

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

COMMON CAUSE FLORIDA, FAIRDISTRICTS)
NOW, FLORIDA STATE CONFERENCE OF THE)
NATIONAL ASSOCIATION FOR THE)
ADVANCEMENT OF COLORED PEOPLE)
BRANCHES, CASSANDRA BROWN, PETER) Case No: 4:22-CV-109-AW
BUTZIN, CHARLIE CLARK, DOROTHY)
INMAN-JOHNSON, VEATRICE HOLIFIELD)
FARRELL, BRENDA HOLT, ROSEMARY MCCOY,) Tallahassee, Florida
LEO R. STONEY, MYRNA YOUNG, and NANCY) September 27, 2023
RATZAN,)
)
Plaintiffs,) 8:34 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 288 through 502)

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P R O C E E D I N G S

(Call to Order of the Court.)

THE COURT: Good morning. Welcome back. Please be seated.

MR. DISKANT: May I report?

THE COURT: Yes, a report would be good.

MR. DISKANT: Mr. Jazil and I spent a long time last night talking about witnesses and timing. I think we were candid and shared our best estimates about everything. We also spent a lot of time with our various witnesses.

We've come to the conclusion that we cannot fill a day on Thursday and should not sit tomorrow because of the Court's concern about that.

However, we believe that we will finish the evidentiary presentation by -- most likely by Tuesday, possibly by Wednesday morning, sum up on Wednesday and be out of here. So if the Court is agreeable with that, I realize it's a last-minute change and I apologize for that, but the case has gone more quickly than we expected, and I'll just tell you exactly what we've got coming up.

We have --

THE COURT: Let me just before -- Judge Winsor is going to sort of take over everything today, so you can direct all administrative --

MR. DISKANT: I'm looking at you.

1 THE COURT: You can look at me. That's okay. I'm the
2 prettier face.

3 But the one thing that we wanted to tell all of you
4 about is the uncertainty of a shutdown. And we haven't received
5 precise guidance on exactly what that means for us. The last
6 time around, the judiciary had money in the bank that it could
7 use to fund operations for a period of days. I think it went
8 close to a month. It may be the same thing this time around.
9 We're going to try to find out and get information for all of
10 you, but we didn't want it to be completely out of your minds
11 that that possibility is looming and it might have an effect on
12 us.

13 MR. DISKANT: It's been very much on our minds.
14 Published news reports have suggested the judiciary has two
15 weeks of funding. Is that right?

16 THE COURT: Yeah, but I'm just telling you we have not
17 received that email that says, yes, we can go forward until
18 October 15th before everything starts to shut down.

19 MR. DISKANT: I completely understand. I just wanted
20 to share what I know, which is what the newspaper --

21 JUDGE RODGERS: One thing we could offer is to ask our
22 Clerk of Court to contact the administrative office, because
23 this case is in trial, and see if we can't get some information
24 from Washington. We could do that.

25 MR. DISKANT: Let me just review where we're going

1 just so it's all clear.

2 This morning our principal witness is Dr. Kousser, who
3 couldn't travel because he broke his ribs, and he developed
4 shingles this week, and last night he was in urgent care, so we
5 were more or less hysterical about what was going to happen.
6 But he's going to testify this morning. So Dr. Kousser will
7 testify by Zoom. He will be the principal witness this morning.

8 In order to give him time to wake up a little bit
9 later, we'll put on a short witness, Dorothy Inman Johnson,
10 first, because it's 5:30 a.m. in California, and he will follow
11 immediately after Ms. Inman Johnson, probably take up most of
12 the day.

13 If he finishes, we will put on two organizational
14 plaintiff witnesses, Amy Keith and Cynthia Slater. If we get to
15 Cynthia Slater, with the Court's permission, she would have to
16 testify by Zoom, because we had planned to bring her in next
17 week and she was part of the shuffling. So if the Court permits
18 and if Mr. Jazil has no objection to it, Ms. Slater would
19 testify by Zoom as the last witness today.

20 JUDGE WINSOR: You have no objection to the Zoom
21 aspect of it, but you do still object to her testimony from your
22 motion before?

23 MR. JAZIL: Yes, Your Honor.

24 JUDGE WINSOR: Okay. Well, maybe we'll talk about
25 that a little bit later in the day.

1 But the response said they were going to substitute
2 Ms. Keith for Ms. -- I can't read my own handwriting here -- the
3 other person you were objecting to, and you don't have an issue
4 with that, correct?

5 MR. JAZIL: The substitution? Your Honor --

6 JUDGE WINSOR: You moved to exclude two witnesses --

7 MR. JAZIL: Yes.

8 JUDGE WINSOR: And one of them they said they're going
9 to back off of, and that is...

10 MR. JAZIL: McClenaghan, Your Honor?

11 JUDGE WINSOR: McClenaghan. I can't read my own
12 handwriting here.

13 MR. DISKANT: We went back to Ms. Keith.

14 JUDGE WINSOR: So the McClenaghan issue is moot?
15 You're not going to call her?

16 MR. DISKANT: We're not going to call her. We'll call
17 Ms. Keith, as they apparently originally thought we were.

18 JUDGE WINSOR: And you don't have any basis to exclude
19 Ms. Keith, right?

20 MR. JAZIL: Your Honor, the problem is Ms. Keith was
21 still not on the 26(a) disclosure, so same basis to exclude her
22 would apply.

23 JUDGE WINSOR: Okay. Well, let me ask this -- maybe
24 we'll talk about that now, then.

25 You agree you never disclosed them as individual

1 witnesses?

2 MR. DISKANT: We didn't disclose them -- oh, those
3 names. That's correct.

4 JUDGE WINSOR: Right. And you have to under the rule.
5 But I guess the issue is the harmlessness. You're saying
6 they're going to say the same thing and they're just going to
7 say you have witnesses -- or you have members in those other
8 districts; is that the long and short of it?

9 MR. DISKANT: That's correct. They're essentially
10 interchangeable witnesses, and certainly the organizations were
11 always disclosed as the plaintiffs in this case. The defendant
12 identified the organizational plaintiffs as witnesses in this
13 case. They noticed their depositions and didn't take them. So
14 had they taken them --

15 JUDGE WINSOR: You're talking about the organize --
16 they noticed 30(b)(6) --

17 MR. DISKANT: Noticed depositions of the
18 organizational plaintiffs but chose not to take them. Had they
19 taken them, they would have had that during discovery.

20 JUDGE WINSOR: No, I understand. But you're not
21 disputing your obligation under Rule 26(a) --

22 MR. DISKANT: No, no, no.

23 JUDGE WINSOR: -- to list an individual who you were
24 going to rely on, and you didn't do that, right?

25 MR. DISKANT: Under 26(a)? I'm not a hundred percent

1 sure. We certainly had an obligation under 26(a) to identify
2 the organizational plaintiffs as witnesses. I'm not --

3 JUDGE WINSOR: You're not calling the organizational
4 --

5 MR. DISKANT: I'm not disagreeing with you. I'm just
6 stating more precisely what I thought the legal obligation was.

7 But in any event, we did not list the organizational
8 plaintiffs. We did not list these individuals. And to the
9 extent that was error, it was inadvertent, because -- it was
10 inadvertent.

11 JUDGE WINSOR: Okay. I think you were required to do
12 it. I think the issue is harmlessness, and if they're going to
13 say the same thing that everyone else is saying, I don't know
14 why it wouldn't be harmless, Mr. Jazil.

15 But your point in your motion was we don't have any
16 idea what they're going to say, which is a fair observation.
17 They say in their response -- here's what they're going to say;
18 they're going say what's in these declarations.

19 So what is the obstacle here, really?

20 MR. JAZIL: Your Honor, I still don't have any
21 information that I can actually test based on the declarations.
22 We propounded interrogatories and request for productions, asked
23 for both answers and documents supporting any diversion of
24 resource theory, any theory that they have members in the
25 specific district. We did not --

1 JUDGE WINSOR: Those are different issues, though. If
2 you're saying you asked for other information and you didn't get
3 it, that's a different issue. Just in terms of they're going to
4 put on a witness to say what's been said in the declarations,
5 what's the harm -- I mean, what would you have done differently
6 if you had known? You want a deposition on the lunch hour or
7 something like that? You're not asking for that, I assume.

8 MR. JAZIL: I'm not asking for that, Your Honor.

9 But the point is if you look at the declarations,
10 they're still not actually telling us, you know, I've got member
11 A, B, and C in District 1, 2, and 2. And if on the stand for
12 the first time, they're going to elaborate on that and actually
13 give the information they need to give us to establish their
14 standing under *Gill v. Whitford*, there's harm to us, because
15 that is the organization's using the rules to keep us from
16 getting information through interrogatories, rogs, and giving a
17 declaration, which then gets around the need to actually provide
18 any of this information in other forms.

19 And so to me, that would be -- that would be not
20 harmless is our position.

21 MR. DISKANT: These organizations have consistently in
22 this court and other courts objected disclosing their members'
23 identity, and we've done so because basically there's harassment
24 that they face that in today's world, honestly, any name that
25 gets associated with public controversy faces Tweets and threats

1 and online harassment, and both organizations are very
2 protective of the identity of their members. We have sworn --

3 JUDGE WINSOR: So they're not going to identify
4 members; they're just going to say what they've said in the
5 declarations, is what you're saying?

6 MR. DISKANT: That's what they would say if the Court
7 permits that as sufficient. However, they also said in their
8 declarations that they have names and addresses, and they would
9 provide that if the Court so ordered under an attorneys' eyes
10 only protective order.

11 So the information is available to Mr. Jazil if the
12 Court thinks that's appropriate.

13 JUDGE WINSOR: Okay. Well, I think we're mixing
14 issues here about what's sufficient as a evidentiary matter and
15 whether you had to disclose somebody. But I don't see any
16 harm -- we'll allow the witnesses to come testify, and then
17 we'll deal with whatever issues come from that later. And say
18 they've surprised you with something, then we can figure out how
19 to remedy that later.

20 MR. JAZIL: Sure, Your Honor. Thank you.

21 MR. DISKANT: In any event, just going back to the
22 order of March --

23 JUDGE WINSOR: Yes, sir.

24 MR. DISKANT: -- if we get all four of those witnesses
25 in today, we only have two witnesses left, and that will be

1 Leader Driskell, who will testify first thing Monday morning,
2 and Professor Baretto, who will follow, and that will wrap up
3 our case. And that might or might not take all day Monday. If
4 these two witnesses don't get on today, we'll put them on first,
5 but we're -- we're thinking our case is basically going to be
6 over Monday slopping over maybe a little into Tuesday.

7 The Secretary has two expert witnesses. Mr. Jazil
8 says each will be about -- I think half an hour, you said?

9 MR. JAZIL: I think an hour and a half or so max for
10 our experts.

11 MR. DISKANT: And we'll be done on Tuesday.
12 Conceivably it will slop over till Wednesday morning, but I
13 don't think either of us can imagine the evidentiary phase going
14 later than that. So I think we'll be well within the two weeks
15 the Court has blocked out, and that's basically the best we can
16 do with the witnesses we have.

17 JUDGE WINSOR: Okay. And you have -- your current
18 plan is just to call the two experts and no one else; is that
19 right?

20 MR. JAZIL: Your Honor, my plan is to call the two
21 experts and, depending on how things shake out, perhaps
22 Mr. Kelly for more focused direct. I think we covered a lot of
23 ground with him, but --

24 JUDGE WINSOR: Okay. But it would be a half day of
25 your case, maybe?

1 MR. JAZIL: Yes, Your Honor. And we'll have
2 Dr. Johnson available Monday so he can pick up --

3 JUDGE WINSOR: That was going to be my next question.
4 So you'll be ready to go starting Monday.

5 MR. JAZIL: Yes, Your Honor.

6 MR. DISKANT: And I also told Mr. Jazil that if
7 Mr. Johnson has trouble on Tuesday -- there's a possibility he
8 might -- we're perfectly happy to go late on Monday if need be.

9 JUDGE WINSOR: And so the ask is just to take tomorrow
10 off and pick up.

11 MR. DISKANT: That's the ask.

12 JUDGE WINSOR: You all agree with that?

13 JUDGE RODGERS: Granted.

14 THE COURT: Our concern was not whether we finish
15 earlier next week or take Thursday off. The concern is just
16 finishing in a two-week period, that's fine.

17 MR. DISKANT: We will finish. I think you've got
18 plans to leave on Friday, so I think we're good.

19 JUDGE WINSOR: Okay. Any other preliminary matters or
20 are we ready to --

21 MR. DISKANT: No, I think we're ready to go. Our next
22 witness is --

23 MR. LI: Wait.

24 MR. DISKANT: Oh, wait.

25 MR. LI: May I approach?

1 JUDGE WINSOR: Yes.

2 MR. LI: So just like yesterday, we have a set of
3 exhibits that we stipulated to. The exhibits that we stipulated
4 to yesterday were filed on the docket and we are getting
5 physical copies to y'all hopefully today, assuming that shipping
6 goes well. And these will also be on ECF tonight.

7 JUDGE WINSOR: Okay. So these are Plaintiff's Exhibit
8 1043.1, Plaintiff's Exhibit 3014, Plaintiff's Exhibit 3040,
9 Plaintiff's Exhibit 7199, and Plaintiff's Exhibit 7223.

10 These are all admitted now by stipulation?

11 MR. JAZIL: Yes, Your Honor.

12 JUDGE WINSOR: Okay. Thank you.

13 *(PLAINTIFF EXHIBITS 3014, 3040, 7199, 7223: Received in*
14 *evidence.)*

15 MR. DISKANT: And with that, our next witness is
16 Dorothy Inman-Johnson, and she will be examined by my colleague,
17 Katelin Kaiser.

18 **DOROTHY INMAN-JOHNSON, PLAINTIFF WITNESS, DULY SWORN**

19 DEPUTY CLERK: Be seated, please.

20 For the record, please state your name and spell your
21 last name.

22 THE WITNESS: Dorothy Inman-Johnson, I-N-M-A-N,
23 hyphen, J-O-H-N-S-O-N.

24 DEPUTY CLERK: Thank you.

25 JUDGE WINSOR: Ma'am, I didn't catch your last name.

1 MS. KAISER: Yes, Your Honor. Kaiser.

2 JUDGE WINSOR: Thank you. Go right ahead.

3 **DIRECT EXAMINATION**

4 BY MS. KAISER:

5 Q. Good morning, Ms. Inman-Johnson. How are you doing?

6 A. Fine.

7 Q. Where do you currently reside?

8 A. In Tallahassee.

9 Q. What county is Tallahassee located in?

10 A. Leon County.

11 Q. And so we have it in the record, what is your racial
12 identity?

13 A. African American.

14 Q. Did you grow up in Tallahassee?

15 A. No.

16 Q. Where did you grow up?

17 A. I was born and raised in Birmingham, Alabama.

18 Q. What was it like growing up in Birmingham, Alabama?

19 A. It was during a period of racial segregation and turmoil,
20 and so it was kind of difficult.

21 Q. And when you say "kind of difficult," can you further
22 explain what you mean by that?

23 A. Because there was a lot of racial overtones with fire
24 hoses, dogs, I was one of the teenage protesters in the civil
25 rights movement.

1 Q. And how did you get involved as a teenage protester in the
2 civil rights movement?

3 A. Because my mother was strongly supportive, and she was an
4 organizer for carpools in Birmingham during that period, and she
5 encouraged her children to be involved.

6 Q. And so about how long have you lived in Tallahassee?

7 A. I moved to Tallahassee in December 1971.

8 Q. And why did you decide to move to Tallahassee?

9 A. I moved to Tallahassee because my first husband, who was
10 getting his honorable discharge from the Army in Tacoma,
11 Washington, had been accepted into Florida A&M University to
12 complete his degree.

13 Q. And since you've moved to Tallahassee, have you always
14 lived in Leon County?

15 A. Yes.

16 Q. Do you know which congressional district you currently
17 reside in?

18 A. Congressional District 2.

19 Q. And are you a member of the Florida NAACP?

20 A. Yes.

21 Q. And are you aware that the Florida NAACP is an
22 organizational plaintiff in this matter?

23 A. Yes.

24 Q. How long have you been a member of the NAACP?

25 A. Four decades. I am a life member.

1 Q. And are you a member of Common Cause Florida?

2 A. I joined Common Cause Florida several years ago and served
3 on its board.

4 Q. And are you currently employed?

5 A. I am retired.

6 Q. When did you retire?

7 A. I retired a couple of times. I retired first in the end of
8 May 2012, and then I retired again in 2015.

9 Q. And before your retirement, what -- I should say
10 retirements, what were some of your previous occupations?

11 A. Well, I was a public school teacher in Leon County and in
12 Gadsden County for 26 years and outside of Florida for two
13 additional years.

14 Q. And did you do anything after you were a public educator?

15 A. I forgot this retirement. I retired from teaching in 1998
16 because I was recruited to become executive director or CEO of
17 the Capital Area Community Action Agency.

18 Q. And have you ever held political office?

19 A. Yes.

20 Q. When was that?

21 A. I filled an unexpired term from '84 till February '85, and
22 I ran for office in 19 -- December 1985 and was elected in
23 February 1986.

24 Q. And what were you elected as?

25 A. City commissioner, and I was the first Black woman ever

1 elected to the City commission.

2 Q. And why did you decide to run for office at that time?

3 A. Because of issues that I felt strongly about, and a lot of
4 the things that led me to do the work I did were being neglected
5 by local government.

6 Q. And what were some of those issues?

7 A. Issues of poverty, of services for children and low-income
8 families, proper housing affordability, and social justice
9 issues.

10 Q. And are you currently running for political office?

11 A. Yes.

12 Q. What office?

13 A. I am again running for City commission.

14 Q. And what made you want to run for office now?

15 A. Because there has been a change in how our local government
16 sees those who are most vulnerable in the community, and I
17 wanted to bring -- I want to bring attention to those issues.
18 Many of them were the same that caused me to run the first time.

19 Q. And do those issues that you just described relate to
20 congressional representation, if at all?

21 A. They relate to urban environments and poverty, and Black or
22 minority families are most affected.

23 Q. I'm going to switch gears and talk about your time -- ask
24 you a few questions about your time at Capital Area Community
25 Action Agency.

1 During your time at the agency, what was its mission?

2 A. I'm sorry?

3 Q. During your time at Capital Area Community Action Agency,
4 what was its mission?

5 A. What was the commission?

6 Q. The agency's mission?

7 A. Oh, the agency's mission.

8 Q. I apologize.

9 A. Thank you.

10 The agency's mission is to help low-income families to
11 lift themselves out of poverty, to attain financial
12 independence.

13 Q. What services, if any, did the agency provide to residents
14 in Leon County?

15 A. The agency provided -- was the grantee agency for several
16 federal programs. Among them was Head Start Community Service
17 block grants that helped families with rental assistance and
18 some utility assistance and family self-sufficiency programs
19 that provided more services, weatherization assistance program,
20 the LIHEAP -- Low-Income Home Energy Assistance Program --
21 and -- trying to make sure I covered all of them. I think that
22 was it.

23 Q. Thank you.

24 Did the agency provide similar services in other
25 counties?

1 A. Yes. We had an eight-county service area.

2 Q. Are there any other issues people in poverty that the
3 agency worked to address?

4 A. Can you repeat the question?

5 Q. We'll skip it.

6 What did you immediately do after retiring from the
7 agency?

8 A. Immediately after retiring from the agency, I wrote my
9 first book.

10 Q. And what was that book?

11 A. *Poverty Politics and Race in America*.

12 Q. And why did you decide to write that book?

13 A. Because during my 14 years as CEO of the agency, there were
14 many stereotypes about poor people that I did not find to be
15 accurate. I grew up in poverty. Those stereotypes didn't fit
16 me, and they didn't fit most of the people who came into our
17 agency.

18 Q. And can you provide the Court an example of one of those
19 stereotypes that you wanted to address?

20 A. That poor people are in the condition they're in because
21 they're lazy; they won't work; they don't -- they aren't
22 responsible. And those just did not fit. There were bad
23 apples, but all poor people were being judged by the bad apples.

24 Q. And in your opinion, how do issues of poverty affect
25 someone's ability to vote or be civically engaged?

1 A. First of all, most low-income families are working low-wage
2 jobs. They're often working part-time jobs, and in order to
3 make ends meet, they usually work more than one part-time job
4 and find it difficult to find childcare because it's not during
5 traditional work hours and transportation.

6 Q. And now we're going to turn our attention to the 2022
7 redistricting process.

8 Did you follow Florida's redistricting process to
9 redraw the congressional map in spring of 2022?

10 A. Mostly through the news.

11 Q. Do you know if Florida provided any publication -- public
12 education about the redistricting process?

13 A. I'm not aware.

14 Q. Do you know if there were opportunities for the public to
15 provide comments or feedback about the proposed maps?

16 A. If there were, I was not aware.

17 Q. And if there was an opportunity, for example, to provide
18 comments or feedback about the proposed maps, would you have
19 participated in that?

20 A. Very likely.

21 Q. Did the Florida legislature pass a new congressional map?

22 A. Yes.

23 Q. And in your opinion, did the new congressional map change
24 the representation of Tallahassee residents?

25 A. The most recent one?

1 Q. Yes, ma'am.

2 A. Yes, it did.

3 Q. How so?

4 A. The only Black or minority representative that Tallahassee
5 has ever had since Reconstruction and maybe before, when that
6 Congressional District 5 map was changed, we no longer had that
7 representative.

8 Q. And who -- what representative are you talking about?

9 A. Congressman Al Lawson.

10 Q. And who is Al Lawson?

11 Who is Al Lawson? Who is Mr. Lawson?

12 A. Al Lawson is an elected -- was an elected official who had
13 previously served in the House, Florida House of
14 Representatives, the Florida Senate, and was elected once
15 Congressional District 5 was drawn to Congress.

16 Q. And you previously mentioned you lived in -- you lived in
17 Congressional District 2?

18 A. Yes.

19 Q. And so how are you impacted by the changes to Congressional
20 District 5?

21 A. Because Al Lawson was a minority, like I am, he understood
22 issues impacting us, and it was important to have somebody in
23 Congress from our region who had interests in common, had an
24 understanding of our county. And it didn't matter whether I was
25 in the part of Leon County that was Congressional District 2 or

1 I was in Congressional District 5; the issues are the same for
2 minorities, and he was a representative that we trusted to know
3 what those issues were and how we were impacted.

4 Q. So even though Mr. Lawson was not your congressional
5 representative, do you feel like you benefited from his
6 representation?

7 A. Absolutely. He was very accessible. He didn't draw a line
8 through Leon County and say you cannot have access to me because
9 you are in 2 instead of 5. He had a congressional district
10 office here in Leon County that had staffers who actively worked
11 in the community, knew the people in our minority community, and
12 worked for us. We had access to reach him and tell him what our
13 needs were, and he would express that on the floor of Congress
14 and brought a lot of benefits back to our county and district.

15 THE COURT: Were you -- you say that you're in current
16 Congressional District 2 now?

17 THE WITNESS: Yes.

18 THE COURT: Is that correct?

19 Were you in the former Congressional District 5 or
20 have always remained in what was called 2?

21 THE WITNESS: There was no congressional district --
22 when Congressional District 5 was drawn, it was drawn without my
23 neighborhood in it, and I was always in Congressional District
24 2.

25 THE COURT: Okay. Got it, got it. Thank you.

1 BY MS. KAISER:

2 Q. And following Judge Jordan's question, was Tallahassee
3 split between Congressional District 2 and Congressional
4 District 5?

5 A. Yes.

6 Q. Did you have any interactions or experiences with
7 Mr. Lawson?

8 A. Regularly.

9 Q. What were some of those interactions with him?

10 A. He arranged -- when I was at Capital Area, he arranged
11 before he was elected to Congress, showing he had always been
12 active to have representation from Congress at a meeting at the
13 capital on healthcare when the Affordable Care Act was passed
14 and there were attempts to eliminate it.

15 Q. And did you have any recent opportunity to vote for
16 Mr. Lawson?

17 A. Yes.

18 Q. When was that?

19 A. Most recently it was the last election, when he ran in
20 Congressional District 2 after 5 was eliminated.

21 Q. And who was Mr. Lawson running against?

22 A. Congressman Neal Dunn.

23 Q. Did your candidate of choice win for Congressional District
24 2?

25 A. No.

1 Q. Who won?

2 A. Neal Dunn.

3 Q. Is it fair to say Mr. Lawson was your candidate of choice?

4 A. Yes.

5 Q. Why was he your candidate of choice?

6 A. He was my candidate of choice because he had been working
7 for Leon County and many of the rural and coastal districts
8 around Leon County and the Big Bend for many years. It was -- I
9 think the late '80 -- the early '80s when he was first elected
10 to the Florida House of Representatives, and he had been very
11 consistent in representing the needs of constituents throughout
12 the district, both the urban needs, the rural needs, and the
13 coastal needs with red tide.

14 Q. In your experience, what is Mr. Dunn like as a
15 congressional representative?

16 A. I really have no awareness of his work.

17 Q. Why do you say that?

18 A. Because he is not as accessible.

19 Q. Do you have an example of an experience with Mr. Dunn?

20 A. Yes.

21 Q. What happened?

22 A. It was basically through phone calls to his office. His
23 staff was very pleasant on the phone, but nothing was done on
24 the issue that I had contacted them about.

25 Q. What issue did you contact his office about?

1 A. I contacted his office on different times. One was about
2 social security and raising the cap to ensure that the fund
3 remained viable.

4 I contacted him about the Affordable Care Act during
5 the many times that we thought it was in danger.

6 Q. And you just mentioned you contacted him by phone; is that
7 correct?

8 A. Yes.

9 Q. And that was his office?

10 A. Yes.

11 Q. Have you ever tried contacting Mr. Dunn through email?

12 A. No.

13 Q. And are there any other experiences that you've had or --
14 with Mr. Dunn in Tallahassee?

15 A. The most recent was when the main post office in
16 Tallahassee was being renamed in honor of Mrs. Edwina Douglas
17 Stevens, and it was -- the renaming was happening because Al
18 Lawson had gotten it through Congress. But at the time it
19 happened, Al was no longer the congressional representative, so
20 Neal Dunn came to the dedication. He was not familiar at all
21 with the long-time work of Ms. Stevens. Al was and had worked
22 very closely with her. She was considered the mother of the
23 South Side of Tallahassee.

24 Q. And for those of us who might not be familiar with the
25 South Side of Tallahassee, could you describe that area for us?

1 A. It is -- it makes up the census tracks that run from
2 actually downtown and where Frenchtown and Griffin Heights over
3 to what you would consider South Side, which would be Bond
4 community and the South City neighborhoods.

5 Q. And what sort of -- what residents live in those
6 neighborhoods?

7 A. The lowest-income residents. The Frenchtown-Griffin
8 Heights, which is the 32304 neighborhood, is considered the
9 poor -- one of the poorest neighborhoods in Florida, and the
10 32301, or South City, is considered Number 2 in Leon County.

11 Q. And how did this experience with Mr. Dunn make you feel as
12 his constituent?

13 A. I wished Congressman Lawson had been there to really talk
14 about the work of Edwina Stevens over many, many years that
15 earned her that title.

16 Q. Do you know where Mr. Dunn is based?

17 A. Panama City.

18 Q. How does Panama City differ from Tallahassee, if at all?

19 A. Has a much lower population, fewer -- much less minority
20 population. It's coastal. It's more of a working and tourist
21 area. And Tallahassee is the largest population center in the
22 Big Bend area, and between Tallahassee and Gadsden County, which
23 is immediately adjacent to the West, they have the highest
24 population of minorities.

25 Q. What issues, if any, has Neal Dunn focused on?

1 A. I don't know.

2 Q. What issues do you wish Neal Dunn would focus on?

3 A. Issues that affect large population centers that are very
4 diverse that deal with poverty issues, economic development
5 issues, housing and healthcare issues, and a lot of social
6 justice, criminal justice issues that are more impactful in
7 highly urban areas, along with the needs of rural communities
8 and coastal communities.

9 Q. And when you previously said you didn't know what issues
10 Mr. Dunn focused on, why did you say that?

11 A. Because I really don't have contact with Congressman Dunn
12 and his staffers. They are not as visible in the Tallahassee
13 area, and they are not easy to contact and get responses, direct
14 responses from. You can get a phone call, but it's usually just
15 a nice phone call, but it really doesn't deal with the request
16 that you're making.

17 Q. And as a resident of Leon County, do you think Neal Dunn is
18 a good representative?

19 A. I don't.

20 Q. Why do you say that?

21 A. For the reasons I've given previously.

22 Q. And when we first started this examination, you had
23 mentioned that you were running for City commissioner.

24 What city is that race for?

25 A. Tallahassee.

1 MS. KAISER: Thank you. I'm -- will pass the witness.

2 **CROSS-EXAMINATION**

3 MR. PRATT: Good morning, Your Honors. May it please
4 the Court. Joshua Pratt on behalf of the Secretary.

5 BY MR. PRATT:

6 Q. Good morning, Ms. Inman-Johnson.

7 A. Good morning.

8 Q. Thank you for taking the time to speak with us today.

9 Just to start off, it's my understanding from your
10 testimony today that you currently reside in Congressional
11 District 2; is that correct?

12 A. Yes.

13 Q. I believe I heard you also mention that you didn't reside
14 in Congressional District 5 under the prior congressional map;
15 is that also true?

16 A. Yes.

17 Q. So Al Lawson was never your elected representative of
18 choice; is that correct?

19 A. He was not in my congressional district, but he was always
20 my representative.

21 Q. But isn't it true that representatives only represent the
22 constituents who live in their district?

23 A. Could you repeat?

24 Q. Sure. Isn't it true that elected representatives of the
25 U.S. House of Representatives, they only represent the

1 constituents who actually live in their district?

2 A. Technically. However --

3 Should I continue?

4 Q. You may.

5 A. However, a good representative, as Al Lawson was, did not
6 draw a line based on needs of people in Leon County, even though
7 Leon County was divided.

8 Q. Understood.

9 Now, if former Congressional District 5 were restored,
10 isn't it also true that you wouldn't have a chance to vote for
11 Al Lawson if you were to run in that election?

12 A. Can you repeat the question?

13 Q. Sure. So if former Congressional District 5 were restored,
14 and your testimony is that you didn't live there, isn't it also
15 true, then, that you wouldn't have the chance to vote in that
16 election for, say, Representative Lawson?

17 A. Yes.

18 THE COURT: You're assuming that it would be
19 reconfigured in exactly the same way as the old CD-5?

20 MR. PRATT: Under that line of questioning, yes, sir.

21 THE COURT: Okay.

22 BY MR. PRATT:

23 Q. But assuming, then, let's say the Jacksonville district
24 were drawn instead -- and I don't know if you've seen the maps
25 in this case, but it's more of a donut hole district that kind

1 of encompasses Jacksonville itself -- since you live in
2 Tallahassee, you wouldn't in that scenario be able it to vote in
3 that Jacksonville election, correct?

4 A. Correct.

5 Q. And speaking of the current representative of your
6 district, Representative Dunn, I think you mentioned that you
7 felt that he wasn't responsive to you or your needs; is that
8 correct?

9 A. Yes.

10 Q. But you have no knowledge of whether Representative Dunn
11 speaks with other constituents or travels regularly when he
12 hasn't talked to you; is that correct?

13 A. That's correct.

14 Q. So it's quite possible that he's very accessible in the
15 Tallahassee area, just not to your knowledge as of yet; is that
16 fair to say?

17 A. It's fair, but not to minorities.

18 Q. Well, in your personal experience, he hasn't met with you,
19 but you don't have any knowledge that he hasn't met with other
20 minorities in your district; isn't that correct?

21 A. That's correct.

22 Q. And then I know you mentioned in your testimony that it was
23 important to you to have a representative that lived in your
24 area so that they would be more accessible; isn't that true?

25 A. Yes.

1 Q. So wouldn't that same reasoning apply, then, to other
2 districts where maybe someone lives in a largely populated area
3 such as Jacksonville, Orlando, Miami? Wouldn't you imagine that
4 they would like to have that same access to their
5 representatives?

6 A. Yes.

7 Q. Now, Ms. Johnson, my understanding from your testimony is
8 that you're a registered Democrat, correct?

9 A. Can you repeat?

10 Q. Yes, ma'am. Are you a registered Democrat?

11 A. Yes, I am.

12 Q. And how long have you been registered as a Democrat for?

13 A. As long as I have been registered.

14 Q. I'm glad that you've been able to participate in the
15 political process for some time, then, too.

16 I imagine, then, when electing your political
17 representatives, political party is important to you, correct?

18 A. The party is important, but not as much as representation
19 on issues of importance to me and other minorities.

20 Q. Well, speaking, then, as representation on issues that are
21 important to you or minorities, is it fair to say that the
22 policy positions on issues that are important to you align
23 generally with the Democratic party?

24 A. Yes, they have been more representative of the needs.

25 Q. And so, then, I would imagine, generally speaking, in

1 elections that you would vote for Democratic candidates
2 regardless of their race or gender?

3 A. It depends.

4 Q. Let's talk about your former congressional district where
5 you resided -- or I guess where you currently reside, which is
6 now Congressional District 2.

7 Do you recall who your elected representative was from
8 1997 to about 2010?

9 A. I know my congressional representatives, but I may not be
10 able to match them up with the exact years.

11 Q. No problem. That's completely understandable.

12 Does the name Allen Boyd ring a bell?

13 A. Yes.

14 Q. And do you recall for a substantial period of time, was he
15 your elected congressional representative?

16 A. Yes, he was.

17 Q. And Mr. Boyd's a white Democrat; is that correct?

18 A. Yes.

19 Q. Now, also, after Mr. Boyd, I believe there was a change in
20 your representation of that seat. Do you recall that change
21 happening maybe around 2010, 2011?

22 A. I know Allen Boyd was defeated by Steve Southerland.

23 Q. So then Steve Southerland would have been your elected
24 representative for a period of maybe four years or so; does that
25 sound right?

1 A. Yes.

2 Q. And Mr. Southerland was a white Republican?

3 A. Yes.

4 Q. Now, speaking of political candidates, Ms. Inman-Johnson,
5 you voted in the 2022 election, correct?

6 A. Yes.

7 Q. And I imagine that you voted for a candidate in the State
8 Senate race; is that also correct?

9 A. I'm sorry?

10 Q. Sure. I'll repeat. So we've been talking about the U.S.
11 congressional House seat, and I'm switching a little bit of
12 change of pace to the State Senate and the State House of
13 Representative seats, so your local representatives for the
14 Florida House and Senate.

15 Just speaking of the State Senate race, do you recall
16 voting for a candidate back in 2022?

17 A. Yes.

18 Q. And do you recall whether that candidate was a Democratic
19 candidate in the State Senate race?

20 A. I'm trying to remember.

21 Q. No problem. Would the name Loranne Ausley refresh your
22 recollection?

23 A. Yes.

24 Q. And I imagine was that the candidate that you voted for
25 that was a Democrat?

1 A. It was.

2 Q. And you're aware that her race is white, not Black,
3 correct?

4 Are you aware of Ms. Ausley's race?

5 A. Yes.

6 Q. And she's a white Democrat, correct?

7 A. Yes.

8 Q. And the Republican candidate, do you recall his name being
9 Corey Simon?

10 A. Yes.

11 Q. And he's a Black Republican, correct?

12 A. Yes.

13 Q. Now, Ms. Johnson, you mentioned a little bit that you
14 followed with great interest the news surrounding the
15 redistricting process this last cycle; is that correct?

16 A. In the news.

17 Q. And I believe you mentioned that you weren't aware of
18 whether the legislature was either responsive to you or maybe
19 took public comment; is that fair to say?

20 A. I was not aware.

21 Q. So then you wouldn't be aware of the public meetings that
22 the Florida legislature would have held where they invited
23 public comment; is that true?

24 A. That would be true.

25 Q. And then you wouldn't necessarily be aware, then, that

1 Florida legislature had an online portal where members of the
2 public could actually present their own versions of
3 congressional maps; is that correct?

4 A. That would be correct.

5 Q. But you are aware, though, that regardless of any issue
6 that's before the legislature, you can always go to your State
7 representatives in the Florida Senate and House and make your
8 beefs known to them, correct?

9 A. Was not aware.

10 Q. Excuse me?

11 I'll repeat. So isn't it true that regardless of
12 whether there's a bill being debated in the Florida House or
13 Senate that you can always go to your elected representative
14 either by email, make a phone call, request a meeting to express
15 your views on a particular issue?

16 A. Yes.

17 Q. But you didn't do that in this case with respect to the
18 congressional redistricting maps that were being debated in the
19 Florida House or Senate, right?

20 A. Because there was no news of the details of the map. It
21 was reported that the legislature had submitted maps to the
22 Governor for approval and he had not accepted them.

23 Q. Understood.

24 Now, Ms. Johnson, I believe you, like many, have a
25 Facebook account; is that correct?

1 A. Yes.

2 Q. And my understanding is that your Facebook account -- you
3 publicly post on a variety of topics and issues; is that right?

4 A. I don't often post on Facebook.

5 Q. That's good practice.

6 But speaking of Facebook posts, have you ever used
7 your Facebook account to refer to the Governor as "a mix of
8 Hitler and Putin"?

9 A. Can you repeat?

10 Q. Sure. Do you recall of posting on your Facebook account a
11 post that referred to Florida's Governor as "a mix of Hitler and
12 Putin"?

13 A. As a...

14 Q. A mix, mixture of Hitler and Putin.

15 A. No.

16 Q. Would it help refresh your recollection or maybe help
17 orient you to what I'm speaking about if --

18 MS. KAISER: Objection, Your Honor. This is outside
19 the scope of her direct examination.

20 MR. PRATT: Your Honor, I believe it goes first to
21 credibility of the witness and then, second, she's been speaking
22 about the harms that face different voters in her district and
23 nearby, and this is just some of her -- potentially some of her
24 speech about political issues.

25 JUDGE WINSOR: It's overruled. But maybe we can move

1 things along a little bit.

2 MR. PRATT: Sure.

3 Your Honor, may I approach?

4 BY MR. PRATT:

5 Q. Ms. Johnson, if you wouldn't mind just taking a quick look
6 at that first page.

7 A. Yes.

8 Q. Having looked at this page, does this --

9 A. This is Twitter.

10 Q. Oh, Twitter. My apologies. I don't use either, so that's
11 my mistake.

12 So going back to the original question, do you recall
13 making those comments on Twitter now?

14 A. Yes.

15 Q. And then relatedly, have you ever referred to the Florida
16 Governor as "a straight-up dictator"?

17 A. Yes.

18 MR. PRATT: No further questions, Your Honor.

19 THE WITNESS: May I read the rest of it?

20 MR. PRATT: If you wish, yes, ma'am.

21 THE WITNESS: "Dismantling our constitutional rights
22 to suit his political agenda."

23 And this was in relationship to the Governor
24 threatening to take our elected superintendent of schools, Rocky
25 Hanna, out of office because of a complaint by one of his

1 constituents about the curriculum in Leon County schools.

2 BY MR. PRATT:

3 Q. Understood. But in that scenario, that was in reference to
4 a complaint made in an investigation done by the Florida
5 Department of Education; is that correct?

6 A. At the Governor's pleading.

7 Q. But you have no personal knowledge of this matter other
8 than the things that you've read in the news, correct?

9 A. And in the news it stated that Governor DeSantis was not
10 happy with Rocky Hanna's "woke agenda" and would be
11 investigating him. And the fear by Leon County residents was
12 that he would do to our superintendent that we elected the same
13 as he had done to a district attorney in Central Florida because
14 he did not agree with a policy by the Governor.

15 MR. PRATT: No further questions. Thank you.

16 JUDGE WINSOR: Before you sit down. Ma'am, there was
17 a discussion, Ms. Inman-Johnson, about -- who's represented you
18 at different times. And you may have said this already, and I
19 apologize. But did you say how long you've lived where you
20 currently live?

21 THE WITNESS: I have lived at the address where I am
22 since 1990.

23 JUDGE WINSOR: Okay.

24 Anything else, Mr. Pratt?

25 MR. PRATT: No, sir.

1 THE COURT: Any redirect?

2 MS. KAISER: No, Your Honors. Thank you very much.

3 JUDGE WINSOR: Thank you, ma'am. You're excused.

4 THE WITNESS: Thank you.

5 *(Witness excused.)*

6 JUDGE WINSOR: So your next witness is the expert by

7 Zoom?

8 MR. DISKANT: Yes, Your Honor.

9 JUDGE WINSOR: Okay. We'll take a break, then, to let
10 you set that up be, and if everyone will be back at a quarter
11 till.

12 MR. DISKANT: Thank you, Your Honor.

13 *(Recess taken from 9:35 a.m. to 9:52 a.m.)*

14 JUDGE WINSOR: Have a seat.

15 Couple of things before we begin with the next
16 witness. I did want to let you all know that the report we're
17 receiving about the shutdown is that we will be able to continue
18 next week whether there's a shutdown or not. So that's the
19 latest information. We'll certainly let you know if that
20 changes.

21 One other thing just to be aware of. Monday -- as of
22 now, there's a separate jury trial scheduled to begin, so I just
23 advise y'all to give yourself a little extra time with security.
24 You might be competing with 40 or 50 potential jurors, so just a
25 couple updates there.

1 And I understand the Zoom connection is all ready.
2 You can call the next witness.

3 MS. BLUM: Plaintiffs call Dr. Morgan Kousser to the
4 stand.

5 JUDGE WINSOR: Dr. Kousser, can you hear me?

6 THE WITNESS: Yes.

7 JUDGE WINSOR: And you could hear the lawyer just now?

8 THE WITNESS: Yes.

9 JUDGE WINSOR: Can you see Ms. Stark there in the
10 pink?

11 THE WITNESS: No.

12 JUDGE WINSOR: She's in a pink blazer.

13 THE WITNESS: I'm sorry. I have a very large -- A
14 very small picture of the courtroom.

15 JUDGE WINSOR: Well, she's going to swear you in, so
16 if you'll just raise your right hand to be sworn.

17 **J. MORGAN KOUSSER, PLAINTIFF WITNESS, DULY SWORN**

18 DEPUTY CLERK: Please state your full name and spell
19 your last name for the record.

20 THE WITNESS: Initial J, middle name Morgan,
21 M-O-R-G-A-N, last name Kousser, K-O-U-S-S-E-R.

22 DEPUTY CLERK: Thank you.

23 **DIRECT EXAMINATION**

24 BY MS. BLUM:

25 Q. Good morning, Dr. Kousser.

1 A. Good morning.

2 Q. Dr. Kousser, what is your profession?

3 A. I'm a historian and political scientist.

4 Q. And what is your highest level of education?

5 A. Ph.D.

6 Q. Where did you receive your Ph.D. from?

7 A. Yale.

8 Q. What universities have you taught at, Dr. Kousser?

9 A. Well, for 50 years, I taught at Cal Tech, California
10 Institute of Technology. I was a visiting professor for a year
11 at Oxford. I was a teaching assistant at Yale. I taught for a
12 summer at the University of Michigan, taught for a semester at
13 Harvard, taught for a semester at the Hong Kong University of
14 Science and Technology.

15 Q. And, Dr. Kousser, you're not an attorney, are you?

16 A. That's correct.

17 Q. Dr. Kousser, what does your work focus on?

18 A. It focuses on elections, particularly election law; on
19 Southern history; on political science and the history of race
20 relations, particularly in the South; and on social scientific
21 history.

22 Q. And have you published on those subjects?

23 A. I have, and legal history as well.

24 Q. Could you give the Court some examples of some of the
25 publications that you've written on these subjects?

1 A. My dissertation and first book is called *The Shaping of*
2 *Southern Politics*. It's about suffrage restriction and the
3 establishment of the one-party South 1880 to 1910. It treats
4 all of the 11 ex-Confederate states, including Florida.

5 *Colorblind Injustice* is a book about more recent
6 voting rights cases and the development of voting rights law.
7 The core chapters were reports -- originally reports in major
8 voting rights cases throughout the country.

9 I published -- coedited a Festschrift --
10 F-E-S-T-S-C-H-R-I-F-T -- that means an essay -- in honor of my
11 Ph.D. thesis advisor, (inaudible) Woodward.

12 And sort of notably, for purposes of recent election
13 law, I published a 110-page, 662-footnote article on the
14 development of Section 5 of the Voting Rights Act in the Texas
15 Law Review 2007.

16 Q. Have you ever previously testified as an expert in
17 litigation?

18 A. I have. I've either testified or consulted in over 60
19 voting rights cases, mostly federal, but also a good many under
20 the California Voting Rights Act, which is separate state voting
21 rights act. So I testified in some notable cases, including, I
22 think, three before in Florida, as well as cases like Los
23 Angeles County Board of Supervisors case, redistricting in
24 Texas, North Carolina, other places as well.

25 *Mobile v. Boldin* was the first case that I ever

1 testified in, but I've testified in both -- both as to the
2 intent of the framers of a particular law and to the statistical
3 basis for Section 2 cases.

4 Q. Have you ever testified before Congress?

5 A. I testified twice before a subcommittee of the House
6 Judiciary Committee, in 1981 on the Voting Rights Act extension
7 at that point and in 2019 on the bill -- the John Lewis bill
8 that passed the House at that point but did not receive
9 consideration in the Senate.

10 Q. As it relates to this case, what is your area of expertise?

11 A. Area of expertise is the history of voting rights and
12 election law, particularly in the South, and for this case, in
13 particular in Florida.

14 Q. Would you say you were also an expert in racial
15 discrimination and the history of it?

16 A. Yes. I've done extensive work on racial discrimination
17 voting laws and, also, in school racial discrimination.

18 SP: Ticker: Your Honors, at this time I would like to
19 offer Dr. Kousser as a qualified expert with respect to
20 Florida's history of voting rights and racial discrimination.

21 JUDGE WINSOR: Any objection?

22 MR. JAZIL: No, Your Honor, but may I have some brief
23 *voir dire*?

24 JUDGE WINSOR: Sure.

25 BY MR. JAZIL:

1 Q. Good morning, Dr. Kousser. Can you hear me all right?

2 A. Yes.

3 Q. Dr. Kousser, you'd agree with me that you are not drawing
4 any conclusions about the intent of anyone in the legislature as
5 part of your opinion in this case, right?

6 A. I am presenting evidence so that there will be plentiful
7 information so that the judges can draw conclusions about many
8 matters, including the intent of the people in the legislature.

9 Q. Okay. So if I understand that correctly, you'll be
10 presenting information about the history, the events, and the
11 statements, but the conclusions about intent are for the Court;
12 you agree with that?

13 A. The Court is the finder of fact, and I will present
14 information that I hope will make it possible for them to reach
15 conclusions on the basis of the full information about the
16 events.

17 MR. JAZIL: Your Honors, so long as he's not drawing
18 legal conclusions about intent, we don't oppose him as an
19 expert.

20 JUDGE WINSOR: Okay. Fair.

21 MR. JAZIL: I don't know if the Court would like for
22 me to renew my objection on a question-by-question basis, or can
23 I just get a definitive ruling under Rule 103 so that we're
24 clear so that Mr. Kousser is not testifying about --

25 JUDGE WINSOR: But the prospective objections you're

1 talking about are just to what? Improper opinion?

2 MR. JAZIL: Yes, Your Honor.

3 JUDGE WINSOR: And you agree on the scope?

4 MS. BLUM: Yes.

5 JUDGE WINSOR: You can go ahead. And I'm sorry.

6 Would you tell me your name? I didn't --

7 MS. BLUM: My name is Anna Bloom, Your Honor.

8 JUDGE WINSOR: Okay. You can go right ahead.

9 MR. JAZIL: Thank you.

10 MS. BLUM: Thank you, Your Honor.

11 BY MS. BLUM:

12 Q. So, Dr. Kousser, I believe that Mr. Jazil covered with you
13 your assignment in this case, so I'll move on from that
14 question.

15 What categories of evidence did you consider in the
16 work that you performed in this case?

17 A. I considered hearings and legislative floor debates,
18 information about press conferences, memos, that sort of stuff,
19 scholarly materials from history and political science relating
20 to redistricting in general in Florida, redistricting matters in
21 particular, the history of discrimination in Florida.

22 I looked at newspaper articles extensively. Those are
23 sources that historians conventionally rely on, and they provide
24 material you can't easily see from individual documents.

25 I looked at some reports, demographic and other

1 reports. I read Professor Beretta's testimony, the testimony of
2 the opposing expert witness in this case.

3 I looked at court cases, because much of the action,
4 particularly in 2021-22 was explicitly framed by the court
5 cases, in particular the Florida Supreme Court's abortion cases
6 from 2012 to 2015, but I also looked at other court cases.

7 I've -- have read a great many Section 2 cases and other cases
8 both for Florida and other places, and they allow me to comment
9 on the continuation of discrimination after 1965, for example.

10 Q. And did you review legislative transcripts in the course of
11 your work in this case?

12 A. Yes. I meant to include those in the legislative hearings
13 and floor debate.

14 Q. Did counsel instruct you to apply the Arlington Heights
15 factors in this case?

16 A. You did.

17 Q. Briefly, could you list those factors for the Court?

18 A. They are the impact of the challenged law, the historical
19 background, the specific sequence of events leading up to its
20 passage, procedural and substantive departures, the contemporary
21 statements and actions of key legislators, the foreseeability of
22 the disparate impact, the knowledge of that impact, the
23 availability of less discriminatory alternatives.

24 I should say, as I discussed in my deposition, that as
25 early as 1991, I looked at the Arlington Heights factors and

1 tried to elaborate on the rationales for the Arlington Heights
2 factors using lower court decisions, lower federal court
3 decisions. The Supreme Court often states things in a sort of
4 oracular manner, leaving it to lower courts to flesh out things,
5 so I list material both in a law review article and in
6 *Colorblind Injustice*, my book, discussing the Arlington Heights
7 factors.

8 I broke down some of the Arlington Heights factors
9 into more specific sorts of statements, but in the report that I
10 gave that I prepared for this trial and which I believe the
11 State has, I showed how you can simply include my -- the factors
12 that I broke out into the Arlington Heights factors as they were
13 originally stated plus the additions made by the Eleventh
14 Circuit.

15 Q. Dr. Kousser, you mentioned earlier that an expert for the
16 defendant offered a report on the history of this case and that
17 you reviewed that report. Did that expert challenge any of the
18 facts that you cite in your report?

19 A. No.

20 Q. Dr. Kousser, I'd like to discuss the Arlington Heights
21 factors that you applied in this case. I'd like to start with
22 the historical background.

23 Dr. Kousser, what historical time period did you
24 examine in connection with this case?

25 A. I started in 1968 and I brought it up to the present, even

1 past the 2022 renewal -- I'm sorry -- the 2022 passage of the
2 redistricting.

3 Q. And in brief, could you summarize the conclusions you
4 reached with respect to the historical background relating to
5 voting in Florida that you considered?

6 A. Florida has used election law from the beginning of the
7 time that Black people could vote in Florida to the present to
8 heighten the discrimination against Blacks. Starting in 1868
9 with the State constitutional convention, State constitution,
10 and moving up to the present, I go through one by one things
11 that happened in the 19th century. It's a very small part of
12 the report; I think it was seven pages out of 152 pages in my
13 report.

14 So I look at it at that point to show that
15 redistricting was used as a disenfranchising device or a device
16 to diminish Black political influence from the very beginning
17 and that that continued. I go through disfranchisement, very
18 quickly over events, the other events in the Jim Crow period,
19 move up to 1965, the Voting Rights Act, go through the cases,
20 cases that Florida produced which minorities won from 1965 to
21 the present, and focused on the development of redistricting and
22 the way that redistricting has been carried out, particularly
23 the passage of the Fair Districts Amendment, which I'll call the
24 FDA, and the use of the FDA in 2020, 2012 to 2015 to challenge
25 what the State of Florida did in 2012 redistricting, which

1 shaped the 2021-22 redistricting.

2 So the history informs what I have to say about the
3 2021-22 redistricting.

4 Q. Dr. Kousser, where geographically was the Black population
5 located in Florida in 1868?

6 A. It was in North Florida, as it had been since Florida came
7 into the Union in 1845.

8 Q. And that was where the plantations had historically been
9 located in Florida; is that right?

10 A. That's correct.

11 Q. That's sometimes called "the Slave Belt" in Florida; is
12 that right?

13 A. Yes.

14 Q. Could you name any modern-day counties that covered this
15 area?

16 A. There are counties -- Gadsden County is the most heavily
17 Black county in Florida, and it has long been. But the rest of
18 the counties in North Florida, particularly Northeastern Florida
19 where CD-5 was located from 2016 through 2022, those are
20 counties that were very much a part of the Plantation Belt at
21 that time.

22 Q. So why, if at all, is the location of the Black population
23 in 1868 significant to this case?

24 A. Well, there's a long tradition of Black people living there
25 and being discriminated against. They were discriminated

1 against in the 1868 constitution in important ways. In -- the
2 1868 constitution contained two provisions that were
3 particularly important for squelching Black power to make sure
4 that it did not develop in politics.

5 The first was that unlike the vast majority of classes
6 in the 1860s, there was not a -- an allocation of the State
7 legislative seats proportionate to the population. Turns out
8 that I had a graduate student who did a lot of work on the
9 apportionment over time, and the 1860s and '70s are the time of
10 most equal apportionment in the history of the United States
11 until 19 -- the 1960s.

12 So the consequence of this was that counties that were
13 overwhelmingly white got disproportionate power, and the
14 counties that were majority Black or near majority Black in
15 North Florida got less power, so that Black males could vote,
16 but they did not have -- even if they voted, they didn't have
17 the opportunity to elect candidates of their choice in nearly
18 the proportions of the population in the State legislature.

19 There was another provision that was important, and
20 that was -- and again, this is very much against the conditions
21 throughout the country, including the South at the time.
22 They -- local office -- officers in counties were not elected
23 after the 1868 constitutional convention until 1985. They were
24 all appointed by the Governor. And historians who specialized
25 in the reconstruction in Florida have said that that was to keep

1 Blacks from getting local office.

2 So Blacks couldn't get in local office and then they
3 couldn't get into the legislature in proportionate terms because
4 of the constitutional violation -- what we would call "the
5 constitutional violation," what they called simply "the
6 constitution" at the time.

7 So election laws have been used from the very first in
8 Florida to ensure that there was -- that Blacks could not
9 exercise power proportionate to their numbers.

10 Q. In the course of your work in this case, did you review the
11 1860 census data available through the Library of Congress?

12 A. I did. I looked at, in particular, a map that had ten
13 shades, but they were shades of gray, so it's a little hard to
14 see them on screen.

15 Q. And that map confirmed your understanding that the Black
16 population lived in North Florida in 1868, right?

17 A. Absolutely, yes.

18 Q. I'd like to show you what's been marked PX4558, which is
19 not yet in evidence.

20 Did you review this map in the course of your work in
21 this case?

22 A. I did.

23 MR. JAZIL: Your Honor, this map is outside the scope
24 of the witness's expert report. The data underlying it was
25 never provided to us either. So I would object to its

1 publication and use at this time.

2 THE COURT: Just a question: Where can we find it,
3 just quickly look at it?

4 MS. BLUM: Your Honor, it's on slide 5 of the
5 PowerPoint presentation I passed up.

6 And I just note that Dr. Kousser does link to the
7 article that this image is taken from in a footnote in his
8 report.

9 JUDGE WINSOR: I'm sorry. What did you say?

10 MS. BLUM: Dr. Kousser does, in his expert report,
11 which was disclosed to the other side -- this image is part
12 of -- its available in a hyperlink in a footnote.

13 JUDGE WINSOR: So it's just this one page is the whole
14 exhibit?

15 MS. BLUM: Yes, Your Honor.

16 MR. JAZIL: And, Counsel, you said it's on footnote
17 440?

18 MS. BLUM: I believe it's 440. I can go check.

19 MR. JAZIL: I clicked the footnote. Lots of maps, not
20 that one.

21 JUDGE WINSOR: Well, consistent with what Judge Jordan
22 said yesterday, why don't we just go ahead. You can ask him
23 about it subject to any arguments later about why we shouldn't
24 consider it or why it's not relevant.

25 The examination on this map is just going to be does

1 this show -- is this the information you gathered about Black
2 population in 1860s?

3 MS. BLUM: Exactly, Your Honor.

4 JUDGE WINSOR: And then you're going to move on?

5 MS. BLUM: Yes, Your Honor.

6 JUDGE WINSOR: Okay. We'll do it that way. So you
7 can ask about what you've reserved any --

8 MR. JAZIL: Understood, Your Honor.

9 JUDGE WINSOR: So it's admitted with that -- this is
10 PX4558 is admitted conditionally.

11 *(PLAINTIFF EXHIBIT PX4558: Received in evidence.)*

12 BY MS. BLUM:

13 Q. Dr. Kousser, this map shows you understanding of where the
14 Black population lived in North Florida graphically; is that
15 correct?

16 A. That's correct.

17 Q. Dr. Kousser, you discussed the first redistricting just
18 now. From that first redistricting and prior to 1900, what
19 other obstacles relating to voting did Black Floridians face?

20 A. Well, later on in the 1880s, starting in the 1880s, there
21 were actions that led to -- step by step led to the
22 disenfranchisement of Blacks after -- from the 1890s on.

23 In 1887, there -- the legislature, on the last day,
24 passed an annual registration act. It made -- it replaced
25 permanent registration with annual registration. Annual

1 registration makes it more difficult to vote, particularly for
2 people like the Black population at the time, which was
3 primarily small farmers, farm workers, sharecroppers, people in
4 agricultural professions. It's hard for them to come into town,
5 get registered annually, but they had to do so under this.

6 They also had to bring registration certificates to
7 the polls. It's like a voter ID law. And, again, if you're in
8 a sharecropping shack, it's more difficult for you to keep
9 documents, and you're not used to that as much as middle class
10 people who lives in towns. So these two measures decreased
11 Black voting.

12 There was also some violence and intimidation in the
13 1880 election, and that reduced the strength of the Republican
14 party, which was the party to which Blacks overwhelmingly
15 adhered at that point, for the 1889 legislature. The 1889
16 legislature then passed two very significant acts that made it
17 much more difficult for Blacks to vote.

18 And the Eight Box Law -- I should say that before 1895
19 in Florida there was no publicly printed ballot. The ballots
20 were printed by political parties or by candidates. Those were
21 brought to the polls, and people put -- prior to the Eight Box
22 Law, they just had one ballot that had all of, say, the
23 Republican party candidates for governor, secretary of state,
24 state senator -- whoever happened to be on the ballot.

25 One ballot. They put it in the box.

1 The Eight Box Law changed that. A ballot for an
2 office had to be put in that particular election box, and the
3 officials, election officials, were not required by the law to
4 tell any voter which box to put which ballot in. Since Blacks
5 were much -- disproportionately illiterate or they had
6 difficulty reading -- approximately ten times as large a
7 proportion of Black adults were illiterate. Black adult males
8 were as illiterate in 1890 in Florida as white adult males --
9 this disproportionately disenfranchised for Blacks. It worked
10 as a literacy test.

11 The poll tax is infamous now. It had been collected
12 often before in various states, but it had not been used prior
13 to 1877 in most of the states as a suffrage requirement. That
14 was changed in Florida in 1889. The poll tax and the Eight Box
15 Law greatly reduced the turnout in the 1892 elections and
16 thereafter.

17 In 1985, the Eight Box Law was replaced by a publicly
18 printed secret ballot law. Again, it was often difficult for
19 people whose education had been discriminated against. They
20 couldn't -- they were barred from learning to read and write
21 during slavery, and afterward, the education provided by the
22 State to Blacks was quite inferior to that provided to whites.
23 So the secret ballot law acted as a literacy test and replaced
24 the Eight Box Law.

25 By 1900, the number of Black adult males who could

1 vote was considerably reduced, and it made it very difficult for
2 Blacks to be able to elect candidates of their choice, even in
3 the places that they were allowed to vote.

4 THE COURT: What was the secret ballot law?

5 THE WITNESS: It was just a law that provided that you
6 had to -- they would give you a ballot and you had to mark it in
7 the voting booth so that you couldn't get help from -- in your
8 more illiterate friends or family or whatever.

9 It's just a secret ballot law, but in the context of
10 massive differences in literacy, it acted as a discriminatory
11 literacy test.

12 BY MS. BLUM:

13 Q. And, Dr. Kousser, was violence an obstacle that Black
14 voters faced in exercising their right to vote during this
15 period?

16 A. They did, particularly in Northern Florida. From 1869
17 to '73, '74 to a hundred, the counts are not very good in
18 these -- during that time of who -- who got killed. Black and
19 white Republicans were murdered in North Florida. This was
20 almost always connected with elections. The amount of election
21 law violence in the United States has been, until very recently,
22 quite underestimated and not widely understood, but a very great
23 deal of violence in the South in the late 19th century through
24 the 20th century has been connected with elections.

25 Q. Dr. Kousser, looking at the period between 1900 and 1965,

1 what obstacles did Black Floridians face relating to voting?

2 A. Well, the chief one that was added was the all-white
3 primary. The Democratic party after 1892 was completely
4 dominant in Florida, so if you wanted to have real power, the
5 real power was all in the Democratic primary. That was where
6 your vote counted. And there was absolute bar on Blacks voting
7 in the Democratic primary until after *Smith v. Allwright* in
8 1844. There was a Florida case follow-on to *Smith v. Allwright*.
9 in 1945.

10 When Blacks did attempt to register to vote, sometimes
11 they could vote in local elections that were not partisan, even
12 if the Democratic primary was all white. They often faced
13 opposition, which was sometimes violent. In Ocoee, there was a
14 response to a voter registration drive and there were what are
15 now famous in 1920, the Ocoee riots.

16 In 1920, when Black women -- all women -- were
17 enfranchised in Florida by the Anthony amendment, 19th amendment
18 to the U.S. Constitution.

19 There was a scare headline in the Jacksonville Times
20 Union saying, "Democracy in Duval County Endangered by Very
21 Large Registration of Negro Women." Negro women often felt that
22 they had -- they would not be treated like Negro men were at the
23 time. There wouldn't be violence directed against them if they
24 tried to register to vote. But it was easy for the registrar to
25 ensure that they didn't get a chance to register to vote.

1 So there was -- the effort to register Black women in
2 1920 in Duval County was repulsed, I think, more by the
3 registration officials than by particular violent actions.

4 The most important of the actions was the
5 assassination on Christmas Eve of 1951 -- I think they blew up
6 his House -- of Harry T. Moore, who was the state president of
7 the NAACP. He had been running registration drives. It was
8 usual in the South in lots of places after the end of the white
9 primary to try to register Black voters, and there was a
10 registration drive in Florida in 1950 and '51, but they
11 assassinated Mr. Moore. It's 12 years before Medgar Evers in
12 Mississippi, but a similar action, similar violence, similar
13 effect.

14 Q. Were there any other notable instances of discrimination
15 relating to voting in the early to mid 20th century?

16 A. Yes, there were. There were actions relating to voting and
17 other kinds of discrimination.

18 Florida was a Jim Crow state. If you look at the
19 range of activities, institutional discrimination in particular
20 and general discrimination, it's hard to separate Florida from
21 Black Belt states like Alabama, Georgia, Louisiana, Mississippi.
22 From 1950 to 1970, every Florida governor campaigned as a
23 segregationist. That includes Leroy Collins, who later on
24 became a civil rights supporter.

25 But the electorate was so devoted to school

1 segregation and other forms of segregation in Florida at the
2 time that he and the rest of the people who were campaigning for
3 governor during this period of time felt the necessity of saying
4 that they were for keeping segregation, particularly in schools.

5 When the at-large -- I'm sorry -- the all-white
6 Democratic party was repealed by courts in 1945 in Florida,
7 almost immediately, there was a move in the State legislature to
8 set up at-large elections statewide for school boards. So every
9 school board elected locally, but it was a law that applied to
10 every school board. Every school board in Florida had to elect
11 its members at large.

12 An at-large election is discriminatory against
13 minority voters if there is racially polarized voting, because
14 if there is a majority of the controlling population, for
15 example, majority that are white in an area, then no Blacks or
16 other members of minority groups -- Hispanics, for example --
17 can be elected. They can't get enough crossover votes to be
18 elected.

19 If there were single-member districts, it would be
20 much easier for them to get elected. There would be areas
21 within an at-large system where -- at-large jurisdiction where
22 you could draw a -- single-member districts, whether it had a
23 majority of the minority group or fewer, where there could be
24 some crossover vote, perhaps, depending upon current political
25 conditions, and the minority group would have a chance to elect

1 candidates of their choice.

2 In 1981, in a case from Escambia County, the 1947 law
3 was declared to have been intentionally discriminatory and it
4 was outlawed, and single-member districts came into being in
5 school boards throughout the state.

6 There was *de jure* segregation. Everything that you
7 could think of -- schools, buses, trains, other source of motor
8 transportation, airplanes, public accommodations, restaurants,
9 beaches, parks, all of the -- sorts of things. You had to swear
10 on a segregated Bible in some places, at least, in Florida.
11 They didn't want whites and Blacks having to put their hands on
12 the same Bible.

13 There were antimiscegenation laws throughout the
14 1960s. They didn't get repealed until after *Loving v. Virginia*
15 in 1967.

16 So the whole range of *de jure* segregation and other
17 *de facto* desegregation -- water fountains, separate entrances to
18 courthouses, county courthouses, and so on and so on. Florida
19 is a Jim Crow state.

20 Q. So, Dr. Kousser, what, if anything, changed in 1965 with
21 respect to legal protections for voting?

22 A. Well, the most important thing was the Voting Rights Act,
23 which passed in 1965. And since the *Northwest Austin* case in
24 2009, I have been constructing a database of all voting rights
25 actions, particularly voting rights actions that minorities won

1 throughout the country. It started in 1957 after the '57 Civil
2 Rights Act and goes up to the present. It's the largest
3 database that anybody's ever constructed on these actions.

4 So it contained Section 2 cases, Section 5 cases,
5 Section 5 objections, what are called "more information requests"
6 under Section 5 that resulted in changes in submissions,
7 settlements, Section 2 of 3208 cases, constitutional cases, and
8 so on.

9 With respect to Florida, what it finds is that from
10 1965 to the present, at least 69 lawsuits, Section 5 objections,
11 settlements which resulted in findings or admissions of
12 discrimination against state, municipal, or county governments
13 have taken place. Among them are nine, at least, that -- where
14 there's a finding of discriminatory intent, and at least 44
15 finding liability under Section 2 of the Voting Rights Act, and
16 they include -- they go up to the end of last year. The
17 Jacksonville City Council was found to have engaged in racial
18 discrimination in drawing the districts -- its districts, and
19 the federal court declared that their action was enjoined as
20 discriminatory, and I believe that that was affirmed by the
21 Eleventh Circuit.

22 Q. Dr. Kousser, was Florida initially covered by Section 5 of
23 the Voting Rights Act?

24 A. It was not. Section 5 -- let me -- Section 5 had, in 1965,
25 a particular formula for coverage. The formula said that you

1 had to have an explicit literacy test, which was the most common
2 form of discrimination in election laws at the time, and you had
3 to have 150 percent turnout in the 1964 November election,
4 presidential election.

5 Florida didn't have an explicit literacy test, so it
6 wasn't covered. But let me explain just a little about how that
7 was set up.

8 There were, I think, 16 states at that time that had
9 literacy tests. And I've read all the hearings in '65, '70,
10 '75, '82 and all the reports of the House and Senate judiciary
11 committees at that time. They wanted to distinguish between the
12 states that were really discriminatory and the states that were
13 less discriminatory, and so what they did was they looked at all
14 the states with a literacy test and they separated them out on
15 the basis of their discriminatory laws in other facets of social
16 existence -- school segregation, discrimination in housing,
17 discrimination in jobs, and so on.

18 Certain states, mostly in the North, had
19 antidiscrimination laws passed or they had gotten rid of their
20 school segregation laws at that point. Certain states in the
21 South still had all those discriminatory laws. Florida still
22 had all those discriminatory laws. There were sort of repeals
23 of school segregation law, but there was extremely little
24 integration in schools in Florida in 1965, and that was on
25 public record.

1 There were, I think, four Black children who went to
2 school in Miami or Miami-Dade in 1959 and not very many more
3 thereafter. There was -- Florida waited until 1958 to allow
4 Blacks to enter higher education, same year as Alabama.

5 So if Florida had not had -- had had a literacy test,
6 it would have been included by the rationale that the committees
7 used in 1965. It wasn't that it was less discriminatory in
8 general; it was that it was less discriminatory in one
9 particular aspect: It did not have a stated literacy test.

10 MR. JAZIL: Your Honor, this testimony concerning how
11 states were selected for preclearance in 1965 under a literacy
12 test is outside the scope of his expert report, so I'd ask to
13 strike that portion of the testimony.

14 JUDGE WINSOR: Response?

15 MS. BLUM: Your Honor, I think it's clearly at issue
16 in this case, and Dr. Kousser has expertise in it.

17 JUDGE WINSOR: But if you'll respond to his suggestion
18 that it's not disclosed as part of his expert --

19 And if there's going to be a lot of this, maybe we
20 ought to have the report up here.

21 MS. BLUM: I'm happy to pass up --

22 JUDGE WINSOR: Thank you.

23 MS. BLUM: -- copies to the Court if it would be
24 helpful to the Court. It is quite lengthy. I believe that
25 Dr. Kousser does discuss Section 5 at one point in it, and we're

1 about to move on from this subject.

2 JUDGE WINSOR: Okay. And, I mean, the congressional
3 history of how they made criteria is what it is, right?

4 MR. JAZIL: Yes, Your Honor, and that history speaks
5 for itself. Dr. Kousser's gloss on how literacy was the sole
6 decider on how -- whether or not someone was subject to
7 preclearance is outside the scope of his report, number one, and
8 again, I'd submit it's inconsistent with the history, but that's
9 for the Court to judge.

10 JUDGE WINSOR: You're saying he's mischaracterizing
11 the statute?

12 MR. JAZIL: Yes, Your Honor.

13 THE COURT: We'll overrule that.

14 But you say you're going to move on?

15 MS. BLUM: Yes, Your Honor.

16 JUDGE WINSOR: And then you can argue however you
17 want. If there's a dispute about what Section 5 said in 1965,
18 we can figure that out later.

19 MR. JAZIL: Thank you, Your Honor. And my objection
20 is just this is beyond --

21 JUDGE WINSOR: I understand.

22 MR. JAZIL: -- what's in his report.

23 JUDGE WINSOR: I understand.

24 BY MS. BLUM:

25 Q. So, Dr. Kousser, you touched briefly in describing the

1 history of discrimination in Florida on how discrimination
2 against Black Floridians after the passage of the VRA through to
3 the present, and I believe this slide summarizes rapidly what
4 you had just said before; is that right?

5 A. That's correct.

6 Q. So what forms of discrimination relating to voting takes
7 place after 1965?

8 A. Well, one of the most important forms was at-large
9 elections. I said something about that, but in particular
10 relating to the State legislature, once *Baker v. Carr* and
11 *Reynolds v. Sims* came down in 1964, Florida, which had a very,
12 very malapportioned legislature previous to that point, went to
13 a proportionate system, so all seats were allocated
14 proportionate to population.

15 But a majority of the seats by 1970 were allocated to
16 at-large districts. So Miami-Dade would have -- would be one
17 district, but you would elect eight people or a certain number
18 of people in that, and that was true throughout the state.

19 As early as 1966, Black interest groups started
20 agitating against that system to try to ensure that there would
21 be single-member districts throughout the state so that they
22 would have an opportunity to elect candidates of their choice.
23 It took until 1982. There were -- there was a referendum in
24 1978 when there was a constitutional revision commission. It
25 recommended a change to single-member districts. That got

1 turned down by the voters because there was a blizzard of
2 referendum issues at the time and it got lost along with
3 everything else in 1978.

4 There were attempts in the legislature; there were
5 legal efforts in the State and federal court systems to have
6 at-large elections declared unconstitutional. They did not
7 succeed.

8 In 1982, when the State was redistricting, the State
9 legislature agreed to make all districts single-member
10 districts. There were also, as I've said, a lot of cases
11 involving at-large elections throughout the state. In
12 localities, school boards, city councils, county electoral
13 bodies and so on, and a great many of these were overthrown
14 either by courts or by settlements when it was clear that if the
15 case had been taken to court, they were going to lose, and so
16 the locality -- local jurisdictions settled.

17 There were -- in the redistrictings, particularly
18 after 1992, there was packing or cracking of local Black and
19 Hispanic communities to satisfy political ends, often partisan,
20 sometimes for Democrats. Mostly after 1992, it's helped
21 Republicans, so that Blacks would be packed -- as the Florida
22 State Supreme Court found it in 2015, Blacks would be packed
23 into particular districts to make it easier to elect whites,
24 usually Republicans, in the surrounding districts, and there
25 would be particular Black communities that would be cracked and

1 moved from district to district that would elect usually white
2 representatives, but they would be moved around to make it
3 easier to elect representatives in Congress and in the State
4 legislature in particular areas. So there's both packing and
5 cracking.

6 There was also vote denial. There were repeated
7 purgings of the rolls. They were often stopped by legal action,
8 either in courts or by the Department of Justice. For example,
9 there were major purges in 2004, 2000, and 2012 which
10 disproportionately affected minorities -- sometimes Blacks,
11 always minorities.

12 So there were both illusion -- there was both illusion
13 discrimination and denial discrimination on -- that made it more
14 difficult for minorities to participate in the elections and
15 elect candidates of their choice after 1965 in Florida.

16 Q. And what was the response of Black voters in Florida to the
17 packing and cracking relating to redistricting that you
18 described?

19 A. There were lots of lawsuits that they filed. There were
20 also -- there were also efforts to cooperate with various
21 political forces. It was so difficult for Blacks to get
22 elected, and they had seen that time after time, that when there
23 were some -- the legal environment changed such that it made it
24 possible for Blacks to have a stronger bargaining position.
25 This was because of the *Gingles* case in 1986, which was the

1 result of the 1982 changes to the Voting Rights Act.

2 Blacks in 1992 were able to bargain with the
3 Democratic party and the Republican party to try to get seats
4 particularly in Congress, but also in the State legislature,
5 that would make it possible to elect Black candidates of choice.
6 What they had to sacrifice was the -- their overall influence in
7 the system, since the political parties, particularly the
8 Republican party, wanted to drain Black voters out of districts
9 that were adjoining the packed Black districts, particularly
10 Congressional District 3 in Northern and Central Florida, in
11 order that more whites, Republicans, could be elected in those
12 surrounding districts.

13 So this -- the difficulty of electing any Black
14 candidates in elections before -- particularly before 1992 made
15 it necessary for Blacks to be able to -- to be willing to
16 compromise except Black packed districts, except the fact that
17 their overall influence would be reduced by those packed
18 districts and cracked districts and in 1992, '93, to bargain so
19 that they would have some opportunity to elect Black candidates
20 of their choice.

21 They had not been able to for a very long time.

22 Q. How many --

23 A. And they were not able to elect anywhere near the
24 proportion in the population until after 1993.

25 Q. And when you say that Black voters were not able to elect

1 Black candidates for a very long time, could you put some
2 numbers on that? How successful were Black Floridians at
3 gaining election to office prior to 1993?

4 A. Well, from 1888 to 1969, they could not elect any members
5 to the House. They elected a Black State senator only in 1982.
6 Again, it's -- 1888, which was the last time before the Eight
7 Box Law and the poll tax, that was last time that they managed
8 to elect anybody to the State legislature. They elected no
9 Black member of Congress from 1877 to 1993.

10 So there was -- they were basically shut out before
11 much of 20th century because of the overwhelmingly --
12 overwhelming discriminatory actions.

13 And note that this doesn't immediately lift in 1965.
14 It was 1969 before they even elected one House member. Most of
15 the rest of the Southern states had elected a House member
16 earlier than Florida, and a State senator, 1982, that was late
17 even for the South.

18 Where it's true that most of the Black -- Southern
19 Black members of Congress were first elected in 1993, 1993 is no
20 earlier for Florida than the election of a lot of Black members
21 of the House in Mississippi, Alabama, Georgia, South Carolina,
22 North Carolina, and so on.

23 Q. So focusing on North Florida, what made a difference to
24 Black voters' ability to elect their candidates of choice to
25 Congress?

1 A. They had to have a district which had enough Black voters
2 in it so that they by themselves, and at first with very little
3 crossover voting, though the crossover voting -- some crossover
4 voting happened pretty quickly -- they had to have enough Black
5 voters packed into a district to be able to elect candidates of
6 their choice.

7 And they did so in Congressional District 3. It was a
8 district that went North-South from Jacksonville to Orlando,
9 roughly, and took in Black communities on the way, somewhat
10 scattered Black communities on the way, in 1993.

11 Q. And how does CD-3 relate to Benchmark CD-5, which we've
12 been discussing in this case?

13 A. The Florida Supreme Court in 2016 ruled that the
14 North-South orientation of the Congressional District 3, which
15 changed its number and went to 5, had allowed for the packing of
16 Blacks into that district and the consequence -- consequent
17 diminishment of Black influence in surrounding areas. So they
18 required the legislature to reorient the congressional district,
19 renaming it 5 and orienting it from essentially Jacksonville to
20 Tallahassee in an East-West division, making it more compact, if
21 you just look at the district -- the districts and compare
22 them -- than it had been earlier.

23 I should say along the way, CD-3 got changed. It was
24 changed by legislation in 1996 to reduce the Black proportion
25 from 50 percent to 41 percent. It was then changed by

1 legislation in 2002 and 2012, and sometimes it was barely
2 majority Black. Most often it had a Black population or voting
3 age Black population which was less than 50 percent. That was
4 quite common in State legislative districts and congressional
5 districts throughout Florida, and it was widely recognized in
6 court decisions and in political discourse at the time that
7 minority access districts or "effective districts," as they were
8 called from time to time, did not have to have 50 percent of a
9 minority population in order to make them effective minority
10 districts.

11 So in 2016, the district gets changed from North-South
12 Jacksonville-Orlando to East-West Jacksonville-Tallahassee.

13 Q. And what was the impact of CD-3 on Black representation in
14 Florida?

15 A. For the first time, Blacks could win a congressional
16 district. There were three congressional districts, two in
17 South Florida and CD-3 in North and Central Florida, which they
18 won as a result of the putting enough Blacks into those
19 districts to be able to elect candidates of their choice. And
20 they were successful.

21 JUDGE WINSOR: What time period?

22 THE WITNESS: The Black candidate --

23 JUDGE WINSOR: What time period are you talking about?

24 THE WITNESS: Sorry.

25 JUDGE WINSOR: You're talking about CD-3, and they

1 were able to elect candidates of their choice. What time period
2 are you talking about?

3 THE WITNESS: 1993 to 2016.

4 JUDGE WINSOR: Okay. Thank you.

5 THE WITNESS: And sorry. I've lost my thought on
6 this.

7 But they were able to elect candidates of their choice
8 regardless of the fact that in 1996, that district was cut down
9 to 41 percent Black.

10 BY MS. BLUM:

11 Q. Dr. Kousser, I'd like to ask you about the Fair Districts
12 Amendment, which we've been discussing in this case.

13 Who supported the FDA?

14 A. Well, there was a difference in the elite support and the
15 voter support. In elite support, the leadership of the
16 legislature and the governor, when Scott got elected, did not
17 support -- in fact, made great efforts to block and then
18 undermine the FDA. They tried to place on the ballot -- at the
19 same time as the FDA was voted on in 2010, they tried to place
20 on the ballot a measure which would have directly undercut it.

21 Then they tried to put forth an interpretation of the
22 FDA which would have continued to allow packing of minorities
23 into districts and, therefore, dilution of their vote, contrary
24 to the FDA. They tried to sell that to the Department of
25 Justice. The Department of Justice did not accept that

1 interpretation and followed their usual procedures, which just
2 is a letter saying, "We do not file an objection."

3 They tried -- they filed lawsuits. They backed
4 lawsuits that were filed after the FDA passed. They financed
5 those lawsuits to try to undermine, undercut the FDA. Those
6 lawsuits lost. One of them was an independent State legislature
7 contention, and that lost long before the recent North Carolina
8 case.

9 They didn't submit -- the Governor, Jack Scott -- I'm
10 sorry -- Rick Scott did not submit the FDA for preclearance or
11 actually withdrew Charlie Crist's submission of it. So the
12 legislature finally had to submit it, and they did.

13 So that there were many actions by the legislative
14 leadership to undercut the FDA and try to stop it.

15 That was not true on the side of the voters and the
16 side of the campaign. The campaign to pass the FDA featured not
17 only Democrats, but also Republicans who were in favor of
18 redistricting reform, and if you look at the polling results, a
19 majority of Democrats, Republicans, and independents all backed
20 the FDA, which passed by more than 62 percent of the vote.

21 So the Republican leadership opposed the FDA in its
22 initial attempts to qualify in its passage and post-passage, but
23 the voters, regardless of political party, overwhelmingly backed
24 it.

25 Q. And at a high level, what arguments were made for the FDA?

1 A. When it was attacked, particularly in an attempt to try to
2 get minority voters to vote against it, the response was that it
3 provided more support and that the amendments were, as the
4 chairwoman of the FDA sponsoring committee, Fair Districts
5 Florida, Ellen Freidin, said, these amendments have been drafted
6 very carefully to ensure that minority voters do not lose
7 representation in Florida. It was presented as an initial --
8 sorry -- an additional guarantee for Black representation in
9 addition to what was offered by the -- Section 2 and Section 5.

10 I remind you that the case from Texas that took place
11 in 2009 hinted in the chief justice's opinion that Section 5 was
12 in trouble. So Section -- so FDA provided support for
13 antidilution and antidiminishment protections, even if the
14 courts weakened the protections that were offered by the Voting
15 Rights Act.

16 The NAACP president -- Florida NAACP president, Adora
17 Obi Nweze, warned that opponents of the FDA sought to turn the
18 clock back to a very dark time in our history. That shows some
19 understanding, which was widespread, given comments that people
20 had made during the legislature during the discussion of the FDA
21 in general, of the fact that Florida's history had been
22 discriminatory. Voters understood that, and the NAACP president
23 at that point says, if the FDA were to lose, we could go back to
24 a very dark time.

25 There were -- there were editorial -- there was a lot

1 of editorial support for the Fair Districts Amendment. The
2 Tallahassee Democrat in an editorial endorsement, said that the
3 districts currently were "Drawn so that they can pack a large
4 number of minority voters into just a few districts. Minorities
5 win seats in the legislature or Congress and they can keep
6 getting reelected, but there aren't enough minority
7 representatives to have any real power once they have that seat
8 at the table."

9 The same thing was reflected, as I've said before, in
10 the Florida Supreme Court's decisions in the eight apportionment
11 cases that came out of the 2012 apportionment. This was widely
12 understood, and it was discussed during the campaign for the
13 FDA, not just in one editorial, but in many.

14 Q. So let's talk about the first redistricting cycle after the
15 FDA.

16 How did the passage of FDA impact the redistricting
17 process in 2012?

18 A. In some sense, it didn't have any impact at all. The
19 legislature more or less ignored it. Although the legislature
20 said -- the legislative leaders said at the beginning of the
21 session that this would be the most transparent, open, and
22 equitable -- I'm not sure I've quoted exactly, but I think
23 "transparent" certainly was there and I paraphrased other
24 words -- redistricting sessions in the history of Florida.

25 They did not live up to that. They held sessions,

1 hearings across the state, in which they listened to -- or at
2 least purported to be listening to the voters, but the
3 legislators in those hearings were actually banned from
4 expressing any opinion on what the voters said in those
5 hearings. They set up a website where average citizens could
6 introduce plans, could submit plans, which supposedly the
7 legislature would consider after that.

8 As it turned out, that was -- that was a scam. That
9 was a smokescreen. As came out during the hearings of the Leon
10 County Circuit Court and the Florida Supreme Court from 2012 to
11 2015, the website was used as a portal for political
12 consultants, Republican political consultants, nationally and
13 locally, to submit plans often under other people's names. The
14 important part of what was -- what became the final plan was
15 submitted in the name of a college student, who testified in the
16 Leon County court that had he never submitted a plan, that he
17 didn't know anything about this.

18 So they submitted plans. Then other people who were
19 in league with them in the legislature, either legislators or
20 staff members, then took those plans and they said, "Ah-ah, the
21 public has suggested that we do such and such. Great. We're
22 going to be responsive to the public. We're going to do --
23 we're going to make our plan simply what is been proposed in the
24 public." And then they proposed a plan that had been, in fact,
25 proposed by -- "conspirators" is probably too harsh a word, but

1 allies secretly, and they had used those to shape the plan.

2 So those plans were put into force by the legislature.

3 When there was extensive discovery and despite the
4 fact that several legislators --

5 THE WITNESS: We've lost him on --

6 THE COURT: Can you just --

7 JUDGE WINSOR: Just a minute, Doctor.

8 MS. BLUM: We've just lost your video. We can still
9 hear your audio.

10 Maybe the screen just timed out.

11 Your Honor, could we have a quick recess while we try
12 to get Dr. Kousser back on there?

13 JUDGE WINSOR: We'll do that. We'll take ten minutes.

14 MS. BLUM: Thank you, Your Honor.

15 *(Recess taken from 11:04 a.m. to 11:18 a.m.)*

16 JUDGE WINSOR: Have a seat. Looks like we got our
17 witness back.

18 Just for everyone's planning purposes, we'll aim to
19 break around 12:30, something like that, for lunch. But,
20 Ms. Bloom, whenever you get to a logical stopping point
21 somewhere in that neighborhood, that would be great.

22 MS. BLUM: Absolutely. Thank you, Your Honor.

23 JUDGE WINSOR: You can continue whenever you're ready.

24 MS. BLUM: Thank you, Your Honor.

25 ///

1 BY MS. BLUM:

2 Q. So, Dr. Kousser, before the break you were testifying about
3 the 2012 redistricting. What was the ultimate result of the
4 2012 redistricting focusing on North Florida?

5 A. The ultimate result was that the Florida Supreme Court
6 overturned the redistricting. There were several districts that
7 were redrawn, but the most important of them was CD-5, which was
8 redrawn East-West rather than North-South.

9 Q. So we've got --

10 Dr. Kousser, did you finish your answer?

11 A. Yes.

12 Q. Dr. Kousser, you've now discussed the history spanning from
13 1865 through to 2022. Why, if at all, is this history of
14 discrimination that goes back to 1865 relevant?

15 A. Well, it's relevant because it shows that election laws
16 have been used from the beginning and continuing on in the
17 intervening years to discriminate against minorities,
18 particularly Blacks. And it's the context that election law
19 discrimination is the context -- provides the context for the
20 apportionment cases, which recognize implicitly that there was
21 discrimination; there was -- there had been discrimination and
22 that that discrimination continued by drawing CD-5 in the
23 North-South orientation that had been, and packing and cracking
24 Black communities to diminish the overall influence of Black
25 voters, and, therefore, that was a continuation of the

1 discrimination that had occurred in the past.

2 Without the 19 -- without the 2012 to 2015
3 apportionment cases, which recognized discrimination that was
4 still going on, the 2020, 2021, 2022 actions by the State
5 legislature and the Governor would have been very different,
6 would have operated in a very different context.

7 So the history of the State of Florida in
8 discriminating using election laws to discriminate against
9 Blacks is important in the passage of the FDA, all of the
10 discriminatory actions that we have seen from 1965 to the
11 present as well as before that time, and setting the context for
12 the 2021-22 redistricting.

13 If elections weren't racially polarized -- hadn't been
14 racially polarized and if there hadn't been a history of
15 discriminatory redistricting, then 2021-22 would have faced a
16 different factual situation and it would have developed,
17 obviously, in some different sort of ways.

18 But since they face -- since the legislators and the
19 Governor faced a particular situation, most importantly, the
20 norms that had been set out, the rules of the road that had been
21 set out by the Florida Supreme Court in the apportionment cases,
22 the legislative session would have developed very, very
23 differently.

24 Q. Dr. Kousser, in your view, are Black voters in Florida
25 still affected by unequal access to the process?

1 A. Yes, certainly. In all the ways that I have talked about
2 and the continuation of the voting rights suits and the
3 continuation of discussion of race in the electorate, the focus
4 on race in this reapportionment, as in all of the redistrictings
5 since 1968 -- the focus of -- on race and of racial
6 discrimination makes clear the extent to which it is well and
7 widely recognized that discrimination persists.

8 Q. How does your assessment of the current climate around race
9 in Florida inform your views about the relevance of the history
10 in this case?

11 A. Well, there was some feeling often expressed after 2008
12 when Barack Obama was elected president that we were moving to a
13 colorblind era. It would be very difficult to think that if one
14 studies what's going on in Florida today and the very recent
15 past.

16 The controversies over books being banned for
17 containing what got called "critical race theory," although it's
18 not the critical race theory that was taught in law schools for
19 a long time -- it seems to be anything that indicates that there
20 is systemic discrimination in the political system or the social
21 environment.

22 The discussion of the African American history course
23 that the SAT had set up that the State rejected, even rejected
24 African American history courses in general; the banning of
25 books that contained evidence, discussion, and so on about

1 systemic racial discrimination and about certain Black important
2 people -- Black people who had been important in the history of
3 Florida and other places -- all of those discussions; the
4 instance more recently after the -- my report was done but still
5 relevant to the current racial climate of what are referred to
6 as the Praeger -- P-R-A-E-G-E-R -- University videos that have
7 been authorized to be used in Florida schools now, which contain
8 awful distortions of Black history; for example, that Frederick
9 Douglass would have opposed -- somehow would have opposed Black
10 Voters Matter and in general Black rights agitation, when
11 Frederick Douglass was throughout his life one of the great
12 agitators that we've ever seen in American history.

13 All of these things have raised the temperature of
14 race relations in Florida to a temperature that it hasn't --
15 hasn't had since the 1960s and '70s during the period of busing
16 and of school integration, and it reflects, echos, periods of
17 the late 19th century disfranchisement periods when racial
18 violence was more common than it is today and certainly the
19 period of Reconstruction, when violence was much more widespread
20 than it is today. They're echos of the previous periods of
21 racial concern that have been propagated in Florida by the State
22 administration at this point.

23 Q. Yesterday Mr. Diskant asked Mr. Kelly whether he believed
24 that Florida has solved all the problems of its discriminatory
25 past, and Mr. Kelly said, "It's my knowledge that Florida 30 and

1 40 years ago compared to today -- it's a very, very different
2 state. It's extremely different from the past 30, 40, 50 years
3 ago."

4 Dr. Kousser, do you have a view as to the accuracy of
5 Mr. Kelly's statement?

6 A. I think Mr. Kelly is wrong. I think -- I've just discussed
7 the racial climate. It seems very hyped right now. I have
8 discussed the continuation of court cases and other voting
9 rights actions during this whole period, which continues.

10 In every redistricting since *Baker v. Carr*, race has
11 been the central issue, and that continues to be the case. It
12 was certainly the case in 2021-22 in the redistricting that is
13 the subject of this trial.

14 So I think that Mr. Kelly is ill informed.

15 Q. I'd like to turn now to that 2022 redistricting process,
16 and in our discussion, I'd like to focus in particular on the
17 third and fourth Arlington Heights factors, key statements from
18 the legislatures and the specific sequence of events.

19 At the start of 2022 redistricting process, what did
20 key legislators say about how they intended the redistricting
21 process to proceed?

22 A. Well, the legislators in 2021 at the beginning of the
23 process wanted to make clear that they had learned their lessons
24 from the 2012 redistricting and its aftermath in the Florida
25 Supreme Court. They wanted to abide by what the Florida Supreme

1 Court had said and what the Florida Supreme Court had done.

2 The Florida Supreme Court not only redrew CD-5, made
3 it East-West rather than North-South, but it also set a series
4 of principles that -- set out a series of principles that the
5 legislature needed to follow in the redistricting. Some of
6 those were simply transparency.

7 And here, the statement on the screen now from the
8 Senate chair of the redistricting committee, Ray Rodriguez,
9 that, "I intend for the committee to conduct a process in a
10 manner that is consistent with case law that developed during
11 the last decade" -- that means the apportionment cases --
12 "beyond reproach and free from any hint of constitutional" --
13 excuse me -- "free from any hint of unconstitutional intent. It
14 is my intention to strictly adhere to the constitutional
15 requirements so that our legislative discretion is preserved."

16 Another thing that the Florida Supreme Court did was
17 that it set out a particular formula or methodology for
18 determining whether a minority district were effective or
19 preserved, and in this it reflected previous State Supreme Court
20 decisions and also previous Federal District Court opinions; for
21 example, *Martinez v. Bush* in 2002, I think. It took a practical
22 view of what was an effective district, and it said in order to
23 determine whether there was effective district or a minority
24 access district, the legislature needed to look not just at the
25 proportion Black in the voting age population, but it also had

1 to look at the proportion Black in the party that it was most --
2 that it most adhered to.

3 I should say, parenthetically, that that doesn't
4 necessarily mean that you have to take the Democratic
5 proportion. In areas in South Florida where there is a very
6 large Cuban population, if you were determining the
7 effectiveness of a district, what you would use is the Latino
8 proportion of the Republican party. There's nothing
9 inherently -- it's partisan, but it's not necessarily Democratic
10 or Republican.

11 To go back, the formula looks at the Democratic
12 proportion that is Black of voters, and then it looks at the
13 proportion -- the crossover vote that a Democratic nominee who
14 was Black in that particular area could expect if the person got
15 the nomination.

16 So you look at the Black proportion of the Democratic
17 party. If that's a majority, then you ask, could the -- could a
18 Black nominee for the Democrat party in that area win -- expect,
19 usually, to win the general election by crossover votes --
20 white, Hispanic, whatever? In South Florida, you would ask the
21 same question of Hispanics and the Republican party, and then
22 could they expect to win crossover votes in order to be elected
23 if they were nominees?

24 So the Court was very specific about that, and the
25 legislature wanted to use that sort of process because it didn't

1 want to be slapped down again, as it had been by the Court in
2 the apportionment cases.

3 Some of the other statements on this slide make that
4 particularly clear. Mr. Rodriguez went on to say, "Some hard
5 lessons were learned through the previous cycle, and I believe
6 that we will learn from those lessons."

7 And House member Leek, the chair of the House
8 Redistricting Committee, said that, "The Speaker and I have made
9 it consistently and abundantly clear that the House will conduct
10 this process in compliance with the Florida Constitution and
11 relevant state -- federal and State legal standards, including
12 relevant Court precedents."

13 That's a reference, I take it, to the apportionment
14 decisions.

15 So the legislature was slapped down by the Court for
16 its procedures and its discrimination in 2012, and the
17 legislature in 2021 made clear that it did not want to go
18 through that again, that it was going to go along with the
19 Florida Constitution as interpreted by the State Supreme Court
20 in those decisions.

21 MS. BLUM: And for the benefit of the record, I'd just
22 like to note that the statements from Senator Rodriguez are in
23 evidence in Joint Exhibit 1 and the statements from
24 Representative Leek are in evidence at Joint Exhibit 3.

25 BY MS. BLUM:

1 Q. Dr. Kousser, how did the legislature's council instruct the
2 legislature to consider the constitutional requirements of the
3 FDA as the FDA relates to nondiminishment of minority access
4 districts?

5 A. The council for the relevant committees in the Senate and
6 House, Mr. Norby and Mr. Bardos, said essentially that it should
7 do the calculations in the way that I have outlined just above.
8 Mr. Norby said, "In order to determine whether there has been a
9 retrogression or diminishment, the legislature must perform a
10 functional analysis." That's a phrase that the Florida Supreme
11 Court had used, and it's a term of -- it becomes a term of art
12 that they use again and again, "functional analysis."

13 Continuing with the quotation: "... to evaluate
14 retrogression and then determine whether a district is likely to
15 perform for the minority candidate of choice. There is no
16 predetermined or fixed demographic percentage used at any point
17 in the functional analysis."

18 So -- that's the end of the quotation.

19 So this is a practical way of determining things. And
20 here, the council is saying it's not enough just to decide what
21 the voting age population, which is Black in a district in order
22 to determine whether that's legitimately a minority access
23 district. The same thing with Hispanics: It's not enough to
24 take just the voting age population or even the citizen voting
25 age population. Those are not the relevant facts. They are

1 simply facts that get built into the total functional analysis.

2 Likewise, Mr. Bardos, the House outside counsel, said:
3 "Simply looking at the voting age population is not enough.
4 Turnout rates, registration rates, whether high or low, can
5 impact the ability of a minority population to elect candidates
6 of their choice." End quote.

7 So the legislature was told by the outside counsel for
8 both committees before the redistricting process got started in
9 2021-22 that what it should pay attention to in the central
10 feature of that redistricting, which was the ability of
11 minorities to be able to elect a candidate of their choice, was
12 given a formula which was not based simply on the percentage of
13 voting age population, but other factors that needed to be
14 determined to figure out whether the respective district and
15 whether a -- if there was some diminishment, it was diminishment
16 within the council's interpretation of the FDA.

17 MS. BLUM: And for the record, the statement from
18 Mr. Norby is in evidence at Joint Exhibit 6 and the statement
19 from Mr. Bardos is in evidence at Joint Exhibit 12.

20 BY MS. BLUM:

21 Q. Dr. Kousser, you discussed that these were the
22 legislature's intentions for the redistricting process.

23 Were those intentions met?

24 A. No. If I may give you sort of 30,000-foot overview of the
25 legislative session.

1 At the beginning of the legislative session, the
2 Senate came out with four separate plans. All the plans have
3 basically the same district in North Florida, the same
4 Congressional District in North Florida. It's the district that
5 had been set up in 2016 by the legislature under court orders,
6 cleaned up a little so that there's some edges taken off of it,
7 but it's essentially the same district.

8 At that point, it looked like the legislature was
9 moving quite quickly, that the House had been holding hearings
10 and meetings to try to develop its own plan, and that the
11 legislature would act quickly enough so that it would be
12 possible for candidates or prospective candidates to find out
13 what districts they could run in and -- in plenty of time so
14 that the new plan could go into effect for the 2022 election.

15 This was brought to a halt, or at least it was slowed
16 down, by the Governor's action of submitting a plan in
17 mid-January.

18 Just to continue with the high overview, the
19 legislature continued to go about its business. The Governor
20 again and again attempted to intervene to stop the legislature
21 from acting in a way that it supposed -- that it supposed it was
22 going to continue to act. He appealed to the State Supreme
23 Court for an advisory opinion, discussed that in more detail.

24 But again and again, the legislature would be
25 considering something. It would pass something through a

1 committee, pass something through a House. The Governor would
2 threaten to veto. He would indicate that he was going to veto.
3 The legislature would attempt to compromise. The Governor would
4 threaten to veto. He would finally veto. Then, finally, he did
5 veto the whole thing and continued, waited several weeks and
6 then call a special session.

7 So the legislature acts; the Governor intervenes to
8 stop the legislature from doing what it thought it needed to do
9 to comply with the previous court decision, set of decisions.
10 The Governor adamantly says that he's not going to accept this.
11 He focuses overwhelmingly on CD-3 -- CD-5, rather. That is the
12 *sine qua non* in his objection, and he repeats it again and
13 again. The legislature tries to compromise. The Governor
14 remains adamant. Then the Governor eventually proposes a third
15 iteration of his plan for a special session. The legislature
16 capitulates, and the plan is adopted.

17 Q. I'd like to ask you in more detail about the request for an
18 advisory opinion that Governor DeSantis made on
19 February 1st that you referenced.

20 Did you review the Governor's request?

21 A. I did.

22 Q. And in brief, what was the Governor's request?

23 A. The Governor requested the State Supreme Court essentially
24 to overturn the apportionment decisions, in particular to
25 overturn that portion of the apportionment decisions that stood

1 out the Benchmark CD-5 on the grounds that it -- it was not
2 compact and that it was set up -- the quotation that's
3 important: "The district was set up solely to connect Black
4 voters in Jacksonville with Black voters" -- sorry -- "with
5 Black voters in Leon County's" --

6 Sorry. My screen doesn't show everything.

7 -- "so that they may elect candidates of their choice
8 without a majority."

9 And it's -- it's central that he says "so that they
10 may elect candidates of their choice." This is what he objected
11 to. He didn't want a district set up so that they may elect
12 candidates of their choice, and that was central to everything
13 that he did in this legislature. And he points out that the
14 Court has previously suggested that the answer is yes. So he's
15 asking the Court to overturn the interpretation that the
16 previous State Supreme Court had offered of both the Florida
17 State requirements of federal constitutional requirements in
18 order to eliminate the possibility that Black voters would be
19 able to elect candidates of their choice in North Florida.

20 There wasn't a full record, and the Supreme Court
21 refused to act. There wasn't a full plan. There wasn't a full
22 record on all of the districts.

23 The Governor consistently, throughout out his
24 objections and actions during the legislative session, refused
25 to perform a functional analysis of his proposed district and of

1 the previous district, the benchmark district, or of any of the
2 districts that were proposed. The legislature always conducted
3 functional analyses, but the Governor refused to so. So he
4 wanted the previous opinions with respect to the Benchmark CD-5
5 to be overthrown, and he asked the State Supreme Court to do
6 that.

7 MS. BLUM: And for the record, that request is in
8 evidence at Joint Exhibit 52.

9 BY MS. BLUM:

10 Q. Dr. Kousser, what districts did the Governor ask the
11 Florida Supreme Court about other than Congressional District 5?

12 A. None.

13 Q. What reasons did the Governor give in asking the Florida
14 Supreme Court to opine other than the use of race?

15 A. Said the district was -- was not compact and that it put in
16 the same district people who don't share particular
17 characteristics other than race.

18 And he -- he indicated that the area in between
19 Jacksonville and Tallahassee had very little population, but
20 that's just a statement of fact. Any district drawn in that
21 area will have areas of relatively thin population just because
22 that's the characteristic of those areas and has been since the
23 1860s.

24 Q. And in particular, how, if at all, did the Governor's
25 comment that the Florida Supreme Court had previously suggested

1 that the answer to his question is "yes" inform your opinion?

2 A. The concentration on District 5, the opening of the request
3 that they overturn the racial portion of the previous
4 redistricting in their previous opinion, the concentration on
5 the fact that CD-5 gave Black voters in North Florida the chance
6 to elect candidates of their choice, made it clear, among other
7 things, that this is what the Governor was concentrating on. He
8 was concentrating not on the political complexion of the
9 district or of other districts, even the racial complexion of
10 other districts, but he was concentrating on the racial
11 complexion of the population in North Florida and the ability of
12 Black citizens in North Florida to elect candidates of their
13 choice under the benchmark district that had been set up under
14 the authorization of the Florida Supreme Court in the
15 apportionment decisions from 2012 to 2015.

16 Q. And after the Supreme Court denied the Governor's request,
17 what did the Governor do?

18 A. He proposed his own plan. This was a plan for the North
19 Florida districts that clearly eliminated any possibility of
20 Black voters having the ability to elect candidates of their
21 choice. I think this plan had been written by Adam Foltz -- at
22 least that's what was testified to in the Florida legislature.

23 It is very much like all of the subsequent Governor's
24 plans. They're essentially the same for the North Florida
25 portion of them.

1 The Governor's plans changed for other portions of
2 Florida, but they were almost always exactly the same or very
3 close to the same for Northern Florida, and particularly they
4 made it impossible for Black voters to elect candidates of their
5 choice from North Florida.

6 Q. And when you say that the Governor's plans were the same
7 for North Florida, did those plans include a Black minority
8 access district?

9 A. Absolutely not.

10 MS. BLUM: Your Honor, I'd like to offer into evidence
11 Plaintiff's Exhibit 5054.

12 JUDGE WINSOR: It's just a map?

13 MS. BLUM: Yes, Your Honor.

14 JUDGE WINSOR: Mr. Jazil?

15 MR. JAZIL: Your Honor, if it's just the map, we have
16 no objection.

17 JUDGE WINSOR: Okay. Then it's admitted.

18 THE COURT: Where is that in the materials you've
19 given us?

20 MS. BLUM: It's both depicted on slide 22 of the
21 direct examination and it's also in the binders that my
22 colleague brought up to the bench, Your Honor.

23 THE COURT: Okay. Got it. Thank you.

24 *(PLAINTIFF EXHIBIT PX5054: Received in evidence.)*

25 *///*

1 BY MS. BLUM:

2 Q. So, Dr. Kousser, how, if at all, did the Governor's
3 decision to submit a new map that looks like map 94 after the
4 Supreme Court had denied his request inform your opinion in this
5 case?

6 JUDGE WINSOR: Just before you get to that, is this
7 one the Governor submitted to the legislature? Is that what
8 you're saying?

9 MS. BLUM: Yes, Your Honor.

10 JUDGE WINSOR: I'm sorry. You can answer, Doctor.

11 THE WITNESS: I'm sorry. Could you restate?

12 BY MS. BLUM:

13 Q. How, if at all, did the Governor's decision to submit a new
14 map that looked like Exhibit 5054, plan 94, inform your opinion
15 in this case, particularly in relation to the fact that it was
16 submitted after the Supreme Court had denied the Governor's
17 request for an advisory opinion?

18 A. Well, the Governor was just going to go along and do what
19 the Governor wanted to do, regardless of the fact that the state
20 Supreme Court on that record declined to -- declined to agree
21 with his legal theory that the benchmark district had to be
22 eliminated.

23 Q. I'd like to ask you next about Mr. Newman's legal opinion
24 summarized in the objections to Congressional District 5, which
25 was issued on February 18, 2022.

1 MS. BLUM: This opinion is in evidence at Joint
2 Exhibit 56.

3 BY MS. BLUM:

4 Q. I'd like to discuss each of the objections Mr. Newman
5 raised in Benchmark CD-5 in turn.

6 So what was the first objections Mr. Newman raised,
7 Dr. Kousser?

8 A. Mr. Newman said, "The proposed district, which largely
9 tracks current Congressional District 5, spans almost 200 miles
10 from East to West and cuts across eight counties to join a
11 minority population in Jacksonville with a separate and distinct
12 minority population in Leon and Gadsden Counties."

13 It states a fact that it's 200 miles long and covers
14 eight counties, but the separate and distinct minority
15 populations in Duval County and Leon and Gadsden County -- in
16 fact, they had shared characteristics for a long time. They
17 were in North Florida, where the Black population had been
18 largely concentrated in 1860 and through the whole rest of the
19 19th century and much of the 20th century.

20 So to consider those separate and distinct minority
21 populations is not -- does not go along with the history of
22 those areas.

23 They also shared other characteristics, and this gets
24 into the second objection that Mr. Newman raised. These
25 communities are in separate and distinct regions of Northern

1 Florida and are not defined by shared characteristics. I don't
2 have that quotation on -- I can't see all of that quotation
3 because some of the pictures are -- are on the right side, so I
4 apologize for not being able to read the whole quotation right.

5 These communities share values, particularly political
6 values, to a degree that is shown in Professor Baretto's report
7 of the -- which I reflected in part in my report, share
8 characteristics like a lack of health insurance, poverty,
9 educational deficiencies, a dependence on Medicaid, which has
10 not been expanded in Florida, unlike most other states in the
11 United States.

12 So there were shared historical characteristics and
13 shared contemporary values and interests that seem to be shared
14 across Northern Florida, as Professor Baretto pointed out in
15 more detail in his report. And also, it reflects the -- this is
16 reflected in the legislative record during this period.

17 I believe you had something from the State Senate on
18 video.

19 Q. We do. And I'd like to show you what's been marked as
20 Plaintiff's Exhibit 1043.1, which is a comment from Senator
21 Gibson during the Senate Committee on Reapportionment, April 19,
22 2022.

23 MS. BLUM: Could we play that video, please.

24 *(The following text is by video.)*

25 SENATOR GIBSON: -- try to figure out always about

1 race. Well, it's more than about race. It's also about need.
2 And so in order for those folks with health -- more health
3 disparities -- or health disparities, I don't know how you could
4 have any more -- neighborhoods that had been crumbling
5 historically, infrastructure needs, cleaning up brown spills in
6 communities of color that weren't anywhere else -- who
7 represents those communities now?

8 Yes, there's growth in upward mobility as well, but
9 there are still healthcare disparities. There's still holes in
10 things that need to happen.

11 And so when a member doesn't understand in totality
12 that population, the funding requests that have been put forward
13 over the years disappear. The blend of everyone takes the focus
14 off of some of those who are the neediest of particularly
15 healthcare and improvement in their neighborhoods, education,
16 those kind of things. While it's getting better, it's been
17 behind for so many years, that catching up -- it becomes
18 difficult without a representative that doesn't understand
19 exactly all of the people they're representing. And I think
20 every individual in any district is just as important as the
21 neighbor next door or across the street. Everyone is. And
22 that's the way I've always done my job, trying to figure out --
23 always about race. Well...

24 *(End of video clip.)*

25 ///

1 BY MS. BLUM:

2 Q. So, Dr. Kousser, I'd like to return for a moment to the
3 first objection that Mr. Newman raised in his memorandum,
4 leaving aside any legal argument, just commenting on the facts.

5 Did the objection that Benchmark CD-5 was not compact
6 and connected a minority population in Jacksonville with a
7 faraway minority population in Tallahassee and surrounding
8 areas -- did that objection make sense to you in light of your
9 review of the history of redistricting in this case?

10 A. Well, I think it is undercut by what happened in the 2000
11 redistricting for Congress. If you look at the Fourth -- I
12 think it was the Fourth Congressional District from 2002 to
13 2012. It was a district that reached essentially from
14 Jacksonville to Tallahassee or almost to Tallahassee, so it's in
15 the same area, goes across eight counties.

16 When that was proposed, I think the chief of staff to
17 the congressman who was an incumbent in the prior district,
18 which wasn't quite as long as this, said it won't make any
19 difference, that this is 200 miles long. We drive that all the
20 time. No trouble.

21 So if you look at the picture of the district from the
22 CD-4, which was basically a white Republican district, drawn
23 without objection in 2000 -- drawn without objection in 2002,
24 basically a long district from Jacksonville to Tallahassee, and
25 you compare it with a benchmark map drawn in 2016 by the

1 legislature under orders from the State Supreme Court from
2 Tallahassee to Jacksonville, it's about the same distance, takes
3 in most of the same counties.

4 If you look at the big difference between the two is
5 in Duval County. In Duval County, CD-4 skirts around -- it
6 excludes the part of Jacksonville which has a high concentration
7 of Black population. It does this in order to make sure that
8 this district is winnable by a white candidate, and there --
9 that portion is taken in by CD-3. That makes it possible to
10 elect a Black candidate elsewhere.

11 But just focusing on CD-4, the exclusion of the
12 largely Black area of Jacksonville makes it much easier to elect
13 a white candidate in CD-4 than it would be if it were included.

14 If you look at the benchmark map, the 2016 map, it
15 includes just exactly that same area. The boundaries are
16 slightly different, but it's basically the same area. It
17 included that area so that it would be possible to elect a Black
18 candidate of choice in North Florida.

19 So the difference is you exclude Blacks from a
20 district in order to make it a winnable district by whites, or
21 you include Blacks in a district in order to make it winnable by
22 a Black candidate or candidates of choice for the Black
23 community.

24 That's the difference between a district that was
25 drawn in 2002 and a district that was drawn in 2016.

1 Mr. Newman says that CD-5 is unconstitutional because
2 it's too long; it's not compact, and it is drawn to make it
3 possible to elect a Black candidate of choice. But CD-4 is
4 about the same length; it has the same counties in between, and
5 it is drawn to exclude the Black area in order to elect a white
6 candidate of choice.

7 It just seems a little strange that, suddenly, what
8 was so constitutional that nobody even questioned it in 2002
9 becomes unconstitutional when it gives an advantage to Black
10 voters in 2016. And this seems inconsistent as a constitutional
11 provision for Mr. Newman to challenge because of that.

12 I'm not getting into the legality. Just the fact of
13 the matter is: What's the difference between the two districts,
14 the (inaudible) community and Duval County.

15 Q. And turning to Mr. Newman's last objection, and again
16 leaving aside any legal arguments, just focusing on his factual
17 objections, what did Mr. Newman raise as a factual objection in
18 his memorandum?

19 A. He said that when Florida voters adopted the FDA, they did
20 not have before them a -- sorry -- "a similar record of
21 pervasive, flagrant, widespread, or rampant discrimination," end
22 quote.

23 But all the things I've been saying about the history
24 of racial discrimination in Florida over the period of time was
25 in effect before the state -- the voters of the State of Florida

1 in the sense that a committee of the U.S. House of
2 Representatives or Senate would have before it, which is all the
3 hearing evidence and all that.

4 But in general, voters realized that there had been a
5 long history of discrimination. That was why it was necessary
6 in the FDA to guarantee against vote dilution and against
7 retrogression, diminishment.

8 So they had -- the voters had before it -- before them
9 a general recognition that there had been discrimination, and it
10 continued enough for them to add the racial components of the
11 FDA to the components against partisan gerrymandering and the
12 other part of the FDA. Clearly they did. They voted for it.
13 There was discussion of it on the campaign trail and in
14 newspapers and other media at the time.

15 So I think that Mr. Newman is basically insulting the
16 voters when he says they didn't really understand the history
17 and current -- the current impact of racial discrimination.

18 Q. And, Dr. Kousser, in a referendum like a referendum for the
19 FDA, is a written factual record typically available to voters?

20 A. No. They -- they're not required to take a history course,
21 and they are just required to vote on what they hear, what they
22 know, and what they're able to perceive.

23 Q. That same day, on February 18, 2022, did the Governor's
24 office send an attorney to try to persuade the legislature to
25 create a map that did not include a district similar to

1 Benchmark CD-5?

2 A. They did. They sent Mr. Popper, who is an attorney who
3 proposed an index of compactness, and he sort of lectured the
4 legislature, as professors do, about, in this case, compactness
5 and said that the Benchmark CD-5 did not pass his compactness
6 index and should be rejected.

7 Q. What was the response from the legislature to the
8 memorandum from Mr. Newman and Mr. Popper's testimony?

9 A. They rejected it. They were quite vociferous in rejecting
10 particularly the Popper testimony. And Representative Sirois,
11 who was a subcommittee chair of the House Congressional
12 Subcommittee, I think, said that, "There has been noise outside
13 of our process dealing with the congressional map. I would
14 encourage all members to put that noise aside. These -- those
15 external influences need to stay external."

16 In light of what had been discovered by the Leon
17 County Court and the Florida Supreme Court in the 2015 -- 2012
18 to 2015 sessions of the Court, which is that outside influences,
19 political consultants from outside had come in and drawn plans
20 which had been secretly proposed, and the Florida Supreme Court
21 had then slapped down the legislature for its -- for paying
22 attention to those external influences.

23 In the light of all that, Representative Sirois'
24 statement here was a slap against the Governor. "Noise outside
25 our process." To put "that noise outside, those external

1 influences" -- treating the Governor as an external influence to
2 the legislative process -- "need to stay external."

3 The legislature wanted to do what it wanted to do, and
4 it didn't want the Governor to tell it what to do. And at
5 first, they were very adamant in refuting what the Governor
6 tried to tell them to do. What they wanted to do was what they
7 thought they were legally required to do, which many statements
8 previously quoted have gotten into: Follow what the State
9 Supreme Court had said in the apportionment decisions.

10 Q. There's been some discussion in this case of a two-map
11 compromise plan. What was this compromise?

12 A. After deciding that the Governor was absolutely adamant and
13 would not accept in North Florida anything besides the
14 destruction of CD-5, the legislature came up with a sort of
15 bizarre compromise. The -- it's very unusual in redistricting
16 cases or in instances that I've looked at about redistricting
17 for a legislature to come up with two maps: Take your choice.
18 Take your choice, Governor. Take your choice, Courts. We'll
19 come up with two maps. We prefer one of them to the other, but
20 if one of them doesn't work, we have a fallback.

21 So what they essentially did was to say, Look, the
22 Governor is making a compactness objection. He's saying that
23 the district that was drawn in 2016 is not compact. And when we
24 followed that district, we were continuing to follow a
25 noncompact district.

1 So we'll give you a compact district. We'll give you
2 a district that's all in Duval County. It doesn't go from one
3 part of Florida to another part of Florida, even though we think
4 that those parts of Florida are connected in interest. It will
5 just be Duval County. The Governor can't object to that as
6 uncompact. He can't object to that as joining different sorts
7 of areas. Just Duval County.

8 And what we'll do is we will calculate according to
9 the formulae procedures that the State Supreme Court has set
10 out, we will compact -- sorry -- we will calculate whether that
11 is an effective district or not.

12 They did the calculation, and they found out that
13 more -- much more than half of the time that was an effective
14 district for Blacks. Blacks only comprised about 35 or
15 36 percent of the voting age population in that district, but
16 they comprised a majority of the Democratic primary election and
17 the number of crossover voters, white crossover voters, in that
18 district in previous elections had been sufficient for a
19 Democratic nominee who was nominated with the support of Black
20 voters to be elected as their candidate of choice in a general
21 election.

22 So they gave the Governor a compact district all in
23 Duval County that they showed would likely elect a candidate of
24 choice of the Black community. He couldn't object to it on most
25 of the grounds that Mr. Newman had adduced, and this was an

1 attempt to meet the Governor more than halfway.

2 If that didn't work, if the Governor rejected that or
3 if a court rejected that on grounds that it diminished the
4 proportion of Black voting age population in CD-5, then here's a
5 backup. The backup was essentially what they had proposed
6 before. It was the benchmark district cleaned up a little,
7 still from Gadsden County to Duval County, going through
8 Tallahassee, still approximately 46 percent of Black voting age
9 population, and they calculated whether this was a district that
10 Blacks could expect to be able to carry. Using the same
11 procedures that I've outlined before, they found that it was.

12 So here are two effective districts. Take your
13 choice, Governor. We are willing to compromise.

14 THE COURT: Which was the alternative? Which was the
15 number one choice and which one was the number two choice?

16 THE WITNESS: The number one choice was the Duval
17 County only district. The number two choice was the district
18 that they had essentially proposed before.

19 BY MS. BLUM:

20 Q. And, Dr. Kousser, you testified that this two-map plan was
21 unusual. Had the legislature ever before passed a redistricting
22 plan with an alternate, a fallback plan?

23 A. Not to my knowledge, and I think it's very unusual across
24 the country.

25 Q. So, Dr. Kousser, how did the legislature justify this

1 compromise plan and distinguish it from the Governor's plan?

2 A. Well, they -- they distinguished it from the Governor's
3 plan because their plan gave Blacks in North Florida an
4 opportunity to elect candidates of their choice. Mr. Leek, the
5 House redistricting chair, said, "We are faced with a unique
6 situation, and this is the House's attempt at continuing to
7 protect the minority group's ability to elect a candidate of
8 their choice, addressing compactness concerns, and working to
9 make sure that we bring this process in for a landing during the
10 regular session.

11 "The primary map was put forward as a way to address
12 the novel legal theory -- novel legal theory" -- I underline
13 that -- "raised by the Governor while still protecting a Black
14 minority seat in North Florida." End of quotation.

15 So the House wanted to do what the -- they believed
16 the apportionment cases had required them to do. The Governor
17 said no. They came up with this compromise. They addressed his
18 compactness concerns as a way to address "the novel legal
19 theory" raised by the Governor, and it still protected a Black
20 minority seat in North Florida.

21 Similarly, Mr. Sprowls, the House speaker, said, "Plan
22 8017 addresses" -- that's the Duval-only district -- "addresses
23 concerns about the shape of Congressional District 5 by creating
24 a more compact North Florida district that should be able to --
25 enable minority candidates to elect the candidates of their

1 choice. We believe this solution creates a singular exception
2 due to the diminishment standard."

3 And Mr. Rodriguez, the Senate chair, said -- another
4 quotation -- "So even though the percentage has gone down, the
5 functional analysis shows that this is still a Democrat
6 performing seat and that the minority controls for the Democrat
7 primary in that seat. That is why we believe it to be
8 constitutional."

9 His reference is constitutional according to the FDA.

10 So three important leaders of the legislature backed
11 this compromise. They point out that their compromise will
12 still enable Black voters to elect candidates of their choice in
13 North Florida and that they're only acting because the Governor
14 refused to compromise. They were willing to compromise. Here's
15 what the compromise does: It still enables Blacks to elect a
16 candidate of their choice.

17 The Governor then did not accept that.

18 MS. BLUM: And for the record, the statements that Dr.
19 Kousser read from the House Redistricting Committee,
20 Representatives Leek and Sprowls, are in evidence at Joint
21 Exhibit 38, and the statement from Senate Chair Rodriguez is in
22 evidence at Joint Exhibit 40.

23 BY MS. BLUM:

24 Q. Dr. Kousser, there's a reference here to plan 8017, and
25 previously in this case, we had discussed plan 0819. What's the

1 relationship between those two plans?

2 A. I believe that 8017 was the Duval-only plan and 8019 was
3 the compromise, the other plan, essentially the benchmark plan.
4 I think that's right. I may have lost count of what the
5 districts -- the exact numbers of the districts. If so, please
6 correct me.

7 Q. And would it refresh your recollection that 8017 was an
8 earlier debated version of 8019?

9 A. Okay. I'm sorry. That is correct.

10 So 8017 and 8019 are the Duval-only district.

11 Q. What was the Governor's response to this plan, even while
12 it was still being considered by the legislature?

13 A. The Governor rejected it. Not only just indicated in
14 conversation with the legislators that he rejected it, but he
15 rejected it in a press conference in the statement that
16 occurred, I think, on Twitter.

17 JUDGE RODGERS: Can I interject here? I have a
18 question about the timeline with the maps, sir.

19 We've -- you've been talking about the Duval-only map
20 and then also the compromise map. But the timeline shows -- and
21 I think the record will reflect -- there were prior maps that
22 were -- that were proposed, one by the Senate, 8060, and one by
23 the House, 8011.

24 Both of those retained CD-5, correct?

25 THE WITNESS: That's correct. The legislature did

1 want to retain CD-5.

2 JUDGE RODGERS: All right. And then Governor sends
3 out word, "I'm not accepting those plans." Legislature comes up
4 with the compromise. Is that how timeline went?

5 THE WITNESS: Well, the legislature had proposed
6 the -- particularly the Senate had proposed a plan previous to
7 the Governor saying anything in proposing any plan at all.

8 JUDGE RODGERS: Right.

9 THE WITNESS: So there were several iterations where
10 the legislature proposes, the Governor rejects, legislature
11 proposes, the Governor rejects, and so on.

12 JUDGE RODGERS: But all of those -- I guess the point
13 of my question is all of the proposals retained CD-5; is that
14 right?

15 THE WITNESS: That's correct.

16 JUDGE RODGERS: All right. Thank you.

17 BY MS. BLUM:

18 Q. So, Dr. Kousser, I was about to ask you about a clip from
19 press conference on February 28, 2022, where Governor DeSantis
20 addressed these plans.

21 MS. BLUM: And this has been marked as Plaintiff's
22 Exhibit 2107. I'd like to offer that clip into evidence and
23 play it.

24 JUDGE WINSOR: Mr. Jazil?

25 MR. JAZIL: Your Honor, it's not the full press

1 conference, but...

2 JUDGE WINSOR: But do you have a legal objection to
3 2107 going in?

4 MR. JAZIL: Completeness, Your Honor. It's not the
5 whole press conference. So long as there's a transcript
6 somewhere that we can also admit together with it, I don't
7 oppose.

8 JUDGE WINSOR: Do you have that?

9 MR. JAZIL: I don't, but I do believe this is just a
10 clip of a large --

11 MS. BLUM: This is just a clip. I don't believe that
12 we currently have a full transcript of the whole press
13 conference, but we'd just like to play a quick clip.

14 MR. JAZIL: Your Honor, can we just play the clip and
15 perhaps I can reserve the objection --

16 JUDGE WINSOR: That's fine.

17 MR. JAZIL: -- before it's introduced into evidence.

18 THE COURT: You can also introduce the whole thing
19 once you get it.

20 MR. JAZIL: Understood, Your Honor. But if the clip
21 is innocuous, I may have no --

22 THE COURT: Okay.

23 MR. JAZIL: -- continuing objection.

24 JUDGE WINSOR: I imagine it's a statement that are in
25 everyone's opening briefs that we've all heard about. But we'll

1 see.

2 MR. JAZIL: Yes, Your Honor. That's why I just wanted
3 to --

4 JUDGE WINSOR: All right. You can go ahead and play
5 it.

6 *(Video recording played in open court.)*

7 GOVERNOR DESANTIS: You know, I have said very clearly
8 that I will veto maps that include some of these
9 unconstitutional districts, and that is a guarantee. They can
10 take that to the bank.

11 MS. BLUM: At this time, I'd like to offer into
12 evident Plaintiff's Exhibit --

13 MR. JAZIL: No objection.

14 JUDGE WINSOR: All right. Plaintiff's 2107 is
15 received without objection.

16 *(PLAINTIFF EXHIBIT PX2107: Received in evidence.)*

17 BY MS. BLUM:

18 Q. So when it came time for the legislature to ultimately vote
19 on this compromise plan, how did the Governor react?

20 A. He said on Twitter that he would "veto the congressional
21 reapportionment plan currently being debated by the House. Dead
22 on arrival."

23 That's what "DOA" refers to in Twitter talk.

24 MS. BLUM: Your Honor, I'd like to offer into evidence
25 Plaintiff's Exhibit 2108.

1 MR. JAZIL: No objection, Your Honor.

2 JUDGE WINSOR: All right. 2108 is received.

3 *(PLAINTIFF EXHIBIT PX2108: Received in evidence.)*

4 BY MS. BLUM:

5 Q. Dr. Kousser, did you view these messages from the Governor
6 as an attempt to influence the legislature?

7 A. Yes.

8 Q. And did the Governor actually go ahead and veto these
9 plans?

10 A. He did.

11 Q. So let's start with the Duval-only plan. What explanation
12 did the Governor give for vetoing this map?

13 A. The explanation was that it diminished the Black proportion
14 of the district and, therefore, was a -- was a violation of the
15 FDA. He did not look at the functional analysis, present a
16 functional analysis, and if -- they performed a functional
17 analysis that is not in the record on the Duval-only district.

18 His objection was that it was -- that it can diminish
19 the proportion of Black voters in the district and that it's not
20 the way that the Florida Supreme Court had determined whether
21 the diminishment provision of the FDA had been infringed or not.

22 And the legislature shared that understanding. It had
23 shared that understanding, even before the apportionment
24 decisions. And State and federal courts as well as the
25 legislature had shared that interpretation going back at least

1 to the 2001-2002 redistricting.

2 Q. And leaving aside any legal analysis, just focusing on the
3 factual objections that the Governor raised to the Duval-only
4 plan, what did you think of those factual objections?

5 A. I think that they indicate that the Governor would not
6 accept "yes" for an answer. He had objected because of -- on
7 compactness grounds. They gave him a district which -- the
8 legislature gave him a district, which was transparently
9 compact. It was a -- it was a district in the shape that should
10 have pleased him. It was giving in to the Governor's power,
11 which should have pleased him, but he would not accept "yes" for
12 an answer.

13 He wanted above all -- and this is very important to
14 my general opinion in this case -- above all, he wanted to
15 eliminate the possibility that Black voters in North Florida
16 could elect a candidate of their choice, and he was unwilling to
17 compromise on any proposal which continued that ability,
18 regardless of whether it was compact or not, regardless of where
19 it went, regardless of anything else. He was laser focused on
20 eliminating the ability of Black voters in Northern Florida to
21 elect a candidate of their choice.

22 MR. JAZIL: Your Honor, I'd ask to strike
23 Dr. Kousser's opinion of what he thinks the Governor wanted.

24 JUDGE WINSOR: Let's get a response from that, because
25 we did talk with this at the outset and you said you agreed with

1 him on the scope, and there was just going to facts in areas
2 saying that his view is that his intention was to make sure
3 nobody could have a district.

4 MS. BLUM: I think he's just expressing his opinion --

5 JUDGE WINSOR: Right, but that was the whole issue
6 before.

7 MS. BLUM: But not on the legal conclusion of the
8 ultimate issue of intent in this case, just as to what he viewed
9 this veto --

10 JUDGE WINSOR: What's the daylight between what he
11 just said and the ultimate issue in this case?

12 MS. BLUM: I think the daylight between what
13 Dr. Kousser just said and the ultimate issue in this case is
14 that Your Honors are being asked to decide the intention of the
15 Governor and the legislature in passing this map as a whole and
16 in each step, and he's just commenting on how he viewed a
17 particular objection at this one point.

18 JUDGE WINSOR: I don't think that's what he just said.

19 It's not going to be stricken, but you all can talk
20 later to us about what we should or shouldn't consider of what
21 he just said.

22 But you can continue -- but your point is not that he
23 can --

24 MS. BLUM: No, Your Honor.

25 JUDGE WINSOR: -- maybe I misunderstand you from

1 earlier. I understand the ultimate issue is the collective
2 intent, but as I understood it, he just said is this is what the
3 Governor's specific intent was, and I thought that you had
4 agreed at the outset that he wasn't going to testify to that; he
5 was just going to testify to facts about what happens without
6 drawing a conclusion about what the Governor's intent was.

7 Maybe you meant something different.

8 MS. BLUM: No, Your Honor. We agree that
9 Dr. Kousser's testimony should be limited to the facts. We just
10 think that it's fair for him to opine in his role as historian
11 on what those facts showed to him, but --

12 JUDGE WINSOR: Well, which is it? Either he's just
13 going to be talking about the facts or he's going to say from
14 those facts the appropriate conclusion is the Governor -- the
15 Governor's intent was X, Y, Z.

16 You're saying he can say that or he cannot?

17 MS. BLUM: I'm saying that I think that it is fair for
18 him to discuss the facts and to discuss what inferences he took
19 from these facts in trying to just understand the process as a
20 whole, but I am not saying that he can decide ultimately on the
21 issue of intent. Obviously that's for the Court.

22 JUDGE WINSOR: So if he says, "My opinion is the
23 Governor's intent was X, Y, Z," we should disregard that?

24 MS. BLUM: I think if he says, "My opinion is that the
25 ultimate conclusion in this case is that there was

1 discriminatory intent," obviously Your Honor should --

2 JUDGE WINSOR: But --

3 MS. BLUM: That and everything else should be a
4 question of weight that Your Honors can decide.

5 JUDGE WINSOR: So you're saying he is competent to
6 testify to what the Government's ultimate intent was?

7 MS. BLUM: I think that he's competent to testify to
8 how the facts in this case show a pattern, as historians often
9 do, and he can say what he thinks that pattern shows.

10 But obviously it's just -- it's not dispositive by any
11 means. It's just an indication. That would be my --

12 JUDGE WINSOR: Okay. I'll ask it one more time and
13 then we'll just move ahead.

14 If he says, "My opinion, my professional opinion,
15 based on my qualifications, is that the Governor's intent was X,
16 Y, Z," we should consider that as evidence or we should not
17 consider that as evidence?

18 MS. BLUM: I think that if he says the Governor's
19 intent is X, Y, Z, your Honors should not consider that.

20 JUDGE WINSOR: Okay.

21 You can go ahead. Thank you.

22 JUDGE RODGERS: Can I ask a question of the witness?

23 Doctor, in which of the apportionment decisions by the
24 Florida Supreme Court did the Court discuss the methodology for
25 determining diminishment that you've been referencing here in

1 your testimony?

2 THE WITNESS: I'm sorry. That is in my report, but --

3 JUDGE RODGERS: Okay.

4 THE WITNESS: -- it's hard for me to separate all of
5 those.

6 JUDGE RODGERS: But it is in your report. I can look
7 for it there?

8 THE WITNESS: Yes, I believe so.

9 JUDGE RODGERS: All right. Thank you.

10 JUDGE WINSOR: Except we don't have the report, do we?
11 The report is not in evidence?

12 MS. BLUM: We have not offered the report in evidence.

13 JUDGE RODGERS: I thought we were going to be given
14 the report. I thought that's what we talked about earlier.

15 MS. BLUM: I'm happy to give Your Honors a copy of the
16 report.

17 JUDGE RODGERS: Well, if not, just give me the case.
18 If you don't want to give me the report --

19 MS. BLUM: I'm happy to do either of those.

20 MR. JAZIL: Your Honor, it's in Apportionment 1 and
21 Apportionment 7.

22 JUDGE RODGERS: Thank you very much.

23 MS. BLUM: Thank you.

24 BY MS. BLUM:

25 Q. So, Dr. Kousser, in the Governor's veto memorandum, did he

1 ever object that the legislature's proposed map, the 8019 map
2 with the Duval-only plan, would not perform for the candidates
3 of choice of Black voters, meaning that they could not elect
4 their candidates of choice under this plan?

5 A. He did not object on those grounds.

6 Q. And you had said previously that there were two maps. What
7 explanation did the Governor give for the veto of the second
8 map?

9 A. The same objection that he had given to the benchmark map
10 in the first place and that he continued to give to the
11 legislature's proposals previous to the legislature offering
12 this compromised plan, that it was not compact, that it had
13 disparate communities in it, that it was race-based.

14 MS. BLUM: Your Honor, it's 12:32. Now would be a
15 great time to break for lunch.

16 JUDGE WINSOR: Okay. We'll do that.

17 Before we break, let me just go over the exhibits that
18 we've got to this point.

19 And then I have a question. There's two videos. One
20 came in just now and then one was part of the stipulated exhibit
21 this morning. You got a disk or a thumb drive?

22 MS. BLUM: Yes, Your Honor.

23 JUDGE WINSOR: Okay. And then what I have coming in
24 in this morning's session other than the stipulated exhibits
25 that we already went over are Plaintiff's 4558, Plaintiff's

1 5054, Plaintiff's 2107, and Plaintiff's 2108. So that's what I
2 have. If there's anything I missed, you'll let me know that.

3 And then why don't we say 1:45. And if you'll just
4 make sure you're here in time to have him all loaded up.

5 We'll continue back with your testimony, Doctor, at
6 1:45 Eastern.

7 Everyone have a good lunch.

8 *(Luncheon recess taken from 12:33 to 1:46 p.m.)*

9 **A F T E R N O O N S E S S I O N**

10 *(All parties present.)*

11 JUDGE WINSOR: Welcome back. Have a seat.

12 We have our witness ready.

13 Do you want to, before we start, just give us an
14 update on the schedule, where we are versus where we thought
15 we'd be and so forth in terms of your direct and the rest of the
16 day.

17 MS. BLUM: Sure, absolutely, Your Honor. I think I
18 have about half an hour left, and opposing counsel has
19 indicated --

20 MR. JAZIL: Your Honor, my cross will be about an
21 hour.

22 JUDGE WINSOR: Okay. So we'll probably get -- and you
23 have somebody ready after that?

24 MR. DISKANT: Yes. We have two witnesses. We have
25 one live witness, Ms. Keith, and if we get to her, we have a

1 Zoom witness, Ms. Slater.

2 JUDGE WINSOR: All right. Very good.

3 And, Doctor, you can hear me? You're all set up?

4 THE WITNESS: I'm sorry?

5 JUDGE WINSOR: Just checking the connection. You can
6 hear me?

7 Not a good sign. Will you say something?

8 MS. BLUM: Dr. Kousser, are you able to hear us?

9 THE WITNESS: Yes, yes.

10 JUDGE WINSOR: Okay. You can continue whenever.

11 MS. BLUM: Thank you, Your Honor.

12 BY MS. BLUM:

13 Q. So, Dr. Kousser, before the lunch break, we spoke about the
14 Governor's veto. What was the next step in the 2022
15 redistricting cycle after the veto?

16 A. The Governor eventually called a special session of the
17 legislature.

18 Q. And what, if anything, is significant about the timing of
19 the veto and the special session?

20 A. It took a long time for him to give the veto, given that he
21 had said he was going to veto it, and he rejected the particular
22 plans that the legislature had indicated an intention to pass.
23 He took a long time finally to follow through and veto.

24 And then there was a three-week break until the
25 special session, so many people were -- many people expressed

1 the opinion at the time that this dragged things on -- out, so
2 that it would not be possible to finish all of the procedures
3 that were challenged in court if the Court overturned it and
4 asked the legislature to draw another plan, et cetera. This
5 could not all be done in time to make it possible for people to
6 qualify for the election in 2022. This is what people said in
7 the legislature.

8 And it's consistent with effort that the legislature
9 had made to front in -- front-end the passage of the
10 legislation. It's why the Senate had acted to produce plans in
11 the middle of January.

12 Q. And was a court challenge pending during the time between
13 the veto and the special session to the redistricting map?

14 A. Yes. Yes, I believe that it was an earlier configuration
15 of this case.

16 Q. So how did the legislature ultimately react to the
17 Governor's veto?

18 A. Ultimately, the Governor -- the Governor's veto was reacted
19 to by the legislature by agreeing that it would not produce any
20 plans for the special session and would only act on the
21 Governor's plans. There wouldn't be any amendments, no
22 legislative plans. They would just defer to the Governor.

23 Q. And so the comment shown on this slide from President
24 Wilson Simpson and Speaker Chris Sprowls to memorandum dated
25 April 11, 2022, in which they said: "At this time, legislative

1 reapportionment staff is not drafting or producing a map for
2 introduction during the special session. We are awaiting a
3 communication from the Governor's office with the map that he
4 will support."

5 MS. BLUM: That's taken from Plaintiff's Exhibit 3040,
6 in evidence.

7 BY MS. BLUM:

8 Q. Dr. Kousser, did that statement inform your opinion?

9 A. Yes, it did. They were clearly just giving in to the
10 Governor and acting only on the Governor's plans, not theirs.

11 Q. So, Dr. Kousser, why, in your view, did the legislature
12 change their opinion on the maps to vote for the enacted map?

13 MR. JAZIL: Your Honor, the --

14 THE WITNESS: I think the conclusion --

15 JUDGE WINSOR: Just a minute.

16 What's the objection?

17 MS. BLUM: Let me rephrase.

18 JUDGE WINSOR: Okay.

19 MS. BLUM: I think I understand the objection.

20 BY MS. BLUM:

21 Q. What did the legislature say about why they changed their
22 opinion to vote for the enacted maps?

23 A. They said in many statements that it was not that they had
24 changed their opinion of what the law was, but that the Governor
25 had insisted on a particular plan.

1 Q. And did the legislature's counsel ever issue a legal
2 opinion that supported a map that did not include a minority
3 access district in North Florida?

4 A. He issued a legal opinion. Mr. Norby issued a legal
5 opinion, and it's not a ringing endorsement --

6 Q. I'd like --

7 A. -- of the Governor's position. He said: "In the absence
8 of controlling judicial precedent, contrary to the Governor's
9 position on the precise question presented. The alternative
10 approach to these districts reflected and proposed map P000C0109
11 is worthy of careful consideration by the Florida Senate as it
12 evaluates congressional redistricting legislation in the
13 upcoming special session."

14 There's a sort of a double negative in the beginning
15 of this sentence and the absence of a position contrary -- of a
16 precedent contrary. He didn't say that there is a position --
17 there is a controlling judicial precedent which supports the
18 Governor's position. He said in the absence of controlling
19 precedent against.

20 And then he said, "It is worthy of careful
21 consideration," not that the Florida Senate should adopt this
22 because it reads the law correctly.

23 Q. I'd like to pause for a moment on this exhibit and just
24 talk about it a little bit more.

25 MS. BLUM: This is Plaintiff's Exhibit 3014, which is

1 in evidence, and the Court has a copy of it in the binders that
2 were passed up earlier. I believe it's in the second volume of
3 binders.

4 BY MS. BLUM:

5 Q. And I'd like to just talk about a couple of statements in
6 this.

7 Dr. Kousser, do you have a copy of that exhibit open
8 in front of you?

9 A. I do.

10 Q. So this opinion is two and a paragraph pages, right?

11 A. Correct.

12 Q. And the first page essentially discusses the configuration
13 of the maps; is that --

14 A. Right.

15 Q. Would you agree with that?

16 Dr. Kousser, can you still hear us okay?

17 A. Yes.

18 Q. In light of your current medical condition, I'm going to
19 read some statements out loud to you, if that's all right,
20 because I know you're having a little difficulty seeing right
21 now on the screen.

22 So I'll just read starting on page 2:

23 Mr. Norby wrote -- and it's page 2 of Plaintiff's
24 Exhibit 3014.

25 THE COURT: Where can we find it?

1 JUDGE RODGERS: It's in the second one.

2 MS. BLUM: I think Judge Rodgers just answered the
3 question, but it is in the second binder.

4 THE COURT: I found it. Thank you.

5 MS. BLUM: Thank you, Your Honor.

6 BY MS. BLUM:

7 Q. Mr. Norby wrote: "The Northeast Florida congressional
8 districts in the Governor's proposal are divided by the
9 St. Johns River. Consistent with the Governor' veto message,
10 these districts have been drawn on the basis of a different
11 legal premise than the legislature's prior maps regarding an
12 unresolved issue of law, whether the Florida Constitution's
13 nondiminishment standard can be constitutionally applied
14 consistent with the Fourteenth Amendment under the unique
15 geographic and demographic circumstances present in Florida's
16 current court-imposed Congressional District 5.

17 "The Governor presented this question in a request for
18 an advisory opinion from the Florida Supreme Court, but neither
19 that court, nor any other court has rendered an opinion on this
20 specific legal issue."

21 Dr. Kousser, does that refresh your recollection as to
22 what Mr. Norby described the Government's position on the law to
23 be?

24 A. Yes.

25 Q. And he noted that the Governor and the legislature were

1 operating on two different legal premises?

2 A. That's correct.

3 Q. So I'd like to continue reading from that page.

4 MS. BLUM: And, Your Honors, I'll just note that
5 there's a yellow highlight that appears on this page, and that
6 highlight was in the document as it was produced to us. It was
7 produced after a public records requests to the Florida
8 Governor's Office and we received it in this form, so the
9 highlight -- to just be clear on the record, the highlight does
10 not come from Plaintiffs or from the defense.

11 BY MS. BLUM:

12 Q. So Mr. Norby continued: "Intervening judicial precedent
13 from the United States Supreme Court following the 2022 regular
14 session has, however, emphasized the narrow circumstances under
15 which the Fourteenth amendment permits the race-based sorting of
16 voters."

17 Dr. Kousser, without giving a legal opinion, is this
18 idea that the Fourteenth Amendment permits the narrow -- permits
19 this race-based sorting of voters under narrow circumstances a
20 new legal idea?

21 A. Well, things have to be narrowly tailored if they are
22 subject to strict scrutiny. It seems not different in that
23 regard than some previous decisions. But, again, I'm not -- I'm
24 not offering a legal opinion.

25 Q. But in your review of documents in connection with this

1 case, did you see that the Governor cited *Shaw v. Reno* from 1993
2 for essentially the same principle?

3 A. Yes.

4 Q. And finally, just to continue on to the last page.

5 Mr. Norby wrote: "The Governor's veto letter provides
6 citation to valid legal precedence in support of his arguments
7 regarding the constitutional standards that should govern the
8 drawing of congressional districts in Northeast Florida. In the
9 absence of controlling judicial precedent, contrary to the
10 Governor's position on the precise question presented, the
11 alternative approach to these districts reflected in proposed
12 congressional map P000C0109 is worthy of careful consideration
13 by the Florida Senate as it evaluates congressional
14 redistricting legislation in the upcoming special session."

15 Dr. Kousser, how did this opinion inform your view of
16 the issues in this case?

17 A. Again, we looked at part of this before, so I won't repeat
18 what I said then.

19 But it does not endorse the Governor's -- the
20 Governor's gloss on judicial opinions, and it does not say this
21 is what the law is. If you contrast it with the opinions that
22 Mr. Norby and the other counsel offered at the beginning of the
23 session, which said here's what the law is, it seems -- it seems
24 instructive to contrast the adamance of the endorsement in the
25 one versus the adamant -- versus the tepid endorsement in the

1 other. It doesn't say this is what the law is; it says this is
2 what the Governor's position on the law is.

3 Q. And, Dr. Kousser, is this the only legal opinion that the
4 Senate received on the enacted map?

5 A. I believe that is the case.

6 Q. Did the legislature ever opine that's the compromise plan
7 that they had passed was unconstitutional?

8 A. No, not to my knowledge.

9 Q. And, in fact, Senator Rodriguez said, and I quote: "Our
10 charge was to pass a map that would be completely
11 constitutional, withstand all court challenges, so that was the
12 map that we brought under those parameters."

13 Dr. Kousser, is that -- does that statement inform
14 your opinion about what the legislature said that their map --

15 A. It does. The legislature thought that what they -- they
16 started out by desiring to follow the apportionment decisions
17 and the advice that they got from counsel as to legal opinions
18 in all courts, and they carried through that and believed that
19 they had done so, and Chairman Rodriguez said that there, and
20 there were similar statements by other people.

21 MS. BLUM: And for the record, that statement is from
22 Joint Exhibit 45, in evidence.

23 BY MS. BLUM:

24 Q. So, Dr. Kousser, you said that the legislature did pass the
25 Governor's map. Did the leaders of the legislature take

1 responsibility for the map that they had passed?

2 A. There were several statements which indicated that they did
3 not take responsibility where they said again and again, this is
4 what the Governor did, and they swore -- they didn't condemn it,
5 but they did not take responsibility for the action.

6 Q. So, for example, Senator Rodriguez's statement, and I
7 quote: "When that bill went to the Governor, the Governor
8 rejected it, and that's his right, because as a bill, it doesn't
9 become law until the Governor signs it. What the Governor
10 looked at and drew attention to in his veto letter, which is
11 also in the information the committee has provided, is that in
12 his legal analysis, District 5 did not meet the protection for
13 nondiminishment."

14 Dr. Kousser, is that one of the statements that you're
15 referring to in your --

16 A. It is.

17 Q. And similarly, when Senator Rodriguez said, "So South" --
18 in discussing this map: "So Southeast Florida is largely the
19 portion of the state we drew, Central Florida is largely the
20 portion of the state that the House drew, and Northeast Florida
21 is largely the portion of the map that the Senate -- that the
22 Governor's Executive Office of the Governor drew, so what we
23 have is a map which is a compilation of maps passed and
24 presented in both chambers and lines that have been drawn by the
25 Governor's staff building off what we have done."

1 Dr. Kousser, is that another statement that informed
2 your view that the Governor -- that the legislature did not take
3 responsibility?

4 A. Did not take responsibility for the part of the map that
5 was drawn for Northeast Florida. They said that this was the
6 Governor's action, and they -- it was not their action, but they
7 claimed responsibility for their action in other parts of the
8 state.

9 Q. And similarly, when Senator Rodriguez said, "As stated by
10 the Governor's office and committee, the legal analysis that
11 they had was that District 5 was not protected because it did
12 not make up a majority in a reasonably shaped district. It was
13 not a compact district."

14 Did that inform your view that the legislature was
15 assigning responsibility to the Governor?

16 A. Absolutely. It says "the Governor's legal analysis." It
17 doesn't say "we agreed" or that that is the correct legal
18 analysis. It says that's the Governor's analysis.

19 Q. And again, when Senator Rodriguez said, and I quote: "And
20 you're correct. In the Governor's veto letter he references the
21 Black voting age population. What we polled was a component of
22 primary turnout, which is what the Florida Supreme Court
23 directed us to utilize in performing a functional analysis
24 during the last round of litigation during the previous
25 redistricting cycle."

1 Is that another statement that similarly informed your
2 view?

3 A. Yes. It seems a criticism of what the Governor had done
4 and disavowal of the way -- of the statistics that were
5 presented by the Governor. And referencing this, what the
6 Florida Supreme Court had said, it says, "We tried to follow
7 what the Florida Supreme Court said, but the Governor didn't
8 present the same sort of analysis."

9 Q. And finally, when Senator Rodriguez said, "And what I would
10 say is for District 5, I would go back to what we learned in the
11 presentation from the Executive Office of the Governor and
12 committee today. That district was -- the reason that the bill
13 was vetoed over that district is because they did not believe it
14 was compliant with the U.S. Constitution, specifically the equal
15 protection clause of the Voting Rights in Section 2 of the
16 Voting Rights Act because it was not a geographically compact
17 district and it was not a minority majority district."

18 Dr. Kousser, how did that statement influence your
19 views in this case?

20 A. Again, he's saying this is what the Governor and the
21 Executive Office of the Governor said is the legal analysis.
22 He's not saying that that legal analysis was correct or that the
23 legislature shared that legal analysis.

24 Q. And, Dr. Kousser, why is Senator Rodriguez's view
25 particularly significant as to this map?

1 A. As the chair of the Senate Redistricting Committee, and
2 chairs of committees in Florida are usually very significant in
3 the consideration of legislation. They guide the legislation.
4 They present the legislation. They're considered the experts on
5 the legislation. They're often deferred to by other members of
6 the legislature.

7 So it was very important that his views be looked at
8 in order to try to see what the legislature's voice really was.

9 Q. And did Senator Rodriguez sponsor the enacted map in the
10 special session?

11 A. Yes.

12 Q. And finally, when Senator Rodriguez said, "Our charge was
13 to take the decisions that came from the Florida Supreme Court
14 and make sure we draw our map within the four frames of the
15 corners of the boundaries of those decisions. What the Governor
16 has done is he has looked beyond the Florida Supreme Court,
17 looked at decisions coming from the U.S. Supreme Court, and said
18 that we failed to account for that and we should have, and that
19 by failing to account for that, we passed maps that were not
20 constitutionally compliant."

21 Did that statement similarly inform your view?

22 A. It did. What he's saying is this is what -- this is why
23 the Governor said he did what he did. And he's not saying this
24 was convincing; we agree that this is the correct analysis or
25 anything like that. He's just saying what we did, we did

1 because we thought it was compliant with the apportionment
2 decisions, and then the Governor acted differently because he
3 was looking at federal precedent on the same issues.

4 It doesn't say that we now agree with the Governor
5 that the federal precedent is governing and it is contradictory
6 to the apportionment decisions.

7 Q. Did any legislator indicate they actually agreed with the
8 Governor's opinion?

9 A. I believe Representative Randy Fine said that he agreed
10 with the Governor's position, but I did not find any other
11 statements of agreement with the Governor's position.

12 Q. Dr. Kousser, let's talk about another Arlington Heights
13 factor, departures from the ordinary process.

14 Based on your analysis of Florida history, did you
15 reach a view about what the ordinary process of a redistricting
16 cycle looks like?

17 A. Yes. In general, the Florida redistricting was a
18 legislative activity. It had been previously a legislative
19 activity. The Governor perhaps vetoed, maybe had talked to
20 people behind the scenes, but the Governor did not insert plans.

21 Now, with regard to the particular process, it was
22 extraordinary that the State Supreme Court had set out in such
23 detail how that process should occur and that the legislature
24 reacted by 2020 and 2021. They agreed to go along with all of
25 the findings, norms, that were put forth and directives that

1 were put forth by the Florida Supreme Court.

2 A good example is the fact that in order to be more
3 transparent, the legislature set up a form that had to be filled
4 out for any plan that was produced. The form had to say who
5 drew the plan and what its purposes were and if anybody helped
6 the plan, helped draw the plan, who they were.

7 The Governor's plans did not come along with this sort
8 of form, and that was noted at the time by opponents of the
9 Governor's plans. I had discussed this in my report.

10 But this was extraordinary in the sense that it was --
11 the norms were specified that the legislature would follow in
12 pretty extraordinary detail, and with the -- with the hammer
13 hanging over the legislature implicitly that if they didn't
14 follow these that the State Supreme Court might well intervene,
15 as it had in the apportionment cases.

16 And so there were -- in particular, there were
17 procedures for determining whether a minority access district
18 was effective or not, that had been spelled out. The
19 legislature adopted those from what is in the State Supreme
20 Court's decisions and other decisions as well, and that was
21 specified.

22 The State Supreme Court had ordered the District 5
23 drawn East-West, so that was something that the legislature took
24 as status quo at the beginning.

25 So the procedure where the Governor intervenes, the

1 Governor proposes plan, the Governor goes to the State Supreme
2 Court for an advisory opinion, the Governor continues to insist
3 on his views, vetoes, has a special session -- almost all of
4 these things were extraordinary procedures compared to what had
5 happened in the legislature before when it was considering
6 apportionment. And that -- that informed my opinions, and it
7 informed more than just my opinions. What it informed was the
8 facts that I presented that I hoped would allow the Court to
9 conclude whether the redistricting had been done with racially
10 discriminatory purpose or not.

11 Q. Dr. Kousser, in your review of Florida's history of
12 redistricting, had you ever seen a Governor draft and submit his
13 own congressional plans prior to 2022?

14 A. No, I had not.

15 Q. And since 1887, to your knowledge, has any Florida Governor
16 asked for an advisory opinion on --

17 A. No.

18 Q. -- a pending piece of legislation?

19 A. They have been asked for advisory opinions, but not on
20 redistricting, so far as I know.

21 Q. And what was the ultimate impact of the plan that was
22 enacted?

23 A. Well, the ultimate impact of the plan that was enacted was
24 to destroy CD-5 as a district that was performing for Black
25 voters.

1 MS. BLUM: And I'll just note for the record that the
2 slide shows two maps, Plaintiff's Exhibit 7190 and Plaintiff's
3 Exhibit 7198, both of which are already -- which are taken from
4 Plaintiff's Exhibit 7190 and 7198, both of which are in
5 evidence.

6 BY MS. BLUM:

7 Q. Dr. Kousser, in the 2022 election, were Black voters in
8 North Florida able to elect their candidate of choice?

9 A. No.

10 Q. And in every congressional election prior, between 1993 and
11 2022, were Black voters in North Florida able to elect their
12 candidate of choice?

13 A. Yes.

14 Q. Was the impact of this map, the enacted map, foreseeable?

15 A. Absolutely. It was foreseen again and again.

16 Q. And when you say, "It was foreseen again and again," how do
17 you know that it was foreseen?

18 A. Legislators said so, and it was discussed extensively in
19 the newspapers, both in Florida and nationally.

20 Q. And when you say "Legislators said so," would you be
21 referring, for example, to a comment from the transcript of the
22 House special session on April 20, 2022, in evidence at Joint
23 Exhibit 48 in which Representative Davis asked: "Will either
24 District 4 or District 5 perform for Black candidates of
25 choice?" And Representative Leek responded, "Thank you,

1 Mr. Speaker. No"?

2 A. Yes, that's a good example of it. Representative Davis, I
3 think, is a Black representative from Jacksonville.

4 Q. And what was the response of Black law mappers -- I'm
5 sorry -- Black lawmakers to the map during the special session?

6 A. Before the special session, they met, I believe, at a Black
7 church, and protested what they knew was coming. And during the
8 special session, they sat down and sang on the floor of the
9 House, I believe.

10 Q. Finally, let's turn to the availability of less
11 discriminatory alternatives, which is another Arlington Heights
12 factor.

13 Was there a less discriminatory alternative available
14 to the legislature than the enacted map?

15 A. There were two, the compromised maps that had been put
16 forward by the legislature: The Duval-only map and the map
17 which basically tracked the map that had been drawn in 2016.

18 So there were less discriminatory alternatives.

19 Q. And do you have an opinion, Dr. Kousser, as to what would
20 have happened without the Governor's intervention in the 2022
21 redistricting cycle?

22 A. There is every reason to believe on the basis of statements
23 of the legislature before the Governor attempted to get involved
24 and actions of the legislature after he did in adopting their
25 own maps which would have been less discriminatory, actions

1 where they came up with these two alternatives, and --
2 statements after the passage of the final bill seeming at least
3 tepid and at most disavowing the actions that they had been
4 pushed into taking and certainly disavowing or at least not
5 endorsing the legal theory that the Governor had put forth.

6 For all these reasons, I think it is likely that the
7 legislature would have adopted maps which would have continued
8 to produce a district in North Florida in which Black voters
9 could elect candidates of their choice.

10 MS. BLUM: Thank you, Dr. Kousser.

11 I have no further questions for this witness.

12 JUDGE WINSOR: Doctor, I see you got some water there.
13 I was going to say you could go get some while we're switching
14 out, but (motioning to Mr. Jazil).

15 **CROSS-EXAMINATION**

16 BY MR. JAZIL:

17 Q. Good afternoon, Dr. Kousser. Can you hear me?

18 A. Yes, I can.

19 Q. Doctor, I'd like to start off where my friend left off and
20 ask a couple questions about the legislature.

21 If I understood your testimony correctly, you just
22 said that leaders of the legislature did not take responsibility
23 for the enacted plan.

24 Did I understand that correctly, sir?

25 A. Yes.

1 Q. And you showed us a few snippets from individual
2 legislators that, in your mind, support that contention,
3 correct?

4 A. From legislative leaders on the reapportionment issue,
5 which --

6 Q. Understood.

7 A. -- directly that.

8 Q. And the legislature leaders were Senator Rodriguez in the
9 Senate, right?

10 A. Yes.

11 Q. And one of the other leaders in the House was
12 Representative Leek, right?

13 A. That's correct.

14 MR. JAZIL: Okay. Can we go to Joint Exhibit 43.
15 This is the transcript of the legislative special session that
16 the doctor was referring to in his testimony.

17 Can we go to page go page 3, lines 14 to 19, please.

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

19 *(Pause.)*

20 BY MR. JAZIL:

21 Q. I'll come back to that, sir.

22 Would you agree with me that the best expression of
23 the legislature's intent, all 160 members of the Florida
24 legislature, is the actual bill that they vote on and pass,
25 right?

1 A. I think that that should be taken into account in trying to
2 determine the legislature's intent, but if there is more direct
3 evidence that is more specific on facets of a piece of
4 legislation, the -- I think that that's exceedingly important in
5 trying to figure out what the legislature's intent actually was.

6 Q. I appreciate that, sir, but my --

7 A. When I was teaching the Supreme Court, I would often teach
8 a case which discusses legislative intent called *Adamson v.*
9 *California* --

10 Q. Doctor.

11 A. -- in 1948, I believe. And Justice Black was trying to
12 determine the legislative intent behind the Fourteenth
13 Amendment, whether it was meant to include the first state
14 amendment, and he has a long discussion about how you determine
15 legislative intent.

16 He put great emphasis on the actions and statements of
17 the principal framer of the Fourteenth Amendment, and I always
18 believed that that was a good guide to legislative intent.

19 Q. Doctor, do you remember my question?

20 A. So I continue to believe that that's the case, that that
21 and the statements, often the statements on the floor, the
22 statements in committee hearings, the statements in legislative
23 reports, I think that all -- all ought to be taken into account
24 in determining legislative intent.

25 But however the Courts -- the Court wants to weigh all

1 of those things in making its final judgment is really up to the
2 Court.

3 Q. Understood, Doctor.

4 Do you remember my question? I asked you whether or
5 not the actual bill passed by the legislature is the best
6 expression of legislative intent. Simply yes or no, sir?

7 A. I do not think that it is the sole one. I think that there
8 are lots of things that you ought to conclude, and I was
9 following Justice Black in saying that with respect to the
10 largest question of intent that Courts have ever considered in
11 the last -- well, it's now more than a half century, he said
12 look at the statements and actions of the principal framer, and
13 I've always been informed by that, and I think it's good advice.

14 Q. Okay. So the answer to my question is what? Yes or no:
15 Is it the best intent?

16 A. I'm -- I was convinced by Justice Black. He was concerned
17 with a very difficult question, which was: Did the Fourteenth
18 Amendment mean to incorporate all the first eight amendments to
19 the Constitution. A -- simply one vote that the Congress took
20 on the Fourteenth Amendment for it or against it did not provide
21 much purchase on the answer to that question.

22 I think that is often the case in analyzing state
23 legislatures, and I think that it is the case in this case as
24 well. I think a lot of things should be taken into account, and
25 it's up to the judges to figure out how to weigh them.

1 Q. Okay. Now, you say that the legislature did not take
2 responsibility for the enacted plan, and do you know whether or
3 not the legislature's participating in any litigation supporting
4 and defending the enacted plan?

5 A. I think they have decided to defend it now, but I think at
6 the time that they were considering it in legislative session,
7 they did not take any responsibility for it. And that --
8 actions that they took at the time, rather than afterwards seems
9 to me more probative in the sense that I would weigh them
10 more -- not in the legal sense. Legal sense is up to the
11 judges, but it's that I would weigh that more in writing about
12 what they wanted to do and what they actually did during the
13 legislative session.

14 Q. So, Dr. Kousser, if I understand your testimony correctly,
15 you're saying that you would weigh what individual legislators
16 said during the legislative process more so than the actual
17 decision by the legislature to enact the plan that's being
18 challenged and then to defend it in court?

19 Am I understanding that right?

20 A. I would weigh it more heavily in trying to figure out what
21 the legislature did. It's much more specific. All they -- it's
22 impossible to determine simply from the final vote if the
23 legislature is complying with what the Governor said because
24 they -- they agreed with it or because -- or despite the fact
25 that they disagreed with it.

1 Q. Okay.

2 A. There are specific opinions that they express which say
3 that they're complying, even though the implication is that they
4 disagreed with it. And that's an answer that's not -- where
5 there's not much purchase in simply looking at the vote that the
6 legislature took.

7 Q. Okay. Fine. Let's look at what Senator Rodriguez said on
8 April 19, 2022, during the special session.

9 MR. JAZIL: Can we pull up Joint Exhibit 46, please,
10 page 30.

11 BY MR. JAZIL:

12 Q. Senator Rodriguez says on lines 14 to 19: "On Tuesday,
13 April the 12th, I was briefed by the Governor's office on a map,
14 which has been published as P000C0109. After a conversation
15 with our Senate counsel, I determined that this map reflects
16 standards that the Senate can support and filed it as Senate
17 Bill 2C."

18 Do you see that, sir?

19 MS. BLUM: Objection. Can you just read the whole
20 statement for completeness? The next paragraph.

21 BY MR. JAZIL:

22 Q. The next paragraph says: "I've asked our general counsel,
23 Mr. Dan Norby, to prepare a legal analysis of the Governor's
24 submission, and that legal analysis is included in today's
25 meeting material for your review. The letter that the

1 Governor's office sent along with their map and their analysis
2 that accompanied the veto message are also included in today's
3 material. At my request, the Governor's office is here today to
4 provide members of this committee with the same briefing that I
5 received last week and to answer questions about the map.
6 Members earlier today, all interested senators, were invited to
7 attend this meeting."

8 Do you see that, sir?

9 A. Yes. The memo --

10 Q. I'd like to refocus our attention to where it says --

11 A. I discussed the Norby memo before.

12 Q. Yes, sir, I understand. But the part you did not discuss
13 was the portion where Senator Rodriguez says that, "I determined
14 that this map reflects standards that the Senate can support."

15 Do you see that statement, page 3?

16 A. Yes. I think that that's -- should be placed beside the
17 statements by Senator Rodriguez that we have reviewed in my
18 testimony before and that the Court should consider them all
19 together.

20 Q. Would you agree with me that the Court should consider
21 those statements together with the fact that the House and
22 Senate passed the enacted map?

23 A. Yes.

24 Q. And you'd agree with me that the Court should consider all
25 those statements together with the fact with the House and

1 Senate are defending the enacted map in State court litigation
2 right now, right?

3 A. I think that's much less useful because it's so much later
4 in time. If you ask what the legislature wanted to do in
5 2021-'22, and that that question should be answered by looking
6 at what happened at that time, the actions of the legislature
7 that I detailed in great detail during my testimony, I think
8 that that's much more relevant than later activities of the
9 legislature.

10 But, again, that's something that the Court can weigh
11 itself.

12 Q. Understood.

13 And just working backwards from where my friend left
14 off, you called this legislative cycle in Florida
15 "extraordinary." That was your word, right?

16 A. It was extraordinary with regard to redistricting for all
17 the reasons that I pointed out.

18 Q. Yeah, so you said it was extraordinary that the Governor
19 sought an advisory opinion from the Florida Supreme Court
20 regarding redistricting, right?

21 A. I don't think that that had been done before.

22 Q. Okay. And you said it was extraordinary that the Governor
23 submitted a map this legislative cycle, correct?

24 A. I don't think Florida Governors had done that in the past
25 that I'm aware of.

1 Q. And if I understood the broader arc of your testimony, you
2 also said it was extraordinary that the Governor was pressuring
3 the legislature to pass a particular version of a congressional
4 map, right?

5 A. I'm not sure of that. The -- it's hard to find -- to
6 figure out often what hath -- goes on behind the scenes, and I
7 do not know that governors have never done that before.

8 Q. Okay. And as a historian --

9 A. The pressure was extraordinary.

10 Q. Understood.

11 And as a historian, you would go and look at the
12 periodicals from the era to figure out whether or not a governor
13 was lobbying the legislature or not, right?

14 A. I'm sorry. The governor was -- I didn't hear you. The
15 verb?

16 Q. You would go and look at periodicals from that time period
17 to assess whether or not the Governor was lobbying the Florida
18 legislature to pass a particular version of a map, right?

19 A. Yes, but you didn't -- I didn't -- it was not -- it's not
20 necessarily clear that every part of the Governor's lobbying
21 would appear in periodicals.

22 Q. But in your expert report, you rely extensively on
23 newspaper reports, right?

24 A. Yes.

25 Q. So newspapers are one source that you would go to if you

1 were trying to figure out whether or not a particular governor
2 was lobbying for a legislature for a particular version of a
3 congressional map or any kind of map?

4 A. Yes.

5 Q. Are you familiar --

6 A. I didn't say that the Governor --

7 Q. Are you familiar with --

8 MS. BLUM: Can you let him finish?

9 THE WITNESS: -- that a governor had never lobbied for
10 a map. Certainly -- excuse me. Sorry.

11 Certainly in the 1950s, Governor Collins lobbied to
12 get maps that were more fairly apportioned. That's not
13 extraordinary, and I knew of that.

14 What's extraordinary here is the degree of the
15 Governor's absorption and his producing maps in the first place.

16 Q. Okay. And you mentioned Governor Collins. Do you know
17 whether he vetoed any maps that the legislature put forward
18 while he was governor, any apportionment maps?

19 A. I believe that he did. He was trying very hard to get
20 malapportionment ended even before *Baker v. Carr*.

21 Q. And do you know whether or not he called any special
22 sessions for apportionment while he was Governor?

23 A. He did. There were lots of special sessions during that
24 period of time, and they failed.

25 Q. Well, let's --

1 A. The Governor did not succeed.

2 Q. Let's go through them, sir.

3 Would you agree with me that Governor Collins called a
4 special session in 1955 that lasted through 1956 concerning
5 apportionment?

6 A. I -- in general, I'm sure you know the exact facts of
7 those. I have not reviewed those recently, but I did read about
8 those, and I know he called special sessions.

9 Q. Would it surprise you to learn that Governor Collins called
10 special sessions in 1955, 1956, 1957, 1962, 1963, 1965, 1966,
11 1967, 1968, 19 -- pardon me. Governor Collins didn't call all
12 those, but those were special sessions called for
13 reapportionment in Florida.

14 Did you go through the archives and figure that out?

15 A. I think I read that in the secondary literature.

16 Q. Okay. Did you look for any primary materials to see when
17 special sessions were called in Florida?

18 A. I knew from the secondary materials that there were many
19 special sessions on malapportionment during that period of time,
20 so I didn't have to go back to the primary materials.

21 Q. Would you agree with me that there were also special
22 sessions called in 1982 concerning redistricting?

23 A. Yes, there was a special session in 1982. The legislature
24 deadlocked.

25 Q. In fact, there were four special sessions in 1982, right,

1 for redistricting?

2 A. I believe that's correct.

3 Q. Sir, you also said it was extraordinary that the Governor
4 signed advisory opinion from the Florida Supreme Court
5 concerning reapportionment, right?

6 A. I am unaware of other governors doing that.

7 MR. JAZIL: Can we pull up Governor Collins' advisory
8 opinion request of the Florida Supreme Court for 1955, please?

9 THE COURT: Mr. Jazil, you said 1955?

10 MR. JAZIL: Yes, sir. This appears at 81 So. 2D 782,
11 if my eyes are not failing me.

12 Can we scroll down so the doctor can see the request?

13 BY MR. JAZIL:

14 Q. Did you come across this letter, Doctor?

15 A. I'm not sure that I looked at it. I was not primarily
16 concerned with things that happened before 1962 with regard to
17 reapportionment. I just summarized them quickly.

18 MR. JAZIL: Okay. We can take that down.

19 If you're unfamiliar with it, you're unfamiliar with
20 it.

21 BY MR. JAZIL:

22 Q. Doctor, you also said that it was unusual for the Governor
23 of Florida to submit a map in the redistricting cycle, right?

24 A. That was what was said during the discussions both in the
25 legislature and was said outside the legislature, yes.

1 Q. Okay. Did you do independent research of your own at the
2 Florida Archives to see whether that was, indeed, the case?

3 A. No.

4 Q. Did you do any independent research at the Bob Graham
5 Center to see whether Governor Graham submitted any maps of his
6 own during the 1982 legislative session?

7 A. I did not go to Florida to do any research on this case.

8 Q. Okay. So that -- I take it that means you didn't do any
9 firsthand research to see whether Governor Chiles submitted a
10 map to the Florida legislature on redistricting?

11 A. That's correct.

12 Q. So you just don't know, right?

13 A. I did not do any independent research, and it was not, I
14 think, discussed in the secondary literature. Those examples
15 that you gave were not discussed in the secondary literature.

16 Q. Okay. Doctor, are you familiar with United Press
17 International?

18 A. I know it existed.

19 Q. It was a wire service, right?

20 A. Yes.

21 Q. And you would rely on material from the wire service in
22 your reports that you provided to courts in the past, right?

23 A. Stories that were carried by the wire services, yes.

24 Q. Okay.

25 MR. JAZIL: Can we pull up Kousser Cross 1, please.

1 BY MR. JAZIL:

2 Q. Sir, this is a wire service story from May 22, 1982. I'd
3 like to focus your attention on the fourth paragraph where it
4 says, "House and Senate leaders, working with Graham, had
5 privately worked out a compromise plan."

6 A. Yes.

7 MR. JAZIL: And if we can zoom out, zoom into the
8 first paragraph.

9 BY MR. JAZIL:

10 Q. And this story is concerning the redistricting of Florida's
11 19th Congressional District.

12 Do you see that, sir?

13 A. Yes.

14 Q. So based on your testimony earlier, you didn't go to the
15 Graham Center or the Florida Archives to see whether or not this
16 private arrangement between Governor Graham, the House and
17 Senate leaders, resulted in Governor Graham giving a map to them
18 for the congressional districts, did you?

19 A. I'm sorry. It does not say that the Governor proposed the
20 map. It says they worked out a compromise plan.

21 Q. Privately?

22 A. Privately, yes.

23 Q. And you'd agree with me that Governor Graham was known for
24 being a meticulous note-taker, right?

25 A. Uh-uh. I do not know that offhand.

1 Q. Okay. Fair enough. We'll move on.

2 Sir, are you familiar with the Orlando Sentinel?

3 A. Yes.

4 Q. In fact, you cite it 42 times in your expert report, right?

5 A. I'm sure that you've counted correctly.

6 MR. JAZIL: Let's go to Kousser Cross 2, please.

7 Can we scroll down so Dr. Kousser can take a look at
8 this article and I'll ask him a question or two about it.

9 THE WITNESS: Okay.

10 BY MR. JAZIL:

11 Q. Sir, you'd agree with me that that article is about a Black
12 lawmaker accusing Governor Chiles of exerting pressure on the
13 Florida legislature when it comes to drawing congressional
14 districts, right?

15 A. Yes, and I said earlier that I don't consider it odd to
16 think that the Governor would lobby on legislative redistricting
17 plans at all. What was different is the degree to which
18 Governor DeSantis intervened by offering his own plans and not
19 compromising.

20 Q. Well, let's break that down.

21 You'd agree with me that in today's day and age,
22 Tweeting is a form of lobbying, right?

23 A. It is, but it's more public.

24 Q. Okay. And you'd agree with me that holding press
25 conferences where you're sending a message to members of the

1 Florida legislature is a form of lobbying, right?

2 A. It is a more public form of lobbying, yes.

3 MR. JAZIL: You can take that down.

4 BY MR. JAZIL:

5 Q. Sir, I'd like to pull up slide 24 from my friend's
6 presentation. I'm going to shift gears here a bit, Doctor.

7 This is a slide that you discussed with my friend
8 earlier on your direct. Do you see that, sir?

9 A. Yes.

10 Q. Sir, would you agree with me that both the 2002 version of
11 the map that's shown on top and the benchmark map from 2016 have
12 noncompact congressional districts in North Florida?

13 A. It depend upon how you define "compactness." There are at
14 least 36 indexes of compactness, and by many of those indexes,
15 this -- both of those would come out as noncompact.

16 The point of what I said was not that -- whether they
17 were compact or not, but that they were comparable.

18 Q. Okay. So let's start with the part where we all agree,
19 that the configuration of Congressional District 4 in the 2002
20 map and the configuration of Congressional District 5 in the
21 2016 map are both not compact.

22 Now, looking at the 2002 map, you'd agree with me that
23 when that map was drawn, there was no Fair Districting amendment
24 in Florida, right?

25 A. That's correct.

1 Q. So there was no prohibition on taking partisanship into
2 account, right?

3 A. That was not a settled question in federal law.

4 Q. But under the Florida Constitution, there was nothing that
5 prohibited the Florida legislature from taking partisanship into
6 account, right?

7 A. There was no explicit provision in the Florida
8 Constitution, but there were partisan challenges that happened
9 all across the country to redistrictings at the time, and that
10 was not settled until the *Rucho* decision in 2017.

11 Q. Fair enough. Would you also agree with me that incumbency
12 was something that map drawers could take into account when
13 drawing maps in 2002 in Florida, right?

14 A. That was often the case throughout the country. They did
15 take it into account.

16 Q. Okay. So when we're looking at the odd squiggles in
17 Congressional District 4 in the Duval area, the odd squiggles in
18 Congressional District 4 in the Leon area, partisanship could
19 have been one of the explanations, a permissible explanation,
20 for the way those lines look, right?

21 A. They were partisanship that was dependent on race, because
22 legislators knew that Black voters were unlikely to vote for
23 white Republican candidates, Duval, it would seem obvious that
24 the area that was predominantly Black and Duval County was
25 excluded from CD-4 in 2002.

1 Likewise, because the redistricters knew that Blacks
2 were likely to vote for Democratic candidates, the -- and
3 candidates of choice who were Black, the 2016 district was drawn
4 to include that area.

5 So it's -- race and partisanship are highly
6 correlated. You exclude a Black area because you want a white
7 Republican to dominate that district; you include a Black area
8 because you want Black voters to be able to elect candidates of
9 their choice.

10 Race is the mean and it is connected with partisanship
11 and the ends as well.

12 Q. Okay. So setting that aside, setting aside for a moment
13 whether or not there was a correlation between partisanship and
14 race, you'll agree with me that in 2002, the jagged lines in
15 Congressional District 4 could have been explained by
16 partisanship, right?

17 A. No.

18 Q. No?

19 A. I don't agree for the reasons that I said.

20 Q. Okay. Could they be explained by incumbency? If the map
21 drawer was trying to make sure that an incumbent in the squiggly
22 parts of Duval stayed within his or her district, a map drawer
23 could have drawn some squiggly lines to keep the incumbent in
24 that seat, right? That was permissible?

25 A. They could -- incumbency was a permissible -- something

1 permissible that you could use, but there was more than a little
2 dent to take up a congressman's home or something like that.
3 There is an exclusion of an area which is clearly an area of
4 Black concentration, and that is the thing that made it possible
5 for that district to remain white.

6 Q. Fair enough.

7 The Fair Districts Amendments also had Tier II
8 standards, right?

9 A. That's correct.

10 Q. And those Tier II standards talked about needing to make
11 districts compact and needing to make sure that districts
12 followed political and geographic boundaries, right?

13 A. Yes, and it also said that the Tier I standards would
14 prevail if there's any conflict between Tier I standards and
15 Tier II standards, and the Tier I standards included
16 nondiminishment and nondilution.

17 Q. Understood, sir. I'm just trying to figure out what the
18 Tier II standards were. We agree what they were.

19 Here's my question: You'd also agree with me that the
20 Tier II standards, compactness, adherence to the local
21 boundaries, adherence to geographic boundaries superseded other
22 redistricting criteria, such as keeping communities of interest
23 whole, right?

24 A. Yes. That was a major concern when the FDA was taken up.

25 Q. Okay. So we agree that compactness, political and

1 geographic boundaries trump communities of interest.

2 Now, could the lines in Congressional District 4 in
3 2002 have been explained by the need to keep certain communities
4 of interest intact?

5 A. The community of interest that is obviously kept intact is
6 a white community of interest by exclusion of the Duval area.
7 And if the community of interest is a racial community of
8 interest, then that has special significance in redistricting.

9 Q. Okay. Fair enough.

10 So we've established that in 2002 we didn't have the
11 Fair Districting amendments. You'd agree with me that for the
12 benchmark map, which is below the 2002 map, the Fair Districting
13 amendments were in place, right?

14 A. That's correct.

15 Q. And so you, as a map drawer, could not take partisanship
16 into account, right?

17 A. I'm sure that map drawers always take partisanship into
18 account, but that's banned by the Fair District Amendments.
19 There was an attempt to ban it by the Fair Districting
20 amendments.

21 Q. Got it. And incumbency was banned as a criterion, too,
22 when drawing maps after the Fair Districting amendments?

23 A. It is banned.

24 Q. Yeah. And we agree that compactness and adherence to
25 political and geographic boundaries superseded other criteria,

1 such as keeping communities of interest whole, right?

2 A. That's correct, but to the extent that it's a minority
3 community of interest, you can't dilute it or diminish what's
4 already there, according to the FDA.

5 Q. Got it. And so you'd agree with me, then, that if you
6 can't take incumbency into account, we can't take partisanship
7 into account, and race can be taken into account, then the
8 squiggly lines in Duval and Leon would be explained by race,
9 right?

10 What was that, sir?

11 A. You're talking about the benchmark now?

12 Q. Yes, sir, the benchmark Congressional District 5.

13 A. That made it possible -- those lines made it possible to
14 continue that as a district that -- where Black voters could
15 elect candidates of their choice.

16 Q. So you would then agree that race explains the squiggly
17 lines in Congressional District 5 in the benchmark map?

18 A. The area of Duval is certainly -- it was included in
19 District 5 because they wanted to allow Blacks to elect
20 candidates of their choice. I agree with that.

21 Q. Would you also agree with me for the South side of
22 Tallahassee, that spot that --

23 A. I'm less familiar with that demography, but I believe that
24 is the case.

25 Q. Understood. Thank you, sir.

1 I'd like to move on to slide 16 during my friend's
2 presentation.

3 JUDGE WINSOR: I'm sorry. What page?

4 MR. JAZIL: Slide 16, Your Honor, from the
5 presentation from my friends over at the plaintiffs.

6 JUDGE WINSOR: Thank you.

7 BY MR. JAZIL:

8 Q. Sir, this is where you quote Dan Norby, counsel for the
9 Florida Senate, and Andy Bardos, counsel for the Florida House
10 on how one looks to see whether or not a district is performing,
11 correct?

12 A. That's correct.

13 Q. And here they say that -- and just taking a look at
14 Mr. Bardos's statement: "Simply looking at voting age
15 population is not enough. Turnout rates, registration rates,
16 whether high or low, can impact the ability of a minority
17 population to elect a candidate of their choice."

18 Do you see that, sir?

19 A. Yes, sir.

20 Q. Okay. So would you agree with me that when we're looking
21 to see whether or not a district is a performing district, it
22 matters which race we're looking at?

23 A. It is usually used as performing for a particular race.

24 Q. Yeah. So if we're taking a look at African American --

25 A. -- as performing for minority race.

1 Q. I apologize, sir. I didn't mean to talk over you there.
2 Would you mind repeating the last part of your answer? I
3 apologize.

4 A. Sorry. I apologize. I should not talk over you either.

5 In common parlance, a performing district is applied
6 to a district which you would otherwise call a minority access
7 district.

8 Q. And, sir, you'd agree with me that in Florida, assessing
9 whether or not a district has sufficient Black voting age
10 population for that district to perform for African Americans is
11 an easier task than making the same assessment for Hispanic
12 voters?

13 A. It depends upon where in Florida you're looking, but in
14 general, yes.

15 Q. And that's because Hispanic voters can have a higher
16 percentage of noncitizens in the voting age population compared
17 to African Americans, right?

18 A. I'm sorry. Let me -- that's not what I meant by saying
19 that. I think what I meant by saying that is that Hispanics'
20 voting behavior in Florida differs more within itself. There
21 are Puerto Rican-based areas in Orlando, Osceola County, that
22 vote differently than Cuban areas that vote differently than
23 Venezuelan areas in South Florida. That's what I meant to refer
24 to.

25 I think if you take into account the fact that the

1 citizenship rates are not the same and you use citizen voting
2 age population, rather than simply voting age population, use
3 citizen voting age population for Hispanics and citizenship,
4 citizen voting age population for Blacks, then it's equally easy
5 to figure out what the performing districts are. In South
6 Florida there are Haitian areas where the citizenship level is
7 not nearly so high as the citizenship would -- level would be in
8 Jacksonville in the Black population, for example.

9 So you -- in order to practically determine effective
10 districts, you have to look at the right statistics. It's not
11 just easier to do one than the other. Whatever you do, it's
12 equally easy if you just use the right statistics.

13 Q. Understood, sir. So I took away from your answer that
14 using citizen voting age population would account for concerns
15 associated with the citizenship rates for Hispanic voters versus
16 African American voters. Did I understand that right?

17 A. There's some areas of what we would call African American
18 voters, probably, where the citizenship rates differ from South
19 Florida to North Florida. North Florida there would be almost
20 no noncitizen Blacks and South Florida there would be more
21 noncitizen Blacks in certain areas.

22 Q. Sir, perhaps it helps if we all look at a concrete example
23 of this.

24 MR. JAZIL: Can we pull up Joint Exhibit 70, which is
25 the legislative packet accompanying the benchmark map.

1 And if we go to the last page, page 14, the functional
2 analysis return. Just the last page. So can we blow that up.

3 BY MR. JAZIL:

4 Q. Dr. Kousser, can you see that this chart shows the Black
5 voting age population for Congressional District 5, which is a
6 Black performing district under this map, the benchmark map, and
7 the population is 46.2 percent?

8 Do you see that, sir?

9 A. Yes.

10 Q. And then the Hispanic performing districts are 25, 26, and
11 27. They have a Hispanic voting age population in the 70s.

12 Do you see that, sir?

13 A. Yes.

14 Q. So could one explanation for needing to have Hispanic
15 voting age population numbers in the 70s be that for these
16 congressional districts, Hispanics have a lower citizenship
17 rate, so you need more Hispanic voters to get to a point where
18 that district performs for Hispanic voters?

19 A. Yes.

20 Q. Okay.

21 MR. JAZIL: Can we pull back out and go back to slide
22 16.

23 BY MR. JAZIL:

24 Q. So as Mr. Bardos is talking about you need to know more
25 than just the voting age population to see whether or not a

1 district performs, he could have been talking about a scenario
2 where the legislature was trying to put together a Hispanic
3 performing district, right, where it's a little tougher to
4 figure out whether or not the district will perform?

5 A. If you use the citizen voting age population as the
6 denominator, then it's no more difficult to figure it out. You
7 just do a functional analysis which is practical.

8 I've done a lot of analysis of California
9 congressional districts and state legislative districts, and you
10 have to take that into account, but once you do, then it's
11 relatively easy to figure out what a performing district is.

12 Q. Understood. But you'd agree with me, sir, that the Florida
13 legislature didn't use citizen voting age population; they used
14 voting age population for their function analyses?

15 A. In the Hispanic areas, that would potentially cause
16 practical problems. I agree that that's the case.

17 Q. Understood, sir.

18 Let's try to get at this one more way. Do you have
19 access to your expert report, sir?

20 A. I do.

21 Q. I'd like to go to page -- and this is Plaintiff's Exhibit
22 5100. I'd like to go to page 95 and 96. Let's start with
23 Table 1 on page 96, sir. It's titled "Minority Access Districts
24 in Congress."

25 Do you see that?

1 A. Yes.

2 Q. So these are districts where, from your perspective,
3 minorities can elect a representative of their choice, right?

4 A. Where they did elect a representative of their choice.

5 Q. Understood, sir.

6 A. Blacks.

7 Q. And if we go to page 95, paragraph 220, it says: "The
8 table includes every district from 1999 through 2023 that either
9 elected a Black member of the House, Senate, or Congress or the
10 Black voting age population percentage was 30 percent or above,"
11 right?

12 A. Yes. I think that I said at one point that there were some
13 errors which your expert pointed out in that and that I left
14 some people out inadvertently.

15 Q. And we'll get to that, sir.

16 But my question is this: As you were doing analysis
17 for a Black performing district, you used 30 percent as a rough
18 rule of thumb, right?

19 A. I just wanted to include every place where there might be a
20 Black access district, so I took 30 percent as a rough rule of
21 thumb. But as the table shows, there are congressional
22 districts, particularly the Orlando Congressional District,
23 where Val Demings won in a district that was, I think, under
24 30 percent Black.

25 What was different about that was that the district

1 had a relatively small proportion of whites and there were a lot
2 of Hispanics who were probably not citizens in that district,
3 and so she could win Democratic primary in that district and
4 then, through crossover votes, win the election.

5 But there are -- so that should be taken into account
6 in considering performing districts. I think the discussion in
7 the legislature and in commentary on what is going on did take
8 that into account in the Tenth District.

9 Q. Understood, sir. So there are some exceptional
10 circumstances, but your rule of thumb was 30 percent Black
11 voting age population equates to minority access district,
12 right?

13 A. Not always. It depends upon what else there is. It's --
14 it depends on who else is in that district.

15 When I did a large-scale study in California of what
16 it took to elect a Hispanic in the late 20th century and I
17 looked at all districts, state, legislative, or congressional
18 district, and I looked at primaries as well as general
19 elections, I concluded that what was crucial was not only the
20 proportion of Hispanics who were Black of the -- I'm sorry --
21 the proportion of Hispanics who were Democrats, but also who
22 else was in the district.

23 What was the -- what was the difference between the
24 Hispanic proportion of Blacks and the proportion of Blacks --
25 proportion of Democrats who were number two in that district.

1 And I think that's the case also in Florida.

2 I did not in this table -- have the data in order to
3 do that, but that would bear upon the consideration of whether
4 it was functional and controllable by a Black -- by the Black
5 electorate.

6 Q. Doctor, you also mentioned some errors in these tables, and
7 since we're on the tables, I'd like to just go through them.

8 In this table, the first one, Table 1A --

9 MS. BLUM: Mr. Jazil, do you have the corrected table
10 that Dr. Kousser had in his deposition?

11 MR. JAZIL: I do not. This is the --

12 MS. BLUM: We didn't introduce it into evidence, and
13 we weren't planning to.

14 MR. JAZIL: Fair enough.

15 Can I have him just walk through the changes he's
16 made?

17 BY MR. JAZIL:

18 Q. Dr. Kousser --

19 MS. BLUM: Mr. Jazil, could you just substitute the
20 correct table later for the record?

21 JUDGE WINSOR: I don't think this is in the record.

22 MR. JAZIL: I'm not introducing it into evidence. I'm
23 just asking him questions.

24 MS. BLUM: Okay.

25 ///

1 BY MR. JAZIL:

2 Q. But this is the expert report you produced in this case,
3 right?

4 A. Yes, and I tried to change it when I had made mistakes.

5 Q. Okay.

6 A. That was in the deposition.

7 Q. And in Table 1A, you did not include Allen West or Byron
8 Donalds, right?

9 A. Because those were not access districts. Those were
10 districts where the Black percentage was quite low. In Donalds'
11 case I remember it was 6 percent. I think the third lowest
12 Congressional District in 2023 was Donalds' district. So it's
13 not a Black access district.

14 What I was trying to show in the table was that most
15 Black access districts were below 50 percent Black. That was
16 the point, because there was a contention in some of the things
17 that the Governor said that only a Black access district that
18 was above 50 percent Black VAP was protected, and, therefore,
19 District 5 was not protected. What I wanted to show was that
20 that was not consistent with the political practice in Florida
21 during this period of time.

22 So leaving out Republicans, which was an oversight on
23 my part, didn't make any difference to the real point of the
24 tables, which was that it was conventional in Florida, and it
25 grew to be more conventional, that there was more and more white

1 crossover to Black -- in support of Black members. That made it
2 easier to elect Blacks, and it made it more conventional for
3 Blacks to be elected by a multiracial coalition. And that had
4 something to do -- that has implications for the position of the
5 Governor, which is that the only districts which are protected
6 are those that are above 50 percent Black. That goes against
7 the conventions the last couple of decades in Florida. It goes
8 against some things that were said in various court cases. And
9 it goes against the increasing political reality in Florida.

10 Q. Understood, sir.

11 Just going back to page 95, where you say, "The table
12 includes every district from 1999 through 2022 that either
13 elected a Black member of the House, Senate, or Congress or were
14 the Black VAP percentage was 30 percent or below."

15 Do you see that?

16 A. Yes, and as I said, that was -- I made mistakes and tried
17 to correct them in my deposition.

18 Q. Got it. And what I'm just not understanding is, was the
19 mistake that you had the "or," the disjunctive, separating
20 "election of Black member" or was that intended to be an "and,"
21 so it captured "Black members elected in districts where the
22 BVAP was under 30 percent"?

23 Is that what you were trying to do?

24 A. I'm sorry. Let me -- let me go back and look at this.

25 I meant -- I made mistakes -- I made a mistake on

1 elected Black member of the House. I don't remember making
2 mistakes or by saying "or where the Black VAP percentage was
3 30 percent or above." I may have made one mistake in that. I
4 think there's a member of Congress who was elected in 2022,
5 white member of Congress from North Florida, and the district
6 was slightly above 30 percent. So I made a mistake by not
7 including him as well, although he was white.

8 Q. Okay.

9 JUDGE WINSOR: What's the significance of --

10 THE WITNESS: I think that I corrected all of that.

11 JUDGE WINSOR: Doctor, what's significant about the
12 30 percent that you keep talking about?

13 THE WITNESS: It just looks like, if you look at the
14 districts, that that is about the level where it's sometimes
15 possible to elect Black members of choice.

16 And the point of the table, really, is that it is
17 possible to elect Black members from districts where they do not
18 comprise a majority, some as low as 30 percent, in a couple of
19 cases as low as 20 percent. It's just to show that how much of
20 Florida political reality would be excluded by the Governor's
21 position that you needed 50 percent in order to have a district
22 where minorities -- Black minorities could elect a candidate of
23 their choice under particular circumstances.

24 MR. JAZIL: We can take that down for a minute.

25 Your Honor, if I may follow up on your questions?

1 JUDGE WINSOR: Sure.

2 BY MR. JAZIL:

3 Q. Dr. Kousser, so if I understood your testimony correctly,
4 you're saying that a Black voting age population of 30 percent
5 can allow African Americans to be elected to Congress, right?

6 A. Depending upon other things. The way to determine it is to
7 use the same sort of functional analysis that the State Supreme
8 Court laid down as the rule, and on a complete analysis, that's
9 what you would do.

10 Q. And in one of the districts that you admitted from your
11 report initially was Congressional District 4 in the enacted
12 map, which had a BVAP of 30 percent, right?

13 A. Yes. It was corrected, but yes. Under particular
14 circumstances, the particular circumstances that you have to go
15 through the functional analysis. 30 percent is possible, but
16 that's not a complete functional analysis.

17 Q. Would you agree with me that if a map drawer was trying to
18 draw a map that excluded African Americans from being able to
19 elect a representative of their choice, he would try to get
20 below the 30 percent Black voting age population rule of thumb
21 that you've used in your report?

22 A. No, I don't, because he would look -- he would perform a
23 functional analysis. That's what the State Supreme Court said
24 to do, and I'm sure that that is what is done.

25 Q. And in the absence of a function --

1 A. If the -- if it were impossible for a Black to get elected
2 because the crossover vote in that particular area was too low
3 at that particular time, then that functional analysis would
4 show that that district was not a district that could be
5 expected to perform.

6 Q. And, sir, in the absence of a functional analysis, a map
7 drawer intent on excluding African Americans from Congress,
8 would be doing a pretty bad job drawing a district with a Black
9 voting age population of 30 percent, right?

10 A. No. If a responsible map drawer or an irresponsible map
11 drawer -- map drawers know very great deal of things. I've
12 spent some time with people who draw redistricting maps, both
13 Democratic and Republican, and they are remarkable in exactly
14 what they know about the characteristics of the district.
15 The -- and that was true in Florida as well of the -- the man --
16 I'm sorry. I'm tired -- the man who testified yesterday. His
17 knowledge of Florida demography, geography, was extraordinary.

18 They know, and they would certainly perform a
19 functional analysis. They wouldn't stop at 30 percent. It
20 would be irresponsible to do that, and nobody who did that would
21 be -- and that's all they did, would be hired and trusted as
22 somebody who would draw a redistricting map.

23 THE COURT: But wouldn't going below a 30 percent BVAP
24 be an important first step, even under your theory?

25 THE WITNESS: It depends who else is in the district.

1 If you had a large Hispanic proportion of the district and the
2 proportion of the people who were Democrats who were Black was
3 high, it's conceivable that in certain areas that would be --
4 could be a performing district.

5 I would expect anybody who's drawing a district who
6 wanted to figure out whether they would have a Black performing
7 district or a Hispanic performing district, they would perform a
8 detailed functional analysis and they would take into account
9 all of the relevant statistics, not just the proportion that --
10 of the AP that happen to be Black in the area.

11 THE COURT: Understood. But all things -- all of the
12 things being equal, wouldn't you rather start with a below
13 30 percent BVAP if you were trying to prevent Blacks from
14 electing their candidates of choice?

15 THE WITNESS: I don't think all things -- are ever
16 equal in redistricting. I think the people who draw districts
17 know the areas and they know particular characteristics. I
18 don't think that it would be responsible on their part just to
19 look at a top line figure. They would know other things. They
20 would know how popular an incumbent is in a particular area.
21 They would know whether people who were -- who were Black or
22 Hispanic are likely to turn out.

23 In another case that I testified in, the 2006 case in
24 Texas, *LULAC v. Perry*, the decision of the Court turned on the
25 turnout rates of Hispanics in different close areas, and the

1 Court decided that the redistricters had taken that into account
2 and that simply knowing the proportion Hispanic in the district
3 was insufficient to make a decision about whether it was a
4 performing district for Hispanics or not and whether that was a
5 district that Democrats could be expected to carry or
6 Republicans could be expected to carry.

7 There is a sensitive discussion is Justice Kennedy's
8 opinion in that case on District CD-23 on which I testified, and
9 he said -- it was close to proving intent. I thought it did
10 prove intent, but he said it was close to proving intent.

11 So there is a widespread understanding by political
12 aficionados, redistricting authorities, Supreme Court Justices,
13 probably District Court judges, and certainly in Florida State
14 Supreme Court justices that the way of figuring out whether
15 there is a performing district or not doesn't stop by looking at
16 the top line voting age population in the area.

17 JUDGE WINSOR: But if you did stop by looking at that,
18 you would -- 30 percent would be the number? I mean, you had to
19 have some reason for choosing 30 percent in your statement,
20 right.

21 THE WITNESS: It was just a rough estimate of what
22 districts had elected Blacks in the past.

23 BY MR. JAZIL:

24 Q. So, Doctor, in Table 1 where you had the rough estimate
25 using the 30 percent rule of thumb, you didn't conduct any

1 functional analyses, right?

2 A. That's correct, because what I was only trying to do in
3 this part of the report was to show that the 50 percent bright
4 line rule would have cut off a lot of people who were actually
5 elected, Black officials, and that it made no practical
6 political sense given what had been the case practically in
7 Florida since 1999.

8 Q. And to your knowledge, there was no functional analysis
9 done for North Florida in the enacted plan, right?

10 A. I think that the Governor and his people did not produce a
11 public functional analysis. There were newspaper reports that
12 functional analyses had been presented, but that was never --
13 that was never made public.

14 Q. I'm sorry, sir. Can you point me to what newspaper said
15 that the Governor's team did a functional analysis for North
16 Florida?

17 A. There was -- there were newspaper reports that analyses had
18 been performed either for the Governor's team or for the
19 legislature. It did not specify North Florida. And those
20 functional analyses were never produced. Some of the Democratic
21 members of the legislature asked for those to be produced. They
22 were not produced. And I don't know the nature of them, other
23 than this newspaper report, that they existed.

24 Q. Understood, sir. And the reason why I'm asking my question
25 is I am not aware of a single newspaper story or any other

1 indication that the Governor's enacted plan came with a
2 functional analysis, either from the Governor's office or from
3 the legislature. If I'm misunderstanding that, please do
4 correct me.

5 A. I think none was made public, certainly. There may have
6 been some private analysis like that, but that was never made
7 public, and it was important that the Governor didn't present
8 those because the State Supreme Court had said that's what you
9 should look at.

10 Q. And again, sir, can you point me to any newspaper that
11 talks about the secret functional analysis from the Governor's
12 office?

13 A. I'm having difficulty finding it. I remember running
14 across it when I was doing research.

15 Q. Could it perhaps be because there is no such newspaper
16 story?

17 A. That is my memory at the time, that there was such a story.
18 I'm trying to remember the guy's name. I may not have included
19 that in the report.

20 Q. Dr. Kousser, you mentioned earlier you were getting a
21 little tired. If you'd like to take a break, with the Court's
22 indulgence?

23 JUDGE WINSOR: How much longer do you have?

24 MR. JAZIL: I'd like to think 30 minutes or 35
25 minutes, but, likely a little longer.

1 JUDGE WINSOR: Yeah, we can take a break.

2 Okay. We'll take a ten-minute break, then, and come
3 back at -- we'll say 3:40. That'll be like 13 minutes.

4 *(Recess taken from 3:26 p.m. to 3:42 p.m.)*

5 JUDGE WINSOR: Have a seat.

6 You may continue whenever you're ready.

7 MR. JAZIL: Thank you, Your Honor.

8 BY MR. JAZIL:

9 Q. Dr. Kousser, I'd like to shift gears a bit and talk about
10 the passage of the Fair Districting amendments.

11 You'd agree with me that there were some Black voters
12 who did not support the Fair District Amendments, right?

13 A. There were some, but there was every effort to convince
14 people to support these amendments, and there was much greater
15 support in general among Blacks than there had been for previous
16 redistricting efforts. The NAACP statewide, the legislative
17 Black caucus, and most of the members of the Black caucus
18 endorsed the FDA.

19 I don't know of polling results that are available by
20 race, but there was quite widespread support, though not
21 unanimous, among Black political leaders and interest group
22 leaders.

23 Q. Understood. And at the time, one of Florida's elected
24 Congress members, Corrine Brown, opposed the Fair Districting
25 amendments, right?

1 A. She did. She had opposed every effort to change
2 redistricting since she was elected.

3 Q. And in your expert report, you called Al Lawson,
4 Congressman Al Lawson, a critic of the Fair Districting
5 amendments, right?

6 A. He was.

7 Q. And, sir, you'd agree with me that the Fair Districting
8 amendments concern more than just race, right?

9 A. Of course. Concerns partisanship, importantly, but it does
10 concern race.

11 Q. Agreed. They concern partisanship. We also talked about
12 how they concern incumbency, right?

13 A. Yes.

14 Q. And how they concern compactness, right?

15 A. Those are Tier II standards, yes.

16 Q. Yeah. And the other Tier II standards were adherence to
17 political and geographic boundaries, right?

18 A. Yes.

19 Q. So the Fair Districting amendments were a package presented
20 to the voters that included provisions concerning race,
21 partisanship, incumbency, compactness, and adherence to
22 political and geographic boundaries, right?

23 A. Yes, but some of them provisions were stated in the
24 amendment to be more important than others, Tier I, Tier II.

25 Q. Okay. And the Tier I standards included partisanship and

1 contiguity, right?

2 A. Yes.

3 Q. So you can't tell, can you, what specific part of the Fair
4 Districting amendment caused a voter to vote for or against it?

5 A. I don't think that there are any studies or polls of that.
6 That's correct.

7 Q. So no studies, no polls that show why voters voted for the
8 Fair Districting amendment, right?

9 A. There are no scientific studies that I know of. It's
10 almost always the case with amendments that have moving parts.
11 There are various things that are put together, and there's an
12 attempt to make it a -- single-subject rule to make sure that
13 sort of logrolling doesn't change the message, doesn't muddy the
14 message.

15 But there are lots of different standards in one
16 particular redistricting amendment, and this was one of those in
17 which there are different parts of the standard.

18 Q. And you'd agree with me that unlike the Voting Rights Act
19 of 1965, there was no packet compiled detailing in detail,
20 excruciating detail, the history of racism in Florida that was
21 presented to the voters who cast their ballot for or against the
22 Fair Districting amendment, right?

23 A. Yes. However much historians would like everybody to be
24 completely aware of every detail of history and have to pass
25 tests in order to be (inaudible) for something, that's never

1 done, so you take the voters as they are.

2 Q. But you'd agree with me that Congress, when it enacted the
3 Voting Rights Act in 1965, did have such a detailed assessment
4 of race-based problems before them, right?

5 A. In '65 and every subsequent renewal and attempted renewal.

6 Q. Understood.

7 MR. JAZIL: Can we go to slide 13 from the
8 presentation.

9 BY MR. JAZIL:

10 Q. And this is a slide, sir, where you discussed with my
11 friend particular statements made in support of the Fair
12 Districting amendments. You recall this slide?

13 A. Yes.

14 Q. Now, you'd agree with me that FairDistricts Florida is a
15 litigant in this case, right?

16 A. Yes.

17 Q. And two of these snippets come from FairDistricts Florida?

18 A. Two of the existent -- I mean, two of the three there?

19 Q. Yes, sir.

20 A. No. One of them comes from FairDistricts Florida.

21 There's -- there's a news story from the Tallahassee Democrat
22 and an opinion article from the Tallahassee Democrat.

23 Q. Yes, sir. In just looking here, the first snippet on the
24 top left, Florida NAACP president?

25 A. Yes.

1 Q. Right under there it says "FairDistrict Florida draws
2 opposition," Tallahassee Democrat.

3 That's the one you're saying is just in a position
4 piece in the Tallahassee Democrat?

5 A. No. I think this is a news article.

6 Q. Okay. And this news article quotes someone from the
7 Florida NAACP?

8 A. The president, yes.

9 Q. And is the Florida NAACP a litigant in this case?

10 A. I believe that they are.

11 Q. Okay. So let's go down look at the Ellen Freidin quote,
12 "Chairwoman of FDA sponsor FairDistricts Florida."

13 Do you see that quote, sir?

14 A. Yes.

15 Q. You'd agree with me that FairDistricts Florida is a
16 litigant in this case, right?

17 A. Yes.

18 Q. And then the third snippet is from what looks like an
19 editorial; is that right?

20 A. Yes.

21 Q. And editorials can have a particular bend. They can --

22 MR. JAZIL: Sorry, Your Honor. The witness
23 disappeared.

24 THE WITNESS: I'm still here.

25 JUDGE WINSOR: Bear with us for one moment here.

1 (Off-the-record discussion.)

2 JUDGE WINSOR: Thank you, TiAnn.

3 DEPUTY CLERK: Mm-hmm.

4 BY MR. JAZIL:

5 Q. Sir, you'd agree with me that *The New York Times* editorial
6 page has a particular slant compared to the *Wall Street*
7 *Journal's* editorial page, right?

8 A. Yes. This is just a -- it is an effort to persuade, and
9 that was all I was presenting it as. It certainly has a
10 particular slant, but it was an effort to persuade voters to
11 vote for the Fair Districting amendment by asserting certain
12 facts, and that's all it's -- it's presented as.

13 Q. Okay. Sir, moving on to another topic.

14 You talked about preclearance in your direct
15 testimony. Do you recall that, sir?

16 A. I'm not sure what I said with respect to preclearance, but
17 preclearance is a topic near and dear to my heart.

18 Q. Sure. Let me ask a more specific question.

19 I recall you discussing the coverage formula for
20 preclearance under the Voting Rights Act of 1965.

21 Do you recall that?

22 A. Yes.

23 Q. Can you point me to the place in your expert report where
24 you discuss the coverage formula for preclearance under the
25 Voting Rights Act of 1965?

1 A. I'm not sure that there is one. I may not have discussed
2 that. But the question had come up in some of your papers,
3 perhaps, that asked why Florida was not covered in 1965, what
4 the significance of that was, and I was just trying to -- in
5 information that I had, which I found out when I was doing
6 research for my presentation on the John Lewis act, rewriting
7 the history of Section 5. I just included that information.

8 Q. And, sir, you'd agree with me that the text of Section 4 of
9 the Voting Rights Act that lays out the coverage formula is the
10 best indication of how that provision works, right?

11 A. How it works, but not, perhaps, how it was chosen.

12 Q. Okay.

13 A. There's a difference in how something was chosen and what
14 is actually the final result of that choice.

15 Q. Okay. Fair enough.

16 Let me ask you this: In 1965, when the Voting Rights
17 Act was enacted, the State of Alabama was covered as a whole
18 under the preclearance formula, right?

19 A. Yes, because it had a literacy test and a low turnout rate.

20 Q. Okay. The State of Georgia was also covered?

21 A. For exactly the same reason.

22 Q. State of Louisiana?

23 A. For exactly the same reason.

24 Q. State of Mississippi?

25 A. For exactly the same reason.

1 Q. And South Carolina, Texas, and Virginia were also covered,
2 right?

3 A. Texas was not covered. Texas was not covered until 1975.

4 In fact, since I did this analysis of all of the
5 voting rights cases in the country as a whole, I can say
6 authoritatively that there are more voting rights cases,
7 settlements, Section 5 objections, all of those things that I
8 listed before, from Texas than any other state. In fact, nearly
9 a quarter of all of the voting rights cases, et cetera, since
10 1957 have come from Texas.

11 So the fact that Texas was uncovered is no more
12 indicative -- in 1965 is no more indicative of a -- of good race
13 relations than the fact that Florida was not covered in 1965.
14 In both of them, after '65, when it became easier to find
15 discrimination, you could use different tools. Then they found
16 more discrimination. And that's very much true in Texas. It
17 was also true in Florida. Without the law, you can't see
18 underneath the covers. You can't discover discrimination.

19 Before 1957, from 1900 to 1957, there were about four
20 voting rights cases in the country as a whole. In fact,
21 there -- we know that there was more discrimination. We just
22 couldn't see it. This is the 1957 Civil Rights Act that allowed
23 us to see it.

24 JUDGE WINSOR: Doctor --

25 THE WITNESS: The same thing is true about 1995.

1 JUDGE WINSOR: -- if you'll just wait for the next
2 question, please.

3 BY MR. JAZIL:

4 Q. Doctor, unlike Texas, was Florida as a state ever entirely
5 covered under Section --

6 A. It was --

7 Q. Go ahead.

8 A. It was not. It was not, because it did not have -- the
9 coverage scene for 1975 was a particular percentage of language
10 minorities, and the particular percentage of language minorities
11 was only in five counties of Texas. It was 254 counties -- I'm
12 sorry -- five counties of Florida, 254 counties of Texas.

13 Q. Okay. So the five Florida counties that were covered for
14 preclearance under the Voting Rights Act in Florida were covered
15 for language-based reasons, right?

16 A. That was what the formula -- that was what fit the formula.
17 Same thing with four counties in California, three counties in
18 New York, and so on.

19 Q. And those language-based counties that were covered in
20 Florida, they were Collier, Hardee, Hendry, Hillsborough, and
21 Monroe, right?

22 A. Correct.

23 Q. And none of those are in North Florida, right?

24 A. Correct.

25 Q. Sir, I'd like to move on another topic.

1 MR. JAZIL: Can we go to slide 5 from the plaintiff's
2 presentation.

3 BY MR. JAZIL:

4 Q. Dr. Kousser, am I correct that this map appears nowhere in
5 your expert report in this case?

6 A. That's correct. I refer to it simply by words, but I
7 didn't put the map in.

8 Q. Now, Doctor, this map, where does it come from?

9 A. It says it comes from MCI Maps, but I looked at something
10 that was taken directly from the printed version of the census
11 in 1860 and compared the -- the counties and the coloration. In
12 the printed map from 1860, there are various shades of gray.
13 This is multicolored, produced for the Internet, and gets the
14 point across better, but it's exactly the same point.

15 That census map, I think, is divided by deciles as
16 well, so it -- it makes the same point: Blacks were heavily
17 concentrated in North Florida.

18 Q. Okay. Let's take that answer one by one, Doctor.

19 You'd agree with me that MCI Maps is a company run by
20 Matt Isbell, a Democratic map drawer?

21 A. Yes. He produces lots of maps on lots of things.

22 Q. And you'd agree with me that he's also a Democratic map
23 drawer? He works for Democrats?

24 A. I believe that he works for Democrats, but I'm not entirely
25 sure. He comments on a great many things and is quoted in

1 newspapers in Florida frequently.

2 Q. And this map does not give us the number of slaves in a
3 given county, does it? It just gives us percentages?

4 A. That's correct.

5 Q. So I don't know whether or not, looking at this map, the
6 population of Marion County is ten people and six of them are
7 slaves, do I?

8 A. No. If you're trying to figure out where the -- what
9 proportion of the population was slaves, you use the percentage
10 of the population. So you don't know that.

11 If you looked at -- some of the counties didn't have
12 very many people in them, for example, in South Florida. They
13 didn't have very many people in them at that point.

14 But that seems a relevant percentage if you're trying
15 to figure out what their share of the population was.

16 Q. But you'd agree with me that not knowing the actual
17 population doesn't give me a sense of how many actual slaves are
18 in a given county in this map, does it?

19 A. It does not.

20 Q. Okay. And looking at this map the way it's been produced,
21 it looks like Marion County had a very high percentage of slaves
22 in it, right?

23 A. I'm sorry. I'm having difficulty figuring out where --
24 where the counties are. If you could direct me to Marion
25 County.

1 Q. Sure, sir. It's in the center of the map, just -- if
2 you're looking at North Florida and you work down -- right
3 there. There's a cursor on it.

4 A. Okay. Yes.

5 Q. Okay. So, sir, we don't know how many slaves were actually
6 in Marion County; we just know that it was a high percentage,
7 right?

8 A. That's what you learn from that map. That's correct.

9 Q. And, sir, you'd agree with me that in Congressional
10 District 5 in the benchmark plan that was in place from 2016 to
11 2022, Marion County was never included as part of Congressional
12 District 5, was it?

13 A. That's correct.

14 Q. And looking at this map, if we look at where Leon County
15 is -- this is the other darker shade.

16 A. Right.

17 Q. And we go two counties to the left, we've got Jackson
18 County. Do you see that, sir?

19 A. Yes.

20 Q. According to this map, it's got a pretty high percentage of
21 slaves, right?

22 A. Yes.

23 Q. And you'd agree with me that in the Congressional District
24 5 that was if the benchmark map from 2016 to 2022, Jackson
25 County was not included, right?

1 A. Yes.

2 Q. And, sir, if we look at Duval County on this map, you see
3 that?

4 A. Yes.

5 Q. We see that it, as a percentage of slave holders, is less
6 than Marion County and Leon County, right?

7 A. I believe that that's the case, yes.

8 Q. But you'd agree with me that just under 70 percent of the
9 population for Congressional District 5 in the benchmark plan
10 from 2016 to 2022 came from Duval County, didn't it?

11 JUDGE WINSOR: What was the percentage again?

12 THE WITNESS: I'm sorry. I don't know the answer to
13 that question. I certainly accept your assertion on that point.

14 BY MR. JAZIL:

15 Q. Now, sir, if we were to draw a district that faithfully
16 adhered to this map with just the percentages of slaves but not
17 the actual numbers, you'd agree with me that that district might
18 well go from Sumter County to Leon County and exclude Duval
19 County altogether, right?

20 A. I don't know the numbers in each district. I think there
21 were three congressional districts in Florida at that time, and
22 I'm not sure where the cuts were. Maybe there were three after
23 1868 or 1870. I don't know what the cuts would be like.

24 Q. So, sir, if we were to draw a district today to combine
25 what you show as the Slave Belt from the 1860s, wouldn't we want

1 to include Marion County, Alachua County, and work our way all
2 the way through Leon if we were to faithfully adhere to the
3 Slave Belt map that you provided?

4 A. The Slave Belt map gives you a general idea of where people
5 were in 1860. There are other considerations in redistricting,
6 but certainly the area of concentration in 1860, in the late
7 19th century, were primarily in Northern Florida. A district
8 that's drawn later, there may be other character -- other
9 considerations -- compactness, et cetera, and population shifts
10 that had occurred over time.

11 But in general, the area of North Florida was the area
12 of slave population, and there has been some continuity -- not
13 perfect continuity, but some continuity in Black political
14 activity from the 1860s to the present.

15 It's very much like the Black Belt of Alabama which
16 was considered in the *Allen v. Milligan* case. There was an
17 amicus brief by historians which I signed talking about the
18 Black Belt of Alabama as being a continuous and important region
19 of Black concentration.

20 Not -- the districts that would be proposed and
21 probably the districts that were made public yesterday don't
22 capture absolutely every county that was in the Black Belt in
23 1860, and it may include a few parts of other areas that
24 weren't.

25 But the court, the District Court in the *Milligan* case

1 and the Supreme Court in the *Milligan* case recognized that there
2 was a general area of cultural continuity, maybe not absolutely
3 following all the contours, but a general area of cultural
4 continuity in Alabama, and it seems that there is a similar area
5 of cultural continuity in North Florida.

6 Q. Understood, Dr. Kousser.

7 If I can sum up your historical perspective that you
8 provided today, I understood it to mean that past discrimination
9 helps us understand whether there's a continuing discrimination
10 in Florida. Did I understand that correctly, sir?

11 A. It's part of continuing discrimination in Florida.

12 Q. So --

13 A. There's a continuity between past and current.

14 Q. Understood, sir.

15 So from your perspective, the effects of redistricting
16 after the 1868 redistricting cycle are relevant to what's
17 happening in the 2022 redistricting cycle, right?

18 A. They're relevant in the sense that I said, not that there's
19 a one-to-one corresponds, but that they show that election laws
20 from the very beginning have been used to discriminate against
21 Blacks.

22 There's a continuity of discrimination in election
23 laws, and so that continuity starting way back helps you
24 understand why the -- why there was a continuous tradition, why
25 it continued after 1965, why it continued in every redistricting

1 from 1970 on. It's background information that helps you
2 understand the current conditions of race relations,
3 particularly in redistricting in Florida.

4 Q. Understood. So 1868 helps inform continuing race relations
5 in Florida in 2022.

6 Is it also your testimony that the effects of the 1887
7 legislative session that you discussed with my friend help
8 provide background information for continuing race relations in
9 Florida in 2022?

10 A. What I meant to show there more than anything else was that
11 there were small steps towards disfranchisement, and we should
12 not overlook small steps in the law. One might consider that
13 the 2022 redistricting was only a small step. It did not lead
14 to the disfranchisement of Blacks altogether. There was still
15 Black members of the State legislature; there were still Black
16 members of Congress, and there were Black members who were
17 representative of the Black community in the sense that Blacks
18 overwhelmingly voted for them.

19 So why not -- why be worried about such a little thing
20 as eliminating one Black congressional district? Well, look
21 what happened in election laws before. One small step actually
22 turned out to be quite important, so we should not overlook
23 small steps. That's all that discussion was meant to do.

24 Q. Understood. And --

25 JUDGE WINSOR: Can I ask a question before we get off

1 this map?

2 Do you know, Doctor, what the numbers on the maps in
3 the individual county lines are? Looks like --

4 THE WITNESS: I do not know.

5 JUDGE WINSOR: Okay.

6 THE WITNESS: I think they probably have something to
7 do with population, but I don't know.

8 JUDGE WINSOR: Thank you.

9 BY MR. JAZIL:

10 Q. Doctor, in the 1880s, you talked about literacy tests.
11 They are, borrowing your phrase, "small steps" that inform
12 what's happening in 2022, correct?

13 A. Those were larger steps. The first steps are the smaller
14 steps, and you get to the larger steps by making the smaller
15 steps first.

16 Q. But they still inform what happened in 2022, from your
17 perspective, right?

18 A. They're part of using election law to discriminate against
19 Blacks, yes.

20 Q. The same is true for the miscegenation laws that you
21 discussed from the 1940s, '50s, '60s?

22 A. Those go to the racial climate of Florida during the
23 period -- the first half of the 20th century. That's what
24 they're meant to do. They're not simply small steps; they're
25 descriptions that make it clear the degree to which Florida was

1 a Jim Crow state during the first half of the 20th century and
2 into the second half.

3 Q. And the riots from the '20s and assassinations from the
4 '50s, they also inform, from your perspective, what happened in
5 2022?

6 A. They were connected with attempts of Blacks to become
7 voters and to exercise the franchise, and all of those are
8 connected with the electoral history, the electoral racial
9 history of Florida.

10 If you look at my report as a whole, you will find
11 that in the 152 pages single-spaced, I've included about seven
12 pages on the period before 1965, so that gives you an idea of
13 how much weight I gave those efforts and the description of
14 those events compared to how much effort and weight I gave the
15 description of later events. So I think that speaks to the
16 general question you're asking.

17 Q. But from your perspective, Florida's antebellum history all
18 the way through today all matters for purposes of race relations
19 in 2022 and what happened in the 2022 redistricting cycle,
20 right?

21 A. I don't start in the antebellum period. I start after
22 Blacks got the right to vote, and I'm concentrating here on
23 Black political activity and the suppression or discrimination
24 against Black political activity and the dilution of Black
25 political power.

1 I think all of these things have some bearing. Some
2 have more bearing than others. That's why I made the page
3 decisions that I made.

4 Q. Understood. So it's post-Civil War all the way through now
5 affects what happened in the 2022 redistricting cycle? Do I
6 understand that right?

7 A. All of it has an effect, but some of it has more of an
8 effect than others. And if you look at what happened after
9 1965, that clearly has more of an effect than what happened
10 before 1965, but it is all of a piece in that election laws were
11 being used to discriminate.

12 This was one of the first tools, and it -- that people
13 wanted to discriminate grabbed on to, and they continue to use
14 it, and they've continued to use it since 1965. If you want to
15 understand the events of 2022, the more recent events have more
16 bearing, but all of the events are relevant.

17 Q. Understood, Doctor. If Florida didn't have this history of
18 race relations dating from the post-Civil War era to now, would
19 you have looked at your historical analysis through a more
20 favorable lens?

21 A. If Florida's history was different from what Florida's
22 history was, of course, the historical analysis of that
23 imaginary history would be different.

24 Q. And so if Florida's history was different, you would focus
25 on what happened in the 2022 redistricting cycle and not worry

1 about what happened in the 150 so odd years preceding it?

2 A. In Florida's history -- if there was an imaginary Florida
3 history that was different, I would take that imaginary Florida
4 history into account in analyzing what happened in 2022. And
5 you would have to specify what the fictional history of Florida,
6 what it said. Did it say that there was never any relation
7 discrimination in Florida? If there was never any racial
8 discrimination in Florida, then my treatment of 2022 would
9 probably be different.

10 But that's not the history of Florida. It's the
11 history of some imaginary place.

12 Q. Dr. Kousser, would you agree with me that there is
13 discrimination against African Americans all around the country
14 in the post-Civil War era --

15 A. There was more discrimination --

16 Q. -- that it wasn't just in Florida?

17 A. -- in some places than there was in others. I have, in
18 fact, studied discrimination all around the country. If I can
19 ever get through with voting rights cases, I will do a book on
20 racial discrimination in schools in the late 19th and early 20th
21 centuries.

22 And one of the things that was really interesting
23 about that is that there were school integration cases which
24 were successful in almost every Northern and Western state or
25 there were laws that were passed by the state legislatures in

1 the 19th century in almost every Northern and Western state
2 except for Missouri and Indiana, but in no such state after
3 Reconstruction was there a successful school integration law.

4 So there was discrimination in lots of places. There
5 was more discrimination in some places. Discrimination was more
6 easily overcome in some places than it was in others.

7 In Florida there was a continuation of discrimination
8 and it was -- it was very similar to what went on in the other
9 deep South states.

10 Q. Understood, Doctor. One last area of inquiry.

11 Are you registered Democrat?

12 A. I am.

13 Q. And do you regularly give money to the Democratic
14 Congressional Campaign Committee?

15 A. I do.

16 Q. Do you also give money to Act Blue, which is a pass-through
17 organization for Democratic-leaning organizations?

18 A. Five dollars a month, yes.

19 Q. And you don't keep track of those specific donations, but
20 is it possible that you gave as much as \$15,000 to
21 Democratic-leaning organizations in 2022?

22 A. It is possible. I'm one of those suckers who gets emails
23 saying the world is going to come to an end unless you send us
24 \$25 immediately, and from time to time, I click "yes."

25 Q. Understood.

1 And isn't it true, Doctor, that you'd like to see more
2 Democrats elected in Florida?

3 A. I would like to see -- I have a long-term interest in
4 racial discrimination and in combating racial discrimination.
5 In Florida currently, as in most places currently, the
6 Democratic party is more firmly against racial discrimination
7 than the Republican party is. If the Republican party were the
8 same sort of Republican party that Jake Javitz or other
9 Republicans of the 1960s and '70s or even from other Southern
10 states like Winthrop or Rockefeller in Arkansas -- if the
11 Republican party were more like that, then I would split
12 donations between Democrats and Republicans. But at this point,
13 the Democrat party is more sympathetic to antidiscrimination
14 measures.

15 I note that I did not -- I have not given any money --
16 or at least I certainly cannot remember having given any money
17 to any specific Democratic candidates in Florida, and I try not
18 to give money to any specific candidates in states where I think
19 I might work in a voting rights case. I don't always succeed in
20 that, but I try to do that.

21 Q. Understood. So the answer to my question was yes, you'd
22 like to see more Democrats elected in Florida.

23 Do you care if those Democrats are Black or white or
24 Hispanic?

25 A. It makes no difference to me what the color of the

1 Democrats are. Much more important is what we believe in.

2 MR. JAZIL: Thank you.

3 I have no further questions, Your Honor.

4 JUDGE WINSOR: Thank you, Mr. Jazil.

5 **REDIRECT EXAMINATION**

6 BY MS. BLUM:

7 Q. Good afternoon, Dr. Kousser.

8 A. Good afternoon.

9 Q. It's been a long day, and I know you're ill, so my first
10 question is: How are you feeling?

11 A. I got up at 4:00 my time, so it is 1:30 my time. I'm
12 tired.

13 Q. I'll try to be brief.

14 Dr. Kousser, Mr. Jazil asked you some questions
15 regarding a functional analysis that was not presented to --
16 that was not publicly presented but that was available to
17 members of the legislature.

18 Do you recall that line of questioning?

19 A. Yes.

20 Q. I'd like you to turn to page 117 of your expert report.

21 A. Okay.

22 Q. You wrote there: "The legislature also refused to make
23 public the functional analyses of districts apparently performed
24 by a UCLA political scientist who served as a consultant to the
25 legislature on redistricting."

1 Is that possibly what you were referring to when
2 you --

3 A. It is.

4 Q. Ask just by the way, on that same page, do you see footnote
5 440?

6 A. Trying to -- on that same page?

7 Q. It's on the same page.

8 A. At the bottom, yes. It is, yes.

9 Q. And that footnote is a reference to MCI Maps, which is the
10 same organization that produced the maps that you were just
11 discussing with Mr. Jazil. And at that link, would you be able
12 to find either that same map or an extremely similar map that
13 depicts the Slave Belt?

14 A. I believe so.

15 Q. And you verified the accuracy of the map by comparing it
16 against Library of Congress data; is that right?

17 A. Yes.

18 Q. So, Dr. Kousser, there was a discussion about a 30 percent
19 Black voting age population number and whether that was
20 sufficient to elect candidates of choice, and you said that it
21 depends. And I understand that that was a reference to
22 Congressional District 4 and the enacted map, which is roughly
23 30 percent Black voting age population; is that about right?

24 A. Yes.

25 Q. Dr. Kousser, did the legislature know that CD-4 would not

1 perform?

2 MS. BLUM: And I'd like to put up slide 27 -- or I'm
3 sorry. Not slide 27 --

4 MR. JAZIL: Objection, Your Honor. The question is
5 did the legislature know, which --

6 JUDGE WINSOR: Rephrase it.

7 MS. BLUM: I'm sorry. Let me rephrase the question.
8 Thank you.

9 BY MS. BLUM:

10 Q. Dr. Kousser, did public statements from members of the
11 legislature reflect the fact that representatives understood
12 that District 4 would not perform for Black candidates of
13 choice?

14 A. Yes.

15 Q. And is the exhibit -- is the statement on the slide from
16 Representative Leek in Joint Exhibit 48 where he answers the
17 question "Will either District 4 or 5 perform for Black
18 candidate of choice?" With the answer "no" an example of such a
19 statement?

20 A. Yes.

21 Q. Dr. Kousser, Mr. Jazil asked you some questions regarding
22 events in the 1950s, '60s, and 1980s about the process of
23 redistricting.

24 Did anything in his questioning change your view that
25 the combination of events leading to the 2022 redistricting was

1 extraordinary?

2 A. No.

3 MS. BLUM: All right.

4 I have no further questions for this witness.

5 JUDGE WINSOR: So you have a live witness for today
6 and then a Zoom witness that I assume you'd hold off on the Zoom
7 one?

8 MR. DISKANT: Whatever you wish. Ms. Keith is here
9 and she's live. She's sitting here. We can do her. She'll
10 take 20 minutes.

11 JUDGE ROGERS: How long is your Zoom and how long do
12 you expect for your live witness?

13 MR. DISKANT: I think we're expecting somewhere
14 between 20 and 30 minutes of direct for each. We may have a
15 fight over the membership lists. That's the only potential
16 issue whatever you wish.

17 *(Discussion amongst the judges.)*

18 MR. DISKANT: Let me say it's no burden on Ms. Keith
19 to come back on Monday. She's going to be here anyway.

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

21 JUDGE WINSOR: The Zoom person is available live
22 Monday, though, correct?

23 MR. DISKANT: Oh, yes. She can be available.

24 JUDGE WINSOR: Why don't we do the live one now and
25 then we'll break for the week and then -- we won't have to turn

1 to Zoom anymore.

2 And, Doctor, we'll sign you off. Thank you, Doctor.

3 THE WITNESS: Thank you very much, sir.

4 *(Witness excused.)*

5 MR. DISKANT: I'd like to thank Mr. Jazil. Poor
6 Dr. Kousser was quite ill last night. He stuck it out, and
7 Mr. Jazil was polite to him, and I'm grateful and I know my
8 whole team is.

9 JUDGE WINSOR: I'm pleased that Zoom went as well as
10 it did. Sometimes we have more trouble with that.

11 MR. DISKANT: Yeah, it worked.

12 We call as our next witness on behalf of Common Cause
13 Amy Keith, and she will be examined by my colleague, Alvin Li.

14 **AMY KEITH, PLAINTIFF WITNESS, DULY SWORN**

15 DEPUTY CLERK: Be seated, please.

16 For the record, please state your full name and spell
17 your last name.

18 THE WITNESS: Amy Keith. K-E-I-T-H.

19 DEPUTY CLERK: Thank you.

20 **DIRECT EXAMINATION**

21 BY MR. LI:

22 Q. Hi, Ms. Keith. How are you doing this afternoon?

23 A. I'm all right, but I'd love a bottle of water before we
24 begin. I have a bit of a throat. I hope it doesn't make it
25 hard to understand me.

1 Thank you.

2 Q. Now, Ms. Keith, are you here to testify on behalf of Common
3 Cause Florida?

4 A. I am.

5 Q. Do you hold a position with Common Cause Florida?

6 A. I do.

7 Q. What position do you hold?

8 A. I'm the program director for Florida.

9 Q. How long have you held this position?

10 A. Since June 1, 2022.

11 Q. Okay. In this position, what sort of responsibilities do
12 you have?

13 A. I help lead -- I lead our voting rights work as well as our
14 election protection program together with partners as well as
15 our work on constitutional issues, ethics and accountability,
16 and campaign finance and representation.

17 Q. Could you briefly describe what you did before you joined
18 Common Cause Florida?

19 A. I was the grants director for a nonprofit healthcare
20 organization.

21 Q. And without going -- without providing exact details, where
22 in Florida do you call home?

23 A. St. Petersburg in Pinellas County.

24 Q. Now, going back to Common Cause Florida, could you describe
25 the organization's mission in just a few sentences for the

1 Court?

2 A. Sure. Common Cause is a nonprofit nonpartisan organization
3 dedicated to upholding the core values of American democracy.
4 We work to create open, accountable government that is of, by,
5 and for the people, and we work to make sure that every eligible
6 voter is able to have a say, have their vote counted, and that
7 our elections reflect the will of the people.

8 Q. Now, you just said ensuring that every voter has their vote
9 counted. Could you describe that in a bit more detail?

10 A. Sure. We have -- one of our largest programs is called
11 Election Protection, and in that program we assist voters who
12 have questions about how to cast their ballot, perhaps how to
13 cure their ballots. We have volunteers who are out at the polls
14 to provide that assistance.

15 We also work with partners to support a hotline where
16 voters can call and receive nonpartisan assistance at any point
17 in the voting process to help make sure that they understand the
18 process, know how to cast a ballot and make sure it counts.

19 Q. Thank you. And you also said that one of Common Cause's
20 missions is to ensure that Government is of, for, and by the
21 people. Could you explain that in a bit of detail to the Court?

22 A. Absolutely. So we'll work to make sure that people
23 understand the process of how their representatives are chosen,
24 to understand how their representatives -- how to contact their
25 representatives, be part of the process, to understand how our

1 ethics and accountability rules work to ensure that our
2 Government is one where people have a say and where all voters
3 have their fair and equal voice to their representatives and in
4 selecting their representatives.

5 Q. Now, you talk about "fair and equal voice." How does that
6 fit into Common Cause's role in this litigation?

7 A. So redistricting is really -- it's part and parcel with our
8 mission. How people are represented impacts their voice, how
9 they're heard, how they're understood by their elected
10 representatives, how their concerns are understood and
11 represented in policy.

12 We work to educate people about the redistricting
13 process, to understand how they're represented and how that
14 representation has changed.

15 Q. And, Ms. Keith, you have been watching this trial, right?

16 A. I have.

17 Q. So you understand that this litigation is about the
18 destruction of CD-5 and -- which resulted in its residents being
19 split into Congressional Districts 2, 3, 4, and 5, right?

20 A. Yes.

21 Q. Now, going back to Common Cause Florida.

22 Ms. Keith, how many members and supporters does the
23 organization have?

24 A. Around 93,000.

25 Q. Okay. And where are those members located?

1 A. Throughout the state of Florida.

2 Q. Now, we just talked about Congressional Districts 2, 3, 4,
3 and 5. Do you know if Common Cause Florida has at least one
4 member in each of those districts?

5 A. Yes.

6 Q. How?

7 A. We took a list of our most committed and engaged members.
8 We took a conservative approach in this process, took a list of
9 our most committed and engaged members. We looked at the ZIP
10 codes where they lived. We compared those ZIP codes to ZIP
11 codes that were wholly contained within the different
12 congressional districts, and we compared those lists to find
13 members that were located in these congressional districts.
14 Then we reached out. We contacted them to confirm their
15 residence and as well as --

16 MR. JAZIL: Objection, Your Honor, hearsay.

17 JUDGE WINSOR: Response?

18 MR. LI: I believe in subsequent questioning,
19 Ms. Keith will testify that she, in fact, supervised the
20 process.

21 JUDGE WINSOR: Overruled.

22 BY MR. LI:

23 Q. Continue, Ms. Keith.

24 A. And then we reached out and contacted them to confirm.

25 Q. Okay. And were you involved in this process?

1 A. Yes.

2 Q. How were you involved in this process?

3 A. I oversaw the process. I also personally was in touch with
4 at least one member in each of the four mentioned districts.

5 Q. Now, let's go back to that process. How long did that
6 process take?

7 A. The whole process took a couple weeks.

8 Q. Why did it take a couple weeks?

9 A. As I mentioned, we had to do the -- we don't maintain a
10 list of all of our members by congressional district, so we had
11 to do that matching process and then also reach out to people to
12 confirm.

13 Q. Okay. And -- now, you said that you reached out to these
14 individuals to confirm. What did you confirm with these
15 individuals?

16 A. I confirmed that they are currently resident at their
17 address that we had on record as well as that they were
18 registered to vote at that address.

19 Q. Okay. And do you have that list -- do you or your counsel
20 have that list with you today?

21 A. Yes.

22 Q. And has that list been disclosed to the public?

23 A. No.

24 Q. Why has that list not been disclosed?

25 A. We do not disclose -- our policy is not to disclose our

1 membership records.

2 Q. Why does Common Cause Florida have this policy?

3 A. We have a concern of retribution or harassment by the State
4 of Florida or, in fact, by private individuals on the basis of
5 people's association with Common Cause.

6 Q. Why does Common Cause have these concerns about
7 retribution?

8 A. So the past few years in Florida, we certainly -- you know,
9 we've seen a more hostile environment from the State towards
10 voters as well as towards organizations, individuals who assist
11 voters. We've also seen going across the country increasing
12 harassment by private citizens of other private citizens, you
13 know, around political activity and electoral work. So it is,
14 you know, an environment of increasing harassment that creates
15 fear.

16 We also have, you know, poll monitors. As I
17 mentioned, as part of our Election Protection program, we have
18 people assisting voters at the polls. They have, you know,
19 experienced, you know, harassment by private individuals when
20 they were out doing this work.

21 So we do have a basis to be concerned about that kind
22 of harassment or retribution on behalf of our members or their
23 association with us.

24 Q. Have you done anything as an organization to address these
25 instances of harassment and concerns?

1 A. We have. We've added -- last year we added a deescalation
2 component to our training for volunteers who are going to be out
3 at the polls.

4 MR. LI: No further questions.

5 THE WITNESS: Thank you.

6 BY MR. LI:

7 Q. And, Ms. Keith, are you prepared to deliver this list under
8 a court order should the Court --

9 MR. DISKANT: Confidentiality.

10 BY MR. LI:

11 Q. Of confidentiality?

12 A. If it's sealed and not publicly available, I believe that
13 those are the conditions that we stated in the affidavit.

14 MR. LI: No further questions.

15 **CROSS-EXAMINATION**

16 BY MR. BEATO:

17 Q. Good afternoon, Ms. Keith. Michael Beato on behalf of the
18 Secretary of State. I'll try to be as brief as possible.

19 A. Thank you.

20 Q. Ms. Keith, did you assist your attorneys with answering
21 discovery responses in this case?

22 A. I'm sorry. Can you clarify the question?

23 Q. Sure. Sure. Do you know whether Common Cause was served
24 with a request for production in this case?

25 A. Sorry. I'm not a lawyer, so that's a --

1 Q. No problem.

2 A. Break that down for me a little bit.

3 Q. Does "interrogatory" sound familiar to you? Were you asked
4 to review any --

5 A. That word does not sound familiar to me. We were asked to
6 look at a number of lists.

7 Q. Ms. Keith, were you asked to answer any questions for
8 Common Cause that has to deal with this litigation?

9 A. We were asked about our members and whether or not they are
10 in each congressional district, especially the Districts 2, 3,
11 4, and 5.

12 Q. Specifically relating to the membership list?

13 A. Yes. We have memberships in Districts 2, 3, 4, and 5.

14 Q. When did you compile this membership list?

15 A. If I'm recalling correctly, I believe it was in July of
16 this year.

17 Q. Were you asked to produce this list earlier than July?

18 A. Not to -- personally from Florida, not to my recollection.
19 Whether my colleagues at our national office were asked, I don't
20 know.

21 MR. BEATO: One moment, Ms. Keith.

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

23 BY MR. BEATO:

24 Q. And, Ms. Keith, please correct me if I'm wrong. You said
25 on direct that you identified members of Common Cause who

1 resided in CD-2, CD-3, CD-4, and CD-5; is that correct?

2 A. Yes.

3 Q. Okay. We don't have to name names right now, but regarding
4 the person who lives in CD-2, how long has that person been a
5 member of Common Cause?

6 A. I don't have that information.

7 Q. How long has that person who resides in CD-2 resided in
8 CD-2?

9 A. We were not asked to collect that information. We were
10 asked to collect that we had members and to confirm that we have
11 members living in each of these congressional districts, which
12 we do.

13 Q. In terms of residing there, you don't know the answer to
14 that?

15 A. I know that they do currently reside there at this time.

16 Q. Circa July?

17 A. No. I actually reconfirmed with each of the four
18 individuals over the past week.

19 Q. Okay. Do you know if the individual you identified as
20 living in CD-2 wants to vote in the next election?

21 A. I know that the individual is, in fact, a registered voter.

22 Q. But in terms of wanting to vote in the next selection, not
23 sure?

24 A. I believe it's a reasonable assumption that those who are
25 members of Common Cause are, you know, committed to the

1 democratic process. I cannot speak for any single individual's,
2 you know, ability or willingness to vote, but I know that this
3 individual is a registered voter.

4 Q. Have you seen -- the person who you identified as living in
5 CD-2, have you seen their voter ID card?

6 A. I have not seen their voter ID card. However, we have
7 checked the public voter rolls and confirmed their voter
8 registration.

9 Q. Okay. Now for the person who you identified as living in
10 CD-3. How long has that member been a member of Common Cause?

11 A. The answers are the same as the member for CD-2.

12 Q. So regarding questions of residence, whether they voted in
13 past elections, whether they want to vote in future elections,
14 same answers?

15 A. For each of -- so for at least one member in each of these
16 four districts, we have confirmed their residence, reconfirmed
17 it within the last week, and confirmed that they are, indeed,
18 registered voters.

19 Q. And intent to vote in the future, not sure?

20 A. As I said, I believe these are people who are committed to
21 the democratic process and participation, and we've confirmed
22 that they are registered voters.

23 MR. BEATO: No further questions, Ms. Keith. Thank
24 you.

25 THE WITNESS: Thank you.

1 JUDGE WINSOR: Any redirect?

2 MR. LI: No.

3 JUDGE WINSOR: You're excused, Ms. Keith.

4 THE WITNESS: Thank you.

5 *(Witness excused.)*

6 JUDGE WINSOR: And you have no other live witnesses,
7 so we will break there for today. That way we can do the other
8 witness that would have been by Zoom live, which I think will be
9 preferable. And then we'll break for the day.

10 Anything else we need to address while we're here
11 before we --

12 MR. LI: I believe we made have the binders ready for
13 y'all, but we have to double-check that include all the exhibits
14 from -- that were stipulated into evidence at the start of day
15 one, so it's a pretty large set. If y'all want it, it's like
16 five binders.

17 MR. DISKANT: Unless you might prefer binders at the
18 end and have all the exhibits.

19 JUDGE WINSOR: Speaking just for myself, I just prefer
20 a thumb drive or something, if it's not too much trouble.

21 MR. DISKANT: We can do that too.

22 JUDGE WINSOR: Binders are fine, also, if you've
23 already prepared them.

24 JUDGE ROGERS: I prefer the binder, and at the end is
25 fine.

1 THE COURT: Same answer as Judge Rodgers.

2 MR. DISKANT: Thank you.

3 THE COURT: Very good. We'll see you all back Monday
4 at 8:30. Thank you.

5 *(Proceedings adjourned at 4:43 p.m.)*

6 * * * * *

7 I hereby certify that the foregoing is a true and correct
8 transcript of the stenographically reported proceedings held in
9 the above-entitled matter, pursuant to the provisions of Section
10 753, Title 28, United States Code.

11 

9/27/23

12 Julie A. Wycoff, RMR, CRR
13 Official U.S. Court Reporter

Date

14 I N D E X

15 PLAINTIFF EXHIBITS

16	<u>Exhibit</u>	<u>Description</u>	<u>Marked</u>	<u>Admitted</u>
17	PX2107	Video clip of DeSantis	398	398
18	PX2108	Twitter messages	399	399
19	PX3014		300	300
20	PX3040		300	300
21	PX4558	Map of Florida from 1868	340	340
22	PX5054	Map	380	380
23	PX7199		300	300
24	PX7223		300	300

Plaintiff Witnesses

DOROTHY INMAN JOHNSON

Direct Examination by Ms. Kaiser301

Cross-Examination by Mr. Pratt315

J. MORGAN KOUSSER

Direct Examination by Ms. Blum327

Cross-Examination by Mr. Jazil425

Redirect Examination by Ms. Blum485

AMY KEITH

Direct Examination by Mr. Li489

Cross-Examination by Mr. Beato496