

1 UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF GEORGIA
 3 ATLANTA DIVISION

4 ALPHA PHI ALPHA FRATERNITY,)
 INC., ET AL.,)
 5 PLAINTIFFS,)
 6 -VS-) DOCKET NO. 1:21-CV-05337-SCJ
 VOLUME 6 - AFTERNOON SESSION
 7 BRAD RAFFENSPERGER,)
 8 DEFENDANT.)

9 COAKLEY PENDERGRASS,)
 ET AL.,)
 10 PLAINTIFFS,) DOCKET NO. 1:21-CV-5339-SCJ
 11 -VS-)
 12 BRAD RAFFENSPERGER, ET AL.,)
 13 DEFENDANTS.)

14 ANNIE LOIS GRANT, ET AL.,)
 15 PLAINTIFFS,) DOCKET NO. 1:22-CV-00122-SCJ
 16 -VS-)
 17 BRAD RAFFENSPERGER, ET AL.,)
 18 DEFENDANTS.)

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 20 TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS
 BEFORE THE HONORABLE STEVE C. JONES
 21 UNITED STATES DISTRICT JUDGE
 MONDAY, FEBRUARY 14, 2022

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1 (HELD IN OPEN COURT AT 12:28 P.M.)

2 THE COURT: Let me put a couple of cases on the record,
3 the citations I've been talking about. One of the cases I was
4 talking about this morning is the Democratic National Committee v.
5 Wisconsin State Legislature. That's 1941 Supreme Court 28, cited
6 October 26, 2020. The other case I talked about this morning is
7 the Democratic National Committee v. Mark Bostlmann,
8 B-O-S-T-L-M-A-N-N, Secretary of Wisconsin Elections Commission. I
9 also talked this morning about People's First of Alabama v.
10 Secretary of State for the State of Alabama, and that's 815 Fed
11 appendix 505. And Curley versus Raffensperger, 397 F. Supp. 3rd
12 1334. And I mentioned those cases, and then I needed to put the
13 cite on there.

14 All right, Mr. Tyson, you represent the people of the
15 State of Georgia, all of them, all 10 million. Would it hurt --
16 you argued that the train has left the station, that this election
17 is started, it's too late to stop it now. But the plaintiffs'
18 argument is it's not going to hurt, it's not going to cause that
19 much confusion or it's not going to cause that much disruption as
20 opposed to people's rights to slow that train down and reschedule
21 it. Why are they not right about that?

22 MR. TYSON: Well, Your Honor, I think there are a couple
23 of major things, and I've written down something Mr. Esselstyn
24 said actually, a really good line where he called redistricting a
25 wonderfully complicated puzzle. I feel like in a lot of ways that

1 is what you have to deal with, too. And I think it is a very
2 important question because if there is dilution of voters in
3 Georgia on account of race or color, we -- and that is a very
4 serious charge the plaintiffs bring. I don't want to discount
5 that at all.

6 THE COURT: I agree.

7 MR. TYSON: I think what you see here, though, is a
8 couple of things: One is the dilution has to be on account of
9 race or color. You already hit on this at one point, I was
10 planning on talking about it, the partisan nature versus the
11 racial nature. So the question we have to work through -- because
12 redistricting is partisan, as Senator Carter has testified. And
13 Justice Alito said in the Cooper case, Cooper v. Harris, at 137
14 Supreme Court at page 1490, the Courts have to exercise
15 extraordinary caution in distinguishing race-based redistricting
16 from politics-based redistricting, because if they don't, they
17 will invite the losers in the redistricting process to seek to
18 obtain in court what they could not achieve in the political
19 arena.

20 And so my biggest thought when you ask the -- my
21 opposing counsel what is the difference in this case in Alabama,
22 and the thing that came to mind for me is, I think this is
23 actually a much harder case than the Alabama case. In a lot of
24 ways, Alabama was a lot more clear-cut. There was a district they
25 knew about, they could have drawn it, they didn't draw it.

1 In this case, we have a lot more complicated facts that
2 go into it, a lot more types of issues with geographic limitations
3 and communities of interest and data and statistics. We've talked
4 about COVID delays in the census, delays in the timeline. And so
5 at the end of the day, the people of Georgia have to have their
6 voice heard through the election process. And we as the State,
7 rightly or wrongly, we have all these series of this complicated
8 machine that we put together to make this thing operate the way it
9 needs to.

10 THE COURT: Is that sort of the argument that the
11 Plaintiffs are making, that more people are affected in Georgia by
12 this than Alabama? You have a House District, three Senate
13 Districts and five House Districts. You have more people affected
14 by these allegations that, hey, you're denying African-Americans a
15 chance to have a person of their choice to vote for and represent
16 them, as compared to one person compared to eight people.

17 MR. TYSON: Certainly, Your Honor. I think that is
18 correct. That is a distinction that more people would be affected
19 by the remedial plans here, certainly. Again, I think it comes
20 back to the lack of this clear entitlement to relief on the
21 likelihood of the success and the merits.

22 So I thought what we could do is talk through all eight
23 Districts, just talk through the ones that we've worked through
24 and try to take a look at that. I think what we can see is, there
25 it not a likelihood of success on the merits of these.

1 I want to start with the census because we made this
2 point several times. That there's been a massive number of new
3 African-American voters in Georgia. That's a great thing. I
4 don't think anybody disputes that Georgia as a growing state and a
5 diverse state is a wonderful thing. But the testimony was that
6 the overall proportion of the black voters moved from a half a
7 point from 2010 to 2020 on the single-race black number, and
8 one-and-a-half points on the any-part black number. So, yes, the
9 chart showed this increasing number of raw numbers going up, but
10 as a percentage of the population, there's not nearly as many
11 shifts as the plaintiffs have made that out here. So I think it's
12 important to remember as we look at these Districts that the
13 overall growth is not nearly as significant a percentage basis as
14 it is a raw-number basis.

15 THE COURT: I think Metro Atlanta showed, like, 484,000
16 additional people in the last ten years.

17 MR. TYSON: Yes, sir.

18 THE COURT: So wouldn't that -- if you take out -- if
19 you just concentrate on that number, would that percentage be
20 higher than half a point and one point?

21 MR. TYSON: I believe in metro Atlanta it is higher than
22 that, Your Honor. The statewide number was that --

23 THE COURT: I understand in these other counties, at
24 least by Richmond and the south end of the Dalton, the number you
25 increase that may not be that high, which brings down the raw

1 number. But if you look at two of the Senate districts in metro
2 Atlanta they're proposing --

3 MR. TYSON: Yes, that's correct, Your Honor. And I
4 think, again, if you look at all of the different numbers and
5 things that we have, the number of majority non-white districts
6 that we talked about there where white people are not a majority
7 is up -- I can't remember the number -- there is additional
8 numbers of those this time around.

9 The other thing I think that is important to remember is
10 people live in different places. And so if people are
11 geographically dispersed, it could be harder to lasso -- "lasso"
12 is the wrong word -- put people into a district together to make a
13 majority of a single race. That's what Bartlett v. Strickland
14 requires in the plaintiffs' showing here.

15 So in terms of just looking at the districts, I wanted
16 to start with the House just to kind of walk our way through
17 there. Because I think it's important that we have two experts
18 that said they could draw additional districts, but they only
19 agreed on a couple of areas of the state about that on the House.
20 So Mr. Esselstyn doesn't draw a district in southwest Georgia;
21 Mr. Cooper does. Mr. Cooper doesn't draw a district in kind of
22 the western metro, the 64 up there; Mr. Esselstyn does. They both
23 drew two Districts south of Atlanta. So we'll talk about that.
24 Mr. Esselstyn drew two Districts in middle Georgia; Mr. Cooper
25 drew one. I think the plaintiffs have made very clear as we've

1 gone through this process, these are illustrative only. We are
2 looking at this -- as we look through these, number one, the
3 variations are so tight, I'm not sure there is another way to draw
4 a lot of these districts.

5 But the second thing is the plaintiffs kind of seem to
6 want to have it both ways, these maps are only illustrative, but
7 then we have no timeline concerns and you can just adopt these
8 maps and implement those. And so it really needs to be kind of
9 one or another. For Mr. Cooper especially when he changes the
10 boundaries of at least every district except for one district from
11 the 2021 plans, that's a huge piece we'll get into on the Purcell
12 side of things.

13 So let me just look through -- let's start with 149 and
14 145 where we talked about this. And again, I think this is
15 important because we're trying to answer the question what did the
16 Legislature fail to do here, what did they not do that they should
17 have.

18 THE COURT: Okay.

19 MR. TYSON: When District 149 -- I've taken these
20 numbers -- these are from Ms. Wright's spreadsheets that she sent
21 around on Friday. So you see 149 is barely a majority of AP black
22 VAP. It's not majority on single-race black VAP, and it is a
23 majority on the black voter registration number.

24 Similarly, 145 is very close on AP black VAP, below
25 majority on single race, below majority on black registered

1 voters. But I think the thing that sometimes can be, well, number
2 one, this finger that goes up to Milledgeville, if you have a
3 district that is 52.0 percent black and is going up to
4 Milledgeville to gather population, there is probably not a whole
5 lot of other ways to configure this and keep it as a majority. So
6 that's sort, I think, of one piece of the puzzle as you sort
7 through that.

8 But the other piece is what this does to Districts 142
9 and 143. So District 142 remains majority black, but only barely
10 by .14, and it's below majority on single-race and below majority
11 on registration.

12 THE COURT: Both of those right now are represented by
13 African-Americans?

14 MR. TYSON: They are, Your Honor. And District 143
15 similarly drops below majority on those single-race and black
16 voter registration. So, yes, Mr. Esselstyn did create four
17 districts here, but he created four districts that just barely
18 cleared that 50-percent threshold. And then most of them are
19 below majority on kind of all the other metrics that you would
20 consider or look at along the way, along with the issue of the
21 public comments that you raised about Macon and what happens
22 there.

23 So again, for this area, if you focus on race, and I'll
24 talk more about this in a minute, the fact that you can create
25 four majority black districts in this area just because you can do

1 it doesn't mean Section 2 requires it. That's what we want to get
2 through as we work through these pieces.

3 The next is Mr. Cooper's in the same vicinity. He
4 talked about what he did in this area. And his testimony was he
5 went and got black voters out of Eatonton to add them to other
6 majority black counties around there, and in doing that he still
7 only got barely above majority on VAP, below majority on single
8 race, and majority on registration.

9 So again, these are complicated issues to try to sort
10 through and work through.

11 For the south Atlanta ones, we have districts with
12 Mr. Esselstyn both in Fayette and Clayton and in Henry. And again
13 for the Fayette one, we have a majority white county in Fayette
14 County, getting a large black population from Clayton County to
15 make that district majority black. Ms. Wright couldn't identify
16 any of the connections here, and I think it is significant that
17 both the plaintiffs' experts struggled to explain what communities
18 were involved. And I know we talked about, well, sometimes we
19 have to draw the line and put disparate communities together. The
20 challenge is if you're putting disparate communities together on
21 the basis of race, that's what LULAC tells us from the Supreme
22 Court, that's where it gets problematic.

23 THE COURT: Why do we have -- what evidence can you
24 point to that indicates that the predominant factor in drawing it
25 this way was race?

1 MR. TYSON: As far as what requires race, I think there
2 are several factors. So both of the map drawers testified that
3 they turned on racial shading and dots at various points where
4 they were drawing the map. They, obviously, were looking for
5 racial makeup of populations.

6 They -- these maps include features that you wouldn't
7 have on other kind of configurations. So the finger on District
8 149 splitting Clayton County in a couple of different places to go
9 in and add population there, other ones we'll talk about where
10 there appears to be racial decisions made in the map drawing.
11 They make changes to other districts that are significant. So we
12 talked about Senate 18 and kind of where that ends up putting the
13 disparate communities together. And I think it is important to
14 remember when a jurisdiction faces a racial gerrymandering case,
15 their defense is, oh, traditional redistricting principles, that
16 is what we always do. And courts have to look and say, well, did
17 you really follow those consistently, or did you just, you know,
18 do them in this one and kind of ignore them in this particular
19 area.

20 So we have maps from both map drawers that is the most
21 majority black districts they drew of any configuration. Those
22 maps split more counties, they split more precincts, they paired
23 more incumbents, they have higher deviations, every single factor
24 you would consider in service of a racial goal in terms of what
25 happened with maps as a whole. So I think that's where this Court

1 can look and say these aren't appropriate remedies, because
2 they're drawn primarily based on race.

3 And I think another important point from LULAC is,
4 Justice Kennedy said the mathematical possibility of a racial bloc
5 does not make a district compact. The fact that you can do this
6 doesn't necessarily mean that it's automatically a district that
7 is required by Section 2. Because if it's a racial gerrymander,
8 it's not a remedy the Court can order, because if the Legislature
9 did it, it would be unconstitutional.

10 THE COURT: Well, when I look at these two maps, I'm
11 still struggling to say, okay, your argument said these maps more
12 or less were written predominantly for race to get the right
13 number of blacks. But don't you have to consider that? I think
14 Mr. Cooper may have said that's why you're looking at a drawing.
15 Don't you have to consider whether they're African-Americans in
16 this pocket? Don't you have to look at that?

17 MR. TYSON: Certainly, Your Honor. I think this is one
18 of those interesting pieces that House Section 2 has developed.
19 Because in the '80s and '90s for your Section 2 cases, you would
20 have a county government. So they have five commissioners, they
21 were all elected at large, and you had a core of black voters in
22 the city of the county, for example.

23 And so, basically, if you drew a circle around those
24 voters in the middle, there's a majority district. Simple, easy
25 to demonstrate.

1 As we've moved kind of beyond those types of Section 2
2 claims to where we are now, this is where it gets really difficult
3 because you see the number of districts that Mr. Esselstyn had to
4 reconfigure to make this district appear here. And again, back to
5 this wonderfully complicated puzzle. Everything you do -- I think
6 of districting like a water balloon; you squeeze in one place,
7 it's going to pop up somewhere else. And so when you're making
8 these kinds of adjustments, you have to, obviously, be aware of
9 race when you're drawing -- I understand what he's saying, but
10 also you're not going to create these districts but for trying to
11 reach some sort of racial goal. And it's not as simple as there
12 is a naturally occurring community here. It's instead, I can
13 connect this part of Clayton County with this part of Fayette
14 County, and I can make a district emerge that's majority black.

15 THE COURT: I guess it kind of goes into the argument
16 regarding clarity of Section 2 in that you wouldn't try to draw
17 the map, you know, going to a majority white district. So you
18 wouldn't go for the majority. When you go that way, then it's
19 predominantly race and it's not correct.

20 MR. TYSON: Certainly. And for jurisdictions who are
21 drawing, it's very hard to give them advice about what to do here.
22 Because you have the one line of cases that talks about you can't
23 focus too much on race, and it's a racial gerrymander of voting
24 rights where you have to take into account race, and there used to
25 be pretty good running room, I would say, between those, where you

1 knew where the boundaries were.

2 As Chief Justice Roberts said in the Alabama case, the
3 Supreme Court's case law in this is a muddle now. It's very hard
4 to discern when a jurisdiction is considering race too much, which
5 is what some of the other three-judge panel cases you had to hear
6 about these maps allege, and we didn't consider race enough, which
7 is essentially what the plaintiffs are arguing here.

8 THE COURT: You raise a good point here. The maps
9 adopted by the State, I could say why would you need 75 percent
10 minority voters in a particular Senate District or even 65
11 percent? But you have six districts that have 65 percent or
12 higher. Why?

13 MR. TYSON: So, Your Honor, I think looking at this map
14 here actually will tell exactly why. If you look in this area of
15 South DeKalb County right here, this is an area that is heavily,
16 heavily African-American. And so is the area here in Clayton is
17 also heavily African-American, North Henry is, Rockdale is, all
18 the way around this area. So you see this shape of District 91
19 that starts in a heavy minority area and radiates out into a
20 whiter area. That's why you see a lot of vacant strip-looking
21 districts on the maps --

22 THE COURT: Yes.

23 MR. TYSON: -- because you're running to make it where
24 it's not too high in the terms of the overall black percentage.
25 But that again makes it a challenge to draw, because if you just

1 drew a box in South DeKalb County, that would be a 90-percent
2 black district or higher.

3 THE COURT: So why can't you draw it to reduce it down
4 from the 75 percent to the 65 percent?

5 MR. TYSON: And, essentially, you would just run out of
6 people. If you start in the middle of DeKalb County, and all of a
7 sudden you make a district as thin as it can be, and you get to an
8 end of where you're trying to get to -- out of the core of DeKalb
9 County, you may be arguing it's your ideal population size before
10 you get to a more diverse population.

11 THE COURT: Well, I think Ms. Khanna asked Mr. Morgan
12 yesterday, when does it become packed? So I ask you that
13 question: When does it become packed?

14 MR. TYSON: And it's a hard question to answer. What
15 Mr. Morgan said --

16 THE COURT: He didn't answer it. In my opinion, he did
17 not answer. He gave an answer.

18 MR. TYSON: Yes. I give you kind of my description of
19 what I could do.

20 THE COURT: Well, he gave an answer. Okay.

21 MR. TYSON: Yes. My general view on that is you have a
22 70-percent district, and next door you have, say, a 45-percent
23 district, and you can very easily move population from the one to
24 the other and make both a majority. I would consider that a
25 situation where you could argue that 70-percent district is

1 packed. If you have a 60 percent, a 60 percent, a 60 percent, and
2 a 70 percent, and there's really no way to shift population
3 because that's where it gets very dependent on the geography
4 you're dealing with. And so in that situation, I wouldn't
5 consider a high percentage district packed.

6 I also find it interesting that on the -- I think it's
7 the Democratic House plan, there are actually some districts above
8 90 percent, and they are in this South DeKalb area on there. So
9 it's difficult to draw in those particular parts of the state
10 where the population is -- is largely minority.

11 THE COURT: Okay.

12 MR. TYSON: SO we have these districts again kind of
13 barely there in terms of the population. We have the testimony
14 from Ms. Wright about 117 and kind of the more rural areas of
15 Henry. Again, you're still barely over 50 percent on your black
16 VAP, under on your single race, under on your registration. So
17 again, this gets us back to what did the Legislature fail to do
18 here, and is there really many other ways to configure this? I
19 think the answer here is probably not, given the high tolerances
20 that we have.

21 Mr. Cooper's in the same area is different but suffers
22 from some of the same issues. He, obviously, has a higher
23 district. His is 60-and-a-half percent. I think in part because
24 he takes the southern part of Fayette County out. But even with
25 this configuration, we had testimony about the difference in

1 Clayton County and Spalding County that are put together in this
2 district to kind of add an additional district.

3 We also have Ms. Wright testified all these other
4 districts around it that are reconfigured, they're still majority
5 black. The Legislature still drew them that way -- not this way,
6 but they are in the same general vicinity, but ultimately this one
7 was added, and you had to connect those pieces of Clayton and
8 Spalding to make that a reality.

9 THE COURT: Well, Mr. Tyson, anyone can make the
10 argument that Spalding County is more rural than Clayton.

11 MR. TYSON: Yes, Your Honor.

12 THE COURT: You have some situations where you're going
13 to have urban and rural.

14 MR. TYSON: Certainly, and you always have that, because
15 we have to get the same number of people. And so again, I think
16 the issue is not so much -- okay, you're going to have people who
17 are -- I'm in an area of Cobb County which is much more built out;
18 West Cobb is more rural-ish, more like Paulding County. If you
19 connected those two, you could say they're all suburban counties,
20 that's it, it's all suburban Atlanta, even though it's different
21 in character. You can't really reach from one to the other to run
22 it; you'd have too many people if you try to do that.

23 So there are situations when you're radiating out from a
24 very populated area, you will have -- you've got to connect some
25 areas that are rural and urban together, that happens, the

1 suburban and ex-urban as we heard about.

2 But at the end of the day, I think it comes back to the
3 "why." If it is truly a population-based calculation, and you
4 have to, as my mom would say, you have to draw the line somewhere,
5 you have to grab some amount of population. If that's the reason,
6 that's one thing. If it's "I have to take this population in to
7 get this district as a majority black district," now we have a
8 different problem.

9 THE COURT: What would make me believe that that map was
10 drawn predominantly based on race then?

11 MR. TYSON: So, Your Honor, I believe Ms. Wright's
12 testimony on this one was the changes around it -- so if it's 75,
13 78, 109, those districts that were around it, all the
14 reconfiguration up there, that created the space essentially to
15 push District 73 farther south. The breaking of the Clayton
16 County border, which had been upheld, I believe, on the Democratic
17 plan and on the State adopted plan and the reuniting of those
18 communities.

19 Now, if the legislation had configured Clayton County
20 similarly to Mr. Cooper and this was the leftover population, I
21 think I would have less concern about them being a -- it would be
22 a population-based decision at that point. But when you're going
23 through these county boundaries along the way and finding a
24 significant reconfiguration, that's where the concern from
25 Ms. Wright and her testimony about this being a race-based draw.

1 THE COURT: Ms. Wright, I understand she testified the
2 way she testified. She said "apparently" in a lot of situations,
3 but she never explained what -- she said apparently was done. But
4 there was never any explanation that followed why it was
5 apparently.

6 MR. TYSON: Certainly, Your Honor. And I think, like
7 she testified, you can't always know what is in the mind of the
8 map drawer. You have to take and figure out, look at what you did
9 and try to discern what were your goals based on what you see. So
10 if, for example, we saw a plan that had every city was kept whole
11 and we split every county in service of keeping every city whole,
12 we could probably reasonably conclude that the map drawers'
13 primary focus was keeping cities whole, because that was the only
14 consistent feature we can find. I think that's -- I'm not going
15 to speak for Ms. Wright, but I'm assuming that's why she had
16 "apparent" there, because she is looking at this saying, I can't
17 figure out any other explanation so it's apparently racial, but
18 she's leaving open the possibility there might be something else.
19 She just can't identify what that is.

20 So we also have District 110 is similar. It's also
21 below majority on black registered voters. It also unites areas
22 around McDonough with Griffin and a lot of the differences we
23 talked about in this area as well. And again, a lot of this is,
24 like Ms. Wright said, is driven by the reconfiguration of other
25 districts around this that lead to these kinds of splits and this

1 kind of approach.

2 I believe this was also the district she testified that
3 split one of the neighborhoods that was there in Henry County,
4 where there is a division here.

5 This District 153 and the configuration of Southwest
6 Georgia, one of the areas where Mr. Cooper and Mr. Esselstyn
7 disagreed, their testimony there is, there really is no reason to
8 connect a House district like this with Thomasville to Albany, a
9 three-way split of Sumter County doesn't make sense, and the fact
10 that Mr. Esselstyn didn't draw a district here, I think, is also
11 incredibly specific and relevant to this.

12 THE COURT: Well, as you heard, I have a concern about
13 this one.

14 MR. TYSON: Yes, Your Honor. And District 64 is an
15 unusual district, I would say. We had the testimony about taking
16 Fulton voters, connecting them through Douglas and into Paulding.
17 But again, this is a district that's barely majority, it's not
18 majority on single race, it's not majority on registration.

19 So again, taking a look at what we've drawn here and the
20 reconfiguration around it as an aside, you can see in District 60,
21 for example, here, this is another example of having to string a
22 district along to lower the overall black percentage in the
23 district. So you have a higher black percentage in this portion
24 of the district moving along the Chattahoochee River into a whiter
25 area as you move into North Fulton. These are some examples of,

1 again, of districts that would be drawn to lower the percentage
2 just because of the concentration of voters in that area.

3 So that's the House plan. Those are the House
4 Districts. And again, I think at the end of the day, the relative
5 lack of agreement and then the lack of clarity in terms of where
6 the Legislature failed to draw these, I think the only agreement
7 is that South Atlanta area and Middle Georgia, and then there was
8 a question of how much and what length the Legislature should have
9 gone to. And given Mr. Cooper was drawing his plans before the
10 Legislature even was drawing their plans, my expectation is if
11 we -- if the Legislature had drawn districts like this, we might
12 have been here on a preliminary injunction on a racial
13 gerrymandering claim instead of a Section 2 claim, just because of
14 the difficulty of considering those issues.

15 So let's look at the Senate. There was more agreement
16 on the Senate plans than there was on the House. I think that's
17 clear, number one.

18 District 23 can only be made majority by connecting, as
19 we talked a lot about, Augusta with Warner Robins and Houston
20 County here. It's a district that is above 50 on AP, below 50 on
21 single race, below 50 on black registration.

22 Mr. Esselstyn configured that same district differently.
23 But both of the configurations required District 22 to leave
24 Richmond County.

25 Ms. Wright testified about splitting of Greene County

1 for minority population and other areas in Wilkes County. And
2 again, the same problem, we get to a majority AP black VAP
3 district for the one that's so close that it's not majority on
4 single race or on voter registration.

5 And I think for these districts, in particular, there is
6 not evidence or testimony from the plaintiffs about what is
7 connecting the various communities contained in these districts.
8 You have to have Milledgeville. You have to have Augusta to try
9 to form a district here that is majority black in this part of the
10 state. And ultimately, we would submit this is a textbook LULAC
11 example, you're coming halfway across the State of Georgia in a
12 single State Senate District to unite communities based on race
13 and achieve a racial goal.

14 District 28 is also suffering from a similar fate here.
15 You have a Fayette, Spalding, Clayton district on Mr. Cooper's
16 configuration. And as you look at the numbers with him, only
17 Clayton County has a majority black population in the '70s, and
18 both Fayette and Griffin/Spalding do not. And so again, we're
19 connecting these to create a district here that was not previously
20 there before. It is a majority on single race. It's below
21 majority on black voter registration.

22 Mr. Esselstyn is in the same general vicinity, but he
23 puts a lot of Fayette County into another black majority district
24 here that runs into Clayton. And instead, he connects Clayton
25 County with North Fayette, South Fulton and down into Newnan to

1 get a district that is a little stronger and is majority black on
2 all three of those. But on either configuration, you have to have
3 Clayton County in the district.

4 Ms. Wright couldn't really identify the interest there,
5 and said going to Newnan to her looked exactly like what she would
6 consider to be a race focus on that configuration of
7 Mr. Esselstyn's, and a three-way split of Clayton County on
8 Mr. Cooper's plan there on the left.

9 District 17 and District 25 in the Henry County area,
10 these also are configured differently in the same Henry County
11 area. There was no testimony, though, about Stonecrest united
12 with McDonough and some of the rural areas of Henry County. This
13 is a very strongly black district, in terms of it's over 62
14 percent, 60 percent on single race, 55 percent on registration.
15 Mr. Esselstyn doesn't go up into DeKalb County, but it does go and
16 has to use population in Clayton County here in the south part to
17 make it a majority black district. It's a little bit lower on the
18 overall numbers, but it is there. Again, I think we're at the
19 same point of connecting these different communities to achieve a
20 racial goal and then reconfiguring, for example, District 10 again
21 as majority black, going all the way from South DeKalb down
22 through Henry and into Butts County to enable the creation of
23 District 25.

24 So again, all these pieces, the division of counties,
25 the increase in deviation, the increase in precincts -- although

1 the plaintiffs give lip service to traditional redistricting
2 principles, these plans have to sacrifice at least some of those
3 in service of the racial goal that they have on these plans.

4 Moving to Coweta -- I mean, it's congressional, I'm
5 sorry. District 6 we talked about this. Testimony from
6 Mr. Cooper couldn't really explain his decision to take this part
7 of Cobb versus the western part or the eastern part. Ms. Wright
8 testified that this district into Fayette cut several precincts,
9 and she couldn't explain what was going on with that little
10 appendage here.

11 THE COURT: The argument is made, though, it wouldn't
12 go -- if you took it east or west, it goes up to Kennesaw. My
13 question is, if you go west or east, would it make a difference?
14 She said I don't think it would make a difference. We're just
15 talking about population.

16 MR. TYSON: Your Honor, I don't want to testify on this,
17 but I am familiar with Cobb County and know that this part of Cobb
18 County has a higher -- is much more diverse in terms of its
19 population makeup than the western part of Cobb County or even the
20 eastern part of Cobb County. So this is a -- when we first looked
21 at this and looked at it with Ms. Wright, this was a pretty
22 obvious reach for population in this district. I believe she
23 testified about that.

24 THE COURT: Let me look at these numbers for a minute.
25 Below 50 on registration.

1 MR. TYSON: And again, I think this is also where the
2 wonderfully complicated puzzle comes into effect because these
3 changes to District 6 mean that District 13 needs population. And
4 so 13 on Mr. Cooper's plan now runs all the way over to -- I think
5 it's Jones County, which I think Mr. Cooper admitted and
6 Ms. Wright said was a rural part of the state with Clayton and
7 Fayette there. So you're making sacrifices kind of in every
8 direction, and it drops that District 13 down below 50 on single
9 race and below 50 on registration.

10 So again, all these different places, you touch it in
11 one place, it does have effects in other parts of the state and
12 the other configurations. Again, the plaintiffs say this is just
13 illustrative; the Legislature can figure something else out. But
14 given the tolerances that are this tight, it's difficult to
15 configure. Although I would assume it's very difficult to
16 configure these districts in some other way. And the plaintiffs
17 haven't showed you that there is another possible way to do this.

18 The allegation is the Legislature should have drawn this
19 district, but if the Legislature drew this district, again, I
20 think we'd be here on a racial gerrymandering claim as opposed to
21 a Section 2 claim.

22 THE COURT: One of the arguments that came up on a
23 number of cases regarding the citizens in Southwest Cobb County
24 being connected with people in Northwest Georgia, no similarities.
25 I think your argument said, well, we actually have population.

1 But isn't that something -- the argument being made by the
2 plaintiffs in some case where we have to find the population?

3 MR. TYSON: Certainly, Your Honor, it's always a factor
4 you want to consider especially for a Congressional District
5 because it's so large. And so that's why you see Mr. Cooper when
6 he fixes that southwest up to northwest, he ends up putting
7 Clayton and Fayette in with rural counties to the east of the
8 state. So ultimately, you know, you have to find the population
9 somewhere. You have to be able to include people. And that's
10 going to involve situations where you have disparate communities.

11 I can't remember if we talked about this or not. I know
12 I talked with Ms. Wright at one point about District 14; one of
13 the things that it does is it stops at the mountain range there.
14 It doesn't go all the way across the top of the state. There are
15 factors like that, there is geography you have to consider. So
16 the Legislature, I think, as a policy-making body, can hear from
17 the public, they can make those calls, we're going to put this
18 with this, they can say, well, put Bartow in, and may decide,
19 well, Congressman Loudermilk lives there, we don't want to take
20 his home county. So we'll take a piece of Cobb instead. They can
21 make those decisions, but, again, those aren't racial decisions.
22 And I think that's the concern is if you're making those same
23 types of decisions based on race, that's where you're stepping
24 beyond what's allowed as an actual remedy in this situation.

25 So we also talked about, and you mentioned -- had

1 discussion about District 18. I think this is another important
2 point that when you start making these types of changes, there are
3 other effects in other districts.

4 So we talked about District 23 and 26 and how that
5 configuration results in this meandering district for District 18.
6 And so the Legislature is having to balance all of these different
7 interests while trying to also take into account traditional
8 principles in other places as well. And so I think this is a
9 significant part of Mr. Cooper's testimony where he said, yeah, I
10 didn't pay as close attention to District 18 because I was really
11 focused on the majority black districts. That's yet again an
12 indication he was focused primarily on race, and that's our
13 concern with this as remedies as to the maps.

14 I think ultimately one point this hole drives to, this
15 is an emergency preliminary injunction proceedings, and these are
16 very, very complicated questions to have to sort out. Ms. Wright
17 said the Legislature spent several months working on these plans.
18 More time will assist the Court in sorting through a lot of this.
19 So I think looking at those pieces, not on a preliminary
20 injunction standard, will also be helpful in determining is there
21 a Section 2 violation here. Because, again, if it's not dilution
22 of votes on account of race or color, then we don't have a
23 violation of Section 2 and these maps are completely lawful.

24 So I wanted to just kind of close out the Gingle's one
25 piece with Justice Kennedy in LULAC where he talked about there is

1 no precise rule governing Section 2 compactness. The inquiry
2 should take into account traditional districting principles, such
3 as maintaining communities of interest and traditional boundaries.
4 And he has some citations and then says, "The recognition of
5 non-racial communities of interest reflects the principle that a
6 state may not assume from a group of voters' race that they think
7 alike, share the same political interests, and will prefer the
8 same candidates at the polls." And that's 548 U.S. at page 433.

9 And I think again, if the Legislature had engaged in the
10 connection of these non-racial or these communities together based
11 on race, it would be engaging in exactly the type of analysis that
12 the Supreme Court has said that you can't make that assumption;
13 you have to look at more things than just the race of the
14 individuals you're putting into districts.

15 So ultimately, the Section 2 -- I mean, essentially what
16 the plaintiffs have shown us is if you focus primarily on race, if
17 you racially gerrymander, you can draw some additional majority
18 black districts. That, to me, is not a very remarkable
19 proposition because, yes, if you focus on one particular thing,
20 you can probably keep squeezing out additional districts, make
21 districts even longer, and then you could probably find some more.
22 But that's where the race consciousness affects the illustrative
23 plans that you've been given here and is not an appropriate
24 consideration as we look at the geographic compactness of the
25 minority community.

1 THE COURT: So you're saying it's not enough minorities
2 in the state to draw this extra Congressional district and three
3 Senate Districts and five House Districts?

4 MR. TYSON: No, Your Honor. The people are definitely
5 there. Again, it's a question of how do you configure it. If,
6 for example, you drew a series of ten -- let's say you brought
7 every district into metro Atlanta, say. If you just cut through
8 the counties, bring things along, I think back to the Cynthia
9 McKinney district in the 1990s, the red plan of Savannah. That
10 was a district that could be drawn, and the people were there to
11 support making that a majority African-American district.

12 THE COURT: Well, here you have 14 Senate districts in
13 2006. You increased the African-American population of Georgia by
14 16 percent, 484,000 out of a million people, yet you have no
15 increase whatsoever in Senate districts. You have 47
16 majority/minority House Districts. Again, you increased the
17 numbers by 16 percent, yet it only goes up two. How do you
18 rationalize that? I understand what you're saying about the
19 overall increase is half percent, 1.5 percent, but in the Senate
20 there is no additional ones even if they're increasing population.
21 The House clearly at least makes the argument, well, we increased
22 two. But in the Senate all that increased population, but no
23 increase in the representation part. That's the argument.

24 MR. TYSON: Yes, Your Honor, and I think it is a
25 very -- it's really important to look at because I think it's more

1 complicated than just there's people; therefore, there should be
2 more districts.

3 THE COURT: All right.

4 MR. TYSON: For example, if all of those individuals --
5 I'm not saying this is what happened, but let's just say all those
6 individuals moved evenly distributed across North Georgia, let's
7 say. There's -- there is a numerical increase, there's not enough
8 of a compact community to form an additional district. I think
9 that's ultimately what we're trying to get to in Section 2; we
10 just can't look at total numbers. We have to look at the
11 geographic compactness of the minority community. So if all of
12 those individuals moved into a part of Atlanta, geographically
13 compact and more of a community there, yes, that district should
14 be drawn.

15 The evidence before you, though, is this is the number,
16 this is the effect, and it's missing a step in the analysis that's
17 needed to look at the geographic compactness of the community.

18 THE COURT: Compactness of the numbers are not there is
19 your argument?

20 MR. TYSON: Yes, Your Honor.

21 So ultimately we have maps drawn primarily based on
22 race. We would submit the plaintiffs can't succeed on prong one
23 for that reason. And I know Ms. Khanna referenced the Davis case
24 in the Eleventh Circuit about what do we look at in terms of
25 Section 2 versus racial gerrymandering. I think we also have to

1 look at Abbott, we also have to look at Cooper, and you also have
2 to look at some of the more recent Supreme Court cases and, again,
3 we get into this muddle of what is the Court to do. If the same
4 maps that can prove a Section 2 violation would be racial
5 gerrymandering if the Legislature drew them, then I think we're at
6 a significant problem in terms of the remedy phase of this. And I
7 think that's why the logic of the Eleventh Circuit that you have
8 to show something you can order as a remedy makes sense as a
9 limiting principle. Because if it can be ordered as a remedy, the
10 Legislature could have drawn it. Those are things that fit within
11 the constitutional bounds of limiting racial gerrymandering.

12 So moving to prongs two and three. This is our racial
13 polarization question. And I think at the end of the day, there
14 is not a whole lot to say here. I think the issue is pretty clear
15 the plaintiffs' experts didn't consider causation as they
16 testified. They just ran the numbers. We found this
17 polarization.

18 I think we had some questions for Dr. Handley in terms
19 of her lack of confidence intervals in the primaries. Ultimately,
20 I don't think it makes a lot of difference to your analysis which
21 is, we would submit, on account of race or color matters here,
22 too. Because if we find that racially-polarized voting exists,
23 and it is not on account of race or color that this dilution is
24 happening, it's because of partisanship, for example, then there
25 is no Section 2 violation again on that point.

1 So whether you consider the political versus racial
2 polarization here or consider it as part of the totality, it's
3 very relevant to is this voter dilution partisan, alleged voter
4 dilution partisan, or is it racial? Ultimately, that requires a
5 remedy from the Court.

6 You have Dr. Alford's testimony on that. Both
7 Dr. Palmer and Dr. Handley also used these reconstituted election
8 results to say, well, we're confident these districts will elect
9 candidates of choice. But if what we have is partisanship in our
10 polarization, then that's not that remarkable of a proposition.
11 If you put a majority of Democrats into a district, it will elect
12 Democrats. That's essentially the analytical process that's
13 happened.

14 As we talked about all of the new majority black
15 districts added for both Mr. Cooper and Mr. Esselstyn that have
16 Republican incumbents currently. Several of the House Districts,
17 there was some testimony on this, also have Republican incumbents.
18 And so there is definitely a partisan impact here from making and
19 advancing the claims that the plaintiffs have made, and that
20 brings us back to Justice Alito's concern about coming to the
21 Court to achieve a partisan outcome under the guise of a Voting
22 Rights Act. We all want to make sure that -- the Voting Rights
23 Act is far too important of a law for it to be used for partisan
24 purposes.

25 So I'll just briefly add, too, on this, the amicus brief

1 from Harvard, I don't think it really adds anything. They didn't
2 post copies of the map that they drew. They said we produced some
3 maps, we haven't looked at them, so I don't think there is much to
4 say on that.

5 So as to the Gingle's precondition, we submit the
6 plaintiffs have not clearly established they can succeed on the
7 merits. And definitely to Justice Kavanaugh's piece, there is not
8 a clear-cut finding here at least on the Gingle's prong. This is
9 a very difficult question to try to resolve.

10 So next we have the totality of the circumstances. And
11 while the plaintiffs have pointed out it's the unusual case where
12 you find the first three Gingle's prongs and don't find the
13 totality, the Eleventh Circuit also requires you as the fact
14 finder to weigh all of these different pieces. And so I'll just
15 briefly talk through those, and, again, I think the totality
16 demonstrates we're in a partisan situation, not a racial
17 situation.

18 So first, I think everyone agrees, Georgia has a
19 terrible history of official state-sponsored racism. I don't
20 think there is any question about that. But the evidence that the
21 plaintiffs have given you, a lot of that ends around the 1980s.
22 And things get a lot murkier as time goes by. And the more recent
23 examples they've given you are cases that you're hearing on our
24 verified action case or open questions about Senate Bill 202, they
25 also -- a lot of what is going on there is partisan in nature.

1 And so that, I think, begs the question of what have we
2 actually found here? And the Eleventh Circuit has warned in
3 Greater Birmingham Ministries in 992 Fed 3rd at 1332, while we
4 credit plaintiffs' argument about Alabama's history of
5 voting-related discrimination, we also reiterate our caution about
6 allowing the old outdated intentions of previous generations to
7 taint Alabama's ability to enact voting legislation. So I think,
8 again, you have to weigh this out and look at the entire context
9 of the situation that happens with the history of discrimination
10 in Georgia.

11 On racially-polarized voting, we talked about the
12 partisan nature of that was, what's the situation there. I think
13 that can be weighed appropriately under this piece of totality,
14 it's not under prongs two and three.

15 Third, the voting practices that tend to discriminate,
16 this I find to be fascinating because Georgia has, as Dr. Jones
17 testified, some things that make it very easy to get access to the
18 polls. We've had automatic voting registration, for example,
19 we've had that for six years now. And we have -- the other thing
20 that is interesting about this is, one of the prototypical
21 practices that is given is the majority vote requirement here, but
22 the majority vote requirement, if that didn't exist, Senator
23 Purdue would have won reelection and Senator Ossoff would not have
24 been successful. So these factors don't necessarily clearly go
25 one way or the other like they did in different parts of Georgia's

1 history. We all agree there is no candidate slating process. Not
2 an issue there.

3 On the evidence of socioeconomic standing of black
4 voters, I think, again, the evidence is what it is. The census
5 data shows what it shows, but ultimately on account of race or
6 color, it comes into play here because the socioeconomic situation
7 has to hinder political participation. That's the analysis of
8 this prong of the totality.

9 And so the massive record-breaking turnout of
10 African-American voters in 2020 that Dr. Jones testified about,
11 that would tend to indicate there's not nearly the difficulty in
12 participating in the political process as maybe has occurred --
13 definitely has occurred in the past in Georgia and not as much
14 more recently. But I think this is again one of those factors
15 that doesn't weigh heavily in favor of the plaintiffs.

16 Dr. Jones testified about some terrible racial appeals
17 and campaigns, and, obviously, those shouldn't have happened and
18 they're terrible. I don't agree, though, that the fact that these
19 candidates who made the appeals were unsuccessful isn't relevant,
20 because I think if the appeals had worked, the candidates might
21 have been successful in the outcome. The fact they attacked
22 Senator Warnock and he still won, it at least shows that these
23 racial appeals don't work in Georgia the way they used to. So,
24 again, I don't think that factor weighs heavily in favor of the
25 plaintiffs.

1 The extent the election is a difficult one, Georgia
2 elected a number of black officials. But we have kind of a rising
3 group of black Republicans. Commissioner Fitzjohnson in the
4 Public Service Commission will stand for election this year.
5 Herschel Walker's success in the Senate race so far. We have
6 Vernon Jones running for Congress in the 10th District, a majority
7 white area. This situation has gotten a lot more muddled than it
8 used to be in terms of the lack of overall success of candidates.

9 And then in terms of responsiveness, and the tenuousness
10 of the policy, again, what we have are largely political disputes.
11 Georgia Republicans didn't expand Medicaid. That is a position
12 Republicans have relatively consistently taken across the country.
13 So, again, we don't have strong evidence of lack of
14 responsiveness, and ultimately we have maps that are very similar
15 to Democratic proposals, similar to the plans that existed
16 previously.

17 Mr. Morgan's analysis in the Congressional plans shows
18 most of their districts retained their core, so whether the
19 Legislature had that as that particular part of their principles
20 or not, they drew maps that way that largely retained district
21 cores.

22 And so the last thing I'll say in totality is, there is
23 five majority non-white Congressional Districts on the current
24 map. So if we're in a situation where I don't think anybody would
25 contest that those districts aren't going to elect the candidate

1 of choice in a minority community by electing Democrats, five
2 divided by 14 is about 35 percent of the population. So in
3 DiGrandi, one of the things that the Supreme Court said you have
4 to take into account in proportionality of elections is,
5 obviously, an indication that minority voters have an equal
6 opportunity to participate in the political process and to elect
7 representatives of their choice. So that's DiGrandi 512 U.S. at
8 1020.

9 So we would submit on all of these factors, both on
10 Gingle's and on the totality, the plaintiffs have not shown
11 they're likely to succeed on the merits.

12 Going to prong two, just briefly, I think the simple
13 answer there is, if there is a Section 2 violation, the harm is
14 irreparable. And because we submit there is no Section 2
15 violation, then there is not an irreparable harm. So I think
16 those two go hand-in-hand.

17 So let's get to the one I know is most posterior in
18 terms of Purcell and all of our equities and public interest.

19 So this is just a quote from Justice Kavanaugh. We
20 recognize it's not precedent. We recognize it's not binding, but
21 I think it is a helpful guide. And as we talked about, again,
22 Justice Kavanaugh found that factors one and four were present in
23 the Alabama case. I think we've -- as we talked through things
24 here, factor one is I think even more present in this case than it
25 was in Alabama, just given the complexity of what's being done.

1 But I think we consistently see that there -- number one, there is
2 an entitlement to relief, injunction in Section 2. And I think
3 the Shelby County opinion says, in the appropriate case, yes, that
4 happens. We have Section 2 claims pending against the Senate Bill
5 202 Legislation. I fully expect we will have preliminary
6 injunctions filed about those, and those cases have been pending
7 for a while.

8 But we have consistently seen in the 2020 cycle any
9 relief ordered by a District Court that changed the election
10 structure was stayed by the Eleventh Circuit. So the New Georgia
11 Project, all Judge Ross did in that case was just to extend the
12 time to receive absentee ballots. And the Eleventh Circuit said,
13 no, you can't do that.

14 THE COURT: She did it in the middle of the election.

15 MR. TYSON: Yes, Your Honor.

16 THE COURT: People were already voting. So I looked at
17 that case, but I said, well, this is in the middle of the
18 election. I'm not saying -- I would never make comments on my
19 colleague's decisions because they're all much smarter than I am,
20 but that's the same situation.

21 MR. TYSON: Exactly. I think it is good to underscore
22 the logic behind what is going on here. I think the Eleventh
23 Circuit in that opinion said, you have to have clear rules of the
24 road so you know what the rules are. And ultimately as we talk
25 about that, I think, the concern here. We're on track, the train

1 is rolling down the tracks. If we have to rebuild the tracks
2 quickly, it's hard to move the train from one to the other,
3 essentially.

4 So I think that one other important point is the
5 plaintiffs have said over and over that the State is not entitled
6 to one free election. But I think that ignores just that we are
7 in a very unprecedented moment right now with the delays in the
8 census due to COVID. We had a much later special session.

9 The governor did what he did in terms of the maps.
10 Can't speak for him. He's not here to talk about that. But
11 meanwhile, election officials have to get their job done. They
12 don't have an option. And they've begun that process.

13 THE COURT: What do I say -- again, I have not made any
14 final decision in this case whatsoever. If I rule on behalf of
15 the State, this equity is a moot point. But if I did on any of
16 these eight proposed maps rule on behalf of the plaintiff, what do
17 I say to those voters if I say, yeah, I think there is a violation
18 of Section 2 here, but it's too late to do anything about it now?
19 Is that it, too late, sorry?

20 MR. TYSON: I agree, Your Honor. That is a very, very
21 difficult thing to say to somebody, that you believe the maps are
22 in violation of Section 2, but yet we just can't do anything about
23 it. I think the key point, though, is -- and I know you had this
24 discussion with Mr. Williams -- I don't think the maps become
25 unlawful when you find the likelihood of success. Because you're

1 forward-looking in the case. I think about the photo ID case, it
2 was very important. So some Georgia voters had to have a photo ID
3 for voting, that was stayed as a preliminary injunction. But
4 ultimately Judge Murphy found it didn't violate the law, and the
5 process went into effect. So I think something similar would have
6 to happen here that it's -- we're at a point in the election
7 process that it's too late. I understand it is a difficult
8 message to communicate to somebody that under the circumstances.
9 But again, we think that is why there is not a question here about
10 all this. You see partisanship at most, essentially.

11 So I just want to dwell on -- we talked about the
12 underlying merits. I don't want to belabor that point. But I do
13 want to talk about the cost -- the significant cost, confusion, or
14 hardship. And I think of this as kind of two pieces. I think of
15 the piece if we move the qualifying day and don't move the
16 election, and then I think about if we move qualifying and the
17 election, what happens. And we have a different set of problems
18 kind of with both.

19 So you heard from Mr. Barnes and Ms. Bailey about if we
20 move qualifying but not the election, you have election officials
21 are going to have to input all of the information into the voter
22 registration database, touch every street segment, work their way
23 along there. Mr. Barnes has to wait on them to finish that task
24 so he can start building ballot combinations. And we're already
25 on this incredibly difficult timeline to get to the UOCAVA

1 deadline for the overseas and military voters. Both Ms. Boren and
2 Ms. Bailey testified this could be a several-week-long process
3 depending on the extent of the changes. And that could cause a
4 significant issue for election officials. And so there's,
5 obviously, a difficulty for election officials in that scenario,
6 and endangering the timeliness of being able to send out absentee
7 ballots to the oversea voters.

8 And that's why the Alpha Phi plaintiffs have said, well,
9 just change the election. You have the power, you can just change
10 it. But again, that leads to its own host of kind of confusions
11 and difficulties. So, first, we have the runoff timeline that
12 Judge Boulee has in front of him in the Senate Bill 202 cases. If
13 he ultimately concludes Georgia couldn't shorten its timeline for
14 nine weeks to four weeks, then we have to build in time for a
15 nine-week runoff. And so we're facing a different set of
16 deadlines there.

17 THE COURT: You raise a question there. If Judge Boulee
18 does not go to 28 days and he keeps it to 45 days, does that not
19 make the plaintiff's argument that much better? Well, you do have
20 time, Judge.

21 MR. TYSON: Well, I don't believe so, Your Honor. I
22 think the reality is that piece only applies kind of between the
23 election and the runoff. So it doesn't affect the time to get
24 ready for the election, it may help you have the runoff be easier,
25 but I think that would be all for that.

1 THE COURT: Not the primary.

2 MR. TYSON: Then we heard all of the elections officials
3 testify, talked about what would happen. They've already secured
4 polling places for the year. They've already talked to their
5 schools, their churches, all that. That's our vacation bible
6 school situation, what would happen if we did that.

7 Dr. Burton when he testified, and if you read that
8 moving polling places has a massive impact for minority voters, in
9 particular. Bishop Jackson talked about that he thought voters
10 could find their polling places if they moved, but agreed in the
11 verified action case, he felt that moving polling places was a
12 tactic of voter suppression.

13 Every one of the state and county officials are grateful
14 for the offer for the AME churches. There are very specific
15 Americans with Disabilities Act requirements for accessibility,
16 power requirements for the machines, a lot of things that have to
17 go into selecting a polling place. It's so not just as simple as
18 calling up the church next door that is not having vacation bible
19 school that week and moving the precinct there.

20 The other piece, and Mr. Barron talked about it, he
21 thought he could get this done. But if we're relying on the June
22 2020 primary as an example of how this -- what would happen here,
23 we've delayed elections before, we've looked at the pictures, we
24 recall the "Hey, Dixie" headline, Complete meltdown. I don't
25 think anybody wants to look at the June 9th primary as kind of a

1 model for how we have to handle this going forward. We don't want
2 to invite the chaos in 2022 that we had to deal with 2020 as we
3 worked through moving polling places and changing locations.

4 And so Carter's testimony about his special election,
5 that was one election that was happening. We weren't running all
6 of the elections at the same time. So I don't think that has a
7 huge value along the way. And I think we thoroughly discussed the
8 election officials' request for more time. That was in the
9 summer, late summer where they had time to prepare for this. It's
10 different now, as Ms. Bailey had talked about.

11 The last piece on this, I think is important, is the
12 potential whiplash effect. Let's say you enter relief and delay
13 the election and we go to the Eleventh Circuit, and the Eleventh
14 Circuit says, no, you're going back on the schedule; well, if we
15 had already dropped a polling place for a county here, and we add
16 it over here, it just invites --

17 THE COURT: That is a very real concern to the Court.

18 MR. TYSON: I think it's a real concern for election
19 officials as well if we were to go down that road.

20 So ultimately we also have the confusion for voters and
21 candidates. That's another important piece of the puzzle. That's
22 going to be an issue we have to work through and sort through
23 along the way. So let me just go to -- I think something we
24 talked quite a bit about, letting an election go forward on an
25 illegal map. What are we going to do if you're convinced the map

1 is illegal, what happens?

2 You spoke to Mr. Williams about 2001. We had maps for
3 the State House and State Senate that were precleared that were
4 used in the 2002 election and then ultimately were found
5 unconstitutional by the three-judge panel. Oh, so we have
6 precedent there.

7 You talked about Ms. Boren and the city county election
8 officials along the way there. I think it's one of those
9 interesting things about county commission boundaries, in
10 particular. We have some counties in Georgia who have not
11 redistricted their county commission districts in 40 years. And
12 as long as nobody sues them, they keep using the same maps.

13 THE COURT: If you name them today, some of them may get
14 sued.

15 MR. TYSON: Exactly. It would be a pretty good idea for
16 a plaintiff's lawyer, though, because you're guaranteed your fees
17 in those cases.

18 THE COURT: Ms. Khanna, can you give us those names?

19 MR. TYSON: But I also went and looked, Your Honor, and
20 there are some other situations and cases where maps were found to
21 be illegal and were not enjoined for use in an election. So we
22 put a few here. You referenced some of them, Putnam, Eli case,
23 Golarden. The Covington case in North Carolina I thought was
24 interesting. The North Carolina Courts specifically declined to
25 change election dates because they thought it would cause

1 considerable confusion, inconvenience, and uncertainty among
2 voters, candidates, and election officials. The Bostelmann case
3 from Wisconsin was a COVID case. The district court found it was
4 a likely constitutional violation, but said the priority of a
5 federal court taking the extraordinary step of delaying a
6 statewide election at the last minute, and the federalism problems
7 that are necessarily implicated, led to not move that election
8 date. But even with that statement, this is the case where the
9 Court entered relief as to absentee ballots and had the Supreme
10 Case ultimately stay.

11 THE COURT: Let me say to everybody, on three of these
12 cases, when you read them, the time is less than the amount of
13 time I have, but the important thing about these cases, if the
14 analysis they give the Court should look at in making a
15 determination, I think the Democratic case was less than six
16 weeks. It's not the time. It's the evidence they give on what I
17 have to look at and what they want by making a decision not to go
18 forward. They're going to get the job done. That's the argument
19 there.

20 MR. TYSON: Yes, Your Honor. So I think we go back and
21 the plaintiffs said, you know what, county officials are going to
22 get the job done. Your Honor, county election officials are some
23 of the hardest-working and most vilified public servants that I
24 know. I represented county election officials who decided after
25 decades in the 2018 election and everything that went down, they

1 were done. They were not going to work the elections anymore.
2 Mr. Barnes testified about -- he doesn't tell people what he does
3 for a living because of what happened in 2020. After he and I
4 walked out when he testified that day, he said he tells his
5 daughter not to tell people what her dad does because of his
6 concerns about the impact of that. So I look at all of that and
7 say, of course these officials are going to tell you they get the
8 job done. That's what they do. They work so hard to get this
9 right. And given all of the massive disruption we have here, if
10 we were to make these kind of changes, I just think at what cost
11 are we doing that? We had elections in 2018 that were challenged
12 on a lot of issues. We had elections also in 2020 that were very
13 seriously contested. Let's not invite further chaos into the
14 process of 2022 by changing the maps at this point.

15 This case isn't over after today. We'll go through
16 discovery and work through this process. We can work through
17 these serious and challenging things to try to get this right. I
18 think that the most important thing for all Georgian voters at the
19 end of the day is that we get this right.

20 So with that, Your Honor, I want to thank you for your
21 time and hearing this case. Thank you to Ms. Wright for all her
22 hard work. Our opposing counsel have been great to work with all
23 the way along. We appreciate being on a short timeline. Our
24 court reporters who have had to put up with my speed talking and
25 others, and all of the staff that have worked here, we're grateful

1 for the chance to present this case to Your Honor and for your
2 conversation.

3 THE COURT: Ms. Khanna, you have ten minutes and the
4 Court will not interrupt you one second.

5 MS. KHANNA: Thank you, Your Honor. And I appreciate
6 the extra time and I appreciate the Court asking these questions.
7 It's nothing worse after finding out after you read the opinion,
8 what the issues were that were really important to the judge. So
9 I want to be able to address some of those in the next ten minutes
10 that I think that I've heard from you and the questions you've
11 asked of the various counsel in this case.

12 I want to talk about a couple points about the merits
13 and then focus more on the equities. Mr. Tyson argued that you've
14 got to establish that this undisputed polarized voting that we
15 have is on account of race and not on partisanship. A lot of the
16 argument that the State presents, it's just partisan politics.
17 Apparently, it is disregarded that the people who are most
18 affected by whatever those partisan motives are are black voters.

19 But when it comes to what Section 2 plaintiffs need to
20 prove, whether they need to prove whether it was race that is
21 driving polarized voting or party, there is no such standard. We
22 do not have to prove that intent. And while that might be the
23 State's preferred standard, that we have to disentangle the two,
24 that is by no means the Supreme Court's standard, the Eleventh
25 Circuit's standard or this Court's standard.

1 In Gingle's, the Supreme Court said, quote, all that
2 matters under Section 2 and under a functional theory of vote
3 dilution is voter behavior and not its explanations. In Carleton
4 Branch, the Eleventh Circuit said, quote, plaintiffs need not
5 prove causation or intent in order to prove a prima facie case of
6 racial block voting.

7 The reason behind this standard, the reason why Courts
8 have said, no, you don't have to establish that race-based intent
9 is because Congress in reauthorizing the Voting Rights Act
10 rejected any intent-based element for Section 2, any requirement
11 that the plaintiffs need to establish racial animus. Not only
12 because that would set an unfairly and unduly high bar for
13 plaintiffs, but because they determined it was just not
14 productive. It's not productive for the State of Georgia for
15 communities who are trying to rectify the problem to be charging
16 voting officials and legislators with racism. You don't
17 have -- you don't have to make accusations of racism or racial
18 animus to establish that the racial dynamics, political racial
19 dynamics as established through the Gingle's factors and the
20 Senate factors, result in a Section 2 violation.

21 Second point on the merits. I have to imagine the Court
22 was shaking its head the same way I was when you heard Mr. Tyson
23 say in response to the question of how is it okay to connect these
24 Cobb County voters with these rural voters out west, and Mr. Tyson
25 responded, well, you've got to find population somewhere. And

1 somehow when Mr. Cooper said that same exact thing, all the red
2 flags went up. And what I understood from that comment, what I
3 understand from the State's position is you've got to find
4 population somewhere. And if the people that you find just happen
5 to be white, even if they are a hundred miles away and share no
6 community of interest whatsoever, that's all good. But if you
7 have to find people, population somewhere, but the people you find
8 happen to be in a diverse community, which is what Mr. Cooper
9 testified, less than 20 miles from the core of the district and
10 shared multiple, practical similarities of interests with
11 everybody else in the district, then that cannot be done. That
12 cannot be the standard.

13 That is not the standard under Section 2, and despite,
14 you know, Mr. Tyson said he had nothing much to say about Davis
15 other than the Court should take another look at more recent
16 Supreme Court precedent in Abbott and Cooper on racial
17 gerrymandering. I actually know a lot of Abbott and Cooper on
18 racial gerrymandering. I was involved in those cases as well.
19 And I think the Court can comb those opinions and it will find
20 nothing that nutures the standards for Section 2 violations.

21 One final point on the merits, Your Honor, and I think
22 this is something of course Your Honor already knows, while we are
23 hearing these cases together for the convenience of the State and
24 the parties, these are three separate cases.

25 THE COURT: Yeah.

1 MS. KHANNA: They need not rise and fall together on the
2 merits or on the equities. This Court may find that the
3 Congressional claim in Pendergrass is simpler and cleaner since it
4 involves the addition of just one district, a common sense
5 district. This Court may find that changes to the Senate map are
6 more complicated than the House Districts map and, therefore, less
7 feasible for implementation in time for 2022. The Court must
8 weigh the facts and the evidence in each case on its own terms.

9 THE COURT: That's very important.

10 MS. KHANNA: I want to turn to the equities now, Your
11 Honor.

12 And I want to talk about Purcell for a moment. Purcell
13 does not hold that any change in an election calendar before an
14 election year is prohibitive. Purcell does not hold that all
15 election laws are frozen in place for the 11 months that precede a
16 general election. Justice Kavanaugh reaffirmed that in his
17 concurrence to the Alabama state order where he said that Purcell
18 is not an absolute bar. And nothing that Your Honor mentioned
19 what the Eleventh Circuit said about Purcell, nothing that I know
20 in the Eleventh Circuit has applied an absolute bar using Purcell
21 to apply an absolute bar. And I firmly believe that in any case
22 if I had done that, Mr. Tyson would have found it.

23 Purcell is about the public interest. That is something
24 Your Honor has asked about multiple times and I appreciate that.
25 The public interest. And it's important. Let's go back to what

1 was Purcell about? Purcell was about voters; not candidates, not
2 election administrators, not judges, not lawyers. The Supreme
3 Court wanted to protect voters from disenfranchisement less than
4 four weeks before an election.

5 So weaponizing Purcell to give a green light to district
6 maps that violate voters' fundamental rights is not only
7 inconsistent, it is inequitable. Mr. Carter in talking about the
8 voter confusion, Mr. Carter half joked that, you know, if he was a
9 candidate and maps are changed, he'd receive 30 text messages
10 about what would be required before Election Day. But that's
11 hardly an exaggeration. The modern campaign infrastructure is
12 designed to keep voters informed; candidates who want to get
13 elected will keep voters informed. As the witnesses testified,
14 churches, activists, political parties will keep voters informed
15 and have the means and the ability and are structured to do just
16 that. So the Court can be assured that the risks of voter
17 confusion here, which I believe should be paramount when
18 determining the equities, are low, indeed.

19 Your Honor, Mr. Tyson talked about whether previous
20 Georgia elections or previous elections Georgia has allowed
21 unlawful maps to go forward. And I believe what Your Honor was
22 referring to was Lazio, what Mr. Tyson referred to was Lazio.
23 There is a very important distinction between this case and Lazio.
24 In Lazio the maps were adopted in spring of 2002. The election
25 was held in November of 2002. The complaint filed challenging

1 those maps was filed in March of 2003. There was not a complaint
2 pending. There was not a substantial likelihood of success on the
3 merits that had already been determined by the time the election
4 rolled around. The election already happened, and then came the
5 lawsuit and then came the remedy. And that's true for the
6 Covington case and many of the cases that the State put up on the
7 screen there as well. Multiple elections had already gone forward
8 before the claim was even brought. Absolutely not the case here
9 where plaintiffs filed their lawsuit within hours from the maps
10 being enacted and as soon as they possibly could before any
11 election could be held on those maps.

12 Your Honor asked me and asked counsel for the Alpha
13 plaintiffs, how should the Court look at the Alabama State order,
14 and I know you've gotten several answers here. Ultimately, Your
15 Honor, I don't think the Court has to close its eyes to that
16 decision to recognize that it still needs to keep its razor focus
17 on the law as it stands and the record before it today. If this
18 Court decides to issue a preliminary injunction, it may be that
19 some days or weeks down the line, the Court also decides that the
20 state will have met its burden for this Court to issue a stay. If
21 this Court decides to issue a preliminary injunction, it may be
22 that the State appeals; it may be that three judges from the
23 Eleventh Circuit also think it should be stayed.

24 THE COURT: I know I said I wasn't going to ask you a
25 question, but you raised a question. If the Court issues the

1 injunction just like in the Alabama case, I fully expect Mr. Tyson
2 to file an emergency motion for a stay. How do you
3 differentiate -- I think you can, but are you saying the Court
4 could say, okay, even though I found the likelihood to succeed on
5 the injunction, I can find the can likihood to succeed on the
6 stay? If I find irreparable harm on the injunction, can I not
7 find irreparable harm on the stay? If I find the equities favor
8 the plaintiffs, can I find the -- on the injunction, can I find
9 the equities favor the plaintiffs on the stay? If I find that the
10 public interest favors the plaintiffs, can I turn around and find
11 on the stay, the public interest favors the stay? Do you see what
12 I'm saying?

13 MS. KHANNA: It's a very good question, Your Honor. You
14 can rest assured what position I will be taking.

15 THE COURT: I know what you'll be taking. But the
16 question is, you understand, it sounds like you're contradicting
17 yourself.

18 MS. KHANNA: I understand, Your Honor. There is a
19 standard for district courts to stay their own judgments, and this
20 would not be the first time for a district court to actually do
21 that -- if the Court decides that's important.

22 THE COURT: I've read that. You're absolutely right.
23 It seems like a contradiction. There are some district courts
24 that have done it and stayed their ruling to give the State time
25 to, you know, ask the Eleventh Circuit or the Supreme Court to see

1 how they're doing.

2 That leads to my second question. You guys are great
3 lawyers. I like asking you questions, all of y'all. I wish I
4 could pack you all up and bring you all along. The question --
5 one more time, Mr. Tyson, I have not decided. This discussion is
6 going to be a moot point.

7 The Court issues the injunction, does not grant the
8 State's stay request, two to three weeks down the line,
9 hypothetical, I issue the injunction on March the 2nd. And then
10 if the injunction says, all right, no qualifying on March 7, and
11 then I don't grant the State's request for emergency stay, and
12 then two to three weeks later it is the Eleventh Circuit, or the
13 Supreme Court says, no, we're issuing the stay. Look at all
14 that's happened in the meantime.

15 MS. KHANNA: I think have three responses.

16 THE COURT: I know you have one.

17 MS. KHANNA: One, that's kind of the way -- Your Honor
18 knows as anyone better in this room, that's the way the judicial
19 system works; right?

20 THE COURT: Look at the chaos it has caused in
21 between -- not chaos. I think that's too strong. Look at the
22 disruption and cost and maybe confusion, cost of those two to
23 three weeks.

24 MS. KHANNA: Your Honor, I think Mr. Tyson or Your Honor
25 called it whiplash.

1 THE COURT: Yeah.

2 MS. KHANNA: And I get that. I get that different
3 courts making different rulings at different times can cause some
4 confusion to the people who are subject to their orders. That was
5 the issue in Purcell.

6 THE COURT: Because you've got to admit based on what we
7 have in front of us, that would be a possibility.

8 MS. KHANNA: It would be a possibility. As a practical
9 matter, Your Honor may choose, if this is a motion to stay, to say
10 I'm not going to stay the whole case pending appeal, but I'll stay
11 pending an Eleventh Circuit ruling on a motion to stay. There are
12 ways to fix that stop gap.

13 THE COURT: Put a time period on it.

14 MS. KHANNA: For some limited time period, exactly. As
15 a real matter, Your Honor, what another Court may do down the line
16 cannot implicate and cannot hamstring what this Court must do on
17 the law and the record before it.

18 THE COURT: Well, this Court must consider what has been
19 done as precedence. My immediate precedence is the Eleventh
20 Circuit, and then, of course, the Supreme Court. I can't just --
21 I can't sit here and guess or assume, you're absolutely right
22 about that. What -- what -- nor can I not consider -- there's a
23 reason why I was reading all these cases this weekend -- consider
24 what is the precedent out there, what has been done. In other
25 words, my wife would have loved if I had paid more attention to

1 her on a Sunday afternoon instead of reading these cases, but
2 that's the reason why you've got to as a judge, in particular
3 District Court Judge, I have to say what they have done? And
4 looking at what have they done, consider what would they do in
5 this case. You agree? Well, you don't have to agree with that.

6 MS. KHANNA: That's exactly right, Your Honor. You do
7 have to comb through the precedent, and the precedent that I'm
8 aware of that the Court has talked about that Mr. Tyson has raised
9 before this Court involves different cases, unique facts, unique
10 timelines, and it does not paint them with a broad brush.

11 THE COURT: I agree.

12 MS. KHANNA: And it would be wrong, I think, for this
13 Court to suggest or to be concerned that the Eleventh Circuit may
14 or may not do that in the future, because it really has not done
15 that yet, neither has the Supreme Court nor the 11th Circuit have
16 said there is an absolute bar in these areas.

17 THE COURT: It has not. But Eleventh Circuit has
18 reversed district court judges that they perceived what they
19 thought disrupted an election.

20 MS. KHANNA: That's right, Your Honor. I'm sure it has
21 also gone the other way.

22 THE COURT: I spoke with Judge Rosenbloom -- Rosenbaum,
23 excuse me, and Judge Rosenbaum -- and I can't remember the name of
24 the case, because I read it yesterday. They said Purcell is not
25 automatic.

1 MS. KHANNA: I believe that is the Peoples' First case,
2 Your Honor.

3 THE COURT: Alabama case, yeah. Not automatically just
4 because it's there, you don't automatically say we're not going to
5 go forward. So you're right. It's on both sides.

6 MS. KHANNA: Speaking of precedent, Your Honor, I want
7 to think about -- I touched on this earlier last week -- think
8 about the precedent that this Court would set. And I understand
9 it doesn't necessarily bind other courts, but you know the Alabama
10 stay order was issued a week ago. This Court is going to be one
11 of the first to really do anything in light of that order or not.
12 And if this Court were to feel like its hands were tied by that
13 order or by Purcell, think about the precedent that will help set
14 for future courts and cases. This is not just this year, Your
15 Honor. That's in every election year. And that's not just in
16 redistricting cases, Your Honor. That's in all voting rights
17 cases.

18 THE COURT: I've given that a lot of thought.

19 MS. KHANNA: And I'm sure Your Honor has, and we do not
20 want to encourage other courts or any states to think that states
21 can do whatever they want with voting rights in any election year
22 and courts must have a hands-off approach. This is not the law.

23 I just want to finish on one final point, Your Honor.
24 Mr. Tyson a week ago started his opening statement by suggesting
25 that this Court should assume the rule of armchair quarterback. I

1 was thinking about this last night, as the whole country was
2 watching the Super Bowl and I was in a hotel conference room with
3 my colleague working through this closing and probably having more
4 fun than anyone.

5 The idea of the armchair quarterback, Your Honor, is not
6 the right analogy. Plaintiffs are not asking this Court to be an
7 armchair quarterback. We're asking it to assume its proper role
8 as referee. We have referees on the field to ensure an even
9 playing field and to ensure both sides are playing by the rules,
10 and when they don't, to make it right. The new Congressional and
11 Legislative maps enacted by the State do not play by the rules.
12 They clearly violate Section 2 of the Voting Rights Act, one of
13 the most momentous pieces of legislation Congress has ever
14 enacted, and now a referee is needed to make the choice to make
15 things right, no matter what the other team or the commentators in
16 the box may say in response.

17 Your Honor, the Pendergrass and Grant plaintiffs
18 respectfully request this Court to make factual findings and draw
19 legal conclusions consistent with the evidence and grant their
20 motion for preliminary injunction.

21 Thank you for giving me the opportunity to speak.

22 THE COURT: Thank you, Ms. Khanna. Is there anything
23 else anybody else feels they need to bring to my attention or tell
24 me? Now is the time.

25 No, you're out of time. You've got your orders. I'm

1 sorry.

2 MS. LAKIN: I simply have the exhibits, the list of
3 exhibits. Should I just -- would you like me to actually read
4 those into the record?

5 THE COURT: Let's put them in the record, make sure
6 Mr. Tyson and Ms. Khanna have copies. You don't have to read them
7 into the record.

8 MS. LAKIN: They're all within the binders themselves,
9 and we should be all set.

10 THE COURT: What I'm going to do, Mr. Tyson and
11 Ms. Khanna, I'm going to look at them and I will issue a written
12 order this afternoon saying I'm allowing this. Mr. Tyson, I'm
13 allowing this over objection from the State. The State indicated
14 they don't think any newspaper articles should come in. Your
15 record will be perfected that way. If I don't allow them, I will
16 note the exception why I didn't allow them. But y'all will get a
17 written order on this one.

18 Let me just say to all of the lawyers, it has been an
19 honor and pleasure to hear you all present this case. It is a
20 judge's dream to have you all arguing the law well prepared. I
21 was telling my staff the other day, I said, you know, they made it
22 difficult for me because they all came in really prepared. So I
23 want to thank you all. I want to applaud you all. It's a real
24 joy, and I will do a case with any of y'all anywhere.

25 Findings of fact and conclusions of law is due Friday.

1 My staff will start working on this, this afternoon. I cannot
2 give anybody an exact date. As I told you, we're going to try to
3 do this as fast as possible. I recognize what I have in front of
4 me. So that's definitely a consideration.

5 Thank you all. I apologize for you missing lunch. If I
6 could -- I can't -- I would buy you all lunch, but I can't. I
7 can't for a lot of reasons. But thank you all, and have a great
8 day and a great week.

9 (Whereupon, the hearing concluded at 1:50 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 14th day of February, 2022.

/s/Viola S. Zborowski
VIOLA S. ZBOROWSKI, CRR, CRC, CMR, FAPR
OFFICIAL COURT REPORTER