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

THE ARKANSAS STATE CONFERENCE
OF THE NAACP, et al

Plaintiffs

Vs.

THE ARKANSAS BOARD OF
APPORTIONMENT, et al

Defendants.

No. 4:21-cv-1239 LPR
February 2, 2022
Little Rock, Arkansas
9:05 a.m.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE LEE P. RUDOFISKY
UNITED STATES DISTRICT JUDGE
VOLUME 2

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

APPEARANCES

On Behalf of Plaintiffs:

BRYAN L. SELLS
The Law Office of Bryan L. Sells, LLC
P.O. Box 5493
Atlanta, Georgia 31107-0493
(404) 480-4212

GARY L. SULLIVAN
ACLU of Arkansas
Legal Division
904 West 2nd Street, Suite One
Little Rock, Arkansas 72201
(501) 374-2842

JONATHAN TOPAZ
American Civil Liberties Union
125 Broad Street, Suite 1800
New York, New York 10004
(212) 549-2640

NEIL STEINER
Dechert LLP
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3671

On Behalf of Defendants:

ASHER STEINBERG
NICHOLAS J. BRONNI
DYLAN L. JACOBS
JENNIFER L. MERRITT
MICHAEL MOSLEY
Arkansas Attorney General's Office
323 Center Street, Suite 200
Little Rock, Arkansas 72201

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1 THE COURT: Everybody be seated, please.

2 Heather, I find myself unprepared. Could I borrow a
3 pen? Nope. Now I find myself prepared, just messy.

4 Good morning, everybody. Appreciate you all getting
5 here. One thing we'll probably need to talk about so you
6 all should think about it during the day is what we do if
7 the predicted bad weather actually comes. And I think at
8 least the last time I looked or spoke to anybody about it,
9 they're predicting some kind of wintry mix for early
10 tomorrow morning. So probably at the end of today,
11 depending on what the weather reports are, I'm going to
12 ask for everybody's view about what, if anything, we do
13 about that.

14 Before we get started in earnest, does anybody have
15 anything they'd like to bring up with the Court?

16 MR. SELLS: I do, Your Honor.

17 Last night after the conclusion of court, we became
18 aware is that Dr. Handley needs to get back to Washington
19 as soon as possible because of her husband's impending
20 surgery tomorrow. And so we reached out to our colleagues
21 on the other side and asked for their consent to put her
22 up now in the middle of Tony's testimony, and they agreed,
23 but, of course, it's up to you.

24 THE COURT: That's fine with me.

25 MR. SELLS: That's all I have.

1 THE COURT: Defendants?

2 MR. MOSLEY: I don't think we have anything
3 right now, Your Honor.

4 THE COURT: Then let's get on with it.

5 MR. SELLS: Your Honor, the plaintiffs call
6 Dr. Lisa Handley.

7 THE COURT: Good morning, ma'am.

8 THE WITNESS: Good morning.

9 Would it be all right if I took off my mask? I'm
10 afraid you won't be able to hear me, okay.

11 LISA HANDLEY, PLAINTIFFS' WITNESS DULY SWORN

12 DIRECT EXAMINATION

13 BY MR. SELLS:

14 Q. The court reporter and opposing counsel are not shy
15 about asking you to speak up, but I'll remind you to try
16 to talk into the microphone.

17 So good morning, Dr. Handley.

18 A. Good morning.

19 Q. Would you, please, state your name for the record?

20 A. Lisa Handley, H-a-n-d-l-e-y.

21 Q. What do you do for a living, Dr. Handley?

22 A. I'm a political scientist. I have a company,
23 Frontier International Electoral Consulting, that does
24 work mostly with the UN overseas in post-conflict and
25 emerging democracies. I also do expert work such as here

1 and consulting work in the United States. I also teach in
2 the UK.

3 Q. Do you have any experience with voting rights or
4 redistricting in the United States?

5 A. Yes, I have lots of experience. 40 years worth of
6 experience.

7 Q. All right. So let's talk about that experience.
8 First, what sort of academic training do you have?

9 A. I have a PhD in political science from George
10 Washington University.

11 Q. What have you done for a living since you earned your
12 degree in political science?

13 A. I have taught. I have mostly just done consulting
14 until I started the company in 1998, and have been working
15 with the company since then mostly -- except for US
16 redistricting periods, mostly overseas.

17 Q. Have you ever published in the areas of voting rights
18 or redistricting?

19 A. I have lots of publications. I have some books and
20 lots of peer reviewed articles. I have chapters in books,
21 chapters in encyclopedias, yes.

22 Q. Have you ever presented at a professional conference
23 on voting rights or redistricting?

24 A. I have.

25 Q. Have you ever served as an expert witness on voting

1 rights or redistricting in other cases?

2 A. Yes. Many cases.

3 Q. About how many would you estimate?

4 A. Scores. I'm sorry. I don't know off the top of my
5 head. A lot.

6 Q. What are you typically asked to do as an expert in
7 voting cases?

8 A. Inevitably, an analysis of voting patterns by race.
9 This is what I specialize in, but I've also been asked to
10 do things like evaluate districts for whether they offer
11 minority voters an opportunity to elect. I just recently
12 had to dip my feet into partisan gerrymandering for some
13 work I did for the Michigan redistricting commission. But
14 mostly, it's voting rights, voting analysis of what we
15 call racial bloc voting analysis.

16 Q. I'd like to show you what has been marked as
17 Plaintiffs' Exhibit 8D. We'll turn to Page 2.

18 Is that your curriculum vitae or CV as it's called?

19 A. Yes.

20 Q. How current is that CV, Dr. Handley?

21 A. Well, probably within the last year.

22 Q. Do you need to offer any corrections or updates to
23 your CV for the benefit of the Court?

24 A. I don't think so. I'm involved in litigation that
25 might not be on the CV. I've also just had an article

1 come out in the Ethiopian human rights journal.

2 Q. Okay.

3 MR. SELLS: Your Honor, we offer Exhibit 8D into
4 evidence.

5 THE COURT: Any objection?

6 MR. STEINBERG: No.

7 THE COURT: It's admitted.

8 (Plaintiffs' Exhibit 8D admitted into evidence.)

9 BY MR. SELLS:

10 Q. Dr. Handley, over the course of your entire career so
11 far, how many times would you say you've performed
12 analyses similar to the ones that you performed in this
13 case?

14 A. Well, I do this analyses a lot for cases -- I mean,
15 for clients who don't end up in court. For example, a
16 jurisdiction will ask me to do this analysis or a
17 redistricting commission. So I've literally done it
18 hundreds of times.

19 Q. Have you ever worked for a defendant in a voting
20 case?

21 A. I have.

22 Q. Have you ever worked for a state or state
23 redistricting body similar to the Board of Apportionment
24 here in Arkansas?

25 A. I have. I've worked the Alaska board is similar.

1 I've also worked for other boards like in Arizona,
2 Colorado, and just recently the new Michigan Redistrict
3 Commission.

4 Q. What are you typically asked to do when you're
5 working for a state redistricting body like the one in
6 Alaska or Michigan?

7 A. Again, it's usually -- it's always an analysis of
8 voting patterns, and then there are some quirks to this.
9 Like I said, in Michigan I had to look at partisan
10 fairness, but it's always at least analyzing voting
11 patterns by race.

12 Q. Why would a state redistricting body want or need
13 that kind of analysis?

14 A. You would want to find out if voting was polarized
15 because, if it is, then you need to draw districts
16 recognizing that in order to comply with the Voting Rights
17 Act.

18 Q. Would it be possible for a state redistricting body
19 to comply with the Voting Rights Act without expert advice
20 from somebody like that you?

21 A. Accidentally, I suppose.

22 Q. Dr. Handley, what were you asked to do in this case?

23 A. The usual, analyzing voting patterns by race. I was
24 also asked to look at the various plans to determine what
25 opportunities they offered for black voters in Arkansas to

1 elect their candidates of choice.

2 Q. And are those the sorts of analyses that you've done
3 in similar voting cases?

4 A. Yes.

5 Q. Did you prepare a report setting forth your analysis?

6 A. Yes.

7 Q. I would like to show you what has been marked as
8 Plaintiffs' Exhibit 8. We'll turn to Page 2.

9 Do you recognize this document?

10 A. Yes.

11 Q. Now, before I offer this into evidence, do you want
12 to make any corrections or updates to this report?

13 A. There's a slight mistake. So in the first paragraph
14 under professional background and experience, I list
15 working for independent redistrict commissions. And
16 instead of writing Alaska, I wrote Arkansas. I have not
17 with worked for the Arkansas Board of Apportionment. I
18 worked for the Alaska Redistricting Commission.

19 Q. Freudian slip perhaps. Thank you for making that
20 correction.

21 Any others that you need to make at this time?

22 A. Not that I'm aware of, no.

23 Q. All right.

24 MR. SELL: Plaintiffs offer Exhibit 8 into
25 evidence.

1 THE COURT: Any objection?

2 MR. STEINBERG: No.

3 THE COURT: It's admitted.

4 (Plaintiffs' Exhibit 8 admitted into evidence.)

5 BY MR. SELLS:

6 Q. Did you reach any conclusions from your analysis?

7 A. I did.

8 Q. Are those conclusions set forth in your report?

9 A. They are.

10 Q. Would you please summarize those conclusions for the
11 Court?

12 A. First, I found that voting is polarized in Arkansas.
13 Black voters are cohesive. White voters usually vote as a
14 bloc to defeat minority-preferred candidates. This
15 pattern of polarized voting means that black voters cannot
16 elect their candidates of choice unless districts are
17 drawn specifically for that purpose.

18 Second, I found that the -- I'm going to call it the
19 proposed plan because, when I wrote this -- by "proposed
20 plan", I mean recently enacted plan. But the proposed
21 plan actually decreases the number of minority opportunity
22 districts relative to the current or old plan and
23 certainly relative to what could have been done as
24 illustrated by the illustrative plan.

25 Q. Okay. Let's turn to your analyses then. I want to

1 first focus on your conclusion that voting in Arkansas is
2 racially polarized. To start, how do you define racially
3 polarized voting?

4 A. The Supreme Court has defined it as, if the electoral
5 outcome would be different if blacks alone voted than if
6 whites alone voted, voting is polarized. This is -- in my
7 book I call it the separate electorates test. I've also
8 offered the definition, if blacks and white vote
9 differently, than voting a polarized.

10 Q. You mentioned the Supreme Court offering this
11 definition. Do you know what case that was?

12 A. Thornburg V. Gingles.

13 Q. What sort of analysis did you do to arrive at your
14 conclusion that voting in Arkansas is racially polarized?

15 A. So you know that we have secret ballot here. So we
16 have to do a series of estimation procedures to try and
17 figure out how black voters and white voters in Arkansas
18 vote. Over the course of the last 40 years, a series of
19 statistical techniques have been developed that allow us
20 to estimate black and white -- or minority and white
21 voting behavior. And that is what I did. I used these
22 statistical techniques to derive estimates that allow us
23 to determine how black and white voters are voting.

24 Q. Is racial bloc voting analysis standard in voting
25 cases?

1 A. I can't think of a voting rights case in which you
2 wouldn't have an analysis of voting patterns to determine
3 if it was -- if whites and blacks or minorities and whites
4 were voting differently, yes.

5 Q. And you've done racial bloc voting analysis in other
6 cases before, right?

7 A. Many, many cases, yes.

8 Q. You mentioned statistical analysis. What statistical
9 methods did you apply in your election analysis in this
10 case?

11 A. I used three standard methods: Homogenous precinct
12 analysis, ecological regression, and ecological inference.
13 There's actually two variations of ecological inference,
14 both of which I used. So I suppose you could say four --
15 four techniques.

16 Q. Okay. Let's start with the first one you mentioned.
17 Homogenous precinct analysis. What is homogenous precinct
18 analysis?

19 A. You're simply comparing the voting patterns of
20 election precincts in which you know are overwhelmingly
21 one race. So any -- all of the precincts that have
22 populations of -- standard definition is over 90 percent.
23 So all of the precincts over 90 percent white are compared
24 to all of the precincts that are, say, over 90 percent
25 black in population.

1 So this is not actually a statistical technique, but
2 the drawback to homogenous precinct analysis is, first,
3 not all voters live in homogenous precincts and lot of
4 times there aren't very many homogenous precinct. And, of
5 course, voters who live in homogenous precincts might
6 actually vote different than voters who live in more
7 integrated precincts.

8 So that's the simplest method. I call that an
9 estimation process, not because it required estimation
10 techniques to derive them but because of the drawbacks
11 that I just mentioned; not many voters live in the
12 homogenous precincts and they might vote slightly
13 differently than those who live in more integrated
14 precincts.

15 Q. The second statistical technique you mentioned was
16 ecological regression. What is that?

17 A. So ecological regression, what you're going to do is,
18 you're going to place your unit of analysis here since you
19 don't have individual data of precincts. This is true for
20 homogenous precinct analysis, for all of the analyses.

21 So with ecological regression, you're going to plot
22 each of your precincts on a scatter plot and you're going
23 to use two variables for this. You're going to look at
24 the percentage minority or the percentage white in the
25 precincts and you're going to look at the voting -- the

1 percentage of votes cast for each of the candidates and
2 you're going to plot this on a plot. And if there is a
3 linear relationship, say, for example, as the percentage
4 black in the precinct goes up, the percentage of votes for
5 a particular candidate goes up. You'll see a linear
6 relationship. And you can use that relationship to
7 actually produce estimates of how blacks and whites in
8 Arkansas are voting. So you have a scattered plot, you
9 draw the line and you use the line to produce estimates.

10 Q. Okay. The third technique that you mentioned was
11 ecological inference, or EI we sometimes call it. What is
12 that?

13 A. Complicated. That's really complicated. Now,
14 instead of a graph, we're going to produce something
15 called a tomographic plot. And every precinct, instead of
16 being a point on this graph, is going to be a line and the
17 line is going to represent all of the probable
18 combinations that could have occurred in that precinct
19 given the margins, given the demographic composition and
20 the voting behavior exhibited by that precinct. It's
21 called the method of balance.

22 So if you know that there are, say, ten whites and 50
23 blacks in the precinct and a candidate got 40 votes, you
24 know at most 40 of the 50 black voters could have voted.
25 And if all 40 did, that meant that none of the whites did

1 and so on. And if all ten of the white voters did, then
2 you have 30 votes left for blacks. You create a
3 probability line. And that line -- you do that for every
4 precinct.

5 So you have a tomographic plot with all of these
6 lines on it. And then you're going to use something
7 called maximum likelihood estimation process to figure
8 out, like, the heaviest concentration of where those lines
9 all meet to produce your estimate.

10 That's a little bit simplified, but that's how that
11 works.

12 Q. Doesn't sound simplified to me. But thank you for
13 that.

14 Have these three statistical techniques been approved
15 by the courts?

16 A. Yes. So back in the days of Thornburg V. Gingles, my
17 mentor, Bernie Grofman, was the plaintiff's expert in that
18 case. And he at that point only had homogenous precinct
19 analysis and ecological regression to use. So those have
20 been around for a long time. And the Supreme Court
21 actually commented and approved of those procedure in
22 Thornburg V. Gingles.

23 Since then, Professor Gary King at Harvard in the
24 1990s developed ecological inference, produced a book on
25 it. What prompted that was actually one of the

1 disadvantages of ecological regression, especially if
2 voting is very polarized because you get estimates that
3 fall outside of logical bounds. For example, you can get
4 an estimate of 105 black voters -- 105 percent of black
5 voters voting for a particular candidate, or minus five
6 percent.

7 So one of the advantages of ecological inference and
8 one of the reasons it was developed is to avoid these
9 kinds of out-of-bounds estimates. So this was developed
10 in the 1990s.

11 Since then, it has been introduced -- by about 2010,
12 it's introduced in most voting rights cases. I know a few
13 experts who still rely only on ecological regression, but
14 it's been -- it's used very commonly in court cases now.
15 Yes.

16 Q. Why do you use all three?

17 A. A series of reasons. First of all, each of these
18 techniques have advantages and disadvantages, and they're
19 different advantages and disadvantages. But also, first
20 of all, we only have the Supreme Court commenting on
21 homogenous precinct analysis and ecological regression, so
22 I include those.

23 Second of all, it's a lot easier to explain the first
24 two. And once you get the idea behind it, the third makes
25 -- by "the third," I mean ecological inference makes a

1 little more sense. Visually, it's a lot easier to explain
2 a scatter plot than a tomographic plot.

3 There's probably other reasons, but I can't think of
4 them right now.

5 Q. Do you regard any one method as the best method?

6 A. Ecological inference is the most advanced
7 statistically. I still use all of the methods because I
8 get more information that way. And the other methods
9 certainly serve as a sort of common sense check on my
10 ecological inference estimates, but I would say that,
11 again, that's pretty much the accepted standard now. It's
12 the most sophisticated.

13 Q. You mentioned that you used more than one kind of EI,
14 ecological inference. Do you want to explain that?

15 A. Okay. So when Gary King developed ecological
16 inference, it was based on what's call a two-by-two
17 contingency table. You had two racial groups, say black
18 and white, and you had two candidates, candidate A and
19 candidate B. So if you had a jurisdiction that like, say,
20 New York City in which you have a lot of other racial
21 groups or you had a contest like a primary that had eight
22 candidates, this would not work so well.

23 So in about 2000 -- I think it was in 2002 or '3,
24 some other statistical geniuses came up with an ecological
25 inference technique called R x C, which means you could

1 have any number of rows and any number of columns; the
2 rows being the race of the voters and the columns
3 indicating the candidates.

4 So this is relevant in Arkansas for a different
5 reason. It also allows you -- because most of the
6 contests I look at actually did have only two candidates.
7 It allows you to account for differential turnout. When
8 you do ecological inference, it has to assume that black
9 and white turnout is the same. You can add a column when
10 you're doing ecological inference of $R \times C$ that says, I
11 want to look at what -- who's not casting a vote. This is
12 like the third -- so you vote for candidate A, candidate
13 B, or you don't vote at all. It allows you to account for
14 those voters who didn't vote at all.

15 This is important in Arkansas because it turns out
16 that black turnout tends to be lower than white turnout.
17 And this allows us to account for that.

18 Q. You anticipated my next question, which is, why did
19 you use both. But I'll ask the question after that, which
20 is -- is one better than the other?

21 A. In some circumstances one is better than the other.
22 For example, even though $R \times C$ was developed to use with a
23 large contingency table, either a lot of racial groups or
24 a lot of candidates. The more you add -- the larger the
25 contingency table gets, the more squirrely the estimates

1 are. That's a statistical term. It's not really. But
2 the estimates are less reliable. You could then go back
3 to what we used to do, and that's use King's EI and just
4 run it iteratively: This race against all other races,
5 this race against all other races, this candidate against
6 all other candidates. And sometimes that's actually more
7 reliable.

8 Q. So why did you run multiple methods here?

9 A. I always run multiple methods. More information is
10 always better than less information.

11 Q. I want to turn to the data that you used for your
12 analysis. What data goes into your racial bloc voting
13 analysis in this case?

14 A. So you're looking at two pieces of information. You
15 want to know the demographic composition of the precincts
16 and you want to know the votes for the precincts. So
17 we're going to get the votes from usually the Secretary of
18 State's office. They will have the votes by precinct
19 online. Now, I actually used the -- there is a sort of
20 nonprofit organization called OpenElections that takes the
21 election results --

22 THE COURT: Can you say that name again?

23 THE WITNESS: OpenElections, one word.

24 That takes the Secretary of State's precinct level
25 election results and actually formats it in a standard

1 format. So for reasons of wanting standardized election
2 results, I used the Secretary of State's election results
3 as culled through the OpenElections procedure. So that's
4 the one piece.

5 The second piece is, you actually need to know the
6 demographic composition of the precincts. So in some
7 places, for example, in other states in the south like
8 Georgia, which have turnout by race, because when people
9 go and register to vote, they have to indicate their race.
10 You don't have that in Arkansas.

11 So what we use in places that you don't that turnout
12 by race is, you have -- you use population data. So when
13 the 2020 census was released, that information, the voting
14 age population information, was used to provide the
15 demographic composition. It's a little more complicated
16 because that comes out in census bloc levels. And I
17 needed for the precinct as a whole and not by the census
18 bloc.

19 So we have to go and find what's called shape files.
20 Those are the precinct boundaries that allow us to know
21 what blocs are in each precinct. We take those shape
22 files -- this is a GIS -- Mr. Fairfax can tell you all
23 about GIS, but it's the outline of the precinct that
24 allows us to determine which census blocs fall in that
25 precinct and give us the demographic composition.

1 Now, precinct boundaries change over time, not just
2 every ten years, but quite frequently in between election
3 cycles. So we need shape files for each election to
4 determine the racial composition and precincts at the time
5 of the election.

6 So this we got from a different -- on the Harvard
7 dataverse website. An organization called VEST, Voting
8 Election Science Team, has pulled together the shape files
9 precincts for all states for 2016, '17, '18, '19 and '20.
10 So this website is where we get the shape files to create
11 the demographic composition of the precincts.

12 Q. Thank you.

13 A. Oops. I'm sorry. Then you have to match the two. I
14 forgot that part. Then you're going to take the precinct
15 names that are available both at the Secretary of State
16 and from the precinct shape files and merge the two
17 together so you have a database that for each precinct
18 allows you to know both the demographic composition and
19 the votes for each candidate. So you're taking the two
20 pieces and putting them together.

21 Sorry. Didn't finish my story.

22 Q. Are these the standard data for this kind of
23 analysis?

24 A. With the caveat that, of course, in some places you
25 have registration or turnout by race, but when we don't,

1 which is most jurisdictions, then you would do voting age
2 population. But, yes, in order to conduct this analysis,
3 you need both the demographic composition and the election
4 returns.

5 Q. Who prepared the database that combined these data
6 sources together for you?

7 A. So the ACLU has a data analytics team who comes
8 together and gathers this information and merges it
9 together for these kinds of cases.

10 Q. And why did you rely on the ACLU's analytics
11 department to prepare this database?

12 A. Well, several reasons. First of all, this is quite
13 typical. You usually don't pay your expert to produce the
14 database because it's sort of time consuming and it
15 doesn't require a political science degree to do and it's
16 pretty standard and it's also -- it's very easy to go
17 through and check this and make sure that it's correct.
18 So it's -- I would just say this is just the way that it
19 is usually done unless you're in a small jurisdiction and
20 you don't want to pay your expert to put these databases
21 together.

22 Q. You mention that it's easy to check. Did you in fact
23 check for the accuracy of your data in this case?

24 A. Both the ACLU and myself did checks on the database.
25 The ACLU has a very complex process that -- it's called

1 county roll-ups, and they're checking the county totals.
2 They're actually doing a series of random checks through a
3 program on precincts.

4 My checking is a little simpler. I look at the
5 candidate totals when I add it up to make sure that it --
6 and then I go to the website, the Secretary of State's
7 website, to make sure that my candidate totals match. I
8 do things like compare, make sure that the population in
9 the precincts actually exceeds the votes in the precincts
10 because, if it doesn't, we have a problem. And these kind
11 of sort of common sense checks.

12 THE COURT: Let me jump in here for one second.
13 The premise of this question may be off, so if it is
14 please, push back because that's why you're here, so I can
15 learn about all of this.

16 Is what you're testifying now about -- does it change
17 based on whether we're talking about a voter tabulation
18 district or an actual precinct? And if it does, is what
19 you're testifying to that you use actual precinct data or
20 am I off in my understanding this?

21 THE WITNESS: No. That's a very good question.

22 Voter tabulation districts are the Census Bureau goes
23 to the states and says, give me your precinct boundaries,
24 define them in terms of blocs, and we'll give you back to
25 the data at the VTD level, the voter tabulation called

1 VTDs. So when you get the census data, you have the
2 precincts more or less as frozen in time when the
3 Secretary of State gave this information to the Census
4 Bureau.

5 So in 2020 I'm guessing, around 2018 they said this
6 is -- these are the blocs that are falling in the
7 precincts at this time.

8 THE COURT: That counts as calling it voter
9 tabulation?

10 THE WITNESS: That's right, because usually it
11 is exactly those precinct boundaries but only for that
12 election cycle for which they provided the information.

13 THE COURT: Okay. So keep -- if you would keep
14 going because this is important for me to understand.
15 Does that mean that your numbers are based on the voter
16 tabulation districts which may to come extent that perhaps
17 we don't know right now be different from the actual
18 precinct numbers?

19 THE WITNESS: The opposite.

20 THE COURT: Okay.

21 THE WITNESS: Because I have precinct shape
22 boundaries, I know what the blocs were at each election.
23 That's why we go and we get the precinct shape. So my
24 analysis is done off of what the precinct composition was
25 at the time of the election. I don't use VTDs. If I were

1 going to come in and just analyze 2018 and I knew that
2 that's what cycle is represented by the VTD, you could do
3 that. But because I went back in time and forward in
4 time, I needed the precinct boundaries to make sure that
5 my demographic composition reflected each precinct.

6 THE COURT: Actual.

7 THE WITNESS: That's correct.

8 THE COURT: Go ahead.

9 BY MR. SELLS:

10 Q. Dr. Handley, I want to digress or take a little bit
11 of a detour and to focus a little more on the election
12 data that you used. Does your analysis for this case
13 include absentee ballots?

14 A. Yes. It used to be the case that Arkansas, if you
15 put in an absentee or early ballot, these were just
16 counted at the county level. But gradually over this last
17 decade, they've all been allocated to the precinct level
18 so that by 2020, the absentee and early voting ballots are
19 all counted at the precinct level. This is important
20 because you want not only the demographic composition, but
21 you want the votes that came from that precinct.

22 So, yes, absentee ballots are included in the
23 precincts for all votes in 2020 and for almost all votes
24 in 2016 and 2018 as some counties gradually moved over at
25 a slower rate than other counties. So we have about 1.3

1 percent of the votes that are only at the county level in
2 2016, and about .7 percent in 2018 that are only at the
3 county level. By the time I get to 2020, none are at the
4 county.

5 Q. So around one percent in '16 and '18 were only at the
6 county level. What did you do with those votes for the
7 purposes of your analysis?

8 A. So they were -- they were disaggregated to the
9 precinct level on the basis of the candidate totals on
10 election day rather than just removing them altogether
11 from the analysis.

12 Q. Did that allocation or aggregation have any effect on
13 the results of your analysis?

14 A. The point of doing it was really so that the
15 candidate totals added up, but, I mean, there were not
16 enough voters to matter in terms of the statistical
17 analysis in the slightest bit.

18 Q. Thank you. I want to turn now to discuss for a
19 minute the elections that you analyzed for your analysis
20 in this case.

21 What elections did you consider?

22 A. All statewide elections. All statewide contested
23 elections in 2016, '18 and '20, and then state legislative
24 elections in the areas where the new opportunity districts
25 were drawn in the illustrative plan.

1 Is it possible to get some water?

2 THE COURT: Yes. Do you need a break?

3 THE WITNESS: No. I just needed a little -- my
4 throat is dry. Thank you.

5 BY MR. SELLS:

6 Q. Let's talk about the statewide elections first, if we
7 could. Why did you look at statewide elections for your
8 analysis in this case?

9 A. Two reasons: First to get a picture of voting in the
10 -- voting patterns in the state as a whole, but probably
11 the more important reason is to look at what statewide
12 elections might be used to help me determine if a minority
13 opportunity exist -- a minority opportunity district exist
14 or not.

15 Q. And why did you focus on three election cycles?

16 A. It has to do with the availability of the precinct
17 shape files. They only go back to 2016. So in order to
18 ensure that I had accurate data, I only went back to 2016.

19 Q. Did you look at primary elections?

20 A. I did. There's only been one statewide Democratic
21 primary. I look only at Democratic primaries because very
22 few blacks -- black voters actually choose to vote in the
23 Republican primary. So you wouldn't find the black
24 preferred candidate in the Republican primary. Chances
25 are you couldn't do even do the analysis because there

1 wouldn't be enough voters. So I looked at Democratic
2 primaries, but there's only been one statewide Democratic
3 primary.

4 Q. Why do you need to look at primaries at all?

5 A. Because this is a two-stage election process here.
6 You have to get through both the primary and the general
7 election to actually gain a seat in the legislature. So
8 you would want to look at both election cycles.

9 Q. All right. Let's turn to the State House contests.
10 Which ones of those did you analyze?

11 A. The courts -- the Supreme Court has specifically
12 said, we want to do a district specific functional
13 analysis. And we were interested in those areas where the
14 illustrative plan showed that you could have drawn
15 districts, but the Board of Apportionment did not draw
16 districts.

17 So I looked at the elections of the -- state
18 legislative election specifically in those areas because
19 those were the areas of -- I guess you would say, the
20 areas of contention. That's the area that we were
21 specifically interested in knowing if voting was racially
22 polarized.

23 Q. How did you determine which districts were the new
24 opportunity districts in the plaintiffs' illustrative
25 plan?

1 A. It mostly rests on I think you've been introduced to
2 the core constituency reports that come out of Maptitude.
3 If you use these core constituency reports, you can figure
4 out where the voters in this particular district end up in
5 the new plan.

6 So using the core constituency report, I could say,
7 okay, so -- I'm going to make up these numbers. So in
8 district -- in the new District 5, 75 percent of those
9 voters came from the old District 5; 20 percent came from
10 district -- the old District 4; and whatever is left came
11 from the old District 2. So it will tell you in the
12 percentage of voters in the new district that came --
13 percentage of population in the new districts that came
14 from each of the old districts.

15 So you can take that and just follow the lines to
16 where the voters went into the new districts, and that's
17 how you determine sort of the evolution.

18 It also helps to know the incumbency residents so you
19 can follow, this incumbent was here in this district and
20 now he's in this district, and 70 percent of his voters
21 are also in that district. So that's the line that you
22 follow to determine. And using that process, you can
23 determine where the new district -- the new minority
24 opportunity districts are relative to the old plan.

25 Q. Is your analysis of the new opportunity districts or

1 identification of the new opportunity districts set forth
2 in your report?

3 A. Yes.

4 Q. I would like to look at Page 11 of Plaintiffs'
5 Exhibit 8. I want to focus your attention on the diagram
6 at the top. It's tabled diagram 1. Is this your
7 analysis?

8 A. Yes.

9 Q. Can you briefly explain this diagram for the Court?

10 A. Yes. So you can see that I'm following some --

11 THE COURT: I'm listening to you. I'm just
12 looking at the same time.

13 THE WITNESS: Let's take the first one, the
14 current plan. District 17, which was 76.35 percent black
15 in voting age population and was represented by Vivian
16 Flowers, who is a black Democrat. Most of that district
17 shows up in the proposed plan in District 65. And that
18 tells you who the incumbent is in that district and,
19 again, the racial composition of that district, the
20 percentage black voting age population.

21 Then the illustrative plan most of the population and
22 the incumbent show up in District 17, which is 50.28
23 percent black, same incumbent.

24 This is what I did for all of the districts that are
25 represented on this table. You can see I've bolded the

1 districts in the illustrative plan that I call the new
2 opportunity districts. So District 5 in the illustrative
3 plan was District 5 in the current plan, and was 52.01
4 percent black. In the proposed plan, it's District 98 by
5 both the voters and the incumbent. It drops down to 44.15
6 percent. But then in the illustrative plan, District 5
7 reemerges at 54.43 percent. So I'm calling it a new
8 district because, although it was in the old plan, it
9 fails to be a minority opportunity district in the
10 proposed plan. So it's new relative to the proposed plan
11 as opposed to the current plan.

12 The same is true of District 55, which begins under
13 the current plan as 51.91 percent black in voting age
14 population with a black incumbent, and then in -- the
15 proposed plan becomes District 34; same incumbent, now
16 we're at 45.84 percent black in voting age population.
17 And then we go back in the illustrative plan to 55, and
18 it's 51.41 percent.

19 BY MR. SELLS:

20 Q. So you can't just look at the district numbers. Is
21 that right?

22 A. I can't look at them for?

23 Q. To trace the evolution of districts from one plan to
24 the next?

25 A. No. Pretty much is the case that you could do that

1 between the current plan and the illustrative plan, but
2 the proposed plan changed the numbers completely. But I
3 think that in most cases, if not all, of the illustrative
4 plan and the current plan and this diagram have the same
5 number. I see that that's not the case in all of them,
6 but in most of them it is.

7 Q. Once you identified the new opportunity districts,
8 how did you determine which districts in the old State
9 House plan overlap with the new opportunity districts in
10 the plaintiffs' illustrative plan?

11 A. So again, I used the Maptitude core constituencies
12 report to tell me, for example, in this District 5 -- in
13 the illustrative plan District 5 what old state
14 legislative districts actually overlapped with that so I
15 could get a very area specific view of that district.

16 So it says, for example, District 5 is made up of,
17 you know, ten percent of this particular district in the
18 old plan and 25 percent of that district and 50 percent of
19 that district. And so I analyzed all three of those State
20 House districts if there was an election contest to get a
21 sense of what voting looked like in the illustrative plan
22 district area of District 5.

23 Q. Is your analysis of those overlap set forth in your
24 report as well?

25 A. I have a list what old House districts make up or

1 overlap with each of the five new illustrative plan
2 minority opportunity districts.

3 Q. If we could go back out and look at that whole page
4 that's on your screen, it is PDF Page 11, and focus now on
5 the bottom part of the page.

6 Dr. Handley, is that the list that you're talking
7 about?

8 A. That's right. Using the core consistency reports
9 from Maptitude, I could identify that, for the
10 illustrative House District 5, it overlaps with the old
11 House Districts 2, 5, 6, and 7. So any state legislative
12 -- any State House contests that were in those old
13 districts were what I chose to analyze.

14 Q. And you analyzed all general elections going back
15 those three election cycles?

16 A. All general elections State House -- there weren't a
17 lot of them. A lot of these districts are not contested.
18 But if it was contested, I analyzed it.

19 Q. Okay. And you analyzed primaries as well, correct?

20 A. That's correct. There were even fewer of those.

21 Q. Okay. We're done with Page 11.

22 Now, I want to jump into your findings, the results
23 of your racial bloc voting analysis. I would like to show
24 you what has been marked Plaintiffs' Exhibit 8B. Can you
25 identify this document?

1 A. So these are the tables that I produced to report the
2 estimates that I derived for each of these candidates in
3 each of these contests. So, for example, on the left,
4 you'll see the year and the election, each of the
5 candidates, and then you'll see their party, their race,
6 and the actual votes that they received. I did this for
7 all of the elections analyzed. I believe there are nine
8 statewide elections analyzed.

9 And then you can see on the right side the estimates
10 that I produced via the four statistical methods. So HP
11 stand for homogenous precinct analysis. ER is for
12 ecological regression. EI 2 x 2 is the original King
13 methodology. And finally, EI R x C is the new and
14 improved -- maybe not so improved, but new ecological
15 inference technique.

16 Q. And under the election on the left-hand column there,
17 there is in italics votes for office, a row there. Can
18 you explain what that --

19 A. Yes. That is actually turnout or more specifically,
20 since we don't have turnout figures, we don't have the
21 number of people who turned out to vote. What this is, is
22 the number of people who cast a vote in that election. So
23 it varies even though it's a 2018, you have several
24 contests. Sometimes you have roll off down the ballot.
25 And so the turnout might decrease because what you're

1 actually looking at is votes for office rather than
2 turnout per se.

3 Q. Is that a ratio or a percentage, the numbers that
4 appear in those columns?

5 A. Yes. So, for example, I'm looking at the first
6 entry, 49.1. That means that 49.1 percent of the voters
7 -- of the voting age population in those precincts turned
8 out and cast a vote for that office. So it's number of
9 votes cast over voting age population.

10 THE COURT: Can I break in for a second? Just
11 to be clear, is the 49.1 percent there the turnout for
12 black voting age population as opposed to total voting age
13 population?

14 THE WITNESS: That's correct.

15 THE COURT: Then for white voting age --

16 THE WITNESS: I'm sorry. That's not correct.
17 Not for homogenous precincts, no.

18 So remember that we've isolated those precincts that
19 are almost all black in voting age population and we're
20 reporting the entire turnout votes for that office over
21 the entire voting age population because we're assuming
22 that all of the voters are -- or at least almost all of
23 the voters are black voters.

24 THE COURT: So that 49.1 is the total that the
25 -- total voting age population turnout percentage?

1 THE WITNESS: It's used as an estimate of the
2 black voting age population percentage, but it's
3 calculated on the assumption that everybody in those
4 precincts is -- they are all black voting age population.

5 THE COURT: Okay. Then if you move over to the
6 ecological regression number, the 42.1, what is that
7 supposed to mean? What is that? Is that the percentage
8 of the total population that -- total voting population
9 that turned out, or is that the estimate for the black
10 voting age population that turned out?

11 THE WITNESS: That's the -- all of these are
12 estimates of the black voting age population that turned
13 out. And I just got too technical on the homogenous
14 precinct because it's calculated slightly different, but
15 all of those are estimates of the black voting age
16 population that turned out and voted for that office.

17 THE COURT: Okay. Thank you.

18 BY MR. SELLS:

19 Q. So picking up on that last point, Your Honor, and
20 Dr. Handley, just looking at that first race, we could say
21 that roughly 42 percent of black voting age population
22 turned out and voted in the 2020 presidential election,
23 whereas, 60 percent of white voting age population turned
24 out in the 2020 presidential election. Is that right?

25 A. More or less. I mean, you see that there -- the

1 estimates are pretty close. We know that somewhere
2 between 42 and 44 percent of the black voting age
3 population turned out to vote, while it's probably around
4 60 to 62 percent of the white voting age population turned
5 out to vote.

6 MR. SELLS: Your Honor, unless you have more
7 questions about this, I'm going to move to the next one.

8 THE COURT: No, but I appreciate that. That was
9 helpful.

10 MR. SELLS: The plaintiffs offer Exhibit 8B into
11 evidence.

12 THE COURT: Any objection?

13 MR. STEINBERG: None.

14 THE COURT: It's admitted.

15 (Plaintiffs' Exhibit 8B admitted into evidence.)

16 BY MR. SELLS:

17 Q. Let's look at Exhibit 8C. And I want to ask you the
18 same questions. Can you identify this document?

19 A. So appendix that -- the one we looked at -- the table
20 we looked at before was the statewide offices. This table
21 actually reports estimates for the State House elections
22 that I analyzed. So it works the same way except you have
23 a lot less homogenous precincts because we're talking
24 about very small areas with a very limited number of
25 precincts and the chances of getting precincts that are

1 overwhelming one race is much smaller. Some of these
2 elections have, say, 15, 20 precincts in them. So that's
3 why that you don't see very many homogenous precinct
4 estimates.

5 Q. I notice that there's also no turnout estimate in the
6 columns for EI R x C. Can you explain why that is?

7 A. If you did it, it would be precisely the same as the
8 EI 2 x 2. It's the same technique. It doesn't change
9 because, of course, you have one row and two columns. So
10 the estimate is the same.

11 So I could have taken the 44.3, for example, and
12 moved it over to the EI R x C because it's the same
13 technique when it's only turnout.

14 MR. SELLS: The plaintiffs offer Exhibit 8C into
15 evidence.

16 THE COURT: I have a couple of more questions on
17 this one.

18 MR. SELLS: Okay.

19 THE COURT: Just so I understand this, I see on
20 Chase McDowell, if you go over to estimate for black
21 voters, it says negative 5.1. What is the negative there?

22 THE WITNESS: Well, that would be one of the
23 disadvantages of ecological regression. Remember, I told
24 you that sometimes they're out of bounds? That's an
25 example of an out-of-bounds estimate. It means that it's

1 very polarized, you have a very steep line, and it's
2 actually intersecting below.

3 So, yeah, it means that very few blacks voted for
4 Chase McDowell, but it doesn't mean that negative five
5 did.

6 THE COURT: Okay. So the same thing essentially
7 works with the Roger Lynch, which is negative 13.8.
8 That's the sort of out of bounds part of the ecological
9 regression?

10 THE WITNESS: Exactly.

11 THE COURT: Okay. I understand that.

12 Let's move over to under State House District 11,
13 turnout of voting age population for estimate for white
14 voters. Under EI 2 x 2, it has an NA.

15 THE WITNESS: Not available. So sometimes you
16 run EI and it just -- it's set to run a certain way, and
17 you have a couple of choices if it decides not to run. It
18 will just not run if there is not enough variation across
19 the precincts sometimes. And you can try and adjust some
20 of the factors. There are statistics called -- you could
21 try and adjust the row. But the problem with that is, you
22 have to produce something like this that -- that all
23 parties can replicate. If you're going -- so you have to
24 make it uniform. If you're going to go and try and adjust
25 it so you get estimates for everything, then you're not

1 using the sort of default values anymore.

2 So you have two choices. And my choice is to
3 actually say, it's not going to produce an estimate with
4 the default values and I've decided not to change the
5 default values election by election because nobody would
6 be able to replicate it and it's almost like you're cherry
7 picking. So I just report NI if the program decides it's
8 not going to produce an estimate for me given the default
9 values.

10 THE COURT: Do I assume that is the same thing
11 essentially for NA under EI 2 x 2 for Joyce Springer and
12 Roger Greer Talley under State House District 34?

13 THE WITNESS: Exactly. Now, it's much more
14 common to get this kind of thing happening with state
15 legislative elections because you have a lot fewer
16 precincts that are going into the analysis. Your units of
17 observations might be 15 compared to, say, 3,000 in a
18 statewide election. So that's why you're getting this in
19 this -- in this set of tables and not in the statewide.

20 THE COURT: Then my last question is, is there a
21 reason under estimate for black voters an estimate for
22 white voters on State House District 55, there's no
23 information?

24 THE WITNESS: Yes. We were not able to obtain
25 one of the counties that are in that district. The

1 precinct results were not available. I don't know why,
2 but because they were missing, I couldn't produce
3 estimates.

4 THE COURT: I appreciate it. Thank you.

5 BY MR. SELLS:

6 Q. Let me follow up on that just a little bit. Do those
7 NAs mean that you did anything wrong in your analysis?

8 A. No. No. No. It just means that the program didn't
9 produce estimates with the default values.

10 Q. Does it mean that there's something wrong with your
11 data?

12 A. It could be the case, if there was something wrong
13 with the data, that it wouldn't run. And so the first
14 thing you do if you get something like that is you go back
15 and look at the data. So, for example, let's say that you
16 had a precinct in which there were more votes than
17 population. You could get an NA. So you go back and you
18 look and you make sure that it's the data and not the
19 program that's causing the problem.

20 Q. Did you in fact look?

21 A. Yes.

22 Q. Same question with respect to the negative numbers
23 under the ER column. Does that mean you did something
24 wrong with your analysis?

25 A. No. It just means that the linear relationship is

1 such that the line is steep enough to go out of bounds.

2 Q. Thanks.

3 THE COURT: Any objection to the admission of
4 this piece of evidence?

5 MR. STEINBERG: None.

6 THE COURT: It's admitted.

7 MR. SELLS: Thank you.

8 (Plaintiffs' Exhibit 8C admitted into evidence.)

9 BY MR. SELLS:

10 Q. Dr. Handley, I want to ask you about the conclusions
11 that you drew from your racial bloc voting analysis.
12 Let's start with your analysis of the statewide elections.

13 What conclusions, if any, did you draw from the
14 statewide general elections that you analyzed?

15 A. So I analyzed nine elections, all of the contested
16 elections for these 2016, '18, and '20. And they were --
17 every one of them was racially polarized with black voters
18 choosing one candidate and white voters voting for another
19 candidate. So all of the contests were polarized.

20 Q. Were there any black preferred candidates that were
21 elected statewide in 2016, 2018, or 2020?

22 A. No.

23 Q. What conclusions, if any, did you draw from the
24 statewide primary elections that you analyzed?

25 A. Again, there was only one. It included a black

1 candidate. Voting was polarized in that. White voters
2 overwhelmingly voted for the white candidate. Black -- a
3 majority of the black voters voted for the black
4 candidate. She lost and the white candidate moved on to
5 the general election.

6 Q. What conclusions, if any, did you draw from the
7 general election for State House that you analyzed?

8 A. Most of those elections were polarized. I don't
9 remember the number off the top of my head, but certainly
10 about three-fourths of them were polarized. When they
11 weren't polarized, it tended to be because there were two
12 black candidates or two white candidates rather than
13 having what's called a biracial election, or you were in a
14 district which was majority black in composition and you
15 had a black incumbent.

16 And then in some instances, white voters did vote for
17 a black incumbent, at least at higher degrees than they
18 did for, say, black challengers. Maybe not in terms of a
19 majority, but there was some variation in terms of voting
20 patterns in the state legislative election. But almost
21 all of them were polarized.

22 Q. And did the black preferred candidates win in the
23 elections that you analyzed?

24 A. If the district was majority black, chances are the
25 black preferred candidate won. If the district was not,

1 they did not with one exception. And then you're going to
2 ask me what the except is and I'm going to have to ask to
3 look at the report. But there's only one exception to
4 that, and that was a contest in which there were three
5 candidates and white voters divided their votes between
6 two candidates and the black voters were very cohesive
7 behind the third candidate, and that third candidate won.
8 Then two years later, the election repeats itself, only
9 this time there's only one candidate that the white voters
10 unite behind and the black preferred candidate who had won
11 two years before that actually lost.

12 Q. Do you consider a split white vote a special
13 circumstance in this analysis?

14 A. So in terms of general elections, you don't see that
15 at all very -- I mean, you would have to have three
16 candidates running.

17 I mean, I'm not exactly sure I understand the
18 question, but it's not very common that that happens.

19 Q. And it happened in this case because one of the
20 candidates was an independent, correct? Do you remember
21 that?

22 A. I think that, yes, you probably -- if you had three
23 candidates running, had a Republican, a Democrat, and an
24 independent. And white voters must have divided their
25 votes between probably the Republican and the independent.

1 Q. Most of the elections that you looked at only had two
2 candidates, a Republican and a Democrat, in the general
3 election, right?

4 A. That's correct. Well, you can -- I mean, I include
5 that information in the tables. So you can -- you would
6 know looking at the tables what the -- what parties --
7 what political party affiliations the candidates had.

8 Q. What conclusions, if any, did you draw from the
9 primary elections for State House that you analyzed?

10 A. So the primaries -- the Democratic primaries, I
11 believe had only black candidates in them. I don't
12 remember -- I don't think -- certainly, most of them were
13 not polarized. I may be the case that none of them were
14 polarized. I can't remember off the top of my head.

15 Q. Stepping back maybe at a high level, Dr. Handley, how
16 does the level of racial polarization that you found in
17 your analyzes in this case compare to other jurisdictions
18 that you've been involved in over the course of your
19 career?

20 A. In almost every jurisdiction that I analyze voting
21 patterns in, I find that black voters are very cohesive.
22 What varies is the degree of what we call white crossover
23 vote for the black preferred candidate. I would say
24 Arkansas is as starkly polarized as any jurisdiction that
25 I've looked at. There are jurisdictions that are as -- as

1 polarized in terms of white crossover as Arkansas, but I
2 can't think of any that are more polarized than Arkansas.
3 So, for example, voting in Alabama, Mississippi is very
4 similar to voting in Arkansas.

5 Q. Are there jurisdictions where you've worked where
6 voting is not as polarized as it is here in Arkansas?

7 A. Yes. Certainly. And there are even jurisdictions in
8 which voting is not polarized. For example, I just did
9 some work in the -- for the Colorado redistricting
10 commission. And although in some areas of Colorado like
11 down in the San Luis Valley, it's very polarized. In
12 other areas like in the Denver area, it's not at all
13 polarized, no polarization.

14 MR. SELLS: Thank you.

15 Your Honor, I'm at a stopping point in my outline if
16 you'd like to take a break.

17 THE COURT: I think that's a smart idea. Let's
18 take a ten-minute break and we will regroup after that.

19 MR. SELLS: Thank you.

20 (A recess was taken at 10:18 a.m. until 10:35 a.m.)

21 THE COURT: Whenever you're ready.

22 BY MR. SELLS:

23 Q. Dr. Handley, are you aware that, even after receiving
24 your report in this case, the defendants have asserted
25 that the reason black voters' preferred candidates tend to

1 lose partisan elections outside of majority black
2 districts is partisanship?

3 A. Yes, I'm aware of that.

4 Q. Are you aware that the defendants rely on a
5 declaration submitted by Professor Brad Lockerbie?

6 A. Yes.

7 Q. Do you know Professor Lockerbie?

8 A. I do not.

9 Q. Do you know if he's sitting here in this courtroom?

10 A. I do not. I do not know.

11 Q. Have you reviewed his declaration in this case?

12 A. Yes.

13 Q. And, briefly, what do you understand his argument to
14 be?

15 A. I believe his argument is, because black voters
16 usually vote for Democrats and white voters usually vote
17 for Republicans, that party rather than race explains the
18 voting patterns that I show in my report.

19 THE COURT: What did you just say, the last part
20 of that?

21 THE WITNESS: He believed that the voting
22 patterns that I show in my report are due to party rather
23 than race.

24 THE COURT: No. I heard that. Then you -- I
25 think -- I thought, and maybe I'm wrong. I thought you

1 then said something else and I missed it. Or did you not?

2 THE WITNESS: I don't remember.

3 THE COURT: Okay. I'll look at the transcript.

4 Sorry. Keep going.

5 BY MR. SELLS:

6 Q. On what evidence does Professor Lockerbie base his
7 argument?

8 A. By looking at the summary tables that I provide and
9 arguing that what I just said, black voters usually vote
10 for Democrats and white voters usually vote for
11 Republicans.

12 Q. Did Professor Lockerbie perform any statistical
13 analysis of his own?

14 A. If he did, it didn't show up in his report. His
15 report relies on my -- on my report and the estimates in
16 my report.

17 Q. Did he engage in any statistical analysis of the
18 estimates in your report to arrive at his conclusions?

19 A. As far as I know, the only thing that he did is look
20 at my report and my estimates and possibly the -- he must
21 have also looked perhaps at the actual election results
22 posted on the Secretary of State's website. I'm not -- I
23 can't tell that -- it doesn't seem to be anything beyond
24 that was done.

25 Q. He's just looking at the results?

1 A. That's what I conclude from looking at his report.

2 Q. Do you agree with Professor Lockerbie's analysis?

3 A. I agree that most whites vote for Republicans and
4 most blacks vote for Democrats. I do not agree that that
5 means party rather than race explains the vote.

6 First of all, the fact is that race also explains the
7 -- explains party, and that is not acknowledged. The two
8 are not actually competing explanations. They are highly
9 correlated explanations, and you have to look at the role
10 that race plays in party as well as the direct
11 relationship between race and vote. There is an indirect
12 relationship mediated by party.

13 Q. Have you prepared a rebuttal to Professor Lockerbie's
14 declaration?

15 A. Yes, I have.

16 Q. I would like to show you what has been marked as
17 Plaintiffs' Exhibit 13. Do you see that?

18 A. I do.

19 Q. Can you identify that document?

20 A. That is my rebuttal report.

21 MR. SELLS: The plaintiffs offer Exhibit 13.

22 THE COURT: Any objection?

23 MR. STEINBERG: None.

24 THE COURT: It's admitted.

25 (Plaintiffs' Exhibit 13 admitted into evidence.)

1 BY MR. SELLS:

2 Q. We're going to go over this report in some detail.
3 Is Dr. -- Professor Lockerbie's method of looking at
4 results -- strictly the results and drawing conclusions
5 from those a scientifically valid way of determining
6 whether election outcomes are caused by race or party?

7 A. No. If you're going to argue that voting is not
8 based on race and is based on party, you actually need to
9 do a statistical analysis to determine how much each of
10 these variables impact the -- in this instance, we have
11 two independent variables: One is race and one is party,
12 and they're both explaining the dependent variable, which
13 is vote choice. And Dr. Lockerbie treats them like
14 they're competing explanations when, in fact, they're
15 highly correlated explanations. One of the reason they're
16 highly correlated is, of course, race plays a role in
17 party choice. So you could do a statistical analysis.
18 That was not done.

19 Q. There are scientifically valid ways of doing that
20 kind of analysis?

21 A. Yes.

22 Q. Why didn't you do that kind of analysis in this case?

23 A. I have always looked at whether voting patterns
24 between blacks -- or minority voters and white voters are
25 different. I have not looked at the cause of why they

1 might be different because my reading of both the
2 amendments to the Voting Rights Act, the court in Gingles,
3 the decision in Gingles, and all of the court cases that
4 have followed that have not done that kind of analysis.
5 They've done precisely the kind of analysis that I have
6 done. This is what is done in these kinds of vote
7 dilution cases.

8 Q. Other than the fact that Professor Lockerbie failed
9 to analyze this mediating effect of party between race and
10 voter choice, does your rebuttal identify any other
11 problems with Professor Lockerbie's report?

12 A. So even the relationship between race and party is
13 not as definitive as between party and vote. It's not as
14 definitive as he contends. There are data points that he
15 doesn't address and doesn't explain. For example, black
16 voters don't always vote for the Democratic candidate. I
17 looked at nine contests, and in two of them the black
18 voters voted for the Libertarian candidate.

19 Another example is that voting in the Democratic
20 primary was polarized. Now parties taken out of the
21 equation, everybody who is voting in that election has
22 decided to vote in the Democratic primary; yet, that was
23 polarized.

24 Another example is that the fact that white voters
25 appear no more thrilled about black Democrats than white

1 Democrats ignores the fact that actually there is a slight
2 difference between their preference for black Democrats
3 and white Democrats. And it completely ignores the fact
4 that there is a big difference between their preference
5 for white Republicans than black Republicans.

6 Q. What is that difference in terms of white support for
7 white Republican candidates and black Republican
8 candidates?

9 A. I'm not exactly sure that I remember the percentages,
10 but it was something like 80-some percentage of white
11 voters supported the white Republicans who ran in state
12 legislative contests and about 50 percent supported the
13 black Republicans.

14 I should have mentioned there are no statewide
15 contest with black Republicans. So this is only based on
16 the State House districts that I analyzed.

17 Q. Dr. Handley, are you saying that party has no role in
18 voter choice?

19 A. No. Party does have a role in voter choice. What
20 I'm objecting to is the fact that it isn't a matter of, is
21 it race or is it party, because race is also related to
22 party. A whole lot of things impact why you choose to
23 vote a certain way. Race with one. Party is one. There
24 are a number of other factors too. There's a gender gap.
25 Whether you're male or female affects how you're going to

1 vote. There are a lot of variables of which party and
2 race are two variables.

3 Q. Does Professor Lockerbie account for any of those
4 variables in his declaration in this case?

5 A. No. He does no analysis at all.

6 Q. I would like to turn now if we can to the second part
7 of what you were asked to do in this case. I believe your
8 report calls it a plan comparison. Can you explain kind
9 of at a high level what you're trying to do in this part
10 of your report?

11 A. What I'm doing is attempting to look at the number of
12 minority opportunity districts that are present in each of
13 the plans. By "the plans," I'm talking about three plans.
14 I'm talking about the current plan or the old plan,
15 however you want to talk about it, the proposed plan, and
16 the illustrative plan. And just simply wanted to look at
17 the opportunities for black voters to elect their
18 candidates of choice in these three plans.

19 Q. How do you go about identifying the opportunity
20 districts in those three plans?

21 A. There are two components to determining if a district
22 provides minority voters with an opportunity to elect.
23 One would be the racial composition or ethnic composition
24 of the district, and the other would be -- and this is
25 part of the district specific functional analysis, and

1 that is looking at the actual voting patterns within that
2 district to determine how white and black voters are
3 voting.

4 For example, if voting wasn't polarized, you wouldn't
5 need to draw these district. If voting was kind of
6 polarized, like 35 percent white crossover, may be the
7 case that you don't need a majority black district. You
8 could do a 45 percent black district. But if voting is
9 starkly polarized and the amount of crossover vote is
10 small, then you would need a higher concentration. So the
11 two play together. You have to look at both the
12 demographic composition of the district and the voting
13 patterns in that district to determine if it provides
14 minority voters with an opportunity to elect.

15 Q. Let's talk about the first item you mentioned, the
16 demographic composition of the district. What do you mean
17 by that? What specifically are you talking about?

18 A. So there is no universal or even statewide target.
19 And this became quite clear in the course of a couple of
20 recent court cases. You can't go in and say 50 percent or
21 55 percent is enough statewide or, you know, across the
22 country. You actually have to do an analysis. And that
23 analysis means that you have to have at least enough vote
24 -- minority voters to actually affect the election. So
25 you need a significant amount. Whether that amount is 45

1 percent or 55 or 50 depends on the voting patterns, but
2 there at least what to be enough minority voters that they
3 actually are having an impact on an election.

4 So if you had a district with ten percent or 15
5 percent of the voters being, say, black, they're not
6 having an impact on the election. If you elect a black
7 preferred candidate in that instance, it's an instance of
8 happy coincidence. I mean, black voters might have
9 supported that candidate, but it's white voters who decide
10 the election because there are not enough black voters to
11 actually have an impact.

12 Q. So how did you go about determining in Arkansas what
13 the demographic composition of a district would need to be
14 in order to provide black voters with an opportunity to
15 elect?

16 A. So there were two indications that you would need a
17 significant minority black population. The first is,
18 voting is polarized and there is not very much white
19 crossover, but it's pretty starkly polarized and you would
20 be very lucky to get a third of white voters voting for
21 minority preferred candidate.

22 The second is the history here in Arkansas. I am not
23 aware of any black candidate being elected in a contested
24 election in a district that wasn't majority black.

25 So we already have an idea that you're going to need

1 a significant number of black voters in the district. And
2 then when you add that to the actual -- I'm sure we'll get
3 to this -- but the effectiveness scores that I calculated,
4 it's quite clear that, at least in the areas that I looked
5 at for the districts that I looked at, you would have
6 needed a majority black district to provide minorities
7 with an opportunity to elect.

8 Q. Now, does that mean that all majority black districts
9 will provide an opportunity to elect?

10 A. It does not. It may be the case that, for example,
11 even if blacks were very cohesive, if they were turning
12 out at much lower rate, it still could be the case that
13 white voters could elect their candidate of choice.

14 Q. Does it mean that only majority black districts can
15 provide an opportunity to elect?

16 A. It doesn't. For example, I've worked this last --
17 just this round of redistricting in many places, Virginia,
18 Michigan, the 11th Congressional District in Ohio, which
19 is north of Cleveland, different story in the south. In
20 all of those areas you do not need a majority black
21 district to elect the black preferred candidate because
22 you had an enormous amount of consistent white crossover
23 in the neighborhood of, literally, 35 to 40 percent of
24 white voters consistently, more like 45 percent, voting
25 for the black preferred candidates in these areas.

1 It even varies within a state. I mentioned Colorado
2 and the fact that in Denver you don't even need to draw
3 minority districts at all. And you go out to the suburbs
4 and you do, but they might be, say, 40 percent Hispanic.
5 And by the time you get to the San Luis Valley, you better
6 make them more than 50 percent.

7 Q. Let's talk about the second part of your functional
8 analysis. How do you determine whether candidates
9 preferred by black voters can win in a district?

10 A. So there were two approaches and they depend on
11 whether you're trying to figure this out before you have
12 proposed districts to look at or after, but both of them
13 take into account the turnout and the voting patterns of,
14 in this case, black and white voters. So you want to know
15 if they're turning out at comparable rates or maybe blacks
16 are turning out at a lower rate. You want to know how
17 cohesive the black population is and how much white
18 crossover you can expect.

19 The way you would do that before an election is, you
20 would do -- or before districts are drawn, is that you
21 would do a racial bloc voting analysis. You would produce
22 estimates. And you would use those estimates and you
23 would use algebra and you would actually calculate the
24 percent black voting age population needed to win in a
25 district.

1 Much easier is if you actually have proposed
2 districts. Then you can look at what are called
3 recompiled election results. They take into account the
4 same things because what you're doing is, you're looking
5 at actual elections and seeing what would have happened.
6 So these actual elections take into account the turnout,
7 the crossover voting, and the cohesiveness.

8 So in this particular instance -- this is a
9 long-winded. But in this instance, I actually had
10 proposed district boundaries that I could use to determine
11 the effectiveness.

12 Q. So you used the second method, not the algebraic
13 method in this case?

14 A. That's correct.

15 Q. Have you used this second method in other cases?

16 A. Yes. This is a pretty conventional method. It's not
17 just vote dilution experts that do this. I know this is
18 -- these election results can be put in the GIS and lots
19 of redistricters are using this information, maybe not to
20 determine if you have opportunity districts, but say to
21 determine how many Democratic and Republican districts you
22 have. But it's very standard and it is certainly
23 something that voting rights experts have relied on,
24 particularly more recently when this information was
25 easily gleaned through a GIS package.

1 Q. So how did you do it in this case?

2 A. So do you mean, explain what I mean by recompiled
3 election results? Go into detail?

4 Q. I want you to walk the Court through the steps of how
5 you did it in this case.

6 A. Okay. So you need to take the precincts and you're
7 going to need to take the election results and bring them
8 back down to the bloc level so that, when you draw
9 boundaries for a district, you can take all of this bloc
10 level and bring it up to the district.

11 If you were drawing with whole precincts, you
12 couldn't even do it because the precinct boundaries
13 change. But let's say you're in a jurisdiction where the
14 precincts were all the same for the entire decade and the
15 districts were drawn using those precincts. Then you
16 would just take those precincts and bound them up, but it
17 doesn't work that way. So I'm going to bring the election
18 results down to the bloc level where all of these
19 elections are, then I'm going to bring them up to the
20 proposed district lines to see how each of the candidates
21 do in these proposed districts.

22 Q. How do you disaggregate election results from the
23 precinct to the bloc?

24 A. So you use the proportion of voting age population
25 that that bloc is of the precinct and you allocate each of

1 the candidates' votes on the basis of the proportion that
2 that bloc makes up of the precinct as a whole.

3 Q. Now, when you're doing this functional analysis, how
4 do you pick which elections to disaggregate and recompile?

5 A. So chances are all of the elections have been
6 disaggregated and can be recompiled. But for determining
7 if a minority candidate would win a district, you would be
8 focusing on a minority candidate who is supported by
9 minority voters and not supported by white voters to
10 determine if a minority candidate could win a particular
11 district.

12 Q. Why are those your criteria?

13 A. I focus on minority candidates because the Court is
14 quite clear that you're not giving minority voters an
15 opportunity to elect. The only people they can elect are
16 whites that they support. They also have to be able to
17 elect minorities that they support. So I focus on
18 minorities who are preferred by minority candidates.

19 Q. Do other experts use the same criteria?

20 A. Yes.

21 Q. And do other experts use the same kind of recompiled
22 election analysis to identify opportunity districts?

23 A. Yes. But my mentor, Bernie Grofman and I -- that's
24 the plaintiffs' expert in Thornburg V. Gingles -- just
25 wrote an article on doing precisely that. He was a

1 special master in a couple of cases and was talking about
2 how you do that while I was talking about how you do it in
3 other places.

4 Q. In this case, for which plans did you calculate these
5 effectiveness scores based on the recompiled election
6 results?

7 A. For all three plans. By "all three plans," I mean
8 the current, the proposed, and the illustrative.

9 Q. For which districts did you calculate the
10 effectiveness scores in each plan?

11 A. All of the districts.

12 Q. I would like to show you what has been marked as
13 Plaintiffs' Exhibit 8D. I'm sorry. I got called out the
14 wrong number. I think it's 8A. Can you identify this
15 document?

16 A. Yes. So this is the effective -- well, it's the
17 total population deviation, the black VAP and the
18 effectiveness scores for the current districts.

19 Q. This is set forth in Exhibit A -- or Appendix A of
20 your report, correct?

21 A. Yes. I think Appendix A includes the current, the
22 proposed, and the illustrative districts.

23 MR. SELLS: The plaintiffs offer Exhibit 8A into
24 evidence.

25 THE COURT: Any objection?

1 MR. STEINBERG: None.

2 THE COURT: It's admitted.

3 (Plaintiffs' Exhibit 8A admitted into evidence.)

4 THE COURT: I do have one question before we
5 continue. Am I right or wrong that the effectiveness
6 score -- so let's just take the top one. It says .352.
7 Am I right that that essentially means that in the models
8 you've done, a black candidate or a black preferred
9 candidate would win 35 percent of the time and lose 65
10 percent of the time or is that not the right way to
11 understand that?

12 THE WITNESS: That's not the right way to
13 understand that.

14 THE COURT: What is the right way to understand
15 what that actually means?

16 THE WITNESS: I'm trying to predict the
17 percentage of votes that a black preferred candidate would
18 get in that district, not the number of times he would
19 win. So I'm predicting, in that district, a black
20 preferred candidate would get 35.2 percent of vote.

21 Let me explain why I didn't put that -- it's
22 essentially a percentage, but I left it at .352 because I
23 was also reporting black VAP percentages. The only reason
24 that's not expressed as a percentage is so that you don't
25 get mixed up about whether I'm talking about black VAP or

1 effectiveness score.

2 THE COURT: I got that. I don't mean to
3 interrupt you, and if you want to continue, continue. But
4 let me make sure I ask it this way.

5 Are you basically saying with the effectiveness score
6 that in some sense a hundred percent of the time the
7 result of the election will be the black preferred
8 candidate getting 35 percent of the vote in that district?

9 THE WITNESS: Not exactly. The reason would be
10 that the composition of the district would presumably
11 change over time as population shifts. So this is my best
12 guess of what's going to happen in, say, the next election
13 or the election after that. So before the demographic
14 shift and the voters move in and out, this is what I think
15 will happen in the next set or two sets of elections.

16 THE COURT: Now I understand it. I appreciate
17 it.

18 BY MR. SELLS:

19 Q. So Dr. Handley, I think you were about to explain the
20 columns in this appendix. Do we need to explain that any
21 further for the Court?

22 THE COURT: No. Why don't you explain it --

23 THE WITNESS: Okay. So the first column just
24 indicates the district. The second is the total
25 population. The third is the deviation from ideal. The

1 fourth is the percentage black VAP of that district. And
2 the final one is the effectiveness score calculated -- I
3 don't know if we talked about how we calculated it. I
4 think we did. That is the recompiled election results for
5 the one black candidate who was preferred by black voters
6 who ran statewide for a major party. And that's the
7 percentage of votes he would have gotten in that district.

8 THE COURT: That's the 2018 lieutenant governor
9 election?

10 THE WITNESS: That's correct.

11 BY MR. SELLS:

12 Q. And the left-most column says this is current
13 district. So this is your effectiveness index or scores
14 for the -- what we've sometimes called the current plan,
15 which is also now the old plan?

16 A. Yes.

17 Q. And Appendix A also sets out your scores for the 100
18 districts in the Board of Apportionment's newly adopted
19 plan and the illustrative plan by the plaintiffs, correct?

20 A. Yes.

21 Q. So I want to focus first on the current State House
22 plan and I want to look at Table 1 of the body of your
23 report, which is Page 4 of Plaintiffs' Exhibit 8.

24 THE COURT: If for some reason I didn't say that
25 the previous chart was admitted, it's admitted. I can't

1 remember whether I just told you all it was admitted or
2 not.

3 MR. SELLS: Thank you, Your Honor. I was
4 wondering about that myself.

5 BY MR. SELLS:

6 Q. So Dr. Handley, can you explain what this table
7 shows?

8 A. What I've done in this table is on the basis of the
9 black voting age population and the effectiveness score
10 identified what I believe are the black opportunity
11 districts in the current plan. So you see the district
12 number, you see the incumbent's name, the race and the
13 party of that incumbent, the percent black VAP of that
14 district as it stands now as opposed to when it was drawn,
15 and the effectiveness score of that district.

16 Q. So how many opportunity districts were there in the
17 old plan?

18 A. 12.

19 Q. Let's look at Table 2 of your report on Page 5 of
20 Plaintiffs' Exhibit 8. What does this table show?

21 A. This is the same information for the proposed plan.
22 Now, of course, it may be the case that incumbents are
23 paired because this is a proposed plan. So in some
24 instances, for example, in 63 and 62 you have -- no,
25 that's not right. In 62 you have paired incumbents, so I

1 list both of them.

2 Q. And according to your analysis how many opportunity
3 districts are there in the Board of Apportionment's newly
4 adopted plan, the proposed plan?

5 A. 11.

6 Q. Are you aware the defendants dispute your analysis of
7 the number of opportunity districts in the Board of
8 Apportionment's new plan?

9 A. Yes.

10 Q. Do you recall how many opportunity districts they say
11 are in their new plan?

12 A. I think that it's four more than this.

13 Q. So that would be 15, right?

14 A. Thank you. Yes.

15 Q. Now, I won't ask you to recall the district numbers
16 of those additional four because I think everyone
17 recognizes that the numbering scheme is crazy and it's
18 very hard to follow. But I am going to ask you about each
19 one of those. If you have any questions about which
20 district I'm asking about, let me know and I'll try to
21 clarify. Okay?

22 A. Yes.

23 Q. So let's start with new District 49, which is located
24 in the Fort Smith area of, I believe, northwest Arkansas
25 and is currently represented by Jay Richardson, a black

1 Democrat.

2 THE COURT: Counsel, can I ask you, unless it is
3 important for you to have this chart up, do you think we
4 can go to the map chart so I can just follow along
5 visually of which districts you're talking about?

6 MR. SELLS: Certainly. That would be
7 Plaintiffs' Exhibit 1. Is that the map that you want?

8 THE COURT: That's fine.

9 MR. SELLS: Can we find -- District 49 should be
10 up in this area. There we go.

11 Is that helpful, Your Honor?

12 THE COURT: Yes. Very helpful.

13 BY MR. SELLS:

14 Q. Let me back up, Dr. Handley, just to orient you a
15 little bit and orient myself. This District 49, northwest
16 Arkansas represented by Jay Richardson, a black Democrat.
17 Why shouldn't this district count as an opportunity
18 district for black voters according to your analysis?

19 A. I believe that it has a black voting age population
20 of around 15 percent, but I don't have that exact number
21 in front of me. So although it is -- well, it isn't
22 electing a black candidate. I believe that, if I'm not
23 mistaken, there hasn't been a contested election for this
24 candidate. But in any case, if there was, I suspect black
25 voters would support him, but there hasn't been. And in

1 any case, it doesn't matter because it's only 11 percent
2 black in voting age population. So it's a happy
3 coincidence that he's elected, but black voters had
4 nothing to do with it.

5 Q. Just to clarify the record, I think you gave two
6 different percentages. And you're going from memory, so I
7 don't think anyone is going to fault you for that. But
8 the first one was correct, 15 percent. It's is roughly 15
9 percent black voting age population.

10 A. Thank you.

11 Q. So does that affect your answer at all, the
12 difference between 11 percent and 15 percent?

13 A. No. No. The point is that there are not enough
14 black voters to impact the election were there to be one.

15 Q. Okay. I want to turn now to new District 74, which
16 is located in Pulaski county and is represented by Tippi
17 McCullough, a white Democrat. Do you see that district?

18 A. I do.

19 Q. Why shouldn't that district count as a black
20 opportunity district as the defendants argue?

21 A. We now have more black voters but we're still shy of
22 being able to impact an election in a district that is
23 only 25 percent black, and you probably told me, but it's
24 somewhere around 25 percent. I'm sorry if I didn't get it
25 exactly. But the percentage is still too low for black

1 voters to actually control that election.

2 Q. That's true even though it has effectiveness score
3 above 50 percent or above .500?

4 A. That's correct. I look at both factors, both the
5 effectiveness score and the percentage black VAP in the
6 district.

7 Q. The next one I want to look at is new House District
8 98, which is in southwest Arkansas. Do you see that
9 district?

10 A. Yes.

11 Q. That district is represented by David Fielding, a
12 black Democrat. Why shouldn't that district count as a
13 black opportunity district according to your analysis?

14 A. Can you repeat for me the black VAP? I think the
15 black VAP is high enough so that you think it might be. I
16 think it's around 45 percent.

17 Q. 44.78 but we'll forgive the two percentage --

18 THE COURT: That's pretty good.

19 THE WITNESS: The downfall of this district is
20 the effectiveness score. It does not score .5 or above

21 BY MR. SELLS:

22 Q. Let me ask you. Would you have considered this an
23 opportunity district if it were 44.8 percent black but it
24 had an effectiveness score of say .6?

25 A. Yes.

1 Q. But it doesn't have an effectiveness score of .6,
2 does it?

3 A. No.

4 Q. Do you recall roughly what the effectiveness score is
5 for this district?

6 A. I don't.

7 Q. It's less than .5, right?

8 A. Yes. That I do recall. I'm sorry. I just don't
9 recall the actual.

10 Q. So what does that effectiveness score tell you about
11 the opportunity of black voters in this 45 percent
12 district to elect candidates of their choice?

13 A. So my prediction, based on the effectiveness score,
14 is a black preferred candidate will get whatever the score
15 is, 42, 43, 44 percent of the vote, which is, of course,
16 shy of being able to win. You would need at least 50
17 percent of the vote.

18 Q. Now, the defendants say the Court shouldn't rely on
19 your effectiveness score; that, instead, you should adjust
20 -- the Court should adjust your effectiveness score
21 upwards because of the incumbent in that district, David
22 Fielding, and his past election results.

23 Do you have a response to that?

24 A. Yes. This is typically not done. In fact, I haven't
25 seen this done before. And the reason is that there are

1 some faulty assumptions here. One is that the incumbent
2 will actually run in that district and have the advantages
3 that an incumbent would have. The second is that you're
4 -- not all the voters see that candidate as an incumbent
5 because it is a new district and they're bringing in new
6 voters. So that isn't going to work either. You can't
7 project how much votes that the people who are new to the
8 district will give to the incumbent because he's not their
9 incumbent.

10 The bonus is also based on the voting patterns and
11 the racial composition of the old district, and we've just
12 decreased the percentage of the voting age -- black voting
13 age population in this district. So the bonus wouldn't be
14 the same. The bonus, I should have explained, is the
15 difference between -- so the votes for Bland versus the
16 votes for the incumbent.

17 Finally, even if all of those things were true, what
18 happens when the incumbent retires or if they don't have
19 an incumbent, you have to be able to elect a black
20 preferred candidate who is challenging, for example, an
21 incumbent if that's who the black voters support.

22 Q. You mentioned an incumbent retiring. Do you know
23 whether Arkansas has term limits for members of the State
24 House?

25 A. I believe they do. It's not short term limits

1 though. I'm thinking 16 years, but I'm guessing.

2 Q. Pretty good guess.

3 Do you know how many years David Fielding has served
4 in the State House?

5 A. I do not.

6 Q. According to the directory here, says Representative
7 Fielding was first -- his first term was 2011. So that
8 might mean he has two more terms, right?

9 A. Yes. I'm going trust your math.

10 Q. If I did that math correctly. We can correct that if
11 I'm wrong.

12 So he's not going to be able to represent this
13 district for the entire decade, correct?

14 A. That's correct.

15 Q. We know that. It's not just dependent on him
16 retiring, right?

17 A. That's correct.

18 Q. Do you remember how much of Representative Fielding's
19 new District 98 is comprised of his old voters and how
20 much is comprised of new voters to him?

21 A. Somewhere between 25 and 35 percent, but the figure
22 would be in my rebuttal report. I just don't remember off
23 the top of my head.

24 Q. 36 percent is new.

25 A. Okay.

1 Q. And 64 percent old. So you're right on again.

2 Is that number significant enough that it could alter
3 election outcomes if the new voters don't vote in the same
4 way as the old voters?

5 A. That's over a third of the district. Yes.

6 Q. Let's talk about the fourth district that the
7 defendants say should be an opportunity district, and
8 that's District 34 in the upper delta region, the
9 northeast corner of the state. It's represented by Monte
10 Hodges who testified yesterday. He's a black Democrat.
11 You didn't see his testimony or hear it.

12 Why shouldn't this district count as an opportunity
13 district for black voters in your view?

14 A. So the adjustment for this particular district --
15 we're talking about Dr. Lockerbie's adjustment to the
16 effectiveness score, the 34 -- assumes first that we're
17 going to have the same incumbent running and enjoying the
18 incumbency advantage. I'm told that he is, in fact, not
19 running and so there will not be a an incumbency
20 advantage.

21 Second, I think it overestimates the percentage of
22 votes if you were going to assume an incumbency advantage
23 that he would get because they choose 2018. In 2020
24 that's substantially less votes against the same candidate
25 that he ran in 2018.

1 Third, the percentage of the black voting age
2 population has declined so the bonus is not going to be
3 the same.

4 And, fourth, again, there isn't actually going to be
5 an incumbent. This is going to be an open seat. So there
6 is no incumbency advantage. So to adjust based on the
7 incumbency advantage is not correct.

8 Q. Just to be clear for the record, this is a district
9 that is in the mid-40s black voting age population under
10 the new plan, correct?

11 A. Yes.

12 Q. And it's effectiveness score is below .5, correct?

13 A. Yes.

14 Q. And that is effectiveness score that leads you to
15 conclude that it is not an opportunity district, correct?

16 A. That's correct. So in some jurisdictions certainly
17 and maybe in some places in Arkansas, that percentage
18 voting age -- black voting age population would have been
19 sufficient, but here, because of the voting patterns of
20 that district of both the new and the old residents
21 because that's the advantage of the recompiled election
22 results, it's telling me the actual voting patterns of the
23 people who are now in that district, not just the old
24 district, but the new district. That's what would --
25 those are the voters that are there now, and that's what

1 happened when the black preferred candidate ran in that
2 area in 2018.

3 Q. So to sum up Dr. Handley, on proposed plan or the new
4 Board of Apportionment plan, do you disagree with the
5 State's contention that there are four more opportunity
6 districts for a total of 15 in the state's plan?

7 A. I do.

8 Q. Finally, unless the Court has anymore questions on
9 the new plan, I'm going to turn to the illustrative plan.

10 THE COURT: This question may be way off base.
11 So, again, if my premise is wrong, stop me and tell me
12 that.

13 In my head, one of the things I'm thinking about is
14 we all -- you know, whether it's MSNBC, Fox News or CNN,
15 we all watch exit pole results on election night and
16 things like that, and we all understand that, when they
17 report them, they usually report them with a plus or minus
18 number, right? So there are some -- there's some kind of
19 statistical error rate that everybody is taking advantage
20 of.

21 Now, I guess, based on my understanding of what
22 you're effectiveness score represents, is there any plus
23 or minus error rate in the same way that there would be
24 with polling information or something close to that?

25 THE WITNESS: There are margins of error around

1 the statistical estimates that I derive for the voting
2 patterns, so for the ecological regression estimates and
3 the ecological inference. But this is not actually a
4 statistical technique. This is just recompiling the
5 results up. So there is no margins of error around this.

6 THE COURT: I appreciate that.

7 BY MR. SELLS:

8 Q. Okay. So we've got the illustrative State House
9 plan. I don't think we're actually going to need to look
10 at that. I want to look instead at Table 3 of your
11 report, Dr. Handley, which appears at Page 6 of
12 Plaintiffs' Exhibit 8.

13 What does this table show?

14 A. Like the other tables, it provides the same
15 information; so the district number, whether there is an
16 incumbent, and if there is, the race and the party of that
17 incumbent, the black voting age population of that
18 district, and the effectiveness score for that district
19 based on the recompiled election results.

20 Q. How many opportunity districts are there in the
21 plaintiff's illustrative plan according to your analysis?

22 A. 16. 16.

23 Q. So four more -- five more than you found in the
24 board's new plan and four more than were in the board's
25 old plan, correct?

1 A. That's correct.

2 MR. SELLS: Your Honor, may I have a minute to
3 confer?

4 THE COURT: Yes.

5 BY MR. SELLS:

6 Q. Dr. Handley, based on your analysis in this case,
7 based on your training as a political scientist and your
8 decades of experience with redistricting, have you formed
9 any opinion on whether the Board of Apportionment's new
10 plan dilutes the voting strength of black Arkansans?

11 A. Yes, I have.

12 Q. What's your opinion?

13 A. My opinion is that voting in Arkansas and in the
14 areas specific where districts could have been drawn that
15 weren't, voting is racially polarized, and that not only
16 does the new proposed plan not -- it decreases the number
17 of effective districts when it in fact could have
18 increased the number of districts that would give minority
19 voters, black voters, an opportunity to elect their
20 candidate of choice. And so I believe that this presses
21 the opportunity of black voters to participate in the
22 electoral system and to elect their candidates of choice.

23 MR. SELLS: I pass the witness, Your Honor.

24 THE COURT: We're going to take a break, but I
25 do have one question. And if this question raises another

1 question for you, you're more than welcome to follow up
2 right now or later as you see fit.

3 Do you have that same opinion about the 2011 -- the
4 2011 House map, that it diluted black voting strength?

5 THE WITNESS: I do, but the reason that I'm
6 hesitating is that the -- I'm not sure what number of
7 districts you could have drawn because the population
8 would have been different. But given the number that you
9 can draw now, I don't believe that you couldn't have drawn
10 more in 2011.

11 THE COURT: So, essentially, the 2011 plan in
12 your view did dilute black voting strength; you just don't
13 know or not necessarily in your view as much as the 2021
14 plan did. Is that fair?

15 THE WITNESS: Okay. I'm speculating. I'm
16 guessing that it did, but I did no analysis of that. So
17 I'm only saying it probably did, but, in fact, I don't
18 know this.

19 THE COURT: That's a fair answer.

20 MR. SELLS: I don't have a followup on that so
21 I'll pass.

22 THE COURT: We're going to take a ten-minute
23 break and then we will come back for cross-examination.

24 I would suspect, if we're not done with
25 cross-examination by 1:00, that is when we will break for

1 lunch.

2 MR. SELLS: Thank you.

3 (A recess was taken at 11:30 a.m. until 11:59 a.m.)

4 THE COURT: Okay. Mr. Steinberg, at your
5 pleasure.

6 MR. STEINBERG: We're taking a break at 1. Is
7 that your plan?

8 THE COURT: My plan is close to 1, but we'll see
9 how things are going.

10 MR. STEINBERG: Okay.

11 CROSS-EXAMINATION

12 BY MR. STEINBERG:

13 Q. Dr. Handley, it's nice to see you. I would like to
14 start with some questions about methodology if I might.

15 So did you say that the only advantages of ecological
16 regression over inference are, one, it's a little simpler
17 to explain because it's a scatter plot as opposed to the
18 tomograph, if I pronounced that correctly or got that word
19 correctly. That's one advantage. And, two it's, been
20 approved by the Supreme Court and the Supreme Court hasn't
21 had an occasion yet to approve ecological inference.

22 A. No. I suspect that there are jurisdiction specific
23 reasons for using ER over EI. You may have not be able to
24 get estimates using EI in some jurisdictions depending on
25 the variation in the independent variables, how much

1 variation there is across the precincts.

2 So there are certainly instances where you might use
3 ER rather than EI or the ER estimates might be better than
4 the EI. But for the most part, I think that most
5 statisticians and political scientists who work in this
6 area prefer the EI estimates.

7 Q. Did you see any of those instances here, instances
8 where ER was superior to EI based on district specific
9 issues data?

10 A. Well, there were instances in which I could not get
11 EI estimates in which case you have to use ER estimates,
12 right?

13 Q. Correct. But other than those, you weren't seeing
14 situations where ER appeared to be estimating more
15 accurately than EI?

16 A. What I'm doing is comparing the estimates to see if
17 I'm -- if they are showing the same sorts of voting
18 patterns, which they were. I'm not -- it doesn't matter,
19 essentially, which is more accurate because they're both
20 showing the same thing.

21 Q. Now, I would like to turn to the differences between
22 2 x 2 and R x C. I understand -- am I correct, 2 x 2 can
23 estimate turnout but not at the same time that it
24 estimates vote share. It can statement racial vote shares
25 for two candidates at one time. It can do turnout, but it

1 doesn't do them at the same time. Is that right?

2 A. That's correct.

3 Q. So when it estimates racial vote share, it assumes
4 equal turnout in proportion to blacks and whites shares of
5 the population. Yes?

6 A. That's correct.

7 Q. That's correct.

8 But R x C is modeling turnout and vote share
9 simultaneously?

10 A. If you mean by "modeling" producing estimates of
11 turnout, no. What it's doing is dividing the groups. Now
12 we have three options. We have candidate one, candidate
13 two, and votes to no candidates. So it's not turnout;
14 it's lack of turnout.

15 Q. I see. I think that you said that, because turnout
16 differential is a phenomenon and you believe that it
17 exists in Arkansas and in particular that the black
18 turnout is often lower than white turnout, that R x C
19 should produced somewhat more accurate estimates than
20 2 x 2 of vote shares?

21 A. Certainly that would be true statewide. It wouldn't
22 necessarily be true state legislative-wide because the
23 limited number of precincts. The limited number of
24 precincts in state legislative contests impacts each of
25 the estimates derived using different methods differently.

1 And I would not characterize the E I R x C more accurate in
2 the state legislative contests.

3 Q. Could we could we put up your Exhibit 8D? I suppose
4 I have to walk over here to see it.

5 Do you notice that in the estimates for white voters,
6 the R x C estimates for the Democratic candidates are
7 consistently tad higher than the estimates for the 2 x 2?

8 A. Yes.

9 Q. Could we go to the next page?

10 And I believe that there are -- thank you.

11 I believe that there is one exception in a general
12 election. But with that one exception, did they again
13 appear to be a bit higher? And by "they," a bit higher, I
14 mean the R x C estimates of white vote share for the
15 Democratic candidates in R x C versus 2 x 2?

16 A. That's correct.

17 Q. Is that because -- is that because R x C is finding
18 to be precise a higher rate of black no voting than white
19 no voting and so it has more votes that it needs to
20 attribute to the Democratic candidate to explain his total
21 because there are fewer black voters in the mix given the
22 turnout differential that it's finding?

23 A. In theory and often in practice.

24 Q. Mm-hmm. Could we look at 8C?

25 Here I think we find a somewhat less consistent

1 relationship. If you look at the top two, do you see
2 about a seven-point gap between 2 x 2 and R x C white
3 support for the Democratic candidate and a five-point gap
4 between R x C in District 7?

5 A. Yes.

6 Q. So again, that in theory and often in practice is
7 because R x C is not modeling turnout, whatever the
8 precise phrasing that you used. But thinking about
9 turnout, whereas, 2 x 2 is assuming equal turnout. And
10 fewer black voters in the mix translate into more votes
11 that it needs to attribute to -- from whites to the
12 Democratic candidate, if you could follow that complicated
13 chain of thought.

14 A. So I said in theory and sometimes in practice.
15 Mostly in practice. The problem here is the limited
16 number of precincts and the variation across the
17 precincts. So, unfortunately, it's hard to tell in any
18 given case. That's why you talk about ranges.

19 So political scientists use to, for example, say,
20 28.8735. And this is like silliness because 20 -- you
21 know, I couldn't even round it up. Really, we don't know
22 if it a 16.16 or 23.8. But it doesn't really matter, does
23 it, because it's just a very small portion of whites.

24 Q. This is jumping far ahead of where I intended to be,
25 but could it not matter a great deal whether crossover

1 vote is 24 percent, 17 percent, 16.6 percent when you draw
2 -- I'm sorry. I'll finish -- when you draw a, say, 45
3 percent black VAP district? Couldn't that eight percent
4 difference in white support for Democratic -- black
5 Democratic candidates be dispositive?

6 A. So that's the beauty of the effectiveness score
7 because, of course, it is taking into account the actual
8 white crossover that you would find among the voters in
9 that district. The effectiveness score does take into
10 account turnout, cohesion, and crossover.

11 Q. Now, back to the topic I was on. I think you said we
12 don't really know if it's 16.6 or it's 23.8. You said
13 that people used to report these numbers out to three
14 decimal places and that was silliness.

15 Are there margins of error in these numbers?

16 A. There are standard errors and there are confidence
17 intervals associated with these numbers.

18 Q. Are they in your report?

19 A. They are not.

20 Q. Do you -- why do you not put them in your report?

21 A. I don't typically do that. It may arise in trial, in
22 which case I provide them. But my preferred method of
23 checking these is to actually use different methods rather
24 than rely on confidence intervals.

25 Now, the confidence intervals are quite tight. The

1 margins of error is quite small in a statewide, but they
2 are wider in the state legislative election. But, again,
3 the better method for determining this voting patterns I
4 think is actually looking at different approaches and
5 whether they produce the same thing. But, certainly,
6 there are confidence intervals associated with ER, EI, and
7 EI R x C estimates.

8 Q. Both flavors of ER. So you said smaller -- first,
9 can you explain why they're smaller at the statewide level
10 and why they're wider? Is it because fewer precincts in
11 your plot or the tomograph, which I probably have gotten
12 the word wrong again, mean, you know, a lesser accuracy of
13 the estimate because you have fewer data points that
14 you're putting into the equation?

15 A. Well, it means wider confidence intervals. Yes, it
16 does have to do with the number of precincts. So if you
17 had a jurisdiction with 10,000 precincts, you would have
18 very tight, very small margins of errors, very tight
19 confident intervals.

20 Q. These districts of approximately 30,000 people have,
21 I think you said earlier, very few precincts.

22 A. Well, it depends on the district that you're looking
23 at, but, yes.

24 Q. So though they're not reported, could you tell us
25 roughly how wide these confidence intervals tend to be for

1 the ER and the two flavors of EI at the House level?

2 A. Not off the top of my head, no. I mean, it varies by
3 district by district. Again, what I would do is actually
4 compare the EI to the ER and the, if they are available,
5 HP estimates to get an idea.

6 Q. And that serves as a cross-check?

7 A. That's correct.

8 Q. But you do agree that there is a successive stage of
9 advantages that these models have over -- sorry, not these
10 models -- that these methods have over each other. The HP
11 makes the assumption that homogenous precincts are similar
12 to heterogeneous precincts, that ER falls outside of the
13 bounds, that EI 2 x 2 is falsely assuming perfectly equal
14 turnout.

15 And so I guess what I don't understand is, how do
16 inferior methods -- you may dispute the inferiority --
17 serve as a cross-check on the last one that -- that's done
18 the best job of solving these various problems?

19 A. I'm not sure that I agree that the last one has done
20 it, nor that the other methods are inferior. What I'm
21 saying is these are different approaches to trying to
22 estimate something that we don't actually know. So
23 they're different approaches. And it's interesting that
24 all of these approaches say exactly the same thing. No
25 matter how you do it, it always tells you that somewhere

1 between nine and 23 percent of whites voted for David
2 Fielding.

3 Q. On the -- for that district?

4 A. Yes. I'm sorry. I'm looking at the example here.
5 Yes.

6 Q. So just to take the interrelationship between the two
7 Els. So you have one that is taking turnout differential
8 into account, the other that's not. How is the one that's
9 not serving as a valuable check of the one that is?

10 A. Because of how they are separating out what you do
11 about nonturnout. This is very statistical. The fact is
12 that this is not, if you have a differential in turnout
13 and you got to allocate the votes, it's doing it more or
14 less proportionally rather than how it might actually be
15 the case. So it's not necessarily better.

16 Q. So, again, if I could ask, I know you said it varies
17 from district to district. But do you have any sense that
18 you could offer just how wide these confidence intervals
19 or are? An example that comes to mind, anything other
20 than they're wider than statewide that's a bit more
21 numerical?

22 A. They're certainly never wide enough to change the
23 results. So let's --

24 Q. Could I stop you?

25 A. Yes.

1 Q. By "result," do you mean polarized versus
2 nonpolarized in your definition of polarization or do you
3 mean, never wide enough to change an electoral outcome?

4 A. I'm not even sure what you mean by "an electoral
5 outcome" here.

6 Q. Well, suppose hypothetically a 45 percent black
7 district and there is ten-point variation, let's say. The
8 confidence interval says white crossover vote could be
9 anywhere in this ten-point range. It would seem to me
10 that that ten-point variation could affect the outcome
11 depending on whether we're on the low end of that range or
12 the high end.

13 A. So I didn't use anything that had confidence
14 intervals to make that decision. So the question that
15 you're asking has no answer as far as I'm concerned. So
16 my determination of whether this 45 percent district was
17 effective or not was not related to the percentage of
18 votes that the EI estimates said a white prefer candidate
19 got. It was based on the actual recompiled election
20 results.

21 Q. So just to be clear then, this is a purely
22 retrospective analysis that doesn't inform your
23 predictions of effectiveness of the board's proposed plan.
24 That is based solely on those effectiveness scores that
25 you've compiled?

1 A. So this was done to determine if voting was
2 polarized. Let's say voting wasn't polarized, then we
3 wouldn't be here. There would be no point in drawing
4 minority preferred districts. If there was a lot of white
5 crossover, then it would impact not my analysis. It would
6 actually impact whether the district was effective or not
7 because the effectiveness score would be higher. If there
8 was a lot of white crossover, it would be reflected in the
9 effectiveness score. But the effectiveness score is
10 derived from recompiled --

11 Q. Could I stop you?

12 THE COURT: Hold on. Please let her finish the
13 answer.

14 BY MR. STEINBERG:

15 Q. Please continue. I'm sorry.

16 A. I forgotten where I was. I'm sorry.

17 Q. I'm trying to remember what -- where I cut in. I
18 think you said that the crossover vote would show up in
19 the effectiveness scores. Yes?

20 A. Yes.

21 Q. But the particular district level crossover vote,
22 that -- would that show up in a proposed district because
23 we're changing who's in the district. So if we saw a lot
24 of crossover vote in a current district, now we've changed
25 borders, would you be able to use the crossover vote -- do

1 you think the crossover vote even in the current district
2 after the borders are changed ought to show up in a
3 propose district's effectiveness score? That's my
4 question.

5 A. That's actually the whole point of doing a recompiled
6 election result. Those are the actual voters that are in
7 this proposed district and that's how they actually voted.
8 So it does take into effect -- it does take into account
9 crossover vote.

10 Q. So if I could loop back to where I was trying to
11 clarify result. You said the confidence intervals are
12 never wide enough to change the results. By "result"
13 then, did you mean whether or not there is polarized
14 voting?

15 A. The confidence intervals -- right. So they have to
16 do only with these tables.

17 Q. Right.

18 A. It has only to do with whether whites voted for this
19 particular candidate or that particular candidate. The
20 confidence intervals were never even close to changing
21 that estimation of who the white voters voted for.

22 Q. So even if the case of District 34 where I see 58
23 percent shares and 41.6 percent shares, the confidence
24 intervals are too narrow to change that?

25 A. Well, that contest is not polarized. So I'm -- I

1 suppose that it -- I suppose in that particular case it is
2 possible that it could have changed it to polarized
3 because those are very close.

4 Q. So these confidence intervals then you concede are
5 possibly as big as 8.4 or more percent?

6 A. Possibly at the state legislative level.

7 Q. Could you page I believe two pages ahead if I don't
8 see the -- yes. This one.

9 So here white voters in R x C supported Hodges or
10 give 42 percent -- 42.7 percent of their votes to Hodges.
11 So that's 7.3 below 50. Here is the confidence interval
12 possibly large enough to change your view of who the white
13 preferred candidate was?

14 A. As you can see that all three estimates are
15 indicating that the Tobar -- Tobar is the candidate of
16 choice.

17 Q. But again 2 x 2 is not taking into account turnout
18 differential and ecological regression. I don't quite see
19 a method of balance problem, but you view EI as an advance
20 on ER?

21 A. I view EI in general as advance on ER. I'm not sure
22 that I view EI R x C in state legislative contests as
23 reliable as ER -- EI 2 x 2. As I said before, in state
24 legislative contests, I'm not going to say that those are
25 more reliable. I will say that they're probably more

1 reliable at the statewide level.

2 Q. Okay.

3 THE COURT: Mr. Steinberg, let me stop you for
4 one second.

5 This question may be better for the lawyers in which
6 case I'll ask it again in our legal argument later on. So
7 if you don't know the answer to this, please just say you
8 don't know the answer. But I know you've been doing this
9 a lot and have experience with it.

10 I think what I'm trying to find out from this
11 conversation is at least your perspective on, when I am
12 looking at whether a particular district meets or doesn't
13 meet the third Gingles factor, am I looking at any of what
14 we're discussing now or am I looking at your effectiveness
15 rating which is totally different?

16 If you don't know the answer, it's fine to say you
17 don't know the answer. I'm just trying to figure out if
18 you have a perspective on it.

19 THE WITNESS: Let me answer from my perspective,
20 and I think both are relevant. You would want to know if
21 voting was polarized in that area and you would want to
22 know if you created an effective district or if an
23 effective remedy existed. But I bet you there is a legal
24 answer that I am not sharing because I'm not a lawyer. I
25 don't know.

1 THE COURT: Okay. So from your witness and
2 expert witness opinion, you're not sure whether I'm using
3 this -- these or the effectiveness number or both, some
4 combination of both, when I'm analyzing the third Gingles
5 factor. Is that fair to say?

6 THE WITNESS: I would believe you would analyze
7 both.

8 THE COURT: Fair enough.

9 BY MR. STEINBERG:

10 Q. Now, I'd like to turn the topic of effectiveness
11 score, again, just methodologically for now. So I think
12 you answered in response to Judge Rudofsky's question,
13 these are not estimates of likelihood that a minority
14 preferred candidate would win. They are estimates of the
15 percentage of the vote that a minority preferred candidate
16 would get in a district.

17 A. It depends on what you mean by the first portion of
18 that, the likelihood that they would win. By that, I
19 understood, you know, in a hundred contests, that they
20 would win 35 percent of those contests. That's not what
21 it is. It is a projection of what I estimate a black
22 preferred candidate would get in an election.

23 Q. To take that example of the 35, so if you estimate
24 that a minority preferred candidate would receive 35
25 percent of the votes in a district, would you say the

1 likelihood of his winning that district is substantially
2 below 35 percent or about the same or we just don't know?

3 A. I'm afraid I can't understand that question.

4 Q. Well, so, for example, when pollster say, we think
5 so-and-so is going to get only 35 percent of the vote in
6 this election, do people normally think that person has a
7 35 percent chance of winning the election? Or rather, do
8 you?

9 A. I forgot the first part of that question.

10 If the prediction is he'll get 35 percent of the
11 vote, the projection is that he'll lose and he'll lose
12 because he only got 35 percent of the vote.

13 Q. And he'll be quite likely to lose? Occasionally, I
14 suppose people who we expect only to get 35 percent of the
15 vote win, but not 35 percent of the time?

16 A. I'm not sure how you're making the jump from 35 of
17 the vote to 35 percent of the time. I thought we did
18 discuss this.

19 I'm saying that I believe that he'll get 35 percent
20 of the vote, which suggests to me that he is going to lose
21 unless there are 18 candidates, and that's a plurality.

22 Q. I'm just wondering if the likelihood of winning is
23 actually significant lower than an effectiveness score.
24 If you predict 35 percent of the vote, you're not
25 predicting a 35 percent chance of winning but probably

1 something lower. Is that right or not?

2 A. I'm not sure if it's lower or higher. I'm not even
3 understanding the question. All I'm saying is, I believe
4 that that candidate will get 35 percent of the vote and
5 lose.

6 Q. You just don't see any way to convert from a
7 likelihood of winning from the estimated vote share other
8 than, obviously, if you're estimating that somebody is
9 likely to get less than 50 percent of the vote, you don't
10 think they're likely to win, you think they're more likely
11 than not to lose?

12 A. I'm predicting they're going to lose.

13 Q. Okay. You talked about what you do with split
14 precincts when you recompile the election results. You
15 said you get down to the bloc level and then you bring it
16 back up. And correct me if I'm wrong, the way you say you
17 do this is you determine what percentage of people live
18 inside a district's portion of a split precinct and then
19 you attribute that percentage to the two candidates' share
20 of the vote in the precinct level election returns. Is
21 that right?

22 A. No.

23 Q. No, that's not right. Thank you.

24 Then please explain.

25 A. So before any districts are even drawn, all I'm doing

1 -- the computer is doing is, it's taking the votes at the
2 precinct level and it's allocating them down to the bloc
3 level. It has nothing to do with what the district looks
4 like in the end.

5 Q. How does it -- how does it do that allocation of
6 proportionately by shares of population living in the
7 blocs?

8 A. Compared to the precinct.

9 Q. So if a district splits the precinct, we have
10 precinct level election returns, and this -- let's suppose
11 a precinct is split 50/50 and a thousand people voted for
12 Mr. Bland and a thousand people voted for his opponent and
13 the precinct is split 50/50 population, and that half is
14 inside a district whose effectiveness score you're
15 calculating and half is in another district. It's going
16 to allocate 500 of those Bland votes to that district and
17 500 of the Bland opponent votes to that district?

18 A. Yes. The allocation is done on the assumption that
19 there is no racial bloc voting. So it's very
20 conservative. It's done just on the basis of population.

21 Q. Sorry. Please.

22 A. So if voting is polarized, of course, the allocation
23 would be less conservative. So if your -- anyway, the
24 best way to do this -- it's the only way that we have to
25 do it -- is to do it just on the basis of population

1 because we don't know how people vote in that particular
2 bloc.

3 Q. And so, number one, does that assume constant rates
4 of turnout in the different blocs that make up this
5 hypothetical split precinct?

6 A. It assumes a constant voting pattern. So inherent in
7 that, I expect would be turnout levels that are
8 comparable, yes.

9 Q. So if, in fact, 75 percent of the voters were in the
10 50 percent populated east side of the split precinct, this
11 will just assume 50 percent of the voters came from the 50
12 percent populated east half and miss that 25 percent in
13 the hypothetical?

14 A. Not exactly. That's sort of it, but you're not
15 actually allocating turnout or even total votes. You're
16 allocating each candidates' votes separately.

17 Q. But inherent in that is an assumption of consistent
18 turnout in the two parts of the split precinct?

19 A. Yes.

20 Q. And also inherent in that is a pattern of perfectly
21 consistent voting in the two parts of the split precinct?

22 A. The process is such that you are assuming that voting
23 is not polarized because you're allocating -- if you were
24 in a mixed precinct, you're allocating the votes not
25 according to race. It's done this way in part because,

1 when you recompile it up, it may be the case, for example,
2 that if voting were more polarized, then your black
3 preferred candidate might actually be getting more or less
4 votes depending on the kind of district that you drew.

5 Q. Now, your finding, of course, is that voting is
6 polarized in these districts, but the assumption is
7 nonpolarization within -- geographically within the
8 precinct.

9 A. Yes. To recompile election results, you're doing it
10 on the basis of VAP just like everybody does, yes.

11 Q. So if a precinct is split between a predominantly
12 black neighborhood and a predominantly white neighborhood
13 and the black neighborhood happens to be the neighborhood
14 captured by a district whose effectiveness score you're
15 finding, you're attributing the voting pattern to which
16 the white voters in the white neighborhood contributed to
17 that black -- predominantly black half of the precinct
18 that's inside the new district?

19 A. I think so. I'm not exactly understanding your
20 question, but I think so. I am not taking into account
21 racial polarization when the election results are
22 disaggregated.

23 Q. So if a precinct happened to be -- if the district
24 line that goes through a precinct happened to be a racial
25 line and the people on the included side of the racial

1 line were minority voters who predominantly voted for
2 Bland, you would tend to underestimate Bland vote inside
3 this district because of -- because you're attributing the
4 total precinct's voting pattern to that to that bloc, that
5 census bloc or blocs?

6 A. If in your hypothetical precinct, it was in fact
7 divided between blacks and whites, you would be assuming
8 black and white voting patterns were the same as you
9 allocated down, yes.

10 Q. Could we pull up Page 18 of Exhibit 7?

11 So do you see that under the board plan, the board
12 has split 282 precincts?

13 A. I've never seen this before. I have no idea what
14 you're talking about.

15 MR. SELLS: Objection. Lacks foundation.

16 THE COURT: What's your objection?

17 MR. SELLS: Lack of foundation to ask this
18 witness if she knows anything about this document.

19 THE COURT: Mr. Steinberg.

20 MR. STEINBERG: So this is in Mr. Fairfax's
21 report which has been admitted. I understand that she
22 didn't personally prepare it, but I think that his
23 statements about precincts splits are reliable.

24 THE COURT: You can ask her if she's seen the
25 report, you can ask her if she's read the report, and you

1 can ask her if she knows whether this is accurate and,
2 assuming it's accurate, what she thinks about it. But,
3 again, she doesn't have to give you that much if she
4 doesn't know.

5 MR. STEINBERG: Okay.

6 BY MR. STEINBERG:

7 Q. Have you seen Mr. Fairfax's report?

8 A. I have not.

9 Q. And assuming -- assuming it's accurate, would this
10 tend to affect the accuracy of your effectiveness scores
11 because there are 300 -- 282 split voting tabulation
12 districts?

13 A. I have no -- I don't know where you're getting that
14 from.

15 Q. I'm sorry. It's Paragraph Number 33. The board
16 plan, that part.

17 A. We know that VTDs increasing aren't necessarily the
18 same thing.

19 Q. I am aware of that though there is often a quite
20 close relationship between these two.

21 A. Okay.

22 THE COURT: Mr. Steinberg, why don't you repeat
23 your question?

24 MR. STEINBERG: Yes.

25 BY MR. STEINBERG:

1 Q. Assuming that 282 voting tabulation districts were
2 split by the board plan, would that have significant
3 effect on the accuracy of your estimates of the share of
4 the vote that Bland received in the board's proposed
5 districts?

6 A. I doubt it.

7 Q. You doubt it. Why do you doubt it?

8 A. That's not enough precincts and I don't know the
9 composition of the precincts, so I doubt it.

10 Q. Could we pull up 7B, 205?

11 Do you see which counties are inside District 98, the
12 board's proposed District 98?

13 A. I don't know which are the district lines or the
14 county lines. I have haven't seen these maps.

15 Q. Okay. So the black line is the boundary of the
16 district.

17 Could you move west?

18 So are you -- would you agree that four counties
19 inside this proposed District 98 are Columbia, Lafayette,
20 part of Nevada, part of Ouachita?

21 If we could zoom out.

22 A. Yes.

23 Q. Okay. Could we go to Page 70 of 7C? 70 of 7C.

24 So this is from -- have you seen this?

25 A. I have not.

1 Q. No. This is from Mr. Fairfax's report, and it's a
2 list of split VTDs and the board's proposed districts and
3 it's listed by county and he gives the populations for the
4 parts of the split precincts.

5 If we could go to 72. Okay. And could we zoom in a
6 bit on the lower half of 72?

7 So the, first -- do you see the first split part in
8 Columbia county in District 98?

9 A. So I don't actually know how to read this. I see a
10 Columbia AR and then a Columbia north. You're going to
11 have to --

12 Q. Okay. So the left column is counties. The center of
13 the or next column is names of the VTDs. Third column is
14 board proposed district number. And then the fourth
15 column is the amount of people in the part of the VTD
16 located in the district in the third column.

17 A. Let me make sure. So Columbia north is in Districts
18 98 and 99. 860 people in 98, and 1,983 people in 99. Is
19 that correct?

20 Q. That's my understanding, yes.

21 So I just wanted to go through roughly the amount of
22 people who live in a split part of precinct 98. So the
23 first 98 you see is the 860?

24 A. Yes.

25 Q. Is the next the 70 voters in Columbia south?

1 A. Is the next?

2 Q. The next component of the split VTD is 70 voters --
3 in 98, the 70 voters in Columbia south?

4 A. So we're trying to reconstruct 98 and we're not
5 trying to figure out what happened to Columbia north? I'm
6 not following.

7 Q. I'm sorry. I'm just trying to figure out the number
8 of people who live in a split piece of a VTD in 98.

9 A. So would you want to add up --

10 Q. 860 plus 70, And --

11 A. 860 plus 70.

12 Q. -- so on.

13 Do you have a calculator up there?

14 A. I do not.

15 Q. Okay. Okay. I thought you were about to put --

16 A. Oh, no. I'm sorry. I'm having trouble seeing this
17 and I'm trying to figure out where you're going here. So
18 I see the 860. I see the 70. But now we're in Columbia
19 south, so I'm not exactly -- so what we're going to do is
20 go through and we're going to add up all the 98s?

21 Q. The pieces of 98, yes, that are in split precincts.

22 A. Okay.

23 Q. So 860 was the first. And is 70 the second that you
24 see?

25 A. Yes.

1 Q. And then is the next 461 in mag ward 1?

2 A. Yes.

3 Q. And then an additional 339 voters in the piece of
4 split mag ward 3?

5 A. Yes. Yes did you -- yes.

6 Q. Yes. And then the next is 396 in mag ward 4?

7 A. Yes. Yes.

8 Q. Could we go ahead three pages from here.

9 THE COURT: Mr. Steinberg, could you go back for
10 a second?

11 MR. STEINBERG: Yes.

12 THE COURT: I just want to make -- sorry. Can
13 we go back to whatever page we were on?

14 MR. STEINBERG: 72. Yeah.

15 THE COURT: Sorry. Hold on. Okay. I'm fine.

16 MR. STEINBERG: Could we go to 75?

17 THE COURT: Mr. Steinberg, my law clerk just
18 confirmed for me what I was worried about and wanted to
19 ask you about. Did you miss 2,000 people on one of those
20 that's also 98? I thought you did, but then when we went
21 back, I wasn't sure.

22 MR. STEINBERG: Yes. Is I missed 2,119 people
23 in mag ward 2.

24 BY MR. STEINBERG:

25 Q. Do you see the 2,119 people in mag ward 2?

1 A. I did. I thought you had a reason, but --

2 Q. No, no, no. I'm sorry.

3 Could we now go to Number 75?

4 And are there 84 people -- we begin the first county
5 is Lafayette county that's in the district after Columbia
6 going in alphabetical order. Do you see the 84 in a piece
7 of 85 Red River?

8 A. I do.

9 Q. Next, we could go to 77 and then we'll be done with
10 this exhibit.

11 The at the top in Nevada, you see the 317 and Bodcaw
12 rural?

13 A. Technically, no, because I have some stuff on the
14 side of my screen, but I can see the 3.

15 Q. Is there a way to clear the items?

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

17 Q. I, frankly, can't see them either.

18 Thank you so much.

19 Have they disappeared now for you too?

20 A. Now I can see the numbers.

21 Q. Okay. All right. Is the next the 68 voters in
22 Rosston rural?

23 A. Yes.

24 Q. And next, the 287 in Willisville rural?

25 A. Yes.

1 Q. And then next the 620 in 010 county 01?

2 A. Yes.

3 Q. Then finally the 1429 in 014 county 05?

4 A. Yes.

5 Q. Now, I intended to bring you a calculator to add
6 these up, but I did not. So assume -- and this is not a
7 fact in evidence -- that those numbers added up to 7,050
8 and that that's 23 percent of the population of the
9 district. Would that have a material effect on the
10 accuracy of your effectiveness score?

11 A. I suppose that it would depend on the racial
12 composition of that population.

13 Q. This is a district in which you found racially
14 polarized -- well, sorry.

15 You found racially polarized voting in the former
16 District 35; Is that correct, the district in which Mr.
17 Fielding -- Representative Fielding runs?

18 A. I believe that's correct.

19 Q. And District 98 is what you call an evolved version
20 of that district.

21 A. I might have used the word "evolved."

22 Q. So you do think there is racially polarized voting in
23 this area of Arkansas?

24 A. Yes.

25 Q. And so given that and given the assumption the 23

1 percent of the population resides in a split part of the
2 precinct where we can do no better than to allocate
3 prorated shares of split precincts into their respective
4 census blocs, it could have a material effect on the
5 accuracy of the effectiveness score for this district?

6 A. So what I said was, it depends on the racial
7 composition of the population.

8 Q. Okay. By that you mean the parts of the precincts
9 that have been split?

10 A. The 7,000. That's correct.

11 Q. Okay. Okay. Thank you.

12 I would like to ask about how you arrived at Bland as
13 the basis for the effectiveness scores. Do I understand
14 correctly that the approach was look for a black statewide
15 candidate in a race that was polarized, and if there is
16 such a person, select that person to be the basis for the
17 effectiveness scores?

18 A. No.

19 Q. No.

20 A. So the way this operates is to select all of the
21 black candidates that were supported by black voters and
22 opposed by white voters and create an index. So, for
23 example, in Georgia where you have over the last six
24 years, seven such candidates -- seven or nine. I'm sorry.
25 I don't remember exactly -- you would use all of them.

1 Q. You would use an average of all of them or what would
2 you do?

3 A. Yes. That is -- I created an effectiveness score in
4 Georgia that had information about seven black candidates,
5 I think. Seven.

6 Q. And over there, did you -- did you throw any out or
7 give any greater weight or treat them all as equal in the
8 composite score?

9 A. I treated them as equal. These were all statewide --
10 I mean, if for example, they hadn't been preferred by
11 black voters, I would not have included them.

12 Q. And, I mean, if some of them had received much lower
13 white crossover vote than others, you would still include
14 them in the average?

15 A. I would because I'm trying to predict a hypothetical
16 candidate in the future.

17 Q. Now here, there was only one, so you could only
18 choose Bland as the one recent black statewide candidate
19 who fit the other criteria you mentioned?

20 A. That's correct.

21 Q. Okay. Now, after arriving at Bland, did you do any
22 kind of test to see whether his performance in House
23 districts was predictive of the minority preferred
24 candidate's performance in districts?

25 A. So these are districts that have had no elections in

1 them. So there's no way to check how a candidate would
2 do. The point --

3 Q. May I interrupt you?

4 THE COURT: No. You can let her finish the
5 answer.

6 THE WITNESS: I guess I misunderstood the
7 question obviously.

8 MR. STEINBERG: No, no, you didn't. You
9 didn't.

10 THE COURT: Sometimes attorneys just interrupt.
11 You can keep going with your answer.

12 THE WITNESS: You'll have to -- I think the --

13 MR. SELLS: Your Honor, can we read back the
14 beginning of her answer before she was interrupted?

15 THE COURT: Would the court reporter do us a
16 favor of just reading back her answer if you can see it?

17 THE WITNESS: Could you ask also read back the
18 question?

19 THE COURT: Yes.

20 (The requested question and answer was read by the
21 Court reporter.)

22 THE WITNESS: What I could do -- again, you
23 can't -- I checked it against what I called a black
24 preferred index. So, for example, I used all of the black
25 preferred candidates. I ran -- there were nine elections.

1 So I created an index of nine black preferred, only two of
2 them who were actually black because there was a State
3 Senate candidate who ran as a Libertarian who was also
4 black preferred.

5 BY MR. STEINBERG:

6 Q. Do you mean the US Senate?

7 A. Yes. I'm sorry. I don't know what I said, but, yes,
8 that's what I meant.

9 So I created that index to see how that compared with
10 this single index as a check to see if it would be
11 different if I used all of the black preferred candidates
12 as opposed to a single one.

13 Q. What was the result of that check?

14 A. It certainly didn't change the number of effective
15 districts. Now, it does turn out that the district with
16 Fielding scored much lower on the black preferred index
17 overall. So in fact, the districts drawn by the proposed
18 plan do less well.

19 Q. In this --

20 A. In black preferred, yes.

21 Q. I think you said there was no way to test because
22 you're looking at districts in which nobody has ever run
23 proposed districts, no way to -- no way to compare House
24 candidate performance to the effectiveness scores because
25 you're evaluating proposed districts.

1 A. If I understood your question as it related to
2 proposed districts, yes.

3 Q. But you did, did you not, calculate effectiveness
4 scores for what you call the current districts, the
5 districts drawn in 2011 that have been operating for a
6 decade?

7 A. There are effectiveness scores for all of the
8 districts in all of the plans.

9 Q. Did you make a comparison between effectiveness
10 scores for the current districts and results in those
11 current districts?

12 A. The effectiveness scores for the current districts
13 are both in the appendix and in for a set number of
14 districts in my report.

15 Q. I know they're there, and I'm asking did you compare
16 the effectiveness scores for the current districts to
17 House election results in the current districts to see if
18 those effectiveness scores were reliably predictive of
19 minority preferred candidates' vote shares?

20 A. So you can look and you can see how each of these
21 candidates did, but they're different candidates. They're
22 incumbents in those districts. So I'm not really sure why
23 I would do that.

24 What I can tell you is that the effectiveness score
25 is accurate in predicting whether a black preferred

1 candidate won because the districts that scored above .5
2 in the current plans for the most part elected black
3 preferred candidates, or at least black candidates. I
4 didn't -- I don't know how many of those contests were
5 actually analyzed by me.

6 Q. Did you compare the share of the white vote you
7 estimated Bland received to the share of the white vote
8 you estimated minority preferred State House candidates
9 received?

10 A. So I only analyzed a small set of the State House
11 districts, only the ones that overlapped.

12 Q. Could we pull up 8B? And looking at the Bland R x C
13 white voter column, do you give an estimated 17.5 percent
14 of the white vote to Bland?

15 A. I estimate that's 17.5 percent of the white voters
16 voted for Bland.

17 Q. Okay. Can we pull up 8C?

18 And at the very top, you estimate 23.8 percent in R x
19 C of white voters voted for David Fielding?

20 A. That's correct.

21 Q. Black Democrat.

22 And if we could go ahead a page at -- two pages or
23 the next page. Sorry.

24 In R x C, do you estimate 42.7 percent of white
25 voters voted for Monte Hodges?

1 A. Yes.

2 Q. So my question is, if minority preferred candidates
3 received 24 percent of the vote, 43 percent of the white
4 vote -- I meant to say white vote in 24 percent -- would
5 Bland's effectiveness score tend to underestimate the vote
6 that they would get in the future?

7 A. If you're talk talking very specifically about the
8 incumbent here, Hodges, in that district with his voters,
9 then we know what percentage he got. The point of the
10 effectiveness score is to predict what will happen to
11 somebody who is not necessarily Hodges. So I'm not really
12 sure why we're talking about how Hodges is going to do.

13 I mean, Hodges might win, but I want to know that
14 somebody besides Hodges -- well, Hodges isn't going to
15 run, so we don't know how Hodges is going to do because
16 he's not going to run. We have to figure out how somebody
17 who is not Hodges is going to do.

18 Q. I have a question about your rebuttal report and what
19 you say about not using state legislative elections for
20 this purpose. Do you recall talking about that in your
21 rebuttal report?

22 A. So statewide elections are used for this kind of
23 analysis, yes.

24 Q. Right. And you say state legislative elections do
25 not use them because you would have to create a composite

1 candidate across multiple districts.

2 A. Composite elections. More than just candidates,
3 composite elections that will vary -- very district
4 specific factors. What I want to do is not combine two
5 elections that are very different. That's not what I want
6 to do. This is the convention, you understand. This is
7 how it's done. You use a statewide election where
8 everybody is facing the same candidate with the same
9 election factors involved in it.

10 Q. Why would it not be more predictive to take an
11 average of two State House races where a district has been
12 comprised now parts of two districts to predict future
13 State House outcomes than to look at the lieutenant
14 governor race?

15 A. What do you want to do here?

16 Q. You say it would not be a good idea to mix two
17 elections to create an effectiveness score. And my
18 question is, why would it not be more predictive to take
19 an average of two State House elections than one
20 lieutenant governor election if you're trying to predict
21 the outcome of State House elections in that particular
22 part of the state?

23 A. Because they might be occurring within very different
24 circumstances. So the voters are reacting to different
25 circumstances. While you take a statewide election,

1 they're all reacting to the same circumstance. Some
2 candidates might be real really popular. I mean, what
3 we're trying to do is level the playing field here.

4 Q. Did you consider use using State Senate races for
5 this purpose?

6 A. I did not.

7 Q. Are those districts not sometimes bigger so that
8 perhaps you could take one State Senate race and project
9 those votes on to a House district?

10 A. The chance of being able to do that uniformly
11 throughout this would be -- it just wouldn't -- it just
12 wouldn't work. I mean, I never seen it done. Certainly,
13 statewide election assure that you can bring in every
14 component of the proposed districts.

15 Q. I have a large piece of this, so if you want to stop
16 at 1:00, this would be a time to do that.

17 THE COURT: I appreciate that. Let me ask -- I
18 guess this is directed to counsel, although maybe counsel
19 will then direct it to the witness. What kind of time
20 frame are we working with today in terms of when the
21 witness needs to leave?

22 MR. SELLS: Her flight is at 6:30, Your Honor.

23 THE COURT: So I think that means we could
24 probably take a break now for about 45 minutes for lunch.
25 Does that work with you all?

1 MR. SELLS: That's plenty for us, Your Honor.

2 THE COURT: Does that work for you all?

3 Obvious, the same rules apply. You're still on the
4 witness stand. So please don't speak with your attorneys.
5 Yes?

6 THE WITNESS: What about my lunch?

7 THE COURT: You can -- no. You can certainly
8 eat your lunch. Let me put it this way. You can
9 certainly pass the time of day with your attorneys.
10 You're going to be off now for 45 minutes, so you can eat
11 lunch. Just don't talk to your attorneys about anything
12 having to do with the case. Okay?

13 Before we leave, I do just want -- I'm thinking of it
14 now, so I want to ask to make sure I understand this
15 correctly. I think I heard you -- and we're still on the
16 record.

17 I think I heard you say in your testimony, but,
18 again, if I'm wrong, please tell me. I think I heard you
19 say that after you did the effectiveness score based on
20 the 2018 lieutenant governor race, you checked it against
21 other statewide races where there were black preferred
22 candidates but not black candidates.

23 First of all, did I hear that correctly?

24 THE WITNESS: Yes and no. I checked it against
25 an index that combined all of those candidates. So it

1 wasn't a candidate-to-candidate comparison. It was the
2 effectiveness score I used based on one candidates to an
3 effectiveness score that averaged all nine candidates.

4 THE COURT: Okay. This is fine if it's true. I
5 just want to make sure it is true so I know I'm not
6 missing anything. That check is not -- and the data from
7 that check is not in your report or in front of the Court.
8 Is that correct?

9 THE WITNESS: It is not in my report. I'm not
10 sure --

11 THE COURT: It doesn't have to be. I'm
12 literally just asking a factual question to make sure I
13 know what information I have and don't have.

14 Am I right that it is not in front of the Court?

15 THE WITNESS: I'm sorry. I have to look at --
16 I'm not sure.

17 MR. SELLS: She doesn't know which exhibits have
18 been offered or --

19 THE COURT: Let me put it this way. Is it in
20 your report?

21 THE WITNESS: It's not in my report.

22 THE COURT: It's not in any of the exhibits
23 underlying your report that you know of. Is that correct?

24 THE WITNESS: That I know of.

25 THE COURT: I'll ask you all that question

1 later, but that's what I -- that's what I wanted to know
2 then. I appreciate it.

3 Okay. We are on break.

4 (A lunch recess was taken at 1:06 p.m. until 1:53 p.m.)

5
6
7 THE COURT: Before we start up again, although
8 this is on the record, I just want to let everybody know,
9 obviously, we have been monitoring the weather. There is
10 still a chance to a fair chance to maybe a significant
11 chance that the courthouse closes tomorrow. As I
12 understand it from conversation I've had, that decision
13 likely won't be made until very, very early in the morning
14 tomorrow, something like 4:00. Don't worry. I will not
15 be awake. Once that decision is made, we will get a email
16 or phone call about it and we will share that with you.

17 I will tell you all that, while my preference is to
18 get this done as quick as we possibly can because I know
19 both the plaintiffs and defendants want and deserve an
20 answer quickly, I understand, A, it's important; and, B, I
21 understand whatever way the decision comes out, one side
22 may want to run to the Eighth Circuit if they think I'm
23 wrong, which is perfectly fine and totally understandable.

24 Having said that, I don't think this is important
25 enough to put people's lives in danger if the roads really

1 are bad enough to close the courts. So my inclination is
2 that, if the courts are closed, we are not going to be
3 here tomorrow.

4 However, I wanted to give the parties a chance to
5 tell me what they thought and what their preference is and
6 see if it is different from my own.

7 Why don't we start with the plaintiffs.

8 MR. SELLS: Your Honor, we don't want to put
9 lives in jeopardy either. And as someone from Georgia, I
10 understand the freak out in the South when there is a
11 possibility of snow or ice. We also understand that a
12 storm like is predicted can knock out power, but we would
13 be open to the possibility of having tomorrow's trial day
14 take place over something like Zoom if people have access
15 to power, if that's something you would consider.

16 THE COURT: I appreciate that point. I am not
17 going to do Zoom. I think this is -- this is too
18 important. And I will just tell you from being here in
19 person, I have learned a significant amount and it is --
20 part of this is this sort of human-to-human interaction
21 that I think is lacking on Zoom. I can't put my finger on
22 why, but I just learn far better in an environment like
23 this than I do on Zoom. So Zoom is not going to be an
24 option for something like this.

25 So given that, where are you all?

1 MR. SELLS: Again, we don't want people to be in
2 danger, and that includes the courthouse staff who would
3 have to be here in order for us to hold trial, obviously.
4 I don't know the staffing levels and so on, but I think
5 it's up to your discretion with that in mind.

6 THE COURT: I appreciate that. Defendants?

7 MR. MOSLEY: Well, Judge, Jennifer and I should
8 probably both address this. Here's the one thing. We're
9 -- we've got a prediction. It is cold raining right now.
10 And let's say that His Honor or the Court gets an email at
11 8:00 in the morning. There are challenges with witnesses,
12 with you know -- at least witnesses. It's really the
13 thing that sticks out to me the most. Not me. I can
14 drive wherever you want me to drive, Judge.

15 THE COURT: We will get something to you I'm
16 guessing about 5 a.m. The decision is usually made by the
17 committee around 4 a.m. So I think at the latest we would
18 probably get to you something by 5. So it would be a
19 situation where, if the court was closed, you wouldn't
20 need to drive and y'all would know it.

21 MR. MOSLEY: Got it.

22 THE COURT: How's that?

23 MR. MOSLEY: That's great. The other thing is,
24 you know, there's some testimony that we're trying to --
25 everybody I think is trying to perpetuate today. And I

1 think because of the possibility of tomorrow shutting
2 down, so I guess, otherwise, I just shut up, sit down, and
3 we start moving on again.

4 THE COURT: Okay. Unless you tell me otherwise,
5 I'm going to take that as general agreement that, if the
6 courthouse is closed tomorrow, we're not going to go and
7 that you're comfortable with my plan.

8 MR. MOSLEY: That's -- you say it, we do it.

9 THE COURT: I appreciate that and understand,
10 but I also understand you have -- you all have your own
11 interests that you need to protect. So if you disagree
12 with me, it has happened once or twice that I've been
13 wrong. So if you degree with me, I want to know why and I
14 might change my mind.

15 MR. MOSLEY: Here was the point I was making,
16 Your Honor. If we do know at 5 a.m., arguably, that the
17 court is not closed, right, then I guess what we need do
18 is just plan to tell the witnesses. The problem only
19 being to me the witnesses to make sure that, even if we
20 know at 5 a.m. -- I don't expect one of the witness to get
21 up at 6, but maybe they do. I guess what I'm getting at,
22 the bottom line for His Honor is, would it not be prudent
23 given the facts that we have a forecast, given the fact
24 that we have inclement weather that appears to be
25 beginning now, to go ahead and make the decision one way

1 or the other. That's my only point.

2 THE COURT: I'll tell you, if this was a case
3 without a cramped timeline, I think that advice would be
4 100 percent right. I am concerned about doing it without
5 -- I'm concerned about making the decision now if we find
6 ourselves tomorrow in a situation that I really didn't
7 need to say, no court, because perhaps -- perhaps for you
8 all also, but probably less for you, I know plaintiffs
9 have an interest in getting this done because, if I get --
10 if I grant them a PI or let's say I make a liability
11 finding on their behalf, they're not going to want to be
12 in a situation where, I agree with you all that the time
13 has run out and I -- even though there is a liability
14 problem, the remedy would just take us too far down the
15 road.

16 Point being, I understand the plaintiffs have an
17 interest in getting this done quickly. I think it's a
18 reasonable interest. And so if we weren't in that
19 situation or the timeline wasn't so cramped, I think I'd
20 agree with you.

21 Having said that, if plaintiffs want me to make a
22 decision now and they agree with your theory, I would be
23 okay with that. I don't know what plaintiffs want.

24 MR. SULLIVAN: We don't agree completely with
25 that theory because, as we know, we look at the map,

1 Little Rock in often the middle of the edge of the worse
2 and the better line. It sometimes falls north of here,
3 sometimes falls south. We don't know what's going to
4 happen. It could go either way. We could be here
5 tomorrow.

6 THE COURT: I appreciate it. I appreciate your
7 point. I think normally you'd be correct. I think, given
8 the squeeze timeline, I'm not going to do it that way. So
9 we will make a call very early in the morning tomorrow
10 and, one way or the other, Heather will inform you all
11 let's say by 5:00.

12 Anything else before we go on, plaintiffs?

13 MR. SELLS: No, Your Honor.

14 THE COURT: Defendants?

15 MR. MOSLEY: No, Your Honor.

16 THE COURT: Mr. Steinberg, the floor remains
17 yours.

18 BY MR. STEINBERG:

19 Q. Do you recognize this article, Dr. Handley?

20 A. I do.

21 Q. It's called, *Minority Success in Nonmajority Minority*
22 *Districts: Finding the Sweet Spot*.

23 A. Yes.

24 Q. You wrote it. You're an author on this article?

25 A. Yes.

1 Q. Was published when?

2 A. Says up here 2019.

3 Q. 2019.

4 If you could look at paragraph on the top. Do you
5 see that you write with your coauthors, "Prior to the 2010
6 round of redistricting, minority candidates had a better
7 than equal chance of being elected only in majority
8 minority districts. More recently" -- strike but. "More
9 recently, districts falling in the 40 to 50 percent black
10 or Hispanic range have offered minority candidates better
11 than equal opportunity to be elected to legislative
12 office."

13 My question is just, do you see that on the top part?

14 A. It don't. It sounds like what we wrote, but where --

15 Q. It's --

16 A. Okay. Sorry. You don't have to reread it, but I
17 didn't see it, but now I see it.

18 Q. Okay. Now, in this article, you proposed a model for
19 predicting a black candidate's likelihood of success based
20 on the share of black voters in a district and the share
21 of Democrats in the district. Is that right?

22 A. I don't remember, but it certainly sounds plausible,
23 yes. You can show it to me.

24 Q. So you say at the bottom --

25 A. Can you --

1 Q. Yes. Page 7.

2 A. Thank you.

3 Q. Page 7. We can model the success likelihood in the
4 general election at some function of the ratio Democrats
5 -- black Democrats plus white Democrats over black
6 Democrats plus white Democrats plus Republicans.

7 A. That's what it says, yes.

8 Q. And says at the bottom, "If we" -- and then at the
9 top of Page 8 -- "assume that victory for the Democratic
10 candidate in the general election is simply a function of
11 share of Democrats in the electorate." Yes?

12 A. Yes.

13 Q. And in the middle or rather at the bottom, you said
14 that you could posit a more complex model so that you
15 wouldn't assume that white Democrats gave 100 percent
16 support to the black Democratic -- black Democratic
17 candidate in the general election, but we will not present
18 the results of such simulations here.

19 Is there -- is there a reason that you model on the
20 assumption that 100 percent of white Democrats gave
21 support to the black Democratic candidate in the general
22 election in this model and didn't present other
23 assumptions?

24 A. I can't remember. I suppose that's easier than
25 picking some arbitrary figure because, of course, it would

1 be vary depending on where you are.

2 Q. Now, do you recognize this table from your article,
3 Table 3?

4 A. More or less, yes.

5 Q. So what is -- what is this table about or showing?

6 A. So I think we're looking at the percentage of black
7 elected officials from each of these districts of that
8 particular composition across the top.

9 Q. You say in the italicized type at the top, that this
10 is percent black and total population?

11 A. Yes.

12 Q. So not voting age population?

13 A. Correct.

14 Q. Is black total population normally slightly higher
15 than black voting age population?

16 A. Yes.

17 Q. So do you find then that in the range of districts
18 with 45 to 50 percent black total population, State House
19 districts, am I understanding this right that 70.6 percent
20 such districts elected black representatives?

21 A. Yes.

22 Q. And then likewise for State Senate, that 83.3 percent
23 of State Senate districts in the 45 to 50 percent black
24 total population range elected a black state senator?

25 A. Yes.

1 Q. And 100 percent of Congressional districts in this 45
2 to 50 percent range?

3 A. Yes.

4 Q. Okay. And in the 40 to 45 percent range, do I
5 interpret this correctly to mean that 53.1 percent of
6 State House districts elect a black representative?

7 A. Yes.

8 Q. Okay. I guess -- I guess one other thing. How do
9 you say does the 45 to 50 percent range compare to the 55
10 to 60 percent range?

11 A. I don't know what you mean, how does it compare?

12 Q. An electoral opportunity or electoral likelihood for
13 black candidates districts that are 55 to 60 percent black
14 total population versus the 45 to 50 percent?

15 A. Are you asking me what the percentages are? It's
16 70.6 in the 45 to 50, and it's 76.1 in the 55 to 60. Is
17 that what you asked?

18 Q. I was asking more for an overall assessment of, do
19 these seems about the same or does 55 to 60 percent
20 provide more electoral opportunity for black
21 representatives?

22 A. Yes. The 55 to 60 has a higher percentage of
23 districts that are electing compared to the 45 to 50.

24 Q. But lower in the State Senate. Is that right?

25 A. Yes.

1 Q. And what sample are these districts taken from? Do
2 you recall which districts you're looking at? Is this
3 nationwide? Is this --

4 A. We certainly collected it nationwide. Sometimes we
5 divide it into South and non-South. I can't remember how
6 that table was constructed. Or sometimes it's all states
7 with more than ten percent black. I don't remember.

8 THE COURT: Mr. Steinberg, can you go back to
9 the last chart for a second?

10 MR. STEINBERG: Yes, Your Honor.

11 THE COURT: I have a question for the doctor,
12 but I'm not sure it makes a difference. I just want to
13 understand this as a general matter.

14 It seems like, if you're looking at percent black in
15 total population and then you're looking at that first
16 row, the State House, 45 to 50 percent if you have -- if
17 you have that in the black total population, then the
18 percent black elected is 70.6. But then if you jump up to
19 50 to 55 percent in total black population, you go to 85.7
20 but then --

21 MR. STEINBERG: Sorry, Your Honor. I was trying
22 to make it less blurry.

23 THE COURT: And then if you jump up to 55 to 60
24 percent, you get a lower number, 76.1.

25 Can you explain that -- is there any explanation

1 other than, look, this is not perfect and it's sort of
2 random based on political geography across the country?
3 Or is there some other explanation?

4 THE WITNESS: There is not another explanation
5 that I can think of at this time. I think it's just an
6 anomaly with this particular group. And it's -- I mean,
7 it's a pretty linear relationship slowly progressing, with
8 the exception of that particular data point, right?

9 THE COURT: I guess the reason I'm asking is, it
10 looks like -- and, again, I don't know that this has any
11 relevance, although maybe Mr. Steinberg will change my
12 mind. I don't know this has any relevance to this case,
13 but I'm trying to figure out, if you look below it, right,
14 that's 77.1, again, that's lower than the 81.3. It just
15 strikes me as very odd.

16 THE WITNESS: It is very odd.

17 THE COURT: Okay. No explanation that you
18 can --

19 THE WITNESS: I'm sorry.

20 THE COURT: That's okay.

21 BY MR. STEINBERG:

22 Q. And I was asking what the sample was here. And you
23 said it might be states greater than ten percent black. I
24 think that's right.

25 Do you see the note under the table?

1 A. Yes. Yes.

2 Q. So it says, "States greater than ten percent black
3 for the state legislature, but the whole country for the
4 US House."

5 A. Yes.

6 Q. Would that include Arkansas in both of those?

7 A. Yes. I mean, you don't have any black
8 representatives in the US House, so you would have been a
9 zero there.

10 Q. I'm sorry. My question is just, was Arkansas looked
11 at in both of these samples?

12 A. Yes.

13 Q. Because the state's population?

14 A. Yes.

15 MR. STEINBERG: Okay. Thanks. I would like to
16 move the admission of that exhibit, Exhibit Number 6.

17 THE COURT: Any objection plaintiffs?

18 MR. SELLS: No.

19 THE COURT: It's admitted.

20 (Defendants' Exhibit 6 admitted into evidence.)

21 BY MR. STEINBERG:

22 Q. Now, you say in your report that in Arkansas black
23 opportunity districts are invariably majority black in the
24 voting age population. Is that correct?

25 A. I'm not sure I used the word "invariably." It's

1 quite possible. I don't think that a black representative
2 has been elected in a contested election in the State
3 House from a district that was not 50 percent.

4 Q. Would you pull up Exhibit 8, Page 6?

5 First sentence, sorry. It's been zoomed in. The
6 first sentence below the table, do you see it says,
7 "invariably"?

8 A. Yes. As I just said, I don't think that you have
9 elected any, so "invariably" would work, yes.

10 Q. Now, I would like to talk about one of your bases for
11 this conclusion, the effectiveness score.

12 Could we go to Page 4 of Exhibit 8?

13 You say there are 12 black opportunity districts
14 under the state's current plan. Is that correct?

15 A. Yes.

16 Q. And then in footnote 2, you note there are four
17 districts besides the majority black districts that have
18 effectiveness scores above .5, but none of them have a
19 significant black population. Is that right?

20 A. Yes.

21 Q. So a quarter of the 16 with effectiveness scores
22 above 500 don't have significant black populations?

23 A. Yes.

24 Q. Four out of 16.

25 If we could go to 8A.

1 Could you look at 33? Is that a black VAP 25.49 and
2 effectiveness score of .679?

3 A. Yes.

4 Q. And that score means that 67.9 percent of the voters
5 in this district voted for Anthony Bland in the 2018
6 election?

7 A. That's correct.

8 Q. Could we go to the next page and look at Number 78?
9 Here we have a 14.3 percent VAP and a 54.9 or .549
10 effectiveness score?

11 A. Yes.

12 Q. And could we look at 85? So is this district 5.76
13 percent black voting age and an estimated 56.3 percent of
14 the voters in the district voted for Anthony Bland?

15 A. Yes.

16 Q. And finally 86, which is in our inset, 7.7 percent
17 black VAP and 68.9 percent of the voters in the district
18 voted for Bland?

19 A. Yes.

20 Q. So if there are districts in Arkansas with
21 single-digit percentages of black population that went by
22 substantial margins for Anthony Bland, the black
23 Democratic candidate in the lieutenant governor race,
24 would you agree that it's possible in Arkansas to draw a
25 district with black VAP in the 40s and create opportunity?

1 A. I haven't seen them. They aren't in the proposed
2 plan, but it's possible. There are areas I did not look
3 at, so possibly.

4 Q. So it's not -- it's not as if there is an iron law of
5 Arkansas politics that white voters vote in such low
6 numbers for Democrats or black candidates that means you
7 can't have such a district; it's just that, as a matter of
8 the particular districts you studied and their estimated
9 effectiveness score, you find there aren't such districts
10 in the 40s?

11 A. Let me add that there haven't been in the past
12 either. In other words, you -- to my knowledge, you have
13 not elected a black candidate from a district that is not
14 50 percent, but that doesn't mean there isn't some area
15 that it might be possible. I just haven't seen it.

16 Q. You say, to your knowledge that hasn't occurred.
17 Could we turn the ELM0 back on?

18 So these are from the parties joint stipulations. Do
19 you see Paragraph 7?

20 A. Yes.

21 Q. It says, does it not, that 78 has elected two black
22 representatives under its current configuration and nobody
23 else without opposition?

24 A. So that wouldn't be an election, right? It would --
25 wouldn't it have to be contested to be an election? I

1 mean, he seems to have represented the district, but if I
2 read this correctly, he was not facing a competitive
3 election. Is that correct?

4 Q. That is correct. There were not opponents.

5 Now, I think you said there are in the current plan
6 or the former plan, whatever we want to call it, the 2010
7 plan, that there were 16 districts with effectiveness
8 scores above 500?

9 A. 16 districts with effectiveness scores above 500 and
10 a significant minority population.

11 Q. I think that's a mistake. Your number is 12 with
12 above 500 and significant black population and then the
13 four that we just went through and the footnote that don't
14 have what you call significant black population. So a
15 total of 16 I believe.

16 A. Okay. I'm sorry. Maybe I didn't understand the
17 question. The question was there were 16 with
18 effectiveness scores above .5?

19 Q. Yes.

20 A. The answer is, yes, I believe so.

21 Q. If I could show you our stipulations again. Do you
22 see Number 5?

23 A. Yes.

24 Q. Okay. And it says that Democrats won 24 districts in
25 the 2018 House of Representatives elections.

1 A. Yes.

2 Q. So Bland ran in 2018. Is that right?

3 A. Yes.

4 Q. So does that mean that he did not carry at least a
5 third of the 24 districts that Democrats won that year?

6 A. Were those contested elections? I didn't even -- I'm
7 sorry. I didn't see it quick enough to notice.

8 Q. Well, the stipulation is one, but some of them may be
9 uncontested. And I understand that you use one to only
10 mean a contested election, right?

11 A. I would only use the word -- well, I'm not -- no, I
12 guess not. I'm not sure. I don't know what that means.
13 You'd have to tell me what that means.

14 Q. I guess the meaning of the word is a matter of
15 interpretation.

16 Could we pull up 8A?

17 Now, I would like if I may to hand you this directory
18 of the members of the General Assembly. I'll put on a
19 mask to come over to you.

20 THE COURT: Do the plaintiffs have a copy or
21 need a copy?

22 MR. SELLS: We do, Your Honor. Mr. Steinberg
23 provided us a copy this morning.

24 THE WITNESS: I have something called the 92nd
25 Arkansas General Assembly directory.

1 BY MR. STEINBERG:

2 Q. Now, if you could look at your A -- Appendix A, could
3 you find the first district with an effectiveness score in
4 the 450 to 500 range? I could give you a hint if that's
5 appropriate, but --

6 A. Why don't you just tell me?

7 Q. Yeah. I believe it's 11.

8 A. Okay.

9 Q. Okay. And then in the directory --

10 THE COURT: Wait. Hold on a second. When you
11 say "the 450 to 500 range," you mean it has to be under
12 500. Is that correct?

13 MR. STEINBERG: That's correct. So 450 to 499.

14 THE COURT: Then 11 is right.

15 BY MR. STEINBERG:

16 Q. In your directory, there is a list of members by
17 district starting at 11. Could you find who the
18 representative of 11 was?

19 A. This is by alphabetic order. It doesn't -- is there
20 a place that gives it by district?

21 Q. I'm sorry. I thought that it was in order of
22 district. Yeah, I think it's in order of district. And
23 you see counties listed next to those numbers, but it is
24 in order of district.

25 Are you on Page 11 of the directory?

1 A. No. I was looking at the names. Page 11?

2 Q. Yes.

3 A. Okay. I got it.

4 Q. Who is the representative of that district?

5 A. Don Glover.

6 Q. Don Glover.

7 Okay. Now, in the back starting at Page 66 you'll
8 find the member's party information in alphabetical order.
9 And could you say whether Glover was a Democrat or
10 Republican?

11 A. I think I remember Glover. I think he -- is it --
12 yes, he's a Democrat. He's the one who won, but didn't he
13 win in '18 and lose in '20?

14 Q. Is that correct. That is correct.

15 A. This is a -- oh, it's '19.

16 Q. We're looking at the 2018 to line up 2018 House races
17 with Bland's election in 2018.

18 Okay. So Glover, a Democrat in 11.

19 A. Yes.

20 Q. Okay. Now, back to Appendix A. You could -- you
21 could skip to it. I believe the next one with an
22 effectiveness score in the range I'm interested in is
23 Number 35, but if you want to look at the ones in between
24 to verify that I didn't miss one, you can.

25 Do you see 35?

1 A. I do.

2 Q. Sorry. On the screen rather.

3 A. I do, yes.

4 Q. So that's an effectiveness score of 492?

5 A. Yes.

6 Q. Okay. And could you look up who the representative
7 was in his party?

8 A. Representative on Page 12 is Andrew Collins. And I'm
9 not using this correctly. Here's the House. Sorry. This
10 is not -- Democrat.

11 Q. All right. Back on Appendix A, I think the next one
12 I'm interested in is 42. Could we see effectiveness score
13 there? Is that .459?

14 A. Yes.

15 Q. And could you check the representative of 42?

16 MS. MERRITT: Excuse me, Judge. Could we
17 approach?

18 THE COURT: You may.

19 (Side bar conference.)

20 MS. MERRITT: I'm so sorry. I believe I saw one
21 of the witnesses who may testify in the courtroom and want
22 to bring it to your attention.

23 MR. SULLIVAN: Which person is it?

24 MS. MERRITT: I believe I saw Representative
25 Flowers. I might be wrong.

1 MR. SULLIVAN: She is not in the courtroom. I
2 have her in the witness room.

3 MS. MERRITT: Thank you. Sorry for the
4 interruption.

5 THE COURT: Okay. Let me just tell you guys,
6 just because it's the second time it's happened. I know
7 it's not on purpose. When y'all come up here -- just
8 bring this back to your respective table. When y'all come
9 up here, just take a beat. The court reporter has got to
10 get set up and then I got to sort of call on each one of
11 you to figure out what's going on. Okay?

12 MS. MERRITT: Yes, Judge. Thank you.

13 (End side bar conference.)

14 BY MR. STEINBERG:

15 Q. I think we were at District Number 42.

16 A. Mark Perry, Democrat.

17 Q. The next one is Number 72, though, again, if you want
18 to verify that I haven't missed a score in this
19 effectiveness score range, you may, but I fairly carefully
20 checked.

21 A. I'm going to trust you.

22 Q. Would you move to Number 72 on this? Thank you.

23 THE COURT: Mr. Steinberg, since I don't have
24 this in front of me, I just want to make sure I'm
25 following correctly. Is this -- what year directory is

1 this?

2 MR. STEINBERG: This is the 2019-2020 directory.

3 THE COURT: So this would have come off of the
4 2018 election. Is that correct?

5 MR. STEINBERG: Yes. And the pages that we're
6 looking at are actually under our Exhibit 7.

7 THE COURT: Okay. I appreciate it.

8 BY MR. STEINBERG:

9 Q. So 72 is an effectiveness score of 42.9. Is that
10 correct?

11 A. I believe you. There it is. Yes, it is.

12 Q. And the representative is who?

13 A. Stephen --

14 Q. N-a-g-i-e?

15 A. Yes.

16 Q. I don't know how to pronounce it either. Let's say
17 Nagie. What party is he?

18 A. Democrat.

19 Q. Okay. Could we zoom in the 80s. So it looks like
20 the scores is in the range I asked about are Districts 84
21 and 89. Is that correct?

22 A. Yes.

23 Q. Point 495 for 84 and .467 for 89?

24 A. Yes.

25 Q. And if you could look who the District 84 elect is

1 and what was their party?

2 A. 84 was Denise Garner, Democrat. 89 is -- 89 is Megan
3 Godfrey, Democrat.

4 Q. So am I right then that every effectiveness score --
5 you can check and see if there are any left in the balance
6 of this exhibit, but every effectiveness score in the .450
7 to .499 range, every district such a score was won by a
8 Democrat in 2018 who are represented by a Democrat after
9 the 2018 election?

10 A. Not by a black Democrat. Bland is a black Democrat.
11 So this is looking to see how black Democrats would do.
12 Yes?

13 Q. These people you believe are white?

14 A. I think that Glover might be black, but I don't think
15 the others are. Maybe one or two. I don't think so.

16 Q. Could we go to Page 1 of this. What effectiveness
17 score did you give District Number 5?

18 A. .508.

19 Q. And if we could look at 8C. What percentage of the
20 vote did Representative Fielding get?

21 A. 56.8 percent in 2020.

22 Q. And if we could page ahead to 2018. What did he get
23 in 2018?

24 A. 56.9 percent.

25 Q. And could we go back to 8A? Next page. What's the

1 effectiveness score for 55?

2 A. .502.

3 Q. What's the effectiveness score for 78?

4 A. .549.

5 Q. And if we could go to 8C page, I believe, Page 4.

6 What percentage of the vote did Monte Hodges get in

7 District 55?

8 A. 61.7.

9 Q. His effectiveness score -- or rather the
10 effectiveness score of that district was 50.2?

11 A. Possibly. I don't remember.

12 Q. It was -- a moment ago, I think we said .502.

13 And as to 78 -- if we could put the ELM0 back on.

14 As to 78, this district has been represented, if you
15 prefer, by a black member unopposed since its drawing
16 after the 2010 census. Is that right?

17 A. I see here 2018, 2020. I can't speak before that.

18 Q. Oh, no. Sorry. You're missing McGill.

19 A. Who did you ask me about?

20 Q. I was asking about whether the district has since
21 2012 elected a black representative?

22 A. Sorry. Yes.

23 Q. Unopposed?

24 A. Yes. Sorry.

25 Q. Now, could we put 8A back up?

1 So, again, the effectiveness score for the current
2 District 5 is .508.

3 A. Yes.

4 Q. And if we could go to the proposed table in 8A. It's
5 going to be two to three pages ahead, I think. Another
6 page or two ahead. Good. Yes. Back one page. Thank
7 you.

8 So is 98 the evolved or the subsequent version of the
9 former current District 5?

10 A. I will believe you if you tell me that. I don't --
11 I'm not getting the numbers.

12 Q. That is what your report says. And what's the
13 effectiveness score here?

14 A. Point 448.

15 Q. Is that a six percent difference from the last one,
16 .508?

17 A. Yes.

18 Q. So what does that mean? Does that mean that the
19 district has become in your estimate six percent less
20 supportive of minority preferred candidates, particularly
21 black candidates?

22 A. I would say that this means that I now predict that a
23 black preferred black candidate in the new configuration
24 will get about 45 percent of the vote.

25 Q. But you don't -- you don't agree that this means that

1 the district has become six percent less supportive of
2 minority preferred candidates?

3 A. I guess I am being more exact. I don't know what you
4 mean by "less supportive," so I'm being very precise in
5 what I mean.

6 Q. So your former estimate is that it would give 50.8
7 percent of its support to a minority preferred candidate
8 and your current estimate is 44.8 percent -- six percent.

9 A. I don't think you phrased that right, but the old
10 district got a score of .508. So I'm predicting a 50.8
11 percent. Here I'm predicting for the proposed plan 44.8
12 percent.

13 Q. Could we go to 8C?

14 Now if we were to assume that the entire six percent
15 decline in support for Bland translated to Representative
16 Fielding's share of the vote in his new district, making
17 that assumption, what percentage of the vote would he get?

18 A. Can you tell me what -- ask the question again. I
19 can't -- if Fielding -- I mean, he got 56.8 percent of the
20 vote. What do you want me to tell you?

21 Q. Essentially, I would like you to subtract six, but
22 the rationale for that is that I'm asking you to assume
23 that the entire six percent decline in the vote for
24 Anthony Bland would translate to David Fielding's share of
25 the vote in his reconfigured district, the district that

1 we observed the six percent difference in effectiveness
2 scores for.

3 A. Well, I wouldn't make that assumption. But it is
4 true that, if you took six from 56.8, you would get
5 whatever you just said, 50.8.

6 Q. You said you wouldn't make that assumption.

7 A. You want to assume that Fielding get the same votes
8 in the new district. Is that what you're asking me to
9 assume?

10 Q. No. I'm asking you to assume he'll get six percent
11 less of the vote because Bland, as the district is
12 redrawn, would now get six percent less of the vote.

13 A. I'm predicting that the person who runs, whether he
14 is an incumbent or not incumbent, will probably get
15 whatever it was, 50.8 percent of the vote, which means
16 that I'm predicting that, if it's Fielding, he would win
17 that election.

18 Q. I think I may have mixed you up with the numbers.
19 The effectiveness score of Fielding's new district is
20 .448. So are you predicting that he would get 56.8 minus
21 six, the difference in the effectiveness scores, or are
22 you predicting he would get his new district's
23 effectiveness score?

24 A. It would help if I had the numbers and a board or a
25 piece of paper because I'm not following this.

1 Q. Let me think about how -- oh, okay. I'll write them
2 down.

3 All right. Is that legible?

4 A. Yes, I can read the numbers. I don't know what
5 they're referring to.

6 Q. I'll try to explain what they're referring to.

7 So this is the effectiveness score of Fielding's
8 District Number 5, current district. This is the
9 effectiveness score of the district as redrawn, proposed
10 District 98. This is the percentage of the vote that
11 Fielding got in the most recent election.

12 So you are predicting that Fielding or anybody -- any
13 other minority preferred candidate would get what
14 percentage of the vote in a future election and in the new
15 district?

16 A. 44.8.

17 Q. 44.8. Okay. So that's your prediction.

18 So you're predicting that his support would drop 12
19 percent -- down 12 percent from 56.8?

20 A. I'm predicting that a hypothetical candidate's would
21 get 44.8 percent.

22 Q. What if Fielding is the candidate?

23 A. Fielding might get more votes because Fielding has an
24 incumbent's advantage with some of his. I don't think
25 it's going to be a 56.8 percent, but he might do better

1 than a hypothetical candidate that is what I'm estimating.
2 I'm not estimating for a particular incumbent who might
3 run again. I'm estimating for a hypothetical candidate.

4 Q. Can I ask then why do you think this number is so
5 predictive of what even the hypothetical candidate's share
6 would be when we saw that every district with an
7 effectiveness score of 450 to 499 was carried by a
8 Democrat in 2018? What makes you believe these numbers
9 are terribly predictive?

10 A. Well, I'm not -- a white Democrat and a black
11 Democrat isn't necessarily the same thing, is it? The
12 reason --

13 Q. Did we not also -- sorry. Please.

14 A. The reason they might not be doing as well as white
15 Democrat is because it's black Democrat. I don't know,
16 but that might be the reason that these House
17 Representatives got elected but Bland didn't carry those
18 districts.

19 Q. Did we not also see that several black Democrats,
20 including the one we're talking about right now,
21 outperformed Bland's effectiveness scores in the election
22 cycle on which those effectiveness scores were based?

23 A. Some black representatives received more votes than
24 Bland did in these majority black districts, yes.

25 Q. So, again, what gives you the confidence that these

1 numbers have such predictive power if we don't see a very
2 close relationship between black State House Democrats
3 vote share and Bland's vote share?

4 A. Because I'm estimating a hypothetical candidate and
5 not an incumbent and not a particular incumbent. So this
6 is not designed to see if the incumbent will win again.
7 This is designed to see if a black preferred candidate
8 might win.

9 Q. I would like to talk about Districts 49 and 74. You
10 testified about them on direct, but if it would help you,
11 we could put up your rebuttal report where you address
12 them specifically. Would you like that up?

13 A. Yes, I definitely would. The district is --

14 Q. I think it's your Exhibit 13, pages -- Page 8.

15 Now, you write that, though this district has an
16 effectiveness score of above 500 and though it currently
17 is represented by a black Democrat, it is not a black
18 opportunity district. Yes?

19 A. If you're reading something, it would be great if you
20 could just point. I'm sorry, but I can't find it straight
21 away. If you could point to where you're reading.

22 Q. It's the first full paragraph. I don't have a
23 pointer, but --

24 A. You used your finger before.

25 Q. When I was -- when I was -- when it was on the ELM0,

1 but this is not -- yes. I'm sorry.

2 A. Tell me again what you want me to -- where are you
3 reading?

4 Q. This paragraph that has been zoomed in upon, you
5 write that, though this district has an effectiveness
6 score above 500 and though it's representative is black,
7 it does not provide black voters with an opportunity to
8 elect their candidates of choice. Is that right?

9 A. I'm sorry. I'm not seeing this. What am I -- can
10 you just tell me like how many lines down you're reading?

11 Q. I think it's really in the first four lines that I'm
12 looking at.

13 Oh, I can point. Okay. But it's in these first four
14 lines. I don't have a more specific place than that.

15 THE COURT: Mr. Steinberg, if you are
16 paraphrasing, it might be good to let the witness know
17 that you're paraphrasing so she's not just looking for the
18 exact language.

19 BY MR. STEINBERG:

20 Q. I am paraphrasing. Is that the source of the
21 confusion, you thought I was --

22 A. Yes.

23 Q. I'm very sorry. Yeah. Okay.

24 A. Sorry about that. I didn't realize that you were
25 doing that and I couldn't find what you were saying.

1 Q. Have I correctly paraphrased you?

2 A. I don't know.

3 Q. Would you like I'll repeat the paraphrase?

4 A. Okay.

5 Q. So you say that this district, you don't think it
6 provides black voters with an opportunity to elect their
7 candidates of choice, and you say that in spite of your
8 acknowledgement that it has an effectiveness score above
9 500 a black representative.

10 A. Correct.

11 Q. Sorry again for the confusion.

12 And your reason for that is that there are not enough
13 black voters to control the outcome of the election. Do I
14 correctly understand what you say below?

15 A. That's correct. I am not saying that Jay Richardson
16 is not preferred by black voters. We don't actually know
17 since there wasn't an election. But I am saying that the
18 whites were responsible for electing him and, if the
19 whites had decided to vote for somebody else, there's
20 nothing the black voters could have done about that
21 because there are not enough black voters to effect the
22 election.

23 Q. So two questions: First, is it mathematically
24 correct that a 15 percent group of voters can never affect
25 the outcome of the election if the other voters are

1 closely divided in their choice?

2 A. In an instance where you might have three candidates
3 and say white voters divide their votes between two of
4 them that black voter support, the other candidate even 15
5 percent, under those strange circumstances might impact
6 the election, yes.

7 Q. Let's just suppose two candidates and one is
8 supported by 55 percent of white voters, the other by 45
9 percent, could a cohesive vote among black voters for
10 their preferred candidate tip the balance and cause the
11 candidate preferred by only 45 percent of white voters to
12 win?

13 A. Not with that figure. You could say 49 and 51 and I
14 might agree with you. The difference is too large.

15 Q. Not even with 45?

16 A. I would have to see the numbers in front of me, but,
17 no, I wouldn't agree to that.

18 Q. I am tempted to pull my calculator out.

19 A. I have conceded that it could in a close case. I
20 just don't think it might be 45. It might be 48.

21 Q. Now, my other question about this is, if a district
22 is consistently electing a black preferred candidate, why
23 do you say that district does not provide black voters an
24 opportunity to elect their candidate of choice?

25 A. It isn't the case that that candidate is not the

1 choice of black voters. If they had voted and supported
2 that candidate, it would be. However, it is not the black
3 voters who are electing that candidate; it is the white
4 voters. And it is merely a happy coincidence that that
5 happens to also be the black voters' choice.

6 Q. So though their candidate of choice has been elected,
7 they lack the opportunity to elect him because they were
8 not decisive in the outcome?

9 A. If white voters are going to elect a candidate of
10 black -- black voters' choice, this is a good thing for
11 black voters, but it is not allowing black voters to elect
12 their candidate of choice.

13 Q. So could I ask you a pure hypothetical? We have a
14 city that's electing its school board at large, no
15 districts, classic problem under cases like Gingles if
16 voting is racially polarized, but voting is not racially
17 polarized and people elected to the school board are black
18 candidates of choice. Would you say that black voters
19 lack the opportunity to elect their candidates of choice
20 in this scenario?

21 A. I would say it was irrelevant because the voting
22 wasn't polarized. Everybody agreed on the same
23 candidates. That's what you said was inherent to this.
24 Yes?

25 Q. So you would say it's irrelevant, but would you say

1 that black voters have less opportunity to elect their
2 candidates of choice than whites because they are not
3 decisive in the outcome?

4 A. No. I'm saying it's irrelevant because voting isn't
5 polarized, black and white voters are supporting the same
6 candidates consistently.

7 Q. Is voting not -- isn't voting nonpolarized in the
8 districts we've identified like that district that have
9 effectiveness scores above 500 even though whites are the
10 majority?

11 A. There were no -- I mean, there was no election to
12 look at in Richardson's case, right?

13 Q. That's correct. No Republican attempted to run
14 against him.

15 A. So what was your question?

16 Q. I think you have a valid point. There was no voting,
17 so we can't say voting was not racially polarized.

18 MR. SELLS: Objection, Your Honor. Rule 403,
19 waste of time.

20 THE COURT: Overruled, but let's move it along.

21 BY MR. STEINBERG:

22 Q. I would like to talk a bit about your rebuttal to
23 Lockerbie -- Dr. Lockerbie. Do you agree with him that
24 there is only on average a 0.7 percent difference between
25 how black Democrats perform among white voters in State

1 House contested elections and how white voters perform --
2 how white Democrats perform among white voters in State
3 House contested elections? Do you find a larger gap?

4 A. I don't think I calculated the gap. I merely said
5 there was a gap despite the fact that he thought there
6 wasn't. I think. I mean, you would have to show me the
7 report, but I don't think I calculated. I just figured he
8 calculated it correctly.

9 Q. If the gaps of that size, 0.7 percent, would you say
10 that's statistically significant?

11 A. I'm not sure how I would calculate the statistical
12 significance of it. I don't know. I didn't calculate it.

13 Q. Okay. You said that a piece of evidence that voting
14 is a function of race not merely of partisanship is that
15 there were two elections in which black voters strongly
16 supported Libertarians?

17 A. That's correct.

18 Q. And were there Democrats running in those races?

19 A. No, there were not.

20 Q. So might the fact that black voters supported
21 Libertarians in those races not be explained by a partisan
22 antipathy to Republicans?

23 A. I'm not -- I don't know what caused that. Alls I can
24 tell you is they didn't vote for Democrats.

25 Q. There were no Democrats to vote for?

1 A. They didn't vote for Democrats. Okay. There were no
2 Democrats for them to vote for, so they did not vote for
3 Democrats.

4 Q. Okay. You also you say in your rebuttal report that
5 you found that white voters are substantially less
6 supportive of black Republicans than white Republicans.
7 Is that correct?

8 A. That's correct.

9 Q. How many contests involving black Republicans did you
10 analyze?

11 A. Off the top of my head, I don't know. There weren't
12 very many. Three. That's a guess.

13 Q. Could we pull up 8C?

14 So it appears there's one on Page 1, but because of
15 the missing precincts, you weren't able to analyze this
16 race, District 55 --

17 A. That's correct.

18 Q. -- in 2020.

19 Could we go to the next page?

20 Do you see any -- yes. There is one black Republican
21 here, District 11. So this is one of them?

22 A. That's correct.

23 Q. And this is three-way race?

24 A. That's correct.

25 Q. Do you recall whether McElroy had previously run as a

1 Democrat in this district?

2 A. I believe he did and then he ran as an independent
3 and then in the next election he's going to run as a
4 Republican and beat Dan Glover.

5 Q. Do you recall if he won in 2016 as the Democrat?

6 A. I don't remember. No. I'm not going to guess.

7 Q. Okay. Do you see any other black Republicans on this
8 page?

9 A. No.

10 Q. And could we go to the next. Tobar at the top,
11 District 55.

12 A. Yes.

13 Q. And any others?

14 A. No.

15 Q. And I think the last page will cover -- or the next
16 page will cover it. There's one election here. Any black
17 Republicans here?

18 A. No.

19 Q. So you analyzed a total of two black Republican --
20 contests involving a black Republican. Is that correct?

21 A. Was it two or three? Now I can't remember.

22 Q. Well, there was one with missing precincts and then
23 there were two that you analyzed.

24 A. Okay. Two.

25 Q. Okay. And one of them was a three-way race?

1 A. That's correct.

2 Q. And did you -- did you attempt to analyze whether
3 white turnout was lower in these elections, whether the
4 presence of black Republicans caused white voters to
5 simply lose interest in voting for anybody?

6 A. I don't think so.

7 Q. So you've looked at the vote shares, but you haven't
8 compared the turnouts?

9 A. I might have, but -- I probably did, but I don't
10 remember.

11 Q. And could we go back to Page 4?

12 So in this election, the two 55 -- District 55, the
13 two candidates were both black.

14 A. Yes.

15 Q. And so you find that a hundred percent of white
16 voters voted for one or the other black candidate?

17 A. If they voted, they had to vote for one of the two of
18 them.

19 Q. And you don't have any opinion on whether white
20 turnout in this district declined in this election
21 compared to other elections in the district?

22 A. Unfortunately, we don't have the precincts for
23 Mississippi county in the 2020 election, so I can't tell
24 you.

25 Q. Could you have looked at whether there was a drop off

1 in voting in this election versus other elections on the
2 ballot in that year? Would that be possible to analyze?

3 A. It would be possible, yes.

4 Q. But you didn't do it?

5 A. No.

6 Q. Okay. Now, in your rebuttal report in attacking
7 Lockerbie's partisanship-not-race theory, I think you say
8 that party affiliation is itself a function of race to a
9 large extent.

10 A. I didn't say the extent. You would have to measure
11 the extent, but it is certainly true that party and --
12 that race has both a direct effect on the vote and an
13 indirect effect on the vote through party because race and
14 party are related.

15 THE COURT: Mr. Steinberg, just so I know about
16 how much longer do you have?

17 MR. STEINBERG: I have very little.

18 THE COURT: Okay.

19 MR. STEINBERG: Could we pull up her report, 13
20 at I believe 5?

21 BY MR. STEINBERG:

22 Q. So do you see at the bottom of this paragraph you
23 cite a study by two Princeton economists and you quote --

24 A. Yes.

25 Q. And you quote it. And their finding is -- I'll quote

1 so we're not paraphrasing. "Defection among racially
2 conservative whites just after Democrats introduce
3 sweeping civil rights legislation explains virtually all
4 of the party's losses in the region."

5 A. That is correct.

6 Q. If we could switch to the ELM0 for a second.

7 Okay. Is this that study -- Page 1 of that study?

8 A. Yes.

9 Q. Looking at the middle of the abstract, do they say
10 that the period in which they're studying this decline is
11 1958 to 1980?

12 A. Yes.

13 Q. Before I show you my next piece of paper. So is that
14 four years after Brown versus Board -- if you don't know
15 approximately -- and about 15 years after the passage of
16 major civil rights legislation?

17 A. Yes. The point of the study was to look at what
18 happened after the civil rights legislation was
19 introduced. This was '64 and '65. Might have been '63 as
20 well. That might have been a housing -- anyway, in the
21 early '60s is the civil rights legislation that they are
22 talking about.

23 Q. So finding of the study is that there was a large
24 decline in support for Democrats in the South that
25 happened in the '60s in reaction they believe to civil

1 rights legislation?

2 A. Yes.

3 Q. Now, I would like to show you what we've marked as
4 our Exhibit 12. It is a declaration of our House
5 Parliamentarian who will be testifying later in this
6 proceeding. You've never -- have you ever seen this
7 document?

8 A. I have not.

9 Q. You have not.

10 So you can't testify to the truth of what it says?

11 A. That's correct.

12 Q. If you could assume that these numbers that he gives
13 in Paragraph 3 in this chart are accurate, what does he
14 say the makeup of the State House was in 2005? I can --

15 A. It says 72 Democrats, 28 Republicans, and zero
16 independents.

17 Q. Then what does he say for 2007 after the 2006
18 election?

19 A. 75 Democrats, 25 Republicans, zero independent.

20 Q. And then after the 2008 election, the year in which
21 Barrack Obama was the Democratic presidential nominee,
22 what does he say the makeup of State House was then?

23 A. Are you talking about 2009, 2010?

24 Q. Yes.

25 A. 72, 28, zero.

1 Q. So when does the large decline in Democratic
2 membership of the State House -- the Arkansas State House
3 take place according to Parliamentarian Johnson?

4 A. That's a gradual decline, but certainly by 2017,
5 2018, the decline is all the way down but -- not all the
6 way down, but anyway.

7 Q. So this is 50-plus years after the civil rights
8 legislation that you mentioned a moment ago?

9 A. That's correct.

10 MR. STEINBERG: Can I confer with my co-counsel
11 for a second?

12 THE COURT: You may.

13 MR. STEINBERG: I have no further questions for
14 you.

15 THE COURT: Mr. Steinberg, can you put that
16 chart up one more time, the last chart you had?

17 MR. STEINBERG: Yes, Judge.

18 THE COURT: Doctor, again, if you don't know the
19 answer to this, that's perfectly fine. Just say, I don't
20 know the answer. But in 2008, the election which I guess
21 would lead to the year of 2009 through 2010 numbers here,
22 do you know whether Democrats or Republicans in each -- in
23 each district we're thinking about now were the preferred
24 candidate of black voters?

25 THE WITNESS: I do not.

1 THE COURT: Is there any easy way to figure it
2 out? I'm not asking you to figure it out. But just is
3 there any way one would be able to figure that out?

4 THE WITNESS: Yes. You could do a racial bloc
5 voting analysis of those districts if you could find the
6 precinct shape files so that you knew the demographic
7 composition. That would be the sticking point to that.

8 THE COURT: Okay. I understand. You can take
9 you can take that one away.

10 My other question involves the interplay between the
11 effectiveness score and the percentage of black voters in
12 a district -- or black voting age population in a
13 district.

14 I think I understand, although, again, correct my
15 premise if it's wrong. I think I understand that through
16 your testimony you would say, look, if the black voting
17 age population was 49.9 percent and the effectiveness
18 score was .80, one might be able to think about that as an
19 opportunity district. Even though the black voting age
20 population is under 50, it's close enough that, given the
21 high effectiveness score, you might be able -- it might be
22 credible to think about it as a black voting -- as black
23 opportunity district. Is that correct?

24 THE WITNESS: Absolutely. Yes.

25 THE COURT: Okay. On the other hand, if we're

1 at the other end of the scale and it's two percent black
2 voting age population, even if the effectiveness score was
3 very high, say .888 or something, I think I understand
4 your testimony to say that would really be more a happy
5 accident than a black voting opportunity district. Is
6 that fair?

7 THE WITNESS: Yes.

8 THE COURT: What I'm trying to figure out is the
9 in between.

10 So let's talk about first the 30s. If there is black
11 voting age population somewhere between 30 percent and 40
12 percent of a district, could it never be a black
13 opportunity district regardless of how high its
14 effectiveness score was? Could it sometimes depending on
15 certain facts? Or if its effectiveness score was over .5,
16 would it always be?

17 THE WITNESS: Let's say the other voters were
18 Hispanics and they didn't turn out, then you would have a
19 situation where it would in fact be an opportunity
20 district because black voters would make up a majority of
21 the voters. So there would be circumstances. I have not
22 identified and I don't know of anyone who's identified any
23 districts in the 30s as effective minority districts
24 because the minority turnout will not be high enough. But
25 it is certainly true that there are districts in the 40s

1 that could fall into that category.

2 Q. Okay. So again, I'm -- when I do this, I'm doing it
3 so I can think about it. But, again, if I recharacterize
4 it wrong, I want you to push back on me.

5 I think what I heard you say is, in the 40s,
6 possible, maybe even -- maybe even, depending on certain
7 situations likely. In the 30s, theoretically possible,
8 but nothing in practice you've ever seen. And then I
9 would take it you would say in the 20s, a hard and fast
10 no. Is that wrong? Right? I want to make sure I
11 understand your testimony.

12 THE WITNESS: So there are districts in Texas
13 that have a lot of Hispanic -- I want to say Hispanic,
14 Asian, and blacks can control those districts even if they
15 are not even close to majority. Again, I don't believe
16 any of them are down below 40 percent, but they can get
17 low because the other potential voters are not voting,
18 whether it's because they can't vote or whatever. The
19 rest of the population is not.

20 THE COURT: What if we take out the large
21 Hispanic population issue.

22 THE WITNESS: Then, no. I mean -- I mean, you
23 can -- by that point you're talking mostly about elections
24 that aren't polarized, right? In which case I'm not even
25 sure that the Voting Rights Act would come into play. You

1 know, in Virginia 43 percent black district elected and, I
2 mean, nobody's disputing that that's not a minority
3 opportunity district. I don't know of any in the 30s when
4 the other voters are white.

5 THE COURT: Okay. I appreciate that.

6 Mr. Steinberg, did that bring anything up that you
7 need to pursue?

8 MR. STEINBERG: Maybe just one brief thing.

9 THE COURT: Brief.

10 MR. STEINBERG: Yeah. It will be.

11 BY MR. STEINBERG:

12 Q. I think you said in response to Judge's first
13 question that it would be possible to find out whether
14 Democrats in State House elections were preferred by black
15 voters in 2008, but you just haven't analyzed that.

16 A. I'm not sure if it's possible. In theory, it's
17 possible, but you would need shape files, and I don't know
18 that the shape files exist.

19 Q. Did you not testify in a challenge to the 2010
20 Arkansas state legislative districting, the case was
21 called Jefferson V. Beebe?

22 A. Yes. State Senate district, yes.

23 Q. At that time, would you have done this analysis of
24 whether black voters preferred Democrats in Arkansas state
25 legislative elections?

1 A. At least in the district being challenged. I think
2 only in the district being challenged. And I don't
3 remember the Senate district. I don't remember.

4 Q. Okay. But no -- no what's called in the trade I
5 believe exogenous elections beyond that, just the state
6 legislative district being challenged?

7 A. I don't remember.

8 MR. STEINBERG: That was my only follow up in
9 response to your questions.

10 THE COURT: We are going to take a ten-minute
11 break and then we will do redirect and then, hopefully, we
12 will get you on your way.

13 (A recess was taken at 3:15 p.m.)

14 * * * * *

15 REPORTER'S CERTIFICATE

16 I, Valarie D. Flora, CCR, certify that the foregoing is a
17 correct transcript of proceedings in the above-entitled matter.

18 Dated this the 4th day of February, 2022.

19

20 /s/ Valarie D. Flora, CCR

21 -----

22 United States Court Reporter

23

24

25

1 (Proceedings continuing in open court at 3:28 PM.)

2 MR. SELLS: I apologize for keeping the Court
3 waiting.

4 THE COURT: You weren't. We were all doing stuff.
5 You're fine.

6 BY MR. SELLS:

7 Q Dr. Handley, I'd like to start with Defendants' Exhibit
8 12, please. This is the declaration of Mr. Johnson who I
9 believe is the parliamentarian of the House or General
10 Assembly. You remember being asked about this document?

11 A I do remember, yes.

12 Q You can see that there is essentially a drop-off, pretty
13 precipitous, in the number of Democrats in the House between
14 the 2008 general election and the 2010 general election. You
15 see that?

16 A Between the 2009 and 2010 and the 2011, 2012 categories?

17 Q Right there.

18 A Yes.

19 Q So that would have been following the 2008 general
20 election and following the 2010 general election?

21 A Yes.

22 Q Is there anything big in racial politics associated with
23 Democrats that happened in 2008 that might explain the big
24 drop-off in Democrats in the Arkansas State House?

25 A There is certainly political science literature that

1 talks about the impact of the election of President Obama. And
2 I don't know if there is anything Arkansas specific, but
3 certainly political scientists point to that election as
4 important in terms of its impact on white voters especially.
5 Well, black and white voters.

6 Q Does this pattern support the inference that race plays
7 no part in Arkansas politics?

8 A Does it support the contention that it does not?

9 Q That it does not.

10 A No.

11 Q In fact, it suggests that race and party are, as you say,
12 correlated in Arkansas politics, doesn't it?

13 A Race and party are correlated in Arkansas politics and
14 this could serve as an example, yes.

15 Q I'd like to turn to Defendants' Exhibit 6, please. This
16 is your article. Do you recall your testimony about that?

17 A Yes. I am a co-author on this article. I'm not going to
18 claim full credit for it, but yes.

19 Q Thank you for that correction. Your co-authors are
20 Bernie Grofman, whom you describe as your mentor, Tom Brunell,
21 and David Lublin, all four well-respected political scientists?

22 A Yes.

23 Q Mr. Steinberg had you go over the table 3 on page 12, so
24 let's look at that if we could. There was discussion about
25 blacks' chance of winning based on various strata of black

1 total population in a district?

2 A That's correct.

3 Q I think you were asked what sample, what data went into
4 these charts.

5 A That's correct, I was asked that.

6 Q It was states with, I think, greater than 10 percent
7 black population?

8 A That was my guess, and it was confirmed when the footnote
9 was brought up, yes.

10 Q So this table doesn't necessarily reflect the experience
11 in Arkansas, correct?

12 A This is for all states that are 10 percent black or more
13 which would include Arkansas, but includes a lot of other
14 places as well.

15 Q You have astounded us with your memory today. Do you
16 remember what those states are?

17 A No. Please don't ask me that. No, I don't.

18 Q Might that be in footnote one of this article?

19 A Okay.

20 Q Can we look at -- footnote one is -- sorry, I don't have
21 a page, but it's at the end of the article. Now, does that
22 refresh your recollection as to which states were included
23 there with respect to the black population?

24 A It does indeed, yes.

25 Q Which states were those for the record?

1 A So you want me to name them all?

2 Q Yes, please.

3 A Alabama, Arkansas, Florida, Georgia, Louisiana,
4 Mississippi, North Carolina, South Carolina, Tennessee, Texas,
5 Virginia, Delaware, Illinois, Maryland, Michigan, Missouri, New
6 Jersey, New York, Ohio.

7 Q Would it be fair to say that the degree of racial
8 polarization in some of these states is quite different than
9 the degree of racial polarization in Arkansas?

10 A I am actually aware of what it is in Ohio, New York,
11 Michigan, Maryland, and even Illinois as well as Virginia. And
12 all of those instances, of course, it is less polarized in
13 those states than it is here. I also know about Georgia and
14 something about Mississippi and Louisiana. It's about as
15 polarized.

16 Q Would it be appropriate for the Court to draw conclusions
17 about opportunity districts in Arkansas from table 3 that
18 Mr. Steinberg discussed with you?

19 A No, but we also know it's supposed to be a very
20 district-specific analysis in any case, but no.

21 Q Thank you. We're done with that exhibit. At the very
22 beginning of Mr. Steinberg's questioning of you a long time ago
23 now, he asked you about confidence intervals. Do you remember
24 that general line of questioning?

25 A Yes, I do.

1 Q He was asking you could there have been confidence
2 intervals in your analyses that might have crossed the
3 50 percent line such that a race that you found to be polarized
4 wasn't really polarized or vice versa?

5 A Yes.

6 Q Let me ask you this. Could the defendants have done the
7 analysis to figure out what those confidence intervals are?

8 A Certainly. Often times, most times that I can think of,
9 defendants also bring in experts who do this kind of work, yes.

10 Q But the defendants haven't done that in this case, right?

11 A Certainly not aware of it. I would think I would know.

12 Q Little bit after that, Mr. Steinberg asked you about the
13 impact of split precincts on a racial -- a reconstituted
14 election analysis or recompiled election analysis. Do you
15 remember that line of questioning?

16 A Yes, I do.

17 Q If I remember your testimony correctly, I believe you
18 said that split precincts under certain conditions could make a
19 reconstituted election analysis go a little funny?

20 A Be a little less accurate.

21 Q You didn't use those words. That was my paraphrase. But
22 do you remember that kind of response?

23 A Yes.

24 Q Mr. Steinberg went through District 98, I think it was,
25 and he was going to have you, with a calculator, calculate how

1 many -- what percentage of the population was involved in a
2 precinct split, correct?

3 A He threatened to, but no, he didn't make me use a
4 calculator. We did go through the populations.

5 Q Now, one of the assumptions that I heard him discuss with
6 you was if voting is racially polarized and if precincts are
7 split along racial lines, then your disaggregation algorithm
8 which assigns votes not based on race but just based on VAP
9 could lead then to misleading results. Do I understand that
10 correctly?

11 A Yes.

12 Q Do you know in this case whether the precincts that were
13 split in House District 98 or in any other district were split
14 along racial lines?

15 A I do not know.

16 Q Do you know whether if the Board of Apportionment had
17 split precincts along racial lines, that might cause other
18 legal problems for the state of Arkansas?

19 A I'm not a lawyer, but I've seen that used as evidence of
20 racial purpose.

21 Q And you haven't seen any analysis of the racial
22 composition of the precinct splits in House District 98 or any
23 other district?

24 A That's correct.

25 Q Now, there were a number of precinct splits in House

1 District 98, correct?

2 A Yes.

3 Q I think it was seven maybe precincts, but don't hold me
4 to that. You probably remember the exact number.

5 A I don't.

6 Q I want you to suppose that -- let me rephrase that
7 question. In order for those splits to have an effect on your
8 recompiled election analysis, isn't it true that they would not
9 only have to be split along racial lines, but all of them would
10 have to be split along racial lines in the same direction, but
11 otherwise they would cancel each other out?

12 A Yes, that's true.

13 Q So, again, you don't have any data or analysis showing
14 that there is a particular racial impact of the split precincts
15 in House District 98 or any other. Correct?

16 A Correct.

17 Q Mr. Steinberg asked you about how you arrived at using
18 Bland for your effectiveness index. Do you remember those
19 questions?

20 A Yes.

21 Q And your response was that he was the only one who met
22 your criteria, right?

23 A In this state, correct.

24 Q Would you restate your criteria just so we have them
25 fresh here?

1 A A minority candidate supported by minority voters and not
2 supported by white voters, member of a major party and
3 statewide.

4 Q Why don't you include white candidates in your criteria
5 such that they would be included in your minority effectiveness
6 index?

7 A The law as I see it is pretty clear that if minority
8 voters don't have -- if they only have an opportunity to elect
9 white candidates and not minority candidates, this is not
10 sufficient that minority voters should be, if they so choose,
11 be able to elect a minority minority-preferred candidate.

12 Q So the risk is that if you included white candidates in
13 there you wouldn't get a true picture of the ability of the
14 minority voters to elect a minority candidate. Is that
15 correct?

16 A I think we even saw when we were going through and
17 looking at the white Democrats and comparing it to the Bland
18 vote in these State House contests that it could, in fact, be
19 the case that black voters got less -- white voters gave more
20 votes to white Democrats than to black Democrats, and that's
21 one of the reasons for the difference.

22 Q And you mentioned, I think, in Georgia there are a lot of
23 statewide black candidates who were black-preferred and thus
24 meet your criteria for an index like the one you prepared here?

25 A That's correct. In Georgia, I had seven candidates to

1 use as a composite hypothetical candidate. Here I only have
2 one.

3 Q And what's the advantage if you have seven candidates
4 instead of one?

5 A You have a more varied number of years, different
6 offices, so that election dynamics are different. So it's more
7 reflective of a broader set of election dynamics.

8 Q I believe Mr. Steinberg asked you then if you did any
9 checks here to make sure that Bland was not misleading, was
10 representative, did not understate, if you will, minority
11 opportunity. Do you recall that questioning?

12 A I do.

13 Q What were those checks that you told Mr. Steinberg about?

14 A I think that we're talking about I created a
15 black-preferred candidate index so that I had a wider range of
16 candidates. I used all nine statewide elections, identified
17 the black-preferred candidate which was white in some instances
18 and black in only two, and created a composite index and
19 compared it to the index produced with Bland alone.

20 Q Now, again, when you include white candidates in with
21 black candidates in a situation like this, the risk is that
22 it's going to overstate minority opportunity, correct?

23 A That's correct.

24 Q What did you find as to your black-preferred index that
25 included white candidates with respect to your opportunity

1 analysis?

2 A So using the black-preferred index did not change the
3 assessment of any of the minority opportunity districts in any
4 of the three plans. It was always either slightly above or
5 slightly below, but in one of the minority opportunity, in both
6 of them, it was slightly below. And I'm sorry, in -- the
7 districts represented by Fielding and Hodges was what I looked
8 at most recently, and the difference was such that actually
9 both candidates did worse with the black-preferred index, and
10 in one instance much worse. And I think it was Hodges, but it
11 might have been Fielding. I don't remember.

12 Q You didn't include that index in your report, correct?

13 A No, again, because I didn't include white candidates. It
14 was just used as a check. My modus operandi is to look at
15 black candidates who are preferred by black voters.

16 MR. SELLS: May I have a moment, Your Honor?

17 THE COURT: You may.

18 MR. SELLS: Can we switch over to the ELM0, please?

19 BY MR. SELLS:

20 Q Dr. Handley, do you recognize this document?

21 A That is the check that I did. It has for each of the
22 districts, the percent of black VAP, the Bland index, which I
23 call the effectiveness index. It also has a Democratic index,
24 which is just the seven candidates that were Democrats, and
25 then it has the black-preferred index, which is all nine

1 candidates that ran statewide that I analyzed.

2 Q I believe you were talking about the District 34 with
3 Monte Hodges where the black-preferred index is, in fact, lower
4 than the Bland index?

5 A Yes, so it was Hodges. Yes, I didn't remember which one.
6 Yes.

7 Q It was actually lower for District 98, Fielding district?

8 A Yes.

9 Q What conclusions do you draw from that pattern of the
10 indices?

11 A I suppose the one I could say is that the .468 might be
12 too optimistic. But, I mean, I'm sticking with the Bland index
13 here, but there is an indication that that might be overly
14 optimistic.

15 Q When you say that might be overly optimistic, which index
16 might be overly optimistic?

17 A The Bland, what's labeled here as the Bland index, the
18 effectiveness index reported in my report.

19 Q For which districts in particular?

20 A Well, this one that I'm looking at right now, Hodges,
21 just because there's a pretty stark difference.

22 Q Do you have a different conclusion as to District 98?

23 A A different conclusion? They're very, very close here.
24 I mean, if you round it, it's .45 versus .44. I would still say
25 that this is not a black opportunity district regardless of

1 which index you look at.

2 Q So as to these two districts, your checks -- your check
3 with the black-preferred index suggests that the Bland index
4 with respect to District 34, .462 might be a little optimistic,
5 you're sticking with it though, and it confirms your analysis
6 of 98 because those numbers are all pretty similar, and you're
7 sticking with the Bland index there too?

8 A Yes.

9 THE COURT: Can I ask to make sure I understand this
10 chart? So let's look, we can stick with 34. Does that mean
11 that the 2018 Bland index -- the Bland index, I guess, which is
12 reflective of the votes that the black Democrat got in 2018,
13 that being higher than the average of the other races, right,
14 so I guess the other races are where there wasn't a black
15 Democrat running, but there were white Democrats running. I
16 guess what I'm trying to figure out is does that mean the black
17 Democrats did better than the white Democrats?

18 THE WITNESS: It also includes a black Libertarian.
19 You had a black Libertarian run for U.S. Senate in 2020 --
20 2018, and it would include that. Actually, it includes two
21 Libertarians.

22 THE COURT: I guess that was one question I had.
23 And then the second question I had is obviously on 34, now
24 let's look at 45.60, I think I understand that that's a blended
25 average. Do you know in those races, whether any of those

1 races, the number was 50 percent or over?

2 THE WITNESS: In the Bland index?

3 THE COURT: No, no, in the percent NH black, which I
4 think I understand is an -- am I right that that's an average
5 or no?

6 THE WITNESS: No, that's just the percentage of
7 non-Hispanic black in that newly proposed district.

8 THE COURT: So then I've made a mistake in my
9 questions. So I thought this was your check where you checked
10 the Bland index against the average of the other races that
11 involved a black-preferred candidate but not a black candidate.
12 Am I wrong about that?

13 THE WITNESS: Yes.

14 THE COURT: So in that case then, explain this chart
15 to me so I understand what each of the columns mean here.

16 THE WITNESS: So you've got the district number, the
17 incumbent, then you've got the percentage black voting age
18 population, then you have the Bland index which shows up in my
19 report as the effectiveness index. That is the recompiled
20 election results for Anthony Bland alone.

21 THE COURT: Right. I'm with you so far.

22 THE WITNESS: Then when we go to the Democratic
23 index, this is for the seven contests that included both a
24 Republican and a Democrat and this is how the Democrat did. In
25 that index would be one black Democrat and six white Democrats.

1 THE COURT: So I think I just screwed up the .415
2 number with the 45.6. But I guess my questions are with the
3 .415 number, that's an average as I understand it of six or
4 seven races. Is there a way to tell whether in any of those
5 races the number reached .5 or greater?

6 THE WITNESS: Yes. You could do a recompilation of
7 each of the candidates individually, and then you would know.

8 THE COURT: I guess my question, though, is, from
9 this, if I asked you do you know if in any of those races the
10 number was .50 or greater, I'm assuming you wouldn't be able to
11 recall that just now on the stand?

12 THE WITNESS: No, I would not.

13 THE COURT: That was one question. Then let me ask
14 my other question again just to make sure now I understand it.
15 Obviously .462 is higher than .415. Do I take that to mean
16 that the black Democrat running in the 2018 lieutenant governor
17 race essentially did better than at least most of the white
18 Democrats in the other races?

19 THE WITNESS: On average, he did better, so he must
20 have done better than a lot of them. Now, it would depend on
21 how wide the margin is, but certainly he did better than some
22 of the white Democrats.

23 THE COURT: Okay. Now I understand it. Thank you.

24 MR. SELLS: Your Honor, I'm just checking my notes
25 to see if I have any further questions.

1 THE COURT: Take all the time you need.

2 MR. SELLS: I want to get Dr. Handley to the
3 airport.

4 THE COURT: Take all the time you want.

5 MR. SELLS: I don't have any other questions on
6 redirect, Your Honor.

7 THE COURT: Thank you. Mr. Asher, sorry,
8 Mr. Steinberg, I asked some questions. If you want recross
9 briefly, I'd give it to you, but quite frankly, I'm not sure
10 it's necessary at this point.

11 MR. STEINBERG: No, I think I'm good.

12 THE COURT: I appreciate very much your testimony.

13 MR. SELLS: One item of housekeeping, Your Honor,
14 came up earlier during Dr. Handley's testimony. I'd like to
15 ask the Court to take judicial notice that David Fielding was
16 first elected in 2010 and is therefore going to be term limited
17 out this coming decade.

18 THE COURT: Any objection?

19 MR. MOSLEY: One moment, Your Honor. You got any
20 objection to that?

21 MR. STEINBERG: We don't object to his first being
22 elected in 2010. My understanding of the Arkansas term limit
23 scheme is that it's a bit complicated, some people are
24 grandfathered and have a longer term limit. So at least at
25 this time, we couldn't agree that that term limit is

1 necessarily 16 years. It's ultimately a legal question.

2 THE COURT: I will take judicial notice that he was
3 first elected in 2010, and if it becomes an issue, I will
4 figure out from the law what that means or doesn't mean.
5 Anything else housekeeping wise?

6 MR. SELLS: No, sir.

7 THE COURT: I have one housekeeping thing. I have
8 just been informed that based on the latest weather report, the
9 courthouse is being closed tomorrow, so given that, we will not
10 be having court tomorrow. We will reconstitute ourselves on
11 Friday. It does mean that depending on how time works out, we
12 may end up going a little bit late tonight. Who's next?

13 MR. SULLIVAN: Your Honor, I call Representative
14 Vivian Flowers. She's in the witness room.

15 THE COURT: Mr. Sullivan, I take it you all have an
16 agreement with the other side that we're not moving straight to
17 the cross of the other expert?

18 MR. SULLIVAN: I believe that's correct, Your Honor.

19 **VIVIAN FLOWERS, PLAINTIFFS' WITNESS, DULY SWORN**

20 **DIRECT EXAMINATION**

21 BY MR. SULLIVAN:

22 Q Ma'am, would you state your name and spell it for the
23 Court, please.

24 A Yes. Vivian, V-i-v-i-a-n Flowers, F-l-o-w-e-r-s.

25 Q Thank you for being so patient waiting for us today.

1 Tell the Court your educational background, please.

2 A Yes. I have a Bachelor's Degree in Political Science and
3 Professional Technical Writing and a Master's Degree in Public
4 Service.

5 Q I'm going to ask you to slow down just a little bit for
6 me and -- how are you currently employed?

7 A I am an elected member of the House of Representatives
8 here in Arkansas and then self-employed.

9 Q Where have you worked previously?

10 A At the University of Arkansas for Medical Sciences for
11 almost ten years as the chief operating officer for the Center
12 for Diversity Affairs. And then before that, for University of
13 Arkansas System and the Division of Agriculture. And before
14 that, the Bureau of Legislative Research, and a few jobs in
15 between, but those are my longest term jobs.

16 Q Are you related to Harold Flowers of the Harold Flowers
17 Law Society?

18 A Yes.

19 Q What's your relationship?

20 A He was my great uncle.

21 Q Tell the Court what the Harold Flowers Law Society is.

22 A It is a state organization, association of
23 African-American attorneys. It was named for my uncle. He was
24 an attorney for years and served in the law in different
25 capacities, but I think they honored him because of his work in

1 the law and public service.

2 Q Do you know what party he belonged to?

3 A My understanding is that he was a Republican and was I
4 think -- one time I was helping go through some of his things,
5 sort through some of his things after his death and he was --
6 he campaigned for Eisenhower, and if I'm not mistaken, he was
7 considered on a short list of contenders for a Supreme Court
8 appointment.

9 Q The U.S. Supreme Court?

10 A Yes.

11 Q Are you currently a member of the Arkansas House of
12 Representatives?

13 A Yes.

14 Q What term?

15 A My fourth term.

16 Q In preparation for your testimony today, did you jot down
17 some bullet points to help you remember the things you wanted
18 to testify about?

19 A Yes.

20 Q Will it help you answering my questions to refer to your
21 notes from time to time?

22 A Yes, please.

23 Q Okay. Have you previously or currently been involved in
24 the black community regarding voting rights?

25 A Yes. This is actually one of the things I had to make a

1 list for.

2 Q Please tell the Court about that.

3 A Yes. When I worked for the Bureau of Legislative
4 Research, one of my assignments was to assist my legislative
5 analysts as staff for the Legislative Black Caucus, and this
6 was sort of my first opportunity to work on these issues, and
7 it's a long story and I won't tell the whole story of what led
8 to my interest, but the chair allowed me to work on a
9 legislative issue that he ended up carrying as a bill and it
10 was around the restoration of voting rights.

11 I was still in school on and off and was perplexed as to
12 why people who, once they serve their debt to society, still
13 did not -- could not access their right to vote, and learned a
14 little bit more about how that really worked in Arkansas, but
15 also learned there were some barriers. And because it was
16 defined by the constitution, the chair at the time allowed me
17 to work on legislation in a pretty narrow capacity, but to
18 remove some of those barriers. So that was my first sort of
19 interest and opportunity, and as I ultimately knew that one day
20 I would want to run for office from my exposure to the
21 legislative process, I worked on campaigns, political
22 campaigns, and worked for a nonprofit organization as a
23 volunteer, mostly around voter registration and mobilization.
24 I got involved in the party when I was a student.

25 And also when I was elected, I ran for caucus chair, the

1 Legislative Black Caucus. And while chair, we waged a voter
2 registration and mobilization effort and did that with
3 students, so I had an opportunity to work with students and try
4 to do those kinds of activities on college campuses as well as
5 at community events. And then the other thing I would add is
6 just I've had my own legislative focus and ran a couple of
7 bills around elections, fair elections, and one of them passed.
8 And I'll go back to my time in graduate school, I also focused
9 my studies and particularly in my practicum on fair election in
10 civil, civic engagement.

11 Q Let me back up just a little bit. What areas does your
12 district cover now?

13 A Right now, it's strictly within Jefferson County and
14 within the city of Pine Bluff.

15 Q And we're going to get to more of that in a moment, but
16 back to the things that you just described with voter
17 registration and mobilization. Did you travel to different
18 parts of the state to do that?

19 A I did.

20 Q Where all did you go?

21 A I went to West Memphis, went to Garland County in Hot
22 Springs, went to the delta region of the state, Little Rock,
23 within Jefferson County, my own county. And in the past just
24 in other, as a part of other efforts, have also been involved
25 in efforts in southwest Arkansas, Camden, been to Camden, and

1 then in northwest Arkansas.

2 Q When you were doing that work, have you identified any
3 hurdles to your goals there?

4 A Yes. It struck me too how -- two things struck me.

5 First, how so many people perceived elections as sort of not

6 mattering in the lives of people who we were trying to get to

7 register who weren't already registered. Students, sometimes

8 seniors, especially young people and middle aged people,

9 though, those who weren't already registered were, like, it

10 doesn't matter. They're going to put who they want in there

11 anyway, they're going to do what they want anyway, or the

12 perception that there was just this sort of inherent corruption

13 that had nothing to do with what could impact or empower them.

14 The other thing that I ran into a lot is sort of people

15 would be cagey and I would grow to learn that when people

16 didn't really want to talk about why they didn't want to

17 register, it was usually because they had some sort of felony

18 in their background and either they didn't really know how to

19 surmount that, or a lot of times people would say I can't, you

20 know, I can't register, I can't vote, and they didn't know in

21 the state of Arkansas they could restore but there were just

22 some steps they had to take. So those were the two major sort

23 of barriers to even penetrating someone's mindset about whether

24 they could register, let alone vote.

25 Q Are there any other issues you've identified when working

1 with the black community?

2 A The issues like issues in voting or issues of concern or?

3 Q Yeah, mainly with voting rights, any other issues have
4 come up?

5 A Oh yes. So some of the barriers, there were access
6 barriers just especially in your more rural areas. This wasn't
7 as prevalent like in Little Rock and Pine Bluff, but certainly
8 people who don't live very close to the courthouse, for
9 example, people who for whom, you know, voting absentee might
10 be a barrier. I probably could go back and say another, a
11 third sort of surprising commonality is that a lot of military
12 people tend to be, like, I'm not political, I don't want to
13 vote. Or if they had a sort of a background in serving in
14 different states, moving around a lot, which we know is pretty
15 common among people, our servicemen and women, and especially
16 out of the country, it just seemed to be that voting was like a
17 big hassle that ultimately didn't really make a difference and
18 then they didn't feel comfortable taking a political or
19 partisan stance and often would say, well, I'm independent and
20 I might do something later on.

21 So that was another thing, and I think that sometimes
22 registration can be a barrier in terms of people being confused
23 about dates, where they can register. And voter ID has come to
24 be a barrier. For someone like me and many people in this room
25 who have a license, have a state ID, it's not an issue, but

1 when that became a policy issue that we would have to vote on
2 and sort of investigate, there were a lot of seniors. And I
3 would have -- I reflected that even my own grandmother when she
4 didn't drive anymore, she didn't have a license or state ID.
5 And, you know, when she was alive, I lived with her just like
6 most of my cousins at some point, and I just remembered helping
7 her vote, and fast forward I'm in the legislature, I just knew,
8 gosh, I'd have to make sure she got her license. And I got
9 calls from people who didn't have access to their birth
10 certificate or the courthouse was burned down and so that was
11 an issue. And then, of course, the voting rights restoration
12 for ex-felons is an issue.

13 And the other thing, too, I think the last thing, when we
14 would attempt to engage students, a lot of students would want
15 to register but were concerned about changing their
16 registration from -- like a lot of -- at UAPB, a lot of
17 students there are from Chicago, I don't know why, but there
18 are a lot of students from Chicago. And a lot of them did not
19 want to change their registration, even they wanted to be
20 involved because they had had experience of trying to register
21 and then not being able to vote because their registration
22 wasn't accepted because it was challenged by someone in our
23 community who up until recently spent his whole life trying to
24 challenge people's ballots.

25 So depending on who might be the county clerk would

1 determine how they would deal with the permanent address versus
2 if they lived on campus and how they write that down. It was
3 just always something and it just wasn't a whole lot of clarity
4 on how that would be handled, whether or not those
5 registrations would be accepted.

6 Q To be fair, the issues you just responded, those are not
7 exclusive to the black community, are they?

8 A So on paper, no, but sometimes in some instances, it
9 seemed that even in Jefferson County where you might see
10 push-back in certain precincts or on a college campus, those
11 issues are not being raised or challenged in other parts like
12 of the county like in White Hall.

13 Q Are so are you saying that these issues are more
14 prevalent in the black community?

15 A Yes. They've been used against, yes.

16 Q You mentioned UAPB. You're referring to the University
17 of Arkansas at Pine Bluff, correct?

18 A Yes.

19 Q That is a historically black university, right?

20 A Yes.

21 Q Do you participate in the Black Legislative Caucus?

22 A Yes, I do.

23 Q Are you familiar with other issues that are especially
24 important to black voters in recent times?

25 A Yes. And I'll go back to say, too, that in my

1 interaction with the Legislative Black Caucus, and I think I
2 mentioned when I served as staff, I got involved at that time,
3 when I became chair of the caucus during 2017 and 2018, we --
4 and I'm sorry if I'm repeating. I think I told you that we
5 waged a campaign for voter registration and mobilization, but I
6 think that it's worth mentioning, too, that many of our members
7 are members of and involved in the National Black Caucus of
8 Legislators, and I wanted to be sure and mention that because a
9 lot of the issues that we deal with here in Arkansas as
10 African-American members of the legislature and just as
11 African-Americans in our communities are not just specific to
12 us, there's definitely a pattern of some of these same issues,
13 some of these same barriers and some of these same concerns
14 which I'll go on to, I know that's the question you just asked,
15 with other black legislators all over the country.

16 So I think it's worth mentioning that NBCSL has for a
17 long time been focused on these issues, concerned about these
18 issues, but especially more recently on a state level as well
19 as national level been really engaged, especially given a lot
20 of the legislation that we've seen pass in states all over the
21 country, but especially in southern states. And --

22 Q Go ahead.

23 A As it relates to issues, you know, one of the things that
24 I learned to do especially when talking to people who tend to
25 believe that, you know, elections don't matter, their votes

1 won't matter, is that, you know, from a local level all the way
2 up to a national level with the federal government, decisions
3 that are made in our form of government are made on behalf of
4 them by other people who do get elected and, you know, the
5 issues that are of concern in our communities are much like
6 those that are the concern of other communities. We want to
7 have a safe environment, we want police protection, we want
8 fire protection, which is like the first role of government.
9 But then also, you know, we want to be left alone.

10 And I think that a lot of people might see on social
11 media or in articles in the news media where there's this
12 colloquial term of fill in the blank while black or fill in the
13 blank while brown. And I wanted to touch on that because I
14 have my own experience where not too long ago I was leaving a
15 fundraiser with a friend of mine and we were just on a public
16 street talking next to my car and, you know, literally
17 confronted by what ultimately grew to be four people telling
18 us, asking us why we were there, telling us to leave, telling
19 us we didn't belong there. A couple of the young men who were
20 sons of one of the ladies accosted us. And I don't know if
21 they were trying to start a fight with just the gentleman who I
22 was with or with both of us, but it was scary stuff, and then
23 eventually there was a gunshot off in the distance. I couldn't
24 tell you exactly, you know, who shot it, I didn't see that, but
25 all of that was really scary, and all we were doing is standing

1 in the street talking, and that was challenged.

2 And that's not just an isolated sort of experience that
3 was just us. And I'm a state representative and, you know, not
4 that it would be, I would be immune, but people would think,
5 oh, that wouldn't happen to her, she's a older lady and she's
6 not threatening and it's not about that. And the bottom line
7 is we're citizens, now we don't feel protected because we're
8 not being left alone to just be citizens. Then we call for
9 protection. And because of that gunshot and because of the
10 nature of what was going on, we're standing waiting for police
11 protection and then, you know, they come guns drawn.

12 Now, as an official and an older person who's seen and
13 read about these stories and dealt with these issues as a
14 policy issue, I understand why that happened but when you're in
15 the moment, it's scary. And as a 52-year-old woman dealing
16 with that and reading about all the throngs of young men, black
17 and brown men especially dealing with that, that's a major,
18 major issue that I think all of us grapple with how do we deal
19 with it, how do we talk about it without it being you're
20 pulling the race card or it's not that big a problem or it's
21 isolated and things have gotten better.

22 But if you don't -- I never thought that that would ever
23 happen to me, so if you don't know when or if it'll ever happen
24 to you, but you know it happens and everybody has a story in
25 their family, it's an issue. So I would say that's huge among

1 them.

2 Q When you say the police came with their guns drawn, were
3 they pointing them at you?

4 A Yes.

5 Q I would have never guessed you were 52. I always assumed
6 you were much younger.

7 A Thank you. Don't tell anybody.

8 Q Has the General Assembly been responsive to the concerns
9 of particular interest to African-Americans?

10 A I'm sorry, repeat that.

11 Q Has the General Assembly been responsive to the concerns
12 of particular interest to African-Americans?

13 A Sometimes, but often not.

14 Q What about this last session?

15 A I would say there were several instances in this last
16 session and probably the session before that that were very --
17 that were very challenging and frustrating, even upsetting. I
18 just gave an example of a policy issue or an experience that,
19 you know, really translated into a policy issue in the last
20 session with the stand your ground law, for example. And to
21 me, what's so interesting about that like it mushroomed up to
22 be this big partisan political issue about gun rights or, you
23 know, Second Amendment rights and public safety. But it's like
24 the fact that every law enforcement official in the state of
25 Arkansas were against this policy fell on deaf ears.

1 So it wasn't about public safety, you know, experts,
2 officials, and those who are out there in the field whose job
3 it is to protect the public and enforce the law. That, for
4 some reason, didn't matter. And then you have so many people
5 who came and testified as to why this would be detrimental and
6 could be dangerous, if not to one person, to many people who
7 might be negatively affected from law enforcement to people
8 wanting to be left alone and be able to walk down the street in
9 peace without being threatened. And it still passed, like it
10 passed in committee on the House and Senate side with lots of
11 testimony, lots of data demonstrating that there is an increase
12 in gun violence, that there was a threat to law enforcement,
13 and it just didn't matter.

14 And certainly the pleas of organizations of individuals,
15 black, white, brown, didn't matter. So it was really, really
16 frustrating. The hate crimes bill was another --

17 Q Before we go there, before we leave stand your ground,
18 did you or other black legislators bring those concerns and
19 statistics up in either committee or on the floor?

20 A Absolutely.

21 Q And do you remember how much it passed by?

22 A I don't know the numbers, but it was overwhelming.

23 Q Go on to hate crimes.

24 A Hate crimes was another issue that actually as a
25 bipartisan effort initially, started out with language that was

1 consistent with other hate crimes legislation in the country,
2 whether it was the national bill or other states, and it was
3 just watered down so much that even a former Supreme Court
4 judge or I can't remember if she was Supreme Court or federal,
5 but who I don't know if I've ever seen her testify while I've
6 been there, felt that it was important enough to testify as to
7 the language of the bill not only not being effective but
8 possibly being harmful, which I found to be compelling.

9 There were many, many individuals and organizations that
10 spoke against the bill. And then a couple who spoke for it,
11 you know, the chamber and a couple of other folks spoke for;
12 throngs of people spoke against. And the perception was, and a
13 lot of the conversation was around sort of this push to be able
14 to check a box while still appeasing people who didn't want
15 hate crimes legislation. And I have to say, too, you know,
16 even years ago when I worked for the Bureau of Legislative
17 Research and there was a legislator in the Senate at the time
18 who before had been my chair for one of the committees I had
19 helped staff, he was on the fence. And this was an issue I
20 think like 20 years prior maybe.

21 And so I would say that to point out that whether it was
22 a Democratic or Republican, you know, administration in the
23 governor's office or leading legislature, the numbers of the
24 majority, this legislation had been put forward and not passed
25 in its best form. I had a conversation though with that

1 legislator who was sort of wanting to discuss and say, you
2 know, well, we already have laws to address these issues and
3 this really would be sort of special laws. And it was a great
4 conversation that I eventually pointed out to him that, you
5 know, hate crimes legislation is not meant to enforce a law
6 against an individual, but it's really to address what amounts
7 to a terroristic act that is meant to horrify and suspend in
8 fear entire groups and entire communities, and gave him a few
9 examples.

10 And from that one conversation, and I wasn't a
11 legislator, I just -- we were just talking about the issue, he
12 changed his mind, and said it in committee. I wasn't even
13 there. And I'm making that point to say that, you know, when
14 you have different perspectives of people who come from a
15 different experience in the same country with the same
16 citizenship, it means something, and you can get to a point
17 where change can happen to benefit all. And it could have
18 happened. It still didn't pass then. So 20 years later, the
19 bill came up again and it was a lot of that same rhetoric of
20 this was a waste, why are we talking about creating special
21 penalties and special rights or whatever.

22 Q When you say you believe a former judge testified or
23 spoke to committee, was that Justice Annabelle Imber Tuck?

24 A Yes.

25 Q It was dangerous for me to ask you that because I didn't

1 know if that was the answer. Twice you've mentioned stuff
2 about going on in other parts of the country. Do you hold an
3 office in a national organization?

4 A Yes.

5 Q What is that?

6 A National Black Caucus of State Legislators, NBCSL. I'm
7 the national secretary.

8 Q When you were elected and took office the first time,
9 were there any other black women in the House?

10 A None. If I could add to that. Unfortunately there had
11 been -- there had been many black women who had served before,
12 and I don't know what was evolving at that time where we had
13 gone from maybe five to zero, but the year before, the term
14 before I was elected, there were zero.

15 Q In this past session and even the session before, were
16 there committees in the House that had no black members?

17 A Yes.

18 Q Were there committees that only had one black member?

19 A Yes. Agriculture has no black members on the House or
20 the Senate side. State Agencies, I believe, has one black
21 member, I believe, on the House side. I don't know about the
22 Senate. And I think in Public Health, I think there's one
23 black member, and I'm not sure about the Senate side.

24 Q Currently, there's 12 black members in the House,
25 correct?

1 A Correct.

2 Q Can 12 black members cover all the committees?

3 A No.

4 Q Why do you think it's important to have more black
5 members on the legislative committees?

6 A I think that just first the whole point of representation
7 is important. I think it's important that African-Americans be
8 at the table. And when I talk about representation, I mean
9 representation of issues that are important in different parts
10 of the state that may not be an issue in another part of the
11 state. I think representation in terms of just the sort of
12 bread-and-butter bring-home-the-bacon issues that happen. And
13 I could represent -- I could represent a part of Pine Bluff and
14 White Hall and Sheridan, and if I am not -- if I have no
15 connections, no interests in White Hall and Sheridan, it would
16 be very easy for me to -- and certainly and then if I had no
17 concern about those areas, it would be very easy for me to
18 focus just on Pine Bluff. And it's not even just about
19 legislation.

20 The role of legislators, really, we have a purportedly
21 citizen legislature that's part time, but if you're doing it
22 right, it really is a full-time role because even though we are
23 in session biennially in terms of creating new laws, and then
24 in the off year like this year, we have a fiscal session which
25 lasts about a month or less, the rest of that time you're, you

1 know, providing oversight. And most importantly to your
2 district, if you're really serving the way you're supposed to,
3 you're dealing with a plethora of constituency services issues.
4 And while, you know, you get to pass laws and vote on laws, you
5 know, for three or four months out of every two years, your
6 ability to really help people and change lives happens when you
7 get those phone calls and those letters. And it can be
8 overwhelming.

9 Honestly, I can't keep up with all of them, especially
10 letters I get from people in prison, but when I get calls from
11 folks, whether it's pharmacists with issues and being
12 remunerated by PBMs or whether it's licensure issues, whether
13 it's individuals trying to access resources or trying to start
14 a business, trying to get a house, trying to get benefits,
15 veterans benefits, Medicaid, Medicare. And even though the
16 state doesn't deal with Medicare, a lot of people don't know
17 where to go, or a lot of people will call on the federal level
18 and can't get through. So that representation is really
19 important not just in showing up and being at the table, but
20 also in serving people on an individual level or community
21 level. I'll speak to the sort of being at the table level.

22 So I'll go ahead and tell a very -- give a very short
23 example. When I first -- and I won't give a name, but when I
24 first came, the freshman class was huge, it was like 40
25 something people. And one of the members, I just thought she

1 was so mean, I used to call her evil. And we laugh about it
2 now because I didn't know her and she didn't know me and I had
3 never met anyone from where she was from. And I used to call
4 her evil because I thought that a lot of her bills were just
5 mean and meant to somehow harm someone from my community. And
6 when we started talking, we kind of ended up one day, one night
7 we were working late and ended up talking because we supported
8 the other's bill, and we were able to reflect.

9 And I was, like, I thought you were crazy, why did you do
10 that, why did you do that bill. And she explained, and I'll
11 give an example. No, I'm not, because y'all will know who she
12 is. I'm not going to do that. But anyway, she explained where
13 she was coming from with her bill, and we ended up over time,
14 really ever since, working together on legislation. And we
15 don't agree on everything, but we actually got to know each
16 other and talk about each other's background, talk about what's
17 going on in the other's community. And that can only happen if
18 she gets a chance to be elected, if I get a chance to be
19 elected. There was a time where neither one of us -- she's a
20 white woman -- would be elected because we're women.

21 And so when someone asks why is it important, you know,
22 for African-Americans to be elected, same reason it's important
23 for women to be elected, the same reason it's important for
24 farmers to be elected in an agricultural state, for vets to be
25 elected, so that representation extends to being able to be the

1 voice for people who have very specific issues that should be
2 voiced and represented.

3 And I'll close on that question with this. It's this is
4 not to me just about making sure we have the numbers because,
5 you know, we have a certain number of African-Americans and we
6 have to make sure that -- in the state, so we have to make sure
7 that there are a certain number of African-Americans in the
8 legislature. I think we have to look at it from a current and
9 historical perspective and recognize that there have been
10 barriers that have been placed, that have been put in place
11 specifically to keep certain people out. And it's not just
12 because of color. It's because of power. It's because of
13 influence. It's because of your impact to make decisions that
14 affect business, it affects pocketbooks.

15 And so, you know, it's sort of all of that is wrapped up
16 in how and why we need to be intentional because, ultimately,
17 these are communities that are filled with residents who look
18 like me who are African-American, and sometimes there are votes
19 cast and there are policies made and things done and said or
20 not done and said because folks know that it's those people so
21 we can afford not to protect those people or we can afford not
22 to roll back barriers for those people. And I think that we do
23 our whole state a disservice when we continue along that line.

24 Q I want to back up to something you said earlier when
25 answering that question. You mentioned the cities of White

1 Hall and Sheridan. I think it's clear from the context of what
2 you were talking about, but those two cities are predominantly
3 white, aren't they?

4 A Yes.

5 Q You also used the term "PBM". Is that pharmacy benefits
6 managers?

7 A Yes.

8 Q You were getting calls from pharmacists about that?

9 A Yes, about reimbursements and workloads, yeah, it's bad.

10 Q What do you think it would mean to black voters if there
11 were four or five more black members in the House?

12 A I think representation would be expanded and I think that
13 some of the same interactions, conversation, engagement that I
14 described between myself and the legislator that I started out
15 not having a good perception about would happen and not could
16 happen, it would happen. I think that the role on committees
17 and in committee leadership would increase. I think that
18 people would see the process as one that doesn't have inherent
19 barriers or that's inherently closed to people of color, black
20 people in particular. And there would be a perception of
21 fairness in the system. I think people, voters, black voters
22 in particular would feel like maybe this is real.

23 I think for anyone, for a lot of people who may or may
24 not have voted for or supported President Obama, for example,
25 once he got elected, and he was not elected by or to be

1 president for black people, you know, this country is 13
2 percent, 12 something percent black people, and a minority of
3 people of color. So it stands to reason that, you know, some
4 white people voted for him but he would not have been elected
5 were it not for the votes of so many black people. And once
6 elected, people felt hopeful, people felt like okay, it's
7 possible.

8 And so, you know, you've seen more people run in
9 districts that are not majority minority, but if we are closing
10 off opportunities to run in districts that are majority
11 minority and shutting down those opportunities in a place where
12 we've never had a statewide African-American elected, we've
13 never had a black person serve in Congress, how can voters
14 think that it's possible? How can we get to a point where we
15 don't have to focus on closing those opportunities and barriers
16 that exist.

17 Q If there were four or five more black members in the
18 House, there could be obviously more black people on the
19 committees where there has been none, correct?

20 A Correct.

21 Q Now, anybody with an internet connection can watch
22 committee meetings on the internet, can't they?

23 A Yes.

24 Q And those are archived, they can watch them in real-time
25 or they can watch them later, correct?

1 A Correct.

2 Q What do you think it would mean to black citizens and
3 black voters if they either came in person or watched the
4 committee meetings on line and they saw more black people
5 sitting at the table?

6 A I think it would make -- in addition to what I just said,
7 I think it would make what is real, what is real to those of us
8 who are there and understand that, you know, black people in
9 the legislature are not unicorns, I think that it would push
10 back on this notion that I'm special. I'm not special. There
11 are a lot of talented, educated, driven, passionate people who
12 could serve but who won't put themselves out there right now
13 today because they are told or they think they can't win unless
14 the district is majority minority. That's number one.

15 Number two, I think that the impact is not just an impact
16 for African-American voters. I think the impact is largely the
17 same for non-minority voters. I think it's important for
18 everybody to see that, you know, as an African-American woman,
19 I can serve on insurance and commerce and grasp and work on
20 issues outside of what's traditionally perceived to be black
21 issues. I can advocate for people who are not just my black
22 constituents because I have constituents that are not black. I
23 serve all of them though. And, you know, I would never even
24 have an opportunity to talk about these issues like this were
25 it not for me being here to testify, you know. I think people

1 think a certain way about me as an elected official and what I
2 can or should be running as legislation or in charge of as a
3 chair.

4 I have been the chair of the Legislative Black Caucus
5 which has been a dream of mine and an honor to do. But I can
6 do more. But I came in to a legislature that had no black
7 women even in the chamber, and when I would speak on that, I
8 would have some people tell me, well, I didn't even notice.
9 And I know what they were trying to say, that, you know, like
10 when people say, well, I don't focus on the color of people.
11 But black women make up over 8 percent of this population and
12 if you didn't miss me, to me that's a problem.

13 Q What do you think it would mean to a black voter who has
14 no intention of running for office as far as looking at the
15 committee and seeing more black members speaking on issues that
16 are important to them? Why is that important?

17 A I think that black voter would want to vote, I think that
18 black voter would be more engaged and learn more about
19 candidates and think, I better vote for the right person
20 because I see people who look like me and I see people from my
21 community who could speak to issues that are important to me.

22 Q Would you still feel that it was important to have more
23 black representatives in the House if Democrats were in the
24 majority?

25 A Absolutely. I think I saw those issues and I was at

1 least a part of conversations when Democrats were in the
2 majority. I don't think this is a partisan issue because I
3 think it's an issue around race because it was an issue when
4 Democrats were in the majority. I mean, the history of black
5 people in the legislature has centered around actions and
6 policy when Democrats were in the majority. And even though we
7 were a one party state, so Republicans and Democrats were
8 Democrats then, still, you know, that sort of didn't figure
9 into the conversation and into the lawsuits.

10 I mean, in the early '70s, I believe there was a lawsuit
11 that preceded the first four African-Americans to serve in the
12 legislature, and for a long time there was only one woman
13 serving, Senator Brown. And then in 1991, I think, or shortly
14 before, there was a lawsuit that precipitated. Before that, it
15 was I think four or five, and then it was a lawsuit that
16 changed the policy and changed the minds so that then there
17 were somewhere around ten or 12. And there was majority
18 Democrats and a Democratic governor ten years ago and there was
19 a lawsuit which failed. I believe Senator Jack Crumbly was
20 suing. So I would say this has nothing to do with party, this
21 has everything to do with race.

22 Q Thank you.

23 Your Honor, may I have just a moment with co-counsel?

24 THE COURT: Of course.

25 BY MR. SULLIVAN:

1 Q I'm just about to wrap up, Representative Flowers. One
2 more set of questions about one issue. I'm pretty sure you've
3 looked at your new district that the Board has approved.

4 Correct?

5 A Yes.

6 Q Did you look at other districts also?

7 A Not a lot, but a little bit.

8 Q Are you familiar with -- well, did you notice that
9 there's a district that covers part of Pine Bluff and extends
10 west to Arkadelphia?

11 A Yes, I did notice that.

12 Q Are you familiar with the city of Arkadelphia?

13 A Yes.

14 Q And some parts of Clark County?

15 A Yes. Actually, that's one of the areas I went to too
16 when we were registering, and I got the chance to speak there.

17 Q Great. Do you see any similarities between Arkadelphia
18 and Pine Bluff?

19 A Yes. I think they're both small cities, both have a
20 significant proportion of African-Americans, both college
21 towns, so yes.

22 Q So UAPB is in Pine Bluff. Are there other colleges in
23 Pine Bluff?

24 A Two-year college, SEARK.

25 Q Then in Arkadelphia there's Henderson State University,

1 correct?

2 A Correct.

3 Q Have you looked up the black student population at
4 Henderson State?

5 A I haven't looked it up, but I know that it's significant
6 because my cousin attended Henderson. And I think they have a
7 strong aviation program. And then because I was in the line of
8 work where I recruited at colleges, I just know that they have
9 a strong or a larger population than average of
10 African-American students. And I think they -- I think
11 Henderson has a strong background in teaching teachers.

12 Q Did you do any voter outreach at Henderson State
13 University in the past?

14 A No. Recruitment for UAMS but not voter.

15 Q So you said there was a significant black population at
16 Henderson State. So you saw that yourself?

17 A For sure, yes.

18 MR. SULLIVAN: I pass the witness, Your Honor.

19 THE COURT: Thank you, Mr. Sullivan. Defendants.

20 CROSS-EXAMINATION

21 BY MS. MERRITT:

22 Q Good afternoon, Representative Flowers. My name is
23 Jennifer Merritt. I'm a senior assistant attorney general with
24 the Office of Arkansas Attorney General Leslie Rutledge. I
25 don't believe we've ever had the pleasure of meeting. It's

1 nice to see you today.

2 A It's nice to see you as well.

3 Q We have never met before, have we?

4 A No.

5 Q And I have not had an opportunity to visit with you about
6 what you were going to say today in court, have I?

7 A No.

8 Q So on your direct examination, I think you talked a
9 little bit about some of the burdens of voting here in our
10 state, some of the things such as voter ID. Right?

11 A Yes.

12 Q You talked about absentee voting. Those burdens of
13 voting apply to everyone in our state, right?

14 A Absolutely.

15 Q Folks in poverty may struggle a bit more with those
16 burdens, correct, regardless of race?

17 A So yes and not with -- and I would say not regardless of
18 race because I think that if we look at the statistics of
19 poverty, I would say that there is an over-representation of
20 African-Americans who are impoverished so I don't think we
21 could separate that.

22 Q I wasn't trying to ask you about the statistics of who's
23 in poverty and who's not, but assuming folks who are in poverty
24 struggle with those burdens of voting?

25 A Yes.

1 Q We have a lot of folks in Arkansas who live in poverty,
2 folks who are Caucasians as well as African-Americans. Would
3 you agree with me on that?

4 A I would.

5 Q Okay. Now, on direct, you talked about -- a lot about
6 the responsiveness of the Arkansas General Assembly to issues
7 affecting African-Americans. Do you remember that testimony?

8 A Yes.

9 Q I'd like to switch gears a little bit and talk about the
10 Arkansas Board of Apportionment and its responsiveness to the
11 issues affecting the African-American community. That's why
12 we're here in court this week. Would that be okay?

13 A Sure.

14 Q Are you aware, Representative Flowers, that the Board of
15 Apportionment held eight public meetings around the state of
16 Arkansas to solicit public feedback and share the proposed maps
17 with the community and hear what the community had to say and
18 really wanted to hear from citizens and voters about what
19 everyone thought about their proposals? Do you recall that?

20 A Yes, I do.

21 Q Did you attend any one of those public meetings?

22 A Actually, I attended the one that was held in Jefferson
23 County. They actually came to Pine Bluff given some of the
24 depopulation, so I did attend that one, yes.

25 Q It was my understanding, Representative Flowers, that the

1 meeting that was held in Pine Bluff was held at your specific
2 request, that was not one of the Board's eight public meetings.
3 That was actually a separate meeting held specifically at your
4 request to meet with the African-American leadership in Pine
5 Bluff to address your specific concerns. Right?

6 A Well, so I would correct that and say I wasn't the only
7 one. It was actually precipitated by Representative Calvin
8 Johnson who contacted me, or former representative, to be
9 clear. And I did have concerns prior to that because given the
10 depopulation in the area and I had -- I was even interviewed by
11 the New York Times about how many people had left the area and
12 yet the public meeting that had taken place in the region, took
13 place in Monticello, and not Pine Bluff, so that was why I
14 pretty aggressively reached out and felt like there needed to
15 be some conversations.

16 And I'll add to that that in addition to the depopulation
17 issue, I had received phone calls and even prior to this, but
18 they ramped up during this time about how the local district
19 lines would be affected. People weren't clear. So I had some
20 of my elected officials, but I also had a lot of people who
21 were not local elected officials also concerned about an
22 ongoing issue and concern with regard to the school district
23 lines. And I'd love to impart that in Pine Bluff, we have --
24 or in Jefferson County, we have four school districts. Three
25 of them are in Pine Bluff. And in particular, something that

1 has really been at the forefront ever since I've been a
2 legislator has been the district lines around Dollarway and
3 Pine Bluff School District. Well, Dollarway and White Hall.

4 And I'm pointing this out because this is something else
5 that, connected to the redrawing of districts, is a perception
6 of race-based impacts and race-based focus on what happened in
7 the past affecting our schools and school funding now. I know
8 that's extra, but I wanted to share that so when you're asking
9 me about a meeting that I specifically requested, it was a
10 meeting specifically requested because I did have leaders in my
11 area as well as citizens concerned about the redrawing of the
12 districts and how the legislative lines would be impacted given
13 the number of people who left but also how our school districts
14 would be impacted.

15 Q Okay, thank you for that. Let's unpack that just a bit.
16 You mentioned that the Board of Apportionment, you agreed with
17 me that the Board of Apportionment did hold eight public
18 meetings around the state to solicit public feedback from
19 Arkansans?

20 A Yes.

21 Q You said that the meeting that was held in your area of
22 the state was held in Monticello, not in Pine Bluff?

23 A Correct.

24 Q And you felt that the Board needed to come to Pine Bluff
25 to hear specifically from your community?

1 A Absolutely.

2 Q And the specific area you were worried about, some school
3 district issues and how the legislative lines might affect the
4 school districts in Pine Bluff?

5 A So not the legislative lines but how the depopulation and
6 how the redistricting in general would and how that might feed
7 over, yes.

8 Q Okay. Because you understand that the Board of
9 Apportionment doesn't have anything to do with school
10 districts, right?

11 A Absolutely, I understand that, but I do also understand
12 that people in my district had concern about census information
13 which was being changed as we spoke. We got a certain batch of
14 information and then we were notified that that information
15 would change. So while I knew what the role of the Board of
16 Apportionment was, being a responsive legislator and having my
17 own city and county officials asking questions as well as
18 citizens, I felt that it was important that their questions be
19 answered and that they hear directly from the Board of
20 Apportionment and not me saying, as we often hear from other
21 sectors of government, well, I don't deal with that.

22 Q Right. So you didn't want to pass the buck, you said
23 you're going to handle it. So did you reach out to Colonel
24 Doug House at the AG's office?

25 A I met with him before that meeting, yes.

1 Q Right. And what about Brad Nye, did you meet with Brad
2 Nye as well?

3 A I did.

4 Q Are you aware that Colonel House and Brad Nye were on the
5 attorney general's Board of Apportionment staff?

6 A Absolutely, yes, I did.

7 Q And you asked Colonel House and Brad Nye to come down to
8 Pine Bluff to meet with the community leaders down there to
9 discuss the process with the Board of Apportionment and what
10 was going to happen?

11 A Yes.

12 Q And did they come down to Pine Bluff and have lunch with
13 you personally and visit with you about how that would go?

14 A No.

15 Q How did that work?

16 A When they came down to visit with me, they really came
17 down to visit with me because they didn't think that they would
18 be able to come and meet. And they wanted to talk to me about
19 my district.

20 Q Okay. Then I'll get there. When they had the community
21 meeting in Pine Bluff, did the community meeting in Pine Bluff
22 happen before or after they talked to you about your district?

23 A After they talked to me about my district.

24 Q When they came down to talk to you about your district,
25 they shared the draft map of your district with you, didn't

1 they?

2 A Yes.

3 Q They answered your questions about your draft district?

4 A Yes.

5 Q And they listened to your concerns about particular areas
6 of Pine Bluff that you preferred to represent versus other
7 areas of Pine Bluff, didn't they?

8 A Yes. And I guess I want to be clear, too, that I wasn't
9 clear about what the district was going to look like because
10 they were very emphatic that it could change, but they were
11 still working on other districts around me. We talked about
12 the depopulation. And if I'm thinking back to our
13 conversation, my only concern that I expressed because,
14 honestly, I didn't think that my district was going to be
15 impacted in terms of the majority minority status just because
16 of how the population is situated in Jefferson County, so that
17 was never a conversation or a large part of the conversation,
18 it was more of an acknowledgment.

19 The two concerns that I expressed was the school
20 districts in my district, and we sort of talked about why that
21 was. And then I think I didn't express a concern but just
22 asked whether or not my district would maintain the confines of
23 within the county versus extending beyond, and I think that
24 Colonel House mentioned it could change. He asked me how I
25 felt about it moving down to Sheridan. So there was nothing

1 final about it, it was sort of this is where it's going, we
2 still have to meet with the secretary of state. I'd had a
3 conversation and original meeting scheduled with the
4 representatives from the governor's office, and so I had
5 meetings with a lot of people and everything was in flux.

6 I never met with any representatives from the governor's
7 office when they showed me a map, but I saw a map from the
8 secretary of state's office which was a little different from
9 what I was shown from the attorney general's office. But my
10 sense was my district would stay relatively the same, could
11 change once they all got together and figured out what it would
12 look like.

13 Q Okay. My understanding was that you were interested in
14 keeping the Watson Chapel area to the southwest of Pine Bluff
15 and that you did not want your district to go north to White
16 Hall. Is that right?

17 A Yes, I expressed that as a preference.

18 Q Why was that?

19 A I felt like -- so I already represented the area going
20 down to Watson Chapel. And if I had to take in a new school
21 district, it made sense for me to take in a Pine Bluff school
22 district and not part of another city's school district.

23 Q Thank you. And as I understand it, the AG's board staff,
24 the Board, in fact, made changes to your district to
25 accommodate your request in the final plan that they adopted.

1 Didn't they, Representative Flowers?

2 A Yes.

3 Q And you were happy with the Board's plan for your
4 district, weren't you?

5 A Yes. I've never said otherwise.

6 Q That was going to be my next question. You've never
7 voiced any displeasure at all in the Board's plan for your
8 District 17, have you?

9 A No.

10 Q You've never submitted any public comments in opposition
11 to the Board's plan for any district, have you?

12 A No.

13 Q Going back to the community meeting that board staff held
14 in Pine Bluff, especially at your request, so in addition to
15 the eight public meetings that they held statewide, board
16 staff, Colonel Doug House, and Brad Nye, came down to Pine
17 Bluff specifically to meet with you, and Senator Stephanie
18 Flowers was there, the mayor of Pine Bluff was there, county
19 judge, and various other community leaders to explain the
20 redistricting process, right?

21 A That's correct.

22 Q And they listened to the community's needs?

23 A Yes.

24 Q And they were responsive to concerns of the community at
25 the meeting?

1 MR. SULLIVAN: Objection. This is way outside the
2 scope of direct.

3 THE COURT: Overruled.

4 BY MS. MERRITT:

5 Q Were they responsive to the needs of the community at the
6 meeting?

7 A I think they were responsive to the questions. I
8 couldn't say what happened after that or who else talked to
9 them about their concerns, but I would say they were responsive
10 to the questions and provided information for sure.

11 Q Okay. Thank you. On your direct examination, you were
12 talking a little bit about the illustrative plan district that
13 includes Arkadelphia and parts of Pine Bluff in one district,
14 and I'd like to show that to you for a minute if we could. If
15 we could turn on the ELM0.

16 So, Representative Flowers, what I'm showing you here is
17 on the plaintiffs' illustrative plan, and I'd like to talk to
18 you about this, too, because their proposal for your district
19 is a lot different than the Board's plan. And it reduces --
20 let's talk about it. The plaintiffs propose to make your
21 district a lot different than the Board's plan, and it reduces
22 the black voting age population down to 50.28 percent, whereas
23 the Board's plan is 66.75 percent black. And my question for
24 you is which plan do you like better, the Board's plan or the
25 plaintiffs' proposal?

1 MR. SULLIVAN: Objection. Relevance.

2 THE COURT: She can answer it and I'll take it for
3 what it's worth.

4 THE WITNESS: I don't think that I could -- I mean,
5 you're just putting this in front of me now, so I wouldn't say
6 what plan I like better. But I would say that I would be
7 supportive of and amenable to a plan that drew a district for
8 my community that maintained minority majority status.

9 BY MS. MERRITT:

10 Q The Board's plan maintained majority minority status for
11 your community, didn't it?

12 A Sure.

13 Q Let's talk just a little bit about illustrative plan
14 District 16. And do you see how this reaches -- there's a
15 little kind of finger here that reaches all the way up into
16 Pine Bluff here to the east and it goes all the way west here
17 with another finger to the west into Arkadelphia? Do you see
18 that, Representative Flowers?

19 A No.

20 Q Yes? District 16?

21 A Okay. I see that, yes.

22 Q And you testified that there were some commonalities
23 between the city of Pine Bluff and the city of Arkadelphia.

24 A Uh-huh.

25 Q But given the population shifts and the loss of

1 population in Pine Bluff that you talked quite a bit about
2 today, are you concerned at all that a plan -- that this
3 particular plan for House District 16 would put Pine Bluff at a
4 disadvantage because Jefferson County continues to lose
5 population, both black and white? This would reduce a
6 political influence of Pine Bluff?

7 A Honestly I'm not concerned about the reduction of
8 political influence of Pine Bluff because Pine Bluff is still a
9 larger city. Pine Bluff, from what I'm looking at, would enjoy
10 representation by more than one legislator. And the other
11 thing I would point out is the growth and trajectory that I
12 think a lot of leaders are working on just would not lean
13 toward a concern about continuing decline given the investment
14 that we're seeing.

15 Q It's your sworn testimony today that you think it makes
16 sense to have Pine Bluff and Arkadelphia in the same House
17 district, really? I mean -- I --

18 THE COURT: Let her answer the question.

19 BY MS. MERRITT:

20 Q It makes sense in your mind if you were drawing these
21 districts that as far apart as these are and, as an Arkansan,
22 you believe that those are similar communities?

23 A Yes.

24 Q Okay. In your opinion do you have concerns with regard
25 to your re-election, your chances at re-election in a district

1 that is only 50.28 percent black?

2 A I have concerns any time I have opposition. And the way
3 I look at running for office is, and I'm sure you've heard this
4 before, that when you have opposition, you should run scared,
5 and that's how I look at it. I was born in Pine Bluff, I've
6 lived most of my adult life in Pine Bluff and have really
7 worked hard and sought to establish a relationship really
8 across the state but regionally and especially in my district
9 and in my city, my birth city, where I feel strong and even
10 confident that people know that I'm not going to lie to them,
11 I'm not going to sell them out and I'm going to work hard, and
12 that's what I run on.

13 So, you know, I think I mentioned to you earlier before
14 that the conversation that I had with the AG's office did not
15 center on the numbers and the population because at the end of
16 the day, outside of my broader concern about majority minority
17 districts being kept intact for a lot of the reasons that I
18 explained, as a candidate, in any minority majority district, I
19 have to focus on the 50 percent plus one to victory. And with
20 that, I don't have a concern outside of me being focused on
21 running as a candidate that has expressed the kind of
22 leadership that I've tried to express. And I guess I would
23 just add, too, that, you know, my comments about my district,
24 the lines around my district, my race, are clearly important to
25 me as, you know, the representative for District 17.

1 But honestly, why I'm here today and what I'm testifying
2 to has to do with everything outside of just about me. It's
3 really about the state, it's really about black voters, it's
4 really about all voters, and it's about our system and how it's
5 supposed to work.

6 Q Sure. You would agree with me when you met with --

7 THE COURT: Were you done answering the question?

8 THE WITNESS: Sort of not. But I can --

9 THE COURT: You can keep going if you need to.

10 THE WITNESS: Well, I guess I just wanted to add
11 that, you know, my dream would be to be able to have a
12 conversation with you or anybody and talk about how these
13 district lines don't matter and I'm running a race to be the
14 best candidate and win irrespective of the race of the person
15 who, you know, is running against me. That's not my reality,
16 though, and that's not the reality for voters. And so, you
17 know, I just wanted to be clear that whatever I want or think
18 or whatever my preferences are for the district that I want to
19 run in, you know, for my race is consistent with, but not
20 specific to what I'm trying to impart in my testimony here
21 today.

22 BY MS. MERRITT:

23 Q Thank you for that. I appreciate it. You understand,
24 I'm sure, Representative Flowers, because you juggle a lot as a
25 representative, and constituents have a lot of competing

1 interests, and likewise, the Board of Apportionment is trying
2 to draw 100 House districts and had to balance and juggle a lot
3 of competing interests. You would agree with me there,
4 wouldn't you?

5 A I suspect so.

6 Q So are you familiar with the redistricting criterion
7 goals that the Board published?

8 A Yes, I am.

9 Q So the number one goal and the one that they said was an
10 absolute legal requirement and was their top priority was the
11 One-Person, One-Vote and they were trying to reach a zero
12 percent variance and equalize the population as much as
13 possible. Are you aware of that, Representative Flowers?

14 A I am aware of that and I think that that is an important
15 goal and clearly a very significant criteria, but it's a
16 criteria among many. And I didn't dig way deep into this
17 process because there is a Board of Apportionment. And my
18 focus -- because in the special session, we were focusing on
19 the congressional lines, so I'm a little more familiar with
20 that process. I also know that when looking at -- and because
21 of that, I know that when you're looking at population
22 variance, trying to get to as close to zero percent variance I
23 think on paper is it looks good and is important to adhere to
24 that criteria, but, for example, with the congressional
25 districts, you had a situation where Pulaski County was split

1 three ways and split particularly in areas that were where
2 there were a majority of black and brown people.

3 And I'm making that point because while some of my
4 colleagues felt it was important to get as close as possible to
5 zero percent variance, it ignored the fact that you have
6 extreme growth in northwest Arkansas, or you had extreme growth
7 in minority populations in those areas. So a zero variance in
8 Pulaski or Pulaski County or in northwest Arkansas is different
9 than a zero variance in Sheridan or a zero variance in Pine
10 Bluff. And so I guess I would just say to you that that's an
11 important criteria, but I think you have to look at population
12 growth, depopulation in an area, in a region when you're
13 drawing those lines.

14 Q And I appreciate your opinion, but the Board of
15 Apportionment is the decision-maker and policy-maker here. Can
16 we agree on that?

17 A Absolutely.

18 Q And they set --

19 A It's not me.

20 Q And they set their goals and criteria and they prioritize
21 those. Can we agree on that?

22 A You're saying they set their criteria or is it based upon
23 the law?

24 Q The Board set their own goals and criteria based on the
25 law and based on their understanding and what they wanted to do

1 in terms of the geographic principles?

2 A Sure.

3 Q And that's within their discretion to do under the bounds
4 of the law and the state constitution, correct?

5 A Sure.

6 Q In terms of you mentioned splitting up Pulaski County for
7 state congressional districts in order to equalize variances,
8 and even under the plaintiffs' proposed plan here, we're
9 slicing and dicing Pine Bluff to equalize districts and create
10 a lot of minority majority districts, so I guess my point is
11 here, redistricting inherently is a human activity, correct,
12 political activity? Would you agree with me on that?

13 A Absolutely it's a political activity, but it's also a
14 political activity that must also take into account the impact
15 to voters, to minority voters who have been disenfranchised for
16 centuries or decades, I'd say. I guess my point is it's more
17 than one criteria, and I guess that's the point I was trying to
18 make about when you asked me about the zero variance, it's more
19 than one criteria. And so while, you know, I understand the
20 point you're trying to make with the map, but you're talking
21 about to your point, 100 legislators and district lines for 100
22 legislators in the House of Representatives versus the example
23 I was trying to give.

24 So I think it -- I mean, I think it was an apple and
25 oranges sort of comparison because the point I'm trying to make

1 is that process was used to disenfranchise voters in the
2 Pulaski County split in the capital city where you have four
3 congressional districts. And you still -- in that process, the
4 law was not followed as it related to all the criteria. And
5 here what you just showed me was an area with larger
6 population, and the voters in that county are not inherently
7 split up and disenfranchised among those hundred district
8 lines.

9 THE COURT: Ms. Merritt, about how much longer do
10 you have?

11 MS. MERRITT: Almost done, Judge.

12 BY MS. MERRITT:

13 Q Just so we're clear, Representative Flowers, I didn't
14 mean to imply that One-Person, One-Vote was the only criteria,
15 there was eight or nine of them posted on the website. So my
16 point is simply if you and I could agree, the Board was
17 balancing a lot of different criteria and you can't meet all of
18 them in drawing a map for 100 House districts. Can we agree?

19 A I would disagree with that.

20 Q You would disagree? You believe you can meet them all?

21 A Better, yes.

22 Q Okay. I appreciate it. I don't have -- give me one
23 minute to confer with my team. Okay. I have no further
24 questions. Thank you for your time today.

25 THE WITNESS: Sure.

1 THE COURT: Mr. Sullivan?

2 MR. SULLIVAN: No questions, Your Honor.

3 THE COURT: Wise man. Thank you very much for your
4 testimony, I appreciate it. We're going to take a ten-minute
5 break. You all should go about your business. I'm going to
6 stay here for a couple minutes and then I'll probably skedaddle
7 out for a second.

8 (Recess at 5:30 PM.)

9 REPORTER'S CERTIFICATE

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

12

13 /s/ Karen Dellinger, RDR, CRR, CCR

14 -----
United States Court Reporter

Date: February 4, 2022

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1 (Proceedings continuing at 5:49 p.m.)

2 THE COURT: While we're trying to do that, let me talk
3 to you about some administrative stuff. Number one, I'm going
4 to try to go as late as we can feasibly go tonight. Now, that
5 doesn't mean midnight. I mean probably eight or 8:30, I think,
6 before we all can't do this anymore at least in any reasonable
7 fashion, but I want to see how far we can get.

8 Let me ask plaintiffs, who is next for you all?

9 MR. TOPAZ: Your Honor, we're going to call Dr. Jay
10 Barth.

11 THE COURT: Okay. Like I asked before, I assume that
12 means you have some type of agreement with the defendants that
13 we can do this before the cross-examination of the one witness
14 that's still open.

15 MR. TOPAZ: Yes, Your Honor.

16 THE COURT: Okay. I am fine with that.

17 In terms of Mr. Fairfax, when do you all intend to have him
18 sit for cross-examination?

19 MR. STEINER: I believe he will be first up Friday
20 morning then. But his flight tomorrow is canceled anyway, so I
21 think he's on a Friday afternoon flight, so I know he will need
22 to finish. I think we will need to take one of the plaintiffs'
23 experts out of turn then, which will also need to be on Friday.
24 I think we're working around all of the rest of the potential
25 scheduling issues.

1 THE COURT: Okay. Now, here's the one quirk that
2 everybody needs to be aware of. There is always the chance that
3 the courthouse is going to be closed on Friday. I don't know
4 how long this is going to last, and there's at least the
5 suggestion that it may be more than 24 hours. I don't know. So
6 I just don't want us to get into a situation where somebody
7 tells me that one of your witnesses who is currently open,
8 specifically Mr. Fairfax, had to leave and cannot come back for
9 cross-examination. It's particularly important to me for the
10 expert witnesses that they are cross-examined live. So as long
11 as you all can make the commitment that any open witness will be
12 here live whenever we get going again, I'm comfortable to do it
13 this way. I take it you all can make that commitment.

14 MR. STEINER: I'm sure that we can have him here -- if
15 Friday is closed also, it might be more re-juggling, but I'm
16 sure that he will testify live for cross-examination sitting in
17 the chair there at some point before the hearing ends.

18 THE COURT: I take your point, and I appreciate it,
19 and I agree with it. Okay. So I am fine proceeding like that.

20 One thing, just for everybody to know, is that after hours,
21 which is definitely now, the front door to the courthouse
22 closes. So sometimes -- and this more happens with jurors than
23 attorneys. But sometimes, if people feel like they need to run
24 out to their car or something, they find that when they try to
25 get back in, they can't. So if for some reason you all need to

1 leave the courthouse while we're in session tonight, please make
2 sure you talk to Heather about it. Heather will be able to
3 figure out a way to get somebody to go with you, to then let you
4 back in, and we can figure out how to do that. But I just don't
5 want people to get sort of accidentally stuck outside when they
6 need to get back in.

7 Before we go on to the next witness, does anybody else from
8 the parties have something administrative for me? Defendants?

9 MS. MERRITT: No, Your Honor.

10 THE COURT: Plaintiffs?

11 MR. SELLS: No, Your Honor.

12 THE COURT: Very good. We can go on.

13 MR. TOPAZ: Dr. Jay Barth, Your Honor.

14 **JAY BARTH, PLAINTIFFS' WITNESS, DULY SWORN**

15 MR. TOPAZ: Your Honor, we are going to do our best to
16 be as streamlined as possible, but we do anticipate that Dr.
17 Barth's testimony will take us beyond seven o'clock, as you
18 rightly surmised. Dr. Barth is, unfortunately, unavailable for
19 at least much of tomorrow, so we're going to do everything we
20 can to finish tonight.

21 THE COURT: Defendants, just so you know, that means
22 we're going to finish tonight with Dr. Barth, so we're going as
23 late as we need to.

24 MR. MOSLEY: Yes, Your Honor.

25 **DIRECT EXAMINATION**

1 BY MR. TOPAZ:

2 Q. Dr. Barth, nice to see you.

3 A. Good to see you.

4 Q. Can you please state and spell your name for the record.

5 A. Yes. It's Walker Jay Barth, W-a-l-k-e-r J-a-y, last name
6 B-a-r-t-h.

7 Q. What's your educational background?

8 A. I received my bachelor of arts from Hendrix College with a
9 degree in American studies in 1987. And then I went to the
10 University of North Carolina at Chapel Hill, where I received my
11 masters in 1989 and my Ph.D. in 1994.

12 Q. Could you describe your career trajectory for the Court?

13 A. Yes. So I came -- after completing my coursework at Chapel
14 Hill, I came straight back to Arkansas and returned to Hendrix
15 College and was a professor there for 26 years, culminating as a
16 distinguished professor the last number of years that I was at
17 Hendrix.

18 Q. In those 26 years as a professor, what have been your main
19 areas of expertise?

20 A. They have included a particular focus on elections,
21 political parties and elections, the politics of the American
22 South, Arkansas politics and government, the politics of
23 education. And that has been the real kind of centerpiece of my
24 work, although I've taught some other classes as well.

25 Q. Would you consider race in American politics part of your

1 expertise?

2 A. Indeed. Of course, it's central to the politics of the
3 American South. But I also did teach a seminar course on race
4 in American politics as well.

5 Q. Since you mentioned a course you taught. What are some
6 other courses that you've taught over the course of your career?

7 A. I've taught American Constitutional Law; Gender, Sexuality
8 and American Politics; American Political Thought and some other
9 political thought courses. I taught a course on the cradle to
10 prison pipeline, some variety of courses of that type.

11 Q. Do you have any publications in peer-reviewed journals
12 related to your areas of expertise?

13 A. Yes. I do have a number of single author and multi-author
14 publications.

15 Q. Do you have a ballpark number for how many publications?

16 A. It's I think about -- peer reviewed is probably in the low
17 twenties. I'm not sure of the exact number.

18 Q. Can you name just a couple of journals where you might have
19 had articles published?

20 A. Yeah. *Social Science Quarterly*; *Political Behavior*;
21 *Politics and Policy*; *State Politics*; *Politics and Policy*
22 *Quarterly*. Those are some of the journals.

23 Q. Have you authored any books about Arkansas government or
24 history?

25 A. Yeah. I was the co-author with the late Diane Blair of the

1 second edition of *Arkansas Politics and Government: Do the*
2 *People Rule?*

3 Q. How would you describe the methodology that you use in your
4 published work?

5 A. You know, most political scientists kind of either fall
6 pretty neatly into a quantitative camp -- and I would say that's
7 the bulk of political scientists. Other political scientists
8 really are more qualitative in their research. My work is
9 really kind of at the intersection of those in that my work
10 really kind of combines both qualitative and quantitative
11 methodology depending upon the research question at hand.

12 Q. Do you have experience with survey work in Arkansas?

13 A. I do. For the last dozen years I've been part of the team
14 that has put together and carried out the Talk Business &
15 Politics - Hendrix College survey. So that has been kind of a
16 core piece of my work for the last dozen or so years. I've also
17 done other survey-based work, including some co-authored pieces
18 with Janine Parry, who is at the University of Arkansas, an
19 alliance on the Arkansas Poll.

20 Q. Have you received any awards for your scholarship and/or
21 teaching?

22 A. Yeah. I was the Arkansas professor of the year, which is
23 an award given annually by some national groups. I also was
24 awarded by the Arkansas Political Science Association a
25 distinguished scholars award for my work in Arkansas politics

1 and in other areas.

2 Q. Dr. Barth, how long have you lived in Arkansas?

3 A. Since I was born, aside from my time at Chapel Hill and a
4 couple of other short stays away.

5 Q. At the risk of divulging your age on the record, how many
6 years have you been an Arkansas voter?

7 A. My first election was in 1984. I didn't know there would
8 be math in this testimony, but whatever that is -- 38.

9 Q. Are you a member of any community service, governmental,
10 clinical or nonprofit organizations?

11 A. Yes. All of the above. I've been a nonprofit board member
12 for a number of organizations, mostly in Arkansas, but some that
13 were outside the state as well. Those have included -- I don't
14 know. Do you want me to go through a list, or do you want --

15 Q. Briefly, please.

16 A. Yeah. So that has included work with the Single Parent
17 Scholarship Fund of Pulaski County, the Arkansas Single Parent
18 Scholarship Fund, the American Civil Liberties Union, which I'm
19 a board member of, and some other organizations. Arkansas
20 Advocates for Children and Families is another organization.

21 Q. Any political organizations that you are a member of?

22 A. Yes. I've been active in the Democratic Party since
23 returning to the state in 1996 in a variety of ways at the local
24 level and at the state level. I am currently one of Arkansas's
25 representatives to the Democratic National Committee, and I was

1 a delegate to the Democratic National Convention on two
2 occasions. I did run for office unsuccessfully in 2010 as a
3 Democratic candidate for the Arkansas State Senate.

4 Then, in terms of governmental activities, I've been on a
5 variety of state commissions. But my most kind of long-term
6 service was on the Arkansas State Board of Education, which I
7 was on for a seven-year term and chaired for two years. And
8 currently I am the chief education officer for the City of
9 Little Rock.

10 Q. Let's talk about your involvement in this case. What were
11 you asked to do as it pertains to this litigation?

12 A. Yes. I was asked to look at the so-called Senate Factors,
13 particularly to look at Senate Factors 1, 3, 5, 6 and 7 and
14 analyze the degree to which Arkansas's political and social
15 history at present support those Senate Factors.

16 Q. Can you briefly describe what the Senate Factors are?

17 A. Yes. So Senate Factor 1 looks at the history of the
18 state's racial dynamics.

19 Q. If I could interrupt you. Sorry, Dr. Barth. I meant more
20 broadly, what the Senate Factors are, where they come from, what
21 their role is.

22 A. Yeah. I apologize. So this, of course, goes back to the
23 1980s and the U.S. Senate Judiciary Committee's laying out of
24 seven numbered factors and two additional factors that are key
25 criteria in determining whether violations of the Voting Rights

1 Act have expressed themselves.

2 Q. As it pertains to this case, were you asked to examine
3 Senate Factor 2, which relates to racial polarization in voting?

4 A. No, I was not.

5 Q. Can you discuss the methodology you used for your analysis
6 in this case?

7 A. Yeah. I mean, much like my kind of overarching
8 methodological bit, it did mix some qualitative and quantitative
9 work depending upon the factor and the nature of evidence that
10 is important to kind of answer the question related to that
11 factor. So I did use different data to answer that question.
12 Some was historical in nature. Some was reliant upon census
13 data and analysis of census data. Other of it was more focused
14 on particularly examinations of political science research on
15 key questions that come into play with the Senate Factors that I
16 was examining.

17 Q. Did you also look at primary sources for the support?

18 A. I did. I did.

19 Q. Do you have a general ballpark for how many sources you
20 relied on for this report?

21 A. I don't know exactly. I think there are a hundred and
22 something footnotes -- that pretty much probably matches -- plus
23 some number of sources that were examined.

24 Q. How did you determine which sources to rely on for purposes
25 of this report?

1 A. It was very much issue by issue. The Senate Factor 1,
2 which, of course, looks at the racial history of the state,
3 that's very historical. Right? So that's a combination of
4 primary sources and historians who have examined those issues.

5 With Senate Factor 5, for instance, which, of course,
6 focuses on kind of the current state of Arkansas when it comes
7 to racial disparities in economics, in healthcare, in education,
8 and how that ties to political activity, that's a much more
9 focus on census data and other data like that that really
10 provides an analysis, statistical analysis, of where the state
11 is now. So it very much depends upon the question at hand what
12 type of data is looked to, what types of sources are looked to.

13 Q. And I think you testified earlier that these are sources
14 that are typically used by historians in their published work.

15 A. Historians and political scientists and other social
16 scientists.

17 Q. Are these the types of sources that you typically use in
18 your published work outside the context of this case?

19 A. Yes, very much so.

20 Q. Do you believe that the methodology you used for this
21 report is generally consistent with the methodology you used for
22 your published work?

23 A. Yes. It was a slightly shorter time frame, yes.

24 Q. For all of us. Dr. Barth, I'm going to show you what's
25 been marked as P-9. Dr. Barth, what is this document?

1 A. This is the preliminary report that I submitted, and it
2 lays out my analysis of those five Senate Factors that I
3 mentioned before.

4 Q. Does this report still represent your opinions in this
5 case?

6 A. It does. There is one correction in the follow-up report
7 that is noted, but otherwise it remains my view.

8 Q. If we could go to page 61. Dr. Barth, is this the first
9 page of your curriculum vitae or CV?

10 A. Yes.

11 MR. TOPAZ: I would like to offer P-9 into evidence,
12 Your Honor.

13 THE COURT: Any objection?

14 MR. MOSLEY: Your Honor, we do not object.

15 THE COURT: It's admitted.

16 (Plaintiffs' Exhibit 9 received in evidence.)

17 BY MR. TOPAZ:

18 Q. Thank you. Dr. Barth, I'll show you what's been marked as
19 P-14. What is this document, Dr. Barth?

20 A. It's a short supplemental declaration that responds to some
21 of the issues raised in the defendants' response.

22 Q. Does this supplemental declaration still represent your
23 opinions in this case?

24 A. Yes.

25 MR. TOPAZ: Your Honor, we would like to offer P-14

1 into evidence.

2 THE COURT: Any objection?

3 MR. MOSLEY: No, Your Honor.

4 THE COURT: It's admitted.

5 (Plaintiffs' Exhibit 14 received in evidence.)

6 BY MR. TOPAZ:

7 Q. Based on your evaluation of the Senate Factors, the five
8 Senate Factors that you mentioned, what opinion, if any, did you
9 arrive at as it pertains to this case?

10 A. It was my view based on my analysis that each of the five
11 Senate Factors had been met by the evidence.

12 Q. And that would be Senate Factors, just so the record is
13 clear, Senate Factors 1, 3, 5, 6 and 7. Is that correct?

14 A. Yes.

15 Q. Let's talk about them in a little bit more detail. Let's
16 start with Senate Factor 7.

17 A. Okay.

18 Q. What were you tasked with in assessing Senate Factor 7?

19 A. Senate Factor 7, the goal is to determine the degree to
20 which black Arkansans have been underrepresented, evenly
21 represented or overrepresented when it comes to their place in
22 political offices across time but particularly in the present.

23 Q. And how do you determine whether a particular group, in
24 this case black Arkansans, is underrepresented, adequately
25 represented or overrepresented?

1 A. Yeah. So it would basically be an examination of the
2 percentage of African-Americans in the population and then,
3 comparatively, the percentage of African-Americans who hold
4 certain political offices. And if the percentage was the same,
5 then that would be kind of even representation. If the
6 percentage of officeholders who are black was less than the
7 percentage of Arkansans who are black, then that would be
8 underrepresentation. And, conversely, of course, if there
9 happened to be more elected officials who are black, a greater
10 percentage who are black than the percentage in the general
11 populus or the voting age population, that would be an
12 overrepresentation, which does not happen very much.

13 Q. How did you determine the race of the elected officials for
14 the offices that you examined?

15 A. Yeah. Of course, with past historical data, it's relying
16 upon historical documents and their descriptions. With
17 contemporary figures, it really does rely upon the way in which
18 those political officeholders presented themselves to the
19 public, whether they joined caucuses like the Legislative Black
20 Caucus. Those would be some kind of evidence of candidates or
21 officeholders' race.

22 Q. Let's talk about some offices in Arkansas. Dr. Barth, how
23 many black members are in the Arkansas House of Representatives?

24 A. There are 12.

25 Q. Is that consistent with what you said in your initial

1 preliminary report in this case?

2 A. No. I did make an error in that regard.

3 Q. What findings, if any, did you make with regard to black
4 representation in the State House and the State Senate?

5 A. In both cases there is underrepresentation. The percentage
6 of African-Americans in the populus is approximately 16 percent.
7 Of course, in the State House the percentage of
8 African-Americans is 12 percent. The State Senate, it is the
9 high single digits.

10 Q. What was the state of black representation in the State
11 Legislature from the late 19th Century to the 1970s?

12 A. It was nonexistent from the era of disenfranchisement from
13 the mid-1890s until 1972, after the Voting Rights Act and the
14 redistricting following the passage of the Voting Rights Act.

15 Q. What findings, if any, did you make regarding the extent to
16 which black members have been elected to State House districts
17 that are not majority black?

18 A. So there is one district that -- what I have found really
19 since the late 19th Century, there was really only one district
20 where a black legislator has been elected, and that is a
21 district that was numbered 78. I think it has a new number now
22 with its alteration, but it was District 78, which was in Fort
23 Smith. And that district did have a black representative from
24 2012 until the present day.

25 Q. There have been two members who have represented that

1 district since that time. Is that correct?

2 A. Yes, sir.

3 Q. Two black members I should say. Is that correct?

4 A. Yes.

5 Q. How many elections with regard to those black members were
6 contested for District 78?

7 A. None were contested either in the primary or the general
8 election.

9 Q. So how many black candidates have won a contested State
10 House race in a non-majority black district since the late 19th
11 Century?

12 A. None.

13 THE COURT: May I stop you there for a second? If
14 this is not your area of expertise, just say it's not your area
15 of expertise. As a political scientist, what am I supposed to
16 take from the fact that nobody has run against these two black
17 candidates? Is it just that people sort of willy-nilly decided
18 not to run, or is it that they knew these black candidates were
19 going to win and so they didn't bother putting up somebody
20 against them?

21 THE WITNESS: Yeah. It's a great question, Your
22 Honor. I do not know the specific political dynamics at play in
23 those races. I think that there are a variety of reasons why
24 black candidates don't challenge, and I just do not know.

25 THE COURT: Okay. I appreciate it. Thank you.

1 MR. TOPAZ: Thank you, Your Honor.

2 BY MR. TOPAZ:

3 Q. Let's run through some other offices quickly. What
4 findings, if any, did you make with regard to the rates of
5 election to the state judiciary among black Arkansans?

6 A. Yes. Of course, the Arkansas Supreme Court is elected
7 statewide, and there have not been any Arkansans of color
8 elected to the state supreme court. There have been a couple
9 who have been appointed over the years. The state court of
10 appeals is represented by a district. There is significant
11 underrepresentation at the court of appeals level and has been
12 since its creation in the late 1970s. Then at the lowest
13 courts, the lowest state courts, the circuit courts and the
14 district courts, there is also significant underrepresentation
15 in those courts as well.

16 Q. What findings, if any, did you make regarding the rates of
17 black Arkansans to statewide offices in Arkansas?

18 A. Based on my evidence, there has been one statewide elected
19 official in the state's history who was elected. That was in
20 the 1870s. Mr. Corbin was elected the superintendent of
21 education at that time. There have been a couple of other
22 appointed individuals of color who were appointed to statewide
23 office. But that has also been, of course, dramatic almost
24 total underrepresentation.

25 Q. How about the rates of election of black Arkansans to

1 federal office?

2 A. There have been no black Arkansans who have represented the
3 State of Arkansas either in the U.S. Senate or the U.S House of
4 Representatives in the state's history.

5 Q. What findings, if any, did you make with regard to black
6 representation among Arkansas mayors?

7 A. The percentage of black mayors in the state
8 under-represents the percentage of Blacks in the population.
9 That has been true really across time. There, unfortunately,
10 has shown to be some decrease in the number of black mayors in
11 the last couple of decades as well.

12 Q. What findings did you make with regard to black
13 representation in other local offices?

14 A. Although this data is a little bit more difficult to come
15 by because it's not as carefully kind of collected as some of
16 the other offices, the evidence is that the percentage of black
17 Arkansans in those elective offices is in the single digits
18 while the percentage of black Arkansans in the total population
19 is about 16 percent. So there is a disconnect, an
20 underrepresentation at the local level as well.

21 Q. So, all told, Dr. Barth, what finding did you make with
22 regard to Senate Factor 7?

23 A. It's my view that the evidence supports that for black
24 Arkansans Senate Factor 7 is met.

25 Q. Let's move on to Senate Factor 3. What were you tasked in

1 assessing this Senate Factor?

2 A. Senate Factor 3 focuses on the mechanics of elections,
3 things such as majority rule or at-large districts and the
4 degree to which they impact black Arkansans' ability to gain
5 office.

6 Q. Let's talk about a few of these in your report. What are
7 majority vote requirements?

8 A. So majority vote requirements, a majority vote is
9 50 percent plus one. And a majority vote requirement would be a
10 requirement at any stage of the electoral process, whether
11 that's in a party primary or whether that's in a general
12 election, that there is a majority rule requirement in law.

13 Q. And this would be contrasted with an election where you
14 could win by a plurality? Is that the idea?

15 A. Exactly. And plurality would be where just getting the
16 most votes gets one elected to office. And there are some other
17 mechanisms, such as a 40 percent requirement, that's in place in
18 a couple of places as well. So there are different mechanisms
19 that are used. But those are the two biggies, a plurality vote
20 and majority.

21 Q. To what extent are majority vote requirements used in
22 Arkansas?

23 A. They are used quite a bit, in different ways in different
24 offices. The primary way in which a vote -- majority vote
25 requirement really comes into play for state offices, state

1 executive branch offices and state legislative offices, is in
2 party primaries. And state law does require a majority vote to
3 gain a party nomination that places one on the general election
4 ballot. Now, at the general election, there is not a majority
5 vote requirement. But to get to that ballot, there is a
6 majority vote process in the party primaries.

7 Q. And that includes the State House, primary State House. Is
8 that right?

9 A. The State Legislature and other statewide executive
10 offices.

11 Q. Why, if they do, do majority vote requirements tend to
12 enhance the opportunity for discrimination against black
13 citizens?

14 A. So assuming that there is racially polarized voting, it
15 makes it decidedly more difficult for a black electorate to
16 elect a black candidate if there is a majority vote requirement.

17 Q. You said that if no one wins the majority you go to a
18 runoff election in a majority vote system? Is that right?

19 A. Correct. That's the mechanism that's used in Arkansas.

20 Q. Do we have any data as to the participation rates of black
21 citizens in runoff elections?

22 A. Runoff election turnout tends to be lower than turnout in
23 other elections. It is an off election. It is kind of a de
24 facto special election. There is a reduction in the entire
25 electorate. As a whole, we do know that in Arkansas the black

1 electorate is decidedly low based on census data.

2 THE COURT: Can I stop you there for a second?

3 MR. TOPAZ: Sure.

4 THE COURT: Have you looked at, or do you know how
5 many actual cases there are in a primary for a State House race
6 or a statewide office -- I don't really care which one at this
7 point -- how many real life examples there are of a black
8 candidate winning the plurality and then losing the majority
9 during the runoff?

10 THE WITNESS: I do not know that. I do know that
11 there are cases where there was racially polarized voting and
12 the fact that it was a majority -- there are a couple of cases
13 of two candidates running against each other, one black, one
14 white, in a majority black district, where the white candidate
15 beat the black candidate, and there was racial polarization in
16 the voting. That is not -- it doesn't exactly answer your
17 question.

18 THE COURT: Right. If it was only two candidates, at
19 least as I understand it -- tell me if I'm wrong. Whether or
20 not it was a plurality versus a majority, at least in practical
21 terms, wouldn't have mattered in that election. So what I'm
22 trying to figure out is are there real life examples where a
23 black Democratic candidate won a plurality but then lost the
24 runoff.

25 THE WITNESS: I do not know of -- I cannot think of an

1 example. I do not know of an example of that.

2 THE COURT: Okay.

3 BY MR. TOPAZ:

4 Q. Dr. Barth, do we have any data on the impact of majority
5 vote requirements on black representation from anywhere in
6 Arkansas?

7 A. I think we see clear evidence -- could you ask that
8 question one more time?

9 Q. Of course. I was wondering if we have any data on the
10 impact of majority vote requirements on black representation
11 anywhere in Arkansas.

12 A. Yeah. The best evidence that we have is really some
13 analysis from the City of Little Rock, which really has changed
14 its vote thresholds across time and at one point had a
15 requirement of majority rule and then moved to a plurality
16 system for the city board. And in Little Rock, as that
17 happened, the number of black representatives on the city board
18 did go up, and they were more successful in plurality elections
19 than in majority rule elections.

20 Q. Let's move to off-cycle or off-year elections. Can you
21 explain what those are?

22 A. Yeah. So an off-year election is an election either in a
23 non-presidential even numbered year or, in some rare instances,
24 in an odd numbered year. So this would be an election that
25 takes place away from a presidential election.

1 Q. To what extent does Arkansas have off-cycle elections?

2 A. Arkansas is quite dependent upon off-year elections,
3 non-presidential year elections for all statewide offices. And
4 when it comes to the State House and the State Senate, of course
5 it is half the time that an election takes place in a
6 presidential year or in an off-year election because of the
7 nature of the timing of those elections.

8 Q. What does the social science say about the impact that
9 off-cycle elections have on the black population relative to the
10 total population?

11 A. In the electorate?

12 Q. Yes.

13 A. Yeah. So the evidence is pretty clear that a presidential
14 cycle creates an electorate that looks more like the state as a
15 whole in that black voters and other voters who tend to be
16 underrepresented in kind of a special election or an off-year
17 election, they tend to turn out at higher rates, and therefore
18 the presidential year electorate looks more like the population
19 as a whole. In off-year elections, there is a diminishment of
20 voters of color, including black voters and some other voting
21 groups, such as younger voters.

22 Q. Just to make that clear for the Court, it seems that
23 everyone's voting rates go down in off-year elections. Is that
24 correct?

25 A. That is correct.

1 Q. But that the rate at which black folks vote in off-year
2 elections is disproportionately less as they do in presidential
3 elections compared to other racial groups. Is that right?

4 A. That's exactly right.

5 Q. Finally, let's talk about at-large elections. Can you just
6 briefly define what those are?

7 A. Yeah. So an at-large election is where multiple candidates
8 might be elected to office for a geographical area covering a
9 larger population. Most -- many other elections are single
10 member district elections where there is one representative
11 elected to serve a very small and discrete geographical area.
12 So, for instance, if you have five members of a city board, if
13 all five of them are elected at large, the entire city votes for
14 those five. If it's single member, those districts would be
15 broken into five geographical areas of equal population size
16 abiding by one person, one vote. And there would be one person
17 elected from each of the five areas.

18 Q. To what extent, if at all, does Arkansas have at-large
19 elections?

20 A. Arkansas had a history of at-large elections in state
21 legislative races, but that has ended. There are, of course --
22 at-large elections for the state supreme court and for other --
23 all statewide offices, of course. But the place where we really
24 see a lot of at-large elections is in continued use in municipal
25 government and in school elections. So kind of closest to the

1 grass roots, that's where we tend to see the greatest use of
2 at-large elections.

3 Q. Do we have any data on the impact that at-large elections
4 have on black citizens either generally or in Arkansas?

5 A. Yeah. We have some general evidence from the political
6 science literature, more nationally. The one kind of
7 quantitative analysis we have in Arkansas is, again, from the
8 City of Little Rock, which has changed systems in that regard as
9 well, moving from -- in fact, Little Rock combines at-large
10 elections and single member districts, wards, in the same
11 system. And there are -- there have been more black individuals
12 elected in the ward elections than in the at-large elections in
13 the same city at the same time -- in the same time period.

14 Q. You mentioned some national data, some social science about
15 the impact of at-large elections outside of Arkansas as it
16 relates to racial disparities. Could you describe that briefly
17 for the Court?

18 A. Yeah. A lot of this research has been done around
19 municipal politics. That's kind of where the area of the
20 research has been most vibrant, although there's been research
21 elsewhere on other levels as well. But especially in municipal
22 governments, we tend to see higher rates of representation for
23 traditionally groups that have traditionally been left out of
24 the process, including African-Americans, when it comes to
25 single member districts.

1 Q. So all told, what finding did you arrive at as it pertains
2 to Senate Factor 3?

3 A. As a whole, I find it is my view based on the analysis that
4 Senate Factor 3 is also met by the evidence in Arkansas when it
5 comes to black Arkansans.

6 Q. Let's turn really quickly to Senate Factor 1. Dr. Barth,
7 what were you tasked with in looking at Senate Factor 1?

8 A. My task there was to look at the history of official
9 discrimination against Blacks in the State of Arkansas and the
10 degree to which that occurred, and some legacy of that remains.

11 Q. Did you come to a finding as to Senate Factor 1 in your
12 report in this case?

13 A. Yes. In a variety of ways I found the official
14 discrimination against African-Americans was wide ranging and
15 over an extensive period of time.

16 Q. I would like to bring up P-70, paragraph one.

17 Your Honor, the parties have arrived at a stipulation,
18 which is Arkansas has a long history of official discrimination
19 that touched upon the rights of African-Americans to register,
20 to vote and to otherwise participate in the political process.
21 Because of the stipulation and the fact that it's late, I would
22 be happy to move beyond Senate Factor 1 unless Your Honor has
23 questions.

24 THE COURT: I don't have any questions on Senate
25 Factor 1.

1 MR. TOPAZ: Thank you, Your Honor.

2 You can take that down.

3 BY MR. TOPAZ:

4 Q. Let's move on to Senate Factor 6, Dr. Barth. What were you
5 tasked with in assessing Senate Factor 6?

6 A. Senate Factor 6 looks at the degree to which there are
7 racial appeals that are the part of campaigns, that are used in
8 campaigns, whether they are overt or explicit or whether they
9 are more subtle or implicit.

10 Q. A few terms we should probably break down there. First,
11 let's start with racial appeal. What do you mean by racial
12 appeal?

13 A. A racial appeal would be kind of the employment of race
14 either in a very clear way that uses racial terminology or in a
15 way that relies upon stereotyping about individuals based on
16 their race to activate or move voters towards a particular
17 candidate or away from a particular candidate.

18 Q. You said -- used the terms "explicit" and "implicit."
19 Could you just briefly explain those terms and how they differ?

20 A. Yeah. So an explicit appeal is the use of a particular
21 specific -- usually in text, an explicit reference to a racial
22 group, whether that's Latinos or Blacks or other racial groups,
23 Asian-Americans. It could even, of course, involve the use of
24 racial epithets. That would be an explicit appeal. An implicit
25 appeal is a reliance upon stereotypes that have been bought into

1 by the voting electorate and really through more subtle
2 text-based appeals, through visuals or through descriptors that
3 those stereotypes get activated. So it's not an explicit appeal
4 that is I think quite obvious and often, especially in the
5 modern world, creates a backlash. It's a much more kind of
6 implicit or subtle appeal.

7 Q. In your analysis in this case, did you find examples of
8 racial appeals in recent Arkansas campaigns?

9 A. Yes. Both explicit and implicit.

10 Q. Let's talk about some of those. Let's start with explicit.
11 What explicit racial appeals in recent years have you found in
12 Arkansas politics?

13 A. You know, there are a number of cases in which candidates
14 for office, or in some cases officeholders who are running for
15 re-election, have used racial epithets. These have come to
16 light whether they were used on social media or whether they
17 were caught on audio. And in a number of cases those
18 individuals have had to resign or leave a race for office.

19 Q. Are there any individuals running for office currently who
20 have made explicit racial appeals in Arkansas?

21 A. There is one candidate running for lieutenant governor who
22 has I think in Twitter -- on Twitter walked very close to the
23 line in terms of -- so implicit that they are explicit in terms
24 of references to especially descriptors about Little Rock and in
25 other ways.

1 Q. Let's talk about some specific races, Dr. Barth. What
2 examples, if any, did you find regarding racial appeals in
3 recent congressional races?

4 A. The examples that I presented all come from the Second
5 Congressional District, where the most competitive races have
6 been in recent years. And there have been uses of both implicit
7 and explicit racial appeals in those races.

8 I'll start with the explicit. In the 2020 congressional
9 race in the Second Congressional District, one candidate
10 referred to a black candidate against whom he was running and
11 saying that she would be a member of the Congressional Black
12 Caucus if she were elected. And that's a fairly explicit appeal
13 really focusing on race. And that's important because the
14 Congressional Black Caucus is not a partisan caucus. It's not
15 an ideological caucus. It is a caucus of black members of the
16 House of Representatives and, indeed, over time in the very
17 recent past has included Republican black members as well as
18 Democratic black members. So that is one example. In that case
19 there really was a lot of critique really from across the
20 political spectrum about that appeal, that it really had been
21 kind of a low point in that race and for that candidate. And a
22 number of prominent Republicans criticized that reliance upon an
23 explicit racial appeal.

24 There are other examples in recent congressional elections.
25 One from 2018 that I think is particularly troubling, there was

1 an outside group -- and this was an ad that, of course,
2 everyone, including both candidates in that race, really
3 criticized. But an outside group ran an ad targeted that was
4 played on black radio, black radio stations, in which women who
5 appeared to have black voices were talking about the Brett
6 Kavanaugh hearings and charges of sexual assault against Justice
7 Kavanaugh during those hearings. And in the radio text, those
8 women are heard saying that they will start coming after our
9 men, our sons, our husbands, our fathers, and indeed it could be
10 -- lead to lynching of our black men if those appeals were made
11 against them. So that would be another I think very troubling
12 racialized appeal.

13 In that same election, in 2018, we also did see the use of
14 an appeal that was not about race but was, instead, about
15 ethnicity and an appeal targeting focus on the MS-13 gang, which
16 is, of course, has its origins in Central America. And imagery
17 was used in that campaign that really used the faces, both the
18 brown faces and tattooed faces, of folks who were described as
19 being members of the MS-13 gang.

20 Q. What examples of racial appeals have we seen in recent
21 judicial elections in Arkansas?

22 A. Yeah. You know, I think as many folks know, this is an
23 area where there's been a lot of outside money, so-called dark
24 money, that has come into state judicial races in Arkansas. And
25 in 2018 there were a couple of these, a couple of contested

1 court of appeals races with incumbent judges running for
2 re-election. There were two ads, one of which used ethnicity of
3 an individual man whose conviction was overturned by the court
4 of appeals, and his name was used. In one of the ads his name
5 was used, which is clearly a Latino last name, and a photo of
6 him was used in that ad.

7 In the other ad there was not the same level of
8 description, but it was a relying upon the picture and name that
9 had been used in the first ad. So there were kind of a
10 combination of ads, one of which used more implicit racial
11 appeals, and the other kind of was a follow-on to that, you
12 know, much like -- you know, the most infamous implicit ad I
13 would say of the modern era was the Willie Horton ad in 1988 in
14 the presidential election. And in the first ad, which was an ad
15 made by an outside group, there was the picture of Willie
16 Horton. In later ads, where the issue of Michael Dukakis'
17 record on crime was brought up, that case was not used. That
18 picture was not used, but that had been implanted through the
19 combination of the stereotyping of black men and criminality to
20 really be activated in later ads.

21 Q. Let's talk about just one more question about those ads and
22 the MS-13 ad. They don't talk about race. They talk about --
23 in the context of the judicial ad, if I'm understanding
24 correctly, they were talking about violent crime. In the
25 context of the MS-13 ad, they are talking about immigration if

1 I'm understanding correctly. Why are those racial appeals when
2 there's no mention of race at all?

3 A. The challenge is the use of imagery of a brown face and
4 some stereotyping about persons of color, especially men of
5 color and criminal behavior in both cases. I think the Willie
6 Horton, it was certainly different from the Willie Horton ad,
7 but it was a very similar technique. And political
8 psychologists have shown that is very effective in terms of
9 changing the attitudes of white voters.

10 Q. Dr. Barth, do we have data about the attitudes of Arkansans
11 regarding race during the presidency of Barack Obama, who was in
12 the presidency from 2009 to 2017?

13 A. Yes. There's a pretty comprehensive study that's cited in
14 the supplemental report in which there was an examination of
15 what in the political science literature is known as racial
16 resentment. And these are kind of underlying attitudes about
17 race that exhibit some level of resentment on the part of white
18 voters.

19 This analysis looked at all 50 states across time. And
20 Arkansas really stands out. The voters of Arkansas, the
21 electorate of Arkansas, really stands out in terms of its levels
22 of racial resentment being particularly high and also being
23 particularly persistent. And that standout, that kind of the
24 way in which Arkansas really stood out, really kind of reaches a
25 high point during the Obama era compared to other states.

1 Q. Do we have quantitative data about the racial attitudes of
2 Arkansas voters as it relates to President Obama himself?

3 A. Yes. There was some work done, especially in 2008, in his
4 first race from the Arkansas Poll that did analysis of the
5 degree to which President Obama's race was activating angst on
6 the part of white voters. And there is some comparative data.
7 There's kind of an experimental design in which half of the
8 respondents got the fact that President Obama would be the first
9 black president. The other denoted that he would have two
10 daughters and that that racial introduction really did show a
11 statistically significant level of agitation on the part of
12 respondents in the state.

13 Q. Briefly, were there examples of racial appeals in Arkansas
14 as it related to former President Obama?

15 A. There were a number. I think one that's mentioned in the
16 report is there was a very closely contested race for control of
17 the State Legislature in the Obama era, and there was a mail
18 piece that was distributed across a variety of districts in the
19 state in which there was the picture of a black doctor in that
20 ad in which there was a criticism of President Obama's
21 healthcare reform bill. But I do think that the black face of
22 that doctor is something that certainly primed voters to be
23 aware of race in seeing that advertisement.

24 Q. I don't want to take up the Court's -- too much time
25 looking at the historical record. Is it safe to say that racial

1 appeals have been commonplace in Arkansas history?

2 A. Yeah. Perhaps the most clear example was Governor Jeff
3 Davis, who often used racial epithets in his public appearances
4 and defended the practice of lynching against black men in the
5 state in public events. We see in 1944, when the white primary
6 was shot down by the U.S. Supreme Court in *Smith versus*
7 *Allwright*, the governor of the state, who was running for U.S.
8 Senate, said if he couldn't win the votes of white Arkansans he
9 didn't want the office.

10 You know, we see -- as late as 1966, we see Jim Johnson,
11 who is the Democratic nominee for governor, refusing to shake
12 black voters' hands in that race. So we see a series of a long
13 history of racial epithets and racial appeals.

14 Q. All told, your finding as it pertains to Senate Factor 6 in
15 this case?

16 A. I find support for the finding that racial appeals, both
17 overt and more subliminal, are a part of the record in Arkansas
18 and that the Senate Factor in my view is met.

19 THE COURT: Can I stop you there for a second?

20 MR. TOPAZ: Please.

21 THE COURT: I don't want to prejudge this issue on
22 what I'm going to find on the record. But assume the following
23 with me, which may or may not be how you actually feel. But
24 just assume ultimately it's the conclusion I come to. Assume
25 that I conclude that there was a large number -- in fact, maybe

1 it was more frequent than not -- of racial appeals, explicit and
2 implicit, however you want to define "back in the day" back in
3 the day. Assume further I find that today there are only a few
4 explicit racial appeals, and when there are explicit racial
5 appeals there often tends to be significant pushback on them and
6 that there are more implicit appeals than there are explicit
7 appeals, although certainly not as many as there were back in
8 the day. Just assume that's where I am.

9 THE WITNESS: Uh-huh.

10 THE COURT: How do I look at the Senate Factor,
11 because the Senate Factor talks about whether political
12 campaigns have been characterized by overt or subtle racial
13 appeals. And what I'm trying to figure out is I think everybody
14 would agree we're not just talking about one racial appeal over
15 ten years. But also, when we start talking about a bunch of
16 racial appeals, we start to approach the threshold. Do you have
17 a thought on how I should think about that threshold?

18 THE WITNESS: Yeah. I think that's why the research
19 that's out there on the racial attitudes of Arkansans is
20 important, because what's been striking is the way in which that
21 has really held steady across time, and thus creates in the
22 Arkansas electorate a ready-made audience for appeals. And
23 while, you know, I think explicit appeals often don't work
24 particularly well, because there's a backlash against those, I
25 think implicit appeals in particular have a ready-made audience

1 with, sadly, those stereotypes firmly in place and ready to be
2 activated. And I think that's why they work particularly well.

3 THE COURT: Thank you.

4 BY MR. TOPAZ:

5 Q. In your opinion, Dr. Barth, is there meaningful distinction
6 in the potency of an implicit racial appeal as opposed to an
7 explicit racial appeal in politics?

8 A. I think it very much depends on the context in which it's
9 made. I think it's safe to say, and the research supports that
10 I think implicit appeals actually often are more effective,
11 sadly, as a form of appeal. So I think their presence is
12 important. I do think that explicit appeals, though, certainly
13 send strong and important signals about the norms of political
14 debate and what's appropriate and inappropriate, and their
15 presence is problematic in a different way.

16 Q. What, if anything, does the continued presence of racial
17 appeals in Arkansas tell us about the salience of race in
18 Arkansas politics?

19 A. I think that the continued use of those appeals and the
20 empirical data that we talked about as well in the electorate, I
21 think they both show that while that history is history, it
22 continues to have a potent legacy in the politics of today.

23 Q. Let's talk very much about today. Let's go to Senate
24 Factor 5, which is the last Senate Factor we'll talk about.
25 What were you tasked with in assessing Senate Factor 5?

1 A. Yes. Senate Factor 5 focuses on disparities in healthcare
2 and education levels of economic quality of life and the degree
3 to which those disparities have an impact in terms of voter
4 participation rates.

5 Q. What data did you rely on to reach your conclusions about
6 Senate Factor 5?

7 A. A lot of Senate Factor 5 does look at census data. And
8 some of that is census data from the most recent census. But,
9 of course, we know that's slowly being released. It takes a
10 while for that to be released. Therefore, it's relied upon
11 what's known as the American Community Survey, which is a
12 sampling process. And we have data, a lot of ACS, American
13 Community Survey, data from the last decade that is heavily
14 relied upon as well. There's some other data included in that
15 that comes -- say, for instance, in the realm of education,
16 there's a lot of data that's collected at the state department
17 of education, right, in terms of test scores and things like
18 that. So it depends upon the issue at hand, but it relies
19 heavily on a lot of data like that.

20 Q. So can you just briefly explain why you might use census
21 data for certain issues, factors, what have you, and ACS data
22 for others?

23 A. It depends, again, on the issue at hand. The census that
24 we all participated in last year, year before last, that's a
25 fairly short discrete number of questions that really kind of

1 hit the high points for all Americans. The American Community
2 Survey is a sample, a survey that samples Americans, but goes
3 deeper. So many of these questions require that kind of deeper
4 analysis, so there is some reliance upon ACS. It has been shown
5 to be a fairly reliable survey because it is a large number of
6 respondents.

7 Q. So there are certain questions that are asked on the ACS
8 survey that aren't asked on the census. Is that the idea?

9 A. Exactly.

10 Q. Can you briefly describe the calculus of voting theory?

11 A. Uh-huh, yeah. So it's now I think a fairly established
12 model in political science that tries to explain why people --
13 some people turn out to vote and why other people don't turn out
14 to vote. And it's a pretty simple -- I always joke with my
15 students. It's more algebra than calculus. It's just a few
16 factors. But the two most prominent ones really are, or the
17 most prominent one is really what are the costs of
18 participation.

19 And the costs of participation might take a lot of forms.
20 It might be laws that are on the books that create obstacles.
21 It might be how far a voting place is from your home. If it's a
22 long way away, that's costlier both in time and transportation
23 than something that's on your corner.

24 So the calculus of voting really looks at what are the
25 benefits that you are going to get out of voting both in terms

1 of physical benefits or economic benefits but also psychological
2 benefits and what are the costs of voting. So that's kind of a
3 way of thinking about voting and who turns out, who doesn't,
4 that really I think is often kind of a ready made way to think
5 about those factors.

6 Q. So if you have racial disparities in healthcare and
7 education in terms of economic resources, what does the social
8 science indicate about how that affects political participation
9 in voting?

10 A. Yeah. So we will use healthcare, because I think it's a
11 very obvious one. You know, if folks are ill, if folks are
12 disabled, then it's harder to leave one's house, go vote. In
13 fact, it may be impossible to leave one's house. You maybe
14 relied upon an absentee ballot, which has its own set of costs
15 that come with it. So the political science research and social
16 science research is pretty clear that all of those factors,
17 being wealthy or poor, being well educated or less well
18 educated, being healthy or being ill or disabled, all of those
19 factor into whether people turn out to vote or not.

20 Q. Let's talk about some disparities. What racial
21 disparities, if any, do we see in poverty rates in Arkansas?

22 A. We see significant disparities and racial disparities in
23 being impoverished and in other aspects of economic health.

24 Q. Which is to say that black citizens have higher or lower
25 poverty rates than white citizens?

1 A. Much higher poverty rates and also, even if they are not --
2 even if we're not talking about true -- the true definition of
3 poverty, those who are on the edge, on the cusp of poverty.

4 Q. Is the disparity in poverty rates between black and white
5 Arkansans higher or lower than racial disparities in other
6 states in the country?

7 A. It is particularly high in Arkansas and particularly high
8 for younger persons.

9 Q. What about racial disparities in terms of child poverty
10 rates?

11 A. That is the area in which it is truly outstanding.

12 Q. Where does Arkansas rank in terms of black child poverty?

13 A. First.

14 Q. You mentioned folks near the poverty line. Is this a
15 discussion of ALICE family, I believe? Would you just briefly
16 define that?

17 A. Yeah. So the Winthrop Rockefeller Foundation, which is a
18 state foundation here, along with other groups around the
19 country, has really begun to think about those who are asset
20 limited but still employed. ALICE stands for Asset Limited,
21 Income Constrained, Employed. That is folks who don't have
22 wealth who are really living paycheck to paycheck and thus are
23 really precarious. If one bad thing happens in their lives,
24 then that may really easily throw them into an impoverished
25 state, even though they are at the moment employed.

1 Q. So we talked about racial disparities and poverty. Are
2 there racial disparities as it pertains to ALICE families?

3 A. Yes. Very similar.

4 Q. Do we see racial disparities in terms of home ownership and
5 the value of homes in Arkansas?

6 A. Yes. We see very stark disparities in both of those
7 things, both in terms of who owns homes and then the value of
8 those homes.

9 Q. Dr. Barth, I might ask you just to be a little bit more
10 specific when we talk about disparities in terms of who is
11 likely to own a home and whose homes are likely to be worth
12 more.

13 A. I apologize. Black Arkansans are least likely to own a
14 home. If they do own a home, their homes are more likely to be
15 lower in value, specifically below \$60,000 in value, than white
16 Arkansans.

17 Q. Excuse me. Sorry about that. Do we see racial disparities
18 in terms of unemployment rates in Arkansas?

19 A. Yes. We see historically very stark disparities with black
20 Arkansans being much more likely to be unemployed than are white
21 Arkansans.

22 Q. And that exists today as well?

23 A. That does exist today.

24 Q. Are there particular factors that you found that contribute
25 to this disparity in unemployment, this racial disparity in

1 unemployment rates?

2 A. Yeah. I think there are a variety of them. In some cases
3 they tie back to some of the other disparities that were focused
4 on in that part of the analysis. Education levels would be one
5 area in which blacks are -- black Arkansans are disadvantaged in
6 terms of their educational opportunities and therefore the jobs
7 that might come with those educational opportunities. Black
8 Arkansans tend to be more likely than white Arkansans to be
9 disconnected from the internet, which is, of course, an
10 important part of economic empowerment in the 21st Century. We
11 also see that black Arkansans are more likely to be disabled
12 than white Arkansans, which may actually make it impossible or
13 very difficult for them to have employment.

14 Q. What about disparities in vehicle ownership rates?

15 A. Yeah. There is also a pattern of real disparity in who has
16 access to vehicles they own. Black Arkansans are less likely to
17 have vehicle ownership than white Arkansans. And that matters a
18 lot in a state like Arkansas, where there is very little public
19 transportation and great reliance upon cars.

20 Q. Before we move on from economic resources, we'll return to
21 the calculus of voting. How do these economic -- these
22 disparities in economic resources affect the cost of voting for
23 black Arkansans in Arkansas?

24 A. Yeah. An example would be that it is often the fact that
25 black Arkansans are having to work longer hours, if they are

1 able to work, and that therefore makes it less likely, less
2 easy, for them to turn out to vote than white Arkansans.

3 Q. Is there a correlation between income levels and political
4 participation?

5 A. Yes. In the United States there is. And in Arkansas there
6 are sharp disparities in participation rates with those who have
7 higher income levels are more likely to participate in voting
8 and other aspects of political participation.

9 Q. Let's move on to education. Do we see racial disparities
10 in terms of high school and college graduation rates?

11 A. Yes. In Arkansas we do see disparities in both areas. The
12 larger disparities are in terms of college graduation rates.
13 But we do see disparities really at all levels of economic
14 achievement, with white Arkansans achieving at a higher level of
15 education than black Arkansans.

16 Q. So just to clarify for the record, Dr. Barth, your
17 testimony is that black Arkansans are less likely to graduate
18 from both high school and college. Is that right?

19 A. That is correct.

20 Q. Do we see any disparities on test scores?

21 A. We see, sadly, enormous disparities on test scores at all
22 grade levels between white students and black students in the
23 state on standardized tests and other measures.

24 Q. What about suspension rates?

25 A. We see an array of disciplinary infractions, including

1 those that lead to suspension rates. Black students are more
2 likely to be disciplined, including being suspended, than their
3 white peers.

4 Q. And what is the current state of school segregation in
5 Arkansas today?

6 A. Yes. This is discussed a bit in the supplemental report,
7 that there has been, of course, resegregation in a number --
8 across the country. But Arkansas is a state where there has
9 been fairly significant resegregation. And thus more students,
10 black students, are going to school only with students who look
11 like themselves, or 90 percent or more of their peers are black
12 than was the case 20 or 30 years ago.

13 Q. Do you know how many school districts are under federal
14 court oversight because of de facto school segregation?

15 A. I do not remember the exact number. There's some that are
16 under court-mandated desegregation orders, some that are
17 voluntary orders. And I cannot remember the exact numbers, but
18 it is -- I believe it is a couple of dozen in terms of the
19 combined, but I'm not sure of the exact. I apologize.

20 Q. If I represented to you it was 14, does that make sense to
21 you?

22 A. Yeah. So it's 14.

23 THE COURT: Counsel, do you have an estimate of how
24 much longer?

25 MR. TOPAZ: Five, ten minutes.

1 THE COURT: We'll take a break after that then.

2 MR. TOPAZ: Very good.

3 BY MR. TOPAZ:

4 Q. Return to the calculus of voting. How do the racial
5 disparities that you testified about in education relate to
6 voter costs incurred by black Arkansans?

7 A. Yeah. A very clear way is to cast an informed vote, one,
8 you know, needs to have an understanding of the issues, the
9 candidate's stances on those issues so that one feels more
10 confident. And we know that when people, when voters have that
11 kind of efficacy or that sense of self-empowerment, they are
12 more likely to vote. And education is a key factor there. And
13 in all of the research on voter turnout, education levels are
14 one of the most important variables in determining whether folks
15 turn out to vote or not.

16 Q. Let's finally talk about disparities in health. What
17 disparities, if any, do we see with regard to health outcomes
18 along racial lines in Arkansas?

19 A. We really see a variety of ways in which there are
20 disparities between white and black Arkansans, you know, whether
21 it is rates of diabetes, whether it's rates of high blood
22 pressure, other kind of key indicators like that. We see
23 differences between black and white Arkansans. We also, of
24 course, in terms of the length of life, the life expectancy,
25 there is a significant gap between white Arkansans and black

1 Arkansans with white Arkansans living longer than black
2 Arkansans.

3 Q. So some of the -- you testified as to -- well, let me say,
4 are there racial disparities as it pertains to cardiovascular
5 disease?

6 A. Yes. That is an area in which black Arkansans tend to have
7 much higher rates of -- slightly higher rates of cardiovascular
8 disease than white Arkansans.

9 Q. What are some others that you can recall for us, other
10 either health outcomes or conditions that you might say?

11 A. Yes. HIV/AIDS, diabetes, which I noted earlier, a variety
12 of other things that are less -- perhaps one would think of as
13 less important, but dental disparities are quite prominent. We
14 see that especially in young children with black Arkansans,
15 young black Arkansans being much more likely to have problematic
16 rates of dental decay. And that's really important long term.
17 We know how important dental health is for folks' ability to
18 feel confident to go to a job interview and actually achieve
19 that job. So those dental challenges at a young age fester into
20 something much more problematic as one grows older.

21 Q. So, again, we'll return to the calculus of voting. How do
22 these racial disparities in healthcare relate to the voter costs
23 incurred by black Arkansans?

24 A. Yes. If one is ill or, in a most severe form, disabled, it
25 is very difficult to cast a vote, and therefore there are those

1 disparities. We do see, again, some data that there is a
2 connection between health, one's health, and one's ability to
3 participate in the political process.

4 Q. What racial disparities, if any, exist in Arkansas with
5 regard to voter turnout?

6 A. So, first off, Arkansas has one of the lowest voter turnout
7 rates across the board. In 2020 Arkansas trailed only to
8 Oklahoma in terms of Arkansas was ahead of only Oklahoma in
9 terms of overall turnout rates. But there was a racial gap with
10 Arkansas black voters being below 50 percent and one of the
11 lowest -- indeed the lowest in the country according to a census
12 analysis.

13 Q. What explains the racial gap in current rates of voter
14 turnout among white and black Arkansans?

15 A. I would argue that many of the things that we've discussed
16 in terms of healthcare, in terms of education, in terms of
17 economic livelihood and some others are really the keys in
18 driving that disparity and voter participation.

19 Q. So, Dr. Barth, your finding as to Senate Factor 5 in this
20 case?

21 A. I do find evidence in my analysis that there is support for
22 Senate Factor 5 as well in Arkansas as it relates to black
23 Arkansans.

24 Q. Dr. Barth, were you aware that at a city board meeting last
25 night that the Little Rock City Director and Vice Mayor Lance

1 Hines referred to the city's prevention intervention and
2 treatment programs as, quote, Hug-a-Thug program?

3 A. Yes.

4 Q. And that was last night?

5 A. That was last night, yes.

6 Q. Does that constitute a racial appeal?

7 MR. MOSLEY: Objection to relevance, Your Honor. He
8 got it in. Object to relevance.

9 THE COURT: Overruled.

10 THE WITNESS: It hits very close to home in terms of
11 my daily work, but I do think there is an implicit racial appeal
12 there based on stereotypes about black men and criminality.

13 BY MR. TOPAZ:

14 Q. Dr. Barth, you are a historian, political scientist,
15 lifelong Arkansan. What impact, if any, does race have on the
16 State of Arkansas's politics today?

17 A. It is an omnipresent presence in terms of politics, in
18 terms of how politics operates and in terms of who has a place
19 at the table and a voice in politics.

20 MR. TOPAZ: I pass the witness, Your Honor.

21 THE COURT: Thank you.

22 MR. MOSLEY: I'm not going to be long. But if you
23 want to take a break, Your Honor --

24 THE COURT: I do want to take a break. I need another
25 cup of coffee. We're going to take a five-minute break.

1 Dr. Barth, while you are still on the stand, just please
2 don't talk to your lawyers about this case until
3 cross-examination is over and redirect is over.

4 (Recess from 7:10 p.m. until 7:20 p.m.)

5 THE COURT: The floor is yours.

6 MR. MOSLEY: Okay.

7 CROSS-EXAMINATION

8 BY MR. MOSLEY:

9 Q. Dr. Barth, how are you?

10 A. I'm good.

11 Q. You and I don't know each other. I have encountered you a
12 number of times in Little Rock. And I've always gone out of my
13 way to say hello because you were a professor to many of my
14 colleagues at the law school: Jennifer, Paul Charton, a number
15 of people you know. And I'm not going to have you here much
16 longer. I appreciate you today for this evening.

17 You've talked about -- in your report, you cite some
18 research about voter turnout. And the way I understand it is
19 socioeconomic status and perhaps correlation depending on who
20 you are, causation, causal factors for turnout. Is that
21 correct? Is that it? There's some research regarding voter
22 turnout in your report.

23 A. Yes.

24 Q. Well, it's from 2003 to 2004. Isn't that correct?

25 A. No. The most recent turnout data I described is from 2020.

1 Q. Okay. Are you familiar -- I mean, you are a political
2 scientist. Correct?

3 A. Uh-huh.

4 Q. Is that a yes?

5 A. Yes.

6 Q. For the record, "uh-huhs" and "huh-uhs" don't pick up well.

7 A. What question am I answering?

8 Q. Are you a political scientist?

9 A. Yes.

10 Q. Thank you. Thank you, Doctor. I'm assuming you keep up
11 with the research in your field especially vis-a-vis voting.

12 A. Yes.

13 Q. Voting laws. Would you agree you keep up with the research
14 in your field vis-a-vis voting laws?

15 A. Yes.

16 Q. Are you familiar with a 2014 paper by Burden and Mayer that
17 regards convenience voting and the effect on turnout?

18 A. I don't know the article that you are referring to.

19 Q. Okay. Then let's talk about generally the research. Do
20 you know what convenience voting is?

21 A. I would appreciate you to define it for me.

22 Q. Convenience voting, you would agree with me, includes
23 things like early voting. Right? Is that a yes?

24 A. Yes.

25 Q. Absentee voting?

1 A. Yes.

2 Q. We have those in Arkansas, do we not?

3 A. Yes.

4 Q. We have absentee voting in Arkansas.

5 A. Yes.

6 Q. And you can get an absentee ballot in the state 45 days
7 before the election. Isn't that correct?

8 A. I believe that's the case.

9 Q. So when you talk about the calculus of voting, the cost of
10 voting, that somewhat, at least somewhat, vitiates it, does it
11 not, the ability to engage in convenience voting?

12 A. What we -- I have done some research on early voting, and
13 the research tends to indicate that those who participate in
14 early voting tend to be those who would have participated in
15 politics at any other point based on their demographics,
16 sociodemographics.

17 Q. Go ahead. Go ahead. If I cut you off, I'm sorry. I think
18 you were going to the next thing. Go ahead.

19 A. The research indicates that those who are going to
20 participate anyway tend to use those techniques as their mode of
21 voting, so it does not tend to bring new voters who might not
22 otherwise have voted into the process.

23 Q. Isn't it true that the research today, this debate about
24 what causes turnout to go up and down, is still an ongoing
25 debate?

1 A. Of course.

2 Q. Because I'm going to represent to you -- have you heard or
3 did you know there is research in the last five years that shows
4 convenience voting actually depresses turnout, overall turnout?
5 Did you know that?

6 A. I know there is vigorous debate about all aspects of
7 election law and their impact on voter turnout, who and when,
8 who turns out and when they turn out.

9 Q. I appreciate that, Doctor. But my specific question was
10 did you know or have you heard that there is research within the
11 last five years -- there's actually research within the last
12 year that shows convenience voting, including absentee voting,
13 early voting, decreases overall voter turnout. Did you know
14 that?

15 A. I've not seen that study that you are referring to.

16 Q. Thank you. Would you agree with me there has been an
17 African-American candidate for the Arkansas Supreme Court since
18 2012?

19 A. Yes.

20 Q. Twenty years. Correct?

21 A. I think that's only ten.

22 Q. Was that ten?

23 THE COURT: Good catch.

24 BY MR. MOSLEY:

25 Q. I'll tell you what. You were successful in getting me off

1 my -- look, why aren't we talking about this? I've been sitting
2 here for two days. Why aren't we talking about -- why aren't we
3 talking about the history of the number of African-Americans
4 that have run for State House and lost? I don't see that
5 anywhere. And I am so confused about -- I'm not saying that
6 what you are saying doesn't have some import here, or you would
7 have heard me objecting over and over. But why? Shouldn't we
8 be talking about the number of African-Americans in the last 20
9 years that have actually run for State House and lost? Isn't
10 that an important thing here?

11 A. What's the exact question?

12 Q. Isn't it important? Shouldn't it be something we look at
13 historically in the last 20 years for this Court to know how
14 many African-Americans have run for State House and lost?

15 A. I think at the end of the day the ultimate question is
16 about representation and who wins elections.

17 Q. Who wins elections?

18 A. And the ability to win elections.

19 Q. That's -- maybe I'm expressing myself wrong. What I'm
20 saying is people, African-American candidates who lose elections
21 in the last 20 years, do you have that information in your
22 report or supplemental report? Let me be clear. The number of
23 African-Americans that have run for State House and lost in the
24 last 20 years, is anything touching on that question in your
25 report or supplemental report, Doctor?

1 A. I think there's clearly an examination in District 12 in
2 the supplemental report, which is a majority African-American
3 district which has had a white representative, and indeed there
4 was a black candidate who lost one of those races.

5 Q. Go ahead.

6 A. But in terms -- that data, the overarching data on the
7 number of black candidates who lost is not reported.

8 Q. When we're talking about racial appeals, I see nothing --
9 but you tell me if I'm wrong. I see nothing about racial
10 appeals in a State House candidacy or a State House campaign.
11 Is there something in the report that regards a State House
12 campaign or your supplemental report on racial appeals, or am I
13 missing it?

14 A. Yes. Well, the attacks on Obamacare with a black physician
15 mailer, that was a state legislative advertisement.

16 Q. Who was running for what? Who was running for what in the
17 state? I'm saying State House campaign. What was -- who were
18 the people that were running?

19 A. That was actually used in a variety of State House races or
20 in State Senate races around the state.

21 Q. Okay. And this goes back to what His Honor was asking you.
22 As it pertains to State House races, you've identified,
23 according to your testimony, one instance of a racial appeal in
24 your report or supplemental report. Is that accurate, Doctor?

25 A. You asked were there any, and I said there was at least

1 that one.

2 Q. I'm being very specific here. Have you -- other than that
3 one, have you identified any racial appeals in a State House
4 race in your report or supplemental report?

5 A. That is the only one I discussed.

6 Q. There's no at-large elections for State House. Is that
7 correct, Doctor?

8 A. That's correct.

9 Q. You know, you tell me if I'm reading this wrong. But you
10 would agree with me political affiliations are essential for
11 successful election to state offices, including State House.

12 A. Gaining a nomination --

13 Q. Okay.

14 A. -- is essential.

15 Q. Is there a difference between party nomination and
16 political affiliation? Let me -- strike that question. When
17 you talk about party nominations, you are necessarily talking
18 about political affiliation as well, are you not?

19 A. No. I think -- I sense that you are mixing two different
20 things.

21 Q. I may be, yeah.

22 A. Could you clarify what you see as the definition of those
23 two?

24 Q. Well, I'm not going to do it that way. Here's what I'm
25 going to do. On page 21 of your report, paragraph 38, you say

1 the following. "This is crucial since," quote, party
2 nominations have been almost essential for successful election
3 to these offices in this state," and that is preceded by a bunch
4 of listed offices. So I guess, when I read that, I thought is
5 Dr. Barth saying political affiliation is important, a factor?
6 "Essential" was the word you used. Is it, or when you say party
7 nominations, does that not encompass political affiliation?

8 A. I think you are mixing two things.

9 Q. I may be.

10 A. What I was writing about there was the mechanism of gaining
11 access to the ballot, which is getting the nomination. That's
12 the key. I think you may be trying to blend in something else
13 that was not meant there.

14 Q. I was just relying on the word party, party nominations.
15 Doesn't party nominations denote political affiliation, Doctor,
16 party nominations?

17 A. I think in the context in which I wrote that, that was
18 really about the mechanism of ultimately winning, having a
19 success at the ballot box.

20 Q. Who was questioned in the Arkansas Poll as you referenced
21 in your report? Who were the respondents?

22 A. It was Arkansas voters.

23 Q. Did they just get phone called?

24 A. Yes. It was a phone survey.

25 Q. What was the sample size?

1 A. I believe it was 800, but I'm not positive of the number.

2 Q. Was there any effort to note anywhere, even in research
3 materials that didn't make it into the paper, that respondents
4 were either white or black?

5 A. Well, the nature -- yes. That was, of course, a question
6 on the survey. But the analysis was particularly looking at --
7 it was experimental in which the sample was split in half, so
8 the samples were quite similar in terms of demographics.

9 Q. Well, that's what I'm saying. These individuals who were
10 called on the Arkansas Poll were given -- some of them were
11 given one message, and some of them were given another message,
12 and it regarded President Obama. Is that correct? Do I
13 understand the basics of the Arkansas Poll?

14 A. Basically on that question. But, of course, it was part of
15 a larger survey.

16 Q. Yeah, I've read it. I've looked at it online. It goes to
17 the University of Arkansas. Right?

18 A. Uh-huh.

19 Q. Is that a yes?

20 A. Yes.

21 Q. I'm saying is that a yes just so we have a clear record.
22 It's for the court reporter and the Court. It's not to be
23 picking on you, Doctor.

24 A. Yeah.

25 Q. Okay. So you report for whites only the difference, based

1 on the message that the person that was called received, was you
2 contend it was greater than statistically significant at the
3 .001 level. Is that correct?

4 A. Yeah. That means with -- not greater than 99.9 percent
5 confident that we can be sure there's a difference.

6 Q. You say for whites only it was 1.74. The difference, based
7 on the message that the person received when they were called,
8 1.74 and 1.63. Is that accurate?

9 A. That is correct. It was part -- can I clarify?

10 Q. Please. I'm sorry.

11 A. There were a list of the attributes, descriptors about the
12 President, characteristics of him. That list was exactly the
13 same except for that one issue that was changed out on one list.
14 It was his race. The other list focused on his two children,
15 and then the question, which of these things bother you about an
16 Obama presidency, and there was a statistically significant
17 difference in terms of the number of attributes that bothered
18 voters.

19 Q. So my question is can you tell me where in your report or
20 supplemental report you have reported the results of the
21 responses from African-American respondents, Doctor?

22 A. Well, it was a focus on white voter attitudes.

23 Q. So no one recorded? Let me ask a better question. Were
24 African-Americans ever asked these two questions? Was this
25 study done? It was not?

1 A. No. It was a survey of all of the respondents of varied
2 races. The analysis is really focused on white voters.

3 Q. Is the data there, though? Is there still -- is there
4 still data that shows African-American respondents believed or
5 had a negative impression of President Obama based on this
6 message versus this message? Is that data anywhere?

7 A. Yes. It's part of the data set. But it was not part of
8 the analysis.

9 Q. Just to be clear, though, you don't report in here
10 information from the data set from respondents who were
11 African-American. That is correct. Right?

12 A. Correct.

13 Q. Doctor, it's been my pleasure. I hope you have a good
14 evening. I'll see you around town sometime, and don't throw me
15 off my game like you did tonight. Otherwise, have a good night.

16 A. Thank you.

17 THE COURT: Plaintiffs redirect?

18 REDIRECT EXAMINATION

19 BY MR. TOPAZ:

20 Q. Dr. Barth, is the data clear that black Arkansans have
21 lower turnout than white Arkansans when going to the polls?

22 A. Yes.

23 MR. TOPAZ: I have no further questions.

24 THE COURT: I appreciate your testimony very much.
25 You are free to go.

1 Okay. Plaintiffs, I assume we're done for the night. Tell
2 me if there's somebody else.

3 MR. SELLS: You have assumed correct.

4 THE COURT: Anything you would like to bring to the
5 Court's attention before --

6 Dr. Barth, you can excuse yourself.

7 Anything you would like to bring to the Court's attention
8 before we adjourn?

9 MR. SELLS: Not that we want to bring to your
10 attention. I think we need to know kind of what --

11 THE COURT: I'll get there. But nothing from you guys
12 to me?

13 MR. SELLS: No, sir.

14 THE COURT: Anything from you all to me?

15 MR. MOSLEY: Your Honor, if I may, I would like to
16 move to withdraw because I resigned. My last day is on Tuesday,
17 and I will not be back, if that is acceptable with His Honor.

18 THE COURT: Any objection over there? I'm trying for
19 you.

20 MR. SELLS: No, sir.

21 THE COURT: You can withdraw.

22 MR. MOSLEY: Thank you, Your Honor.

23 THE COURT: Would you do me a favor or have somebody
24 else from the AG's office do me a favor and just file it on the
25 record, and we'll just text order grant it?

1 MR. MOSLEY: My main reason was to tell you I wouldn't
2 be back. I didn't want to offend the Court. Of course I will.

3 THE COURT: You didn't offend the Court. I've got it.

4 So in terms of what's going to happen, we already know that
5 the courthouse is closed for tomorrow, so we are not going to be
6 here tomorrow. Heather and I will be checking on what decision
7 they are going to make for Friday. We'll see how things go. My
8 preference, obviously, would be to continue on on Friday. My
9 second preference would be to continue on on Friday with a late
10 opening. Maybe we will see if we can do that if we think that
11 the temperatures are going to get high enough in the morning,
12 that things will unfreeze on Friday morning. And then,
13 obviously, if that's not going to happen and the building is
14 going to stay closed all day, then we will stay closed.

15 I do intend to have a Saturday session. I think from the
16 weather report it is pretty clear that Saturday is going to be
17 okay even if for some reason Friday was not okay. Either Friday
18 or Saturday I intend to start at nine o'clock. Other questions
19 or something I was not clear on or things you need guidance on?

20 Plaintiffs.

21 MR. SELLS: It may be silly. On Saturday is the
22 courthouse restricted as it is in after hours such as we may
23 have to bring our lunch?

24 THE COURT: On Saturday we will have court security.
25 The court security will be there for you all to come in in the

1 morning. They will work it that if you would like to leave for
2 lunch you can leave and come back, and then obviously at night
3 you will leave when we get done. However, other than the
4 morning, the middle of the day sometime and the afternoon, you
5 are not going to be able to walk freely in and out of the
6 building.

7 MR. SELLS: That's helpful to know.

8 THE COURT: Anything else?

9 Plaintiffs?

10 Defendants, anything else?

11 MR. STEINBERG: No, Your Honor.

12 THE COURT: We're adjourned.

13 (Proceedings concluded at 7:40 p.m.)

14 REPORTER'S CERTIFICATE

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

17 /s/Elaine Hinson, RMR, CRR, CCR
18 United States Court Reporter

Date: February 4, 2022.