UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALPHA PHI ALPHA FRATERNITY, INC., ET AL.,
PLAINTIFFS,
-VS-
BRAD RAFFENSPERGER,
DEFENDANT.

DOCKET NO. 1:21-CV-05337-SCJ
VOLUME 2 - A.M.

COAKLEY PENDERGRASS, ET AL.,
PLAINTIFFS,
-VS-
BRAD RAFFENSPERGER, ET AL.,
DEFENDANTS.

DOCKET NO. 1:21-CV-5339-SCJ

ANNIE LOIS GRANT, ET AL.,
PLAINTIFFS,
-VS-
BRAD RAFFENSPERGER, ET AL.,
DEFENDANTS.

DOCKET NO. 1:22-CV-00122-SCJ

TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS
BEFORE THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE
TUESDAY, FEBRUARY 8, 2022

VIOLA S. ZBOROWSKI, CRR, CRC, CMR, FAPR
OFFICIAL COURT REPORTER FOR THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA
404-215-1479
VIOLA_ZBOROWSKI@GAND.USCOURTS.GOV

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

KEVIN J. HAMILTON, ESQ.
ABHA KHANNA, ESQ.
SOPHIA LIN LAKIN, ESQ.
ARI J. SAVITZKY, ESQ.
SEAN J.YOUNG
RAHUL GARABADU
ROBERT BOONE
ABIGAIL SHAW
ALEX W. MILLER
MAURA DOUGLAS
ANURADHA SIVARAM
EDWARD WILLIAMS
JENNESA CALVO-FRIEDMAN
GEORGE P. VARGHESE

ON BEHALF OF THE DEFENDANT:

BRYAN P. TYSON, ESQ.
LOREE ANNE PARADISE, ESQ.
BRYAN JACOUTOT, ESQ.

THE COURT: One of the issues the case has to decide in this case, along with the preliminary injunction, is whether or not it would be a burden on the State or to go forward in this case based on the elections coming forward. In the State of Alabama, there was a case that started in November of 2021 on their redistricting maps. That's before a three-judge panel. That case -- was three cases, I believe. One case was a constitutional challenge, along with the Voters Right Act challenge, and then there was one single Voters Right Act challenge that Judge Manasco held.

I think it was January 27, Alabama, a three-judge panel issued a ruling, and the ruling they issued was not based on the constitutional challenge, but it was on voters' section to the Voters Right Act challenge. And also the same judge ultimately made a ruling, a 225-page order they found that under Gingle's that the district could be compact in a geographic area. I think there was a political wish list in voting and polarization. That case was entered. There was an appeal, and petition by the Attorney General, Secretary of State of Alabama to the Supreme Court.

Yesterday the Supreme Court issued a ruling staying the Alabama case and granting a writ of petition. Three other justices did not give an opinion why they issued the stay. Two of the justices -- well, one justice, Justice Kavanaugh, wrote a concurrent opinion with Justice Alito. And it in they -- let me

also back up. The State of Georgia and 13 other states issued an amicus brief saying it was too close to election; this should not go forward. And Justice Kavanaugh and Justice Alito agreed with those 14 states; it was too close.

Justice Kavanaugh pointed out that the lower courts, when it's close to election, should not do anything that could cause that election to be put into chaos or disorganization. And he pointed out, he had a test that he put forward to indicate that underlying merits are clear-cut. He says, I think that the Purcell principle just might be overcome even with respect to the injunction issued to an election, if the plaintiff established at least the following: The underlying merits are entirely clear-cut in favor of the plaintiff. The plaintiff will suffer irreparable harm after the injunction. The plaintiff has not unduly delayed in bringing the complaint to the Court, and the changes in the questions are at least feasible before the election without significant cost, confusion, and hardship.

He also pointed out two of them probably could be met. But he pointed out two of them, and one particular he didn't think could be met. And that's having such a relaxed version of Purcell would not permit the District Court's late-breaking injunction. That is because the plaintiffs could not satisfy at least two of those four prerequisites; namely, that the merits be clear-cut in favor of the plaintiff, and that the changes be feasible without significant cost, confusion or hardship.

He goes on to point out that this Court and the lower federal courts have been less than clear about the rules that govern the majority/minority districts, and bluntly adds that the states need clarity.

The issue in this case is exactly the issue in the Alabama case. It's a Section 2 Voting Right Act case. It's no different. It's the exact same thing. I know as I sit here this morning that two of the justices are saying it's too close to the Alabama primary election. The Alabama primary election is May 24. The Georgia primary election is May 24. Again, I don't know what the other three justices' reasons were, but I do know the issues of this case are the exact same issues that is in front of them in the Alabama case.

As a United States District Court judge, I am required to follow the precedents and the decisions of the Supreme Court and the Eleventh Circuit.

In looking at this last night and looking at it this morning, I asked: How does this case differ in any way from the case in front of the Supreme Court? And there's only two things that are different: The one in front of the Supreme Court of Alabama was a three-judge court, and this is a single-judge court. And the other issue is that I have not issued a ruling in this case; they have a ruling there in that case.

But hypothetically, if I said to the plaintiffs -- the Court will hear everything that y'all want to say, congressional

maps, on the Section 2 maps, I agree with you. I agree you have substantial reason to think you're going to succeed. It's irreparable harm. I don't think it is in the public's interest. I think you're going to suffer more than the defendant. If I said every one of those things, and it's no question in my mind, Mr. Tyson is going to appeal it. No question in my mind those same 13 states that sent those amicus briefs are going to send the same ones. I don't see how the Supreme Court is going to rule any different in a stay in my case than in any other case.

The key thing, I'm required -- and I'm going to tell you, y'all are veteran, excellent lawyers, but I have to say what I'm saying. I'm required to follow what the Supreme Court says. I understand, Mr. Hamilton, that this case probably will first go to the Eleventh Circuit. But I would be totally surprised if not today or later this week, the one case in Alabama's -- in the Eleventh Circuit, the Eleventh Circuit is going to issue a ruling today or later this week saying we stay.

Even if the Eleventh Circuit didn't stay my case, let's say I rule your way entirely, and Mr. Tyson appeals it, and the Eleventh Circuit says, no, we're not going to grant the stay; what is Mr. Tyson going to do next? He's going to appeal it to the Supreme Court.

This is not a decision that I make lightly. I understand and I'm not going to make a decision until I hear from y'all, but this is not something I'm facing lightly, because I

understand your positions strongly. I understand the State's position. I understand that I have to make the decision that is going to affect a lot of different people in a lot of different ways. Okay?

One more time, I am required to follow the decisions and the precedents by the United States Supreme Court. It's not negotiable. And as I read this ruling, and I read -- I read it all. As I read this ruling, what I'm basically hearing them say is: Lower court in the Northern District of Georgia, you are not to go forward.

Now, before I make a decision and tell you what I'm all going to do, I wanted to tell you how I was thinking and I want to hear from y'all. That's only fair. Everybody in this case has worked very, very hard to get to where we're at now, and I appreciate that. My wife asked me last night, how did they all do. I said the lawyers came here really prepared. They really knew what they were doing -- all the lawyers. I said that was -- that's a judge's pleasure to have lawyers that come prepared and are passionate about what they argue. So that's why I'm going to give y'all a chance to tell me what's on your mind, and then we'll go from there. Ms. Khanna, I will start with the Pendergrass lawyers.

MS. KHANNA: Thank you, Your Honor. Abha Khanna for the Pendergrass and Grant plaintiffs.

The Supreme Court's order and the stay order in Merrill

is not binding on this Court, and changes absolutely nothing about the course of these proceedings, and that is for at least three reasons.

Your Honor just mentioned that this Court is bound to follow the precedent of the Supreme Court. That is true. But the Supreme Court yesterday issued no precedent and no binding opinion and no majority opinion that would bind this Court to rule one way or another on the issue in front of it. Because that is there is simply no majority opinion for this Court to follow. Only two Justices indicated that the timing-related equities of that case was the reason for the stay in that case. Four Justices concluded that the timing-related equities were not an obstacle to relief in that case. No other Justice included -- indicated their views one way or another. It would be entirely unwarranted for this Court to halt all proceedings in this case based on the assumption and speculations of what was in the hearts and minds of the majority.

THE COURT: What is it that you would see that would make you think, make me think that if I issue a stay -- again, if I rule your way completely, that those five Justices would rule differently?

MS. KHANNA: I actually think there is multiple differences, Your Honor. I think the fundamental question --

THE COURT: Give me some.

MS. KHANNA: I'll go through the factual differences as well. But I think the fundamental question that Your Honor raises

is really -- I can't think of another instance where a District Court would be forced to throw up his hands because the likelihood of a different ruling on a potential hypothetical appeal is slim. Right? I think the question before this Court is whether the evidence before this Court allows this Court to rule on the motion for preliminary injunction, which it absolutely will, however it rules one way or the other. What the Eleventh Circuit or the Supreme Court might do in this case, for the Court to just say, well, it's probably going to turn out this way, so we can just stop. I've never heard of that, Your Honor. I don't think that that's something we want to suggest, that a two-Justice concurrence in a stay order has the power to do here.

THE COURT: I guess my question, though, is that you have to show the public interest aspect, and in reading -- I can't see -- it's going to be very difficult for you with this ruling to overcome the public interest part of the requirement on the preliminary injunction. I think it just wouldn't be wise for me to say I'm completely disregarding what the Supreme Court just said.

MS. KHANNA: I don't think the Court has to disregard anything. But -- and you're right, maybe it might be hard for us, but we deserve the chance to be able to make our case. And the State does not just get to -- we don't get to presume that the State will be able to make their case on the interests here. You mentioned, Your Honor, that the differences between Alabama and

Georgia are on the merits and on the feasibility. That's exactly what we're here to decide in this hearing. What are the merits of this case? How clear-cut are they? And what is the feasibility in Georgia?

THE COURT: I guess, though as I indicated before -- I'm thinking out loud -- if I rule entirely your way, every issue, I can't see how a stay is not going to be granted. It's the same issues.

MS. KHANNA: I can see that actually, Your Honor. Well, two things: One is you mention that Mr. Tyson might go jump to the Supreme Court. And difference in the posture here is actually very relevant. Because the Supreme Court in the Alabama case had mandatory direct review. It had no choice. It has no choice but to hear that case. The Supreme Court does not have to hear this case or really any case.

THE COURT: I understand that. What would make you think that the Supreme Court with the exact same issue -- it's no different in this case than the Alabama case -- is not going to say -- I agree they might not have to hear this case, but why would they say, Georgia, you go forward with your injunction, draw up new maps. Alabama, we're not going to go that?

MS. KHANNA: Two responses to that, Your Honor. One is I litigated the Alabama case, and I can attest this is not the exact same issue as the Alabama case. That is because as the defendant's counsel reminded us in his opening statement, Section

2 requires an intensely local appraisal of the various factors. So to suggest that we can just paint all Section 2 cases with a broad-brush, frankly, if that were it true, we could have dispensed with this entire hearing once the Alabama ruling was decided because 235 pages were already found in our favor. But that's not something -- I don't believe the State is going to agree to that. They are not identical by any means, just given the very nature of Section 2.

And the second point, Your Honor, you began this -- this hearing this morning correctly indicating that this Court is bound by binding precedent of the Supreme Court. This Court, however, is not bound to predict what the -- what a Supreme Court -- what any Appellate Court might do if it lands on their desk at the end of a hypothetical ruling in this case. That is not being -- that's not dictated by precedent. That is this Court reading the tea leaves, figuring out what might happen on appeal, and that's not how courts --

THE COURT: That's what the District Courts do every day. There's not an exact ruling on all fours on every case that comes in front of the District Court. I have to look at what the Eleventh Circuit does in the case, what the Supreme Court does in a case, and make a ruling based on what I think they are going to do. I do that every day. It's not a case on point every day that says two plus two is four. It's not like that. I'm looking at cases every day; not just me, other District judges. Okay. In

this case the Supreme Court did this; here are some similarities. The Eleventh Circuit did this, here's some similarities. Based on what the Supreme Court did here and the Eleventh District did here, here's how I'm going to ruling.

MS. KHANNA: Based on binding precedent, this Court is required to interpret that precedent and apply that precedent. There is no binding precedent. There can be no dispute about that. The stay order issued yesterday is not binding precedent on anyone or anything, and certainly provides no majority that can name those reasons. So what exactly is it that this Court is bound by? Is it the silence of three Supreme Court Justices? That can't be right. By the concurrences of two Supreme Court Justices? That can't be right.

THE COURT: Well, let me ask you this question. You're saying that you don't think if this same case went in front of those same nine Justices, you would get a different ruling?

MS. KHANNA: I don't think it is this Court's task at this moment to try to predict what an Appellate Court might do in the future and predict a likelihood of success on appeal in a different circumstance. The task before this Court is to determine the likelihood of success on the merits before this Court. Absolutely, this Court is bound -- for instance, Your Honor, this Court is bound by binding Eleventh Circuit and Supreme Court precedent, and the last time the Supreme Court actually provided binding precedent on it, most recently in the Shelby

County case, the Supreme Court was very clear that Section 2 is permanent. Section 2 applies nationwide, and, quote, injunctive relief is available in appropriate cases under Section 2 to block voting laws from going into effect. That is an actual binding opinion that is binding on this Court.

THE COURT: You're overlooking one of the things I said, though, is that the public interest part of a preliminary injunction is that if I don't say, okay, you might -- you have to have four as against the public interest to go forward on this matter, does that not stop your case right there?

MS. KHANNA: Not at all, Your Honor.

THE COURT: You lose one -- you have to win all four, don't you?

MS. KHANNA: Absolutely, and I believe we can.

THE COURT: If you lose one, you don't go forward.

MS. KHANNA: I don't there is any precedent or reason for this Court to presuppose that we're going to lose.

THE COURT: I have to look at all of the aspects that's there. You're not saying I should totally disregard what the plaintiff is saying, are you?

MS. KHANNA: I'm not saying for you to disregard anything, Your Honor. I am saying that you can look at the guidance provided by two Supreme Court Justices in a concurring opinion, if the Court would choose to do so, it's not binding precedent, and then apply it to the facts of this case, and the

1 facts of this case are what we're here to develop over the course
2 of these proceedings.
3 The State is going to offer testimony, witness testimony
4 about the feasibility of holding this election in Georgia,
5 changing district lines in Georgia. It is certainly our ability,
6 our right and, frankly, it is in the Court's interest to hear that
7 evidence, determine whether we can meet an admittedly high bar in
8 a preliminary injunction to satisfy those elements. I don't think
9 that the Supreme Court's stay order yesterday changed the standard
10 by any means. But even if it did, it did not -- we're still -- I
11 think this Court would still benefit from allowing plaintiffs the
12 opportunity to meet that standard. And it might find, and I
13 actually believe it will, that we do meet that standard here.
14 Just even if -- even setting aside the fact that there is no
15 binding majority opinion in this case, even setting aside the fact
16 that the procedural posture is entirely different, even if we take
17 Justice Kavanaugh's concurrence as pretending it's binding,
18 continuing with this hearing is still appropriate to determine
19 whether the preliminary injunction factors in this case, including
20 the equities under Purcell, permit injunction here.
21 I will be very clear in how we can do that, spelling out
22 those four factors that Justice Kavanaugh did.
23 Justice Kavanaugh is very clear that Purcell is not an
24 absolute rule. And it does not prohibit injunctions against state
25 election laws in the period close to an election. If Justice

Kavanaugh wanted to suggest an absolute rule in his concurring opinion, he could have, but he expressly disclaimed that. So point one is that I don't believe it makes sense for this Court to treat Alabama as an absolute rule when it specifically said it is not. Instead, Justice Kavanaugh said that the Purcell principle allows the District Court to enjoin an election law close to an election if, number one, the underlying merits are entirely clear-cut in favor of the plaintiff; number two, the plaintiff would suffer irreparable harm if you issue the injunction; number three, the plaintiff has not unduly delayed bringing the complaint; and number four, the changes in question are at least feasible before the election without significant cost, confusion or hardship. Let me briefly march through those factors here.

Number one on the merits. The only way for this Court to determine, quote, the underlying merits, whether the underlying merits are entirely clear-cut in favor of the plaintiffs, is to hold the hearing and to hear the evidence.

THE COURT: Let's stop right there. What does Kavanaugh say further? What does he say about clear-cut further in his concurrence? What does he say?

MS. KHANNA: What does he say about what counts as clear-cut evidence?

THE COURT: What does he say about clear-cut in his ruling? What does he say?

MS. KHANNA: Is there a specific passage that Your

Honor --

THE COURT: I'm asking you.

MS. KHANNA: I'm sorry?

THE COURT: He is saying -- maybe I'm interpreting this wrong, but the Court case law in this area is notoriously unclear and confusing.

MS. KHANNA: But I don't believe that Justice Kavanaugh suggests that there is no such thing as a clear-cut case under Section 2. I certainly -- without a record in that case before the Court, let alone a hypothetical record in this case, I don't think that we can determine or certainly not predetermine what Justice Kavanaugh may or may not find to be clear-cut. That is this Court's prerogative to determine right now; it is not the Eleventh Circuit's right now, and it is certainly not Justice Kavanaugh's prerogative right now. And as I mentioned earlier, Section 2 requires an intensely local appraisal. That is precisely why the case is before this Court who is best positioned to provide that meritorious determination based on an intensely local appraisal.

Irreparable harm. I believe there is no dispute that plaintiffs would suffer irreparable harm if the Court were to find there is a likely Section 2 violation.

Undue delay, the Pendergrass plaintiffs filed their case just hours after Governor Kemp signed these maps into law. And the Grant plaintiffs followed less than two weeks later. Notably,

Your Honor, the only party to these proceedings that engaged in undue delay is the State itself, when Governor Kemp delayed more than a month after the Legislature passed these statewide redistricting plans to sign them into law in an apparent effort to foreclose timely judicial relief.

On the feasibility of the injunction, again, the only way to determine for this Court whether implementing new plans in this case, in Georgia, is feasible, is to hold this hearing. We need to hear from the witnesses about what is and is not feasible in Georgia. And we, the plaintiffs, believe that the evidence will establish that altering the map at this point is entirely feasible.

Your Honor is correct that Georgia and Alabama share a primary date of May 24. But Georgia has a significantly later qualifying deadline than Alabama does. Alabama's qualifying deadline was January 28, a full month-and-a-half before Georgia's March 11 qualifying.

THE COURT: March 7.

MS. KHANNA: March 7 is the opening of the period, correct, Your Honor, and March 11 is the deadline. Still a month away. Unlike in Alabama where the Court's opinion was just, I think, one or two business days before the qualifying deadline and it had to be stayed. This Court is entirely -- we believe that the evidence will show that it is entirely feasible to find in our favor and to remedy on preliminary basis without altering the

election schedule at all. That was not possible in Alabama.

THE COURT: Do you believe that?

MS. KHANNA: I do believe that, Your Honor. I can say that with experience in multiple courts where legislators are given opportunities to remedy violations and are able to meet that task. And where they are not, courts are.

THE COURT: The case will probably be over at the earliest on Friday, maybe Monday. This is one judge as opposed to three judges. Let's say a decision is made on February the 18th, the Friday, next Friday. As the law indicates, I have to give the general assembly the opportunity to make the corrections first. Probably you're talking about two weeks. That puts you at around March 1st, 3rd, something like that. And qualifying starts on March the 7th. So you're saying there wouldn't be any problem whatsoever?

MS. KHANNA: I honestly don't believe that that -- I think that that's entirely feasible. Does it require some people to be inconvenienced? Absolutely. Does it require throwing out the voting rights of hundreds of thousands of black voters? I don't think so.

THE COURT: It's a tough call.

MS. KHANNA: It's a tough call, and it is the tough call that this Court is empowered to make. It's not whether this was decided for this Court yesterday or the day before or today.

THE COURT: What if I just stopped this hearing and

certify a question up to the Eleventh Circuit that says, maybe I should say, hey, look, I'm not going to go forward because I think it's going to be stayed. Y'all have a right to go to the Eleventh Circuit and say we think Judge Jones stopped too quickly.

MS. KHANNA: Certainly that is this Court's prerogative as well. I believe this Court has no reason to abdicate its fact-finding duties here and assume the facts will turn out one way or the other.

THE COURT: At least we'd have some kind of answer from Eleventh Circuit if I certify an appeal up to them, and said Judge Jones stopped too quick. He shouldn't have stopped. He should have proceeded with the hearing. I thought about what if I was to wait and see what the outcome was from the Alabama case. I want to hear from y'all this morning. Go ahead.

MS. KHANNA: Well, then that would, basically, be this Court inviting a pronouncement that as a legal matter, cases brought at a certain time are too late. But that's a law -- that's precedent that nobody has suggested. Justice Kavanaugh did not suggest that. Purcell is not a matter of law; Purcell is a factual inquiry. And I think that would be an error. I don't know what the Eleventh Circuit would say, but I certainly don't believe that this Court --

THE COURT: Why do you think it's error? They'd probably agree with you -- maybe.

MS. KHANNA: Perhaps, but I don't believe that this

Court needs to take on that guesswork at this stage. You need to file -- follow binding precedent. But you don't need to guess at what the precedent could be down the road.

THE COURT: I guess one of the things I'm concerned about is that we go through the rest of this hearing, the rest of this week and -- no, go ahead. I need to quit talking and let you talk.

MS. KHANNA: No, no.

THE COURT: Go ahead.

MS. KHANNA: I'm happy to answer any questions that the Court has.

THE COURT: I interrupted too many times. I apologize. Go ahead.

MS. KHANNA: Not at all. I appreciate the opportunity to be able to answer the Court questions; these are very big issues. As Your Honor mentioned first thing yesterday, why are we all here? Why are we not doing this over Zoom because these are really, really important issues that warrant bringing people from across the country even in the midst of a pandemic to hammer them out and to see what are the facts here. Who is going to be harmed? How clear-cut are the merits? And what is the Court's responsibility and possibilities to remedy if there is a violation? We have come here to -- to make that showing, to hammer out those issues. And I believe that this Court is best positioned to do that. I would encourage this Court to welcome

the opportunity to do that. That doesn't mean this Court is bound to decide one way or the other. At the end of the day, the decision is yours, Your Honor, of course. But I would -- I would really strongly encourage the Court to just hear the evidence and see if this case warrants the injunction that we believe it does.

THE COURT: I know I said I wouldn't interrupt, but I apologize. I almost feel like issuing an advisory opinion.

MS. KHANNA: That this Court would be issuing?

THE COURT: Let's say we go all the way through and at the end of the next week I issued an opinion; it's on your behalf. Going forward -- again, the enormity of what has to be done here can't really be expressed in words. And --

MS. KHANNA: I understand entirely why it might feel that way. I imagine district court judges feel that way often, that their rulings might not stand up on appeal.

THE COURT: I'm not worried about that. I've been a judge since 1995. I rule. If they agree with me, I'm happy. If they disagree with me, I say, they're right, I'm wrong, and I go onto the next case. I'm kind of a relief pitcher. I don't know that for the last case. And after 30-some years being a judge -- don't get me wrong, every judge wants to be affirmed. I want to be affirmed all the time. And they'll tell you. But I don't make a decision based on -- I try to make a decision based on what I think the law is and what the facts are. That's what I'm saying.

MS. KHANNA: Absolutely, Your Honor, and I couldn't

agree more. This Court needs to make a decision based on what the law is, which is exactly what it was yesterday morning because there is no binding precedent, and based on what the facts are which are exactly what we're here to do over the course of the next five days, and I believe that this Court -- I believe that this Court, the State of Georgia, the parties would benefit from actually deciding Georgia's fate in Georgia's courts based on Georgia's facts, and not reading the tea leaves from a non-majority opinion to say what may or may not happen if this case goes on appeal, if the Supreme Court takes it. I think that this Court would -- I think there would be certain -- I don't think there is any need to abdicate the very real authority this Court has and there is nothing advisory about any opinion this Court issues when this Court issues an injunction. That is the law of the land unless and until an Appellate Court says otherwise. And I don't -- I don't believe that the District Court should short-circuit that process and throw up its hands.

I do also want to emphasize one other difference just on the facts. Here the primary election or the primary election does not begin next month. Justice Kavanaugh noted in the Alabama opinion that the primary election in the state, quote, begins next month. I have to say and again I litigated that case, it is unclear to me why -- why he believes that the primary election in Alabama begins next month. But putting that record aside, on this record, the primary election does not begin next month, it begins

at the very earliest on April 5, which is two months from now.

THE COURT: I think what he meant is that the process begins next month. You have to send out the absentee ballots, and then you have to mail the calling requirements for the 45-day period. So the State of Georgia, I'm not clearly up-to-date on the requirements in Alabama. But the State of Georgia, they have to start doing that in March.

MS. KHANNA: I'm sorry.

THE COURT: They've already started a lot of the process. Now some of the other processes -- I could be wrong; he could mean something else. That's how I took it. Not that he was saying the actual election would be in March, that the process of getting ballots and things done begins in March.

MS. KHANNA: Certainly states may choose and may usually prepare for elections. That does not mean the elections begin. The Court is right; you have deadlines to require 45 days before the election to send out absentee ballots, but that 45-day period here is April 9.

THE COURT: Well, but the ballots have to be -- the local ballots in the counties have to be put together and the Secretary of State has to sign off on them. The process has already begun on that. But go ahead. I understand your point. As you interpret it, he got the date wrong in the primary.

MS. KHANNA: I'm not suggesting that he got the date wrong. I understand. I understand that certain preparations have

to be made, but we just can't be backtracking about and repeat backtracking about -- when you look at Purcell, Purcell talked about Election Day. How close are we to Election Day. That was an October case about a November Election Day. Well, you kind of start preparing, and the primary and it's July, but you really start printing in June, that's a certainly slippery slope, and I don't know what the kind of -- rule on when an election begins that way. Because really then the State can say that, your know, I started sitting down -- our employees started sitting down with ballots; they started doing that months ago. So really this case is over.

THE COURT: I think your argument is similar to Justice Kagan's argument, is that, you know, you're almost kind of boxed in when you can actually bring a Voters Right Act. It's almost like you can only bring it -- not in the year of an election. But that is not me saying it. I understand what you're arguing.

MS. KHANNA: I think that is a very good point, Your Honor.

THE COURT: It's not my point.

MS. KHANNA: It's not your point, I understood. But as a legal matter, as a factual matter, and, again, I can speak with some experience having litigated these cases before, it's almost always too late unless it's too soon. And that can't be how we judge the voting rights of minority voters in the State of Georgia, and we certainly can't make that decision without the

record to decide that very, very crucial question.

I do want to make a final note on this question of confusion that Justice Kavanaugh discusses and the State mentioned in his opening statement and I imagine Mr. Tyson will argue as well. The candidates in Georgia did not even know what districts they were going to be in until a few weeks ago when these plans were enacted into law on December 30. It cannot be that the passage of a month has now cemented in place those lines and those expectations indefinitely such that they can never be altered or cannot be altered over the course of the next eight months. That seems -- there is something in Congress about that.

THE COURT: Let me ask you this question. Let's say we go forward and I issue a ruling, and I issue a ruling in your behalf, but then I turn around and say, I'm going to stay my ruling?

MS. KHANNA: If the Court were to issue a preliminary injunction and stay its own injunction?

THE COURT: I can actually -- I may be wrong. I could have this hearing, I could rule and maybe rule in your favor, but is there anything to say I cannot stay -- I'm staying my ruling; I'm not going to let it go into effect at this time?

MS. KHANNA: Certainly, there is nothing restricting this Court from doing that. Actually, Your Honor, if the question is in that instance is it even worth it in the first place, I would say the answer even there, if the Court were to take that

drastic step --

THE COURT: I tell you if I ever get in trouble, I'm going to call you up. You're fiery.

MS. KHANNA: I would say in that instance, it is absolutely worth it. For this Court to weigh in on the merits before it and decide the question actually presented to it for the voters of Georgia, for the parties in this case, as I think as a -- as a -- I think it matters for a whole host of reasons, for citizens, for voters. But as a practical matter, I also think it matters because what if the Supreme Court appeal happened -- we have no idea the scheduling of appeal will --

THE COURT: October.

MS. KHANNA: What if it happens next month, what if it happens in six months. The point is if this Court has already hammered out a preliminary ruling on the likelihood of success on the merits, that is absolutely something that could expedite relief when and if this Court decides to lift that stay.

THE COURT: We have one other issue. The Supreme Court is going to look at this issue of the Voters Right Act, Section 2, next fall, October. The lower courts, all of us need guidance. I don't know what they're going to say on that ruling. I could rule one way and they can come back and say, Jones, once again, you messed up. It's not -- this is not the way it's going to be. It's just throwing things out. They can -- I don't know where they're going to go. They can do a number of things on this

Voters Right Act. And it's almost to the point where I'm trying to decide what do I do not only with this case, but I'm involved in a three-judge panel case with the NAACP in Cobb County. What do we do as far as Voters Right Act, Section 2, up until -- almost maybe they tell us what they're going to do in the fall?

MS. KHANNA: Your Honor, I also don't know what the Court is going to say or do in the fall, next summer, whenever they issue an opinion in that case. But I do know what the Court has done. I do know the law as it stands right now, and that is Gingle's and that is Bartlett and that is the well-established precedent of the Supreme Court.

THE COURT: Let me give you an example of what I'm talking about. Mr. Young brought a case in front of me, an abortion case, about 18 months ago? Okay. I looked at the law and I said, this is the law, and I issued an injunction based on the law, the law as I saw it. And I know -- but to me the law is clear-cut. This is the law. It was appealed to the Eleventh Circuit, and at the same time a Mississippi case was in front of the Supreme Court. The Eleventh Circuit said, we're not going to rule yet. We're going to wait and see what the Supreme Court says with the Mississippi case. I admit this is not exactly the same, but it almost -- because I know right know they're going to take up this issue of the Section 2 of the Voters Right Act in the fall of 2022.

MS. KHANNA: Your Honor, the Eleventh Circuit, again,

had the prerogative to decide it wanted to wait, as does this Court, if it wants to stay its own ruling. I don't think it means you have to stop the proceedings altogether.

THE COURT: If I stay my ruling, why go through the whole process? You know, we're all lawyers here and I understand we -- and that's why we're having this discussion now, but from a practical point of view, if I practically know I'm going to stay my ruling, why go through this whole process?

MS. KHANNA: I guess, Your Honor, I think you should go through this whole process because I believe I can convince you that this injunction needs to go forward. I really think I can convince you not to stay the ruling. I think that even if this Court did decide that it wanted to stay its ruling, there is still merit in actually adjudicating these motions because the minute that the stay lifts, we should be able to proceed as quickly as possible. The last place we want to find ourselves is to say, oh, actually, now it's too late again for Georgia voters.

THE COURT: If I were to stay it, it wouldn't lift until after the Supreme Court. Why would I lift a stay on my ruling? First of all, if I don't lift a stay on my ruling for the Georgia Election on May 24, it's moot anyway, isn't it?

MS. KHANNA: This Court might lift a stay on its ruling if the Supreme Court indicates that it should.

THE COURT: What?

MS. KHANNA: If the Supreme Court, when it does rule on

Section 2, whatever it says is about the Alabama case, I'm not willing to say today what that ruling is going to be.

THE COURT: I don't know either.

MS. KHANNA: And it could well mean this Court -- any stay imposed by this Court should be lifted, and then at that point we might be in, when, 2023.

THE COURT: If I don't lift the stay before May 24, it is a moot point, because the next election is 2024. By that time, the common cause -- NAACP parties already know their schedule, that we're looking at a trial on the matter before the 2024 elections, even before we get into 2024. So what I'm saying is that it's your situation, based on how I rule here, would be basically the same way, you're looking at a trial of -- an injunction hearing. Again, if I issue a stay and I don't lift that stay before May 24, it's a moot point.

MS. KHANNA: I have two responses to that, Your Honor. I had one. I had two responses; now I have one because one left my mind.

THE COURT: Well, I'm going to give you a chance to say something else after Mr. Tyson is finished. So if you forget, you can come back.

MS. KHANNA: Okay, I do have two responses. One comes from, as I mentioned before, Your Honor, experience in litigating voting right cases. There is an election every two years. I can guarantee you the day after the November 2022 election, there will

be states that say, likely the State of Georgia who say, you know what, it's too late for us to do anything in 2024. I can guarantee you even more that next spring they will definitely be saying that, next summer even more so, and next fall, we'll be in the place we are right now.

THE COURT: I don't doubt you. Mr. Tyson is shaking his head. I don't doubt what you're saying. They might say it. They probably will say it. And they said it here.

MS. KHANNA: They say it everywhere, Your Honor. It's always too late. I mean, look, and sometimes --

THE COURT: That doesn't mean I'm going to agree with you, though. Let's give --

MS. KHANNA: Sorry. If I may, just one last point.

My second point on the primary, Your Honor. Justice Kavanaugh's opinion seems to presuppose that the primary is something fixed, and the Alabama District Court also seemed to presuppose that the primary was something fixed. Let's be very clear about this: This is a question in Georgia, and who has authority to do what here? Many of the very candidates who the State says need to be protected from this confusion borne of this upcoming election, this primary, are current members of the legislature. And if they are so worried about confusion, about where they could run, about when they need to file, or about the March 11 deadline, or even about the May 24 primary, they have the power to fix that by enacting new deadlines. And if Governor Kemp

were so concerned about the settled expectations of candidates, Georgia candidates, he would not have intentionally delayed signing the bill for a month.

And if at the end of this hearing, this Court is convinced, as I think it will be, that the irreparable harm to hundreds of thousands of black voters, whose votes will be diluted under these maps, outweighs any confusion borne by a handful of candidates, then this Court has the power to move the filing deadline or even the primary. At one stroke, Your Honor, this Court could move remedy plaintiffs' vote dilution and prevent any confusion caused by the election calendar. This Court has the power to do both. To be clear, there is absolutely nothing sacrosanct about the primary date. In 2020 just two years ago at the start of the pandemic, 16 states chose to delay their primaries without disrupting the November election, without descending into the chaos that the State seems to pretend is going to happen here.

THE COURT: What did Kavanaugh say about that when he said -- I can't remember his exact sentence. More or less what he says, the words, if the State wanted to interrupt the Purcell matter, they can do it. In other words, I find -- I'm going to give you a written order. He said if the states want to do this, they can; but plaintiff, you can't.

MS. KHANNA: I don't believe that's what he said. I certainly agree that if the state is worried about candidate

confusion, the very candidates who will be confused can solve that problem today. I do not believe he said that this Court is powerless to issue injunctions, and even if he had, that would not overturn the binding precedent in Shelby County that says that federal courts have the authority and the obligation to issue injunctions under Section 2.

THE COURT: Can I interrupt one second?

MS. KHANNA: Yes, of course.

THE COURT: It is one thing for a state on its own to toy with its election laws close to the state's election, but it's quite another thing for a Federal Court to swoop in and redo a state's election laws that appear close to an election.

MS. KHANNA: And that's a true statement. The State can decide to change its election calendar for any reason or no reason whatsoever. This Court cannot do that. This Court, however, can change the election calendar not for no reason whatsoever, but if it finds that this case warrants it.

THE COURT: I'm familiar with that. That's the reason why we have May 24 primary in Georgia now instead of July. Some judge changed that.

MS. KHANNA: That is correct, Your Honor. And in 2020 the State changed the primary twice. We would be in a different conversation. Purcell was a fall case about a November election. Moving the November general election, now that, I will admit, is a high bar.

THE COURT: I don't get to do that.

MS. KHANNA: Exactly. And we are not asking the Court to do that. And we're not even asking the Court to change the primary. My point is that there is nothing set in stone about that date as Georgia itself has proved as recently in the last two years. In short, Your Honor -- and I will sit down.

THE COURT: Listen, I appreciate a lawyer that has passion.

MS. KHANNA: I'm not laughing at that, Your Honor.

THE COURT: You also understand the law quite well.

MS. KHANNA: The State has unclean hands. The State of Georgia -- I'm not speaking about the State of Alabama, the State of Georgia has unclean hands when it comes to the timing-related concerns of this case. Any purported concern about timing is a problem of the State's own making, and the State is the one with power to remedy any injury it thinks it has. Ultimately, Your Honor, the only blameless parties in this case are Georgia's black voters. Who unlike the State and unlike this Court are also powerless to rectify any actual or perceived harms in this case. Purcell does not give states an automatic free pass to violate minority voting rights once a decade. I don't believe that's what Justice Kavanaugh even suggested. And it does not allow federal courts like this one to abdicate the responsibility to recognize and to remedy violations of federal law.

THE COURT: Thank you. Let me make one correction

regarding the abortion case with Mr. Young. Even though the Eleventh Circuit stayed and put it on hold, they did not change the laws on abortions or policies being held in Georgia. That's a significant difference between this case and that case.

MS. KHANNA: Thank you, Your Honor.

MR. SAVITZKY: Good morning, Your Honor. Ari Savitzky on behalf of the Alpha plaintiffs. I know we've been over many of the issues. I'll keep it, perhaps -- perhaps a little shorter in trying to cover the same ground. But as we see it, the hearing should proceed. The Supreme Courts non-precedential stay order in Milligan doesn't change anything. The Voting Rights Act is the same today as it was yesterday. The irreparable harm to Georgia voters, loss of political rights, is the same today as it was yesterday. And this Court's task, hearing the evidence before it and applying the law as it is, as it was, as it remains, is the same today as it was yesterday.

So I'd like to first make a sort of global point and then similarly talk about the factors in the -- in the -- in Justice Kavanaugh concurrence and some potential distinctions with the Alabama case. The global point is that there's no opinion from five Justices here; there is no presidential opinion. We have a one-paragraph order. But what Justice Kavanaugh's concurrence does say very clearly is that the stay order here, quote, does not make or signal any change in Voting Rights Law. Make no mistake, it would be a substantial change in Voting Rights

Law to hold that a plaintiff who comes into court on a VRA redistricting claim, minutes, hours after the challenge maps goes into effect, who files a comprehensive preliminary injunction motion within a week of maps going into effect, should not even be heard in seeking relief.

THE COURT: Let me ask you this question. Same question I asked Ms. Khanna, let's say I have a hearing, continue the hearing and I rule completely in your way, and then I issue a stay, what will I have accomplished? I understand -- at least we have a ruling that what the State of Georgia did was wrong.

MR. SAVITSKI: That's right, and we would have the ability to argue that the stay should not be issued and to ask the Eleventh Circuit on a emergency basis to consider the grounds on which you decide to stay your decision. But let me just back up because the idea that you would find for the plaintiffs --

THE COURT: What if I issue the stay now and allow you to take it to up to the Eleventh Circuit now without going through the rest of the five days?

MR. SAVITZKY: Well, that's the fundamental point, Your Honor. We don't have a record to go up on. We don't have a record to decide whether it stays --

THE COURT: Your argument said I really should not be stopping the hearing.

MR. SAVITZKY: Correct.

THE COURT: And I should not issue a stay.

MR. SAVITZKY: Correct. But whether or not you issued a stay at the end of the day, I strongly would oppose the issuance of a stay at the end of these proceedings. But for Your Honor, the question of whether or not a stay would be proper would be based on the evidence that's adduced at the hearing. How strong is the merits showing? We think, we can move right into the factors of Justice Kavanaugh's concurrence. How strong is the showing? We think it would be strong. Whatever is in the record and papers and testimony you heard is clear-cut. We will hear plenty more evidence on the merits. That is how the Court rules, how the Court considers any potential stay, how the Court crafts the scope of the relief that it orders, and I'd like to get back to that point.

Just going to the second factor, irreparable harm. We know the loss of political rights is irreparable harm. We know once we run elections on an illegal map, we have incumbents, who have the power of incumbency, who are elected on a map that violates the Voting Rights Act. The scope of the irreparable harm to voters, to the system, to the process is substantial.

THE COURT: Is that not the same -- I'm -- was that argument not that same argument before the Supreme Court that the map in Alabama is unconstitutional and voters have to vote on an unconstitutional map? Is that not the argument?

MR. Savitzky: I think Justice Kavanaugh in his concurrence --

THE COURT: I think Justice Kavanaugh, the other four also -- the argument you're making now is that why should voters have to vote on an unconstitutional map.

MR. SAVITZKY: Correct. And we think it would be irreparable harm in the extreme. There is no way to remedy that that harm. You cannot get that election back.

THE COURT: Is that not the argument that was made to the Supreme Court when they came up with this ruling yesterday?

MR. SAVITZKY: Yes, and just to back up. It's one of the factors to be considered in this sort of Purcell-type analysis and any stay analysis. You could consider the strength of the merit case; you can consider the irreparable harm. On that front you're balancing all of these factors. This isn't is a case where there is any doubt, there is any question about irreparable harm. This is a case where irreparable harm is at its highest possible level. That's another thing to consider in this case specific -- as you look at all of the evidence that's come in, the evidence on the merits, on irreparable harm, -- let me get to that third factor, undue delay. We've talked about already. Obviously the plaintiffs came in within moments of the maps being enacted. Obviously --

THE COURT: I agree. I have no problem with it. I think the plaintiffs -- I think one of them got filed hours after the Governor signed the -- I have no problem. I think the plaintiffs did everything they're supposed to have done. They

waited, they couldn't file it if they had to. That's not an issue for me.

MR. SAVITZKY: Then, Your Honor, to the last points which is really what we've been focused on. I would emphasize we're balancing all of these and looking at the evidence that's come in on them. That's precisely our point, are changes to the map feasible before the election without significant cost hardship. We think those changes are feasible. We think those changes are feasible without changing the dates, but we think you also could change the dates if you think there are some hardships. The point is we need to hear evidence on that.

There is going to be testimony on those issues. The Court has yet to hear any testimony about the nature of the relevant deadline. We have a piece of paper with some dates, but we haven't heard testimony about it. We haven't heard testimony about the kinds of hardships. We will have questions on cross-examination on those issues. The Court also --

THE COURT: The point I think -- excuse me for interrupting -- is that again, even if I agree with you on everything, maybe I don't agree with you on District 18, but let's say I agree with you on everything, and then I said, well, I agree but I don't agree that this is not going to cause the State undue burden on trying to have an election, and I grant the stay.

MR. SAVITZKY: I think at the end of the day if you decided that there would be a substantial significant hardship --

and here's an important point -- that couldn't be remedied with additional ancillary or other relief, then you might decide an injunction was inappropriate. But the point is you would have to make that determination based on hearing the evidence in the record. Based on hearing the testimony that we are here to put on and to elicit and to all hear.

I just want to be very clear about that last point, and Ms. Khanna raised it as well. The Court hasn't heard any testimony about whether, if there are hardships. We don't know what the hardships are, what the nature of them are, we don't know how they balance out, and it is the extreme irreparable harm here against the clear-cut nature of the merits here. But if there are hardships and if they have some significance to them, we also haven't heard evidence on whether there is additional relief that the Court could order.

We're here talking about how to craft an equitable remedy, a remedy that addresses voting rights act violations, and that could include changing some deadlines, and maybe the evidence will indicate which deadlines might not be changed and how.

THE COURT: Why could they have not allowed the Alabama court to change the deadlines in Alabama?

MR. SAVITZKY: Well, that's an important distinction, Your Honor, because if you look at the Alabama decision what the Court said is, well, we read Purcell to say if the deadline is very imminent, that's a problem. Yes, the candidate filing

deadline is tomorrow, you know, is imminent, we're going to stay that for two weeks, but otherwise there's two months; there's enough time.

THE COURT: Why did they not say that? Why could they have not said District Court, you have the authority to change -- as they'd already done -- the qualifying deadline in Alabama to change the primary date, the absentee ballot date, why did they not give that option?

MR. SAVITZKY: Your Honor, I don't know why the Alabama court didn't do that.

THE COURT: Not the Alabama court, the Supreme Court.

MR. SAVITZKY: Your Honor, what we're looking at with the Supreme Court -- it's important to understand the reason we don't have that from the Supreme Court, but what we do have from the Court is a one-paragraph order --

THE COURT: But you are going to say that I could go through and work around Purcell by changing all these dates.

MR. SAVITZKY: To the extent that Purcell is about whether or not a ruling extremely close in time to an election would, in particular, cause hardship, ancillary or supporting relief to move back the dates of the election, especially now -- as Ms. Khanna pointed out, we're early in the calendar. It is February of 2022. That relief will alleviate those Purcell problems. And that is relief that is within the Court's power to grant, and that is part of what the Court does in providing

remedies. The remedy, the violation of rights, and provide a whole remedy that addresses all of the issues in the public interest.

And so we need to hear testimony about exactly what the facts are and the best way for the Court to craft a remedy for a serious -- what we think is a clear-cut and serious voting rights violation. If the Court agrees, the Court could also hear those facts and determine how to put a remedy into place. And that is going to be fact-specific. Of course, it is. Whatever that remedy is will then be entirely different from what the Alabama court did for sure, and it will be based on different facts.

We think that is a significant distinction between the Alabama case because we don't have a record yet, because a remedy hasn't been crafted yet because the facts supporting the potential remedy and possible remedial actions the Court could take to obviate some of those concerns are still open because we're on day two of the hearing. We think the hearing should proceed. The Court should hear all the evidence. And then the Court will determine what relief is appropriate based upon the ERA violation.

THE COURT: Thank you.

MR. SAVITZKY: Thank you, Your Honor.

THE COURT: Anyone else? Mr. Tyson? Mr. Tyson, the argument is made that there is no evidence in the record yet that it's going to be difficult for Georgia to conduct these elections if I proceed and rule against Georgia.

MR. TYSON: I'm sorry, Your Honor?

THE COURT: The argument is being made there is no evidence in the record. I understand it's in the briefs, there is no evidence in the record that it's going to be difficult for Georgia to proceed if I rule against Georgia.

MR. TYSON: Your Honor, I think there is evidence in the record on that point from Mr. Barnes and Ms. Bailey in their declarations. They laid out for the Court the timelines and the difficulties that are there. And I think the key point when we're looking at all this, looking back at 2020 and all those different election cases that were rolling through, and the Eleventh Circuit was consistently staying those based on Purcell, the Georgia project was to set forth ballots after the election was over. In terms of procedurally where we see this, I think you issuing an opinion and staying an opinion is much more like an advisory opinion in that scenario. For our position, given the evidence in the record from Mr. Barnes and Ms. Bailey, the plaintiffs don't have any sort of specific evidence that I'm -- they can point me to something if I missed it, but I don't believe there is something in the record on timing of the election from the plaintiffs, that you can deny the preliminary injunction motions based purely on the public interest in Purcell issues that are involved. We think that is the proper procedural posture then to either stay the case and give us some direction on Section 2 or we proceed on the same calendar along the three-judge panel cases, we

can work through towards a trial.

THE COURT: Let me ask you this, Mr. Tyson. The plaintiffs very strongly -- since this is denying black voters the right to vote for the person they want. I don't know how I'm going to rule yet. But if I did rule against the State, they also argue, Judge, it's not right that they don't get a chance to be heard in this important matter. Something I thought about a lot last night. What's the State's position? These are the state's citizens. These are black voters. These black voters are citizens of State of Georgia. You represent them as well.

MR. TYSON: Yes, Your Honor. And I think it is -- it is a very serious charge to say any voters in Georgia are going to be affected adversely by this process. Number one, we recognize that is a very serious charge the plaintiffs make. Based on the testimony yesterday you heard from Mr. Cooper, there is a lot of uncertainty, a lot of things that go into drawing district maps. It's a complicated process. There are a lot of pieces to it. And as we were going to explore with other experts, there's even disagreement among the experts about where Georgia should have drawn additional districts they didn't draw. So we think that, number one, it is a very difficult factual scenario to work through.

Number two, these districts are largely similar to what you saw in the Georgia Democratic Party plans that were submitted, those were the only ones before the Legislature. We've stipulated

with the plaintiffs that the only plans the legislature had to look at were the ones the chairs drew and the ones the Democratic caucus drew. These plans don't go viciously after incumbents. They don't make these major changes that will adversely affect voters.

They're largely similar to the plans that were in place for the last decade. And so from the State's perspective, the State did the very hard job of working through the public comment, getting the input there, getting input from Legislatures who know their constituents, and putting all those factors together into redistricting plans. And the showing that these plans violate the Voting Rights Act, it's not as if we're in the scenario -- I think back to the cases in the early '80s and '90s, where you had an at-large system of election for a county. They were clearly subverting the rights to vote, of black voters in an urban core of a county having at-large elections. You could have very simply and easily crafted an additional district with all redistricting principles and address the right to vote like that.

This case is far more complex than that because we're talking about what is the impact of drawing predominantly based on race, which we know we can't do under Shaw. How do we square that with the requirements of the Voting Rights Act? And the State has engaged in all those processes in the time that it took to draw the district.

THE COURT: Isn't that something we should talk about in

the hearing, hear evidence on it, help me make a determination whether or not, you know, the state law -- there's a lot of assumptions that I'm going to rule, I may at the end of the day say I'm ruling for the State of Georgia. Should I not hear that and at least make that determination?

In other words, the question also said -- I think they raised, well, Judge, do you have the authority to stop it in the middle? Right now I think I do. But that's really a valid question.

MR. TYSON: It certainly is, Your Honor. And I think this comes back to what we've been saying from the beginning, which is, Section 2 cases require, as Ms. Khanna said, an intensely local appraisal of the facts. We're essentially trying to take a year-long process of discovery and digging into what is happening here and cram it into an emergency timeline when, from our position, it is already too late to alter the election machinery. And so we think Your Honor, the Court, the people of Georgia will be better served by let's dig in and really unearth these facts and explore these questions we talked about with Mr. Cooper, explore the partisan race issues we have with the political scientists -- not on an emergency track, but explore that on a normal discovery track. Because at the end of the day, the four prongs that you have to get to get an injunction, the plaintiffs are not going to be able to clear the equities and public interest because of the place we are in the election

calendar.

We talked about kind of this, you know, when does Purcell apply. It's always too late, Ms. Khanna said. As someone who elects -- represents local election officials, put it that way, county boards of election, you can't just snap your fingers and hold an election. There is a whole process you have to go through to work that. The Supreme Court precedent recognizes there's this concept of election machinery. You kind of get the election machine rumbling down the tracks, and it gets to be too late to put a stop to it.

THE COURT: Ms. Khanna said, Judge, you did that back in January when you started this. Let's face it, I'm having this discussion with y'all now based on what the Supreme Court did yesterday. Okay? And the argument is being made, Mr. Tyson, that says, Judge, you really don't know what the other three are thinking.

MR. TYSON: Certainly, yes. And maybe, if I could, Your Honor, maybe on that point. I think it's helpful to look at what other Justices said, because I think that might help clarify on some of these things. So, obviously, we have Justice Kavanaugh and we talked a lot about his situation there, the massive hardship that is involved. But I think if you look at Justice Kagan's dissent, it helps reinforce the reason why. The Alabama case in many ways was a simpler decision-making process than the facts that you've got here. Justice Kagan notes in her dissent

there are several things Alabama didn't argue. She said Alabama had been on notice since 2018 that they could draw this additional majority black district. There was actually a map introduced in the special session that drew the district the Legislature rejected. In the stipulated facts in the case here, nobody had drawn a majority black 6th Congressional District before Mr. Cooper proposed that. No one had drawn any of these other districts on the legislative maps until they were proposed here. This is a different scenario we're facing versus than Alabama.

Justice Kagan noted that Alabama didn't argue that its enacted plans were better on compactness than traditional redistricting principles. That's exactly what we're arguing here. That the enacted plans are more compacted. That they do fit traditional principles better.

Justice Kagan said Alabama didn't contend it was impossible to redraw the map on their election timeline because although it's the same election, they had the earlier qualifying period and all that. We are contending it's impossible to do that on this timeline. That's what Ms. Bailey talked about, Mr. Barnes talked about. Those are the points we're making there.

So ultimately when you look at the Chief Justice's dissent, I think he frames the whole issue that we're struggling with, which is Gingle's and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim. Justice Kavanaugh said

something similar, and to show clear-cut entitlement to relief, we're going to have show many more different facts here than they had in the Alabama case. Even if they couldn't show it there, there's no basis for us to find that here.

THE COURT: In other words, I raised the question that we really won't know about Section 2, the Voters Right Act, until after the Supreme Court issues a ruling in the fall. I'm not sure they're going to hear it in the fall. They might not issue a ruling until June of the next year '23. So where does that put me? In other words, that's the concern I had last night is that I don't know what they're going to say about Section 2, the Voters Right Act, until they say it.

MR. TYSON: Certainly. I've given that a lot of thought since last night, too. What do we do from here? I think we kind of have two options essentially. One option is we move forward with discovery and kind of get all of the facts into the record so we at least know some of them, hoping the Supreme Court doesn't add some more factors that we have to consider later. I think largely the factors will be the same. It is going to be political science research, it's going to be district maps, a lot of those same principles.

THE COURT: But right now, I do know what the law is right now. The law of the land right now is the Gingle's factors, the Gingle's factors and the totality of the circumstances. So why should I not say -- mainly kind of like I did in the abortion

case. Here's what I'm ruling now. If it changed, it changed, but here is the law now.

MR. TYSON: Your Honor, I think the reason is because that's only one factor of the preliminary injunction issue. Even if you were to find the plaintiffs' likelihood of success on all of the existing law pieces, we still don't cross public interest. We don't cross equities, and so for that reason the injunction is going to need to be denied, no matter what. We can work through the likelihood of success and all the other pieces of the puzzle and the existing law in the normal discovery track on the schedule that's been set in the three-judge panel cases and then see when we get direction from the Supreme Court.

But as a practitioner, I'm in the same mode as Chief Justice Roberts is, it is hard to give good legal advice around compliance of Section 2 because the law is very difficult to interpret what is the role of racial predominance when you're drawing this unconstitutional with Section 2 requirement that you must draw these districts. These are questions that we need to know the answer to before all these cases go forward.

THE COURT: One last question for you. I have a general idea if I don't go forward, I should say. There is another question that said, well, if you stop it, are you denying the injunction, are you suspending the hearing or are you issuing a stay? What are you saying, Judge Jones, right now? The hearing is -- only had one witness.

MR. TYSON: And, Your Honor, I think the proper procedural posture would be, you have not concluded this, and your review of the evidence, it's in the record, and based on the input of the Supreme Court in the Alabama case, that the public interest and the equities cannot be met no matter what the evidence or the likelihood of success would be. So at this point we would deny the motions for preliminary injunction based on public interest and equities based on the evidence in the record before you, which is Ms. Bailey's declaration, Mr. Barnes' declaration, and then we can set a schedule and proceed after we go from there. We think procedurally that makes the most sense at this point.

THE COURT: Thank you, Mr. Tyson.

MR. TYSON: Thank you, Your Honor.

THE COURT: Any last words from Ms. Khanna?

MS. KHANNA: Thank you, Your Honor, a few brief points in response. Mr. Tyson began his argument and ended the argument with a discussion of the evidence on the record. And the evidence on the record that he pointed to is a declaration by Mr. Barnes, I believe paragraph declaration by Mr. Barnes, that actually gets the deadline wrong for you to call the ballots. It says that the deadline is April 5th; it's not. That is the first day under Georgia law that ballots may be sent to overseas, not the deadline.

It also assumes the credibility of Ms. Bailey's expert report. They're submitting her as an expert. They could not

manage to get expert analysis from her by the Court-ordered deadline originally when plaintiffs objected, and they put in an expert analysis two days later to assume that this evidence in the record is unassailable. Without any cross-examination, without any determination of the witness' credibility, without any probing into the facts is quite a dangerous precedent indeed. I think the Court has talked about what precedent this Court should follow, but I think it's also important to think about what precedent would this Court be setting if it were to stop the hearing at this point? And I think that precedent would be one of two things, both of which would be very dangerous. One is it would be undermining what Justice Kavanaugh said by turning Purcell into an absolute bar. Saying, oops, there is nothing as a matter of law essentially, nothing I can really do here, nothing the courts can really do here. Or if it were to determine it based on the, quote, unquote, evidence in the record, it would basically say all the State has to do is throw together a declaration in 12 hours; we don't get to test the relevance, the probative. We don't get to decide whether or not it's credible or not, but we just presume that the State can kind of wave a magic wand and hands off, Court's done. And what message would every other court in the land take from that? That really at the end of the day the Court is powerless, and that the Court -- and that somehow a non-binding stay order from the Supreme Court in a different case has now shut down voting rights litigation for the rest of the year. That

can't be true.

THE COURT: Well, I'm not the only judge in America. I think there are at least three other judges in three other states are having to deal with this today.

MS. KHANNA: And it would be a dangerous position, indeed, for the Courts to decide -- for the District Courts to decide that they are entirely powerless. The Supreme Court never said it, and I don't think this Court needs to presume that at this point.

Mr. Tyson's comments about why this hearing should not go forward, why the preliminary injunction should be denied, were entirely based on the merits -- I'm sorry, the bulk of that discussion was on the state-specific issues and the plan-specific issues. He said that the Legislature did everything right here. He said the maps in front of him were doing this and not that. He said that they followed previous lines. I understand that's Mr. Tyson's position; certainly plaintiffs have a different position, but that is the nub of the issue. What are the planned specific merits of each of the plans at issue here, and maybe they're not all created equal. Maybe some are simpler than others; maybe some are more clear-cut than others. There is a Congressional case, there is a House case and there is a Senate case. And we can't just wave with a broadbrush saying they are probably more or less the same because the state's attorney has decided that the process here was good.

And then at the end of that discussion, Mr. Tyson says well, after disclaiming that the merits here matter -- even the State seems to believe that the merits here matter, says well, we can really just wash away the merits entirely in this preliminary injunction hearing, turns out that this first merit issue just gets thrown out the window because this Court can't issue a injunction no matter what. And again, that is a complete reversal of what the preliminary injunction standard is. There is not one wholly dispositive factor. It is always a balance.

And when Mr. Tyson says it is already too late, when the State says it is already too late, think about what that means, Your Honor. The minute that we filed our lawsuit, which was the first minute we could file our lawsuit, it was already too late.

THE COURT: I didn't agree with that. If I agreed with that, I would have stopped it on January 4. So I don't agree with that.

MS. KHANNA: But that argument that it is already too late suggests or I think necessitates the State's position that in an election year, in the redistricting cycle where we draw a new map, we kind of get a freebie. We can pack all black voters in one district, and turns out there's nothing we can do about it because it's too late. We can malapportion the districts, but there is nothing anybody can do about it because it's too late. We can concede a voting rights action, but there's really nothing the State can do about it because it is too late. That can't be

true.

THE COURT: I'm not saying it's true. I'm not making a determination on anything. All I'm saying is that -- you know, sometimes it's best to listen than talk. So I'll listen.

MS. KHANNA: I understand, Your Honor, and I will take the same advice. I appreciate the opportunity to address the Court today.

THE COURT: I need about 15 minutes to -- well, go ahead.

MR. SAVITZKY: Thank you, Your Honor. Very briefly. To stop this hearing now would be to say that a state can sort of slow walk its redistricting process until the beginning of the state's election calendar as the state describes it, and then be immune from a suit under the ERA for at least one election. They can use the process entirely within their own control to escape any judicial review. That cannot be right. And, in fact, I would suggest that the State create a delay -- would support altering, if the facts support it, after we hear the evidence, the State's schedule in order to insure that the Court can impose effective relief to remedy any violations of law that it finds are likely.

I would add to that only, we think that at a minimum, you should hear the witnesses the state has talked about who are going to testify to purported difficulties. Mr. Tyson said it would be impossible -- impossible under the current schedule. We don't think that's right, impossible under a schedule the Court

alters slightly. We think that could make it even less difficult. But the point is we need to develop at least those facts, even if the Court wants to consider sort of hardship issue first. There are no facts in the record on that beyond a declaration on a piece of paper that doesn't get to the actual nature of the hardships. It doesn't get to, well, how difficult is it really. And that includes, by the way, the fact that plaintiffs have reserved the right to put on a rebuttal case in response to those witnesses. So there is -- there's evidence to be heard on the issues that the Court is concerned about. There's, of course, evidence to be heard on the merits, on the significant ERA violations that we think are clear on this record and that we think we can show further through testimony.

And so we think before there is any decision, you need to hear the evidence. You need to hear the evidence that goes both to the merits, but especially if the Court is concerned about these questions of -- of whether a remedy is possible, let's hear the evidence on that, too.

THE COURT: Thank you. Mr. Tyson, any last words?

MR. TYSON: Yes, Your Honor. Just very briefly, Your Honor. I think it's also important to remember we're on a very unusual timeline this year and last year. We had COVID delays in the census. The census numbers would normally come out in March and April. Special session is usually August. This year we had August since its release, November special session. There are a

lot of unique things that happened this year on the timeline. And so again I think it's important to remember this is not -- the machinery of the election is the key point at this point.

In a -- in a different year with a different timeline in the Legislature, there may be more time to review these kinds of issues ahead of time. The Governor is not a party here. The Secretary can't tell the Governor what to do; I'm sure he could try. The Governor chose to sign the maps when he signed them. All those pieces, though, don't impact the local election officials' work to get the election run, and that is essentially where we are at the end of the day. I want to make sure from the timeline perspective this was part of it.

THE COURT: I want to ask this question, I think I know the answer, but I want to make sure. In the 2001 redistricting, the maps that they ran on was the maps that the general assembly -- I think Governor Miller was the governor at the time and that the DOJ precleared. They did not change those maps until later; is that correct?

MR. TYSON: That's correct, Your Honor. DOJ initially objected to the state plan in 2001. There were slight modifications made in the regular session in early January, but they were -- those maps were run on 2002, and there was litigation after that to throw them out.

THE COURT: Those maps were later declared unconstitutional, but they did run on those maps. My point is,

that it is not something completely new that elections proceed on maps that are later found to be unconstitutional. I think it's happened twice in Georgia. I know it happened in 2001. I think it happened again -- the maps were not declared unconstitutional in 2012, but I was trying to last night to find other states where they have proceeded on maps that were later found unconstitutional. So it's -- go on.

MR. TYSON: You're correct, Your Honor. Also too the challenge was that the 2001 Congressional map was unconstitutional. The three judge court rejected that claim of the plaintiffs. There was a second election on that 2001 Congressional plan as well and the Legislature redrew it later.

THE COURT: Thank you all. Give me a few minutes. I'm going to go back to my office and think about this, and I'll come back and tell you what I'm going to go.

(Whereupon, a break was taken.)

THE COURT: Here's what I would like to do. I want to sort of shift how we're going to do this. I want the State to put up evidence regarding why this would be difficult for the State to go forward. I'll allow the plaintiff to present rebuttal evidence to that. We were talking more or less about equity and public interest.

Now the question is, is the State prepared to do that after lunch today, or will you need to wait until tomorrow?

MR. TYSON: Your Honor, I can check on Mr. Barnes. He's

in Atlanta. Ms. Bailey is in Augusta, I'm not sure I can get her this afternoon. I can check on Mr. Barnes' availability this afternoon.

THE COURT: We might do Mr. Barnes this afternoon and Ms. Bailey tomorrow. She's in Augusta. I don't know how soon you can have your rebuttal witnesses ready.

MR. TYSON: We can do our best, as fast as possible, Your Honor.

THE COURT: That's what we'll probably do. Here's what we will do. We will adjourn until 2 o'clock this afternoon, and then we'll start -- we only have Mr. Barnes. We only have Mr. Barnes. If Ms. Bailey can be here -- Augusta is, what, a two-hour drive from Atlanta on I-20. If she can get here to help -- if she can't, then we'll deal with her tomorrow. That's what we're going to do. Thank y'all.

(Whereupon, the hearing concluded at 10:48 a.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

I do hereby certify that the foregoing pages are a true and correct transcript of the proceedings taken down by me in the case aforesaid.

This the 8th day of February, 2022.

/s/Viola S. Zborowski

VIOLA S. ZBOROWSKI, CRR, CRC, CMR, FAPR
OFFICIAL COURT REPORTER