

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

RALEIGH WAKE CITIZENS)
ASSOCIATION, et al.)
Plaintiffs,)
)
vs.) Case No.
) 5:15-CV-00156
WAKE COUNTY BOARD OF ELECTIONS,)
Defendant.)

CALLA WRIGHT, et al.)
Plaintiffs,)
)
vs.) Case No.
) 5:13-CV-00607
THE STATE OF NORTH CAROLINA,)
et al.)
Defendant.)

BENCH TRIAL - DAY 1
BEFORE CHIEF DISTRICT JUDGE JAMES C. DEVER III
DECEMBER 16, 2015; 9:00 A.M.
RALEIGH, NORTH CAROLINA

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DECEMBER 16, 2015; DAY 1

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P R O C E E D I N G S

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THE COURT: Good morning and welcome to the United States District Court for the Eastern District of North Carolina. We're here today for the trial in the matter of Raleigh Wake Citizens Association versus Wake County Board of Elections and Calla Wright versus the State of North Carolina. I have received the amended joint exhibit list that the parties submitted.

Is there anything we need to take up by way of a preliminary matter, Ms. Earls, from the plaintiffs?

MS. EARLS: Yes, Your Honor. As you mentioned the exhibit list, if I might just make a housekeeping note about the exhibits in the trial.

THE COURT: Okay.

MS. EARLS: As you know, there was an initial list of exhibits, numbers 1 through 447, I believe, that were on the list with the original pretrial order. There's been no -- there are no objections to those exhibits, and we will -- for expediency we'd like to be able to refer to those and use those during testimony and then move to admit them all at the same time, and counsel has represented that there's no objection to any of those exhibits.

THE COURT: We'll follow that process. 1 through 447, y'all can refer to them and you can move them in at

1 whatever point you want during your case.

2 MS. EARLS: Thank you, Your Honor.

3 There is the second set of exhibits that have been
4 added since that time, and of those there may not be any
5 objections but we have not had a chance to fully confer, and so
6 we'll have to get back to you with regard to those, but counsel
7 has also indicated that if there are any objections to any
8 exhibit that we are seeking to use with a witness, he will let
9 us know at that time.

10 THE COURT: Okay. Mr. Marshall, anything else?

11 MR. MARSHALL: Ms. Earls has accurately stated all of
12 that, we just -- some of these exhibits literally came in the
13 last day or two, so I just was reserving objections.
14 I honestly don't think there will be many, if any, but if so I
15 will raise them at the appropriate time.

16 THE COURT: I guess two housekeeping matters. One,
17 none of the members who are lawyers in the wells of the court
18 are visitors in this courtroom, so you feel free to take your
19 visitor badges off when you are trying a case here. Once you
20 get outside, security issues or whatnot, they may -- someone
21 may ask you to put it back on, but while you're in this
22 courtroom, none of you are visitors here.

23 Did either side want to invoke Rule 615 on excluding
24 witnesses or not? Have you all talked about that?

25 MS. EARLS: We do not, Your Honor.

1 THE COURT: Okay.

2 MR. MARSHALL: We have not talked about that. The
3 only one that I might ask to exclude is the expert testimony
4 during -- is having an expert witness in the courtroom during
5 fact testimony, but I had not thought about -- I have not
6 consulted with them about that.

7 THE COURT: Well, it's one of those things that I
8 would need to know. I mean, basically under the rule, as each
9 side knows, if the rule is invoked each side gets one
10 representative who can be with them at the table. The parties
11 could agree not to invoke the rule.

12 MR. MARSHALL: I'll agree not to invoke that rule,
13 that's fine, make it a lot easier.

14 THE COURT: Okay. All right. With that, any other
15 preliminary matters?

16 MS. EARLS: No, Your Honor.

17 THE COURT: Any other preliminary matters from the
18 defense?

19 MR. MARSHALL: No, Your Honor.

20 THE COURT: All right. Would plaintiffs like to make
21 an opening statement?

22 MS. EARLS: Yes.

23 THE COURT: Okay.

24 MS. RIGGS: Good morning, Your Honor. My name is
25 Allison Riggs and I'm here with my colleagues from the Southern

1 Coalition for Social Justice on behalf of plaintiffs in the
2 consolidated cases before this Court, plaintiffs who include
3 numerous Wake County voters who are here in the courtroom
4 today. They're here in the courtroom today and they're
5 bringing these actions challenging the 2013 enacted
6 redistricting plan for the Wake County School Board and the
7 2015 enacted redistricting plan for the Wake County Board of
8 County Commissioners because significant deviations in those
9 enacted plans make their votes count less than the votes of
10 people elsewhere in the county. They are also here because
11 they have the right to be free from discrimination by
12 unjustified Governmental action based on race.

13 The facts in this case are extraordinary. This is
14 not a case where the legislature has to make political
15 judgments after a decennial census to even out district sizes,
16 in fact it's the opposite, it's a case where mid-decade for
17 arbitrary and discriminatory reasons the legislature increased
18 the unevenness among districts and used race to create an
19 unnecessary majority black district, packing black voters into
20 that district based on the color of their skin. This is the
21 context in which our legal arguments will need to be analyzed.

22 The plaintiffs are bringing three distinct claims in
23 these consolidated actions. First we will prove that the
24 enacted plans violate the one person one vote guarantee towards
25 the defendant, the deviations in the enacted plans devalue the

1 votes of plaintiffs, and we will present evidence, and I quote,
2 that the apportionment plan had a taint of arbitrariness and
3 discrimination, that's what the Fourth Circuit in Wright said
4 that we needed to prove to win this case, so that's the law of
5 the Fourth Circuit and the law of this case.

6 Moreover, the unrebutted evidence will show that the
7 deviations in the challenged plans were actually caused by
8 improper motivations. These improper motivations include an
9 intent to favor rural and suburban voters over urban Raleigh
10 voters by devaluing the weight of urban voters. These improper
11 motivations also include an intent to favor Republicans over
12 Democrats, which as a cause for deviating from equal population
13 is impermissible.

14 We will present both direct and indirect evidence
15 that the apportionment process was tainted by arbitrariness and
16 discrimination and bad faith and that the deviations were
17 motivated or caused by the goals I've just described.

18 The direct evidence will include legislative
19 statements by opponents of the bills, many of whom will testify
20 in the next two days. The direct evidence we'll present will
21 also include statements made by proponents during the
22 legislative process, and those are in the transcripts that you
23 have in evidence, and we have statements made by legislative
24 proponents to members of the public.

25 Additionally, we will present a host of

1 circumstantial evidence of the arbitrariness and bad faith,
2 ranging from the fact that this was a mid-decade
3 re-redistricting that increased district deviations rather than
4 moving closer to equal population. We'll put on evidence that
5 the process, the legislative process, was unusual and
6 abbreviated and provided only minimal input from the
7 Wake County voters affected by these changes, and we'll show
8 the evidence of the blatantly obvious impact of the bill, which
9 can be circumstantial evidence of intent. The obvious impact
10 is that the higher deviations were created to ensure a
11 political outcome, the election of a majority of Republicans to
12 the County Commission and to ensure elections of a majority of
13 School Board members who are registered Republicans.

14 Dr. Chen will testify that it is not possible to
15 achieve the political performance that we see in the challenged
16 maps without deviations as high as they are. The totality of
17 the evidence will show that all of the justifications proffered
18 are pretextual and not rationally advanced by the deviations in
19 the enacted plan. You'll hear from witnesses unpacking those
20 justifications for the changes and hear how the challenged
21 plans actually result in the exact opposite of what some
22 legislators said they were trying to accomplish.

23 Second, our second claim in this case is a State
24 Constitutional one. Under the heightened scrutiny required by
25 the North Carolina Constitution in this situation the

1 deviations and the evidence we'll be discussing in the Federal
2 one person one vote claim also create an independent State
3 Constitutional violation and the same evidence is applicable
4 under both claims, but with the State Constitutional claim the
5 hurdle is lower since it's beyond dispute, as described in our
6 pretrial brief, that the Court must be even more sceptical of
7 the alleged reasons for the justification under State law.

8 Finally, the third claim brought in this case is that
9 District 4 in the County Commission district plan is an
10 unconstitutional racial gerrymander. You'll hear from numerous
11 witnesses that race predominated in the drawing of the district
12 lines for District 4. Dr. Chen will testify about his analysis
13 that even if District 4 were drawn to achieve the same level of
14 political performance that it did, it didn't need to have such
15 a high black population, which is strong statistical evidence
16 that the district was drawn predominantly for racial reasons,
17 not political ones.

18 Other witnesses will testify how District 4 combines
19 small parts of Knightdale and Garner into the bulk of the
20 district, which is in southeast Raleigh, and that these
21 areas -- the only common interest in these areas is that they
22 are populated with African American residents.

23 The district lines split ten precincts and there's no
24 reliable political data on the subprecinct level. This is
25 undisputed evidence.

1 Based on the evidence we'll proffer in the next few
2 days, plaintiffs will respectfully ask this Court to find that
3 the enacted plan and specifically District 4 violate the equal
4 protection guarantees of both the Federal and State
5 Constitution and to permanently enjoin these laws.

6 Thank you, Your Honor.

7 THE COURT: Thank you, ma'am.

8 Mr. Marshall, would you like to give an opening?

9 MR. MARSHALL: Thank you, Your Honor. If you don't
10 mind, I'd just like to stand at the table.

11 THE COURT: That's fine.

12 MR. MARSHALL: I have Jessie Thaller-Moran and
13 Matt Tynan to assist me today, over the next couple days. Also
14 from our client, the Wake County Board of Elections, I think
15 all three Board members are here, Brian Ratledge, Mark Ezzell,
16 I think Ellis Boyle is here as well.

17 I want to thank the Court first of all for agreeing
18 to expedite this trial. We had mentioned earlier that one of
19 the key goals of my client was to have this case heard as
20 quickly as possible so they could get some finality as to the
21 legality of the districts at issue. Also I want to thank the
22 Court for your patience as I'm trying to navigate my role in
23 exactly what it is the Board of Elections is going to be doing
24 here at trial today.

25 On that point, this is, as you know, an action

1 alleging unlawful actions by the North Carolina General
2 Assembly. There are no allegations that the Wake County Board
3 of Elections did anything improper or anything unlawful,
4 because they had nothing to do with the drawing of the
5 district, so the Wake County Board of Elections' position today
6 is that they don't have a political position on what the
7 districts should be or whether they should or should not have
8 been withdrawn or administratively what they should be, but
9 they do have to administer the districts, and as the sole
10 defendant they are in a position where they're forced to defend
11 the Constitutionality of those districts in order to avoid any
12 possible legal exposure that it may have caused by the actions
13 of the General Assembly, and also to try to avoid a result that
14 would make it easier for plaintiffs down the road to bring a
15 suit against the Wake County Board of Elections any time
16 there's a small population deviation or claims of partisanship
17 in districts, especially if the Board of Elections is going to
18 be the only defendant in the future as well.

19 So with that background, I just want to talk briefly
20 about what we may expect to hear over the next couple days.
21 What you won't hear is any testimony from Republican members of
22 the General Assembly. As you know, there have been assertions
23 of legislative privilege to that regard, and again because I'm
24 not representing the political interests of the General
25 Assembly in this matter, only the interests of the Board of

1 Elections, we really are going to be trying this case largely
2 just through cross-examination, and the best way to explain
3 what we'll be doing ultimately is just testing the sufficiency
4 of the evidence, the factual evidence the plaintiffs are going
5 to put forward, and we're going to test that sufficiency
6 against the governing legal standards in one person one vote
7 cases and racial gerrymandering cases, and frankly, Your Honor,
8 most of that work I will probably do at closing argument in the
9 form of a legal argument, but throughout the course of the
10 trial we will be cross-examining the experts and certainly some
11 of the other witnesses as well just to test the sufficiency of
12 that evidence.

13 What you will hear, I believe, and you and I might be
14 in a similar position here because without having done
15 discovery, a lot of this testimony I'll also be hearing for the
16 first time, but what's been projected, I think, given the
17 witness list and what we've heard in opening is we will see a
18 rerun, so to speak, of a lot of the arguments put forward
19 during the legislative debate over both of these redistricting
20 plans. There are several democratic legislators that will
21 testify about their opposition to the bill, and I've read the
22 legislative transcripts and the Court probably has as well,
23 there's no doubt that the opposition to this bill is eloquent,
24 it's passionate and it's very sincere, and our position is that
25 that opposition is more appropriate for the political sphere

1 than in the Federal courtroom.

2 Second of all, you're going to hear testimony that
3 the plans at issue could have been drawn better, they could
4 have split less precincts, they could have had less population
5 deviations, they could have been more pleasing to the eye. Our
6 position is that's evidence that you could have drawn a better
7 plan, but again, we consider those to be political
8 considerations, again, more appropriate for the other side of
9 the street as part of that redistricting debate in the
10 political sphere.

11 Third, you're going to hear testimony about the
12 so-called super districts, Districts A and B, and the fact that
13 they might divide Raleigh -- or Wake County, excuse me, into
14 rural or urban sections, Raleigh/non-Raleigh, city/county, and
15 I'll just encourage the Court during that testimony to really
16 look at that map, because the more I look at it, it becomes
17 increasingly difficult to really understand how those divisions
18 really make sense in terms of a wholesale urban/rural,
19 wholesale Raleigh/non-Raleigh, and I'll return to that again in
20 the legal argument.

21 On the racial gerrymandering claim, I'm not exactly
22 sure what we're going to hear in terms of evidence that race
23 predominated in the drawing of District 4. As you remember,
24 the only racial gerrymandering claim is in the 2015 County
25 Commissioners case, and it's undisputed that in that case the

1 General Assembly simply adopted the districts that had already
2 been drawn in 2013. In the 2013 case before you, the Wright
3 case, there is no claim of racial gerrymandering.

4 There are claims of partisanship. You will hear it
5 throughout the course of the next few days, I have no doubt
6 about that. This I think will flow into the closing legal
7 arguments as well, because ultimately I think this Court is
8 probably going to be presented with at least one of the issues
9 in the Harris case pending before the Supreme Court, and that
10 is if there's evidence of partisanship in the redistricting
11 process and the results of that partisanship create population
12 deviations that are within the de minimis threshold established
13 by Daly v Hunt, is that a Constitutional violation? Our
14 position as a legal matter defending the Constitutionality of
15 these Districts today as we must, is that, no, that does not
16 rise to the level of a Constitutional violation, so we'll look
17 forward to making that argument as a matter of law for the
18 presentation of the evidence.

19 Thank you.

20 THE COURT: The plaintiff may call its first witness.

21 MS. EARLS: Thank you, Your Honor. The plaintiffs
22 call Reverend Earl Johnson.

23 THE CLERK: Please place your left hand on the bible
24 and raise your right hand and state your name for the record.

25 THE WITNESS: My name is Reverend Dr. Earl C.

1 Johnson.

2 THE CLERK: Do you swear that the testimony you're to
3 give the Court in this case shall be the truth, the whole truth
4 and nothing but the truth, so help you God?

5 THE WITNESS: I do.

6 THE CLERK: Thank you. You may have a seat in the
7 witness stand, and please watch your step.

8 THE COURT: Good morning, Reverend. Ms. Earls or one
9 of these lawyers at this table is going to ask you some
10 questions and then these lawyers will have an opportunity to
11 ask you some questions. If the lawyer who is not asking the
12 questions objects to the other lawyer's question, don't say
13 anything until I rule on the objection. Please try and keep
14 your voice up so we can all hear what you have to say. That
15 microphone will adjust. Feel free to adjust it. If you get
16 too close it will be too loud, if you get too far away we won't
17 be able to hear you, so you'll have to find the right spot.

18 THE WITNESS: Okay.

19 THE COURT: You may examine the witness.

20 MS. EARLS: Thank you, Your Honor.

21 - - - - -

22 DIRECT EXAMINATION

23 BY MS. EARLS:

24 Q Would you state your name for the record, please.

25 A I am Reverend Dr. Earl C. Johnson.

1 Q Thank you.

2 And are you president of the Raleigh Wake Citizens
3 Association, the organization that is a plaintiff in both of
4 these cases?

5 A Yes.

6 Q How are you employed?

7 A I'm employed through Martin Street Baptist Church as
8 pastor.

9 Q Briefly, what is your educational background?

10 A I have a Master's and a Doctorate degree.

11 Q Do you have any children?

12 A I have two children, and both of them attended Wake County
13 Schools, Panther Creek High School, and are ready to graduate
14 from North Carolina State's finest colleges, I might say.

15 Q In addition to the Raleigh Wake Citizens Association, are
16 you involved with any other community organizations?

17 A Yes. As a person of advocacy I'm involved with
18 Common Cause, I'm involved with Great Schools in Wake County,
19 involved with clergy coalitions, involved with NAACP, pretty
20 much a variety of coalition groups that tries to improve the
21 makeup of the City of Raleigh.

22 Q How long have you been president of the Raleigh Wake
23 Citizens Association?

24 A It's a four year term. Yeah.

25 Q And when were you first selected?

1 A Four years ago. I'm coming out in January, so --

2 Q Now, can you tell us a little bit about the background of
3 the Raleigh Wake Citizens Association. When was it
4 established?

5 A Well, it was established in 1932. We're one of the oldest
6 African American organizations in Wake County and probably in
7 the State of North Carolina.

8 Q And what's the goal or purpose of the organization?

9 A Well, the goal of the organization originally was to
10 examine and try to gather the goals, problems, situations of
11 the African Americans in southeast Raleigh. That's the way it
12 originally started. Now it has expanded to the entire county,
13 where it tries to be in advocacy for -- in issues of political,
14 social, economic, things like that, homeless situations,
15 dealing with people who may have mental issues, dealing with
16 political issues, almost anything that the membership feel that
17 the -- that is detrimental to the -- not only African
18 Americans, but to Wake County itself.

19 Q Now, the Raleigh Wake Citizens Association is a nonprofit
20 organization; is that right?

21 A It's a nonprofit organization.

22 Q Do you also have an associated PAC, an election committee?

23 A We have a PAC associated with that, and the role of the
24 PAC is to, of course, have forums for candidates, and we have
25 county forums and we allow the community of Raleigh anywhere in

1 the state, in the city -- I mean in the county to come out and
2 listen to the candidates and then the PAC will make a decision
3 as to who may have the best interests of the city at heart and
4 they'll present that to the -- to the PAC members, they will
5 decide whether or not that slate of officers will be the one
6 that will be chosen to be put on ballots, and then we will --
7 after it's voted on, we will begin to go to work for those
8 candidates.

9 Q Focusing now just on the nonprofit organization, can you
10 tell me roughly how many members RWCA has.

11 A Well, we're probably at about 100 now. It's increasing
12 steadily as we deal with more and more issues that you see
13 coming up.

14 Q And do you have to be a resident of Wake County to be a
15 member?

16 A Yes.

17 Q And are you generally familiar with who the members are
18 and where they live?

19 A Sure.

20 Q I'd like to ask you to look at Exhibit 257, which I
21 believe will be brought up on the screen.

22 MS. EARLS: May I approach, Your Honor?

23 THE COURT: You may.

24 BY MS. EARLS:

25 Q Can you see on the screen or does it help you to have

1 this?

2 A I can see it.

3 Q So this is a map of the two super districts that have been
4 drawn for the School Board and the County Commission in

5 Wake County. Do you have -- are you confident that you have
6 members who live inside the pink district, the super district
7 A?

8 A I would say the majority of our members are in that
9 district.

10 Q And then if you could look at Exhibit 258, can you --

11 A Yes, I see that.

12 Q And that shows the seven single member districts that have
13 been enacted for the School Board and the County Commission.
14 Do you -- does the organization have members who live in
15 Districts 3, 4 and 6, which are the blue, magenta and yellow
16 districts in that map?

17 A Absolutely.

18 Q So let me turn now to the events leading up to the School
19 Board re-redistricting in 2013 and ask you first, was the
20 Raleigh Wake Citizens Association active on School Board issues
21 in 2009?

22 A I think -- I moved here in 2009 from New Jersey, where I
23 had pastored for about 13 years, and when I moved here in '09,
24 the election had just taken place where the Republicans had
25 just taken control of the School Board, and so I'm not too

1 familiar with 2009, but I did get involved with -- the RWCA did
2 get involved in 2010 where we began to have, you know,
3 different rallies, different programs, different presentations
4 and inviting the community into -- I'm the pastor of Martin
5 Street Baptist Church and we use the church as a platform for
6 many of the arguments and issues that came out of this entire
7 debacle that took place.

8 Q And what were the education related issues that were
9 important to the Raleigh Wake Citizens Association in 2010?

10 A Well, we were focused really on education, jobs,
11 transportation, as I mentioned, you know, homelessness,
12 you know, things of that nature.

13 Q But you described in 2010 that you had meetings at the
14 church.

15 A Oh, yes. Yes. Yes.

16 Q What was the issue that people were coming there to meet
17 about?

18 A Well, the issue there was we felt, at least the Board felt
19 that the makeup of the School Board at the time was leading the
20 community, African American community down the wrong path, that
21 the programs, policies, the school mandates that they were
22 proposing were not helpful for African Americans, and they
23 wanted to try to do something about that. For example, they
24 felt that there was a resegregation taking place and they
25 wanted to stop that. They felt that the School Board did not

1 have the interests of -- the African Americans' best interests
2 at heart, they felt that the school system was going the way of
3 Charlotte, which we know Charlotte went to neighborhood schools
4 and it -- up to this point now it's still been a major failure,
5 and we also knew that the majority of the people did not -- of
6 Wake County did not approve of what had been taking place.

7 They had given us, the RWCA, some data saying that
8 they had done a -- paid \$35,000 in research that shows that the
9 majority of people were approving what they were doing and so
10 forth, but we found that not to be true, and so we fought, and
11 so most of the meetings we had at Martin Street were rallies,
12 they were discussions about strategies and how we can best --
13 not fight, but best argue our case to the School Board that
14 they were going in the wrong direction, and of course they had
15 deaf ears, deaf ears, and decided to go the way that they had
16 pretty much made their mind up to go.

17 Q Did you ever speak on behalf of the Raleigh Wake Citizens
18 Association at School Board meetings in 2010 on the issues?

19 A Sure. Sure. I spoke on numerous occasions and let my
20 voice be heard, and like many of us, we pretty much echoed the
21 same thing, that we're going down the wrong path, that Raleigh
22 had good schools, I think it was the Washington Post, one of
23 the writers who came down to Raleigh once and wrote an article,
24 he said he couldn't find any better schools anywhere than in
25 the City of Raleigh and in the county of Wake County, so there

1 was no problem with the school system as we saw it, so we
2 didn't know why anyone would want to change a system that was
3 as good as it was, and so those are some of the discussions
4 that we kind of dealt with.

5 Q And when you said earlier the Board felt that the School
6 Board was not going in the right direction, what Board are you
7 referring to?

8 A I'm referring to the RWCA at this time.

9 Q So when the RWCA Board and the community you were working
10 with concluded that the School Board was not listening to them,
11 what did they do at that point?

12 A Well, we decided to -- we decided to continue to attend
13 every School Board meeting that we could, many of us spoke out
14 loud and clear for almost a year so they could hear, and we
15 just discovered that they wouldn't, and we decided the only way
16 to try to resolve this was through the legal system.

17 Q Now, what happened in the 2011 elections for the
18 Wake County School Board?

19 A Well, I think we -- when I say "we," I'm speaking for the
20 RWCA and the other coalition groups that were involved, decided
21 that the best course of action was to try to find men and women
22 who had the best interests of Wake County and Raleigh in their
23 heart and try to work with them and try to get them on the
24 School Board. And so we worked diligently, the PAC that I'm
25 involved with had a forum, I think our forum had about

1 500 people that came out and listened to the candidates, and
2 the candidates that are on the School Board now are the ones
3 that we -- that the PAC endorsed and people voted for them and
4 we were able to overturn the system as it was and we were happy
5 about that.

6 Q So in the 2011 elections did the balance of votes on the
7 School Board shift?

8 A It shift. It shifted from the Republicans to the
9 Democrats, and we were all jubilant about that because we felt
10 that we had people now who had the best interests of our kids
11 at heart, who would do the right thing, and besides there was
12 a -- on that same election there was a bond, I believe, for
13 \$90 billion, something like that, and that was for the
14 rebuilding of schools, and RWCA felt that some of that money
15 needed to trickle down to the schools in the inner city. We
16 found out later that the majority of the money was going to the
17 schools on the peripheral of Wake County, like Knightdale,
18 Cary, Garner and places like that, and the only thing that we
19 were going to get in the inner city was, you know, a patch-up
20 job, you know, painting, fixing the roof and stuff like that,
21 and we were really upset after we heard that.

22 Q Now, at some point did you become aware of a proposal to
23 change the method of election of the Wake County School Board?

24 A Yes. We were very upset about that because we had worked
25 so hard to make sure that we had the right people in place and

1 we were confident of that, and then when that came up I think
2 we were very very very disheartened about that.

3 Q And when did you first hear about that?

4 A I think it was shortly after the Democrats took control,
5 within weeks, I believe, we started hearing rumors that the
6 legislature may change the way we elect officials.

7 Q Now, did you speak at a public hearing held by the
8 Wake County legislative delegation in 2013 --

9 A Yes.

10 Q -- about the proposal?

11 A Yes.

12 Q And what did you tell the legislature at that legislative
13 delegation?

14 A Well, I basically told them that I thought that African
15 Americans were being disenfranchised, I thought the -- the
16 redistricting would give an advantage to the Republican
17 delegation, that they were trying to put more Democrats back on
18 the Board, and my reason for saying that was because of the
19 money, they had -- they had claimed that the Commissioners knew
20 better about how to build schools than the School Board could,
21 and the School Board had been building schools for hundreds of
22 years and then all of a sudden they don't know how to build
23 schools anymore, and they wanted -- the Commissioners wanted to
24 be -- you know, control the purse strings of that, and we just
25 didn't think it was fair that they would take that away from

1 the School Board. I talked about that and I talked about the
2 fact that the districts would unfairly impact African Americans
3 as well, and, you know, in terms of where we would end up in
4 this whole debacle was unclear to us, we didn't know where we
5 were going to be. We had -- during the primary -- I mean after
6 the lines were drawn we had I think a primary or something, and
7 during the -- one of the early voting we had people who had
8 voted in the same district right across the street from their
9 house, all they had to do was walk across the street right to
10 the precinct and vote, and they were told that their precincts
11 had changed, they had to go almost two miles away to vote
12 somewhere else, and they didn't know that, nobody --

13 Q Sorry to interrupt you, but if I can --

14 A No problem. No problem.

15 Q -- move us forward to -- you then spoke on behalf of the
16 Raleigh Wake Citizens Association --

17 A Exactly.

18 Q -- in opposing the change to the method of election for
19 school districts?

20 A Absolutely. Absolutely.

21 Q And why did the Raleigh Wake Citizens Association oppose
22 this new method of election?

23 A Well, they just felt like it was disenfranchisement, they
24 felt it was discriminatory, they felt like it was racist, they
25 felt that African Americans would be left behind, this doughnut

1 hole that they were trying to create and giving monies and
2 entitlements to the county had left African Americans behind
3 and we felt it was the wrong thing to do and we wanted to
4 protect that.

5 Q So is part of the work of the Raleigh Wake Citizens
6 Association to encourage civic engagement, encourage people to
7 vote?

8 A Absolutely. Absolutely.

9 Q Does the non-compact shape of districts make it harder for
10 you to carry out those duties?

11 A Well, it makes it very hard. If you look at District 4,
12 which the proposal would create --

13 MS. EARLS: May I approach, Your Honor, to --

14 THE COURT: You may.

15 MS. EARLS: I'm showing the witness what has been
16 marked as -- this is not marked on it, but I believe I'm
17 correct that this is Exhibit 258, which is also on the computer
18 screen.

19 THE COURT: Which number was that?

20 MS. EARLS: Exhibit 258.

21 THE COURT: Thank you.

22 BY MS. EARLS:

23 Q And you are referring now to District 4, the magenta
24 colored district?

25 A Right. This is the -- I believe this is the largest

1 district where the African American population resides,
2 especially for RWCA, for my church, Martin Street, for many of
3 the African American churches in that area, many African
4 Americans live in that district, and so to split that district
5 up like that, I think somebody said maybe ten precincts coming
6 out of that, we felt that it will dilute the African American
7 vote along with voter identity. You know, I don't want to say
8 it's a conspiracy, but we felt that it was just totally unfair
9 and unjust for the redistricting.

10 Q Let me just clarify something. When you say split that
11 district up and that there's ten splits, are you talking about
12 precincts --

13 A Precincts, yes.

14 Q -- in the district being split?

15 A Yes. Yes.

16 Q And that impacts your ability --

17 A Absolutely. Absolutely.

18 Q -- to do --

19 A First of all, I don't know how it could work, I don't know
20 whether it would work or not, and then it gives an advantage,
21 I believe, to the Republican delegation to get more of their
22 people in whatever positions they're trying to give them.

23 Q Now I want to turn to the events leading up to the
24 re-redistricting for the Wake County Commission in 2015.

25 Do you recall the County Commission elections in

1 2014?

2 A Absolutely.

3 Q And what issues were important for the Raleigh Wake
4 Citizens Association in the 2014 County Commission elections?

5 A Pretty much the same, you know, jobs, education,
6 transportation, trying to deal with those, those issues.

7 Q And what did RWCA or the PAC do in 2014 to further those
8 interests?

9 A Well, what we did is what we usually do. We had the PAC
10 conference where we invited, you know, the public to come out,
11 all the candidates again to come out, state their case, why
12 they want to run for office and so forth, and then the PAC was
13 to elect seven or eight, I think, individuals who they thought
14 best represented the Commission, Board of Commissioners, and,
15 you know, the membership voted for those who were elected and
16 we ended up getting the majority of Democratic Commissioners in
17 the Commission, on the Board of Commissioners.

18 Q So you're saying that the result of the election in 2014
19 was that there were a majority of commissioners --

20 A Absolutely. Absolutely.

21 Q Do you recall becoming aware of a proposal to change the
22 method of election for the Wake County Commission?

23 A Yes.

24 Q And did you testify at a House Committee on Elections
25 public hearing on March 31st on the County Commission bill?

1 A Yes, I did.

2 Q I'd like you to look at Exhibit 251, pages 30 and 31.

3 This will be pulled up on the screen for you.

4 A Okay.

5 Q Now, we were on page 29. I'm asking that we look at
6 page 30, down at the bottom of the page.

7 A Number 24?

8 Q Yes. If you look at line 24, the transcript has you
9 saying that the map is clearly designed to give Republicans in
10 Venice not -- and that is not fair. Do you recall what you
11 were actually saying?

12 A Well, what I was saying was the map is clearly designed to
13 give Republicans an advantage.

14 Q Okay. Thank you.

15 A That's what it should say.

16 Q Why does the Raleigh Wake Citizens Association oppose
17 using the seven single number districts and the two super
18 districts for electing the Wake County Commission?

19 A Well, we just think that the African American votes,
20 again, will be diluted, we don't feel that we would have
21 representation in our communities, almost going back to
22 taxation without representation, and we just feel that we'll be
23 left out of the entire economic pie, the power will shift from
24 the city to the county, which is what has taken place now, and
25 very few of us are in the county but we are spreading out, so

1 it's not as impacted in the city as it used to be.

2 MS. EARLS: Thank you. Those are all my questions.

3 THE COURT: Thank you. Any cross-examination?

4 MR. MARSHALL: Just a few questions, Your Honor.

5 THE WITNESS: Yes.

6 MR. MARSHALL: Thank you, Reverend Johnson, for your
7 time today.

8 - - - - -

9 CROSS-EXAMINATION

10 BY MR. MARSHALL:

11 Q Reverend Johnson, you were testifying earlier about in
12 2011 when the Democrats won back the majority of the School
13 Board; do you recall that?

14 A Um-hum.

15 Q And did the RWCA support those candidates in 2011 because
16 they were Democrats or because they favored certain school
17 education policies?

18 A Well, the PAC does that -- I am the representative for
19 RWCA, so we have two tiers, and so the PAC is responsible for
20 doing that and I think their thinking was that -- and again,
21 the RWCA is non-partisan, so we don't select based on Democrat,
22 independent or Republican, we just select based on who we feel
23 is the best candidate for African Americans and for, you know,
24 people in the entire county. So, no, it wasn't just based on
25 Democrats, no, it was based on who we felt had the best

1 interests at heart.

2 Q But you're contending today that the General Assembly drew
3 the new School Board districts in order to favor Republicans,
4 right?

5 A Yes.

6 Q And what evidence do you have that the General Assembly
7 was intending to favor Republicans over Democrats?

8 A Well, I look at the map and I see, you know, the split,
9 you know, you're taking one district, I mean one -- yeah, and
10 making ten precincts, making overpopulated and underpopulated
11 districts, and of course we know that overpopulated districts
12 does not give you a good turnout on election day as opposed to
13 underpopulated districts, and you can easily see that on the
14 map, and so -- and not only that, it brings on confusion, as I
15 mentioned earlier, during the primary, not the general
16 election, the primary election, people were confused about
17 where they were -- after they redistrict the areas, they didn't
18 know where to vote, and we thought that was a shame, that
19 people who used to vote in the same area had to go two miles
20 away to vote and then they get there and then they were told
21 that, well, no, you're supposed to be at your district, so it
22 was -- I mean, we had hundreds of people who went through that
23 same process, and it's going to be worse in 2016 if this thing
24 works out, and so we're feeling that you are disenfranchising
25 thousands of people on one fact, and the one fact is that they

1 don't know where their districts are, and secondly, you are
2 trying to split up the districts to give an advantage to one
3 party over the other.

4 Q And how does splitting the districts give the Republicans
5 advantage over Democrats?

6 A Well, I just said, you know, you're talking
7 overpopulation, underpopulation, and if you got, you know,
8 one group that is underpopulated, I mean, of course you could
9 have more voters turn out as opposed to overpopulated, where
10 you have less people come out. I mean, the bigger the district
11 does not mean that you're going to have more people who turn
12 out. In fact, research shows that you have less people come
13 out. So the smaller the districts, the better off you are.

14 So what district 4, 3, 5, 6 shows is that they're
15 larger districts, you split, but the District 4 is one of the
16 largest populations, and so what's going to happen is that
17 you're going to have a -- you know, these large precincts, and
18 in my understanding and the understanding of the RWCA there's
19 not going to be large turnouts in those areas, and by not
20 having large turnouts you get smaller turnouts than the other
21 areas around the city, which will make up a new power shift
22 that will be leaving the City of Raleigh to the counties.

23 Q And Districts 3, 4 and 6 can still elect a candidate of
24 their choice, correct?

25 A True.

1 Q Just like Districts 1, 2 and 3 can elect one candidate of
2 their choice?

3 A Well, I mean, if you're talking about doing a -- if you're
4 talking about the -- what we call the election where anybody
5 can vote for anyone else, that's fine, but that's not a problem
6 that we are concerned about because research has shown and we
7 know for a fact that African Americans can win in districts
8 where there are a majority of whites. I mean, for example, the
9 Honorable Senator Dan Blue won in a majority white district.
10 We had Jennifer Holmes (sic) who just won on the Commission
11 Board in basically a white district, so that isn't the argument
12 we're making. The argument is that, you know, when you draw up
13 these districts and that District 4, it's going to cause
14 African Americans in there to be discouraged, it's going to
15 cause problems with where precincts are, it's going to cause
16 them to think that they have been racially gerrymandered, it's
17 going to cause major problems in their ideology in terms of
18 fairness in the voting process.

19 Q Reverend Johnson, do you know what the population
20 deviation is in District 4?

21 A Well, I don't know exactly the population, no. As the
22 pastor of the church, I know it's probably over 100,000, I
23 would think.

24 Q I'm sorry. The overpop -- you allege there's an
25 overpopulation.

1 A Oh. Overpopulation.

2 Q Do you know what the percentage of overpopulation in
3 District 4 is as compared to the ideal district?

4 A I think it's probably about 5 percent maybe.

5 Q 5 percent?

6 A I would think.

7 MR. MARSHALL: All right. Can we pull up --

8 A 4.9, 5 percent, somewhere in that area.

9 And that's what I'm guessing. I'm not an expert,
10 okay? So I'm just giving you my opinion.

11 Q Reverend Johnson, I put a copy of the Complaint --

12 A I see that.

13 Q -- in the School Board case up.

14 Do you see that on your screen?

15 A Um-hum.

16 Q Do you see this is a list of the population deviations
17 that you allege in the Complaint?

18 A Um-hum.

19 Q Do you see District 4 there?

20 A Um-hum.

21 Q Okay. And what is the alleged overpopulation?

22 A Well, the deviation is 1.24, but, you know, again,
23 you know, you have -- everybody has their own stats, you know,
24 some people have, you know, come up with different numbers
25 based on population trends and so forth. I mean, just in the

1 last two or three months Raleigh has grown by, you know, maybe
2 10, 15,000, so you can't base this on something that has
3 already increased in such a short amount of time, so I can't --
4 again --

5 Q But these are the allegations in your Complaint, right?
6 You're a plaintiff in this lawsuit.

7 A Yeah, I mean, exactly.

8 Q Okay.

9 A But still, not with these numbers.

10 Q And you mentioned the growth of Raleigh may affect these
11 numbers. Do you know where most of the growth in Raleigh is
12 occurring right now?

13 A Most of the growth is on the outside of Raleigh, I
14 understand that, most people understand that.

15 Q In where?

16 A Probably Cary, Knightdale, Garner, Fuquay-Varina, places
17 like that, and we do have African Americans in those areas, I
18 won't deny that either.

19 Q Reverend Johnson, you testified that you did have an
20 opportunity to state your views to the Wake Delegation in
21 opposition to the School Board Redistricting Bill?

22 A Um-hum.

23 Q And you also testified that you had the ability to testify
24 at the House Elections Committee in 2015 in opposition to the
25 County Commissioners Bill?

1 A Yes.

2 MR. MARSHALL: I have no further questions.

3 THE COURT: Thank you. Any redirect?

4 MS. EARLS: No, thank you, Your Honor.

5 THE COURT: Thank you, Reverend. Please watch your
6 step stepping down, and there's a step up as you come back
7 through the well and there's a step down through the gates.

8 THE WITNESS: Yes, sir. Thank you, Your Honor.

9 THE COURT: Plaintiffs may call its next witness.

10 MS. RIGGS: Your Honor, plaintiffs call Senator
11 Dan Blue to the stand.

12 THE CLERK: Please place your left hand on the bible
13 and raise your right hand and state your name for the record.

14 THE WITNESS: I'm Daniel T. Blue, Jr.

15 THE CLERK: Do you swear that the testimony you're to
16 give the Court in this case shall be the truth, the whole truth
17 and nothing but the truth, so help you God?

18 THE WITNESS: I do.

19 THE CLERK: Thank you. You may have a seat in the
20 witness stand and please watch your step.

21 THE COURT: Good morning, Senator.

22 THE WITNESS: Good morning.

23 THE COURT: Senator, I don't know if you were here
24 when I said it, but I say it to most every witness, if the
25 lawyer who is not asking you questions objects, don't say

1 anything until I rule. Please try and keep your voice up so we
2 all can hear what you have to say. That microphone will
3 adjust, feel free to adjust it.

4 THE WITNESS: Thank you very much, Your Honor.

5 THE COURT: You may examine the witness.

6 - - - - -

7 DIRECT EXAMINATION

8 BY MS. RIGGS:

9 Q Good morning, Senator Blue. Can you tell the Court a
10 little bit about your background, where you're from, what you
11 do for a living.

12 A I'm Daniel T. Blue, Jr. I grew up in rural Robeson
13 County, North Carolina, near Lumberton. I have an
14 undergraduate degree, majored in mathematics at North Carolina
15 Central University, a Juris Doctorate degree from Duke
16 University, I've practiced law in Raleigh since 1973, and I've
17 served in the General Assembly since 1980 minus three years
18 from 2002 to 2006. 2003 to 2006.

19 Q And how long in total have you lived in Wake County?

20 A Since 1973.

21 Q Did you have any electoral offices before joining the
22 General Assembly?

23 A I did not.

24 Q And how long now have you been in the Senate?

25 A I went to the Senate in 2009 and I've served continuously

1 in the Senate since then.

2 Q Senator Blue, are you familiar with Senate Bill 325 that
3 passed through the legislature in 2013?

4 A 325 is the bill that redistricted the Wake County School
5 Board.

6 Q And you're familiar with that?

7 A Yes, I am.

8 Q Were you present for floor debate on that bill?

9 A I was.

10 Q What justifications were advanced for Senate Bill 325?

11 A There were several advanced. One was that the people in
12 rural Wake County would have an opportunity to elect
13 School Board members other than from Raleigh, although the
14 districts were already formulated to do that, but also that you
15 needed people to be able to vote for more than one School Board
16 member, and so there was this super -- set of super districts
17 sort of imposed over the entire county, split two ways; but the
18 other justification was that you just needed to redistrict it.

19 The School Board had been redistricted back in 2011.
20 Kieran Shanahan, a local attorney, had been hired by the School
21 Board to redraw the district lines, and so he had redrawn them
22 to get them in conformity with the population changes, and to
23 reflect, I guess, some of the communities of interest and
24 various other things, but with respect to the School Board
25 districts, there were no other valid reasons that I recall put

1 forth other than they just wanted to do it.

2 Q Did you oppose the bill?

3 A I did.

4 Q And what points did you make in opposition during debate?

5 A Well, there were several reasons. One, the districts that
6 had been redrawn by Mr. Shanahan had been vetted by the
7 residents of the county, had been vetted by the current
8 School Board, and they were more compactly drawn than the
9 districts that were drawn in 2013, they preserved communities
10 of interest, geographical contiguity and those kinds of things,
11 and they did not unreasonably split communities using a
12 technique that the General Assembly has perfected of splitting
13 voter tabulation districts or precincts.

14 Q Senator Blue, did you also discuss some of the racial
15 implications of the bill?

16 A I did.

17 Q Can you tell us about that.

18 A Yeah. Wake County, since -- since I've lived here, since
19 the early '70s, has consistently and continuously elected
20 minorities to the governing boards, both the County
21 Commissioners as well as the School Board, with and without
22 districts that had heavy minority populations, and so one of
23 the things that struck me was that there was this effort to
24 create black super districts, districts that exceeded
25 unreasonably more than 50 percent minority population, creating

1 districts using race when that was not necessary, unreasonably
2 packing minorities into the same district, and so those were
3 the kinds of things that concerned me. I understand that
4 partisanship can play a role in redistricting, and it is
5 permissible to a point, but using race to gain that party an
6 advantage is one of the things that struck me about those
7 districts when I saw them.

8 The bill had been introduced early on in March,
9 I think, maybe, during a long session, and the delegation had
10 discussed it. I as well as the other members of the Senate had
11 asked Senator Hunt to let's have community hearings and
12 participation of the affected parties on it, and so when I saw
13 it in final form none of that had happened and they hadn't
14 incorporated any of the ideas that people have proffered, so I
15 basically opposed it because I think it unduly used race to
16 create the minority district, District 4, and by unduly using
17 race, putting that entire district into the -- one of the super
18 districts, the one that primarily had the city, and putting a
19 bigger population in that district than the other districts,
20 that disproportionately, I thought, diluted the strength of
21 minorities in the overall electoral process.

22 MS. RIGGS: Shannon, can you pull up Exhibit 257.

23 Q You talked about looking at the maps and thinking that
24 race predominated. Can you explain to the Court why you
25 concluded that.

1 A Yeah. It's much easier if you had the earlier maps that
2 were drawn with respect to the redistricting following the 2010
3 census, but what this map did, if you look at the -- there's a
4 feature on the right side, it's sort of the northeast quadrant,
5 it looks like a crab claw.

6 Q Do you see the green cursor? Am I pointing to it?

7 A You're pointing directly at it, yeah. And the other one,
8 the other side looks like his other pincer.

9 But if you look at those, most of those areas involve
10 splitting precincts and finding minority populations outside
11 the more concentrated areas in the center city or in southeast
12 Raleigh, and so what this map did is really reached up to put
13 minorities into this super district in an unreasonable way as
14 well as doing the same thing with District 4 in southeast
15 Raleigh, which was the minority district that, again, did not
16 have to be created.

17 MS. RIGGS: Shannon, can you pull up Exhibit 258?
18 Let's look at that map of District 4.

19 THE WITNESS:

20 A Do which one?

21 Q Look at District 4.

22 A Yeah. I'm watching District 4 now, and you'll notice it's
23 got some of the same features of sort of the crab district, for
24 lack of a better way to describe it, where the pincers are
25 coming out, especially on the right side, again, splitting out

1 precincts, and at the bottom, extreme bottom, they do the same
2 thing, to gather up minorities to put into this minority
3 district, again, that does not have to be created, at least
4 under the applicable law as I understand it.

5 And so for those reasons I was opposed to the
6 district maps for the individual districts as well as the
7 overall two super districts.

8 Q Can you clarify exactly why splitting precincts makes you
9 think that race predominated.

10 A Well, there's no other way that -- you cannot split
11 precincts and show that it's for a partisan purpose unless you
12 consider it -- because you can't tell how people voted in that
13 precinct, we still have secret elections and you don't publicly
14 disclose how individuals voted, and so unless -- there is a
15 direct correlation between the minority populations in the
16 precincts that are split and those that aren't, and so if you
17 were splitting these precincts for partisan reasons, you would
18 just go in and split precincts to get the numbers that you
19 need, but this one puts a disproportionate number of minorities
20 into the district, the districts that are split, and then joins
21 them to the majority minority district.

22 Q Senator Blue, have you won elections in Wake County in
23 non-majority black districts?

24 A Sure.

25 Q And do you have a sense for the amount of support you get

1 from white voters in your past elections?

2 A Yeah. They're I think -- frankly, I don't go and sort it
3 out to see who voted how, but I've won countywide Wake County
4 when there was -- 15 percent of the electorate was -- of the
5 registered vote was minority, I've won -- my Senate district
6 was not a majority minority district when I was elected, it
7 only became a majority minority after the 2011 redistricting.
8 But the amazing thing, and it's something that I've wrestled
9 with since I was in law school, is that you can't just have a
10 one size fits all formula when you're creating these kind of
11 districts when you're using race. I mean, there's certain
12 guidelines that define how you can use race, whether it's in
13 redistricting or anything else, because it's something that you
14 basically want to avoid using, so any time I see that as a
15 factor, whether it's in redistricting or anything else, it sort
16 of makes my antenna go up, and that's exactly what happened
17 here. There was no other way to explain the districts that
18 were created than to analyze them based on the racial basis for
19 their creation, there's nothing else that can justify it,
20 because these districts were electing minorities before they
21 became super minority districts, and a super district involving
22 the city, again, you don't have to go split Knightdale, split
23 Garner, split the other municipalities to get a partisan
24 advantage, but when you use race I think you're crossing the
25 line and using an impermissible factor.

1 Q Senator Blue, going back to the process of how Senate
2 Bill 352 moved through the legislature, how common is it to
3 enact local legislation over the objection of the county
4 delegation?

5 A It's pretty uncommon. Historically it was absolutely --
6 it didn't happen, but over the last few years it's happened
7 with some frequency, but it's still not common. Usually
8 because of this, the Chamber of Commerce and the other entities
9 in the city and the county were openly opposed to these
10 redistricting efforts because they thought it had a negative
11 effect on the county brand, its ability to recruit industry and
12 other things of that nature, and so those are the things that
13 factor in.

14 You know, different people come from different
15 ideologies, different backgrounds, and when you put it all
16 together, you pull all the different constituencies together,
17 you get an idea of where the community wants to go, and so the
18 delegation, in reflecting that, was very split on whether or
19 not the School Board districts ought to be changed. The vote
20 reflected it a little bit differently, but among the
21 delegation, both Republicans and Democrats, there was an issue
22 of resistance to changing it because you had not had the public
23 input.

24 Q Senator Blue, are you familiar with Senate Bill 181 that
25 restructured the Wake County Board of County Commissioners in

1 2015?

2 A I am.

3 Q And were you present for floor debate on that bill?

4 A I was.

5 Q Again, what justifications were advanced for that bill?

6 A The primary justification was that, well, since the School
7 Board districts have already been changed, we ought to change
8 the County Commission districts, but also the argument was made
9 that the County Commissioners were elected at large and there
10 ought to be a process where every part of the county would be
11 assured that they would get representation, and there was
12 nothing in the system that existed prior to 2015 that
13 prohibited that.

14 The County Commission that was elected in 2010 came
15 from different parts of the county, somebody from Knightdale,
16 somebody from Garner, somebody from down in Southwest
17 Wake County, and I think maybe of the seven members three or
18 four of them were from Raleigh, so with an at-large election
19 system you could live anywhere in the county and get elected,
20 so that was not a strong reason to do it; but even if creating
21 specific districts to do it was justified, the current map does
22 not achieve that objective. I think of the seven specific
23 districts, either five or six of them have parts of Raleigh in
24 them, and again, with the various splits, especially in east
25 Wake County, you don't have full communities, so Raleigh is

1 represented in all of these, so the person who would represent
2 the district could still come from Raleigh.

3 There hadn't been that much debate, at least I hadn't
4 sensed any debate in the Commission or in my constituency or in
5 Wake County at large about the residence of individual County
6 Commissioners, so that made that justification suspect.

7 Q Did you -- I'm sorry. Did you raise the issue of
8 deviations amongst districts in the plan?

9 A I did, because it had the same flaws that the School Board
10 redistricting plan had except they were more pronounced,
11 because with the County Commission elections, since they were
12 all at large, it wouldn't matter whether the residential
13 districts deviated in population or not because still everybody
14 had a chance to vote on them, but with this deviation I
15 suggested to Senator Barefoot that since we knew what it was
16 and we had the computer capability to put an identical number
17 of people in all of the districts, that we at least ought to
18 adjust this deviation problem and have an equal number of
19 people in these two super districts, and my suggestion was
20 ignored. But, yeah, we raised it, it was an issue that several
21 of us debated on the Senate floor.

22 Q Did you also raise the issue of the pending litigation in
23 the Fourth Circuit with respect to the School Board districts?

24 A Yeah. It was represented in the floor debate by Senator
25 Barefoot that the School Board districts had been upheld, and

1 so by doing the County Commission districts we were doing a
2 plan that had already received the sanction of the Court.
3 Certainly I took issue with that and explained to the
4 membership of the Senate that that was not the case, that it
5 had not been upheld, that there had not been a trial, that
6 through a procedural process the decision had been appealed on
7 the basis of whether there was an issue that -- whether a cause
8 of action had been stated, but that it was pending in the
9 Fourth Circuit at the time, and I think the decision may have
10 come down from the Fourth Circuit even before we finalized this
11 map.

12 Q And finally, did you raise concerns about the racial
13 implications of Senate Bill 181, like with Senate Bill 325?

14 A I did, and 181 even more so.

15 Again, I've been involved in different forms of
16 redistricting and understand what some of the concepts and
17 principles are, and I think it's a special place to be. I had
18 an old law professor that believed -- agreed with me on this,
19 in fact sued us because of the districting that we had done in
20 the Congressional districts in the early '90s, but if you don't
21 have to use race then you don't use it, and when you do, it has
22 pernicious effects across a broad range of things.

23 Wake County had not performed like the eastern rural
24 North Carolina counties had performed in elections, in the
25 inability of minorities to elect candidates of their choice,

1 and so to treat Wake County as you would treat the others was
2 to basically accuse white citizens of Wake County of being
3 racist when their actions had shown that they weren't in the
4 way that they were voting countywide since the 1970s, whether
5 they were the Constitutional offices, the Sheriff, the
6 Registrar of Deeds, whether it's the judges, County
7 Commissioners, School Board members, legislators, Wake County
8 citizens had consistently elected minorities in districts that
9 were not majority minority, in districts that had very few
10 minorities in them. Both in the legislature, the School Board,
11 County Commission, a disproportionate number of minorities had
12 been elected to the County Commission and to the School Board
13 without relying on racially identifiable districts, and the
14 effect of using race in such a prominent way was to set back
15 the progress that this county had made and to basically treat
16 it as you would some of the more rural northeastern counties
17 that still were working through some of these racial issues,
18 and so those are the kinds of arguments we made and that's why
19 I feel so passionately about the way these districts came
20 about.

21 I think that the business communities in this county
22 strongly oppose the County Commission redistricting, the
23 realtors oppose it because it changes the way that they market
24 houses, it changes the way that they sell new businesses on
25 coming to Wake County, and so I tried to articulate some of

1 those viewpoints, some of those positions that had been
2 expressed by these other interest groups around the county.

3 MS. RIGGS: Thank you, Your Honor. I pass the
4 witness.

5 THE COURT: Thank you. Cross-examination.

6 MR. MARSHALL: Sure.

7 - - - - -

8 CROSS-EXAMINATION

9 BY MR. MARSHALL:

10 Q Good morning, Senator Blue.

11 A Good morning.

12 Q Thanks for being here today.

13 A Sure.

14 Q I want to go back to the School Board maps that you were
15 talking about that were drawn by Mr. Shanahan.

16 A Um-hum.

17 Q Mr. Shanahan was hired by the School Board that was then
18 controlled by Republicans; is that right?

19 A That's correct.

20 Q And Mr. Shanahan's map sought to favor Republicans; is
21 that right?

22 A Sought to?

23 Q Yes.

24 A It did, sure.

25 Q It did.

1 And Mr. Shanahan's map did actually split some
2 municipalities?

3 A In order to comply with one person, one vote.

4 Q And Mr. Shanahan's map also split voter tabulation
5 districts, correct?

6 A Yeah, precincts, more familiar with that terminology,
7 yeah, but -- and again, to comply with the one person one vote
8 requirement.

9 Q But in fact Mr. Shanahan's map also did contain some
10 population deviations, didn't it?

11 A Sure. The idea at the time was that you could have
12 population deviations among districts, you tried to get them as
13 closely as possible, but some of the jurisprudence from the
14 2000 election cycle and the '90s election cycle led those who
15 were advising this area to believe that you could have plus or
16 minus 5 percent deviation in the population of some of the
17 districts, but the push was to have less deviation if you were
18 talking about local governments than was permitted at the
19 legislative level.

20 Q Right.

21 A So, yeah, he had some deviation on it.

22 Q And the School Board districts that you were opposing also
23 had split municipalities; is that right?

24 A Sure.

25 Q And split VTDs?

1 A Well, and again, if you have 450,000, 400 - 450,000 people
2 in a city, you're going to split cities, so Raleigh is going to
3 be split, Cary is going to be split and you're going to split
4 some of the other municipalities just to get the population
5 within acceptable deviation ranges. So I don't know how many
6 of the specific smaller towns Mr. Shanahan had in his version
7 of the map, but a lot of what he had in it was by consensus,
8 those communities were consulted with, at least the leaders in
9 those communities, and they were looking at communities of
10 interest. I think there was certain criteria that was used to
11 sort of guide Mr. Shanahan in the way he drew the maps. There
12 was no criteria used in the way they were drawn in 2013 and
13 2015 other than the whims of the legislators who drew them.

14 Q Senator Blue, did you contend the new School Board
15 districts were intentionally drawn to favor Republicans more
16 than the districts drawn by Mr. Shanahan?

17 A Sure, I would contend that, and I would also put this on
18 it, again, I understand that you can have partisan
19 redistricting, I don't like it, you know, it ought to be by
20 independent commissions, don't like it, but when you inject
21 race as one of the bases of creating these partisan districts,
22 I think that it is impermissible or it should be, and that's
23 the problem here. When you inject race into drawing the
24 super district and you treat the place where you've put the
25 minorities in a disparate way than you treat the other

1 district, to have that district with more than 10 percent
2 greater population, where you have the vast overwhelming
3 majority of minorities, and then say that that district is
4 equal to the district that is overwhelmingly white that has
5 10 percent deviation but certainly less than -- a greater than
6 10 percent less population, it's a patent inherent unfairness
7 about that.

8 Q Well, how much more partisan do you think the new School
9 Board districts are than the Shanahan districts?

10 A The -- and again, there are programs that are used now by
11 the General Assembly staff that goes in and looks at a
12 multitude of factors, how people have performed -- how people
13 have performed in elections over a decade usually with top
14 races and stuff, and you then look at the way the districts
15 were drawn by Mr. Shanahan and see how they've performed, and
16 they performed in a way that favored Republicans, and then you
17 use the same criteria, overlay them on the maps that were drawn
18 in 2013 and 2015, and you see that they perform Republican at
19 an even higher level than the ones that Mr. Shanahan drew.

20 And again, I'm saying that you can -- you can do
21 that, but you can't use race as one of the bases for doing it
22 and identify -- treat the district that has a disproportionate
23 number of minority members in it differently than the other
24 district. Again, it perhaps shouldn't be done, that is
25 partisan gerrymandering, but I know to some extent you can do

1 it. The courts simply haven't said it's illegal.

2 Q And did you contend that partisanship actually went too
3 far in drawing the School Board districts?

4 A Well, I can't say that it went too far, but I can say that
5 when you create two districts that are supposed to be equal,
6 these two super majority districts, these two super districts,
7 each having -- at least ideally having half of the county's
8 population based on the 2010 census, when you create two that
9 are not equal and the one that has the most people in it is the
10 one that has 60, 70, 80 percent of the minorities in the county
11 and you intentionally put the minorities in those districts,
12 I think that that crosses the line, not looking at it as simply
13 whether or not you make a district more friendly toward
14 Republicans or less friendly.

15 Q Senator Blue, I do want to address your comments about
16 District 4.

17 A Okay.

18 Q You weren't actually involved with drawing the District 4
19 map --

20 A No.

21 Q -- were you?

22 A No.

23 Q And your testimony about race being a factor is based on
24 your looking at the maps; is that right?

25 A Well, and also because it took my whole district and put

1 it in it, not all of it, but most of it, my district has
2 200,000 people in it, or it did, roughly that many in 2010, and
3 the School Board district 120, 130,000, I guess, based on the
4 county population; but when it left southeast Raleigh, the core
5 of the minority population in southeast Raleigh, and started
6 moving around in districts that were not majority minority
7 precincts, voter tabulation districts that were not majority
8 minority, and teased the minority voters out of those precincts
9 and put them in District 34 -- and that's why you see a lot of
10 jagged edges along District Number 4. Number 4. I said 34.
11 Number 4. I think that there may be 10 or 12 split precincts
12 in that district, and of course if you split them to put people
13 in District Number 4 you're going to have a corresponding
14 number of split precincts in some other districts, I understand
15 that, but that's what -- not just looking at it but knowing the
16 precincts and the voter tabulation districts that are in
17 District Number 4.

18 Q Just to be clear for the Court, Senator Blue, you're not
19 testifying that District 4 is the same as your Senate district,
20 are you?

21 A No. No. My district has almost twice the population, but
22 the core part of it is -- and then it follows the contours of
23 my Senate district until it fills up with permissible
24 population.

25 Q Okay. I'm going to put on your screen what's been marked

1 as Exhibit 36.

2 A Okay.

3 Q This is a map, and I'll let you take a second to look at
4 it, that's been proposed by the plaintiff's experts, and you
5 see District 4 drawn there?

6 A Is it defined by the red --

7 Q Right. It's just -- there's a 4.

8 MS. EARLS: Objection, Your Honor, that's --

9 A I see the 4.

10 THE COURT: Wait. Wait. There's an objection.

11 What was your objection?

12 MS. RIGGS: I think counsel needs to clarify with the
13 witness what the exhibit is and what the district lines are.

14 THE COURT: That's fine. That's fine.

15 BY MR. MARSHALL:

16 Q Senator Blue, do you see that there are numbered districts
17 1 through 7 on this map?

18 A I do.

19 Q And do you see District 4?

20 A Yeah.

21 Q The Number 4?

22 A I do, and the reason I was answering your question as I
23 did, it seemed like red lines are throughout that District 4
24 and I wasn't sure what is happening down at the bottom of it,
25 whether this thing I'm looking at is District 4, it's got

1 overlays and stuff.

2 Q Okay. So I'm just looking at the dark maroon red line
3 that was tracing the outlines of District 4.

4 A I see what -- I think I see what is District 4.

5 Q Okay.

6 A District 4 -- I'm confused by whether this is District 4.

7 Q And do you see at the bottom of the key it says Obama '08
8 Percentage?

9 A Yeah, I see that.

10 Q Okay. And then you see the different shades of green and
11 at the very bottom there's a shade of green that says 80 and
12 above?

13 A Sure.

14 Q Okay. And do you see that there's almost a large dark
15 green circle in District 4?

16 A I'm going to be honest with you, I don't know what this
17 map is saying, it is absolutely confusing, and I read a lot of
18 maps. The borders are not clear, that's the point I'm making.
19 I don't know where District 4 begins and where it ends.

20 Q All right. Senator Blue, are you aware of whether
21 Mr. Shanahan's map in 2011 has a district that contains more
22 than 50 percent registered African American voters in it?

23 A I don't know. I wouldn't -- I would not argue with you
24 that it didn't, because part of -- part of the rationale
25 following a Supreme Court decision toward the end of the last

1 decade, Strickland versus Board of Elections, Bartlett was the
2 name of it, people read that decision to mean that if you got a
3 minority district then you got to have more than 50 percent
4 population minority in it. It's not what the case really stood
5 for, but that's how it was interpreted and that's how the
6 General Assembly dealt with it, and so people tend to draw
7 minority districts in the 2011 cycle by all of a sudden packing
8 minorities into these minority districts without doing a
9 Gingles analysis, that is to see whether a minority district
10 was necessary in the first place, and so I would not be
11 surprised if District 4 did not have a majority minority, but
12 if it did, it was done in a -- probably a less obtrusive way,
13 that is without splitting precincts unreasonably, because as I
14 remember, Shanahan's districts were pretty compact.

15 Q But you don't know how Mr. Shanahan drew that District 4,
16 do you?

17 A No.

18 Q But you wouldn't have a problem if it was a majority black
19 district?

20 A No, if you got contiguity and if you got the population
21 that's right there together, you know, you don't go out of the
22 way to make it a non-majority minority district, and again the
23 School Board districts don't have the population that say the
24 Senate districts have, and so it's possible that you could put
25 together 100,000 people in Wake County using southeast Raleigh

1 as a base where 50,000 of them would be minority without
2 unreasonably splitting precincts, breaking up communities of
3 interest, splitting towns and doing that stuff. And so I
4 wouldn't be surprised if Mr. Shanahan's maps did that.

5 Q So, stated another way, it's possible to draw a majority
6 minority district centered around -- anchored in southeast
7 Raleigh without necessarily using race as a factor?

8 A Draw a majority minority district -- how is it majority
9 minority if you're not factoring in race? I'm sorry, I don't
10 mean to ask a question, I'm trying to understand.

11 Q Well, I'm asking, Senator -- excuse me. Mr. Shanahan drew
12 a District 4 that you say may have had a majority black
13 population.

14 A Simply because I haven't analyzed it to see what the
15 makeup of it was.

16 Q And could he have done that without using race as a
17 factor?

18 A He could have known that a predominance in southeast
19 Raleigh, race is African American, and just go out from there
20 and draw districts, but the fact of the matter is he was
21 looking at maps like the code -- the legend in the map you had
22 referred me to earlier that showed 20, 40, 60, 80 percent
23 performance for Obama and for other African American candidates
24 as a basis for drawing the map, more than likely. I don't know
25 whether he said this district has precincts that are 56 percent

1 black and so I'm going to group them all together. I just
2 don't know the process he used to draw the districts.

3 Q Right. So he could have drawn a map looking at Obama
4 voters that happened to create a majority black district even
5 if he didn't intend to use race for that factor?

6 MS. RIGGS: Objection. Calls for speculation.

7 THE COURT: Overruled.

8 A He could have created a district that overwhelmingly voted
9 for Obama, looking at that. Now, he would have had to use that
10 as a proxy for black voters or something, but I mean that's
11 what that would tell you if he looked at that criteria, that's
12 what the district would be, a district that performed
13 disproportionately for Obama in 2008 or -- in 2008.

14 Q So to go back to my original question, do you think it's
15 possible to draw a majority black district anchored in
16 southeast Raleigh without using race as a factor?

17 A No. No, it is not possible because going into it you know
18 what the racial composition of the base of the district is, and
19 if you have 100,000 population, you know if it's centered in
20 southeast Raleigh at least 50,000 of them will be African
21 American.

22 Q So are you also saying that then Mr. Shanahan had to have
23 used race as a factor in drawing his district?

24 A I'm saying he probably -- he knew -- he doesn't exist in a
25 vacuum, he knew in going into it that it was a district that

1 traditionally had been represented by an African American.
2 I think probably since the School Boards were merged in the 70s
3 that was a district that was represented by African Americans,
4 and I think that he was continuing that district, expanding the
5 population in it, but the population had grown naturally over
6 time anyhow, but I don't know, I'm only speculating what he
7 did, but if you're asking me if he knew that it was a minority
8 district, I'm pretty sure he knew it was a minority district
9 after he created it.

10 Q And yet you had no objection to it?

11 A No. No.

12 THE COURT: We're going to take our mid-morning
13 recess for 15 minutes. We'll be in recess.

14 - - - - -

15 (Recess at 10:30 a.m. until 10:45 a.m.)

16 - - - - -

17 THE COURT: Mr. Marshall, you may continue the cross.

18 MR. MARSHALL: Thank you, Your Honor.

19 Senator, just a couple more questions.

20 BY MR. MARSHALL:

21 Q As part of the redistricting process in the House in 2011,
22 are you aware that Democratic House members proposed districts
23 for Wake County that would have created majority black
24 districts?

25 A Yeah, I'm aware of that, in the House.

1 Q Yes. And going back to the Shanahan districts, in 2011
2 Democrats won a majority of the School Board on those Shanahan
3 drawn districts, right?

4 A That's correct.

5 MR. MARSHALL: No further questions.

6 THE COURT: Thank you. Any redirect?

7 MS. RIGGS: No redirect, Your Honor. Thank you.

8 THE COURT: Thank you, Senator.

9 Plaintiffs may call their next witness.

10 MS. RIGGS: Your Honor, plaintiffs call Ms. Amy
11 Womble.

12 THE CLERK: Please place your left hand on the bible
13 and raise your right hand and state your name for the record.

14 THE WITNESS: Amy Womble.

15 THE CLERK: Do you swear that the testimony you're to
16 give the Court in this case shall be the truth, the whole truth
17 and nothing but the truth, so help you God?

18 THE WITNESS: I do.

19 THE CLERK: Thank you. You may have a seat in the
20 witness stand and please watch your step.

21 THE COURT: Good morning, Ms. Womble. Ms. Riggs is
22 going to have questions for you. If the lawyer who is not
23 asking you questions objects to the other lawyer's question,
24 don't say anything until I rule. Please try to keep your voice
25 up so we all can hear what you have to say.

1 THE WITNESS: All right. Thank you.

2 THE COURT: You may examine the witness.

3 MS. RIGGS: Your Honor, may I approach to display
4 some charts and also to give the witness a paper copy of the
5 charts that are blown up?

6 THE COURT: Absolutely.

7 - - - - -

8 DIRECT EXAMINATION

9 BY MS. RIGGS:

10 Q Good morning, Ms. Womble. Can you tell the Court a little
11 bit about your background.

12 A I'm a Wake County native, graduated from Wake County
13 schools. I have two children who have graduated from
14 Wake County Schools and my youngest is a senior in a
15 Wake County school.

16 Q And where does your youngest go to school?

17 A He goes to Enloe High School.

18 Q Can you tell us a little bit about how you came to be
19 interested in being in organizing on Wake County Public School
20 System issues.

21 A Well, as a native, I've lived here most my life, I've
22 lived a few other places, but I've always been a big supporter
23 of our strong school system, so I've always kept an eye on it,
24 and I became very concerned after the 2009 elections because
25 there seemed to be a lack of transparency and there was such a

1 partisanship that I had not seen before in what's supposed to
2 be a nonpartisan election. I was very concerned about the
3 direction of the new Board. We were moving -- I was afraid we
4 were going to become a Charlotte. Charlotte had a very
5 well-integrated school system, and when they went to
6 neighborhood schools they segregated overnight and I didn't
7 want to see that happen in our county.

8 Q Did you become involved in any community organizations?

9 A I became involved. I was one of the co-chairs of
10 Government relations for Great Schools in Wake.

11 Q And what does Great Schools in Wake do?

12 A Great Schools advocates for a high quality public
13 education for every child.

14 Q And, Ms. Womble, have you ever worked on any political
15 campaigns?

16 A I have. I've worked for Bill Fletcher's campaign. I've
17 worked for Susan Evans.

18 Q And who are those?

19 A They are current School Board members. I've also helped
20 Kevin Hill and Zora Felton.

21 Q And over what timeframe were you working -- have you been
22 working on political campaigns in Wake County?

23 A Probably since 2009.

24 Q Ms. Womble, are you familiar with a 2013 bill in the
25 General Assembly known as Senate Bill 325?

1 A I am.

2 Q And what did you understand to be the justifications for
3 Senate Bill 325?

4 A Well, one of the justifications we were told is that it
5 would better align the districts so that the district that you
6 voted in would be aligned where your child went to school.

7 Q Okay. Did you support Senate Bill 325?

8 A I did not.

9 Q What if anything did you do to voice your objections to
10 Senate Bill 325?

11 A Well, I spoke at the legislature.

12 MS. RIGGS: Shannon, can you pull up Exhibit 2 and
13 flip to page 29, and scroll down to line 17.

14 BY MS. RIGGS:

15 Q Ms. Womble, on the page displayed at line 17, the
16 transcript says the name of the speaker is Amy Wobble, but is
17 this the testimony you offered at that 2013 meeting?

18 A It is.

19 Q And what did you say about Senate Bill 325?

20 A Well, I didn't understand why we needed it. As we talked
21 about Shanahan's districts, the county had already spent
22 \$40,000 to have those redrawn, and I thought that the new
23 districts that were drawn in 325 were going to make alignment
24 worse than it had been.

25 Q What effect personally does Senate Bill 325 have on you?

1 A Well, I live in District A and I live in what would be
2 District 3, so my vote will not count as much, it's been
3 diluted.

4 Q Are those districts overpopulated?

5 A They are.

6 Q Ms. Womble, are you familiar with student assignment plans
7 in Wake County?

8 A Yes.

9 Q When did you start following those?

10 A Probably -- well, probably since I've been in school, but
11 particularly since I've had children in the schools, I've
12 always kind of kept an eye on them.

13 Q And I'd like to talk a minute about the justification you
14 mentioned earlier. Did that justification about aligning
15 school assignment zones in election districts make sense based
16 on what you know about student assignment zones?

17 A No, because I don't really think it's possible to align
18 them because of the way the districts are, and each person had
19 a Board member that they could reach out to.

20 Q And do you know how magnet schools factor into the student
21 assignment zones?

22 A How they factor into the zones?

23 Q Yes.

24 A What is your question?

25 Q What are magnet schools?

1 A What is a magnet school? A magnet school is typically in
2 a high poverty area, in an underused -- they were originally in
3 under-utilized buildings, to make efficient use of those
4 buildings, to draw students and to more economically balance
5 the schools.

6 Q So if you have a child that goes to a magnet school, is
7 the attendance zone that you live in relevant?

8 A Well, no.

9 MS. RIGGS: Shannon, can you pull up Exhibit 361.

10 Q You can open your binder to the first tab. Exhibit 361 is
11 the middle map in there, and it's displayed on the screen,
12 Exhibit 361.

13 Ms. Womble, are you familiar with Exhibit 361?

14 A Yes. Yes.

15 Q What is it?

16 A This is the 2013-14 base attendance area map for Leesville
17 High School.

18 Q And for the Judge's ease, can you describe some of the
19 major roadways on this map. I'll follow them with my cursor
20 and you just tell me if I'm getting it right.

21 So what are some of the major roads here?

22 A Okay. Well, we're talking about Creedmoor Road.

23 Q Did I highlight that correctly?

24 A Yes.

25 Q Okay.

1 A And then we're looking at Glenwood or Highway 70.

2 Q Okay.

3 A And 540.

4 Q Did I get those right?

5 A Yes.

6 Q Okay.

7 MS. RIGGS: Your Honor, may I approach the
8 demonstrative chart?

9 THE COURT: You may.

10 MS. RIGGS: Your Honor, for the record, this
11 demonstrative is Exhibit 361 in the middle, above it is
12 Exhibit 450, which is a zoom of the School Board plan as
13 enacted in 2011 with Leesville High School on it, and below it
14 is Exhibit 456, which is a zoom of the School Board plan as
15 enacted in Senate Bill 325, again with Leesville High marked on
16 it.

17 BY MS. RIGGS:

18 Q Ms. Womble, comparing the top map to the assignment zone
19 map in the middle, can you describe where the Leesville High
20 School assignment zone is in relationship to the School Board
21 districts in the 2011 plan.

22 A It is primarily in District 7.

23 Q Okay. And comparing then the bottom map to the assignment
24 zone map, can you describe where the Leesville High School
25 assignment zone is in relationship to the School Board

1 districts in Senate Bill 325?

2 A Well, now it's divided into 5, District 5, District 2 and
3 District 1.

4 Q Thank you, Ms. Womble.

5 MS. RIGGS: Shannon, can you pull up Exhibit 331.

6 Your Honor, may I approach again to switch exhibits?

7 THE COURT: You may.

8 MS. RIGGS: Thank you.

9 BY MS. RIGGS:

10 Q Ms. Womble, if you can turn to the second tab and/or look
11 at the screen in front of you, this is Exhibit 331. Are you
12 familiar with this document?

13 A Yes.

14 Q What is it?

15 A We have the 2013-14 base attendance area map for
16 Garner High School.

17 Q And again, for the Judge's ease, can you describe the
18 major roadways and I'll follow them with the cursor and you
19 tell me if I'm getting it right.

20 A Okay. We have Highway 70.

21 Q Okay.

22 A We have I-40. We have Fayetteville Road.

23 Q And where is the county line?

24 A You can see the county line over the triangle between
25 40 and 70.

1 Q Did I get that right with the cursor?

2 A Yes.

3 MS. RIGGS: Your Honor, the demonstrative that is
4 displayed there, for the record, is Exhibit 331 that we just
5 discussed with Ms. Womble in the center, above it is
6 Exhibit 451, a zoom of the School Board plan as enacted in 2011
7 with Garner High School marked on it, and below it is
8 Exhibit 457, a zoom of the School Board plan as enacted in
9 Senate Bill 325 with Garner High School marked on it.

10 BY MS. RIGGS:

11 Q Ms. Womble, comparing the top map to the assignment map in
12 the middle, can you describe where the Garner High School
13 assignment zone is in relationship to the School Board
14 districts in the 2011 plan?

15 A It's primarily in District 2.

16 Q Okay. And comparing then the bottom map to the assignment
17 map in the middle, can you describe where the Garner High
18 School assignment zone is in relationship to the School Board
19 districts as enacted by Senate Bill 325.

20 A It's now in Districts 1, 4, 6 and 7.

21 Q Thank you. Ms. Womble, you can close that exhibit binder
22 now if you'd like.

23 Can you explain to the Court what the term "feeder
24 schools" means?

25 A A feeder school is like, for example, if you have several

1 elementaries that feed into a middle school, and the same to
2 the high schools.

3 Q Can you give us an example of what a high school and its
4 feeder middle school might be?

5 A Well, Martin feeds into Broughton, as an example.

6 MS. RIGGS: Shannon, can you pull up Exhibit 452.

7 Q Ms. Womble, have you seen this map before?

8 A Yes.

9 Q And can you describe to the Court what this map is.

10 A It's the 2011 assignment plan for Broughton High School,
11 Martin.

12 Q And I'm going to draw a circle around Broughton. Is that
13 correct?

14 A Yes.

15 Q I'm going to draw a circle around Martin. Is that
16 correct?

17 A Yes.

18 Q So how are Martin and Broughton related in this zoom from
19 the School Board plan?

20 A Well, they're both in District 6.

21 Q Okay.

22 MS. RIGGS: Shannon, can you pull up Exhibit 458.

23 Q And, Ms. Womble, have you seen this map before?

24 A Yes.

25 Q And what is it?

1 A It's the Senate Bill 325 numbered districts map for
2 Broughton and Martin.

3 Q I'm going to circle again Broughton and Martin, and can
4 you tell me if I got that correctly?

5 A Yes.

6 Q I did get it correctly?

7 A Yes.

8 Q How are Martin and Broughton related in this zoom from the
9 Senate Bill 325 school plan?

10 A Well, now they're in different districts, you've got
11 Broughton in 3 and you have Martin in 5.

12 Q So what does that mean for a parent with a child in Martin
13 who lives in District 5?

14 A Well, when they feed into Broughton, they're not going to
15 have their same School Board rep.

16 Q Is that significant to you in any way as a parent with a
17 child in the Wake County Public School System?

18 A To me personally, I'm not sure it is, but it's going to
19 cause a lot of confusion in the county for other parents.

20 Q The splitting of --

21 A The splitting of the -- yes, the feeder --

22 Q Okay. The splitting of the feeder and the high school?

23 A Yes.

24 MS. RIGGS: All right. You can take that down.
25

1 BY MS. RIGGS:

2 Q Ms. Womble, are you familiar with Senate Bill 181 that
3 passed through the General Assembly in 2015?

4 A Yes.

5 Q Okay. Were you opposed to that plan?

6 A Yes.

7 Q What if anything did you do to voice your objections to
8 the plan?

9 A I spoke at the legislature.

10 MS. RIGGS: Shannon, can you pull up Exhibit 9 and
11 turn to page 68.

12 Q If you look at line 1, it says the speaker's name is
13 Amy Rundell. I just wanted to clarify, is this the testimony
14 you offered at that meeting?

15 A Yes.

16 Q And what was the basis of your opposition to Senate Bill
17 181?

18 A Well, it partly seemed to be political payback for the
19 election, but also I didn't understand the need for it. These
20 districts have worked in the past, we've elected majority
21 Republican and majority Democrat County Commissions.

22 Q When you say payback for that election, what election are
23 you talking about?

24 A The recent 2014 election where the Commissioners were
25 swept by the --

1 MS. RIGGS: Shannon, can you pull up Exhibit 277.

2 Q Ms. Womble, do you recognize this document?

3 A Yes.

4 Q What is it?

5 A It's the Wake County corporate limits. It's the map for
6 the Commissioner districts.

7 Q And did you introduce this map or give this map to anyone
8 in the legislature?

9 A Yes.

10 Q When did you do that?

11 A In the spring. I think it may have been March.

12 Q Of what year?

13 A 2015.

14 Q And so what does the map show with the corporate lines and
15 the district lines?

16 A Well, one of the justifications for redrawing it was said
17 to be to give more representation to the outer limits, and what
18 happens is the only areas that are left undivided are Wendell,
19 Zebulon and Morrisville, all of the others are divided at least
20 into two parts. Raleigh is divided into Districts 1 through 5.

21 Q And how does that compare to the previous plan for the
22 County Commission?

23 A Well, previously they were elected at large.

24 Q So were there any divided municipalities when it came to
25 voting?

1 A I don't believe so, no. No.

2 MS. RIGGS: Thank you, Ms. Womble. That's all I
3 have.

4 THE COURT: Thank you. Cross-examination.

5 MR. MARSHALL: Thank you, Ms. Womble, for being here
6 this morning.

7 - - - - -

8 CROSS-EXAMINATION

9 BY MR. MARSHALL:

10 Q Ms. Womble, do you recall back in March of this year that
11 you wrote a letter to the editor of the Raleigh News & Observer
12 about the 2015 County Commissioner --

13 A Yes.

14 Q Do you recall saying in that article, quote, that the bill
15 was nothing more than a thinly veiled retribution for the
16 election of a majority of Democrats to the Board of
17 Commissioners, end quote?

18 A I did say that.

19 Q So you believe that Senate Bill 181 targeted Democratic
20 incumbents on the County Commissioners?

21 A Yes. That was part of the reason.

22 Q Which one? Which incumbents were targeted?

23 A Which were targeted?

24 Q Right.

25 A I would say -- were targeted on the previous Board? The

1 ones who did not support adequate funding of public schools.

2 Q So how were these particular incumbents targeted by the
3 bill?

4 A Oh, you're saying -- I just gave the wrong answer.

5 How were they targeted by the bill?

6 Q Right.

7 A Well, it was made so that it was more likely that
8 Republicans would be elected in the next drawing.

9 Q In all of the districts or just some of them?

10 A Can you clarify that, ask me again, please?

11 Q Sure. How did Senate Bill 181 target any particular
12 Democratic incumbent commissioners?

13 A Well, it sought to divide the more urban Democratic areas.

14 Q In what ways?

15 A I'm not an attorney. I don't feel like I can answer.

16 Q Ms. Womble, in your Complaint you allege the purpose of
17 the maps, for the new district maps for the School Board, was
18 to disfavor incumbents who are registered Democrats and support
19 progressive education policies. Is that true?

20 A That is one of the reasons, yes.

21 Q And again, which incumbents on the School Board were you
22 referring to who were registered Democrats and supported
23 progressive education policies?

24 A Not any in particular, just the districts seemed to be
25 drawn to favor Republicans.

1 Q Okay. You also said in the Complaint that the only goal
2 that the new plan accomplishes is to further Republican
3 interests and advance conservative policies; is that right?

4 A That is true.

5 Q And when you say "advance conservative policies," which
6 specific policies are you referring to as it relates to the
7 School Board?

8 A Well, the ones that had originally caused me to become
9 involved. I did not support a move toward neighborhood
10 schools.

11 Q So neighborhood schools would be one of the conservative
12 policies you were referring to in the Complaint?

13 A Neighborhood schools that create high poverty schools by
14 the way they're divided. I mean technically in the past under
15 other Boards there were a lot of kids that were assigned close
16 to their neighborhood, there was really only about 3 percent
17 assigned to make the schools more diverse, but a pure
18 neighborhood schools model would resegregate, as it has in
19 Charlotte.

20 Q Are there any other conservative policies that you claim
21 Senate Bill 325 was trying to advance?

22 A No.

23 Q How do you measure whether a redistricting plan does or
24 doesn't favor particular voters based on their support or
25 opposition to neighborhood schools?

1 MS. RIGGS: Objection. Calls for a legal conclusion.

2 THE COURT: Overruled.

3 A I don't know.

4 Q Ms. Womble, you said you currently reside in District 3?

5 A Yes.

6 Q And you allege in the Complaint that that is an
7 overpopulated district?

8 A Yes.

9 Q Do you know what percent -- what percentage of
10 overpopulation it has?

11 A I do not.

12 Q Which school district do you currently reside in under the
13 Shanahan school district --

14 A Under Shanahan I'm in District 6.

15 Q You're in District 6. Okay.

16 Do you know if District 6 under the Shanahan plan
17 that you were in is overpopulated or underpopulated?

18 A I do not know.

19 Q Is there some deviation, is there some level of
20 overpopulation in your district that you would be okay with?

21 A Well, again, I'll say I'm not an attorney. I don't really
22 know.

23 Q Okay. So you don't know what the level of overpopulation
24 is under the new maps?

25 A I think there was, as you mentioned with Senator Blue,

1 some deviation under Shanahan, but I'm assuming -- it's my
2 assumption that it is worse under the new plan.

3 Q Okay. But you're not complaining under the Shanahan plan
4 about any overpopulation in your district, are you?

5 A No.

6 MR. MARSHALL: I have no further questions.

7 THE COURT: All right. Any redirect examination?

8 MS. RIGGS: Just briefly, Your Honor.

9 - - - - -

10 REDIRECT EXAMINATION

11 BY MS. RIGGS:

12 Q Ms. Womble, you live in District A; is that correct?

13 A Yes.

14 Q And how do you understand the deviations to be between
15 District A and District B, the super districts?

16 A Well, I understand that the votes of District B are going
17 to count more than my vote.

18 MS. RIGGS: No further questions.

19 THE COURT: Thank you. Any recross?

20 - - - - -

21 RECROSS-EXAMINATION

22 BY MR. MARSHALL:

23 Q Ms. Womble, you said you're in District A?

24 A Yes.

25 Q Okay. If District A and B were both evenly populated, you

1 would still only vote for one super district representative,
2 right?

3 A Yes.

4 MR. MARSHALL: No further questions.

5 THE COURT: Thank you. Thank you, Ms. Womble. Watch
6 your step stepping down and stepping back through the gate.

7 Plaintiffs may call their next witness.

8 MS. RIGGS: Your Honor, plaintiffs call School Board
9 member Bill Fletcher.

10 THE WITNESS: I will affirm.

11 THE CLERK: Please raise your right hand and state
12 your name for the record.

13 THE WITNESS: I'm Bill Fletcher.

14 THE CLERK: Do you affirm that the testimony you're
15 to give the Court in this case shall be the truth, the whole
16 truth and nothing but the truth, and is this your solemn
17 affirmation?

18 THE WITNESS: Yes, it is.

19 THE CLERK: Thank you. You may have a seat in the
20 witness stand, and please watch your step.

21 THE COURT: Good morning, Mr. Fletcher.

22 THE WITNESS: Good morning.

23 THE COURT: Ms. Riggs is going to have some questions
24 for you and then one of the lawyers over here will have some
25 questions for you, or at least have an opportunity to ask you

1 questions. If the lawyer who is not asking you questions
2 objects, just don't say anything until I rule on the objection.
3 Please try to keep your voice up so we all can hear what you
4 have to say. Feel free to adjust that microphone, sir.

5 THE WITNESS: Yes, sir.

6 THE COURT: You may examine the witness.

7 - - - - -

8 DIRECT EXAMINATION

9 BY MS. RIGGS:

10 Q Good morning, sir. Can you introduce yourself to the
11 Court and give some of your educational and professional
12 background.

13 A I'm Bill Fletcher, born in Wake County some long time ago,
14 lived here for all but two years of my life, and currently I'm
15 a real estate broker with Keller Williams Realty. My family
16 has been a longtime series of community servants. My father
17 was on the Parks and Recreation Board for 50 years and things
18 like that. My family and I live in Cary. My wife works in the
19 schools. My daughter is an assistant principal, my son is a
20 Cary police officer, and our youngest is finishing his degree
21 to be a PE teacher, so we're very heavily involved in the
22 schools. I'm not trained as an educator. I have a degree in
23 zoology, a background in business, and I've been in business
24 all of my professional life.

25 Q How did you get involved in Wake County politics?

1 A My children were subject to reassignment, and we moved
2 from a school that was essentially across the street to a brand
3 new school a little further south in Cary, Penny Road
4 Elementary School, and the reassignment really wasn't the
5 issue, the issue was that in our first year in that building
6 there were trailers outside on the playground. I said to
7 myself, this is the Ph.D. capital of the world, why on earth
8 would there be trailers outside this brand new building.
9 Surely Wake County can plan better.

10 I found out later that the reality was the school
11 district did a pretty good job of planning, the bankers
12 typically didn't step up to fund the capital plan that was
13 actually needed, so -- and we have some of that today but we've
14 improved greatly with the last election.

15 Q And so then when did you first run for a position on the
16 Wake County Board of Education?

17 A I ran for Board in 1993 and was elected to my first term.
18 I was privileged to serve three terms through 2005, took a
19 hiatus from the Board and was -- my District 9, the
20 representative resigned and left an open seat, the School Board
21 had a selection process for identifying candidates, and out of
22 the five applicants they chose me to fill the remainder of that
23 term, and then in the fall of 2013 I ran for reelection in that
24 district and won.

25 Q Now, Mr. Fletcher, are you registered as a voter with a

1 political party right now?

2 A I am. I'm a registered Republican.

3 Q Were you involved in the School Board redistricting
4 process in the year 2001 after the 2000 census?

5 A I was.

6 Q Can you describe that process briefly for us?

7 A We had three School Board members, myself, Susan Perry and
8 Beverly Clark, who worked with attorneys from Tharrington
9 Smith, who had the software and the data to guide our process,
10 and we worked diligently to come up with balanced population
11 districts really without regard to political affiliation.
12 Our Board at that time, regardless -- it still is supposed to
13 be a nonpartisan Board. At that time we really practiced that,
14 we were there for the kids, we wanted to make good decisions
15 and this redistricting process was one of those decisions, how
16 do we help our voters select the next Board for the next
17 decade.

18 Q So did you have any consistently applied criteria in that
19 redistricting process?

20 A Well, the issue was to balance the districts, that was the
21 primary -- the primary issue, and then the undergirding,
22 minimizing any kind of split districts and things like that.
23 I'm not sure we had any split precincts in our maps, but I
24 don't really know for sure.

25 Q I want to talk to you briefly about the history of School

1 Board elections. Based on your experience on the Board, have
2 School Board elections and campaigns changed in recent years?

3 A They have. They've become much more expensive from a
4 political fundraising standpoint, they have also become more
5 partisan-based by the emergence of sets of block candidates.
6 At one point in our history one of the parties might have run
7 a -- typically the Republican party might run three or four
8 candidates that were running as a block, and those candidates
9 typically didn't do well. That's changed of late and the
10 political party machine has become more active in terms of
11 really bringing money to the table and advertising to support a
12 particular point of view.

13 The traditional campaign methods of coffees, meeting
14 in coffee shops, having meet and greet events in people's
15 homes, community forums, that classic small municipal type
16 election strategy has been overshadowed by the advertising
17 campaigns that are today so prevalent.

18 Q Are there any issues in particular that you think have
19 contributed to the increased partisanship?

20 A Well, I do know that facing very very high growth in the
21 county, the School Board in concert with the County Commission
22 made what was a controversial decision to expand the multitrack
23 school program. Just a brief definition, multitrack schools in
24 theory can house between 15 and 30 percent more students in one
25 building by having four groups of students, three groups of

1 which attend the school at any one time.

2 In the mid '60s -- in the mid 2000s, 2006 or so, a
3 decision was made that new school construction, which was
4 through a bond referendum, so we had both Boards agreeing,
5 would build primarily schools that were multitrack or
6 year-round, and to deal with a very very high rate of growth
7 many existing schools would be converted from a traditional
8 calender to the multitrack calender, and that created -- that
9 was a sensible stewardship thing to do. It created a political
10 firestorm around the changes that were forced on families.

11 Q Did the Board's socioeconomic diversity policy play any
12 role in the increased partisanship of elections?

13 A I think it has. The Board for years has been committed to
14 the concept that all children deserve an opportunity to learn
15 in an environment that is diverse, both culturally, ethnically
16 and socially and socioeconomically, and the Board uses several
17 strategies to try to achieve this relative balance of student
18 types in the building, including the magnet program that you
19 heard from previously, also some reassignment strategies that
20 may move students beyond their closest school to another school
21 in order to achieve this objective, which research continues to
22 say today that diverse school environments are most helpful and
23 healthy for a student in their achievement.

24 Q Do you recall approximately how many students take part in
25 the Wake County Public School System magnet school program?

1 A There are approximately 12,000 magnet students currently
2 enrolled in the Wake County program, and there's always an
3 over-application pool, so there are more in wait, but 12,000
4 magnet students within those schools. There would be other
5 students who attend those schools that are there by base of
6 their residency, but not through application.

7 Q Switching topics now, Mr. Fletcher, are you familiar with
8 Senate Bill 325 that passed through the General Assembly in
9 2013?

10 A Yes, I am.

11 Q And do you remember when you first heard about Senate Bill
12 325?

13 A It was early 2013, probably March or April. There were
14 several other bills that were dealing with changes to school
15 construction and some other items that were coming out of the
16 legislature. It was kind of a whirlwind, what's going to be
17 next.

18 Q Did you have any advanced notice before the bill came to
19 be formally debated in the legislature?

20 A No, none.

21 Q What is your understanding of the motivations for Senate
22 Bill 325?

23 A By talking with folks in the legislature and other folks
24 who had talked with folks in the legislature, my understanding
25 was the public conversation was everybody in the county should

1 have at least two School Board members they can call, and I
2 said, well, why is that, and the explanation was that, well,
3 some people aren't getting their phone calls returned, and
4 that's -- that's not how this Board operates.

5 The current Board, the current election cycle,
6 election maps, we have nine members elected by districts but
7 our obligation is to serve the entire county, and I know that
8 if I get a call from Wake Forest, I'm returning the call, I'm
9 trying to help that client; same thing if I get a call from
10 Zebulon or Wendell or from Cary, or the part of Cary that I
11 don't represent, that's the attitude of our Board in terms of
12 being good customer servants and helping our clientele, our
13 voters, our community find answers to their questions and
14 support the school system.

15 Q Did you understand that there was some justification about
16 voter turnouts for Board elections?

17 A The other -- the moving of the election to the
18 Presidential cycle was said to increase voter turnout.
19 My concern with that is that voter turnout -- voters who come
20 out to the polls -- the School Board race is going to be so far
21 down the ballot, you know, they may never get to it, and so
22 I think that's an issue with the bill. Moving the election
23 from the municipal cycle to the Presidential election cycle
24 will have a very ill effect on people being informed about what
25 their School Board opportunities -- School Board choices really

1 are.

2 Q And do you have any expectations for what it will do to
3 the cost for running for School Board elections?

4 A Well, School Board races for the most part have been
5 funded under \$20,000, there are some exceptions, some very
6 heated races in northern Wake County recently pushed a
7 six figure number. I think when you look at what the -- what
8 this cycle does, it's going to put us more at a County
9 Commission level in terms of having to raise close to \$100,000
10 or more to have any visibility in a Presidential election
11 cycle.

12 Q Mr. Fletcher, were you opposed to Senate Bill 325?

13 A Yes, I was, and I am.

14 Q And what actions did you take to voice that opposition?

15 A I shared my opposition privately with members of the
16 delegation with whom I have relationships, also participated in
17 our School Board as we together crafted and passed a resolution
18 from our Board opposing the passage of Senate Bill 325.

19 MS. RIGGS: Shannon, can you pull up Exhibit 437,
20 please.

21 BY MS. RIGGS:

22 Q Mr. Fletcher, is that the resolution you just referenced?

23 A Yes, it is.

24 Q The reasons that you understood to be motivating Senate
25 Bill 325, did you find those convincing?

1 A No, I did not, and if I can go to a second motivation
2 I didn't mention earlier, which is this supposed alignment of
3 legislative or Board districts with school districts, as fluid
4 as our community is, districts that might be aligned today in
5 six months may not be. The movement of children in and out of
6 our schools, roughly 20,000 to 25,000 students change each
7 year, those are students who change grade levels, students who
8 graduate, new kindergarteners who move in, families who move
9 within our county, folks who move into our county. So there's
10 a great deal of transition in who our population is and where
11 they live, and so the role of the School Board is to be
12 available to our constituents, and frankly we do a pretty good
13 job.

14 Q Can you tell the Court what Board Advisory Councils are?

15 A In the merger legislation back in 1975, each Board member
16 is supposed to have a Board Advisory Council made up of citizen
17 representatives from each of the schools that meets at least
18 four times a year to advise the Board member on issues that
19 they have in their schools and to hear from the Board member
20 things from the district and the direction that the district
21 may be trying to take the community. In my area those meetings
22 typically have -- I currently have 22 schools in my Board
23 Advisory Council area and we will have 60 to 70 people in those
24 meetings for an exchange of ideas and for sharing of
25 information.

1 Q So did you conclude that the public reasons for Senate
2 Bill 325 were pretextual?

3 A Yes. It's fairly clear that after the outcome of two
4 elections that were held based on the 2011 Shanahan maps had
5 not gone the way of the Republican party, that they were going
6 to take matters into their own hand at the legislature and
7 change the maps.

8 MS. RIGGS: Shannon, can you pull up Exhibit 257.

9 BY MS. RIGGS:

10 Q Mr. Fletcher, are you familiar with this document?

11 A Yes.

12 Q And can you explain what it is?

13 A It is a map detailing the District A and District B
14 so-called doughnut and hole districts that have been created by
15 the legislature.

16 Q Can you describe what this map will mean for both families
17 with students and also School Board incumbents?

18 A Well, I believe there are six incumbents that are lumped
19 into the B district of the current members, so that means that
20 there is change coming. The other thing that it means is if
21 you look at the perimeter, the B district, you're asking one
22 representative to cover 895 square miles of district territory
23 and you're saying that this one person will be asked to
24 represent the interests of small town Zebulon and rapidly
25 growing Cary at the same time, plus Wake Forest, Fuquay,

1 Holly Springs, Morrisville, Zebulon, Knightdale, and that
2 creates a challenge for the Board member to be an effective
3 representative, and if the issue is to improve relationships
4 and opportunity to have conversations with Board members, this
5 map doesn't seem to support that concept.

6 Q How many schools do you have in your School Board district
7 right now?

8 A Right now there are 22, and mine is one of the more
9 compact districts because of the population density in the Cary
10 area.

11 Q Do you know about how many schools would be in each of
12 these super districts?

13 A Well, there are 170 schools countywide today. We're
14 growing by three or four schools each year. I have not seen
15 the actual counts. Most of our new school construction has
16 been on the fringe of the county because that's where the
17 growth has been. My estimation would be more than half of the
18 schools are going to be in B. Probably significantly more than
19 half of the schools would be in B.

20 Q And how does that affect -- how would that affect your
21 ability to do your job as a School Board member?

22 A It would alter the care that I'm able to give to
23 constituents and to items raised by school administrators from
24 those districts.

25 Q Finally, I wanted to discuss with you the way that the

1 election system is now staggered. Can you explain to me the
2 advantages of the current system?

3 A One of the benefits of the current system is the fact
4 that -- let me start over.

5 I am a -- I believe in change over time, not
6 necessarily change overnight. If you want change to last, it
7 has to be inculcated into the institution. When we go from
8 electing in staggered elections half the Board to electing a
9 super majority of the Board at one time, the loss of
10 institutional knowledge from the Board members can be
11 significant. Replacing seven Board members in a single
12 election, which is a possibility with this new election,
13 in fact, replacing all nine members is a possibility in 2016,
14 would just be an untenable lack of good governance that the
15 legislature has put on the table.

16 There is a tremendous need to have institutional
17 knowledge and the understanding of the role and the function of
18 Board members to continue from Board to Board as that
19 membership changes. This law turns that on its head and says
20 it's okay to take the Board of Directors for the biggest
21 economic engine in Wake County and to change them all out at
22 one time, and that's just not good governance, that's not good
23 for our community.

24 Q Would you have been opposed to any changes to the method
25 of election for the Wake County Board of Education?

1 A There had been different things discussed over time, but
2 the point of this is that nothing was discussed. There was no
3 opportunity to provide input, to have a debate or discussion
4 about different election strategies, it was simply drafted in a
5 bill and presented and passed with little opportunity for
6 rational thought.

7 Q Based on your experience on the Board dating back to
8 '93 --

9 A '93.

10 Q -- was that uncommon, for there to be laws imposed by the
11 General Assembly without any input from the School Board?

12 A Based on my recollection, yes. I can't remember at any
13 time -- we're not talking about education law and typical
14 stuff, anything that was germane to Wake County always had the
15 consultation between the legislative delegation and the sitting
16 Board, and there might -- there may have been some changes made
17 but they're always done in concert as opposed to in opposition.

18 MS. RIGGS: Thank you, Mr. Fletcher. Those are all
19 the questions I have right now.

20 THE COURT: Thank you. Cross-examination.

21 MR. TYNAN: Thank you for your time, Mr. Fletcher.

22 - - - - -

23 CROSS-EXAMINATION

24 BY MR. TYNAN:

25 Q In 2013 was there a clear partisan split between voters

1 who preferred the county's socioeconomic diversity policy and
2 voters who were opposed to the socioeconomic diversity policy?

3 A In two thousand -- would you repeat that, please.

4 Q In 2013, was there a clear partisan split between voters
5 who preferred the county socioeconomic diversity policy and
6 voters who did not?

7 A You're asking if there was a partisan split?

8 Q Right.

9 A I don't know that I can say that. I know Republicans and
10 Democrats who both believe socioeconomic diversity is an
11 important factor in our schools' success.

12 Q And you're a Republican who supports that policy?

13 A I'm going to ask you to repeat. I'm having trouble
14 understanding you. I'm sorry.

15 THE COURT: Move that microphone down a little.

16 BY MR. TYNAN:

17 Q And you are a Republican who supports the socioeconomic
18 diversity policy?

19 A I am, yes.

20 Q And do you know other Republicans who support the
21 socioeconomic diversity policy?

22 A Yes.

23 Q Did some of them vote to elect you in 2013?

24 A Some did.

25 Q Do Wake County voters decide who to vote for in

1 School Board elections based on party or based on issues?

2 A In the past it's been some of both. Sometimes a party
3 would identify a candidate and shoo other people away so
4 there's only one party -- one candidate from that party in a
5 particular race. Other times it's been clearly issue oriented,
6 such as when the -- I mentioned the conversion of schools from
7 single track to multitrack, that created -- that was an issue
8 around which candidates came -- they may have had a party
9 affiliation but it was the issue that was bringing people out.

10 Q Can you tell whether a given School Board district favors
11 certain policies?

12 A That's a really broad question. Because I am in
13 communication with folks in my district and I have two public
14 meetings a month where they can come and talk about anything
15 they want to and I communicate well with the folks who make
16 inquiries to me, I know what the people in my district want.
17 I don't try to predict what other districts want if I don't
18 know the constituents.

19 Q You say that you represent the entire student population
20 of Wake County; is that right?

21 A That's my responsibility as an elected Board member.

22 Q Do you believe that's the responsibility of all the Board
23 members?

24 A I do.

25 Q Do you believe that would be the responsibility of the

1 Board members who would be elected to the super districts?

2 A It would be. It would be very difficult to accomplish it,
3 but yes, it would still be their responsibility.

4 Q Would it be more -- would it be more difficult for them to
5 meet that responsibility than it is for you to do so?

6 A Within a single district? I'm sorry.

7 Q You stated that you represent the interests of the entire
8 student population of Wake County.

9 A Well, the constituents too, yes.

10 Q And so the representatives of the super districts would
11 also represent the interests of the entire student population
12 of Wake County?

13 A Yes, they would.

14 Q Is it more difficult to do so because they're drawn into
15 particular districts?

16 A It's difficult to do so because of the scope.

17 Q Because the county is too big?

18 A Because the district is arranged in such a way it's
19 extremely inefficient to try to serve the constituents that are
20 spread out around the perimeter of an 895 square mile county.

21 Q But you're able to serve the interests of the entire
22 county?

23 A I'm able to serve the interests of the people who reach
24 out to me, and in my role -- when I say I serve the entire
25 district, my primary responsibility is to listen to the voters

1 in my district and to share that information as we make policy
2 decisions at the Board level. I will listen intently to the
3 Board member from Zebulon, for example, to say what is going on
4 in Eastern Wake County and how do we -- how do I as a Board
5 member who is elected by folks in Cary help accomplish what
6 would help kids learn in Eastern Wake County by listening to
7 the sitting Board member from that area. That's how we
8 represent the county, by understanding what's going on in our
9 communities and sharing that with other Board members so that
10 we can make good policy decision that supports academic
11 achievement across the county.

12 Q If you got a call from a parent from outside your
13 district, would you listen to them?

14 A I do listen to them, yes, and I attempt -- if I don't have
15 an answer, which is often the case, I find out to whom they can
16 talk to and get the answer.

17 Q So if a parent was confused about which School Board
18 district member -- which School Board member they should
19 contact and they contacted you, you would refer them to the
20 correct person?

21 A Well, I would -- I would make sure that the School Board
22 member knew I had been contacted. I may very well try to solve
23 the problem, or direct the person to the person -- a typical
24 call might be a parent who calls and says I want to complain
25 about a particular principal. My first question is have you

1 talked to the principal, and if the answer is no, then I let
2 the principal know that I've gotten the call, I let the other
3 Board member know that I've gotten the call and encourage the
4 parent to call the principal, that's where their problem can be
5 solved.

6 Q We talked about earlier that one of the stated purposes of
7 Senate Bill 325 was to give two votes to each parent; is that
8 right?

9 A That's what I had heard, yes.

10 Q Under the plan as you understand it, will parents be able
11 to vote for two Board members?

12 A As I understand it, yes.

13 Q And all things being equal, wouldn't parents prefer to
14 have the ability to vote for two Board members instead of one?

15 A I don't know how to answer that. I have not polled the
16 community. The issue is whether they're going to be properly
17 represented and whether that Board member would be attentive to
18 the community's needs.

19 Q And you believe it's the duty of School Board members to
20 be attentive to the needs of the entire county?

21 A Yes, and I gave the explanation of how that's possible
22 given our current configuration.

23 MR. TYNAN: No further questions.

24 THE COURT: Thank you. Any redirect?

25 MS. RIGGS: Nothing on redirect.

1 THE COURT: Thank you, Mr. Fletcher. Please watch
2 your step stepping down and stepping back through the gate.

3 THE WITNESS: Thank you, sir. I appreciate the
4 reminder.

5 THE COURT: Plaintiffs may call their next witness.

6 MR. EPSTEINER: Good morning, Your Honor.
7 George Epsteiner for the Southern Coalition for Social Justice.
8 The plaintiffs call Christine Kushner.

9 THE COURT: Good morning, Mr. Epsteiner.

10 MR. EPSTEINER: Good morning.

11 THE CLERK: Please place your left hand on the bible
12 and raise your right hand and state your name for the record.

13 THE WITNESS: Christine Kushner.

14 THE CLERK: Do you swear that the testimony you're to
15 give the Court in this case shall be the truth, the whole truth
16 and nothing but the truth, so help you God?

17 THE WITNESS: I do.

18 THE CLERK: Thank you. You may have a seat in the
19 witness stand, and please watch your step.

20 THE COURT: Good morning. Is it Kirchner?

21 THE WITNESS: Kushner.

22 THE COURT: Kushner. Good morning, Ms. Kushner.

23 THE WITNESS: Good morning.

24 THE COURT: Mr. Epsteiner is going to have some
25 questions for you and then Mr. Marshall may have some questions

1 for you. If the lawyer who is not asking you questions objects
2 to the other lawyer's question, don't say anything until I
3 rule. Please try to keep your voice up so we all can hear what
4 you have to say. Feel free to adjust the microphone.

5 THE WITNESS: Thank you, sir.

6 THE COURT: You may examine the witness.

7 MR. EPSTEINER: Thank you, Your Honor.

8 - - - - -

9 DIRECT EXAMINATION

10 BY MR. EPSTEINER:

11 Q Please introduce yourself.

12 A Good morning. I'm Christine Kushner.

13 Q Ms. Kushner, do you currently hold elected office?

14 A Yes, I serve on the Wake County Board of Education.

15 Q And what is your current district?

16 A I currently represent District 6.

17 Q And under the plans that would be going into effect in
18 2016, what would your district be?

19 A In the 2016 plan I would live in District 5.

20 Q How long have you been a member of the School Board?

21 A I was first elected in the fall of 2011.

22 Q Briefly describe some of the duties and responsibilities
23 of School Board members for Wake County.

24 A The primary responsibility of the Wake County Board of
25 Education is to develop the policy of the Wake County School

1 System and oversee the policies and procedures of the school
2 system. We have a system of 171 schools.

3 Q Is the School Board responsible for making decisions about
4 where new schools are built?

5 A Yes. Part of our duties are through the facilities
6 committee and working in concert with the Board of
7 Commissioners planning for growth in Wake County, siting new
8 schools as well as prioritizing renovations and life cycle
9 projects for our schools.

10 Q Does the School Board fund its budget?

11 A No.

12 Q Who has taxing authority in the county for School Board
13 funding?

14 A The taxing authority in Wake County is with the local
15 Board of Commissioners.

16 Q The County Commissioners; is that right? The Board of
17 County Commissioners?

18 A Yes. Correct. About a third of our budget comes from the
19 local County Commissioners and all of our capital budget comes
20 from the county.

21 Q In 2011 did your campaign discuss socioeconomic diversity
22 in Wake County school assignment?

23 A Yes, during the 2011 campaign the issue of maintaining
24 socioeconomic diversity in our schools was an issue.

25 Q And before the 2011 election was the School Board divided

1 on this issue?

2 A During 2009 and '11 it was a 5-4 split on that issue, yes.

3 Q And so before the 2011 election what was the political
4 party of the five that were against socioeconomic diversity in
5 school assignment?

6 A Can you repeat your question?

7 Q Sure. You said there was a 5 to 4 split before the 2011
8 election regarding school assignment policies. What was the
9 political party of the five Board members that -- did the five
10 School Board members support or were against socioeconomic
11 diversity in school assignment?

12 A Well, 2009 was a change in the governance of the School
13 Board. The parties were very involved in the 2009 election and
14 there were five identified members of the School Board who
15 identified themselves as Republicans and were -- came in on a
16 platform to eliminate a lot of the policies that the School
17 Board and the school system had in place to have socioeconomic
18 diversity in the schools.

19 Q What were the overall results of the 2011 election with
20 regard to control of the School Board?

21 A There were five seats that were up for election and there
22 were candidates on both sides of -- identified as Republicans
23 as well as those who identified as Democrats, and that was
24 through, you know, the media as well as party elections, or
25 party campaigning, and the five who identified as Democrats

1 were victorious.

2 Q And of the five candidates who won the 2011 election, did
3 all five support socioeconomic diversity in school assignment?

4 A I think it -- the campaigns were on many issues, and
5 I think maintaining socioeconomic diversity in the schools and
6 heading off the trends that were evident between 2009 and '11
7 were supported by those who won those elections.

8 Q And then there was another School Board election in 2013;
9 is that right?

10 A Yes.

11 Q What was the result of the 2013 election as to the School
12 Board?

13 A In 2013 there were four seats that were up, there was one
14 incumbent and two who had been appointed to the School Board,
15 including Mr. Fletcher, and another open seat, and that
16 resulted in Mr. Fletcher being elected, Mr. Tom Benton in
17 District 1, and Ms. Zora Felton defeated an incumbent in
18 District 7, and Ms. Monika Johnson-Hostler was elected in
19 District 2.

20 Q And other than Mr. Fletcher, who previously testified,
21 were the other successful candidates in 2013 registered
22 Democrats?

23 A I believe so, yes.

24 Q And did all of them support socioeconomic diversity in
25 school assignment?

1 A I think they would be -- they were in favor of maintaining
2 the diversity we have in Wake County Schools.

3 Q Now, going back to after the 2011 election, what was the
4 relationship like between the Wake County School Board and the
5 County Commission?

6 A After the -- I'm sorry. Which election?

7 Q After the 2011 election.

8 A In 2011, when I was first -- joined the Board, I would say
9 there were tensions over financial issues between the
10 two Boards, and that had been the case on and off. There's a
11 natural tension between the Board of Commission and the School
12 Board, given that the School Board does not have taxing
13 authority and the County Commission does, and I would say that
14 tension was present in 2011.

15 Q Did the County Commission take any position on
16 redistricting of the School Board in 2013?

17 A In the next year I do believe one of the goals of the
18 Board of Commissioners was to have -- to change the way the
19 Board of Election -- the Board of Education was elected.

20 Q And is that their -- a legislative goals document, that's
21 a written document that's generated for the public?

22 A Yes, they had both commission goals but also legislative
23 objectives, and one of their legislative goals was to change
24 the way that the Board of Education was elected.

25 Q And do you know what change the County Commission

1 advocated for in its legislative goals?

2 A Their stated goal was to have countywide elections of the
3 Board of Education.

4 Q And what was the School Board's reaction to this
5 legislative priority of the County Commission?

6 A It -- again, I think we felt as though -- the current
7 districts that had been in place, the districts that were used
8 in 2011, had been based on districts that had been present
9 since merger, they'd obviously changed because populations
10 change, but they were essentially similar districts to those
11 that were put in place in the mid '70s, and so to have a very
12 different way of electing the Board of Education was
13 surprising.

14 Q Did the County Commission consult you as a member of the
15 School Board before coming out with that legislative priority?

16 A No, I don't recall that they consulted with us.

17 Q Ms. Kushner, when I refer to Senate Bill 325, do you know
18 what I'm referencing?

19 A The Senate Bill that redistricted our -- that changed the
20 way that the School Board is being elected, yes.

21 Q When did you first become aware of the bill?

22 A I heard about it the way most people did, when it was
23 filed, through media reports, and we may have received an
24 e-mail on it.

25 Q Were you consulted by members of the General Assembly who

1 supported the bill before the bill was introduced?

2 A Not that I recall, no.

3 Q Did you attend public meetings related to the bill?

4 A I did.

5 Q What public meetings do you recall attending regarding the
6 bill?

7 A There was a -- I believe in April, on April 17th, there
8 was a committee meeting that the Senate held that I attended
9 that also discussed the Greensboro -- or the Guilford County
10 Board of Education proposed changes, how they were -- the
11 Greens -- the Guilford County Board of Education was being
12 elected, and then there was a Wake delegation meeting in March
13 that I attended.

14 Q So you first attended a March --

15 A Yes.

16 Q -- Wake County delegation meeting and then you attended a
17 Senate committee meeting on the bill in April?

18 A To my best recollection, yes.

19 Q Let's talk about each meeting.

20 So regarding the March Wake Delegation meeting that
21 you attended, what was your sense of the public's response to
22 the bill at that meeting?

23 A I don't remember hearing any supportive -- any support for
24 the bill, but there was opposition to the bill.

25 Q And what about the April 17th Senate committee meeting,

1 what was your sense of the public response to the bill at that
2 time?

3 A At that time also there was a lot of confusion as to why
4 the bill was being proposed, why there was a need to change the
5 way that the School Board was elected, and much of the public
6 comment was opposed to the bill.

7 Q Was it more negative or more positive at that Senate
8 meeting, that you recall?

9 A My best recollection in looking at news reports from the
10 time was that it was against the bill.

11 Q What was the School Board's response to Senate Bill 325?

12 A In the spring of 2013 the Board developed -- wrote and
13 approved a resolution that reaffirmed our existing election
14 system that was in place in 2011.

15 Q Do you recall some of the reasons why the School Board
16 reaffirmed the districts that it drew in 2011?

17 A Well, the 2011 was drawn before I had gotten on the Board,
18 but in 2013 we reaffirmed that the current -- the 2011 maps I
19 feel because it was -- had more compact districts, they were
20 districts that represented school communities in more efficient
21 ways, and we didn't see a need for changing the way that we
22 were elected. And at our recent meeting, I believe it was
23 December 1st, the sitting Board, the current Board, did
24 reaffirm support for those 2011 election maps.

25 Q Do you recall the resolution talking about the way the

1 terms were staggered in the 2011 plan versus the plan that was
2 proposed by Senate Bill 325?

3 A Well, as I think Mr. Fletcher pointed out, in Senate Bill
4 325 -- in the 2011 method, five seats were up in -- I believe
5 five seats would be up in odd number years, in 2011, and then
6 two years later four seats would be up, so having that 5-4
7 stagger, and I apologize if I'm not explaining it right, but in
8 one year, in one election cycle five seats would be up, and
9 then two years later four seats would be up for election, and
10 as Mr. Fletcher underscored, having that sort of even
11 distribution of election cycles allows for that institutional
12 history to stay with the Board. Being a School Board member is
13 very complex, we deal with a wide range of issues, and so
14 having continuity of having five seats up in one year and then
15 two years later having four seats up provides some stability to
16 the Board.

17 In contrast, the 2016 election will have all nine
18 School Board members up for reelection, for election, so it
19 could be a turnover of nine members, and I think one of the
20 strengths of our current Board is that we have someone like
21 Mr. Fletcher, who has a depth of experience, and we have folks
22 who have been on the Board with knowledge of the school system,
23 a very complex school system of 171 schools. So the 2011 cycle
24 allows for a much more even election cycle.

25 Under the 2016 plan all nine -- as I stated, all nine

1 seats are up, two of those seats will only be for two year
2 terms and seven of the seats will be four year terms, and so
3 then the stagger becomes seven seats up and then -- every four
4 years, and then two seats would be up every four years, so that
5 7-2 stagger is uneven and allows an opportunity for all seven
6 seats to have turnover every four years, which would lead to a
7 great deal of instability, in my personal opinion.

8 Q What do you recall are the differences in the population
9 deviations of the districts in the 2011 districts versus the
10 districts that were drawn in the 2016 plan in Senate Bill 325?

11 A Not having numbers and notes in front of me, I don't want
12 to misquote numbers, but my sense is that the 2011 districts
13 have less deviation than the 2016 districts.

14 Q Did any parents or constituents speak to you about
15 supporting Senate Bill 325 while it was being considered?

16 A No, not -- I don't recall that at all.

17 Q And you don't believe they did?

18 A I don't remember receiving any -- or hearing much support
19 for the bill.

20 Q Did members of the General Assembly ask for your input
21 during legislative consideration of the bill?

22 A I recall speaking with some legislators during -- there
23 were a lot of issues during that legislative session. I did
24 speak with legislators to a great extent on the construction
25 bill that was in that legislative session, and we may have

1 spoken briefly about the election bill. I remember having a
2 conversation with representative Chris Malone and stated that,
3 you know, if they wanted to have at-large districts it would be
4 simpler to add two at-large seats to the Board and keep the
5 nine districts as they are in place, and that if there was a
6 need -- and that was a suggestion I had made to Mr. Malone.

7 Q Do you recall receiving any requests for information from
8 the General Assembly about how you would respond to a
9 constituent who lives outside of your single-member district?

10 A Senator Josh Stein sent an e-mail to the Board and asked
11 us how we would react to or how we would respond to
12 constituents, and I think Mr. Fletcher gave a very nice
13 explanation, and what I said to Senator Stein is that if I do
14 have an inquiry from a parent who lives inside my district or
15 outside my district, I would respond similarly.

16 What I think happens with having compact districts
17 is, say, if I get a question from someone from Broughton High
18 School, which is in District 6, I could answer that directly, I
19 would know the principal and who to direct the parent to. If
20 it's someone outside my district, I similarly could -- may know
21 the principal or may know the area superintendent to send that
22 person to, but I also know that I have a colleague who would be
23 more intimately aware of the issues in that district so would
24 certainly respond to that colleague. Mr. Fletcher does a great
25 job of that. When he sends an e-mail he'll reply to all Board

1 members to make sure that folks are knowing a concern and know
2 that we're trying to work to address that concern.

3 Q And in your response about how to respond to both a
4 constituent inside and outside of your district, similar to
5 Mr. Fletcher's response, was that the general consensus of the
6 School Board in responding to Senator Stein's request?

7 A Yes, and we did -- I think we all responded to him,
8 because I think we were all copied on some e-mails back to
9 Senator Stein saying pretty much that same sentiment, that we
10 do work to address the concerns of all citizens in the county,
11 but having compact districts it makes it effective for us to
12 have more detailed knowledge about our own districts.

13 Q Did any supporters of the bill ask for your opinion or
14 input at any time during legislative consideration of the bill.

15 A I'm sure that I spoke with some legislative supporters and
16 the concern being that folks should have more Board members to
17 address. I think we also have to keep in mind that 70 percent
18 of the voters do not have children of school age, so I also
19 feel a responsibility to represent the voters and taxpayers of
20 Wake County who may not have school aged children but for whom
21 I believe the school system is important for their tax value,
22 for the economic and civic future of our community.

23 MR. EPSTEINER: I'd like to pull up Exhibit 257.

24 Q Ms. Kushner, does the exhibit on your computer screen
25 reference the lettered super districts in the Senate Bill 325?

1 A Yes, that's what they look like.

2 Q What is the impact of the super districts on you?

3 A The impact of the super districts on -- I am in
4 District A, I believe.

5 Q And how would you characterize the differences between
6 District A and District B?

7 A I have to borrow the phrase that they're not easy on the
8 eye, the map, but it appears to divide the county in half in a
9 doughnut and doughnut hole manner, as we've come to refer to
10 them.

11 Q And would you consider District A to be an extremely large
12 geographic area of Wake County?

13 A Both A and B are large geographic districts of
14 Wake County, and as I think has already been expressed by my
15 colleague, it makes it difficult for a School Board member
16 representing either A -- or speaking for myself, representing A
17 would be difficult to do on the detailed level that we work to
18 represent our school communities.

19 Q Would you also believe that it would be difficult to
20 represent the constituents in Super District B as well?

21 A I would think so.

22 MR. EPSTEINER: I'd like to pull up Exhibit 469.

23 A And if I could give an example of that, we do student
24 assignment changes that we just recently did, and when we get
25 to that level of detail that we're analyzing, we're talking

1 about neighborhoods and communities, and so a School Board
2 member currently under the nine districts, we can have a good
3 handle on a ninth of the county, and so when we're having those
4 discussions at the table, having the districts the way they are
5 currently set up based on 2011 allows us to have those
6 discussions where I can turn to a colleague and say, you know,
7 near your area what does that look like, and so that's where
8 the more detailed knowledge of a district comes in handy --

9 Q And so --

10 A -- and is useful.

11 Q -- talking about school alignment, do you recall a
12 justification for the bill being that Senate Bill 325 improves
13 School Board representation by better aligning the school
14 assignment zones with the election districts? Did you hear
15 that as a justification?

16 A I don't recall hearing that vividly, but I think that was
17 put forward.

18 Q And what would your response to that be, being that the
19 districts in front of you, the numbered districts as currently
20 drawn, better allow students to have a school located in that
21 particular district?

22 A Well, as an example of the changes from the current
23 district I represent, District 6, Broughton High School, which
24 I think has been raised, is in my current district, 6, and it
25 is fed not only by Martin but also by Daniels Middle School and

1 has been for -- and under the current district both Broughton
2 as well as Daniels and Martin are in District 6. I have a
3 Board Advisory Council where those three schools and other
4 schools gather and we look at information and share ideas, and
5 those three schools are together in my current district, and
6 under these maps that are now on the screen, I think as it's
7 been said, Broughton is in District 3, Martin is in District 5
8 and Daniels is in District 2.

9 Q And so when you said your current districts, you mean the
10 districts that were drawn in 2011?

11 A Right. In 2011, those three schools are in my current
12 district, but in the 2016 District 5 will have Martin but not
13 the other two.

14 Q And then looking again at the numbered districts in front
15 of you, what is the impact of you being in your new District 5?

16 A Well, currently in my 2011 district my district is all in
17 the City of Raleigh and is fairly central. It's been very
18 altered and carved up into other districts under the 2016 maps,
19 and under these 2016 maps I'm in District 5 and have -- about
20 two-thirds of the precincts will be different, and instead of
21 being in Raleigh, the District 5 includes parts of Raleigh, all
22 of Morrisville and much of Cary.

23 Q What type of effect does your new District 5 have on your
24 campaign costs for a future election?

25 A I don't know how to speculate on that, but it will be a

1 different group of voters that I will need to campaign and talk
2 with.

3 Q Do you think it would increase campaign costs to have to
4 try to reach those new voters that you didn't have to
5 previously reach in your previous district?

6 A I think it will -- also to the point that it's an election
7 year that includes a Presidential race and a U.S. Senate race
8 and it's a long ballot, Wake County will have a long ballot
9 next year, it will likely increase costs. And being in a
10 nonpartisan race in a year where there are partisan races, in
11 my -- in the election of 2011 there were four candidates in my
12 race, so I don't know but I think one could speculate that
13 there might be three or four candidates, there might be a
14 chance of a runoff in 2016 that then would need to be after the
15 November election.

16 Q As a technical matter, what time of year would the
17 2013-2014 student assignment maps be public?

18 A Can you repeat that question?

19 Q Sure. Do you know what time of year the 2013-2014 student
20 assignment maps would be made public?

21 A 2013-2014 student assignment maps? They were public that
22 year. I'm not quite following your question.

23 Q Right. You said that year. I'm asking at what time of
24 the year.

25 A What time of year?

1 Q January, March, June?

2 A In two thousand -- for the 2013-14 school year we would
3 have discussed student assignment plans in -- we would have
4 started in the summer, about May, June perhaps, is our typical
5 schedule, if there are any changes. We don't have changes
6 every year. Most years but not every year.

7 THE COURT: Of 2013?

8 THE WITNESS: Of 2013 -- let me think back.

9 A When we came in in 2012 is when we had the countywide
10 choice plan, and in 2013 we went back to the 2011 assignment
11 maps, and then -- so that would have been the summertime, if I
12 remember right. There's been a lot of complex decision making
13 on student assignment in the last four years.

14 Q And the map that's in front of you, would you agree that
15 it represents the seven numbered districts under the Senate
16 Bill 325 with the names of the incumbents at the time the bill
17 was being considered in 2013?

18 A Yes, that looks right.

19 Q When the bill was enacted in 2013, what was the effect on
20 incumbents who are registered Democrats?

21 A Could you repeat your question?

22 Q When the bill was enacted in 2013, what was the effect on
23 incumbents who are registered Democrats?

24 A In District 1 there were three incumbents who were triple
25 bunked in one district. Both Kevin Hill and Tom Benton had run

1 as Democrats, Mr. Hill ran as a Democrat in 2011 and Mr. Benton
2 was a registered Democrat when he ran in 2013, and in the 2016
3 maps those two, Mr. Hill and Mr. Benton, were double bunked in
4 a district that I believe leans Republican with an incumbent
5 who is a registered Republican, Mr. Tedesco. And in District 6
6 Mr. Fletcher, who is identified as a Republican, was put in the
7 same district with two identified Democrats, Ms. Evans and
8 Dr. Martin.

9 Q And in District 1, John Tedesco, did he support
10 socioeconomic diversity in school assignment?

11 A He had been part of a Board that had eliminated
12 socioeconomic diversity from our student assignment policy.

13 Q And were Mr. Benton and Mr. Hill supportive of diversity
14 in school assignment?

15 A I think it's fair to say Mr. Hill and Mr. Benton support
16 maintaining socioeconomic diversity in our schools.

17 Q And in District 6 actually all three of the candidates
18 support socioeconomic diversity in school assignment; would you
19 agree?

20 A Yes, I would agree that's generally true.

21 MR. EPSTEINER: Ms. Kushner, I don't have any other
22 questions at this time.

23 THE COURT: Cross-examination.

24 MR. MARSHALL: Very brief.

25 Thank you, Ms. Kushner, for being here.

CROSS-EXAMINATION

BY MR. MARSHALL:

Q Were you in the courtroom when Mr. Fletcher was testifying?

A Yes.

Q Okay. So did you hear him say how he feels it's his obligation to represent the interests of the entire Wake County School District?

A Yes.

Q And you agree with that?

A Yes, I would agree that I also have that duty, yes, sir.

Q Right. And I know your campaigns have been very successful and you've attracted support from both registered Republicans and Democrats; is that right?

A Yes, I would like to say that.

Q And have you found in your campaigns that your supporters are more influenced by your political party registration or your position on school issues?

A I would say it would be both.

Q Both. And have you found since you've been on the Board that the pressing School Board policies of interest to parents have changed from cycle to cycle?

A Would I think that issues have changed? I think many have changed and many have stayed constant. We have a very active parent community in Wake County and we also have a very active

1 citizenry who supports public education.

2 Q And are you aware of any statistical correlation between
3 political party registration and people's positions on school
4 assignment policies?

5 A No, I don't know of any.

6 Q I only have one more item.

7 I'm going to put up on the screen Exhibit 5, and this
8 will come up in just a second.

9 Ms. Kushner, when the final version of Senate Bill
10 325 was enacted, are you aware that the districts were just
11 a little bit different than they were when the bill was
12 originally introduced?

13 A Could you repeat your question?

14 Q Sure. When Senate Bill 325 was finally enacted, the final
15 bill, are you aware that the districts were a little different
16 than the districts in the original bill that the Republicans
17 proposed?

18 A Yes. I believe that Ms. Prickett, who is a registered
19 Republican, had been placed into a Democratic leaning district
20 and she was moved out of that district and put into a
21 Republican leaning district, and I was switched out of
22 District 2 into District 5.

23 Q Okay. And would that be a more favorable district for
24 you?

25 A Slightly. It's pretty even across both Democrat,

1 Republican, unaffiliated, I believe. It was -- yes.

2 THE COURT: What exhibit is that, did you say?

3 THE WITNESS: I don't quite under -- I didn't have
4 time to read it.

5 THE COURT: Which exhibit is this?

6 MR. MARSHALL: It's Exhibit 5.

7 THE COURT: Exhibit 5. Thank you.

8 BY MR. MARSHALL:

9 Q So, Ms. Kushner, I'm just going to pull up Exhibit 5.

10 Sorry, yeah, page 8. I'm sorry, page 8, Exhibit 5.

11 I'm just highlighting what Representative Stam said
12 here. He said there was a news report that said it would give
13 these two members safe seats, that's not the case, but it put
14 these two members who are incumbents in districts that they
15 have a decent chance of winning instead of putting them in a
16 district that they can't win or it would be difficult to win.
17 So this was to maintain continuity on the Board for two highly
18 respected members. Is that referring to you and Ms. Prickett?

19 MR. EPSTEINER: Objection. I don't think there's
20 been any testimony that she was at this hearing.

21 THE COURT: Well, if you know.

22 A I don't remember seeing or hearing these words. I'm
23 struck -- you're implying Representative Stam is referring to
24 me as a very highly respected member of the School Board? That
25 is really nice of him.

1 Q So you're flattered?

2 A I am. I truly am, and I work hard to be a good School
3 Board member, so -- I remember the news report at the time,
4 I have to say, I do remember that, but as I stated, I remember
5 that Ms. Prickett was -- they were altered so that Ms. Prickett
6 was put into a Republican leaning district and I was placed
7 from 2 into 5, I do recall that, yes.

8 MR. MARSHALL: Okay. No further questions.

9 Thank you.

10 THE COURT: Any redirect?

11 MR. EPSTEINER: Nothing further, Your Honor.

12 THE COURT: Thank you, ma'am. Please watch your step
13 stepping down. We're at our time for our lunch recess. We'll
14 be in recess until 1:15.

15 - - - - -

16 (Recess at 12:17 p.m. until 1:14 p.m.)

17 - - - - -

18 THE COURT: Plaintiffs may call their next witness.

19 MS. EARLS: Thank you, Your Honor. The plaintiffs
20 call Anthony Fairfax.

21 THE COURT: Sir, please watch your step stepping
22 through there, there's a step up.

23 THE WITNESS: Thank you. Appreciate it.

24 THE CLERK: Please place your left hand on the bible
25 and raise your right hand and state your name for the record.

1 THE WITNESS: Anthony Edward Fairfax.

2 THE CLERK: Do you swear that the testimony you're to
3 give the Court in this case shall be the truth, the whole truth
4 and nothing but the truth, so help you God?

5 THE WITNESS: Yes.

6 THE CLERK: Thank you. You may have a seat in the
7 witness stand and please watch your step there.

8 THE COURT: Good afternoon, Mr. Fairfax. Ms. Earls
9 will have some questions for you and I think Mr. Marshall may
10 have some questions for you. If the lawyer who is not asking
11 you questions objects to the other lawyer's question, just
12 don't say anything until I rule. Please try and keep your
13 voice up. Feel free to adjust that microphone, it will move up
14 and down and you'll find the spot that will allow us all to
15 hear you.

16 You may examine the witness.

17 MS. EARLS: Your Honor, may I approach?

18 THE COURT: You may.

19 MS. EARLS: I have a notebook of exhibits I'll be
20 using.

21 THE COURT: Yes.

22 - - - - -

23 DIRECT EXAMINATION

24 BY MS. EARLS:

25 Q Would you state your name for the record, please.

1 A Anthony Fairfax.

2 Q And did you prepare a demographic analysis of some of the
3 districts that are at issue in this litigation?

4 A Yes, I did.

5 Q Would you give us a little bit of information about your
6 background and experience with regard to redistricting.

7 A Yes. I've got over 24 years of redistricting plan and
8 development and creation experience. I've worked in the
9 1990 redistricting round, the 2000 redistricting round and the
10 2010 redistricting round. Over the course of that period of
11 time I've developed several hundred redistricting plans, from
12 small cities to statewide Congressional as well as state
13 legislative districts. I have done or provided services for
14 plan development review, analysis like we have here, and
15 redistricting training, which includes both training of the
16 software, redistricting software, as well as what's called
17 traditional redistricting criteria principles, or sometimes
18 they call it guidelines. I have provided consulting services
19 for a variety of nonprofit, nonpartisan organizations, some of
20 them notable national organizations. I have provided expert
21 reports in several court cases, given depositions, and provided
22 testimony as an expert witness twice in Federal Court.

23 Q Thank you. Now, you mentioned you've done training.
24 Who were you training?

25 A You can go back as far as when I began with my

1 redistricting experience, which is back in 1990, 1991, I worked
2 for a project called The Redistricting Project at a local
3 university, Norfolk State University, and part of the mission
4 of that grant funded project was to actually go out and
5 actually train other universities, almost mimicking what we had
6 at Norfolk State, train them on the use of the software as well
7 as how to actually develop maps. That began my initial
8 training aspect.

9 Q And have you published any written work on census data?

10 A Yes. About 13, 14 years ago I published a book called
11 A Step by Step Guide to Using Census 2000 Data, it was sort of
12 a follow-on book of a manual that I had published that was
13 developed for the Census Bureau called A Beginners Guide to
14 Using Census Data. They distributed it to census information
15 centers. Essentially the book is exactly what the title says,
16 A Step by Step Guide to Using Census 2000 Data, it covered
17 what's called P.L. 94-171 data, or the redistricting data, as
18 well as the summary file data, both the 100 percent count as
19 well as what's called sample count, which is the precursor to
20 the American Community Survey we use today, the ACS.

21 The second book -- there's a couple of books,
22 iterations rather, it's called The Presidential Trend and it's
23 on a particular voting phenomenon that I had uncovered, some
24 people say had discovered, pertaining to the popular vote in
25 Presidential elections.

1 Q I'd like you to turn to Exhibit 28 in the notebook in
2 front of you, and we'll just put the first page -- actually the
3 second page -- I'm putting up the first page of your resumé.
4 Is that's what's contained in Exhibit 28?

5 A Yes.

6 Q And is that a true and correct copy of your most recent CV
7 that summarizes -- or that gives the details of the
8 qualifications that you just summarized for us?

9 A Yes.

10 Q Now, you said you've twice qualified as an expert witness.
11 By that do you mean that you've testified in court after a
12 judge has ruled you're an expert?

13 A Yes.

14 Q And you've also given four deposition testimonies as an
15 expert witness?

16 A Yes.

17 Q And then you've prepared expert reports in redistricting
18 cases in addition to those occasions in numerous cases?

19 A Correct.

20 MS. EARLS: Your Honor, the plaintiffs tender
21 Mr. Fairfax as an expert in demographic and spatial analysis
22 and the use of census data as it relates to redistricting.

23 THE COURT: Does the defense want to be heard?

24 I accept him and he'll be qualified in that regard
25 and you may examine him as an expert.

1 MS. EARLS: Thank you, Your Honor.

2 BY MS. EARLS:

3 Q Mr. Fairfax, what were you asked to do in this case?

4 A I was asked to review several redistricting plans
5 pertaining to Wake County and provide analysis and an opinion
6 on six different redistricting related aspects.

7 Q And did you prepare an expert report?

8 A Yes.

9 Q Can you look at Exhibit 27 in the notebook in front of
10 you.

11 A Yes.

12 Q Is that a copy of the expert report that you prepared
13 after doing your analyses?

14 A Yes, it appears to be.

15 Q And just for completeness sake, as you were reviewing the
16 exhibit as we prepared it, did you note that two tables of
17 background data -- and correct me if I'm not describing this
18 correctly, but your report, it reports on the results of your
19 analysis, and then the appendices to your report, the first
20 appendix is your CV and the remaining appendices are maps and
21 background data that is the basis of your report; is that
22 correct?

23 A That's correct.

24 Q And did you discover that two tables of background data
25 were inadvertently left out of the report?

1 A That's correct, as I was combining the files, I left one
2 of the files out.

3 Q Can you look at Exhibit 477, which should be in the
4 notebook in front of you.

5 A Could you give me that number again.

6 Q 477. I'm sorry.

7 A I don't think I have that.

8 MS. EARLS: Your Honor, if you'll indulge me just one
9 moment, I need to consult the exhibit list.

10 THE COURT: That's fine.

11 BY MS. EARLS:

12 Q I can bring it up on the screen. I apologize that it's
13 not in the notebook.

14 A No problem.

15 Q So I have on the screen now what's marked as Exhibit 477.

16 A Yes.

17 Q And would you just scroll through the pages of that
18 exhibit so we can kind of -- are these the tables that were
19 inadvertently left out of the appendices to your --

20 A That's correct.

21 Q Now, turning to pages 5 and 6 of Exhibit 27, which is the
22 actual text of the report itself, as listed there items 1
23 through 6, are those the six aspects of the redistricting plans
24 that you were asked to examine?

25 A Yes.

1 Q We're going to talk about those in a minute, but I want to
2 ask you generally, what data did you use to perform these
3 analyses?

4 A The primary data comes or came from Maptitude for
5 Redistricting, that's the primary software that I used, and
6 Maptitude essentially integrates census, in this case 2010
7 data, population data, geographic data, what they have they
8 call TIGER data, and integrates it into a single data set, and
9 that was the primary data that was used.

10 The second data set used were boundary files or shape
11 file, which is a digital form, that was used to recreate the
12 district boundaries, that was both for the School Board as well
13 as the County Commission.

14 The third was incumbent residences for both the
15 School Board as well as the County Commissioners.

16 And the fourth was a data file that was obtained from
17 the state legislative website that included Presidential
18 election results for 2004 and 2008 at what's called the voting
19 district or VTD level.

20 Q Okay. Thank you.

21 So I want to talk first about your analysis of the
22 population deviations in the various maps, and if you would
23 turn to Exhibit 29, which is Appendix B to your report, and is
24 the first map there the Wake County 2011 nine School Board
25 member districts?

1 A Yes.

2 Q And what's the overall deviation of the population in this
3 map?

4 A For the School Board?

5 Q Yes.

6 A It was 1.75.

7 Q And could you just explain to the Court what we mean by
8 overall deviation.

9 A Right. Essentially the overall deviation takes the lowest
10 populated district, grabs its deviation from that, and the
11 highest populated district and finds out -- determines actually
12 the difference between the two and that gives you the overall
13 deviation.

14 Q Then if you look at the next map in that exhibit, this is
15 a map of the enacted seven district plan for the -- for
16 Wake County, and did you calculate the overall deviation for
17 this plan?

18 A Yes.

19 Q And what was that?

20 A It was -- excuse me. It was 7.1, approximately.

21 Q Then the third map there is the Wake County super district
22 plan, the two district plan. What is the overall deviation of
23 that plan?

24 A Approximately 9.8.

25 Q And then the map after that, the Wake County Gill

1 seven district plan, did you also calculate those deviations?

2 A Yes.

3 Q And what's that?

4 A .32.

5 Q Then I want to look at the number of split precincts in
6 each of those plans. Did you -- did you assess that?

7 A Yes, I did.

8 Q And is that what's reported on Table 5 of your --

9 A Yes, it is.

10 Q So can you summarize for us how many split precincts there
11 are in those three plans.

12 A Right. For the nine district plan, there were 12 split
13 precincts; for the enacted seven distract plan that I call
14 there were ten; and for the Gill seven district there were
15 zero.

16 Q Then did you also look at the super district plan?

17 A Yes.

18 Q And how many split -- how many precincts were split in
19 those districts?

20 A For the enacted super districts there were 21, and for the
21 Gill super districts there were zero, there weren't any.

22 Q And can you explain the difference between -- is there a
23 difference between a VTD and a precinct?

24 A In some cases there is. Precincts sometimes may vary from
25 voting districts. Voting districts were and are created by the

1 Census Bureau, so on some occasions the Census Bureau may
2 deviate from the local precincts, eventually they should all
3 match in years to come, but right now there may be some
4 discrepancies between precinct and voting district.

5 Q And in your analysis, you were looking at the VTD district
6 lines as provided by the Census Bureau?

7 A That's correct.

8 Q Then did you also calculate the number of cities and towns
9 split by the various plans?

10 A Yes, I did.

11 Q And where does that appear in your report?

12 A That's Table 9 on page 18.

13 Q And can you walk us through what this table shows in terms
14 of split cities and towns.

15 A Sure. It lists the cities and towns contained within
16 Wake County, and each column shows or indicates how many
17 districts actually split that city or town, or you could look
18 at it as how many cities -- how many districts are encompassed
19 inside a particular city or town. At the bottom you have the
20 total number of cities that were split for that particular
21 column. At the very bottom where it says total splits, that's
22 the total number of districts that were split by cities. So if
23 you add up all of those district splits in that particular
24 column you come up with the bottom number. In this case
25 enacted seven districts had 30 different districts split each

1 of the cities or counties -- cities or towns, rather.

2 Q And so when it says -- just so I'm clear, when it says in
3 the first column the enacted seven districts, for Apex there's
4 a number 2, what does that number 2 means?

5 A That means that two districts split that particular city.

6 Q Thank you.

7 And so what was your conclusion about the comparison
8 among the plans in terms of how many cities and towns are
9 split?

10 A Well, the enacted plan split the most cities and towns
11 compared to the nine district and the Gill seven district plan.

12 Q And what about the comparison between the enacted super
13 districts -- and can you explain what we mean by Gill super
14 districts? We haven't had any testimony about that yet.

15 A Okay. The plan -- the overall plan is called a 7-2 plan,
16 and so you have two seven district single member districts but
17 you also have a secondary plan where they run in two super
18 districts, very large districts where each candidate runs in
19 these large super districts, adding up to a total of nine
20 members, if you will.

21 Q And the Gill plan, are you referring there to the
22 amendment that was introduced by Representative Rosa Gill?

23 A Yes. Yes. Yes.

24 Q So your analysis, what does it show in comparing the
25 enacted super districts to the Gill super districts?

1 A The enacted super districts split more than twice the
2 number of the Gill super districts.

3 Q Then let's turn to your analysis of compactness of the
4 districts. Can you tell us what compactness means?

5 A Sure. Compactness in essence is a measurement of how a
6 district conforms to a particular shape. Many people use or
7 many compactness measures actually use what's called a circle
8 as the ideal compact size, and so in the measures that I use,
9 they use a circle to compare the district to, but you could use
10 a square in many cases or could use a rectangle, in some cases
11 what's called a convex hull, which is like wrapping a rubber
12 band around the district, and so compactness -- there are many
13 different compactness measures.

14 Q I was going to ask you, roughly how many different types
15 of measures of compact -- how many compactness measures are
16 there?

17 A There are dozens of compactness measures.

18 Q How many did you use in your evaluation of the compactness
19 of the districts in this case?

20 A Three.

21 Q And which ones were those?

22 A I used Polsby-Popper, Schwartzberg and Reock or Reorck,
23 depending upon how people pronounce it.

24 Q And are those named after the political scientists or
25 social scientists who developed them?

1 A Correct.

2 Q Why did you pick those three?

3 A Those were the most widely used in political science
4 research as well as just layman's research that you'll find out
5 there.

6 Q And why did you look at three instead of just picking one?

7 A Because if you look at one you may be biased to a specific
8 anomaly in the district, but if you look over three, you'll
9 sort of average that out.

10 Q Now, what were you asked to evaluate with regard to
11 compactness?

12 A I was asked to look at District 4 of the enacted plan and
13 compare it to the other districts of the other plans that I
14 looked at.

15 Q Could you turn to Table 7 in your report, which I believe
16 is on page 15.

17 A Thank you.

18 Q And is that the table that summarizes your compactness
19 analysis?

20 A Yes, it is.

21 Q And can you explain what is illustrated there in that
22 table.

23 A Right. Each district was compared to the three
24 compactness measures of District 4, and so each district --
25 for example, District 1 was compared with the three compact

1 measures for District 4, so the number three indicates that
2 there were three, each of those three districts were -- excuse
3 me, each of those measures for District 1 was more compact than
4 District 4.

5 Q And so in the total column -- so first looking at the 2011
6 School Board nine district plan, you had nine districts and
7 three measures for each district, so you had a total of
8 27 possible compactness measures.

9 A That's correct.

10 Q And so your table shows that the 2011 plan -- what does
11 the 20 of 27 mean?

12 A Right. The 20 is the total number of the measures that
13 were more compact than District 4, so 20 out of the 27, the
14 nine district plan, had measures that were more compact,
15 districts that had measures that were more compact, excuse me,
16 than District 4 of the enacted plan.

17 Q And then in the enacted seven district plan the line for
18 4 is blocked out because you'd be comparing 4 to itself.

19 A Absolutely.

20 Q And so the zero means, for example, that District 1 was
21 actually less compact than District 4?

22 A Yes.

23 Q And would the compactness of districts surrounding
24 District 4 be impacted by that district?

25 A Yes, it would.

1 Q And then in the Gill seven district we only have
2 21 measures of compactness because we have seven districts and
3 three measures per district.

4 A That's correct.

5 Q So what did your analysis show comparing the enacted
6 District 4 to the Gill seven district --

7 A To summarize, there was only one district that was less
8 compact than District 4, it showed 18 that were more compact
9 and two that were equal in compactness measure.

10 Q You said one district. You mean only on one measure?

11 A Only on one measure, exactly.

12 Q Then you also look at the partisan impact of districts.
13 How did you measure that?

14 A I obtained the VTD shape file from the website and I
15 performed what's called disaggregation/aggregation using one of
16 the features of Maptitude. Essentially what it does is it
17 breaks down the population or the results of the election down
18 to the block level and then rebuilds them up to any level that
19 you want. In this particular case I chose the district as one
20 of those levels. So you have what the candidate received at
21 that district level and you're able to do analysis at the
22 district level using that disaggregation/aggregation function.

23 Q And is the result -- is the -- are you showing us the
24 results of that analysis on Table 6, which is page 11?

25 A Yes.

1 Q So can you explain what this table shows.

2 A It shows -- of course you see the population and the
3 deviation, but it also shows the results for each of the
4 candidates, the Presidential candidates for 2004 as well as
5 2008 for each of those districts.

6 Q And by having the deviation there as well as the election
7 returns, were you able to analyze any differences between the
8 overpopulated and the underpopulated districts with regard to
9 partisan performance?

10 A Yes.

11 Q What did your analysis show?

12 A It showed that excluding one district, District 6, the
13 overpopulated district was a Democratic performing -- were
14 Democratic performing districts, the underpopulated districts,
15 except for District 5, were Republican performing or leaning
16 districts.

17 Q And did you draw any other conclusions about the partisan
18 impact of the new plan?

19 A The -- by overpopulating you obviously minimize the
20 Democratic performance in other districts, other surrounding
21 districts.

22 Q Now, you also looked at incumbents' residences, and it
23 might be easiest if we look at Exhibit 469, which should be at
24 the back of your notebook, and we'll pull it up on the screen.

25 And what is Exhibit 469?

1 A That's the -- that's the enacted seven district plan with
2 the overlay of the nine School Board incumbents.

3 Q And what does that show about the impact on School Board
4 incumbents?

5 A Could I refer to this? As a summary, several incumbents
6 were grouped together, paired together, if you will.

7 Q And is that summarized on page 16 of your report?

8 A Yes, that's what I was trying to find. That's exactly
9 right. Where District 1 paired three incumbents together,
10 District 6 paired another three incumbents together, District 1
11 had one Democrat and Republican and unaffiliated, and
12 District 6 had two Democrats and one Republican. Districts 3
13 and 7 had no incumbents included in them.

14 Q And then did you also look at the incumbent residences of
15 County Commission members?

16 A Yes, I did.

17 Q And is that the map that's shown as Figure 6 on page 17?

18 A Yes.

19 Q And what does that show about the impact on incumbents for
20 the County Commission of the seven district plan?

21 A The County Commission also included three County
22 Commissioners into a single district, and then there were no
23 incumbents in District 5 and District 3.

24 Q Did you also calculate whether the rural suburban outer
25 ring areas of Wake County have grown faster since 2010 than the

1 urban core?

2 A Yes, I did.

3 Q What data did you use for that analysis?

4 A The Census Bureau population estimate for 2014 for cities
5 and towns.

6 Q And how does the Census Bureau derive that population
7 estimate?

8 A They use what's called administrative records, and that's
9 essentially birth data, mortality data, immigration, people
10 moving into the city or the county, and emigration,
11 E-M-igration, people moving out of the city or out of the town,
12 they consolidate that or combine it together to give their
13 population estimates.

14 Q And is that sampled data?

15 A No, it's not sampled.

16 Q Then how did -- you how did you conduct that analysis?

17 A Essentially I looked at the portion of the districts that
18 were within each city, and so I used Census 2010 data to
19 determine that. I then calculated the increase, so the growth
20 of each of the cities from 2010 to 2014. I then reflected that
21 percentage on each of those portions and then I could aggregate
22 or sum up all of those totals for each of the sides or each of
23 the cities and sum it up to each of the plans, plan A and plan
24 B.

25 Q Would you turn to Exhibit 274.

1 Can you tell us what this chart shows.

2 A Essentially it shows you the cities that are listed or
3 contained within Wake County, and you show the portions that
4 are contained within the District A and District B, and then
5 you have the portions for the Census -- excuse me, the 2010
6 Census as well as the 2014 Census. At the end of the table it
7 also gives you a projection of what they would be for 2020.

8 Q So by "end" you mean the far right-hand --

9 A Correct. Far right.

10 Q -- column of the table?

11 A That's correct.

12 Q So how did you derive the 2020 projection?

13 A Essentially it was a linear projection, so I took what the
14 growth was from 2010 to 2014 and just extrapolated that on out
15 to 2020.

16 Q So where on this table do we find what your -- what the
17 population estimates show is the size of District A versus
18 District B in 2014?

19 A If you look down at the bottom of the table, you see
20 District A totals and District B totals, and so you can look at
21 the population for 2010 and then you can look at the population
22 growth for 2010 to 2014, and then you can look at the total
23 population for 2014, and then on the far right you have the
24 same thing for 2020.

25 Q So am I reading this right that District A, using the

1 population estimates calculated as you described, the
2 population is 522,488 and District B is 476,133?

3 A Correct.

4 Q And these are total population, not voting age numbers.

5 A Correct.

6 Q And then the very last column, using the projection as you
7 described it, District A becomes 597,341 people and District B
8 is only 547,721?

9 A That's correct.

10 Q And then would you turn to Exhibit 275. It's also on the
11 screen now. Can you tell us what this exhibit is.

12 A This is a thematic map that depicts the population growth
13 of those cities in Wake County, where the darker color shows
14 you a higher population color, the darker green in this
15 particular case, and the lighter color shows you less
16 population growth, and we're talking about absolute numbers.

17 Q So when you say absolute numbers, you mean these are not
18 rates of growth, right?

19 A Correct.

20 Q If you have a small city that's 100 people and it doubles
21 in size, that's a really fast growth rate but it's not a whole
22 lot of people.

23 A Absolutely. That's correct.

24 Q And then what do the numbers underneath each name of the
25 city mean?

1 A That's the growth in the city from 2010 to 2014.

2 Q So that's the actual -- so under Raleigh where it says
3 36,004, the population estimates from the Census Bureau say
4 that the City of Raleigh increased by 36,004 people?

5 A Yes.

6 Q And then I also want to ask you about -- from your
7 experience drawing redistricting maps, is it more likely -- if
8 you have a jurisdiction like Raleigh that has a certain
9 percentage of a minority population, African American
10 population, is it more likely that you would draw a majority
11 black district if you are drawing nine single member districts
12 than it would be if you are drawing seven single member
13 districts?

14 A Yes.

15 MR. MARSHALL: Objection.

16 THE COURT: I didn't understand the question.

17 BY MS. EARLS:

18 Q So my question is, in general, when you have a population
19 that has a substantial or sizable racial minority group, is it
20 more likely that that group would be a majority in a single
21 district if you have -- if you're dividing the county into
22 nine districts versus if you're dividing the county only into
23 seven districts?

24 MR. MARSHALL: Objection. I'm just not sure
25 I understand the concept of the minority population we're

1 talking about.

2 MS. EARLS: Well, I can make it more specific.

3 THE COURT: Okay.

4 BY MS. EARLS:

5 Q If you are dividing Wake County into nine single member
6 districts, and feel free to assume the population distribution
7 that we have in Wake County, is it more likely that you would
8 have a majority African American single member district when
9 you're drawing nine districts than when you're only drawing
10 seven?

11 THE COURT: If you understand the question, I'm
12 working on it, but if you understand it, you can answer and you
13 can help educate me.

14 A The answer is yes, and the reason for that is that the
15 threshold that you have for becoming a majority minority
16 district is lower with the number of districts, so for example
17 if you had nine districts, in order for a district to become
18 majority minority maybe 50,000 population of African Americans
19 or latinos or whatever, but if you had seven districts it may
20 be 60,000 and so that creates an environment where it's easier
21 if you have more districts to create a majority minority
22 district as you increase the number of districts.

23 Q That was my question.

24 MS. EARLS: I have no further questions at this time.

25 THE COURT: Thank you. Cross-examination.

1 MR. MARSHALL: Thank you. Thank you for your time,
2 Mr. Fairfax. I have a few questions for you.

3 - - - - -

4 CROSS-EXAMINATION

5 BY MR. MARSHALL:

6 Q Mr. Fairfax, when you analyzed the partisan results of the
7 enacted districts -- and let me back up.

8 When I say "enacted districts" I'm using your
9 terminology from the report, and if I say "enacted districts"
10 I'll be referring to both the seven enacted -- the enacted
11 seven district plan and the enacted super district plan.

12 A Okay.

13 Q If I'm referring to one or the other I'll try to say
14 enacted seven or enacted super.

15 A Okay.

16 Q Feel free to correct me if I don't do that.

17 THE COURT: All with respect to the School Board?
18 I guess that's one thing that I would ask each counsel to just
19 be -- I think it's helpful to the witness and certainly helpful
20 to me if it's 2013 School Board enacted and 2015 County
21 Commission enacted, as just sort of -- as a housekeeping matter
22 it helps me keep these -- y'all have been living with this
23 case, I know, but just it's easier for me to understand it.

24 MR. MARSHALL: So, Your Honor, I think in
25 Mr. Fairfax's report he used the enacted districts to refer to

1 both the '13 and the '15 districts, and because they are
2 identical districts, I'm assuming that's why you're --

3 THE COURT: Okay.

4 BY MR. MARSHALL:

5 Q So, Mr. Fairfax, when you analyzed the partisan results of
6 the enacted districts, you didn't compare the partisan results
7 to those from the Gill districts or the 2011 districts, did
8 you?

9 A No.

10 Q And why didn't you do that?

11 A I wasn't asked to do so.

12 Q You weren't asked to do so?

13 But you did compare the number of split precincts of
14 the enacted districts with the Gill plan and the 2011 plan,
15 didn't you?

16 A That's correct.

17 Q And you did compare the number of split municipalities
18 between the enacted districts and the Gill plan and the 2011
19 plan, didn't you?

20 A That's correct.

21 Q And you did compare the level of population deviations
22 between the enacted districts, the Gill plan and the 2011 plan,
23 didn't you?

24 A That's correct.

25 Q And so was there some reason -- do you not find it strange

1 that you weren't asked to compare the partisan results of all
2 three districts?

3 A Well, I assumed that the reason for it was the focal point
4 was the overpopulation of the districts in the enacted plans,
5 and so that's the reason why I assumed only the enacted plans
6 would be studied, because the other plans did not have a
7 considerable amount of overpopulation.

8 Q But the partisan analysis you did just refers to the
9 partisan results of the enacted districts plans?

10 A It also included the overpopulation in the conclusion.

11 Q Right. You added that conclusion, but I'm just talking
12 about the raw data.

13 A Correct.

14 Q You did not include any of the raw data of the partisan
15 results of the Gill plan or the 2011 plan?

16 A That's correct.

17 Q What about for the impact on incumbents in the enacted
18 districts plan, you didn't compare that to the 2011 plan or the
19 Gill plan, did you?

20 A No, I did not.

21 Q And again, so why were you not in that specific instance
22 comparing the 2011 and the Gill plan?

23 A Once again, I wasn't asked to do so.

24 Q Okay. But as part of your methodology don't you usually
25 compare the subject plan to other redistricting plans?

1 A In many cases, yes, or some cases.

2 Q But from a methodology standpoint, as an expert, do you
3 not find it is within your methodology to compare the subject
4 districts to the -- to compare the subject districts to other
5 districts?

6 A In some cases, not necessarily all cases. It depends on
7 what I'm requested to look at, and there may be a specific --
8 as I mentioned before with the overpopulation, that was
9 targeted I think toward that.

10 Q So for this case, your testimony is you just weren't asked
11 to draw those comparisons with respect to incumbents and
12 partisan results?

13 A That's correct.

14 Q Okay. In your partisan results summary you used both 2004
15 Presidential election data and 2008 Presidential election data;
16 is that right?

17 A Correct.

18 Q Okay. Why did you go back as far as 2004?

19 A Because one election may be an anomaly of some type, so
20 it's best to actually average the two together. You can see
21 much better or much more clear if you have two different
22 elections versus one.

23 Q In that case, why didn't you use the 2012 election?

24 A I didn't have that available.

25 Q Excuse me?

1 A I didn't have it available. It wasn't available.

2 Q You didn't have 2012 election data available?

3 A No, it wasn't on the website at the VTD level.

4 Q When you say "website," what website are you referring to?

5 A The State -- North Carolina State Legislative website.

6 Q State Legislative website?

7 A That's where I obtained it.

8 Q Did you look at the Wake County Board of Elections website
9 for any election-related data?

10 A No.

11 Q And are you aware that the Board of Elections compiles
12 Voter Tabulation District data?

13 A No, I'm not. I've seen it before but I don't know if they
14 compiled it for -- in this particular case yet.

15 Q Okay. Did you look anywhere else for 2012 data besides
16 the North Carolina Legislative site?

17 A No.

18 Q In your methodology, do you usually look for Presidential
19 election data from more than one source?

20 A Yes.

21 Q Okay. So why didn't you do that in this case?

22 A Because I thought the 2004 and 2008 was sufficient.

23 Q Okay. But why wouldn't 2012 data, which is less than
24 two years ago -- excuse me. Why wouldn't 2012 data, which is
25 less than four years ago, be much more relevant statistically

1 than 2004 data, which is 11 years ago?

2 A The data wasn't available to me at that particular time.

3 Q It wasn't available to you or you just didn't look hard
4 enough for it?

5 A I was under a time constraint, the data was available on
6 the legislative website and I obtained what I thought was
7 appropriate for this particular analysis, which was a couple of
8 years, different election years, and so I used what was
9 available at that particular time.

10 Q And I want to just turn back to a few of your other
11 conclusions.

12 You concluded that with respect to population
13 deviations the General Assembly could have drawn the enacted
14 plans in a way that produced lower deviations; is that right?

15 A That's correct.

16 Q And you also concluded that the enacted plans could have
17 been drawn to split fewer voter tabulation districts; is that
18 right?

19 A Correct.

20 Q And yet didn't the seven district enacted plan split fewer
21 VTDs than the 2011 plan?

22 A Could you repeat that?

23 Q Didn't the seven district enacted plan split fewer VTDs
24 than the 2011 plan?

25 A The nine district plan. Yes, if you're looking at the

1 seven district, no if you're combining the super districts and
2 the seven district plan together. It's 31 if you actually
3 combine the two.

4 Q Okay. I was only asking the seven district enacted plan
5 versus the nine district 2011 plan.

6 A Right. If you're looking only at the seven district plan,
7 you're correct, but if you look at it from a holistic point of
8 view of a plan, the enacted plans split 31 districts -- I mean,
9 excuse me, split 31 precincts and the other split much less.

10 Q The seven district plan, the enacted seven district plan
11 and the 2011 nine district plan covered the exact same
12 geographic territory, right?

13 A Correct.

14 Q And then looking at split municipalities, you concluded
15 that the enacted plans split more towns than the other
16 two plans, right?

17 A Correct.

18 Q In fact, the enacted plan, seven district enacted plan you
19 said split ten municipalities, right?

20 A That's correct.

21 Q The 2011 plan split nine; is that right?

22 A Correct.

23 Q And the Gill plan did split eight, right?

24 A Yes.

25 MR. MARSHALL: All right. No further questions,

1 Your Honor.

2 THE COURT: Any redirect?

3 MS. EARLS: If you give me just one moment.

4 THE COURT: You may.

5 MS. EARLS: No further questions, Your Honor.

6 THE COURT: Thank you, Mr. Fairfax. Please watch
7 your step stepping down and stepping back through the gate.

8 Plaintiffs may call their next witness.

9 MS. EARLS: Thank you. The plaintiffs call
10 Representative Rosa Gill.

11 THE COURT: Ma'am, please watch your step stepping
12 through. I don't know if you've been there the whole day.
13 There's a step up.

14 THE CLERK: Please place your left hand on the bible
15 and raise your right hand and state your name for the record.

16 THE WITNESS: Rosa Gill.

17 THE CLERK: Do you swear that the testimony you're to
18 give the Court in this case shall be the truth, the whole truth
19 and nothing but the truth, so help you God?

20 THE WITNESS: I do.

21 THE CLERK: Thank you. You may have a seat in the
22 witness stand and please watch your step there.

23 THE COURT: Good afternoon, Representative Gill.

24 THE WITNESS: Good afternoon.

25 THE COURT: Ms. Earls is going to have some questions

1 for you, then Mr. Marshall may have some questions for you. If
2 the lawyer who is not asking you questions objects to the other
3 lawyer's question, please don't say anything until I rule on
4 the objection. That microphone will move up and down, feel
5 free to adjust it so we all can hear what you have to say to us
6 this afternoon.

7 You may examine the witness.

8 THE WITNESS: Thank you.

9 MS. EARLS: Thank you, Your Honor.

10 - - - - -

11 DIRECT EXAMINATION

12 BY MS. EARLS:

13 Q Would you state your name for the record, please.

14 A Rosa Gill.

15 Q And where did you grow up?

16 A I am a Wake County native. I grew up in Apex,
17 North Carolina, attended the Wake County Public Schools and
18 have been here all my life.

19 Q And do you have a family with children who attended
20 Wake County Public Schools?

21 A I have two grown daughters who both graduated from the
22 Wake County Public Schools, and I have two grandchildren who
23 now attend the Wake County Public Schools, and I taught in the
24 Wake County Public Schools.

25 Q How long did you teach in them?

1 A I taught for 23 years.

2 Q And how long have you been a member of the North Carolina
3 General Assembly?

4 A I've been a member ever since 2009.

5 Q And what district do you represent?

6 A I represent District 33.

7 Q And where is that located?

8 A That's part of Southeast Raleigh and part of Garner.

9 Q Would you describe your educational background briefly.

10 A You mean college, beyond high school?

11 Q Yes.

12 A I attended Shaw University, majored in mathematics, and I
13 did graduate studies at North Carolina State and Central.

14 Q When were you first elected to public office?

15 A In 1999.

16 Q And did you -- and what office were you elected to?

17 A I was elected to the School Board, Wake County School
18 Board.

19 Q Did you serve on the School Board continuously until you
20 were appointed to the General Assembly?

21 A I served on the School Board for ten years, and that was
22 from 1999 to 2009.

23 Q And just for the record, what is your race?

24 A I'm African American.

25 Q And I think we neglected to also make this a matter of the

1 record, which we need for certain of our claims: Senator Blue
2 testified earlier today; do you, for the record, know his race?

3 A I think he would classify himself as an African American.

4 Q Thank you.

5 Let me turn to the events leading to the enactment of
6 new School Board districts, and I want to start with 2009.

7 Do you recall controversy at that time among School Board
8 members and between the School Board and the County Commission
9 relating to student assignment and the building of new schools?

10 A Yes, I do.

11 Q And could you describe that for us, please.

12 A Because the responsibility of building schools and
13 locating schools was the responsibility of the School Board,
14 the County Commissioners often wanted to have some say-so in
15 where the schools were being built or how much the schools were
16 going to cost or how we equipped the schools. We thought as
17 School Board members that we knew best how we could make our
18 schools successful, I mean institutions that would allow our
19 kids to be successful, and plus we had experts on our staff who
20 often conferred with the County Commissioners about the
21 different issues.

22 Q And what was the view of the County Commission in 2009?

23 A They were -- they wanted to be in control of all of the
24 decisions that we had to make, and if they did not like the
25 decisions we were often told that we couldn't get the money to

1 do the things that we wanted to do. In fact, when I became
2 Chair, the Chair of the County Commissioner said if you're
3 Chair then you haven't seen nothing yet as far as moving
4 forward on your plans.

5 Q And you're referring now to when you were Chair of the
6 Wake County School Board?

7 A Wake County School Board.

8 Q So then what led to the General Assembly considering a new
9 method of election for the Wake County School Board in 2013?

10 A They were asked by the County Commissioners in the
11 legislative agenda for the County Commissioners.

12 Q And from your point of view why were the County
13 Commissioners wanting to change how the School Board was
14 elected?

15 A The County Commissioners wanted to have some say-so in how
16 students were assigned, and most of the time with the
17 assignment our staff would make recommendations of what schools
18 needed to be filled and where those students would need to come
19 from, either from overcrowded schools or we had to do the
20 opening of new schools, so we as a School Board -- well, me
21 particularly as a School Board felt like we had a better handle
22 on how students should be assigned in order to maximize our
23 resources.

24 MS. EARLS: Can I have 475, please.

25 Q For the record, I'm going to display what's been marked as

1 Exhibit 475. This is a timeline, I'll represent, based on the
2 public records we have for the passage of Senate Bill 325, and
3 I want to ask you if you remember when you first learned of
4 Senate Bill 325.

5 A The legislative agenda for the County Commissioners were
6 presented to the Wake Delegation prior to the March -- prior to
7 March 14th. The bill was filed on March 13, I'm sorry, and it
8 was read into the record and that's when we really got an
9 opportunity to look at what the new districts would look like.

10 Q And do you recall speaking about the bill when it came to
11 the House floor later in the process?

12 A I do.

13 MS. EARLS: If I can have Exhibit 5.

14 Q I'm showing you portions of a transcript from -- this is
15 Exhibit 5, portions of the transcript from the proceedings in
16 June, 2013, and this is where Representative Stam was
17 introducing an amendment to the bill. Do you recall that?

18 A I do.

19 Q And what was the purpose of Representative Stam's
20 amendment?

21 A Well, Representative Stam approached me about changing
22 some of the district lines, and this is the amendment that he
23 showed me and asked me to concur with it, we discussed it, I
24 talked with the Wake County School Board members and the Wake
25 Delegation about it. If I'm not -- it would slightly change

1 some of the districts, and in the discussion he talked about
2 trying to preserve incumbents and he wanted to also preserve a
3 member of the Republican Party.

4 Q And you actually spoke in favor of that amendment; is that
5 right?

6 A I did, because it is part of the law that if you're going
7 to do -- if you're going to preserve incumbent seats, that you
8 don't just do it for one, and I thought because they were doing
9 it for both the Democrat -- a Democrat and a Republican, that
10 it would be okay.

11 Q And do you recall an amendment offered by Representative
12 Holly on the floor of the House that would have put this new
13 election method on the ballot for the voters of Wake County to
14 vote on?

15 A I do.

16 Q And did you support that amendment?

17 A I did.

18 Q And why?

19 A Because I think that the people of Wake County should have
20 had a say-so in whether they wanted the districts redrawn, and
21 from what I was hearing from most of the citizens, they were
22 not in favor of redrawing the districts.

23 Q And as a participant in the legislative process, what was
24 your understanding of the reasons publicly given for wanting to
25 change the method of election?

1 A The reasons that they stated on the floor or my -- the
2 reasons I believe that they wanted to redraw the districts?

3 Q Let's start with the reasons stated on the floor.

4 A Okay. I think it was stated that several parents had
5 complained about not getting a response from their School Board
6 representative and that students were being assigned to schools
7 that were not in their -- the district that they live in.

8 Q And what was your perspective on that concern as having
9 been a School Board member?

10 A Well, in Wake County we have several types of schools, we
11 have year-round schools, the traditional schools and the magnet
12 schools, and each child was given a choice of three, you
13 would -- they would identify your traditional school, your
14 year-round school and your magnet school, so most parents would
15 know which district or where their child would be attending
16 school, and most of the parents in Wake County were satisfied
17 that they did have choices. There were some limited choices,
18 but they did all have choices, and the fact that some parents
19 wanted to attend a certain school even if that school was
20 over-capacity was some concerns that we had and probably some
21 of the reasons why parents were upset.

22 If there was no capacity, for example, if a parent --
23 if a family had two children, one in third grade and one in
24 kindergarten, there may have been capacity at that school for
25 kindergarten but not for third grade so, you know, the parent

1 had a choice to either send the kid -- both kids to another
2 designated school or split the kids, one at one school and one
3 at the other, and sometimes I think that was confused with the
4 assignment of a student to a particular school.

5 Q So do I understand then that all of the different factors
6 that might implicate where someone lives and where their child
7 goes to school made it extraordinarily difficult to align the
8 election districts with the attendance zones for Wake County
9 schools?

10 A Yes.

11 Q During the legislative process were you provided any
12 systematic analysis of the bill which would show you whether or
13 not it was in fact improving alignment for any subset of
14 parents or families?

15 A No.

16 Q So there was no comprehensive evidence about how many
17 schools and parents would be more aligned under the new
18 election districts than under the old election districts?

19 A No.

20 Q Were there other justifications offered publicly or on the
21 floor that you haven't mentioned?

22 A Not that I can recall.

23 Q And so you said that you also had an opinion about what
24 you thought the real reasons were.

25 A I thought the real reason was because of the outcome of

1 the election, the 2010 election, when it changed the makeup of
2 the School Board.

3 Q And can you say a little bit more about how that impacted
4 the motivation behind enacting a new election method for the
5 Board of Education.

6 A As a School Board member, we made a decision that we
7 wanted all of our schools to be good schools or outstanding
8 schools, so we used about 13 different factors to decide on how
9 we were going to -- how our schools would be made up, one of
10 them was the socioeconomic factor, and I think the
11 socioeconomic factor was a driver for the outcome of the
12 election, and even though -- let me go back and -- ask that
13 question again, let me make sure --

14 Q Yes. Thank you. That was not a well-worded question. I
15 apologize.

16 What I'm trying to understand is you said you felt
17 the motivation for this law was the election results in the
18 School Board election prior to that, in 2011, and I'm trying to
19 understand -- I'm asking you to explain more clearly how that
20 led to the introduction of Senate Bill 325.

21 A Well, there were two things I think led to the desire to
22 change the redistricts -- I mean the districts, one was they
23 wanted control, and when I say "they," I'm talking about the
24 majority of the commissioners wanted to be able to control the
25 outcome of decisions that were made by the School Board, they

1 wanted to have control over decisions on how we spent the money
2 and they wanted to have control over the decision to reassign
3 students, because at the same time that we were dealing with
4 this we were also dealing with the County Commissioners wanting
5 to take over the construction of the public schools.

6 Q And in 2013, when you were in the General Assembly and
7 this bill was introduced, the distinction broke down along
8 party lines, right? Correct?

9 A Right.

10 Q So I want to turn now to the events leading to the law
11 establishing a new method of electing the Wake County
12 Commission in 2015, and I'd like to ask you, in 2015 were you a
13 member of the House Elections Committee?

14 A In 20 --

15 Q 15.

16 A Yes.

17 Q Yeah, turning to the County Commission.

18 A Right.

19 MS. EARLS: And actually, if I could have
20 Exhibit 476.

21 Q This is a timeline of the passage of Senate Bill 181 in
22 2015. When did you become aware that there would be -- that
23 Senate Bill 181 was being considered?

24 A I heard rumors. I had heard rumors that there was going
25 to be a Senate Bill introduced that would redraw or redistrict

1 the County Commissioners. We had Delegation meetings, and
2 nothing was discussed in our meetings about a bill for the
3 redistricting of the County Commissioners, so I really found
4 out or I saw it for the first time when the bill was filed.

5 Q So that would have been on March 4th?

6 A Yes.

7 Q Now, had anyone in the -- any of the bill's sponsors
8 talked to you about the bill before it was introduced as a
9 member of the Wake County Delegation?

10 A No, no one.

11 Q Now, did you offer an amendment to the bill when it made
12 it to the House Elections Committee?

13 A I did.

14 Q And I'll pull that up.

15 MS. EARLS: If we could have Exhibit 469. I'm sorry,
16 471. I apologize. Exhibit 471.

17 Q Is this --

18 MS. EARLS: I actually do want to start with 470.
19 Thank you.

20 Q Okay. This is what I was going to show you. Is this the
21 amendment that you offered to Senate Bill 181?

22 A Yes.

23 Q And then the next exhibit, does that show the two
24 district -- that shows the two district alternative that you
25 proposed?

1 A Yes.

2 Q Oh, I'm sorry. This actually shows both.

3 A The combination of them.

4 Q So if we can just describe this, the line across the
5 middle, that divides the county into two super districts?

6 A Yes.

7 Q And then the different shaded colors represent seven
8 single member districts?

9 A Yes.

10 Q What were you trying to achieve by offering this
11 alternative set of seven districts with two super districts?

12 A First of all, I wanted to -- if you look at the adopted
13 map, you will notice that there were a lot of split precincts
14 and there were -- and it was kind of confusing for an ordinary
15 voter or an ordinary citizen to look at and make a decision
16 exactly where they lived or in which district, so one of the
17 purposes of doing this was to make sure that all precincts were
18 held whole, that the citizens would know which precinct they
19 lived in and they could tell by that which district, school
20 district, they were in.

21 Secondly, I wanted to make sure that we had compact
22 areas so that different -- the citizens in the different
23 districts have similar concerns and issues, and that can be
24 addressed either by one or two members of the School Board, and
25 I wanted the deviation of the seven districts to be as close as

1 possible to zero. I also wanted to make sure -- and I did not
2 want to take into consideration anything about race nor
3 incumbents' location or where the incumbents lived, so I just
4 wanted to use population as a basis for drawing the districts
5 and the law, which means that it had -- we had to have equal
6 representation.

7 Q And this amendment did not pass?

8 A No, it did not.

9 Q You did also offer this map as an amendment to the bill on
10 the House floor the next day; is that right?

11 A Yes.

12 Q And it failed there as well?

13 A Yes.

14 Q Have you had an opportunity to review the statements that
15 you made both on the floor debates in the House in 2013 and
16 then in committee and on the floor of the House in 2015
17 regarding the School Board plan in 2013 and the County
18 Commission plan in 2015? Have you had a chance to review the
19 transcripts of those debates?

20 A I did, briefly.

21 MS. EARLS: And just for the record, Your Honor, if I
22 may, I would note that that appears -- the debate on the floor
23 of the House is in Exhibit 5, numerous pages throughout that
24 exhibit, and specifically, I may have missed some, but pages 9,
25 20, 24, 35, 39, 46 to 48; then the House Committee on Elections

1 proceedings are found at Exhibit 251, and Representative Gill's
2 statements there are pages 71 to 73, 76, 84 to 89 and 103; and
3 then the transcript of the House floor debates, Exhibit 13,
4 Representative Gill's comments are at pages 7 to 9 and 17.

5 THE COURT: What were those numbers again?

6 MS. EARLS: For Exhibit 13?

7 THE COURT: Yes, ma'am.

8 MS. EARLS: Exhibit 13, it's pages 7 to 9 and 17.

9 BY MS. EARLS:

10 Q And so I asked Representative Gill if she had reviewed
11 those, and my question now is: Are the statements you made
12 then still correct today?

13 A They are.

14 Q Now, the alternative map that you proposed does not have a
15 majority black district; is that right?

16 A Right.

17 Q Why didn't you draw one of the seven single member
18 districts in your alternative proposals to be majority black?

19 A Because we have often -- I mean Wake County is a very
20 progressive county and most of the time our citizens will vote
21 for a candidate that they think best represent their interests,
22 and a lot of time we think that making -- I mean -- sorry.

23 I did not want to take race into consideration
24 because I felt like if we were going to represent the entire
25 school population, that it didn't matter whether it was in --

1 whether we had a minority majority district or not, and if you
2 look at the districts, you will see that they're -- it may not
3 have been a minority majority district, but when I ran for the
4 School Board I didn't run in a minority majority district and I
5 was elected, so I just did not take race into consideration.

6 Q And in proposing your plan for the County Commission, were
7 you aware of history of candidates of choice of black voters
8 winning at-large in Wake County for the County Commission?

9 A Yes.

10 Q Now, in your view, does the plan that was enacted for both
11 the School Board and the County Commission hurt urban Raleigh
12 voters and help rural voters?

13 A Yes.

14 Q And how is that?

15 A If you look at the map of the two super districts, you
16 will notice that you have a compact area, even though the
17 population is dense there, you still have a compact area, I
18 call it the little doughnut hole or the middle of the district,
19 and then you have the super district that is outside, and it
20 resembles a lot the segregated school system that we had prior
21 to the merger, where we had the Raleigh School System and the
22 Wake County School System.

23 MS. EARLS: I have no further questions.

24 THE COURT: Thank you. Cross-examination.

25 MR. MARSHALL: Good afternoon, Representative Gill.

1 THE WITNESS: Good afternoon.

2 - - - - -

3 CROSS-EXAMINATION

4 BY MR. MARSHALL:

5 Q Can you tell the Court for the record which House district
6 you serve currently.

7 A House District 33.

8 Q 33. Thank you. Okay.

9 And, Representative Gill, do you agree that the
10 citizens of Wake County are willing to elect the best
11 candidates for the job regardless of their party affiliation?

12 A I do.

13 Q And that if you're not doing a good job, the citizens will
14 vote you out regardless of your party?

15 A Right.

16 Q Do you contend that the School Board districts enacted by
17 the General Assembly in 2013 by the Republican majority were
18 drawn to favor Republicans?

19 A We were told, and I'm trying to remember what we were
20 told, that the districts were drawn in such a way that there
21 would be four minority -- I mean Democratic districts and
22 four -- and five -- sorry, five Democratic districts and four
23 Republican districts, if I'm not mistaken.

24 Q So they would be drawn up five Democratic districts --

25 A I think that's what we were told.

1 Q Okay.

2 A But when you look at the map itself, you can see that even
3 though it may be that was their intention, it may not be the
4 case because of the growth. So I don't know -- I guess I'm
5 confused now. Could you go back and ask your question again?
6 I'm sorry.

7 Q Sure. I just asked, do you contend that the Republicans
8 in the General Assembly who voted for Senate Bill 325 to redraw
9 the School Board districts had a motivation to create more
10 Republican districts?

11 A I agree that I felt that that was their intention, or that
12 they wanted the majority of the members of the Board to be from
13 the Republican Party, because of the sweep of the prior
14 elections.

15 Q Representative Gill, you just answered some questions
16 about Super Districts A and B.

17 A Of which map?

18 Q Super Districts A and B, you were just asked some
19 questions about that map.

20 A Which map?

21 Q I'll put that map back on the screen for you.

22 A Okay.

23 Q And I believe you agreed with Ms. Earls when she said that
24 District A was more of an urban district and District B was
25 more of a rural district; is that your testimony?

1 A Yes.

2 Q Okay. Representative Gill, do you consider people who
3 live inside the belt line in Raleigh to be in a rural district?

4 A That depends on where you're looking at. The northern
5 part or the southern part?

6 Q I'm just looking at District B that dips down right within
7 the Raleigh belt line, 440, and we'll draw a line around it,
8 right there. Do you see how District B drops within the
9 440 belt line into Central Raleigh?

10 A Yeah.

11 Q Okay. And do you consider that to be a rural part of
12 Wake County?

13 A No.

14 Q Okay.

15 A But I do -- when I look at it, I see that it is -- if I'm
16 not mistaken -- no, I won't say that.

17 Q Do you know where the new North Hills Mall area is?

18 A I do.

19 Q Do you consider that to be a rural part of Wake County?

20 A No, I don't, but if you look at the entire map, you will
21 see that the map itself, if you look at the B part, that it
22 does extend -- it has more rural in it than it does urban.

23 Q Are you familiar with the Wake Forest area of --

24 A I am.

25 Q -- Wake County?

1 Have you been there before?

2 A I have.

3 Q And the town of Wake Forest itself, do you consider that
4 to be a rural part of Wake County?

5 A It's outside of the city limits of Raleigh. Most of the
6 time we consider that as a --

7 Q And one more question. If you see District A, if you
8 follow it down to the far left, where our hand tool is, if you
9 follow District A all the way out to the far left corner,
10 that's not part of the Raleigh city limits, is it, over by
11 Apex?

12 A No.

13 Q Representative Gill, I want to turn back to your amendment
14 that was offered to Senate Bill 181, and you just testified
15 that you wanted to draw a map that had more equal population,
16 correct?

17 A Right.

18 Q Okay. And you wanted it to have --

19 A And I wanted to align it with what the districts currently
20 were from the 2011 map that was given to them.

21 Q 2011 map.

22 And you wanted to draw a map, you said, that was more
23 compact?

24 A I wanted to be -- yes.

25 Q And you wanted to draw a map that tried not to split any

1 precincts?

2 A Yes.

3 Q And so if you drew a map that was more compact and didn't
4 split precincts and had a lower population deviation, why do
5 you think it wasn't approved by the Republican majority?

6 A I don't know why unless they had some other reason why
7 they didn't think it was a good idea. I would think that
8 population deviation, which should have been the number one
9 choice for redrawing or redistricting of the County
10 Commissioners and the School Board, because you want equal
11 populations in each district.

12 Q But you don't have an opinion as to why you think your
13 Republican colleagues didn't adopt your amendment?

14 A If you want to talk about what my opinion is, I can tell
15 you, because they always support the party who is presenting --
16 the majority party. They were in the majority and they had all
17 the votes.

18 Q Representative Gill, I want to turn your attention back a
19 few years to 2011, when the General Assembly considered
20 redistricting plans for the North Carolina House of
21 Representatives.

22 A Yes.

23 Q And do you recall an amendment sponsored by Representative
24 Alexander that would have proposed a Democratic alternative for
25 House District 33?

1 A Representative Alexander?

2 Q Representative Alexander.

3 A I don't recall.

4 MR. MARSHALL: Your Honor, I have a copy of the
5 amendment. I'd like to approach the witness.

6 THE COURT: You may.

7 MR. MARSHALL: This is the first time I've had to do
8 this today, so I wanted to give a copy to everybody, if that
9 would be your preference.

10 THE COURT: Absolutely. That's fine.

11 A Is this Representative Alexander from Charlotte or is it
12 the one from Raleigh? I mean, that's Senator.

13 Q Kelly Alexander.

14 MR. MARSHALL: I'm not going to introduce this into
15 evidence.

16 Q All right. Representative Gill, I've handed you a
17 printout of the record of the amendment, this is from the House
18 of Representatives redistricting page, okay? So I want to walk
19 you through just a couple pieces of it.

20 Do you see that it refers to House Bill 937 Lewis
21 Dollar Dockham House Redistricting 2011?

22 A Yes.

23 Q Okay. And then right under that it says Sponsor, Lewis
24 and then A2, Alexander?

25 A Yes, I remember.

1 Q Okay. And then it has a vote tabulation of the ayes, and
2 I just wanted to confirm that your name Gill is listed in the
3 ayes.

4 A Yes.

5 Q Okay. Then if you turn the page --

6 A Let me make one statement.

7 Q Sure.

8 A When you were talking about this, I didn't know that you
9 were talking about the redistricting for the entire state. I
10 was still focused on the Wake County redistricting, and
11 that's --

12 Q I understand.

13 A -- why I said I did not -- could not recall.

14 Q Do you recall this amendment now?

15 A I do recall this one.

16 Q Okay. And do you recall that it had a proposal for House
17 District 33?

18 A Yes, I --

19 Q Okay. It's on the very back page. Excuse me. It would
20 be on the fourth page where it says: Districts Statistics
21 Plan, K. Alexander, Possible House Districts, District 33.

22 A Yes.

23 Q And do you see down about six columns where it says Single
24 Race Black, 50 percent, 50.52 percent?

25 A Yes.

1 Q Okay. So this proposal would have created a majority
2 African American district, correct?

3 A Yes, but I had been elected before in that district and it
4 was not 50 -- it was not a majority minority district. It was
5 not a minority majority district.

6 Q Right. But you still supported this particular amendment?

7 A I supported the entire map because I thought it gave us a
8 better understanding and picture of how we should redistrict
9 the entire state.

10 Q And do you also recall a similar amendment from
11 Representative Grier Martin from Wake County?

12 A An amendment?

13 Q Right. An amendment that would also propose alternate
14 districts for Wake County.

15 THE COURT: For the state legislature?

16 MR. MARSHALL: Yes.

17 A I think he did present one.

18 Q Okay. Do you recall whether he also proposed a majority
19 African American district for District 33?

20 A I'm pretty -- I'm pretty sure he did.

21 Q He did? Okay.

22 A But you have to remember that 33 was redrawn because of
23 the increase in our population, so we changed the makeup, each
24 of our precincts, because of the population shift in
25 Wake County.

1 Q And do you recall if you supported Representative Martin's
2 amendment?

3 A I did.

4 MR. MARSHALL: No further questions.

5 THE COURT: Thank you. Any redirect?

6 MS. EARLS: No, thank you, Your Honor.

7 THE COURT: Thank you, Representative. Please watch
8 your step stepping down, and there's a step up as you come off
9 there and there's a step down back through the gate.

10 Plaintiffs may call their next witness.

11 MR. EPSTEINER: Good afternoon, Your Honor.
12 George Epsteiner again for the plaintiffs. Plaintiffs call
13 representative Darren Jackson.

14 THE CLERK: Please place your left hand on the bible
15 and raise your right hand and state your name for the record.

16 THE WITNESS: Darren G. Jackson.

17 THE CLERK: Do you swear that the testimony you're to
18 give the Court in this case shall be the truth, the whole truth
19 and nothing but the truth, so help you God?

20 THE WITNESS: Yes, ma'am.

21 THE CLERK: Thank you.

22 You may have a seat in the witness stand, and please
23 watch your step.

24 THE COURT: Good afternoon, Representative.
25 Mr. Epsteiner is going to have some questions for you and then

1 Mr. Marshall may have some questions for you. If the lawyer
2 who is not asking you questions objects to the other lawyer's
3 question, just don't say anything until I rule on the
4 objection. You can move that microphone up and down, you just
5 need to adjust it so we all can hear what you have to say.

6 THE WITNESS: Yes, sir.

7 THE COURT: You may examine the witness.

8 MR. EPSTEINER: Thank you, Your Honor.

9 - - - - -

10 DIRECT EXAMINATION

11 BY MR. EPSTEINER:

12 Q Good afternoon. Could you please state your name for the
13 record, please.

14 A Darren Glenn Jackson.

15 Q Are you a member of the General Assembly?

16 A I am.

17 Q What district do you represent?

18 A I represent District 39.

19 Q And is that in the House of Representatives?

20 A It is.

21 Q Where is House District 39 located?

22 A In the eastern part of the county. Originally, when I
23 first started, it was all of Eastern Wake County, but because
24 of population growth and redistricting, now it's I would say a
25 portion of Eastern Wake County.

1 Q What municipalities does House District 39 include?

2 A I have half of Knightdale, half of Wendell, probably half
3 of Zebulon and parts of Garner and a small part of Raleigh,
4 basically Heddingham and some surrounding areas to the north.

5 Q How long have you been a member of the House of
6 Representatives?

7 A Since January of 2009.

8 Q How long have you been a resident of Wake County?

9 A All my life.

10 Q How would you describe the communities in your district?

11 A I would describe Eastern Wake County as the rural part of
12 the county. When you often tell people you're from
13 Wake County, they can't believe that there is a rural part of
14 Wake County, but what rural area there is is in my district in
15 Eastern Wake County.

16 Q Would you characterize Eastern Wake County differently
17 than how you would characterize Western Wake County?

18 A I would.

19 Q How so?

20 A Well, you're more likely to see a tobacco or a cotton
21 field in my area than you are in Representative Stam's district
22 over in Apex. You're more likely to see starter homes. I like
23 to tell people the fact that I represent more State employees
24 than any other member in the House, and the reason for that is
25 because Eastern Wake County has all the affordable housing in

1 Wake County. Most of the teachers, State employees that work
2 downtown, they generally live out towards Garner or Eastern
3 Wake County because of housing prices.

4 Q Representative Jackson, are you familiar with Senate Bill
5 325 that was passed by the General Assembly in June, 2013?

6 A Yes, that was the School Board redis -- the second School
7 Board redistricting.

8 Q Did you attend a public hearing on the bill? And by
9 "the bill" I'm referring to Senate Bill 325, the School Board
10 redistricting Bill. Did you attend a public hearing on the
11 bill held by the Wake Legislative Delegation during legislative
12 consideration of the bill?

13 A Yes, I did.

14 Q Was there public comment during this meeting?

15 A Yes, there was.

16 Q What was your impression of the public's response to the
17 bill at the Wake Legislative Delegation meeting?

18 A People were against it, from what I remember. The Chair
19 of the County Commissioner, who was at that time from my area,
20 a Republican, was in favor of it, and of course the bill's
21 sponsors were in favor of it, but the majority of the people
22 who spoke were against it and questioned why it was even needed
23 since the Republicans had just redrawn the districts two years
24 earlier, we had just -- we had just really had one election
25 under the new districts and were questioning why it was needed.

1 Q And when you say they had just redrawn the districts, are
2 you referring to when the Republican Wake County School Board
3 redrew the redistricting maps in 2011?

4 A Yes. My -- I always refer to it as the Shanahan plan. My
5 understanding is that Attorney Kieran Shanahan had a big hand
6 in redrawing the districts, but they were just done in 2011 and
7 so in the fall of 2011 there was a School Board election and so
8 that's the one election that had been held under the new maps,
9 prior to the 2013, when they attempted to do so for a second
10 time.

11 Q Was this bill popular among Wake County voters?

12 A Not the ones I talked to.

13 Q Based on your years of experience as a member of the
14 General Assembly, how would you describe how the bill moved
15 through the legislature?

16 A I would say quickly. There are oftentimes bills that for
17 whatever reason, timing, time of year, things of that nature,
18 that do move very quickly, however I heard Mr. Marshall's
19 questions earlier to Representative Gill about the 2011
20 legislative redistricting and so I contrast the two of those
21 together, and I was on that redistricting committee in 2011,
22 I was not on this one, but in 2011 it moved very slowly, the
23 maps were made public, they were out for public comment, they
24 went around the whole state, amendments and changes were made,
25 people were able to discuss and everything, and so I mean when

1 you compare that one to this one, it was just done and over
2 with very quickly.

3 Q Do you recall when House Bill 325 was referred to the
4 House Committee on Elections?

5 A I would not.

6 MR. EPSTEINER: Can you pull up Exhibit 440, please,
7 on the screen?

8 THE WITNESS: Your Honor, I may have to borrow your
9 glasses or ask for a clearer copy of this exhibit.

10 THE COURT: Mr. Epsteiner, do you have a hard copy
11 for the Representative?

12 MR. EPSTEINER: I do.

13 THE WITNESS: I can see where it is, but I can't read
14 the data.

15 THE COURT: We'll get you a paper copy of it.

16 THE WITNESS: I'm sorry.

17 MR. EPSTEINER: May I approach, Your Honor?

18 THE COURT: You may.

19 THE WITNESS: Thank you. I'll be able to read it
20 from this now.

21 MR. EPSTEINER: Here is a hard copy if you need it.

22 A Referred to the Committee on Elections on April 24th of
23 2013.

24 MR. EPSTEINER: Can you please put Plaintiff's
25 Exhibit 4 on the screen, the last page of Plaintiff's

1 Exhibit 4.

2 BY MR. EPSTEINER:

3 Q Representative Jackson, can you tell me what this document
4 is?

5 A That is a committee hearing notification, it would go out
6 to members who sit on the House Committee on Elections as well
7 as there is a function on the General Assembly website that if
8 you're interested maybe in elections bills or if you know there
9 was a bill in particular that was assigned to House Elections,
10 you can go on there and give your e-mail address and it would
11 notify you as well, but for instance this notice -- I'm not on
12 House Elections at this point in 2013, so unless I had gone in
13 and told the computer to send me a copy, I wouldn't receive
14 this notice. This would only go to people on the committee,
15 their staffs, the bill's sponsors, people like that.

16 Q But this is a way for members of the public to receive
17 notifications on when a committee is debating a bill, if they
18 sign up for those notifications?

19 A Absolutely. And I'm sure that there are members of the
20 media and maybe even of the public who go in and subscribe to
21 all these lists, so they always get notice of committees, if
22 there's a time change or room change, a bill change, it will
23 send out an amended corrected copy.

24 Q And I believe you testified that this is a committee
25 notice for the House Committee on Elections, right?

1 A Yes, that's what this letter says. It says it's going to
2 meet on Wednesday, May 29th.

3 Q And that's the same committee that the House referred to
4 Senate Bill 325 on April 24th?

5 A Yes, it would be.

6 Q And what -- and when was notice given for discussion of
7 the bill located in this document? When was notice provided?

8 A This appears to be the first notice, because like I said,
9 it would usually say corrected number 1, corrected number 2,
10 things of that nature, so this appears to be the original
11 notice that was given, and it was given at 1:09 p.m. on
12 Thursday, May 23rd.

13 Q And what bill was being discussed in this notice?

14 A Asheboro/Charter Amendments. It's being held in election
15 so I will assume it has something to do with the electing of
16 Commissioners in the City of Asheboro.

17 Q Can you go to the previous page of the exhibit, please,
18 page 12.

19 What is this particular document?

20 THE COURT: Is this Exhibit 4 or Exhibit 440?

21 MR. EPSTEINER: Your Honor, this is Exhibit 4.

22 Exhibit 440 was the bill history.

23 THE COURT: Okay.

24 BY MR. EPSTEINER:

25 Q What is this document?

1 A This appears to be the first corrected copy of the
2 committee notice.

3 Q And --

4 A What this is. I said it appears. This is.

5 Q Same House Committee on Elections?

6 A Yes.

7 Q What day and time was notice given?

8 A 1:22 p.m. on May 28th, 2013, so I guess 23 and a half
9 hours prior to the committee meeting.

10 Q And what bill was added to this committee notice?

11 A The School Board District -- redistricting bill, Senate
12 Bill 325.

13 Q So it was added on May 28th even though it was referred to
14 the Committee on April 24th; is that right?

15 A Yes.

16 Q Is less than 24 hours of public notice for discussion of a
17 bill normal practice?

18 A Probably best to talk about normal practice in all bills
19 and maybe normal practice in redistricting bills. I would say
20 certainly not in redistricting types of situations.

21 A non-controversial bill, you know, might get added on 24 hours
22 beforehand, yes. I mean, you know, if there's not expected to
23 be a controversy, oftentimes committee chairpeople may add a
24 bill on in order to move it along in the process, maybe a
25 committee like -- you know, some of them don't meet weekly like

1 others do and so they might add on several bills, like local
2 Government would meet on Thursday mornings and it was not
3 uncommon for a handful of non-controversial bills to be added
4 on the day before.

5 Q Would you consider Senate Bill 325 to be a controversial
6 bill?

7 A I would consider it to be both controversial, and usually
8 there's a lot of hoops that people are trying to jump through
9 to make sure that they meet the legal requirements, and so to
10 add it with less than 24 hours notice to the public I would say
11 is rare, or unusual.

12 Q Did the Wake County School Board districts need to be
13 redrawn in 2013?

14 A No, like I was saying, they were just -- they had just
15 been redone by the Republican majority in 2011 and only one
16 election had been held under the new districts.

17 MR. EPSTEINER: Can you put up on the screen
18 Exhibit 257, please.

19 BY MR. EPSTEINER:

20 Q Representative Jackson, were you opposed to Senate Bill
21 325?

22 A Yes, I was.

23 Q And on the screen in front of you should be the lettered
24 super districts for Senate Bill 325. Is that what you're
25 seeing?

1 A Well, it says this is for the 2016 election. Yes, it has
2 an A and a B.

3 Q And do those look like the super districts that were
4 passed in Senate Bill 325?

5 A Yes, they're the same shape. For some reason I remembered
6 the map we had being a different color, but yes.

7 Q Now, if you look at the outer lettered district,
8 District B, does that contain areas of Eastern Wake County
9 where your constituents are?

10 A Yes, some.

11 Q What areas?

12 A Well, like all the -- all the shaded green color from
13 about halfway up to the corner of the map, that would all be in
14 my district.

15 THE COURT: I think if you touch it you can make a
16 circle, I think, we'll see if it works or not, and if you
17 just -- if you wanted to just draw with your finger basically
18 where your district is, if that would be helpful to you, you
19 can do that.

20 A I think that's basically it, the red. Honestly, it's
21 difficult to draw your exact district without a map nowadays.
22 On the left-hand side of the road, if you're driving down the
23 road, may be in your district and on the right-hand side it may
24 not, I mean, on our House districts, you know, House and Senate
25 districts, so -- that's the general idea.

1 Q And so in that District B, in the area that you circled,
2 are there areas of Zebulon and Wendell in there?

3 A Oh, yes. Yes.

4 Q And if you look at the northeast part of the map, do you
5 know the areas of -- do you know the areas of Brier Creek,
6 Falls Lake?

7 A I believe Brier Creek is right in here, and of course this
8 up in here is the Falls Lake area.

9 Q And so those areas would also be in Super District A?

10 A They would be in Super District B.

11 Q Oh, Super district --

12 A B. I mean, it goes all the way --

13 Q Super District B. I'm sorry. You're correct.

14 A Yeah. I mean, it goes all the way over here to the power
15 plant, the nuclear power plant over here in the corner.

16 Q Right. Super District B. I apologize. I misspoke.

17 Do those communities of Brier Creek and Falls Lake,
18 are those communities of interest with those areas of Zebulon
19 and Wendell that your constituents live?

20 A Not in my opinion.

21 Q Looking at --

22 A I would be surprised if a lot of people from Brier Creek
23 have ever even been out to my area.

24 Q Let's look at Exhibit 277, please.

25 Representative Jackson, does this map represent the

1 numbered districts for -- which I can tell you for Senate Bill
2 325 and 181 are the same, so is this a map of the numbered
3 districts broken down by number and municipality?

4 A Yes.

5 Q And if you look at the map, does it appear that in,
6 for example, numbered District 1, that encompasses Wendell and
7 Zebulon and parts of Knightdale?

8 A Yes. All of Zebulon, all of what's been known
9 traditionally as Wendell. There's a new subdivision that's not
10 really connected to the town that's part of the town that may
11 be a little bit into 4, I'm not sure by looking at this, and
12 then parts of Knightdale are all in District 1.

13 Q And those areas in District 1, are those communities of
14 interest with Brier Creek and Falls Lake that I believe are
15 also in District 1?

16 A They would not be, again, in my opinion.

17 THE COURT: We're going to take our 15 minute
18 afternoon recess until 3:15.

19 Representative, if you could be back up on the stand
20 and we'll resume again at 3:15.

21 - - - - -

22 (Recess at 2:59 p.m. until 3:15 p.m.)

23 - - - - -

24 THE COURT: You may continue the examination.
25

1 BY MR. EPSTEINER:

2 Q Representative Jackson, did you participate in the House
3 floor debate on Senate Bill 325?

4 A Yes, I -- yes, I wasn't on any of the committees that
5 heard the bill, that was my first opportunity.

6 Q And generally what were your objections to the bill?

7 A I didn't believe it accomplished any of the stated goals.
8 My recollection is that the County Commissioners first came to
9 us when they presented their legislative agenda and asked us to
10 redistrict it where there were five individual districts and
11 four at-large districts, so that every person would vote for a
12 majority of the School Board. Of course this plan doesn't do
13 that.

14 Senator Hunt was really big on saying that he wanted
15 a School Board member who represented the school your child
16 attended, and of course there's no guarantee of that in this as
17 well. In fact, in my opinion the only way that you could
18 accomplish that stated goal that Senator Hunt had would be to
19 make it all at-large, and so I had an amendment on the House
20 floor that would make -- I don't see them up here, but the A
21 and the B district, instead of the doughnut hole and the
22 doughnut, is what I call them, would have made them both
23 at-large and therefore you would be guaranteed, no matter what
24 Wake County Public School your child or children attended, that
25 you would have at least two School Board members who

1 represented that plus the area of the county that you lived in.

2 MR. EPSTEINER: Can you put Exhibit 474 up on the
3 screen, please.

4 Q Representative Jackson, you proposed an amendment on the
5 House floor for Senate Bill 325; is that correct?

6 A Yes.

7 Q And is that what you're talking about, creating two purely
8 at-large districts?

9 A Right. It kept the districts from the 2011 redistricting
10 plan, which I believe is this Board down here, or nine total,
11 and it added two truly at-large districts covering the whole
12 entire county that each person would be able to vote for as
13 well, each voter.

14 Q And what was the purpose of your amendment proposing two
15 purely at-large districts as opposed to the super districts
16 that were ultimately enacted?

17 A Well, it was to accomplish both of the Republicans' stated
18 goals, to give you more representation on the School Board and
19 to make sure that you had a School Board member who represented
20 your child's school, and it accomplished both of those goals.

21 Q You talked about how you didn't think that the
22 justifications were actually accurate in what they stated in
23 the bill. What do you think the actual motivations for the
24 bill, for Senate Bill 325 were?

25 A Well, I mean, in my opinion I think it's clear that they

1 redrew the districts in -- when I say "they," the Republicans
2 redrew the districts in 2011, lost the 2011 election and so
3 came to the General Assembly to attempt to make them even more
4 partisan.

5 Q And just to be clear, the exhibit that's on your screen
6 right now, which is 474, did that amendment pass?

7 A It did not.

8 Q I want to shift now --

9 MR. EPSTEINER: You can take the amendment off the
10 screen. Thank you.

11 A According to this other printout, it failed 48 to 65.

12 Q Representative Jackson, I want to switch gears now to the
13 other bill, which is Senate Bill 181 that was passed by the
14 General Assembly in April, 2015. Are you familiar with that
15 bill?

16 A Yes, that's the bill that redistricted the Wake County
17 Commissioners after the 2014 elections.

18 Q How do you recall this bill moved through the legislature?

19 A Very quickly as well. There may have been some delay
20 between when it was heard in the Senate and the House, but if
21 I'm not mistaken, this is -- this is the version of the bill
22 that was given less than two hours notice when it was first
23 heard in the Senate, in committee, if I'm not mistaken.

24 Q Did you attend a public hearing on this bill by the Wake
25 Legislative Delegation during legislative consideration of the

1 bill?

2 A I attended a public hearing. The sponsor of that public
3 hearing, who that was, I'm not exactly sure. The prior time I
4 had been the delegation chair, one of the co-chairs, and was
5 responsible for setting things up, and I just don't remember
6 who set this one up.

7 Q But was this outside of a committee meeting, this was some
8 type of other public meeting, you're not sure the exact scope?

9 A I'm just not sure.

10 Q Was there public comment during this meeting?

11 A Yes.

12 Q What was your impression of the public's response to the
13 bill at this meeting?

14 A Overwhelmingly against.

15 Q Did you speak to any other members of the General Assembly
16 during this public meeting?

17 A I did.

18 Q Who did you speak to?

19 A One of the bill's sponsors, Senator Barefoot.

20 Q And this was during the public meeting, it wasn't a
21 private conversation?

22 A That's correct.

23 Q And what did Senator Barefoot say?

24 A I asked him if he would consider some slight tweaks to the
25 districts to keep Eastern Wake County more together and

1 something that would not in any way change the partisan makeup
2 in any significant way of any of his other districts, and he
3 told me no. I was looking to see if he was looking to try to
4 get some bipartisan support.

5 MR. EPSTEINER: Can you put Exhibit 12 on the screen,
6 please.

7 Q Representative Jackson, looking at this page, the first
8 page of Exhibit 12, what is this document?

9 A This is the committee notice and bill sponsor notification
10 that goes out when a bill is scheduled for committee.

11 Q And what committee is this?

12 A House Committee on Elections.

13 Q Were you a member of the House Committee on Elections at
14 this time?

15 A At this time --

16 Q Sorry. Let me rephrase.

17 A Okay.

18 Q The notice that you're looking at appears to notice a
19 meeting of the House Elections Committee for March 31st, 2015;
20 is that correct?

21 A Yes.

22 Q And were you a member of the House Elections Committee on
23 March 31st, 2015?

24 A On the 31st I was. That was my first committee meeting.

25 Q And how much notice was given for discussion of the bill

1 referenced in this document? When was public notice given?

2 A This was sent out at 8:31 the night before, Monday,
3 March 30th.

4 Q So less than 24 hours notice?

5 A Yes.

6 Q And what bill was being discussed?

7 A The Wake County Commissioner Districts, Senate Bill 181.

8 Q And again, is less than 24 hours of public notice for the
9 discussion of a controversial bill a normal practice in the
10 General Assembly?

11 A No, I would say this notice specifically says that public
12 comment will be taken, and generally the public is given a lot
13 more notice than that. Now, I understand that when you do a
14 statewide redistricting people have to come from Asheville,
15 whereas in Wake County they're only coming from Wake County
16 most likely, but to give this notice -- I mean, there are
17 people who probably use their work e-mail addresses who
18 wouldn't even have seen this notice until the next morning when
19 they got to work. At 8:31 at night, I likely would not have
20 seen the notice until the next day.

21 Q And would you consider Senate Bill 181 to be a
22 controversial bill?

23 A Very much so.

24 Q Did you attend the March 31st House Committee on Elections
25 meeting where this bill was discussed?

1 A I did. It was my first I attended as an actual member of
2 the committee.

3 Q Did members of the public speak at the March 31st House
4 Committee on Elections meeting?

5 A Yes.

6 Q What was your impression of the public's response to the
7 bill at this committee meeting?

8 A Certainly against. A few speakers were very passionate,
9 passionately against, I guess you would say.

10 Q Did you take any action to try to improve the bill?

11 A Yes. I ran three separate amendments, three separate
12 amendments in the elections committee, and I believe
13 Representative Gill ran at least one, maybe two that night.
14 I remember them saying -- I ran the first two and they said
15 they were going to give me a break from talking and so they let
16 her go and then I think they went back to me and did my third
17 one.

18 MR. EPSTEINER: Can you put Exhibit 12, page 2 on the
19 screen, please.

20 Excuse me for a moment, Your Honor.

21 BY MR. EPSTEINER:

22 Q Representative Jackson, do you recall how many amendments
23 you introduced during the House Committee on Elections meeting?

24 A I believe it was three. I believe there was two and then
25 they went to Representative Gill and then they came back to me.

1 Q Right. Do you recall what each of those three amendments
2 proposed?

3 A I know that one of them would have been to make the A and
4 the B truly at-large seats, one of them was to move the
5 elections to only Presidential years, and there's a third one,
6 I'm sorry.

7 Q Do you recall one relating to eliminating the two letter
8 districts?

9 A Oh, okay. Just getting rid of that A and B.

10 Q Did those amendments pass, any of them?

11 A No. I'm sure it was right down party lines.

12 Q Did you support -- I believe you referenced
13 Representative Gill's amendment. What do you recall was the
14 substance of Representative Gill's amendment?

15 A I remember Representative Gill's amendment as being also a
16 hybrid approach with lettered and numbered districts; however,
17 her A and B were divided right in the middle of the county,
18 maybe along the highway, I can't really remember, but I
19 remember the deviation was really close on her A and her B, and
20 then what I remember about the numbered districts of hers were
21 that they kept my areas together, Knightdale, Wendell and
22 Zebulon were in one district and Garner was in another
23 district.

24 Q Do you recall whether the population deviations of
25 Representative Gill's amendment were lower or higher than the

1 deviations in Senate Bill 181?

2 A I don't. Your maps that y'all have shown here don't
3 contain deviations, but the ones that we would have had in
4 committee, it would have been listed right on the district, you
5 could have seen the number of Republicans, the number of
6 Democrats in the deviation.

7 Q Did Representative Gill's amendment pass?

8 A No.

9 Q Were you opposed to Senate Bill 325 -- I'm sorry, 181?

10 A As written, yes.

11 MR. EPSTEINER: Can we go to Exhibit 277 on the
12 screen, please?

13 Q So again, Representative Jackson, what's in front of you
14 are the numbered districts in the Wake County Commission plan.
15 Why did you oppose the numbered districts in the enacted plan?

16 A I opposed it because of the way Eastern Wake County is
17 separated and the way Garner is divided. I mean, honestly, the
18 Republicans were in control, it was going to be a Republican
19 map that favored Republicans to a certain extent, so I was
20 trying to keep my communities together.

21 Q And does numbered District 1 keep communities together in
22 Knightdale?

23 A No. No. In fact, it --

24 Q Does numbered District 1 keep communities together in
25 Garner?

1 A Honestly, looking at this map, I can't even tell what it
2 does to Garner. It appears that Garner has possibly four
3 members, or four different members, depending on which area of
4 Garner you live in, so the voting power that Garner would have
5 in a district, say this bottom Board labeled as number 2, where
6 Garner is going to elect most likely the representative,
7 Garner is going to have very little say-so in this, the
8 majority of District 7 is going to -- Holly Springs is going to
9 elect that member, number 1 is probably going to be elected by
10 the majority of the people up by Falls Lake. It's just --
11 they're not going to have any voting strength.

12 MR. EPSTEINER: Can we put Exhibit 259 on the screen,
13 please.

14 Q And again, Representative Jackson, what should be on your
15 screen is the lettered super districts in Senate Bill 181.
16 Is that in front of you?

17 A Yes, it's purple and green.

18 Q And why did you oppose the lettered districts in the
19 enacted bill for Senate Bill 181?

20 A For a lot of reasons. I mean, to divide -- again, they
21 divide several of my communities, Knightdale and Wendell and
22 Zebulon. It's really a countywide district with the middle cut
23 out as far as if you're out from our area and -- from Zebulon
24 and you're running for this district, you have to go to
25 Falls Lake, you have to go to Shearon Harris, that's where the

1 population is going to be, down in those areas. It's really,
2 really confusing.

3 You know, as I mentioned before about the 2011 House
4 and Senate redistricting, it's very confusing to me as the
5 person who represents that area which side of the road you're
6 on and everything. This just takes that one step further.
7 It's going to be confusing to voters. I cannot imagine between
8 the House, the Senate districts, the School Board, the County
9 Commissioners, the way -- I can't imagine how many ballots
10 we're going to have to have in each precinct out our way.
11 I mean, they might as well just put everybody's name on a
12 ballot and just hand them out by name because they're going to
13 have so many. It's going to -- I mean, you take that and you
14 combine that confusion with voter -- the new voter requirements
15 for voter I.D., in my opinion, the election is going to be a
16 disaster on Election Day.

17 This map takes all the Democrat urban voters and
18 packs them into A, overpopulates District A to an extreme
19 percentage and underpopulates District B with Republican
20 voters. My point in one of my amendments is my understanding
21 is, if you look at this, that it will elect one Republican and
22 one Democrat, and so I had an amendment just to do away with
23 it. If there's no partisan advantage and you create all the
24 confusion and the issues and the expense that this is going to
25 create, I just didn't see the need for it.

1 Q And did Senate Bill 181 ultimately pass?

2 A Yes, it did.

3 Q And similar to Senate Bill 325, when I asked you about
4 that bill, for Senate Bill 181, what do you believe the true
5 motivations for the bill were?

6 A To ensure Republican control of the County Commissioners
7 at the expense of Democrats. I mean, absolutely.

8 MR. EPSTEINER: I don't have any other questions.
9 Thank you, Representative Jackson.

10 THE COURT: Cross-examination.

11 MR. MARSHALL: Thank you for your time,
12 Representative Jackson. I just have a couple questions.

13 THE WITNESS: Yes, sir.

14 - - - - -

15 CROSS-EXAMINATION

16 BY MR. MARSHALL:

17 Q With respect to Representative Gill's amendment, you
18 testified that it would have provided more of a voice for
19 regions in Eastern Wake County that you represent?

20 A That's my recollection, yes, sir. I don't -- I don't
21 think it's up here, but that's my recollection on it, yes, sir.

22 Q And is that one of the reasons you supported it?

23 A Yes. Yes.

24 Q You mentioned 2011 redistricting. I think you also
25 mentioned -- you were in the courtroom when I asked

1 Representative Gill a few questions. Do you recall introducing
2 an amendment during the 2011 redistricting with respect to
3 certain counties in Eastern Wake County?

4 A Absolutely. I thought it was more than one, but if you
5 say it's just one, between -- I was actually on that committee,
6 the redistricting committee, and on the House floor, and so
7 there might have been different amendments at different points,
8 but yes, I ran --

9 Q I have one in particular, I'm happy to hand you a copy if
10 that would help.

11 A Okay. Yes. I certainly ran at least one amendment, yes,
12 sir.

13 Q Representative Jackson, if you can just take a second to
14 familiarize yourself with that one amendment.

15 A Well, I mean, this is not the amendment.

16 Q That you're referring to?

17 A No. I mean, this isn't an amendment, this is the
18 roll call, the voting on the amendment.

19 Q Right. Excuse me.

20 A But the actual -- the amendment is not in any of these
21 pages.

22 Q Right. So the first page shows the roll call vote,
23 correct?

24 A Yes, sir, on the amendment. Yes, sir.

25 Q And then the second page, this is pulled from the

1 redistricting website, and this describes the amendment,
2 Eastern Wake, it says this amendment was offered by
3 Representative Jackson to alter House Bill 937, Lewis, Dollar,
4 Dockham 2. Do you see that?

5 A Oh, at the header, yes, sir, but I don't -- again, I can't
6 tell you which one of the amendments it is because the
7 amendment is not attached.

8 MR. EPSTEINER: And I'm going to object to the
9 document. I mean, it's not the actual language of the
10 amendment.

11 THE COURT: That's fine. He's just using it to
12 refresh his memory about it.

13 MR. MARSHALL: That's right.

14 THE COURT: I'll overrule that.

15 Do you remember basically the amendment?

16 THE WITNESS: I believe, Your Honor, there was
17 several amendments, and so there's nothing about this one that
18 can help me differentiate --

19 THE COURT: So it doesn't refresh your memory?

20 THE WITNESS: No, it's just nothing can tell me which
21 one this one is in particular.

22 MR. EPSTEINER: Okay. Well --

23 THE WITNESS: Because I don't know them by number.
24 If you had the language I might, or a map.
25

1 BY MS. RIGGS:

2 Q Why don't I do this. If you go to the third page, this
3 is -- you're familiar with the stat packs in redistricting.
4 This says: District Statistics Plan, Jackson, Eastern Wake.
5 Do you see that?

6 A Yes, sir.

7 Q The title says "Jackson, Eastern Wake" and then the
8 previous page you also see it said Eastern Wake amendment
9 offered by Representative Jackson.

10 A Yes, sir.

11 Q Okay. And I'll represent to you that I printed these off
12 together, off the redistricting page.

13 And then it refers to District 38.

14 A That's what it says, yes, sir.

15 Q And do you see about six columns down it says single race,
16 black, 51.30 percent?

17 A Yes, sir, I see -- yes, sir.

18 Q Do you recall this particular proposal you sponsored for
19 District 38?

20 A No, sir, I didn't sponsor this for District 38, that's
21 what I'm trying to explain to you.

22 Q Even though it says Jackson Eastern Wake HD --

23 A Yes, sir. My amendment would have dealt with House
24 District 39, but it probably had an effect on House District
25 38, being, you know, taking -- changing 39 is obviously going

1 to change the ones around it, and that's -- all my amendments
2 would have done that because the way the House redistricting is
3 done, it uses 64 Highway and it separates Knightdale, Wendell
4 and Zebulon, and so I tried to put them back together, but it's
5 just impossible to do that in a vacuum, it would have affected
6 all the districts around there, and so I'm sure that you could
7 print one of these statistics out for each House District but I
8 would probably only be familiar with 39, which is the seat I'm
9 in.

10 Q Okay. I guess my question is --

11 A If that makes sense.

12 Q -- yeah, just why is your name associated, Jackson,
13 Eastern Wake District 38, with an amendment --

14 A Because my amendment -- I would have -- what I would have
15 said was, to the staff, if you can draw me an amendment keeping
16 Knightdale, Wendell and Zebulon together --

17 Q Okay.

18 A -- and they would have come up with an amendment and given
19 me statistics for District 39; however, that would have
20 affected every other district in Wake County, and so there
21 would be statistics but I could -- I mean, I would not have
22 looked at those and I would not have had any -- I wouldn't have
23 said I want you to put 51.3 percent African Americans in
24 District 38 because that's not what I was trying to do. I was
25 trying to put Eastern Wake County into one district.

1 And my history with that goes back to actually the
2 redrawing of the districts in 2002, I led an effort to try to
3 get Knightdale, Wendell and Zebulon combined into a House
4 District to start with, because they were communities of
5 interest. Originally that wasn't done in 2002, but in 2004,
6 when the Courts ordered another redraw, the three communities
7 were put together, and I was just trying to maintain that.

8 Q Okay. Well, I think you've answered my question, which is
9 you didn't intend through this amendment to create a majority
10 African American district?

11 MR. EPSTEINER: I'm going to object to the language.
12 He said this wasn't his amendment.

13 THE COURT: Do you understand the question?

14 THE WITNESS: I do, Your Honor.

15 A I mean, I'm sure that this is part of the amendment,
16 because the amendment would have required a full redraw of
17 Wake County. I would not have looked and made a conscious
18 decision to make districts a majority minority district.
19 In fact, my instructions to the House staff, redistricting
20 staff, most likely it was Erika Churchill, that's what my
21 recollection is that I worked with, would have been to not
22 change the House Republican proposal Lewis, Dollar, Rucho,
23 whatever number, not to change how many Republicans or how many
24 Democrats were expected to be elected, but instead to focus on
25 the Constitutional requirement of communities in interest and

1 keeping Knightdale, Wendell and Zebulon together.

2 So is this the result of my amendment? Absolutely,
3 I'm sure that you printed it out correctly. But had I ever
4 intended or made a conscious effort to make any district in
5 Wake County above or below 51 percent? No, sir. I mean,
6 I represent a district that could go either way, it's been
7 represented by an African American in the past, now obviously
8 I'm not African American. That was not part of my
9 consideration for any of my amendments that I recall.

10 MR. MARSHALL: No further questions.

11 THE COURT: Thank you. Any other questions?

12 MR. EPSTEINER: Nothing, Your Honor.

13 THE COURT: Thank you, Representative. Please watch
14 your step stepping down and stepping back through the gate.

15 Plaintiffs may call their next witness.

16 MR. EPSTEINER: Yes, Your Honor. Plaintiffs call
17 Tom Jensen.

18 THE COURT: What was the last name?

19 MR. EPSTEINER: Jensen.

20 THE COURT: Jensen.

21 THE CLERK: Please place your left hand on the bible
22 and raise your right hand and state your name for the record.

23 THE WITNESS: Thomas Woodside Jensen.

24 THE CLERK: Do you swear that the testimony you're to
25 give the Court in this case shall be the truth, the whole truth

1 and nothing but the truth, so help you God?

2 THE WITNESS: I do.

3 THE CLERK: Thank you. You may have a seat in the
4 witness stand and please watch your step.

5 THE COURT: Good afternoon, Mr. Jensen.
6 Mr. Epsteiner will have some questions for you and Mr. Marshall
7 may. If the lawyer who is not asking you questions objects to
8 the other lawyer's question, don't say anything until I rule on
9 the objection. Please try and keep your voice up so we can
10 hear you. That microphone will adjust, feel free to adjust it.

11 THE WITNESS: Thank you, sir.

12 THE COURT: You may examine the witness.

13 MR. EPSTEINER: Thank you, Your Honor.

14 - - - - -

15 DIRECT EXAMINATION

16 BY MR. EPSTEINER:

17 Q Good afternoon. Please introduce yourself.

18 A My name is Tom Jensen. I'm the Director of Public Policy
19 Polling.

20 Q And where is -- excuse me. Where is Public Policy Polling
21 located?

22 A 2912 Highwoods Boulevard in Raleigh.

23 Q What do you do in your capacity for Public Policy Polling?

24 A Basically oversee the day-to-day operations of our polling
25 outfit. We're a national polling company doing surveys across

1 the country. My jobs are to do things like write the questions
2 for those surveys, do the statistical analysis about them, help
3 put them out into the public in some cases, those sorts of
4 things.

5 Q How long -- do you mind if I refer to Public Policy
6 Polling as PPP?

7 A That's fine.

8 Q How long have you worked at PPP?

9 A I've been there for a little over eight years.

10 Q What type of polling topics have you worked on for PPP?

11 A We really do a very wide range of things. We do a lot of
12 polling on elections for things ranging from the Presidency all
13 the way down to school boards and water boards and stuff like
14 that. We do a lot of polling about issues that are going on in
15 state legislature, city councils, county commissioners, things
16 like that. So a lot of political races, a lot of issues. We
17 also do more offbeat polling about sports and entertainment
18 topics. So it's a pretty wide gamut.

19 Q How many polls have you worked on creating and executing
20 in your career?

21 A The number would be in the thousands. We do anywhere
22 between 500 to 1,000 polls a year, and it's been eight years
23 now.

24 Q Can you tell the Court about what kinds of clients PPP
25 generally works for?

1 A Yeah. We work for candidates for various offices, from
2 the sort of top of the food chain, Senate, Congress, stuff like
3 that, all the way down to local offices like school boards,
4 city councils, those kinds of things. We do a lot of work for
5 advocacy organizations, organizations that are interested in
6 moving forward an issue, getting bills passed, that sort of
7 thing. So those are sort of the two mainframes for our
8 clients, are issue groups and political candidates.

9 Q And the polls that you work on, are they solely in
10 North Carolina?

11 A No, we're a national polling company. We've done work in
12 all 50 states.

13 Q Are you familiar with Senate Bill 181, a bill passed by
14 the General Assembly in April, 2015?

15 A Yes, sir, that's the Wake County Commissioner
16 Redistricting Bill.

17 Q How did you come to know about this bill?

18 A Both from the press coverage about it and also because we
19 were commissioned to conduct a poll to find out what the
20 citizens of Wake County actually felt about the proposal.

21 Q Who hired you?

22 A We were hired by Real Facts NC.

23 THE COURT: By who?

24 THE WITNESS: Real Facts, F-A-C-T-S, NC.

1 BY MR. EPSTEINER:

2 Q And what type of organization is Real Facts NC?

3 A They are an organization that is I think generally focused
4 on holding politicians accountable, making sure that they are
5 acting in accordance with the public, those sorts of things.

6 Q And what was the request from this client?

7 A Just to conduct a poll of registered voters in Wake County
8 and ask them what they knew about the proposal, how they felt
9 about the proposal, sort of give them some information about
10 what each side was saying about it, see how they reacted to
11 that, and then after people had been given more information, to
12 ask them again how they felt about the proposal after they had
13 become more informed.

14 Q And how did you specifically conduct the poll?

15 A Sure. We used our standard polling procedures. We pulled
16 a random sample of phone numbers of registered voters in
17 Wake County and we called those people with an automated
18 polling methodology over the weekend of the third weekend in
19 March. So the way that works is that people get asked the
20 questions from a prerecorded voice, everybody gets asked the
21 same questions in the same way and then they answer the
22 questions by pushing buttons on their phone to say I think
23 this, press 1, I think this, press 2, that sort of thing.

24 So over the course of that weekend, every phone
25 number that we called we attempted to reach people four or five

1 times, because we were trying to give people an opportunity to
2 answer if they hadn't been home the previous times we called,
3 and we collected 500 interviews of Wake County voters, that's a
4 pretty standard sample size for even a statewide poll, but
5 certainly for a countywide pole, and then we weighted that data
6 to make sure that it was representative of the overall
7 population of Wake County and that's what was put out in
8 public.

9 Q And when this poll was conducted, was that during
10 legislative consideration of Senate Bill 181?

11 A Yes. I believe that it was while the House was
12 considering the bill.

13 MR. EPSTEINER: Could you put Exhibit 14 on the
14 screen, please, and if you could just slowly kind of scroll
15 through the document.

16 BY MR. EPSTEINER:

17 Q Mr. Jensen, what is this document?

18 A This is a copy of the poll that we conducted on the
19 Wake County Commissioner redistricting proposal.

20 Q Does it include the results of the poll?

21 A Yes, sir.

22 Q Does it break down the results of the poll by different
23 demographic characteristics?

24 A Yeah, it breaks it down by gender, party, race, age and
25 the State House District that the respondents lived in.

1 Q And what were the overall results of the poll?

2 A We found that people in the county were opposed to the
3 proposed redistricting of the County Commissioners. Only
4 28 percent of voters in the county supported the plan,
5 53 percent were opposed. A couple key things that we found
6 looking at the cross tabs were that 60 percent of Democrats and
7 57 percent of Independents were opposed to the bill, so you saw
8 pretty strong opposition from both of those groups, and then
9 even among Republican voters there was less than 40 percent
10 support for the proposed redistricting of the County
11 Commissioners.

12 We also made a point of looking at the results broken
13 out by State House districts so we could get a sense of how
14 voters in all the different parts of the county were reacting,
15 be they from Raleigh or from other parts of the county, and
16 what we found was that in no individual State House District
17 within Wake County was there majority support for the proposal.

18 Q Mr. Jensen, was this poll released to the public?

19 A Yes, sir.

20 Q How do you know it was released to the public?

21 A I believe there was a press conference. I was not present
22 at the press conference but I did see media coverage of the
23 poll's release in outlets such as the News and Observer and the
24 Independent Weekly.

25 Q So there was public notice of this poll before the House

1 passed this particular legislation?

2 A Yes, it was definitely out in the public sphere, I think,
3 for a week or so before that final vote was taken.

4 MR. EPSTEINER: I don't have any further questions.

5 THE COURT: Thank you. Cross-examination.

6 - - - - -

7 CROSS-EXAMINATION

8 BY MR. MARSHALL:

9 Q Mr. Jensen, do you know who the president of Real Facts
10 is?

11 A I do not.

12 Q Who is your contact there?

13 A Justin Guillory.

14 MR. MARSHALL: No further questions.

15 THE COURT: Thank you. Any other questions?

16 MR. EPSTEINER: No, Your Honor.

17 THE COURT: Please watch your step stepping down,
18 Mr. Jensen, and watch your step stepping back through the gate.

19 Plaintiffs may call their next witness.

20 MR. EPSTEINER: Yes, Your Honor. Plaintiffs call
21 Brian Fitzsimmons to the stand.

22 THE CLERK: Please place your left hand on the bible
23 and raise your right hand and state your name for the record.

24 THE WITNESS: Brian Patrick Fitzsimmons.

25 THE CLERK: Do you swear that the testimony you're to

1 give the Court in this case shall be the truth, the whole truth
2 and nothing but the truth, so help you God?

3 THE WITNESS: I do.

4 THE CLERK: Thank you. You may have a seat in the
5 witness stand, and please watch your step.

6 THE COURT: Good afternoon, Mr. Fitzsimmons.
7 Mr. Epsteiner is going to have some questions for you and then
8 Mr. Marshall is going to have some questions for you. If the
9 lawyer who is not asking you questions objects to the other
10 lawyer's question, don't say anything until I rule on the
11 objection. Please try to keep your voice up so we can hear
12 you. Feel free to adjust that microphone.

13 THE WITNESS: Yes, sir.

14 THE COURT: You may examine the witness.

15 MR. EPSTEINER: Thank you, Your Honor.

16 - - - - -

17 DIRECT EXAMINATION

18 BY MR. EPSTEINER:

19 Q Good afternoon. Would you please introduce yourself for
20 the Court.

21 A My name is Brian Fitzsimmons.

22 Q Mr. Fitzsimmons, where do you live?

23 A I live in Northeast Raleigh.

24 Q Are you a registered voter of Wake County?

25 A I am. Precinct 19-17, Forrestville Fire Station.

1 Q Are you familiar with Senate Bill 181 that was passed by
2 the General Assembly in April, 2015?

3 A I am. That was the Wake County Commission Redistricting
4 Bill.

5 Q How did you become aware of the bill?

6 A I originally found out about the bill when it was filed,
7 I believe on March 4th, it was filed that night. I first -- or
8 then received notification of a meeting of the committee on
9 redistricting, and I received that notification the following
10 day, around 11:30, for the meeting at one o'clock.

11 Q So you received about 90 minutes notice for a
12 redistricting committee meeting in the Senate --

13 A That's correct.

14 Q -- discussing the bill?

15 A That's correct.

16 Q Were you able to attend that meeting on March 5th in the
17 Senate?

18 A I was not. I'm a small business owner. It was -- I have
19 to plan a little bit farther ahead than 90 minutes.

20 Q Did you get notice of any other committee meetings
21 relating to this bill?

22 A I did. I received notification of a -- what I believe to
23 be a meeting of the Wake County Delegation soon after the bill
24 was filed on March 4th -- 5th -- on March 4th -- 5th. 4th.
25 I received a notification of a Wake County Delegation meeting

1 of the various members of the General Assembly from
2 Wake County, and at that meeting there was a public comment
3 session.

4 Q So this is outside of a House or Senate committee meeting,
5 this was a meeting specifically organized by the Wake
6 Delegation, you believe?

7 A That is correct.

8 Q And you said this was a public meeting?

9 A Yes, sir.

10 Q And public comment was taken during this meeting?

11 A Yes.

12 Q And so you think this was sometime in early March?

13 A Soon after. I believe it was still being -- it had not
14 yet been passed by the Senate, so that would have been before
15 March 12th, 14th, whenever it was passed by the Senate.

16 Q Did you speak at this public comment period at the Wake
17 Delegation meeting?

18 A That's correct, I did.

19 Q Did you voice support or an objection to the bill?

20 A Objection.

21 Q And what was your objection to the bill at the time?

22 A For me, as somebody from District 3, or at the time --
23 still for the County Commission I'm in District 1, but I would
24 have been put into District 3, that district was one of the
25 districts that had a positive deviation of 3 point -- 3.4, 3.5

1 percent, that was -- in looking at some of the other districts
2 compared to my district, District 3, I was -- there were a
3 number of other districts that had negative percentages, and
4 immediately when seeing that I recognized that my vote means
5 less or is counted less than those votes of those in districts
6 that have a negative deviation. So that was one of the first
7 things that I saw that I didn't agree with.

8 I certainly had objections to the idea of having to
9 draw a majority minority district. I had just gotten finished
10 working with some candidates, specifically Jessica Holmes in
11 Southwest Raleigh -- or Southwest Wake County, that had been
12 elected to the County Commission, further proving that there
13 was no direct need to draw a majority minority district. That
14 was another concern I had, the way that the districts were
15 drawn.

16 More than anything for me too, this bill was being
17 proposed by my Senator, I am a constituent of Senator Barefoot,
18 so that was of particular concern for me. Whenever -- I'm the
19 type of geek where when I see my Senator, my representative,
20 passing bills or putting forth bills, I pay particular
21 attention just because they're the ones that I elect, they're
22 the ones that I'm voting for or against, so I saw this come up
23 from Senator Barefoot and that was of particular concern.

24 In looking at the districts themselves, one of
25 Senator Barefoot's main arguments was that he felt as though

1 there was not enough rural representation, that outlying areas
2 of Wake County were not being represented enough on the Board
3 of Commissioners, and so he wanted to make sure that there was
4 equal representation for rural areas, and the continued use of
5 the term "representation" was troubling to me because I kept
6 looking at the map and seeing that we have -- if you look at
7 the district portion, you have areas in Garner that are
8 represented by areas -- represented by the same district as
9 areas in Brier Creek, and so they're not very -- when we're
10 talking about representation, they're not very contiguous,
11 they're not representing similar areas. District 1,
12 for example, wraps all the way around almost the northern part
13 of Wake County.

14 Then in looking at the lettered districts, we had --
15 there again was the argument that we wanted to increase
16 representation for rural areas by using the -- by creating that
17 doughnut or the Popeye district, and they -- in doing so
18 though, if you look at -- we've got in District -- in
19 District A, we've got precincts -- it's a little off there, but
20 we've got precincts as north in Zebulon is 09-02 and as south
21 in Holly Springs as 09-09 -- or 06-06, 09-02 in the north,
22 06-06 in the south, and so this district that we were told was
23 meant more or less to represent the urban area of Wake County
24 had had some pretty wide scope across the county. So those
25 were the main reasons why at least when I first got the

1 opportunity to read the bill and look at the maps, that was why
2 I was immediately against it.

3 Q And going back to this Wake Delegation meeting that you
4 attended and provided public comment, was public comment at
5 this Wake Delegation meeting predominantly positive or negative
6 regarding the bill?

7 A It was overwhelmingly negative, and what made me pay
8 particular attention to the rural/urban argument was that, if I
9 recall, those that were speaking for the passage of the bill
10 were all using the argument of we live in outskirts -- in the
11 outskirts of Wake County, or we're from the outskirts of
12 Wake County, we represent the farming community or whatever,
13 and they were all sort of saying that we need to do this so
14 that we can increase the representation of outlying areas in
15 Wake County on the Board of Commissioners, so it seemed like
16 that was a real prevailing argument that was being put forth by
17 those who were for it, including the Senators and
18 representatives.

19 Q So you just talked about the Wake Delegation meeting that
20 you provided public comment at. Did you provide public
21 comment -- I know you first talked about not being able to
22 attend that meeting in early March --

23 A Sure.

24 Q -- at the Senate.

25 A Sure.

1 Q Was there another Senate redistricting meeting after that
2 meeting?

3 A There was. There was a second meeting of the
4 redistricting committee that was after that Delegation meeting,
5 right -- maybe a day before the bill was actually passed in the
6 Senate. I spoke at that. It was very similar to the
7 Delegation in that the majority of the people that were there,
8 the vast majority of people that were there were speaking out
9 against the bill. It was -- it was very -- another situation
10 where the notice was very short. There was -- at that meeting,
11 I believe, there was a situation where we were asked to sign up
12 online and so I was one of the first ones to send in my name, I
13 sent in my name, I was on the list to speak. They had cut off
14 the list soon after they opened it up for -- to ask for people
15 to speak, and so there were a number of people that showed up
16 that were under the impression that they couldn't speak because
17 the list was already full, and so there were a number of people
18 there that ended up being able to speak because Senator Rucho
19 said that if you are here and you want to say something, you
20 can, so there were a number of people there that thought they
21 weren't going to speak, they weren't able to, but actually were
22 able to, so we had a number of people that showed up that
23 weren't necessarily prepared or had the idea that they were
24 going to speak.

25 MR. EPSTEINER: If we could put Exhibit 471 on the

1 screen.

2 BY MR. EPSTEINER:

3 Q Mr. Fitzsimmons, what I'm showing you is an amendment that
4 was offered by Representative Gill during legislative
5 consideration of the bill. Are you familiar with the content
6 of that amendment?

7 A Basically, yes. I've seen this map before.

8 Q Does this map keep communities of interest together in a
9 way different than the enacted plan?

10 A Absolutely. Absolutely it does.

11 I would look at this map and you can see specifically
12 that you have the majority of Morrisville, which is in the
13 eastern part right here, you've got that area that's all
14 contiguous, you've got -- as Representative Jackson pointed
15 out, you've got Wendell and Zebulon and Knightdale all in
16 there, and then you've got Garner all in one area there, and
17 then Fuquay and Holly Springs and Apex down in the corner
18 there, so you have all of them together, whereas in the new map
19 you look at District 1, I go back to that, you've got people in
20 Zebulon being represented by the same district representative
21 that represents the RDU Airport, and so we have entirely
22 different areas by any definition, whether you want to define
23 it as rural, urban, whatever it is, they're two completely
24 different areas. So this map that Representative Gill proposed
25 does a much better job at keeping the communities of interest

1 together.

2 Q And were your comments at this Senate redistricting
3 meeting similar to your comments at the Wake Delegation meeting
4 that you spoke at?

5 A That's correct. Yeah.

6 Q And then after this Senate redistricting committee
7 meeting, I believe the bill moved over to the House and it was
8 referred to the House Committee on Elections.

9 A Sure.

10 Q Did you attend a meeting of the House Committee on
11 Elections discussing Senate Bill 181?

12 A I did. That was on March 31st, I believe, March 30th, at
13 the end of the month.

14 Q Did you provide public comment at this meeting?

15 A I did. The basis of my public comment there was a little
16 bit different than it had been at the beginning of the month.
17 That was more focused on the fact that these districts had been
18 drawn by the Republican majority just a few years before, and
19 they were drawn and there was -- I think part of that argument
20 too was that when these districts that we are -- that our
21 Commissioners that are on the Board now were elected to, they
22 were drawn by the Republican majority in 2011-ish, around
23 there, and then in 2013 the School Board was redistricted, and
24 my contention at the meeting at the end of March was
25 questioning why the County Commission districts were an

1 issue -- were not in issue in 2013 but became an issue in 2015.

2 Q And at this March 31st House Committee on Elections
3 meeting where you spoke, did you speak about polling data that
4 was available to the General Assembly?

5 A Absolutely, I did. Yeah. I pointed out the fact that you
6 had a majority of Democrats, a majority of Independents --
7 Wake County has more independent voters than we do even
8 Republican voters, so we've got a very high Independent base.
9 So we had a majority of Independents, a majority of Democrats,
10 and certainly we had a small minority of Republicans that were
11 for the bill. It was the same poll that Mr. Jensen was
12 referencing.

13 Q When you say a small minority of Republicans supported the
14 bill, what about -- was the percentage of Democrats large or
15 small that supported this bill?

16 A It was very small. It was very small. The majority of
17 Democrats were against the bill.

18 Q And what about Independents?

19 A The majority of Independents were against the bill.

20 Q And again, was public comment at this meeting, the
21 March 31st House Elections Committee meeting, predominantly
22 supportive or in opposition to the bill?

23 A As with all others that I attended, it was overwhelmingly
24 negative.

25 Q And what ultimately happened to the bill?

1 A The bill was passed by the House, and because it's a local
2 Bill it was not -- it did not need to be signed by the Governor
3 so it became law.

4 Q And did Representative Gill's amendment pass?

5 A No, it did not.

6 Q And what impact does this bill have on Wake County voters
7 like yourself?

8 A The thing that struck me immediately in looking at the
9 deviations was that there were other -- you know, there are a
10 number of areas in -- areas that I knew to have a number of
11 Republican voters that had negative deviations, and in my area
12 I had a higher, more positive deviation, and so in looking at
13 that I see right away that my vote in the two -- in this case
14 the two people that I would be electing to the County
15 Commission, my vote would mean less because there are more
16 people in my district.

17 For me, when we kind of talk -- talk a little bit
18 more about the representation too, I am -- I guess it's all
19 relative when you try to determine what the word
20 "representation" means, but currently as it stands today, I
21 have -- I had the ability to elect all seven members, vote on
22 all seven members of the County Commission, so I had -- I was
23 able to exercise my most -- the most powerful vehicle I have in
24 holding electeds accountable and that's with my vote. I had
25 the ability to do so with seven of the members. As it stands

1 with the maps that were passed by the House and the Senate, I
2 will be able to exercise my vote on only two of those members,
3 so with every -- everything that I know about the word
4 representation, that's less.

5 MR. EPSTEINER: I don't have any further questions.
6 Thank you.

7 THE COURT: Cross-examination.

8 - - - - -

9 CROSS-EXAMINATION

10 BY MR. MARSHALL:

11 Q Mr. Fitzsimmons, do you hold any position with the State
12 or County Democratic Party?

13 A I do.

14 Q Currently?

15 A I do.

16 Q And what's your title?

17 A I am the Chair of the Wake County Democratic Party.

18 Q And how long have you been in that position?

19 A Since April of 2015.

20 Q Okay. Just one second.

21 Are you aware if any of the new County Commissioner
22 districts are overpopulated Republican districts? Do you know
23 if there are any?

24 A I don't have the numbers in front of me, so I wouldn't
25 want to quote on the numbers.

1 Q Do you know if there are any underpopulated Democratic
2 districts?

3 A Again, I don't have the numbers in front of me, but --

4 Q You just testified, I think, that under the new plan
5 you'll go from being able to elect seven County Commissioners
6 to two; is that right?

7 A That's correct.

8 Q And that would be one from the single member district that
9 you live in, District 3?

10 A Um-hum.

11 Q And one from District A, right?

12 A That's correct.

13 Q Okay. And --

14 A I'm sorry. District B, I believe I'm in.

15 Q You're in District B.

16 A Yeah.

17 Q And if you are a resident of District 1, you would still
18 elect the same number of representatives, right, just two?

19 A Under the new plan, yes. Yeah.

20 MR. MARSHALL: I don't have any further questions.

21 THE COURT: Thank you. Any further --

22 MR. EPSTEINER: Nothing, Your Honor.

23 THE COURT: Thank you, Mr. Fitzsimmons.

24 Please watch your step stepping down and stepping
25 back through the gate.

1 THE WITNESS: Thank you, Your Honor.

2 THE COURT: Plaintiffs may call their next witness.

3 MS. RIGGS: Your Honor, plaintiffs call Wake County
4 Commissioner John Burns.

5 THE CLERK: Please place your left hand on the bible
6 and raise your right hand and state your name for the record.

7 THE WITNESS: John David Burns.

8 THE CLERK: Do you swear that the testimony you're to
9 give the Court in this case shall be the truth, the whole truth
10 and nothing but the truth, so help you God?

11 THE WITNESS: Yes, I do.

12 THE CLERK: Thank you. You may have a seat in the
13 witness stand, and please watch your step.

14 THE WITNESS: Good afternoon, Your Honor.

15 THE COURT: Good afternoon, Mr. Burns.

16 Ms. Riggs is going to question, have some questions
17 for you, and then Mr. Marshall may have some questions for you.
18 If the lawyer who is not asking you questions objects to the
19 other lawyer's question, don't say anything until I rule.
20 Please try and keep your voice up so we all can hear what you
21 have to say. That microphone will adjust, feel free to adjust
22 it.

23 THE WITNESS: Thank you, Your Honor.

24 THE COURT: You may examine the witness.

25 MS. RIGGS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. RIGGS:

Q Good afternoon, sir. Can you please introduce yourself to the Court and tell us a little bit about your background.

A My name is John Burns. I am a Wake County Commissioner. I was elected in November of 2014. I'm an attorney here in Raleigh and I live on Windchase -- excuse me, on Battleford Drive in northwest Raleigh. I've been a resident of Raleigh since 2001, grew up in High Point, clerked for Judge Britt in this very courtroom and the one across the hall, and that was in '99 and 2000, and then came back here in 2001 to practice law.

Q When were you sworn into the County Commission?

A December 1st, 2014.

Q Had you ever run for political office before running for the County Commission in 2014?

A Have not. I was an active participant but never a person on the ballot.

Q Commissioner Burns, are you familiar with Senate Bill 181 that passed through the General Assembly in 2015?

A Yes, I am.

Q Okay. And were you opposed to that bill?

A I was.

Q Okay. Can you tell us what you did to voice that opposition to the bill.

1 A I did quite a lot to voice opposition to that bill.

2 Q And actually, before you get into that, I'm going to pull
3 up Exhibit 12 and page 17 and I want you to tell me what it is.

4 A I see circles on it.

5 Q Yeah. We're going to make those go away.

6 MS. RIGGS: Can you hit the clear button?

7 A It's gone.

8 The exhibit before me is a -- are my comments that
9 were prepared for the -- I believe it was the House hearing,
10 which was on March 31st of 2015. It looks like an e-mail
11 because sometimes when I'm writing something like this I'll --
12 the quickest thing to do is open up my own e-mail and if I get
13 caught in the middle of a draft I can e-mail it to myself and I
14 won't lose my notes, so that's what I did here, I opened up my
15 e-mail. When we print, it prints with our name on the top of
16 it. So this was never e-mailed to anybody, it was just my own
17 notes. I carried this into the hearing and spoke from these
18 notes, but as I am kind of wont to do, I ad libbed a little
19 bit, strayed from my remarks and felt like I needed to hand
20 this to the Sergeant-at-Arms that day, so that's what this is,
21 is what I handed to the Sergeant-at-Arms.

22 Q How many public hearings or committee meetings did you
23 speak at?

24 A I believe three. There were two in the Senate and then
25 one in the House, and I might have that backgrounds, but I

1 spoke three times.

2 Q And do you recall which one you submitted this --

3 A This was the House on March 31st. And I remember that
4 because the chairman of that committee gave us five minutes if
5 we were public officials, so I took full advantage of that.

6 Q Can you describe to us a little bit about your opposition
7 to Senate Bill 181.

8 A I opposed it because -- well, for several reasons. We had
9 been elected in November of 2014, four of us, in what was a
10 pretty important race in 2014, but we all -- I mean, the first
11 comment I made upon being sworn in December 1st was that I
12 recognized that 49 percent of people in Wake County or so,
13 47 or 48, in there somewhere, didn't vote for me and it was
14 very much my objective to make sure that everybody that voted
15 for me and those that didn't felt represented, because we
16 represent the whole county.

17 This district or these districts in this plan in
18 Senate 181 was based upon the idea that I couldn't possibly
19 represent people outside of the area of the county that I live
20 in, and it was based on what I felt to be kind of a punitive
21 and retributive effort to punish the Democrats for winning that
22 election. I had been in office for all of three and a half
23 months, and the people that spoke at that hearing, all three of
24 those hearings, who claimed not to be represented by me had
25 never called me on the issues they were concerned about. I had

1 never spoken to any of those folks. So it was a bit of a
2 personal thing, but also just in terms of political theory, I
3 thought it was wrong. It took -- as Mr. Fitzsimmons said, it
4 took folks who could vote for seven and makes them vote for
5 two, and in my year on the Commission I know that it helps to
6 have us all looking out for the whole county.

7 My strong suspicion and fear is that after this is
8 passed, if it is in fact upheld and Commissioners are elected
9 by district, you're going to end up with horse trading, which
10 doesn't occur right now. Right now if we need a library in
11 Holly Springs, all seven of us determine whether we need a
12 library in Holly Springs. I'm afraid what you're going to end
13 up with is someone representing Holly Springs wanting a library
14 and someone representing Wake Forest saying, if you want my
15 vote then you'd better vote for my fire station. That type of
16 horse trading does not occur on the Wake County Commission
17 right now as it's currently set up.

18 Q Can you tell us about some of the activities of the
19 Wake County Commission that led you to disagree with the
20 assertion that --

21 A Sure.

22 Q -- some folks weren't getting adequately represented?

23 A Well, first of all, I'd only been in office for about
24 90 days, so the idea that I had -- the districts had failed
25 utterly in 90 days was factually incorrect and a bit insulting.

1 They were the same districts that elected my opponent,
2 Mr. Coble, who had been in office for a long time, I think
3 eight years on the County Commission, and there had been no
4 complaints about the -- there was certainly opposition to
5 Mr. Coble but no complaints that he couldn't represent the
6 whole county any more than I could.

7 In March, I think it was just after the first
8 hearing, but it had been set up prior to that, we -- three of
9 us met with the Town Board in Rolesville for their -- for their
10 town -- for their Town Board Planning Retreat. We attended and
11 had lunch with them and talked about the goals of the City of
12 Rolesville. Just the following week I attended a tour of a
13 facility in Fuquay-Varina that was going to be proposed as an
14 art center and they were seeking funding through the County's
15 hotel and restaurant tax allocations for tourism development.
16 Fuquay had a proposed project and I got a tour of that and
17 walked around and met the Mayor.

18 All during the campaign we had all worked very hard,
19 I met with every Mayor in Wake County save one and we traveled
20 all over the county, it was fully our intention to represent
21 everyone in the county, and we won districts -- I won precincts
22 outside of the urban areas as Senator Barefoot described them
23 in his press release.

24 Q I'm going to now put on the screen briefly Exhibit 277.

25 A Sure.

1 Q Do you have an opinion on the effect that Senate Bill 181
2 had on dividing municipalities in Wake County?

3 A Yes, I do. The argument was made that these new districts
4 were necessary for the County Commission, even though they were
5 drawn for the Board of Education, it was necessary for the
6 County Commission to make sure that the smaller municipalities
7 in the surrounding part of Wake County would have stronger and
8 more guaranteed representation and a unity of interest in that
9 representation, and my first -- when I first looked at this map
10 I laughed because the map doesn't make -- doesn't meet the
11 proposed purposes of the liti -- excuse me, legislation.

12 Look at Garner. I think -- I counted it up and
13 I think five districts touch Garner. Let's see. Apex and
14 Holly Springs and Fuquay-Varina are all divided. Wake Forest
15 is in at least three districts and Rolesville is in two, and
16 you've got Zebulon in there with the northern parts of
17 Brier Creek, which -- and actually far west -- far eastern
18 Garner is in the same district as northern Brier Creek, and
19 that just doesn't make any sense, there's no unity of interest
20 there whatsoever.

21 Also the proponents of this legislation said that
22 they were concerned about the cost of campaigning and that
23 these districts would make it cheaper to run. That is -- shows
24 either -- I want to be careful what I say here. That is either
25 inaccurate or deceptive, because Wake County is a media market

1 and if you're going to run in any of these widespread districts
2 here or if you're going to run all in the entire county you are
3 still going to be advertising in the Raleigh/Wake media market,
4 it's still expensive. So, you know, what you'll do is you'll
5 mail to a certain number of households and you will focus on
6 social media and you'll focus on as much TV and radio time as
7 you can get. You'll do that whether you're running in
8 District 1 on this map or running countywide, it's still going
9 to cost you money.

10 Q Do you -- let me -- while we're on that topic, let me show
11 you what has been previously marked as Exhibit 71.

12 Have you had a chance to review any campaign finance
13 reports recently?

14 A I looked through the last several from -- I think it went
15 back to 2011 -- the 2010 cycle. I didn't study them, by any
16 means, but I looked over them.

17 Q What can you generally say about the costs for running for
18 County Commission in recent years?

19 A It's a lot less than the costs for running for Senator
20 Barefoot's Senate seat. I think in my race I raised about
21 130,000 over the end of the -- I mean, I got into the race at
22 the end of the prior cycle for reporting, and then in 2014's
23 reporting cycle I think I had \$107,000 in expenditures. My
24 colleagues each were somewhere around there. I think
25 Mr. Hutchinson was the largest, I think he had about 140,000 in

1 expenditures, Jessica Holmes spent about 94,000, and
2 Mr. Calabria spent about 104, something like that, and,
3 you know, prior years where folks had competitive races, like
4 Mr. Coble and Mr. Matthews, they spent around ninety-some
5 thousand four years prior, so about the same, similar anyway.

6 Q And you've said you've had some past experiences working
7 on campaigns?

8 A Yes. In 2004 I was the State Director for a county -- for
9 a Court of Appeals race statewide, I did that on a volunteer
10 basis and realized how much time that took away from my law
11 practice, that was lots of fun, and then I did the -- I was the
12 County Director for a Lieutenant Governor primary campaign.

13 Q And were you the County Director in Wake County?

14 A Yes.

15 Q So I want you to go over with me some of the different
16 kinds of costs incurred in running a county campaign.

17 A Sure.

18 Q You mentioned the media market.

19 A Um-hum.

20 Q How does the Wake County media market differ from other
21 counties?

22 A Well, Wake County has Raleigh in it and it is either the
23 first or second most expensive media market in the state
24 after -- either after or just before Charlotte, that's if you
25 want to get on television. I didn't buy any TV time. In the

1 race that I ran -- that I helped a friend run for Lieutenant
2 Governor, he did have some TV time, but he bought in on a
3 statewide cable basis and I wasn't involved in that decision.
4 We considered television but knew that it was a much more
5 effective approach to do direct mail. And I think Mr. Coble
6 did go on television, but, you know, he was looking at his
7 expenditures, and remembering what I remember about the race,
8 he was on basically local news one or two times each --
9 you know, each day for about two weeks.

10 Q Is it possible to be on television only in a certain
11 district in the county?

12 A Certainly not. I mean, now, cable allows you to do some
13 targeting. And this gets beyond my expertise, that's why I
14 hire people to help me with this. Cable will allow you to
15 target to specific voters in specific areas, but if you're
16 going to buy time on the network news, you're going to be in
17 the Raleigh media market and your time is going to be more
18 expensive than if you were buying in say Asheville.

19 Q Okay. And then you were talking about --

20 A Direct mail is the main expense, and if you're running for
21 County Commission, when we calculated it, giving our -- giving
22 our ability to raise money and what we wanted to spend, we
23 targeted I think 20,000 households and we hit them each four
24 times and that was considered a pretty good effort, and the way
25 you look at it is you balance it and you figure out where your

1 swing voters are and you target them. Both sides do that. And
2 you would do that in a district as well.

3 Q Would there be -- if I did that math right, that was about
4 80,000 pieces of mail?

5 A You get a bulk rate. There's rates that are available
6 that you can -- yeah, we spent probably -- let's see. I could
7 look at it and tell you exactly what we spent, but most of my
8 budget was for mail.

9 Q Are you aware of how 80,000 would compare to the number of
10 households in a single -- in a single member district?

11 A Under 181? I'm not. I'm sorry. I don't know that
12 answer.

13 Q Do you have any reason to suspect you would need to send
14 out fewer mailings under 181?

15 A No. If you raised \$100,000, you wouldn't only spend 20 of
16 it on mail, you would hit that same number and hope to have --
17 either hit fewer households more times or hit the same number
18 of houses the same number of times we did, because in order for
19 someone to be persuaded by something like that, it means they
20 need to see it multiple times, especially in the noise of a
21 large campaign when you have -- you know, I don't envy those
22 folks running in 2016 because there's a presidential, a
23 gubernatorial and a senatorial race all at the same time.

24 Q I want to talk about that noise. Are you aware that
25 there's been a change to the method of election for School

1 Board members?

2 A Yes.

3 Q Based on your experience running campaigns in Wake County,
4 what do you think is likely to be the effect of that change in
5 moving to even year elections on the cost of a School Board
6 race?

7 A On the cost of the -- for the candidate, it likely won't
8 affect it all that much, it will be about the same expense
9 except for the fact that you're going to be trying to get
10 attention in the middle of a race where everybody is paying
11 attention to those further up the ballot. The biggest effect
12 this is going to have is confusing voters and making it more
13 expensive for our Board of Elections, even though they're the
14 technical defendant in this case. There's a whole lot of
15 ballot styles that are going to have to be printed and people
16 are going to be voting in different districts and not
17 understanding the district they're in. That is going to happen
18 and it is going to be hard. The candidates are going to need
19 to probably spend a little more money to make sure that the
20 voters know that they're able to vote for that particular
21 candidate, whereas they might have previously voted in a
22 different district.

23 Q I want to talk to you about that split precinct --

24 A Sure. And I mentioned that.

25 Q Yeah. Can you see the --

1 A I don't know that anybody can read it, because it was
2 something I hand wrote. It's about two-thirds of the way down
3 the page. My handwriting is really bad when I'm only writing
4 for me to read it. But what I wrote there is it is said that
5 this will be cheaper but it imposes split precincts and
6 multiple ballot styles on an overburdened Board of Elections,
7 and I think that's a real risk.

8 Q In that same paragraph you also talk about where
9 commissioners live. Can you explain to the Court what your
10 opposition was on that front?

11 A The proponents of the legislation stated that there were
12 five current members of the Board of Commissioners who lived in
13 the City of Raleigh in a 15 mile -- a 15 square -- let's see,
14 in a 15 mile radius. My first problem was that if you take a
15 15 mile radius from the center of Raleigh, you get most of
16 Wake County except for some very small areas of fringe on the
17 far north and the far Southwest.

18 If you -- there are actually -- as far as I know,
19 there are four current residents who live in the City limits of
20 Raleigh -- current Commissioners, not five, we couldn't quite
21 convince the proponents of that, but that's what I understand,
22 and the districts as they are drawn in Senate Bill 181 would
23 give Garner the opportunity to reelect five, and how is that
24 more representative than the current Commission?

25 That was one of my main problems with this, is that

1 the districts as drawn in the legislation, Your Honor, do not
2 meet the stated objectives of the legislation, they just don't.
3 There's got to be another reason behind this, because the
4 stated reasons are not met by the districts drawn by the bill.

5 It's no less expensive to run, it is -- it doesn't
6 guarantee any better representation across the county, you can
7 still have four people in Raleigh under the new plan and five
8 from Garner. It doesn't better the opportunity of the smaller
9 communities to guarantee a representative from that community
10 because they're all split.

11 Every one of the smaller communities is either split
12 or stuck in a district with a much larger community, which was
13 the whole -- was the proponents' entire problem with
14 representation countywide, is that they claimed that the votes
15 of those folks in the smaller communities were drowned out by
16 those from Raleigh.

17 Q As a Wake County Commissioner, as a sitting Wake County
18 Commissioner, were you consulted by anyone in the legislature
19 about Senate Bill 181?

20 A Absolutely not. I heard about this bill when I was on my
21 way to a basketball game at Davidson, and I turned around and
22 came back to speak at that first hearing.

23 Q That was the first you had heard of the bill?

24 A I got a text, yeah.

25 Q That being said --

1 A Let me make sure that I'm being completely accurate there.
2 I found out about the bill the day before that. I didn't find
3 out about the hearing on the bill until I was on my way to
4 Davidson.

5 Q Did you ask the legislature to slow down the process?

6 A We did formally. I believe we passed the resolution
7 asking the legislature to allow us to convene a citizens
8 commission on representation which would have been appointed
9 through -- by the commission and the municipalities for -- from
10 folks from all across Wake County to investigate the claims of
11 the proponents of this legislation and propose new districts if
12 they were necessary. We asked the legislature to do that.

13 I repeatedly requested that Senator Barefoot meet
14 with me and even do sort of a traveling debate if he wanted to
15 do that to talk about the issues and why this was necessary and
16 why I thought it wasn't. I was never taken up on that offer.
17 And the legislature just passed it quickly, it went through the
18 House in two days and it went through -- I'm sorry, it went
19 through the Senate in two days, the House held it in abeyance
20 for a while and then held a hearing on the 31st and passed it
21 the first week of April.

22 Q So even during that abbreviated legislative process had
23 you taken steps to begin the citizens commission process?

24 A We had. We posted it online and asked people to apply to
25 be on it, and we fully expected that sometime in April or May

1 we would have a commission set up. Once it was passed we put
2 those plans on hold.

3 Q So why did you think the citizens commission was a good
4 idea?

5 A Well, the allegation was that we couldn't -- we didn't
6 know what people out in the -- in the more rural parts of the
7 county wanted and that we couldn't represent them. Given that
8 we had just been elected by the whole county, we disagreed with
9 that, but we wanted to make sure that if there were people out
10 there who thought that, they had a chance to be heard in our
11 own process, and so we thought it would be good to give it a
12 try. The current districts were drawn by the prior commission,
13 and it could very well be that there were problems with those
14 districts, I didn't have any role in drawing those, and if
15 there were folks out there that thought there was a better way
16 to do it, I would have been very receptive to it. I really
17 objected to the process here in addition to what I thought was
18 a fairly deceptive claim for what this legislation would do.

19 Q Would you have objected to adding seats to the Wake County
20 Commission?

21 A I actually did not. It's a big county and having two more
22 people on the Commission is not anything that I necessarily
23 oppose. The doughnut and the doughnut hole districts, that's
24 how we call A and B, I think they are drawn wrong. I think
25 they were -- including Rosa Gill's bill would have drawn two

1 bigger districts which might very well have worked, and there's
2 certainly room at our table for two more folks.

3 Q You posted openings for the citizens commission. Do you
4 recall --

5 A The County Manager's office did, yes.

6 Q Do you recall if you had started receiving applications
7 for it?

8 A I personally received a number of people sending me
9 e-mails that they were interested in it. I directed them to
10 that website. I, frankly, do not know whether they sent in
11 their applications, but people were interested, including
12 opponents of mine who contacted me and wanted to make sure that
13 I knew they were interested. So, you know, I can -- I can name
14 names, but I don't necessarily think that's necessary, but
15 there were people who were pretty vocal supporters of the bill
16 who wanted to be on this commission and I was happy to put them
17 on if they wanted to.

18 Q We've spent some time now talking about the purported
19 justifications and why you believed that these justifications
20 were pretextual or deceptive. Can you tell us what you think
21 the real reason behind Senate Bill 181 was?

22 A To ensure a Republican majority in Wake County on the
23 Commission despite the vote totals in 2014. And I found that
24 to be bad public policy and ignorant of what happened
25 four years prior. I mean, Wake County's Commission goes in

1 cycles in many ways. You have four in the -- in on-year
2 cycles -- four in off-years and three in on-years, or four in
3 non-Presidential years and three in Presidential years, and
4 usually they break one way or the other, because we're all on
5 the ballot together, and if you run countywide you tend to all
6 be subject to the same large trends.

7 This year is considered -- 2014 was considered to
8 have been a pretty good Republican year nationwide, and I think
9 Senator Hagan would agree with me that it was a pretty good
10 Republican year in North Carolina, yet we won in Wake County,
11 and we won because of the issues, and we won because of concern
12 about the public schools and other things that we ran on, but
13 what people miss is that four years prior to that the
14 Republicans swept all four seats, and so it kind of goes that
15 way. So the argument that Wake County is somehow permanently
16 locked into a democratic majority if you allow Raleigh to vote
17 in all the districts is just fallacious, it is not true, and it
18 hasn't been true over the history of this county. Moreover,
19 the argument that we needed to guarantee the election of
20 African Americans through a majority minority district is also
21 ignorant of the history of this county, and in fact it's
22 ignorant of the people who are sitting on the Board right now.
23 You have two African Americans, one of whom was 29 when she was
24 elected and had never run for office before, who were elected
25 countywide, and --

1 Q What does that tell you about the fact that she was 29 and
2 it was her first election?

3 A The argument that the cost, expense and size of this
4 county is an impediment to people running for office is belied
5 by the fact that three of the four people who were elected in
6 November were first time candidates, and Sig Hutchinson had run
7 for State Senate once before but has never served in public
8 office, so you have four newcomers who were able to raise
9 sufficient funds and generate a great deal of volunteer
10 activism and we were elected, and so, again, that's another
11 argument for this bill, Your Honor, that isn't -- isn't met by
12 the language of the bill itself.

13 Q What does the election of Jessica Holmes, a 29-year-old
14 African American woman you're referencing, what does that tell
15 you about the willingness of white voters to support an African
16 American candidate in Wake County?

17 A It proves that an African American can get elected
18 countywide in Wake County without the sort of institutional
19 support that a more senior candidate might have had, and I --
20 you know, Jessica Holmes is a rare political talent, I have
21 to -- I mean, she's my colleague but she's also a very
22 impressive person and she impressed everybody and ran a great
23 race and won. James West is on the Commission, he's African
24 American and was -- I think he was reelected without opposition
25 the last time he ran.

1 There have been African American chairmen of the
2 Wake County Commission. Harold Webb was an elected member of
3 the Wake County Commission. Lindy Brown was an elected member
4 of the Wake County Commission. There is -- I don't want to
5 speak for folks who -- I have to be careful saying there are no
6 barriers, because there certainly are, but an African American
7 can be elected in this county as well as a first time
8 candidate. I'm one of those.

9 MS. RIGGS: One second, Your Honor.

10 A And also people in the rural districts of Wake County can
11 be elected to the Wake County Commission. Phil Matthews was
12 elected on the same lines that I was elected under, so --

13 Q For the record, where is Phil Matthews from?

14 A Phil Matthews lives in I believe Garner or Fuquay. The
15 problem was that the gentleman who was elected who lived in
16 Fuquay is a Democrat and that's why they wanted to change this,
17 not because they felt that the people in Raleigh had too much
18 voice.

19 MS. RIGGS: No further questions, Your Honor.

20 THE COURT: Cross-examination.

21 MR. MARSHALL: Thank you.

22 Mr. Burns, good afternoon. Thanks for being here.

23 I appreciate the awkward situation we're in on this
24 side of the table.

25 THE WITNESS: Yes, and I do want to acknowledge that.

1 MR. MARSHALL: Yes.

2 THE WITNESS: That I'm here under subpoena, because
3 I think the County Commission is advancing the funds that are
4 paying the counsel for the Board of Elections, and that is an
5 awkward situation, but we have been -- we've recused, we don't
6 do anything -- we haven't instructed you to do anything or the
7 Board of Elections in this case.

8 MR. MARSHALL: Absolutely not. We haven't spoken
9 about this case. I appreciate you being here. A few
10 follow-ups on some of your Direct testimony.

11 - - - - -

12 CROSS-EXAMINATION

13 BY MR. MARSHALL:

14 Q You spoke a lot about the citizens commission --

15 A Yes.

16 Q -- that you formed, and I gathered what you had said, and
17 tell me if I'm not right here, that you felt the commission
18 would have been the more appropriate vehicle to address any
19 possible changes to the election of County Commissioners in
20 Wake County?

21 A Yes.

22 Q And that you're not actually closing the door on any
23 potential changes that might come out of that commission?

24 A I would not. I mean, we would have considered them fully
25 and -- I mean, I'm not guaranteeing that I would have voted for

1 them, but I certainly would have considered them.

2 Q But you thought that the commission would have been the
3 more appropriate vehicle to consider those changes?

4 A Absolutely.

5 Q And I'm just trying to think about Wake County elections
6 versus City of Raleigh. The City of Raleigh has a couple
7 at-large seats and then single member districts, right?

8 A They do.

9 Q And do you find that that's working well, at least for the
10 City of Raleigh?

11 A I don't want to speak to the -- as a resident of the City
12 of Raleigh, I'm pretty pleased with the leadership of the City,
13 so, you know, there are more than one way to elect people, I'll
14 admit to that, yes, sir.

15 Q And I guess, similarly, in the School Board elections,
16 until the two super districts were created, they were all
17 single member districts serving Wake County as a whole, just
18 like the County Commissioners are. Do you feel like that
19 system was working well?

20 A Well, I believe our School Board is well-represented now,
21 and I -- it's a little bit different, the tasks of the School
22 Board are different than the tasks of the County Commission, so
23 it's a little bit different what you're looking for there.
24 Also I'll point out that many of the proponents of this
25 particular bill were proposing at-large representation for the

1 School Board, so it's kind of -- I guess it depends on who you
2 ask and what they're trying to pass at the time you ask them.

3 Q Commissioner Burns, you said your first election was in
4 2014?

5 A Yes, sir.

6 Q The first time you ran for County Commissioner?

7 A Yep.

8 Q And how many people were on the ballot for County
9 Commissioner in 2014?

10 A There were four seats, so there were eight people up for
11 four seats.

12 Q And so how many people could a voter vote for in 2014?

13 A All four.

14 Q Could they choose to only cast one vote if they wanted?

15 A They certainly could. You can under-vote. Yeah.

16 Q Is that also known as single shot voting?

17 A It is, but it wouldn't have the same effect because of the
18 residential districts. It's not like we're all running for the
19 same district. We run countywide but we have to live in a
20 residential district, so if you single shot it, you would
21 really only be affecting one race, you wouldn't be affecting
22 all four, because they are not running against each other.

23 Q The discussion about campaign finance, this interested me,
24 I had a couple follow-ups there.

25 A Sure.

1 Q Because I was somewhat following Senator Barefoot's race
2 when that was going on.

3 Did you have any Super PACs or outside interest
4 groups spending money in your election?

5 A Because I did not coordinate with any outside groups, I
6 don't know for sure who spent money, but I do know that there
7 was a -- there was a PAC formed that -- Wake Citizens For Good
8 Government or something like that, that did some polling and
9 did some other things, but I'm not privy to everything that
10 they did.

11 Q Okay. And on the corollary, are you aware --

12 A They did not spend money on television in my race, no.

13 Q Excuse me. They did?

14 A I don't believe there was any outside expenditure in the
15 media.

16 Q That's where I was going. And that would be for your
17 opponent as well. Are you aware of any outside money that was
18 spent on media in favor of your opponent?

19 A No.

20 Q Okay. And are you aware of any outside money being spent
21 on media for or against any candidate in 2014 for County
22 Commissioners?

23 A Not that I'm aware of.

24 Q Okay. In Senator Barefoot's last race, do you recall any
25 outside money being spent there?

1 A Certainly on both sides of that matter, yes.

2 MR. MARSHALL: I don't have any other questions.

3 Thanks.

4 MS. RIGGS: Just one on redirect, Your Honor.

5 THE COURT: You may.

6 - - - - -

7 REDIRECT EXAMINATION

8 BY MS. RIGGS:

9 Q You had a conversation with Mr. Marshall about the single
10 member districts for the Raleigh City Council and the single
11 member districts for the Wake County School Board. Does the
12 Wake County Commission have different taxing authority than the
13 Wake County Board of Education?

14 A The Wake County Board of Education has no taxing
15 authority. We pass the taxes, we pay the penalty for passing
16 those taxes electorally. The Board of Education, we like to
17 say we tax and they spend, but that is very different. So that
18 money that is raised, I'm glad you raised that issue, because
19 if we raise taxes, we raise taxes on the whole county, and it
20 is spent countywide, and so I can't pass taxes for District 3
21 and I can't pass taxes to build a high school in Rolesville.
22 Everybody in Wake County pays the taxes to build the high
23 school in Rolesville, and I am responsible and I am answerable
24 for those decisions, countywide. Now after Senate Bill 181
25 I won't be, which is unfortunate.

1 MS. RIGGS: That's all, Your Honor.

2 THE COURT: Thank you. Any recross?

3 MR. MARSHALL: No.

4 THE COURT: Thank you, Mr. Burns. Please watch your
5 step stepping down and stepping back through the gate.

6 Plaintiffs may call your next witness.

7 MS. EARLS: Your Honor, if I may, this might be an
8 appropriate time to -- there may be some exhibits that we are
9 fighting over, and seeing the hour of the day, I wonder if we
10 could -- if plaintiffs' next witness could start tomorrow
11 morning and we could talk a little bit about scheduling,
12 because I think that my colleague also has a question regarding
13 scheduling for tomorrow.

14 THE COURT: That's fine with me.

15 MS. EARLS: So should we start with scheduling or
16 with the exhibits?

17 MR. MARSHALL: Either way.

18 MS. EARLS: If you'll permit me just one moment.

19 Thank you for your indulgence, Your Honor. I think
20 that we may be able to shorten the Court's time if we also
21 defer the exhibit discussion until tomorrow morning, but in
22 terms of the schedule for the rest of the plaintiff's case, I'm
23 fairly certain that we will finish at some point tomorrow and
24 probably shortly after lunch, midafternoon, and I think that
25 raises questions that you wanted to --

1 MR. MARSHALL: Certainly, I was -- as I said, because
2 of the way we're handling this case, we are going to be saving
3 a decent amount of our time for closing argument, I assure you
4 it won't be too much, I never want to be accused of talking too
5 long, but I was trying to figure out just for my preparation
6 overnight -- I had been thinking that we would probably close
7 Friday morning, but if we're done early morning -- early
8 afternoon, I just want to know how the Court would prefer to --

9 THE COURT: I mean, I had blocked out all three days
10 for y'all, so I'm certainly happy, you know, if Ms. Earls is
11 amenable to it, I think it gives lawyers a chance to organize
12 your thoughts, and if we work towards arguing first thing on
13 Friday morning, again, I want to thank both of y'all for
14 working so well together, it's clear that you have, but I'm
15 certainly fine with that, like whenever we finish tomorrow, to
16 then say we'll just have closings beginning at 9:00 on Friday,
17 I'm certainly fine with that, unless there's some objection
18 from somebody. I assume that y'all had blocked out these three
19 days too, since you asked me for these days.

20 MR. MARSHALL: And we talked about it to confirm. I
21 just wanted to make sure that the Court didn't have a
22 preference.

23 THE COURT: Oh, no. Absolutely. I realize that in
24 particular from a lawyer's perspective that it would -- that it
25 would be better to be able to gather your thoughts up and think

1 about it and then close Friday morning, and I think that
2 undoubtedly, given the excellent counsel on each side, it would
3 be better for me to hear y'all being even more prepared, so I'm
4 fine with that.

5 MS. EARLS: Thank you, Your Honor.

6 THE COURT: And did you want to -- I'm certainly
7 happy to start earlier than 9:00. I mean, I leave it up to
8 you. If you think -- it sounds like we're on a good schedule
9 that we could start at 9:00, if you all can't work it out,
10 again, I appreciate the fact that y'all have been conferring
11 and trying to work things out, I'm certainly open to doing that
12 if you did have -- I also realize sometimes you have a witness
13 who is going to be here at 9:00 and then they need to leave,
14 and if there's any issue like that I could start early, if not
15 we can just start at 9:00, I can hear you on whatever you have
16 to say about the exhibits, if there is anything to say.

17 MR. MARSHALL: Sure. Sure.

18 THE COURT: Otherwise we could just start back with
19 testimony at 9:00.

20 Ms. Earls?

21 MS. EARLS: I think we're fine starting at 9:00, and
22 we'll deal with the exhibits issues at that time, first thing.

23 THE COURT: Okay. Anything else from plaintiffs or
24 defense?

25 MR. MARSHALL: No.

1 THE COURT: All right. Well, hope y'all have a nice
2 evening and we will be in recess until nine o'clock.

3 - - - - -

4 (Proceedings adjourned at 4:52 p.m.)

5 - - - - -

C E R T I F I C A T E

This is to certify that the foregoing transcript of proceedings taken in a bench trial in the United States District Court is a true and accurate transcript of the proceedings taken by me in machine shorthand and transcribed by computer under my supervision, this the 28th day of December, 2016.

/S/ DAVID J. COLLIER

DAVID J. COLLIER
OFFICIAL COURT REPORTER

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

RALEIGH WAKE CITIZENS)
ASSOCIATION, et al.)
Plaintiffs,)
)
vs.) Case No.
) 5:15-CV-00156
WAKE COUNTY BOARD OF ELECTIONS,)
Defendant.)

CALLA WRIGHT, et al.)
Plaintiffs,)
)
vs.) Case No.
) 5:13-CV-00607
THE STATE OF NORTH CAROLINA,)
et al.)
Defendant.)

BENCH TRIAL - DAY 2
BEFORE CHIEF DISTRICT JUDGE JAMES C. DEVER III
DECEMBER 17, 2015; 9:00 A.M.
RALEIGH, NORTH CAROLINA

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

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I N D E X

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P R O C E E D I N G S

- - - oOo - - -

THE COURT: Good morning, Counsel. Anything preliminarily before we proceed?

MS. EARLS: Yes. Thank you, Your Honor, and good morning.

THE COURT: Good morning.

MS. EARLS: I can report that the parties have conferred and we have resolved any objection, potential objections concerning the exhibits. The way we would like to proceed is to move the admission of all of the exhibits at the close of the plaintiffs' case.

THE COURT: Okay.

MS. EARLS: There is -- it was our -- it was both parties' intent to make sure that Your Honor had a complete record of all of the legislative history, all of the legislative proceedings, and we have discovered that there was one transcript of floor debate during concurrence on the Senate Bill 325 that was inadvertently left off the list. I have copies and I'll use that with our first witness, so that will be in addition to the exhibit list.

THE COURT: Okay.

MS. EARLS: The other -- if I may inquire, Your Honor, it would help the plaintiffs with our planning if we could know what the -- how much time we have used.

1 THE COURT: You all have used 293 minutes.

2 MS. EARLS: Thank you, Your Honor.

3 THE COURT: And the defense has used 83 minutes.

4 Plaintiffs may call their next witness.

5 MS. EARLS: The plaintiffs call Senator Josh Stein.

6 THE CLERK: Please place your left hand on the bible,
7 raise your right hand and state your name for the record.

8 THE WITNESS: Josh Stein.

9 THE CLERK: Do you swear that the testimony you're to
10 give the Court in this matter shall be the truth, the whole
11 truth and nothing but the truth, so help you God?

12 THE DEFENDANT: I swear.

13 THE CLERK: Thank you. You may have a seat in the
14 witness stand, and please watch your step.

15 THE COURT: Senator, if the lawyer who is not asking
16 you questions objects to the other lawyer's question, don't say
17 anything until I rule on the objection. Please try and keep
18 your voice up so we can hear what you have to say. That
19 microphone will adjust, feel free to adjust it.

20 You may examine the witness.

21 MS. EARLS: Thank you, Your Honor.

22 - - - - -

23 DIRECT EXAMINATION

24 BY MS. EARLS:

25 Q Will you state your name for the record, please.

1 A Yes. My name is Josh Stein.

2 Q And where did you grow up?

3 A I grew up my first few years in Charlotte and then in
4 Chapel Hill.

5 Q And where do you reside now?

6 A I live in Raleigh.

7 Q And am I right, you earned your undergraduate degree at
8 Dartmouth College, you have a law degree from Harvard Law
9 School and a degree in public policy from the Kennedy School of
10 Government?

11 A That's correct.

12 Q And you have three children who attend Wake County Public
13 Schools?

14 A I have.

15 Q How long have you been a member of the North Carolina
16 General Assembly?

17 A I have just completed my seventh year in the
18 North Carolina Senate.

19 Q And what district do you represent?

20 A I represent Senate District 16.

21 Q And where is that district located?

22 A The district essentially runs from the airport to
23 downtown, that's the central midpoint, it's western
24 Wake County. It's about a third of Raleigh, the northern half
25 Cary and all of Morrisville.

1 Q Can you tell me how many Senate districts there are in
2 Wake County.

3 A There are five Senators who reside in Wake County. There
4 are four and two-thirds Senate districts, because one district,
5 Senate District 18, Senator Barefoot's district, is essentially
6 two-thirds Wake County and one-third Franklin County.

7 Q And how many House districts are there in Wake County?

8 A There are 11 complete districts in Wake County, House.

9 Q I'd like to turn now to the events surrounding the
10 enactment of the new School Board districts in 2013.

11 In 2013 when did you first learn that there was a
12 proposal being considered to change the method of electing the
13 Wake County School Board?

14 A Not until the bill was introduced and referred to the
15 redistricting committee.

16 Q So were you -- as a member of the Wake County Delegation,
17 were you consulted before the bill was introduced?

18 A No, I was not. In fact, I chaired the Wake County
19 Delegation, co-chaired it. The way we do it here in
20 Wake County is that the 11 House members, the five Senators
21 have a delegation and we choose one House chair, one Senate
22 chair of opposite parties, and this is in keeping with the
23 spirit of bipartisanship and bicameralism that we have on local
24 matters, and what we do is we will meet with a series of
25 interest groups, whether it's the County Commission, the School

1 Board, local governments, citizens, hospitals, just important
2 stakeholders in Wake County, and we will hear from our
3 constituents what are local bills that you all want to have us
4 consider to run this session, and we don't take -- we don't
5 move bills unless we agree that it's a good idea, and so it was
6 quite startling to learn that this local bill affecting the
7 School Board elections was being introduced when we've been
8 having a series of these Wake Delegation meetings and it was
9 never raised at those meetings.

10 Q So it was a stark departure from your common practice to
11 have that bill introduced without discussing it amongst the
12 delegation first?

13 A Absolutely.

14 Q Do you know then what led to the General Assembly
15 considering a new method of election for the Wake County School
16 Board in 2013?

17 A I know what the stated justifications were and I know what
18 I believe the true reasons were.

19 Q What justifications were advanced by the bill proponent?

20 A The bill proponent gave a very brief statement and said
21 there are two reasons why he wanted to essentially unilaterally
22 change the school districts, because the School Board wasn't
23 for it, the Chamber of Commerce wasn't for it, there was no
24 group asking for this other than his initiative to bring it
25 forward. He said if we move it to even year elections we'll

1 have higher turnout, and the other reason was too many children
2 were attending schools outside the districts in which the
3 family resided and so parents didn't know which School Board
4 member to communicate with when they had an issue at their
5 child's school.

6 Q And what was your response to those justifications?

7 A I thought they were fairly weak. Well, the first
8 justification on moving to increase turnout, that has nothing
9 to do with redistricting, so if that was a true concern, that
10 could happen independent of changing the districts. Just as an
11 aside, that failed to appreciate the fact that when you move
12 School Board races to a Presidential or Congressional year,
13 it's going to dramatically increase the costs of running those
14 elections, but as it related to the school redistricting, the
15 irony is that the districts had just been redrawn two years
16 prior, in 2011, after the census, the districts were redrawn
17 and they were redrawn by the School Board, given that authority
18 by the General Assembly, and it was a Republican General
19 Assembly gave a Republican School Board the authority to redraw
20 the districts, they hired a Republican lawyer, a prominent
21 attorney, Mr. Kieran Shanahan, who at the time the bill was
22 being debated at that point was Secretary of Public Safety
23 under Governor McCrory, and they redrew the maps in a way to
24 try to protect the Republican incumbent majority on the School
25 Board.

1 Q And when you say "now," you're referring to --

2 A 2011.

3 Q Thank you.

4 A Yeah. Sorry for the confusion.

5 So in 2011 the maps had just been redrawn by
6 Republicans, approved by Republicans, for Republicans, and then
7 the elections in 2013 came about and the voters were unhappy
8 with the School Board, and even though the maps favored the
9 Republican incumbents, the voters chose a Democratic School
10 Board, and immediately thereafter these maps were introduced to
11 redistrict the School Board, and I think for fairly transparent
12 partisan purposes.

13 Q I am going to ask you a few more questions about what you
14 understand based on your experience were the real reasons, but
15 I want to talk a little bit more now about the process.

16 So did the Wake County Delegation actually have a
17 public hearing about House -- Senate Bill 325?

18 A It was a coincidence that we traditionally have a -- when
19 we meet as a delegation, we meet -- have a series of meetings
20 and then the last one generally is a meeting for the public, so
21 the public members of Wake County can come talk to their
22 members, and if they have ideas for local bills or concerns,
23 they can raise them. There had been two bills introduced about
24 the same time, I don't know exactly the dates, but one had to
25 do with the redistricting of the School Board and the other had

1 to do with abolishing the lease that the State had signed with
2 the City of Raleigh to transfer the Dorothea Dix property, and
3 the amount of public interest at that hearing was as intense, I
4 would wager more intense than any other public hearing that's
5 ever happened with the Wake Delegation and members of the
6 general public.

7 I chaired that meeting and there were easily
8 70 people who spoke to us. I would say that probably 50 of
9 those people, you know, about three-quarters of them, were
10 concerned about the Dorothea Dix park and the abolishment of
11 the lease; say 20, 15 or 20, dealt with the School Board; and
12 there was not a single person who spoke in favor of
13 redistricting the School Board again two years after it had
14 just been redistricted. Everyone was unanimous in that this
15 was contrary to the interests of the county.

16 Q Now, after that public hearing did you participate in the
17 floor debate on the bill when it first came to the Senate floor
18 on April 22nd?

19 A I did.

20 MS. EARLS: If I can have, please, Exhibit 3.

21 Q I'm pulling up on the screen in front of you what's
22 previously been marked as Exhibit 3. If you can go back to the
23 first page. I just want to show you the front page so you know
24 which transcript you're looking at and then ask you about a
25 statement.

1 A Okay. Very good.

2 Q So this is the transcript of the legislative debate on the
3 Senate floor on April 26, 2013, and if we go to page 4,
4 I believe --

5 A I think the transcriber got the bill number wrong on that
6 one, but it is the right transcript, from my review.

7 Q Thank you.

8 Now, on page 4, you talk about -- I believe this
9 is -- I'm sorry. Go to the next page, beginning at line 17.

10 A Yes.

11 Q It says: "I polled the current School Board members on
12 this question." Can you explain what you're referring to
13 there?

14 A Yeah. I had mentioned previously that the bill sponsor
15 offered two justifications for this legislation, one was to
16 increase voter turnout in even years elections, the other was
17 to alleviate confusion of parents whose children attend schools
18 outside the district in which they reside, which baffled me,
19 and so I polled all the School Board members, which at that
20 point was still I think a majority Republican School Board,
21 I don't know that the change had happened yet, I don't
22 remember, but eight of the nine replied to me, both Democrat
23 and Republican, and they were unanimous and said that if they
24 got an inquiry from a parent about a kid who attended a school
25 and they represented the school but not the parent, that they

1 would try to resolve whatever the concern was of that parent.
2 Conversely, if they represented the parent and the kid attended
3 a school outside the district in which they represented, they
4 would try to resolve the issue. What came to my conclusion was
5 that you were actually better served if you were a parent whose
6 kid attended a school outside your district because you
7 actually had two School Board members you could go to as
8 opposed to the one if you were both living in and your child
9 was attending a district -- a school within that same district.

10 Q And during the legislative consideration of this bill, did
11 you ever see any data or compilation of information about the
12 extent to which there's alignment or non-alignment for families
13 in Wake County Public Schools?

14 A No. There was no data in any way, shape or form given
15 to -- just to support the assertion that parents were confused
16 as to who they should go to when there was an issue, and when
17 you just look at the two maps, the likelihood -- first of all,
18 any time your kid goes from a middle -- elementary school to a
19 middle school to a high school, even if it's relatively close,
20 there's going to be a matter of miles around you, so the odds
21 are decent that while your elementary school and your high
22 school may be in your residential district, your middle school
23 may not be, it's a very common practice, but then the new map
24 that was proposed, there's no geographic rationalization to the
25 districts, so the odds, I would wager, if anyone did any

1 analysis and you overlaid it to the typical feeder patterns of
2 schools, it would substantially increase the number of
3 instances where a parent had that scenario where they would
4 have their kid outside their district.

5 Just a perfect downtown example is Daniels Middle
6 School and Broughton High School are in the same feeder
7 pattern, they were in the same district under the 2011 maps
8 drawn by the Republican County Commission under Mr. Shanahan,
9 but they were in different districts under the map that was
10 later enacted.

11 Q So in your -- in your opinion, it would be more likely
12 that the enacted plan would exacerbate the problem, make it
13 worse, rather than make it better?

14 MR. MARSHALL: Objection. Calls for speculation.

15 Q Well, based on what you know about school attendance
16 zones.

17 THE COURT: I'll allow it. I mean, if you know.

18 THE WITNESS: Yeah.

19 THE COURT: If you have an opinion.

20 A I do have an opinion, that to the extent it's a problem,
21 and my first belief is it's not a problem, but to the extent
22 it's a problem, the actual solution would worsen the problem it
23 was supposedly meant to address.

24 MS. EARLS: Can I advance to page 12?

25 Q I'm pulling up on the screen now just further along in the

1 same transcript that we've just been looking at. This is page
2 12, and if you look at the comments beginning at line 16, you
3 said: "This legislation is about a Republican majority in the
4 General Assembly inserting itself into local affairs in order
5 to exact partisan payback." What did you mean by that?

6 A The way it has worked traditionally with redistricting of
7 Local Government Boards, whether it's the School Board or the
8 County Commission, is that the legislature will delegate to
9 that Board the ability to redraw its own lines, and that's
10 exactly what happened in 2011, and as I described earlier, a
11 Republican legislature authorized a Republican School Board to
12 hire -- and by the way, Wake County was the only district,
13 school district in the state that hired a partisan lawyer to
14 redraw their maps in 2011, spent tens of thousands of dollars
15 doing that, and that map was enacted or was authorized and
16 approved.

17 The legislature did not like the outcome of the
18 elections that the people of Wake County chose for themselves
19 in terms of who would be their School Board members, and so
20 within a matter of months the legislature goes in, and only
21 five of us live in Wake County, by definition 45 Senators don't
22 live in Wake County, and so we have a legislature of people who
23 don't live here coming into our county and saying to the
24 representatives, you don't have the authority to redraw -- or
25 to use the maps that you previously approved and we are in fact

1 going to redraw them even though there was a declaration from
2 the School Board opposing this effort and -- because I think
3 that the stated justifications for the bill were fairly flimsy,
4 that the real reason was partisan objective, to try to get more
5 Republican members -- more Republicans elected to the School
6 Board. And I'm fine with people electing Republicans to the
7 School Board, I'm fine with people electing Democrats to the
8 School Board, but I don't think that the legislature should go
9 in and try to dictate outcomes for the people of Wake County.

10 Q Now, do you recall speaking on the floor of the Senate
11 again when the bill came back to the Senate?

12 A I do.

13 MS. EARLS: Your Honor, may I approach?

14 THE COURT: You may.

15 Q I've handed you what's been marked as Exhibit 481, and can
16 you identify that for us?

17 A I can. What's in front of me appears to be the transcript
18 of when the bill came back for concurrence to the Senate.

19 Q And that is -- beginning on page 2, that's a record of
20 your statements at that time on the floor?

21 A That's correct.

22 Q And this -- I don't know that the pages are numbered, but
23 it's the third page, if you count the cover as page 1, if you
24 look at the third page, beginning at line 8, you said: "This
25 bill is nothing more than a political effort to rejigger the

1 districts to favor Republican candidates for the School Board."

2 So you said then what you've just testified to?

3 A Correct.

4 Q Let me turn now to the events leading to the law that
5 established the same districting plan for the Wake County Board
6 of County Commissioners in 2015. When did you learn about that
7 bill?

8 A Similarly, I learned about that bill an hour or two before
9 it was introduced and then referred to the redistricting
10 committee.

11 Q And what events, to your knowledge, precipitated the
12 introduction of that bill in 2015?

13 A The elections of 2014. Wake County had a majority
14 Republican County Commission at the time of redistricting, and
15 again, the legislature had already granted to the County the
16 ability to redistrict, which it had done, the Republicans had a
17 majority through the elections of 2014, and at that time the
18 voters exercised their will, and as is their custom in
19 Wake County, over a 20 year period there was a back and forth
20 between Republicans and Democrats, Republicans had a majority
21 12 years, Democrats had a majority eight years, this is what
22 happens a lot of times, people get into power and then they do
23 things that the voters are unhappy with and they put the other
24 side in power, that's fairly standard in a democracy, and my
25 view was the legislature was unhappy with the will as expressed

1 by the voters of Wake County and decided to reconstitute the
2 districts for the County Commission in order to try to dictate
3 the outcome.

4 Q And just to be clear about the process, were you consulted
5 by any of the bill sponsors prior to Senate Bill 181 being
6 introduced in 2015?

7 A Precisely as to what we did -- I was not the Chair of the
8 Wake County Delegation at this point, it was Senator Barringer
9 and I think Representative Gill, again, bipartisan/bicameral.
10 We had had a series of meetings in which we discussed every
11 local bill that anyone had any idea for, and it could have come
12 from the City, could have come from the County Commission,
13 could have come from a citizen, from a hospital, whichever was
14 the source, whatever was the source, and throughout all of
15 those meetings this proposal was never discussed, never brought
16 to the Delegation for consideration and certainly wasn't
17 unanimous, which is the custom.

18 Q Did you participate in the Senate floor debate on Senate
19 Bill 181 in March of 2015?

20 A I did.

21 Q And I'll just bring up Exhibit 10, please.

22 Have you recently had an opportunity to review that
23 transcript?

24 A I have.

25 Q Which is Exhibit 10, for the record.

1 Are the statements that you made on that occasion
2 accurate?

3 A They are.

4 Q Now, you offered an amendment at that time; is that right?

5 A I did.

6 Q And what would your amendment have accomplished?

7 A The amendment addressed the issue of, I thought, the
8 impropriety of 45 Senators who do not live in Wake County
9 deciding the outcome of how Wake County constitutes its local
10 government. So the amendment would have taken whatever bill
11 the legislature passed and simply put it to a referendum for
12 the people of Wake County to ratify, that if this was truly in
13 the interests of the people of Wake County, that the
14 legislature somehow knew better than Wake County residents what
15 was the best solution for them, then the people could ratify
16 it.

17 Q And did that amendment pass?

18 A It was killed. It did not pass.

19 Q Now, were there any different asserted justifications for
20 Senate Bill 181 to change the County Commission to the single
21 member districts?

22 A There were. There were various justifications made both
23 in the press and on the floor. One was that -- initially said
24 you'll be able to vote for more members of the County
25 Commission, which was actually factually incorrect. The way

1 the County Commission is elected is obviously different -- or
2 is different than the School Board. County Commission, you
3 reside in a district but everyone was elected at-large, and
4 what this bill did was to make people -- make members elected
5 by district and then there would be these two super districts,
6 one essentially Democratic, urban, heavily minority, and then
7 the other exurban, more rural, or the perimeter of the county,
8 and under the current -- under the previous model everybody got
9 to vote for every County Commissioner; under this, one would
10 only be able to vote for two County Commissioners, the one who
11 lived in their district, residential district, and the one who
12 was in their super district; and so seven being more than two,
13 I didn't think that was a weighty argument.

14 They argued that it would reduce the costs of
15 elections because you would only be running in your district
16 rather than countywide, and there is something intuitive to
17 that except for there's not a direct correlation. The average
18 cost of the County Commission elections I think in 2014 were
19 less than 100,000, approximately 100,000, I think, it's in my
20 testimony, and then meanwhile Senator Barefoot, who only
21 represents a fifth of the county, less than a fifth of the
22 county, spent 1.2 million in his election. And so just the
23 fact that there are fewer people doesn't necessarily correlate
24 to cost.

25 There was an argument that it would ensure

1 representation for people on the perimeter of the county, that
2 somehow the sense was that the County Commission was too
3 Raleigh-focused, and that was untenable in that there are
4 14 municipalities in Wake County. The only way to ensure that
5 somebody comes from each of those municipalities is to have a
6 district that sits exclusively on those -- on those
7 municipalities, and there's the one district, if I may point to
8 the map --

9 MS. EARLS: Yeah, Your Honor, may I approach?

10 A I think it's District 1, the green one. Yeah, it is
11 District 1.

12 You look at District 1 and what -- Senator Barefoot
13 is from Eastern Wake County, and the candidate on the County
14 Commission who is from Eastern Wake County lost, and so he was
15 upset that there was no longer a person from Eastern
16 Wake County on the County Commission, but if you look at
17 District 1, which is Eastern Wake County, there are more people
18 who live over by Brier Creek than there are in Eastern North
19 Carolina -- I mean Eastern Wake County, so it's entirely
20 possible that the people from Knightdale will now be
21 represented by somebody who lives by the airport, so it did not
22 even achieve necessarily his stated outcome, and of course
23 Brier Creek is in Raleigh, and if you look at that map there's
24 actually -- eight of the nine districts have Raleigh somewhere
25 in the district, so theoretically you could have eight of the

1 nine County Commissioners hail from Raleigh, which again was
2 the supposed stated justification.

3 Then there was talk about, well, at-large gives
4 everybody an ability to be able to have somebody who has a
5 broader notion, but these districts -- these super districts
6 are not at-large, in fact they are clearly partisan drawn, the
7 two -- what I call the doughnut and the doughnut munchkin,
8 they're very partisan, and so whereas with an at-large
9 election, if you had two districts that were at-large, you
10 would truly -- it would go with whatever the will of the county
11 was. Are the Democrats going too far in one way? We'll elect
12 Republicans. If the Republicans are going too far in one way,
13 we'll elect Democrats. This assures that you always have one
14 Republican and one Democrat, and it makes the mentality of
15 those elected representatives be concerned about appealing to
16 their Republican or their Democrat base, and so I thought it
17 didn't achieve the ends that they said it would as it related
18 to at-large.

19 Q So in your experience through the legislative process, the
20 justifications offered for the bill as regards the method of
21 electing the Wake County Board of County Commissioners were
22 pretextual justifications?

23 A That is correct.

24 MS. EARLS: I have no further questions.

25 THE COURT: Thank you. Cross-examination?

1 MR. MARSHALL: Senator, thanks for being here today.
2 Thanks for your service. I don't have any questions.

3 THE COURT: Thank you, Senator. Please watch your
4 step. There's a step up as you come off and there's a step
5 back through the gate.

6 Plaintiffs may call their next witness.

7 MS. RIGGS: Your Honor, plaintiffs call Wake County
8 Commissioner James West.

9 THE COURT: Mr. West, there's a step up as you come
10 through there. Please watch your step.

11 THE CLERK: Please place your left-hand on the bible
12 and raise your right hand and state your name for the record.

13 THE WITNESS: James West.

14 THE CLERK: Do you swear that the testimony you're to
15 give the Court in this case shall be the truth, the whole truth
16 and nothing but the truth, so help you God?

17 THE WITNESS: I do.

18 THE CLERK: Thank you. You may have a seat in the
19 witness stand and please watch your step.

20 THE COURT: Good morning. Good morning,
21 Commissioner. Ms. Riggs is going to have some questions for
22 you, then I think Mr. Marshall will. If the lawyer who is not
23 asking you questions objects to the other lawyer's question,
24 don't say anything until I rule. Please try and keep your
25 voice up so we can all hear your testimony. Feel free to

1 adjust that microphone.

2 You may examine the witness.

3 MS. RIGGS: Thank you, Your Honor.

4 - - - - -

5 DIRECT EXAMINATION

6 BY MS. RIGGS:

7 Q Good morning, sir. Could you introduce yourself to the
8 Court and tell us a little bit about your background.

9 A Yes. I'm James West, and I grew up on a farm and worked
10 with the Cooperative Extension Service, I worked my way up to
11 be the Director of County Operations for the State of
12 North Carolina and worked out of NC State University, took an
13 early retirement opportunity, got involved in a lot of
14 consulting related to bringing about change and helping people
15 to improve the quality of their lives, and then I was talked
16 into running for the Raleigh City Council. I served on the
17 Raleigh City Council -- well, I was elected six consecutive
18 terms but then I had an opportunity to move to the Board of
19 Commissioners.

20 While on the Raleigh City Council, eight of those
21 terms -- six of those terms I served as Mayor pro tem with
22 Mayor Charles Meeker, whereas we did a lot of work in terms of
23 revitalizing downtown; and since I have been on the Board of
24 Commissioners, 2010, I'm currently serving as Chair and was
25 reelected as Chair, and I guess basically I'm working on my

1 soul, and my main goal is to help to improve the quality of
2 life of all of our citizens, especially those that are left
3 behind. We have over 120,000 people in Wake County at or below
4 the poverty level. I think I should just stop right there.

5 Q When was the last time you were elected to the Wake County
6 Board of Commissioners?

7 A That was -- time flies when you're having fun. I guess
8 that was in 2012.

9 Q Sir, I want to ask you a few questions first about a bill
10 called Senate Bill 325 that went through the General Assembly
11 in 2013 with respect to the School Board, Wake County School
12 Board. Are you familiar with this bill?

13 A Yeah, I'm familiar with that bill. Yes.

14 Q Okay. And did you understand one of the motivations for
15 the bill to be that the County Commission at the time asked for
16 the School Board to be redistricted?

17 A Am I familiar? Yes.

18 Q Yes. Okay. Can you tell us a little bit about that.

19 A It's been a little water over the dam, and it was very
20 interesting dialogue. As I recall, there were three goals,
21 legislative goals, one related to construction, one related to
22 buying land for charter schools, and this particular bill that
23 you just mentioned, and --

24 Q If I put up a list of those, would that help --

25 A Yeah, that would help me.

1 Q All right. If you look at the computer screen in front of
2 you, we've put up Exhibit 52.

3 A That was item -- legislation -- no, it was legislation to
4 elect a majority School Board member on an at-large basis.
5 Yes. That kind of gets me back on that little piece of
6 history.

7 Yes. What I can remember was this, there was a lot
8 of talk about School Board members being, I guess, elected as
9 single member districts and that more people should be able to
10 vote and that we should have some at-large positions on the
11 School Board, and I think it was like maybe five at-large and
12 four would be in districts, because everybody in the county
13 didn't have any input into the School Board elections and a
14 majority on the Board said that was very important, that
15 everybody should be able to vote for a majority or at least
16 some portion of those being elected to -- for some
17 accountability purposes, and so that was presented to I think
18 the legislative goals meeting at the State Association of
19 County Commissioners and went through the General Assembly, and
20 I understand that after it got to the General Assembly it was
21 changed back to this configuration that we have now, and I see
22 that really as a contradiction, that the goal at that time was
23 stating that we needed more at-large because we needed an
24 opportunity for everybody to be able to vote for at least half
25 of them, and now the bill that has come through moved us from a

1 very effective system to a system now where that -- we can only
2 vote, I guess, for single member districts of just -- for a
3 much more limited number of individuals that would be -- now
4 each voter in the county can vote for all seven of us, and now
5 they can only vote for two, so there's a contradiction, there's
6 a paradox, it just simply does not make sense from a good
7 governance point of view.

8 Q I just want to ask you a few follow-up questions.

9 This document that is in front of you is marked
10 Draft, but the local legislative goal number 3 that you
11 discussed, does that accurately reflect what was the
12 legislative goal of the County Commission in 2013?

13 A Yes, that was, and it reflects in the minutes as well,
14 yeah, the minutes following that, yes.

15 Q Excellent. And so ultimately what -- did the County
16 Commission get what it asked for from the General Assembly with
17 respect to the School Board?

18 A No, they did not, and I think -- well, maybe I shouldn't
19 say it that way. I think there was a little -- not from my
20 perspective, I voted against it, but I think it was a little
21 perplexing to those that asked for it on the Board.

22 Q Sir, are you familiar with a bill called Senate Bill 181
23 that was enacted by the General Assembly earlier this year?

24 A Too familiar.

25 Q Can you tell us about the procedure, from your

1 perspective, the procedure for debate and passage of Senate
2 Bill 181.

3 A Well, the process is the thing that I felt was very, very
4 bad. You know, my philosophy is this, that -- well, actually
5 Deming stated that 80 percent of the problem is in the process
6 and 20 percent of the problem is in the people, and the first
7 thing we do, we go and we attack people. It was top down, it
8 is myopic, it's very narrow in scope, it does not look at the
9 big picture related to a need for us to be very competitive.
10 Wake County is a very competitive county in terms of economic
11 development, growth, 63 people coming in every day, and I feel
12 that it's really because that we have the big picture piece, we
13 have the district residency piece which gives us, I think,
14 connection to our district but everybody is able to vote for
15 every commissioner at this particular time.

16 So I guess I simply don't think that it's good
17 government. It should be government of the people by the
18 people for the people. I believe in citizen politics, where
19 that the citizens should be on top and the experts should be on
20 tap, it should not be a hierarchical democracy, it should be a
21 knowledge democracy that's fluid and open, and this bill does
22 not help to achieve that, and I'm just of the opinion that
23 consciously or subconsciously or unconsciously that it was not
24 vetted properly.

25 We begged and pleaded for the opportunity to set up a

1 citizen advisory committee. We actually set up a committee
2 consisting of business people, community leaders, the Wake
3 Delegation, and did a resolution, people were excited about
4 discussing the pros and cons of the question of actually how we
5 should be governed and how we should be elected, but they said
6 no.

7 I spoke to one of my dear friends, Mayor Frank
8 Eagles, a day or two afterward and he set up a meeting where we
9 met with Senator Barefoot. We actually met for three hours.
10 We had a good conversation, very civil, very respectful, but we
11 did not get anywhere, and I just feel strongly that if the
12 process had been set up in a way where it had been engaging,
13 involving our citizen, empowering in a Democratic way, that we
14 possibly could have come up with some combination thereof.
15 As I said, I worked on the Raleigh City Council, we had five
16 at-large and three -- no, three at-large and five districts,
17 including the Mayor, and so I had experience with both and I
18 consider myself pretty well-grounded in process. My training
19 has been in process improvement and organizational development
20 and things of that sort.

21 Q So I think it's obvious, but just to clarify, did the
22 Wake County Board of County Commissioners ask the legislature
23 for Senate Bill 181?

24 A No, we did not ask. It was kind of a shock. It was
25 really fast tracked. I was over at Triangle J meeting with

1 chairs and vice chairs for the county and the region, and I got
2 a call from the manager, said please get down to the General
3 Assembly, you have 45 minutes to get there, and it was really
4 I think a Greensboro bill that was -- one was supposed to be,
5 but ours took precedent, and so, no, we had no input
6 whatsoever.

7 I believe in localism and that the mere fact that
8 most counties -- and I'll give you those statistics in maybe
9 another question -- most counties in the state, they make the
10 decision related to their governance. I know the General
11 Assembly has all power, all power is in their hand, and so it
12 was just -- it was just kind of surreal the way it happened,
13 because I always try to develop extremely good relationships
14 and work with everyone, you know, it ain't about partisan
15 politics, it's about helping people.

16 My data says that if you look at at-large, whether
17 it's district at-large or whether you're looking at pure
18 at-large, there are about 61 counties in that category, where
19 everybody votes for all of the candidates, and then I think
20 there's a total of about 81 where that there's some combination
21 of districts and at-large, so it doesn't fit the norm, it's
22 totally against the norm. I think it's very unprecedented.
23 I think we were singled out for some reason or another, and I'm
24 not going to impugn any blame on anybody, because they say if
25 you point one finger, you get three fingers pointed right back

1 at you.

2 Q You mentioned meeting with Mayor Eagles and Senator
3 Barefoot. What were the justifications advanced for Senate
4 Bill 181?

5 A Well, I'm a very professional person, so I try to say
6 things in the right way and hope that, you know, in terms of
7 more important view, you know, that what I say will not be
8 perceived as being partisan in any way, but the essence of the
9 conversation, we just dialogued for about three hours about the
10 pros and con, I shared my points of view, he shared his points
11 of view, but kind of the bottom line to me is that Eastern
12 Wake County was not being represented.

13 I know eastern Wake County. I know Franklin County.
14 Actually I'm on the Board of Trustees of Louisburg College,
15 Louisburg College Board of Trustees, and actually Senator
16 Barefoot just joined that Board so we're very cordial, we
17 talked and it is what it is, but it was really about
18 representation and that is not warranted. You know, if we'd
19 have had the opportunity to have some true dialogue and involve
20 the citizens, maybe had a referendum, the citizen committee on
21 representation, I think we'd come out with a much much better
22 product, and I can give you some examples, but maybe you -- you
23 may want to go ahead and ask a question.

24 Q Yeah. It's --

25 A -- of why I feel, some empiric data and evidence.

1 We make a real strong effort to reach everyone in the
2 county.

3 Q Well, let me ask you about that. Can you tell us a little
4 bit about how the County Commission functions and how it serves
5 residents in Eastern Wake County?

6 A Yes. We're very sensitive because it is a large county,
7 but I think that's one of the strengths, that we have these
8 districts and the fact that it creates, I guess, opportunities
9 for diversity, to bring people together, and I believe
10 incentives, where they say that the whole can be greater than
11 the sum of its parts, so we look at the sum of the parts and we
12 try to make it even greater and higher and better than what it
13 is. So what we try to do is to make sure that we look at the
14 whole county in detail, we have a plan, we have goals that we
15 set to bring the whole county together, even on the transit
16 piece, that we are working to make sure that the areas out on
17 the rim outside of the county would have parity in the process.

18 But two or three specific examples, many of our
19 farmers out in the rural Wake County -- and I believe in
20 farming because I grew up on a farm, that's one of my values,
21 I was with the Ag Extension Service for a number of years, and
22 so what we do -- it's the only instance where we have a special
23 Board of Commissioners meeting with minutes and everything, and
24 that's with our farmers and our Farm Bureau, and we just had
25 just recently Farm City Week down in the Fuquay area, which is

1 south, and had a number of Commissioners there. We have a
2 program out at the fairground where in fact all the
3 Commissioners were there kicking off Farm City Week, kicking
4 off the expo at the fair, and then there's a bigger legislative
5 meeting where General Assembly members, Congress people,
6 et cetera, we have a big breakfast.

7 We also have intentionally set up three regional
8 centers, one at Wake Forest, kind of northeast; one at Zebulon,
9 which is probably one of the areas where there are more
10 challenges, in Zebulon we just set up a pilot project to
11 address and reduce poverty; and then one in Fuquay.

12 We have a number of other initiatives, so
13 for instance when we had the issue of NC FAST, dealing with
14 food stamps, Medicaid, we set up listening tours and went out
15 in the county and all the Commissioners attended, particularly
16 one in the Wendell area. So we are very conscious of making
17 sure that we try to involve everyone and try to pull people
18 together on our Boards and Commissions, we attempt to do the
19 same kind of thing, and Human Services, as I said, we have the
20 same kind of services at these regional centers and we engage
21 folks from all across the county in a way to make sure that we
22 can not only be competitive and deal with many of the big
23 picture items, but also to get everyone's input.

24 I am not going to sit here and say there are not more
25 challenges down east, but we know that we have the Eastern Wake

1 Educational Partnership, wherein -- working with local
2 community leaders, and the County has put some pretty big
3 dollars into that to make sure that we are dealing with the
4 disparities in Eastern Wake County.

5 Q Thank you, Commissioner.

6 MS. RIGGS: Shannon, can you put up Exhibit 257,
7 please.

8 Q Commissioner West, do you recognize this map?

9 A Um-hum.

10 Q This is the Board of Education districts, but it's the
11 same shape for the County Commission super districts, and I
12 want to ask you, do these districts help Eastern Wake County
13 achieve better representation in any way?

14 A I personally don't think so, but I think there's a bigger
15 picture item here back at this whole issue of fragmentation,
16 silos, et cetera. I think it's more divisive than it is in
17 terms of bringing people together, and my whole philosophy in
18 terms of everything I've worked for is to bring people together
19 around shared values, working toward a common interest. I
20 think that's the greatness of our society, is the mere fact
21 that we can bring people together with diverse points of view.

22 Q And, Commissioner West, do you know of anyone who has
23 registered -- filed to run in District B?

24 A I think -- I don't follow that. I don't even know whether
25 anyone has filed against me. My philosophy is not to worry

1 about who is running against you, just focus on yourself.

2 I think -- it was in the paper. I think former Commissioner
3 Phil Matthews.

4 Q Okay. Now, sir, I'd like to talk about District 4.

5 MS. RIGGS: And, Shannon, can you pull up
6 Exhibit 258?

7 Q But, sir, the map of the single member districts is up
8 there in front of you and it's going to be on the computer
9 screen in front of you.

10 Sir, are you aware that one of the justifications for
11 Senate Bill 181 is that at-large elections submerge or dilute
12 the voting strength of black voters and makes it harder for
13 black voters to elect their candidates of choice?

14 MR. MARSHALL: Objection.

15 THE COURT: Well, just establish a foundation.

16 BY MS. RIGGS:

17 Q Did you hear any justifications during the legislative
18 process or are you aware of any justifications advanced for
19 drawing a majority black district in this plan?

20 MR. MARSHALL: Objection.

21 A I don't --

22 THE COURT: Do you understand the question?

23 THE WITNESS: Repeat it one more time. Yes.

24 Thank you, Judge.

25

1 BY MS. RIGGS:

2 Q Are you aware of any justifications advanced for Senate
3 Bill 181 District 4 as it related to the ability of black
4 voters to elect a candidate of their choice?

5 A Well, I got an opinion.

6 THE COURT: But just -- but I think it's about are
7 you aware from some source, not your opinion about the district
8 or your opinion in general about things but just aware of that.

9 A Yeah, I'm aware of it. Yes, I'm aware of it.

10 Q Okay. And in your -- what -- do you recall what that
11 justification was?

12 A Well, the justification is shallow, from my point of view.
13 It's basically a guarantee that you have one black elected by
14 putting more people in a district than needed, but that works
15 against the whole concept that there is a greater opportunity
16 to have more minority or people of color elected, and I think
17 it also affects the people themselves that we serve in terms of
18 their common interests and, back to the maps themselves,
19 I think it erodes the whole concept of sense of community,
20 which, you know, that's what I try to do every day is pull
21 people together to work together.

22 So I feel it's to some degree insulting. I think it
23 sends a message of not respecting black voters. I think it
24 also diminishes the idea of self-worth. I think that that
25 particular solution is somewhat disparaging to some degree, and

1 it just kind of sends a message to me that there is some
2 manipulation or misunderstanding in order to -- I guess I might
3 say to limit opportunities for blacks who may have been in
4 other areas to really have even a greater influence in terms of
5 their interests by putting way more than needed into just one
6 district.

7 Q And, Commissioner West, are you aware of -- or have black
8 candidates experienced significant success being elected
9 countywide in Wake County?

10 A Everything is relative. I would say definitely yes.

11 On our Board since 1990 there have been four times
12 where we have had two black candidates elected to the Board,
13 and I would have to go back -- and I think that's definitely
14 moving in the right direction and it was at-large and
15 everybody -- so it's not necessary to have a district overly
16 stacked or whatever the terminology, you know, in order to get
17 elected.

18 So, yes, I am -- I'm aware of that and I think that
19 it's a plus, I think it's a direction that we should be going,
20 and having served on the Raleigh City Council, which is a
21 fantastic council, we did a whole lot of things, they still do
22 a whole lot of things, I was a district representative in a
23 district that had a whole lot of challenges, still have some
24 challenges, but a lot of great people, and in that case going
25 back in history there's only been one African American that has

1 been elected and served out of eight.

2 Q And to clarify, you said a plus or going in the right
3 direction, does that mean having at-large elections where there
4 were two African American candidates on the Board?

5 A Oh, yeah, to me that is definitely a success, yeah. Yeah,
6 that is truly a success, I mean, if you look at the population
7 makeup and so forth and so on, but it also verifies or
8 validates the point that you don't have to have a district with
9 more people than you need. Actually one of my good friends,
10 former deacon Vernon Malone, I like to invoke his name every
11 now and then, he said to me one time, I'd rather have a
12 district that has about 40 percent and spread it out a little
13 bit and give some opportunities for some other candidates that
14 might serve the interests of blacks, you know, and even maybe a
15 black candidate.

16 But my Raleigh City Council point is the fact that,
17 you know, three at-large and five in district, there has been
18 one member, you know, in the history, there may have been steps
19 going back twenty-some years ago, but -- so the point is that
20 we do run at-large and we have a much better track record,
21 should suggest that it is working, and if it ain't broke don't
22 fix it, and it's not a solution, you're just looking for a
23 problem, and I don't think that people fixing things for you
24 without your involvement helps you to be empowered and to grow.

25 MS. RIGGS: Thank you. No further questions.

1 THE COURT: Thank you. Cross-examination.

2 MR. MARSHALL: Thank you.

3 - - - - -

4 CROSS-EXAMINATION

5 BY MR. MARSHALL:

6 Q Mr. West, I just want to clarify something I might have
7 heard you say during one of the questions.

8 Did you say you had heard a justification for Senate
9 Bill 181 to elect an African American member?

10 A No. If I said that, I did not mean that, but the results
11 and the data clearly shows that -- I mean, it's almost
12 guaranteed. I mean, it's just kind of like, you know, just --
13 if you file, because of the numbers, yes.

14 MR. MARSHALL: All right. No further questions.
15 Thank you.

16 THE COURT: Thank you.

17 MS. RIGGS: No redirect.

18 THE COURT: Thank you, Commissioner. Please watch
19 your step. There's a step up as you come off and a step down
20 through the gate.

21 Plaintiffs may call their next witness.

22 MS. EARLS: Your Honor, the plaintiffs call Dr. Jowei
23 Chen.

24 And, Your Honor, may I approach to move the --

25 THE COURT: Yes, you may.

1 MS. EARLS: Thank you, Your Honor.

2 THE CLERK: Place your left hand on the bible, raise
3 your right, and state your name for the record.

4 THE WITNESS: Jowei Chen.

5 THE CLERK: Do you swear that the testimony you're
6 about to give the Court shall be the truth, the whole truth and
7 nothing but the truth, so help you god?

8 THE WITNESS: Yes, ma'am, I do.

9 THE CLERK: Thank you. You may have a seat in the
10 witness stand, and please watch your step.

11 THE COURT: Good morning, Dr. Chen.

12 THE WITNESS: Good morning, sir.

13 THE COURT: Ms. Earls -- I think Ms. Earls is going
14 to have some questions for you, either Ms. Earls or Ms. Riggs,
15 and Mr. Tynan I think is going to have some questions for you.
16 If the lawyer who is not asking you questions objects to the
17 other lawyer's question, please don't say anything until I rule
18 on the objection. Please try and keep your voice up. That
19 microphone will adjust.

20 You may examine the witness.

21 MS. EARLS: Your Honor, may I have permission to
22 approach and provide the witness with this exhibit?

23 THE COURT: You may.

24 - - - - -

DIRECT EXAMINATION

BY MS. EARLS:

Q Would you state your name for the record, please.

A Jowei Chen.

Q And what is your educational background?

A I have a Bachelor's degree in ethics, politics and economics from Yale University in 2004, I have a Master's of Science in statistics from Stanford University in 2007, and finally I have a Ph.D. in political science from Stanford University in 2009.

Q And how are you employed?

A I am an Associate Professor at the University of Michigan in Ann Arbor in the Department of Political Science.

Q Do you have any other academic positions at this time?

A Yes, I do. I am a faculty associate at the Center for Political Studies at the Institute for Social Research at the University of Michigan, I am a research associate at the Social Science Spatial Laboratory at Stanford University, and I'm principal investigator at Willamette University at the Center for Governance and Public Policy Research.

Q And in your academic work what is your area of specialty?

A My academic areas of expertise are political geography and redistricting.

Q I'd like to show you what's been marked as Exhibit 465, and that should appear on the screen in front of you. Is that

1 a copy of your CV?

2 A Yes, it is.

3 Q And on the first page there you list some publications.
4 Since the date of that CV, August 2015, have there been any
5 additional publications that you've authored?

6 A Since this August 2015 CV I have since published one
7 additional paper, it was a peer-reviewed article in Election
8 Law Journal on partisan gerrymandering and it appears in
9 Election Law Journal, it's called "Cutting Through the
10 Thicket."

11 Q And what is the general subject matter of that article?

12 A What I do in that article, the Election Law Journal
13 article, is I develop and I illustrate a method for detecting
14 and measuring partisan gerrymandering in state legislative
15 districts, and I apply this method in the State of Florida,
16 apply it to the Congressional districts in Florida, I
17 illustrate the method and I describe its statistical qualities
18 and I show the sort of statistical certainty with which we can
19 determine the extent of partisan gerrymandering in a
20 districting plan.

21 Q And the method and conclusions that you draw in that
22 article appeared in a peer-reviewed journal?

23 A That is correct, Election Law Journal is a peer-reviewed
24 journal.

25 Q And is that roughly the same method that you used in

1 analyzing the districts in this case?

2 A It is essentially the same method that I've applied here
3 in Wake County, yes.

4 Q If you could look at the fourth page, which I have pulled
5 up on the screen of that exhibit, 465, and there you list under
6 the heading Review Service a number of academic journals. Can
7 you explain what you mean by Review Service?

8 A Reviewer Service is part of the peer review process by
9 which we publish articles in academia in any field. Reviewer
10 Service means that the -- it just means that the editors of all
11 of these journals have chosen me, have asked me to serve as a
12 reviewer for manuscripts that were submitted to their journals.
13 What that means is that they send me the manuscript, I read it,
14 I review it and I write up a review of it in which I advise
15 these editors on, one, whether they should publish the articles
16 that have been submitted, the manuscripts that have been
17 submitted to the journal, or, two, what sorts of changes ought
18 to be made before publication. So in essence I'm advising the
19 editors on whether they should publish certain manuscripts in
20 their journals.

21 Q Now, have you served as -- or have you prepared expert
22 reports in cases other than this case?

23 A Yes, I have.

24 Q I'm going to show you now the first page of Exhibit 15 and
25 just ask you if the second paragraph of -- is Exhibit 15 your

1 expert report prepared in this case?

2 A Yes, it is.

3 Q And does the second paragraph there identify the other
4 cases in which you've prepared expert reports?

5 A Yes, it does.

6 MS. EARLS: Your Honor, I tender Dr. Chen as an
7 expert in political geography and redistricting.

8 THE COURT: Mr. Tynan, do you want to be heard?

9 MR. TYNAN: No, Your Honor.

10 THE COURT: All right. I'll accept him and you may
11 continue.

12 MS. EARLS: Thank you, Your Honor.

13 BY MS. EARLS:

14 Q Now, Dr. Chen, what were you asked to do in this case?

15 A I was asked to review the districting -- the seven
16 district plan as well as the two super district plan enacted
17 for Wake County for 2016, that was enacted by Senate Bills 325
18 and 181.

19 Q And more specifically I'm going to show you page 2 from
20 Exhibit 15, your expert report, and just ask you to explain to
21 the Court what you were asked to analyze with regard to that
22 redistricting plan.

23 A I was asked to analyze two questions. First I was asked
24 to look at whether I could determine a motivation for the
25 deviations from population equality exhibited in the two

1 districting plans, and second I was asked to determine whether
2 I could identify a predominant factor in the drawing of
3 District 4 in the seven district plan.

4 Q And after you completed your analysis, were you able to
5 draw conclusions regarding those two questions?

6 A Yes, I was.

7 Q And I'm going to show you now an excerpt from page 10 of
8 Exhibit 15, your report, and ask you to summarize what
9 conclusion you drew about the first question regarding the A
10 and B super districts.

11 A Regarding the two super district plan, I was able to
12 determine that, first, that there was a noticeable deviation
13 from population equality in the population levels of these two
14 districts, and I was then able to determine that these
15 population deviations appear to have been motivated by an
16 effort to achieve a particular partisan outcome in the
17 underpopulated district, which is the district labeled B.

18 Q And then from page 13 of Exhibit 15, also your report, can
19 you tell us what conclusion you drew with regard to the seven
20 member district plan?

21 A I determined there was a substantial level of deviation
22 from population equality across the seven district plan; and
23 second I was able to determine that these deviations from a
24 stricter level of population equality appear to have been
25 motivated by an effort to achieve a rather unusual level of

1 Republican partisan control over four of the districts out of
2 that seven district plan.

3 Q And then looking at page 18 from your report, Exhibit 15,
4 what conclusion did you draw with regard to the second question
5 you were asked to analyze?

6 A I reached the conclusion that with very high statistical
7 certainty it was clear that the racial packing of African
8 American voters in District 4 was the predominant factor in the
9 drawing of District 4 of that seven district plan. I also
10 determined -- I analyzed and was able to determine with very
11 high statistical certainty that any possible partisan goal was
12 not the predominant factor, that the predominant factor was
13 racial packing.

14 Q So I want to turn now to how you analyzed the
15 redistricting plans to come to these conclusions, and I want to
16 start by asking you just to describe -- just asking you to
17 describe for the Court your general -- the general method you
18 followed to perform your analysis.

19 A For each of these two districting plans I analyzed the
20 enacted plan, the seven district plan and the two super
21 district plan, with respect to, among other things, population
22 equality levels as well as the partisanship of the districts in
23 these plans. I then conducted a large number of simulations,
24 500 simulations of seven district plans as well as 500 computer
25 simulations of two super district plans. And finally I

1 compared the enacted plan against all of these simulated plans.

2 Q And can you describe what you mean by computer generated
3 simulated plans.

4 A I developed and applied a computer algorithm that draws
5 computer districting plans, that has a computer draw, simulate
6 districting plans by following traditional redistricting
7 criteria.

8 Q And in drawing the computer generated simulated plans in
9 this case, what redistricting criteria did you follow?

10 A I followed four traditional redistricting criteria, these
11 are criteria that are normally applied in redistricting in any
12 number of areas across a large number of states. So those four
13 criteria are, first, population equality; second, the holding
14 of municipal -- of incorporated municipalities intact; holding
15 precinct boundaries intact; and then finally maximizing the
16 geographic compactness of the individual districts.

17 Q And these are the criteria you identify on pages 3 and 6
18 of Exhibit 15, your report?

19 A That is correct.

20 Q Now, when you talk about geographic compactness, just to
21 be clear, is that the same concept that Tony Fairfax was
22 testifying about yesterday?

23 A It is.

24 Q Now, would it help you to illustrate the process that you
25 used to use what I've put on the screen now, which is

1 Plaintiffs' Exhibit 463?

2 A Sure. So the way the simulation process works is, as I
3 just mentioned, we're going to hold existing precinct
4 boundaries intact, and so I began by taking the geographic
5 boundaries of the 200 precincts that comprise Wake County, and
6 so that's what this exhibit illustrates, the boundaries of
7 these 200 precincts. The next step --

8 Q I'm sorry. Just to be clear, the red lines on this map,
9 the outer line is the county boundary of Wake County and the
10 red lines are the precincts?

11 A That is correct. So the red lines indicate the individual
12 precinct boundaries, and of course you can see the contour of
13 Wake County as a whole.

14 So the next step is then I look at municipal
15 boundaries and I merge precincts to the extent that is
16 necessary in order to protect municipal boundaries, to the
17 extent that that's feasible, and I found that there are eight
18 municipalities, eight incorporated municipalities which are
19 shown here on this exhibit, eight municipalities that can
20 feasibly be held fixed in districting, and so I merged
21 precincts to the extent necessary to protect those eight
22 municipal boundaries.

23 What I do at that point is then to look at -- to look
24 at districting plans in which I am going to divide Wake County
25 into two districts, so --

1 Q So just to be clear, you're explaining now the process
2 that you followed when you were having the computer simulate
3 the two district plan?

4 A Correct. So I'll first just explain this very simple case
5 of how I have a computer draw two district -- simulated two
6 district plans or two super district plans, and then I'll later
7 explain how we do the more complicated case of seven district
8 plans.

9 Q Thank you.

10 A So for two district plans, after holding -- after starting
11 with those precinct boundaries and holding municipal boundaries
12 intact, then we divide all of Wake County into two equally
13 populated halves. We haven't yet gotten to the issue of
14 compactness, but this simply divides Wake County in this step
15 here into two equally populated halves.

16 What we finally want to do next is to maximize
17 compactness to the extent that we can, and the way the
18 algorithm takes this step is by randomly selecting precincts
19 that straddle the border of the two districts that were
20 previously created. So the computer randomly picks precincts
21 that are along this border and asks two questions, if we switch
22 this precinct, if we reassign the precinct from one district to
23 the other, will we increase compactness, will we improve
24 geographic compactness of the plan as a whole; and second, if
25 we make that switch are we going to preserve population

1 equality within plus or minus 1 percent. And if we can
2 maintain population equality to that level while improving
3 compactness then the computer will make that switch.

4 Q So on the map that's on the screen now, which is step 4 of
5 this process, what does the blue shade -- the dark blue shading
6 indicate.

7 A The dark blue precinct that's been selected there is just
8 one example of the computer having randomly selected one of the
9 precincts along the border and doing the same analysis of would
10 it improve compactness if we switched it from one district to
11 another. So that's just an example of how the computer
12 iteratively hundreds and hundreds of times makes this sort of
13 random selection and possible switching.

14 Q Then --

15 A And so the computer does that hundreds of times, and then
16 this is an example of a completed simulated two district plan
17 that emerges from this process.

18 So that's the basic process that the computer goes
19 through in order to simulate hundreds of two district plans,
20 and so those are the simulations that I just referred to, and
21 so what I can do now is to describe the process by which I
22 simulated seven district plans as well.

23 MS. EARLS: Your Honor, this might be a good point to
24 break, or I can keep going.

25 THE COURT: Do you want a break?

1 MS. EARLS: No, it's your preference.

2 THE COURT: Let's go to 10:30.

3 MS. EARLS: Thank you, Your Honor.

4 BY MS. EARLS:

5 Q So let's describe how you simulate a seven district plan.

6 A Okay. So for a seven district plan it's essentially the
7 same process but it's going to be a little bit trickier because
8 we are dividing all of Wake County into seven districts instead
9 of just two. So the first step is going to be a little bit
10 more complicated here. We're going to divide -- what the
11 computer does is it first divides all of Wake County into two
12 portions, two regions, one of them is going to be a 3/4ths
13 region containing -- I'm sorry, a 3/7th region containing
14 3/7ths of Wake County's total population, and the other region
15 is a 4/7ths regions containing 4/7ths of Wake County's total
16 population.

17 What I do next is to take these two regions and
18 subdivide them further so now that 4/7ths region becomes
19 divided into a 2/7ths and another 2/7ths region; and of course
20 the other 3/7ths region now becomes divided into a 1/7th and a
21 2/7ths region; and then the next step is to take those
22 subregions and subdivide them even further until we finally end
23 up with seven regions, all equally populated, containing 1/7th
24 of the county's population. So at that point I've now divided
25 all of Wake County -- the computer has divided all of

1 Wake County into seven equally populated regions.

2 The next step is to take those seven 1/7th regions
3 and to improve compactness, and so it's exactly the same
4 process as I just described previously, the computer randomly
5 selects precincts along the borders of two districts and asks
6 whether switching that precinct from one district to the other
7 would improve compactness while maintaining the same level of
8 population equality, and again the computer does that hundreds
9 and hundreds of times in order to improve compactness, and so
10 that finally leads us --

11 Q And so on the map that's on the screen right now the
12 darker shaded precinct is an example of one that might have
13 been switched to improve compactness?

14 A That's correct, that black shaded precinct is just an
15 example of the computer having selected randomly one of the
16 precincts along the border of that orange and that red
17 district, and as you can just see visually, switching that
18 black precinct from the orange to the -- from that upper left
19 orange to the lower right red district would improve
20 compactness by a tiny amount, and so the computer probably
21 would have made that switch, assuming that population equality
22 was not violated. So that's just an example of the hundreds of
23 iterations the computer goes through in order to improve
24 compactness of these districts.

25 So that results in this exhibit, which is just an

1 example of one of the 500 seven district plans that my computer
2 drew, and so that's the outcome of this process, is 500 plans
3 drawn using that process.

4 Q Okay. Now, I'm showing you what is marked as Figure 1
5 from your expert report, Exhibit 15, and can you tell us what
6 this shows?

7 A There are two maps here in this figure, and these are
8 seven district maps. The map on the left was the enacted map
9 for 2016, the legislature's enacted seven district map. The
10 map on the right is just an example of one of the 500 computer
11 simulated seven district plans that my computer drew and that I
12 analyzed in this report.

13 Q And from a political geography point of view, what does
14 this comparison signify for you?

15 A The most striking thing about comparing these two maps is
16 the differing levels of geographic compactness. You can see
17 that the districts on the simulated map are visually very
18 compact, and I measured that compactness using a couple of
19 different -- a couple of different quantitative measurements of
20 compactness, but you can just visually see how compact the
21 districts are in relation to most of the districts of the
22 legislature's enacted seven district plan on the left, so
23 clearly the computer simulated process is producing much more
24 geographically compact districts.

25 Q And again, this is a computer simulated process that's

1 complying with the four traditional redistricting criteria we
2 outlined earlier?

3 A That is correct, all of these computer simulated
4 districting plans are drawn by following those four criteria
5 that I outlined.

6 Q And what does Figure 2 from Exhibit 15 of your report
7 show?

8 A It's an analogous comparison for computer simulated and
9 enacted two super district plans. So on the left, that's just
10 a map of the legislature's enacted two super district plan, and
11 you can see the A and the B districts, with A in the middle of
12 the county and B as the doughnut district surrounding A;
13 and then the map on the right is an example of one of the
14 500 computer simulated two district plans. And again, we see
15 the same patterns here, where the computer simulated process is
16 drawing much more geographically compact districts and is
17 drawing them in a manner consistent with and following the four
18 traditional districting criteria I outlined earlier.

19 Q Now, I want to turn to Figure 3 from your expert report,
20 Exhibit 15, and ask you to explain to the Court what this
21 figure illustrates.

22 A This figure describes the 500 computer simulated plans
23 that my computer conducted of two super district plans.

24 Q So basically this is a representation of the results of
25 your simulation exercise?

1 A It is. It is a representation of the results and analysis
2 of the simulations and a comparison of those results to the
3 legislature's enacted two super districts A and B.

4 Q So what are the green and blue dots on the left-hand side?

5 A The green and blue dots on the left side of this figure
6 represent individual districts drawn in these 500 computer
7 simulated plans, and what I've depicted for each of these
8 500 plans is along the horizontal axis -- I've illustrated
9 along the horizontal axis, along the bottom there, the
10 population deviation of each of these computer simulated
11 districting plans, and again, of course, they are very highly
12 equally populated, so that deviation is always going to be very
13 low.

14 Along the vertical axis, along the left there, what
15 that depicts is the partisanship of every one of the simulated
16 districts. So I measured the partisanship using 2014 County
17 Commissioner races and aggregating the Republican candidates'
18 vote shares together, and so I've analyzed the partisanship of
19 these simulated districting plans.

20 Q I'm sorry. What's the significance in the difference
21 between the blue and the green dots?

22 A For every district, for every districting plan, for every
23 one of the 500 districting plans that I drew, obviously there
24 are two districts within each of these districting plans, and
25 so these two districts are going to be depicted by a green

1 circle and a blue triangle. The green circle simply represents
2 the more Republican of the districts, of the two districts, and
3 the blue triangle represents the less Republican or the more
4 Democratic of the two districts. So what these simulation
5 results show you is that in every districting plan, every
6 district, every one of the simulated districts is going to have
7 a partisanship ranging from about 41 percent to a little over
8 48 percent, the less Republican of these districts is always
9 going to be from about 41 to 44 percent Republican and the more
10 Republican one is always going to be around 45 to 48 percent
11 Republican.

12 Q And then what are the red dots on this?

13 A The red dots are the legislature's enacted districts A and
14 B, and so what these -- what these points show us is that,
15 first of all, the legislature's A and B plan, the legislature's
16 two super district plan is an extreme outlier in terms of
17 population equality, but more importantly we're able to analyze
18 the motivations for that deviation from population equality,
19 and what these results show us with very high statistical
20 confidence is that the deviations from population equality
21 appear to have been motivated by an effort to achieve a very
22 statistically unusual partisan outcome in the drawing of the A
23 and B districts.

24 Q And what do the two charts on Figure 4 show? How are they
25 different from the one in Figure 3?

1 A The two charts in Figure 4 show exactly the same thing but
2 they use a slightly different measure of partisanship just to
3 show the statistical robustness of the results. So the one on
4 the left uses 2012 rather than 2014 County Commissioner
5 election race results and the figure on the right simply uses
6 2012 preferential vote share, the election between Barack Obama
7 and Mitt Romney, but the results show exactly the same thing as
8 we showed before, which is that the population deviations in
9 the legislature's A and B super district plan appears to have
10 been motivated by an effort to achieve statistically unusual
11 partisan outcome, and this unusual partisan outcome is one that
12 allowed the legislature to draw one Republican leaning
13 district, that's District B, and one very Democratic leaning
14 district, District A. That's a very statistically unusual
15 outcome when we look at the distribution of the 500 simulated
16 plans, all of which are always producing districts between
17 about 40 to about 48 percent Republican vote share using all of
18 these measures.

19 THE COURT: Why don't we take our mid-morning break
20 for 15 minutes. We'll be in recess until 10:45.

21 - - - - -

22 (Recess at 10:28 a.m. until 10:45 a.m.)

23 - - - - -

24 THE COURT: You may continue the direct examination
25 of the Doctor.

1 MS. EARLS: Thank you, Your Honor.

2 BY MS. EARLS:

3 Q Before the break, Dr. Chen, we were looking at Figures 3
4 and 4 from your report and you explained that whether you
5 looked at 2014 County Commission election data, 2012 County
6 Commission election data or 2012 Presidential data, the results
7 of your simulations were the same, right?

8 A That's correct.

9 Q And the results mean that if you wanted to draw a -- in
10 the super districts, if you wanted --

11 MR. TYNAN: Objection.

12 MS. EARLS: Can I get my question --

13 THE COURT: Yeah, let her get the question out.

14 BY MS. EARLS:

15 Q If you wanted to draw a district that was higher than
16 48 percent Republican or lower than 39 percent Republican, you
17 would have to increase the deviation to 5 percent?

18 MR. TYNAN: Objection.

19 THE COURT: What's the basis of the objection?

20 MR. TYNAN: Leading.

21 MS. EARLS: Your Honor, I was just trying to
22 summarize to get us back on track. I can restate.

23 THE COURT: Yeah, just restate it.

24 BY MS. EARLS:

25 Q Can you look at Figures -- looking at Figures 3 and 4,

1 what do those results mean?

2 A Sure. I'll describe the way that I interpret what all of
3 these results show us, regardless of which election -- which
4 election we use.

5 What I see from these results here is that the
6 partisanship of the legislature's enacted A and B districts are
7 completely outside of and extremely far outside of the range of
8 partisanship of districts created by all 500 of the
9 simulations, and what that leads me to conclude is that I can
10 say with extremely high statistical certainty, beyond any sort
11 of doubt here, beyond any sort of statistical doubt, I can
12 conclude that the only way to draw districts as extreme in
13 partisanship as the legislature's B and A districts is to use
14 population deviations that are far outside of what I had
15 allowed for in my simulations, and in fact the deviations that
16 were necessary in order to achieve the partisan outcomes here
17 were approximately on the order of over 10 times as large as
18 the population deviations that I allowed for in the
19 simulations.

20 Q And I just want to ask you a brief question about the
21 choice of election data that you -- that is appropriate to use.

22 You were here yesterday when questions were raised
23 regarding the use of 2004 and 2008 partisan data. Is there a
24 reason why that is not an appropriate data set to be using to
25 examine partisanship?

1 A I used the 2012 County Commissioner elections as well as
2 the 2012 Presidential elections just because they're the most
3 recent elections that were available, along of course with the
4 2014 County Commissioner elections, so that's why I chose to
5 use the 2012 and 2014 elections.

6 Now, the other -- even though I did not use the 2008
7 Presidential election results -- again, I used the 2012
8 Presidential results here to analyze these simulations and the
9 enacted districting plans. Even though I didn't use the 2008
10 election, Presidential election results, I know from my own
11 research, both in North Carolina as well as in other states,
12 that there is an extremely high statistical correlation between
13 2008 and 2012 Presidential elections. In other words, even
14 though the outcomes of the Obama/Romney election are different
15 than the outcomes of the Obama/McCain election, at the precinct
16 level they're very highly statistically correlated.

17 Q I'd like to show you what's been marked as -- I'm bringing
18 it up on the screen -- Exhibit 253. Do you know what I mean
19 when I refer to a Stat Pack?

20 A Yes, I do.

21 Q And did you have an opportunity to examine Exhibit 253,
22 which is the Stat Pack for the enacted bill in this case?

23 A Yes, I did.

24 Q Did the General Assembly when it was considering Senate
25 Bill 181, did it have -- in 2015, did it have the 2012 -- did

1 they have the 2012 Presidential election data?

2 A They did not because the Stat Pack only provides results
3 from elections 2010 and earlier, so of course 2004 and 2008
4 would have been included; however, of course, 2012 results were
5 not.

6 Q So now let's look at the results of your analysis for the
7 seven district plan.

8 I'm showing you Figure 5 from Exhibit 15, your
9 report. Can you tell us what this figure illustrates.

10 A This figure describes the 500 computer simulation results,
11 this time though looking at seven district plans. So before
12 the break we had looked at the results and the analysis from
13 two district plans, now we're looking at the seven district
14 plans, both the enacted as well as the simulated plans, and
15 it's a very similar figure but it looks at the results in a
16 slightly different way here.

17 Along the horizontal axis, once again we're looking
18 at population deviation, the overall population deviation of
19 each districting -- of each seven district plan, both the
20 legislature's enacted seven district plan as well as the
21 500 computer simulated plans. Along the vertical axis there
22 along the left though, what that's telling us is the number of
23 Republican leaning districts in each of these districting
24 plans, and I'm measuring Republican leaning districts by
25 looking at 2014 County Commissioner elections, so I'm

1 aggregating the four contested elections in the County
2 Commissioner election races and identifying how many of these
3 districts overall had more Republican support, more Republican
4 votes than Democratic votes, and so that's what I'm measuring
5 here.

6 Q And so what does -- what do the blue dots, for example,
7 across from 3 on the vertical axis, what do those mean?

8 A Each of the blue circles is one of the 500 computer
9 simulations, and so you can see that all of these blue circles
10 are either at 3, 2 or 1. What that indicates is that for all
11 of the 500 computer simulation plans, the simulations result in
12 a seven district plan that creates most of the time two
13 Republican leaning districts. Occasionally it results in one
14 Republican leaning district out of seven, and very rarely, very
15 occasionally, it results in three. Never does the computer
16 simulations ever produce a districting plan that creates four
17 or more Republican leaning districts. That's what makes the
18 legislature's enacted plan, which does create four Republican
19 leaning districts using this measure, so statistically
20 extraordinary, so much of a statistical outlier.

21 Q And so then what do the results of your simulations as
22 indicated in this figure, what do those results mean?

23 A What they allow me to conclude is with extremely high
24 statistical confidence we can say that the only way to achieve
25 a districting plan that allowed for such an extreme partisan

1 Republican control over four districts out of seven, the only
2 way to create such an extreme partisan plan was to deviate from
3 population equality to a great extent.

4 Q And what does Figure 6 from your report show?

5 A These show us exactly the same thing except that I'm using
6 in these figures the 2012 Presidential election as a measure of
7 partisanship and the 2012 County Commissioner election races as
8 a measure of partisanship, but using those two other elections,
9 just to show robustness, I'm measuring partisanship in exactly
10 the same way and I'm finding essentially the same statistical
11 results. Once again, looking at these figures we can see with
12 extremely high statistical confidence that the only way to
13 create as extreme of a partisan plan as we saw in the
14 legislature's enacted seven district plan, which using any of
15 these measures is a four Republican seat plan, the only way to
16 create such a partisan outcome is to deviate from population
17 equality.

18 Q Now, returning to the two questions that you were asked to
19 analyze, I want to turn now to the second question, and again
20 tell the Court what was the second issue that you were asked to
21 analyze in this case?

22 A The second issue I was asked to analyze is a fundamentally
23 different sort of question than what I had analyzed --
24 everything before now. The second question I was asked to
25 analyze was to look at a district, to look at District 4, and

1 to determine whether I could identify a predominant factor that
2 drove the drawing of District 4.

3 Q And were you able to do that?

4 A I was able to do that.

5 Q Looking at Figure 7, what does that illustrate?

6 A This figure is a map of District 4 in the legislature's
7 enacted seven district plan, so this is the enacted District 4,
8 and the map in the background -- so the red lines are the
9 geographic boundaries of District 4 and no other districts.
10 In the background what you see shaded in gray scale from white
11 to black, that indicates to us the proportion African American
12 population at the census block level of census blocks in the
13 greater Raleigh area.

14 Q And what does the -- from a political science point of
15 view, what's the significance of the shading in District 4
16 here?

17 A What we can see here from this map, if you trace the
18 contours of the red boundaries, of the boundaries of
19 District 4, especially in the Southeast Raleigh area, as you
20 can see just how closely the district boundaries of District 4
21 follow along radiants of African American population. In other
22 words, it clearly in many areas around the Southeast Raleigh
23 region follows right along the areas where more heavily African
24 American neighborhoods transition into less African American
25 neighborhoods. In other words, it clearly falls along racial

1 boundaries.

2 Q And District -- this District 4 is one of seven districts
3 in the seven single member district plan, right?

4 A That is correct.

5 Q Yesterday I asked Tony Fairfax if it would -- if you would
6 be more likely to draw a majority black district if you were
7 drawing nine single member districts instead of seven, and I'd
8 like to take you through a demonstrative exhibit to see if I
9 can illustrate that point.

10 MS. EARLS: Your Honor, may I approach the witness?

11 THE COURT: You may.

12 BY MS. EARLS:

13 Q I've handed you what's been marked for illustrative
14 purposes only as Exhibit 482, and what I want to ask you is
15 assume a hypothetical jurisdiction of 100,000 people. If
16 you're drawing two single member districts in that jurisdiction
17 am I right each district would have 50,000 people?

18 A That's correct.

19 Q And then the math tells you that you would need 25,000
20 people out of that 100,000 to get a majority minority district?

21 A That's correct.

22 Q And then doing the same exercise for if you had four
23 districts, four, seven or nine, each time you new fewer African
24 Americans to have a majority in a single member district?

25 A That's correct.

1 Q And so looking back at this map here, the fairly
2 geographically compact African American population of Southeast
3 Raleigh, is it possible that it would be easier to draw a
4 geographically compact district in that part of Raleigh if
5 instead of for the seven member districts you needed 7,000
6 people but for a nine member district you only need 5,500
7 people, that you would be more likely to have that occur in
8 Southeast Raleigh if you're drawing more districts?

9 A That's exactly right. The basic math here is that when we
10 increase the number of districts, the total population of each
11 district becomes smaller and therefore the amount of clustered
12 African American population that you need to comprise a
13 majority African American district also becomes smaller.
14 In essence that means that it's easier to draw a majority
15 African American district when we have a larger number of
16 districts.

17 Q And is it easier to draw that district following other
18 traditional redistricting criteria at the same time, that is to
19 make it more compact, to not split precincts, to follow
20 subdivision boundaries?

21 A That's exactly right. It would be easier in the sense
22 that we would need to -- it would not require extreme
23 violations of traditional districting criteria in order to
24 achieve such African American level populations.

25 Q And if you were drawing one of 11 State House districts,

1 it would be even easier?

2 A That is correct.

3 Q Now, in terms of your analysis of District 4, what is
4 depicted in Figure 8 from Exhibit 50 in your report?

5 A This figure again shows us the 500 simulations, but this
6 time what each of the blue circles represents is the following:
7 For each of the 500 simulations of seven district plans I have
8 gone in and identified the one district that has the largest
9 African American population and I have depicted that district
10 here. Of course that district is almost always going to
11 include the Southeast Raleigh area. So what I'm essentially
12 comparing here are simulated districts in the Southeast Raleigh
13 area, and that of course is going to be compared against the
14 legislature's enacted District Number 4, and what I am
15 depicting here along the horizontal axis, along the bottom
16 here, is the African American share of the total population in
17 each of these districts in Southeast Raleigh.

18 Q And for this analysis you're using the exact same
19 500 computer simulated plans as in the previous analysis?

20 A Exactly. These are drawn from the 500 simulations in
21 which I drew seven district plans.

22 Q And you're applying the same four traditional
23 redistricting criteria?

24 A Exactly.

25 Q Then what does -- and what's the red dot on this?

1 A The red dot represents the legislature's enacted District
2 Number 4, which it's equivalent, the most heavily African
3 American district in its plan, which of course also includes
4 Southeast Raleigh.

5 Q And so what do the results as depicted here tell you?

6 A The most striking result from this analysis is that the
7 legislature's enacted District Number 4 is clearly an extreme
8 statistical outlier in terms of racial composition of African
9 American proportion of the district's population. It contains
10 approximately 54.3 percent African American share of the total
11 population. That is statistically outside of the entire
12 distribution, the entire set of 500 districting plans that my
13 computer simulated. In other words, we can conclude with
14 extreme statistical certainty that the legislature's enacted
15 District Number 4 was drawn in a way that was motivated by
16 racial packing of African Americans.

17 Q And looking at Figure 9, what does that illustrate?

18 A Figure 9 here is simply a subset of the 500 simulated
19 plans that we just saw in the previous figure. Specifically,
20 it contains those districts, again, the Southeast Raleigh
21 districts, it is just a subset of the 60 districts that have a
22 partisanship very nearly identical to the legislature's enacted
23 District 4, which has a partisanship of a little bit over
24 19 percent Republican vote share. So this is just the 60 plans
25 where that Southeast Raleigh district has nearly an identical

1 partisanship to the legislature's enacted District 4.

2 The reason I did this analysis is to try and
3 determine whether or not partisan gerrymandering could possibly
4 explain and account for the legislature's drawing of District
5 Number 4.

6 Q And what did you conclude based on the results of this
7 analysis?

8 A I concluded that partisanship does not explain the drawing
9 of District Number 4. The reason I see that is because I can
10 see that these are 60 districting plans versus 60 districts in
11 Southeast Raleigh simulated using traditional districting
12 criteria that achieve a partisanship nearly identical to the
13 legislature's District Number 4. Not a single one of these
14 60 districts ever achieves as extreme of a racial packing of
15 African Americans as the legislature's District Number 4.

16 In other words, what this allows me to conclude with
17 very high statistical certainty is that the legislature's
18 drawing of District Number 4 was clearly motivated by racial
19 packing of African Americans and not by any partisan intention.
20 If the legislature had wanted to simply draw a district with
21 the same partisanship of District 4 but was not motivated by
22 race, such a process would have resulted in a district in
23 Southeast Raleigh that would have ranged from approximately
24 40 percent to 53 percent African American population, but
25 that's not what the legislature did. What the legislature drew

1 instead was a districting plan that was entirely outside of
2 that range and above that range at 54.3 percent African
3 American population. That allows me to conclude with extreme
4 statistical certainty that the legislature's drawing of
5 District Number 4 was motivated by a racial packing of African
6 Americans, not by any partisan intent alone.

7 Q Can you explain how this conclusion is consistent with the
8 conclusion you drew with regard to the first question of your
9 analysis, and by that I mean how is it consistent to say that
10 District 4 was motivated by a desire to pack on the basis of
11 race but that the deviations in the overall plan were motivated
12 by a partisan interest?

13 A That first part of my analysis was a completely separate
14 question entirely. That first part of the analysis is simply
15 asking what the motivations were for the deviations from
16 population equality. That is a question asking me to analyze
17 the districting plan as a whole, the legislature's districting
18 plan as a whole, because population equality and deviations
19 from population equality are a feature of districting plans as
20 a whole. Just to provide a very simple example, in the two
21 super district plan if you overpopulate District A then you
22 necessarily have to underpopulate District B and vice versa.
23 So that's analyzing a quality of the districting plan as a
24 whole.

25 What I was asked to do in the second question, with

1 respect to the second question, is to simply analyze the
2 motivations that predominated the drawing of one single
3 district in isolation, District Number 4, and so that's what I
4 did separately in the second part of the analysis.

5 Q So then based on your analysis in this case, do you have
6 an opinion about what explains the 7.11 and 9.8 deviations in
7 the seven district and two district enacted plans?

8 A Yes, I do. I concluded with very high statistical
9 certainty that those population deviations in the seven
10 district plan and the two district -- and the two district plan
11 were motivated by an effort to create a partisan outcome across
12 partisan control of those districts that was not achievable
13 without those extreme population deviations.

14 Q And in your opinion, could the General Assembly have
15 enacted -- could the General Assembly have achieved exactly the
16 same partisan result in District 4 in the seven district plan
17 without using race to the same extent?

18 A Yes, absolutely, and the reason I know that is because the
19 simulations demonstrated 60 examples of doing such a process,
20 and I found that when the simulations achieve a similar
21 partisan outcome to the legislature's District 4, that involved
22 drawing a Southeast Raleigh district that was never as extreme
23 as District Number 4 in terms of the racial packing of African
24 American population.

25 MS. EARLS: Thank you. Those are my questions.

1 THE COURT: Thank you. Cross-examination.

2 MR. TYNAN: Good morning, Dr. Chen.

3 THE WITNESS: Good morning, sir.

4 - - - - -

5 CROSS-EXAMINATION

6 BY MR. TYNAN:

7 Q Your algorithm used a 1 percent population deviation
8 threshold for the numbered districts; is that right?

9 A I'm sorry. Excuse me. I didn't hear the first part of
10 your question, if you could just --

11 Q Your algorithm used a 1 percent population deviation
12 threshold for the numbered districts; is that right?

13 A That is correct, yes, sir.

14 Q And that means the maximum population deviation possible
15 for any of your simulated seven district plans was 2 percent;
16 is that right?

17 A Yes, sir.

18 Q And your algorithm used a 0.3 percent population deviation
19 threshold for the lettered districts; is that right?

20 A I actually used exactly the same 1 percent deviation. It
21 resulted in all of the districting plans having a very low
22 level of deviation though.

23 Q So you used a 1 percent population deviation limit for the
24 super district plan?

25 A I did, but what I was explaining is that it still resulted

1 in -- it resulted in very tightly equally populated districts
2 at that -- I think 0.3 is roughly right.

3 Q And so the maximum population deviation possible for any
4 of the simulated two district plans would have been 2 percent;
5 is that right?

6 A Exactly.

7 Q And your algorithm didn't take partisanship into account
8 in drawing districts; is that right?

9 A Exactly. Correct.

10 Q And your algorithm keeps municipalities intact; is that
11 right?

12 A Correct. Eight municipalities.

13 Q And it doesn't split a single precinct; is that right?

14 A That is correct.

15 Q And it maximized compactness; is that right?

16 A That is correct.

17 Q So your algorithm shows what districting plans could look
18 like if you ignore partisan concerns, hold deviations to less
19 than 2 percent, keep all municipalities intact, keep all
20 precincts intact and maximize compactness; is that right?

21 A That's one of the most important things that the analysis
22 allows me to look at, yes.

23 Q And you refer to these criteria as traditional districting
24 criteria; is that right?

25 A That's correct.

1 Q But 1 percent population deviation is not a traditional
2 districting criterion, is it?

3 A Absolutely it is.

4 THE COURT: Where? Where?

5 THE WITNESS: How did I -- how did I come to the
6 1 percent threshold?

7 THE COURT: No. You testified you worked in a number
8 of -- is there a state that has enacted that in a Constitution?
9 I mean, do you know?

10 THE WITNESS: It's the threshold that I've used in my
11 analysis of districting plans in other states like Florida, in
12 addition --

13 THE COURT: I know, but that's different -- that's a
14 different question of what you're saying your analysis is as
15 opposed to your saying it is a traditional districting
16 principle if the premise is in state law, and I would be
17 interested to know if you're aware of one of the 50 states that
18 requires no more than 1 percent deviation.

19 THE WITNESS: Yeah, I can't answer that question
20 legally. I can just tell you what the practice has been when
21 I've analyzed plans in other states, and the reason I use the
22 1 percent threshold here, the plus or minus 1 percent threshold
23 here, is that I analyzed the nine district plan that the School
24 Board had previously and I analyzed the population levels of
25 the districts in that nine district plan, I observed that that

1 threshold was plus or minus 1 percent, and so I applied that
2 same threshold when simulating plans here.

3 THE COURT: Go ahead, Mr. Tynan.

4 BY MR. TYNAN:

5 Q So you stated that you don't know of any states that have
6 a 1 percent deviation limit enacted in the law; is that
7 correct?

8 A It's -- I just wouldn't be an expert in telling you the
9 laws of the other states.

10 Q It's population equality that is the traditional
11 districting criterion, right, population equality, not
12 1 percent population deviation; isn't that right?

13 A I don't see a distinction between the two because
14 requiring population equality requires me to choose a
15 threshold, and so that's what I've done here.

16 Q So 1 percent is just something you came up with?

17 A No, again, the reason I chose 1 percent is that I analyzed
18 the plan that was in place for the School Board previously, the
19 nine district plan, I observed that it was within a plus or
20 minus 1 percent threshold, and I decided to follow that same
21 principle in simulating plans.

22 Q And maximizing compactness is not a traditional
23 districting criterion, is it?

24 A Absolutely it is.

25 Q Isn't it just compactness that matters, not maximum

1 compactness?

2 A Again, compactness has to be measured somehow in order for
3 us to verify that we followed it, and so what I do as an expert
4 is I come up with and apply quantitative ways of determining
5 whether or not a districting plan is compact, and that has to
6 be quantified somehow, it has to be objectively measured, and
7 so that's what I've done here in implementing compactness
8 through an algorithm.

9 Q Is there a legal requirement that compactness needs to be
10 maximized?

11 A Again, I can't answer that question for you legally.

12 Q Your report says you used four traditional districting
13 criteria. Are there more than four possible traditional
14 districting criteria?

15 A You know, there are different ways of understanding these
16 basic criteria and they're applied differently in different
17 jurisdictions, but these are the four basic -- these capture
18 the four main ideas that we think of when we think of
19 traditional districting principles.

20 Q Are these the only four traditional districting criteria
21 that have been recognized by the courts?

22 A I'm not a legal expert. I can't tell you that. What I
23 can tell you is that these are -- you know, these traditional
24 districting criteria would be expressed in slightly different
25 ways in different jurisdictions, but these are the four basic

1 ideas.

2 Q Is incumbent protection a traditional districting
3 criterion?

4 A Not to my understanding.

5 Q Dr. Chen, you concluded that your algorithm couldn't
6 produce the same partisan outcomes as the enacted districts; is
7 that right?

8 A That's correct, in both the seven district and the two
9 super district plans.

10 Q But you didn't test whether you could have produced the
11 same partisan outcomes as the enacted districts if you allowed
12 a population deviation of 1.5 percent, did you?

13 A If I allowed the simulations to reach a 1.5 percent
14 deviation threshold?

15 Q You didn't test that, did you?

16 A I just want to make sure I'm understanding your question
17 correctly.

18 Q I'll rephrase the question.

19 A Okay.

20 Q You didn't look at whether you could have produced the
21 enacted districts' partisan outcomes if you had allowed a
22 3 percent maximum population deviation among the districts; is
23 that right?

24 A A 3 percent total population deviation?

25 Q Correct.

1 A I didn't test that specific threshold, but let me just try
2 and help you to understand the process that I went through.
3 Any time I conduct computer simulations I conduct them using a
4 very wide range of population deviation thresholds in order
5 just to look at the robustness of those results before I decide
6 on a final set of simulations that I'm going to report on, and
7 I would have always tried all kinds of thresholds, up to
8 20 percent, 15 percent, 10 percent, that would be very much
9 within my normal research process.

10 Q That's what you normally do?

11 A Again, yes, I would normally try a wide range of different
12 thresholds. So I can't answer for you if I specifically tried
13 3 percent, but that certainly would have been well within the
14 range of thresholds that I would experiment with just to look
15 at the robustness of the results before even beginning my final
16 reports.

17 Q Dr. Chen, I asked if you used a 3 percent population
18 deviation, if you looked at that, and your answer was no. Are
19 you saying that you did try a 3 percent population deviation?

20 A Again, what my answer is is that I try a range of
21 thresholds, I can't remember whether 3 percent is specifically
22 one of those, but certainly 10 percent, 5 percent, 1 percent,
23 0.5 percent, those are all within the normal sort of range of
24 thresholds that I would experiment with.

25 Q Did you do that in this case?

1 A Yes, absolutely.

2 Q But it's not in your report, is it?

3 A No, because that's not central to my analysis here. It's
4 not central to the questions I'm asked to answer.

5 Q So you don't know whether your algorithm could have
6 produced the enacted plan's partisan outcomes with larger
7 population deviations, do you?

8 A Sorry. If I could just ask you to repeat, a little bit
9 slower.

10 Q Sure. You don't know whether your algorithm could have
11 produced the enacted plan's partisan outcomes using greater
12 population deviations, do you?

13 A Again, I absolutely do know because I analyzed a wide
14 range of population thresholds and what I can say is that using
15 any reasonable population threshold I can conclude with
16 statistical certainty that the only way to achieve the partisan
17 outcomes achieved by the districting plans enacted by the
18 legislature is to deviate from population equality.

19 Q Where is that in your report?

20 A The essential analysis is in the figures depicting the
21 500 simulations, and the question I'm being asked to address is
22 to explain what motivated the population deviations, and the
23 way to do that is by starting with a baseline of districting
24 plans that do not deviate from population equality, and that's
25 what I did, so that's why I ended up analyzing the districting

1 plans that adhere to population equality.

2 Q Dr. Chen, you didn't test whether you could have produced
3 the partisan outcomes achieved in the enacted plans by allowing
4 one or more municipalities to be divided, did you?

5 A I'm sorry. Could you just repeat that a little bit
6 slower?

7 Q You didn't test whether you could have produced the
8 partisan outcomes of the enacted plans by allowing divided
9 municipalities, did you?

10 A I wasn't interested in intentionally dividing
11 municipalities, so no.

12 Q And you didn't test whether you could have produced the
13 enacted plan's partisan outcomes by allowing one or more
14 precincts to be split, did you?

15 A I wasn't interested in intentionally splitting precincts,
16 so no.

17 Q And you didn't test whether you could have produced these
18 outcomes by allowing less compact districts, did you?

19 A I wasn't interested in intentionally producing noncompact
20 districts, so no.

21 Q So your algorithm doesn't take partisanship into account,
22 that's right?

23 A The drawing of the districts does not intentionally take
24 partisanship into account. I take partisanship into account in
25 the last figure that I described in which I'm looking at

1 districts that are very similar in partisanship to District
2 Number 4.

3 Q So a legislator who wants to achieve a partisan advantage
4 in a redistricting process would not use your simulated
5 districts; is that right?

6 A I can't tell you whether a legislator would use this
7 particular process or not.

8 Q Dr. Chen, I want to take another look at Figure 4 from
9 your report.

10 A Sure.

11 Q So we just talked about -- I just asked you about whether
12 your report considers population deviations greater than
13 1 percent, and -- sorry. Let me start over.

14 You stated that, in talking about Figure 4, that the
15 enacted plans which are shown on these -- in these charts
16 appear to be outliers compared to the simulated districts; is
17 that right?

18 A That's correct.

19 Q And I've just circled two areas. Can you see those?

20 A Yes, sir.

21 Q And is that the area where you would find simulated
22 districting plans that had population deviations greater than
23 1 percent?

24 A Those areas would certainly include simulated districting
25 plans with population deviation greater than 1 percent if I

1 conducted and reported on such simulations.

2 Q Dr. Chen, haven't you used a 5 percent population
3 deviation limit in an expert report where you examined possible
4 partisan gerrymandering in Florida Congressional districts?

5 A I can't remember the exact threshold, but that sounds
6 reasonable.

7 Q You used a 5 percent threshold?

8 A Again, I can't remember the exact number, and there are
9 multiple reports in that case, but it sounds reasonable.

10 Q Would it help if I gave you a copy of that report to
11 refresh your memory?

12 A Yeah. Sure.

13 MR. TYNAN: May I approach, Your Honor?

14 THE COURT: You may.

15 BY MR. TYNAN:

16 Q Dr. Chen, do you recognize the document I just gave you?

17 A Yes, sir.

18 Q What is it?

19 A It's an expert report I filed in Florida, a Florida case.

20 Q Would you please turn to page 8.

21 A Yes, sir.

22 Q And doesn't -- have you had a chance to read page 8?

23 A Oh, you want me to read the page?

24 Q Yeah, to refresh your recollection.

25 A Sure. Just give me a minute.

1 Okay.

2 Q And does page 8 describe the algorithm, the population
3 deviation limit you used in the Florida redistricting case?

4 A Yes, it describes one of the -- one of the algorithms that
5 I followed -- that I used in one of the reports.

6 Q And does it state you used a population deviation of
7 5 percent?

8 A It does.

9 Q Dr. Chen, when you wanted to look for whether partisan
10 motivation or racial motivation predominated in the drawing of
11 enacted District 4, you used the same simulated districting
12 plans we've already discussed; is that right?

13 A Could you repeat the question?

14 Q When you were looking at whether partisan motivation or
15 racial motivation predominated in the drawing of enacted
16 District 4, you used the same simulated districting plans we
17 have already discussed; is that right?

18 A That is correct.

19 Q You did not modify the algorithm to simulate districting
20 plans that are more advantageous to Republicans; is that right?

21 A That's correct.

22 Q So you used nonpartisan, nonpartisan districting maps to
23 determine what could be accomplished with partisan motivations;
24 is that right?

25 A Not exactly. What I did was I used the entire set of

1 500 districting plans produced by a nonpartisan districting
2 process, but then what I did was selectively choose districting
3 plans that had achieved a particular partisan outcome similar
4 to District 4. That itself is a partisan process of choosing.

5 THE COURT: And that was when you were choosing among
6 the 500?

7 THE WITNESS: Yes, sir, those 60 districting plans
8 that I showed you at the end.

9 BY MR. TYNAN:

10 Q Haven't you in fact developed a way to modify your
11 algorithm to simulate the influence of partisanship on district
12 drawing?

13 A I have never done that in an expert report. I've
14 certainly done that in my own academic research.

15 Q So you know how to modify an algorithm to simulate
16 partisan redistricting plans; is that right?

17 A I just want to make sure I understand your question
18 correctly. To modify partisan redistricting plans. I
19 certainly modify districting plans all the time, that's not --

20 Q Isn't it true that you know how to modify your algorithm
21 to produce partisan leaning redistricting plans?

22 A Absolutely, and that's essentially what I've done here in
23 this report.

24 Q You stated that you did not modify your algorithm that you
25 used to draw the simulated redistricting plans; isn't that

1 right?

2 A That's correct, I didn't modify the mechanics of the
3 algorithm that I described at the outset. I just want to make
4 sure that you properly understand what I actually did at the
5 end of the analysis, is I used the same 500 simulated
6 districting plans and then I took one additional step in which
7 I selected 60 of those 500 districting plans using a partisan
8 criteria, that's essentially using the same algorithm that I
9 used originally, the same results, and then adding one
10 additional step in which I've selected a subset of those plans
11 using a partisan criteria, so that's an extension of the
12 original process.

13 Q So you didn't modify the algorithm but you could have?

14 A Again, I extended it by adding one additional step.
15 I just -- I just really want to make sure that I -- that I
16 explain this to you clearly, that I'm just taking one
17 additional step at the end and I'm asking which of these
18 500 districting plans produce a district in Southeast Raleigh
19 that is very similar, that is nearly identical to District
20 Number 4 on partisanship, and then I am examining those
21 60 plans in isolation. So that's just one additional step, one
22 very small step I'm adding at the end.

23 Q So you decided to use your nonpartisan simulations to
24 determine what partisanship might look like in a redistricting
25 plan; is that right?

1 A No, that's just not a correct characterization. Again, it
2 is taking the simulations from a nonpartisan districting
3 algorithm process and then adding one step at the end that is
4 very explicitly partisan. That one last step is saying let's
5 just look at the subset of districting plans that have achieved
6 a partisanship very similar to District Number 4. That is very
7 partisan step at the end.

8 Q And so you looked at districts that were close to
9 19.2 percent Republican voters; is that right?

10 THE COURT: As to -- I didn't hear the question.

11 Q I'm sorry. So you selected -- you selected among the
12 simulated districts by looking for districts that had close to
13 19.2 percent Republican voter share; is that right?

14 A That's exactly right.

15 Q Do you think a partisan motivated map drawer would be
16 focused on the outcome of the entire map rather than a single
17 district?

18 A That's certainly possible, and that was not the focus of
19 my question. My question was to answer whether or not I could
20 identify a predominant motive in the drawing specifically of
21 District Number 4, not in the other districts on the map, so
22 that's why I focused in on District Number 4's characteristics.

23 Q Dr. Chen, did you find that under a nonpartisan compact
24 districting plan -- let me restart.

25 Did you find that under a nonpartisan compact

1 redistricting drawing plan, redistricting drawing process, with
2 strict population equality among districts that it was possible
3 that a majority black district could be drawn in Wake County?

4 A If I could just ask you to repeat.

5 Q Did you find that, using your criteria that you used to
6 draw out the simulated districts, that you could generate a
7 majority black district in Wake County?

8 A Yes. What I found is that using a nonpartisan process
9 following strict traditional redistricting criteria, that in
10 general one would not in general achieve a majority black
11 district in Southeast Raleigh; however, certainly in some of
12 the simulations I achieved up to -- the simulation process
13 achieved a Southeast Raleigh district that went as far as up to
14 53 percent black population; however, the essential finding in
15 my central conclusion was that the District 4's racial
16 composition was an extreme statistical outlier.

17 Q In fact, Figure 8 shows a number of majority African
18 American outcomes; is that right?

19 A Absolutely. You can see towards the right side of that
20 figure that the simulation process in a small minority of
21 cases -- I think I can just circle this for you right there.

22 I screwed up. Hold on. Can I delete what I just
23 did?

24 Okay. So this region over here, that's what you're
25 referring to, and what that shows us is that it's very possible

1 to produce using the traditional redistricting criteria a
2 district in Southeast Raleigh that does contain a slight
3 African American majority in the total population, and that
4 proportion can go up to approximately 53 percent; never,
5 however, does it achieve or approach the 54.3 percent exhibited
6 by the legislature's enacted District Number 4.

7 Q Isn't it possible that a simulated districting plan using
8 your algorithm could create a district with greater than
9 53.1 percent people who are black in that district?

10 A I'm sorry. Could you repeat?

11 Q Isn't it possible that a simulated districting plan
12 created using your algorithm could include a district with
13 greater than 53.1 percent people who are black?

14 A What I found, what I concluded is that we can say with
15 very strong statistical certainty, because I conducted the
16 process 500 times, that such an outcome would be a statistical
17 outlier. In other words, it would require an extreme, unusual
18 effort to achieve those sorts of levels.

19 Q Did you simulate every possible districting plan that
20 could be made using your criteria?

21 A Let me see if I can understand what you're asking me.
22 You're asking me whether or not every possible districting plan
23 that would be -- that would be geographically possible were
24 produced by the districting algorithm; is that correct?

25 Q Every possible plan. Did you do that?

1 A There are an infinite number of possible districting plans
2 that one could draw, and that was not what I was interested in.
3 What I was interested in are plans that follow the traditional
4 districting criteria that I outlined earlier.

5 Q Under a partisan neutral but race blind districting
6 process with less strict adherence to the districting criteria
7 you applied, could there be a majority black district with a
8 black population share greater than 53.1 percent?

9 A I just want to ask you to repeat the question, there's
10 a little part of that that I didn't catch.

11 Q Under a partisan neutral but race blind districting
12 process with less strict adherence to the districting criteria
13 that you applied, couldn't there be a majority black district
14 with a black population share of greater than 53.1 percent?

15 A Certainly if we violated traditional redistricting
16 criteria it would be mathematically possible to racially pack
17 African American voters in the greater Raleigh area to such an
18 extent that I could, if I really wanted to, create an extreme
19 racial packing of African Americans and exceed 54.3 percent, so
20 that is -- I definitely can say that is geographically possible
21 if one really wants to racially pack African Americans.

22 Q That's not the question I asked you. I asked you under a
23 partisan neutral but race blind redistricting process, race
24 blind, with less strict adherence to the districting criteria
25 that you applied in your algorithm, couldn't there be a

1 majority black district with a black population greater than
2 53.1 percent?

3 A Okay. I understand your question now, and I apologize, I
4 misheard it earlier.

5 The answer that I have seen in all of my -- you know,
6 in all of my research in Wake County is that that -- that would
7 be an extremely statistically unusual outcome, and I've done
8 this by trying different versions of the algorithm that try
9 different ways of adhering to the various redistricting
10 criteria in less stringent ways, and so I can say from my own
11 research, from my own experience in analyzing districting
12 plans, various simulated districting plans in Wake County, that
13 getting up to those levels of African American population in
14 Southeast Raleigh would be an extreme statistical outlier.
15 That's not to say that if you sat there and try and come up
16 with some very unusual sorts of criteria that technically
17 didn't involve race you might not be able to somehow one day
18 come up with one in a million plans that do that, but again the
19 essential point is that that would require extraordinary effort
20 and it would be an extreme statistical outlier to achieve such
21 a packing of African American population.

22 Q But you achieved 53.percent using your districting
23 criteria; isn't that right?

24 A Yes. Let me just clarify that. When you say "achieve,"
25 I just want to emphasize that is a very statistically unusual

1 outcome, that's 1 in 500. The point here is that when we look
2 at the range of that Southeast Raleigh district, what we see is
3 a range from 35 percent, a little under 35 percent to 53
4 percent. The normal part of that range is well under
5 50 percent. That is the normal outcome when we follow
6 traditional redistricting criteria, and that's the essential
7 point I want to make sure that I get across here.

8 Q Dr. Chen, I want you to look at Figure 8 from your report
9 again.

10 In Wake County -- do you know in Wake County there's
11 a correlation between people who are black and Democratic
12 voting?

13 A You're asking me specifically in Wake County whether
14 there's a correlation between Democratic voting and African
15 American populations?

16 Q That's right.

17 A Well, I mean, I can speak to this from my research all
18 across southern states, you know, all across the United States,
19 in virtually every state and certainly in every southern state
20 there is some degree of statistical correlation, that's
21 something that you will find everywhere.

22 Q And so if you try to increase the percentage of Democratic
23 leaning voters in the district, is it possible you could
24 increase the proportion of people who are black in that
25 district?

1 A It doesn't work that simply, and you have to be really
2 careful in distinguishing between black population and
3 Democratic population. The correlation between blacks and
4 Democrats is not as strong in Wake County as you'd find in many
5 areas, for example, of the Deep South, and part of what makes
6 this a difficult thing to understand is that there are lots
7 of -- there are lots of non-black voters that vote --
8 non-blacks who vote Democratic, and so the correlation is not a
9 very tight one where you can just assume that all Democrats are
10 black, there are lots of white Democrats in Wake County to
11 account for, and so that's why it's not that simple. That's
12 why we need to -- we need to look at the sort of analytical
13 relationship between the simulated districting plans in terms
14 of race and partisanship.

15 Q Taking a look at Figure 8, as you move up the vertical
16 axis, that means that the district has a greater Republican
17 share; is that right?

18 A That's correct.

19 Q And as you move down the axis, that means there's a
20 greater Democratic share; is that right?

21 A That is correct.

22 Q And as you move across the horizontal axis to the right,
23 that means there's a greater proportion of people who are black
24 in those districts; is that right?

25 A That is correct.

1 Q So doesn't this chart show that there is a correlation
2 between percentage of Democratic voters in a district and the
3 proportion of people who are black in that district?

4 A Not at all, and I just want to help you to understand this
5 in a broader context. This sort of relationship in most
6 Deep South states would be a much stronger correlation because
7 there would be racially polarized voting, for example, in
8 Mississippi or Al -- many areas of Mississippi or Alabama.
9 What we see here is that it's actually a very complicated
10 relationship because what we see here is evidence of a large
11 number of non-black voters that are clearly voting Democratic,
12 that's the biggest piece that I take away from this figure
13 here, that the relationship between race and partisanship in
14 voting is actually quite a complicated one and it's not a
15 simple black or white matter.

16 Q Dr. Chen, looking again at Figure 8 -- scratch that. I'll
17 start over.

18 Dr. Chen, does your report contain a list of all the
19 publications you authored in the previous ten years?

20 A Yeah. Again, I think Ms. Earls was asking me about --
21 earlier about things I've published since this CV in August,
22 2015. I mentioned that there was one more that's being
23 published right now, this month.

24 Q But does your report include a list of any publications
25 you published?

1 A Does my report -- I just don't remember whether my report
2 contains my CV or not. If it did, you know, that would have
3 been a CV probably from August, 2015, so it contained the
4 publications up until that point, yeah.

5 Q Have you testified as an expert at trial or by deposition
6 in the previous four years?

7 A Yes, I have.

8 Q Does your report state in which trials you testified as an
9 expert?

10 A I believe so. I believe that that was -- those were
11 listed on the first page.

12 Q Can you tell me where that is?

13 A It's on the first page of the report. I believe it was
14 one of the first couple paragraphs.

15 Q Dr. Chen, I zoomed in on this paragraph from your report,
16 it says "I have provided expert reports in the following
17 redistricting cases" and then it lists several cases.

18 A Oh, sure.

19 Q Did you provide testimony in those cases?

20 A Did not provide -- did not testify in court in any of
21 these cases.

22 Q Did you testify by deposition?

23 A Yes.

24 Q Did you include that information in your report?

25 A I can see that the word "deposition" does not appear in

1 this paragraph.

2 Q Were you aware that the Federal Rules of Civil Procedure
3 require expert reports to list cases in which experts have
4 testified in deposition or by trial? Were you aware of that?

5 A I don't know those rules. I understood that I needed to
6 certainly report what I've -- what expert work I've done in the
7 past and I tried to comply as best as I could understand by
8 listing out all the cases in which I've worked, and I said I've
9 provided expert reports in these cases. So I, you know, tried
10 to do as best as I could to follow what I understood was normal
11 practice.

12 Q How much are you being paid for producing your expert
13 report and for testifying here today? What's your rate of
14 compensation?

15 A \$500 an hour.

16 Q Were you aware that -- were you aware that that
17 information was required to appear in your report?

18 A I'm not sure.

19 Q Dr. Chen, just a couple more questions.

20 I want to look at Figure 9 from your report. This
21 figure used 2012 Presidential election data; is that right?

22 A Yes, sir.

23 Q And does it show that enacted District 4 would have a
24 19.2 percent Republican vote share based on the 2012 election
25 data?

1 A Yes, sir, it's something close to -- something between 19
2 and 19.5 percent, I don't have the exact number with me, but
3 that's in the rough ballpark.

4 Q And does it show that the highest Republican percentage in
5 these districts you looked at was 21 percent? Sorry. Or so?

6 A Yes, sir, and I just want to emphasize again that that
7 is -- that is my process of looking at the simulated
8 districting plans that produce a Southeast Raleigh district as
9 very partisan-similar to the enacted District Number 4, and so
10 I chose to look at plans that were roughly between, we can see
11 here, from approximately 17.8 percent to about 21. -- a little
12 bit around 21 percent. So that is -- that is -- that's that
13 final step that I just want to make sure you understand.

14 THE COURT: And this, Doctor, is when you pulled the
15 60 out of the 500?

16 THE WITNESS: Exactly. Yes, Your Honor, that is
17 those 60 -- that subset of 60 plans that we were talking about
18 earlier.

19 BY MR. TYNAN:

20 Q Dr. Chen, does your report name any statistical tests that
21 you used for any of your analyses?

22 A I described the statistical tests throughout the report,
23 so yes, that's how I -- that's how I named them.

24 Q Which statistical tests did you use?

25 A Well, what -- let me just try and make sure that you

1 understand the sort of statistical analysis that I'm doing here
2 throughout the report, is I produce a range, a range of
3 simulated districting plans, and I analyze that distribution,
4 so that's the statistical test I'm looking, is to identify
5 whether or not the enacted districts on all of these various
6 measures that I've produced in this report fall outside of or
7 within the range and within what point of the distribution. So
8 essentially what I'm doing is analyzing distributions. This is
9 a very common, standard statistical practice in social science
10 and science research. That's just what we do when we conduct
11 statistical empirical analysis.

12 Q What is the name of the statistical test used in this
13 case?

14 A Again, this sort of analysis is so common that we don't
15 have an esoteric fancy name for it. We call it looking at
16 distributions. What we call it is making inference from data.
17 We don't have a fancy statistical name for you. I mean, that
18 is just common practice in statistical analysis.

19 Q So you didn't use a test, you just looked at it?

20 A Again, the test consists of looking at the distribution
21 and asking does the enacted districting plan fall within or
22 outside of the distribution and at what point within the
23 distribution does it fall. This is something that
24 statisticians have been doing for hundreds of years and this is
25 not something that we need to come up with a fancy statistical

1 term to call it something.

2 MR. TYNAN: No further questions.

3 THE COURT: Thank you. Any redirect?

4 MS. EARLS: Yes, Your Honor, just one question.

5 - - - - -

6 REDIRECT EXAMINATION

7 BY MS. EARLS:

8 Q You were asked about your testimony in the Florida case,
9 and my question is: In the Florida case were you asked to
10 explain the deviation, the deviations from the one person
11 one vote standard in Florida?

12 A No, not at all. In the Florida case I was addressing a
13 very specific -- a very specific esoteric question, and the
14 question I was being asked to analyze in the Florida case is
15 whether or not the districting plans, the Congressional
16 districting plans and the State Senate districting plans
17 violated Amendments 5 and 6 in the Florida Constitution, and it
18 was written in a very specific way. It was very fundamentally
19 different than what I did here today in this report, which was
20 to analyze the motivations for deviating from population
21 equality in the legislature's enacted seven and two district
22 plans.

23 THE COURT: Are those Constitutional provisions in
24 Florida? Do they have up to a 10 percent for State legislative
25 apportionment? Is that why you used the 5 percent?

1 THE WITNESS: I can't answer the question for you
2 legally. What I can tell you is that the enacted plan, the
3 Congressional enacted plan, is certainly within -- is very
4 close to zero percent population --

5 THE COURT: Right. That's because the Federal law is
6 different with respect to -- that's why I was wondering if your
7 report had to do with State legislative plans. I was just
8 curious as sort of underlying premises, I mean, just as a
9 follow-on to Ms. Earl's question about why whoever asked you to
10 do that report gave you certain premises, but you're just
11 not -- you're just not sure what Florida law is in that regard
12 with respect to State plans? Because Federal law with respect
13 to Congressional plans is very different with respect to
14 population deviation.

15 THE WITNESS: Well, Your Honor, I can tell you that I
16 know because that was part of my expert report in Florida that
17 certainly Amendments 5 and 6 do not -- do not have a
18 specific -- do not have a numeric -- numeric specification.
19 They do, of course, say that districts must be equally
20 populated.

21 Now, the reason in that particular case, part of
22 my --

23 THE COURT: The Amendments say that, but have they
24 been construed to allow some deviation?

25 THE WITNESS: Well, what I can certainly tell you

1 is that my analysis of the Florida State districting -- State
2 legislative districting plans, not the Congressional --

3 THE COURT: Right.

4 THE WITNESS: -- is well within 1 percent.

5 THE COURT: Okay.

6 THE WITNESS: So that is certainly -- now, that's
7 a -- I want to emphasize that that is a different report than
8 the one that we were looking at, the one that we were just
9 talking about a couple minutes ago, but certainly I've analyzed
10 the State legislative plan in Florida, it's well within
11 1 percent, and that is part of how I came to understand that
12 traditional redistricting criteria would involve choosing a
13 population threshold like that.

14 THE COURT: But you're just not sure if Florida
15 requires that in State plans?

16 THE WITNESS: I can't give you a legal answer to
17 that.

18 THE COURT: That's fair.

19 Any other questions, Ms. Earls?

20 MS. EARLS: No, thank you, Your Honor.

21 THE COURT: Any recross?

22 MR. TYNAN: Just clarification.

23 RECROSS-EXAMINATION

24 BY MR. TYNAN:

25 Q The 2013 expert report you submitted in the Florida case,

1 that dealt with Congressional redistricting, didn't it?

2 A It is a Congressional plan question in that particular
3 case, yes.

4 Q You used a 5 percent population deviation threshold?

5 A You're talking about the report that you handed me --

6 Q Correct.

7 A -- earlier today?

8 Yeah. Absolutely. And, I mean, I would emphasize
9 that part of -- part of the point there was that I was not
10 being asked to -- I did choose a 5 percent threshold in that
11 case, and part of the reason was that I was not being asked in
12 that case to answer the motivations for deviating from
13 population equality. Population equality was simply not an
14 issue that was put forth to me in that case, and so it really
15 was not much of a concern, and that's why I used a much -- that
16 particular 5 percent threshold. I was -- it was not something
17 that was put forth to me as a question I had to analyze in the
18 way that it was put forth here, that my job was to analyze the
19 motivations for deviating from population equality.

20 THE COURT: About how many hours do you have in this
21 case, would you estimate?

22 THE WITNESS: Approximately 40, Your Honor.

23 THE COURT: Okay. Anything else, Mr. Tynan?

24 MR. TYNAN: No further questions.

25 THE COURT: Anything else, Ms. Earls?

1 MS. EARLS: No, thank you, Your Honor.

2 THE COURT: Thank you, Doctor. Please watch your
3 step stepping down, and there's a step up and there's a step
4 down through the gate.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: Plaintiffs may call their next witness.

7 MS. EARLS: Your Honor, plaintiffs call Jannet Barnes.

8 THE COURT: Ms. Barnes, please watch your step as you
9 step through, there's a step up.

10 THE CLERK: Please place your left hand on the bible
11 and raise your right hand and state your name for the record.

12 THE WITNESS: Jannet Barnes.

13 THE CLERK: Do you swear that the testimony you're to
14 give the Court in this case shall be the truth, the whole truth
15 and nothing but the truth, so help you God?

16 THE WITNESS: I do.

17 THE CLERK: Thank you. You may have a seat in the
18 witness stand and please watch your step there.

19 THE COURT: Good morning, Ms. Barnes. Ms. Riggs is
20 going to have some questions for you and then
21 Mrs. Thaller-Moran will have some questions for you. If the
22 lawyer who is not asking the questions objects to the other
23 lawyer's question, please don't say anything until I rule on
24 the objection. Please try and keep your voice up so we can
25 hear what you have to say. That microphone will move up and

1 down. Feel free to adjust it, ma'am.

2 You may examine the witness.

3 MS. RIGGS: Your Honor, may I approach to hand the
4 witness something?

5 THE COURT: You may.

6 - - - - -

7 DIRECT EXAMINATION

8 BY MS. RIGGS:

9 Q Good morning, Ms. Barnes. What I've handed you, for the
10 record, are the parties' joint stipulations in this case, and
11 you and I might be discussing some specific precincts later in
12 our conversation, so I wanted you to have the list from our
13 stipulations of all the precinct numbers and names.

14 Can you introduce yourself to the Court and tell us
15 a little bit about your background.

16 A My name is Jannet Barnes and I am the Chair of 17-04. I
17 work at the North Carolina Reinsurance Facility. It's not a
18 State Government -- it's our name because of our geographical
19 location. I've been there going on almost 35 years. I am the
20 compliance manager, I manage a team of nine auditors, so it's
21 my responsibility to audit the automobile liability carriers,
22 both commercial and private passenger, that are licensed and
23 writing in the State of North Carolina, which means I have a
24 responsibility of auditing upwards of a billion dollars in
25 premium and close to \$850 million in losses.

1 Q Did you grow up in Wake County?

2 A I grew up in Wake County. My early years was in the
3 southern part of Wake County, which was out in the Apex-Fuquay
4 area, and then later on it was in the eastern part of
5 Wake County. The vast majority of my life I have been living
6 in the eastern part of Wake County.

7 Q And what town do you live in right now?

8 A I live --

9 Q What's your address?

10 A My address is 1609 Cotton Drive, Knightdale, and it's
11 Knightdale but I live in the unincorporated part of Knightdale,
12 I do not live in an incorporated area of Knightdale, which is
13 the city limits of Knightdale.

14 Q And how long have you lived in this area, the specific
15 Knightdale region?

16 A Since 1965.

17 Q And you said you're the Chair of 17-04. Can you explain
18 to the Court what that means?

19 A That means when we have our precinct organizations, our
20 precinct members come together and they elect officers, they
21 elect a chair, a vice chair, a secretary and a treasurer, and
22 at the meetings, at NECEC meetings, if all of the members are
23 not there then I get the weighted -- to get the weighted vote
24 of the precincts based upon -- if there's two or three of us
25 there and, for example, if our weighted votes are 20, then I

1 get to cast 10 and the other person gets to cast 10, and we
2 would caucus, but that's what the responsibility mean. I also
3 make sure that we have precinct meetings and then secondly make
4 sure that we get together and address common issues, issues
5 that affect us.

6 Q So 17-04 is your precinct?

7 A 17-04 is my precinct.

8 Q Can you -- besides being precinct chair of 17-04, can you
9 tell us a little bit more about your political involvement in
10 Wake County?

11 A I am one of the past presidents of the Raleigh Wake
12 Citizens Association, which is the oldest African American
13 group in Wake County. I am also the past president of the
14 Wake County African American Caucus, which addresses the
15 African American issues, and then I've also worked on several
16 campaigns of local individuals in the Zebulon town commission.

17 Q Have you ever done any Get Out the Vote work?

18 A I do a lot of Get Out to Vote work. From August last year
19 up until the fourth Sunday in October, either every Saturday or
20 every Sunday or even during the week at church revivals, I --
21 the pastors ask me to come in and speak to the congregations
22 about the importance of Get Out To Vote. I cannot tell them
23 who to vote for because this is -- this is just an effort to
24 tell them to get out to vote, and when you look at the increase
25 in that effort, and that was both in Fuquay, it was from all

1 over Wake County that we were doing that, just encouraging them
2 and reminding them of the importance of getting out to vote,
3 the African American community.

4 Q When you've worked on political campaigns or done Get Out
5 the Vote work, have you had the opportunity to review election
6 results by precinct?

7 A Yes, I have, and in fact I look at a lot of the
8 demographics and, yes, I have.

9 Q Ms. Barnes, again, based on your political work, are you
10 aware, have black candidates been elected countywide in
11 Wake County?

12 A Yes. We had -- Linda Coleman was elected County
13 Commissioner. We also had Lindy Brown that was elected County
14 Commissioner. James West was elected County Commissioner and
15 even Vernon Malone at one time was elected.

16 Q And based on your review of precinct level election
17 results, do black candidates -- do white voters support black
18 candidates in Wake County?

19 A Yes.

20 Q What district will you live in, Ms. Barnes, under the 2016
21 County Commission District Plans?

22 A District 4.

23 Q And to clarify, these are the plans enacted by the
24 legislature this year?

25 A That is correct.

1 Q Have you had a chance to look at a map of District 4?

2 A Yes, I have.

3 MS. RIGGS: Shannon, I'm going to have you pull up
4 Exhibit 258, and this is a zoom of District 4. I want to --

5 Q Ms. Barnes, can you tell us a little bit about the
6 communities that are in this district as drawn here?

7 A I am in 17-04, which is up here. Oh, I've got to move
8 that arrow.

9 Q That's fine. You can draw on it.

10 A Okay. I did the wrong one. Clear it, please.

11 I am in 17 -- I'm still not over far enough. Clear
12 it one more time. I'll come over further.

13 I am in 17-04.

14 Q Is that a split precinct?

15 A It is a split precinct.

16 Q Okay. Continue.

17 A And then you have 17-02, and then when I look at the
18 bottom half of this district, 16-06, and I have -- we use
19 precinct titles, we don't use precinct numbers, so 16-06 is
20 actually -- I'll tell you what it is in a minute.

21 16-06 is Vandora Springs Elementary, that's clear on
22 the other side of the county, so there's no relationship
23 between 17-04 and 16-06. And when you look at that,
24 Vandora Springs Elementary is in a municipality. The needs of
25 the precincts that are in a municipality and the ones that's in

1 unincorporated areas, the needs are quite different.

2 Q Okay. So just stepping back, this protrusion of the
3 districts that goes to the right, let me circle it so you know
4 what I'm talking about, are these parts of incorporated and
5 unincorporated Knightdale?

6 A 17-02 is at Knightdale Elementary School. 17-02 is in the
7 incorporated area of Knightdale. In fact, it's across 64.

8 Q And then looking down at some of these precincts down at
9 the bottom of the district here, are these part -- what town or
10 address of town would that area be?

11 A 16-08 is Barwell Road and that's off Rock Quarry Road.

12 Q Is that in Garner?

13 A That's in Garner. And then when you look at 16-02,
14 Creech Road, that is in the corporated -- incorporated area of
15 Garner. So we are miles apart when you're talking about this
16 district now.

17 Q Okay. And then looking at this center part of the
18 district here, are you familiar with precincts 01-34, the
19 Tarboro Road Center and 01-26, the Chavis Community Center?

20 A Yes. Chavis is right in the heart of close to downtown
21 Raleigh. In fact, that is -- was what is in -- is right off of
22 Martin Luther King Boulevard.

23 Q Your district, 17-04, what does it have -- your precinct,
24 17-04, what would it have in common with the precinct -- the
25 Chavis Community Center precinct?

1 A Absolutely nothing.

2 Q Can you explain a little more?

3 A Because when you look at 17 -- at the Chavis district,
4 that's in a highly populated residential area, but when you
5 look at 17-04, you're talking about some unincorporated, some
6 farm land out there, so the geographical relationship between
7 the two is quite different.

8 THE COURT: Ma'am, tell me the number, if you know
9 it, for the Chavis. I think you said it, I just didn't --

10 THE WITNESS: The Chavis is 01-26.

11 THE COURT: Thank you.

12 THE WITNESS: That's right in downtown Raleigh, close
13 to --

14 BY MS. RIGGS:

15 Q And so the part of unincorporated Knightdale that you live
16 in, are there different transportation needs or infrastructures
17 there than there is in 01-26 down by Chavis?

18 A Yes. The closest -- Chavis you can catch the bus to
19 most -- any area, there's a lot of bus stops. The closest that
20 you can catch the express bus for the CAT Express that runs
21 from Raleigh to Zebulon is to go to the Walmart, which is over
22 on 64, which that's not even in our district, it's across 64,
23 and then you will have to go there, catch the bus, and it
24 doesn't run as regular as the buses inside the city limits and
25 municipalities, and so you have to be strategically there, and

1 where normally it may take two hours to go to a doctor's
2 appointment and catch a bus back, for that particular
3 transportation it may take you four to five hours because you
4 got to wait for when the bus is going to run by. So there are
5 different needs.

6 Q Now I want to ask you the same questions about the -- down
7 in Garner.

8 MS. RIGGS: Can you zoom -- shift it up just a little
9 bit, Shannon?

10 Q Okay. So we talked about the Vandora Springs precinct,
11 16-06, down here.

12 A Um-hum.

13 Q What was -- what does precinct 16-06 have in common with
14 precinct 01-26, Chavis Community Center?

15 A Chavis is a little bit more condensed. When you look at
16 that 16-06, that Vandora Springs, it's a lot of businesses out
17 there, you have Carolina Barbecue, then you have a shopping
18 center there, so it's a different need there.

19 Q Ms. Barnes, you mentioned that you live in a split
20 precinct. Can you -- based on your political experience, what
21 kind of harm comes from splitting a precinct?

22 A Well, it's a lot of confusements on the ballots, you know,
23 because they may have a different representative than what we
24 may have, and so it doesn't matter which party it is, there are
25 different ballots for that. In some cases you may have upward

1 of 10 to 12 ballots and it's confusing, and so when they get
2 there, it's like they -- and it's also hard to get them to
3 participate because their interests may not be as great as the
4 larger part of the precinct, so then they don't participate on
5 a regular basis.

6 Q When you look at this map, based on your knowledge of the
7 area, what conclusion do you come to as to why these precincts
8 were split?

9 A I guess to achieve the contentuousness (sic) because the
10 precincts, when they do the redistricting, they have to touch,
11 and I guess it was to do that to make sure that they would have
12 the right population in there, based upon my knowledge of
13 redistricting.

14 Q Do you know, were some of these precincts, based on your
15 understanding, to capture bits of black population?

16 A Yes, I can look at it and tell that it is.

17 Q Ms. Barnes, do you think the voting age population in
18 District 4 needed to be drawn over 54 percent in order for
19 black voters in your area to have a fair opportunity to elect a
20 candidate of their choice?

21 A No, it's really insulting because it's saying that we do
22 not have the capability or the knowledge to make an informed
23 decision, and it takes me back -- we hear about Dr. Martin
24 Luther King's speech, I have a dream, but prior to that he made
25 a speech in 1957, May, 1957, when he was saying give us the

1 ballots, and what he was asking for the ballots for -- at that
2 time he said negroes, so that we can make informed decisions,
3 and who thought that in 2015 that we would be back here again
4 asking for the opportunity to let us make our own informed
5 choice about who our candidates are. We don't need to be
6 stacked and packed and all that thing, because we really have
7 the intelligence. When you look at the vast majority of the
8 population, what we call the millennial generation and my
9 generation, a lot of the older generations, they use absentee
10 ballots, and so the thing about this, that you have to do this
11 so we can have representation -- we've had adequate
12 representation. I mean, even when we did the merger of the
13 School Board we still had adequate representation. We don't
14 want to be chosen or feel like that we can't make informed
15 decisions and that we need to be token residents of any county.

16 MS. RIGGS: Ms. Barnes, thank you so much. I have no
17 more questions.

18 THE COURT: Cross-examination.

19 MS. THALLER-MORAN: Just one second.

20 No questions, Your Honor.

21 THE COURT: Thank you, Ms. Barnes. Please watch your
22 step stepping down and stepping back through the gate.

23 I think it's time for our lunch break. Is there
24 anything before we do that?

25 MS. EARLS: Well, Your Honor, just for your

1 information, that concludes the witnesses on behalf of the
2 plaintiffs. We still want to move into introduction of our --
3 we still want to move introduction of our exhibits, but maybe
4 we can --

5 THE COURT: Yeah, why don't over the lunch just clear
6 up any housekeeping things, we'll take a break, everybody be
7 comfortable, we'll come back at 1:15, we'll deal with
8 housekeeping, and then, like I said, unless you all have
9 something else that you want to talk with me about, I would
10 anticipate we would then adjourn for the day and reconvene at
11 9:00, but that will also let you all talk on housekeeping,
12 we'll get that squared away right when we get back.

13 I hope you all enjoy your lunch. We'll be in recess
14 until 1:15.

15 - - - - -

16 (Recess at 12:14 p.m. until 1:15 p.m.)

17 - - - - -

18 THE COURT: Good afternoon, Counsel. Ms. Earls, did
19 you want to move some exhibits in?

20 MS. EARLS: Yes, Your Honor, and I think that it
21 might be helpful to the Court if I go through the exhibit list
22 and at least identify categories of types of exhibits, and
23 there's some randomness, but I think that this will be useful.

24 What I will say is that the exhibit list filed with
25 the Court indicates whether the plaintiff or the defendant or

1 both are tendering the exhibit, but we would like to move at
2 this point all of the exhibits.

3 THE COURT: All right. They will be received.

4 I gather, Mr. Marshall, that the prior comments that
5 there had been an agreement, there's no objection to any of
6 them?

7 MR. MARSHALL: That is correct, Your Honor, we have
8 no objection to any of these exhibits, they're being moved in
9 jointly and all for the Court's consideration.

10 THE COURT: They are all received and I thank you
11 both.

12 MS. EARLS: So, Your Honor, Exhibits 1 through 13 are
13 transcripts of the legislative history of both of the bills.
14 Exhibit 14 is the report from Public Policy Polling, PPP.
15 Exhibits 15 through 26 are exhibits in connection with
16 Dr. Chen's testimony. Exhibits 27 to 50 are exhibits relating
17 to Tony Fairfax's testimony. Exhibits 51 to 54 are really kind
18 of random documents relating to the case, I'm not -- it won't
19 be helpful, they're just miscellaneous items.

20 THE COURT: Thank you.

21 MS. EARLS: Exhibits 55 to 70 are election results.
22 Exhibits 71 to 81 are campaign finance reports. Exhibits 82 to
23 85 are production -- documents produced from the Wake County
24 Board of Elections, mostly e-mails, and to be clear,
25 Exhibits 86 and 87 are blank, so there are no Exhibits 86 and

1 87.

2 THE COURT: Thank you. I'm glad you let me know that
3 because I'm sure when I was going through them I would have
4 contacted each side and asked if they were intentionally blank.

5 MS. EARLS: Exhibits 88 through 249 are the
6 2015-2016 Wake County School Board student assignment maps.
7 Then Exhibits 250 to 251 are more legislative history, these
8 are transcripts of legislative proceedings. 252 to 253 are the
9 statistics produced by the legislature for the two bills, so
10 the Stat Packs.

11 THE COURT: Stat Pack. Okay.

12 MS. EARLS: And 254 to 255 are again blank, there are
13 no Exhibits 254 or 255.

14 256 to 261 are various maps. 262 to 270 are voter
15 registration statistics. And then 271 to 273 are election
16 results. 274 to 276 are supplements to Tony Fairfax's report
17 or testimony. Exhibit 277 is a map. And then Exhibit 278
18 through 436 are all 2013-2014 Wake County Board of Education
19 student assignment maps. Exhibits 436 to 443 are -- again,
20 this is kind of miscellaneous, the Wake County resolution, the
21 text of the bills, they're miscellaneous documents, hard to
22 categorize.

23 Exhibits 444 to 446 are election results.
24 Exhibit 447 is a document produced by the Institute of
25 Government and it's a guide to local redistricting for local

1 Governments. 448 to 458 are additional maps. 459 to 462 are
2 more Board of Election e-mails. I'm sorry, Board of Education
3 e-mails. And then 463 to 464 are supplements to Dr. Chen's
4 testimony, supplemental exhibits to his testimony.

5 Exhibits 465 through 467 are documents produced by
6 the legislators in response to the subpoenas that were issued.
7 Exhibit 468 is a supplement to Tony Fairfax's testimony.
8 469 to 474 are the various amendments to the bills that were
9 offered during the legislative process. Yes, through 474.
10 Exhibit 475 and 476 are demonstrative exhibits of the
11 legislative process. And then Exhibits -- Exhibit 477 is -- I
12 do know what this is, Your Honor, I'm blanking at the moment,
13 this is a document I believe in connection with one of the
14 experts' testimony. And then 478 through 480 are legislators'
15 e-mails. Exhibit 481 is the transcript of the -- final
16 transcript of the proceedings on the Senate floor that we
17 introduced today.

18 THE COURT: With Senator Stein.

19 MS. EARLS: That's correct.

20 So at this point I am moving for the introduction of
21 those exhibits that I've just identified.

22 THE COURT: Those exhibits will all be received and
23 are received.

24 MS. EARLS: And I will just note for the record that
25 we utilized Exhibit 482 but that was only for demonstrative

1 purposes.

2 MR. MARSHALL: Is that the one with the
3 mathematical --

4 MS. EARLS: Correct.

5 THE COURT: Right, the 100,000 people.

6 MS. EARLS: That's correct. I am not moving that,
7 but I wanted to note that it exists.

8 MR. MARSHALL: Sure.

9 MS. EARLS: So that's all the exhibits.

10 THE COURT: Okay. They're all received, and with
11 that, is that the close of plaintiffs' evidence?

12 MS. EARLS: Yes.

13 THE COURT: Okay. And again, Mr. Marshall, I know
14 this would be the time for a Rule 52(c) motion. I can tell you
15 that I'm going to reserve and listen to oral argument tomorrow,
16 but if for whatever reason procedurally you wanted to formally
17 make it, you can, and then you can tell me if you're going to
18 put on any evidence and then we can see if we're done until
19 9:00.

20 MR. MARSHALL: No, Your Honor, I do not intend to
21 make any motion at this time and that's why I allowed all the
22 evidence to be put in at once --

23 THE COURT: Okay.

24 MR. MARSHALL: -- for the joint exhibits.

25 Additionally, again, due to the unique factors in

1 this case in which we find ourselves, we are not going to call
2 any witnesses, so the defense will rest.

3 THE COURT: All right. The evidence then is closed
4 for purposes of the trial. As I mentioned yesterday and as we
5 discussed here in court, it would be my plan to hear oral
6 argument from each of y'all, closing argument in the trial
7 tomorrow morning beginning at 9:00. I could give you the time
8 limits. I suspect neither of you would approach the amount of
9 time that you have left, and so unless you tell me, well, I'm
10 going to need four hours for closing or something, if either of
11 you were to tell me that, we'd probably need to talk, but
12 again, I just -- I know all the counsel involved in the case
13 are very experienced, so I look forward to hearing your closing
14 arguments tomorrow. I don't -- I don't set a time limit, I
15 don't -- I mean, unless you all want to be heard on it, I just
16 expect you all to be reasonable and I know you will be.

17 Anything else, Ms. Earls?

18 MS. EARLS: Yes, Your Honor, there are just a couple
19 of other additional housekeeping matters that I would like to
20 raise.

21 THE COURT: Okay.

22 MS. EARLS: First I want to be clear, we will file a
23 final exhibit list, because we've added one or two things, and
24 we'll file that with the court and bring hard copies tomorrow.

25 THE COURT: Thank you.

1 MS. EARLS: I wanted to inquire about time deadlines
2 for post-trial findings of fact, conclusions of law, posttrial
3 briefs, because that would -- and in particular part of that
4 might depend on whether citations need to be to a certified
5 transcript or whether we can use an uncertified transcript.

6 THE COURT: Have you all talked about that?

7 MS. EARLS: We have not, Your Honor.

8 MR. MARSHALL: We have not. I was obviously going to
9 ask the Court whether, A, that was necessary, whether you were
10 expecting them and then if so we would talk about time frames.

11 THE COURT: I wasn't expecting them, but that does --

12 MR. MARSHALL: Well, I'm certainly not asking. If it
13 would assist the Court, we will certainly do them.

14 THE COURT: I'll put it this way, if you all want to
15 talk this afternoon and then even at the close of -- after oral
16 argument tomorrow, closing arguments, if we want to revisit
17 that, we'll just leave that open, is what I would propose,
18 leaving it as an open item, you all have been conferring
19 throughout, to just confer again on that. You know, I suspect
20 part of that is going to be thinking -- you'll want to think
21 about it tonight or whatever, which is fine. I also realize
22 that it's soon to be the holiday season and in terms of
23 requiring something from either side or both sides at the same
24 time -- so we'll leave that as an open item.

25 MS. EARLS: Thank you, Your Honor.

1 THE COURT: Anything else from the defense?

2 MR. MARSHALL: No, Your Honor.

3 THE COURT: All right. I do thank counsel for your
4 work here today. We will be in recess until 9:00 a.m.
5 tomorrow.

6 - - - - -

7 (Proceedings adjourned at 1:26 p.m.)

8 - - - - -

C E R T I F I C A T E

This is to certify that the foregoing transcript of proceedings taken in a bench trial in the United States District Court is a true and accurate transcript of the proceedings taken by me in machine shorthand and transcribed by computer under my supervision, this the 2nd day of February, 2016.

/S/ DAVID J. COLLIER

DAVID J. COLLIER
OFFICIAL COURT REPORTER

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

RALEIGH WAKE CITIZENS)
ASSOCIATION, et al.)
Plaintiffs,)
)
vs.) Case No.
) 5:15-CV-00156
WAKE COUNTY BOARD OF ELECTIONS,)
Defendant.)

CALLA WRIGHT, et al.)
Plaintiffs,)
)
vs.) Case No.
) 5:13-CV-00607
THE STATE OF NORTH CAROLINA,)
et al.)
Defendant.)

BENCH TRIAL - DAY 3
BEFORE CHIEF DISTRICT JUDGE JAMES C. DEVER III
DECEMBER 18, 2015; 9:00 A.M.
RALEIGH, NORTH CAROLINA

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P R O C E E D I N G S

- - - oOo - - -

THE COURT: Good morning, Counsel. Anything before I hear from the plaintiffs in their closing?

MS. EARLS: Nothing from the plaintiffs, Your Honor.

THE COURT: Anything from the defense?

MR. MARSHALL: No, sir, Your Honor.

THE COURT: Okay. Ms. Earls or Ms. Riggs.

MS. EARLS: Good morning, Your Honor, and may it please the Court.

On behalf of my clients in the 2013 Wright case and the 2015 Raleigh Wake Citizens Association case, we thank you for expediting these proceedings and for permitting us to present our evidence over the past two days.

Through the words of the voters who testified, you heard how all engaged citizens seek to use the democratic system to elect representatives who will speak for them when critical decisions are made, such as where to build new schools or how to encourage economic growth and job creation in Wake County, and you heard how their elected School Board members, County Commissioners and legislators seek to represent their constituents to the best of their abilities, drawn on their diverse life experiences and varied professional skills, but our democratic system is broken when it operates to give the votes of some voters greater weight than others and when

1 race is used in the drawing of district lines without
2 justification.

3 We all understand that fundamentally our political
4 battles should be fought on a level playing field, and we don't
5 have a level playing field when the one person one vote
6 criteria is not complied with; and, secondly, we understand
7 that fundamentally the Government should not divide people on
8 the basis of race.

9 The plaintiffs are here today not because better
10 redistricting plans could have been drawn or because better
11 policy options should have been pursued. They are not
12 advocating for the adoption of any particular redistricting
13 map. They have come to court seeking to protect their
14 Constitutional right of one person one vote and their
15 Constitutional right to equal treatment on the basis of race.
16 Constitutional rights are not policy options. The only venue
17 for enforcement of those rights is right here in this
18 courtroom.

19 The plaintiffs are here because as the U.S. Supreme
20 Court explained in the 2004 decision in Bush v. Gore, quote:
21 Having once granted the right to vote on equal terms, the State
22 may not, by later arbitrary and disparate treatment, value one
23 person's vote over another, that's 531 U.S. at 104.

24 That is exactly what happened in this case. In 2011
25 the School Board redrew its boundaries, it granted the right to

1 vote on equal terms, the County Commission elections have
2 always granted the right to vote on equal terms, being
3 at-large, but the plans that were passed by the legislature in
4 Senate Bill 325 and House Bill 181 by arbitrary and disparate
5 treatment disvalue the votes of some persons over that of
6 others.

7 In my comments this morning I would like to address
8 three things. First, plaintiffs' one person one vote claim,
9 this is a claim about the districting plan as a whole. We're
10 comparing voters in one district to voters in another district
11 and the overall deviations in those districts, 7.11 percent for
12 the seven member districts and 9.8 percent for the two super
13 districts. Secondly, we'll talk about plaintiffs' racial
14 gerrymandering claim, which as the Supreme Court made very
15 clear in the Alabama decision decided earlier this year, that
16 is a claim about a single individual district, and here it is
17 District 4 that we challenge, and the question there is whether
18 that district -- whether race predominated in the drawing of
19 that district. It is clearly -- there may be countywide
20 evidence that's relevant, but it's clearly about a single
21 district. So two very separate claims. Finally, we'll take a
22 few moments to address appropriate remedies.

23 So with regard to the one person one vote claim, the
24 overarching standard that is repeated time and again in
25 one person one vote cases talking about State legislatures,

1 talking about local governing bodies, is that the Government
2 must make an honest and good faith effort to construct
3 districts as close to equal population as is practicable, and
4 I'll note that's also the same language under our State
5 Constitution in the Strickland case where the State Supreme
6 Court similarly -- I'm sorry, the Bartlett v. Stephenson case,
7 where the State Supreme Court similarly said drawing districts
8 as close to equal population as practical is how you comply
9 with our State Constitution.

10 If there are deviations in district size, they can
11 only be for traditional redistricting principles, and these are
12 listed in numerous cases, Karcher v. Daggett is a good source,
13 where the Court said that -- identified four traditional
14 redistricting criteria that could justify deviating from
15 one person one vote. Keeping political subdivisions whole was
16 one, and it's clear that that didn't happen in this case, that
17 the evidence is that more precincts were divided than ever
18 before and more municipalities were divided than was necessary,
19 so this first traditional redistricting principle was not what
20 was motivating the deviations here.

21 The second traditional redistricting principle is
22 protecting all incumbents equally. The Court has said that if
23 it's a policy that we value experience in holding public
24 office, if it's applied in a neutral fashion and you're
25 protecting incumbents equally, that is a justification for

1 deviating from one person one vote, and that was clear in the
2 Larios versus Cox case where the three judge District Court
3 found that incumbents were not protected equally, and that's
4 why in that case a deviation that was under 10 percent was
5 still found to be unconstitutional and those legislative
6 districts were redrawn pursuant to court order. That was
7 upheld by the U.S. Supreme Court. The reason for the redrawing
8 was because those districts did not -- they favored the
9 incumbents of one party over those of another. So it's not
10 simply enough to say incumbent protection. What the equal
11 protection clause requires in this context in the one person
12 one vote context is that you treat incumbents equally.

13 The third traditional redistricting criteria that's
14 identified in Karcher is compactness or contiguity, and again,
15 the evidence in this case is that the districts that were drawn
16 enacted in the challenged legislation were less compact, we
17 don't have any contiguity problems, but they were less compact
18 than either the 2011 districts that had been drawn or other --
19 the Gill alternative is an example of showing how it's possible
20 to divide the population in a 7-2 configuration and have much
21 more geographically compact districts. So the point there is
22 that the compactness or contiguity doesn't explain the
23 deviation from one person one vote because these maps are
24 actually not contig -- not compact.

25 And then the fourth element in Karcher which is also

1 not present here is preserving the cores of prior districts,
2 and this is part of the reason why the U.S. Supreme Court in
3 the Tennant case most recently out of West Virginia said that
4 it was actually okay to deviate from the strict population
5 equality requirement of Congressional districts. Part of what
6 the State offered as a justification in that case was that
7 we're preserving the core of prior districts, that it's a plus
8 to our democracy that people don't get moved around too much
9 and we want to keep our districts somewhat similar to what they
10 were before. If that's a neutral -- if that's neutrally
11 applied throughout the State, that's a neutral Governmental
12 principle that would justify deviating from one person
13 one vote, but clearly when you look at the current districts
14 that are drawn for the School Board, these districts that were
15 enacted don't seek to preserve the core of prior districts,
16 that's not the explanation here for why there is a deviation
17 from one person one vote.

18 I want to make clear that these traditional -- we're
19 not saying this these traditional redistricting principles are
20 legal requirements. This is very similar to what
21 Justice O'Connor said in the Shaw versus Reno case. There she
22 identified three of the four from Karcher, said they were
23 traditional redistricting criteria, she identified compactness,
24 contiguity, respect for political subdivision lines, and she
25 said, "We emphasize that these criteria are important not

1 because they are Constitutionally required - they are not - but
2 because they are objective factors that may serve to defeat a
3 claim that a district has been gerrymandered on racial lines."

4 What I am suggesting is that in this case these
5 neutral factors are not legally required of the jurisdiction,
6 but they are objective factors that if that were the reason for
7 deviating from one person one vote, it could defeat our claim
8 of partisan favoritism and favoring the rural versus urban
9 voters.

10 So the heart of our case here is that the goal of
11 favoring one political party over another or favoring voters in
12 one part of the county over those in another, however they're
13 described, whether they're rural, suburban, even if they're a
14 mix, the basic point is you can't favor voters based on where
15 they live, that votes are supposed to be counted equally, so
16 you can't intentionally for a non-neutral reason give voters an
17 advantage, and the reason is because that's exactly what the
18 one person one vote criteria is meant to prevent, so partisan
19 favoritism can hardly be a neutral or legitimate justification
20 for weighing some votes more than others, even though in the
21 partisan gerrymandering context the Courts have said -- have
22 not agreed on a standard. In the one person one vote context,
23 what we're saying is you can't have imbalanced districts where
24 the reason is to favor one set of voters over another, because
25 that's entirely what one person one vote is meant to stop, it's

1 meant to say everyone's vote counts equally.

2 So when we talk about the cases that are controlling,
3 the Fourth Circuit's opinion in Wright versus North Carolina
4 interprets both Larios vs. Cox and Daly vs. Hunt, the earlier
5 Fourth Circuit precedent, and those are really the three key
6 cases on the standards in one person one vote context.

7 Wright says that we glean several lessons from
8 Larios. First of all, the Supreme Court has not created a
9 10 percent threshold below which all redistricting decisions
10 are inherently Constitutional, that's 787 F.3d at 256, and
11 Wright also explains the Fourth Circuit's earlier decision in
12 Daly when deviations are under 10 percent -- and remember here
13 for the super districts they're just barely under 10 percent --
14 plaintiffs must prove that the plan was tainted by bad faith,
15 arbitrariness or invidious discrimination, so that's our
16 standard. Here plaintiffs' unrebutted evidence of bad faith,
17 arbitrariness and invidious discrimination was both direct and
18 indirect, so I want to talk a minute about both those types of
19 evidence.

20 The direct evidence of intent to discriminate comes
21 from the unrebutted testimony of legislators involved in the
22 process. Senators Blue and Stein, Representatives Jackson and
23 Gill all testified that based on their knowledge of the
24 legislative process and their participation in that process,
25 the purpose of the bill in 2013 and in 2015 was to create an

1 advantage for the Republican voters, and I want to take just a
2 moment to review some of the evidence that was admitted without
3 testimony to explain the significance of it, and here -- so
4 this is another type of direct evidence that partisan
5 influences caused the deviations in this case.

6 Exhibit 466 is an e-mail that was obtained through
7 the subpoenas, and this -- and it's up on the screen now. This
8 exhibit is an e-mail from Donna Williams, the Wake Republican
9 Chair, and she sends this e-mail to Neil Hunt saying that she
10 has looked at the maps, she's reviewing them, and she's having
11 trouble understanding how we would take five of the nine seats.
12 District 1 is what I'm questioning. Can anyone jump in to
13 explain.

14 The sponsor of the bill back in 2013 says: Brent is
15 the expert, he explained it to me, but Kyle will get him to
16 call you, and he is facilitating their communication.

17 Our point here is not that there's anything improper
18 about this communication, but that it is direct evidence that
19 partisan -- that the partisan implications of this plan and in
20 particular the goal to be able to control five out of the nine
21 seats was clearly a part of the process.

22 Similarly, Exhibit 468, which is the next exhibit on
23 the screen, is another e-mail from that subpoena production,
24 and again this is Donna Williams, and she really lays out her
25 concerns about how the currently elected School Board members

1 would serve an additional year, that advantages Democrats,
2 Republicans would have to run again, that has a Democratic
3 advantage, and in essence she is again raising concerns about
4 the partisan implications of the plan.

5 I've highlighted just two, but there are a couple of
6 other e-mails in the record now, so in total Exhibits 466, 467,
7 468 and 478 are all e-mails involving Donna Williams raising
8 questions and her concerns being addressed by the sponsors of
9 the bill about the partisan implications of the plan.

10 With regard to direct evidence, I also want to
11 explain the plaintiffs' position regarding the fact that
12 holding plaintiffs to a standard of bringing forward direct
13 evidence in a situation where the legislature has failed to
14 exercise its right to intervene, to defend, and none of the
15 bill proponents have come to testify, they've all claimed
16 privilege, the plaintiff should not be held to a standard that
17 requires a high degree of direct evidence. I mean, the direct
18 evidence is being closed off to us. So this is really an
19 equity argument. I'm not saying that the law requires some
20 kind of inference from their failure to testify or their
21 invoking of the privilege, but I am saying that as a matter of
22 equity this means that plaintiffs' indirect evidence should be
23 given greater weight, and while we do have direct evidence, we
24 shouldn't fail to meet our burden of proof on this point simply
25 because we didn't have sufficient direct evidence.

1 So let me turn then to the indirect evidence.
2 Overwhelmingly and predominantly I would say is the simulation
3 analysis of plaintiffs' expert Dr. Chen. He was able to
4 conclude based on his study and his methods that have been
5 published in a peer-reviewed article, peer-reviewed journal, he
6 is able to conclude with a high degree of statistical certainty
7 that the deviations were caused by partisan considerations, and
8 this is un rebutted evidence here, so that's our first and most
9 powerful form of indirect evidence, but then there's a wealth
10 of other types of evidence.

11 First, the fact that the plans don't advance the
12 asserted justifications, and that's why you heard a lot about
13 the policy, it wasn't because plaintiffs are claiming that they
14 have a legal right to have their policy preferences enacted,
15 it's because the facts don't bear out the policy justifications
16 that the bill proponents asserted, and our contention here
17 is that if the legislation doesn't rationally advance the
18 stated goals, then it's arbitrary under the Daly v. Hunt and
19 Wright standards.

20 I think it's important that -- this is a situation
21 where saying it doesn't make it so. Simply because a proponent
22 of the bill stood on the floor of the legislature and said this
23 bill will align election districts with school attendance
24 zones, it's the function of this Court to weigh that, whether
25 that asserted justification found in the legislative history

1 weighed against the evidence presented here, and that's not so
2 that the Court can substitute its own judgment about what the
3 policy should be, that's so that the Court can evaluate whether
4 that's the true motivation behind the bill or whether it is an
5 arbitrary -- whether the bill is actually arbitrary or
6 in fact -- and those are pretextual reasons.

7 So that's why we put in the record all of those
8 school assignment zone maps, because what they show is that --
9 and you heard in testimony as well that there was no systematic
10 analysis, study, information legislators had about the degree
11 to which alignment didn't occur under the 2011 districts and
12 would be improved under the 2013 plan. We gave you examples
13 through Amy Womble's testimony of ways in which the alignment
14 was made worse by these enacted districts. Senator Stein
15 testified about how just from his knowledge of the magnet
16 school system and how parents send their kids to magnet schools
17 outside the election district, that the irregular shapes of
18 these districts make it even more likely that someone will live
19 in a different district than the school district where their
20 child attends. So the evidence is fairly overwhelming that the
21 alignment of School Board election districts, while it was an
22 asserted justification, the facts don't bear out that the
23 legislation in any way actually achieved that, achieved that
24 goal.

25 Similarly, with regard to the County Commission

1 districts, one of the main justifications advanced was that it
2 was important to have representation for small towns in
3 Wake County, and here I think it's useful to look again at the
4 map that shows how the different municipalities are divided by
5 the seven single member districts and to recall
6 Representative Jackson's testimony about how in District 1 the
7 population in the Falls Lake area is so large it's going to
8 dominate the smaller towns of Wendell and Zebulon, and
9 Representative Gill's alternative illustrates that there are
10 ways to divide up the county that better protect
11 municipalities. Similarly, Dr. Chen's simulations also
12 demonstrate that it's possible to better protect
13 municipalities. So here again, the facts don't illustrate that
14 the legislation was actually designed to advance that
15 justification, and there are -- I'm not going to go through all
16 of the justifications, but that sort of highlights for you some
17 of the most important ones for the School Board and County
18 Commission.

19 Another type of indirect evidence is similar to the
20 Arlington Heights factors, and I just pulled them out here for
21 the Court because actually it always helps me to remember
22 exactly what they are.

23 Some of our evidence was tied to -- and I think
24 Arlington Heights is relevant because there the Court was
25 grappling with how do you prove intentional discrimination when

1 you don't have direct evidence, and the Court said you look to
2 these four factors, you look at what the historical events are
3 leading up to the enacted plan, what was the context of the
4 decision that was made, and here in this case we presented
5 evidence about the historical background to the decision in
6 2013 to redraw the School Board districts, the controversy that
7 the School Board was dealing with in 2009, the change in the
8 composition of the School Board in 2011, and those are factors
9 that you're entitled to take into account in determining
10 whether there was a discriminatory motive behind the change
11 that occurred in 2013.

12 Similarly for the County Commission, you heard
13 testimony about how in 2014 the results of that election were
14 Democratic candidates swept the open seats. Then led to an
15 attempt to essentially reverse the outcome of that election in
16 2015 by putting in place a plan intended -- that's designed and
17 intended to favor and advantage Republican voters. So those
18 historical events are part of the context that's relevant to
19 whether or not there was discrimination here.

20 The second Arlington Heights factor that we provided
21 evidence to is the departure from normal processes, and I may
22 not be being exactly -- yes, number 2, departures from normal
23 procedural sequence. Here we had evidence of a local bill
24 being introduced without prior consultation of the local
25 delegation and being passed over the objection of the local

1 governing body that the bill was impacting, and unique for
2 legislation that's controversial, unique for legislation that
3 involves redistricting, there were very short timeframes.

4 Representative Jackson testified about how it's
5 highly unusual for controversial redistricting legislation to
6 have less than 24 hours of committee consideration, and here
7 again I want to just highlight the evidence that was admitted
8 without a witness explaining the significance.

9 If you look at what was admitted as Exhibit 480, this
10 is an e-mail, again one of the e-mails produced in response to
11 the plaintiffs' subpoenas, and this e-mail is from a
12 constituent -- I'm sorry.

13 So the first e-mail is from a constituent who says
14 where should we go tomorrow, what time, what should we expect,
15 and this is regarding the -- you have on the exhibit the full
16 e-mail, there's an attachment that's a press release, and the
17 press release is from Representative Barefoot who says --
18 I'm sorry, Senator Barefoot who says that he's filing a local
19 bill to increase representation and geographic diversity on the
20 Wake County Board of Commissioners, so that's the subject of
21 the e-mail. The press release itself -- and it's significant
22 that this e-mail exchange is happening on Wednesday, March 4th.
23 This is before the committee consideration of the bill that
24 happened on March 5th. This is the same March 5th meeting that
25 plaintiffs testified that they didn't get notice of except

1 90 minutes before the meeting, had to rush to try to get there.

2 The press release does not say that the bill is going
3 to be on the committee for consideration the next day, the
4 press release simply says that Senator Barefoot is introducing
5 the bill, and in response to the inquiry about where we should
6 go, what time, he provides this information, that the meeting
7 starts at 1:00 p.m. in the legislative office building, other
8 people are coming, really important, and the point here is not
9 that the Senator can't communicate with his constituents about
10 a committee hearing, the point is that this process is highly
11 irregular, to provide information to some members of the public
12 before there is a public announcement available to other
13 members of the legislature and to the public in general about
14 the consideration of this bill.

15 The point there simply is that this is unusual and a
16 departure from what you would expect normally in terms of the
17 consideration of this legislation, and this alone, Your Honor,
18 does not make it unconstitutional, it's just one factor that
19 you can take into account in weighing whether or not there is
20 sufficient evidence of a discriminatory intent.

21 The other Arlington Heights factor that we have here
22 is the question of whether the decision weighs more heavily on
23 one group or another, essentially is there a disparate impact,
24 and here the data is in Tony Fairfax's report, the Urban and
25 Democratic districts, with one exception, the Urban, Democratic

1 districts are overpopulated, making the votes of those voters
2 weigh less, and the Rural and Republican districts are
3 underpopulated, so in that regard there is a disparate impact.

4 Similarly, the impact on the incumbents is different,
5 that Democratic incumbents are more disfavored than Republican
6 incumbents in the plan.

7 Another element of the arbitrariness, another element
8 of our indirect proof that this plan is arbitrary is shown by
9 the failure to follow traditional redistricting criteria, and
10 here I want to highlight again an e-mail that was admitted but
11 the significance wasn't explained.

12 What is on your screen now is an e-mail from
13 Cherie Poucher, who at the time, and this is from 2011, was the
14 director of the Wake County Board of Elections, and she is
15 e-mailing Ron Margiotta, who at the time was the Chair of the
16 Wake County School Board, and she's explaining to him that the
17 School Board will need to redraw their districts following the
18 2010 census, and she makes clear in the third paragraph of this
19 e-mail the Wake County Board of Elections will stress, as we do
20 prior to any redistricting, that the district lines do follow
21 our precinct lines. So the point just being that following
22 precinct lines was a criteria, a neutral Governmental
23 redistricting principle that when the School Board redrew in
24 2011, they were aware and understood that this was a criteria
25 that they should follow, and then that -- the fact that the

1 2013 enactment splits precincts is evidence of the
2 arbitrariness and the failure to follow what are generally
3 understood traditional redistricting principles.

4 Finally, another type of evidence, indirect evidence
5 that the motivations behind the drawing of these districts was
6 arbitrary is the fact that there are significant
7 inconsistencies in the justifications between the proposal in
8 2013 and the proposal in 2015, and here I've put up on the
9 screen just a little chart that highlights what I'm talking
10 about here.

11 When Senate Bill 325 was being considered, the
12 justification was that each voter should have more
13 representatives on the Board and that this would be better for
14 the citizens of Wake County because instead of voting for
15 one out of the nine seats, School Board members -- or voters
16 would now be able to vote for two out of nine, and yet in
17 Senate Bill 181, where under the current system everyone votes
18 for all seven seats, voters would only be able to vote for
19 two out of nine, so truly inconsistent justification there.

20 I think you also heard testimony about the
21 rationality of having districts for the School Board the way
22 that School Board members do and interactions they have with
23 their constituents and the decisions they have to make really
24 necessitates them being closer to the communities versus the
25 County Commission, where they -- at least the incumbent County

1 Commissioners feel it's useful to have at-large elections
2 because they take into account the whole county, they don't
3 engage in some horse trading, those are policy preferences, and
4 we're not saying the law is unconstitutional because it
5 violates those, we're saying the fact that the current
6 system -- there's some rationality to the current system and
7 that deviating from that and reversing that is some evidence of
8 the arbitrariness here.

9 The second inconsistency, when Senate Bill 181 was
10 considered the justification was that the costs of running for
11 election should be decreased. Now, we had evidence that
12 in fact the bill won't have that impact, but in addition to
13 that, Senate Bill 325 had the opposite effect because instead
14 of running in the less-expensive elections in odd-numbered
15 years -- and that was the point of some of the talk about media
16 markets and how hard it is to get attention when you're on the
17 ballot in a general election year versus when there are fewer
18 offices on the ballot. What the impact of Senate Bill 325 is
19 for the School Board is to actually increase the costs because
20 candidates will now have to run in the more expensive
21 even-numbered years.

22 The third inconsistency in justifications comes from
23 the fact that the County Commissioners -- in Senate Bill 325
24 the assertion was that the County Commissioners requested the
25 bill and the General Assembly should respect what the County

1 Commissioners are requesting, but in fact when Senate Bill 181
2 was passed, it was passed quickly and over the objections of
3 the County Commission, so again, an inconsistency in
4 justifications, and we suggest that some evidence -- that
5 provides some evidence of the arbitrariness of the decisions
6 here.

7 So overwhelmingly the un rebutted evidence in this
8 case is that deviations were caused by the improper motivation
9 of wanting to give greater weight to certain voters in
10 Wake County.

11 There are two important points I want to make about
12 our claim generally. First of all, it's important to consider
13 all of this evidence together. I think the standard is,
14 looking at the totality of the circumstances, have plaintiffs
15 proven that the deviations were motivated by bad faith,
16 discrimination or arbitrariness. So it's not that any single
17 piece of our evidence carries that burden, the question is
18 whether our evidence in whole carries that.

19 The second important point is that this type of claim
20 does not mean that there will be a lawsuit every time lines are
21 redrawn. The 2011 School Board redistricting is a prime
22 example of that. You heard testimony from Senator Stein and
23 others that there was a sense that the county -- that the
24 School Board was the only School Board in the State that had
25 hired a consultant, they hired a consultant that they felt

1 would draw districts in a way that favored Republicans, and
2 there wasn't a lawsuit brought at that time even though this
3 was not done in secret, people knew about it, the discussions
4 publicly were that this was a partisan drawn plan. The
5 deviations in that plan were very low, so there was no way to
6 assert that the plan was weighing votes of some voters over
7 votes of others where the deviations were so low. So the fact
8 that a plan that's under 10 percent but much closer to
9 10 percent gives rise to a claim here does not mean that every
10 single redistricting plan can be changed.

11 I think that Professor Chen's evidence on this point
12 is also relevant, because not every plan is going to be one of
13 those extreme -- going to be the kind of extreme outlier that
14 we have in this case, and if the enacted plan had fallen within
15 his range of 500 simulated plans, then he would not have been
16 able to conclude that partisanship and partisan motives was the
17 reason why the deviation increased.

18 Finally I just have to say that that type of argument
19 ignores the fact that when rights are violated, as they have
20 been here, that violation should be redressed regardless of
21 what might happen in the future with other redistricting plans.

22 So let me turn to plaintiffs' racial gerrymandering
23 claim, and this is a claim about the County Commission,
24 District 4. The elements of a racial gerrymandering claim have
25 been well-established, it's the burden of the plaintiffs to

1 show that race predominated in the drawing of a district. If
2 it is demonstrated that race predominated, the burden shifts to
3 the defendants to come forward with proof that that -- that the
4 district is narrowly tailored to serve a compelling
5 Governmental interest. What's important here is that if we
6 have proven that race predominated, we win. There has been no
7 evidence from the defendants that District 4 is narrowly
8 tailored to achieve a compelling governmental interest, so in
9 this case the whole question is whether or not the plaintiffs'
10 evidence proves that race predominates, and again we have
11 direct and indirect evidence.

12 The direct evidence is from statements during the
13 legislative process. In particular there are two times in the
14 record of the County Commission debates where Representative
15 Stam says that at-large districts submerge minority voters.
16 It's not -- it's an indication that the desire to prevent
17 that -- to prevent vote dilution was the reason for District 4,
18 and if that was the reason then it was intentionally drawn to
19 be a majority black district, race predominated in the drawing
20 of that district.

21 In addition, during the legislative history
22 Senator Blue, Representative Gill, Senator Stein said that it
23 wasn't necessary to draw a majority black district in
24 election -- in an election system for the Wake County Board of
25 County Commissioners because African American candidates and

1 candidates the choice of African American voters had been
2 winning for many years in Wake County, and even with that
3 evidence in the record, even with that position being taken,
4 the legislature passed the bill anyway.

5 Then, more powerfully, our indirect evidence. I want
6 to talk first about Professor Chen's evidence, because it's
7 exactly what Easley versus Cromartie requires. He looked at a
8 subset of his simulated districting plans and determined that
9 the percentage black population in the enacted plan was again
10 outside the range of any of the plans that he drew following
11 traditional redistricting principles, and Easley vs. Cromartie,
12 in that case the Supreme Court said that where there's an
13 allegation that it's partisanship, not race that's leading to
14 the creation of a majority black district, the plaintiffs'
15 burden is to prove that you could achieve the same partisan
16 outcome without using race to the same degree. That was the
17 standard that was established in Easley vs. Cromartie,
18 532 U.S. 234 at 258. Here that's exactly what Professor Chen's
19 evidence shows, you can achieve the same partisan outcome in
20 that district without taking race into account to the same
21 degree.

22 I want to make clear what the difference is between
23 consciousness of race, which Justice O'Connor said is always
24 present -- may always be present in redistricting versus what
25 it means for race to predominate.

1 What's on your screen now is the map that shows the
2 contours of District 4, and you can see that it follows along
3 much of its boundaries -- it's reaching out to pick up pockets
4 of high African American concentration and it's dividing
5 precincts in order to pull out African American population, and
6 this map is itself exactly the kind of indirect evidence that
7 race predominated that the Supreme Court has relied on in Shaw,
8 Miller, Vera, the entire line of racial gerrymandering cases.

9 The next slide is comparing one of Dr. Chen's
10 simulations with the enacted plan, and if a compact black
11 population turns out to be a majority in a district that's also
12 drawn to comply with other redistricting criteria -- so on the
13 right-hand side you have a map that was drawn to comply with
14 the requirements of compactness, keeping political subdivisions
15 whole, that is not splitting precincts, keeping cities and
16 towns whole to the extent possible. Even on that map one of
17 those districts, one of the Southeast Raleigh districts turned
18 out to be majority black. If this map happens to be one of
19 those dots on his graph that was over 50 percent black, I would
20 submit to you that's an example of race not predominating.
21 These are compact districts, other criteria were followed, and
22 the fact that you end up with a majority black district, I
23 sometimes refer to them as naturally occurring majority black
24 districts, that's not a Constitutional violation, race has not
25 predominated.

1 The problem that the Supreme Court first addressed in
2 Shaw versus Reno and as addressed most recently in the Alabama
3 decision is that you can't draw a redistricting plan where race
4 is the predominant factor, where it's the factor that plays a
5 greater role than all others unless it's justified by a
6 compelling Government interest, and that's what happened here.

7 District 4 is highly non-compact, it splits
8 precincts, and remember the evidence from Jannet Barnes that it
9 does not capture communities of interest, and ultimately the
10 harm is the same harm that the Supreme Court identified, it
11 makes assumptions about voters based on their race and it
12 assumes that -- and this is equally true, I believe this is
13 equally a harm for white voters as black voters, that it
14 assumes that voters are voting along racial lines, that they
15 have everything in common because of their race, and that's the
16 kind of assumption, the kind of race-based decision making that
17 the Supreme Court said does not meet Constitutional muster. So
18 the proof in this case establishes that District 4 in the
19 County Commission plan is a racial gerrymander without
20 justification and is therefore unconstitutional.

21 If Your Honor has no questions about those two
22 claims, I'd like to -- I am ready to move to remedy.

23 THE COURT: Okay. Well, I would love to hear you say
24 what you think the Supreme Court is going to do in Harris, and
25 I realize that it's just a prediction, but I know you're very

1 well-versed in this area of the law and I know you're aware of
2 that argument and I would love to hear your views on that.

3 MS. EARLS: I think that, as usual, this is a case
4 that could have implications -- that Harris could have
5 implications for this case. The decision could come out in a
6 way that doesn't -- I mean, it's controlling because it's
7 Supreme Court precedent, but the facts there are very
8 different, and I say that -- so it may not answer the questions
9 we need answered here or change any outcome here.

10 I say that because the commission in Harris was --
11 the Court's findings, the trial Court findings in Harris were
12 that the deviations were caused by two things, a desire to
13 comply with Section 5 of the Voting Rights Act and then the
14 impermissible partisan implications.

15 I think when you do read the oral arguments, most of
16 the Court seemed to agree that partisan factors couldn't cause
17 an imbalance, and I say that in particular thinking of
18 Justice Scalia, and again, this is just oral argument, but he
19 says: Well, that's because there's no Constitutional criterion
20 for where you draw the district lines. There is a
21 Constitutional criterion for how you weigh voters, district by
22 district. And the Court seemed to understand that partisan
23 factors can't trump the Constitution, that if there's a
24 Constitutional standard that says you make these districts the
25 same size, you can't allow favoring a political party, which is

1 not a Constitutional requirement, you can't allow that to trump
2 the Constitution.

3 But the fact that this is a mixed -- the Harris case
4 is a mixed motive case, the Court has been clear that -- the
5 Court has repeatedly -- the Supreme Court has repeatedly said
6 we will assume without deciding that compliance with the Voting
7 Rights Act is a compelling Governmental interest. Wake County
8 is not covered by Section 5, so that's just not a factor in
9 this case, and so we don't have the kind of mixed situation
10 where there may have been a legitimate motive that's mixed with
11 a partisan motive, how do you separate them out. Is the
12 standard that you have to prove a but-for causation or is there
13 some other causation? I would submit to you that in our case
14 we don't have this mixed motive problem because the motive that
15 we're -- both the -- all of the motives that we're putting
16 forward evidence to show were the real reason are all
17 illegitimate motives, and I would even say -- this was not
18 advanced by the defendants here, but even if they were to say
19 that the deviations were caused by our desire to draw
20 District 4 as a majority minority district, there's just no
21 evidence in the record to suggest that there was a need to do
22 that, so that can't be a justification of this plan.

23 So we don't have in this case a mixed motive
24 situation, and that's why I say it's possible that the Harris
25 decision will come down in a way that really doesn't implicate

1 what you decide in this case.

2 THE COURT: That's fair. I appreciate your thoughts.
3 I know you're well-versed in the area and I really do
4 appreciate your -- and I realize it's a tea leaf reading issue
5 when you read an oral argument transcript and read briefs and
6 read a lower court opinion, and it's under submission up there
7 and we will wait and -- I mean we will learn eventually what
8 they rule.

9 MS. EARLS: Yes.

10 THE COURT: But I'll now hear you on remedy.

11 MS. EARLS: Thank you, Your Honor.

12 Of course we ask that you issue a declaratory
13 judgment that the districting plans are unconstitutional
14 because they violate the Federal Equal Protection Clause in
15 two ways, they violate the one person one vote requirement and
16 District 4 violates the equal protection guarantee on the basis
17 of race.

18 I think the remedy question was answered by the
19 Fourth Circuit in this case, and so we're asking you in
20 addition to enjoin the defendant from conducting elections
21 under the election methods established by Senate Bill 325 and
22 181, that is our request. The impact of that, I submit,
23 is that these bodies would revert to the last legally
24 enforceable method of election, the one that's been used up
25 until now.

1 In Wright the Court said, and now I'm quoting:

2 "The District Court could, for example, mandate that the Board
3 of Elections conduct the next election according to the scheme
4 in place prior to the Session Law's enactment until a new and
5 valid redistricting plan is implemented." That's 787 F.3d at
6 262.

7 The Fourth Circuit in Wright also went on to point
8 out that there are a couple of authorities, legal entities that
9 can fix the issue. The General Assembly can enact something
10 different if they wish, but even with the failure of the
11 General Assembly to act at all, State law provides that the
12 State Board of Elections can make reasonable interim rules with
13 respect to pending elections, and that's North Carolina General
14 Statute Section 163-22.2.

15 So I think it's clear that as the Fourth Circuit lays
16 out, if you find that plaintiffs have met their burden and
17 proven that these maps are unconstitutional, the appropriate
18 remedy is to enjoin the defendant from conducting any elections
19 under these plans for either the County Commission or the
20 School Board, and that's what the plaintiffs ask in this case.

21 THE COURT: Thank you. Mr. Marshall.

22 MR. MARSHALL: Your Honor, I would project that my
23 argument would not take longer than Ms. Earls', just to serve
24 as a roadmap. I wonder if there's any way I could take just a
25 five minute break.

1 THE COURT: We'll take a break until ten o'clock.
2 We'll be in recess until ten o'clock.

3 - - - - -

4 (Recess at 9:48 a.m. until 10:00 a.m.)

5 - - - - -

6 THE COURT: The Court will now recognize Mr. Marshall
7 for his closing argument on behalf of the defendant.

8 MR. MARSHALL: Thank you, Your Honor.

9 I join Ms. Earls and thank you again for expediting
10 this proceeding. I also want to -- before I forget, I want to
11 thank Ms. Earls, Ms. Riggs and their entire team for their
12 professionalism and courtesy throughout this entire matter.
13 In a short frame of time, both with pretrial work, during
14 discovery and getting ready for trial, I was really happy that
15 we could agree on joint exhibits. As I've said from the
16 beginning, in our situation the more information you can have
17 to evaluate the evidence and make your decision is probably
18 better for everybody involved, so I just want to thank them
19 publicly on the record.

20 THE COURT: And I will echo those thanks with respect
21 to all counsel. I really very much appreciate the
22 professionalism all of the lawyers in this case have exhibited
23 throughout.

24 MR. MARSHALL: Thank you, Your Honor.

25 And just organizationally, much like Ms. Earls, I'll

1 talk about one person one vote probably for the majority of my
2 remarks as to both the 2013 and the 2015 bill, because they're
3 the same districts, and then I will close with some
4 conversation about District 4 and that claim as well.

5 I want to start by saying I was struck by a few
6 themes that I heard in the courtroom that I think over the last
7 couple of days are worth opening with because I think it really
8 helps inform the type of evidence we had in this case because
9 it's a little different than a lot of the civil cases that I'm
10 involved in.

11 I was struck first by how many witnesses expressed a
12 real palpable frustration with the fact that the General
13 Assembly had made the decision to draw School Board districts
14 and County Commission districts rather than let those decisions
15 be made at the School Board level, at the County Commissioner
16 level that's closer to the voter and closer to the parents.
17 I understand that frustration, we heard it loud and clear
18 throughout the trial, and it certainly is as a matter of public
19 policy a very valid point, and it really sounds of Federalism,
20 and even though the parties are a little bit differently
21 aligned in that usually a lot of times we're hearing
22 Republicans talk about Federalism, in this case we really did
23 hear those local decisions really need to be made at the most
24 local level of our Government and we had Republicans in the
25 General Assembly saying, no, we're going to take back control

1 over this redistricting process because we have a different way
2 we want to do it.

3 The second thing I heard was over and over that what
4 the Republicans in the General Assembly did was not what the
5 will of the Wake County voters and parents were, that this was
6 not a popular decision and that there were a number of people
7 who spoke out against this bill very vocally in the General
8 Assembly and then even with outside it.

9 And then finally there was complaints about the
10 process, the speed in which the bills were taken up in the
11 General Assembly, the process in general. I do think the
12 plaintiffs themselves showed that most of them that testified
13 actually did weigh in at the General Assembly and there were --
14 as you can tell by the transcripts, we had lots of committee
15 hearings and the bill had gone back and forth several times.
16 I think there's 10 or 11 different transcripts alone.

17 But the reason I bring that backdrop in is
18 redistricting, we all know, is a political process and the
19 legislative sphere is where the policy and political judgments
20 about how districts are to be drawn are made, and what the
21 plaintiffs seem to be doing throughout much of their evidence
22 is questioning the wisdom of those political judgments that
23 were made by legislators at the policy level, and for the local
24 Board of Elections, who took no position in this matter,
25 certainly my clients were not advocating that the School Board

1 not be able to draw their districts or the County Commissioners
2 shouldn't be able to draw their districts.

3 I think the County's lawyer said this in the
4 Fourth Circuit, they don't make the sausage, they just have to
5 eat the sausage. So there was no political interest by my
6 client during that process at all, and had the General Assembly
7 not wanted to do this or had they lost the votes to redistrict,
8 then certainly my client would have no problem and would
9 continue implementing these same -- the same School Board
10 districts, the same County Commission districts, but the fact
11 of the matter is the political process shook out the way it
12 did, the bills were enacted, and so my client now has to
13 implement these maps unless they're invalidated by a court.

14 Effectively what I was hearing for the first day and
15 a half we had testimony was they were asking you, the
16 judiciary, to really reevaluate, review and even override the
17 political judgments that were made by the General Assembly, and
18 so there was times where this courtroom really in some ways did
19 sound like a legislative hearing room, and I was struck
20 especially by the testimony of the pollster about out of 500
21 Wake County residents this many opposed the move to change the
22 County Commission districts.

23 Again, I understand the argument behind that,
24 I understand the will of the voters, but ultimately there was a
25 political decision made, and I want to take that thought, which

1 is the role of the judiciary in these cases is to the evaluate
2 the Constitutionality of the districts, it's not to
3 second guess or sort of revisit the political judgments about
4 which maps should be used, how compact they should be, whether
5 the Shanahan map was a better map at the time, and frankly,
6 Your Honor, whether or not the General Assembly should have
7 exercised its role to take away the redistricting process from
8 the local level. That itself is a political question.

9 So with that, I want to turn to what the fundamental
10 claim here on the one person one vote rule is today, and that
11 is is it appropriate for the General Assembly to use
12 partisanship as redistricting criteria within the 10 percent
13 de minimis threshold for population equality that was
14 established by Daly v. Hunt and the Fourth Circuit.

15 Everyone argued, to a man and a woman, from the stand
16 in the last couple of days that this map was drawn for a
17 partisan purpose, and that was to help elect more Republicans
18 and to unseat more Democrats, that was squarely put in front of
19 you, and I think Senator Stein probably said that as clearly
20 and concisely as anybody yesterday, and so I'm going to address
21 head-on the question of whether partisan gerrymandering and
22 that string of case law is directly relevant to de minimis
23 variation challenges under the one person one vote rule,
24 because we believe in this case that it is, and frankly we
25 believe this is the very case that was reserved by Larios and

1 that was addressed in Harris. And I agree with Ms. Earls, it's
2 very likely that Harris is not going to come down on this very
3 narrow question because it very well may not have to, but the
4 way this case is postured -- and in part because I don't have
5 the benefit of the General Assembly defending their own
6 districts, so from an evidentiary standpoint I think this case
7 really might present that very question, which is can you have
8 partisanship as the basis for districts that are drawn if the
9 result of the districts is still within the 10 percent
10 variation established by Daly v. Hunt. So what I'd like to do
11 is connect very briefly the case law in Gaffney versus Cummings
12 and then the Vieth case, which is the partisan gerrymandering
13 case.

14 Gaffney is the case, Gaffney versus Cummings, that
15 set the high bar for challenging small population deviations.
16 In Gaffney the deviation was -- the overall deviation was 7.83.
17 Our case here for the seven member districts is 7.1.
18 And Gaffney is interesting because it immediately cites the
19 problems with population equality in general, how you measure
20 it, how you count noses is what the Court said, and they said,
21 look, population -- the counting of population is in itself a
22 difficult process and we have to have some level of give, and
23 this is how the whole 10 percent threshold that Daly v. Hunt
24 recognized was effectively borne out. So we have to have some
25 level where Courts are not going to be able to intrude just

1 because there happens to be a deviation with the difficulty in
2 counting noses.

3 In order to make sure that we protected the Courts
4 from being brought into those granular decisions, we set the
5 standard a bar of invidious conduct, and that was the standard.
6 Invidiousness is the word used by Gaffney, and I can only
7 imagine that's the -- really the origins of Daly v. Hunt when
8 they talk about invidious discrimination as well. So by
9 setting that bar of invidiousness, the Court was recognizing
10 there has to be some level of give in population equality and
11 there has to be a high bar so we don't have Courts -- and I
12 want to quote Gaffney here -- in a position where the Federal
13 Courts are going to find themselves having to make political
14 decisions necessary to formulate a plan or accept those made by
15 reapportionment plaintiffs who may have wholly different goals
16 from those embodied in the official plan. That's from Gaffney.

17 I'll take that language and connect it to Vieth,
18 which is the political gerrymandering case, because that's
19 exactly what you would have to do, Your Honor, in this case.

20 The allegation here is that the districts were drawn
21 for a partisan motive, and we're accepting that as true for
22 purposes of this argument because every single plaintiff
23 testified to that fact, I will certainly concede that, and we
24 did not put on any evidence to rebut claims of partisanship,
25 but we look at Vieth because now we have to see -- if you have

1 to evaluate partisanship in this context, Vieth explains how
2 you would do that, and what the plurality opinion in Vieth
3 says, Your Honor, as you know, is you can't do that, and I want
4 to talk very briefly about why Vieth came down that way and how
5 it's actually relevant to the evidence in this case.

6 What Vieth said is that political affiliation is an
7 immutable characteristic because it may shift from election to
8 election and even within a given election, and not all voters
9 follow the same party line. That was borne out here in this
10 case over the last two days over and over. What I heard was
11 partisan lines don't work here in Wake County. Mr. Shanahan
12 drew a district map that was intended to favor Republicans, is
13 what we heard from the stand, but it didn't work because the
14 voters in Wake County didn't like what the Republican School
15 Board majority was doing, so they elected Democrats on a map
16 drawn by Mr. Shanahan. So it's hard to see how you can
17 evaluate how partisan a map was or wasn't when the results of
18 election indicates that people are voting in ways that were
19 inconsistent with how the map was allegedly drawn.

20 Representative Gill said it herself both in her
21 legislative testimony and here, she said in Wake County if
22 you're not representing the interests of the voters we're going
23 to throw you out of office, and we've seen it time and time
24 again, switches on the County Commission, switches on the
25 School Board, that there is a level of independence at the

1 local level about what issues we're voting on, and that's
2 exactly what Vieth was talking about. We've seen even a switch
3 I think in District 5 between the '04 data and the '08
4 Presidential election data.

5 So from that Vieth concluded -- Justice Scalia said:
6 "These facts make it impossible to assess the effects of
7 partisan gerrymandering, to fashion a standard for evaluating a
8 violation, and finally to craft a remedy."

9 Then Vieth went on to reject the Powell standard in
10 Bandemer, and you know, Your Honor, Bandemer was the original
11 partisan gerrymandering claim, and again the Powell standard
12 was relevant here because what it said was -- Justice Powell
13 was the one who examined whether partisanship was used solely
14 to the exclusion of all other factors, and Scalia referred to
15 this as a fairness test, the totality of the circumstances
16 test. It's very similar to what the plaintiffs were just
17 arguing in closing, and that is we need to look to other
18 traditional criteria, okay, to make sure it wasn't just
19 partisanship. But what Vieth said was how do you do even that?
20 Sometimes fairness can be explained by even a noncontiguous
21 district. Sometimes there are traditional districting criteria
22 that may not be met at a certain level that could still be
23 fair. How would you just fairness is what Scalia said, and
24 really how would you -- how do you know that on a level of
25 compactness that a district needs to be this compact or it can

1 only split this many precincts. Even Justice Kennedy in his
2 concurrence said there's no substantive definition of fairness
3 and, frankly, even if we tried to -- if we tried to apply one
4 there's no limit to where the line of judicial intrusion would
5 be.

6 So what Vieth ultimately stood for at the end of the
7 day was a principle, again, from the opinion that the fact that
8 partisan districting is a lawful and common practice means
9 there's always room for an election-impeding lawsuit contending
10 that partisan advantage was the predominant motivation, and so
11 that's exactly what we have here, Your Honor, because if you
12 apply these principles from Vieth in the partisan
13 gerrymandering case, then if partisanship is not a permissible
14 motive within a 10 percent population deviation then every
15 deviation will thrust this Court into the vast apportionment
16 slough, which is what Gaffney referred to, where you would have
17 to identify and apply judicial standards to evaluate partisan
18 claims, because that's -- because you would have to do that
19 very task here, Your Honor, that's the very type of
20 apportionment slough Gaffney was referring to, the only way you
21 could do that is to apply the very standards proposed in Vieth
22 that the Supreme Court had rejected.

23 So turning full circle back to Gaffney, Gaffney had
24 mentioned that if the Court were to continue to have to review
25 these one person one vote claims with respect to different

1 plans, that at some point it's a never-ending parade of
2 different plans and alternatives that you have to weigh, and
3 what Gaffney said was the point is, quote, that such
4 involvements should never begin.

5 So applying the partisan gerrymandering line of cases
6 to this case, I want to briefly talk about why in fact the
7 Vieth opinion should apply here, because it almost makes it
8 impossible to explain or to evaluate when partisanship goes too
9 far.

10 If you look at this case, the claim is that these
11 districts will help Republicans, and it's true that by a 5-4
12 margin under the '08 election data that five of these districts
13 went for McCain and four of the districts went for Obama if you
14 total them up. It's also true that if you look at voter
15 registration status, which I will concede are not to be used or
16 not weighted as heavily for these purposes as actual election
17 results, but still it's 5-4 Democrats. So it's either 5-4
18 Republicans based on election data, it's 5-4 Democrats based on
19 voter registration data. But even Senator Blue testified -- he
20 said, I know partisanship is a legitimate criteria, and I asked
21 if he thought it went too far in this case, and I really wanted
22 to know the answer to that question, and he said -- he said no,
23 I don't think it did, and so there's at least -- you have at
24 least one of the plaintiffs' witnesses saying that, and I know
25 that that's not a party concession, I'm not suggesting that

1 there isn't an argument that it might have gone too far, and
2 certainly they will contend that, but I want to point out a few
3 other pieces of evidence that again just show how difficult it
4 is to judge this.

5 We know that in the School Board case that the lines
6 were actually changed during the debate and it was to -- it was
7 to help two incumbents in terms of making their districts
8 a little more favorable, which proves that even during that
9 process there was a changing of the line for a political
10 purpose that at least in that case seemed to favor both a
11 Republican and a Democrat, and it might have favored the
12 Republican more than the Democrat, I think we can assume that
13 was true because it was a Republican General Assembly, but
14 again, how do we evaluate that? How do you say that that was
15 more partisan or less partisan? And the question of incumbent
16 targeting, again, is also somewhat of a mixed bag.

17 Even after you look at the adjustment of lines, in
18 the School Board elections there were -- there was one district
19 that had two Democrats and a Republican, I think it was
20 District 6, and then District 1 had two Democrats and a
21 Republican. I think one was unaffiliated but leaned Democratic
22 or identified with the Democrats. So you had -- you were
23 bunking Republicans and Democrats, period. And then in the
24 County Commissioners case you did have three County
25 Commissioners in one district, but remember, the County

1 Commissioners districts simply took the School Board districts
2 and overlaid them, so there's really no evidence that those
3 lines had been redrawn at all for that incumbent purpose.

4 But again, assuming, as we have to, that incumbency
5 and partisanship go hand-in-hand, how do you draw that line?
6 How many incumbents would it be okay to potentially try to
7 disadvantage? How do you -- how do you measure bunking one
8 Republican and one Democrat versus two Democrats and one
9 Republican? Do we look at motive? Do we look at true
10 targeting or a motive that we want to -- we want to vote this
11 particular person out of office so we are going to do whatever
12 we can to make it as difficult as we can for he or she to be
13 elected? How do we align a mixed motive -- how do we draw a
14 line with respect to incumbents and partisanship?

15 Again, I think that a great way to -- a great way to
16 illustrate this problem is comparing the Shanahan plan and the
17 Senate Bill 325 and Senate Bill 181, because in those plans,
18 Your Honor, the testimony was that Shanahan plan was a partisan
19 plan. The testimony was that this plan was partisan. The
20 Shanahan plan split ten cities and towns. The seven district
21 plan split nine cities and towns. The Gill plan split eight
22 cities and towns. Both the Shanahan and the enacted plan split
23 precincts, both of them had deviations, and the Shanahan plan
24 had a lower deviation, there's no doubt about that, and the
25 Shanahan plan was a poor predictor of election results.

1 So how do you draw that line to say that the Shanahan
2 map may have been permissibly partisan but this map would be
3 impermissibly partisan? How are we going to measure the
4 electoral data? How are we going to measure the number of
5 precincts that can or can't be split? How are we going to draw
6 the line at the deviation?

7 I would ask Your Honor to think about a sliding scale
8 approach, how difficult that would be, if you said, well, if
9 it's a 3 percent deviation and a certain level of
10 X partisanship, well, that would be non-permissible, but if it
11 was a 2 percent deviation and a lower level of partisanship
12 that would be. Or what if you a 10 percent deviation and just
13 a smidgen of partisanship? At some level trying to align --
14 trying to draw another line within 10 percent and say, well,
15 that's not permissible if there's a certain level of
16 partisanship I think would be wholly unworkable.

17 Before I go off this topic, I do need to point out
18 again, draw it back to how this affects my client. I mean,
19 ultimately, I have to say it over and over, they do not care
20 what the districts are, they do not care that the General
21 Assembly did or didn't draw the districts in a certain way, and
22 they certainly don't take any political position on that
23 matter, but if in fact courts are going to take maps that fall
24 within the 10 percent population deviation and evaluate whether
25 there's a Constitutional violation solely because of

1 allegations of partisanship, and if the Attorney General is not
2 going to be here defending these cases and the General Assembly
3 is not going to be here, then my client does institutionally
4 have a serious problem in terms of potential litigation, and it
5 doesn't matter what party is in power, whether the Democrats
6 are redrawing the districts or the Republicans are redrawing
7 the districts.

8 There was a comment that the Shanahan plan wasn't
9 challenged. If as a result of this case a deviation within
10 10 percent with evidence of partisanship can lead to throwing
11 out the districts, there's no doubt that a map like the
12 Shanahan map in the future will be challenged, and there's no
13 doubt that a Democratic map would be challenged probably by
14 Republicans. That's just been the history of redistricting.
15 So the idea that there hasn't been a previous challenge to
16 these maps I think is premature in terms of what the Court is
17 being asked to do today.

18 There's been conversation about the Larios case, and
19 I do want to talk about Larios very quickly.

20 In Larios, one really important distinction is that
21 the testimony -- and I've got a few slides I'll put up in a
22 moment, but the testimony was the legislators in Larios in
23 Georgia sat in a room and they said, look, we have got to
24 protect all of southern rural Georgia and inner city Atlanta
25 because we're losing population and we're not going to be able

1 to hold on to a certain number of seats that we need, so what
2 we need to do is figure out how we can stop the flow of voters
3 outside of our district so that we can hold onto these
4 districts, and the only way to do that, they determined, was to
5 use the 10 percent safe harbor as a sword. In that case the
6 Court said that legislators actually thought that they could do
7 whatever they wanted within 10 percent and they could just run
8 it up to 10 percent and then try to accomplish their objectives
9 that way, using it as a sword, and that's exactly what they
10 did.

11 Why don't we put up just a couple slides.

12 In Larios, in the House plan, there were 90 seats
13 drawn with greater than 4 percent deviations, 60 seats with
14 greater than 4 and a half, 20 seats with greater than 4.9,
15 the Senate plan was similar, and all of the Senate districts
16 and most House districts with the negative deviations over 4
17 were in south Georgia or inner city Atlanta.

18 One thing you certainly don't have in this case that
19 we had in Larios, if we move forward -- I just want to sample
20 some testimony.

21 This was the redistricting staff person,
22 Linda Meggers. She said: I took all of south Georgia and
23 lassoed it in as if it were one big district. We had the
24 population and the deviation and how many seats, so I knew how
25 many seats I could draw and be within 5 percent.

1 And then Senator Brown in Georgia said: When I
2 looked at the southern part of the State, there was one
3 paramount concern, and that was that we not lose any more
4 districts than would absolutely be necessary.

5 Then finally Linda Meggers again: With the numbers
6 we had, we knew that at a minimum they were going to lose --
7 they were going to lose seven seats, and my job -- my job was
8 to keep them from doing that. They wanted me to help them see
9 if they could draw a plan that held it to seven if at all
10 possible.

11 Your Honor, there's obviously none of this evidence
12 in this case, and in fact there's not even evidence that the
13 deviations themselves were used to create the partisan result,
14 because that would require proof that 9.8 percent in the super
15 district and 7.3 in the seven district plan was the actual
16 trigger that would lead to the partisan result, either the --
17 or a fault line, a fault line, if you will, that if it was
18 7 percent that it wouldn't work or if it was 9 percent it
19 wouldn't work either. There's no testimony to that effect.

20 What Dr. Chen said was at 2 percent we can tell you
21 what the partisan outcomes are, but he can't tell you what they
22 would be at 3 percent, 4 percent, 5 percent, 6 percent or even
23 7 percent, so there's no evidence that these deviations were
24 the very thresholds and the only way that these partisan
25 objectives could be accomplished.

1 The better evidence, Your Honor, is that the lines
2 were drawn politically and the deviations were a result of the
3 partisanship. And again, if you look at the fact that even
4 during Senate Bill 325 the lines were being adjusted between
5 the original bill and the enacted bill, that adjustment which
6 was clearly a political adjustment, that was the testimony,
7 Representative Stam made that clear in his legislative
8 testimony, but that line drawing affected the deviations in
9 such a way that District 1 went from being overpopulated
10 Republican to underpopulated Republican.

11 I think that's a good way to peek behind the curtains
12 and see that the partisanship was being used and the deviation
13 simply resulted, and if they were within 10 percent there
14 wouldn't be any need, at least under the Fourth Circuit's
15 precedence -- there would be no legal requirement that they
16 would have to then change them to some other acceptable or
17 closer deviation.

18 I'll talk just for a minute about the rural versus
19 urban issue, and I'll go back to Larios. Honestly, Your Honor,
20 we did hear some testimony about rural parts of Wake County,
21 underpopulating districts, but remember, we do know that
22 District 5 is an underpopulated Democrat district, District 6
23 is an overpopulated Republican District, and again, in the
24 original version of Senate Bill 325 even District 1 would have
25 been an overpopulated Republican district.

1 But as a practical matter -- and why don't we put the
2 A and B district map up -- if the General Assembly is drawing a
3 partisan map for partisan purposes, it would look like
4 Districts A and B right here. I mean, it's really difficult,
5 first of all, to divide Wake County into two large districts in
6 a way that isn't going -- isn't going to encompass both rural
7 and urban areas.

8 I mean, I think I mentioned this in the brief, if you
9 drew a line horizontally you would have, you know, sort of
10 high tech RTP suburban quarters and then you would have a lot
11 of rural southern Wake County. If you drew it east/west you
12 could draw similar distinctions. I mean, the testimony even at
13 trial was both A and B have demographic characteristics that
14 are all over the map literally, and it occurred to me right
15 before the trial, and I asked Representative Gill this, that
16 part of inside the beltline Raleigh is in the so-called rural
17 district and part of outer Apex outside going south Wake is in
18 the urban district and Wake Forest is in the rural district.

19 And again, there was testimony about this crab claw
20 jutting out. These were political boundaries and, if anything,
21 drawn for partisan purposes, and I just don't think you can use
22 Larios, which talked about the entire swath of south Georgia,
23 and there was testimony about the two Georgias, a historical
24 struggle between the southern rural parts of the State with the
25 suburban growth in Atlanta. There's no such -- there's no such

1 historical struggle between any two distinct rural and urban
2 parts of a single county such as Wake County, so I think
3 factually Larios just doesn't work.

4 I think as a matter of line drawing and map drawing
5 that any sort of A and B district drawn for any purpose,
6 including a partisan purpose, is going to be -- is going to
7 have demographically and geographically dissimilar parts, and
8 we even heard testimony that in District 4 itself that there
9 weren't necessarily communities of interest, that you had,
10 you know, parts toward Knightdale all the way to Chavis Park,
11 and the testimony was these really aren't similar at all.

12 Representatives Jackson and Stein have testified that
13 District 1 here, even though it covered a lot of rural
14 territory, that there weren't communities of interest there
15 either, so I think it's hard to draw that distinction.

16 Unless the Court has questions on the one person
17 one vote comments, I'll move to District 4.

18 THE COURT: What do you think is going to happen in
19 Harris? And I know Ms. Earls was totally accurate and I know
20 you know too that there's not a Section 5 issue that was
21 present in Arizona, but then there's the -- I think it was the
22 first question in the cert petition that they took, and I also
23 realize, just as I discussed with Ms. Earls, that we'll find
24 out when we find out, but how, if at all, do you think
25 Harris -- what do you think the Court will do and how might

1 that impact this case?

2 MR. MARSHALL: Well, I agree with Ms. Earls, I think
3 if the Supreme Court doesn't have to address the issue that
4 I've posed before you today, I don't think they want to address
5 that issue, and I think if there's a way that they don't have
6 to address it, that they're not going to, because if you really
7 look at the history of the jurisprudence, they haven't
8 addressed it, they've tried not to address it.

9 Justice Scalia came the closest in his dissent in
10 Larios. He said, look, I don't want Larios to be read as
11 saying that partisanship can't be used in one person one vote
12 cases within 10 percent, and so he wanted to hear that case, he
13 wanted to make sure that if that -- if that was the direction
14 the Court was going to go, that a per curiam opinion was not
15 the way to do it, and so I think he was forecasting that, look,
16 if we're going to take this on, we need to take it on, and it
17 hasn't been taken on since then, and it is -- it is arising in
18 Harris, but if they don't have to do it, I'm not sure that
19 they're going to, and I agree that there are other motives at
20 issue in Harris and other ways to do it.

21 But again, I certainly can't predict where the votes
22 would go, but I will say that going back to my connecting
23 Gaffney with Vieth, I just don't understand how, Your Honor, if
24 you're asked to examine whether partisanship went too far in
25 this case within a de minimis threshold, if you're being asked

1 that within that threshold, which there's a Constitutional
2 presumption that these districts are drawn in good faith and
3 are Constitutional, within that presumption if you're being
4 asked to evaluate whether partisanship went too far, how are
5 you not faced with the exact same problems the Supreme Court
6 identified in Vieth? How are you not being asked to engage in
7 the exact type of inquiry? And I think Harris would have to
8 address that question if they're going to look at whether
9 partisanship went too far. That was an independent commission
10 though in Harris, it was different, it wasn't --

11 THE COURT: Right. Arizona had adopted a
12 redistricting commission. The Court approved Lester and,
13 right, there was -- it's my memory of the case there was some
14 evidence that two of the five were partisan, and I know
15 Judge Wake wrote a dissent. I mean, I just was curious because
16 you had the first issue about if they say that the deviations
17 are permissible under -- that the Voting Rights Act, as
18 Ms. Earls said, that there is a line of cases, that that's a
19 compelling interest with respect to engaging -- in appropriate
20 cases, and likewise trying to get Section 5 preclearance on the
21 first try, which as I recall what that case was talking about,
22 that the commission very much wanted to do, which had not been
23 the history in Arizona, as I recall from the case, that if
24 that -- and the commission said that's why we had population
25 deviation, and then we also have this other -- this other

1 finding associated with partisanship. If the Court says that
2 Section 5 provides a rationale for the deviations, what does it
3 do with the partisanship component of that case --

4 MR. MARSHALL: Right.

5 THE COURT: -- if anything.

6 I mean, as Ms. Earls said, and as you said, it's just
7 hard to know what they're going to do, but at least it's part
8 of -- it certainly was part of the discussion that Justice
9 Sotomayor and Justice Kagan and other Justices had associated
10 with this discussion stemming back to Gaffney.

11 MR. MARSHALL: And I think it's interesting that --
12 I know that Ms. Earls is much more familiar with this type of
13 litigation in her time, she's an expert in it, and I know they
14 wrote a very good amicus brief in Harris, but the first time
15 that I read Vieth I was just struck with -- if that's what the
16 Court is being asked to do in this case, even though I will
17 readily admit it's a different claim -- I mean, Vieth is a
18 political gerrymandering case, and as Ms. Earls has pointed
19 out, there are plenty of cases that say political
20 gerrymandering cases are not one person one vote cases, and the
21 very fact that a mixed motive case in Harris is instructive is
22 because in most cases they are going to be mixed motive and
23 you're not going to necessarily have to address this very
24 question, but again, in this case I -- I think it's a
25 procedural posture. I think if the General Assembly was here

1 it very well may be a mixed motive case and we probably would
2 have had testimony about what the intent was, but again, we
3 don't have that here, so I am again having to litigate on
4 cross-examination, and the evidence presented was over and over
5 that these were partisan districts and they were designed to
6 favor Republicans and to disfavor Democrats.

7 I did want to just point out a historical curiosity
8 I found going back to the difficulty of predicting results.
9 Vieth actually cited a case in North Carolina where there was
10 a -- this might have been before I started practicing, but the
11 Republicans brought a political gerrymandering claim regarding
12 the election of Superior Court Judges, and Your Honor may have
13 been around for that, and I think the fact that they were being
14 elected statewide for district seats that allegedly favored
15 Democrats, made it impossible for Republicans to win, and the
16 Fourth Circuit actually let the case go forward, and it was
17 I think the only Court of Appeals that had recognized a
18 political gerrymandering claim, at least a cognizable claim to
19 go forward, and then ultimately subsequently in that case what
20 happened was the District Court found that Republicans in fact
21 couldn't be elected to Superior Court Judge seats, then five
22 days after that eight Republicans swept these judge seats and
23 the Fourth Circuit came back and said, we're actually going to
24 consider that evidence, because the whole point of trying to
25 evaluate this claim is the impact and the results, and here

1 we're faced -- we have a prediction from the District Court and
2 in the Fourth Circuit the answer was, well, we've already had
3 these elections and this was the result of the elections.

4 Then finally I wanted to -- before I move on to
5 District 4, I wanted to -- I wanted to respond to one point
6 Ms. Earls made, because I think it was -- I think it was an
7 interesting point about the degree of alignment with
8 traditional redistricting criteria.

9 Again, we didn't have any evidence of what the
10 General Assembly's motivations were with respect to certain
11 other traditional redistricting criteria, but again I think it
12 falls into the same category, which is how would you judge the
13 compliance -- how would you judge the compliance of that
14 criteria, and I think again that falls back to the Powell
15 standard in Bandemer.

16 Let me move on quickly and go ahead and wrap up by
17 addressing the District 4 issue. This is the one where we're
18 certainly hamstrung by the lack of evidence on our side of the
19 table here, but I'm going to suggest, Your Honor, a procedural
20 way to dispose of this case, and it really wasn't addressed
21 during trial, and I certainly had mentioned it during briefing
22 and I believe my Answer, but these districts were drawn in
23 2013, that much is undisputed, including District 4, it was
24 drawn as a pack of districts for the School Board. The
25 districts were adopted in 2015 wholesale, and the reason stated

1 by Senator Barefoot and Representative Stam for why they
2 adopted these particular districts and not draw different
3 districts was at the time Judge Boyle had upheld the
4 Constitutionality of those districts.

5 Now, that was on appeal, and ultimately we're in this
6 very case and the Fourth Circuit ultimately did throw out --
7 send the case back to where we are standing today, but the
8 stated reason in 2015 was we don't want to have additional
9 litigation, we've got districts that have been approved so far,
10 we don't want to create a different set of districts that might
11 also be challenged, so that was at least the stated reason for
12 Representative Stam, and at that time there was no racial
13 gerrymandering claim in Wright based on the 2013 districts, and
14 that was at the time the districts were drawn, including
15 District 4.

16 So the first time a racial gerrymandering claim
17 arises is in 2015, but the difficulty here is in 2015 they
18 adopted the districts wholesale, so there's no evidence of any
19 motive about what the 2015 General Assembly was intending to do
20 with respect to District 4, because in fact, Your Honor, it
21 didn't do anything with respect to District 4, it took an
22 entire map from two years ago that had District 4 in it and it
23 adopted that map wholesale because, at least in the bill
24 sponsors' eyes, they testified that this has been upheld so
25 we're just going to use it.

1 I don't think you can impute whatever motives may
2 have been present in 2013 from one General Assembly to 2015,
3 even if the bill sponsors were the same, because you just
4 adopted the plan as a whole. So I think that's -- I think
5 that's a real problem procedurally with proving motive at all,
6 because you have to look at the intent of the General Assembly
7 members in 2015 as to District 4, because the Alabama case says
8 you're not looking at districts as a whole, you have to look --
9 excuse me, the plan as a whole, you're looking at individual
10 districts. There was never a determination district by
11 district in 2015. The determination was the plan as a whole.

12 For the same reason, Representative Stam's comment
13 that at-large votes -- at-large voting submerges minorities --
14 first of all, he at some point in the testimony said, I'm
15 talking about all different kinds of minorities, racial,
16 gender, political, rural, urban, and then he says they're just
17 a bad idea. So even if you take that though as a consideration
18 of race, in 2015, he was talking about the method of election,
19 at-large versus single member districts, he wasn't talking
20 about any particular district, and, again, under Alabama that's
21 not enough, otherwise any time there was a change from at-large
22 to single member districts, if there was a stated intention
23 that it had something to do with avoiding or submerging the
24 minority vote then the entire plan would be affected, that's
25 why Alabama counsels you have to do this district by district.

1 If you do look to 2013 though, to the motives, there
2 is no direct legislative evidence, we do not know what the
3 General Assembly was intending to do from any testimony of
4 anybody that was there, and so we really sit here today, just
5 like the plaintiffs do, just like their witnesses do and just
6 like the Court does, just like Dr. Chen does and Mr. Fairfax,
7 you have to look at the map, and you have to look at the
8 characterization -- the characteristics of the district.

9 I'll point out that this is a 79 percent Democratic
10 district, it's the highest level Democratic district in the
11 entire plan. The testimony is that the entire plan is partisan
12 and political, and, Your Honor, I'm going to -- I will leave it
13 to the Court to read the map. You've heard the testimony
14 today. Certainly there are African American precincts and
15 census blocks that are just outside of the district as well as
16 just inside of the district; but again, you have the testimony
17 and you have the characteristics of the districts.

18 I do want to propose an alternative explanation
19 that's consistent with something Representative Jackson said,
20 and that is when you draw an entire districting plan for a
21 specific purpose or even draw a specific district for a
22 specific purpose, it's going to have a domino effect on other
23 districts, that's just inevitable. As you remember, I asked
24 about a specific amendment he had proposed, and he said, well,
25 I didn't really propose that amendment to that district, I

1 proposed -- it was 38 and 39, I might have switched them, but I
2 was proposing to 38, because he wanted to do something around
3 Wendell and Zebulon specific and it had a result in 39 that
4 created a majority African American district, and he didn't
5 even testify when he was aware of it. For all I know, he
6 wasn't aware until I told him that. But he certainly made
7 clear he did not intend to create a majority African American
8 district. What he intended to do was accomplish a particular
9 result around Wendell and Zebulon.

10 So I think if you take that fact, the domino effect,
11 and you overlay it to the allegations in this case, which is
12 the entire plan was designed to create a result that favored
13 Republicans, the fact that this particular district ended up
14 with a 54 percent African American population could be
15 explained by the fact that changes that were made or decisions,
16 political decisions made in other districts or the plan as a
17 whole, could have created that result, and if you look at
18 Dr. Chen's figure, he has the enacted district outside his
19 statistical population, but just by way of example, you see
20 there are a number of dots, you know, hovering around
21 50 percent or just below 50 percent, so let's take a 47 or
22 48 percent district, a simulated district by Dr. Chen. If
23 District 4 was, say, 47 or 48 percent and changes were made to
24 other districts in order to achieve a certain partisan outcome
25 with other districts, it's perfectly likely that that could tip

1 the scale from 47 to 49 or 49 to 51.

2 I think what Dr. Chen shows is that if you're trying
3 to achieve a partisan outcome here, he's attempting to show, at
4 about 19 to 21 percent, this is what the simulations would be.
5 They're all right in between 45 and 53 percent. So already,
6 even in Dr. Chen's simulated districts, you're pretty close to
7 the line, so it's not going to take much to tip it a little
8 further.

9 But again, this is a really difficult position for us
10 to be in because, you know, my client had zero to do with
11 drawing this district and they certainly don't have any
12 political position on whether districts should have been drawn
13 in any particular way at all, and my job today simply as the
14 lawyer for the Board is to propose some other ways to dispose
15 of this case. I'm not going to try to read the map. I think
16 the Court can read the maps and characteristics as well as
17 anybody.

18 Finally, Ms. Earls is correct, obviously, we did not
19 put on any evidence, and I know there's -- I know there are
20 issues of racial polarized voting in Dickson v. Rucho, that's
21 not the case here today, we didn't introduce any evidence from
22 that case, but I know that it is addressing some of the similar
23 issues on different facts and different stated motivations.

24 Unless the Court has any questions, again I just want
25 to thank you for the awkward position we're in today and the

1 way you've treated me throughout this trial.

2 THE COURT: Thank you for your argument.

3 Ms. Earls, anything else?

4 MS. EARLS: If I may, Your Honor.

5 THE COURT: Yes, ma'am.

6 MS. EARLS: I just have a couple of brief comments
7 I'd like to make.

8 First on the question of the evidence we presented on
9 public opinion, I want to make clear that the significance of
10 that evidence is that to the extent in the legislative record
11 you will read a justification asserted for the bill that this
12 is what the public wanted, our evidence of the polls shows that
13 justification was not factually accurate, and the fact that the
14 polls and results of the polls were told to the legislature
15 during public hearings and was in the paper means that the
16 legislators were aware of the poll. Now, we're not asking to
17 second guess what significance they gave it, we're just saying
18 that it's evidence that a purported justification for the bill
19 was in fact not true as a matter of fact.

20 On the question of Gaffney, the Gaffney case is
21 completely the opposite of this case in the sense that what the
22 Court said in Gaffney was that if your goal is to achieve
23 partisan proportionality, that's a neutral goal, and I'll quote
24 from the opinion in 1973: "Neither we nor the District Courts
25 have a Constitutional warrant to invalidate a State plan,

1 otherwise within tolerable population limits, because it
2 undertakes not to minimize or eliminate the political strength
3 of any group or party, but to recognize it and, through
4 districting, provide a rough sort of proportional
5 representation in the legislative halls of the State."

6 So in Gaffney what the Court was saying is -- so it's
7 not simply were partisan factors involved, it's how did you
8 treat those partisan factors, and in Gaffney the plan treated
9 those partisan factors by trying to achieve fairness, by trying
10 to achieve proportional representation, and the Court said
11 that's a neutral principle that justifies the deviations that
12 were there under 10 percent, so that's exactly the opposite of
13 this case, where we're showing that it was the desire to
14 discriminate between voters of one political party versus
15 voters of another.

16 THE COURT: What's that distinction though if you
17 have -- if you have, say, 8 districts or 100 in a state and
18 like in Gaffney the legislators say we want to roughly try and
19 have it at about 50/50, we want kind of -- and we're going to
20 try and draw your lines and keep it within 10 percent at about
21 50/50, is that okay, if they're just right out front and they
22 say, you know, we realize we can look and gather -- that case
23 was from the '70s and computer technology and data is a lot
24 greater now than then. Can a legislator -- do you think
25 Gaffney would permit that? And where is that line?

1 MS. EARLS: So I think that what Gaffney stands for
2 is the proposition that -- in your example the 50/50 would be
3 assuming that the voters are split 50/50. I think -- so if you
4 had a jurisdiction that was 70 percent one party and
5 30 percent, I think Gaffney says if you're trying to provide
6 that 70 percent of your districts and 30 percent, that's the
7 divide, it's proportional. Gaffney says if the ultimate
8 evidence in the case is that the goal was to provide
9 proportional representation, that's a motive that is neutral,
10 that is not discriminatory, is not arbitrary and is
11 permissible.

12 THE COURT: And what if you have an odd number like
13 nine and you have five for one party and four for the other,
14 I mean, how do you think that that fits or doesn't fit in
15 Gaffney?

16 Do you see what I'm saying? I mean, to kind of --
17 and nine, of course, is the -- well, the total number, but
18 whatever, the number, you know what I'm saying, where you have
19 an odd number, it's not unique to nine, it's just any odd
20 number, and some legitimator -- because y'all say in your brief
21 that -- and Senator Blue and Representative Gill and certainly
22 going back to all the history in Easley v. Cromartie that
23 partisanship as -- as something, but then you get into case law
24 about when it goes too far. What do you think Gaffney teaches
25 about that issue if it's an odd number and a legislature tries

1 to make it roughly proportional, is that okay under Gaffney, do
2 you think?

3 MS. EARLS: Yes, and I would say it is roughly
4 proportional, and this is an issue we face in voting rights
5 cases all the time. So, for example, the question of whether
6 or not the number of districts in a Voting Rights Act context,
7 in a Section 2 context -- we're also talking about vote
8 dilution --

9 THE COURT: Right.

10 MS. EARLS: -- as we are here in this case.

11 In a Section 2 context, rough proportionality is some
12 evidence of whether or not the minority voters have an equal
13 opportunity to participate. So, for example, you might have a
14 County Commission that's five members. African Americans may
15 be 25 percent of the population. Well, you can't get -- you
16 can't divide a five member Board so that you have exactly
17 25 percent of the population, so does that mean that African
18 Americans get -- that they are proportionally represented if
19 they have one seat which gives them 20 percent, or do they need
20 two seats which would give them 40 percent, and the Courts have
21 dealt with that by saying it's roughly proportionate, it's not
22 precise mathematical. But I think the other -- so here the
23 touchstone is whether or not it's discriminatory and intending
24 to weigh the votes of some voters more than others.

25 THE COURT: And I guess that's what my -- tell me

1 your best argument or help me understand. The Gaffney court,
2 and I think Justice White wrote the opinion and it was a
3 unanimous opinion, my memory of it, the court says this rough
4 proportionality of partisan balance is okay. Where does the
5 invidious line -- when does it move over into the invidious
6 discrimination violative of the Equal Protection Clause, if
7 that's okay, under Gaffney?

8 MS. EARLS: Right. So I just think there's a
9 fundamental difference between saying we're trying to achieve
10 rough proportionality, that is to say we're not trying to favor
11 one party over the other, we're trying to get rough
12 proportionality, versus we are trying to ensure that one party
13 controls the governing body. Those are just -- they're just
14 two different things. It's not a sliding scale, it's either
15 you're intending to give an advantage to one party or you're
16 actually trying to provide rough proportionality, and I think
17 it's the same -- it's very akin to the question of incumbency
18 protection, it's okay if you're protecting all the incumbents,
19 it's not okay if you're only protecting the incumbents of one
20 party or another, and that's the Larios case.

21 Let me talk about Vieth for a minute, because most of
22 counsel's argument was essentially an argument that the
23 Fourth Circuit decision in Wright got it wrong, because Wright
24 deals with the Vieth case and the Fourth Circuit said that
25 Vieth doesn't bar our claim here, that this is not -- the

1 problems of measuring partisanship and figuring out how far is
2 too far don't apply in this case, where if the plaintiffs prove
3 that the deviations -- it's just as Justice Scalia said in the
4 one person one vote context, we do have a standard and that's
5 the equal population standard, and in fact for Congressional
6 districts that's down to one person, like zero percent.

7 THE COURT: Right.

8 MS. EARLS: We have a standard, and so the
9 Fourth Circuit said that if we in this case -- if plaintiffs
10 prove that partisan motivations were the cause of the deviation
11 and it could have been possible that there were other
12 legitimate redistricting criteria explanations for the
13 deviations, the districts had been drawn to follow precinct
14 lines and the only way you could follow precinct lines was to
15 have this deviation, or if there was testimony that the
16 districts were drawn to avoid a natural boundary, sometimes in
17 counties you have a river going through the county or if
18 there's some legitimate neutral explanation for the deviation
19 then the under 10 percent is permissible, but in -- which is
20 now law of the case for this -- for the purposes today, until a
21 higher Court says otherwise.

22 The Wright case said if the plaintiffs -- and I
23 really want to get this correct because this was our roadmap
24 for our proof in this case. The Court right after it's talking
25 about Vieth says -- this is in Section B of the opinion, and

1 I'm looking -- I'm reading from page 268, and the --

2 THE COURT: In the F.3d.

3 MS. EARLS: Yes, 787 F.3d 256, and then beginning at
4 page 268, the Court says -- they talk about Vieth, and:

5 "In stark contrast to a mere 'political gerrymandering claim,'
6 Plaintiffs allege that the Session Law violates the one person
7 one vote principle by creating 'non-compact,' 'confusing'
8 districts with maximum population deviations reaching almost
9 10 percent and that the deviation from one person one vote is
10 'unjustified' and results in discrimination amongst not only
11 political interests but also 'rural' versus 'urban'
12 populations. In other words, Plaintiffs here have pled an
13 equal protection claim."

14 And then later on, in the end of Section B, the Court
15 says: At the end of the day, we cannot say whether Plaintiffs
16 will ultimately succeed with their equal protection claim. But
17 we can say that the allegations were sufficient.

18 My point is the Fourth Circuit has said we have
19 examined Vieth, we understand the challenges of a partisan
20 gerrymandering case, but in this case if Plaintiffs prove that
21 partisan -- that the intent is to weigh voters' votes
22 differently because of what political party they belong to, if
23 plaintiffs prove that, they've proven a violation of the Equal
24 Protection Clause, so when counsel says that we have shown that
25 the deviations were the result of partisanship, that's a

1 concession that we have proven what the Fourth Circuit says we
2 need to prove and that we have met the legal standard as the
3 Fourth Circuit interprets it as of this time.

4 So that explains why the question is not in this case
5 did partisanship go too far, that's the question here, have
6 you -- there isn't a line drawing exercise that you have to
7 engage in to figure out what is too much partisan
8 consideration, the question here is were the deviations from
9 one person one vote -- were the ways in which those 44,000
10 people difference between the super districts, if that was
11 caused by a partisan desire to advantage one party over the
12 other, not a partisan desire to have rough proportionality but
13 a partisan desire to advantage one party over the other, then
14 the Constitution is violated and that's what Wright says you
15 have to do.

16 THE COURT: And how do you think both Wright and
17 Gaffney -- and again, I've got a lot to read and I really
18 appreciate the dialogue. If the evidence is that the
19 legislative record shows that there was an effort to create one
20 urban Democratic leaning district and one rural Republican
21 leaning district, is that okay or not okay? Is that invidious
22 or is that rough proportionality from Gaffney? That's what I'm
23 trying to understand, where that line is within the context of
24 an equal protection claim, because I -- and I understand your
25 brief and, you know, I know about Bandemer and Vieth and a pure

1 political gerrymandering claim, and that's not your claim,
2 you know, that's not the claim in the case, but where is that
3 line?

4 MS. EARLS: I would say that it is on Dr. Chen's
5 graph, Your Honor, and if this district fell within his normal
6 distribution, if you draw 500 redistricting plans and the one
7 drawn here in terms of partisanship falls in the middle there,
8 then that is --

9 THE COURT: But even compare A and B, so I don't --
10 I mean, again, if you have legislators who say this will
11 probably result in -- you know, again, and the voters
12 ultimately control. I mean, history is filled with legislators
13 who thought they created safe seats that don't turn out to be
14 safe at all, but I mean comparing what the legislators
15 bipartisanly said, that basically what they thought would
16 happen based on voting patterns, which of course with a county
17 that grows and brings in new voters -- how does that factor in,
18 do you think, on this line between invidiousness and Gaffney
19 rough proportionality that's okay under the Equal Protection
20 Clause?

21 MS. EARLS: I think it is a -- you have to weigh the
22 evidence and decide does the evidence show that what the
23 General Assembly was trying to do was rough proportionality or
24 does the evidence show that the General Assembly was trying to
25 favor the voters of one party over another, and to some degree

1 I think we're comparing apples and oranges because you're
2 talking about what I would call just one piece of the puzzle in
3 the evidence you evaluate and that is what is the overall
4 partisan balance of the districts and the plan, and I'm talking
5 about the percentage of Republicans in each district, because
6 Dr. Chen's graph, you remember, is -- and he found an outlier
7 for the two super districts, A and B were also outliers on his
8 500 simulations, and what --

9 THE COURT: So then would the line of -- would the
10 line of invidiousness be at 8.9 percent? That's what I guess
11 I'm trying to understand, what the -- part of what in every
12 case one grapples with, and I realize that -- I realize where I
13 sit in the judicial hierarchy in terms of notions of precedent,
14 but folks then trying to go forward, I mean, and say, well,
15 this is the law or this is the guidance we have, or, you know,
16 if it's a holding from the Supreme Court, this is what the
17 Supreme Court says so we need to follow it, obviously. Do we
18 get into that? Would it be -- if the plan were within the
19 Dr. Chen sample at 8.9 percent and the legislators still
20 believed that it roughly based on voting history they thought
21 would yield one Democrat and one Republican, that that would
22 be -- that that's okay but that when it gets, in his analysis,
23 still below 10 percent but it moves incrementally at a
24 percentage, that that's where the Constitutional line is?

25 And I take your point that it's -- I mean, we're just

1 talking hypothetically. I take your point that you have to
2 look at all the whole evidence, you're absolutely right, but
3 just for purposes of analysis and thinking of limiting
4 principles, what do you think about that?

5 MS. EARLS: I think that the Courts have said
6 repeatedly that in the one person one vote context there isn't
7 a bright line, that there isn't a percentage below -- except
8 zero, zero is a bright line.

9 THE COURT: Right. We all agree that if the law from
10 the Supreme Court in the area of redistricting had said zero
11 percent population deviation, you know, that they absolutely
12 all have to be equal, then everyone going forward would know,
13 all right, if there's, you know, a difference more than one
14 person then it doesn't comply with the Equal Protection Clause,
15 but they haven't said that.

16 MS. EARLS: So my point is there isn't a deviation
17 below which a plan -- the courts have just said there's no
18 deviation point below which a plan is irrebuttably and
19 absolutely Constitutional, and so it does put courts in the
20 position of making a judgment call about the evidence. There's
21 no number that's going to say above this number it's
22 Constitutional -- or unconstitutional, below this number it's
23 absolutely Constitutional, can never be challenged, and I think
24 you see some of the wrestling with this in Daly vs. Hunt. This
25 is not the first time --

1 THE COURT: Right, because that was -- I mean, remind
2 me, didn't that case involve a redistricting of Mecklenburg
3 County Board of Commissioners and the Board of Education --

4 MS. EARLS: Very similar facts.

5 THE COURT: -- by the General Assembly in like 1992
6 or '93?

7 MS. EARLS: Yes. Precisely. But in that case the
8 Court said, you know, there just isn't a bright line, and below
9 10 percent plaintiffs can come and prove that the deviation is
10 due to invidious discriminatory purposes, and let me give you
11 an example of why that is.

12 There are cases in South Carolina where districts --
13 School Board districts have been -- the lines have been drawn
14 around an incumbent's house to draw them out of their district.
15 Now, if that was done in such a way that respected the
16 Constitutional rights of all the voters in that district and
17 that district was the same size as other districts, that --
18 you know, there's discretion. What we're saying is that that
19 discretion is limited by the Constitutional requirement that
20 votes carry the same weight, and so if that move -- in order to
21 draw that incumbent out of their district, you increased the
22 deviation over what it otherwise would be, that would be
23 intentional, discriminatory, arbitrary it wouldn't be treating
24 all voters the same, and --

25 THE COURT: How do we deal with the cases that --

1 I think you all cited some and they cited some, the other side,
2 about when we talk -- Gaffney talked about this rough
3 proportionality and then there's some cases that at least
4 suggest in connection with incumbents the whole concern is
5 about voters, and incumbents, they're a secondary concern of
6 whatever party or no party, that the whole point of this type
7 of litigation is about voters; and again recognizing that --
8 and you cited some in your papers and there are cases out there
9 where legislatures have talked about neutrally applying
10 incumbency protection, but about this concept of rough
11 proportionality of party, I'm trying to get your sense about
12 where that line is when you are -- when you're below the
13 10 percent so that some client who comes to you for advice,
14 some legislature or, you know, some School Board and says can
15 we -- can we take politics into account at all, and your brief
16 says politics are okay kind of up to a point, and
17 Senator Blue -- I mean, again, it kind of gets back to a first
18 principle discussion about this whole topic in the context of
19 an equal protection claim, and --

20 MS. EARLS: And so my answer would be, I think,
21 similar to what Bob Joyce wrote in the manuscript that he
22 prepared for local governments and his role at the Institute of
23 Government, which is that you can't -- you can't treat parties
24 differently. He's talking about incumbent -- he gives local
25 Boards advice about incumbents and he says, if in redrawing

1 your School Board districts you want to protect incumbents and
2 he talks about how that's just a natural thing, they're drawing
3 their own lines, they want to protect their seats, as long as
4 you protect all of them, and I think the same thing is true
5 here about what role can partisanship play, as long as you're
6 neutral, because once you start treating parties differently
7 you're trying to advantage some voters over others and that's
8 what's not fair, that's why I keep saying what our clients in
9 this case are entitled to is a level playing field. So my
10 advice to local governments would be you can take partisan --
11 the party affiliation of voters, the election results from
12 other elections into account, but you have to treat all the
13 voters the same when you take that into account.

14 I just want to say one word about the fact that
15 Larios is being distinguished because of the types of evidence
16 there and the types of evidence here, and as those slides
17 showed, in Larios legislators waived privilege and consented to
18 testify, the map drawer who was an employee of the legislature
19 came and testified, and in this case, completely out of our
20 control, we sought that evidence, legislators shielded -- as
21 they are entitled to do with legislative privilege, but we
22 should not be prejudiced and that should not be held against us
23 in this case because that's -- I mean that's why Larios is
24 different from our case in terms of the evidence.

25 Then I also want to just quickly say a word about the

1 racial gerrymandering claim. The argument that the
2 partisanship -- this domino effect of partisanship is what
3 created this majority black district in the 4th District here
4 is exactly what the Supreme Court wrestled with in Easley vs.
5 Cromartie, and --

6 THE COURT: And reversed the lower court -- I think
7 the lower -- my memory of that case in that iteration was that
8 the lower court had found it to be a racial gerrymander and
9 then the Supreme Court -- and looked at some evidence, I think
10 it may have been Cooper's floor comment -- again, the type of
11 evidence in these types of cases are similar, they looked at
12 the evidence and said -- or looked at the record, the Supreme
13 Court looked at the record and said, we find this was based on
14 politics, that the predominant motive was politics, not race,
15 and reversed the lower court finding that had found race to be
16 predominant.

17 MS. EARLS: Exactly. And the type of evidence that
18 they had, that the Supreme Court found persuasive, because in
19 essence they were overturning a factual finding of the Court
20 below, was that Dr. Peterson had examined the outlines of all
21 the -- of the district and the partisan and racial makeup of
22 the precincts on the outside of the district versus the
23 partisan and racial makeup of the precincts on the inside of
24 the district and he showed that more often than not, the
25 precincts that were included were partisan, greater partisan

1 population than racial population, so he could identify
2 precincts that were more black and were left out of the
3 district and precincts that were more Democratic that were put
4 in the district.

5 We have a very different kind of evidence, but it's
6 getting at that same question, that is the -- what explains the
7 composition of the district, is it race or is it partisanship.
8 In our case what -- and that's why we looked for this analysis
9 at just the 60 of the 500 simulations, because those were where
10 the partisanship -- the partisan makeup of the district is
11 roughly the same but the racial makeup was not as high, and
12 that's why -- that evidence along with the other evidence that
13 we have of the shape -- the traditional types of evidence that
14 Justice O'Connor identified you rely on in showing a racial
15 gerrymander, we also have that evidence here, but the basic
16 proposition in Cromartie is -- and this claim isn't in all
17 cases, sometimes it's not claimed that it's partisanship that
18 caused the district to become a majority black district, but in
19 this case that is the claim, and we brought forward evidence
20 that showed you the same partisan outcome without using race to
21 the same extent, and when you show that, that shows that --
22 under the Easley standard, that shows the threshold question
23 that race predominates.

24 I want to also make clear that -- and the Court made
25 this clear in Alabama, here when you're asking did race

1 predominate, it's not exactly the same nature of claim as
2 intentional invidious racial discrimination. A legislature may
3 have a very benign purpose. In the Alabama case the Supreme
4 Court said it's laudable that the Alabama legislature wanted to
5 comply with the Voting Rights Act, and we're not saying that
6 that's, you know, a bad thing.

7 THE COURT: Right. That gets to your second part of
8 the standard question, right? I mean, that if -- at least in
9 the Voting Rights Act context, if race -- in some cases there's
10 an argument that race predominated, and the explanation that a
11 General Assembly says is we did this because of Section 2, we
12 created this district and we had a compelling interest to
13 comply with Section 2 and it's narrowly tailored to meet that.

14 MS. EARLS: Right.

15 THE COURT: Where it's benign, it's a permissible --
16 well, that first finding is necessary for then there to be a
17 defensible explanation. Is that what you're talking about?

18 MS. EARLS: Well, but I'm also saying on the first
19 part of the test on whether or not race predominated, the
20 question is whether racial considerations trumped all other
21 traditional redistricting criteria in the redistricting
22 process, and that's what I'm saying, the test for racial
23 gerrymandering is not the same as a traditional this was
24 intentionally discriminatory against African Americans, and
25 in fact, that's why the whole Shaw versus Reno line of cases

1 was, you know, a new claim, announcing that this is a new
2 claim, because it's not just the same as a traditional
3 14th Amendment equal protection did race -- was there an intent
4 to discriminate.

5 That's significant, again, going back to the chart,
6 because the difference in Dr. Chen's chart between the
7 60 districts that fell close to the same African American
8 population but not as -- didn't use race as much is that those
9 districts were drawn in compliance with the criteria he
10 identified, the four criteria that he identified initially, the
11 keep subdivision lines whole, keep the precincts whole, keep
12 the municipalities whole as much as possible, make the
13 districts as compact as possible and make the deviation as low
14 as possible. Those were the four traditional criteria which in
15 the quotation I read to you earlier from Justice O'Connor in
16 Shaw versus Reno, those traditional criteria are evidence that
17 race did not predominant, so those -- the dots, the circles
18 that were drawn following those traditional criteria is very
19 different from the dot that's the outlier, I would submit to
20 you, because those followed traditional redistricting
21 principles, race didn't predominant, whereas in the outlier
22 those traditional principles were disregarded, precincts were
23 divided, municipalities were divided, the district is not
24 compact. I mean, I showed you sort of the comparison between
25 Dr. Chen's -- one of his 500 simulations and the actual enacted

1 district. They're not geographically compact.

2 So our point here is that in District 4, drawing a
3 majority black district was the criteria that outweighed all
4 the other traditional redistricting criteria and that's what
5 makes it a racial gerrymander.

6 So just in concluding, I want to recognize on behalf
7 of my clients that even though the Harris case is out there,
8 they have elections coming up, and voting rights cases and
9 elections are one type of case where once you go forward under
10 an unconstitutional plan it is extraordinarily difficult to go
11 back and put the plaintiffs in the position they would have
12 been before that election, it impacts, you know, what
13 candidates run, the expenditures they expend, the policies they
14 adopt, it's just not possible to restore plaintiffs back to
15 where they would have been once the election occurs, and that's
16 why we're here today asking the Court to apply the law as it
17 exists in the Fourth Circuit.

18 We've proven that partisanship was the cause of the
19 deviations in this case, we've proven the plan is
20 unconstitutional, and if we've proven that race predominated in
21 the drawing of District 4, we've proven -- and I just want to
22 note, we filed our Complaint just weeks after the Alabama
23 decision, the second Complaint, and that was a significant
24 development in the law with regard to racial gerrymandering,
25 and I think the fact that that case came down in 2015 made

1 clear to us that the 4th District met that legal standard, and
2 there's no precedent for the proposition that just because you
3 adopt a plan that was used before, it can't be challenged as a
4 racial gerrymander, so because we've shown that the plan --
5 District 4 is also unconstitutional, we ask that you grant the
6 relief we're seeing.

7 THE COURT: Thank you. Anything else from either
8 side?

9 I do thank counsel again for all of your work.
10 Anything else from the defense? Just procedurally or
11 anything else.

12 MS. EARLS: Your Honor, I had raised yesterday the
13 possibility of post-trial findings of fact and conclusions of
14 law. We did confer and I think both of our clients feel very
15 strongly that if there were any possibility that would delay a
16 decision in this case, and given the timing that seemed
17 possible, we would prefer to move forward without those.

18 THE COURT: Okay. That's fine. And certainly under
19 our local rules that's why we have them before, but I always
20 will listen if somebody wants to discuss it, because y'all have
21 certainly given me a lot to read and I will -- as I had
22 indicated, I will take it under advisement.

23 Again, I thank you. I can't tell you a date of when
24 I'm going to -- I'm going to do a written ruling, I can tell
25 you that, and I can tell you y'all have done an excellent job

1 in presenting your cases and, again, I compliment the lawyers
2 on their professionalism and their efforts and their arguments.

3 So with that, the matter will be submitted and I will
4 take it under advisement and we will be in recess until I begin
5 a criminal term of court at 9:00 a.m. on Monday.

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7 (Proceedings concluded at 11:18 a.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript of proceedings taken in a bench trial in the United States District Court is a true and accurate transcript of the proceedings taken by me in machine shorthand and transcribed by computer under my supervision, this the 3rd day of February, 2016.

/S/ DAVID J. COLLIER

DAVID J. COLLIER

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