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

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

v. No. 4:21CV01239 LPR

February 8, 2022
Little Rock, Arkansas
9:00 AM

ARKANSAS BOARD OF APPORTIONMENT, et al.,

Defendants.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
VOLUME 5
BEFORE THE HONORABLE LEE P. RUDOFSKY,
UNITED STATES DISTRICT JUDGE

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Appearances continuing.

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(Proceedings continuing in open court at 9:00 AM.)

THE COURT: Good morning, everybody. Before we start with closings, Plaintiffs, anything administratively to discuss?

MR. SELLS: No, Your Honor.

THE COURT: Defendants?

MS. MERRITT: No, Your Honor.

THE COURT: In that case, Mr. Sells or whoever from the plaintiffs is starting out, the floor is yours.

MR. SELLS: Thank you, Your Honor. And may it please the Court. Before I get into my summation this morning, I hope the Court will indulge me, I'd like to thank a number of folks who have made this week possible. Probably foremost among them, Steven Najarian, our trial tech who has really made this week run much more smoothly I think than it would have otherwise. I want to think Sarah Everett and Holly Dickson from the Arkansas ACLU. I want to thank our trio of new lawyers who are graduates and passed the bar but haven't been admitted yet in New York because of New York. Those are Nina Riegelsberger, Elizabeth Baggott, and Biaunca Morris. I want to think our fabulous paralegals, Tiffany Lewis and Madison Perez, and our assistant Makayla LaRonde-King who made sure that we all had hotel rooms to stay in and flights to take to be here and to stay here over the course of the last week.

Finally, I want to thank members of the Arkansas NAACP

and the Arkansas Public Policy Panel who have been here for almost every minute of the trial over the last week, even on Saturday I would note. And they are a reminder of what this case is all about.

According to the 2020 census, the population of Arkansas grew by approximately 100,000 people over the last decade. The number of black Arkansans increased both in absolute numbers and as a share of the state's population. They now constitute approximately 16 percent of the state's population. Arkansas's white population, on the other hand, shrank by almost 110,000 people. That's a decrease of more than 6 percentage points and more than enough population to fill three and a half House districts. Yet compared to the old plan, the Board of Apportionment's new House plan decreases the number of majority black districts and increases the number of majority white districts. As I said at the beginning of this hearing, this case presents a single straightforward claim of minority vote dilution under Section 2 of the Voting Rights Act.

We have moved for a preliminary injunction preventing the defendants from implementing that plan. In light of yesterday afternoon's Supreme Court decision in the Alabama case, we'd like to amend our request for relief such that if the Court determines that preliminary relief in 2022 would be too disruptive, that the Court order an election to be held in 2023 for a one year term under a lawful plan.

In the Eighth Circuit, under a preliminary injunction the Court has to apply what is known as the *Dataphase* factors. I'm sure you're well familiar with them. It's a wonderful name in the Eighth Circuit. Of course, it's likelihood of success, threat of irreparable harm, balance of harms, and public interest. In election cases, however, the final three requirements are generally deemed to have been satisfied, so what this case really comes down to is the likelihood of success on the merits.

As to the first *Dataphase* factor, likelihood of success on the merits, this is not a close case. The Board of Apportionment's plan substantially underrepresents black voters in Arkansas and thereby dilutes black voting strength. As I said before, black Arkansans constitute 16 percent of Arkansas's 2020 population, and it was possible for the Board to have drawn 16 out of 100 House districts in which black voters would have a meaningful opportunity to elect candidates of their choice, but the Board's plan only includes 11 opportunity districts and that's a deficit of five districts.

Section 2 of the Voting Rights Act as amended in 1982 prohibits voting practices and procedures that result in unequal electoral opportunity on the basis of race, color or membership in a language minority. The Supreme Court has explained that the essence of a Section 2 claim is that a certain electoral law, practice, or structure, in this case the

Board's redistricting plan, interacts with social and historical conditions to cause an inequality of opportunity enjoyed by black and white voters to elect their preferred candidates.

In *Gingles*, as you know, the Supreme Court set out three preconditions that a plaintiff must establish as a threshold matter to bring a Section 2 vote dilution claim. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district. Second, the minority group must be able to show that it is politically cohesive. And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances such as the minority candidate running unopposed, usually to defeat the minority's preferred candidate.

If Plaintiffs establish these three *Gingles* preconditions, the Court must next determine under the totality of circumstances whether minority voters have less opportunity than other members of the electorate to participate in the political process and to elect candidates of their choice. That inquiry requires a searching practical evaluation of past and present reality and on a functional view of the political process. Under the totality of circumstances inquiry, virtually any circumstance is potentially relevant depending on

the nature of the claim. That's what totality means.

But the Supreme Court has identified several factors set out in the legislative history of the 1982 amendments and they're known as the Senate Factors. I'm not going to read each one of them, but we have history of discrimination, racial polarization, other enhancing electoral structures, access to the slating process, socioeconomic disparities, racial appeals in campaigns, the extent to which minority members have been elected. And there are two unnumbered Senate Factors: Lack of responsiveness and whether the policy underlying the challenged structure is tenuous.

The Supreme Court has since added another factor and that was in the *Johnson v. De Grandy* case, and it's known as proportionality. And proportionality asks whether there's rough proportionality between the number of majority minority districts and the minority members' share of the relevant population. While not always dispositive, proportionality or the lack thereof is highly probative in vote dilution cases.

Now, before I dive into the *Gingles* preconditions, I want to first address the issue of standing. As the Court observed in its ruling a little earlier in this case, we based our standing on what is known as associational standing. And what that essentially comes down to in this case is whether members of the Arkansas NAACP and Arkansas Public Policy Panel would have standing in their own right to sue. And the evidence now

before the Court more than sufficiently establishes standing for the purposes of a preliminary injunction. Barry Jefferson confirmed that the Arkansas NAACP has members who are black registered voters in all of the challenged districts except for two, Districts 90 and 95. Bill Kopsky confirmed that the Arkansas Public Policy Panel has members who are black registered voters, most importantly in the two missing districts from the NAACP, 90 and 95. Overall, Mr. Kopsky confirmed that the Arkansas Public Policy Panel has members who are black registered voters in all but three of the challenged districts, and he said, and his testimony is un-rebutted, that the Arkansas Public Policy Panel very likely has members who are black registered voters in all of the challenged districts.

Turning to *Gingles*. The first *Gingles* precondition requires in this case that we show it's possible to draw one more majority minority district in a 100-district House map. The first *Gingles* factor, in its discussion of whether the minority group is sufficiently large and geographically compact, it's talking about the compactness of the minority population, not to the compactness of the shape of a district. That's an important distinction that I want to make here and that I think we'll come back to in just a moment.

Most of what you need to know for the first *Gingles* precondition is on these four maps that you see in front of you. These four maps are the 2000 decade plan for the state

House drawn by the Board of Apportionment, the 2011 plan drawn by the Board of Apportionment, our illustrative plan drawn by Tony Fairfax, and the challenged plan, the Board of Apportionment's 2021 plan. And I dare say if we didn't have those labeled and if they were all formatted in a similar fashion, it would be virtually impossible to distinguish one from the other.

And that's because the first three are evolutionary. The 2011 plan is very similar to the 2002 plan, it just adjusts for population. It keeps the core of existing districts in tact, and it does what one normally does in a redistricting plan, just make the changes that you need to equalize population. Mr. Fairfax took the same approach in drawing his map, and his map looks very similar to the 2011 plan in many respects because he took that same approach. And you can see from where you're sitting now that none of the districts in any of those three plans stands out as unusual as not fitting in with the others.

Now, the 2021 plan is a little bit different. It doesn't really look like the other three and I think we learned yesterday the reason why. Mr. Davis testified that he didn't and his colleagues didn't necessarily start with the previous plan and make changes as necessary to equalize population and meet other goals. You heard him testify quite clearly that some of his colleagues started on a blank slate. So that's why

this plan looks a little bit different. But I still dare say that none of the districts in any of the other three plans before you look markedly different than the ones in the Board of Apportionment's plan.

That's most of what you need to know for the first *Gingles* precondition. This is the other important piece of evidence on the first *Gingles* precondition. This is the comparison chart that is in Mr. Fairfax's expert report. What this shows is that he beat them at their own game. Mr. Fairfax's plan complies with the Board's stated guidelines better than the Board's own plan does. Many of the criteria are ties, draws, just about the same between one plan or the next.

But there are two criteria that stand out. The first is all the way at the bottom, incumbents paired. Mr. Fairfax's plan only pairs two incumbents, and that is one of the Board's redistricting criteria. Why does it only pair two incumbents? Because that's what he was trying to accomplish, number one, and, number two, when you start out with the existing plan and make changes from there, that happens somewhat naturally. When you start on a blank slate, however, you end up with what the Board did here, pairing 11 incumbents. That's a big deal in a legislature of 100 members. The other big difference between the illustrative plan and the Board's plan is in the number of VTD splits.

You heard testimony from Shelby Johnson about how important that is. You also heard testimony yesterday from Josh Bridges about the difficulties that split VTDs or precincts cause for local election administrators. Tony Fairfax was well aware of that. He's been doing this a long time. He understood that in an election year like this when there's less time to implement a new redistricting plan, it is more important than ever to draw plans with whole VTDs, and his did that. He split only 98 VTDs.

Some of those splits are inevitable in any plan because you have to equalize population, you have to protect incumbents. There are any number of reasons why you have to split VTDs. The Board did not have to split 282 VTDs. That's more than 10 percent of all the precincts in the state of Arkansas. You heard Mr. Johnson, the number is 2,740. I would add there's no dispute about any of this on the chart. There's no dispute that overall Mr. Fairfax's plan does a better job of satisfying the Board's own criteria than the Board's plan.

The defendants challenge five districts in Mr. Fairfax's plan which, of course, they must, because unless they can knock out five districts, we win. We don't have to show that you can draw 16. We don't have to show you can draw 15. We don't have to show you can draw 14 or 13, only 12. So they have to knock out all five of our districts in order to prevail on the first *Gingles* precondition. The first district they challenge is

House District 55.

The defendants argue that House District 55 is racially gerrymandered because it goes back and forth across I-55, because it has a low compactness score, and because it excludes two precincts at the top of the district. And you heard Mr. Fairfax's testimony, the reason it goes back and forth across I-55 is because he drew the plan using whole precincts. The compactness score for House District 55 is very similar to the compactness scores for House District 55 in each of those two previous iterations, and the Board's own version of House District 55. Theirs is a little bit more compact because they chose to split precincts, but that's the ordinary balancing of competing goals. Compactness versus precinct splits. That's no indication that what Tony did here was racial gerrymandering, none whatsoever.

Now, the precincts at the top of the map, you heard the testimony of Mr. Fairfax. The reason he had to exclude those is because he chose instead to include the entire city of Blytheville. Why did he choose that? Because he had community input that it would be good for that city to be whole in the district. Did he do that for racial reasons? No. His testimony was that, in fact, including the entire city of Blytheville meant that you would include the northern section which is comprised of affluent white voters. That is not drawing districts on the basis of race, that is drawing

districts on the basis of community input and the Board's own criteria.

Mr. Fairfax also testified that, hey, if you want to include those two precincts in the district, fine, you can still do it, you can still have a majority black district here, you just have to make other choices as pertains to split precincts or split counties, perfectly legitimate choices that the Board of Apportionment can make in a remedial plan.

The evidence in total does not support the conclusion that race was the predominant motive for the boundaries of Illustrative District 55, nor does it show that even if it were, race was used more than reasonably necessary to comply with Section 2. Certainly the evidence doesn't show that no majority black district could be drawn in this part of the Mississippi Delta without violating the constitution, and that's what they have to show in order to knock out this district.

The next district that they challenge is House District 16. The defendants argue that House District 16 is noncompact because it stitches together geographically disparate black populations that have little in common. This is the district that extends from Pine Bluff to Arkadelphia. But that hasn't been the evidence. You heard yesterday Kymara Seals' testimony about the divine nine and the commonalities between Pine Bluff and Arkadelphia, particularly the black communities in those

two cities, the AME church. There are three adjacent counties, they're not that far away. Mr. Fairfax testified about socioeconomic similarities.

Both cities are younger than the rest of the state, both cities have a higher poverty rate than the rest of the state, both cities have a lower proportion of married couples with children than the rest of the state, both cities' median household incomes are lower than the state's, both cities have more renters than the rest of the state, both cities' median housing values are lower than the rest of the state, both have lower percentages of homes built after 2010 than the rest of the state. Both have higher percentages of households receiving food stamps and SNAP benefits than the rest of the state.

But if that weren't enough, take a look at Exhibit 66. This is Arkansas's own website. According to the state of Arkansas, Arkadelphia and Pine Bluff are in the same geographic region. Arkadelphia is in the heart of southwest Arkansas, and Pine Bluff sits right there on the border of the two. Don't take my word for it. Take Arkansas's word for it. They are within the same region of the state of Arkansas. You also have before you in the record these maps. They show that Arkadelphia and Pine Bluff have been in the same congressional district, District 4, for the last 50 years, since before you were born, Your Honor, and almost since before I was born.

That's a long time.

They didn't have to be drawn this way, but they have. Because whoever draws -- whoever drew these districts, the General Assembly found it reasonable to put Pine Bluff in the same district as Arkadelphia. If you look at the shape of District 16 on the map in front of you, it doesn't stand out as being any different from the others, in any of the previous plan. So the evidence doesn't support the defendants' argument that the black population in southwest Arkansas is not sufficiently numerous and geographically compact to form a majority in a single member House district. It is.

The defendants also argue that House District 5 in Mr. Fairfax's illustrative plan is noncompact and a racial gerrymander. So let's dispense with the compactness argument quickly. Arkansas has had a majority black district in this part of southwest Arkansas for decades. It keeps getting smaller as population shifts to northwest Arkansas and central Arkansas, but it's been there continually. We didn't make that up. The evidence also doesn't support the defendants' argument that the population -- scratch that.

As to the racial gerrymandering claim, Mr. Fairfax testified that he carved the new District 5 out of the area of the old District 5. You can see that on the slide in front of you. But the shape was dominated largely because he wanted to eliminate the county split in Nevada County. That county was

split in the previous iterations, and he was able to eliminate the number of splits or reduce the number of splits from four to three. He also testified that there are alternative configurations of this district that could achieve the same result if the Board of Apportionment wants to choose some other choices. If it wants to split more counties, it can do so and still draw a majority black district here.

The defendants' main criticism is that this district splits three cities, but Mr. Fairfax testified that three-city splits in a single district is not uncommon. Several of the districts in the Board of Apportionment's plan split three cities. Several split more than three cities, and overall Mr. Fairfax's plan splits fewer cities than the Board of Apportionment's plan. The defendants' argument here is simply cherry picking. Overall, the evidence doesn't support the conclusion that race was the predominant motive for the boundaries of House District 5 in the illustrative plan or that even if it were, Mr. Fairfax used race more than reasonably necessary to draw this district such that no majority black district can be drawn in this area. A majority black district has been drawn in this area for decades and it can be drawn in this decade depending on how the Board chooses to prioritize its other factors.

The defendants next argue that House District 12 is not compact. Their argument is based on the shape, not the

population, but even if you look at the shape, Mr. Fairfax's Illustrative House District 12 is, in fact, more compact than its predecessor. You heard him testify that he reduced the county split in Desha County and reduced the portion of Arkansas County that the district takes up, and overall, that district is more compact in shape than its predecessor. There was also a lot of testimony on cross-examination yesterday with Mr. Davis about this district and a lot of that went to the fact that Phillips County is a Delta county, row crop county, but I believe at the end of the day, Mr. Davis testified that Pine Bluff -- it makes sense for Pine Bluff and Phillips County to be linked for that very reason, with Pine Bluff being an economic hub of the row crop industry.

If you remember the map of Arkansas regions that I showed you a moment ago in Exhibit 66, all these counties are in the same region of Arkansas. This is not about stitching together communities that have nothing to do with one another. 48 is the next district they challenge. And, again, their challenge is on the shape of the district. And, again, Mr. Fairfax testified that his 48 is more compact than the predecessor 48. It's all in the upper Delta region on that map I showed you. And while the Board can make other choices about which counties it wants to adjoin to Lee County, that district does not for a moment suggest that the black population in that part of the Delta isn't sufficiently compact. It's there. It's in

Helena-West Helena primarily, which anchors that District 48.

The defendants' gripe with that is not that there's an insufficient black concentration in the Helena-West Helena area, it's that in order to empower that black concentration, Mr. Fairfax made different choices than they would have about where to extend the district. That does not establish that House District 48 in our illustrative plan is noncompact, or more importantly, that the black population in that part of the Delta is not sufficiently compact.

So to summarize the first *Gingles* precondition, we only need one district above the 11. We have 16. Even if the Court disagrees with us about one or two of those, we have the first *Gingles* factor established. The second *Gingles* precondition requires the minority group to show that it is politically cohesive. That can be done through statistical analysis and through anecdotal evidence from lay witnesses, and in this case we have both. You heard Barry Jefferson, Bill Kopsky, Monte Hodges, Vivian Flowers, and Kymara Seals all talk about the issues that are important to the black community in Arkansas, issues such as voting rights, voter suppression, stand your ground laws, hate crimes, economic and civil rights issues.

You also get a flavor of this from our census data that you've taken judicial notice of. There are real economic disparities between black and white Arkansans and that suggests that black Arkansans have a unique identifiable interest. That

also goes to political cohesion. Then, of course, there's Dr. Handley's statistical analysis. I'm not going to go over every race for you but that's the column you need to look at. And whether you look at homogenous precinct analysis, ecological regression, or either flavor of ecological inference that she's used here, the results jump off the page. Black voters support their preferred candidates with overwhelming supermajorities often exceeding 90 percent.

That is way more than enough to establish political cohesiveness under the second *Gingles* factor or *Gingles* precondition. And it's probably for that reason the defendants don't dispute that we can satisfy the second *Gingles* precondition. Black voters in Arkansas are politically cohesive. The third *Gingles* precondition requires us to show that the white majority in Arkansas votes sufficiently as a bloc to enable it usually to defeat a minority's preferred candidates. There's no added requirement that we show that racially polarized voting is caused by white voters' racial bias. I suspect we're going to get into that in a little bit in the legal argument section. But let me say this. Lisa Handley's report and testimony in this case establishes that white voters vote sufficiently as a bloc to defeat the candidates preferred by black voters.

She found that voting was racially polarized according to the Supreme Court's definition of racially polarized voting in

every statewide primary and general election that she was able to analyze. She also found that voting was polarized in 13 of the 17 state House elections that she was able to analyze and of the ones that weren't polarized, one involved only black candidates, one involved only white candidates, and two involved a minor party candidate. With one exception, white majorities voted sufficiently as a bloc to defeat the black preferred candidate except in districts where blacks were the majority. The one exception was the 2018 House race in District 11 where you might recall white voters split their votes between a black Republican and a white Independent and that allowed a black Democrat to win the 2018 election and he promptly lost his reelection bid to that same candidate who was then running as a Republican.

As to the defendants' argument that race no longer plays a role in Arkansas politics, the evidence here simply does not support it. Their expert, Professor Lockerbie, gave it away when he admitted on cross-examination that he wasn't even suggesting that race plays no role in Arkansas politics. He also admitted that he hadn't done any analysis to determine the relative contributions of race versus party in explaining vote share of black preferred candidates. What he did do was eyeball the results of Dr. Handley's racial bloc voting analysis and without doing any analysis of his own, he reached the rather unremarkable conclusion that partisanship also plays

a role in Arkansas politics.

But in reaching that conclusion, Professor Lockerbie went cherry picking through the election results and failed to account for the results that didn't quite fit the conclusion that his clients wanted him to reach. The record shows, for example, that black preferred candidates lose even when they prefer non-Democrats. The record shows that the Democratic primary in 2018 between a white candidate and a black candidate was racially polarized. The average white share -- the average share of the white vote received by statewide white candidates is higher than the white vote share received by the only black statewide candidate, Anthony Bland. So there's a differential there if you look broadly.

The degree of racial polarization in that Bland race was higher than any other race on the ballot in that election. The average white support for white legislative candidates is higher than the average white support for black Democratic candidates. Lockerbie didn't discuss that result. And perhaps most tellingly, the average white support for white Republicans was 30 points higher than the average white support for black Republicans. Lockerbie had no answer for those facts because they didn't fit the conclusion that his clients wanted him to reach. In addition to her racial bloc voting analysis, Dr. Handley also analyzed minority electoral opportunity in the Board's old plan, the Board's new plan, and in the illustrative

plan. And the slide before you presents her analysis of electoral opportunity in the new plan.

Dr. Handley determined that the Board's plan has 11 opportunity districts, a decrease of one from the old plan and five fewer than the illustrative plan. What her analysis means is that there are 89 House districts in the Board's plan in which black voters do not have an opportunity to elect candidates of their choice either because they make up too small a percentage of the District's population or because the voting is racially polarized or both. And that is what you see on her effectiveness index that's Exhibit 8A for the proposed plan.

The defendants don't dispute that the plaintiffs have satisfied the third *Gingles* factor with respect to additional districts that we have drawn in a lower Delta region. Those are Districts 11 and 12 in our illustrative plan. But they do argue that House Districts 34, 98, and 74 are opportunity districts that preclude a finding that Plaintiffs have satisfied the third *Gingles* precondition in the upper Delta in southwest Arkansas and in the central Arkansas regions. And I'll address each of those in turn starting with District 74.

District 74 is in central Arkansas, and I want to note that the defendants don't dispute that the plaintiffs can satisfy the third *Gingles* factor with respect to House District 75 which is right next door to District 74, but they argue that

we have to show that both satisfy, and that contention has no basis in law. But let's talk about 74. They contend that 74 is an opportunity district. That district is 21.22 percent black, and it has an effectiveness score of .63. The incumbent is the House minority leader, white Democrat, Tippi McCullough. On cross-examination, Professor Lockerbie admitted that his conclusion with regard to House District 74 was based solely on the effectiveness score, the .632.

And as you saw, that analysis leads to the absurd result that Professor Lockerbie considers any district as a opportunity district as long as there's one black person in it, if it has a score above .5. That's not a black opportunity district, that's a Democratic district, certainly a district in which a black Democrat can win. What the record actually shows is that the only districts in which black voters have consistently been able to elect candidates of their choice in contested elections have been in majority black districts, and you heard Dr. Handley testify that she looked for electoral opportunity at all districts with a substantial black majority and she could only come up with 11 in the Board's proposed plan.

Next district I want to talk about is House District 98. The defendants -- in southwest Arkansas, the defendants don't dispute that the plaintiffs have satisfied the third *Gingles* precondition with respect to House Districts 97 and 99, but

they argue that House District 98 is an opportunity district for black voters in the new plan. This is the district currently represented by David Fielding as a 44.15 percent black voting age population and an effectiveness score of .448, less than 50 percent. The defendants rely again on Professor Lockerbie here who argues that the effectiveness score should be adjusted upwards based on Fielding's prior performance to .508 or .509 depending on which of Fielding's prior elections you look at.

First of all, the adjusted effectiveness score is junk science. Professor Lockerbie suggested that there's support for it in one of Lisa Handley's articles. That is not at all consistent with Dr. Handley's testimony. But you have the article that he cited in the record, it's admitted as evidence, it's Lisa Handley's drawing effective majority minority districts, and it's Defendants' exhibit, I want to say 7, but it's on the list. And I spent time reviewing that entire article and couldn't find it, and I respectfully suggest you won't be able to find it either. He made that up. There's no such thing as an adjusted effectiveness score.

His adjusted effectiveness score also fails to account for the fact that 36 percent of the voters in District 98 have never voted for David Fielding before. They're new. And there's no reason to suggest that he will get the incumbency advantage for voters where he's not really an incumbent. And,

of course, Fielding is term limited out or will be soon if he manages to prevail in the next election. And black electoral opportunity is not limited to the opportunity to continue to re-elect incumbents. There has to be a level of opportunity there that they can elect a candidate of their choice. That is what the standard is, even if they choose a nonincumbent.

Turning to House District 34, this is in the Board plan, the district in the northeast corner of the state. In the upper Delta region, the defendants don't dispute that the plaintiffs have satisfied the third *Gingles* precondition with respect to House District 37, but they argue that House District 34 is an opportunity district. This district has a 45.8 percent black voting age population and an effectiveness score of .462. The incumbent is Monte Hodges who testified during this proceeding and he testified that it would be extremely difficult for a black candidate who isn't him to win that district. He said a white candidate might have a better chance, but it would be extremely difficult for a black candidate to win.

And if you're not already familiar with it, the *Smith v. Clinton* case out of this very court, Circuit Judge Richard Arnold laid down the rule that Section 2 protects the right of black voters to choose the candidates of their choice even if that's not a white candidate. So to the extent that there's any opportunity there, it needs to be the opportunity to elect

a black candidate or a white candidate. Without that opportunity, it's not an opportunity district. The defendants' argument is based, again, on an adjusted effectiveness score, it's junk science, but it's especially problematic here because Monte Hodges isn't running again. The voters in that district don't have the opportunity to re-elect him. Whoever runs for that seat won't have the incumbency advantage and it makes absolutely no sense to adjust that score upwards even if there were some basis for an adjusted score in law or fact.

With respect to District 34, the defendants don't even really say that it's an opportunity district, they say it's a toss up district and that's good enough. We'll probably talk about this later, but that's not good enough. In order to qualify as an opportunity district, there has to be a meaningful opportunity to elect candidates of their choice going forward and a toss-up doesn't qualify under those circumstances. In virtually every other district in the state, white voters have a shoe win to win easily. Whichever candidate is preferred by white voters is going to win. To say that equal opportunity in House District 34 is satisfied by a toss-up is anything but equal.

So to sum up the third *Gingles* precondition, we haven't had elections in the new districts yet, but all of the credible evidence before the Court points in the same direction, white voters in Arkansas vote sufficiently as a bloc to enable them

usually to defeat the black preferred candidates outside of the 11 opportunity districts that we've identified. None of this is seriously in dispute. The opposition is based entirely on Professor Lockerbie's rather unserious notion that a single black soul can turn a district into an opportunity district, or his junk science adjusted effectiveness scores and speculation that a black candidate can win a contested election in a majority white district for the first time since reconstruction.

The Court should, therefore, conclude that the plaintiffs are likely to satisfy the third *Gingles* precondition as well. And at this point, I'm going to pass the baton to my colleague, Mr. Topaz, to talk about the totality of circumstances.

THE COURT: Thank you, Mr. Sells.

MR. TOPAZ: Thank you, Your Honor. And may it please the Court. Once Plaintiffs establish the *Gingles* preconditions, courts must then determine based on a review of the totality of the circumstances whether the challenged practice results in unequal electoral opportunity for black voters. That said, if the first three *Gingles* preconditions are met, it's very unusual in the Eighth Circuit and otherwise that Plaintiffs will fail to satisfy the totality of the circumstances. When we look at Gingles, what Gingles tells us is that the Senate Factor inquiry and the totality of the circumstances is a flexible one. Plaintiffs don't need to

prove any particular factors, they don't need to prove a majority, they don't need to prove a particular number.

Dr. Jay Barth testified as Plaintiffs' expert witness on the Senate Factors. A lifelong Arkansan and professor of American politics for 26 years, Dr. Barth literally wrote the book on Arkansas politics and government. He's also published dozens of articles and peer-reviewed journals and taught classes for decades on racial politics, Arkansas politics, the politics of the American South, and other areas related to those expertise. Your Honor, I'm going to go through the Senate Factors in order.

The first Senate Factor looks at whether there's been an official history of racial discrimination particularly as it pertains to the electoral process. And as Your Honor is aware, judges in this court on several occasions have taken judicial notice of Senate Factor 1 and has found that it need not be proved anew in each case under the VRA, as a judge in this court has found Arkansas has, quote, a long history of official discrimination, it has a present effect, and some instances of it are still occurring. As I noted in the examination of Dr. Barth, the parties have arrived at a stipulation that very closely mirrors the language of Senate Factor 1.

Senate Factor 2 looks at the degree of racial polarization, that is, the degree in which black voters vote together and white voters vote together. The evidence that

black and white voters generally prefer different candidates, along with Senator Factor 7, which I'll discuss in a little bit, this is one of the two central Senate Factors. I'm not going to belabor the point as was discussed by Mr. Sells in terms of *Gingles* preconditions two and three, but Dr. Handley testified that all nine statewide elections were racially polarized, and almost all of the state House elections were. I direct the Court to Dr. Handley's testimony when she noted that Arkansas is as starkly polarized as any jurisdiction I've looked at.

Dr. Handley, of course, testified that she has 40 years of experience in voting rights and redistricting. That's how stark the polarization is. I'd also note that in her testimony, Dr. Handley noted that the racial polarization in Arkansas is so notable because of how cohesively white Arkansans vote together. That is, of course, the only part of the racial polarization aspect that Defendants contest.

Senate Factor 3 looks at voting practices and procedures that enhance the opportunity for discrimination against black citizens. The Eighth Circuit permits courts to look at statewide data or data from outside the specific elections in evaluating this factor. Dr. Barth in his testimony focused on three voting procedures that are extremely common in the Senate Factor 3 analysis. That is majority vote requirements, at-large elections, and off cycle elections, and I'll go over

each of those briefly.

Dr. Barth begins with majority vote requirements which is the requirement that a winning candidate get 50 percent plus one of the vote rather than a plurality. The Eighth Circuit and the Supreme Court have noted repeatedly that majority vote requirements are suppressive or dilutive of black voters' influence. In Arkansas, majority vote requirements are used in primary elections including those for state House, and as Dr. Barth noted, empirical data from Little Rock makes clear that eliminating majority vote requirements in establishing plurality elections has allowed black voters in Little Rock to better elect the candidates of their choice while those majority vote requirements have harmed black preferred candidates.

Next up are at-large elections which the Eighth Circuit has noted tend to suppress minority voters' influence. At-large elections are used in statewide elections in certain municipal and local elections including in Little Rock, and again, empirical data from Little Rock -- from Arkansas and elsewhere in this country has shown that ward elections as opposed to at-large elections lead to more fulsome representation for black citizens rather than at-large elections.

And, finally, most Arkansas elections take place off cycle which means in non-presidential years. This includes

half of all state House races. The data show that black turnout disproportionately drops in non-presidential years. That means that black turnout drops by a greater percentage than white turnout does in non-presidential years. I'd add, Your Honor, that this also informs why majority vote requirements can have an additional dilutive effect. If no one receives a majority in a majority vote election, that election goes to a run-off which always takes place off cycle. That means that run-off elections will involve disproportionately whiter electorates. So we see the way in which some of these voting practices and procedures work with each other to harm black voters.

Senate Factor 4 concerns black access to a candidate slating process if one exists in the jurisdiction. As Your Honor is aware, the parties arrived at a stipulation that there is no slating process as it pertains to the Arkansas state House. Senate Factor 5 looks at the extent to which black citizens bear the effects of discrimination across a wide range of socioeconomic factors which hurts their opportunity to participate politically. The Eighth Circuit as well as the very important Senate Judiciary Committee report from 1982 has determined that as long as Plaintiffs are able to establish that black citizens lag behind in socioeconomic indicators, it's not necessary to show the causal link to the political process. Regardless, Dr. Barth, his reports and his testimony

made that nexus all too clear.

I note that as with Senate Factor 1, the Eastern District of Arkansas has on several occasions taken judicial notice of Section 5 as it pertains to black citizens in the state. Frame that Dr. Barth used when discussing Senate Factor 5 is the well-established concept of calculus of voting which comes from political science. This concept tells us that people who are financially well off, well educated, and in good health face relatively few costs to voting. By contrast, individuals who don't have much money, who are in poor health or who are not well educated face much steeper voting costs.

Disparities in socioeconomic factors such as those three, economic resources, education, and healthcare, to quote Dr. Barth, factor into whether people turn out to vote or not. So Dr. Barth started with the economic resources. And the disparities in economic resources in Arkansas are simply enormous. Black Arkansans have much higher poverty rates than white Arkansans, and this racial gap is larger than in other states in the country. There is a massive child poverty gap, and sadly Arkansas has the highest black child poverty rate in the country. Black Arkansans disproportionately comprise ALICE families, which as Dr. Barth told us, are folks who are just above the poverty line and who live paycheck to paycheck. Black Arkansans are less likely to own a home than their white counterparts and if they do own a home, it's worth less.

And black Arkansans have a higher unemployment rate than white Arkansans. The disparity that is informed, of course, by other disparities in other socioeconomic factors such as lack of access to a vehicle, internet access, and disability rates. Moving on to education, black Arkansans are much less likely to graduate from high school and much less likely to graduate from college. Dr. Barth noted stark disparities in test scores, in school discipline, and suspensions. And in his supplemental report and in his testimony, Dr. Barth noted how 14 school districts in the state remain under involuntary federal court oversight due to de facto school segregation. Schools in Arkansas are more segregated than they were three or four decades ago.

Finally, in healthcare we see dramatic disparities across a wide range of health outcomes. This one is particularly upsetting. Life expectancy, infant mortality, low birth weights, HIV/AIDS, diabetes, and others. Dr. Barth testified that voting participation -- black voting participation in Arkansas is very low and lags well behind white voter participation. And the reason as Dr. Barth explained in his testimony, is largely these voter costs. It's harder to participate in the political process when you're working two jobs. It's harder to participate in the political process when you have health problems. It's harder to participate in the political process if you don't have a car to get you to the

polls or internet access to figure out voting logistics. It's harder to participate in the political process if you lack sufficient education. These racial disparities which are the result of centuries of official discrimination against black citizens in Arkansas directly explain the racial turnout gap.

Senate Factor 6 looks at whether political campaigns have been characterized by overt or subtle racial appeals. And Dr. Barth made clear that these can be either explicit in which the minority group is named, or implicit, in which they're not. As the *Bone Shirt* case makes clear, you don't need more than a couple of examples to satisfy Senate Factor 6. I note that in the *Bone Shirt* case, one of the two or three examples that the Court looked at was nearly three decades old by the time that case was decided. We still see explicit racial appeals to this day. Dr. Barth noted that at least three candidates in the state in the past several years have made racial epithets, some of which were done in public or in recordings released to the public.

Dr. Barth notes three racial appeals in congressional elections from just the past two cycles alone. This first one is an explicit one. In 2020, Representative Hill stated in public that his opponent, Joyce Elliott, would be, quote, a member of the Congressional Black Caucus. Again, that is an explicit racial appeal. Defendants try to argue that this is somehow a comment about Senator Elliott's liberal politics

ignoring the fact that the Congressional Black Caucus is nonpartisan, has had Republican members as recently as a couple years ago, and that there's another caucus on Capitol Hill, the Congressional Progressive Caucus, that is literally dedicated to liberal politics.

In 2018, a radio ad supporting Representative Hill featured the voices of black women claiming that white Democrats will be lynching black folks again. And in that same election cycle, Representative Hill ran his infamous MS-13 mailers. Your Honor, I won't belabor the point on the various testimony on Senate Factor 6. Dr. Barth testified as to various racial appeals in the 2018 judicial elections. He noted the intense climate of racial resentment during the Obama era in Arkansas, and he noted the disturbing history of racial appeals in Arkansas's past, defenses of lynching, support for the white primary that excluded black voters, candidates who refuse to shake the hands of black voters on the campaign trail.

But, Your Honor, as Dr. Barth made clear, this isn't about some distant past. This isn't about grainy black and white videos. This is about right now. This is about a prominent Little Rock elected official using disgusting racialized rhetoric at a public meeting just 24 hours before Dr. Barth testified in this courtroom. It is about how Dr. Barth, as a lifelong Arkansan, told us how race is an

omnipresent powerful force in Arkansas political life still today at this very moment.

Senate Factor 7 looks at the rates of election of black candidates to various offices in Arkansas. As I mentioned earlier along with Section 2, it's the most central factor in the analysis. As with Senate Factor 3, the Eighth Circuit, the Eastern District of Arkansas, and plenty other courts of appeals have looked not just at rates of election to the office in question but to other offices around the state. This is a fairly simple one. Black Arkansans are underrepresented at every single level of elected office.

As it pertains to the state legislature, while more than 16 percent of Arkansans are black, just 12 percent of the state House is black and less than 10 percent of the state Senate is black. No black candidates have won a contested race in a non-majority black district since about at least the 19th century and could be far longer than that. We've got an 80-year period from the 1890s until the 1970s in which zero black legislators were elected to the state House.

Pick an office, any office. State judiciary, underrepresented at all three levels. State Supreme Court, court of appeals, district court. One black person has been elected statewide in the history of the state. And that was 150 or so years ago, during reconstruction. No black Arkansans have ever been elected to the United States Senate or House.

Arkansas is the only southern state not to do that. And we see severe underrepresentation among mayors in the state and other local offices. Senate Factor 8 looks at whether elected officials are sufficiently responsive to black citizens. While we heard plenty of testimony about from black citizens that the legislature is not responsive to their concerns, Plaintiffs are not arguing this factor for purposes of this motion.

Finally, Senate Factor 9 looks at whether the policy underlying the voting practice is tenuous. As several courts of appeals have found, it's important to probe the explanations provided for the plan because they may bear on whether the justification was pretextual, contrived or motivated by discriminatory purpose.

It's true, Your Honor, that so far in this extremely expedited case, Plaintiffs have not alleged tenuousness. Even as we argue that we should prevail on the totality of the circumstances, we didn't feel with the very limited time we had that we had sufficient evidence. But with all due respect to the individuals who worked hard during the redistricting process to get the 2021 maps in order, that was before this hearing. That was before four separate witnesses confirmed that the Board did not commission or perform any racial bloc voting analysis without which it's impossible to find out whether the plan complies with Section 2 or not. That was before Mr. Davis, the state's principal map drawer, testified

that he couldn't say for sure whether he used any part black or black alone data in drawing his districts.

It sounds to Plaintiffs that Defendants and Mr. Davis use black alone data in their redistricting process which runs afoul of the Supreme Court precedent. This was before Mr. Davis testified that he and the Board didn't have citizen voting age population data, CVAP data, when drawing the House map which perhaps explains why only nine of the Board's 11 majority black districts are majority VCVAP. That was before Mr. Davis testified that he didn't even try to unpack the obviously packed majority black districts in Pine Bluff. And that was before, as Mr. Sells elucidated, we knew that unlike Mr. Fairfax who drew his map with starting with the 2011, the 2002 plans, that they drew it on a blank slate.

That was also before Mr. Bearden's testimony, Richard Bearden, a consultant to the Board testified that he abided by the Board's criteria of minimizing partisanship. Yet minutes later, he acknowledged that he and Secretary Thurston, a defendant in this case, held previously undisclosed meetings with white Republican members and successfully schemed together to reduce the VVAP in vulnerable Republican districts. In these meetings, the principals spoke in political and racial terms discussing narrow margins of victories and likely political outcomes in the explicit context of those districts' minority populations. Plaintiffs thus argue that Senate

Factors 1, 2, 3, 5, 6, 7, and 9, well more than a majority of the Senate Factors, even though that is not necessary, are met for purposes of the preliminary injunction.

Finally, we turn to proportionality which is an element, if not a dispositive one as Mr. Sells noted of the totality of the circumstances analysis, as Mr. Sells noted, courts look to whether there's rough proportionality between the number of majority black districts in the black statewide population. I note that the *Johnson v. De Grandy* case notes that courts need not choose between using total population BVAP or BCVAP for purposes of this analysis. So let's look at all three. This is about as simple as it gets.

As defense counsel said on Saturday, Plaintiffs' plan achieves exact proportionality. 16 percent in the state where the total population BVAP and BCVAP all hover between 15.2 percent and 16.5 percent. The House plan by contrast dramatically underrepresents black Arkansans, which is frankly typical of a packs and cracks black citizens to the extent that the House plan does. As a last ditch effort to argue proportionality, Defendants instead claim that four districts, all of which they acknowledge are non-majority black, are still black opportunity districts. I will go through these quickly because Mr. Sells referenced most of these.

The first two districts, HD 49 and 74, have effectiveness scores above .5 but have incredibly small black populations.

As Dr. Handley explains, these cannot be thought of as black opportunity districts because the white population can elect their candidates with or without black support. If the white population doesn't support the black preferred candidate, the black preferred candidate cannot win in these two districts.

Dr. Lockerbie's testimony, as Mr. Sells noted, makes clear just how untenable Defendants' position is. There's no principled reason to distinguish between these districts with a BVAP of around 15 or 21 and a district where there's one black person in it if all that matters is an effectiveness score. Dr. Lockerbie claimed that a district of 30,000 people and only one black voter is still a black opportunity district so long as it has an effectiveness score of more than .5. You can't have a black opportunity district without black people. This argument, if it held at its most logical conclusion, makes a complete mockery of Section 2.

Mr. Sells discussed the last two of these, House District 34 and House District 98, so I won't go through them in much detail. The only thing I'd add on HD 34 in addition to Representative Hodges' comments about how extremely difficult it would be for a black candidate to win the district he knows so well, is that the BVAP in the new District 34 has dropped by six points and Representative Hodges won his district by just about four points in 2020. And there will be no incumbency advantage next time around. And we discussed District 98,

Representative Fielding's sort of new district given that more than a third of it is not included in his old district, and how his old District 5 has a far higher BVAP.

Your Honor, the record is clear Plaintiffs' illustrative plan achieves proportionality where the adopted House plan submitted by the Board of Apportionment falls well short. On the Senate Factors, Defendants have put up no competing expert, they've barely touched Dr. Barth's detailed factual findings in their briefing, and they essentially challenged none of them when they cross-examined him for all of five or ten minutes the other night. Plaintiffs' evidence demonstrates that the totality of the circumstances inquiry weighs in favor of Plaintiffs and that Plaintiffs are likely to succeed on it. I will turn it over to Mr. Sells for our conclusion as to the other three factors.

THE COURT: Thank you, Mr. Topaz.

MR. SELLS: Your Honor, the law in the Eighth Circuit is that irreparable harm is presumed in election cases, and it's not just the Eighth Circuit. But there are two main reasons for that, I want to go over those just quickly. One, of course, is the fundamental nature of the right to vote. I could read off a number of quotes but no right is more fundamental in a free society than the right to vote. The other reason, of course, is that you can't unring a bell, and that advantages accrue to those who win elections even if

they're held under an unlawful plan, so those two reasons are why courts universally treat the harm of an election going forward under an unlawful plan as irreparable.

It's also the case in the Eighth Circuit and elsewhere that courts generally find that administrative burdens or financial burdens of complying with the law don't outweigh the fundamental right to vote, and that the public has an interest in nondiscriminatory elections so the public interest is usually aligned with democracy at large in election cases. In this case, we also have Mr. Steinberg's concession during an early telephone conference that the Court has the power to adjust the state's election calendar if necessary, and that is precisely what this court should do. Let me be clear about the steps we think the Court should take.

Number one, it should immediately enjoin candidate qualification which has not yet begun. Number two, it should immediately order the State to begin making the adjustments necessary to its existing map in order to bring it into compliance with Section 2. This is not about redrawing all 100 districts, it's about making the adjustments necessary to the Board's existing map to comply with Section 2, and that process should begin immediately. And finally, number three, the Court should order the State to propose revisions to the election calendar, if any, that it believes are necessary and appropriate to implement a lawful map in 2022. Or in the event

that the Court concludes that it would be just too disruptive to implement a remedial plan over the next nine months, the Court should order the State to propose an election calendar to implement a remedy in early 2023.

Before I conclude, let me briefly address yesterday's decision by the Supreme Court in the Alabama case. Justice Kavanaugh's concurrence announces a new gloss on the *Purcell* principle that applies once a state's election machinery is under way. What Justice Kavanaugh's concurrence does not do is announce a test for identifying when a state's election machinery is under way. In Alabama, voting was to begin seven weeks from now, and that's not where we are in Arkansas. We've got 12 weeks. So we think there is a material difference between Alabama and Arkansas on that score, and that is the only sign post that Justice Kavanaugh's concurrence identifies to give the lower courts some clue as to when his new test applies.

But there are, of course, other standards. One possibility is when the State begins working on the next election. And that's a bad idea because the State, as you heard in this very case, began working to implement the redistricting plan even before it took effect. So that gives the State a head start, an unfair advantage that cuts off a plaintiff's right for relief of an unlawful plan even before they can bring an action to challenge it.

Another possibility is the first date on an election calendar, and you heard some testimony yesterday about how January 1st was that date, because that's the date when independent candidates can begin circulating petitions. That's also a bad idea as a start date for a couple reasons. Number one, we don't have any indication that anyone has taken out a petition. In fact, we have some testimony that the secretary of state hasn't even calculated the numbers of signatures that are required for an independent candidate to begin circulating a petition. But it's further a bad idea because that date is very easily changeable, and if that becomes the start date, it would be trivial for Arkansas or any other state to set the petition beginning date to be the day after any previous election.

And it can't possibly be the rule that a legislature can insulate its plans from challenge with such a trivial change in the law. But let's assume that Justice Kavanaugh's new test applies. We can meet that test here. He announced four factors that are a gloss on the preliminary injunction factors that apply when a state's election machinery is under way. The first factor, the underlying merits are entirely clear cut in favor of the plaintiffs. That's Justice Kavanaugh's factor. We meet that test here. Why? Because we're talking about five districts. This is not about one district that's on the knife's edge. We're talking about five districts here. You

don't get that kind of a disparity very often in election cases.

The second factor in Justice Kavanaugh's new test is irreparable harm. And harm here is irreparable for the reasons I just discussed. The third factor here under Justice Kavanaugh's new test is that the plaintiffs have not unduly delayed in bringing the claim to court, and we filed on day one. And the fourth factor under Justice Kavanaugh's new test is whether the changes in question that would be needed to comply with the law are at least feasible before the election without significant cost, confusion or undue hardship.

That's really the question here. But we think we can meet that test here for several reasons. The foremost among those is the testimony you heard yesterday that there are very, very few contested primaries in Arkansas. The difficulties that Mr. Bridges testified about are related primarily to contested primaries and, of course, the State has to implement any new redistricting plan, but the marginal increase of the burden from a remedy in this case would affect contested primaries. And of those, there are very few in Arkansas. Most of the costs and hardships that Mr. Bridges testified are costs and hardships that the state has to undergo anyway.

And finally, on that -- well, two other points actually. The alternative non-*Purcell* remedy is also burdensome, frankly. An election in 2023 would have additional costs and additional

burdens, but there's nothing in Justice Kavanaugh's opinion or in any case I'm aware of that says that they get a whole free term, right? The Court has the power and we think the obligation if it's too difficult to implement a remedy this year, then implement a remedy next year. There's a legislative session in early '24 that could be -- that representatives elected under a lawful plan could participate in in 2024.

Finally --

THE COURT: Mr. Sells, we'll obviously talk about this a little more later, but just to clarify for now, are you asking -- in this alternative regime, assuming we get there, are you asking for the election not to go forward in 2022 and instead to be moved to 2023, which I don't know what the implications of that would be, or are you asking for yes, an election goes forward in 2022, but whoever's elected in 2022 will only serve part of their term, I guess, and then there will be another election in 2023 for the remainder of that term?

MR. SELLS: Right. So I think the answer is the latter, not the former, meaning that at this point, and this is all less than 24 hours old, but at this point, I don't think we're asking to stop the 2022 election in the House. It's possible to do that, however, and it's not always possible in election cases, right, because sometimes you have a change in the number of representatives. You can't do anything there.

Here we have the same number of representatives so you could feasibly hold over. We haven't had the time to do any research into whether that is actually feasible. I can tell you I've been in cases where elections were enjoined and there were hold-overs and it was completely fine.

But we don't know if that's the case in Arkansas at this point, so I'm not coming down hard on either side of the line, but to answer your question, at this point we're not asking for the 2022 elections to be called off. Just a special election in '23 for the remainder of the term. So the last point I want to make on the Kavanaugh test and on the last piece of the Kavanaugh test, the confusion and the cost and the hardship, is that every voting remedy in every voting case involves some degree of cost, confusion, and hardship.

We don't really have a lot of evidence about confusion in this case. Mr. Bridges testified about the burden on administrators, but in general, that does not outweigh the equal voting rights of black Arkansans. But that's why you have life tenure, that's your job as a judge to make the hard calls and to impose the hard costs that the State won't undertake voluntarily.

So I want to conclude almost exactly where I started a week ago. This case presents a straightforward claim of vote dilution. I think we've all gotten a glimpse of the sausage making that went on at the Board of Apportionment and that was

anything but straightforward. But nonetheless, our claim here is clear, Arkansas's black population increased, its white population decreased, and yet the Board plan unnecessarily leaves black voters more underrepresented than they were before. And it leaves white voters more overrepresented than they were before. Representation matters, and that's vote dilution, very simple.

We're not here to debate whether the law of Section 2 is good or bad policy. That's a conversation for a different time and place. But we're here to ask this court to apply well-established law to the factors of this straightforward case, and if you do that, we believe that you have to conclude based on the record that's now before you that the Board of Apportionment's newly adopted plan for the Arkansas State House likely violates Section 2 of the Voting Rights Act.

THE COURT: Thank you, Mr. Sells. We're going to take a break. However, just for planning purposes, do the defendants plan on doing a formal close or just doing argument?

MR. BRONNI: Your Honor, we plan just to do argument. We understood from the Court yesterday it's probably easier, and given that much of their presentation already focused on legal argument, we think that'll simplify things. In fact, to preview a little bit, I think primarily the *Purcell* issue that's already been discussed, I think it's our view that Mr. Sells basically conceded his case in the first --

THE COURT: Let's not get into argument at this point. I just wanted to know how we're going to proceed. There are two ways we can do this, I guess. Given that the defendants are not doing a closing, which I agree with your choice for what it's worth, so that's fine, I wanted to give you an opportunity to if you wanted to make a record, but I think argument makes more sense at this point. Given that they're not doing a closing, I could essentially start with the defendants in terms of argument or I'm happy to go back and start with the plaintiffs as sort of we do in a more traditional route. Mr. Sells, do you have any thoughts on one way or the other? We are going to start, for what it's worth, with standing and private right of action.

MR. SELLS: Can I have a moment to confer?

THE COURT: Sure.

(Brief discussion off the record.)

MR. SELLS: Your Honor, we don't have a strong preference on that, so whatever you prefer, that'd be fine. I understand, I think, which way you're leaning.

THE COURT: Defendants, do you have a strong preference one way or the other? And I want to preface this, and it's probably useful for both sides to hear this. I know we haven't gotten into argument yet. Mr. Bronni, I understand your *Purcell* point, but I will tell you I think that there is -- what's the best way or most fair way to phrase this -- a

not insignificant question about both subject matter and private right of action and hypothetical jurisdiction. And so as much as I might like to just say let's go to *Purcell* or let's go to the merits, I have some questions that I need to feel confident about myself before I say I have the authority to move on to either the merits or the *Purcell* issue.

So with that, given that we're going to start with standing and private right of action, what's your thoughts on whether y'all want to go first or second?

MR. BRONNI: I think our preference would be to go second since they obviously have the burden of proof and we haven't touched on those issues.

THE COURT: We'll do it the traditional way then as we would normally do, essentially just for regular argument. So when I come back, we'll start on standing slash private right of action.

MR. BRONNI: Your Honor, if I could ask one point of clarification.

THE COURT: You can in one second. I think Mr. Sells is about to ask something.

MR. SELLS: Traditionally we would also get the last word, so will we also have an opportunity for rebuttal?

THE COURT: Yes.

MR. BRONNI: Just to confirm, Your Honor, you're going to walk through all the various parts with them and then

turn to us? It's not a back and forth on individual --

THE COURT: It is not with the exception that I am going to walk through only standing and private right of action, then I'm going to come to you all to standing and private right of action, and then we will go back to them, at which point we will take a break and do a second section on the merits and *Purcell*. I want to divide them up in my head. That's the easiest way for me to think about them.

MR. BRONNI: Understood.

THE COURT: It is 10:40. We will come back at 10:50.

(Recess from 10:42 AM until 10:57 AM.)

THE COURT: Mr. Topaz, I take it you are handling standing slash private right of action?

MR. TOPAZ: That's correct, Your Honor.

THE COURT: Do you have anything you want to start with or you just want me to ask some questions, which I'm happy to do?

MR. TOPAZ: That's certainly up to Your Honor. I'm also happy if you'd like me to start with standing or private right of action.

THE COURT: I just didn't want to catch you unprepared. If you have something to say, why don't you start and then I'll ask some questions as I think appropriate.

MR. TOPAZ: So just so I understand, would you

prefer me to start in one particular area?

THE COURT: Why don't we start with standing.

MR. TOPAZ: Understood. May it please the Court, Your Honor. Plaintiffs have established, as Mr. Sells noted in our closing, associational standing, which as Your Honor noted requires three factors. The first is that members have standing to sue in their own right, that the interests at stake are germane to the organization's purpose, and that the individual members aren't required to participate in the suit. I will cut to the chase as to Your Honor's question regarding the members in the districts.

Your Honor issued an order asking Plaintiffs to identify which areas were packed and cracked in the Board of Apportionment map and to declare that there is a black member in each of those districts. You have seen declarations and you've heard testimony that the Arkansas State Conference and the Public Policy Panel have black districts in -- have multiple black members in districts that comprise all 19 of those districts.

THE COURT: Let me stop you there. And I will just say at least initially, I don't really have any questions on the Arkansas State Conference of the NAACP. Now, I may have some questions for Defendants about their line of questioning yesterday about certificates of good standing from the secretary of state's office and things like that, but we'll see

if I get there. My question is really more related to the Arkansas Public Policy Panel, and what I'm trying to hone in on is whether or not the Public Policy Panel is really a membership organization as that term is used in the case law.

And I was a little bit concerned that at least as I heard the evidence, there are donors, there are perhaps key participants or key leaders, it's not very clear who's who, at least in relation to who's a member in each of these districts, and there's no, like, membership application or way to say I'm a member. That's really my concern as it relates to the Arkansas Public Policy Panel. Maybe you could tell me why under the case law that shouldn't be a concern of mine.

MR. TOPAZ: Sure. So I think the *Carnahan* case law in the Eighth Circuit is the one that sort of outlines what we look at when we talk about associational standing as it relates to members. In that case, the Court takes a look at whether members can participate in and guide the organization's efforts, whether members serve in the organization, and whether those members fund the organization.

THE COURT: But don't they have to be members?

MR. TOPAZ: Well, Your Honor, I believe Mr. Kopsky's testimony is that while there's not necessarily a membership application, that he -- that they do, in fact, have members and in fact they have standards for determining who those members are, and if you recall from his testimony regarding how he

determined for Your Honor that there were black members in each of those districts, he talked about geocoding his membership list. So I think it's pretty clear that while there may not be a single application that is definitive as to the PPV's membership list, it seemed clear to me that Mr. Kopsky testified that there are clear standards for who members are, that he has a membership list, that he knows these folks and, you know, something that came up, I think, on cross and redirect was this idea of, well, are the members, are they just folks who donate one time and then they go away.

Mr. Kopsky made perfectly clear that the members who he named, who he listed for purposes of the declaration were folks who could only be described as core members, folks who have leadership roles in the organization, participate in sort of all the efforts of the organization whether it pertains to advocacy, voter mobilization, things of that nature. So to my mind, while there may not be a membership application, Mr. Kopsky certainly considers the fact that PPP has members and he provides standards to the Court on that score.

Now, unless Your Honor has further questions with regard to the PPP, the second part of the -- let me return to the injury, in fact, still which is, of course, whether members have standing in their own right. The entering fact, I believe the declarations combined with the testimony gave you two different types of sworn testimony to determine that there are,

in fact, multiple black members in challenged districts from both the PPP and the State Conference and we heard testimony specifically from Mr. Jefferson and from Mr. Kopsky about how their members are harmed by vote dilution which would constitute the injury.

I don't think traceability and redressability is too much at issue here. It's clear where the injury comes from, and it's clear how it can be addressed by drawing additional majority black districts.

THE COURT: If I think -- and this is a big if, but if I think that the Arkansas public -- the Arkansas -- is it Public Policy Panel?

MR. TOPAZ: That's correct.

THE COURT: Arkansas Public Policy Panel is not a membership organization in the way that the cases suggest it needs to be, does it matter at all? I mean, one thing that strikes me is if I think the NAACP here has standing, the only two districts potentially that are at issue is 90 and 95 and there are districts around them that the NAACP has members in that are allegedly packed or cracked so maybe it doesn't matter at all if the Arkansas Public Policy Panel has standing or not. Is that right or wrong or what's your thought on that?

MR. TOPAZ: If I could provide Your Honor with a few points about that. The first point is that in Your Honor's order about which were the districts that were packed and

cracked, that obviously include a lot more than five districts, so we, of course, wanted to respond directly to Your Honor's inquiry and wanted to be as comprehensive as possible. I might need to -- so I think the idea here is that's correct, that we think we have satisfied standing.

The second point I would make, Your Honor, is that if you recall from Mr. Jefferson's testimony and Mr. Kopsky's testimony for that matter, Mr. Sullivan asked them if they stopped at a particular point, and basically Mr. Jefferson testified that he stopped after he was told, instructed by counsel that, hey, we've got members in every district. So I would just want to be clear for the record that Mr. Jefferson in no way said that there are no black members in Districts 90 or 95. He simply in the interest of expediency and not running his staff members ragged did not do an exhaustive search. I have no doubt that based on the reach of the Arkansas State Conference, that with Your Honor's indulgence, should Your Honor feel it necessary to ensure that there are members in those two districts, that Mr. Jefferson would be able to submit a sort of supplemental declaration.

So I believe that that is correct, Your Honor, and I don't recall from Mr. Jefferson's testimony, we'd need to check the record, but I know Mr. Kopsky testified that he believed that he had black members in every district even though he was instructed to stop. I can't recall in this exact moment

whether Mr. Jefferson testified the same, but I would suspect so.

THE COURT: I will tell you first of all in terms of supplemental declarations at this point, at this point, the record is closed. I've sort of got what I got. I issued you all an order and you chose to respond to it how you wanted to respond to it and that's perfectly fine. I will say I'm not so sure the belief that there are members in the district without checking really meets the more likely than not standard, so I'm not sure that's a particularly strong argument in your favor. But I think you answered the two questions I had on standing at least to my satisfaction.

MR. TOPAZ: Understood, Your Honor. So the record's clear, I would agree with Your Honor that -- well, I would say again that we believe that the Arkansas PPP is a membership organization, that they do have members, black members in District 90 and 95, that Mr. Kopsky testified to that, that there's a rigorous membership process, and that he personally knows the members in those districts.

THE COURT: When you say there's a rigorous membership process, I didn't hear that testimony. Can you remind me of what you thought the testimony was on a rigorous membership process?

MR. TOPAZ: I think he outlined several standards that the PPP looks at in terms of who constitutes their

members, whether it's financial donations, participation in the leadership of the organization, and participation, regular participation in the organization's efforts, whether it's at the state House or otherwise.

THE COURT: I'm not sure I agree with you there, but I at least understand from your argument where to look for that testimony. I know what you're talking about.

MR. TOPAZ: Thank you, Your Honor. Just to make sure that I cross off my boxes on the rest of the standing inquiry, I believe that that should address the first part of the associational standing test which is to say that the members should have standing on their own. I believe there's no real contest as to the other two factors as it pertains to associational, the interest at stake here obviously germane to these organizations' purpose. You heard plenty of testimony about how important these issues are, social justice, minority vote dilution, things of that nature.

THE COURT: I tend to agree with you. I do have one question, quite frankly, that is probably more for my own edification than anything else. The word "germane" is inherently flexible, right? I mean, it's very hard for me to tell whether the courts meant it has to be, like, directly 100 percent a fit or it's sort of, you know, just in some sense related to maybe one of the activities they do. Quite frankly, I'm not sure that matters very much in this case, but reading

the cases, do you have any thought about at sort of what fit level the word "germane" requires?

MR. TOPAZ: Not standing here right now, Your Honor. The only thing I would say is whatever that standard might be, these organizations clearly meet it. This civil rights, social justice, policy advocacy, the interest of black voters are at the core of these organizations more than many others I could really imagine. Finally, Your Honor, as to the final, I see no reason for -- that there would require the participation of individual members in the lawsuit, so for those reasons, Your Honor, I believe that Plaintiffs have satisfied associational standing as it pertains to the Arkansas Public Policy Council and the State Conference of the NAACP.

I would just add one thing, Your Honor, before I move to the private right. I couldn't tell exactly where Defendants were going yesterday, but I would refer Your Honor to -- you know what, let me strike on and move on to private right.

THE COURT: I will say that may be a point for you to pick up in rebuttal if Defendants sort of better explain what I think their line of questioning might be of trying to argue, but we'll wait for them to argue it.

MR. TOPAZ: Sure. I will let them go about that. On the private right of action piece, Defendants need to establish two things. They need to establish that the private right of action is the question of whether there's a private

right of action is jurisdictional and they need to establish that there's no private right of action provided for in Section 2 of the Voting Rights Act. Both of those inquiries come into conflict with decades of unbroken Supreme Court case law. Let's start with the jurisdictional issue.

Decades of Supreme Court case law as recently as 2015, I'm quoting here from *Mata v. Lynch*, 576 U.S. 143, the absence of a valid cause of action does not implicate subject matter jurisdiction.

THE COURT: Let me stop you for a second. I, quite frankly, agree with you that the Supreme Court and other circuits and even sometimes maybe the Eighth Circuit have said several times what you've just said they have in terms of the private right of action. I get that. I will also tell you that, and I would say most of the lawyers in this room will understand this, I really don't have a desire to opine on whether or not there's a private right of action in Section 2 of the Voting Rights Act. Having said that, what do I do about the Eighth Circuit's recent case, *Cross v. Fox* or Fox v. Cross? I have spent a long time looking at that case and trying to figure out why it doesn't tell me that I have to independently deal with this issue. And I can't make it there.

Now, it may well be that the Eighth Circuit is wrong and that they've got the Supreme Court precedent wrong, but even if that's true, I don't know that that's a call I can make. I

think I would have to follow what the Eighth Circuit said and then the Eighth Circuit would have to overrule itself if it's convinced that it got it wrong under Supreme Court precedent. Help me out and, I'm serious, help me out with *Cross v. Fox*.

MR. TOPAZ: Sure. I would refer Your Honor to *Principal Securities, Inc. v. Agarwal*. This is 2022 Westlaw, 273, 267 at 3. This is an Eighth Circuit case from 17 days later than *Cross v. Fox*, and I'm quoting. Because the issue is not jurisdictional or in the nature of a jurisdictional bar, the Agarwals have waived the cause of action issue and we decline to address it. So that's an Eighth Circuit case from 17 days after *Cross v. Fox* which says the exact opposite of what is in *Cross v. Fox*.

THE COURT: Was that a right of action case?

MR. TOPAZ: Yes. And this is consistent as Your Honor, I think, was starting to discuss, that this is consistent with other Eighth Circuit cases, one from 2021. It is firmly established in our cases that the absence of a valid cause of action does not implicate subject matter jurisdiction. That's *U.S. v. Harcevic*, 999 F.3d, 1172. So the Eighth Circuit as recently as a couple weeks ago was siding with decades of unbroken Supreme Court case law. Now --

THE COURT: Is your theory -- and this might not be crazy, but is your theory that the Eighth Circuit is just going back and forth or is your theory that *Cross* just sort of got it

wrong and I should look at it as a complete aberration or is your theory that somehow these cases mold together and *Cross* means something other than what I think it means?

MR. TOPAZ: I think it's some combination of the first two, Your Honor, which is to say that I think *Cross* gets it wrong because, again, we have clear Supreme Court precedent. I acknowledge that the Eighth Circuit case law on this issue appears to be muddled at best. And so when that is the issue, we have a higher court at the U.S. Supreme Court that has made rulings on this in 1998, 2002, 2015. I assume part of what is motivating Your Honor's interest in this is the Gorsuch concurrence in the *Brnovich* case. Justice Gorsuch in *Brnovich* says even when he is talking about the potential of a private right, he says the existence of a cause of action does not go to a court's subject matter jurisdiction.

THE COURT: I hear you. I'm with you. *Cross* is hard for me to reconcile with that and I will obviously take a look at the case you've cited to us and see essentially if it more or less is completely inconsistent with *Cross*, in which case that's a good legal point and I'm glad you brought it to my attention.

MR. TOPAZ: Of course, Your Honor. And I also refer you to the 2021 case as I also mentioned. There is no need to parse exactly what's going on in these competing Eighth Circuit case laws when we have clear holdings from the Supreme Court.

THE COURT: I guess let me ask it to you this way. If you didn't have this new case from 17 days ago, if all we had was, at least all recently we had meaning in the last like month or two months, all we had was *Cross*, you all would agree, would you not, that I have to follow *Cross*? I'm bound by it even if it's wrong compared to Supreme Court precedent?

MR. TOPAZ: Two points on this. First of all, this most recent case is not the only case that stands for the proposition that the private cause of action is not jurisdictional.

THE COURT: Not in the last couple months?

MR. TOPAZ: No. I mentioned the *Harcevic* one from 2021, that's another case that says the same thing.

THE COURT: What's that cite?

MR. TOPAZ: 999 F.3d 1172. And, Your Honor, I think -- I don't know exactly which case was first, but, you know, *Cross* cannot rule the prior Eighth Circuit, and under the Prior Panel Rule, that might go back a ways. I'm not exactly sure which was first, so to speak, but again, this court is bound by U.S. Supreme Court precedent which unlike the Eighth Circuit is quite clear. I would turn to the second part of the private right issue now, Your Honor.

THE COURT: Let me ask you I guess the last question here, and it may be honestly that your answer is the same, which is fine. I obviously have spent some time looking at

Roberts v. Wamser on the second issue which we're going to talk about, but *Roberts* also seems to suggest in the first portion of its opinion that this is an issue I'm supposed to raise sua sponte. Is your position just that *Roberts* is old and it's been sort of superseded by the Eighth Circuit and Supreme Court case law that we've just been discussing?

MR. TOPAZ: I think so, Your Honor. I think the Gorsuch concurrence is pretty clear as to waiver as is the Eighth Circuit case from the *Agarwal* case from just a couple weeks ago. So I think Your Honor was correct the first time as to the fact that if this was not timely raised, it is waived.

THE COURT: Okay. I understand your position.

MR. TOPAZ: As to the second part of the inquiry, the Voting Rights Act has been in place for 56, 57 years. There have been hundreds of Section 2 of the Voting Rights Act cases filed during that time by private plaintiffs. No federal court, not the Supreme Court, not the Eighth Circuit, has ever barred a case involving private plaintiffs. Big name cases, *Gingles*, the foundational case for this proceeding we're in now, *Brnovich*, the case we just included from a year ago, *LULAC v. Perry*, *Ferguson* from the Eighth Circuit in 2018, *Bone Shirt*, private plaintiffs have brought these cases.

There is decades upon decades upon decades of federal courts including the highest courts that are binding on this court not entertaining cases. Sometimes the private plaintiffs

win, sometimes they lose. They are never thrown out of court based on the fact that they're private plaintiffs. Defendants will be unable to cite you one case to that effect.

THE COURT: So is your position essentially just Justice Gorsuch and Justice Thomas were just wrong in their concurrence when they said it's an open question?

MR. TOPAZ: Far be it for me to --

THE COURT: They can be wrong too. They're just last, but they can be wrong also. I really want to know.

MR. TOPAZ: It is our position that this is a very settled issue that has been the -- has been, again, case after case after case brought by private plaintiffs under Section 2. You know, I think we can go through the other indicia of why there's a private right under Section 2 of the Voting Rights Act and I will in a second, but there are few things in life, Your Honor, that are literally unprecedented and this would be one of them. To determine that there's no private cause of action in Section 2 of the Voting Rights Act would literally be unprecedented.

We see in the *Morse v. Virginia Republican Party* case, Defendants suggest that somehow the congressional intent stems only from the congressional reports but the *Morse* case says the existence of the private right of action under Section 2 has been clearly intended by Congress since 1965. And then makes clear that that's the reason why they've entertained cases

brought by private litigants to enforce Section 2. Obviously as Your Honor knows, and I think has referred in this -- referred to in this proceeding, the senate judiciary committee report of 1982 is no simple ordinary committee report. This is a report that *Brnovich* said is off-cited correctly in VRA cases and the Senate Factor report is obviously relied on very heavily in interpretation of the Voting Rights Act by the Supreme Court including, by the way, in *Gingles v. Thornburg*. My closing on the Senate Factors comes directly from the senate report.

THE COURT: So let me ask you this, in terms of *Morse*. *Morse* is definitely in one sense a good case for you. But in another sense, I want to talk about something else that *Morse* says that I don't know how good it is for you all, so I think it was -- if I'm right, I think it was Justice Stevens and Justice Ginsburg who said that at least at that point if the Voting Rights Act had been drafted the year they decided *Morse v. Republican Party*, it's not clear at all that courts would say there was a private right of action, and that's because between 1965 or the 1960s -- I'll just generally say between the 1960s and the time *Morse* was decided, we all know that the Court's jurisprudence on implied rights of actions got far more narrow.

And so I think what Justice Stevens and Justice Ginsburg were saying is, look, if we judge the implied right of action

question by today's standards, today I guess meaning back when *Morse* was decided, it may well be the case that there was no implied private right of action. But they essentially said you should boot-strap, and I don't mean that in a bad way, I mean it in a neutral way, you should sort of boot-strap the legal context in the 1960s which had the looser implied right of action standard and assume Congress meant to incorporate that. I mean, first of all, I guess let's start with basics. Do you agree with that read of what Justice Ginsburg and what Justice Stevens were saying?

MR. TOPAZ: I might ask you just to clarify exactly what read you mean here.

THE COURT: Sure. That if the Voting Rights Act language had been passed for the first time the year *Morse* was decided, under the stricter private right of action jurisprudence of the Court at that point, there would not have been an implied right of action under the Voting Rights Act.

MR. TOPAZ: I think it's unclear, Your Honor. I will grant you that there is sort of particular language obviously that emerges decades after the Voting Rights Act is passed on the sort of rights-creating language that we would expect from a private right of action. I think there are other provisions in the VRA that could be argued to have the sort of rights-creating language, and we can talk about those in a sec, that make it clear that this is the sort of rights-creating

language that would mean that this is a statute that has an implied private right of action. I would -- I would argue, Your Honor, that, you know, the prior construction obviously still holds because this is an interpretation that has been, as I said at the outset, settled for decades upon decades --

THE COURT: So we can talk about that portion of the argument, and you are right, in *Morse*, at least as I understand *Morse*, and *Allen*, and sort of *Morse* boot-strapping *Allen* into modern times, that is what *Morse* said. At least in my view reading it, *Morse* seems to suggest that you essentially take what the legal context was in the 1960s and say, look, Congress was drafting against this legal context, they didn't think they had to include an expressed right of action, and they didn't think they had to be any more clear than they were because they assumed that there was going to be the sort of 1960s version of implied rights of action.

And then you have, over the decades, a narrowing of what the Court is willing to say creates an implied right of action. And at least the way I read *Morse*, they recognize this narrowing, they recognize that it probably means that judged against today's private right of action standards, the Voting Rights Act would not be read to have an implied right of action, but then they talk about you can't judge it against today's standards, you have to judge it against the legal standards in 1965. I guess what I'm trying to figure out is do

you accept that version of *Morse*. Do you think that's right or do you think that's wrong?

MR. TOPAZ: I certainly accept the idea that the context is very different in the 1960s. I also again accept to a certain extent Your Honor's point about the fact that if you -- that the rights-creating language is not as clear in the Voting Rights Act as it might be in a piece of legislation that was passed today. If I could refer Your Honor to a couple parts of the structure of the Voting Rights Act.

THE COURT: Before we get there, this is important to me, I'm trying to figure out what's debated between the parties and what's not debated between the parties on this. Forget *Morse* for a second. Maybe I'll ask the question in a different way. If the Voting Rights Act as it was written when *Morse* was decided, if that version had been drafted today. So not back then, but literally today, under the Supreme Court's current standards for implied rights of action, do you believe that there would be an implied right of action? We all agree there's no express right of action, there's no private right of action written in on its face. Under the Court's stricter standards for implied rights of action that are at issue today, do you think if the Voting Rights Act was passed today as it was back then that there would be an implied right of action decided by the Court?

MR. TOPAZ: I don't intend to be evasive, Your

Honor, I think it's a genuinely close call and that's why I was trying to briefly refer Your Honor. There's a couple sections in the statute that I think if I were to -- that are complicating my answer, which would be Section 14E, which is the provision as to attorneys' fees which allows, quote, a prevailing party other than the United States to seek attorneys' fees in any action or proceeding to enforce the voting guarantees of the Fourteenth and Fifteenth Amendment. So the statute is expressly contemplating the idea that there will be a prevailing party who is not the United States, i.e., a private party, very similar language --

THE COURT: Could the prevailing party be the State?

MR. TOPAZ: I suppose, Your Honor, but that would be a very atypical Section 2 case or Voting Rights Act case.

THE COURT: Meaning atypical because the State wouldn't usually win?

MR. TOPAZ: No, because -- I see Your Honor's point -- give me just one second. Yeah, because if actions to enforce the voting guarantees of the Fourteenth and Fifteenth Amendment I think is contemplating the idea of attorneys' fees on behalf of those bringing Section 2 claims, let's say, against Defendants, Defendants are typically, in these cases, the State.

THE COURT: This is going to sound like a very lawyerly question. Other than common sense, where do you get

that? Sometimes Congress doesn't have a whole lot of common sense. I guess my question is, couldn't prevailing parties here mean the State?

MR. TOPAZ: I don't think so, Your Honor. A proceeding to enforce the voting guarantees the Fourteenth and Fifteenth Amendment again contemplates the idea that Plaintiffs would be entitled to attorneys' fees. There's no limitation in this --

THE COURT: I guess let me ask you this question. Let's assume for a second that I thought based on the language, Section 2 allowed the attorney general to sue a state but not a private party. If the attorney general sued a state and the State prevailed, under this, the State could get fees. If the attorney general prevailed, the attorney general could not get fees.

MR. TOPAZ: I think, Your Honor, that interpretation would be strained if we refer to the second provision that I was going to mention, which would be Section 3.

THE COURT: Before we get there, I don't want to leave this section yet. Different question. This says in any action or proceeding to enforce the voting guarantees of the Fourteenth and Fifteenth Amendment. You're obviously not bringing a Fourteenth or Fifteenth Amendment claim here. You're bringing a Voting Rights Act claim. Why should I assume those two things are the same?

MR. TOPAZ: That's the similar decades of unbroken Supreme Court case law as recently as *Brnovich*. I'm quoting here: Section 2 closely tracked the language of the amendment it was adopted to enforce. They're referring to the Fifteenth Amendment. I believe the *Mobile* case says similar things. The Voting Rights Act was --

THE COURT: We're not asking about whether the Voting Rights Act was adopted to enforce the Fourteenth or Fifteenth Amendment. We're asking if this is a proceeding to enforce the Fourteenth or Fifteenth Amendment.

MR. TOPAZ: I suppose I don't quite see the distinction there, Your Honor. Respectfully, the Voting Rights Act is the implementing statute famously of the Fourteenth and Fifteenth Amendments. This language is included in the statute itself. It stands to reason that this language is not referring to Fourteenth and Fifteenth Amendment cases on their own. I would add that --

THE COURT: If that's true, why wouldn't it say in any action or proceeding enforcing this section or this chapter, the Court may allow? I mean, they didn't just pull out, maybe they did, I don't think they just pulled out the Fourteenth or Fifteenth Amendment language. They could have said this section or chapter if they wanted to.

MR. TOPAZ: It's not about the section or chapter, Your Honor, it would be the entire statute itself.

THE COURT: Fair enough. This statute. But they didn't do that.

MR. TOPAZ: I would agree with Your Honor that the second provision I was going to mention, which is Section 3, is more artfully drafted than this one, but I think it's clear, and I would add that, for example, in the *Ferguson* case in the Eighth Circuit, courts consistently award attorneys' fees based on Section 14E to private plaintiffs under Section 2. If we turn to Section 3 --

THE COURT: We can turn to Section 3 in a second. You would agree, I think, and push back if this is wrong, you would agree that the Voting Rights Act protects a larger circle of conduct than the Fourteenth and Fifteenth Amendment? That's the idea that Congress changed things after *Mobile*, right? I mean, they essentially said the Fourteenth and Fifteenth Amendment only protects against intentional discrimination. The whole point of the Voting Rights Act is that it actually protects more stuff so it protects whether or not it's intentional discrimination, it has this results test which protects sort of an umbrella around the Fourteenth and Fifteenth Amendment.

So I think that's what I'm struggling with when we talk about a proceeding to enforce the Fourteenth or Fifteenth Amendment. You're enforcing the Voting Rights Act which maybe sometimes enforces the Fourteenth or Fifteenth Amendment and

maybe sometimes enforces something different than the Fourteenth or Fifteenth Amendment. Why is that wrong?

MR. TOPAZ: Your Honor, the Voting Rights Act was -- again, as referred to in the Supreme Court case law, referred to as implementing statute for these two specific amendments, and the answer, Your Honor, is something rooted in history which is to say that the Fourteenth and Fifteenth Amendments were passed after the Civil War. And there were, as Your Honor heard from Dr. Barth, let's say, there's a century in which that history and those amendments were not sufficiently protected so the Voting Rights Act at the time was explicitly thought of as a statute that was passed to protect the provisions of the Fourteenth and Fifteenth Amendment that were not sufficiently protected for a century in America's history.

So it's a little odd to bring history into this, but that is really the history of the Voting Rights Act and why it was passed in the first place, and the Supreme Court has noted that again from *Brnovich* closely tracking the language of the amendment it was adopted to enforce.

THE COURT: I understand your position. You wanted to move to I think it was Section 3?

MR. TOPAZ: That's right, Your Honor. This is the second provision. I'm quoting here again. Whenever the attorney general or an aggrieved person institutes a proceeding under any statute to enforce the guarantees of the Fourteenth

and Fifteenth Amendment, I think that that provision gets at both of Your Honor's concerns about the drafting in 14E.

THE COURT: But I'm not sure that's right. Why wouldn't you just assume that's a 1983 action to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment?

MR. TOPAZ: Can you ask that question one more time?

THE COURT: My point is, you seem to be emphasizing the phrase "under any statute" and assuming that's what's linked to enforce the voting guarantees. What I'm telling you is it seems more clear to me that you're still talking about a proceeding to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment and it's just talking about doing it under any statute. But you can do it under 1983. Why am I reading "under any statute" to read "under this statute"?

MR. TOPAZ: Of course, any -- Your Honor -- would be a very -- a broad -- would require a broad interpretation that would include the Voting Rights Act. Obviously this provision is included in Section 3.

THE COURT: No, that puts, in some sense, the cart before the horse because it has to be a proceeding to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment that you're bringing under any statute. That just gets us back to whether this is a proceeding to enforce the Fourteenth or Fifteenth Amendment. Doesn't it?

MR. TOPAZ: If I'm understanding Your Honor

correctly, I'm not sure we're reading it in the exact same way. Again, I think Section 3 is contemplating the idea that an aggrieved person, not just a state, a private individual could institute a proceeding under the Voting Rights Act to enforce the voting guarantees of the Fourteenth and Fifteenth Amendment. Perhaps what Your Honor is saying is that "under any statute" does not specify which statutes are there to enforce the Fourteenth and Fifteenth Amendment, maybe if I'm understanding Your Honor's point.

And, again, I would argue that there is no statute that is designed to enforce the voting guarantees of the Fourteenth and Fifteenth Amendment like the Voting Rights Act is. It was literally the one that was passed to enforce the voting guarantees of the Fourteenth and Fifteenth Amendment.

So I think that provision addresses Your Honor's concern also again about the fact that this is not intended to be the attorney general or a state. An aggrieved person I think also there reflects the idea that this would be a private individual.

THE COURT: You did say one thing that I thought was very interesting and may actually have a lot of force. I just wanted you to repeat it so I make sure I can get it down. You said that in the Eighth Circuit, case law has interpreted the attorneys' fees provision to be the provision that awards fees to a prevailing party in Section 2 cases. Can you just give me

the cite for that?

MR. TOPAZ: Yes, Your Honor. That is the *Missouri NAACP v. Ferguson Florissant School District*. My fellow attorneys back at the ACLU will be very unhappy that I don't have the cite because that is their case, but I will provide a cite for you.

THE COURT: We have that case or at least easy access to that.

MR. TOPAZ: Prominent Eighth Circuit 2018 case.

THE COURT: I'm saying this really more so Defendants can just sort of get ready for it in their argument, but at least maybe that sounds like it suggests that I'm bound by the Eighth Circuit to say that that section speaks of the Voting Rights Act perhaps.

MR. TOPAZ: I think that's right, Your Honor.

THE COURT: I'll obviously want to look at it closely, but that's a fair argument.

MR. TOPAZ: So we've discussed decades of unbroken guidance from the Eighth Circuit and Supreme Court. We discussed the congressional intent as evidenced in *Morse*. We've discussed the structure of the Voting Rights Act, the two provisions that we just discussed together, legislative history to the extent Your Honor needs it. As I mentioned, I won't belabor the point, we have both committee reports including the incredibly influential Senate Judiciary Report.

The last thing I wanted to raise for Your Honor was the statement of interests issued by the U.S. Department of Justice. The law in that is substantially similar to ours. I don't want to belabor the point for Your Honor. I would just note that the one argument that the Justice Department raises is that how the Voting Rights Act enforcement requires a private right because the attorney general can't do this all alone, especially in the absence of preclearance after the *Shelby County v. Holder* decision. There's no one who is more equipped to --

THE COURT: Let me stop you there. And this may be my own idiosyncrasy, but that really sounds more like a policy argument to me. Quite frankly, I may agree with you that as a policy matter, I think there should be a private right of action in the Voting Rights Act, I might agree with you that if there happens to not be one, maybe someone should add one, but I don't know that that gets you very far other than saying maybe that's something we should think about that was motivating Congress in the beginning, but if there's something you want to say about that, why you think I shouldn't care about the policy arguments here, I'm happy to listen to it, but that just strikes me as I'm a judge, not a legislator.

MR. TOPAZ: I think that's perfectly fine, Your Honor. I was just flagging the fact that there was a statement of interest filed by the Justice Department. Their

interpretation of the law as another party that brings a lot of Section 2 cases aligns pretty much exactly with ours. Your Honor, unless Your Honor has any further questions --

THE COURT: I do. Number one, I have a question on sort of *Sandoval* and *Ziglar*, and this is one of the reasons that I was pushing you so hard on the *Morse* question. The way I read both *Sandoval* and *Ziglar* is that you can't really do this boot-strapping anymore, and the boot-strapping that *Morse* was talking about which is you go back and look at the kind of legal context when an act was passed to figure out if Congress wanted to imply a right of action. *Sandoval* strikes me as saying period, you can't do that anymore. *Ziglar*, I'm not sure it says it exactly that forcefully, but it essentially cites *Allen* as saying *Allen* was a case under this old regime and is not what we would have decided now. Can you talk about that? That strikes me as the Supreme Court telling me that I can't use this boot strapping method, I have to use current modern day Supreme Court jurisprudence on the implied right of action.

MR. TOPAZ: A couple points on that, Your Honor. First of all, I don't think we need to guess as to what the Supreme Court is or is not telling you because as it pertains to this very statute, since the *Sandoval* decision, they have not held otherwise or, again, thrown a case out brought by private plaintiffs. So, again, as we discussed earlier, there's no question that the implied private right of action

case law has changed since the passage of the Voting Rights Act, but again, we don't need to guess about what the Eighth Circuit or the Supreme Court thinks on this. They have already failed to again throw any of these cases out.

THE COURT: But your position, right, is that it's not jurisdictional, it's not something you can bring up on your own, so they can only decide that issue if somebody raised it?

MR. TOPAZ: That's correct, Your Honor.

THE COURT: So there haven't been cases. Now, this is a notch in your belt too, this helps you, but there haven't been cases up at the Supreme Court where people have raised this issue and the Court has just sort of not said anything, right? I mean, this issue just hasn't come up at that point?

MR. TOPAZ: I couldn't say one way or the other, Your Honor, at this moment. To return to Your Honor's question about *Sandoval*, again, I do think that the existence of 14E, the existence of Section 3 creates at least an arguable case that this statute has the sufficient private right language that would satisfy the more modern case law. There's a third point.

THE COURT: Can I ask you this? What am I to make, if anything, that -- I think it's the John Lewis Act, but whatever the recent -- whatever the name of the recent voting rights legislation that has passed the House, what am I to make of the fact that it actually has an express right of action in

it, but it doesn't seem to be able to pass the senate?

MR. TOPAZ: I would say first, Your Honor, I'm a litigator, I'm not a policy person, so I am a little reluctant to go outside my lane. I would say that that is -- if I had to surmise, that would be an acknowledgment as we have been discussing that, of a sort of ensuring that any such law would pass judicial muster on private right of action in light of the changing case law. I don't think it has any bearing though on what was done in 1965.

THE COURT: I think that's a fair answer.

MR. TOPAZ: There's a third point I had for Your Honor on the previous question, but I'll confess I've forgotten it.

THE COURT: Let me move to this question. So I don't think I can say all of the cases, but I can say a very large number of the cases that you're talking about have been brought by either voters alone or organizations and voters at the same time. Let's assume for a second that I believe for Article III purposes your clients have standing. So y'all have Article III standing. There's obviously a difference between having Article III standing and getting a private right of action implied or otherwise under a statute. Congress gets to decide who they want to give and what the scope of a private right of action they want.

And here -- and really in some sense, I'm riffing a

little bit off of the old *Roberts* case in the Eighth Circuit. Here, to the extent they have added anybody other than the attorney general, it would be an aggrieved person. It strikes me that that is not the same thing as allowing an organization without an aggrieved voter to sue under this statute. Why is that wrong?

MR. TOPAZ: Two points, Your Honor. First of all, Section 3 says aggrieved person which I think arguably would cover organizations. I'll get to that in a second, but also I'd refer Your Honor to Section 14E which again refers to prevailing party other than the United States, so it doesn't contemplate the idea of an individual person. I would also note that in the *Ferguson* --

THE COURT: But prevailing party can't be stretched to a candidate, we know that from *Roberts*, so that doesn't help that much. Prevailing party doesn't mean it can be anybody, right? It's still got to be an aggrieved person, even under the theory that there's some kind of private right of action. So you're all not basing your standing on direct standing. You're not saying you as the organization are an aggrieved person. What you are saying at least as I understand it is that you can stand in the shoes of black voters in Arkansas, at least your members who are black voters in Arkansas. And what I'm asking you is why am I to think that Congress implied the right of action to an organization as opposed specifically to

voters?

MR. TOPAZ: I would take exactly what Your Honor just said and say that it supports our argument which is to say that there's a difference as Your Honor, of course, knows between organizational standing and associational standing. We are standing in the shoes of, as Your Honor said, of the black members. And, again, the test that we discussed with regard to standing necessarily requires that those members have standing in their own right, so the associational standing is really the organization on behalf of those members who are the aggrieved persons.

THE COURT: So is your position that if you have Article III associational standing, you basically always will have standing under the statute? Like there's no difference at all, there's no Delta between Article III standing and a congressional prescribed private right of action?

MR. TOPAZ: I'm speaking specifically with regard to the Voting Rights Act which, again, as we said, there's a different -- there's different legal conventions at the time that it was passed regarding a private right of action, but yes, as it pertains to the Voting Rights Act, yes.

THE COURT: Any case law to back that up?

MR. TOPAZ: To back what up exactly specifically?

THE COURT: That the Article III standing inquiry at least as it affects the Voting Rights Act is essentially

concomitant with the I guess what I'll call the statutory standing argument for lack of a better phrase.

MR. TOPAZ: None off the top, but again, Your Honor, we have hundreds of cases in the past decades.

THE COURT: But you would agree the large majority of those if not nearly all of them involve voters or at least not just organizations alone?

MR. TOPAZ: What I was about to get at, Your Honor, was that I can't tell you standing here today which of those cases -- for example, the *Ferguson* case, I couldn't tell you at this exact moment whether that case was brought only on behalf of the Missouri NAACP, whether there were voters involved. I will say though, again, speaking back to the tomes of case law we have on this, we haven't heard a whiff about this in any case about, well, standing is achieved, but it's not achieved as to the organizations. There's nothing like that in case law to suggest that there would be some sort of Delta as Your Honor said.

THE COURT: Okay. Very good. I appreciate it.

MR. TOPAZ: Of course. Does Your Honor have any more questions?

THE COURT: I do not have further questions on the private right of action, but I'm happy to hear anything else you want to say on it.

MR. TOPAZ: Your Honor, I would simply say again

that I think that we have decades of Supreme Court case law that shows that this is -- that the private cause of action is a nonjurisdictional issue and that nothing has ever gotten in the way of private plaintiffs bringing Section 2 claims and that it would be a truly unprecedented decision for this court to make. With that, I appreciate Your Honor's questions and I'll reserve until rebuttal.

THE COURT: Mr. Topaz, Defendants know this about me because they've appeared in my courtroom before, I tend to ask a lot of questions and try to push on what I think the weak parts of the argument are regardless of where I ultimately will come out. I just want to say I thought you had a very good argument.

MR. TOPAZ: Thank you, Your Honor.

MR. STEINBERG: Good morning, Your Honor.

THE COURT: Good morning.

MR. STEINBERG: I'll start with standing. So I think we have at the least a real standing problem as to the Public Policy Panel. Let me just go through the law that I think applies here. So number one, if you're seeking associational standing, you normally need to be a traditional voluntary membership organization. That's out of *Hunt v. Washington State Apple Advertising Commission*. And I think what the voluntary membership organization means is that a person makes a volitional act and says I want to become a

member, at least somebody tells you if you do X, you're becoming a member.

What Mr. Kopsky testified is that when you write a check to them, they're going to call you a member for a period of three years after you write that check. Then he also testified if you sit on certain executive boards, you're a member. I would call those people members perhaps in a de facto sense. Then finally he said if you actively engage with the panel, respond to their calls for action, attend their meetings, they deem those people members. Those people never filed out a membership application, he admits there is no membership application. He did not testify that they tell you if you write a check, we're going to call you a member and we're going to be able to sue on your behalf.

Now, it's true that that does not completely exhaust associational standing, and perhaps this is a concession. I agree with my friend, Mr. Topaz, that in *Carnahan*, the Eighth Circuit said if you are not a traditional voluntary membership association, that you have indicia of membership which also comes out of the Supreme Court decision in *Hunt v. Washington State Apple Advertising Commission*, then you can sue on behalf of those de facto members. But I don't think that we have the indicia of membership that the Court talked about in *Hunt* here. And those are, number one, you elect the leadership. There's no testimony that these donors have any right to elect the

Public Policy Panel's leadership, any say in the matter. Two, that only those people can participate in the organization.

There's, again, no testimony that the donors participate in the organization or that other people besides these people who are called members cannot participate in the organization. And then finally, three, that you finance the activities of the entity. Now, it's true the donors finance the activities of the entity, but then we have all these other people who donate money who, quote, engage who aren't financing the activities of the entity and yet they're being called members and Mr. Kopsky is relying on them in part to get his standing. Now, there was some testimony that he didn't call the really edge -- he didn't rely on the really edge cases of members, but the extent of that is just I didn't use people who donated a very long time ago, three years ago, I relied on recent members.

THE COURT: Isn't that enough at the preliminary injunction stage? All he has to prove at this point is standing by a more likely than not burden.

MR. STEINBERG: No, because I think the distinction that he's drawing between recent members and old members has absolutely no bearing on the standing inquiry. I think -- sorry, donors. I think I keep saying members instead of donors. A donor is not a voluntary member. A donor doesn't have these indicia of membership that *Hunt* talks about. It doesn't matter if he's a recent donor or a three years ago

donor, so I think the answer is no. Now, if you have questions about that.

THE COURT: Here's I think my big question. Let's assume for a second I agree with you.

MR. STEINBERG: I'm going to.

THE COURT: Does it really matter in this case and particularly while, in theory, it could knock out something related to District 90 and 95, there are districts around them that the NAACP does have members in that they claimed are packed or cracked, which would in some sense lead to the same illustrative map redrawing?

MR. STEINBERG: I think Mr. Topaz may be able to enlighten on that on rebuttal a bit, but my understanding of the effect of taking challenges to 90 and 95 out of the case has is as follows. Their proposed 11 is a combination of parts of 95 and 62. They don't challenge 62 because it's currently a majority minority district. So one of these requests for --

THE COURT: I'll have to go back and look. Did they not say 62 is packed?

MR. STEINBERG: No. No. I do not believe that that is on the list of challenged packed or cracked districts. As to 90, which -- sorry, as to 90, we've all heard that 16 takes up a piece of Arkadelphia and Arkadelphia's in 90. I don't see how they can assert the rights of voters in Arkadelphia and Pine Bluff to collectively come together and be decracked if

they don't have people inside number 90. So that's what I think the effect is. It does not end the case, but it whittles down the issues on the merits for a request for five additional majority minority districts to three. Now I'll turn to the NAACP unless you have more on the panel.

THE COURT: No. And obviously just on the NAACP, I'd sort of like to know what, if any, argument comes from the line of questioning we heard yesterday.

MR. STEINBERG: I think the problem is legal personality. We have in Arkansas something called the Uniform Unincorporated Nonprofit Association Act. If you file under this act, you gain, under state law, the right to sue. But if you're an unincorporated nonprofit and you don't do that, you don't have legal existence under state law. It's a surprisingly underwritten-about topic, whether entities that lack legal existence lack standing to sue. Certainly it goes to capacity and cause of action, which may be nonjurisdictional questions. But, for example, a trust lacking legal personality cannot go and sue in federal court. The trustee has to sue.

I think that everybody would agree if something calling itself a corporation that never truly incorporated came into federal court, we would say you're not a thing under state law, you don't exist, you're not a natural person. You're calling yourself a legal person, you lack legal personality. Therefore, you can't sue. I understand that people under this

banner march on Juneteenth, that they organize together, they do things together.

THE COURT: But it's more than that, right? We all agree or I think we all agree that at least at some point the Arkansas State Conference of the NAACP was an organization of quote, unquote, whatever you want to call it, valid organization that had filed its paperwork with the secretary of state's office. Is your position that if that paperwork expires, for example, because of some clerical error, that the very next day, that organization can no longer be an organization that can bring a lawsuit?

MR. STEINBERG: Yes, that is our position, that if you lose your legal personality, you can no longer sue until you cure that error.

THE COURT: Do you have any cases at all that talk about this or that hold that?

MR. STEINBERG: No, I only have cases on related questions but not that precise question.

THE COURT: Well, maybe tell me about the related questions, because maybe something will jog my mind here.

MR. STEINBERG: Well, the related question I must say is rather far afield. The Tenth Circuit -- but I want to be frank. The Tenth Circuit has held that unincorporated corporations are not registered, are not persons that can sue under 1983. And when we're talking about aggrieved persons

under the provisions of this statute that supposedly imply a cause of action, if they lack legal personality, at least there's a cause of action problem even if we agree that a cause of action exists. But I recognize that's, well, unless you decide that the cause of action question is jurisdictional, not a standing holding at least.

THE COURT: Okay. I understand your position.

MR. STEINBERG: All right. Well, then I think I'm going to turn to cause of action and obviously we'll start with the jurisdictionality. I think we all agree what *Cross v. Fox* says and then the question is really is the Eighth Circuit precedent so muddled that you can say I'm not bound by *Cross v. Fox*. I look up --

THE COURT: Let me stop you there. Have you read the case that your friend on the other side talked about, the one that's more recent than *Cross v. Fox*?

MR. STEINBERG: Yes, yes.

THE COURT: I have not read it. I have not seen it yet. I will go back and read it. Do you agree with your friend on the other side in his understanding of what it says?

MR. STEINBERG: I think I do. It's an FAA case, the Eighth Circuit says that's not really a cause of action under the FAA, that you didn't argue that below, it's waived. Now, perhaps it could be distinguished they are acknowledging there is a cause of action under this section of the FAA, but they

say that cause of action doesn't extend to the particular kind of relief as I read the case very quickly that you're seeking, but they say that's a nonjurisdictional question. They at least viewed it as a cause of action question and they say it was nonjurisdictional. That was January 31st. So that's our reading of *Agarwal*.

THE COURT: So does that mean that *Agarwal*, at least in your view -- it's silly to talk about it as overruling at this point, but am I supposed to follow *Agarwal* as opposed to *Cross v. Fox* because *Agarwal* is even newer than *Cross v. Fox*?

MR. STEINBERG: My understanding of how that worked was always just the opposite. That a panel of the Eighth Circuit aside from you would be bound by the prior decision unless a later decision comes along and says that decision has been abrogated, we have some basis to overrule it, the Supreme Court just said something in the past 14 days, but if a panel just ignores panel A two weeks ago, then panel C coming along in February, March, has to follow panel A.

THE COURT: What do I have to do?

MR. STEINBERG: I think that you have to do what the Eighth Circuit would have to do, if the Eighth Circuit is still bound by *Cross* versus *Agarwal*.

THE COURT: But here's the problem with that at least for you. I do agree with Plaintiffs that there are -- or at least I should say I think I agree with Plaintiffs that

there are cases earlier than *Cross* both at the Eighth Circuit and the Supreme Court that seem to suggest *Cross* is not right. So if your position is that I would follow *Cross* instead of *Agarwal*, wouldn't your position have to be that I should follow those earlier cases as opposed to *Cross*?

MR. STEINBERG: No, because *Cross* relies, itself, on two earlier cases, 2012 and I think 2018, and they say this is what Eighth Circuit precedent means, it binds me, the author of *Cross* to say these are jurisdictional questions. So I'm not sure exactly which intervening moment you're thinking of. I think I heard a cite to -- well, I know I did. I heard a cite to something called *Harcevic*. That's actually about a defective indictment. There's some language that at some moment refers to this as a cause of action, I don't get that. To be fair, the Eighth Circuit said it. But that was not a cause of action case, no plaintiff was suing. The United States had indicted somebody and Mr. Harcevic said this isn't a crime so, therefore, there's a lack of subject matter jurisdiction. I think that's a very different question.

THE COURT: Let me ask it this way. And I'm struggling with this because I really want to figure out what a district court judge is supposed to do. Part of me is wondering whether I'm supposed to just say the answer to what the Eighth Circuit has said here that's precedential is hopelessly confused and, therefore, I just do what I think

either the Supreme Court has said or I do whatever I think is most persuasive from the Eighth Circuit. The other part of me is still trying to struggle to figure out what the Eighth Circuit has in a controlling way told me to do on this issue. Do you have a thought on what is the right approach there?

MR. STEINBERG: I think that would turn on whether you truly had some intractable intercircuit split such that you could not apply, you know, to the best of your ability the Prior Panel Rule and you just through up your hands, and at that point, I think you could look through the Eighth Circuit to the Supreme Court. I think that would be appropriate at that point. I don't think we're there. What I have down here is *Cross* relies on two cases before it, it says it's bound by them, something happens two weeks later, I think that's out under the Prior Panel Rule. You've got a statement about an indictment and a defect in it not being jurisdictional. I don't think you're there. But if you get to the point where you're lining up all the cases and there are 10, 20 of them, you discover they're 50/50, I think you're going to have to look to the Supreme Court.

THE COURT: Do you agree with your friends on the other side that the Supreme Court is pretty clear that the rule in *Cross v. Fox* is wrong?

MR. STEINBERG: So it's not really quite for me to say that Judge Gruender's reading of a Supreme Court precedent

is wrong. There are definitely statements in cases like *Steel Co* that say that. Judge Gruender in *Cross* has an argument. He says to have jurisdiction under 1331, you need a right of action, you need to actually be claiming a right under federal law. If there is no such right, logically follows that there's a lack of subject matter jurisdiction under 1331. I think that is not so frivolous that we have to say the Eighth Circuit is just flatly disobeying the Supreme Court.

THE COURT: That's what I was going to say. I'll ask it a different way if you don't want to say Judge Gruender is wrong. Which, when you seek cert on things, you generally say judges are wrong, so I'm not sure what the issue is, but is what Judge Gruender said -- or forget Judge Gruender, the majority of the Eighth Circuit, the majority of the panel in *Cross v. Fox*, is it inconsistent with Supreme Court precedent?

MR. STEINBERG: It is inconsistent with statements in *Steel Co* and *Mata*.

THE COURT: Statements that you think were holdings or dicta? Or you don't know, which is a perfectly fine answer.

MR. STEINBERG: I don't know if they're holdings or dicta. I don't know that the Court has ever said in a way where the outcome of the case turned on it, this cause of action question is nonjurisdictional, but there are statements.

THE COURT: Keep going.

MR. STEINBERG: Did you have questions about

hypothetical jurisdiction?

THE COURT: I did. You all cited me the one hypothetical case and the article which I found very helpful. I appreciated that. We found some later cases that have walked away at least in some sense from the case you all cited. And I guess I really don't understand the idea that if I am saying something is jurisdictional and I am saying I have the authority and not only the authority but the obligation to decide whether or not I have subject matter jurisdiction, if I decide I don't have subject matter jurisdiction, how is it possible that I can then go on and render what would amount to an advisory opinion? I mean, Congress is allowed to tell me to keep my hands out of something. Can you just explain what's going on?

MR. STEINBERG: I think the view of the rather large majority of circuits that have adopted this hypothetical statutory jurisdiction that Mr. Stillman mentions in his article is that there are constitutional limits on jurisdiction and there are statutory limits on jurisdiction, and while you may be rendering an opinion that you lack subject matter jurisdiction in the statutory sense to write, you are not committing an Article III violation when you hypothesize about the merits of a case or you're not sure that you have authority subject matter jurisdiction and that's not an advisory opinion in the constitutional sense.

THE COURT: But does that mean that if a case was brought under the diversity jurisdiction statute and I didn't think there was either diversity of citizenship or there was $75,000 in controversy, I could basically say, ehh, I don't care, I'm going to assume I have jurisdiction and just answer the merits?

MR. STEINBERG: The defenders of hypothetical jurisdiction, and I want to be frank, I'm not one of them, do not talk about that, doing that. They don't say, oh, you know, if you think that you don't have jurisdiction, but let's reach the merits, they say if it's a really hard question and you're being forced to make a really big decision as I think you potentially would be here if you say there's cause of action or no cause of action, it may sometimes be prudent and serve judicial economy to reach the merits. There's no let's just disregard jurisdiction for, you know, for no justifiable purpose here. I think that Your Honor also said that you found some cases that maybe walked *Lukowski* back.

THE COURT: I did. So obviously this is our independent research so I'm not expecting you to have them there, but I will just tell you all, *Arkansas Blue Cross Blue Shield*, 551 F.3d 812, Eighth Circuit 2009 essentially says, quote, a Court may not assume hypothetical jurisdiction to decide contested questions of law when its jurisdiction is in doubt. And it makes clear that it's talking about statutory

jurisdiction, not Article III jurisdiction.

Then *Public School Retirement System v. State Street Bank*, 640 F.3d 821 in 2011 essentially says you may not assume hypothetical jurisdiction because, quote, jurisdiction is a threshold question and must be answered before all other questions. And, again, there we're talking about statutory jurisdiction. So I'm having a little bit of trouble seeing how I get to the merits, assuming -- I mean, assuming arguendo all through the line that this is how I feel, I've never seen a case before where I would actually or where a judge would actually answer the statutory jurisdiction question and then go on to the merits.

The case you all cited to me, the judge basically didn't give an answer on the statutory jurisdiction question, he assumed it hypothetically and gave a merits answer, but it's a little bit different right here because I would be affirmatively deciding I don't have jurisdiction and then saying, ah, but if I did, here's the merits answer. So those are the two concerns I have.

MR. STEINBERG: On number one, my perhaps telegraphed answer is going to be the Prior Panel Rule. *Lukowski* is there. I didn't see negative citations of *Lukowski* when I cited it to you and I don't believe those cases --

THE COURT: Westlaw especially in this area could do with some more people working for it.

MR. STEINBERG: Right. So I don't think that those cases said, oh, actually, *Lukowski* got abrogated by something and it's gone. They appear to be, as far as I can tell from what you said, acting in unawareness of *Lukowski*, and I think *Lukowski* would actually trump the Eighth Circuit return to this question today. Your second concern about the alternative holding path that we suggested, I think that's actually a bit more moderate than the full bore hypothetical statutory jurisdiction. I don't reach a jurisdictional question, I just pave ahead to the merits. To say in a case where, as you've noted, there's likely to be an appeal, this is hard, but I think -- there's not a cause of action.

However, I want to provide a full opinion for the Court to review if I'm wrong about that as many courts think I am, as Plaintiffs adamantly think I am, that there's no cause of action, this is what I think about the merits, I think that's more modest and perhaps even defensible course than assuming the jurisdictional question away.

THE COURT: Let's not assume that everything works out rosy for you. Let's assume that my ultimate decision was I don't think there's a private right of action, but if I were to get to the merits, you all would lose. I can say that? Really? I mean isn't that like the textbook definition of an advisory opinion?

MR. STEINBERG: I think Your Honor is right about

that. I don't want to sound like this is a particularly one-sided ruling, it only works in our favor.

THE COURT: That's the problem for you.

MR. STEINBERG: But the fact is that is the nature of hypothetical statutory jurisdiction, people assume jurisdiction away to say the Defendant wins anyway even if Plaintiff is properly in court, even if I have the power to hear this, I would rule for Defendants on the merits. That's just how the doctrine as it's used in Eighth Circuit in *Lukowski* works.

THE COURT: So let me ask you this then. Let's assume, and again, this is all assumption, let's assume that I don't think there's a private right of action, let's assume that I think that based on what the Supreme Court said even if there was -- even if the plaintiffs won on the merits, I really shouldn't give them a preliminary injunction because we're too close to an election and I don't buy this 2023 thing, again, all assumptions, but let's assume we get there. Is your position that I really should blow past my jurisdictional ruling, blow past my *Purcell* ruling, and then reach the merits hypothetically just so the Eighth Circuit can have all of this in front of them?

MR. STEINBERG: No, I don't think that it's necessary to blow past *Purcell* to reach the merits. As we'll hear in the afternoon, I think you could very easily stop

Purcell.

THE COURT: But then what have I really done? Your point in wanting me to assume hypothetical jurisdiction -- and, look, as a practical matter, it's a very good point. I'll ask them, but I assume the plaintiffs agree with you. Again, I don't want to speak for them, I'll see what they say, but it's a very good practical point that you want me to be able to -- y'all want me to be able to decide all of the issues here so they can all go up to the Eighth Circuit so we don't find ourselves in a situation where we're bouncing back and forth and we get piecemeal things. That's not good for anyone. I get it.

Now, whether or not the law requires it is a different question, but I get the practical point. But isn't that point mitigated if I'm going to stop after *Purcell* and I'm not going to provide the full factual findings and legal conclusions on the real merits of their claim?

MR. STEINBERG: Thinking about it, I don't really see how it is mitigated if you have some ground on the merits. And Purcell's part of the merits, not the first prong, but the nonjurisdictional merits.

THE COURT: It's sort of part of the merits.

MR. STEINBERG: To deny the injunction. That said, you could certainly address the equities as well as likelihood of success. There's no reason -- that's not hypothetical in

any sense to address all parts of the preliminary injunction inquiry and say there is or isn't likelihood of success, but the equities is a real problem for Plaintiffs. So I don't believe it mitigates it, but it also is an unnecessary feature of this hypothetical jurisdiction proposal.

THE COURT: I'll tell you you're right, it's not, but in general, right, in general, courts try not to answer questions they don't have to, especially if they're particularly difficult questions. A, because the Courts don't want to make an error that they have to walk back later or that somehow binds people later; B, because if it's a really difficult issue and it's not necessary to the decision or to the relief that someone's going to get or not get, courts shouldn't be in the business of issuing advisory opinions. I guess what I'm struggling with is it strikes me that you're asking me to, even if I decide there's no jurisdiction, blow past that, and then are you also asking me even if I decide that the *Purcell* issue would bar relief in any circumstances, I should go past that and get to what I will call the real merits?

MR. STEINBERG: No, no, we do not request that you reach the real non-*Purcell* merits. We think that you could definitely stop *Purcell* and that it would speed things up to stop *Purcell*.

THE COURT: Let me ask you this. How do you all

deal on the private right of action question with *Roberts*? *Roberts v. Wamser*. I guess there's a dicta holding argument in there, but Roberts said that there's a private right of action for Section 2. It just said that the people who were the plaintiffs in that case didn't fall within the scope of the private right of action. How do I deal with that? Doesn't *Roberts* bind me?

MR. STEINBERG: I think my answer is the dicta holding distinction that you just -- the holding of *Roberts* is that that plaintiff was not a party who could sue. And it stated -- I'm not sure it very clearly stated, but suggested that others could sue aggrieved persons who were not the attorney general. My best answer is --

THE COURT: Your best answer is it's dicta?

MR. STEINBERG: My best answer is dicta holding, but my secondary answer would be *Roberts* predates *Sandoval*. *Roberts* predates *Ziglar*. *Roberts* predates a lot of things that I think really compel a contrary conclusion that there is no cause of action. And, yes, you're generally bound by circuit precedent until it's overruled, but if it's abrogated very clearly by Supreme Court precedent, the mandate's a contrary conclusion, you are no longer bound, my understanding is, by precedent. And that's particularly true if it's not even clear that the statements that you're concerned about are holding.

THE COURT: Can we talk a little bit about the

statutory text that your friend in opposition brought up? Because I do think the hardest parts for you are 12F, 14, I may get the numbers and letters wrong, but 14E, the parts where at least arguably one could say that there are textual references to potentially an assumption that Congress thought there would be a private right of action. Can you go through those with me and tell me why you disagree with your friend on the other side?

MR. STEINBERG: Yes. So the first thing that I would say about those provisions is that they do not create causes of action, they regulate such causes of action that exist under some statute. We'll talk about whether that statute is the VRA. And when Congress enacted those in 1975, they already knew from *Allen v. State Board* that the Supreme Court had implied a cause of action into Section 5 so they have some reason to deal with who gets fees in a Section 5 action, they have some reason to deal with the procedural questions, I'll call them, in Section 3, but they are not -- I don't see how they're stating that there is a cause of action that suffuses this entire statute by saying here's who gets fees in an action brought to enforce the Fourteenth and Fifteenth Amendments.

At most, I think they're saying that *Allen*, a Section 5 action could be such an action and here is who is going to get the fees and here's how the procedures will work in such an

action. It doesn't imply that there is cause of action throughout the statute.

THE COURT: Why would it imply that there's a Section 5 cause of action and not a Section 2 cause of action?

MR. STEINBERG: I don't think it implies that there's a Section 5 action. I think it already existed. Congress is acting against that background. The Supreme Court implies it in 1969. And then they say here is how fee shifting works in an action brought to enforce the provisions of the Fourteenth and Fifteenth Amendments. There already is that implied cause of action there. And I don't concede that they're speaking to a Section 5 action, but they could be speaking to who gets the fees in the Section 5 action. Which exists at the moment they're enacting those amendments.

THE COURT: But isn't that another way of saying Congress was assuming that all these actions existed? Why would Congress assume a Section 5 action existed and not a Section 2 action? Yes, you're right, Allen was a Section 5 case, I get that, but it seems a little strange to then say okay, well, this language assumes a Section 5 action but not a Section 2 action. Is your point that it only does that because of *Allen*? I guess I'm a little confused there.

MR. STEINBERG: Yes. I think they're saying to the extent there is a cause of action to enforce the Fourteenth and Fifteenth Amendments under some statute, here is how that

lawsuit will work. And they already know that there's a Section 5 enforcement cause of action, but they are not, by saying here's who would get fees in such an action, saying that there are causes of action under every provision of the VRA.

THE COURT: Does that mean that you accept your friend in opposition's view that a proceeding to enforce the Fourteenth or Fifteenth Amendment includes actions brought under the VRA?

MR. STEINBERG: No. And if you look at the full text of Section 3 or if you read a little bit down, and I intended to bring it up with me, Section 3 is going to start talking about actual violations of the Fourteenth and Fifteenth Amendments. It's going to say if such voting guarantees are violated, here's what you do. If a violation of those constitutional amendments is found, here's what you do. I think that reading that in pari materia with the phrase up at the top enforcing the amendments themselves, you have to read that -- you know, you're suing because you say those amendments have been violated. And that is how VRA lawsuits worked at the beginning.

People always were bringing constitutional claims and statutory claims together, people did not understand that the VRA was exceeding the bounds of the Fifteenth Amendment. Section 2 hadn't been amended to so state, it just parroted the language of the Fifteenth Amendment. It's understandable that

the 1975 Congress might have thought every VRA action may well be a Fifteenth Amendment enforcement action. Today we have an action that expressly disclaims intentional discrimination which is what we know from *Bolden* which comes along in 1980 after those amendments are enacted, is about intentional discrimination. So the two have become really decoupled. Not just really decoupled, they're two different things. So no, not every VRA action absent a constitutional claim tacked on to it is going to be an action to enforce the Fourteenth and Fifteenth Amendments.

THE COURT: Am I bound by the Eighth Circuit case law that your friend on the other side brings up that essentially awards attorneys' fees in Section 2 cases under 14, I guess, E or F, whatever the right subsection is?

MR. STEINBERG: I pulled up *Florissant* while Mr. Topaz was speaking and I couldn't find anything about the fees. Maybe he'll tell me I'm wrong or correct that citation to something else, but I don't think that you're bound by that case law because I don't know it to exist.

THE COURT: If that existed, if there was an Eighth Circuit case that awarded attorneys' fees under that section in a Section 2 Voting Rights Act case, would I be bound to say that that section applies to Section 2 Voting Rights Act cases or assumes a private right of action in that context?

MR. STEINBERG: If they apply the fees provision to

Voting Rights Act cases, you're bound to say the fee provision applies to Voting Rights Act cases, and so then you're bound to reject this argument about enforce the Fourteenth and Fifteenth Amendments. I think that what you're not at all bound to do is take the additional logical leap that because that section regulates Section 2 lawsuits that Congress, therefore, said or implied that there must be Section 2 lawsuits just means in most that if, as many courts do, imply rights of action under Section 2, here is who the Eighth Circuit's saying gets the fees look to that provision. Just because -- and maybe this is the argument that's been confusing, but just because a statute assumes a cause of action doesn't mean that it creates one.

THE COURT: But that's a little odd, right? Because we're talking about implied private rights of action. And, look, I accept, and quite frankly, I think Plaintiffs would accept that the legal context over time has changed in the sense that the Supreme Court has narrowed significantly the implied right of action contest. Everybody in this case agrees there's no expressed private right of action and we all I think also agree that the Supreme Court has, whether you want to say it applies or doesn't apply to the Voting Rights Act, the Supreme Court has narrowed their jurisprudence on when a private right of action is implied, but there's still some Delta, I think, between an expressed private right of action and the existence or nonexistence of an implied right of

action, right? Otherwise there wouldn't be a distinction between the two.

So there's some situations where the private right of action is, even today, not express but implied. And if Congress was using that language to assume that there would be a private right of action, isn't that the very situation where a right would be implied?

MR. STEINBERG: I want to say something that I think is very directly responsive to that. As you know, *Morse* is a fractured opinion, plurality concurring opinion. Footnote 47 of the plurality opinion says: The *Republican Party of Virginia* or whoever the defendant was, must have been *Morse*, says to us, look, don't rely on these 1975 amendments because *Cort v. Ash* which started to narrow things, came out that year, and Justice Stevens says, ah, but *Cort v. Ash* came out on June 17th, Congress enacted these amendments on August 6th, so they couldn't have been aware of *Cort v. Ash*, and you know it's probably true that these amendments don't get you there under our current law, but they didn't know about *Cort v. Ash* back then.

Now, we could talk about whether you're bound by that kind of reasoning after *Sandoval*, but I think Justice Stevens acknowledges in that footnote that those amendments don't get you there under even *Cort v. Ash*, and he's writing before *Sandoval* comes down and he's writing before Ziglar elections

comes down, etc., etc. So I don't think that those amendments work. And I also would note that my friends and also the United States don't cite any case from the Supreme Court that says if Congress has a fee provision, that means that it's implied that there's right of action. The most on point thing that I can say that kind of says the opposite is Liu v. SEC a couple terms ago, the Court dealt with an argument like this from the United States, the United States says look at all these provisions of the securities act that talk about how discouragement ought to work.

Congress has said things about discouragement, and the Court said that doesn't mean that discouragement even exists under this statute, that just means that Congress was aware that a lot of lower federal courts were creating this weird beast called equitable discouragement and they wanted to do something about it, but maybe they didn't have the votes to get rid of it, so they did a little something about it.

THE COURT: I appreciate your point. So I want to preface this by saying I know you all did not raise this issue, right? I, as the Court, sua sponte raised the issue and your friend on the other side is right, the reason I raised the issue is because Justice Gorsuch and Justice Thomas said it was an open question in their concurrence in *Brnovich*, and then this *Cross v. Fox* thing happened where *Cross v. Fox* seemed to suggest if it's an open question, I need to -- actually I have

the obligation to satisfy myself that there's jurisdiction and this is jurisdiction.

So understanding you all did not bring this up, I'm still going to ask the question that your friends on the other side pose, and I think it's a good question. No other court, district court, appellate court, Supreme Court, has said or as a majority matter even suggested that there's no private right of action for Section 2 of the Voting Rights Act. Isn't that a fairly good indication that there is one?

MR. STEINBERG: I think what we mostly have are assumptions that there is one. There are very few holdings that there is one, and the holdings that there is one can't be squared, and I don't think that they really attempt to square them with the Supreme Court's test for recognizing causes of action. I think that *Morse* even acknowledges this is all being done under the auspices of *Borak*, this is all an extension of *Allen*, this is because *Cort v. Ash* came a few weeks out before the Congress wrote some amendments. This doesn't satisfy the current test. I don't think that's a close question. And while you're certainly bound by *Morse* in the Section 10 case, *Allen* in a Section 5 case, I think if you're trying to reconcile all this, you follow them in Section 5 and 10 cases and follow *Sandoval* and Ziglar and that entire line of cases in this case.

I think there's simply very little writing about this

question one way or the other. And I would add that two years before Congress reenacted Section 2, the Court said in *Bolden*, this is open, they drop a footnote, they cite *Cort v. Ash* and note things are changing, and all Congress can do is stick a line in the Senate report and say we've always clearly intended it to ourselves. But they don't put it in the statute.

THE COURT: What do I do from this? If you're right that *Cross v. Fox* has essentially been the rule for a while in the Eighth Circuit or for a significant amount of time, what do I do with the fact that there have been a bunch of Voting Rights Act cases where the Eighth Circuit has not sua sponte raised this when under your theory if there was a problem they should have sua sponte raised it?

MR. STEINBERG: I think that is what is known as a drive-by jurisdictional holding. When people -- when courts miss jurisdictional questions that they're faced with, we don't say that they implicitly have held that there is jurisdiction over the thing that they exercise jurisdiction over. We instead say that question wasn't addressed. And there's very clear precedent about how to deal with a jurisdictional assumption that is missed. And the precedent is unless the jurisdictional question is analyzed, that's a drive-by. It's a pejorative term, but it's the term that the Supreme Court uses, a drive-by jurisdictional holding, you're not bound by it.

THE COURT: I don't have anything else for you. Do

you have anything else for me on those issues?

MR. STEINBERG: I think I just have one other thing, and it's a little technical thing. The correct interpretation of the cases that *Cross* cites isn't really a question for us. The Eighth Circuit has said that's what Eighth Circuit precedent means, so there's a trilogy of cases as it understands it that requires us to treat these questions as jurisdictional.

THE COURT: Mr. Steinberg, like your friend on the other side, you did a very good job. I appreciate it. We're going to take a break before we get back to you. We're essentially going to take a break, we're going to do whatever rebuttal we have and then we will go straight into merits. I do want to say before we break, I think this is a useful thing to say for everybody who is either not a lawyer or who is not sort of really up on these technical issues, I understand that all of the legal jargon and all of the questions about a very preliminary and nonmerits issue can be frustrating.

In my view, I have to ask them, I have to make sure that I have jurisdiction and authority to decide this case. It's very, very important. Equally as important as the merits, and the merits are very, very important here. This is a enormously serious issue, but as an unelected federal judge, I can't just sort of willy-nilly run into these issues in a place where I potentially am worried that I haven't been given authority to

go. So the fact that I've asked all these questions, the fact that I have spent a lot of time doing this should really tell nobody anything except that I really want to make sure if I'm going to get to the merits, I have the authority to do it. Again, I know neither party raised these issues so I am very thankful that at my request you have all helped me valiantly with this.

Some people may not agree, but I think this is a very difficult area. I think it's been made more difficult by both Supreme Court precedent and Eighth Circuit precedent on various aspects of these issues. And I'm going to obviously give it my best shot to figure out what I think about it. But like I said, Mr. Topaz, you'll have a chance for rebuttal when we get back and then we will go straight into the merits of this. By the merits, I am including *Purcell*, so the real merits and *Purcell*. Right now it is 12:40. I think this is probably an appropriate time to break for lunch. Why don't we do a half an hour, a quick lunch, and then we will get back here at let's say 1:15.

(Recess at 12:43 PM.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript of proceedings in the above-entitled matter.

/s/ Karen Dellinger, RDR, CRR, CCR

United States Court Reporter

Date: February 10, 2022

THE COURT: Mr. Steinberg, I do have one more question for you.

We'll go back on the record now.

And Mr. Steinberg, just because I forgot to ask it. I want to get your view on it, but please be brief if you can. I wanted to ask you generally about Section 12 F, which I don't know if you have it up with you. It says, the District Court of the United States shall have jurisdiction of proceedings instituted pursuant to this section, and shall exercise the same without regard to whether a person asserting rights under the provisions of Chapter 103 to 107 of this title shall have exhausted any administrative or other remedies that may be provided by law. And if you don't have it, maybe one of your colleagues can bring it up on their phone, so you can look at what I'm talking about.

MR. STEINBERG: I think I have her words in my head, more or less. I haven't seen it before.

THE COURT: Okay. It's 52 USC 10308, but here's my question for you. It says, without regard to whether a person asserting rights under the provisions of Chapter 103 to 107 of this title. I guess what I'm trying to figure out is whether that language assumes a person can assert rights under Section 2 of the VRA, whether or not that might be part of the sort of structural inferences for an implied right of action. And if you're not familiar with the statute, please take a minute or

two just to look at the section. And if you have any thoughts, give them to me. And if you don't, that's okay as well.

MR. STEINBERG: So first reaction is that that's a large cross reference that goes from 103, which I think is what we commonly refer to as the VRA, through 105, through 107. We're no longer in the VRA there. So I think that this again assumes a right of action located somewhere in those three chapters that when this provision was enacted, I don't know, does Your Honor know when it was enacted?

THE COURT: I don't.

MR. STEINBERG: I suspect that by the time it is enacted, rights of action have already been implied under Section 5. And I want to say that there is a quite good chance that there are more express rights of action in 105 and 107, but I do not know that. Generally though, the answer is the same as with the fees and procedure Section F and Section 3, except I recognize this has an express cross reference, and we are no longer dealing with enforce the Fourteenth or Fifteenth Amendments arguments. And now we are certainly talking about a reference to a range of statutes, Section 2 of which is one. But I still don't think that you get there on two levels.

One, you don't have Section 2 singled out. And two, you just have an assumption of a cause of action, but you do not have rights creating language.

THE COURT: Okay. I appreciate it. Thank you very

much.

MR. TOPAZ: Your Honor, I don't have too much, but I want to address a few points raised in defendant's argument. I want to start with the state conference as to standing. And I want to direct you to Federal Rule of Civil Procedure 17(b)(3)(A). If I can quote, that rule says, a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under United States constitution or laws.

Your Honor, plaintiffs would submit that's pretty cut and dry. The federal rules contemplate that. To the extent the defendants are arguing that the state conference is unincorporated under state law, and therefore cannot bring suit, which we don't agree necessarily, but that this rule makes clear that they can bring suit under the federal rules to enforce a substantive right under the federal laws, obviously Section 2 of the Voting Rights Act is that and provides substantive rights.

THE COURT: I have an inkling, whether it's because of this section or some other piece of law, I have an inkling that you are right. Do you happen to have any case law that deals with this general issue?

MR. TOPAZ: Yeah. We have three cases, Your Honor. Westwego Citizens for a Better Government versus City of Westwego. The site for that is 872 F.2d 1201. The second

case -- I'm sorry, that's Fifth Circuit 1989. Second case, Citizens for a Better Gretna versus City of Gretna, 834 F.2d 496, Fifth Circuit 1987. And then Green Party of Arkansas versus Priest, 159 F.Supp 1140. And that is the Eastern District of Arkansas in 2001.

If I can go a little further on that.

THE COURT: Yes.

MR. TOPAZ: Yes, I would agree with Your Honor that including a judge in this court has determined that there are -- unincorporated associations are allowed to sue in their own name.

I would add that in two of those cases the -- both of the Fifth Circuit cases, those organizations were expressly made up for the purposes of filing a lawsuit. So there you might have some genuine concern about whether this is a legitimate organization. And if I could, Your Honor, I would just like to point out the obvious. The Arkansas State Conference of the NAACP is one of the most important organizations in the entire state. This is not some made-up organization that has no legacy whatsoever. This is as real and as important as organizations get. I would add also as just a last point on this that defendants acknowledge that at least at some point the state conference was incorporated, they didn't provide any case law as to what happens when incorporation status lapses. I don't know that the incorporation status has lapsed, so I don't think this

is much ado about anything.

THE COURT: It's up to you, but I don't think you have to spend anymore time on that.

MR. TOPAZ: Moving on, Your Honor. As to Districts 90 and 95, Your Honor asked whether, assuming without conceding that we have not been standing as to those two districts, I would note that as it pertains to 95, District 94, which is near 95 is a cracked district that is on our list. And as it pertains to District 90, 96 which is also near District 90 is cracked. So I think, as Your Honor suggests, even again assuming without conceding, we don't have 90 and 95, the 94 and 96 gives us what we need.

The last piece I would say on standing, and I just couldn't tell from sitting where I was whether Mr. Steinberg was representing that Hunt provided some sort of three-part test or something like that. That is not at all our reading of Hunt. And I also don't want to impugn Mr. Steinberg if that -- he has a different reading, or he wasn't saying that, but I just want to clarify for the record that that is not our reading. Our reading, as Mr. Steinberg said, is that the key is indicia of membership. And for reasons that I specified in my initial time up here, we believe that that's met.

Unless Your Honor has further questions, I'll move on to the cause of action.

THE COURT: I do not.

MR. TOPAZ: As to the jurisdictional piece. I think I heard defendants acknowledge that Agarwal says what we say it does, and that Cross is inconsistent with the line of Supreme Court case law that I cited. Defendants suggest that the prior panel rule should -- should govern instead. I think, Your Honor, this is a bit of a fool's errand. I think we can go well beyond 2012 to find older cases. We were able to find one that might be helpful, U.S. versus Seay 620 F.3d 919, an Eighth Circuit case from 2010. I don't know -- all that is to say, defendants first criticize us for not having a case that was more recent than Cross. And now they want us to have a case that is older than Cross. I think it's safe to say that when you have unbroken Supreme Court case law on the one side and panels going back and forth on the other, you know, I think we could probably go back and find an older case in 2012.

THE COURT: The way I, after argument, am thinking about this issue is that if I go back and analyze the cases, and I can see a distinction between the Cross line of cases and the Agarwal line of cases, and I feel like this fits into Cross, then I'm bound to follow Cross, even if I think it's wrong under Supreme Court precedent, but if I think that Agarwal and Cross are basically irreconcilable with each other then I follow Agarwal. That's generally my thought process. Is that something you all agree with or disagree with?

MR. TOPAZ: I think, Your Honor, that we are less

clear on the case law as to what happens if there is some sort of conflict between a holding from the Supreme Court and a holding from the Eighth Circuit. I can't commit to your interpretation, but I also can't necessarily say that -- can't cite you chapter and verse on that particular issue.

THE COURT: Fair enough.

MR. TOPAZ: Finally, as it pertains to the merits of the private right issue, whether there is a private right of action, I want to clarify one thing as it pertains to cases affirming Attorney's fees under Section 2. I mentioned Ferguson. Ferguson was an Eighth Circuit case -- the merits was reached at the Eighth Circuit in 2018. The fees decision was at the District Court in 2020 and was not appealed. So I just want to make the record clear for Your Honor that that is not actually an Eighth Circuit holding.

THE COURT: I appreciate that.

MR. TOPAZ: That said, Emery versus Hunt 272 F.3d 1042, Eighth Circuit 2001, excuse me, is a case in which the Eighth Circuit affirmed attorney's fees under the relevant provision in Section 2. I believe Mr. Sells was counsel on that case.

THE COURT: Mr. Sells is counsel on a lot of the cases I have been reading.

MR. TOPAZ: I would also add, Your Honor, other cases that are not necessarily binding on you, but on the Bone Shirt

case, another case that Mr. Sells litigated, that was basically the exact same thing happened as the Ferguson case, which is to say the Eighth Circuit ruled on the merits as to the violation, and then the fees -- were awarded fees at the District Court following the violation. There is also a D.C. Circuit case, Donnell versus U.S. 682 F.2d 240. And that is a D.C. Circuit decision from 1982 in which it found that attorney's fees for private litigants were proper under 14 E. I believe there is a more recent D.C. Circuit case that says the same. I don't have that citation for you at this exact moment.

THE COURT: So I very much appreciate you getting me these cases, and I'm going to look at them. And I know in some sense this might be a little bit hairsplitting and getting really into the weeds. Do you happen to know if in any of these cases there was an active fight about whether or not this section gave rights to attorneys's fees under Section 2, or was it just sort of assumed by everybody? And if you don't know, that's okay, I'll go back and read them.

MR. TOPAZ: I don't know standing here today.

THE COURT: Okay.

MR. TOPAZ: The only other thing, Your Honor, that I think I have to add is on -- the defendant's made reference to the Lou case, which I think is getting at this issue of the prior construction. I would just say, we saw obviously that citation in defendant's briefing. Plaintiffs just want to be

clear that that case is completely in opposite, insofar as the interpretation here is well settled, and has been well settled for decades. And so this is not an issue in which there is meaningful debate in either at the administrative level or the judicial level about whether there is a private right of action under Section 2.

Unless Your Honor has further questions, I would rest.

THE COURT: No, I'm good. Thank you very much.

MR. TOPAZ: Thank you, Your Honor.

THE COURT: Okay. Who is up on the merits?

MR. SELLS: That would be me, Your Honor. And I don't really have a presentation for you, because I'm not sure --

THE COURT: Well you did a two-hour bang up job this morning, so that's perfectly fine. I understand that.

MR. SELLS: So I'm willing to go wherever you want to take me.

THE COURT: Okay. Let's start here, just because I happen to be thinking about it. I'm, at least, thinking about it in reference to -- and I want to make sure I get the naming convention right. In the Board Plan, the Little Rock District that the defendants argue was a crossover district, and you all say it only has 21 percent or so black voting-age population. Is that District 34, or is that District 74? I forget which is which in the illustrative plan and which is which in the Board Plan.

MR. SELLS: So it is 74 in the Board's Plan, and it is 34 in the previous iterations, I think, going all of the way back.

THE COURT: Okay. So I guess let me start with this. I take your point that one percent, two percent, three percent is not enough. I think that's a very good point. I guess the question for me is where do I draw that line. Is it a strict numerical line that I say anything under 40 percent, or anything under 30 percent is, by definition, not high enough of a population, or is it at some point, and I guess the question is where is this point, does it become some type of balancing test between how much population there is and what the effectiveness rate is.

MR. SELLS: So the short answer is you don't draw a line. That is not one of the inquiries that you have to answer in deciding this case. I mean, you have to, I suppose, respond to the defendant's argument about 74, although perhaps not because of District 75. But I think your phrasing of the question also kind of provides an answer, which is that if this is a crossover district, it is not an opportunity district, because under the Supreme Court's taxonomy, if you will, which is not entirely clear, but I look at Bartlett and how they have kind of functionally identified districts. A crossover district is one in which African-American voters, or some group of minority voters can elect with a substantial grouping of white

crossover voters. That doesn't necessarily satisfy Section 2 in terms of being an opportunity district.

So, number one, I don't think you have to draw the line. Number two, I don't really think there is an argument from the case law that it would satisfy Section 2, even if it were. I think what you would have to find is that it's an opportunity district, that black voters can control the outcome in that district. Now --

THE COURT: I guess what I'm struggling with is, when you say control the outcome, my next question is okay, so when can they control the outcome. I mean, if it's 35 percent -- if BVAP is 35 percent, and the effectiveness rating is 90 percent, does that -- or .9, whatever, you understand my point, does that mean they can control the outcome? And if it does, why?

MR. STEINBERG: So Dr. Handley's testimony went into that pretty extensively. And she didn't draw a line for you either. And the reason is because it's going to depend on things like how much crossover there is. Rates of turnout is going to be important, whether it's a partisan or a nonpartisan office, because in a house election like we have here, you have to be able to elect in both the primary and the general. And so there are really too many factors to be able to give you some kind of algorithmic road map to determine whether 74 is or is not. All of the testimony here, all of the serious testimony is that it is not.

THE COURT: Well, and I guess that's a little bit of what I'm struggling with. And I guess you could frame it as whether it's a crossover district or an opportunity district. And I understand, by the way, I understand your point about the district next door having problems. And I think that's a very good point, and I'm going to ask the defendants about that, but I guess the other way you could understand it is whether or not the district we are talking about now has racially polarized voting. And I don't want to confuse the two things, but it's a little hard for me to figure out why would a district that has 21 percent VAP, BVAP, but an effectiveness rate over 50 percent, why we would think that there's racialized -- there is racially polarized voting in that district?

MR. SELLS: There isn't. There is not racially -- that is what the effectiveness index score shows, that there is no racially polarized voting in that district. There is in 75. But we haven't alleged that there is specifically in that district. We have shown that the voting is racially polarized statewide and so forth, but the effectiveness index, at least, doesn't suggest that there is racially polarized voting in the Anthony Bland contest.

THE COURT: Is there anything to suggest, and this may not be your argument, but I heard a little bit about this on the stand, and I'm trying to figure out if this is any part of your argument. Is there anything to suggest that there is racially

polarized voting in that district in the democratic primary?

MR. SELLS: I don't think there was a democratic primary in that district that was among the contests that Dr. Handley analyzed. And while she analyzed a statewide primary, she did not construct a primary index. So I think, at least as far as what's in the record, we don't know about that district specifically.

THE COURT: I think here is where you're gonna push back on me, and the reason I'm asking this question is because I'm trying to get it straight in my head. Part of me feels like it would make sense that the question of racially polarized voting for Gingles 3 is essentially the flip side of whether or not something can be considered an opportunity district, but I have a feeling somewhere I have gone awry in that frame of thinking. Is that wrong?

MR. SELLS: I would -- I don't want to say it's entirely wrong, because I do think they are linked, yes.

THE COURT: So I guess my question is if in the Board Plan that district is not characterized by racially polarized voting, why wouldn't on the flip side of that, I call it an opportunity district, is the only reason because you think 20 percent is too low just in some sense as a definitional matter.

MR. SELLS: Right. Now you are heading down Professor Lockerbie land where any district with one black soul in it, as long as you get above the effectiveness index is an opportunity

district.

THE COURT: Yeah. In some sense that's a little -- for me, that's a little too reductive. I'm not talking about a situation where there is one black soul. I'm talking about a situation where 20 percent of the black voting-age -- if 20 percent of the total voting-age population is black. So I, with respect, I think that's a different situation than the 1 percent. So what I'm trying to do is find out why -- I mean, you would agree, I think, that if it was 49.9 percent with that effectiveness rating, it would be an opportunity district. I don't want to put words in your mouth, but I think you would agree.

MR. SELLS: Yes.

THE COURT: What I'm trying to figure out is why is 20 percent too low. And what is the right percentage below which I can't go?

MR. SELLS: So Dr. Handley testified about that, right?

THE COURT: Yeah. But she just said 20 percent is too low. She didn't really explain why, or at least as far as I understood her testimony.

MR. SELLS: Well, I don't have it in front of me. I think it would be worth rereading her testimony, but as I understood it she didn't -- she was very hesitant to say that even 40 percent would be high enough. She said mid 40s, sure,

I'll look at those. I can't, as I sit here today, think of a single instance where a district below 40 was considered an opportunity district, certainly not below 30. And you know, District 74 is close to 20, but I think the testimony was --

THE COURT: I'm willing to concede to you, I mean, I haven't done all of it, but I certainly sat here for her testimony, and I'm willing to concede that she said that -- what you just repeated is true with what she said. What I didn't hear was the why not. And that's what I'm trying to ask you. Why is 40-something okay, but 30 is not?

MR. SELLS: And I think I remember her testimony being that when you get that low, black voters aren't able to control either aspect of the electoral process in a partisan election.

THE COURT: Okay. Let me ask more broadly about primaries.

MR. SELLS: Okay.

THE COURT: So it was getting late yesterday when I think we heard some evidence about there really only being 10 percent of the primaries in Arkansas that are actually contested. And then there was some, you know, questioning back and forth about was that right, but I think everybody generally agreed that that seemed like it was right. What I'm trying to figure out is I know you all, at least in part, rely on the primaries being majority rule. Right. And in your totality of the circumstances analysis, one of the things that your point

was that primaries tended to keep black candidates away from winning, because of the majority rule requirement. How does that square with only having 10 percent of the primaries contested? I mean, that's 90 percent of the time that the majority rule doesn't come into play.

MR. SELLS: Right. You threw me off there, because we call it the majority-vote requirement.

THE COURT: Fair enough.

MR. SELLS: But I think I caught up to your question. So, what I would say is a lot of the contests, as I discussed with Mr. Bridges, are in Pulaski County. Right? So --

THE COURT: Yeah, sure.

MR. SELLS: Maybe it lessens the impact of the third Senate Factor, but when you look at where those primaries are, and that was the point I was making in that line of questioning, they're not all over the state. It's not random. Frankly, they're concentrated in and around Pulaski County, and a lot of areas with black voters.

THE COURT: I want to make sure I understand what your client's position on this is.

MR. SELLS: Okay.

THE COURT: In terms of primaries.

Is it the Arkansas NAACP's position, and the Arkansas Public Policy's position that in democratic primaries white voters are less likely to vote for black candidates or

black-preferred candidates?

MR. SELLS: That's what the evidence before the court shows. We have one statewide democratic primary, and there was racial polarization in that one. There are a few legislative primaries that were in the overlapping districts that Dr. Handley analyzed. And I think the evidence there was that none of them are polarized, but they only involved either black or only white candidates. So it wasn't a racial choice. I don't have that committed to memory. We can pull it up, but the pattern of votes shows what it shows.

THE COURT: Okay. This question is broader than just the primaries; although, it sort of, what you just said leads into this. I think one of the concerns I have is that a lot of the data we are dealing with is somewhat exogenous, right, in terms of the primaries, we are dealing with statewide primaries, as opposed to primaries in the legislative districts for the effectiveness calculation. We are dealing with one statewide primary, as opposed to a lot more information, whether it's inogenous or exogenous. That gives me a little bit of heartburn. Now, I will say, and I'm going to ask the defendants this, there is a difference between a preliminary injunction hearing and a trial on the merits. And at this point all you all have to prove is more likely than not, so that's working in your favor, but what do I make of the fact that a lot of the evidence that you all have provided strikes me as exogenous, and

perhaps not a lot of exogenous information.

MR. SELLS: Well, I will disagree with you to this extent. I don't agree that a lot of it is exogenous. All of it is exogenous, 100 percent, because there haven't been any elections held under the Board's plan. Inogenous elections would be elections held under the Board's plan. Maybe we get there next year, right, but this is not unusual in a redistricting case, and I would point the Court to LULAC versus Perry. I mean, that's kind of the quintessential Supreme Court redistricting case. It is a fractured opinion and all of that, but part of Justice Kennedy's opinion that attracts a majority of the vote deals with whether Congressional District 23 violates the Voting Rights Act. And if you read that carefully, I think particularly after having heard Dr. Handley's testimony, the Supreme Court is relying on exactly the same evidence that you have heard. Now, I will also concede that in Texas you have a lot more contests with Hispanic voters than we have here with black voters. We deal with the data that we have. There is case law that, you know, that -- particularly when data is scarce, as it used to be, quite frankly, all of the time in voting cases, particularly in the south, right, that courts are instructed to give the plaintiffs a break on that and deal with what you have before you. But one isn't nothing. That's the first thing.

And number 2, Dr. Handley did the checks with the other

elections. And she explained why she doesn't like to rely on elections with only white candidates. And I think her reasoning there is quite sound, but if you think of that one as backed up by -- I think it's nine additional candidates, all of which say the same thing, right, they support, bolster what conclusions she reached based on the one, that that's really enough data here for you. That should allow you to sleep at night on that question. One is enough, but Dr. Handley did the checks. Those are in the record. And it is not as though they point in different directions. All of the evidence here points in the same direction.

THE COURT: I appreciate that answer.

Let me ask you, I guess, more fundamentally, I thought your point before was interesting that if I find essentially that you've successfully drawn in the Illustrative Plan one more district than the Board Plan, that's enough. Now I obviously take what you mean to be A, it's enough for Gingles 1, and ultimately, if we follow through all of the way it is enough for liability. As to what the remedy would be, obviously, if I only found one we wouldn't be redrawing six or seven potentially.

MR. SELLS: Potentially.

THE COURT: I guess what I'm trying to figure out is, do I need to look at this statewide as a whole, or am I supposed to look at this area by area? You know, the Defendants spend a bunch of time in terms of explaining look, you have asked for X

number of, or you have shown or you have potentially shown X number of new districts can be drawn in the northeast or in the delta or in Little Rock, and then they have spent some time showing, well, really it's only less than you can say can be drawn. I guess my question is do I break it up locally, or do I look overall, or does it matter.

MR. SELLS: Well, I think the answer will depend on what you mean by it, because if you are talking about proportionality, the Supreme court is very clear. LULAC versus Perry, you need to look statewide, but I will say that if you're talking about liability; and therefore remedy, if you were to find, let's just take southwest Arkansas, because that's where we have one additional district. If you were to find that for some reason the black population in southwest Arkansas is no longer sufficiently compact to form a majority new district, then one wouldn't expect a remedy would include a district down there. Pretty simple. I mean, I don't want to elevate Arkansas's regions to any sort of legal status, right, but it's kind of a helpful way of dividing up the state.

THE COURT: Okay. Let me ask some questions that I think are sort of Gingles 1 questions.

MR. SELLS: Okay.

THE COURT: So, and we can take a particular district, if you want to use it as an example, or we can just go generally. For this one, let's talk about Illustrative

District, I think it's 5. The one that defendants, I think, say is racially gerrymandered with the arms coming up this way and this way and this way and this way. Are we on the same page, you know which one I'm talking about?

MR. SELLS: I know the one you are talking about. Yes, that's the southwest Arkansas district, yes.

THE COURT: So assuming I find that that is racially gerrymandered, if I made that decision. And assuming I find that you can't withdraw -- you can't redraw that district without a racial gerrymander, then I stop the inquiry. Right, Gingles 1 is over, you all lose on that one, or is there any way you can still prevail on that one?

MR. SELLS: Well, are you putting in your hypothetical when you say racial gerrymandering, do you mean that the use of race there can't be justified by a compelling state interest, such as complying with Section 2, because I think that's an important part of the inquiry here. It's not just, oh, okay, they used race. That's not what the law is, right?

THE COURT: Right.

MR. SELLS: So you could say --

THE COURT: It has to be using race as the predominant feature, although defendants may object to that argument, or do you think even if race was used as a predominant feature you all still can win.

MR. SELLS: Yes. So strict scrutiny isn't triggered

until you find race was the predominant factor, right. And that is the district where we show that Mr. Fairfax unsplit a county, did all of these things. You're going to have to find --

THE COURT: This is all assuming I find this.

MR. SELLS: Assuming you find that race was the predominant factor, then you go to the next part of the inquiry. And you have got to find that Mr. Fairfax used race more than was reasonably necessary to comply with Section 2.

THE COURT: Okay.

MR. SELLS: Okay. And I think you would have a hard time finding any evidence on that in the record whatsoever, certainly not from Mr. Davis.

THE COURT: Okay. I appreciate your answer. Let's talk within Gingles 1 about, I guess reasonable compactness, but obviously we are going to unpack that.

I think I understand your point about the compactness inquiry being about the minority population, and whether the minority population is numerous and compact enough to draw multiple districts. But I'm a little stumped on how the case law explains I go about figuring that out. And you heard my example that I asked the witness about the squares versus the pizza pie sections that continue on. It strikes me that one of the ways I'm supposed to figure out whether or not there is a reasonably compact and numerous minority population is to look at whether the district that has been drawn to give that

population an extra majority-minority seat is itself reasonably compact. If it's not reasonably compact, that would be, I guess, what I would call my first clue that there is not enough minority population compactness to justify an extra seat. Is that the right or wrong way to look at it?

MR. SELLS: I would say wrong.

THE COURT: Okay. Can you tell me why?

MR. SELLS: So, when we were talking about this District 5 in my summation, I dispensed with the compactness piece of it pretty quickly, because that district is not very large, and it exists exactly where previous majority black districts have been, right. And the shape may or may not indicate that race was a motive, perhaps the predominant motive behind drawing the districts, but it doesn't actually carry with that much territory, and it doesn't stitch together communities that have nothing to do with one another. The defendants actually get that right in their articulation of the standard of what compactness is, where they talk about stitching together communities that are desperate. And we disagree on the facts about whether our districts actually do that, but you can't tell from a shape or a compactness score whether that's the case. I could draw a district that would fit inside this room that would have a Reock score something close to zero, but no one would ever say that a district, which is the size of this courtroom is not compact in the Gingles 1 sense, because it encompasses less

than one city block. The compactness scores are really all about jagged edges and stuff like that that might give an indication of gerrymandering. Gomillion versus Lightfoot, that's what they are trying to detect with those scores. Gomillion versus Lightfoot was not about whether a black community in Tuskegee, Alabama was compact. Of course they are. They are all in Tuskegee, Alabama. It was really about the shape of the districts, were those districts drawn to exclude or include certain people from the city boundaries or district boundaries.

THE COURT: I guess what I'm trying to figure out is, let's assume -- let's assume you had a district in the Illustrative Plan that took a little slice of Little Rock where I think we would all agree there is a large black voting-age population. Took a little slice of Little Rock, and then basically extended the rest of the district all of the way up to the northeast, right? So all of the way up to the northeast section, as far as you could, just to get more population. Wouldn't I look at that and say, okay, yes, there is a reasonably compact minority population in Little Rock. That's certainly true. But as to the question of whether it would support an additional district, the fact that the way they have gotten this district is by taking some small slice of the Little Rock population, and then a huge slice of, you know, the rest of the population, basically just to get up to 30,000 or something

like that, wouldn't -- wouldn't that be part of the analysis, or no?

MR. SELLS: So I think you have to assume several counterfactuals to what we have here. We don't have a district like that.

THE COURT: Correct. That's why I asked the question. I didn't want to ask a live question.

MR. SELLS: Right. But so, I think you would also have to assume that there aren't any other districts like that in a plan, because I think what goes for compact in Arkansas might not be what goes for compact in Arizona, for example. And that's one of the reasons why I put those four plans side by side in front of you is you could see, none of them -- none of the districts in the plan stick out. And so I think to find a shape of a district or the size of a district like gives rise to an inference of noncompactness, let's just put it that way, it would really have to stick out in the context of the geography of a state over time.

THE COURT: Okay. Do you all think that the 2011 and/or 2001 plans violated the Voting Rights Act?

MR. SELLS: I don't think we can say, Your Honor. I haven't seen any analysis of the elections from the time preceding that. We certainly didn't try to analyze that from the perspective of challenging that plan.

THE COURT: Well, I guess here's though what I'm

confused about. I can't imagine you think that in 2021 there's racially polarized voting, but in 2011 or 2001 there wasn't racially polarized voting. You could tell me if I'm wrong, but that seems like a pretty odd proposition to me to come from the plaintiffs. And then, I think I understand that while there's been some differential in population change, you still didn't have the proportion of seats in 2011, the majority-minority seats that you would suggest the minority population deserved in terms of rough proportionality. So I'm a little confused as to what is missing for you to say whether or not the 2011 and 2001 plans violated the Voting Rights Act.

MR. SELLS: Two pieces. Number 1, I, anyway, haven't seen an Illustrative Plan showing what could have been drawn in 2011. I just haven't seen that. Based on Mr. Fairfax's maps from this decade, I suspect that he probably could have drawn more than 12 districts at the time. I think he may have even testified to that. That part, I think is pretty easy. The hard part is could we have analyzed the elections in a way that could support such a claim. I don't necessarily dispute that voting was polarized at the time, but could we have proven that, or could someone have proven that, and that I don't know the answer to.

Dr. Handley suggested in her testimony that Arkansas's election results have basically been a mess until the last few years, and she had trouble analyzing them the last decade. I

can't say about before that, but that may be why.

THE COURT: I guess what I'm trying to get at is, it doesn't seem to me like the question of whether or not the new Board Plan or the Illustrative Plan follows the sort of older plans means very much, because we don't really know whether the older plans were good, bad or indifferent. For example, let's look at Illustrative District 5. One could very easily say, if one thought it was a racial gerrymander now, the fact that it was racially gerrymandered in 2011 or 2001 doesn't, in some sense, save it now. Do you see my line of concern there?

MR. SELLS: Yeah, I do. But I believe the 90s plan were drawn by a court. And we don't -- I don't have that map for you, but I find it hard to believe that the 2001 plan was that much of a deviation from what the court told them to do in the 1990s.

THE COURT: Theoretically, I guess that would mean that the 1990, slash, more recent plans, could have violated the Voting Rights Act. That's my point. I mean, I guess you are relying on those plans, but it strikes me that those plans, either in terms of equal protection or in terms of the Voting Rights Act could have very similar problems to what you are alleging now. I know I'm talking about racial gerrymandering, but you're talking about the voting rights. And so I just -- I guess what I don't really understand is why -- how much does it matter that your Illustrative Plan is like the old plan.

MR. SELLS: Well, we think it matters a great deal, because that was one of the Board's criteria. And that was the starting point, at least for Mr. Fairfax it was. It wasn't for Mr. Davis. The Board of Apportionment decided that one of the criteria was to maintain the core of existing districts. That's a perfectly legitimate and appropriate criteria.

THE COURT: Okay. I think I understand the Arkadelphia, Pine Bluff issue. As I understand it, the real question for me to decide, at least as it relates to Gingles 1, is whether or not I think the two black populations there are sufficiently similar to constitute essentially a geographically black population. Is that the right way to analyze that question or no?

MR. SELLS: I'll say the answer is yes with an asterisk, because I don't think it's necessarily kind of a subjective test in a way. You know, I showed you the map. They are in the same part of Arkansas. I don't think you have to find that they, you know, go to dances together or something of that nature to find that they are --

THE COURT: But ultimately, in terms of the objective effects, I have to make that decision. I guess you are right, I can't use absolutely anything I want, but within whatever the objective factors are, at least as I understand it, that's the question I have to decide. I want to make sure I am right about that, that the question I have to decide is whether those two

populations, two black populations of those cities are sufficiently similar to constitute a graphically compact minority population. Is that right? Again, I'm really not trying to trick you. I just want to make sure I am answering the right question that you all think I need to answer.

MR. SELLS: And my answer was yes, with that caveat, and I think that Mr. Fairfax's testimony really puts the nail in that coffin, if you will, by comparing the socioeconomics of those two, the black communities in the two cities.

THE COURT: Let me ask you what is off about -- not analogy but the logical train I'm about to make. I understand you say that Arkadelphia and Pine Bluff are similar, both in terms of city characteristics and in terms of black population. And I understand you make the argument also there is the same sort of geographic region according to the state, but there is another district. Unless I'm wrong about this, there is another District 16 that goes from Pine Bluff out to the Mississippi River. And I think you tell me the same thing about that district, that Pine Bluff is similar enough to the counties out in the Mississippi delta that there is some kind of geographic compactness of the populations. What I'm trying to figure out is does that mean that your point is the city population of Arkadelphia and the delta region all of the way over by the Mississippi River are all the same, and we can essentially consider that whole span to be similar?

MR. SELLS: No.

THE COURT: So where is the logical fallacy that I'm making in that jump.

MR. SELLS: I would refer to Arkansas's own website in the way that it describes Pine Bluff. I would also refer to the satellite image of the state of Arkansas, right. What the state of Arkansas says about Pine Bluff is that it's on the boarder between two of Arkansas's natural regions, the southwest Arkansas region, and the lower delta region. And it is. If you look at the satellite image, you can see right where Pine Bluff is, and it's a bluff. It is on a bluff overlooking the delta covered with pine trees. And so we are not talking about a district that connects southwest Arkansas to the delta side of Pine Bluff in any significant fashion, or a district that connects the Mississippi River to the bluff side of Pine Bluff. We are talking about a district that goes from the delta into Pine Bluff, and another one that goes from the Pine Bluff -- the bluff side of Pine Bluff over to Arkadelphia. If you -- we had drawn a district that goes three quarters of the way across the state in that fashion across those regions, then I think we would be in a much different spot.

THE COURT: And maybe I'm slicing it too thinly, and maybe I'm sort of taking too literally the words of the test. I guess what's holding me up is if -- if the delta, all of the way over by the Mississippi River, those communities are essentially

similar communities of interest, in terms of the minority population with Pine Bluff, and the ones in Pine Bluff are similar to Arkadelphia, is what you're saying the sort of similarities are different in the sense of one has similarities here, one has similarities here, but the similarities are different, because I don't really know how A could be similar to B and B could be similar to C, but A is not similar to C.

MR. SELLS: Well, I haven't examined any socioeconomic data connecting Arkadelphia to, I don't know, Helena, West Helena. There might be some similarities there, but that's not the -- not necessarily the end of the story, right. There are other factors to consider. And there is the geographic difference as well. That is a long way.

THE COURT: Okay. I understand your answer. Gingles 2, I mean, I'll obviously ask the defendants, but I don't think they're raising --

MR. SELLS: Before we move on past Gingles 1, there is one point I want to come back to on Gingles 1.

THE COURT: Go ahead.

MR. SELLS: You were asking about the remedy.

THE COURT: Yes.

MR. SELLS: And if you knock out, let's say, District 5, is it gone forever. And I should have mentioned when you asked that question, that I have been involved in a case where during the remedy stage the case was assigned to a special

master, and the special master, who was better than my expert, was able to draw one more district than I was able to draw. And the court implemented that as the remedy. And I drew four out of seven districts, the special master -- no, I drew three out of seven districts. The special master drew four, and the court approved four and that was affirmed. That is the Wright versus Sumter County case. So I would not necessarily say that just because Mr. Fairfax, because you don't like Mr. Fairfax's district, you know, perhaps Shelby Johnson can draw a better one, or perhaps this case is assigned to a special master who can even draw a better one.

THE COURT: So to make sure I understand your point, in theory, let's say I thought you didn't make the cut on one of the Gingles factors on the district in southwest Arkansas, let's say Little Rock, and let's say the -- let's say southeast Arkansas, but I thought you did make the cut in northeast Arkansas, and I thought there was a liability problem. I guess your point is in theory, at the remedy stage, whoever is drawing the maps would not be limited to adding an additional or two additional districts in northeast Arkansas. Theoretically they could add two districts in any region, is that right? I mean, is that your position?

MR. SELLS: I think what I would say is that any revenue would probably have to begin with northeast Arkansas, but if Shelby Johnson could draw a district that fixes whatever

problems you identified down there, or if Mr. Fairfax could draw another district that fixes the problems that you identified down there, there is no reason why the court couldn't adopt that plan as a remedy.

THE COURT: And I guess that would be right if my ruling was based on Gingles 1, but if my ruling on something was based on Gingles 3 in terms of no racially polarized voting in X particular area, that then couldn't go back at the liability stage, right, I'm sorry, the remedy stage and add a district there?

MR. SELLS: I think that's probably right. I have never seen that happen.

THE COURT: Neither have I. Part of why I'm asking you the questions is just to make sure I understand what your argument is, so I'm starting from the place where I know what you all want.

Okay. Gingles 2, I don't think the defendants bring it up. I assume you agree with that.

MR. SELLS: We do.

THE COURT: Okay. I'll ask the defendants whether that's right.

Gingles 3, we have already talked about the effectiveness score in terms of it being one exogenous election. I understand your answer there. Let me ask you this on Gingles 3. So, in terms of racially polarized voting, do you agree that I need to

go district by district and make sure in the challenged districts that are racially polarized voting, or do you think that I can do that as a statewide matter and then just sort of assume it for all of the districts?

MR. SELLS: I think I would, if I were in your seat, look to LULAC versus Perry.

THE COURT: Okay.

MR. SELLS: And what the Supreme court noted there, finding that the plaintiffs had satisfied the third Gingles factor with respect to Congressional District 23 is three things. Number one, looked at a statewide analysis. We have done that. Number two, look at overlapping districts. And there were fewer of those, because we are talking congressional district, but they did analyze some congressional races under a predecessor district. We have done that. And the third thing that the Supreme court relies on is ineffectiveness index. We have done that.

THE COURT: Okay. So I guess the answer to that is look at everything and sort of see how it all fits together. Is that a fair re characterization of your answer?

MR. SELLS: I think so. I mean, it all points in the same direction, and it did LULAC versus Perry.

THE COURT: Okay. Onto perhaps in some sense the biggest question or at least the biggest legal question for me and I'm really just going to give you some room to talk about

it. I will tell you currently, of course I have not talked to the defendants about, so my mind may change. Currently my view on the causation argument is that it is something to take into account at the totality of the circumstances case if the Gingles preconditions are passed. At the totality of the circumstances stage, the burden of proof is still on you all. Now that doesn't mean you have to negate every possible cause of the voting disparities other than potentially race, but it does mean that especially in a case where the defendants raise it as a possible issue, you all at least need to negate politics as a -- and I'm going to leave a blank here, primary motivating, dual factor. One thing I want to know is what that blank should be, but do you agree or disagree, either in part or in whole, with what I have just said.

MR. SELLS: I would say probably in part.

THE COURT: Okay.

MR. SELLS: We certainly agree that to the extent that you consider causation, and I'm putting that in air quotes, for the record. To the extent that you consider causation, it should be done at the totality of circumstances stage of the case. I'm not sure I agree that we have the burden of negating anything that the defendants come forward with. I think the cases in Second Circuit, First Circuit that address and allow causation evidence to come in are less than clear on that, but basically treated as an affirmative defense, or some kind of a

defense.

THE COURT: White and Whitcomb don't really do that though, right? I mean, to the extent causation is relevant at all, I think it's because you trace it back to White and Whitcomb. At least that's my view. If that's true, I guess what I -- what I tried to do is read both those cases and sort of at least ferret out some meaning from them. And to the extent I could, the meaning I have ferreted out from them is that politics is a big enough potential explainer of the discrepancy, that it's the only sort of nonracial issue that you all need to disprove if they raise it. Is that basically a wrong reading of White and Whitcomb in your view?

MR. SELLS: Well I think it's a wrong reading of Gingles. I think that the 1982 amendments fundamentally change the nature of proof under a Section 2 claim, Statutory Section 2.

THE COURT: Even though the Senate report basically said they were trying to go back to White and Whitcomb?

MR. SELLS: Well, what they were trying to go back to were the White and Zimmer factors, which are subsequent to Whitcomb. And what the White and Zimmer factors attempt to do is to do that very question, to answer that very question. Is it race, or is it some other factor. But I think once they are in the senate report, and once the Supreme Court essentially adopts the senate report, what the Supreme Court is getting at,

both with the just Gingles preconditions and with the totality of circumstances test, is to try to make it a little bit more objective, right. And what the courts have said, both about the White and Zimmer factors preGingles and about the senate factors post amendment, is that those things give rise to a strong inference that race is the factor, right. And so where we proved that three Gingles preconditions, there is a very strong inference that race is the factor. And in the 11th -- excuse me, the Eighth Circuit under Harvell, that takes us a long way to the end, maybe not all of the way to the end, but a long way to the end. And it is because after the 1982 amendments and Gingles the Supreme court had sort of regularized that inquiry.

THE COURT: I'm thinking about your answer. Hold on a second. Let's assume for a second that under the totality of circumstances test, or maybe as an addendum to the totality of circumstances test, you all have the burden of proof to show that race isn't the explanatory factor here. And the reason I'm struggling between A explanatory factor and B explanatory factor is I'm about to ask you about this.

MR. SELLS: Okay.

THE COURT: What is it, in the plaintiff's view, that would preclude liability under Section 2? Does politics have to be a motivating factor, the motivating factor, if it's half politics and half race, if I can't figure out how much it is politics and how much it is race, what am I looking at? Now I

will say as a premise I understand that your position may be that I shouldn't worry about this political question at all, but if we are past that, what is the right thing I'm looking for here?

MR. SELLS: Well, I want to ask -- I want to push back against the hypothetical a little bit to say that I really don't think that politics is the right inquiry here. In that respect, I agree with the first and the second circuit that have said yeah, you can disprove causation, but you have really got to point to things like candidate quality, underfunding, things like that, because when you talk about a black preferred candidate lost because they are in the wrong party or perhaps they espoused the wrong issues during the campaign, then what you are really talking about is black voters have the right to have any flavor of ice cream they want, as long as it's vanilla, right. If equal electoral opportunity means anything, it means the opportunity to select candidates that they agree with on the issues, whether those candidates are democrat, republican, libertarian or otherwise. Right. It is the next extension of Judge Arnold's statement in Smith versus Clinton. Equal opportunity is not realized under the Voting Rights Act if black voters can elect candidates of choice, as long as those candidates are white. That's not what equality is. So that being said, I'll return to your question. And I think there is not a clear answer in the case law on that, on how much I have

to disprove, but the whole reason why it's a factor at all is because of the on account of race part.

THE COURT: I'm with you.

MR. SELLS: So what I gleaned from that, I think it's also consistent with the intent cases under the constitution. Arlington Heights, you can show discriminatory intent if you show that it is a factor. It doesn't have to be the sole factor, as long as it's a motivating factor. The text doesn't say solely on account of race, any on account of race, I think, would satisfy the text in Section 2. And Professor Lockerbie freely admitted that race is still a factor in Arkansas politics. Right. So what I think has to be shown for us to lose is that race has no role to play in Arkansas politics. And everyone knows that that is not the case.

THE COURT: I have a question that is, I guess, tangentially related to Purcell, or really to what the Supreme court did yesterday. And it is probably a good excuse for if you want to talk more about that, talk more about that, but I want to make sure you can answer my question first. And the reason I'm asking this is, it is very clear to me you are an expert in Voting Rights Legislation. I have read the cases you have been involved with. I have seen you here. I think you have done an excellent job at this hearing. So if anybody could answer this question, it's you. I was heartened when Justice Kavanaugh wrote his concurrence, not for any reason in terms of

what the result was, but because both him and Chief Justice Roberts seem to agree that the Gingles test is incredibly hard, incredibly complicated, and incredibly messy. And until I saw that, I was a little worried that I was the only one thinking that. And so I guess here's what I want to ask you. It strikes me, given what Chief Justice Roberts said, and what Justice Kavanaugh and Justice Alito said, that the Supreme Court is on the cusp of figuring out what to do about the difficulty of the Gingles test. As a practical matter, does it make sense, given everything else they have said, as a practical matter, does it make sense for me to wait until they have sort of unboggled Gingles, and come up with whatever new rule or new explanation they are going to come up with, or a refinement, though it doesn't have to be a big change, a refinement of Gingles, as opposed to do dealing with it under the current Gingles framework, and then having to go back very shortly thereafter and dealing with it under whatever refinement the Supreme Court comes up with. And I wouldn't normally ask this question, but it just strikes me, given what the court has said in these concurrences and descents that everybody seems to think Gingles is a mess and overly complicated.

MR. SELLS: Doesn't seem to be overly complicated to me, Your Honor, but I have been doing this for a while. So we don't know when that case is gonna be on the docket, but on my Twitter feed it says it is going to be on next term's docket,

which means that we are looking at a decision by July of 2024, and I think that answers the question.

THE COURT: It does.

MR. SELLS: And that's too long the wait.

THE COURT: Okay. I don't have any other questions. I imagine you either may want to talk more about Purcell now or you may want to wait and in your rebuttal after the defendants go, talk more about Purcell, but that's up to you.

MR. SELLS: Yeah, I think there are a couple of things I want to say about that. And Justice Kavanaugh cites two cases near the end of his concurrence; Lucas versus Townsend, and McCarthy versus Briscoe. I'm well familiar with those cases. Those are cases where the Supreme Court has stepped in at the last minute to change election rules. And they're not the only two cases that are like that. Norman versus Reed, 1992 Supreme Court case that the Supreme Court stepped in on October 25th before a November election, Hadnott versus Amos, 1969 case, Supreme Court stepped in on October 11th. Dailey versus Tenant. Court stepped in on September 22nd. There is a whole mess of cases where courts make changes -- have made changes to election rules at the last minute. And the reason why I think Justice Kavanaugh cited those cases is because those are examples of, you know, where the outcome was fairly clear. In other words, he's bringing those cases into the Purcell era. He is not rejecting those cases. And as I said earlier, I think this

falls in that category of cases where the outcome is sufficiently clear, because we are talking about a delta of five seats. But we're also in February, and I don't know what kind of scheduling order this court has in mind for the rest of the case, but it is entirely conceivable that we have trial in August and you issue a ruling in September, and then we are in Lucas versus Townsend land and -- and I think it's far better to make that decision now than, you know, in the middle of October, or to have a special election following another election. We have got the time to do it. We think we are going to prevail. And so we don't think that this new rule in Alabama prevents the relief that we are seeking either now or next year in 2023.

THE COURT: Let's talk about the 2023 request. And I understand it's an alternative request. I get that. Are there any cases where that's ever been done?

MR. SELLS: Ketchum versus City Council of City of Chicago, 630 F. Supp 551 at pages 564 and 65. That's a Northern District of Illinois case, as you might imagine, from 1985. And that case does call for a special election in a aldermanic election that found to be held under a plan that violated Section 2, but I cite it in particular, because it also sort of discusses the cases that come before. And the power of federal court to do that kind of thing has been established since the 1960s, as you might can imagine.

THE COURT: And I guess that's, in some sense, my

question about the power. I have not looked this up yet. I will. I am assuming that the Arkansas constitution prescribes the terms of state representatives. Obviously, if there is a Voting Rights Act violation here, the Voting Act -- the violation is the reapportionment map. It is not the section of the constitution that establishes the terms, right? I guess, is your position and the position of the cases, or at least the cases that you brought up in terms of my equitable power that would flow from remedying a Section 2 problem, I can essentially, you know, my words, not yours, run roughshod over the Arkansas constitution terms, because I mean, obviously the Voting Rights Act is higher in our order of Supremacy. Is that essentially your position?

MR. SELLS: Well, specifically about terms, absolutely. And I wouldn't call it running roughshod.

THE COURT: Those were my words, but I'm a little worried about that.

MR. SELLS: So the Eleventh Circuit in my Sumter County case, Wright verses Sumter County approved remedial plan that adjusted the terms of office. That was just 2020. But I want to push back on the premise of that question a little bit, because you said that the violation here is the Board passing the apportionment plan. That is not the violation. The violation is the election held under that plan. And what the remedial cases from the 1960s, which you know, span frankly back

to the Brown versus Board of Education stand for is that it is not only the -- within the power, but it is the duty of a federal court to make black voters whole from an election that occurs under an unlawful plan. And that doesn't mean -- that does not mean that the court needs to be oblivious to state prerogatives. I think the Perry case from 2012, the Perez versus Perry from 2012 makes that entirely clear. You have to work within the state framework as much as possible, but the power of the Supreme Court -- excuse me. Power of federal courts to act in this area is not contested, and Mr. Steinberg conceited as much.

THE COURT: I appreciate it. Thank you very much, Mr. Sells.

Defendants?

MR. STEINBERG: Can I have five minutes?

THE COURT: You may. We are going to take a five-minute break.

(Recess taken from 2:43 p.m. until 2:51 p.m.)

THE COURT: Okay. Mr. Steinberg, you are up.

MR. STEINBERG: Do you have a preference for the sequence of issues that I address?

THE COURT: I do not.

MR. STEINBERG: Then I'm actually going to start with Purcell.

THE COURT: Okay.

MR. STEINBERG: So I think this breaks down into two parts. I'll take the original request that we had to have relief this year.

THE COURT: Can you make sure you are on the mic?

MR. STEINBERG: Sure. Sure. Yeah. I'll just come over here. I think this case is an a fortiori case compared to Alabama in a lot of ways. The Alabama District Court entered its order 15 days ago. We're 15 days ahead. I know he said that Alabama absentee's voting starts March 31st. However, our absentee voting starts on April 7th. So there is a one-week smaller window than what the court was faced with in Alabama. If you look at the Staybry thing on which the court based this decision to grant what Justice Kavanaugh tells us is a Purcell-based stay, there are about three pages in the stay application and reply combined that talk about the Purcell problems. What we heard --

THE COURT: Can I ask you a question here? This might

have a very easy answer. Obviously, we have an opinion from Justice Kavanaugh, and I believe it was Justice Alito who says this is a Purcell-based stay. We don't know what the other three justices and the majority were doing. I mean, quite frankly, I think the commonsense assumption was it was a Purcell-based stay, but I don't know that. And maybe it could have been for some other reason. Do I just assume that Justice Kavanaugh and Justice Gorsuch are kind of speaking for the court here, or no. Sorry. Not Justice Gorsuch, Justice Kavanaugh and Justice Alito.

MR. STEINBERG: I think there are two levels of that really. Justice Kavanaugh is speaking certainly for himself about why he concurred in this order and did what he did. And Justice Alito joins fully in his opinion. What they go on to do is they respond to the dissent, which says this signals to lower courts some change in the law. They say, no, this order signals absolutely nothing about the merits. The basis for this order, the reason the court did what it did was Purcell. If the other three justices who joined in the order, you know, actually wanted to send a merit signal, or on the other hand, want to say, ie., you're really signaling the wrong thing about Purcell, they could have responded to that. So I think they are actually making a statement about why the court did what it did. I don't just think that. They literally are. So I think we have to take that on its face. And I'll also say that while Purcell is

a well-settled principle in the law, Alabama has a theory of Gingles 1 on the merits that would, you know, at least the court would have to announce it for it to become the Supreme Court's view of the law. I don't think that the Supreme Court has ever adopted yet Alabama's theory of Gingles 1, and I believe that is the only merits argument Alabama is making. So I think the only reasonable view of this order is that it's based on Purcell. So if I could turn back to the similarities and differences, Alabama, like us, put on some testimony from an election officer. And of course he is going to talk about similar things, the problems of reassignment, the problems with cascading deadlines, but what we heard the other day, last night, was that the effects of forcing reassignment of voters would literally be catastrophic, and that there would be a domino effect of a series of cascading deadlines. And we also heard, just as a blunt fact, that only nine of the 75 counties have completed the reassignment that they need to do, based on the map that the Board adopted back in late November, that they need to get done for the primary. And they would have to start all of this over from scratch if a new map were ordered, once that map was actually in existence, you know, the work couldn't start today or tomorrow night, that they would have to wait for that map to get adopted, and then the work could begin. I think that, before you ever get to the problem with the cascading series of statutory deadlines, is just an intractable stopping

point to have effectual relief for this election. And I think that we are in a much worse place than Alabama was when it went up to the court and got a Purcell stay on the redrawing of seven congressional districts. We are talking about 100 state house districts, and a whole lot of substantively new districts, not just one additional requested majority black district.

THE COURT: So is what you're essentially saying is under the fourth prong of, I guess I'll call it Kavanaugh's Purcell light test, this case would fail no matter what happened with the first three prongs?

MR. STEINBERG: Yes. This is way beyond the phrase that Kavanaugh uses, Justice Kavanaugh uses. There is significant confusion, cost, hardship. This is the uncontroverted testimony shows something that is really impossible, and the three-judge district court in Alabama had a very different view about how to do Purcell. They said, we can only withhold relief if it would be necessary to do so. I would submit that we would even meet that standard. Of course, that is not really the law. That was a mistaken, you know, a reasonable mistaken view, but we would certainly yes, meet the fourth prong of Justice Kavanaugh's test.

I'm happy to talk about a few of the other prongs. I think the delay in bringing this case is a concern under that test.

THE COURT: So I am a little confused about that argument.

MR. STEINBERG: Sure.

THE COURT: At least from what I can ferret out, the plaintiffs didn't delay at all, and they brought it the first day they could. Why is that wrong? Could they have brought it before, or would it have been premature?

MR. STEINBERG: So number one, I think that's a pre enforcement challenge. The Board adopted a map. Doesn't become effective until the culmination of a challenge period in state court, but they adopted that map. And I don't really see how it's terribly different from suing before statute goes into effect, but it's been enacted by a state legislature. Theoretically somebody bring in a pre enforcement challenge in state court and stop it from, you know, becoming the law of the state, a state court could stop it. That's just the situation here. So I believe this challenge was right, but let's say that's wrong. There is a 30-day challenge period in state court, and they could say to that court there is a Voting Rights Act problem. Mr. Sells is the smart, so he is going to say we would remove it. Maybe that's so, but if it's unripe in federal court, then it would go back to the state court. So I don't understand why they didn't avail themselves of that 30-day challenge period, or how it could be read to only apply to challenges under state law. So I do think there is a real delay, and that they did not need to wait until December 29th.

On the merits, that will get into the merits or preview the

merits, I at least think that the merits here are just as unclear cut as they were in Alabama. Alabama's sole argument on --

THE COURT: Let me stop you there. Do you accept Mr. Sells' position, at least so far as I think I understand it, that even if there was liability on one district, so you knocked out all of the others, but they could draw 12 districts instead of 11. I think my math is right, but you take my point, do you agree with Mr. Sells that if it was clearcut that they, at least, get one more district in terms of liability, that that would satisfy prong 1 of this Purcell Light test?

MR. STEINBERG: Yeah, I would agree to this district, yes. That would be if it were a clearcut liability as to that district, then it is a clearcut liability to that district.

THE COURT: Okay.

MR. STEINBERG: I'm not going to preview the full arguments on the merits right now. I'll just say that, you know, we have disputed a lot more of this test than Alabama has. Alabama simply said there is polarized voting, there is a district that looks pretty compact, but it turns out that if you use a computer program 2 million times you never get it. Therefore, ex post facto, this is race based, not compact. I think we have stronger evidence of, you know, racial intent here than that. But we also have a dispute over polarized voting. We also have a dispute over causation. We have a lot of issues

in dispute between us, so I don't see how, you know, the merits are less clearcut in Alabama than in this case.

THE COURT: Let me ask you, in terms of this clearcut issue, and of course I think we're all struggling because I know I am, because this opinion was just issued. And so I don't know if anybody has even really had time to digest this, let alone sort of parse over the word clearcut, or entirely clearcut, or figure out what that actually means. Is entirely clearcut like beyond a reasonable doubt, is it clear and convincing evidence, is it a firm conviction? Do you have any sense of what that language means.

MR. STEINBERG: I don't think it's a factual standard like clear and convincing evidence or beyond a reasonable doubt. I think it's something like a certainty of likelihood of success on the merits incorporating all of the legal and factual elements of that, but I do want to say, you know, if -- you wouldn't really ever have to apply Prong 1. We are so far above the significant confusion, hardship, et cetera on Prong 4 that that could be the beginning and end of the --

THE COURT: I think you have very strong arguments on Prong 4, but obviously we are talking about Prong 1 now.

MR. STEINBERG: Right.

THE COURT: And so I guess I'm still confused a little bit by your answer. You said likelihood of success on the merits, which at least in the Rounds context, which I understand

plaintiffs are disputing the Rounds should apply, but let's for a second say Rounds applies. That's more likely than not. That strikes me far below entirely clearcut. So I'm trying to figure out what entirely clearcut means.

MR. STEINBERG: I think that was misspeaking, or it was misspeaking. What I mean to say is essentially -- I apologize for that weasel word. Certainty of success on the merits.

THE COURT: No apology. Certainty of success.

MR. STEINBERG: Yeah. The phrase in the opinion is entirely clearcut. The underlying merits are entirely clearcut in favor of the plaintiff. So I think entirely means entirely.

But I want to say something about the 2023 request. There are many problems with that. One is that they never asked for it until today. It is not in their PI motion.

THE COURT: Let's assume I get over all of that.

MR. STEINBERG: Sure.

THE COURT: Given the late-breaking Supreme court issue.

MR. STEINBERG: Right. I think the most fundamental problem, that is not in the nature of a PI request. The reason we give people a relaxed standard on the merits, likelihood of success on the merits versus having to prove your case to get a permanent injunction, is that somebody is facing some kind of the imminent harm and they need immediate action from a court to

save them from imminent harm. And so we go in here. We don't have discovery. We are moving very fast, and we say, well, you are likely to succeed on the merits, you get an injunction. They are talking about relief that would kick in 15 months from now, essentially. I think that we could try that claim. I think that there has also been no testimony about what the effects of such an order would be, how one-year terms would affect the work of the state legislator, how one-year terms would affect the work of the election officials.

I think I forgot a point.

Finally on that, that's a much more extraordinary use of equitable power than merely moving a filing deadline, or even slightly delaying the primary itself. That's changing the nature of this office, the duration of the terms that these people sit for. I heard one --

THE COURT: Do you agree with your friends on the other side that I have the authority to do it if I think it's appropriate?

MR. STEINBERG: No.

THE COURT: Why not?

MR. STEINBERG: Well, by no, I mean that I have not seen where that authority comes from, or that there is law telling you that you have that authority. I have seen a district court opinion in 1985 in Illinois that read a Seventh Circuit opinion in 1973, it turns out, and said you can delay

elections, but I haven't seen anything binding on you that says that you can do that. So right now, the answer is no, we're not aware of that authority or the authority saying that you have such authority.

THE COURT: I guess, doesn't that authority flow from the Voting Rights Act? If there is a Voting Rights Act violation, I would think I have the equitable power to remedy that, even if that includes changing terms set out in the Arkansas Constitution, but that may be wrong.

MR. STEINBERG: I don't even understand, in a sense, how that is a remedy of the dilution that would have theoretically occurred. So we would have an election under a map that they say is dilutive. People's votes would be diluted. People would then be elected. They would serve those terms for a year, and then under their proposal we would have a different election. It seems to me the way you cure vote dilution is to have elections under undilutive maps. I don't understand how --

THE COURT: Yeah, but Steinberg, put yourself in the shoes of a black voter in one of these packed or cracked districts whose vote has been diluted, and so they don't get to elect, or they don't even get the opportunity to elect the candidate of their choice. Isn't the harm from that 50 percent less if they are only being represented by that person for a year, as opposed to two years?

MR. STEINBERG: I don't think the answer to that is

yes. I believe that vote dilution is remedied by having elections under undiluted maps, and that it would not be an appropriate remedy under the Voting Rights Act for example, to say so and so was elected under a diluted map, the federal court is removing that person from office now, and kind of holding a new election. I mean, perhaps that just assumes the answer, but it does seem very strange to say that when somebody is elected, that itself is a violation of the Voting Rights Act, and he needs to be pulled from office and replaced with somebody elected under a different map. I think that the Voting Rights Act is violated each time the election happens, if there is a dilutive map, and that the remedy is a new election. Again, I think the most fundamental point here is that that claim for relief the year out from now can be tried. There is not imminent harm under the hypothetical 2023 election. And they should not be able to get an order for the 2023 election, based on a mere likelihood of success on the merits. They need to actually prove their case to get relief 15 months from now.

If you don't have anymore questions on Purcell --

THE COURT: I do not.

MR. STEINBERG: -- I'll talk about the merits, so to speak.

On Gingles 1, I think the really fundamental difference of the view on the law between myself and Mr. Sells, is that they think race can be used even as predominant motive

to remedy Section 2 violation. We read the Eighth Circuit to have said, as a statutory matter, you cannot do that. You cannot use a racial gerrymander to satisfy Gingles 1. You can't use a racial gerrymander as a Section 2 remedy. Predominantly, racially motivated districting is off the table in a Section 2 case. And a plaintiff needs to prove that it is possible to draw majority-minority districts without using race as a predominant motive in those districts.

THE COURT: Let me ask about that. And this is, I guess, partially off of the Alabama case, but more generally a question -- sort of an overall question. I understand the theory about sort of automating map systems now to be able to draw all of these random maps based on traditional district criteria, and then looking at them and seeing if you could get an additional majority-minority district. I understand that point. But if that's off the table, either because it's not an absolute requirement, or because we are five years ago before we had this sort of technology. I think what I struggle with here is probably what everybody, including Mr. Fairfax and everybody else struggles with. How do you draw a map that shows you can put -- you can get extra majority-minority districts without, in some sense, using race. And not just sort of saying well, race is one of the factors, but what you might call a predominating factor, meaning if you're trying to draw the map to get additional majority-minority districts, it makes sense that you

are going to say oh, is here a bunch of extra majority-minority population, maybe I can put this in following traditional redistricting principles, maybe I can put this into this other district and create that. I think what I'm struggling with is how do you use race in a situation like this, which your obviously, in some sense, called to do, without it predominating?

MR. STEINBERG: It is a very difficult line to draw. And I think the most helpful thing I have heard about this the past week was actually Your Honor's question about the square or the circle rather that was being split two ways, and so on out into the radiating pizza pie slices. I think that a mapmaker such as Mr. Fairfax can look at a population and observe that it's cracked say. And say well, you know what, it will be possible to draw a circle around this and suddenly it's a majority-minority district. He hasn't made an effort to draw a race conscious district. He's just observing that a so-called naturally occurring majority-minority district exists in that area. I think where you get into trouble is if you draw a compact shape and then you say, as the Board did, frankly, you say, ah, I'm at 45 percent, what do I do. Well, you know what, let me reach out here and let me exclude these people here, and then suddenly I'm at 50 percent. Now you are, in the language of Miller V Johnson excludeing, or including a significant number of people on the basis of their race to hit a racial

target. And everybody agrees that if Section 2 weren't in the mix, you couldn't do that. And our reading of Eighth Circuit precedent is that it says, even with Section 2 in the mix, you can't do it to satisfy Section 2 either at the liability stage or at the remedial stage.

THE COURT: Okay.

MR. STEINBERG: So to go on with that a bit, I think the inquiry that you are really faced with is you have to look at their proposed illustrative districts, which is how they prove that satisfying Gingles 1 is possible. It isn't enough to talk about the hypothetical possibility of other districts, or even to draw one district without explaining how the other 99 are going to fill in. They need to prove that it is possible to draw a district that satisfies Gingles 1. So you look at these illustrative districts, and you ask, are these predominantly motivated by race in the sense that, are a significant number of voters included or excluded from the districts on the basis of race. And if you would say that in the absence of Section 2 that district would violate the constitution, then you can't do it under Section 2.

THE COURT: I'm listening.

MR. STEINBERG: Okay.

THE COURT: I'm thinking, but I'm listening.

MR. STEINBERG: All right. I don't have a lot of comments about specific districts. I'm happy to answer

questions about specific districts. I think there are a few that exemplify this problem.

THE COURT: What do you think the worst district for you is, and the best district for the other side is?

MR. STEINBERG: Of the ones that we challenge?

THE COURT: Obviously.

MR. STEINBERG: Right. I think the worst districts for us are the ones that we attack for splitting Helena/West Helena from the rest of Phillips County.

THE COURT: Is that 48 or something like that?

MR. STEINBERG: I think the pair is 48 and 12 on one side of the split and the other. You look at that line. If you just look at that line, it doesn't look like a terribly unusual line. And I don't want to argue their case for them, but -- and I would like to talk about, you know, why we think even those are a problem.

THE COURT: Yep. Tell me.

MR. STEINBERG: Okay. I think the essence of the problem there is that this rather unusual split where you take a county seat, remove it from the rest of its county and take the rural population left over from that county and have them districted with Pine Bluff, a long way over in a situation where they have very little political power inside this Pine Bluff dominated district, the reason you would do that, the only reason I think that we heard from Mr. Fairfax about why you

would do it is it creates two majority-minority districts, and a simpler scheme does not. You are able to take --

THE COURT: But I guess that's the exact reverse of the question I asked before. I mean, you get to take race into account in some sense, and it would strike me that looking at a map, you look at Helena, West Helena and say there is a bunch of population there. And instead of it being in this district, let's see what happens if we put it in that district. Is that really -- and again, putting in those district don't seem to really violate the other traditional redistricting principles. Is that really enough to say that race is predominated? I mean, maybe it is under your theory. It just seems very difficult then to ever draw illustrative maps, unless we are like behind the veil of ignorance.

MR. STEINBERG: I think that if you find that the reason for excludeing Helena from the rest of Phillips County, or the vice versa is race, then race was the predominant factor that motivated the placement of a significant number of people within or without a particular district. That may well be a difficult standard to satisfy. And I understand the impulse of my friends to say, we can place predominant -- sorry. We can place significant numbers of people within or without particular districts in order to comply with Section 2. The difficulty for them is that the Eighth Circuit, starting in the last sentence of Harvell, said stop doing racial gerrymandering as the Supreme

Court has defined it, even in order to comply with Section 2. And they remanded that case down for a remedy, and then a trilogy of cases, they started applying this test up at Gingles 1. And there has really been no response from Mr. Sells or plaintiffs on that reading of Eighth Circuit precedent, and I'm happy to take questions from you about it.

THE COURT: Nope. I'm okay. I mean, that's just whether or not I agree with you or Mr. Sells on that reading of Eighth Circuit. I can deal with that one.

MR. STEINBERG: Okay. I think then I will turn to Gingles 3.

THE COURT: No, can we talk about -- can we talk about -- again, I may screw up the numbers between the Illustrative Plan and the Board Plan, but I'm talking about the district in northeast Arkansas that has what you all would refer to as an island, what they would not refer to as an island is 55 right?

MR. STEINBERG: Yes, 55.

THE COURT: Okay. Is your only claim there about why this doesn't pass Gingles 1, basically that hangover island?

MR. STEINBERG: We have -- well, no. The answer is no. That is our only racial gerrymandering argument. And I thank Your Honor, because you have reminded me of some other things that I do want to say about Gingles 1. The island is our only racially gerrymandering argument. I think that we would

have traditional districting principles, which unlike Mr. Sells, I do read LULAC and Abrams before it to say are factors even in Gingles 1, compactness in the normal sense, not the special Section 2 sense.

But the other thing I do want to say about District --

THE COURT: Hold on. Before we get onto what else you want to say on Gingles 1, I -- whether or not it's right or wrong, and I'm going to go back and look very closely at the case law. When I look at that map, I don't have an instinctively negative reaction to that illustrative district. It strikes me that the hangover part of it, the sort of small channel has nobody in there. There is no population in that small green channel at the top. It might feel a little different to me if there was -- if there was a small -- you know, if there was population there. It also might feel different to me if the hangover island came down further. But it doesn't come very far. It just doesn't strike me as a particularly bad map-drawing exercise. I mean, if you look at some of the other -- some of the other districts, they may not have the sort of true hangover, because it's not on the Mississippi, but there are districts that are sort of pushed to the right a little further than the districts under them, or pushed to the left. Is this one really that egregious to you?

MR. STEINBERG: The hangover, even in their own map is a very unusual feature. Districts that are essentially aligned

east and east where they switch positions, and the one that was on the west is now on the east of the -- to the east of the district that's on the east, I find that a very strange districting maneuver.

THE COURT: But doesn't it happen a lot? I mean, it happened -- I mean, if you look at maps from all over the country, I'm guessing you would see that a fair amount. I haven't done it, and I don't know and it's not in evidence, but it would be one thing if the hangover island came all of the way down, or even came really significantly down, but it doesn't. It is sort of more in that northeastish part of it. Why is that so bad?

MR. STEINBERG: It is a very strange thing -- it would be a very strange thing in the context of Arkansas's map, which does not do things like that. And we are entitled to choose our redistricting criteria and pursue compactness to a greater or lesser degree than other states do that may be pursuing partisan aims. With that said, even if it's not a purely traditional districting criteria problem, it is certainly a racial problem, because there is no nonracial explanation for this. If those precincts were part of District 55, it would be less underpopulated. And the other one to its west would be less overpopulated. They would suddenly have somewhat more normal shapes, maybe not vastly more normal shapes, more normal shapes, they would be more compact under the metrics that Mr. Fairfax

looked at. And the only reason this happened is because if you were to include those predominantly white precincts, this district would drop below a CVAP of 50.03 percent, which is the last point that I wanted to make about District 55, if I could.

Obviously, Bartlett requires you to get over 50 percent. Voting-age population is a metric that you can look at normally -- well, sorry, I'm being a bit confusing.

Ultimately, citizen voting-age population is the correct metric to look at, because ultimately we are asking whether majority of the people can legally vote in a district, or of minority. Now, Mr. Fairfax's testimony on the 50.01 percent black CVAP district, and the 50.03 percent black CVAP district, 5 and 55, are that there was just as good a chance that those districts were below 50 percent as they were above. If that's the case, the evidence on whether they satisfied Bartlett V Strickland is in perfect equipoise by his own admission. And you don't even have likelihood of success on Gingles 1.

I do want to respond to an argument Mr. Fairfax made -- sorry to point to his empty chair. He said that if you were to take these margins of error too seriously, you would be forcing plaintiffs to get outside the margins of error and you would force them to draw 50 percent black CVAP districts, and that wouldn't be fair. I don't think that's a logical conclusion of the argument that I'm making. If you have a 51 percent black CVAP district, and you have a plus or minus 4 margin of error,

which was what you were suggesting the ACS had, the odds that you were over 50 would be greater than the odds that you were under 50. The problem that you have is if you drop all of the way to 50.01, then you truly are at equipoise.

THE COURT: What do you make about Mr. Fairfax's rebuttal report where he shows, or he at least says you could draw 55 in a different way. If you wanted to get those two islands, you could draw it in a different way that still would have a majority black population.

MR. STEINBERG: I think says is the right word. He did not show it. He drew an alternative district for 5, not for 55. So we haven't seen the alternate. You haven't seen the alternate, but more importantly, we haven't seen the entire plan around that. So it may be possible to draw a district that doesn't do that in a vacuum, but we don't know if a plan can be built around that that satisfies equi populousness and everything else.

THE COURT: And I would assume there's a similar answer, other than the Seays versus Shows, is that a similar answer for District 5?

MR. STEINBERG: After District 5, I don't understand how the alternative plan cured anything other than the very specific objection that Mr. Davis made about splitting certain precincts in Union County, Fairfax showed a district in a vacuum that didn't split those precincts, but it still had the odd

feature of splitting these three counties and having this three-legged or three whatever you want to call them, tentacles he said, feature. So, I don't think that ultimate plan is secure, unless you are just focused on the splitting of those precincts in Union County.

THE COURT: Moving over to Illustrative District 16.

MR. STEINBERG: Sure.

THE COURT: I will tell you at the beginning of this hearing, I was a little bit concerned about Illustrative District 16. I thought that Pine Bluff and Arkadelphia were at least unusually put together. We have heard a bunch of evidence that suggests there are significant similarities, if not between Arkadelphia and Pine Bluff, at the very least between the black population in Arkadelphia and the black population in Pine Bluff. Why isn't that enough to essentially say that's a reasonably compact black population?

MR. STEINBERG: A couple of things. The testimony on the similarities between the black populations in Pine Bluff and Arkadelphia took a couple of forms. One, there were observations from Mr. Fairfax that certain socioeconomic factors are the same if you look at the census. I think that when you compare communities on paper, relative to majority race communities and those places, you are often going to find similar disparities, but that doesn't mean that minority people in one place, minority people in another place, have a lot in

common because there are similar rates of renting or you know, similar poverty differentials. Then there was lay testimony that I think that you should take more seriously, in theory. But the similarities that I heard and I maybe -- I'm probably missing some. Are attending some of the same churches, sororities, Divine 9. Visiting each other's church congregations. We don't believe that that kind of thing amounts to a shared community of interest, or at least that it --

THE COURT: What would amount to it? Because that's what I'm struggling with. I mean, it strikes me as a little bit hard for me to sit here in Little Rock and sort of be deciding what does or doesn't count as a community of interest for the black population in Arkadelphia and Pine Bluff. That seems like a little bit of a stretch to me. So I'm trying to figure out what I really need to look at. If you don't think the testimony we heard is enough, what would you think is enough?

MR. STEINBERG: I think that the cities have to be -- this is an empty word, but similar. And I'll attempt to fill it out. Similar in any number of senses. You can have similar kinds of employment in the two places, but what we heard is that Pine Bluff is an industrial town, and Arkadelphia is a timber, slash, college town. You could have similar degrees of urbanization, versus communities that are more rural, but Pine Bluff is quite a bit more urban than Arkadelphia. You could simply have places that are a lot closer to each other than

these two cities are, but while they may be in the same region of Arkansas on a travel map, they are quite a ways from each other in a state where you have 100 districts, and the entire state is only five hours from end to end.

THE COURT: Yeah, but that's true of a bunch of districts in your plan too.

MR. STEINBERG: That is true of a bunch of districts in our plan too, except that we don't have a LULAC problem.

THE COURT: I get it. I get the difference between your drawing districts and the obligations you have versus the obligations they have, but just eyeballing it, District 16 is at least as reasonably compact as some of the districts you drew, your client drew.

MR. STEINBERG: Right.

THE COURT: You have given me the -- or you have started to give me some thoughts about what makes cities similar. I'm not sure that's what I'm supposed to be focussed on, at least in a situation like this. I'm wondering if what I'm supposed to be focussed on is the similarities between the black populations in the two places. And here is my point, I don't know if we did or didn't hear enough evidence on this. This is part of what I'm asking you, but you have told me there is difference in, you know, one is urban, one is more rural, and things like that. That might matter if everybody in each of those cities were essentially the same. But if the black

population inhabits, in general, a certain sector of the industry, and of course we are talking in great generalizations here, because unfortunately the case law makes us do this, a certain sector in Arkadelphia, and a -- backwards and a certain sector in Pine Bluff, it doesn't really matter what other people do in those cities if the black populations are doing the same thing, and have the same jobs and are living in the same type of buildings. There was some testimony about apartments with the implied warranty of habitability, or lack of it. Do you see what I'm trying to get at? And is what I'm saying fair, or do you disagree that that's what I have to look at?

MR. STEINBERG: No, I don't disagree that that's what you have to look at for the purely LULAC and Perry district communities, et cetera. If there were evidence that black communities of Arkadelphia and Pine Bluff, notwithstanding the differences of the cities generally were working the same kinds of job, and that their lives were quite similar, then that would be a much weaker LULAC argument.

THE COURT: You just don't think we have that testimony?

MR. STEINBERG: No. And again, if I'm missing something, maybe I am, but what I heard about were same churches, sorority, social connections, which are meaningful to those people.

THE COURT: Meaningful to everybody.

MR. STEINBERG: Meaningful to everybody, but do not -- do not make those communities a shared community of interest, and the other thing I would say about 16, and I don't mean to presume that your question about pizza pie slices was a statement of your view of the evidence. Pine Bluff, under their plan, got split five ways. And then we have these, so to speak, slices that radiate outwards to far away minority communities. And it's difficult to understand a nonracial motive for that, and I think that Mr. Fairfax said, I don't know that we even could have reached 16 majority-minority districts unless we had split Pine Bluff five ways to maximize that population, and you know, make the best use of it.

THE COURT: Would it be okay if you went into the -- for the Illustrative Plan, would it be okay if you went into the map drawing session saying look, I know there is a lot of black population in Pine Bluff. So I'm gonna try to draw using traditional redistricting districts, as many districts as I can draw using the population in Pine Bluff. Would that be an okay way to do this, or does that violate whatever rule you think applies to the predominance issue?

MR. STEINBERG: This may be an analytically difficult answer to stomach, but I think the Supreme Court has answered that directly in Bethune-Hill versus Virginia State Board of Elections, one of post Shaw cases in recent years where they said choosing among plans that satisfy traditional districting

criteria for the predominant motive of race is still predominantly motivated by race. So...

THE COURT: Okay. I am not saying I agree with you. I understand your answer.

MR. STEINBERG: I would then like to turn to Gingles 3, and do you have a preference?

THE COURT: Let me keep you on Gingles 1 for one second. So in Little Rock --

MR. STEINBERG: Yes.

THE COURT: I think what I understand is you all point to District 74 in the Board Plan and say look, it's basically -- it's an opportunity district. And so therefore, the plaintiffs, in their Illustrative Plan, have drawn seven majority-minority districts, but that's not more than the opportunity, the number of opportunity districts we have in Little Rock in our plan. And I guess what I'm trying to figure out is how that maps onto the Gingles Factor, slash, totality of the circumstances analysis, because I would think normally, if you had District 74, what you would ask is, is District 74 -- does -- is there racially polarized voting in District 74? And if the answer is there is not racially polarized voting in District 74, it satisfies Gingles, so it is not technically a problem district, but 75, or whatever its neighbor is, is a problem district. And so therefore, the new Illustrative Plan essentially combines one district that's not a Gingles 3 problem with one district that

is a Gingles 3 problem, and creates a majority district. So I guess what I'm trying to figure out is why doesn't that -- why doesn't that pass the Gingles preconditions, but then potentially have a totality of the circumstances problem in Little Rock. I think I'm having trouble seeing how your argument maps onto Gingles.

MR. STEINBERG: Okay. So there is a concession from Mr. Sells that there is not racially polarized voting in 74, but then your question is what about 75, which I may be misremembering, but I'm not sure was analyzed by Dr. Handley, but let's presume that there is racially polarized voting in 75. And let's say we only have 74 and 75. So, no racially polarized voting in 74. There is in 75. And then the response is to -- is to create a majority-minority district to remedy the racially polarized voting in 75. And we don't have anymore districts where minority voters could elect their candidates of choice than we had before. We just have more majority-minority districts than we had before. I think that's the premise.

THE COURT: Close enough.

MR. STEINBERG: Yeah.

THE COURT: And I guess my real question is; why is that a Gingles precondition issue, as opposed to a totality of the circumstances issue?

MR. STEINBERG: I think that -- I think that you are right. I think that you are right. I think the correct way to

analyze that is ultimately regional proportionality as DeGrandy did it with Dade County, and say we are just swapping districts that elect candidates of choice for other districts that elect candidates of choice, but what is the point when we already have a proportionate number, or just the same number of districts that elected candidates of choice as before.

THE COURT: That makes more sense to me. And I just wanted to make sure the way I was thinking about it back in chambers is the way you all are thinking about it. Of course on rebuttal I'll talk to plaintiffs about it, but I think now I understand your position.

MR. STEINBERG: Okay. So then I won't talk about District 74 in the context of Gingles 3, but I will have a lot to say about Gingles 3. And do you have a preference as to whether I begin with causation or the precausation?

THE COURT: You can begin wherever you want. It may make more sense to begin with causation, and then assume that I end up not agreeing with you on causation and then tell me what would happen then.

MR. STEINBERG: All right. And -- sorry.

THE COURT: If you want to do it a different way, that's fine too.

MR. STEINBERG: No. I was going to ask if you have any questions about the causation test and whether --

THE COURT: Well, you heard what I told plaintiffs in

terms of what I thought. If you disagree with that, and you would like to try to change my mind, you are more than welcome to, otherwise, if you could answer the questions that I asked of plaintiffs, that would be helpful, in general.

MR. STEINBERG: On causation, I think it's true that most circuits that are addressing causation are doing it in the totality under Senate Factor 2, though I want to note that a footnote in Gingles says that you must always satisfy Senate Factor 2. So if causation is the correct interpretation of Senate Factor 2, this is a precondition, whether we put it under Gingles Precondition 3 or Senate Factor 2, so I'm not sure the classification of that makes a great deal of difference. What is important, of course, is how required causations is under, you know, either one of those rubrics. I believe, and perhaps Your Honor's question suggests that the best argument for why causation is required is that 1982 senate and congress generally was attempting to go back to White and Whitcomb, which they saw Bolden as refutuating. And White and Whitcomb drew a not entirely clear, but a fairly clear line between, you know, dilution that had effects because of differing partisanship, and dilution that had effects because of racial bias in the community. Racial bias in a way that is incomparable to anything that plaintiffs try to argue exists here. And I don't think that you need to look at legislative history to see that congress was trying to bring White and Whitcomb back. They

literally copied a central passage of White into the proviso that we see in Section 2. And nobody has ever disputed that congress was trying to return to White and Whitcomb. So the only question is if we accept these premises, are we misreading White and Whitcomb somehow.

THE COURT: I guess misreading suggests that there is a proper way to read it, which to be perfectly honest, I have now read White and Whitcomb like 12 times, and I don't think White and Whitcomb answer the question of what has to be found by whom, and how and when and whether it's part of a totality, or if it is a prerequisite, but if you think so, please explain to me where.

MR. STEINBERG: I agree that the question is a burden, and when in this analysis are not in White and Whitcomb, because White and Whitcomb are in a preGingles precondition, and a preSenate Factor world. So they are not looking at the world that way, and they are not talking about burdens of proof, and Whitcomb says, you know, the evidence is just missing. And White says the evidence is clearly there of the thing that we are looking for. So you're not going to get that level of specificity out of White and Whitcomb. What you are going to get is the basic concept that causation is really important. And Whitcomb, in particular, which is not, you know, terribly eloquently drafted perhaps, makes the point that if we were to say the Court is saying that the differing partisanship is

enough for constitutional vote dilution, then we would need to say that about white democrats and white republicans and everybody who is sometimes in the political minority. Now obviously this is not a constitutional vote dilution case, but congress decided, wisely or unwisely, to copy and paste White and it's test about the political processes not being equally open into the statute, and explained for dozens of pages in the senate report that they were trying to adopt all of these holdings, essentially, and the lower courts ought to look at them, and when they are applying their new statute, follow those cases.

I also think that burden is a question that you probably do not need to decide. Let's say that it were an affirmative defense. We put in evidence that there is no statistically significant racial disparity between the rates at which white voters vote for black democrats, and for white democrats. That evidence comes from their report. They observed that there is a numerical difference in state house races of seven-tenths of one percent, but if we were asking why is it that these minority-preferred candidates lose, the reason, even if we believe that that seven-tenths of one percent is true and accurate and correctly divine from the precinct level returns and will repeat over time, all of those assumptions. The reason that minority-preferred candidates lose is not because they didn't get that extra seven-tenths of one percent of the white

vote, it's because either way they are getting on average 19 percent of the white vote, because they are democrats. If they had that seven-tenths of one percent, they would still regularly lose to white polarized voting because of their party. So there is simply no causal role -- and that's also true of the disparity that was observed with Mr. Bland and his fellow democratic candidates for statewide office. They all lost. They received an average of 20 percent of the white vote. He received an estimate of 17.5. The 2.4 percent had nothing to do with the outcome of these elections. The outcome of the elections turned on 80 percent of white voters, no matter who it was voting against a democrat. And as to Bland, I think it's important to note that he actually outperformed his white gubernatorial running mate, which is difficult to understand if race were driving these choices.

If you have any questions about their evidence, causation, the democratic primary, black republicans.

THE COURT: I have asked them all of the questions I need to ask.

MR. STEINBERG: Okay.

THE COURT: I will ask you this. What do you make of the dip in -- the strong dip in support for the democratic party after the election of Barack Obama.

MR. STEINBERG: So that strong dip, I'm not a trial lawyer, so I'm always worried about questions of evidence, but I

think that you can take judicial notice, so to speak of the 2010 midterm and what happened across the country. Everywhere republicans did very well in 2010 after the enactment of the Affordable Care Act.

THE COURT: Yeah. But if that were the issue, you would assume that it would tick back up afterwards. Right? I mean, if it was just a midterm tsunami, you would assume that in the next four years it wouldn't have gotten worse, instead it dipped off even more.

MR. STEINBERG: But then if we are attributing this to Obama, hypothetically, President Obama, I think the next assumption that you might make is that once he were no longer the standard bearer of the democratic party things might turn around. That has not happened. And the other assumption that I think that one would make if this were about President Obama is that democrats would have suffered when he was at the top of the ticket in 2008, but they lost three seats in Arkansas State House elections.

THE COURT: Well, I hear your response. There is obviously a time lag issue, and when people -- when people decide they do or don't want to be a part of a party anymore, right. I mean, in one sense the -- it's one thing what happens simultaneously in the election with President Obama, it's another thing what happens when people sort of then have time to process and reflect and decide whether they want to remain part

of one party, or change to another party, or change their allegiance. I guess what I'm saying is, I take your point that race may not be the only explanation of that. There may be a lot of explanations, but I find it a little hard to believe that race didn't play any role. And that leads me, I guess, to my next question, which is in terms of causation, how much of a role does race have to play before it's enough to find liability under your view of causation.

MR. STEINBERG: I think it has to be a but for cause.

THE COURT: Where do you get that from?

MR. STEINBERG: The cases that we -- that adopt the causation test, I believe are doing it in those terms.

THE COURT: Where do they get it from?

MR. STEINBERG: They -- they get it from the statute they're readings of Whitcomb and White and constitutional avoidance and all the reasons we laid out.

THE COURT: That's a fair answer. I'm not saying I agree with you, but I understand that answer.

MR STEINBERG: Right. I think the last thing I want to say about the inflection point is that I think that what Your Honor says is not, you know, an unreasonable speculation, but it isn't evidence that proves that it's more likely than not the case that race, and particularly President Obama's race is the cause of the current unpopularity of the Democratic party in Arkansas.

THE COURT: I think we will -- I don't want to speak for plaintiffs, but my guess is I think we would all agree that if that was the only evidence in the record, you would certainly be right. I guess my point though is it's one thing to say it's marginal evidence, it is a little evidence. You have to make some big inferences from it, but to say it is no evidence at all just sort of strikes me as a little bit much.

MR. STEINBERG: I will accept that it is not no evidence at all, but we need to add it to other evidence to get a likelihood of whatever causal role we need.

THE COURT: We do not disagree there.

MR. STEINBERG: And I do not know what other evidence that would be. I mean, I do know what they say it would be, but if you have no questions about the gubernatorial primary.

THE COURT: I don't. I mean, you can tell me why you think they are wrong, but essentially, what I understand your position to be is Dr. Handley's evidence is not good enough, and even if was good enough, there are issues with it that show there is really either not racially polarized voting in some places, or that actually sort of can be boomeranged on her in some sense to show that under the totality of circumstances, politics is far more involved than race. That's what I understand your question to be. I don't have questions about it unless you think I'm wrong about that.

MR. STEINBERG: No, that's a fair characterization of

our position. I'll then turn to what we have left, which are some of the district specific questions, and finally the proportionality and totality of the circumstances. So, on the district specific questions, a couple of points about the law. Normally -- well, not normally, but often people sue and they challenge a plan under which we have seen some elections, and they say white block voting usually defeats minority preferred candidates in the elections under the districts that we are challenging. We have a new plan, and so we have to predict what's going to happen in those districts. And as you know, the basis for those predictions are these endogenies effectiveness scores. That's not the only way to make this kind of prediction. One thing that Dr. Handley testified that she could do is apply math to her own estimates of racially polarized voting, take the new population of the district, and say if it's the case that 80 percent of white voters vote for a republican or a white republican, and 90 percent of black voters vote for a black democrat, and I have this population and I make certain assumptions about turn out that my own regressions have generated, then here is what would happen. She chose not to do that. I think that would be a lot more informative to the court than inferences from other elections. Sometimes you could also have lay testimony about what's likely to happen in a district, given the changes in the population, and we heard a little bit of that from Representative Hodges. He said he thought he could

win his district, and a black democrat who is not him is going to have to work extremely hard. So we are just left with the effectiveness scores.

Dr. Handley has a theory that these effectiveness scores can predict, roughly down to the percentage point and decimal what is going to happen in a state house election. And she checked that theory by looking at other statewide elections, and she finds that those other statewide elections generate the same predictions, but what she has never done is compare the predictions that she made about the old districts to what actually happened in those old districts. Now I attempted to do so the other day. However, ham-handedly. And what we found is that Mr. Bland carried 16 districts in 2018, democrats carried 24, 50 percent more. Then we looked at the close calls that this predictive model generates, districts where it says somebody is going to win about 45 to 49.9 percent of the vote, and it turns out that a democrat won in the very same year each one of those six districts. So for you to place credence in this model and the close calls that it makes, you have to say it's going to get better at doing its job the farther away in time that we get from the 2018 election. I don't --

THE COURT: Let me ask you this. You might be right if we were at trial. But we're not. We're at a preliminary injunction hearing. Isn't Dr. Handley's work good enough for a preliminary injunction, because all I have to figure out is

whether it is more likely than not that something is going to be the case, not did she do a perfect job, was it an error free job, are her statistics perfect or you know, at some level given the preliminary injunction stage, do I hold Dr. Handley to the same sort of rigor that I would need at a full-blown trial?

MR. STEINBERG: The answer, of course, given the standard of proof, is no. I mean, there are Purcell problems again, and we are talking about a clearcut merits case.

THE COURT: I understand your point there. Forget about those.

MR. STEINBERG: Sure. Sure. Right. If you think that these predictions are going to be right 55 percent of the time, I suppose that you can say that the Gingles 3 box has been checked off by that 55 percent accurate model. The trouble is that it's not just, you know, kind of sloppy, but reasonably leading you in the right direction. When it's faced with a close call it gets things wrong every single time. And the calls that we're challenging are the close calls. We're not attacking her statement that some district somewhere is going to give about 20 percent of its votes to the minority preferred candidate. And candor, if you look at those districts, they are covered by republicans. It's not very surprising that there is not a 30-point gap between Mr. Bland and a state house democrat someplace, but there are gaps. And I want to say they are not just limited to white democrats, not that I believe that matters

for a legal reason, but they are not. Fielding, as we know, out performed Bland by six points. Mr. Hodges, Representative Hodges outperformed Bland by 11 and a half points one year, two points another year. We have other people who are being elected unopposed. Republicans don't even bother to run against them for decades. Representative Richardson and his predecessor, in districts where Dr. Handley says a republican would actually get 45 percent of the vote and stand a fair chance perhaps of winning, but nobody is interested in challenging these people. The model just isn't any good at predicting the outcomes of close elections.

THE COURT: Mr. Steinberg, can I ask you to come up here for a second? And can I ask Mr. Sells to come up here for a second?

(Whereupon, there was a side-bar conference).

THE COURT: I would appreciate your discretion obviously. You can do whatever you want, but I would appreciate your discretion.

I know you haven't meant to. I know that, but you have twice referred to black folks as these people and those people. I understand in context that was not what you meant, but just try to avoid that.

MR. STEINBERG: Yes.

THE COURT: Okay. That's it.

(Whereupon, proceedings continued in open court.)

MR. STEINBERG: Continuing on that train of thought, I think the court could do one of two things with the effectiveness scores in the close cases; could observe that they are not predictive, that they have been proven to not be predictive of elections in the very same year on which they are based, 2018 at the state house level. And it could just say, I am left with a want of information on which to base any conclusion on what's going to happen in the districts that are scored as close. The other thing it could do is adopt the much derided adjusted effectiveness scores of Dr. Lockerbie. And I want to say --

THE COURT: Well, I guess in some sense there is a third option, right, sort of a pocks on both of your houses. I don't really know what any of this evidence means. You have made some good points about problems with their evidence. They have made some really good points about problems with your evidence, and therefore I'm left with something in equipoise. I'm not saying that's where I'm going, but that's the third option, right?

MR. STEINBERG: I think that is a variation of my first option actually, but yes, you could do that. On the concept of the adjusted effectiveness scores, I think this really gives them a great deal of credit, perhaps more than they are owed. The idea is that these effectiveness scores cannot predict elections down to the percentage point in decimals for

elections other than lieutenant governor or some statewide race, but they can show you, and I would admit this, how much or less democrat leaning a district has become. When Dr. Handley says that it used to be the case that roughly 50.2 percent of people voted for Bland in a district. And now, as redrawn, 46.2 percent have. That is telling you something that 4 percent of Bland voters have been replaced by 4 percent of Lieutenant Governor Tim Griffin voters. I think that it is quite fair, and again perhaps generous, to say, as a result we would think that a state house candidate running in that district is likely to get 4 percent less of the vote than he did in the past before his district got redrawn, but when you do that you get to exactly the same place as these so-called adjusted effectiveness scores. What is truly illogical to me, and -- at least to me, is to say the following: Representative Fielding, for example, got 56.9 percent of the vote in the 2018 election, 56.8 percent of the vote in the 2020 election. And back in those days, 50.8 percent of the voters, 6 percent less, voted for Bland in his district, now has redrawn 44.8 percent of the vote, 6 percent less than before. Dr. Handley says Representative Fielding or somebody else running in that district is likely to get now 44.8 percent of the vote. That's 12 percent less than what Representative Fielding got in November of 2020, yet the district has only become 6 points less supportive of Bland. And I don't understand what motivates the assumption that things are

going to get much worse for Fielding relatively than they are getting for Bland in this hypothetical lieutenant governor election that's being run in that district. There has been one explanation given, and that is incumbency. One day Representative Fielding will be term limited. And Representative Hodges, as you know, is not running for that seat. The trouble -- the trouble with that explanation is, is we haven't seen any evidence that incumbency is terribly helpful to democrats or anybody else in state house elections. There is enormous amounts of turnover. I think the only testimony about incumbency and its strength in state legislative elections was Dr. Lockerbie's answer to you where he said the political science literature says it is quite weak in state legislative elections. And I think that's confirmed by just the returns that Dr. Handley compiles. We see a lot of surprising movement from race to race, incumbents losing their seats one year, sometimes even gaining them back as McElroy did in District 11. So I don't think that this can all be ascribed to incumbency, and that once you take an incumbent out and say this is just a state legislative race and it's open, all of a sudden things are going to collapse to the Bland level. I don't know what the evidence to support that is.

THE COURT: I understood your argument.

MR. STEINBERG: I do want to say one legal thing about Gingles 3 before I move on to proportionality. When we raised

District 74, and Tippi McCullough, she's white, we made a preemptive point in our response, and said it does not matter that she's white as opposed to being a different race, because the Eighth Circuit said Onbach and Cottier V City of Martin, that if minority voters are electing their preferred white candidates, then there is not racially polarized voting within the meaning of Gingles 3, even if there is a pattern of consistency of minority-preferred -- minority candidates, as was the case in Cottier. Today Mr. Sells pointed us to Judge Arnold's famous statement in Smith V City of Clinton that there is not equality of opportunity if minority voters can elect their preferred candidates only if those candidates are white. The trouble with that is, is that Cottier simply says something different. That may affect your consideration of District 74, and I think that it also may affect your consideration of the propriety of focussing on Bland as a prognosticator of the future. Bland, of course, is selected because he is the one black statewide candidate, and the claim is that what happens to him is going to be uniquely predictive of what happens to minority race, minority preferred candidates.

THE COURT: Okay.

MR. STEINBERG: I'm just trying to think if it affects anything else that I need to mention. No, I don't think so. So I'll turn to proportionality. So there has been a small fight in the briefing, though I didn't hear about it today, as to

initially the -- I get my denominators and enumerators confused. I think denominator, are we looking at voting-age population, or are we looking at total-age population. And of course that's very important because total population is the basis for their request for 16 as opposed to 15. Via, if I'm pronouncing it correctly, from the Eighth Circuit, is pretty clear that there would have been a problem with proportionality there, if you were looking at total population, or rather they assumed it arguendo. And they said but the plaintiffs lose if we are looking at voting-age population, and DeGrandy instructs us to look at voting-age population.

THE COURT: Would that be a similar answer if I asked you about the difference between black voting-age population and black citizen voting-age population? And the reason I'm asking is I think I understand the black citizen voting-age population to be 15.5, which if we round up is 16.

MR. STEINBERG: I would not say that Via precludes reliance on citizen voting-age population. I think that it precludes reliance on populations that don't consider voting generally. And moreover, it's the case that LULAC looked at CVAP, so I think that Your Honor is free to choose between 15.2 and 15.5, but not 16.5 if I'm remembering the numbers correctly.

Okay. Then the harder question probably is the numerator and the number of opportunity districts. And --

THE COURT: Well, can I ask you a question before

then, a sort of denominator question?

MR STEINBERG: Okay.

THE COURT: Do you agree with what I think is the plaintiff's position, that you look at this statewide, as opposed to in various parts of the state where there are significant black population?

MR. STEINBERG: I believe it generally turns on choices about how a plaintiff makes its claim. If a plaintiff has just focussed on a region solely, statewide proportionality is not going to come in to save the defendant if there is disproportionality in that region. If a plaintiff makes a statewide claim, a statewide proportionality will save the defendant. I hesitate a bit, because this claim, while it's a statewide claim of course, it's constructed as a series of like, you know, regional sub claims in a way.

THE COURT: That's why I asked the question.

MR. STEINBERG: Right. So given my answer before about where we positioned the fact of nonpolarized voting in District 74 is that a Gingles 3 question or a totality question. And I hadn't thought about this interesting wrinkle before, but I believe that if you have got statewide claim comprised of regional sub claims, statewide proportionality remains a defense of course, and regional proportionality is a defense to those region specific sub claims, so to speak. And sub claims isn't a technical term about what they have done.

The numerator then. So of course we agree that the 11 districts that Dr. Handley characterizes is opportunity districts count towards this numerator. You've heard what I think of -- I'll call them the Fielding District and the Hodges District. I do want to say one thing in response to Mr. Sells about toss ups not counting as opportunity districts. That's -- sorry.

THE COURT: You need a break?

MR. STEINBERG: No. No, I don't need a break. I think the cases here speak very clearly to what we are looking for are districts where minority voters have inequality of opportunity of fair chance to win those districts, and that there is no requirement that the districts be safe in order to count them as opportunity districts. So if District 55 is a so-called tossup district, that's going to be a district that provides minority voters an opportunity. The hard question, of course, are these districts that Dr. Handley says are likely to elect minority-preferred candidates, but are not comprised of 40 percent black populations or 50 percent black populations, et cetera. A couple of things. One, I think that Mr. Sells is just wrong when he says that Bartlett says that crossover districts can't be opportunity districts. I think it's just the opposite. Bartlett said that you were never required, under Gingles 1, to draw a crossover district, but then it says we don't want to discourage anybody from drawing crossover

districts. This is a way to satisfy Section 2. It is just not something that a plaintiff can come in and fault a state for failing to do, but if you create a series of crossover districts where minority voters and whites predictably come together to elect their mutual candidate of choice, those are places, by definition, where minority voters have an opportunity to elect. I think the harder question really is should these even be considered crossover districts, which is where I would have expected Mr. Sells to attack.

No, I don't need a break.

THE COURT: I'm happy to take one if you want it.

MR. STEINBERG: No. No.

THE COURT: Mr. Steinberg, so our court reporter needs a break between 4:15 and 4:30. So if you want to take a break, we can take a break. You can then finish, and then I'll go to the plaintiffs. It is not a problem at all.

MR. STEINBERG: Yes. Thank you, Your Honor.

THE COURT: Let's take a 10-minute break.

(Recess at 4:20 p.m.)

REPORTER'S CERTIFICATE

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

/s/Teresa Hollingsworth, CCR Date: February 10, 2022.
United States Court Reporter

(Proceedings resumed at 4:31 p.m.)

THE COURT: We're back on the record.

MR. STEINBERG: So we were talking -- I was talking about the two districts with populations of 15 percent, rounding, and 21 percent black voting age population that Dr. Handley predicts would elect minority-preferred candidates and that, for all we know, have elected minority-preferred candidates and their substantially similar configurations under the 2010 plan.

Plaintiffs say that a logical conclusion of the position that those districts are opportunity district is that a district, of course, with a single African-American voter that were likely to elect a Democrat would be an opportunity district. And her response to that is that these populations of 15 percent and 21 percent actually play an important role in the electoral success of the minority-preferred candidates that these districts elect.

For example, with -- I hope I'm getting the numbering right -- District 49, the Jay Richardson district, Dr. Handley says 53 percent of the voters in that district as redrawn gave their votes to Bland. And Dr. Handley observes that 15 percent of the population is black.

I find it hard to believe that, if we did not have those black voters in that district, things would be quite the same either at the primary level where black Democrats

have won uncontested the primary for the past decade, or at the general election level. And the same is true with the district in Little Rock, which Dr. Handley says 63 percent of the voters approximately are predicted to give their votes to Democrats and 21 percent of the voters in that district are black. And Dr. Handley says that black voters tend very cohesively, and we haven't disputed it, to vote for Democrats. If you remove these 21 percent of voters from the district, the coalition that is electing these Democrats starts to break down, may break down completely.

So we view these as coalition districts where black voters play a meaningful role in electing the Democrats who are elected in those districts at the general election and in influencing the outcomes of the primaries in those districts.

For those reasons, we count those districts as opportunities districts. We count the 11 districts that Dr. Handley and the plaintiffs agree are opportunity districts. We see the districts currently represented by Fielding and Hodges as districts that are going to be competitive for sure, but provide minority voters there a -- an electoral opportunity to really determine the outcome of closely-fought races.

So we count, without getting into the districts with

six percent black population and democratic representatives, 15 opportunity districts out of 100 under our plan, and we compare that to 15.2 percent voting age population or 15.5 percent citizen voting age population, and either way, you have rough proportionality. The difference between 15 and 15.2 or 15.5, if you want to round it up to 16, we don't care, is smaller than differences that the DeGrandy court talked about, is a lot smaller than a difference that the LULAC court talked about where it said, you know, a difference -- I'm forgetting the number, but it's at least five percent that might well be proportionality. And the Court only said, we don't need to reach that because we see something very tantamount almost -- almost tantamount to intentional discrimination in the cracking of this opportunity district that was about to elect a minority-preferred candidate and then was dismantled by Texas.

THE COURT: Would you all consider 14 seats to be rough proportionality? I'm really trying to figure out what the boundaries of rough proportionality are.

MR. STEINBERG: Yes.

THE COURT: 13?

MR. STEINBERG: Yes, but I think that at that point you can begin to weigh that softer showing of rough proportionality against other considerations and

proportionality starts to become less of the absolute bar to liability that via really suggest it is absent the unusual circumstances that cause the DeGrandy court to say this is not a per se rule, things could happen that could make us accept -- that could make us say, you know, a proportionate plan still violates Section 2.

And in fact, the LULAC court assumed there was proportionality with, you know, about a five percent, I'm saying shortfall, and then said, but we have something that bears the markers of purposeful discrimination that we aren't quite finding constitutional violation and that, weighed against the proportionality, gets us to a Section 2 violation.

THE COURT: Okay.

MR. STEINBERG: Okay.

THE COURT: I certainly don't have any more questions. If there's something you'd like to say for the record, you're more than welcome to; otherwise, I'm good.

MR. STEINBERG: I have a very minor point on one of the Senate Factors. It's just a small irony in the request for a 2023 election, and that is that --

THE COURT: The off-cycle nature of it?

MR. STEINBERG: Yes. If I don't need to spell it out, then I --

THE COURT: You don't, although I think it's

more a tonal point than a legal point, but I understand what you're saying.

MR. STEINBERG: I think it's -- it is a legal point if they argue in part that they ought to win because we have, unsurprisingly, off-year elections every two years like the vast majority of states, that to push this into an off-year, say that would cure the Section 2 violation seems at best inconsistent.

I don't think that I have anything else to say about the Senate Factors, if you don't have any questions about them.

THE COURT: I do not.

MR. STEINBERG: Okay.

THE COURT: Thank you very much, Mr. Steinberg.

MR. STEINBERG: Thank you.

THE COURT: Mr. Sells or whoever is up?

MR. SELLS: Yes. It's me again.

THE COURT: Welcome back.

MR. SELLS: Thank you.

I will, of course, ask -- answer any questions that you have for me in light of Mr. Steinberg's presentation.

THE COURT: I don't really have anything. I may think of some as you talk, but my sense is you can use this time to tell me what you want about your thoughts on Mr. Steinberg's presentation or anything else that he has

jostled in your memory.

MR. SELLS: Right. Well, given the hour and all of that, I'm not going to try to go point by point unless you have particular questions. I want to hit just a couple of highlights. And I'll start with this idea of proportionality and try to tell you I think our view on it is that you don't have to choose between the numbers here. This is not a case where the choice between total black voting age population or black CVAP makes any difference whatsoever, and the reason is because Stabler versus Thurston county. That's an Eighth Circuit case. And what that case stands for is the proposition that you don't achieve proportionality if you're below, right? So full proportionality means above that numerical line. And we think that means 16.

Now, if we were going strictly by total population, maybe there is an argument for 17, but we haven't drawn 17. So under the facts of this case, 16 is 16. You don't have to get into that argument as to which one you pick. So even though VAP, if I remember correctly, is 15.2 and CVAP is 15.5, full proportionality is 16 in either case.

THE COURT: When you say "full," is that the equivalent of rough proportionality? I mean, I guess my question is, I thought I understood the phrase to be rough proportionality. Is there a difference between that and

full?

MR. SELLS: Well, I think you'd have to look at the Stabler case. And they're using proportionality in slightly different context, right? But I think it winds up being the same thing, that if you can draw an additional district to get to that full proportionality and the other one is below, then one complies more with Section 2.

I want to address next the idea of effectiveness scores. And I think Mr. Steinberg's argument and perhaps some of your questioning suggests that what Dr. Handley did here is in some way novel or untested. And I want to say emphatically, it is not. This is what the Supreme Court approved in Black versus Perry in 2006. It's the kind of thing that you have to do in this circumstance because we haven't had an election under districts that really correspond.

THE COURT: In LULAC v. Perry, was it just one exogenous race?

MR. SELLS: No. Again, in Texas you had a lot of them to choose from. And the way that --

THE COURT: And just so you understand, I guess in part that's my concern. I understand your position. I also understand that in some sense you take the record as you find it, and Arkansas shouldn't get the benefit just

because there haven't been a whole lot of black people who got to run for office. I get that. At least statewide. I understand that.

On the other hand, I'm not sure we can say that what Dr. Handley has provided in terms of evidence is exactly the same as most of these other cases. She's only provided one race.

Now, I understand after cross-examination she provided the average checks. And that's a little bit of a tick in your favor. There is no question. Although, we don't know a whole lot about those averages, right? She didn't give me all the underlying data of every race and everything like that. So I guess that's where a little bit of my uncomfortableness with Dr. Handley's effectiveness rate comes from.

MR. SELLS: Sure. And I'm pushing back I think in a different direction on Mr. Steinberg's argument that, well, the numbers don't validate because, if you compare them to what actually happened in these races, it doesn't line up. And all of that would have also been true in Texas. So that's the point I'm pushing back against.

THE COURT: That's a fair point.

MR. SELLS: I understand your concern and I would, of course, point to the -- all of the white-white races that also show what Dr. Handley concluded.

So I -- this may be my last point unless it brings up other questions. But I also want to push back a little bit again on some of your questioning of Mr. Steinberg and where you express concern that, well, how do you do this. How do you draw maps without running afoul one way or the other. Right?

And I can understand, as being someone new to this area and in your position never -- you probably never used Maptitude or any geography software.

THE COURT: That would be correct.

MR. SELLS: It seems mysterious. I get that. Okay. So I'm not -- I'm not suggesting that there is anything wrong or improper about the line of questioning.

What I want to say is that this isn't 1995 anymore and courts have been drawing -- federal courts have been drawing districts consistent with the Shaw versus Reno cases and consistent with Section 2 for the better part of 20, 25 years. And you don't have to look very far to find examples of how you do that. Even in the last decade there were special masters hired by federal courts to draw districts all across the country, most notably in Virginia. I think Mr. Steinberg mentioned the about Bethune Hill case. There was a series of cases in Virginia. I'm sure you've come across those.

There were series of case in North Carolina. The

Covington case is one where a three-judge panel hired a special master to draw districts. And my own case in Wright versus Sumter County, the Court there hired Bernie Grofman who was I think also the expert in Bethune Hill case to draw districts.

The point here is that those federal courts gave instruction to the special masters: Here's how you do it. And I can -- I can tell that you in the Sumter County case, those instructions are in Document ECF 267. And the case number for the Sumter County case is 14-CV-42. Real easy to remember there.

But it says, you do this, you pay attention to this, you do this, you know, don't split boundaries and so on, just pretty much like the Board of Apportionment's criteria. And then it says, use racial and election data only to the extent necessary to ensure that a remedial plan cures the Section 2 violation and otherwise complies with state and federal law. That's how you do it. It's like the last thing.

THE COURT: I think my concern is more of a abstract one. I'm not quibbling that people have been doing this for a long time. I'm really suggesting that the guardrails that everybody has set up don't seem to really have what I find to be some serious substantive content. It's very hard for me to figure out what these

courts mean when they say, don't take race into account a lot, but take race into account. I

Guess what I'm struggling with is, I understand what they've said, but it sounds a whole lot more like a system we've set up to say something and then not really do what we -- what we're saying we're doing. I don't know how to resolve that. It's just a question I wanted everybody's views on.

Look, I'm a lowly district judge. I don't get to change what the Supreme Court has said. But it just strikes me that there really doesn't seem to be a whole lot of room between don't let race predominate and take race into account.

MR. SELLS: Well, I'm guessing -- I'm saying that federal courts have found a way. It's a set of instructions. It is a set of instructions that sounds a lot like the way that Tony Fairfax drew his map here, and you end up with maps that look just like Tony Fairfax's map in this case, which, as you said, doesn't look that bad. It is in no way, shape, or form akin to those maps that started the Shaw revolution in the early '90s.

Map drawers learned their lesson over the course of the 2000 decade, and now it's just not that hard to do for someone with the experience of Mr. Fairfax. Maybe not someone new to the game, fair enough, but for someone with

Mr. Fairfax's experience. He's been through all this stuff before. He's seen this. He knows how to do it. And you use race only as much as necessary to ensure that you can comply with Section 2. And to disturb that kind of a map, you need a lot better evidence than we have here from Mr. Davis who we still think should be thrown out as a nonexpert.

THE COURT: Let me ask you on the illustrative map. I understand the precedent that would make it fine for you to only provide one map. On the other hand, a lot of these cases have significantly more than one map, whether it's two, three, four, five, a bunch of different maps under the theory that it shows, even if one map -- even if one map doesn't work, there are other ways to draw the district.

Now I understand Mr. Fairfax's rebuttal report did some of that. Defendants argue that it didn't draw the full map. And I get that argument for what it's worth.

But why didn't y'all provide more than one map?

MR. SELLS: I think our view is that one map is enough. That's number one.

Number two, time. This is a case that came in the middle of redistricting. This isn't the only case that Mr. Fairfax is working on. It's not the only -- I mean, he does stuff other than litigation. He draws maps for

people, and it has been a very busy time since the election data came out. So I think all of those things kind of explain why we have one map here. In my experience, it's not that unusual. Maybe you're looking at different cases than I am.

THE COURT: I may be. And I certainly don't claim to have the whole universe of cases though.

MR. SELLS: In Bone Shirt I can tell you we had one illustrative plan, but then when it came to remedial plans, I think we had five and the Court picked one, but liability was determined on the basis of one.

THE COURT: Okay. That's it for me.

MR. SELLS: Let me just confer and I think I'm done.

Two I think quick factual points that I'd like to point out. We believe the testimony was that the board made technical changes during the window from the 29th of November to December 29th, and we think that sort of underscores the ripeness issue here that we could not have sued earlier because it wasn't even the final map.

THE COURT: For what it's worth, you don't have a problem with me on that issue.

MR. SELLS: And then the second factual point I want to make is that there really -- we think there are real distinctions in the election calendar between Alabama

and Arkansas. The election calendar is in the record, so you don't have to take my word for it. You can certainly make that comparison on your own, but we think there is enough difference there to distinguish this case from Alabama.

THE COURT: Are you all comfortable with me relying on the Alabama either surpetition or stay motion to get their calendar from?

MR. SELLS: I have not seen it in their surpetition. I know I've glanced at the surpetition, but I think it's something that you could almost certainly take judicial notice of because every secretary of state has it on their website. That's pretty -- pretty standard.

THE COURT: Appreciate it.

MR. SELLS: I think that's all I have

THE COURT: Thank you, Mr. Sells.

Anything administrative while I have you here, Mr. Sells, that we need to deal with from the plaintiffs' side of the aisle?

MR. SELLS: I don't think so, Your Honor.

THE COURT: Anything administrative that we have to deal with for the defendants?

MR. STEINBERG: No, Your Honor.

THE COURT: Okay. Like I said halfway through

this, thank you all for the excellent work you have done. I know this has been long. I know it has been grueling before today and certainly today.

I'll just tell you and I'm sure y'all picked up on it throughout the day, my process in terms of deciding these cases is to ask hard questions at oral argument. Even if ultimately I don't think I'm going to go that way, I want to poke and prod at people's positions to figure out where I think the strengths and weaknesses are of various arguments. I think you all did an exceptional job today at oral argument. You've done an exceptional job all week, but I think you've particularly all done an exceptional job today at oral argument. It has helped me a lot.

In terms of timing, let me say this. I know it is very important to get a decision as soon as possible for a whole host of reasons, including the very important nature of this issue, but also involving the calendar and everything else. I get that. I will say that I have not made a decision yet. This is not a situation where I have come in here with a view and then sort of said, well, that's where I think we're going and so let's draft it like that and let's see if I change my mind.

I think this is a hard case on a lot of different legal and factual levels. I have not been, like, drafting

out findings of facts and things like that as we go. I am going to take tomorrow and I'm going to think about all of this and read the transcript. The court reporters have been amazing, so I think I basically have all the transcripts. I'm going to do whatever work I need to do to make sure I understand the transcripts.

I imagine I will make a decision tomorrow or the next day. And then in terms of writing up the decision, I will get that done as fast as humanly possible. I will commit to you all that we'll be working, essentially, 24/7 until we get it out.

Obviously, depending on how I decide certain legal and factual issues, this will either be a moderately lengthy opinion or a very lengthy opinion. So I will get it to you just as soon as I can. I would not expect it until at least the beginning or middle of next week. But I will try to get it out sooner if I possibly can.

We're adjourned.

(Proceedings adjourned at 4:58 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 9th day of February, 2022.

/s/ Valarie D. Flora, CCR

United States Court Reporter