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 5 - 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
MONDAY, SEPTEMBER 11, 2023

STENOGRAPHICALLY RECORDED BY:

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

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(Proceedings held in open court at 1:47 p.m., Atlanta, Georgia.)

THE COURT: I hope you had a good lunch. You may resume your redirect.

MR. GARABADU: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. GARABADU:

Q. Hello again, Dr. Ward. Thanks for sticking around for the lunch break. I just had a few questions for you based on Mr. Boyle's cross-examination.

Now, Mr. Boyle asked you some questions about which parts of your report you stand by and which parts you disavow. I just want to be clear for the record, do you stand by all your conclusions that are in the report you authored for this case?

A. Yes.

Q. Is there anything in that report that you disavow?

A. No.

Q. Just because you didn't testify about any portions of the report, are you in any way disavowing them or retracting them in some way?

A. No.

Q. Okay. Now, you were also asked some questions about some changes that Georgia has made to election devices, including automatic voter registration and increases in early voting days.

Do you remember that line of questioning?

A. Yes.

Q. Now, how do you weigh these types of mechanisms when you're analyzing whether or not Georgia's history of voter discrimination continues to the present?

A. I'm -- I'm analyzing them in light of that historical context. Right? So I approached this assignment as a historical assignment. I would not have -- I would not have agreed to write it if I wasn't writing it from the perspective of a historian, because I don't think I would be qualified. So, you know, I can't -- I can't boil down my analysis and my conclusions to, you know, any kind of definitive statistical measure of how these policies and how these tactics influence and impact racial politics.

Q. And does -- do things like automatic voter registration and increases in early voting days, do they change your conclusion in any way that voter discrimination against Black voters in particular continues to the present day?

A. They do not. I do not take the -- I do not take those -- that data as conclusive evidence that historical trends and patterns cease to exist.

Q. Now, Mr. Boyle listed a number of legal determinations that courts have made about electoral devices.

Do you remember that line of questioning?

A. Yes.

Q. Now, I want to be clear. You're not a lawyer, are you, Dr. Ward?

A. I am not.

Q. And your report doesn't opine about the legality of any of these electoral devices, does it?

A. No.

Q. Okay. Is it fair to say that your conclusion in this report is about the historical trends surrounding these types of electoral devices?

A. Yes, trends and context.

Q. Now, you were also asked some questions about the election of Senator Ossoff and Senator Warnock through runoff elections.

Do you remember that line of questioning?

A. I do.

Q. Does the election of Senator Ossoff or Senator Warnock change any of your conclusions in your report today?

A. No.

MR. GARABADU: Thank you, Your Honor.

Thank you, Dr. Ward. I have no further questions.

THE COURT: Any cross?

MR. BOYLE: No further questions, Your Honor.

THE COURT: I have a question.

One of the arguments that's been made, and it may be made in this case, I think will be made in this case, it's

been made also in some other cases have come forth from the 11th Circuit, Judge Totenberg and I have seen it, is that there's no recent discrimination. There's one case I read that says, well, yeah, we'll admit, the State of Georgia will stipulate that there's racial discrimination from the Civil War up until 1990s.

What's your response to that?

THE WITNESS: I'm -- I'm reluctant to set any kind of hard end date. If others can, that's -- it's beyond my ability to do, looking at the evidence and looking at the context.

One of the things about how historians work is that we're constantly -- we're constantly thinking about how close can you get to the present and still be historical in your analysis. But, you know, the starting line for that is one second ago. I mean, the starting line for that is last week. The starting line for that -- or the endpoint for that is right up until present.

And it can be more challenging to develop a historical perspective, historical arguments, and certainly reach historical consensus with other scholars without the process of peer review and research and publication. That creates a bit of a lag time, but I'm consistently skeptical of arguments that are based upon the premise that there's some sort of hard cutoff date where history stops.

THE COURT: I may have phrased it the wrong way. I'm quoting basically kind of a case I read. The 2000s, how would you analyze or interpret or state the state of racial discrimination against Blacks in Georgia?

THE WITNESS: Certainly. I mean, you know, one of the things that happens in that time period is a power shift, right, a historical power shift that I believe counsel referenced in terms of when you actually see a change in who's controlling, you know, major levels -- major levers of power in state government, local government.

That is consistent with the patterns by which political power and political alignments changes hands in Georgia. It takes longer at the state, the local level, for the Democratic party to lose the stranglehold on electoral power that they've held for over a century than it does, say, the national level.

So just because -- just because white Georgians may express -- or Black Georgians may express an overriding preference for a candidate in a presidential election, it doesn't necessarily mean that those same dynamics are going to hold, you know, in a race for county commissioner or school board. But certainly by the beginning of the 21st century, that trickled-down political change has affected all levels. And that's why you see controversy, debates, litigation over electoral policies and requirements that play out on the local

level as well about how district lines are drawn. Whether you even elect people by district or at large, a majority vote requirement for city council as well as at the state level. So it's an uneven process, it's a contingent process and, you know, it plays out for decades.

THE COURT: What if the argument is made that -- in Georgia you have five elected Black congressional individuals and one United States Senator is Black, and an argument is being made that shows there's no discrimination. I don't think you ever get to the point that says no discrimination, but it does not have the effect, that Blacks are allowed to elect -- to have an equal right to elect a person they want to elect.

THE WITNESS: Right. That's a complicated question. And it's a complicated argument, but one of the things, particularly the congressional level that's tricky, and you see this in other states like Mississippi as well, is that the creation of a majority Black district at the same time can be pointed to as a measure of progress because it results in Black representation.

That argument, that historical landmark, that's symbolic and practically significant moment is not mutually exclusive with the statistical math that reeks on the other districts, neighboring districts. Right? So you can make a district majority Black, overwhelmingly Black, and achieve an

electoral result that maybe you could not have before that doesn't change the fact that -- you know, making that district 60, 70, 80 percent African-American doesn't reduce the statistical proportion of the electorate in other districts and result in very different circumstances.

THE COURT: So you could be electing -- if I'm hearing you correctly, you could be electing Black officials here, discrimination still can be occurring over here?

THE WITNESS: And there. Well, in a cite in the report, a recent example is I believe a Democratic State legislator who complained about drawing majority Black districts because of the political result that that would make more likely. But then on the other -- there are counter-arguments to why you need to be attentive to proportionate representation rather than, you know, packing a district, so to speak.

And we've seen examples of that in Mississippi with the so-called Delta district, which carves off the majority Black region of the state into a single district. Dilutes, diminishes the proportion of African-American voters in other districts.

My home state of North Carolina, we had some very creative congressional maps for a very long time that were, you know, seeking to -- again, the spatial and racial aspects of the history and the practical nature by which you can

determine where people live based on race incentivizes those kinds of maneuvers and makes them highly contentious.

THE COURT: Thank you, Doctor.

Anything else for the plaintiff or defendant?

MR. GARABADU: No, Your Honor. We ask that this witness be excused.

THE COURT: Well, we'll see what the State has to say.

MR. BOYLE: Well, I guess I'd just like to ask one question.

THE COURT: Yeah. You can ask as many as you like.

RECROSS-EXAMINATION

BY MR. BOYLE:

Q. Professor, just now you were talking about statistics and mapping. Again, you're not an expert in statistics or mapping; right?

A. No.

MR. BOYLE: That's all.

THE COURT: Thank you. Doctor, thank you.

Can he be excused?

MR. GARABADU: Yes, Your Honor.

MR. BOYLE: Yes, Your Honor.

THE COURT: Dr. Ward, thank you. Have a great day. I appreciate you being here.

(Witness excused.)

THE COURT: Call your next witness.

MR. TYSON: Your Honor, can I just interject before we call the next witness?

THE COURT: Yeah.

MR. TYSON: Ms. Khanna and I were talking about kind of where we stand in the case. I believe the witness that will be testifying next for the plaintiffs is the last witness and we'll be at the end of the plaintiffs' case by probably our afternoon break. We don't anticipate it taking that long.

We've discussed at that point we'll, obviously, make a 52(c) motion. We are prepared to argue that now or do whatever you would want us to do.

I think the main question for us is going to be, do we need to get -- go ahead and get Ms. Wright, who will be our first witness, here this afternoon or not?

THE COURT: How long do you think this next witness is going to take? It's 2:00 now. Because I have some scheduling questions that I have for you-all.

MR. TYSON: Okay.

MS. KHANNA: I think we'll be, including cross-examination, between an hour and hour and 15.

THE COURT: Okay. And then we have the motion argument. I'll probably say we'll probably give you-all a break. I've been driving you-all pretty hard. And start back in the morning at 9:00.

Now, how long does the State think your case will take to present?

MR. TYSON: So, Your Honor, we have four witnesses total. Ms. Wright, who will be several hours talking about both *Gingles* 1 and the totality of the circumstances. We're going to do kind of a similar thing to the plaintiffs on that, to avoid having to calling her twice.

Mr. Morgan, who will be rather lengthy in terms of his testimony. He has to respond, obviously, to three sets of maps.

Dr. Alford, who will not take as long, I think he'll be relatively brief, maybe half a day at most for him.

And then Secretary of State witness Mr. Germany, who will talk about responding to some of the voting issues.

So all told, I'm thinking that's probably two days for us, somewhere in that neighborhood, for all four of them.

THE COURT: Okay. Tuesday, Wednesday. Thursday, closing arguments?

Okay. And that's -- the reason why I ask is that if it looked like we were going to go past Friday, Monday and Tuesday and Wednesday of next week I have hearings set that I have to do. And I was going to say, come back on -- I would bring you-all back on Thursday and finish it, but it looks like we'll finish this Thursday.

MR. TYSON: I think that's likely at this point, Your

Honor, if we bleed into Friday. I don't think we're going past Friday, though, on the current pace.

THE COURT: If we're going to Friday, I may have to stop at noon on Friday and bring you back next Thursday for the closing arguments, because closing arguments are going to be quite extensive based on time I'm giving you. And I really don't want to rush closing arguments, because I have -- there's going to be interruptions from the Court on your closings. I have some questions that have not been addressed yet but you may answer them in your case and the last witness.

But the way this looks now, that we'll have a full day of closings. I really want to do the closings on one day. So if we finish the evidence at noon on Wednesday, I will excuse you all Wednesday and say be back here at 9:00 Thursday morning so I can just have a full day of closings.

MS. KHANNA: So, Your Honor, in light of that, and since we have -- obviously, we have been -- we've argued this case extensively, we would ask that we defer -- that Your Honor defer consideration on the Rule 52(c) motion and defer argument on it as well so that we can address all of the arguments in closing, as opposed to kind of interrupting the presentation of evidence to present argument on the legal motion.

I don't think anyone would waive any of the arguments in so doing, but it would allow us to proceed efficiently to

the evidence and then hopefully have the time to block out just a single Thursday, then, for closings.

THE COURT: Well, in this case, it's not too many times the lawyers get to make the choice in court, but in this case, Mr. Tyson will have to tell me he wants to wait for his 52(c) because he has the right to make it at the close of your case.

MR. TYSON: And Ms. Khanna and I talked about this this weekend, we would like to argue the motion, the 52(c) motion.

THE COURT: So we'll do it at the close of your case today.

MS. KHANNA: Thank you, Your Honor.

THE COURT: Next witness.

MS. RUTAHINDURWA: The Grant and Pendergrass plaintiffs call Dr. Burton to the stand to testify on the totality of the circumstances.

THE COURT: All right. Dr. Burton.

THE DEPUTY CLERK: Sir, can you remain standing and raise your right hand, please.

ORVILLE VERNON BURTON

a witness herein, being first duly sworn,

was examined and testified as follows:

THE DEPUTY CLERK: Thank you. Have a seat and if you will please state and spell your name for the record.

THE WITNESS: Yes. Orville Vernon Burton; Orville, O-R-V-I-L-L-E, Vernon, V-E-R-N-O-N, Burton, B-U-R-T-O-N.

THE DEPUTY CLERK: Thank you, sir.

THE COURT: And this will be totality of the circumstances?

MS. RUTAHINDURWA: Yes, Your Honor.

And I have a PowerPoint printed-out version. Can I pass it out to you and others?

THE COURT: Yes, ma'am.

DIRECT EXAMINATION

BY MS. RUTAHINDURWA:

Q. Good afternoon, Dr. Burton.

A. Good afternoon.

Q. You've been retained as an expert in the Pendergrass and Grant plaintiffs in this litigation; is that right?

A. Yes.

Q. And to specify, is it your understanding that you've been retained as an expert on the -- several Senate factors that courts consider in evaluating whether a Section 2 violation has occurred?

A. Yes.

Q. First Senate Factor 1, the history of official voting-related discrimination in Georgia?

A. Yes.
Q. The second Senate factor, the extent to which voting in Georgia is racially polarized?
A. Yes.
Q. The third Senate factor, the extent to which Georgia has used discriminatory voting practices and procedures?
A. Yes.
Q. The sixth Senate factor, the use of racial appeals in political campaigns in Georgia?
A. Yes.
Q. And the seventh Senate factor, the extent to which Black people have been elected to public office in Georgia?
A. Yes.
Q. And now you've prepared a few expert reports. A report and a supplemental report for both Pendergrass and Grant at the preliminary injunction stage; is that right?
A. Yes.
Q. And then a report for both Pendergrass and Grant at the trial phase; is that right?
A. I'm sorry, I'm having trouble hearing the --
Q. I'll bring it up.
Can you hear me better?
A. I can. Thank you.
Q. So you prepared a report for both Pendergrass and Grant at the trial phase of the litigation; is that right?

A. Yes.
Q. I'm pulling up on the screen Pendergrass Exhibit 4, page 1. Can you please identify this exhibit?
A. Yes. This is a report that I did for Pendergrass.
Q. Great. And the date of the report is December 5th, 2022; is that right?
A. Yes.
Q. Do you have this report printed out in front of you under tab 1?
A. I believe that I do. This was handed to me. And, of course, I haven't looked at it, but it looks like it, yes.
Q. And now I want to pull up on the screen Grant Exhibit 4, page 1. Can you please identify this exhibit?
A. This is for the Grant plaintiffs. Same report.
Q. Great. And you noticed -- you said it's the same report. Are there any substantive differences between your Pendergrass and your Grant report?
A. No substantive difference. Just the title, I believe.
MS. RUTAHINDURWA: So, Your Honor, at this time, move to admit Pendergrass Exhibit 4 and Grant Exhibit 4 into evidence.
THE COURT: Any objections?
MS. LAROSS: No objection, Your Honor.
THE COURT: Admitted without objection.
(Pendergrass Exhibit 4 and Grant Exhibit 4 were

admitted and marked into evidence.)

BY MS. RUTAHINDURWA:

Q. And for the rest of this examination, we'll just be working off of your Pendergrass report. The testimony in this case will apply to both Pendergrass and Grant since the reports are identical.

Is your report true and accurate to the best of your knowledge?

A. It is. There is one thing I noticed I thought was corrected.

Q. And what is that?

A. That I made a silly error and caught it and thought it had been corrected, but in the printed version that I looked at, it did not. That I said that Jimmy Carter was the last time that Georgia had voted for a Democrat until this most recent election with Joe Biden. And, of course, Bill Clinton won in 1992. That's the only thing that I saw.

Q. And so apart from that, everything else in your report you believe to be true and accurate to the best of your knowledge?

A. I do. To the best of my knowledge.

Q. And your CV is attached to the report, pages 81 through 113; is that right?

A. Can I just check --

Q. Yes.

A. -- before I say yes?

Yes.

Q. Is this a complete and accurate summary of your background and professional experience through December of 2022?

A. Through the -- December of 2022. Of course, there's a lot of other things that I didn't list, like book reviews or manuscript reviews, things like that, but it's an overall view of my career.

Q. And I understand congratulations are in order. You've received a couple of honors since writing your report in December 2022. Can you share with the Court some of those awards?

A. Well, I believe the Mays Legacy Award may have been before, but then I received -- in October here, I was inducted into the Morehouse College Martin Luther King, Jr. Collegium of Scholars. And I received the lifetime achievement award, the John Hope Franklin lifetime achievement award for the Southern Historical Association in November, I believe.

THE COURT: Congratulations.

THE WITNESS: Thank you.

BY MS. RUTAHINDURWA:

Q. Dr. Burton, can you briefly describe your background?

A. Do you want education and background or -- is that what you're asking, just to --

Q. Yes, your educational background.

A. Well, I was born in Royston, Georgia. Grew up near the town of Ninety Six, South Carolina, a little farm in the country, but right outside city limits of little mill country town. I went to public schools in Ninety Six, South Carolina.

I graduated and went to Furman University. While at Furman I also -- some professors nominated me, I didn't know what it was, went to the Harvard-Yale-Columbia Intensive Summer Studies Program each summer. I did ROTC at Furman, so I went into the Army. And after the Army I went to Princeton where I did both my master's and my PhD in American history.

I had to go back in the Army to fulfill some obligations. And drove straight from the Army out to the University of Illinois at Champaign—Urbana where I taught for 34 years.

And then I retired there to come and take an endowed chair at Coastal Carolina that had been a wish of the current chair, Charles Joyner, who wanted me to have his endowed chair, Chair of Distinguished Professor of Southern History and Culture.

And then Clemson lured me away to come. And I'm now currently at Clemson, the Matthew J. Perry distinguished professor of history, -- Judge Matthew J. Perry distinguished professor of history at Clemson University.

Q. Thank you.

And, Dr. Burton, have you served as an expert before?

A. I have.

Q. On what subjects?

A. Well, on redistricting, on racial bloc voting, voting analysis, on socioeconomic -- what's generally called Senate Factor 5. In fact, I've done totality of the circumstances all -- for several cases, all seven of the Senate factors, plus the two Zimmer factors.

Arlington Heights, I've done Arlington Heights reports on intent, as well as, of course, the effect of voting and voting laws. I have done felony disfranchisement there, some discrimination cases.

Q. Can you give a few examples of how many voting cases related to discrimination you've testified as an expert in?

A. It's embarrassing, but I started in 1980 after *Mobile v. Bolden* and did not really keep a list. I've got the more current ones, but I started early in 1980, when the Supreme Court had decided in *Mobile v. Bolden* at that time that it didn't matter if a law discriminated, but you had to show that the intent and purpose of that law was to discriminate.

Of course, in 1982 the Congress renewed the Voting Rights Act and added that, to the effect, our intent, but most attorneys like more than one arrow in their quiver, so I continued to do both the effect and the intent in court cases.

I can give an estimate, but I don't know, because many of the times, particularly in the early days, you didn't even do

a report, just sort of testified. And then so many of them were settled before you actually went to testify.

Q. Can you give a couple examples of recent cases that you've testified in?

A. Yes. Of course, there was this preliminary injunction trial I believe was the most recent. And then there was the North Carolina felony disfranchisement case. The South Carolina in-person voter ID case. The North Carolina -- excuse me. The Texas in-person voter ID case. The redistricting case twice, it came back twice, the redistricting case in Texas. I believe these are all listed in my report.

Q. Thank you, Dr. Burton.

MS. RUTAHINDURWA: Your Honor, at this time I tender Dr. Burton as an expert on the history of race discrimination and voting to address the Senate factors outlined earlier in his testimony.

THE COURT: Ms. LaRoss, do you wish to voir dire?

MS. LAROSS: Yes, I do, Your Honor.

VOIR DIRE EXAMINATION

BY MS. LAROSS:

Q. Good afternoon, Dr. Burton.

A. Good afternoon.

Q. It's nice to meet you in person. We met on Zoom a few months ago.

A. I remember.

Q. Thank you. I just have a few questions for you. And congratulations on your latest achievements and awards.

A. Thank you.

Q. You're welcome.

So you've been retained as an expert in a number of cases, as you've mentioned, but have never testified on behalf of any State defendant or State entity in a lawsuit; correct?

A. I don't believe so, unless you're saying that I -- you know, I worked for the Department of Justice. They are a State organization. But it was -- well, I -- no. I think the answer is no. I want to be truthful in -- on this.

Q. All right. Thank you.

And you've never testified on behalf of any Republican entity; correct?

A. I was hired by Republicans in Illinois and was doing a report, but I did not testify.

Q. And you're not here to opine that the maps enacted by Georgia in 2021 violate the Voting Rights Act; correct?

A. Would you repeat that question?

Q. Absolutely.

So you're not here to give us an opinion that the maps enacted by Georgia in 2021, the redistricting maps, violate the Voting Rights Act; correct?

A. Let me think just a moment. I misunderstood. I didn't

understand maps. I thought you said that word, "map."

You know, I looked at maps and they helped me form an opinion, but I'm here to testify about the history of discrimination. So though I used maps as evidence, you know, spatial evidence goes way back, it is not me testifying to that specifically, but I don't want to say I didn't look at them to use them in coming to my conclusions in my report.

Is that fair?

Q. Yeah. That's absolutely fair.

Because what -- the point I'm getting to here is, I know you've got a lot of experience in different areas, but you're not here testifying as an attorney or giving a legal conclusion; correct?

A. I always insist, I am not an attorney. I am not -- you know, I study the law, or recently more have studied, but I am not trying to do any legal -- I'm not -- I don't believe I'm qualified. I come to historical judgments by looking at all the evidence I can in the context of it, but I'm not making a legal argument or trying to interpret the law at all.

I have opinions about whether I think the law is right or wrong or hurts some people and not others, but I'm not here -- that's for the attorneys. I look at my report as -- an old friend of mine used to say as sort of putting hay down for the goats to eat. That is the attorneys.

So I'm giving you the context for you guys to -- and for

the judge, of course, to help come to your opinion.

THE COURT: You just gave me another way to refer to these lawyers.

MS. LAROSS: I think maybe I should sit down. I'm not really sure what to do after that.

BY MS. LAROSS:

Q. But thank you. That's exactly the distinction I was making.

And, you know, you mentioned you may have some opinions about the law or whatever, but you kind of leave it obviously to Judge Jones and the lawyers?

A. And for you folks to fight it out over the evidence that I have provided.

Q. A goat that I may be.

A. I didn't mean it that way.

Q. All right. That brings me to my next question.

So your work isn't, obviously, to give a legal conclusion. It's -- your work in this case is to attack the issues and problems as a scholar studying the issue and not in the legal framework that the attorneys do; is that fair?

A. That is correct. I am trying to put it -- part of -- part of what I was asked to do is to put into context, you know, I think probably the legal term, we call it totality of circumstances. But it's the same thing that historians do, is we put things into a historical perspective in context over

time to see how the different things we look at, evidence, point in one direction or another or don't.

Q. Okay. And so it's fair to say that you provide the historical analysis of voting and race discrimination, and then the lawyers fit it into a legal analysis under the Senate factors?

A. I would agree. I would agree with that.

Q. Okay. And you've been retained multiple -- you said that you've testified, you've been part of many cases, too many to count.

A. But I'm going to correct you. You -- somebody more careful who was doing this deliberately, I was not doing it deliberately, probably would have counted. But I was just trying to help out in what I thought was doing my civic duty to bring the scholarship and my research abilities to help people come to the best conclusion they could. But I didn't think of it as a -- you know, each time I thought, this will be it, until recently, or the last 20 years, 10 years or so.

Q. Recently. Yes.

So -- but you've been retained multiple times by the NAACP, the American Civil Liberties Union, as well as the Lawyers' Committee for Civil Rights in connection with lawsuits starting back in 1980.

Does that sound correct?

A. Yes. 1980 was when I was first contacted.

MS. LAROSS: Okay. Those are all the questions that I have. Thank you.

THE COURT: Any objection to this witness testifying as an expert in the requested areas?

MS. LAROSS: Yeah. No, we have no objection to him testifying in -- with regard to the historical context and the other areas that have been noted.

THE COURT: All right. Thank you. Then he will be allowed to testify as an expert in the areas as requested.

MS. RUTAHINDURWA: Thank you, Your Honor.

DIRECT EXAMINATION (CONT'D)

BY MS. RUTAHINDURWA :

Q. So I'd like to direct your attention back to the Pendergrass Exhibit 4, page 2. And you can look at your report or the screen. It's just a summary of the statement of inquiry.

Is this an accurate summary of what you were asked to do in this report?

A. Yes. May I ask a question? Is it okay for me to mark on this, that you just gave me, or is it not?

Q. That is your copy, Dr. Burton --

A. Okay. Thank you.

Q. -- to do what you want with it.

And, briefly, what were you asked to do in this case?

A. Well, as it says there, I was asked to look at the

history of discrimination as it related to voting in Georgia, the historical context. And to put that into historical perspective, or totality of circumstances, as well as to look at the history of race and partisanship and how political parties developed, particularly in the modern era, but over time in Georgia and how that related to -- race and partisanship relate.

Q. And you did not submit a reply or rebuttal report in either case; is that right?

A. In either case? You mean Pendergrass or Grant?

Q. That's right.

A. No.

Q. Why not?

A. No one ever gave me a rebuttal report to reply to. As far as my memory is, I never saw a critique except for the, you know, deposition.

Q. So it's your understanding that there was no one to rebut the conclusions you reached in your report?

A. Not to my knowledge.

Q. Directing your attention to pages 8 and 9 of your report, the section titled Methodology and Sources. Is this an accurate summary of the sources you reviewed to form your opinions in this report?

A. I'm sorry, I was looking at the screen. I apologize. What was your question again?

Q. On pages 8 and 9 of your report there's a section titled Methodology and Sources?

A. Yes.

Q. Is this an accurate summary of the sources that you viewed to form your opinions in this report?

A. Yes. But I tried to do extensive footnotes, which is something historians are rather famous for, is their footnotes. And so it is there where I try to list the sources that the particular statement comes from that goes together to make what conclusions I have come to and arguments. So it doesn't list all. It talks about the kinds of sources that I used.

And it would be, you know, the same sort of thing if I was doing my book, Justice Deferred (indicating), little bit of advertisement here, yeah, or The Age of Lincoln. It's the same methodology, the same kind of sources I would go to understand and make a historical contextual understanding of a time period, a place or a person.

Q. And can you briefly describe the sources that you reviewed?

A. Well, like any historian or social scientist, political scientist, sociologist, I would start, and always do, with the secondary sources, what other scholars have written about the question I'm looking at in here, discrimination in Georgia, particularly as it related to voting.

And from those primary sources, I usually look at their notes and their bibliography and find other sources that you go to, looking at those as well.

In this case, of course, I try to -- with the modern era of the Internet, you're able to look at the Secretary of State's website and things like that. But trying to follow the legislative history of the bills, I looked at all of Georgia's Constitutions, looked at bills. I followed particularly newspapers, because newspapers really give you how the public is viewing it in the context. And as people say about good journalism, it's the first draft of history. And I believe that historians are trained better than any social scientist to evaluate newspapers, to measure them against each other, and to look for the larger truths that are there as you're putting these things together.

I looked at even videos, debates, magazines. As I said, if you want to know what I -- not everything in the footnotes -- I did a lot more than's in the footnotes, but for what is in the report, I would hope I tried to footnote carefully where those quotes or my interpretation or conclusion has come from there so that someone can check it.

Q. Thank you, Dr. Burton.

And you wrote a summary of findings starting on page 2; is that right?

A. I'm sure I did. I mean, I know I did, but I want to make

sure we start on page 2.

Yes.

Q. So at a high level, what did you conclude about the history of voting-related discrimination in Georgia?

A. That it begins as -- well, it begins before the end of slavery, but with the end of the enslaving of people, you have discriminatory actions, particularly against Black people, and it continues.

One of the things that struck me in studying Georgia was the pattern that every time, such as Reconstruction or the People's Party movement, commonly called the Populist Party, P-O-P-U-L-I-S-T, where Black and white farmers came together. Then with the advancements made with both the World War II, the end of the white primary, the Civil Rights Movement, the Voting Rights Act, every time that Black citizens made gains in some way or another or were being successful, that the party in power in the state, whether it's Democrat or Republican, found ways or came up with ways to either disenfranchise, but particularly dilute or in some ways make less effective the franchise of Black citizens than those of white citizens.

And it was striking to me this continued pattern, again, no matter who was in charge, whether it was Democrats or Republicans.

Q. And what did you conclude about racially polarized voting

in Georgia?

A. That it was very, very strong. And when I read some other reports, I should have said -- one of the things I did, of course, is look at other court cases, including previous court cases, expert opinions, and, you know, I read a number of those, including those that specifically looked at racial bloc voting, as it's called and its continued strong pattern of white voters not voting for candidates of choice of the Black citizens and voters and that Black voters tended to vote differently than white voters.

Q. And did you form an opinion as to whether Georgia has used discriminatory voting practices and procedures?

A. Yes.

Q. What did you conclude?

A. That they have consistently, as I pointed out, particularly at certain periods in history, when there have been advances or some changes, used techniques to keep Black people's vote from being as effective as white citizens' votes were.

Q. And do those practices continue to this day?

A. Yes.

Q. What conclusion did you reach about the use of racial appeals in political campaigns in Georgia?

A. Well, it's a long, long lecture, and I'm sure you don't want it or you won't get through next week if I give it to

you.

THE COURT: Summary form.

THE WITNESS: Yes.

It was very, very -- you know, in the early days, even when I started in 1980, there were still direct racial appeals using language that we consider very offensive today.

But there's a section in my report about coded words, what's called coded racial appeals. There's a big social science literature on it now. And that is very common now. Though, I will say in the last -- starting in 2016, last elections, I never thought we would go back to seeing almost overtly racial appeals have been (sic) used in Georgia and the nation as well. So they're still there. And they're very, very important if you want to understand the other part of what I did in my report about the development of the modern parties.

BY MS. RUTAHINDURWA:

Q. And, finally, Dr. Burton, did you reach a conclusion as to the extent to which Black candidates have been elected to public office in Georgia?

A. Yes.

Q. What conclusion did you reach?

A. That Black candidates, normally at the state legislative level in particular, have not been able to win on a congressional level unless it is a majority Black district.

Q. So I believe your report is ordered chronologically; is that right?

A. Yes. Well, except the summary at the first.

Q. Since your report is in the record, we're not going to touch on everything. I'd just like to walk through a couple conclusions that you reach.

Starting on page 11 of your report where you analyze the Reconstruction period after the Civil War, can you briefly explain for the Court the history of discrimination against Black Georgians from this period through the early 1900s?

A. Yes. Well, the first Reconstruction divided usually was called two periods. The first is presidential reconstruction, which was primarily Andrew Johnson. And during that period Georgia wrote its 19 -- excuse me -- 1865 Constitution. And, of course, only white males were enfranchised. But they went even further to write into the Constitution that African-Americans could not be elected to the office.

There's a lot of violence, of course. And then at that time, really, terrorism in Georgia against Black citizens. It's the end of this horrible Civil War. Along with the election of former confederates; particularly in Georgia, Alexander Stephens was one of the two prominent senators elected from Georgia. Then the Congress refuses -- US Congress refuses to seat them.

And in 1867 you get the military acts. And for the first

time Black men are allowed to vote. They're voting on the 1868 election for a constitutional convention, which will include the Fourteenth Amendment, approval of the Fourteenth Amendment. And 25 Black people are elected.

It's not very long after that, though, it's pretty amazing, that white -- some white Republicans join with a Democratic minority of whites, and they expel all of these 25 Black except for four, who are very light-skinned and could almost pass for white.

And that, of course, along with huge violence, Klan activity, murdering of Black people, particularly those involved in politics, some even elected, threats, all of these sorts of things, Congress then really puts in the military.

They come back and they throw out the former white confederates of the Congress, reinstate the Black legislators. But then in 1871, the Republican white governor, Governor Bullock is, in fact, not elected. A Democrat is elected. And that basically ends Reconstruction in Georgia much, much earlier than, say, neighboring South Carolina in 1876, 1878. So that's the end of Reconstruction.

Right then at that time, almost immediately, what you have is, then, all of the local election officials are controlled by the white Democrats. And they do things like close polling places, make these kind of tactical decisions and things to make it more difficult for Blacks to vote.

And they put in a poll tax, which if you know anything about how the former enslaved people, most of them had to work as tenant farmers, sharecroppers, laborers, not having money, except a certain type -- if they got any money at all makes it more difficult to vote when they do the 1877 Constitutional Convention.

In fact, the person who was secretary of the confederacy, like Alexander Stephens, had been the vice president of the confederacy, and it said that the confederacy was based upon white supremacy, was the cornerstone. The chair of the Constitutional Convention was very similar. And they added a cumulative poll tax there.

Q. Thank you, Dr. Burton.

A. And the cumulative poll tax, it's obvious why it makes it so hard. If you haven't voted since 1871, you'd have to pay poll tax every year that basically disfranchised a huge number of people and some whites.

Q. And you also discuss in your report discrimination against Black voters from the early 1900s up until the Voting Rights Act; is that right?

A. Yes.

Q. I'm going to skip forward to save the Court's time and talk about right prior to the Voting Rights Act.

Can you describe how Georgia treated Black voters during the apportionment of its congressional and legislative

1 districts in the years like right before the Voting Rights
2 Act?
3 **A.** Yes. Georgia was notorious -- do you want to point me to
4 the pages, I can summarize it very quickly -- was notorious
5 in terms of -- I believe Fulton County was the most
6 misrepresented, like the largest congressional district, the
7 three counties at that time, I believe, or maybe four, that
8 were part of Fulton County. DeKalb was the same.
9 But basically the vote of a white person in a rural
10 congressional district was two to three times the value of
11 what the vote would come out of the urban areas, which is
12 where most Black people who were -- who were the majority of
13 the Black vote was at the time.
14 And, of course, you had the county unit system until
15 1962, which was basically the same effect that started in
16 1917. So that originally you could have a maximum of three
17 representatives, every county had one. So very small white
18 counties would have way overproportion for the white vote to
19 count more than Black voters with the franchise.
20 **Q.** And the Court has heard testimony earlier about county
21 unit systems being used in Georgia. Can you describe what
22 happened in Georgia after the county unit system was outlawed?
23 **A.** Well, yes. This is really when things like the using
24 at-large elections in the context of strong racial bloc voting
25 that we discussed earlier were used. The majority vote

requirement, which meant that -- and there's some examples in my report of where a Black person would have won as a candidate for mayor or some other areas if they had not put in the majority vote requirement.

And then using the enhancement devices that went with at-large elections, such as staggered terms, numbered post places, those sort of things became very common after the county unit system.

Q. And can you explain how at-large districts impacted Black voters in Georgia?

A. Yes. You know, at 1964, I think it was that year, or maybe the year before, there were only three Black elected officials in Georgia. And as long as whites were not willing to vote for a candidate of choice of the Black person, whether it's Black or white, because what really matters is the race of the voter, not of the candidate, then they could never win in those elections.

However, if you had districts -- because of segregated patterns, many of those State-enforced, like, covenants or red-lining that came from the State that had sort of forced us into this segregated patterns where African-Americans would live in the area together, if they could have voted for a district candidate, they would, or with the majority vote thing, that if they were able to vote all their -- vote for one person, many white -- if several white candidates were

running, this kept them from winning there.

And even in areas which were majority Black, because of the low registration, which relates back to socioeconomic factors, what we call Senate Factor 5, also the -- you know, the continued intimidation, fear that sort of came out of the cultural history of slavery, which you couldn't have had slavery unless you had violence or the threat of violence, and you couldn't have slavery if you didn't have white and Blacks together. You have that whole culture there in terms of the intimidation factor that goes on.

Q. Thank you, Dr. Burton.

Section G of your report starting on page 35 details the Voting Rights Act preclearance requirement. Can you please explain the preclearance requirement?

A. Yes. In Section 4 of the Voting Rights Act, it had a formula that determined which states were covered so that they were required to put any changes that they made that would have affect voting, like closing a poll or changing dates of elections, all those sorts of things, to the Justice Department or a three-judge court, district courts, to get approval.

And, of course, that formula, which was based upon the percentage of the population and the percentage of registered voters, and then of the voters, percent of voters registered and those percentage who voted, that sort of combination, and

also the literacy requirement which Georgia had, if it was used discriminatory, which it was used with discrimination against Black voters as opposed to white, then it was covered. And they had to send -- or they were supposed to send all of their changes to the Justice Department or to announce them so they could, you know, ask for them to be approved.

Q. And do you know how long Georgia was subject to preclearance?

A. Until *Shelby v. Holder* in 2013.

Q. On page 36 of your report you have a table that I've previewed up here on the screen. Can you describe for the Court what this table shows?

A. Yes. It is the percent registered in 1976. The Voting Rights Act is 1965. So you can see after 11 years of the Voting Rights Act the difference in percentage of white and Black registration to vote. So you see after a decade the Voting Rights Act, throughout those covered jurisdictions, these are all of the states that are completely covered by the voting rights.

You see North Carolina is not here; 40 counties were covered, but not all. So this states that all of the counties are -- not just counties, cities, every change is there.

And what you note, of course, is pretty striking, is that Georgia is the second in the amount of difference between

white and Black, but it's also the lowest, in fact, percentage of percent Blacks registered to vote in 1976 of those states that were covered by Section 5 of the Voting Rights Act.

Q. Dr. Burton, why did this disparity in voter registration persist even after the Voting Rights Act was passed?

A. That's another long lecture, but we mentioned part of it, of course, in terms of a historical memory. You know, even today there are people who were -- did not vote until the Voting Rights Act of 1965 and associated going to a courthouse, which had a monument to a confederate soldier, often, say, in white supremacy, it could have been dangerous. So you have that historical memory there as part of it.

But, in fact, you have the socioeconomic status differences as such. I believe I have in my report where the social scientists point out how education, transportation, all of those things, whether you rent or own a home, correlate, in fact, with voting. So those socioeconomic factors make a huge difference.

One that I talk about in my report that came out of my book Justice Deferred is the *Cumming's* case where the Supreme Court approved Augusta closing the only white -- closing the only Black high school, but allowed the keeping of a white high school. And there were very few high schools, even, for Georgia.

So literacy, which, of course, was one of the ways that

Blacks were kept from voting, understanding clause, who's administering, do you understand the Constitution as well as be able to read it or be a good citizen, out of the Felder-Williams Bill that was passed in 1908, all of these things.

You have the Georgia challenge laws. And those challenge laws are so important because they come out of that same context of Blacks having been killed in Reconstruction, of violence, of lynchings, all of these actions that have happened in Georgia, about intimidation, threat and violence. So there's a lot of reasons that this registration is lower, voting.

There was also -- you know, white registration did increase with the Voting Rights Act. It's like when Blacks registered to vote, whites registered to vote as well.

Q. Thank you, Dr. Burton.

A. And there's more, but that...

Q. But we would be here all day.

A. Yes.

Q. Can you tell us why -- on page 37 of your report you discuss Georgia's majority vote law.

A. Right.

Q. Can you tell us why Georgia enacted a majority vote law?

A. Yes. After the county unit system, as I remember -- and most jurisdictions had had plurality voting, but particularly now with Blacks able to vote after the white primary was

ended, both, you know, the Texas case in '44 and then right after there there's a Georgia case specifically that outlaws use of the primary, then this is a way to keep Blacks from winning where they might concentrate their vote on one candidate, and whites would split their vote among others.

There was even the queueing process after this of where they would get whites together and unofficially agree that the others would drop out, I mention in my report.

Q. And fast-forwarding a bit, on page 44 of your report you talk about the Supreme Court's decision in *Shelby County v. Holder*. Why do you discuss that case in your report?

A. Well, it is usually looked at as gutting the -- page 44? Did you say page 44?

Q. Yes. Page 44.

A. Yeah.

-- of gutting the Voting Rights Act. And it struck me so much when Judge Roberts said things are not as they were. It echoed the famous statement back in Missouri in the Dred Scott case, which also echoed what Alito said in Brnovich, things are not as they were in 1982. It seems to be a trope. And historians, as you look at this pattern, to argue that -- he doesn't rule against Section 5, he actually rules against Section 4; that is, that the formula is no longer relevant.

And the minute that happens throughout the South, Texas, Georgia, you begin to see jurisdictions put in laws or put in

restrictions or ways that would disadvantage Black voters where the Justice Department had objected before. And one of the -- one of the most that happens is closing the number of polling places, and particularly in areas which are where Black people are most concentrated.

Q. And did that happen in Georgia?

A. Oh, yes.

Q. You mentioned polling place closures. What effect did these closures have on Black voters in Georgia?

A. Well, it made it harder for them to vote.

I remember one county, it was about 26 miles away was the nearest polling place. When you put that in the context, again, of socioeconomic status, most of -- not all, but a lot of Black voters are paid laborers, work 8:00 to 5:00, and so they have to get off of work and lose -- in fact, if their employer doesn't say that they can do it, they may lose actual income, almost another kind of poll tax, if you want to look at it that way. But it cost them to have to go to a place.

Many -- I mean, the socioeconomic status is African-Americans own fewer cars than white people do. So that can make it more difficult.

While the language is race neutral, the effect is upon a -- one group of people more than others to make it more difficult for them to either register to vote or to vote.

Q. On page 48 of your report you discuss a 2018 assessment

from the U.S. Commission on Civil Rights. Can you describe what your report says about that assessment?

A. Oh, yes. This is -- this is an assessment of the chart that compares the formerly-covered states with non-covered jurisdiction and of the most common uses of -- of discriminatory ways of keeping people from voting or to -- particular minorities, or to make it more difficult for them to vote. And Georgia is the only state that does all five, the voter ID requirement, documentary proofs of citizenship, purges of voters from the rolls -- I can't even read this other one -- cuts to early voting and the moving of or eliminating of polling locations.

Q. And you also have a section in your report discussing Senate Bill 202 starting on page 53; is that right?

A. Page 53. Sorry, yes.

Q. Can you explain why you have a section on SB 202 in your report?

A. As I said, when I looked at this pattern that I had not expected to find in Georgia, the very -- the very kind of things that are being done here reminded me so much of the Felder-Williams Bill, Felder -- the 1908, what they called the disfranchising law, became known as the disfranchising law, but, of course, had the same kind of neutral, wonderful sounding name that SB 202 has, that would not make you think that it was in any way discriminatory.

But it just reminded me because what you have is this huge demographic shift in Georgia. Georgia is barely, barely now a white majority state. And so when I looked at the kind of things that it was doing, it really reminded me of the same pattern you had seen since Reconstruction of as gains are made by Black citizens toward voting or, in fact, winning elections, then these kind of measures are put in. And I list some of them.

You know, it's a complex bill. There are 40 sort of provisions to it. I -- I thought NPR probably did the best job for me to understand it. I read several different things. But they reduced the time available to request an absentee ballot when we know how important, particularly you put it in context, absentee ballots was in the previous election.

Banning state and local governments from sending unsolicited absentee ballots. Increasing identification requirement for absentee ballots. Limiting use of absentee ballot drop boxes, huge, huge effect, particularly in Metro Atlanta, Fulton County, Gwinnett and DeKalb and others, the number that were dropped.

And, of course, the mobile polling places and the -- probably the one most famous, and maybe not as important, but not letting -- when people had to stand in line for five hours not letting people except the poll -- I believe it's the poll workers there to bring water or food.

Q. And on pages 53 or 54, and I pulled up on the screen as well, this is where you discuss the statistics relating to ballot drop boxes; is that right?

A. Yes.

Q. Section D on page 55 of your report talks about the electoral success of Black candidates. You provide a table about winning candidates in the 2020 Georgia House and State Senate races.

Can you explain for the Court what the table shows?

A. It shows that Black people or citizens or candidates are really not elected unless they have Black majority districts or close to it.

Q. And at what percentage of white registered voters in a district does the number go from -- go to zero?

A. Rephrase the question for me again.

Q. Yeah.

So fair to say in the Georgia House of Representatives, if the percentage of white registered voters in a district is over 55 percent, no Black candidate would be elected into that district?

A. That's right. And even from 46.2 to 54.9, you had one Black Democrat elected.

Q. You talk about what is called the, quote, Great White Switch on page 58. Can you describe what the Great White Switch was?

A. Sure. That was a term that Earl and Merle Black, two twin political scientists, one taught right here at Emory University, the other taught at Rice University, talked about in the 1960s the huge shift of African-Americans from the party of Lincoln, the Republican party, to the Democratic party and the shift of white conservatives from the Democratic party to the Republican party.

A lot of people forget, you know, the 1960 election, Daddy King was a Republican and was probably supporting Nixon until the famous phone call came when Martin Luther King, Jr. was in jail, but there was that -- that was a really pivotal moment. And Georgia's critical in that about what happens.

THE COURT: Do you think it was '60 rather than '64?

THE WITNESS: It actually begins a little earlier. You probably won't be going into this, but I think '64 is critical. And I can explain that later, because it really starts in '48 when Strom Thurmond runs on what is commonly called the Dixiecrats. And he takes -- or the party uses the confederate flag commitment to segregation. So that changes everything. And then that plays back into Georgia with the flag wars of 2002, you know.

THE COURT: How did the fact that Truman's decision on integrating the military --

THE WITNESS: Well, that's it. It was '48. And that's why Thurmond and the third party runs. And it's very

interesting because, you know, Thurmond (sic) has it on the left with the Wallace and the progressives, and he has Strom Thurmond on the right, so no one thought he could pull it off.

And it's -- he integrates the military, but he also does that Civil Rights Commission, and that's often overlooked at how critical that was for America to start looking at race and what race was about in American politics. So that really starts it. Then Strom Thurmond is the -- really the first to leave the Democratic party, powerful Democrat, to go into the Republican party.

And then you have the '64 election where you have a major candidate, a non-Southerner, saying, let's go hunting where the ducks are. Let's don't, you know, try to attract Black people, let's don't go for Black voters, we can go for white voters.

And then you have -- after Strom Thurmond had run, it is his campaign manager, Harry Dent, who goes with Richard Nixon. And you have Kevin Phillips with his book on the Southern Strategy, they put it in. And then Nixon says, you know, let's don't go for the Jews or the Blacks. And it's a big shift there. And then Lee Atwater sort of explains the racial appeal and how that all appeals -- appears into it.

For me, it's a sad story for someone who loves Lincoln and that great Republican party that was committed to equal rights. And we forget that the Civil Rights Act, the

Voting Rights Act, the renew- -- were bipartisan. But we have to understand how we got there. And that's what I try to do in my report, is explain it.

And I think Lee Atwater's sort of confession about what he was doing -- and Lee Atwater, of course, had worked with Harry Dent, so you trace it, to me, back really to that '48. Now, Dan Carter would say it's a lot of George Wallace, but I think it really starts with Thurmond and Truman.

THE COURT: So it starts to slide in '48, it goes down, '60, and then '64, all the way to --

THE WITNESS: That's right. And Nixon was -- you know, in the Eisenhower Administration, Nixon was viewed as someone who was good on race issues, perhaps better a lot of people thought at that time, particularly Black people, than Kennedy. So it was a pretty critical moment when Robert Kennedy called Coretta Scott King when Martin Luther King was in jail.

I have a good friend, Reverend Butler, who was in jail with -- here with Martin Luther King, Jr. when he got that phone call, which is a great story, but I can tell it to you later.

THE COURT: I'll take you up on that.

BY MS. RUTAHINDURWA:

Q. So you mentioned Lee Atwater in that conversation with Your Honor. Can you just describe for the Court the Southern

Strategy and the use of racial appeals in political campaigns?

A. Yes. Well, the Southern Strategy was the idea that you would identify the Democratic party as a party of Black people, encouraging white people to leave. I -- I -- you know, we look back at it now, but I think at the time, having lived through it, people didn't quite understand how much of a strategy that became because of a -- it became as a way to move forward.

And, of course, Georgia is central to that, both the Reagan campaign, where Reagan runs against Jimmy Carter and uses these racial appeal -- you know, the racial code words like strapping young Black (sic) and welfare queen. And then Newt Gingrich's new book out by Dana Milbank paints Gingrich as really central to this sort of Southern Strategy.

But it goes further back. The idea of law and order, antibusing for integration purposes. And it's complex. It's not just one thing. People are not just one thing. They have different and varied interests.

Physical conservatism is a good value for a lot of people, but these other things were what was used to come there -- I'm sorry.

THE COURT: No, no. I was listening to you. I've been told by my team that I ask too many questions when I get tired, so I'm going to be quiet and let her finish her questions. They're already sending me notes.

THE WITNESS: I'm sure if they could send me notes, they would me too.

THE COURT: They already said you can talk to him at lunch, Judge.

MS. RUTAHINDURWA: On slide --

THE WITNESS: Now, did you have a question, I think, and I -- you want me to --

BY MS. RUTAHINDURWA:

Q. I'm going to move forward just because I think you answered the bulk of my question, but --

A. I do encourage people to read what Lee Atwater said, what John Ehrlichman said. These things are important, and they're important to understand how we have partisanship and race so messed up now that it's something that breaks my heart.

Q. On page 61 you discussed the Republican Party's nomination of Herschel Walker.

A. Yes.

Q. And on the following page you provide a table, which I put up here on the screen. Can you describe what the table shows?

A. It's the percentage of Black men, Black women, white men, white women breakdown of how they voted. And what I wanted to show was that while Herschel Walker is Black, Ryan Kemp is white, different -- you know, different offices, but the percentage of Black people voting for them are very close,

almost identical. And it's to under -- I keep trying to tell my students and everyone the important thing is the race of the voter, not of the candidate. It is the candidate of choice. And that's very stark. And it reinforces to me just how partisanship and race have become so intertwined in Georgia.

Q. On page 68 of your report you note Congressman Doug Collins' remarks about Senator Warnock during the 2020 Senate race. Can you describe what he said?

A. Well, I can quote it. That's the easiest thing to do. I don't like to describe it. I don't want to use words like this.

"There's no such thing as a pro choice pastor. What you have is a lie from the bed of hell. It's time to send it back to Ebenezer Baptist Church."

And "it," of course, is horrible. It also -- this election it's sort of sad that there had been a good relationship between the Republican party and Ebenezer Baptist Church for years. I don't understand what they're doing here, but they did it. And it works to show the power of these words.

And, you know, "it" goes back to this horrible trope, the kind of tropes I talked about throughout the report, that somehow Black people are not human or bestiality or, you know, the sentence of Noah's son, you know, who was the bad guy, or

the Cane/Able division, or the worse, the bestiality, when we -- you know, we know, as my sainted mother used to -- well, we know there's no such thing as race. There's no gene for race. Or as my mother taught me my whole life, all people are created in the image of God, and yet the courts have somehow defined race and made it something that creates racism.

So no offense, Judge, but I think the courts are -- have to be looked at very carefully in how they have made something that's not existent into a way to discriminate.

Q. And this is an example that you have in your report about --

A. That's one of the many examples.

Q. -- recent racial appeals?

A. Yes.

MS. RUTAHINDURWA: Your Honor, the Pendergrass and Grant plaintiffs move to admit Exhibit 14 into evidence. It's an article that Dr. Burton relied upon in his expert reports. It's cited in footnotes 241 and 243 of his December 2022 reports.

THE COURT: Ms. LaRoss, any objections?

MS. LAROSS: I am looking in my --

THE COURT: All right.

Will you repeat that again?

MS. RUTAHINDURWA: Yep. So it's Exhibit 14 in both Grant -- I'll have to check on that one. I believe it's

Exhibit 14 for both Grant and Pendergrass.

MS. LAROSS: What is the -- you think it's 14 --

THE COURT: While they're doing this -- well, I guess they have to listen to my question. They gave me permission to ask one question.

MS. RUTAHINDURWA: Apologies, Your Honor. It's Pendergrass Exhibit 14 and Grant Exhibit 15 for the record.

MS. LAROSS: I have found it. Thank you. That made the difference, those numbers.

Okay. So we do object to the exhibit based that it's hearsay under Federal 802. And object to the exhibit on the basis of relevance as well. And those are our objections.

THE COURT: Can one of you-all find it for me? I need to look at it to tell whether it's hearsay or not.

Which book -- I've got like ten books up here. Which book is it in? Can we just take a look at what you have?

MS. RUTAHINDURWA: Your Honor, if I may describe it. Exhibit 14 is an article titled It Was Too Easy For Brian Kemp's Last-Minute Dog Whistle About Stacey Abrams to Go Viral.

THE COURT: Who wrote the article?

MS. RUTAHINDURWA: The article was written by -- I do not have that information available in front of me, but it was published in Slate. And the plaintiffs' position is that the article's not hearsay because Your Honor --

THE COURT: Why is it not hearsay?

MS. RUTAHINDURWA: As Your Honor ruled on the July 17th, 2023, order, denying the parties' cross-motions for summary judgment, the evidence is admissible; whereas here it is of a variety generally relied upon in the field for expert testimony.

THE COURT: I ruled on this particular --

MS. RUTAHINDURWA: And Dr. Burton relies on this in the footnotes.

THE COURT: Did I rule on this particular exhibit?

MS. RUTAHINDURWA: I don't believe so, Your Honor. In general, you provided the opinion that when experts rely on articles for their expert opinions, it is not hearsay evidence. And as we noted, this article was relied upon on the expert report.

THE WITNESS: I do have the author there. It's April Glaser.

THE COURT: How much did you rely on this article in forming your opinions?

THE WITNESS: It's everything that comes together. It's just one part of everything. In this case, it was looking at modern racial appeals, covert dog whistles and things like that. It was one part of several examples.

MS. LAROSS: Your Honor --

THE COURT: I think it's relevant, Ms. LaRoss. The

question I've got is still the hearsay aspect of it.

MS. LAROSS: Yeah. Well, I think it's more than just hearsay, because it's hearsay within hearsay, is what they're looking to is to look at the statements that are contained within the article. And Dr. Burton, has, you know, already testified about racial appeals. And so at any rate it is hearsay within hearsay.

THE COURT: What about the argument that the witness, who has been qualified as an expert, relied on it in forming his opinion?

MS. LAROSS: Yeah. Well, again, we'll -- we would have to fall back on Rule 403, that it's more prejudicial than probative. And I lodge the objection for the record, Your Honor.

THE COURT: I will note your objection. I will allow it in over objection, give it whatever weight it needs to be given.

I guess the question I have, Doctor, is that what do you base -- in reading this article, what -- define what category you put it in. How do you use it to base your opinion on?

THE WITNESS: Well, one of the things about the articles is -- you know, there was another one about, like, robocalls, and very few people received a robocall, the famous one about someone pretending to be Oprah Winfrey. But then it

goes in the newspapers and people read about it.

So it's part of what's going on. I mean, this is how these ideas and things get disseminated. So I think it's important. And it's not just one piece, but you put that together over and over again with other racial appeals that have gone on, I think it's important.

Now, again, I would argue it's not one thing. There's not one thing there that comes to my opinion. I sort of go with the null hypothesis to start, there is no racial discrimination in voting in Georgia. And then I keep finding evidence that there is, and I put it together and I have to say, well, there is racial discrimination in voting in the laws in Georgia. And use of racial appeals becomes very important since this becomes something important to a political party as a way to motivate voters.

So, to me, I see it as important as part of the larger context of others as well.

THE COURT: So an article like this article, It Was Too Easy for Brian Kemp's Last-Minute Dog Whistle for Stacey Abrams to Go Viral, you see it as a racial appeal to motivate whites to vote against Stacey Abrams?

THE WITNESS: I do. And it seems to me it fits in with what we think of now as those dog whistles, coded racial appeals. They're subtle, but if you'll read what Lee Atwater said, that's what is done now.

THE COURT: Tell me again how these racial appeals, just one aspect of the racial history -- you explained it a second ago, just explain it again. How do these racial appeals work into the racial discrimination aspect?

THE WITNESS: To the racial discrimination? Well, what -- where these appeals are going, of course, is to white voters who have stereotypical ideas, many who are, in fact, white rurals like I grew up with, my family, my family in Georgia.

THE COURT: Weren't they already probably more inclined to vote for Brian Kemp over Stacey Abrams?

THE WITNESS: I would think so.

THE COURT: So how does this --

THE WITNESS: It certainly reinforces it, doesn't it? It gives them a reason to not like her, to think that she is not qualified. And it reinforces those negative stereotypes of African-Americans that go back, not just into Reconstruction, but into slavery itself, to reenforce that that is a reason that you don't want someone.

It's not a pretty picture. It's not something that's pleasant. I wish it weren't there. But it is and it affects people. It has been very effective in making the political parties into what they are today, particularly in the American South and the old confederacy has helped to explain partisanship and race and how that happened.

And we look back in my report and it explains that it was deliberate strategy that started pretty early, as I try to lay it out, and it continues today in more subtle forms. As Lee Atwater says, you want to be as subtle but trigger these emotions that I wish we didn't have as people, but it has worked pretty well.

THE COURT: Ms. LaRoss, I see your objection -- I mean, at first I was inclined to sustain your objection. I think it's relevant, as I start making my analysis at the end of all this, but I'll note your objection. Because I see where your point is coming from, because as I'm looking at it, it is quoting a lot of different people in this article. I think it is relevant.

MS. LAROSS: Again, it's, you know, the same -- because it's the effect of the racial appeal. And this is not about the effect of the racial appeal. This is just the racial appeal. And I'm not sure this -- the Slate is as widely publicized, but --

THE COURT: The last -- excuse me for interrupting you.

The last answer he gave me addressed the concern I had when I asked how does this affect the racial appeal. And the answer was, it reinforces stereotypes against someone who probably wasn't going to vote for Stacey Abrams in the first place but motivates a belief that these individuals have.

Now, I'm not saying I believe it or don't believe it, but he answered the question I had. Same question you had.

Go ahead.

MS. LAROSS: I understand. And if you're going to note our objection for the record, I appreciate it.

THE COURT: I'll tell you what I'll do. I won't let it in until you cross him. I'll hold it until you do cross-examination. And if you can convince me on cross-examination not to let it in, I won't. If you can't, then I will. What about that?

MS. LAROSS: Okay. Thank you, Your Honor.

THE COURT: All right.

MS. RUTAHINDURWA: Thank you, Your Honor.

BY MS. RUTAHINDURWA:

Q. I have just one more question for you, Dr. Burton.

On page 74 of your report you talk about positions that Georgia's Democratic and Republican Parties take on issues that are linked to race, And you provide a table. Can you describe for the Court your analysis of this issue?

A. Yes. And I have used this in many of my reports and testimony that's been credited by the courts over the years that the NAACP has been doing this. It's like a report card on how different legislators, Congress -- in Congress vote on issues that the NAACP, which is probably the largest and most important group representing particularly African-Americans,

but other minorities now as well, that they see issues are important to them.

Specific questions, I really wasn't looking at, but they can be everything from how they voted on a Supreme Court nominee to bread-and-butter issues and how the NAACP has decided that these are pro or anti the concerns of African-Americans.

THE COURT: Now, here's a question I have about this. You look at this, you would say, okay, Rick Allen is 90 percent in voting on pro civil rights matters. But if you go back to the mid '50s, Lyndon Johnson was the Senate majority leader; right?

THE WITNESS: Yes, sir.

THE COURT: And he made sure that the civil rights matters that came forth in the '50s were either voted down or watered down so much they were irrelevant; right?

THE WITNESS: I'm not sure they were irrelevant.

THE COURT: But he watered it down where it became irrelevant.

THE WITNESS: That's right.

THE COURT: They passed -- in '56, they did pass --

THE WITNESS: '57, 1957 --

THE COURT: They passed the civil rights matter, but it was watered down, so it really wasn't that --

THE WITNESS: That's right. That's why you had to

have voting rights.

THE COURT: He becomes President in '63. He passes the 1964 Civil Rights Act. He passes the 1965 Voter Rights Act. He passes the 1965 House Act.

So if you look at him in the '50s, he's probably going to fall at the bottom of pro civil rights matters. So how much of this is politics and how much of this is real?

THE WITNESS: Well, I think what we have is real. Now, that doesn't mean they agree with it. They're voting that way, and that is that record. So I am reporting the record of how they voted. And when you look at it by party, you see that one party is highly supporting what the NAACP sees as the issues that are most important to minorities, particularly African-Americans. And another party is not getting a very good grade on how they're voting for them.

So that's what it tells me, whatever their motivation, you know, and that's not something you can -- that's easy to get at unless they tell us. I mean, we're trained as historians, probably better than anybody else, to look at motivation, to come to conclusions of it. But you have a good point.

I will defend Johnson a little bit, but this is not here or there. No. No. Not -- in his earlier thing. It's in the real -- you know, it's why I understand why the Republican party now is doing some of the things it's doing.

They want to win. And that is -- so there's -- what's wrong with that; right? But how you do it is another issue, and what you're using to motivate people to come out to vote to become Republicans.

I would like for us -- there was a time when Republicans I loved and admired went for our better angels as opposed to our demons. And there's still some Republicans there who go for the better angels. But on these terms here, all you see is the voting record. And that's what's going to matter in Congress, isn't it?

Not that they may feel bad about voting against something, but they did it. So maybe Lyndon Johnson was making up for his guilt. We could give him that maybe.

THE COURT: Let me say this. Let me say this. My question is not to cast Lyndon Johnson in a negative light. I think he was a great President. You know, anybody in my office knows that. It's just questions I have to ask because I've got to formulate some opinions.

And I'm just saying to the State, the question I'm asking is not saying I'm agreeing or disagreeing with what this says on here, because, again, I'm trying to formulate decision-making.

So, again, I think Lyndon Johnson was a great President. And so the question I'm asking is not to cast him in a negative light, but it's just trying to, you know, filter

out where we're at, how we get there, what is said.

THE WITNESS: What would have happened to him in Georgia might be relevant to what would happen to certain candidates -- excuse me -- what would have happened to him in Texas if he had taken other stands in terms of getting re-elected. And you might ask the same thing that's relevant to these people in Georgia as a way to explain.

THE COURT: My staff has told me I've used up all my questions for today. So go ahead. I won't interrupt again.

BY MS. RUTAHINDURWA:

Q. Based on that exchange, I just have one more question.

What impact or message would this scorecard have on Black voters under -- who are living under Republican members as their representatives?

A. I think I understood, but rephrase that question.

Q. What impact would this scorecard have or what message would the fact that Republican members of Georgia's congressional delegation have low scorecards have on Black voters in the districts -- in the districts in which Republican members control those districts?

A. I don't want to speculate, because I'm a historian and not a prophet. You know, if I did, I'd make a lot more money.

MS. LAROSS: Your Honor, I would object. That question does call for speculation and the witness has acknowledged that that's the whole --

THE COURT: I'll sustain that objection.

THE WITNESS: I can frame up what I --

MS. RUTAHINDURWA: I can rephrase the question --

THE WITNESS: Okay.

MS. RUTAHINDURWA: -- as that was sustained.

BY MS. RUTAHINDURWA:

Q. As a historian, how do Black voters react to having representatives who are not their representatives of choice?

MS. LAROSS: Your Honor, I still -- I have the same objection.

THE COURT: Yeah. It's kind of --

MS. RUTAHINDURWA: That's fine. I can strike that, Your Honor.

No further questions at this time.

THE COURT: Ms. LaRoss, before you begin your cross, we started back at 1:45. It's 3:20 now. I think we probably need to take a break and then you can start your cross.

While on the break, though, you may want to take a look, Ms. LaRoss, at a case called *Fox v. General Motors, LLC*, it came out of the Northern District of Georgia, Judge Cohen, issued. It's 17-CV-209 and Federal Rule --

MS. LAROSS: I'm sorry, Your Honor. Say again.

THE COURT: It's Fox, F-O-X, v. General Motors, LLC. It's an opinion written by Judge Mark Cohen. It is 17-CV-209. And it's 2019 WL 3483171 at 26. It's a 2019 case.

You may also want to look at Federal Rules of Civil Procedure 803.13, acceptance of treaties and publications. And this is in regard to this Slate article.

MS. LAROSS: Thank you, Your Honor.

THE COURT: It is 3:25. We'll start back at 3:40. Thank you, all.

(After a recess, proceedings were continued at 3:45 p.m. as follows:)

THE COURT: Thank you. You can begin your cross.

MS. LAKIN: One item before cross begins.

The Alpha Phi Alpha plaintiffs would like to incorporate the testimony of Dr. Burton into the Alpha Phi Alpha record on the same basis as Dr. Jones' testimony was incorporated this morning.

MR. TYSON: And, Your Honor, on behalf of the defendants, while we have concerns about us continuing to cross pieces of this, to be consistent on the defendants' side, we're not going to oppose the incorporation as long as Dr. Burton's expert report doesn't come into Alpha Phi Alpha and the entirety of his oral testimony is incorporated.

THE COURT: All right. I'm going to do this, but at the end of all the evidence, to make sure we have all this lined up the right way, we'll need to go over it again.

All right. I will allow that.

MR. TYSON: All right. Thank you, Your Honor.

MS. LAROSS: May I proceed, Your Honor?

THE COURT: You may proceed, yes, ma'am.

MS. LAROSS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. LAROSS:

Q. Dr. Burton, I do have a couple of questions for you.

And you had held up your book there, Justice Deferred: Race in the Supreme Court. That's your book; correct?

A. I'm co-author of the book.

Q. Okay. Great.

And in the first page of the introduction you state that race is a fiction; correct?

A. Yes.

Q. And in -- on page --

A. Well, I didn't look to see if it was the first page. I'm going to take you at your word without me confirming that I did it.

Q. We can if you'd like, if you'd feel more comfortable.

I have a -- I brought a copy just in case you hadn't, so...

A. And my grandchildren thank you.

Is it note to the reader? I don't have a -- is it page 1 or -- what did you say it was?

Q. Can I grab the book?

A. Sure. I believe it's probably --

MS. LAROSS: May I approach, Your Honor?

Oh, no. Not the --

THE WITNESS: I thought you said page 1, I'm sorry.

THE COURT: I think your wife is getting a kick out of this.

MS. LAROSS: Really.

BY MS. LAROSS:

Q. What I'm referring to is this (indicating).

A. Yes, ma'am. Right. Okay.

Q. So we agree on the -- that it appears on the first page of your introduction?

A. The first page of the introduction, yes, which is page 1.

Q. Page 1. Thank you, Dr. Burton.

Let's take a look at your report on page 61. And I'm referring to the end of the first paragraph there. And you opine that, quote, "One cannot as a scientific matter separate partisanship from race in Georgia"; correct?

A. You're on page 61?

Q. Yes, sir.

A. Whereabouts?

Q. And then where the -- the first half paragraph there, the last sentence.

A. To be sure?

Q. Above that. "One cannot as a scientific matter separate partisanship from race in Georgia elections."

A. Yes.
Q. And you agree with that statement?
A. I do. And I would say in most of the South, and that would go back to Reconstruction as well.
Q. Yeah, that you just can't separate race from partisanship. Okay.
And you believe that the fact that Senator Warnock, as the candidate of preferred Black voters, that he succeeded in re-election may reflect an increase in the voting strength of Black voters; correct?
A. He won. And it was an extraordinary election, but he barely, barely won.
Which election are you talking about? Both of them or --
Q. Yeah. And the second, because, you know, a second win, as University of Georgia knows, makes a difference, just to have two wins.
Okay. So then in your report on page -- if you could look at 57 with me. And counsel talked about the tables that are on page 56, and I wanted to ask you a question about the tables on page 57.
A. Okay.
Q. And they're entitled Successive Candidates for Statewide Office in the South 1989 through 2018.
Do you see what I'm referring to there?
A. I do. 2018; 1989 through 2018.

Q. Did I say that incorrectly? 1989 through 2018?
A. Yes.
Q. And as I would understand it, the sentence above that table indicates that you are relying on a publication in footnote 198 for the -- for that table; is that correct?
A. That's correct. Charles Bullock, Susan MacManus, Jeremy Mayer and Mark Rozell, African-American Statewide Elections in the South (sic).
Q. Okay. And in that -- the -- Dr. Bullock and the other authors, their book, do you recall when you looked at and relied on their table, that they indicated that the dataset that they were using, that they had reviewed and you relied on, all but five of the Black candidates were Democrats?
Do you recall that in their book?
A. Now that you say it, it sounds familiar, but I actually -- it was so long ago, I don't recall, but I believe you -- it sounds very familiar.
Q. Okay. Good. And the authors also indicate that six of the 11 Democratic successes occurred in Georgia. Does that sound about -- that would be correct, too?
A. That sounds right. But, again, I promise you if I remembered -- I'm not disputing you, but I don't remember, but it sounds right.
Q. Okay. All right. And in your deposition you explained to us that there's a huge demographic shift in Georgia as the

only deep south state where there is a large increase in the Black population; correct?

A. Yes.

Q. And in that same -- Dr. Bullock's book, he and his co-authors define growth states in the South as those states that are experiencing significant economic, demographic, cultural and political change. And they would include Georgia as a growth state. Would you agree with that?

A. Did you say they did or they would?

Q. They did, that it -- that they concluded that.

A. That is my memory, but it's by memory.

Q. Okay. Great.

A. From a couple years ago.

Q. Okay. And also in that article the authors say that the growth states are states in the South in which Black statewide candidates are now competitive.

Do you remember that in that book?

A. You said article first. Did you mean the book?

Q. Yeah. I mean, the book --

A. Yes. Yes. I --

Q. Yeah. That you would confirm that?

A. Yeah. But that they said that is what you asked me; right? Not that I agreed?

Q. Yeah.

A. Go ahead.

Q. Okay. And the authors also state that the -- and have concluded in reviewing Georgia elections that the future electoral prospects of African-American statewide nominees in growth states such as Georgia are indeed promising.

Do you remember that conclusion by those authors?

A. I do remember that conclusion actually.

Q. And let me ask you some questions now concerning the history of redistricting. So the redistricting plans drawn --

A. Can I just state something --

Q. Sure.

A. -- from -- do you mind, to go back?

You know, I agree with what they said, but what I showed also is historically with Georgia, back from Reconstruction, that when these things happen, then you get more legislation from whichever party is in power that works to sort of disfranchise or at least dilute or make the vote count less. So I don't want to -- while I agree with what -- I don't want to say that that is what is happening.

And in my study of the recent election of how close they were, it doesn't take much to swing an election. It's very competitive. So that's -- I just want to make sure that you're -- that I'm not saying -- while I agree with what they said, I'm not saying that is what is happening. We'll have to see what will continue.

Q. Yeah. And that you have that reservation, but you agree

with that conclusion?

A. I do.

Q. Okay. Thank you.

And so we're going to move on to redistricting, the history of redistricting, sir.

And in -- the redistricting plans that were drawn in 1971, 1981, 1991 and 2001 were drawn by Democratic majority legislatures; correct?

A. Yes.

Q. And the State had at least one redistricting plan objected to by the Department of Justice under preclearance in -- for 1971, 1981, 1991 and 2001; correct?

A. Yes.

Q. And all three of the Republican-drawn maps in 2011 were precleared by the Department of Justice on the first attempt; correct?

A. Yes. Much quicker than people thought because there was, at that time, Jason Carter, Stacey Abrams who were working to oppose those. And it got approved before they could get going almost.

Q. And the 2001 State Senate and State House plans were -- sorry.

The 2001 State Senate and State House plans were found unconstitutional by a three-judge court; correct?

A. Did you say 2001?

Q. 2001.

A. You went back? Yeah, okay. Yes.

Q. Okay. And the 2004 election in which Republicans took control of the state legislature was run on maps drawn by the federal court; correct?

A. Yes.

Q. And the only cases about redistricting in the 2011 cycle never found any of the -- sorry.

A. Can I just -- I'm having a little trouble. Could you move your microphone a little bit closer to you. I'll move mine, too. I'm sorry.

Q. And that's better. I don't want to shout at you, so...

A. That's all right, you can shout. I have five daughters; I'm used to it.

Q. Yeah. It can be that way, I suppose.

All right. So the only cases about redistricting in 2011 were never found to be illegal; correct?

A. No.

Q. Is that not --

A. Well, ruling -- the ruling, yeah.

Q. Yeah. That they weren't found illegal?

A. No. No, they were -- they weren't challenged, I don't believe, were they?

Q. Okay. And then with respect to just, you know, your historical review in Georgia, now you're not saying that the

Republicans in Georgia are racist, are you?

A. I have a statement in this report -- it better be there, because I put it there, that no. And I don't have to or anyone else. In fact, one of the things that bothers me the most as a historian is this: I think that many of the people who are doing things are not racist and they know better. As opposed to, say, Tom Watson, who, in 1895, said these horrible things, but I think he might have believed them.

But this is one of the things that bothers me the most, that the -- good people, maybe that's just politics, but they're using racial appeals.

So, no, I don't have to, that's not part of what an expert does. But race is -- plays a part in the elections and in the racial appeals. So race is there, but I am never saying that an individual is racist, but often people use coded words particularly in racial appeals to motivate people to go to their worst instincts or a way to vote.

Q. Okay. So you're saying -- you're not saying that all Republicans in Georgia are racist --

A. No.

Q. -- you're just pointing to some --

A. I'm not saying all Democrats are racist either. But, you know, we can make our own decision. Doesn't matter what I think anyway, but, no, I do not believe that.

Q. Yeah. I just want to make sure that the record is clear

there.

And you're not saying that the Republican-controlled legislature of Georgia is racist?

A. No. I am not saying that the legislature is -- I am saying that some of the legislation that comes out has a disparity -- it affects Black citizens differently than white citizens to the disadvantage of Black citizens, but I'm not saying that they are racist. But the effect has a disparate impact among whites and Blacks and other minorities.

Q. Okay. And one of those laws would be SB 202?

A. Not all parts of SB 202, but some that I listed in this report I think have -- and from my historical investigation, has a disparate impact, you know. Simple things like socioeconomic disparities, people having Internet or not or Internet connections. If they have a car, you know. You get automatic registration, which is a great thing that Georgia did, but if you're in Downtown Atlanta and don't have a car, you're not doing that. And the larger proportion of people who do that, who don't have the car, live downtown in Fulton County, Gwinnett, Cobb, are African-American or minorities.

So it has -- like older laws did since the Fifteenth Amendment, a neutral law, by wording, has a disparate effect. That's what I'm saying or trying to say.

Q. Okay. But you would agree that no court has found that any part of SB 202 was enacted with intentional racial

discrimination?

A. You know, I'm not -- in this case I'm not doing SB 202. But my understanding is it is being litigated or will be litigated. I know the Department of Justice can no longer object, but the Department of Justice is suing on SB 202, saying it has both intent and effect, but no court has found.

But as a historian, as we established, I am not an attorney and not a law professor. I'm looking at this as a historian and a scholar to get you the evidence I've found so that you folks can fight it out.

Q. And as you mentioned, you are serving as an expert against the State of Georgia in the SB 202 litigation; correct?

A. I'll bet so. But, the honest truth, I don't know who I am serving as an expert against. I was hired to do a report. And I'd have been just as happy if the State of Georgia offered me to do a report for them as who I'm doing it for on this thing.

So I don't know if I'm against the State of Georgia. I assume it would be. I'm not sure who -- you know, I know there are plaintiffs, and that's probably the State of Georgia.

Q. Yeah. And you were hired by the plaintiffs; is that fair?

A. That's right, yes.

Q. And not the State of Georgia?
A. Right.
Q. Okay.
A. I just don't see it in those terms. I'm sure you're absolutely right.
Q. Thank you.
And you'd agree that SB 202 expands the number of days required for early voting; correct?
A. Yes.
Q. And your -- and you would also agree that no excuse absentee voting is still part of the election law in Georgia; correct?
A. No excuse absentee -- yes.
Q. And in your report on pages 53 through 54, footnotes 183, 185, 187 and -- through 189, your opinions concerning SB 202 are primarily based on newspaper articles, six articles by Stephen Fowler and Mark Niesse; is that correct?
A. That -- I haven't looked, but I know I spent a lot of time looking at particularly the NPR page, explaining -- as you know, SB 202 is a very complicated piece of legislation. And since then you've also had the Bluestein's book come out that I have studied.
Q. Okay. But I just want to get back to my question, sir.
A. Okay. I haven't looked from what you said.
Q. Okay.

A. So which notes?
Q. Okay. Yeah. I might have said them too fast. 183.
A. All right. I'm going to mark them, if that's okay, in this one. Okay.
Q. Footnote 183 on page 53. Footnote 185 --
A. Not 184?
Q. Well, 184, yeah, that's -- well, 184.
A. Okay.
Q. 185. And then there's 187 through 189. Those are -- those all include the -- or those are all articles in the Atlanta Journal; correct?
A. I think I disagree with you.
Q. Okay.
A. 188 is NPR. Stephen Fowler, NPR, What Does Georgia's New Voting Law Do?
And these are footnotes to specific things, but I'm looking at a lot of other things as well.
Q. Okay. Well, I was referring to those specific footnotes.
A. Okay.
Q. That's fine. Let me -- I'll ask my next question then.
A. And 184 is also to the NPR website. So two of those, the first two, I haven't looked at the --
Q. NPR, in addition to the other articles, then?
A. Okay. I haven't looked at the other ones.
Q. Okay.

A. 185, right?

Q. Yes, sir.

A. And that is the Atlanta Journal-Constitution newspaper article.

And then you skip 186.

187 is -- I'm coming up with 187 is a Georgia Government Administration absentee ballot application. Democratic counties hire --

Q. That's what --

A. Oh, it's got two things there, hasn't it? That's what it is. So it's -- there's the example of the ballot in there. Atlanta Journal-Constitution. Okay.

Q. Okay. Thank you, sir.

And in preparing your report, you never interviewed any Georgia voters concerning SB 202; correct?

A. What do you mean by "interview"? Talking to is not the same thing. I think I told you, I was on a panel with Otis -- I'm blanking on the name of the longtime mayor, Black mayor of Savannah. We did a panel at a university on voting in Georgia, and he discussed and I listened and then I -- you know, SB 202.

I've got cousins who I see in Georgia and they talked about a lot of things. I try not to discuss politics with them, but I heard, you know.

So I did not officially go out and do oral history or

interviews. Is that fair enough?

Q. That is my question, yes.

A. But, you know, I listened about it.

Q. You were with your cousins and then you were on a panel where there was discussion?

A. Yeah. And I was on a panel of Social Science History Association.

Oh, and at the political science -- Midwestern Political Science Association, which were all talking about voting rights, and SB 202 was often discussed there. But these were scholars and scholarly discussions.

Q. Yeah. And not specifically doing -- you know, setting up a bunch of interviews --

A. No.

Q. -- with random Georgia voters --

A. No.

Q. -- to find out how they feel about SB 202?

A. No.

Q. Okay. And you never spoke to any Georgia legislators about the legislation; correct?

A. Not knowingly.

Q. Not knowingly. Okay.

A. I wouldn't know.

Q. Fair enough. I think you might know.

And you never intentionally interviewed any of the

Georgia policymakers concerning SB 202; correct?
A. No.
Q. And you would agree that Georgia experienced record turnout for the midterm election in the 2022 election cycle after SB 202 was in effect; correct?
A. I believe you are correct. I'm not looking at the numbers. I know that it was. I know that people were really motivated on both sides. 202 (sic) was bigger than 2020, is that what you're saying?
Q. I'm sorry, 202 --
A. Or that the 2022 had larger turnout than 2020, you're saying?
Q. That it had --
A. Than the Presidential election? Is that what you told me?
Q. Yeah. That they had record -- experienced record turnout for a midterm election --
A. Midterm. Okay. Yeah. Okay. Midterm election. All right. I missed the midterm part in there.
Q. Okay. So we're on the same page?
A. Yeah.
Q. Okay. That --
A. But not a record turnout.
Q. Not record turnout in general, but record turnout for a midterm election?

A. Yes.
Q. Okay. And in formulating your opinions in this case, you looked at all the sources you possibly can and then -- but you determined both the circumstantial and contextual evidence; correct? Is that part of your methodology?
A. What was the second -- the contextual and the -- what was the second part?
Q. Sure. I can split it up.
That in formulating your opinions you look at all the -- sources you possibly can; correct?
A. Yes, or at least so that you feel confident in your conclusions, you know. It could go on forever. But, yes.
Q. Okay. And then you examine both circumstantial and the contextual evidence?
A. Yes.
Q. Okay. You also look at all the secondary sources that you can find or are aware of. And then you look at the primary sources, including statements that people make; correct? Does that sound right?
A. That's part of it, yes. It's larger than that, but yes.
Q. And reviewing all the sources that you possibly can, you particularly examined both the circumstantial and contextual evidence that is going on at the time in which a particular decision is being made, as well as any direct evidence of the reason for the decision?

MS. RUTAHINDURWA: Objection, Your Honor. It mischaracterizes his testimony. He just said he doesn't review all the sources he possibly can, just the sources -- I'll stop there.

THE COURT: I think he did say something along those lines, but I can't remember exactly. So why don't you ask it another way. How many sources that he reviewed, ask it again.

MS. LAROSS: Yeah. Just the -- okay.

BY MS. LAROSS:

Q. So the point here is just that you review all the sources that you can, which is what we talked about earlier?

A. In the time frame allowed.

Q. In the time frame allowed, yep.

And then you particularly examine the circumstantial and contextual evidence of what's going on when you're considering a decision being made or evaluating a certain decision that's being made by a legislature or by an individual. Would that be correct?

A. Yes, I believe so.

Q. And then --

A. I understand the question. Correct.

Q. Sure. Okay. And then you would also look at the direct evidence for the reason for the decision?

A. Yeah, whether it's a tenuous reason or, you know, historic -- put into the context of history, what reasons were

given by the policymakers.

Q. Sure. And then, you know, gathering as much information concerning each incident that you comment on in your report is essential for the accuracy of your analysis; correct?

A. Repeat that question, please.

Q. Sure. Gathering as much information as you can concerning each incident that you comment on in your report is essential to the accuracy of your analysis; correct?

A. I don't think that has to actually be true. You try to, but as I said, you can go on forever. And it's not one particular incident that I am interested in. I'd like to, if you had all the time in the world, but you put all of this together in a sort of totality of the circumstances to see which way all evidence -- in this case, all evidence pointed. So, you know, I don't think I agree with you.

Q. Okay. So if we look at page 45 of your report, there's a -- you have a heading that's entitled State-sponsored Voter Investigations.

Do you see where I am? Page 45, sir.

A. I'm on page 45.

Q. Okay. And so look at the top of the page where there's a -- the heading says State-sponsored Voter Investigations.

A. Yes.

Q. And the first instance that you talk about in that first paragraph concerns Mayor Nancy Dennard; correct?

A. Yes.
Q. And when you formulated your opinions in this case, you were not aware that a white candidate named Judge Carlton Vines was also prosecuted for the same conduct at almost the exact same time; correct?
A. No. No, I was not aware at that time. I have become aware since.
Q. You have what?
A. Become aware since. I think you told me. And then I --
Q. Yes. And that was -- so -- and that fact wasn't uncovered in your research, but it was something that I told you at your deposition; correct?
A. Right.
Q. And another investigation you discuss in your report on page 46 was by then Secretary of State Kemp and the investigation of the New Georgia Project. Do you see where I'm referring there, sir?
A. I see New Georgia Project like the third line down. Around that time, Kemp's office wants to criminal (sic) into the New Georgia Project, yes.
Q. Okay. And you mentioned in your report that the New Georgia Project was cleared of wrongdoing; correct?
A. Yes.
Q. And the sources that you cite there is an article in the New Republic and a WSB News report at footnote 159; correct?

A. Yes.

Q. And you were not aware that the State Election Board's investigation revealed that the New Georgia Project's contractors had violated election law and those claims against the contractors were turned over to the Attorney General for prosecution; correct?

A. I knew it at some point. I'm not sure if I knew it when I wrote this report.

Q. Okay. So when you wrote the report, you didn't look at the State Election Board documentation concerning the hearings and the transcripts on the investigation; correct?

A. Not at the time when I was writing the report.

Q. And so you'd agree that there was a little bit more to the story than the news stories you relied on indicated; correct?

A. I would agree that what I have in the report is true and accurate.

Q. But it didn't include -- but you didn't look at the primary sources or the -- of the State Election Board transcripts from those hearings; correct?

A. No, I did not.

Q. Let's go ahead and look at some recent elections in Georgia after the enactment of SB 202.

In 2022, Senator Warnock was, of course, re-elected to his US Senate seat in a statewide election; correct?

A. Yes.

Q. And Senator Warnock, of course, is the pastor of Ebenezer Baptist Church?

A. Yes.

Q. And in the general election in 2022, Georgia voters also re-elected Governor Brian Kemp; correct?

A. Yes.

Q. And both candidates faced Black candidates in the general election and won; correct?

A. Yes.

Q. And you'd agree that Senator Warnock, of course, defeated Herschel Walker in their runoff; correct?

A. Yes. Barely.

Q. And you're aware that their runoff in Georgia was the first race in Georgia history where two Black men competed for a US Senate seat?

A. Yes.

Q. You have some discussion in your report, and I believe it's on page 54, and -- well, let me just -- concerning Fulton County.

Well, wait a second. So your report -- let me do it this way.

So in your report on page 54 you talk about SB 202, the first full paragraph there, and point out that SB 202 gives State Election Board and, by extension, Georgia General

Assembly more power to intervene in county election boards; correct?

A. Yes.

Q. And that's a criticism of SB 202; right?

A. That's a stated fact. I don't think --

Q. Okay. You're not criticizing it one way or another, you're just saying that provision is there?

A. Well, that's what I'm doing as a historian.

Q. Very good.

A. I'm saying that this is some of the changes that are made. And when you put all those changes together, they point in one direction.

Q. And so -- but you'd agree that no county board of election has been suspended under that provision since the passage of SB 202; correct?

A. Not Fulton County. But later on, and maybe I'm getting it confused, there were several counties where they reorganized. I remember the one where you had three Black women that were replaced by three white women. So maybe I'm confusing the question. This is by memory. I'd have to go look. Spalding County, maybe?

And I think there were like a number of counties who reorganzied. And basically you -- where -- I remember one where it had always been bipartisan, which I thought was terrific. It is now partisan. And that a number of Democrats

and Black people had been replaced, the majority of those.

But is that the same thing you're asking or is that a --

Q. No, it's not actually.

A. Okay. I get them confused.

Q. So let me do this, then.

A. Okay.

Q. Let's go ahead and move to page 74 of your report.

And let me know when you're there, sir.

A. Okay, I'm here.

Q. Okay. And at the top of the page, the first incomplete paragraph there, the second sentence reads, "As discussed above, the intense focus on Fulton County is not random" --

A. I think I'm in the wrong place. "The drum beat of allegations"?

Q. Okay. Look at the sentence just before that.

A. Oh, before that. Not the full paragraph.

Q. Not the full paragraph, just the partial paragraph.

A. Oh, I misunderstood the question.

"As discussed above, the intense focus on Fulton County is not random. Reference to this large urban majority-minority county in Georgia has been used as a coded racial appeal in the election context." Yes.

Q. And one of the things that was focusing -- the focus on Fulton County was the performance review in Fulton County; correct? The performance review or the --

A. I remember the performance review and the result, but I'm wondering how it fits in with what are you asking me about this sentence I have related to that before I answer.

Q. Sure.

A. So I need to look back. Am I talking about the Fulton County review?

Q. Right.

A. Yeah.

Q. And I think that you're talk -- you were talking about racial appeals.

A. Yeah. I mean, it was so clear. Look at -- I mean, this is national news. Ruby Freeman, her daughter Shaye Moss, threatening to hang them, like referring back to the violence of lynching, these kind of threats you have to hide. Is that -- I don't understand your --

Q. Here's my point. So your conclusion is about that -- saying that the focus on Fulton County is not random, that reference to the large urban majority-minority county in Georgia has been used as a coded racial appeal in the election context?

A. Yes.

Q. And I'm -- and referring to -- and you determined that the focus on Fulton County was a racial appeal, not based on Fulton County's past history of election administration; correct?

A. Well, what I -- what I was talking about, and I think I have a section in there, particularly President Trump started out, when he was running in the primary against Ted Cruz and others, saying that urban areas where Black people live are using the same trope they used to explain how they disfranchised and overthrew the interracial government of Reconstruction, that voter fraud, and particularly pointing out those counties. And then they really focused in, not just Donald Trump and Rudy Giuliani, but local people, in particular on Fulton County, which is coincidentally where a huge number of Black voters are.

And that became one of those code words, as I explained the development -- how code words work. They would say Fulton County with the idea that it's voter fraud just because Black people are there. And that has been an untrue trope for a long time, that -- I have quotes going back that read the purchasable negro. This is what the 1908 Felden-Williams Bill that's called disfranchisement, that's when the challenge law was put in, right after that, it becomes part of the 2010 code. And they say it's to keep Blacks from voting because they are subject to fraud and corruption and ballots can be purged.

So that's what I was saying. This became a code word just like that. Instead of saying it's Black people, you say Fulton County.

Is that what you're asking me?

Q. Not quite.

A. Okay.

Q. But I understand -- I understand your answer there.

So what I want to focus with you on is you had mentioned that you were aware of the --

A. Yeah.

Q. -- performance review panel that was convened and developed with the assistance from The Carter Center and along with Fulton County; correct?

A. Yes.

Q. You'll have to say verbally.

A. Yes. I thought I did. I probably wasn't...

Q. Okay. And the review panel found that there had been a longstanding history of administration -- election administration issues in Fulton County that goes back decades. Would that surprise you?

A. No, it wouldn't surprise me they found that. But the kind of terms that they put it in in the legislature when they were talking about it fits into the pattern I'm talking about about racial coded words and when they do it, things like that.

Q. Okay. All right. So let's go ahead and we're going to look at on the screen the -- you had talked about the NAACP's civil rights report. And I'm showing you what's been marked

Defendant's Trial Exhibit 107, the NAACP's Civil Rights Federal Legislative Report Card from 2017 to 2018.

Do you see that there?

A. Yes.

Q. And let's take a look -- and this is something that you relied on in your report; correct?

A. And I've relied on it in many reports that have been credited by the courts. Not this one, but the ones for those states or issues.

Q. Okay. And --

MS. LAROSS: At this time, Your Honor, I would move to admit Defendant's Trial Exhibit 107.

THE COURT: Any objections?

MS. RUTAHINDURWA: No objection.

THE COURT: 107 is admitted without objection.

MS. LAROSS: Thank you, Your Honor.

(Defendant's Exhibit 107 is admitted and marked into evidence.)

BY MS. LAROSS:

Q. And let's scroll down here to vote descriptions, and particular votes that the report card relies on. And there we have the note number 1, do you see that there? Betsy DeVos' confirmation as US Secretary of Education?

A. I do.

Q. And then number 3 was Tom Price's confirmation as US

Secretary of Health and Human Services; correct?

A. Yes.

Q. And number 5 was Mick Mulvaney's confirmation as director of the US Office of Management and Budget?

A. Yes.

Q. And also number 6 is Scott Pruitt's confirmation as administrator of the US Environmental Protection Agency?

A. Yes.

Q. And then if we go down to number 11, was Neil Gorsuch's confirmation as an associate justice to the United States Supreme Court; is that correct?

A. Yes.

Q. And number 12 there, the 12th vote that they considered, is Repeal and Replace the Affordable Care Act; correct?

A. Yes.

Q. And then on to number 18, was a tax overhaul; correct?

A. Yes.

Q. And then they also included in number 22 Stuart Kyle Duncan to serve as a judge on the United States Court of Appeals for the 5th Circuit.

Do you see that there?

A. Yes.

MS. LAROSS: Okay. And we can take that exhibit down.

Your Honor, I'd like to just check with co-counsel.

THE COURT: Yes.

MS. LAROSS: Lastly, Your Honor, I think you had asked us to address the Slate article. And we would ask that you note our objection for the record. We have reviewed the case law that you presented to us.

THE COURT: Based on the case law I see there and what I said earlier, I'm going to admit it over objection. I note your objection for the record.

(Pendergrass Exhibit 14 and Grant Exhibit 15 were admitted and marked into evidence)

MS. LAROSS: Thank you, Your Honor.

Those are all the questions I have, Dr. Burton. Thank you.

THE COURT: Redirect?

MS. RUTAHINDURWA: Yes, Your Honor.

REDIRECT EXAMINATION

BY MS. RUTAHINDURWA:

Q. Dr. Burton, earlier on in the cross-examination Ms. LaRoss asked or stated that in your book Justice Deferred you state that race is a fiction.

Do you remember that?

A. I do.

Q. Can you explain what you mean by race is a fiction?

A. Yes, I'm happy to. There's no such thing as race. It's just a social construct. It's sort of a -- almost a literary

term, but it's become overused. But it's made up. It's a genome project. Everything that -- genetics all say that there's no such thing but the human race, one race.

And as I said before, my sacred mother taught me from day one that, from my faith perspective, that all people are created in the image of God. So there is no such thing as race. But there is a thing called racism.

And I was surprised when I was doing the book that I co-authored with Armand Derfner, Justice Deferred, how much the courts created this real-life thing called racism by singling out a group of people and then making laws early on that explicitly made them legally different by the law. And even making white people behave differently, that they could not teach Black people to read or write. They could not marry someone they loved if they were Black. It's not a different race, but that law had the effect of creating racism.

And I would never deny that racism exists and that that is part of our culture and has been part of sort of the original sin of a country I love. That we have come so far and I had hoped that sort of moved beyond that until the last few years, it seems like, that we are really, once again, dealing with these issues that tear at our heart of who we are as Americans, and particularly democracy itself, I think, is being challenged. And race, the word "race" and groups of people being used to tear up the greatest experiment the

world's ever seen.

Is that what you were asking? I don't know what you were asking.

Q. Yes.

And as a historian, you agree that race has been used in -- in -- throughout history and particularly with respect to voting laws and discrimination against Black voters?

A. Yes.

Q. You had an exchange about why race -- about race and party being inextricably linked.

Do you remember that?

A. Yes.

Q. Can you explain why race and party can't be separated in Georgia?

A. Well, you know, the statistical term, when I talk statistics, was multicollinearity -- I can spell it for you later, okay -- which means that if you look at race and partisanship, that statistically they're going to correlate so much with party that you cannot really separate them. I mean, they can be separate things, but the way that they are -- have developed.

And I think part of that is because one group of a political party decided to use race and to use coded words, in particular, to get the former confederacy, to white people, desert the Democratic party and become part of the Republican

party by appealing to the -- not everything was race. I mean, physical conservatism, a lot of people, you know, look at it that way.

So you can't really separate it out. There are a lot of issues that go into who someone chooses to vote for, what political party they are a part of. But race was used so that now we find ourselves at a critical moment in politics where it is almost impossible to distinguish race from partisanship, particularly on how people vote. As the scorecard from the NAACP dramatically shows, I think, from looking at -- as I said, it's not the candidate's race, but the race of the voter and how they vote for political parties.

As Charles Bullock said, you know, the percentage of Blacks who vote for the Democratic party identify as Democrat, the percent of whites who identify with the Republican Party and vote for Republican party, all those things have come together.

Q. Has the State of Georgia ever asked you to provide a historical analysis of voting discrimination?

A. No. I wish they would.

Q. Dr. Burton, you were asked about your use of news articles as sources you considered in writing your report.

Do you recall that?

A. I do.

Q. As a historian are you trained to evaluate reports and

news articles to assess their accuracy?

A. Historians are trained better than any single discipline to evaluate, to contextualize, to look at newspaper sources to be able to use, whether it's in court or in writing any book, how to evaluate it, evaluate the biases of that article and still try to find out what is best.

And what's really good about them is the public opinion, like that Slate article explaining how that meme went -- that trope got distributed on Facebook and got, you know, all over the place right before the election.

Q. Did you only cite to sources you found to be reliable in your report?

A. I hope that I did, that I evaluated each one. And, again, it's not just one thing. It's the totality of all these things. And as I said, that pattern that begins with reconstruction of advancement in terms of Blacks and then laws coming in to stop it.

Advancement by Blacks, laws that -- they never give up. I mean, it amazes me why Black people love democracy in the US so much because of all the times of that discrimination, but they never give up and keep fighting for the equal rights -- they're only asking for the equal rights and opportunities that whites have.

Even though whites fantasize that other things are happening, like the Black Panther Party and the meanness in

the Slate thing that was objected to, all they ever have asked for historically is to be equal American citizens with the same rights.

Q. Dr. Burton, you had an exchange about SB 202.

Do you remember that?

A. Yes.

Q. And in that exchange you talked about how it's currently in litigation; is that right?

A. I couldn't understand what you said. Currently what?

Q. Currently being litigated.

A. Yes. I mean, to the best of my knowledge. I just -- I'm not following it very closely.

Q. Are you aware of laws passed that were upheld by courts as lawful and later found to be unlawful or discriminatory?

A. I bet I've got four or 500 in Justice Deferred. But just think about it, Judge Taney in Dred Scott and African-Americans had no rights till the Fourteenth Amendment. Probably the most famous is separate but equal, that *Briggs v. Elliott*, which I'd rather say than *Brown v. Board*, undid.

And look at the white primary. At least three times in Texas it was held as constitutional until it's not. As we learn more -- what I hope I'm doing here is giving you the evidence to make the decisions about the injustice and the unfairness of laws, yes.

And as a historian, while it's nice that in 1990 they found historical discrimination in Georgia is widespread and all of that, it wouldn't matter if I found it as a historian. It's good to have that as another piece of evidence, that the courts say that, but I'm looking at it as a historian to tell the story, to find the evidence, and to see where it points.

Q. You had a discussion about the redistricting process by Democrats.

Do you recall that?

A. I do.

Q. Is the discrimination that you discuss in your report based on party?

A. That's a tricky question. Parties in power were the ones who were -- whether it was the Democrats, as I said, or Republicans, and I said it wouldn't matter to me if it was the martians; it doesn't matter at all -- is the party who has the power and they want to retain that power. And they take the opportunities they see to disadvantage Black citizens and voters in terms of their opportunity to elect a candidate of choice equally as a white voter would have.

Q. You talked about the fact that you did not interview legislators about SB 202 prior to writing your report.

Do you recall that?

A. Yes.

Q. Do you need to interview legislators in order to assess

the impact of such legislation?

A. No. There's a big debate about oral history, and particularly politicians. As we were talking about Lyndon Johnson, if you ask Lyndon Johnson, I'm sure he remembered differently what he was doing before '57 and '64 and things.

But, you know, I will grant to the opposing counsel, if I had all the time in the world, I'd love to talk and see what they had to say. But I don't think the evidence I found was strong enough. And that's what most scholars rely on, instead of how people say what they were doing at the time.

But I feel very confident in my report. I feel it's the truth. And I tried my best. My integrity, everything I've ever stood for in my life is my integrity. I did the best I could in that length of time. And I feel good about the integrity of the report and my reputation going with it.

Q. You spoke about Reverend Warnock or Senator Warnock winning elections in recent history.

Do you recall that?

A. I do.

Q. Does the success of a Black-preferred candidate control your analysis on the use and effect of the racial appeals?

A. Well, he barely won. And Stacey Abrams lost both times. I don't quite understand the question.

Does the success of Warnock -- and, you know, we all know, too, that these kind of campaigns inspire more people to

come out sometimes because they're told they're going to be stopped from voting.

I guess I don't understand your question. Try it again. I think I'm just tired, but go ahead, ask me one more time.

Q. Does the success of Senator Warnock change your analysis and conclusion about the use of racial appeals in Georgia?

A. No.

Q. And Ms. LaRoss showed you some of the specific voting things on the NAACP scorecard.

Do you remember that?

A. Yes.

Q. As a historian, are environmental issues important to Black voters?

A. Oh, absolutely. We talked about how segregation occurred and why you could have districts and, you know. I mean, historically you could point out and even, you know, the number of times Black people are near the waste dump or nuclear things over and over, yes. Environmental issues are very important.

Q. Is access to adequate healthcare historically important to Black voters?

A. Yes.

Q. There was a conversation about how Black voter turnout was high in 2020. Were there different voting procedures used during the 2020 election?

A. Different from when?

Q. From prior elections.

A. Yes. You had the polling places that were open where people could get into and vote not locked down, not restricted hours. You had the -- I think it was called the mobile bus, mobile voting. So, yes, it was different because you had COVID at the time that allowed people -- so you got huge absentee turnout from the minority, particularly African-American community. And absentee voting had always been something that was used more by Republicans than Democrats and particularly minorities. So it was a huge shift.

Q. And did these new voting procedures impact Black voter turnout?

A. Yes.

Q. Do you know if these procedures have remained in place in later elections?

A. By later elections, do you mean in the 2021 or just later elections?

Q. Since 2020, the election.

A. Since SB 202 you have reduced -- not just reduced, significantly reduced the number of polling -- I'm blanking on the name, getting tired here -- of the mobile polling places that you can go and cast your ballot. I think that the buses for the mobile units are no longer available at all.

Q. Are you referring to ballot drop boxes?

A. Ballot drop boxes, yes. Sorry. Thank you.

MS. RUTAHINDURWA: Okay. I don't have any more questions. Thank you, Dr. Burton.

THE WITNESS: Thank you.

THE COURT: Recross?

MS. LAROSS: I have no recross, Your Honor.

THE COURT: All right. Thank you, Doctor. You're excused.

THE WITNESS: Thank you.

THE COURT: Have a great rest of the day.

THE WITNESS: Let's hope the traffic's not too bad down 85.

THE COURT: It's 4:45 in Atlanta. It's going to be bad. Thank you, sir.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

MR. TYSON: And, Your Honor, just as we're wrapping up with Dr. Burton, I wanted to make sure, so our record is clear, I believe there was one exhibit that was admitted with Dr. Jones' testimony, Defendant's Exhibit 59, that I believe --

THE COURT: It was admitted.

MR. TYSON: And it should go with, I believe, the Grant/Pendergrass designation of that cross as part of it --

THE COURT: Yes.

MR. TYSON: -- that case?

And then similarly for Defendant's Exhibit 107 admitted with Dr. Burton, that would also, again, go into Alpha, according to what we agreed. I just wanted to make sure everybody was in agreement about that.

THE COURT: Is that you-all's understanding? That's my understanding.

MS. RUTAHINDURWA: That's my understanding as well, Your Honor.

MS. LAKIN: Your Honor, that's my understanding as well, though there was the additional exhibit of Pendergrass 14 and Grant 15 that came in during the direct, not the report. But I move to admit that particular exhibit into the Alpha Phi Alpha case as well.

THE COURT: It came in through Grant/Pendergrass and you want to make it part of Alpha Phi Alpha?

MS. LAKIN: Correct.

MR. TYSON: Right. And then did we object to that exhibit? Whatever our objection was, if we had one, we'd have the same objection go over. If we didn't have one, we'll just have it do that.

THE COURT: I think you had an objection. You had an objection, and I allowed it in over objection.

MR. TYSON: That's right. Over objection, you're

right, Your Honor.

THE COURT: Okay. It is 4:50.

And does Alpha have any other evidence to present regarding *Gingle*s 1, *Gingle*s 2 or totality?

MS. LAKIN: No, Your Honor.

THE COURT: Does Pendergrass/Grant have any other evidence regarding *Gingle*s 1, *Gingle*s 2 or totality?

MS. KHANNA: No, Your Honor.

THE COURT: So all the plaintiffs rest at this point?

MS. KHANNA: Yes, Your Honor. And we can go through the exhibits and make sure we've got everything squared away.

THE COURT: Mr. Tyson wanted to make a 52(c) motion. It's 4:50. Do you still want to go forward with it or do it in the morning?

MR. TYSON: Your Honor, I know we're all tired after a long series of days. I'm happy to do whatever you would prefer.

THE COURT: How long do you think your argument would be?

MR. TYSON: I'm thinking it's less than 30 minutes. I don't want to belabor the points, but I do want to walk through the evidence that we have.

THE COURT: And they'll probably have about a 30-minute response, or 20 minutes each. That's going to put us probably a little after 6:00.

How long does Alpha think you'll have for a response?

MR. SAVITZKY: 15 minutes, 20 minutes, something like that.

MS. KHANNA: 10 to 15 minutes, Your Honor.

THE COURT: I don't mind staying. If you-all want to do it, we can stay and do it today. We can take a 10-minute break. You do your 30 minutes and each plaintiff has got 15 each, then that puts us about right at 6:00.

MR. TYSON: I'm fine to proceed that way, Your Honor.

THE COURT: We'll take a 10-minute break right here.

(After a recess, the proceedings continued at 4:48 p.m. as follows:)

MS. KHANNA: Your Honor, just before plaintiffs officially rest, I want to make sure that the stipulations are admitted into evidence.

THE COURT: I think they are but --

MR. TYSON: And, Your Honor, those are the facts we stipulated to, so we are fine with all the stipulations with the pretrial order coming into evidence.

THE COURT: Okay. All stipulations as stated in the pretrial order are part of the admitted evidence.

MS. KHANNA: Thank you, Your Honor.

THE COURT: All right. You may proceed.

MR. TYSON: Thank you, Your Honor.

So on behalf of the Secretary of State in all three

cases and the State Election Board members in the Pendergrass and Grant cases, we would move for a motion -- for judgment on partial findings in favor of the defendants in those cases.

I do have some slides, Your Honor, if we could turn the screen on.

THE COURT: All right.

MR. TYSON: I completed them today, so I will get printed copies to everybody tomorrow, if that works.

THE COURT: There we go.

MR. TYSON: There we go. Thank you.

So, Your Honor, as you're aware, once a party has been fully heard under 52(c), the Court can enter judgment against that party on a claim or defense that's under the controlling law can only be maintained or defeated with a favorable ruling (sic). And so, obviously, in Section 2 we have a lot of required elements we have to look at.

This is also a time where every point the Court has considered plaintiffs' evidence up until now, it has not been able to weigh the evidence. And we've now reached the point in the case plaintiffs' evidence is closed. This Court can now weigh the plaintiffs' evidence. There's no longer a deferential view to the plaintiffs' evidence. Instead the Court can weigh it.

And there's no -- as the Court says, it's not viewed in the light most favorable to plaintiffs at this point, the

United States v. the $242,000 case from the 11th Circuit. And the Court can weigh and consider the issues.

So, Your Honor, what I'd like to do today -- I know you're well familiar with the law on all these points. What I want to do is just walk through what the plaintiffs have presented to you at the conclusion of their case.

THE COURT: All right.

MR. TYSON: And I think we have to do that, just as a reminder in light of *DeGrandy*, we have this question of equal opportunity as the focus of the inquiry. And so the plaintiffs have to come forward with evidence on that front.

And, again, we're getting -- trying to get to the question of whether past and present realities result in a lack of an equal opportunity for minorities to participate in the political process on account of race. And so the Court can now weigh these factors, but I think it must also do so in a case I know the Court knows well also, *League of Women Voters.* And in that case, the district court found that separating race from politics only works in science fiction regarding white and Black voters in Florida.

And the 11th Circuit said that it -- the Supreme Court warns courts not to conflate discrimination on the basis of party affiliation with discrimination on the basis of race.

And so as the 11th Circuit also said, a connection between race and partisan voting patterns is not enough to

transform evidence of partisan purpose into evidence of racially discriminatory intent.

And as we've heard repeatedly from the plaintiffs along the way, the evidence that they've presented to the Court shows that they do not believe race and politics can be disentangled. They have not provided a method for the Court to do that. They have not provided a way for the Court to evaluate whether we have discrimination on account of partisan affiliation or discrimination on account of race. And that is fatal to their claims at this point, because before we get into all the *Gingles* factors and the other pieces, we have to look at is there a lack of an equal opportunity on account of race, not on account of partisanship or being a bad candidate.

And Your Honor has honed in on this with each expert. We've had these conversations. Dr. Jones explained that it was a partisanship issue that includes the desire to have the body of the party be white voters. She concluded that statement by saying, So it's not just race, it's partisanship. And that's exactly what the plaintiffs have presented.

You asked Dr. Jones a question and she stated the parties are racially polarized. In her view the Republican Party is the white party, the Democratic party is the more diverse party. It's very stark. She's not separating race and politics in her analysis.

In addition to that, we have just the other evidence

around on these points. We'll get into some of these pieces. But Dr. Palmer in the Grant and Pendergrass case does not believe race and politics can be separated in his racial polarization analysis.

Dr. Collingwood never looked at partisanship in terms of voting patterns.

Dr. Burton just testified that race and politics are so intertwined, he felt that was a terrible thing, but he didn't see a way to separate them either.

And so at the conclusion of what the plaintiffs have presented to you, they have presented to you evidence of partisan polarization in Georgia and racial polarization in Georgia. They have not provided you with a method to try to disentangle those two. And as a result, the Court cannot presume race when partisan affiliation equally is present in that exact situation.

So also I wanted to address one other point. The Court talked with Dr. Ward about does proportionality show there's no discrimination. And for the defendants, we wouldn't say that proportionality demonstrates discrimination is gone. What proportionality demonstrates is that whatever discrimination is occurring in Georgia is not interacting with the election system to prevent equal opportunity. And that's really the question under Section 2. That even if there's some discrimination that still exists in the system, the

system is not interacting with that discrimination in such a way that there is a lack of success for both Black-preferred candidates and Black candidates.

And as we'll look at the factors, we kind of go back and forth in the totality, but I think that's an important point as well of what proportionality demonstrates.

THE COURT: But how do I determine whether or not the discrimination -- let's take an example. We have five Black congressional representatives. How can I determine whether or not discrimination has prevented it from being six or seven rather than five?

MR. TYSON: And, Your Honor, I think the answer to that is, number one, you look at the districts those members are currently elected from. And for Congresswoman McBath, that's a 29 percent AP Black VAP district. She was elected from a 15 percent district originally.

You look at Senator Warnock's success. The state is 31 percent Black on voting age population.

And so in terms of reviewing that, you look at those and say, okay, we see success in Georgia of Black-preferred candidates. If we see success that is up to and in this case of the members of Congress exceeding the percentage of the Black voting age population, then we can say the system must be equally open.

And we can see in Georgia it's not just majority

Black districts that are returning those results on the congressional level. It's districts that are also varying percentages. And we see Senator Warnock succeeding statewide. So I think that's what the Court has to look at on this question of equal openness.

There is not evidence before you that we have kind of a lack of opportunity unrelated to partisanship in those various districts. Congresswoman McBath, one of the witnesses testified, had changed districts because she was drawn out of her district. In reality, she was drawn into a district that was dramatically more Republican. I think she still lives in the 6th District as it's drawn, but she chose to run in a different district because the 6th, as configured, was no longer a majority Democratic district.

Now, I know I'm getting a little bit beyond in terms of the plaintiffs' evidence itself. And I don't want to -- this is a 52(c) motion, I don't want to get outside of that. But to answer the Court's question, I think those are the questions you have to look at and consider.

So what I'd like to do, then, is just walk through each piece of the *Gingles* factors and the evidence the Court has heard on this front, starting with Mr. Cooper in the Alpha Phi Alpha case.

And I think one thing that's consistent across the map drawer explanations is the relative lack of explanation

for these districts apart from race.

So Mr. Cooper used "packed" and "unpacked" in his report. He kind of ran away from that terminology later on.

He testified he relied on the shared experience of all Black Americans as a community of interest. That's something *LULAC* says you can't do.

He used racial identification to identify precincts.

When he talked about certain areas of the state, he talked about them in racial terms. Peachtree City, for example, is a predominantly white area.

He didn't have access to socioeconomic data.

The splits he made of counties, as we talked through his testimony there, showed that he would consistently exclude more heavily white population and include more heavily Black population.

In the process, he also couldn't identify in a lot of places a consistent pattern. So sometimes he followed census features or city boundaries. Sometimes he followed county commission boundaries. Sometimes he followed a community he thought was there in some way. But the only consistent feature he used was the racial makeup of the districts he was creating.

And he also split more counties in the areas where he created new majority Black districts. He then unsplit counties in other parts of the state to make the overall

metrics look more similar. A little bit different than Mr. Esselstyn, who did admit that he split more counties overall in his drawing in the process.

But time and time again when Mr. Cooper was asked why did you draw this district in this way, the opportunity to create a new majority Black district was a consistent feature of what he had to say of why he did it. He also often relied on associations as loose as everyone's part of Metro Atlanta, or the counties are close together, or these cities are similar to each other, even while admitting that he was connecting more urban populations with more rural populations in order to create his new majority Black districts.

And I kept looking at that thinking if the legislature was challenged on a map like this and came in with explanations that thin for what they were doing, I think they would rightly be found to be racial gerrymanders because they couldn't explain the districts for nonracial reasons, which then pushes us back to the question of, well, does Section 2 require that?

We know that there can be a compelling interest in complying with Section 2, which assume there is. So how thin does Section 2 require districts to get? How long does it require to get?

How many more districts was the State supposed to have drawn? Both -- Mr. Cooper testified that he can draw

more majority Black districts than the one challenged in this case. Is there a Section 2 obligation on the State to go beyond what's being challenged here?

These are all the types of questions that point back to the contrast between the State's efforts to comply with Section 2 and what Mr. Cooper did when he was drawing the illustrative plans for House and Senate.

So looking next at some of the specific districts, I just note the specific things -- I won't go through all of this, your Honor. But District 17, Mr. Cooper testified, goes for more heavily Black areas in DeKalb to heavily white areas. The shared interest he could identify was being in Metro Atlanta.

Similarly, District 28 includes heavily Black areas to rural white areas. His shared interest he identified was the shared history of Black individuals and people being geographically close to one another in the configuration of the district. Again, not reasons that go with why these districts were created. They were created to be new majority Black districts.

As we talked about in opening, having that goal is okay. And I think that's what *Davis v. Chiles* says. You can have the goal to add more majority Black districts, but you've got to do it in a way that the legislature would have been able to do it as well. And that's where these districts fail.

District 23 likewise requires using Black population from former District 22. It requires moving District 22 outside of Richmond County. Mr. Cooper had to move it into McDuffie and Warren and Glascock.

The split he made of Wilkes County is a racial split. And his connections he could identify were primarily the Black Belt and transportation corridors, even though he couldn't say for certain which districts were in -- which counties were in and out of the Black Belt as he considered that.

On the House we had the same pattern. 69, 77, 74 all run for more heavily Black areas in the north parts of those districts down into more white and more rural areas in the south part of those districts.

Mr. Cooper said he was relying on a belief that geographic closeness was a connection and not much more beyond that. He couldn't identify the shared interest between the piece of Peachtree City in District 69 and the part of South Fulton in the north part of that same district.

District 117 splits both Locust Grove and Griffin. And, again, it's much smaller in footprint. But Mr. Cooper's only identified basis was geographic proximity and the chance to create a majority Black district.

District 133 in the east adds six county splits in this area Mr. Cooper testified. It includes racial splits of counties where Mr. Cooper is including heavily black

populations in either existing majority Black districts or District 133 in order to create this district this way.

And in District 145 he's basically slicing up the Black population in Bibb County into three districts and then has to move it out to more rural areas on this side of 145 in order to make the district work.

So, again, Mr. Cooper shows a focus on using black Black populations strategically and lengthening districts in order to create new majority Black districts. And we would submit that while Section 2 requires at least some element of that, it doesn't require the additional steps Mr. Cooper has taken in these plans.

Oh, last one. I'm sorry. 171 also adds a county split in Lee, runs all the way down to Thomas County, makes a racial split of Thomas County. Mr. Cooper's primary community of interest was the highway. He didn't find the Corridor Management Plan until after he drew the district. He agreed he connected two different Black populations through intervening white population to create this district.

So, again, Mr. Cooper shows that the focus on race and adding county splits to serve his racial goals in this area.

Finishing out Alpha on *Gingles* 2 and 3, Dr. Handley also didn't review any sort of causal element. She did not rely -- although she ran primary in that election analysis,

she didn't rely on it for conclusions about racially polarized voting, that was based on the general's only.

She believes that there's this connection between race and party, race explains party in part, again a linking of race and party that is not separable in the plaintiffs' experts minds.

And then Dr. Handley also found, she said that race impacts who you're going to vote for, what party you're going to support, again connecting race and party in a way that are inseparable in this situation.

Moving to the Grant case, Mr. Esselstyn doesn't offer an opinion about whether the current districts are packed or not. And I think that's important to recognize in terms of what the Court is approaching.

He admits that he uses more county splits, more precinct splits, higher deviations than the enacted House and Senate plans in drawing his illustrative plans.

Mr. Esselstyn testified he relied on racial information he had on his screen, at least at times, to inform decisions about what portions of districts went in and out of what he was drawing.

He couldn't rely on politics like the State did when it created various county splits because he didn't have that data.

And, ultimately, although talking about the Black

Belt, Mr. Esselstyn said he did not rely on counties being in or out of the Black Belt when he was creating these districts.

So, again, when you look at the totality of what Mr. Esselstyn talked about, you see, again, an inability to explain why he's connected various places.

Mr. Esselstyn also multiple times mentioned that he wasn't trying to connect communities of interest. If he found a community of interest, he said he would try to keep it whole. But if, for example, he didn't feel the need to say there was some community of interest between a portion of a district he included in the north part and a portion he included in the south part, he didn't view that as part of his job.

And I think Mr. Esselstyn's direct testimony really gets to one of -- the way that the plaintiffs view this case as a checklist, that as long as Mr. Esselstyn can draw the district and he can perform okay on the compactness scores, there's really no other explanation needed in the plaintiffs' mind that this is a district that just should have been drawn. And if the legislature had to draw that district, it had to do more explaining, there had to be some reasoning behind why it placed the lines the places that it did.

So looking at Mr. Esselstyn's district, District 23, he agreed made changes to District 22.

Mr. Esselstyn testified that there were

geographically separate Black communities in the various counties he placed within District 23.

Mr. Esselstyn testified that he connected Clayton and Henry in District 25 because they were next to each other.

And he referenced this trial and error process but then kind of backed away from what an error was in that scenario but clearly drawing with a racial goal looking for a configuration that would result in a majority Black district.

District 28, Mr. Esselstyn testified, connected more rural areas with more urban areas. He couldn't identify communities of interest in that district. The only thing that Mr. Esselstyn could consistently identify was that -- the racial makeup of the districts that he created. And he didn't address any of the other surrounding districts in that process.

Similarly on the House, Mr. Esselstyn's conclusion about where the geographically compact Black population in District 64 was was because he was able to draw a district over 50 percent Black voting age population, that's why he believed there was a geographically compact community there.

He didn't look at the racial splits of the counties in reaching that conclusion.

Mr. Esselstyn did not offer an opinion about whether portions of Fayette County he included in District 74 were rural or not. Instead he just relied on that he could draw a

majority Black district.

Same thing with District 117, Mr. Esselstyn was unable to identify any community that he kept whole.

Rounding out with the Macon area, Mr. Esselstyn connected Bibb, Twiggs, Wilkinson and Baldwin on the House plan. He divided them on the Senate plan. And had different reasons for why he did that.

He was unable to identify a clear process for why he created 149.

And then all of these Macon districts were made extremely close to 50 percent in the process.

Finally on to Pendergrass for *Gingles* 1.

Mr. Cooper originally proposed a new majority Black district in East Georgia in 2018 in a different case. In this case he's now proposing one in Atlanta.

And in his drawing process he focused on districts that were not currently electing Black Democrats.

Every district Mr. Cooper testified that touched District 7 was changed except for District 7.

Mr. Cooper and several other witnesses testified that some of the Black population that's located in illustrative District 6 is already in enacted District 13, meaning that population is already in a majority Black district. So is District 6 truly a new district or is it a reconfiguration of District 13? I think that's a question the Court has to

evaluate and look at.

Mr. Cooper in both Alpha and in Pendergrass would use features of Maptitude that showed him where additional -- where precincts that had more than 30 percent Black population were located, so he would then know where he needed to draw as he worked through his maps.

His illustrative District 6 splits the City of Tyrone.

Mr. Cooper testified the only portion of six that is majority Black of any of these four counties included in it is the Fulton portion.

The geographically compact Black community Mr. Cooper could identify was just the boundaries of District 6.

Overall district-by-district compactness scores, as Mr. Cooper testified, were lower than the enacted plan even though the average was similar.

And then we did a little bit of math at the end that this district is so close to 50 percent that a move of approximately 1,300 people would drop it below 50 percent on Black voting age population. So is this a district required by Section 2?

And in creating District 6 Mr. Cooper altered a number of other districts that did the exact same things he criticized the enacted plan for doing, connecting parts of urban and suburban Metro Atlanta with more rural populations

across the state.

Moving to *Gingles* 2 and 3, Dr. Palmer didn't even look at primaries. He doesn't believe race and party can be separated.

As I already said, Dr. Burton testified he doesn't believe race and party can be separated.

Dr. Collingwood didn't look at those issues either.

So, Your Honor, that gets us to the totality piece of the puzzle. And this is where we've had a lot of discussion the past few days. I'm just going to hit some high points here on these.

On the history of discrimination we've had a lot of older history. The primary recent history we've had is SB 202. I'd be happy to stipulate on behalf of the State up until 1990 we had historical discrimination in Georgia. But looking at SB 202 there's no order from Judge Boulee regarding intentional racial discrimination. Those issues are still being litigated. And it does seem a little odd to try to kind of have an mini trial on what Senate Bill 202 does or doesn't do and whether it fits into a history of discrimination in this case, especially when there's not been an order on that front.

Under racial polarization, now we have the question of what did the plaintiffs present here that is different. And ultimately the plaintiffs haven't given you information

that shows that there can be a detangling of race and politics. And so in the weighing the totality this has to weigh more to the political side than to the racial side as the Court looks at that.

Again, Dr. Burton, who is now in all three cases, says race and politics are so intertwined.

Dr. Jones says it's not just race, it's partisanship.

That's the evidence that the plaintiffs have presented to you here.

In looking at voting practices, a lot of focus on Senate Bill 202. I know the Court is well aware of the interconnected nature of voting in Georgia. We have things like a lot more weekend voting than a lot of states do. Senate Bill 202 added a required weekend voting day.

There's criticism of drop boxes. Drop boxes are open on the weekends in early voting sites, even if there's fewer of them.

We've talked a lot about automatic voter registration. And that matters because the barriers to registering to vote in Georgia are so few as this Court discussed in *Fair Fight*.

And plaintiffs don't like driver's license numbers on absentee ballots, but other plaintiffs, including some represented by the lawyers here, have sued over signature matching.

So Georgia has to run elections at some point, and the burden on the right to vote that comes from reasonable regulations is being litigated in the SB 202 cases. And that is under Anderson-Burdick, interest of the state, burden on the voter. It doesn't weigh in favor of a finding of voting practices that adversely affect minority voters in this case.

We don't have at-large elections.

We've talked about majority vote requirements, helping Senator Ossoff, redistricting, diluting minority voting strength.

Dr. Jones talked about the 2015 mid-decade redistricting. Those districts were never found finally to violate any law or constitutional provision because the claims were dismissed after, surprise, Democrats won those seats.

And, similarly, when we had the District 7 and Congresswoman McBath, more Republicans in the district led her to run in a district that is more favorable politically.

So ultimately, Your Honor, we have all these different factors that don't weigh in favor of finding a violation.

We don't have candidate slating.

We've talked about socioeconomic disparities not showing an inability of Black voters to vote.

We have turnout numbers that can match or be very nearly at white voters levels when Black voters choose to do

so in Georgia, or plaintiffs' experts never analyzed if turnout for white voters was different.

We've talked about racial appeals. We have a handful of those in the record. But ultimately we don't have racial appeals from the plaintiffs for the districts they're challenging. They're not putting in racial appeals in legislative races. They're not putting in racial appeals in congressional campaigns. What they're putting in is examples on a state-wide basis increasingly from candidates who were not successful in the races.

Racial appeals have to characterize the election system under Section 2. And a few scattered examples do not demonstrate that racial appeals characterize that system.

We've talked about the extent of election of Black and Black-preferred candidates to office.

One thing Dr. Jones' chart of people who served in Congress who are Black individuals over time doesn't account for is people like Congressman Lewis or Congressman Bishop that served decades, served the state for decades in Congress, they're only counted as one person on that chart. They have longstanding benefits for the State of Georgia from their service to all of us.

In terms of particularized needs, the primary issues we've heard are partisan issues by and large. If it's NAACP voter card on Justice's Gorsuch's confirmation, that doesn't

seem to be as much of a civil rights vote as a party identification vote.

The expansion of Medicaid has largely become a partisan issue.

Or plaintiffs would identify issues that are common to all voters, as the witnesses would agree: Traffic; safe schools; safe neighborhoods.

There's not particularized needs for the elected officials they're challenging that would help with these cases.

And just, again, Your Honor, on proportionality, we looked at this slide in the beginning in terms of who all is elected in different places. We're not saying proportionality shows no discrimination. What we're saying it does show is equal political opportunity in the State of Georgia. And in a state with 31 percent Black population, in a state where plaintiffs' evidence says you can't disentangle race and party, that means Black-preferred candidates are enjoying wide-ranging success at every level in the political system in Georgia. And as a result, that shows that the system is equally open to voters in this case.

So we talked about Section 2. We know it can't be proportionality that has to change. We know it can't be more Democrats being elected at the end of the day. And this is where *De Grandy* I think becomes such an important part of this

process.

In *De Grandy* the Court said it was apparent political effectiveness from having the number of districts that matched the proportion of the population of the challenged minority group.

In Georgia we have actual political opportunity, we have actual political success of both Black candidates and Black-preferred candidates.

So, Your Honor, we would submit that the evidence before the Court, the totality of the circumstances, shows that Georgia's election system is equally open to participation by all voters. Candidates who lose in Georgia lose on account of partisanship or on account of being a bad candidate, they don't lose on account of race or color, and that's what Section 2 requires.

So as we said at the beginning, we believe at this point in the case with the close of the plaintiffs' evidence there is no substantial evidence supporting a finding that past and present realities in Georgia result in a current lack of an equal opportunity to participate in the electoral process in Georgia on account of race.

And so we would ask the Court to enter judgment on partial findings for the defendants in all cases and bring the trial to a conclusion.

THE COURT: Thank you, Mr. Tyson.

MR. TYSON: Thank you, Your Honor.

THE COURT: Alpha.

MR. SAVITZKY: Good afternoon, or good evening, Your Honor. Ari Savitzky from the Alpha Phi Alpha plaintiffs.

Your Honor knows the standard under Rule 52(c) motion. Here's the bottom line. If you stop the clock on this trial right now, resolve credibility issues, resolve this case on the trial record as it stands, the Alpha plaintiffs would win across the board.

It makes good sense to defer, evaluate the parties proposed trial -- proposed findings of fact and conclusions of law after the defense closes its case. But if you want to take this motion on the merits, it has to be denied.

So I discerned three or four arguments that Mr. Tyson is making, and I want to address them in turn.

The first one goes to *Gingles* 1. And the basic claim is that Mr. Cooper's illustrative plans emphasize race too much. It's an argument of racial predominance I suppose.

Defendant doesn't have the law here. It definitely doesn't have the facts. The basic requirement in *Gingles* 1, it's a show that additional Black majority districts can be drawn and areas of the Black population is sufficiently numerous and concentrated consistent with traditional districting principles. You need to draw a reasonable district.

And as Chief Justice Roberts' opinion in *Milligan* explained, an illustrative plan can't be faulted merely because a map drawer tried to draw districts that are Black majority districts. So where is the line? Right? This is the question that Mr. Tyson asked, where's the line in this specific context of Section 2 illustrative plans? And what this Court said, citing Davis against Chiles, is illustrative plans cannot subordinate traditional redistricting principles to racial considerations substantially more than is reasonably necessary to avoid liability under Section 2.

So with this trial record the question for the Court in the Alpha case is this: Do Cooper's illustrative plans subordinate traditional redistricting principles to racial considerations substantially more than necessary?

Milligan shows exactly the type of things that we look to to answer that question. And conveniently it's a case that also involved Bill Cooper.

Are the illustrative plans comparable to the enacted plans with respect to objective metrics like population deviation and splits and compactness scores? They are.

Did the map drawer credibly testify that he balanced all the different traditional districting principles, that race didn't predominant over them? Yes.

Did the mapper back that up with specific factors, reasons, other than race, that supported the particular

mapping decisions he made?

Did the plaintiffs put forward additional evidence to show that the illustrative plans maintained communities of interest? Yes. Again yes. We have all of that here.

On this trial record, the Alpha plaintiffs have proven *Gingles* 1.

There's no basis to find any subordination of traditional districting principles in illustrative plans, let alone substantial subordination, though Cooper did a detailed demographic analysis of areas of the state that the Black population is numerous and concentrated. He found that Georgia's Black population has increased dramatically, that the political opportunities for Black voters -- number of Black majority districts, I should say, basically haven't budged.

Cooper demonstrated in his report and on the stand that he drew additional majority Black districts that are consistent with traditional districting principles. He gave detailed consistent testimony that he understood all the principles, he balanced them. He told you about he was drawing plans on paper and faxing them to Lumber City in the '80s. He's been doing this for a while. And he cares about his plans.

Mr. Cooper's on that stand talking to Mr. Tyson in cross-examination for four hours. He didn't always like the

1 questions he got. He definitely didn't like the racial
2 shading maps that he was shown again and again and again
3 because he doesn't use them. What he told the Court is he
4 doesn't use that. That's not consistent with traditional
5 districting principles. Those overemphasize race. But that's
6 not what he did.
7 And he answered every question. And at the end of
8 all that what he told you was, I balanced all the factors, I
9 balanced the traditional principles and you can put these
10 plans into effect.
11 And we can go district by district, I'm happy to do
12 it. I know I said 15 minutes, and I want to get to these
13 other points. And we will put it all in our finding of fact
14 and conclusions of law.
15 But I think it's telling that on the Atlanta Metro
16 districts, Cooper's districts are by and large more compact.
17 They're visually obviously compact. They're in a suburban
18 area that he identified demographically through socioeconomic
19 factors and others that are backed up by the testimony of
20 Sherman Lofton that you heard today who lives in that area and
21 knows every square inch of it. And in response, Mr. Tyson
22 focuses on other districts that aren't the districts that Bill
23 Cooper actually drew.
24 On Senate District 23, in the Eastern Black Belt,
25 Mr. Cooper identified many reasons why he -- he said, I'd

split the same number of counties. He explained exactly why he drew the lines the way he did in Wilkes County. He used municipal lines. He used county commission lines. He identified the Black Belt but also socioeconomic factors like poverty.

And, again, we also have testimony from Diane Evans talking about the commonalities in that area that's being united in a majority Black district.

Very briefly, Mr. Tyson also talked about these other remaining House districts. Talked about District 133 and how it has more VTDs splits. Mr. Cooper on the stand told you that Milledgeville has an extremely oddly-shaped set of VTDs, oddly-shaped boundaries, and he splits in VTDs to sacrifice that for compactness. That is what a mapper does. That is what Bill Cooper does.

And at the end of the day, that *Gingles* 1 question is a question of credibility for this Court to resolve. And this Court got a really great look at Mr. Cooper, at the reasons why he drew the districts the way he did, the way he draws maps. And I think there's no question that his extensive testimony merits a finding that he's credible, that he didn't overemphasize race, he certainly didn't subordinate traditional districting principles. Every consideration that the Court relied on in *Milligan* is present in this record.

Let me briefly talk about *Gingles* 2, 3, the issue of

is it party, is it race that Mr. Tyson raised.

I just want to start out on the legal point here because Mr. Tyson focused on this *League of Women Voters* case, which talks about, well, you can't conflate discrimination on the basis of party and on race. The *League of Women Voters* is an intentional discrimination case. The motivation for discrimination is central -- is a central issue in that case in a way that it is not here. The question is racially polarized voting. The question is meeting the standard under *Gingles*. *League of Women Voters* doesn't have anything to do with that.

The standard at *Gingles* 2, 3 is simply is there racially polarized voting behavior? That's what this Court has said. That's what the law is. There's no question on this record that there is. It's basically not contested. And that was Dr. Lisa Handley's testimony.

Section 2 plaintiffs don't have to prove a negative. They don't have to prove that party or partisanship was not the reason. But defendants can come forward with the totality of the circumstances and show -- try to show that there were some non-racial causes for the partisan -- or for the polarized voting behavior that's observed.

So the question is, What does the record show here? Have defendants done that on this trial record? Of course they haven't.

Considering just the trial record that the Court has before it now, the Alpha plaintiffs have amassed powerful, affirmative evidence from multiple fact and expert witnesses that race best explains the racially polarized voting patterns that we see in Georgia.

And Lisa Handley testified directly on this point. And critically she looked at primary elections where race, as she said, necessarily -- excuse me. Where racially polarized voting behavior, and she observed it in the majority of the primary elections that she looked at, necessarily cannot be explained by party. Parties control foreign primaries. Nevertheless, she observed that behavior.

And, again, we have Dr. Handley and Dr. Jones and Dr. Ward and Dr. Burton all talking about and giving qualitative examples the way in which Black and white voters realign their partisan affiliations based on the parties' positions with respect to racial equality civil rights. Race, they explained in various ways, drives and enforces partisan alignments.

Dr. Ward told you this morning over a century and a half since the Civil War race has been the most consistent predictor of partisan preference in Georgia.

And Dr. Jones and Dr. Burton both also explained how racial appeals fit into the mix, policing and driving the use of race to enforce those partisan boundaries.

All that expert testimony was also corroborated by fact testimony from witnesses describing how Black Georgians will vote for the party that most aligns with their interests.

So it's the end of the plaintiffs' case. Maybe defendants will put on some evidence that actually starts to rebut the inference that one draws from the existence of powerful consistent persistent racially polarized voting.

But the defendants haven't put on their case yet. And on this record there's extensive evidence that race best explains that race drives racially polarized voting patterns in Georgia. If you end the case right now, we would prevail on that issue no matter exactly how you phrase or frame the law on party versus race.

I just want to briefly touch on proportionality and get to totality of the circumstances.

On the proportionality issue Mr. Tyson raised the fact that there are Black candidates and Black-preferred candidates who have prevailed in Georgia. I noticed on his slide it said 43 percent of State Senate is Black-preferred candidates. I'm not sure where the evidence in the Alpha case is on that.

Dr. Lisa Handley told you that she didn't analyze whether every single Senator in the State of Georgia is a Black-preferred candidate. So it seems like what's being presented is a little bit of a switch-a-roo between Democrats

and Black-preferred candidates. That's, again, not the evidence in this case.

THE COURT: This case though said 37 percent of 35.7 percent of elected officials in Congress were Black. And the population of the state -- Black population appears to be 33 percent, 32-point something. So Mr. Tyson's argument said that there is an equal opportunity for Blacks to elect a person of their choice. Obviously you disagree with that. Why?

MR. SAVITZKY: Well, setting aside the fact that the Alpha case is focused on the state legislature and not on Congress as I'm sure Mr. -

THE COURT: All right. Let's go back to the legislature.

Mr. Tyson's argument is more or less that -- I may have it backwards, 41 percent Black, 43 percent Senate elected. His argument said there's equal opportunity for Blacks to be elected. Obviously you disagree with that. Why?

If the proportionality argument is such a strange argument, you can't argue that you should have a certain percentage, but on the other hand you can turn and argue the percentage, you know, goes against -- in your case there goes against you, according to Mr. Tyson.

MR. SAVITZKY: It does seem like the way that the defense is framing the law on proportionality it's good for

the goose but not good for the gander.

THE COURT: But that's not -- that's the law.

MR. SAVITZKY: Well, I'm not sure that's right in the sense that --

THE COURT: You can't argue -- I don't think you can argue that you're supposed to have a certain proportion of Blacks elected. I think the Supreme Court said that. But on the other hand, I think they do allow in the -- to argue that, well, based on population and representation, there is equal opportunity. Now, I'm not saying I agree or disagree, that's why I'm asking you why is that not right? Why is that the wrong argument?

MR. SAVITZKY: Well, accepting that and just on the question of proportionality, with respect to the state legislature 27 percent of the House seats, 49 of the 180, are Black majority districts. That's less than 32 percent Black voting age population in the state by a good bit.

25 percent, 14 out of 56, State Senate districts are Black majority districts. Again, less than the almost 32 percent Black voting age population in the state. And the standard -- and, again, it's not a dispositive defense but it's something you can consider proportionality. But when you're considering it under that Johnson against De Grandy case the question is you compare the number of majority-minority seats to the total of voting age population.

And on that metric, the right metric, there's no question that we are nowhere near proportionality, and that the remedy the plaintiffs seek wouldn't actually even get us to proportionality. We would still be under that 32 --

THE COURT: Even if you add the three and the five.

MR. SAVITZKY: Your Honor, I don't have my calculator up here, but, yes, I think that's right. It would be closer for sure but it would not be super proportioned.

So I just want to get to the final point to make, which is about equal openness, another argument that Mr. Tyson made.

The defense says that the political process is equally open. And there's no question that Georgia's changed since 1965 in some important ways, but that isn't the question. That's not the question for this court to answer.

Once the *Gingles* preconditions are met, it's the very unusual case, as the Court knows the quote, knows the law, when liability doesn't follow. The preconditions show -- the function of the precondition is to show that Black voters are being shut out of power by racially polarized voting patterns even though the lines could reasonably be drawn to give Black voters an opportunity to elect the candidates of their choice. Once you do *Gingles* 1, 2, 3, those are the circumstances, that's where you are.

So the totality of the circumstances inquiry is what

is the context in which the state has drawn these districts in certain areas that shut Black voters out of power? Does that context give us comfort even though there is racially polarized voting and even though Black voters have been drawn into white majority districts where they typically will not prevail because of white bloc voting, we can still have comfort that the political process is equally open to them in the areas of focus.

That's really the question for this Court. And this is not -- what the trial record shows here is this is not a context where we can feel comfortable that the political process is equally open despite the fact that in these areas Black voters have been drawn into district that will shut them out of power due to racial bloc voting.

The testimony of Dr. Ward, Dr. Burton, Dr. Jones, Dr. Burch, as well as fact witnesses in this case, show that while some things have changed, other circumstances persist. We see the persistence of voting practices that do have discriminatory effects.

And I just want to point out, I mean, Mr. Tyson mentioned through 1990 as the date out there. Fayette County was using an at-large commission system that was struck down as a VRA Section 2 violation in -- less than 10 years ago.

Persistence of voting practices with discriminatory effects.

The persistence of polarized voting patterns against Black-preferred candidates observed in election after election after election.

The persistence of socioeconomic disparities in education and other areas that cause a gap, what Dr. Burch called a significant gap in turnout, that she observed using multiple different metrics in voting between white and Black Georgians.

And her education data on this was fascinating because it showed that at different education levels Black Georgians are participating, sometimes more than white voters. But the structural and systemic effect of discrimination in education, the fact that there are fewer Black Georgians with a college degree at those higher level of education that translate directly into more participation, meaning that you have this turnout gap, that is exactly what Senate Factor 5 is talking about. And, again, that persists.

The persistence of, yes, ugly racial appeals in politics that were discussed by Dr. Jones and Dr. Burton.

THE COURT: I don't want to cut you off, but I think -- and I will let you finish and then let Ms. Khanna do her argument in the morning because, you know --

MR. SAVITZKY: Two more minutes. I don't want to deprive Ms. Khanna of the opportunity to address the Court.

THE COURT: Well, go ahead.

MR. SAVITZKY: And, finally, a persistence of underrepresentation in specific areas of focus, and Dr. Jones looked directly at the areas of focus here. That is the context that this Court -- that this Court sees in this trial record. That's not the very unusual case where liability doesn't follow once you've shown *Gingles* 1, 2, 3.

We've known *Gingles* 1, *Gingle*s 2, *Gingle*s 3 here. And the totality of the circumstances, the whole trial record that we have, demonstrate the vital role that the Voting Rights Act continues to play.

Plaintiffs have proven their case on this record. Thank you, Your Honor.

THE COURT: Ms. Khanna.

MS. KHANNA: Thank you, Your Honor. I'm aware of the 6:00 deadline we're trying to meet and I --

THE COURT: Make your argument because I gave Mr. Tyson 30 minutes, and I gave Mr. Savitzky 20 minutes, so I'm not going to cut you down to 10.

MS. KHANNA: I think I can beat them both, Your Honor.

THE COURT: A lot of people in this room are hoping that.

MS. KHANNA: As Your Honor knows concurrent with this litigation is an ongoing Section 2 litigation in Alabama. As Your Honor knows, I've been involved in that case as well.

And, of course, that was a big topic of discussion during the preliminary injunction phase a year and a half ago.

I don't need to walk through all the things that have since happened in Alabama, but the Section 2 claim was that -- Alabama was found liable on preliminary injunction. The US Supreme Court affirmed. We went to back to the Alabama court on appeal. The legislature was given the opportunity to draw a new map and they failed to take that opportunity to draw a lawful remedy. And after the trial court found that the legislature's remedial map was no remedy at all, the legislature -- the defendants in Alabama moved to stay that decision pending appeal.

While we've been in court today, the Alabama District Court ruled on that motion to stay. It denied it. It found, among other things, that Alabama was not likely to prevail. But one thing was notable about it. In its motion to stay pending appeal, Alabama had written that it is overwhelmingly likely to succeed on appeal. And the Alabama court referred to that phrase, overwhelmingly likely to prevail on appeal, as bare as it is bold.

And, Your Honor, I would submit that the motion under 52(c) by the State of Georgia in this case is as bare as it is bold. And it is bold, Your Honor, because a year and a half ago we were all talking about Alabama, *Allen v. Milligan*. You did not hear the words *Allen v. Milligan* once in Mr. Tyson's

presentation.

A year and a half ago this court found that plaintiffs were likely to succeed on the merits of their Section 2 case in both Pendergrass and Grant on an almost identical record that has only been bolstered over the last several days of trial here.

And in light of this Court's summary judgment order rejecting each and every one of the defendants' legal arguments, it is indeed bold for the defendants to come up and say that they've probably won this case.

But let's take them at their arguments.

I won't repeat what Mr. Savitzky said about the disentanglement of race and party. I'll just note that Mr. Tyson fails to cite a single case that says it is plaintiffs' burden to disentangle the two, or that it is plaintiffs' burden to prove it is one and not the other.

The case law says just the opposite. As this Court has already found, it's not an issue at all at the *Gingles* phase. And to the extent it is an issue at all, it is defendants' burden at the totality of the circumstances.

I'm eager to see defendants' case on this, Your Honor, but I can certainly say that given the evidence that is already in the record, they will have an uphill battle, because contrary to Mr. Tyson's assertions, it is not that plaintiffs have thrown up their hands and said race, party,

who knows? What are we going to do?

What the plaintiffs' witnesses have testified time and time again is that the story of partisan affiliation in Georgia is the story of race. It is informed by race. And that's historically and in present day situations when different parties are aligning themselves on racial issues in different ways and meeting interests of different racial groups. And then that prompts voters to vote in their own interest. That is race and party showing us that -- those are not -- they are not things that can be so easily divided. Those are -- that is the story of Georgia.

Now, we've heard a lot from opposing counsel, from defendants' counsel about Lucy McBath and Senator Warnock. I believe I heard Mr. Tyson say that these elections somehow are emblematic of the eradication of discrimination, the progress, the equal opportunity and the fact that Black voters enjoy wide-ranging success in Georgia.

There is a very important piece of that story missing, Your Honor. Defendants like to note how the Lucy McBath district, not a district at issue here, is a 29 percent Black voting age population, perhaps on hoping that one might infer from that that there's crossover voting and that no Black and white voters have come together in that district to elect the Black-preferred candidate. No such thing. Lucy McBath's district is a majority-minority district. It is a

minority white district. And, again, not at issue in this case. But the -- all of the evidence so far in this case shows that when it comes to Black and white voters, there is stark polarization.

We have not examined what happens to those other minority voters, but we do know that those other minority voters make up a very significant portion of the statewide population and of Lucy McBath's district.

And that brings me to Senator Warnock. Senator Warnock is elected -- was elected statewide. And recall that the white population statewide is now, what, 50.03 percent. A razor thin majority. And Senator Warnock won by a razor thin majority, to say the least.

The fact that the State of Georgia could not dilute the Black vote in US Senate elections does not somehow disprove the fact that it could and it did dilute the Black vote when it drew districts for the US Congress and for the State House and the State Senate.

The story of Georgia over the last 30 years has been one of exponential growth in Black population and stagnation when it comes to Black opportunities to elect. The story of Georgia over the last 30 years has been one of decline in the white population, and yet somehow white opportunity has remained in full force. And I would say that the white voters, to use Mr. Tyson's term, enjoy wide-ranging access,

and one might even say disproportionate access, to the political process when it comes to districted elections.

I'll touch very briefly on the Esselstyn and the Cooper maps in the Grant and the Pendergrass cases.

In the Grant case Mr. Tyson noted that Mr. Esselstyn's districts did not always meet or beat the enacted map on various criteria and that he looked at race alongside the other criteria. That's all that I heard, Your Honor. I think at some point he said he was -- Mr. Esselstyn was unable to explain why he connected certain communities other than proximity. I mean, I think anybody drawing districts probably understands that proximity and adjacency is perhaps the place that you start out first. That's hardly a suspect criterion.

But I think all of this just shows how divorced the state is from the actual legal standards that govern the *Gingles* 1 inquiry. The *Gingles* 1 inquiry is about whether the illustrative majority Black districts are reasonably configured. It is not whether they win in a beauty contest. The Supreme Court just told us that again in *Allen v. Milligan*. It is not whether they considered race. That does not disqualify an illustrative district. Again, the Supreme Court just told us that.

And to the extent that the defendants are focused on why was this community with this community and what's the same

and is it identical? I believe, Your Honor, they are grounding that in the *LULAC v. Perry* case, but the *LULAC v. Perry* case does not bring them anywhere near where they are trying to take this court.

The *LULAC v. Perry* case found that that -- the *LULAC* district was not compact for purposes of *Gingles* 2 for two reasons. Sorry. For *Gingles* 1 for two reasons:

That the minority populations were far flung, some 300 miles apart, and had widely disparate interests.

And as a reminder, I believe that in *LULAC* they were talking about the Latino population in Austin versus the Latino population at the Mexican border in Rio Grand Valley.

I have not seen anything like that here, Your Honor. I don't think we've dealt with a single district that would even approximate what the Court was concerned about in *LULAC*.

In Pendergrass Mr. Tyson mentioned something about some of the Black population in illustrative CD6 is already in CD13, so is it truly a new district? I'm baffled by the argument. That's the first I think I've heard of such an argument. I'm pretty sure the way packing and cracking works is not -- I'm sorry, the way that illustrative maps work, it's not that map drawers have gone off to some Narnia-type place and discovered Black voters that didn't exist in the previous map. It's that they took Black voters in districts where they were either packed or cracked. And we don't need to decide on

the legal definitions of those terms to understand that when you are creating a new district that has a majority Black population, you get them from the existing districts.

Honestly, Your Honor, we put illustrative District 6 before this Court. I'm not going to do it again, but I think by any measure of traditional redistricting principles illustrative District 6 is unobjectionable by any and every standard.

Notably when it comes to the *Gingles* 1 analysis in neither Grant or Pendergrass did Mr. Tyson mention any of the fact witnesses who specifically testified to the shared communities in all these districts.

The last -- I won't go through all the Senate factors, Your Honor. I will just note one thing that struck me in the PowerPoint presentation presented by defendants. And that was the discussion of Senate Factor 5, which referred to -- and I wrote it down -- the ability of Black voters to turn out when they choose to do so. I don't think I'm making that up. When they choose to do so. And that struck me, Your Honor, because -- and I think I heard something else I think during one of the cross-examinations by defendants' counsel about how, Well, is it that they couldn't turn out or that they didn't want to vote?

And the reason that these comments have struck me, Your Honor, is because I thought -- and I've litigated a lot

of these cases, so it takes a lot to kind of surprise me because I -- but I thought that if there was one thing we could all agree upon it was that the history of America, the history of the south and the history of Georgia could not be characterized as Black people don't want to vote, Black individuals choose not to vote.

Black voters throughout the south, and specifically in Georgia, have fought and bled and died for the right to vote for decades. And they continue to do so, including in this courtroom.

So the very notion that the state could shrug and say, Maybe the disparate turnout is because Black voters choose not to vote, is a slap in the face to the history of the lived experience of Georgians, and it's a slap in the face to the statistics, it's a slap in the face to the severe disparities that continue to effect Black voters due to centuries of discrimination. And I think it is extremely telling, Your Honor.

My final point. I mentioned that Your Honor did not hear any mention in Mr. Tyson's presentation of the *Allen v. Milligan* case, Section 2 case, just came down this summer. Heard no mention of the *LULAC v. Perry* case, which I think is the basis of this entire community angle that the defendants are trying. Instead what the Court heard about was the *League of Women Voters* case, which as Mr. Savitzky pointed out, is an

intentional racial discrimination case, and the *Johnson* case, which is about proportionality.

Now, I don't think that's an accident, Your Honor, because what we saw in Alabama is the defendants trying to import, reimport that intentional discrimination racial animus standard into Section 2. That standard that was rejected in 1982 by Congress, that was rejected in 1986 by the US Supreme Court in *Gingles,* and that was rejected in 2023 by the US Supreme Court in *Allen*.

And *Johnson*, Your Honor, *Johnson* is about proportionality. And defendants' emphasis on *Johnson* is really their story of there needs to be a ceiling on Black voting strength in Georgia. Regardless of Black numbers. Regardless of white numbers. Regardless of how representative these districts are of actual Georgia citizens after the 2020 census. Enough is enough. They should be happy enough with what they got 30 years ago under those Voting Rights Act cases and leave the rest up to chance.

I submit, Your Honor, *Johnson v De Grandy* does not stand for the proposition that there is a ceiling on Black opportunity, particularly where that ceiling is divorced from the demographics and the reality and the racial politics and the voting patterns and the history of the state.

For all of these reasons, Your Honor, we would ask that you deny the motion or at the very least defer ruling on

it.

Thank you, Your Honor.

THE COURT: Thank you.

Anything?

MR. TYSON: No.

THE COURT: I will think about it overnight, give you a decision in the morning, but have your people ready to go if I come in in the morning at 9:00.

MR. TYSON: Yes, sir. Ms. Wright will be our first witness at 9:00 should you deny the motion or hold it in abeyance.

THE COURT: Can you send Ms. Wright for me your PowerPoint?

MR. TYSON: I did, Your Honor. And I copied plaintiffs' counsel on that.

We'll bring paper copies tomorrow, but I finished it today, so...

THE COURT: I'll take a look at it tonight. I'll give you-all a ruling.

We're going to start at 9:30 in the morning rather than 9:00.

(Proceedings recessed at 6:08 P.M.)

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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 12th Day of September, 2023.

PENNY PRITTY COUDRIET, RMR, CRR
OFFICIAL COURT REPORTER

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