

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

COMMON CAUSE FLORIDA, FAIR DISTRICTS)
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) September 26, 2023
RATZAN,)
)
Plaintiffs,) 8:42 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 1 through 287)

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P R O C E E D I N G S

(Call to Order of the Court.)

JUDGE JORDAN: Good morning and welcome. Please be seated.

Judge Rodgers, Judge Winsor, and I are very happy to welcome you for the beginning of this trial. This is Case Number 22-00109, Common Cause of Florida, *et al.*, v. Cord Byrd as the Florida Secretary of State.

A couple of preliminaries. This is obviously a three-judge court, and we have to figure out a functional way of dealing with things that come up during a trial on the administrative side. So we are going to alternate days in terms of dealing with matters like objections and the like.

So I'll handle objections and any administrative things today. Judge Winsor will handle them tomorrow and Judge Rodgers will handle them on Thursday, and we'll go back to the same sequence next week.

Okay. We want to ask you some questions about scheduling and timing and things like that, but we'll do it after opening statements are completed. We'll take a short break after that and then we'll resume for the beginning of the case itself.

So we're ready. So we're ready for opening statements on behalf of Common Cause and the other plaintiffs.

MR. DISKANT: Your Honor, my name is Greg Diskant on

1 behalf of the Common Cause plaintiffs, and my partner, Greg
2 Baker, will do our opening statement.

3 JUDGE JORDAN: Thank you.

4 You know, I forgot -- it's been a while since I've
5 been on a trial court bench, so I forgot to have you introduce
6 yourselves. So if you could just go ahead and do that and then
7 we'll start with your opening statement. So, Mr. Diskant, if
8 you could introduce the people on your side.

9 I'm Greg Diskant.

10 MR. HALPER: I'm Michael Halper for the plaintiffs.

11 MR. BAKER: Greg Baker for the plaintiffs.

12 MR. LI: Alvin Li, for Plaintiffs.

13 MS. DJANG: Catherine Djang.

14 MS. KAISER: Katelin Kaiser. And, Your Honors, I'd
15 like to have a moment to introduce our clients. Over here from
16 the NAACP and Common Cause Florida.

17 JUDGE JORDAN: Okay. Good morning and Welcome to all
18 of you.

19 Mr. Jazil, on your side.

20 MR. JAZIL: Thank you, Your Honor.

21 Mohammad Jazil, Michael Beato, and Josh Pratt on
22 behalf of Secretary of State Byrd, and our client representative
23 is Brad McVay, Deputy Secretary of State, Your Honor.

24 JUDGE JORDAN: Good morning and welcome to all of you
25 as well.

1 Okay. We're ready, Mr. Baker.

2 MR. BAKER: Thank you, Your Honor.

3 Before I begin, with your permission, I have a
4 PowerPoint that I'd like to walk through. I'd like to ask that
5 one of my colleagues approach the bench so we can find hard
6 copies in the event of any technical malfunctions.

7 JUDGE JORDAN: Sure. You've given a copy to
8 Mr. Jazil?

9 MR. JAZIL: Yes, we have, Your Honor.

10 MR. BAKER: May it please the Court. My name is Greg
11 Baker, and together with my colleagues, I am pleased to
12 represent three plaintiff organizations: Common Cause, the
13 Florida conference of the NAACP, and Fair Districts Now.

14 JUDGE WINSOR: I'm sorry. Can we get the presentation
15 -- oh, we've got it there.

16 MR. BAKER: Fair Districts Now as well as ten
17 individual plaintiffs in this action.

18 Your Honor, our complaint alleges that the 2022
19 federal congressional map passed by the Florida Legislature at
20 the insistence of Governor Ron DeSantis and currently in effect
21 unlawfully discriminates against Black Floridians because it
22 destroyed a Black Opportunity District in violation of the
23 Fourteenth and Fifteen Amendments of the U.S. Constitution.
24 Just a few weeks ago, the Florida State trial court found that
25 the same map violated the Fair Districts amendment of the

1 Florida Constitution because it diminished the ability of Black
2 voters to elect representatives of their choice.

3 The Court enjoined the Secretary from using that map
4 in future congressional elections, although that decision is
5 stayed while the Secretary and his codefendants seek an appeal.

6 The State court case is based on the Fair Districts
7 amendment of the Florida Constitution. Ours is based on the
8 Fourteenth and Fifteenth amendments of the U.S. Constitution.

9 There is no dispute in this case that Florida's 2023
10 congressional map eliminated a long-functioning Black
11 Opportunity District in North Florida, Congressional District 5,
12 or CD-5 for short, in which the Black population, while not a
13 majority, aligned with voters from other demographics to elect
14 the candidates of their choice.

15 In North Florida, which consists of 600,000 Black
16 citizens, there are now zero Black performing or crossover
17 districts.

18 In 2009 the U.S. Supreme Court decision of *Bartlett v.*
19 *Strickland*, Justice Kennedy wrote the following, which you see
20 before you on the slide:

21 "If there were a showing that a state intentionally
22 drew district lines in order to destroy otherwise effective
23 crossover districts, that would raise serious questions under
24 both the Fourteenth and Fifteenth Amendments."

25 That is what we've alleged here, and that is what we

1 will prove in this trial.

2 The main issue in this trial is whether the facts
3 demonstrate that intentional discrimination on the basis of race
4 was the reason, at least in part, for the destruction of the old
5 CD-5, and the failure to replace it with a Black performing
6 district in North Florida. We submit that they do. We will
7 show that the -- that Governor DeSantis sought to destroy CD-5,
8 a Black performing district, at least in part because of -- not
9 merely in spite of -- its adverse effects pong an identifiable
10 group of Black Floridians. We will prove the Governor's intent
11 by proving the so-called Arlington Heights factors, with which
12 this Court is well familiar.

13 And I should note that, unlike many of these types of
14 cases, the defense will not be that the Governor's intent was
15 partisan advantage, rather than racial. Seeking partisan
16 advantage in redistricting is illegal in Florida, and the
17 Secretary does not content otherwise. So this case is purely
18 about racial discrimination.

19 From 2016 to 2022, the purple area in this
20 demonstrative before you was Congressional District 5. We will
21 refer to it in this trial as "Benchmark CD-5" because it
22 represents the benchmark against which the current congressional
23 maps were drawn. It connected Jacksonville and Tallahassee,
24 along Florida's Northern border, and it had a Black voting age
25 population of 40 percent. While Black voters did not constitute

1 a majority, it was a functioning crossover district, meaning
2 that the Black voters in that district aligned with voters from
3 other demographics, consistently enabling them to elect
4 candidates of their choice.

5 This map was drawn by the Florida Supreme Court to
6 comply with the Fair Districts amendment of the Florida
7 Constitution, which contains what is called a "nondiminishment
8 clause," which states that -- and I quote -- "Districts shall
9 not be drawn with the intent or result of denying or abridging
10 the equal opportunity of racial or language minorities to
11 participate in the political process or to diminish their
12 ability to elect representatives of their choice."

13 From 2016 to 2022, this district was represented by Al
14 Lawson, a Black resident of Northern Florida who reflected the
15 views of his Black constituents. Benchmark CD-5 was also the
16 location of Florida's slave belt, where many enslaved people
17 lived and worked before the Civil War. Today this area is still
18 home to a significant Black community. The Black community of
19 North Florida shares that painful history and the subsequent
20 effects of Jim Crow segregation and other acts of discrimination
21 that are still being felt to this day.

22 But those Black citizens are also part of a proud
23 community. They vote and they want to vote. They want to elect
24 representatives who reflect their views.

25 The next slide before you shows the current

1 congressional map in Florida. The Black voters of Benchmark
2 CD-5 as well as all the other voters having cracked into four
3 separate districts, Districts 2, 3, 4, and 5, each of which
4 elected a white Republican to Congress in 2022. As a result,
5 the Black voters in North Florida have lost their ability to
6 elect a candidate of their choice.

7 I'd like to talk for a few minutes about the
8 redistricting process. How did Florida go from having a
9 functioning opportunity district in North Florida which existed
10 for 30 years to having none?

11 The answer lies in the actions of Governor DeSantis
12 and the Florida Legislature's acquiescence to his will. Florida
13 received an additional seat in Congress as a result of the 2020
14 census, increasing the number of seats from 27 to 28 in the new
15 congressional map. In this state, the responsibility to draw
16 congressional maps rests with the state legislature, subject to
17 the Governor's veto.

18 But Governor DeSantis injected himself into the
19 redistricting process in a manner unprecedented in Florida's
20 history and developed an obsessive interest in destroying
21 Benchmark CD-5 and consequently destroying the ability of Black
22 Floridians in North Florida to elect the representative of their
23 choice.

24 At first, Florida's legislature resisted. Even though
25 both the Florida House and Florida Senate were controlled by

1 Republicans and usually deferred to the Governor. But the
2 Governor pushed and pushed and pushed until, with its back
3 against the wall, the legislature folded and enacted the current
4 congressional map, which destroyed Benchmark CD-5.

5 The chronology of this case of the redistricting
6 process is important. Our chronology starts in January of 2022
7 when the Republican-led Florida Senate passed a new
8 congressional redistricting plan, which we'll refer to as "map
9 8060," that complied with the law. It protected minority voting
10 rights by identifying and preserving four Black Opportunity
11 Districts in Florida, including Benchmark CD-5.

12 In response, in a marked departure from ordinary
13 procedures, Governor DeSantis proposed his own congressional
14 redistricting map on January 16, 2022, map 79, the map which you
15 can see before you. So far as we can determine, this was the
16 first time in Florida history that a Governor injected himself
17 into the redistricting process by producing a congressional map.
18 The Governor's proposed map was notably racially biased. It
19 proposed destroying Benchmark CD-5 by cracking it into four
20 white districts, and the Governor made clear his intention to
21 veto any bill that preserved Benchmark CD-6 as a Black
22 Opportunity District.

23 Next, on February 1, 2022, the Governor requested an
24 unprecedented advisory board from the Florida Supreme Court
25 about the constitutionality of any proposed map that retained

1 CD-5. The Governor suggested that the Fair Districts amendment
2 would be unconstitutional when applied to Benchmark CD-5, and he
3 asked the Court to address -- and I'm now quoting Governor
4 DeSantis -- "whether the Florida Constitution's nondiminishment
5 standard mandates a sprawling congressional district in Northern
6 Florida that stretches hundreds of miles from East to West
7 solely to connect Black voters in Jacksonville with Black voters
8 in Gadsden and the end counties with few in between so that they
9 may elect candidates of their choice, even without majority.
10 This Court has previously suggested that the answer is yes," end
11 quote.

12 What the Governor called a suggestion, however, was,
13 in fact, a holding. Of course, no question about the
14 constitutionality of the Fair Districts amendment under the
15 Equal Protection Clause was raised in eight prior appeals to the
16 Florida Supreme Court in the last restricting cycle. We will
17 show in this case that the Governor's argument about the
18 geography of Benchmark CD-5 was little more than a pretext.

19 There is nothing unusual about a sprawling
20 congressional district along the Georgia border. As we see from
21 the next slide, there had been one in the prior restricting
22 cycle, CD-4, although it was carefully drawn to be a white
23 district, not a Black district. And the Governor did not
24 provide the Supreme Court with the information necessary even to
25 address, let alone answer, his complicated request.

1 Unsurprisingly, on February 10, 2022, the Florida
2 Supreme Court declined to answer the Governor's request for an
3 advisory opinion. It explained that the determination of
4 whether a race-based district was lawful under the federal
5 constitution, would require proof of a complicated set of facts
6 based on a full record that could only be developed during
7 litigation. But the Governor was undeterred in his mission to
8 eliminate the Black Opportunity District in North Florida.

9 In the weeks that followed, there was seemingly no
10 other redistricting issue that even interested him other than
11 denying Black Floridians in North Florida the representative of
12 their choice. He pressed his argument by sound bite bullying
13 and not by presentation of anything approaching a serious
14 constitutional argument based on a full record, let alone a full
15 argument presented against an adversary in court. And, of
16 course, when given the opportunity to do that in State court a
17 few weeks ago, he failed.

18 On February 14, 2022, Governor DeSantis submitted
19 another proposed congressional map, which we'll refer to as map
20 94, which you see before you. That map, again, proposed
21 destroying Benchmark CD-5. Even as he continued to insist there
22 was a problem with Benchmark CD-5 because it, again -- and I
23 quote -- "stretches over 200 miles from East to West," his own
24 map proposed a non-Black district of similar length,
25 Congressional District 2. In fact, Congressional District 2 in

1 the enacted map that is currently in effect is almost as long as
2 the district from Benchmark CD-5. Thus, the Governor had no
3 problem with the geography of a long congressional district
4 comprised of predominantly white voters. It was only a problem
5 when it came to preserving a Black Opportunity District.

6 The Florida legislature tried to resist the Governor's
7 interference. At a hearing of the House Redistricting Committee
8 on February 18, 2022, it heard the testimony of a witness,
9 Robert Popper, whom the Governor's office paid to travel to
10 Tallahassee to testify in favor of the Governor's plan. By a
11 bipartisan 14-to-7 vote, the Republican-led committee
12 resoundingly rejected Popper's arguments, instead electing to
13 retain the Black Opportunity District in North Florida.

14 But the Florida legislature was plainly discomfited by
15 the Governor's pressure. He's a powerful man in Florida. So
16 the legislature elected to compromise. It proposed a new map,
17 map 8019, which you see before you, that addressed all of the
18 Governor's alleged concerns. The new map included a Black
19 Opportunity District centered in Duval County in Northeast
20 Florida. It is shaded in purple on this map.

21 The district was largely framed by the political
22 boundaries of Duval County, and it was compact. The Duval
23 County option had a somewhat reduced Black voting age population
24 but was still expected to allow Black voters to elect the
25 candidate of their choice. This option eliminated all of the

1 Governor's stated objections to Benchmark CD-5 and would have
2 preserved the Black Opportunity District in North Florida.

3 The legislature also drafted a fallback map, map 8015,
4 which you see before you now, that largely retained the original
5 Tallahassee-Jacksonville configuration of Benchmark CD-5. The
6 legislature stated that it wanted this fallback map to go into
7 effect if the principal map was found to be unconstitutional for
8 any reason.

9 The Governor was not pleased. Meeting his stated
10 concern was not good enough, because his real concern was having
11 any Black district in North Florida, compact or not.

12 On the morning of March 4, 2022, as the bill was being
13 debated on the house floor, Governor DeSantis publicly stated on
14 Twitter that he would veto -- I quote -- "veto the congressional
15 reapportionment plan currently being debated by the house.
16 DOA" -- short for "dead on arrival." End quote.

17 That same day, he stated that he would -- and again I
18 quote -- "veto maps that include some of these unconstitutional
19 districts, and that is a guarantee. They can take that to the
20 bank," end quote.

21 For a moment, the legislature once against resisted
22 the Governor's pressure, passing the maps he threatened to veto,
23 both the 8019 Duval-only primary map and the 8019 East-West
24 backup map that same day. But on March 29, 2022, the Governor
25 followed through on his threat, vetoing the legislature's

1 redirecting plan, calling the proposed maps "unconstitutional
2 racial gerrymanders." He called for a special legislative
3 session to address restricting over a period of three days from
4 April 19th to April 22nd of 2022.

5 The Governor's general counsel, Ryan Newman, also
6 issued a memo on March 29th that, in a tortured fashion,
7 attempted to explain the Governor's veto. He presented by now
8 the Governor's now-familiar sound bite objections to the
9 East-West map, that it was supposedly not compact enough.

10 But the Duval-only primary map met all of the
11 Governor's objections, and so it presented difficult problem.
12 Mr. Newman claimed the Governor vetoed that map because it
13 reduced the percentage of the Black voting age population too
14 much, so that even though it performed for Black voters and
15 would allow them to elect the candidate of their choice, it
16 somehow did not satisfy the Florida Constitution's
17 nondiminishment standard. And so it was vetoed and eventually
18 replaced by a new congressional map enacted at the Governor's
19 insistence that completely eliminated all Black Opportunity
20 Districts in North Florida. It diminished their voting power to
21 zero.

22 The legislature caved to the Governor's desires. The
23 congressional map enacted by the legislature and signed by the
24 Governor destroyed the Black Opportunity District in North
25 Florida.

1 I'd like to next turn for a few moments to discussing
2 the Arlington Heights factors.

3 As the Supreme Court has stated and as this Court has
4 previously acknowledged, "In denying defendant's motion to
5 dismiss, outright admissions of impermissible racial motivation
6 are infrequent, and plaintiffs often must rely upon other
7 evidence." And I'm quoting *Hunt v. Cromartie*, 526 U.S. 541,
8 1999.

9 In *Village of Arlington Heights v. Metropolitan*
10 *Housing Development Corp.*, the U.S. Supreme Court provided a
11 nonexhaustive list of factors to consider in evaluating claims
12 of racial discrimination. Those factors include the impact of
13 the challenged action; the historical background; the specific
14 sequence of events leading up to the challenged action,
15 including departures from normal procedural sequence;
16 substantive departures, particularly if the factors usually
17 considered important by the decision-maker strongly favor a
18 decision contrary to the one reached; and the legislative or
19 administrative history.

20 The 11th Circuit has since articulated additional
21 factors under *Arlington Heights*, including the foreseeability of
22 the disparate impact, the knowledge of that impact, and the
23 availability of less discriminatory alternatives.

24 Your Honors, as we will show, each of these factors
25 points towards racial discrimination in this case. This Court

1 accurately summarized what we allege with respect to CD-5 in
2 denying the motion -- the defendant's motion to dismiss. At the
3 time you agreed that these factors suffice to state a claim.
4 Now we will prove that they are true. And I quote now from this
5 Court's decision:

6 "First, the congressional redistricting plan
7 negatively impacts Black voters in Florida because it destroys
8 or diminishes an opportunity for a crossover district, CD-5.

9 "Second, Florida has a history of suppressing Black
10 voters.

11 "Third, there were departures from procedural norms
12 including, (a), the legislature rejecting Governor DeSantis's
13 proposed map and approving two maps, an initial map
14 incorporating some of Governor DeSantis's views while still
15 allowing for the possibility that a Jacksonville-only district
16 might have allowed Black voters to elect candidates of their
17 choice, and a fallback map in case the initial map was found
18 legally wanting; (b) Governor DeSantis publicly rejecting those
19 maps and vetoing those maps while making it clear that his map
20 was based on racial considerations, because he opposed any
21 proposal that preserved CD-5; (c) Governor DeSantis proposing a
22 map for the legislature; (d) the legislature failing to propose
23 any amended map in the special legislature session and simply
24 approving in toto the map put forth by Governor DeSantis.

25 "This was, according to the complaint, the first time

1 in Florida history that a congressional restricting map had been
2 created by the Governor, rather than the legislature.

3 "Fourth, Governor DeSantis frequently complained that
4 CD-5 was 200 miles long but the new CD-2, a new white majority
5 district, was almost the same length.

6 "Fifth, Governor DeSantis's map violated Florida law,
7 i.e., the Fair Districts amendment, as recently confirmed by a
8 Florida trial court.

9 "Sixth, some Republican legislators stated that the
10 legislature's two proposed maps complied with the law by
11 continuing to protect the minority group's ability to elect a
12 candidate of their choice under the Florida Constitution and
13 urge the legislature to put aside external motives and influence
14 from the outside.

15 "Seventh, the congressional districting map was
16 enacted over objections that it disparately impacted Black
17 voters."

18 There's a lot here and more, and it will all be proved
19 up during this trial. But when you consider the facts in light
20 of the Arlington Heights factors, all signs point to the fact
21 that intentional discrimination on the basis of race was the
22 reason, at least in part, for the elimination of the old CD-5.

23 Two Black Opportunity Districts enacted by the
24 legislature in compliance with the Florida Constitution, both
25 vetoed, one supposedly because it wasn't impact enough, although

1 it had been expressly approved by the Florida Supreme Court; the
2 other supposedly because it didn't have enough Black voters and
3 so didn't sufficiently protect their right to vote. Of course,
4 the outcome of these vetoes didn't protect the rights of Black
5 voters at all. Rather, Benchmark CD-5 was compacted into four
6 white districts, districts in which Black voters don't have a
7 chance. Either way, the result was the same. For the first
8 time in 30 years, Black voters in Northern Florida were denied
9 the opportunity to elect a candidate of their choice. That was
10 the ultimate diminishment, from one Black Opportunity District
11 to none.

12 So why was benchmark CD-5 eliminated? We believe the
13 proof will show that it was because of the Governor, who was
14 inalterably opposed to allowing Black voters in the old Slave
15 Belt in Northern Florida the opportunity to elect a candidate of
16 their choice, no matter what. He stated his purported
17 objections, and then, when they were all met, he moved the
18 goalpost and rejected the legislature's compromise.

19 We submit that the Court will conclude when all the
20 proof is in that that was because both versions of CD-5
21 protected Black voters and for no other reason. The Governor
22 did exactly what Justice Kennedy warned about in *Strickland*,
23 intentionally drawing district lines in order to destroy
24 otherwise protected crossover district, raising serious
25 questions under both the Fourteenth and Fifteenth Amendments.

1 Here, Governor DeSantis crossed the line. His
2 congressional map forced on the legislature destroyed CD-5 and
3 abridged the right of Black voters of North Florida to vote on
4 account of their race. The Governor violated the U.S.
5 Constitution, and in acquiescing in the Governor's illegal
6 campaign, albeit reluctantly, the legislature shares
7 responsibility for that constitutional violation.

8 Thank you.

9 JUDGE JORDAN: All right. Thank you very much,
10 Mr. Baker.

11 Mr. Jazil.

12 MR. JAZIL: Thank you, Your Honors. May it please the
13 Court. Mohammad Jazil on behalf of Secretary Byrd.

14 769,221. That's the number of people that must be
15 within each congressional district, plus or minus one. That's
16 the margin of error. 769,221 people must be in each
17 congressional district.

18 The evidence will show that the State of Florida, both
19 the Governor and the legislature, adopted a map that prioritized
20 compactness and adherence to political and geographic boundaries
21 when enacting the plan that's being challenged here.

22 The Governor and the legislature did not consider
23 partisanship; they did not consider incumbency, and as to North
24 Florida, they did not consider race.

25 Plaintiffs, however, in this case are asking this

1 Court to turn notions of equal protection on their head.
2 They're saying that the State of Florida violated the
3 Fourteenth Amendment's equal protection clause and the
4 Fifteenth Amendment when it adopted a race-neutral map.

5 To get there, my friends from the plaintiffs say that
6 the Arlington Heights factors and the Greater Birmingham factors
7 for intentional discrimination have been met. That's simply not
8 the case. True, the legislative debates show that the
9 legislature and the Governor were struggling with how, if at
10 all, to be race-conscious without having race predominate. They
11 didn't agree in January of 2022. They didn't agree in February
12 of 2022. They didn't agree in March of 2022. The Governor made
13 public statements trying to convince the legislature to see
14 things his way.

15 True, in March of 2022, the Governor ultimately vetoed
16 two maps that the legislature passed. The legislature passed
17 those maps after inviting the Governor and his team to provide
18 their perspective in an open legislative hearing. Robert
19 Popper, the namesake of the Polsby-Popper Metric for
20 Compactness, presented his perspective that a 200-mile district
21 that connected populations from the First Coast with populations
22 in the Big Bend where 80 percent of the population came from
23 either end of that 200-mile stretch, where the stretch narrowed
24 to 3 miles just North of Tallahassee, violated the equal
25 protection clause because it wasn't compact. That was Robert

1 Popper's testimony. That was the Governor's perspective. That
2 was the perspective that the Governor laid out over and over
3 again.

4 And it's also true, Your Honors, that the Governor
5 called a special session in April of 2022. During that special
6 session, Alex Kelly, the Governor's deputy chief of staff at the
7 time, and Ryan Newman, the Governor's general counsel, both
8 testified in front of legislative committees. The Court has
9 their transcripts. The Court has their videos. The Court can
10 assess the sincerity and their credibility based on the videos
11 and the presentations given.

12 And the map that the Governor's office presented to
13 the legislature, that the legislature heard in committee, that
14 the legislature voted on was a compromise map, as the
15 legislative transcripts, which are going to be part of the
16 record, show. Ten of the 28 districts in the enacted plan come
17 from the legislature. 18 of the districts change, but the
18 legislative packets that are going to be part of this record
19 show that the Governor's proposal, which is a compromise with
20 the legislature, improved on traditional restricting criteria,
21 metrics. It split one fewer county. It split fewer cities. It
22 was more adherent to political and geographic lines.

23 Statistically, the least compact district in the enacted plan
24 was more compact than the ones in the legislature's plans, and
25 visually the intraocular test for compactness -- does it look

1 compact -- was an easy one to satisfy. North Florida -- gone
2 were the tentacles on either end of the former Congressional
3 District 5 that picked up Black populations with surgical
4 precision from certain census blocks in Duval, in certain census
5 blocks in Tallahassee, the South side of Tallahassee. They were
6 replaced with nice, straight lines that adhered to major
7 roadways, waterways, and that resembled a shape like a rectangle
8 or a circle or a square and not odd tentacles.

9 769,221 people. That's how many people need to be in
10 each congressional district. You compare a congressional
11 district in an urban area with a congressional district in a
12 rural area, looking simply at how far they are doesn't tell you
13 the full story. The question is: If you are trying to draw a
14 compact district in an urban area, how far are you going to get
15 the 769,221 people? In the Jacksonville area, you don't have to
16 go that far. Jacksonville is one of the 16 cities that was
17 split in the enacted plan. Why? Because it's bigger than the
18 size of a congressional district. You have to split it
19 somewhere.

20 It was split in the enacted plan along the lower
21 St. Johns River, as the evidence will show, a natural boundary
22 that citizens are familiar with in Jackson. It was not split
23 along odd census block lines that people are not familiar with.

24 The same was true for Leon County. And, yes, the
25 Governor did sign the bill into law on April 22, 2022. It was a

1 Friday. He's right-handed. He was the captain of the Yale
2 baseball team. The fact that these things were the first time
3 that this confluence of events happened doesn't make it so that
4 the Arlington Heights factors are violated. It doesn't make it
5 unprecedented in an unconstitutional manner. They do not show
6 discriminatory intent.

7 And how could they? At every step of way, as my
8 friend outlined, every step of the way, the legislature and the
9 Governor were acting within the confines of the powers given to
10 them under the Florida Constitution. There's no extra
11 constitutional action.

12 There's also discussion of the historical background.
13 My friends talk about the Slave Belt that preceded the Civil
14 War. They talked about the Jim Crow era. Under *Arlington*
15 *Heights*, as interpreted by Greater Birmingham from the Eleventh
16 Circuit, this long march from the Civil War on is inappropriate.
17 As a practical matter, the decision-makers in Florida -- many of
18 them weren't alive during the Jim Crow era. None of them were
19 alive immediately after the Civil War and the Reconstruction
20 Era, and none of them were alive before the Civil War in the
21 Antebellum Era. To impute some kind of taint onto these
22 decision-makers who had no role in what happened then is
23 inappropriate.

24 Even if we look at the last 30 years, from 1992 to
25 now, we see that Florida has made great strides and great

1 improvements. 1992 was the first time that we had Black
2 performing districts created in the State of Florida. This was
3 an era of the George H.W. Bush administration's "Max Black
4 policy" to create as many Black performing districts as
5 possible. Florida, in '92 after the election, had three.

6 In 2022, after the supposedly racially gerrymandered
7 map, after the legislature in Florida and the Governor of
8 Florida supposedly were out to dilute Black representation,
9 after that map passed in the 2022 election, four Black members
10 of Congress.

11 Finally, in the papers in this case, there's been some
12 back-and-forth about the presumption of good faith and what that
13 means. Everyone agrees that it applies; the question is: What
14 does it mean?

15 The plaintiffs say that the presumption of good faith
16 is no different than the burden of persuasion. Who has the
17 burden of persuasion and the presumption of good faith are tied
18 at the hip, as they say.

19 That's simply not true. If we pick up any Black's Law
20 Dictionary, the presumption of persuasion and the presumption of
21 good faith are two different things. Federal Rule of Evidence
22 301 says they're two different things. If this Court looks at
23 *Miller v. Johnson* and *Abbott v. Perez*, you see the Court is
24 treating the presumption of good faith and the burden of
25 persuasion as two different things.

1 So what exactly is the burden of persuasion? I
2 believe, in reading *Greater Birmingham* and how the presumption
3 was applied, the presumption is a weight placed on a scale that
4 was in equipoise. The weight is placed such that it benefits
5 the State of Florida, and as we go through every one of the
6 Arlington Heights factors, the plaintiffs have to overcome the
7 weight that's been placed in favor of the State. As a practical
8 matter, that means inferences should be made in favor of the
9 State.

10 And there's nothing unusual about that. We go all the
11 way to *Fletcher v. Peck*, 1810, Chief Justice Marshall: "Saying
12 that someone had improper intent is a question of much delicacy
13 which seldom, if ever, we decide in the affirmative."

14 We don't presume that our Decision-makers are acting
15 inappropriately. We presume the opposite. We presume they're
16 acting in good faith, and it's the plaintiffs' burden to
17 overcome that.

18 My friends rely on Justice Kennedy's statement from
19 *Bartlett v. Strickland*. A few points about that. One, that
20 opinion was joined by three justices. Two, that statement is
21 dicta. Bartlett's holding -- and I'm quoting from page 24 of
22 the opinion in the U.S. Reporter: "Bartlett's holding
23 recognizes only that there is no support for the claim that
24 Section 2 of the Voting Rights Act can require the creation of
25 crossover districts in the first instance."

1 We're not required to create crossover districts.
2 This is a crossover district. Black voters make up
3 46.2 percent, Black voting age population of the former
4 Congressional District 5. White voters make up 40.2 percent and
5 Hispanic voters make up 9.1 percent. Under these circumstances,
6 there's no requirement to create a Black performing district,
7 nor was there a requirement to retain such a district. *Clark v.*
8 *County of Putnam* from the Eleventh Circuit, the *City of*
9 *Jacksonville* case from the Middle District of Florida, *Allen v.*
10 *Milligan* from the United States Supreme Court all say that if
11 your goal is to retain a core that itself has created to sort
12 people based on race, that has the effect of sorting people
13 based on race, the predominant effect -- that is not something
14 that the State can do absent a compelling reason or narrow
15 tailoring.

16 Getting back to the *Bartlett* quotation from Justice
17 Kennedy, it does not suspend the Equal Protection Clause.
18 Justice Kennedy writes that, "States that wish to draw crossover
19 districts are free to do so where no other prohibition exists."

20 "Where no other prohibition exists." So if the equal
21 protection clause serves as a barrier to connecting people with
22 surgical precision on either end of a 200-mile district, you
23 cannot create that crossover district. You cannot retain that
24 crossover district.

25 Finally, the intent factor still matters. *Feeney*

1 teaches us that the plaintiffs have to show that the action was
2 done because of race, not in spite of race. They will not be
3 able to show that during the course of this trial.

4 8019, the Duval-only map, will not be how they get
5 there either. The legislative record shows that in drawing
6 8019, the Duval-only district, members of the legislature were
7 trying to meet the statistical number. They were trying to get
8 to a number where the district would perform for Black voters.
9 Race predominated in their decision-making process. They were
10 literally trying to get to a number.

11 What was the number? 46.2 percent was the Black
12 voting age population of the former Congressional District 5.
13 Under the Florida Supreme Court's case law, Apportionment 1 and
14 Apportionment 7. In Apportionment 1, the Florida Supreme Court
15 says that slight deviations from the number are okay to meet
16 Florida's nondiminishment test. In Apportionment 7, the Florida
17 Supreme Court is a bit more vague about how one reaches the
18 nondiminishment test.

19 But the legislature was trying to come up with a way
20 to get to a number that would allow for only slight diminishment
21 to satisfy the Florida Constitution. For equal protection
22 purposes, that means there was a numeric target they were trying
23 to hit.

24 And, yes, the compactness number for the Duval-only
25 district, the little triangle, is better. But what happens to

1 the district around it? We're creating a shape where PacMan is
2 eating a ghost. The PacMan district, which is adjacent to the
3 Duval-only district, has an awful compactness number.

4 Finally, as Mr. Newman outlines in his veto memo to
5 the Governor, the other problem is that the legislature is
6 trying to meet the nondiminishment standard under the Florida
7 Constitution where you cannot diminish, does the word say in the
8 Florida Constitution? The legislature falls short of that mark,
9 because when you take a look at the functional analysis, which
10 will be in evidence in this case as part of the record, the
11 functional analysis for the 8019 district, the Duval-only
12 district, shows that it performs -- that it does not perform,
13 rather, for Black voters in five of 14 elections. Five of 14
14 test elections.

15 So a third of the time, Black voters can't elect a
16 representative of their choice. Compare that to the benchmark.
17 The former Congressional District 5, 14 out of 14 elections, it
18 performs. Compare that to the other Black performing districts
19 in both the benchmark and the enacted plan, 8019, 14 out of 14
20 times Black voters get to elect the representative of their
21 choice. So 8019 is no solution.

22 Finally, Your Honors, the Court will see when this
23 trial is done that there is but one conclusion to reach. It's
24 that the plaintiffs haven't proven that there was intentional
25 discrimination. The plaintiffs haven't proven that Florida's

1 race-neutral enacted plan should give way to something else.

2 Thank you.

3 JUDGE JORDAN: All right. Thank you very much,
4 Mr. Jazil.

5 We're going to take a ten-minute break and we'll come
6 back at right around 9:35 and begin with the plaintiffs' case.

7 One final thing about objections and evidence. This
8 is obviously a bench trial. We do not have a jury. And if
9 there are close calls, the chances are pretty good that we are
10 going to err on the side of admission. The Supreme Court has
11 explained that in bench trials, judges routinely hear
12 inadmissible evidence that they are later presumed to ignore
13 when making their actual decision. That's from *Harris v.*
14 *Rivera*, 454 U.S. 339, page 346, from 1981.

15 So, again, if there are close calls, the three of us
16 are probably going to err on the side of admissibility for now,
17 let you raise any objections in your posttrial filings, and then
18 take up the ultimate issue of admissibility at the end of the
19 day.

20 Okay. All right we'll see you in ten minutes.

21 *(Recess taken from 9:29 a.m. to 9:38 a.m.)*

22 JUDGE JORDAN: Welcome back. Please be seated.

23 Okay. Mr. Diskant, you may call your first witness.

24 MR. DISKANT: Your Honor, before I do that, if I may,
25 a couple housekeeping matters.

1 We have largely agreed on an exhibit list that
2 we're -- are admitted as far as we're concerned. I can either
3 mark it as a Court exhibit or some Courts prefer reading it out
4 loud, but whatever you prefer.

5 JUDGE JORDAN: You don't have to read it out loud. As
6 long as we have a copy and we file it in the record, that will
7 be sufficient.

8 MR. DISKANT: Great. So that will be Court Exhibit 1
9 or -- however you want it.

10 JUDGE JORDAN: You can call it whatever you want.

11 MR. DISKANT: Okay.

12 JUDGE JORDAN: What do you want to call it?

13 MR. DISKANT: I'm going to call it Court Exhibit 1.

14 JUDGE JORDAN: Fine.

15 JUDGE RODGERS: I'd like a copy of that.

16 JUDGE JORDAN: May we get copies?

17 JUDGE WINSOR: Are you moving everything in now?

18 JUDGE JORDAN: These are agreed-on moved in, so we can
19 refer to them as we're examining and not be slowed down. There
20 will be exhibits that there may be objections to, but these are
21 all in.

22 MR. JAZIL: Yes, Your Honor. And might I suggest that
23 we file it on the ECF docket as well at the end of the day?

24 JUDGE JORDAN: Yes. If you could do that, just have
25 it as a joint filing, and that will be the set of exhibits that

1 the parties agree to. And we'll admit those by agreement.

2 MR. DISKANT: Thank you.

3 Secondly, and I'd just like to give the Court a
4 preview of where we're going in terms of witnesses today. Today
5 we're going to call Alex Kelly as an adverse witness, and if he
6 runs over till tomorrow, the next witness -- well, in either
7 event, the next witness will be one of the named plaintiffs,
8 Charlie Clark, who's in the courtroom. And then we'll move to
9 our expert historian, Dr. Kousser. Then if there's still time
10 on Thursday, another named plaintiff, Dorothy Inman Johnson. I
11 think that will complete our witness list for the week.

12 Next week, our first witness will be Leader Driskell
13 from the House, followed by the two organizational plaintiffs,
14 followed by our expert map maker -- or drawer, analyzer,
15 Dr. Baretto. Unless I've forgotten someone, that will complete
16 our presentation. We should be done, Monday/Tuesday.

17 I understand there will be two witnesses from the
18 defendant that will wrap up. I think we've at least agreed as
19 between ourselves that we -- unless something develops, our
20 preference would be just to sum up, rather than spit more
21 papers, but if you want more papers -- or something may occur
22 during the trial in which either the Court requests briefing on
23 something or we'd like to.

24 But as we stand here right now, I think our preference
25 would be just to sum up at the end if -- but on a new day. So

1 testimony ends on Tuesday, we'd sum up Wednesday morning, if
2 that's agreeable with the Court.

3 JUDGE JORDAN: I don't see any problem with that.

4 MR. DISKANT: Okay. And then -- I guess the only
5 other -- oh, one other thing.

6 We have a large number of young lawyers putting on
7 their first witnesses in court. I think Mr. Jazil knows as
8 well. And I just alert the Court that -- very exciting
9 opportunity for all of them.

10 And I think -- one other question I have. What is the
11 Court's plan for the length of the court day?

12 JUDGE JORDAN: Yet to be determined.

13 MR. DISKANT: Okay.

14 JUDGE JORDAN: We'll see how things are going.

15 MR. DISKANT: Okay.

16 JUDGE JORDAN: If we have a witness that one side or
17 the other is about to wrap up and we go a little bit beyond the
18 normal close of business, we'll probably continue, depending on
19 your estimates, and get that witness done.

20 MR. DISKANT: Okay.

21 JUDGE JORDAN: We don't intend on going until 7:00 or
22 8:00 p.m. any night.

23 MR. DISKANT: Excellent.

24 JUDGE JORDAN: But we may go a little bit beyond the
25 normal closing time if we think it'll help to get a witness done

1 and then start fresh the following morning.

2 MR. DISKANT: That's perfectly agreeable with us.
3 We've compared notes on how long we think for various witnesses
4 will be. Our guess was my cross of Mr. Kelly will be maybe two
5 hours or so. The direct will be two hours and then we'll move
6 on.

7 JUDGE JORDAN: Perfect. Okay.

8 MR. JAZIL: Yes, Your Honor. I agree with everything
9 my friend said. Just one addendum, just as a matter of good
10 housekeeping. I'd like to reserve the right to call Mr. Kelly
11 back in my case in chief --

12 JUDGE JORDAN: Sure.

13 MR. JAZIL: -- just in case something comes up. I
14 don't anticipate it, but I'd just like to reserve that right.

15 JUDGE JORDAN: That will not be a problem.

16 MR. JAZIL: Thank you, Your Honor.

17 JUDGE WINSOR: Before you begin, one question on the
18 exhibit list.

19 You had mentioned in your opening, Mr. Jazil, that we
20 had certain transcripts, and I know you'd filed some at our
21 request. But you said those would be part of the record. I
22 don't know if they're on this or -- I want to make sure the
23 record is clear about that or if there's disagreement about what
24 is and isn't part of the record with respect to those earlier
25 transcripts.

1 MR. JAZIL: Your Honor, I do believe all the
2 legislative transcripts are part of the record. We agreed to
3 their submission to the Court.

4 JUDGE WINSOR: Okay.

5 MR. DISKANT: You should have a full record.

6 JUDGE JORDAN: But we need to make sure that every
7 one -- I haven't looked through this list, but we need to make
8 sure that every single one of these exhibits that are agreed to
9 and have now been admitted get filed in the record. We may have
10 a chunk of them, but we may not have all of them, so we need to
11 make sure that by the end of the trial, all of these get filed.

12 And the same goes for any other exhibits, whether or
13 not they're objected to, that get admitted. You'll be
14 responsible for putting them in under your exhibit list so that
15 the record contains the copy of them.

16 MR. DISKANT: Yes. Thank you, Your Honor. You
17 reminded me, also, we do plan to do that.

18 With respect to each witness, our plan at least is to
19 provide the Court with a binder and the witness -- with a binder
20 of exhibits we plan to use with that witness, but by the end of
21 the trial to submit a complete record of all the exhibits.

22 JUDGE JORDAN: No, that will be helpful for us as both
23 sides go through a witness and show him or her a document --

24 MR. DISKANT: Yeah.

25 JUDGE JORDAN: -- for us to have it here, or you can

1 put it up on the screen. But for our recordkeeping purposes and
2 for anything that happens after us, we need them to be part of
3 the District Court record too.

4 MR. DISKANT: I think both sides will work hard to
5 make sure you have everything.

6 MR. JAZIL: Your Honor, would you prefer the Judge
7 Hinkle approach of just filing every exhibit on the record on
8 the CM/ECF record? Would that be one way to ensure that
9 everyone has a copy of the materials in an accessible way, or
10 would you prefer physical copies, three sets of each exhibit?
11 Whatever the Court's preference is.

12 JUDGE RODGERS: I do. I would prefer the physical for
13 me. I'm not as savvy as Judge Hinkle. I would prefer that.

14 Plus, I also heard a reference to video testimony.
15 Did I hear that correctly?

16 MR. DISKANT: The transcript -- the transcripts you
17 have were transcribed by us. We hired a court reporter to
18 transcribe them. They were video-recorded. Occasionally, we
19 may play some video. I don't know if the videos were on the
20 list.

21 MR. JAZIL: They may not be, but I think they'll come
22 in.

23 But, Your Honors, the videos for each of the committee
24 stops in the legislature on the Florida channel, we can work
25 with our friends from the plaintiffs to just compile a list of

1 those.

2 JUDGE RODGERS: I would like that, yeah. I would
3 appreciate that.

4 JUDGE JORDAN: So, again, just to wrap everything up,
5 you can give us physical copies as you go through a witness's
6 testimony, direct, cross, redirect, et cetera. But we need to
7 make sure that every single exhibit gets filed in the CM/ECF
8 system at the end of the day so if anybody is looking for
9 Exhibit JX009, they will have it in the CM/ECF system.

10 MR. DISKANT: We will do that, Your Honor.

11 MR. JAZIL: Thank you, Your Honor.

12 JUDGE JORDAN: Okay. We will ask you later, next
13 week, probably, what you want to do about post-trial submissions
14 and how you want to handle that, so think about it. We don't
15 need any answers today or tomorrow or Thursday, but we'll talk
16 about it next week. So you can begin to put that --

17 MR. DISKANT: For what it's worth, our tentative
18 thinking is we would just sum up, but --

19 JUDGE RODGERS: I don't think there was anything about
20 submitting anything --

21 JUDGE JORDAN: I know that's your thinking.

22 MR. DISKANT: We'll do whatever you want.

23 JUDGE JORDAN: I'm just saying that we're going to
24 talk about it next week.

25 MR. DISKANT: That's fine.

1 JUDGE JORDAN: So you can convince us that one way is
2 better than another, but we'll talk about it next week, so just
3 be ready to discuss it on both sides.

4 MR. DISKANT: We're ready to do whatever you want.

5 JUDGE JORDAN: One option, of course, will be that
6 with regards to trial evidence, your summing up will be enough,
7 but we may ask for a briefing on a certain issue or issues that
8 come up during the trial too.

9 MR. DISKANT: Thank you, Your Honor.

10 JUDGE JORDAN: Okay. We're ready.

11 MR. DISKANT: Plaintiffs call Alex Kelly.

12 **JAMES ALEXANDER KELLY, PLAINTIFF WITNESS, DULY SWORN**

13 DEPUTY CLERK: Be seated, please. For the record,
14 please state your name and spell your last name.

15 THE WITNESS: James Alexander Kelly. My last name is
16 spelled K-E-L-L-Y. I go by Alex.

17 *(Discussion off the record.)*

18 JUDGE JORDAN: Mr. Diskant, Mr. Diskant, probably two
19 hours, give or take, and break for lunch.

20 **DIRECT EXAMINATION**

21 BY MR. DISKANT:

22 Q. Good morning, Mr. Kelly.

23 A. Good morning.

24 Q. My name is Greg Diskant, representing the plaintiffs.

25 You are now acting chief of staff for Governor

1 DeSantis; is that correct?

2 A. Yes, sir.

3 Q. And you were deputy chief of staff during the events that
4 led up to the enactment of the 2022 congressional redistricting
5 plan; is that right?

6 A. Yes, sir.

7 Q. You drew the 2022 plan for Florida; is that right?

8 A. 18 of the 28 districts. Yes, sir.

9 Q. Excuse me?

10 A. 18 of the 28 districts. Yes, sir.

11 Q. Well, you incorporated ones that the legislature had drawn,
12 but you presented an entire map that you were responsible for,
13 right?

14 A. I presented the 18 districts that I drew.

15 Q. You didn't present an entire map?

16 A. I did, but I was clear in my testimony that ten of the
17 districts were not drawn by me; they were drawn by the
18 legislature.

19 Q. Well, I understand you determined to retain them, but you
20 did determine to retain them in the map that you presented to
21 the legislature; is that correct?

22 A. Yes, sir.

23 Q. Okay.

24 MR. DISKANT: Could I have the ELMO?

25 DEPUTY CLERK: Yes, sir.

1 MR. DISKANT: Thank you.

2 BY MR. DISKANT:

3 Q. On this enacted map, this excerpt from the enacted map, PS
4 7190 --

5 MR. DISKANT: And for the Court, the height of one
6 just means it's an excerpt from the entire exhibit.

7 BY MR. DISKANT:

8 Q. 7190 is part of the map that you drew, right?

9 A. Yes, sir.

10 Q. And you were personally involved in dealing with the
11 legislature in the months leading up to the plan; is that right?

12 A. Yes, sir.

13 Q. And you testified in support of the map, correct?

14 A. Yes, sir.

15 Q. Now, you were first involved in redistricting in the 2002
16 redistricting cycle; is that right?

17 A. I was a legislative aide at the time, and I was following
18 the process. I wasn't drawing maps for the legislature at the
19 time.

20 Q. You drew a State House map for Representative Dean, did you
21 not?

22 A. Representative Dean directed me to draw a map for him, yes,
23 sir.

24 Q. And you did?

25 A. Yes, sir.

1 Q. And by the 2012 redistricting cycle, you were the staff
2 director of the House Redistricting Committee; is that right?

3 A. Yes, sir.

4 Q. By the end of that cycle, you were very experienced in
5 drawing maps both for the State House, the State Senate, and the
6 congressional maps, right?

7 A. Yes, sir.

8 Q. You drew dozens of maps; is that fair?

9 A. Yes, sir. Probably a couple dozen.

10 Q. Okay. And you also served as a member of the Florida
11 Election Commission until 2019; is that right?

12 A. Yes, sir.

13 Q. Now, you're not a lawyer; is that correct?

14 A. Correct, yes, sir.

15 Q. But you know a lot about the legal requirements for
16 redistricting; is that right?

17 A. Yes, sir.

18 Q. Are you familiar with the Fair Districts amendment?
19 Correct?

20 A. Yes, sir.

21 Q. You're familiar with terms like "functional analysis" and
22 "compactness" and "minority opportunity district" and
23 "compelling state interest" and "narrow tailoring" and the like;
24 is that right?

25 A. Yes, sir.

1 Q. And you used all those terms in your testimony before the
2 legislature with respect to the map that we're talking about,
3 PX7190, right?

4 A. Yes, sir.

5 Q. I may use them in questioning you also, but if anything I
6 ask is outside of your knowledge because you're not a lawyer,
7 just say so, and I'll move on. Is that fair?

8 A. Sure. Thank you.

9 Q. We mentioned that -- your involvement in the 2002 and 2012
10 redistricting cycle. Governor Bush and later Governor Scott
11 signed the congressional maps in those two cycles; is that
12 right?

13 A. Yes, sir.

14 Q. So far as you know or remember, they played no other role;
15 is that right?

16 A. I don't know about what role Governor Bush played. I know
17 Governor Scott played something of a role.

18 Q. Neither one proposed a map of their own; is that right?

19 A. Correct.

20 Q. Neither offered any ideas; is that right?

21 A. Not to my knowledge.

22 Q. Okay. And so far as you know, that hands-off approach --
23 so far as you know, that hands-off approach was pretty much the
24 norm for Florida Governors in this century until Governor
25 DeSantis; is that right?

1 A. Of this century, yes.

2 Q. Now, in redistricting in Florida, it's very important to
3 understand the Fair Districts amendment, correct?

4 A. Yes.

5 Q. I'll sometimes call that the "FDA." You'll understand
6 that?

7 A. Sure. Yes, sir.

8 Q. Okay. So let's just take a look at it. This is PX7057. I
9 know you're familiar with it, but I just want to point to it for
10 a moment.

11 The Fair Districts amendment was enacted in 2010. It
12 was first used in the 2012 redistricting cycle; is that right?

13 A. Yes, sir.

14 Q. And you understand the focus of this case is racial
15 discrimination, so I'm going to focus on that part of the Fair
16 Districts amendment.

17 "No apportionment plan or individual district shall be
18 drawn with the intent to favor a political party, and" -- and
19 here's the racial part -- "districts shall not be drawn with the
20 intent or the result of denying or abridging equal opportunity
21 of racial or language minorities to participate in the political
22 process or to diminish their ability to elect representatives of
23 their choice."

24 Correct?

25 A. Yes, sir.

1 Q. And "districts shall consist of contiguous territory,"
2 right?

3 A. Yes, sir.

4 Q. And those are the so-called Tier I standards?

5 A. Yes, sir.

6 Q. And the Tier II standards talk about equal population,
7 compactness, and using existing political and geographic
8 boundaries, correct?

9 A. Yes, sir.

10 Q. But, it says, that's true, "unless compliance with this
11 subsection conflicts with the standards of subsection (a) or
12 with federal law," right?

13 A. Yes, sir.

14 Q. And you understand that to mean that the Tier II standards
15 are subordinate to the Tier I standards, right?

16 A. Yes, sir.

17 Q. And so if there's a conflict between the two, Tier I
18 standards govern, right?

19 A. Well, in federal law.

20 Q. Yes. Conflicts between the two in federal law, Tier I -- I
21 misspoke.

22 If there's a conflict between Tier II and federal law
23 over Tier I, federal law and Tier I govern, right?

24 A. Tier I or federal law.

25 Q. Yeah.

1 A. And the equal in population, equal -- even though the
2 language in the Florida Constitution subordinates equal
3 population, that is your number-one federal law for
4 redistricting. So that paragraph really can't subordinate equal
5 population.

6 Q. Okay. In its simplest terms, the nondiminishment provision
7 is designed to preserve minority opportunity districts; is that
8 fair?

9 A. Opportunity districts? I'm not sure I read it that way.

10 Q. Preserve the ability of minorities to elect representatives
11 of their choice; is that fair?

12 A. Yes.

13 Q. Okay. And you're familiar with the term of minority
14 opportunity districts or minority performance districts, right?

15 A. Yes.

16 Q. And that's a term used to describe a district in which a
17 minority can elect the representatives of their choice, right?

18 A. Yes.

19 Q. Okay. Let's use a quick example just so we're all on the
20 same page.

21 I'm going to use African American or Black district
22 because that's what this case is about.

23 A Black Opportunity District is one in which a
24 sufficient number of Blacks reside; they vote cohesively enough,
25 and they have sufficient white allies or non-Black allies so

1 that they can elect their candidate of choice, even though they
2 are not a minority -- a majority. Excuse me. Is that right?

3 A. I'm sorry. You got me confused.

4 Q. I'll try again. I misspoke in the middle, throwing us both
5 off.

6 A Black Opportunity District is one in which a
7 sufficient number of Blacks reside; they vote cohesively enough,
8 and they have sufficient non-Black allies so that they can elect
9 the candidate of their choice, even though they are not a
10 majority; is that right?

11 A. I'm -- can I see what you're reading? I'm still -- I'm not
12 following.

13 Q. I'm just reading my notes. I can go slower.

14 Why don't you tell me what you think Black Opportunity
15 District is.

16 A. To my knowledge, a Black Opportunity District -- I hear
17 that term used differently. I generally -- personally, I
18 generally distinguish that a little bit from a majority minority
19 district.

20 Q. Okay.

21 A. But that's where there's still a significant enough, you
22 know, Black voting age population, Hispanic voting age
23 population, or some other minority group, significant enough of
24 a population where there's still an opportunities to elect a
25 candidate of choice.

1 Q. Okay. We can stay with that. Let me give you an example
2 and see if you agree with it.

3 A district has a majority of Democratic voters.
4 Blacks are 40 percent of the district, but they constitute
5 60 percent of the Democratic vote. If the Black population
6 votes cohesively, they can pick the Democratic candidate in the
7 primarily; is that fair?

8 A. Sure.

9 Q. Okay. And then, because Democrats are a majority in the
10 district, if the white Democrats or non-Black Democrats vote
11 with the Black voters, then the Black candidate who won the
12 primary is elected; is that right?

13 A. I assume there would be a probability of that happening,
14 yes.

15 Q. Exactly, because the idea of the Black Opportunity District
16 is it's an opportunity; it's not a guarantee, right?

17 A. Right.

18 Q. And there's lots of variability in elections and different
19 outcomes occur, no?

20 A. There's no question.

21 Q. Yeah. Is that correct?

22 A. Yes.

23 Q. Okay. Sometimes Black Opportunity Districts are called
24 "crossover districts"; is that right?

25 A. I've heard people interchange these terms. You know, I

1 think sometimes people make these terms out to be the same
2 thing. I wouldn't say they are the same thing.

3 Q. Why are they different?

4 A. Because I hear people use them inconsistently. In my
5 experience, I've heard people use these phrases pretty
6 inconsistently.

7 Q. Okay. What do you think a crossover district is?

8 A. In my experience, a crossover district would be where even
9 though a minority community might not have a significant
10 percentage of the electorate, the nonminority community reliably
11 crosses over, and, nonetheless, there's some history of the
12 nonminority community supporting the minority community's
13 candidate of choice.

14 Q. That doesn't sound terribly different to me. Can you
15 explain why that's different from a Black Opportunity District?

16 A. Sure. So in the first scenario you described, you
17 described a situation where the minority community controls
18 the -- whatever political party is the majority party in the
19 district, you described a scenario where the minority community
20 controls that political party's primary and, therefore, can
21 frequently elect a candidate of choice and, therefore, still
22 control the general election.

23 In the crossover scenario, that -- in my practice,
24 that generally means that the minority community doesn't
25 actually control their own primary; however, there's a history

1 of nonminority voters voting with the minority candidates,
2 nonetheless, and so there's some crossover effect occurring in
3 the primary or even maybe in the general election that's showing
4 there's some history of a minority community being able to elect
5 their candidate.

6 JUDGE JORDAN: Is it fair to characterize your view of
7 the difference between the two in this way: A crossover
8 district can have less Black African American voting power as a
9 group, right? In a crossover district, you could be down maybe
10 in -- I don't want to put numbers in your mouth, but you could
11 be in the 20, 30 percent range but get enough crossover from
12 nonminority groups so that the candidate of choice of the
13 minority population has a probability of getting elected, and
14 you see a Black Opportunity District as having a higher
15 percentage of voting power for the minority group?

16 Is that accurate or not?

17 THE WITNESS: Your Honor, I phrase it slightly
18 differently. I believe in the crossover scenario, it's not so
19 much a probability of getting elected; it's that there's a
20 history of it. So even though that minority community, as you
21 said, may be 25, 30 percent of the district and unto themselves
22 may not have a probability of being able to control the outcome
23 of the election, there's a history there that nonminority
24 voters, nonetheless, coalesced with the minority community,
25 whereas in the other scenario, more of the opportunity scenario,

1 there's actually a statistical probability because that minority
2 community is cohesive enough in one -- win one particular
3 political party, and so through the electoral process, that
4 minority community can actually control the election.

5 JUDGE JORDAN: All right. Thank you.

6 BY MR. DISKANT:

7 Q. You're familiar with the -- what the Florida legislature
8 has called Black performance districts, are you not?

9 A. Yes.

10 Q. And they go down to 29 percent Black population, don't
11 they?

12 A. I don't know.

13 Q. You don't know?

14 A. I don't know if it goes down to 29 percent.

15 Q. You know that the Black performance districts were reviewed
16 and approved by the Florida Supreme Court in the last cycle,
17 correct?

18 A. I did not follow closely the process that the Florida
19 Supreme Court went through the last cycle. I don't --

20 Q. You know it's required by law, don't you?

21 A. I'm sorry?

22 Q. You know it's required by law that the legislature -- the
23 State legislative maps be reviewed by the Florida Supreme Court
24 per compliance with the Fair Districts amendment, correct?

25 A. I'm sorry. I think you're -- if I understand your question

1 correctly, you're asking about what the Florida Supreme Court
2 did with the congressional map in the last redistricting
3 cycle --

4 Q. No.

5 A. Maybe I misunderstood your question.

6 Q. That's not what I'm asking. I'm talking about the
7 legislature maps, the State legislative maps.

8 And you understand, do you not, that the State
9 legislative maps -- that's for the State House and the state
10 Senate -- are required by law to be reviewed by the Florida
11 Supreme Court and approved for compliance with the Fair
12 Districts amendment, correct?

13 A. Yes, the Florida Supreme Court does a facial review of the
14 State legislative maps.

15 Q. And if the Court wanted to see what percentages the Florida
16 Supreme Court proved as Black performing districts, they could
17 look at the public record that was submitted in connection
18 with -- with those maps, right?

19 A. Yes, the Court could look at that record.

20 Q. Okay. And you've got no reason to disagree that some of
21 those -- percentages were as low as 29 percent, do you?

22 A. I don't have them in front of me. I don't know what they
23 deem to be performing districts.

24 Q. Let me represent to you -- I'm going to move past it, but
25 let me just represent to you that at least two districts were as

1 low as 29 percent in the last cycle.

2 Now, figuring out why there's something --

3 Oh, excuse me, sir. I see you don't have a bottle of
4 water. Would you like one?

5 A. Yes. Thank you.

6 MR. DISKANT: Can someone provide the witness with a
7 bottle of water please.

8 *(Discussion off the record.)*

9 BY MR. DISKANT:

10 Q. Now, figuring out whether a particular district will be a
11 Black performance district requires a close look at a variety of
12 variables, right?

13 A. Yes, sir.

14 Q. One of the variables is the Black voting age population
15 called BVAP; is that right?

16 A. Yes, sir.

17 Q. But it would be wrong just to look at the BVAP, because the
18 same BVAP in one district might work to make it a functioning
19 district and not in another; is that right?

20 A. Yes, sir.

21 Q. If there is a Black performing district or Black
22 Opportunity District, as a general principle, the FDA says it
23 shouldn't disappear in the next plan; is that right?

24 A. I'm sorry. Can you repeat the question?

25 Q. Yes. If there is a Black Opportunity District or Black

1 performance district, as a general principle, the FDA says it
2 should not disappear in the next plan; is that right?

3 A. Yes.

4 Q. Okay. And you know that the Florida Fair Districts
5 amendment was enacted in 2010 and approved by over 60 percent of
6 the voters?

7 A. Yes.

8 Q. And you were in Florida during that time period, right?

9 A. Yes.

10 Q. You know that the advocates for the amendment argued that
11 minority protection provisions were necessary because of the
12 long history of discrimination in Florida against Black voters
13 on the basis of race, right?

14 A. I don't remember what their arguments were.

15 Q. You're certainly aware of the history of discrimination in
16 Florida against voters on the basis of race, right?

17 A. It was before my time. Yes, I'm aware of it.

18 Q. Well, you're responsible for education policy for the
19 Governor. It's part of your portfolio, is it not?

20 A. It was.

21 Q. That includes the teaching of African American history,
22 right?

23 A. Yes.

24 Q. And that includes the long history of discrimination
25 against Blacks in voting in Florida, right?

1 A. Yes.

2 Q. Okay. You're familiar with acts of violence and other --
3 I'll move on.

4 You know that the Voting Rights Act was enacted in
5 1965, right?

6 A. Yes.

7 Q. But it took almost 30 years until a Black congressman was
8 elected in Florida, 1993, right?

9 A. Yes.

10 Q. You know the FDA was subject to lots of litigation in state
11 and federal court, right, when it was enacted?

12 A. State court, yes.

13 Q. There's also one federal court case.

14 A. Okay.

15 Q. Judge Winsor was involved.

16 It survived all its challenges, right?

17 A. Yes.

18 Q. And it was precleared by the U.S. Department of Justice,
19 right?

20 A. Yes.

21 Q. And that meant the U.S. Department of Justice found that
22 the Fair Districts amendment did not discriminate on the basis
23 of race, right?

24 A. I believe the way that -- U.S. DOJ response is,
25 essentially, they have no comment.

1 Q. Okay. In any event, this case involves Benchmark CD-5,
2 putting up here on the screen. It's PX7198.

3 And Benchmark CD-5 attracted the attention of Governor
4 DeSantis in the last redistricting round, right?

5 A. Yes.

6 Q. He was very upset by it, correct?

7 A. He disagreed with the legal premise behind it and argued --

8 Q. Legal premise?

9 A. -- and argued that it wasn't constitutional.

10 Q. I see. He didn't want a Black performing district in
11 Northern Florida, correct?

12 A. He never made that statement.

13 Q. I'm asking you, sir, isn't it true that he did not want a
14 Black performing district in North Florida? Isn't that right?

15 A. I'm saying no, he never made that statement.

16 Q. You're saying no. He wanted -- you're saying that he had a
17 constitutional objection to CD-5; is that right?

18 A. Yes, sir.

19 Q. And that's his reasoning, but the result that he wanted was
20 the elimination of the district, right?

21 A. I'm telling you: He never made that statement. His
22 objections were based on the constitutionality of it, that it
23 violated equal protection clause and that it otherwise violated
24 other traditional redistricting principles -- compactness,
25 county boundaries.

1 Q. I'm having a hard time understanding. The result that he
2 wanted -- I'm not talking about his reasoning, why he wanted it.
3 The result he wanted was the elimination of CD-5; isn't that
4 right?

5 A. The result that he wanted that he said repeatedly was he
6 wanted a constitutionally compliant map and a constitutionally
7 compliant district.

8 Q. And in particular, he wanted the elimination of Benchmark
9 CD-5; isn't that just self-evidently true?

10 A. The district was unconstitutional. Yes, he wanted to
11 eliminate unconstitutional district.

12 Q. And so he wanted it eliminated in the map that you drew,
13 right?

14 A. Yes, sir.

15 Q. And that meant eliminating the Black Opportunity District
16 in North Florida, right?

17 A. He never once commented on eliminating a Black Opportunity
18 District.

19 Q. I'm sorry. What he asked you to do and what you did was
20 draw a map that eliminated the Black Opportunity District of
21 Northern Florida, right?

22 A. He asked me to draw a constitutional map.

23 Q. He asked you to draw a map that did not have a Black
24 Opportunity District; isn't that true?

25 A. He never once said that.

1 MR. JAZIL: Objection, Your Honor. Asked and answered
2 and argumentative at this point.

3 JUDGE JORDAN: Overruled in this respect:

4 I think his question to you is not whether or not the
5 Governor said that he wanted to eliminate a Black performing
6 district. You've testified that he never made any such comment,
7 right?

8 THE WITNESS: Yes, Your Honor.

9 JUDGE JORDAN: His next question is whether or not the
10 map that you drew for Governor DeSantis eliminated, as a matter
11 of fact, a Black opportunity district. That's a different
12 question, not whether Governor DeSantis said he wanted to
13 eliminate minority rights or Black voting power, but whether or
14 not the map that you drew for him, in fact, eliminated that
15 Benchmark CD-5.

16 THE WITNESS: Yes, Your Honor, it eliminated that
17 Benchmark CD-5.

18 JUDGE JORDAN: Okay.

19 BY MR. DISKANT:

20 Q. Now, except in Northern Florida, except with respect to
21 CD-5, the Fair Districts amendment was used repeatedly in the
22 last redistricting cycle in drawing maps; isn't that right?

23 A. Yes.

24 Q. Yes?

25 A. You said that would be Fair Districts amendment was used

1 repeatedly in the last redistricting cycle?

2 Q. Yes.

3 A. Yes.

4 Q. Okay. And, in fact, by my count, there are 40 State Senate
5 and legislative maps that were drawn compliant with the
6 FairDistricts amendment; is that right?

7 A. I'm sorry. There were 40 State Senate and legislative maps
8 that were drawn --

9 Q. Yes.

10 A. -- compliant with the Fair Districts amendment?

11 Q. Yes.

12 A. I don't know how many total compliant maps were drawn.

13 Q. Well, 120 maps were drawn, if I have that number right.
14 Maybe it's 160. I'm sorry.

15 A. I think you mean districts.

16 Q. Excuse me?

17 A. I think you mean districts.

18 Q. I can't hear you. I'm sorry.

19 A. I think you mean districts.

20 Q. Oh, you're right. That the Fair Districts amendment was
21 used in drawing 40 State Senate and legislative districts in the
22 last legislative cycle, correct?

23 A. 46 Senate, and, yes, 120 state House districts.

24 Q. I'm not asking how many maps there were or districts there
25 were. I'm asking how many were drawn specifically to comply

1 with the FDA.

2 There were 40 total drawn specifically to comply with
3 the FDA and reviewed by the Florida Supreme Court; is that
4 right?

5 A. 40 state Senate districts, yes.

6 Q. I think I said state Senate and legislative districts?

7 A. There are 120 state -- I'm sorry.

8 Q. We're not communicating.

9 A. I'm sorry.

10 Q. Let me try it one more time, and if we don't get anywhere,
11 I'll move on.

12 The Fair District amendment was used to draw 40
13 districts in the State legislative maps, Senate and
14 congressional, 40 districts to have -- to be Black performing --
15 or minority performing districts in the 2022 cycle; is that
16 right?

17 A. I apologize. I don't know the number of -- your question
18 has changed. I don't know the total number of minority
19 performing districts in all the maps combined.

20 Q. And you, in fact, personally used the Fair Districts
21 amendment to draw at least one map in the congressional map --
22 or approved that you submitted to the legislature, right?

23 A. Yes.

24 Q. So there was nothing wrong with the Fair Districts
25 amendment in the last cycle; the Governor's attention was

1 focused on CD-5; is that right?

2 A. The Governor's public statements were very focused on
3 Congressional District 5 in Northeast Florida, yes.

4 Q. Okay. And let me just point to Joint Exhibit 52, which is
5 one of his statements on this score. This is a request of the
6 Florida Supreme Court. I'm just focusing on the highlighted
7 portion that describes: "The district stretches over 200 miles
8 from East to West along eight counties without conforming to
9 usually political or geographic boundaries solely to connect the
10 minority population in Jacksonville with the separate and
11 distinction minority population center in Leon and Gadsden
12 Counties so that these minority populations may elect the
13 candidate of their choice."

14 That captures his objection in a sentence; is that
15 right?

16 A. Yes.

17 Q. Okay. Now, in fact, in the year 2011, when you were with
18 the House, you drew a map with an East-West configuration along
19 the Georgia border from Jacksonville to Tallahassee that the
20 Florida Supreme Court relayed upon in creating Benchmark CD-5;
21 is that right?

22 A. We drew a district -- I drew a district to resemble some
23 public input that we had received. It wasn't part of the plan
24 in the actual legislature. It was just part of public
25 submission that we received, public input.

1 Q. Let's look at the plan you drew. That's PX7221. Excuse
2 me. PX7222 -- well, that's not it. Sorry.

3 I'm sorry. Let me do it a little differently.

4 Go back to 2011, and this is the enacted plan, 2002
5 enacted plan that was in effect in 2010.

6 You're familiar with it, right?

7 A. Generally, yes. It's been a while.

8 JUDGE JORDAN: What exhibit is that, Mr. Diskant?

9 MR. DISKANT: 7222.

10 BY MR. DISKANT:

11 Q. And it had a Black -- a North-South oriented Black
12 Opportunity District; is that right?

13 A. Are you referring to the District 3?

14 Q. Yes, I am.

15 A. I believe that district at the time might have actually
16 been a majority minority seat.

17 Q. Might have been what?

18 A. A majority minority seat, if my recollection is correct, in
19 2002.

20 Q. I think it has the opinion -- well, the opinion upholding
21 it said it was 46 percent, but I don't know what it was in 2011.
22 So maybe...

23 A. My recollection may be wrong. I thought at some point
24 during that decade it was a majority minority seat.

25 Q. I can't answer that question. Certainly when it was drawn,

1 it was not.

2 But in any event, you considered that district a
3 reasonably compact district, based on the law; is that right?

4 A. I didn't work on --

5 JUDGE JORDAN: Which district are you asking him?

6 MR. DISKANT: CD-3, the one in the light blue that I
7 drew the line around.

8 BY MR. DISKANT:

9 Q. You considered it, based on the law, to be a reasonably
10 compact district, right?

11 A. That district, if it was achieving a majority minority
12 status, then it would be a different review, but, I mean, I
13 didn't work on this map in 2002.

14 If you're asking me today, no, I don't consider that
15 reasonably compact.

16 Q. I'm sorry. You're saying you do not?

17 A. Sitting here today. But I don't know all the factors in
18 front of me. I'm uncertain about the majority minority status
19 of it.

20 Q. You testified about it in your deposition; isn't that
21 right?

22 A. Can I see what deposition you're referring to?

23 MR. DISKANT: Yeah.

24 Can we hand the witness a copy of his deposition?

25 I'll put it on the screen while we're pulling it up,

1 and I'll read it -- I'll give you the transcript yourself so you
2 can look at it yourself.

3 BY MR. DISKANT:

4 Q. This is from June 7, 2023, line 1, starting on --

5 Okay. Questioning starts here on page 55, and you're
6 being asked about this version of CD-5, and then -- that is --
7 those -- CD-3 starts here in Central Florida, has this little
8 appendage that goes into Sanford, et cetera, picks up on the
9 East side of Gainesville, winds up in Jacksonville. That's the
10 description of CD-3 from the 2002 map, right?

11 A. I'm sorry. You're showing me the map from the 2002
12 redistricting and a transcript regarding the comments regarding
13 the 2012 redistricting map. That's two different maps.

14 Q. I think not, sir. In this version of CD-5 that's
15 ultimately enacted in 2012, which is talking about -- it's
16 actually hard to tell from the transcript. It's describing a
17 map that starts in Central Florida, has a little appendage down
18 here, goes up through the East side of Gainesville, picks up the
19 Palatka and winds its way up to Jacksonville. It's certainly
20 something similar to this, right?

21 A. Sir, can I see the top of this image?

22 JUDGE JORDAN: No, the top of the map.

23 THE WITNESS: Sir, you're showing me the 2002 enacted
24 map and then you're showing me questions that were asked about
25 the 2012 enacted map.

1 BY MR. DISKANT:

2 Q. I'm not sure that that's correct, if you parse through the
3 transcript, but I'm not going to do that. I'm just asking
4 you -- my only question is about a map that starts down in
5 Central Florida and winds its way up to Jacksonville, not this
6 particular designation.

7 And you said at the time that, "You believed this
8 district was reasonably compact, based on our understanding of
9 the law?

10 "Yes."

11 Right?

12 A. Can you show me where in the transcript, sir?

13 Q. It's right up at the top of 56.

14 JUDGE RODGERS: There's a reference to a question
15 about switching over to something -- Exhibit 5, which is the
16 2002 enacted congressional districts. That's what you're
17 showing, I think, now.

18 MR. DISKANT: I think so.

19 JUDGE JORDAN: I speak only for myself. I'm confused.

20 MR. DISKANT: I'm officially confused. I'm going to
21 move on.

22 BY MR. DISKANT:

23 Q. I apologize.

24 In any event, you were talking about the alternative
25 map that you drew in response to public comment, and that is

1 PX7 -- excuse me -- 4553, right? Is that correct?

2 A. To my recollection, it's similar to what public comment was
3 that we received.

4 I don't know if what you're showing me is the exact
5 same thing.

6 Q. Well, I'm actually asking you about the map you drew. You
7 drew this map, correct, 4553?

8 A. I don't -- I can't tell you definitively I drew what you're
9 literally showing me, but I did draw something similar to this
10 that public comment -- we had public comments similar to this,
11 and so I drew this to resemble that public comment or something
12 similar to this, but I can't tell you that I literally drew
13 exactly what you put on the screen.

14 JUDGE JORDAN: When was that, Mr. Kelly?

15 THE WITNESS: Your Honor, fall of 2011, somewhere in
16 the September-October time frame, we were -- we were showing our
17 committees public comment that we had received from our public
18 meetings around the state.

19 JUDGE WINSOR: Mr. Diskant, I don't believe this one's
20 in evidence. Are you moving this in?

21 MR. DISKANT: Confused once again.

22 I do offer it.

23 MR. JAZIL: Your Honor, we have a foundation and
24 hearsay objection. Since the witness didn't identify this as
25 something he drew, perhaps my friend could just ask a few more

1 questions.

2 MR. DISKANT: Sure.

3 BY MR. DISKANT:

4 Q. You just said this was at least similar to what you drew,
5 right?

6 A. Yes.

7 Q. Okay. And it's an exhibit from the -- CP876 is an exhibit
8 from trial in 2012; is that right?

9 A. Yes, appears to be.

10 Q. The trial -- yeah. The caption is a 2012 caption.

11 And you testified about this map or a similar one at
12 that trial, right?

13 A. Yes.

14 Q. Okay. So you drew a map that basically went East to West
15 from Jacksonville to Gadsden, right?

16 A. Yes.

17 Q. And it was designed to be a Black performance district,
18 right?

19 A. I don't know what the constituent's design was. The
20 general idea, probably, but I don't know exactly what the
21 constituent was thinking.

22 Q. Well, you do recall that the Florida Supreme Court relied
23 on this map in drawing CD-5, don't you?

24 A. I'm aware of that, yes.

25 Q. Yes? Okay. And you can probably remember this language

1 itself. Quote: "Legislative staffer Alex Kelly initially drew
2 an East-West version of the district with a BVAP of
3 44.96 percent and concluded that such configuration would be
4 constitutionally compliant," right? End quote.

5 A. The Court missed the context there. I did not conclude
6 that it would be constitutionally compliant.

7 Q. Okay. So the Court got it wrong in understanding your
8 testimony from the trial?

9 A. Yes. The Court relied on committee evidence of our
10 committee process where we were showing our committees hundreds
11 of maps that the public submitted. The Court took one excerpt
12 of that and added -- you know, added statements to me that I
13 simply didn't make.

14 Q. Okay. Now, let's see what you did say. This is PX40 --
15 5045 at page 934.

16 It's talking about exhibit --

17 JUDGE JORDAN: Mr. Diskant, are you going to keep
18 talking to him about PX4553?

19 MR. DISKANT: Yes.

20 JUDGE JORDAN: You want to move it into evidence
21 again?

22 MR. DISKANT: Oh, I'm sorry. Yes, I do. I move it
23 into evidence.

24 MR. JAZIL: No objection, Your Honor.

25 JUDGE JORDAN: Okay. Admitted.

1 (PLAINTIFF EXHIBIT PX4553: Received in evidence.)

2 JUDGE JORDAN: PX4553.

3 BY MR. DISKANT:

4 Q. I guess, Mr. Kelly, is this is what the Florida Supreme
5 Court was talking about. I'm not sure, of course.

6 MR. DISKANT: But this is from page 934 of PX5045,
7 which I also offer, the transcript from -- Mr. Kelly's testimony
8 in that trial.

9 JUDGE JORDAN: I missed the number.

10 MR. DISKANT: 5045.

11 MR. JAZIL: Your Honor, I'd simply ask that we include
12 the whole transcript and not just the excerpt, but if my friend
13 wants to rely on the excerpt for his question, that's fine by
14 me.

15 MR. DISKANT: That's perfectly fine, Your Honor.

16 JUDGE JORDAN: Okay. PX5045 is admitted in full. You
17 can obviously publish and use whatever you wish.

18 MR. DISKANT: Thank you, Your Honor.

19 (PLAINTIFF EXHIBIT PX5045: Received in evidence.)

20 BY MR. DISKANT:

21 Q. Anyway, you're describing an East-West map, something
22 around 45 percent, and you say the African American community in
23 the East to West configuration represents a greater proportion
24 of your voting strength in elections for whatever reason, just
25 the residences who happen to live in those counties as opposed

1 to the North-South configuration.

2 You gave that testimony?

3 A. Yes.

4 Q. And on the next page. This is very faint transcript.

5 At 935, you add, "I do know Leon County's typically
6 your strongest voting turnout county in the state," correct?

7 A. Yes.

8 Q. Okay. And you gave that testimony, correct?

9 A. Yes.

10 Q. And the result, your map and your testimony led, in part,
11 to Benchmark CD-5, right?

12 A. Yes. The Court relied on that.

13 Q. Okay. Now, you got involved in the 2022 redistricting in
14 December 2021; is that right?

15 A. I'm sorry. Say that again.

16 Q. You got involved in the 2022 redistricting in December
17 2021; is that correct?

18 A. Yes.

19 Q. You started as an advisor and ultimately became the map
20 drawer?

21 A. Yes.

22 Q. The legislature was considering maps that preserved CD-5 as
23 drawn by the Florida Supreme Court, right?

24 A. Yes.

25 Q. We talked a little bit about CD-5 in the 2012 cycle, but

1 you knew there had been a Black Opportunity District -- I think
2 your counsel said it in opening -- since the early 1990s, right,
3 in the Northern Florida area?

4 A. The district went from Northern Florida to Central Florida,
5 so differently shaped. But, yes, it did include the
6 Jacksonville arrest.

7 Q. Was anchored in Jacksonville?

8 A. Yes.

9 Q. The same way you can think of as Benchmark CD-5 is anchored
10 in Jacksonville?

11 A. Yes.

12 Q. Okay. Congresswoman Brown held that seat, right?

13 A. Yes.

14 Q. And that Black Opportunity District in North Florida
15 existed in 2010 when the FDA was passed, right?

16 A. Yes.

17 Q. And the passage of the FDA required preserving a Black
18 Opportunity District in North Florida, correct?

19 A. The district ran from Jacksonville to Orlando, so it wasn't
20 just North Florida. It was a North to Central Florida district.

21 Q. It required preserving some version of that district,
22 right? That's what the Florida -- isn't that what the Florida
23 Supreme Court in creating CD-5, Benchmark CD-5?

24 A. Well, the Florida Supreme Court invalidated the benchmark
25 seat.

1 Q. I couldn't hear your answer, sir.

2 A. The Florida Supreme Court invalidated the benchmark seat
3 that ran from Jacksonville to Orlando.

4 Q. Okay. In any event, the legislature began a redistricting
5 process determined to preserve a version of Benchmark CD-5 as a
6 Black Opportunity District in compliance with the Florida
7 Constitution, right?

8 A. Yes.

9 Q. But the Governor was determined to achieve the result of
10 eliminating that district, whatever his motivation, right?

11 A. The Governor was determined, he said repeatedly, to draw
12 it -- to have a constitutional map.

13 Q. With the result of eliminating Benchmark CD-5, right?

14 A. The Governor didn't -- just simply didn't speak in those
15 terms. The Governor spoke in the terms of drawing a compliant
16 map that didn't violate the equal protection clause.

17 Q. I hate to go through this with you endlessly, but the
18 result of his position was to eliminate the Black Opportunity
19 District in Northern Florida, right?

20 A. The result eliminated that district. That wasn't his
21 position to eliminate the district. His position was to have a
22 compliant map.

23 Q. Yeah. It was just a coincidence that the Black Opportunity
24 District was eliminated?

25 MR. JAZIL: Objection, argumentative.

1 JUDGE JORDAN: Overruled.

2 THE WITNESS: The result is that Benchmark CD-5 goes
3 away.

4 BY MR. DISKANT:

5 Q. Are you saying that's a coincidence, or is it the direct
6 result of the Governor's position?

7 A. To draw a compliant map, that does eliminate that district.

8 Q. So you're saying it's the direct result of the Governor's
9 position?

10 A. The result of the position is that CD-5 goes away, yes.

11 Q. Okay. And that's the result that the Governor wanted,
12 right?

13 A. The result that the Governor wanted was to draw a compliant
14 map that complies with the U.S. Constitution.

15 Q. And the result that the Governor wanted was the absence of
16 a Black -- of a Black performing district in Northern Florida,
17 right?

18 A. No.

19 Q. In any event, since the legislature was interested in
20 preserving the benchmark district, there was a series of
21 back-and-forth and pushing and pulling between the legislature
22 and the Governor, with the legislature sticking to its plan to
23 keeper version of Benchmark CD-5 in compliance with the Florida
24 Constitution and the Governor insisting on eliminating it; is
25 that right?

1 A. The Governor insisted on drawing a compliant map, compliant
2 with the U.S. Constitution.

3 Q. And the legislature insisted on violating the U.S.
4 Constitution? Was that the debate?

5 A. Yes.

6 Q. Can you point to anything in which the legislature said
7 they wanted to violate the U.S. Constitution?

8 A. Our office repeatedly forewarned the legislature they were
9 violating the U.S. Constitution in very public memorandums, very
10 public legal opinions, very public statements.

11 Q. They very publicly disagreed with you; isn't that right?

12 A. Yes.

13 Q. Okay. So they weren't attempting to violate the U.S.
14 Constitution, were they?

15 A. They were forewarned that they were.

16 Q. I understand you had a position -- okay.

17 Let's just quickly look at a -- I'm going to show you
18 a timeline. I'm not going to dwell on it for now, because we'll
19 go through it more slowly, just to orient our thinking about
20 what happened.

21 This is about the redistricting cycle. And
22 essentially what I'm showing here is the legislature starts by
23 retaining a Black Opportunity District in Northern Florida, and
24 the Governor responds by submitting a map that eliminates the
25 district, right? Do you remember that happening in January?

1 A. Yes.

2 Q. And the Senate ignored or rejected the Governor's position
3 and continued with the map that preserved the Black Opportunity
4 District, right?

5 A. Yes.

6 Q. And the Governor didn't give up. He went to the Supreme
7 Court and tried to get an advisory opinion, and he had some
8 testimony submitted to the legislature. And the bottom line of
9 all of that was the House continues to retain a Black
10 Opportunity District in Northern Florida, right?

11 A. Yes.

12 Q. Okay. I'm just showing there's back -- a lot of
13 ping-ponging, essentially, back-and-forth.

14 After that, the legislature has a two-map compromise
15 in which it has retained -- I can blow it up for you. I can see
16 you're squinting. There are not any surprises here, sir.

17 But in any event, there's a two-map compromise. The
18 legislature's still keeping a Black Opportunity District,
19 notwithstanding the Governor's position, right, by February 25?

20 A. I don't know if those exact dates are right, but I don't
21 know if you're asking me to scrutinize the whole document, but
22 there is an error on the document. It says --

23 Q. Where is that, sir?

24 A. At least I think it is. This is map 8017?

25 Q. You're right. It's 8015 -- no, it's 8019.

1 A. 8019.

2 Q. Right you are. We'll fix it. Thank you.

3 In any event, the Governor responds to the two-map
4 compromise by saying you're going to veto any bill like that,
5 they can take it to the bank, and Tweets it's DOA, and
6 notwithstanding another round of objections from the Governor,
7 the legislature passes the two-map compromise, right?

8 A. Yes.

9 Q. And the final round, there's a -- after the veto, the
10 Governor submits -- there's the enacted map, the one you drew,
11 and it eventually gets passed, right?

12 A. Yes.

13 Q. Okay. There are a lot of firsts in this sequence, so I
14 just want to review them with you.

15 The first time, to your knowledge, that a Florida
16 Governor has proposed his own redistricting map, right?

17 A. Proposed map, yes, to my knowledge.

18 Q. And it's also the first time the Florida Governor has
19 sought advice from the Florida Supreme Court about any matter
20 pending legislation since the 1880s; is that right?

21 A. To my knowledge, yes.

22 Q. It's the first time the Governor submitted a second
23 redistricting map, right?

24 A. Yes.

25 Q. First time the Governor -- Florida Governor submitted a

1 third redistricting map, right?

2 A. Yes.

3 Q. The first time, to your knowledge, a Florida Governor has
4 submitted any bill knowing that it was in direct violation to
5 the Florida Constitution, right?

6 A. Did not submit a bill in violation of the Florida
7 constitution.

8 Q. I'm sorry. We're talking about the Fair Districts
9 amendment. His map did not comply with the Fair Districts
10 amendment, did it?

11 A. The Governor's maps were all legally compliant maps.

12 Q. They were legally compliant with the Fair Districts
13 amendment?

14 A. Yes, sir.

15 Q. Because he decided it was unconstitutional and he didn't
16 have to comply with it? Is that why?

17 A. Could you be more specific about what you're referring to?

18 Q. Sure. I want to understand why it was legally compliant
19 with the Florida Constitution when the Florida Constitution,
20 according to the Florida Supreme Court, required the Black
21 Opportunity District in Northern Florida. It was not legally
22 compliant with the Fair Districts amendment. It may have been
23 compliant with the Governor's opinion about the federal equal
24 protection clause, right?

25 A. No. The Florida Supreme Court got it wrong.

1 Q. Okay. So he violated the Florida Supreme Court's order
2 with respect to complying with the Fair Districts amendment,
3 right?

4 A. I'm sorry. I'm not following. It's like a double
5 negative.

6 Q. Okay. You're saying the Florida Supreme Court got it wrong
7 about what the Fair Districts amendment required, right?

8 A. Yes.

9 Q. And Governor DeSantis was able, because he knows better, to
10 reject what they said, right?

11 A. But the map the Florida Supreme Court drew violated the
12 equal protection clause.

13 Q. And Governor DeSantis was able to decide that on his own
14 and reject what the Florida Supreme Court said, right?

15 A. We have a legal team in the office --

16 JUDGE RODGERS: Can I ask a question? Mr. Kelly, had
17 any Court agreed with that opinion?

18 THE WITNESS: I'm not familiar with all court rulings
19 on that question. I couldn't answer that question.

20 JUDGE RODGERS: Okay.

21 JUDGE JORDAN: Let me put it a different way.

22 Two parts. As the law stood in late 2021, early 2022
23 in Florida, did Governor DeSantis's proposed map comply with the
24 Fair Districts amendment?

25 THE WITNESS: Yes.

1 JUDGE JORDAN: I thought you said the Florida Supreme
2 Court was wrong?

3 THE WITNESS: Yes.

4 JUDGE JORDAN: I'm confused. Is the contention
5 that -- from the Governor and the people in the executive branch
6 that under current Florida law in 2022, his map complied with
7 the Fair Districts amendment?

8 THE WITNESS: Yes -- yes, Your Honor. It's our
9 contention --

10 JUDGE JORDAN: It didn't matter whether or not the
11 legislature was violating the equal protection clause?

12 THE WITNESS: Your Honor, if I understand your
13 question, it definitely matters that the legislature was
14 violating the equal protection clause in the drawing of their
15 maps.

16 JUDGE JORDAN: But that's the reason why you think it
17 complied with the FDA, not because current law is dictated by
18 the Florida Supreme Court blessed the map? Or am I missing
19 something?

20 THE WITNESS: I may be at the limits of -- because I'm
21 not a lawyer, I may be at the limits of my understanding of your
22 question, but the map enacted by the Florida Supreme Court -- or
23 the map drawn by the Florida Supreme Court in the middle of the
24 last decade violated the equal protection clause, so it was
25 carrying with it a district that violated the law.

1 JUDGE RODGERS: According to what Court? According to
2 what law?

3 THE WITNESS: Your Honor, the U.S. Supreme Court --
4 I'm sorry. The U.S. Constitution.

5 JUDGE RODGERS: But as interpreted by what Court?

6 THE WITNESS: Your Honor, I'm sorry. I can't -- I
7 don't know every court case on the equal protection clause. I'm
8 sorry.

9 JUDGE RODGERS: Is there a court that supports the
10 Governor's opinion? Is there a Court decision that supports the
11 Governor's opinion about the equal protection clause and the
12 Fair Districts amendment?

13 THE WITNESS: Your Honor, I'd have to rely on our
14 legal count to make that argument.

15 JUDGE JORDAN: Let me try to get to -- an answer to
16 the question that I had.

17 I understand the position of the Governor that things
18 as they stood in 2021, 2022 with the legislature's proposed maps
19 were unconstitutional because, in the Governor's view and his
20 staff's view, those maps violated the equal protection clause,
21 right?

22 THE WITNESS: Yes, Your Honor.

23 JUDGE JORDAN: Okay. Am I also right in thinking that
24 the Florida Supreme Court had taken a different view of things
25 than the Governor, and that's why you say the Governor thought

1 the Florida Supreme Court was wrong?

2 THE WITNESS: Yes, Your Honor.

3 JUDGE JORDAN: Okay. So as Florida law stood, as
4 interpreted by the Florida Supreme Court in late 2021-early
5 2022, what the legislature was doing was not unconstitutional,
6 according to the Florida Supreme Court?

7 THE WITNESS: Yes, Your Honor.

8 JUDGE JORDAN: Okay. It was unconstitutional
9 according to Governor DeSantis?

10 THE WITNESS: Yes, Your Honor.

11 JUDGE JORDAN: Okay. Got it.

12 BY MR. DISKANT:

13 Q. So in any event, my question was: Is this the first time,
14 to your knowledge, that a Florida Governor has submitted a bill
15 know -- to the legislature -- knowing that it violated the
16 Florida Constitution?

17 A. I don't know.

18 Q. Okay. It's also the first time, to your knowledge, that a
19 Governor has threatened to veto a redistricting plan, right?

20 A. I believe prior governors have threatened to veto plans,
21 and per my research, one did.

22 Q. Okay. It's the first time a -- a Florida Governor ever
23 actually vetoed a redistricting plan; is that right?

24 A. I believe, based on my research -- I know this is going
25 back a bit, but I believe Governor Collins vetoed a legislative

1 map --

2 Q. We'll check that?

3 A. -- in the mid-'50s.

4 Q. It's the first time the legislature passed two
5 redistricting plans, a primary plan and a secondary plan, so far
6 as you know?

7 A. Yes.

8 Q. And it's the first time that the Florida legislature
9 enacted a final plan at the Governor's request knowing that it
10 violated the Florida Constitution and diminished the ability of
11 Black voters in Northern Florida to elect their candidate of
12 choice; is that right?

13 A. I don't know that -- I don't know the internal opinion of
14 the legislature. Your question is asking their opinion of their
15 map. I don't -- I don't know.

16 Q. Okay. In any event, the Governor's plan was to have a
17 redistricting plan that eliminated Benchmark CD-5, and he was
18 laser focused on that throughout the 2022 redistricting cycle;
19 is that right?

20 A. He was focused on drawing a constitutionally compliant map
21 in Northeast Florida, spoke about it frequently, spoke about the
22 problems with the benchmark map regarding the equal protection
23 clause of the U.S. Constitution. His goal, he stated
24 frequently, was to address that.

25 Q. And that is because he had an intellectual commitment to --

1 let me withdraw that.

2 Be in any event, you were the deputy chief of staff at
3 the time?

4 A. Yes.

5 Q. Is it fair to say that this project of eliminating
6 Benchmark CD-5 was one of the most important issues to which the
7 Governor devoted himself in the period of January to April 2022?

8 A. The redistricting process and addressing this
9 constitutionality was one of the important issues.

10 Q. And the only district that he focused on, at least
11 publicly, was CD-5, right?

12 A. No. He spoke about other districts in the map.

13 Q. Okay. In any event, this is PX5053. It's in evidence.

14 MR. DISKANT: The timeline, by the way, was just a
15 demonstrative, obviously.

16 BY MR. DISKANT:

17 Q. This is PX5053. It is the first of the proposed Northern
18 Florida maps that the Governor submitted. It was on January 16,
19 2022. Do you recall seeing that?

20 A. Yes.

21 Q. You didn't draw that, but you were consulted about it,
22 right?

23 A. Yes.

24 Q. It -- of course, it did not consider partisanship; that's
25 forbidden under the FDA, right?

1 A. Correct.

2 Q. And it plainly eliminated a Black Opportunity District in
3 Northern Florida, right?

4 A. Correct.

5 Q. It cracked it into four different districts, Tier 2, 11, 3,
6 and 4, right?

7 A. I think that term -- I think that term you're using is a
8 term of art, and I would say no. The term you're using,
9 "cracked."

10 Q. It split CD-5 into four districts, 2, 11, 3, and 4?

11 A. Yes.

12 Q. Okay. "Splits" okay.

13 And about that time, the Governor's press secretary
14 claimed -- this is the first public statement: "The Northern
15 Florida map is an unconstitutional gerrymander that unnaturally
16 connects communities in Jacksonville with communities hours away
17 in Tallahassee and Gadsden Counties."

18 That was the Governor's public position, right?

19 A. Yes.

20 Q. And the legislature basically --

21 JUDGE JORDAN: I'm sorry to interrupt you.

22 You said this was in evidence?

23 MR. DISKANT: PX --

24 JUDGE JORDAN: 5053?

25 MR. DISKANT: No?

1 JUDGE JORDAN: I'm trying hard to keep track, but
2 that's not on the joint exhibit list that the parties agreed to.
3 It's in the trial exhibits submitted for Mr. Kelly, but no one
4 has moved it into evidence.

5 MR. DISKANT: Your Honor, I apologize. We were up
6 late last night trying to coordinate all the terms.

7 JUDGE JORDAN: That's all right. I'm trying to just
8 keep track and make sure that we're all on the same page.

9 MR. DISKANT: I'm glad you are.

10 Mr. Jazil says he has no objection if I wish to move
11 the entire map into evidence and I'm just showing an excerpt of
12 it.

13 JUDGE JORDAN: Okay. Without objection?

14 MR. JAZIL: The entire map, Your Honor, but --

15 JUDGE JORDAN: The entire map, which is 5053-1 for the
16 plaintiffs; is that right?

17 MR. DISKANT: No. The entire map is 5053. The -1
18 indicates this is an excerpt of it.

19 JUDGE JORDAN: Okay, but we're going to need -- I
20 don't want to be a pain about this, but the exhibit list for
21 Mr. Kelly only has the excerpt. Somewhere, when this trial is
22 done, there's going to need to be a master exhibit list with a
23 correct tabulation numbering of the exhibits that were
24 introduced. If not, it's going to be hard for everyone to keep
25 track of what was in and what was out.

1 MR. DISKANT: That's our plan, Your Honor.

2 JUDGE JORDAN: Okay. 55 -- PX5053, which is the
3 entire map, is admitted without objection.

4 *(PLAINTIFF EXHIBIT PX5053: Received in evidence.)*

5 JUDGE JORDAN: You can use 5053-1 as an excerpt.

6 MR. DISKANT: Thank you.

7 BY MR. DISKANT:

8 Q. In any event, after the Governor went public with his
9 objection to Benchmark CD-5, the legislature pushed back; is
10 that fair to say?

11 A. Yes.

12 Q. And this is Joint Exhibit 27. Senator Rodriguez, who
13 headed the Senate Restricting Committee, saying, "We're a
14 hundred percent confident that there is no retrogression with
15 the map that we have passed off the floor today. We are
16 prepared to defend that map in court, if necessary."

17 This is January 19, 2022.

18 You were following that, at least generally, at the
19 time?

20 A. Can I see the full document?

21 Q. You want to see what?

22 A. Can I see the document?

23 Q. Sure. It should be in your binder, unless the only
24 exhibits --

25 MR. DISKANT: Is the full transcript in the binder?

1 Full transcript, I'm told, is in your binder. I hope
2 it is.

3 Oh, it's not. We'll pull it up for you, sir.

4 BY MR. DISKANT:

5 Q. But in any event, you recall the Senate disagreeing with
6 the Governor's map, right?

7 A. Yes.

8 Q. And indeed, after the Governor's map was submitted on
9 January 20, the Senate passed Senate Map 8060?

10 MR. DISKANT: And I have an excerpt of it as PX5062.
11 I think it's in. I don't know.

12 JUDGE JORDAN: Would you repeat that number? I'm
13 sorry.

14 MR. DISKANT: 5 -- oh, maybe it's not. PX5062, which
15 I offer. It's these.

16 *(Discussion off the record.)*

17 MR. DISKANT: And I offer the entire map, and I have
18 an excerpt that I'd like to show.

19 MR. JAZIL: No objection, Your Honor, for 8060.

20 JUDGE JORDAN: Plaintiff Exhibit 5062, the map in
21 full --

22 MR. JAZIL: Yes, Your Honor.

23 JUDGE JORDAN: -- is admitted and you can use 5062-1
24 as an excerpt as well.

25 *(PLAINTIFF EXHIBIT PX5062: Received in evidence.)*

1 MR. DISKANT: Thank you, Your Honor.

2 BY MR. DISKANT:

3 Q. In any event, January 20, the House -- the Senate -- excuse
4 me -- overwhelmingly passes Map 8060 with a vote of 31 to 4.

5 Do you recall that?

6 A. Yes.

7 Q. And CD-5 is retained, obviously, right?

8 A. Yes.

9 Q. And the Senate has rejected the Governor's position, his
10 argument?

11 A. Yes.

12 Q. Okay. In January, after this map was passed, you met with
13 House leaders to discuss the Governor's position, right?

14 A. Yes. I don't know if it was the literally -- we met in
15 January. I don't know if it was literally before or after this
16 passed --

17 Q. Okay.

18 A. -- but around that time.

19 Q. In any event, CD-5 was the main part of the conversation,
20 correct?

21 A. No. There were other parts of the map.

22 Q. Your team argued that there was an equal protection problem
23 with CD-5 as a Black performing district, right?

24 A. Yes.

25 Q. And you know the difference between an argument and a court

1 order, right?

2 A. Yes.

3 Q. And you'd rather have a court order than an argument,
4 right?

5 A. Yes.

6 Q. And no Court had ever said that the application of the Fair
7 Districts amendment in North Florida were unconstitutional under
8 the federal Constitution, right?

9 A. Yes.

10 Q. And if anything, in creating Benchmark CD-5, the actions of
11 the Florida Supreme Court suggested otherwise, that it was
12 constitutional, right?

13 A. The Florida Supreme Court believed that it was.

14 Q. Right. They got it wrong, according to you?

15 A. Yes.

16 Q. Okay. So the House leaders said to you -- or your group,
17 why don't you ask the -- why doesn't the Governor ask for an
18 advisory opinion from the Florida Supreme Court, right?

19 A. Yes.

20 Q. And the result of that --

21 And that's permitted under Florida law, right?

22 A. Yes.

23 Q. Okay. Since 1887, however, to your knowledge, no Governor
24 had ever asked for an opinion on a pending piece of legislation,
25 right?

1 A. I don't know.

2 Q. Okay. In any event, on February 1, 2022, Governor DeSantis
3 wrote a letter to the Florida Supreme Court, and it's Joint
4 Exhibit 52, in evidence.

5 This is the front page. I want to direct your
6 attention to page -- and actually, we already looked at this
7 language on page 1, which he outlines his objection to the
8 district.

9 But then on page 4, he asks a specific question:

10 "Specifically, I ask if the Florida Constitution's
11 nondiminishment standard mandates a sprawling congressional
12 district in Northern Florida that stretches hundreds of miles
13 from East to West solely to connect Black voters in Jacksonville
14 with Black voters in Gadsden and Leon Counties so they may elect
15 candidates of their choice, even without a majority.

16 "This Court has previously suggested the answer is
17 yes, it does mandate it."

18 Right? That's what the letter says?

19 A. Yes.

20 Q. But it wasn't a suggestion, was it? It was an order?

21 A. Are you asking me a question?

22 Q. Yeah. I'm asking you: You know perfectly well and the
23 Governor knew perfectly well that the Florida Supreme Court had
24 ordered the creation of Benchmark CD-5 under the Florida
25 Constitution, right?

1 A. Yes.

2 Q. So "suggestion" is a little on the disingenuous side,
3 wouldn't you say?

4 A. No.

5 Q. Okay.

6 What this letter was really about is asking the Court
7 to give a different answer than the one it had given in 2016,
8 right?

9 A. The court, to my knowledge, wasn't presented with a
10 question of the equal protection clause at the time in 2015.
11 And so this was presenting a new question to the Court they
12 didn't consider.

13 Q. It's asking the Court to give a different answer to this
14 question whether the Florida Constitution requires Benchmark
15 CD-5, right?

16 A. Yes.

17 Q. Okay. And on February 10, the Florida Supreme Court
18 declines to do that, right?

19 A. Yes.

20 Q. And you saw the opinion, right?

21 A. Yes.

22 Q. And that is -- I've got an exhibit number somewhere. Oh,
23 yeah. PX5077.

24 Here's a little bit of the opinion I'd like to draw
25 your attention to.

1 "The Court acknowledges the importance of the issues
2 presented by the Governor and the express need for quick
3 resolution and finality. History shows that the
4 constitutionality of a final redistricting map for all
5 congressional districts will be subject to more judicial review
6 through subsequent challenges in court.

7 "Moreover, the Governor's request might necessitate
8 fact-intensive analysis in consideration of other congressional
9 districts, not just District 5, and we have no record before us
10 setting forth a functional analysis of statistical evidence,
11 such as voting age of minority populations and election results.
12 A record will assist the judiciary in answering the complex
13 federal and State constitutional issues implicated by the
14 Governor's request."

15 Right? That's what it said?

16 A. Yes.

17 Q. Okay. Basically says that it's too complicated to be
18 answered based on this short letter, right?

19 A. Saying that in just looking at a question about a singular
20 district in isolation without a complete set of statistics and
21 facts and the full presentation of a map is difficult to do, and
22 so the Court declined to answer just a question about an
23 isolated district without a full record.

24 Q. It wasn't just the isolated district that was the problem.
25 There are complex federal and State constitutional issues that

1 needed to be addressed, right?

2 A. Yes.

3 Q. Okay. It was too complicated to be answered based on his
4 letter, right?

5 A. The court was saying that they don't have the record --
6 they did not have the record --

7 Q. Sure?

8 A. -- in front of them.

9 Q. Okay. So the Governor had three choices, having asked the
10 Court for its opinion. One choice was to follow its implied
11 suggestion, let the legislature enact the map pursuant to the
12 Florida Constitution and have it challenged in litigation so a
13 full record could be created and the Court would be in a
14 position to answer the complex State and federal constitutional
15 questions. That was a choice, right?

16 A. Yes.

17 Q. Another choice was to do that himself, to compel it and
18 submit to the legislature a full and complete factual and legal
19 record setting forth all the legal and factual issues and
20 addressing the compelling state interest in enacting the Fair
21 Districts amendment and the narrow tailoring requirement and the
22 like? He could make a full presentation to the Florida Court --
23 legislature comparable to what the Court is talking about here,
24 right?

25 A. Yes.

1 Q. That would require a lot of money and time, right?

2 A. I'm sorry. "That" would require a lot of money and time?
3 I'm not sure what you're saying.

4 Q. Yeah. The "that" is creating a complete submission of full
5 factual analysis and a full legal analysis addressing the
6 complex federal and State issues. That would require a lot of
7 investment in time and money, right?

8 A. Time -- we spent a lot of time developing three different
9 maps, multiple legal analysis. We didn't spend a lot of money
10 doing that, but we spent a lot of time doing that.

11 Q. Okay. In any event, he never submitted something like that
12 to the Florida legislature? He just submitted relatively short
13 letters?

14 A. I disagree. Our office submitted three entire maps for
15 consideration, submitted multiple legal analysis to the
16 legislature.

17 Q. We'll take a look at that, then. Okay.

18 MR. JAZIL: Your Honor, may I indulge the Court for a
19 five-minute break?

20 MR. DISKANT: Sure.

21 JUDGE JORDAN: Sure. See you in five minutes.

22 *(Recess taken from 11:09 a.m. to 11:17 a.m.)*

23 JUDGE JORDAN: Welcome back. Be seated. We'll go for
24 another hour and break for lunch.

25 MR. DISKANT: Thank you. May I proceed?

1 JUDGE JORDAN: Yes. Go right ahead.

2 MR. DISKANT: Thank you, Your Honor.

3 BY MR. DISKANT:

4 Q. Mr. Kelly, the day after the Supreme Court denied an
5 advisory opinion on February 11, Governor DeSantis said, quote:
6 "We will not be signing any congressional map that has an
7 unconstitutional gerrymander in it, and that is going to be the
8 position that we stick to. Just take that to the bank."

9 Do you remember that?

10 A. Yes.

11 Q. Okay. Governor DeSantis frequently called Benchmark CD-5
12 an "unconstitutional gerrymander" or a "racial gerrymander,"
13 right?

14 A. Yes.

15 Q. You know that's a charged term, a loaded term?

16 A. I don't know what you mean.

17 Q. Okay. It's a -- actually, it's just a legal conclusion
18 that a district has been drawn in violation of the equal
19 protection clause of the Fourteenth Amendment with race
20 predominating and not narrowly tailored to meet a compelling
21 state interest.

22 That's what it means, right?

23 A. Yes.

24 Q. And no Court, as we've agreed, has every reached that
25 conclusion about either the Fair Districts amendment or

1 Benchmark CD-5, right?

2 A. Right.

3 Q. So the language is colorful, perhaps, but it assumes a
4 conclusion, right?

5 A. It doesn't assume a conclusion. It's based on legal
6 analysis and research.

7 Q. It asserts a conclusion?

8 A. Yes.

9 Q. Okay. In reality, cutting out that colorful language, the
10 Governor objected to a district drawn to comply with the Fair
11 Districts amendment at the direction of the Florida Supreme
12 Court after decades of discrimination against Black voters in
13 order to afford Black voters the opportunity to elect
14 representatives of their choice, right?

15 That's what this dispute was about?

16 A. The specific district you're referring to, the dispute was
17 about its violation of the equal protection clause, not the
18 history of race in the State of Florida. It was about the
19 violation of the equal protection clause.

20 Q. It could have been a gerrymander to protect white voters
21 and the Governor's position would have been the same?

22 A. Yes.

23 Q. And it was just a coincidence that the district he chose to
24 complain about protected the rights of Black voters, right?

25 A. I don't understand what you mean by "it's a coincidence,"

1 but the district -- I don't debate you about what the district
2 was, but the district was a violation of the equal protection
3 clause.

4 Q. It wasn't a coincidence. The Governor picked it out
5 precisely because it was a Black Opportunity District that he
6 objected to, right?

7 A. No.

8 Q. Okay. In any event, on February 14, 2022, Governor
9 DeSantis submitted a second map.

10 MR. DISKANT: And this one, also, for some reason --
11 PX4527, the entire map, we'll offer, but I'd like to show an
12 excerpt.

13 MR. JAZIL: That's fine.

14 BY MR. DISKANT:

15 Q. It's PX4527-1. This is the plan 94, the second of the
16 three plans that the Governor submitted to the Florida
17 legislature, right?

18 A. Yes.

19 JUDGE JORDAN: Hold on. Hold on. You've got to let
20 one of us sort of bless it, or else we're going to be in
21 trouble.

22 MR. DISKANT: Oh, I'm sorry.

23 JUDGE JORDAN: So without objection, PX4527, the
24 entire map, is admitted. You can use this as an excerpt.

25 *(PLAINTIFF EXHIBIT PX4527: Received in evidence.)*

1 MR. DISKANT: Thank you, Your Honor, and I apologize
2 for jumping the gun.

3 BY MR. DISKANT:

4 Q. It was not about partisanship, right?

5 A. Correct.

6 Q. And like the first map he submitted, it eliminated
7 Benchmark CD-5, right?

8 A. Yes.

9 Q. And it split it into four districts, here, 4, 3, 11, and 2,
10 right?

11 A. Yes.

12 Q. And none of them were desired to allow Black voters to
13 elect a Black representative, right?

14 A. I'm sorry --

15 Q. None of these four districts was designed to give Black
16 voters the opportunity to elect a representative of their
17 choice; is that right?

18 A. Correct. They were drawn with race-neutral principles.

19 Q. And then on February 18, the Governor went to the
20 legislature to present his arguments through a witness, Robert
21 Popper, right?

22 A. Yes.

23 Q. And Robert Popper gave some testimony about the
24 constitutionality of Benchmark CD-5, right?

25 A. Yes.

1 Q. He's a lawyer for Judicial Watch; is that right?

2 A. Yes.

3 Q. And you thought he had a unique level of understanding and
4 expertise in redistricting, right?

5 A. Yes.

6 Q. You found him a couple of days before he testified, after
7 several other lawyers had declined; is that right?

8 A. I don't know the order and day of when he was found and the
9 other lawyers, I don't -- did or didn't decline. I don't know.

10 Q. Okay. In any event, you spoke to him the night before his
11 testimony, right?

12 A. Yes.

13 Q. And you reviewed his prepared testimony, correct?

14 A. Yes.

15 Q. And you didn't attend, but you watched most of his
16 testimony, right?

17 A. Yes.

18 Q. And you know from reading his testimony that all he did to
19 prepare was to read the proposed maps, right?

20 A. I don't believe that's all he did to prepare. You'd have
21 to ask him to be certain.

22 Q. Let's look at his testimony, which is PX2236. And let's
23 just take a look. It's quite short. It's exactly six
24 double-spaced pages, right, sir? Is that correct?

25 A. Can you point to where it is?

1 Q. It's PX2236. Page 6 is the last page, but it's in your
2 binder if you want to look at it.

3 Got it?

4 A. Yes. It's six pages.

5 Q. So it's six pages long. Pages 1 and 2 basically just give
6 his credentials, right?

7 A. Can I have a moment to look at it?

8 Q. What?

9 A. Can I have a moment to look at it?

10 Q. Sure. Take your time.

11 A. Yes. Towards the bottom of the end of page 2, except the
12 last couple sentences, he's stating his credentials.

13 Q. Okay. And then he says what he did in preparation for my
14 testimony. He looked at proposed congressional districts and
15 maps drawn by the House Redistricting Committee, and there's
16 a -- cites a bunch of them, right?

17 A. Yes.

18 Q. He then -- he says they're vulnerable to being enjoined in
19 a lawsuit, right?

20 A. Yes.

21 Q. And then for the next pages, 3 and 4, he recites some legal
22 propositions that he thinks are relevant, right?

23 A. Into the top of page 5, yes.

24 Q. That's true. Okay.

25 So I guess what I'm really asking is: He doesn't turn

1 to what was then called Congressional District 3, which we know
2 is Benchmark -- well, it's a version of Benchmark CD-5.

3 Can we agree on that?

4 A. Yes.

5 Q. Okay. Anyway, he doesn't get to that until page 5 of the
6 six-page report, right?

7 A. Yes.

8 Q. Okay. And then, just to cut back, on page 6, he talks
9 about, "Well, I know Section 2 claim is possible with respect to
10 it."

11 I think no one's ever suggested a Section 2 claim's
12 relevant to this Fair Districts amendment issue, have they?

13 A. I haven't heard of such a thing.

14 Q. It's not a relevant observation, right?

15 A. Are you asking me if his testimony in talking about that
16 was a relevant observation?

17 Q. I'm asking you whether, in the debate over the Fair
18 Districts amendment and Benchmark CD-5, there was no suggestion
19 by anyone that Section 2 of the Voting Rights Act had
20 applicability, was there?

21 A. There were several legislators --

22 Q. Okay.

23 A. -- who mistakenly offered that, offered that in different
24 testimony. So --

25 Q. So --

1 A. -- that did occur pretty frequently in the legislative
2 process.

3 Q. Okay. So that's why he's addressing it.

4 But his constitutional argument, really, is --
5 consists of the two paragraphs on page 5, right?

6 A. I believe his constitutional argument begins towards the
7 first full paragraph of page 3 through the remainder of the
8 document.

9 Q. I'm sorry. My question related to his application of his
10 constitutional principles to the benchmark district. That
11 begins on page 5 and ends on page 6, right?

12 A. Yes.

13 Q. Okay. In any event, he doesn't mention here the Fair
14 Districts amendment, right?

15 A. Can I have a moment to read it?

16 Q. Sorry?

17 A. Can I have a moment to read it?

18 Q. Sure.

19 A. He does make reference to Florida law in general.

20 Q. Where is that?

21 A. On -- I believe it was page 5. I'll find the exact
22 citation.

23 Towards the bottom of page 5: "But further, even if
24 race-based character of the districts could be justified by
25 federal or Florida law."

1 And then he may have been bringing up on page 6 the
2 discussion of Section 5, because a decade ago the thinking about
3 Fair Districts was that it was akin to a Section 2 and Section 5
4 type of state --

5 Q. Okay.

6 A. -- language.

7 So I'm not for certain why he was bringing up
8 Section 5. That may have been why he was bringing up Section 5.

9 Q. Okay. I guess my question is, he doesn't even use the
10 phrase "Fair Districts amendment", let alone discuss it, am I
11 right?

12 A. Correct. He doesn't say "Fair Districts."

13 Q. And he doesn't refer to the fact that the district -- the
14 benchmark district was created by the Florida Supreme Court,
15 does he?

16 Tell you what: If you can't agree with that, I'll
17 just move on. We can all look at it.

18 A. I haven't seen him reference it.

19 Q. Okay.

20 In any event, I realize you solicited his testimony,
21 but you'd have to recognize this is a very superficial analysis
22 of a complex subject, correct?

23 A. No.

24 Q. No?

25 A. No.

1 Q. Okay. He was then asked whether -- at the hearing, he was
2 asked about the Fair Districts amendment, and I'd like to direct
3 your attention to some of his testimony. This is Joint
4 Exhibit 27 in evidence. And here it is on page 101.

5 He's asked --

6 JUDGE JORDAN: What number is this?

7 MR. DISKANT: Joint Exhibit 37.

8 JUDGE JORDAN: Okay.

9 BY MR. DISKANT:

10 Q. "Why is complying with the Florida Constitution not a
11 compelling state interest?"

12 And he says, "It absolutely can be a compelling State
13 interest, just as it could have been, when it was operative, the
14 compelling state interest to comply with and enforce Section 5
15 of the Voting Rights Act. It could be. It depends on the
16 remedy, and the remedy has to be narrowly tailored. I don't
17 suggest and my testimony is not to suggest that the Fair
18 Districts amendment would be unconstitutional in all its
19 applications. It absolutely wouldn't. It could justify a
20 race-based district. It could."

21 Correct?

22 A. Can I see the full page? And could you -- I'm sorry. I'm
23 having trouble following you in the exhibits.

24 Q. I'm sorry --

25 A. Where are you at?

1 Q. Should be in your binder.

2 A. Can you give me the number?

3 Q. JX37. And if I go too fast, I'll slow down when I'm
4 reading. I apologize.

5 A. It's okay.

6 Q. Okay.

7 In any event, he agrees that there can be a compelling
8 state interest behind the Fair Districts amendment, right?

9 A. Yes.

10 Q. And he's essentially arguing that it's not narrowly
11 tailored. Is that -- Benchmark CD-5 is not narrowly tailored.

12 Is that what you take to be the essence of his point?

13 A. Yes.

14 Q. Of course, the Florida Supreme Court found that it was more
15 compact than the other alternatives and necessary to comply with
16 the compelling state interest behind the Fair Districts
17 amendment, right?

18 A. I don't know if they found it to be more compact. I don't
19 know.

20 Q. In any event, he's asked one of the Governor's arguments
21 was that the district had to be compact. His objection was it
22 was too long. Remember that?

23 A. Yes.

24 Q. And Mr. Popper has asked questions about that. This is on
25 page 83.

1 "Are you aware of any Court interpretation of
2 Section 5 that requires a" -- that's referring to the Voting
3 Rights Act, of course -- "that requires a district to be
4 compact?

5 "No, I'm not aware of any federal court decisions that
6 state it must be compact."

7 Do you see that?

8 A. Yes.

9 Q. And he later says there are 20 or 30 different ways to
10 measure compactness.

11 Do you remember that from watching the testimony?

12 A. Can you point me to where?

13 Q. Sure.

14 A. Testimony?

15 Q. This is page 96.

16 "How many compact metrics are there that you're aware
17 of?

18 "There are a lot. 20, maybe 30."

19 A. Okay. I see that, yes.

20 Q. Okay. In any event, whether you think -- whatever you
21 thought of Mr. Popper's testimony, the legislature was not
22 impressed; is that fair?

23 A. Yes.

24 Q. In fact, in your view, they were very hostile to him,
25 slanderous of him, very hostile; is that right?

1 A. Yes.

2 Q. Basically, you may not have thought his presentation was
3 superficial, but they did, right?

4 A. I don't know whether they thought it was superficial.

5 Q. Okay.

6 A. They attacked him personally after inviting the testimony.

7 Q. Republicans and Democrats?

8 A. Yes.

9 Q. The same day at Mr. Popper's testimony, the Governor's
10 counsel, Ryan Newman, sent a letter to the legislature, right?

11 A. Yes.

12 MR. DISKANT: And that's Joint Exhibit 56, in
13 evidence.

14 BY MR. DISKANT:

15 Q. And you're familiar with Mr. Newman's letter, right?

16 A. Yes.

17 Q. And this is presenting the Governor's arguments again?

18 A. Yes.

19 Q. And the Florida Supreme Court emphasized that the facts
20 were very important. Do you remember that?

21 A. Yes.

22 Q. Okay. So I just want to focus on a couple of facts in
23 Mr. Newman's letter.

24 He cites a Supreme Court case saying, "The plaintiff
25 must prove the legislature subordinated traditional race-neutral

1 districting principles, but not limited to -- including but not
2 limited to compactness, contiguity, respect for political
3 subdivisions for communities defined by actual shared interests
4 to racial considerations."

5 And then the next paragraph, he says: "With respect
6 to proposed Congressional District 3" --

7 And that is what we've been calling Benchmark 5 or the
8 version of it under consideration, right?

9 A. Yes.

10 Q. Okay. "With respect to proposed Congressional District 3,
11 it does not respect political subdivisions or communities
12 defined by actual shared interests," right?

13 A. Yes.

14 Q. You were asked about what he was referring to in that
15 sentence at your deposition, and you said you thought he was
16 just referring to the quote above.

17 Do you recall that?

18 A. Sounds like what I probably said. I don't recall exactly,
19 but --

20 Q. Okay.

21 A. -- that's reasonable.

22 Q. In any event, he's actually making a factual statement
23 about the proposed district. It's not -- it doesn't include
24 communities defined by actual shared interests, to be saying as
25 a matter of fact to the legislature, right?

1 A. Yes.

2 Q. Of course, he cites nothing, right, about the shared
3 interests of the communities?

4 A. He does below.

5 Q. Below. And we talked about it has four counties and three
6 municipalities, but you know that this region of Northern
7 Florida was once known as the Slave Belt?

8 A. I'm not familiar with that.

9 Q. You're not? You knew that basically the communities along
10 the Georgia border were the home of many plantations and slaves
11 in the Antebellum Era?

12 A. No, I'm not familiar with that.

13 Q. Okay. In any event, you understand this to be a -- an
14 asserted statement of fact about the residents of Congressional
15 District 5 -- or call -- it's 3 here, right?

16 A. No. You're asking me -- your last couple questions are
17 asking about something I'm not familiar with, so, no, I'm not --

18 Q. Let me rephrase. It's not moving away from that slightly.

19 There's a statement that there are no actual shared
20 interests across proposed CD-5, right? That's what he's saying
21 in words?

22 A. Yes.

23 Q. But, in fact, the residents of Benchmark CD-5 and this
24 version of it have very much in common with each other.

25 Don't you know that?

1 A. No.

2 Q. Do you know that they're younger in age and have lower
3 income and lower education than the rest of Florida?

4 A. We wouldn't be allowed to consider that for a reason for
5 drawing a district in Florida.

6 Q. I'm asking you if you know it.

7 A. I don't know it.

8 Q. Isn't that what he's saying isn't true?

9 A. No. No, I believe Mr. Newman's statements there in that
10 letter are referring to things such as counties, cities,
11 political and geographical boundary lines.

12 Q. All right. But wouldn't you want to know about whether
13 these communities have shared interests or not before deciding
14 there was a constitutional problem? He seems to think it's
15 relevant.

16 A. I believe he's referring to political and geographical
17 boundary lines when he says that.

18 Q. Okay. On page 4, he says, "When Florida voters
19 approved" -- and that's the Fair Districts amendment, right,
20 Article III, Section 28?

21 He's referring to the Fair Districts amendment; is
22 that right?

23 A. Yes.

24 Q. I'll just substitute it when I read it this time.

25 "When Florida voters approve the Fair Districts

1 amendment, by contrast, they did not have before them a similar
2 record of pervasive, flagrant, widespread, or rampant
3 discrimination."

4 Do you see that?

5 A. Yes, I see it.

6 Q. Now, in fact, as I think we've discussed earlier, in
7 Florida there is a history of pervasive, flagrant, widespread,
8 and rampant discrimination, isn't there?

9 A. There was a history, yes.

10 Q. And to say that the Florida voters didn't have that before
11 them, they voted in a popular referendum, right?

12 A. Can I read the whole paragraph to try to understand the --

13 Q. Sure. Go ahead.

14 A. -- context of it?

15 Okay. I'm sorry. What was the question?

16 Q. In any event, the Fair Districts amendment was voted on in
17 a popular referendum, right?

18 A. Yes.

19 Q. And so far as you know, popular -- referenda aren't
20 supported by records like legislation is, right? The voters
21 don't get a legislative package like a legislative committee
22 might get, do they?

23 A. Not to the same extent. There is a record -- there is a
24 record that's submitted through the Department of State
25 summarizing the full language, a summary of what the ballot

1 initiative does. There's a legal -- essentially documentation
2 that's built up. The attorney general has to review the
3 amendment. So there is a sort of legal documentation trail
4 regarding amendments.

5 Q. I'm talking about what goes to the voters. Voters get a
6 summary, and that's what the Government provides, right?

7 A. Yes. The ballot has a summary on it.

8 Q. Okay. And I think I asked you earlier about the campaign
9 supporting the FDA, and I think you said you didn't remember it
10 particularly; is that right?

11 A. I remember it in general.

12 Q. Okay. In general, do you remember frequent references to
13 Florida's history of "cracking and packing" Black voters to deny
14 them political power?

15 A. No.

16 Q. Do you have any reason to think Florida voters were not
17 well aware of Florida's horrendous history of racial
18 discrimination in voting?

19 A. As I noted earlier --

20 MR. JAZIL: Objection, speculation, goes beyond the
21 scope --

22 JUDGE JORDAN: Sustained.

23 MR. DISKANT: Okay.

24 BY MR. DISKANT:

25 Q. It's not your testimony, is it, that Florida has solved all

1 the problems of its discriminatory past?

2 A. It's my knowledge that Florida 30 and 40 years ago compared
3 to today, it's a very, very different state. It's extremely
4 different from the past 30, 40, 50 years ago.

5 Q. You don't contend that Black voters are no longer affected
6 by their historically unequal access to the political process,
7 do you?

8 A. Sorry. You're just confusing me with the double negative.
9 I'm sorry. What are you asking?

10 Q. You don't contend that Florida voters are no longer
11 affected by their historically unequal access to the political
12 process?

13 A. I'm sorry --

14 Q. Let me put it in positive words so maybe it will be easier
15 for you to follow.

16 You'll agree with me that Florida voters are still to
17 some extent affected by their historically unequal access to the
18 political process?

19 A. No.

20 Q. Okay. You're aware that even last year, Judge Howard in
21 Jacksonville preliminarily enjoined the redistricting maps for
22 the city council districts on the grounds that they violated the
23 equal protection clause?

24 A. I'm not at all aware of what happened in Jacksonville.

25 Q. Okay. In any event, you're not contending that 63 percent

1 of the Florida voters were wrong in thinking that the Fair
2 Districts amendment was a necessary remedy to historical
3 discrimination, are you?

4 A. I don't know what voters were thinking when they voted for
5 these amendments.

6 Q. Okay. So you're comfortable saying the Florida Supreme
7 Court was wrong, but you're not going to offer an opinion about
8 the voters?

9 A. The Florida Supreme Court offered a written documented
10 opinion, so, yes, I'm comfortable that the Florida Supreme Court
11 was wrong.

12 Q. Okay.

13 A. I don't know what the voters were thinking.

14 Q. In any event, the legislature ignored Mr. Popper's
15 testimony and ignored Mr. Newman's letter, right?

16 A. Yes.

17 Q. They were not persuaded by your equal protection arguments?

18 A. Yes.

19 Q. They were not -- it is correct that they were not
20 persuaded --

21 A. Yes, correct.

22 Q. Just didn't want to get confused with the negatives.

23 In any event, what happened next was that the
24 legislature attempted to create a compromise to comply with the
25 Fair Districts amendment and also to meet the Governor's

1 objections, right?

2 A. Eventually in the process. It wasn't literally the next
3 thing, but eventually.

4 Q. Okay. Well, the Governor's objection was essentially that
5 the Benchmark CD-5 was unconstitutional because it was elongated
6 and not compact and crossed many political lines, right?

7 A. Yes.

8 Q. Okay. So the legislature drew a new map that solved that
9 problem, Map 8019, which it passed, right?

10 A. It did not solve that problem.

11 Q. Solved the Governor's problem. Let's take a look.

12 MR. DISKANT: PX3076 -- oh, this is the -- this is in
13 evidence as DX98.

14 MR. JAZIL: For the record, I do believe DX98 may be
15 the entire legislative packet, not just the map.

16 JUDGE JORDAN: That is correct.

17 MR. DISKANT: Oh, sorry.

18 JUDGE JORDAN: DX98 is listed as the entire
19 legislative packet, but it includes this document.

20 MR. DISKANT: It includes the map.

21 MR. JAZIL: Yes, Your Honor. The map is the first
22 page.

23 JUDGE JORDAN: Right. So you can certainly question
24 him about it. The whole thing is in.

25 ///

1 BY MR. DISKANT:

2 Q. Okay. So this is Map 8019, which is the -- well, it became
3 the primary map at the legislature, right?

4 A. Yes.

5 Q. And it was described by Congressman Leek, chair of the
6 redistricting committee in the House -- this is JX38.

7 "The primary map was put forward as a way to address
8 the novel legal theory raised by the Governor while still
9 protecting a Black minority seat in North Florida."

10 Right?

11 A. Yes, I see that.

12 Q. Then, in addition to that, the legislature passed a
13 secondary map, PX3078, which is also in evidence as DX97. It's
14 a page from it. And this is Map 8015, the secondary map, right?

15 JUDGE JORDAN: Wait, wait. This is part of DX97?

16 MR. DISKANT: Yes, Your Honor.

17 JUDGE JORDAN: And it's Map 8015? That's the way
18 you're referring to it?

19 MR. DISKANT: Yes, 8015.

20 JUDGE JORDAN: Okay. Continue.

21 MR. DISKANT: Okay.

22 BY MR. DISKANT:

23 Q. So basically there are two maps proposed by the
24 legislature, one as a -- I'll call it Duval-only CD-5, and the
25 other I'll call east-west CD-5.

1 Are you comfortable with those terms?

2 A. Yes.

3 Q. Okay. This didn't please the Governor either, did it?

4 A. The legislature's testimony about why they drew this 8019
5 alternative created multiple -- and the actual drawing of it
6 created multiple legal problems.

7 Q. Okay. And that day the Governor Tweeted, "I will veto the
8 congressional reapportionment plan clearly being debated by the
9 House DOA."

10 Remember that?

11 A. Yes.

12 Q. Before we get to the veto, let's take a closer look at the
13 Duval-only map.

14 JUDGE JORDAN: Can you put it up?

15 MR. DISKANT: Yes. I keep looking for it.

16 Here we go.

17 BY MR. DISKANT:

18 Q. This is a blowup. I've got it marked from PX3076, but it's
19 also from DX98, as the other one was.

20 So there's a compact map, right, CD-5 here?

21 A. CD-5, yes.

22 Q. And it respects existing political boundaries, right?

23 JUDGE JORDAN: Wait, wait, Mr. Diskant. I'm sorry.

24 I got to play recordkeeping here.

25 MR. DISKANT: I'm sorry.

1 JUDGE JORDAN: I'm trying to stay with everything.

2 But this excerpt comes -- or this blowup comes from
3 which exhibit?

4 MR. DISKANT: DX98.

5 JUDGE JORDAN: PX --

6 MR. DISKANT: D as in dog. It should be in evidence.

7 JUDGE JORDAN: It is. My confusion is that that's
8 listed as PX3076.

9 MR. DISKANT: That's how we marked it, but I'm going
10 to...

11 JUDGE JORDAN: Okay.

12 MR. DISKANT: Sorry, Judge.

13 JUDGE JORDAN: No, no. I'm just trying to make sure
14 that nobody has a problem at the end of the day, so I may make
15 mistakes as we go --

16 MR. DISKANT: I may too.

17 JUDGE JORDAN: -- forward in keeping these numbers
18 together.

19 JUDGE RODGERS: Can I ask, for a point of
20 clarification, the difference between DX98 and DX97? Some of
21 what we've been --

22 MR. DISKANT: 97, I think was the other map, was the
23 8015 map.

24 JUDGE RODGERS: Okay. That's DX97.

25 MR. DISKANT: Let me confirm that, Judge, before I

1 jump to it.

2 Yes, 8015 is from DX97, and that's the backup map, the
3 East-West configuration --

4 JUDGE RODGERS: Okay.

5 MR. DISKANT: -- here.

6 JUDGE WINSOR: You might want to spend some time
7 tonight going over the exhibits and getting them a little bit
8 better organized.

9 MR. DISKANT: I promise you we will, Judge. You can
10 imagine it was a late night last night.

11 JUDGE RODGERS: Thank you.

12 BY MR. DISKANT:

13 Q. In any event, we're talking about the Duval-only map. And
14 compactness is a Tier II consideration, right?

15 A. Yes.

16 Q. Subordinate to Tier I, right?

17 A. Yes.

18 Q. And it also respects political subdivisions very precisely,
19 right?

20 A. Are you referring to District 5?

21 Q. Yeah.

22 A. District 5 is entirely located in Duval County there. It
23 has incorporated it in all of the city of Baldwin, which is in
24 Western Duval. And it doesn't -- to my knowledge, that didn't
25 touch Neptune, Atlantic, or Jax Beach.

1 Q. I'm not sure what you just said.

2 A. Those are some cities in Eastern Duval County. To my
3 knowledge, that did not touch the boundaries of Neptune Beach,
4 Atlantic Beach, or Jacksonville Beach.

5 Q. Let me ask the question I'm going to ask, because I'm not a
6 hundred percent sure of the point you're making.

7 The -- this line and this line and this line, the
8 Northern, Western, and Southern lines, are exactly the lines of
9 Duval County, right?

10 A. Yes. Those are the lines where Duval County intersects
11 with Clay, Baker, Nassau, and a little bit of St. Johns.

12 Q. Okay. And the reason it doesn't take in all of Duval
13 County is Duval County is the only county in Florida with a
14 population greater than one congressional seat, correct?

15 A. There are other counties larger than a congressional
16 district.

17 Q. Are there?

18 A. Yes.

19 Q. In any event, with respect to Duval, Duval is larger than
20 one congressional seat in terms of population?

21 A. Yes.

22 Q. So if you wanted to center a district in Duval County, it
23 could not be the entire county?

24 A. Correct.

25 Q. Okay. So if you want to center a district in Duval, it has

1 to be divided somewhere, and the legislators drew a kind of
2 rough North-South line following I-95 and some other highways,
3 right?

4 A. Interstate 95 runs down the middle and sort of the core of
5 the district. Interstate 95 runs down the middle of the
6 district. That border -- looking here, looks closer to around
7 where University of North Florida is.

8 Q. My only point is there is a rough North-South line?

9 A. Yes.

10 Q. Okay. Even without thinking about the Fair Districts
11 amendment, Congressional District 5 is a pretty good map, right?

12 A. No. It creates a distorted district around it.

13 Q. We'll talk about that in a moment. I'm talking about CD-5
14 at the moment.

15 There's a lot of benefit, is there not, to keeping a
16 district entirely within one county?

17 A. It's a good goal to do so.

18 Q. It's a good goal because that way people in the -- let me
19 ask you a question about Florida geography so I don't misstate
20 it.

21 Is Jacksonville identical to Duval County, or are they
22 slightly different?

23 A. Duval County and Jacksonville is an interesting county.
24 Jacksonville encapsulate the entire county, but at the same
25 time, there are four other cities within the boundaries of the

1 City of Jacksonville.

2 Q. Okay. The only reason I was asking was I'm using them
3 synonymously and I don't want to make a mistake if that's
4 incorrect.

5 So if I say Jacksonville, that is Duval County?

6 A. Yes, depending on the question you're asking, you might not
7 want to use them synonymously.

8 Q. Okay. Keep me honest. I'll do my best with my geography
9 here.

10 In any event, it's a benefit if one representative
11 represents Jacksonville and no other county, correct?

12 A. It's a good goal if you can locate that district entirely
13 within a county.

14 Q. Right. Because the representative has an incentive to know
15 and represent the city where the voters share that common
16 interest, right, in the city?

17 A. I would say it differently. I think it's more plain
18 sighted is that the people are in the same county.

19 Q. Okay. But in any event, they share a common interest in
20 the county. If you have a representative who's situated
21 entirely within the county, these are people who have a common
22 interest, right?

23 A. Yes, they're in the same county.

24 Q. Okay. And let's go back to the Governor's objections to
25 CD-5.

1 Goes over 200 miles from East to West. The Duval-only
2 map doesn't do that, does it?

3 A. No.

4 Q. It crosses eight counties. It doesn't do that, does it?

5 A. Correct.

6 Q. Doesn't conform to the usual political or geographic
7 boundaries. This doesn't have that problem either, does it?

8 A. It creates a problem for the district around it.

9 Q. We'll talk about that in a moment. I'm talking about the
10 Governor's objections.

11 Governor's objections was CD-5 doesn't conform to
12 usual political or geographic boundaries, where the Duval-only
13 one does, right?

14 A. You can't separate one district from a district it touches.

15 Q. Okay. And it talks about connecting minority population
16 centers in Jacksonville to separate and distinct population
17 centers in Leon and Gadsden Counties, and it doesn't have that
18 problem either, does it?

19 A. Correct.

20 Q. Okay. So it's a pretty good map, no?

21 A. No.

22 Q. Okay. When Mr. Newman testified sitting next to you, he
23 said a map like this -- I'll read you what he actually said. We
24 can then talk about it. This is testimony he gave on April 19,
25 2022. It's JX44 at pages 67 and 68.

1 JUDGE JORDAN: That's one of the admitted exhibits.
2 Go ahead.

3 MR. DISKANT: Joint Exhibit 44?

4 JUDGE JORDAN: Yes, that's one of the joint exhibits
5 admitted.

6 MR. DISKANT: Yes.

7 JUDGE JORDAN: Yes. I said go ahead.

8 MR. DISKANT: Oh, I'm sorry.

9 BY MR. DISKANT:

10 Q. In any event, he's making the equal protection arguments
11 before the legislature.

12 Do you remember when he did that?

13 A. Yes.

14 Q. Okay. And he says, "Don't get me wrong. That's not to say
15 there are other applications of the Florida Constitution's
16 nondiminishment standard that could be or could survive strict
17 scrutiny." And he says, "One would be if you had a sufficiently
18 compact African American community right in the district. You
19 can't necessarily carve up that district, and perhaps that could
20 survive strict scrutiny. But what does and cannot provide
21 strict scrutiny is trying to cobble together disparate minority
22 communities from across northern Florida.

23 Right?

24 A. Yes, I see it.

25 Q. Okay. And what he's saying is that the Fair Districts

1 amendment, in his view, was constitutional or could be
2 constitutional when applied to a sufficiently compact African
3 American community, right?

4 A. It could be.

5 Q. Okay. And here we have a compact African American
6 community in CD-5, right?

7 A. Probably, yes.

8 Q. And your objection is to the surrounding territory, CD-4,
9 right?

10 A. There's probably at least three different objections to
11 what happened with this map. The legislature admitted publicly
12 that -- the legislature admitted publicly -- the House admitted
13 publicly they drew CD-5 and this map with race-based intentions.
14 They subordinated other standards to try to accomplish a racial
15 purpose. They made that clear in their public testimony. They
16 drew a very noncompact district around it.

17 And so it wasn't just simply looking at what CD-5
18 does, but what happened around it. And the reason why the
19 legislature admitted it, it's in testimony that they drew this
20 with race-based purposes.

21 Q. I'm not understanding. Doesn't the Fair Districts
22 amendment require taking race into account and preserving the
23 ability of Black voters to elect their candidate of choice?
24 Isn't that what it's all about?

25 A. There's a gulf of a difference between taking something

1 into account and drawing it for that purpose.

2 Q. Might be required by Florida law to preserve the ability of
3 Black voters to elect their candidate of choice. Isn't that a
4 legal requirement in Florida?

5 A. The problem there is that the legislature admitted they
6 both drew this with a race-based purpose and then admitted that
7 they also backslid off their own diminishment standard, so they
8 were essentially arguing that they both violated the equal
9 protection clause and the State constitution at the same time.

10 Q. You're giving, perhaps, a legal argument there?

11 A. That's what they said in their testimony.

12 JUDGE JORDAN: Mr. Kelly, if you had two identical
13 possible maps in terms of compactness and each one of them
14 satisfied every Tier I and Tier II requirement of the Fair
15 Districts Act, one of the proposed configurations would preserve
16 Black minority voting power, the other one would not.

17 In your opinion, can the legislature choose the one
18 that preserves Black minority voting power for that reason?

19 THE WITNESS: Yes. In that example, Your Honor, the
20 legislature's considering a multitude of factors, and so in that
21 scenario, Your Honor, the legislature wouldn't be just drawing a
22 district for race-based purposes or predominantly race-based
23 purposes.

24 And so, yes, at that point, the legislature would just
25 need to consider the one that was better for Black voters.

1 JUDGE JORDAN: Okay. Go ahead.

2 BY MR. DISKANT:

3 Q. You don't think the legislature here is considering
4 compactness and political divisions also?

5 A. I'd say we're not considering compactness because of what
6 was done to Congressional District 4. I do believe they were
7 considering political divisions.

8 Q. Okay. You know under the fair districts amendment,
9 compactness is a secondary consideration to allowing Black
10 voters the opportunity to select their candidate of choice,
11 right?

12 A. If you're referring to the nondiminishment standard and the
13 State constitution, yes.

14 Q. Okay. So if something, in your view, isn't as compact as
15 it might be, like CD-4, but CD-5 preserves the opportunity of
16 Black voters to elect their candidate of choice, that's okay
17 under the Fair Districts amendment, isn't it?

18 A. It may be, but the Fair Districts amendment can't compel
19 the State to violate federal law.

20 Q. Okay. Now we're back to a constitutional argument, the
21 U.S. Constitutional argument that you want to make?

22 A. Yes.

23 Q. Okay. We talked a little bit earlier about the fact that
24 the Florida Supreme Court reviewed and approved 40 Black and
25 Hispanic opportunity districts in the 2022 redistricting cycle.

1 Do you recall that?

2 A. I recall us discussing that, yes.

3 Q. Okay. One of the maps that they approved was State Senate
4 Map 5. Are you familiar with State Senate Map 5?

5 A. Could you show it to me?

6 Q. Sure. I was hoping you'd ask.

7 MR. DISKANT: This one, PX7064, I believe is in
8 evidence. And PX7076 is just, once again, DX98.

9 JUDGE JORDAN: PX -- you said 7064?

10 MR. DISKANT: 7064, I believe, is --

11 JUDGE JORDAN: Yes, that is.

12 MR. DISKANT: -- in evidence.

13 JUDGE JORDAN: That is jointly admitted.

14 MR. DISKANT: Yes.

15 JUDGE JORDAN: PX7064. It looks like it's a lot of
16 stuff, a Florida Senate map and statistics, State Senate plans,
17 and the redirecting data.

18 MR. DISKANT: Right.

19 JUDGE WINSOR: And then you mentioned a second
20 exhibit?

21 MR. DISKANT: 3076 is DX98 again.

22 MR. JAZIL: So, Your Honor, I have no problem with
23 DX98 being used, and that appears to be a picture from DX98.

24 I do have an objection to PX3076, because it seems to
25 be --

1 MR. DISKANT: Oh, 76?

2 MR. JAZIL: Yes, Your Honor. So if we can say that
3 it's an excerpt from DX98, I think that would be fine.

4 For PX3076, I have an objection because there's some
5 handwritten notes from someone.

6 MR. DISKANT: Not on this.

7 MR. JAZIL: Not on this. That's right.

8 JUDGE WINSOR: It would be helpful to have a page
9 number if we're going back to look at this.

10 Is DX98 many, many pages? And if so, which pages are
11 you using?

12 JUDGE JORDAN: That's a lot of pages. That's the
13 legislature packet.

14 MR. JAZIL: Yes, Your Honor. It's the legislative
15 packet for the 8019 map is DX98.

16 So this is the excerpt.

17 *(Discussion off the record between counsel.)*

18 MR. DISKANT: This is page 6152; is that right?

19 MR. JAZIL: Page 1 of 14.

20 JUDGE WINSOR: Of 98?

21 MR. JAZIL: Yes, sir.

22 MR. DISKANT: I'm sorry.

23 MR. JAZIL: So this.

24 MR. DISKANT: The one on the left is DX98, page 1 of
25 14.

1 I thought you had checked the exhibits.

2 MR. JAZIL: No, no. This is fine.

3 MR. DISKANT: Oh, I'm sorry. I'm completely confused.

4 They've got no objection to 7064. That should be in
5 evidence.

6 BY MR. DISKANT:

7 Q. Okay. On the right is the State Senate map that the
8 Florida Supreme Court approved as compliant with the Fair
9 Districts amendment.

10 Have you seen that before?

11 A. Yes.

12 Q. Okay. And you'll agree with me it's pretty similar to
13 Congressional District 5 in shape and -- first -- go slow.

14 It's a small, compact map, smaller than CD-5 because
15 it's a State Senate map and there are fewer people in a State
16 Senate district, right?

17 A. That State Senate district is probably wholly included in
18 that congressional district. So they're similar.

19 Q. It was a smaller --

20 JUDGE WINSOR: Is probably what? I'm sorry.

21 THE WITNESS: Probably wholly included in -- that
22 State Senate District 5 is probably wholly included in that
23 Congressional District 5. They're similar geography.

24 JUDGE JORDAN: I'm sorry. I'm losing -- I'm starting
25 to lose track. Can you explain that, Mr. Kelly?

1 THE WITNESS: Yes, Your Honor. The question, if I
2 understood correctly, was about the similarity, the geographical
3 similarity.

4 MR. DISKANT: Yeah.

5 THE WITNESS: And the State Senate district on the
6 right, State Senate District 5, that -- I don't have a zoomed-in
7 version of it, but most, if not all, of that State Senate
8 District 5 is probably wholly included or almost wholly included
9 in at that Congressional District 5 on the left.

10 MR. DISKANT: Here's the line for Duval County.

11 JUDGE RODGERS: Does the State Senate map have a
12 number?

13 JUDGE JORDAN: Yes.

14 JUDGE WINSOR: It's 5?

15 JUDGE RODGERS: It's just 5? Okay. I got you now.

16 JUDGE WINSOR: And you said this is the adopted --

17 MR. DISKANT: This is the adopted map approved by --
18 on official review by the Florida Supreme Court.

19 JUDGE RODGERS: Okay.

20 MR. DISKANT: And I think I found the Duval line and
21 marked it in green.

22 Does that seem about right?

23 THE WITNESS: Yes.

24 BY MR. DISKANT:

25 Q. So you're right. Senate 5 is wholly contained or seems to

1 be wholly contained within CD-5.

2 A. Right.

3 Q. Okay. And like CD-5, it is surrounded by adjacent
4 territory, right?

5 A. Yes, or mostly surrounded. There's a green --

6 Q. Okay.

7 A. -- Clay County district is a different district.

8 Q. And the Florida Supreme Court didn't seem to have a problem
9 with that, right?

10 A. They upheld it.

11 Q. In your view, both maps have the same problem?

12 A. I don't know what the record in the Senate was, in the
13 legislature was, regarding the Senate district. The record in
14 the legislature regarding the congressional district there, it
15 just impugns the constitutionality of it. The record and
16 testimony was that it was drawn for race-based purposes, and the
17 record of that congressional district shows that it dropped its
18 Black voting age population by double digits significantly.

19 So the legislature essentially failed on both sides of
20 its own argument. I don't know what the Black voting age
21 population of that Senate district was. I don't know what other
22 factors the legislature discussed. I didn't follow their
23 discussion of the Senate map.

24 Q. Okay. Let me ask you, then: You don't have an
25 objection -- assuming that was all done in a way that meets your

1 standards, you don't have an objection to the fact that the
2 compactness of the surrounding territory is subordinated to
3 meeting the Fair District amendment?

4 A. I would be concerned that the compactness of the
5 surrounding district is subordinated, but I would need to know
6 the full record of what --

7 Q. Okay.

8 A. -- was discussed about the Senate district to know whether
9 that was a reasonable decision to make.

10 Q. Okay. In any event, going back to DX98 and the Duval
11 County map alone, you know the BVAP, the Black voting age
12 population, for that district was about 35 percent?

13 A. Yes.

14 Q. And you know the legislature conducted a functional
15 analysis, correct?

16 A. I don't know if they -- I believe the legislature did
17 conduct a functional analysis. I do believe they testified to
18 that or presented that in their process.

19 Q. And the legislature concluded that the district performs as
20 a Black Opportunity District, right?

21 A. I don't know if they concluded --

22 Q. No?

23 A. -- that it performs -- I know that it's published in their
24 packets. I know they published data in their committee packets
25 to that effect.

1 Q. Okay. We'll look at the data in a moment. But for the
2 moment, let's just look at the congressional -- or the
3 legislative record, JX38 at page 61.

4 This is Representative Leek talking about the --

5 JUDGE JORDAN: You said JX38?

6 MR. DISKANT: Yes.

7 JUDGE JORDAN: That's one of the joint exhibits.

8 Go ahead.

9 BY MR. DISKANT:

10 Q. Representative Leek, the chairman of the House committee,
11 says, "This district, CD-5, as drawn even in the primary map" .

12 -- and that's the Duval-only map, right?

13 A. Yes.

14 Q. "Still performs, so there's no effect on the functional
15 analysis for CD-5."

16 That was the congressional conclusion, right?

17 A. I see that.

18 Q. And in the Senate, JX40, which is also in evidence, this is
19 Senator Rodriguez, head of the Senate committee, said:

20 "Even though the percentage has gone down, the
21 functional analysis shows that there's still a Democratic
22 performing seat and that the minority controls the Democrat
23 primary in that seat. That is why we believe it to be
24 constitutional."

25 Right?

1 A. I see that, yes.

2 Q. So both the Senate and the House did functional analyses
3 and concluded that this district, the Duval-only CD-5, would
4 perform for minority voters, right?

5 A. That's what they said.

6 Q. Okay.

7 JUDGE JORDAN: Is this a good time to break? Unless
8 you're going to --

9 MR. DISKANT: Let me just ask two more questions.

10 JUDGE JORDAN: Sure. Go ahead.

11 MR. DISKANT: This will be quick.

12 JUDGE JORDAN: No, no. That's okay.

13 BY MR. DISKANT:

14 Q. The Governor's office did not do its own functional
15 analysis; is that right?

16 A. Correct.

17 Q. He just relied on what the legislature provided?

18 A. Correct.

19 Q. And a BVAP of 35 percent can still perform for minority
20 voters, right?

21 A. That's what they testified to.

22 Q. That's what they testified --

23 A. The problem is the legislature changed its definition
24 during the process of what a diminishment was. So earlier in
25 the legislative process, their testimony was that the Black

1 voting age population or for whatever district in question might
2 be that it should be relatively the same, and then later in the
3 legislative process they changed their definition.

4 Q. I'll ask you about that after lunch.

5 But my actual question is not whether it has to be the
6 same or different than the benchmark, but whether a benchmark of
7 BVAP of 35 percent can still perform for minority voters.

8 Right? It can?

9 A. Yes.

10 MR. SKWRAO: Okay. That is a perfectly fine time to
11 break, Your Honor.

12 JUDGE JORDAN: Okay. We will see you back at 1:20.
13 It's a little bit more than an hour. Okay.

14 *(Luncheon recess taken from 12:18 to 1:22 p.m.)*

15 **A F T E R N O O N S E S S I O N**

16 *(All parties present.)*

17 JUDGE JORDAN: Welcome back. Please be seated.
18 Whenever you're ready.

19 MR. DISKANT: Okay. Thank you, Your Honor.

20 BY MR. DISKANT:

21 Q. Good afternoon, Mr. Kelly.

22 A. Good afternoon.

23 Q. Okay. So we just saw the two maps that the legislature
24 passed, and the Governor vetoes those two maps and calls a
25 special session.

1 So let us look at the memorandum supporting the veto
2 that Mr. Newman wrote, which you're familiar with, I'm sure.

3 A. Yes.

4 Q. That's Joint Exhibit 55. And the Governor's fire during
5 this process had principally been directed at Benchmark CD-5 and
6 maps that looked like that, right?

7 A. Yes.

8 Q. Mostly talking about during this two-month period?

9 A. Mostly, yes.

10 Q. Yeah, because he didn't even know about the Duval
11 compromise till the last minute, more or less?

12 A. Yes.

13 Q. Okay. So this is the secondary map. It's not what the
14 legislature wants to have imposed on the State, but it's a
15 backup, right?

16 A. A backup, yes.

17 Q. A backup. And you do know that it improves on the lines of
18 old Benchmark CD-5 in multiple respects along the borders,
19 right?

20 A. Yeah, some of the borders in some parts of it.

21 Q. And you can see, for example, this little triangle on the
22 right, Duval is following the political boundaries this time?

23 A. Yes, it's following the political boundaries.

24 Q. Yeah, and its geographical area is actually smaller than
25 old Benchmark CD-5, correct?

1 A. I don't know.

2 Q. You don't know? Okay.

3 In any event, although it's the secondary map, it's
4 the first thing Mr. Newman talks about and the last thing he
5 talks about. He talks about it on page 2, and I think I'll skip
6 reading this sentence because it very similar to ones we've
7 seen. The sprawling district that goes 200 miles East to West,
8 that's the Governor's refrain throughout this period, right?

9 A. I'm sorry. You said it was Exhibit 50 --

10 Q. 55, joint exhibit.

11 A. Oh, gotcha. Thank you. I'm sorry.

12 Q. You with me?

13 A. Yes.

14 Q. Okay. In any event, what I highlighted here is more or
15 less the same thing that the Governor said to the State of
16 Florida Supreme Court, right, describing the district as
17 sprawling and 200 miles and the like?

18 A. Yes.

19 Q. Okay. So he starts on page 2 with that, and then he winds
20 up actually concluding with that also. Back on page 7, on the
21 secondary map, District 5 complies with the Florida
22 Constitution's nondiminishment requirement, but in so doing, it
23 violates the Fourteenth Amendment to the U.S. Constitution,
24 right?

25 A. Yes.

1 Q. That's the argument you've been making throughout?

2 A. Yes.

3 Q. So state law says one thing, but federal law is superior
4 and trumps state law more or less?

5 A. Yes.

6 Q. Okay. And he says here, "Mere compliance with a state
7 constitutional requirement to engage in race-based districting
8 is not without more compelling interest to satisfy strict
9 scrutiny."

10 Do you see that?

11 A. Yes.

12 Q. And, of course, he says "without more," and then he doesn't
13 really explain or address the compelling state interest behind
14 the Fair Districts amendment, does it?

15 A. Would I be able to review the rest?

16 Q. You can if you want.

17 A. Thank you.

18 Q. But let me just focus you on what I'm asking you about more
19 specifically.

20 You remember Mr. Popper saying that -- there was a
21 compelling state interest behind the Fair Districts amendment,
22 at least in certain applications? The testimony we looked at
23 this morning?

24 A. Yes.

25 Q. Okay. And if you were to ask a lawyer defending the Fair

1 Districts amendment, they would say the compelling state
2 interest, in fact, is that Black voters are still historically
3 affected by race discrimination in this state and this is a
4 remedy that the voters enacted. You don't have to accept that
5 as compelling or not compelling, but that's the argument.

6 He doesn't really address that, does he?

7 A. It's okay if I review the rest of the memorandum?

8 Q. Excuse me?

9 A. Is it okay if I review the rest of the memorandum?

10 Q. Sure. I mean, my basic question is: He really doesn't
11 address the history of race discrimination that led to the
12 enactment of the FDA.

13 You can take a look.

14 A. Thank you so much.

15 Mr. Newman does discuss the history of racial issues,
16 racial tensions in the State of Florida. If you were to look at
17 the discussion, it begins on the bottom of page 4 and extends
18 over to page 5. Mr. Newman talks about the history of Section 5
19 of the Voting Rights Act.

20 Q. Oh, I see it there.

21 A. Based on those five counties in Florida that were required
22 to go through preclearance, those five counties in Florida are
23 Collier, Hardee, Hendree, Hillsborough, and Monroe Counties.

24 Q. Yeah.

25 A. So this is a discussion of those five counties where there

1 was a history of interference based on race or other factors in
2 elections. All of those counties are not represented in this
3 discussion about the benchmark district.

4 Q. Right. But the benchmark district and the FDA apply to the
5 state as a whole, and the question I was asking you was about
6 discrimination in the state as a whole. And let's just leave
7 the letter as it sits. You've looked at it now.

8 Other than the section you pointed to about Section 5
9 of the Voting Rights Act, it doesn't address the history of the
10 discrimination in Florida that supporters of the FDA thought
11 justified it, correct? Statewide discrimination?

12 A. I don't know what supporters of FDA thought, but as a
13 matter of fact, it does address the history of discrimination in
14 Florida because it does touch on the five counties that
15 previously Florida was required to preclear --

16 Q. Okay.

17 A. -- voting laws for.

18 Q. In any event, we can disagree --

19 JUDGE WINSOR: This letter is in evidence, correct?

20 MR. DISKANT: Yeah.

21 JUDGE RODGERS: It's part of 55.

22 MR. DISKANT: Yes, yes, yes.

23 BY MR. DISKANT:

24 Q. In any event, you -- Mr. Newman himself agreed, I think we
25 saw in testimony, that there was a compelling interest in a

1 narrow Black district? Do you recall that? Or could be?

2 A. I remember him talking about hypothetically what could be.

3 Q. Yeah.

4 A. But I don't remember his comment being for a specific
5 district.

6 Q. No, it wasn't. It was a comment about the
7 constitutionality of the Fair Districts amendment.

8 JUDGE JORDAN: Is this Mr. Newman or Mr. Popper?

9 MR. DISKANT: Both. Mr. Popper did and Mr. Newman
10 did. Mr. Newman in the testimony I showed you earlier today --
11 and maybe it's not worth going back to everything -- but it was
12 a testimony about him saying that it wasn't always
13 unconstitutional. It was -- similar to what Mr. Popper said,
14 and it's in the record. I'm not sure I can find it fast enough.

15 Oh, here it is.

16 BY MR. DISKANT:

17 Q. This is from JX44, Mr. Newman testifying. He says -- this
18 is the same point he was making in the letter.

19 "Mere reliance on the Florida Constitution cannot by
20 itself be enough. Don't get me wrong; that's not to say there
21 are other applications of Florida Constitution nondiminishment
22 standard that could be -- or that could survive strict
23 scrutiny," and he talks about compact African American district,
24 right?

25 A. Are you just asking me if he said this.

1 Q. Yes.

2 A. Yes, he said this.

3 Q. And as you understand it, to survive strict scrutiny, you
4 need narrow tailoring and a compelling state interest, right?

5 A. Yes.

6 Q. And here narrow tailoring would be the compact community,
7 right, in this example that he's using?

8 A. A compact -- a compact minority community could help in
9 that analysis, yes.

10 Q. And the compelling state interest is the compelling state
11 interest in having a performing district that allows African
12 Americans to elect the candidate of their choice? That's the
13 compelling state interest, isn't it?

14 A. Are you asking me, or are you telling me?

15 Q. I'm asking you. That Mr. Newman, by saying it can survive
16 strict scrutiny, is agreeing that that's a compelling state
17 interest in allowing Black voters to elect the candidate of
18 their choice in Florida?

19 A. You're leaving out the subordinated other traditional
20 redistricting standards and did so in a race-based way. That's
21 not the full analysis.

22 Q. I'm asking you a question about the compelling state
23 interest, and your answer is?

24 A. The compelling state interest could be -- could be helping
25 the African American community elect a candidate of choice, but

1 that's not the only part of the analysis.

2 Q. Okay. I'll take your point.

3 Here we go.

4 In any event, there's nothing particularly new here
5 about the veto of the secondary map. When we get to the primary
6 map, that was kind of a wild card for the Governor, was it not?

7 A. I don't know what that means.

8 Q. Wild card? Surprise. He didn't expect the Duval-only map,
9 right?

10 A. The Florida House of Representatives had given us a
11 heads-up that they weren't going to propose a map --

12 Q. Okay.

13 A. -- like that, so it was not a surprise.

14 Q. In any event, he hadn't spent months making speeches and
15 Tweeting about why it's a bad idea, had he?

16 A. The same principles of violating equal protection applied.

17 Q. Well, not exactly, because he says that the District 5
18 complies with the nondiminishment requirement in the secondary
19 map, but he says it doesn't in the primary map, right?

20 A. Which page are you on? You're flipping pages.

21 Q. Excuse me?

22 JUDGE JORDAN: You're back to Mr. Newman's memo?

23 MR. DISKANT: Yes. I'm sorry.

24 BY MR. DISKANT:

25 Q. I'm back to Mr. Newman's memo, JX55, and he draws a

1 distinction between the two maps, because there's no reason to
2 think that District 5 in the primary map complies with the
3 nondiminishment requirement.

4 And in contrast, he says that the secondary map does
5 comply with nondiminishment requirement, right?

6 A. Correct. The District 5 in the primary map, the map that
7 drew the district in Duval County, that district had a
8 double-digit drop in its Black voting age population.

9 The District 5 in the secondary map was more similar
10 to the benchmark map. Its Black voting age population was more
11 similar to the benchmark Black voting age population.

12 Q. Okay. So the argument that the Governor -- or Mr. Newman
13 made and the Government adopted was that the drop in the
14 percentage BVAP meant that the primary map did not comply with
15 the Fair Districts amendment, right?

16 A. Correct.

17 Q. Okay. So let's see what he says there.

18 Then there's the point you were just making: "The
19 nearly 11 percentagepoint drop is more than slight and that
20 while the House redistricting chair represented that the Black
21 population could still elect a candidate of choice, there
22 appears to be little dispute that the ability to do so has been
23 reduced."

24 That's the argument he makes?

25 A. Yes.

1 JUDGE JORDAN: Can I ask you a question? And I don't
2 want to you speak for Mr. Newman, but don't those same problems
3 exist with the map that the Government proposed?

4 THE WITNESS: That same exact problem?

5 JUDGE JORDAN: Yeah.

6 THE WITNESS: No, Your Honor.

7 JUDGE JORDAN: The dropping of the percentage?

8 THE WITNESS: The Black voting age population, Your
9 Honor -- the Black voting age population does drop in the final
10 map that was passed, but that alone is not the analysis.

11 JUDGE JORDAN: No, no. I'm not asking you to agree
12 with that point. My point is that paragraph in Mr. Newman's
13 memo talks about nondiminishment, right?

14 THE WITNESS: Yes, sir.

15 JUDGE JORDAN: And only nondiminishment, right?

16 THE WITNESS: Yes, Your Honor.

17 JUDGE JORDAN: And my question is: Does that
18 nondiminishment problem -- not any other problems -- continue to
19 exist with the map that the Government -- that the Governor
20 proposed and that the legislature enacted?

21 THE WITNESS: Yes, the same issue occurs there.

22 JUDGE JORDAN: So why is that a legitimate criticism,
23 then, if the map that then gets proposed has the same problem?

24 THE WITNESS: Your Honor, I guess because the
25 legislature, particularly the Florida House of Representatives,

1 when they presented that map as a solution, they both
2 represented that it was drawn for race-based reasons.

3 JUDGE JORDAN: But that's not -- but that's not --
4 that paragraph speaks nothing about equal protection or the
5 constitution. That is the Florida Constitution's
6 nondiminishment requirement, right?

7 THE WITNESS: Yes, Your Honor.

8 JUDGE JORDAN: That problem is not solved by the
9 Governor's map, right? As a matter of fact, it's exacerbated,
10 is it not?

11 THE WITNESS: Your Honor, that -- the benchmark
12 district was not a lawfully drawn district, so --

13 JUDGE JORDAN: That's not my question. Your premise
14 and the Governor's premise and Mr. Newman's premise is that the
15 Benchmark CD-5 was itself unconstitutional, right?

16 THE WITNESS: Yes, Your Honor.

17 JUDGE JORDAN: Because it was drawn with race as a
18 predominant factor?

19 THE WITNESS: Yes, Your Honor.

20 JUDGE JORDAN: Correct? Okay. I understand that
21 argument. I understand that contention.

22 This paragraph does not speak to the equal protection
23 federal constitutional problem; it speaks to compliance with the
24 Florida Constitution. Am I right about that?

25 THE WITNESS: Yes, Your Honor.

1 JUDGE JORDAN: Okay. With regard to that Florida
2 Constitution nondiminishment target, doesn't the Governor's map,
3 the one that was ultimately passed, have the same
4 nondiminishment problem?

5 THE WITNESS: Yes, Your Honor.

6 JUDGE JORDAN: So why is it valid to complain about
7 these maps on that ground when the Governor's maps have the same
8 problem?

9 THE WITNESS: Your Honor, the -- Mr. Newman's
10 commentary was getting at the dual -- the dual problem that the
11 legislature's final map passed because the legislature's
12 explanation was that it was drawing a race-based district and at
13 the same time, the legislature argued that it met its
14 nondiminishment standard. Mr. Newman was pointing out that
15 either way, the legislature wanted to look at it, either side of
16 the argument failed. So the legislature's argument, it was
17 contradicting itself.

18 JUDGE JORDAN: Even though the Governor's map had the
19 same problem?

20 The Governor's map doesn't solve that problem, right?

21 THE WITNESS: Correct, Your Honor.

22 JUDGE JORDAN: Okay. Thank you.

23 BY MR. DISKANT:

24 Q. Pick up on that question, Mr. Kelly. The fact is that the
25 benchmark map had one Black district in North Florida and the

1 enacted map diminishes that to zero in North Florida; is that
2 right?

3 A. Yes.

4 Q. Isn't that exactly what the Fair District amendment is
5 intended to prevent?

6 A. I don't know what you mean. I don't know I can speak for
7 Fair Districts and what they were intending.

8 Q. Well, you read it and you applied it. And you understand
9 that it's intended to protect Black voters ability to elect
10 their candidate of choice from diminishment? You just told me
11 that the enacted map diminishes that ability in North Florida
12 from one district to zero.

13 A. But the Fair Districts amendment can't be read -- you know,
14 it can't be read in a silo as if the U.S. Constitution doesn't
15 exist.

16 Q. I understand you have a constitutional argument, and we'll
17 get there in a moment, but here we're just talking about the
18 Fair Districts Amendment, right, in these paragraphs that Judge
19 Jordan was asking about?

20 A. Yes.

21 Q. Okay. So the legislature concluded that the only criteria
22 that mattered is whether the new district performed or not,
23 right? The letter says that?

24 A. Yes. The legislature had shifted its criteria to just
25 performing.

1 Q. Well, we'll see if it shifted it or not in a moment. But
2 the -- this letter does not dispute that conclusion; it just
3 argues about the percentage BVAP going down, right?

4 A. If I can rereview that section again? Is that okay?

5 Q. Let me ask you a different question.

6 It focuses here on -- the 11 percentage point drop is
7 more than slight, right?

8 A. Yes.

9 Q. And this is talking about the BVAP, Black voting age
10 population, going from 46 to 35, correct?

11 A. Yes.

12 Q. And you know that BVAP doesn't tell you whether a district
13 will perform or not, right?

14 A. Right.

15 Q. And more than that: Comparing the BVAP of one district to
16 one that has a different geography and population tells you
17 nothing at all about how the two districts compare in
18 performance, does it?

19 A. Depending upon the gap. It's not the end-all be-all.
20 You'd want to do a more thorough analysis than just the Black
21 voting age population.

22 Q. Well, you told me earlier that 35 percent can perform and
23 44 percent, 46 percent can perform, right?

24 A. Yes.

25 Q. And you have to analyze it?

1 A. Yes.

2 Q. And so comparing percentages especially -- these aren't the
3 same district. These are completely different geography. One's
4 East-West from Duval to Gadsden County and the other is just
5 Duval. There are different people in those overlapping.
6 There's different geography. You can't really compare the
7 percentages, right?

8 A. Right. You would want to do a deeper analysis than just
9 the percentages.

10 Q. And all Mr. Newman is doing is comparing the percentages
11 and saying it doesn't meet the test of the Florida Constitution.
12 Isn't that what he says?

13 A. No.

14 Q. No?

15 A. The line that I was trying to read earlier, the last line
16 of that paragraph, distinguishes that the -- the frequency that
17 the community would choose a candidate of choice diminishes.

18 Q. That's here?

19 A. Yes.

20 Q. Okay. The idea that it's relying upon is -- okay. Let me
21 back up.

22 We just agreed that BVAP alone doesn't tell you the
23 answer, right?

24 A. Yes.

25 Q. Okay. And, in fact, do you know today that the test that

1 the U.S. Supreme Court applies is whether there's a diminishment
2 in the number of Black Opportunity Districts, not the percentage
3 of BVAP?

4 A. Do I know the U.S. --

5 Q. Do you know that?

6 A. -- Supreme Court standard?

7 Q. Yeah.

8 A. No, I don't know the U.S. Supreme Court standard.

9 Q. Okay. And do you know whether the Florida Supreme Court
10 follows that law?

11 A. No.

12 Q. Okay. So we've agreed that there is, in fact, a
13 diminishment in the number of districts in North Florida that
14 had a Black Opportunity District from one to zero?

15 A. Yes.

16 Q. And if that's the test for diminishment, then the
17 Governor's map violates the Florida Constitution, right?

18 A. No.

19 Q. Okay. In any event, the functional analysis -- and you
20 just mentioned these numbers -- it doesn't tell you that it's
21 not a performing district, does it?

22 Let's take a look at the actual numbers.

23 A. Tells you the degree to which it performs.

24 Q. Sorry?

25 A. Tells you the degree to which it performs.

1 Q. Yeah, and there's -- none of these performing districts are
2 guaranteed to perform every time, are they?

3 A. Correct.

4 JUDGE JORDAN: Mr. Kelly, you may not be the right
5 witness to ask this question of, but I thought that in the State
6 litigation, the Secretary conceded that the districts as
7 configured in the map that was passed violated the Florida
8 Constitution and specifically the Fair Districts Amendment. The
9 contention is that that itself is unconstitutional.

10 But in terms of Florida law, I thought that the
11 Secretary had conceded that there was a problem with the Florida
12 Constitution. Am I mistaken about that?

13 THE WITNESS: I'm not sure.

14 JUDGE JORDAN: Okay.

15 BY MR. DISKANT:

16 Q. Okay. This is DX98 at 3. I think you should have it in
17 your folder, and I realize no one can see it on the screen, but
18 if you look at it, I will call your attention to the functional
19 analysis.

20 Do you have it?

21 A. Page 3, yes.

22 Q. Okay. The third -- there are three rows of data, and third
23 at the bottom is the functional analysis for the performing
24 Black districts and Hispanic districts in the primary map,
25 right?

1 A. Yes.

2 Q. Okay. And CD-5 is listed there, along with two other Black
3 districts and three Hispanic districts, correct?

4 A. Yes.

5 Q. And if we just follow through, the blue tells you who won
6 the election. And the blue for the -- is a Democrat here, and
7 that's evidence that the -- the functional analysis showing the
8 candidates preferred by the Black voters is winning, right?

9 A. The blue appears to be showing that a Democrat won the race
10 and the red appears to be showing the Republican won the race.

11 Q. Right, and the blue is the candidate of choice of the Black
12 community, right?

13 A. That's what it's asserting, yes.

14 Q. Okay. So here in 2020 -- these are statewide elections --
15 the Democrat won. In 2018, three statewide elections -- four
16 statewide elections, the Democrat won. Five statewide
17 elections.

18 In 2016, two statewide elections a Democrat won one
19 and a Republican won one. In 2014, in four elections the
20 Republican won, and in 2012 in two statewide elections the
21 Democrat won, correct?

22 A. Correct.

23 Q. And that's nine out of 14 elections, and all of the most
24 recent elections, correct?

25 A. Correct.

1 Q. And that's basically the basis for the legislature's
2 conclusion that CD-5 would perform for Black voters, right?

3 A. Yes.

4 Q. And you noted that it's not every election that performs
5 for Black voters in the CD-5, right?

6 A. Yes.

7 Q. But certainly all the more recent ones did, right?

8 A. Since 2016 -- or one of the 2016 races and then everything
9 more recent.

10 Q. Right. And --

11 JUDGE JORDAN: Mr. Diskant, you're referring to the
12 primary or the secondary configuration here?

13 MR. DISKANT: This is the primary map.

14 JUDGE JORDAN: Right. Got it.

15 MR. DISKANT: The Duval-only map.

16 JUDGE JORDAN: Got it. Thank you.

17 BY MR. DISKANT:

18 Q. And this is the functional analysis that the legislature
19 did, and I think as we agree the analyses are just predictions;
20 they're not guarantees, right?

21 A. Right.

22 Q. And this was the basis of a reasonable prediction by the
23 legislature that this district would perform for Black voters,
24 right?

25 A. If you're asking me if it's reasonable, they're saying it

1 would perform, but they are also saying it would drop in its
2 likelihood of performance.

3 Q. I'm sorry. I can't hear what you just said.

4 I'm asking you, is this the basis for a reasonable
5 conclusion that the district will perform in the future for
6 Black voters?

7 A. I don't think the legislature's analysis was reasonable
8 here. So you used the word "reasonable."

9 Q. I know. I'm asking you do you think it's reasonable on
10 this basis to think this district will perform for Black voters?

11 A. If it's --

12 Q. In the future?

13 A. The analysis would show that it would perform nine out of
14 14 times --

15 Q. Yeah.

16 A. But the question you asked me earlier, you used the word
17 "reasonable."

18 Q. Yeah.

19 A. And originally the legislature was considering a map that
20 would perform 14 out of 14 times.

21 Q. Well, you said that was unconstitutional, so you can't
22 consider that one.

23 A. I didn't say it was unconstitutional. I said it has a
24 diminishment issue.

25 Q. How could it have a diminishment issue compared to an

1 illegal map?

2 A. I don't know -- I'm not sure what you're referring to.

3 Q. You're saying that the East-West version would have had a
4 Black performing candidate in 14 of 14 prior elections. This
5 one has nine out of 14, and that's less than the illegal map,
6 right?

7 A. I'm simply saying that the legislature asserted that they
8 didn't diminish, but then their data shows that they did
9 diminish.

10 Q. Well, we can argue about diminishment. I'm asking you
11 about whether it performs.

12 A. It performs, according to their analysis, nine out of 14
13 times.

14 Q. Okay. And do you think it's a reasonable bet that this
15 district will continue to perform frequently for Democrats in
16 the future based on the population as this analysis shows?

17 A. More often than not, this district would perform for the
18 Black community's candidate of choice.

19 Q. Okay. And that's kind of the most you can ask for as a
20 guarantee, isn't it?

21 A. I don't know what that question means. I'm sorry.

22 Q. Okay. I mean, for example, we can have the Hispanic
23 population down below, and if you -- I don't want to spend too
24 much time on these things that no one can see, but if you scroll
25 your eyes along these lines, some are red and some are blue,

1 right, throughout the array? That is -- these Hispanic
2 districts don't perform every time, right?

3 A. They're -- those Hispanic districts, 26, 27, 28 --

4 Q. You know what? I think I'll stop that line of questioning.
5 My eyes can't quite handle it.

6 In any event, by the Governor's veto, North Florida
7 went from having one Black performance district to none, right?

8 A. Yes.

9 Q. And the Governor -- oh, I do have one other thing to say.
10 Sorry.

11 After the diminishment discussion that Judge Jordan
12 asked you about and I'm going to ask you about, it gets to the
13 bottom and says: "Therefore, compliance with the Florida
14 Constitution cannot supply the compelling reason to justify the
15 legislature's use of race in drawing District 5 in the primary
16 map."

17 Right?

18 A. Yes.

19 Q. So it's an essential part of veto analysis that the CD-5 in
20 the primary map is not protected by the Fair Districts
21 Amendment, right?

22 A. Yes.

23 Q. Okay. Did it seem odd to you to go from having one Black
24 performing district in North Florida to having none and not
25 conceding that that was diminishment in violation of the Fair

1 Districts Amendment?

2 A. My experience, I was the map drawer. I wasn't drawing a
3 map for race-based purposes.

4 Q. Okay. So let's talk about drawing the map. This is my
5 last point.

6 So you drew the map that was submitted by the Governor
7 and became the enacted plan, right?

8 A. Yes.

9 Q. And you testified about it before the legislature, correct?

10 A. Yes.

11 Q. And you told --

12 Now, in drawing the map, I think, as we've discussed,
13 you understood that it did not comply with the Florida
14 Constitution, correct?

15 A. No.

16 Q. You didn't? I thought you told us that the Florida
17 Constitution required an East-West district to allow Blacks to
18 elect their candidate of choice.

19 A. I didn't tell you that.

20 Q. You didn't tell us that? Didn't the Governor say that in
21 his letter to the State Supreme Court, that the Florida
22 Constitution required the creation of what he called "a
23 sprawling East-West district"? And he said -- the suggestion
24 was yes, it did. And we talked about it and you agreed the
25 Florida Constitution did require the creation of an East-West

1 Black Opportunity District in North Florida, right?

2 A. The Governor raised the question of whether or not the U.S.
3 Constitution was being ignored by the application of the State
4 Constitution.

5 Q. I understand what he was doing. I'm asking you whether you
6 understood that the Florida Constitution required you to draw an
7 East-West Black Opportunity District?

8 A. What I understood was that the benchmark seat was not
9 lawful; therefore, in effect, it was not an obligation.

10 So in my experience of drawing a seat, drawing 28
11 districts, in this case the final map drawing 18 of those
12 districts, I wasn't obligated to redraw that seat.

13 Q. Did it trouble you at all to -- let me withdraw that.

14 In any event, you testified that you drew the map in a
15 race-neutral fashion, right?

16 A. Yes.

17 Q. But, in fact, you considered race in many places throughout
18 the map, right?

19 A. Considering race and drawing are two different things.

20 Q. You considered race in many places throughout the map,
21 right?

22 A. You would need to be somewhat race-conscious in parts of
23 the map.

24 Q. And we'll talk about North Florida in a second.

25 In Central Florida you considered racial data in

1 Orlando, Palatka, Daytona Beach, and Gainesville?

2 A. I considered racial data regarding Gainesville, Palatka,
3 and Daytona Beach in the sense of I was trying to see if there
4 was a way to draw a more compact version of Northeast Florida.
5 I would refer to that as "the Northeast Florida communities."

6 But I was trying to draw a more compact version of a
7 Black voting age population district that was similar in number
8 to the benchmark but more compactly located in Northeast
9 Florida. I determined that it wasn't possible.

10 That was the limit to the extent that I considered
11 that data in those parts of the state.

12 In Orlando, the legislature was having a debate about
13 whether or not there was a requirement to redraw a seat similar
14 to the benchmark Congressional District 10, and so I looked at
15 some of the racial data to understand what it was the
16 legislature was debating and whether or not that was a real
17 issue at play.

18 Q. And in South Florida, you considered race in CDs 20, 24,
19 26, 27, and 28; is that right?

20 A. Race or ethnicity, depending on the district you're
21 referring to.

22 Q. The Secretary's brief in this case says, "Mr. Kelly didn't
23 consider race when drawing lines."

24 That's not true, is it?

25 A. It is true. I did not consider race when drawing lines.

1 Q. Okay.

2 JUDGE JORDAN: What do you consider race in? You just
3 said you considered it to some degree, so how did you consider
4 it?

5 THE WITNESS: Your Honor, not in the drawing of lines.
6 What I did in Northeast Florida is regarding the topic around
7 the Benchmark CD-3 or what became CD-5, I looked at whether or
8 not there was a way to draw a Jacksonville core district that
9 would extend, perhaps, to places like Gainesville, Palatka,
10 Daytona Beach, whether or not there was a way to draw a more
11 compact seat in that part of the state that still came somewhere
12 close to the Black voting population of the benchmark seat,
13 which I think was in the 44, 45, 46 percent range.

14 I looked to see if that was possible. The communities
15 that were potentially close ultimately didn't work, but I looked
16 to see if Gainesville, Palatka, and/or Daytona Beach, if going
17 to those areas could make it work. Ultimately, it couldn't. I
18 determined there was no way to come close to the benchmark.

19 And then in Orlando, there was this discussion --
20 House and Senate had a disagreement in the process where the
21 House believed that there was no obligation legally to redraw
22 Congressional District 10 the way it was drawn, which was
23 primarily in West Orange County, Apopka, Winter Springs, a few
24 areas like that. And the Senate contended that that was
25 required.

1 The district -- when I looked at what the House and
2 Senate were debating, the benchmark in the two districts they
3 were debating were somewhere between, give or take, 25 percent
4 African American -- Black voting age population, about 27
5 percent Hispanic voting age population.

6 What I found was that I think that the House's
7 argument was right in that matter in that there was no
8 requirement to do so, so I abandoned the efforts to draw -- to
9 look at that any further. I didn't have a reason to draw based
10 on race.

11 What I ended up drawing happened to be a very compact
12 seat in Orange County that still actually came pretty close to
13 those Black and Hispanic voting age population numbers without
14 even trying to. That's just the community that's there,
15 compactly located in Orange County.

16 So in both cases I looked at whether or not there was
17 a need and what the art of the possible was. I determined that
18 it was not possible in the case of Northeast Florida. I
19 determined it was not needed in the case of Central Florida.

20 So I didn't, therefore, have to draw the districts
21 that I drew with race as a factor. I drew them free at race at
22 that point, because it wasn't possible in one case and it wasn't
23 necessary in the other case.

24 JUDGE JORDAN: If it was possible to do it, would you
25 take race into account in deciding which option to go with?

1 THE WITNESS: Your Honor, if it was possible in that
2 Northeast Florida example to have come very close to the Black
3 voting age population of the benchmark district, I would have,
4 because in that case, I would -- I would have been achieving
5 adherence to county lines, city lines, compactness, and also
6 achieving the purpose of nondiminishment.

7 So at that point, if I could have essentially checked
8 all the boxes, I would have done that. I thought that --

9 JUDGE JORDAN: Well, wouldn't somebody accuse you, if
10 two maps were equal in terms of all of those other criteria, of
11 choosing one over the other on the basis of race?

12 THE WITNESS: Your Honor --

13 JUDGE JORDAN: In other words, mapmakers these days
14 with computer software can do a lot of things with lines, right?

15 THE WITNESS: Yes.

16 JUDGE JORDAN: You can move one line, move another to
17 sort of achieve things you want to achieve in terms of the
18 factors at play.

19 If you had two possibilities, both take care of
20 exactness, district lines, county lines, historical communities
21 that share political and other sort of characteristics, and you
22 had two of them and each one of them satisfied all of your
23 mapmaking concerns, one of them maintained Black -- for lack of
24 a better term, Black minority voting power and one did not,
25 you're saying you could choose the one that preserved Black

1 minority voting power, right?

2 THE WITNESS: Yes, Your Honor, in that scenario.

3 JUDGE JORDAN: Wouldn't someone accuse you of that if
4 you made that choice of using race to break the tie?

5 THE WITNESS: Your Honor, someone could make that
6 accusation.

7 JUDGE JORDAN: Would they be right?

8 THE WITNESS: Your Honor, they'd be wrong. I would
9 have a pretty compelling argument that I had used the other
10 factors -- compactness, county lines, city lines, other
11 political geographical boundaries. I would be able to show that
12 I wasn't just using race as a predominant factor in that
13 scenario.

14 JUDGE JORDAN: No, but you maybe used race in terms of
15 the ultimate choice.

16 THE WITNESS: Your Honor, in redistricting, there is a
17 place where if you're complying with the law this way or that
18 way, ultimately, you can make a decision as long as you're
19 complying with the law. In the mapmaking process, there's -- in
20 some parts of the state, there's thousands of ways you could go,
21 even if you're complying with the law if you're drawing compact
22 districts that follow city and county lines.

23 JUDGE JORDAN: Okay. Thank you.

24 BY MR. DISKANT:

25 Q. And go back to South Florida for a moment.

1 I've asked you about Districts 20, 24, 26, 27, and 28.
2 I think four of those are VRA districts and one is an FDA
3 district; is that right?

4 THE WITNESS: I believe 20, 26, 27, 28 are districts
5 that are affected by Section 2 of the Voting Rights Act.
6 District -- I think it's District 24 is a little below that
7 50 percent --

8 Q. Right --

9 A. -- majority/minority threshold.

10 Q. And these districts were not drawn to be race-neutral; is
11 that right?

12 A. I didn't draw these districts, so I can't speak to exactly
13 all the considerations that the legislature made.

14 Q. You chose to submit them to the legislature as part of the
15 plan on behalf of the Governor, did you not?

16 A. Yes.

17 Q. And you knew that they had -- were drawn as to consider
18 race, to comply with racial considerations, were they not?

19 A. Race and ethnicity. And I knew that these districts
20 complied with a number of other tenets of traditional
21 redistricting principles: Compactness, adherence to city and
22 county lines, adherence to other well-recognized political and
23 geographical boundaries.

24 Q. Well, let's look at CD24 for a second. That's enacted map.
25 CD24, PX7190. Here it is. It's a little hard to see the line

1 because the yellow and green sort of blur together. I'm going
2 to roughly color it with blue just so we can see it better, if
3 that's all right.

4 Now, you found -- this map, it's not a majority. I
5 think it's got a BVAP of 42 percent. You did not do a
6 functional analysis of this, but you accepted the functional
7 analysis by the legislature, right?

8 A. Yes.

9 Q. And you found it very compact and respective of political
10 and geographical boundaries, and it's a performing minority
11 seat, right?

12 A. Yes.

13 Q. And you thought, therefore, it was perfectly good in
14 compliance with the Fair Districts Amendment, right?

15 A. Yes.

16 Q. In fact, I don't know if you studied this or not, but you
17 know the legislature actually moved some of the Black population
18 into this district in its redistricting process? Were you aware
19 of that?

20 A. No.

21 Q. Okay. I'll save that for another witness, then.

22 JUDGE WINSOR: I thought this was the enacted map you
23 were showing.

24 MR. DISKANT: This is the enacted map.

25 JUDGE WINSOR: They didn't move from this one? You're

1 talking about --

2 MR. DISKANT: Oh, no, no. In creating this map --

3 Let me just pose the question just so it's clear.

4 In creating this map, the record will show, from the
5 benchmark before, this area here was added and an area here was
6 subtracted, and the added area is largely Black and the
7 subtracted area is largely Hispanic.

8 JUDGE WINSOR: Okay. I misunderstood the question.

9 BY MR. DISKANT:

10 Q. Are you aware of any of that, Mr. Kelly?

11 A. No.

12 Q. Okay. So when you agree that CD24 is drawn in compliance
13 with the Fair Districts Amendment, you also think that it has no
14 U.S. constitutional problem; is that right?

15 A. Correct. It's a fairly compact map adherent to county and
16 city lines.

17 Q. And what you're agreeing with in terms of the Fair
18 Districts Amendment is that for this map, at least, the Fair
19 Districts Amendment provides the compelling state interest in
20 this narrowly tailored map, right?

21 A. That the Fair Districts Amendment itself is providing a --

22 Q. Yeah. This is drawn pursuant to the Fair Districts
23 Amendment. Race is considered in order to avoid diminishment,
24 pursuant to the Fair Districts Amendment.

25 Do you think it's constitutional? I realize you're

1 not an attorney, but you're agreeing, are you not, that there is
2 a compelling state interest in the Fair Districts Amendment
3 compliance in CD24?

4 A. To my knowledge, yes.

5 Q. Okay. But I'm trying to understand, then, what the problem
6 is with the Duval map. We're looking now at DX98 compared to
7 PX7190. And CD24 is compact. It respects political boundaries.
8 CD5 on the primary map is compact and reflects political
9 boundaries. Both had race considered in the drawing. Both are
10 supported by the Fair Districts Amendment.

11 And you just said there's a compelling state interest
12 in the Fair Districts Amendment down here in 24, but seemingly
13 not over here in the primary map 5. Why is that?

14 A. The map on the left creates a district drawn for a
15 race-based reasons, creates noncompact district around it, and
16 also fails its own diminishment test that the legislature
17 testified to. So it creates a series of problems.

18 District 24 on the right is a compact district that
19 follows city and county lines. This district would be a good
20 district in probably any other way and doesn't create any kind
21 of tension for the districts around it.

22 So you can't just look at a district in isolation unto
23 itself. When you look at the districts below 24, above 24, 24
24 creates nice, clean breaks along county and city lines, doesn't
25 create any problems for the districts to the North or South or

1 West of it. It's just a good district all around.

2 Q. You are placing compactness over compliance with the FDA,
3 aren't you? To me, you're saying that CD-4, you don't think is
4 compact, and that's a reason to reject CD-5, right?

5 A. CD-5 creates a compactness problem with CD-4, yes.

6 Q. And CD-4's compactness problem is subordinate to complying
7 with the Fair Districts Amendment, right?

8 A. To read Fair Districts that way, you're reading that Fair
9 Districts is, then, in conflict with the U.S. Constitution. You
10 can't read it that way.

11 Q. Okay. So there's a U.S. Constitution problem up here in
12 Duval County. Isn't the problem that Governor DeSantis simply
13 did not want a Black district in North Florida?

14 A. No.

15 Q. Isn't the problem that the Governor had been ranting about
16 this for months and there was no way that this was going to get
17 approved, even when the legislature met every one of his stated
18 objections?

19 A. No.

20 Q. Okay. So the map you drew -- so now we're looking at
21 PX7198, which is the benchmark, and the enacted map PX7190.

22 And when you drew 7190, you knew you were creating
23 four white districts, correct?

24 A. No.

25 Q. You didn't know that?

1 A. No.

2 Q. Well, you were aware of the demographics of the benchmark
3 map, no?

4 A. I was aware of the demographics, but I didn't pay attention
5 to what I was creating for those districts when I was drawing
6 the map.

7 Q. You were aware of the demographics of the benchmark map,
8 right?

9 A. Generally speaking.

10 Q. And this is Joint Exhibit 68, and this is the 2016 map from
11 the legislative package.

12 Basically, what you see is you -- you know what I'm
13 going to do is I'm going to write D2, D3, D4, D5 over here so we
14 can see them better.

15 Black voting age population District 2 was 12.4,
16 District 3 was 16.1, District 4 was 10.36, and District 5 was
17 46.

18 It was pretty obvious that when you split District 5
19 into four maps in the same region, they're going to be white
20 majority maps, large white majority maps, right?

21 A. I wasn't drawing for that reason.

22 Q. Sir, I'm asking you whether it was perfectly obvious to you
23 that the districts you were drawing were going to be white
24 majority districts?

25 A. It's a reasonable guess that might happen, but I wasn't

1 drawing for that reason.

2 Q. I'm just asking you whether you knew that's what it was
3 doing -- if that's what you were doing. You're drawing four
4 white majority districts in Northern Florida, right?

5 A. I did not know that's what I was doing.

6 Q. Okay.

7 JUDGE JORDAN: Did you realize it at some point?

8 THE WITNESS: During this process, yes, Your Honor.

9 JUDGE JORDAN: After the fact?

10 THE WITNESS: Yes, Your Honor.

11 JUDGE JORDAN: So you never looked at any of the
12 numbers --

13 THE WITNESS: I did --

14 JUDGE JORDAN: -- for voting age population when you
15 drew the maps?

16 THE WITNESS: During the process, yes, Your Honor.
17 When I felt that I needed to, I did. But once we concluded that
18 there was no way to draw something reasonably similar to the
19 benchmark district in that part of the state, I had no further
20 reason to look at the racial data or ethnic data for North
21 Florida.

22 JUDGE JORDAN: Okay. Thank you.

23 JUDGE RODGERS: Can I ask what that exhibit number was
24 earlier?

25 MR. DISKANT: Excuse me. The top map?

1 JUDGE RODGERS: No, with the -- with the statistics.

2 MR. DISKANT: I'm sorry. That was Joint Exhibit 68.

3 JUDGE RODGERS: Joint Exhibit 68?

4 Okay. Thank you.

5 BY MR. DISKANT:

6 Q. So you just told us that you spent time trying to draw a --
7 or trying to see if you could draw a Black Opportunity District
8 in Northeast Florida, correct?

9 A. Yes.

10 Q. And you spent -- this was after the Governor had publicly
11 stated that CD-5 had to go?

12 A. Yes.

13 Q. And you thought you would be free to go back to the
14 Governor and say, "Problem solved, boss. I've got a Black
15 performing district in North Florida," and he would say,
16 "Great"?

17 A. As a -- at the time deputy chief of staff for the Governor,
18 it's an obligation to advise him that if I felt there was a way
19 to address the concern, address his legal concerns and at the
20 same time sort of, again, check all the boxes, so to speak, it's
21 an obligation that I would have in that role to advise him.

22 Q. So let me understand. You were looking to see if you could
23 use race to draw a district in Northeast Florida that, in your
24 view, checked all the boxes, right?

25 A. A variety of factors, race being one of them, but a variety

1 of factors. Compactness, adherence to city and county lines.

2 Q. And --

3 A. Other political and geographical boundary lines.

4 Q. You were seemingly wedded to the idea that you had to get
5 44 percent BVAP before you could report back that you succeeded?

6 A. No.

7 Q. I thought you said that you wanted to get close to
8 44 percent?

9 A. Yes.

10 Q. Okay. But you surely knew as you undertook this exercise
11 that you would get 35 percent in Duval alone, as the legislature
12 itself did, did you not?

13 A. Duval alone?

14 Q. Yeah.

15 A. I'm not sure. I'm not sure. But the population necessary
16 to get a district, a completed district, is around 769,000
17 people, so --

18 Q. Yeah.

19 A. -- to complete a district and do so in a way that's
20 relatively adherent to compactness, political and geographical
21 boundary lines, and at the same time try to come somewhere close
22 to the Black voting age population of the benchmark district
23 proved too difficult. It proved not possible.

24 Q. I don't understand why what you're describing wasn't
25 exactly what the legislature did in creating District 5, except

1 you don't think 35 percent's good enough.

2 A. An 11-point drop is going to be a statistically significant
3 drop. An 11 percent drop -- that's not a percentage or two.
4 That's not something, as we showed -- as you showed me earlier,
5 that district went from 14 out of 14 elections to nine out of 14
6 elections. That's a pretty significant drop.

7 Q. So just so we understand, there's no difference between
8 what you did and what the legislature did except that you were
9 looking for more like 44 percent and they were content with
10 35 percent; is that right?

11 A. Right. I was trying to get closer to the benchmark.

12 Q. Right. And --

13 JUDGE JORDAN: If that Duval -- as we've been
14 referring to it, if that Duval-only CD-5 had 44 percent for the
15 Black voting age population, would that have served a compelling
16 state interest?

17 THE WITNESS: I think if I was able to hit 44 or right
18 around that percent Black voting age population, there would be
19 a much stronger argument for it.

20 JUDGE JORDAN: In your mind, did you create a minimum
21 threshold in terms of percentages that you could not go below
22 without eliminating or creating a self-diminishment problem?

23 THE WITNESS: Your Honor, I felt like if you could get
24 to at least 39, 40, 41 percent, it would be pretty hard to
25 argue. We would want to do a full functional analysis to be

1 certain, but I felt like if you couldn't get somewhere close to
2 40 percent, it would be pretty tough to argue.

3 JUDGE RODGERS: But the analyses --

4 Excuse me. Are the analyses that you said you did
5 when you were trying to draw a Black Opportunity District for
6 North Florida -- you thought you had an obligation to do that,
7 and you looked at a number of factors. You mentioned those.
8 But you were trying to get closer to 44 percent. Are the
9 analyses that you conducted in the record somewhere?

10 MR. DISKANT: It's never been produced to us.

11 MR. JAZIL: No, Your Honor, they're not.

12 JUDGE RODGERS: Okay.

13 BY MR. DISKANT:

14 Q. And you never did -- but you told us many times that there
15 is no fixed minimum percentage for BVAP for diminishment
16 purposes, right?

17 A. Correct.

18 Q. And so the entirety of your 40, 41 percent is comparing it
19 to Benchmark CD-5? Is that what you're doing?

20 A. The percentage, yes. Yes.

21 Q. Even though you're of the view that that's an illegal map,
22 right?

23 A. Yes.

24 Q. So it's okay to use it for comparison purposes but not to
25 enact into law?

1 A. I was trying to see if there was a way to check all the
2 boxes. I determined there wasn't, but I felt I had an
3 obligation to try.

4 Q. Yeah. Did you draw this Duval map when you were
5 experimenting?

6 A. This map right here?

7 Q. Yeah.

8 A. No.

9 Q. Okay. You didn't think that if you came back to the
10 Governor and said, "I've solved your problem, Governor. We can
11 keep a Black district in North Florida with this map I've
12 drawn," you didn't think you'd be fired?

13 A. I'm sorry?

14 Q. Sir?

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

16 Q. Question was that the Governor didn't want to hear about a
17 Black district in North Florida; isn't that the fact?

18 A. The Governor expects us to have to do our due diligence.

19 Q. In any event, the map that was eventually enacted into
20 law --

21 Oh, one more thing. I'm sorry.

22 This is what you did draw in Northeast Florida, right?
23 This is PX7190, right?

24 A. Yes.

25 Q. And you have to separate -- you have to cut into Duval in

1 some fashion because it's larger than one CD, right?

2 A. Yes.

3 Q. And what you did was you took Duval County and parts of it
4 are -- in CD-4 you've merged it with Nassau and Clay Counties,
5 right?

6 A. Yes.

7 Q. And over here in CD-5, you've combined parts of it with
8 St. Johns County, right?

9 A. Yes.

10 Q. So instead of the Duval-only alternative that the
11 legislature had come up with in which Duval and St. Johns were
12 the only counties in the --

13 MR. DISKANT: I'm misstating this. Skip that. I
14 withdraw that question. I'm sorry.

15 BY MR. DISKANT:

16 Q. In any event, you had to draw a line down to Jacksonville
17 somewhere?

18 A. Yes.

19 Q. And you knew the demographics of Jacksonville pretty well
20 from the work you had done in trying to draw a Black Opportunity
21 District in Northeast Florida, right?

22 A. Reasonably.

23 Q. And you knew, for example, that the Black community in
24 Jacksonville spanned both sides of the river, right?

25 A. Yes, sir.

1 Q. And you draw the line between CD-4 and 5 down the river,
2 right?

3 A. Yes.

4 Q. Splitting the Black community in Jacksonville into two
5 different congressional districts, correct?

6 A. Yes.

7 Q. And the result of what you did in drawing the enacted map
8 was to destroy Benchmark CD-5, correct?

9 A. The result of what I did was to draw legally compliant
10 districts. That would mean getting away from Benchmark CD-5.

11 Q. Right, and you did that because it was a Black Opportunity
12 District, at least in part, not despite that fact?

13 A. No, I did not do it because it was a Black Opportunity
14 District.

15 Q. Okay. Remains an irrelevant data point?

16 JUDGE JORDAN: Was that question?

17 MR. DISKANT: It was.

18 JUDGE JORDAN: Ask it again.

19 MR. DISKANT: Yes, sir.

20 BY MR. DISKANT:

21 Q. As far as you're concerned, that's an irrelevant
22 observation, that the Black community no longer has a Black
23 Opportunity District in North Florida?

24 A. It's relevant observation. It wasn't a legal reason to
25 have to draw the benchmark district again.

1 Q. Okay.

2 In any event, by the time you testified about the map
3 before the legislature, the legislature had essentially given up
4 on its effort to have a map that complied with the Fair
5 Districts Amendment, right?

6 MR. JAZIL: Objection, Your Honor. Now we're going
7 into what the legislature planned to do.

8 MR. DISKANT: I'll withdraw the question. That's
9 fine.

10 BY MR. DISKANT:

11 Q. The legislature had decided to comply with the Governor's
12 wishes by the time you testified; is that right?

13 MR. JAZIL: Same objection, Your Honor.

14 JUDGE JORDAN: If what you're asking is whether or not
15 the legislature passed the Government --

16 MR. DISKANT: That's why I'm going.

17 JUDGE JORDAN: -- map, I'll allow the question.

18 MR. DISKANT: That's where I'm going, for sure.

19 JUDGE JORDAN: Ask it that way, then.

20 BY MR. DISKANT:

21 Q. The legislature was in special session when you testified;
22 is that right?

23 A. Yes.

24 Q. And can we agree that the Governor had carefully timed that
25 session to take place right before a hearing scheduled before

1 this Court?

2 A. No.

3 Q. No? The legislature passed the two maps on March 4, 2022,
4 right?

5 A. That sounds right.

6 Q. And the Governor vetoed it three weeks later on March 29
7 and called a special session for April 19, 2022, six weeks
8 later; is that right?

9 A. Yes.

10 Q. And that timing was no accident, because there was a
11 hearing scheduled before this Court on drawing a new map for the
12 State of Florida a week or so later. You know that?

13 A. The timing was necessary to call a special session because
14 at some point, supervisors of elections have to set boundaries
15 so that candidates can qualify to run for office.

16 So the clock was ticking. We had to set a special
17 election -- not a special election -- a special session at some
18 point in order to have a map so that supervisors can do their
19 work so that candidates can then, therefore, run for office.

20 Q. Well, sure, but you didn't call a special session until six
21 weeks after the legislature passed the maps, right? That's not
22 exactly time of the essence.

23 A. We were negotiating with the House and the Senate.

24 Q. And we can agree that the special session was a few days
25 before -- even after filings had begun in this court on whether

1 the federal court should draw a new map. Do you recall that?

2 A. I don't.

3 Q. Okay. Docket Number 78 has the schedule that the Court
4 set.

5 In any event, do you recall that the legislature
6 expressed that it did not want the Court to draw a map? Or
7 legislators expressed that?

8 A. I don't recall that specific statement. I can't say.

9 Q. Do you recall that the legislature didn't even bother
10 trying to come up with a new map after the Governor's veto?

11 A. We worked with the legislature and that final map was a
12 comprised of pieces of the maps the House and Senate put forward
13 and the maps the Governor put forward.

14 Q. The Governor put forward one map, and that's what was voted
15 on; is that right?

16 A. No. The Government put forward three maps, and then --

17 Q. I'm talking about in April 2022.

18 A. Did the Governor -- there was one map that was filed for
19 that special -- well, I think one or two legislators may have
20 filed some competing maps, but the Governor put forward a map
21 for that special session.

22 Q. Okay. The record will straighten that out.

23 But in any event, you worked for the Governor for
24 quite some time now?

25 A. Yes, since April of 2021.

1 Q. Let's see if we can agree on this, that the credit or the
2 blame for the elimination of a Black Opportunity District in
3 North Florida goes to Governor DeSantis?

4 A. The law guides this process of redistricting.

5 Q. Okay. He's the reason there's no Black opportunity map --
6 district in North Florida; is that right?

7 A. No.

8 MR. DISKANT: Okay.

9 I have nothing else, Your Honor.

10 **CROSS-EXAMINATION**

11 JUDGE JORDAN: Mr. Jazil, we'll go for about an hour
12 or so, but if it's the wrong time to break, you just let us
13 know. We can let you go a little further or stop a little
14 earlier.

15 MR. JAZIL: Your Honor, I was just checking with my
16 client.

17 JUDGE JORDAN: Okay.

18 MR. JAZIL: To see --

19 JUDGE JORDAN: It's always important. And I didn't
20 mean for the day. I meant when we take a break.

21 MR. JAZIL: Yes, Your Honor. Understood.

22 BY MR. JAZIL:

23 Q. Mr. Kelly, I'd like to bring up where my friend focused the
24 latter part of his discussion with you on Plan 8019.

25 And if I understood your earlier testimony

1 correctly -- and you tell me if I'm wrong -- plan 8019 was
2 vetoed by the Governor?

3 A. Yes.

4 Q. What's your understanding of why that was vetoed?

5 A. Plan 8019 was vetoed because it still had raised equal
6 protection concerns under the U.S. Constitution. It still
7 raised concerns about other traditional restricting principles,
8 such as compactness, adherence to city and county lines.

9 Q. And did I also hear you talk about how it diminished the
10 ability of Black voters to elect representatives of their
11 choice --

12 A. Yes.

13 Q. -- in your colloquy with my friend?

14 I'd like to focus on that last part, the diminishment
15 of the ability to elect.

16 Where does that requirement come from, to your
17 understanding?

18 A. The State Constitution.

19 Q. Okay. And you told my friend that it did diminish the
20 ability to elect, and you and my friend went through the packets
21 that accompanied plan 8019. And I'd like to hand you a copy of
22 those together with the packet that goes along with the
23 benchmark map, the map that was there from 2016 to 2022.

24 JUDGE JORDAN: What exhibits are those?

25 MR. JAZIL: Your Honor, I will be handing the witness

1 Defense Exhibit 98 and Joint Exhibit 70.

2 JUDGE JORDAN: Okay. Both of those are already in
3 evidence.

4 MR. JAZIL: Yes, Your Honor.

5 Can you pull up PX98, please.

6 BY MR. JAZIL:

7 Q. Mr. Kelly, take a look at the packet and just tell me, to
8 your understanding, what exactly is this? What would you call
9 this packet?

10 A. Which one?

11 Q. DX98, please.

12 A. Sure. This is one of the two maps that the legislature
13 passed and sent to the Governor. This is the primary map, map
14 8019. This is the map that created a different-looking
15 Northeast Florida towards the end of the process.

16 Q. And on the first page, District 5 is the Duval-only
17 district that we've been referring to, right?

18 A. Yes.

19 Q. Can you tell us where in this packet we can find the Black
20 voting age population for Congressional District 5?

21 JUDGE JORDAN: For the proposal.

22 MR. JAZIL: Yes, sir, for 8019 in DX98.

23 THE WITNESS: It's on the third page, the bottom
24 bracket. It's on the third page.

25 BY MR. JAZIL:

1 MR. JAZIL: Okay. Can we go to the third page,
2 please. Can we blow up the top left of the first row.

3 Can we go up. There we go.

4 BY MR. JAZIL:

5 Q. Is that what you're referring to, the BVAP for District 5?

6 A. Yes.

7 Q. And here it says that there are two other Black performing
8 districts. Can you identify those for us, please?

9 A. Yes. 20 and 24.

10 Q. And what's your understanding of what's to the immediate
11 right of 20 and 24?

12 A. The Black voting age population.

13 Q. Okay. And so the Black voting age population for CD-5 in
14 plan 8019 was 35.32 percent.

15 MR. JAZIL: Can we go to D -- Joint Exhibit 7, please.

16 BY MR. JAZIL:

17 Q. Can you tell us what JX70 is, sir?

18 A. Sure. It's the benchmark maps that the Florida Supreme
19 Court drew.

20 Q. And can you find for me in this packet the Black voting age
21 population for Congressional District 5?

22 A. Yes. It's on page 2.

23 Q. And what is the Black voting age population for this
24 district?

25 A. It's 46.20.

1 Q. So if you could just do the quick math for me, what is the
2 decline in Black voting age population from the benchmark
3 district to the plan 8019 vetoed by the Governor?

4 A. It's about 11 percent.

5 Q. Okay.

6 JUDGE JORDAN: That second number, Mr. Kelly, comes
7 from Joint Exhibit 7 or is that --

8 MR. JAZIL: Yes, Your Honor. Joint Exhibit 70. It's
9 on page 2.

10 JUDGE JORDAN: Okay. Thank you.

11 BY MR. JAZIL:

12 Q. Now, Mr. Kelly, going back to Defense Exhibit 98, which is
13 plan 8019, my friend showed you the functional analysis on here,
14 right? Can you tell us what page the functional analysis is on,
15 and we'll have our tech blow it up.

16 A. On 198.

17 Q. Yes, sir.

18 MR. JAZIL: Defense Exhibit 98.

19 THE WITNESS: The functional analysis would be -- I
20 believe it would be page 3.

21 BY MR. JAZIL:

22 Q. Okay. Let's go to page 3.

23 A. Looks like it continues on in greater detail in the pages
24 thereafter.

25 Q. So let's focus on page 3, the election results column.

1 Can you tell us what we have on the rows on top where
2 it says 2020 President, 2018 Governor, 2018 AG, et cetera? What
3 do those columns connote, sir?

4 A. Those show the bottom bracket election results. Those show
5 the election results for the Republican candidate and Democratic
6 candidate in each of those elections from the 2020 presidential
7 all the way back to the 2012 U.S. Senate race.

8 Q. And you testified earlier when my friend was asking you
9 questions that this district performs for Black voters in nine
10 out of 14 elections. So doing the math for me, in how many
11 directions does this map not perform for Black voters?

12 A. In District 5?

13 Q. Yes, in District 5.

14 A. Does not perform in five of the 14 elections.

15 JUDGE JORDAN: For the new CD-5, right?

16 MR. JAZIL: Yes, Your Honor. This is plan 8019.

17 JUDGE JORDAN: Right, right.

18 MR. JAZIL: This is the Duval-only district. I
19 believe the witness has now said it does not perform in five out
20 of 14 elections.

21 BY MR. JAZIL:

22 Q. Looking at this functional analysis, can you tell us how
23 many test elections the plan fails to perform for Black voters
24 in Congressional District 20 and 24, the two other Black
25 performing districts?

1 A. It does not fail to perform in any of them.

2 Q. So it performs in all 14 of 14 test elections for the other
3 Black performing districts?

4 A. Yes.

5 Q. Now, can we go back to the benchmark, which is Joint
6 Exhibit 70.

7 Mr. Kelly, where's the functional analysis in this
8 packet?

9 A. It's spread across pages 5, 6, 7, and 8.

10 Q. Okay. Let's go to page 8, please.

11 Mr. Kelly, looking at this functional analysis return,
12 can you tell me the number of times that the benchmark,
13 Congressional District 5, which was in place from 2016 to 2022,
14 performed for African Americans?

15 A. In all -- in every case.

16 Q. Okay. And what about for Congressional Districts 20 and
17 24?

18 JUDGE JORDAN: I have a question.

19 MR. JAZIL: Yes, sir.

20 JUDGE JORDAN: How many -- the last graphic had 2010
21 to 2022, right?

22 MR. JAZIL: Yes, Your Honor.

23 JUDGE JORDAN: So this one is truncated a little bit.

24 MR. JAZIL: Your Honor --

25 JUDGE JORDAN: 2015 to '22? No?

1 THE WITNESS: Your Honor, they both appear to have
2 2012 to 2020.

3 JUDGE JORDAN: They're both the same, then?

4 THE WITNESS: Yeah.

5 JUDGE JORDAN: In terms of the number of elections?

6 THE WITNESS: Yes.

7 JUDGE JORDAN: Okay. I misunderstood. I'm sorry.

8 BY MR. JAZIL:

9 Q. So, Mr. Kelly, I believe you can use your finger to
10 highlight where the test elections are on this functional
11 analysis. Do you mind doing that, just for everyone's
12 education?

13 MR. JAZIL: And for the record, the witness is marking
14 Joint Exhibit 70 and he's highlighting the test elections.

15 JUDGE WINSOR: Wasn't CD-5 only in place starting with
16 2016? So if you're doing this analysis for this Benchmark 5,
17 CD-5, it's really the elections from 2016 to 2022.

18 MR. JAZIL: Your Honor, the way the functional
19 analysis works -- and perhaps I can ask the witness a question
20 or two about it -- is they look the census block area and they
21 run the elections in it.

22 JUDGE JORDAN: As if the districts had --

23 MR. JAZIL: Exactly, as if the district had already
24 been in there.

25 JUDGE JORDAN: So technically speaking, 2010 to 2016

1 are not real elections with that district. They're what they
2 would have been under an analysis had the district existed.

3 MR. JAZIL: Yes, Your Honor. Because remember, we're
4 looking at 8019 as well, which was never put in place for any
5 election.

6 JUDGE WINSOR: But the other one was, and so --

7 JUDGE JORDAN: The other one's a complete hypothetical
8 test, right? This one has actual test results for a period of
9 time and then a functional analysis for the years where it
10 wasn't in place, right?

11 Is that right, Mr. Kelly?

12 THE WITNESS: Your Honor, my understanding of the way
13 this kind of analysis is done is that when you take the district
14 boundaries of a district that did exist or just a proposed
15 district, that's essentially dropped into the map, and it tells
16 you: Had that district existed, this is what the result would
17 have been based on those census blocks.

18 JUDGE RODGERS: But you know how Benchmark CD-5
19 performed in certain elections. I mean, it's not a
20 hypothetical. It's not a statistical analysis. You have the
21 data, right?

22 THE WITNESS: Your Honor --

23 JUDGE JORDAN: You're just going back -- you're going
24 back to have an even comparison between the new Duval County
25 proposed CD-5 and the old Benchmark CD-5, and you're running

1 them all from 2010 to 2022.

2 MR. JAZIL: Yes, Your Honor.

3 JUDGE JORDAN: For one, it's all hypothetical because
4 a district never technically existed, and for the other one,
5 it's partially factual and partially hypothetical because this
6 district wasn't in place from 2010 to 2016.

7 MR. JAZIL: Yes --

8 JUDGE WINSOR: You're using different races to do the
9 measurement, though, right?

10 MR. JAZIL: Yes, different races to do -- you can use
11 different races to do the measurements. The way it was done
12 here is there are 14 test elections for both comparison
13 purposes. And for those 14 test elections, as Judge Jordan
14 pointed out in the benchmark district, that benchmark district
15 was in place for some of those elections, so it's actual data
16 for that district versus the results you would get from the
17 census blocks from those elections and that you would cobble
18 together in some hypothetical --

19 JUDGE RODGERS: That makes sense.

20 JUDGE JORDAN: I think we understand it now.

21 BY MR. JAZIL:

22 Q. So, Mr. Kelly, just taking a step back, what conclusions
23 can you draw by looking at the functional analysis done for the
24 hypothetical Duval-only district and the functional analysis
25 done for the benchmark district as it relates to diminishment?

1 A. The hypothetical district in 8019 that was vetoed, that
2 district performed -- based on the analysis, performs in nine
3 out of 14 historical elections. The district in the benchmark
4 performs in 14 out of 14 historical elections.

5 MR. JAZIL: We can take those down.

6 Can we pull up Joint Exhibit 38, please.

7 Can we pull up joint Exhibit 38, please can we blow up
8 the title so that we know what date this is from. Scrolling
9 down, please?

10 BY MR. JAZIL:

11 Q. Mr. Kelly, this has been admitted into evidence as Joint
12 Exhibit 38. This is a transcript of the House Redistricting
13 Committee hearings on February 25, 2022.

14 I would like to go to page 63 of the transcript
15 beginning at line 16 and page 64, line 1, please.

16 Take a moment to read that, Mr. Kelly.

17 A. I have to apologize. I'm not sure how to get rid of that
18 blue mark.

19 Q. Now, here you have someone named Representative Geller
20 talking about the functional analysis and whether or not the map
21 performs in 14 out of 14 districts.

22 I'll represent to you that he is talking about the
23 Duval-only configuration of the district.

24 My question for you is this: Do you know who
25 Representative Geller is?

1 A. Yes.

2 Q. Do you know whether he's a Democrat or Republican?

3 A. He's a Democratic member of the House.

4 Q. Do you know whether other Democratic members expressed
5 concerns about the Duval-only district not performing for
6 African Americans?

7 A. I remember the dialogue in general, yes.

8 Q. Thank you.

9 MR. JAZIL: We can pull that down.

10 Can we pull up PX7190, please. Can we zoom in on
11 district 24. Southeast Florida, rather.

12 If we zoom on the far left, it will...

13 THE VIDEOGRAPHER: It's not conducive. Sorry.

14 BY MR. JAZIL:

15 Q. Mr. Kelly, do you recall the discussion with my friend
16 about Congressional District 24 in the enacted map?

17 A. Yes.

18 Q. Do you recall my friend showing you the lines that
19 Congressional District 24 follows in South Florida?

20 A. Yes.

21 Q. And do you recall discussing how Congressional District 24
22 is not a majority minority district?

23 A. Yes.

24 Q. You, in your colloquy with my friend, did, however, say
25 that it's a compact district.

1 My question to you is this: Why is this a compact
2 district, sir?

3 A. The shape of the district is very similar to a square.
4 There's a small edge that, if I recall correctly, is accounting
5 for the city boundary of Miami Beach down towards the bottom
6 right of it, but otherwise it's -- of course, it's right along
7 the coast, but it's basically pretty near a square, so just
8 optically speaking, it looks very compact. The small little
9 movements in it are just tracking city boundaries, but other
10 it's very -- very compact in terms of physical shape.

11 If you were to look at the statistical compactness,
12 whatever way you looked at it, whether you were using a
13 measurement of the convex points around it or some sort of
14 circular measurement, the area of the district is going to
15 generally fill up most of the shape, so it's going to achieve a
16 score pretty high, close to one. I don't know the exact score
17 of this district, but it will achieve a pretty high statistical
18 score too, so optically, statistically, it's going to be
19 compact, no matter how you look at this district.

20 Q. And you testified earlier -- my friend was asking about the
21 districts surrounding it, and you said they were VRA districts.
22 Can you elaborate on that? What's your understanding of what
23 the districts surrounding it are vis-a-vis the Voting Rights
24 Act?

25 A. Sure, sure. There are four districts in South Florida that

1 Section 2 of the Voting Rights Act weighs in on, and there's
2 District 20, which is a majority Black voting age population
3 district, and then there's Districts 26, 27, and 28 that are
4 majority Hispanic voting age population districts.

5 And so there's -- a Voting Rights Act analysis is
6 essentially necessary to ensure compliance with federal law
7 regarding these districts.

8 Q. Okay. And my friend represented to you earlier that in
9 portions of Congressional District 24, when Congressional
10 District 24 was redrawn, African American voters were added to
11 the North and Hispanic voters were subtracted from the South.

12 Do you recall that representation by my friend?

13 A. Yes.

14 Q. Why would something like that be appropriate, in your
15 experience as a map drawer in this area?

16 A. I'd just be -- I would only be guessing as to why the map
17 drawer may have made that final decision. There could have been
18 a municipal boundary on either side that was implicated.
19 Knowing that the district goes up into Broward a little bit and
20 the city boundaries of Miramar are in that area. There's -- I
21 want to say Hollywood. Hollywood's boundary is somewhere in
22 that area too, so there could have been a municipal boundary
23 issue that the map drawer was trying to address.

24 I do know from just studying how the legislature drew
25 this part of the state, they continually fixed municipal

1 boundaries. As our office put forward maps that had better city
2 boundary compliance, the legislature continually improved the
3 city boundaries. I'd have to spend some time studying it to be
4 certain.

5 Q. Fair answer.

6 Let me ask the question another way. Congressional
7 District 27, is that a VRA district?

8 A. Yes.

9 Q. Is that a VRA district that is intended to allow African
10 Americans an opportunity to elect a candidate of their choice,
11 or is it a VRA district designed to ensure that Hispanic voters
12 can elect a representative of their choice?

13 A. Hispanic.

14 Q. Okay. So if one were to add Hispanic voters to a Hispanic
15 VRA district, in the abstract, as a map drawer, would you be
16 okay with that approach?

17 A. If one were to add Hispanic voters to that district?

18 Q. Yes, sir.

19 A. Assuming that wasn't the sole purpose of the drawing of the
20 district. The district is a pretty compact district, and I'm
21 familiar with the city boundaries in that area. It's a pretty
22 compact that follows city lines. That District 27 would stand
23 on its face regardless.

24 Q. Understood.

25 MR. JAZIL: We can take that down.

1 BY MR. JAZIL:

2 Q. Mr. Kelly, you were asked a series of questions about
3 Florida history. Do you recall that?

4 A. Yes.

5 Q. Are you a historian, sir?

6 A. No.

7 Q. Mr. Kelly, you were also asked some questions about
8 Mr. Popper?

9 A. Yes.

10 Q. As a map drawer, are you familiar with Mr. Popper?

11 A. Yes.

12 Q. How so?

13 A. I got to meet Robert Popper when he came to testify, and
14 I'm familiar with his name. It's the Polsby-Popper, one of the
15 compactness measures.

16 Q. Do you use that Polsby-Popper compactness measure?

17 A. Yes.

18 Q. Why?

19 A. It's one of the more commonly used statistical measures of
20 compactness.

21 Q. You said you watched Mr. Popper's testimony before the
22 Florida legislature, right?

23 A. Most of it.

24 Q. Do you recall whether it was long or short?

25 A. I've testified before committees for two to three hours at

1 a time, so I guess that's relative.

2 I believe he was testifying and answering questions
3 for somewhere in the 30- to 45-minute range.

4 Q. Would you say it was a robust discussion between the
5 legislature and Mr. Popper?

6 A. Yes.

7 Q. Mr. Kelly, I'd like to take a step back and explain both
8 your background, how you got to the point of drawing this map,
9 and then walk the Court through the map, with the Court's
10 indulgence.

11 MR. JAZIL: Unless an afternoon break would be
12 appropriate, Your Honor?

13 JUDGE JORDAN: Do you think -- how long do you think,
14 generally speaking, that segment of his testimony is going to
15 be?

16 MR. JAZIL: Your Honor, we can go through some
17 background information.

18 JUDGE JORDAN: Why don't you go through that.

19 MR. JAZIL: Yes, sir.

20 JUDGE JORDAN: And we'll break there, and then after
21 the break, you can start with the questions about what went into
22 drawing the map.

23 MR. JAZIL: Thank you, Your Honor.

24 BY MR. JAZIL:

25 Q. And you got into this with my friend from Plaintiffs, but I

1 just want to make sure we have a full record here.

2 Are you a native Floridian?

3 A. No.

4 Q. When did you move here?

5 A. The summer of 1998.

6 Q. Why did you move here?

7 A. I came to the University of Florida for graduate school to
8 get my master's degree.

9 Q. When did you graduate from the University of Florida?

10 A. Summer of 2000. August 2000.

11 Q. And we know you're currently the chief of staff of the
12 Governor, but can you tell us for the past 23-odd years what
13 kind of jobs you've held?

14 A. Sure. I've worked three different times in the Florida
15 House of Representatives, once in the Florida Senate. I've
16 worked on four different political campaigns. I've worked --
17 now working for my fifth state agency and now my second time
18 working in the Governor's office. I have two jobs now.

19 And I also worked a little shy of six years for a
20 nonprofit that does education advocacy.

21 Q. And in all that time in government, can you approximate for
22 us the number of bills that you've worked on?

23 A. Well more than a thousand.

24 Q. Of those approximately thousand bills, how often, in your
25 experience, did the Governor of Florida get involved in the

1 lawmaking process, either advocating for or against a bill?

2 A. More than half. Certainly more than half.

3 Q. Are there any common themes that you can draw on the areas
4 where the Governor got involved?

5 A. Sure. The bills that take on a prominent level of public
6 importance, whether because the meeting may have an interest or
7 a particular constituency or groups of constituents around the
8 state have an interest.

9 Of course, there are bills that every governor gets
10 involved in just because they're personally of interest to the
11 governors. Some bills just -- some bills just create a certain
12 level of significant milestone-type public policy questions,
13 questions that have perhaps never been contemplated before, and
14 so Governor might get involved -- my observation, governors have
15 gotten involved for all of those reasons.

16 Q. Have you seen vetoes in your time working on approximately
17 a thousand bills?

18 A. Yes.

19 Q. Can you approximate for us how many?

20 A. I'd say it's fair to say probably five to ten vetoes,
21 vetoes of different bills each year.

22 Q. Five to ten each year?

23 A. Yes.

24 Q. How many special sessions have you seen in your 23 or so
25 years working in and around Florida government?

1 A. Sure. At least -- probably an average of one to two a
2 year. Some years it could be four, some years it might be none,
3 but it probably averages one to two a year.

4 Q. And you told my friend earlier that in the last
5 redistricting cycle you served in the House, right?

6 A. Yes.

7 Q. What was your role?

8 A. In the 2012 redistricting, I was the staff director for the
9 Florida House of Representatives Redistricting Committee.

10 Q. When were you hired?

11 A. For that position?

12 Q. Yes, sir.

13 A. I think I gained that position either in October or
14 November of 2010.

15 Q. And when did you leave that position?

16 A. September of 2012.

17 Q. How big was the staff that you were directing?

18 A. Eight to nine, including myself.

19 Q. And what did your job entail as a staff director for the
20 House Redistricting Committee?

21 A. A committee staff director is the liaison for the committee
22 between the Speaker's Office. The staff director guides the
23 staff of the committee to prepare for all of the meetings that
24 the committee might hold, prepares an analysis and literal
25 handling of any of the bills that might come through the

1 committee process, briefings and meetings that are done also
2 oftentimes to educate the members of the committee in advance of
3 considering legislation.

4 In our case, we also hosted 26 meetings around the
5 state in the summer of 2011, so staff director, I was
6 orchestrating, organizing that process, delegating duties to my
7 staff to oversee every aspect of that process. And then also,
8 of course, would work with my counterpart in the Florida Senate,
9 the staff director for their respective committee.

10 Q. Those public meetings y'all held in 2011, what was the
11 purpose of them?

12 A. We went around the state. We had 26 meetings where we
13 would take citizen testimony, get public input on the maps and
14 to take testimony the citizens might give that might be very
15 narrow in some cases, very broad in other cases, but to get
16 public input and to essentially listen, start the process by
17 listening.

18 Q. Did constituents hand you maps that they would have liked
19 to have seen adopted at those public meetings?

20 A. Yes. Yes. It was pretty normal for a person to come to a
21 meeting, and if they spoke at the meeting, oftentimes they would
22 hand us maps. They would hand us, you know, written copies of
23 their testimony. They would -- and then oftentimes they would
24 share with us maps too before and after those meetings.

25 Q. And if someone handed you a map at one of those meetings,

1 what would you and your staff do with those maps?

2 A. We put all of the -- all of the testimony that we received
3 ended up somewhere on our website. If it was just verbal
4 testimony and transcript, it ended up in a transcript on our
5 website. If it was an actual map or a portion of a map, no
6 matter how, you know, small or extensive it was, we always put
7 it on our website for the public to look at so there was a full
8 public repository of all that information.

9 MR. JAZIL: Can we pull up 4553, please.

10 BY MR. JAZIL:

11 Q. Now, you remember discussing this map with my friend
12 earlier?

13 A. Yes.

14 Q. Was this a map that was provided to you during a public
15 hearing?

16 A. It looks like it's a -- not provided at a hearing. It
17 looks like this is an attempt to -- I believe it's an attempt to
18 draw a map that was provided by a member of the public at a
19 hearing. This is an attempt to formally draw it on the
20 application that the legislature had.

21 Q. Okay. I see. Someone gave you a map and you tried to put
22 it on the application the legislature uses?

23 A. Yes.

24 Q. Could you tell us a bit more about the circumstances
25 surrounding this map that someone gave you and that you and your

1 team then --

2 A. Sure.

3 Q. -- put together --

4 A. Sure.

5 Q. -- for their website?

6 A. A gentleman came to see us, I believe at our Broward County
7 public meeting. It was the day we were in Palm Beach and
8 Broward. I think this meeting was Broward. A gentleman came to
9 see us, had drawn a map, a crayon-drawn map on just a white
10 blank piece of paper. It was a crayon-drawn map. He presented
11 that map to the members of the legislature who came to that
12 public meeting, and then he provided us that crayon-drawn map to
13 our staff.

14 Q. So fair to say the idea for this map didn't come from you
15 and your staff?

16 A. Correct.

17 Q. Came from a member of the public?

18 A. Correct.

19 Q. Did you and your staff yourselves draw any East-West
20 configurations of Congressional District 5 that went from
21 Jacksonville to Leon County?

22 A. I know that we tried to draw a map similar to what that
23 member of the public gave us. Because it wasn't in a -- it
24 wasn't in a -- most people gave us maps in format using our
25 application. That didn't happen every time, and so if somebody

1 gave us a map that was, in this case, just on a piece of paper,
2 we tried to draw something as similar as possible so that the
3 members of the committee could have it and so that it could be
4 on our website.

5 So as I said before, I don't know this is literally
6 exactly, but we did try to draw something like this.

7 JUDGE RODGERS: What's the time frame? I'm sorry if I
8 missed it.

9 MR. JAZIL: 2011, Your Honor.

10 JUDGE RODGERS: Thank you.

11 MR. JAZIL: We can take that down now.

12 BY MR. JAZIL:

13 Q. So other than taking ideas from the public and trying to
14 put them in a format that could be uploaded to the legislature's
15 website, did you yourself draw any redistricting maps during the
16 2011-2012 cycle?

17 A. Yes.

18 Q. Did you draw any State Senate maps?

19 A. Yes.

20 Q. What about State House maps?

21 A. Yes.

22 Q. Did you and the legislature present those State House,
23 State Senate maps to the Governor for his approval?

24 A. No. No. Florida law doesn't -- Florida law never since
25 the '68 convention doesn't require any more of that. State

1 legislative map goes to the Governor.

2 Q. Okay. So the State legislative map doesn't go to the
3 Governor. What about congressional maps? Did you and your team
4 draw any congressional maps during the 2011-2012 cycle?

5 A. Yes.

6 Q. Did those go to the Governor?

7 A. Yes. The congressional map went to the Governor, yes.

8 Q. Now, you touched on this some with Judge Jordan, but I want
9 to go back to 2011-2012 when you were the House director.

10 How, if at all, did you take racial demographics into
11 account in your job as director of the House Redistricting
12 Committee?

13 A. It was taken into account to the extent necessary. It was
14 a factor that was looked at. Our approach was only to the
15 extent that it was a necessary thing to look at.

16 Q. And you made a distinction in both your colloquy with the
17 Court and my friend for the plaintiffs between drawing maps and
18 doing other things. I'd like you to elaborate on that.

19 What is the list of other things for which you would
20 take race into account, things that are other than drawing a map
21 itself?

22 A. Sure. It's important to understand as the map drawer or
23 even just someone who's just looking at the map, it's important
24 to understand what the starting point is, what the essentially
25 lay of the land is at the beginning of the process.

1 So there's -- important just to be generally aware in
2 parts of the map without racial and ethnic data. And, you know,
3 parts of the map, it's important to be aware of that at the end
4 of the process from a point of view of checking your work.

5 Q. Understood. Mr. Kelly, I'd like to go back to Joint
6 Exhibit 70, which you already have.

7 Now, sir, I'd like to ask you this first question:

8 What role, if any, did you have in the drawing of this
9 benchmark map that we've been talking about from the last
10 redistricting?

11 A. None.

12 Q. Why is that? I thought you were the director of the House
13 Redistricting Committee.

14 A. This benchmark map was decided on -- drawn by the Florida
15 Supreme Court in, I believe, 2015. At that point I worked
16 for -- I wasn't even working in the legislative or government
17 process. I was working for an education foundation that
18 advocated for education issues to the Government, but I wasn't a
19 State employee at that point.

20 Q. Now, my friend, referring to some language from the Florida
21 Supreme Court, said that you suggested the kind of East-West
22 configuration that the Florida Supreme Court ultimately adopted
23 in its redistricting cases. Is that correct? Did you suggest
24 an East-West configuration?

25 A. No.

1 Q. So where did this East-West configuration with Alex Kelly's
2 name on it come from?

3 A. I can only surmise based on the record that the Court
4 misunderstood that we were presenting public feedback to our
5 committees. That particular configuration was something that
6 when we presented it, our committees thought that it was just
7 not any kind of, you know, reasonable option. I don't want to
8 ridicule it, but that's essentially what the committee did.

9 JUDGE JORDAN: Do you think the Florida Supreme Court
10 simply got everything wrong or took any statements you might
11 have made during the 2011-2012 cycle out of context?

12 THE WITNESS: Your Honor, I believe they took them out
13 of context, certainly. Whether there was intent behind that, I
14 can't say, of course. But I believe, based on the record, that
15 the Supreme Court definitely took what we presented out of
16 context.

17 MR. JAZIL: Your Honor, I was going to move into the
18 enacted plan.

19 JUDGE JORDAN: We'll go ahead and take a break now.
20 We'll see you back at 3:30.

21 *(Recess taken from 3:16 p.m. to 3:35 p.m.)*

22 JUDGE JORDAN: Please be seated.

23 Whenever you're ready.

24 MR. JAZIL: Thank you, Your Honor.

25 ///

1 BY MR. JAZIL:

2 Q. Mr. Kelly, I'd like to move on to the enacted plan.

3 MR. JAZIL: If we can pull up Defense Exhibit 93,
4 which I believe is already in evidence.

5 BY MR. JAZIL:

6 Q. Mr. Kelly, that's -- let me ask you a couple of obvious
7 questions.

8 Do you recognize this document?

9 A. Yes.

10 Q. What is it, sir?

11 A. It is the enacted plan.

12 Q. And what role did you have in the drawing of this enacted
13 plan?

14 A. I drew 18 of the 28 districts of this plan. I drew
15 Districts 3 through 19, and I also drew some portions of
16 District 26.

17 Q. And which of the other ten came from the legislature?

18 A. Sure. Districts 1 to 2, 20 to 25, and 27 to 28, and the
19 Eastern portions of District 26 came from the legislature as
20 well.

21 Q. What, if any, goals did you have when you were drawing the
22 18 districts that you drew for this map, sir?

23 A. Just generally?

24 Q. Yes, sir.

25 A. To draw a lawfully compliant map.

1 Q. And in your mind, how would one go about drawing a lawfully
2 compliant map?

3 A. A multitude of factors involved with trying to comply with
4 those. First and foremost, the number one most important
5 criteria is drawing districts of equal population to achieving
6 one person, one vote, so that the population -- the boundaries
7 of the districts are balanced to match the most recent census
8 data, and that way a person's vote in any part of the state has
9 an equal weight to that of persons in any other part of the
10 state.

11 A variety of other factors involve the Voting Rights
12 Act, the Florida Constitution as well, compactness, city and
13 county boundaries, other geographical boundary lines.

14 It's a balancing of all these factors.

15 Q. And I'd like to pick at some of those. And we've talked
16 about compactness some, but can you tell us what compactness is?

17 A. Sure, sure. Compactness can be measured a few different
18 ways. I always start with what I call the "intraocular test,"
19 which is just simply a looking at the map at a plain-sighted
20 way. Would an ordinary person reasonably conclude that the
21 districts are -- granted, Florida itself is sort of abnormally
22 shaped, but to the extent that the geography of our peninsula
23 state allows, are those districts, generally speaking, easy on
24 the eyes -- squares, rectangles, circulars -- circular; do they
25 represent sort of clear and obvious appealing shapes?

1 That analysis, compactness analysis, often does
2 actually incorporate county boundaries as well, because a county
3 can be viewed as a proxy for compactness. If you're, let's say,
4 keeping a county whole, compactness is often looked at through
5 statistical measures. There are a few that are more commonly
6 used than others, but the basic premise of those measures is
7 that you would either draw something like a circle or a convex
8 shape around a district, and then you would measure compactness
9 as a ratio of the percentage of the actual filled-in boundaries
10 of a district that are part of the convex shape or the circular
11 around the district.

12 So those are measured basically as a ratio. So if
13 you -- you measure from zero to one, the closer to one the
14 better, basically, with measuring those statistical scores.

15 Q. In your answer you talked a bit about "keeping counties
16 whole."

17 Now, why is that important, sir?

18 A. Sure, sure. Keeping a county whole is part of Florida law.
19 It's keeping -- respecting political geographical boundary
20 lines.

21 Counties are the most commonly understood boundary
22 line within a state. If you ask the average citizen of all the
23 different political and geographical boundaries that they might
24 be associated with, wherever they live, a county line tends to
25 have more actual recognition for any person, and a county line,

1 just in looking at the map, it's more easily discernible and
2 recognized.

3 People who live in the same county overlap different
4 units of government, so from a point of view of when a voter --
5 a voter and their neighbor are going to vote and because they
6 live in the same county, their ballot has a lot of similarities
7 to it, there's cohesion amongst a group of voters because they
8 live in the same county, and there's a lack or a minimizing of
9 confusion amongst voters because they live in the same county.

10 So keeping a county whole has a number of value
11 points, some that are characterized, you know, specifically in
12 law. But overall, I think a county too -- or I shouldn't say
13 "end overall." Keeping a county whole, I think, is also just an
14 easily plain-sighted way to the public to explain why the
15 boundary is that you -- why you use that particular boundary.
16 There's nothing arbitrary about that boundary.

17 Q. Is it important to keep cities whole?

18 A. To the extent you can. It's a more difficult task, and
19 city boundaries are not as well recognized by the average
20 person. Some cities themselves, their boundaries are -- their
21 boundaries are at a micro level if you really zoom into the map.
22 Some city boundaries are a big of a bug splat, a bit of a -- you
23 know, some city boundaries can be sprawling as cities annex
24 property.

25 But to the extent you can keep cities whole, it is an

1 important goal. Keeping cities whole is easier in a
2 congressional map because the districts are larger than it would
3 be if, let's say, you were drawing a state legislative map or if
4 you were drawing something like a county commissioner school
5 board map within a county.

6 Q. Any other political boundaries that it's important to
7 adhere to as you're drawing maps?

8 A. Sure, sure. Major roadways, railways, waterways, those
9 that are significant and are easily discernible -- you know,
10 easily discernible to whatever community in the state you're
11 talking about. So your major roadways, railways, waterways.

12 Q. Can you give an example of major waterways?

13 A. Sure, sure. A major waterway -- we talked earlier about
14 the St. Johns River. That's a significant water boundary.

15 Another significant water boundary would be Lake
16 Okeechobee. Lake Okeechobee is a boundary that's near the size
17 of some counties. It's a pretty significant waterway.

18 Tampa Bay is pretty significant water boundary.

19 There's a number throughout Florida.

20 Q. Now, Mr. Kelly, you said adhering to these county lines is
21 important to you. Can you tell us first, how many counties are
22 there in Florida?

23 A. 67.

24 Q. And how many counties does the enacted map split?

25 A. 17.

1 Q. And how does that compare to the Duval-only district that
2 the legislature passed as its primary map that the Governor
3 vetoed?

4 A. I believe it's a slight improvement from the Duval-only
5 map.

6 Q. Let's take a look. DX98 in front of you.

7 That's the Duval-only configuration, right?

8 A. Yes.

9 Q. Where in here does it tell us the county splits?

10 A. If you look on the second page of the document, it shows
11 the county splits.

12 Q. And what does it show as the county splits?

13 A. It shows the county splits at 18.

14 Q. Is that right?

15 A. Yes.

16 JUDGE JORDAN: It shows -- can you repeat the question
17 and the answer? It shows that county splits as...

18 MR. JAZIL: As what?

19 JUDGE JORDAN: And your answer?

20 THE WITNESS: 18.

21 JUDGE JORDAN: Got it. So it would result in 18
22 county splits overall?

23 THE WITNESS: This map, the legislature's primary map,
24 would split 18 counties.

25 JUDGE JORDAN: Which is one worse than the enacted

1 map?

2 THE WITNESS: Yes. Yes, Your Honor.

3 JUDGE JORDAN: Okay.

4 BY MR. JAZIL:

5 Q. Do you recall how many county splits were in plan 8015?

6 This is a secondary plan that the Governor vetoed.

7 A. I'd have to look at it.

8 Q. Do you recall whether it was more or less than the enacted
9 plan?

10 A. The plan 8015 split more counties than the enacted plan.

11 Q. Do you recall how many counties the benchmark plan split?

12 A. The benchmark plan, I believe, also split more counties
13 than the enacted plan.

14 Q. Moving on to cities, can you tell us how many cities there
15 are in Florida?

16 A. Sure. I believe there's 412 incorporated cities.

17 Q. And how many cities does the enacted plan split?

18 A. 16.

19 Q. Is that an improvement over plans 8019, the Duval-only
20 plan, 8015, the secondary plan, and the benchmark plan?

21 A. It's an improvement over one of the two plans that the
22 legislature adopted and it's equal to the other. I believe it's
23 an improvement over plan -- I believe it's an improvement over
24 plan 8015 and equal to plan 8019. It's an improvement over the
25 benchmark.

1 Q. And pardon me. You said that the enacted plan split 16
2 cities, right?

3 A. Yes.

4 Q. Can we go back to DX98, please. This is the packet for the
5 Duval-only plan. Can we go to the second page, sir.

6 A. Yes.

7 Q. It says here that there was 17 city splits. Is that
8 accurate?

9 A. That's what it says, but I know that's not accurate. The
10 legislature's mapping application had a flaw in it, in Pinellas
11 County that, depending upon how you drew the districts in
12 Pinellas County, you might or might not notice. And in a
13 congressional district, depending on how you drew it, you know,
14 it might not affect your total there.

15 In the way the legislature's mapping application
16 works, the City of Oldsmar, which is in the Northeastern portion
17 of Pinellas County, the map accidentally assigns a census block
18 sliver to the City of Oldsmar in sort of the Western Central
19 part of the county, not correctly. And I didn't even notice
20 this through a lot of the legislative process, and it didn't
21 matter in the way that I drew Pinellas County because I drew
22 Pinellas County North to South, and Oldsmar, the actual
23 boundaries and the sliver, both ended up in the same district
24 regardless. So that error didn't show up.

25 The legislature drew the map South to North, so the

1 sliver of Oldsmar ends up in one district; the actual City of
2 Oldsmar ends up in a different district. And so just knowing
3 that, if you go back to the legislature's presentation of this
4 map, they verbally account for the fact that it actually only
5 splits 16 cities, so the enacted map and this map, the primary
6 map, split the same number of cities. There's some differences
7 in which cities, but it split the same number.

8 Q. Now, earlier, Mr. Kelly --

9 MR. JAZIL: We can take that down.

10 BY MR. JAZIL:

11 Q. -- you testified that the enacted plan was a compromise
12 between the Governor's office and the legislature. Do you
13 recall that testimony with my friend, Mr. Diskant?

14 A. Yes.

15 Q. I'd like you to expand on that. What do you mean that it
16 was a compromise?

17 A. Sure. So, of course, as I've noted, ten of the districts
18 are as the legislature drew them towards the end of the process.
19 So ten of the districts are literally the legislature's
20 districts.

21 In addition to that, of course, as I was attempting to
22 draw districts in a way that our office was trying to draw
23 districts, there were certain principles of the legislature's
24 different ideas that I incorporated into that map.

25 So, for example, in Central Florida, I adopted the

1 House's explanation of how the map has a very compact -- sort of
2 Orlando, Winter Park, Maitland area district in Central Northern
3 Orange County, which the House was considering and
4 prioritizing -- or not prioritizing, but that's the way the
5 House had drawn the maps up through their committee process
6 until, ultimately, they negotiated with the Senate.

7 So I adopted the House's iteration of -- of something
8 very similar to that, basically almost like a brick in that
9 middle part of Orange County. However, the way that the Senate
10 related the districts in Brevard and Volusia County just to the
11 East of that, the Senate held the Brevard-Volusia County line
12 where there was one district to the South of that, one district
13 to the North of that.

14 The House split Volusia County an extra way. If you
15 take what I'm saying about Orange County and if you imagine
16 you're almost deciding how to split boundaries of districts
17 around that and you're almost sort of spinning a wheel, if you
18 will, the Senate stopped two districts at the Volusia-Brevard
19 line, which reduced overall county splits, not just county
20 splits in total, but also splits of counties when you add up the
21 number of splits.

22 So I took the Senate's adoption of that line. In
23 addition, the Senate maps did a pretty good job throughout their
24 process of adhering more statistically -- more consistently
25 statistically to political and geographical boundaries. So if

1 you actually look at every line on the map and the legislature's
2 tool does a statistical analysis that says what percentage of
3 those lines are clearly definitively political or geographical
4 boundary lines versus what percentage cannot be explained by a
5 plain-sighted political or geographical boundary line, the
6 Senate was more adherent to political and geographical boundary
7 lines.

8 So I took that -- what seemed to be a driving
9 motivation in their maps and I made sure that in the final map,
10 in the final 18 districts that I drew, that I adopted that as a
11 principle and said no matter what I do, I'm going to beat the
12 best score in terms of use of political and geographical
13 boundary lines.

14 The counterpoint that I had to address in doing that
15 is that the House -- and the Senate, but the House, very
16 emphatically, were not supportive of using census-designated
17 places, which essentially is your -- sort of your unincorporated
18 communities. They're not -- they're not incorporated
19 municipalities, but they're communities. So, for example, if
20 you were to go East of Tallahassee and you were to go to like
21 the Miccosukee community East of Tallahassee -- that's an
22 incorporated area outside the city boundaries. In the House's
23 process, they were very emphatic that the use of
24 census-designated places would get into this community of
25 interest argument, which isn't supported in Florida law, and so

1 I made sure to not factor that in. I adopted that methodology
2 that the House emphatically used to say census-designated places
3 really have no place in this map drawing process.

4 So I was blending the different key points. There's
5 others, but I was taking their key points and not just -- not
6 just the big picture of a district, but how the boundaries of a
7 district around it were finalized and finished. In every
8 district you have to make, at some point, a difficult decision
9 about equal population. So in every single district, there's
10 one or two or three places where you basically get what you
11 would call your zero pop. And so in order to do that, at some
12 juncture, you're going to have to make a decision that down --
13 when you zoom in at that micro level is purely based on getting
14 the population, one person above or below the average of that
15 769,000.

16 In order to do that, I was taking -- trying to take
17 these principles that were either the preferred practice of the
18 Senate map drawers or the House map drawers and fuse them into
19 the final decisions.

20 There were other decisions that I made to make sure
21 that I keep more counties whole and more cities whole and so
22 forth, but I was trying to take their preference for how to draw
23 the maps throughout the state.

24 Q. At any point in that process of compromise, did you take
25 partisanship into account when drawing the enacted plan?

1 A. No.

2 Q. Why not?

3 A. It's against the law.

4 Q. Did you at any point in that process take incumbency into
5 account?

6 A. No.

7 MR. JAZIL: Now, if we can pull back up DX93, please.

8 I'd like to actually walk through the boundaries of
9 some of these districts, please.

10 Can he we zoom in on North Florida, please.

11 BY MR. JAZIL:

12 Q. So, Mr. Kelly, as my friend pointed out, the Governor made
13 a big deal about the benchmark district being 200 miles long.
14 Looking at this map, why were you, as a map drawer, okay with
15 Congressional District 2 being as long as it is, stretching from
16 Holmes County to Madison County?

17 A. Sure. These are predominantly rural counties. Leon and
18 Bay Counties are moderately-sized counties, but predominantly,
19 these are rural counties.

20 If any map drawer is simply just simply adopting sort
21 of a sort of square and circle method of just adopting clearly
22 compact shapes, the Florida panhandle, especially for a
23 congressional district, especially in rural counties, doesn't
24 leave you many options. And so the only way to draw those
25 districts in a clear fashion is chunk, chunk, like that. The

1 district lines, though, are extremely adherent to county
2 boundaries. These are mostly whole counties that are included
3 in District 2 and District 1 and 3 as well. I believe you
4 always have to look at the districts that are adjacent to the
5 one that you're asking about and make sure that the effects of
6 the decision in one district don't have some unnecessarily
7 negative effect on the districts next to them.

8 Obviously, you can't go North and South here. So just
9 given the sheer population numbers, most of these counties in
10 this district have eight, ten -- I think Liberty has 8,000
11 people. 8-, 10-, 20-, 25-, 30 thousand people. Jackson may get
12 to 60-. Again, Leon, 250; Bay, probably give or take around
13 Leon.

14 But to get the 769,000 people, you don't have a choice
15 but to draw -- if you're just drawing a compact shape to draw a
16 district of predominantly rural counties, several rural
17 counties.

18 Q. Then earlier in one of your answers You just mentioned this
19 concept of "zero pop" is, I believe, how you referred to it?

20 A. Yes, sir.

21 Q. And you tied it together with getting to the 769,221
22 number.

23 Can you walk us through how it is zero pop factors in
24 when you, as a map drawer, are trying to draw your lines on a
25 map?

1 A. Sure. Sure. Are we still talking about District 2?

2 Q. You can pick the district. District 2 or 3. I'm asking
3 you to help us understand the concept of zero pop that you
4 brought up.

5 A. Sure. So I'll just use District 2, since we're looking at
6 it.

7 So with District 2, if you just draw West to East, as
8 probably the map drawer here in the legislature did with
9 District 1, you get to Walton County, and you have to make a
10 decision to split Walton County. Some county in the Florida
11 panhandle is getting split. It's a physical impossibility to
12 not split some county in the Florida panhandle.

13 So the map drawer is predominantly going up and down
14 roadways, significant roadway, basically, in Walton County.

15 I know that the little divots here, kind of along this
16 area -- that's DeFuniak Springs. So the map drawer would have
17 been accounting for the city boundaries of DeFuniak Springs.

18 Somewhere in that area, the map drawer would have --
19 would have, you know, found essentially what the population
20 differential is between District 1 and District 2 and would have
21 identified census blocks so that just the math gets them to the
22 zero population.

23 Going over to Districts 2 and 3, in this area right
24 here, that District 2 and 3 generally keep either Madison and
25 Taylor Counties, Hamilton, Suwannee, and Dixie whole in one

1 district or the other. Lafayette County, the map drawer comes a
2 little bit into Lafayette County to equalize that zero
3 population. Just knowing the geography of that county, what the
4 map drawer did was they stayed away from Mayo and Lafayette
5 County. There may be another incorporated city there; there's
6 not many.

7 But basically, the map drawer for the House made
8 sure -- or the legislature made sure that they weren't going
9 into any kind of incorporated communities in Lafayette. So in
10 terms of then when I looked at that line and I'm now working in
11 District 3, generally speaking, I'm dealing with county lines
12 that were held whole in that district again, but not intruding
13 on Mayo and Lafayette County.

14 So how I work my way then East, I have a nice, clean
15 opportunity to create this North-to-South wall on District 3
16 along Nassau, Duval, and Clay Counties and Putnam as well.

17 The math worked out where I could make almost a
18 North-to-South kind of bricklike effect with relatively speaking
19 whole small counties. Alachua County is a moderately-sized
20 county, as is Marion, Alachua a whole lot larger than Marion.

21 The decision based on the math made sense to me to
22 basically create a wall on that Eastern side of the district.
23 If you look at the Northern part of Marion, you see a little
24 bit -- if you really zoom in where Alachua and Marion meet, you
25 do see these little squirrelies, and that's just the waterways

1 that come out of Alachua County, so just kept Alachua whole.

2 But otherwise, when it goes down into Marion County,
3 those lines at the northern and southern end of the middle of
4 Marion County are using major roadway to define them. That bump
5 in Marion County from District 3, that's the city boundaries of
6 Ocala, I think Silver Springs, maybe one other municipality.

7 I know that if you zoom into the bottom of that bump,
8 that's where I got my zero population work in, and that's just
9 literally when you get down to the census block level, it's a
10 tedious task that can sometimes take quite a while, but a
11 tedious task of trying to identify census blocks on this side of
12 one district or this side of the other to get that zero
13 population.

14 I did the same kind of work over in the Putnam-Flagler
15 area where I accepted the line that the legislature had drawn at
16 the -- where St. Johns is split. At some point, you're going to
17 have to split one of those counties. And where St. Johns is
18 split, I took the line the legislature gave there, and so taking
19 their line and I kept the Clay-Putnam line whole; I kept the
20 Putnam-Alachua line whole. I made the moves that I did.

21 In Marion County, I had a bit of a give-and-take. And
22 if you zoom back out -- this is probably easier to explain. But
23 if you zoom back out, where you see District 6 dive down into
24 Lake County a little bit and you see where District 6 splits
25 Volusia County, I knew that Volusia County was likely to get

1 split somewhere, and there's a cluster of cities in Western
2 Volusia and a cluster of cities in Eastern Volusia that are all
3 very intertwined together. So there was a lot of give and take
4 there in Volusia County of: How do I make this split without
5 intersecting one of these city boundaries?

6 And at the same time: How can I try to create a
7 visually and mathematically compact type of shape for District
8 6? I knew that Lake County has this sort of Statue of Liberty
9 effect, so I knew that that's very difficult to keep that
10 portion of Lake County -- or I should say to keep Lake County
11 whole in a map, just because it's in the middle of the state; it
12 has this odd Statue of Liberty effect where kind of Astatula and
13 some of those communities are.

14 So what I actually figured out I could do was I could
15 create almost a more somewhat circular bottom to the district.
16 So if you're pulling out, if you're pulling back from the map,
17 it has more of a circular bottom shape, which is going to be
18 very compact, but when you zoom in, I had to work around the
19 city boundaries of places like either Fruitland Park in District
20 11, Lake -- Lady Lake in District 6, and then cities like
21 Leesburg in one district, Tavares in the other; Leesburg in 11,
22 Tavares in 6, Eustis, Mount Dora as well in 6. And then I had
23 to follow this roadway. It's a little squiggly, but it's a
24 roadway along the unincorporated area of Sorrento and this kind
25 of part of Lake County.

1 And so the Lake County piece, getting my zero
2 population was a bit of a back-and-forth exercise between 6, 7,
3 and 11. And what impacted that decision was I held the county
4 lines of Seminole and Orange and Volusia and Brevard true, so
5 holding those lines then forced 7 up to a certain point towards
6 6 in Volusia County, where at that point, knowing I need to get
7 zero pop, that then forced me to bring 6 down a little lower
8 into 11.

9 So, again, I used -- it's almost like spinning a wheel
10 till you get your populations just right in terms of total
11 population, trying to hold county lines, trying to hold city
12 lines. So -- I don't believe there's a single city in Lake
13 County split. And those cities, if you look at the way they
14 interlock with each other, it's very, very difficult.

15 Q. So, Mr. Kelly, if I understand this right, to get to your
16 zero population, plus or minus one of the numbers you have to
17 hit, you're literally trading census blocks at the end of
18 drawing a particular district?

19 A. Yeah. Yes. And as you do that, you will, at times
20 realize, oh, wait, you did cross a city line or you did cross a
21 county line. The city lines in particular, so as you do that,
22 you have to kind of make a difficult decision as to whether or
23 not the overall -- the overall boundary was more important than
24 the city line or whether the city line can be cured by making a
25 slight shift one way or the other.

1 So, for example, in this part of the map, I kept Port
2 Orange in Volusia County whole. The legislature split Port
3 Orange. I kept it whole and I basically drew in Volusia County
4 those districts lines mostly along city boundaries. There's one
5 little place in Volusia County where there's literally an
6 interlocking situation of a city that's very hard to cure.

7 Q. So, Mr. Kelly, I'd like to focus in on sort of the crux of
8 this case. Can we go to page 5 of this document, sir.

9 These are the boundaries between Congressional
10 Districts 4 and 5. Help us understand why you drew these
11 particular boundaries as you drew them.

12 A. Sure. Sure. Well, as we talked about before, you know
13 you're going to have to split Duval County one way or another,
14 so that's a decision you're going to have to confront.

15 You also have the challenge that Nassau County
16 essentially sticks up into Georgia, so Nassau has unique
17 geography where you can't go -- and Nassau also is just
18 awkwardly shaped, its actual shape, because Duval slopes down
19 and Nassau comes back over Duval County like that. So you can't
20 go to the West, North, or East of Nassau. Obviously, it's on
21 the coast.

22 So knowing that, and then when you do the math, just
23 mathematically, one of these other counties is going to have to
24 get split. When I did the math, St. Johns is a little more
25 populated than Clay, and most of the population in Clay is in

1 the northern part of the county. The southern part of the
2 county, Green Cove Springs, Middleburg, some of those areas are
3 lesser populated. The most population is by Orange Park.

4 So I wanted to try to create a clean line going
5 across, and I also liked the line that the legislature had
6 evolve -- the House had really evolved over the process, where
7 in the maps that we were proposing, we were keeping
8 St. Augustine and St. Augustine Beach whole. The legislature --
9 or the House in the legislature ultimately adopted a line here
10 in St. Johns County that put all of St. Augustine and
11 St. Augustine Beach in a district in essentially the top half,
12 if you will, of St. Johns County.

13 Recognizing that Clay is lesser populated and most of
14 the population is in the northern part of the county, I knew
15 that I couldn't use Clay County to effectively create something
16 of a clean, flat line, like an aesthetically just clear line at
17 the bottom of the district. And I knew I probably had a better
18 option of keeping Clay whole and making that split in St. Johns.
19 I liked the split the legislature ultimately landed on in
20 St. Johns, and so I kept that line true between 4, 5, and 6. So
21 I basically made 4 and 5 a sandbox, if you will, within which to
22 craft two districts.

23 The most easily discernible prominent political
24 geographical boundary line in Nassau, Duval, Clay, and St. Johns
25 County is the St. Johns River. The St. Johns River is literally

1 the dividing line between Clay and St. Johns County, and it is a
2 very, very well-recognized, discernible boundary line in Duval
3 County. It even towards the northern part of Duval -- it's not
4 a literal buffer with Nassau, but it's pretty close to a buffer
5 with Nassau County.

6 Q. But, Mr. Kelly, the line you drew between CD-4 and 5
7 doesn't follow the lower St. Johns River all the way to the
8 Atlantic, does it?

9 A. The lower St. Johns River?

10 Q. Pardon me. The St. Johns River.

11 A. Oh. The top part of Districts 4 and 5, if you -- this
12 area, if that shows up. If you follow the St. Johns River
13 exactly, then what happens is District 5 is needing about 1500
14 people and District 4 has 1500 too many, so -- I'm sorry. I
15 said that in reverse. District 4 -- I'm sorry -- is short about
16 1500. District 5 would have 1500 too many.

17 So in this area, somewhere I had to pierce the
18 St. Johns River. I had to make a decision somewhere to get that
19 zero population for both districts.

20 What I noticed was that -- I would think it's the
21 Arlington Expressway that goes from that -- North of the
22 St. Johns River to the South, and another major well-recognized
23 bridge basically connect into -- basically have a community
24 within them. If one goes North to South and one goes West to
25 East, they basically represent a almost entire whole community

1 in that South of St. Johns River side of District 5.

2 And so I used those major roadways as a way to get to
3 my zero population, knowing I needed about 1500 more residents
4 for District 4. That was something that I wanted to clean up
5 during the process, because earlier iterations of this sort of
6 sporadically accounted for that zero population, and I wanted to
7 give that line more real definition and meaning and purpose, and
8 so I used those major roadways as a way -- two bridges,
9 basically, that then become major roadways, two bridges to
10 basically give it a clear purpose so that if you're on this side
11 or that side of the bridge, this side or that side of the river,
12 you understand what district you're in.

13 JUDGE JORDAN: How many -- this has to be a
14 complicated task, so how many possible map configurations do you
15 go through before you figure out that this is the one that
16 accomplishes everything in the best way?

17 THE WITNESS: Sure. Your Honor, I would say not just
18 configurations overall, but a complete -- to do a complete map,
19 I generally view that as a 60-hour task, and to get to a place
20 where, as a map drawer, I'm comfortable that, you know, this is
21 a really good map and would be comfortable in a setting like
22 this to present it, you know, I was able, of course, to watch
23 what the legislature was doing, but -- and observe their maps
24 and whatnot.

25 But if I was doing this process just by myself, I

1 didn't have the legislature's work product to observe and learn
2 from, I would, you know, probably draw a dozen maps just to get
3 to a final product. Of course, I had the legislature's maps to
4 look at and compare to.

5 JUDGE JORDAN: Thank you.

6 BY MR. JAZIL:

7 Q. Mr. Kelly, what do you say to the charge that by using the
8 St. Johns River as the boundary, you split the Black population
9 in Jacksonville?

10 A. I'm sorry. Say again. You faded at the beginning. Sorry.

11 Q. What do you say to the charge that by using the St. Johns
12 River as a boundary to divide Jacksonville, you split the Black
13 population in Jacksonville on one side of the river and the
14 other?

15 A. Sure. I had no legal obligation to try to keep a
16 particular community together in Jacksonville. What I had was
17 an obligation to try to draw a district in this case based on
18 race-neutral principles. I picked the most easily discernible
19 boundary in the entire area. It's clearly not an arbitrary
20 boundary. It's clearly a boundary that anyone -- it's a
21 boundary that literally divides some counties, let alone the
22 City of Jacksonville. And, of course, I had to make a split in
23 Jacksonville, so I picked easily the most recognized boundary in
24 the whole region of the state.

25 Q. And then when you were actually drawing this map, the

1 enacted map, did you know where the Black population in
2 Jacksonville was on census block by census block basis as you're
3 trying to get to zero population?

4 A. Every single census block? No. No, I had a general idea
5 just because, as I mentioned before, I tried to discern, you
6 know, what was possible, if there was a way to essentially check
7 all the boxes in terms of drawing a district in that area.

8 But census block by census block, no.

9 Q. And then -- let me ask you this: What application did you
10 use to draw this district?

11 A. Sure. I used the legislature's restricting application,
12 the public application that they made.

13 Q. And the public application has racial demographic data on
14 it, right?

15 A. Yes.

16 Q. Did you have that racial demographic data turned on as you
17 were drawing the lines on this map?

18 A. No.

19 Q. Why not?

20 A. It's going to sound funny, but I couldn't figure out how to
21 turn it on. I couldn't figure out how to show that layer of
22 information.

23 Q. I'd like to move on to the 2015 congressional map which was
24 used from 2016 to 2022.

25 MR. JAZIL: Can we pull up JX70, please.

1 BY MR. JAZIL:

2 Q. So, Mr. Kelly, you talked to my friend, Mr. Diskant, a
3 great deal about benchmark District 5, as he called it.

4 Do you see that district, sir?

5 A. Yes.

6 Q. And why did you retain this district in your enacted plan?

7 A. Why did I not retain it?

8 Q. Why did you not retain this district as configured in your
9 enacted plan?

10 A. It wasn't necessary to. The district violates the Equal
11 Protection Clause of the United States Constitution. It was
12 drawn for predominantly race-based reason which it subordinated
13 other traditional redistricting criteria, and so there was no
14 requirement to keep the district, and so that's why I didn't
15 retain it.

16 Q. And, sir, you discussed some legal reasons why you didn't
17 retain this, but you testified earlier that you're not a lawyer,
18 right?

19 A. Correct.

20 Q. If you need a lawyer, who do you go to?

21 A. I go to our general counsel.

22 Q. Who's your general counsel?

23 A. Ryan Newman.

24 Q. So would you defer to him on the legal positions taken by
25 the Governor in his office?

1 A. Yes.

2 MR. JAZIL: Let's pull up JX52, please.

3 JUDGE RODGERS: Can I ask a question?

4 MR. JAZIL: Yes, please.

5 JUDGE RODGERS: Mr. Kelly, did you bring a concern to
6 the Governor about CD-5 or did he or someone bring it to you?

7 THE WITNESS: Thank you, Your Honor. The Governor
8 made his concerns public before ever having any conversation
9 with me, so --

10 JUDGE RODGERS: Okay. So you were already aware of
11 that when you started your process?

12 THE WITNESS: Yes.

13 MR. JAZIL: So can we pull up JX52, which is already
14 in evidence.

15 BY MR. JAZIL:

16 Q. Now, Mr. Kelly, we saw snippets of this, but can you, just
17 so the record is clear, tell us what JX52 actually is?

18 A. Sure. This is the request by -- by the Governor's office
19 to see if the Florida Supreme Court would offer an advisory
20 opinion.

21 Q. And you'd defer to the legal position that was taken in
22 this document, right?

23 A. Yes.

24 MR. JAZIL: Can we pull up JX54, please. The second
25 page.

1 JUDGE RODGERS: While you're doing that --

2 Mr. Kelly, when did you start the process of drafting
3 the ultimately reenacted map?

4 THE WITNESS: Your Honor, I would have started working
5 on the enacted plan likely March, in March of 2022.

6 JUDGE RODGERS: All right. Thank you. I apologize.

7 MR. JAZIL: Can we go to the first page, please.

8 BY MR. JAZIL:

9 Q. You discussed this document with my friend, Mr. Diskant.
10 So just so the record's clear, can you tell us what this is?

11 A. This is Ryan Newman's memo to the Governor regarding the
12 constitutionality of the maps that the legislature ultimately
13 passed in Senate Bill 102.

14 Q. Was this memo made public?

15 A. Yes.

16 Q. How so?

17 A. I believe this accompanied the veto message for the veto.

18 Q. And you defer to the legal positions taken by the
19 Governor's general counsel on this memo, right?

20 A. Yes.

21 MR. JAZIL: Can we move on to JX56, please.

22 BY MR. JAZIL:

23 Q. Just so the record's clear, can you tell us what this
24 document is, sir?

25 A. Yes. This is the legal memorandum that Ryan Newman

1 provided to the chair of the House's Congressional Redistricting
2 Subcommittee, Tyler Sirois. This is the day that Robert Popper
3 testified in the committee, that committee.

4 Q. Would you defer to this as the position of the Governor's
5 office?

6 A. Yes.

7 Q. Now, Mr. Kelly, did Mr. Newman also testify before the
8 Florida legislature during the special session?

9 A. Yes.

10 MR. JAZIL: Can we go to Joint Exhibit 44, page 63 of
11 the transcript, line 19.

12 JUDGE JORDAN: This is 64, you said?

13 MR. JAZIL: It is 44, Joint Exhibit 44.

14 JUDGE JORDAN: 44.

15 JUDGE WINSOR: Page 63? I'm sorry.

16 MR. JAZIL: Page 63 to 64.

17 JUDGE JORDAN: Thank you.

18 BY MR. JAZIL:

19 Q. In here Mr. Newman says on lines 20, "On the issue of
20 federal constitutionality of District 5 as it was originally
21 configured, the Florida Supreme Court never actually addressed
22 that issue. That question has never been resolved by the
23 federal -- by the Florida Supreme Court as to whether or not
24 District 5, as it was configured, complied or not with the
25 federal constitution."

1 Do you defer to Mr. Newman's understanding of what the
2 Florida Supreme Court did or did not do in the last
3 redistricting cycle in addressing issues?

4 A. Yes.

5 Q. And then --

6 MR. JAZIL: I commend this for the Court's
7 consideration. If we go from page 64 to 69 of this particular
8 transcript, Mr. Newman answers the questions of the House
9 members on why it is that he and the Governor's office
10 maintained that Congressional District 5 in the benchmark plan
11 would violate the law and why it is that the Supreme Court has
12 not addressed these issues. I won't go through that with the
13 witness.

14 We can take that down. If we can go back to Joint
15 Exhibit 70, please. Congressional District 5.

16 BY MR. JAZIL:

17 Q. Now, Mr. Kelly, you testified before that you did not draw
18 this district. My question to you now is: Would you draw, as a
19 map drawer, Congressional District 5 as it exists in the
20 benchmark plan?

21 A. No.

22 Q. Why not, sir?

23 A. It's a gerrymander.

24 Q. What's that?

25 A. It's a gerrymander.

1 Q. As a map drawer, not as a lawyer, explain to me why you
2 think it's a gerrymander.

3 A. It's a sprawling district that from a point of view of
4 compactness, political and geographical boundary lines, any
5 traditional redistricting criteria can only be explained with
6 one purpose, and that's race. It -- a district drawn this way
7 would make me worry that the map drawer had a particular
8 political outcome in mind or some other purpose. And so I
9 wouldn't draw a district this way.

10 My approach is to draw districts that are
11 plain-sightedly obvious what I, as the map drawer, am trying to
12 accomplish, and so this district, to me, the only obvious goal
13 is something other than traditional redistricting criteria.

14 JUDGE JORDAN: Would you consider it a gerrymander if
15 race wasn't the reason for that configuration?

16 THE WITNESS: Your Honor, I would be suspicious of a
17 district like this. If race wasn't a factor, I'd still be very
18 suspicious.

19 BY MR. JAZIL:

20 Q. Just to follow up on the Court's question, how do you know
21 partisanship wasn't the factor?

22 A. I don't know.

23 Q. Under Florida law, can you take partisanship into account
24 in drawing districts?

25 A. No.

1 Q. How do you know that incumbency wasn't a factor when
2 drawing this district?

3 A. I don't know.

4 Q. Under Florida law, can you take incumbency into account
5 when drawing a district?

6 A. No.

7 Q. So if you can't take incumbency into account and you can't
8 take partisanship into account, what, as a map drawer, would you
9 conclude about the shape of this district on either end in Duval
10 and in Leon?

11 MR. JAZIL: If we could blow that up.

12 THE WITNESS: Sure. What's discernible about a
13 district like this is the bulk of the population of the district
14 is located in Duval and Leon Counties. That's probably 80 to
15 85 percent of the district. And so basically, these are two
16 significantly remotely located centers of population that are
17 put together with just a string of rural communities, again,
18 getting as thin as just a few miles from the Georgia border
19 there in Leon County, that these are two distinctly different
20 pockets of population in really two entirely different parts of
21 the state. So they're stuck together for some reason with a
22 string of small counties that have 20-, 25,000, 30,000 people
23 each in between them.

24 Q. And you said that the bulk of the population, 80 to
25 85 percent comes from where, Mr. Kelly?

1 A. Duval and Leon Counties.

2 Q. Can you circle those on this map, please?

3 A. Sure. Sorry. I'm not good at this.

4 Q. And you went through some of the major roadways and the
5 major waterways in the area in great detail all across the
6 panhandle.

7 Sitting here, can you tell us whether or not the shape
8 in Duval County follows any major roadways or any major
9 waterways or major railways?

10 A. None that I can recognize here.

11 Q. What about Tallahassee?

12 A. No, they -- it definitely does not in Tallahassee.

13 MR. JAZIL: You can pull that down.

14 JUDGE JORDAN: Mr. Jazil asked you about incumbency
15 and partisanship, right? What about shared communities
16 purportedly living in that strip on the northern end of Florida?
17 Would that be a legitimate districting factor to take into
18 account?

19 THE WITNESS: Your Honor, it's my understanding of
20 Florida law with the passage of Fair Districts that --

21 JUDGE JORDAN: No, no, I'm not asking about Florida
22 law.

23 You're a map maker. Would you -- could you
24 legitimately take into account shared communities and their
25 history, association, cultural ties, political ties, religious

1 ties, et cetera, in figuring out district lines? Is that
2 legitimate or illegitimate as an abstract matter?

3 THE WITNESS: Your Honor, that would contradict the
4 Florida law.

5 JUDGE JORDAN: I know. I'm not asking you about
6 Florida law.

7 You've talked about traditional districting criteria,
8 right? Right?

9 THE WITNESS: Yes, Your Honor.

10 JUDGE JORDAN: Okay. I'm asking you about traditional
11 districting criteria. Put aside Florida law for a second.

12 Is taking into account a geographic areas's shared
13 community in terms of ethnicity, race, religion, history,
14 politics, et cetera -- is keeping that sort of a community
15 together a traditional and legitimate districting tool or
16 criteria, whatever name you want to put on it?

17 THE WITNESS: Your Honor, I apologize for the
18 complexity here. Some of what you said, race and ethnicity
19 could be factored in. Most of what you said could not be, and
20 generally speaking, factoring in sort of cultural ties,
21 historical ties, different shared and common interests that
22 people have in communities, in the practice of redistricting,
23 and even in Florida law has generally been considered an abused
24 concept where basically saying that cultural, historical ties
25 can be utilized to draw maps becomes a nebulous thing where

1 anything could be justified.

2 For example, it used to be that districts in Florida
3 might be drawn to say, well, this is a coastal district or this
4 is a district that ties together communities of a particular
5 similarity heritage of some sort. But those concepts were
6 generally abused to where nothing was illegal and there was
7 nothing that had a real concrete definition.

8 So the Florida Constitution places some more generally
9 understood concepts of political and geographical boundaries and
10 so forth that have -- you can define, and they're not
11 necessarily -- they're not arbitrary and they're not in the eye
12 of the beholder.

13 (Inaudible speaker.)

14 JUDGE JORDAN: Can you repeat the last part of the
15 answer for her?

16 THE WITNESS: Sure. Yes, Your Honor.

17 And they're not necessarily in just the eye of the
18 beholder.

19 JUDGE JORDAN: Okay. So last hypothetical.

20 So if you had a community that lived in one contiguous
21 county for 50 years and that community was split later into
22 three different counties because counties got redone, can you
23 violate the county line factor in trying to keep that community
24 together in districting, or do the county lines predominate?

25 THE WITNESS: Yes, Your Honor. The county lines would

1 predominate.

2 JUDGE JORDAN: Okay. I'm done. Thank you.

3 MR. JAZIL: Thank you, Your Honor.

4 BY MR. JAZIL:

5 Q. I'd let to get into a bit more of the specifics for
6 Congressional District 5.

7 MR. JAZIL: Can we pull up Defense Exhibit 89, which
8 has been entered into evidence and is a map created by the
9 Florida legislature.

10 BY MR. JAZIL:

11 Q. Mr. Kelly, can you first tell us what we're looking at
12 here. What kind of map is this?

13 A. Sure. This is a heat map.

14 Q. And what's a heat map, sir?

15 A. A heat map is used to show -- with the effect of shading on
16 the map to show different concentrations of whatever the
17 particular data point -- in this case, the Black voting age
18 population. Whatever the particular data point of interest
19 might be, the heat map shows shading. The darker the shading in
20 this particular case, the greater the concentration of that
21 population.

22 Q. And what is this particular heat map showing in the dark
23 green colors through the white colors? Just walk us through
24 what the colors mean.

25 A. Sure. The darker -- if you look at the -- look at the bar

1 sort of on the top, the top left and then you look at the
2 shading, what the darker shading is showing -- these are all
3 census blocks. The darker shading is showing where the Black
4 voting age population might be 91 to 100 percent, the darkest
5 shading, and the lighter the shading, the lower the Black voting
6 age population.

7 So you can see essentially clusters of high
8 concentrations of Black voting age population in this area here.

9 Q. So it's the Black voting age population as a percentage of
10 the total voting age population?

11 A. Yes, sir.

12 Q. In each census block.

13 MR. JAZIL: Can we zoom out, please.

14 BY MR. JAZIL:

15 Q. What's the red line showing?

16 A. This is -- it appears to be, according to the description,
17 appears to be the benchmark map. So this appears to be -- the
18 red line, one side of it appears to be the Duval County portions
19 of the benchmark Congressional District 3, I guess, from the
20 2016 map.

21 Q. And as a map drawer, what conclusions can you draw from
22 this heat map?

23 A. Sure. The map drawer of this likely was targeting these
24 exact census blocks to try to maximize the Black voting age
25 population in the district.

1 MR. JAZIL: Can we go on to Defense Exhibit 90, which
2 has also been entered into evidence and was also provided by the
3 Florida legislature.

4 BY MR. JAZIL:

5 Q. Is this another heat map, sir?

6 A. Yes.

7 Q. Do the green shadings mean the same thing as they did in
8 the last one we looked at?

9 A. Yes. This is shaded by the Black voting age population.
10 And again, it looks to be a -- depictions of Congressional
11 District 5 in the map adopted by the Court in -- well, adopted
12 by the Court in 2015 and ultimately enacted for 2016.

13 Q. And what's the region for which this heat map is giving us
14 information?

15 A. Sure. This is Leon and Gadsden Counties.

16 Q. And again, sir, as the map drawer -- as a map drawer, what
17 conclusions, if any, could you draw from this heat map?

18 A. Yeah. The Western boundary of the district seems to
19 encompass all of Gadsden County. Gadsden County, I believe, is
20 the one county in the state that's a majority minority African
21 American county. So it adopts all of Gadsden County.

22 And then you can see that the map drawer went around
23 some parts of Tallahassee, Florida, and went to southern
24 Tallahassee, so basically the South side of the city, to grab
25 some predominantly high Black voting age population

1 neighborhoods.

2 MR. DISKANT: I hesitated to object, but Mr. Jazil
3 seems to be turning Mr. Kelly into an expert witness on a map
4 being drawn that he had nothing to do with.

5 JUDGE JORDAN: Okay. Overruled.

6 I understand, as other witnesses will have the same
7 issue, that no witness can testify about somebody else's
8 subjective intent. But giving an opinion, a lay opinion, given
9 his expertise, is okay.

10 MR. DISKANT: Okay. I'll withdraw the objection.

11 BY MR. JAZIL:

12 Q. Mr. Kelly, I've circled a portion of this map. Do you
13 happen to know how long that particular strip of the map is from
14 North to South?

15 A. You mean from the edge of the district up to the Georgia
16 border?

17 Q. Yes, sir.

18 A. I believe it's 3 miles.

19 And I should say there's a scale at the bottom of the
20 map to the left. I'm kind of doing this with my fingers, but
21 roughly speaking, if you do 3 -- there's the number 3 right
22 there. So maybe it's -- maybe it's 4 miles, about 3 to 4 miles.

23 MR. JAZIL: Can we go to Defense Exhibit 85, which has
24 been admitted into evidence and was provided by the Florida
25 legislature.

1 BY MR. JAZIL:

2 Q. Mr. Kelly, what are we looking at here?

3 A. Sure. We're looking at another heat map, just pulled back
4 to encompass what looks like all of the benchmark District 5
5 from the 2016 map.

6 Q. And what are the numbers underneath the names of the
7 individual counties connoting?

8 A. Appears to be the population of those counties.

9 Well, you know, either that or the population -- yeah,
10 it's the total population of the counties, yeah.

11 Q. And what conclusions, if any, can you draw as a map drawer
12 who puts together maps from this particular heat map?

13 A. Sure. Same conclusion I mentioned before, that there are
14 two significant population centers in the district, and they're
15 Duval -- they're portions of Duval and Leon Counties. They're
16 significantly far apart. So basically the district is using a
17 slice of rural counties to connect otherwise two major
18 population centers that are pretty distant from each other.

19 Q. And, Mr. Kelly, I notice that there are two dark green
20 spots to the South of Duval and to the South of Baker Counties.

21 Do you see those?

22 A. Yes.

23 Q. Can you --

24 MR. JAZIL: Zoom out, please.

25 BY MR. JAZIL:

1 Q. Mr. Kelly, I've circled a portion of this map. Do you know
2 what that is, what part of the state that is?

3 A. That's Gainesville, Florida.

4 Q. Okay. And what about this circled portion?

5 A. That appears to be Palatka.

6 Q. And you had a colloquy with Judge Jordan earlier. Can you
7 explain to us why it is you didn't connect the population in
8 Duval with the populations in Gainesville and Palatka?

9 A. Sure. Sure. So in order to connect those populations,
10 there were a couple things that were important: One, could I do
11 so in a way that was reasonably adherent to other traditional
12 redistricting criteria -- compactness, adherence to county and
13 city lines -- and at the same time, could I potentially
14 accomplish at the same time a purpose of getting close to the
15 Black voting age population of the benchmark district.

16 What I determined was that it wasn't possible. It
17 wasn't possible to get close to the Black voting age population
18 in the benchmark district, and it wasn't possible to connect
19 Jacksonville to Gainesville and Palatka and also Daytona Beach.
20 It wasn't possible to connect those communities in a way that
21 was in any way -- the district would likely look like a
22 spiderweb. It wouldn't -- it would be extremely far from
23 anything compact or reasonably shaped.

24 Q. Understood.

25 MR. JAZIL: You can take that down.

1 BY MR. JAZIL:

2 Q. Mr. Kelly, earlier today my friend asked you -- and I wrote
3 this down. Perhaps I didn't get it word for word. I apologize.

4 But he asked you -- he said, "As far as you know, the
5 Governors of Florida were hands off when it came to
6 redistricting in this century."

7 And you paused and you repeated "this century."

8 What about, as you understand it, to your knowledge,
9 what was the role of the Florida Governors last century? Were
10 they hands off?

11 A. No.

12 Q. Can you expand on that, please?

13 A. Sure. Just from reading and research, I know that Governor
14 Graham in the '82 redistricting, Governor Chiles in the '92
15 redistricting, I think it would be fair to say strongarmed the
16 legislature to whatever their particular issue of the day was.
17 They exerted their will on the legislature.

18 And then, as I noted earlier, the one instance where I
19 know of an actual veto was, I believe, in 1955 Governor Collins
20 vetoed a legislative map.

21 The Governor doesn't get to review the legislative map
22 anymore, so that option doesn't exist based on the '68
23 constitutional revision, but -- so based on my reading and
24 research.

25 JUDGE JORDAN: By that, by "legislative map," you mean

1 the state map?

2 THE WITNESS: Yes, Your Honor.

3 MR. JAZIL: Your Honor, I may be done. May I just
4 have a moment to --

5 JUDGE JORDAN: Sure.

6 MR. JAZIL: -- speak to my colleague here.

7 *(Pause in proceedings.)*

8 MR. JAZIL: Your Honor, I have no further questions.

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

10 **REDIRECT EXAMINATION**

11 BY MR. DISKANT:

12 Q. I just have a few, Mr. Kelly. I just want to clarify the
13 mistake I made earlier.

14 Remember I asked you about -- yeah, okay. Sorry.

15 Remember I asked you what was marked as CP876 in the
16 2012 litigation?

17 A. Yes.

18 Q. And I had the transcript and I read from the wrong part of
19 the transcript, so let me just correct what I was reading.

20 This is PX5045. And the transcript says -- let's go
21 to Map 876, this portion of the transcript, and that's what
22 we're looking at, 876.

23 JUDGE JORDAN: It's been a while since we covered that
24 terrain, Mr. Diskant.

25 MR. DISKANT: I'm just correcting an error.

1 JUDGE JORDAN: What?

2 MR. DISKANT: I'm just correcting an error.

3 JUDGE JORDAN: I'm not stopping you.

4 MR. DISKANT: Oh.

5 JUDGE JORDAN: I just want -- I want you to remind me
6 what that transcript is.

7 MR. DISKANT: Oh, I'm so sorry. I thought you were
8 telling me to move on.

9 JUDGE JORDAN: No.

10 MR. DISKANT: This is the transcript of Mr. Kelly's
11 deposition in connection in 2012 --

12 JUDGE JORDAN: Got it.

13 MR. DISKANT: -- that was relied upon by the Florida
14 Supreme Court.

15 JUDGE JORDAN: Got it. Okay.

16 MR. DISKANT: And it's PX5045, and -- I got confused
17 what part I was reading.

18 BY MR. DISKANT:

19 Q. So in any event, it says: "Mr. Kelly, let's pull up 876,
20 and this map is 876, correct?"

21 Which is PX4553 in this case.

22 JUDGE JORDAN: I thought you said it was PX5045.

23 MR. DISKANT: 5045 was the transcript.

24 JUDGE WINSOR: Maybe I'm confused. I thought before
25 you were impeaching him with his deposition in this case from

1 his deposition in June, and that's what the confusion was.

2 MR. DISKANT: I asked him about this transcript, and I
3 was down -- later there's questioning about 874, and I got
4 confused about which map I was asking him about. I didn't have
5 874 in my hands.

6 JUDGE WINSOR: Okay. But this is not the transcript
7 from a deposition in this case?

8 MR. DISKANT: No, no.

9 JUDGE WINSOR: This is from years ago?

10 MR. DISKANT: This is from 2012. Again, this is what
11 the Florida Supreme Court relied upon in citing Mr. Kelly's
12 work, and all I want to do is clarify.

13 BY MR. DISKANT:

14 Q. You were asked about 876, and the question was --

15 JUDGE WINSOR: And I'm sorry to keep interrupting, but
16 this is trial testimony or a deposition from way back when?

17 MR. DISKANT: I'm not a hundred percent certain. I
18 think it's trial.

19 Oh, it's trial testimony.

20 JUDGE WINSOR: Okay.

21 BY MR. DISKANT:

22 Q. And here it says -- we're looking at 876.

23 "You did not draw a complete map to try to fill in the
24 district -- I mean fill in the district on the configuration; is
25 that correct?

1 "Answer: Not a complete map. That's correct."

2 And then it says: "That indicates that the Black
3 voting age population in that district, which you were calling
4 District 2, was 44.95932; is that correct, sir?"

5 "Yes, sir."

6 And this is the -- sorry. I should have read the
7 first question.

8 This is on the previous page.

9 "You looked at a potential district from Duval to
10 Gadsden County, correct?"

11 "Yes, sir."

12 And that's 876, right? That was the testimony you
13 gave, right?

14 A. Yes, that's my testimony.

15 Q. Okay. And that's, in turn, what led the Florida Supreme
16 Court to the benchmark, which is in JX70, which you just gave
17 some testimony about why you would not have drawn such a map.

18 Do you recall that?

19 A. Yes.

20 Q. And I just want to ask you: A map like that says "enacted
21 plan from 2002," PX7222. An East-West map running -- this one's
22 from the Atlantic to -- oh, it's into Leon County.

23 That's not unprecedented in Florida, is it?

24 A. Are you asking me to compare the question in --

25 Q. I'm asking you basically: It's not all that strange in

1 Florida to run a map along the Georgia border from the Atlantic
2 inwards?

3 A. Well, in 2002 you could intentionally favor or disfavor
4 incumbents and political parties. It was a completely different
5 set of rules for the road.

6 I didn't draw the map in 2002, but the law was pretty
7 significantly different.

8 MR. DISKANT: Okay. Thank you.

9 I have nothing else.

10 JUDGE JORDAN: We're done with him?

11 MR. JAZIL: Yes, Your Honor. I have no further
12 questions.

13 JUDGE JORDAN: Okay. Unless Mr. Jazil calls you back,
14 you're excused. Thank you, Mr. Kelly.

15 *(Witness excused.)*

16 JUDGE JORDAN: Okay. Call your next witness.

17 MR. DISKANT: Our next witness is --

18 Examining witness is out -- examining lawyer is in the
19 hallway. We'll get her.

20 JUDGE JORDAN: Okay.

21 MR. DISKANT: Next witness is Charles Clark.

22 JUDGE JORDAN: Is Charles -- I'm sorry. Can you give
23 me the last name again?

24 MR. JAZIL: Clark, Your Honor.

25 JUDGE JORDAN: Clark.

1 **CHARLIE LOUIS CLARK, PLAINTIFF WITNESS, DULY SWORN**

2 MR. DISKANT: And Mr. Clark will be examined by my
3 colleague, Sarah Hardtke.

4 JUDGE JORDAN: Okay.

5 DEPUTY CLERK: Be seated, please.

6 JUDGE RODGERS: Are you all going to be needing the
7 exhibits that are up here on the witness stand for this witness?

8 DEPUTY CLERK: Sir, for the record, would you state
9 your name and spell your last name.

10 THE WITNESS: My name is Charlie Louis Clark,
11 C-L-A-R-K.

12 DEPUTY CLERK: Thank you.

13 **DIRECT EXAMINATION**

14 BY MS. HARDTKE:

15 Q. Good afternoon, Mr. Clark. Will you please state your name
16 and address for the Court.

17 A. Good afternoon. My name is Charlie Louis Clark, and my
18 address is 1112 South Magnolia Drive, Tallahassee, Florida
19 32301.

20 Q. Are you a plaintiff in this case?

21 A. Yes, I am.

22 Q. And where were you born and raised?

23 A. I was born in lake Charles, Louisiana, June 28, 1951, and I
24 was raised there for the first 22 years of my life.

25 Q. How did growing up in the South shape your experiences,

1 particularly with regards to race?

2 A. When I was born in 1951, my entire existence from the time
3 I entered kindergarten at 3 year old until the time I left for
4 undergraduate college was a totally Black environment, was a
5 totally Black society, because everything was segregated by race
6 and by geographics in my hometown. We called it "the Jim Crow
7 South."

8 But basically, I was raised in a segregated area of my
9 city and through my kindergarten, elementary, junior high, high
10 school, and my first four years at Southern University in Baton
11 Rouge were all basically segregated. Everything I did that was
12 interscholastic, everything I did with sports, everything that I
13 did involving literature was against only other Black children.

14 Q. Is your family from the South?

15 A. Yes, my entire family. We call ourselves "the I-10 people"
16 because we live on I-10 between Texas and Florida.

17 Q. When did you move to Florida?

18 A. I moved to Florida September 30, 1983.

19 Q. And where in Florida do you reside?

20 A. Tallahassee, Florida.

21 Q. Have you resided in Tallahassee for the entire time that
22 you've been in Florida?

23 A. Yes. This Saturday will be 40 years.

24 Q. In what county in Tallahassee?

25 A. Leon County.

1 Q. Do you know what congressional district you reside in?

2 A. I'm currently in U.S. Congressional District 2.

3 Q. Do you know what congressional district you were residing
4 in until 2022?

5 A. Before 2022, it was U.S. Congressional District 5.

6 Q. And, Mr. Clark, are you employed?

7 A. I'm retired.

8 Q. What did you do for work before you retired?

9 A. Before I retired, I worked for 32 years with the Florida
10 Department of Agriculture and Consumer Services. I worked for
11 five commissioners of agriculture, and I was head of the Florida
12 Department of Agriculture Pesticide Registration Program.

13 Q. Were you the first Black person to serve in that role?

14 A. Yes, the first Black person for 22 years.

15 Q. Mr. Clark, do you vote regularly in Florida elections?

16 A. I do.

17 Q. And why do you vote regularly?

18 A. I came from a family and I still hear it ringing in my ears
19 and my father has been dead 50 years this month -- he basically
20 said the credo was that if you did not exercise your opportunity
21 to vote, then you could not complain about anything any
22 politician ever did.

23 Q. Are you involved with any civic or community-based
24 organizations in Florida?

25 A. That number that I give my time to because I am a member of

1 the Retired Peace Corps Volunteers of North Florida. There are
2 about 87 of us.

3 I'm a member of St. Michael and All Angels Episcopal
4 Church here in Tallahassee for the last 40 years.

5 I work with the NAACP here in Tallahassee, and I also
6 am a member of a group -- we call ourselves "The Old Guys Saving
7 Our Democracy."

8 Q. Could you tell the Court a little bit more about your
9 involvement with your Episcopal church.

10 A. I'm the member of the Episcopal church -- it's called the
11 Diocese of Florida, and just like for the United States, the
12 Episcopal Church of North America, in every state they have the
13 state divided up in what we call districts, but we call it a
14 diocese, and every one of these diocese has a bishop. And so
15 I'm a part of the Diocese of North Florida.

16 Q. And where is the Diocese of North Florida located?

17 A. Our headquarters is in Jacksonville, and it extends from
18 Jacksonville West to Quincy and South to Gainesville.

19 Q. You also mentioned The Old Guys Saving Our Democracy group.
20 Could you tell the Court a little bit about how you got involved
21 in that group?

22 A. Yes. Back in July -- July of 2019, I was on a pilgrimage
23 to Montgomery, Alabama, with a group of other people from
24 Episcopal churches, and it just so happens that one of the
25 fellows that I was volunteered to sit next to, Thomas Moore, had

1 been a former legislator here in Tallahassee, and he and I both
2 served in the United States Peace Corps and we both served in
3 Liberia, but we didn't realize it until we got on the bus
4 together.

5 And I started complaining to him immediately sitting
6 on the bus that I was really upset with the United States
7 Supreme Court because I was unhappy that they had made a
8 decision in June of 2019 that they were no longer going to
9 directly interact with what I call gerrymandering cases from the
10 states, that they were going to send all of those cases back to
11 state legislators to handle issues where people were not happy
12 with political gerrymandering in the given state.

13 And as a result of that, one thing led to another, and
14 we meet every Thursday for an hour from 12:00 to 1:00. We used
15 to meet before COVID at International House of Pancakes, because
16 we love pancakes, but during COVID, we meet every Thursday by
17 Zoom, and so we've been meeting for the better part of almost
18 four and a half years.

19 Q. Mr. Clark, are you familiar with the Fair Districts
20 Amendment?

21 A. I am.

22 Q. Did you vote for the Fair Districts Amendment?

23 A. I did.

24 Q. And why did you vote for the Fair Districts --

25 A. Well, I voted for it because I thought it was proper to be

1 a part of something where Blacks were not guaranteed to have a
2 person of their choosing to represent them, but a fair process
3 by which, if Blacks got together, they were given a fair chance
4 to choose somebody of their liking to represent them.

5 Q. Following the FDA's enactment, were you able to elect your
6 congressional candidate of choice?

7 A. I was part of a group of people who, yes, the answer is
8 yes, I was able to.

9 Q. Is that true for every election until 2022?

10 A. Yes.

11 Q. And who was your congressional representative following
12 FDA?

13 A. His name was -- is still Alfred Lawson, Jr.

14 Q. You testified earlier that until those -- this last
15 redistricting cycle in 2022, you were residing in Congressional
16 District 5; is that correct?

17 A. Yes.

18 Q. Do you have a general understanding of the configuration of
19 that district?

20 A. Yes. Just generally, it stretched from Gainesville to
21 Gadsden County.

22 Q. Are you familiar with the Jacksonville area?

23 A. I am. I travel to Jacksonville probably about seven times
24 a year because I represent the Apalachee region because, just
25 like for states and counties, our Diocese of Florida is divided

1 up into regions, and we are the farthest region away. We are
2 the Western region. And so I am the lay representative as a
3 clergy representative to represent the Episcopal churches in our
4 region at our headquarters in Jacksonville.

5 So I'm there fairly often. As a matter of fact, I sit
6 on a council. It's called our Diocesan Council, and this
7 council basically helps the bishop to run the affairs of our
8 church in Florida.

9 Q. And are you familiar with the Black community in Northern
10 Florida?

11 A. Yes. I have -- over the last 40 years I have friends in
12 Live Oak. I have friends in Jacksonville, friends in Gadsden
13 County, all over Gadsden County. So I would say that I pretty
14 well know this area of North Florida pretty well.

15 Q. Having lived in Northern Florida for four decades now, are
16 there certain issues that you believe are common to constituents
17 who go across the region?

18 A. For certain. I have done pretty well myself. I have a
19 bachelor's degree and two master's degrees. But I've seen
20 pockets of poverty all through the district.

21 We have -- like most other groups, we have people that
22 are fabulously wealthy. We also have many groups that live
23 below the federal poverty line. I have seen, especially during
24 situations where we have hurricanes, people that had nothing,
25 and they were not even able to get the basics after large events

1 of climate like hurricanes.

2 So, yeah, I have seen the needs of many of -- and I'm
3 going to say Black people within this huge district.

4 Q. Mr. Clark, are you involved in local Florida politics?

5 A. I say involved only in that I give my opinions and I
6 volunteer for those groups and for those causes that I think are
7 relevant, because I believe that -- once again, like my father
8 said, you can't complain unless you're willing to volunteer, and
9 I'm one of those people that I'm most effective working behind
10 the scenes. I'm the type of person I love to put out signs and
11 I love to put up banners and I love to get food ready for
12 fundraisers, things like that. But I also do give my time,
13 talent, and treasure to local politicians that run.

14 Q. Did you follow the events surrounding the 2022
15 redistricting cycle?

16 A. I did. As much as we could get information on -- I'm an
17 avid listener to NPR, mostly WFSU here in Tallahassee, and also
18 the Tallahassee Democrat and the national news outlets, yes.

19 Q. And did you provide any public input during this last
20 redistricting cycle, the 2022?

21 A. I actually did not, not formally. I thought I was going to
22 have an opportunity to provide public input because I was
23 actually waiting on the legislation -- or legislators in Florida
24 to basically come out with a plan and for that plan for
25 citizens, regular citizens like me, to be able to have a chance

1 to go to a hearing and express our concerns about the map that
2 they had drawn, et cetera.

3 Q. During the 2012 redistricting cycle, did you have an
4 opportunity to provide public input?

5 A. I did on two occasions, and I just found it very refreshing
6 because you got a chance to actually have your people that you
7 voted for, people that represent you -- you had a chance to have
8 them listen to your comments. It was very refreshing.

9 Q. And what was your reaction to the events of the 2022
10 redistricting cycle?

11 A. I was pretty horrified as just a regular citizen, because I
12 get with my friends and we yap about the things that we don't
13 like, and in terms of things that we don't believe are going to
14 represent us very well.

15 And I was really quite upset, because I was ready for
16 once the Supreme Court said that legislators would look within
17 their own state constitutions and follow those constitutions in
18 order to, you know, draw maps, et cetera, and I was just kind of
19 upset when my turn -- this is my turn, when I felt that the
20 Governor of Florida hijacked the whole process and kind of bent
21 the legislators to their knees until they basically capitulated
22 and did what he wanted them to do in terms of redrawing the map
23 of this district.

24 Q. You testified earlier that your prior congressional
25 representative was representative Al Lawson; is that correct?

1 A. That's right.

2 Q. Who is your congressional representative now?

3 A. Currently for U.S. District 2, it's Neal Dunn.

4 Q. Was Representative Neal Dunn your candidate of choice?

5 A. He was not.

6 Q. Who was your candidate of choice?

7 A. Alfred Lawson, Jr.

8 Q. Do you know former Representative Lawson personally?

9 A. I do. I've known him for 40 years.

10 Q. Have you discussed this litigation with him?

11 A. No. The only thing that I've ever said to him, because
12 he's so busy -- I see him at church, and he said, "Oh, Charlie,
13 I heard that you're going to be a part of this lawsuit," and I
14 said yes, and he flew away in his car.

15 Q. In your experience, was Representative Lawson responsive to
16 his constituents?

17 A. Very responsive.

18 Q. How so?

19 A. Oh, I could give you hundreds of examples but I'll give you
20 two that really impressed me, because things was at such a
21 boiling point in terms of the needs of some of the poor
22 constituents in his district.

23 We had a terrible hurricane here that hit Tallahassee
24 directly called Hurricane Hermine. Also in 2018, October, we
25 had a hurricane that kind of gave a glancing blow to Gadsden

1 and Leon County, and it was called Hurricane Michael.

2 Well, I actually have seen him because it's all the
3 paper process to wait on FEMA, to wait on counties, to wait on
4 the State to raise funds. I've seen him go to various groups,
5 especially like Episcopal churches, and for everybody who could,
6 he would ask, you know, if you can afford to give -- I think the
7 amount was like \$400, because \$400 would buy a light pole, and
8 especially for people that had homes that were out in rural
9 areas and they were mobile homes.

10 Well, the light companies would connect the wires to
11 your mobile home, but had you to buy the pole, that big pole
12 that holds all of the wires, and most of the people had serious
13 issues because there were tornadoes inside of Hurricane Michael
14 and Hermine, and it had blown the poles down. So part of his
15 effort initially where he did not wait for any government
16 assistance was that he basically had a list of homes that needed
17 poles, and we got that done.

18 So I've seen him, much to the chagrin of his wife,
19 give his personal cell phone to somebody who catches him on the
20 street, and he certainly will always give you his office phone
21 number. But I could just tell you hundreds of fundraisers that
22 he's initiated for constituents that basically needed help.

23 Q. And what changes, if any, have you seen in your
24 representation under Representative Dunn?

25 A. There are two changes -- and this is me personally.

1 Realizing that he was our new representative, I called a couple
2 of times during this past legislative session this year, and
3 what I was trying to do was I was trying to get someone to
4 answer through email or for me to get an address so that I could
5 mail a couple of letters, because there were a couple of issues
6 that I wanted him to basically speak out on behalf of myself and
7 a number of people in my group of friends here in Tallahassee.

8 Q. What were the issues that you were reaching out --

9 A. The two that I was most concerned with myself was basically
10 the protection of people who are pregnant. As I understand it,
11 within our Florida Constitution, I was looking for him to
12 publicly basically say that, you know, all of these -- all this
13 legislation that regards women and pregnancy that basically, you
14 know, he was going to, you know, be a real force for us in
15 saying just follow what's already in the Florida Constitution in
16 terms of people having adequate protections and privacy
17 protections, especially as regarded pregnant women.

18 The other one -- and this is the one that I'm going to
19 try to be a little bit -- how shall I say -- very selective in
20 my words, but I was actually seething, because I am the product
21 of people who were at one time slaves in our history, and for
22 somebody to say to me that any portion of slavery could be
23 beneficial to a person who was a slave horrifies me.

24 So that's my nice way of putting it. And I wanted him
25 to publicly denounce the whole concept of that any portion of

1 slavery was positive for Black people.

2 Q. You mentioned -- you just testified right now that you're
3 the product of persons who had dealt with slavery.

4 Could you say more about that to the Court?

5 A. Yes. My sister is one of these people who first got into
6 23 and Me about where we came from. So our history is
7 basically -- was very easy to follow, because we had so many
8 people who were enslaved. So we came from the East -- West
9 Coast of Africa to what is now Haiti. We were there for a
10 couple hundreds years as slaves on sugar plantations.

11 There was a riot on the Haitian side of what you now
12 know to be the Dominican Republic in Haiti, because at one point
13 there was a couple of hundred slaves per slave master, and when
14 the slaves decided to riot, my lineage was -- some of the slaves
15 that they sent from Haiti to the mouth of the Savannah River to
16 Statesboro, Georgia. They were sold. My group of ancestors
17 went to Alexandria, Louisiana, the central city of Louisiana.
18 We made our way down to Baton Rouge. We adopted the plantation
19 owner's, name, which was Clarke, C-L-A-R-K-E, but we dropped the
20 E.

21 Q. In your opinion, is Representative Dunn focused on issues
22 that impact Black communities?

23 A. So far, with this most recent election, reelection for him,
24 the answer would be no, because there have been so many things
25 that have been said nationally, things that have been done in

1 Washington, D.C., just things that have happened here in the
2 State of Florida that has been so divisive until I have not
3 personally heard him speak out publicly as I would like as a
4 Black person to say, you know, X, Y, and Z is wrong.

5 Q. Does Representative Dunn hold public meetings with
6 constituents?

7 A. If he has, I have been looking out for them, because as you
8 probably tell, there are a couple of things I want to talk
9 publicly with him about. But so far, given the constraints of
10 being a congressperson, he has not had a public meeting.

11 And what I call these things -- I'm trying to think of
12 it. They call them forums or meetings, but basically where you
13 can go and ask your politician questions, yeah. Town hall
14 meetings, I guess you call them.

15 Q. Did Representative Lawson hold townhouse meetings with
16 constituents?

17 A. For the time that he was a U.S. representative, the time he
18 was a State senator, State representative, he would, when he had
19 time available, especially after he got a chance to go to
20 Washington, basically, we always could call his office and find
21 out when he was going to be back from Washington, and he would
22 always have -- especially in Gadsden County, places in Leon
23 County, he would have meetings of some sort that you could kind
24 of meet and greet and talk to him about things that had happened
25 in Washington while he was gone.

1 Q. Have you tried to -- apologies.

2 Had you -- you testified earlier that you have
3 personally tried to contact Dunn's office; is that correct? And
4 did you receive a response?

5 A. Both times I called, I just called the -- Googled the
6 number and called. And the only thing I really wanted -- I left
7 my name, my number, my email address, personal email address. I
8 just wanted their process for his congressional office for if I
9 could sent a complaint in by email or for somebody to call me
10 and tell me where I could mail a letter to his office in
11 Washington, D.C. about those two issues, but I did not get
12 callbacks from either one of them.

13 Q. Did you personally contact Representative Lawson's office?

14 A. Well, I would like to say that I did. I have on many
15 occasions, but most of the time I would just grab him by the
16 coat when I would see him in church on Sunday. When he was not
17 in Washington, I would see him in church every Sunday.

18 Q. And he was always responsive to you?

19 A. Yes. He is one of those people that I -- that -- to me, he
20 was just born to be a politician, because he likes people and he
21 just inhales human beings. That's the best way I can say it.

22 Q. Mr. Clark, as a Black Floridian who's lived in Northern
23 Florida for four decades now, how did the events of the 2022
24 redistricting cycle impact you personally?

25 A. I think the biggest effect on me was psychologically,

1 because due to my education, I'm one of those people that I've
2 always been able to express myself through a written letter or
3 through just reasonable contact with other people.

4 But I just have a -- I just personally felt that --
5 and a lot of my friends also felt that it was a kind of mental,
6 psychological impact, negative, because we really did not feel
7 that the actions of the Governor was a positive action for us as
8 Black people. Because, you know, speaking for myself, I can say
9 this. I just really felt it was a vicious assault on what I
10 have come to expect as just a regular voter in Leon County.

11 MS. HARDKE: Thank you, Mr. Clark.

12 Your Honor, no further questions.

13 Thank you, Mr. Clark.

14 Your Honors, no further questions.

15 JUDGE JORDAN: Thank you very much.

16 How do I pronounce your last name?

17 MR. PRATT: Good afternoon. My name is Joshua Pratt,
18 here to ask a few questions on behalf of the Secretary.

19 Good afternoon, Mr. Clark.

20 THE WITNESS: Good afternoon.

21 JUDGE JORDAN: I thought you were Mr. Beato. That's
22 why I was asking how to pronounce your last name.

23 MR. PRATT: Pratt.

24 JUDGE JORDAN: Pratt I can understand.

25 MR. PRATT: Joshua Pratt.

1 JUDGE JORDAN: It's just a joke. I'm sorry.

2 MR. JAZIL: Your Honor, I apologize. They switched
3 places.

4 JUDGE JORDAN: No, it's okay. Go right ahead.

5 **CROSS-EXAMINATION**

6 BY MR. PRATT:

7 Q. So I know you've been talking a little bit today about your
8 voter history. I just want to start off with: I imagine you
9 have a voter ID card; is that correct?

10 A. Yes, I do.

11 Q. And is it your testimony today that you reside in CD-2
12 currently?

13 A. Yes, Congressional District 2.

14 Q. And is it also your testimony that you're sure that where
15 you resided in the last redistricting map when it was in effect
16 was in CD-5; is that correct?

17 A. Congressional District 5, yes.

18 Q. And speaking of your voter registration card, is that
19 something that you provided to your counsel in this case?

20 A. No. They -- a copy of the card? No.

21 Q. And speaking of, I guess, your current district's --
22 looking at the state district that you're in, do you happen to
23 know who your State House district representative is?

24 A. Oh, State House district representative, I've forgotten.

25 Q. No problem. And do you happen to know who your State

1 Senate district representative is?

2 A. Oh, the lady -- I forgot the name. I'm sorry. Catching a
3 blank.

4 Q. I believe you mentioned earlier that you're a registered
5 Democrat; is that correct?

6 A. Yes.

7 Q. And you've been registered as a Democrat for more than a
8 decade; is that correct?

9 A. More than -- yes.

10 Q. And when electing politicians, I imagine political party
11 matters to you?

12 A. Yeah.

13 Q. And if given the option, is it fair to say that you'd elect
14 a Democrat over a Republican?

15 A. Now, that depends, because I have had situations -- I
16 mostly vote for candidates by their track record, and when I was
17 in Louisiana, I actually have voted, when I was able to, across
18 party lines, because I like to vote for people that I think have
19 my best interest at heart, yeah.

20 Q. Isn't it true that the Democratic party generally supports
21 the policies that you support when you're looking for
22 candidates?

23 A. A majority of the times, yes.

24 Q. And the majority of the time, generally speaking, the
25 Republican party doesn't support those policies that you would

1 prefer?

2 A. Not all the policies, because there are some things that
3 Republican candidates put out that I find to be very reasonable
4 and rationale and that I could, you know, live with, yes.

5 Q. Now, switching gears a little bit.

6 You voted in the 2022 election, correct?

7 A. Yes.

8 Q. And you also voted for a candidate in the State Senate
9 race, correct?

10 A. State Senate race? I believe so. Whatever the complement
11 of the ballot was, yes.

12 Q. And for that State Senate race, did you vote for the
13 Democratic candidate?

14 A. I'm sure I did, yeah.

15 Q. And the Democratic candidate -- do you happen to recall
16 what race or gender they were?

17 A. Race or gender? I think white and female.

18 Q. And do you know the name of who that candidate was?

19 A. I'm having a block today.

20 Q. No problem. Well, do you happen to know who the opposing
21 Republican candidate was in that race?

22 A. No, I actually -- I can't remember that -- line a total
23 block. I'm going -- you know, normally I would remember faces,
24 but I can't remember today.

25 Q. Does the name Corey Simon ring a bell?

1 A. Corey Simon? Yes, uh-huh.

2 Q. And do you happen to know his race?

3 A. Corey Simon is Black and male, uh-huh.

4 Q. And then looking, I guess, prior to this cycle and to
5 the -- you know, the 2016 congressional map, going back all the
6 way to 2010, do you happen to recall who your congressperson was
7 back then?

8 A. Back in 2010? I think I'm going to say Congressman Boyd.

9 Q. Would maybe the name Steve Southerland --

10 A. Southerland, yeah. Because Southerland -- Boyd for a while
11 and then Southerland replaced him, yeah.

12 Q. Understood. And then would Representative Southerland --
13 do you happen to recall whether he would have been your
14 representative in 2012 as well?

15 A. I don't remember. I can't remember that, but I'm guessing
16 that he would have been, yes. Congressional representative,
17 yes.

18 Q. But you do recall for the 2010 election that he was the
19 elected representative for your district?

20 A. Southerland?

21 Q. Mm-hmm.

22 A. Yes.

23 Q. And do you happen to know what race Mr. Southerland is?

24 A. Male, white.

25 Q. And how about fast-forwarding a little bit to the 2014

1 congressional race. Do you recall who your elected
2 representative was?

3 A. 2014? No, I do not.

4 Q. Would the name Gwen Graham perhaps ring a bell?

5 A. Gwen Graham? Yes, uh-huh. Female, white.

6 Q. And then also switching gears a little bit, I think you
7 mentioned earlier that you have lots of friends here in
8 Tallahassee and nearby?

9 A. Yes.

10 Q. Is it fair to say that you have friends in other parts of
11 the state, perhaps other big cities?

12 A. The only other big city, because I'm not -- I wasn't born
13 here, is probably Tampa.

14 Q. Okay. So you have some friends in Tampa. How about
15 looking farther afield from Florida? Do you have friends who
16 maybe reside in other states?

17 A. In other states, yes, for sure.

18 Q. So these are people that you perhaps share values with or
19 different interests, and yet they don't live near you?

20 A. Oh, yeah. Mm-hmm.

21 Q. And I think you mentioned a little bit earlier a comment on
22 the poverty level in the area that you're in, which obviously
23 you're not, so then that's a good thing.

24 But do you happen to know much about the poverty
25 levels throughout Florida, maybe in other areas?

1 A. Just from what I can hear on the news, national news, what
2 I read in the newspaper. I listen -- on Fridays, usually I'm
3 listening to news all day because it's Friday news updates for
4 the state, for the nation, for the world, and so that's where I
5 get most of my news from every Friday, you know, because I can
6 work and listen to NPR and BBC.

7 Q. Is it fair to say, though, that your knowledge of the
8 poverty in your local area, you would have a lot less
9 familiarity, say, in Miami or somewhere farther in the state
10 from you?

11 A. Well, yeah. I know that poverty exists pretty much
12 everywhere, but I think I'm a little bit more aware of it here
13 where I've been for 40 years up in North Florida, yeah.

14 Q. And would that same kind of reasoning maybe apply to other
15 issues that are important to you? Whether it's, you know,
16 something to do with, you know, farming or a local commerce
17 issue, would you have more familiarity with that in your area
18 versus another area in the state?

19 A. It depends on the topic, because if you talk about farming,
20 if you talk about migrant issues, I have a great deal of
21 information on that because that was a part of my job working
22 for the Commissioner of Agriculture in Florida. Sometimes
23 they're more famous than the Governor, and so we have to impact
24 all those kinds of people. National, state laws, migrant
25 workers, farmers. You know, that's called -- kind of in my

1 bailiwick when I worked for the Department of Agriculture, yes.
2 So I know great deal about farm workers' issues, yeah.

3 Q. So I guess sometimes there are issues that are very local
4 that may be important to the people in a certain community and
5 perhaps issues that are more of statewide importance, correct?

6 A. Oh, sure. Mm-hmm.

7 Q. And I think one that you mentioned that was important to
8 you is the issue of abortion, correct? The issue of abortion?

9 A. Abortion, yes.

10 Q. And is your position -- is it fair to say that it's
11 consistent with that of the Democratic party?

12 A. Generally speaking, but, you know, I don't like to be
13 pigeonholed by saying, you know, because, of course, I've had a
14 mother and I have two sisters. I have a daughter. I have a
15 granddaughter.

16 My big thing is that people should be allowed to
17 handle their pregnancies with their doctor and their husband,
18 boyfriend or love interest. That's it.

19 Q. Understood.

20 I believe you mentioned earlier -- you made a few
21 references to history and different regions of Florida, some of
22 your understanding and familiarity with that; is that correct?

23 A. The history of some areas of Florida, yes, sir, uh-huh.

24 Q. But you're not a historian; is that true?

25 A. No, not a historian. Microbiologist.

1 Q. And then I know you mentioned earlier that you've been
2 hopeful to have meetings with your current elected
3 representative, but you haven't had that opportunity yet; is
4 that correct?

5 A. Right.

6 Q. Do you happen to know whether during this last
7 redistricting cycle the Florida legislature held public meetings
8 for people to come and speak about issues?

9 A. No, I wasn't -- I was busy myself. I wasn't aware of that
10 if they did hold public meetings, yeah.

11 Q. Okay. So for any public meetings they may have had, is it
12 your testimony that you wouldn't have taken the time or had the
13 opportunity to go speak with them about some of these issues
14 that are important to you?

15 A. Probably wasn't even -- wasn't aware that they were being
16 held, yeah.

17 Q. And so I guess relatedly, did you ever try to use the
18 online portal either to submit a public map of redistricting or
19 to give any comments to the legislature about it?

20 A. No, I really didn't, because the issue for me was that I
21 would have liked to have seen the legislative process play
22 itself out to the -- you know, to the end of what they were
23 supposed to do or what I expected them to do.

24 The fact that, to me -- it was all interrupted by what
25 I call the wishes of the Governor. To me, it just -- it just

1 kind of threw cold water on my desire to be a real part of that
2 whole process, yeah, because I think it should be the
3 legislature who actually does that because they represent all
4 the people of Florida between the House and the Senate.

5 Q. And you mentioned earlier, I believe, that you get to go to
6 church with the former congressman --

7 A. Yes.

8 Q. -- Mr. Lawson. And I imagine, then, that you -- do you go
9 to church with Representative Dunn as well?

10 A. Representative Dunn, no. We don't go to -- I don't even
11 know his religious affiliation.

12 Q. So is it fair to say that a lot of your opportunities to
13 meet your former congressperson were just kind of naturally
14 facilitated by the fact that you had lived in the same area or
15 attended the same church?

16 A. Yeah, because, like I said, even when he was a local
17 representative and senator, I'd still see him in church every
18 Sunday.

19 MR. PRATT: Your Honor, if I may have just a moment
20 just to --

21 JUDGE JORDAN: Of course.

22 MR. PRATT: -- see if I have more questions.

23 That will be it.

24 Thank you for your time, Mr. Clark. Appreciate it.

25 THE WITNESS: You're welcome.

1 JUDGE JORDAN: Thank you very much.

2 MR. PRATT: Thank you.

3 MS. HARDTKE: No further questions.

4 JUDGE JORDAN: Okay. Mr. Clark, thank you very much.
5 You're excused.

6 *(Witness excused.)*

7 JUDGE JORDAN: Okay. That wraps it up for today.

8 Before we finish, I'm going to do this today because I
9 want to make sure that -- given my obsession with the exhibits,
10 that we have everything down and that your notes correlate with
11 ours.

12 So in addition to all of the exhibits moved into
13 evidence jointly by the parties today, and those exhibits are:
14 Joint Exhibits 1 through 71, sequentially numbered, so 1 through
15 71; Defense Exhibits 85, 89, 90, 91, 92, 93, 97, 98, and 99; and
16 Plaintiff's Exhibits 20 to 36, 5077.1, 7057, 7064, 7190, 7198,
17 and 7222. In addition, the plaintiffs moved in the following
18 exhibits today: 4553, 5045, 5053, 5053-1, 5062, 5062-1, 4527,
19 and 4527-1.

20 If there are any issues, mistakes, problems, look at
21 them. Look at your notes. Let me know tomorrow, but that's
22 what we have as the set of exhibits in evidence as of the end of
23 today's session.

24 Okay. So what's on tap for tomorrow, Mr. Diskant?

25 MR. DISKANT: Tomorrow I believe Dr. Kousser's going

1 to testify, but we're getting some notes about his health. But
2 I think it will be --

3 Do you think he'll be fine?

4 We think he'll be fine. So Dr. Kousser is our main
5 Wednesday. He'll take most of day tomorrow, perhaps all of the
6 day. And --

7 JUDGE JORDAN: He's the one who's appearing by Zoom?

8 MR. DISKANT: Yes.

9 JUDGE JORDAN: Okay.

10 MR. DISKANT: And then Dorothy Inman Johnson.

11 JUDGE JORDAN: Okay. So we will see you at 8:30
12 tomorrow morning.

13 MR. DISKANT: One other thing. I think Ms. Inman
14 Johnson will be our last witness for this week.

15 JUDGE WINSOR: For this week?

16 MR. DISKANT: Yes.

17 JUDGE JORDAN: Well, she'd better be a daylong
18 witness.

19 MR. DISKANT: Well, we have Mr. -- Dr. Baretto --
20 wait, we need to put on the two --

21 JUDGE JORDAN: Remember, you've got two more trial
22 days to fill up.

23 MR. DISKANT: I think we're going to wrap up.

24 JUDGE JORDAN: I'm not telling you how many witnesses
25 to call or who to call. But if you're stopping with that other

1 witness, then we're stopping for your case in chief.

2 MR. DISKANT: Okay. Well --

3 JUDGE JORDAN: You've got to keep going.

4 MR. DISKANT: Human beings right here.

5 JUDGE JORDAN: You've got to keep going.

6 MR. DISKANT: Okay.

7 JUDGE JORDAN: Right? So it's one thing if you want
8 to end half an hour early, you know, on Thursday. That's not a
9 problem. But we're not skipping a trial day.

10 MR. DISKANT: Okay.

11 JUDGE JORDAN: So you got to have witnesses for two
12 full trial days to go.

13 MR. DISKANT: I know we have a problem with
14 Dr. Baretto, who can't be here until Monday, but we'll work on
15 this.

16 JUDGE JORDAN: Okay.

17 JUDGE WINSOR: I thought you had Monday and Tuesday
18 filled up. Maybe I misunderstood.

19 MR. DISKANT: I was just guessing on how long things
20 would go. I think my prediction was that Mr. Kelly would run
21 into tomorrow, and I was obviously incorrect. So that sort of
22 spilled into Dr. Kousser filling tomorrow afternoon and Thursday
23 morning. We're moving faster than that, to which I'm grateful,
24 and we have -- we have three other witnesses -- we have
25 Dr. Kousser, three plaintiffs, and Dr. Beretta, and that's it.

1 So we will -- Dr. Beretta can't be here.

2 I'm sorry. I forgot Leader Driskell. She's not
3 available also until Monday. But we'll work on this overnight.

4 JUDGE JORDAN: Okay.

5 JUDGE WINSOR: Your other plaintiffs would be about
6 the same length as Mr. Clark?

7 MR. DISKANT: Yes.

8 JUDGE JORDAN: Okay. Here's the thing. We have a
9 limited amount of time together --

10 MR. DISKANT: Yes.

11 JUDGE JORDAN: -- to do this. So finishing early this
12 week may not be a problem if there is a guarantee that you're
13 going to finish early enough next week so that Mr. Jazil's case
14 is not impacted negatively.

15 MR. DISKANT: Well, that's absolutely guaranteed.

16 JUDGE JORDAN: Okay. What we -- where we don't want
17 to be next week -- and I think I speak for the three of us -- is
18 hitting the end of next week and we're not done, and then we got
19 to keep going, and then that creates a problem for all of us in
20 terms of scheduling.

21 MR. DISKANT: I completely understand that. Mr. Jazil
22 and I, even when we were overestimating Mr. Kelly's time,
23 thought we would be done by Tuesday, I still think Tuesday or
24 Monday.

25 JUDGE WINSOR: You're talking about your case or the

1 whole -- or everything?

2 MR. DISKANT: The whole case.

3 MR. JAZIL: Yes, Your Honor.

4 JUDGE RODGERS: Can y'all talk this evening now that
5 we know where we've landed end of today and give us an update
6 tomorrow on what you expect in terms of the remainder of your
7 case, the plaintiffs, and then, Mr. Jazil, what you're expecting
8 for yours?

9 MR. JAZIL: Yes, Your Honor. We'll touch base with
10 our friends from the other side.

11 I just note there's a motion to exclude pending, which
12 may truncate their case even more.

13 JUDGE JORDAN: Yes. It's one of many things that we
14 have to look at, yes. We'll tell you about it tomorrow.

15 MR. JAZIL: Yes, Your Honor. And I just bring that up
16 because it may cut their case down a bit more. So just --

17 JUDGE WINSOR: Not much. Those deal with individuals
18 and they're relatively short.

19 MR. JAZIL: Yes, sir.

20 JUDGE WINSOR: Maybe a couple hours' difference.

21 MR. JAZIL: But we'll touch business with our friends
22 from the other side, come up with a plan.

23 JUDGE JORDAN: The other thing is that at least for me
24 and I know, in part, for Judge Rodgers, if we're not going to be
25 here Thursday, we need to make arrangements to leave. I'm not

1 leaving in a car, so I've got to make arrangements, and the air
2 travel Miami to Tallahassee is not abundant, so I just need to
3 know.

4 MR. DISKANT: We'll do everything we can to get the
5 best time estimate we can to the Court.

6 JUDGE JORDAN: Okay. Sounds good.

7 JUDGE RODGERS: Nobody's complaining about going home
8 on Wednesday.

9 JUDGE JORDAN: We just need to know.

10 MR. JAZIL: Well, Your Honors, I apologize for all of
11 Tallahassee's airport and service.

12 JUDGE JORDAN: It's not the airport. It's just the
13 airlines. It used to be a lot better. There used to be more
14 flights, but deregulation gives and it takes, so you can get
15 out; you just got to go to weird places like Dallas, Charlotte,
16 right? Atlanta, to go back down to Miami.

17 All right. Thank you very much for everything. We
18 will see you tomorrow morning at 8:30.

19 *(Proceedings adjourned at 5:36 p.m.)*

20 * * * * *

21 I hereby certify that the foregoing is a true and correct
22 transcript of the stenographically reported proceedings held in
23 the above-entitled matter, pursuant to the provisions of Section
24 753, Title 28, United States Code.

25 

9/26/23

Julie A. Wycoff, RMR, CRR
Official U.S. Court Reporter

Date

I N D E X

Government Witnesses**JAMES ALEXANDER KELLY**

Direct Examination by MR. DISKANT38

Cross-Examination by Mr. Jazil182

Redirect Examination by Mr. Diskant251

CHARLIE LOUIS CLARK

Direct Examination by Ms. Hardtke256

Cross-Examination by Mr. Pratt272

PLAINTIFF EXHIBITS

<u>Exhibit</u>	<u>Description</u>	<u>Marked</u>	<u>Admitted</u>
PX4527	Second map submitted by Governor	96	96
PX4553	Map drawn per public opinion	68	68
PX5045	Mr. Kelly's trial testimony	68	68
PX5053	First map proposed by Governor	85	85
5062	Senate Map 8060	86	86