

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

ANNIE LOIS GRANT; QUENTIN T.
HOWELL; ELROY TOLBERT; TRIANA
ARNOLD JAMES; EUNICE SYKES;
ELBERT SOLOMON; DEXTER
WIMBISH; GARRETT REYNOLDS;
JACQUELINE FAYE ARBUTHNOT;
JACQUELYN BUSH; and MARY NELL
CONNER,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official
capacity as the Georgia Secretary of State;
WILLIAM S. DUFFEY, JR., in his official
capacity as chair of the State Election
Board; MATTHEW MASHBURN, in his
official capacity as a member of the State
Election Board; SARA TINDALL
GHAZAL, in her official capacity as a
member of the State Election Board;
EDWARD LINDSEY, in his official
capacity as a member of the State Election
Board; and JANICE W. JOHNSTON, in
her official capacity as a member of the
State Election Board,

Defendants.

CIVIL ACTION FILE
NO. 1:22-CV-00122-SCJ

**PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

The Supreme Court’s decision in *Allen v. Milligan* confirms that Plaintiffs have satisfied the familiar requirements of *Thornburg v. Gingles* that “ha[ve] governed our Voting Rights Act jurisprudence since it was decided 37 years ago.” *Allen v. Milligan*, No. 21-1086, ---U.S.----, ---S. Ct.----, 2023 WL 3872517, at *10 (June 8, 2023).

In satisfaction of the first *Gingles* precondition, Plaintiffs introduced reasonably configured illustrative plans, showing “it is *possible* that the State’s map has a disparate effect on account of race.” *Id.* at *13 (emphasis in original). As to the second and third *Gingles* preconditions, there is no material dispute that Black Georgians in the metropolitan Atlanta region and the Black Belt are “politically cohesive” and that “the white majority” in those areas “votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.” *Id.* at *9 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986)). Plaintiffs’ un rebutted evidence thus satisfies these preconditions under the Section 2 standard that has existed for the past four decades and as reaffirmed and applied by the Court in *Allen*.¹

¹ Plaintiffs focus their argument in this brief on *Allen*’s application of the *Gingles* preconditions. See Hr’g Tr. at 44–45 (May 18, 2023), Ex. 1 (noting that “[i]f the Court determines that the totality analysis requires fact finding or the weighing of evidence or a variety of inferences, it remains free to issue summary judgment on

Rather than rebutting Plaintiffs’ evidence, Defendants attempted to transform this “intensely local appraisal” into a thicket of novel prerequisites and bars to relief—requiring race-blind map drawing and proof of causation. But *Allen* forecloses Defendants’ attempts to prevail under a revised interpretation of Section 2 that never came to pass.

Allen “reiterat[es] that §2 turns on the presence of discriminatory effects, not discriminatory intent.” *Allen*, 2023 WL 3872517, at *13; *see also id.* at *22 (Kavanaugh, J. concurring) (“[A]s this Court has long recognized—and as all Members of this Court today agree—the text of §2 establishes an effects test, not an intent test.”). It makes clear that race consciousness does not equate to racial predominance. *Id.* at *15–16 (plurality opinion). And it reaffirms that proof of racially polarized voting satisfies the second and third *Gingles* preconditions without showing that the racial polarization is caused by racial motives rather than partisan ones. *Id.* at *11.

Defendants cannot prevail under the familiar *Gingles* framework because they hardly made any evidentiary showing at all. Their defense of the enacted maps

the undisputed fact[s] of the *Gingles* preconditions, and . . . reserve for trial the ultimate determination of liability. . . . *Gingles* is an objective, straightforward test.”).

hinged entirely on their hope that the law was going to change. It didn't. *Allen* confirmed that this Court properly applied the *Gingles* framework at the preliminary injunction phase and that Defendants' arguments are entirely unfounded.

ARGUMENT

I. *Allen* confirms that Black Georgians in the Atlanta metropolitan area and the Black Belt can constitute a voting majority in reasonably configured legislative districts.

Allen makes clear that Plaintiffs have satisfied the first *Gingles* precondition with respect to six of their eight illustrative districts by showing that Black Georgians in the Atlanta metropolitan area and the Black Belt are “sufficiently large and geographically compact to constitute a majority in a reasonably configured district.” *Allen*, 2023 WL 3872517, at *9 (alteration adopted) (quoting *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam)).

Defendants have already conceded that Georgia's Black population is sufficiently numerous to create three additional majority-Black districts in the Senate plan and five additional majority-Black districts in the House plan. Statement of Undisputed Material Facts in Supp. of Pls.' Mot. for Partial SJ (“SUMF”) ¶¶ 17, 30 (Mar. 20, 2023), ECF No. 189-2; Expert Rep. of Blakeman B. Esselstyn (“Esselstyn Rep.”) ¶¶ 13, 17, 63 (Mar. 20, 2023), ECF No. 191-1; Dep. of John B. Morgan (“Morgan Dep.”) at 73:17–75:4, 164:8–165:14, 197:15–19 (Mar. 17, 2023), ECF

No. 177. Instead of refuting Plaintiffs’ evidence that Mr. Esselstyn complied with traditional redistricting criteria in creating these districts, Defendants instead quibbled that Mr. Esselstyn must have considered race as a predominant factor. Defs.’ Br. in Supp. of Mot. for Partial SJ (“Defs.’ SJ Br.”) at 19–21 (Mar. 20, 2023), ECF No. 190-1. But *Allen* makes clear that Defendants’ criticisms are unfounded. Mr. Esselstyn’s illustrative districts are reasonably configured because they comply with traditional redistricting criteria. SUMF ¶¶ 42, 45–46; Esselstyn Rep. ¶¶ 25, 33. And contrary to Defendants’ repeated refrain, race did not predominate in Mr. Esselstyn’s illustrative plans, as mere awareness of race is insufficient to establish predominance. Plaintiffs have thus satisfied the first *Gingles* precondition with respect to six of the eight illustrative districts.

A. Mr. Esselstyn’s illustrative districts are reasonably configured.

Mr. Esselstyn’s illustrative districts are “reasonably configured” because they indisputably “comport[] with traditional districting criteria.” *Allen*, 2023 WL 3872517, at *9. In *Allen*, the Court concluded that the experts’ plans were reasonably configured because their districts were compact, had no obvious irregularities, had equal populations, were contiguous, and respected existing political subdivisions. *Id.* at *10. Here, Mr. Esselstyn’s illustrative plans undoubtedly comport with the same criteria.

Compactness. *Allen* concluded that one of the expert’s plans was compact because its “districts [were] roughly as compact as the existing plan.” *Id.* So too here. The mean compactness measures for Mr. Esselstyn’s illustrative plans are comparable—if not identical—to the mean measures for the enacted plans. SUMF ¶¶ 53, 68; Esselstyn Rep. ¶¶ 36, 57, tbls.2 & 6; Morgan Dep. 90:6–17, 168:6–11. The individual compactness scores for Mr. Esselstyn’s additional majority-Black districts fall within the range of compactness scores of the enacted districts using the Reock, Schwartzberg, Polsby-Popper and Area/Convex Hull measures; in other words, each of Mr. Esselstyn’s additional majority-Black districts is more compact than the least-compact enacted districts. SUMF ¶¶ 54–56, 69–71; Esselstyn Rep. ¶¶ 37, 58, figs.8 & 17, tbls.3 & 7, attachs. H & L; *see also* Order Denying Mot. for Prelim. Inj. (“PI Order”) at 110–15, 135–39 (Feb. 28, 2022), ECF No. 91. And Defendants’ mapping expert, John Morgan, does not dispute that Mr. Esselstyn’s illustrative plans are similarly compact as the enacted plans. *See* Expert Rep. of John Morgan (“Morgan Rep.”) ¶¶ 22, 50 (Apr. 19, 2023), ECF No. 203-2.

No obvious irregularities. *Allen* explained that the experts’ plans lacked “tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find them sufficiently compact.” *Allen*, 2023 WL 3872517, at *10

(internal quotation marks omitted). Here, Mr. Esselstyn’s illustrative districts similarly lack any obvious irregularities, and Defendants have not argued otherwise.

Equal population. *Allen* observed that the experts’ plans “contained equal populations.” *Id.* In Mr. Esselstyn’s illustrative State Senate and House plans, most district populations are within plus-or-minus 1% of the ideal, and no district in either plan has a population deviation of more than 2%. Pls.’ Statement of Additional Material Facts (“SAMF”) ¶¶ 9–14 (Apr. 19, 2023), ECF No. 205; Esselstyn Rep. ¶¶ 34, 55, attachs. H & L. Both plans fall well within the accepted bounds of constitutionality. *See Evenwel v. Abbott*, 578 U.S. 54, 60 (2016) (“Where the maximum population deviation between the largest and smallest district is less than 10%, the Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule.”).

Contiguity. The districts in Mr. Esselstyn’s illustrative plans satisfy the contiguity requirement in the same manner as the enacted plans. SUMF ¶¶ 50, 67; Esselstyn Rep. ¶¶ 35, 56; *see also* PI Order at 115, 139.

Political Subdivisions. *Allen* held that the experts’ plans “respected existing political subdivisions, such as counties, cities, and towns.” *Allen*, 2023 WL 3872517, at *10. Here, Mr. Esselstyn’s illustrative plans split only marginally more counties

and voting districts than the enacted plans. SUMF ¶¶ 57, 72; Esselstyn Rep. ¶¶ 39, 59, tbls.4 & 8, attachs. H & L; *see also* PI Order at 115–18, 139–42.

* * *

Mr. Esselstyn’s illustrative plans are thus reasonably configured because they comport with the same “traditional districting criteria” that the Court approved in *Allen*.

B. Race does not predominate in Mr. Esselstyn’s illustrative maps.

Allen requires rejection of Defendants’ argument that race predominates in Mr. Esselstyn’s illustrative plans. Moreover, because no majority of the *Allen* Court endorsed a new standard for assessing racial predominance, the Eleventh Circuit’s decision in *Davis v. Chiles*, 139 F.3d 1414 (11th Cir. 1998), remains good law, and it too compels the conclusion that race does not predominate in Mr. Esselstyn’s illustrative plans.

1. *Allen* concludes that mere awareness of racial considerations is insufficient to establish predominance.

Allen’s conclusion that “in the context of districting . . . aware[ness] of racial considerations . . . is permissible,” *Allen*, 2023 WL 3872517, at *15 (plurality opinion) (internal quotation marks omitted), forecloses Defendants’ argument that race predominates in Mr. Esselstyn’s illustrative plans merely because he “*at some point*” displayed the Black voting-age populations for the geographic areas in which

he was working. SAMF ¶ 1; Dep. of Blakeman Esselstyn (“Esselstyn Dep.”) at 76:21–77:6 (Mar. 17, 2023), ECF No. 179. *Allen* recognized that “[t]he question whether additional majority-*minority* districts” can be drawn “involves a ‘quintessentially race-conscious calculus.’” *Allen*, 2023 WL 3872517, at *15 (plurality opinion) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)) (emphasis in original)). Consequently, “[t]he contention that mapmakers must be entirely ‘blind’ to race has no footing in our § 2 case law.” *Id.* at *16 (plurality opinion). The Supreme Court has “long drawn” a line “between consciousness and predominance.” *Id.* (plurality opinion). Race predominates when “‘race-neutral considerations come into play only after the race-based decision had been made.’” *Id.* at *15 (plurality opinion) (alteration adopted) (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 580 U. S. 178, 189 (2017)).

Here, as in *Allen*, race did not predominate because Mr. Esselstyn gave “equal weighting” to “several other factors” including “compactness, contiguity, and population equality.” *Id.* (plurality opinion); *see also* PI Order at 125–28, 149–152. Mr. Esselstyn attested that neither race nor any other single factor predominated in the drawing of his illustrative plans, SAMF ¶ 7; Esselstyn Rep. ¶ 25. At most, the undisputed evidence indicates that Mr. Esselstyn utilized racial information to

inform his mapping decision, which is perfectly acceptable under *Allen*. SAMF ¶ 8; Esselstyn Dep. at 77:20–25.

2. *Davis* also forecloses a finding of racial predominance.

Because no majority of the *Allen* Court announced a new standard for finding racial predominance, *Davis* remains binding in this Circuit, and *Davis* likewise compels the conclusion that mere awareness of race is insufficient to establish predominance.

Davis rejected the argument that race predominates in a remedial plan merely because “race was a factor” in the mapmaker’s “process of designing the proposed” remedy. *Davis*, 139 F.3d at 1426. Instead, it recognized that Section 2 “require[s] plaintiffs to show that it would be possible to design an electoral district, consistent with traditional districting principles, in which minority voters could successfully elect a minority candidate.” *Id.* at 1425. Thus, “[t]o penalize [plaintiffs] for attempting to make the very showing that *Gingles* [and its progeny] demand would be to make it impossible, as a matter of law, for any plaintiff to bring a successful Section Two action.” *Id.* *Davis* held that race does not predominate when a mapmaker “adhere[s] . . . to traditional redistricting criteria,” testifies that “race was not the predominant factor motivating his design process,” and explains that he never sought to “maximize the number of majority-minority” districts. *Id.* at 1426.

Here, Mr. Esselstyn adhered to traditional redistricting criteria, *see supra* at 4–7. He attested that neither race nor any other single factor predominated in the drawing of his illustrative plans. SAMF ¶ 7; Esselstyn Rep. ¶ 25. And he did *not* attempt to maximize the number of majority-Black districts in his illustrative plans. SAMF ¶ 4; Esselstyn Dep. at 229:2–5. *Allen* and *Davis* thus require the Court to find that race does not predominate in Mr. Esselstyn’s illustrative plan.

II. *Allen* confirms that Plaintiffs have indisputably satisfied the second and third *Gingles* preconditions.

Plaintiffs have satisfied the second and third *Gingles* preconditions because Black Georgians in the Atlanta metropolitan area and the Black Belt are “politically cohesive” and “the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.” *See Allen*, 2023 WL 3872517, at *9 (quoting *Gingles*, 478 U.S. at 51). The second precondition, “concerning the political cohesiveness of the minority group, shows that a representative of its choice would in fact be elected.” *Id.* “The third precondition, focused on racially polarized voting, ‘establishes that the challenged districting thwarts a distinctive minority vote’ at least plausibly on account of race.” *Id.* (quoting *Grove v. Emison*, 507 U. S. 25, 40 (1993)). Satisfying these preconditions creates the inference that polarization is on account of race. *See Nipper v. Smith*, 39 F.3d 1494, 1525–26 (11th Cir. 1994) (en banc).

Defendants did not dispute the material facts that support Plaintiffs' satisfaction of the second and third *Gingles* preconditions. Defendants instead argued that they were entitled to summary judgment because Plaintiffs failed to prove that the racial polarization was caused by racial motives rather than partisan ones. *See, e.g.*, Defs.' Reply Br. at 11 (May 3, 2023), ECF No. 215 ("This is not a factual dispute because everyone agrees on the facts. It is only the conclusion drawn from those facts that is at issue."). Defendants even argued that Section 2's well-settled effects test is unconstitutional. Br. in Supp. of Defs.' MSJ ("Defs.' Mot.") at 30–32 (Mar. 20, 2023), ECF No. 190-1. But *Allen* rejected Defendants' "attempt[] to remake . . . §2 jurisprudence anew." *Allen*, 2023 WL 3872517, at *11. Instead, it confirmed that the second and third *Gingles* preconditions are straightforward, objective inquiries that do not include a causation requirement. *Id.* Plaintiffs' undisputed evidence of racially polarized voting easily satisfies the second and third *Gingles* preconditions.

A. The record contains undisputed evidence of racially polarized voting.

Plaintiffs' undisputed evidence of racially polarized voting is just as strong as the evidence submitted in *Allen*. There, "Black voters supported their candidates of choice with 92.3% of the vote" while "white voters supported Black-preferred candidates with 15.4% of the vote." *Id.* (internal quotation marks omitted) (citation

omitted). Even the state’s expert in that case conceded that “the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by Black voters.” *Id.* (internal quotation marks omitted).

Here, Dr. Palmer found that Black voters in the focus areas are extremely cohesive, with a clear candidate of choice in all 40 elections he examined—a conclusion with which Defendants’ expert, Dr. John Alford, readily agreed. SUMF ¶ 87; Expert Rep. of Dr. Maxwell Palmer (“Palmer Rep.”) ¶ 18, fig.2, tbls. 1, 2, 3, 4, 5 & 6 (Mar. 20, 2023), ECF No. 191-2; Suppl. Expert Rep. of Dr. Maxwell Palmer (“Suppl. Palmer Rep.”) ¶ 6, fig.1, tbl.1 (Mar. 20, 2023), ECF No. 191-3; Expert Rep. of Dr. John R. Alford (“Alford Rep.”) at 3 (Mar. 20, 2023), ECF No. 191-7; Dep. of Dr. John Alford (“Alford Dep.”) at 37:13–15 (Mar. 17, 2023), ECF No. 178. Across the focus area, Black voters supported their candidates of choice with an average of 98.5% of the vote, a finding reflected in each constituent State Senate and House district. SUMF ¶¶ 88–90; Palmer Rep. ¶¶ 16, 18–19 & nn.14–15, fig.3, tbls.1 & 7. Plaintiffs therefore satisfy the second *Gingles* precondition. *See* 478 U.S. at 56 (“A showing that a significant number of minority group members usually vote for the same candidates is one way of proving [] political cohesiveness[.]”); *see also* PI Order at 186–87 (concluding that “Plaintiffs have met their burden to establish the second *Gingles* precondition”).

Dr. Palmer also found high levels of white bloc voting in opposition to the candidates whom Black voters cohesively supported—another finding Dr. Alford did not dispute. SUMF ¶ 91; Palmer Rep. ¶ 18, fig.2, tbl.1; Suppl. Palmer Rep. ¶ 6, fig.1, tbl.1; Alford Report 3; Alford Dep. 38:20–39:8. On average, only 8.3% of white voters supported Black-preferred candidates, and in no election did white support exceed 17.7%. SUMF ¶ 92; Palmer Rep. ¶ 18. SUMF ¶ 91; Palmer Rep. ¶ 18, fig.2, tbl.1; Suppl. Palmer Rep. ¶ 6, fig.1, tbl.1; Alford Report 3; Alford Dep. 38:20–39:8. These findings were confirmed by the endogenous results from the 2022 midterms, in which Black-preferred legislative candidates were defeated in every majority-white district and elected in every majority-Black district in the focus areas. SUMF ¶ 97; Suppl. Palmer Rep. ¶ 5, tbl.2.

In short, Black voters’ candidates of choice are consistently defeated in the focus areas by white bloc voting, except where Black voters make up a majority of eligible voters—thus satisfying the third *Gingles* precondition. *See* 478 U.S. at 68 (“Bloc voting by a white majority tends to prove that blacks will generally be unable to elect representatives of their choice.”); *see also* PI Order at 200–01 (concluding that “Plaintiffs have satisfied their burden under the third *Gingles* precondition”).

B. Section 2 does not require Plaintiffs to prove that racially polarized voting results from racial motivations.

Rather than disputing Plaintiffs' evidence of racially polarized voting, Defendants "attempt[ed] to remake . . . §2 jurisprudence anew," *Allen*, 2023 WL 3872517, at *11, by contending that the second and third *Gingles* preconditions require Plaintiffs to prove that racially polarized voting is caused by racially discriminatory motives. *See, e.g.*, Defs.' Reply Br. at 13 ("Plaintiffs claim Defendants improperly require them to prove [that] race, not party, is the cause of polarization. But this is precisely their burden of proof." (internal quotation marks omitted)). But *Allen* squarely rejected this argument. It confirmed that Supreme Court "precedents and the legislative compromise struck in the 1982 amendments clearly rejected treating discriminatory intent as a requirement for liability under §2." *Allen*, 2023 WL 3872517, at *19.

Allen also "reiterat[ed] that §2 turns on the presence of discriminatory effects, not discriminatory intent." *Id.* at *13; *see also id.* ("Congress . . . used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." *Id.* (quoting *Gingles*, 478 U. S., at 71, n. 34 (plurality opinion))). Thus, *Allen* makes clear that Defendants were wrong when they argued that "establishing racial polarization requires something more than just different races voting for different parties." Defs.' Reply

Br. at 9. These principles foreclose Defendants’ repeated protestations that Plaintiffs cannot satisfy the second and third *Gingles* preconditions without showing that racially polarized voting in the focus area is motivated by race rather than partisanship or any other factor.

C. *Allen* reiterates that Section 2’s effects test is constitutional.

Allen also rejected Defendants’ arguments that Section 2 is unconstitutional. *See* Defs.’ Mot. at 30–32. For nearly sixty years, the Supreme Court has held and reaffirmed that “[t]he VRA’s ‘ban on electoral changes that are discriminatory in effect . . . is an appropriate method of promoting the purposes of the Fifteenth Amendment.’” *Allen*, 2023 WL 3872517, at *21 (quoting *City of Rome v. United States*, 446 U.S. 156, 177 (1980)); *accord* *South Carolina v. Katzenbach*, 383 U.S. 308–309, 329–337 (1966). *Allen* also recognized that proper application of the *Gingles* framework alleviates the equal protection concern that Defendants raised because federal courts have “authorized race-based redistricting as a remedy for state districting maps that violate § 2” for four decades. *Allen*, 2023 WL 3872517, at *21. No constitutional considerations arise unless race predominates in a remedial map, and for the reasons discussed in *Allen*, those concerns are not present here. *See id.* at *23 (Kavanaugh, J., concurring) (“Alabama asserts that §2, as construed by *Gingles* to require race-based redistricting in certain circumstances, exceeds Congress’s

remedial or preventive authority under the Fourteenth and Fifteenth Amendments. As the Court explains, the constitutional argument presented by Alabama is not persuasive in light of the Court's precedents.""). Accordingly, Defendants' constitutionality arguments fail.

CONCLUSION

Plaintiffs have satisfied the *Gingles* preconditions as to six of Mr. Esselstyn's eight illustrative state legislative districts. Defendants' arguments on summary judgment relied on their subjective expectation that the U.S. Supreme Court might upend settled Section 2 precedent. The Court refused to do so. The Court's decision in *Allen* reaffirmed that the familiar requirements of *Thornburg v. Gingles* remain good law, and applying *Allen* to the undisputed material facts in this case shows that Plaintiffs are entitled to summary judgment on the *Gingles* preconditions as to six of the eight illustrative districts. Plaintiffs respectfully request that the Court enter partial summary judgment in their favor on, at the very least, the three *Gingles* preconditions, and allow the rest of Plaintiffs' claims to proceed to trial.

Dated: June 22, 2023

By: **Adam M. Sparks**

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Plaintiffs' Supplemental Brief in Support of Their Motion for Partial Summary Judgment has been prepared in accordance with the font type and margin requirements of LR 5.1, NDGa, using font type of Times New Roman and a point size of 14.

Dated: June 22, 2023

Adam M. Sparks
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused to be electronically filed a copy of the foregoing Plaintiffs' Supplemental Brief in Support of Their Motion for Partial Summary Judgment with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to counsel of record.

Dated: June 22, 2023

Adam M. Sparks
Counsel for Plaintiffs

Exhibit 1

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

ALPHA PHI ALPHA FRATERNITY,)
INC., ET AL.,)
PLAINTIFFS,)
-VS-) DOCKET NO. 1:21-CV-05337-SCJ
BRAD RAFFENSPERGER,)
DEFENDANT.)

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

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

TRANSCRIPT OF SUMMARY JUDGEMENT PROCEEDINGS
BEFORE THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE
THURSDAY, MAY 18, 2023

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1 (HELD IN OPEN COURT AT 10 A.M.)

2 THE COURT: I was starting to walk in here this morning
3 to tell you-all that I just got off the press a ruling from the
4 Supreme Court on Merrill. But once I figured if I told you-all I
5 was joking, that one CSO couldn't protect me. So I decided not to
6 do that.

7 Good morning, everyone.

8 Ms. Wright, you can call the case for the day.

9 THE DEPUTY CLERK: Yes, sir. The Court calls the
10 following civil actions for court: Alpha Phi Alpha Fraternity,
11 Inc., and others v. Brad Raffensperger, Civil Action No.
12 1:21-CV-05337; Coakley Pendergrass and others v. Brad
13 Raffensperger and others, Civil Action No. 1:21-CV-5339; and Annie
14 Lois Grant and others v. Brad Raffensperger and others, Civil
15 Action No.1:22-CV-00122.

16 THE COURT: Okay. If the plaintiffs' counsel will
17 introduce yourself and who all else is working for the plaintiffs'
18 case this morning. I have a list, but I need it for the record.

19 MR. SAVITZKY: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. SAVITZKY: Ari Savitzky from the American Civil
22 Liberties Union on behalf of the Alpha Phi Alpha plaintiffs, Alpha
23 Phi Alpha AME Church, and Mr. Woods, Ms. Glenn, Mr. Browning,
24 Ms. Stewart (phonetic). With me at counsel table are Sophia Lakin
25 and Kelsey Miller.

1 THE COURT: Thank you.

2 MS. KHANNA: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MS. KHANNA: Abha Khanna for both the Pendergrass and
5 the Grant plaintiffs. I will be arguing today on behalf of the
6 Pendergrass plaintiffs, and my colleague Jonathan Hawley will be
7 arguing on behalf of the Grant plaintiffs.

8 THE COURT: Good morning. Is there anyone else?

9 All right. For the defense.

10 MR. TYSON: Good morning, Your Honor. Brian Tyson for
11 the defendants. I'm joined today by Brian Jacoutot, Diane LaRoss,
12 and Dan Weigel from our firm. We also have a law clerk with us, a
13 University of Georgia grad. He's applying for law schools right
14 now. And Diana LaRoss is joining us as well.

15 THE COURT: Well, I hope you apply to UGA and you get
16 accepted -- and all of the other law schools you applied to as
17 well.

18 We're going to start off this morning with the Alpha Phi
19 Alpha Fraternity v. Brad Raffensperger, et al. Defendants' motion
20 for summary judgment. It's 20 minutes. You can use all 20 or you
21 can save time for rebuttal. Then we'll hear from plaintiffs, and
22 then we'll go from here.

23 Mr. Tyson.

24 MR. TYSON: Your Honor, if I could, we have a paper copy
25 of the slides.

1 THE COURT: Thank you. Mr. Tyson has done this with me
2 so many times, he knows to bring the paper copy. Thank you.

3 MR. TYSON: I've also had the technology fail on me more
4 than once. So it's always safe to have a backup.

5 THE COURT: That happens.

6 MR. TYSON: All right. Well, thank you, Your Honor.
7 Brian Tyson for the defendants.

8 What I want to do today is just walk through our motion
9 for summary motion, and I think it's important for us as we come
10 to this to recognize -- I know we were here on a preliminary
11 injunction a little bit over a year and three months ago. We,
12 obviously, have an evidentiary standard today that looks for "is
13 there a dispute about a material fact." Our submission is there
14 is not, and we want to talk to you about why that is this morning.

15 I'm going to cover the law on Section 2 and Gingles 1.
16 Mr. Jacoutot will finish up with Gingles 2 and 3, and then we'll,
17 hopefully, save a few minutes for rebuttal.

18 THE COURT: All right. Sounds good to me.

19 MR. TYSON: We're going to begin -- you've seen this
20 slide before, legal standards on Section 2. We talked about this
21 last time. Is there a denial or abridgement of the right to vote
22 on account of race or color. You look at all of these different
23 factors. For this motion, since there is no plaintiff's motion,
24 we're only talking about Gingles 1, 2 and 3. We're not talking
25 about totality for this one. We'll get to those with the others.

1 I wanted to flag -- you've already flagged for us the
2 *Milligan* case that's out there. I've called this one of our known
3 unknowns. When we get this opinion, it might change the law in
4 Section 2. It might not. We don't know.

5 Arguing the law, focusing on *Gingles 1*, and so I think
6 there are some questions there.

7 Another known unknown we have is the *Rose v.*
8 *Raffensperger* case. That's an appeal from the Public Service
9 Commission, an order issued by Judge Grimberg. Again, the appeal
10 on that one focused on *Gingles 2 and 3*. The Southern Circuit
11 expedited it. They heard argument in December. We thought they
12 would give an opinion by the end of March --

13 THE COURT: Remember, just for the record, I will
14 indicate that Judge Grant said he kind of wanted to wait until the
15 Supreme Court rules. When I didn't see anything by March, I kind
16 of figured they're waiting.

17 MR. TYSON: Exactly. So we're waiting on both of those.

18 What I wanted to talk through in terms of how -- what
19 we're looking at in Section 2 is -- as this Court recognizes,
20 preliminary injunction order, this is the first redistricting site
21 to include Shelby county. And so when you look at historically
22 how redistricting cases have been brought against Georgia
23 redistricting Georgia claims. '80s, '90s, 2000s, generally
24 speaking, you have Constitutional challenges and you have
25 challenges that are Section 5 and the preclearance provisions

1 involved with that. You have a couple Section 2 cases, none that
2 have really gotten to a final judgment. But historically when you
3 look at a Section 2 case, a lot of them involve multi-member at
4 large methods of election. And so we have -- an example, common
5 example a county like this, you have a county that had a city
6 center with a black population in it, a surrounding white area.
7 The county used an at-large method of election, and then the Black
8 voters had their voices drowned out by the white voters around
9 them. And so the solution was to draw five districts that created
10 a district where the candidate of choice, the Black community,
11 could be elected. And so we convert from an at-large system to a
12 district-based system.

13 But this case is a little bit different in what we're
14 looking at. And the Court in *De Grandy* talked about that. The
15 Court talked about in a multiple member district challenge, it's
16 different than when you challenge a series of single-member
17 districts for where dilution may be more difficult to grasp.

18 Because in that situation you're not saying, you know,
19 total submergence, you're saying, well, we've had some electoral
20 success, but we need more electoral success. And how you measure
21 that is more challenging. It's also challenging because as you
22 look on the map there, you can see that's a map of the Atlanta
23 area covered by the Black person into each precinct. So the blue
24 and teal areas involve areas with less concentration to Black
25 voters. White, green, and red show heavier concentrations of

1 Black voters. And this is from Mr. Coopers' districts, that we'll
2 talk about, in which you can see, for example, in District 28
3 starting in a heavily Black area, South Clayton County, running
4 through Fayette down into a more rural white areas of Spalding
5 County. And we'll see this kind of consistent pattern of striking
6 districts out of Atlanta in order to create additional majority
7 Black districts.

8 And so one of the challenging things for the Court is
9 trying to assess how much of that striking is required to create
10 additional majority Black districts beyond what's already created,
11 and we'll look through some of those pieces along the way.
12 Because unlike the kind of county-based things, we're not uniting
13 the Black community that's having its voice submerged. A lot of
14 these maps were connecting disparate communities to create
15 additional districts, different types of communities.

16 So what I want to do this morning is move through one
17 other piece of the puzzle, which is in the legislative world,
18 you've got to navigate between complying with Section 2 of the
19 Voting Rights Act and also not racial gerrymandering. So you have
20 to use race enough to consider the Voting Rights Act compliance
21 but not so much that you cross the line into a racial
22 gerrymandering. And the top district there is the Shaw District
23 in North Carolina. The bottom district is the Miller District
24 that ran from Atlanta down to Savannah. In the '90s cycles are
25 prototypical racial gerrymanders.

1 But the difficulty is determining where -- where do we
2 find this balance along the way?

3 THE COURT: You anticipated a question I was going to
4 ask you. Where did you find the balance at? You-all indicated
5 that you thought they were shading, but, you know, the Black
6 voters --

7 MR. TYSON: Yes, Your Honor.

8 THE COURT: Where do you stop? Where do you stop and
9 where do you begin?

10 MR. TYSON: And I think that's in evidence. I think
11 from our perspective when you're relying on race to make the
12 decision about where the population goes, that's when you've
13 crossed the line. So with that county example, when you're
14 uniting the community in the middle of the county, for example,
15 you don't need to use race. You can draw five districts and see
16 there's clearly a district there. When you're making -- using
17 racially shading and using racial features and then deciding what
18 population goes in and out based on that, that's where we think
19 you've crossed the line into racial predominance.

20 We'll talk a little bit about two that the -- unlike the
21 Legislature, the map drawers in all these cases didn't have to
22 look at the data. So there was no explanation for politics for
23 the decisions they made; it had to be race. So we knew that also
24 as a distinction.

25 But I think it gets us back to this main problem. What

1 was the Legislature supposed to do about these particular plans?
2 And this is important because *Voinovich* tells us that federal
3 courts have to respect the state's districting decisions until
4 those choices contravene the federal requirements.

5 So does the federal requirement contravene drawing more
6 majority-Black districts on the various plans? Which is what
7 these cases say. Is it drawing more coalition districts and fewer
8 majority-Black districts? Which is the argument in the Georgia
9 NAACP case, which I know we're not here about today. Or is it
10 drawn less based on race, not using any racial splits of counties
11 and precincts like the Common Cause in Georgia NAACP cases say.

12 So I think this kind of begins zooming out to what the
13 question the Court has to consider is, how do you assess what
14 exactly is the violation here? And we submit that what the
15 plaintiffs are giving you is not enough to show a violation of
16 Section 2.

17 So let me look a little bit more at one of the other
18 challenges with these plans, especially Mr. Cooper's plans is,
19 they want -- there's a continuing focus on looking at the
20 statewide numbers for these various plans, but I think you have to
21 go district by district. I think their preliminary injunction
22 order definitely shows district by district. But, for example,
23 Mr. Copper says, ah-huh, I split one less county on the house plan
24 than the enacted plan did, and I draw more majority-Black
25 districts. So, therefore, my plan wins. But when you look at

1 what Mr. Cooper did in areas in the state, he went to places there
2 and there's not much Black population and unsplit counties, for
3 example, Gordon County in the northwest corner of the state. Mr.
4 Morgan talked about this. So it makes the overall statistics look
5 better than they actually are along the way.

6 So I think it is very important that the Court not look
7 at kind of global statistics of really digging in district by
8 district. What was the failure as to this district that needed to
9 happen.

10 So let's look at a few of these districts, and I think
11 it might be helpful to see what we're looking at here along the
12 way, and why there's not a disputed fact -- just, okay, we have a
13 bunch of maps from people, why is not a disputed fact that we need
14 to consider? And I think if you just look at the districts you
15 can see what's here.

16 So, for example, starting with
17 District 69 in Mr. Copper's plan. You can see it starts in the
18 South Fulton area. The little cutout box there is another part of
19 Mr. Morgan's report that shows the racial makeup of the counties
20 included in that district. So the portion of District 69 that
21 is -- in District 69 from Fulton is 94.15 percent Black. The
22 portion of Fayette is only 34 percent. So I've covered my own
23 things in the process there. 34 percent Black along the way. So
24 that's the issue we have for that district, is striking from a
25 heavily minority area down to a heavily white area.

1 The same thing happens in District 77 with heavy
2 concentrations in Clayton County, down into a more rural
3 population in Fayette county.

4 Same in District 74. We look at South Clayton over into
5 Henry and Spalding counties. 80 percent Black population in
6 Clayton down to 13 percent Black population in Spalding. And this
7 is a pattern that continues throughout Mr. Cooper's plans. So it
8 brings the question of what was the reason for drawing the
9 districts this way. And the ultimate reason Mr. Copper gave was
10 not only a dispute about a material fact, he gave platitudes
11 about, well, it was their own Metro Atlanta statistical area. I
12 looked at socioeconomic conditions. He testified he did not look
13 at socioeconomic conditions beyond the county level. He only had
14 the map of the county level. So it couldn't have been that. It
15 couldn't have been politics. He didn't have that information. So
16 our submission is that it has to be based on race to create these
17 districts.

18 Over in the eastern part of the state, we have another
19 example of this down in Laurens County here. Mr. Copper begins
20 with a racial split of Laurens, goes through -- cuts Johnson
21 County over to Washington and Jefferson County, four different
22 counties along the way. All that you can see, including more
23 heavy concentrations of Black voters, excluding lighter
24 concentrations of Black voters, and the same District 133.

25 Then we also have in South Georgia the connection

1 between Albany and Dougherty County, all the way down to Thomas
2 County. We've talked about this one in the preliminary
3 injunction. In Mr. Copper's deposition he said he followed this
4 highway but never checked to see if it matched the boundaries he
5 had looked at or located along the way. And we submit, again, it
6 is not a disputed fact about the reasoning for this, it was the
7 connecting communities where intervening white population -- based
8 on race.

9 Mr. Copper's senate plans are similar. We looked at
10 this a little earlier. But we have the connection of heavy
11 concentrations of Black voters in Clayton County and South DeKalb,
12 even North Henry, North Clayton inbound with more rural
13 populations to create additional majority-Black districts.

14 And then this -- in the Eastern District and Senate
15 District 23, you see moving Senate District 22 out of its historic
16 home in Richmond County up to Warren and McDuffie Counties,
17 splitting those counties and then in taking in counties around
18 that free (sic) and Black population in this area of Richmond
19 County to create an additional majority Black district there.

20 So all in all, what Mr. Cooper has shown consistently in
21 his map drawing is a focus on race. The other reasons he's
22 offered don't really create any dispute over a material fact
23 because he hasn't offered a basis that would be appropriate for
24 this. That means he hasn't drawn a remedy this Court can order,
25 which is our Gingles 1 burden on the plaintiffs, and they haven't

1 carried that.

2 THE COURT: Your argument that, therefore, summary
3 judgment should be granted based on compactness. Or, one -- I
4 wrote a question down here. Isn't that a weighing, wouldn't that
5 example create a disputed fact? Not a disputed fact, but a
6 dispute?

7 MR. TYSON: Yes, Your Honor. I think the key is that it
8 doesn't create a dispute about an issue of material fact. So if
9 Mr. Cooper had come forward with some basis of explaining
10 particular connections, I think at that point then we do have a
11 disputed fact. But his -- all the reasons that he gave didn't
12 create a dispute of a material fact, because none of them actually
13 explained a boundary if you look at what he said.

14 So our submission would be, there's not a dispute of a
15 material fact. I understand there may be disputes of fact about
16 what the drawing process was, those kinds of things, but not as to
17 any particular district.

18 THE COURT: Because he does not offer an explanation
19 other than race?

20 MR. TYSON: Yes, Your Honor. And he does offer
21 explanations, I want to be clear, but we don't believe any of
22 those are material -- both inform the decision about the district
23 boundaries. Only race informs those decisions.

24 So with that, Your Honor, I'll hand things over to Mr.
25 Jacoutot to talk about *Gingles 2 and 3*, and I'll save time for

1 rebuttal.

2 THE COURT: Okay.

3 MR. TYSON: Thank you.

4 MR. JACOUTOT: Good morning, Your Honor. Brian Jacoutot
5 for the state defendants. Very good to see you again.

6 THE COURT: Very good to see you again.

7 MR. JACOUTOT: So I want to talk about the elephant in
8 the room, about *Gingles 2 and 3* first. That is how your ruling
9 was at the preliminary injunction hearing. You said at the
10 preliminary injunction hearing that, "The Court concludes as a
11 matter of law that, to satisfy the second *Gingles* precondition,
12 plaintiffs need not prove the causes of racial polarization, just
13 its existence." And I don't think that we necessarily disagree on
14 that point, but we are saying that the plaintiffs haven't offered
15 anything apart from proof of partisan polarization, and that that
16 is not sufficient under the *Gingles 2 and 3* standard as adopted by
17 the majority justices of the Supreme Court.

18 THE COURT: All right. Here's the question the
19 plaintiffs can be prepared for. Your argument is that most
20 African-Americans in Georgia vote Democrat, Democratic party,
21 Democratic candidate. And that really you have to separate the
22 difference between partisans, bloc voting and racial bloc voting.
23 The burden is on the plaintiff. How does the plaintiff do that?

24 MR. JACOUTOT: Well, I'm glad you asked that, Your
25 Honor. We can skip this slide here.

1 The Eleventh Circuit has great evidence on how to do
2 that. And *Wright v. Sumter County* is a perfect example. In that
3 case it was a non-partisan election. So parties were out of the
4 equation. And in that case, Black voters routinely voted for
5 Black candidates, extremely cohesively there, plenty of evidence
6 in that record -- in the record. White voters routinely voted for
7 white candidates very cohesively. And there was actually a
8 situation in that case where there was two white candidates
9 running for a particular office in Sumter County and the Black
10 voters cohesively voted for a write-in candidate that was Black.
11 So when the option presented itself with two white candidates,
12 Black voters cohesively decided that a write-in Black man was
13 preferable. I mean, this is obvious -- this is obvious racial
14 polarization; right? And the Eleventh Circuit has routinely said
15 that that is plenty of evidence.

16 But what we have here, the plaintiffs are offering, is
17 obvious evidence of partisan polarization and nothing more.
18 Whenever the race of a candidate changes and the evidence offered
19 by the plaintiffs' experts, the cohesiveness stays almost exactly
20 the same. And that's what caused our expert, Dr. Alford, to say,
21 you know, there's remarkable stability in cohesion. The race
22 defense was utterly ineffectual in terms of what -- what the
23 outcome was for the cohesive blocs.

24 So that's the kind of evidence that we would be looking
25 for under the appropriate *Gingles 2 and 3* standard.

1 THE COURT: Well, in that case then, the only way they
2 can show it, you would have to be a Black candidate in the
3 election? In other words --

4 MR. JACOUTOT: That's not the only way, but that's the
5 most likely way. That's the way courts usually get that
6 information.

7 THE COURT: When I looked at this 15 months ago, Gingles
8 pointed out, you're right, causation cannot be a requirement.
9 It's irrelevant. I admit since that time out of the Eleventh
10 Circuit there's been a number of cases where the Eleventh Circuit
11 says, no, you have to show the difference between partisan bloc
12 voting and racial bloc voting.

13 MR. JACOUTOT: Absolutely.

14 THE COURT: They had prior issued a ruling, a couple of
15 weeks ago, something along those lines. And it probably to a
16 certain extent is just saying the same thing. But does that not
17 just then basically then eliminate that? In other words, most --
18 I wouldn't say most of the time. A number of times you're going
19 to have a white Democrat candidate running. I tried to go back
20 the other night to see how many times state-wide races you had a
21 Black candidate run against a Democrat or a Black candidate run
22 against as a Republican. The last senate race, you know. But
23 after that, in the general elections, I can only think about one
24 other time in the last ten years that you had a Black -- Mike
25 Thurmond was the one that came to mind. Of course the governors'

1 race, you know, Ms. Abrams. But how many -- how many times do you
2 really have that? So if I say they voted for the Democrat, does
3 that almost eliminate that particular factor, political
4 cohesiveness on No. 2?

5 MR. JACOUTOT: I don't think it eliminates it,
6 particularly when you consider Section 2 as it applies to the
7 nation as a whole, which it does. Georgia has some pretty unique
8 demographics. And so it is more rare here than elsewhere to have
9 that occur. But I don't think it eliminates it as a factor. And
10 I think if we just say, well, let's throw up our hands and say
11 partisanship and race are inextricably intertwined that you run
12 afoul of the *League of Women Voters* out of the Eleventh Circuit
13 that just recently came down saying precisely that you cannot do
14 that. So I hope that answers your question.

15 THE COURT: It does. But, again, this is a question I'm
16 going to ask the plaintiffs, but, you know, you've anticipated
17 what I was going to ask. Go ahead.

18 MR. JACOUTOT: Okay. Would you like me to continue?

19 THE COURT: Yes, continue.

20 MR. JACOUTOT: Please interrupt me if you feel it's
21 needed.

22 And so just to kind of continue with this slide since
23 we're here. All these cases here, *Georgia State Conference v.*
24 *Fayette County, United States v. Marengo*, cases that, you know,
25 are seminal on racialized polarized voting.

1 THE COURT: Let me indicate one thing for the record. I
2 didn't mean to not acknowledge Herschel Walker in the Republican
3 last senate race. That was another situation.

4 MR. JACOUTOT: Certainly. And I think you'll see, you
5 know, that's -- it's a question of voter preference, right, and
6 that changes, but the law itself doesn't and it needs to be able
7 to address the changes of voter preference. So we can't
8 guarantees that things are always going to be the way they were.

9 So these cases here all show racially polarized voting,
10 and the evidence that was presented to the Court there was just
11 like *Wright v. Sumter County*, and the evidence that we have here
12 is unlike that. And that's part of the problem.

13 And the *Southern Christian Leadership Conference* case
14 out of the Eleventh Circuit sort of alluded to the fact that other
15 factors besides race can drive racial polarization and that that
16 should be considered, and it could obviate *Gingles 2 and 3*.

17 THE COURT: What else other than a Black candidate
18 running can show racial bloc voting?

19 MR. JACOUTOT: Well, another example could be vote
20 switching. Say a white voter votes for a white Democrat in the
21 primary but a Black Democrat wins that primary, and then that
22 white voter -- the data shows that there is less white support in
23 the general for that Black Democrat and it increased voter support
24 for the white Republican, that would be another example of
25 evidence.

1 And so I understand that you have, I think, read our
2 briefs on *Thornburg v. Gingles*, so I'm not going to waste your
3 time on that. But suffice it to say that the issue of Part III-C
4 was not decided by the majority of the Court, it was decided by
5 plurality. And what does Part III-C talk about? Evidence of
6 racially polarized voting.

7 THE COURT: The plaintiffs disagree with you on how you
8 summarized Justice White's position. In your brief, you put
9 Justice White in the position with the majority, not necessary
10 going with causation being irrelevant. And in the plaintiff's
11 brief, they say, no, they don't summarize Justice White's position
12 correctly in *Gingles*.

13 MR. JACOUTOT: Well, I think Justice White in his
14 concurring opinion says -- he starts off with Justice Brennan --
15 Justice Brennan states in Part III-C. He doesn't join Part III-C.
16 And he says, I do not agree pretty unequivocally.

17 THE COURT: Justice White. Justice White not Brennan.
18 I've read Brennan again last night for the 100th time. But
19 Justice White. The plaintiff says in their brief -- I think I
20 remember it correctly. I admit, I read a lot of papers in the
21 last few weeks.

22 MR. JACOUTOT: We apologize for that.

23 THE COURT: You-all have really hurt trees in Georgia.
24 But I think I remember plaintiff's argument correctly, they argued
25 the position you-all arguing with Justice White is not totally

1 correct.

2 MR. JACOUTOT: I'm not sure -- I think Justice White is
3 pretty clear, he doesn't really agree with Part III-C. We're
4 talking about Justice White; correct?

5 THE COURT: Yes.

6 MR. JACOUTOT: Yeah, I think he's pretty clear that he
7 doesn't agree with III-C, and that it results in exactly what we
8 have here, interest group politics: Democrats v. Republicans.
9 And it is really important that in that opinion he says
10 specifically or expressly that it seems quite at odds with the
11 discussion in *Whitcomb*. He offered *Whitcomb*. In Section 2
12 purported to restore *Whitcomb* and *White* -- *White*, the case, not
13 the justice, obviously. So it purported to restore *Whitcomb*. And
14 he in his concurrent opinion said, "III-C doesn't comport with my
15 understanding of my own opinion." So I think that's pretty
16 relevant here.

17 I think I'm out of time.

18 THE COURT: You've used your time. Sorry.

19 MR. JACOUTOT: Thanks.

20 THE COURT: Thank you. I get the feeling that this will
21 not be the only time today that we'll be talking about this.

22 MR. SAVITZKY: Good morning, Your Honor. We can take
23 that off the screen. I'm going to go decidedly low tech this
24 morning.

25 THE COURT: I'll take it any way you present it.

1 MR. SAVITZKY: May it please the Court, Ari Savitzky for
2 the American Civil Liberties Union on behalf of the Alpha Phi
3 plaintiffs.

4 It's been 15 months since we were before this Court on a
5 preliminary injunction hearing. And at this point we have a
6 factual record with the scope and the complexity that one would
7 expect for trial on a Section 2 case involving multiple
8 legislative districts in the State of Georgia.

9 Summary judgment has to be denied unless there is no
10 dispute of material fact, viewing the facts in the light most
11 favorable to the plaintiffs, and if the defendant is entitled to
12 judgment as a matter of law. And what we've just heard and we've
13 seen in defense papers are trial arguments, trial defenses, not
14 dispositive legal defenses based on undisputed facts.

15 So just to get into it on *Gingles 1*, defendant isn't
16 actually arguing that Mr. Cooper's illustrative plans are
17 inconsistent with traditional districting principles. The
18 defendant basically agrees. The overall numbers are what they
19 are, and on every -- more or less, every objective metric, overall
20 compactness, minimum compactness, splits Mr. Cooper's meeting the
21 appeal, the standard set by the enacted map, to say nothing of the
22 benchmark map that existed before it.

23 So their fundamental argument is instead Mr. Cooper's is
24 too focused on race. But there's massive evidence in the record
25 that a fact finder could credit, including not just overall and in

1 terms of Mr. Cooper's discussion of how he thought about
2 compactness, the law about splits, thought about keeping towns
3 together, thought of community interest, thought about
4 transportation quarters and economic connections and census-based
5 areas, not just that, but specific district-by-district testimony.

6 THE COURT: They're arguing, though, that there is not
7 sufficient evidence coming from you-all regarding compactness that
8 makes it material.

9 MR. SAVITZKY: So I understand. And when I -- when I
10 heard Mr. Tyson say the word "material" there, I think that the
11 question is not one of materiality but one of credibility and what
12 a fact finder would credit. If a fact finder credits -- and we
13 don't think credibility determinations, as the Court well knows,
14 in summary judgment (sic). A fact finder could credit
15 Mr. Cooper's testimony -- and just if you want to look at the
16 district-by-district evidence, a fact finder could consider
17 Mr. Cooper's testimony -- let's start with District 171 in
18 southwest Georgia that Mr. Cooper was reducing county splits in
19 Dougherty County. Enacted maps split Dougherty County four times.
20 Mr. Cooper only splits it three. And Mr. Cooper knew that there
21 was a historic Route 19, Dixie Highway, connecting Thomasville and
22 Albany and Mitchell County that Mr. Cooper was looking at
23 socioeconomic connections and historical connections, high levels
24 of poverty that join those towns together, who was looking at the
25 regional commission which include those counties, identifies them

1 in the same region. He thought of all those factors.

2 There is specific evidence in the record on each of
3 these points. And what it goes to is the fact, and not just there
4 but on every single one of these districts, district by district
5 evidence. Look at pages 13 to 16 of our briefs. It takes us
6 three pages to give you the pin sites for the specific testimony
7 from Mr. Cooper that the fact finder could credit that he thought
8 about factors other than race in configuring these specific
9 illustrative districts.

10 THE COURT: Was race the dominant factor in making his
11 decision or was it just a factor?

12 MR. SAVITZKY: It absolutely was just a factor. That's
13 Mr. Cooper's testimony. He was asked point blank in his
14 deposition, Did you prioritize race over other traditional
15 factors? His response was, "Oh, absolutely not." And the rest of
16 his testimony bears that out.

17 He discusses all of the different factors he considered.
18 And, of course, he did also consider race as one factor, which you
19 have to do to complete the *Gingles 1* assignment, to consider
20 whether or not you can draw additional Black majority districts
21 consistent with traditional districting principles.

22 THE COURT: At what point, if any, in drawing the maps,
23 could taking race into consideration become unconstitutional?

24 MR. SAVITZKY: So I think what this Court said is as
25 if -- as if traditional districting principles are subordinated to

1 race, significantly more than necessary to -- to remedy vote
2 dilution, then that would be problematic in terms of the
3 illustrative maps. That's what the Court said. The Court based
4 that on that standard, which I think in some way presages what may
5 well be, you know, what the Supreme Court says in Merrill.

6 THE COURT: Could these maps pass strict scrutiny?

7 MR. SAVITZKY: I absolutely think that they could,
8 because I think they remedy vote dilution. But I don't think that
9 strict scrutiny applies here. What the Eleventh Circuit has said
10 is that strict scrutiny, and what the Supreme Court said in *Bush*
11 *v. Vera* is strict scrutiny, applies to state action.

12 Now, I understand that the *Gingles 1* illustrative maps
13 need to be a workable remedy, but I don't think we're close to
14 that because you don't get to strict scrutiny until you get to
15 racial predominance in which all of the traditional districting
16 factors are subordinated to race. And, again, we're here on
17 summary judgment. A fact finder could look at this record, the
18 extensive testimony and evidence in his report from Mr. Cooper
19 that he considered other factors, balanced them all, and did not
20 subordinate race and say that that certainly you can't conclude as
21 a matter of law that race predominated. And that is really all we
22 need to decide today. The ultimate question is --

23 THE COURT: Let's look at factors two and three. You
24 read my opinion. You probably know it. As pointed out
25 previously, the Court ruled based on what I would say that

1 causation is irrelevant, more or less. You heard me say, though,
2 since that 15-month decision, particularly coming out of the
3 Eleventh Circuit, there has been about three cases, maybe more,
4 where the judges are saying, well, district court judge you might
5 want to make sure it is not partisan bloc voting as compared to
6 racial bloc voting. Okay?

7 Do I stick with what I said in my preliminary injunction
8 or do I stop and say, well -- this goes to the Eleventh Circuit
9 first. I always tell myself that I may write a brilliant order,
10 but it's going in front of the Appellate Court one way or the
11 other. Okay? And this goes first to the Eleventh Circuit. I
12 have a case that came out, the *League of Women Voters* case, it
13 came out about three weeks ago, chief judge of the circuit
14 wrote -- page 13 of that order -- make sure it's not partisan bloc
15 voting as compared to racial bloc voting.

16 So my question is do I stay with my ruling in my
17 preliminary injunction that says -- because, you know, this is
18 summary judgment, but if you can't get passed all three, you're
19 not going to go to trial. Do I stay with my prior ruling? If so
20 why? How close should I look at what's being said to me.

21 In the case, the Rose case, Judge Branch and Judge
22 Grant -- and who is the third judge in that case? Branch, Grant
23 -- you-all flunk the test.

24 MR. TYSON: Anderson, maybe.

25 THE COURT: Before I leave here, somebody is going to

1 tell me.

2 They also pointed out, well, there is a difference
3 between partisan bloc voting and racial bloc voting.

4 MR. SAVITZKY: So, Your Honor, I do think that you can
5 deny the summary judgement motion here as a matter of law, the
6 case, or you can get into it more. Because ultimately the
7 question of the cause of racially polarized voting, to the extent
8 it is relevant, is going to be a fact-intensive issue. And we
9 have evidence in this record that race is the driver of the racial
10 polarized voting that everyone -- no one is disputing that it is
11 observed in Georgia elections that it's consistent and it is a
12 pattern over time.

13 THE COURT: What would separate that from the partisan
14 voting? In other words, there's no denying in the State of
15 Georgia, because the facts bear this out, that most of the time
16 the African-Americans are voting for the Democratic candidate, and
17 the whites are voting for the Republican candidate. Now, the
18 question is, not wanting to see any more of a delay, but how do
19 you separate that? Defense counsel has indicated based on the
20 case --

21 MR. SAVITZKY: So -- and I -- just -- I will answer that
22 question.

23 THE COURT: Go ahead.

24 MR. SAVITZKY: Preliminarily just to say, I mean, I do
25 think *Gingles* -- not just the concurrence, but the majority of

1 *Gingles*, cite 478, 56(3)(B) of the opinion, this is the majority
2 of the opinion where the Court pretty clearly says what's required
3 for that *Gingles* 2/3 showing, and says the fact of polarization is
4 sufficient. I think that's the law in *Nipper*. And, you know, if
5 you look at, you know, what Judge Wisdom said in the *Marengo*
6 *County* case, racial polarization in voting, strong counter racial
7 polarized voting is the surest indication of race-conscious
8 politics.

9 THE COURT: Yes, but in my ruling I, basically, said --
10 and I'm not saying I'm changing the ruling -- however, I,
11 basically, said causation was irrelevant.

12 MR. SAVITZKY: And I think that at the *Gingles* 2/3 stage
13 that's true. And what *Marengo County* and *Nipper* indicate is not
14 that you can just show the fact of causation and -- and, sorry,
15 not just show the fact that polarization and causation is sort of
16 neither here or there, but rather the fact of polarization creates
17 an inference that racial bias is at work. I mean, that's
18 literally a quote: "Creates an inference that a racial bias is at
19 work," from the Eleventh Circuit in *Nipper*. Right?

20 So then the defendant can come forward at the totality
21 of the circumstances stage and they can rebut that inference.
22 Right? And this gets into the Court's question: What is the
23 evidence that race is ultimately driving the polarization here.

24 Now, we don't think it's a *Gingles* 2/3 issue. I mean,
25 the Court was right about that. You know, we don't think there is

1 any reason to think that the Eleventh Circuit is going to get out
2 ahead of the Supreme Court in *Gingles* in its majority and front
3 load all of that analysis into *Gingles 2/3*.

4 THE COURT: Well, in *Brnovich* the Supreme Court said
5 something, not exactly, but they did indicate that you need to
6 look at the partisan bloc voting as compared to racial.

7 MR. SAVITZKY: So -- and I do think that the totality of
8 the circumstances stage, that is a fact-intensive issue. You
9 know, opposing counsel's discussion of how you might go about
10 proving causes, just highlights how fact intensive it is. And so
11 let me talk about what's in this record here.

12 We have, first of all, Dr. Handley, the racial
13 polarization expert did look at primary elections. You saw some
14 of that evidence in the preliminary injunction hearing. She did
15 observe racially-polarized voting patterns in a large number of
16 primary contests. And, of course, defendant's racially-polarized
17 voting expert concedes partisan primaries control per party. You
18 cannot explain the racially-polarized voting that is reserved in
19 party primaries through party. So that's strong evidence that
20 raises -- it's not just that. You have Emory University historian
21 Jason Ward who talks about the history of race and politics, and
22 how race is the best predictor of partisan preference in Georgia
23 since the Civil War.

24 And, in fact, the parties realign themselves over time
25 in response to -- voters realign themselves and their party

1 preferences over a time in response to the party's position on
2 issue of race and racial equality.

3 Not only do you have the historical evidence and the
4 evidence from partisan primaries, but you also have the expert
5 testimony of Dr. Jones who talks about contemporary politics, who
6 talks about racial appeals in politics. If voters were just
7 responding to party and were not responsive to race, then there
8 would be no reason for candidates to continuously use racial
9 appeals in politics. But instead you continue to see, into the
10 present day, racial appeals in politics. They're designed to
11 polarize voters on the basis of race. And, of course, we do
12 see -- and no one disputes -- a persistent, over election after
13 election after election, pattern of racially-polarized voting,
14 which itself, as the Eleventh Circuit says, creates an inference
15 that racial bias is at work.

16 And so -- but even if you want to sort of get into the
17 ultimate causes question, there is more than enough evidence here
18 for a fact finder to decide we've shown that race best explains
19 the observed and undisputed racial polarization in the electorate.

20 So you can deny summary motion on that basis as well, if
21 you'd like to go there.

22 THE COURT: What is the argument, also -- I said I
23 wasn't going to bring it up, but since it's on my mind that
24 you-all have not really shown past racial discrimination, because
25 what you have put forth is so past -- in other words, as they

1 pointed out in the *League of Women Voters* case is that -- and in
2 the *Greater Birmingham* case is that the recent discrimination of
3 the nature that we're looking at, has not been shown in a lot of
4 the cases. And the plaintiffs -- the defendants argue, also,
5 something that happened in 1965 it's not really relevant as far as
6 what's going on in 2023.

7 MR. SAVITZKY: So, first, I would be remiss to not point
8 out that the *Greater Birmingham* case and *League of Women Voters*
9 cases are not redistricting cases, aren't *Gingles* cases, which is
10 an important distinction.

11 You know, Your Honor, the weightiness and the salience
12 of Georgia's history and the history of racial discrimination in
13 voting is precisely the type of totality of the circumstances
14 question going to the total context, going into the ultimate
15 issues that are best decided at trial after you hear witnesses and
16 hear their testimony and weigh and think about their arguments and
17 assess them. I mean, these are -- I understand the argument, but,
18 again, what we're getting at are trial arguments and trial
19 defenses, not summary judgment arguments.

20 And we would, of course, argue that the history of
21 discrimination and the way that voters have responded to
22 discrimination, to messages about race and the parties' statements
23 about race by realigning themselves and reiterating over and over
24 and again racially polarized voting patterns, supports a finding
25 on that causation piece, if you want to consider the total of the

1 circumstances, and supports the ultimate finding that we met our
2 burden and shown vote dilution.

3 If you have no further questions, Your Honor, I'll rest
4 on that.

5 THE COURT: Thank you.

6 MR. SAVITZKY: Thank you.

7 THE COURT: If the defendants have any time left --

8 MR. TYSON: I don't think we have any time left.

9 THE COURT: All right. Then we move to the next set of
10 arguments.

11 So no one needs a break?

12 Come on down.

13 Pendergrass plaintiffs argument/motion for summary
14 judgment.

15 MS. KHANNA: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MS. KHANNA: Abha Khanna on behalf of the Pendergrass
18 plaintiffs.

19 THE COURT: Good to see you again.

20 MS. KHANNA: The Court set out today a good amount of
21 time to consider a good number of motions, but ultimately there's
22 very little that the attorneys will argue today that Your Honor
23 hasn't heard already.

24 Now, as this Court well knows, we've been here before.
25 And as we note in our briefs, the law as -- the existing law has

1 not changed. Now, I recognize what Your Honor has noted about in
2 the intervening 15 months there have been discussions of the
3 Eleventh Circuit, there have been statements in non-Section 2
4 cases and non-redistricting cases that, perhaps, provide glimmers
5 of the kind of laws that the defendants are hoping to achieve at
6 the Eleventh Circuit, are hoping to have become -- made the law of
7 the land, but those are not the law of the land today, and that is
8 what we're arguing in this summary judgment motion. The Court is,
9 obviously, very familiar with that loss. I'm going to dive
10 straight into the undisputed facts that warrant summary judgment
11 in favor of plaintiffs in this cases, in the Congressional
12 Pendergrass case.

13 I'm actually going to start with *Gingles 2 and 3*,
14 because I think that analysis is the most straightforward and has
15 been the subject of a lot of consideration already.

16 The second *Gingles'* precondition requires plaintiffs to
17 establish that the minority group in question is politically
18 cohesive. This fact is not in dispute. As made clear in the
19 response to plaintiffs' statement number 76, defendants do not
20 dispute that Black voters are extremely cohesive in the focus
21 area.

22 The third *Gingles'* precondition requires plaintiffs to
23 show that the white majority votes sufficiently as a bloc to
24 enable it usually to defeat the minority-preferred candidate.
25 This fact is also not in dispute.

1 In response to plaintiffs' statements 78 to 85,
2 defendants do not dispute that white voters in Georgia are highly
3 cohesive in opposition to Black-preferred candidates, and that
4 white-preferred candidates defeated Black-preferred candidates in
5 every election examined in each of the relevant districts except
6 for majority Black CD13.

7 The reason the defendants have not disputed these two
8 foundational and fundamental facts is because they are beyond
9 dispute.

10 The racial voting patterns observed in the focus area
11 here as depicted in Mr. -- in Dr. Palmer's graphic on the screen,
12 exemplify polarization along racial lines. In fact, defendants'
13 own expert described this pattern of polarization between Black
14 and white voters as striking and remarkably stable across
15 elections.

16 So based on these undisputed facts, the second and third
17 *Gingles* preconditions are satisfied as a matter of law.

18 Now, defendants argue that *Gingles 2 and 3* don't
19 actually mean what they say, and instead require plaintiffs to
20 prove something else, specifically that race caused this
21 polarization. That is absolutely not what *Gingles 2 and 3* says,
22 and that itself is an attempt to read tea leaves. That just does
23 not have any support in the existing case law.

24 More than a year ago this Court concluded as a matter of
25 law that under the *Gingles'* preconditions, plaintiffs need not

1 prove the causes of racial polarization, just its existence.

2 In fact, defendants' are well aware, not only from this
3 case, but in the Rose case that the defendants also mention. In
4 that same case the defendants made the same legal argument that
5 they make here before Judge Grimberg, and Judge Grimberg also
6 rejected it as a matter of binding law under Supreme Court
7 precedent and Eleventh Circuit precedent.

8 THE COURT: When it went in front of the Eleventh
9 Circuit, though, was it not a question -- did it not -- at least
10 two of the judges questioned Judge Grimberg's decision and
11 preceded that way?

12 MS. KHANNA: The Eleventh Circuit's most recent
13 reiteration?

14 THE COURT: Yes. They had oral argument, and I can't
15 remember the name. You have to find it. All I need is for the
16 Eleventh Circuit judge to check this.

17 They raised a question about whether Judge Grimberg was
18 correct on polarization of bloc voting.

19 MS. KHANNA: I believe that the question is now
20 currently pending before the Eleventh Circuit based on defendant's
21 reformulation of the law of *Gingles 2 and 3*. I think we can sit
22 here today and kind of debate what happened over oral argument,
23 who said what and what I can gleaned and what you can glean from
24 that, Your Honor. But the fact is there's no law from the
25 Eleventh Circuit saying anything other than what this Court held

1 in its PI order or anything other than what Judge Grimberg said in
2 his order. And then unless and until that law comes down, we have
3 to operate under the law that exists.

4 THE COURT: But that law can change in a swift of an
5 opinion.

6 MS. KHANNA: That law could do that. You're right, Your
7 Honor. And I believe the plaintiffs and the parties in this case
8 have shown their facility and their ability to turn on a dime as
9 developments in the law happen. And we know we are in an
10 environment where that could happen at any movement.

11 THE COURT: Yes.

12 MS. KHANNA: But does that mean that we kind of halt the
13 analysis or halt the progress of this case and let yet another
14 election go by in the hopes that maybe there will be some clarity
15 from another court? It does not. In fact, defendants have not
16 moved for a stay in this case pending either of them, either for
17 *Milligan* or *Rose*. So unless and until there is some change, we
18 have to operate under the law as it exists.

19 And under the law as it exists, the facts are not in
20 dispute, and plaintiffs have established their burden under
21 *Gingles 2 and 3* warranting summary judgment on the existence of
22 racial bloc voting.

23 I'll turn now to *Gingles 1*. The first *Gingles*
24 precondition requires plaintiffs to demonstrate that the Black
25 population in the focus area is sufficiently large and

1 geographically compact to constitute a majority in a single member
2 district. So this precondition has two component parts:

3 Numerosity and compactness.

4 There is no dispute that plaintiffs have satisfied the
5 numerosity requirement. In response to plaintiffs' statements 31
6 to 38, defendants do not dispute that in Mr. Cooper's illustrative
7 District 6, it has a Black voting age population of over 50
8 percent; and that it does so without reducing the number of
9 majority-Black districts -- existing majority-Black districts in
10 the enacted map.

11 Notably, Your Honor, there is no dispute among the
12 experts as to satisfaction of both Gingles -- both components of
13 the *Gingles 1* precondition. In paragraph 86 of his report, our
14 expert, Mr. Cooper, states that the Black population in Metro
15 Atlanta is sufficiently numerous and geographically compact to
16 allow for the creation of an additional majority-Black
17 congressional district consistent with redistricting principles.

18 Mr. Morgan's very short report in Pendergrass provides
19 nothing to contradict any part of this statement. And, in fact,
20 when asked in his deposition whether his report disputes Mr.
21 Cooper's conclusions in paragraph 86, he responded, quote, it
22 neither supports nor refutes it.

23 And in this sense, Mr. Morgan's Pendergrass report
24 stands out from his other reports in these consolidated cases. In
25 both of the state legislative cases, Mr. Morgan's reports twice

1 conclude that the illustrative maps he's analyzing there presented
2 by plaintiffs, quote, focused on race, prioritizing race to the
3 detriment of traditional redistricting factors. There is no such
4 statement in the Pendergrass report. In those reports, you will
5 see a lot of pictures and racial shading and a lot of things that
6 the defendant put on the screen just now. There is no such
7 picture of the Pendergrass illustrative map and the district at
8 issue there. For a good reason. There is no dispute as to the
9 facts of that illustrative map when it comes to the experts
10 themselves.

11 In Pendergrass, the defendants have no expert evidence
12 to dispute plaintiffs' satisfaction of *Gingles 1*. And they never
13 even in all of the Pendergrass briefing, defendants do not even
14 mention their expert Mr. Morgan once.

15 So let's go to the actual maps at issue. Let's first
16 start with the enacted map. Here is the enacted congressional
17 map. And the focus area for our section two claim is here. This
18 is the western Metro Atlanta area.

19 Plaintiffs contend under *Gingles 1* that the Black
20 population in this focus area is sufficiently numerous and
21 geographically compact to comprise a majority of the voting age
22 population in a new congressional district. To demonstrate this,
23 plaintiffs offer illustrative District 6. Importantly, defendants
24 do not dispute any of the objective metrics about the illustrative
25 maps' compliance with traditional districting criteria. They do

1 not dispute that the illustrative map achieves equal population.
2 They do not dispute that the illustrative map is contiguous. They
3 do not dispute that the illustrative map generally, and
4 illustrative District 6 specifically scored as high or better than
5 the enacted congressional districts on objective measures of
6 compactness. They do not dispute that the illustrative maps put
7 the same number of counties as the enacted map, and includes fewer
8 unique county splits, fewer municipality splits, and fewer voting
9 district splits than the enacted map. They do not even dispute
10 that the eyeball test tells us that illustrative District 6 is
11 compact. None of these criteria are in dispute with respect to
12 this map. And this is the map that is before this Court on
13 *Gingles 1* in the Pendergrass case.

14 So what do defendants say about plaintiffs' illustrative
15 map? What do they say that their expert couldn't say? What do
16 they say that the objective features of the map couldn't say?
17 Let's go to their brief to find out. They make feeble arguments.

18 They say in their opposition brief -- first they cite
19 *LULAC* for the proposition that plaintiffs must demonstrate
20 connections between the disparate geographic communities they
21 unite that go beyond race. But here, unlike the district at issue
22 in *LULAC*, there simply are no disparate geographic communities to
23 speak of within this illustrative district.

24 In *LULAC*, the Court examined the Section 2 compliance of
25 a district that it described as a long, narrow strip that winds

1 its way to combine Latino populations on the Mexican border with
2 Latino populations in Austin, in the center of the state 300 miles
3 away. And *LULAC*, in that case the Court emphasized it is the
4 enormous geographical distance separating the Austin and Mexican
5 border communities coupled with the disparate needs of interest of
6 those populations and not either factor alone that renders
7 District 25 not compact for Section 2 purposes.

8 Now, defendants parrot and quote the *LULAC* language in
9 their brief, but they fail to actually connect it to the actual
10 illustrative district in question in this case. Here just looking
11 at illustrative District 6, there are no disparate geographic
12 communities of any race included in this illustrative district.
13 The district is anchored in just four counties that comprise the
14 western edge of the 11-county Atlanta Metro area as objectively
15 defined by the Atlanta Regional Commission. That is not in
16 dispute. Defendants identify no far flung segments of a racial
17 group within this district, a district that otherwise complies
18 with all objective metrics of traditional criteria.

19 THE COURT: They argue that you're putting rural and
20 urban areas together.

21 MS. KHANNA: Your Honor, I believe all they note is that
22 Mr. Cooper noted that some portions of western Douglas County are
23 more rural than some of the more urban areas included in Cobb
24 County. Now, there is prohibition on putting rural and urban
25 areas together. And we, of course, are not bringing a claim

1 against bringing rural and urban areas together.

2 But specifically to their argument on this map again,
3 it's a cute little district, and I think we all have to agree --

4 THE COURT: I'm not saying I disagree with you. I'm
5 just saying that's what they are arguing.

6 MS. KHANNA: And I'll address that. And that argument,
7 in particular, is -- I think the Court can acknowledge that to the
8 extent any portion of Douglas County is rural, the defendants'
9 objection that we should have divided Douglas County and that
10 somehow would have been more consistent with traditional
11 districting principles, defies the very guidelines that guided the
12 Legislature where they said that counties and courts have
13 routinely found that county boundaries are objective metrics of
14 communities of interest.

15 So faulting plaintiffs for including the whole of
16 Douglas County, its, perhaps, somewhat rural and somewhat urban
17 populations included, it rings hollow here in this context, Your
18 Honor.

19 Defendants actually -- referring back to *LULAC* now.
20 Again, that was a 300-mile long district that conjoined two very
21 disparate populations of minority population. And there's a
22 legend at the bottom of this map right here. And you can see that
23 one inch is about six miles. So if we take that little one
24 inch -- and I have a little handy tool there to do this -- and we
25 approximate how many of those little inches does this district

1 span? I see one, two, three, four, five, six -- six-and-a-half
2 inches, 39 miles from top to bottom, approximately. This is not
3 the *LULAC* district. Defendants cite to *LULAC*, but they fail to
4 point to any evidence to indicate that this district, illustrative
5 District 6, is a *LULAC* district. In other words, they identify no
6 genuine dispute of fact to the geographic compactness of the
7 minority population in this district.

8 The defendants' remaining objection on *Gingles 1*
9 reflects a straight up legal error. Defendants look beyond
10 illustrative District 6. And to pretend that Mr. Cooper connected
11 the same types of communities that he criticized the enacted plan
12 for connecting in other illustrative districts, in eastern
13 Georgia. This argument fails on at least two levels:

14 First, the question under *Gingles 1* is whether the Black
15 population in western Metro Atlanta is large enough and compact
16 enough to comprise the majority in an additional district.

17 Defendants' complaint about districts other than
18 illustrative District 6 have no bearing on that question. *LULAC*
19 itself makes this clear. When evaluating the Section 2 violation
20 in District 23, it examined the compactness of the minority
21 population in District 23. When evaluating the Section 2 defense,
22 Texas' Section 2 defense of District 25, it examined the
23 compactness of the minority population in District 25. And when
24 the State of Texas tried to point to District 25 to defend against
25 Section 2 liability in District 23, the Court rejected their

1 attempt to look outside of the area that was the actual subject of
2 the Section 2 inquiry.

3 But more fundamentally, Your Honor, as Your Honor
4 already pointed out, defendants' argument on this score really
5 just misunderstands the legal relevance of plaintiffs illustrative
6 map. Plaintiffs do not challenge the enacted map, because it
7 connects rural and urban populations. That, of course, is not a
8 legal claim. That does not violate any law.

9 Plaintiffs challenge the enacted map because it dilutes
10 the vote of a compact cohesive Black population in violation of
11 Section 2. This Court does not have to decide whether the
12 illustrative map is better or worse than the enacted map. This
13 Court does not have to choose the map it likes best as a legal
14 matter, as a practical matter, as a policy matter. All it has to
15 do is determine whether plaintiffs' illustrative map identifies a
16 large compact minority population in the western Metro Atlanta
17 area that could comprise the majority of a new congressional
18 district. That is the legal standard, and based on undisputed
19 facts, plaintiffs satisfy it.

20 Defendants have come forward with no evidence at all for
21 this Court to find in favor of the non-moving party. All they
22 offer is their misunderstanding of the law.

23 Very briefly, Your Honor, there really is no dispute
24 that the *Gingles* preconditions, with all the pre-*Gingles*
25 preconditions that I've just discussed, are readily amenable to

1 summary judgment determination. The defendants say as much on
2 page 32 in our on opposition brief to our motion where they state
3 that the *Gingles* preconditions are, quote, proper basis on which
4 this Court can rule on the legal impact of the undisputed material
5 facts without weighing evidence.

6 On page 25 of our reply brief, we identified several
7 cases -- reports related to summary judgement for Section 2
8 plaintiffs on one or more *Gingles* preconditions. And, of course,
9 just last year in *Rose*, Judge Grimberg granted summary judgement
10 to plaintiffs on each of their three *Gingles* preconditions,
11 holding that the secretary may present evidence at trial about the
12 inferences the Court should draw from these facts under the
13 totality of the circumstances.

14 And, of course, while plaintiffs have moved for summary
15 judgment on the entire case here, and why we believe that we have
16 established several of the senate factors as a matter of law, this
17 is not an all or nothing motion. If the Court determines that the
18 totality analysis requires fact finding or the weighing of
19 evidence or a variety of inferences, it remains free to issue
20 summary judgment on the undisputed fact of the *Gingles*
21 preconditions, and reserve the trial -- reserve for trial the
22 ultimate determination of liability. Because in the totality of
23 circumstances, all of the -- the hemming and the hawing, and what
24 about this and what about that, and all of the various stories
25 that defendants want to tell about the objective data, that's a

1 place for the total of circumstances analysis. There is no place
2 for that under *Gingles*. *Gingles* is an objective, straightforward
3 test.

4 THE COURT: Do you really believe there's no argument
5 under compactness factor at all? In other words, there is no
6 argument whatsoever?

7 MS. KHANNA: I believe there is no argument whatsoever.
8 And the way I know that is not only by looking at this case, their
9 briefs in this case and their evidence in this case, by looking at
10 it in the other cases. They recognize or they tried, their expert
11 tries to -- to refute compactness as a factual matter -- the
12 Legislative cases. They don't even try to do it here. All they
13 say is "*LULAC*" and "disparate communities," but they don't
14 actually identify any disparate communities. There are no
15 disputes about the objective traditional redistricting criteria,
16 including the Atlanta Regional Commissions' definition of the
17 community of interest.

18 And so I really believe that the Congressional case, you
19 know, doesn't fit their story line, Your Honor. I understand the
20 story that they have crafted, that they crafted 15 months ago and
21 that they kind of deployed in each of these cases is the same,
22 word for word. But, unfortunately, the facts just don't add up in
23 this case. The maps just don't add up in this case. There's a
24 reason they don't point to any portions of those maps. There's no
25 reason their expert's report doesn't even show a picture of our

1 map, because there is no dispute about what that map actually does
2 on both numerosity and geographic compactness.

3 Your Honor, we are not asking this Court to do anything
4 that would make it queasy on summary judgment. I know there's a
5 lot of opinions that are hanging out there in the balance. We do
6 want to get this done right. And while that may mean that we'll
7 be back here for trial in September, this Court has every reason
8 to narrow the issues actually in dispute and streamline the trial
9 to ensure the opportunity for effective and efficient relief for
10 plaintiffs on their claim in advance of the 2024 elections.

11 I don't know if I have any time left, but I will reserve
12 any time left for rebuttal.

13 THE COURT: How much time does she have left? Nothing.

14 MS. KHANNA: I said it all, Your Honor. Thank you.

15 THE COURT: It was Judge Schlesinger.

16 MR. TYSON: Judge Schlesinger. Okay. I think Judge
17 Henderson must have been in the Curling appeal.

18 THE COURT: Three panelists have heard these arguments.

19 Mr. Tyson --

20 MR. TYSON: Yes, sir.

21 THE COURT: The argument is you now have a dispute here.

22 MR. TYSON: Yes, Your Honor, and I'm going to explain
23 why I believe we do, not surprisingly. And I want to begin with
24 the standard of review, because I think it's important again. I
25 know this is a unique situation where we're saying we're entitled

1 to summary judgment, the plaintiffs are saying they're entitled to
2 summary judgment. I think it's important to remember that the
3 standard is different for -- for defendants getting summary
4 judgment versus plaintiffs. And so we have the summary judgment
5 standard -- actually, Your Honor, if I could, I can hand up paper
6 copies.

7 THE COURT: Thank you.

8 MR. TYSON: The Fayette County case, I think, is a very
9 important one for this Court to consider as it thinks about
10 granting summary judgment for the plaintiffs. That was a case
11 where Judge Batten granted summary judgment to the plaintiffs in a
12 case. And A lot of what the Eleventh Circuit said, essentially,
13 was, well, we think that the defendants are going to lose at
14 trial, but you improperly weighed the evidence. And so the
15 discussion there from Judge Wilson was, the district court at
16 trial -- at summary judgement may not weigh the evidence or find
17 facts. You can't make credibility determinations on your own.

18 And in *Burton v. Belle Glade* I think it is even clearer
19 that even if we agree on basic facts but disagree about the
20 inferences that should be drawn from those facts, that's not where
21 summary judgment fits. And I think this is where the distinction
22 between defendants' motion for summary judgement or we can say
23 plaintiffs haven't given you enough evidence to get past the
24 preconditions to get to trial. It's different than plaintiff
25 saying we have carried our burden even assuming every inference in

1 favor of the non-moving party, which for this motion is the state.
2 So the standard review matters a lot.

3 To talk through a couple of points Ms. Khanna made, we
4 wanted -- I want to be clear that the *League of Women Voters* and
5 *Greater Birmingham, Brnovich*, yes, those were not restricting
6 cases. We get that. But they are interrupted in Section 2 and a
7 standard in Section 2. So I understand there's a lot that's
8 different in redistricting. I don't think the legal standard
9 there is different for those.

10 And I want to say freely, too, Mr. Morgan does treat
11 this plan differently. We'll talk a little bit as we get into our
12 motion on this and why we believe that the Court has to look more
13 broadly on that. I think for purposes of the *Gingles 1* -- and
14 I'll start the piece of this -- looking at what's happening -- oh,
15 I should address one point, Your Honor.

16 One issue of fact that we raised in our briefs and to
17 mention this as an aside, Mr. Cooper testified just a few years
18 ago that there should have been a new majority Black district in
19 eastern Georgia, not in Metro Atlanta. And that was his expert
20 report here in the *White* case. Just like in *Fair Fight* where the
21 burden wasn't on us to come forward with things, cross-examining
22 the witnesses about why they went through the methodology they
23 went through that leads to these kinds of disputes of fact. Why
24 look at Atlanta this time versus eastern Georgia last time. And
25 Mr. Cooper said, well, the census was different. Okay, that's

1 fine. But there was a clear change in direction for Mr. Cooper,
2 and then what he did in drawing is an important difference, and
3 Ms. Khanna showed you this map. But you have to look one step
4 deeper, which is what is the racial makeup of the counties in --
5 what she referred to as the cute district on that front.

6 The racial makeup is -- the Fulton County portion at the
7 bottom there is 88 percent Black. The Douglas County portion is
8 almost majority Black at 49 percent for the age population. The
9 Cobb portion is not majority Black, it's only 37 percent. And the
10 Fayette portion is only 21 percent.

11 So as the Court is considering this question of where is
12 the geographically compact minority community that is not being
13 properly represented, again, in a situation where we're not saying
14 no opportunity and we need to get opportunity, we're saying we
15 have some opportunity and we need more opportunity. This is an
16 important factor in considering where is that population.

17 What the plaintiff's essentially wants you to do for
18 your *Gingles 1* analysis is -- is oversimplify the analysis for
19 purposes of their motion to the point of where they say, can we
20 draw a district? If yes, we have succeeded on *Gingles 1*.
21 Whereas, the Eleventh Circuit standard is you have to find a
22 remedy the Court can enter. And this is where we get into a
23 little bit of a chicken and egg problem in Section 2, because how
24 do you know you need to draw the district? There was a Section 2
25 violation. How do you prove the Section 2 violation? You've got

1 to draw a district. And that's an awful place to be. But I think
2 in looking at this, it has to be more than just I can draw a
3 district. It has to be I can create a remedy, I can explain why
4 I'm uniting these communities, I have a reason behind why I'm
5 doing what I'm doing. And when we get into our motion, we'll talk
6 a little bit more about the other districts around the state.
7 Because I think you can't look at again one district in isolation,
8 because redistricting is a very interconnected process. Creating
9 this one district drives decisions about other districts around
10 the state that will make a big difference in how that goes.

11 THE COURT: According to her, in *LULAC* they say, no,
12 it's not relevant what effect it has on another district.

13 MR. TYSON: The discussion in *LULAC* was, you can't use
14 one district to just -- because we created a new majority Latino
15 district over here, therefore, it's okay that we got rid of this
16 district over here. And that's more of a Section 5 argument, the
17 total number of districts, is it retrogressive.

18 What we're advocating on this point is, you can't look
19 at District 6 in isolation because the decisions made about
20 creating District 6 have an effect on the other districts around
21 the state.

22 THE COURT: You said in your brief, how many districts
23 are affected. Let's say if we looked at this new District 6, how
24 many other districts are affected? What other changes does it
25 have on the other 13?

1 MR. TYSON: And my recollection, Your Honor, is that
2 Mr. Cooper changed I believe eight of the other districts to draw
3 this one. And a couple of distinctions that happened there --
4 let's look at some of them. District 3, Mr. Cooper in his report
5 heavily criticizes the state for connecting parts of south Cobb
6 with the suburbs of Chattanooga. But he's done the same thing
7 here in this -- connecting part of south Cobb or west Cobb all the
8 way down through Carroll County, through LaGrange, all the way
9 down to downtown Columbus. I mean, he's added farming communities
10 that are parts here. He couldn't explain his decision-making
11 about why those different portions of the districts were connected
12 beyond, well, I portioned equality, and I think he thought that
13 Cobb County was closer to Columbus than it was to Chattanooga.

14 On other side of the state, his District 10, also.
15 Really, he couldn't explain the explanation for that beyond
16 population equality. It starts in majority-Black Hancock County.
17 There's a lot of discussion about the Black belt in our
18 preliminary injunction hearing. And Clarke County was part of
19 that. It includes Clarke all the way up to Rabun and Towns
20 Counties.

21 Over in District 14, Mr. Cooper cut across where the
22 General Assembly drew a line in a mountain range. He has cut
23 right past that between Murray and Fannin and Gilmer Counties in
24 creating that district. So this is where I think you have to look
25 and weigh out at *Gingles 1* the question of is this a remedy the

1 Court can order, because these are all things that were affected
2 by District 6. And I know the response has always been this is
3 just illustrative, you don't have to use this map, you can use a
4 different map. The reality is if you draw District 6 the way it's
5 drawn, it has impacts all across the rest of the state. So we get
6 back to the question was the General Assembly required by
7 Section 2 to draw District 6 as it's configured here or at least
8 draw a majority Black district in western Atlanta, or is it
9 required to do something else?

10 The other piece I want to touch on in terms of where --
11 would it be required to find for the plaintiffs, and I think
12 Ms. Khanna has in a lot of ways kind of backed off some of the
13 totality factors here, but the Court literally is required to
14 conduct a searching analysis and weigh out the weight to give to
15 the various totality factors. And we just don't see how that can
16 happen at summary judgment.

17 As we talked about, you can't infer the racial issue
18 from a partisanship, and we'll talk about *Gingles 2 and 3* in a
19 minute. We've talked about the history of discrimination and what
20 is the impact of that. I'm relying on the things that this Court
21 and other courts have ruled are not discriminatory, are not
22 actionable. How does that weigh into the official history of
23 discrimination in Georgia? That's something the Court has to
24 weigh. How does, for example -- they cite again in *Fair Fight* to
25 this alleged memo from then Secretary Kemp about closing polling

1 places. How does that play into this particular factor? How does
2 that affect -- and then, again, is it informing the environment
3 that goes to the question of is there, based on the totality of
4 circumstances, a denying or abridgement on account of race.

5 You have to use the various voting practices that are
6 involved. *Brnovich* makes clear, I think, you have to look broader
7 than just those practices. You have to look at the entire
8 environmental. How do you factor in early voting? How do you
9 factor in other opportunities to vote, like, automatic voting
10 registration? Those are things that require weighing.

11 The effects of discrimination on the ability to
12 participate in the political process. We recognize the Eleventh
13 Circuit has said you have disparate socioeconomic conditions that
14 kind of gets you across this particular factor, but then how much
15 weight does that carry especially when Georgia is electing
16 candidates of choice in the Black community on a statewide basis.
17 Senator Warnock, Senator Ossoff, President Biden are all examples
18 of that. So how does that factor weigh? Again, we're well beyond
19 what summary judgment requires here.

20 Racial appeals is the same thing, figuring out what the
21 weight to give that. What is the impact of using voter fraud as a
22 racial appeal in voting? The extent of election minority members
23 to public office. We have three members of Congress from Georgia
24 who are Black-preferred candidates and Black individuals who are
25 elected from non-majority districts. That's Congressman Bishop,

1 Congresswoman Williams, Congresswoman McBath. How does that
2 weight into the consideration of the Court here? We understand
3 the statewide elections happen -- Mr. Thurman and others. But how
4 do we weigh out those pieces? Again, that's not a factor or
5 decision for summary judgement.

6 The plaintiffs don't offer you anything on
7 responsiveness of the elected official just because we don't have
8 a particularized need of the Black community that's distinct. Not
9 just, again, a Democratic political priority, which is what the
10 large discussion was, but a distinct issue for the Black community
11 that is not being represented right now. Judge Grimberg talked
12 about that in *Rose*.

13 And the justification, the tenuousness of the
14 justification ignores the evidence of partisanship from the
15 Legislator. And it kind of gets us back to our same point of
16 *League of Women Voters* and *Brnovich*, how do we weigh out race and
17 partisanship? And without more, that's something, number one, you
18 can't weigh at summary judgment on the senate factor. But in
19 terms of how do you interpret the evidence the plaintiffs have
20 brought forward, have they brought you sufficient evidence to get
21 across the finish line even if all inferences are drawn in our
22 favor on their motion. We'll obviously argue for our motion that
23 there's not enough to even get you past Gingles 2 and 3 on those
24 other points.

25 So with that, Your Honor, I will yield to Mr. Jacoutot

1 to talk a little bit more about partisan and racial polarization.

2 THE COURT: Thank you.

3 MR. TYSON: Thank you.

4 MR. JACOUTOT: Thank you, Your Honor.

5 I want to begin with something that Ms. Khanna said in
6 her argument. She characterized our argument with respect to
7 *Gingles 2 and 3* as a reformulation of the factors -- or a
8 reformulation of the law, excuse me. And I don't think -- I don't
9 think that's what we're doing here at all. I don't think we're
10 changing the law at all. In fact, all of these Eleventh Circuit
11 cases that you see here, would come out precisely as they did
12 under the standard that we are advocating for -- with respect to
13 *Gingles 2 and 3* except, perhaps, *Southern Christian Leadership*
14 *Conference*, which is a case where racial polarization was not
15 found -- or excuse me, a Section 2 violation was not found, and
16 that one might turn out differently.

17 But the cases where racial polarization was found and a
18 Section 2 violation was found, those all come out, I think,
19 exactly the same under our standard.

20 In fact, it's worth pointing out that *Gingles* itself
21 comes out exactly the same under our standard. That's why there
22 were concurring opinions.

23 I want to highlight sort of the lack of evidence, the
24 absolute lack of evidence that we have on point for granting
25 plaintiffs' summary judgment using the *Wright v. Sumter* case that

1 we talked about earlier as a model. The *Wright v. Sumter* case
2 had, again, nonpartisan elections, and they had some elections
3 with Black and white candidates, some elections with only white
4 candidates. But if you look here, you'll see the Black support is
5 very cohesive for the Black candidate who is identified with
6 asterisk next to their name. This is not all of the election
7 contests, this a portion. I don't want to go through them all,
8 but this is indicative of the overall analysis that the Eleventh
9 Circuit included in its opinion in this case.

10 And you'll see Black support very cohesive of Black
11 candidates. White support sometimes split amongst white
12 candidates, but very cohesive for white candidates. And if you
13 compare that with what Dr. Palmer has given us in this report,
14 you'll see a kind of stark difference. The asterisk here -- this
15 is, again, a portion of Dr. Palmer's report, not the whole
16 thing -- but the asterisk here represents Black candidates, and
17 the first column is Black voter cohesion with respect to the
18 election. And you'll notice a very strong pattern of Black
19 cohesion for any candidate regardless of their race. Right?
20 They're constantly saying the only thing that is different amongst
21 these candidates or, excuse me, the only thing that matters to the
22 Black voter is the party of the candidate. And the same is true
23 for the white voters. White voters routinely vote against the
24 Black candidate regardless of whether -- Black-preferred candidate
25 regardless of whether that candidate is white or Black. This is

1 very different than what we see in *Wright v. Sumter County*.

2 I highlighted the race at the bottom there, the two
3 white candidates, and you'll notice all of that cohesion between
4 the races absolutely evaporates in that -- in that race because
5 they had two white candidates. The -- there's hardly -- possible
6 to determine a candidate of choice for either race in that -- in
7 that contest.

8 And then, of course, there was the write-in campaign,
9 another contest -- this is also taken from the *Wright v. Sumter*
10 *County* opinion -- was a write-in campaign because there were two
11 white candidates who split the white support. And then the Black
12 voters in that area actually wrote in very impressively a
13 candidate for office in that election as well. You see that
14 candidate has a write-in -- received 96.5 percent of Black support
15 and actually got 27.3 percent of overall support. So a very
16 strong write-in campaign. And that shows the racial cohesion,
17 racial element that we think is required for racial polarization.

18 But I think the plaintiffs have asked you that we just
19 sort of infer from the data that they provided in Dr. Palmer's
20 analysis from the partisan evidence. And as we spoke about the
21 *League of Women Voters*, the recent case said, essentially, that
22 that should not be done. And the District Court's opinion that
23 that case was appealed from, the District Court said something
24 very familiar, you probably heard this here today, that racial
25 partisanship are inextricably intertwined.

1 And then the court, the District Court found that --
2 this Court finds that white voters are likely to vote for the
3 Republican party, while Black voters -- Floridians are likely to
4 vote for the tax map party. I think you called it science fiction
5 in certain terms, with the ability to separate those two.

6 And addressing that remark about science fiction, the
7 Eleventh Circuit said the Supreme Court has warned against
8 conflating discrimination on the basis of party affiliation with
9 discrimination on the basis of race citing *Brnovich*. Partisan
10 motives are not the same as racial motives.

11 And so the evidence that you have before you asks you to
12 make that inference. And we would submit that it is certainly not
13 appropriate for granting summary judgment in favor of the
14 plaintiffs, and I think we will show that it's worth granting
15 summary judgement in favor of the defendants on that issue.

16 THE COURT: So you strongly disagree with Ms. Khanna
17 when says the law is set? I shouldn't try to anticipate what the
18 Eleventh Circuit might do. I should go with what the law says
19 right now. So you disagree that the law is not set?

20 MR. JACOUTOT: Yes, I agree that the law -- *Gingles 2*
21 *and 3* are not at issue. We are saying, you just -- it's the
22 manner in which those factors are applied where there is a
23 discrepancy. *Gingles 2 and 3* are not at issue. The law is set,
24 and something more needs to be given -- remember, it is the
25 plaintiffs' burden at this juncture to give you something more

1 than partisan differences for you to make a judgment as to *Gingles*
2 2 or 3. If you don't, you're necessarily inferring race where
3 they've only shown party, and as we seen in the *League of Women*
4 *Voters*, that is not a permissible thing for the Court to do.

5 I would also state --

6 THE COURT: Maybe I misunderstood. I thought Ms. Khanna
7 was saying, Judge, you need to stick with what you said in your
8 preliminary injunction order, that causation is irrelevant. I
9 raised the *League of Women Voters* thing twice, but you're saying,
10 no, that's not the case, Judge. The *League of Women Voters* has
11 said partisan bloc voting and racial bloc voting are different --
12 or the same, excuse me, in a sense, and that you need to show how
13 they're different at all. Maybe I misunderstood Ms. Khanna's
14 argument. I thought she was saying, Judge, the law is set, and
15 you're saying it is not.

16 MR. JACOUTOT: Well, I think the term "causation" is
17 also a little confusing because there is a statistical term for
18 causation, which is as our experts have shown, is very different
19 from what we might consider is a legal term for causation. We're
20 certainly not asking for a statistical cause of causation analysis
21 here. Merely what we're saying is there has to be -- in order for
22 you to say that there is racially-polarized voting, there has to
23 be some evidence in the data that they present -- given that it is
24 their burden, there has to be some evidence beyond what they've
25 presented. And it can look a lot like what *Wright v. Sumter*

1 County said. But when I show you Dr. Palmer's analysis and you
2 watch the remarkable cohesion regardless of any sort of racial
3 factor, that's the whole ball game. They are missing something
4 incredibly important for you to rule in their favor on *Gingles 2*
5 *and 3*. And I want to be clear that we are not asking for some
6 sort of intent analysis. We're not asking to get into the
7 motivation of the voter.

8 THE COURT: I understand that. You're not asking that.

9 MR. JACOUTOT: Okay. That's outside of our opinion and
10 our argument. But there should be objective measurable factors
11 that you can pull from, and the plaintiffs have not shown us any
12 thus far.

13 So if you don't have any other questions, that's all I
14 have.

15 THE COURT: Thank you, sir.

16 Before we start with the defendants' argument, let's
17 take a break. It is 11:25. I have 11:22. I have to go to a
18 lunch meeting at 12:30. So I would like to at least get through
19 the defendant's argument. So let's come back at 11:35. Okay?

20 THE DEPUTY CLERK: This Court will be in recess until
21 11:35.

22 (Recess from 11:22 a.m. to 11:35 a.m.)

23 THE COURT: Mr. Tyson, are you ready?

24 MR. TYSON: I'm ready, Your Honor.

25 I spoke with Mr. Hawley and Ms. Khanna on the break, and

1 we're going to see where we can get to before 12:30. There's a
2 lot of argument --

3 THE COURT: I have to stop at 12 and have you-all come
4 back, unless you-all think you can do it in 20 minutes.

5 MR. TYSON: I don't think we can do that, Your Honor.

6 THE COURT: Here is the plan. I have to be at the place
7 at 12:30 and it will take 20 minutes for me to get there. So
8 we'll stop at 12 and start back at 2.

9 MR. TYSON: That works. Thank you, Your Honor.

10 THE COURT: This is a new 20 minutes.

11 MR. TYSON: Thank you, Your Honor.

12 Brian Tyson for the defendants' again. So when I talk
13 about our motion in Pendergrass, there are a couple of different
14 pieces -- a lot of what we already covered.

15 First, my state election board clients would always want
16 me to emphasize they understand why they're defendants in a lot of
17 the cases that they're defendants in, this one they don't.

18 THE COURT: Why?

19 MR. TYSON: And we would submit, they have no role in
20 the implementation of the plan and there is nothing in what the
21 plaintiffs have offered to show that they have a role in that, and
22 there is no reason to keep them in the case. We can continue with
23 a separate hearing. So I don't think I need to say more on that.

24 For *Gingles 1*, we've talked through already just the
25 differences of the districts. And our submission would be that

1 since the plaintiffs have to come forward with a plan the Court
2 can order as a remedy, they've given the significant questions of
3 Mr. Cooper's inability to explain the other districts beyond
4 District 6 and how he fit District 6 back into the statewide plan,
5 that that's the failure of proof here. So it is a little bit
6 different than the argument for the legislative districts, which
7 we'll talk about those in Grant, where we've said the racial
8 predominance element here is the lack of an explanation of how
9 this district fits back into the overall plan.

10 Mr. Cooper didn't have any explanation beyond population
11 equality or I think this place is closer than that place when
12 asked about several of the districts. We've talked about District
13 3, District 10, and we believe that that is a requirement of the
14 proof. It has to fit back into the plan, because it has to be
15 something that the Court can order.

16 So from our perspective, either it's a scenario where
17 the plaintiffs have failed to come forward with evidence on that
18 point, which means summary judgment for the defendants or --

19 THE COURT: And the plaintiffs have argued that
20 Mr. Cooper's compactness scores are similar or identical to the
21 enacted plan.

22 MR. TYSON: That's correct. I don't think anybody
23 disputes the scores in those.

24 THE COURT: But your argument is that he does not still
25 provide us with enough information about how he came about putting

1 together this particular Congressional district?

2 MR. TYSON: Yes, Your Honor. Because of the
3 interconnected nature of districting, I think that's where we get
4 back to. It's like a water balloon, you squeeze at one point,
5 it's going to pop out somewhere else. That's the way population
6 works.

7 Mr. Cooper and the plaintiffs are saying you must draw
8 District 6 or something very much like it on this plan. Well,
9 that leads to all of the other pieces on this plan. It pushes
10 District 13 from Fayette to Clayton, all the way out to Jasper
11 County -- that pink district there at the bottom. Mr. Cooper
12 couldn't explain the very rural nature of Butts and Jasper
13 connecting back with Clayton and Fayette. It is those kind of
14 things where the decision made at one point on the map affect the
15 remainder of the map. So, again, it's a little bit different
16 argument overall, but I think at the end of the day, either this
17 plan is not a sufficient evidentiary offering of a remedy, or in
18 this case, we would receive summary judgment, or there are
19 significant questions about the way Mr. Cooper drew this plan
20 which goes to the weight the Court is supposed to give it as to
21 whether it is a proper remedy, which means the plaintiffs don't
22 get summary judgment and we're at trial. So I think it's either
23 one of those pieces of the puzzle.

24 So with that I want to talk briefly also about
25 proportionality that we raise in our briefs. And I think the key

1 point from *LULAC* here is, does the absence of this district
2 constitute impermissible vote dilution. That's the thing that
3 proportionality is trying to get at. And as *De Grandy* said, we
4 know from the statute there is no right to proportionality.

5 THE COURT: True.

6 MR. TYSON: And we know that. And then the question
7 becomes how do we assess proportionality otherwise. And right now
8 in Georgia we have five districts, majority or not, that are
9 electing the candidates of choice to the Black community and their
10 electing Black individuals to those offices. That's more than a
11 third of the population. So the question --

12 THE COURT: I have a problem with that, though, Mr.
13 Tyson. You are right. You don't have a right to say we have 35
14 percent African-American population in Georgia, so 35 percent of
15 the Congressional district should be African-American. We agree
16 with that.

17 MR. TYSON: Right.

18 THE COURT: You take it the other way, though, you're
19 saying, well, we only have five districts, we have 32 percent of
20 the population of Georgia is African-American. Five out of 14 is
21 about 35 percent. So it's not being diluted.

22 MR. TYSON: And I think it gets to your evidentiary
23 question. Is the election system that's happening here in Georgia
24 diluting the right to vote on account of race or color. And if
25 the system is electing Senator Warnock statewide, if it's electing

1 35 percent of the members of Congress from Georgia as candidates
2 of choice of the Black community, where is the denial of equal
3 openness in the system under Section 2? I think that's what
4 proportionality at the end of the day gets to. And does it
5 require then in the light of that adding an additional district
6 where Black voters are entitled to elect the candidate or have an
7 opportunity to elect the candidate of choice. Because then we get
8 6 districts out of 14 in that scenario. So does Section 2 compel
9 that outcome when the political system looks like it looks for
10 Georgia overall. And I think that's the key for proportionality.

11 THE COURT: What about the individuals, though, in that
12 district, proposed District 6? What if I'm saying to them, taking
13 your arguments that, look, 35 percent of the Congressional
14 districts in the State of Georgia are represented by
15 African-Americans and, therefore, there is no vote dilution. But
16 if you're in that district and you're saying but I don't -- I'm
17 not represented by an African-American. I don't know if it's
18 compactness here --

19 MR. TYSON: Certainly, Your Honor. And I think the
20 key -- it gets us back to the obligation to kind of push, pull,
21 haul, trade in the political process. That's ultimately where we
22 get to. Because the same could be said of a white Republican
23 voter in District 7 or District 5 in Atlanta. I may look and say,
24 well, I cannot ever elect the candidate of my choice either.

25 So the question is not so much can a particular

1 political outcome happen, I think that's where we start straying
2 you to is this a Constitutional -- are we interpreting Section 2
3 in a way that raises questions about its constitutionality if it's
4 compelling a political outcome.

5 The question is, is the system equally open? Is there a
6 right to vote that's being abridged in some way on account of race
7 or color, and we can do something about that. So I think that's
8 where -- I understand the frustration everybody has had -- various
9 points lived in districts that you didn't like the member that was
10 elected from that. But the question is does it violate Section 2,
11 and we submit that it does not.

12 With that, Mr. Jacoutot has a few more points on prongs
13 two and three.

14 THE COURT: Okay. Thank you.

15 MR. TYSON: Thank you.

16 MR. JACOUTOT: I'm going to say good afternoon, Your
17 Honor.

18 THE COURT: Almost.

19 MR. JACOUTOT: So I have a few more things to discuss
20 about *Gingles 2 and 3*. I want to bring up the senate report,
21 because it does I think inform Justice White's concurrence in
22 *Gingles*.

23 The senate report made pretty clear that the amendment
24 restores the legal standards based on the controlling Supreme
25 Court precedents according to *Mobile v. Bolden*. And Justice

1 O'Connor said that amended Section 2 was intended to codify the
2 results test employed in *Whitcomb* and *White*. And both *Whitcomb*
3 and *White* were written by Justice White. So I think those helped
4 inform his concurring opinion.

5 And just briefly looking at the text in the -- which I
6 know you have seen, but it's important to note that the touchstone
7 is whether the political processes are equally open in that -- or
8 not equally open in that the members of the class of citizens
9 protected by Subsection A have less opportunity than other members
10 of the electorate to, one, participate in the political process;
11 and, two, to elect representatives of their choice.

12 Justice Brennan's -- excuse me. Justice Brennan's view
13 on the *Gingles* factors 2 and 3 really only looks at number 2 and
14 it doesn't consider number 1, and we would submit that both of
15 those needs to be considered under *Gingles 2 and 3*. And looking
16 to what Justice White's opinion was in *White*, he said it is the
17 plaintiff's burden to produce evidence and to support findings.
18 And then he goes on to use language almost identical to that which
19 is used in the statute. In fact, the statute was taken from that
20 language.

21 And in this portion he cites himself in *Whitcomb*. And
22 in *Whitcomb*, it's very clear that Justice White was worried about
23 Section 2 being morphed into a partisan equality, a law that
24 protects political parties or interest groups instead of what it's
25 supposed to do, which is to protect the electorate against

1 invidious discrimination by a majority. He said that the voting
2 power of the plaintiffs in *Whitcomb* may have been cancelled out in
3 that they lost and as the district court held. But that seemed to
4 him like a mere euphemism for political defeat at the polls. So
5 partisanship was very much on his mind in that case.

6 And a reverse in district court, Justice White held that
7 the district's court standard was, again, expressed in a more
8 general proposition that any group with distinctive interests must
9 be represented in the Legislative halls if it's numerous enough to
10 command at least -- that's a typo -- command at least one seat and
11 represent a majority living in an area sufficiently compact to
12 constitute a single-member district.

13 Now if that sounds like *Gingles 1, 2 and 3* as Justice
14 Brennan interprets it, it is because it's very close to that. And
15 he was worried about that eventuality.

16 And returning to his opinion in *White* -- or, excuse me,
17 in *Gingles*, he says: I do not agree with how Justin Brennan
18 states part III-C. He says, this is interest group politics. And
19 he says, it seems quite at odds with the discussion in *Whitcomb*.
20 It also could be read that it seems quite at odds as my opinion in
21 *Whitcomb*. So he wrote that.

22 In closing, racial polarization under *Gingles 2 and 3* as
23 the majority of concurring justices saw it, requires more than
24 mere differential voting patterns and it requires it at the
25 *Gingles* precondition stage. If it doesn't, as Mr. Tyson alluded

1 to earlier, it potentially raises serious Constitutional questions
2 as to the ongoing viability of Section 2. And we have our
3 Hornbook law here, *McCulloch v. Maryland*. But that -- that is,
4 essentially, what leads to congruence in proportionality
5 requirements so that Section 2 be adopted with the injury to be
6 prevented or remedied in mind. So Section 2, it becomes just a
7 device to protect political parties and interest groups. It is
8 beyond that Section 2 of the Fifteenth Amendment enforcement
9 authority granted to Congress, and its Constitutional viability
10 becomes very much in question. The way to stop that is
11 interpreting *Gingles* 2 and 3 appropriately so that something
12 beyond mere partisanship shows a violation.

13 So in conclusion, I think the defendants' interpretation
14 is faithful to the majority of justices' view on the necessary
15 evidence to establish racially-polarized voting. I think it is
16 faithful to the text of Section 2 of the Voting Rights Act as
17 amended by Congress. I think it's faithful to the pre-*Bolton*
18 Supreme Court precedent under *Whitcomb* and *White* that Congress
19 expressly sought to restore. And I think it's faithful to the
20 scope of Congressional authority outlined by the Constitution.

21 So if you don't have any other questions -- I'm happy to
22 answer any that you might have. But with that, I can sit down.

23 THE COURT: Thank you.

24 We'll have the response after lunch, unless you think
25 you can do it in ten minutes. But I don't want to rush you. I

1 want you to take all the time that you will need.

2 MS. KHANNA: I will take the lunch, Your Honor.

3 THE COURT: We'll start back at 2.

4 (Recess from 11:50 a.m. to 2 p.m.)

5 THE COURT: I'm ready to resume.

6 MS. KHANNA: Your Honor, good afternoon.

7 I want to respond to a few points raised by defendants
8 and their arguments in support of their motion for summary
9 judgment. There is going to be some overlap. I'm going to try
10 not to repeat myself for the court, because I think there are ways
11 to kind of pinpoint --

12 THE COURT: Don't worry about it. You just say what you
13 have to say.

14 MS. KHANNA: It's notable, Your Honor, when it first
15 comes to *Gingles* 1 that counsel's -- Mr. Tyson's first slide
16 jumped first to a picture of illustrative Congressional District
17 3. Defendants are making a point of looking everywhere but the
18 actual illustrative district to try to find some dispute of facts,
19 let alone some dispute of material fact. And I believe Mr. Tyson
20 said something, like, you cannot look at the illustrative district
21 in isolation. But *LULAC* on 548 U.S. at 429 specifically said when
22 it's considering Section 2 liability in District 23, considering
23 the district in isolation, the three *Gingles* preconditions are
24 satisfied. It then goes on to reject the state's attempt to look
25 somewhere other than the actual Section 2 district at issue.

1 So this is, in fact, the law. The law that, frankly,
2 defendants rely upon when they repeatedly site *LULAC*. *LULAC*
3 specifically says it is the minority population in this district.
4 And that is the subject of the examination, and it is notable that
5 that is not the subject of dispute here.

6 Defendants' counsel also talked about the need for the
7 illustrative plan as a whole to be a viable remedy. That was the
8 basis, I think, that their argument for looking at districts other
9 than the illustrative district. But the cases on which they
10 relied, *Nipper* -- cases like *Nipper* where the issue there is
11 whether the remedy that plaintiffs are seeking, which is complete
12 overhaul to the way an election system is run -- in that case the
13 election of judges -- whether that is a feasible remedy.

14 There's no -- so, for instance, in this case, if
15 plaintiffs were asking for a 15th or 16th Congressional district,
16 that would be a remedy that we would really have to prove up that
17 could possibly even be conceivable by this Court. That's not the
18 case here. We're talking about single-member district maps just
19 like the one that is enacted. Those maps, as we know from the
20 recent Fifth Circuit decision in *Robinson v. Ardoin*, they do not
21 have to be perfect. They do not have to be the map. They're just
22 that, they're illustrative. I believe that counsel said that the
23 Court has to be able to -- it has to be something that the Court
24 can order. And they've identified no reason why the Court
25 couldn't order a 14-District map like the ones in place of

1 illustrative district.

2 Mr. Tyson's only real complaint with the other
3 districts, even if we were to look at them, even if they were part
4 of the agreement, is what he referred to as the inability of
5 Mr. Cooper to explain his reasoning behind them other than
6 population equality and county boundaries -- which was his reason
7 for explaining.

8 Now, it's important to note they're not arguing, for
9 instance, that the creation of our illustrative district
10 necessitates some kind of racial gerrymander in an adjacent
11 district. They're not even arguing the creation of our
12 illustrative districts create some serious non-compactness problem
13 in an adjacent district. They're really just taking issue with
14 the fact that they don't like his explanation for why you did this
15 and that in north Georgia, in south Georgia, in east Georgia, none
16 of which are at issue in this case. That is not a legal basis.
17 That's not a factual basis for denying summary judgment here.

18 Before I move onto *Gingles* 2 and 3, I just want to
19 briefly touch on proportionality. I know that's not part of the
20 *Gingles* 1 analysis. And, frankly, as we've already discussed,
21 this is part of a senate factors analysis that the Court can
22 clearly defer to a fact-finding stage. They are not part of the
23 salvaging the *Gingles* preconditions. But I do want to clear up
24 what I think is a serious misconception.

25 Defendants have effectively invented a new standard for

1 proportionality, one that is inconsistent with the binding
2 precedent. *De Grandy* and its progeny are clear, the proper method
3 for proportionality inquiry is the number of majority/minority
4 districts. Not the number of districts where the
5 minority-preferred candidates prevail. At most, only four of
6 Georgia's 14 districts are majority Black. It's 29 percent, while
7 the state's Black population is, roughly, 33 percent.

8 Now, proportionate -- as we've already discussed,
9 proportionality is never an absolute bar in any event. But here
10 it does not even weigh against the finding of vote dilution.

11 Now defendants focus on what they call five majority/
12 minority districts or minority opportunity districts. Notably,
13 they're not majority Black districts. They're including districts
14 where different minority groups are joining together in coalition
15 and forming a majority for voting age population.

16 Now, if that is the metric that they would like to use,
17 then the appropriate apples to apples comparator is the minority
18 population of the State of Georgia. That is not 33 percent.
19 That's the Black population. The minority population of the State
20 of Georgia is just under 50 percent. It's 49 percent. So by that
21 logic that the minority opportunity districts that they say would
22 require -- would be proportionately, would be half of 14
23 districts. Five is nowhere close.

24 And on this point, Your Honor, I want to note that
25 defendants vigorously object to any remedy noted that place

1 minority voters at some kind of parity with their share of the
2 site-wide population. But it's interesting to note that they have
3 no such qualms about white over representation in the enacted map.
4 Right now white voters are a majority in nine of the states 14
5 Congressional districts -- 64 percent even though they comprise a
6 razor-thin majority of the state's population. Even if a fifth
7 majority black district were added pursuant to our claim, 57
8 percent of the districts would still remain majority white. If
9 there is a proportionality problem, it is not because Black voters
10 are trying to get more than their fair share.

11 I want to move onto the *Gingles* 2/3 analysis that
12 Mr. Jacoutot addressed.

13 I believe Mr. Jacoutot said something along the lines of
14 *Gingles* 2 and 3 are not at issue. If the inference is that you
15 draw from those factors, that cannot be done on summary judgment.
16 I think that is a very telling statement, because what cases like
17 *Nipper* have told us is that the mere existence and establishment
18 of *Gingles* 2 and 3 necessarily create an inference of the racial
19 bias and the account on account of race that the defendants are
20 talking about.

21 As a matter of law, the establishment of *Gingles* 2 and 3
22 creates the inference. That's not something that the Court has to
23 weigh or consider, that is as a matter of law. And when it comes
24 to the other factors, the other inferences that can be made to
25 maybe outweigh or counter that, that is part of the totality

1 analysis. That's what *Nipper* says. It is not part of *Gingles* 2
2 and 3.

3 Mr. Jacoutot also said several times that it is
4 plaintiff's burden to show the cause behind *Gingles* 2 and 3. He
5 specifically said there has to be some evidence beyond the *Gingles*
6 factors to establish the *Gingles* factors. There is not a single
7 case that says that, Your Honor.

8 THE COURT: Would it be fair to say, hypothetically, if
9 I maintain my ruling in the preliminary injunction hearing in this
10 case and say the law is what I said it was there, then I should
11 grant summary motion for two and three?

12 MS. KHANNA: Absolutely. And the law is what Your Honor
13 said it was. When it comes to the *Gingles* preconditions, there is
14 no reasonable dispute about that, because there is no -- Mr.
15 Jacoutot could not point to a single case that says it is
16 plaintiffs' burden to establish some evidence beyond the *Gingles*
17 factors when proving the *Gingles* factors.

18 THE COURT: I think what Mr. Jacoutot was doing, and I
19 may have led him this way, the cases that have come out since the
20 preliminary injunction hearing are not Section 2 cases.

21 MS. KHANNA: Right.

22 THE COURT: They were 14th and 15th amendment
23 Constitution cases. But you are a very good lawyer. You
24 sometimes try to read what the appellate courts may be
25 telegraphing to you. That is kind of what I was doing last week.

1 Are they telegraphing me something here? But you're right. They
2 weren't Section 2 cases. They were 14th and 15th amendment cases.
3 But I can't say that Mr. Jacoutot was completely off base because
4 you've got it at some level. Maybe they're saying for these 14th
5 and 15th amendment cases it might apply. But I understand what
6 you're saying, Judge, that's not the law.

7 MS. KHANNA: Well, Your Honor, let's look at that case.
8 Let's look at the *League of Women Voters* case that was discussed.
9 But I understand the concerns raised there. That was a Section 2
10 intentional discrimination case. It's not a redistricting case,
11 not a *Gingles* case, it's an intent-based claim.

12 The paragraphs that Your Honor mentioned and that Mr.
13 Jacoutot mentioned about the distinguishing between racial animus
14 or racial discrimination and partisan discrimination, have
15 absolutely nothing to do with any discussion with the *Gingles*
16 preconditions, have absolutely nothing to do with any discussion
17 of racial-polarized voting. Instead, in context of an intentional
18 discrimination claim, the Court said we should be mindful of the
19 fact that we're looking at racial discrimination and not solely
20 partisan discrimination.

21 There is one important sentence that was left out of
22 defendants' analysis of that paragraph in the *League of Women*
23 *Voters* case. In that same paragraph that Mr. Jacoutot cited, the
24 Court says in the --

25 THE COURT: What is it?

1 MS. KHANNA: The site is -- it is Star 6 of the *League*
2 *of Women Voters'* opinion on Westlaw page 7, if that is at all
3 helpful.

4 And, again, this is in the intentional discrimination
5 context. To be sure, as the organizations point out,
6 intentionally targeting a particular racist's access to the
7 franchise because its members vote for a particular party is
8 impermissible.

9 The Court there acknowledges, as it must, that you
10 cannot disenfranchise -- and that's a vote denial case -- you
11 cannot disenfranchise a racial minority because of the way they
12 vote. And that kind of -- you can call that political, but that
13 is race-based discrimination.

14 So even the very passages that Mr. Jacoutot chose to
15 rely on in that case, which again is an intent-based claim, don't
16 suggest that plaintiffs have any burden to completely separate and
17 disentangle race from party as if they are two entirely separate
18 and different things.

19 The actual case law at issue here when it comes to the
20 *Gingles* preconditions two and three, say that it is, in fact,
21 defendants' burden.

22 THE COURT: Well, Mr. Jacoutot may have overlooked one
23 section of that *League of Women Voters* case, though. On page 15,
24 I don't know if it's the same one you have, the Supreme Court has
25 warned against conflating discrimination on the basis of party

1 affiliation with discrimination on the basis of race. The
2 partisan voters are not the same as racial voters. Be sure an
3 organization -- as an organization pointed out, intentionally
4 targeting a particular race with respect to the franchise because
5 if its members vote a particular partisan is impermissible. And
6 that's kind of where this Court is at, but I see your point. I
7 see his argument is just what I'm saying.

8 MS. KHANNA: No, I completely understand, Your Honor.
9 Actually, read the last sentence of that paragraph.

10 But we must be careful not to infer that racial
11 targeting is, in fact, occurring based solely on evidence of
12 partisanship. We do not have evidence solely of partisanship.

13 And, in fact, the Eleventh Circuit standard tells us
14 that if the defendants want to argue that it is solely
15 partisanship or it is not or something other than race, it is
16 their burden to put that evidence forward. They do not even
17 grapple with that legal standard, Your Honor, and for good reason,
18 because they have put no evidence here. The only evidence they
19 have on *Gingles* 2 and 3 is Dr. Alford's report and his testimony
20 here. What we know about Dr. Alford, and these are undisputed
21 facts, is he testified that the objective facts listed in
22 Dr. Palmer's report, the objective facts about racial-polarized
23 voting are consistent with both race and party as a cause.

24 He has testified that race likely plays a role -- he
25 agreed that race likely plays a role in shaping the voters'

1 partisan preferences. And he testified that he conducted no
2 analysis of his own to determine what factor other than race would
3 be driving these polarized-voting results. He opined that maybe
4 it's partisanship that is doing some of the work here. He
5 inferred from the undisputed data, but he did not actually do
6 anything to further the ball on defendant's burden to establish --
7 to counter the inference of racial bias at play that is created by
8 the satisfaction of *Gingles* 1 -- 2 and 3.

9 THE COURT: Here is what caught my attention when I was
10 reading this these last few weeks. The argument is that you don't
11 want to seem like you're favoring one political party over
12 another. In doing this, if one race is voting particularly
13 Democrat and you say, well, that's just the way it is. That's,
14 basically, what I was saying. So far that's the way it is. But
15 they argue, well, you can't favor one political party over
16 another, and if you have one race that is voting particularly for
17 one party, could it not be argued that if you go and start making
18 changes you really have to make the changes based on the political
19 party?

20 MS. KHANNA: No, Your Honor. I think the premise of the
21 question, where you started, Your Honor, was that's just the way
22 it is. That Black voters are voting for Democrats and white
23 voters are voting for Republicans. That's not just the way it is.
24 There's not some generic component to party affiliation that
25 requires or that predisposes Black voters to vote for Democrats.

1 And while it is not plaintiffs' burden to disprove factors other
2 than race, even if in that context plaintiffs did provide plenty
3 of evidence in the report of Dr. Burton that says it's not just
4 the way it is when it comes to partisan affiliation of different
5 issues. In fact, Dr. Burton testifies, unrebutted testimony, race
6 is the driving factor in determining partisan preferences in
7 Georgia precisely because of the racial policies embraced by the
8 political parties, both historically and in the present day. It
9 is not an accident of -- of politics that we're seeing this racial
10 polarization among the two political parties. It is because of
11 the racialized policies those parties have. That is the evidence
12 that plaintiffs has put forward to do as Your Honor has suggested,
13 like, is there a way to explain the causes here. We have provided
14 that evidence. Defendants have not rebutted that evidence.
15 Defendants have not even addressed that evidence.

16 I believe we raised Dr. Burton's testimony in each of
17 our briefs. I don't believe that defendants have once actually
18 engaged in that testimony. In fact, their expert Dr. Alford, who
19 is their only expert on racially-polarized voting and purports to
20 opine on the partisan basis of polarized voting, did not even read
21 Dr. Burton's report. Did not even engage with plaintiffs'
22 evidence. Forget doing his own analysis there.

23 THE COURT: So would it be better for this Court to say
24 causation is irrelevant?

25 MS. KHANNA: It would be -- I think under the standard

1 in *Nipper*, the causation question is, A, deferred to the totality
2 of circumstances; and, B, the burden of defendants once plaintiffs
3 have established *Gingles* 2 and 3. That is the accurate statement
4 under the law.

5 I want to address the issue that -- we talked a lot
6 about Justice White's concurrence in *Gingles*. And I think, again,
7 I just think looking at the actual cases, looking at *LULAC*,
8 looking at *Gingles*, looking at the *League of Women Voters*, I think
9 we will learn a lot more than just kind of pulling out the quotes
10 that each side likes the most.

11 Justice White's concurrence in *Gingles* -- I thought it
12 was three paragraphs. Essentially two paragraphs long. We can
13 read it together. I won't tire the Court with that right now.

14 But Mr. Jacoutot pointed out, though, highlighted the
15 key sentences. One is: "I do not agree;" and two is: "This is
16 interest group politics rather than a rule hedging against racial
17 discrimination." What he did not quote was the sentence precisely
18 before that.

19 Before that Justice White says that the reason that he
20 believes the race of A candidate might be relevant, because I take
21 it that otherwise there would be a violation in a single-member
22 district that is 60 percent Black but enough of the Blacks vote
23 with the whites to elect a Black candidate who is not the choice
24 of the majority of Black voters. This is interest group politics
25 rather than a rule hedging against racial discrimination.

1 What Justice White was hypothesizing in that case -- it
2 was not the actual case -- but he was, basically, making the
3 assumption, well, if Black voters are only faced with the choice
4 of white candidates, they're not really going to be cohesively in
5 support of any one of those candidates. They're going to break
6 either way or maybe slightly in one way. That is the hypothetical
7 on which Justice White's concurrence was based in which he said:
8 "You can't say the race of the candidate is never relevant."

9 In *Nipper*, the court follows up on this in the Eleventh
10 Circuit. In *Nipper*, Tjoflat says when it comes to the White v.
11 White elections, such elections may reveal little about the issue
12 to be determined. Particularly where voting is extremely
13 polarized by race in an election in which Black candidates
14 participate, white on white elections in which a small majority or
15 a plurality of Black voters prefer the winning candidate seem
16 comparatively less important.

17 The very important qualifier there is for white on white
18 elections is the assumption that in those elections, that Black
19 voters will be kind of divided among their options. That is not
20 the case here. Those assumptions have not proven true, and
21 they're certainly not proving true here where the undisputed facts
22 show that there's not just cohesion, there is extreme cohesion.
23 There is 98 percent Black cohesion for Black-preferred candidates
24 regardless of their race. So are not -- this case does not fall
25 within the ambit of the concerns expressed by Justice White in his

1 concurrence.

2 The last thing I'll say, Your Honor, and I promise this
3 is the last anything.

4 THE COURT: I have one question before you finish.
5 Finish your argument. It is something a little different.

6 MS. KHANNA: I want to go back to the political -- to
7 the idea about partisan politics instead of race.

8 The defendants have done everything they can to make
9 this a case about partisanship rather than of race. And to
10 affirmatively -- and they have even affirmatively stated that the
11 Legislature had a partisan reason to redraw the Atlanta Metro area
12 the way they did.

13 Now, as plaintiffs unrebutted evidence has demonstrated,
14 this distinction between partisan and race that they draw is
15 actually not substantiated by the evidence -- theirs, and ours,
16 obviously, refute it. But even setting that aside, the defendants
17 cannot escape the requirements of Section 2 simply by trying to
18 make this a case about politics. We know that once again because
19 the Supreme Court told us so *LULAC*.

20 In *LULAC* the State of Texas had a partisan explanation
21 for what it did in District 23. It explained that it did not draw
22 a minority opportunity district where Section 2 required one in
23 the interest of protecting a Republican incumbent. The Court
24 flatly rejected this justification explaining, quote, this policy
25 whatever its validity in the realm of politics, cannot justify the

1 effect on Latino voters. And here, Your Honor, Georgia's apparent
2 policy preference for ensuring greater Republican success cannot
3 justify the effect on Black voters, which is a violation of
4 Section 2.

5 I'm happy to answer your question.

6 THE COURT: One of the questions raised regarding the
7 Board of Election, board individuals, why should they remain in
8 this case?

9 MS. KHANNA: Your Honor, I think we've explained -- in
10 our papers we addressed the fact that as a legal matter, as a
11 statutory matter, the board has a legal responsibility to oversee
12 fair elections. That responsibility is shared with the secretary
13 under statute. Unlike in the *Jacobson* case that the defendants
14 rely upon, that's where the Court found that the secretary that
15 was sued there had no responsibility for overseeing the
16 implementation of the law. That is just not the case here as a
17 matter of law.

18 THE COURT: But the board is going to supervise the
19 election regardless whoever I say or the General Assembly says --
20 it's an elected situation. But we have a Sixth District that's
21 also selected. If we don't add one -- in other words, what effect
22 do they have other than the fact that they supervised the
23 election? The Secretary of State supervises the election. But
24 I'm trying to figure out what effect does this case have on them
25 or they have on this case?

1 MS. KHANNA: Well, that's a fair question, Your Honor.
2 I think ultimately the reason why these kinds of cases sue
3 executive officials is because the injunction that plaintiffs are
4 seeking is against the implementation of the map. And regardless
5 of who drew the map, it is the secretary in conjunction with the
6 state board who oversees the implementation of the map. To enjoin
7 them is to enjoin the map.

8 THE COURT: Yes, but they're not in this case and the
9 Secretary of State Raffensperger is still in this case. What
10 effect does that have on your case?

11 MS. KHANNA: Your Honor, if this Court decides that as a
12 legal matter that they're a nonprobative defendant here, doesn't
13 have any effect on the ability for us to continue to litigate our
14 case. Certainly, we are cognizant of the *Jacobson* case, and the
15 Eleventh Circuit's decision that somebody must or must not be in
16 the defendant's seat --

17 THE COURT: I've been doing Fair Fight for five years.
18 I know the *Jacobson* case quite well. I can assure you, that if I
19 take the State Election Board out of this case, Mr. Raffensperger
20 is still going to meet all of the objective requirements.

21 MS. KHANNA: Then on that argument, Your Honor, we will
22 rest on our papers. And I see your point that it will not have a
23 practical effect of bringing this case to a halt or dismissing it.

24 THE COURT: Thank you.

25 MS. KHANNA: Thank you, Your Honor.

1 THE COURT: You have some time left. So do you --

2 THE DEPUTY CLERK: Yes, you do. Ten minutes.

3 MR. TYSON: Thank you, Your Honor. I will endeavor not
4 to use all of the ten minutes.

5 THE COURT: You could if you need to.

6 MR. TYSON: Just a couple of little points in response
7 to Ms. Khanna's arguments.

8 Just so that we are abundantly clear, the secretary
9 builds the ballots, as the evidence shows in this case, and I
10 think an injunction against the secretary about the ballots is
11 enough to get you to where you need to go remedy-wise. The State
12 Election Board's evidence shows they had no role in that process.
13 So that settles that issue.

14 On *Gingles* 1, I think Ms. Khanna's argument there kind
15 of points out the difficulty we're facing of fitting this case
16 into the general multi-member at large world that Section 2
17 emerged from.

18 We've got -- we have to find a remedy the Court can
19 order. And the reason for all those Eleventh Circuit cases about
20 the types of remedies in judicial cases and the other cases was,
21 we had to look at what can a court actually do here. And because
22 it is a part of that element of proof -- that's what the
23 plaintiffs have to show -- here's something you can order, Judge,
24 that fits into the larger issues. And we would submit -- and
25 again I don't have a case that says this -- but something that

1 could fit with the policy roles the Legislature shows but for
2 whatever the failing is. Like, where did the Legislature go
3 astray from the requirements of federal law related to the
4 creation of this district? And if the only way to create the
5 district is to create a number of other districts around it that
6 can't be explained, that don't meet up with other factors that the
7 Legislature was considering, I think that is a significant issue
8 as to whether it is an appropriate remedy. And so we looked at
9 all those districts, and we don't need to go back through that
10 again.

11 In terms of the proportionality arguments, again, I
12 think the challenge there is proportionality goes primarily to
13 this question is there equal openness in the political process.
14 And so when you look at the process, we're not relying on
15 districts that are majority non-white as a basis for
16 proportionality. What we're saying is you have districts across
17 the State of Georgia that are electing candidates preferred by the
18 Black community. You have the State of Georgia as a state
19 electing candidates that are preferred by the Black community.
20 That goes to the question of the equal openness of the process
21 overall, and that's, I think, the important point on that.

22 Again, what did Section 2 require the state to do in
23 terms of providing those opportunities beyond what's it's arguing.
24 That's the issue for that piece.

25 Ms. Khanna talked -- Mr. Jacoutot will talk about

1 *Gingles* 2 and 3 here in a minute. But I think an important
2 evidentiary piece at this point is she talked, again, about the
3 inferences that come from that. And, again, I think that
4 inference only arises once you've met the burden, once you've come
5 forward with the evidence. And the submission we're looking at
6 here is, we have no evidence that voter behavior changes in the
7 slightest based on the race of the candidates. The concerns of
8 Justice White's and the concerns from Judge Tjoflat, in the
9 situation where partisanship are -- partisanship, where you have
10 the right type of scenario, where voter behavior changes when
11 there are two white candidates, for example, that would tend to
12 indicate that you do have racially-polarized voting there, not
13 partisanship. Because you see voter behavior changing when the
14 race of the candidate changes.

15 That's not the evidence we have here. The evidence we
16 have here with no preliminaries, just only general elections is
17 that voter behavior doesn't change based on the race of the
18 candidates. And I think that's the key point, that the plaintiffs
19 need to come forward with something more than just voting is
20 polarized in a general election. Maybe they could have looked
21 at primaries or looked at other issues, but they haven't done that
22 in this case.

23 So with that, Your Honor, I will turn it over to Mr.
24 Jacoutot and finish up our piece of evidence.

25 THE COURT: Thank you, Mr. Tyson.

1 Mr. Jacoutot.

2 MR. JACOUTOT: I don't have any additional slides for
3 you today. I just wanted to respond to Ms. Khanna's argument
4 there saying that we sort of conceded that *Gingles* 2 and 3 were
5 established. I don't think that we did.

6 In order to establish *Gingles* 2 and 3 and get that
7 inference in your favor that was spoken of in *Marengo County*,
8 there still has to be some underlying evidence of something behind
9 partisan motivations. We're saying they haven't established two
10 and three under the appropriate standard. So they don't get that
11 *Marengo County* inference.

12 THE COURT: Well, let me ask you this first. If the
13 Court may reject your argument regarding two and three, racial
14 bloc voters compared to partisan bloc voters, do you concede then
15 that they should receive summary judgment on two and three?

16 MR. JACOUTOT: I don't know if they could get summary
17 judgment on it. I think that we still would be able to show
18 partisan motivation at trial, maybe with the evidence that we have
19 that Dr. Alford provided, for instance, the Herschel Walker race,
20 things like that, adding that in.

21 THE COURT: I don't know if I follow you on that. In
22 other words --

23 MR. JACOUTOT: Well, I think that is something that
24 would have to be weighed. You could weigh Dr. Alford's evidence
25 of that primary against the evidence that the plaintiffs have

1 provided. But at the end of the day if --

2 THE COURT: If I reject your arguments regarding racial
3 bloc voting and partisan bloc voting and maintain the prior ruling
4 that I made, I don't know what we are left to argue.

5 MR. JACOUTOT: Yes. I'm sorry, I misunderstood you. If
6 you reject that argument, then I think at two and three you would
7 be able to grant summary judgment on that. But that doesn't mean
8 that racial polarization is established. At that point, racial
9 polarization kicks to the totality of the circumstances analysis,
10 and that would be our opportunity at trial to show, yes, they've
11 shown what we call partisan polarization and here's why.

12 THE COURT: Under your Constitutional argument, would
13 Section 2 be unconstitutional if the Court -- I mean, were to
14 consider the partisan issue at the totality of the circumstances
15 phase instead of the *Gingles* precondition phase?

16 MR. JACOUTOT: I think it would be a little redundant to
17 consider -- effectively, *Gingles* 2 and 3 is considering the racial
18 polarization question. And then we say, historically, we'll allow
19 another inquiry into racial polarization at totality of the
20 circumstances. I don't think that's necessary. But the racial
21 polarization senate factor is just that, it's a senate factor from
22 the report. It is not part of the case law, except to the extent
23 that racial polarization appears in *Gingles* 2 and 3.

24 So to answer your question, I think that that would be
25 probably an unconstitutional view of Section 2 in this instance

1 where the only evidence that's been presented is clearly along
2 partisan lines.

3 If there's conflicting evidence that -- if there was a
4 traditional *Marengo County* or *Wright v. Sumter* case, I think you
5 can avoid two and three and then we can go to -- ask another
6 totality of circumstances, if there was evidence in the record
7 like that. But since we don't have that, I think it would be
8 improper to, essentially, say let's take this question up later.
9 I think it should be taken up now.

10 THE COURT: All right.

11 MR. JACOUTOT: And I think that's all I have, Your
12 Honor. So you if you don't have any other questions...

13 THE COURT: Thank you, sir. Okay.

14 I think we now move to Grant's argument for motion for
15 summary judgment argument.

16 MR. HAWLEY: Good afternoon, Your Honor. May it please
17 the Court, Jonathan Hawley on behalf of the Grant plaintiffs.

18 Now, I'm going to start with some good news. As the
19 Court is aware, the Grant plaintiffs' evidence and arguments
20 overlap considerably with Pendergrass plaintiffs. So I'm not
21 going to repeat the things that Ms. Khanna has already said.

22 Instead, I want the focus to begin on the first *Gingles*
23 preconditions. And so that's where most of the distinctions
24 between Grant and Pendergrass can be found.

25 I want to begin with *LULAC v. Perry*. We talked a lot

1 about this case over the last few hours, and I thought it would be
2 helpful to actually take a look at it.

3 Now, defendants rely heavily on the *LULAC* case, and they
4 argue that our cases here are analogous to that one. But that
5 just isn't so. As we can -- so this is the map that was at issue
6 in *LULAC*. And the Section 2 discussion in that case, which it was
7 actually drawn by a majority of the U.S. Supreme Court. It is a
8 polarity opinion overall, but the Section 2 was enjoined by a
9 majority of the court. And the district at issue there was
10 Congressional District 25. And it's circled there. It's a little
11 hard to see, but it's that gray district there. It snakes for 300
12 miles from Austin and central Texas down to the Rio Grande valley.

13 As we've discussed, the Supreme Court concluded that
14 District 25 was not compact. Not only because of its size and
15 it's meandering shape, but because it grew the Austin Latino
16 population in an urban and suburban area with Latino communities
17 along the Mexico boarder who were separated not only by hundreds
18 of miles, but vastly different lived experiences, needs,
19 socioeconomic interests and so forth. That is what noncompactness
20 looks like.

21 Now, I want to start by looking at it, because when
22 we're talking about compactness, the eyeball test is a good place
23 to start. That's just what the Fifth Circuit noted last year in
24 the *Robinson v. Ardoin* case. It's a helpful place to get your
25 grounding.

1 And so now that we're primed, I would like to look at
2 the six districts that Mr. Esselstyn drew in this case in which we
3 are now seeking summary judgment.

4 Illustrative Senate Districts 25 and 28, as you can see,
5 are geographically confined to the southern Atlanta metropolitan
6 area. Illustrative Districts 64 and 117 are also small districts
7 in the Atlanta metro area. And illustrative House Districts 145
8 and 149 are small districts anchored in Macon-Bibb County.

9 All six of these districts satisfy the *Gingles*
10 numerosity requirement. They have 50 percent Black voting age
11 population. There is no dispute on that point.

12 And all six of these districts are compact as well. And
13 we know this not just because of the eyeball test, but as a
14 quantitative matter as well.

15 Mr. Esselstyn supplied these charts in his report that
16 show the compactness scores for his illustrative districts as
17 compared to the range of the compactness scores of the enacted
18 districts. And the illustrative districts fall well within range
19 of normal districts under the enacted plan both for the State
20 Senate and for the House. Mr. Esselstyn's illustrative districts
21 are not outliers. They're not vast sprawling districts with
22 appendages and tendrils that reach out and grab isolated pockets
23 of Black votes. They do not include disparate communities.
24 Instead, they're either firmly anchored in the Atlanta area or the
25 Macon area. The districts are visually compact, they're

1 geographically compact, and they're quantitatively compact and,
2 therefore, for the purposes of *Gingles 1*, they are sufficiently
3 compact.

4 Now, here is the crucial thing. Defendants do not
5 meaningfully dispute the compactness of these six districts.
6 Certainly, Mr. Morgan didn't.

7 Now, I want to note, the Grant plaintiffs are not moving
8 for summary judgment on illustrative Senate District 23 or
9 illustrative House District 74. And that's because Mr. Morgan at
10 least attempted to contest the compactness of those districts.
11 And so we acknowledge there is a dispute of fact as to whether
12 those two districts are compact. But that's where his analysis
13 stopped. Mr. Morgan did not even mention Senate Districts 25 and
14 28 in his report. And for illustrative House Districts 64, 117,
15 145, 149, he only reports the same compactness scores that
16 Mr. Esselstyn already provided. There is no analysis of
17 compactness of these districts of any kind, meaningful or
18 otherwise. And there is certainly nothing in his report that can
19 develop a genuine dispute as to whether these six districts are
20 compact.

21 Now, defendants themselves as a legal matter tried to
22 contest compactness by pointing out some of the districts
23 contained communities that are different one from another. But
24 there is no uniformity requirement under Section 2. And the *LULAC*
25 majority actually spoke to this point. They acknowledge that,

1 quote, "Members of a racial group in different areas, for example,
2 rural and urban communities, could share similar interests and,
3 therefore, form a compact district if the areas are in reasonably
4 close proximity." That's at 548 U.S. Reporter at 435. Reasonably
5 close proximity. That describes to a tee these six illustrative
6 districts.

7 And defendants have not actually argued that
8 Mr. Esselstyn's districts do unite disparate communities based
9 only on race. They don't argue that because they can't. There is
10 no genuine dispute that these six districts are compact.

11 THE COURT: They do argue that he does not explain his
12 decisions or connect to them.

13 MR. HAWLEY: The records shows that Mr. Esselstyn at
14 times could not recall specific line drawings decisions he made
15 more than a year ago, right, because his maps did not change
16 considerably between the PI phase and his report that was
17 submitted last December. These decisions were made a long time
18 ago.

19 But, again, just as there is no uniformity or
20 homogeneity requirement under Section 2, there is not a memory
21 requirement either. He might have some difficulty explaining, but
22 these are small geographically compact districts in metropolitan
23 areas. And the fact --

24 THE COURT: Go ahead, go ahead, go ahead.

25 MR. HAWLEY: The very fact of their size and their

1 nature -- and, again, there is no evidence in the record that
2 there are disparate communities that the *LULAC* court or any court
3 would consider would defeat compactness in these cases.

4 He might not be able to explain every detail in this
5 district, but that doesn't mean that the districts are not
6 compact. And defendants never actually take that leap and say so.
7 That's because they do not contain disparate communities.

8 And Mr. Esselstyn's -- whether it be a memory issue or
9 whatever difficulty he might have identifying specific things, I
10 think it is notable that the largest district that we're seeking
11 summary judgement on is House District 149, which is just
12 physically the largest of these House districts.

13 And he explained there that Macon, Milledgeville, and
14 Baldwin County are connected by shared interests. He gleaned that
15 from public comments that were submitted during the redistricting
16 process, by what Ms. Wright testified when she testified before
17 the Court last year, and because of geographic and economic
18 similarities that come from them being fall line cities.

19 So even on the largest district there where compactness
20 might be, perhaps, you know, arguably the most questionable, he
21 does provide specific reasons why those districts were composed as
22 they are.

23 The other districts, again, they are small districts
24 firmly ensconced in these metropolitan areas.

25 Now, setting aside compactness, defendants' last resort

1 is to once again to bang the drum of racial predominance. It is
2 an argument we heard throughout the last year. But all the
3 records in this case shows is, one, that Mr. Esselstyn focused on
4 areas with higher concentration of Black voters when he drew his
5 illustrative maps; and two, that that demographic information
6 informed some of his line drawing decisions. That's it.

7 Equating this mere consideration and awareness of race
8 with elicited racial predominance, is not only disingenuous, it's
9 foreclosed by Eleventh Circuit precedent.

10 *Gingles* 1 has a numerosity requirement. Plaintiffs must
11 prove that majority Black districts can be drawn as a quantifiable
12 matter. The Voting Rights Act does not require that Mr. Esselstyn
13 clicks around in his "Math A Tube" software at random in the hopes
14 that he would eventually land on a district that has a Black
15 voting age population over 50 percent.

16 Section 2 is proof with evidence, not blind luck. That
17 is exactly what the Eleventh Circuit was getting at in the
18 *Davis v. Chiles* opinion. Defendants attempted application of
19 *Miller* and these other racial gerrymandering cases to *Gingles* 1,
20 would make it impossible for any plaintiff to satisfy Section 2
21 and prove the first *Gingles* precondition.

22 *Davis* is still good law, as much as defendants might
23 wish it weren't. And in this circuit, their racially
24 gerrymandering argument fails at the outset. And even if
25 defendants could advance this argument, there is no genuine

1 disputed fact here that race was not the predominant factor, and
2 there certainly is no dispute that Mr. Esselstyn complied with
3 traditional redistricting principles when he drew his illustrative
4 maps.

5 Now to illustrate, I want to, once again, return to the
6 eyeball test. We'll take a quick tour through some past
7 districts. I will play the part of ghost of gerrymanders past.
8 We'll start here in Georgia, *Miller v. Johnson* from the 1990s.

9 On the left is the proposed district that the
10 Legislature worked with, and they eventually drew the Eleventh
11 District that appears on the right. And I'll let the *Miller* court
12 do the talking for me.

13 Quote, "The populations of the 11th are centered around
14 four discrete widely-spaced urban centers that have absolutely
15 nothing to do with each other, and stretch the districts hundreds
16 of miles across rural counties and narrow swamp corridors."

17 Next. Also in the 1990s. Both of these Congressional
18 District 4s in Louisiana were struck down at racial
19 gerrymandering. One can see one skirted the outlines of
20 Louisiana, and the other one cut through what I believe they said
21 in the opinion, like an ink stain spreading out across the
22 state -- struck down as racial gerrymanders.

23 *Shaw v. Reno*, another seminal gerrymandering case.
24 Courts invalidated Congressional District 1, which is that
25 rust-colored district in the eastern part of the state, and if you

1 can see it, Congressional District 12 which is that
2 fuchsia-colored district that snakes through central North
3 Carolina, struck down as racial gerrymanders. 20 years later day,
4 déjà vu all over again. *Cooper v. Harris*, again, Congressional
5 District One and Congressional District 12 struck down as racial
6 gerrymanders.

7 This is what racial gerrymandering looks like. These
8 are districts where traditional redistricting principles were
9 subordinated to racial considerations.

10 And now you look at Mr. Esselstyn's map. Those are his
11 illustrative districts. That did not happen here. Mr. Morgan
12 stated that race predominated to the detriment of traditional
13 redistricting principles, but that's all he says. He makes a
14 conclusionary statement about content. He doesn't back it up with
15 any analysis, any opinions certainly, any support.

16 To defeat summary judgment under Eleventh Circuit case
17 law, you need something more than speculation. But speculation is
18 all that Mr. Morgan has provided with respect to the six districts
19 that we're moving for summary judgment on.

20 Now, defendants also suggest that Mr. Esselstyn's maps
21 don't comply with traditional districting principles. But the
22 only basis for that assertion, is that the illustrative map that
23 don't (sic) outperform the enacted map on certain criteria.

24 As this Court knows, there is no requirement that the
25 illustrative map has to be the best enacted map across every

1 principle. Illustrative maps don't have to be perfect. And,
2 again, defendants never actually assert that these maps don't
3 comply with traditional districting principles. They just make
4 the comparison with the enacted map. But that doesn't say
5 anything about whether these maps do comply with traditional
6 redistricting principles. There is no evidence that they don't.
7 There is no dispute that these maps comply with traditional
8 criteria.

9 That ends *Gingles* 1. And so I'll briefly talk about
10 *Gingles* 2 and 3 because there has been a lot of discussion about
11 that, and I feel that, you know, just a brief clarification of
12 where the law stands at this moment in this Court might again be
13 helpful. And we have a map.

14 This is the reporting that Dr. Palmer did here in the
15 Grant case showing clear and undeniable racial polarization across
16 the focus areas where we proposed new districts. And I have the
17 slide with Dr. Alford's report. It is the same thing he said
18 about Pendergrass -- quite striking and it's remarkably stable.
19 But let's go back for a second.

20 Mr. Jacoutot just a moment ago suggested that *Gingles* 2
21 and 3, that they require more than just proving *Gingles* 2 and 3
22 but there has to be some evidence of causation or some evidence
23 that race is what was causing these things. But there's no case
24 that says that.

25 We've have what *Gingles* says. *Gingles* 2 is the minority

1 group cohesive? We can look at this chart. The answer to that is
2 as what Dr. Alford said, is absolutely yes.

3 *Gingles* 3. Does the white majority voters bloc you to
4 defeat Black preferred candidates? Yes, they do. Those are the
5 dots at the bottom. These are quantitative facts that are not in
6 dispute. That is all *Gingles* 2 and 3 requires. And from that we
7 have the inference that racial bias is at work, an inference that
8 has gone un rebutted in this case.

9 THE COURT: So I should grant you summary judgment on
10 two and three for Grant?

11 MR. HAWLEY: Yes. Yes, I would say so. Because we've
12 satisfied -- we've demonstrated un rebutted -- in fact, not only is
13 it un rebutted, Dr. Alford agreed there is political cohesion among
14 the Black communities in these areas, and the white voters vote as
15 a bloc to defeat Black-preferred candidates. That is all that is
16 required under *Gingles* 2 and 3, and it is also sufficient to
17 create the inference of racial bias that defendants claim we have
18 to prove independently. Again, there is no case that says that.
19 We have *Gingles* 2 and 3, we have the *Nipper* "gloss" that shifts
20 the burden to them to prove that it's something other than race.
21 The burden that Ms. Khanna has pointed, they have utterly failed
22 to grapple with. And they have not even addressed Dr. Burton's
23 evidence that race is the driver of partisanship in Georgia
24 elections.

25 There is some brief discussion about the race of the

1 candidates might be relevant here. But again setting aside that
2 that is a totality of circumstances issue, if you read the case
3 law talking about the race of the candidates, like *Nipper*, it is
4 because as Ms. Khanna said, it was the court's belief that, for
5 example, white on white elections might not be probative of
6 racially-polarized voting if Black voters essentially split
7 equally between the two. But the *Nipper* court acknowledged that
8 if there is a case where Black voters overwhelmingly support even
9 a white candidate and white voters don't, that's an indication of
10 racially-polarized voting. Again, I direct you to look at this
11 chart. That is exactly what happens in contemporary Georgia. And
12 so these concerns about the race of the candidates the defendants
13 have raised simply do not apply here.

14 I will finish -- I have a few minutes left. I will save
15 what time I have. But just before I go, Mr. Tyson was talking
16 about sort of the requirement that plaintiffs or the mapmaker
17 justified a composition of every district other than the
18 illustrative district. That is true both in the Congressional
19 Pendergrass case, but that has also come up in this case. We have
20 a lot of other Legislative districts other than the six
21 illustrative districts that Mr. Esselstyn is moving -- that we are
22 moving for summary judgment on.

23 Now, I don't have a case that says if we need to prove
24 the compactness and prove the -- you know, defend the compositions
25 of every other district. They don't have a case that says that.

1 But we have *LULAC*. And, again, *LULAC* says you look at the
2 district where the vote dilution has occurred. That is where we
3 focus the compactness inquiry. *LULAC* is good law. It's the
4 majority of the court. That is the case that provides the
5 standard when we're assessing compactness of districts.

6 Defendants as a policy preference, they might prefer a
7 higher standard that would require essentially the drawing of a
8 perfect map or the drawing of a map that somehow satisfies
9 everybody or satisfies them.

10 If that is their policy preference, this is not the
11 right forum to air it. What we have here is binding law from the
12 U.S. Supreme Court, from the Eleventh Circuit, and it rejects
13 they're position. They're attempting to raise the burden on
14 plaintiffs.

15 Plaintiffs have satisfied at least, and especially as to
16 the *Gingles* preconditions, the requirements of the Eleventh
17 Circuit and the requirements, again, that this Court correctly
18 laid out in the preliminary injunction order. That analysis, that
19 legal analysis was all correct, and the law hasn't changed since
20 then. Under those standards, we have satisfied the *Gingles*
21 preconditions in both *Pendergrass* and in *Grant*.

22 THE COURT: In the preliminary injunction order, though,
23 I think I did consider what effect the new sixth district will
24 have on the fifth district in Fulton County. I think it went
25 from, like, 57 percent to 52 percent, something like that.

1 MR. HAWLEY: Yes.

2 THE COURT: And your argument is that is irrelevant.

3 MR. HAWLEY: There is a point there. And I think this
4 actually -- there is a -- if I can have a small exception to that.
5 What *De Grandy* and other cases looking at *Gingles* have proposed,
6 is the creation of additional districts, essentially, where
7 minority voters would have the opportunity to elect their
8 preferred candidates.

9 So we do believe that it is important to know that the
10 creation of these additional illustrative districts, will not take
11 away opportunities for Black voters and minority voters in other
12 parts of the state. And that's why Dr. Palmer looked into this.
13 He looked at this issue, and he concluded that in the preexisting
14 majority Black districts, Black voters would still have the
15 opportunity to elect their preferred candidate.

16 So when we're moving for summary judgment on six of
17 these illustrative districts, these are sixth additional districts
18 where Black voters have the opportunity to elect their preferred
19 candidates without taking away those opportunities where they
20 currently exist in the enacted maps.

21 Thank you.

22 THE COURT: Thank you. I know you are all very excited
23 about this, but the court reporter can't keep up with you-all.
24 Slow down. Because I've got to read it, and if she doesn't give
25 it to me right, then I won't get it right.

1 MR. TYSON: Thank you, You Honor. I've already been
2 admonished once before we started today actually. So I will do my
3 best on that front.

4 Your Honor, what I will do here again not to repeat all
5 of the different pieces here, I'll just respond to a few of
6 Mr. Hawley's arguments. I'll look at the maps in our motion. It
7 fits a little better there on the *Gingles* 1 issue.

8 THE COURT: All right.

9 MR. TYSON: Mr. Hawley mentioned the policy preference
10 issue, we're trying to raise the burden on the plaintiffs. And I
11 think, going back to *Brnovich* tells us, you don't get to
12 substitute what the Legislature did until there is a violation of
13 federal law. And figuring out exactly what that is important.

14 And determining -- the plaintiffs for their motion have
15 to show that with all the inferences in favor of the state and why
16 the state did what they did and if they still prevail on all these
17 points -- and, again, we can't draw those inferences.

18 Mr. Hawley didn't discuss the totality of the
19 circumstances. I think that we all agree that if there is not
20 summary judgment for the defendants at this point, we're going to
21 trial on those issues.

22 So, again, just kind of pulling back to a few of the
23 larger points.

24 Mr. Hawley talked about the districts being small in
25 size. And we know Georgia has a lot of counties. We also have a

1 lot of state representatives and a lot of state senators, which
2 means that by nature our -- the geography of our districts is
3 going to be relatively small. So I think, again, going back over
4 and over to the 200/300 mile distance in *LULAC*, that was there.
5 But also the shape of that district was striking down from one
6 area into another. And that's a consistent feature we see on the
7 districts that are on Mr. Esselstyn's plans that he altered to
8 create these additional districts.

9 The other piece we have on the compactness score chart
10 Mr. Hawley showed, those charts Mr. Esselstyn testified didn't
11 include all of his districts. He only included the districts that
12 were new. So he didn't look at districts around the districts he
13 drew that were irregular in shape. And we'll get to those in our
14 motion on that part.

15 THE COURT: This eye test argument they're making, one
16 thing I need to look at is a past eye test. Is that a map that
17 can be distributed?

18 MR. TYSON: I think it is, Your Honor, because I think
19 by nature of the eye test means what is in the eye of the
20 beholder. So I think there is an element there in terms of that.

21 I think the bigger challenge is it's very easy to find a
22 set of metrics that will justify a particular outcome. And this
23 is kind of a statistical game at some level on the maps.

24 The eye test, I think for the shape of the districts,
25 while it's relevant to the racial gerrymander piece and I think

1 can be paired with, for example, a mapmaker's decision to only
2 look at race in terms of what goes in and out of district, which
3 that's what Mr. Esselstyn has testified that he used race to
4 decide what went in and what went out. That combined with the eye
5 ball test, I think can get you to a racial predominance issue.
6 But I think that race has standing on one of them, eye ball test
7 is kind of an idle holder by nature.

8 In terms of whether Mr. Morgan disputes the various
9 pieces, I think, again, it's the plaintiffs' burden at this point
10 in their motion. Whether Mr. Morgan offers testimony there or
11 not, he's provided data and information that we can argue and we
12 can test Mr. Esselstyn on the stand with. So, again, I don't
13 think that standing alone the fact that Mr. Morgan didn't specify,
14 I believe this district is also problematic, gets the plaintiffs
15 to summary judgement on these points because it involves weighing.

16 The other piece, Your Honor, in terms of the *Davis v.*
17 *Chiles* case, I think we've addressed this in our briefing. In
18 that decision the issue the Eleventh Circuit discussed was the
19 relationship of racial predominance and the drawing of districts.
20 But in that case they also found there was no racial predominance
21 in the drawing of the districts. They looked at it and said this
22 is a very normal looking district, the mapmaker didn't make
23 decisions based on race. So they really didn't have to reach the
24 question of how far is too far in a remedial plan.

25 And, again, I think it pushes us back onto this world

1 of, again, we're not asking the Court to go from no opportunity to
2 some opportunity; we're asking to go from some opportunity to more
3 opportunity. And so ultimately, at least on the evidence before
4 the Court, the plaintiffs are not entitled to summary judgment on
5 any of the factors here -- with the one exception/caveat from Mr.
6 Jacoutot earlier. I think you are correct that if you reject our
7 argument on *Gingles* 2 and 3, then summary judgment to the
8 plaintiffs would be appropriate. But we still would have an
9 opportunity at totality to raise the issues for polarization.

10 THE COURT: All right. There won't be any game at will.

11 MR. TYSON: And it didn't end the game with Rose either,
12 Your Honor, I think for Judge Grimberg, how he handled that.
13 So... But that's all we have to offer in response on *Grant*.

14 THE COURT: Thank you, Mr. Tyson.

15 MR. TYSON: Thank you.

16 THE DEPUTY CLERK: I think you have about four minutes.

17 MR. HAWLEY: I will only take two minutes.

18 THE COURT: Take all four, if you need to.

19 MR. HAWLEY: I have a sneaky suspicion that the
20 admonition about slowing down might have been directed in my way.
21 So maybe I'll take three minutes just in the interest of the Court
22 court reporter.

23 Just three brief responses to Mr. Tyson just now.

24 He pointed out that those charts that Mr. Esselstyn
25 produced with the compactness scores, doesn't include all of

1 districts he changed. I know that Mr. Esselstyn prizes the
2 presentability of information. And I think putting all of the
3 districts in would have been a polychromatic nightmare. And so he
4 focused on, again, what *LULAC* tells us to focus on. What is the
5 compactness of the illustrative districts.

6 But his report, the appendices, do include the full
7 information about each -- the compactness score of all 56 Senate
8 Districts and 180 House districts, both in the enacted plan and
9 the illustrative plan. So that evidence is there.

10 And also the average scores between the enacted plans
11 and the illustrative plans are essentially the same.

12 THE COURT: Mr. Hawley, let's take another hypothetical.

13 MR. HAWLEY: Sure.

14 THE COURT: Let's stay with this idea with you on two
15 and three. But I still have some questions about, one,
16 compactness. That's not a material disputed fact there. Tell me
17 why I'm wrong. Let's say I think that, one, there are disputed
18 material facts there. Tell me why I'm wrong.

19 MR. HAWLEY: So I would say that -- and actually there
20 is some language in *Fayette County* -- in *Fayette County*, the
21 Eleventh Circuit decision, that is essentially our -- we can
22 consult a rule book for how to resolve these issue on summary
23 judgment. And Judge Wilson emphasized, you have to be careful and
24 really be thoughtful about it.

25 But there is a quote there that I like. At summary

1 judgment the Court is both limited to deciding whether there is
2 sufficient evidence upon which a fact finder could find for the
3 non-moving party. Again, for the state. So we can take a step
4 back. You can set aside plaintiffs' evidence. What evidence has
5 defendants presented that can lead to a finding in their favor?
6 They have no meaningful evidence on the issue of compactness for
7 the six districts. They have legal arguments about whether or not
8 we need to look at the other districts to form conclusions. We
9 know that we don't because of *LULAC*.

10 They make the legal argument that the district has to
11 best be an enacted map on these metrics in order to be deemed
12 compliant with traditional redistricting principles. We know
13 that's not the case as *Bush v. Vera* said, the plurality of the
14 opinion there. We don't need the -- the illustrative map doesn't
15 need to best the map, an endless beauty contest. That's not the
16 inquiry we're looking for.

17 They have legal arguments on their side, but they don't
18 actually have any evidence to demonstrate that these districts are
19 not compact. We have not only the eye ball test, which, granted,
20 is an inherently sort of a qualitative exercise. We have
21 quantitative evidence of compactness as well, and we have
22 Mr. Esselstyn's testimony and his deposition, and in his report
23 about other shared interests that these various districts have.

24 THE COURT: What you asking me at this stage is to make
25 a decision based on a difficult trial standard rather than a

1 summary judgment standard?

2 MR. HAWLEY: No. We believe that using that summary
3 judgment standard, which is asking if there are any genuine
4 disputes of material fact. And here we believe that there are not
5 as to first *Gingles* precondition. That's the summary judgment
6 standard, and we believe that is satisfied here because of the
7 complete absence of meaningful evidence on the other side.

8 The Court is not supposed to weigh evidence at summary
9 judgement, but weighing presupposes that there is something on the
10 other side. If there is nothing on the other side, no weighing is
11 necessary. And we're not asking for the Court to draw any
12 improper influences -- inferences, especially not on the first
13 *Gingles* precondition, because we have evidence of compactness, we
14 have evidence that the maps comply with traditional districting
15 principles, and there is not a shred of compelling evidence for
16 these six districts on the other side. Not enough to rule and
17 defend in the state's favor on the other side, and certainly
18 nothing to develop a genuine dispute of material fact.

19 THE COURT: They say you're finished.

20 MR. HAWLEY: Thank you.

21 THE COURT: Anybody need a break? Let's keep going
22 then.

23 MR. TYSON: I'm going to hand up, with your permission,
24 a few more sets of maps.

25 THE COURT: This is a new motion.

1 MR. TYSON: All right. Last round of districting plans
2 here, Your Honor.

3 So not to recap where we've been all the way along. I'm
4 just going to focus in on *Gingles* 1 and the issue particularly
5 with Mr. Esselstyn's plan. And unlike the plans in Alpha Phi
6 Alpha, Mr. Esselstyn's plans have higher population deviations
7 than the enacted plans. They have more split counties than the
8 enacted plans. So when we talk about what is the evidence on
9 *Gingles* 1, I think recognizing there's a distinction there is
10 important because the Court has to look at what's going on with
11 that.

12 So looking -- just to go kind of district by district, I
13 know the plaintiffs are not moving particularly on Senate 23. We,
14 obviously, are moving on all claims. So I want to go ahead and
15 cover these pieces.

16 This is a similar heat map of what we looked at
17 previously. And you can see, again, if you look at around the
18 perimeter of the districts starting in Baldwin County, you see
19 racial splits there. Greene County taking in more heavily Black
20 population, Wilkes County taking in more heavy Black population,
21 excluding the white population. Same in McDuffie as we curve all
22 the way around on the plan. And this data is borne out by the
23 information of what Mr. Esselstyn included and excluded in
24 District 23. In every situation where there is a split county,
25 the Black percentage of what's included in the district is much

1 higher in many cases than what is included outside of the
2 district. The one exception is Richmond County there where there
3 is a District 22 and 23 are both majority Black. And we would
4 submit, just like the evidence in the Constitutional cases of
5 racial splits of counties being evidence of racial predominance,
6 here Mr. Esselstyn had no political data, did not look at any
7 political data, and so the only explanation is a racial focus in
8 his map drawing.

9 District 28 the plaintiffs showed the shape here
10 earlier, but if you look at the underlying demographics, you can
11 see, again, a pattern of including heavily Black populations in
12 Fulton, Clayton, and Fayette, and then putting about 40 percent of
13 the district into Coweta County, which is only 25 percent Black
14 and going down to Newnan there in the southern part of the
15 district down at this part here.

16 So, again, combining communities to reach racial goals,
17 the shape is present there, the shape is nice and compact. And I
18 think looking at compactness scores alone doesn't really tell you
19 a lot because you have to look at the underlying population and
20 see what is the explanation for this district. And Mr. Esselstyn
21 wasn't able to offer that.

22 In terms of him having a memory test, I think it's the
23 plaintiffs' burden to show why was this district drawn the way it
24 was drawn? If it was -- if it was -- if there was no other
25 evidence beyond a racial goal, then the plaintiffs' haven't

1 carried their burden, we submit, under *Gingles* 1.

2 District 25 on the Senate map I think is a special case
3 because it is a nice compact district in the middle of Henry
4 County there. But, again, to understand how Mr. Esselstyn drew
5 District 25, you have to look at what happens around it. So on
6 one side you have the District 34 there, again, taking heavily
7 Black populations in Clayton, combining that with populations,
8 basically, from the airport down to Peachtree City to create a
9 district, striking that district down along the way to create a
10 majority Black district on one side and free up Henry County
11 population.

12 On the other side we have a district that runs from
13 South DeKalb, where the population in the district is 94.9 percent
14 Black, all the way down to Butts County, Georgia, coming through a
15 more white area of Henry County along the way. Again, these are
16 the kinds of decisions that are necessary to free up what
17 Mr. Esselstyn does in District 25, and why, we would submit, that
18 it's very easy to look at a district in isolation. It's much more
19 difficult to consider is this District 25 a district that must
20 have been drawn, especially when you have to modify all these
21 districts around it, that the Legislature failed to draw a
22 district it should have here.

23 Those are the Senate Districts, Your Honor.

24 On the house districts you see a similar pattern in the
25 Macon districts. Each of the districts that's majority Black is

1 just barely so; 50.14, 50.64, 50.38, 51.5. And we would submit
2 when you're at that tight of a tolerance, you have to be aware of
3 your racial decisions because you're drawing right at the edge of
4 what's considered a majority district. And you see on the heat
5 map here, the division of the Black population in Macon into four
6 separate districts, the running of District 145 and into the more
7 heavily Black population in Warner Robins around the Air Force
8 base, and then up into Baldwin County to capture Black voters in
9 the Milledgeville area. So we would submit, again, this shows
10 evidence of racial predominance.

11 Mr. Esselstyn's testimony here about public testimony
12 and about other issues that he considered, I believe all came
13 after he drew the map. And so it couldn't have informed -- he's
14 looking for justifications after he had drawn these districts.

15 For House District 64, the shape, again, is relevant.
16 We start in the heavily Black area of Fulton County that's 96
17 percent Black, and drive out to Paulding County. This is, again,
18 is about 40 percent of the district here, which is 32 percent
19 Black, much lower percentage. And the striking is necessary to
20 create this district. And, again, we're back to kind of where we
21 started on the geographic compactness of the minority community,
22 and what we're trying to represent in the district is this
23 District 64 compelled and required by Section 2 to run out across
24 these three counties and connect them. And, again, Mr. Esselstyn
25 couldn't identify a reason for doing that.

1 In South Metro you also see this similar pattern on
2 House. Districts that begin up here in Clayton County strike
3 their way down to Brooks and South Fayette County, starting in the
4 southern part of Clayton, running through Hampton down into rural
5 areas of Spalding County. And, again, these are areas where one
6 county is going to be heavily majority Black and the other
7 counties are going to be much lower to create these additional
8 majority-Black districts.

9 And in the Henry County area, we see the same pattern.
10 District 91 starts in South DeKalb, runs all the way down into a
11 more heavily white area of Henry, staying with the striking of
12 District 116 to then allow the population for District 117, which
13 Mr. Esselstyn says is a new majority-Black district.

14 So, Your Honor, just in terms of looking at the *Gingles*
15 1 maps, we, again, see a mapmaker making decisions primarily based
16 on race, not able to explain the reasons for those districts, and
17 uniting populations with this kind of striked approach or
18 race-conscious splitting of counties to do that, which we would
19 submit is not permissible as a remedy under *Gingles* 1.

20 And with that, Your Honor, I'll hand it over to
21 Mr. Jacoutot. I think he has a couple of last points on *Gingles* 2
22 and 3.

23 THE COURT: Thank you.

24 MR. TYSON: Thank you.

25 MR. JACOUTOT: Thank you, Your Honor. I did just want

1 to clear up a few remaining things. I don't think we need to
2 rehash everything we talked about this afternoon and earlier this
3 morning.

4 I just want to point out that it is not our standard
5 that requires more than proving *Gingles* 2 and 3. It's the
6 question -- excuse me. It's not that our standard requires more
7 than proving *Gingles* 2 and 3, it is the question of how to prove
8 or the evidence required to prove two and three was exactly what
9 is in dispute in Part III-C of the *Gingles* opinion. And the
10 dispute is --

11 THE COURT: Say that again. Say that again.

12 MR. JACOUTOT: Sure.

13 It's that the question of how to prove or the evidence
14 required to prove *Gingles* 2 and 3, that was exactly what was in
15 dispute in Part III-C of the *Gingles*' opinion. The dispute was
16 whether, as Brennan thought, Justice Brennan thought that the mere
17 mechanical evidence of cohesion and bloc voting was sufficient to
18 show racial polarization and demonstrate *Gingles* 2 and 3 or was it
19 something more. And I believe we've shown today that Justices
20 White and O'Connor felt that there was something more than that is
21 necessary in the usual case. Five justices were worried about
22 that being sufficient.

23 And I do just want to point out that regarding the
24 historical expert reports -- using the historical expert reports
25 to demonstrate *Gingles* 2 and 3 would be somewhat out of character.

1 It's inherently a statistical inquiry. And we've shown cases here
2 where the statistics pan out and do show racial polarization right
3 in Sumter County being an example. But the statistics that we
4 have here are simply not enough, and I'm not going to rehash why
5 we feel that.

6 Unless Your Honor has any further questions...

7 THE COURT: Thank you, sir.

8 MR. HAWLEY: Thank you, Your Honor. A few brief points,
9 and, again, we won't try to avoid rehashing things done, if
10 possible.

11 Mr. Tyson showed a bunch of heat maps showing the
12 demographic information in these maps. From that alone, he
13 concludes that these decisions were drawn, these maps -- these
14 districts were drawn, quote, "primarily based on race." But that
15 is not what those maps show. Those maps show only the
16 unremarkable fact that Mr. Esselstyn, consistent with *Bartlett v.*
17 *Strickland*, drew illustrative districts that had Black voting age
18 populations above 50 percent. That is far from being a
19 controversial point. That is what the requirement is under
20 Section --

21 THE COURT: But the problem is that he does not give any
22 other reason or cannot show any other reason for drawing it other
23 than alining the Black population.

24 MR. HAWLEY: Certainly -- and there are times, I will
25 say, he does give those reasons. To say he gives no reason, I

1 think, kind of ignores both deposition testimony and his report.
2 And we discuss this in our brief. But, for example, a number of
3 times he identified counties as being within the Atlanta
4 Metropolitan area. As Ms. Khanna described earlier, that is sort
5 of an objective way of defining a community of interest. He also
6 looked at other landmarks and things. He incorporated public
7 comments. So it isn't -- again, it is a district by district
8 inquiry. But to say that he had no reasons other than race is
9 simply untrue. And when he was flat out asked if race
10 predominated in any of these decisions, he said no.

11 THE COURT: Look, if he splitting counties, splitting
12 precincts to get to that 50 percent, could it be inferred that you
13 are just trying to get to race and you're just saying you're doing
14 it? And that's part of his argument is that you're splitting
15 counties, you're splitting precincts to get to that -- some of it
16 was something like 55.5, 51.2, could I infer, well, he's trying to
17 get to that 50 percent mark to do it?

18 MR. HAWLEY: I would say, first of all, if that is an
19 inference, then by -- again, by the defendants' own statement,
20 that is not an appropriate undertaking for summary judgment.

21 But even setting that aside, I don't think that is a
22 fair inference, because as with any map drawing decisions about
23 balancing criteria, Mr. Esselstyn was consistent about that in his
24 report and in his deposition. He has to hit 50 percent because
25 the U.S. Supreme Court set that benchmark. How to do that

1 involves at times weighing and balancing the other criteria,
2 keeping a county whole versus splitting a county. Making some
3 population deviation within the kind of the acceptable five
4 percent balanced versus not. Those are individualized decisions
5 that he -- as he testified, he made those decisions in balance
6 with each other. The very fact that you hit close to 50 percent
7 on some of the Macon-Bibb counties --

8 THE COURT: Three of them.

9 MR. HAWLEY: Three of them. That alone proves that --
10 all that proves is that he has, again, satisfied that the U.S.
11 Supreme Court's standard. But whether race predominates -- but I
12 will say this. Again, if the Court has any doubts about what --
13 how his specific methodology went, if the Court would like to
14 assess Mr. Esselstyn's credibility, ask him some of these
15 questions, then going to trial is the appropriate course. And we
16 acknowledge that all -- we want this Court to get this right, and
17 we want to get this right, and if that means discussing *Gingles* 1
18 further or even distinguishing between the different districts,
19 because again it is an individualized district alternative and,
20 you know, some districts -- not all districts are created equally.

21 THE COURT: You hit on a key part. At this point in
22 time, I can't weigh credibility of what he says or what he did,
23 but I can at trial.

24 MR. HAWLEY: That's absolutely true. If the Court feels
25 that -- again, especially using kind of *Fayette County* as sort of

1 a helpful guide as to when summary judgment is appropriate in a
2 Section 2 case and when it is not, if credibility determinations
3 are required here -- we'd always say they are not, again, because
4 of the absence of evidence on the other side. But that being
5 said, if further interrogation in Mr. Esselstyn's thought process
6 and his decisions, if that is required, then that is an issue that
7 we can have at trial. But it's certainly not an issue that should
8 be resolved against plaintiffs on summary judge and end this case
9 when the only evidence they have is, again, descriptive evidence
10 of how these districts look without any evidence about the intent
11 of Mr. Esselstyn or any other circumstantial evidence of illicit
12 racial predominance.

13 There's no bright line in racial gerrymandering cases.
14 It is a complicated inquiry. You have to look at many different
15 issues. Simply pointing to a heat map and seeing, you know, where
16 Black voters live and how the districts are drawn, that certainly
17 falls well short of any kind of conclusion that Section 2 isn't
18 satisfied here because these maps are not compact or not an
19 appropriate remedy or however they would characterize it. Those
20 are issue that would need to be determined by the finder of fact.

21 THE COURT: Well, I'm still trying to think of what
22 Mr. Esselstyn said that takes it outside of Mr. Tyson's argument.
23 Mr. Tyson's argument, Judge, there is no other way you can come to
24 the conclusion that he drew these districts based on race. He
25 doesn't argue that he tried to put people together at the same

1 military bases or -- I'm trying to think. What is there for me to
2 say, no, Mr. Tyson, this is a disputed fact?

3 MR. HAWLEY: Sure. I will tell you one thing is what we
4 don't have the benefit of right now is fact witness testimony. If
5 you remember, at the PI stage from Senator Carter who talked about
6 how these districts -- how they perform on the ground? Who are
7 people that live in these districts, and how do they -- what do
8 they have to do with each other? That is evidence that we can
9 hear in trial that we don't have in the record right now.

10 THE COURT: Well, Senator Carter talked about -- what
11 did he call them? Well, being a lawyer is a big honor. But he
12 talked about going up toward -- he was talking about the ones in
13 South Georgia or the Augusta area.

14 MR. HAWLEY: Sure. Not to show our hand truly, but in
15 our pretrial disclosures we identify a number of fact witnesses
16 from -- throughout Georgia who can speak to these other districts
17 much in the way that Mr. Carter referred to the districts in the
18 Atlanta Metropolitan area, and those are ways of establishing the
19 communities of interest that exist in these districts, the
20 compactness. We don't have that in the record right now. What we
21 do have is Mr. Esselstyn's testimony, and we have the objective
22 metrics of compactness.

23 THE COURT: But that's Mr. Tyson's argument, though, you
24 don't have anything in the record to point to other than as Mr.
25 Tyson is saying, it was put together based on race. You don't

1 have anything to point to, that says, well, he tried to tie
2 communities that military bases together. He tried to tie
3 together communities that were all rural, whatever. That's his
4 argument.

5 MR. HAWLEY: Right. But, again, I would encourage the
6 Court, again, to look at what Mr. Esselstyn has actually said
7 about these different districts, because I think there is more
8 there than, perhaps, what the defendants are giving him credit
9 for. To reach the inference that race predominated when we don't
10 have any other evidence that it did, that is an inference that is
11 not appropriate for summary judgment based only on the descriptive
12 criteria of how these districts are drawn. It is a leap to then
13 infer intent to Mr. Esselstyn, and to discount the other criteria
14 that might justify the creation of these maps.

15 Even setting aside what we discussed in our brief
16 whether or not -- whether, kind of, the racially predominance
17 inquiry is appropriate in this -- the first *Gingles* precondition.
18 Anyway, Courts have suggested that it's not precisely for this
19 reason. Because in the Fifth Circuit, *Robinson v. Ardoin*,
20 recognized the tension between requiring -- Section 2 requires
21 some consideration of race, but too much consideration of race is
22 racial gerrymandering. There is a tension. But it's a line that
23 the state is expected to thread as part of its redirecting
24 obligations, but it is not something that I think -- underscores
25 that you can't jump to the inference of racial predominance in a

1 case like this, because some consideration of race is expected.
2 And the evidence right now, that's all we have. Mr. Esselstyn
3 admitted as much, that he did have racial demographic information,
4 and that at times that -- that it informed his decisions. He
5 never said it predominated. In fact, he said the opposite. So I
6 think with that evidence in the record to infer that he -- that,
7 in fact, race did predominate, that's an inference that this Court
8 simply cannot not reach on summary judgment.

9 Last thing on *Gingles*. I feel we dissected *Gingles*, you
10 know, basically, talking about comas and semicolons at this point,
11 but one last note on *Gingles*.

12 The *Gingles* majority, which is to say the four justices,
13 including Justice Brennan and Justice White, joined together in
14 adopting the district court's definition of racially-polarized
15 voting, which was a correlation between the race of voters and how
16 they vote. That is something that all five justices agreed to.
17 That is, in essence, *Gingles 2* and *Gingles 3*; is their cohesion on
18 one side, and is there cohesion on the other side that defeats
19 minority-preferred candidates. That was the majority of the
20 *Gingles* court as we discussed in our briefs. And that definition
21 is very important, because that is what has driven every case
22 subsequently that has treated *Gingles 2* and *3* as objective factors
23 without concerns about causation. That is how this Court
24 approached it at the PI hearing. That is good law, and that comes
25 from the *Gingles'* majority.

1 Again, where Justice White -- we don't even need Justice
2 O'Connor to reach our conclusion here. We have Justice White,
3 because he agreed with that definition. He parted ways with Part
4 III-C, the *Gingles* plurality opinion, only to the extent that
5 Justice Brennan suggested that causation and these other
6 qualitative issues were never relevant to the inquiry. Justice
7 White said I don't agree with that. He admitted it's not relevant
8 here. Because under the facts of *Gingles*, there was -- like we
9 have in this case -- striking polarization between Black voters
10 and white voters. He said, I don't need to talk -- essentially, I
11 don't need to worry about causation here under the facts of this
12 case. But I'm concerned to say that it's never relevant precisely
13 because there could be occasions where Black voters are not
14 foreclosed from participating in the political process, because
15 white candidates of choice, court Black voters engaged in partisan
16 politics, interest group politics, and are able to achieve winning
17 majorities with white and Black voters. Because in that case, the
18 Black candidate of choice might not win, but Black voters are part
19 of a coalition that elects the white-preferred candidate. In that
20 case there might not be a Section 2 violation, which is why deeper
21 inquiries into causation might be required.

22 But that wasn't the case in *Gingles*, and that is
23 certainly not the case here where we do not have Black crossover
24 voting for white-preferred candidates. It is infinitesimally
25 small in these elections in Georgia in the areas where we're

1 moving for summary judgment.

2 So using that, Justice White's concurrence simply does
3 not apply here. And his suggestion that causation is sometimes
4 relevant, is consistent with what this court said at the PI stage.
5 As part of the totality of the circumstances, perhaps, we will
6 look at issues of causation. But, again, the Eleventh Circuit has
7 been clear, once you have second and third *Gingles* preconditions,
8 that creates an inference that then defendants have to rebut. We
9 have that inference here because we've satisfied *Gingles* 2 and 3
10 as the objective metrics that the *Gingles* majority said that they
11 are.

12 THE COURT: Thank you, sir.

13 MR. HAWLEY: Thank you.

14 THE COURT: Mr. Tyson, this defendant alluded to the
15 credibility of the expert, something I should weigh and weigh at
16 the trial. In other words, he does say I considered race but it
17 wasn't a predominant issue.

18 MR. TYSON: Yes, Your Honor. So I think, number one, if
19 you're weighing credibility of experts, yes, that is a trial
20 question. And if from your perspective Mr. Esselstyn's blanket
21 statement I didn't consider race is enough to get across that
22 line, then I think that becomes a trial issue.

23 We would submit that the relative lack of evidence on
24 all of the other explanations doesn't overcome a statement of "I
25 didn't consider race." And if "I didn't consider race" is enough

1 to get you across that line, then you just can include that in an
2 expert report and you're always getting to trial.

3 I think the key point is, is it a material fact at this
4 point? Is it disputed by a material fact about how Mr. Esselstyn
5 drew those districts? I want to make sure I'm being precise.
6 Mr. Esselstyn did provide some reasons.

7 THE COURT: Yes.

8 MR. TYSON: But like Mr. Cooper, they were very much on
9 the platitude kind of idea -- I think the closest he could provide
10 was the Georgia fall line between Macon and Milledgeville. He
11 mentioned Fort Gordon around the Augusta area, but that was about
12 the extent of where we were. Most of it was all along the lines
13 of it's all in Metro Atlanta, which to me is not enough to create
14 a genuine issue of material fact.

15 So, again, I think the key point is looking at the data,
16 looking at the lack of explanation, and then Mr. Hawley talked
17 about, well, we had Senator Carter at the PI, we had these other
18 witnesses. The plaintiffs could have come in their response with
19 declarations from those witnesses of, yes, those districts
20 Mr. Esselstyn drew unites my community in some way. They haven't
21 done that. They've relied on Mr. Esselstyn's testimony here.

22 So that's our view why there it's not a disputed fact.
23 But I think you are correct, to the extent it requires a weighing
24 of evidence in some way or a credibility assessment about
25 Mr. Esselstyn's testimony, then that would be a triable issue.

1 That's why we also tried to rely on Mr. Esselstyn not looking at
2 Mr. Morgan in terms of any disputes on those points.

3 I think the last point, Your Honor, just -- Mr. Hawley
4 mentioned infinitesimally small levels of support for
5 Black-preferred candidates as we kind of look at the *Gingles* 2 and
6 3 issues. That is exactly our point. If you look at the other
7 cases that found racially-polarized voting under *Gingles* 2 and 3,
8 you don't find situation where the only consistent explanation is
9 partisanship. You find voter behavior changing as the race of the
10 candidate changes, as the dynamic of the race change. And as all
11 of the charts show, there is absolutely no change in voter
12 behavior on either front when they're presented with different
13 kinds of candidates along the way.

14 So we submit that we're entitled to summary judgment on
15 those points, but to the extent we're not, we'll be ready to go to
16 trial if that is what Your Honor says.

17 THE COURT: Thank you, Mr. Tyson.

18 MR. TYSON: Thank you, Your Honor.

19 THE COURT: I think that's it.

20 All right. Let me tell you my plan. I'm not going to
21 rule, which you-all figured out, until I hear from the Supreme
22 Court. They've got to tell me -- correct the record. They don't
23 have to do anything. But in the past, they have made rulings by
24 June 30 at the latest.

25 I don't plan on ruling on these motions for summary

1 judgment until after June 30. So let me kind of give you-all a
2 calendar of what may happen. If they rule, let's say, on June 30,
3 I will be asking supplemental briefs to be due by July 7. You
4 don't have to file a supplemental brief, but something in my mind
5 tells me that they're going to say something that you-all probably
6 want to file supplemental briefs on. Okay?

7 July 7. You have until July 7. Does anybody think you
8 need more time? I'm asking you-all to file at the same time, July
9 7 send me supplemental briefs.

10 At this point in time, I don't plan on doing another
11 oral argument. But if somebody -- you need to tell me. I think
12 I'm going to be -- you-all have been quite thorough in your briefs
13 that you sent me, and I really appreciate it. And today you've
14 been quite thorough.

15 I've thrown question at you-all that I have been
16 pondering. I was kind of anticipating and do things -- it's just
17 the way I do things. I'm sorry. But I don't think I will need
18 another oral argument after I get your briefs on July 7 -- unless
19 somebody says, I really want to be heard. Tell me now.

20 Then what happens next is then I'm going to try my best
21 to get you a summary judgment order, okay -- put those knives down
22 -- by July 21. The reason, if that's the case, we will then have
23 a pretrial conference if there is something left to try on August
24 the 15th. Pretrial orders be due on August the 22nd. The
25 deadline to Daubert motion will be August the 22nd. The deadline

1 to file a motion in limine will be August the 22nd. Deadline to
2 file objection to any video depositions will be August the 22nd.

3 Now, you-all may be saying, Judge, that's a lot to get
4 done, because I have a trial date set if it going to trial is
5 September the 5th, the day after Labor Day.

6 I'm trying to balance two things: Plaintiffs on one
7 hand is saying to me, Judge, we really need these done so it can
8 affect the 2024 election. And the defendants are saying, Judge,
9 we need to be able to present our case and build our record.
10 That's, basically, what I'm hearing.

11 I have been doing this long enough to know that you-all
12 probably know how I'll rule in that trial, but let me add one
13 other thing. September the 25th, proposed findings of facts and
14 conclusion of law will be due from you-all.

15 I'm anticipating trial is going to take, roughly, two
16 weeks. So once I get those findings of facts and conclusion of
17 law from you-all, I'm guessing two to three weeks, maybe less,
18 maybe more. I should get an order back to you in October.

19 Now, this is saying we're going to have a trial on the
20 issues. But right now I can't tell you how many issues you're
21 going to have in there. So this is giving you a broad overview.
22 Okay? It might be narrower or it might be wider. It's going to
23 depend on -- I heard a lot today that's going to help me fashion
24 what I think the issues are, but the Supreme Court is really going
25 to make the final decision for me, obviously.

1 After that, once I rule and, you know, obviously one or
2 both sides are going to appeal the case, it is out of my hands.
3 It's up to the people in the Eleventh Circuit.

4 What I'm saying to you plaintiffs, it's going to be a
5 whole lot of fast moving on a whole lot of different ends for it
6 to affect the 2024 election. And that's all I can say about that.
7 But I have no control after it leaves me.

8 Questions? Do you want me to go over the schedule
9 again? We'll prepare an order. If we haven't already sent them
10 an order on their schedule.

11 Yes, sir?

12 MR. HAWLEY: Thank you, Your Honor. If we hear from the
13 Supreme Court before June 30, should we assume a similar schedule
14 will follow with supplemental briefings due a week later?

15 THE COURT: Great question. Let's say they tell me
16 something on June 16 or June 15, you'll get a new schedule.
17 You'll get a whole new schedule from me. It may be saying
18 supplemental briefs due -- if I got a ruling on June 15, I may say
19 supplemental briefs due on June 25, something like that. I'm
20 trying to give you-all enough time to prepare for trial. But your
21 question is a great question.

22 You know, I think most of you-all were either district
23 or circuit clerks -- I think you-all have been Supreme Court
24 clerks. In the past, they usually would just tell you the last
25 week. That's what we kind of went through and looked at and

1 talked to people. So I don't know. If they tell me something
2 tomorrow...

3 I was reading the other day that South Carolina has a
4 redistricting case that the Supreme Court said -- I kind of
5 laughed, when they said we need you to put it on the October trial
6 -- not trial, oral argument, and we get a ruling to you-all by
7 January the 1st. I said okay. I'm not going -- I'm going to send
8 you a brief outline of what the schedule is like in an order.

9 Good question, though. It may changed, but I don't anticipate it.

10 Anything else?

11 Did I miss anything, ladies?

12 Thank you-all, have a great day and a great rest of the
13 week.

14 (The hearing concluded at 3:34 p.m.)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

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

This the 18th day of May, 2023.

/s/Viola S. Zborowski
VIOLA S. ZBOROWSKI,
RDR, FAPR, CMR, CRR, RPR, CRC
OFFICIAL COURT REPORTER TO
THE HONORABLE STEVE C. JONES

Exhibit 1

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

ALPHA PHI ALPHA FRATERNITY,)
INC., ET AL.,)
PLAINTIFFS,)
-VS-) DOCKET NO. 1:21-CV-05337-SCJ
BRAD RAFFENSPERGER,)
DEFENDANT.)

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

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

TRANSCRIPT OF SUMMARY JUDGEMENT PROCEEDINGS
BEFORE THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE
THURSDAY, MAY 18, 2023

VIOLA S. ZBOROWSKI, CRR, CRC, CMR, FAPR
OFFICIAL COURT REPORTER FOR THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA
404-215-1479
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1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFFS:

3 ABHA KHANNA, ESQ.
SOPHIA LIN LAKIN, ESQ.
4 ARI J. SAVITZKY, ESQ.
JONATHAN HAWLEY, ESQ.
5 MING CHEUNG, ESQ.
RAHUL GARABADU, ESQ.
6 KELSEY A. MILLER, ESQ.
CASEY SMITH, ESQ.
7 MAURA DOUGLAS, ESQ.
CAITLIN F. MAY, ESQ.
8 CORY ISAACSON, ESQ.
JOSEPH D. ZABEL, ESQ.
9 JUAN M. RUIZ TORO, ESQ.
JOYCE GIST LEWIS, ESQ.
10 ADAN SPARKS, ESQ.

11 ON BEHALF OF THE DEFENDANT:

12 BRYAN P. TYSON, ESQ.
13 DIANA F. LA ROSS, ESQ.
BRYAN JACOUTOT, ESQ.
14 DANIEL H. WEIGEL, ESQ.

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1 (HELD IN OPEN COURT AT 10 A.M.)

2 THE COURT: I was starting to walk in here this morning
3 to tell you-all that I just got off the press a ruling from the
4 Supreme Court on Merrill. But once I figured if I told you-all I
5 was joking, that one CSO couldn't protect me. So I decided not to
6 do that.

7 Good morning, everyone.

8 Ms. Wright, you can call the case for the day.

9 THE DEPUTY CLERK: Yes, sir. The Court calls the
10 following civil actions for court: Alpha Phi Alpha Fraternity,
11 Inc., and others v. Brad Raffensperger, Civil Action No.
12 1:21-CV-05337; Coakley Pendergrass and others v. Brad
13 Raffensperger and others, Civil Action No. 1:21-CV-5339; and Annie
14 Lois Grant and others v. Brad Raffensperger and others, Civil
15 Action No.1:22-CV-00122.

16 THE COURT: Okay. If the plaintiffs' counsel will
17 introduce yourself and who all else is working for the plaintiffs'
18 case this morning. I have a list, but I need it for the record.

19 MR. SAVITZKY: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. SAVITZKY: Ari Savitzky from the American Civil
22 Liberties Union on behalf of the Alpha Phi Alpha plaintiffs, Alpha
23 Phi Alpha AME Church, and Mr. Woods, Ms. Glenn, Mr. Browning,
24 Ms. Stewart (phonetic). With me at counsel table are Sophia Lakin
25 and Kelsey Miller.

1 THE COURT: Thank you.

2 MS. KHANNA: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MS. KHANNA: Abha Khanna for both the Pendergrass and
5 the Grant plaintiffs. I will be arguing today on behalf of the
6 Pendergrass plaintiffs, and my colleague Jonathan Hawley will be
7 arguing on behalf of the Grant plaintiffs.

8 THE COURT: Good morning. Is there anyone else?

9 All right. For the defense.

10 MR. TYSON: Good morning, Your Honor. Brian Tyson for
11 the defendants. I'm joined today by Brian Jacoutot, Diane LaRoss,
12 and Dan Weigel from our firm. We also have a law clerk with us, a
13 University of Georgia grad. He's applying for law schools right
14 now. And Diana LaRoss is joining us as well.

15 THE COURT: Well, I hope you apply to UGA and you get
16 accepted -- and all of the other law schools you applied to as
17 well.

18 We're going to start off this morning with the Alpha Phi
19 Alpha Fraternity v. Brad Raffensperger, et al. Defendants' motion
20 for summary judgment. It's 20 minutes. You can use all 20 or you
21 can save time for rebuttal. Then we'll hear from plaintiffs, and
22 then we'll go from here.

23 Mr. Tyson.

24 MR. TYSON: Your Honor, if I could, we have a paper copy
25 of the slides.

1 THE COURT: Thank you. Mr. Tyson has done this with me
2 so many times, he knows to bring the paper copy. Thank you.

3 MR. TYSON: I've also had the technology fail on me more
4 than once. So it's always safe to have a backup.

5 THE COURT: That happens.

6 MR. TYSON: All right. Well, thank you, Your Honor.
7 Brian Tyson for the defendants.

8 What I want to do today is just walk through our motion
9 for summary motion, and I think it's important for us as we come
10 to this to recognize -- I know we were here on a preliminary
11 injunction a little bit over a year and three months ago. We,
12 obviously, have an evidentiary standard today that looks for "is
13 there a dispute about a material fact." Our submission is there
14 is not, and we want to talk to you about why that is this morning.

15 I'm going to cover the law on Section 2 and Gingles 1.
16 Mr. Jacoutot will finish up with Gingles 2 and 3, and then we'll,
17 hopefully, save a few minutes for rebuttal.

18 THE COURT: All right. Sounds good to me.

19 MR. TYSON: We're going to begin -- you've seen this
20 slide before, legal standards on Section 2. We talked about this
21 last time. Is there a denial or abridgement of the right to vote
22 on account of race or color. You look at all of these different
23 factors. For this motion, since there is no plaintiff's motion,
24 we're only talking about Gingles 1, 2 and 3. We're not talking
25 about totality for this one. We'll get to those with the others.

1 I wanted to flag -- you've already flagged for us the
2 *Milligan* case that's out there. I've called this one of our known
3 unknowns. When we get this opinion, it might change the law in
4 Section 2. It might not. We don't know.

5 Arguing the law, focusing on *Gingles 1*, and so I think
6 there are some questions there.

7 Another known unknown we have is the *Rose v.*
8 *Raffensperger* case. That's an appeal from the Public Service
9 Commission, an order issued by Judge Grimberg. Again, the appeal
10 on that one focused on *Gingles 2 and 3*. The Southern Circuit
11 expedited it. They heard argument in December. We thought they
12 would give an opinion by the end of March --

13 THE COURT: Remember, just for the record, I will
14 indicate that Judge Grant said he kind of wanted to wait until the
15 Supreme Court rules. When I didn't see anything by March, I kind
16 of figured they're waiting.

17 MR. TYSON: Exactly. So we're waiting on both of those.

18 What I wanted to talk through in terms of how -- what
19 we're looking at in Section 2 is -- as this Court recognizes,
20 preliminary injunction order, this is the first redistricting site
21 to include Shelby county. And so when you look at historically
22 how redistricting cases have been brought against Georgia
23 redistricting Georgia claims. '80s, '90s, 2000s, generally
24 speaking, you have Constitutional challenges and you have
25 challenges that are Section 5 and the preclearance provisions

1 involved with that. You have a couple Section 2 cases, none that
2 have really gotten to a final judgment. But historically when you
3 look at a Section 2 case, a lot of them involve multi-member at
4 large methods of election. And so we have -- an example, common
5 example a county like this, you have a county that had a city
6 center with a black population in it, a surrounding white area.
7 The county used an at-large method of election, and then the Black
8 voters had their voices drowned out by the white voters around
9 them. And so the solution was to draw five districts that created
10 a district where the candidate of choice, the Black community,
11 could be elected. And so we convert from an at-large system to a
12 district-based system.

13 But this case is a little bit different in what we're
14 looking at. And the Court in *De Grandy* talked about that. The
15 Court talked about in a multiple member district challenge, it's
16 different than when you challenge a series of single-member
17 districts for where dilution may be more difficult to grasp.

18 Because in that situation you're not saying, you know,
19 total submergence, you're saying, well, we've had some electoral
20 success, but we need more electoral success. And how you measure
21 that is more challenging. It's also challenging because as you
22 look on the map there, you can see that's a map of the Atlanta
23 area covered by the Black person into each precinct. So the blue
24 and teal areas involve areas with less concentration to Black
25 voters. White, green, and red show heavier concentrations of

1 Black voters. And this is from Mr. Coopers' districts, that we'll
2 talk about, in which you can see, for example, in District 28
3 starting in a heavily Black area, South Clayton County, running
4 through Fayette down into a more rural white areas of Spalding
5 County. And we'll see this kind of consistent pattern of striking
6 districts out of Atlanta in order to create additional majority
7 Black districts.

8 And so one of the challenging things for the Court is
9 trying to assess how much of that striking is required to create
10 additional majority Black districts beyond what's already created,
11 and we'll look through some of those pieces along the way.
12 Because unlike the kind of county-based things, we're not uniting
13 the Black community that's having its voice submerged. A lot of
14 these maps were connecting disparate communities to create
15 additional districts, different types of communities.

16 So what I want to do this morning is move through one
17 other piece of the puzzle, which is in the legislative world,
18 you've got to navigate between complying with Section 2 of the
19 Voting Rights Act and also not racial gerrymandering. So you have
20 to use race enough to consider the Voting Rights Act compliance
21 but not so much that you cross the line into a racial
22 gerrymandering. And the top district there is the Shaw District
23 in North Carolina. The bottom district is the Miller District
24 that ran from Atlanta down to Savannah. In the '90s cycles are
25 prototypical racial gerrymanders.

1 But the difficulty is determining where -- where do we
2 find this balance along the way?

3 THE COURT: You anticipated a question I was going to
4 ask you. Where did you find the balance at? You-all indicated
5 that you thought they were shading, but, you know, the Black
6 voters --

7 MR. TYSON: Yes, Your Honor.

8 THE COURT: Where do you stop? Where do you stop and
9 where do you begin?

10 MR. TYSON: And I think that's in evidence. I think
11 from our perspective when you're relying on race to make the
12 decision about where the population goes, that's when you've
13 crossed the line. So with that county example, when you're
14 uniting the community in the middle of the county, for example,
15 you don't need to use race. You can draw five districts and see
16 there's clearly a district there. When you're making -- using
17 racially shading and using racial features and then deciding what
18 population goes in and out based on that, that's where we think
19 you've crossed the line into racial predominance.

20 We'll talk a little bit about two that the -- unlike the
21 Legislature, the map drawers in all these cases didn't have to
22 look at the data. So there was no explanation for politics for
23 the decisions they made; it had to be race. So we knew that also
24 as a distinction.

25 But I think it gets us back to this main problem. What

1 was the Legislature supposed to do about these particular plans?
2 And this is important because *Voinovich* tells us that federal
3 courts have to respect the state's districting decisions until
4 those choices contravene the federal requirements.

5 So does the federal requirement contravene drawing more
6 majority-Black districts on the various plans? Which is what
7 these cases say. Is it drawing more coalition districts and fewer
8 majority-Black districts? Which is the argument in the Georgia
9 NAACP case, which I know we're not here about today. Or is it
10 drawn less based on race, not using any racial splits of counties
11 and precincts like the Common Cause in Georgia NAACP cases say.

12 So I think this kind of begins zooming out to what the
13 question the Court has to consider is, how do you assess what
14 exactly is the violation here? And we submit that what the
15 plaintiffs are giving you is not enough to show a violation of
16 Section 2.

17 So let me look a little bit more at one of the other
18 challenges with these plans, especially Mr. Cooper's plans is,
19 they want -- there's a continuing focus on looking at the
20 statewide numbers for these various plans, but I think you have to
21 go district by district. I think their preliminary injunction
22 order definitely shows district by district. But, for example,
23 Mr. Copper says, ah-huh, I split one less county on the house plan
24 than the enacted plan did, and I draw more majority-Black
25 districts. So, therefore, my plan wins. But when you look at

1 what Mr. Cooper did in areas in the state, he went to places there
2 and there's not much Black population and unsplit counties, for
3 example, Gordon County in the northwest corner of the state. Mr.
4 Morgan talked about this. So it makes the overall statistics look
5 better than they actually are along the way.

6 So I think it is very important that the Court not look
7 at kind of global statistics of really digging in district by
8 district. What was the failure as to this district that needed to
9 happen.

10 So let's look at a few of these districts, and I think
11 it might be helpful to see what we're looking at here along the
12 way, and why there's not a disputed fact -- just, okay, we have a
13 bunch of maps from people, why is not a disputed fact that we need
14 to consider? And I think if you just look at the districts you
15 can see what's here.

16 So, for example, starting with
17 District 69 in Mr. Copper's plan. You can see it starts in the
18 South Fulton area. The little cutout box there is another part of
19 Mr. Morgan's report that shows the racial makeup of the counties
20 included in that district. So the portion of District 69 that
21 is -- in District 69 from Fulton is 94.15 percent Black. The
22 portion of Fayette is only 34 percent. So I've covered my own
23 things in the process there. 34 percent Black along the way. So
24 that's the issue we have for that district, is striking from a
25 heavily minority area down to a heavily white area.

1 The same thing happens in District 77 with heavy
2 concentrations in Clayton County, down into a more rural
3 population in Fayette county.

4 Same in District 74. We look at South Clayton over into
5 Henry and Spalding counties. 80 percent Black population in
6 Clayton down to 13 percent Black population in Spalding. And this
7 is a pattern that continues throughout Mr. Cooper's plans. So it
8 brings the question of what was the reason for drawing the
9 districts this way. And the ultimate reason Mr. Copper gave was
10 not only a dispute about a material fact, he gave platitudes
11 about, well, it was their own Metro Atlanta statistical area. I
12 looked at socioeconomic conditions. He testified he did not look
13 at socioeconomic conditions beyond the county level. He only had
14 the map of the county level. So it couldn't have been that. It
15 couldn't have been politics. He didn't have that information. So
16 our submission is that it has to be based on race to create these
17 districts.

18 Over in the eastern part of the state, we have another
19 example of this down in Laurens County here. Mr. Copper begins
20 with a racial split of Laurens, goes through -- cuts Johnson
21 County over to Washington and Jefferson County, four different
22 counties along the way. All that you can see, including more
23 heavy concentrations of Black voters, excluding lighter
24 concentrations of Black voters, and the same District 133.

25 Then we also have in South Georgia the connection

1 between Albany and Dougherty County, all the way down to Thomas
2 County. We've talked about this one in the preliminary
3 injunction. In Mr. Copper's deposition he said he followed this
4 highway but never checked to see if it matched the boundaries he
5 had looked at or located along the way. And we submit, again, it
6 is not a disputed fact about the reasoning for this, it was the
7 connecting communities where intervening white population -- based
8 on race.

9 Mr. Copper's senate plans are similar. We looked at
10 this a little earlier. But we have the connection of heavy
11 concentrations of Black voters in Clayton County and South DeKalb,
12 even North Henry, North Clayton inbound with more rural
13 populations to create additional majority-Black districts.

14 And then this -- in the Eastern District and Senate
15 District 23, you see moving Senate District 22 out of its historic
16 home in Richmond County up to Warren and McDuffie Counties,
17 splitting those counties and then in taking in counties around
18 that free (sic) and Black population in this area of Richmond
19 County to create an additional majority Black district there.

20 So all in all, what Mr. Cooper has shown consistently in
21 his map drawing is a focus on race. The other reasons he's
22 offered don't really create any dispute over a material fact
23 because he hasn't offered a basis that would be appropriate for
24 this. That means he hasn't drawn a remedy this Court can order,
25 which is our Gingles 1 burden on the plaintiffs, and they haven't

1 carried that.

2 THE COURT: Your argument that, therefore, summary
3 judgment should be granted based on compactness. Or, one -- I
4 wrote a question down here. Isn't that a weighing, wouldn't that
5 example create a disputed fact? Not a disputed fact, but a
6 dispute?

7 MR. TYSON: Yes, Your Honor. I think the key is that it
8 doesn't create a dispute about an issue of material fact. So if
9 Mr. Cooper had come forward with some basis of explaining
10 particular connections, I think at that point then we do have a
11 disputed fact. But his -- all the reasons that he gave didn't
12 create a dispute of a material fact, because none of them actually
13 explained a boundary if you look at what he said.

14 So our submission would be, there's not a dispute of a
15 material fact. I understand there may be disputes of fact about
16 what the drawing process was, those kinds of things, but not as to
17 any particular district.

18 THE COURT: Because he does not offer an explanation
19 other than race?

20 MR. TYSON: Yes, Your Honor. And he does offer
21 explanations, I want to be clear, but we don't believe any of
22 those are material -- both inform the decision about the district
23 boundaries. Only race informs those decisions.

24 So with that, Your Honor, I'll hand things over to Mr.
25 Jacoutot to talk about *Gingles 2 and 3*, and I'll save time for

1 rebuttal.

2 THE COURT: Okay.

3 MR. TYSON: Thank you.

4 MR. JACOUTOT: Good morning, Your Honor. Brian Jacoutot
5 for the state defendants. Very good to see you again.

6 THE COURT: Very good to see you again.

7 MR. JACOUTOT: So I want to talk about the elephant in
8 the room, about *Gingles 2 and 3* first. That is how your ruling
9 was at the preliminary injunction hearing. You said at the
10 preliminary injunction hearing that, "The Court concludes as a
11 matter of law that, to satisfy the second *Gingles* precondition,
12 plaintiffs need not prove the causes of racial polarization, just
13 its existence." And I don't think that we necessarily disagree on
14 that point, but we are saying that the plaintiffs haven't offered
15 anything apart from proof of partisan polarization, and that that
16 is not sufficient under the *Gingles 2 and 3* standard as adopted by
17 the majority justices of the Supreme Court.

18 THE COURT: All right. Here's the question the
19 plaintiffs can be prepared for. Your argument is that most
20 African-Americans in Georgia vote Democrat, Democratic party,
21 Democratic candidate. And that really you have to separate the
22 difference between partisans, bloc voting and racial bloc voting.
23 The burden is on the plaintiff. How does the plaintiff do that?

24 MR. JACOUTOT: Well, I'm glad you asked that, Your
25 Honor. We can skip this slide here.

1 The Eleventh Circuit has great evidence on how to do
2 that. And *Wright v. Sumter County* is a perfect example. In that
3 case it was a non-partisan election. So parties were out of the
4 equation. And in that case, Black voters routinely voted for
5 Black candidates, extremely cohesively there, plenty of evidence
6 in that record -- in the record. White voters routinely voted for
7 white candidates very cohesively. And there was actually a
8 situation in that case where there was two white candidates
9 running for a particular office in Sumter County and the Black
10 voters cohesively voted for a write-in candidate that was Black.
11 So when the option presented itself with two white candidates,
12 Black voters cohesively decided that a write-in Black man was
13 preferable. I mean, this is obvious -- this is obvious racial
14 polarization; right? And the Eleventh Circuit has routinely said
15 that that is plenty of evidence.

16 But what we have here, the plaintiffs are offering, is
17 obvious evidence of partisan polarization and nothing more.
18 Whenever the race of a candidate changes and the evidence offered
19 by the plaintiffs' experts, the cohesiveness stays almost exactly
20 the same. And that's what caused our expert, Dr. Alford, to say,
21 you know, there's remarkable stability in cohesion. The race
22 defense was utterly ineffectual in terms of what -- what the
23 outcome was for the cohesive blocs.

24 So that's the kind of evidence that we would be looking
25 for under the appropriate *Gingles 2 and 3* standard.

1 THE COURT: Well, in that case then, the only way they
2 can show it, you would have to be a Black candidate in the
3 election? In other words --

4 MR. JACOUTOT: That's not the only way, but that's the
5 most likely way. That's the way courts usually get that
6 information.

7 THE COURT: When I looked at this 15 months ago, Gingles
8 pointed out, you're right, causation cannot be a requirement.
9 It's irrelevant. I admit since that time out of the Eleventh
10 Circuit there's been a number of cases where the Eleventh Circuit
11 says, no, you have to show the difference between partisan bloc
12 voting and racial bloc voting.

13 MR. JACOUTOT: Absolutely.

14 THE COURT: They had prior issued a ruling, a couple of
15 weeks ago, something along those lines. And it probably to a
16 certain extent is just saying the same thing. But does that not
17 just then basically then eliminate that? In other words, most --
18 I wouldn't say most of the time. A number of times you're going
19 to have a white Democrat candidate running. I tried to go back
20 the other night to see how many times state-wide races you had a
21 Black candidate run against a Democrat or a Black candidate run
22 against as a Republican. The last senate race, you know. But
23 after that, in the general elections, I can only think about one
24 other time in the last ten years that you had a Black -- Mike
25 Thurmond was the one that came to mind. Of course the governors'

1 race, you know, Ms. Abrams. But how many -- how many times do you
2 really have that? So if I say they voted for the Democrat, does
3 that almost eliminate that particular factor, political
4 cohesiveness on No. 2?

5 MR. JACOUTOT: I don't think it eliminates it,
6 particularly when you consider Section 2 as it applies to the
7 nation as a whole, which it does. Georgia has some pretty unique
8 demographics. And so it is more rare here than elsewhere to have
9 that occur. But I don't think it eliminates it as a factor. And
10 I think if we just say, well, let's throw up our hands and say
11 partisanship and race are inextricably intertwined that you run
12 afoul of the *League of Women Voters* out of the Eleventh Circuit
13 that just recently came down saying precisely that you cannot do
14 that. So I hope that answers your question.

15 THE COURT: It does. But, again, this is a question I'm
16 going to ask the plaintiffs, but, you know, you've anticipated
17 what I was going to ask. Go ahead.

18 MR. JACOUTOT: Okay. Would you like me to continue?

19 THE COURT: Yes, continue.

20 MR. JACOUTOT: Please interrupt me if you feel it's
21 needed.

22 And so just to kind of continue with this slide since
23 we're here. All these cases here, *Georgia State Conference v.*
24 *Fayette County, United States v. Marengo*, cases that, you know,
25 are seminal on racialized polarized voting.

1 THE COURT: Let me indicate one thing for the record. I
2 didn't mean to not acknowledge Herschel Walker in the Republican
3 last senate race. That was another situation.

4 MR. JACOUTOT: Certainly. And I think you'll see, you
5 know, that's -- it's a question of voter preference, right, and
6 that changes, but the law itself doesn't and it needs to be able
7 to address the changes of voter preference. So we can't
8 guarantees that things are always going to be the way they were.

9 So these cases here all show racially polarized voting,
10 and the evidence that was presented to the Court there was just
11 like *Wright v. Sumter County*, and the evidence that we have here
12 is unlike that. And that's part of the problem.

13 And the *Southern Christian Leadership Conference* case
14 out of the Eleventh Circuit sort of alluded to the fact that other
15 factors besides race can drive racial polarization and that that
16 should be considered, and it could obviate *Gingles 2 and 3*.

17 THE COURT: What else other than a Black candidate
18 running can show racial bloc voting?

19 MR. JACOUTOT: Well, another example could be vote
20 switching. Say a white voter votes for a white Democrat in the
21 primary but a Black Democrat wins that primary, and then that
22 white voter -- the data shows that there is less white support in
23 the general for that Black Democrat and it increased voter support
24 for the white Republican, that would be another example of
25 evidence.

1 And so I understand that you have, I think, read our
2 briefs on *Thornburg v. Gingles*, so I'm not going to waste your
3 time on that. But suffice it to say that the issue of Part III-C
4 was not decided by the majority of the Court, it was decided by
5 plurality. And what does Part III-C talk about? Evidence of
6 racially polarized voting.

7 THE COURT: The plaintiffs disagree with you on how you
8 summarized Justice White's position. In your brief, you put
9 Justice White in the position with the majority, not necessary
10 going with causation being irrelevant. And in the plaintiff's
11 brief, they say, no, they don't summarize Justice White's position
12 correctly in *Gingles*.

13 MR. JACOUTOT: Well, I think Justice White in his
14 concurring opinion says -- he starts off with Justice Brennan --
15 Justice Brennan states in Part III-C. He doesn't join Part III-C.
16 And he says, I do not agree pretty unequivocally.

17 THE COURT: Justice White. Justice White not Brennan.
18 I've read Brennan again last night for the 100th time. But
19 Justice White. The plaintiff says in their brief -- I think I
20 remember it correctly. I admit, I read a lot of papers in the
21 last few weeks.

22 MR. JACOUTOT: We apologize for that.

23 THE COURT: You-all have really hurt trees in Georgia.
24 But I think I remember plaintiff's argument correctly, they argued
25 the position you-all arguing with Justice White is not totally

1 correct.

2 MR. JACOUTOT: I'm not sure -- I think Justice White is
3 pretty clear, he doesn't really agree with Part III-C. We're
4 talking about Justice White; correct?

5 THE COURT: Yes.

6 MR. JACOUTOT: Yeah, I think he's pretty clear that he
7 doesn't agree with III-C, and that it results in exactly what we
8 have here, interest group politics: Democrats v. Republicans.
9 And it is really important that in that opinion he says
10 specifically or expressly that it seems quite at odds with the
11 discussion in *Whitcomb*. He offered *Whitcomb*. In Section 2
12 purported to restore *Whitcomb* and *White* -- *White*, the case, not
13 the justice, obviously. So it purported to restore *Whitcomb*. And
14 he in his concurrent opinion said, "III-C doesn't comport with my
15 understanding of my own opinion." So I think that's pretty
16 relevant here.

17 I think I'm out of time.

18 THE COURT: You've used your time. Sorry.

19 MR. JACOUTOT: Thanks.

20 THE COURT: Thank you. I get the feeling that this will
21 not be the only time today that we'll be talking about this.

22 MR. SAVITZKY: Good morning, Your Honor. We can take
23 that off the screen. I'm going to go decidedly low tech this
24 morning.

25 THE COURT: I'll take it any way you present it.

1 MR. SAVITZKY: May it please the Court, Ari Savitzky for
2 the American Civil Liberties Union on behalf of the Alpha Phi
3 plaintiffs.

4 It's been 15 months since we were before this Court on a
5 preliminary injunction hearing. And at this point we have a
6 factual record with the scope and the complexity that one would
7 expect for trial on a Section 2 case involving multiple
8 legislative districts in the State of Georgia.

9 Summary judgment has to be denied unless there is no
10 dispute of material fact, viewing the facts in the light most
11 favorable to the plaintiffs, and if the defendant is entitled to
12 judgment as a matter of law. And what we've just heard and we've
13 seen in defense papers are trial arguments, trial defenses, not
14 dispositive legal defenses based on undisputed facts.

15 So just to get into it on *Gingles 1*, defendant isn't
16 actually arguing that Mr. Cooper's illustrative plans are
17 inconsistent with traditional districting principles. The
18 defendant basically agrees. The overall numbers are what they
19 are, and on every -- more or less, every objective metric, overall
20 compactness, minimum compactness, splits Mr. Cooper's meeting the
21 appeal, the standard set by the enacted map, to say nothing of the
22 benchmark map that existed before it.

23 So their fundamental argument is instead Mr. Cooper's is
24 too focused on race. But there's massive evidence in the record
25 that a fact finder could credit, including not just overall and in

1 terms of Mr. Cooper's discussion of how he thought about
2 compactness, the law about splits, thought about keeping towns
3 together, thought of community interest, thought about
4 transportation quarters and economic connections and census-based
5 areas, not just that, but specific district-by-district testimony.

6 THE COURT: They're arguing, though, that there is not
7 sufficient evidence coming from you-all regarding compactness that
8 makes it material.

9 MR. SAVITZKY: So I understand. And when I -- when I
10 heard Mr. Tyson say the word "material" there, I think that the
11 question is not one of materiality but one of credibility and what
12 a fact finder would credit. If a fact finder credits -- and we
13 don't think credibility determinations, as the Court well knows,
14 in summary judgment (sic). A fact finder could credit
15 Mr. Cooper's testimony -- and just if you want to look at the
16 district-by-district evidence, a fact finder could consider
17 Mr. Cooper's testimony -- let's start with District 171 in
18 southwest Georgia that Mr. Cooper was reducing county splits in
19 Dougherty County. Enacted maps split Dougherty County four times.
20 Mr. Cooper only splits it three. And Mr. Cooper knew that there
21 was a historic Route 19, Dixie Highway, connecting Thomasville and
22 Albany and Mitchell County that Mr. Cooper was looking at
23 socioeconomic connections and historical connections, high levels
24 of poverty that join those towns together, who was looking at the
25 regional commission which include those counties, identifies them

1 in the same region. He thought of all those factors.

2 There is specific evidence in the record on each of
3 these points. And what it goes to is the fact, and not just there
4 but on every single one of these districts, district by district
5 evidence. Look at pages 13 to 16 of our briefs. It takes us
6 three pages to give you the pin sites for the specific testimony
7 from Mr. Cooper that the fact finder could credit that he thought
8 about factors other than race in configuring these specific
9 illustrative districts.

10 THE COURT: Was race the dominant factor in making his
11 decision or was it just a factor?

12 MR. SAVITZKY: It absolutely was just a factor. That's
13 Mr. Cooper's testimony. He was asked point blank in his
14 deposition, Did you prioritize race over other traditional
15 factors? His response was, "Oh, absolutely not." And the rest of
16 his testimony bears that out.

17 He discusses all of the different factors he considered.
18 And, of course, he did also consider race as one factor, which you
19 have to do to complete the *Gingles 1* assignment, to consider
20 whether or not you can draw additional Black majority districts
21 consistent with traditional districting principles.

22 THE COURT: At what point, if any, in drawing the maps,
23 could taking race into consideration become unconstitutional?

24 MR. SAVITZKY: So I think what this Court said is as
25 if -- as if traditional districting principles are subordinated to

1 race, significantly more than necessary to -- to remedy vote
2 dilution, then that would be problematic in terms of the
3 illustrative maps. That's what the Court said. The Court based
4 that on that standard, which I think in some way presages what may
5 well be, you know, what the Supreme Court says in Merrill.

6 THE COURT: Could these maps pass strict scrutiny?

7 MR. SAVITZKY: I absolutely think that they could,
8 because I think they remedy vote dilution. But I don't think that
9 strict scrutiny applies here. What the Eleventh Circuit has said
10 is that strict scrutiny, and what the Supreme Court said in *Bush*
11 *v. Vera* is strict scrutiny, applies to state action.

12 Now, I understand that the *Gingles 1* illustrative maps
13 need to be a workable remedy, but I don't think we're close to
14 that because you don't get to strict scrutiny until you get to
15 racial predominance in which all of the traditional districting
16 factors are subordinated to race. And, again, we're here on
17 summary judgment. A fact finder could look at this record, the
18 extensive testimony and evidence in his report from Mr. Cooper
19 that he considered other factors, balanced them all, and did not
20 subordinate race and say that that certainly you can't conclude as
21 a matter of law that race predominated. And that is really all we
22 need to decide today. The ultimate question is --

23 THE COURT: Let's look at factors two and three. You
24 read my opinion. You probably know it. As pointed out
25 previously, the Court ruled based on what I would say that

1 causation is irrelevant, more or less. You heard me say, though,
2 since that 15-month decision, particularly coming out of the
3 Eleventh Circuit, there has been about three cases, maybe more,
4 where the judges are saying, well, district court judge you might
5 want to make sure it is not partisan bloc voting as compared to
6 racial bloc voting. Okay?

7 Do I stick with what I said in my preliminary injunction
8 or do I stop and say, well -- this goes to the Eleventh Circuit
9 first. I always tell myself that I may write a brilliant order,
10 but it's going in front of the Appellate Court one way or the
11 other. Okay? And this goes first to the Eleventh Circuit. I
12 have a case that came out, the *League of Women Voters* case, it
13 came out about three weeks ago, chief judge of the circuit
14 wrote -- page 13 of that order -- make sure it's not partisan bloc
15 voting as compared to racial bloc voting.

16 So my question is do I stay with my ruling in my
17 preliminary injunction that says -- because, you know, this is
18 summary judgment, but if you can't get passed all three, you're
19 not going to go to trial. Do I stay with my prior ruling? If so
20 why? How close should I look at what's being said to me.

21 In the case, the Rose case, Judge Branch and Judge
22 Grant -- and who is the third judge in that case? Branch, Grant
23 -- you-all flunk the test.

24 MR. TYSON: Anderson, maybe.

25 THE COURT: Before I leave here, somebody is going to

1 tell me.

2 They also pointed out, well, there is a difference
3 between partisan bloc voting and racial bloc voting.

4 MR. SAVITZKY: So, Your Honor, I do think that you can
5 deny the summary judgement motion here as a matter of law, the
6 case, or you can get into it more. Because ultimately the
7 question of the cause of racially polarized voting, to the extent
8 it is relevant, is going to be a fact-intensive issue. And we
9 have evidence in this record that race is the driver of the racial
10 polarized voting that everyone -- no one is disputing that it is
11 observed in Georgia elections that it's consistent and it is a
12 pattern over time.

13 THE COURT: What would separate that from the partisan
14 voting? In other words, there's no denying in the State of
15 Georgia, because the facts bear this out, that most of the time
16 the African-Americans are voting for the Democratic candidate, and
17 the whites are voting for the Republican candidate. Now, the
18 question is, not wanting to see any more of a delay, but how do
19 you separate that? Defense counsel has indicated based on the
20 case --

21 MR. SAVITZKY: So -- and I -- just -- I will answer that
22 question.

23 THE COURT: Go ahead.

24 MR. SAVITZKY: Preliminarily just to say, I mean, I do
25 think *Gingles* -- not just the concurrence, but the majority of

1 *Gingles*, cite 478, 56(3)(B) of the opinion, this is the majority
2 of the opinion where the Court pretty clearly says what's required
3 for that *Gingles* 2/3 showing, and says the fact of polarization is
4 sufficient. I think that's the law in *Nipper*. And, you know, if
5 you look at, you know, what Judge Wisdom said in the *Marengo*
6 *County* case, racial polarization in voting, strong counter racial
7 polarized voting is the surest indication of race-conscious
8 politics.

9 THE COURT: Yes, but in my ruling I, basically, said --
10 and I'm not saying I'm changing the ruling -- however, I,
11 basically, said causation was irrelevant.

12 MR. SAVITZKY: And I think that at the *Gingles* 2/3 stage
13 that's true. And what *Marengo County* and *Nipper* indicate is not
14 that you can just show the fact of causation and -- and, sorry,
15 not just show the fact that polarization and causation is sort of
16 neither here or there, but rather the fact of polarization creates
17 an inference that racial bias is at work. I mean, that's
18 literally a quote: "Creates an inference that a racial bias is at
19 work," from the Eleventh Circuit in *Nipper*. Right?

20 So then the defendant can come forward at the totality
21 of the circumstances stage and they can rebut that inference.
22 Right? And this gets into the Court's question: What is the
23 evidence that race is ultimately driving the polarization here.

24 Now, we don't think it's a *Gingles* 2/3 issue. I mean,
25 the Court was right about that. You know, we don't think there is

1 any reason to think that the Eleventh Circuit is going to get out
2 ahead of the Supreme Court in *Gingles* in its majority and front
3 load all of that analysis into *Gingles 2/3*.

4 THE COURT: Well, in *Brnovich* the Supreme Court said
5 something, not exactly, but they did indicate that you need to
6 look at the partisan bloc voting as compared to racial.

7 MR. SAVITZKY: So -- and I do think that the totality of
8 the circumstances stage, that is a fact-intensive issue. You
9 know, opposing counsel's discussion of how you might go about
10 proving causes, just highlights how fact intensive it is. And so
11 let me talk about what's in this record here.

12 We have, first of all, Dr. Handley, the racial
13 polarization expert did look at primary elections. You saw some
14 of that evidence in the preliminary injunction hearing. She did
15 observe racially-polarized voting patterns in a large number of
16 primary contests. And, of course, defendant's racially-polarized
17 voting expert concedes partisan primaries control per party. You
18 cannot explain the racially-polarized voting that is reserved in
19 party primaries through party. So that's strong evidence that
20 raises -- it's not just that. You have Emory University historian
21 Jason Ward who talks about the history of race and politics, and
22 how race is the best predictor of partisan preference in Georgia
23 since the Civil War.

24 And, in fact, the parties realign themselves over time
25 in response to -- voters realign themselves and their party

1 preferences over a time in response to the party's position on
2 issue of race and racial equality.

3 Not only do you have the historical evidence and the
4 evidence from partisan primaries, but you also have the expert
5 testimony of Dr. Jones who talks about contemporary politics, who
6 talks about racial appeals in politics. If voters were just
7 responding to party and were not responsive to race, then there
8 would be no reason for candidates to continuously use racial
9 appeals in politics. But instead you continue to see, into the
10 present day, racial appeals in politics. They're designed to
11 polarize voters on the basis of race. And, of course, we do
12 see -- and no one disputes -- a persistent, over election after
13 election after election, pattern of racially-polarized voting,
14 which itself, as the Eleventh Circuit says, creates an inference
15 that racial bias is at work.

16 And so -- but even if you want to sort of get into the
17 ultimate causes question, there is more than enough evidence here
18 for a fact finder to decide we've shown that race best explains
19 the observed and undisputed racial polarization in the electorate.

20 So you can deny summary motion on that basis as well, if
21 you'd like to go there.

22 THE COURT: What is the argument, also -- I said I
23 wasn't going to bring it up, but since it's on my mind that
24 you-all have not really shown past racial discrimination, because
25 what you have put forth is so past -- in other words, as they

1 pointed out in the *League of Women Voters* case is that -- and in
2 the *Greater Birmingham* case is that the recent discrimination of
3 the nature that we're looking at, has not been shown in a lot of
4 the cases. And the plaintiffs -- the defendants argue, also,
5 something that happened in 1965 it's not really relevant as far as
6 what's going on in 2023.

7 MR. SAVITZKY: So, first, I would be remiss to not point
8 out that the *Greater Birmingham* case and *League of Women Voters*
9 cases are not redistricting cases, aren't *Gingles* cases, which is
10 an important distinction.

11 You know, Your Honor, the weightiness and the salience
12 of Georgia's history and the history of racial discrimination in
13 voting is precisely the type of totality of the circumstances
14 question going to the total context, going into the ultimate
15 issues that are best decided at trial after you hear witnesses and
16 hear their testimony and weigh and think about their arguments and
17 assess them. I mean, these are -- I understand the argument, but,
18 again, what we're getting at are trial arguments and trial
19 defenses, not summary judgment arguments.

20 And we would, of course, argue that the history of
21 discrimination and the way that voters have responded to
22 discrimination, to messages about race and the parties' statements
23 about race by realigning themselves and reiterating over and over
24 and again racially polarized voting patterns, supports a finding
25 on that causation piece, if you want to consider the total of the

1 circumstances, and supports the ultimate finding that we met our
2 burden and shown vote dilution.

3 If you have no further questions, Your Honor, I'll rest
4 on that.

5 THE COURT: Thank you.

6 MR. SAVITZKY: Thank you.

7 THE COURT: If the defendants have any time left --

8 MR. TYSON: I don't think we have any time left.

9 THE COURT: All right. Then we move to the next set of
10 arguments.

11 So no one needs a break?

12 Come on down.

13 Pendergrass plaintiffs argument/motion for summary
14 judgment.

15 MS. KHANNA: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MS. KHANNA: Abha Khanna on behalf of the Pendergrass
18 plaintiffs.

19 THE COURT: Good to see you again.

20 MS. KHANNA: The Court set out today a good amount of
21 time to consider a good number of motions, but ultimately there's
22 very little that the attorneys will argue today that Your Honor
23 hasn't heard already.

24 Now, as this Court well knows, we've been here before.
25 And as we note in our briefs, the law as -- the existing law has

1 not changed. Now, I recognize what Your Honor has noted about in
2 the intervening 15 months there have been discussions of the
3 Eleventh Circuit, there have been statements in non-Section 2
4 cases and non-redistricting cases that, perhaps, provide glimmers
5 of the kind of laws that the defendants are hoping to achieve at
6 the Eleventh Circuit, are hoping to have become -- made the law of
7 the land, but those are not the law of the land today, and that is
8 what we're arguing in this summary judgment motion. The Court is,
9 obviously, very familiar with that loss. I'm going to dive
10 straight into the undisputed facts that warrant summary judgment
11 in favor of plaintiffs in this cases, in the Congressional
12 Pendergrass case.

13 I'm actually going to start with *Gingles 2 and 3*,
14 because I think that analysis is the most straightforward and has
15 been the subject of a lot of consideration already.

16 The second *Gingles'* precondition requires plaintiffs to
17 establish that the minority group in question is politically
18 cohesive. This fact is not in dispute. As made clear in the
19 response to plaintiffs' statement number 76, defendants do not
20 dispute that Black voters are extremely cohesive in the focus
21 area.

22 The third *Gingles'* precondition requires plaintiffs to
23 show that the white majority votes sufficiently as a bloc to
24 enable it usually to defeat the minority-preferred candidate.
25 This fact is also not in dispute.

1 In response to plaintiffs' statements 78 to 85,
2 defendants do not dispute that white voters in Georgia are highly
3 cohesive in opposition to Black-preferred candidates, and that
4 white-preferred candidates defeated Black-preferred candidates in
5 every election examined in each of the relevant districts except
6 for majority Black CD13.

7 The reason the defendants have not disputed these two
8 foundational and fundamental facts is because they are beyond
9 dispute.

10 The racial voting patterns observed in the focus area
11 here as depicted in Mr. -- in Dr. Palmer's graphic on the screen,
12 exemplify polarization along racial lines. In fact, defendants'
13 own expert described this pattern of polarization between Black
14 and white voters as striking and remarkably stable across
15 elections.

16 So based on these undisputed facts, the second and third
17 *Gingles* preconditions are satisfied as a matter of law.

18 Now, defendants argue that *Gingles 2 and 3* don't
19 actually mean what they say, and instead require plaintiffs to
20 prove something else, specifically that race caused this
21 polarization. That is absolutely not what *Gingles 2 and 3* says,
22 and that itself is an attempt to read tea leaves. That just does
23 not have any support in the existing case law.

24 More than a year ago this Court concluded as a matter of
25 law that under the *Gingles'* preconditions, plaintiffs need not

1 prove the causes of racial polarization, just its existence.

2 In fact, defendants' are well aware, not only from this
3 case, but in the Rose case that the defendants also mention. In
4 that same case the defendants made the same legal argument that
5 they make here before Judge Grimberg, and Judge Grimberg also
6 rejected it as a matter of binding law under Supreme Court
7 precedent and Eleventh Circuit precedent.

8 THE COURT: When it went in front of the Eleventh
9 Circuit, though, was it not a question -- did it not -- at least
10 two of the judges questioned Judge Grimberg's decision and
11 preceded that way?

12 MS. KHANNA: The Eleventh Circuit's most recent
13 reiteration?

14 THE COURT: Yes. They had oral argument, and I can't
15 remember the name. You have to find it. All I need is for the
16 Eleventh Circuit judge to check this.

17 They raised a question about whether Judge Grimberg was
18 correct on polarization of bloc voting.

19 MS. KHANNA: I believe that the question is now
20 currently pending before the Eleventh Circuit based on defendant's
21 reformulation of the law of *Gingles 2 and 3*. I think we can sit
22 here today and kind of debate what happened over oral argument,
23 who said what and what I can gleaned and what you can glean from
24 that, Your Honor. But the fact is there's no law from the
25 Eleventh Circuit saying anything other than what this Court held

1 in its PI order or anything other than what Judge Grimberg said in
2 his order. And then unless and until that law comes down, we have
3 to operate under the law that exists.

4 THE COURT: But that law can change in a swift of an
5 opinion.

6 MS. KHANNA: That law could do that. You're right, Your
7 Honor. And I believe the plaintiffs and the parties in this case
8 have shown their facility and their ability to turn on a dime as
9 developments in the law happen. And we know we are in an
10 environment where that could happen at any movement.

11 THE COURT: Yes.

12 MS. KHANNA: But does that mean that we kind of halt the
13 analysis or halt the progress of this case and let yet another
14 election go by in the hopes that maybe there will be some clarity
15 from another court? It does not. In fact, defendants have not
16 moved for a stay in this case pending either of them, either for
17 *Milligan* or *Rose*. So unless and until there is some change, we
18 have to operate under the law as it exists.

19 And under the law as it exists, the facts are not in
20 dispute, and plaintiffs have established their burden under
21 *Gingles 2 and 3* warranting summary judgment on the existence of
22 racial bloc voting.

23 I'll turn now to *Gingles 1*. The first *Gingles*
24 precondition requires plaintiffs to demonstrate that the Black
25 population in the focus area is sufficiently large and

1 geographically compact to constitute a majority in a single member
2 district. So this precondition has two component parts:

3 Numerosity and compactness.

4 There is no dispute that plaintiffs have satisfied the
5 numerosity requirement. In response to plaintiffs' statements 31
6 to 38, defendants do not dispute that in Mr. Cooper's illustrative
7 District 6, it has a Black voting age population of over 50
8 percent; and that it does so without reducing the number of
9 majority-Black districts -- existing majority-Black districts in
10 the enacted map.

11 Notably, Your Honor, there is no dispute among the
12 experts as to satisfaction of both Gingles -- both components of
13 the *Gingles 1* precondition. In paragraph 86 of his report, our
14 expert, Mr. Cooper, states that the Black population in Metro
15 Atlanta is sufficiently numerous and geographically compact to
16 allow for the creation of an additional majority-Black
17 congressional district consistent with redistricting principles.

18 Mr. Morgan's very short report in Pendergrass provides
19 nothing to contradict any part of this statement. And, in fact,
20 when asked in his deposition whether his report disputes Mr.
21 Cooper's conclusions in paragraph 86, he responded, quote, it
22 neither supports nor refutes it.

23 And in this sense, Mr. Morgan's Pendergrass report
24 stands out from his other reports in these consolidated cases. In
25 both of the state legislative cases, Mr. Morgan's reports twice

1 conclude that the illustrative maps he's analyzing there presented
2 by plaintiffs, quote, focused on race, prioritizing race to the
3 detriment of traditional redistricting factors. There is no such
4 statement in the Pendergrass report. In those reports, you will
5 see a lot of pictures and racial shading and a lot of things that
6 the defendant put on the screen just now. There is no such
7 picture of the Pendergrass illustrative map and the district at
8 issue there. For a good reason. There is no dispute as to the
9 facts of that illustrative map when it comes to the experts
10 themselves.

11 In Pendergrass, the defendants have no expert evidence
12 to dispute plaintiffs' satisfaction of *Gingles 1*. And they never
13 even in all of the Pendergrass briefing, defendants do not even
14 mention their expert Mr. Morgan once.

15 So let's go to the actual maps at issue. Let's first
16 start with the enacted map. Here is the enacted congressional
17 map. And the focus area for our section two claim is here. This
18 is the western Metro Atlanta area.

19 Plaintiffs contend under *Gingles 1* that the Black
20 population in this focus area is sufficiently numerous and
21 geographically compact to comprise a majority of the voting age
22 population in a new congressional district. To demonstrate this,
23 plaintiffs offer illustrative District 6. Importantly, defendants
24 do not dispute any of the objective metrics about the illustrative
25 maps' compliance with traditional districting criteria. They do

1 not dispute that the illustrative map achieves equal population.
2 They do not dispute that the illustrative map is contiguous. They
3 do not dispute that the illustrative map generally, and
4 illustrative District 6 specifically scored as high or better than
5 the enacted congressional districts on objective measures of
6 compactness. They do not dispute that the illustrative maps put
7 the same number of counties as the enacted map, and includes fewer
8 unique county splits, fewer municipality splits, and fewer voting
9 district splits than the enacted map. They do not even dispute
10 that the eyeball test tells us that illustrative District 6 is
11 compact. None of these criteria are in dispute with respect to
12 this map. And this is the map that is before this Court on
13 *Gingles 1* in the Pendergrass case.

14 So what do defendants say about plaintiffs' illustrative
15 map? What do they say that their expert couldn't say? What do
16 they say that the objective features of the map couldn't say?
17 Let's go to their brief to find out. They make feeble arguments.

18 They say in their opposition brief -- first they cite
19 *LULAC* for the proposition that plaintiffs must demonstrate
20 connections between the disparate geographic communities they
21 unite that go beyond race. But here, unlike the district at issue
22 in *LULAC*, there simply are no disparate geographic communities to
23 speak of within this illustrative district.

24 In *LULAC*, the Court examined the Section 2 compliance of
25 a district that it described as a long, narrow strip that winds

1 its way to combine Latino populations on the Mexican border with
2 Latino populations in Austin, in the center of the state 300 miles
3 away. And *LULAC*, in that case the Court emphasized it is the
4 enormous geographical distance separating the Austin and Mexican
5 border communities coupled with the disparate needs of interest of
6 those populations and not either factor alone that renders
7 District 25 not compact for Section 2 purposes.

8 Now, defendants parrot and quote the *LULAC* language in
9 their brief, but they fail to actually connect it to the actual
10 illustrative district in question in this case. Here just looking
11 at illustrative District 6, there are no disparate geographic
12 communities of any race included in this illustrative district.
13 The district is anchored in just four counties that comprise the
14 western edge of the 11-county Atlanta Metro area as objectively
15 defined by the Atlanta Regional Commission. That is not in
16 dispute. Defendants identify no far flung segments of a racial
17 group within this district, a district that otherwise complies
18 with all objective metrics of traditional criteria.

19 THE COURT: They argue that you're putting rural and
20 urban areas together.

21 MS. KHANNA: Your Honor, I believe all they note is that
22 Mr. Cooper noted that some portions of western Douglas County are
23 more rural than some of the more urban areas included in Cobb
24 County. Now, there is prohibition on putting rural and urban
25 areas together. And we, of course, are not bringing a claim

1 against bringing rural and urban areas together.

2 But specifically to their argument on this map again,
3 it's a cute little district, and I think we all have to agree --

4 THE COURT: I'm not saying I disagree with you. I'm
5 just saying that's what they are arguing.

6 MS. KHANNA: And I'll address that. And that argument,
7 in particular, is -- I think the Court can acknowledge that to the
8 extent any portion of Douglas County is rural, the defendants'
9 objection that we should have divided Douglas County and that
10 somehow would have been more consistent with traditional
11 districting principles, defies the very guidelines that guided the
12 Legislature where they said that counties and courts have
13 routinely found that county boundaries are objective metrics of
14 communities of interest.

15 So faulting plaintiffs for including the whole of
16 Douglas County, its, perhaps, somewhat rural and somewhat urban
17 populations included, it rings hollow here in this context, Your
18 Honor.

19 Defendants actually -- referring back to *LULAC* now.
20 Again, that was a 300-mile long district that conjoined two very
21 disparate populations of minority population. And there's a
22 legend at the bottom of this map right here. And you can see that
23 one inch is about six miles. So if we take that little one
24 inch -- and I have a little handy tool there to do this -- and we
25 approximate how many of those little inches does this district

1 span? I see one, two, three, four, five, six -- six-and-a-half
2 inches, 39 miles from top to bottom, approximately. This is not
3 the *LULAC* district. Defendants cite to *LULAC*, but they fail to
4 point to any evidence to indicate that this district, illustrative
5 District 6, is a *LULAC* district. In other words, they identify no
6 genuine dispute of fact to the geographic compactness of the
7 minority population in this district.

8 The defendants' remaining objection on *Gingles 1*
9 reflects a straight up legal error. Defendants look beyond
10 illustrative District 6. And to pretend that Mr. Cooper connected
11 the same types of communities that he criticized the enacted plan
12 for connecting in other illustrative districts, in eastern
13 Georgia. This argument fails on at least two levels:

14 First, the question under *Gingles 1* is whether the Black
15 population in western Metro Atlanta is large enough and compact
16 enough to comprise the majority in an additional district.

17 Defendants' complaint about districts other than
18 illustrative District 6 have no bearing on that question. *LULAC*
19 itself makes this clear. When evaluating the Section 2 violation
20 in District 23, it examined the compactness of the minority
21 population in District 23. When evaluating the Section 2 defense,
22 Texas' Section 2 defense of District 25, it examined the
23 compactness of the minority population in District 25. And when
24 the State of Texas tried to point to District 25 to defend against
25 Section 2 liability in District 23, the Court rejected their

1 attempt to look outside of the area that was the actual subject of
2 the Section 2 inquiry.

3 But more fundamentally, Your Honor, as Your Honor
4 already pointed out, defendants' argument on this score really
5 just misunderstands the legal relevance of plaintiffs illustrative
6 map. Plaintiffs do not challenge the enacted map, because it
7 connects rural and urban populations. That, of course, is not a
8 legal claim. That does not violate any law.

9 Plaintiffs challenge the enacted map because it dilutes
10 the vote of a compact cohesive Black population in violation of
11 Section 2. This Court does not have to decide whether the
12 illustrative map is better or worse than the enacted map. This
13 Court does not have to choose the map it likes best as a legal
14 matter, as a practical matter, as a policy matter. All it has to
15 do is determine whether plaintiffs' illustrative map identifies a
16 large compact minority population in the western Metro Atlanta
17 area that could comprise the majority of a new congressional
18 district. That is the legal standard, and based on undisputed
19 facts, plaintiffs satisfy it.

20 Defendants have come forward with no evidence at all for
21 this Court to find in favor of the non-moving party. All they
22 offer is their misunderstanding of the law.

23 Very briefly, Your Honor, there really is no dispute
24 that the *Gingles* preconditions, with all the pre-*Gingles*
25 preconditions that I've just discussed, are readily amenable to

1 summary judgment determination. The defendants say as much on
2 page 32 in our on opposition brief to our motion where they state
3 that the *Gingles* preconditions are, quote, proper basis on which
4 this Court can rule on the legal impact of the undisputed material
5 facts without weighing evidence.

6 On page 25 of our reply brief, we identified several
7 cases -- reports related to summary judgement for Section 2
8 plaintiffs on one or more *Gingles* preconditions. And, of course,
9 just last year in *Rose*, Judge Grimberg granted summary judgement
10 to plaintiffs on each of their three *Gingles* preconditions,
11 holding that the secretary may present evidence at trial about the
12 inferences the Court should draw from these facts under the
13 totality of the circumstances.

14 And, of course, while plaintiffs have moved for summary
15 judgment on the entire case here, and why we believe that we have
16 established several of the senate factors as a matter of law, this
17 is not an all or nothing motion. If the Court determines that the
18 totality analysis requires fact finding or the weighing of
19 evidence or a variety of inferences, it remains free to issue
20 summary judgment on the undisputed fact of the *Gingles*
21 preconditions, and reserve the trial -- reserve for trial the
22 ultimate determination of liability. Because in the totality of
23 circumstances, all of the -- the hemming and the hawing, and what
24 about this and what about that, and all of the various stories
25 that defendants want to tell about the objective data, that's a

1 place for the total of circumstances analysis. There is no place
2 for that under *Gingles*. *Gingles* is an objective, straightforward
3 test.

4 THE COURT: Do you really believe there's no argument
5 under compactness factor at all? In other words, there is no
6 argument whatsoever?

7 MS. KHANNA: I believe there is no argument whatsoever.
8 And the way I know that is not only by looking at this case, their
9 briefs in this case and their evidence in this case, by looking at
10 it in the other cases. They recognize or they tried, their expert
11 tries to -- to refute compactness as a factual matter -- the
12 Legislative cases. They don't even try to do it here. All they
13 say is "*LULAC*" and "disparate communities," but they don't
14 actually identify any disparate communities. There are no
15 disputes about the objective traditional redistricting criteria,
16 including the Atlanta Regional Commissions' definition of the
17 community of interest.

18 And so I really believe that the Congressional case, you
19 know, doesn't fit their story line, Your Honor. I understand the
20 story that they have crafted, that they crafted 15 months ago and
21 that they kind of deployed in each of these cases is the same,
22 word for word. But, unfortunately, the facts just don't add up in
23 this case. The maps just don't add up in this case. There's a
24 reason they don't point to any portions of those maps. There's no
25 reason their expert's report doesn't even show a picture of our

1 map, because there is no dispute about what that map actually does
2 on both numerosity and geographic compactness.

3 Your Honor, we are not asking this Court to do anything
4 that would make it queasy on summary judgment. I know there's a
5 lot of opinions that are hanging out there in the balance. We do
6 want to get this done right. And while that may mean that we'll
7 be back here for trial in September, this Court has every reason
8 to narrow the issues actually in dispute and streamline the trial
9 to ensure the opportunity for effective and efficient relief for
10 plaintiffs on their claim in advance of the 2024 elections.

11 I don't know if I have any time left, but I will reserve
12 any time left for rebuttal.

13 THE COURT: How much time does she have left? Nothing.

14 MS. KHANNA: I said it all, Your Honor. Thank you.

15 THE COURT: It was Judge Schlesinger.

16 MR. TYSON: Judge Schlesinger. Okay. I think Judge
17 Henderson must have been in the Curling appeal.

18 THE COURT: Three panelists have heard these arguments.

19 Mr. Tyson --

20 MR. TYSON: Yes, sir.

21 THE COURT: The argument is you now have a dispute here.

22 MR. TYSON: Yes, Your Honor, and I'm going to explain
23 why I believe we do, not surprisingly. And I want to begin with
24 the standard of review, because I think it's important again. I
25 know this is a unique situation where we're saying we're entitled

1 to summary judgment, the plaintiffs are saying they're entitled to
2 summary judgment. I think it's important to remember that the
3 standard is different for -- for defendants getting summary
4 judgment versus plaintiffs. And so we have the summary judgment
5 standard -- actually, Your Honor, if I could, I can hand up paper
6 copies.

7 THE COURT: Thank you.

8 MR. TYSON: The Fayette County case, I think, is a very
9 important one for this Court to consider as it thinks about
10 granting summary judgment for the plaintiffs. That was a case
11 where Judge Batten granted summary judgment to the plaintiffs in a
12 case. And A lot of what the Eleventh Circuit said, essentially,
13 was, well, we think that the defendants are going to lose at
14 trial, but you improperly weighed the evidence. And so the
15 discussion there from Judge Wilson was, the district court at
16 trial -- at summary judgement may not weigh the evidence or find
17 facts. You can't make credibility determinations on your own.

18 And in *Burton v. Belle Glade* I think it is even clearer
19 that even if we agree on basic facts but disagree about the
20 inferences that should be drawn from those facts, that's not where
21 summary judgment fits. And I think this is where the distinction
22 between defendants' motion for summary judgement or we can say
23 plaintiffs haven't given you enough evidence to get past the
24 preconditions to get to trial. It's different than plaintiff
25 saying we have carried our burden even assuming every inference in

1 favor of the non-moving party, which for this motion is the state.
2 So the standard review matters a lot.

3 To talk through a couple of points Ms. Khanna made, we
4 wanted -- I want to be clear that the *League of Women Voters* and
5 *Greater Birmingham, Brnovich*, yes, those were not restricting
6 cases. We get that. But they are interrupted in Section 2 and a
7 standard in Section 2. So I understand there's a lot that's
8 different in redistricting. I don't think the legal standard
9 there is different for those.

10 And I want to say freely, too, Mr. Morgan does treat
11 this plan differently. We'll talk a little bit as we get into our
12 motion on this and why we believe that the Court has to look more
13 broadly on that. I think for purposes of the *Gingles 1* -- and
14 I'll start the piece of this -- looking at what's happening -- oh,
15 I should address one point, Your Honor.

16 One issue of fact that we raised in our briefs and to
17 mention this as an aside, Mr. Cooper testified just a few years
18 ago that there should have been a new majority Black district in
19 eastern Georgia, not in Metro Atlanta. And that was his expert
20 report here in the *White* case. Just like in *Fair Fight* where the
21 burden wasn't on us to come forward with things, cross-examining
22 the witnesses about why they went through the methodology they
23 went through that leads to these kinds of disputes of fact. Why
24 look at Atlanta this time versus eastern Georgia last time. And
25 Mr. Cooper said, well, the census was different. Okay, that's

1 fine. But there was a clear change in direction for Mr. Cooper,
2 and then what he did in drawing is an important difference, and
3 Ms. Khanna showed you this map. But you have to look one step
4 deeper, which is what is the racial makeup of the counties in --
5 what she referred to as the cute district on that front.

6 The racial makeup is -- the Fulton County portion at the
7 bottom there is 88 percent Black. The Douglas County portion is
8 almost majority Black at 49 percent for the age population. The
9 Cobb portion is not majority Black, it's only 37 percent. And the
10 Fayette portion is only 21 percent.

11 So as the Court is considering this question of where is
12 the geographically compact minority community that is not being
13 properly represented, again, in a situation where we're not saying
14 no opportunity and we need to get opportunity, we're saying we
15 have some opportunity and we need more opportunity. This is an
16 important factor in considering where is that population.

17 What the plaintiff's essentially wants you to do for
18 your *Gingles 1* analysis is -- is oversimplify the analysis for
19 purposes of their motion to the point of where they say, can we
20 draw a district? If yes, we have succeeded on *Gingles 1*.
21 Whereas, the Eleventh Circuit standard is you have to find a
22 remedy the Court can enter. And this is where we get into a
23 little bit of a chicken and egg problem in Section 2, because how
24 do you know you need to draw the district? There was a Section 2
25 violation. How do you prove the Section 2 violation? You've got

1 to draw a district. And that's an awful place to be. But I think
2 in looking at this, it has to be more than just I can draw a
3 district. It has to be I can create a remedy, I can explain why
4 I'm uniting these communities, I have a reason behind why I'm
5 doing what I'm doing. And when we get into our motion, we'll talk
6 a little bit more about the other districts around the state.
7 Because I think you can't look at again one district in isolation,
8 because redistricting is a very interconnected process. Creating
9 this one district drives decisions about other districts around
10 the state that will make a big difference in how that goes.

11 THE COURT: According to her, in *LULAC* they say, no,
12 it's not relevant what effect it has on another district.

13 MR. TYSON: The discussion in *LULAC* was, you can't use
14 one district to just -- because we created a new majority Latino
15 district over here, therefore, it's okay that we got rid of this
16 district over here. And that's more of a Section 5 argument, the
17 total number of districts, is it retrogressive.

18 What we're advocating on this point is, you can't look
19 at District 6 in isolation because the decisions made about
20 creating District 6 have an effect on the other districts around
21 the state.

22 THE COURT: You said in your brief, how many districts
23 are affected. Let's say if we looked at this new District 6, how
24 many other districts are affected? What other changes does it
25 have on the other 13?

1 MR. TYSON: And my recollection, Your Honor, is that
2 Mr. Cooper changed I believe eight of the other districts to draw
3 this one. And a couple of distinctions that happened there --
4 let's look at some of them. District 3, Mr. Cooper in his report
5 heavily criticizes the state for connecting parts of south Cobb
6 with the suburbs of Chattanooga. But he's done the same thing
7 here in this -- connecting part of south Cobb or west Cobb all the
8 way down through Carroll County, through LaGrange, all the way
9 down to downtown Columbus. I mean, he's added farming communities
10 that are parts here. He couldn't explain his decision-making
11 about why those different portions of the districts were connected
12 beyond, well, I portioned equality, and I think he thought that
13 Cobb County was closer to Columbus than it was to Chattanooga.

14 On other side of the state, his District 10, also.
15 Really, he couldn't explain the explanation for that beyond
16 population equality. It starts in majority-Black Hancock County.
17 There's a lot of discussion about the Black belt in our
18 preliminary injunction hearing. And Clarke County was part of
19 that. It includes Clarke all the way up to Rabun and Towns
20 Counties.

21 Over in District 14, Mr. Cooper cut across where the
22 General Assembly drew a line in a mountain range. He has cut
23 right past that between Murray and Fannin and Gilmer Counties in
24 creating that district. So this is where I think you have to look
25 and weigh out at *Gingles 1* the question of is this a remedy the

1 Court can order, because these are all things that were affected
2 by District 6. And I know the response has always been this is
3 just illustrative, you don't have to use this map, you can use a
4 different map. The reality is if you draw District 6 the way it's
5 drawn, it has impacts all across the rest of the state. So we get
6 back to the question was the General Assembly required by
7 Section 2 to draw District 6 as it's configured here or at least
8 draw a majority Black district in western Atlanta, or is it
9 required to do something else?

10 The other piece I want to touch on in terms of where --
11 would it be required to find for the plaintiffs, and I think
12 Ms. Khanna has in a lot of ways kind of backed off some of the
13 totality factors here, but the Court literally is required to
14 conduct a searching analysis and weigh out the weight to give to
15 the various totality factors. And we just don't see how that can
16 happen at summary judgment.

17 As we talked about, you can't infer the racial issue
18 from a partisanship, and we'll talk about *Gingles 2 and 3* in a
19 minute. We've talked about the history of discrimination and what
20 is the impact of that. I'm relying on the things that this Court
21 and other courts have ruled are not discriminatory, are not
22 actionable. How does that weigh into the official history of
23 discrimination in Georgia? That's something the Court has to
24 weigh. How does, for example -- they cite again in *Fair Fight* to
25 this alleged memo from then Secretary Kemp about closing polling

1 places. How does that play into this particular factor? How does
2 that affect -- and then, again, is it informing the environment
3 that goes to the question of is there, based on the totality of
4 circumstances, a denying or abridgement on account of race.

5 You have to use the various voting practices that are
6 involved. *Brnovich* makes clear, I think, you have to look broader
7 than just those practices. You have to look at the entire
8 environmental. How do you factor in early voting? How do you
9 factor in other opportunities to vote, like, automatic voting
10 registration? Those are things that require weighing.

11 The effects of discrimination on the ability to
12 participate in the political process. We recognize the Eleventh
13 Circuit has said you have disparate socioeconomic conditions that
14 kind of gets you across this particular factor, but then how much
15 weight does that carry especially when Georgia is electing
16 candidates of choice in the Black community on a statewide basis.
17 Senator Warnock, Senator Ossoff, President Biden are all examples
18 of that. So how does that factor weigh? Again, we're well beyond
19 what summary judgment requires here.

20 Racial appeals is the same thing, figuring out what the
21 weight to give that. What is the impact of using voter fraud as a
22 racial appeal in voting? The extent of election minority members
23 to public office. We have three members of Congress from Georgia
24 who are Black-preferred candidates and Black individuals who are
25 elected from non-majority districts. That's Congressman Bishop,

1 Congresswoman Williams, Congresswoman McBath. How does that
2 weight into the consideration of the Court here? We understand
3 the statewide elections happen -- Mr. Thurman and others. But how
4 do we weigh out those pieces? Again, that's not a factor or
5 decision for summary judgement.

6 The plaintiffs don't offer you anything on
7 responsiveness of the elected official just because we don't have
8 a particularized need of the Black community that's distinct. Not
9 just, again, a Democratic political priority, which is what the
10 large discussion was, but a distinct issue for the Black community
11 that is not being represented right now. Judge Grimberg talked
12 about that in *Rose*.

13 And the justification, the tenuousness of the
14 justification ignores the evidence of partisanship from the
15 Legislator. And it kind of gets us back to our same point of
16 *League of Women Voters* and *Brnovich*, how do we weigh out race and
17 partisanship? And without more, that's something, number one, you
18 can't weigh at summary judgment on the senate factor. But in
19 terms of how do you interpret the evidence the plaintiffs have
20 brought forward, have they brought you sufficient evidence to get
21 across the finish line even if all inferences are drawn in our
22 favor on their motion. We'll obviously argue for our motion that
23 there's not enough to even get you past Gingles 2 and 3 on those
24 other points.

25 So with that, Your Honor, I will yield to Mr. Jacoutot

1 to talk a little bit more about partisan and racial polarization.

2 THE COURT: Thank you.

3 MR. TYSON: Thank you.

4 MR. JACOUTOT: Thank you, Your Honor.

5 I want to begin with something that Ms. Khanna said in
6 her argument. She characterized our argument with respect to
7 *Gingles 2 and 3* as a reformulation of the factors -- or a
8 reformulation of the law, excuse me. And I don't think -- I don't
9 think that's what we're doing here at all. I don't think we're
10 changing the law at all. In fact, all of these Eleventh Circuit
11 cases that you see here, would come out precisely as they did
12 under the standard that we are advocating for -- with respect to
13 *Gingles 2 and 3* except, perhaps, *Southern Christian Leadership*
14 *Conference*, which is a case where racial polarization was not
15 found -- or excuse me, a Section 2 violation was not found, and
16 that one might turn out differently.

17 But the cases where racial polarization was found and a
18 Section 2 violation was found, those all come out, I think,
19 exactly the same under our standard.

20 In fact, it's worth pointing out that *Gingles* itself
21 comes out exactly the same under our standard. That's why there
22 were concurring opinions.

23 I want to highlight sort of the lack of evidence, the
24 absolute lack of evidence that we have on point for granting
25 plaintiffs' summary judgment using the *Wright v. Sumter* case that

1 we talked about earlier as a model. The *Wright v. Sumter* case
2 had, again, nonpartisan elections, and they had some elections
3 with Black and white candidates, some elections with only white
4 candidates. But if you look here, you'll see the Black support is
5 very cohesive for the Black candidate who is identified with
6 asterisk next to their name. This is not all of the election
7 contests, this a portion. I don't want to go through them all,
8 but this is indicative of the overall analysis that the Eleventh
9 Circuit included in its opinion in this case.

10 And you'll see Black support very cohesive of Black
11 candidates. White support sometimes split amongst white
12 candidates, but very cohesive for white candidates. And if you
13 compare that with what Dr. Palmer has given us in this report,
14 you'll see a kind of stark difference. The asterisk here -- this
15 is, again, a portion of Dr. Palmer's report, not the whole
16 thing -- but the asterisk here represents Black candidates, and
17 the first column is Black voter cohesion with respect to the
18 election. And you'll notice a very strong pattern of Black
19 cohesion for any candidate regardless of their race. Right?
20 They're constantly saying the only thing that is different amongst
21 these candidates or, excuse me, the only thing that matters to the
22 Black voter is the party of the candidate. And the same is true
23 for the white voters. White voters routinely vote against the
24 Black candidate regardless of whether -- Black-preferred candidate
25 regardless of whether that candidate is white or Black. This is

1 very different than what we see in *Wright v. Sumter County*.

2 I highlighted the race at the bottom there, the two
3 white candidates, and you'll notice all of that cohesion between
4 the races absolutely evaporates in that -- in that race because
5 they had two white candidates. The -- there's hardly -- possible
6 to determine a candidate of choice for either race in that -- in
7 that contest.

8 And then, of course, there was the write-in campaign,
9 another contest -- this is also taken from the *Wright v. Sumter*
10 *County* opinion -- was a write-in campaign because there were two
11 white candidates who split the white support. And then the Black
12 voters in that area actually wrote in very impressively a
13 candidate for office in that election as well. You see that
14 candidate has a write-in -- received 96.5 percent of Black support
15 and actually got 27.3 percent of overall support. So a very
16 strong write-in campaign. And that shows the racial cohesion,
17 racial element that we think is required for racial polarization.

18 But I think the plaintiffs have asked you that we just
19 sort of infer from the data that they provided in Dr. Palmer's
20 analysis from the partisan evidence. And as we spoke about the
21 *League of Women Voters*, the recent case said, essentially, that
22 that should not be done. And the District Court's opinion that
23 that case was appealed from, the District Court said something
24 very familiar, you probably heard this here today, that racial
25 partisanship are inextricably intertwined.

1 And then the court, the District Court found that --
2 this Court finds that white voters are likely to vote for the
3 Republican party, while Black voters -- Floridians are likely to
4 vote for the tax map party. I think you called it science fiction
5 in certain terms, with the ability to separate those two.

6 And addressing that remark about science fiction, the
7 Eleventh Circuit said the Supreme Court has warned against
8 conflating discrimination on the basis of party affiliation with
9 discrimination on the basis of race citing *Brnovich*. Partisan
10 motives are not the same as racial motives.

11 And so the evidence that you have before you asks you to
12 make that inference. And we would submit that it is certainly not
13 appropriate for granting summary judgment in favor of the
14 plaintiffs, and I think we will show that it's worth granting
15 summary judgement in favor of the defendants on that issue.

16 THE COURT: So you strongly disagree with Ms. Khanna
17 when says the law is set? I shouldn't try to anticipate what the
18 Eleventh Circuit might do. I should go with what the law says
19 right now. So you disagree that the law is not set?

20 MR. JACOUTOT: Yes, I agree that the law -- *Gingles 2*
21 *and 3* are not at issue. We are saying, you just -- it's the
22 manner in which those factors are applied where there is a
23 discrepancy. *Gingles 2 and 3* are not at issue. The law is set,
24 and something more needs to be given -- remember, it is the
25 plaintiffs' burden at this juncture to give you something more

1 than partisan differences for you to make a judgment as to *Gingles*
2 2 or 3. If you don't, you're necessarily inferring race where
3 they've only shown party, and as we seen in the *League of Women*
4 *Voters*, that is not a permissible thing for the Court to do.

5 I would also state --

6 THE COURT: Maybe I misunderstood. I thought Ms. Khanna
7 was saying, Judge, you need to stick with what you said in your
8 preliminary injunction order, that causation is irrelevant. I
9 raised the *League of Women Voters* thing twice, but you're saying,
10 no, that's not the case, Judge. The *League of Women Voters* has
11 said partisan bloc voting and racial bloc voting are different --
12 or the same, excuse me, in a sense, and that you need to show how
13 they're different at all. Maybe I misunderstood Ms. Khanna's
14 argument. I thought she was saying, Judge, the law is set, and
15 you're saying it is not.

16 MR. JACOUTOT: Well, I think the term "causation" is
17 also a little confusing because there is a statistical term for
18 causation, which is as our experts have shown, is very different
19 from what we might consider is a legal term for causation. We're
20 certainly not asking for a statistical cause of causation analysis
21 here. Merely what we're saying is there has to be -- in order for
22 you to say that there is racially-polarized voting, there has to
23 be some evidence in the data that they present -- given that it is
24 their burden, there has to be some evidence beyond what they've
25 presented. And it can look a lot like what *Wright v. Sumter*

1 County said. But when I show you Dr. Palmer's analysis and you
2 watch the remarkable cohesion regardless of any sort of racial
3 factor, that's the whole ball game. They are missing something
4 incredibly important for you to rule in their favor on *Gingles 2*
5 *and 3*. And I want to be clear that we are not asking for some
6 sort of intent analysis. We're not asking to get into the
7 motivation of the voter.

8 THE COURT: I understand that. You're not asking that.

9 MR. JACOUTOT: Okay. That's outside of our opinion and
10 our argument. But there should be objective measurable factors
11 that you can pull from, and the plaintiffs have not shown us any
12 thus far.

13 So if you don't have any other questions, that's all I
14 have.

15 THE COURT: Thank you, sir.

16 Before we start with the defendants' argument, let's
17 take a break. It is 11:25. I have 11:22. I have to go to a
18 lunch meeting at 12:30. So I would like to at least get through
19 the defendant's argument. So let's come back at 11:35. Okay?

20 THE DEPUTY CLERK: This Court will be in recess until
21 11:35.

22 (Recess from 11:22 a.m. to 11:35 a.m.)

23 THE COURT: Mr. Tyson, are you ready?

24 MR. TYSON: I'm ready, Your Honor.

25 I spoke with Mr. Hawley and Ms. Khanna on the break, and

1 we're going to see where we can get to before 12:30. There's a
2 lot of argument --

3 THE COURT: I have to stop at 12 and have you-all come
4 back, unless you-all think you can do it in 20 minutes.

5 MR. TYSON: I don't think we can do that, Your Honor.

6 THE COURT: Here is the plan. I have to be at the place
7 at 12:30 and it will take 20 minutes for me to get there. So
8 we'll stop at 12 and start back at 2.

9 MR. TYSON: That works. Thank you, Your Honor.

10 THE COURT: This is a new 20 minutes.

11 MR. TYSON: Thank you, Your Honor.

12 Brian Tyson for the defendants' again. So when I talk
13 about our motion in Pendergrass, there are a couple of different
14 pieces -- a lot of what we already covered.

15 First, my state election board clients would always want
16 me to emphasize they understand why they're defendants in a lot of
17 the cases that they're defendants in, this one they don't.

18 THE COURT: Why?

19 MR. TYSON: And we would submit, they have no role in
20 the implementation of the plan and there is nothing in what the
21 plaintiffs have offered to show that they have a role in that, and
22 there is no reason to keep them in the case. We can continue with
23 a separate hearing. So I don't think I need to say more on that.

24 For *Gingles 1*, we've talked through already just the
25 differences of the districts. And our submission would be that

1 since the plaintiffs have to come forward with a plan the Court
2 can order as a remedy, they've given the significant questions of
3 Mr. Cooper's inability to explain the other districts beyond
4 District 6 and how he fit District 6 back into the statewide plan,
5 that that's the failure of proof here. So it is a little bit
6 different than the argument for the legislative districts, which
7 we'll talk about those in Grant, where we've said the racial
8 predominance element here is the lack of an explanation of how
9 this district fits back into the overall plan.

10 Mr. Cooper didn't have any explanation beyond population
11 equality or I think this place is closer than that place when
12 asked about several of the districts. We've talked about District
13 3, District 10, and we believe that that is a requirement of the
14 proof. It has to fit back into the plan, because it has to be
15 something that the Court can order.

16 So from our perspective, either it's a scenario where
17 the plaintiffs have failed to come forward with evidence on that
18 point, which means summary judgment for the defendants or --

19 THE COURT: And the plaintiffs have argued that
20 Mr. Cooper's compactness scores are similar or identical to the
21 enacted plan.

22 MR. TYSON: That's correct. I don't think anybody
23 disputes the scores in those.

24 THE COURT: But your argument is that he does not still
25 provide us with enough information about how he came about putting

1 together this particular Congressional district?

2 MR. TYSON: Yes, Your Honor. Because of the
3 interconnected nature of districting, I think that's where we get
4 back to. It's like a water balloon, you squeeze at one point,
5 it's going to pop out somewhere else. That's the way population
6 works.

7 Mr. Cooper and the plaintiffs are saying you must draw
8 District 6 or something very much like it on this plan. Well,
9 that leads to all of the other pieces on this plan. It pushes
10 District 13 from Fayette to Clayton, all the way out to Jasper
11 County -- that pink district there at the bottom. Mr. Cooper
12 couldn't explain the very rural nature of Butts and Jasper
13 connecting back with Clayton and Fayette. It is those kind of
14 things where the decision made at one point on the map affect the
15 remainder of the map. So, again, it's a little bit different
16 argument overall, but I think at the end of the day, either this
17 plan is not a sufficient evidentiary offering of a remedy, or in
18 this case, we would receive summary judgment, or there are
19 significant questions about the way Mr. Cooper drew this plan
20 which goes to the weight the Court is supposed to give it as to
21 whether it is a proper remedy, which means the plaintiffs don't
22 get summary judgment and we're at trial. So I think it's either
23 one of those pieces of the puzzle.

24 So with that I want to talk briefly also about
25 proportionality that we raise in our briefs. And I think the key

1 point from *LULAC* here is, does the absence of this district
2 constitute impermissible vote dilution. That's the thing that
3 proportionality is trying to get at. And as *De Grandy* said, we
4 know from the statute there is no right to proportionality.

5 THE COURT: True.

6 MR. TYSON: And we know that. And then the question
7 becomes how do we assess proportionality otherwise. And right now
8 in Georgia we have five districts, majority or not, that are
9 electing the candidates of choice to the Black community and their
10 electing Black individuals to those offices. That's more than a
11 third of the population. So the question --

12 THE COURT: I have a problem with that, though, Mr.
13 Tyson. You are right. You don't have a right to say we have 35
14 percent African-American population in Georgia, so 35 percent of
15 the Congressional district should be African-American. We agree
16 with that.

17 MR. TYSON: Right.

18 THE COURT: You take it the other way, though, you're
19 saying, well, we only have five districts, we have 32 percent of
20 the population of Georgia is African-American. Five out of 14 is
21 about 35 percent. So it's not being diluted.

22 MR. TYSON: And I think it gets to your evidentiary
23 question. Is the election system that's happening here in Georgia
24 diluting the right to vote on account of race or color. And if
25 the system is electing Senator Warnock statewide, if it's electing

1 35 percent of the members of Congress from Georgia as candidates
2 of choice of the Black community, where is the denial of equal
3 openness in the system under Section 2? I think that's what
4 proportionality at the end of the day gets to. And does it
5 require then in the light of that adding an additional district
6 where Black voters are entitled to elect the candidate or have an
7 opportunity to elect the candidate of choice. Because then we get
8 6 districts out of 14 in that scenario. So does Section 2 compel
9 that outcome when the political system looks like it looks for
10 Georgia overall. And I think that's the key for proportionality.

11 THE COURT: What about the individuals, though, in that
12 district, proposed District 6? What if I'm saying to them, taking
13 your arguments that, look, 35 percent of the Congressional
14 districts in the State of Georgia are represented by
15 African-Americans and, therefore, there is no vote dilution. But
16 if you're in that district and you're saying but I don't -- I'm
17 not represented by an African-American. I don't know if it's
18 compactness here --

19 MR. TYSON: Certainly, Your Honor. And I think the
20 key -- it gets us back to the obligation to kind of push, pull,
21 haul, trade in the political process. That's ultimately where we
22 get to. Because the same could be said of a white Republican
23 voter in District 7 or District 5 in Atlanta. I may look and say,
24 well, I cannot ever elect the candidate of my choice either.

25 So the question is not so much can a particular

1 political outcome happen, I think that's where we start straying
2 you to is this a Constitutional -- are we interpreting Section 2
3 in a way that raises questions about its constitutionality if it's
4 compelling a political outcome.

5 The question is, is the system equally open? Is there a
6 right to vote that's being abridged in some way on account of race
7 or color, and we can do something about that. So I think that's
8 where -- I understand the frustration everybody has had -- various
9 points lived in districts that you didn't like the member that was
10 elected from that. But the question is does it violate Section 2,
11 and we submit that it does not.

12 With that, Mr. Jacoutot has a few more points on prongs
13 two and three.

14 THE COURT: Okay. Thank you.

15 MR. TYSON: Thank you.

16 MR. JACOUTOT: I'm going to say good afternoon, Your
17 Honor.

18 THE COURT: Almost.

19 MR. JACOUTOT: So I have a few more things to discuss
20 about *Gingles 2 and 3*. I want to bring up the senate report,
21 because it does I think inform Justice White's concurrence in
22 *Gingles*.

23 The senate report made pretty clear that the amendment
24 restores the legal standards based on the controlling Supreme
25 Court precedents according to *Mobile v. Bolden*. And Justice

1 O'Connor said that amended Section 2 was intended to codify the
2 results test employed in *Whitcomb* and *White*. And both *Whitcomb*
3 and *White* were written by Justice White. So I think those helped
4 inform his concurring opinion.

5 And just briefly looking at the text in the -- which I
6 know you have seen, but it's important to note that the touchstone
7 is whether the political processes are equally open in that -- or
8 not equally open in that the members of the class of citizens
9 protected by Subsection A have less opportunity than other members
10 of the electorate to, one, participate in the political process;
11 and, two, to elect representatives of their choice.

12 Justice Brennan's -- excuse me. Justice Brennan's view
13 on the *Gingles* factors 2 and 3 really only looks at number 2 and
14 it doesn't consider number 1, and we would submit that both of
15 those needs to be considered under *Gingles 2 and 3*. And looking
16 to what Justice White's opinion was in *White*, he said it is the
17 plaintiff's burden to produce evidence and to support findings.
18 And then he goes on to use language almost identical to that which
19 is used in the statute. In fact, the statute was taken from that
20 language.

21 And in this portion he cites himself in *Whitcomb*. And
22 in *Whitcomb*, it's very clear that Justice White was worried about
23 Section 2 being morphed into a partisan equality, a law that
24 protects political parties or interest groups instead of what it's
25 supposed to do, which is to protect the electorate against

1 invidious discrimination by a majority. He said that the voting
2 power of the plaintiffs in *Whitcomb* may have been cancelled out in
3 that they lost and as the district court held. But that seemed to
4 him like a mere euphemism for political defeat at the polls. So
5 partisanship was very much on his mind in that case.

6 And a reverse in district court, Justice White held that
7 the district's court standard was, again, expressed in a more
8 general proposition that any group with distinctive interests must
9 be represented in the Legislative halls if it's numerous enough to
10 command at least -- that's a typo -- command at least one seat and
11 represent a majority living in an area sufficiently compact to
12 constitute a single-member district.

13 Now if that sounds like *Gingles 1, 2 and 3* as Justice
14 Brennan interprets it, it is because it's very close to that. And
15 he was worried about that eventuality.

16 And returning to his opinion in *White* -- or, excuse me,
17 in *Gingles*, he says: I do not agree with how Justin Brennan
18 states part III-C. He says, this is interest group politics. And
19 he says, it seems quite at odds with the discussion in *Whitcomb*.
20 It also could be read that it seems quite at odds as my opinion in
21 *Whitcomb*. So he wrote that.

22 In closing, racial polarization under *Gingles 2 and 3* as
23 the majority of concurring justices saw it, requires more than
24 mere differential voting patterns and it requires it at the
25 *Gingles* precondition stage. If it doesn't, as Mr. Tyson alluded

1 to earlier, it potentially raises serious Constitutional questions
2 as to the ongoing viability of Section 2. And we have our
3 Hornbook law here, *McCulloch v. Maryland*. But that -- that is,
4 essentially, what leads to congruence in proportionality
5 requirements so that Section 2 be adopted with the injury to be
6 prevented or remedied in mind. So Section 2, it becomes just a
7 device to protect political parties and interest groups. It is
8 beyond that Section 2 of the Fifteenth Amendment enforcement
9 authority granted to Congress, and its Constitutional viability
10 becomes very much in question. The way to stop that is
11 interpreting *Gingles* 2 and 3 appropriately so that something
12 beyond mere partisanship shows a violation.

13 So in conclusion, I think the defendants' interpretation
14 is faithful to the majority of justices' view on the necessary
15 evidence to establish racially-polarized voting. I think it is
16 faithful to the text of Section 2 of the Voting Rights Act as
17 amended by Congress. I think it's faithful to the pre-*Bolton*
18 Supreme Court precedent under *Whitcomb* and *White* that Congress
19 expressly sought to restore. And I think it's faithful to the
20 scope of Congressional authority outlined by the Constitution.

21 So if you don't have any other questions -- I'm happy to
22 answer any that you might have. But with that, I can sit down.

23 THE COURT: Thank you.

24 We'll have the response after lunch, unless you think
25 you can do it in ten minutes. But I don't want to rush you. I

1 want you to take all the time that you will need.

2 MS. KHANNA: I will take the lunch, Your Honor.

3 THE COURT: We'll start back at 2.

4 (Recess from 11:50 a.m. to 2 p.m.)

5 THE COURT: I'm ready to resume.

6 MS. KHANNA: Your Honor, good afternoon.

7 I want to respond to a few points raised by defendants
8 and their arguments in support of their motion for summary
9 judgment. There is going to be some overlap. I'm going to try
10 not to repeat myself for the court, because I think there are ways
11 to kind of pinpoint --

12 THE COURT: Don't worry about it. You just say what you
13 have to say.

14 MS. KHANNA: It's notable, Your Honor, when it first
15 comes to *Gingles* 1 that counsel's -- Mr. Tyson's first slide
16 jumped first to a picture of illustrative Congressional District
17 3. Defendants are making a point of looking everywhere but the
18 actual illustrative district to try to find some dispute of facts,
19 let alone some dispute of material fact. And I believe Mr. Tyson
20 said something, like, you cannot look at the illustrative district
21 in isolation. But *LULAC* on 548 U.S. at 429 specifically said when
22 it's considering Section 2 liability in District 23, considering
23 the district in isolation, the three *Gingles* preconditions are
24 satisfied. It then goes on to reject the state's attempt to look
25 somewhere other than the actual Section 2 district at issue.

1 So this is, in fact, the law. The law that, frankly,
2 defendants rely upon when they repeatedly site *LULAC*. *LULAC*
3 specifically says it is the minority population in this district.
4 And that is the subject of the examination, and it is notable that
5 that is not the subject of dispute here.

6 Defendants' counsel also talked about the need for the
7 illustrative plan as a whole to be a viable remedy. That was the
8 basis, I think, that their argument for looking at districts other
9 than the illustrative district. But the cases on which they
10 relied, *Nipper* -- cases like *Nipper* where the issue there is
11 whether the remedy that plaintiffs are seeking, which is complete
12 overhaul to the way an election system is run -- in that case the
13 election of judges -- whether that is a feasible remedy.

14 There's no -- so, for instance, in this case, if
15 plaintiffs were asking for a 15th or 16th Congressional district,
16 that would be a remedy that we would really have to prove up that
17 could possibly even be conceivable by this Court. That's not the
18 case here. We're talking about single-member district maps just
19 like the one that is enacted. Those maps, as we know from the
20 recent Fifth Circuit decision in *Robinson v. Ardoin*, they do not
21 have to be perfect. They do not have to be the map. They're just
22 that, they're illustrative. I believe that counsel said that the
23 Court has to be able to -- it has to be something that the Court
24 can order. And they've identified no reason why the Court
25 couldn't order a 14-District map like the ones in place of

1 illustrative district.

2 Mr. Tyson's only real complaint with the other
3 districts, even if we were to look at them, even if they were part
4 of the agreement, is what he referred to as the inability of
5 Mr. Cooper to explain his reasoning behind them other than
6 population equality and county boundaries -- which was his reason
7 for explaining.

8 Now, it's important to note they're not arguing, for
9 instance, that the creation of our illustrative district
10 necessitates some kind of racial gerrymander in an adjacent
11 district. They're not even arguing the creation of our
12 illustrative districts create some serious non-compactness problem
13 in an adjacent district. They're really just taking issue with
14 the fact that they don't like his explanation for why you did this
15 and that in north Georgia, in south Georgia, in east Georgia, none
16 of which are at issue in this case. That is not a legal basis.
17 That's not a factual basis for denying summary judgment here.

18 Before I move onto *Gingles* 2 and 3, I just want to
19 briefly touch on proportionality. I know that's not part of the
20 *Gingles* 1 analysis. And, frankly, as we've already discussed,
21 this is part of a senate factors analysis that the Court can
22 clearly defer to a fact-finding stage. They are not part of the
23 salvaging the *Gingles* preconditions. But I do want to clear up
24 what I think is a serious misconception.

25 Defendants have effectively invented a new standard for

1 proportionality, one that is inconsistent with the binding
2 precedent. *De Grandy* and its progeny are clear, the proper method
3 for proportionality inquiry is the number of majority/minority
4 districts. Not the number of districts where the
5 minority-preferred candidates prevail. At most, only four of
6 Georgia's 14 districts are majority Black. It's 29 percent, while
7 the state's Black population is, roughly, 33 percent.

8 Now, proportionate -- as we've already discussed,
9 proportionality is never an absolute bar in any event. But here
10 it does not even weigh against the finding of vote dilution.

11 Now defendants focus on what they call five majority/
12 minority districts or minority opportunity districts. Notably,
13 they're not majority Black districts. They're including districts
14 where different minority groups are joining together in coalition
15 and forming a majority for voting age population.

16 Now, if that is the metric that they would like to use,
17 then the appropriate apples to apples comparator is the minority
18 population of the State of Georgia. That is not 33 percent.
19 That's the Black population. The minority population of the State
20 of Georgia is just under 50 percent. It's 49 percent. So by that
21 logic that the minority opportunity districts that they say would
22 require -- would be proportionately, would be half of 14
23 districts. Five is nowhere close.

24 And on this point, Your Honor, I want to note that
25 defendants vigorously object to any remedy noted that place

1 minority voters at some kind of parity with their share of the
2 site-wide population. But it's interesting to note that they have
3 no such qualms about white over representation in the enacted map.
4 Right now white voters are a majority in nine of the states 14
5 Congressional districts -- 64 percent even though they comprise a
6 razor-thin majority of the state's population. Even if a fifth
7 majority black district were added pursuant to our claim, 57
8 percent of the districts would still remain majority white. If
9 there is a proportionality problem, it is not because Black voters
10 are trying to get more than their fair share.

11 I want to move onto the *Gingles* 2/3 analysis that
12 Mr. Jacoutot addressed.

13 I believe Mr. Jacoutot said something along the lines of
14 *Gingles* 2 and 3 are not at issue. If the inference is that you
15 draw from those factors, that cannot be done on summary judgment.
16 I think that is a very telling statement, because what cases like
17 *Nipper* have told us is that the mere existence and establishment
18 of *Gingles* 2 and 3 necessarily create an inference of the racial
19 bias and the account on account of race that the defendants are
20 talking about.

21 As a matter of law, the establishment of *Gingles* 2 and 3
22 creates the inference. That's not something that the Court has to
23 weigh or consider, that is as a matter of law. And when it comes
24 to the other factors, the other inferences that can be made to
25 maybe outweigh or counter that, that is part of the totality

1 analysis. That's what *Nipper* says. It is not part of *Gingles* 2
2 and 3.

3 Mr. Jacoutot also said several times that it is
4 plaintiff's burden to show the cause behind *Gingles* 2 and 3. He
5 specifically said there has to be some evidence beyond the *Gingles*
6 factors to establish the *Gingles* factors. There is not a single
7 case that says that, Your Honor.

8 THE COURT: Would it be fair to say, hypothetically, if
9 I maintain my ruling in the preliminary injunction hearing in this
10 case and say the law is what I said it was there, then I should
11 grant summary motion for two and three?

12 MS. KHANNA: Absolutely. And the law is what Your Honor
13 said it was. When it comes to the *Gingles* preconditions, there is
14 no reasonable dispute about that, because there is no -- Mr.
15 Jacoutot could not point to a single case that says it is
16 plaintiffs' burden to establish some evidence beyond the *Gingles*
17 factors when proving the *Gingles* factors.

18 THE COURT: I think what Mr. Jacoutot was doing, and I
19 may have led him this way, the cases that have come out since the
20 preliminary injunction hearing are not Section 2 cases.

21 MS. KHANNA: Right.

22 THE COURT: They were 14th and 15th amendment
23 Constitution cases. But you are a very good lawyer. You
24 sometimes try to read what the appellate courts may be
25 telegraphing to you. That is kind of what I was doing last week.

1 Are they telegraphing me something here? But you're right. They
2 weren't Section 2 cases. They were 14th and 15th amendment cases.
3 But I can't say that Mr. Jacoutot was completely off base because
4 you've got it at some level. Maybe they're saying for these 14th
5 and 15th amendment cases it might apply. But I understand what
6 you're saying, Judge, that's not the law.

7 MS. KHANNA: Well, Your Honor, let's look at that case.
8 Let's look at the *League of Women Voters* case that was discussed.
9 But I understand the concerns raised there. That was a Section 2
10 intentional discrimination case. It's not a redistricting case,
11 not a *Gingles* case, it's an intent-based claim.

12 The paragraphs that Your Honor mentioned and that Mr.
13 Jacoutot mentioned about the distinguishing between racial animus
14 or racial discrimination and partisan discrimination, have
15 absolutely nothing to do with any discussion with the *Gingles*
16 preconditions, have absolutely nothing to do with any discussion
17 of racial-polarized voting. Instead, in context of an intentional
18 discrimination claim, the Court said we should be mindful of the
19 fact that we're looking at racial discrimination and not solely
20 partisan discrimination.

21 There is one important sentence that was left out of
22 defendants' analysis of that paragraph in the *League of Women*
23 *Voters* case. In that same paragraph that Mr. Jacoutot cited, the
24 Court says in the --

25 THE COURT: What is it?

1 MS. KHANNA: The site is -- it is Star 6 of the *League*
2 *of Women Voters'* opinion on Westlaw page 7, if that is at all
3 helpful.

4 And, again, this is in the intentional discrimination
5 context. To be sure, as the organizations point out,
6 intentionally targeting a particular racist's access to the
7 franchise because its members vote for a particular party is
8 impermissible.

9 The Court there acknowledges, as it must, that you
10 cannot disenfranchise -- and that's a vote denial case -- you
11 cannot disenfranchise a racial minority because of the way they
12 vote. And that kind of -- you can call that political, but that
13 is race-based discrimination.

14 So even the very passages that Mr. Jacoutot chose to
15 rely on in that case, which again is an intent-based claim, don't
16 suggest that plaintiffs have any burden to completely separate and
17 disentangle race from party as if they are two entirely separate
18 and different things.

19 The actual case law at issue here when it comes to the
20 *Gingles* preconditions two and three, say that it is, in fact,
21 defendants' burden.

22 THE COURT: Well, Mr. Jacoutot may have overlooked one
23 section of that *League of Women Voters* case, though. On page 15,
24 I don't know if it's the same one you have, the Supreme Court has
25 warned against conflating discrimination on the basis of party

1 affiliation with discrimination on the basis of race. The
2 partisan voters are not the same as racial voters. Be sure an
3 organization -- as an organization pointed out, intentionally
4 targeting a particular race with respect to the franchise because
5 if its members vote a particular partisan is impermissible. And
6 that's kind of where this Court is at, but I see your point. I
7 see his argument is just what I'm saying.

8 MS. KHANNA: No, I completely understand, Your Honor.
9 Actually, read the last sentence of that paragraph.

10 But we must be careful not to infer that racial
11 targeting is, in fact, occurring based solely on evidence of
12 partisanship. We do not have evidence solely of partisanship.

13 And, in fact, the Eleventh Circuit standard tells us
14 that if the defendants want to argue that it is solely
15 partisanship or it is not or something other than race, it is
16 their burden to put that evidence forward. They do not even
17 grapple with that legal standard, Your Honor, and for good reason,
18 because they have put no evidence here. The only evidence they
19 have on *Gingles* 2 and 3 is Dr. Alford's report and his testimony
20 here. What we know about Dr. Alford, and these are undisputed
21 facts, is he testified that the objective facts listed in
22 Dr. Palmer's report, the objective facts about racial-polarized
23 voting are consistent with both race and party as a cause.

24 He has testified that race likely plays a role -- he
25 agreed that race likely plays a role in shaping the voters'

1 partisan preferences. And he testified that he conducted no
2 analysis of his own to determine what factor other than race would
3 be driving these polarized-voting results. He opined that maybe
4 it's partisanship that is doing some of the work here. He
5 inferred from the undisputed data, but he did not actually do
6 anything to further the ball on defendant's burden to establish --
7 to counter the inference of racial bias at play that is created by
8 the satisfaction of *Gingles* 1 -- 2 and 3.

9 THE COURT: Here is what caught my attention when I was
10 reading this these last few weeks. The argument is that you don't
11 want to seem like you're favoring one political party over
12 another. In doing this, if one race is voting particularly
13 Democrat and you say, well, that's just the way it is. That's,
14 basically, what I was saying. So far that's the way it is. But
15 they argue, well, you can't favor one political party over
16 another, and if you have one race that is voting particularly for
17 one party, could it not be argued that if you go and start making
18 changes you really have to make the changes based on the political
19 party?

20 MS. KHANNA: No, Your Honor. I think the premise of the
21 question, where you started, Your Honor, was that's just the way
22 it is. That Black voters are voting for Democrats and white
23 voters are voting for Republicans. That's not just the way it is.
24 There's not some generic component to party affiliation that
25 requires or that predisposes Black voters to vote for Democrats.

1 And while it is not plaintiffs' burden to disprove factors other
2 than race, even if in that context plaintiffs did provide plenty
3 of evidence in the report of Dr. Burton that says it's not just
4 the way it is when it comes to partisan affiliation of different
5 issues. In fact, Dr. Burton testifies, unrebutted testimony, race
6 is the driving factor in determining partisan preferences in
7 Georgia precisely because of the racial policies embraced by the
8 political parties, both historically and in the present day. It
9 is not an accident of -- of politics that we're seeing this racial
10 polarization among the two political parties. It is because of
11 the racialized policies those parties have. That is the evidence
12 that plaintiffs has put forward to do as Your Honor has suggested,
13 like, is there a way to explain the causes here. We have provided
14 that evidence. Defendants have not rebutted that evidence.
15 Defendants have not even addressed that evidence.

16 I believe we raised Dr. Burton's testimony in each of
17 our briefs. I don't believe that defendants have once actually
18 engaged in that testimony. In fact, their expert Dr. Alford, who
19 is their only expert on racially-polarized voting and purports to
20 opine on the partisan basis of polarized voting, did not even read
21 Dr. Burton's report. Did not even engage with plaintiffs'
22 evidence. Forget doing his own analysis there.

23 THE COURT: So would it be better for this Court to say
24 causation is irrelevant?

25 MS. KHANNA: It would be -- I think under the standard

1 in *Nipper*, the causation question is, A, deferred to the totality
2 of circumstances; and, B, the burden of defendants once plaintiffs
3 have established *Gingles* 2 and 3. That is the accurate statement
4 under the law.

5 I want to address the issue that -- we talked a lot
6 about Justice White's concurrence in *Gingles*. And I think, again,
7 I just think looking at the actual cases, looking at *LULAC*,
8 looking at *Gingles*, looking at the *League of Women Voters*, I think
9 we will learn a lot more than just kind of pulling out the quotes
10 that each side likes the most.

11 Justice White's concurrence in *Gingles* -- I thought it
12 was three paragraphs. Essentially two paragraphs long. We can
13 read it together. I won't tire the Court with that right now.

14 But Mr. Jacoutot pointed out, though, highlighted the
15 key sentences. One is: "I do not agree;" and two is: "This is
16 interest group politics rather than a rule hedging against racial
17 discrimination." What he did not quote was the sentence precisely
18 before that.

19 Before that Justice White says that the reason that he
20 believes the race of A candidate might be relevant, because I take
21 it that otherwise there would be a violation in a single-member
22 district that is 60 percent Black but enough of the Blacks vote
23 with the whites to elect a Black candidate who is not the choice
24 of the majority of Black voters. This is interest group politics
25 rather than a rule hedging against racial discrimination.

1 What Justice White was hypothesizing in that case -- it
2 was not the actual case -- but he was, basically, making the
3 assumption, well, if Black voters are only faced with the choice
4 of white candidates, they're not really going to be cohesively in
5 support of any one of those candidates. They're going to break
6 either way or maybe slightly in one way. That is the hypothetical
7 on which Justice White's concurrence was based in which he said:
8 "You can't say the race of the candidate is never relevant."

9 In *Nipper*, the court follows up on this in the Eleventh
10 Circuit. In *Nipper*, Tjoflat says when it comes to the White v.
11 White elections, such elections may reveal little about the issue
12 to be determined. Particularly where voting is extremely
13 polarized by race in an election in which Black candidates
14 participate, white on white elections in which a small majority or
15 a plurality of Black voters prefer the winning candidate seem
16 comparatively less important.

17 The very important qualifier there is for white on white
18 elections is the assumption that in those elections, that Black
19 voters will be kind of divided among their options. That is not
20 the case here. Those assumptions have not proven true, and
21 they're certainly not proving true here where the undisputed facts
22 show that there's not just cohesion, there is extreme cohesion.
23 There is 98 percent Black cohesion for Black-preferred candidates
24 regardless of their race. So are not -- this case does not fall
25 within the ambit of the concerns expressed by Justice White in his

1 concurrence.

2 The last thing I'll say, Your Honor, and I promise this
3 is the last anything.

4 THE COURT: I have one question before you finish.
5 Finish your argument. It is something a little different.

6 MS. KHANNA: I want to go back to the political -- to
7 the idea about partisan politics instead of race.

8 The defendants have done everything they can to make
9 this a case about partisanship rather than of race. And to
10 affirmatively -- and they have even affirmatively stated that the
11 Legislature had a partisan reason to redraw the Atlanta Metro area
12 the way they did.

13 Now, as plaintiffs unrebutted evidence has demonstrated,
14 this distinction between partisan and race that they draw is
15 actually not substantiated by the evidence -- theirs, and ours,
16 obviously, refute it. But even setting that aside, the defendants
17 cannot escape the requirements of Section 2 simply by trying to
18 make this a case about politics. We know that once again because
19 the Supreme Court told us so *LULAC*.

20 In *LULAC* the State of Texas had a partisan explanation
21 for what it did in District 23. It explained that it did not draw
22 a minority opportunity district where Section 2 required one in
23 the interest of protecting a Republican incumbent. The Court
24 flatly rejected this justification explaining, quote, this policy
25 whatever its validity in the realm of politics, cannot justify the

1 effect on Latino voters. And here, Your Honor, Georgia's apparent
2 policy preference for ensuring greater Republican success cannot
3 justify the effect on Black voters, which is a violation of
4 Section 2.

5 I'm happy to answer your question.

6 THE COURT: One of the questions raised regarding the
7 Board of Election, board individuals, why should they remain in
8 this case?

9 MS. KHANNA: Your Honor, I think we've explained -- in
10 our papers we addressed the fact that as a legal matter, as a
11 statutory matter, the board has a legal responsibility to oversee
12 fair elections. That responsibility is shared with the secretary
13 under statute. Unlike in the *Jacobson* case that the defendants
14 rely upon, that's where the Court found that the secretary that
15 was sued there had no responsibility for overseeing the
16 implementation of the law. That is just not the case here as a
17 matter of law.

18 THE COURT: But the board is going to supervise the
19 election regardless whoever I say or the General Assembly says --
20 it's an elected situation. But we have a Sixth District that's
21 also selected. If we don't add one -- in other words, what effect
22 do they have other than the fact that they supervised the
23 election? The Secretary of State supervises the election. But
24 I'm trying to figure out what effect does this case have on them
25 or they have on this case?

1 MS. KHANNA: Well, that's a fair question, Your Honor.
2 I think ultimately the reason why these kinds of cases sue
3 executive officials is because the injunction that plaintiffs are
4 seeking is against the implementation of the map. And regardless
5 of who drew the map, it is the secretary in conjunction with the
6 state board who oversees the implementation of the map. To enjoin
7 them is to enjoin the map.

8 THE COURT: Yes, but they're not in this case and the
9 Secretary of State Raffensperger is still in this case. What
10 effect does that have on your case?

11 MS. KHANNA: Your Honor, if this Court decides that as a
12 legal matter that they're a nonprobative defendant here, doesn't
13 have any effect on the ability for us to continue to litigate our
14 case. Certainly, we are cognizant of the *Jacobson* case, and the
15 Eleventh Circuit's decision that somebody must or must not be in
16 the defendant's seat --

17 THE COURT: I've been doing Fair Fight for five years.
18 I know the *Jacobson* case quite well. I can assure you, that if I
19 take the State Election Board out of this case, Mr. Raffensperger
20 is still going to meet all of the objective requirements.

21 MS. KHANNA: Then on that argument, Your Honor, we will
22 rest on our papers. And I see your point that it will not have a
23 practical effect of bringing this case to a halt or dismissing it.

24 THE COURT: Thank you.

25 MS. KHANNA: Thank you, Your Honor.

1 THE COURT: You have some time left. So do you --

2 THE DEPUTY CLERK: Yes, you do. Ten minutes.

3 MR. TYSON: Thank you, Your Honor. I will endeavor not
4 to use all of the ten minutes.

5 THE COURT: You could if you need to.

6 MR. TYSON: Just a couple of little points in response
7 to Ms. Khanna's arguments.

8 Just so that we are abundantly clear, the secretary
9 builds the ballots, as the evidence shows in this case, and I
10 think an injunction against the secretary about the ballots is
11 enough to get you to where you need to go remedy-wise. The State
12 Election Board's evidence shows they had no role in that process.
13 So that settles that issue.

14 On *Gingles* 1, I think Ms. Khanna's argument there kind
15 of points out the difficulty we're facing of fitting this case
16 into the general multi-member at large world that Section 2
17 emerged from.

18 We've got -- we have to find a remedy the Court can
19 order. And the reason for all those Eleventh Circuit cases about
20 the types of remedies in judicial cases and the other cases was,
21 we had to look at what can a court actually do here. And because
22 it is a part of that element of proof -- that's what the
23 plaintiffs have to show -- here's something you can order, Judge,
24 that fits into the larger issues. And we would submit -- and
25 again I don't have a case that says this -- but something that

1 could fit with the policy roles the Legislature shows but for
2 whatever the failing is. Like, where did the Legislature go
3 astray from the requirements of federal law related to the
4 creation of this district? And if the only way to create the
5 district is to create a number of other districts around it that
6 can't be explained, that don't meet up with other factors that the
7 Legislature was considering, I think that is a significant issue
8 as to whether it is an appropriate remedy. And so we looked at
9 all those districts, and we don't need to go back through that
10 again.

11 In terms of the proportionality arguments, again, I
12 think the challenge there is proportionality goes primarily to
13 this question is there equal openness in the political process.
14 And so when you look at the process, we're not relying on
15 districts that are majority non-white as a basis for
16 proportionality. What we're saying is you have districts across
17 the State of Georgia that are electing candidates preferred by the
18 Black community. You have the State of Georgia as a state
19 electing candidates that are preferred by the Black community.
20 That goes to the question of the equal openness of the process
21 overall, and that's, I think, the important point on that.

22 Again, what did Section 2 require the state to do in
23 terms of providing those opportunities beyond what's it's arguing.
24 That's the issue for that piece.

25 Ms. Khanna talked -- Mr. Jacoutot will talk about

1 *Gingles* 2 and 3 here in a minute. But I think an important
2 evidentiary piece at this point is she talked, again, about the
3 inferences that come from that. And, again, I think that
4 inference only arises once you've met the burden, once you've come
5 forward with the evidence. And the submission we're looking at
6 here is, we have no evidence that voter behavior changes in the
7 slightest based on the race of the candidates. The concerns of
8 Justice White's and the concerns from Judge Tjoflat, in the
9 situation where partisanship are -- partisanship, where you have
10 the right type of scenario, where voter behavior changes when
11 there are two white candidates, for example, that would tend to
12 indicate that you do have racially-polarized voting there, not
13 partisanship. Because you see voter behavior changing when the
14 race of the candidate changes.

15 That's not the evidence we have here. The evidence we
16 have here with no preliminaries, just only general elections is
17 that voter behavior doesn't change based on the race of the
18 candidates. And I think that's the key point, that the plaintiffs
19 need to come forward with something more than just voting is
20 polarized in a general election. Maybe they could have looked
21 at primaries or looked at other issues, but they haven't done that
22 in this case.

23 So with that, Your Honor, I will turn it over to Mr.
24 Jacoutot and finish up our piece of evidence.

25 THE COURT: Thank you, Mr. Tyson.

1 Mr. Jacoutot.

2 MR. JACOUTOT: I don't have any additional slides for
3 you today. I just wanted to respond to Ms. Khanna's argument
4 there saying that we sort of conceded that *Gingles* 2 and 3 were
5 established. I don't think that we did.

6 In order to establish *Gingles* 2 and 3 and get that
7 inference in your favor that was spoken of in *Marengo County*,
8 there still has to be some underlying evidence of something behind
9 partisan motivations. We're saying they haven't established two
10 and three under the appropriate standard. So they don't get that
11 *Marengo County* inference.

12 THE COURT: Well, let me ask you this first. If the
13 Court may reject your argument regarding two and three, racial
14 bloc voters compared to partisan bloc voters, do you concede then
15 that they should receive summary judgment on two and three?

16 MR. JACOUTOT: I don't know if they could get summary
17 judgment on it. I think that we still would be able to show
18 partisan motivation at trial, maybe with the evidence that we have
19 that Dr. Alford provided, for instance, the Herschel Walker race,
20 things like that, adding that in.

21 THE COURT: I don't know if I follow you on that. In
22 other words --

23 MR. JACOUTOT: Well, I think that is something that
24 would have to be weighed. You could weigh Dr. Alford's evidence
25 of that primary against the evidence that the plaintiffs have

1 provided. But at the end of the day if --

2 THE COURT: If I reject your arguments regarding racial
3 bloc voting and partisan bloc voting and maintain the prior ruling
4 that I made, I don't know what we are left to argue.

5 MR. JACOUTOT: Yes. I'm sorry, I misunderstood you. If
6 you reject that argument, then I think at two and three you would
7 be able to grant summary judgment on that. But that doesn't mean
8 that racial polarization is established. At that point, racial
9 polarization kicks to the totality of the circumstances analysis,
10 and that would be our opportunity at trial to show, yes, they've
11 shown what we call partisan polarization and here's why.

12 THE COURT: Under your Constitutional argument, would
13 Section 2 be unconstitutional if the Court -- I mean, were to
14 consider the partisan issue at the totality of the circumstances
15 phase instead of the *Gingles* precondition phase?

16 MR. JACOUTOT: I think it would be a little redundant to
17 consider -- effectively, *Gingles* 2 and 3 is considering the racial
18 polarization question. And then we say, historically, we'll allow
19 another inquiry into racial polarization at totality of the
20 circumstances. I don't think that's necessary. But the racial
21 polarization senate factor is just that, it's a senate factor from
22 the report. It is not part of the case law, except to the extent
23 that racial polarization appears in *Gingles* 2 and 3.

24 So to answer your question, I think that that would be
25 probably an unconstitutional view of Section 2 in this instance

1 where the only evidence that's been presented is clearly along
2 partisan lines.

3 If there's conflicting evidence that -- if there was a
4 traditional *Marengo County* or *Wright v. Sumter* case, I think you
5 can avoid two and three and then we can go to -- ask another
6 totality of circumstances, if there was evidence in the record
7 like that. But since we don't have that, I think it would be
8 improper to, essentially, say let's take this question up later.
9 I think it should be taken up now.

10 THE COURT: All right.

11 MR. JACOUTOT: And I think that's all I have, Your
12 Honor. So you if you don't have any other questions...

13 THE COURT: Thank you, sir. Okay.

14 I think we now move to Grant's argument for motion for
15 summary judgment argument.

16 MR. HAWLEY: Good afternoon, Your Honor. May it please
17 the Court, Jonathan Hawley on behalf of the Grant plaintiffs.

18 Now, I'm going to start with some good news. As the
19 Court is aware, the Grant plaintiffs' evidence and arguments
20 overlap considerably with Pendergrass plaintiffs. So I'm not
21 going to repeat the things that Ms. Khanna has already said.

22 Instead, I want the focus to begin on the first *Gingles*
23 preconditions. And so that's where most of the distinctions
24 between Grant and Pendergrass can be found.

25 I want to begin with *LULAC v. Perry*. We talked a lot

1 about this case over the last few hours, and I thought it would be
2 helpful to actually take a look at it.

3 Now, defendants rely heavily on the *LULAC* case, and they
4 argue that our cases here are analogous to that one. But that
5 just isn't so. As we can -- so this is the map that was at issue
6 in *LULAC*. And the Section 2 discussion in that case, which it was
7 actually drawn by a majority of the U.S. Supreme Court. It is a
8 polarity opinion overall, but the Section 2 was enjoined by a
9 majority of the court. And the district at issue there was
10 Congressional District 25. And it's circled there. It's a little
11 hard to see, but it's that gray district there. It snakes for 300
12 miles from Austin and central Texas down to the Rio Grande valley.

13 As we've discussed, the Supreme Court concluded that
14 District 25 was not compact. Not only because of its size and
15 it's meandering shape, but because it grew the Austin Latino
16 population in an urban and suburban area with Latino communities
17 along the Mexico boarder who were separated not only by hundreds
18 of miles, but vastly different lived experiences, needs,
19 socioeconomic interests and so forth. That is what noncompactness
20 looks like.

21 Now, I want to start by looking at it, because when
22 we're talking about compactness, the eyeball test is a good place
23 to start. That's just what the Fifth Circuit noted last year in
24 the *Robinson v. Ardoin* case. It's a helpful place to get your
25 grounding.

1 And so now that we're primed, I would like to look at
2 the six districts that Mr. Esselstyn drew in this case in which we
3 are now seeking summary judgment.

4 Illustrative Senate Districts 25 and 28, as you can see,
5 are geographically confined to the southern Atlanta metropolitan
6 area. Illustrative Districts 64 and 117 are also small districts
7 in the Atlanta metro area. And illustrative House Districts 145
8 and 149 are small districts anchored in Macon-Bibb County.

9 All six of these districts satisfy the *Gingles*
10 numerosity requirement. They have 50 percent Black voting age
11 population. There is no dispute on that point.

12 And all six of these districts are compact as well. And
13 we know this not just because of the eyeball test, but as a
14 quantitative matter as well.

15 Mr. Esselstyn supplied these charts in his report that
16 show the compactness scores for his illustrative districts as
17 compared to the range of the compactness scores of the enacted
18 districts. And the illustrative districts fall well within range
19 of normal districts under the enacted plan both for the State
20 Senate and for the House. Mr. Esselstyn's illustrative districts
21 are not outliers. They're not vast sprawling districts with
22 appendages and tendrils that reach out and grab isolated pockets
23 of Black votes. They do not include disparate communities.
24 Instead, they're either firmly anchored in the Atlanta area or the
25 Macon area. The districts are visually compact, they're

1 geographically compact, and they're quantitatively compact and,
2 therefore, for the purposes of *Gingles 1*, they are sufficiently
3 compact.

4 Now, here is the crucial thing. Defendants do not
5 meaningfully dispute the compactness of these six districts.
6 Certainly, Mr. Morgan didn't.

7 Now, I want to note, the Grant plaintiffs are not moving
8 for summary judgment on illustrative Senate District 23 or
9 illustrative House District 74. And that's because Mr. Morgan at
10 least attempted to contest the compactness of those districts.
11 And so we acknowledge there is a dispute of fact as to whether
12 those two districts are compact. But that's where his analysis
13 stopped. Mr. Morgan did not even mention Senate Districts 25 and
14 28 in his report. And for illustrative House Districts 64, 117,
15 145, 149, he only reports the same compactness scores that
16 Mr. Esselstyn already provided. There is no analysis of
17 compactness of these districts of any kind, meaningful or
18 otherwise. And there is certainly nothing in his report that can
19 develop a genuine dispute as to whether these six districts are
20 compact.

21 Now, defendants themselves as a legal matter tried to
22 contest compactness by pointing out some of the districts
23 contained communities that are different one from another. But
24 there is no uniformity requirement under Section 2. And the *LULAC*
25 majority actually spoke to this point. They acknowledge that,

1 quote, "Members of a racial group in different areas, for example,
2 rural and urban communities, could share similar interests and,
3 therefore, form a compact district if the areas are in reasonably
4 close proximity." That's at 548 U.S. Reporter at 435. Reasonably
5 close proximity. That describes to a tee these six illustrative
6 districts.

7 And defendants have not actually argued that
8 Mr. Esselstyn's districts do unite disparate communities based
9 only on race. They don't argue that because they can't. There is
10 no genuine dispute that these six districts are compact.

11 THE COURT: They do argue that he does not explain his
12 decisions or connect to them.

13 MR. HAWLEY: The records shows that Mr. Esselstyn at
14 times could not recall specific line drawings decisions he made
15 more than a year ago, right, because his maps did not change
16 considerably between the PI phase and his report that was
17 submitted last December. These decisions were made a long time
18 ago.

19 But, again, just as there is no uniformity or
20 homogeneity requirement under Section 2, there is not a memory
21 requirement either. He might have some difficulty explaining, but
22 these are small geographically compact districts in metropolitan
23 areas. And the fact --

24 THE COURT: Go ahead, go ahead, go ahead.

25 MR. HAWLEY: The very fact of their size and their

1 nature -- and, again, there is no evidence in the record that
2 there are disparate communities that the *LULAC* court or any court
3 would consider would defeat compactness in these cases.

4 He might not be able to explain every detail in this
5 district, but that doesn't mean that the districts are not
6 compact. And defendants never actually take that leap and say so.
7 That's because they do not contain disparate communities.

8 And Mr. Esselstyn's -- whether it be a memory issue or
9 whatever difficulty he might have identifying specific things, I
10 think it is notable that the largest district that we're seeking
11 summary judgement on is House District 149, which is just
12 physically the largest of these House districts.

13 And he explained there that Macon, Milledgeville, and
14 Baldwin County are connected by shared interests. He gleaned that
15 from public comments that were submitted during the redistricting
16 process, by what Ms. Wright testified when she testified before
17 the Court last year, and because of geographic and economic
18 similarities that come from them being fall line cities.

19 So even on the largest district there where compactness
20 might be, perhaps, you know, arguably the most questionable, he
21 does provide specific reasons why those districts were composed as
22 they are.

23 The other districts, again, they are small districts
24 firmly ensconced in these metropolitan areas.

25 Now, setting aside compactness, defendants' last resort

1 is to once again to bang the drum of racial predominance. It is
2 an argument we heard throughout the last year. But all the
3 records in this case shows is, one, that Mr. Esselstyn focused on
4 areas with higher concentration of Black voters when he drew his
5 illustrative maps; and two, that that demographic information
6 informed some of his line drawing decisions. That's it.

7 Equating this mere consideration and awareness of race
8 with elicited racial predominance, is not only disingenuous, it's
9 foreclosed by Eleventh Circuit precedent.

10 *Gingles* 1 has a numerosity requirement. Plaintiffs must
11 prove that majority Black districts can be drawn as a quantifiable
12 matter. The Voting Rights Act does not require that Mr. Esselstyn
13 clicks around in his "Math A Tube" software at random in the hopes
14 that he would eventually land on a district that has a Black
15 voting age population over 50 percent.

16 Section 2 is proof with evidence, not blind luck. That
17 is exactly what the Eleventh Circuit was getting at in the
18 *Davis v. Chiles* opinion. Defendants attempted application of
19 *Miller* and these other racial gerrymandering cases to *Gingles* 1,
20 would make it impossible for any plaintiff to satisfy Section 2
21 and prove the first *Gingles* precondition.

22 *Davis* is still good law, as much as defendants might
23 wish it weren't. And in this circuit, their racially
24 gerrymandering argument fails at the outset. And even if
25 defendants could advance this argument, there is no genuine

1 disputed fact here that race was not the predominant factor, and
2 there certainly is no dispute that Mr. Esselstyn complied with
3 traditional redistricting principles when he drew his illustrative
4 maps.

5 Now to illustrate, I want to, once again, return to the
6 eyeball test. We'll take a quick tour through some past
7 districts. I will play the part of ghost of gerrymanders past.
8 We'll start here in Georgia, *Miller v. Johnson* from the 1990s.

9 On the left is the proposed district that the
10 Legislature worked with, and they eventually drew the Eleventh
11 District that appears on the right. And I'll let the *Miller* court
12 do the talking for me.

13 Quote, "The populations of the 11th are centered around
14 four discrete widely-spaced urban centers that have absolutely
15 nothing to do with each other, and stretch the districts hundreds
16 of miles across rural counties and narrow swamp corridors."

17 Next. Also in the 1990s. Both of these Congressional
18 District 4s in Louisiana were struck down at racial
19 gerrymandering. One can see one skirted the outlines of
20 Louisiana, and the other one cut through what I believe they said
21 in the opinion, like an ink stain spreading out across the
22 state -- struck down as racial gerrymanders.

23 *Shaw v. Reno*, another seminal gerrymandering case.
24 Courts invalidated Congressional District 1, which is that
25 rust-colored district in the eastern part of the state, and if you

1 can see it, Congressional District 12 which is that
2 fuchsia-colored district that snakes through central North
3 Carolina, struck down as racial gerrymanders. 20 years later day,
4 déjà vu all over again. *Cooper v. Harris*, again, Congressional
5 District One and Congressional District 12 struck down as racial
6 gerrymanders.

7 This is what racial gerrymandering looks like. These
8 are districts where traditional redistricting principles were
9 subordinated to racial considerations.

10 And now you look at Mr. Esselstyn's map. Those are his
11 illustrative districts. That did not happen here. Mr. Morgan
12 stated that race predominated to the detriment of traditional
13 redistricting principles, but that's all he says. He makes a
14 conclusionary statement about content. He doesn't back it up with
15 any analysis, any opinions certainly, any support.

16 To defeat summary judgment under Eleventh Circuit case
17 law, you need something more than speculation. But speculation is
18 all that Mr. Morgan has provided with respect to the six districts
19 that we're moving for summary judgment on.

20 Now, defendants also suggest that Mr. Esselstyn's maps
21 don't comply with traditional districting principles. But the
22 only basis for that assertion, is that the illustrative map that
23 don't (sic) outperform the enacted map on certain criteria.

24 As this Court knows, there is no requirement that the
25 illustrative map has to be the best enacted map across every

1 principle. Illustrative maps don't have to be perfect. And,
2 again, defendants never actually assert that these maps don't
3 comply with traditional districting principles. They just make
4 the comparison with the enacted map. But that doesn't say
5 anything about whether these maps do comply with traditional
6 redistricting principles. There is no evidence that they don't.
7 There is no dispute that these maps comply with traditional
8 criteria.

9 That ends *Gingles* 1. And so I'll briefly talk about
10 *Gingles* 2 and 3 because there has been a lot of discussion about
11 that, and I feel that, you know, just a brief clarification of
12 where the law stands at this moment in this Court might again be
13 helpful. And we have a map.

14 This is the reporting that Dr. Palmer did here in the
15 Grant case showing clear and undeniable racial polarization across
16 the focus areas where we proposed new districts. And I have the
17 slide with Dr. Alford's report. It is the same thing he said
18 about Pendergrass -- quite striking and it's remarkably stable.
19 But let's go back for a second.

20 Mr. Jacoutot just a moment ago suggested that *Gingles* 2
21 and 3, that they require more than just proving *Gingles* 2 and 3
22 but there has to be some evidence of causation or some evidence
23 that race is what was causing these things. But there's no case
24 that says that.

25 We've have what *Gingles* says. *Gingles* 2 is the minority

1 group cohesive? We can look at this chart. The answer to that is
2 as what Dr. Alford said, is absolutely yes.

3 *Gingles* 3. Does the white majority voters bloc you to
4 defeat Black preferred candidates? Yes, they do. Those are the
5 dots at the bottom. These are quantitative facts that are not in
6 dispute. That is all *Gingles* 2 and 3 requires. And from that we
7 have the inference that racial bias is at work, an inference that
8 has gone unrebutted in this case.

9 THE COURT: So I should grant you summary judgment on
10 two and three for Grant?

11 MR. HAWLEY: Yes. Yes, I would say so. Because we've
12 satisfied -- we've demonstrated unrebutted -- in fact, not only is
13 it unrebutted, Dr. Alford agreed there is political cohesion among
14 the Black communities in these areas, and the white voters vote as
15 a bloc to defeat Black-preferred candidates. That is all that is
16 required under *Gingles* 2 and 3, and it is also sufficient to
17 create the inference of racial bias that defendants claim we have
18 to prove independently. Again, there is no case that says that.
19 We have *Gingles* 2 and 3, we have the *Nipper* "gloss" that shifts
20 the burden to them to prove that it's something other than race.
21 The burden that Ms. Khanna has pointed, they have utterly failed
22 to grapple with. And they have not even addressed Dr. Burton's
23 evidence that race is the driver of partisanship in Georgia
24 elections.

25 There is some brief discussion about the race of the

1 candidates might be relevant here. But again setting aside that
2 that is a totality of circumstances issue, if you read the case
3 law talking about the race of the candidates, like *Nipper*, it is
4 because as Ms. Khanna said, it was the court's belief that, for
5 example, white on white elections might not be probative of
6 racially-polarized voting if Black voters essentially split
7 equally between the two. But the *Nipper* court acknowledged that
8 if there is a case where Black voters overwhelmingly support even
9 a white candidate and white voters don't, that's an indication of
10 racially-polarized voting. Again, I direct you to look at this
11 chart. That is exactly what happens in contemporary Georgia. And
12 so these concerns about the race of the candidates the defendants
13 have raised simply do not apply here.

14 I will finish -- I have a few minutes left. I will save
15 what time I have. But just before I go, Mr. Tyson was talking
16 about sort of the requirement that plaintiffs or the mapmaker
17 justified a composition of every district other than the
18 illustrative district. That is true both in the Congressional
19 Pendergrass case, but that has also come up in this case. We have
20 a lot of other Legislative districts other than the six
21 illustrative districts that Mr. Esselstyn is moving -- that we are
22 moving for summary judgment on.

23 Now, I don't have a case that says if we need to prove
24 the compactness and prove the -- you know, defend the compositions
25 of every other district. They don't have a case that says that.

1 But we have *LULAC*. And, again, *LULAC* says you look at the
2 district where the vote dilution has occurred. That is where we
3 focus the compactness inquiry. *LULAC* is good law. It's the
4 majority of the court. That is the case that provides the
5 standard when we're assessing compactness of districts.

6 Defendants as a policy preference, they might prefer a
7 higher standard that would require essentially the drawing of a
8 perfect map or the drawing of a map that somehow satisfies
9 everybody or satisfies them.

10 If that is their policy preference, this is not the
11 right forum to air it. What we have here is binding law from the
12 U.S. Supreme Court, from the Eleventh Circuit, and it rejects
13 they're position. They're attempting to raise the burden on
14 plaintiffs.

15 Plaintiffs have satisfied at least, and especially as to
16 the *Gingles* preconditions, the requirements of the Eleventh
17 Circuit and the requirements, again, that this Court correctly
18 laid out in the preliminary injunction order. That analysis, that
19 legal analysis was all correct, and the law hasn't changed since
20 then. Under those standards, we have satisfied the *Gingles*
21 preconditions in both *Pendergrass* and in *Grant*.

22 THE COURT: In the preliminary injunction order, though,
23 I think I did consider what effect the new sixth district will
24 have on the fifth district in Fulton County. I think it went
25 from, like, 57 percent to 52 percent, something like that.

1 MR. HAWLEY: Yes.

2 THE COURT: And your argument is that is irrelevant.

3 MR. HAWLEY: There is a point there. And I think this
4 actually -- there is a -- if I can have a small exception to that.
5 What *De Grandy* and other cases looking at *Gingles* have proposed,
6 is the creation of additional districts, essentially, where
7 minority voters would have the opportunity to elect their
8 preferred candidates.

9 So we do believe that it is important to know that the
10 creation of these additional illustrative districts, will not take
11 away opportunities for Black voters and minority voters in other
12 parts of the state. And that's why Dr. Palmer looked into this.
13 He looked at this issue, and he concluded that in the preexisting
14 majority Black districts, Black voters would still have the
15 opportunity to elect their preferred candidate.

16 So when we're moving for summary judgment on six of
17 these illustrative districts, these are sixth additional districts
18 where Black voters have the opportunity to elect their preferred
19 candidates without taking away those opportunities where they
20 currently exist in the enacted maps.

21 Thank you.

22 THE COURT: Thank you. I know you are all very excited
23 about this, but the court reporter can't keep up with you-all.
24 Slow down. Because I've got to read it, and if she doesn't give
25 it to me right, then I won't get it right.

1 MR. TYSON: Thank you, You Honor. I've already been
2 admonished once before we started today actually. So I will do my
3 best on that front.

4 Your Honor, what I will do here again not to repeat all
5 of the different pieces here, I'll just respond to a few of
6 Mr. Hawley's arguments. I'll look at the maps in our motion. It
7 fits a little better there on the *Gingles* 1 issue.

8 THE COURT: All right.

9 MR. TYSON: Mr. Hawley mentioned the policy preference
10 issue, we're trying to raise the burden on the plaintiffs. And I
11 think, going back to *Brnovich* tells us, you don't get to
12 substitute what the Legislature did until there is a violation of
13 federal law. And figuring out exactly what that is important.

14 And determining -- the plaintiffs for their motion have
15 to show that with all the inferences in favor of the state and why
16 the state did what they did and if they still prevail on all these
17 points -- and, again, we can't draw those inferences.

18 Mr. Hawley didn't discuss the totality of the
19 circumstances. I think that we all agree that if there is not
20 summary judgment for the defendants at this point, we're going to
21 trial on those issues.

22 So, again, just kind of pulling back to a few of the
23 larger points.

24 Mr. Hawley talked about the districts being small in
25 size. And we know Georgia has a lot of counties. We also have a

1 lot of state representatives and a lot of state senators, which
2 means that by nature our -- the geography of our districts is
3 going to be relatively small. So I think, again, going back over
4 and over to the 200/300 mile distance in *LULAC*, that was there.
5 But also the shape of that district was striking down from one
6 area into another. And that's a consistent feature we see on the
7 districts that are on Mr. Esselstyn's plans that he altered to
8 create these additional districts.

9 The other piece we have on the compactness score chart
10 Mr. Hawley showed, those charts Mr. Esselstyn testified didn't
11 include all of his districts. He only included the districts that
12 were new. So he didn't look at districts around the districts he
13 drew that were irregular in shape. And we'll get to those in our
14 motion on that part.

15 THE COURT: This eye test argument they're making, one
16 thing I need to look at is a past eye test. Is that a map that
17 can be distributed?

18 MR. TYSON: I think it is, Your Honor, because I think
19 by nature of the eye test means what is in the eye of the
20 beholder. So I think there is an element there in terms of that.

21 I think the bigger challenge is it's very easy to find a
22 set of metrics that will justify a particular outcome. And this
23 is kind of a statistical game at some level on the maps.

24 The eye test, I think for the shape of the districts,
25 while it's relevant to the racial gerrymander piece and I think

1 can be paired with, for example, a mapmaker's decision to only
2 look at race in terms of what goes in and out of district, which
3 that's what Mr. Esselstyn has testified that he used race to
4 decide what went in and what went out. That combined with the eye
5 ball test, I think can get you to a racial predominance issue.
6 But I think that race has standing on one of them, eye ball test
7 is kind of an idle holder by nature.

8 In terms of whether Mr. Morgan disputes the various
9 pieces, I think, again, it's the plaintiffs' burden at this point
10 in their motion. Whether Mr. Morgan offers testimony there or
11 not, he's provided data and information that we can argue and we
12 can test Mr. Esselstyn on the stand with. So, again, I don't
13 think that standing alone the fact that Mr. Morgan didn't specify,
14 I believe this district is also problematic, gets the plaintiffs
15 to summary judgement on these points because it involves weighing.

16 The other piece, Your Honor, in terms of the *Davis v.*
17 *Chiles* case, I think we've addressed this in our briefing. In
18 that decision the issue the Eleventh Circuit discussed was the
19 relationship of racial predominance and the drawing of districts.
20 But in that case they also found there was no racial predominance
21 in the drawing of the districts. They looked at it and said this
22 is a very normal looking district, the mapmaker didn't make
23 decisions based on race. So they really didn't have to reach the
24 question of how far is too far in a remedial plan.

25 And, again, I think it pushes us back onto this world

1 of, again, we're not asking the Court to go from no opportunity to
2 some opportunity; we're asking to go from some opportunity to more
3 opportunity. And so ultimately, at least on the evidence before
4 the Court, the plaintiffs are not entitled to summary judgment on
5 any of the factors here -- with the one exception/caveat from Mr.
6 Jacoutot earlier. I think you are correct that if you reject our
7 argument on *Gingles* 2 and 3, then summary judgment to the
8 plaintiffs would be appropriate. But we still would have an
9 opportunity at totality to raise the issues for polarization.

10 THE COURT: All right. There won't be any game at will.

11 MR. TYSON: And it didn't end the game with Rose either,
12 Your Honor, I think for Judge Grimberg, how he handled that.
13 So... But that's all we have to offer in response on *Grant*.

14 THE COURT: Thank you, Mr. Tyson.

15 MR. TYSON: Thank you.

16 THE DEPUTY CLERK: I think you have about four minutes.

17 MR. HAWLEY: I will only take two minutes.

18 THE COURT: Take all four, if you need to.

19 MR. HAWLEY: I have a sneaky suspicion that the
20 admonition about slowing down might have been directed in my way.
21 So maybe I'll take three minutes just in the interest of the Court
22 court reporter.

23 Just three brief responses to Mr. Tyson just now.

24 He pointed out that those charts that Mr. Esselstyn
25 produced with the compactness scores, doesn't include all of

1 districts he changed. I know that Mr. Esselstyn prizes the
2 presentability of information. And I think putting all of the
3 districts in would have been a polychromatic nightmare. And so he
4 focused on, again, what *LULAC* tells us to focus on. What is the
5 compactness of the illustrative districts.

6 But his report, the appendices, do include the full
7 information about each -- the compactness score of all 56 Senate
8 Districts and 180 House districts, both in the enacted plan and
9 the illustrative plan. So that evidence is there.

10 And also the average scores between the enacted plans
11 and the illustrative plans are essentially the same.

12 THE COURT: Mr. Hawley, let's take another hypothetical.

13 MR. HAWLEY: Sure.

14 THE COURT: Let's stay with this idea with you on two
15 and three. But I still have some questions about, one,
16 compactness. That's not a material disputed fact there. Tell me
17 why I'm wrong. Let's say I think that, one, there are disputed
18 material facts there. Tell me why I'm wrong.

19 MR. HAWLEY: So I would say that -- and actually there
20 is some language in *Fayette County* -- in *Fayette County*, the
21 Eleventh Circuit decision, that is essentially our -- we can
22 consult a rule book for how to resolve these issue on summary
23 judgment. And Judge Wilson emphasized, you have to be careful and
24 really be thoughtful about it.

25 But there is a quote there that I like. At summary

1 judgment the Court is both limited to deciding whether there is
2 sufficient evidence upon which a fact finder could find for the
3 non-moving party. Again, for the state. So we can take a step
4 back. You can set aside plaintiffs' evidence. What evidence has
5 defendants presented that can lead to a finding in their favor?
6 They have no meaningful evidence on the issue of compactness for
7 the six districts. They have legal arguments about whether or not
8 we need to look at the other districts to form conclusions. We
9 know that we don't because of *LULAC*.

10 They make the legal argument that the district has to
11 best be an enacted map on these metrics in order to be deemed
12 compliant with traditional redistricting principles. We know
13 that's not the case as *Bush v. Vera* said, the plurality of the
14 opinion there. We don't need the -- the illustrative map doesn't
15 need to best the map, an endless beauty contest. That's not the
16 inquiry we're looking for.

17 They have legal arguments on their side, but they don't
18 actually have any evidence to demonstrate that these districts are
19 not compact. We have not only the eye ball test, which, granted,
20 is an inherently sort of a qualitative exercise. We have
21 quantitative evidence of compactness as well, and we have
22 Mr. Esselstyn's testimony and his deposition, and in his report
23 about other shared interests that these various districts have.

24 THE COURT: What you asking me at this stage is to make
25 a decision based on a difficult trial standard rather than a

1 summary judgment standard?

2 MR. HAWLEY: No. We believe that using that summary
3 judgment standard, which is asking if there are any genuine
4 disputes of material fact. And here we believe that there are not
5 as to first *Gingles* precondition. That's the summary judgment
6 standard, and we believe that is satisfied here because of the
7 complete absence of meaningful evidence on the other side.

8 The Court is not supposed to weigh evidence at summary
9 judgement, but weighing presupposes that there is something on the
10 other side. If there is nothing on the other side, no weighing is
11 necessary. And we're not asking for the Court to draw any
12 improper influences -- inferences, especially not on the first
13 *Gingles* precondition, because we have evidence of compactness, we
14 have evidence that the maps comply with traditional districting
15 principles, and there is not a shred of compelling evidence for
16 these six districts on the other side. Not enough to rule and
17 defend in the state's favor on the other side, and certainly
18 nothing to develop a genuine dispute of material fact.

19 THE COURT: They say you're finished.

20 MR. HAWLEY: Thank you.

21 THE COURT: Anybody need a break? Let's keep going
22 then.

23 MR. TYSON: I'm going to hand up, with your permission,
24 a few more sets of maps.

25 THE COURT: This is a new motion.

1 MR. TYSON: All right. Last round of districting plans
2 here, Your Honor.

3 So not to recap where we've been all the way along. I'm
4 just going to focus in on *Gingles* 1 and the issue particularly
5 with Mr. Esselstyn's plan. And unlike the plans in Alpha Phi
6 Alpha, Mr. Esselstyn's plans have higher population deviations
7 than the enacted plans. They have more split counties than the
8 enacted plans. So when we talk about what is the evidence on
9 *Gingles* 1, I think recognizing there's a distinction there is
10 important because the Court has to look at what's going on with
11 that.

12 So looking -- just to go kind of district by district, I
13 know the plaintiffs are not moving particularly on Senate 23. We,
14 obviously, are moving on all claims. So I want to go ahead and
15 cover these pieces.

16 This is a similar heat map of what we looked at
17 previously. And you can see, again, if you look at around the
18 perimeter of the districts starting in Baldwin County, you see
19 racial splits there. Greene County taking in more heavily Black
20 population, Wilkes County taking in more heavy Black population,
21 excluding the white population. Same in McDuffie as we curve all
22 the way around on the plan. And this data is borne out by the
23 information of what Mr. Esselstyn included and excluded in
24 District 23. In every situation where there is a split county,
25 the Black percentage of what's included in the district is much

1 higher in many cases than what is included outside of the
2 district. The one exception is Richmond County there where there
3 is a District 22 and 23 are both majority Black. And we would
4 submit, just like the evidence in the Constitutional cases of
5 racial splits of counties being evidence of racial predominance,
6 here Mr. Esselstyn had no political data, did not look at any
7 political data, and so the only explanation is a racial focus in
8 his map drawing.

9 District 28 the plaintiffs showed the shape here
10 earlier, but if you look at the underlying demographics, you can
11 see, again, a pattern of including heavily Black populations in
12 Fulton, Clayton, and Fayette, and then putting about 40 percent of
13 the district into Coweta County, which is only 25 percent Black
14 and going down to Newnan there in the southern part of the
15 district down at this part here.

16 So, again, combining communities to reach racial goals,
17 the shape is present there, the shape is nice and compact. And I
18 think looking at compactness scores alone doesn't really tell you
19 a lot because you have to look at the underlying population and
20 see what is the explanation for this district. And Mr. Esselstyn
21 wasn't able to offer that.

22 In terms of him having a memory test, I think it's the
23 plaintiffs' burden to show why was this district drawn the way it
24 was drawn? If it was -- if it was -- if there was no other
25 evidence beyond a racial goal, then the plaintiffs' haven't

1 carried their burden, we submit, under *Gingles* 1.

2 District 25 on the Senate map I think is a special case
3 because it is a nice compact district in the middle of Henry
4 County there. But, again, to understand how Mr. Esselstyn drew
5 District 25, you have to look at what happens around it. So on
6 one side you have the District 34 there, again, taking heavily
7 Black populations in Clayton, combining that with populations,
8 basically, from the airport down to Peachtree City to create a
9 district, striking that district down along the way to create a
10 majority Black district on one side and free up Henry County
11 population.

12 On the other side we have a district that runs from
13 South DeKalb, where the population in the district is 94.9 percent
14 Black, all the way down to Butts County, Georgia, coming through a
15 more white area of Henry County along the way. Again, these are
16 the kinds of decisions that are necessary to free up what
17 Mr. Esselstyn does in District 25, and why, we would submit, that
18 it's very easy to look at a district in isolation. It's much more
19 difficult to consider is this District 25 a district that must
20 have been drawn, especially when you have to modify all these
21 districts around it, that the Legislature failed to draw a
22 district it should have here.

23 Those are the Senate Districts, Your Honor.

24 On the house districts you see a similar pattern in the
25 Macon districts. Each of the districts that's majority Black is

1 just barely so; 50.14, 50.64, 50.38, 51.5. And we would submit
2 when you're at that tight of a tolerance, you have to be aware of
3 your racial decisions because you're drawing right at the edge of
4 what's considered a majority district. And you see on the heat
5 map here, the division of the Black population in Macon into four
6 separate districts, the running of District 145 and into the more
7 heavily Black population in Warner Robins around the Air Force
8 base, and then up into Baldwin County to capture Black voters in
9 the Milledgeville area. So we would submit, again, this shows
10 evidence of racial predominance.

11 Mr. Esselstyn's testimony here about public testimony
12 and about other issues that he considered, I believe all came
13 after he drew the map. And so it couldn't have informed -- he's
14 looking for justifications after he had drawn these districts.

15 For House District 64, the shape, again, is relevant.
16 We start in the heavily Black area of Fulton County that's 96
17 percent Black, and drive out to Paulding County. This is, again,
18 is about 40 percent of the district here, which is 32 percent
19 Black, much lower percentage. And the striking is necessary to
20 create this district. And, again, we're back to kind of where we
21 started on the geographic compactness of the minority community,
22 and what we're trying to represent in the district is this
23 District 64 compelled and required by Section 2 to run out across
24 these three counties and connect them. And, again, Mr. Esselstyn
25 couldn't identify a reason for doing that.

1 In South Metro you also see this similar pattern on
2 House. Districts that begin up here in Clayton County strike
3 their way down to Brooks and South Fayette County, starting in the
4 southern part of Clayton, running through Hampton down into rural
5 areas of Spalding County. And, again, these are areas where one
6 county is going to be heavily majority Black and the other
7 counties are going to be much lower to create these additional
8 majority-Black districts.

9 And in the Henry County area, we see the same pattern.
10 District 91 starts in South DeKalb, runs all the way down into a
11 more heavily white area of Henry, staying with the striking of
12 District 116 to then allow the population for District 117, which
13 Mr. Esselstyn says is a new majority-Black district.

14 So, Your Honor, just in terms of looking at the *Gingles*
15 1 maps, we, again, see a mapmaker making decisions primarily based
16 on race, not able to explain the reasons for those districts, and
17 uniting populations with this kind of striked approach or
18 race-conscious splitting of counties to do that, which we would
19 submit is not permissible as a remedy under *Gingles* 1.

20 And with that, Your Honor, I'll hand it over to
21 Mr. Jacoutot. I think he has a couple of last points on *Gingles* 2
22 and 3.

23 THE COURT: Thank you.

24 MR. TYSON: Thank you.

25 MR. JACOUTOT: Thank you, Your Honor. I did just want

1 to clear up a few remaining things. I don't think we need to
2 rehash everything we talked about this afternoon and earlier this
3 morning.

4 I just want to point out that it is not our standard
5 that requires more than proving *Gingles* 2 and 3. It's the
6 question -- excuse me. It's not that our standard requires more
7 than proving *Gingles* 2 and 3, it is the question of how to prove
8 or the evidence required to prove two and three was exactly what
9 is in dispute in Part III-C of the *Gingles* opinion. And the
10 dispute is --

11 THE COURT: Say that again. Say that again.

12 MR. JACOUTOT: Sure.

13 It's that the question of how to prove or the evidence
14 required to prove *Gingles* 2 and 3, that was exactly what was in
15 dispute in Part III-C of the *Gingles*' opinion. The dispute was
16 whether, as Brennan thought, Justice Brennan thought that the mere
17 mechanical evidence of cohesion and bloc voting was sufficient to
18 show racial polarization and demonstrate *Gingles* 2 and 3 or was it
19 something more. And I believe we've shown today that Justices
20 White and O'Connor felt that there was something more than that is
21 necessary in the usual case. Five justices were worried about
22 that being sufficient.

23 And I do just want to point out that regarding the
24 historical expert reports -- using the historical expert reports
25 to demonstrate *Gingles* 2 and 3 would be somewhat out of character.

1 It's inherently a statistical inquiry. And we've shown cases here
2 where the statistics pan out and do show racial polarization right
3 in Sumter County being an example. But the statistics that we
4 have here are simply not enough, and I'm not going to rehash why
5 we feel that.

6 Unless Your Honor has any further questions...

7 THE COURT: Thank you, sir.

8 MR. HAWLEY: Thank you, Your Honor. A few brief points,
9 and, again, we won't try to avoid rehashing things done, if
10 possible.

11 Mr. Tyson showed a bunch of heat maps showing the
12 demographic information in these maps. From that alone, he
13 concludes that these decisions were drawn, these maps -- these
14 districts were drawn, quote, "primarily based on race." But that
15 is not what those maps show. Those maps show only the
16 unremarkable fact that Mr. Esselstyn, consistent with *Bartlett v.*
17 *Strickland*, drew illustrative districts that had Black voting age
18 populations above 50 percent. That is far from being a
19 controversial point. That is what the requirement is under
20 Section --

21 THE COURT: But the problem is that he does not give any
22 other reason or cannot show any other reason for drawing it other
23 than alining the Black population.

24 MR. HAWLEY: Certainly -- and there are times, I will
25 say, he does give those reasons. To say he gives no reason, I

1 think, kind of ignores both deposition testimony and his report.
2 And we discuss this in our brief. But, for example, a number of
3 times he identified counties as being within the Atlanta
4 Metropolitan area. As Ms. Khanna described earlier, that is sort
5 of an objective way of defining a community of interest. He also
6 looked at other landmarks and things. He incorporated public
7 comments. So it isn't -- again, it is a district by district
8 inquiry. But to say that he had no reasons other than race is
9 simply untrue. And when he was flat out asked if race
10 predominated in any of these decisions, he said no.

11 THE COURT: Look, if he splitting counties, splitting
12 precincts to get to that 50 percent, could it be inferred that you
13 are just trying to get to race and you're just saying you're doing
14 it? And that's part of his argument is that you're splitting
15 counties, you're splitting precincts to get to that -- some of it
16 was something like 55.5, 51.2, could I infer, well, he's trying to
17 get to that 50 percent mark to do it?

18 MR. HAWLEY: I would say, first of all, if that is an
19 inference, then by -- again, by the defendants' own statement,
20 that is not an appropriate undertaking for summary judgment.

21 But even setting that aside, I don't think that is a
22 fair inference, because as with any map drawing decisions about
23 balancing criteria, Mr. Esselstyn was consistent about that in his
24 report and in his deposition. He has to hit 50 percent because
25 the U.S. Supreme Court set that benchmark. How to do that

1 involves at times weighing and balancing the other criteria,
2 keeping a county whole versus splitting a county. Making some
3 population deviation within the kind of the acceptable five
4 percent balanced versus not. Those are individualized decisions
5 that he -- as he testified, he made those decisions in balance
6 with each other. The very fact that you hit close to 50 percent
7 on some of the Macon-Bibb counties --

8 THE COURT: Three of them.

9 MR. HAWLEY: Three of them. That alone proves that --
10 all that proves is that he has, again, satisfied that the U.S.
11 Supreme Court's standard. But whether race predominates -- but I
12 will say this. Again, if the Court has any doubts about what --
13 how his specific methodology went, if the Court would like to
14 assess Mr. Esselstyn's credibility, ask him some of these
15 questions, then going to trial is the appropriate course. And we
16 acknowledge that all -- we want this Court to get this right, and
17 we want to get this right, and if that means discussing *Gingles* 1
18 further or even distinguishing between the different districts,
19 because again it is an individualized district alternative and,
20 you know, some districts -- not all districts are created equally.

21 THE COURT: You hit on a key part. At this point in
22 time, I can't weigh credibility of what he says or what he did,
23 but I can at trial.

24 MR. HAWLEY: That's absolutely true. If the Court feels
25 that -- again, especially using kind of *Fayette County* as sort of

1 a helpful guide as to when summary judgment is appropriate in a
2 Section 2 case and when it is not, if credibility determinations
3 are required here -- we'd always say they are not, again, because
4 of the absence of evidence on the other side. But that being
5 said, if further interrogation in Mr. Esselstyn's thought process
6 and his decisions, if that is required, then that is an issue that
7 we can have at trial. But it's certainly not an issue that should
8 be resolved against plaintiffs on summary judge and end this case
9 when the only evidence they have is, again, descriptive evidence
10 of how these districts look without any evidence about the intent
11 of Mr. Esselstyn or any other circumstantial evidence of illicit
12 racial predominance.

13 There's no bright line in racial gerrymandering cases.
14 It is a complicated inquiry. You have to look at many different
15 issues. Simply pointing to a heat map and seeing, you know, where
16 Black voters live and how the districts are drawn, that certainly
17 falls well short of any kind of conclusion that Section 2 isn't
18 satisfied here because these maps are not compact or not an
19 appropriate remedy or however they would characterize it. Those
20 are issue that would need to be determined by the finder of fact.

21 THE COURT: Well, I'm still trying to think of what
22 Mr. Esselstyn said that takes it outside of Mr. Tyson's argument.
23 Mr. Tyson's argument, Judge, there is no other way you can come to
24 the conclusion that he drew these districts based on race. He
25 doesn't argue that he tried to put people together at the same

1 military bases or -- I'm trying to think. What is there for me to
2 say, no, Mr. Tyson, this is a disputed fact?

3 MR. HAWLEY: Sure. I will tell you one thing is what we
4 don't have the benefit of right now is fact witness testimony. If
5 you remember, at the PI stage from Senator Carter who talked about
6 how these districts -- how they perform on the ground? Who are
7 people that live in these districts, and how do they -- what do
8 they have to do with each other? That is evidence that we can
9 hear in trial that we don't have in the record right now.

10 THE COURT: Well, Senator Carter talked about -- what
11 did he call them? Well, being a lawyer is a big honor. But he
12 talked about going up toward -- he was talking about the ones in
13 South Georgia or the Augusta area.

14 MR. HAWLEY: Sure. Not to show our hand truly, but in
15 our pretrial disclosures we identify a number of fact witnesses
16 from -- throughout Georgia who can speak to these other districts
17 much in the way that Mr. Carter referred to the districts in the
18 Atlanta Metropolitan area, and those are ways of establishing the
19 communities of interest that exist in these districts, the
20 compactness. We don't have that in the record right now. What we
21 do have is Mr. Esselstyn's testimony, and we have the objective
22 metrics of compactness.

23 THE COURT: But that's Mr. Tyson's argument, though, you
24 don't have anything in the record to point to other than as Mr.
25 Tyson is saying, it was put together based on race. You don't

1 have anything to point to, that says, well, he tried to tie
2 communities that military bases together. He tried to tie
3 together communities that were all rural, whatever. That's his
4 argument.

5 MR. HAWLEY: Right. But, again, I would encourage the
6 Court, again, to look at what Mr. Esselstyn has actually said
7 about these different districts, because I think there is more
8 there than, perhaps, what the defendants are giving him credit
9 for. To reach the inference that race predominated when we don't
10 have any other evidence that it did, that is an inference that is
11 not appropriate for summary judgment based only on the descriptive
12 criteria of how these districts are drawn. It is a leap to then
13 infer intent to Mr. Esselstyn, and to discount the other criteria
14 that might justify the creation of these maps.

15 Even setting aside what we discussed in our brief
16 whether or not -- whether, kind of, the racially predominance
17 inquiry is appropriate in this -- the first *Gingles* precondition.
18 Anyway, Courts have suggested that it's not precisely for this
19 reason. Because in the Fifth Circuit, *Robinson v. Ardoin*,
20 recognized the tension between requiring -- Section 2 requires
21 some consideration of race, but too much consideration of race is
22 racial gerrymandering. There is a tension. But it's a line that
23 the state is expected to thread as part of its redirecting
24 obligations, but it is not something that I think -- underscores
25 that you can't jump to the inference of racial predominance in a

1 case like this, because some consideration of race is expected.
2 And the evidence right now, that's all we have. Mr. Esselstyn
3 admitted as much, that he did have racial demographic information,
4 and that at times that -- that it informed his decisions. He
5 never said it predominated. In fact, he said the opposite. So I
6 think with that evidence in the record to infer that he -- that,
7 in fact, race did predominate, that's an inference that this Court
8 simply cannot not reach on summary judgment.

9 Last thing on *Gingles*. I feel we dissected *Gingles*, you
10 know, basically, talking about comas and semicolons at this point,
11 but one last note on *Gingles*.

12 The *Gingles* majority, which is to say the four justices,
13 including Justice Brennan and Justice White, joined together in
14 adopting the district court's definition of racially-polarized
15 voting, which was a correlation between the race of voters and how
16 they vote. That is something that all five justices agreed to.
17 That is, in essence, *Gingles 2* and *Gingles 3*; is their cohesion on
18 one side, and is there cohesion on the other side that defeats
19 minority-preferred candidates. That was the majority of the
20 *Gingles* court as we discussed in our briefs. And that definition
21 is very important, because that is what has driven every case
22 subsequently that has treated *Gingles 2* and *3* as objective factors
23 without concerns about causation. That is how this Court
24 approached it at the PI hearing. That is good law, and that comes
25 from the *Gingles'* majority.

1 Again, where Justice White -- we don't even need Justice
2 O'Connor to reach our conclusion here. We have Justice White,
3 because he agreed with that definition. He parted ways with Part
4 III-C, the *Gingles* plurality opinion, only to the extent that
5 Justice Brennan suggested that causation and these other
6 qualitative issues were never relevant to the inquiry. Justice
7 White said I don't agree with that. He admitted it's not relevant
8 here. Because under the facts of *Gingles*, there was -- like we
9 have in this case -- striking polarization between Black voters
10 and white voters. He said, I don't need to talk -- essentially, I
11 don't need to worry about causation here under the facts of this
12 case. But I'm concerned to say that it's never relevant precisely
13 because there could be occasions where Black voters are not
14 foreclosed from participating in the political process, because
15 white candidates of choice, court Black voters engaged in partisan
16 politics, interest group politics, and are able to achieve winning
17 majorities with white and Black voters. Because in that case, the
18 Black candidate of choice might not win, but Black voters are part
19 of a coalition that elects the white-preferred candidate. In that
20 case there might not be a Section 2 violation, which is why deeper
21 inquiries into causation might be required.

22 But that wasn't the case in *Gingles*, and that is
23 certainly not the case here where we do not have Black crossover
24 voting for white-preferred candidates. It is infinitesimally
25 small in these elections in Georgia in the areas where we're

1 moving for summary judgment.

2 So using that, Justice White's concurrence simply does
3 not apply here. And his suggestion that causation is sometimes
4 relevant, is consistent with what this court said at the PI stage.
5 As part of the totality of the circumstances, perhaps, we will
6 look at issues of causation. But, again, the Eleventh Circuit has
7 been clear, once you have second and third *Gingles* preconditions,
8 that creates an inference that then defendants have to rebut. We
9 have that inference here because we've satisfied *Gingles* 2 and 3
10 as the objective metrics that the *Gingles* majority said that they
11 are.

12 THE COURT: Thank you, sir.

13 MR. HAWLEY: Thank you.

14 THE COURT: Mr. Tyson, this defendant alluded to the
15 credibility of the expert, something I should weigh and weigh at
16 the trial. In other words, he does say I considered race but it
17 wasn't a predominant issue.

18 MR. TYSON: Yes, Your Honor. So I think, number one, if
19 you're weighing credibility of experts, yes, that is a trial
20 question. And if from your perspective Mr. Esselstyn's blanket
21 statement I didn't consider race is enough to get across that
22 line, then I think that becomes a trial issue.

23 We would submit that the relative lack of evidence on
24 all of the other explanations doesn't overcome a statement of "I
25 didn't consider race." And if "I didn't consider race" is enough

1 to get you across that line, then you just can include that in an
2 expert report and you're always getting to trial.

3 I think the key point is, is it a material fact at this
4 point? Is it disputed by a material fact about how Mr. Esselstyn
5 drew those districts? I want to make sure I'm being precise.
6 Mr. Esselstyn did provide some reasons.

7 THE COURT: Yes.

8 MR. TYSON: But like Mr. Cooper, they were very much on
9 the platitude kind of idea -- I think the closest he could provide
10 was the Georgia fall line between Macon and Milledgeville. He
11 mentioned Fort Gordon around the Augusta area, but that was about
12 the extent of where we were. Most of it was all along the lines
13 of it's all in Metro Atlanta, which to me is not enough to create
14 a genuine issue of material fact.

15 So, again, I think the key point is looking at the data,
16 looking at the lack of explanation, and then Mr. Hawley talked
17 about, well, we had Senator Carter at the PI, we had these other
18 witnesses. The plaintiffs could have come in their response with
19 declarations from those witnesses of, yes, those districts
20 Mr. Esselstyn drew unites my community in some way. They haven't
21 done that. They've relied on Mr. Esselstyn's testimony here.

22 So that's our view why there it's not a disputed fact.
23 But I think you are correct, to the extent it requires a weighing
24 of evidence in some way or a credibility assessment about
25 Mr. Esselstyn's testimony, then that would be a triable issue.

1 That's why we also tried to rely on Mr. Esselstyn not looking at
2 Mr. Morgan in terms of any disputes on those points.

3 I think the last point, Your Honor, just -- Mr. Hawley
4 mentioned infinitesimally small levels of support for
5 Black-preferred candidates as we kind of look at the *Gingles* 2 and
6 3 issues. That is exactly our point. If you look at the other
7 cases that found racially-polarized voting under *Gingles* 2 and 3,
8 you don't find situation where the only consistent explanation is
9 partisanship. You find voter behavior changing as the race of the
10 candidate changes, as the dynamic of the race change. And as all
11 of the charts show, there is absolutely no change in voter
12 behavior on either front when they're presented with different
13 kinds of candidates along the way.

14 So we submit that we're entitled to summary judgment on
15 those points, but to the extent we're not, we'll be ready to go to
16 trial if that is what Your Honor says.

17 THE COURT: Thank you, Mr. Tyson.

18 MR. TYSON: Thank you, Your Honor.

19 THE COURT: I think that's it.

20 All right. Let me tell you my plan. I'm not going to
21 rule, which you-all figured out, until I hear from the Supreme
22 Court. They've got to tell me -- correct the record. They don't
23 have to do anything. But in the past, they have made rulings by
24 June 30 at the latest.

25 I don't plan on ruling on these motions for summary

1 judgment until after June 30. So let me kind of give you-all a
2 calendar of what may happen. If they rule, let's say, on June 30,
3 I will be asking supplemental briefs to be due by July 7. You
4 don't have to file a supplemental brief, but something in my mind
5 tells me that they're going to say something that you-all probably
6 want to file supplemental briefs on. Okay?

7 July 7. You have until July 7. Does anybody think you
8 need more time? I'm asking you-all to file at the same time, July
9 7 send me supplemental briefs.

10 At this point in time, I don't plan on doing another
11 oral argument. But if somebody -- you need to tell me. I think
12 I'm going to be -- you-all have been quite thorough in your briefs
13 that you sent me, and I really appreciate it. And today you've
14 been quite thorough.

15 I've thrown question at you-all that I have been
16 pondering. I was kind of anticipating and do things -- it's just
17 the way I do things. I'm sorry. But I don't think I will need
18 another oral argument after I get your briefs on July 7 -- unless
19 somebody says, I really want to be heard. Tell me now.

20 Then what happens next is then I'm going to try my best
21 to get you a summary judgment order, okay -- put those knives down
22 -- by July 21. The reason, if that's the case, we will then have
23 a pretrial conference if there is something left to try on August
24 the 15th. Pretrial orders be due on August the 22nd. The
25 deadline to Daubert motion will be August the 22nd. The deadline

1 to file a motion in limine will be August the 22nd. Deadline to
2 file objection to any video depositions will be August the 22nd.

3 Now, you-all may be saying, Judge, that's a lot to get
4 done, because I have a trial date set if it going to trial is
5 September the 5th, the day after Labor Day.

6 I'm trying to balance two things: Plaintiffs on one
7 hand is saying to me, Judge, we really need these done so it can
8 affect the 2024 election. And the defendants are saying, Judge,
9 we need to be able to present our case and build our record.
10 That's, basically, what I'm hearing.

11 I have been doing this long enough to know that you-all
12 probably know how I'll rule in that trial, but let me add one
13 other thing. September the 25th, proposed findings of facts and
14 conclusion of law will be due from you-all.

15 I'm anticipating trial is going to take, roughly, two
16 weeks. So once I get those findings of facts and conclusion of
17 law from you-all, I'm guessing two to three weeks, maybe less,
18 maybe more. I should get an order back to you in October.

19 Now, this is saying we're going to have a trial on the
20 issues. But right now I can't tell you how many issues you're
21 going to have in there. So this is giving you a broad overview.
22 Okay? It might be narrower or it might be wider. It's going to
23 depend on -- I heard a lot today that's going to help me fashion
24 what I think the issues are, but the Supreme Court is really going
25 to make the final decision for me, obviously.

1 After that, once I rule and, you know, obviously one or
2 both sides are going to appeal the case, it is out of my hands.
3 It's up to the people in the Eleventh Circuit.

4 What I'm saying to you plaintiffs, it's going to be a
5 whole lot of fast moving on a whole lot of different ends for it
6 to affect the 2024 election. And that's all I can say about that.
7 But I have no control after it leaves me.

8 Questions? Do you want me to go over the schedule
9 again? We'll prepare an order. If we haven't already sent them
10 an order on their schedule.

11 Yes, sir?

12 MR. HAWLEY: Thank you, Your Honor. If we hear from the
13 Supreme Court before June 30, should we assume a similar schedule
14 will follow with supplemental briefings due a week later?

15 THE COURT: Great question. Let's say they tell me
16 something on June 16 or June 15, you'll get a new schedule.
17 You'll get a whole new schedule from me. It may be saying
18 supplemental briefs due -- if I got a ruling on June 15, I may say
19 supplemental briefs due on June 25, something like that. I'm
20 trying to give you-all enough time to prepare for trial. But your
21 question is a great question.

22 You know, I think most of you-all were either district
23 or circuit clerks -- I think you-all have been Supreme Court
24 clerks. In the past, they usually would just tell you the last
25 week. That's what we kind of went through and looked at and

1 talked to people. So I don't know. If they tell me something
2 tomorrow...

3 I was reading the other day that South Carolina has a
4 redistricting case that the Supreme Court said -- I kind of
5 laughed, when they said we need you to put it on the October trial
6 -- not trial, oral argument, and we get a ruling to you-all by
7 January the 1st. I said okay. I'm not going -- I'm going to send
8 you a brief outline of what the schedule is like in an order.

9 Good question, though. It may changed, but I don't anticipate it.

10 Anything else?

11 Did I miss anything, ladies?

12 Thank you-all, have a great day and a great rest of the
13 week.

14 (The hearing concluded at 3:34 p.m.)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

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

This the 18th day of May, 2023.

/s/Viola S. Zborowski
VIOLA S. ZBOROWSKI,
RDR, FAPR, CMR, CRR, RPR, CRC
OFFICIAL COURT REPORTER TO
THE HONORABLE STEVE C. JONES