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

ALPHA PHI ALPHA FRATERNITY, INC., ET AL., PLAINTIFFS, -VS- BRAD RAFFENSPERGER, DEFENDANT.	DAY 8 - P.M. SESSION DOCKET NO.1:21-CV-05337-SCJ
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 BENCH TRIAL
BEFORE THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE
THURSDAY, SEPTEMBER 14, 2023

STENOGRAPHICALLY RECORDED BY:

PENNY PRITTY COUDRIET, RPR, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS:

SOPHIA LIN LAKIN, ESQ.
ARI J. SAVITZKY, ESQ.
ALEX W. MILLER, ESQ.
RAHUL GARABADU, ESQ.
ED WILLIAMS, ESQ.
DENISE TSAI, ESQ.
CAITLIN F. MAY, ESQ.
KELSEY MILLER, ESQ.
MING CHEUNG, ESQ.
GEORGE VARGHESE, ESQ.
JUAN RUIZ TORO, ESQ.
ANUJ DIXIT, ESQ.
JOSEPH ZABEL, ESQ.
MARISA DIGIUSEPPE, ESQ.
JOYCE GIST LEWIS, ESQ.
MAKEBA RUTAHINDURWA, ESQ.
ABHA KHANNA, ESQ.
ADAM SPARKS, ESQ.

ON BEHALF OF THE DEFENDANT:

BRYAN P. TYSON, ESQ.
DIANE F. LA ROSS, ESQ.
BRYAN JACOUTOT, ESQ.
DANIEL H. WEIGEL, ESQ.
DONALD P. BOYLE, JR., ESQ.

(PROCEEDINGS HELD IN OPEN COURT AT 1:48 P.M., ATLANTA, GEORGIA.)

THE COURT: You-all can be seated.

Okay. Is there anything before we start the closings?

MR. SAVITZKY: No, your Honor.

MS. KHANNA: Sorry. Just one administrative matter I'm not sure we've clarified. Your Honor had mentioned earlier this week about providing any substantive proposed edits on the transcripts.

THE COURT: Yes.

MS. KHANNA: I'm assuming that's not by close of trial today?

THE COURT: No. No. No. No, I wanted it an hour ago.

MS. KHANNA: I guess we'll just stop talking.

THE COURT: No. What about by Monday?

MS. KHANNA: That sounds great, Your Honor. Thank you.

MR. SAVITZKY: Fine, Your Honor. Thank you.

MR. TYSON: Fine for us as well.

THE COURT: All right. And we still have the scheduled conclusions of law and facts you-all get to me by the 25th.

Okay. Mr. Savitzky, are you going first?

MR. SAVITZKY: Yes, Your Honor.

THE COURT: All right.

MR. SAVITZKY: Good afternoon, Your Honor.

THE COURT: Good afternoon, sir.

MR. SAVITZKY: Ari Savitzky for the Alpha Phi Alpha plaintiffs. We'd like to reserve five minutes for rebuttal.

THE COURT: Okay.

MR. SAVITZKY: And before I start the argument proper, I just want to make two points.

First, I want to acknowledge Ms. Katie Bailey Glenn of McDonough, Georgia, one of the individual plaintiffs in the Alpha Phi Alpha case is in the courtroom with us today.

THE COURT: Good to have you, ma'am. Glad to have you here with us.

MR. SAVITZKY: Thank you, Your Honor.

THE COURT: Thank you. Thank you, ma'am.

MR. SAVITZKY: I also want to acknowledge and thank again the Court staff, specially the court reporters, for their tireless efforts over the last two weeks. I know that we take personal responsibility. I haven't always made it easy for them. Thank you.

The *Gingles* vote dilution framework carries out Congress's clear command: To prohibit voting schemes that have discriminatory results, regardless of intent. *Gingles* has been applied by courts for decades. And in *Milligan*, the

Supreme Court took it up, reviewed it, and left it virtually untouched.

This case raises important questions; no doubt. The facts are complex; no doubt. But there's also no doubt about this, on this trial record, on this evidence, we have shown that the *Gingles* results test is met.

In the areas of focus in the Alpha Phi Alpha case, reasonably configured Black majority districts can be drawn consistent with traditional districting principles, *Gingles* 1. And persistent, stark patterns of racially polarized voting exist, such that Black voters, despite voting cohesively for preferred candidates, are shut out of power outside of Black majority districts. That's *Gingles* 2 and 3.

It's the very unusual case where those conditions are shown to be present and a determination of vote dilution doesn't follow. And there's a reason for that.

Once those preconditions are met, we know we're likely looking at a situation where the combination of district lines and racially polarized voting patterns are operating in a particular area to lock Black voters out of power. This is the submergence dynamic that *Gingles* recognized. The evidence shows that is exactly what is happening here in the specific areas of Georgia that plaintiffs are challenging.

The evidence on the totality of the circumstances

shows that this is not that very unusual case where we have such confidence in the openness of the political process that we can overlook that dynamic of submergence.

So what I want to do now is go through the elements to show how we have proved our case piece by piece, brick by brick. And along the way I want to take on some of the arguments that Mr. Tyson has raised over the last two weeks.

Gingles 1. We've heard a lot of opinions about maps in the last two weeks, spent a lot of time looking at maps, a lot of time talking about maps. I think we can all agree no two mappers are going to draw a map in the exact same way. And that's why the *Gingles* 1 standard is straightforward, it's flexible. Can reasonably configured Black majority districts be drawn consistent with traditional districting principles?

And the *Milligan* case shows exactly the types of things that you should be thinking about and looking at to answer that question. Are the illustrative plans that have been proposed comparable to the enacted plans in terms of the objective metrics that one uses to assess a map?

Did the map drawer credibly testify that he balanced the various districting principles that race did not predominate among the various considerations?

Did the mapper back that up with specific reasons supporting the mapping decisions taken?

Did the plaintiffs put forward additional evidence to

show that the illustrative plans offered maintain and respect communities of interest?

Here's what the trial record shows.

Bill Cooper did a detailed demographic analysis demonstrating that there are areas in the state where Black population is numerous and concentrated. No one disputes the demographic reality. In South Metro Atlanta the population has changed completely. Those trends of mass growth, diversification, suburbanization and development are continuing.

And in other specific areas of the state, the eastern end of the Black Belt, Macon Metro, Southwest Georgia, a combination of Black population growth and white population decline has similarly changed the demographic reality. But what has not changed is the political reality.

As Mr. Cooper showed, number of Black majority districts has remained essentially static since before the 2010 census. He called it baffling, is what he said on the stand.

Cooper's illustrative plans draw additional majority Black districts consistent with traditional districting principles in all those areas that I mentioned. And on the objective metrics, looking at that first consideration I mentioned, Cooper's illustrative plans are comparable to or better than the enacted plans in terms of population

deviation, compactness scores, county splits, VTD splits, municipal splits, regional commission area splits, metro area splits, incumbent pairings, all while adding those additional Black majority districts.

None of that's disputed. Defendants' mapping expert confirmed it. Those metrics are powerful evidence of a balanced plan with reasonably configured districts, just like the evidence in *Milligan*.

And Cooper also gave detailed and consistent testimony that he understood, that he considered, that he balanced those principles. He worked hard to successfully stay within that tight 1 percent, 1.5 percent deviation. He eyeballed those districts.

He minded the locations of incumbents as best he could. He worked to keep counties and VTDs and municipalities whole. And he also considered communities of interest and integrated research and his deep knowledge of Georgia's demographics from drawing many maps in the state into his plans and his report and his testimony.

And he also detailed the limited and reasonable way that he considered race, how race was one factor in his analysis. He was aware of it, but what he said is it didn't control how any of these districts were drawn.

Cooper's testimony was specific and credible. He's been qualified as an expert in over 50 cases. He's drawn

plans from Lumber City to Emanuel County to Henry to Fayette. Courts use his plans. He cares about his plans. He cares about getting them right.

As the Court may remember from the PI stage of this case, when Mr. Cooper thinks that even a single district in his plan is not ready for prime time, he says so.

In this trial he was cross-examined on the stand for four hours. He was repeatedly shown racial heat maps made by the defendants' expert that he had never seen before, maps that he found upsetting because, as he told the Court, they overemphasize race, they distort the map drawing process, they're inconsistent with his balanced approach. Mr. Cooper did not waver.

He asked -- when he was asked again and again about every VTD in every county, he was able to articulate the reasons for why he configured the districts the way he did. And after all that, he told this Court in no uncertain terms that his illustrative plans are ready to go. His plans are reasonable, he told you, and balanced, and they could serve as a remedy for vote dilution.

This Court can take Mr. Cooper's plans and his credibility to the bank just like the Court did in *Milligan*.

A local appraisal starts with geography. I want to touch on the districts that Mr. Cooper included in his illustrative plans briefly.

Illustrative Senate District 28 in the South Atlanta Metro, Cooper testified he drew a compact district. The communities in the district are close to one another, they're connected to one another. He minded the population deviation in this district, connected suburban communities, considered socioeconomic data.

And Sherman Lofton, by the way, also testified about the connections in these communities. He told you if you go to a shopping center in Griffin, you're going to see license plate tags from Fayette and Clayton County.

Let's look at Senate District 17. Mr. Cooper is familiar with Henry County. He testified he relied on that. And he also considered geographic proximity of the communities being connected, the suburban nature of these areas, suburban Atlanta. Sharing an identity as part of Metro Atlanta. The compactness of the district. The State's district stretched all the way out to Morgan and Walton County. Mr. Cooper drew a more -- as defendants' expert admitted, more geographically compact district.

And again, Sherman Lofton, who lives in McDonough, testified about the connections between communities like McDonough and Stonecrest and Conyers in this district.

Moving to District 23. Again, Mr. Cooper drew a district that united communities of interest, moving east-west, across Georgia's Black Belt. He considered

1 socioeconomic data. He sought to keep counties whole. Same
2 number of county splits as the districts in the enacted map,
3 same distance across. And where he split a county, he
4 followed municipal lines and county commission lines.
5 And as to this district, we have, additionally, the
6 testimony of Dr. Traci Burch talking about the political
7 identity of the Black Belt and its unique political history.
8 And we also have the testimony of Dr. Diane Evans who
9 discussed common interests in this area and how residents
10 there are served by the same grocery stores, commercial
11 centers, hospitals.
12 Moving to District 74. I don't even need to spend
13 much time on this district. Mr. Cooper testified it couldn't
14 be more compact. It is almost a perfect square. Mr. Cooper
15 looked at municipal boundaries, he kept the deviation in line,
16 he ensured compactness, he drew in a suburban area. We've
17 heard a lot about the -- how the tail of Clayton County is
18 suburban, similar to the other portions in this incredibly
19 small and compact district that Mr. Cooper drew.
20 Let's look at District 117. Very similar area,
21 again. No one disputes the obvious compactness of this
22 district. Defendants' expert agreed it was compact, uniting
23 proximate communities. Sherman Lofton testified about the
24 connections here. He talked about the Tanger Outlets in
25 Locust Grove, talked about driving down 155 and about the

tremendous demographic change in this area.

Moving to District 133. Mr. Cooper testified again about connecting communities in the historic Black Belt, about connecting counties with shared socioeconomic commonalities, about avoiding incumbent pairings, and balancing compactness and VTD lines and municipal lines as he drew the lines here around Milledgeville.

Moving to 145, unless the Court would like to look at it a little more.

THE COURT: Yeah. Click it back for one second.

MR. SAVITZKY: Sure.

Testified about keeping municipalities together as best he could.

THE COURT: Thank you.

MR. SAVITZKY: 145, again, despite not including anything about it in his report, defendants' expert concedes it's compact, District 145. Mr. Cooper discussed keeping the district in the Macon-Bibb metro area, discussed how incumbents affected his map drawing decisions, discussed following county lines and VTD lines.

Moving to District 171. And this district in Southwest Georgia, Mr. Cooper testified about the transportation connections in this district. There's evidence in the record now about the ways in which the different communities in this district, the different municipalities,

Albany, Pelham, Camilla, Thomasville, work together on common projects within the Southwest Georgia region. District connects rural counties, rural areas, areas that have somewhat higher levels of poverty.

And by the way, Bishop Jackson testified about this area as well. Describing the area as a little more rural or more agrarian; sharing similar attributes, similar levels of education, socioeconomic attributes.

And we can take this down for now.

As the Court knows, *Gingles* 1 is not a beauty contest, but if it were a beauty contest, I'd like our odds.

And we can do the next slide.

Every single consideration that supported the Supreme Court's affirmance in *Milligan* is present in this record, grounded in highly credible testimony by the very same mapper and objective facts as set out in the metrics in the maps.

So what does the defense say to all this? Not much. Mr. Tyson's tried to argue that race predominated in the illustrative plans. But the evidence is in. Facts don't back up the argument. Again and again Mr. Tyson asked Mr. Cooper why he drew a district one way or the other. And again and again Mr. Cooper testified, while he was aware of race, he made his decisions about where to draw lines by balancing all of the traditional principles. And we just went over a few of the considerations he considered in reviewing the districts

now.

THE COURT: Will this PowerPoint be provided to me when you finish?

MR. SAVITZKY: Yes, Your Honor. We're still printing it out, but we will provide it to you.

THE COURT: Thanks. Sorry to interrupt you.

MR. SAVITZKY: Your Honor, I submit this Court can resolve the defense's racial predominance argument on Mr. Cooper's credibility alone.

And the defense talked about racial shading, racial splits in their summary judgment papers. That's not what the evidence showed at trial. Mr. Cooper made clear he doesn't use those racial shading maps. Defense's own expert didn't back up even his very limited and ambiguous claims about the prioritization of race in the illustrative plans. He didn't even disagree that Mr. Cooper's plans are consistent with traditional districting principles. He barely read Mr. Cooper's report.

And his analysis consists mostly of cherry-picking, inconsistencies, and, again, those racial shading maps that distort much, much more than they reveal. On this record the Alpha plaintiffs have met *Gingles* 1.

Moving to *Gingles* 2 and 3. Evidence demonstrates we've proven those preconditions as well. Mr. Tyson continues to argue that Section 2 plaintiffs have to prove a negative,

that is to prove that party or partisanship is not the reason for racially polarized voting patterns.

We don't need to prove a negative at any stage. That is not the standard at any stage. But I will address the arguments about party and race and I'll do it where they belong, with the totality of the circumstances.

So just on *Gingles* 2 and 3, the Court has the law right. We need to show that majority voter political cohesion and racial bloc voting exist. That's what we need to show.

And on the evidence, no one disputes that this pattern of racially polarized voting exists in the areas of interest here, in the areas where those districts are drawn.

Dr. Lisa Handley conducted racial bloc voting analyses in this case. She's done the same analysis, using the same methodology hundreds of times. She used it in her report. She described it on the stand.

As to *Gingles* 2, Dr. Handley offered detailed testimony regarding racial bloc voting and the ability of Black voters to elect candidates. She looked at 16 statewide elections. She looked at 54 state legislative general elections right in the areas of interest in the South Atlanta Metro, in the eastern end of the Black Belt, in Macon, in Southwest Georgia. And in each of those areas she found starkly polarized voting patterns with Black voters overwhelmingly supporting one candidate and white voters

consistently bloc voting against Black preferred candidates.

That pattern of racially polarized voting is not contested. The parties have actually stipulated to it.

Now, on *Gingles* 3 the question is, do these voting patterns mean that Black voters' preferred candidates are typically defeated? Also have to show that.

In other words, given these district lines that were drawn, does racially polarized voting operate to submerge -- we talked about this submergence dynamic -- operate to submerge Black voters such that they have no opportunity to elect their preferred candidates?

The answer is yes. Dr. Handley testified that because of this uncontested, starkly racially polarized voting, Black voters in the areas of focus will be submerged unless district boundaries are drawn to provide Black voters with an opportunity to elect candidates of choice.

And she also testified that in the specific areas of focus, in the South Atlanta Metro, in the Eastern Black Belt, in the Macon Metro, in Southwest Georgia, the only districts that provide Black voters with an opportunity for electoral success, given this level of racially polarized voting, are majority Black districts, including the districts drawn by Mr. Cooper.

Gingles 2 and 3 are met.

So I want to transition to totality of the

circumstances then. Again, the 11th Circuit has said it will be only the very unusual case where liability doesn't follow once you meet those preconditions. And, again, that's because once you've established the preconditions, you've demonstrated that Black voters are being shut out of power by racially polarized voting patterns, even though the lines could reasonably have been drawn to give Black voters an opportunity to elect candidates of their choice.

And so the totality of the circumstances portion of the inquiry, we look around at the big picture. We make that fact-driven appraisal of the areas of focus. We asked, what is the context in which the challenged districts were drawn? Does an examination of this context give us some comfort that even though the district lines and the persistent patterns of racially polarized voting do combine to shut Black voters out of power in the areas of focus? Even though that is happening, nevertheless, there are good reasons to conclude that the political process is actually equally open.

The trial record here does not provide that comfort. The trial record here does not show that there is no cause for concern. The trial record makes clear we cannot feel comfortable that the political process is equally open in these areas where Black voters have been drawn into districts that will shut them out of power.

So before I move to the Senate factors, address them

one by one, I want to address one of the primary arguments the defense has brought up, which I think the trial record has revealed is just not supported by the facts, and then I'll turn to the overall totality piece.

So I'm starting with Senate Factor 2 because it gets to this argument that the defense is making. At bottom they say voter behavior, the voter behavior we see in Georgia, is party polarization that is being driven by party and not by race.

Now, let's be clear. Whether they can mount that defense and succeed is a fact question for this Court to resolve. And on this trial record, the evidence does not back them up. Instead, it shows that race and racial politics are the best explanation for voter behavior, for the behavior that we see.

Now, again, Dr. Handley, Dr. Burton, Dr. Jones all testified about the extent to which voting in Georgia is racially polarized. Starkly polarized.

And just the fact of that stark polarization creates an inference, as Judge Tjoflat's *Nipper* opinion said, that racial bias is at work.

Judge Wisdom wrote in the *Marengo County* case, "Racially polarized voting is the surest indication of race-conscious politics."

And so with that inference in place, how do we look

at this question of party or race at the totality of the circumstances stage?

On the one hand, in the Section 2 results case plaintiffs do not have the burden to affirmatively prove the ultimate cause of unequal opportunities for Black voters. That's not our burden. We certainly don't need to show intent or animus of any kind. And that's why we can put that *League of Women Voters* case to the side, at least when it comes to applying the *Gingles* results test.

But the defendants can try to mount a defense. They can try to rebut proof of vote dilution by showing that losses by minority-preferred candidates are attributable to nonracial causes. That's what *Nipper* says.

And I understand that that is what the defense is trying to do. But this trial record does not let them do that.

Relying on the testimony of Dr. Alford, whose testimony has been discredited time after time, they point out the undisputed fact that in recent general elections Black voters have voted for Democratic candidates and white voters have voted for Republicans. Therefore, they say party explains voting behavior. Post hoc, ergo propter hoc. After this, therefore because of it.

Your Honor, the defense's picture of voter behavior is a thin impoverished account of why voters behave the way

they do. Ask them, why do we see such stark patterns of racially polarized voting in Georgia? They said it's party.

Ask them, well, why are the party lines also the racial lines? They have no answer. They can't answer that question. Their position is racial determinism. Black voters vote for Democrats, white voters vote for Republicans; that's how it is.

That's not good enough. Why? Why do we see these patterns of racially polarized voting, these stark patterns, these persistent patterns, the surest indication of race-conscious politics? History tells us why if we listen. Political context tells us why if we listen. The data tells us why if we listen.

In this trial record the Alpha plaintiffs have amassed powerful, affirmative evidence that confirms that it's race that best explains the racially polarized voting patterns in Georgia that we see.

Dr. Jones, Dr. Ward, Dr. Burton, Dr. Handley all testified repeatedly, consistently, that you can't talk about partisanship without talking about race. Black and white voters have, over decades, realigned their partisan affiliations based on the parties' positions with respect to racial equality and civil rights.

Simply put, voters vote their values and their interests. And that includes their perceived interests on

those important issues. When parties and candidates change their message and their positions on the issues that relate to racial equality and the interests of Black voters, the voters listen, they respond. History bears this out.

As Dr. Ward noted in his report, he testified on the stand, race has consistently been the best predictor of partisan preference since the end of the Civil War through various realignments between the parties.

As Dr. Jones explained, because partisan affiliations has shifted and realigned but racial division has remained consistent, partisanship can't explain the lack of political opportunity for Black voters rooted in that division.

And whether it's southern Democrats or the Republican Party since 1965, parties and candidates mobilize and energize voters using racial division. That's what Dr. Jones testified.

To use Dr. Alford's term, the cue is not the race of the candidates. The cue is their positions on the issues to which voters respond. History bears that out. Political context bears that out. Dr. Jones and Dr. Burton explained how racial appeals are used to signal the positions of the candidates and the parties and to drive voter behavior.

Dr. Jones explained how racial appeals signal to voters that it's the Republican Party that's the party of white voters. Dr. Burton lamented the use of these appeals

and noted that they're still used because they have an effect.

The history, the political context, the data bears it out as well. Dr. Handley testified directly on that point, describing racially polarized voting in primary elections that necessarily cannot be explained by party. It's an intraparty election and you still see the polarization.

She testified that in the Democratic primary races that she analyzed a majority of those contests were polarized. The racial cohesion in those primary elections may not have been the same as the general, but it's there. And party cannot explain it.

History, political context, data. The record does not support the defense's suggestion that Black voters and white voters' support for particular parties are predetermined. It shows the opposite.

Bishop Jackson testified, Blacks, like everybody else in this state, want to vote in their best interests. And I think their best interests depends upon who the candidates are and the position on the issues.

No doubt the question of what accounts for polarized voting, that ultimate question, is a complex one of fact. It's not one that we need to prove.

On this record the overwhelming evidence is that race best -- better explains the undisputed patterns of racially polarized voting that we see in Georgia.

Let's now really turn to the totality of the circumstances. And we don't disagree, Your Honor, with Mr. Tyson that the ultimate question, as the statute says, is about whether the political process is equally open. And, again, it's an intensely local appraisal.

It is a good thing that Georgia has automatic voter registration. It is a good thing that Raphael Warnock can be elected to the United States Senate. It is a good thing that we no longer live in the days of poll taxes and grandfather clauses.

But these things can be good and great and signify change and still not answer the question for this Court. Because the question for this Court is different. It's more specific. Is the political process equally open in these areas, in these district-based state legislative elections, despite the fact that in these areas and in these districts Black voters have been drawn into districts that will shut them out of power due to racial bloc voting? And the evidence in this trial record shows that the answer is no. Senate Factor 1 to Senate Factors 1 and 3.

Mr. Tyson said himself on the first day here, Georgia obviously has a long history of official racial discrimination. Dr. Jones, Dr. Ward, Dr. Burton all detailed extensively this history of centuries of state-sanctioned efforts to fence Black voters out of political power and the

political process.

And this long and painful history includes the use of voting practices and procedures that enhance the opportunity to discriminate, some of them listed on this slide.

The defense argues this is all in the past. Somehow it has no impact on why we're all here today. That's not what the evidence in this record shows.

As Dr. Jones testified, some of the methods that the State is using today are exactly the same as those that were used historically.

Dr. Burton testified, some of the most egregious discriminatory practices are still within the living memory of many Georgians, many Georgians in 2023.

As we mentioned on Monday, at-large county elections in Fayette County were in place until they were struck down by a federal court under Section 2 until 2015.

And as Dr. Jones and Dr. Ward and Dr. Burton all testified, discriminatory voting practices have not just persisted, they're evolved. As Dr. Burton testified, every time that Black citizens made gains in some way or another, were being successful, party and power in the state, whether it's Democratic or Republican, found ways or came up with ways to either disenfranchise or particularly dilute or in some ways make less effective the franchise of Black citizens.

Practices like voter roll purges, identification

requirements, voter challenges, the removal or attempted removal of Black elected officials are new incarnations of the same kinds of tactics.

Whether intentionally or not, whether or not they've been found to be legal, these practices disproportionately burden Black voters. They continue to do so today.

Looking at Senate Factor 5, the evidence shows that racial disparities persist in Georgia with Black voters worse off when it comes to education, income, employment, health, criminal justice. Those disparities are not a random or natural occurrence. As Dr. Traci Burch testified, they're the result of a long history of racial discrimination.

And Dr. Burch testified that those disparities make it more difficult for Black voters to participate in the political process. They're correlated with higher burdens on political participation.

And Dr. Burch also looked directly at participation. She observed a turnout gap between Black and white voters in the specific areas of focus in this case, where the district lines have been drawn resulting in Black voters being shut out of power. She found this turnout gap using multiple methods using the State's own data.

And defendants' view is that Black voters' personal choices explain the disparity in voting participation. That's been suggested. But as Dr. Burch showed, the turnout gap is

not about the personal choices of voters. As she testified, if Black Georgians simply didn't want to vote, you would see Black turnout that's lower than white turnout across every level of education. But, instead, what you see when you look at the data, is that Black Georgians are voting at higher levels than white Georgians at particular educational attainment levels.

But there's still an overall gap in turnout. And that's because Black Georgians are concentrated more in the lower educational attainment levels and, therefore, most acutely experience those burdens on voting.

It's no response to point out the good things that Georgia has sometimes done to promote participation. Although some of those things truly are good.

As Dr. Burch testified, the unequal burdens on participation that flow from the socioeconomic disadvantages of discrimination are true and persist regardless of the particular rules of the election system.

Moving to Senate Factor 6. The evidence shows that racial appeals sadly persist in Georgia politics. Dr. Jones testified that racial appeals are used to create fear and concern about Black people and galvanize majority voters based on the idea that voting for a Black person would be problematic. That was her testimony.

She highlighted ads against Black candidates that

1 invoke discriminatory tropes to make Black candidates more
2 unelectable in the mind of voters. She used powerful and
3 recent examples. And she explained why it makes sense to
4 consider these racial appeals as evidence here, even if the
5 candidate who is targeted by them ultimately prevailed. Those
6 ads, she testified, tell us that candidates think that racial
7 appeals work. They think they work; that's why they persist.
8 And it's actually telling, she explained, that racial
9 appeals are used even, or especially, when a candidate appears
10 strong.
11 Moving to Senate Factor 7. Dr. Jones testified the
12 underrepresentation of Black Georgians in elected office
13 persists. Most importantly she testified that
14 underrepresentation is apparent in the specific areas at issue
15 in this litigation and the precise areas of focus here.
16 Dr. Jones' unrebutted analysis demonstrates that the
17 specific district areas of interest in the South Atlanta
18 Metro, in the eastern end of the Black Belt, in the Macon
19 Metro, in Southwest Georgia, have largely failed to elect
20 Black General Assembly members over the last 20 years. That's
21 precisely the type of evidence that speaks to that Section 2
22 intensely local appraisal.
23 And, finally, on Senate Factor 8, that
24 underrepresentation matters. As Dr. Burch testified, elected
25 officials in Georgia have not taken concrete steps to address

too many of those issues where persistent racial disparities exist and persist for Black Georgians.

And Dr. Burch also testified that Black Georgians themselves report feeling less satisfied with public officials, the direction of the State, the quality of government services.

And the complexities of the statute aside, and I understand the complexities of the statute have been discussed in this courtroom; S.B. 202 is case in point here. As Dr. Burch testified, 70 percent of Black Georgians believe it was passed to make it more difficult for certain groups to vote rather than to increase voter confidence.

The failure of responsiveness contributes there. Fair representation would make a difference. As Sherman Lofton testified, the Alphas volunteered to encourage participation in the 2020 census because it was understood that the census would impact redistricting and representation.

Districts that dilute the voting strength of Black voters tarnish the efforts of the Alphas and the church and so many others across party and idealogical lines who understand that fair representation and responsive government go hand in hand.

I want to try and anticipate Mr. Tyson a little bit. He's repeatedly raised the question, how much is too much? Isn't this enough? But there is, I think, an unstated point

there, which is, it could be worse.

As the Court will remember, to put a point on it, defense submitted into evidence an illegal map, one with no analytical value to show anything to be sure, but they submitted it showing how much worse it could be, showing that some mapper could draw even fewer Black majority districts.

I don't have to tell the Court that it could be worse is not the standard. We agree that the ultimate question is about the openness of the political process. It could be worse does not speak to the openness of the political process. It does not speak to whether elections for state legislative districts in these areas are equally open.

When the State draws legislative districts that needlessly shut Black voters out of power due to bloc voting, to racial bloc voting, it tells us that the political process in those areas, in those districts, is not equally open.

When the population of Black Georgians grows by over a million and yet the number of Black majority districts barely bulges, it tells us that the political process in those areas, in those elections is not equally open.

When voting practices with discriminatory and disparately burdensome effects, whether legal or illegal, persist and new ones keep cropping up, it tells us the political process is not equally open.

When racially polarized voting patterns, the surest

indication of racial politics at work, persist in election after election after election, it tells us that the political process in these areas, in these districts, is not equally open.

When there's a gap in turnout in political participation, despite all the efforts of Black voters to exercise hard won political rights, where the evidence shows that this gap is born out of disparities in education, in employment, in health, that are the direct legacy of discrimination, it tells us the political process in these areas, these districts is not equally open.

When shameful racial appeals persist, and even seem to get worse, it tells us the political process is not equally open.

When underrepresentation in the halls of power, especially in the state legislature, especially in districts in the South Atlanta Metro, in the eastern end of the Black Belt, in Metro Macon, in Southwest Georgia persists, it tells us the political process is not equally open in those areas, in these districts.

And when the needs of Black Georgians are too often unmet, when the disparities that Black Georgians shoulder are too often unaided by government, when faith in the willingness or ability of representatives to respond to those needs is difficult to muster, it tells us the political process is not

equally open.

Looking at the totality of the circumstances in these areas, in these legislative district elections, we see precisely the dilution and submergence of Black voters' voices due to racially polarized voting that *Gingles* and the results test guard against.

Now I hear another argument from Mr. Tyson in my ear, something to the effect of, where does it end? Where does it stop? When the racially polarized voting patterns stop. That's when it ends.

And I think Justice Jackson's description in the VRA during the oral argument in *Milligan* speaks directly to this point. In the VRA Justice Jackson described -- she used the word "self-liquidating." Self-liquidating.

When racially polarized voting patterns persist, Section 2 ensures that those voting patterns ordinarily cannot be combined with district lines to dilute, submerge, Black voters' voices. But the flip side of that is that when those polarized voting patterns stop, the problem of submergence goes away. That's when it ends.

When candidates and parties stop dividing Georgians with racial appeals, that's when it ends.

When candidates and parties' positions and voters' behavior in response are no longer organized around basic questions of racial equality, that's when it ends.

When racial division no longer structures our politics, that's when it ends.

Changing Georgia politics is not something this Court can order and it's not what we're asking the Court to do.

THE COURT: Thank you.

MR. SAVITZKY: But make no mistake, it is something that can change. It can.

Here in this room, though, all we can do is make a record about the facts as they exist and apply the law, the Gingles results test as it stands.

On this trial record, in this moment in time, in these areas of Georgia, in these legislative district elections, the Alpha plaintiffs have proven their case.

We ask the Court to find for the plaintiffs and to order a remedy into place.

THE COURT: Thank you, Mr. Savitzky.

We're going to take a ten-minute break and then we're going to start the Grant/Pendergrass closing at 3:00.

(After a recess, the proceedings continued at 2:50 p.m. as follows:)

THE COURT: Ms. Khanna, I'm ready when you are.

MS. KHANNA: Good morning, Your Honor. Abha Khanna on behalf of the Pendergrass and Grant plaintiffs.

It's been a long couple of weeks. And for the plaintiffs who filed these lawsuits against the enacted maps

back in December of 2021, it has been a long couple of years. In that time we've had the equivalent of two trials on these maps.

We've seen the fundamental tenets of Section 2 of the Voting Rights Act tested and tried before the US Supreme Court. And we've seen an entire election come and go based on districts that were and continue to be unlawful.

Your Honor is very familiar with the Section 2 test. It's the same test applied by this Court in determining that plaintiffs were likely to succeed on the merits of their claims during the preliminary injunction phase. And it's the same test reaffirmed by the US Supreme Court in *Allen v. Milligan*.

So before I walk through the elements of that test, I'd like to take some of my time this afternoon to respond to some of the key arguments raised by the defendants because it's not -- I don't think that test is really any longer in dispute. Instead at times it has felt like we are litigating an entirely different case than they are.

And so before we close the books on these proceedings, I want to make sure to address any questions or concerns that this Court might have about what it is we are actually still fighting about here.

Now, at the very outset of his opening statement Mr. Tyson invoked what he referred to as defendants'

big-picture argument. And that is whether Georgia's election system is equally open, where Black preferred candidates have shown an ability to win statewide.

As I understand this argument, Your Honor, defendants are saying in light of the success of Black preferred candidates in Georgia, can't the State just call it a day on the Voting Rights Act? Haven't we given enough opportunities to Black voters?

Let's take a look at the data points the defendants rely upon for this argument.

First, they point to the success of Black preferred candidates on a statewide basis. Here in the transcript in his opening statement, Mr. Tyson specifically referenced the election of Reverend Warnock.

Now, to hear defendants tell the story, Black and white Georgians have come together and joined hands across the state to achieve a level of racial unity and racial equality we could never have dreamed about in 1965 when the Voting Rights Act was enacted.

The reality is something quite different. Not to say there have not been gains since 1965, but as an initial matter it's worth noting that Senator Warnock was elected for the first time in 2020, one year before we filed these lawsuits. And I'd submit that the last two years of his success on a statewide basis does not stamp out the previous 200 years

where that almost never happened.

But even more importantly, Senator Warnock's success does not reflect some kind of post-racial utopia. It instead reflects a drastically different demographic reality and trend than we saw 50 or 30 or even 10 years ago.

White Georgians have dropped from a super majority statewide to a razor thin majority. Black Georgians, by contrast, have grown from a quarter to more than a third of the statewide populations. And Georgia has essentially become a majority-minority state.

What that means is white voters, in losing their numbers, have lost some of their electoral power statewide. By contrast, Black voters, as well as other minority voters who are only gaining in population, are on the verge of gaining electoral power statewide. That is a significant thing indeed.

And I'd submit it's probably a scary prospect for the white preferred candidates and elected officials who have controlled the political process in Georgia for so long. But the fact remains that in statewide elections, unlike in districted elections, the State of Georgia cannot dilute the Black vote by drawing districts that minimize that growing Black voting strength.

Defendants also refer to Georgia's congressional delegation. And specifically Congresswoman McBath's district,

which they've repeatedly reminded us has just under 30 percent Black voting age population. But they're not telling us the full story there either.

Congressional District 7 in Gwinnett County is a majority-minority district. Now, to be clear, there's nothing in the record about the preferences of each racial group in this district and the performance for each racial group's preferred candidates. But to the extent that defendants want to point to CD7 to argue for proportionality or to make a proportionality argument, they need to provide an apples-to-apples comparison. They can't look at all minority opportunity districts and measure that against the Black population.

If they are going to look to all minority opportunity districts, then the appropriate comparator is all minority population. And there's a reason they don't want to talk about those numbers in their discussion of proportionality. Because, as we know, racial minorities comprise nearly half of Georgia's total population.

True proportionality on that basis would mean 7 out of 14 congressional districts for minority preferred candidates, 28 Senate districts for minority preferred candidates, 90 House districts for minority preferred candidates.

And I want to be very clear, Your Honor, we are not

arguing for those numbers. We are not arguing for proportionality. But I do want to point out that defendants' emphasis on proportional voting, on *Johnson v. De Grandy*, is conflating different metrics and it's pulling a bait-and-switch. Even under the State's creative math, the numbers just don't add up.

Now, at a few points in his opening statement Mr. Tyson asked, What if the legislature had decided to make Congresswoman McBath's district a majority Black district in lieu of plaintiffs' illustrative District 6?

Now, the State poses this as a question. But this Court should recognize it for what it is, which is a threat to just trade off minority opportunities from one district to another.

What I hear defendants saying is if plaintiffs want more opportunities for Black voters in CD6, in Western Metro Atlanta, the State may just choose to eliminate minority opportunities in CD7, in Gwinnett County.

Make no mistake, the State cannot feign innocence while pulling a switch -- a bait-and-switch on minority voters. It cannot simply try to zero out minority voting strength across the state in purported compliance with the Voting Rights Act. Indeed, *Johnson v. De Grandy*, written some 30 years ago, saw this argument coming.

And there the Court rejected a proportionality safe

harbor precisely because of the "demonstrated ingenuity of state and local governments in hobbling minority voting power."

The *De Grandy* court rejected the highly suspect premise that in any given voting jurisdiction the rights of some minority voters under Section 2 may be traded off against the rights of other members of the same minority class.

That Court went on to note that under the State's view, the most blatant racial gerrymandering in half of a county's single member districts would be irrelevant under Section 2 if offset by political gerrymandering in the other half so long as proportionality was the bottom line. And that is the precise argument the State is advancing here.

They're asking this Court to ignore the demographics and the racial voting patterns and the history and the patterns of discrimination and just look at the number of Democratic representatives as the bottom line. The rest will all come out in the wash.

This Court should reject Georgia's attempt to use the gains that Black and minority voters have accomplished through sheer numbers to impose a ceiling on minority opportunity in the state.

One last point on proportionality, Your Honor. Defendants' apparent outrage at the very notion that Black voters might get a dram more than their fair share does not

seem to extend to white voters. Defendants' repeatedly emphasize the existence of five majority non-white congressional districts as evidence of proportionality. But 5 out of 14, about 35 percent, is far lower than the State's non-white population, which is near 50 percent.

And as we discussed with Mr. Morgan, 9 out of 14, over 64 percent, majority white districts is far higher than the State's white population, which is also near 50 percent.

In short, Your Honor, if the State wants to boil this case down to the numbers, then it has to look at all of them.

But, Your Honor, that's not what this standard requires. The standard is not a game of numbers and whose fancy math can beat out the others. The standard is local, it is detailed and it is specific.

I'll turn to that standard now.

First to *Gingle*s 1. During his opening statement, Mr. Tyson promised that the evidence will show that at each point, when faced with a choice of accommodating a racial goal or following a traditional redistricting principle, the racial goal prevailed, and that plaintiffs' map drawers' pursuit of a racial goal required them to disregard traditional redistricting principles. That's on pages 41 to 42 of the transcript of the first day of this trial.

Your Honor, I sure hope the Court was not holding its breath in anticipation of that promised evidence, because it

would still be left wanting.

And here I'm going to break order for a little bit, Your Honor, and discuss the Pendergrass case first. And that's just because I don't think there's an actual dispute, let alone a credible dispute, on *Gingles* 1 when it comes to the congressional case. Or at the very least, I don't understand it.

At the end of his cross-examination I asked defendants' expert, Mr. Morgan, if he disputed Mr. Cooper's ultimate conclusion that the Black population in Metro Atlanta is sufficiently numerous and geographically compact to allow for the creation of an additional majority Black district consistent with traditional districting principles. And he said no. He did not dispute that.

Your Honor, that conclusion is *Gingles* 1.

Now, defendants invoke the specter of racial predominance. That is their story. That has been their story since day one. But even their own expert, after some two years of trying, Mr. Morgan, has -- could not bring himself to assert that Mr. Cooper's illustrative congressional map prioritizes race. And I'm willing to venture, Your Honor, that that was not for lack of trying.

Defendants spoke of disregarding traditional districting principles and object to the fact that illustrative District 6 draws from existing majority Black

District 13. But the illustrative plan makes both districts more compact than they are in the enacted plan, substantially so.

The illustrative plan not only satisfies traditional districting criteria, it surpasses the State's map in doing so. Again, that's not a standard we have to meet. It's just the facts. As Mr. Cooper said, this is a district, that in all his years of experience, drew itself.

In other words, it was the State of Georgia that had to bend on traditional redistricting principles to avoid drawing an additional Black district in a part of the state that was home to 80 percent of its population growth over the last decade, more than half of which is attributable to Black voters.

Now, defendants make a lot of hay out of the fact that in other districts the illustrative plan combines parts of Metro Atlanta with rural areas to the north. And here they latch on to a statement by Mr. Cooper that the enacted map did the same thing when it placed Cobb County residents in Marjorie Taylor Greene's district.

Okay. Mr. Cooper did not think that the configuration of Cobb County in the enacted map was necessary. But at the end of the day, plaintiffs did not file an action against the enacted map for its connection of rural and urban communities. That is not the claim here and that is not the

alleged violation.

Plaintiffs filed an action under Section 2 of the Voting Rights Act for dilution of the Black vote by failing to draw an additional opportunity district where the size and the location of the Black population as of 2020 all but demanded it.

Honestly, Your Honor, I am at a loss for what could possibly be the *Gingles* 1 objection to this district or this map.

In the Grant case. Now, the *Gingles* 1 argument in the Grant case against Mr. Esselstyn's map is slightly more complicated solely because of the various numbers of districts and locations, but it is no more availing for the defendants.

Now, at this point I want to just take a second to note, and perhaps I'm stating the obvious, but these three cases need not rise and fall together. I know we're all here in the interest of efficiency, but these cases are not consolidated. And perhaps the congressional case could have opened and shut within a couple of days instead of a couple of weeks. But, regardless, when it comes to Pendergrass and Grant, the *Gingles* 2, 3 and totality analysis almost entirely overlap, and the differences lie in the *Gingles* 1 inquiry.

Let's turn to Mr. Esselstyn's map. All of Mr. Esselstyn's illustrative districts fall well within the compactness range of enacted districts in Georgia. None of

Mr. Esselstyn's illustrative districts are sprawling or connect far-flung and disparate populations. So, again, the question is, what are we fighting about here?

Mr. Morgan launches a broadside attack on each of Mr. Esselstyn's maps as focused on race to the detriment of traditional redistricting principles. Now, what that conclusion is based on is anyone's guess. Because to the extent Mr. Morgan analyzes and opines on traditional districting principles at all, his analysis is selective and uneven.

He doesn't consistently look at any metrics across districts. And even when comparing a specific set of districts in the enacted plan to a specific set of districts in the illustrative plans, he does not employ an apples-to-apples comparison. That is either shoddy work or it is selective work.

What is perhaps most notable from the testimony of the various mapping experts in these cases is that if there is one expert who has prioritized race, it is Mr. Morgan. He looked only at race as a possible explanation for the illustrative maps. He created these indecipherable race heat maps that neither Mr. Esselstyn, nor Mr. Cooper, and I don't think even the State has ever used in drawing maps.

And lo and behold, Mr. Morgan's singular focus on race in analyzing the illustrative maps led him to conclude

that those maps were drawn on the basis of race.

But even then, with all that energy devoted to race in the illustrative House and -- State and Senate -- sorry -- State Senate and House maps, Mr. Morgan failed to even mention more than half of Mr. Esselstyn's new majority Black illustrative districts.

Mr. Morgan testified about what he referred to as Mr. Esselstyn's technique of elongating existing majority Black districts to free up population for new majority Black districts. But his emphasis on elongation is puzzling, to say the least.

What traditional districting principle prohibits that purported elongation? Indeed, by his own admission, that purported elongation is entirely consistent with how the State draws districts, indicating no stark divergence in technique in the illustrative maps. It would be odd indeed if a technique is innocuous when employed by the State but somehow suspect when replicated by plaintiffs' expert.

At bottom, Mr. Morgan's dispute with elongation appears to be based on the joining of Black and white voters in the same district. But he fails to identify a single traditional redistricting principle that demands racial homogeneity across a single district.

At the end of the day, defendants' *Gingles* 1 argument in Grant fails to credibly dispute that the Black population

in Metro Atlanta, in the Eastern Black Belt and the Western Black Belt is large enough and geographically compact enough to comprise majorities of eligible voters in additional majority Black districts.

Turning to *Gingles* 2 and 3. This Court has already ruled on and reaffirmed the proper legal standard under *Gingles* 2 and 3. And indeed the parties have already stipulated, as far as I'm concerned, to *Gingles* 2 and 3.

Stipulated fact 218: Black voters in Georgia are extremely cohesive. That is *Gingles* 2.

Stipulated fact 222: White voters in Georgia are highly cohesive in opposition to the Black preferred candidate in the areas examined. That is part of *Gingles* 3.

And stipulated facts 225 and 226 show that white preferred candidates consistently defeat Black preferred candidates outside of majority Black districts.

These same stipulations hold true in the Grant case, Your Honor, if you look at paragraphs 270 to 274.

Gingles 2 and 3 are thus beyond dispute.

So that brings us to the totality of the circumstances. I'm going to briefly walk through each of the Senate factors. And I'm going to try not to repeat a lot of what Mr. Savitzky says, which I think is a good characterization of a lot of the evidence in all of these cases.

Senate Factor 1 is the history of voting-related discrimination in the state. During opening statements defendants echoed a familiar refrain, which is that the history is long past. And to be sure, plaintiffs' experts disagree, and we'll talk about that, Your Honor.

But I think it's notable that defendants have failed to provide any expert on the totality of circumstances. Where is the historian who will testify that the history books are closed, or that Georgia's history of voting-related discrimination ended in 1965 or 1990 or 2000 or 2010 or whatever the State deems the cutoff to be?

One would think that if defendants' view of history had an actual basis in the study of history, they would be able to find a credible historian to say as much.

Senate Factor 2 is the extent of racially polarized voting.

Now, during his opening statement, Mr. Tyson stated on page 45, "The Court will have to answer the question of is the polarization in Georgia best addressed by partisanship or by race?"

But where is the case that says that the Court has to answer that question? At the very least, as this Court has already noted in its summary judgment order, there is no case saying that plaintiffs must answer that question, either at the *Gingles* phase or at the totality of circumstances phase.

And to the extent that defendants have even tried to demonstrate that polarization in Georgia is better explained by partisanship rather than race, they have fallen woefully short.

Dr. Alford provided no new data or analysis whatsoever in response to Dr. Palmer's report, just a different inference based on the same data that plaintiffs' expert used to establish *Gingles* 2 and 3.

To the extent that Dr. Palmer believes that primaries are a critical part of the analysis, he certainly didn't independently or affirmatively analyze primary data to try to answer the question that he believes to be is so central to the inquiry and that defendants keep asking of this Court. Where is their effort to answer that question?

In any event, Dr. Alford testified today that his opinion in these cases is limited to examining whether the race of the candidate explains the observed polarization. He offers no conclusions on the extent to which the race of the voter explains the polarization. In fact, Dr. Alford admitted that race probably does explain partisan preferences among Georgia voters.

Even if plaintiffs did bear the burden on this point, they have more than satisfied it. Dr. Burton testified in detail to the ways in which the race of voters and issues related to race have informed partisan affiliation throughout

Georgia's history and continue to do so today.

In other words, while defendants seek to waive away the stark pattern of polarization as simply Black voters voting for Democrats and white voters voting for Republicans, in fact, Black and white voters in Georgia are voting for their own interests related to race and the candidates that they determine will best protect and represent those interests.

Partisanship is not some randomly assigned trait or some genetic characteristic. It is not an accident of birth that we can just waive away as a race-neutral factor. Partisanship in Georgia is a product of the issues that are important to the voters and the candidates. And in Georgia race is at the top of those issues.

Senate Factor 3, voting practices that tend to enhance the opportunity for discrimination.

Dr. Burton testified that Georgia is the only state that was formerly subject to Section 5 of the Voting Rights Act to adopt all five traditional voting methods that have historically had a discriminatory impact on minority voters.

Number 1, voter ID laws.

Number 2, proof of citizenship requirements.

Number 3, voter purges.

Number 4, cuts in early voting.

And, number 5, widespread polling place closures.

Let's just take one example from this list. Between 2012 and 2018 Georgia Secretary of State removed 1.4 million voters from the eligible voter rolls. Those purged were significantly overrepresented in precincts that overwhelmingly voted for Stacey Abrams, the Black and the Black preferred candidate in the 2018 gubernatorial race.

Dr. Jones echoed the pattern observed by Dr. Burton, that Georgia has a habit of coming up with a new method of Black voter suppression in the event that the previous methods are either deemed unlawful or proved to be ineffective. She noted that some 70 percent of the applications that failed verification under the State's "exact match" procedures were from Black voters.

She noted that Black voters are disproportionately likely to receive voter challenges, to be on the other end of a voter challenge; eerily similar to the challenges in the past that often resulted in bodily violence.

And she noted that the 2020 election just demonstrates that Black voters vote when the methods are available for them to do so. And that in the wake of the success of Black preferred candidates, the State of Georgia once again restricted access to expansive voting methods.

Senate Factor 5, socioeconomic disparities that hinder Black access to the franchise. Dr. Collingwood made clear that Black Georgians are doing worse than white

Georgians across every single socioeconomic metric that he examined. And he testified that the relationship between socioeconomic status and voter participation is one of the closest things to a hard-and-fast rule among experts in his field.

Black voters continue to suffer the effects of discrimination in education and in employment and in income and in healthcare. And as long as they remain on the bottom rungs, they will disproportionately face barriers in accessing the franchise.

Senate Factor 6, racial appeals. Now, the evidence here is stark. Defendants objected to much of that evidence as inflammatory and prejudicial under Rule 403. But, Your Honor, that is exactly the point. Images of a dark and menacing Reverend Warnock, robocalls about the magical Negro, are intended to inflame racial divisions among the electorate and to feed on and fuel voters' racial prejudice.

Defendants argue those appeals have not been in congressional or state legislative campaigns. But that is not a prerequisite to Senate Factor 6 evidence. There is no such qualifier in the Senate report on this factor.

Defendants also argue that those appeals have not been successful presumably because Reverend Warnock has won. But the level of racially polarized voting in the state demonstrates that those appeals have likely done exactly what

they were intended to do: Persuade voters to vote along racial lines.

Senate Factor 7, success of Black candidates. We've already discussed some of that. Much of the success that we have seen -- and, again, we are still a far cry from equal opportunity, but much of the success that Black candidates have seen at the polls is a function of the growth of the Black population and cannot be attributed to the eradication of racial discrimination.

Senate Factor 8, the responsiveness of elected officials to minority concerns. This Court heard from Dr. Diane Evans, a product of the Eastern Black Belt, a pastor, a teacher, a longtime Jefferson County school nutrition director and a businessowner.

Under plaintiffs' illustrative map she would reside in Senate District 23. She would preach in Senate District 23. And with her vast experience, both as a candidate and an active participant in the political process, she would teach her community to be politically engaged in Senate District 23.

Her current representative, meanwhile, does not return her phone calls when it comes to issues she is asking about on behalf of her community.

This Court also heard from Fenika Miller, a lifelong Houston resident who was called to action to run for her House

seat because she felt her representative was not addressing issues important to her community.

Now, defendants have painted this picture of the interests of these communities as really being abstract or common to all voters. And Ms. Miller's testimony refutes that assertion. Ms. Miller focuses on the tangible: Lack of public transportation, sidewalks and streetlights, dilapidated housing that needs lots of revitalization, inaccessible or inadequate healthcare, food deserts in her community with only one grocery store nearby, clean air and clean water.

Defendants are quick to assert that everybody wants these things. And that is true. But it is the Black communities and Black residents that are deprived of them. It is her Black community that is deprived of them, that has unequal access to these services and is being ignored.

The Court also heard from Gina Wright, the State's primary map drawer for so many years. And she testified that she heavily relies on legislators to represent and advocate for their communities when drawing new district lines.

And by that logic, Your Honor, where certain communities are not represented by their legislators, their interests are less likely to be reflected in the new redistricting plan or in any legislative policy.

And, lastly, Senate Factor 9, the State's purported justification for drawing the district lines. The State has

made every effort to show that this map -- these maps, they're all about politics. But plaintiffs don't dispute that it is politically expedient for the State of Georgia to dilute the Black vote. It was politically expedient to dilute the Black vote in 1965.

Minority vote dilution does not need to be accompanied by pitch forks and burning crosses and literacy tests for it to result in minority vote dilution. The fact that minority vote dilution achieves defendants' political goals does not make it any more lawful.

I began by saying that it's been a long two weeks. And I'm not going to lie, Your Honor. And not just in the way that we are all physically and mentally exhausted from all of the hard work over the past few weeks. And that includes the Court staff, all of the lawyers and staff and, of course, the Court's resources. I cannot thank everybody enough for the long hours and the hard work.

But in addition to that level of exhaustion that we're all experiencing, Your Honor, I am tired of trying to parry and anticipate every new argument as the State ducks and weaves to avoid the clear legal standard and the clear implications of the Voting Rights Act, as it tries to do and say anything and everything it can to avoid its Voting Rights Act obligations.

Now, to be honest, Your Honor, when we started this

trial, I was dubious about what was even left to try given the extensive preliminary injunction record and the now undeniable legal precedent governing these cases.

And two weeks later I have seen the State's effort to pull at this thread or try this angle or throw this argument at the wall in case it sticks. And I have found it not only baffling, but at times outright galling.

I am tired, Your Honor, and I am just a lawyer standing up in this court over the last two weeks to present the evidence. I can only imagine how tired the Black voters of Georgia must be to have lived this evidence day in and day out.

I'm sure Diane Evans is tired of teaching and preaching to advance the interests of her community only to have her representatives not return her calls.

I'm sure that Fenika Miller is tired, after representing an organization called Black Voters Matter in the Black Belt, only to hear the State's map drawer testify on the stand that she does not recognize the Black Belt as a community at all.

But the truly remarkable part, Your Honor, is as tired as those individuals must be, they are tireless when it comes to their willingness to fight for their right to vote on equal footing.

Dr. Evans and Ms. Miller and Reverend Pendergrass and

Ms. Grant and so many others are continuing their lifelong struggle in this courtroom, not because they're looking for a free pass, but because what they want is what they're entitled to, which is a fair chance.

Your Honor, plaintiffs are prepared to continue this fight to ensure that not another election goes by based on unlawful maps and to try to stave off the State's ever morphing and ever ingenious ways of diluting minority voting strength.

We respectfully request that the Court enjoin the enacted congressional and state legislative maps as violations of Section 2 of the Voting Rights Act.

THE COURT: Thank you, Ms. Khanna.

We'll take a ten-minute break. And at 3:50 we'll start the State's argument.

MS. KHANNA: And, Your Honor, I forgot to reserve five minutes.

THE DEPUTY CLERK: You have 20.

MS. KHANNA: Oh, even better.

THE COURT: You have plenty.

(After a recess, the proceedings continued at 3:50 p.m. as follows:)

THE COURT: You-all may be seated.

I'm ready whenever you are, Mr. Tyson.

MR. TYSON: Thank you, Your Honor.

Your Honor, we've come to the end, or almost to the end, of our journey in this redistricting case. And I know everyone's glad for that, as Ms. Khanna eluded to.

I also think, if nothing else, this trial has made clear why it's difficult to give legal advice to a jurisdiction about how to comply with Section 2 at times.

But we submit here, Your Honor, that the evidence that you have before you shows that Georgia's voting system is equally open to all voters, making this Section 2 case a much easier one than the average Section 2 case.

So I want to begin today with *Allen*. The US Supreme Court has reminded us that the things we've been discussing for the last ten days are primarily the duty and responsibility of the states, not federal courts.

And the purpose of why we conduct this inquiry from *Gingles* is to limit judicial intervention to those situations where there's intensive racial politics; the excessive role of race is denying minority voters the equal opportunity to participate.

And so as we come to the issues in the case, I think it's important to remember the role of this Court in this process of evaluating what happened here.

And so I'm going to walk through the same checklist everybody else has on the issues. But I think it's worth remembering that the question ultimately all these different

factors are trying to help us answer the question of, is voting equally open in Georgia? Are these redistricting plans causing dilution of minority votes?

And I think that, as we'll discuss, the facts here are dramatically different than the facts in Alabama that were in front of the Court in *Milligan*.

So we've looked at the text of Section 2 a bunch of times. We all know what it says. But I think it's important to begin that this is an obligation on governments. This is what states should not do. This is the obligation a state has to follow the law.

And the goal of Section 2 is not to set a ceiling. It's not to set a requirement of proportional representation. It's to ensure equality of opportunity.

And the reason why we talk about proportionality, the reason why we talk about equal opportunity is once you get to the point where the political processes are equally open, it's like Dr. Alford said today, then it's just party politics and everybody makes their best case to the voters, the voters vote how they're going to vote, and then the winner comes out on top and we move forward.

So in considering where we are, the goal isn't to ensure an outcome; the goal is to ensure opportunity. And we have opportunity. We're going to see politics continue, that's how our system is designed to work, but what we won't

1 see is discrimination or dilution on account of race or color.
2 Also looking back at *LULAC*, just to remind you about
3 the purpose of the Voting Rights Act, the goal is to get to a
4 point where we're no longer as a society fixated on race. And
5 as difficult as these last ten days have been talking about
6 that, keeping that goal in mind I think is important as well,
7 that our purpose here, what we want to get to as a society
8 that's not fixated on race, we can all make our political
9 cases and move forward as we go from here.
10 And I think the challenge as someone representing the
11 government officials here is this obligation of Section 2
12 applies to the legislature and how it drew the maps. And
13 where is the endpoint in terms of what Section 2 requires to
14 get us to equal opportunity is an important question for
15 helping the officials who have to follow this law know what
16 they're supposed to do.
17 And so does it mean -- I think under the plaintiffs'
18 view the legislature must just keep drawing more and more
19 majority Black districts if they're capable to be drawn on the
20 map until, Mr. Savitzky said, we reach some point where
21 racially polarized voting disappears. On the current
22 situation, the only way I know that racial polarized voting
23 can disappear is if white voters start voting for Democrats or
24 Black voters start voting for Republicans.
25 And so in terms of -- we kind of keep coming back to

partisanship as we try to sort through what has happened here. And ultimately if this Court is going to find that there is some violation of Section 2 on these redistricting plans, the legislature will need to know, is it supposed to draw the 19 majority Black State Senate districts that Mr. Cooper drew on his preliminary injunction State Senate plan?

Is it the 17 the plaintiffs are proposing now?

Is it the 18 Mr. Cooper actually drew on his illustrative plan in Alpha?

The parameters and the instructions around what the government is supposed to do to comply with Section 2 is going to be a critical part of this Court's order in order for it to find for the plaintiffs. And we submit that's not how you should find, obviously.

But the key point is we're trying to get to a place where there's not this fixation on race as a result of the Voting Rights Act. We want to be at the place where everyone can have equal opportunity and make their political case, and whoever wins, wins. That's what we want to see as everyone participates.

So at the risk of breaking every PowerPoint rule, I'm putting a lot of words on the screen.

I just wanted to contrast -- Ms. Khanna talked about it felt like at times we were trying two different cases. And I think part of that is just the way each of us approach

Section 2. Plaintiffs will talk about intensely local appraisals, but then their evidentiary proof ends up looking more like a checklist.

For *Gingles* 1, the only question is, can we draw a new majority Black district? Are its compactness scores similar to the enacted plan? And if that's the case, check, we can move on from *Gingles* 1.

From the State's side, we believe the precedent says you have to look at whether the maps that the plaintiffs have proposed are remedies the Court can enter under 11th Circuit precedent. And you've talked about in your summary judgment order, are the maps something the legislature can implement? Is this racially predominant maps or is this racially conscious maps? So there's an inquiry that has to happen on *Gingles* 1 beyond just a checklist.

Likewise, with *Gingles* 2 and 3, the plaintiffs' view and this Court's order on summary judgment, basically do Black and white voters prefer different candidates? We submit there needs to be a deeper analysis there and/or at the Senate Factor 2. And so I'll talk today primarily about *Gingles* -- about the partisan racial issues in Senate Factor 2 based on this Court's orders.

So let's jump in and discuss what the Court's heard about the *Gingles* preconditions. So I want to start with Alpha on *Gingles* 1.

And as we go towards this, I think it's a reminder to go back to what the Supreme Court told us in *Bethune-Hill*, that race can predominate even when a reapportionment plan respects traditional principles. And the reason why is if the race was the criterion, then the State's view or map drawer's view could not be compromised and race-neutral considerations came into play only after the race-based decision had been made. That's racial predominance in that scenario.

Likewise, a map drawer can't assume that a group of voters is going to think alike, share the same political interests, prefer the same candidates based merely on the color of their skin.

And so what do Mr. Cooper's maps in Alpha show us?

First of all, we have Mr. Cooper testifying that he relied on the shared experience of all Black voters. In other words, doing what *LULAC* said you can't do as a -- when you're a map drawer drawing redistricting plans. He turned on racial dots and talked about how every precinct with greater than 30 percent Black population had a dot on it so he could identify areas that he wanted to consider as he looked for new majority Black districts.

He made racial splits of counties. And we showed that through the evidence, that he consistently sorted people into districts based on their racial makeup.

And all the various justifications Mr. Cooper

proposed came after he finished the plans. He went and looked at socioeconomic data after he finished drawing. He went and found the corridor management plan after he finished drawing. He didn't look at public comments first. He looked and checked his various splits on regional commissions, things like that.

He didn't follow a consistent process, either, for splitting and unsplitting counties. Didn't follow a consistent process for whether he was following municipal boundaries, county commission boundaries.

Ultimately, the only consistent process Mr. Cooper followed was creating districts in such a way that he could add majority Black districts and splitting counties to get there, splitting precincts to get there, whatever was necessary to create these plans.

Mr. Cooper also used what he called the ripple effect as kind of both a sword and a shield. It was -- it explained the difference in the enacted plans, there was a ripple effect out to different places. But also he didn't want us to look or didn't look at any districts that were not majority Black districts that he had changed when it was necessary to see what happened around the new majority Black districts to understand the design.

And, ultimately, he's also someone coming after the State drew its plans. So in some ways he's also able to teach

to the test. He knows what the mean compactness score is on the State plan before he starts drawing. He knows the number of majority Black districts. He knows the number of split counties. And so he's an experienced map drawer who can create a plan that matches those metrics as well.

And as we discussed and looked at, Mr. Cooper made great efforts to mask his efforts to make the top line numbers look the same. So we have splits of counties that could not be ripple effect and could not be related to changes, like Gordon County.

And at some point Mr. Cooper's repeated insistences that race did not predominate in the drawing of his plan give way to the only consistent feature of his county splits, the only consistent feature of his precinct splits, was working towards that racial target in the districts that he had.

And Mr. Morgan talked about some different techniques that were involved in Mr. Cooper's various plans. Techniques like connecting more Black voters with more rural white voters, there was a specific process there. Techniques like removing heavily white voters from Peachtree City in order to create a new majority Black district.

These kind of stretches and elongating of districts made it possible to lower the Black percentage and free up votes in other areas. Or Mr. Cooper added county splits all around District 133 in order to achieve the goal of making

that a new majority Black district.

The House plan in East Georgia cuts a variety of counties. Mr. Morgan said, I believe Mr. Cooper did as well, this is the most county splits of any district in District 128 that was designed to help free up the Black population to create new House District 133. And ultimately what we see is the consistent pattern of racial sorting in Mr. Cooper's plans.

District 17 on the Senate is elongated. District 23 on the Senate is designed to gather disparate Black populations all around the East Georgia area. It makes racial splits.

The House plan, we see elongation of districts in 74 and 117. In District 145 he divides the Black community in Macon into multiple districts. And in District 171 he splits counties and precincts along racial lines and gathers disparate Black populations into a single district.

So yesterday Your Honor had some questions about Mr. Morgan's so-called race-blind map. And I want to discuss that a little more here because I think it helps frame what the Court has to evaluate.

This is not -- to be very clear, this is not the Alabama proposed race-neutral benchmark that they tried to use in their case. That's not the same thing here. But in helping the Court find the line between what's race

consciousness and what's race predominance, this is a helpful analytical tool. And here's why.

If you look at, for example, Mr. Morgan's race-blind plan in the Metro Atlanta area, you see compact, relatively normal-looking districts that are designed in the area. And we saw some of those had extremely high Black populations based on the way they were configured. I think District 55 was well over 90 percent.

When you move to the enacted plan, you see elongation of districts. Ms. Khanna referenced this. This is an element of the State's plan. These districts, as Mr. Esselstyn and Mr. Cooper both testified, if you elongate a district, you can lower the overall Black percentage and create additional districts. That's part of the design.

But then when you go to the illustrative plan, now you see a splitting up of communities in Clayton. You see further lengthening of districts that run even longer, from farther north to farther south, that then enable the creation of the districts that are drawn.

So from our perspective, Your Honor, the General Assembly plan is a race-conscious plan. The legislature clearly made changes to address compliance with Section 2.

But then, as you heard from Ms. Wright, there's an explanation for each of these districts as well. This is not race alone driving the configuration. This is race as a

consideration.

So, ultimately, Your Honor, when you get to Mr. Cooper's plan, though, you don't have explanations for many of these districts beyond, well, I thought they had something in common, I thought there was a reason to do this.

So in our view, the line between race predominance and race consciousness runs right here between these plans. When Ms. Wright can explain the basis for the districts, you can see efforts to comply with Section 2 versus a map drawer who is focused on race and racial goals using the techniques Mr. Morgan describes to achieve a racial goal; that's when we cross from a district that is race conscious to race predominant. And we're in the world that the *Bethune-Hill* court talked about of even if you can point to some traditional principles of redistricting, you still have a map drawer who is pursuing race as the one thing that cannot be compromised on a plan.

We have a similar design or issue on the House plan. And not to belabor this point, but to get from the enacted plan in its District 69, here in pink, to Mr. Cooper's 74 that is a new majority Black district, you have to elongate both 69 and 77 to get there and use the Black population in the north part of these districts, as the maps attached to Mr. Morgan's report demonstrate. That's what's necessary to enable District 74 as a new majority Black district.

So, ultimately, Your Honor, we would submit that the maps that are in existence for Mr. Morgan's plans in Alpha Phi Alpha demonstrate the type of race predominance that makes them inappropriate as *Gingles* 1 remedies based on the evidence before you.

Moving to Mr. Esselstyn's plans on *Gingles* 1 as well, I want to talk through those. And, again, same quote from *Bethune-Hill*, we have an issue in terms of whether race predominates. Traditional districting principles don't necessarily tell us the answer.

Mr. Esselstyn, a little bit different, though, in some ways. He didn't have as many explanations for why he drew what he drew. His direct testimony was much more, I can create this district. I don't have a reason why I'm connecting certain parts of the district with another part of the district; it's just something I drew along the way.

He didn't have familiarity with communities of interest in Georgia beyond what he could see on the census. And ultimately wasn't taking anything into account that the legislature would have taken into account, aside from some things that he could see that were visible on his plan.

Mr. Esselstyn has some of the same techniques we've discussed on the Cooper plan. District 28 strikes out and elongates for more heavily Black areas in the north part to more heavily white areas in the south part, even when Coweta

County is one of the largest counties in this district.

Mr. Esselstyn's District 23, every cut it makes of a county is racial in nature. He always includes more Black population in District 23 and always excludes more heavily white population.

And the Senate District 25 that was created was only enabled by the creation of Senate District 10 that Mr. Morgan discussed in his report, elongating a district all the way from Stonecrest down to Butts County.

On the House plan we see similar patterns. Mr. Morgan talked about the additional technique of racial sensitivity, that you have all these districts so close to 50 percent in Macon, that every move you make necessarily has to be not only race conscious, but race has to be the thing that sets off the alarm bell, like the astronauts in Apollo 13, to know what's happening.

In addition to these districts, Mr. Esselstyn's plans elongate districts radiating out for more heavily Black areas in District 64, in 74, in 117 and Metro Atlanta.

Your Honor, the only consistent feature of these plans is trying to get to the creation of 50 percent plus Black districts. And we would submit that, again, like Mr. Morgan's plans, the lengthening of and elongation of districts is again demonstrated in 34, in 10. That frees up population to create District 25.

And on the House, the same concept of elongating districts in Fayette County to gain more access to Clayton County as was testified in the various proceedings.

Race consciousness is okay. Race consciousness is what the legislature did. Race predominance is existent on the Grant plans that are submitted here because the map drawer's one thing he couldn't compromise was race in the drawing of these district plans, even if he can point to some traditional districting principles.

I'll move to the Pendergrass case next on *Gingles* 1. And I'll give a point of agreement here with Ms. Khanna, the evidence is different on Pendergrass than it is in Grant and Alpha Phi Alpha.

Mr. Morgan didn't opine about race prioritization. The challenges were, though, Mr. Cooper couldn't identify where the geographically compact Black community was in District 6. Most of the Black voters, as we looked at in those various maps, were already in majority Black District 13 as we're considering this.

This district, as drawn, as Mr. Cooper's testimony indicated, is only 1,300 people above majority. That's how tight the goal is in terms of creating this district as a majority Black district.

And as I understand their claims, and I'm sure Ms. Khanna will correct me if I'm wrong on this in her

rebuttal, I don't understand the plaintiffs are necessarily claiming District 13 as a packed district. This was primarily District 13 previously, a lot of the geography. And if it was not -- District 13 was not packed, then what is the necessity of the creation of District 6 in this area as a remedy for the Voting Rights Act?

So with that, Your Honor, let me move -- oh, I'm sorry, one other point here.

Only the Fulton County portion we pointed out is majority Black, which goes to where is the geographically compact Black community?

In terms of the politics versus race questions that you have to get into, either *Gingles* 2 or 3 or on the totality, both Mr. Savitzky and Ms. Khanna are right, *League of Women Voters* is an intentional discrimination case, but the case that's cited for that proposition is the *Bertovich* case, which was a Section 2 case. And, yes, it was part of the *Bertovich* opinion related to intentional discrimination. There were kind of two pieces to that case. But I think it's important to remember where we are in terms of the role of the court.

The Supreme Court told us in *Rucho* that federal courts can't vindicate generalized partisan preferences. That's why they said that there was no jurisdiction over partisan gerrymandering in federal court, because ultimately

as *De Grandy* says, minority voters are not exempt or immune from their obligations to, as they put it, pull, haul and trade to find common political ground.

This takes us back to the question of equal openness as we work through this process because ultimately we want this to be about politics. We don't want it to be about race. The idea behind the Voting Rights Act is we move beyond the element of the world where everything is such a focus on race, as the Court said, and get to a place where everyone can participate politically on an equal basis.

So let me get to -- skip ahead a little bit here, Your Honor, to the totality, because I think this is where most of our time is spent and the Court's efforts will be moving forward.

We, of course, believe that we win on the *Gingles* preconditions alone, that you can rule in our favor based on that. But if the plaintiffs have met those *Gingles* preconditions, the Court moves to the totality. And this is where the facts of each case are the key part, the intensely local appraisal of the design, all the reasons why you, as a district court judge, can sit here and dig into the questions of fact that can't be addressed otherwise.

You're not limited to the Senate factors, they're a starting point, but it's part of the process. No requirement that there's any particular factors be proved, but, again, all

of this goes to equal openness.

So let's talk about the factors.

Plaintiffs have, again, when it comes to the totality, a checklist approach. I'm not going to read the whole slide here, but essentially from the plaintiffs' argument, we go down the list.

Do we have a history of discrimination? Yes, we do.

Do we have Black and white voters preferring different candidates? Yes, we do.

And they work down the checklist. And that's the end of the analysis at that point.

But what the Section 2 and the cases require is this intensely local appraisal, looking behind the system to understand what's happening with the electoral system and its design.

So that begins with the history of discrimination. And I believe this Court referenced whether racial discrimination permeates Georgia's election fabric.

The testimony before Your Honor and the testimony from the deposition designations is that you don't have people who are unable to vote before you or have had that experience. Mr. Germany's testimony is voting is easy in Georgia, regardless of race.

There's been a lot of references to Senate Bill 202 being a continuation of historical practices. And in some

ways, I -- as counsel for the State in the Senate Bill 202 cases, I feel a little bit like we're having a mini trial of Senate Bill 202.

But I would just point out for the Court that currently before Judge Boulee is plaintiffs' motion on intentional racial discrimination on a preliminary injunction is pending. We might have a hearing a week from tomorrow on that.

The plaintiffs' brief and exhibits on that preliminary injunction were over 3,000 pages of material. And as the State's counsel, we obviously think there's no merit to that claim. We're going to litigate that with Judge Boulee on those questions.

But we would submit the plaintiffs can't just kind of throw Senate Bill 202 out as here is something we disagree with about election administration and say, ah-ha, we've found a connection to the historical practices. Something more than that is required. And we would submit that that burden has not been met by the historians that have testified in this case.

Mr. Germany has provided context for many of the changes in Senate Bill 202, context of what happened in 2020, complaints that were received, reasons why drop boxes were changed. The Court, again, can't presume some sort of racial impact based on that.

And the plaintiffs haven't connected the -- any of these practices necessarily to redistricting. We have a bunch of discussion of history, but there's also specific maps that are being challenged. The allegation isn't but for this particular election practice Black voters could succeed, whether that's drop boxes or anything else. This case is about particular maps.

We move to the second Senate factor in race and politics. And ultimately what the plaintiffs' evidence shows is that regardless of year, regardless of candidate, regardless of office, Black voters prefer Democrats and white voters vote for Republicans.

And I'll go back to the *Solomon County* decision because I think it's important to remember that the 11th Circuit recognized that it's entirely possible that bloc voting, as defined by *Gingles*, could exist, but that such bloc voting would not result in a diminution of minority opportunity to participate in the political process.

And what matters for the Court's analysis is the evidence the plaintiffs have actually presented.

Dr. Alford testified that the statistical sheet from Dr. Palmer indicated a resounding success of the Voting Rights Act; that you no longer saw the race of a candidate playing a role in the decisions of voters.

As Dr. Alford pointed out, the data clearly indicates

that the race of the candidate is not affecting behavior of Black voters, it's not affecting the behavior of white voters. Both Dr. Palmer and Dr. Handley carefully avoided elections that would have led into this analysis.

The race of the candidate demonstrates that race doesn't enter into the calculation of the electorate based on the evidence the plaintiffs have put before the Court. And we know that because the pattern of bloc voting is incredibly stable.

As Dr. Alford explained, if a Democrat is on the ballot, Black voters are going to vote for the Democrat with remarkable stability; white voters vote for the Republican with remarkable stability.

And, importantly, white voters don't alter their voting behavior simply because the Black preferred candidate is Black themselves or has identified with the interests of the Black community.

And that's a key distinction from how we used to see these voting patterns, as Dr. Alford testified today. That the Georgia of today, in terms of voting patterns, is different than the Georgia of the past when white voters would change the candidates they supported if that candidate was a racial minority or is identified with a Black community in an election.

And as Dr. Handley's primary analysis revealed in

Alpha, if the white preferred candidate in the Democratic primary loses the election in the primary, the white voters don't stay home or gravitate toward another political party. They consistently vote for the Black preferred candidate in the general election.

And in Republican primaries, the evidence from Dr. Alford shows that white voters are willing to vote for Black candidates even over longtime elected officials like Commissioner Gary Black.

What the evidence doesn't show is that white voters are unwilling to support the Black preferred candidate if the Black preferred candidate were somehow to be a Republican in a situation. We don't see that, though, because, again, these are partisan voting patterns.

So at this point the record before this Court has no evidence of legally significant racially polarized voting. And while the 11th Circuit in *Marengo County* said that racially polarized voting is the surest indication of race-conscious politics, that's only true if you're evaluating the polarization correctly. And we would submit that here this indicates party-conscious politics, not race-conscious politics.

On Senate Factor 3, voting practices, this is where *Gingles* is showing its age a little bit, because it identifies specific practices that, at least in Georgia, led to the

1 election of, for example, Senator Ossoff as a result of the
2 majority vote requirement.
3 There's, again, pointing to Senate Bill 202, I won't
4 go back to that again.
5 What we see in Georgia, though, is increases in early
6 voting in Senate Bill 202, which is what Mr. Germany testified
7 to. A 98 percent registration rate of eligible individuals,
8 Mr. Germany said.
9 And then the other issues raised by the plaintiffs
10 are largely issues that have been considered in this court in
11 *Fair Fight*. You've looked at the issue of list maintenance
12 and whether that violated the law. You've looked at "exact
13 match" and active MIDR and all the pieces that go with that in
14 Section 2 case.
15 And so ultimately plaintiffs can't rely on practices
16 like that to show discriminatory effects on Georgia voters
17 because those practices are not discriminatory at the end of
18 the day.
19 On the fifth factor of socioeconomic disparities, the
20 Court talked about the status of minority life in Georgia is
21 what this one largely speaks to. Turnout gaps can disappear
22 at times, the plaintiffs' evidence shows that, when there's
23 particular candidates who motivate turnout.
24 Dr. Burch 's evidence shows that Black voters in most
25 educational levels outvote white voters at the same

educational levels.

And ultimately there's no disparate behavior of Black and white voters. People tend to turn out more in presidential years, less in midterm election years. We don't see, even in turnout gaps, any barriers to voting that come from that.

And we recognize the 11th Circuit precedent on this Senate factor says that you assume causation from the disparity. But we think that the turnout that's been demonstrated for the Court means that this has very little weight because it generally only shows the status of minority life in Georgia. It doesn't bear directly ultimately on the ability to succeed in the challenged elections.

When we talk about the racial appeals, the question is are campaigns characterized by racial appeals? Because, again, as *Allen* said, we're looking for the excessive role of race in the electoral process that denies an opportunity.

And, interestingly enough, when *Gingles* was first decided, a lot of times a racial appeal was putting a picture of a candidate on campaign material so voters would know the race of the candidate. Today, I don't think anyone in Georgia didn't know that Senator Warnock and Herschel Walker were both Black men. That's a difference in our politics today.

And so the plaintiffs have talked about things like the fake Oprah phone call that the evidence shows originated

outside Georgia, went to fewer than a thousand people.

We have Senator Warnock running statewide and succeeding.

And we also have evidence plaintiffs put in the record of at least claims by a Republican candidate that Democrats were making racial appeals. The ad from Mr. Walker claimed that the Democratic party were the ones making racial appeals to Black voters. So, again, we keep kind of circling back to partisanship as we work through the totality of the circumstances.

And ultimately I think the issue of are the appeals in congressional races, are the appeals in the legislative races goes more to the weight at least, because even if there are examples of racial appeals in an election system, that doesn't mean the system is characterized by those appeals. And if those appeals aren't for the offices that are being challenged in the case, they would bear very little weight overall in the Court's analysis.

On the extent of election of Black officials, Senate Factor 7, the Senate factors change from Black preferred candidates to Black candidates or minority candidates. And what we see is success of Black and Black preferred candidates.

We heard from Mr. Allen who testified that he was elected from a non-majority Black district. He ran for

lieutenant governor on a statewide basis because he thought he could win. There's not an example here of lack of success overall.

Black candidates and Democratic candidates like Mr. Carter run statewide. And if Black and Black-preferred candidates are winning, then don't we have a system that is equally open to participation by all voters?

On Senate Factor 8, the responsiveness to particularized needs, you haven't heard needs that are necessarily attuned to the offices that are being challenged. So there was some discussion about Ms. Miller talking about sidewalks and streetlights. We have a challenge on a legislative plan and there's been no evidence that the legislature bears some role in things like that.

On issues for food deserts, clean air, public transportation, those are issues that are shared by voters in large areas. Traditionally, this responsiveness to needs was rooted in a place. I remember in our Fayette County case years ago there was a Black community in North Fayette that wanted a park built in the northern part of Fayette County where the Black community was. And part of the lack-of-responsiveness evidence was the at-large elected officials weren't responsive to building the park at that location. It was primarily an area of Black voters.

What we have here is situations where we have non --

or partisan issues that are raised as an example of responsiveness, whether that's the NAACP report card on Justice Gorsuch's nomination being an example of lack of responsiveness or issues that are widely shared by voters in a similar socioeconomic place.

Let me go to the justification for the policy.

I think it's worth remembering that *Bush v. Vera* says that states have a lot of flexibility for avoiding Section 2 liability in the creation of their plans.

And Ms. Wright's testimony shows the communities of interest, the cities, the political considerations that went into the enacted districts. They were the result of a thoughtful and deliberative process. There was input from Republicans. There was input from Democrats.

And while you see partisan or heard about partisan goals as part of that process, you can also see an effort to comply with Section 2. Districts are elongated on the enacted plans and that they're not put -- what you did not have, though, is other pieces and techniques used by the plaintiffs.

So you didn't see examples of the enacted plans bypassing white population, cutting counties in a racially-sorted way to achieve a particular goal, or these extremely close to 50 percent Black VAP districts.

And Ms. Khanna argues, well, it's the State's interest to go ahead and dilute the votes of Black voters

because there's a partisan benefit to that. But we're then, again, back to how do we disentangle race and partisanship? What do we do because we can't presume race when partisanship is an explanation?

And, ultimately, Your Honor, does Section 2 require longer, thinner, more-striped districts to achieve the particular racial target? Does it require cutting more counties? Does it require increasing deviations to achieve its goals as the plaintiffs' plans have proposed?

And ultimately that's the challenge we would submit of finding for the plaintiffs in this case is there's not a limiting principle for how far the State must go up to proportionality. And we know proportionality can't be the answer.

So speaking of proportionality, let's end on that piece of the puzzle.

To be clear, we're not arguing that proportionality is a safe harbor. The Supreme Court in *De Grandy* said it's not. But I think the Court has to consider how we evaluate the success of Black candidates and Black preferred candidates. Do we only look at majority Black districts to determine proportionality, which goes directly to equal openness? Do we look at the election of Black preferred elected officials? If race and party truly can't be disentangled, as the plaintiffs' evidence shows, then how is

every Democratic member of the legislature, regardless of the district they're elected from, not a Black preferred candidate?

Ms. Khanna talked about a variety of other racial minorities, but in this case we're talking specifically about the plaintiffs' claim that Black voters' votes were diluted. And so if Black voters' preferred candidates are succeeding even in areas where there is less than 50 percent Black population and Democrats are being elected, how do we not have an equally open system for purposes of proportionality?

Now, there was a reference this week -- we talked about the members of Congress. And there was a reference to, well, we can't count Congresswoman McBath's district because it's 29.8 percent Black, but it's also majority non-white.

Mr. Cooper's own numbers, if you go back to the district that Congresswoman McBath won originally, the benchmark plan District 6, with the 2020 census numbers applied, it was a 55.58 percent non-Hispanic white district. That's the district that Congresswoman McBath won in 2018 when she beat an incumbent congresswoman for that job. And so in terms of evaluating political success, again, that district was trending democratic even though the overall racial numbers had not changed.

And so ultimately, Your Honor, what all these different factors show is that if you're a good candidate in

Georgia, you can go and get elected in districts. You can go get elected statewide.

I included this slide in my opening, just walking through the various pieces of success of different officials at different levels. And I think, again, that it just goes to the question of if race and party are inseparable, how is the widespread success of Democratic candidates not counted for equal openness in support of Black voters in this case?

So let me move to *De Grandy* for us to close out today. This is a case that is about more success in place of some success. That's what we're here to talk about. And we have to look not only at the *Gingles* factors, but this Court must treat equal political opportunity as the focus the Supreme Court has told us.

And I think this is where we get into the difficult place of what Section 2 means.

Abbott v. Perez tells us that the Constitution restricts consideration of race. The Voting Rights Act demands consideration of race. And so when the Supreme Court was faced with a situation where there was a requirement to consider a race-based remedy, in the *Harvard* case it found there must be an endpoint to that.

Justice Kavanaugh in the *Allen* case said, "The authority to conduct race-based redistricting cannot extend indefinitely into the future."

And *Gingles*, properly interpreted, avoids this concern completely, because if the facts on the ground in Georgia indicate equal openness under the *Gingles* test, and we submit they do, we don't run into a conflict between the Constitution and the Voting Rights Act because ultimately race-based remedies would not be required. We'd be to the world of everyone play party politics. And we're not expecting rainbows to descend and angels to come down and everyone to hold hands and agree. What we are expecting is a system where everybody makes their case to the voters and people vote for who they want to vote for.

When voters are able to vote for candidates based on their interests and on what they want, that to see in the election -- I mean, in the government, that's an equally open political system.

But, Your Honor, if ultimately we're in a situation where the facts in Georgia do not demonstrate equal openness, now *Gingles* is running headlong into the Constitution's prohibitions on race-based remedies.

Mr. Savitzky said we'll know we reach the end when racial polarization is not happening anymore in voting. But that will only happen if Republicans start voting for Democrats or Black voters -- and Democrats start voting for Republicans. We can't have this -- we can't have a political remedy under the Voting Rights Act.

And that's the concern we have here, that if the Court finds liability for Georgia on these facts, they are endangering Section 2 of the Voting Rights Act in places where it's still needed, in places like Alabama, maybe, that has different facts than Georgia, like Baltimore that Dr. Alford referenced earlier today.

The reality on the ground in Georgia is that unlike that of Alabama, this is not a place where intensive racial politics are present in a way that the excessive role of race in the electoral process denies minority voters an equal opportunity to participate. Georgia is a state where any candidate can make their case to the voters and win. And the evidence shows that.

And ultimately if candidates are losing on these redistricting plans that this Court is considering, it's not on account of race or color. It's not a violation of the Voting Rights Act. It's on account of partisanship or on account of being a bad candidate. It's not on account of race.

So in light of that, Your Honor, we would ask for a defense verdict in the Alpha Phi Alpha case, in the Grant case, in the Pendergrass case, because with all the evidence before the Court, there is no substantial evidence supporting a conclusion that any Georgia voter has their vote diluted on account of race or color on these redistricting plans.

So we appreciate, again, and add our thanks for your time, for the time of the staff and all the work that's gone into this trial. We're grateful for the opportunity to present our case. And thank you, Your Honor.

THE COURT: Thank you, Mr. Tyson.

Mr. Savitzky, you have roughly nine minutes left, I was told.

THE DEPUTY CLERK: Yes, sir.

MR. SAVITZKY: Thank you very much, Your Honor.

And I don't intend to use the nine minutes unless the Court has questions.

For the record, I just want to note, in case the Court sees fit to use the slide deck, we will get you the deck for our presentation.

On pages 5 and 6 of the deck that Mr. Tyson passed out, there are various quotations and statements about the Cooper APA plan and image that depicts a district that Mr. Cooper did not draw and was not in his plan. So I wanted to make sure that was clear in the record.

THE COURT: Pages 5 and 6, do you agree with that, Mr. Tyson?

MR. TYSON: And, Your Honor, I apologize. I was trying to use a generic map, and I did not catch that that is -- that's one of Mr. Esselstyn's districts. So I agree, those two maps are not Mr. Cooper's maps on the slides.

THE COURT: I will not consider them as Mr. Cooper's maps.

MR. SAVITZKY: Thank you, Your Honor.

Other than that, I believe we've addressed why we believe the conditions in the state demonstrate that the political process is not equally open, that we've made our case. We'd stand on our arguments.

Unless the Court has questions, we're happy to leave it there.

THE COURT: You-all have been very thorough.

MR. SAVITZKY: Thank you, sir.

MS. KHANNA: Thank you, Your Honor.

And I guess I just want to briefly address one of the points that Mr. Tyson raised just now, is -- I believe he said at the top of his argument just now that this case in Georgia is much easier than the average Section 2 case.

I've heard that before, Your Honor. And there was an amicus brief that I wish I had my fingers on right now, but there was an amicus brief in the Alabama case before the US Supreme Court that I believe Chief Justice Roberts cited during argument, but certainly I believe it was cited in the majority opinion. And I can run that down.

But there was an amicus brief nonetheless that specifically noted the statistics on Section 2 cases in this country and the average Section 2 case fails. This is --

Section 2 is -- the standard that exists right now, it is a gauntlet. And for a case to come this far is unusual. The vast majority of these cases fail. And they fail at the outset. They fail at the *Gingles* preconditions.

This idea that *Gingles* is just this checklist that anyone can just come into court and establish, it just doesn't get borne out by the facts.

And that gets to the point of what is the endpoint, I believe was one of the questions that Mr. Tyson asked, how will we know when we've gotten there?

And this is a question that I know that they've pointed to Justice Kavanaugh's concurrence for. But the thing about Section 2 of the Voting Rights Act, frankly, unlike Section 5 of the Voting Rights Act, which was a big concern when dealing with that provision, is that it has a built-in sunset provision.

Chief Justice Roberts, when he wrote the *Shelby County* opinion, specifically said that Section 2 remains a permanent and nationwide injunction on voter discrimination. And when I say that it has a built-in sunset provision, it's because of the fact-intensive, quantitative and qualitative gauntlet that plaintiffs have to establish in order to get to a violation.

Where you don't have the kind of residential segregation that you see, and that we've seen in these cases

of minority voters, of Black voters, you're not going to have a Section 2 violation. You're not going to draw that reasonably configured district, you're not going to find that numerous and concentrated Black population.

Believe it or not, that doesn't happen all that often. You don't get those populations. You don't see that same level of racial segregation in areas that are outside of Georgia and lots of areas in this country.

Where races vote for different candidates at different times on different issues in different elections based on the different offices that are speaking to them, not uniformly in lockstep with their race, you don't have a Section 2 violation.

The kinds of racial voting patterns that we see here, as Dr. Alford said, are striking; you don't see them everywhere. And many Section 2 cases fail at *Gingles* 1, 2 and 3 because the conditions that *Gingles* 1, 2 and 3 are testing for are troublesome, emblematic of a system, of a society in which race infuses the political process. And that is unusual, Your Honor.

So on this point I might agree, this is not your average Section 2 case, because your average Section 2 case is really hard to establish.

Mr. Tyson asked -- well -- I believe stated that the only way that racially polarized voting can disappear is if

Democrats start vote -- sorry -- if Democrats start voting for Republicans and Republicans start voting for Democrats. It's just not true, Your Honor. You don't see that, again, other places where there's no Section 2 violations or no Section 2 claims to be found.

The way that racially polarized voting disappears or even abates is by having elected officials who can start trying to represent the interests of different races, by having elected officials who view themselves as responsive to different racial pockets within their jurisdictions. Because, again, Black voters are not -- Black people are not born Democrats. White people are not born Republicans. This is not some, you know, accident that people have a political party affiliation. Voters are smart. And they vote in their interests. And they vote for the candidates who represent their interests.

My final point, Your Honor, is a lot of what we've heard from the defendants is really an attempt to reimport an intense standard that has been thoroughly and repeatedly rejected under the Section 2 results test. You heard words like "but for causation" in Mr. Tyson's discussion of the Senate factors analysis. Yeah, but that's not -- but racial appeals have not caused the disparities. They're not specifically about redistricting. I think the socioeconomic status is not the cause of redistricting-related issues. I'm

not sure. I mean, the slide that defendants just put up says, well, that only shows the current state of minority life in Georgia.

I have trouble reconciling that kind of it-is-what-it-is approach, because at the end of the day, what is the totality of circumstances analysis? It is not a way of reimporting causation and intent and animus at every single point in the process. It is not reinjecting that factor into plaintiffs' burden.

But the Senate factors analysis is comprehensive. It's meant to understand what is life and politics and socioeconomics and campaigns. What is it like in this jurisdiction? And to what extent does race inform and does race infuse and does race divide on these fundamental issues?

And I would submit, Your Honor, that in Georgia that extent remains high. It doesn't have to be that way. It is not that way everywhere. And it doesn't have to be that way forever. But it is no answer to say politics as usual or the state of minority life, because politics as usual and the state of minority life is exactly what got us to the Voting Rights Act in the first place. That was the politics as usual as people in power trying to retain power by suppressing those in opposition.

The state of minority life in Georgia has gotten a lot better since the '60s. But the state of minority life in

Georgia is starkly disparate, particularly in the areas that we're talking about here; right? And that's another specific question that I think the defendants really fail to grapple with; right?

We're not painting all Black voters in Georgia with a broad brush, oh, you have Democrats, you have -- you know, I see some Black elected officials; let's just, you know, all go home and call it a day for the Voting Rights Act. We're talking about Black voters in the Black Belt who had -- the State's map drawer got up there and said there's no such thing as the Black Belt.

These opportunities cannot be painted with a broad brush. It is incumbent on us to establish -- us as plaintiffs to establish the facts on the ground and to give this Court everything it needs to conduct that localized, highly fact-intensive appraisal of all of these factors.

And the Court cannot follow defendants down a path of saying slippery slope of minority voting rights, or the numbers are good enough, or can we just, you know, call enough enough.

The Section 2 legal standard tells us when is -- when have we satisfied the Voting Rights Act? It's not a mystery. It's the same standard. It is a meticulous and fact-intensive standard. It's a standard we have established here. It doesn't leave any question marks.

So to the extent that defendants, the State of Georgia, remain confused about, well, what is required under the law, I would submit, Your Honor, that it might be because they're looking outside of the Voting Rights Act law; when Mr. Tyson said in his opening statement, I really didn't understand what the *Allen* case meant until I read the affirmative action case three weeks later.

I mean, at some point, we just have to take the courts at their word that the law of Section 2 in redistricting is what it is. It may not be what the defendants want it to be, but it is what it is. And we have to follow that law.

And if defendants are confused, all they have to do is read that law and think through these standards. Not looking at affirmative action in college admissions. Not looking at *City of Mobile* and *Whitcomb v. Chavis* to find intentional discrimination.

Looking at the Section 2 precedent and looking at the Section 2 facts yields only one conclusion in the Pendergrass and Grant cases, and that is that there is a violation of Section 2.

I'm happy to answer any questions if the Court has any.

THE COURT: No questions.

MS. KHANNA: Thank you, Your Honor.

THE COURT: Thank you, Ms. Khanna.

The first week of January 2022 I had arrived back to Georgia from Miami after watching Georgia defeat Michigan and learned that I had been assigned this case. I remember saying two things to myself, Mr. Savitzky. Why me?

No, I didn't say that.

The first thing I said, this is a very important case. It's going to have a big effect on a lot of people.

The second thing I said to myself, this is going to be a very difficult case to decide. In a sense, you-all have made it more difficult and less difficult. You've made it less difficult because you-all have done an outstanding job presenting the cases. You've given me a lot of information that I need to make a decision. And on that part, you made it somewhat hard; and that's everybody's doing their job presenting what you had to present in a way of representing your client.

Now, here's where I start now. And I have to go through all the information and try to make a decision that I think fits the facts with the law. And it goes back to the first thing I thought about, my decision is going to have an effect on a whole lot of people one way or another. If I rule for the plaintiffs, if I rule for the State, it's going to have an effect on a lot of people. So I have to make sure I look at everything very thoroughly, fairly, and try to make

the best decision I can as soon as I can.

I can't tell you-all exactly when I'm going to render my decision, but I can tell you this much: We start working on this in 15 minutes. Actually, we've already started reading these things. It goes back to the first thing I said to myself whenever I realized this case had been assigned to me: This is a very important case that will have an effect on a lot of people's lives, and I have to make sure I do it right and give it everything I have.

I owe that to the people of Georgia, and I owe that to you-all. But you-all have done an outstanding job. Every one of you-all: Alpha attorneys, Grant/Pendergrass attorneys, State attorneys.

As a judge, I'm going to tell you-all, I've been a judge since 1993, I've seen the best and I've seen not so much of the best. When you get the best, it makes it a whole lot easier to try and do what you've got to do. So I commend you and I thank you.

And as I said in the beginning, I'll try to get you a ruling back as soon as possible, but it's a lot of information and I have an obligation to make sure I try to do the best job I can.

So thank you, all. I would say Happy Thanksgiving, but I'm going to get it back to you before Thanksgiving, that I can assure you.

So what I always say, go Dawgs. Thank you.

(PROCEEDINGS REPORTED WERE CONCLUDED AT 4:51 P.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 15th Day of September, 2023.

PENNY PRITTY COUDRIET, RMR, CRR
OFFICIAL COURT REPORTER

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