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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 1, 2022
Little Rock, Arkansas
1:05 p.m.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE LEE P. RUDOFISKY
UNITED STATES DISTRICT JUDGE
VOLUME 1

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

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1 THE COURT: Good afternoon, everybody. This is
2 the Arkansas State Conference NAACP, et al, against the
3 Arkansas Board of Apportionment, et al, Case Number 9 --
4 let me repeat that. Case Number 4:21-CV-01239. We are
5 here on a preliminary injunction motion for our
6 preliminary injunction hearing.

7 Before we get to that, we are going to deal with the
8 motion to quash that I received this morning. And I will
9 say, I'm going to make as part of the record the email
10 that I got last night from Mr. Jacobs -- or yesterday
11 afternoon from Mr. Jacobs and the response email that I
12 sent to Mr. Jacobs. Obviously, both of those emails
13 copied everybody so we all know what I'm talking about.
14 But I'm going to put them in the record as exhibits to
15 today's hearing.

16 Essentially, the long and short of that, for those of
17 you who are not privy to the emails, is that, as I
18 understand it, the plaintiffs have issued two additional
19 subpoenas and the defendants are asking to quash them.
20 And we will start with that.

21 However, for the record, what I would like everybody
22 to do is introduce themselves. Let's start at plaintiffs'
23 table.

24 MR. SELLS: Your Honor, Bryan Sells for the
25 plaintiffs.

1 THE COURT: Good to see you again, Mr. Sells.

2 MR. SULLIVAN: Gary Sullivan for the plaintiffs.

3 THE COURT: You too, Mr. Sullivan.

4 MR. STEINER: Neil Steiner from Dechert for the
5 plaintiffs.

6 THE COURT: Nice to meet you.

7 MR. TOPAZ: Your Honor, Jonathan Topaz for
8 plaintiffs.

9 THE COURT: Good afternoon.
10 Defendants.

11 MR. STEINBERG: Asher Steinberg from the
12 Arkansas Attorney General's office.

13 THE COURT: This will cover all of you. Good to
14 see all of you again.

15 MR. BRONNI: Nicholas Bronni for the Attorney
16 General.

17 MR. JACOBS: Dylan Jacobs also with the Attorney
18 General's office, defendants.

19 MS. MERRITT: Good afternoon, Judge. Jennifer
20 Merritt for the defendants.

21 MR. MOSLEY: Mike Mosley for the defendants,
22 Your Honor.

23 THE COURT: Good afternoon. Okay. As I said,
24 we're going to start with the motion to quash the two
25 additional subpoenas.

1 Mr. Jacobs or whoever is speaking for the defendants
2 on this, obviously, I have read your motion. I've read
3 the cases you've cited in your motion. Quite frankly, I
4 don't think you have to say anything more at this point,
5 and I'm really just going to ask the plaintiffs to
6 respond. But if you want to say something more for the
7 record, I'm happy to let you do so.

8 MR. JACOBS: Thank you, Your Honor. I don't
9 think there is anything we would add on the front end to
10 what we filed. We would appreciate a brief reply.

11 THE COURT: A brief reply is fine. You get that
12 normally.

13 Defendants?

14 MR. SULLIVAN: We're the plaintiffs.

15 THE COURT: That's good. You're defending this
16 motion, but plaintiffs.

17 MR. SULLIVAN: Do I need a mic? Good morning
18 again, Your Honor.

19 THE COURT: Mr. Sullivan, I know you did not get
20 a written response, so you're more than welcome to take as
21 much time as you need.

22 MR. SULLIVAN: Thank you. It will be sort of
23 brief.

24 Your Honor, the chief deputy over at the Secretary of
25 State's office has a saying he uses quite often called,

1 Arkansas is a small town. And anybody that's lived here
2 very long knows that's true.

3 I know the defense attorneys. I know almost
4 everybody in this room. Everybody here knows me. And
5 I've worked for two of the defendants, so I know how
6 things are done there.

7 One of the people we subpoenaed is Kevin Niehaus who
8 is the director of PR at the Secretary of State's office.
9 I've known him for a few years. There are occasionally
10 issues that require the director of PR at any
11 constitutional office to be present and to usually get
12 into a group with other people to make responses to any
13 inquiries that come in or any other issues that arise in a
14 meeting. At the Secretary of State's office, that's a
15 rare occurrence. So unless there is an inquiry that has
16 just a yes-or-no answer, a whole bunch of people gather.
17 Sometimes it's just by email or they gather in person.
18 This goes all the way to the top to the chief deputy or
19 even sometimes to the Secretary of State. And they get
20 together and decide what the response is going to be to
21 whatever came in. This usually takes sometimes all day,
22 occasionally more than a day.

23 Mr. Niehaus could easily come over here for 30
24 minutes or one hour to testify if we needed him.

25 Another fact that a lot of people don't realize, the

1 Secretary of State's office is in charge of the capitol
2 police. So any employee in the capitol can get a ride
3 with the capitol police down the street here to this
4 courthouse. Mr. Niehaus could be here in less than ten
5 minutes. There would be no burden for that. In fact, if
6 for some reason he couldn't get a ride, he could walk here
7 in about 15 minutes. I've done it several times from the
8 capitol to this building for court.

9 There have been a number of communications with
10 counsel for both sides in the past few days about taking
11 witnesses out of turn for conveniences of the witness or
12 convenience of an attorney. All of these have been
13 cordial. When these subpoenas were sent to the state,
14 Mr. Sells told them, we can take Mr. Niehaus Thursday or
15 Friday, we'll work with you, whatever day is most
16 convenient. Everyone knows that would have been done. If
17 he could only come today, we would put him on today. If
18 he could only come Friday or Saturday. That's been done
19 in this district for forever and that's the way gentlemen
20 practice law.

21 We would not ever expect any witness, let alone
22 people from the Secretary of State's office, the
23 Governor's office, to sit out here in the hall all day.
24 That's just not the way we do it.

25 In the original set of subpoenas that were served, we

1 didn't want to inconvenience a bunch of witnesses, so we
2 didn't subpoena everyone that we could have.

3 Now, the defendants took a whole week to file their
4 first motion to quash. As you know, the Court ruled on
5 that yesterday morning. So we got together and thought,
6 what are we going to do now. We don't have anybody from
7 the Governor's office. We need somebody from the
8 Secretary of State's office. So we had to decide who
9 we're going to subpoena, and decided to subpoena
10 Mr. Niehaus and Mr. Rhodes from the Governor's office.

11 I disagree -- based on what I've just said about how
12 we all work together to put witnesses on whenever it's
13 convenient for everybody, I disagree that these subpoenas
14 were served in less than 48 hours. If Mr. Niehaus came on
15 Thursday, that would be more than 48 hours from yesterday,
16 which was a Monday.

17 THE COURT: Do you think 48 hours is reasonable?

18 MR. SULLIVAN: It's the rule. That's all I
19 know.

20 THE COURT: I take it you don't mean it's in
21 Rule 45, which it's not, right? The only thing in Rule 45
22 is a reasonable amount of time. When you say it's the
23 rule, do you mean you think 48 hours is the line drawn by
24 the case law?

25 MR. SULLIVAN: I do not know. I don't have the

1 answer to that, Your Honor, but I do know that in the
2 number of cases that I've been a party to and most people
3 in this room, 48 hours is sometimes for a PI hearing. In
4 fact, I've seen less than that.

5 THE COURT: So that's -- Mr. Sullivan, I guess
6 that's really where the rubber meets the road here. So
7 look, if this was a PI hearing, then after you filed the
8 PI motion, I sat for two days after that or three days
9 after that, we might well be in a different situation.
10 But that's not exactly what's going on here. So I think
11 what I want to understand is why you think 48 hours is
12 reasonable.

13 Let me tell you my concern. What I think the rule is
14 trying to protect is people getting hauled in to court and
15 having to testify without being prepared by their lawyers.
16 Right? We all know that part of being a lawyer is good
17 witness preparation, going over important things like, you
18 don't lie on the stand, here's what the theory -- here's
19 what our theory of the case is, here's what their theory
20 of the case is, all of those things. You can't do that,
21 at least in my view right now, in 48 hours.

22 So how is 48 hours reasonable?

23 MR. SULLIVAN: Well, again, I would say it's
24 more than 48 hours because we might not call them until
25 Friday or Saturday. We would know a little bit better

1 idea after today or tomorrow.

2 THE COURT: First of all, the subpoena was for
3 today. So in theory the subpoena was 24 hours. Let's say
4 I spot you the argument, look, it was for today but we're
5 not going to call them until at least tomorrow. Now we're
6 talking about 48 hours. But we're also -- or maybe as you
7 say 72 hours. But we're also talking about a time period
8 where all of the lawyers are going to have to be in court
9 from -- at least for tomorrow from the morning until 7:00
10 at night. It just doesn't strike me that that leaves a
11 whole lot of time for any serious witness preparation.

12 And I guess on the other side is, you all did
13 appropriately and timely send subpoenas, I don't know the
14 exact date, but back more than a week ago. And so that
15 seems like you gave enough time, but this is quite
16 different.

17 MR. SULLIVAN: I understand your position, Your
18 Honor. Like I said, we didn't know until yesterday
19 morning, when you denied the motion to quash, that we were
20 going to need someone else, that the Secretary of State
21 couldn't come.

22 THE COURT: But I guess let me ask you about
23 that. So you subpoenaed originally people from the
24 Attorney General's redistricting team and the Attorney
25 General. Under your theory, if you subpoenaed the

1 Attorney General, why would you have also subpoenaed the
2 people from the Attorney General's office? In the same
3 vein, why wouldn't you have subpoenaed back then the
4 people from the Governor's office or the people from the
5 Secretary of State's office. There is a disjunct between
6 what you're telling me is the reason you didn't subpoena
7 them and the fact that you did subpoena those from the
8 AG's office.

9 MR. SULLIVAN: One reason is, we didn't want to
10 subpoena everybody on every team last week, although we
11 could have. We didn't know we weren't going to get to
12 call the principals until yesterday. We didn't know until
13 late Friday in witness preparation with two of our
14 witnesses that Mr. Niehaus' name came up as having had
15 communications with people that we want to bring up to the
16 Court's attention. We didn't know we needed him until
17 late Friday, so we subpoenaed him on Monday.

18 As far as preparation goes --

19 THE COURT: Why didn't you subpoena him on
20 Friday?

21 MR. SULLIVAN: It was after hours when we got
22 this information.

23 THE COURT: We've been doing a lot of things
24 after hours in the run up to this preliminary injunction.
25 Why did you wait?

1 MR. SULLIVAN: As of Friday, we thought the
2 Secretary of State might get to testify. The other reason
3 not to subpoena everybody, especially since this is a PI
4 hearing, is that we don't know what any witness is going
5 to say from these teams.

6 Now, as far as preparation goes, for the last couple
7 of weeks based on the email communication, I can tell you
8 everybody on my team has been working sometimes around the
9 clock, much late at night, much witness preparation. And
10 the fact that we get emails from defense counsel, I think
11 they're doing the same thing probably. There's plenty of
12 time after even 7:00 tonight for someone on the -- five
13 lawyers. One of them could talk to Mr. Niehaus and
14 prepare him for -- they don't know what we're going to
15 ask, but they can talk to home about what all he's ever --

16 THE COURT: The normal way witness preparation
17 works.

18 MR. SULLIVAN: They could get him up to speed by
19 Friday. I've done it before. I know it's true. I think
20 all of them would agree with that.

21 In their first motion to quash regarding the
22 constitutional officers, the defendants argued -- one of
23 their argument was plaintiffs should question lower level
24 employees first. Now there is no one -- no constitutional
25 officers are going to testify. So now they're objecting

1 to us questioning lower level employees. Seems like they
2 don't want us to question anybody. How can the Court make
3 a ruling in this case without hearing some evidence?

4 THE COURT: Well, but they didn't object to the
5 folks -- the four folks that you did subpoena timely,
6 right?

7 MR. SULLIVAN: Right. Again, we don't know what
8 they're going to say.

9 THE COURT: No, no, no, but they're not --
10 you're telling it -- in one sense you're telling me that
11 the defendants are trying to stiff arm you and not let you
12 hear from anybody, but they very specifically didn't
13 object to those four folks. Is that correct?

14 MR. SULLIVAN: I think they were busy objecting
15 to the other three.

16 THE COURT: So you think they just forgot?

17 MR. SULLIVAN: No. I don't think they forgot,
18 but it would look awfully bad if they objected to every
19 witness we subpoenaed. Could be a strategic decision
20 there.

21 The crux of their argument today is undue burden.
22 I've just explained it is not an undue burden for
23 Mr. Niehaus to come down here, giving him as much as an
24 hour's notice probably later in the week. It's not undue
25 burden on them. Someone can prepare him before then. His

1 testimony probably wouldn't take even a whole hour.

2 In the motion to quash as far as Mr. Rhodes goes,
3 there's arguments made about privilege because he is an
4 attorney. The proper thing to do is -- if he's on the
5 stand and somebody asked a question that was --

6 THE COURT: I'll stop you now. I agree with you
7 on that point. On that point, meaning in terms of the
8 attorney-client privilege. Those -- that's an issue for,
9 if he's on the stand, you know, if a specific question is
10 inappropriate or calls for something inappropriate, we can
11 deal with it that way.

12 I'll tell you what. I'm not sure I'm entirely with
13 you, but I at least think you at least have a fair
14 argument on the undue burden motion. I'm just still
15 struggling on the reasonable time to comply issue. So I
16 mean, you can -- I'm not cutting you off. You can argue
17 all of it if you want to and you can certainly say it for
18 the record. I'll just tell you that I think your time
19 would be wisely spent on giving me a case where something
20 like this happened and the Courts considered it a
21 reasonable time to comply or something where you think
22 this is reasonable.

23 MR. SULLIVAN: I think I've said all I can say
24 about the notice part. I don't have a case for you. This
25 was very quick notice, and I had other things I needed to

1 do also for this case.

2 I can tell you from past experience that we brought
3 witnesses to court on very short notice and prepared them
4 in the hallway. It's done all the time and this is not a
5 particularly intense examination of Mr. Niehaus or
6 Mr. Rhodes for that matter.

7 THE COURT: They don't know that, right? And I
8 don't know that.

9 MR. SULLIVAN: They do now. I just said it.

10 THE COURT: I appreciate that, but the point the
11 point is, right. I understand that your questioning you
12 say is not going to be particularly difficult, but we
13 don't know that, right? I mean, I can't decide whether
14 it's a reasonable amount of time based on whether you say
15 you're going to give them a hard or short or quick or long
16 cross, can I? Or direct?

17 MR. SULLIVAN: I would argue that you should,
18 but I understand your point.

19 THE COURT: Do you have a case that supports
20 your argument that I should?

21 MR. SULLIVAN: I do not.

22 I want to turn in closing to the brief that was filed
23 a little over three and a half hours ago from the state in
24 support of their motion to quash. They made the argument
25 that we've just discussed as well as to go on to make this

1 unnecessary statement that the decision to subpoena these
2 two witnesses smacks of bad faith and warrants the Court
3 quashing the subpoenas.

4 I take offense to that because every person at that
5 table knows me, every person -- almost every person at
6 that table has been co-counsel with me. They've known me
7 for years, as well as Your Honor knows I don't practice
8 law that way. I don't subpoena people in bad faith.
9 There is a reason -- and I wouldn't be a part of a team
10 that would do that. For them to throw that -- I don't
11 know who wrote this brief, but to throw that in is
12 insulting, especially since they know better.

13 So in conclusion, there is no reason why Mr. Niehaus
14 or Mr. Rhodes could not be prepared to testify by Thursday
15 or Friday, and we think the motion to quash should be
16 denied.

17 THE COURT: So let me ask you this.
18 Technically, the subpoena was for today.

19 MR. SULLIVAN: I believe it had all of the names
20 on it.

21 THE COURT: Technically the subpoena was for
22 today. If I -- if I operate very particularly and say the
23 subpoena was for 24 hours, would you agree that that is an
24 unreasonable time frame?

25 MR. SULLIVAN: I know if it was my witness, I

1 would be making that argument, but I have to point out the
2 defendants -- we made an agreement to 24 hours before each
3 day to exchange our witness list so they would know who we
4 were putting on so they could prepare for just those and
5 vice versa so we wouldn't spend time on others who might
6 testify later or not at all.

7 As of 9:00 yesterday, the defense attorneys knew who
8 we were putting on here today and they knew Kevin Niehaus
9 was not on that list and Mr. Rhodes was not on that list.

10 THE COURT: Mr. Sullivan, I take your point
11 about 24 hours not being in your view the right number to
12 use. But if we're past that -- and assume my question
13 right. Don't fight the premise. If I think 24 hours is
14 the right number to use, do you concede that that is an
15 unreasonable time under Rule 45?

16 MR. SULLIVAN: Under that argument, you can
17 quash today's their appearance for today and we would have
18 no objection to that.

19 THE COURT: I'll take your answer for what I
20 think I understand it to be.

21 MR. SULLIVAN: That's all I have, Your Honor.

22 THE COURT: I appreciate it.

23 Mr. Jacobs or whoever is speaking for your side.

24 MR. JACOBS: Thank you, Your Honor.

25 So I'll say at the start that, while they're related,

1 reasonableness and undue burden are two different factors
2 under Rule 45. So in order for the subpoena to be valid
3 under the rules, it has to both allow reasonable time to
4 comply and it can't cause an undue burden for the witness.
5 Those are related obviously, but I think it's worth it to
6 point out that, regardless of what the Court thinks on the
7 burden issue, I think it's pretty clear from the cases
8 that we cited and all of the cases that I've read, that 48
9 hours or less for a subpoena for hearing testimony, even
10 in one of the cases we cited, a short trigger TR0 hearing
11 is not reasonable.

12 THE COURT: What if they told you that he didn't
13 have to be -- these people didn't have to testify until
14 Friday or Saturday?

15 MR. JACOBS: I still think that would be
16 unreasonable. We cited cases where there were two
17 businesses days, four days. I think there was one that
18 was nine days.

19 THE COURT: I know you did, but none of those --
20 and tell me if I'm wrong. I don't think those are
21 precedential in terms of binding on me.

22 MR. JACOBS: Certainly, Your Honor.

23 THE COURT: I guess what I'm trying to ask you
24 is, what is your personal view of where the reasonable
25 line is? I understand it might be context specific, and

1 that's fine to explain to me. But in general, two days in
2 your view unreasonable? 14 days, probably reasonable?
3 Where is the line in between?

4 MR. JACOBS: I don't know that there is a hard
5 line. Certainly, if there is a hard line, we think that
6 48 hours falls in the wrong side of it. I think it's
7 probably context specific and takes into account not only
8 how many days prior the subpoena was issued to the
9 testimony, but how many days prior could it have been
10 issued.

11 If these subpoenas had been issued on the 14th with
12 the other seven, if they had been issued on 19th when we
13 informed plaintiffs' counsel that probably we were going
14 to try to quash at least some of the constitutional
15 officers' subpoenas, we wouldn't be arguing
16 reasonableness. If they had been filed on the 21st when
17 we did in fact move to quash all three constitutional
18 officers' subpoenas, we would not be here arguing the
19 reasonableness of the time that the subpoenas were served.

20 We're here because the subpoenas were served
21 yesterday -- or excuse me. Attempted to be served. I
22 think it's worth pointing out at the outset these
23 subpoenas have not been served. We haven't been
24 authorized to accept service of the subpoenas for either
25 of these witnesses yet. We're still less than a day out

1 from receiving the subpoenas. If the Court denies the
2 motion to quash, we'll have to work through that.

3 THE COURT: Let me stop you there. This is an
4 abstract and technical question, but I want to make sure
5 that I'm doing things in the right way. If you all
6 actually haven't been served with the subpoena, can I
7 actually rule on the motion to quash? Is a motion to
8 quash timely at this point?

9 MR. JACOBS: I don't know whether the motion to
10 quash becomes ripe when the subpoena is issued and we've
11 been notified of it under the rules or when it's been
12 served. I think if the Court -- I don't think there is a
13 reason you couldn't rule on it now. I think if --

14 THE COURT: I guess -- I guess what I'm trying
15 to ask is, are the subpoenas currently effective? And if
16 you're position -- and I might ask the plaintiffs again
17 what their position is. But if your position is they're
18 not effective until they're served, am I ruling on this
19 before there is even an actual issue?

20 MR. JACOBS: I don't know the answer to that,
21 Your Honor. I think if the Court doesn't consider them
22 ripe, then, should they be served, then it would become
23 ripe and the Court could rule at that point.

24 I think it's pretty clear that the plaintiffs are
25 going to attempt to effectuate service if the motion to

1 quash isn't granted. So I don't know that that's a --

2 THE COURT: I understand your answer. I may
3 return to the plaintiffs and ask them. And I'm really
4 just previewing it for them so they can think about it
5 while they're sitting there and ask them if currently
6 their view is that the subpoenas are effective.

7 MR. JACOBS: On the reasonableness, I think the
8 overarching concern is they could have filed -- they could
9 have issued these subpoenas at any point earlier in this
10 case and made things a lot easier on our side counsel-wise
11 and the witnesses, and we wouldn't be having this issue.

12 THE COURT: Can I -- let me ask you a question
13 about that because you've said that twice now. The rule
14 requires -- the rule requires a reasonable time to comply.
15 It seems to me like you are loading into the word
16 "reasonable" what they sort of did in terms of issuing
17 subpoenas the first time around.

18 To me, the reasonableness of this stands and falls on
19 its own. Is 48 hours enough? Is two days enough? I
20 don't know why it makes it more or less reasonable whether
21 they issued subpoenas to other people in the past.

22 MR. JACOBS: I would say, if the Court set an
23 emergency hearing two days out, say, in less than 48 hours
24 and they had immediately issued subpoenas for every
25 witness they wanted to attend, we might have an argument

1 that that's de facto unreasonable, but I think also the
2 other side would argue, well, it was as reasonable as it
3 could have been in light of the circumstances, we did it
4 as soon as we could. Aside from maybe a bright line rule
5 of 48 hours isn't reasonable in any circumstance is --

6 THE COURT: No, no, no. I get your point, but I
7 think what I'm saying is, okay, now put it in our current
8 situation, right, where the preliminary injunction hearing
9 was set three weeks out or whatever the right number is
10 out. So there was enough time. Why does it matter
11 whether or not they issued some set of subpoenas two weeks
12 ago? I mean, other than to show that they could do it if
13 they wanted to which we all know that they could. I mean,
14 your argument wouldn't change if they didn't issue
15 subpoenas a week or a week and a half ago to other people,
16 would it?

17 MR. JACOBS: I think it's more of an extra point
18 to the extent that they're arguing that we couldn't have
19 done this until we did, the fact that they did so with
20 other witnesses is just evidence that that's not true.

21 THE COURT: Okay.

22 MR. JACOBS: And as far as the argument it's
23 necessary because of the Court quashing the constitutional
24 officers' subpoenas, as we mentioned in the brief, these
25 witnesses been known to them. As Mr. Sullivan said, it's

1 a small town, small state. There hasn't been any new
2 information about this.

3 THE COURT: How do you know the witnesses have
4 been known to them? I mean, I understand -- I understand
5 quite literally they know who, for example, Mr. Niehaus
6 is. But at least from what Mr. Sullivan has represented,
7 they didn't seem to know his involvement until Friday --
8 until Friday night.

9 Do you accept that or are you telling me that can't
10 be true?

11 MR. JACOBS: I don't know of any reason that his
12 involvement would have been just surfaced on Friday night.

13 As to Mr. Rhodes, I believe Mr. Rhodes was the one
14 who received the suggested or draft maps from Mr. Sullivan
15 in person months ago during this process. He was one of
16 the governor's Counsel at that time as well. So their
17 involvement to the extent they've been involved, I don't
18 think anyone is making an argument it's suddenly become
19 aware.

20 And I have to say that, when we move to quash the
21 subpoenas, I think the onus was on the plaintiffs to think
22 about, well, if this motion is granted, you know, we don't
23 -- we haven't subpoenaed another witness from the
24 Governor's office. They have subpoenaed Richard Bearden
25 from the Secretary of State's office who was under

1 subpoena. We've not objected his testimony. So as far as
2 also subpoenaing Mr. Niehaus, I don't think they have an
3 argument that he's the only lower level official from SOS
4 who can testify now.

5 As to Mr. Rhodes, they were on notice that, if the
6 Court granted that motion to quash the subpoena of the
7 governor of Arkansas to testify at preliminary injunction
8 hearing, that they might want to have a backup in case
9 that request was granted.

10 THE COURT: Can we go back to my first question?
11 Let's -- the most generous. Let's say this hearing goes
12 until Saturday or Monday, and let's say the other side
13 agrees that they won't call Mr. Niehaus or Mr. Rhodes
14 until Saturday or Monday. And I'm okay with going out of
15 order on witnesses and all of that. Why in that situation
16 is there a lack of reasonable time to comply?

17 MR. JACOBS: I think five days for a testimonial
18 subpoena at expedited PI hearing, I think that's still
19 pretty unreasonable even as --

20 THE COURT: Why do you think that?

21 MR. JACOBS: Especially in the context of the PI
22 hearing. Everybody is scrambling to get their legal
23 arguments or evidence, prep their witnesses. We only have
24 so many lawyers who can work on this case. We're only
25 aware of some of the witnesses that plaintiffs are going

1 to call until we just got the witness list this morning.
2 There were several witnesses that prior to receiving that
3 we had no idea were going to testify in this case. That's
4 additional work.

5 So I think even -- so even if it's not a -- you know,
6 five days under a bright line approach is maybe
7 reasonable. I don't think it's reasonable in light of the
8 circumstances here.

9 I think that also touches on the burden issue. As
10 Your Honor mentioned, witnesses need to be prepared.
11 We're going to be in court from early in the morning until
12 the evening. I don't know about my co-counsel. I'm sure
13 -- I have work to do in the evenings afterwards as well on
14 this case and perhaps others. The witnesses also would
15 have the burden of having to meet up with lawyers to
16 prepare after 7 p.m. in the evenings. We all have to
17 sleep sometime, even if it's not that much right now. So
18 I think there's a significant burden on that.

19 The time and travel issue isn't the burdens that
20 we're talking about. Being able to walk over from the
21 office or the fact that all the witnesses live here. The
22 burden is on the overall preparation of this case. And
23 that's why we describe this as sandbagging because we're
24 seriously constrained in our ability to prep these two
25 witnesses in addition to the other witnesses that we're

1 already under significant constraints and preparing for
2 this and preparing for new witnesses that we've just got
3 on plaintiffs' exhibit list this morning.

4 So I think that -- unless the Court has any further
5 questions, that's all.

6 THE COURT: Appreciate it, Mr. Jacobs.

7 Mr. Sullivan, do you all consider the subpoenas to be
8 effective currently?

9 MR. SULLIVAN: For this purpose, yes, Your
10 Honor.

11 THE COURT: I don't know what it means, "for
12 this purpose."

13 MR. SULLIVAN: Well, for these, yes. Yes, we
14 do. Obviously, if they're not considered effective and we
15 served them today, we're going to be back in here another
16 motion and there's just no point.

17 THE COURT: I'm with you. I just want to make
18 sure you all agree at this point that they should be
19 treated as effective.

20 MR. SULLIVAN: Yes, Your Honor. I would like to
21 point out -- I didn't sign these subpoenas, so I just made
22 aware. They were not -- today's date was not on the
23 subpoenas. They were -- it says February 2 is the first
24 date.

25 THE COURT: Hold on. Let me get them -- I'm

1 looking at the subpoenas. Go ahead.

2 MR. SULLIVAN: That's all I wanted to point out
3 on that that I didn't realize earlier.

4 As far as -- well, never mind. That's all I have.

5 THE COURT: So they were issued on 1/31/2022 and
6 they are for tomorrow, 2/2/2022 so 9 a.m. So 48 hours.
7 Is that right?

8 MR. SULLIVAN: That's right.

9 THE COURT: Okay. I appreciate that. That's a
10 helpful and good factual clarification. Thank you.

11 You all, Mr. Jacobs, normally on a motion -- on your
12 motion, I give you all the last word. On their motion,
13 I'll give them the last word. Do you have anything to say
14 in response to Mr. Sullivan's point?

15 MR. JACOBS: No. We agree, Your Honor. We
16 represented in our motion that the service was for
17 Wednesday, February 3rd, and that we've been --

18 THE COURT: Hold on. February 2nd.

19 MR. JACOBS: Wednesday -- excuse me. Wednesday,
20 February -- the brief says Wednesday, February 3rd. But
21 for Wednesday, tomorrow, at 9 a.m. So that's why we
22 tagged our argument as 48 hours being presumptively -- or
23 less than 48 hours presumptively unreasonable. Thank you.

24 THE COURT: I appreciate it.

25 For the record, I am going to quash the subpoenas. I

1 do not think there is a reasonable time to comply.
2 Essentially, I agree with the defendants' brief at Section
3 1. There is zero reason in my mind that these could have
4 not been issued significantly earlier. We are not in a
5 situation where the preliminary injunction hearing was set
6 two days or three days or five days after the motion was
7 made. There has been a significant amount of time for the
8 plaintiffs to issue and serve whatever subpoenas they
9 want. Obviously, we all know they did that more than I
10 think a week ago, but significantly earlier. And I -- I
11 don't think it makes any sense why these -- these
12 subpoenas were issued just yesterday for tomorrow.

13 I do not think in this context 48 hours is a
14 reasonable time to comply with a subpoena. And even if we
15 were to push that in this context to say, well, they don't
16 really have to testify until maybe 72 hours away, I still
17 think in this context that is unreasonable.

18 So I am going to quash the two subpoenas under Rule
19 45.

20 Okay. We are now ready to get on with the
21 preliminary injunction.

22 Plaintiffs, it is your stage first. And as I said
23 when we last spoke, you all can decide whether you want to
24 do an opening or whether you just want to just get to it
25 with the witness.

1 MR. SELLS: We do, Your Honor. But we have a
2 number of housekeeping items if that's okay.

3 THE COURT: That's fine too.

4 MR. SELLS: First is we would like to ask for
5 the Rule on witnesses.

6 THE COURT: Yes. The Rule -- so I'm going --
7 I'm going to issue the Rule. I assume you all don't have
8 any concern with that?

9 MR. MOSLEY: No. Your Honor.

10 THE COURT: Then, yes. To make sure we all
11 agree on what that means, the way I understand it is that
12 one representative for each party is entitled to stay.
13 All fact witnesses definitely have to be outside the
14 courtroom except for when they're testifying.

15 What I want to make sure we all agree on is experts.
16 Can expert witnesses stay during other testimony or not?

17 Mr. Sells, under your position, what's the answer to
18 that?

19 MR. SELLS: Yes.

20 THE COURT: And who is going to talk from over
21 there?

22 MR. MOSLEY: Yes, they can stay. And that's
23 consistent with the law.

24 THE COURT: I guess I want to make sure -- when
25 I say experts in this case, I want to make sure we all

1 agree.

2 Mr. Sells, who are your experts?

3 MR. SELLS: Attorney Fairfax, Lisa Handley, and
4 Dr. Jay Barth.

5 THE COURT: I agree with that.

6 Defendants, any objection to that?

7 MR. JACOBS: No, Your Honor.

8 THE COURT: Defendants, who are your experts?

9 MR. MOSLEY: Your Honor, Andy Davis, Brad
10 Lockerbie.

11 THE COURT: Plaintiffs, any objection to that?

12 MR. SELLS: May I have a moment to confer, Your
13 Honor?

14 THE COURT: You may. That's why I asked.

15 MR. SELLS: Your Honor, we don't want to waive
16 any objection we might lodge later by being gracious
17 enough to allow Mr. Davis to stay in the courtroom. With
18 that understanding, preserving all other objections, we
19 would not object to Mr. Davis remaining in the courtroom.

20 THE COURT: So I take it just to be clear, your
21 point may be that later on you may object to Mr. Davis
22 being treated as an expert witness, but for purposes of
23 the Rule, because he might be an expert or under your view
24 might not, you'll all be comfortable with him staying. Is
25 that a fair characterization?

1 MR. SELLS: I think you restated it correctly,
2 Your Honor.

3 THE COURT: I think that's all fine. So I think
4 we all now agree who can stay and who cannot stay.

5 I want to tell both sides that I'm going make you all
6 responsible to make sure that your witnesses are out of
7 the courtroom and not in here. And if you all see them
8 happen to walk in, you need to stop things and tell me.
9 And I am not going to be a happy person if accidentally
10 somebody is in here who shouldn't be, but I'm going to put
11 the onus on you all to make sure that that happens for
12 each side. Okay?

13 Mr. Sells?

14 MR. SELLS: That's acceptable to us.

15 THE COURT: Defendants?

16 MR. MOSLEY: Mr. Davis is not here so he may
17 walk in.

18 THE COURT: That's fine. I think what I'm
19 saying to you is, I am not going to pay attention to who
20 walks in and out of that door. You all need to make sure
21 that who shouldn't be in the courtroom is not in the
22 courtroom and who can be in the courtroom may be in the
23 courtroom.

24 Mr. Sells, what else do you got housekeeping-wise?

25 MR. SELLS: On that, we may need to pause for

1 just a minute because there may be some folks we don't
2 know but we can get through the housekeeping first.

3 THE COURT: That's fine.

4 MR. SELLS: I want to make sure it's okay with
5 you, Judge, if we take witnesses out of the order. As I
6 think Mr. Sullivan mentioned, we've been in cordial
7 communications with opposing counsel and they have
8 identified a couple of issues that we have agreed to
9 accommodate. We may have an issue of like that on our
10 side. Not sure yet. But some judges don't like that, and
11 just want to make sure that's okay with you.

12 THE COURT: When you say "out of order," I'm
13 fine with that. I think the one thing I want to know
14 about is if -- if we are jumping back and forth between
15 plaintiffs' case and defendants' case, I just want to make
16 sure I know that we're doing that and I know technically
17 whose witness it is so I know who's doing the direct and
18 cross essentially.

19 MR. SELLS: We can make that clear if that comes
20 up, Your Honor. Absolutely.

21 THE COURT: That's fine.

22 MR. SELLS: Next item on my list regards
23 stipulations, Your Honor. Again, we have been in cordial
24 communication with opposing counsel and we have arrived at
25 a lists of ten or 11 stipulations. I wasn't sure how you

1 wanted to handle those, as an exhibit or if you want us to
2 file them on ECF separately. We're prepared to do them
3 either way. I've got hard copies of them right here.

4 THE COURT: Let's actually do it as both. So if
5 you can give them to me, that's fine. And then if at some
6 point you can file them on ECF -- as long as, obviously,
7 they don't have confidential information, if you can file
8 them on ECF, I think that's a good way to make it part of
9 the actual record for sure.

10 MR. SELLS: In that case, if it's all right with
11 you, I'll approach and hand those up.

12 THE COURT: You may.

13 MR. SELLS: For the record, these are marked as
14 Plaintiffs' Exhibit 70.

15 THE COURT: Defendants, I assume you have no
16 objection with this being admitted.

17 MR. MOSLEY: No, Your Honor.

18 THE COURT: Then I'm go to admit this as
19 Plaintiffs' 70.

20 (Plaintiffs' Exhibit 70 admitted into evidence.)

21 MR. SELLS: Thank you, Your Honor. That's a
22 good segue to my next housekeeping point. There are a
23 number of exhibits that I believe are self-authenticating
24 and to which there are no objection. If it's all right to
25 you, I'd like to move those all in.

1 THE COURT: It is as long as the defendants have
2 no objection. If they do, then I'm going need to go one
3 by one.

4 MR. SELLS: Right. So I'll try to read that
5 list slowly for the defendants' benefit. It's I think
6 about 20 of them in total.

7 But it's Exhibit 1, Exhibits 3 through 6, Exhibits 10
8 and 11, Exhibits 34 to 43, Exhibits 63 and 64, and Exhibit
9 67.

10 THE COURT: Defendants, take your time but let
11 me know if you have any objections.

12 MR. MOSLEY: Your Honor, what was the last one?

13 MR. SELLS: 67.

14 MR. MOSLEY: Your Honor, we can respond if
15 that's appropriate?

16 THE COURT: Make sure you're on a mic though
17 when you speak.

18 MR. MOSLEY: With the exception, Your Honor, of
19 Exhibit 63, which we would like them to lay foundation
20 for, we'll stipulate to all of the ones that Mr. Sells has
21 requested stipulation to.

22 THE COURT: Okay. Mr. Sells -- Mr. Sells, just
23 to make sure for our court reporter and our courtroom
24 deputy, we are going to admit, based on there being no
25 objection, the list you just read except for 63 at this

1 point. But I'd like you to read the list again so we can
2 get it accurately.

3 MR. SELLS: Okay. Do you want me to read the
4 list minus 63?

5 THE COURT: Correct.

6 MR. SELLS: Okay. So minus 63 the list is
7 Exhibit 1, Exhibit 3 through 6, Exhibits 10 and 11,
8 Exhibits 34 through 43, Exhibit 64, and Exhibit 67.

9 THE COURT: Okay. Those are admitted under
10 those numbers. And it is correct to call them Plaintiffs'
11 Exhibits, correct?

12 MR. SELLS: They are. They're labeled -- our
13 exhibits are Bates stamped P with the exhibit number.

14 (Plaintiffs' Exhibits 1, 3, 4, 5, 6, 10, 11, 34
15 through 43, 64, and 67 admitted into evidence.)

16 THE COURT: Fine. I appreciate it.

17 63, is there some reason you want to talk about it
18 now or you just want to deal with it when somebody is up
19 there?

20 MR. SELLS: Well, I'm not -- it's a printout
21 from the House website. I'm not sure that there is anyone
22 who is going to lay a foundation. We do have some House
23 members testifying, so I could theoretically ask them
24 about it, but I think it's self-authenticating.

25 THE COURT: Can you show it to me? What did you

1 say it was?

2 MR. SELLS: 63. Can we put that up on the
3 screen?

4 THE COURT: Defendants, I should say just so you
5 all understand, usually I have the parties flipped. I
6 have the plaintiffs on this side and the defendants on
7 this side. We're not doing that because I know in this
8 case the plaintiffs need a jury room to set up. But just
9 so you know I will likely confuse you all again. So I
10 apologize for that in advance.

11 MR. SELLS: I won't take offense, Your Honor.

12 THE COURT: Good.

13 Defendants, could you explain to me what your
14 objection is? I mean, I understand it's a foundation
15 objection, but this doesn't seem very problematic.

16 MR. MOSLEY: No, it's not. We'll stipulate to
17 it. What it was is, we had seen the list but I don't know
18 that we laid eyes on this just yet. It does appear
19 self-authenticating and I'll not disagree with that. I
20 happen to know of some of these members so I know it's at
21 least somewhat accurate.

22 THE COURT: I take it you've withdrawn your
23 objection?

24 MR. MOSLEY: Correct.

25 THE COURT: In that case Plaintiffs' Exhibit 63

1 is admitted.

2 (Plaintiffs' Exhibit 63 admitted into evidence.)

3 MR. SELLS: Thank you, Your Honor.

4 My last I believe housekeeping item has to do with
5 the issue of whether the private right of action under
6 Section 2 of the Voting Rights Act. You directed us to
7 brief the issue in our reply on the preliminary injunction
8 motion. You gave the defendants a surreply on that issue,
9 but it was actually a response to our initial argument.
10 And so I want to address that briefly, not on the merits,
11 but I want to say that we do not intend file or seek to
12 file any further reply on that.

13 And I don't know if the Court wants to address the
14 issue of jurisdiction, but it is our position that the
15 Court should hear this motion, take the evidence, and make
16 whatever ruling it's going to make on the merits.

17 THE COURT: I do not plan on talking about
18 standing or private right of action until we get into the
19 legal arguments where I will ask questions on that, just
20 like I will ask questions on the merits. And then
21 ultimately I'll decide the case how I decide, -- how I
22 decide the case. But we're certainly going forward with
23 the preliminary injunction hearing and hearing all of the
24 facts and everything else. There is no question about
25 that.

1 MR. SELLS: Okay. Fair enough.

2 So that concludes my housekeeping, and the plaintiffs
3 do wish to make an opening statement.

4 THE COURT: Okay. Let me take a five-minute
5 break just because I think we're going to then get into
6 opening and witnesses and take some time. So let's give
7 everybody a little time to regroup and then we will go
8 from there.

9 MR. SELLS: We'll make sure that there aren't
10 any witnesses who need to exclude themselves.

11 THE COURT: I appreciate it. As Mr. Sullivan
12 says, this is a small town and I do know most of the
13 lawyers from both sides -- from both sides -- from both
14 sides of the aisle and I am confident that you all will do
15 what I've asked.

16 (A recess was taken at 1:54 p.m. until 2:01 p.m.)

17 THE COURT: Are you ready, Mr. Sells?

18 MR. SELLS: I am, Your Honor. If it's okay I am
19 going to take my mask off for this.

20 THE COURT: At your leisure.

21 MR. SELLS: May it please the Court.

22 Your Honor, this case presents a single,
23 straightforward claim of minority vote dilution under
24 Section 2 of the Voting Rights Act of 1962. We allege
25 that the Board of Apportionment's newly adopt

1 redistricting plan for the Arkansas House of
2 Representatives interacts with social and historical
3 conditions in Arkansas to cause an inequality in the
4 opportunities enjoyed by white and black Arkansans to
5 elect their preferred candidates to the State House.

6 Our claim is based largely on facts that are not
7 seriously in dispute. African-Americans are roughly 16
8 percent of the state's population. Arkansas's black
9 population grew since the last census both in absolute
10 numbers and as a share of the state's population.
11 Arkansas's white population shrank by more than 100,000
12 people since 2010. That's more than enough to fill up
13 three whole House districts, and it's a six percentage
14 point decrease as a share of the state's population.

15 And yet, compared to the old plan, the Board of
16 Apportionment's new plan decrease the number of majority
17 black seats and increases the number of majority white
18 seats.

19 We know that result was not inevitable because we've
20 shown that it's possible to draw 16 majority black
21 districts -- that's five more than the board drew -- and a
22 plan that complies with the board's own redistricting
23 criteria better than the board's own plan does.

24 We also know that no African-American has ever won a
25 contested election for the State House in a district that

1 was not majority black, at least not in the last ten years
2 we know that, and we think not in the last 140 years since
3 the dawn of Reconstruction.

4 Why? Why is that? It's because voting is polarized
5 along racial lines in Arkansas, at least according to the
6 Supreme Court's definition of racially polarized voting,
7 it is. Indeed, the levels of racially polarized voting in
8 Arkansas today far exceeds the levels of racially
9 polarized voting that the Supreme Court found to be severe
10 in North Carolina almost 40 years ago.

11 Our claim is also based on law that is well
12 established. Thornburg versus Gingles is the seminal case
13 in this area, and that's the case I was talking about
14 that's almost 40 years old decided in 1986 before many of
15 the counsel on my side were born. There were a series of
16 explanatory decisions in the early '90s ending with
17 Johnson versus DeGrandy in 1994. There was Lulac versus
18 Perry in 2006. But the law has basically been settled for
19 a good 30 years. The law in this circuit Harvell versus
20 Blytheville School District, the en banc case, that's a
21 1995 case. Bone Shirt, another big case you're going to
22 hear a lot about this week, that was 2006.

23 Now, the defendants are unabashedly asking you to
24 change that settled law and to make rulings that are
25 literally unprecedented in the 57-year history of the

1 Voting Rights Act. But this ordinary, straightforward
2 case is not the appropriate vehicle for making new law,
3 certainly not in the district court.

4 I want to close by highlighting the areas where I
5 think at least there's some agreement and disagreement
6 that you're going to have to decide as a factual matter
7 over the next week.

8 Gingles one. There was a factual dispute as to
9 whether five districts in the plan that we've drawn
10 satisfied the first Gingles factor.

11 You're going to hear testimony later today probably
12 from our expert Tony Fairfax, who is extraordinarily well
13 respected in the field, has been doing this for a long
14 time and even teaches on the subject.

15 You'll hear later in the week from Andy Davis, who
16 best I can tell from what has been submitted to the Court,
17 has no prior experience with redistricting and has
18 presented no analysis of the kind the Supreme Court
19 regularly relies on in cases of this nature.

20 Excuse me. My toddler gave me her cold.

21 THE COURT: Been there, done that.

22 MR. SELLS: That's Gingles one.

23 No dispute as to Gingles two.

24 As to Gingles three, there is a factual dispute about
25 the defendants' claim that House District 34, 98 and 74

1 give black voters a meaningful opportunity to elect
2 candidates of their choice. They say they do. We say
3 they don't.

4 You're going to hear later this week from our expert,
5 Lisa Handley, again, a well-respected expert in this
6 field, has been testifying in this area for 30 years,
7 literally wrote the book on this kind of analysis.
8 There's really no dispute as to the substance of what she
9 has found. Sometimes you get that in cases where an
10 expert says, no, you did the math wrong or you looked at
11 the wrong elections or something like that. There's none
12 of that here.

13 What we do have on the other side is Professor Brad
14 Lockerbie, who seems like a distinguished professor, no
15 doubt there, of political science who has no prior
16 experience in voting cases and has presented no analysis
17 of his own other than what we call in the business the
18 intraocular test, which is kind of put your thumb up there
19 and using your eyeball to see if you can discern any
20 patterns in the sand.

21 There's also of course a factual dispute about the
22 defendants' claim that race plays no role in Arkansas
23 politics. And their evidence on that will also come from
24 Professor Lockerbie, and it just doesn't add up to the
25 claim that they are making.

1 As to the Senate Factors, we don't think there's any
2 dispute as to Senate Factor 1. That's in the
3 stipulations. We don't really think there's any dispute
4 as to Senate Factor 2 according to the Supreme Court's
5 definition of what racially polarized voting is. We don't
6 think there's a factual dispute as to the third Senate
7 Factor. Might be a legal dispute as to the relevance of
8 some of the undisputed facts. There's no dispute as to
9 the fourth Senate Factor. That's also in the
10 stipulations. There's not really a factual dispute as to
11 the fifth Senate Factor. You took judicial notice of
12 those facts already. And there's really no dispute as a
13 factual matter on the seventh Senate Factor. But, here
14 again, there is a legal dispute as to the relevance of
15 some of those facts.

16 There is a factual dispute I think on the sixth
17 Senate Factor which is whether elections in Arkansas have
18 been characterized by racial appeals.

19 You'll hear from our expert, Dr. Jay Barth, who will
20 describe some of those racial appeals. I'm not sure who
21 they're going to have on that side who is going to say
22 that they -- that these are not racial appeals that you're
23 going hear about, but that I think is a factual issue that
24 you're going to have to decide: Are these racial appeals.

25 Then the last what I'll call totality factor -- it's

1 not a Senate Factor, but the Supreme Court said it should
2 be considered in the totality of circumstances. The last
3 factor is proportionality. There is a factual dispute on
4 that as well.

5 The defendants claim that House Districts 34, 49, 74,
6 and 98 should count as districts in which black voters
7 have an effective majority, and we don't. And so you're
8 going to have to decide that as a matter of fact when
9 assessing proportionality.

10 But on that issue, if you decide that in their favor,
11 that doesn't get you to proportionality. There's still
12 under-representation and inequality of opportunity for
13 black Arkansans. They can't get to 16, which is what we
14 believe full proportionality requires in this case.

15 I just want to kind of close by emphasizing really
16 why we're here today. It's not to fight over one or two
17 districts, although we win if we can only show that it's
18 possible to draw one or two more districts. But we're
19 here today because it's possible to draw five more
20 districts, almost 50 percent more than are in the board's
21 new plan, the board's plan that went backward as the black
22 population went forward.

23 Thank you.

24 THE COURT: Thank you, Mr. Sells.

25 Defendants, are you all doing an opening?

1 MR. JACOBS: Your Honor, if we may, we would
2 like to reserve doing opening until the portion of our
3 case in chief.

4 THE COURT: That's fine.

5 Plaintiffs, you're up for your first witness.

6 MR. SELLS: I won't take offense.

7 MR. SULLIVAN: I don't need a toddler's cold. I
8 have plenty of children in our house.

9 Your Honor, I call Barry Jefferson.

10 BARRY JEFFERSON, PLAINTIFFS' WITNESS, DULY SWORN

11 DIRECT EXAMINATION

12 BY MR. SULLIVAN:

13 Q. Good afternoon, Mr. Jefferson. Can you hear me okay?

14 A. I hear you very well.

15 Q. Let me know if my volume gets too low. I don't think
16 it will though, not today anyway.

17 Would you say and spell your name for the court
18 please?

19 A. My name is Barry Jefferson. Barry is spelled
20 B-a-r-r-y. Last name Jefferson, J-e-f-f-e-r-s-o-n.

21 Q. Mr. Jefferson, what is your educational background?

22 A. I have attended Central High School here in Little
23 Rock. I also attend Southern New Hampshire University two
24 years.

25 Q. What did you study at Southern New Hampshire?

1 A. Business.

2 Q. How are you currently employed?

3 A. I work for CARTI Cancer Center.

4 Q. For anyone that doesn't know, that's the Central
5 Arkansas Radiation Therapy Institute. Is that correct?

6 A. That's correct.

7 Q. Are you involved with the NAACP?

8 A. Yes, I am.

9 Q. Just in case anybody doesn't know, what does NAACP
10 stand for?

11 A. The National Association of Colored People.

12 Q. How long have you been involved with NAA --

13 A. I've been involved with the NAACP for about ten
14 years.

15 Q. What positions have you held?

16 A. Right now, I am the president of the Jacksonville
17 branch in Pulaski county, and I also hold political action
18 committee chair for the state.

19 Q. Have you received any awards for your service with
20 NAACP?

21 A. I don't think so. Just work.

22 Q. Can you state the mission of the NAACP?

23 A. I'm glad you mentioned that. I keep it in my pocket
24 because I think it's very important that we have to have
25 that at all time. I'm going give you the short version

1 that most people usually ask.

2 To eliminate racial discrimination through democratic
3 process and to ensure the political, educational, social,
4 and economic equality of all people.

5 Q. You mentioned the democratic process. Does NAACP
6 engage its members in elections for the state House of
7 Representatives in Arkansas?

8 A. Yes.

9 Q. Tell me how.

10 A. We do a get out the vote, we educate them, we move
11 them forward, we mobilize them.

12 MR. MOSLEY: Your Honor, I don't mean to
13 interrupt. We have witnesses still in the --

14 THE COURT: Hold on. Why don't y'all come up to
15 the bench for a second?

16 (The following was held at side bar:)

17 THE COURT: So Mr. Sullivan, hold on. Just
18 listen. First of all, if you need to stop anything, just
19 say, Your Honor, can we approach. Just come approach and
20 we'll talk about it.

21 Second of all, what's the problem?

22 MR. MOSLEY: One of their witnesses at least is
23 in the courtroom still, which is fine. If they want to
24 testify, I guess maybe they should leave.

25 THE COURT: Which witness is in the courtroom?

1 MR. MOSLEY: Representative Monte Hodges.

2 MR. SULLIVAN: I don't see him. I'm sorry.

3 MR. MOSLEY: He's sitting right there in the
4 back.

5 THE COURT: No pointing.

6 MR. SULLIVAN: Beside the door?

7 MR. MOSLEY: Yeah.

8 MR. SULLIVAN: Are you sure that's him?

9 MR. MOSLEY: When I asked him if it was him, he
10 said yes.

11 MR. SULLIVAN: Then he needs to leave.

12 THE COURT: Everybody take the temperature down.
13 I understand it is a sensitive case, but let's take the
14 temperature down. All I would like you to do is go ask
15 one of your colleagues to ask him to leave. I don't think
16 he's heard anything that would be problematic at this
17 point, unless you do.

18 Do you think he's heard something at this point
19 that's been problematic?

20 MR. MOSLEY: I don't know. I was outside
21 coughing.

22 THE COURT: Well, if you want go talk to your
23 other counsel who were here. I don't think there's
24 anything he's heard so far that would prejudice his
25 testimony, but if you all think so, then let me know, but

1 otherwise just go talk to him.

2 MR. MOSLEY: I'm going to defer to the Court.
3 Mr. Sullivan, you need to understand he's right -- I
4 think's got -- impeccable --

5 THE COURT: I know he does.

6 MR. MOSLEY: I just wanted to make that clear.

7 THE COURT: I appreciate it.

8 (End side bar conference.)

9 MR. SULLIVAN: Your Honor, we've been informed
10 that the mic on the Teams feed is down and our members
11 that could not be here can't hear. If anything can be
12 done for that or not --

13 THE COURT: I think we can try to work on that
14 and we will get our tech folks to try to work on it, but
15 for now we just have to keep going.

16 BY MR. SULLIVAN:

17 Q. Mr. Jefferson, were you finished with your last
18 response?

19 A. Yes.

20 Q. Is the NAACP engaged in advocacy before the General
21 Assembly?

22 A. Yes, we are.

23 Q. What kind of advocacy?

24 A. We go up and speak on behalf of our membership. We
25 work with elected officials on issues that affect our

1 members in the African-American communities.

2 Q. Can you tell the Court what issues -- the main issues
3 just in general that have been a concern of the NAACP in
4 Arkansas in recent years?

5 A. I think several main issues. You can look at the
6 voter laws that they have past that affect
7 African-American community. You can look at the stand
8 your ground laws. You can look at multiple things that
9 have affected our community that we hear from our
10 membership, and not only our membership, but people from
11 the African-American community on these issues.

12 Q. Where is the State Conference of Arkansas NAACP
13 located?

14 A. Our office is located in Little Rock, Arkansas.

15 Q. Approximately how many members does it have?

16 A. 2,625.

17 Q. Just a moment on the screen in front of you, I'll
18 show you Plaintiffs' Exhibit 60.

19 A. Yes.

20 Q. Can you see that?

21 A. Yes, I do.

22 Q. Are you familiar with this declaration?

23 A. Yes, I am.

24 Q. And if we can page to the last page. Is that your
25 signature?

1 A. That is my signature.

2 Q. I believe that's an electronic signature. Did you
3 affix that yourself?

4 A. Yes.

5 Q. Have you been informed which districts -- which Board
6 of Apportionment districts are alleged to be -- have vote
7 dilution in Arkansas?

8 A. Yes, I have.

9 Q. Which ones are they? And please read them slowly.

10 A. 34, 37, 61, 64, 65, 74, 75, 76, 77, 79, 80, 90, 93,
11 94, 95, 96, 97, 98, and 99.

12 Q. Were you able to determine in which of those
13 districts you just named NAACP has members who are both
14 black and are registered voters?

15 A. Yes, I have.

16 Q. Tell the Court how you went about determining that.

17 A. So what I did first, our state -- state conference
18 does not have the voter list. We usually keep that
19 nationally --

20 Q. I'm going ask you to slow down just a little bit.

21 A. Our state conference does not have a voting list at
22 this time of our membership. So I went -- reach out to
23 our general counsel in the national office. They provide
24 that list to me with identifying the person and the
25 address. I verified that through their name with some

1 help from my -- some other members and I also verified
2 their voting roll ten days before with the updated from
3 the state -- Secretary of State office.

4 Q. You may have -- I'm sorry if you just said it. How
5 did you determine the race of those people?

6 A. Mostly I knew a lot of them and we had other members
7 that knew them. I made calls to talk to them personally
8 and some other members here did the same thing.

9 Q. Did y'all work together?

10 A. We all worked together until about 12:00 or so.

11 Q. You worked with counsel too, right?

12 A. Yes.

13 Q. How many of the challenged districts that you've
14 already read off did you determine that you have members
15 who are black registered voters?

16 A. We did majority of them -- if you want me to read
17 them off. 64, 65, 74, 75, 76, 77, 79, 80, 93, 94, 96, 98,
18 and 99.

19 Q. And that's what's on your declaration, correct?

20 A. Yes, sir.

21 Q. That's 13 -- I believe you just said 13 of the 19
22 districts, correct?

23 A. Yes.

24 Q. And your declaration says you had at least people in
25 those 13 districts, correct?

1 A. That's correct.

2 Q. Have you since that time determined that you actually
3 had -- not since that time. At that time, did you
4 determine you had members in even four more districts?

5 A. Yes, we did. We did actually have members in four
6 more districts that we verified that's not on this list.

7 Q. Who presented this declaration for you to sign?

8 A. You did.

9 Q. Prior to being presented with this declaration, did
10 you inform me that you had verified that the state
11 conference had black registered voters in all but two of
12 the 19 districts?

13 A. That is correct.

14 Q. Those two were district 90 and 95, correct?

15 A. Yes.

16 Q. At that time, what did I tell you about those --
17 about verifying those two districts?

18 A. That our other plaintiff, they identified people in
19 their area, partner.

20 Q. So this declaration should have stated you had
21 members in District 34, 37, 61, and 97, correct?

22 A. That's correct.

23 Q. I just left them out, correct?

24 A. Yes, sir.

25 Q. You are certain that you verified people in those

1 four districts?

2 A. Yes, I am. Yes.

3 Q. When was this oversight brought to your attention?

4 A. Today.

5 Q. Today or yesterday?

6 A. Is today Monday?

7 Q. Today is Tuesday.

8 A. Yes, sir. I'm sorry.

9 Q. Tell the Court what impact, if any, the adopted House
10 plan has on your black members who live in the challenged
11 districts.

12 A. It's not just our black members. It's other black
13 citizens that live in the area too. It's cracking their
14 votes. And when you're cracking votes, you're dividing
15 their votes and they're not getting the opportunity to
16 vote for the person that they choose to pick and of
17 someone of their belief. And I think that is very
18 important in any election. And this is why we stand up
19 fighting for this because we're speaking for our
20 membership.

21 Q. I want to go back just a little bit and make sure
22 we've completely talked about how you got the names of the
23 people that you were then checking to see if they were
24 registered black voters.

25 A. Yes.

1 Q. Now, did I understand you to say the state NAACP does
2 not have that information?

3 A. We do not have that type information. Most of that
4 information go to our national office. I reach out to our
5 general counselor -- associate general counselor. She
6 provided information through the membership -- our
7 membership portal that we have, and our national counsel
8 provided the name and address and verified the race and
9 everything.

10 Q. Were the districts we were looking at provided to the
11 general counsel for NAACP?

12 A. Yes.

13 Q. As well as the geocoding information --

14 A. Yes --

15 Q. -- so they could --

16 A. All of that information was provided to them.

17 Q. -- to report to you?

18 A. Yes.

19 Q. And did you just stop verifying after you found one
20 member in each district for me?

21 A. No, no, no.

22 Q. Do you think --

23 A. We have multiple members that stay in those areas.
24 We just identified one member.

25 Q. You're certain of that?

1 A. I'm positive.

2 Q. You know most of them --

3 A. Looking at two right now.

4 Q. You do?

5 A. Yeah.

6 MR. SULLIVAN: Your Honor, I move for admission
7 of Plaintiffs' 60. I don't think it was stipulated to,
8 but he's identified it.

9 THE COURT: Defendants, any objection?

10 MR. JACOBS: No, Your Honor.

11 THE COURT: It's admitted.

12 (Plaintiffs' Exhibit 60 admitted into evidence.)

13 MR. SULLIVAN: I pass the witness.

14 THE COURT: Thank you, Mr. Sullivan.

15 CROSS-EXAMINATION

16 BY MR. JACOBS:

17 Q. Good afternoon, Mr. Jefferson. My name is Dylan
18 Jacobs. If you can't hear me or if I need to speak
19 slower, please let me know. I know I tend to talk a
20 little fast sometimes.

21 You're not employed with the NAACP, are you?

22 A. No, sir.

23 Q. And you testified that you are president of the
24 Jacksonville branch of the NAACP.

25 A. That is correct.

1 Q. I want to make sure that I heard you correctly. You
2 say you were the chair of the political action committee
3 for the state conference.

4 A. That is correct.

5 Q. And what is the political action --

6 A. We do work on voter registration. We also work on
7 legislation issues that we deal with through our state at
8 the State House and at local levels.

9 Q. Can you tell me how the state -- the Arkansas State
10 Conference of the NAACP is organized as an entity?

11 A. We have -- we have over -- nationwide, we have been
12 in existence for over 100 years fighting for social
13 justice. Here in the state of Arkansas, we have
14 identified branches in multiple areas through Arkansas.
15 We have elected officers for those branches, and we have
16 subcommittees for each of those branches that go out there
17 and work on different issues.

18 Q. But the state conference of -- the Arkansas state
19 conference, it isn't, say, incorporated?

20 A. Not Arkansas state conference because we're under the
21 umbrella of the national.

22 Q. Just so I'm clear, the state conference is not, for
23 example, incorporated as its own separate --

24 A. Yes, we are.

25 Q. You are?

1 A. Yes.

2 Q. You're incorporated --

3 A. We have our own EIN number and everything. Yes.

4 Q. Okay. You said that -- so does the -- you said the
5 state conference is incorporated. It's its own entity.
6 Does it have its own bank?

7 A. We have our own bank account, our own executive board
8 that oversee the conference. We have our own president
9 and officers for the state conference.

10 Q. When someone would want to join the NAACP Arkansas
11 state conference who lives in Arkansas, how would they go
12 about doing that?

13 A. They can go to their nearest branch because most of
14 the membership is locally. You join your local branch.
15 The local branch reports to the state conference. And
16 most of the membership of the executive board and things
17 like that, it's coming from our local branches.

18 Q. Do the local branches keep lists of all of their
19 members?

20 A. Most of them do. Yes, they should.

21 Q. But the state conference does not keep --

22 A. No, no. Only thing they keep is the president and
23 the secretary of the branch.

24 Q. So in order to find out who the members of the
25 Arkansas state conference were, you said you had to ask

1 the national organization.

2 A. The national organization keep the membership list
3 because everything go to national. They keep a roster of
4 the membership list. And to get access to that membership
5 list, you have to be a branch and the branch have access
6 to that membership list, but they have to be authorized by
7 the national office.

8 Q. What sort of information is kept on the membership
9 list? You mention name and address. Is there anything
10 other information?

11 A. The membership -- what you do, you have a membership
12 card. You complete your membership card with your name,
13 your address, other items, some personal items probably.
14 I don't think -- date of birth maybe. It's been so long
15 since I filled one out since I'm a life member.

16 Q. But the membership list that you received didn't have
17 voter registration information?

18 A. No. We look that information up.

19 Q. So it's fair to say that the state conference does
20 not keep voter registration information in its regularly
21 conducted business?

22 A. No. What we do we keep -- go to the Secretary of
23 State office to get that information.

24 Q. You mentioned when you were testifying that you
25 verified some information with the help of some other

1 members. Can you tell me what information you were able
2 to personally verify and what information that you had
3 help from other members on?

4 A. Sure. I verified personally addresses. I contacted
5 most of the members that I verified with their addresses,
6 the location, the district they live in. I also verified
7 their voter registration by knowing they were registered
8 to vote. Some of the other members did that information
9 too. They sent it to me and I re-verified the information
10 when they sent it to me. It was like a double.

11 Q. When you contacted these members, did you call them
12 on the phone?

13 A. I called them on the phone, yes.

14 Q. Did the list of members that you received from the
15 national organization have phone numbers as well as names
16 and addresses?

17 A. Most of the members that they sent to me, I knew
18 anyway. I knew them personally.

19 Q. Okay. But what about for the members that you didn't
20 know personally?

21 A. I contacted the person that probably knew them from
22 one of our branches.

23 Q. You contacted a different member --

24 A. Yes. One of the presidents, yes.

25 Q. I would like to go -- give me one moment.

1 So I don't have a fancy HDMI setup so we're going to
2 do this on the ELMO if that works. Let me know if you
3 can't hear me.

4 I may need some help getting this to the screen.

5 MR. SULLIVAN: Your Honor, we'll allow opposing
6 counsel to use our technology person if it is an exhibit
7 we already have.

8 MR. JACOBS: It's his declaration.

9 THE COURT: Thank you, Mr. Sullivan.

10 MR. JACOBS: If we could go to Page 2 of
11 Mr. Jefferson's declaration.

12 BY MR. JACOBS:

13 Q. You testified earlier that the initial list of
14 districts in Paragraph 3 was incomplete based on the
15 information that you knew when you signed it. Is that
16 right?

17 A. Yes, sir.

18 Q. You should have had Districts 34 and 37 on that list?

19 A. And 61 and 94, if I -- 94, 95, one of them.

20 Q. So that would leave how many districts still missing
21 out of the challenged districts?

22 A. I think it was like two were missing.

23 Q. Two districts?

24 A. Yes.

25 Q. Since that time, you haven't made further efforts and

1 personally identified any further members living in those
2 two districts?

3 A. No, because our partner plaintiff, they identified
4 those people in those districts.

5 Q. Right.

6 A. They have members in those districts. No, I have
7 not.

8 Q. Thank you.

9 So when someone comes to join the state conference of
10 the NAACP, do they submit an application or how does that
11 work?

12 A. They do not join the state conference. They join a
13 branch and the branch is a local branch, like
14 Jacksonville. Say, someone comes to Jacksonville. First
15 they would get a membership form because there is a thing
16 to fill out. They complete the membership form. And
17 that's the starting point of the -- of joining the local
18 branch.

19 Q. Are there local branches that cover every city and
20 town in the state of Arkansas?

21 A. No. We do not have every branch covered.

22 Q. If you had a voter who lived in some, say, remote
23 town who wanted to join the state conference and didn't
24 have a local branch, what would they do?

25 A. They go to the nearest branch. They go to the

1 nearest branch. Like, we have Jacksonville -- we have
2 people come from Cabot or Searcy who come join our branch.

3 Q. Could they join online?

4 A. Yes, they can.

5 Q. And when you join online, are you joining the state
6 conference specifically or are you joining the national
7 organization more broadly?

8 A. You join -- when you join online, they assign you to
9 a local branch. You identify that local branch and you go
10 to that local branch.

11 Q. Can you join as an at-large member and not select a
12 local branch?

13 A. No.

14 Q. On --

15 A. Not to my knowledge. Let me make sure. Not to my
16 knowledge.

17 MR. JACOBS: Okay. Your Honor, if I could have
18 one moment. I think we may be finished with the witness.

19 THE COURT: You may.

20 MR. JACOBS: We pass the witness.

21 THE COURT: Mr. Sullivan, I want to ask one
22 followup question. And based on my question, of course,
23 you obviously can redirect. We'll see if we need to go
24 around one more time. Of course, it's always dangerous
25 when I say one. Depending on your answer, I might have

1 more.

2 Mr. Jefferson, can you explain the relationship
3 between the local branch and the state conference? I want
4 to flesh out my question a little bit to maybe try to get
5 a clearer answer.

6 When you join the local branch as a member, are --
7 does the local branch in some way report up to the state
8 conference or does it report straight up to the national
9 NAACP and the state conference is kind of a different
10 entity? Which way does that work?

11 THE WITNESS: Thank you for that question, Your
12 Honor.

13 This is how it work when you -- with the branches.
14 The branches report to the state branches because they are
15 under the state branches.

16 THE COURT: When you say "state branches,"
17 that's state conference?

18 THE WITNESS: State conference. I'm sorry. The
19 local branches report to the state conference and it's
20 under that umbrella. You cannot be a branch stand alone.
21 You have to be under the state conference. The state
22 conference reports to the national.

23 THE COURT: Okay. That answered the question I
24 have, but I do have one more question.

25

1 I think I understand it from how you phrased your
2 declaration, but I just want to be sure. When you say in
3 Paragraph 3, "I personally confirm that the Arkansas State
4 Conference NAACP has African-American members who are
5 registered voters living in at least the following
6 districts." Then you list the districts. And today,
7 obviously, you've supplemented that with some more
8 districts that were, at least based on your testimony,
9 accidentally left out that should have been in there.

10 THE WITNESS: Yes, sir.

11 THE COURT: As to at least one member in each of
12 those districts, were they members when this lawsuit
13 started?

14 THE WITNESS: Yes, sir.

15 THE COURT: You know that?

16 THE WITNESS: Yes, sir, for a fact, yes, sir.

17 THE COURT: Okay. I appreciate it.

18 Mr. Sullivan.

19 MR. SULLIVAN: Just one question, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. SULLIVAN:

22 Q. Mr. Jefferson, you testified you are a member of the
23 Jacksonville Chapter, correct?

24 A. Yes.

25 Q. Do you consider yourself member of the Arkansas

1 NAACP?

2 A. When you're a member of the branch, you're a member
3 of the state conference, yes.

4 MR. SULLIVAN: Thank you. That's all I have.

5 THE COURT: I appreciate it.

6 Mr. Jacobs, anything else?

7 MR. JACOBS: I guess one further question.

8 RECROSS-EXAMINATION

9 BY MR. JACOBS:

10 Q. Can you hear me, Mr. Jefferson?

11 A. I hear you real well.

12 Q. You said that the state conference itself is
13 organized as its own corporation. Did I catch that right?

14 A. Yes.

15 Q. Are you registered with the Secretary of State's
16 office as an Arkansas corporation?

17 A. Is the state branch registered with the Arkansas
18 Secretary of State?

19 Q. Yes, sir.

20 A. I can't answer that question because I am not the
21 treasure or nothing. I can't answer that question right
22 now.

23 MR. JACOBS: That's all, Your Honor. Thank you.

24 THE COURT: Mr. Sullivan?

25 MR. SULLIVAN: Nothing further, Your Honor.

1 THE COURT: Mr. Jefferson, thank you for your
2 testimony. I appreciate it.

3 Let me ask this to both of the lawyers. It may well
4 be that some witnesses, after they are done testifying,
5 would be interested in staying in the courtroom. I have
6 no idea if you want to recall people or anything like
7 that.

8 What is everyone's view of folks staying in the
9 courtroom after they've testified?

10 Mr. Sullivan?

11 MR. SULLIVAN: As to Mr. Jefferson, he is the
12 party representative, so he's allowed to stay anyway. But
13 anybody else, I want anyone that's not a party to be under
14 the Rule after they testify unless --

15 THE COURT: Even after they testify, we'll keep
16 them under the Rule?

17 MR. SULLIVAN: Yes, Your Honor.

18 MR. MOSLEY: Doesn't matter what I say at this
19 point.

20 THE COURT: That's right. Very smart. Okay.
21 Mr. Sullivan. Good.

22 MR. SULLIVAN: Your Honor, I call Bill Kopsky.

23 MR. MOSLEY: Your Honor, may we approach?

24 THE COURT: Sure. But let's first swear him in.

25 BILL KOPSKY, PLAINTIFFS' WITNESS, DULY SWORN

1 DIRECT EXAMINATION

2 BY MR. SULLIVAN:

3 Q. Sir, would you state your name and spelled it for the
4 Court, please?5 A. Bill Kopsky. B-i-l-l. And the last name is
6 K-o-p-s-k-y.

7 Q. What is your educational background?

8 A. I attended the University of Colorado, completed
9 degrees -- bachelor degrees for --10 Q. If you could just slow down a little bit for me,
11 please.

12 A. Sure. Going fast.

13 I went to the University of Colorado, studied biology
14 and English with a minor in philosophy.

15 Q. When was that?

16 A. '92 to '96, I believe.

17 Q. How are you currently employed?

18 A. I'm the director at the Arkansas Public Policy Panel.

19 Q. What is the Arkansas Public Policy Panel?

20 A. We're a nonprofit that organizes in communities
21 across the state and brings communities together to solve
22 local problems that our leaders identify and then we also
23 bring those different communities we work in together in
24 collation where our members again select priorities that
25 we work on at the state level.

1 Q. How old is the Public Policy Panel?

2 A. Founded in 1963.

3 Q. Can you tell the Court the mission of the Public
4 Policy Panel?

5 A. Like Barry, I have a cheat sheet. Make sure I get it
6 right here. Our mission is to expand social justice in
7 Arkansas by organizing grassroots communities to be more
8 civically engaged and bringing those communities together
9 in coalitions to work for the betterment of Arkansas.

10 Q. Does the Public Policy Panel engage its members in
11 elections for the State House of Representative in
12 Arkansas?

13 A. Absolutely. We register people to vote. We hold
14 candidate forums. We encourage people to get out and
15 vote. We educate the public and our members about the
16 laws and rules around how to vote safely and effectively.

17 Q. Is the Public Policy Panel engaged in advocacy with
18 the General Assembly?

19 A. We do on issues that our members elect.

20 Q. Tell me what form that takes.

21 A. Really our advocacy is through our members. We have
22 members that live in legislative districts all over the
23 state that are far more effective with lawmakers than we
24 are. So we basically encourage our members to contact
25 their lawmakers. Our members elect the issues that they

1 work on. They tend to be around kind of four buckets of
2 issues: Civil rights and election law, the environment,
3 economic opportunity, and education.

4 Q. Do your members ever appear and testify or speak at
5 committee meetings at the General Assembly?

6 A. Yes.

7 Q. Is that regularly or sporadically or what?

8 A. Regularly, yeah.

9 Q. Generally, tell the Court what the main issues of
10 concern that the Public Policy Panel members have in
11 recent times.

12 A. In recent times, some of our priorities have been
13 around trying to improve our public education system,
14 advocating for fair tax policy. Arkansas has an upside
15 down tax system. Climate change and water quality have
16 been big priorities for us. Criminal justice reform has
17 been a big priority for us to name a few.

18 Q. Do any of those issues, especially criminal justice
19 reform, of particular interest to your black members?

20 A. Absolutely. I think, you know, some of the election
21 laws that we've worked on, thinking about our members that
22 are black, have most engaged around election law reform, a
23 lot of the economic issues that we worked on, obviously a
24 lot of civil rights issues that we work on.

25 Q. Where is the Public Policy Panel headquartered?

1 A. We're just a few blocks over on Second Street here in
2 Little Rock.

3 Q. Approximately how many members do you have?

4 A. About 3,000.

5 Q. On the screen before you in a moment I'll show you
6 Plaintiffs' Exhibit 59 titled, "Declaration." Do you --
7 are you familiar with this declaration?

8 A. I believe I signed it, yes.

9 Q. And if we'll page down to the last page. Is that
10 your signature?

11 A. Yes.

12 Q. And back on the first page in your declaration, you
13 mentioned that you were familiar with the 19 challenged
14 districts that the Board of Apportionment approved for the
15 State House in Arkansas, correct?

16 A. Correct.

17 Q. And would you briefly and slowly read those
18 districts?

19 A. Sure. 34, 37, 61, 64, 65, 74, 75, 76, 77, 79, 80,
20 90, 93, 94, 95, 96, 97, 98, and 99.

21 Q. Were you able to determine in which of those
22 challenged districts the Public Policy Panel has members
23 who are both black and registered voters?

24 A. Yes.

25 Q. Tell the Court how you went about making that

1 determination.

2 A. So we polled our membership from those districts we
3 have in our database geocoded. We're able to pull our
4 membership by those districts. And through there I worked
5 with my staff that we personally knew most of them and
6 identified members who were black and confirmed their
7 voter registration status.

8 Q. How did you go about confirming their voter
9 registration status?

10 A. Either by cross-referencing the Secretary of State's
11 registration files or by personal knowledge that we -- we
12 know most of these people that we work with.

13 Q. Is that the same answer for how you determined their
14 race?

15 A. Yes.

16 Q. How many of the 19 challenged districts did you
17 determine that the Public Policy Panel has members in?

18 A. I believe it was all but two, if I'm not mistaken.
19 Might be -- other than three it looks like.

20 Q. And importantly, did you determine you had members in
21 district 90 and 95?

22 A. Yes.

23 Q. If you had worked on this project longer, do you
24 believe you had other members in other districts that you
25 did not already determine had members?

1 A. Yes.

2 Q. What impact, if any, does the adopted House plan have
3 on your black members who live in the challenged
4 districts?

5 A. Has a huge impact. It really marginalizes their
6 ability to have state representatives represent their
7 interests at the capitol, and also just to even really
8 consider them as a significant constituency bloc within
9 their districts.

10 MR. SULLIVAN: Can I have one moment with
11 counsel, Your Honor?

12 THE COURT: You may.

13 MR. SULLIVAN: Your Honor, I move for admission
14 of Plaintiffs' Exhibit 59.

15 THE COURT: Any objection?

16 MR. JACOBS: No, Your Honor.

17 THE COURT: It's admitted.

18 (Plaintiffs' Exhibit 59 admitted into evidence.)

19 MR. SULLIVAN: I pass the witness.

20 THE COURT: Thank you, Mr. Sullivan.

21 MR. JACOBS: If we could, could we keep -- thank
22 you. Move this over year --

23 CROSS-EXAMINATION

24 BY MR. JACOBS:

25 Q. Good afternoon, Mr. Kopsky.

1 A. Good afternoon.

2 Q. My name is Dylan Jacobs. If I'm speaking too quickly
3 or if you can't understand me, please let me know. I will
4 slow down.

5 A. Yes, sir.

6 Q. So you are with Arkansas Public Policy Panel. Is
7 that organized as a nonprofit corporation?

8 A. Yes, sir.

9 Q. If you look at Public Policy Panel's materials, you
10 sometimes come across Citizens First Congress. Can you
11 tell me what that is?

12 A. That's a coalition that we've organized that's
13 incorporated as a 501(C)4. It is a separate organization,
14 but we work closely together.

15 Q. How closely do the two organizations work together?
16 Do they share staff? Do they share offices?

17 A. Both. They have separate boards and separate
18 governing structure, make decisions a little bit
19 differently, but we do -- basically the Panel provides
20 staff to the Citizens First Congress.

21 Q. Do they have separate membership?

22 A. The Citizens First Congress has organizational
23 membership of 60 member organizations, not individual
24 memberships. So, yes.

25 Q. When you testified the Public Policy Panel has 3,000

1 members -- about 3,000 members, those members are
2 individuals and none of them are members of Citizen First
3 Congress?

4 A. Correct.

5 Q. So looking back to your declaration -- so I won't ask
6 you to read all of those numbers again.

7 A. Thank you.

8 Q. But if you could just look at it for a moment. Would
9 you agree with me that the list of districts in Paragraph
10 3 is missing Districts 34, 37, 61, and 97 out of the list
11 of districts in Paragraph 2?

12 A. I thought it was three, but you're right. It's four.

13 Q. So when you conducted your inquiry to determine if
14 you had members in these districts, you did not personally
15 verify that you had members living in Districts 34, 37, 61
16 or 97, correct?

17 A. That is correct.

18 Q. And --

19 MR. SULLIVAN: Your Honor, I believe Mr. Kopsky
20 meant 64.

21 MR. JACOBS: 64, yes. Sorry. That's my --
22 that's my mistake.

23 BY MR. JACOBS:

24 Q. So 34, 37, 64, and 97 are the ones that's missing
25 from that list.

1 THE COURT: Hold on. Mr. Jacobs, you just said
2 64 again.

3 MR. JACOBS: I typed it out wrong. There we go.
4 Okay.

5 THE WITNESS: I do not believe identified
6 members in 34, 37, 61, or 97.

7 BY MR. JACOBS:

8 Q. Thank you.

9 A. You're welcome.

10 THE COURT: Good team work.

11 THE WITNESS: We'll get there.

12 MR. JACOBS: Been looking at a lot of lists with
13 a lot of numbers these past few days.

14 BY MR. JACOBS:

15 Q. So you testified that, in order to get that
16 information, you started with the names of your members.
17 Was that from a member list that Public Policy Panel
18 keeps?

19 A. Correct.

20 Q. How do you keep that? Is it digital? Is it on paper
21 somewhere?

22 A. We have a database.

23 Q. Database?

24 A. Mm-hmm.

25 Q. What kind of information does that contain? Names?

1 Addresses? Any other pertinent information?

2 A. General contact information.

3 Q. You said I believe that you cross-referenced that
4 with Secretary of State voter role information or personal
5 knowledge to determine whether these members were
6 registered voters. Did I summarize that right?

7 A. Yes, sir.

8 Q. When you say personal knowledge of whether someone is
9 a registered voter, what do you mean by that?

10 A. Well, so we have staff organizers who work for us and
11 they work in the community where we do voter registration
12 drives, for example, or hold candidate forums or we've
13 trained some of our members to be pole watchers. So for a
14 lot of our members, we're so deeply involved in
15 encouraging civic engagements in that local community
16 that, again, we know that they're registered voters
17 because we're doing pole watching with them or they've
18 attended voter registration drives with us.

19 Q. When you were doing this, you didn't ask anybody if
20 they were a registered voter?

21 A. When I did this for this specific affidavit?

22 Q. Correct.

23 A. No. I did not feel the need to call any individual.
24 I did call a couple of my staff that work with our members
25 and confirm with them. But, again, we feel like we know

1 our members so well that we didn't feel like we needed to.
2 I'm extremely confident in our conclusions.

3 Q. So I believe Mr. Sullivan asked you -- after you gave
4 the answer that you cross-referenced your member list with
5 the Secretary of State voter roles and your personal
6 knowledge to confirm voter registration, I believe he
7 asked you is that the same answer for race, and you said
8 yes. Was that --

9 A. Yes.

10 Q. -- what you testified?

11 A. Yes.

12 Q. Does your membership list contain information about
13 whether a person is registered to vote?

14 A. Yes. We have some voter registration data in our
15 database.

16 Q. And does your membership list contain information on
17 your member's race?

18 A. That's where I thought you were going. No, it does
19 not.

20 Q. So when you say that you cross-referenced with
21 Secretary of State data or personal knowledge, the
22 Secretary of State data didn't have anything to do with
23 you verifying membership's race?

24 A. That's correct. That was done through personal
25 knowledge of either me or my staff.

1 Q. So you testified that you had information as to some
2 of these and some members you did not personally know
3 them. Is that right?

4 A. In a few districts I did not know them but a member
5 of my staff did.

6 We went dark.

7 Q. Can we bring that back. Sorry. Not quite.

8 So did you -- when you were doing your inquiry for
9 this declaration, did you have to personally call any of
10 these members yourself?

11 A. Again, I called some of my staff that work with
12 members in those districts, but I did not call any
13 individuals.

14 Q. So you didn't?

15 A. Correct.

16 Q. For the witnesses that you identified on your
17 personal knowledge, where did -- how did you -- how did
18 you know what race they are?

19 A. Because I knew them and I've worked there for 25, 26
20 years.

21 Q. Did you know all of these members for 26 or 25 year?

22 A. No, certainly not. Some of them have been active
23 with us for different periods of time. But again, either
24 I or one of our staff personally knew somebody in each of
25 these districts.

1 Q. Okay. So on Paragraph 2 of your declaration, you
2 give the list of the districts that are being challenged
3 here, and you describe the lawsuit as challenged as either
4 packed or cracked.

5 Can you explain what you consider those terms to mean
6 in this context?

7 A. Sure. So packing in the context of racial
8 gerrymandering would be when you take a lot of black
9 voters in an area and you basically cram them all into one
10 district and make that district, say, 80 percent, 70
11 percent, some very high number black so that you can then
12 have surrounding areas that are really in the same
13 community of interest as some of those black members be
14 majority white districts. So you basically create fewer
15 super majority black districts by packing them.

16 And then cracking is the exact opposite. You take a
17 population a community interest of black voters that ought
18 to have its own representation or at least have an
19 opportunity to have their own representation, and instead
20 of having them be one coherent community of interest, you
21 splinter them like a wagon wheel if you will out with
22 populations of non-black voters so that the -- even though
23 there is a large enough population center there for there
24 to be enough black voters to have a district where they
25 would have an opportunity to elect the candidate of their

1 choice, instead they're diluted with white voters or other
2 race voters so that they don't have that opportunity.

3 Did I explain that clearly?

4 Q. I think that answered my question. Thank you.

5 A. Thanks.

6 Q. Is it fair to say the Public Policy Panel has been
7 involved with the redistricting process in Arkansas and
8 the Board of Apportionment?

9 A. Yes, mm-hmm.

10 Q. Did the Public Policy Panel submit formal comments to
11 the Board of Apportionment during the process?

12 A. We did.

13 Q. Can we switch the view to the ELM0?

14 I have this on my screen, but I don't have it on
15 here. So someone might need to --

16 A. Where is that going to pop up? Okay. Good.

17 Q. Do you recognize this cover page?

18 A. Yes.

19 Q. So is this the cover page of the comments Public
20 Policy Panel submitted to the Board of Apportionment
21 during the process?

22 A. Looks just like it.

23 Q. Were you personally involved in drafting or approving
24 this document?

25 A. In approving it, yes.

1 Q. So you're fairly familiar with what the document
2 says?

3 A. Yeah.

4 Q. So is it fair to say that the Public Policy Panel's
5 comments were dissatisfied with the maps that were drawn
6 with -- by the Board of Apportionment as far as the House
7 districts?

8 A. We found, unfortunately, numerous problems with the
9 way the Board of Apportionment conducted this
10 redistricting process. That's a fair conclusion.

11 Q. So are you familiar, at least generally, with the
12 criterion goals that the Board of Apportionment stated
13 that it was going to use in drawing the legislative maps?

14 A. Yes. I think we have them outlined in our report.

15 Q. So this is Page 3 of this report. So there is a
16 numbered list down here that starts on Page 3 that starts
17 at 1 and goes to 8. If you want to take a moment to
18 refresh your memory of it.

19 A. I feel pretty confident. I might need to refer back.

20 Q. Thank you. There are eight criterion here. I
21 believe the board had nine on its website, but would you
22 agree that the criterion is substantially similar to each
23 other, the various considerations that you listed here and
24 what the board said that it was doing when it did the work
25 of drawing these maps?

1 A. That was our goal. So yes.

2 Q. So this is Page 16 of the document. You see at the
3 top there it says, Appendix 2, House district detailed
4 analysis.

5 Do you recall this portion of the report?

6 A. Yeah. We basically go district by district, I
7 believe, through all 100 and gave comments on them.

8 Yeah, there it is.

9 Q. Okay. So that was Page 16. Now we're on Page 17. I
10 want to direct you to the top up here.

11 So you see at the very top where it says, "The
12 overall view of the BOA" -- by that -- that means Board of
13 Apportionment?

14 A. Our overall view of the BOA proposed map. Correct.
15 These were comments that we gave to the Board of
16 Apportionment before they finalized the final maps.

17 Q. So it says, "The overall view of the BOA proposed map
18 for the State House is that 79 out of the 100 districts do
19 not adhere to the nine redistricting criterion goals."

20 Did I read that right?

21 A. Correct.

22 Q. So by the nine redistricting criterion goals, are you
23 referring to the criterion goals that the board published
24 that are substantially similar to the eight the Public
25 Policy Panel laid out here?

1 A. Yes.

2 Q. So going on, it just says, 79 out of the 100
3 districts do not adhere to those. And it goes on to say,
4 "with the exception of the following 21 districts that
5 do."

6 Now, I won't make you read out that long list, but
7 will you agree with me that the numbers 74, 75, 76, 77,
8 79, and 80 appear on that list?

9 A. Yeah. And I mean, so this is the --

10 Q. Let me -- let me --

11 A. Yes. I agree.

12 Q. Okay. I'll get to more questions.

13 So would you agree with me, at least for what this
14 document is saying here, that the list at the end of that
15 paragraph is a list of districts that, at least at this
16 time, Public Policy Panel is saying do adhere to the nine
17 redistricting criterion goals that the Board of
18 Apportionment published?

19 A. At that point in the process under the advice of the
20 experts that we had working with us, that was our opinion
21 at that moment in time, correct.

22 Q. So I'll go back to Page 3 of this. And so Number 2
23 on this list says that "Section 2 of Voting Rights Act of
24 1964 as amended prohibits discrimination based on race,
25 color, or language minority." Did I get that right?

1 A. Yes.

2 Q. And so when Public Policy Panel wrote this, it was
3 the organization's position that these 21 districts
4 adhered to these criterion goals which included compliance
5 with the Voting Rights Act?

6 A. That was the conclusion at that moment in time of the
7 experts that we had engaged to help us conduct this
8 analysis, but yes.

9 Q. So this report was submitted on November 26. Is that
10 right?

11 A. Yes.

12 Q. Do you know what date that the lawsuit in this case
13 was filed?

14 A. I don't know that off the top of my head, no.

15 Q. I believe it was December 29. So we can agree that's
16 somewhere about a month later, not much longer than that.

17 So between November 26 when this was published and
18 then a month later, is it fair to say that the
19 organization changed its stance on the six districts that
20 appeared on Page 17 of this report at the top of it?

21 A. Sure. I can explain.

22 Q. I'll get there.

23 A. Okay.

24 Q. We're going to be here a long time. Let's not make
25 it any longer.

1 THE COURT: Let me jump in, Mr. Kopsky, just so
2 you understand. Mr. Jacobs, obviously, is going to ask
3 you questions. He may want you to answer just the
4 questions he's asked. Obviously, your lawyer on redirect
5 can ask you to elaborate on anything you feel like you
6 need to elaborate on. And so if you feel like there is
7 something you need to say, I'm sure your lawyer will pick
8 up on that and ask you to -- you know, what you wanted to
9 say when it's not a direct answer to Mr. Jacobs.

10 THE WITNESS: Thank you, Your Honor.

11 MR. JACOBS: Thank you, Your Honor.

12 BY MR. JACOBS:

13 Q. Do you know what date the Board of Apportionment
14 approved the House district maps?

15 A. I believe it was the Monday after Thanksgiving, so
16 you'll have to give me the exact date of that.

17 Q. Does November 29 sound correct?

18 A. I won't argue with you. It was the Monday after
19 Thanksgiving.

20 Q. We'll say it was November 29 then. So the board
21 approved the House districts maps and the other maps at
22 issue three days after Public Policy Panel submitted
23 comments saying that the six districts that we were
24 talking about complied with all of its criterion goals at
25 least at that time. Is that right?

1 A. Correct.

2 Q. Go to Page 31 of this. So see Page 3 is down there.
3 So I believe we're still -- the report is still
4 talking about the House map. Here, let me get this in the
5 right view.

6 At the top of here, it says, "The BOA proposed State
7 House map has 12 verified VRA majority minority districts
8 comprised of over 50 percent voting age population."

9 Did I read that right?

10 A. Yes, sir.

11 Q. It's not your position now in this lawsuit that the
12 proposed map has 12 majority. That's not your position
13 now.

14 What -- what changed the organization's mind between
15 filing this report and file its lawsuit?

16 A. Deeper analysis and talking to other experts in the
17 field helped us understand the knots better. Again, we
18 did this -- may I elaborate?

19 Q. I think --

20 THE COURT: You may. Mr. Jacobs asked a
21 question. You can answer it.

22 BY MR. JACOBS:

23 Q. You can finish the answer to that, but I'll preview,
24 after this question, I think we're done. So --

25 THE COURT: Hold on. Mr. Jacobs is getting a

1 little bit out of his lane. You can finish your answer.
2 He asked you why you changed your mind. You can tell him.

3 THE WITNESS: I think I did. We had deeper
4 analysis from other experts that we didn't have access to
5 beforehand.

6 MR. JACOBS: That's all the cross I have, Your
7 Honor.

8 THE COURT: Before we go to redirect, I do have
9 a couple of questions.

10 I'm trying to figure out exactly what it means to be
11 a member of the Arkansas Public Policy Panel from how you
12 join, who you join with, what as a member you can do. Can
13 you just kind of explain that to me?

14 THE WITNESS: Sure, sure. So we have -- we
15 define membership in a couple of different ways. So, one,
16 we have a donor base of individual donors of about 1,000
17 people who donate money regularly to the organization. We
18 also have, in the communities where we organize, key
19 leaders. Most the communities where we're organizing have
20 an executive board of 13 members. So those members and
21 then their kind of local leadership, if you will. So like
22 in Gould, Arkansas or -- my brain is shorting out. Dumas
23 -- I was getting DeWitt, Dumas and -- combined. So their
24 leadership in those local communities. And then other
25 people who are in a more broad database who take regular

1 action. They attend our meetings. They respond to our
2 appeals to take action. They're deeply engaged with us in
3 helping carry out the mission of the organization.

4 THE COURT: Is there, for example, a membership
5 application or do you write to somebody if you want to be
6 a member or how does that work?

7 THE WITNESS: We don't have an individual
8 membership application, for example. Again, we count
9 members as kind of donors, key leaders, and then people
10 who are actively engaged with us.

11 THE COURT: I appreciate it. That's all the
12 questions I have.

13 You know what? That's exactly what they tell lawyers
14 not to do. Thankfully, I'm on the other side of the
15 bench, so I can do it without some concern.

16 Same question that I had for the gentleman from the
17 NAACP, Mr. Jefferson. In terms of the discussion that you
18 have found members from each of the districts you've said,
19 were they members at the time -- the members of the
20 Arkansas Public Policy Panel at the time the lawsuit was
21 filed?

22 THE WITNESS: Yes, sir.

23 THE COURT: Okay. I appreciate it.

24 Mr. Sullivan, you're up,

25 And I'll come back to you, Mr. Jacobs, if you have

1 something else.

2 MR. SULLIVAN: Your Honor, I would ask if
3 Mr. Jacobs would allow me to use the report he was just
4 questioning from.

5 MR. JACOBS: Can't promise the page ordering.
6 That's Page 16.

7 REDIRECT EXAMINATION

8 BY MR. SULLIVAN:

9 Q. Mr. Kopsky, I believe that you pointed out the date
10 on this report was November 26 of 2021, correct?

11 A. Correct.

12 Q. Which was slightly before the board approved the --
13 its maps on November 29, correct?

14 A. Correct.

15 Q. Now, when you were -- whoever put this together and
16 you reviewed this analysis, were they looking at draft
17 maps at that time?

18 A. They were looking at draft maps at the time, yes.

19 Q. And correct me if I'm wrong, weren't the maps, even
20 after November 29, there were some changes made or was
21 that right before?

22 A. There were some changes made. We did not know about
23 the changes until they approved them.

24 Q. And who did you submit -- did you submit this to the
25 Board of Apportionment?

1 A. We did.

2 Q. Did you get any response from them?

3 A. None whatsoever.

4 Q. You personally, did you ever submit any comments to
5 the Board of Apportionment?

6 A. As an individual, I did not. We encouraged our
7 members to. I thought we were speaking with an
8 organizational voice with our --

9 Q. Of the six districts that Mr. Jacobs asked you about,
10 is it still your view that these districts do not comply
11 with Section 2 of the Voter Registration Act?

12 A. No.

13 Q. Okay. And you were going to explain why. Could you
14 go ahead and do that?

15 A. Sure. We talked to other experts in the field who
16 had a deeper analysis. I think it's important to remember
17 that the deadline for public comments was the Monday after
18 Thanksgiving, so we were I think I --

19 MR. JACOBS: Your Honor, I think we're going to
20 object on hearsay grounds anything other experts may have
21 told Mr. Kopsky that he would testify about here.

22 THE COURT: I'm going to let it in for now.
23 Whether or not I ultimately use it is a different
24 question, but given that we're not in front of a jury, I
25 think I can deal with it.

1 MR. SULLIVAN: Thank you, Your Honor.

2 BY MR. SULLIVAN:

3 Q. Go ahead.

4 A. At any rate, we were sort of in the crush before
5 Thanksgiving of trying to get the comments out.
6 Afterwards, we had hoped that the board would, frankly,
7 delay their decision to take into account some of the
8 comments that they got. They did not. They issued final
9 maps on that Monday without responding to our comments or
10 many, many others. And so we did further analysis and
11 found deeper problems.

12 MR. SULLIVAN: Thank you. Your Honor --

13 THE COURT: Can I stop you for a second,
14 Mr. Sullivan? I just want to clean up something from the
15 record because I think I know what your question meant and
16 I think I know what his answer meant, but it's not how it
17 looks on the transcript so I want to make sure.

18 I think Mr. Sullivan meant to ask you, do you still
19 believe that the districts you identified in that report
20 as comporting with Section 2, do you still believe they
21 comport with Section 2.

22 And I think your answer was, no, you all have changed
23 that opinion.

24 First of all, Mr. Sullivan, do you agree that that's
25 what the question you meant to ask?

1 MR. SULLIVAN: It is, Your Honor.

2 THE COURT: Okay. And do you agree, Mr. Kopsky,
3 that that's the answer you meant to give?

4 THE WITNESS: Yes, sir.

5 THE COURT: Just so you all know for the record
6 the reason I cleaned it up is, either you said,
7 Mr. Sullivan, or the court reporter got an extra "not" in
8 there and so it actually ended up the opposite way. And I
9 just wanted to make it clear for the record.

10 BY MR. SULLIVAN:

11 Q. Just so I'm clear, it's your position that these
12 districts do not comply with the Section 2, correct?

13 A. Yes, sir.

14 MR. SULLIVAN: Your Honor, at this time, I want
15 to move for admission of the report that Mr. Jacobs
16 brought to us. That would be Plaintiffs' Exhibit 71.

17 THE COURT: Any objection?

18 MR. JACOBS: No, Your Honor.

19 THE COURT: It's admitted.

20 (Plaintiffs' Exhibit 71 admitted into evidence.)

21 MR. SULLIVAN: It is not stamped or labeled
22 because we didn't bring it.

23 THE COURT: We can call it Court's Exhibit 1.

24 MR. SULLIVAN: Thank you, Your Honor. May I
25 present to the court reporter?

1 THE COURT: You may.

2 MR. SULLIVAN: And I pass the witness.

3 THE COURT: Thank you, Mr. Sullivan.

4 Mr. Jacobs, since I asked a question, I'll give you a
5 short followup. And then if Mr. Sullivan wants a last
6 chance, he can have one.

7 MR. JACOBS: Thank you, Your Honor.

8 RECROSS-EXAMINATION

9 BY MR. JACOBS:

10 Q. You mentioned just now with Mr. Sullivan that you
11 were encouraging members to make comments about the board.
12 I want to go back to this membership information.

13 Did I hear you correctly when you said that anybody
14 who is a donor is considered to be a member of Public
15 Policy Panel?

16 A. Correct.

17 Q. When you have a member list, do you have a separate
18 list for people who donated money and people who joined
19 Public Policy Panel in other ways?

20 A. Yeah. We can segregate that in our database.

21 Q. You say you can segregate that data. Have you done
22 that or is it all contained in the same database as it
23 sits there today?

24 A. It's in the same database but we did pull the list
25 differently.

1 Q. What do you mean?

2 A. Basically, I pulled the donor list, reviewed that,
3 and then pulled a list of our active leadership, as I
4 mentioned to Your Honor.

5 Q. So when you went through the inquiry to come up with
6 the declaration that you submitted, did you take that
7 information from just the -- we'll call it the non-donor
8 portion of your member list or did it include the donor
9 list as well?

10 A. Both.

11 Q. So Public Policy Panel would consider anyone who
12 gives the panel money at some point in time years later to
13 still be a member of the organization?

14 A. No. It's an active donor which means they've donated
15 in the past three years.

16 Q. Past three years, okay.

17 But someone could be considered an active member if
18 they donated money, say, two and a half years ago and have
19 had absolutely no further interaction with the
20 organization in theory?

21 A. In theory that would be a very small number of
22 people.

23 Q. But if there were a person that they just donated
24 money less than three years ago and didn't do anything
25 else, they would have shown up on the list?

1 A. Correct. They would have been on our donor list.

2 Q. They would have been on the member list that you used
3 to come up with your declaration which you filed in this
4 case?

5 A. That's correct.

6 Q. So as you were discussing with Mr. Sullivan, the
7 panel -- I call it "the panel" since it's kind of a
8 mouthful to say over and over.

9 A. That's what we call ourselves too.

10 Q. -- did further analysis after it submitted the report
11 that we've been discussing to the board. Is that correct?

12 A. Correct.

13 Q. Would you say that that was a pretty thorough
14 investigation that the panel did on the front end to come
15 up with that report?

16 A. I would say so, yes.

17 Q. You don't have to tell me what these experts told
18 you, but you did engage with some outside experts to come
19 up with the detailed map analyses that are contained in
20 that report.

21 A. Absolutely.

22 MR. SULLIVAN: Objection, Your Honor. I believe
23 that's outside the scope of the questions you asked the
24 witness.

25 THE COURT: Overruled, but let's move it along.

1 BY MR. JACOBS:

2 Q. So is it fair to say that, since the panel came up
3 with one conclusion in November and came up with a
4 different conclusion in December, that reasonable minds
5 could disagree as to those six districts?

6 A. I think it's important to remember we came to
7 conclusions around a set of draft maps and not the final
8 maps.

9 Q. Are you aware of any changes that were made to the
10 six districts that we discussed that led to the panel
11 changing its view about whether they complied with the
12 VRA?

13 A. No. Again, we brought in more analysis after we had
14 -- as I mentioned, we had hoped the board would delay the
15 decision and take into account all of the comments they
16 were getting. That did not occur.

17 MR. JACOBS: I don't have anything else, Your
18 Honor.

19 THE COURT: Thank you, Mr. Jacobs.

20 Mr. Sullivan, last shot.

21 FURTHER REDIRECT EXAMINATION

22 BY MR. SULLIVAN:

23 Q. Did I understand your testimony that you personally
24 knew almost all of the members that you verified lived in
25 the challenged districts?

1 A. Either I or one of my staff members did, correct.

2 Q. Of the ones you knew, were any of them people that
3 just know donated once two years ago, two and a half years
4 ago?

5 A. No.

6 Q. Were they what you consider regular, active --

7 A. Regular, active donors or members, yes.

8 Q. You know that because you know them?

9 A. Yes, sir.

10 MR. SULLIVAN: Thank you. Thank you.

11 THE COURT: Thank you very much, Mr. Kopsky. I
12 appreciate it.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: In terms of break scheduling, do we
15 have more fact witnesses or are we moving on to experts?

16 MR. SULLIVAN: We have today one more fact
17 witness.

18 THE COURT: About how long do you think it
19 should take?

20 MR. SULLIVAN: The same amount of time probably
21 as the last two, maybe a little bit longer.

22 THE COURT: We're going to take a five-minute
23 break now and we'll continue -- then we'll continue with
24 that fact witness.

25 (A recess was taken at 3:27 p.m. until 3:43 p.m.)

* * * * *

REPORTER'S CERTIFICATE

I, Valarie D., Flora, CCR, certify that the foregoing
is a correct transcript of proceedings in the
above-entitled matter.

Dated this the 3rd day of February, 2022.

/s/ Valarie D. Flora, CCR

United States Court Reporter

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1 THE COURT: We are back on the record. Just so all
2 the parties know, I was just informed by my courtroom deputy
3 that the reason we were having technical difficulties with
4 Teams, in terms of letting people look in from cyber space is
5 apparently Microsoft Teams went down over the whole nation, or
6 so I hear. Maybe just in the court system in the nation, I
7 don't know. Point being, we had some trouble, but I think now
8 we are back and everybody is using it. Hopefully that will
9 remain that way going forward.

10 Mr. Sullivan or whoever else on your team is ready,
11 you're up.

12 MR. SULLIVAN: Your honor, I call Representative Monte
13 Hodges.

14 REPRESENTATIVE MONTE HODGES, PLAINTIFFS' WITNESS, DULY SWORN

15 THE COURT: Thank you for being with us today.

16 DIRECT EXAMINATION

17 BY MR. SULLIVAN:

18 Q. Sir, would you state and spell your name for the Court,
19 please?

20 A. My name is Monte Hodges, that's M-O-N-T-E, last name
21 Hodges, H-O-D-G-E-S.

22 Q. And thank you for speaking slowly. I'm going to need you
23 to do that throughout your testimony.

24 Tell the Court your educational background?

25 A. Product of the Blytheville School System, k-12. And

1 attended Arkansas State University, where I hold a undergrad in
2 business administration with emphasis in economics and finance.

3 Q. How are you currently employed?

4 A. I'm currently employed with Southern Bank Corp Bank in
5 Blytheville.

6 Q. What is your position there?

7 A. I am the senior vice president of commercial lending.

8 Q. You said nine years?

9 A. I have been with them -- it'll be nine years this years,
10 yes.

11 Q. What did you do before that?

12 A. I worked for another community bank, Farmer's Bank and
13 Trust in Blytheville as assistant vice president of lending for
14 about 18 and a half year years.

15 Q. Did you also serve in the military?

16 A. I did. I did six years. I did a total of nine years. I
17 did three years in the Army reserve, and I did six years in the
18 Arkansas National Guard.

19 THE COURT: Thank you for your service.

20 THE WITNESS: Thank you.

21 BY MR. SULLIVAN:

22 Q. And you are currently a member of the Arkansas House of
23 Representative; is that right?

24 A. I am. I'm in my fifth term in the Arkansas House of
25 Representatives.

1 Q. Tell the Court what the Arkansas Black Legislative Caucus
2 is?

3 A. The Arkansas Legislative Black Caucus is comprised of black
4 legislators. We are a nonpartisan body, and we just focus on
5 issues that really -- you know, it derived from the
6 congressional black caucus many, many years ago led by Shirley
7 Chisholm. And we just address issues that affect, you know,
8 marginalized groups and things of that nature.

9 Q. You said that the black caucus is nonpartisan. Have you
10 had republican members of the caucus in the past?

11 A. In the past, yeah. Way before my time.

12 Q. Have you had independent members also, or do you know?

13 A. We have had Green. We had a Green party member at one
14 time, yeah.

15 Q. Okay. Do you hold a position in the black caucus?

16 A. I am the chair.

17 Q. How long have you been the chair?

18 A. This is -- I was elected. This is my first year as chair.

19 Q. Do you feel like you are familiar with issues that are
20 important to black voters in your district?

21 A. I think I'm pretty in tune to what black voters...

22 Q. Do you get out and talk to them on a regular basis?

23 A. Absolutely, you know, doing elections.

24 Q. Tell the Court, just briefly and generally, some of the
25 issues that are important to black voters in your district?

1 A. Of course, you know, voter suppression has been one of the
2 key issues that I have heard constituents talk about when it
3 comes to...

4 And I think that a lot of the black voters feel that, you
5 know, they don't -- they really don't have a voice. Oftentimes,
6 that's the reason they don't vote, or won't go register to vote.

7 Q. Do you feel that the general assembly has been responsive
8 to concerns that are particularly interesting to African
9 Americans in Arkansas?

10 MR. MOSLEY: Objection. Calls for speculation.

11 THE COURT: Overruled. You can answer.

12 THE WITNESS: As a black member of the House, this
13 particular session was probably one that -- of the most -- I saw
14 just a disregard for the African-American voice this particular
15 session, in particular, yeah.

16 BY MR. SULLIVAN:

17 Q. Were there any particular bills that led you to that
18 conclusion?

19 A. Absolutely. As a matter of fact, I spoke adamantly against
20 a couple of the bills. One was the Stand Your Ground bill that
21 I, you know, spoke against in the well, you know, looking at the
22 stated on how it disproportionately affected black and brown
23 people when it came to homicides when you look at our
24 neighboring states. So I voted to -- against it, and I spoke
25 against that bill. That's one in particular that really stands

1 out to me.

2 Q. What about the Hate Crimes bill?

3 A. The Hate Crime bill is another one. Thank you. That I
4 spoke against. We had a pretty solid one that was kind of
5 watered down, that really didn't, you know, address the people
6 that it needed to address when it came to the targeted groups.
7 So yes, that's another bill that I spoke against and voted
8 against during this past session.

9 Q. And explain further why that was important to black voters.

10 A. Because, you know, often -- you know, hate crimes are
11 normally targeted to marginalized groups, you know, the LGBTQ
12 community, people of color are targeted, things of that nature.
13 So I think if you are going to have a Hate Crime bill it needs
14 to address people that it's targeted to. And I don't think the
15 bill that we passed did that.

16 Q. What committees were you on this past session?

17 A. I served on Rev and Tax, Insurance and Commerce. Of course
18 I'm on Budget. A few of the ones I can think of right offhand.

19 Q. For the ones that you served on, were there any other black
20 representatives on those committees besides you?

21 A. So on Rev and Tax I was the only black representative on
22 that committee. Insurance and Commerce, we had a few more
23 stacked on it, but Rev and Tax, which is a pretty powerful
24 committee was -- I was the only person of color on that
25 committee.

1 THE COURT: Let me ask a question for there, or at
2 that point.

3 On those committees, if you know, what is the breakdown
4 between Republican and Democrat?

5 THE WITNESS: Of course there is a super majority in
6 the house. So it's only a little over 20 Democrats in the house
7 anyway. So they're the vast majority of republicans on these
8 committees as opposed to Democrats. So if I would have -- so
9 we -- a little bit over 20, I think 20 members on the
10 committees, and there were probably -- I think there is only two
11 Dems on the Rev and Tax committee, if I'm not mistaken.

12 THE COURT: Sorry, Mr. Sullivan. Keep going.

13 BY MR. SULLIVAN:

14 Q. Representative Hodges, what was the first year you served
15 in the House of Representatives?

16 A. I got elected in 2012, so I went into session 2013.

17 Q. Was the Republican party in the majority of the house at
18 that time?

19 A. Actually, it was half and half. So you had 50 Republicans,
20 you had 49 Democrats, and you had one Green.

21 Q. Do you recall at that time how many members of the House
22 were black?

23 A. During that time, almost about the same. That's not --
24 there hasn't been much variation with the number of black
25 representatives.

1 Q. Were the issues that black voters have now the same back in
2 2013?

3 A. I would say, you know, things have changed a lot. Things
4 have changed a lot in society.

5 Q. Let's talk about the two bills that you just mentioned.
6 Stand Your Ground has been tried several times --

7 A. Yes, it has.

8 Q. -- in Arkansas, correct?

9 A. Yes, it has.

10 Q. I don't remember exactly. Was it debated in 2013?

11 A. It was debated -- no, it was debated in the session prior
12 to this past session.

13 Q. And hate crimes has come up more than once?

14 A. It has.

15 Q. Correct?

16 A. Yeah.

17 Q. Okay. Back in 2013, were you on committees where you were
18 the only black member?

19 A. Thinking back, I think this is the first session that I was
20 the only black on a committee, this past session, if I'm not
21 mistaken.

22 Q. Are there -- were there committees this past session that
23 you are aware of that had no black members?

24 A. I'm sure there is a couple. I couldn't tell you which
25 committee they are, but there are a few that didn't have any

1 people of color on them.

2 Q. And how many black members of the house are there now?

3 A. There are 12 of us currently in the house.

4 Q. Can 12 black members cover all of the committees?

5 A. No.

6 Q. Are you familiar with the new Board of Apportionment
7 District approved for where you live?

8 A. Yes.

9 Q. What areas does that cover?

10 A. So, my area, I live in northeast Arkansas. I live in
11 Blytheville. I have covered the eastern portion of Mississippi
12 County, and I have two small municipalities in Crittenden
13 County, so Turrell and Gilmore. That's when it was District 55,
14 so we are in District 34 now. I no longer have Turrell in my
15 district anymore.

16 Q. How else is the new district different than what it was
17 previously?

18 A. So now, I encompass all of -- pretty much all of
19 Blytheville. I didn't cover the north end of the city of
20 Blytheville, and then I have some west of the county. It's a
21 town called Gosnell where the former Eaker Air Force Base was.
22 I went west, and I have got some more of the north end. And
23 then I have lost -- I lost Turrell in that process.

24 Q. What is the make up of the voters that have been added to
25 your district this time?

1 A. We are about -- you know, we -- they're still consider it a
2 minority majority district, but very, very minuscule. Very,
3 very small amount in the minority population now.

4 THE COURT: Mr. Sullivan, could I ask you, since we
5 are talking about it, could you put up the district we are
6 talking about? Do you have the map of the district?

7 MR. SULLIVAN: We do. I don't know the number.
8 Somebody here does.

9 MR. MOSLEY: I've got it. Would you like me to give
10 it to you here?

11 MR. SULLIVAN: If you'll tell us.

12 MR. MOSLEY: It is Document 2-8, Page 19.

13 MR. SELLS: I think it's Exhibit 1.

14 MR. MOSLEY: Which looks like plaintiffs -- okay.
15 Whatever y'all --

16 BY MR. SULLIVAN:

17 Q. Let's look at Plaintiffs' 1.

18 Does that help you in answering these questions,
19 Representative Hodges?

20 A. If I could see.

21 THE COURT: Whether or not it helps me him, it helps
22 me in understanding the answers.

23 BY MR. SULLIVAN:

24 Q. So of the areas that have been added to your district that
25 were not there before, tell me about the people that live in

1 those areas?

2 A. So, the -- the new redistricting has, like I said, the
3 north end of Blytheville is more affluent white population. And
4 Gosnell is more a white population in that area.

5 Q. So if I'm understanding you, you are saying in the new
6 district the black population is less than it was before?

7 A. Yes. And Turrell had more -- Turrell was more black, had
8 more black, you know, majority of that little town was African
9 American. That was eliminated.

10 Q. That was eliminated. Okay.

11 Are you running for reelection to the house?

12 A. No.

13 Q. If you did run for reelection, how do you feel about your
14 chances of success in the new district?

15 MR. MOSLEY: Objection. Well, never mind. Withdrawn.

16 THE WITNESS: In the new district, you know, I'm an
17 incumbent, large name recognition. Really people pretty much
18 all know me there in that area. So I would have a pretty good
19 chance of winning my seat back had I ran again.

20 BY MR. SULLIVAN:

21 Q. You have had that seat almost 10 years, right?

22 A. Yes. This is my fifth term, my tenth year.

23 Q. You're vice president of the bank, a lot of people know
24 you?

25 A. Right.

1 Q. Okay. What about a new black candidate that might decide
2 to run in that district, how do you think their chances are?

3 A. I think it would be extremely difficult. They would have
4 to work extremely hard, my successor, in trying to win that
5 seat, yeah.

6 Q. But if the person running for the democratic nomination
7 were white, would they have a better chance or equal?

8 A. I think they would have a much greater chance of winning.

9 Q. Of winning the nomination?

10 A. Yes.

11 Q. Okay.

12 A. Yes.

13 Q. Did you ever express your concerns about the proposed Board
14 of Apportionment maps that were being considered?

15 A. I did. I had a brief meeting to go over my concerns, and
16 some ideas I thought would be good for the district.

17 Q. Who was that meeting with?

18 A. Secretary of State's office.

19 Q. Do you remember who it was?

20 A. I cannot think of the gentleman's name right off.

21 Q. If I said his name, would you recognize it?

22 A. I think it's Kevin, maybe.

23 Q. Was it Kevin Niehaus?

24 A. Kevin Niehaus.

25 Q. Thank you. Did the Board respond in any way to your

1 concerns?

2 A. They just listened. Listened. You know, that's pretty
3 much.

4 Q. And did you have some other correspondence with anyone in
5 the governor's office?

6 A. No.

7 Q. Okay. What did you tell Mr. Niehaus that your concerns
8 were?

9 A. That as far as the way the map was, how I felt -- I just
10 gave him some ideas on how I would like to see the district
11 drawn out, some ideas that I thought would be good for District
12 55, at the time.

13 Q. Okay. What would it mean to black voters if there were
14 four or five more black members in the house?

15 A. You know, I think that it would -- first of all, probably
16 would encourage -- increase the number of African-American
17 voters to get out and vote when they know they have somebody at
18 the table that had their best interest in mind. You know, you
19 have a -- you know, you have a -- it could capture those
20 apathetic voters that feel like they just don't, you know, I'm
21 not going to register to vote, because you know, it's not going
22 to do me any good. I don't see anybody that looks like me there
23 at the capitol representing me.

24 Q. And if there were four or five more black members, is it
25 correct that then there could be more black members on a

1 committee meeting? Excuse me. A committee.

2 A. Yeah, there would be more on committees. And you know, we
3 would have a seat at the table. I think, you know, this past
4 session we, you know, I knew that there was a probability that
5 the bill was going to still get passed, even if I argued the
6 point that this hurts marginalized groups and all of that, but I
7 still had a voice at the table to share for my perspective as a
8 person of color, how these pieces of legislation would affect me
9 or affect people that looked like me. So I think we definitely
10 need to have more people at the table to express those
11 viewpoints from a different perspective.

12 Q. And you think that would have a more positive effect on a
13 black voter who came to the committee meeting and saw that
14 happening?

15 A. Absolutely.

16 Q. Do you believe it would still be important to have more
17 black representatives, even if Democrats were in the majority of
18 the House?

19 A. Yes, absolutely.

20 Q. And I'm sure -- do you know that Democrats have been in the
21 majority for many years of the past here?

22 A. They have. And there was still a dismal amount of people
23 of color represented in the House.

24 Q. Say that part again.

25 A. There was still a low number of African American even under

1 Democratic control.

2 Q. Same issue?

3 A. Yeah.

4 Q. Okay. Is that why race matters in Arkansas politics?

5 A. Yes. I think race matters in everything, yes.

6 MR. SULLIVAN: Pass the witness.

7 THE COURT: Thank you, Mr. Sullivan.

8 MR. MOSLEY: No offense Gary, but I don't want
9 anybody's germs today.

10 CROSS-EXAMINATION

11 BY MR. MOSLEY:

12 Q. Representative Hodge, how are you doing, sir?

13 A. I'm great. Thank you.

14 Q. And we have met in the past?

15 A. We have.

16 Q. I have represented the city of Blytheville when you were on
17 the city counsel; is that correct?

18 A. That's correct.

19 Q. And I think we had conversations at that time when you had
20 ascended to your spot now as state representative?

21 A. Right.

22 Q. Your, as drawn, the Board of Apportionment line, you said
23 includes all of Blytheville now, correct?

24 A. Yes.

25 THE COURT: Can we put the map back up, please?

1 MR. MOSLEY: We can put the map back up. I'm going to
2 have some on the Elmo here in just a minute, but let's take a
3 look at that, to be more specific, if we could.

4 BY MR. MOSLEY:

5 Q. Okay. Now this is the Board of Apportionment proposed map.
6 Is that what you understand, Representative Hodges?

7 A. Looks like it.

8 Q. Okay. Now, am I correct -- let me take this over here.
9 You tell me if I'm correct. Crittenden County is down here,
10 right?

11 A. Yes.

12 Q. Is this line in the Board of Apportionment map where --

13 A. Turrell.

14 Q. Turrell. And what was the other city?

15 A. Gilmore. Gilmore is still in -- that portion of Crittenden
16 County, I think, is still in District 34 now.

17 Q. When you met with Kevin Niehaus, did you or did you not ask
18 that one of the -- one of your desires was that your district
19 not gain more of Crittenden County, or was it not?

20 A. I expressed to him that, you know, I think that Crittenden
21 County should be separate -- should be a separate -- separate
22 with its own representative in that area, and District 34 should
23 encompass more of Mississippi County.

24 Q. Do you feel that way though, Representative Hodges for
25 purposes of compliance with the Voting Rights Act, is that why

1 you were saying that to Mr. Niehaus at the Secretary of State's
2 office?

3 A. No. I just felt that, you know, that it needs to be --
4 Mississippi County should -- District 55 at the time should just
5 encompass all of Mississippi County. And Crittenden County
6 should be a separate -- should be separate with their
7 representation in that area. They're familiar -- they're more
8 familiar with that area over there than someone from the
9 northern part of the county, state.

10 Q. And I understand what you're saying. Do you see what this
11 is called? It's the plaintiffs', it's what's known as part of
12 their illustrative plan.

13 A. Uh-huh.

14 Q. Do you see that?

15 It actually includes more of Crittenden County, doesn't it?

16 A. It's the former map here.

17 Q. This is the plaintiffs' map, the illustrative map. The map
18 they want.

19 A. Okay. Yeah.

20 Q. You see, it includes more of Crittenden County. Do you see
21 that, Representative Hodges?

22 A. Probably because it has more of an African-American
23 population in that area.

24 Q. Whether it does or doesn't, based on what you told
25 Mr. Niehaus, you don't agree this ought to be what's drawn for

1 purposes of that district, do you?

2 A. (No response.)

3 Q. Let me -- let me -- let's go back --

4 THE COURT: Hold on. You asked the question. Let him
5 answer it.

6 THE WITNESS: Yeah. You know, at the time I spoke
7 with him, I felt that District 55 should encompass more of
8 Mississippi County. Because the representation -- the -- most
9 of the representation that has come from that particular
10 district has always been from the north end of the county other
11 than one representative.

12 By MR. MOSLEY:

13 Q. And whether you know it or not, I know that.

14 A. Yeah.

15 Q. But my question was, didn't you tell Mr. Niehaus that you
16 thought Crittenden County shouldn't be in that district?

17 A. Yes.

18 Q. Yet what the plaintiffs have proposed here is for
19 Crittenden County to, in fact, be in the district, correct?

20 A. Based on what you are telling me.

21 Q. Well this is their's, not mine. My point is, you wouldn't
22 agree with this drawing, would you?

23 A. You know, I'm not a map expert, so I wouldn't, you know --

24 Q. So you -- well, I guess my point is less about the drawing,
25 although that is an interesting point. You would disagree with

1 the Plaintiffs' stated intention to have Crittenden County to be
2 part of the district?

3 A. That was my argument.

4 Q. And so would you agree with me that Blytheville makes up
5 most of your district, or am I wrong about that?

6 A. It does.

7 Q. It does. Okay. And Blytheville is served by an
8 African-American mayor by the name of James Sanders, correct?

9 A. That's correct.

10 Q. For many years now, correct?

11 A. That's correct.

12 Q. In fact, he has had white challengers and they have lost to
13 him, correct?

14 A. Uh-huh. That's correct.

15 Q. Is that correct?

16 And now let's talk about Crittenden County. That is served
17 by Marco McClendon as mayor, correct?

18 A. Uh-huh.

19 Q. He is an African American; is that also correct?

20 A. That is correct.

21 Q. Before it was William Johnson. He was a white man,
22 correct?

23 A. That's correct.

24 Q. Is that correct?

25 Okay. So, I guess what my question is then, Representative

1 Hodges, again, we are having to speculate a little bit, because
2 we are not talking about you running again, because you are an
3 incumbent, right?

4 A. Right.

5 Q. So we have to speculate. We are talking about a
6 hypothetical candidate who is not an incumbent, who is running
7 for the district as drawn, as I believe Mr. Sullivan was
8 effectively asking you, right?

9 A. Right.

10 Q. And you thought that individual would have to work harder
11 and might have some trouble getting elected to your seat?

12 A. That's correct.

13 Q. But your seat contains most of Blytheville. And
14 Blytheville has elected an African-American mayor repeatedly,
15 even though it contains, as you put it, affluent white
16 population, correct?

17 A. That's correct.

18 Q. Representative Hodges, it was nice to see you again.
19 Please be safe going back to Blytheville.

20 I have no further questions.

21 THE COURT: Thank you, sir. Mr. Sullivan?

22 Turnabout is fair play.

23 REDIRECT EXAMINATION

24 BY MR. SULLIVAN:

25 Q. I believe I heard you say you are not a mapping expert,

1 correct?

2 A. Right.

3 Q. Okay. And have you looked at any of the mathematical
4 analysis of the districts of the Board of Apportionment maps
5 that have been approved?

6 A. Have I looked at the map?

7 Q. The analytical equations, whatever they use. I don't even
8 know what they call it.

9 A. Not really. I just kind of looked at, you know, the
10 district that I'm in. I haven't looked at any of the other.

11 Q. When you spoke with Kevin Niehaus, did you tell him that
12 District 55 should be majority white?

13 A. No.

14 Q. Would you have told him what you did tell him if he told
15 you that the district would flip from majority black to majority
16 white?

17 A. No.

18 MR. SULLIVAN: Nothing further, Your Honor.

19 THE COURT: Thank you very much for testifying. I
20 appreciate it. You're excused.

21 MR. MOSLEY: I was going to say nothing further
22 either, Your honor.

23 THE COURT: Well I didn't ask any questions, so we
24 weren't going to do a second round.

25 MR. MOSLEY: I just thought you wanted me to be --

1 Judge, can I ask a point of procedure?

2 THE COURT: You certainly may.

3 MR. MOSLEY: My understanding is that you are okay
4 with counsel coming and going, based on personal needs and
5 things of that nature?

6 THE COURT: That is correct.

7 MR. MOSLEY: Thank you, Your Honor.

8 THE COURT: Who do we got next?

9 MR. STEINER: The plaintiffs call Tony Fairfax.

10 ANTHONY FAIRFAX, PLAINTIFFS' WITNESS, DULY SWORN

11 THE COURT: Proceed.

12 MR. STEINER: Thank you.

13 DIRECT EXAMINATION

14 BY MR. STEINER:

15 Q. Mr. Fairfax. Mr. Fairfax, could you please just state your
16 name for the record, sir?

17 A. Anthony Fairfax.

18 Q. And could you describe for the Court your educational
19 background?

20 A. I have a Bachelor's of Science degree from -- in Electrical
21 Engineering from Virginia Tech. And a Master's in Geospatial
22 Information, Science and Technology from N.C. State.

23 Q. And when did you get your degree from Virginia Tech?

24 A. Back in '82, 1982.

25 Q. And when did you get your master's degree, sir?

1 A. In 2016.

2 Q. So after you graduated from Virginia Tech, did you start
3 working?

4 A. Yes. I worked for the company that I co-oped for.

5 Q. And could you just describe -- could you describe briefly
6 your educational background?

7 A. The educational?

8 Q. Sorry. Your work background.

9 A. Yes. At Teledyne I was a electrical hardware engineer for
10 a division of Teledyne Hastings-Raydist. It manufactured
11 flowmeters and vacuum gauges. I worked on special projects
12 there. I left Teledyne to work for Engineering and Economics
13 Research, a government, if you will, consulting firm with
14 military contracts. Did somewhat of the opposite of what
15 Teledyne. They worked on hardware, whereas the EER Systems
16 really developed analytical reports for the government. I then
17 left EER Systems and started a business, computer-training
18 business with a couple of individuals, one silent partner and a
19 working partner. So we worked that particular business for a
20 couple of years. And the recession kicked in and so we had to
21 close the doors. I left there and began consulting, independent
22 consulting. Landed a contract with Norfolk State University, a
23 local university working in the School of Education Department's
24 lab. They told me about a project though. Someone told me
25 about a project, a redistricting research project in political

1 science. And I began -- they hired me. I began working on that
2 and it sort of changed the direction and course of my life.

3 Q. And about when was that?

4 A. That was in 1991.

5 Q. And you said that that changed the course or direction of
6 your life. Was that your entre into the redistricting world?

7 A. Yes, that was my first redistricting project in 1991.

8 Q. Okay.

9 MS. MERRITT: Your Honor, this is Jennifer Merritt,
10 for the record. I am hearing impaired, and I'm going to be
11 taking this witness on Cross. Would it be okay if Mr. Fairfax
12 removed his mask? It would greatly assist me in hearing him.

13 THE COURT: Mr. Fairfax, I think that's a reasonable
14 request. Are you okay with that?

15 THE WITNESS: I'm fine.

16 THE COURT: Okay.

17 MS. MERRITT: Thank you so much.

18 THE WITNESS: Should I spray this?

19 MS. MERRITT: And speak into the mic as well.

20 THE WITNESS: Okay. I'm sorry. And let me know if
21 I'm speaking too fast.

22 MR. STEINER: Can we put up Exhibit A, Steve, please?

23 BY MR. STEINER:

24 Q. Mr. Fairfax, do you recognize Exhibit 7A?

25 A. Yes.

1 Q. What is that?

2 A. That is the first page of my resume.

3 Q. And if we -- it is quite a few page, but if we went through
4 them, I think it's 13 pages long. Was that an up-to-date resume
5 or CV at the time you filed your expert report in this matter,
6 at the end of December?

7 A. Yes.

8 Q. I think you were onto -- and Your Honor, we would ask that
9 Exhibit 7A just be admitted?

10 THE COURT: Any objection?

11 MS. MERRITT: No objection.

12 THE COURT: It's admitted.

13 MR. STEINER: Thank you.

14 (Plaintiffs' Exhibit A was received in evidence.)

15 BY MR. STEINER:

16 Q. You were getting into your entre into the redistricting
17 world. Could you describe what you have done in the
18 redistricting space over the last 30 years?

19 A. And so for that particular project, the project objectives
20 were to assist local area -- local organizations rather in the
21 south mostly that didn't have the wherewith all or knowledge to
22 draw redistricting plans. I was the primary mapping person,
23 really the only mapping person there as the GIS consultant. The
24 second part was to go out and actually train other universities
25 in actually developing similar redistricting project, like what

1 we had in Norfolk State. So I went to like two or three
2 different universities, taught them actually how to do the same
3 thing that we did at Norfolk State. During that time developed
4 probably a couple of hundred, I don't know, redistricting plans
5 throughout the south.

6 Worked on, I guess, a couple of interesting projects during
7 that time. One, I was a one half of an expert master's team
8 that drew the initial plan for the city of Miami. They call it
9 Metropolitan Dade back there. I was the map drawer, the
10 primary. The codirector of the project was a political science
11 person. Also --

12 Q. Let me just try and break it up.

13 A. Sure.

14 Q. Just to make it a little bit hopefully user friendly for
15 the Court, but what types of jurisdictions have you drawn maps
16 for over the course of those 30 years of hundreds of maps?

17 A. Small as jurisdictions the size of maybe 5,000 people to
18 statewide congressional plans.

19 Q. And in terms of the statewide plans, what jurisdictions?
20 Can you name some of those jurisdictions?

21 A. Statewide plans, I have drawn plans in probably 22
22 different states throughout the country. Congressional plans,
23 that next decade, I don't know if I'm going to get there. I
24 worked on a project in D C for the Congressional Black Caucus
25 Institute, had an opportunity to draw congressional plans

1 throughout, statewide plans pretty much throughout the country.
2 But as I mentioned before, I worked on plans as small as cities
3 to large congressional state plans.

4 Q. And in terms of some of the states, have you done work in
5 North Carolina, Virginia?

6 A. I have developed plans for -- yeah, North Carolina,
7 Virginia, Alabama, Tennessee, I believe, Florida, New York even.
8 I mean, I have done plans, like I said, 22 different states.

9 Q. And are you doing anything in Georgia in the current
10 redistricting cycle?

11 A. Drew the plans with a team of mapping persons to draw the
12 congressional districts for the -- that were submitted by the
13 House and the Senate.

14 Q. By the Georgia House and the Georgia Senate?

15 A. Yeah. Correct.

16 Q. Have you -- I think you mentioned some of the training that
17 you have done of other people. Have you done any type of
18 consulting work for different organizations?

19 A. Yes. I have done training that was a expert preparation
20 that was done in the 2010 realm where I was one half of a
21 project manager team, if you will. They had a political science
22 side, and then they have a map-drawing side. I was the project
23 manager for the map-drawing side. We brought in about 18
24 different -- we called them cartographer, persons that had
25 mapping skills. And the idea was to train them to be the next

1 generation of expert witnesses, if you will. It was a
2 week-long-intensive process.

3 Q. And then have you yourself testified as an expert in
4 redistricting plans?

5 A. I have testified probably around seven or eight times.

6 Q. And is that state court, federal court?

7 A. In state and federal.

8 Q. What were some of the jurisdictions where you have
9 testified?

10 A. North Carolina, Texas, Alabama, depositions in Tennessee, I
11 believe, most of those.

12 Q. And did you testify in court in Virginia Beach?

13 A. In Virginia. That's right. In Virginia Beach. Thank you.

14 Q. And what was the subject of your testimony as a
15 redistricting expert?

16 A. It varied. It would -- usually I do comparative analysis
17 of redistricting plans. Sometimes I'll do some demographic
18 analysis like I did in Texas. Sometimes I'll look at a
19 particular plan. One particular case I looked at a plan and
20 showed that you could un racially gerrymander the district in a
21 following traditional redistricting criteria. So it varies
22 really.

23 Q. And in addition to drawing illustrative plans during the
24 course of the litigation, have you ever participated in the
25 drawing of remedial plans? I think you started to mention Miami

1 Beach or Miami.

2 A. Miami was a situation where the courts deemed that their
3 voting system violated, I guess, Hispanic or Latino and black
4 voters. And so the expert masters team that I was a part of, we
5 came in and we actually drew that particular plan for Miami.
6 And then in Virginia Beach, this recent case, I guess, within
7 the last year or two, I assisted with the remedial plan
8 development for the city of Virginia Beach.

9 Q. And aside from serving as an expert in litigation, training
10 other map drawers, working on remedial plans, have you been
11 hired on the front end by a government entity to draw
12 redistricting plans?

13 A. Yes. About a year to two years, I was hired by the city of
14 Everett, Washington, to be their expert masters. They were
15 moving voluntarily from an at-large system to a districting
16 system. And they hired me to actually walk in and assist the
17 commission there, if you will, in drawing their first
18 districting system.

19 Q. Okay. And so I would like to turn and focus on this case a
20 little bit?

21 A. Sure.

22 Q. At some point were you approached about looking at
23 redistricting maps in Arkansas?

24 A. Yes.

25 Q. Okay. Approximately when was that?

1 A. This was several months ago.

2 Q. And what -- what was your understanding of what you were
3 tasked to do?

4 A. I was asked to determine whether additional majority black
5 house districts could be created in the state of Arkansas, of
6 course, adhering to federal and state redistricting criteria and
7 guidelines.

8 Q. And I would like for you to just give a very high level
9 overview about how you went about performing that task?

10 A. First I obtained the data, a data set that was available.
11 I then reviewed the redistricting criteria. Then I performed
12 planned development.

13 Q. And did you prepare exhibits and supporting data for the
14 analysis that you did?

15 A. Yes.

16 Q. And did you write up your findings and enter a report?

17 A. Yes.

18 Q. Let's look Exhibit 7.

19 And can you identify on the screen.

20 If we go to Page 21 of the PDF, I believe, Steve.

21 Is that your signature on the report?

22 A. Yes, it is.

23 Q. And is Exhibit 7 -- well, what is Exhibit 7?

24 A. I believe it is my report.

25 Q. And was that a -- when you wrote your report, was that a

1 fair and accurate summary of the opinions that you had formed
2 and the basis for your opinions?

3 A. Yes.

4 Q. I'll go through some of the highlights.

5 MR. STEINER: I would ask that we, in the interest of
6 efficiency, so I don't go through it all, admit Exhibit 7.

7 THE COURT: Any objections?

8 MS. MERRITT: No objection.

9 THE COURT: It's admitted.

10 MR. STEINER: Thank you.

11 (Plaintiffs' Exhibit 7 was received in evidence.)

12 BY MR. STEINER:

13 Q. So you mentioned that the first step of what you did was
14 gathering data. Could you describe what types of data you used?

15 A. Sure. The primary dataset was a dataset known as a PL
16 94-171 dataset. That is a dataset produced or generated by the
17 census. It is an extract from the decennial census. It goes
18 down to the block level, all of the way to the nation
19 population, nation numbers. That data was provided by Caliper
20 Corporation, the company that manufactures or created the
21 software that I use. Same dataset or population numbers as the
22 census, just reformatted to work with their system. The next
23 sort of dataset, if you will, was the American Community Survey
24 dataset. This provided -- this is also created by or generated
25 by the Census Bureau. This provides what is called

1 Citizen-Voting-Age Population data. I obtained that from a
2 website, well established, called the Redistricting Data Hub.
3 What they do is they actually take census data, reformat it into
4 a more user friendly, same population. And so I acquired the
5 dataset from that particular website. Some boundary datasets
6 that I accessed; the existing or current house districts were
7 included with the Caliper datasets in their formats. They also
8 included the boundary files for the census geography, the block
9 black group tract, BDD counties, cities. Also landmarks, and
10 for the state as well. And so that came with the dataset for
11 Caliper. I accessed the BOA, or the Board of Apportionment plan
12 from the Arkansas GIS website, also accessed the incumbents from
13 Arkansas GIS website. And I think that covers pretty much it.

14 Q. Okay. And did you obtain school boundary?

15 A. Yes.

16 Q. And where was that from?

17 A. Yes. That was also from the Arkansas GIS website.

18 Q. And then here in Pulaski County, did you access anything
19 specific from the Pulaski County website?

20 A. I did look at neighborhoods. And so I did download a shape
21 file for neighborhoods.

22 Q. And I think you mentioned the 2020 Census data, and the
23 five-year ACS data. Do you also reference at all the one-year
24 ACS data?

25 A. I utilize that in the reports, not in the planned

1 development.

2 Q. Okay. And are all of those data sources the type of data
3 that you regularly use when you are developing redistricting
4 plans?

5 A. Yes. Absolutely.

6 Q. And others in the fields use that data?

7 A. Yes. Yes.

8 Q. And could you just briefly, I think you mentioned Caliper
9 Cooperation and the Redistricting Data Hub. Could you just
10 explain what those two groups are?

11 A. Sure. The Caliper Corporation is probably arguably the
12 largest GIS company. And so they created what is called the
13 shape file, if you will. And so they created a package
14 called -- I mean, arguably the largest mapping redistricting
15 software, not GIS company. My apology. I'm thinking of ESRI.
16 They created a package called Maptitude for Redistricting. It's
17 utilized out there for governmental bodies, consultants.
18 Colleges and universities utilize it. Probably the leading
19 redistricting software that is out there.

20 ESRI, I utilize that as a software to create presentation
21 of maps. ESRI, which I made a mistake before, is arguably the
22 largest GIS company out there. They are the manufacturer or
23 creator of the shape files. My apology for the confusion.

24 Q. And then did you use any Microsoft products?

25 A. I used Microsoft Excel to put together tables, if you will.

1 Q. One thing I didn't hear mention of in the list of datasets
2 was political party affiliation data. Did you use that at all?

3 A. No. No. Didn't even look at that.

4 Q. Did you consult with any data that would show how the
5 districts that you drew would perform politically?

6 A. No. No.

7 Q. Okay. And I think you mentioned the B of A website, the
8 Board of Apportionment's website?

9 A. That's correct.

10 Q. And what types of information did you draw from the BOA
11 website?

12 A. One of the central bits of information was the criteria,
13 the redistricting criteria. So that's what I reviewed in order
14 to develop the plans.

15 Q. And why did you review those criteria to develop the plans?

16 A. Well that's what you do. In plan drawing you follow a set
17 of criterial guidelines. And usually that is established either
18 by a legislature or by a board of apportionment as was done
19 here.

20 Q. Can we look at Exhibit 34, please?

21 Is that okay, Mr. Fairfax?

22 A. Yes.

23 Q. Can you explain what Exhibit 34 is?

24 A. This is the redistricting criteria.

25 Q. Is this from the B of A website?

1 A. Yes.

2 Q. And let's walk through those if we can, and I would like
3 you to explain them and how that impacted your map drawing. So
4 the first one talks about one person, one vote. Do you see
5 that?

6 A. Yes.

7 Q. Could you explain what that criteria is or requirement is
8 and why it's important?

9 A. Sure. One of the goals is to try or attempt to equally
10 populate the districts. The courts have ruled substantially
11 equal for legislative and local jurisdiction, strict equality
12 for congressional district. The substantially equal usually
13 means a 10 percent deviation from the idea population size. And
14 so you have the ability to deviate from the lowest populated
15 district to the highest populated district by 10 percent of the
16 idea population size.

17 Q. Okay. And on the B of A website, it says plus or minus 5
18 percent deviation is considered an acceptable margin. Do you
19 see that?

20 A. Yes.

21 Q. Okay. And did you employ that margin in your map
22 drawing?

23 A. Yes, absolutely.

24 Q. And how did you go about measuring whether or not something
25 was within plus or minus 5 percent of the idea size?

1 A. The software actually tells you in what is called the data
2 view. So you can see what the deviation is while you are
3 drawing the plan.

4 Q. Okay. And what was that plus or minus five percent
5 compared to, or a deviation off of?

6 A. Yeah. It's off of the idea population size. And so you
7 see where they have that 30,000. It's approximately 30,000. It
8 is 30,000, I think, 115. So you calculate that idea population
9 size by dividing the jurisdiction population by the number of
10 districts, in this case 100. And that's how they get that
11 30,000, approximately. And the deviation is 10 percent from
12 that 30,000. So that would be roughly 3,000. Plus or minus 5
13 would be half of that 3,000, 1,500 plus or minus. So therefore,
14 the range that you can work with would be plus or minus 30,000
15 plus the 15, and 30,000 minus the 15. That's approximate
16 though.

17 Q. And that's the criteria that you used in drawing your
18 districts?

19 A. Absolutely, yes.

20 Q. And then the next one says, Section 2 of the VRA prohibits
21 discrimination based on race, color or language minority?

22 A. Yes.

23 Q. Do you see that?

24 A. Yes.

25 Q. Can you explain the significance of that criteria?

1 A. Sure. What they are trying to do in this particular case
2 is trying to eliminate vote dilution of a particular minority
3 group. And the two techniques -- there are many techniques that
4 can do that, but the two techniques are packing and cracking
5 that was explained prior with the previous witness.

6 Q. Okay. And did you avoid packing or cracking in your map
7 drawing?

8 A. Yes. Absolutely.

9 Q. And I take it that you agree that that is an important
10 redistricting goal?

11 A. Oh, yes. Definitely.

12 Q. Or redistricting criteria.

13 The next one says the equal protection clause limits
14 redrawing -- limits redrawing district boundaries strictly based
15 on race?

16 A. Yes.

17 Q. And could you explain that criteria and how you applied
18 that?

19 A. Sure. There was a series of court cases in the '90s where
20 race should not predominate. And the interesting thing about
21 this is it is strictly based on race, which infers that you can
22 use race as a factor, but you do not draw strictly based on
23 race.

24 Q. Okay. And you talked about court cases saying you can't --
25 race can't predominate. And did you, in setting out, did you

1 honor that redistricting criteria when you set about on your
2 work?

3 A. Absolutely. And the way you do it is you adhere to the
4 traditional redistricting criteria. Don't subordinate that to
5 race.

6 Q. So you can consider race, as long as you don't subordinate
7 the other criteria to races?

8 A. That's correct.

9 Q. You say that's based on your experience in court cases over
10 the last decades?

11 A. Yes.

12 Q. Then the next one that the Board talks about is
13 compactness. Could you explain that?

14 A. Sure. Compactness refers to how dispersed or how
15 irregularly shaped the district boundary lines are. Analysts
16 have come up with what's called compactness measures to sort of
17 quantify compactness.

18 Q. And did you consider compactness measures in your map
19 drawing?

20 A. Yes. I used three compactness measures; Reock,
21 Polsby-Popper and convex hull.

22 Q. And how did you calculate those, or is that from the
23 computer does?

24 A. It does. The computer actually calculates it. I
25 understand the algorithm behind it, but it does do the

1 calculations for you.

2 Q. It's faster if the computer does it?

3 A. Absolutely.

4 Q. And that --

5 THE COURT: Let me stop you here, because I wanted to
6 ask this question anyway, and I was going to ask it later, but I
7 think it makes sense to ask it now.

8 Can you explain to me, knowing that I am not a
9 statistician, can you explain to me what the tests are, and what
10 the difference in the tests are? And I read it in your report,
11 sort of an explanation, but maybe I'll understanding it more if
12 you can walk me through it person to person.

13 THE WITNESS: Right. Right. Right. The -- what each
14 of the measures are, they are trying to get to really two
15 different points. The dispersion of area is really one. And
16 the irregular boundary shapes. The Reock measurement looks at
17 the area to the smallest, what they call circumscribed circle.
18 So they compare that area to the district, to the area of that
19 small circumscribed circle and come up with a number. Usually
20 it is between zero and one. The higher that number is, the more
21 compact it is. And it is going to be more of a circle. So if
22 you have a district that is an idea shape, like a circle, then
23 it is going to have a compactness of 1, because you are dividing
24 the area to the area of the circle when you have that circle
25 that circumscribed another circle. So you see that. So area

1 dispersions package usually catch extensions, long fingers,
2 areas that stick out. Because when you do that, that circle is
3 gonna get larger. And the area that is empty in there is going
4 to work to the disadvantage of that particular district,
5 compactness measurement.

6 THE COURT: Does that mean one of the potential
7 drawbacks of the Reock test would be that if the district was
8 compact, but was basically compact because it was a square, it
9 still might have a bad Reock number because the circle is still
10 bigger.

11 THE WITNESS: It probably would have a fairly good
12 compactness measurement. However, if it was a rectangle, then
13 exactly what you said.

14 THE COURT: I understand the Reock. Okay. Move on to
15 the next one.

16 THE WITNESS: The other one is Polsby-Popper. And
17 Polsby-Popper looks at the area of the district to the area of a
18 circle with the same perimeter as the district. So the way you
19 sort of perceive that is if you took the district and stretched
20 it out to a circle, you would get the circle that it's going to
21 compare to. So you can see, kind of visualize, as you have got
22 more of these squiggly lines going around the district, then
23 you'll have a larger circle that you actually create. So a lot
24 of the little squiggly lines would mean that the perimeter is
25 larger. So then when you compare that area to the district to

1 the area of that circle, it's lower if you have more squiggly
2 lines, if you will.

3 THE COURT: Which of course, and I know this is a
4 heated bone of contention between the parties, but on the
5 districts where you have one of the side of the boundaries being
6 the Mississippi River or the state of Mississippi, that's why at
7 least on that test that boundary would have a potential problem
8 under this second test you are talking about?

9 THE WITNESS: Absolutely. And potentially the other
10 one.

11 THE COURT: Potentially the other ones, but this one
12 perhaps more than the others.

13 THE WITNESS: Exactly. Exactly.

14 THE COURT: Okay. We have got that one. Now we can
15 go on to the third one.

16 THE WITNESS: The third one, Convex Hull. This one
17 can be thought of -- the way I like to put it is if you can
18 think of the district as a wooden block, if you cut the district
19 out of a wooden block. So you know how you can go to wood shop
20 and cut it out, think of that. And then you wrapped a rubber
21 band around the district. You can imagine how that rubber band
22 is going to go from point to point to point to point, right?
23 You see how it's gonna go?

24 THE COURT: Yes.

25 THE WITNESS: That polygon, as they call it, is what

1 you compare to the area of the district. So the area of that
2 polygon you compare to the area of the district. So you can see
3 that it kind of cuts and doesn't have the effect as Reock, which
4 Reock would have a big circle arc and all of that empty area
5 would work against that compactness measurement for that
6 district. When you slice it, the Reock -- I mean, the Convex
7 Hull would give you a little better measurement, higher, because
8 it is more forgiving, because it kind of cuts on the edges, if
9 you can imagine that. So those are the three things.

10 THE COURT: That all makes sense to me. The wrap-up
11 question there is, at least for me, is there one of these that
12 you think is better or fairer or more accurate than the other,
13 or does it depend on something else or do you have to look at
14 all of them?

15 THE WITNESS: I always -- I shouldn't say always, but
16 I can recall pretty much always using an odd number of
17 compactness measurements. And the reason why is the reason why
18 you would have an odd number on a board. You would have to have
19 someone to break the tie. And so you have one that looks at
20 area measurement and one that looks at parameter and then
21 another one that kind of looks at area measurement. You have to
22 actually -- I mean, you don't have to, but I like to see which
23 one breaks the tie, because many times you may have two that
24 actually are working for a particular district with lower
25 measurements and one upper measurement. So you can look at the

1 lower two as being the judge. If you had one measurement, you
2 really don't get the full gambit of compactness, because there
3 are biases built inside each of the compactness measurements.
4 There is --

5 Yeah?

6 THE COURT: No, no. No. Keep going, if you want to
7 keep going.

8 THE WITNESS: There -- if I had to pick one, and I'm
9 trying to think through, there would be a new one that's coming
10 up -- that's come out called cut edges. And I think it does
11 them both. It's both a area measurement and a parameter
12 measurement, but it's complicated and very difficult to explain,
13 and so I haven't gravitated to using it yet, but may.

14 THE COURT: Okay. I appreciate that. I'm sorry for
15 interrupting, but I thought it was better there than later on.

16 MR. STEINER: You are the one who it is most important
17 to understand, so if you are now ready to teach the rest of us.

18 THE COURT: I wouldn't go that far.

19 BY MR. STEINER:

20 Q. The next one on the Board's list is contiguity. Could you
21 explain that? I don't think that is quite as difficult
22 mathematically or conceptually?

23 A. Right. It is simply all areas of the district touching
24 each other. And you can include water in that.

25 Q. And then the next one on the Board's listed, I think, is

1 minimizing political subdivision. Sorry. The next one as the
2 Board frames it is maintaining the core of existing districts.
3 Do you see that?

4 A. Right.

5 Q. Could you explain that?

6 A. Right. This is sort of a twofer, if you will. You are to
7 attempt to have the existing or the current plan, if you will,
8 maintain the existing districts. The second part of that is
9 also minimizing political subdivision splits. And so you have
10 maintaining sort of the core, if you will, district areas, in so
11 far as possible, but then you want to minimize political
12 subdivision splits. And these are entities that have some
13 governmental bodies when they label them as political
14 subdivisions splits. So those counties or cities or precincts
15 or what's called VTDs, Voting Tabulation Districts that are
16 analogous many times to precincts.

17 Q. Okay. I was going to ask you, because that's a new term,
18 VTDs or Voting Tabulation Districts. Could you explain what
19 that is?

20 A. Sure. VTDs are created by the Census, and there is a
21 Voting Tabulation District Boundary Project. And the theory,
22 what's supposed to happen is each of the states submit their
23 proposed VTDs to the Census Bureau. And it -- many times, or at
24 least more than what it used to be, the precincts are submitted.
25 And they're getting closer and closer to having precincts

1 identical to VTDs in some states, but it's still not completely
2 there. But precincts exist for the conduction of elections,
3 whereas VTDs are made of census blocks. And there is a
4 difference sometimes. Not a great difference in some states or
5 jurisdictions, but some difference.

6 Q. And what's the significance of VTDs for map drawing?

7 A. As I mentioned before, in many states they're analogous to
8 precincts. So you are -- in the plans that I develop, I try to
9 use VTDs as the building block, and not split them, because it
10 is very similar to using the precinct as the building block.

11 Q. And just to relate to the compactness measurements. Are
12 VTDs kind of perfect shapes, whether circles or squares, or you
13 know, equilateral triangles?

14 A. No. No. No. That is an excellent point. In some
15 jurisdiction, the VTDs are just so irregularly shaped, and many
16 times they are not contiguous. So you will have these islands
17 of VTDs that aren't contiguous with each other. So it is a
18 judgment call when you're drawing districts. What do you do?
19 Do encompass the islands that are out there, or do you segment
20 them and split the VTDs? But they have, as you were talking
21 about, I guess, they can relate to the compactness of the
22 district. So if you have these irregular shaped VTDs, and you
23 are putting together a district, you may end up with a district
24 that is irregularly shaped, not by any nefarious reason, but
25 just because of the jurisdiction has these irregular VTDs.

1 Q. And now on all of these different things that we have
2 talked about with compactness and contiguity and the number of
3 splits, are those things that when you are using the Maptitude
4 program, it can assess and provide data on?

5 A. Yes. It can provide data on the splits or political
6 subdivisions.

7 Q. And is that something you used in preparing your maps?

8 A. Yes.

9 Q. The last one on the B of A criteria on Exhibit 34 is
10 minimizing partisanship. Do you see that?

11 A. Yes.

12 Q. And could you explain that criteria or goal?

13 A. States have been trying to move toward removing
14 partisanship. So this criteria is that you minimize private
15 partisanship. I minimize by not even including any data at all.

16 Q. And -- right. So that's how you -- I think you said before
17 you didn't have partisan data?

18 A. Correct.

19 Q. And I might have gone a little too fast on a couple.
20 Number 7 is communities of interest. Could you explain how that
21 factors into the redistricting process?

22 A. Sure.

23 Q. In your map drawing?

24 A. Sure.

25 There is an attempt to preserve communities of interest.

1 And communities of interest they sometimes call it communities
2 of voting interests, because to a certain extent, they are
3 anything that the voters really deem or determine what's a
4 communities of interest. So they could be Economic, they could
5 be environmental, could be language, could be a variety of
6 things that the voters determine should be preserved and
7 retained inside a particular district. Although there are
8 acceptable, sort of acknowledged, if you will, communities of
9 interest automatically; neighborhoods, let's say, or colleges
10 and universities. We tend to automatically -- city is another
11 one. We tend to automatically want to preserve those entities.

12 Q. And then I think the 8th one before we talked about
13 partisanship was maintaining continuity of representation.
14 Could you explain that and why that is a redistricting criteria
15 or goal?

16 A. What your trying to do, or what they are trying to do and
17 many criterias are trying to do is stop from, they call it
18 double bunking, trying to put two or more different incumbents
19 inside the same district running against each other. So that is
20 incumbent pairing comes underneath that. So while I'm
21 drawing -- I'm looking at the incumbent location and insuring
22 that, as best as I could, that the incumbents are one for each
23 district.

24 Q. And in your experience, is it possible to draw maps that do
25 every one of these criteria, you know, perfectly, and so they

1 have perfect compactness measures, perfect contiguity, don't
2 split any cities or school districts or other political
3 subdivisions; is that possible or are there trade offs involved?

4 A. There are -- there are always trade offs involved with
5 pretty much all of the criteria, all of the compactness,
6 contiguity, communities of interest, political subdivision
7 splits. There are trade offs that you make in decisionmaking.
8 If you want to increase compactness, you may have to split a
9 county or split a city. If you want to equalize the population,
10 then maybe you have to actually come back on compactness. So
11 you're making these decisions all of the time while you are
12 drawing the plan.

13 Q. Now, those are the Board's criteria. In preparing your
14 illustrative maps, or in preparing to prepare the maps, did you
15 familiarize yourself with the demographics and the demographic
16 changes in the state of Arkansas?

17 A. Yes. Yes, I did.

18 Q. Could you briefly describe kind of the change in Arkansas
19 population from the 2010 plans to the 2020 redistricting?

20 A. Right. It was approximately 3 million people in the state.
21 It increased about 95,000 from 2010 to 2020. There was a
22 decrease of about 110, almost, thousand in white persons. There
23 was an increase of 27 thousand, approximately, in black persons.
24 Excuse me. Increase in the Latino population of about 70
25 thousand. And two or more increased of over 100,000

1 individuals.

2 Q. And could you explain what you mean by that grouping, two
3 or more --

4 A. Uh-huh.

5 Q. -- races?

6 A. Sure. The census allows you, since 2000, to select
7 multiple race categories on the census. And so they keep track
8 of those individuals who self identify as more than one race.
9 And so the two or more category for the census, those that
10 selected two races, say black and white, or black and white and
11 Asian or Asian and white, and so they collect that in a category
12 two or more.

13 Q. And I think you summarized this in some of the charts in
14 your report that we don't need to look at in detail, but you use
15 the term any part black. Could you describe what you mean by
16 that, or how you use that term?

17 A. Sure. Any part black includes any individual that selected
18 black. So it is black alone, all of those that selected only
19 black, plus black and whoever selected the multiracial
20 categories. And so it is a combined collection of all of them.

21 Q. Okay. And then you used the terms VAP and CVAP. Could you
22 explain those two terms?

23 A. Sure.

24 Q. The acronym and then what they mean or how you use them?

25 A. Sure. VAP includes all persons above the age of 18. And

1 CVAP, Citizen Voting Age Population includes those who are
2 citizens above the age of 18. One comes from the Decennial
3 Census, the other comes from the American Community Survey. The
4 CVAP comes from the American Community Survey. The Decennial
5 Census provides you with the voting age population.

6 THE COURT: Let me stop you and ask a question here.
7 And the reason I'm asking the question is because in looking at
8 the charts, I'm just trying to make sure that I'm following the
9 numbers correctly. When you discuss the BVAP, right, so the
10 Black Voting Age Population and you give a percentage, is the
11 denominator there the total population or is it the total voting
12 age population? Because in the charts you give us the total
13 population, but unless I'm wrong, I don't think you ever give us
14 the total voting age population. So I'm trying to figure out
15 what the ratio is.

16 THE WITNESS: It is the voting age population.

17 MR. STEINER: So, maybe I can help out. Let's just
18 take a quick look, because I want to make sure certainly that
19 you understand.

20 THE COURT: Yes, please. The whole point is --

21 MR. STEINER: So Steve, if we can pull up in Exhibit
22 7, it's PDF 11. It's Page 7 of the report.

23 BY MR. SULLIVAN:

24 Q. So this is Figure 2 in your report, Mr. Fairfax?

25 A. Yes.

1 Q. And so -- so maybe just walk through the VAP line. I know
2 you said there were 3 million, roughly 3 million people in the
3 state of Arkansas, and then the VAP line has 2.2 million in
4 2010, and a little over 2.3 million in 2011?

5 A. Yes.

6 Q. I'm sorry. In 2020?

7 A. Yes.

8 Q. Okay.

9 A. But I was just going to address, Your Honor, your question.
10 That top line is the voting age population. So that's the
11 denominator. That is that 2.3 million for 2020.

12 THE COURT: So let me just make sure I understand this
13 then. Because if we go, for example, to Document 2-8, I guess
14 it's Page 93 of 581. And I'm just picking out a page. These
15 are the long list of charts that you have. In there, what it
16 has is population, which I take to be total population, not
17 total voting age population.

18 THE WITNESS: Yeah.

19 THE COURT: And then it has BVAP and CVAP percentages.
20 So I just want to make sure even on those charts --

21 THE WITNESS: Right.

22 THE COURT: The BVAP and CVAP percentages are using
23 the correct denominator.

24 THE WITNESS: Right. Right. I see what you -- on
25 those charts that have the tables listed. Yeah. Yeah. And I

1 extracted that from the -- what is called the data view. And it
2 automatically puts the population. I probably should have
3 substituted, not even thinking that there would be a confusion,
4 but you are right.

5 THE COURT: Okay. So even in these charts, the BVAP
6 has the denominator of total voting age population. And the
7 CVAP has the denominator of total citizen voting age population?

8 THE WITNESS: Correct. Correct.

9 THE COURT: Okay. Now I understand. And I appreciate
10 it.

11 MR. STEIN: And let's just go, Steve, because I think
12 the other data is also in there. If you go to Figure 1 or Table
13 1, which is on Page 10 of the PDF. It's Page 6 of the report.

14 BY MR. STEINER:

15 Q. So Mr. Fairfax is this table putting total population in
16 2010 and 2020 broken down by various races, and then you have
17 two or more in any part black; is that right?

18 A. That's correct.

19 Q. Okay. And then the table 2 that we had looked at a minute
20 ago has the same breakdowns with respect to the voting age
21 populations; is that right?

22 A. Correct.

23 Q. And the difference there is simply whether the person is
24 over 18 -- is 18 or over or not. Is that right?

25 A. That's right.

1 Q. Okay. And then when we talk about citizen voting age
2 population, what's that used for?

3 A. Many times citizen voting age population is used to get a
4 better depiction of the pool of actual voters. Sometimes, I
5 won't say many times, there are a considerable amount of
6 undocumented persons. So you may have a voting age population
7 that is larger than the reality of what -- who can actually turn
8 out and register and vote.

9 Q. Putting aside documented or undocumented, say a green card
10 holder of permanent resident would fall into being of the voting
11 age population, but not of the citizen voting age population?

12 A. Correct.

13 Q. Is that right?

14 A. Correct.

15 Q. And in your experience, do you typically see significant
16 differences in percentages VAP versus CVAP among white or black
17 groups, or is that more commonly a difference among Latino
18 groups?

19 A. Yeah. Yeah. Usually you see the difference between Latino
20 groups and Asians. Some rare exceptions to black populations.
21 And when I say -- when you say white groups, it's nonHispanic
22 white as well, because there is a difference between Hispanic or
23 Latino in the racial groups. Two different classifications.

24 Q. And you, in fact, went about and drew alternative maps or
25 illustrative maps; is that right?

1 A. That's correct.

2 Q. And why don't we just go ahead quickly, so we can put the
3 exhibits in. I think we have marked 7B. Just put that up,
4 Steve.

5 Okay. And what is Exhibit 7B, the first page?

6 A. This is a depiction of the illustrative plan that I have
7 created and two insets of Benton, Washington and Pulaski.

8 Q. Okay. And then if we go to the next page of the exhibit,
9 Steve.

10 The next page says. Arkansas State House District 1
11 Illustrative Plan, and I think there are maps that go 1 to 100;
12 is that right?

13 A. That's correct.

14 Q. And who prepared these maps?

15 A. I did. I put them together.

16 Q. And that is based on the work that you did to develop the
17 illustrative plans?

18 A. Yes.

19 MR. STEINER: We would ask that 7B be admitted as an
20 exhibit?

21 THE COURT: Any objection?

22 MS. MERRITT: No objection.

23 THE COURT: It's admitted.

24 (Plaintiffs' Exhibit 7B was received in evidence.)

25 BY MR. STEINER:

1 Q. And then if we could just turn quickly, I know the judge
2 asked a question about 7C, so let's just look at that quickly.

3 Could you explain what's been put together as Exhibit 7C?

4 A. Yes. That's a population summary report that's created
5 using the Maptitude redistricting software. And as Your Honor
6 was pointing out, it automatically puts the population and
7 deviation, the total population and deviation in there as the
8 initial heading, let's say. And the other fields represent the
9 voting age population for Latino, Hispanic Latino, the
10 nonHispanic is the NH 18. It is the nonHispanic BAP for a white
11 population. And then AP Black, which is Any Part Black voting
12 age population. The last three has to do with citizen voting
13 age population. That's for Hispanic, Latino, white and black.

14 THE COURT: Let me stop you there. Do I have -- and
15 this is at first a question for you, and then it might be a
16 question for you. Do -- I guess I should clear that up for the
17 record. This first is a question for the witness, and then it
18 might be a question for counsel.

19 For the witness, do I have anywhere in your report a
20 breakdown by district, both the actual Board of Apportionment's
21 districts and your illustrative plan districts, the total voting
22 age population in each district?

23 THE WITNESS: The tables, I thought, included that.
24 The tables that were the Excel tables.

25 THE COURT: Maybe now I will ask counsel.

1 MR. STEINER: So, the answer -- I'm just trying to do
2 the math quickly. I thought that the percent, if you look at
3 the headings, the percentage, age 18 plus population, you know,
4 I would interpret, but I can ask Mr. Fairfax is that Hispanic
5 18 --

6 THE WITNESS: Yes, that is Hispanic, Latino.

7 MR. STEINER: -- plus. And then there is nonHispanic
8 white, 18 plus, and percentage black 18 plus, representative 18
9 plus any part black. So those are columns there. And if you
10 look the -- each row, those three columns don't add up to 100
11 percent. And my guess would be that the differential would be
12 the percentage of the district that's under 18, and therefore --
13 so it's not --

14 THE COURT: I think that's true, but I guess my point
15 is I only have the percentages, so I don't know. I think, and
16 that's why I'm asking, I don't know right now in each district
17 what the total voting population is, and I just want to make
18 sure I'm correct when I say that. That it's not I'm just
19 missing somewhere to look.

20 MR. STEINER: So let's -- could we go to Exhibit 2 for
21 a minute, Steve?

22 BY MR. STEINER:

23 Q. Okay. And so on -- do you have in front of you on the
24 screen there, Mr. Fairfax?

25 A. Yes.

1 Q. -- Exhibit 2?

2 And that's again, that's you first page of your
3 illustrative map; is that right?

4 A. That's correct.

5 Q. And if we can go to the next page, Steve. Can you blow
6 that up a little bit?

7 A. There is the 18 pop, yeah.

8 Q. Okay. And that's -- so that's the VAP --

9 A. Yes. The 18 plus pop.

10 THE COURT: So let me stop you for a second, and then
11 we can continue asking questions. I just want to make sure. I
12 think I understand now for the illustrative plan, your point,
13 counsel, is if I add the 18 plus Hispanic population to the 18
14 plus white -- no, your point is the 18 plus population is the
15 total voting population?

16 MR. STEINER: Correct.

17 THE COURT: Is that correct? That is in the
18 illustrative plan. Do I have the same information for the Board
19 of Apportionment plan?

20 MR. STEINER: The answer is I don't believe so.

21 BY MR. STEINER:

22 Q. Is that something that you have run, Mr. Fairfax?

23 A. If it is not behind this particular spreadsheet, then it's
24 not included. I know I have run it in the past, but this
25 provides you the total voting age population for each of the

1 districts.

2 THE COURT: For the illustrative plan?

3 THE WITNESS: Right.

4 THE COURT: Is that correct, sir?

5 THE WITNESS: Correct.

6 THE COURT: That makes sense to me. That is very
7 helpful. I appreciate it.

8 THE WITNESS: You are looking for the Board though?

9 THE COURT: Well, I want to make sure I have all of
10 the data, whether I truly need it or not, I want to make sure I
11 have all the data I might need.

12 THE WITNESS: Right.

13 THE COURT: So if I don't have this data --

14 THE WITNESS: Sure.

15 THE COURT: -- I would like to get that data.

16 THE WITNESS: Absolutely.

17 BY MR. STEINER:

18 Q. And Mr. Fairfax, is that data on the Board's plan data that
19 you would have the capability of running and supplementing?

20 A. Sure. Sure.

21 THE COURT: That's fine for now.

22 THE WITNESS: Sure.

23 BY MR. STEINER:

24 Q. Now, in terms of the first redistricting criteria of one
25 person -- you know, one person one vote, or equal population, do

1 you have an understanding as to whether that refers to total
2 population being within the plus or minus five percent among
3 districts, or voting-age population or citizen-voting-age
4 population?

5 A. It's total population. I think there has only been a
6 couple of cases that have used voting-age population. And then
7 there is one that used registered-voters, I believe.

8 Q. But your understanding of the Arkansas criteria is that
9 it's total population?

10 A. Total population.

11 Q. Okay. Now I would like you to explain, and certainly if
12 the Court has questions on it, to answer them, how you went
13 about kind of drawing the maps from all of this data?

14 A. Sure. I first imported the current plan into the Maptitude
15 software. And I began with the current districts. And one of
16 the things that I was trying to look for since I'm trying to
17 determine whether you can create additional majority black
18 districts is I'm looking for evidence of packing or evidence of
19 cracking. And so in essence, I began in Pulaski County as the
20 initial county. It is the most populated county in the state.
21 And so I began looking at the districts in there.

22 You want me to continue.

23 THE COURT: When you say the current plan, do you mean
24 the 2021 Board of Apportionment Plan, or do you mean the 2011,
25 more or less, Board of Apportionment Plan?

1 THE WITNESS: I call it the current plan, because when
2 I started in September it was the current plan, so my vernacular
3 stays with the current plan. So I'm talking about the 2011.

4 BY MR. STEINER:

5 Q. And so you start -- and why do you start with the 2011
6 plan, as your starting point rather than blank slate?

7 A. Right. One of the criteria is existing core. So you want
8 to actually start with the existing current districts. And that
9 is usually the normal process of redistricting. And that is why
10 they call it redistricting versus districting, which is the
11 first time you actually draw, they call it districting. So you
12 are actually redrawing, usually from some sort of benchmark, if
13 you will, or baseline.

14 Q. Okay. So you started with the 2011 plan as the current
15 plan. And you said you looked for evidence of cracking or
16 packing?

17 A. Yes.

18 Q. And why do you do that?

19 A. Because it would be a violation, and it also would limit
20 the number of majority black districts inside a particular area.

21 Q. And after you look at that, what did you do next in trying
22 to determine what boundaries you are going to need to change?

23 A. Well, you know, as I move, I move from area to area. So I
24 started in Pulaski County, looked at those districts. I saw
25 that there were several districts that were high, in essence,

1 packed. I unpacked those districts; 30, 34 and 37, unpacking
2 them. And that created, in essence, two new majority black
3 districts.

4 I then shifted over to the delta area, delta counties and
5 drew those districts down from the northern end down to the
6 lower end of the delta, then shifted up. There is somewhat of a
7 Y, if you will, of the black districts that exist inside
8 Arkansas. They come down the delta, and they kind of go up in a
9 Y to Pulaski County. Went and redrew those districts, and then
10 there was a new district that was in sort of the -- based from
11 Pine Bluff to Arkadelphia. And then finally ending up in the
12 south and redrawing that district, HD 5. Once I finished that,
13 I moved to Benton area, that had a significant amount of
14 population growth in there. And so I redrew those districts,
15 and then began to sort of redraw and equally populate the
16 districts in the north and the south.

17 Q. And you talked about a lot of growth in the Bentonville
18 area. Is there a point in the process, or where in the process
19 do you look at changes in population and how that will
20 necessitate moving boundaries around?

21 A. Yeah. One of the things that you do when you are trying to
22 generate additional, if you will, majority minority districts,
23 or determine, you look for two things. You look for population
24 growth, and you look for evidence of packing and cracking. And
25 so those are the two aspects that you sort of use to hunt down,

1 if you will, if additional majority minority districts can be
2 created. And so there was population growth, of course, in
3 Pulaski County and that surrounding area. And so that became
4 sort of an area to actually begin. And the other areas were
5 lacking in population, or did not keep up with the population
6 growth for the state. So those districts had to expand usually.
7 They had to actually add territory onto it, or at least add
8 population onto it as was in the HD 5 and the southern end.

9 Q. And so when you identify districts that are either
10 overpopulated or underpopulated, what is it that you do to kind
11 of balance those out?

12 A. Balance out the population?

13 Q. Right.

14 A. Well, you're looking at the population deviation. And so
15 you are adding districts, and maybe even subtracting districts,
16 because you are thinking and considering those traditional
17 redistricting criteria. So you are adding and subtracting
18 districts, trying to make a district more compact. You are
19 trying to not split the cities or the county boundaries. You
20 are trying to include communities of interest.

21 Q. And you use -- what do you use as the blocks that you are
22 moving around on that?

23 A. VTDs.

24 Q. That's using the VTDs?

25 A. Yes.

1 Q. I think you mentioned balancing the population, and then
2 looking at city and county boundaries. Are there other layers
3 that you can add on in Maptitude to try and meet with the other
4 redistricting criteria?

5 A. Yeah. So usually, you'll have the county boundaries on
6 consistently, so you can see the county boundaries, using the
7 VTD boundaries on consistently, but you may not have the city
8 boundaries on all of the time, because sometimes they get
9 unwieldy, just the collection of cities when you zoom out. So
10 you will periodically turn those on and off, but when you do you
11 attempt to try to keep them whole. And I am speaking of the
12 city boundaries. And then occasionally you will look at the
13 other potential communities of interests, such as, like I said,
14 colleges and universities, the military bases. So you will
15 attempt to look at those to see if you can continue to keep
16 those whole contained with inside a particular district. So you
17 are doing all of this really at the same time as you are drawing
18 and developing the plan.

19 Q. And are there other layers that you can put in Maptitude to
20 show communities of interest?

21 A. Yes. Yes. And those were those layers that I mentioned as
22 far as the colleges, universities, landmarks, air force bases.
23 Those can be overlaid on top. And as I mentioned before with
24 the cities, you don't usually keep those on because it just
25 clutters the map too much. So you periodically turn them on,

1 look at where you are at, go back, see if you can preserve it by
2 adding a precinct here or there. The same thing with school
3 districts. You may not keep them on all of the time. You may
4 turn them on. See if you can include them in a particular
5 district, which usually is very difficult, but you attempt to
6 try to do that.

7 Q. And I take it that if you are building districts, House
8 districts that have an idea population of just over 30,000
9 people, there are some cities and counties that, by necessity,
10 have to be split into multiple districts. Is that right?

11 A. Absolutely. It is inevitable that you are going to split
12 cities, as I think you mentioned, eluded to before. You are
13 going to split some cities, some of course larger cities, and
14 even occasionally smaller cities that actually will overlap
15 county boundaries. So the decision is whether to actually split
16 that city or split the county boundaries. So you are making
17 these decisions all of the time, as I said.

18 Q. And is there a way in Maptitude to look at the addresses of
19 incumbents in the different districts?

20 A. You can overlay. You can do what is called geocoding if
21 you want, and actually take an address and then convert it into
22 a latitude longitude point location for a layer, but the
23 incumbent database that I had was already converted. I could
24 just overlay that on top. And so that becomes another criteria
25 that you actually will look at. Usually when it comes to

1 incumbents, most of the time you will leave that on. You will
2 leave that on, so you can be assured that you are not actually
3 doubling up on the incumbents.

4 Q. And why did you do that, or why did you try to avoid
5 doubling up on the incumbents?

6 A. It is one of the criterias that we listed.

7 Q. And putting all of those building blocks and different
8 criteria in mind, how do you then determine whether you can or
9 can't have an additional majority black district?

10 A. You use the data view that comes with Maptitude that gives
11 you the population and the percentages for each race and
12 ethnicity group.

13 Q. And when you adjusted boundaries, was making minority
14 populations a majority in a district, was that ever your primary
15 motivating factor?

16 A. No. No. I didn't use race as a predominant factor, if
17 that's what you are saying. No.

18 Q. Okay. And why is that?

19 A. Well, it's against the criteria, and the courts have ruled
20 against that.

21 Q. Now as far as this process, I know you said you started
22 with the 2011 plan. Did you familiarize yourself with the
23 number of majority black districts in the 2011 plan?

24 A. Yes.

25 Q. And how many were there?

1 A. There were 12.

2 Q. Okay. And can you generally describe where those were
3 across the state?

4 A. Sure. There were some in Pulaski County. I believe there
5 were five in Pulaski county. There were three, I believe, in
6 the upper delta region. Three in the lower delta region, I
7 believe. And then one in the southern there.

8 Q. And Steve, we can just put up from Exhibit 7, Page 9 of
9 your report. I think it's Page 13 of the PDFs.

10 So this is the 2011 plan, is that right?

11 A. That's correct.

12 Q. Okay. And by the way, you described different regions
13 where the majority black districts were. Where did you base
14 those regions on?

15 A. In literature that I looked up, there are, specifically the
16 delta region, there are 15 counties that are included in that
17 delta classification that are primary counties. And then there
18 are ten other sort of separate counties that are considered also
19 in a second tier for delta counties. There also are regions
20 inside the travel Arkansas travel -- I don't know what you want
21 to say there, their travel department, I guess, that is
22 classified regions, six regions inside the state.

23 Q. Can we look at Exhibit 66 real quick? Go to the next page,
24 Steve.

25 Is this what you are referring to?

1 A. Yes.

2 Q. And where did you get this from?

3 A. It's a website, Arkansas.

4 Q. Okay. It is an Arkansas state website?

5 A. I believe so.

6 Q. We would ask that Exhibit 66 be admitted.

7 THE COURT: Any objection?

8 MS. MERRITT: No objection.

9 THE COURT: It's admitted.

10 (Plaintiffs' Exhibit 66 was received in evidence.)

11 BY MR. STEIN:

12 Q. If we could go back, Steve, to Exhibit 7, Page 13.

13 Now did you also have occasion to look at the Board's plan?

14 A. Yes.

15 Q. And did you determine how many majority black districts
16 were in the Board plan?

17 A. Yes. 12. I mean, 11. Excuse me.

18 Q. And so 11 majority black-voting-age-population districts?

19 A. Yes.

20 Q. And do you recall the comparative changes to the black
21 population and the white population from 2010 to 2020 censuses?

22 A. Yes. You're speaking of the decrease of 100,000 in white
23 population, and the increase of 27,000 in black.

24 Q. Okay. And did it surprise you in relation to the
25 population changes that there were actually fewer majority black

1 districts in the 2020 plan?

2 A. Yes.

3 Q. Did you do anything to determine where those changes were
4 in the Board's plan from the 2011 plan?

5 A. I didn't do anything. I looked at what those changes were.

6 Q. Okay. Better way of saying that.

7 A. Yeah.

8 Q. Why don't we look still in your report on Page 15 of the
9 PDF, Steve. It's -- okay. And actually, can we put Page 13 and
10 Page 15 side by side? And then blow up the two maps.

11 Okay. And so can you just point out where the Board -- I
12 know it's a net reduction of one.

13 A. Right.

14 Q. But can you point out the changes in majority black
15 districts from the 2011 plan to the Board's proposed plan?

16 A. Right. First they changed the numbers. So it is not a
17 true number-to-number match, but if you look at the HD current
18 and -- over the 2011 HD 55, that was removed. The HD 5 for the
19 2011 was removed, but there was an additional majority black
20 district included in Pulaski County. That gave the net one
21 decrease.

22 Q. Okay. And we started to look at, I think a little bit
23 earlier, but were you able to draw a map that had more than the
24 11 districts proposed by the state?

25 A. Yes.

1 Q. Okay. And if we can go back to exhibit 2, please, Steve.

2 Okay. And this is your map. Is that right?

3 A. That is correct.

4 Q. Okay. And I know we have looked at the population metrics.
5 Can you explain kind of the blue lines and the red lines, and
6 you know, the difference between solid red and dashed red lines
7 on the map?

8 A. The red lines represent the county boundaries. The blue
9 lines represent the district boundaries. The red lines are
10 dashed. So when you have a overlapping district boundary with a
11 county boundary it is shown in a solid color, usually.
12 Occasionally that may happen. The red numbers indicate majority
13 black districts.

14 Q. Okay. Right. So there is numbers all over the map. Those
15 are the district numbers?

16 A. Yes. Correct.

17 Q. And if the number is in black, what does that represent?

18 A. That means it is not a majority black district. If the
19 number is in red, that means it is.

20 Q. Okay. Perfect. And then -- and I believe Exhibit 2 is
21 already in, right?

22 So if you can put Exhibit 2, which is the map plus the
23 back-up -- yeah, our calculations?

24 THE COURT: Any objections?

25 MS. MERRITT: I'm sorry?

1 MR. STEINER: Exhibit 2.

2 MS. MERRITT: No objections.

3 THE COURT: It's admitted.

4 MR. STEINER: Thank you.

5 (Plaintiffs' Exhibit 2 was received in evidence.)

6 BY MR. STEINER:

7 Q. So, did you then also in your report prepare a version of
8 this that just focuses on the majority black districts?

9 A. Specific maps, are you referring to?

10 Q. Yeah.

11 Let's go back, Steve, to Exhibit 7. And it's Page 16 of
12 the PDF.

13 It's Page 12 of your report.

14 Okay. And Mr. Fairfax, what is -- what is this figure in
15 your report?

16 A. This shows the illustrative plan, majority black districts.

17 Q. And you drew this map?

18 A. Yes.

19 Q. And when you drew this map, what did you -- how did you
20 measure what counts as a majority black district?

21 A. I used the any-part-black-voting-age population, but I also
22 insured that it was above 50 percent for the citizen-voting-age
23 population.

24 Q. And how many majority black districts are there in your
25 illustrative plan?

1 A. 16.

2 Q. And all 16 of those have a black --
3 majority-black-voting-age population, and
4 majority-black-citizen-voting-age population?

5 A. Correct.

6 Q. And did you compare your plan to the Board's proposed plan?

7 A. Yes.

8 Q. And I think you said there are 11 in the Board's plan?

9 A. That's correct.

10 Q. And of the 11 in the Board's plan, did you make a
11 determination of how many have actually a
12 black-citizen-voting-age population above 50 percent?

13 A. In the Board's plan?

14 Q. In the Board's plan.

15 A. I noticed there were two that did not.

16 Q. Two of the 11 that the Board had as a
17 majority-black-voting-age population were less than a
18 majority-black-citizen-voting-age population?

19 A. That is correct.

20 Q. Now, did you make any comparisons of your plan to the
21 Board's plan on the redistricting criteria that were established
22 by the Board?

23 A. Yes, I did.

24 Q. Okay. In your opinion, does your illustrative plan comply
25 with the Board's guidelines?

1 A. Yes.

2 Q. And did you analyze whether their plan -- the Board's plan
3 complied with the Board's guidelines?

4 A. That is not what I analyzed.

5 Q. Okay. What is it that you analyzed?

6 A. I did a comparison of the redistricting criteria between
7 the Board's plan and the illustrative plan with 10 different
8 criteria.

9 Q. And how did the two plans compare, your illustrative plan
10 and the Board's plan on those ten criteria?

11 A. The illustrative plan was equal or comparable or better in
12 eight of the ten criteria.

13 Q. And you drew those ten criteria from the Board's
14 redistricting criteria, is that right?

15 A. Yes. In addition to one, which is fracking.

16 Q. So let's look at the table. I think it is on Page 15 of
17 your report, Page 19 of the PDFs, Steve.

18 Okay. And what does this table show, Mr. Fairfax?

19 A. This shows the comparison between the illustrative plan and
20 the Board plan for those criteria that I looked at.

21 Q. And could you just walk through and explain the comparison
22 on each. The first one is equal population. That is mandatory,
23 right?

24 A. Correct.

25 Q. And how did your plan do and the Board's plan do?

1 A. They were comparable. Both were acceptable. And it is a
2 situation that you either are within the allowable tolerance or
3 you are not.

4 Q. So you had 100 out of 100 within, and the board had 100 out
5 of 100 within?

6 A. That's correct.

7 Q. And how about contiguity, I think we talked about was the
8 districts touching each other and not jumping over from one
9 district to another and having islands; is that right?

10 A. That's correct.

11 Q. And that's an equal?

12 A. Both of them were equal. Both of them were contiguous
13 plans.

14 Q. I know we got a nice math lesson on compactness, but can
15 you explain the three numerical -- you don't have to walk
16 through how you calculated them again, but what the three
17 comparisons are and how the two plans compare?

18 A. Sure. Sure. The three represent the measurement for
19 Reock, Polsby-Popper and Convex Hull. And when you compare the
20 two plans, there is an insignificant difference there relatively
21 equally compact.

22 Q. And for example, any of the numbers, did you calculate, for
23 example, the standard deviations that go along with the
24 numerical calculations?

25 A. Well, the report that you -- that Mapititude generates has

1 the standard deviation. And these are less than one standard
2 deviation difference.

3 Q. On all three measures?

4 A. On all three measures, correct.

5 Q. And then the next talks about county splits?

6 A. Yes.

7 Q. Okay. I think we talked about that. When a district
8 crosses, splits a county?

9 A. That's correct.

10 Q. Okay. And do you have a view of the 53 versus the 51?

11 A. They're very close. The illustrative plan actually
12 performs better. Still close.

13 Q. I think the illustrative plan has a couple more splits,
14 right?

15 A. Yes.

16 Q. Now the next one --

17 A. I'm sorry if I said that the illustrative plan performs
18 better. The illustrative plan performs worse with two splits.

19 Q. And that is on the counties and on the cities, it is
20 flipped; is that right?

21 A. That's correct. I was looking at the VTD splits.

22 Q. Okay. And I assume same thing, 69 and 70 is not in your
23 mind is a significant difference?

24 A. Yes.

25 Q. It is just one goes in the illustrative plan's favor and

1 one goes in the Board's favor?

2 A. Yes.

3 Q. How about VTD splits?

4 A. There is a significant difference between VTD splits.

5 Q. Significant difference. Whose maps perform better?

6 A. The illustrative plan performs better.

7 Q. That is your plan?

8 A. Yes.

9 Q. Then again, landmarks and school district splits, those are
10 comparable between the two, and one in the illustrative plan's
11 favor, and one in the Board's favor; is that right?

12 A. That's correct.

13 Q. Okay. I don't think we have heard fracking before, so can
14 you explain that?

15 A. Right. Fracking is relatively new, but I think it's
16 becoming more and more popular. And that is where a district may
17 slice through, if you will, a county in two or more places, but
18 inside the county they are not contiguous. So you can imagine a
19 county, and then you slice through on this part of the county,
20 and then the district comes and slice through that. And inside
21 these two areas are contiguous to each other.

22 THE COURT: Can you say that one more time?

23 THE WITNESS: Sure. If you can imagine that you had a
24 district, and you have a county, and the district cuts through
25 part of the county, but then doesn't cut through say that

1 center. And then it cuts through another part of the county.
2 You have these two separate areas that aren't contiguous inside
3 the county. And the reason for it is that it's attempt to get
4 at possible gerrymandering. Why did they leave that not
5 contiguous piece there. Now you are trying to avoid some areas.
6 And there are administrative reasons as well. I mean, there are
7 two areas in the county that may confuse the voters. Why is
8 that the case?

9 MR. STEINER: I think you can draw on the touch
10 screen. I think it would be helpful to draw an example and if
11 it wouldn't be --

12 THE COURT: It's up to you, but I understand.

13 BY MR. STEINER:

14 Q. And so that comparison, that is something you avoided in
15 your plan; is that right?

16 A. Yes. Yes.

17 Q. And then the last thing, incumbent's paired. That was one
18 of the criteria that the Board had; is that right?

19 A. That's correct.

20 Q. And how the two plans compare?

21 A. The illustrative plan fared, I think, much better than the
22 Board plan. Two incumbents had to pair to where they paired 11.

23 Q. And of the 11 -- well, I guess on your two pairs, I guess
24 there is none that paired three incumbents; is that right?

25 A. That's right.

1 Q. Pushed three incumbents together?

2 A. That's right.

3 Q. And do you know whether the board's plan put three
4 incumbents together?

5 A. They did have a district with three incumbents in there.

6 Q. And do you happen to know whether the district where there
7 are three incumbents together is one of the majority black
8 districts in the --

9 A. I believe it was. I believe it was, but I'm not looking at
10 that. I'm looking at the pairing, but I believe it was.

11 THE COURT: Before we leave this chart, on VTD splits,
12 am I supposed to take from that that it's likely that in terms
13 of actual precinct splits, the numbers are close to that, or
14 could it be that if I look at actual precinct splits, the
15 numbers would be pretty far off one way or the other?

16 THE WITNESS: I looked at the precincts layer, and
17 compared it to the VTDs, and they were very, very close. And
18 only certain areas I saw, maybe a slice through here and there.
19 So I would say this is close to what the precincts would be.
20 Good question.

21 MR. STEINER: And the -- I don't remember 7 -- or 7B,
22 7C.

23 So I just move in 7C, which was the various compilations.

24 THE COURT: Any objection?

25 MS. MERRITT: No.

1 THE COURT: It's admitted.

2 (Plaintiffs' Exhibit 7C was received in evidence.)

3 BY MR. STEIN:

4 Q. And actually if we could go back to 7C for a minute, Steve.
5 We digressed to one of the other charts when we were talking
6 about population. Can we go to the first page? Now -- no, the
7 first page of the exhibit. Sorry.

8 So I know we talked about the population, but did you see
9 there in 7C, so it's Exhibit C to your report, the various
10 reports that you generated?

11 A. Yes.

12 Q. Okay. And those are all things that you did or you caused
13 Maptitude to put out the numbers from your report?

14 A. Yes.

15 Q. Okay.

16 THE COURT: Is this a good time for a break?

17 MR. STEIN: I was going to say there is -- yes.

18 Because we move to the rebuttal report, there are three other
19 exhibits that I just want to put in. We can do it before or
20 after.

21 THE COURT: What would you like to put in?

22 MR. STEINER: So 15 -- Steve, I think it's 15, 16, and
23 17. I think they are various comparisons.

24 BY MR. STEINER:

25 Q. So can you just explain quickly what is this -- is this

1 comparison on court constituencies, is this something that you
2 generated?

3 A. Yes.

4 Q. And what does this compare?

5 A. This compares the -- in this particular one, the current
6 plan with the Board of Apportionment plan. And it shows you
7 where the different populations come from, different districts
8 in each of the plans, or in the current plan rather.

9 Q. And if we can go quickly, Steve, to 16.

10 And is this similarly comparing the Board plan to the
11 illustrative plan?

12 A. That's correct.

13 Q. Okay. And then 17 should be the illustrative plan to the
14 current plan hopefully?

15 A. Yes.

16 Q. Okay. And are those all -- that's all data or reports that
17 are generated by Maptitude showing where population came from?

18 A. Exactly.

19 Q. So I ask that all three of those be admitted.

20 THE COURT: Any objection?

21 MS. MERRITT: No, Your Honor.

22 THE COURT: It's admitted.

23 (Plaintiffs' Exhibits 15, 16, 17 were received in
24 evidence.)

25 MR. STEINER: And this is a perfect time for a break,

1 Your Honor.

2 THE COURT: We are going to take a break. Obviously
3 you are still going to testify when we come back, so if you
4 would please not speak with anyone, including your own counsel
5 while you are still on the witness stand, that would be
6 appreciated. Obviously once you are done with your testimony,
7 you can talk to your counsel as much as you like.

8 THE WITNESS: Thank you. I appreciate it.

9 THE COURT: Let's take a 15-minute break, and then
10 we'll start up again.

11 (Recess taken from 5:39 p.m. until 6:07 p.m.)

12 THE COURT: At your leisure we can keep going.

13 MR. STEINER: Thank you, Your Honor.

14 BY MR. STEINER:

15 Q. Mr. Fairfax, before we broke, I think we had talked about
16 your initial report and your conclusion that you could draw 16
17 majority black districts consistent with the Arkansas
18 redistricting principles. I would like to talk a minute, did
19 you have a chance to review, or did you understand that one of
20 the members, one of the people who worked with the Board of
21 Apportionment to draw the plans has put in a declaration
22 critiquing some of the choices that you made?

23 A. Yes. You are speaking of Mr. Davis?

24 Q. Mr. Davis. And have you had a chance to review Mr. Davis's
25 affidavit and his critiques of your illustrative plan?

1 A. Yes. Yes, I did.

2 Q. And did any of Mr. Davis's critiques cause you to change
3 any of your opinions about the performance of your illustrative
4 map and the ability to draw 16 majority black districts?

5 A. No, none at all.

6 Q. Did you prepare a report that responded to the issues
7 raised by Mr. Davis?

8 A. Yes. Yes, I did.

9 Q. And can we look at Exhibit 12.

10 And what's Exhibit 12?

11 A. That's my report in rebuttal for Mr. Davis's declaration.

12 Q. And who drafted that report?

13 A. I did.

14 Q. And is that an accurate -- you prepared it as a truthful
15 and accurate summary of the opinions that you performed in
16 response to Mr. Davis's, the concerns raised by Mr. Davis?

17 A. Yes. Yes, I did.

18 Q. Can we look at Exhibit 12A for a minute, Steve?

19 Okay. And can you explain what Exhibit A to your report --
20 this is Exhibit 12A for the plaintiffs.

21 And Steve, if we need to go to the next page.

22 Could you explain what reports you generated here?

23 A. These are split cities.

24 Q. Okay. And why did you generate these, this additional
25 information?

1 A. There was a concern that Mr. Davis put in his declaration
2 that I had split cities in certain districts. And the point of
3 this is to show that even in the BOA plan, you split multiple
4 cities with many different districts.

5 Q. And let's look at Exhibit 12B quickly.

6 Okay. And 12 --

7 And if we go to the next page.

8 And what do you -- what data were you generating in Exhibit
9 12B, and why did you do that?

10 A. This just looks back at the 2001 House plan. And
11 unfortunately the data didn't have the name, but had what is
12 called the census place number, but this shows the same thing.
13 It really shows that there are split cities in the house plan
14 back in 2001.

15 Q. That was an adopted house plan from 2001?

16 A. Yes, that's correct.

17 Q. And then if we go to 12C for a minute.

18 Okay. And what were you doing in 12C?

19 A. This, I believe this is the modifications of the
20 illustrative plan. I looked at compactness in this particular
21 case, where there was a concern that one, the district wasn't
22 compacted; and two, had split two precincts, actually a third
23 precinct. And I recreated and modified the House District 5 and
24 removed the split precincts and reconfigured it slightly. And
25 it ended up being actually a more compact district with those

1 select precincts removed or made whole, let's say. That's
2 probably better.

3 Q. So can you just explain what that means in terms of the
4 ability to draw 16 majority black districts?

5 A. And the result was that it -- you could continue to draw 16
6 majority black districts, even with the alteration of that HD 5.

7 Q. So we'll go through some of the responses that you had to
8 some of Mr. Davis's specific criticisms, but again, I just move
9 12, 12A, 12B, and 12C into evidence.

10 THE COURT: Any objections?

11 MS. MERRITT: No objection.

12 THE COURT: It's admitted.

13 (Plaintiffs' Exhibit 12, 12A, 12B, 12C were received in
14 evidence.)

15 BY MR. STEINER:

16 Q. And I notice that 12B talked about the 2001 plan, and some
17 numbers you generated from that.

18 Can we just put up Exhibit 61 for a minute, Steve?

19 Okay. And what is Exhibit 61?

20 A. This is the -- it's title 2002, but it's the 2001 plan.

21 Q. So this is the plan that is developed after the 2000
22 census; is that right?

23 A. That's correct.

24 Q. And did you create this, or -- and if you did, how did you
25 go about creating it?

1 A. Well, I downloaded the boundary files from the census
2 website, and imported it into our GIS program that I spoke about
3 early on and recreated the same maps that I did before, but
4 using different boundary layers.

5 Q. Using the 2001 boundary layers?

6 A. That's correct.

7 MR. STEINER: We ask that Exhibit 61 be admitted.

8 THE COURT: Any objection?

9 MS. MERRITT: No objection.

10 THE COURT: It's admitted.

11 (Plaintiffs' Exhibit 61 was received in evidence.)

12 BY MR. STEINER:

13 Q. Actually, while we're at it, one more. If we go to Exhibit
14 65, please, Steve.

15 And can you explain what Exhibit 65 is?

16 A. Same thing with the adopted 2011 plan, boundaries for that.

17 Q. And you did the same thing, you downloaded boundaries and
18 put it into the ArcGIS?

19 A. GIS, uh-huh. The Arc map.

20 MR. STEINER: So we would ask that Exhibit 65 be
21 admitted as well.

22 THE COURT: Any objection?

23 MS. MERRITT: No objection.

24 THE COURT: It's admitted.

25 BY MR. STEINER:

1 Q. I would like to turn to some of Mr. Davis's specific
2 comments on the additional districts in your plan.

3 So Steve, if we can put back up maybe side by side, the
4 2011 current map, and then the illustrative map.

5 Nope Exhibit 7, please. And then the two maps that are
6 side by side in exhibit 7.

7 Now did you understand that one of Mr. Davis's
8 critiques of your districts was with respect to District 55?

9 A. Yes.

10 Q. Okay. And what did you understand Mr. Davis's critiques to
11 be?

12 Can we focus on those, Steve?

13 A. In essence, he pointed to the irregular shape of the
14 district boundaries.

15 Q. Okay. And that is like the curvy lines on the right side
16 of the district?

17 A. Yes.

18 Q. Okay. And is there -- is there a reason for those curvy
19 lines on the right side of the district?

20 A. That's the Mississippi River.

21 Q. Is there any way to draw that differently?

22 A. Not in a coastal district, no.

23 Q. Okay. Can you change the river or the coastline?

24 A. No. No.

25 Q. Not easily?

1 A. No.

2 Q. Okay. And what impact does that have on the various
3 compactness measures that we have talked about?

4 A. Right. Coastal districts usually are lower in compactness
5 measures because of the meandering coastal boundaries. And
6 usually what you have is an extended extension, if you will, of
7 the district area along the coastal lines. So that also adds to
8 the lowering of compactness measures.

9 Q. And then Mr. -- I think there is some criticism of the
10 population size of these districts; is that right?

11 A. Right.

12 Q. Okay. And did you have a response to that?

13 A. That all of the districts were within the acceptable
14 deviations.

15 Q. And the map on the left, that's the 2011 current plan for
16 District 55?

17 A. Correct.

18 Q. And the Board's proposed plan eliminates this as a majority
19 black district; is that right?

20 A. That's correct.

21 Q. And again, when you drew your maps, what did you use as the
22 starting point before you started adjusting for population?

23 A. The current map. The 2011 plan.

24 Q. And is there a reason you started from the current map?

25 A. Well, you know, one of the criteria is to use the existing

1 cores, and that is a normal process that's done in redistricting
2 is to start with the existing current map.

3 Q. And then I believe Mr. Davis had a criticism that your map
4 crossed Interstate 55. Is that --

5 A. That's correct.

6 Q. And did you have a response to that?

7 A. The board decided to slice through precincts, and I decided
8 to keep precincts whole.

9 Q. And so precincts cross Interstate 55?

10 A. Yes, that's correct.

11 Q. Okay. And then I think there was a criticism about the
12 shape of the district up at the top, and the part of the
13 district that's not -- that's now out of 55 from the old plan?

14 A. Yes.

15 Q. Are you familiar with that criticism?

16 A. Yes.

17 Q. Okay. And could you explain why you chose to draw the map
18 in that way?

19 A. Sure. In one of the earlier versions of 55, I actually had
20 it identical to the current plan, but then Blytheville was
21 added. So I removed those two precincts to the right, and then
22 also reconfigured and extended into Crittenden.

23 Q. And could you -- you said one of the versions that you had
24 kept that upper boundary the same?

25 A. Yes.

1 Q. Would you have been able to draw a district in that area
2 that kept the old top of it without the part of Blytheville that
3 was still majority black?

4 A. That's correct. That version had a majority black district
5 that kept that northern in exactly what the current district,
6 and it was majority black.

7 Q. And did you have an understanding of what it means when you
8 are drawing an illustrative plan?

9 A. Right. It is a plan that illustrates or demonstrates
10 something. It is not a perfect plan. It is not an idea plan.
11 There are many different versions of illustrative plans that you
12 can actually create. So it for the purpose of demonstrating
13 something can be done.

14 Q. Okay. And you are not saying this is the only way to do
15 something?

16 A. Right. That is correct.

17 Q. Okay. And in your opinion, having looked at Mr. Davis's,
18 the issues raised by Mr. Davis, there is both the way that you
19 drew it and there are other ways to draw the district that would
20 still meet that, have a majority black population?

21 A. That's correct.

22 Q. Now I think the -- I think the next district that Mr. --
23 that Mr. Davis criticized was District 5. Are you familiar with
24 his criticism of District 5?

25 A. Yes.

1 Q. Okay. And again, he talks about district 5 reaching into
2 and connecting parts of three cities; is that correct?

3 A. That is correct.

4 Q. And can you explain -- and again, did you do the same
5 thing, start with the old District 5, which is on the left?

6 A. Yes.

7 Q. And to then draw the new District 5?

8 A. That's correct.

9 Q. And did the old District 5 reach into multiple counties?

10 A. Yes. It actually reached into four counties. I reduced
11 it down to three, so you see that chunk from Nevada gone.

12 Q. Okay. And so you started with what's on the left to end
13 up --

14 A. Yes.

15 Q. -- on the right.

16 And did you -- did you have responses to Mr. Davis's point
17 that he raised, and we might have talked about it some, that
18 this district includes three cities that are connected across
19 the district. How did you respond to that?

20 A. Right. Well, he made comments as though they were; one,
21 there were three cities that were split. And of course the
22 comments of that is many districts are split in the Board plan,
23 and unfortunately in the illustrative plan. That is just
24 unfortunately the nature of redistricting and drawing
25 state-level plans. He also talked about the fact that those

1 three areas, or those three cities shouldn't exist, or eluded to
2 that as well.

3 Q. Okay. And what was your -- what was your response to his
4 issue that those three cities shouldn't be included together?

5 A. Right. And you know, one of the things that I looked at, I
6 look at this normally are sort of socioeconomic variables to see
7 if there is some commonality amongst the cities or areas. Not
8 in a detailed fashion, but in a cursory view. And I looked at
9 that and found that there were commonalities amongst the three
10 cities, which was Camden, Magnolia and El Dorado.

11 Q. And you found that those had common interests across the
12 three?

13 A. That's right.

14 Q. And again, I know we talked about the illustrative plan
15 with respect to 55. Were there other variations that could be
16 considered with respect to 5 that would still maintain a
17 majority black district?

18 A. That is correct. That was the earlier appendix that you
19 actually brought up the compactness measurements for that
20 alternative version. He addressed some concerns of the split
21 precincts that were in Union. And I wanted to demonstrate that
22 you could actually unsplit those, if you will, and keep them
23 hole and still be able to draw and develop a majority black
24 district for 5.

25 Q. And then the third district that Mr. Davis raises issues

1 with is District 16, which I think is the blue district in your
2 plan. It is one of your new districts. Is that --

3 A. Yes.

4 Q. And again, here he -- the issues raised by Mr. Davis are
5 largely that this includes parts of Arkadelphia on one side and
6 Pine Bluff on the other; is that right?

7 A. That's correct. That's one of the concerns. That's right.

8 Q. And in Mr. Davis's view, there is not a connection between
9 Arkadelphia and Pine Bluff; is that right?

10 A. That's correct.

11 Q. Did you have a response to that?

12 A. Yes. And the response is once again, I looked at different
13 socioeconomic variables with Pine Bluff and Arkadelphia. And
14 there are similarities between the two. There were eight
15 different sort of socioeconomic aspects that have commonalities
16 amongst the Arkadelphia city and the Pine Bluff city.

17 Q. And can you give examples of some of those that would be
18 particularly of interest to the black community?

19 A. Sure. It was unfortunately poverty, age, percentage of
20 married couples with children, renter percentage. There were
21 eight different ones.

22 THE COURT: Let me ask you a question there.

23 When you were doing those comparisons, are you comparing
24 just general population to general population, or are you
25 comparing the black population in that -- in each of those two

1 areas, and what is the right way to do it? I don't know.

2 THE WITNESS: I'm comparing the general population,
3 not just the black population. So those cities by themselves
4 had commonalities amongst the general population. I would
5 imagine that if I looked at just the black population, it
6 probably would be even a closer alignment, if you will. That's
7 usually the case.

8 BY MR. STEINER:

9 Q. And regionally, going back to the different regions of the
10 state, regionally are Arkadelphia and Pine Bluff, at least
11 according to the state's tourism bureau, in the same area?

12 A. Yes. They're in the same area. And one of the interesting
13 things is I actually looked up a map, a satellite map that
14 actually had the depiction of the delta region. And it
15 actually -- you could see that the difference in agricultural.
16 It's a stark difference where you can actually literally see
17 from that eastern side where the delta region, it cuts right
18 through where Pine Bluff is. And from Pine Bluff or halfway to
19 Pine Bluff to the rest of the part of the state, there is a
20 different distinct agricultural soil content, which of course
21 drives the production that's included in there, the economic
22 production, which I thought was very interesting.

23 Q. And then again, with respect to Pine Bluff, do you know
24 whether all of Pine Bluff could be in a single district?

25 A. No. No. It's -- I believe it's 41,000.

1 Q. But it's -- the population of Pine Bluff is more that it
2 necessarily has to be in multiple districts?

3 A. That's correct.

4 Q. And then the last pair of districts that Mr. Davis raised
5 issues with were Districts 12 and 48, which kind of border each
6 other on the delta?

7 A. Correct.

8 Q. There is 12 and 48, and I think they are blue and green in
9 your illustrative map instead of pink and orange.

10 Okay. And again, so when you went to draw your map,
11 starting from the 2011 map, you started with all of Lee County
12 as District 48, and all of Phillips as District 12, and then
13 expanded out from there; is that correct?

14 A. That is correct. As I mentioned before, I started really
15 with 55 up at the top and came down and drew 51, and then 50,
16 and then of course that impacted the 48 and 12. And so once I
17 got to 48, there was really a couple of choices. I could either
18 go down and interfere with 12. And also there is a district
19 below 48, an incumbent that is located there. Or I could curve
20 up. So I curved up for 48. And then 12, I took it out to
21 Jefferson.

22 Q. Okay. But again, it's starting -- I think the criticism
23 there is that they expand west into noncompacted area, and
24 that's starting from the same spot in 2011. Is that right?

25 A. That's correct. Correct. And it's -- both of those are

1 more compact districts. 48, and the illustrative plan is more
2 compact than the current plan, or 2011 plan. And the 12 as
3 well. You can see the irregular shape for the 2011 plan.

4 Q. And I believe that Mr. Davis again raised the issue of
5 splitting cities and splitting Helena, West Helena off of the
6 district. Do you have responses to that?

7 A. Same as I said before. That, you know, occasionally you
8 are going to split cities. And in the Board plan, they do
9 virtually the same thing with Arkadelphia in one of the
10 districts where they carve that out, and the remaining portion
11 of the county is in that district, but the Arkadelphia is in a
12 different district.

13 Q. And actually since you mentioned Arkadelphia, I want to go
14 back and look. There is one other thing. Did you look at
15 Arkadelphia and Pine Bluff in terms of where they are in
16 congressional districts over time?

17 A. Yes. Yes.

18 Q. Could we put up Exhibit 68, please? And I think -- sorry.
19 Let's start with 67, which is already in.

20 And 67 is the new redistricting on the congressional side;
21 is that right?

22 A. Right. Correct.

23 Q. And where are Arkadelphia and Pine Bluff in this map?

24 A. They are in that District 4.

25 Q. The blue district?

1 A. The blue district, correct.

2 Q. And if we go back to Exhibit 60. 68, the first page of
3 Exhibit 68, is this something you put together?

4 A. Yes. Yes, it was.

5 Q. And again, do you do this based on the same boundaries that
6 you talked about before, putting it into the ArcGSI?

7 A. That's correct. That's correct.

8 Q. And Steve, we can show the title on this one.
9 And which period is this from?

10 A. 2013, 2021 of the latest, last version.

11 Q. So this would be the current, it was after the 2010 census?

12 A. Yes.

13 Q. And again, where are Arkadelphia and Pine Bluff?

14 A. In District 4.

15 Q. And if we go to the next page of the district, Steve.
16 And so now where are we?

17 A. This is the decade before.

18 Q. And is this also a map that you put together with the same
19 inputs?

20 A. Yes.

21 Q. And I see the boundaries have shifted a lot from 2003 to
22 the current proposal, but where are Arkadelphia and Pine Bluff
23 in this one?

24 A. Still in the same District 4.

25 Q. Okay. Steve, can we go to the next page?

1 Okay. So, again, the boundaries in the congressional
2 districts going back a decade earlier shift again, but where are
3 Arkadelphia and Pine Bluff?

4 A. In that District 4 still.

5 Q. And can we look at the 80s, Steven? Next page.

6 Again this is something that you put together from using
7 the inputs?

8 A. Yes.

9 Q. And again, a lot of -- a lot of the boundaries are
10 shifting, but where are Arkadelphia and Pine Bluff?

11 A. Still in that District 4.

12 Q. And the last one, let's go back to the 70s.

13 And going all of the way to back to the 1973 redistricting
14 plan, where have Arkadelphia and Pine Bluff been?

15 A. Still in the District 4.

16 Q. I ask to admit Exhibit 68, please?

17 MS. MERRITT: I object to this one, Judge, based on
18 relevance. There is only four congressional districts in the
19 state of Arkansas. And I think there has been some evidence
20 about that the law says they have to be completely equal in
21 population. And so I just don't see what the relevance of this
22 is to 100 house districts, whether it's --

23 THE COURT: Do you have any other objection, other
24 than relevance?

25 MS. MERRITT: No, Your Honor.

1 THE COURT: Overruled. It's admitted.

2 BY MR. STEINER:

3 Q. I think I just skipped one exhibit.

4 Steve, can we put up Exhibit 62 for a minute?

5 I don't have this checked off as in, so Mr. Fairfax, can
6 you just look at Exhibit 62 and explain -- this looks like it's
7 a comparison from 2002 what Exhibit 62, what this report that
8 you generated was?

9 A. Right. This, I think we discussed this. This is the 2002
10 house plan, and it shows the split places. Unfortunately, the
11 data did not have the name. And so it has the ID, but it shows
12 that the splits were each of those places, places being a city
13 or town or something called a census designated place.

14 MR. STEINER: So it may be in already, but I don't
15 have it checked off, so I just ask to admit 62?

16 THE COURT: Any objection?

17 MS. MERRITT: No objection.

18 THE COURT: It's admitted.

19 (Plaintiffs' Exhibit 62 was received in evidence.)

20 BY MR. STEINER:

21 Q. Mr. Fairfax, having done the work that you have done,
22 having considered the issues raised by Mr. Davis, and you know,
23 the continuing work that you have done, in your opinion is the
24 black population of Arkansas sufficiently large and
25 geographically compact to create more than 11 majority black

1 districts?

2 A. Yes, it is.

3 Q. Okay. In your opinion, how many majority black districts
4 can be drawn for the Arkansas statehouse consistent with the
5 Board of Apportionment's redistricting principles as well as,
6 you know, federal law and the Arkansas constitution?

7 A. I would say 16, at least.

8 Q. And would drawing those 16 districts deviate from the Board
9 of Apportionment's guidelines or other traditional redistricting
10 principles?

11 A. No.

12 MR. STEINER: I have no further questions.

13 THE COURT: Thank you.

14 Let's all have a conversation right now. It is 6:30.
15 I will tell you, I'm a little bit conflicted, because as a
16 general matter, I really don't like to give the
17 cross-examination side the evening to kind of stock up on their
18 fire power and figure things out. I don't generally think
19 that's fair. On the other hand, we are getting relatively late.
20 So let me ask Plaintiffs first, what would you all like to do?
21 Would you like to continue going with cross-examination. And if
22 we start, we're not gonna stop. I mean, we're going to finish
23 the cross-examination. Or do you want to go home and do the
24 rest tomorrow?

25 MR. SELLS: May I inquire of opposing counsel how many

1 hours of cross she expects?

2 THE COURT: You may. And obviously, don't forget if
3 we do cross, I mean, there may be redirect. And you know,
4 again, I'm not going to give anybody an advantage. So if we're
5 doing cross, we're doing redirect.

6 MS. MERRITT: My -- I mean, obviously Judge, I can't
7 time it. I haven't timed my cross. My best guess would be
8 probably an hour and a half or so of cross. It could take
9 longer. And I'm sure that there would be redirect, but I
10 suspect it would be a very late night, and the Defendants would
11 prefer to start fresh in the morning.

12 THE COURT: I am sure the Defendants would. And I
13 understand it. I'm not being flip. It's not just a tactic
14 issue. I understand. It's getting late. On the other hand, I
15 do want to be fair here.

16 So, Plaintiffs what are your thoughts?

17 MR. SELLS: Can we have just a moment to confer?

18 THE COURT: You may. Because look, if we are taking
19 another hour and a half, and you have got to then assume we need
20 some breaks, and then there is going to be redirect and probably
21 my own questions. We are starting to get really late.

22 MR. STEINER: On scheduling issues, could we also
23 consult with the witness?

24 THE COURT: You may.

25 Plaintiffs?

1 MR. STEINER: So, we're happy to continue, but we're
2 also happy to accommodate the scheduling. And you know,
3 hopefully if the reverse turns out to be the case, we'll do the
4 same.

5 THE COURT: I think that makes sense. And I
6 appreciate the gesture, and I'm sure the Defendants appreciate
7 the gesture as well. So we will end for the night.

8 Given that we are in the middle of your testimony, I would
9 ask you not speak with your lawyer. Don't speak with anybody
10 about the case, including whoever is at home if anybody is at
11 home, all of that.

12 THE WITNESS: That's correct.

13 THE COURT: Come back here. You'll finish your
14 testimony, and then you can go about your business.

15 THE WITNESS: Appreciate that.

16 THE COURT: You can get off the stand. And thank you
17 so far for your testimony. And does anybody have any legal
18 issues or anything like that that they want to talk about before
19 we adjourn for the night?

20 MR. STEINER: We don't, Your Honor.

21 THE COURT: Let's just -- Plaintiffs?

22 MR. STEINER: No, Your Honor.

23 THE COURT: Defendants?

24 MS. MERRITT: No, Your Honor.

25 THE COURT: We're adjourned.

1 (Overnight Recess at 6:51 p.m.)

2 REPORTER'S CERTIFICATE

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

5 /s/Teresa Hollingsworth, CCR
6 United States Court Reporter

Date: February 3, 2022.

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