

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

COMMON CAUSE FLORIDA, FAIRDISTRICTS )  
NOW, FLORIDA STATE CONFERENCE OF THE )  
NATIONAL ASSOCIATION FOR THE )  
ADVANCEMENT OF COLORED PEOPLE )  
BRANCHES, CASSANDRA BROWN, PETER ) Case No: 4:22-CV-109-AW  
BUTZIN, CHARLIE CLARK, DOROTHY )  
INMAN-JOHNSON, VEATRICE HOLIFIELD )  
FARRELL, BRENDA HOLT, ROSEMARY MCCOY, ) Tallahassee, Florida  
LEO R. STONEY, MYRNA YOUNG, and NANCY ) October 3, 2023  
RATZAN, )  
 )  
Plaintiffs, ) 8:33 a.m.  
 )  
v. )  
 )  
CORD BYRD, in his official capacity )  
as Florida Secretary of State, )  
 )  
Defendant. )  
\_\_\_\_\_ )

**TRANSCRIPT OF BENCH TRIAL  
BEFORE THE HONORABLE ADALBERTO J. JORDAN  
UNITED STATES CIRCUIT JUDGE  
HONORABLE M. CASEY RODGERS, UNITED STATES DISTRICT JUDGE  
HONORABLE ALLEN C. WINSOR, UNITED STATES DISTRICT JUDGE**

**(Pages 777 through 1064)**

*Julie A. Wycoff, RMR, CRR  
Official United States Court Reporter  
(850) 470-8196 \* julieawycoff@gmail.com*

APPEARANCES:

For the Plaintiffs:

Patterson Belknap Webb & Tyler, LLP  
by: **GREGORY L. DISKANT**

**H. GREGORY BAKER**

**MICHAEL K. HALPER**

**CATHERINE J. DJANG**

**ALVIN LI**

1133 Avenue of the Americas

New York, New York 10036

(212) 336-2000

*gldiskant@pbwt.com*

*hbaker@pbwt.com*

*mhalper@pbwt.com*

*cdjang@pbwt.com*

*ali@pbwt.com*

Southern Coalition For Social Justice

by: **KATELIN KAISER**

**CHRISTOPHER SHENTON**

1415 West Highway 54

Suite 101

Durham, North Carolina 27707

(919) 323-3380

*katelin@scsj.org*

*chrisshenton@scsj.org*

Holtzman Vogel Baran Torchinsky &

Josefiak, PLLC

by: **MOHAMMAD O. JAZIL**

**JOSHUA E. PRATT**

**MICHAEL BEATO**

119 South Monroe Street

Suite 500

Tallahassee, Florida 32301

(850) 274-1690

*mjazil@holtzmanvogel.com*

*jpratt@holtzmanvogel.com*

*mbeato@holtzmanvogel.com*

**P R O C E E D I N G S**

*(Call to Order of the Court.)*

JUDGE JORDAN: Good morning. Welcome back. Please be seated.

Okay. Updates before we get started, Mr. Jazil?

MR. JAZIL: Thank you, Your Honor. I touched base with Mr. Kelly in his office. He's available at 1:00 p.m. I apologize for that. I do believe that would require a break after the morning session with our two experts.

JUDGE JORDAN: We talked about that yesterday and about different things that might play out, and so 1:00 o'clock is fine. 1:00 o'clock is fine. We'll break whenever we need to break after your other witnesses are done, and we'll bring him back at 1:00 o'clock and finish with that.

MR. JAZIL: Thank you, Your Honor.

And just on a related note, if Mr. Kelly is testifying at 1:00, I don't see the direct or the cross lasting more than an hour, but that would mean that our three hours for summation would go through 5:00 p.m. in the evening. Is it better to postpone that to the next morning, perhaps?

JUDGE JORDAN: You know, I think the general preference on this side is to finish without rushing you but as quickly as possible. So I think -- I think we would prefer to finish today. And I don't know if that's the preference of my colleagues.

1 JUDGE RODGERS: Absolutely. Yes.

2 JUDGE JORDAN: So let's think about this. Play --  
3 let's say Mr. Kelly comes at 1:00. Let's say his total  
4 testimony takes an hour. We'll take a break to let you sort of  
5 breathe a little and collect your thoughts, everything else.  
6 And then so -- if we start at 2:30, approximately, you've got an  
7 hour and a half; you've got an hour, you said. You can take  
8 more, but you said you have about an hour. I think we can  
9 finish today. And --

10 JUDGE WINSOR: Not to interrupt, but if the two other  
11 witnesses you have are only 45 minutes each, there will be a  
12 large break between this morning and 1:00 when Mr. Kelly comes  
13 back.

14 JUDGE RODGERS: That's right.

15 You'll have time to gather your thoughts in between  
16 then and Mr. Kelly as well. So depending on how long that break  
17 is, you may not need as long of a break after Mr. Kelly before  
18 you start your closings.

19 MR. DISKANT: Summing up today is fine with me.

20 JUDGE JORDAN: Okay. I think that's where we're  
21 going. And, you know, we'll talk -- maybe we'll talk after your  
22 witnesses are done before we take a longer morning break about  
23 submitting proposed findings and conclusions.

24 I'll tell you from my perspective, here's my fear in  
25 not asking you to do that. I think we've all taken, you know,

1 very careful notes of all the witnesses' testimony. We've  
2 participated in some questioning as well. But we have these  
3 things, these binders, which have been admitted sometimes in  
4 bulk with regards to large exhibits. And I certainly don't want  
5 to miss something inside of one of those exhibits that's been  
6 admitted but that wasn't really highlighted by a witness but may  
7 turn out to be important. And from my perspective, that's why I  
8 think --

9 MR. DISKANT: Yeah.

10 JUDGE JORDAN: -- I prefer to have proposed findings  
11 and conclusions, because I want to make sure that we haven't  
12 missed anything. And we obviously haven't gone through -- at  
13 least I haven't gone through every single page of every single  
14 exhibit, you know, so far. We'll do that afterward. We've  
15 looked at the stuff that you've highlighted and the things that  
16 you've put up, but not every single page.

17 JUDGE RODGERS: Well, I'd also like to know after all  
18 of the evidence, you know, has actually been admitted into the  
19 record what you all think is most important about that evidence.

20 MR. DISKANT: Yeah, as I think I said the other day,  
21 for our part, at least, we've come to the conclusion that we  
22 would like to it that way, so that's perfectly fine.

23 JUDGE JORDAN: Okay.

24 JUDGE RODGERS: Would you ask Mr. Kelly to please do  
25 his best to be here at 1:00 o'clock?

1 MR. JAZIL: Yes, Your Honor.

2 JUDGE RODGERS: All right. Thank you.

3 MR. JAZIL: And, Your Honor, just one other update. I  
4 know the Court in its pretrial order had asked for the status of  
5 State case. I note that yesterday as we were concluding the  
6 Court session, the First District Court of Appeal issued an  
7 order directing the parties to be prepared for oral argument on  
8 October 31st --

9 JUDGE JORDAN: Okay.

10 MR. JAZIL: -- before the *en banc* Court.

11 JUDGE JORDAN: And is the briefing set? They set a  
12 briefing schedule too, or that was done ahead of time?

13 MR. JAZIL: They set a briefing schedule. Our initial  
14 brief is due tomorrow, and the briefing concludes October 27th,  
15 which is the date for the reply brief.

16 JUDGE JORDAN: Gotcha.

17 MR. JAZIL: And they're holding argument four days  
18 after.

19 JUDGE JORDAN: Okay, perfect. Thank you for letting  
20 us know.

21 JUDGE RODGERS: Thank you.

22 MR. DISKANT: Just one more comment, which I think is  
23 implicit in all of this, but if we start summations today, I  
24 think it's important that we finish them and we not have an  
25 overnight break between mine and Mr. Jazil.

1 JUDGE JORDAN: Agreed.

2 JUDGE RODGERS: Even if you have to shorten them.

3 MR. DISKANT: (Inaudible.)

4 JUDGE JORDAN: Yes, agreed.

5 So I will tell you this: I have -- or maybe the  
6 proper word is "had" -- a phone conference today on my Eleventh  
7 Circuit side of my job at 5:30. If we're going beyond 5:30, I'm  
8 going to need a five-minute break to at least notify everybody  
9 that I won't be on the call or may join it late.

10 But other than that, we will, of course, go through  
11 and we will not break you up into two days.

12 MR. DISKANT: Thank you, Your Honor.

13 JUDGE JORDAN: Okay. We're ready.

14 MR. JAZIL: Thank you, Your Honor. Our first witness  
15 is Dr. Johnson, and Mr. Beato will be presenting counsel.

16 MR. BEATO: And, Your Honors, just so we're clear and  
17 just so the record's clear, we'll be relying on three exhibits  
18 that are already in evidence.

19 JUDGE JORDAN: Okay.

20 MR. BEATO: It's going to being DX111, DX112, and  
21 DX113, and we have physical copies in case Your Honors would  
22 like them.

23 JUDGE JORDAN: Do we have copies of those now, the  
24 physical copies, or not yet?

25 MR. BEATO: I don't --

1 JUDGE JORDAN: I guess it depends whether you think we  
2 need them or not. If you're going to put them up on the screen,  
3 we may not need them.

4 MR. BEATO: I think it would just be helpful just to  
5 have them physically.

6 But you are correct, Your Honor. We will put it on  
7 the screen.

8 JUDGE JORDAN: As long as we get them all at the end.

9 JUDGE RODGERS: They're single exhibits. They're not  
10 big binders.

11 **DOUGLAS MARK JOHNSON, DEFENSE WITNESS, DULY SWORN**

12 DEPUTY CLERK: Be seated, please.

13 For the record, please state your full name and spell  
14 your last name for the record.

15 THE WITNESS: Douglas Mark Johnson. Johnson is  
16 J-O-H-N-S-O-N.

17 DEPUTY CLERK: Thank you.

18 **DIRECT EXAMINATION**

19 BY MR. BEATO:

20 Q. Good morning, Dr. Johnson.

21 A. Good morning.

22 Q. First question: What's your education?

23 A. I have a bachelor's in government from Claremont McKenna  
24 College, an MBA from University of California at Los Angeles,  
25 and a Ph.D. in political science from Claremont Graduate



1 University.

2 Q. And you mentioned your Ph.D. What's your Ph.D. on?

3 A. It was in political science, and my dissertation was a case  
4 study of independent redistricting commissions.

5 Q. And what dates did you receive your degrees?

6 A. My undergrad was 1992, and then my MBA was 1999, and the  
7 Ph.D. was 2015.

8 Q. And I notice a gap between the undergraduate degree and the  
9 Ph.D. What did you do in between them?

10 A. Correct. I was a fellow in the Coro Foundation's  
11 fellowship in public affairs. Coro is C-O-R-O.

12 And then I was a legislative staffer for a member of  
13 the House of Representatives for four years.

14 Q. And where do you currently work?

15 A. I'm president of National Demographics Corporation.

16 Q. And what do you do there?

17 A. I oversee all the company's work, so demographic studies,  
18 mapping, everything we do.

19 Q. And who typically are your clients?

20 A. Mostly local governments, so cities, counties, school  
21 districts, special districts, and occasionally some states.

22 Q. Do you draw maps?

23 A. Yes, lots of them.

24 Q. And you mentioned demographic studies. Could you briefly  
25 described what that entails?

1 A. So we have various services all kind of related that we  
2 offer these local governments. If they are concerned about  
3 potential voting rights liability under either federal or  
4 California laws, we'll do detailed demographic studies and  
5 assess that liability. Many of our clients are moving from  
6 at-large elections to by-district elections, and so we're  
7 drawing those districts mid-decade. And then many of them are  
8 redistricting -- after every census, we get very busy -- and so  
9 we'll guide them through the process of redistricting.

10 And we handle everything: Building the database,  
11 drafting maps, planning their schedules, planning their  
12 hearings, and often leading the discussions in their official  
13 hearings and in any community outreach meetings they do.

14 Q. And how long have you been in the redistricting field?

15 A. I started in 1990.

16 Q. So that's about 30 years or so?

17 A. A little over 30 years with a -- the break from '92 to  
18 2001.

19 Q. So how many redistricting cycles is that?

20 A. Four cycles, as we look at it in the redistricting world.

21 Q. And how many maps have you personally drawn?

22 A. Thousands.

23 Q. And how many redistricting projects have you overseen?

24 A. We're -- I think we're over 500 now.

25 Q. And just to clarify, you've done work for states before?

1 A. Yes.

2 Q. Which states?

3 A. Worked for the Arizona Independent Redistricting Commission  
4 twice, two different decades; worked for Ohio, Alabama,  
5 Louisiana, and Florida.

6 Q. And you said that you worked for local governments before?

7 A. Yes. That's most of our work.

8 Q. And about how many local governments?

9 A. Oh, well, close to 500. All but those five or six state  
10 projects were local government projects.

11 Q. And how many local governments are you currently doing  
12 redistricting work for?

13 A. We're currently working for about 25.

14 Q. And have you done any local government work in Florida  
15 regarding redistricting?

16 A. Yes.

17 Q. What is that?

18 A. For Jacksonville.

19 Q. Okay. So, Dr. Johnson, you talked about working for  
20 Arizona. When did you work for Arizona?

21 A. First for the 2001 Arizona Independent Redistricting  
22 Commission, and then we came back in the 2021-2022 cycle for the  
23 Arizona Independent Redistricting Commission.

24 Q. So you mentioned the Arizona Independent Redistricting  
25 Commission. What is that?

1 A. Arizona was the first state where the voters, by  
2 initiative, created an independent commission that both was  
3 created independently of a legislature and parties and operated  
4 independently of the legislature and parties, so it -- anyone  
5 could apply, and there was a commission that vetted applications  
6 for the redistricting commission, and then that nominating  
7 commission would pick -- went through a process and picked two  
8 Republicans and two Democrats to be on the commission, and then  
9 those four picked an independent who would be the fifth member  
10 in chair.

11 Q. So, Dr. Johnson, you talked about your first stint in  
12 Arizona. What did you do there?

13 A. A lot of mapping. I was the -- lead technical staffer for  
14 drawing the legislative map. And Arizona is weird; they only  
15 have one legislative map. They don't have separate House and  
16 Senate maps, so they have one map legislative map. And then I  
17 assisted withdrawing the congressional map as well.

18 And in addition to the technical side, then there was  
19 a lot of leading public forums, leading commission meetings,  
20 describing how the maps had changed, soliciting feedback from  
21 the commissioners on what they liked about the maps and what  
22 they wanted to see changed and then implementing those, and also  
23 presented all this information to the general public.

24 Q. Did the commission vote on your work?

25 A. Yes.

1 Q. And what did they vote?

2 A. The congressional map was a unanimous 5-0 yes vote, and the  
3 legislative map was a 4-1 -- bipartisan 4-1 vote yes.

4 Q. Did that work lead to litigation?

5 A. Yes.

6 Q. How many years did that litigation last?

7 A. About seven or eight years.

8 Q. And what was your role in the litigation, if any?

9 A. At the start and through discovery, I was treated as an  
10 expert witness but ultimately ended up as what they called the  
11 30(b)(6) person most knowledgeable about the process witness.

12 JUDGE JORDAN: You're talking about the 2012 cycle and  
13 then the litigation that ran afterwards?

14 THE WITNESS: The 2001 cycle.

15 JUDGE JORDAN: Oh, the '01 cycle.

16 THE WITNESS: Yeah.

17 JUDGE JORDAN: Got it.

18 BY MR. BEATO:

19 Q. And how long did you testify for?

20 A. I spent seven days testifying.

21 Q. So, Dr. Johnson, you talked about a second stint in  
22 Arizona. What did you do for that second stint?

23 A. In 2021 we came back, and my firm in DC partnered with a  
24 firm called the Timmons Group, which is a big national GIS firm  
25 that has lots of technical expertise. And so they provided all

1 the technical support and staff and web tools and all those  
2 technical sides of it, and I was the subject matter expert on  
3 redistricting, kind of guided connecting the Timmons Group folks  
4 with the commission and explaining how all the mapping and  
5 commission process needed to go.

6 Q. And just so we're clear, what kind of maps did you assist  
7 with?

8 A. In 2021 it was overseeing both the congressional and the  
9 state legislative map.

10 Q. And did that work lead to any litigation?

11 A. There was a small procedural case that went away quickly,  
12 but no significant litigation.

13 Q. And did you have a particular title for your work with the  
14 commission during the second stint?

15 A. It was subject matter expert.

16 Q. And, Dr. Johnson, you mentioned work for Ohio. When did  
17 you work for Ohio?

18 A. In this 2021-22 cycle.

19 Q. And what did you do for Ohio?

20 A. Ohio has their own redistricting commission, and they drew  
21 maps. The maps ended up in litigation. And as one part of the  
22 litigation, the court suggested and the commission decided to  
23 follow that suggestion of bringing in what they titled  
24 "independent mapmakers," and so there were two of us brought in  
25 who weren't tied to Ohio and the state's process up to that

1 point and literally put in an office, live-streamed from the  
2 moment we walked in that office to the moment we walked out at  
3 midnight or later.

4 And we built the databases and then tried to draw the  
5 House and Senate maps and went through the whole process. And  
6 the other mapmaker had a preexisting commitment, so he was there  
7 for all but the last two days, and then I was the sole  
8 independent mapmaker for the last two days.

9 JUDGE WINSOR: And I'm sorry. You said already, but  
10 which cycle was this?

11 THE WITNESS: The 2021-22, yes.

12 JUDGE WINSOR: Thank you.

13 BY MR. BEATO:

14 Q. And which maps, just to be clear, did you review?

15 A. Those were the State House and State Senate maps.

16 Q. And, Dr. Johnson, you said that you worked for Alabama, I  
17 believe?

18 A. Yes.

19 Q. And what was your work like with Alabama?

20 A. I was an expert witness for the State, not in the current  
21 litigation, but in the litigation in 2019, 2020.

22 Q. And just at a very broad level, what was your task? What  
23 did you look over? What did your Alabama job entail?

24 A. In that case it was some demographics and mapmaking work,  
25 but primarily looking at the plaintiffs' proposed/illustrative

1 map work to identify whether it had been drawn based on the kind  
2 of communities of interest and other traditional factors or if  
3 race appeared to be the predominant factor in drawing that map.

4 Q. And you mentioned work for Louisiana?

5 A. Yes.

6 Q. What did you do for Louisiana?

7 A. I'm currently an expert witness in both of the cases going  
8 on there, the congressional case and the legislative case.

9 Q. And again, at a very general level, what was your task with  
10 Louisiana?

11 A. Very similar of looking at the plaintiffs'  
12 proposed/illustrative map and reviewing their expert's report  
13 with his explanations of why he had drawn the lines where they  
14 were and looking at: Did those explanations actually match the  
15 map, or was it possible that race was being its predominant  
16 factor?

17 Q. And, Dr. Johnson, you mentioned that you worked for the  
18 Florida Senate. When did you work for the Florida Senate?

19 A. In 2001.

20 Q. And what did you do for the Florida Senate?

21 A. The Senate was considering at the time the Senate map and  
22 the congressional map, and the maps were already drawn. I came  
23 in very late in the process. But I worked on a review of all  
24 the kind of traditional principles and did the maps map, you  
25 know, geographic boundaries of cities and counties, and then in



1 particular reviewing all the testimony in the hearings and in  
2 the public input about communities of interest and looking at  
3 how the maps matched up with that testimony and did they follow  
4 that or not.

5 Q. And just curious, Dr. Johnson: What's a community of  
6 interest?

7 A. It's a term of art in the redistricting world, used all the  
8 time but not always defined.

9 Generally speaking, it means a geographic or  
10 socioeconomic or policy-interested group that share a -- some  
11 kind of common interest or characteristic. Usually it's in the  
12 context of discussion that that area should be kept together in  
13 a district, but not always. And it -- it's a very flexible  
14 term. Unfortunately, it's often abused nowadays. I was looking  
15 for a Ph.D. dissertation to write today, I think, looking at the  
16 abuse of communities of interest as a smokescreen for some other  
17 partisan or other nontraditional principle. That would be an  
18 interesting topic.

19 Q. And, Dr. Johnson, you said that you worked for the City of  
20 Jacksonville?

21 A. Yes.

22 Q. When did you work for the City of Jacksonville?

23 A. Just this past year.

24 Q. And what did you do for Jacksonville?

25 A. They had drawn their initial city council redistricting map

1 in-house, just using city staff, and that map had been  
2 challenged, and they lost that case and an order to redraw the  
3 map.

4 And so they brought me in to guide them through that  
5 process of redrawing the map, so building the database, taking  
6 all the input looking at their communities of interests, looking  
7 at their neighborhoods and things like that and coming up with  
8 draft map options, and then presenting those to a city council  
9 subcommittee, which held public hearings and got public input,  
10 and then the subcommittee members gave input, and then revising  
11 those maps and eventually doing the same with the full council  
12 of presenting the maps, getting public input, and adopting those  
13 maps.

14 Q. And which maps are we talking about?

15 A. The city council.

16 Q. And we touched on this before, but I just want to make a  
17 clean record.

18 Have you provided expert testimony in redistricting  
19 cases?

20 A. Yes.

21 Q. How many cases?

22 A. About a dozen.

23 Q. Have you testified on behalf of state defendants?

24 A. Yes.

25 Q. Which ones or which states?

1 A. Alabama, Louisiana, now Florida, and...

2 Q. Dr. Johnson, what would you consider your expertise to be  
3 in?

4 A. Really in most elements of redistricting, but in particular  
5 mapmaking and demographics.

6 MR. BEATO: Your Honor, I would like to tender  
7 Dr. Johnson as an expert in demographics, the redistricting  
8 process, and mapmaking.

9 MR. PORTORREAL: Your Honors, Newton Portorreal for  
10 the plaintiffs.

11 We have some problems with this witness, but I'll save  
12 it for cross-examination, if that's okay.

13 JUDGE JORDAN: So no objection to him being tendered  
14 as an expert?

15 MR. PORTORREAL: No, no objection.

16 JUDGE JORDAN: Okay. So accepted.

17 BY MR. BEATO:

18 Q. Dr. Johnson, what were you asked to do in this case?

19 A. To review the report that Dr. Barreto and his coauthor  
20 wrote.

21 Q. Do you know which parts of the report Dr. Barreto wrote and  
22 which part of the report his coauthor wrote?

23 A. No.

24 Q. Do you have any issues with Dr. Barreto's expert  
25 conclusions?

1 A. Yes.

2 Q. What are they?

3 A. Significantly disagree with his use of the dot maps. I  
4 think they're misleading, and I think they actually confuse him  
5 as well.

6 I disagree with his description of Jacksonville  
7 demographics and his allegations that the enacted map cracked  
8 the Black voting strength in Jacksonville.

9 And disagree with his description of the Senate  
10 district in Jacksonville, Senate District 5 with the HC19  
11 proposed congressional district in the same area. And he  
12 characterized those as closely resembling each other, and I  
13 don't think they resemble each other at all.

14 Q. So, Dr. Johnson, we'll break each down.

15 Let's start with Dr. Barreto's reliance on dot maps.

16 At a gentle level, tell us what a dot map is.

17 A. So the GIS software that we use can create these maps, and  
18 it takes the data and shows it in different ways.

19 A dot map is one of those options where it puts a dot  
20 for every certain number of people of a given group, and in  
21 Dr. Barreto's case, he's putting a dot for each unknown number  
22 of Black voting age residents and in some of the maps also  
23 Hispanic and white voting age residents.

24 Q. And just to pause very briefly, you mentioned "GIS."

25 What is GIS?

1 A. It's geographic information systems. So it's the fancy  
2 title or technical title for the mapping software that we use to  
3 take all these giant tables of data and put them on screen in a  
4 map form so we can easily look at them and assign them to  
5 districts.

6 Q. And, Dr. Johnson, what's your issue with using a dot map as  
7 Dr. Barreto used it?

8 A. It tells you where there are five or ten or 50 members of  
9 the group, but it doesn't tell you anything about their voting  
10 strength.

11 Q. And you mentioned voting strength. What is voting  
12 extension?

13 A. So the goal of districts is obviously to draw these  
14 geographic areas that hold elections, and when you are looking  
15 at the Voting Rights Act or other elements of voting, you want  
16 to know a group's voting strength. It doesn't do you any good  
17 to know there's 50 people at a given dot if you don't know if  
18 it's 50 of 70, in which case, they'd be huge voting block and  
19 dominant, or 50 of a hundred thousand, which is essentially  
20 irrelevant for voting strength.

21 Q. Does knowing voting strength matter in redistricting?

22 A. Yes. That's ultimately the end result of districting at  
23 any level is drawing districts that hold elections, and the  
24 voting strength determines which group will elect their  
25 candidate.

1 MR. BEATO: So I'd like to pull up what's been marked  
2 as DX111, please.

3 BY MR. BEATO:

4 Q. Okay. Dr. Johnson, do you see this?

5 A. Yes.

6 Q. At a broad level, what is this?

7 A. So on the left is Dr. Barreto's dot map of the Jacksonville  
8 area, and on the right is essentially my reproduction of that  
9 exact same map but with the color scheme flipped. And so you  
10 can see the red dash lines -- this is actually the same map we  
11 looked at yesterday in Dr. Barreto's testimony. The red dashed  
12 lines are the enacted districts, so you can see four on the left  
13 and at the top and five in the bottom right.

14 And the black lines are the benchmark lines of the old  
15 congressional district where it comes into Duval County and kind  
16 of has its tentacles going around Jacksonville.

17 Q. And so for Dr. Barreto's map, what do the green dots  
18 represent?

19 A. The green dots are the Black voting age residents. I had  
20 thought there was a dot for every 50, but we learned yesterday,  
21 we don't actually know how many people each dot represents.

22 Q. And staying with Dr. Barreto's map on the left, what do the  
23 pink dots represent?

24 A. Those are the -- the pink dots are the white voting age  
25 residents.

1 Q. Okay. And moving over to the map on the right, what do the  
2 pink maps -- strike that.

3 What do the pink dots represent?

4 A. So in the map on the right, I've simply flipped the color  
5 scheme, so the pink dots on the right are the Black residents of  
6 voting age and the green dots are the white residents of voting  
7 age.

8 Q. Why did you flip the colors?

9 A. One of the big weaknesses of dot maps is they're -- as a  
10 human eye looks at them, they're very vulnerable to color  
11 selection, so the dominant color looks like the biggest group,  
12 even if there are fewer dots.

13 So, for example, if you look at the part of the  
14 benchmark district that comes across the river where the black  
15 lines kind of zig and zag through what's District 5 -- oh, I can  
16 touch over here, can't I?

17 If you look in this area, it looks in Dr. Barreto's  
18 map fairly green within that -- those black lines and looks like  
19 it -- certainly to the eye, it looks like there's more Black  
20 residents than there are white residence and more green dots  
21 than there are pink dots.

22 If you look over on the other side, that same area, it  
23 again looks like there's more green dots. It's because they're  
24 green; it's not because there's more dots.

25 And so simply flipping the color makes the map look

1 like there's a different larger group in a dot map.

2 Q. At the very least, Dr. Johnson, what conclusions do you  
3 draw from Dr. Barreto's dot map?

4 A. It does tell you where there are any of the given group.  
5 So on very rare occasions, I'll actually use it to see are there  
6 any Blacks in this area; are there any Latinos or Asian  
7 Americans in a given area.

8 And so what you can see on his map on the left is that  
9 that benchmark district was drawn with these fingers to get  
10 every possible Black resident into that district. Anywhere  
11 there was a collection of a few dots, they drew a finger to grab  
12 those residents.

13 Q. Dr. Johnson, in your redistricting work, do you use dot  
14 maps?

15 A. Very, very rarely. Sometimes at the start of a process  
16 just to see which groups might have any numbers in a given area,  
17 we might do a dot map, but not when we're actually mapping.

18 Q. Do you use any other maps?

19 A. Yes. We use what's called a heat map.

20 MR. BEATO: And I would like to pull up what's been  
21 marked as DX112, please.

22 BY MR. BEATO:

23 Q. And, Dr. Johnson, at a broad level, what is a heat map?

24 A. A heat map is the map on the right -- how do I clear that?  
25 There we go. Thank you.



1           So it's the map on the right, and in this case we're  
2   showing the percentage of the voting strength, in this case the  
3   percentage of the voting age population, or VAP. And so the red  
4   is 75 percent or more of that, in this case, census block, which  
5   is essentially a city block. 75 percent or more of the voting  
6   age population in that block is Black.

7           At the other end of the spectrum in the purple, you  
8   get 25 percent or less of the voting age population is Black.  
9   You can see there the greens, the yellows, and reds are majority  
10   Black, while the blues and purples are less than majority.

11   Q.   And how does a heat map compare to a dot map?

12   A.   It tells you exactly the voting strength of that group. So  
13   at a glance, you can see that African Americans or Blacks are  
14   75 percent of the -- most of the area on the West side of the  
15   river and that benchmark District 5 going up into Jacksonville  
16   into the heart of Jacksonville.

17           And you can see over on the East side of the river,  
18   there are a couple of little small pockets where there's a  
19   yellow or red that's a majority block, but there are no big  
20   neighborhoods, and the East side of the river is definitely  
21   significantly less than majority Black.

22   Q.   And looking at your heat map on the right, what does your  
23   heat map tell you about Benchmark CD-5?

24   A.   It tells me that they were trying to get every little  
25   pocket of Black voting strength into that district that they

1 could. You can see is -- it really explains the fingers over on  
2 the East side of the river where they go down even to grab a  
3 little 35 percent area just to get every small pocket of Black  
4 voting age population into the district that they could.

5 Q. And just curious, Dr. Johnson. How did you create your  
6 heat map?

7 A. In the Maptitude for redistricting software that I use, the  
8 GIS software that I use.

9 Q. Is that the same software that's on the Florida  
10 redistricting website?

11 A. No. The Florida State site has what's called ESRI, or  
12 E-S-R-I, software.

13 Q. Why didn't you use the Florida redistricting website to get  
14 a heat map?

15 A. ESRI's software is very powerful and good, but making heat  
16 maps in it is a real pain. It's really easy to make in  
17 Maptitude.

18 Q. So switching gears, Dr. Johnson, Dr. Barreto says that the  
19 enacted map cracks Duval County Black voters. Do you agree?

20 A. No.

21 Q. Why do you disagree?

22 A. And you can see in the heat map that the river is a  
23 significant boundary, and the area where the Black residents  
24 are, the majority of the voting strength is all on the West side  
25 of the river and all in Congressional District 4 in the enacted

1 map.

2 Q. Dr. Johnson, you said that the river is a significant  
3 boundary. In your experience generally, are rivers used as  
4 district boundaries?

5 A. Yes.

6 Q. Why?

7 A. They make very good boundaries. When we're looking to draw  
8 districts, the goal is, of course, to hold elections, and we  
9 want residents to be able to get involved in those elections, to  
10 go knock on doors and walk precincts for the candidates they  
11 like. So it's really easy to walk around your neighborhood, but  
12 if part of the district is across the river, it's very hard to  
13 go campaign across the river. You have to drive around, at  
14 best.

15 So they make a good, clear boundary that's really easy  
16 for voters to understand. It also makes it easier for the  
17 representative and the voters after the election. If someone  
18 wants to hold a town meeting, if the elected official wants to  
19 hold a town meeting, it's a lot easier in the neighborhood, in  
20 the area, than if you have to go, in some cases, out of the  
21 district, across a bridge in some other district, and come back  
22 down into your district.

23 Q. Dr. Johnson, in your Jacksonville redistricting experience,  
24 did you use the St. Johns River as a district boundary?

25 A. Yes.

1 Q. Again, generally speaking, why?

2 A. The city council actually had as one of its principles in  
3 redistricting to use the river as a boundary and to cross it  
4 only if required to cross it for population balancing and, in  
5 that case, to just cross it once.

6 Q. And when, if at any time, would a district cross over a  
7 river?

8 A. Of course, if you don't have the right number of people on  
9 one side of the river to make exactly a number of districts, you  
10 have to cross the river once in order to balance the population  
11 numbers under federal law.

12 JUDGE JORDAN: The city, the Jacksonville City Council  
13 used the river as a natural boundary both when its plan was  
14 struck down and after its plan was struck down?

15 THE WITNESS: Yes. And actually, one of the  
16 agreements or stipulations, I think in the term -- is the  
17 case -- in the case was that all of the districts on the East  
18 side of the river were uncontested. The whole lawsuit was only  
19 about districts on the West side of the river.

20 BY MR. BEATO:

21 Q. Dr. Johnson, just to switch gears again, Dr. Barreto  
22 concludes that plan 8019 CD-5, the Duval-only district  
23 boundaries, closely resemble the shape and boundaries of Senate  
24 District 5. Do you agree with that conclusion?

25 A. No.

1 MR. BEATO: Can we pull up what's been marked as  
2 DX113.

3 BY MR. BEATO:

4 Q. Okay. So, Dr. Johnson, what are we looking at?

5 A. So on the left is Senate District 5 as enacted, and on the  
6 right is Congressional District 5 as proposed in HC 8019.

7 Q. And just so we're clear, is this an even scale comparison?

8 A. No. The two maps are not to scale. They're just zoomed in  
9 on just that district.

10 Q. Which district is bigger and which district is smaller?

11 A. So the Senate district is much smaller.

12 Q. Okay. And I think it would be helpful if you could draw  
13 Senate District 5 inside of 8019, if that would be possible,  
14 just so we get a sense in comparison?

15 A. Yes. The Senate district has -- nicely follows what we  
16 call traditional principles of highways and freeways and the  
17 county line as a boundary, so you can actually see it in the  
18 congressional district. If we start down at the county line, it  
19 follows the highway up to Interstate 10, goes across on  
20 Interstate 10 to the 295 loop, and then goes around the 295  
21 loop, following the loop, and then it switches over to the  
22 highway and comes right down until it finishes.

23 Q. That happened to me yesterday, Dr. Johnson.

24 A. Yes.

25 But you can really see how until it gets down to

1 the -- back down to the river and the county line at the bottom,  
2 that's the Senate district. It really is the highway -- the two  
3 freeways and the highway again. And you can see how the  
4 congressional district is much larger.

5 Q. Mm-hmm.

6 A. My little crazy line obscures a little bit, but over on the  
7 East, this area that's in the congressional district but not in  
8 the Senate district, that's tens of thousands of people in the  
9 heart of Jacksonville. There's two college campuses. The  
10 airport is in there. It's a very highly populated area.

11 And then --

12 Q. So, Dr. Johnson -- not to cut you off.

13 But why do you disagree with Dr. Barreto's conclusion?

14 A. Oh, because he said they closely resemble each other, and  
15 the Senate district is completely surrounded by the  
16 congressional district, but it doesn't resemble it at all.

17 Q. Why?

18 A. It has all this extra population and extra territory, so  
19 you've got that tens of thousands in the East -- you know,  
20 instead of stopping at the 295 loop, which is a very prominent  
21 division, it goes all the way up to the county line up North.  
22 You can see all the territory up there that's included with lots  
23 of population.

24 Over in the West, it also doesn't stop at the freeway.  
25 It goes out all the way to the county line. And again, South of

1 the 10, it doesn't stop at the highway. It goes out all the way  
2 to the county line.

3 Instead of closely resembling each other, the only  
4 boundaries they share are the Southern county line and a little  
5 part of the bridge where they both cross the river at the same  
6 spot.

7 JUDGE JORDAN: One of -- not the only, but one of the  
8 opinions that Dr. Barreto provided yesterday was that Senate  
9 District 5, right --

10 THE WITNESS: Yes.

11 JUDGE JORDAN: -- that Senate District 5, like the  
12 Duval-only 8019 map, were both enveloped by the surrounding  
13 district. In other words, that the surrounding district came  
14 around both sides, both ends of the respective district.

15 JUDGE RODGERS: You're talking about 4? 4 goes  
16 around --

17 JUDGE JORDAN: Right. In Dr. Barreto's view, CD-4,  
18 the current CD-4, wrapped around the proposed 8019 Duval-only  
19 proposal, and in this case with the State Senate map, the  
20 surrounding district also enveloped around Senate District 5.

21 Can you give us your thoughts on that?

22 THE WITNESS: To be honest, that was new. That wasn't  
23 in his report. So I hadn't looked at it in detail.

24 His report was all about the Senate District 5 matches  
25 Congressional District 5.

1           There's some of that, I guess, of the Senate district  
2 and the congressional district do wrap around to a degree.

3           JUDGE RODGERS: Just so -- I think that came from  
4 Mr. Kelly's testimony, which I don't think Dr. Barreto had at  
5 the time of his testimony yesterday until Mr. Kelly had  
6 testified here.

7           But that's where that testimony came from about the  
8 Senate District 4, you know, enveloping District 5, and the same  
9 with the enacted map 8019.

10          And so I'm on Judge Jordan -- that's in the record  
11 now, so what is your response to that?

12          THE WITNESS: To a degree, there is some wraparound in  
13 both maps. Looking at these maps, which were the maps from his  
14 report, you can see in the Senate map that District 4 and 6 over  
15 here both are up against District 5, whereas the congressional  
16 district in the CD-5 completely wraps around it.

17          So there's some similarity, I suppose, but I don't  
18 think it's the same situation.

19          MR. BEATO: Your Honors, would it be helpful if we  
20 pull up 8019, that map, just to clarify?

21                 Can we pull up DX98, please.

22          THE VIDEO TECHNICIAN: 98?

23          MR. BEATO: Correct, 98. If we could zoom in on  
24 Duval. If you could get a better shot of that.

25          ///



1 BY MR. BEATO:

2 Q. So, Dr. Johnson, what is the effect of having that  
3 encapsulated District 5? What's the effect for District 4?

4 A. So in this case you get almost a full PacMan from  
5 District 4 of it completely wrapping around District 5 and being  
6 on the North, the East, and the Southern sides of the district.  
7 Everything except for the small spot where it touches Baker  
8 County is completely encircled by District 4.

9 Q. And does that affect compactness?

10 A. It affects the compactness of District 4 but not of  
11 District 5. District 5 is a highly compact district.

12 Q. And what effect does it have on the compactness of  
13 District 4?

14 A. Of which one?

15 Q. District 4. What is the effect of District 5's --

16 Let me rephrase.

17 Noting District 5, what is District 5's effect on the  
18 compactness of District 4?

19 A. Depending on which compactness measure you're looking at,  
20 some of them, it won't have an impact, but on many of them that  
21 internal bump into it will reduce the compactness of District 4.

22 JUDGE RODGERS: When you say "the internal bump into  
23 it" --

24 THE WITNESS: The way that District 4 kind of has the  
25 bump of District 5 taking up the middle of it. Depending on the

1 compactness formula and how it's measured, some of them don't  
2 really look at the inside boundaries and some of them do look at  
3 the total length of the boundary and things like that.

4 JUDGE RODGERS: So following up on Judge Jordan's  
5 question, does the same compactness issue with District 4 occur  
6 with the Senate District 4 and 5?

7 Can we pull that back up again?

8 MR. BEATO: If we can go back to DX113.

9 JUDGE RODGERS: Or is there a distinction in terms of  
10 the compactness on District 4?

11 THE WITNESS: So where the congressional district is,  
12 like I said, the full PacMan, completely going around, the  
13 Senate District 4 is -- it comes around and it stops at the  
14 river, so it's two-thirds of the PacMan.

15 JUDGE RODGERS: So it has a little bit -- it has some  
16 of the same problem but not all of it?

17 THE WITNESS: Correct.

18 JUDGE RODGERS: Okay. All right. Thank you.

19 MR. BEATO: And just to go back to DX98, please. And  
20 if you can again zoom in on Duval.

21 BY MR. BEATO:

22 Q. Dr. Johnson, could you comment on the visual compactness of  
23 these two districts?

24 A. I mean, the ultimate rule of compactness is you know  
25 just -- you know it when you see it. So District 5 is almost an

1 ideally compact district. You know, by most formulas a perfect  
2 circle is perfect compactness.

3 But to the degree you're following the county line and  
4 getting close to that, you're about as close as you'll ever get  
5 in a real to being perfectly compact.

6 And then District 4 is wrapping around that, which is  
7 less than ideally compact, but other than the part taken up by  
8 Jacksonville in District 5, it's -- the outer boundaries are  
9 very compact.

10 Q. And why is District 4 not ideally compact?

11 A. Because District 5 is in the middle of it, so you're going  
12 around one group of people to get to another.

13 Q. Dr. Johnson, just to sum up, do you have issues with  
14 Dr. Barreto's expert conclusions?

15 A. Yes.

16 Q. Do you agree or disagree with Dr. Barreto's reliance on dot  
17 maps?

18 A. Strongly disagree.

19 Q. Do you agree or disagree with Dr. Barreto's conclusion that  
20 enacted map CD-4 and CD-5 cracks Black populations in  
21 Jacksonville?

22 A. I disagree.

23 Q. Do you agree or disagree with Dr. Barreto's description of  
24 Jacksonville's demographics and boundaries?

25 A. Yes, disagree.

1 Q. And do you agree or disagree that Senate District 5 mirrors  
2 CD-5 in plan 8019?

3 A. Disagree.

4 MR. BEATO: No further questions.

5 JUDGE JORDAN: All right. Thank you very much.

6 MR. PORTORREAL: Good morning, Your Honors.

7 Good morning, Dr. Johnson.

8 THE WITNESS: Good morning.

9 MR. PORTORREAL: It's good to see you in person.

10 Dr. Johnson, I'm Newton Portorreal. Am I audible? Is  
11 everything okay?

12 JUDGE JORDAN: We can hear you fine.

13 MR. PORTORREAL: Thank you, Judge.

14 **CROSS-EXAMINATION**

15 BY MR. PORTORREAL:

16 Q. Dr. Johnson, I think you spoke with my friend earlier about  
17 your experience testifying as an expert, and you cited about a  
18 dozen, I think was your number. Is that the number of times  
19 you've testified in court or is that including depositions sort  
20 of in that number?

21 A. It includes declarations. There are other cases where I've  
22 been in depositions too.

23 Q. Okay. Thank you.

24 And sort of from the CV I've seen that was provided  
25 along with your report, you've testified maybe six or seven

1 times, and that includes the two times you testified for the  
2 Arizona Independent Redistricting Commission; is that about  
3 right? And by "testified," again, I mean in court.

4 A. Actually, no. The second time around with Arizona there  
5 was no court hearings.

6 Q. Okay.

7 A. And the first time was not as an expert.

8 Q. Okay. So you've testified about five times as an expert,  
9 then? Does that sound about right?

10 A. Off the top of my head, I don't know, but that sounds about  
11 right.

12 Q. Okay. Was one of the cases that you testified in *Common*  
13 *Cause v. Lewis*, a North Carolina State case?

14 A. Yes.

15 MR. PORTORREAL: That citation for that case is 2019  
16 WL4569584.

17 And if I could pull up the ELMO.

18 BY MR. PORTORREAL:

19 Q. So, Dr. Johnson, I'm looking at portions of this opinion,  
20 and I think you can -- let me know if you can see the  
21 highlighted text, which reads, "Paragraph 640: Legislative  
22 defendant's expert Dr. Douglas Johnson has a bachelor of arts in  
23 government from Claremont McKenna College, a master of business  
24 administration from the Anderson School at UCLA, and a Ph.D. in  
25 political science from Claremont Graduate University."

1 And that's you?

2 A. Yes.

3 Q. Yes. Okay.

4 JUDGE WINSOR: What was that document? That was a  
5 published case?

6 MR. PORTORREAL: Yes, Your Honor. I have some copies  
7 of the published case if the Court would like that. They're  
8 about 350 pages long, and I'm only using a small portion.

9 JUDGE WINSOR: But that's the citation that you just  
10 gave us --

11 MR. PORTORREAL: Yes, Your Honor.

12 JUDGE WINSOR: Okay.

13 BY MR. PORTORREAL:

14 Q. And I am reading now from paragraph 647. This is the  
15 highlighted text, which reads:

16 "The Court finds Dr. Johnson's analysis unpersuasive  
17 and gives his opinions little weight."

18 Is that what that says?

19 A. Yes.

20 Q. And that was the Court's conclusion in that case about your  
21 testimony?

22 A. Yes.

23 Q. And the Court also -- quote, reading from paragraph 652 of  
24 the opinion: "... struck this testimony and all related  
25 portions of Dr. Johnson's rebuttal report under Rule 702 and

1 Rule 403 after it was uncovered on cross-examination that  
2 Dr. Johnson had made a series of significant errors."

3 That's also correct?

4 A. In context, yes. Their only -- when they say "this  
5 testimony," they're only discussing one piece of my report, not  
6 all of my testimony.

7 Q. Understood.

8 And at paragraph 648, the Court also identified some  
9 other cases in which you've been a live expert witness. Those  
10 include *Covington v. North Carolina*, I believe; *Luna v. County*  
11 *of Kern*; *Garrett v. City of Highland*; *Jauregui v. City of*  
12 *Palmdale*, and in all of those cases, your analysis had been  
13 rejected either in whole or in part; is that correct?

14 A. I might quibble with the Highland description they're  
15 talking about there. That was a choice of methodologies.

16 But otherwise, the quotes are as you described them.

17 Q. So, Doctor, as we just discussed, you've testified about  
18 five times as an expert, and in all five of those cases, your  
19 opinions have been excluded or otherwise entitled to very little  
20 weight; is that right?

21 MR. BEATO: Objection, Your Honor. Relevance  
22 objection. What other Courts said about Dr. Johnson's  
23 credibility has no weight on what this court determines.

24 MR. PORTORREAL: I think what other courts have said  
25 about Dr. Johnson's ability to testify as an expert and what, if

1 at all, they'll consider his opinions, I think, has great  
2 relevance to his qualifications here today.

3 JUDGE JORDAN: If the objection is a relevance  
4 objection, it's overruled.

5 BY MR. PORTORREAL:

6 Q. And, Doctor, as we discussed, you wrote a report in this  
7 case, correct?

8 A. Yes.

9 Q. And in that report, you don't talk about or dispute  
10 Dr. Barreto's conclusion that the Benchmark CD-5 was a  
11 functioning crossover district that elected Black candidates of  
12 choice?

13 A. I don't go into that issue.

14 Q. And your report doesn't dispute Dr. Barreto's conclusion  
15 that the CD-5 that's present at maps 8015 and map 8019 also are  
16 functioning Black crossover districts or would be; is that  
17 right?

18 A. Which districts are you talking about?

19 Q. The CD-5 that exists in map 8015, the secondary map passed  
20 by the legislature, and map 8019, the CD-5 that you were just  
21 discussing with my friend on the other side.

22 Your report doesn't at all address Dr. Barreto's  
23 conclusion that those districts would be functioning crossover  
24 districts or -- and elect Black candidates of choice; is that  
25 right?



1 A. I don't look at that issue at all in my report.

2 Q. Okay. And your report doesn't dispute Dr. Barreto's  
3 conclusion that the enacted map, the congressional districts  
4 currently in effect in the State of Florida, contain no  
5 functioning crossover district in Congressional Districts 1, 2,  
6 3, 4, or 5 here in Northern Florida; is that right?

7 A. I don't go into that in my report. Obviously the  
8 Jacksonville experience could show some difference.

9 Q. And your report doesn't dispute Dr. Barreto's conclusion  
10 that in the enacted map, voters that were previously in  
11 Benchmark CD-5 are now in Congressional Districts 2, 3, 4, and 5  
12 of the enacted map; is that right?

13 A. I don't go into that in my report, no.

14 Q. And your report doesn't say anything about Dr. Barreto's  
15 conclusions that the enacted map reflects inconsistently applied  
16 rationales for the consideration of race even within the  
17 congressional map; for example, in Congressional District 24,  
18 where it appears race had been used to draw lines?

19 Your report doesn't say anything about that, does it,  
20 Dr. Johnson?

21 A. Well, now that you've brought up the idea of 24 being an  
22 outlier year, I definitely disagree with that. But it wasn't in  
23 his report, so I didn't discuss it in my report.

24 Q. Understood.

25 I just want to ask the question again.

1           Your report doesn't have anything to say about  
2 Dr. Barreto's conclusion that there were inconsistently applied  
3 treatments of race within the congressional map, the currently  
4 enacted congressional map; that's right, correct?

5 A.    I don't go into that in my report.

6 Q.    Okay. And your report doesn't address Dr. Barreto's  
7 conclusion that the State legislative maps also demonstrate --

8           Excuse me. Let me rephrase that.

9           Your report also doesn't dispute Dr. Barreto's  
10 conclusion that the State legislative maps were drawn with the  
11 intent not to diminish under the Florida Fair Districts  
12 Amendments as well; is that right?

13 A.    Correct. The only part of the State districts I look at is  
14 that Senate District 5 we just discussed.

15 Q.    Okay. But your report does talk about dot maps, right, and  
16 heat maps?

17 A.    Yes.

18 Q.    Yes. And as you said before with my friend, dot maps are  
19 useful for figuring out where certain population might live, say  
20 a population of Black residents; is that right?

21 A.    They're useful for spotting where there are any of a given  
22 group. They're not very functional for identifying the voting  
23 strength or where that group could be a large voting strength  
24 population.

25 Q.    Okay. So we talked about voting strength, and you think

1 heat maps better reflect voting strength of a particular group,  
2 right? That's your contention?

3 A. Mine and standard redistricting practice just about  
4 everywhere.

5 Q. So I'd like to look at a heat map prepared by the  
6 legislature.

7 MR. PORTORREAL: This is marked DX89. This is already  
8 in evidence.

9 BY MR. PORTORREAL:

10 Q. Can you see that, Dr. Johnson?

11 A. Yes.

12 Q. Okay. And do you see on the top left there where there is  
13 the key, it says "Black VAP percentage" and there are a number  
14 of squares?

15 Do you see that?

16 A. Yes.

17 Q. And do you see that those squares are all shades of green,  
18 getting progressively darker as the percentage of BVAP  
19 increases; is that right?

20 A. Yes. It comes off a little bluey on the monitors, but yes.  
21 I know what you mean.

22 Q. Sorry. This is a technological issue here, so I appreciate  
23 it.

24 And you see also that there are -- is a consistent  
25 scale of buckets of about 10 percentage points of BVAP where the

1 shade changes?

2 Do you see that as well?

3 A. Yes.

4 Q. So I'd like to now look at DX112, which you looked at with  
5 my friend. And I'd like to focus in particular on your heat  
6 map.

7 You see on the bottom right where your key is, the  
8 Black VAP has what looks to be six different colors?

9 A. Yes.

10 Q. And do you see that the buckets for the scale are  
11 inconsistent? Some are a range of 25 percent, some are a range  
12 of 10 percent, and some are a range of 15 percent.

13 Do you see that as well?

14 A. Yes.

15 Q. And in particular, you see in the top -- or the three  
16 bottommost buckets starting with 50 percent, 65 percent, and  
17 75 percent BVAP, those are green, yellow, and red. I'm not sure  
18 quite how they'll appear on the ELMO.

19 But you see that those bucket have different colors,  
20 right?

21 A. Yes.

22 Q. So is it fair to say that heat maps, when drawn  
23 differently, could also be somewhat misleading?

24 A. No.

25 Q. No? Well -- okay. Well, then, we will come back to DX89.

1           So -- I'm sorry. Just pushing that there.

2           So you see how the buckets on the right-hand side of  
3 the key that are over 50 percent Black BVAP are progressively  
4 darker and green? You see that?

5 A. Yes.

6 Q. And do you see how within the boundaries of Jacksonville,  
7 there are on the North and Western banks of the St. Johns River  
8 very dark concentrations -- or very dark green census blocks  
9 representing high BVAP percentages?

10 A. Yes. The -- the term "West bank" is a little off, but  
11 generally there's the -- part of Jacksonville is the  
12 darkest-colored area, yes, which is also the highest percentage  
13 area.

14 Q. And you see how on the other side of the river in lighter  
15 but still green, there are concentrate -- there are census  
16 blocks with BVAP concentrations that look to me to be 41 percent  
17 to 50 percent, 51 percent to 60 percent?

18           Do you see that as well?

19 A. There are maybe three that are majority Black.

20 Q. Well, thank you, Dr. Johnson, but my question was whether  
21 you also see ones that are 41 to 50 percent. If I could perhaps  
22 circle them, it might look --

23           This is the color of those there, the color of that  
24 there, the color of these here, the color of these here all seem  
25 to match up with the scale at 41 to 50 percent; isn't that

1 right?

2 A. Yes, they do seem -- with this many ranges of 10 percent,  
3 it can be hard to match the colors without holding them right  
4 next to each other.

5 But, yes, the ones you just circled are majority  
6 white, but they have some significant percentage of Black. But  
7 they are less than 50 percent.

8 Q. Well, how do you know that they're majority white from this  
9 image? Isn't the only thing that's represented here BVAP and we  
10 don't know what the other races might be in those census blocks?

11 A. That's true. They might be about the same, because there  
12 is some Asian American and Latino population, but not large  
13 numbers in Jacksonville.

14 Q. So doesn't this heat map created by the legislature really  
15 reflect exactly what Dr. Barreto's report and testimony was,  
16 that while there are greater concentrations of Black voters on  
17 one side of the river than the other, there's still a  
18 significant number on this -- I know North and South didn't work  
19 for you, but the South or East bank of the St. John's River;  
20 isn't that right?

21 A. There are -- overall, the Black voting strength on the East  
22 side of this area that is outlined in red by the benchmark  
23 district red line is significantly less Black than 50 percent,  
24 so putting it in reduces the Black voting strength of that  
25 district.

1 Q. But did -- didn't Dr. Barreto conclude only that there was  
2 a Black population on both sides of these banks and not that  
3 there were equal density or equal Black voting strength on both  
4 sides of this river?

5 A. Actually, his phrase here on the stand was that, "The  
6 enacted district line splits the Black population in half," and  
7 that is clearly wrong.

8 Q. Okay. So you talked about with my friend how you didn't  
9 consider -- get this off the screen -- how you didn't consider  
10 the enacted map as cracking the Black population of  
11 Jacksonville; is that right?

12 A. Correct.

13 I'm sorry. You said "didn't consider it"?

14 Q. Yes.

15 A. Yes.

16 Q. No, not trying to trick you.

17 And you, in looking at -- again, I'm looking at DX112.

18 Looking at this figure, you describe the benchmark as,  
19 I believe, having tentacles that were scooping in Black voters;  
20 isn't that right?

21 A. Yes.

22 Q. So doesn't the enacted map cut off some of those tentacles?

23 A. It cuts off the tentacles that are grabbing every possible  
24 Black voter that the benchmark district is putting in. It does  
25 not cut off significant Black voting strength. These are areas

1 where Black voters are outnumbered.

2 JUDGE JORDAN: When you say "enacted map," what are  
3 you talking about?

4 MR. PORTORREAL: I'm sorry. I'm talking about the  
5 currently enforced congressional maps.

6 JUDGE JORDAN: Okay. Because the legislature  
7 obviously passed a couple that --

8 MR. PORTORREAL: Yes.

9 JUDGE JORDAN: -- the Governor vetoed, so I want to  
10 make sure our terminology is right.

11 MR. PORTORREAL: Thank you, Your Honor.

12 JUDGE RODGERS: So by "enacted," that's the 109?

13 MR. PORTORREAL: Yes, yes. Plan C109.

14 BY MR. PORTORREAL:

15 Q. I'm sorry, Dr. Johnson. I asked you whether a tentacle was  
16 cut off, and I didn't quite hear your answer. If you could just  
17 repeat what you said.

18 A. Oh, sure. So, yes, it does cut off the tentacles that were  
19 grabbing every possible Black voter to grab every one they  
20 could. It does not cut off areas where Blacks are a majority of  
21 the voting strength.

22 Q. So you talk about voting strength. Like we discussed  
23 earlier, you didn't conduct any sort of functional analysis of  
24 any of the maps that we've been talking about today?

25 A. Correct. I was just looking at the percentage of the



1 voting age population.

2 Q. And you know that the Benchmark CD-5, the map 8015 CD-5,  
3 and the map 8019 CD-5 do cross the river and keep Black voters  
4 within a performing district for them; is that right?

5 A. Well, the -- as we talked about yesterday and is there in  
6 the data, there's about a 3 percent difference in the two,  
7 between the two maps of the map that's in place today and the  
8 various maps you were mentioning, it's 32 versus 35.

9 What they really change is which white voters are in  
10 the districts.

11 Q. I'm sorry, Dr. Johnson. My question was: Don't the  
12 Benchmark CD-5, the map 8015 CD-5, and the 8019 CD-5 both  
13 draw -- are both drawn to have Black voters on both sides of the  
14 river in the same district?

15 A. Generally speaking, so does the currently in place map.

16 Q. I'm sorry. I don't understand.

17 The currently enacted map keeps Black voters in  
18 Jacksonville who are on both sides of the river in the same  
19 district? Is that what you're saying?

20 A. If your point is that -- if there are any Black voters on  
21 the East side of the bank -- I'm sorry -- the East side of the  
22 river in the district, there are in the enacted map as well. It  
23 crosses the river.

24 Q. Okay. Let me --

25 A. It just doesn't cross it as much.

1 Q. Let me be a little more clear. Perhaps visualizing this  
2 will be -- make me more clear.

3 Don't all of the maps we were just discussing -- the  
4 benchmark, the 8015 CD-5, and the 8019 CD-5 in particular --  
5 keep this population here or roughly together in one district?

6 A. Roughly speaking, yes.

7 Q. Okay.

8 A. Their individual boundaries differ map from map to map.

9 Q. Okay. And as we discussed before, you don't at all dispute  
10 Dr. Barreto's conclusion that those districts that keep these  
11 populations that I just circled here together perform for Black  
12 voters, whereas the enacted map doesn't, right?

13 A. The numbers I looked at were the 32 percent Black versus  
14 35 percent Black difference among the maps. I didn't look at  
15 the --

16 Q. Well, Doctor --

17 A. -- full functional analysis.

18 Q. -- where in your report did you look at this 32 to  
19 35 percent number, Doctor?

20 A. Obviously, if I'm making the heat map, I have all the  
21 demographics data that are used to make the heat map, and the  
22 computer shows you as you're working what those percentages are.

23 Q. But you didn't conduct any functional analysis as to  
24 whether the -- I believe the 32 percent number you're talking  
25 about is the current Congressional District 4 in force and the

1 35 percent number you're talking about is the map 8019  
2 Congressional District 5; is that right?

3 A. Yes, the Black BVAP percentages of each of those maps.  
4 You're right.

5 Q. And you don't dispute Dr. Barreto's conclusions that in his  
6 functional analysis as well as the State legislature's  
7 functional analysis, the 8019 map with 35 percent BVAP does  
8 perform for Black voters, whereas the enacted map with  
9 32 percent BVAP in CD-4 and splitting this population here along  
10 the river does not perform for Black voters in either CD-4 or  
11 enacted currently in CD-5; is that right?

12 A. Correct. I don't go into the functional analysis of his  
13 report in my report.

14 JUDGE RODGERS: Can I ask: Is it your position that  
15 you needed 50 percent or greater BVAP to have a performing  
16 minority district -- or Black performing district? You must  
17 have a threshold of 50 percent?

18 THE WITNESS: No.

19 JUDGE RODGERS: Okay. All right. Thank you.

20 JUDGE WINSOR: But you're not offering opinions on the  
21 performance of any district; is that right?

22 THE WITNESS: Correct.

23 JUDGE RODGERS: But you are talking about Black voting  
24 strength? Because we've heard a lot about that.

25 THE WITNESS: Yes. I'm disputing Dr. Barreto's claim

1 that where the currently placed congressional district lines  
2 cracked the Black voting strength.

3 Where the big swing performance comes is which white  
4 voters are in with that 32 or 35 percent Black population.

5 JUDGE RODGERS: Thank you.

6 BY MR. PORTORREAL:

7 Q. Dr. Johnson, I know you were here for Dr. Barreto's  
8 testimony. Have you also had a chance to review Mr. Kelly's  
9 testimony?

10 A. No.

11 Q. Well, I'd like to show you some of what Mr. Kelly, who drew  
12 the enacted map, has said. I'm going to pull this up on the  
13 ELMO. This is from our first day of trial all the way back last  
14 Tuesday. It's hard to believe.

15 And in this exchange here at the bottom, I've  
16 highlighted some portions I'd like to ask you some questions.

17 Is that okay?

18 A. Sure.

19 Q. Okay. From Mr. Diskant questioning:

20 "And you knew, for example, that the Black community  
21 in Jacksonville spanned both sides of the river, right?"

22 Answering is Mr. Kelly, who's on direct examination.

23 "Yes, sir."

24 Again, Mr. Diskant: "And you draw the line between  
25 CD-4 and 5 down the river, right?"

1           Mr. Kelly answering: "Yes."

2           Mr. Diskant again: "Splitting the Black community in  
3 Jacksonville into two different congressional districts,  
4 correct?"

5           Mr. Kelly: "Yes."

6           So my question to you, Dr. Johnson, is with this new  
7 data from the map drawer acknowledging that he's splitting a  
8 Black community in Jacksonville, does that change your  
9 conclusions regarding Dr. Barreto's analysis that the enacted  
10 map splits a Black community in Jacksonville?

11       A.   His analysis wasn't that it split the Black community; it  
12 was that it split their Black voting strength by cracking their  
13 Black voting strength.

14           I think all the maps, every map out here, splits some  
15 of the Black community, because there are Black residents in  
16 every part of Duval County. And, as Dr. Barreto confirmed  
17 yesterday, Duval County's too big for one district, so some of  
18 that community is going to be split off.

19           MR. PORTORREAL: Okay.

20           Sorry. Just taking a second to organize my papers.  
21 If you'll bear with me.

22       BY MR. PORTORREAL:

23       Q.   You spoke with my friend earlier about your view that there  
24 are -- the districts State Senate District 5 and Congressional  
25 District 5 don't closely resemble one another; is that right?

1 A. Yes.

2 Q. Sorry -- I have an image here I'd like to show you in just  
3 a second. There we go.

4 And these are -- and these are the two districts in  
5 question, those districts being Congressional District 5 and map  
6 8019 on the left and State Senate District 5 in the currently in  
7 force State Senate districts on the right; is that right?

8 A. Yes.

9 Q. And you understood the point of Dr. Barreto's testimony  
10 that the reason these two are similar involve both the -- the  
11 doughnut shape of the surrounding districts as well as the  
12 crossing of the river in that area that I circled earlier for  
13 both districts; is that right?

14 A. I mean, to a degree, yes.

15 Q. And you also understood that the point of his testimony  
16 about the similarity between these two districts is that both  
17 are Black Opportunity Districts in which the Black candidate of  
18 choice may be elected; is that right?

19 A. I was thinking -- I was understanding his testimony more of  
20 a geographic description.

21 Q. And in terms of a geographic description, you know that  
22 there are something like 540,000 people, I think, is the number  
23 in the State Senate district in Florida?

24 A. I'll take your word for it. I don't know off the top of my  
25 head.

1 Q. I'll represent to you that it is.

2 And you know that in a congressional district, there's  
3 769,221 people plus or minus one here in Florida; is that right?

4 A. I don't know the number off the top of my head, but I'll  
5 take your word for it. It sounds about right, yes.

6 Q. I'll represent to you again that it is.

7 So really your conclusion is that these two districts  
8 are not geographically similar because the map drawers couldn't  
9 find a way to fit 540,000 people into the same geographic space  
10 or location that they could fit 769,000 people?

11 Is that your conclusion?

12 A. Dr. Barreto's claim was that the 540,000 Senate seat and  
13 the 700 and some thousand congressional district closely  
14 resemble each other, and they don't. One is completely subsumed  
15 within the other, yes, but that's like saying Duval County is  
16 completely subsumed within Florida.

17 JUDGE JORDAN: Can I go back to my earlier question?

18 So you talked about the visual compactness test,  
19 right? So now you're looking at the 8019 Duval-only proposed  
20 map and the enacted State Senate 5 map.

21 What's the difference in terms of enveloping and  
22 affecting the neighboring district? You talked about the PacMan  
23 effect, and I'm not a map drawer, but to my eyes, both  
24 District 5, the 8019 proposed District 5, and the State Senate 5  
25 are almost completely enveloped by the neighboring district.

1 Isn't the compactness of CD-4 and Senate District 4 affected in  
2 the same way by those two districts?

3 THE WITNESS: Judge, yes. I think the new testimony  
4 yesterday, it wasn't in his report and wasn't what I was  
5 disputing in my report about Districts 4, yes. You've got the  
6 full PacMan and kind of the two-thirds or three-quarters PacMan  
7 going on in those districts.

8 But that's separate from what I was addressing in my  
9 --

10 JUDGE JORDAN: Are they both not the same? In terms  
11 of the effect on the compactness, you said -- you said that 8019  
12 CD-5 affected the compactness of 4 because of the envelopment  
13 and because it was fully within the boundaries of what would be  
14 4, right?

15 THE WITNESS: Yes.

16 JUDGE JORDAN: Isn't that the same exact thing that's  
17 happening with State Senate District 5 and neighboring State  
18 Senate District 4, that it is completely within and that it's  
19 affecting the compactness of 4?

20 THE WITNESS: It's very similar. It's just a matter  
21 of degree in that you can see that in the State Senate map  
22 you've got the screen coming around the bottom so that the  
23 yellow 4 doesn't completely envelop it.

24 But, yes, it's just a matter of degrees difference.

25 ///



1 BY MR. PORTORREAL:

2 Q. Dr. Johnson, you said that Dr. Barreto did not talk about  
3 the similarities in his report.

4 I'd like to show you what's been previously marked  
5 Plaintiff's Exhibit 5042-45, I believe, which is Dr. Barreto's  
6 report at paragraph 81, and I'd like to read you the highlighted  
7 language I'm going to highlight.

8 "Senate District 5 also creates the appearance of a  
9 so-called doughnut district in that Senate District 4 wraps  
10 around SD-5."

11 Is that right? Is that what that report says?

12 Let me zoom in here.

13 Actually, I will start a little earlier.

14 "The Governor did not oppose the State Senate map, and  
15 ultimately the Secretary of State of Florida implemented this  
16 map without objection in the 2022 elections. Senate District 5  
17 also creates the appearance of a so-called doughnut district in  
18 that Senate District 4 wraps around SD-5."

19 Is that right? Is that what that says?

20 A. Yes.

21 Q. A little further down, Dr. Barreto writes:

22 "In contrast, Governor DeSantis rejected the HC 8019  
23 because he first claimed it was below 50.1 percent Black VAP  
24 and, second, the surrounding doughnut district was oddly  
25 shaped."

1                   Is that right? Is that what that says?

2       A.    Yes.

3       Q.    So Dr. Barreto did say in his report that there was a  
4   similarity in that Senate District 5 in the currently enforced  
5   State Senate maps is wrapped around by a doughnut district,  
6   Senate District 4; is that right?

7       A.    Yes.

8       Q.    And Dr. Barreto also drew a contrast between that, the  
9   appearance of those districts and the appearance of map 8019,  
10   specifically the doughnut district surrounding Congressional  
11   District 5 in that map; is that right?

12      A.    I'm sorry. What's the question?

13      Q.    That Dr. Barreto did draw the contrast between the shape of  
14   Senate District 4 and 5 and the shape of Congressional  
15   District 4 and 5 in map 8019; is that right -- oh, yes, the  
16   similarity between those two sets of districts.

17                   Is that right?

18      A.    Yes. This was separate from the discussion that I was  
19   addressing in my report.

20                   MR. PORTORREAL: All right. Thank you so much,  
21   Dr. Johnson.

22                   THE WITNESS: You're welcome.

23                   JUDGE RODGERS: Can I ask you a question before we go  
24   to redirect?

25                   Dr. Johnson, would you give me your definition of

1 "cracking"?

2 THE WITNESS: It's where a population, generally a  
3 protected class under the Voting Rights Act --

4 JUDGE RODGERS: Right.

5 THE WITNESS: -- is divided in a way that splits their  
6 voting strength.

7 JUDGE RODGERS: So does it mean -- in your definition,  
8 does it mean that each of the two populations individually alone  
9 would not be able to elect the candidate of their choice, but  
10 only when combined, could they?

11 THE WITNESS: Or it could be where one of them can  
12 elect but the other one can't after it's cracked.

13 JUDGE RODGERS: All right. Thank you.

14 MR. PORTORREAL: Thank you, Your Honor.

15 **REDIRECT EXAMINATION**

16 BY MR. BEATO:

17 Q. Good morning again, Dr. Johnson.

18 Just a few questions.

19 So at the beginning of the discussion with my friend,  
20 a few cases that you were involved in were mentioned, for  
21 example, the North Carolina State case.

22 Could you provide some context?

23 A. Just that in the case where there was the error in the one  
24 part of my report, there were seven parts of that report, and  
25 actually the plaintiffs moved to have my whole report dismissed,

1 and the Court rejected that motion.

2 So the other six parts of my report were accepted by  
3 the Court.

4 Q. And any of the other cases that were discussed with my  
5 friend, can you provide any context, if you can?

6 A. In terms of what?

7 Q. I'll move on.

8 Dr. Johnson, were you asked to do a functional  
9 analysis in this case?

10 A. No.

11 Q. Were you asked to critique Dr. Barreto's functional  
12 analysis in this case?

13 A. No.

14 MR. BEATO: I'd like to pull up DX112, please. Okay.

15 BY MR. BEATO:

16 Q. Dr. Johnson, with my friend you talked about this scale  
17 over here. Tell us, how did you get that scale?

18 A. That is what we use at my firm as our standard scale. It's  
19 far and away the -- we found it in, like I said, 500 projects to  
20 be the best way to convey the key information about maps.

21 When you're looking at it in maps and voting strength,  
22 you're not really worried about if an area is 2 percent, in this  
23 case, Black or 5 percent Black or 8 percent Black or 11 percent  
24 Black. What you want to know -- and at the other end of the  
25 scale, you're not really concerned if it's 92 or 95 percent.

1           Where you really want to focus is the areas that are  
2 on the border, from -- that's why the ranges get smaller when  
3 you get between 25 and 75 percent, because those are the areas  
4 that moving them is going to be the trickiest to understand if  
5 you're going to improve the voting strength or hurt the voting  
6 strength of the population in question.

7           And we do this with -- we use the same range with  
8 voting rights protected classes, be they Black, Latino, or  
9 Asian, and with renters or with income groups -- whatever  
10 socioeconomic or -- group we're looking at in a given map.

11 Q.   So in your redistricting experience, when looking at heat  
12 maps, other heat maps have the same scale?

13 A.   Oh, yes. That's the scale we use on just about every map  
14 that we make.

15 Q.   And other experts in the redistricting context?

16 A.   We'll do similar approaches. Everyone probably has their  
17 own personal preferences in exact ranges, but the goal and the  
18 reason for those ranges is very similar.

19 Q.   And then with my friend you talked about your disagreement  
20 with enacted District CD24. Do you remember that?

21 A.   Yes. The House district, yeah.

22           MR. BEATO: If we can pull up -- is this the --

23 BY MR. BEATO:

24 Q.   Was it the House district or it was the Congressional  
25 District?

1 A. House of Representatives District 24.

2 Q. There's a lot of maps.

3 MR. PORTORREAL: Excuse me, Your Honors. I'd like to  
4 object on the basis that Dr. Johnson did not have anything to  
5 say about CD24 in his report.

6 JUDGE JORDAN: You asked him a question about  
7 Dr. Barreto's opinion concerning the -- the alleged  
8 inconsistency, so your objection is overruled.

9 MR. PORTORREAL: Excuse me, Your Honor. I did --

10 JUDGE JORDAN: Your objection is outside the scope of  
11 cross?

12 MR. PORTORREAL: No, Your Honor. I asked him whether  
13 he had made any conclusions as to Dr. Barreto's conclusions  
14 about CD24, and Dr. Johnson confirmed that he did not in his  
15 report. He had nothing to say on the topic.

16 JUDGE JORDAN: Well, we'll see if he changes his mind  
17 now, and if he does, you can have some recross.

18 MR. PORTORREAL: Thank you, Your Honor.

19 BY MR. BEATO:

20 Q. Do you disagree with Dr. Barreto's conclusions as to CD24?

21 A. Well, it's interesting, because his ultimate conclusion, as  
22 we talked about yesterday, is that the changes lowered the Black  
23 voting age population, which I agree with.

24 It's a good example, somewhat of what I called out in  
25 my report, about how dot maps can be misleading, because as you

1 talked about yesterday, took out all the orange -- we showed  
2 yesterday you took out all the orange areas in the enacted map  
3 and the lines kind of focused on the green dots. But, again, I  
4 talked about the eye -- the human eye focuses on the darker  
5 dots.

6 What was completely missed in the discussion is that  
7 the enacted District 24 adds all this in. It actually makes a  
8 much more compact district, because instead of the barrier  
9 reef -- or barrier islands being out of the district, now the  
10 district goes all the way over and adding those areas in that  
11 you miss because they're pink dots.

12 And so the human eye misses them, and those light  
13 colors actually reduced by, I think, 2 percent, we found  
14 yesterday, the Black voting age population of that district.

15 So, yes, it would be very poop mapping if you were  
16 trying to take -- trying to racially gerrymander along the black  
17 dots, as Dr. Barreto talked about, and you reduced the overall  
18 Black percentage, which this map did.

19 Q. Dr. Johnson, you also talked with my friend about the 2014  
20 election being an outlier?

21 A. Yes.

22 Q. Do you recall that?

23 A. Yes.

24 Q. What's your opinion on that?

25 A. Oh, the discussion was that it was record low turnout, and

1 the turnout table's right there on the Florida elections web  
2 page. It was the highest off-year election turnout of the  
3 decade. 2014 turnout was higher than 2010 or than 2006 in  
4 Florida.

5 MR. BEATO: Can we pull up DX127, please.

6 BY MR. BEATO:

7 Q. Dr. Johnson, what is this?

8 A. This is the page on the Florida state website that gives  
9 the election turnout in every election back to 1954.

10 MR. BEATO: And if we can scroll down to 2014, please.  
11 And if we could highlight.

12 THE WITNESS: Yeah, so the -- obviously the 2014 is a  
13 year -- the 18 percent is their first primary, and the stars  
14 indicate there was no second primary. And the 51 percent is  
15 turnout in the general election.

16 MR. BEATO: And so if we could zoom out. How does --

17 *(Off-the-record discussion.)*

18 MR. BEATO: Your Honors, I'd like to move this exhibit  
19 into evidence. It's not in evidence yet.

20 JUDGE JORDAN: Any objection?

21 MR. PORTORREAL: No, Your Honors.

22 JUDGE JORDAN: You want to give it a number,  
23 Mr. Beato?

24 MR. BEATO: I believe it's DX127.

25 JUDGE JORDAN: Okay. Admitted without objection.



1           (DEFENSE EXHIBIT Number           : Received in evidence.)

2           JUDGE RODGERS: I think with that, just to tie up  
3 loose ends, since I was presiding yesterday and I left open --  
4 took under advisement the issue of defendants objection to this  
5 testimony from Dr. Barreto about the 2014 election, that  
6 objection is overruled. We've moved far past that.

7           MR. JAZIL: Thank you, Your Honor.

8 BY MR. BEATO:

9 Q. So just in comparing the 2014 turnout, how does that  
10 compare with all these other elections?

11 A. If we look at the non-presidential years, 2014, 2010, 2006,  
12 you can see 2014 was 51 percent turnout in Florida, 2010 was  
13 49 percent, 2016 was 47 percent. So over that decade's worth of  
14 off-year elections, it's actually the highest turnout.

15           It's lower than 2018, which is four years later, which  
16 was 63 percent, but it's higher than each of the preceding  
17 midterm elections.

18           And actually, if we get -- you see on the right, which  
19 is the bottom part of the page, 2018 is actually the outlier  
20 where it jumps up to 63 percent. 2022 it drops back down to  
21 54 percent, much closer to 2014's 51 percent.

22           So 2014 fits right into the pattern of turnout and is  
23 actually a higher turnout than the preceding midterm elections.  
24 Presidential elections are always much higher than midterm.

25           MR. BEATO: And then if we could go to DX93, please.

1 And if we can go to page 13.

2 BY MR. BEATO:

3 Q. Okay, Dr. Johnson. This is the enacted map in Duval  
4 County, correct?

5 A. The enacted congressional districts, yes.

6 Q. Okay. If you could, could you show me where the boundary  
7 between 5 and 4 crosses the St. Johns River?

8 A. It's right in the area we've been talking about. There's a  
9 little crossing right in the heart of Jacksonville, right where  
10 all the bridge is and everything across the river.

11 Q. And you discussed with my friend the overall configuration  
12 of North Florida, Northeast Florida in the center map, correct?

13 A. Yes.

14 Q. How does the visual compactness of that Senate map compare  
15 to the visual compactness of this map?

16 A. This one's much more compact.

17 Q. Why?

18 A. Because both districts are highly compact. Nothing's  
19 wrapping around anything else.

20 MR. BEATO: No further questions, Your Honor.

21 Thank you, Dr. Johnson.

22 JUDGE JORDAN: Okay. Thank you.

23 You want to recross?

24 MR. PORTORREAL: Yes, Your Honor. Thank you.

25 **RECROSS-EXAMINATION**

1 BY MR. PORTORREAL:

2 Q. Hello again, Dr. Johnson.

3 A. Hello again.

4 Q. You spoke with my friend a little earlier about CD24. Did  
5 you know Mr. Kelly testified both before the legislature and  
6 here on Tuesday that race was used to draw CD24?

7 A. No. Again, I have not seen Mr. Kelly's testimony.

8 Q. And did you know that race was used to draw CD24 to comply  
9 with the FDA, the Florida Fair Districts Amendment?

10 A. No, that's not something I read either way.

11 Q. And you understand that drawing a congressional district in  
12 compliance with the FDA meets a compelling state interest?

13 MR. BEATO: Objection, legal conclusion.

14 JUDGE JORDAN: Sustained. You can rephrase if you  
15 want.

16 MR. PORTORREAL: I'll withdraw the question. Thank  
17 you, Your Honor.

18 BY MR. PORTORREAL:

19 Q. Earlier my friend just showed you some printouts from the  
20 Florida Division of Elections with voter turnout; is that right?

21 A. Yes.

22 Q. And you talked about comparing statewide voter turnout in  
23 2014 with other elections; is that right?

24 A. Yes.

25 Q. But in the period from 2012 to 2020, did those figures show

1 that 2014 had the lowest turnout?

2 A. You're leaving out -- well, yes, I guess it is lower than  
3 2022 as well.

4 Q. I'd like to look at some more focused turnout data from the  
5 area covered by Congressional District 5.

6 What I am putting on the ELMO here is marked  
7 Plaintiff's Exhibit 4800. And you'll see at the top, this is  
8 district voter turnout analysis for the 2012 general election  
9 from the Duval County Supervisor for Elections.

10 So here I've got some things highlighted. Can you see  
11 that I've highlighted the columns white and Black voters there?

12 A. From the presidential 2012 election, yes.

13 Q. Yes and do you see a little further down in those rows, the  
14 percentage turnout for those columns --

15 MR. BEATO: Objection, Your Honor. There's no  
16 foundation laid for this exhibit.

17 JUDGE JORDAN: What do you mean, "foundation"?

18 MR. BEATO: I mean I'm not sure where this exhibit  
19 came from. There's no one here to authenticate that exhibit.

20 JUDGE JORDAN: I mean, as for the second point, we're  
21 way beyond that, because both sides have been introducing --  
22 this doesn't go to your objection, but we've had a lot of  
23 Government-based exhibits introduced without someone here to  
24 authenticate them or lay a foundation.

25 Your first point, I think, is better taken.

1           So where does this come from?

2           MR. PORTORREAL: The first point was where does this  
3 come from -- this is from the Duval County Supervisor of  
4 Elections. I believe these were taken from the Duval County  
5 elections website, yeah. So this is a public record from the  
6 Supervisor of Elections website.

7           JUDGE JORDAN: The problem is that it is -- that's why  
8 we have an exchange of exhibits before trial, so that each side  
9 can look at each other's sets of document and see if there's any  
10 objection or the like.

11           I don't doubt what you're telling me, but I also  
12 understand the objection that as we sit here today, we don't  
13 know where this comes from.

14           JUDGE RODGERS: Could I just ask: Are you seeking to  
15 use this or using it for impeachment? What is your purpose?

16           MR. PORTORREAL: Judge Rodgers, we're using this to  
17 cross -- to impeach Dr. Johnson's conclusions regarding the  
18 earlier exhibit. I'd also point out that the exhibit that was  
19 just offered --

20           JUDGE WINSOR: What conclusions about the previous  
21 exhibit? I mean, all he was doing with the previous exhibit, as  
22 I recall, was saying what the numbers said and this number is  
23 lower than that number. Is that what you're impeaching?

24           MR. PORTORREAL: We're -- also trying to demonstrate  
25 sort of with a more focused view how those numbers play out in

1 Duval County, this area of Congressional District 5.

2 JUDGE WINSOR: That doesn't sound like impeachment,  
3 Counsel.

4 MR. PORTORREAL: I -- point taken, Your Honor.

5 I'd also like to point out that the exhibit that was  
6 just offered was shared with us only last night.

7 JUDGE JORDAN: But you didn't object, and we've been  
8 playing the same sort of standard for both sides. So if  
9 something has come up late, wasn't exchanged, is new but the  
10 other side doesn't object, we just admit it.

11 Okay. His new testimony was about 2014 and whether  
12 2014 was a low voter turnout election, right?

13 MR. PORTORREAL: Yes, Your Honor.

14 JUDGE JORDAN: I told you you could have recross on  
15 that, and I want to remain true to my word. But the exhibit you  
16 just put up is about 2012.

17 So if there's something about 2014 in comparison to  
18 other stuff that you want to ask him about, we'll let you do  
19 that.

20 MR. PORTORREAL: Okay.

21 JUDGE JORDAN: Otherwise, the objection to the exhibit  
22 is sustained.

23 MR. PORTORREAL: Thank you, Your Honor.

24 BY MR. PORTORREAL:

25 Q. With that in mind, I'd like to show you a similar document

1 about the 2014 elections.

2 Can you see that, Dr. Johnson?

3 A. Yes.

4 Q. And you can see again I've highlighted the columns for  
5 white and Black voters? You see that?

6 A. And now we're in a midterm election. Yes.

7 Q. Yes. And you also see I've highlighted the percent turnout  
8 for those two columns, which are 54.8 percent for white voters  
9 and 44.3 percent for Black voters; is that right?

10 A. Yes.

11 Q. And wouldn't you agree there's a substantial, about 14 1/2  
12 percentage point difference in turnout between white and Black  
13 voters for this election?

14 A. Compared to the presidential election?

15 Q. I'm sorry. Within this election, there's a 14 1/2 percent  
16 turnout difference between white and Black voters?

17 A. No.

18 Q. No? Then how would you interpret the --

19 *(Off-the-record discussion.)*

20 JUDGE JORDAN: You can't -- you can't take the  
21 percentage as an absolute number because of the different  
22 populations underlying each one of the numbers.

23 MR. PORTORREAL: Agreed, Your Honor. Thank you.

24 JUDGE JORDAN: I know the point you're trying to make.  
25 So you can rephrase the question.

1 MR. PORTORREAL: Yes.

2 BY MR. PORTORREAL:

3 Q. Would you agree that this reflects that whites voters in  
4 Duval County turned out at 54.8 percent for the 2014 election?

5 A. For the presidential election? -- or I'm sorry. For the  
6 midterm election, yes.

7 Q. And it also shows a -- I'm sorry. This is -- I see where I  
8 my math was off.

9 The Black voters in Duval County turned out at  
10 44.3 percent for this same election?

11 A. For this midterm election, yes.

12 Q. And you understood from Dr. Barreto's testimony yesterday  
13 that turnout could affect a functional analysis, in particular  
14 in 2014; is that right?

15 A. He was saying that the outlier status of 2014 was -- could  
16 be one of the reasons why those districts performed differently.

17 The key point I'm making is 2014 wasn't an outlier.  
18 It was actually a high turnout midterm election.

19 Q. And I am pulling up here a slide from yesterday's  
20 presentation, the source of which is Plaintiff's Exhibit  
21 5042-69, which I -- which is in evidence.

22 And do you see the column on the right is sort of  
23 highlighted in green that says "CD-5" at the top? Do you see  
24 that, Doctor?

25 A. Yes.



1 Q. And zooming in to see the title, you see that's the 8019  
2 map that we've been discussing today? Do you see that?

3 A. Yes.

4 Q. And let's try to get a little more clarity here.

5 Can you see the elections on the left and the CD-5  
6 results on the right still?

7 A. Yes.

8 Q. Rightmost column?

9 A. Yes.

10 Q. As we just discussed, the elections in this range, 2014,  
11 were of the -- all of the election years listed on this  
12 document, which are 2020 to 2012, that 2014 election did have  
13 the lowest turnout statewide, right?

14 A. Sorry --

15 Q. I can rephrase it, yes. Yes.

16 JUDGE JORDAN: You're comparing apples and oranges.  
17 Each side is focusing on -- for its own reasons on a different  
18 slice of years.

19 He's not going to disagree with you. He picked a  
20 slice of years; Dr. Barreto picked a slice of years. It just  
21 depends what slice you're looking at. The numbers are what they  
22 are.

23 If you compare 2014 to the earlier years, not an  
24 outlier. If you compare it to the lower years, it looks like a  
25 lower turnout election.

1 I'm just telling you my reaction to this thing.

2 THE WITNESS: And, Your Honor, I would -- in 2022 it's  
3 not an outlier relative to 2022 either.

4 JUDGE JORDAN: What's that?

5 THE WITNESS: It's not an outlier relative to 2022  
6 either. It's just 2018 that it's the only outlier relative to.

7 JUDGE JORDAN: My point is that how you see 2014  
8 depends on part on what you compare it to.

9 THE WITNESS: Exactly.

10 JUDGE JORDAN: That's the only point.

11 JUDGE WINSOR: And each side can argue what they're  
12 going to argue at the end, but asking witnesses "doesn't this  
13 chart say this; doesn't this chart say that" just ends up making  
14 a lot of time get consumed in a day we're trying to finish  
15 today.

16 MR. PORTORREAL: Thank you, Your Honors.

17 And thank you again, Dr. Johnson.

18 JUDGE JORDAN: All right.

19 Doctor, I think you're excused. Thank you very much.

20 THE WITNESS: Thank you.

21 *(Witness excused.)*

22 JUDGE JORDAN: How long is your next witness going to  
23 be? Ballpark.

24 MR. JAZIL: 40 minutes, Your Honor, for the direct.

25 JUDGE JORDAN: Okay. Then we'll take five minutes and

1 then we'll pick up with his testimony.

2 *(Recess taken from 10:20 a.m. to 10:32 a.m.)*

3 JUDGE JORDAN: Welcome back. Please be seated.

4 Mr. Jazil, you can call your next witness.

5 MR. JAZIL: Thank you, Your Honor.

6 Out next witness is Dr. Mark Owens.

7 **MARK EDWARDS OWENS, DEFENSE WITNESS, DULY SWORN**

8 DEPUTY CLERK: Be seated, please.

9 For the record, please state your full name and spell  
10 your last name for the record.

11 THE WITNESS: My name is Dr. Mark Edward Owens,  
12 O-W-E-N-S.

13 DEPUTY CLERK: Thank you.

14 **DIRECT EXAMINATION**

15 BY MR. JAZIL:

16 Q. Good morning, Dr. Owens. Where are you from?

17 A. I was born and raised here in Tallahassee, Florida.

18 Q. And what do you currently do, sir?

19 A. I'm a professor of political science at The Citadel.

20 Q. Do you do anything else other than hold a professorship The  
21 Citadel, sir?

22 A. Yes. I'm the codirector of the Symposium on Southern  
23 Politics.

24 Q. And briefly, can you tell us what the Symposium on Southern  
25 Politics is?

1 A. It's a conference and gathering of scholars every two years  
2 of those who study elections and state politics in the South.

3 Q. And you said "scholars." What kind of scholars attend this  
4 symposium, sir?

5 A. Primarily political scientists, but historians as well as.

6 Q. And what did you do before joining The Citadel and becoming  
7 the codirector of the Symposium on Southern Politics?

8 A. I was a professor of political science at the University of  
9 Texas Tyler.

10 Q. For how long, sir?

11 A. For eight years.

12 Q. And at both UT and The Citadel, what kind of classes have  
13 you taught?

14 A. I teach graduate and undergraduate courses primarily in the  
15 areas of research methods, campaigns, elections, other portions  
16 we have about American institutions at the state politics level  
17 and federal level.

18 Q. Does history focus at all in the classes you teach?

19 A. It does. We --in any way we can use history as a  
20 comparison to show the changes I think most frequently is  
21 prominent, and when I teach the courses about Southern politics  
22 where we make comparisons across states and show how the region  
23 is different than other parts of the country.

24 Q. And in these classes, how, if at all, does Florida's  
25 political history factor in?

1 A. Florida represents one of the states which often sees a lot  
2 of change. We see population changes. We've seen the greatest  
3 part of new growth. We use that as a comparator to states where  
4 we can see some similarities that might overlap with Texas. We  
5 also see in particular -- how it can contrast to other places  
6 like Virginia.

7 And so given my own experience, I do tend to use  
8 Florida as an example.

9 Q. Doctor, have you published any books?

10 A. Yes. I've published two books.

11 Q. And can you briefly tell us what they were about?

12 A. The first book is about -- a textbook in American politics,  
13 so it's for a general introductory course and -- about American  
14 politics.

15 And the second book is about Texas political history.  
16 Very much in the most recent case, so from 2018 to 2022 -- or  
17 2020, we use polling data to talk about what voters -- how their  
18 preferences were and how they compared across different regions  
19 within the state.

20 Q. Do you have speaking engagements where you talk about  
21 politics in your work?

22 A. Yeah. Some have come out of talking about that book; as  
23 well, other times talking about voting trends that exist in  
24 Texas. And so I've spoken to the League of Women Voters in  
25 Tyler, Smith County. I've also spoken about the book at the

1 Dallas Democratic Forum and another talk at Southern Methodist  
2 University.

3 Q. And are you giving us just some of your speaking  
4 engagements or are these all of them?

5 A. That's just sort of within the last year.

6 Q. So it's a flavor?

7 A. Yes.

8 Q. Doctor, what, if any, experience have you had in conducting  
9 survey work?

10 A. In survey work? At the University of Texas at Tyler, I was  
11 the director of the Center for Opinion Research and did surveys  
12 of voters across the state. We were able to publish those  
13 during the time of the 2020 election with the Dallas *Morning*  
14 *News*.

15 I also did survey work in relation to policy, and this  
16 was through a grant and contract from the Texas Department of  
17 State Health Services about vaccine hesitancy.

18 Q. And how big was that grant from the State of Texas?

19 A. \$2.6 million.

20 Q. And, Doctor, can you sum up for us your educational  
21 background?

22 A. When I left Tallahassee, I went to the University of  
23 Florida and graduated there in 2006 with a bachelor's in  
24 political science. Then I went to -- my next degree comes from  
25 Johns Hopkins University in government. I graduated there in

1 2008 and then went to the University of Georgia for my Ph.D.,  
2 graduating in 2014.

3 Prior to that graduation, though, I spent part of my  
4 time as a visiting doctoral student at the University of Oxford  
5 in England while I completed my dissertation.

6 Q. And what was your dissertation on, sir?

7 A. The political history of the appropriations process,  
8 primarily how the Senate is able to use procedures to leverage  
9 policy outcomes, sometimes even identifying when there weren't  
10 government shutdowns and how they avoided them.

11 Q. And just so the record's clear, you're referring to the  
12 United States Senate, right?

13 A. Yes, the United States Senate, and this spanned from 1865  
14 to 2014.

15 Q. And, Doctor, have you provided expert witness services in  
16 other cases?

17 A. Yes. The moment -- in this case for testifying, I  
18 testified in the case *Homer v. Hobbs*, which is in federal court  
19 in Washington. There the detail and scope of my report was  
20 racially polarized voting.

21 And then I also testified in Galveston County. This  
22 was related to three cases in federal court in Texas. My work  
23 was focused on district compactness as well as political history  
24 in *The United States v. Galveston County*.

25 Q. And aside from the testifying work, have you provided

1 expert reports in other voting cases?

2 A. Yes, I have. In the *Black Voters Matter v. Byrd* case, I  
3 provided expert reports that focused on racially polarized  
4 voting.

5 Q. And that's the State case concerning polarized  
6 redistricting plans for the cycle? Do I have that correct, sir?

7 A. Yes.

8 Q. Dr. Owens, what were you asked to do in this case?

9 A. In this case, I was asked to respond to the reports from  
10 Plaintiffs' experts that were related to racially polarized  
11 voting and political history.

12 MR. JAZIL: Your Honors, I'd like to tender Dr. Owens  
13 as an expert in political history, racially polarized voting,  
14 and the redistricting process generally.

15 MS. BLUM: No objection, Your Honors.

16 JUDGE JORDAN: Without objection, so accepted.

17 MR. JAZIL: Thank you.

18 BY MR. JAZIL:

19 Q. Dr. Owens, you read Dr. Kousser's report in this case?

20 A. Yes.

21 Q. And did you sit through his testimony in this case?

22 A. I did.

23 Q. What, if any, disagreements do you have with Dr. Kousser's  
24 conclusions?

25 A. Actually, there are three. One was the -- in his analysis,



1 he pointed to the fact that there was a lack of critical  
2 junctures where we see moments that we can actually compare  
3 Florida's history to itself. We also see that there were -- I  
4 felt like there was some omissions on the fact of the political  
5 history in Florida, especially in the last 20, 30 years. And  
6 then we also see how the redistricting process here was  
7 characterized as being "unusual." And I think in some cases,  
8 there are a lot of common parts.

9 Q. Let's take those one at a time.

10 You mentioned critical junctures. First, can you  
11 describe for the Court what you mean by "critical junctures"  
12 from the historical analysis?

13 A. So major shifts in how we might define an institution or  
14 how an institution has governed itself can serve as knowing it  
15 as a time point. So this could be a constitutional amendment.  
16 It could be a major reform that we see of policy proposal that's  
17 going to change a process.

18 Q. And what critical junctures would you use if you were  
19 talking about Florida's history?

20 A. I think we can begin most related to this case in 1964 and  
21 '65. There was some changes we can call a "redistricting  
22 revolution."

23 Also, then, in 1992, there's two fundamental changes  
24 that relate to Florida, and then in 2011.

25 Q. So let's take each of those in turn.

1           Why are you using 1964-65 as a critical historical  
2     juncture?

3     A.    Back when Florida was in the reapportionment, it gave it 12  
4     congressional districts. There was also the case *Wesberry v.*  
5     *Sanders*, and so we see that those 12 districts were going to be  
6     redrawn so that there would be equal population between the  
7     districts. No longer would there be aspects where one district  
8     has more population than another.

9           Then that was followed by the Voting Rights Act of  
10    1965, when there were federal standards placed and definitions  
11    of which states had committed discrimination related to its  
12    elections.

13   Q.    Okay. And so you mentioned two things there. The one  
14    person, one vote standard -- was that utilized in Florida before  
15    1964-65?

16   A.    No.

17   Q.    And then you mentioned the Voting Rights Act in 1965. Can  
18    you expand on why it is you think that's a critical juncture in  
19    Florida?

20   A.    Yeah.

21   Q.    Florida wasn't covered?

22   A.    Well, it was also covered in Dr. Kousser's testimony on  
23    the -- that Florida was not included among states in the South  
24    of -- so in this case, showing an absence of large-scale, in  
25    this case, discrimination.

1 Q. You said another critical juncture that you would utilize  
2 is 1992. Why would you utilize 1992 as a critical historical  
3 juncture here in Florida?

4 A. So the redistricting process leading into 1992 was one  
5 where Florida had just received a large population change. It  
6 gained four congressional districts. Three of those districts,  
7 though, that came out of the congressional district plan were  
8 Black Opportunity Districts. They came to elect Representatives  
9 Carrie Meek, Corrine Brown, and Alcee Hastings, and so those  
10 three new African American representatives for the first time  
11 since Reconstruction.

12 Q. Any other reasons why 1992 would be a critical juncture in  
13 Florida's political history?

14 A. In that November 1992 election, Florida amended its  
15 constitution to enact term limits for the State legislators that  
16 they would serve eight-year terms.

17 Q. And why is that important?

18 A. Well, in this case, also as we've seen through, I think,  
19 other testimony the fact it was -- representatives are very  
20 rarely in -- have experience within redistricting from decade to  
21 decade, and in this case wouldn't have the same continuous  
22 service in any one of those chambers.

23 Q. Finally, Doctor, you said you'd utilized 2011 as a critical  
24 juncture when looking at Florida's political history.

25 Why is that, sir?

1 A. From the 2010 election, Florida had passed its  
2 constitutional amendment which we've been referring to here as  
3 the "Fair Districts Amendment."

4 Q. And help me understand this. What could you do before the  
5 passage of the Fair Districting Amendments that you can't do  
6 now?

7 A. Before the Fair Districts Amendment, you could draw  
8 districts that protected incumbents, that utilized partisanship  
9 to creates safe districts that might also help those incumbents.  
10 You could focus on communities of interest, right, in order to  
11 keep them together. Those are things that are not possible --  
12 in this case, you're actually directed not to consider those  
13 issues or to prioritize important factors like compactness,  
14 right, in limiting political and geographic subdivisions.

15 Q. And, Doctor, moving on from the critical junctures  
16 discussion, you also mentioned Dr. Kousser's use of selective  
17 facts. What are you referring to here?

18 A. One is that he -- the quotes that are used often to frame  
19 and provide a narrative to the redistricting process reflect the  
20 quotes given by members of the minority or, in this case, it's  
21 utilizing things of the chair who are directing what the process  
22 will be, and I think the -- you're pointing to an omission. So  
23 I used in this case a quote from Representative Randy Fine that  
24 also sort of gave context to how other representatives in the  
25 state House would have felt.

1 Q. How so?

2 A. Representative Fine was taking an objection to the fact of  
3 how the larger narrative or characterization that  
4 representatives were blindly following the Governor in this  
5 case, and he said that "They were not mindless automatons" --  
6 that one sort of caught my attention -- on the fact that, you  
7 know, they knew what was happening in particular and  
8 participated in that process.

9 I understand it was multiple rounds, but we would also  
10 think in this case that these legislators, right, fully  
11 understood what they were doing and said that they supported it.

12 Q. And, sir, as someone who studies the United States  
13 Congress, studies state legislatures, from your perspective,  
14 what's the best way to gauge the intent of the legislative  
15 bodies?

16 A. I think the vote of the plan that is ultimately enacted.

17 Q. And, sir, any other issues with Dr. Kousser's use of what  
18 you call selective facts?

19 A. I think one of the opportunities that we would see is when  
20 he's not including aspects about veto, right, or other things  
21 that Governor -- other governors have done in other states.

22 Q. And we'll get to that. I'd like to focus some on the  
23 discussion of demographics.

24 Sir, can you help us understand how Florida's  
25 demographics have changed over the last ten years?

1 A. Yeah. Looking back with the estimates of the American  
2 Community Survey and of the citizen voting age population will  
3 show that prior to the last redistricting process, the Hispanic  
4 voting -- citizen voting age population was approximately  
5 14 percent, and now, leading into just the most recent data,  
6 it's 21 percent. There was a large increase in this portion of  
7 the citizen voting age population that is Hispanic within the  
8 state of Florida.

9 And in this case, this has occurred at the same time  
10 where, if we look back ten years, the citizen voting age  
11 population and share that's African American has increased  
12 1 percent.

13 So while we see this change exists with an increase in  
14 Hispanic population and a relatively stagnant African American  
15 population relative to the overall growth of the state -- I  
16 mean, the African American population is growing at  
17 approximately the same rate as the rest of the state. We have  
18 continued to see that throughout the redistricting plans that  
19 are proposed, Florida tends to elect three to four African  
20 American representatives to Congress each year.

21 Q. So let me make sure the record's clear on this.

22 In 1992, can you tell us how many Black members of  
23 Congress there were?

24 A. Three.

25 Q. And in 2023, after the implementation of Florida's enacted

1 plan signed by the Governor, how many African American members  
2 of Congress are there?

3 A. Four.

4 Q. Doctor, you touched on this some, about contextualizing the  
5 Governor's veto based on what happened naturally.

6 Just to take a step back, in this redistricting cycle,  
7 in how many instances did the governors of particular states  
8 veto congressional maps?

9 A. Six times.

10 Q. Can you walk us through what those states were?

11 A. In Kansas --

12 JUDGE JORDAN: I'm sorry. What -- what time period  
13 are you asking?

14 MR. JAZIL: This redistricting cycle, Your Honor, 2021  
15 and 2022.

16 JUDGE JORDAN: Got it. Thank you.

17 THE WITNESS: Governors in Kansas, Kentucky,  
18 Louisiana, Pennsylvania, New Hampshire, and obviously here in  
19 Florida had vetoed plans for the U.S. congressional maps that  
20 were passed by their state legislatures.

21 BY MR. JAZIL:

22 Q. And can you tell us in which of those states were the  
23 vetoes overridden by the legislature?

24 A. In Kansas, Kentucky, and Louisiana.

25 Q. And in which of those states did the vetoes remain

1     operative, i.e., where they weren't overridden?

2     A.    Yeah.   In Pennsylvania and also in New Hampshire.

3     Q.    Any instances --

4                 JUDGE JORDAN:   You're missing one, right?

5                 THE WITNESS:   In Florida.   Yes, sir.

6     BY MR. JAZIL:

7     Q.    And, Doctor, were any of those instances where the veto  
8    happened in a state where the Governor and the legislature were  
9    of the same party?

10    A.    In New Hampshire.

11    Q.    So based on this national context, how would you  
12   characterize the statement from Dr. Kousser that vetoing of  
13   congressional maps was "extraordinary"?

14    A.    I felt that one of the things that we tend to see is that  
15   we know in Florida the maps that are proposed in this case is a  
16   bill.   Those bills go to both chambers, and then they go to the  
17   Governor.

18                 It's very common in this case that just as any of  
19   those bills, governors have the opportunity to use their veto.  
20   Florida is different than some of those other states.   A lot of  
21   states give governors veto opportunities within their  
22   congressional maps -- or in any map, but Florida limits that  
23   only to the U.S. Congress maps.

24                 And so in this case, we reflect on how Florida stands  
25   against other states.   Not only was -- another Republican



1 governor vetoed a plan provided by a Republican State  
2 legislature, right; the Governor did so in Florida in this case  
3 in the only opportunity that he had to participate.

4 Q. Understood.

5 A. Yes.

6 Q. And you read his report?

7 A. I did.

8 Q. What, if any, disagreements do you have with Dr. Barreto's  
9 overall analysis?

10 A. His analysis would report that individuals are -- primarily  
11 associate their votes based on race. I think there's a large  
12 possibility that cannot account for the other political factors  
13 that exist here -- partisanship, incumbency -- that also drive  
14 election outcomes in the state.

15 Q. You mentioned partisanship and incumbency as two possible  
16 factors that affect election outcomes.

17 How does incumbency play a role in election outcomes?

18 A. Incumbency is one of the first leading factors where  
19 individuals then have a record for their representation. We in  
20 political science often talked about this as the opportunity for  
21 a personal vote, so someone may be able to attract votes  
22 different than just their partisanship, so there's an incumbency  
23 bump that we would expect.

24 It's also the fact here that we know that those are  
25 things that -- especially if individuals have a local connection

1 to an area. But the mapmakers can't take those things into  
2 account.

3 Q. Sir, I'd actually like to show you a figure from  
4 Dr. Barreto's report, and perhaps you can walk us through where  
5 you see incumbency bumps.

6 MR. JAZIL: If we can pull up Plaintiff's Exhibit  
7 5042, Figure 9, please.

8 BY MR. JAZIL:

9 Q. Doctor, this is the functional analysis from Dr. Barreto's  
10 report for the enacted plan, the one that was passed by the  
11 legislature and signed by Governor DeSantis.

12 Looking at this figure, Doctor, can you tell us where,  
13 if at all, you see a possible incumbency bump?

14 A. Yep. One at the -- so in particular, look at the elections  
15 in this case for 2012. We see that Senator Nelson, when he was  
16 running for reelection in 2012 against then U.S. Congressman  
17 Connie Mack, he's able to win in the enacted districts of  
18 Congressional District 2, Congressional District 3, and  
19 Congressional District 4.

20 Q. So in that test election, you're saying that the incumbency  
21 bump could help explain why Congressional District 2, 3, and 4  
22 in the enacted plan are Black performing districts?

23 A. Yes. I think in this case there's maybe something about --  
24 Senator Nelson's had a long history in representing Florida at  
25 the State level as well as those six years -- or at that

1 point -- sorry -- 12 years before. And you have opportunities  
2 to reach out to areas especially here in North Florida.

3 We also see other times and other incumbents on this  
4 list who are running, even though they're Republican incumbents.

5 Q. Can you point me to other instances on this figure where  
6 you think the incumbency bump played a role?

7 A. Yes. At one point even -- at first, I would look to 2018.  
8 Again, just to keep consistent with Senator Nelson, in this case  
9 the elections are closer while Senator Nelson is running against  
10 then Governor Scott, an opportunity where, compared to other  
11 test elections, if we were to look at one where voters might be  
12 primarily making their decision on just partisanship alone,  
13 sometimes people compare it to the attorney general's race.

14 Senator Nelson, in the same election, received 5 --  
15 almost 6 percent more -- sorry -- it's 40.8 compared to 45.6 in  
16 Congressional Districts 3 and in Congressional Districts 2, 43  
17 to 47.

18 And if we just look at this -- that Senator Nelson is  
19 outperforming other Democratic candidates who are running,  
20 whereas governors -- now Governor DeSantis is running against  
21 then Mayor Andrew Gillum. And in that case, Mayor Gillum is  
22 performing at times very close to Senator Nelson in those  
23 elections, but we primarily in this case see that incumbency is  
24 helping look to those individuals when you see someone is  
25 running against them, compared to Gillum and DeSantis is an open

1 seat race at which that's just a different context for our  
2 election. They're both strong candidates where partisanship is  
3 going to drive a lot of the attention that voters have.

4 Q. Understood.

5 Doctor, you also mentioned partisanship. Can you  
6 unpack for us what you mean when you say that partisanship can  
7 explain election outcomes that Dr. Barreto suggested can be  
8 explained by race?

9 A. In this case it would be the correlation of these aspects,  
10 that voters who have those races, we can look to other points of  
11 data that determine that they have policy interests. There may  
12 be crossover votes that -- individual voters are willing to  
13 support a candidate because of the issues that they support.  
14 And so -- but partisanship is overall a reflection on the  
15 policies and ideologies that candidates overwhelmingly support  
16 on one side.

17 Q. And how can we gauge the policy preferences of voters that  
18 we're using as a proxy to partisanship here?

19 A. So in my report, I can reflect back onto the exit polls  
20 where we can survey individuals about this and ask them what are  
21 the issues that are most important to them, and then typically  
22 as political scientists, we would say what party do people  
23 believe are best adept to addressing that policy.

24 To 2022 in the election, voters overwhelmingly -- 39  
25 percent, I think, in this case -- believed that inflation was a

1 top issue of concern, and very much in this case that's a hard  
2 thing for people of the president's party -- in this case, the  
3 Democratic party -- or that Republicans often run on trying to  
4 help the economy.

5 Q. And so the exit polls would show that 39 percent were  
6 worried about inflation. Do we know how they voted?

7 A. Yeah. They tend to vote for Governor Ron DeSantis.

8 Q. So the exit polls are giving us a proxy for partisanship  
9 because they're telling us what policy preference someone is  
10 adhering to, and using the numbers from the exit polls and how  
11 those votes voted, we can gauge whether or not a particular  
12 partisan did better or worse?

13 Am I understanding that right?

14 A. Yes. You can look -- does partisanship explain most of  
15 those responsibilities. And here we can think of even in this  
16 case -- you said, "Are you a Republican and who did you vote  
17 for, for Governor?" You'll see about 90 percent of individuals  
18 say that they voted for the Republican candidates.

19 You know, I think in this case, you can also then look  
20 at it compared to race. How did that happen? And if we look  
21 within that statewide comparison, Hispanic voters, who did they  
22 overwhelmingly support? 57 percent voting for Governor Ron  
23 DeSantis.

24 I think in this case, you could look through exit  
25 polls as well to even determine differences between gender

1 within a racial and ethnic group.

2 And so the opportunities that exist here is just to  
3 say that we want to look at both the fact of race could be a  
4 factor, party could be a factor, and when they show the same  
5 things, on our ability as social scientists to determine what  
6 caused the outcome, right, it's almost entirely difficult to  
7 separate those.

8 Q. Now I'd like to continue the discussion of partisanship by  
9 looking at another figure from Dr. Barreto's report.

10 MR. JAZIL: If we can go to 5042, Figure 6, please.

11 BY MR. JAZIL:

12 Q. Dr. Owens, this was the racially polarized voting analysis  
13 from Dr. Barreto's report for all of North Florida. This was  
14 the racially polarized voting analysis that was then used by  
15 Dr. Barreto in all of his functional analyses.

16 Looking at this racially polarized voting analysis,  
17 Doctor, what can you tell us about partisanship?

18 A. Well, this gets right -- presumably we're talking about  
19 North Florida as Congressional Districts 1 through 5, so the  
20 entire, as he showed, panhandle and Northern part of the state.

21 But we see here that at least often 30 percent of  
22 white voters are willing -- will choose and are prefer the  
23 Democratic candidate as it existed if 2018 as well as 2020.

24 In -- if we even go back down to the race I had  
25 mentioned before, 2012, it could show that the highest amount of

1 this, with incumbency considered, that 37 percent of white  
2 voters may crossover and support the Democratic candidate when  
3 there's a strong recognition of the incumbent, right, and their  
4 service in the state.

5 Q. And so, Doctor, you're talking about the white crossover  
6 vote. Can you just identify for us so it's clear which of these  
7 columns tells us that about 30 percent of white voters vote  
8 Democrat?

9 A. The gold column on the left identifies that 30 percent of  
10 white voters would support a Democratic candidates. We see that  
11 that occurs in the 2020 presidential election, the 2018 Senate  
12 election, the 2018 governor election. And so these are all in  
13 the more recent elections that we're beginning to see crossover  
14 voting occur among North Florida's white population.

15 Q. And what's the right column, the green one, tell us?

16 A. This is the partisan preference or candidate preference of  
17 Black voters in the North Florida area as well. And so it's  
18 showing in this case that about 9.7 percent -- so close to  
19 10 percent, if we just rounded it, from 2018 to 2020, 90 percent  
20 support the Democratic candidate.

21 Q. So 90 percent of African Americans support the Democratic  
22 candidate usually, according to this, and about 30 percent of  
23 white voters support the Democratic candidate usually, according  
24 to this chart? Am I understanding that right?

25 A. Yes.

1 Q. And, sir, this is undisputed in the record. Congressional  
2 District 5, the benchmark, was not a majority minority district  
3 because no one member of a minority, i.e., Black people, made  
4 up a majority, correct?

5 A. Correct.

6 Q. Why is it an analysis like this showing that 30 percent of  
7 voters in North Florida, which is being defined as larger than  
8 Benchmark District 5 -- why is an analysis like that relevant  
9 when we're looking at a benchmark district where no one race  
10 makes up a majority?

11 A. It's a determination that -- given that they're not able --  
12 or making up the majority and the district lines would show that  
13 more African Americans would not be added to the district, it  
14 requires that you have to have a cross -- a district that  
15 includes a crossover. In this case, as presented in this map --  
16 or figure, white voters who are willing to support the  
17 Democratic candidate and that they exist.

18 Q. And what conclusions can we draw about the role of  
19 partisanship when it comes to voting in a benchmark district  
20 like Congressional District 5?

21 A. To me, it shows a particular role of partisanship is that  
22 this is a more compelling theory of why -- how the elections are  
23 taking place than race. There are a lot of political factors  
24 which are existing in the outcomes of these elections.

25 MR. JAZIL: I have no further questions, Doctor.



1 Thank you.

2 JUDGE JORDAN: Thank you very much.

3 MS. BLUM: Thank you, Your Honor. We have a binder of  
4 some exhibits that I may use in the course of this cross  
5 that I'd like to pass up while I gather my materials.

6 May my colleagues approach?

7 MR. LI: May we approach?

8 JUDGE JORDAN: Yes.

9 MS. BLUM: Your Honor, there was a copy of a trial  
10 transcript that we were possibly going to use at one point, but  
11 it's not necessary to include it in the binders.

12 JUDGE JORDAN: You can just leave it up there. We'll  
13 use it if we need to.

14 DEPUTY CLERK: I think Judge Rodgers has the  
15 additional stuff.

16 MS. BLUM: Ms. Stark, may I switch to the ELMO?

17 May I proceed, Your Honors?

18 JUDGE JORDAN: Yes. Go right ahead.

19 **CROSS-EXAMINATION**

20 BY MS. BLUM:

21 Q. Good afternoon, Dr. Owens.

22 This is your third time testifying as an expert,  
23 right?

24 A. Yes.

25 Q. And prior to 2022, you'd never testified as an expert,

1 right?

2 A. Correct.

3 Q. And every time you've offered an expert opinion, you've  
4 been hired by Holtzman Vogel, right?

5 A. Yes.

6 Q. Dr. Owens, your assignment in this case was to respond to  
7 Dr. Kousser, right?

8 A. Yes, as well as Dr. Barreto.

9 Q. And you're not a historian, right?

10 A. No. Political scientist.

11 Q. And you might have some disagreements about the  
12 interpretations of historical events, but you don't object to  
13 Dr. Kousser's account of the history and the events in Florida  
14 that he recites, right?

15 A. That he recited? No. In this case, I added additional  
16 historical details to give the more complete description.

17 Q. You would agree that there's been a long-standing history  
18 of racial discrimination against minorities that has influenced  
19 Florida's electoral process, especially North Florida, right?

20 A. I think, in this case, there's an early history, right, and  
21 this was -- you're talking about a middle history and then you  
22 can talk about the more recent history. Those are not all the  
23 same, and so -- but as far as long-standing and in their  
24 comparisons, I mean, discrimination has occurred in the state of  
25 Florida.

1 Q. So you would agree that overall, it's influenced Florida's  
2 electoral process, this long history of discrimination; is that  
3 right?

4 A. In influencing the electoral process? We see that  
5 there's -- this is why I identified and pointed to 1965 as a  
6 critical difference.

7 Q. I'd like to show you part of transcript of your deposition.

8 Do you recall when I asked you:

9 "Specifically in North Florida, where the Court  
10 created a Black access district, would you agree that there has  
11 been a long-standing general history of racial discrimination  
12 against minorities that has influenced Florida's electoral  
13 process in that area?"

14 And you responded: "In general, yes. In a lot of  
15 ways prior to the 1965, especially the 1980s, as we discussed, I  
16 agree."

17 Do you see that?

18 A. Yes.

19 Q. And is that consistent with your opinion here today?

20 A. Yes.

21 Q. And while you might think that certain periods of history  
22 should be given more or less weight, you would agree that  
23 Florida's long history of racial discrimination is relevant to  
24 the issues in this case, right?

25 A. Yes.

1 Q. And you would like to focus on events after 1965, and you  
2 also indicated 1992 and 2011, but you agree it would be  
3 incomplete to ignore events prior to 1965 in this case, right?

4 A. Correct.

5 Q. And similarly, you would agree that it would be incomplete  
6 to ignore events before 1992 or 2011, right?

7 A. Well, right. In this case, I've also described those. I  
8 mean, I think we've seen in particular are there reasons for  
9 those reforms, right, and are the outcomes improving.

10 Q. Let's talk about Dr. Kousser's account prior to 1900.

11 Dr. Kousser opined that there was a series of  
12 restrictive election laws, including a malapportioned  
13 constitution, a poll tax and Eight Box Law, and secret ballot.

14 And you don't dispute any of that in your report,  
15 right?

16 A. No.

17 Q. Dr. Kousser discussed the period from 1900 to 1965, and he  
18 identified a number of obstacles to Black voters electing the  
19 candidates of their choice, including an all-white Democrat  
20 primary and violence that erupted when Black voters tried to  
21 register to vote, including the Ocoee riots and the  
22 assassination of Harry T. Moore.

23 And you're not disputing any of that either, right?

24 A. No, I'm not.

25 Q. In fact, you would agree with Dr. Kousser that there has

1     been a bias sometimes supported by violence against Black voting  
2     in Florida, certainly in the hundred years before 1965?

3     A.    No, I don't disagree.

4     Q.    And similarly, Dr. Kousser also discussed that from 1950 to  
5     1970, every Florida governor campaigned as a segregationist, and  
6     from 1947 to 1981, there was a mandatory at-large school board  
7     election and there was also juror segregation, public  
8     accommodation segregation, and antimiscegenation laws through  
9     the 1960s.

10           And again, you're not disputing any of that, right?

11     A.    No. I think it's part of Florida's history.

12     Q.    And you're also aware that in 1970, Governor Kirk responded  
13     to an order to integrate the Manatee County schools by  
14     dismissing the superintendent and closing the schools rather  
15     than integrating them, right?

16     A.    Yes, that existed.

17     Q.    So you testified that Florida was not covered under  
18     Section 5 of the Voting Rights Act when it was originally  
19     enacted and that only counties in the south of Florida were  
20     originally covered. But you know that was a decision made by a  
21     formula that also included the entire state of Texas, right?

22     A.    Into the -- when the five counties were added?

23     Q.    Prior to when the five counties were added, in 1965 when  
24     the Voting Rights Act was originally enacted, Texas wasn't  
25     covered, right?

1 A. Texas was not covered, right.

2 Q. Neither was Florida, right?

3 A. No, it was not.

4 Q. But the fact that Florida wasn't covered doesn't change any  
5 of the history of discrimination in Florida that we just  
6 discussed, right?

7 A. And that -- it does not, and the examples that you've  
8 pointed really often points to things that are not related to  
9 elections, though.

10 Q. You don't think that a malapportioned constitution is  
11 relevant to elections?

12 A. I think that that -- the *Wesberry v. Sanders* decision has  
13 made sure that that never happens again. Florida hasn't  
14 returned to that decision.

15 Q. But your testimony today isn't that the history of  
16 discrimination is unrelated to elections, right?

17 A. I would think -- no, my testimony is not to say that it's  
18 not -- that it is unrelated. I think that, number one, this is  
19 exactly the reason why we talk about critical junctures is that  
20 Florida has never returned back to trying to do malapportioned  
21 districts.

22 Q. I think that's sort of the issue in this case in some ways.

23 So for what it's worth, you'd agree that in 1984 a  
24 judge ordered that Gadsden County School District right here in  
25 North Florida be bailed into Section 3 of the Voting Rights Act,

1 which means that in light of the finding of potential  
2 discrimination, the court had to review all changes to the  
3 school board elections for a period of years, right?

4 A. Yeah. There's a bail-in provision.

5 Q. So you're not contending that the Voting Rights Act ended  
6 racial discrimination in North Florida, are you?

7 A. No. I think it indicates -- it's just saying that the  
8 United States government just would not identify Florida.

9 Q. And you're not disputing Dr. Kousser's finding that since  
10 1965, after the Voting Rights Act, there have been at least 69  
11 lawsuits or Section 5 objections which resulted in a finding or  
12 admission of discrimination on the basis of race against state,  
13 municipal, or county governments, right?

14 A. That's account that he testified to. I think  
15 overwhelmingly as well, he also identified that Texas had a much  
16 larger number as well. So I think that still stands out that  
17 while these can occur, and Florida is a very large state with a  
18 lot of school districts and lot of counties, that -- those are  
19 the metrics by which he's counting, right, is a local government  
20 being sued. And we're going to have more local governments in  
21 Florida than a place like Arizona.

22 Q. Dr. Kousser was discussing findings or admissions of  
23 discrimination, right? Not just the number of lawsuits; is that  
24 correct?

25 A. Correct.

1 Q. So the number of governments isn't really relevant to how  
2 often there is discrimination, unless your contention is that a  
3 certain number of governments will discriminate, and if you have  
4 more governments, there will be more discrimination? That  
5 doesn't really follow?

6 A. With the number of individuals which you have to study -- I  
7 mean, we're talking here about the increasing number of sample  
8 size. And I'm also just pointing out -- and that's one of  
9 reasons why the number in Texas is larger too. There's 267  
10 counties compared -- or 254 counties compared to 67 here.

11 Q. But that doesn't change the fact that there was 69  
12 lawsuits --

13 A. No, it doesn't.

14 Q. -- across the nation?

15 A. Just context for what the number is.

16 Q. And you don't dispute Dr. Kousser's finding that no Black  
17 state House member was elected in Florida from 1888 to 1969 and  
18 no Black State Senator was elected from 1888 to 1982 and no  
19 Black member of Congress was elected from 1887 -- I'm sorry --  
20 1877 to 1993, right?

21 A. Correct, yes. That's why I think I pointed to 1992 as an  
22 important time period.

23 Q. And moving into the 21st century, you didn't dispute in  
24 your report the voter roll purges that Dr. Kousser discussed in  
25 the early 2000s, which removed Black voters at a higher rate



1 than white voters, right?

2 A. No.

3 Q. And you didn't dispute Dr. Kousser's discussion of how  
4 Black voters packed and cracked to satisfy political ends in the  
5 years 2000 to 2010, so prior to the enactment of the FDA, right?

6 A. No. It focused on this cycle.

7 Q. And you're not disputing any of the facts that Dr. Kousser  
8 discussed regarding arguments made in support of the enactment  
9 of the FDA, right?

10 A. No.

11 Q. And you're not disputing Dr. Kousser's account or the full  
12 Supreme Court's findings about illegal packing of Black voters  
13 in the predecessor of Congressional District 5, the benchmark  
14 congressional district, following the FDA's enactment and during  
15 the course of 2012 redistricting, right?

16 A. Can you restate that?

17 Q. You're not disputing either Dr. Kousser's account or the  
18 Florida Supreme Court's findings about illegal packing of Black  
19 voters in what we've been calling in this case Benchmark CD-5 --

20 A. Uh-huh.

21 Q. -- during the 2012 redistricting, right?

22 A. I'd say no.

23 Q. And that's after the FDA's enactment, right?

24 A. Correct.

25 Q. And would you agree that Black voters are still affected by

1 this history of discrimination even today?

2 A. Yeah. I mean, I think there's two ways that I would want  
3 to say that. I mean, the thought particularly is that in a  
4 context of, yes, one of the things governments would do is try  
5 and make sure that there's trust, right, in the electoral  
6 process and that people want to participate and feel that there  
7 -- this is an open process.

8 I think the other part is to say that -- right, is the  
9 State continually changing its laws in order to make it easier  
10 to vote, and I think that also is true.

11 Q. Did you discuss anywhere in your report the State changing  
12 its laws to make it easier to vote?

13 A. Or for the protection of them. I mean, we talked about the  
14 Fair Districts Amendment.

15 Q. But other than the FDA --

16 A. No.

17 Q. -- you're not discussing any?

18 And you'd agree that Black voters are not equally able  
19 to participate in the political process due to this history of  
20 discrimination, right?

21 A. They're not able to equally?

22 Q. Mm-hmm.

23 A. And what -- is the clarification about participation?

24 Q. So you'd agree that Black voters are still affected by the  
25 history of discrimination? That's how we -- that's what you

1 just agreed to, right?

2 A. I think in the determination -- what I was pointing to in  
3 particular was about expectations of trust, right, and the  
4 differences there we could look at in turnout.

5 But I think often -- as far as being treated  
6 differently, I don't think that there's a racial intention of  
7 election laws or points that create discrimination.

8 Q. But you think that Black voters turnout at lower rates  
9 because of this history of discrimination? That's what you were  
10 saying?

11 A. I think that there's a lot of factors towards it.

12 JUDGE WINSOR: There's a lot of -- I'm sorry. I  
13 didn't hear your answer.

14 THE WITNESS: There's multiple other factors. We tend  
15 to think about -- yeah, I mean, whether there's past  
16 involvement, right, age. So we've -- in particular we've talked  
17 about demographic differences.

18 You know, to answer that question more fully, we'll  
19 look at -- well, what's the average age of each group.

20 BY MS. BLUM:

21 Q. My question was: Do you think that Black voters are at  
22 least, in part, turning out at lower rates due to this history  
23 of discrimination?

24 A. Yeah. I think if that's proven that it's related to trust,  
25 right? I feel it was motivations.

1 Q. I asked your opinion, Dr. Owens.

2 A. I mean, I think I haven't given them a survey question  
3 about, you know, reasons for not voting. But collectively, I  
4 think that's one of the -- you know -- it would make sense in  
5 that way of like the psychology of a voter. But I'm not a  
6 psychologist.

7 Q. But you're a political scientist, right?

8 A. Yeah. So I'd say that's why one of the things I would  
9 check or look for.

10 JUDGE WINSOR: What of the things you would -- I'm  
11 sorry?

12 THE WITNESS: I would sort of look for. Is there  
13 someone where they have a reason to have less trust in  
14 elections? And I guess this was -- I don't want to personalize  
15 it too much, but the thought is I always felt like Leon County  
16 did a very good job at handling its elections. I don't see  
17 where there would be examples of: They don't trust.

18 BY MS. BLUM:

19 Q. But outside of Leon County, looking at Florida generally,  
20 you agree that the history of discrimination that Black voters  
21 have endured influences their turnout rate, right?

22 A. Yeah. I think that's -- it would make statements to that  
23 effect, so yes.

24 JUDGE WINSOR: I'm sorry. I'm just having a hard time  
25 hearing you. What did you say?

1 THE WITNESS: Well, I felt like sometimes that's a  
2 point at which, you know, the arguments about this history  
3 affect the turnout today. I mean, it would be like if there was  
4 less trust, and people would cite that. I think that's why you  
5 have to talk to the communities that are there.

6 BY MS. BLUM:

7 Q. So you agree that Black voters are not equally  
8 participating in the political process due to this history of  
9 discrimination, right?

10 A. That's -- I think I can't say constantly that it's due to  
11 that. I think sometimes we've talked about political  
12 competition is existing, right? When you see Republican  
13 incumbents were on the ballot more in 2014, they're winning  
14 elections for 2020 as well.

15 And so political competition is something that also  
16 breeds turnout.

17 Q. I'll move on.

18 I'd like to discuss the history of Congressional  
19 District 5.

20 Dr. Owens, you'd agree that there has been a minority  
21 access district in North Florida since 1992, right?

22 A. Yes.

23 Q. And versions of that Black access district existed in North  
24 Florida for the next 30 years until 2022, right?

25 A. Correct.

1 Q. And you agree that Benchmark CD-5 was required by the  
2 Florida Supreme Court in 2015 to comply with the Fair Districts  
3 Amendment to the Florida Constitution, right?

4 A. Yes. So in this case, the Court created the map to do that  
5 and to potentially change the geographic distribution -- or I  
6 guess direction and area of CD-5.

7 Q. So let's take a look at Benchmark CD-5.

8 MS. BLUM: I'd like to put up what's been marked as  
9 Plaintiff's Exhibit 7199, which is in evidence, and I'll just  
10 focus on the North part of the map.

11 BY MS. BLUM:

12 Q. Benchmark CD-5 runs right here along the Northern  
13 Florida -- of Florida across the panhandle, and you know it was  
14 created by the Florida Supreme Court to enable Black voters to  
15 elect their candidates of choice, right?

16 A. Yes.

17 Q. But you'd agree that there's more than race that unites the  
18 population in Benchmark CD-5, right?

19 A. I think we've seen -- yeah, I've heard arguments in  
20 particular, too, you know, it's an area that also shares  
21 partisanship. And the report of Dr. Barreto pointed to the fact  
22 of there are issues.

23 But I think when we consider the district, right, it's  
24 identifying those parts on top of other traditional  
25 redistricting principles. We talk about keeping subdivisions

1 and geographical areas whole and following -- or subdivisions  
2 whole and following geographic boundaries.

3 Q. I'm sorry. Is it your contention that Congressional  
4 District 5 does keep subdivisions whole and follow geographic  
5 boundaries?

6 A. No.

7 Q. You'd agree that the population of Congressional District 5  
8 is generally poor, younger, and less well-educated than the  
9 surrounding districts, right?

10 A. Yes.

11 Q. And you'd agree that that result of being poor, younger,  
12 and less well-educated is, in part, the result of the selective  
13 nature in which the district was created to be a Black  
14 performing district, right?

15 A. I would say it makes sense.

16 Q. And you agree that there are, in particular, many different  
17 cultural connections that unite areas of the Florida panhandle,  
18 right?

19 A. Can you be more specific?

20 Q. I'd like to show you a portion of your deposition  
21 testimony. I think that might help.

22 JUDGE WINSOR: Is this to refresh or to impeach?

23 MS. BLUM: It's to refresh, Your Honor.

24 BY MS. BLUM:

25 Q. I asked you the same question at your deposition, and you

1 said:

2 "There are in particular a lot of different cultural  
3 connections that area of the panhandle keep to those times."

4 Let me pull up the question that I asked you that that  
5 comment was in response to.

6 I asked you: "Would you agree that the Black  
7 population in Congressional District 5 has a lineal connection  
8 to the many enslaved people brought there to work in the  
9 antebellum period?"

10 And you said: "I think that those connections exist.  
11 I think it's a little bit complicated to me because I know in  
12 some ways -- we know we, in some ways, have experienced aspects  
13 of migration to the North as well as coming back to areas of  
14 Florida, so there's been a lot of population change. But there  
15 are, in particular, a lot of different cultural connections that  
16 areas of the panhandle keep to those times."

17 Does that refresh your recollection?

18 A. It does. And I think -- but one of the things that we're  
19 talking about the locations of enslaved populations in Florida.  
20 I think it's point -- in that I continued to talk about.

21 This is -- if we go back to the late 19th century,  
22 this is where Florida's population was as well more generally.  
23 And I think that when we talk about populations that move closer  
24 to the coasts and also down through the panhandle, that's one of  
25 those parts where we'd say in particular, too, is separation.



1 The expanding populations that we have now are individuals who  
2 moved to Florida and have a particular -- a different historical  
3 connection to the state.

4 Q. But you'd agree that in the North of Florida, there's a  
5 long history of Black Floridians residing on that Northern  
6 border because there was a concentration of plantations in North  
7 Florida, right?

8 A. Yes, and I think the questions we've like looked and that  
9 that is -- they can be geographically disparate as well. And  
10 this is all a farming, community, if we're making that argument,  
11 but I think that in this part in particular of locations of the  
12 culture that in an African American population, it does exist.

13 Q. And you agree that even though that population in North  
14 Florida has changed some over time with people moving in and  
15 moving out, the Black population in what we were just looking  
16 at, benchmark Congressional District 5, has a lineal connection  
17 to the many enslaved people brought there to work in the  
18 antebellum period, right?

19 A. I would think -- if we were to go back to the map as well,  
20 I think that -- and we stay "old North Florida," it's going to  
21 be geographically larger than that congressional district would  
22 be.

23 Q. Turning back to the previous page that we just looked at, I  
24 asked you: "Would you agree that the Black population in  
25 Congressional District 5 has a lineal connection to the many

1     enslaved people brought there to work in the antebellum period?"

2             And you said: "I think those connections exist," and  
3     then you gave some caveats and said there were cultural  
4     connections.

5             But you stand by that testimony, right?

6     A.     I do.

7     Q.     I'd like to switch topics and talk about the 2022  
8     redistricting cycle.

9             In your review of the 2022 redistricting cycle, you  
10    started with the Governor's veto in special session, right?

11    A.     Yes.

12    Q.     And you told me in your deposition that you did not review  
13    any legislative transcripts and you only watched one day of  
14    testimony from the special session, and that was the day that  
15    Alex Kelly presented the maps, right?

16    A.     Right.

17    Q.     And so that one day of legislative testimony and the  
18    articles you reviewed and cited in your report form the basis  
19    for your opinions, right?

20    A.     Also following with Dr. Kousser's report.

21    Q.     Well, Dr. Kousser reviewed legislative transcripts, right?

22    A.     Mm-hmm. In this case provided -- read the chronology of  
23    events, too. And so asking what did I rely on -- I'm just  
24    adding on to that list as well.

25    Q.     So you -- you relied on either Dr. Kousser's report and

1 then this one day of legislative testimony, right?

2 A. Right.

3 Q. But although you reference events prior to the veto in your  
4 report, you described your opinions as focused on events after  
5 the veto or, in your words, looking at how they resolved what  
6 you call "the veto bargain," right?

7 A. Yes.

8 Q. So I'd like to talk about some of the events prior to the  
9 veto. And I know you've been in court for the -- during the  
10 course of this trial.

11 But when you wrote your report, you weren't aware that  
12 the Governor submitted his own maps prior to the veto and his  
13 maps eliminated a minority access district in North Florida,  
14 right?

15 A. I'm generally aware of this, but the focus of our report  
16 that I'll put into evidence was that he -- we're focused on what  
17 the enacted map was and its legislative history.

18 Q. So I asked you at your deposition when -- I asked:

19 "Are you aware that the Governor submitted maps prior  
20 to the veto?"

21 And you responded, "I am not aware of that."

22 Does that refresh your recollection?

23 A. Sure.

24 Q. And that was the testimony you gave, right?

25 A. Yes.

1 Q. But you weren't aware that in contrast, in early 2022 all  
2 the maps that were being considered by the legislature  
3 maintained a minority access district in North Florida, right?

4 A. Yes.

5 Q. And you weren't aware when you wrote your report that  
6 before the veto, the Governor's office brought an outside  
7 consultant to testify to the legislature to opine that  
8 Congressional District 5, as it was being drawn by the  
9 legislature in 2022 prior to map 8019, was unconstitutional  
10 under the U.S. Constitution, right?

11 A. I knew that that was the position, is that starting to draw  
12 a map which was reflective of the fact of the benchmark map  
13 being unconstitutional.

14 Q. But you weren't aware of the fact that the Governor brought  
15 in an outside consultant to testify to the legislature, right?

16 A. No.

17 Q. And you weren't aware that the Governor submitted a legal  
18 opinion from his chief counsel to the same effect, right?

19 A. I think this would be just -- as part of that history and  
20 reading it, but no, that's not the focus of my report.

21 Q. But you weren't aware of it existing?

22 JUDGE WINSOR: What time period are you talking about?

23 MS. BLUM: When he wrote his report, Your Honor.

24 THE WITNESS: I would think just as far as having and  
25 reading those parts. But no, I don't know -- did not look at

1 the memo or, in this case, the documentation.

2 Q. But when I just asked you about the legal opinion and the  
3 presence of an outside consultant, you told me at your  
4 deposition, you weren't aware that those are events that had  
5 happened, right?

6 A. Yeah.

7 Q. And then after we discussed the appearance of an outside  
8 counsel at your deposition, you agreed with me that the  
9 legislature rejected the Governor's view that CD-5 was  
10 unconstitutional and that they passed two plans that preserved  
11 or attempted to preserve a minority access distribute in North  
12 Florida, right?

13 A. Can you ask that again?

14 Q. So we discussed these facts at your deposition, and after  
15 we discussed them, you agreed with me that the legislature  
16 rejected the Governor's view that Congressional District 5 was  
17 unconstitutional, and the legislature then passed two plans that  
18 preserved or attempted to preserve a minority access district in  
19 North Florida, right?

20 A. Yes.

21 Q. And you'd agree with me that Governor DeSantis's statements  
22 throughout the redistricting process reflected the fact that he  
23 recognizes the Florida Supreme Court had required that a  
24 minority access district be drawn in North Florida pursuant to  
25 the FDA, right?

1 A. Yes.

2 Q. That was a yes?

3 A. Mm-hmm.

4 Q. And you know that no Court has ever agreed with Governor  
5 DeSantis's view that the Florida Supreme Court got it wrong when  
6 they required the East-West district, right?

7 A. Yes.

8 Q. And at your deposition, we discussed Benchmark CD-5, and I  
9 asked you why it would be impermissible to connect Jacksonville  
10 and Gadsden Counties when the Florida Supreme Court had said it  
11 was required, and the only authority you cited to me at your  
12 deposition for why it would be impermissible was the  
13 Government's veto, right?

14 A. Yes.

15 Q. But you agree that the executive does not properly decide  
16 what is and is not constitutional under federal law, right?

17 A. No, the Governor doesn't get to make the decision. The  
18 Governor does get to be a part of legislative process and  
19 therefore is constitutionally involved and has a role in  
20 determining what the congressional maps will be.

21 Q. But not what is and what is not constitution, right?

22 A. No.

23 Q. And the executive's role is to enforce the law, not decide  
24 what the law is or should be, right?

25 A. I mean, one part of it, yes. It's also -- say enforcing

1 the law. It would be approving it and being part of this  
2 bargain.

3 Q. I'd like to show you the testimony you gave in response to  
4 this question at your deposition.

5 JUDGE WINSOR: Are you going to impeach him on whether  
6 the executive enforces the law?

7 MS. BLUM: Yes, Your Honor.

8 JUDGE WINSOR: We're not going to have much of a lunch  
9 break, then.

10 JUDGE JORDAN: Is your point that the Governor has no  
11 role to play in legislation whatsoever?

12 MS. BLUM: No, Your Honor. My point is just that the  
13 Governor's role is to enforce the law, not to determine what is  
14 and is not constitutional. That's the court's role.

15 JUDGE JORDAN: If you're saying that as sort of a  
16 final matter, I think in our system, you're probably right, but  
17 that's doesn't mean the Governor has no role in playing a part  
18 of legislative process.

19 MS. BLUM: Right, Your Honor. I'll move on.

20 BY MS. BLUM:

21 Q. So, Dr. Owens, you understand that at some point in the  
22 process -- and this was before the veto -- the legislature  
23 composed a two-map solution? There was a Duval-only map, which  
24 we've been calling 8019, and a plan that resembled benchmark  
25 CD-5, which we've been calling 8015, right?

1 A. Yes.

2 Q. And you agree that the legislature's plans complied with  
3 the Fair Districts Amendment, right?

4 MR. JAZIL: Your Honor, objection, legal conclusion  
5 and also beyond the scope of direct.

6 MS. BLUM: Your Honor --

7 JUDGE JORDAN: Overruled as to both. If you want to  
8 expand on the area on your redirect, you can.

9 Go ahead. Ask your question again.

10 BY MS. BLUM:

11 Q. You agree that the legislature's plans complied with the  
12 Fair Districts Amendment, right?

13 JUDGE WINSOR: I'm sorry. Which plans are you talking  
14 about?

15 MS. BLUM: Benchmark 8015 and 8019, Your Honor.

16 THE WITNESS: Yeah, I would -- except in this case  
17 when they made those statements, the legislature said that was  
18 their guiding principle.

19 BY MS. BLUM:

20 Q. And you understand that the Governor then vetoed the  
21 legislature's two-map proposal, right?

22 A. Yes.

23 Q. And that's when you started your analysis, right?

24 A. Yes.

25 Q. But you didn't read the Governor's memorandum that



1 contained his legal arguments, right?

2 A. No.

3 Q. So at the time you were writing your report, you knew that  
4 the Governor believed the map to be unconstitutional, but you  
5 didn't know why he reached that conclusion, right?

6 A. Correct. I took it from his role in the legislative  
7 process that he had a reason that justified behind that veto and  
8 that it would be unconstitutional.

9 Q. Right, but you didn't know what that reason was?

10 A. No. I don't think that's part of the analysis of looking  
11 at the end of what was the -- in my mind, how these districts  
12 comply, how they would perform.

13 Q. And at your deposition, you agreed with me that the reason  
14 that Governor DeSantis vetoed the maps the legislature passed  
15 was in part because the maps preserved a Black access district,  
16 right?

17 A. It was because -- I think I was saying probably many ways  
18 that I recall that we talked about the importance of  
19 compactness.

20 Q. I'd like to show you another portion from your deposition  
21 testimony.

22 I asked you: "Would you agree with me that Governor  
23 DeSantis vetoed the maps which the legislature passed and in  
24 particular vetoed 8015 because it preserved CD-5, which is a  
25 Black access district?"

1           And you responded: "I believe at least from what I  
2 understand, looking at the latter examples and discussions of  
3 the new maps, that the answer to that is partially the reason  
4 why and that there are other districts which had been proved in  
5 order to add additional compactness to the districts."

6           That was your testimony, right?

7       A.    Yes.

8       Q.    So you agree that the reason that Governor DeSantis vetoed  
9 the maps was at least partially because they preserved a Black  
10 access district, right?

11      A.    And because that's a conflict with other components in  
12 particular of the Fair Districts Amendment and how that -- the  
13 map was being drawn.

14      Q.    And the only concern that Governor DeSantis communicated  
15 publicly about Congressional District 5 was a concern about its  
16 racial composition, right?

17      A.    Yes.

18      Q.    So you know that the Government, after the veto, submitted  
19 his own map to the legislature, right?

20      A.    Correct.

21      Q.    And as far as you're aware, in Florida history, a  
22 Governor's office had never before submitted a redistricting  
23 map, right?

24      A.    No. No, I don't disagree.

25      Q.    And you testified at your deposition that Governor

1 DeSantis's attempt to lead the process of redistricting after  
2 the veto is unique in Florida, right?

3 A. I think in this case, right, helping to provide details. I  
4 mean, we looked back to this, yes. But I also think I also  
5 talked about the fact that this was submitted and is a bill from  
6 Senator Rodriguez.

7 Q. But the answer to my question whether Governor DeSantis's  
8 attempt to lead the process of redistricting after the veto is  
9 unique in Florida -- that answer is yes, right?

10 A. I mean, there are portions of this in the context that  
11 exist how they got to those. We also talked about it being  
12 unique with the importance of court-ordered maps in the past,  
13 and when we think about this, any unique activity relative to  
14 the Fair Districts Amendment -- this is the second time that the  
15 legislature is being tasked with writing -- drawing maps  
16 underneath the new rules.

17 So I thought in some ways, yes, it's unique, but also  
18 we don't have many points in history to compare it to.

19 Q. But this was specific question about leading the process of  
20 redistricting, that is unique, right?

21 A. You saw him as unique, but I also saw him as a partner.

22 Q. I'd like to show you another portion from your deposition  
23 testimony.

24 MR. JAZIL: Your Honor, improper impeachment.

25 JUDGE JORDAN: Sustained. I mean, you need to ask him

1 a question. If he can't remember, you refresh. If he gives you  
2 an answer that's inconsistent, you impeach.

3 MS. BLUM: Yes, Your Honor.

4 BY MS. BLUM:

5 Q. Let's talk about the map that Governor DeSantis submitted  
6 in April and that was ultimately enacted. And this is  
7 Plaintiff's Exhibit 7190, which is in evidence.

8 You can see immediately that it eliminates Benchmark  
9 CD-5 and that there is no district running along the Georgia  
10 border from East to West, right?

11 A. Right.

12 Q. And you can agree at that just by looking at plan C0109,  
13 the enacted map, as we've been calling it, you can tell that the  
14 map would distribute the Black population in North Florida  
15 across predominantly white districts, right?

16 A. Yes, if that's how you're defining it. I often look at  
17 these maps as new opportunities and -- yeah, collection of  
18 counties.

19 Q. And you're aware, because you were here when Mr. Kelly  
20 testified, that when he drew the enacted map he realized at some  
21 point during the process that he was drawing white-controlled  
22 districts, right?

23 MR. JAZIL: Your Honor, I object as outside of the  
24 scope of --

25 JUDGE JORDAN: Sustained.

1 BY MS. BLUM:

2 Q. So you discussed in your report that Representative Leek  
3 supported the Governor's plan. And I'd like to take a look at  
4 the full quote that you included in your report.

5 This is from your expert report, and you wrote -- you  
6 quoted Chairman Leek as saying: "We are fully cognizant of the  
7 Governor's veto authority and what he said he would like to do.  
8 There are also many member of this chamber who would like to  
9 give the Governor the opportunity to make a legal argument,  
10 which is a novel legal argument."

11 Did I read that correctly?

12 A. Yes.

13 Q. So Representative Leek emphasized that the proposed plan  
14 which eliminated the Black Opportunity District in North Florida  
15 was what the Governor supported or, in his words, what he would  
16 like to do, right?

17 A. It does. I think that's what the quote says.

18 Q. And Representative Leek said that this was "a novel legal  
19 argument," right?

20 A. He did say that.

21 Q. It's not an argument that you studied yourself, right?

22 A. Correct.

23 Q. It's an argument that Mr. Norby, the Senate counsel, called  
24 "worthy of careful consideration," right?

25 A. Yes.

1 Q. But it's not a theory that anyone said that any court  
2 endorsed, right?

3 A. Correct.

4 Q. And you weren't able to find -- earlier you discussed with  
5 Mr. Jazil a statement that Representative Fine made supporting  
6 the map.

7 But you weren't able to find anyone in your research  
8 other than Representative Fine who stated publicly that they  
9 agreed with the Governor's novel legal theory, right?

10 A. Yes, because that is the one that I included to represent  
11 this and also reflect back the votes that were cast.

12 MS. BLUM: Your Honor, I'd like to impeach with a  
13 portion of Dr. Owens' deposition transcript.

14 BY MS. BLUM:

15 Q. Dr. Owens, I asked you at your deposition:

16 "Are you aware of any other legislator other than  
17 Randy Fine who said that they agreed?"

18 And you responded: "I think beyond that part of the  
19 research, I do not."

20 Is that what your testimony --

21 A. Of knowing that other legislators, right, would have given  
22 statements about -- I think that is --

23 Q. You said that they agreed with Governor DeSantis's theory?

24 A. No.

25 Q. I'm sorry. What was your answer?

1 A. From statements? I do not know -- am aware of those. But  
2 I think that when we described this as well, there's folks from  
3 two chambers, right, which supported the map.

4 I'm more interested in particular of the commenting on  
5 the legislative process, right, and the identification that it  
6 is -- was not novel. And that was the reaction to Dr. Kousser  
7 saying that this was in this case something that had not been  
8 done.

9 Q. But you included one statement in your report, and that was  
10 the only statement you could find, right?

11 A. Yes.

12 Q. And when it came time to vote on the bill that passed the  
13 redistricting maps, the only map the legislature ultimately  
14 considered was the map that Alex Kelly drew, right?

15 A. Correct.

16 Q. And at your deposition, you said you weren't aware that in  
17 April 2022 there was a deadline set by federal court hearing  
18 where if there was no plan in place, a Court would have drawn  
19 the map.

20 But you now understand the legislature's choices at  
21 the special session were either to approve the map or have the  
22 Court draw the map, right?

23 A. Oh, in this case it's a -- I mean, I understand that  
24 that's -- that timeline existed, yes.

25 Q. So, Dr. Owens, you'd agree that Governor DeSantis's veto of

1     redistricting maps passed by a legislature controlled by his own  
2     party and based on his views about race contrary to the state  
3     constitution make his action unique in the 2022 redistricting  
4     cycle, right?

5     A.    As for the reasons, yes. But he's not the only governor  
6     who vetoed a bill from his own party.

7     Q.    And you would agree with Dr. Kousser that the events of  
8     this 2022 redistricting cycle are extraordinary in Florida  
9     history, right?

10    A.    Yeah, it would be his phrase, but I think in particular,  
11    yeah, we're seeing multiple rounds there were parts in this case  
12    that were not done last decade.

13    Q.    And you don't despite that after Congressional District 5  
14    was destroyed, Black voters have been unable to elect their  
15    candidates of choice in North Florida under the current map,  
16    right?

17    A.    In the 2022 election, I agree with you.

18    Q.    Dr. Owens, you opined that the number of Black  
19    Congresspersons has stayed relatively constant at four under the  
20    enacted map, right?

21    A.    Yes.

22    Q.    But you recognize that even if a district elects a Black  
23    representative, that district is not a Black access district,  
24    right?

25    A.    Correct.



1 Q. In order for a district to be a Black access district, that  
2 district has to elect the candidate of choice of Black voters,  
3 right?

4 A. Yes.

5 Q. And one of the Black Congress members elected in 2022 was  
6 Byron Donalds, right?

7 A. It is.

8 Q. And you would agree that Byron Donalds' district is not a  
9 Black access district, right?

10 A. Correct. It's a smaller population than those districts in  
11 North Florida, say like Congressional District 4.

12 Q. And Byron Donalds was not the candidate of choice of Black  
13 voters, right?

14 A. I don't know. I didn't study that.

15 Q. So under the benchmark map, there were four districts in  
16 which Black voters could elect their candidates of choice to  
17 Congress, right?

18 A. You said how many?

19 Q. Under the benchmark map, the 2016 map that contains  
20 Benchmark CD-5, there were four districts?

21 A. Correct.

22 Q. And under the enacted map, there are only three districts  
23 where Black voters can elect their candidates of choice to  
24 Congress, right?

25 A. I think when we look beyond on other test cases, there

1 are -- exists other districts that under -- you know, certain  
2 conditions and with candidates that are able to appeal on policy  
3 to more crossover voters. That was something we talked about a  
4 little bit earlier. But on the opportunity here, it would be  
5 three.

6 Q. Just three opportunity districts?

7 A. Yes.

8 Q. And focusing on North Florida under the benchmark plan,  
9 there was one district in North Florida where Black voters could  
10 elect their candidates of choice to Congress, right?

11 A. In benchmark, correct.

12 Q. And under the enacted map, there are zero districts in  
13 North Florida where Black voters can elect their candidate of  
14 choice to Congress, right?

15 A. Yes.

16 Q. So in North Florida, the number of Black opportunity  
17 districts has been diminished from one to zero by the new plan,  
18 right?

19 A. Yes.

20 Q. And you discussed with Mr. Jazil what you said drove votes  
21 in Florida, right?

22 A. I did.

23 Q. But that was just based on eyeballing election results,  
24 right? You didn't, for example, perform a multivariable  
25 regression that would allow you to control for race or party?

1 A. No.

2 Q. And so you don't know definitively why voters voted the way  
3 that they did, right?

4 A. Correct.

5 Q. You testified that governors across the country have vetoed  
6 redistricting maps, right?

7 A. Yes.

8 Q. And all but one of those other governors' vetoes were  
9 vetoes of a map passed by the opposing party, right?

10 A. Right.

11 Q. And the exception to that is in New Hampshire, right?

12 A. Correct.

13 Q. There, Governor Sununu vetoed the New Hampshire  
14 congressional map because the proposed New Hampshire  
15 congressional map placed both incumbent representatives in the  
16 same district, right?

17 A. Yes.

18 Q. So Governor Sununu's veto had nothing to do with race,  
19 right?

20 A. No, it did not. It sort of -- and I think that reflects  
21 some of the differences that we would see in states, right?  
22 Would take into account the local areas.

23 Q. But Governor DeSantis's veto was unique this cycle because  
24 it was a veto based on the racial composition of voters in the  
25 proposed district, right?

1 A. Yes.

2 Q. You discussed exit polls with Mr. Jazil. Do you recall  
3 that testimony?

4 A. Yes.

5 Q. And you recall that those same exit polls suggested that,  
6 on average, 86 percent of Black voters do not support Governor  
7 DeSantis, right?

8 A. Correct.

9 Q. And you don't dispute the analysis by the legislature or  
10 Dr. Barreto that based on actual votes, the Black population in  
11 North Florida votes cohesively, right?

12 A. Yeah, I would not dispute that. I think they do.

13 Q. Dr. Owens, you would agree that Governor DeSantis has made  
14 himself a culture warrior in Florida, including on the issues of  
15 race, right?

16 A. I don't particularly study that, but I don't know that race  
17 is the driving issue that he's using to do that.

18 Q. Well, you certainly agree that the climate of racial  
19 politics has heated up in Florida under Governor DeSantis in  
20 part because of the issues and positions that he's taken, right?

21 MR. JAZIL: Objection, argumentative and beyond the  
22 scope.

23 JUDGE JORDAN: Sustained as to beyond the scope.

24 MS. BLUM: No further questions, Your Honor.

25 JUDGE JORDAN: All right. Thank you very much.

1 Redirect, Mr. Jazil.

2 MR. JAZIL: Thank you, Your Honor.

3 **REDIRECT EXAMINATION**

4 BY MR. JAZIL:

5 Q. Dr. Owens, did Dr. Barreto, anywhere in his report, conduct  
6 a multivariable regression analysis showing a causal  
7 relationship between race and election results in North Florida  
8 while controlling for partisanship and incumbency?

9 A. No. His --

10 Q. What would such a regression analysis have shown had one  
11 been conducted?

12 A. One part about this that's difficult is when we talk about  
13 these regression analysis, you would have ended up using -- have  
14 to be at the precinct level, not the individual votes. One of  
15 the biggest aspects is why we use ecological inference to study  
16 these associations is because of the secret ballot, and we don't  
17 know the identity of who cast those ballots. We do know where  
18 those came from and we know whereabouts people live, but I would  
19 say that to make any kind of individual estimates, that  
20 information cannot be connected to the dependent variable. It  
21 would have to be done by, you know, our -- at the congressional  
22 district level, which we also have a small sample size from.

23 Q. But that is the kind of variable analysis, the  
24 multivariable analysis, that one would conduct to show whether  
25 one thing is affecting another, right?

1 A. Correct.

2 MR. JAZIL: Thank you. No further questions.

3 JUDGE JORDAN: Okay. Thank you very much, Doctor.

4 You're excused.

5 *(Witness excused.)*

6 JUDGE JORDAN: Okay. We will see you back at  
7 1:00 o'clock for Mr. Kelly's return. Okay. See you then.

8 *(Recess taken from 11:57 a.m. to 1:01 p.m.)*

9 JUDGE JORDAN: Welcome back. Please be seated.

10 Mr. Jazil.

11 MR. JAZIL: Thank you, Your Honor. We'd like to call  
12 Alex Kelly back.

13 DEPUTY CLERK: Would you like him resworn?

14 JUDGE JORDAN: No, I think it's okay if we just keep  
15 him under oath.

16 Mr. Kelly, you're still under oath from the last time.

17 THE WITNESS: Thank you, Your Honor.

18 JUDGE JORDAN: Okay. Whenever you're ready.

19 **JAMES ALEXANDER KELLY, DEFENSE WITNESS, PREVIOUSLY SWORN**

20 **DIRECT EXAMINATION**

21 BY MR. JAZIL:

22 Q. Mr. Kelly, I'd like to briefly touch on two different  
23 topics.

24 First, you testified last week that you used the  
25 legislature's website to draw what became the enacted plan,

1 passed by the legislature, signed by the Governor, right?

2 A. Yes, sir.

3 Q. And you also testified that you couldn't figure out as you  
4 were drawing how to turn on the heat map function on the  
5 legislature's website. Did I understand that right?

6 A. Yes, sir.

7 Q. But you said both in your testimony before the court and  
8 before the legislature that early in the redistricting process,  
9 you tried to figure out if you could draw a district that only  
10 reduced the Black voting age population compared to the  
11 benchmark Congressional District 5 by a couple points, a  
12 district that, in your estimation, would comply with both the  
13 Florida Constitution and the Governor's perspective on the  
14 federal constitution.

15 Did I understand that right?

16 A. Yes, sir. Early in the process, I attempted to draw a  
17 district that would sort of check all the boxes, if you will, of  
18 being similar to the Black voting age population, the benchmark,  
19 and would be compact, follow/respect city and county lines, not  
20 do anything negative to the districts around it. Yes, sir.

21 Q. My question for you is this: How did you try to see what  
22 was possible if you couldn't turn on the heat map feature on the  
23 legislature's website?

24 A. Yes, sir. Painstaking process. It required -- the  
25 legislature's application allows you to run reports for a

1 variety of things. In this case, you can run a report to show  
2 something like the Black voting age population. And so I had to  
3 frequently -- in attempting to kind of draw that  
4 check-the-boxes-type district, I had to frequently run reports.

5 So it was a painstaking process.

6 MR. JAZIL: If we can just pull up JX69, which has  
7 already been admitted into evidence.

8 BY MR. JAZIL:

9 Q. Is this the kind of report you're referring to, Mr. Kelly?

10 A. Yes, sir. This is a voting age population summary report  
11 that you would run in the legislature's application. You could  
12 run it as a HTML report or you could run it as a PDF report.

13 Q. Okay. Thank you.

14 MR. JAZIL: We can take that down.

15 BY MR. JAZIL:

16 Q. And, Mr. Kelly, moving on to the second topic I'd like to  
17 cover with you, it's the availability of functional analysis for  
18 the various plans, and we discussed two of them in your earlier  
19 testimony, the functional analysis for a benchmark plan and the  
20 functional analysis for plan 8019.

21 MR. JAZIL: Your Honor, if I may I approach the  
22 witness?

23 JUDGE JORDAN: Yes, of course.

24 To go back to the first questions that Mr. Jazil asked  
25 you while he is distributing the handouts. You said early in



1 the process, you tried to figure out whether or not you could  
2 draw a new CD-5 that would check all the boxes -- for example,  
3 be compact, be attuned to the Governor's concerns, and still  
4 come close to what the old CD-5 had in terms of Black voting age  
5 population, right?

6 THE WITNESS: Yes, Your Honor.

7 JUDGE JORDAN: Okay. When you did that, I just want  
8 to see if I remember correctly. You said that for you, the  
9 threshold where you stopped trying to figure out new map  
10 possibilities was 40 percent Black voting age population or  
11 thereabouts; is that right?

12 THE WITNESS: Yes, Your Honor. I felt like if I could  
13 get to 40 percent Black voting age population, that would have  
14 been a reasonable starting point to continue to try to build  
15 that district complement.

16 JUDGE JORDAN: And so you did not try to configure  
17 anything below 40 percent?

18 THE WITNESS: Your Honor, I found that I could only  
19 probably get to the mid-30s. I found I couldn't get even close  
20 to 40.

21 JUDGE JORDAN: So you could -- you could come up with  
22 a map that satisfied all the other criteria, checked all the  
23 boxes, but got you to 35 percent Black voting age population?

24 THE WITNESS: No, Your Honor. Where I left off about  
25 that 35 percent would be a district that would be significantly

1 noncompact, almost looking like a spider, that it would just be  
2 very tortured with long arms stretching to places like  
3 Gainesville and Palatka. So it wouldn't be in way compact. It  
4 would probably be a more tortured district.

5 JUDGE JORDAN: Okay. Thank you very much.

6 BY MR. JAZIL:

7 Q. Mr. Kelly, I provided you what's been marked as Joint  
8 Exhibit 70, which is in evidence; DX98, which is in evidence;  
9 and DX128, which is not yet in evidence.

10 Can you confirm for me the JX70 and JX -- and DX98 are  
11 the functional analyses we discussed last week in your  
12 testimony?

13 A. Yes. We discussed these maps last week, yes.

14 Q. If you can take the legislative packet for --

15 MR. JAZIL: Can we put JX70 on the screen, please.

16 BY MR. JAZIL:

17 Q. So, Mr. Kelly, this is the legislative packet for the  
18 benchmark plan. And can you remind us where in this packet you  
19 see the functional analysis results presented?

20 A. Sure. The summary of those results appears on page 5.

21 Q. Okay.

22 A. And goes over to page 6 and page 7.

23 Q. And if we go back to the last page --

24 A. And my apology. Page 8 as well.

25 Q. And so in this functional analysis, we -- for the benchmark

1 plan, we have Congressional District 5 included in there, right?  
2 This is the benchmark plan?

3 A. Yes.

4 MR. JAZIL: And if we can go to DX98, please.

5 JUDGE WINSOR: That was 70?

6 MR. JAZIL: Yes, Your Honor. We were previously  
7 discussing Joint Exhibit 70, which was the legislative packet  
8 for the benchmark plan. This is DX98.

9 BY MR. JAZIL:

10 Q. Mr. Kelly, can you confirm for me that this is the  
11 legislative packet for plan 8019 that we were discussing last  
12 week?

13 A. Yes.

14 Q. And can you point us to where in here we see the summary  
15 results for the functional analysis?

16 A. Sure.

17 JUDGE WINSOR: I'm sorry. Did you say the 70 was for  
18 the benchmark or the enacted plan?

19 MR. JAZIL: Joint Exhibit 70 was for the benchmark.

20 JUDGE WINSOR: Okay. That was the packet from years  
21 ago?

22 MR. JAZIL: Yes, Your Honor.

23 JUDGE WINSOR: Okay. I'm sorry to interrupt you.

24 BY MR. JAZIL:

25 Q. And 98 is the legislative packet for 8019, the Duval-only

1 district, which was the primary map in what the legislature  
2 passed but the Governor vetoed.

3 Now, Mr. Kelly, where in here do we see the summary  
4 results for the functional analysis?

5 A. Page 3.

6 MR. JAZIL: Can we go to page 3, please.

7 BY MR. JAZIL:

8 Q. In here we see summary results for Congressional District  
9 5, correct? If we look at the very last table, the second  
10 column from the left?

11 MR. JAZIL: In here we see summary results for  
12 Congressional District 5, correct if we look at the very last  
13 table, the second column from the left, right?

14 A. Yes.

15 MR. JAZIL: Can we blow that up?

16 BY MR. JAZIL:

17 Q. Okay. Mr. Kelly, you also have in front of you DX128.

18 Can you tell us what that document is, sir?

19 A. Sure. This is the enacted map that -- the final map that  
20 was passed during the special session and signed by the  
21 Governor.

22 Q. Okay. Does it have additional information in that packet  
23 that's similar to the information we looked at for plan 8019 and  
24 the benchmark plan?

25 A. Sure.

1 MR. JAZIL: Can we put up the next one too.

2 THE WITNESS: It looks like the summary of the  
3 functional analysis is on page 5.

4 BY MR. JAZIL:

5 Q. All right. Well, you anticipated my question.

6 So if we go to page 5, this is the summary of the  
7 election results for the enacted plan, the summary of the  
8 functional analysis results for the enacted plan.

9 Now, Mr. Kelly, do you see Congressional Districts 2,  
10 3, 4, or 5 in that functional analysis summary?

11 A. No.

12 Q. Now, in this legislative packet, we don't have a functional  
13 analysis summary for the enacted plan.

14 Are you aware, sir, of any functional analysis done by  
15 the House for the enacted plan?

16 A. No.

17 Q. Are you aware of any functional analysis done by the Senate  
18 for the enacted plan for Districts 2, 3, 4, or 5?

19 A. No.

20 JUDGE JORDAN: By who? I'm sorry.

21 MR. JAZIL: Pardon me, Judge?

22 JUDGE JORDAN: By whom?

23 MR. JAZIL: By the Florida Senate.

24 JUDGE JORDAN: Got it.

25 ///

1 BY MR. JAZIL:

2 Q. And, sir, did you do any functional analysis for Districts  
3 2, 3, 4, 5 in the enacted plan?

4 A. No.

5 Q. Did anyone at the executive office of the Governor do a  
6 functional analysis for Congressional Districts 2, 3, 4, 5 in  
7 the enacted plan?

8 A. No.

9 JUDGE JORDAN: Why wasn't that done?

10 THE WITNESS: Your Honor, there would be no need or  
11 reason to do that. A functional analysis was something that the  
12 legislature would do, and they explained often in their meetings  
13 that they did so when they had a reason to do so, if they felt  
14 there was a piece of data they had to chase down, if they had to  
15 figure that out.

16 But our office never did a functional analysis. We  
17 relied on the functional analyses of the legislature. We never  
18 took issue with what the legislature put forward as their  
19 functional analysis into itself, and with the rare exception of  
20 what I described earlier about -- in terms of trying to draw a  
21 district in Duval County that would sort of check all the boxes,  
22 we never used -- I never used -- we never used any of the kind  
23 of partisan data that you would use to do a functional analysis,  
24 so we stayed away from at that data.

25 JUDGE JORDAN: But why is that the case? Like why

1 would you use Black voting age population -- and I'm not saying  
2 one is right or one is wrong. I just want to know why.

3 Why would you use Black voting age population as the  
4 marker as opposed to a functional analysis when you were trying  
5 to see what you could configure?

6 THE WITNESS: Sure, Your Honor. So a functional  
7 analysis like that would be looking at a tandem of both  
8 political data and race or ethnicity data. It would be a  
9 combination of doing both of those. And typically a functional  
10 analysis like that's done by a statistician through pretty  
11 significant analysis determining probability of an electoral  
12 result.

13 And so absent that case where we took -- I took a look  
14 at Northeast Florida, we otherwise completely stayed away from  
15 any kind of partisan or electoral data, so we didn't venture  
16 down that path.

17 And in terms of the functional analysis that the  
18 legislature did in their explanation of their analysis, we were  
19 comfortable that the legislature and whomever they used to  
20 use -- to do their functional analysis, we were comfortable that  
21 they were more than qualified to do that.

22 JUDGE RODGERS: You drew -- or the Governor's office  
23 drew -- was it ten of the districts in -- there were 18, but --  
24 I guess left intact, right?

25 THE WITNESS: It was -- Your Honor, it was the

1 opposite. In the final enacted map I drew 18 of the districts,  
2 and we accepted ten of the districts the legislature --

3 JUDGE RODGERS: Ten. I apologize.

4 So for those 18, what did you rely on in drawing those  
5 new districts?

6 THE WITNESS: Sure.

7 JUDGE JORDAN: Or drawing new maps or new boundaries  
8 for those districts?

9 THE WITNESS: Sure, Your Honor. Other traditional  
10 redistricting criteria: Population, county lines, city lines,  
11 major geographical boundary lines, political boundary lines,  
12 things like railways, major roadways, waterways.

13 I didn't have any reason to believe that I had to look  
14 at anything that would require something of a functional  
15 analysis for those districts. I was drawing those districts  
16 free of any partisan data, political data. I was drawing those  
17 districts free of any race-based criteria. I was drawing those  
18 districts just strictly based on traditional redistricting  
19 criteria.

20 JUDGE JORDAN: How about the nondiminishment  
21 requirement of the Florida Fair Districts Amendment?

22 THE WITNESS: Your Honor, the 18 districts that I  
23 drew, that was not an issue for any of those districts.

24 JUDGE JORDAN: What do you mean, it wasn't an issue?

25 THE WITNESS: Sure. Your Honor, the nondiminishment



1 standard did not apply to any of those 18 districts.

2 JUDGE JORDAN: I don't understand that. Like, you're  
3 saying it didn't apply generally because of the Governor's view  
4 that as applied, it would be unconstitutional, or you're saying  
5 that the districts you drew didn't diminish anything to anybody?

6 THE WITNESS: Your Honor, you characterized it fairly  
7 regarding the Northeast Florida district. For the other  
8 districts there would have been no diminishment issues to worry  
9 about. Those were not districts where that argument of an  
10 opportunity to elect was ever present. Those weren't districts  
11 that I had to worry about that sort of analysis for.

12 JUDGE JORDAN: Right --

13 JUDGE RODGERS: North Florida was one of the 18,  
14 wasn't it?

15 THE WITNESS: Yes.

16 JUDGE JORDAN: No, I understand that about all the  
17 others. So I'm asking, how did you take the nondiminishment --  
18 if at all, how did you take the nondiminishment criteria of the  
19 Fair Districts Amendment into account in drawing the new CD-5?

20 THE WITNESS: Our position was that the  
21 nondiminishment criteria was in conflict with the 14th amendment  
22 of the United States Constitution, and so as I noted, it tried  
23 to resolve whether both matters could be essentially satisfied,  
24 whether there was a way to draw in district that met the  
25 nondiminishment criteria and at the same time followed other

1 traditional redistricting criteria to essentially resolve that  
2 federal constitutional issue.

3 JUDGE RODGERS: I think you said we don't have any of  
4 that in the record -- in any of your work in that regard?

5 THE WITNESS: Right.

6 JUDGE WINSOR: In the what?

7 JUDGE RODGERS: I asked this question during  
8 Mr. Kelly's testimony last week. There's -- none of that work  
9 is in the record.

10 JUDGE JORDAN: So the last question -- then I'll stop  
11 interrupting Mr. Jazil.

12 The position is that the nondiminishment criteria in  
13 the Fair Districts Amendment is or was unconstitutional as  
14 applied to the old benchmark 5 or was facially unconstitutional,  
15 no matter what the facts on the ground were?

16 THE WITNESS: Your Honor, I'm not sure. I don't know  
17 how to interpret that.

18 JUDGE JORDAN: You have two districts. You're trying  
19 to use traditional, as you put it, cri- -- traditional  
20 districting criteria, right? Compactness, boundaries, political  
21 boundaries, geographic boundaries and the like, right?

22 THE WITNESS: Yes, Your Honor.

23 JUDGE JORDAN: Okay. You have two districts. You can  
24 draw two different configurations of the two districts. In one  
25 of them, in one configuration, you are diminishing Black voting

1 age population by -- let's use a round number -- 20 percent. In  
2 the other one, you satisfy all the other criteria; you check all  
3 the boxes; you're only diminishing it by 5 percent.

4 Is the nondiminishment criteria of the Fair Districts  
5 Amendment unconstitutional as applied there to have you choose  
6 one alternative over the other?

7 I thought you said the last time that in the  
8 Governor's view, you were not prevented from making a choice  
9 between two alternatives, one of which diminished Black voting  
10 power less, as long as you met all of the other traditional  
11 districting criteria.

12 Did I misunderstand your testimony the last time?

13 THE WITNESS: I apologize, Your Honor. I think I'm  
14 following your question, but I'm struggling with it a little  
15 bit.

16 JUDGE JORDAN: Okay.

17 THE WITNESS: If you're presented with --

18 JUDGE JORDAN: You have -- you have two districts.  
19 Okay? So this is a rectangle. You have to split this rectangle  
20 into two districts. Okay?

21 You can go down the middle, 50/50. In that  
22 alternative, you are going to diminish Black voting -- and by  
23 the way, this was an old 1 district, so you're now splitting it  
24 because of new population changes, and you have to do that.

25 In this alternative, you are diminishing Black voting

1 age population by 20 percent. Okay?

2 Other possibility satisfies everything else. You  
3 split it up like this into two triangles. Okay? You meet all  
4 the other traditional districting criteria. They're compact;  
5 they follow boundaries; they follow everything else. This  
6 alternative, the triangle alternative, diminishes Black voting  
7 age population in one of the districts only by 5 percent.

8 Do you take into account the nondiminishment criteria,  
9 then, in choosing which alternative to follow?

10 THE WITNESS: In that scenario, Your Honor, I would  
11 attempt to draw the district that minimizes the diminishment.  
12 So I would attempt in that triangle scenario, if the district  
13 still diminished the Black voting age population by 5 percent,  
14 that could be a tough call. There may still be an opponent who  
15 may still object and say it diminished, and ultimately you'd  
16 want to do at that point a full functional analysis to attempt  
17 to see if, statistically speaking, that 5 percent in the overall  
18 Black voting age population made an actual difference. It may  
19 or may not. But if you got that far and you had, you know, an  
20 otherwise fairly compact-looking district that, as you said,  
21 followed city and county lines, a 5 percent drop, that would at  
22 least probably take you to where you would want to do something  
23 of a functional analysis and determine whether or not that  
24 slightly less compact shape is otherwise, you know, a reasonable  
25 attempt.

1           The ultimate answer would lie in a combination of what  
2     your alternatives were and whether or not that functional  
3     analysis showed that you made a reasonable decision.

4           You mentioned population earlier too. Population  
5     might force your hand. That does happen in the mapmaking  
6     process.

7           So all those things could be reasonable factors to  
8     defend such a district.

9           JUDGE JORDAN: So the nondiminishment criteria of the  
10    Fair Districts Amendment, the problem, as the Governor saw it,  
11    was that it was unconstitutional as applied, not facially?

12          THE WITNESS: I see what you're saying. Yes, Your  
13    Honor.

14          JUDGE JORDAN: And so if it's as applied, how could  
15    you figure out unconstitutionality as applied without doing a  
16    functional analysis?

17          THE WITNESS: Yes, Your Honor.

18          Functional analysis on a district the way you  
19    described it there where you're making a very reasonable attempt  
20    to draw a reasonably compact shape and you're otherwise  
21    representing other boundary lines, I think you would at that  
22    point go do a functional analysis.

23          In the case that I looked at, I was drawing a district  
24    that ended up looking more tortured, less compact, less  
25    respectful of state and county lines, less -- and very -- a

1 very -- at that point it would have certainly created less  
2 compact districts around it.

3 So there was no reasonable reason to even go to a  
4 functional analysis stage, because it was making all of the  
5 other traditional redistricting criteria worse, not better.

6 JUDGE JORDAN: Okay. Thank you very much for the  
7 interruption.

8 MR. JAZIL: And with Your Honor's permission, I'd like  
9 to follow up on your question.

10 JUDGE JORDAN: Of course, of course.

11 BY MR. JAZIL:

12 Q. So, Mr. Kelly, if I understand this correctly, we had a  
13 benchmark district of a Black voting age population of  
14 46 percent, and your understanding of how one would go about  
15 complying with the nondiminishment standard was, Hey, you can  
16 reduce the Black voting age population only so much. And you  
17 reduced it to 40 percent as you were trying to look at the art  
18 of the possible, right?

19 A. I -- I attempted to. I couldn't get -- I was stuck  
20 somewhere in the mid-30s.

21 Q. And then for the federal equal protection argument, as a  
22 map drawer, your understanding was that required you to draw a  
23 district that was fairly compact, right?

24 A. Right.

25 Q. And so when you were looking at the art of the possible to

1     comply with Florida's nondiminishment standard and the federal  
2     equal protection standard as a map drawer, what you were trying  
3     do was a get a slide reduction in the Black voting age  
4     population from 46 percent to some number over 40, right, and  
5     still keep that shape compact?

6             Am I understanding that correct?

7     A.    I would want to distinguish. I wasn't trying to get a  
8     slight drop in the Black voting age population. I was willing  
9     to accept -- if I could get the district to be more compact and  
10    still adherent to other traditional criteria, I was willing to  
11    accept a slight drop. I wasn't trying to get a slight drop.

12    Q.    And so that is what you were talking about when you said  
13    "the art of the possible"?

14    A.    Yes.

15    Q.    And that alliance with Judge Jordan's questions about the  
16    triangle versus rectangle configuration of a shape -- am I  
17    understanding that right?

18    A.    Yes.

19    Q.    Moving back to the functional analysis discussion.

20             You were following the legislative process and the  
21    legislature's presentment of functional analyses, right?

22    A.    Yes.

23    Q.    And who was presenting those functional analyses to the  
24    legislature?

25    A.    The staff would discuss those in their committee meetings.

1 Q. And you followed the staff committee meetings that were  
2 part of the special session where the enacted plan was put  
3 forward, voted on, and approved by the Florida legislature,  
4 right?

5 A. Yes. I was speaking in them.

6 Q. Did you see any staff presentations of a functional  
7 analysis for the enacted plan?

8 A. No.

9 MR. JAZIL: Your Honors, I'd like to move Defense  
10 Exhibit 128 into evidence.

11 MR. DISKANT: No objection.

12 JUDGE JORDAN: Without objection, 128 for defense is  
13 admitted.

14 MR. JAZIL: And, Your Honor, I have no further  
15 questions. Thank you.

16 JUDGE WINSOR: Before you sit down, and I -- you  
17 talked about something that was already introduced, what you  
18 referred to as the legislature packet that went to the  
19 benchmark. I think it was 70?

20 MR. JAZIL: Yes, Your Honor.

21 JUDGE WINSOR: Maybe I just don't understand what you  
22 maintain by "legislature packet," but I thought the testimony  
23 was that the enacted plan was drawn by the Florida Supreme Court  
24 and not the legislature; is that right?

25 MR. JAZIL: Yes, Your Honor.



1 JUDGE WINSOR: And there was a packet that went behind  
2 it? How did that work?

3 MR. JAZIL: Your Honor, I believe the legislative  
4 packet was created as part of this redistricting cycle, but it  
5 includes data concerning boundary splits, city splits. It  
6 aligns presentation of the benchmark map with the other maps  
7 that were being considered.

8 JUDGE WINSOR: I see. So it was created more  
9 recently.

10 MR. JAZIL: Yes, Your Honor.

11 JUDGE WINSOR: Okay. I apologize. I was confused.  
12 Thank you.

13 MR. JAZIL: And I apologize, Your Honor.

14 As I understand, it was created so there was an  
15 apples-to-apples comparison as the legislature was going through  
16 its work.

17 JUDGE JORDAN: So that was your Exhibit 128, right?

18 MR. JAZIL: Yes, Your Honor.

19 JUDGE JORDAN: Got it. Admitted.

20 *(DEFENSE EXHIBIT 128: Received in evidence.)*

21 **CROSS-EXAMINATION**

22 BY MR. DISKANT:

23 Q. Good afternoon, Mr. Kelly.

24 A. Good afternoon.

25 MR. DISKANT: Can I have the ELMO?

1 BY MR. DISKANT:

2 Q. Now, you talked about the parts of the map that you drew,  
3 and we can agree that you drew all of North Florida, 1, 2, 3, 4,  
4 and 5, right?

5 A. No.

6 Q. Which was it you drew in North Florida?

7 A. The legislature drew Districts 1 and 2. Therefore, I drew  
8 the remaining districts in North Florida.

9 Q. So you drew 3, 4, and 5?

10 A. Yes.

11 Q. Okay. And you testified, I think, that there was no -- the  
12 nondiminishment standard did not apply to North Florida, right?

13 A. It did not -- did not apply to my map drawing, correct,  
14 yes.

15 Q. Okay. And I'm not going to get this right, but extremely  
16 roughly, old Benchmark CD-5 crossed 2, 3, 4, and 5, right?

17 A. Yes.

18 Q. And if you were to apply the nondiminishment provision as  
19 construed by the Florida Supreme Court, then the nondiminishment  
20 issue would need have applied to North Florida, correct? Right?

21 A. You said if --

22 Q. If you had done what the Florida Supreme Court said to do  
23 in 2016, there would, in fact, be a nondiminishment issue to  
24 address in North Florida, right?

25 A. If I had followed the --

1 Q. Yeah.

2 A. -- Court's drawing?

3 Q. Sure.

4 A. If I had just tried to replicate that?

5 Q. Yeah, if you followed the law as put down by the Florida  
6 Supreme Court.

7 A. If I was following the Court's process, then I would have  
8 been beholden to that standard.

9 Q. Okay. And I realize it wasn't your decision, but the  
10 Governor's decision was not to do that?

11 A. The Governor's decision was that we were not obligated to  
12 do it because it had tension with the 14th amendment of the U.S.  
13 Constitution; therefore, we weren't obligated to follow that  
14 standard.

15 Q. More than not obligated to. You were directed not to,  
16 correct?

17 A. I think it's one and the same.

18 Q. I think they're different, but that's all right.

19 In any event, you were directed not to apply the  
20 nondiminishment provision of the Florida Supreme Court in North  
21 Florida, correct?

22 A. Correct.

23 Q. Okay. But I think, as Judge Jordan's questioning  
24 illuminated, you did, in fact, use the Fair Districts Amendment  
25 elsewhere in the map, in CD24, for example, correct?

1 A. I didn't draw CD24.

2 Q. You reviewed CD24 and you put it on the map that you  
3 submitted to the Florida legislature, correct?

4 A. Correct.

5 Q. And you knew it applied the Fair Districts Amendment,  
6 correct?

7 A. Correct.

8 Q. In order to afford minority voters the opportunity to elect  
9 their candidate of choice in CD24, right?

10 A. Right.

11 Q. And therefore, CD24 at least is not race-neutral? You told  
12 us that, right?

13 A. I didn't draw CD24. You'd have to ask --

14 Q. That's not my question.

15 My question is: It's not race-neutral, correct?

16 A. I mean, I know the legislature drew that district to  
17 maintain the minority community's opportunity to elect, so I  
18 know the legislature considered race.

19 Q. Okay. And I think you told us when you were here last time  
20 that considering race in CD24 met a compelling state interest,  
21 right? Do you remember that?

22 A. I don't recall.

23 Q. Okay. The record says what it says.

24 A. But I -- I mean, I would say it's a very well-drawn  
25 district. It achieves several purposes that are enumerated in

1 state law.

2 Q. And it complies, in your view, with the U.S. Constitution  
3 and the Florida Constitution?

4 A. Yes.

5 Q. Okay. Now, you gave some testimony about trying to draw a  
6 map in North Florida that would meet the Governor's objections  
7 with respect to Benchmark CD-5 and still comply with the Fair  
8 Districts Amendment and the U.S. Constitution?

9 A. Yes, I attempted to.

10 Q. And this district that you attempted to draw would be  
11 compact, right?

12 A. I attempted to do that. I couldn't achieve it.

13 Q. I understand that. I'm asking about what you were  
14 attempting to do.

15 You're looking to draw a district that was compact,  
16 right?

17 A. Yes.

18 Q. And that would perform as a Black Opportunity District,  
19 right?

20 A. Yes.

21 Q. And if you had succeeded in finding a district that in  
22 Northern Florida was compact and would perform as a Black  
23 Opportunity District, then there would be no problem with such a  
24 district under either the Governor's objection or the Fair  
25 Districts Amendment, right?

1 A. It's a little more complicated. If I could get it to  
2 perform near, about, to the same degree as the benchmark  
3 district, so I was trying to get to a place where it was near --  
4 reasonably close to the benchmark seat in terms of that  
5 performance and at the same time compact, adherent to city and  
6 county lines.

7 Q. I think we're mixing an apple and an orange. You were  
8 focusing on BVAP percentage, correct?

9 A. I was using that as an indicator to see if I could even get  
10 close. So I was using that 40 percent marker just to see if I  
11 could get somewhere reasonably close to the benchmark.

12 Q. And if you got 40 percent -- I think in your testimony you  
13 said maybe 39 percent -- then you would have done a functional  
14 analysis to see if it would perform as a Black Opportunity  
15 District correct?

16 A. If I could have gotten to that 40 percent or so threshold  
17 and drawn a district that was compact, adherent to other, you  
18 know, traditional criteria, then it would have merited -- I  
19 wouldn't have personally done a functional analysis, but it  
20 would have merited probably doing a functional analysis at that  
21 be point.

22 Q. Okay. So as far as you were concerned, a compact district  
23 with a BVAP of 40 percent in North Florida would comply with  
24 both the Fair Districts Amendment and the U.S. Constitution,  
25 right?

1 A. I wouldn't say that the way you said it. 40 percent is not  
2 some sacrosanct line in the sand.

3 Q. Sure.

4 A. 40 percent was just simply a reasonable number to know that  
5 if I could get to that and adhere to other principles in  
6 traditional redistricting criteria, then it would merit looking  
7 at whether or not it was a close -- functionally close district  
8 to the predecessor.

9 Q. I don't mean to interrupt. I'm sorry.

10 The reason for all of that is you wanted to -- because  
11 the test is: Is it a functional district, not what its  
12 percentage is, right?

13 A. Right. At some point you want to analyze functionally  
14 whether it truly is similar to the predecessor.

15 Q. Okay. So you need a functional district, and it's got to  
16 be compact, and the best you could do is about 35 percent, but  
17 what you were drawing had all kinds of -- I don't remember what  
18 phrase you used, but it was not compact?

19 A. Yes.

20 Q. Okay. But, of course, the legislature drew CD-5 in map  
21 8019, right?

22 A. Yes.

23 Q. And that CD-5 was compact, right?

24 A. Yes.

25 Q. And the legislature's functional analysis reported that it

1 performed, right?

2 A. The legislature's functional analysis showed that the  
3 performance dropped.

4 Q. Right.

5 A. It diminished.

6 Q. It performed, correct? That was their conclusion?

7 A. Their conclusion was that it performed but that it  
8 diminished.

9 Q. I don't think -- well, let me withdraw that question.

10 We're having a disagreement, you and I, and the Court  
11 will resolve it, about whether the question -- the right  
12 question under the Fair Districts Amendment is performance or  
13 comparative performance.

14 You're focusing on comparative performance, right?

15 A. Yes.

16 Q. But if the question is not comparative performance but just  
17 performance, then CD-5 performed, so concluded the legislature,  
18 right?

19 A. The legislature impugned its own testimony, because the  
20 legislature went -- they passed this map, contradicted their  
21 testimony from earlier in the session about the exact same  
22 question. Earlier in the session they were focused on  
23 diminishment, which is the constitutional word, and then later  
24 in the session, they passed this map. They on the floor of the  
25 House changed their own analysis.



1 Q. We can look -- and we don't have time to do it right now --  
2 at what they said at the beginning, but let's just set that to  
3 the side.

4 The legislature concluded that CD-5 in map 8019  
5 performed for minority voters, right?

6 A. Yes.

7 Q. Okay. And it's compact and it meets other redistricting  
8 criteria, except you don't like the shape of CD-4, right?

9 A. Yes.

10 Q. Okay. And you agree that if, indeed, CD-5 complied with  
11 the Fair Districts Amendment, then it didn't matter that CD-4  
12 wasn't compact, in your view, right?

13 A. It definitely matters.

14 Q. Okay. And in your view, a performing -- a functionally  
15 performing, compact district in North Florida would not -- would  
16 comply with the Fair Districts Amendment and it should have been  
17 adopted if there were such a district, right?

18 A. The way you worded that, I couldn't tell.

19 Q. It's too complicated again?

20 A. You changed -- you fumbled your wording in the middle of  
21 the question. Could you repeat it?

22 Q. Let me try again. I don't want to confuse you.

23 As far as you were concerned, if you could find a  
24 compact, functionally performing district in North Florida, the  
25 Fair Districts Amendment required that it be adopted, and that

1 was okay under the U.S. Constitution; is that right?

2 A. If I could have drawn a functionally performing compact  
3 district and obviously not do something tortured to the district  
4 around it, but if I could have -- if I could have checked all  
5 the boxes, that would have been the right thing to do. That's  
6 what I would have done.

7 Q. Okay. And then, lastly, you just testified that there was  
8 no functional analysis done by the legislature.

9 You -- are you familiar with the statements of  
10 Representative Leek on the House floor in which he said they had  
11 done a functional analysis of CDs 4 and 5 and neither one would  
12 perform for Black voters?

13 A. I'm not familiar with the statements.

14 Q. Okay.

15 MR. DISKANT: I've got nothing else, Your Honor.

16 JUDGE JORDAN: All right. Thank you very much.

17 MR. JAZIL: I have nothing further, Your Honor.

18 JUDGE JORDAN: Okay. Mr. Kelly, thank you very much  
19 for coming back. You're excused.

20 THE WITNESS: Thank you.

21 *(Witness excused.)*

22 MR. JAZIL: Your Honor, with the permission of my  
23 friends, I'd like to move into evidence DX129 and DX130. These  
24 would be the chart that accompanies our video compilation for  
25 both sides and the video compilation itself.

1 MR. PORTORREAL: No objections.

2 JUDGE JORDAN: Tell me the numbers again.

3 MR. JAZIL: Pardon me, Your Honor. It's DX129 is the  
4 chart that accompanies our videos, and DX130 will be the  
5 video -- videos or video?

6 MR. BEATO: Videos.

7 MR. JAZIL: Videos themselves. And this will be a  
8 compilation of the legislative debates from both sides.

9 JUDGE JORDAN: Without objection, DX129 and DX130 are  
10 admitted.

11 *(DEFENSE EXHIBIT DX129, 130: Received in evidence.)*

12 MR. JAZIL: Your Honor, just logistically, we can file  
13 the notice with CM/ECF that we've compiled a video, and we can  
14 file the table lining up what points of the video show what.

15 What's the best way for us to get the thumb drives to  
16 the Court? Is just through the court clerk?

17 JUDGE JORDAN: You know, let us talk about it and  
18 we'll get back to both of you at the conclusion of the  
19 proceedings today about everything.

20 MR. JAZIL: Thank you, Your Honor.

21 JUDGE JORDAN: We'll do that.

22 MR. JAZIL: Your Honor, with that, we have no further  
23 witnesses.

24 JUDGE JORDAN: Okay. Thank you very much, Mr. Jazil.

25 Mr. Diskant.

1 MR. DISKANT: We have no rebuttal, Your Honor.

2 JUDGE JORDAN: Okay. All right. We're going to let  
3 you, by the end of the day, figure out whether there's an  
4 exhibit here or there missing that you need to move in and get  
5 the other side's agreement or disagreement so we can have the  
6 record closed.

7 But subject to that, both sides have rested.

8 Okay. So what if we start at 2:00?

9 MR. DISKANT: Sure.

10 JUDGE JORDAN: Okay. We'll start at 2:00 o'clock,  
11 give you a little time to get your thoughts together, and then  
12 we should be done sometime before 4:30 or so.

13 How do you want to split your time, Mr. Diskant?

14 MR. DISKANT: I have an hour and a half?

15 JUDGE JORDAN: Yes.

16 MR. DISKANT: I'll go an hour and 15 and then save 15  
17 for rebut.

18 JUDGE JORDAN: Okay.

19 And have you thought about how much time you want?

20 You can obviously have as much time as he does, but --

21 JUDGE WINSOR: But you don't have to.

22 MR. JAZIL: I will try to be brief, but my goal is to  
23 answer as many of the Court's questions as possible. I  
24 recognize this is a bench trial and my job is to help y'all  
25 decide.

1 JUDGE JORDAN: Okay. Do you want us to give you time  
2 warnings when you've hit certain markers or no?

3 MR. DISKANT: I have people who will do that.

4 JUDGE JORDAN: You have people who have people. Okay.

5 MR. DISKANT: I have people who will let me know.

6 JUDGE JORDAN: All right. We'll see you at  
7 2:00 o'clock.

8 MR. DISKANT: Thank you, Judge.

9 *(Recess taken from 1:43 p.m. to 2:00 p.m.)*

10 JUDGE JORDAN: Welcome back. Please be seated.

11 Before you start and before I forget, the exhibits  
12 admitted today, not in the exhibit list handed out at the  
13 beginning, we have DX127, DX128, DX129, and DX130.

14 So if we've missed anything, let us know at the end of  
15 the day.

16 Okay. We're ready for closing on the plaintiffs'  
17 side.

18 MR. DISKANT: Thank you very much. May it please the  
19 Court.

20 I know I speak on behalf of my clients when I say how  
21 grateful we are for the attention and promptness with which this  
22 Court scheduled this hearing. We view it as very important, and  
23 I think the Court recognizes the issues are significant.

24 Let me be clear, also, it gives me no pleasure to  
25 bring a lawsuit in which essentially we accuse the Governor of

1 making racist decision-making and the legislature of acquiescing  
2 in a racially biased map at his insistence.

3 To be clear, under current law, race-based  
4 redistricting is lawful if narrowly tailored to be a compelling  
5 state interest. But it's not racist to disagree with that. It  
6 is not racist to have a different view of the Constitution.  
7 It's not racist to think a color-blind Constitution should  
8 prohibit any race-based redistricting. Reasonable people can  
9 have good-faith disagreements about issues like that. Race is  
10 too important to our society not to recognize that and permit it  
11 and encourage good-faith discussion.

12 What is out of bounds is, in part for reasons of race,  
13 in a state that has Black Opportunity Districts, to decide to  
14 destroy a Black Opportunity District because of its adverse  
15 effects on Black voters, not in spite of them, in violation of  
16 the State constitution, contrary to prior decisions of the  
17 Florida Supreme Court and without Court approval. That's a fact  
18 question that we're asking this Court to decide.

19 Normally I'd start this case with the Arlington  
20 Heights factors, but the case is unusual because of the clarity  
21 and the vehemence and the obsession with which the Governor  
22 expressed his race-based views and the disingenuous nature of  
23 his defense.

24 So I'm going to start with pretext and get to the  
25 Arlington Heights factors.

1 I recognize when I start --

2 May I have the ELMO, please.

3 I recognize when I start that the good faith of the  
4 legislature is presumed, but when there's proof a discriminatory  
5 purpose has been a motivating factor in the challenged decision,  
6 a judicial deference is no longer justified.

7 That's from *Arlington Heights*.

8 This case swirls around the Fair Districts Amendments  
9 adopted overwhelmingly by the Florida voters in 2010 mandating  
10 that districts not diminish the ability of Blacks to elect  
11 candidates of their choice. The provision was vehemently  
12 opposed by some and was subject to litigation. It led to eight  
13 visits to the Florida Supreme Court and one to the Eleventh  
14 Circuit. But by year 2016, well before this redistricting  
15 cycle, the Court had thought it laid out the rules pretty  
16 clearly.

17 This case shows the fight is not over and in some  
18 sense the same battles still continue.

19 The dispute, of course, is about Benchmark CD-5. It  
20 is the fifth iteration of a -- it is the fifth iteration of a  
21 Black Opportunity District in Northern Florida.

22 And I apologize; I don't have hard copies of these  
23 slides because we got them together too late, but I will  
24 endeavor to get the Court a set of them if it wishes.

25 In any event, in red are the various Black Opportunity

1 Districts that have existed in this state for the last 30 years.  
2 And as you can see pretty clearly, they're not models, as  
3 Mr. Kelly might have said, of compactness. And in truth, you  
4 can see that CD-5 is the best of the districts. It is the most  
5 compact.

6 JUDGE WINSOR: But you don't dispute it was drawn for  
7 race-based purposes, right?

8 MR. DISKANT: All of these were. Yes, Your Honor. I  
9 don't want to get into arguing about predominance or  
10 consideration. That's an issue, but -- yes, it was drawn for  
11 race-based reasons, just like all five of these districts were,  
12 and at least one of them was upheld by a three-judge Court over  
13 an equal protection challenge. I think it's the 2002 version,  
14 but I might be incorrect.

15 These fights all led to CD-5, and that, in turn,  
16 followed some traditions in Florida history. This is a 2002  
17 map, and there was an East-West -- not Black Opportunity  
18 District, but there was a East-West district running along the  
19 border there. Mr. Kelly, when he was in the legislature in  
20 2011, drew a similar district intended to be a Black Opportunity  
21 District and that, in turn, led eventually the Florida Supreme  
22 Court to the existing benchmark, or the now no longer existing  
23 Benchmark CD-5. And the Florida Supreme Court relied on  
24 Mr. Kelly's testimony that he drew an East-West version of the  
25 map. He concluded a configuration would be constitutionally



1 compliant, and Mr. Kelly tells us the Court just got it wrong in  
2 understanding his testimony.

3 But there was a lot of that from Mr. Kelly. The  
4 Florida Supreme Court got it wrong. You're saying the Florida  
5 Supreme Court got it wrong about the Fair Districts -- the Fair  
6 Districts Amendment required? Yes. And it is this willingness  
7 to substitute private opinion for the Court's that is the  
8 hallmark of the Governor's behavior during this redistricting  
9 cycle. The Governor's view was that CD-5 should be destroyed,  
10 and the only reason he mentioned until he got into the details  
11 was race.

12 This is from the first paragraph of his letter to the  
13 Florida Supreme Court asking whether the nondiminishment  
14 standard is required by the Constitution so that Black voters  
15 may elect candidate of choice.

16 That's the question. It's a race-based question.  
17 It's about Black voters having a choice here in Northern  
18 Florida.

19 The Court has previously suggested that the answer is  
20 yes. Well, it didn't actual suggest it; it said it. This is,  
21 at best, disingenuous. But it says that the Governor knows what  
22 the law is and he planned, apparently from the outset, to ignore  
23 it. And to ignore it, even though no Court had sanctioned that  
24 conclusion.

25 Mr. Kelly: "No Court ever said that application of

1 the Fair Districts Amendment was unconstitutional under the  
2 federal constitution. Yep. If anything, creating it -- in  
3 creating the benchmark, the Florida Supreme Court suggested  
4 otherwise, that it was constitutional. Florida Supreme Court  
5 believed that it was," said Mr. Kelly.

6 "They got it wrong, according to you?

7 "Yes."

8 And Judge Jordan asked him: "So as Florida law stood  
9 as interpreted by the Florida Supreme Court in late 2021, early  
10 2022, what the legislature was doing was not -- was not  
11 unconstitutional, according to the Florida Supreme Court?

12 "Yes, Your Honor.

13 "Okay. It was unconstitutional according to Governor  
14 DeSantis?

15 "Yes, Your Honor."

16 JUDGE WINSOR: May I ask a question about the Florida  
17 Supreme Court piece of this?

18 MR. DISKANT: Excuse me?

19 JUDGE WINSOR: May I ask a question about the Florida  
20 Supreme Court piece of this?

21 MR. DISKANT: Sure.

22 JUDGE WINSOR: Your burden is to show that the State  
23 acted in a racist manner in drawing these lines, right?

24 MR. DISKANT: At least in part.

25 JUDGE WINSOR: Okay. And as I understand the

1 argument, it's that this request to the Florida Supreme Court  
2 for a sort of blessing of the non-- of the enacted map is part  
3 of your evidence showing that intent, correct?

4 MR. DISKANT: Yeah.

5 JUDGE WINSOR: Okay. But then what I'm struggling  
6 with is how that fits in. Because suppose the Florida Supreme  
7 Court had done what he apparently wanted, which is said, "Don't  
8 worry about the amendments. Don't worry about what we said in  
9 2000" --

10 MR. DISKANT: I doubt we'd be here.

11 JUDGE WINSOR: It's, "Do what you like." And then he  
12 draws this exact same district.

13 MR. DISKANT: Mm-hmm.

14 JUDGE WINSOR: You'd have the exact same equal  
15 protection claim that you have now, wouldn't you? I mean,  
16 wouldn't your claims --

17 MR. DISKANT: No, no, no. Let me back up.

18 JUDGE WINSOR: Okay.

19 MR. DISKANT: It is a fact-based analysis of what  
20 Governor's intent was. I am confident that if the Florida  
21 Supreme Court told him, "Go ahead," we wouldn't be here. We  
22 wouldn't be here because it would be impossible to prove that he  
23 was motivated even in part by animus when the Florida Supreme  
24 Court has said what you're doing is right.

25 So that -- the reason it's part of our case is that he

1 went to the Florida Supreme Court, and they told him it was too  
2 complicated to decide without a record, that there are complex  
3 State and federal issues, that you need a record.

4 And so in my view, at least, what they were saying was  
5 "Sit back, Governor. Follow the law. There will be litigation.  
6 If you have a position in the litigation, that's the time to air  
7 it and have it decided by a Court."

8 JUDGE WINSOR: Are you saying you couldn't prove your  
9 case without that piece of it? I guess I misunderstood.

10 MR. DISKANT: No, I'm not saying that. No, no, I can  
11 prove -- I'm saying I couldn't prove my case if -- on the  
12 counterfactual statement that the Florida Supreme Court said,  
13 "We agree with you, Governor DeSantis." I can prove my case  
14 because it isn't what they said and there's a lot of other  
15 evidence.

16 JUDGE WINSOR: That's what I'm saying. I think -- I  
17 would think you would still be saying, Look, you know,  
18 foreseeability -- he knew this was going to happen.  
19 Performance, the other option, the absurdity of vetoing  
20 something -- I would think would be the exact same.

21 MR. DISKANT: I don't think so, Judge, but it's  
22 something that didn't happen. That is the way it rolled out.

23 JUDGE WINSOR: Got it.

24 JUDGE RODGERS: You're relying on this as evidence of  
25 pretext? I mean, that's essentially what --

1 MR. DISKANT: It's the beginning of the pretext story.  
2 And it shows an intent, and it shows knowledge of what the Court  
3 said. So it -- it means the Governor knew exactly what the  
4 Court said, and as we see as we go along, he is not going to  
5 follow it. And as we see going along, he's not going to follow  
6 it even when the legislature meets all of his objections, then  
7 comes up with this little, narrow, Duval-only map that truly  
8 cannot be challenged by any of the arguments he makes. I will  
9 get to that in a moment if you'll permit me.

10 But this is the beginning of the story, and, you know,  
11 I don't want to prejudge what case might or might not exist, but  
12 I highly doubt that anyone would have been challenging the  
13 Governor's actions had a Court decision behind -- it's  
14 impossible for me to imagine challenging the Governor if he had  
15 a Court behind his actions. He didn't. And that sort of gets  
16 to the heart of it.

17 It was unconstitutional according to Governor  
18 DeSantis. That's the problem, or at least the beginning of the  
19 problem.

20 So let me then turn to the two maps. And I'm going to  
21 talk about the law a bit, but to be clear, we're not here trying  
22 an equal protection case. We're not asking for a ruling on the  
23 equal protection issues.

24 The reason I'm talking about what he had to said is to  
25 show how slender, inconsistent his arguments are, and they tend,

1 in our view, to be supportive of the conclusion that he's acting  
2 with racial animus, at least in part, in relying on slender,  
3 poorly developed, weak arguments.

4 So anis first argument -- and now I'll talk about map  
5 8015, the elongated version -- is from his general counsel.

6 "Mere compliance with the State constitutional  
7 requirement to engage in race-based districting is not, without  
8 more, a compelling interest sufficient to satisfy strict  
9 scrutiny."

10 Nowhere in his argumentation does he recognize that  
11 eight justices of the Supreme Court have said they believe  
12 there's a compelling state interest in the nondiminishment  
13 provision of the VRA, Section 5.

14 A couple quotes from Justice Scalia:

15 "The compelling nature of the State's interest in  
16 Section 5 compliance" -- that's the nondiminishment standard --  
17 "is supported by our recognition in previous cases that race may  
18 be used when necessary to remedy identified past  
19 discrimination."

20 Justices Stevens and Breyer agreeing with Justice  
21 Scalia. Justice Souter and Ginsberg agreeing with Justice  
22 Scalia, and Justice Scalia was joined by Justices Thomas,  
23 Roberts, and Alito.

24 That's a lot of people on both sides of the  
25 political -- on all sides of the political spectrum saying this

1 is okay. The idea of using race to protect against diminishment  
2 can be supported by past discrimination, as a remedy for past  
3 discrimination.

4 So what does the extent the general counsel engages on  
5 this subject -- and it's more or less this sentence; it's not  
6 much more -- on compelling state interest. He says: "The  
7 Florida voters, when they voted for this, they didn't have  
8 before them a record of pervasive, flagrant, widespread, rampant  
9 discrimination."

10 Well, of course they didn't have a record. It's a  
11 referendum. They had a little ballot box on the top, and they  
12 had arguments that people made to support it -- to support it to  
13 remedy -- to avoid the dark times of the past. And I don't  
14 think there's much dispute about the dark times of the past.

15 Dr. Kousser told us Florida's used election law from  
16 the beginning to heighten discrimination against Blacks in  
17 voting. So that's part --

18 JUDGE WINSOR: Your view is that a state could put in  
19 Section 5 VRA standards statewide without any record?

20 MR. DISKANT: There's no law whatsoever on referenda.

21 JUDGE WINSOR: Why is the VRA Section 5 not in place  
22 anymore? I thought it was because the Supreme Court said there  
23 wasn't a record to justify it anymore.

24 MR. DISKANT: That's for Section 4, not Section 5,  
25 Your Honor. They struck Section --

1 JUDGE WINSOR: Well, Section 4 is what created the  
2 Section 5 standard.

3 MR. DISKANT: I understand.

4 JUDGE WINSOR: Okay.

5 MR. DISKANT: But being precise, however, they went  
6 out of their way to say Section 5 was not being invalidated. So  
7 Section 5 remains the law, and because it was an act of  
8 Congress, it needed a record.

9 But there's no law anywhere that I'm aware of that  
10 suggests that before a popular referendum in a state, whether  
11 it's on marriage equality or race issues or affirmative action  
12 -- you know, there are many controversial issues that go to the  
13 people in referenda, and there's no support that I'm aware of in  
14 the law that there has to be some kind of special record for the  
15 people. The people are deemed to know the facts that matter to  
16 them, and it's obviously going to matter variably. It's a human  
17 population. But --

18 JUDGE WINSOR: I just -- I thought you were saying --  
19 I thought you were citing cases saying that strict scrutiny was  
20 satisfied in those cases, in the VRA Section 5 cases, and I  
21 thought you were saying --

22 MR. DISKANT: That is what --

23 JUDGE WINSOR: Okay. So you're saying there would not  
24 need to be a -- if a state passed a -- by referendum something  
25 that explicitly discriminated on the basis of race, there



1 wouldn't need to bring any record to justify that?

2 MR. DISKANT: Well, it might be an unlawful law. But  
3 the record component I don't think exists in the law. You know,  
4 the public argument was about the need to remedy past  
5 discrimination. There's ample reason to believe that Floridians  
6 are aware of rampant discrimination, and 62 or '3 percent voted  
7 in favor of it. So it was not a close call. It was an  
8 overwhelming support for this law.

9 And the fact is -- and it's not a coincidence -- that  
10 the law lines up with the history of rampant discrimination in  
11 the state. So that's --

12 But more than that, let's move past that and move to  
13 the behavior of the Governor on this exact subject, because the  
14 Governor's witnesses and representatives have agreed that  
15 there's a compelling state interest behind the Fair Districts  
16 Amendment.

17 Mr. Popper testified, why not comply -- why isn't  
18 complying with the Constitution a compelling state interest?

19 It can be. The remedy has to be narrowly tailored.  
20 That's all. He was arguing about the benchmark. He said it  
21 wasn't narrowly tailored. But he didn't -- he agreed that the  
22 Constitution itself was okay.

23 And Mr. Newman, the general counsel to the Governor,  
24 said pretty much the same thing. The nondiminishment standard  
25 can survive or could survive strict scrutiny if you have a

1 compact African American community. So surviving strict  
2 scrutiny means there's compelling state interest.

3 And Mr. Kelly who was just here, testified about CD24  
4 the last time he was here, and he said it was a compact map. He  
5 drew it complying with the FDA. And there's a compelling state  
6 interest in the Fair Districts Amendment in CD24? To my  
7 knowledge, yes.

8 So basically, Mr. Kelly, Mr. Newman, and Mr. Popper,  
9 the three protagonists for the Governor on this issue, all  
10 agreed that there was a compelling interest in the Fair  
11 Districts Amendment.

12 JUDGE RODGERS: Just not as applied to benchmark --

13 MR. DISKANT: That's right. Their argument was narrow  
14 tailoring, not -- not that there was no compelling state  
15 interest.

16 And I'll turn to narrow tailoring and their arguments  
17 there for a moment because they were, in my view, disingenuous.

18 Narrow tailoring is an idea that basically once you  
19 have a compelling interest, what you've got to do is as narrow  
20 as possible to achieve that interest. If the interest is  
21 preventing diminishment of minority -- preventing Black  
22 voters --

23 Let me state it in the affirmative.

24 Allowing Black voters to elect their candidate of  
25 choice and protecting that from diminishment, then what's the

1 best district you can draw that does that in North Florida?

2 Well, the Florida Supreme Court said the East-West  
3 orientation was the only alternative option -- that was in  
4 Apportionment VII. In Apportionment VIII, they said, "It is  
5 more visually and statistically compact than the 2012 enacted  
6 district and the 2014."

7 So basically what they're staying is it meets the  
8 narrow tailoring requirement because it's the best choice we  
9 have to achieve our goal of avoiding diminishment of Black votes  
10 in Northern Florida. And when you look at the collection of  
11 maps that preceded it, it looks pretty good.

12 And, to complete that story, when you look at what was  
13 actually before the legislature in plan 8015, it's even better.  
14 Make it narrower and better. Is it a model of compactness? No,  
15 but it is a map that is in the tradition of districting in  
16 Florida. There are elongated maps; we saw one from 2002 in that  
17 exact area, and it is narrowly tailored.

18 So what does the Governor argue? He says, "It  
19 connects separate and distinct minority communities not defined  
20 by shared interests." And to be clear, this is his lawyer,  
21 Mr. Newman, not the Governor himself.

22 Well, they cite *Shaw against Reno* in challenging this,  
23 and this language is often cited by those who are challenging  
24 districts. It includes in one district individuals of the same  
25 race otherwise widely separated by geographical and political

1 boundaries and who may have little in common with one another  
2 but the color of their skin.

3 And that's the Governor's argument in a sound bite.  
4 It's pretty much the same point he makes to the Florida Supreme  
5 Court.

6 But actually, *Shaw* has a sentence that follows  
7 immediately: "It reinforces the perception that members of the  
8 same social group, regardless of their age, education, economic  
9 status, or the community in which they live, think alike."

10 Well, that's a stereotype that Black people think  
11 alike. But it matters if you think about variables like age and  
12 education and economic status and community, and then they --  
13 this otherwise suspect district, if it is suspect, has a  
14 community of interest, and that's a legitimate redistricting  
15 factor. It goes to narrow tailoring.

16 And we saw the data, which is very interesting.  
17 "People in Benchmark CD-5 compared to the enacted North Florida  
18 districts are younger, earn less, have many more people below  
19 the poverty line, many more children below the poverty line,  
20 fewer people with high school educations, fewer people with  
21 education."

22 And Judge Jordan asked Mr. Kelly: "Well, can you take  
23 that into account? Is that legitimate or illegitimate?"

24 And Mr. Kelly says that would contradict Florida law.  
25 You can't consider communities of interest.

1           Well, he's just wrong. The case he's referring to,  
2       which is apportionment -- I don't know which one. Sorry. Oh,  
3       it's Apportionment I, I'm quite sure.

4           The Senate had argued to construe the term "compact"  
5       to include communities of interest, and the Florida Supreme  
6       Court said, no, you can't do that. It doesn't give the term  
7       "compact" such an expansive meaning, and it explains why.

8           "And we hold, in reviewing compactness, the term  
9       should be construed to mean geographical compactness."

10          But communities of interest have everything to do with  
11       protecting a minority community and enabling them to elect the  
12       candidate of their choice because, indeed, there is a community  
13       of interest running along Northern Florida that old Benchmark  
14       CD-5 protected. Leader Driskell told us about the shared  
15       interest in public education and healthcare and broadband  
16       access.

17          Charlie Clark, who testified and travels -- he's a  
18       member of the Diocese of Northern Florida, travels from  
19       Tallahassee to Jacksonville and back, sees poverty across the  
20       district. Dorothy Inman-Johnson, another of our named  
21       plaintiffs, talks about urban environments and poverty. Senator  
22       Audrey Gibson in the record talks about health disparities.

23          It's more than about race. This is not just a *Shaw*  
24       issue. It's about need and infrastructure and the like.

25          And it is not irrelevant that this district shares a

1 heritage with the past. The U.S. Supreme Court just this summer  
2 made that clear in *Allen v. Milligan*, the Black belt in Alabama,  
3 and the same sort of thing: Concentrated poverty, unequal  
4 access to government services, lack of adequate healthcare --  
5 they could be writing about North Florida -- and a lineal  
6 connection to the many enslaved people brought there in the  
7 antebellum period.

8           So narrow tailoring -- you've got a community of  
9 interest that goes well beyond race, and it's the best district  
10 that was presented to the Florida Supreme Court to achieve that  
11 interest. Again, I'm not asking for a ruling on narrow  
12 tailoring, but I am saying that for the Governor's counsel  
13 simply to say these are separate and distinct and lack shared  
14 interests without any facts to support that is not an argument  
15 that engages seriously in the issue before the legislature. And  
16 the issue is a very serious issue: Ignore the Florida  
17 Constitution. Ignore the Florida Supreme Court.

18           Someone acting in good faith asking for such an  
19 extraordinary outcome is obligated to put forward more than a  
20 sentence or two.

21           So that's benchmark -- that's the elongated  
22 benchmark -- excuse me -- the elongated map.

23           The second -- the primary map -- the primary map, and  
24 I think, you know, in poker, this is the tell. The tell that  
25 the Governor is not acting in good faith, the tell that he's at

1 least, in part, motivated by racial animus is why on earth  
2 didn't he say "thank you" to the primary map? The primary map  
3 meets every one of his stated objections. It's not 200 miles  
4 long. It --

5 JUDGE WINSOR: Is it your client's view that this map,  
6 what we've been calling the Duval-only map, satisfies the Fair  
7 Districts Amendments and --

8 MR. DISKANT: Oh, absolutely.

9 JUDGE WINSOR: Okay.

10 MR. DISKANT: Yes, beyond all question. It -- it  
11 functions. It protects the rights of minority to elect their  
12 candidate of choice.

13 It's not what our clients would view as the preferable  
14 alternative because, as Leader Driskell said, she would like  
15 very much to see places like Gadsden included because Gadsden is  
16 the highest minority population percentage-wise in the state.

17 So it's not first choice. But my goodness, if you are  
18 looking to have a minority access district in Northern Florida  
19 and check all the boxes, as Mr. Kelly likes to say, this checks  
20 the boxes. And I'll go through it and tell you why.

21 But, you know, this is the Governor's inability to say  
22 "yes," to say "thank you," for taking his objections seriously.  
23 Not 200 miles long, crosses no political boundaries, doesn't  
24 connect distant populations. It's entirely within one county.

25 The Governor had been -- I won't say ranting -- had

1    been complaining loudly about the, you know, connecting  
2    200 miles, you know, elongation, all those arguments, and that  
3    he had been saying that publicly again and again and again  
4    throughout this time period, January and February, and then gets  
5    to March and the legislature says, Okay, Your Honor, Governor,  
6    we'll do what you want, and they create this map.

7           And its BVAP goes down, goes down from about  
8    46 percent of the benchmark to 35. And that's what they fixate  
9    on in the veto, the reduction in the percentage.

10           This is from Mr. Newman's veto, 46 versus 35, and that  
11   is diminishment in his argument, but everything is wrong with  
12   this starting with the facts and ending with the law big time.

13           First, the percentages. Comparing the percentages is  
14   meaningless without a functional analysis. Mr. Kelly told us  
15   that. Comparing the percentages -- they're not the same  
16   district. One goes from Duval to Gadsden, the other is just  
17   Duval. Different people, different geography. You can't  
18   compare the percentages, right? Right. You got to look deeper.  
19   You got to do a functional analysis.

20           Well, what is Mr. Newman doing? He's comparing the  
21   percentages. Yes, 35 is less than 46.

22           But -- but 35 can perform and 46 can perform. You've  
23   got to do a functional analysis. And who did the functional  
24   analysis and drew a conclusion? The legislature.

25           This is Chair Leek from the House: "This district,



1 CD-5, as drawn even in the primary, still performs. There is no  
2 effect on the functional analysis."

3 Senator Rodriguez, Senate chair of redistricting:  
4 "Even though the percentage has gone down, the functional  
5 analysis says it's still a Democrat performing seat. That's why  
6 we believe it to be constitutional."

7 And Mr. Kelly: "The Governor's office didn't do its  
8 own functional analysis?

9 "Correct. He relied on what the legislature provided.

10 Well, the U.S. Supreme Court has said that the  
11 legislatures don't have to all be perfect in this, but they have  
12 to have a sound basis in evidence for their conclusion. Well,  
13 they did. They did a functional analysis. It showed nine out  
14 of 14 districts, nine out of 14 races, the preferred candidate  
15 of the Black population winning, and all the recent ones. And  
16 the older ones are older ones.

17 And we don't even have to talk about turnout. I'll  
18 save that for a private conversation one day.

19 But the legislature concluded it was functional, and  
20 the Governor didn't really dispute it. And I asked Mr. Kelly,  
21 "Mr. Kelly, is it a reasonable bet that it'll continue to  
22 perform frequently for Democrats? More often than not."

23 Well, that's about all you can expect in life. You're  
24 making a prediction about the future. And that was the Senate's  
25 prediction, the functional analysis.

1           So the focus --

2           JUDGE WINSOR: You're not saying anything that would  
3 more often than not elect a Black candidate of choice would be  
4 considered a performing district --

5           MR. DISKANT: Yes.

6           JUDGE WINSOR: -- under the VRA, are you?

7           MR. DISKANT: It would.

8           JUDGE WINSOR: So you can --

9           MR. DISKANT: In fact, I think the *Martinez* case -- I  
10 think "reasonable probability" is the phrase it used or  
11 something like that. You know, there are no guarantees.

12           JUDGE WINSOR: I release there's no guarantees, but  
13 are you saying if you took a, say, 80 percent Black district  
14 down to 26 percent and a functional analysis said it would win  
15 51 percent of the elections, a Black candidate of choice would  
16 be elected, your clients would say that's a performing district  
17 for purposes of Section 5?

18           MR. DISKANT: I don't know. This one doesn't support  
19 that comparison. I mean, here we have every district -- every  
20 election in the last, I think, six years going for the Democrat.  
21 And, in fact, we just saw actually turnout in 2014 for Blacks  
22 was much lower than for whites, which directly affects  
23 performance.

24           So, you know, Justice Souter said some very wise words  
25 on this subject, which is these laws aren't intended to free the

1 Black voter from the obligation to work to win, you know, to get  
2 out the vote, to canvass, to -- he had a very colorful phrase,  
3 which I can't quite remember. But, you know, this is an  
4 opportunity. And does Duval provide an opportunity? It does.  
5 The legislature concluded it did. And --

6 JUDGE JORDAN: Your contention is that nine out of 14,  
7 which is somewhere in the mid-60s, is performing?

8 MR. DISKANT: Yeah, but my more complete contention is  
9 the more recent races are much more important, so -- yes --

10 JUDGE WINSOR: That's fair. I'm not quibbling with  
11 that.

12 MR. DISKANT: I'm trying to respond to Judge Jordan.

13 JUDGE JORDAN: No, you can -- deal with Judge Winsor  
14 now.

15 JUDGE WINSOR: But you said all you could ever hope  
16 for is more likely than not, and --

17 *(Simultaneous crosstalk.)*

18 MR. DISKANT: I don't -- I think there are districts  
19 in which you're pretty well guaranteed. You know, you've got a  
20 90 percent Black population, you know Black vote's going to win.  
21 That's -- but here we're in the universe of districts that  
22 definitionally do not have Black majorities. So definitionally,  
23 you're in a world where you're looking for white supporters  
24 where, you know, less is certain. That's all I'm saying.

25 But here's the money quote from Mr. Kelly: "There's

1 diminishment in the number of districts in Northern Florida from  
2 one to zero." And that violates the Florida Constitution, and  
3 there didn't have to be that result. Now, that's the facts.

4 I haven't mentioned the law, because they are  
5 incredibly off base on that, so off base that they either did no  
6 legal research or they chose to ignore the relevant case law.  
7 Let me show you.

8 This is the argument that Mr. Newman made. It has to  
9 do with the word "slight." And because he says, "The reduction  
10 in Black voting population is more than slight, it's no good."

11 And the first problem, of course, is he's comparing  
12 BVAPs, and as I just noted, BVAPs don't tell the answer. You  
13 need a functional analysis.

14 But let me walk through the cases quickly.

15 JUDGE WINSOR: Real quick: Was that in a memo to the  
16 legislature or to the Governor?

17 MR. DISKANT: There was a memo to the legislature.

18 JUDGE WINSOR: Okay.

19 MR. DISKANT: Oh, it is the veto memo. Sorry. This  
20 is the veto memo.

21 JUDGE WINSOR: Veto memo.

22 MR. DISKANT: Because they didn't address this  
23 publicly until the end because it just popped up, and again,  
24 they just declined to accept a compromise.

25 Okay. So the word "slight" shows up, incidentally, in

1 Apportionment I. "We conclude that under Florida's provision, a  
2 slight change in percentage doesn't necessarily have an effect."

3 But it continues. "This is because the ability to  
4 elect a candidate of choice depends on more than just population  
5 figures. It's a retrogression evaluation, an inquiry into --  
6 likely to performance, a functional analysis, considering  
7 population, political data" -- a lot. A lot. What we've been  
8 talking about is a functional analysis.

9 And so the truth is that the word "slight" appears  
10 there. It's their first case considering this issue, and as the  
11 cases unfold -- and were they to write the paragraph again, I  
12 think the word "slight" would be eliminated, and I'll show you  
13 why.

14 Now we're in Apportionment VII, and they're citing the  
15 U.S. Supreme Court: "BVAP itself cannot be viewed in a vacuum.  
16 The ability to elect a preferred candidate of choice -- it is --  
17 it is the ability to elect, not a particular percentage, that's  
18 the pertinent point. It doesn't require maintaining the same  
19 percentages. It's satisfied if minority voters retain the  
20 ability to elect. The functional analysis is yes or no, perform  
21 or not perform, not keeping the percentages one thing or  
22 another."

23 And let's take a look at this case, the Alabama  
24 legislative Black caucus case, which the Florida Supreme Court's  
25 relying upon. And in that case in 2015, the District Court

1 thought it was important that the relative percentages of Black  
2 voters not being substantially reduced. That's the same as  
3 Mr. Newman's "slight." No -- you know --

4 And what does the Supreme Court say about that  
5 argument? That's wrong. It's a misperception of law. "It does  
6 not require a covered jurisdiction to maintain a particular  
7 numerical minority percentage. It requires the jurisdiction to  
8 maintain the ability to elect."

9 The only question on diminishment is: Do you have a  
10 functional Black district or not?

11 JUDGE JORDAN: The citation to legislative Black  
12 caucus is 575 U.S. -- what page number?

13 MR. DISKANT: 254 at 275. Now, we cite it also in our  
14 prehearing brief.

15 And then, if there's any doubt whatsoever what they're  
16 talking about, a year later in *Harris v. Independent*  
17 *Redistricting Commission*, 578 U.S. 253 at 260, they say it in  
18 unchallengeable language. "The plan leads to impermissible  
19 retrogression. When compared to the plan currently in effect,  
20 the new plan diminishes the number of districts in which the  
21 minority groups can elect their preferred candidate of choice."

22 Mr. Newman's focus on diminishing percentages was  
23 factually baseless and legally wrong. The number of districts  
24 has gone down here in Northern Florida from one to zero, and  
25 that's it. That's diminishment.

1           And the focus on percentages as meaningless was just  
2 emphasized this afternoon by Mr. Kelly when he talked about his  
3 efforts to -- and this gets to the -- kind of the incoherence of  
4 their position. So now they're vetoing the Duval-only CD-5  
5 because it's diminished from 46 to 35 percent. And now  
6 Mr. Kelly -- now, this is a crude map I drew. I think it was  
7 what Mr. Jazil drew. But he's looking around in North Florida  
8 to see if he can hit all the markers.

9           And Judge Jordan asked him: "Did you create a minimum  
10 threshold in terms of percentages?"

11           "If you can get to 39 or 40 or 41, it would be pretty  
12 hard to argue with." He's used various numbers in his  
13 testimony.

14           But what's he doing? He's told us many times, there's  
15 no fixed minimum percentage, and he is saying -- he said this  
16 this morning -- this afternoon that if he had found a compact  
17 district in Northern Florida with a 40 percent BVAP, he would  
18 have done a functional analysis, and if was compact, well, then  
19 he would go with it, and it would comply with the U.S.  
20 Constitution and the Fair Districts Amendment. And what did he  
21 have in front of him at the time? He had the Duval -- and I  
22 don't have it. He had the Duval-only district that the  
23 legislature passed as a compromise at 35 percent and there was a  
24 functioning performing district. It would have preserved a  
25 Black Opportunity District in Northern Florida. There it is.

1 It would have been preserved a Black Opportunity District in  
2 Northern Florida and would have complied with the U.S.  
3 Constitution and the Fair Districts Amendment, and we wouldn't  
4 be here.

5 But the Governor, Mr. Newman -- maybe he was sloppy  
6 and didn't read the cases. Maybe he was intentionally  
7 misleading. I don't know the man. But I know that what he said  
8 was wrong, seriously wrong. Diminishment is not measured by a  
9 decline in BVAP. Diminishment is measured by a diminution in  
10 the number of performing districts. And that's the problem with  
11 this map, with the map that was enacted.

12 And then the last of these complaints that Mr. Newman  
13 registered is the bizarre doughnut shape. And -- oops, got the  
14 wrong map.

15 The so-called bizarre doughnut shape appears in the  
16 benchmark map itself. Do we have that?

17 In any event, it also appears in the State Senate map,  
18 which was approved by the Florida Supreme Court and the proposed  
19 Duval-only map.

20 And, yes, the yellow -- you know, District 4 goes  
21 around District 5. It's -- you know, Mr. Johnson -- I think it  
22 was Mr. Johnson, said, you know, it wasn't perfect, but it was  
23 sort of okay.

24 But ultimately, who cares? Compactness is a Tier II  
25 consideration. It's not a U.S. Constitutional requirement that



1 a district be compact.

2 What is required under the Florida Constitution is  
3 that you preserve a Black Opportunity District, and if that  
4 requires sacrificing compactness, that's a Tier II standard.  
5 That's why even on facial review the Florida Supreme Court had  
6 no problem at all with CD-4 and 5.

7 JUDGE JORDAN: Let me ask you a question, Mr. Diskant.

8 MR. DISKANT: Yes, sir.

9 JUDGE JORDAN: So you said at the very beginning that  
10 reasonable people can have a discussion --

11 MR. DISKANT: Sure.

12 JUDGE JORDAN: -- about race-based remedies and when,  
13 if ever, they may be appropriate.

14 MR. DISKANT: Mm-hmm.

15 JUDGE JORDAN: So if the Governor believed that the  
16 Fair Districts Amendment and specifically the nondiminishment  
17 provision was going to be applied or might be applied in a  
18 federally unconstitutional way, what is his way of trying to --

19 MR. DISKANT: Raise the issue.

20 JUDGE JORDAN: -- raise the issue, present the issue  
21 or the like?

22 MR. DISKANT: Okay. Well, he can say it, to begin  
23 with. He can --

24 JUDGE JORDAN: Sure, but saying it --

25 MR. DISKANT: No, no, I have --

1 JUDGE JORDAN: Saying it is not legally effective,  
2 right?

3 MR. DISKANT: What he can do is -- his first step was  
4 fine, going to the Florida Supreme Court. The Florida Supreme  
5 Court, in my view, suggested the answer, and the answer is: You  
6 state your position. The Governor's obligation is to enforce  
7 the law. The law is the Florida Constitution. The U.S.  
8 Constitution does not correctly address this except, you know,  
9 you can have an argument based on it, but there's no doubt about  
10 what the Florida Constitution requires. So his obligation, in  
11 my view, is to allow a map to be passed in compliance with the  
12 Florida Constitution. And then he can encourage or engage in  
13 litigation to resolve the question. He has many allies and he  
14 himself, the Secretary goes to court. The -- litigation is the  
15 answer to the -- a question like this because you can't --  
16 once --

17 If there were no laws on the books, then you can have  
18 a civilized conversation and decide to disagree. But when there  
19 are laws on the books, as the Governor of the state, his  
20 obligation, in my view, is to enforce the law, just as he has  
21 argued with respect to the some of the prosecutors he's removed  
22 from office. He's got to enforce the law. He can encourage  
23 litigation. He can even take litigation positions against the  
24 law, perhaps. There's a disagreement about that --

25 JUDGE JORDAN: But --

1 MR. DISKANT: -- but I'll let him do that.

2 JUDGE JORDAN: My question runs a little bit deeper.

3 MR. DISKANT: Okay.

4 JUDGE JORDAN: If you have a -- let's assume a  
5 scenario very different than this case.

6 MR. DISKANT: Okay.

7 JUDGE JORDAN: Okay? You have a state law that is  
8 unconstitutional on the federal side.

9 MR. DISKANT: Mm-hmm.

10 JUDGE JORDAN: It has been declared so --

11 MR. DISKANT: Yes.

12 JUDGE JORDAN: -- by the federal courts.

13 MR. DISKANT: Mm-hmm.

14 JUDGE JORDAN: The state courts, however, have upheld  
15 the state law. Right?

16 MR. DISKANT: That one's easy, right?

17 JUDGE JORDAN: No, not the way you've expressed it.  
18 You say the Governor's job is to enforce state law.

19 THE WITNESS: No, no, the Government's job is to  
20 enforce *the* law, and if there's an on-point federal precedent --  
21 let's talk about *Brown v. Board*. You know, I mean, there were  
22 lots of state laws enforcing segregation, but the supreme law of  
23 the land was *Brown*, and Governor Kirk here in Florida was held  
24 in contempt for refusing to comply with it, so --

25 JUDGE JORDAN: So -- but your point is, then, that if

1 there is no law on the books dictating what a governor has to  
2 do, then his or her job is to follow state law, the state  
3 constitution, and the state Supreme Court?

4 MR. DISKANT: Yeah.

5 JUDGE JORDAN: Okay.

6 MR. DISKANT: Yes. And when he does so, in the way --  
7 I mean, here we have this -- this incoherent set of arguments.  
8 They're coupled with inconsistent behavior. Sometimes it's  
9 compelling, sometimes -- it's hard to even track what his  
10 arguments are. And so to me, this all adds up to evidence of  
11 good faith. Governor acting in good faith could clearly state a  
12 position, could clearly go to court, could -- but the question  
13 is --

14 JUDGE WINSOR: Could he veto a legislative proposal  
15 that he thought was unconstitutional?

16 MR. DISKANT: That's an interesting question. I  
17 think, probably the answer is yes.

18 JUDGE WINSOR: So you're not challenging -- there's  
19 not a lot of discussion about the veto --

20 MR. DISKANT: Yeah.

21 JUDGE WINSOR: -- and it was not done in good faith or  
22 whatever.

23 MR. DISKANT: Yeah.

24 JUDGE WINSOR: But you're not -- you're here  
25 challenging the final enacted map; you're not challenging the

1 veto, correct?

2 MR. DISKANT: No, we're challenging the veto also as  
3 reflecting racial animus.

4 JUDGE WINSOR: You're using the veto as evidence of  
5 racial animus.

6 MR. DISKANT: You can look at it that way.

7 JUDGE WINSOR: But you're not asking us to invalidate  
8 the veto and put in this map that the legislature passed,  
9 correct?

10 MR. DISKANT: Oh, no.

11 JUDGE WINSOR: Okay.

12 MR. DISKANT: What we're asking you to do is to  
13 invalidate the map that the legislature passed --

14 JUDGE WINSOR: Right, after the veto. So you're not  
15 saying the veto itself was an unconstitutional act?

16 MR. DISKANT: No, I'm saying the veto itself --

17 JUDGE WINSOR: Okay.

18 MR. DISKANT: -- was an act motivated by racial  
19 animus, at least in part, and it led to the enacted map, which  
20 incorporated that racial animus, at least in part.

21 Does that track?

22 JUDGE WINSOR: Well, I think I got it except you said  
23 it was not an unlawful veto, but you're saying it was motivated  
24 by racial discrimination.

25 It maybe doesn't matter. If you're not making the

1 claim, it doesn't matter what --

2 MR. DISKANT: It's parsing it a little.

3 JUDGE WINSOR: But you're not challenging here?

4 You're not asking us to invalidate the veto?

5 MR. DISKANT: No. We're asking you to invalidate the  
6 map.

7 JUDGE WINSOR: That's what I thought. There has been  
8 so much discussion, I wanted to make sure I understood.

9 MR. DISKANT: Yeah, I mean, the veto, in our view, is  
10 motivated, at least in part by racial animus. That's part of  
11 our story.

12 JUDGE WINSOR: I understand that. It's in evidence.

13 MR. DISKANT: In any event, I'm moving on in time. So  
14 let me move on in argument, although I think I'm doing pretty  
15 well on my schedule. Oh, yeah, I am.

16 So basically, as I said at the outset or a few moments  
17 ago, the Duval-only story is the tell. You know, there's just  
18 no -- it's wrong on the law; it's wrong on the facts; it's a  
19 complete compromise, it gives him everything he wants, and he  
20 still vetoes it. He still -- with arguments that are made up,  
21 that just aren't factually supported or legally supported. And  
22 that, I think, more than anything -- you know, if I had to pick  
23 one event that demonstrates that there's something more going  
24 on, something that doesn't meet the eye, that there's some  
25 racial animus in play, I think it's that.

1           So I'll do the Arlington Heights factors reasonably  
2 quickly, because I've hit a lot of them as I've talked.

3           Of course, we need the Arlington Heights factors  
4 because racial intent must be inferred. Outright admissions of  
5 impermissible motivation are infrequent, and today racism is no  
6 longer pledged from the portico of the Capitol or exclaimed from  
7 the Florida constitutional convention.

8           This one's pretty unusual, though, because the racial  
9 component of what the Governor's doing was on the face of it  
10 from the beginning. You know, if you argue for a literacy test,  
11 you can say, "I think voters should be educated." If you argue  
12 for a poll tax, you can say, "I think we should raise some money  
13 for the government." At-large voting, "It's good to have  
14 members representing a larger population."

15           Here, there's -- race is what it's all about. The  
16 Governor goes to the Florida Supreme Court. In his opening  
17 paragraphs, what's his grievance? Minority populations electing  
18 the candidates of their own. It's very close to an outright  
19 statement of racial animus. It's not, exactly, but it's -- it  
20 is close. Let me just leave it at that.

21           History -- you know, there's been a lot of litigation  
22 about the relevance of history. I think we know history's  
23 relevant. We know more recent history's more relevant.  
24 Dr. Kousser has told us redistricting was used as a  
25 disenfranchising device or device to diminish Black political

1 influence from the very beginning and that has continued.

2 But let me just start with our record, start from  
3 1950, start with the people you've heard from of from the  
4 witness stand.

5 Charlie Clark, who's a plaintiff. He went to  
6 segregated schools until graduate school.

7 Ms. Inman-Johnson marched with Martin Luther king as a  
8 young woman.

9 So that history of racism and discrimination and  
10 intolerance is part of their lives. It's part of today's  
11 history. It's part of the lives of legislators living and  
12 acting today. During their lifetime, a Black witness in a  
13 Florida courtroom would be sworn in on a Black Bible and a white  
14 person would be sworn in on a white person's Bible.

15 JUDGE JORDAN: Without diminishing what they have been  
16 through, which is unfathomable, does the history got less  
17 probative as you go more backwards in time?

18 MR. DISKANT: Oh, yeah, if I started in 1950. I just  
19 skipped over everything before.

20 JUDGE JORDAN: No, I ask because of the history that  
21 Dr. Kousser talked about, which --

22 MR. DISKANT: That --

23 JUDGE JORDAN: -- stemmed back well into the 19th  
24 century.

25 MR. DISKANT: Yeah. I think under existing circuit



1 law, anyway, the further going you go, the less relevant it  
2 becomes. But it's always relevant, and I think the relevance --  
3 this denial of rehearing *en banc* in -- was it the SB90 case?  
4 Within the last couple days, at least, there was a -- Your Honor  
5 dissented and --

6 In any event, the further back you go, the less  
7 relevant the history becomes. History's always relevant. More  
8 recent history's more relevant. And I think -- and for our  
9 purposes -- I'm not saying this is background noise because it's  
10 not background noise; it's very much the lived lives of our  
11 plaintiffs. And in particular, today, besides the packing of  
12 Black votes by this legislature in the year 2012 and in 2022,  
13 they're concerned about the heightened racial tensions in this  
14 state caused by the Governor, and, you know, they both gave  
15 examples in their lived experiences. And I think the witness  
16 this morning agreed that there was a heightened climate of  
17 racial tension in the state, and I think, respectfully, the  
18 Court can consider that in trying to assess the Governor's  
19 motivation here.

20 And that's all I'm going to say about history.

21 Relevant sequence of events. It's in a sense a  
22 ping-pong match against a guy with a veto pen. But basically,  
23 I'm going to go through the timeline.

24 But what you see is the legislature trying to enforce  
25 the Florida Constitution and the Governor pushing back; the

1 legislature trying to enforce the constitution and the Governor  
2 pushing back; the legislature trying to enforce the constitution  
3 and the Governor pushing back; the legislature trying to enforce  
4 the constitution and the Governor pushing back; the legislature  
5 trying to enforce the constitution and the Governor pushing  
6 back.

7           One, two, three, four, five, a ping-pong match of  
8 sorts. And there's a sort of -- a dispute to some extent about  
9 what was first and what wasn't. I think what we know is, first,  
10 and what matters is this is the first time that anyone's been  
11 able to identify that a Governor has submitted one redistricting  
12 plan or two redistricting plans or three redistricting plans,  
13 and all of them on their face violated the State constitution;  
14 all of them eliminated a Black Opportunity District in Northern  
15 Florida; all of them usurped the legislative function of drawing  
16 the map; all of them lacked court support; and all of them  
17 ignored the Florida Supreme Court. That's quite a list that  
18 goes with those firsts.

19           Leader Driskell told us the process went off the  
20 rails, and that was once the Governor got involved. And by the  
21 end of the ping-pong match, the five back-and-forths, the  
22 legislature essentially abdicated its constitutional function to  
23 propose maps. On April 11 before the special session, the  
24 legislative staff is not drafting or producing a map. That's  
25 its job under the U.S. Constitution and under the Florida

1 Constitution.

2 We asked Representative Driskell, Did it live up to  
3 its constitutional duty to redistrict? No. The Governor did  
4 it. And did the legislature go along? I would say yes, sort of  
5 holding its nose.

6 Senator Rodriguez, in the special session, defends the  
7 constitutionality of the map they proposed. "Our job was to  
8 pass a map that would be completely constitutional and withstand  
9 all Court challenges. That was the map we brought under those  
10 parameters," says Senator Rodriguez after the Governor's veto  
11 and before he winds up voting for the Governor's proposed plan.

12 The only legal memo that has been produced to us, at  
13 least, from the Senate Council is about as lukewarm as one can  
14 get. He says, "The Governor's map has been drawn resolving a--  
15 unre- -- regarding an unresolved issue of law," meaning there's  
16 in case that says the Governor's right. And then he says, "In  
17 the absence of controlling judicial precedent contrary, there's  
18 no case that says he's wrong." So, therefore, you should think  
19 long and hard about it. That's kind of what the opinion of  
20 counsel adds up to.

21 And we heard this morning about one -- maybe there are  
22 two or three. I don't know. There are no more than a handful  
23 of legislators actually said they supported the map. The --  
24 excuse me. I misspoke. No more than a handful of legislators  
25 said they supported the Governor's legal argument. The majority

1 obviously enacted the map.

2 JUDGE WINSOR: Is the actual vote something we should  
3 consider in terms of whether it was -- I don't know if it's in  
4 this record or not -- whether there was --

5 MR. DISKANT: You're certainly welcome to consider it.  
6 I don't know what the vote is. I assume it was largely a party  
7 line vote.

8 JUDGE JORDAN: It's probably a matter of public  
9 record, too.

10 MR. DISKANT: I'm sure it is, and if you want to take  
11 notice of it --

12 JUDGE WINSOR: You're not saying it should not matter  
13 one way or the other for purposes of your claim?

14 MR. DISKANT: No. I think it's the sequence of events  
15 that lead the -- that lead the legislature to give up arguing  
16 about it. Why did this happen? Why did they stop fighting? I  
17 mean, I found them courageous and impressive, honestly, to  
18 repeatedly say we're going to this this way because it's what  
19 the constitution requires and we understand what the  
20 constitution requires. And the Governor's making noise out  
21 there and he's sending these tweets about DOA and bullying us,  
22 and it's not going to work.

23 And to me, that's a courageous legislature operating  
24 within the limits that a legislature can operate within, which  
25 is he called -- he timed the special session, you know, for --

1 his veto was, I think, March 4 -- or no, the legislation was  
2 passed March 4. The special session was called for April 19,  
3 not exactly a coincidental date, because this Court had  
4 scheduled a hearing on a new map because of a legislative  
5 impasse for the next week. And so they -- the legislature  
6 wasn't going to try to write a map anymore; they tried and they  
7 tried and they tried and they tried. Five times, they tried.  
8 The Governor says no, no, no, no, no, and he vetoes the  
9 compromise map.

10 And then, you know, there's a protest on the floor of  
11 the House. Leader Driskell told us about that. Because it was  
12 so obvious what was happening. What was happening is Black  
13 voters in Northern Florida were losing their opportunity to  
14 select a member of their choice. And they didn't have much, you  
15 know, trial -- this Court's order, and I know that on April 18,  
16 the day before the special session, we put in our papers on  
17 that -- for that hearing. It was hanging over the legislature.  
18 They basically felt they had no choice, the Governor's map or  
19 this Court, and they folded. I think that's what happened, not  
20 endorsing it, but acquiescing in it.

21 JUDGE WINSOR: Can I ask a question about that? Is  
22 this sort of a cat's paw theory? Are you saying the legislature  
23 acted with racial animus, or is your view that they just adopted  
24 what the Governor drew with a racial animus?

25 MR. DISKANT: There's a body of law on this. It's

1 cited in our brief. Basically, there are circumstances like  
2 this one, when someone puts pressure on a legislature to do  
3 something unconstitutional, and the legislature says, yeah, we  
4 just did it. And the answer is no. You don't get -- you don't  
5 get a free pass on that one. Legislature can't avoid the  
6 strictures of the equal protection clause by deferring to the  
7 wishes or objections of a third party.

8 JUDGE WINSOR: I'm asking a factual matter.

9 MR. DISKANT: No, I -- let me answer that.

10 JUDGE WINSOR: Okay.

11 MR. DISKANT: I was getting there. I'm sorry.

12 JUDGE WINSOR: No, I didn't mean to rush you.

13 MR. DISKANT: I apologize for not answering it more  
14 directly and more quickly.

15 But am I contending -- I'm contending that the  
16 legislature, by passing this, bears responsibility for the  
17 racial animus that motivated, in part, the Governor. I'm not  
18 accusing any legislator of racial animus.

19 JUDGE WINSOR: Okay.

20 MR. DISKANT: But I am saying they don't get a free  
21 pass, because what they did enacted into law a plan motivated in  
22 part by racial animus that deprived Black voters of Northern  
23 Florida of the representative of their choice.

24 JUDGE WINSOR: But the racial animus, you're saying,  
25 that was the Governor's racial animus, not any legislator's

1 racial animus?

2 MR. DISKANT: Yes. We're accusing Governor Ron  
3 DeSantis of acting with racial animus, at least in part,  
4 throughout this period from January till April.

5 JUDGE WINSOR: And you're not leveling that accusation  
6 against any legislator?

7 MR. DISKANT: No.

8 JUDGE JORDAN: So it is, to use Judge Winsor's words,  
9 a sort of equal protection cat's paw theory as derived from  
10 Title VII law? In other words, you have a racially  
11 discriminatory supervisor who makes a recommendation about  
12 discipline for an employee on admittedly racial improper  
13 grounds, and the higher-ups just simply rubber-stamp it.

14 MR. DISKANT: Right, and they're held liable.

15 JUDGE JORDAN: I'm sorry?

16 MR. DISKANT: They're held liable.

17 JUDGE JORDAN: Correct. It's generally called the  
18 cat's paw theory in Title VII law, and I think that's partially  
19 what Judge Winsor was asking.

20 MR. DISKANT: It's the same idea but somewhat in  
21 reverse, but yeah.

22 JUDGE JORDAN: You've got about six minutes left on  
23 your hour and 15.

24 MR. DISKANT: I'm doing great.

25 The effect of the plan, I don't think I need to

1 address. A Black performing district was lost.

2 The availability of alternatives, I likewise don't  
3 need to address. There were two alternatives, both enacted by  
4 the legislature, 8019 and 8015.

5 And that's it for Arlington Heights factors.

6 And the last part of the analysis is what would have  
7 happened if we have a demonstrated, as I believe we have, a  
8 discriminatory purposes as a motivating factor behind the plan,  
9 via the cat's paw argument, then the burden shifts to the  
10 Secretary to demonstrate that the same law would have been  
11 enacted without discriminatory motivation, and in our view that  
12 should be pretty straightforward. Without the Governor's  
13 illegal intervention, a map would have been enacted that  
14 protected the rights of Black voters in Northern Florida.

15 And that, in the end, is exactly what Justice Kennedy  
16 was talking about in *Strickland*. "If there were a showing that  
17 a state intentionally drew district lines in order to destroy an  
18 otherwise effective crossover district, that would raise serious  
19 questions under both the 14th and 15th Amendment."

20 He couldn't have been talking more precisely about our  
21 facts.

22 I thank you for your attention.

23 JUDGE JORDAN: Thank you very much.

24 MR. JAZIL: Let me start.

25 JUDGE JORDAN: Whenever you're ready.



1 MR. JAZIL: Good afternoon, and may it please the  
2 Court.

3 Your Honors, I will address the arguments my friend  
4 made as best I can. However, I'd like to start by actually  
5 sharing Mr. Newman's words with the Florida legislature. It's  
6 been suggested that Mr. Newman is this Wizard of Oz who's  
7 putting together these veto memos and these advisory opinion  
8 requests without actually explaining himself, and that's simply  
9 not the case. He did explain himself before the legislature  
10 during the special session.

11 You also heard from Mr. Kelly that when it comes to  
12 legal issues, who's his lawyer? Who's the guys he defers to?  
13 It's Mr. Newman. And that is why I would actually like to begin  
14 with a clip from Mr. Newman before the Florida legislature  
15 during the special session, because I think that's a good  
16 framing for why it is he wrote the words he did.

17 *(Video recording played in open court as follows.)*

18 *On the issue of the federal constitutionality of District 5*  
19 *as it was originally configured, the Florida Supreme Court never*  
20 *actually addressed that question. That question's never been*  
21 *resolved by the federal -- by the Florida Supreme Court as to*  
22 *whether or not District 5, as it was configured, complied or not*  
23 *with the federal constitution.*

24 *And so what we did in the memo that we submitted -- and it*  
25 *lays out, I hope, in sufficient detail legal argument for why*

1 compliance with the Florida Constitution in Northern Florida --  
2 and that's complying with the nondiminishment standard of the  
3 Florida Constitution -- can't square with the equal protection  
4 clause of the United States Constitution.

5 And so just to step back to sort of walk through the  
6 analysis, right, the Supreme Court has made very clear that you  
7 cannot draw voting districts based on race unless the state can  
8 satisfy strict scrutiny. So there must be a compelling interest  
9 and the district must be narrowly tailored to achieve that  
10 compelling interest.

11 Now, the only time that the United States Supreme Court has  
12 been willing to even countenance a compelling interest in this  
13 context is when there is good reason to believe that the  
14 district is necessary to comply with either Section 2 or  
15 Section 5 of the Voting Rights Act.

16 And I need to point out even on this point, that is still  
17 an open question. The U.S. Supreme Court has only assumed that  
18 compliance with the Voting Rights Act is a sufficient compelling  
19 interest to justify a race-based district.

20 That's very narrow, and the Supreme Court is only been  
21 willing to assume that much. It's never actually definitively  
22 held that.

23 So with respect to compliance with the Voting Rights Act,  
24 okay, there's two components to the Voting Rights Act: There's  
25 Section 2 of the Voting Rights Act and there's Section 5 of the

1     Voting Rights Act. Section 5 of the Voting Rights Act no longer  
2     applies in this context because of the Shelby County case,  
3     right, which wiped out Section 4, so Section 5 is no longer  
4     operative.

5             But I do want to make an important point here. Section 5  
6     never applied to the State of Florida as a whole. It never has.  
7     So there was never even back, you know, in 1968 or wherever,  
8     back when the -- you know, the evidentiary basis for the Voting  
9     Rights Act, 1965, was being assembled, there was never  
10    sufficient evidence to determine that the entire state of  
11    Florida should be subject to the Voting Rights Act. It was only  
12    determined that five counties, none of which are in Northern  
13    Florida, were subject to the Voting Rights Act. So -- for  
14    Section 5.

15            So Section 5 of the Voting Right Act -- I guess my point is  
16    that's just out of picture. Right? So that just leaves us,  
17    then, with Section 2. Okay?

18            So does Section 2 of the Voting Rights Act require that  
19    District 5 in Northern Florida be drawn? And the answer has to  
20    be no. Why? Because of the Gingles preconditions that are  
21    required for making out a Section 2 claim. You can't even make  
22    out a Section 2 claim unless you satisfy the Gingles  
23    preconditions.

24            The first precondition -- this is what Alex was trying to  
25    get to. The first precondition is: Is there a minority

1 population that's reasonably compact in a reasonably compact  
2 geographic location that constitutes a majority of the district?  
3 And District 5, notwithstanding the fact that it's -- that it's  
4 gerrymandered -- I mean, the district was drawn for the specific  
5 purpose of connecting African American populations in  
6 Jacksonville with the African American population in Tallahassee  
7 and Gadsden Counties. And even then, that district is not a  
8 majority minority district. It only got up to 44 percent or so.  
9 44, 45 percent, if my memory serves. And that's even without  
10 respecting traditional districting criteria.

11 So that district cannot be -- is not required by the Voting  
12 Rights Act, and because it's not required by the Voting Rights  
13 Act, it doesn't -- cannot serve as a compelling interest to  
14 justify the drawing of a district in Northern Florida based on  
15 race. Okay?

16 So the only -- the only question, then, is whether or not  
17 mere compliance with the Florida Constitution alone, by itself,  
18 is a compelling interest to justify a race-based district. And  
19 in this context, where you're having to ignore all redistricting  
20 criteria, which is what the federal courts look at to determine  
21 whether or not, you know, the district is necessary, it cannot  
22 be a compelling interest.

23 (End of video recording.)

24 JUDGE JORDAN: Can you pause it?

25 So I have a question about that last point.

1 MR. JAZIL: Yes, sir.

2 JUDGE JORDAN: He, Mr. Newman, seems to say -- or I  
3 guess he's taking it -- he's taking it as a given for purposes  
4 of this discussion that you can have a compelling state interest  
5 if you need to comply with Section 2 of the Voting Rights Act.

6 MR. JAZIL: Yes, Your Honor.

7 JUDGE JORDAN: He says it hasn't been completely  
8 settled, but he's sort of taking it as --

9 MR. JAZIL: Subsumed.

10 JUDGE JORDAN: -- a responsibility that that could  
11 happen, right?

12 MR. JAZIL: Yes, Your Honor.

13 JUDGE JORDAN: If the Fair Districts Amendment  
14 nondiminishment provision was meant to mirror or mimic the  
15 Voting Rights Act, why doesn't that also act as a compelling  
16 state interest?

17 MR. JAZIL: Sure, Your Honor. A few points.

18 Section -- the Voting Rights Act was intended to  
19 further the express powers given to Congress under the Civil  
20 Rights Amendments. We don't have that kind of analog in  
21 Florida. Right? So unlike Congress, which had a specific  
22 grant, you know, in the Civil Rights amendments to put forward  
23 legislation to implement those amendments, there's no analog in  
24 Florida.

25 Number two, the Voting Rights Act and the *Katzenbach*

1 case from the United States Supreme Court shortly after the  
2 Voting Rights Act was passed was supported by a voluminous  
3 record. The record included material in there such as the voter  
4 registration rates for Black voters in Mississippi of  
5 6.9 percent, so extreme examples put together in a voluminous  
6 record that supported this intrusion. That's number two.

7 Number three, even then, Your Honor, the Voting Rights  
8 Act, with its express provisions from Congress, its voluminous  
9 record, it was targeted. It had the Section 2 provision, which  
10 applied if you have a majority minority district and you satisfy  
11 the other Gingles preconditions, then you meet the totality of  
12 circumstances under the Senate factors. Section 5 had its own  
13 preclearance test.

14 So the Voting Rights Act, with its express powers for  
15 Congress, with its voluminous record was still targeted to  
16 identify a race-based problem and come up with a targeted  
17 race-based solution.

18 What we have here under the Florida redistricting  
19 amendments, which were incorporated Article 20, Section 8, is  
20 not the same. There's no express power. The equal protection  
21 analysis after the -- the civil --

22 JUDGE JORDAN: Why does the express power matter when  
23 you're dealing with a referendum?

24 MR. JAZIL: Your Honor, it still matters, because what  
25 we're doing is we're saying we should be race conscious in this

1 process, right? And if we're saying we have to be race  
2 conscious, that that triggers strict scrutiny. That triggers a  
3 need for us to be, you know, reflexively cautious about this  
4 approach, really cautious, because we're saying that we're going  
5 to take something into account that we don't ordinarily take  
6 into account.

7 So you went through the referendum process, fine. But  
8 there was no record. I don't know how best to put together a  
9 record to justify a nondiminishment standard that, read one way,  
10 applies all over.

11 Now, the Governor --

12 JUDGE JORDAN: What about the record created -- and  
13 this will be my last question.

14 MR. JAZIL: Sure.

15 JUDGE JORDAN: What about the record created when the  
16 whole redistricting thing went up to the Florida Supreme Court  
17 and got decided in 2015?

18 MR. JAZIL: Yes, Your Honor. And so as part of that  
19 process, there was no facial review to ensure that it was  
20 constitutional under the federal constitution.

21 JUDGE JORDAN: No, no, I'm not suggesting there was.  
22 I'm just saying there was a record of sorts built up when the  
23 matter went up to the Florida Supreme Court in 2015.

24 MR. JAZIL: Yes, Your Honor.

25 JUDGE JORDAN: So what do we do with that record, if

1 anything?

2 MR. JAZIL: Your Honor, two points. That record  
3 wasn't presented to the Court here.

4 Number two, even if it were --

5 JUDGE WINSOR: You say it was not?

6 MR. JAZIL: That record was not presented to the Court  
7 in this case, number one.

8 Number two, even if you look at that record, Your  
9 Honor, the review by the Florida Supreme Court is narrow. It's  
10 not focused on whether or not there was sufficient record  
11 evidence to support the federal constitutionality of this  
12 race-based solution. So that record isn't going to be terribly  
13 insightful if this Court were to undertake an analysis like  
14 that.

15 JUDGE JORDAN: Okay. Thank you very much.

16 MR. JAZIL: And, Your Honor, we can pause here. You  
17 get a flavor for what Mr. Newman was trying to explain to the  
18 legislature. He went before them. He was doing his best to  
19 earn votes. And there are a couple --

20 JUDGE JORDAN: That's going to be on the vote clip  
21 that you're --

22 MR. JAZIL: Yes, Your Honor, that will be on the video  
23 clip, so you can watch it. So this is him not hiding. This is  
24 him showing up to the Florida legislature in a public meeting,  
25 answering questions from members. This is a question posed



1 by --

2 JUDGE JORDAN: When was this testimony in the process?

3 MR. JAZIL: Your Honor, this is during the special  
4 session --

5 JUDGE JORDAN: Got it.

6 MR. JAZIL: -- in April.

7 And, Your Honor, he begins his testimony by making a  
8 point, which I'd like to use as a jumping off point to make sure  
9 we're all singing from the same hymnal here.

10 Mr. Newman says that the Florida Supreme Court has  
11 never addressed this issue, and it hasn't. The Florida Supreme  
12 Court was never confronted with the question of whether or not  
13 you can draw a district for race-based reasons while still  
14 complying with the federal constitution. Apportionment VII,  
15 where benchmark district came out of, it was focused on a remedy  
16 for partisan gerrymandering. During the last redistricting  
17 cycle, the big focus was the effect of political consultants  
18 from the outside impacting the redistricting process, tainting  
19 the legislature with improper partisan -- and so partisan intent  
20 was sort of, of a focus there.

21 And there, the former Corrine Brown district, the one  
22 that went from Duval County down to Orlando, was found to be an  
23 improper partisan gerrymander. And so the remedy for the  
24 improve partisan gerrymander was the creation of this East-West  
25 district.

1           Now, in this clip, Mr. Newman concludes by referring  
2   to a Wisconsin case. This is a Wisconsin case from 2022 from  
3   the United States Supreme Court. What was happening in  
4   Wisconsin is there was an impasse on the State legislature map,  
5   so the State Supreme Court held a beauty contest. It invited  
6   all the stakeholders to put together maps and submit them.

7           The Governor of Wisconsin submitted a map that was  
8   trying to create one extra Black district. And this issue went  
9   up to the U.S. Supreme Court and they issued a summary reversal.  
10   The important part there is that the U.S. Supreme Court in its  
11   discussion talked about how it didn't matter whether it was --

12           JUDGE JORDAN: I can't understand the context without  
13   knowing what the lower court had done.

14           MR. JAZIL: Your Honor, the -- my understanding is  
15   there was no maps. It was an impasse process where the courts  
16   were coming up with a map. So it --

17           JUDGE JORDAN: And they enacted a map?

18           MR. JAZIL: Yes, Your Honor. So what happened is --  
19   so in an earlier iteration of this case, we had no map. The  
20   Court met. If there were no map, the Court would have drawn a  
21   map either through the use of the special master or through  
22   picking from among the submissions.

23           And so that was sort of the similar posture in  
24   Wisconsin, where folks submitted maps for the Wisconsin Supreme  
25   Court to consider. The Wisconsin Supreme Court picked the

1 Governor's map as the map that should be used.

2 And the important part is the case went up to the U.S.  
3 Supreme Court. The U.S. Supreme Court didn't care that the  
4 Wisconsin Supreme Court made the map. Right? Wisconsin Supreme  
5 Court, Florida Supreme Court, both State Supreme Courts. The  
6 U.S. Supreme Court didn't care that the Wisconsin Supreme Court  
7 made the map and said that we're going to apply strict scrutiny.  
8 You don't get a pass if the Court in your state comes up with  
9 the map.

10 And I think that's an important point, because that  
11 sort of frames our discussion. So as the Governor is getting  
12 involved in this process in January of 2021, after the Senate  
13 has passed a map that retained a version of the East-West  
14 configuration, the Governor's involved. The Governor's  
15 concerned that, hey, this might be a partisan gerrymander. What  
16 are his options? Under the Florida Constitution, he can  
17 threaten to veto; he can veto. But what he can't do that my  
18 friend mentioned is if the legislature passes a map, he can't  
19 actually sue, himself, challenging the enacted plan. That would  
20 violate the public official standing doctrine in Florida. The  
21 Governor and its agents, the Secretary of State, are public  
22 officials. They cannot challenge the constitutionality of duly  
23 enacted legislation. That's --

24 JUDGE JORDAN: Under Florida law?

25 MR. JAZIL: Yes, Your Honor. Under Florida law --

1 JUDGE JORDAN: He's already said Florida law is  
2 unconstitutional in some respect, so why not challenge that too?

3 MR. JAZIL: Well, Your Honor, the point is this: What  
4 he's saying in the map-drawing process is that if you have  
5 Tier I standards under the Florida Constitution, you have  
6 Tier II standards under the Florida Constitution, there's sort  
7 of a Tier Zero where you also have to ensure compliance with the  
8 federal constitution.

9 And so when you, as a lawmaking body, are trying to  
10 draw a map? You have to ensure compliance with Tier Zero,  
11 federal law; Tier I, Tier II under the Florida Constitution, and  
12 where there's a conflict, federal law prevails. It's the  
13 supremacy clause, right? I mean, that's -- that's his point.

14 JUDGE RODGERS: So what was the conflict?

15 MR. JAZIL: Your Honor, the conflict was illustrated  
16 in -- and this is the issue that's playing out in State court,  
17 right? So we've got a --

18 JUDGE RODGERS: I'm sorry, Mr. Jazil, but what was the  
19 conflict at the time this was happening in the law?

20 MR. JAZIL: Sure, Your Honor.

21 JUDGE RODGERS: I mean, the case -- just -- I'm asking  
22 about the law right now.

23 MR. JAZIL: Your Honor, the law --

24 JUDGE RODGERS: You said, you know, supremacy clause  
25 and federal law, Tier I, Tier II, then supremacy clause if

1     there's a conflict. What was the conflict?

2             MR. JAZIL: Sure, Your Honor. And so as applied to  
3     North Florida, the conflict was this: We have a -- and the  
4     conflict can be framed in a couple of ways.

5             One, we have a benchmark plan that goes from East to  
6     West, where you have over 80 percent of the population that's  
7     just coming from two counties. And remember, after the Fair  
8     Districting amendments passed, the squiggly lines, as we got  
9     into with Dr. Kousser in Duval County and Leon couldn't be  
10    explained by anything by race. So you have a map that is not  
11    compact, that sprawls a long line --

12            JUDGE RODGERS: I'm sorry. I'm not being clear.

13            I'm asking you to -- as my old civil procedure  
14    professor used to say, "Cite me a case." So a case that  
15    demonstrates the conflict here, in other words, that -- I'm  
16    looking for a case that would suggest that the Fair District  
17    Amendments were unconstitutional under the 14th amendment.

18            MR. JAZIL: Sure, Your Honor, and I want to be clear.  
19    Part of what we're doing is saying that the Fair Districting  
20    Amendments as applied to North Florida would be unconstitutional  
21    in the benchmark map.

22            JUDGE RODGERS: Fair enough, as applied.

23            MR. JAZIL: And so if -- we're saying that. And we're  
24    saying, okay, what would be the circumstances in which this  
25    would be unconstitutional?

1 JUDGE RODGERS: Wait. Cite me a case that tells me  
2 that.

3 JUDGE JORDAN: You can't cite a case, but that -- let  
4 me tell you what I understand why you can't.

5 MR. JAZIL: Sure.

6 JUDGE JORDAN: I don't want to put words in your  
7 mouth, but tell me if I'm got part of the theory right.

8 Your argument is that the Governor had the  
9 constitutional duty and the authority to believe, to conclude,  
10 as Mr. Newman was explaining, that the Fair District Amendment,  
11 as applied through the potential enactment of 8015 and 8019,  
12 would violate the federal constitution for different reasons.  
13 As a result, he vetoed those two maps, and he continued with  
14 that belief and assertion by submitting a map that he thought  
15 complied with the federal constitution.

16 But as he acted, there is no case. Because Mr. Newman  
17 said the Florida Supreme Court had not addressed the issue and  
18 that no federal court had, either, there is no case on the books  
19 one way or the other that addresses the constitutionality as  
20 applied of the Fair District Amendment's nondiminishment  
21 provision.

22 MR. JAZIL: Yes, Your Honor.

23 JUDGE RODGERS: I don't disagree with that. I guess  
24 my question was triggered by your statement about the supremacy  
25 clause, right? If there's a conflict, then the supremacy clause

1 prevails -- the federal law prevails under the supremacy clause.

2 And so are you saying the Governor's opinion created  
3 the conflict?

4 MR. JAZIL: No, Your Honor. What I'm saying is that  
5 the potential enactment of a map that would have gone East and  
6 West would have created the conflict. The potential enactment  
7 of a Duval-only map would have created the conflict.

8 And, Your Honor, if you're looking for a case just for  
9 the general proposition about, you know, the supremacy clause  
10 and how we don't have an obligation to follow provisions of  
11 state law if those provisions are in conflict with federal law,  
12 I'd just cite *Cipolline v. Liggett*. It's the tobacco case from  
13 the '90s, I'd like to say. It --

14 JUDGE WINSOR: Can I ask a question?

15 MR. JAZIL: Yes, Your Honor.

16 JUDGE JORDAN: Mr. Diskant says we don't need to  
17 decide whether the benchmark district or the new proposed one  
18 that was somewhat similar would violate equal protection. He  
19 said we don't need to decide that to resolve this case.

20 Do you agree with that?

21 MR. JAZIL: I do, Your Honor, because in this case,  
22 we're not testing whether or not the benchmark plan is or was  
23 unconstitutional. We're not testing whether or not the enacted  
24 plan could or couldn't straddle the line between nondiminishment  
25 and the federal equal protection requirements in a redistricting

1 context.

2 The sole issue in this case is whether or not the  
3 Governor acted with mal intent, discriminatory intent, and  
4 whether or not the legislature acted with discriminatory intent.

5 JUDGE WINSOR: So your position would be even  
6 Mr. Newman was incorrect with all this -- maybe that -- you  
7 know, evidence of pretext or something or other, but he can be  
8 wrong and you could still win, right?

9 MR. JAZIL: Yes, Your Honor. He can be wrong and we  
10 can still win in this court. He can't be wrong and us win in  
11 the Florida courts, because that's where this issue is squarely  
12 being played out, at the First District and presumably at the  
13 Florida Supreme Court. That set of courts, the state courts,  
14 will decide whether or not the Governor's straddling of the line  
15 between nondiminishment and equal protection was or wasn't  
16 valid.

17 JUDGE RODGERS: Do you agree, though, that in ruling  
18 in this case, either way, we have to address and consider the  
19 plaintiff's arguments about the implausibilities and  
20 inconsistencies in the Governor's position that he took in  
21 regards to Benchmark CD-5?

22 MR. JAZIL: Your Honor, I would submit that those  
23 aren't inconsistencies, but --

24 JUDGE RODGERS: No, I understand that, but we have to  
25 address that question.



1 MR. JAZIL: Yes, Your Honor. That would be part of  
2 the Arlington Heights analysis, I would suggest, that if you  
3 think that the evidence shows that everything the Governor was  
4 saying or doing is untethered to the actual arguments that are  
5 being put forward -- forget that the argument's wrong, but he's  
6 putting forward the arguments because he just wants to dismantle  
7 a Black district -- if that's the conclusion that this Court  
8 comes to, then that is significant for --

9 JUDGE RODGERS: I'm not suggesting any conclusions.  
10 I'm just asking if you agree that those -- under Arlington  
11 Heights, those are things we have to look at, we have to  
12 consider.

13 MR. JAZIL: That would be part of Arlington Heights  
14 mix. Yes, Your Honor. I'd say that.

15 JUDGE WINSOR: I just wanted -- just on the Mr. Newman  
16 thing, we've got the video. There's his veto letter. There's  
17 the letter to the -- internal memo to the Governor and then the  
18 separate memo to the legislature.

19 Is that sort of the totality of what he said that is  
20 in the record here?

21 MR. JAZIL: Yes, Your Honor. So you have his  
22 testimony. You have the advisory opinion request of the Florida  
23 Supreme Court. You have the memo to Chair Sirois at the Florida  
24 legislature, and you have the memo that accompanies the veto  
25 message. So that's the universe.

1 JUDGE WINSOR: Is that the same memo that we referred  
2 to as the memo to the Governor? That's the same one that goes  
3 with the veto letter?

4 MR. JAZIL: Yes, Your Honor.

5 JUDGE WINSOR: Okay.

6 MR. JAZIL: So that memo is attached with the veto  
7 message once the Governor vetoed the legislature.

8 JUDGE WINSOR: Thank you.

9 JUDGE JORDAN: Mr. Jazil, before you finish your  
10 argument -- you've got plenty of time.

11 But I want to tell you some of the things about your  
12 case, like I asked Mr. Diskant about his case, some of the  
13 things that give me some pause and give you a chance to address  
14 them.

15 So first, there is a contention by Mr. Newman in one  
16 of the memos -- I forget which one now -- that 8019, the  
17 so-called Duval-only map, is a problem under the Florida  
18 Constitution because it diminishes BVAP from 46 to 35 percent,  
19 right?

20 MR. JAZIL: Mm-hmm.

21 JUDGE JORDAN: Okay. Standing 3,000 feet apart, it  
22 seems to me that that sort of an objection would lead to  
23 something which fixes the problem, but the solution that's  
24 proposed diminishes BVAP even more. That's the problem for me.

25 MR. JAZIL: Okay.

1 JUDGE JORDAN: So if you say, "I object because of X,"  
2 and then I give you a solution, which is "X plus 2," that's a  
3 problem for me.

4 MR. JAZIL: Understood.

5 JUDGE JORDAN: It may not be determinative, but it's a  
6 concern.

7 I have a couple of others after that.

8 MR. JAZIL: So, Your Honor, let's walk through that.  
9 That language comes from the veto memo from Mr. Newman, and  
10 Mr. Newman's veto memo is explaining why the Governor can't sign  
11 the legislature's map, which includes 8019 as a primary  
12 configuration.

13 Now, had that map passed, the Secretary of States's  
14 office would be defending that map. The Secretary of State's  
15 office, working for the Governor, would be defending that map.  
16 And the defense would have been something along the lines of:  
17 We did not diminish under the Florida Constitution because this  
18 is still a performing district.

19 The problem with that defense was a couple fold.  
20 Number one, the Florida Supreme Court -- my friend showed you  
21 some snippets from apportionment I and VII. The Florida Supreme  
22 Court said slight diminishment in BVAP by itself is not enough  
23 to show that you -- you're not checking that box. Justice  
24 Canady, who took a more textualist approach, said diminishment  
25 is making anything less.

1           So remember, the Florida Constitution uses the word  
2 "diminish." It doesn't say "functional analysis"; it says  
3 "diminish." And the Florida Supreme Court in Apportionment 1  
4 said that the nondiminishment test borrows from Section 5, but  
5 it's not the same. It's textually different, and the Florida  
6 Supreme Court said we have an independent obligation to  
7 interpret these words.

8           The legislature, as part of its process as we were  
9 making our way through the entire legislative process, took the  
10 position that slight changes in BVAP from the benchmark to the  
11 enacted map are okay. More than slight changes are bad, because  
12 they show we're making less than -- they're sort of taking the  
13 Justice Canady approach.

14           And here, the justification that the legislature was  
15 putting forward that we would have had to defend in the  
16 executive branch was that if you take a BVAP from 45.6 percent  
17 to 35.2 percent, that's okay. And --

18           JUDGE JORDAN: But now you have to defend an even  
19 worse scenario.

20           MR. JAZIL: But, Your Honor, a couple points. That  
21 was going to be the legislature's justification if we put  
22 forward 8019. Right?

23           JUDGE JORDAN: Right.

24           MR. JAZIL: And we're not putting forward 8019  
25 anymore. We've taken 8019 and we've said we're not going that

1 route. We're going the route of a race-neutral map. We're  
2 drawing the districts race-blind, and, therefore, we're not  
3 using the nondiminishment test as sort of a justification for  
4 what it is we're doing.

5 And I can address that one other way, Judge. I want  
6 to answer your question here as best I can.

7 Your Honor, one of the other arguments that's playing  
8 out in the state court is this: That the use of the enacted map  
9 as a benchmark is inappropriate. It's not an appropriate  
10 benchmark, and here's why.

11 If the benchmark itself is unconstitutional, it is no  
12 benchmark at all. And we know this from *Allen v. Milligan*,  
13 *Clark v. Putnam* from the Eleventh Circuit, and the *City of*  
14 *Jacksonville* case. So we've got the United States Supreme  
15 Court, the Eleventh Circuit, and a District Court here in  
16 Florida saying that, look, if the -- if the starting point is  
17 race-based, you cannot use that as an appropriate benchmark and  
18 then take a minimal changes approach and say we've done our job,  
19 because if you're retaining the core of the racial gerrymander,  
20 that's really bad. That cannot be the appropriate starting  
21 point, the appropriate benchmark.

22 And that's the philosophical perspective that the  
23 Governor's been taking.

24 If you look at the advisory opinion request, at the  
25 very end of it, this is the first time the Governor laid out his

1 theory. This is before the Florida legislature. One of  
2 questions he asked at the very end that hasn't been highlighted  
3 in this case, but it's there, is whether or not benchmark  
4 District 5 can serve as an appropriate benchmark. That's the  
5 question that was also in the advisory opinion request.

6 And I think that's important, because if the  
7 Governor's theory is right and benchmark District 5 cannot be  
8 used as the appropriate benchmark, then we don't have to worry  
9 about the nondiminishment standard, because we don't have a  
10 district that we're using as a baseline from which we have to  
11 worry about diminishment.

12 JUDGE JORDAN: Then there's never any benchmark.

13 MR. JAZIL: In that instance there wouldn't be a  
14 benchmark. Remember, the Governor's concern for benchmark  
15 District 5 was focused on the fact that it was not compact, it  
16 was really long, and only race could explain the lines.

17 Contrast that with Congressional District 24, for  
18 example, Your Honor. It's not a majority Black district, but  
19 it's a very compact district in Southeast Florida. It doesn't  
20 have those same concerns. Right? So there, there's no --  
21 concern that we're running afoul of something. We don't have a  
22 concern that the benchmark is inappropriate. And there,  
23 Congressional District 24, which we contrast with long  
24 Congressional District 5, there is a benchmark that we have to  
25 use. There is a benchmark from which nondiminishment can and

1 should be measured.

2 JUDGE JORDAN: Okay. Let me ask you the other two  
3 questions, then.

4 The next question is the length of the district. So  
5 that was one of -- one, though, not the only complaint, about  
6 Benchmark CD-5, right?

7 And I forget the numbers now. Too many numbers. But  
8 the one that goes from 2 West.

9 MR. JAZIL: Okay.

10 JUDGE JORDAN: Right? Is it 2 -- no, the one that  
11 goes from 4 West. I'm sorry. That's a hundred and something --  
12 180 miles, something like that? Pretty close.

13 MR. JAZIL: Yes, Your Honor.

14 JUDGE JORDAN: So you haven't solved that problem. So  
15 that's concern number two.

16 MR. JAZIL: Sure, Your Honor. And there, I point you  
17 to Mr. Kelly's testimony. Mr. Kelly, as he -- I asked him a  
18 question on direct about, well, how do you explain the length of  
19 one of these districts that's 180 miles? And there, he started  
20 talking about how, look, if you've got a rural county and you're  
21 trying to find as many voters as you can to get to the magic  
22 number of 700,000-plus, you have to keep stretching it out until  
23 you get to the population number, because when we're drawing  
24 congressional maps, our margin of error is plus or minus one  
25 person.

1           And so if you're just starting from one end of the  
2 state, panhandle, less populated, you literally draw a line as  
3 far East as you can go until you get to the number you need to  
4 get to a congressional district, and then from there you start  
5 the next congressional district. You just draw a line as far as  
6 you need to go to get to that number.

7           And so when you look at some of those districts that  
8 are 180 miles or so, that's what's going on, Your Honor.

9           JUDGE JORDAN: And that was going on with the old  
10 Benchmark CD-5 too?

11          MR. JAZIL: Respectfully, Your Honor, it was not.  
12 Right? Because if you take a look at Duval County, we've  
13 established that Duval has a lot of people in it. It's so big,  
14 you can't even contain a congressional district there.

15          So unlike the rural parts of Florida where you just  
16 start on one end and you work your way through until you get to  
17 the magic number, in Duval, you don't need to do that. In  
18 Duval, there's no reason why you can't draw two districts in  
19 that area. In the enacted plan, 4 and 5 are on top of each  
20 other. They're stacked. In 8019, there's the PacMan shape.

21          But, again, in both instances, you're not going  
22 hundreds of miles to get to the relevant population.

23          JUDGE JORDAN: Okay. All right. So concern number  
24 three is the so-called PacMan shapes of --

25          MR. JAZIL: Sure.



1 JUDGE JORDAN: -- current CD-5 and current State  
2 District 5. From my visual perspective, the problem looks  
3 pretty close to me. They are both almost completely  
4 enveloped -- although in different ways, but they're enveloped  
5 on three sides. Both districts are. And there is a complaint  
6 about one -- and I know the process is different on the State  
7 legislative side, but no complaint, no challenge on the other.

8 MR. JAZIL: Sure, Your Honor. So a couple points.

9 For the State Senate maps, again, the Governor didn't  
10 have the veto --

11 JUDGE JORDAN: Veto power.

12 MR. JAZIL: -- power there, and as I've discussed, he  
13 can't file a lawsuit to challenge an enacted bill, so that's  
14 issue one.

15 Issue --

16 JUDGE JORDAN: Why not tell the legislature, Listen, I  
17 can't do anything about it, but you got a problem here with  
18 State District 5, State Senate District 5, because it's the same  
19 problem that your enacted proposed CD-5 8019 has. Just letting  
20 you know you got a problem.

21 MR. JAZIL: And, Your Honor --

22 JUDGE JORDAN: It's just silence.

23 MR. JAZIL: Your Honor, standing here, I can't tell  
24 you one way or the other whether or not that was communicated,  
25 right? Because what we have here for the most part are public

1 communications from the Governor's office to the legislature. I  
2 don't know whether there are any private communications to that  
3 effect. I just don't know.

4 Number two, Your Honor, this is an inherently  
5 political process where you've got two branches of the  
6 legislature and the Governor acting where the Governor has a  
7 more precise role. I think you have a greater chance, just as a  
8 matter of political realism, to move people.

9 The Governor also has a finite amount of political  
10 capital. He needs the legislature to pass all sorts of other  
11 bills for him. Perhaps he's picking his fights. There are an  
12 infinite number of political reasons for not putting pressure on  
13 the legislature publicly for those maps.

14 As far as the Duval-only district, Your Honor, in the  
15 veto message, the Governor points out that under the functional  
16 analysis, that district doesn't always perform. So if the test  
17 it --

18 JUDGE JORDAN: But it is a fully functioning district.

19 MR. JAZIL: Well, Your Honor, I don't know where one  
20 would draw that line. Right?

21 JUDGE JORDAN: Nobody's come in here and said that  
22 nine out of 14 is not performing.

23 MR. JAZIL: No one's come in here and said nine out of  
24 14 is not performing. I will concede Dr. Barreto said nine out  
25 of 14 is performing.

1 But I note this: Again, the Florida Constitution  
2 Article 20A talks about diminishment. It doesn't talk about  
3 functioning districts. So if you're reducing the ability of a  
4 district to perform from 14 out of 14 to nine out of 14 times,  
5 the Governor's position, shared by Democrats, was that that is  
6 diminishment.

7 And with the Court's indulgence, I can play two short  
8 clips from Democratic legislators who say that.

9 If we could play Mr. Geller's clip please.

10 *(Video recording played in open court as follows.)*

11 *Thank you. I don't believe that the change in the*  
12 *proposed minority district contained wholly within Duval County*  
13 *is constitutionally compliant in that I think that it represents*  
14 *a substantial dilution or diminishment of the minority's ability*  
15 *to elect representatives of that community's own choice. In*  
16 *that sense, I believe that proposed map is constitutionally*  
17 *deficient.*

18 *(End of video recording.)*

19 MR. JAZIL: Can we play Skidmore, please.

20 *(Video recording played in open court as follows.)*

21 *I am very concerned about the primary map, District 5,*  
22 *because it does seem to, me based on language that the House*  
23 *actually used, that it does reflect diminishment. And I*  
24 *recognize that the secondary map is there in case the Court does*  
25 *rule that way, but to me, I feel like we should have just gone*

1     *forward with the secondary map.*

2             *(End of video recording.)*

3             JUDGE JORDAN: Who was that? I'm sorry.

4             MR. JAZIL: It was Representative Skidmore, was the  
5     second.

6             JUDGE JORDAN: Skidmore?

7             MR. JAZIL: Skidmore, yes, Your Honor.

8             And the first clip was Representative Geller.

9             JUDGE JORDAN: Geller. I got that one.

10            Okay. Those were my questions. Thank you.

11            MR. JAZIL: Thank you, Your Honor.

12            Your Honor, with that, I'd like to just walk through  
13     the Arlington Heights factors as laid out by both the United  
14     States Supreme Court and the Eleventh Circuit.

15            But before I do, in an earlier order from this Court,  
16     there was some question about whether or not this Court is bound  
17     by Eleventh Circuit precedent when it's sitting as a three-judge  
18     panel and the appeal goes not to the Eleventh Circuit, but to  
19     the U.S. Supreme Court.

20            I commend for the Court's consideration a case titled  
21     *Alabama Legislative Black Caucus v. Alabama*. This is the  
22     District Court iteration of that case, 988 F.Supp. 2D, 1285, and  
23     the pin cite is 1305, where the three-judge panel, in citing  
24     Fifth Circuit cases under *Bonner v. Pritchard* would be binding  
25     for the proposition that the Eleventh Circuit case law does bind

1 the three-judge panel.

2 JUDGE JORDAN: Why should that be?

3 MR. JAZIL: Why should that be?

4 JUDGE JORDAN: I mean, it's a three-judge court -- and  
5 I know there are reasonable arguments on both sides. It's a  
6 hard question, I think.

7 But if you have -- a three-judge Court is a creature  
8 of statute, and the appeal is only to the U.S. Supreme Court.  
9 So in terms of, like, general federal courts theory, what should  
10 be the body of binding precedent?

11 MR. JAZIL: Your Honor, I take your point. If this  
12 were -- so we had the legislative privilege fight in this case  
13 earlier, where the appropriate remedy would have been to -- had  
14 we lost it and gone to the -- we would have gone to the Eleventh  
15 Circuit on a writ of mandamus would be the appropriate vehicle,  
16 and because the remedy was from the Eleventh, in that instance,  
17 I would argue it's clearer that the Eleventh Circuit case law  
18 would be binding.

19 But as you point out, from here the appeal goes to the  
20 U.S. Supreme Court, so the logic of what I'm saying for the  
21 discovery issue would suggest that the U.S. Supreme Court would  
22 be binding and not the Eleventh Circuit.

23 I have been thinking about this, Your Honor --

24 JUDGE JORDAN: It's a hard issue.

25 MR. JAZIL: I have no clear answer. I'm just

1 presenting the best case --

2 JUDGE JORDAN: No, I get it.

3 JUDGE WINSOR: But your best case is a Fifth Circuit  
4 case that you're saying binds us -- it's sort of a circular  
5 argument, isn't it?

6 MR. JAZIL: Your Honor, it gets a little worse.  
7 There's a District of Georgia case that says that the Fifth  
8 Circuit case binds. But it's the best I could find, and so...

9 JUDGE WINSOR: Where does it end up making a  
10 difference in this case? Just for the Arlington Heights factor?  
11 Is that where you go with that, the extra two or three that came  
12 out of the --

13 MR. JAZIL: Well, Your Honor, I'd say that *Greater*  
14 *Birmingham* and *League of Woman Voters* both, especially on the  
15 history part, are better than just reading *Arlington Heights* in  
16 the abstract.

17 And then also, on the presumption of good faith, I  
18 think the *Greater Birmingham* case, especially, if you're trying  
19 to give teeth to this concept of presumption of good faith,  
20 *Greater Birmingham* is the best case out there for it.

21 *Abbott v. Perez* talked about the presumption of good  
22 faith. This is a U.S. Supreme Court case. And in *Abbott*, it  
23 was Texas had a map. It got thrown out. Texas comes up with  
24 another map. The three-judge panel says, well, Texas did bad  
25 things before, so they must be doing bad things now, and the

1 Supreme Court said that's not appropriate; we have to apply a  
2 presumption of good faith.

3 But *Greater Birmingham*, to me, adds teeth to that.  
4 And *Greater Birmingham*, when we work through the eight factors  
5 that *Greater Birmingham* went through, it supports my position  
6 that the presumption of good faith is really a weight placed on  
7 a scale that was previously in equipoise. And so to overcome  
8 that weight, the plaintiffs have a hard road to hoe for each of  
9 the eight factors. There were six *Arlington Heights*, two more  
10 in *Greater Birmingham*.

11 So that's where I think it makes a difference, and  
12 that's why I'd like to keep making the argument.

13 Your Honor, starting with the impact factor, my  
14 friends showed you a series of maps over time in North Florida,  
15 various configurations of what they say were Black performing  
16 districts. And we went through this with Dr. Kousser.

17 Before the Fair Districting Amendments, you could take  
18 partisanship into account. You could take incumbency into  
19 account, and you could rely on this amorphous notion of  
20 communities of interest to draw these districts.

21 After the Fair Districting Amendment, so after 2010,  
22 you cannot take partisanship into account in Florida. You  
23 cannot take incumbency in account in Florida. And communities  
24 of interest, that plays third fiddle to compactness, adherence  
25 to political and geographic boundaries.

1           So as a practical matter, communities of interest is  
2 no longer a thing in Florida that you can hang your hat on if  
3 you can't first check the box for compactness, adherence with  
4 political or geographic boundaries.

5           JUDGE RODGERS: Mr. Diskant argues that it's still  
6 relevant under Supreme Court case law.

7           MR. JAZIL: Your Honor, the U.S. Supreme Court case  
8 law says that traditional redistricting criteria can be used.  
9 Traditional redistricting criteria include communities of  
10 interest.

11           However, we are giving weight to the Florida  
12 Constitution, right? The Florida Constitution can say, without  
13 violating the strictures of federal equal protection, that one  
14 traditional redistricting criteria is off the board. Florida  
15 Constitution actually said three traditional redistricting  
16 criteria are off the board. Partisanship was also a traditional  
17 redistricting criteria that after the Fair Districting  
18 Amendments, Florida said you can't use it.

19           Incumbency protection was a traditional redistricting  
20 criteria that Florida said you can't use. And as --

21           JUDGE RODGERS: If there's a conflict between the  
22 federal law on this issue and state law, now we are to follow  
23 state law, not federal?

24           MR. JAZIL: No, Your Honor. I'm not saying there's a  
25 conflict. There is --



1 JUDGE RODGERS: Okay.

2 MR. JAZIL: -- no conflict in federal law. Federal  
3 law, when it talks about traditional redistricting criteria,  
4 talks about it in the context of, okay, we've got a district.  
5 Did race predominate? No, race did not predominate if someone  
6 followed traditional redistricting criteria like partisanship,  
7 incumbency, adherence to political or geographic boundaries,  
8 keeping communities of interest --

9 JUDGE RODGERS: So federal law doesn't say you should  
10 or you must --

11 MR. JAZIL: No, it doesn't, it doesn't. Federal law,  
12 read in context, is simply saying that these are other possible  
13 explanations to defeat a claim of race predominating.

14 JUDGE RODGERS: Okay. I understand.

15 MR. JAZIL: And in Florida, those other traditional  
16 redistricting criteria aren't on the table, so when we're  
17 looking at these long districts in Florida pre the Fair  
18 Districting Amendments, they can be justified by a host of  
19 things.

20 But in Dr. Kousser's cross-examination -- this is in  
21 the transcript, page 445, lines 5 through 20 -- he agreed with  
22 me that if you take these traditional redistricting criteria off  
23 the board, they're not to be considered when you're drawing  
24 lines. When you look at the Benchmark CD-5, the squiggly lines  
25 in Duval, the tentacles, as Dr. Johnson called them, and the

1 hook with the finger in Tallahassee, race is the justification  
2 for them. Those shapes exist because of race. We're not trying  
3 to keep an incumbent in his or her district. We're not trying  
4 to keep partisans together.

5 So to me, that was very telling. That is Dr. Kousser  
6 actually agreeing with the Governor's theory. That's  
7 Dr. Kousser agreeing that, look, when you look at the benchmark,  
8 race predominated.

9 And if you look at the benchmark, you know what you  
10 can't do if race predominated? You can't just retain its core  
11 shape. You know what cases say that? *Allen v. Milligan*, U.S.  
12 Supreme Court. *Clark v. Putnam County*, Eleventh Circuit. *City*  
13 *of Jacksonville*. Because if race predominates, we can't just  
14 perpetuate a racial gerrymander.

15 And the Wisconsin case from 2022 from the U.S. Supreme  
16 Court says that it matters not that the State Supreme Court came  
17 up with the racial gerrymander; it's a racial gerrymander.  
18 Strict scrutiny applies.

19 JUDGE WINSOR: I thought you were talking about  
20 impact, though. Was that part of that? Or maybe I missed --

21 MR. JAZIL: Your Honor, I went with the flow.

22 JUDGE WINSOR: Okay, fine.

23 MR. JAZIL: I apologize.

24 JUDGE WINSOR: So that was not an argument about  
25 impact, though?

1 MR. JAZIL: It was not an argument about impact. But  
2 Dr. Kousser is sort of telling us about the impacts, and to me,  
3 he doesn't get us there. Then we get to Dr. Barreto and his  
4 discussion --

5 JUDGE JORDAN: Did this have an adverse impact on  
6 Black minority groups in North Florida or not?

7 MR. JAZIL: Your Honor, I don't know is the honest  
8 answer. And the reason why I don't know is because we go  
9 through the functional analysis from Dr. Barreto that's being  
10 used as support for this idea that there is an adverse impact on  
11 African Americans. And the functional analysis, you'll recall,  
12 a critical component of the functional analysis that one must do  
13 is a racially polarized voting analysis, right? That's like a  
14 key ingredient that's baked into every one of the functional  
15 analysis tests.

16 And then Dr. Barreto, for his functional analysis  
17 test, defined North Florida as Escambia County all the way to  
18 Duval County South to Marion county, so he's defining his area  
19 in such a way that we're just having a hard time figuring out as  
20 part of this functional analysis whether or not -- and this was  
21 the point of Dr. Owens' testimony -- whether or not it's race or  
22 whether or not it's partisanship for the Congressional District  
23 5.

24 Because we're not doing apples-to-apples comparison.  
25 Dr. Barreto has all of North Florida from Escambia to Duval

1 South to Marion. Congressional District 5 never had that kind  
2 of footprint. And I think that's important, Your Honor, and  
3 that goes back to another point in *Bartlett v. Strickland*.

4 So the former Congressional District 5 was a crossover  
5 district, right? You didn't have majority Black voters. It was  
6 Black voters combining with other voters to elect a candidate.

7 And the point of the lawsuit in *Bartlett v. Strickland*  
8 was, hey, if we have crossover districts, are they protected by  
9 Section 2? And the Court said, No, they're not. That was a  
10 holding of the Court.

11 And if you look at the plurality discussion from  
12 Justice Canady joined by Justice Alito and Justice Roberts,  
13 there's a discussion about how, with crossover districts, it's  
14 very difficult for us to figure out what the driving force here  
15 is. We're drawing these lines that it's not entirely clear are  
16 they being determined by race or something else.

17 And that's the point that --

18 JUDGE WINSOR: But before you had, by all accounts, a  
19 district that was drawn for racial purposes and did perform for  
20 Black people a hundred percent of the time, and you take that  
21 away. I mean, it's just one factor, but if the argument is  
22 there may or may not be an adverse impact here, that seems like  
23 a difficult argument, isn't it?

24 MR. JAZIL: Your Honor, I see your point. And what  
25 I'm trying to say is that based on the expert analysis that was

1 presented, we can't quite get there. But if the point is we  
2 have a Black performing district that performed 14 out of 14  
3 times based on the functional analysis and now we have districts  
4 that, according to Dr. Barreto's functional analysis, two,  
5 three, and four performed one out of 14 times, does that show  
6 that it's likely to have an adverse impact? Yes. I think it's  
7 likely to show that. But has he proven it through a functional  
8 analysis that does an apples-to-apples comparison? No.

9 And practically speaking, if we look at the 2022  
10 election, did Al Lawson, a Black candidate, lose? Yes.

11 And so if I put all those things together...

12 JUDGE WINSOR: I mean, impact in *Arlington Heights* --  
13 there's always -- you know, in all these cases, there's always  
14 some other factor that could be related to something.

15 But, I mean, it sounds like if you're right, then the  
16 impact prong or impact inquiry would just mean nothing in these  
17 cases.

18 MR. JAZIL: Your Honor, the impact inquiry is more  
19 than just, you know, did it have an adverse impact on African  
20 Americans? As is further explicated by the cases, it's the  
21 foreseeability of the impact and there's, I think, at least one  
22 other factor that touches on impact.

23 So if I'm -- if I'm using impact as a broad category  
24 to cover all those factors, then I don't think all of those  
25 factors are checked.

1 But, yes, if we're defining impact to just be a -- was  
2 there an adverse effect on African Americans because a  
3 14-out-of-14 performing district was no longer there and an  
4 African American congressman is no longer there, yes, that point  
5 would be checked. But if impact is being defined as  
6 foreseeability of the impact, whether or not certain things  
7 would happen or wouldn't happen, I don't think that would be  
8 checked.

9 JUDGE WINSOR: Foreseeability is a separate factor,  
10 isn't it? Or maybe it's not.

11 MR. JAZIL: Well, it is a separate factor, but it's  
12 foreseeability of the impact is how I read it, and if that's one  
13 framing of it, then I don't think that one would be checked,  
14 especially if we're drawing a race-neutral map and the  
15 legislature did not do a functional analysis.

16 And I come back to this functional analysis point.  
17 Yes, Representative Leek said what he said during the floor  
18 debate as a bill was being passed at the end of a special  
19 session. But you also heard from Alex Kelly that during the  
20 legislative process, the functional analysis where you know  
21 whether or not a certain district will or will not perform was  
22 not provided by the legislative staff. In the functional  
23 analysis that we actually have, the packet for the enacted map  
24 does not have a functional analysis for CDs 2, 3, 4, 5, the  
25 North Florida region. And to me, that goes to the

1 foreseeability of the impact prong.

2 Also, what goes to the foreseeability of the impact  
3 prong is Dr. Kousser's testimony. Dr. Kousser said he tends to  
4 use 30 percent as sort of a rough rule of thumb to see whether  
5 or not you have a Black performing district. And the point on  
6 cross-examination with him was if you have a 30 percent rule of  
7 thumb and you're drawing a district with a BVAP of 32 percent,  
8 you're doing a pretty bad job trying to keep Black folks out of  
9 Congress if that's your rule of thumb and there's no functional  
10 analysis.

11 And I stand by that, because that, to me, cuts against  
12 this notion of foreseeability and, broadly speaking, intent. If  
13 we're drawing districts with BVAPs in the high 30s, then to me,  
14 that means that we are, A, doing this race-blind; B, we don't  
15 have foreseeability of the adverse impact on African Americans.

16 Now, the argument was made and will be made, I'm sure,  
17 that Mr. Kelly had a rough rule of thumb, 40 percent. And what  
18 I got out of the colloquy with Judge Jordan was he was trying to  
19 comply with what he understood the nondiminishment standard to  
20 be the way the Florida legislature was applying it. Slight  
21 deviation in the numbers is okay. Big deviations, 10 percentage  
22 points, which is what the deviation would be from the former  
23 CD-5 to CD-4, not okay. As a map drawer, not a lawyer, that  
24 seemed to be his rule of thumb. And --

25 JUDGE JORDAN: But then again, it goes back to my

1 other question. He sort of went nuclear, because he went way  
2 below the 10 percent. So it's like here's a problem, I want to  
3 avoid this problem, and I'm going to avoid it by making the  
4 problem worse.

5 I just can't get my head around that. Maybe it's just  
6 me.

7 MR. DISKANT: Sure, Your Honor. So I guess --

8 JUDGE JORDAN: Okay. I have this nondiminishment  
9 provision of the Florida Constitution. But if I go below 5, 6,  
10 7 percentage points, I'm already violating the nondiminishment  
11 standard, so I'm not going to worry about it anymore.

12 But his solution is to go diminish even more. That's  
13 just -- it's difficult for me to understand, I guess.

14 MR. JAZIL: So, Your Honor, I guess I would say that  
15 his solution was to put race aside and to draw a race-blind  
16 and --

17 JUDGE JORDAN: And ignore nondiminishment as a factor.

18 MR. JAZIL: And ignore nondiminishment as a factor  
19 because of the Governor's theory that an improper benchmark  
20 can't be a factor.

21 And remember, he testified -- and this is in his  
22 legislative testimony too -- early on in the process, when he  
23 got involved, early on in the process, in January, to see the  
24 art of the possible is how, I believe, his legislative testimony  
25 is framed. He was looking to see if you can draw a Black



1 performing district in the compact way while still complying  
2 with the nondiminishment standard. And at the time, the  
3 legislature was taking the same position the Governor ultimately  
4 took in his veto message and said the nondiminishment standard  
5 is a couple of percentage points below.

6 We're not looking at functional analysis; we're just  
7 looking at, hey, are we diminishing at all the ability to elect?  
8 And that's when he was trying to do the art of the possible and  
9 he gave up, because he was trying to -- he was trying to get to  
10 a number in the 40s, not 35.2 percent, which is what Duval had,  
11 right? And so he was trying to get to a number in the 40s,  
12 which is why he was exploring areas in Palatka and Gainesville  
13 to try to see if he can get to that number.

14 Your Honor, I would like to turn you around on this,  
15 so if I'm not making progress, let me know if I'm making  
16 progress --

17 JUDGE JORDAN: No, no, I have --

18 MR. JAZIL: -- answer questions.

19 JUDGE JORDAN: I haven't settled on anything, and we  
20 haven't talked about this, and we certainly haven't reviewed  
21 every bit of evidence. But I just wanted to let you know where  
22 a couple of my hangups were with parts of your case, not all of  
23 your case. You've got stuff going in your favor, at least from  
24 my perspective, like the presumption of legislature good faith,  
25 the ability of the government to test a legal theory or the

1 like, but you've got some things that -- your case has some  
2 things that concern me.

3 MR. JAZIL: Understood, Your Honor.

4 JUDGE RODGERS: And, Mr. Jazil, could you cite to some  
5 of the more prominent cases on the issue of the adverse impact  
6 and foreseeability? Adverse impact -- and I'm not using those  
7 terms interchangeably, but we were in that discussion and I  
8 wanted to ask you if you could refer me to some of the, again,  
9 more prominent cases in that area.

10 MR. JAZIL: Sure, Your Honor. Two recent ones that  
11 come to mind are *Greater Birmingham Ministries* --

12 JUDGE RODGERS: Right.

13 MR. JAZIL: Which is 992 F.3d 1299.

14 JUDGE RODGERS: Okay.

15 JUDGE JORDAN: And the second one is *League of Women*  
16 *Voters v. Florida Secretary of State*, 66 F.4th 905.

17 JUDGE RODGERS: Okay, and any Supreme Court cases?

18 MR. JAZIL: Your Honor, *Arlington Heights* would be the  
19 one Supreme Court case that I cite to.

20 JUDGE RODGERS: All right. Thank you.

21 JUDGE JORDAN: Mr. Jazil, there are not holdings, but  
22 language in some 1990s, early 2000s Supreme Court cases which  
23 say that state legislatures, unlike federal courts, are not  
24 limited in the same way in taking race into account and  
25 redistricting. I forget the name of the case right now.

1           Your position is that that language, for whatever it  
2           was worth way back when, has been obliterated and abrogated by  
3           more recent developments?

4           MR. JAZIL: Yes, Your Honor. And I think you're  
5           referring to the good reasons test that some of those cases  
6           refer to. And I think if we look at the progression of cases,  
7           especially *Cooper v. Harris*, I think that good reasons approach  
8           to justifying something has taken a backseat, and the Courts  
9           are -- at least the U.S. Supreme Court is taking a harder look  
10          when it comes to applying strict scrutiny.

11          JUDGE JORDAN: There's also -- I mean, there's also --  
12          and I understand despite your belief that we should follow  
13          Eleventh Circuit law, there's an old Fifth Circuit case, which  
14          turns that language of the older Supreme Court cases into  
15          Eleventh Circuit holding. And I forget the name of it now too.  
16          Should have written it down. And it says that states can take  
17          race into account in districting as long as it's not the  
18          predominant factor.

19                Do you think those cases are also no good anymore too?

20          MR. JAZIL: No, Your Honor. I think those cases are  
21          still good law.

22          JUDGE JORDAN: Okay.

23          MR. JAZIL: And the way it would work is -- I think  
24          conceptually, this is how it should work.

25                The first question is to ask is: Are we being

1 race-conscious? If the answer is yes, then if we're being  
2 race-conscious, is race predominating?

3 How do we know whether or not race predominates?  
4 Well, we look to see what other traditional redistricting  
5 criteria could help justify the thing that's being done.  
6 Traditional redistricting criteria are things like partisanship,  
7 incumbency, communities of interest, compactness, adherence to  
8 political or geographic boundaries.

9 And in Florida, if we're going through that analysis,  
10 if we're saying, okay, we're going to be race-conscious but  
11 we're saying that race didn't predominate, some of those  
12 justifications for race not predominating have been taken off  
13 the table. And if those justifications have been taken off the  
14 table, the question is: What's left?

15 And in Florida, what's left is compactness, adherence  
16 to the political or geographic boundaries. That's pretty much  
17 it. I mean, if that's -- if we've -- we've decided we're going  
18 to be race-conscious and then we're going to say race didn't  
19 predominate, then we have to justify why it is the shapes on our  
20 map look the way they do.

21 And what you heard from Mr. Kelly is that he was laser  
22 focused on how compactness and adherence to political and  
23 geographic boundaries. So when he was drawing the districts  
24 that he drew, race didn't predominate. If the Florida  
25 legislature -- if we take Congressional District 24, for

1 example, in Congressional District 24, which is in Southeast  
2 Florida -- this is the Black performing district in Southeast  
3 Florida -- the Florida legislature's saying we're complying with  
4 the nondiminishment standard, then the Florida legislature's  
5 checking the box on being race-conscious, but then the Florida  
6 legislature is also checking the box on compactness, adherence  
7 to the political or geographic boundaries and race, which is  
8 fine, because at that point, according to the old Fifth Circuit  
9 case law, which is still good law, and I think the U.S. Supreme  
10 Court case law aligns with it, you no longer have race  
11 predominating because you have all these other factors that are  
12 also being checked.

13 And that's part of reason the Governor was so adamant  
14 that Benchmark District 5 wasn't like Congressional District 24,  
15 where you couldn't check those other boxes, the only box left to  
16 check if you were being race-conscious it was race predominating  
17 and -- not to get back to that.

18 Your Honor, I'd like to move on to the historical  
19 analysis. And there, Dr. Kousser said it was extraordinary that  
20 the Governor of Florida asked for an advisory opinion and it was  
21 extraordinary that the Governor of Florida vetoed a map and it  
22 was extraordinary that there were special sessions had. But  
23 then he agreed with me that the Governor of Florida had, in  
24 fact, previously asked for an advisory opinion, that there were  
25 several special sessions held.

1           And Dr. Kousser, in his historical analysis, conceded  
2 he didn't go to the Florida archives. He never went to the Bob  
3 Graham Center at the University of Florida. He never went  
4 through Lawton Chiles's papers.

5           And Bob Graham -- I asked him a question. It was like  
6 "Bob Graham was known to be a great note-taker. He carried a  
7 small little booklet where he kept track of everything he did  
8 all day." And those are a treasure trove for historians. But  
9 he never went back and saw whether or not Bob Graham, according  
10 to a newspaper article, had a private meeting and came to a  
11 private resolution with a Florida House and Senate member. He  
12 didn't go to see whether or not Bob Graham had submitted a map.

13           And I'd actually like to put up DX104. This is  
14 something that was admitted into evidence, but it was never  
15 published.

16           Next page, please.

17           This is just a certified copy, and this is a packet  
18 from the Florida House of Representatives Committee on  
19 Reapportionment from 1991.

20           If we go to page 4 and 5, please.

21           THE VIDEO TECHNICIAN: As marked?

22           MR. JAZIL: Yes.

23           And if we start with the last paragraph, it's giving  
24 us some historical context. This is a time when the  
25 rural-dominated legislature was dubbed "The Pork Chop Gang."

1           And if we can look at what Governor Collins said on  
2 page 5, we see that "The Governor called the legislature back  
3 for a special session. The legislature passed two apportionment  
4 plans, which Collins vetoed."

5           And in the last paragraph on page 5, second sentence:  
6 "The bitterness reached extraordinary heights in the 1957  
7 session when the fate of practically the whole legislation  
8 seemed to rest entirely on where sponsors stood on  
9 reapportionment."

10           And I think that that's important as both a historical  
11 point and as a political realism point. If you're trying to  
12 work with the other branch who are independent actors, there's a  
13 give and take, and so you can't get everything you want. Even  
14 if you don't like the Senate maps and how some of them might be  
15 configured, even if you don't like the House maps and how some  
16 of them might be configured, part of it is you try to get what  
17 you can.

18           And if we go to page 25 of this document.

19           Your Honors, pages 25 and -- pages 25 through 27 list  
20 all the special sessions that were called from 1955 through  
21 1982. And by my count, there were one, two, three four, five --  
22 there's 17 special sessions called during this period to address  
23 redistricting.

24           So there's nothing unusual about the process seen in a  
25 historical perspective or the process seen in the perspective of

1 the sequence of events that led to it. At every point in the  
2 juncture, the actors were acting within their constitutional  
3 confines. The legislature was doing what it had the power to  
4 do. The Governor was doing what he had the power to do. There  
5 was a dispute. They passed a map shortly before this Court,  
6 sitting in an impasse capacity, was to draw a plan.

7 And that sequence of events doesn't show anything  
8 nefarious. That sequence of events, seen through the lens of a  
9 presumption of good faith, shows a political compromise.

10 And we can play Senator Rodriguez's point to that  
11 effect:

12 *(Video recording played in open court as follows.)*

13 *Well, I would go back and say -- and I said this*  
14 *earlier. Anytime you're passing legislature, it's a bill that*  
15 *requires three to tango. You need the House, the Senate, and*  
16 *the Governor to approve it. The House and Senate agreed on a*  
17 *map, but the Governor never did, and then he vetoed that map,*  
18 *which is he had indicated he would do, which is why we've come*  
19 *back to the drawing board to come up with another map that will*  
20 *pass the House, the Senate, and be signed by the Governor.*

21 *What we've seen is the Governor has provided a map*  
22 *that takes ten districts off the map that we drew, which is*  
23 *Southeast Florida and the panhandle, and if takes districts*  
24 *through Central Florida that were on the House map that they*  
25 *drew, and then the Governor's drawn the districts -- the*



1 executive office of the Governor has drawn the districts in  
2 Northeast Florida and into portions of Central Florida to  
3 address the constitutional concerns that he had with the map.  
4 That's why it's been referred to as a compromise map, because a  
5 portion of it you can find in maps that passed the Senate; a  
6 portion of it you can find in maps introduced by the House, and  
7 a portion of it were drawn by the executive office of the  
8 Governor.

9 (End of video recording.)

10 MR. JAZIL: Your Honors, I realize I'm running out of  
11 time. Beg the Court's indulgence. May I have five minutes to  
12 briefly touch on standing?

13 JUDGE JORDAN: Sure.

14 MR. JAZIL: So, Your Honor, we had two organizational  
15 plaintiffs testify and we had two individual plaintiffs testify.  
16 The individual plaintiffs were Ms. Inman and Mr. Clark. Neither  
17 of the individual plaintiffs submitted a voter ID card to  
18 substantiate where they live and to assure us beyond any doubt  
19 whether or not they'd be affected.

20 Ms. Inman and Mr. Clark both testified that they have  
21 a personal relationship with Congressman Lawson. Congressman  
22 Lawson is a Tallahassee fixture. He's in the community.  
23 Mr. Clark goes to church with him. Ms. Inman-Johnson runs into  
24 him as well.

25 JUDGE JORDAN: Are you saying there's an insufficiency

1 of evidence there or just these are reasons we should find  
2 Mr. Clark was not being honest about where he lives?

3 MR. JAZIL: Your Honor, I would frame it as Mr. Clark  
4 may have been confused about where he lives. And I'd like to  
5 take some of the testimony from Ms. Inman-Johnson to make the  
6 point.

7 JUDGE RODGERS: Did you all make a production request  
8 for his ID card?

9 MR. JAZIL: Yes, Your Honor, we asked --

10 *(Off-the-record discussion.)*

11 MR. JAZIL: Your Honor, my colleague tells me he does  
12 not recall, so -- but I --

13 JUDGE RODGERS: You got another update.

14 MR. JAZIL: But I will note a couple things.

15 Standing is their burden. Ms. Inman-Johnson said she  
16 feels that Congressman Lawson was her representative, even  
17 though she didn't live in the same district as him. Mr. Clark  
18 testified that he doesn't know any of his other representatives.  
19 Mr. Lawson is someone with whom he felt a bond, a connection,  
20 because Mr. Clark goes to church with Congressman Lawson.

21 And so I point that out to note that it's their burden  
22 of establish standing. Standing could have been easily  
23 established with a voter ID card put in evidence. It wasn't.

24 Ms. Inman-Johnson's testimony about what people  
25 consider -- who people consider to be their representative

1 colors Mr. Clark's testimony as well, because Mr. Clark could  
2 not name his other elected officials, but he felt like  
3 Mr. Lawson represented him, perhaps not in the congressional  
4 representation sense of the word.

5 JUDGE RODGERS: Which I think he forget his address or  
6 his -- district.

7 MR. JAZIL: Your Honor, it's possible he forgot his  
8 district. Standing here, I can't tell you who my Florida House  
9 member is. For example --

10 JUDGE RODGERS: I guess I'm just -- along the lines of  
11 what Judge Winsor just asked, are you asking us to find that his  
12 testimony was not credible or to be --

13 MR. JAZIL: Yes, Your Honor.

14 JUDGE RODGERS: -- relied upon?

15 MR. JAZIL: It's that point. It's the credibility  
16 points. It was incredible in light of the fact that folks are  
17 taking the word "representative" to mean this person is someone  
18 who shares my values versus this person is someone who actually  
19 represents me.

20 JUDGE WINSOR: Well, one witness did that, but  
21 Mr. Clark said, "I'm in his district. I've been in his  
22 district." He testified to that.

23 Assume for a second that we find that credible. And  
24 that he would have standing, correct?

25 MR. JAZIL: Then he would have standing.

1 JUDGE WINSOR: And one thing I wanted to address: I  
2 don't understand the argument -- the standing goes to the claim.  
3 There's one claim here, so he has standing for the claim.

4 You're talking in your papers about a remedy or  
5 standing to pursue a remedy. That way the remedy would be later  
6 if you're unsuccessful here, right?

7 MR. JAZIL: Yes.

8 JUDGE WINSOR: So are you saying he couldn't bring the  
9 claim without a bunch of co-plaintiffs who live in other places?  
10 If he just wanted -- Mr. Clark just wanted to bring to the same  
11 claim that all the plaintiffs had brought together, he couldn't  
12 do that because he doesn't live in all the different districts?

13 Or -- do you understand my question?

14 MR. JAZIL: I do understand your question, Your Honor.

15 JUDGE WINSOR: Okay.

16 MR. JAZIL: So your question is: Can he bring the  
17 claim if the remedy might be something a little different?

18 JUDGE WINSOR: Well, your point is they need to have a  
19 plaintiff in every district that would be affected by the  
20 presumed remedy, which I assume you're saying would be an  
21 implementation of something like the benchmark. And it seems  
22 like if you're right, that would mean that a single plaintiff  
23 couldn't bring this claim. It would seem like if he's around by  
24 the map as it was drawn, then he has standing, and then if he  
25 succeeds on the merits, then the remedy is whatever the remedy

1 turns out to be, right?

2 MR. JAZIL: Sure, Your Honor. So --

3 JUDGE WINSOR: So I guess I'm not seeing why it would  
4 matter. I understand you have some points about, well, they  
5 don't have someone in District 4 or something -- and maybe they  
6 don't, and I think you've got some good arguments on that.

7 But I'm not sure that it ends up mattering one bit.

8 MR. JAZIL: So, Your Honor, I'd put my arguments in  
9 the redressability prong of standing. And for the  
10 redressability prong of standing, the plaintiffs have to show  
11 that there's some remedy available to them at the end of this,  
12 and they have to show that through the course of the trial.

13 During the course of the trial, the plaintiffs have  
14 not shown that there is a remedy for the cracking of voters, as  
15 they've characterized it, that would benefit Mr. Clark. The  
16 remedy for the cracking of the voters would be a sufficiently  
17 compact Black performing district.

18 And the plaintiffs, to me, have seemed to put all  
19 their chips into this 8019 configuration, right, where 8019 is  
20 the district that would be it. That would be the district that  
21 performs, that they can live with, et cetera. Problem is for  
22 Mr. Clark, if Mr. Clark is the one that we're hanging all of our  
23 standing hats on, that doesn't help Mr. Clark. Mr. Clark is way  
24 off in the Leon County. And so --

25 JUDGE WINSOR: He goes from being in an

1 unconstitutional district to a constitutional district, though,  
2 if he's right on the merits.

3 MR. JAZIL: Your Honor, his district wouldn't change  
4 if he's right on the merits, right? Because his district would  
5 not be reconfigured.

6 JUDGE JORDAN: You're saying if we keep -- if we find  
7 against you, and if we declare a remedy, and that remedy is the  
8 8019 Duval-only map, Mr. Clark's situation doesn't change?

9 MR. JAZIL: Yes, Your Honor. And --

10 JUDGE JORDAN: The problem is that, theoretically,  
11 injury -- he's been injured, right?

12 MR. JAZIL: Mm-hmm.

13 JUDGE JORDAN: You agree with that?

14 MR. JAZIL: Yes, Your Honor.

15 JUDGE JORDAN: Okay. And you agree that assuming his  
16 cause of action to have merit for purposes of standing that he's  
17 shown causation?

18 MR. JAZIL: Yes, Your Honor.

19 JUDGE JORDAN: Okay. With regard to redressability,  
20 if we find against you on the merits but disagree with the  
21 plaintiffs on the appropriate remedy and say that the remedy is  
22 8015, does he show redressability?

23 The answer is yes, right?

24 MR. JAZIL: Yes, Your Honor.

25 JUDGE JORDAN: And if we find other battle target for

1 you, if we find against you on the merits and kick everything  
2 back to the legislature to come up with a map, he's  
3 theoretically got a remedy too.

4 MR. JAZIL: Yes, Your Honor.

5 JUDGE JORDAN: Right?

6 MR. JAZIL: (Nodding head.)

7 JUDGE WINSOR: Okay. And even if he ends up at the  
8 end of this, if you're unsuccessful on the merits and he ends up  
9 in a district similar to what he's in now, some new map that  
10 complies with the Constitution, again, if you're wrong on the  
11 merits, would take him from being in a situation where he's  
12 being discriminated against to one where he's not being  
13 discriminated against based on race, which is their whole claim  
14 in this case, right?

15 MR. JAZIL: Yes.

16 JUDGE RODGERS: Regardless of whether he gets  
17 Representative Lawson back as a representative.

18 MR. JAZIL: Yes.

19 Your Honors, I have clients with feelings too.

20 With that, unless the Court has additional questions,  
21 I do believe I have eaten up more than my time.

22 JUDGE JORDAN: Okay. Thank you very much, Mr. Jazil.

23 You may have one more question before you sit down.

24 JUDGE RODGERS: Well, I'm going to ask it of both of  
25 you, so -- but I should ask it before Mr. Jazil sits down.

1           So do does your client have a position on whether we  
2     should -- we're going to have our record very soon here --  
3     whether we should move forward with this case or stay a decision  
4     pending the outcome of the companion State case? I'll call it a  
5     companion State case. You know the case I'm referring to?

6           MR. JAZIL: Yes, ma'am.

7           JUDGE RODGERS: Because of the remedy being -- if the  
8     Circuit Court is ultimately upheld, then I do think this case is  
9     moot based on the remedy that would be issued in that case.

10          MR. JAZIL: Yes, Your Honor. If the Circuit Court in  
11     the Black Voters Matters case is ultimately upheld, this case  
12     because moot because we would have to either have the  
13     legislature draw remedial map or the Court will draw a remedial  
14     map.

15          JUDGE RODGERS: So do you have a position? And if you  
16     don't, that's fine. I'm just curious.

17          MR. JAZIL: Your Honor, I think that we've established  
18     that there is no intentional discrimination, and I'd just rather  
19     get this case decided and shift my focus to the other one.

20          But I will note that *Grove v. Emison*, the U.S. Supreme  
21     Court case, suggests that the more appropriate thing to do would  
22     be to wait for the state courts to work through the process.

23          JUDGE JORDAN: Here's --

24          JUDGE RODGERS: That's why I asked.

25          JUDGE JORDAN: I'm the problem-thrower, so here's the



1 potential problem.

2           Given the Governor's theory, you could have a  
3 scenario -- I played this out in my head, so maybe I'm right,  
4 maybe I'm wrong.

5           The first DCA may feel itself bound in some way,  
6 shape, or form by Apportionment VII. They may express  
7 disagreement with Apportionment VII, but they may say, "We're  
8 stuck. We have to affirm. Go to the Florida Supreme Court."

9           Even if the Governor loses, the Governor's  
10 representative loses the Florida Supreme Court, given the  
11 constitutional theory that's being advanced, you're going to  
12 seek cert. And so this State case may not be resolved,  
13 depending on how it plays out.

14           If it comes out differently in the DCA and the Florida  
15 Supreme Court, different story, but if it comes out adverse to  
16 the Secretary, this case may not be solved in time for the next  
17 election cycle.

18           So I don't know. From my perspective, it's one thing  
19 to stop on remedy and not do anything on remedy and wait for the  
20 State side to do that, but I just think -- I'm thinking out  
21 loud. I just think we have to move on liability because of  
22 uncertainty about what's going to happen on the State court side  
23 of the case. We just don't know. We just don't know.

24           But in any event, those are just ramblings.

25           JUDGE RODGERS: I just wanted to know if your client

1 had a position.

2 Thank you.

3 MR. JAZIL: Your Honor, I tried the *Grove v. Emison*  
4 early on unsuccessfully, and I don't want --

5 JUDGE WINSOR: That's still your position, right?

6 MR. JAZIL: It's still our position. It's still our  
7 position. But, Your Honor, I'm also mindful of the fact the  
8 Court has already considered it, and moving forward is not the  
9 worst thing in the world, especially if you side with us.

10 So thank you.

11 JUDGE JORDAN: Thank you.

12 MR. DISKANT: I'm told I have 17 minutes.

13 JUDGE JORDAN: Well, you have a question before you  
14 get on your 17.

15 MR. DISKANT: I'm going to answer the question. I  
16 thought it was part of my 17 minutes.

17 In any event, yeah, our client's position, I think, is  
18 pretty much what Judge Jordan just articulated. The stakes are  
19 too high. The uncertainties are too many. We've had a trial.  
20 We would appreciate a Court ruling, and we can address what, if  
21 anything, to do with respect to remedy once there's a ruling, if  
22 it's in our favor.

23 But I think first instance -- in the first order of  
24 business, I think the Court should, in prudence, go forward,  
25 because we just don't know what's going to happen.

1 JUDGE RODGERS: And our decision won't impact the  
2 State case. It obviously will not impact the State case in  
3 terms of liability.

4 MR. DISKANT: No, I think what was -- I was gratified  
5 to hear Mr. Jazil say what we think as well, which is this is  
6 not a case about interpreting the fair -- you know --

7 JUDGE RODGERS: Right.

8 MR. DISKANT: -- this is not an equal protection case.  
9 It is -- this is a --

10 JUDGE JORDAN: It is --

11 MR. DISKANT: It's an animus case. It's not a case  
12 construing the Fair Districts Amendment. It's not the case that  
13 is before the Florida courts. The remedies may be overlapping.  
14 I agree with Your Honor that in any event the trial court  
15 decision is upheld, any remedy in our case will be moot, but I  
16 just don't know what else -- I don't know if there will be a  
17 decision, I don't know what it will say, and there are many  
18 scenarios in which we would need relief.

19 JUDGE WINSOR: The remedy would be moot? The whole  
20 case would be moot, right?

21 MR. DISKANT: Well, certainly the remedy would be  
22 moot. I have to --

23 JUDGE RODGERS: The remedy would moot the whole case.

24 MR. DISKANT: I'm not going to quarrel on it. I'm not  
25 sure.

1 JUDGE WINSOR: Okay. But we'll worry about that  
2 later.

3 MR. DISKANT: I'm not going to address standing except  
4 just to point out we have two organizational plaintiffs. Each  
5 came to court. Each established they have a member in each of  
6 the challenged districts. Each offered to produce to the  
7 plaintiffs further proof --

8 JUDGE JORDAN: To the defense.

9 MR. DISKANT: Right, to the defense -- the identities  
10 and addresses and verification information with respect to those  
11 persons, and the defense chose not to ask for the information,  
12 so --anyway.

13 This is basically, in our case, an animus case, as I  
14 said many times. The Governor -- and I'm told I shouldn't refer  
15 to this as a "cat's paw" because the Governor is part of the  
16 legislative process, and so I understand that.

17 The -- so it is blatantly about race from day one when  
18 he goes seeking advisory opinion. He knows the answer. There's  
19 an extraordinary sequence of back-and-forth in which the  
20 legislature again and again and again and again holds firm on  
21 what it believes the constitution requires and surrenders only  
22 truly when its back is against the wall.

23 I thought it was interesting to see the little clip  
24 from Mr. Newman, because if you read what Mr. Newman has to say,  
25 it's, in a sense, part of our point. They said it's an

1 as-applied challenge, and certainly what the Governor was  
2 interested in throughout the process was an as-applied challenge  
3 to the elongated East-West district, the 200 miles, crossing  
4 political boundaries, et cetera. And I can understand that as a  
5 challenge, right or wrong. That's what he was saying.

6 When Mr. Newman testifies before the legislature after  
7 the veto, that's what he's talking about, basically. He's  
8 talking about the challenge.

9 This is page JX44, 67 and 68. And -- "You can't  
10 satisfy strict scrutiny by cobbling together disparate minority  
11 communities." Okay. That's map 8015, the secondary map, the  
12 map the legislature was perfectly content not to come into  
13 effect.

14 He doesn't give any testimony at all about the primary  
15 map except to say -- as though he's forgotten about the primary  
16 map altogether: "That's not to say there are other applications  
17 of the constitution's nondiminishment standard that could  
18 survive strict scrutiny, and one example would be a sufficiently  
19 compact African American community."

20 Well, that's what Duval was. So what's the veto  
21 about? This is part of the internally inconsistent, almost  
22 incoherent arguments that the Governor's men and women made in  
23 order to defend a decision that's inexplicable other than on --  
24 at least in part, on the basis of race.

25 The Duval-only choice was a logically excellent

1 choice. The focus on percentages, Counsel says that the  
2 legislature changed course. I don't have it with me right here,  
3 but we'll put it in our papers. The legislature said at the  
4 beginning that it was going to be governed by functional  
5 analysis. It said that at the end. It did a functional  
6 analysis of both versions of its map. Both versions complied.

7 And I can't overstate how foolish, foolish what  
8 Mr. Newman did was. You can't compare percentages. You can't  
9 compare percentages when you've got different people in  
10 different populations -- this is Mr. Kelly -- you have to do  
11 more. You have to do the functional analysis.

12 So the stated basis for the reason was incoherent on  
13 the facts, and on the law was wrong. This is the Florida  
14 Supreme Court. Yes, it used the word "slight" once some years  
15 ago. But it wasn't about slight. There's no particular  
16 minority percentage. I don't have to maintain a particular  
17 minority percentage. The question is retaining the ability to  
18 elect, and the U.S. Supreme Court, which the Florida Supreme  
19 Court has frequently cited and referred to, though this came  
20 after the last decision, says, clear as a bell, "Diminishment is  
21 diminishing the number of districts," and that's exactly what  
22 happened.

23 And, as Judge Jordan has posed in his questioning, the  
24 Governor's solution to the problem, gee, the percentage is too  
25 low; the right solution to be, how do I get it up? You get it

1 up by going to the other map, going up to 44 percent or some  
2 other version of that.

3 The solution to the problem of it's too low, if that's  
4 a problem -- and it's not -- if that's a problem, you go back.  
5 But it's not a problem because the second one performs, and the  
6 answer is diminishment in North Florida. That violates the  
7 Florida Constitution.

8 So again, you know, we're not asking for rulings on  
9 many of the issues of law that are subsumed in the issues we're  
10 talking about. I'm talking about the legal issues, because in  
11 our view, they demonstrate a Governor who set aside the law.  
12 "DOA. Take it to the bank." This is very provocative,  
13 argumentative language. The "DOA" Tweet comes as the committee  
14 is actually hearing testimony about the new maps. Legislator  
15 Driskell was shocked by it.

16 This is a governor who's obsessively involving himself  
17 in a process left by the Constitution, the U.S. Constitution and  
18 the Florida Constitution, to the legislature.

19 JUDGE WINSOR: I understand that, but just he's  
20 involved. He's part of the legislature process.

21 MR. DISKANT: He is part the legislative process.

22 JUDGE WINSOR: Where is it in either the U.S. or  
23 Florida Constitution that says it's just the legislature and  
24 he's not to have anything to do with it?

25 MR. DISKANT: Well, the U.S. Constitution says the

1 legislature does the redistricting as, if you followed *Moore v.*  
2 *Harper*, you know that -- well, actually, there's a case -- I  
3 can't remember with a year, in the 1930s -- in which the Supreme  
4 Court says the Governor can also be -- can veto a map and that's  
5 not --

6 JUDGE WINSOR: Because he's part of the lawmaking  
7 function, right?

8 MR. DISKANT: Yeah. I'm agreeing with that.

9 JUDGE WINSOR: Okay.

10 MR. DISKANT: He is part of the lawmaking function.  
11 But --

12 (*Simultaneous crosstalk.*)

13 MR. DISKANT: If not by law, at least by custom --

14 JUDGE WINSOR: -- interjecting himself --

15 MR. DISKANT: At least by custom and possibly by  
16 law -- I'll have to look into it -- the legislature is tasked  
17 with drawing the maps and the Governor's not tasked with drawing  
18 the maps. And certainly, it's unprecedented in Florida history  
19 for the Governor to do that.

20 And my point isn't that it's legal or illegal; my  
21 point is it's an *Arlington Heights* factor. It's a deviation  
22 from norm. And it's a deviation from norm -- you know, why are  
23 all these things happening? Why is he -- you know, imposing his  
24 will on the legislature? Why is he making substantive  
25 involvements in what the map should look like? Why he is making



1 procedural involvements in when things should happen and, you  
2 know, why is there an adverse effect on Black voters in Northern  
3 Florida? Why is this perfectly foreseeable because the  
4 legislature was on strike, almost. They were having protests  
5 about it.

6           You know, none of this was secret, and it all makes  
7 little sense unless one draws the inference, which I think the  
8 facts compel. And, of course, we have an arm or two arms tied  
9 behind our backs. We aren't able to depose the legislators.  
10 We're not able to depose the Governor. All we have is  
11 Mr. Kelly, and I don't think it does to then start making  
12 excuses for Mr. Kelly, who they decided to produce as their  
13 witness. You know, he gives us, I would say, incoherent  
14 testimony about when the constitution does and doesn't apply and  
15 when there's a compelling interest and when there isn't.

16           And I think he seems like a lovely man, and he seems  
17 to be trying hard to do his job. I'm not critical of him  
18 personally. But the upshot of it all is the Governor, who has  
19 raised the climate of racial tension in this state, seems to  
20 delight in issues like this, and the question is why? Is there  
21 an element of racial animus in it, at least in part?

22           There's more to it, perhaps. Of course, there's more  
23 to it. It's part of the analysis of racial animus, and that's  
24 the yes under *Arlington Heights*.

25           And this is exactly what Justice Kennedy was talking

1 about when he said "intentional destruction of a functioning  
2 crossover district." 30 years of a functioning crossover  
3 district and, suddenly, it's unconstitutional.

4 And let me just pause just for -- if I have a minute,  
5 but...

6 Your Honor, Judge Rodgers asked: Cite a case. Cite a  
7 case that supports this. Well, you can look through the record  
8 and you'll see what cases they cited. I have one that I just  
9 happen to have one here, which is Andy. This is the -- I'll  
10 call it "the sad memo" that Mr. Norby wrote, sad because he  
11 doesn't have anything really good to say about the Governor's  
12 position, even though he's Republican counsel to the Senate.

13 And what's he say? Legislative -- districts have been  
14 drawn on the basis of a different legal premise than the prior  
15 maps because of this unresolved issue of law, but it can  
16 constitutionally be applied. Governor presented this, you know,  
17 request for an advisory opinion, but neither the Court nor any  
18 other has rendered an opinion.

19 I'm going to come back to this sentence in just a  
20 moment.

21 He says: "The Governor's letter provides citation to  
22 valid precedents in support of his arguments regarding the  
23 constitutional standards. In the absence of controlling legal  
24 precedent contrary to the Governor's position on the precise  
25 question presented, the alternative proposal is worthy of

1 careful consideration."

2 That's about as lukewarm an endorsement as one can  
3 write. They're all on the same side as he is.

4 And look at this. "Intervening judicial precedents  
5 from the U.S. Supreme Court following the regular session" --

6 JUDGE JORDAN: You need to pull it up if you want us  
7 to look at it.

8 MR. DISKANT: Oh, I'm so sorry.

9 "Intervening judicial precedent from the U.S. Supreme  
10 Court following the 2022 regular session, however, has  
11 emphasized the narrow circumstances under which the 14th  
12 Amendment permits race-based sorting."

13 This is a -- I would call it an extremely weak attempt  
14 to suggest that something new has happened. Something new  
15 hasn't happened. This issue -- this goes back to *Shaw v. Reno*  
16 in 1993. Yes, there are issues about race-based sorting of  
17 voters. That's an issue. There are cases that say it's an  
18 issue and there are cases that say when it predominates, it must  
19 be supported by a compelling state interest and narrow  
20 tailoring, but that's the law. It's been the law for quite some  
21 time.

22 And nothing that Mr. Norby cites, the single case --  
23 when you look at the Governor's memos, he does the same kind of  
24 thing. Oh, look, there's a recent decision that says race-based  
25 sorting is bad. And I take that as a given. I think we all

1 understand this is a sensitive issue that requires careful  
2 consideration, but nothing changed. You know, the Governor just  
3 decided to pick a fight on an issue that he cared about. And  
4 why did he care about it? That's the question: Why?

5 And I respectfully submit, at least in part, the  
6 answer is racial animus, that he did not want a Black performing  
7 district in North Florida. And that is the question we  
8 respectfully put to this Court for decision.

9 Thank you very much.

10 JUDGE JORDAN: All right. Thank you very much.

11 We want to thank all of you for working together and  
12 for presenting the case in a streamlined way. And we know you  
13 had a lot of young lawyers on both sides dealing with witnesses,  
14 so they did a good job, and we're appreciative of their work as  
15 well.

16 So questions: How long do you want for proposed  
17 findings and conclusions?

18 Mr. Diskant.

19 MR. DISKANT: I had a date in mind. I have to open my  
20 calendar, if you don't mind.

21 JUDGE JORDAN: Sure.

22 MR. DISKANT: But before I do that, let me thank Your  
23 Honor for your comments about our colleagues and theirs. All my  
24 young lawyers were putting on their first witness in a federal  
25 court, and I was very proud of them. So I thank the Court for

1 indulging.

2 JUDGE JORDAN: It was quite a case in which to do it  
3 for both sides.

4 MR. DISKANT: And I want to also specially thank my  
5 colleague Andrew Wells, the only one who didn't get to put on a  
6 witness because his witness got scrapped at the last minute, but  
7 he stayed up all night with me. Here's a reward.

8 Let me find dates -- I was thinking about a Monday.

9 *(Off-the-record discussion.)*

10 JUDGE JORDAN: You've got the State stuff going on.

11 MR. JAZIL: Yes, Your Honor. The State reply brief is  
12 due on the 27th and the *en banc* oral argument is on the 31st.

13 JUDGE JORDAN: Okay. Let me ask you this question,  
14 then, and maybe we can work backwards.

15 I have a memory a little bit of what happened last  
16 year when we talked about deadlines, and dates and by the time  
17 we get to do something if the legislature didn't act one way or  
18 another.

19 So give me, Mr. Jazil -- so I'm going to ask you to  
20 assume the worst. So if the decision were to go against you and  
21 you needed to have the Secretary move, by when do you need a  
22 ruling?

23 And I ask you the worst-case scenario because  
24 otherwise, to you, it doesn't really matter, because if you're  
25 going to prevail on the merits, then...

1 MR. JAZIL: Your Honor, as a practical matter, if the  
2 Court rules against us and orders a remedy, the legislature is  
3 in session starting in January.

4 So if you find for my friends on liability but you say  
5 kick the map back to the legislature on remedy, if we can give  
6 the legislature enough time to go through their process, it's a  
7 60-day session that starts in January, goes through March. So  
8 just --

9 JUDGE JORDAN: A decision by the end of the year?

10 MR. JAZIL: Yes, Your Honor. I think that would be  
11 helpful.

12 JUDGE JORDAN: Okay.

13 MR. DISKANT: October 20th? Does that work?

14 MR. JAZIL: Your Honor, one set of simultaneous papers  
15 on the 20th, does that work for the Court?

16 JUDGE JORDAN: Yes, but I know you've got the State  
17 case on the other side, so we want to be cognizant of that too.

18 MR. DISKANT: I have problems the entire week of the  
19 9th, so we're going to get into the next week.

20 JUDGE JORDAN: We know you have cases going on both  
21 sides, and we don't want to presume that one case is bigger than  
22 the other for the Secretary.

23 So how about simultaneous briefing the first week of  
24 November?

25 MR. JAZIL: That works for us, Your Honor. Thank you.

1 JUDGE JORDAN: Okay. What's the last day of the first  
2 week of November? The 3rd?

3 Okay. How's that?

4 MR. JAZIL: Works for us.

5 MR. DISKANT: That's fine, Judge.

6 JUDGE RODGERS: When can we expect to have hard copy  
7 exhibits for those of us dinosaurs who need those in hard copy?

8 MR. LI: Your Honor, we have them right there and  
9 right there for the plaintiffs in the Joint, so we can give that  
10 to you all shortly afterwards.

11 And housekeeping measure, PX5042-52 was not on the  
12 record admitted into evidence, but we believe that it was in  
13 evidence, and we've conferred with Defendant on it and Defendant  
14 agrees.

15 JUDGE WINSOR: Tell me that number again? 5042- what?

16 MR. LI: 52. So it's --

17 DEPUTY CLERK: It's on here. It's on here.

18 JUDGE JORDAN: It's admitted.

19 MR. DISKANT: Would Judges Jordan and Rodgers like  
20 their binders shipped to their chambers?

21 JUDGE JORDAN: It doesn't matter. I mean, you can  
22 leave them here. I've got stuff to ship to Miami too, so as  
23 long as I've got a complete set that I can ship down, we'll ship  
24 it down. That's not a problem.

25 MR. DISKANT: Judge Rodgers?

1 JUDGE RODGERS: Same. If you want to leave them here,  
2 someone can get them to me.

3 MR. DISKANT: Okay.

4 JUDGE RODGERS: And the videos.

5 JUDGE JORDAN: Yes, and you can just -- you can give  
6 copies, three copies of thumb drive to TiAnn and she'll get them  
7 to us, and we'll ship them down with everything.

8 MR. DISKANT: I told --

9 DEPUTY CLERK: These are some of the videos that have  
10 been admitted.

11 MR. JAZIL: Your Honors, the binders that are in the  
12 courtroom aren't quite complete sets. If it's okay with  
13 Mr. Diskant, I'm happy to take the binders that were provided  
14 and just make sure that they're complete sets with the exhibits  
15 that were included today and then provide them to the Northern  
16 District of Florida. Since I'm a local, I can make sure they  
17 get to the Court and can be directed through --

18 JUDGE JORDAN: That's fine. If you can just -- I  
19 mean, I presume --

20 Each one of those banker's boxes back there is one  
21 full set of exhibits or no?

22 MR. LI: Each of those over there is -- at least two  
23 of them are both of the JX exhibits, so the joint exhibits. And  
24 then Plaintiff's exhibits are a far smaller set, and we have two  
25 physical sets over here. I believe the defendants have sets --



1 JUDGE JORDAN: We just need you to make sure that you  
2 label the boxes so that -- and you can just label them, you  
3 know, Rodgers Plaintiff's Exhibit, Rodgers Joint Exhibits,  
4 Rodgers Defense Exhibits. We've got all those. Same thing for  
5 Jordan, same thing for Winsor. And once we have them here,  
6 we'll just seven them to the respective places. That will give  
7 you a little bit more breathing room.

8 JUDGE WINSOR: And everything we're talking about is  
9 just judge copies, right? Somebody has or will file everything  
10 on the docket --

11 JUDGE JORDAN: Physical copies, right.

12 JUDGE WINSOR: Other than the videos. Got it.

13 MR. LI: And I got one quick question. We've been  
14 filing the exhibits that have been stipulated to every morning  
15 on the docket. Would you like us to file a consolidated set  
16 with all the JX exhibits followed by all the PX and DX?

17 JUDGE JORDAN: No, you don't need to do the extra  
18 work. As long as they're all in, you don't need to do the extra  
19 work. As long as we can look at every day's exhibits and say  
20 this is what was admitted, this was admitted for both sides, JX,  
21 DX, PX, we're good.

22 JUDGE RODGERS: Let me ask: With the exhibit you've  
23 been filing throughout the trial, is there an index or  
24 something?

25 JUDGE WINSOR: I'm sorry?

1 JUDGE RODGERS: Is there an index with those that have  
2 been filed on the docket? And then beyond that, with the copies  
3 that you sent to myself and Judge Jordan and Judge Winsor over  
4 here, but I would like a master index. And I can print it. You  
5 can email it. That's fine. But I think, for anybody that goes  
6 onto the docket that would say, I want to pull something up  
7 electronically, and I look back at my notes and I see the day  
8 that something was -- an exhibit was, you know, filed on the  
9 docket by you all, I'm just wondering if you have an index of  
10 exhibits admitted that day, that correspond to what you filed  
11 that day.

12 If you don't, it's okay, but I do want a master index.

13 MR. LI: We can construct one, Your Honors. We  
14 have -- for all the exhibits that we filed, they have been filed  
15 with an index in front of them, but we can construct one that  
16 covers all the days and has what was admitted on each day.

17 JUDGE RODGERS: Okay. That would be helpful.

18 JUDGE JORDAN: We've been trying to not be too  
19 demanding of the things we want and give you a little breathing  
20 room, but here's something you'll need to do. So doesn't have  
21 to be done today or tomorrow or Thursday or Friday, but we need,  
22 as Judge Rodgers said, a master index of all exhibits  
23 admitted -- plaintiffs, defense, joint -- as one filing so that  
24 somebody can see everything that got admitted during the trial  
25 in one document and not have to go day by day.

1 JUDGE WINSOR: And with that, you know, Plaintiffs'  
2 Exhibit 1, and next to that say it's at docket entry 65-6 or  
3 whatever it is.

4 JUDGE JORDAN: Admitted on -- admitted on this date,  
5 and see docket entry whatever.

6 JUDGE RODGERS: Yeah, that would be -- then you  
7 wouldn't need to do the separate index filing, so that's a much  
8 better solution to just put it all in the index.

9 Does that make sense? Do y'all follow what we're  
10 asking for?

11 MR. LI: Yes, Your Honors.

12 JUDGE RODGERS: And we just were just handed PX1043.1  
13 and PX 2107. Is this the extent of the electronic evidence? I  
14 mean not electronic -- the video evidence?

15 DEPUTY CLERK: No.

16 JUDGE JORDAN: No.

17 MR. BEATO: Defendants have flash drives.

18 JUDGE RODGERS: Oh, this is just PX. I'm sorry.

19 *(Off the record discussion.)*

20 MR. JAZIL: Your Honor, just a quick question. As  
21 we're talking about the index for the exhibits, in our written  
22 submissions, just a citation preference. I realize some of the  
23 Court is using the paper copies and some of the Court is using  
24 the CM/ECF citations, so if we're citing to evidence that's been  
25 admitted, is there a citation preference that you have, or

1 should we just sort of include both to --

2 What makes your life easier, I suppose is the  
3 question, in the written submissions?

4 JUDGE JORDAN: If we have that index, I don't think it  
5 matters, really. As long as we have something that tells us  
6 where -- what the exhibit number is and what the CM/ECF number  
7 is, however you cite to it, somebody's going to be able to go  
8 back and reference it. And we have the hard copy we can look  
9 and if we want to go online we can look.

10 JUDGE RODGERS: Well, the only thing I would add to  
11 that -- and I agree with what Judge Jordan has said -- but some  
12 of these exhibits are voluminous, and so if you're -- in your  
13 proposed findings of fact and conclusions of law, if you cite to  
14 a specific page number in a very large exhibit, I mean, I would  
15 just cite the exhibit number and then the page. I don't need  
16 anything more than that, but I do think I would need the page  
17 reference.

18 MR. JAZIL: Yes, Your Honor.

19 MR. DISKANT: We just conferred about length.

20 JUDGE JORDAN: I'm sorry?

21 MR. DISKANT: About the length of the -- the length.

22 JUDGE JORDAN: The important thing for us is  
23 thoroughness and to make sure that we haven't missed anything.

24 MR. DISKANT: Okay.

25 JUDGE JORDAN: So, I mean, I think you'll stay under

1 500 pages each.

2 MR. DISKANT: Guaranteed.

3 JUDGE JORDAN: But I've been through one of these  
4 before and, you know, the submissions are lengthy because the  
5 issues are complicated.

6 MR. DISKANT: Fair enough.

7 JUDGE JORDAN: So use your judgment.

8 Last thing: When you submit your proposed findings  
9 and conclusions, I don't know how the CM/ECF system translate to  
10 my docket on the court that I'm on, so if you could please  
11 provide Word copies to TiAnn of those submissions, and that way,  
12 she can forward the Word copies to all of us, and we will have  
13 not only your CM/ECF copy but a Word copy to use and begin our  
14 work.

15 MR. DISKANT: One other issue just comes to mind as  
16 we've been standing here, which is obviously, in this case,  
17 there's a direct appeal to the U.S. Supreme Court, and if we  
18 were to win, the defendant may seek a stay or emergency appeal  
19 of some sort.

20 I think there's probably enough time in the process to  
21 do that, but I just wanted to flag it as a -- because there's 60  
22 days in the legislative session. I'm -- I don't know what's  
23 going to happen. I just wanted to flag that as something  
24 hanging out there.

25 JUDGE JORDAN: It's -- there are a lot of

1 possibilities depending upon what happens.

2 MR. DISKANT: Right.

3 JUDGE JORDAN: We know. We know.

4 MR. DISKANT: Okay. Thank you.

5 JUDGE RODGERS: In your briefs, will you also -- if  
6 there's any more to argue or to provide us with information on  
7 as far as what law we are compelled to follow --

8 MR. DISKANT: Okay.

9 JUDGE JORDAN: -- whether it's the Eleventh Circuit or  
10 the Supreme Court, if there's any more -- I don't know -- I  
11 can't recall if you all addressed this in your other briefing.  
12 I don't recall seeing it.

13 MR. JAZIL: No.

14 JUDGE RODGERS: So I would ask for you to include a  
15 section on that in your briefing, please.

16 MR. DISKANT: We will do that.

17 MR. JAZIL: Your Honor, I'd like to thank the Court  
18 and our friend, Mr. Diskant, who does not like my referring to  
19 him as my friend, but he truly is my friend.

20 MR. DISKANT: We have become friends. I'd like to  
21 join Mr. Jazil. We've had a lovely relationship. It's been  
22 collegial. It's the way I like to try cases. It's the way he  
23 likes to try cases, and it's --

24 JUDGE RODGERS: It's actually how we like you to try  
25 cases too.

1 MR. DISKANT: It's always a happy moment.

2 JUDGE JORDAN: You can -- I think from this side of  
3 the bench you can tell, and we're appreciative.

4 MR. DISKANT: And where I grew up, you don't call your  
5 adversary your friend, so it's just -- but that's okay. I get  
6 it.

7 MR. JAZIL: It's a good kind of social contagion.

8 JUDGE JORDAN: Okay. Well, I think that wraps up at  
9 least the court part of this process, so we look forward to  
10 getting your submissions and we'll get to work.

11 MR. DISKANT: Thank you very much.

12 JUDGE JORDAN: We're in recess.

13 JUDGE RODGERS: Thank you.

14 *(Proceedings adjourned at 5:04 p.m.)*

15 \* \* \* \* \*

16 I hereby certify that the foregoing is a true and correct  
17 transcript of the stenographically reported proceedings held in  
18 the above-entitled matter, pursuant to the provisions of Section  
19 753, Title 28, United States Code.

20 

10/3/23

21 Julie A. Wycoff, RMR, CRR  
22 Official U.S. Court Reporter

23 Date

24  
25

## I N D E X

Defense Witnesses**DOUGLAS MARK JOHNSON**

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**DEFENSE EXHIBITS**

<u>Exhibit</u>	<u>Description</u>	<u>Marked</u>	<u>Admitted</u>
128	Enacted map	929	929
DX129, 130	Video clips	939	939