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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GOLDEN BETHUNE-HILL, et al.,	:
	:
Vs.	:
	:
VIRGINIA STATE BOARD OF	:
ELECTIONS, et al.	:
	:

Civil Action No.
3:14CV852
July 9, 2015

COMPLETE TRANSCRIPT OF THE BENCH TRIAL

HEARD BEFORE: THE HONORABLE ROBERT E. PAYNE
THE HONORABLE GERALD BRUCE LEE
THE HONORABLE BARBARA M. KEENAN

APPEARANCES:

Kevin J. Hamilton, Esquire
Perkins Coie, LLP
1201 Third Avenue
Suite 4800
Seattle, Washington 98010

Bruce V. Spiva, Esquire
Aria C. Branch, Esquire
700 13th Street NW
Suite 600
Washington, D.C. 20005
Counsel for the plaintiffs

Peppy Peterson, RPR
Official Court Reporter
United States District Court

1 APPEARANCES: (cont'g)

2 Tony F. Troy, Esquire
3 Eckert Seamans Cherin & Mellott, LLP
4 707 East Main Street
Suite 1450
Richmond, Virginia 23219

5 Daniel A. Glass, Esquire
6 Eckert Seamans Cherin & Mellott, LLC
7 1717 Pennsylvania Avenue, NW
Suite 1200
Washington, D.C. 20006

8 Godfrey T. Pinn, Jr., Esquire
9 Harrell & Chambliss, LLP
707 East Main Street
Suite 1000
10 Richmond, Virginia 23219
Counsel for the Virginia State Board of Elections

11 E. Mark Braden, Esquire
12 Katherine L. McKnight, Esquire
Jennifer M. Walrath, Esquire
13 Richard B. Raile, Esquire
Baker & Hostetler, LLP
14 1050 Connecticut Avenue, NW
Suite 1100
15 Washington, D.C. 20036

16 Dalton L. Oldham, Jr., Esquire
Dalton L. Oldham, LLC
17 1119 Susan Street
Columbia, South Carolina 29210
18 Counsel for Virginia House of Delegates

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P R O C E E D I N G S

THE CLERK: 3:14CV852, Golden Bethune-Hill, et al., versus Virginia State Board of Elections, et al., versus Virginia House of Delegates.

JUDGE LEE: Good morning, counsel. Good morning, Delegate Jones.

JUDGE PAYNE: Good morning.

MR. HAMILTON: Your Honors, good morning. I wanted to bring to the Court's attention two items: Number one, there was a docket entry last night referencing the stipulation, the factual stipulation of the parties, and I believe the clerk made an error. The correct docket number is 83, not 80, and that's, no doubt, due to my fault because I misspoke when I first said 80 and then corrected it to 83. So the correct docket entry should be docket 83, and I just wanted to correct that for the record.

JUDGE PAYNE: Thank you, Mr. Hamilton.

MR. HAMILTON: And then second, I neglected to point out to the Court and bring to the Court's attention the previously submitted deposition designations filed by both parties. It's been previously filed. That's docket entry number 90, and that, of course, is part of our case.

JUDGE PAYNE: You mean as part of your case.

1 MR. HAMILTON: Yes.

2 JUDGE PAYNE: All right. I guess technically
3 we'll reopen the case and allow those entries in. You
4 have no objection, Mr. Braden? I take it you knew they
5 were coming.

6 MR. BRADEN: I have no objection, Your Honor.

7 JUDGE PAYNE: All right, they're part of the
8 case, and thank you very much, Mr. Hamilton, for catching
9 that. Sometimes in the heat of these things, we overlook
10 a few things. No harm, no foul.

11 MR. HAMILTON: Thank you, Your Honor.

12 JUDGE PAYNE: Mr. Spiva, are you going to pick
13 up?

14 MR. SPIVA: Yes, Your Honor, thank you.

15 JUDGE PAYNE: Delegate Jones, I remind you, you
16 are under the same oath you took yesterday.

17 MR. JONES: Yes, sir.

18

19 **STEVEN C. JONES,**

20 a witness, called at the instance of the defendant,
21 having been previously duly sworn, testified as
22 follows:

23 CROSS-EXAMINATION

24 BY MR. SPIVA: (resuming)

25 Q Good morning, Delegate Jones. How are you doing?

1 A Great. Good morning to you.

2 Q Thank you. I think yesterday when we stopped,
3 Delegate Jones, we were looking at Plaintiffs' Exhibit 35.
4 Do you still have that notebook in front of you?

5 A Yes, sir.

6 Q Could you turn to Plaintiffs' Exhibit 35, please.

7 A I'm there.

8 Q And if you could turn to page 72, I'd appreciate it.

9 MR. SPIVA: Your Honors, would it be all right if
10 we put a demonstrative exhibit? It was one we've used
11 previously.

12 JUDGE PAYNE: Sure. No objection, Mr. Braden?
13 You know what it is?

14 MR. BRADEN: Actually, I do object to that, Your
15 Honor. I have no problem with everything below the top
16 line, but on the 55 percent rule, it does not seem to
17 be --

18 JUDGE PAYNE: You mean the caption?

19 MR. BRADEN: The caption is incorrect.

20 JUDGE PAYNE: Take it down if he's objected to it
21 unless you want to cover up the caption.

22 MR. SPIVA: That's fine, Your Honor.

23 JUDGE PAYNE: All right. I think he's right.
24 That's your argument, and he's got a different position.
25 We can't go both ways.

1 MR. SPIVA: Understood.

2 JUDGE PAYNE: Take that off the slide, please.

3 Thank you.

4 Q So, Delegate Jones, if I could turn your attention to
5 page 72 of Exhibit 35, starting at line five, Delegate
6 Armstrong asks you a question. He says, "So the gentleman
7 has stated that in his opinion nothing below a 55 percent
8 minority-majority district would be sufficient for the
9 minority community to elect its candidate of choice?"

10 Delegate Armstrong asked you that question; correct?

11 A That is correct.

12 Q And in the next line, starting line ten, you answer,
13 "I'm not sure he was listening closely. I said it's my
14 opinion from the testimony that was received during our
15 public hearings that the community felt that they needed a
16 percentage of 55 percent or better. That was my response
17 to the gentleman."

18 And that was your response and statement on the floor
19 of the House; is that correct?

20 A That is correct.

21 Q Okay. Let me ask you to turn in the same exhibit,
22 Plaintiffs' Exhibit 35, to page 107, and I'm going to
23 start with the statement of yours on line 16, Mr. Jones.
24 It says, "Mr. Speaker, I must admit to the gentleman -- I
25 told my wife I wouldn't use any versus from songs, so I

1 won't. I'm a little dazed and confused. I'm looking here
2 at the -- what I have for the commission plan, option one,
3 and I have a high percentage of black voting-age
4 population of 56.8 and a low of 52.7.

5 "Now, I can tell the gentleman in House Bill 5001 that
6 is substituted before this body, we -- every single,
7 solitary district majority-minority is over 55 percent.
8 Now, I know I wasn't that good at math. I'm not a math
9 major, but from my reading of this and my double-checking
10 it, that's what I have.

11 "So maybe we just have -- you know, numbers can say
12 different things to different people, and I can stand to
13 be corrected based upon what I've had available to me
14 throughout this process and I have -- and I am a detail
15 person. I double-check it twice. You know, I'm not a
16 very good carpenter, so I always measure three times
17 before I cut one time.

18 "So I'm looking at it, and I do not agree with that
19 statement. As a matter of fact, the average black
20 voting-age population is 54.4 percent in the 12 plan from
21 the commission."

22 That was also your statement in the floor of the
23 House; isn't that right?

24 A That is correct, and I was speaking in reference to
25 the 55 percent that was the DLS which rounded to greater

1 than 100 percent.

2 Q Okay, fair enough, but you didn't say in that
3 statement that you -- there was this different
4 calculation, that there was a DOJ black calculation that
5 was less than 55 percent, did you?

6 A No, I did not, but I did know that the method I
7 introduced had three districts that were below the
8 55 percent.

9 Q But you didn't note that in the statement in the
10 House, did you --

11 JUDGE PAYNE: Mr. Spiva, we can read and
12 understand what he did not say. There's no need to ask
13 him what he didn't say. You can make that in your
14 argument, but you don't need to take up time doing that.

15 Q Let me ask you to turn to page 113 of the same
16 exhibit. It's starting on line one. Delegate Morrissey
17 asks you a question. He says, "Given that the gentleman
18 then studied the plan, I would ask him, does he
19 distinguish as there being a difference between a
20 55 percent BVAP versus 53 BVAP," and you say, "Mr.
21 Speaker," and Delegate Morrissey continues, "That is, does
22 the gentleman consider that a significant and meaningful
23 difference," and you respond, "Mr. Speaker, I would say
24 based on the testimony that we have, that we heard during
25 the process, I would say yes, based on the testimony from

1 the community."

2 Is that -- that was your response to Mr. Morrissey on
3 the floor of the House?

4 A Yes. That was based on testimony from the community
5 and also just election returns that -- in elections that I
6 had observed over the years.

7 Q And let me ask you, you've mentioned testimony from
8 the community. Are you referring to the community
9 meetings that you held around the state at -- as part of
10 the redistricting process? You had testified, I think,
11 about that yesterday, that there were these community
12 meetings that you held, public meetings?

13 A That and from the members of the black caucus, yes.

14 Q Okay. But in terms of input from the community, you
15 are primarily talking about these public hearings that you
16 had?

17 A And the black caucus, yes, sir.

18 Q So if we scour the transcripts of those hearings,
19 those public documents, isn't it fair to say that we won't
20 find one reference to the need for a 55 percent or greater
21 BVAP in the 12 challenged districts?

22 A I did not read -- I did not attend every public
23 hearing. I did not read the transcripts from every one of
24 those public hearings.

25 Q Do you recall a specific instance of a community

1 member coming into one of these public hearings and saying
2 that their district, one of these challenged districts
3 needed to have a 55 percent or greater BVAP?

4 A No, I don't, but I do recall the black members of the
5 black caucus telling me that they felt they needed north
6 of 55 percent based on some personal experience by the
7 black caucus members, and other elections that had
8 occurred in districts that they currently finally won by
9 being a Caucasian.

10 Q Understood, but my question was directed specifically
11 to community members. Let me shift for a minute, and I'd
12 like to have you turn to a different exhibit, if you will.
13 It's Plaintiffs' Exhibit 48 in your book.

14 A I don't have 48 in my book.

15 JUDGE PAYNE: He's getting you a book. While
16 he's looking at that, are you through with this volume for
17 awhile?

18 MR. SPIVA: Yes, Your Honor.

19 Q Delegate Jones, I can, if you need this, I can direct
20 you to another exhibit which will demonstrate that this is
21 part of the 2011 preclearance submission to the DOJ from
22 the Commonwealth, but do you recognize it as such?

23 A I recognize it as a submission. I did not read it.
24 That would have been done by the Attorney General's Office
25 working with Legislative Services. My job would have been

1 officially done as a patron of the bill.

2 Q I see. But it was prepared in order to try to obtain
3 preclearance for the plan?

4 A It was required -- it was prepared as required by law,
5 yes, sir.

6 Q Right. And presumably the idea was to encourage DOJ
7 to preclear the plan.

8 A I think that's self-evident.

9 Q And I assume that the House tried to provide DLS and
10 DLS provided DOJ accurate information?

11 A I would say the House didn't provide anything. We
12 work with the Division of Legislative Services on a bill.
13 The bill has to go through enrolling -- drafting first,
14 and then it goes to the process of being approved, signed
15 by the president of the Senate, signed by the speaker of
16 the House, goes to the governor for signature, and then is
17 enrolled. The House members have nothing to do with that
18 part of the enrollment. Then it becomes law.

19 Q Fair enough, but this is the submission that was done
20 on behalf of the Commonwealth to try to get the plan
21 pre-cleared. Why don't I turn your attention to page 11
22 of this document, which I should have mentioned for the
23 record is titled "Legislative History of 2011 Virginia and
24 General Assembly Redistricting Plans." It's attachment 17
25 to the preclearance submission, and let me just turn

1 your --

2 JUDGE LEE: I'm sorry. Did he say that he wrote
3 this?

4 MR. SPIVA: He did not write it. This was an
5 official document that was submitted to the DOJ for the
6 preclearance.

7 JUDGE LEE: I thought I heard him say that the
8 Attorney General prepared this. Is that right?

9 THE WITNESS: They did -- I'm sorry. If I may --
10 in conjunction with Division of Legislative Services
11 working with the Attorney General. They then file to the
12 Department of Justice, and I believe they also
13 simultaneously file with the district court.

14 JUDGE LEE: So is this your document?

15 THE WITNESS: No, it's not my document. It
16 belongs to the House. It's a, quote unquote -- when a
17 bill is enrolled and then it becomes law, this document
18 was prepared because of the requirement for preclearance
19 with the Department of Justice.

20 JUDGE LEE: Go ahead.

21 JUDGE PAYNE: Have you read it before today?

22 THE WITNESS: No, sir.

23 Q I just want to turn your attention to one sentence
24 that is in the document that was prepared by DLS and the
25 Attorney General. In the second full paragraph, the

1 paragraph that begins "As outlined in attachment five,"
2 and a few lines down you'll see all --

3 JUDGE LEE: Page 11? Are you referring to page
4 11?

5 MR. SPIVA: Yes, sir. Yes, Your Honor.

6 Q And then second full paragraph, six lines down you see
7 a sentence that says, "All 12 black majority districts
8 were maintained in chapter one with greater than
9 55 percent black VAP -- a range of 55.2 percent to
10 60.7 percent."

11 And so it's fair to say that the Attorney General and
12 DLS submitted, as part of the Commonwealth's submission to
13 the DOJ, a document that affirmed that all 12 black
14 majority districts had a 55 percent BVAP or higher; is
15 that fair?

16 MR. BRADEN: I object to the form of that
17 question. It isn't fair to ask him a question about a
18 document that, one, he didn't author; two, he's never read
19 before. It seems to me to be the wrong way to phrase that
20 question.

21 JUDGE PAYNE: Sustained. Objection sustained.

22 Q So, Delegate Jones, were you aware that this statement
23 that I just read was made to the DOJ?

24 A I would say knowing that they used a population total
25 that exceeded 100 percent based on the documents that they

1 had, that that's what they would have presented. That's
2 not what DOJ would have seen when they put the block
3 assignment file into their computer to run their analysis.

4 JUDGE PAYNE: I think the question was, were you
5 aware that this statement had been made.

6 THE WITNESS: No, I was not aware the statement
7 had been made, but I would assume it would have been made.

8 Q Let me ask you to turn -- and I apologize, Your
9 Honors, because I think I do need to go back to the other
10 notebook which is -- to Plaintiffs' Exhibit 9 which is in
11 the notebook that everybody was just looking at. Do you
12 have it, Delegate Jones?

13 A I do.

14 Q All right. And you see that the cover of this is from
15 the Federal Register, Wednesday, February 9th, 2011,
16 Department of Justice, and if you flip through to the
17 second page, it says "Guidance Concerning Redistricting
18 Under Section 5 of the Voting Rights Act," and at the top,
19 it's dated Wednesday, February 9th, 2011. I take it you
20 saw this document during the period that you were involved
21 in redistricting in 2011?

22 A I was aware that the document existed, yes.

23 Q And you actually looked at it, didn't you?

24 A I can't say that I looked at it. I don't recall. I
25 had attorneys who were assisting me and helping me along

1 the way.

2 Q Have you seen it before?

3 A I believe that I have. I recall a document that I
4 got, I think the week before. I think it was dealing
5 maybe with the census numbers that were official, and I'm
6 certain that I received this at some point along the way,
7 but I can't say with 100 percent certainty that I read it
8 in that regard. It's only, what, about four pages, I
9 guess, but I can't say that I read it.

10 Q You can't say that you read every line of it?

11 A I'm certain I did not read every line. I would have
12 perused it, if anything, to be quite honest with you.

13 Q Okay, but you did receive it?

14 A I received it. I'm certain that I did.

15 Q Okay. Thank you. Let me ask you to -- let me direct
16 your attention, I guess, to the second printed page, so
17 page 7471, page three of the document. That would be a
18 little easier. Look at the bottom, it says page three.

19 And the right-hand column -- there are three columns.
20 The right-hand column, and about, I guess, it's the second
21 full paragraph, it says, um, "In determining whether the
22 ability to elect exists in the benchmark plan and whether
23 it continues in the proposed plan, the Attorney General
24 does not rely on any predetermined or fixed demographic
25 percentages at any point in the assessment."

1 Were you aware of that guidance by the DOJ in terms of
2 Section 5, that they don't use predetermined or fixed
3 demographic percentages at any point in the assessment?

4 A I recall from reading "Drawing the Lines," Mary
5 Spain's document, Legislative Services, that there were
6 certain things you looked to consider, and one would
7 certainly be what the benchmark districts were, but there
8 was no predetermined number that had to be met.

9 Q And you were concerned about retrogression in the
10 drawing of the new map; is that correct?

11 A I was concerned about compliance with the Voting
12 Rights Act, yes, sir. Voting Rights Act and the
13 constitution.

14 Q And that includes avoiding retrogression?

15 A Absolutely.

16 Q And this is the DOJ guidance on that question; is that
17 right?

18 A I think partly their guidance. I can't speak to if
19 it's their total guidance.

20 Q Do you know whether it's the guidance or not?

21 A No, no. I think there are many things that guide the
22 Voting Rights Act. This is certainly one of them. I
23 would not say it's all of the items that you have to
24 consider when you are doing that.

25 Q My question wasn't that. It actually was this: Were

1 you aware that this was the DOJ's guidance on that
2 question, compliance with the Voting Rights Act under
3 Section 5?

4 A That there was a functional analysis required?

5 Q No. My question is, were you aware that this was the
6 DOJ's guidance on the question of compliance with the
7 Voting Rights Act, specifically Section 5?

8 A I was aware that you could not retrogress to give
9 the -- I think it's the effective election --

10 Q I want to make sure --

11 JUDGE PAYNE: Wait a minute, Mr. Spiva. You all
12 are getting back into the habit of stepping on each
13 other's discussions, and the court reporter can't take
14 both of you. So, Delegate Jones, give Mr. Spiva a chance
15 to finish his question. Mr. Spiva, give Delegate Jones a
16 chance to finish his answer and listen -- as John Wayne
17 said, Delegate Jones, listen tight, answer just the
18 question that's been asked. All right, Mr. Spiva, go
19 ahead.

20 MR. SPIVA: Thank you, Your Honor.

21 Q So the question, Delegate Jones, is just, were you
22 aware that this was DOJ's guidance concerning compliance
23 with the Voting Rights Act, specifically Section 5?

24 A I think I said yes a few minutes ago. It was one of
25 the items that they consider, yes.

1 Q This was the DOJ's guidance on that issue.

2 A I said yes, yes, sir.

3 Q But you didn't read it?

4 A I didn't say that. I said that I didn't read this
5 line for line. I indicated that Mary Spain had given us
6 some guidance and documents.

7 Q Let me just turn your attention to the -- continuing
8 that same paragraph, it says, "Rather, in the department's
9 view, this determination requires a functional analysis of
10 the electoral behavior within the particular jurisdiction
11 or election district. As noted above, census data alone
12 may not provide sufficient indicia of electoral behavior
13 to make the requisite determination. Circumstances, such
14 as differing rates of electoral participation within
15 discrete portions of a population may impact on the
16 ability of voters to elect candidates of choice, even if
17 the overall demographic data show no significant change."

18 Were you aware that was part of the guidance by the
19 DOJ of what you should consider to determine whether a
20 plan complied with the Voting Rights Act?

21 A Yes, I was aware of a functional analysis being
22 required.

23 Q And further, in the next paragraph it says, "Although
24 comparison of the census population of districts in the
25 benchmark and proposed plans is the starting point of any

1 Section 5 analysis, additional demographic and election
2 data in the submission is often helpful in making the
3 requisite Section 5 determination," and cites to a
4 regulation.

5 "For example, census population data may not reflect
6 significant differences in group voting behavior.
7 Therefore, election history and voting patterns within the
8 jurisdiction, voter registration and turnout information,
9 and other similar information are very important to an
10 assessment of the actual effect of redistricting plan."

11 Were you aware that that was part of the DOJ guidance?

12 A Yes, and that was the reason that I spoke directly
13 with all the members of the black caucus.

14 Q And, so, you were aware that census population data
15 alone may not reflect significant differences in group
16 voting behavior; correct?

17 A Correct.

18 Q You also have to look at election history and voting
19 patterns; is that fair?

20 A Which I did, yes.

21 Q Within each district -- is that something you have to
22 look at within each district?

23 JUDGE LEE: That's a compound question. Would
24 you ask one question at a time, please.

25 MR. SPIVA: Sorry.

1 Q Is election history within each district something
2 that you have to look at as part of the analysis?

3 A I would say what I did was look at the election
4 results and the contested races that you had in primaries
5 for the members of the majority-minority districts, but I
6 cannot say that I did an analysis of voting behavior in
7 each and every 12 districts, no, sir.

8 Q It also talks about, the part that I just read,
9 looking at the voter registration and turnout information.
10 Were you aware that looking at voter turnout and
11 registration information within each district was
12 something that was part of the DOJ guidance?

13 A I would assume that it was. I was not totally aware
14 of that, but we did have discussions and met with some of
15 the -- I think very good discussions we had with members
16 of the black caucus and their frustration with Caucasians
17 beating black members in majority districts previously in
18 the Commonwealth.

19 Q Let's talk about that. Did you, at any time, compile
20 all of the election results from the challenged districts
21 over the previous ten years?

22 A I did not.

23 Q Sitting here today, can you tell us the last time a
24 minority-preferred candidate lost an election in
25 challenged District 63?

1 A I would say that would be in 1991 or 1993, Joe
2 Preston, who actually just served in the House and ran for
3 the Senate seat in the primary against Senator Dance.

4 Q So it was 1991 or 1993, that was the last time that a
5 minority-preferred candidate in District 63 lost an
6 election?

7 A In that situation, yes, but the rule in Virginia had
8 been, from my recollection, with Frank Hall, which is
9 House District 69, Betsy Carr, and House District 63,
10 which used to be Jay DeBoer and then Senator Dance, that
11 once you win in the primary, that the election is pretty
12 much decided. So Frank Hall had won and defeated a
13 minority candidate when it was a black majority-minority
14 in '91 and, I think, '93.

15 Q In 1993, okay.

16 A I believe it was '93.

17 JUDGE PAYNE: Wait a minute. Was Frank Hall in
18 63?

19 THE WITNESS: No, sir. I'm sorry. I answered
20 his question with a compound answer. Mine was, did I do
21 an analysis of all the districts.

22 JUDGE PAYNE: Going back to Frank Hall, Frank
23 Hall was elected when?

24 THE WITNESS: He was elected in 1976, and when --

25 JUDGE PAYNE: That was a majority black district?

1 THE WITNESS: I don't believe, not at the time.
2 I think it became in the 1980s, I believe.

3 JUDGE PAYNE: He continued to be reelected until
4 he resigned when?

5 THE WITNESS: Yes, sir. He resigned in 2007, but
6 when they redrew the line significantly in 1991, he had a
7 challenger, and he won in that primary and never had a
8 primary challenger after that.

9 JUDGE PAYNE: The number of that district was
10 what?

11 THE WITNESS: 69.

12 Q I was going to ask you about 69 next, but I take it
13 your answer with respect to 69 to my question, which is
14 sitting here today, can you tell us the last time a
15 majority-preferred candidate has lost an election --
16 before I said in District 63, but so the record is clear,
17 in District 69, is it 1993?

18 A 1993 was Frank Hall, and I believe -- I can't recall
19 if there was another primary after that in the 2000s. I
20 don't believe there was from my recollection.

21 Q Sitting here today, can you tell us the last time a
22 minority-preferred candidate lost an election in District
23 63? That was the one I started with, but I think you
24 answered regarding 69.

25 A 63, I believe it was Joe Preston to Jay DeBoer, and I

1 don't believe that DeBoer had any other challenges until
2 he retired in 2001.

3 JUDGE PAYNE: Joe Preston lost to Jay DeBoer.

4 THE WITNESS: Yes, sir, who was Caucasian, and
5 then he ran unopposed, if I recall correctly, Jay DeBoer
6 did, and he retired when we redrew the lines in 2001, and
7 then Delegate Fenton Bland, I believe, won that seat who
8 is African American.

9 Q Let me ask you, Delegate Jones, are you equating the
10 candidate being African American with the
11 minority-preferred candidate?

12 A I'm equating the -- when you looked at the results in
13 the -- there were several races. You had Betsy Carr,
14 which was a three- or four-way race -- I think it was a
15 four-way race. When you look at the one-on-one race, I
16 believe, that occurred in the primary, the overwhelming
17 majority of the African Americans chose from the -- I
18 think the work that was done or was looked at in the
19 Loewen report that they overwhelmingly preferred Joe
20 Preston, but Jay DeBoer won. That's 63rd which, I think,
21 was your question.

22 Q Thank you, sir. So you don't equate African-American
23 candidate with minority-preferred candidate?

24 A No, not at all, sir. I think I answered that in a
25 deposition as well.

1 Q Sitting here today, can you tell us the last time a
2 minority-preferred candidate lost an election in
3 challenged District 70?

4 A I don't believe that there has ever been one that's
5 lost in -- no, 70, that would be McQuinn's. During my
6 tenure, it's always been held by an African American, to
7 my knowledge.

8 Q And with respect to District 71, sitting here today,
9 can you tell us the last time minority-preferred candidate
10 lost an election in District 71?

11 A I don't believe they have because of the high affinity
12 of the democratic vote in that district.

13 Q And can you tell us -- in fact, District 71 has been
14 represented by an African American since the early '80s?

15 A I would say at least, yes, sir.

16 Q Maybe late '70s?

17 A Probably late '70s, but I don't know that for a fact,
18 so I don't want to misrepresent anything.

19 Q Fair enough. And can you tell us the last time a
20 minority-preferred candidate has lost an election in
21 District 74?

22 A If I may, I believe when Delegate Morrissey ran in a
23 five-way primary, he was certainly not the candidate of
24 choice of the minorities at that point in time. There
25 were four African Americans that ran against him. He was

1 the only Caucasian, and he won. Just like in the DeBoer
2 case, situation, Frank Hall case, typically, in those
3 situations, whoever wins the democratic primary will win
4 the general, and then they stay in that seat pretty much
5 as long as they want to.

6 Q So Mr. Morrissey, though, won reelection in 2009, did
7 he not?

8 A So did Jay DeBoer in the '90s, yes, sir.

9 Q Right. So Mr. Morrissey, at least as late as 2009,
10 was the African-American preferred candidate; isn't that
11 correct?

12 A I would say based on the election returns of him being
13 sent back to Richmond, one would make that assumption,
14 yes, sir.

15 Q And challenged District 75, can you tell us the last
16 time a minority-preferred candidate has lost an election
17 in District 75?

18 A Well, Paul Council, Delegate Paul Council actually
19 held that seat for 31 years, I believe, or 32 years, and
20 it was African American in the '80s. After the court
21 case, I believe it became for multi-member districts to
22 single-member districts. He held that seat, had several
23 challenges throughout the, I think, those 20 years, and
24 then when he retired in 2005, I believe, Delegate Tyler
25 ran in the primary, and there were five contestants, two

1 which were Caucasian, and Delegate Tyler won by only less
2 than 300 votes. And then the general election with a
3 Caucasian running against her, she won by less than one
4 and a half percent.

5 Q So if I understood you correctly, the person who held
6 the seat before Delegate Tyler was an African American?

7 A No, Caucasian. He was Caucasian.

8 Q Okay. So Delegate Tyler, though, has not been
9 defeated in any election including the one you just
10 mentioned; correct?

11 A I don't believe she's had an opponent after 2005. She
12 barely won against a weak opponent, by all accounts, in
13 the election in 2005.

14 Q But that's the last time that she's had an opponent?

15 A Right, and that drove her concerns about her district
16 being much higher than 55 percent, yes, sir.

17 Q And that was in 2005, so ten years ago?

18 A 2005.

19 Q And challenged District 77, when was -- can you tell
20 us the last time a minority-preferred candidate lost an
21 election in District 77?

22 A Yes. I would say it was probably Willa Bazemore. At
23 the time, after 1991 when the districts were redrawn, we
24 created two additional majority-minority districts, I
25 believe, during that cycle. I believe Thomas Forehand,

1 who went on become a judge, actually defeated Willa
2 Bazemore in a general election by five or six points.

3 Q So 1991 was the last time that a minority-preferred
4 candidate lost an election in District 77; is that what
5 your testimony is?

6 A And to put it in the proper context, Delegate Spruill
7 would have won in 1993 and has served in that capacity
8 ever since.

9 Q Thank you. That's helpful. Districts 80, can you
10 tell us the last time a minority-preferred candidate has
11 lost an election in District 80?

12 A I believe that has been held by an African American as
13 long as I can remember. Ken Melvin actually held that
14 seat prior to Matthew James. I think Ken Melvin was there
15 for 20-plus years, 24 years, I think.

16 JUDGE PAYNE: Melvin was what race?

17 THE WITNESS: He was African American, Your
18 Honor.

19 Q And it sounds like you can't precisely remember, but
20 can you give us kind of a decade and maybe early or late
21 part of the decade in terms of how far back that seat,
22 District 80, has been held by a minority-preferred
23 candidate?

24 A I can't recall when it was first established because I
25 was still in high school probably, college, but to my

1 knowledge, it has been held by an African American since
2 the '80s, I believe.

3 Q Fair enough, thank you. Can you tell us the last time
4 a minority-preferred candidate has lost an election in
5 District 89?

6 A I can't in that regard. I can recall working with
7 then-Delegate Alexander on the configuration of his
8 district.

9 Q And can you tell us --

10 JUDGE LEE: What race is Alexander?

11 THE WITNESS: He is African American, Your Honor.

12 Q Can you tell us the last time a minority-preferred
13 candidate has lost an election in District 90?

14 A You know, we've lost three districts in that city, and
15 so to say that district is not the same as it might have
16 been, you know, 20 years ago because there were five seats
17 in the city of Norfolk. I believe that has been held by a
18 minority candidate since the early '80s, I believe.

19 Q Okay. Thank you. Can you tell us the last time a
20 minority-preferred candidate lost an election in District
21 92?

22 A I do not -- I'm trying to think who her predecessor
23 was. That would be Delegate Ward. I would say probably
24 has been held by a minority since its inception, but I
25 stand to be corrected if I'm wrong.

1 Q Can you tell us the last time a minority-preferred
2 candidate lost an election in District 95?

3 A I believe Flora Crittenden was the member there, and
4 she served 30-plus years. I believe the two -- there were
5 two African-American females that represented those two
6 districts on the peninsula for 30 -- probably between 24
7 and 30 years. One was a schoolteacher and maybe
8 principal, and I forget what the other one did.

9 Q You, of course, knew this election history when you
10 drew the enacted map; is that true?

11 A I did.

12 Q Did you consider minority registration rates in each
13 of the challenged districts when you were drawing the
14 enacted map?

15 A Certainly. That's part of the equation, the lower
16 voter turnout concern that many members, African-American
17 members had, and I think you heard that spoken to on the
18 floor of the House of Delegates in some of the clips you
19 saw yesterday. It was certainly expressed to me during
20 the process, a lower registration and a lower voter
21 turnout.

22 Q Did you look specifically at each district, at the
23 registration rate for each district, the black
24 registration rate?

25 A You know, I did not, and I would say to maybe shorten

1 the line of questioning, I did not do an ecological
2 retrogression analysis. I did a functional analysis of
3 the plan, talking with the community, with the members,
4 and looking at election results. That was the extent of
5 what I did.

6 Q Yes, Delegate Jones, I wasn't asking you about an
7 ecological regression analysis actually. I was really
8 just asking you whether you had considered the voter
9 registration rates of African Americans in each of the
10 challenged districts before or during the time that you
11 were drawing the enacted plan.

12 A I would say I did in the majority, but I can't say for
13 certain every one. Listening to members come to me like
14 Delegate Tyler and Delegate Dance who lost as an
15 independent prior to going to the House. They were very
16 concerned about the low turnout.

17 You saw Delegate Tyler's comments yesterday about the
18 prison facilities in her district that adversely would
19 affect the turnout and would not make a 55 percent really
20 an effective 55 percent for the African American to win in
21 a race.

22 Q Beyond listening to the statements of the delegates,
23 of some of the delegates themselves, did you actually look
24 at the actual registration rates of African Americans and
25 compare those to the registration rates of whites in the

1 challenged districts?

2 A No, I didn't, because I would say that registration
3 rates, while they might be a statistic to consider, it's
4 really who turns out to vote, and while you have to be
5 registered to vote, the number of registrants does not
6 equate into turnout.

7 Q Fair enough. You mentioned Delegate Tyler talking
8 about the prisons in her district, District 75, and you
9 recall they played a clip, I think it was yesterday, where
10 she said that there were, I think she said 8,000 prisoners
11 in her district; do you recall that? I think that was the
12 number she used.

13 A I do, and that was an issue that was discussed during
14 the process. The way the census -- if I may, you don't
15 get the group quarters dispersion from the census until
16 May or June of that year, the year that ends in a one. So
17 we could not reallocate where those residents were. So
18 those were counted in her district as adult population,
19 black population and black voting-age population.

20 So that would have to be discounted, in my opinion,
21 pretty heavily to get an effective voting percentage, and
22 I think that's why, quite frankly, she voted against the
23 bill at the end of the day. She didn't think there was
24 enough black population to be able to have her win that
25 seat through the balance of the decade.

1 Q And, Delegate Jones, I appreciate that. I just want
2 to ask you to listen to the actual question that I'm
3 asking, which all I asked is whether you had heard
4 Delegate Tyler say that there were about 8,000 prisoners
5 in her district.

6 A I did.

7 Q And did you do anything to check whether that number
8 was anywhere near accurate?

9 A I did.

10 Q You realize in terms of the way that would affect the
11 black voting-age population, that there are only about
12 4,000 black prisoners in her district? And there are only
13 about 6,000 total prisoners?

14 A That was not the population that I believe that I was
15 given. I think -- I can't remember where it came from.
16 Probably DOC or maybe -- might have been DOC. She gave me
17 the figure of 8,000, so I trusted her with that.

18 Q You weren't aware that her figures were off, the total
19 figure was off by more than 20 percent, and in terms of
20 the black voting-age population, it would have been off by
21 half?

22 MR. BRADEN: Your Honor, I'd object to that. We
23 surely haven't had any evidence --

24 JUDGE PAYNE: I can't hear you.

25 MR. BRADEN: He just attempted to put something

1 into the record --

2 JUDGE PAYNE: 6,000 figure?

3 MR. BRADEN: Yes.

4 JUDGE PAYNE: There's no evidence of what the
5 population is.

6 MR. SPIVA: It's just impeachment, but we are
7 happy to prove the impeachment in our rebuttal case, Your
8 Honor.

9 JUDGE LEE: You do that.

10 MR. SPIVA: Thank you.

11 Q Let me move on from there. Did you look at -- you
12 mentioned a minute ago that it was very important to look
13 at turnout rates; is that fair?

14 A That's fair, yes.

15 Q Did you look at minority turnout rates in each of the
16 challenged districts while you were drawing the map?

17 A Not each of them, no.

18 Q Did you look at minority registration -- I'm sorry,
19 turnout rates in District 63?

20 A Did not.

21 Q Did you look at minority turnout rates in District 69?

22 A Did not.

23 Q Did you look at minority turnout rates in District 70?

24 A Did not.

25 Q Did you look at minority turnout rates in District 71?

1 A No.

2 Q Did you look at minority turnout rates in District 74?

3 A I did look at the precinct results for the primary,
4 yes.

5 Q Did you look at minority turnout rates for District
6 75?

7 A Yes, I did. I think I mentioned that yesterday.
8 There were like five precincts that had single-digit votes
9 for the now-incumbent member who wanted to get rid of
10 those precincts because they were so heavily -- had a much
11 higher turnout than the white precincts in her district.

12 Q Did you look at minority turnout rates for District
13 77?

14 A No. I talked directly with the member, Lionel
15 Spruill.

16 Q But you didn't look at minority turnout rates?

17 A No. I'll answer -- blanketly I'll answer your
18 questions. I didn't look at turnout rates except in two
19 or three of the districts.

20 Q Do you recall which of those two or three districts
21 you looked at turnout rates?

22 A It would have been the 74th because they had a
23 primary. It would have been 75, and I believe I did look
24 at 63. I think there was a primary. I think I might have
25 looked at the race, the independent race when Delegate

1 Dance -- then-Mayor Dance ran as an independent. I do
2 recall doing that. So if you want to say the turnout
3 rate, I looked at the election results from that. So I
4 did 63, 74, and 75.

5 Q And the race you just mentioned with Delegate Dance,
6 what year was that in?

7 A I'm trying to remember.

8 Q Was it 2005?

9 A I don't recall.

10 Q And when you were drawing the challenged districts,
11 did you review the Senate districts, the state Senate
12 districts that were drawn at the same time in those areas?

13 A I did not.

14 Q Are you aware that the Senate map, that in the Senate
15 map all of the majority-minority districts are less than
16 55 percent BVAP?

17 A I'll take you at your word on that. I did not study
18 the Senate map at all, and I know that sounds strange, but
19 it wasn't -- even though it was in my bill, the deal was
20 the Senate would lay their bill on mine, it would come
21 back, the governor wouldn't mess with it.

22 Q Fair enough. And I take it, Delegate Jones, that you
23 did not analyze voter behavior and BVAP in prior Virginia
24 Congressional districts?

25 A Did not. I did not do the Congressional map.

1 Q Did you review any maps that had been pre-cleared from
2 other Section 5-covered jurisdictions elsewhere in the
3 country?

4 A I did not. I had reference to the *Wilkins v. West*
5 case and the --

6 Q My question just was just did you review any maps that
7 had been pre-cleared from other Section 5-covered
8 jurisdictions from elsewhere in the country.

9 A I think I answered no.

10 Q And did you review any maps that had been rejected by
11 DOJ?

12 A No.

13 Q Now, Delegate Jones, you know or understand what a
14 racially polarized voting analysis is?

15 A I have heard of it, yes, sir.

16 Q And in the 2011 redistricting process, you did not
17 perform, nor did you direct anyone to perform, a racially
18 polarized voting analysis to determine whether there was
19 racially polarized voting in any of the challenged
20 districts; is that correct?

21 A I did not. As a practice, the state has never done a
22 racial polarized voting study for a pre-submission, for
23 submission to DOJ.

24 Q When you say that the state has never done one, I take
25 it you mean for the House or the Senate.

1 A For a plan to be pre-approved. There have been ones
2 done with court cases that have occurred, but I was
3 surprised when I talked to Jack Austin and Mary Spain.
4 They said in their 30-plus years each, they had never done
5 a racial polarized block vote study retrogression analysis
6 in any plan that was going to be submitted for
7 preclearance to DOJ.

8 Q And is it your testimony then that in the 2011
9 process, that no racially polarized voting analysis was
10 done or submitted to DOJ?

11 A That is correct.

12 Q Okay. Whether Senate or House.

13 A That is correct.

14 MR. SPIVA: Court's indulgence. I'm trying to
15 get to a different place since we're talking about this
16 now.

17 Q So you are not aware, Delegate Jones, I take it, that
18 there was -- excuse me one second. Excuse me. Court's
19 indulgence.

20 You are not aware, Delegate Jones, that there was an
21 RPV, a racially polarized voting analysis, that was done
22 by a political scientist for the Senate map in this 2011
23 cycle?

24 A Not aware. That's what I just testified. I wasn't
25 aware of it.

1 Q You weren't aware that there was one, in fact,
2 submitted to the DOJ?

3 A No.

4 MR. BRADEN: Objection, Your Honor. Is there
5 something in the record on this submission?

6 JUDGE PAYNE: Haven't got anything, do you?

7 MR. SPIVA: Yeah, I do, actually.

8 JUDGE PAYNE: There's not some exhibit or
9 something that's in the record?

10 MR. SPIVA: It's not in the record. I'm getting
11 ready to offer it up, Your Honor, right now, either to
12 refresh or impeachment as the case may be. Would you -- I
13 can pass it up in hard copy.

14 JUDGE PAYNE: I think he needs to see what you
15 are talking about. It's up to him how he can read it. If
16 you want to hand it up, hand it up, let him look at it,
17 see if he knows about it. I thought he just said he
18 didn't but... You are trying to refresh his recollection;
19 correct?

20 MR. SPIVA: Should I pass ones up to the Court?

21 JUDGE PAYNE: Do you have it on the screen?

22 MR. SPIVA: We can put it on the screen.

23 JUDGE PAYNE: It hasn't been admitted.

24 MR. SPIVA: No.

25 Q Delegate Jones, I take it you know Senator McEachin?

1 A I do.

2 Q And if you turn to the second page of this document,
3 um, it's a letter on Senate of Virginia letterhead; do you
4 see that?

5 A I do.

6 Q It's dated May 31st, 2011; do you see that?

7 A I do.

8 Q And it addressed to Mr. Chris Herron, Chief Voting
9 Section, Civil Rights Division; do you see that?

10 A I do.

11 Q Do you see the numbers down in the bottom right-hand
12 corner, VSBE 005608?

13 A Yes, sir.

14 Q I can tell you this was --

15 MR. SPIVA: I just want to let the Court know
16 this was produced to us by the State. We didn't actually
17 find it until this trial had already started and the
18 testimony came out about there not having been racially
19 polarized --

20 THE COURT: I think you want to ask him
21 foundational questions to see if you can get it in, if you
22 want to impeach him or whatever you said you were going to
23 do. Go ahead and do that.

24 Q You see here that in the first paragraph, Delegate
25 Jones, that it says, "I look forward to the opportunity to

1 discuss the Virginia Senate redistricting plan" --

2 JUDGE LEE: Do you want to ask him if he's seen
3 this before.

4 Q Have you seen this before?

5 A I have not.

6 Q So you weren't aware of this letter submitting --
7 submits a racially polarized voting analysis for the
8 Senate plan?

9 A I was not.

10 MR. SPIVA: I'm going to come back, because there
11 are a couple that go with this set. I want to see if it
12 refreshes his recollection.

13 JUDGE PAYNE: You can take that off.

14 Q Delegate Jones, do you have in front of you a document
15 with -- an email from J. Gerald Hiebert to Ernest
16 McFarland and Robert Popper dated June 1st, 2011?

17 A I do.

18 Q And attached to that, there is a document entitled, "A
19 Voting Rights Analysis of the Proposed Virginia Senate
20 Plan," prepared by Dr. Lisa Handley, principal, Frontier
21 International Electoral Consulting; do you see that?

22 A I do.

23 Q Does this at all refresh your recollection that there
24 was such an analysis done for the Senate plan?

25 A I have never seen this document before to my

1 knowledge. It's dealing with the Senate plan, not the
2 House plan.

3 MR. SPIVA: Your Honor, he obviously has never
4 seen these documents. They were produced by the State,
5 though, as indicated by the Bates numbers, so we would --
6 there's no real dispute as to their authenticity given who
7 produced them. They are official records of the state, so
8 we would ask that they be submitted on that basis. We
9 didn't have them on our exhibit list. We would have
10 but --

11 JUDGE PAYNE: Excuse me, Mr. Spiva. Now, since
12 he doesn't know anything about it, isn't that now part of
13 your rebuttal case? Isn't that the time you would offer
14 them?

15 MR. SPIVA: That's probably right, Your Honor.

16 JUDGE PAYNE: All right, well, offer them then.

17 JUDGE LEE: If you have a witness, of course.

18 JUDGE PAYNE: Somebody proves them up or he
19 stipulates the authenticity or you lay a foundation, we'll
20 deal with it at the time, but this witness can't get it
21 in, apparently.

22 MR. SPIVA: Thank you, Your Honor.

23 JUDGE LEE: Mr. Braden, we didn't mean to take
24 your objection away, but objection sustained.

25 JUDGE PAYNE: I think it became moot.

1 MR. SPIVA: Mr. Braden is so good he can get his
2 objection without making it.

3 MR. BRADEN: It's always safer when I don't
4 object.

5 JUDGE PAYNE: All right, anything else?

6 Q Now, Delegate Jones, were you aware that Chris
7 Marston, who worked with you and for Speaker Howell in the
8 redistricting process, that he actually gathered
9 information to do a racially polarized voting analysis?

10 A I was not aware of that, no. Not to my knowledge. He
11 might have been, but I don't recall.

12 Q So let me ask you to turn to Plaintiffs' Exhibit 7,
13 just see whether this refreshes your recollection. This
14 is an email from Chris Marston to Katie Alexander Murray,
15 subject, RPV Leadership Roster, date, 12/9/2010. And in
16 that, Mr. Marston -- sorry, give me one second. He says,
17 "Email is okay, too. Just be careful in how you describe
18 what you are seeking. We need to keep out any hint of
19 unfairness," and in parentheses, Mr. Marston says, "except
20 the fundamental unfairness of the Voting Rights Act,"
21 close parens, "or partisanship."

22 Says, "For example, I'm working on an important
23 project for Speaker Howell and the House Republican
24 Caucus. In order to develop redistricting plans for
25 Virginia in full compliance with the Voting Rights Act, we

1 need to collect data for racial block voting analysis.
2 One way to analyze the data is to look for elections in
3 which an African-American candidate and a white candidate
4 both compete either in one's primary or the general
5 election."

6 Does that refresh your recollection that Mr. Chris
7 Marston was gathering data in order to do a racially
8 polarized voting analysis?

9 A I would note, I'm not copied on this, and as I
10 mentioned in my deposition, I have never been involved
11 with the leadership --

12 THE COURT: Have you seen this before?

13 THE WITNESS: No, sir, I have not.

14 JUDGE PAYNE: Talked about it with anybody?

15 THE WITNESS: No, sir.

16 JUDGE PAYNE: Mr. Spiva, I thought it would be
17 helpful to say last night -- I may not have been clear.
18 Why don't you not read everything and tell him to read the
19 part that you want to read, then ask him a precise
20 question about the part that you want him to read.

21 JUDGE LEE: He can read it to himself. I think
22 he can read.

23 MR. SPIVA: Okay.

24 JUDGE PAYNE: We sort of have the ability to
25 read, too.

1 MR. SPIVA: Okay, thank you, Your Honor.

2 JUDGE PAYNE: You don't -- you haven't seen this;
3 is that your testimony?

4 THE WITNESS: No, sir, I have not seen this
5 email.

6 Q So I take it, Delegate Jones, that you weren't aware
7 that Mr. Marston, who worked with you, actually gathered
8 the information to do -- or began gathering the
9 information to do a racially polarized voting analysis,
10 but ultimately one was not done.

11 MR. BRADEN: I would object. I'm not sure that
12 there's anything in the record as a foundation for the
13 formation of that question.

14 JUDGE PAYNE: What is it? Are you relying on the
15 "for example" sentence for that proposition?

16 MR. SPIVA: I'm relying on that. I've got
17 several other documents I was going to skip over, but now
18 that I've got the objection, I probably need to go through
19 them.

20 JUDGE PAYNE: You're going to go through
21 something else to lay a foundation, because the "for
22 example," he's quoting something which, I don't know, but
23 it looks to me like he's telling her how she can say
24 something. He's not saying he's done it.

25 MR. SPIVA: Your Honor, he's gathering

1 information for a racially polarized voting analysis, and
2 he's telling his assistant how to ask for that
3 information.

4 JUDGE PAYNE: Well, maybe, but you need a witness
5 to testify to that. I don't know that that's true, and
6 you can't discern that from this email. So if you want to
7 prove it up, go right ahead, but the objection is
8 sustained to the question, the form of the question.

9 JUDGE LEE: You can take that off the screen,
10 too.

11 Q Let me ask you to turn to Exhibit 14 in that same
12 book. On -- this is an email from Chris Marston to
13 Cortland Putbrese, subject, Help with Contested Election
14 Information, dated 3/11/2011, and if I could ask you to
15 read the, just the sentence that begins "To comply with
16 the Voting Rights Act," and -- just so the record is
17 clear, Your Honors, I'd like for you to read that aloud.

18 JUDGE LEE: I guess the concern that we have
19 is -- if you ask him if he's ever seen it before -- just
20 having him read somebody else's emails is not admissible.

21 MR. SPIVA: It's somebody he worked with. It's
22 already admitted, Your Honor. These are admitted
23 exhibits. These are stipulated exhibits.

24 JUDGE LEE: But if you're going to ask this
25 witness about other people's emails, you need to lay a

1 foundation that he's even seen it before. Can you do that
2 first? He hasn't shown that he has a vague recollection
3 yet, so you can't refresh recollection. It's not
4 impeachment because it's not his statement, so lay a
5 foundation that he's even seen it before.

6 Q Have you seen this email, Delegate Jones?

7 A I have not.

8 Q Were you aware of Chris Jones attempting to gather
9 information for a racially polarized voting analysis?

10 A You meant Chris Marston.

11 JUDGE PAYNE: Chris Marston.

12 Q Sorry, Chris Marston.

13 JUDGE PAYNE: Yes or no?

14 THE WITNESS: I was not aware that he was doing a
15 racial polarized voting. I know he was looking at
16 election returns, and the answer would be, yes, I knew he
17 was looking at election data, but I don't know for what
18 purpose, because I've never seen this email.

19 Q Why don't we move -- still want to talk to you about
20 the racially polarized voting analysis. Was there any
21 statistical analysis done whatsoever to determine the
22 degree of racially polarized voting in any of the
23 challenged districts?

24 A No.

25 Q Delegate Jones, you'd agree that for good government,

1 it's important that politicians generally don't do in
2 private something that's fundamentally different from what
3 they tell the public; would you agree with that?

4 A You should comport yourself -- I think for anyone that
5 should be the rule.

6 Q And you had, as we discussed earlier, you had public
7 hearings all over the Commonwealth prior to drawing the
8 map about the redistricting process; is that correct?

9 A We did.

10 Q Let me just direct your attention to one of the
11 transcripts from one of the hearings, Plaintiffs'
12 Exhibit 3. Tell me when you've got it in front of you.

13 A I'm ready.

14 Q And this is -- on the cover it shows that this is the
15 Redistricting Subcommittee of the Privileges and Elections
16 Committee of the Virginia House of Delegates, date,
17 September 22nd, 2010; location, TCC Roper Performing Arts
18 Center in Norfolk, Virginia. This was one of the hearings
19 that you spoke of?

20 A Correct.

21 Q And let me direct your attention to page five of the
22 transcript, and these are part of your opening remarks at
23 the hearing. If you want to verify that, I think your
24 name appears a couple pages before, but I can represent to
25 you that this is part -- this is you talking.

1 A Yes, sir.

2 Q You can check me out if you want to. And in here, is
3 it fair to say that you basically summarize three points
4 that you want to emphasize about the redistricting process
5 and that you kind of start towards the bottom of page
6 five?

7 A Yes, sir.

8 Q You said the first one is that the redistricting
9 process must be fair?

10 A Correct.

11 Q And then the second is that it must create districts
12 that are nearly equal in population as is practicable;
13 correct?

14 A Yes, sir.

15 Q And then finally, the third point is that the
16 districts must comply with the law, the federal U.S.
17 Constitution, and the Voting Rights Act; is that fair?

18 A That's fair.

19 Q And there's nothing in the opening remarks, I take it,
20 that suggests that part of the process is going to be to
21 try to unseat Democrats.

22 A No.

23 Q Or to do some kind of a partisan gerrymandering;
24 correct?

25 A No.

1 Q And if we search this whole transcript, we wouldn't
2 find anything like that, would we, that suggested that the
3 plan and the map that you were embarking on drawing, that
4 that was intended to unseat Democrats; is that fair?

5 A That is fair.

6 Q And probably, if we looked at each of these, we
7 wouldn't find anything -- each of these transcripts from
8 these various hearings, we wouldn't find anything like
9 that?

10 A No, you would not. I don't think one would expect
11 that we would treat Republicans worse than we treat
12 Democrats in the process since we had two-thirds of the
13 chamber.

14 Q And but there's nothing in these transcripts that
15 suggests that, is there?

16 A Nope.

17 Q And you recall, we looked at the House criteria -- we
18 can turn to the exhibit if you need it, but you recall
19 what I'm talking about, the House criteria for the
20 redistricting?

21 A I do.

22 Q And that was in Plaintiffs' 16, but you know the
23 document I'm talking about. It's fair to say that there's
24 nothing in those criteria that suggests that the goal of
25 the redistricting process is to unseat Democrats; correct?

1 A That is correct. It wasn't the goal. It wasn't a
2 goal.

3 Q And there certainly wasn't anything in there that said
4 the goal was to unseat white Democrats; correct?

5 A I would say that the plan itself would have been a
6 status quo plan that had broad-base support from the
7 members of the caucus and the members of the black caucus.
8 We had only nine no votes. We had 84 votes in favor of,
9 which was very remarkable and unprecedented in the history
10 of Virginia as far as a redistricting map.

11 Q There were a lot of Democrats who voted for the plan;
12 correct?

13 A A majority of Democrats voted for the plan, yes, sir.

14 Q Even a super majority of the Democrats; right?

15 A Very close, yes, sir.

16 Q And in your experience, you've had a lot of experience
17 in politics, usually members don't -- don't vote for
18 something that's against their -- that they perceive to be
19 against their interest; is that correct?

20 A My recollection of 2001, we didn't have anywhere near
21 as many Democrats voting for the plan as we did in 2011.

22 Q Let me turn your attention -- actually, we don't need
23 the transcript for this, but you recall we reviewed
24 several times the April 5th floor debates. This was
25 Exhibit 35. Do you recall we've gone through that?

1 A Yes, sir.

2 Q And it's fair to say, right, that if we were to look
3 through every page of that transcript, we wouldn't find
4 anything about the goal of the plan to be to unseat
5 Democrats; correct?

6 A You wouldn't because that wasn't the goal.

7 MR. SPIVA: Court's indulgence. I think I'm
8 almost done.

9 Q I did have one more. I guess you can never thrust a
10 lawyer who says he has one more question, but, Delegate
11 Jones, I think yesterday when you were testifying about
12 District 71, the subject of precinct 207 came up. Do you
13 recall that?

14 A I do.

15 Q You remember the 207 is the precinct in the Fan that
16 Delegate McClellan and both -- both you and Delegate
17 McClellan testified about?

18 A I think there's two precincts. That's one of the two,
19 yes, sir.

20 Q Yes, right, but do you recall 207 was the one that
21 Delegate McClellan said that she -- testified that she
22 wanted to keep in her district?

23 A Correct.

24 Q And you are aware, of course, that precinct 207 is a
25 majority democratic district; correct?

1 A That's correct.

2 Q I think you testified that Delegate Loupassi wanted
3 207 in his district?

4 A That was my recollection, yes, sir.

5 Q So he wanted a predominantly democratic precinct to be
6 moved into his district; is that correct?

7 A He's somewhat like me. He had a broad base support
8 from the democratic side of the aisle, or democratic
9 voters in his district, and he represented city council,
10 and I think most members who serve locally on city
11 councils actually have -- it's more the community of
12 interest and the individual as opposed to the party, and
13 that was the reason or my understanding as to why he
14 wanted the Fan district.

15 JUDGE PAYNE: Delegate Loupassi is --

16 THE WITNESS: He is a white Republican, yes, sir.

17 Q Precinct 207, though, had been in HD 71 for 30 years?

18 A I would say 20 years probably. I can't speak back to
19 the '70s.

20 Q But at least 20 years?

21 A Yes, sir, I would say.

22 Q And I think you had also testified yesterday that
23 there were changing demographics in downtown Richmond; is
24 that correct?

25 A There was, and there still is.

1 Q And I assume, though, that you would agree with me
2 that there's no reason why an African-American delegate
3 cannot represent a predominantly white area of the city of
4 Richmond; correct?

5 A No. As a matter of fact, if I may, Delegate Spruill,
6 some of the precincts that we put in in south Norfolk are
7 actually majority white that he wanted in his district.

8 MR. SPIVA: I have no further questions. Thank
9 you, Delegate Jones.

10 JUDGE PAYNE: Redirect.

11 MR. BRADEN: Your Honors, I will be very brief.
12 I will just ask basically questions in three areas.

13

14 REDIRECT EXAMINATION

15 BY MR. BRADEN:

16 Q One, HB 5001 was vetoed?

17 A Correct. It was vetoed by the governor because of his
18 concerns with the Senate districts that were overlaid on
19 my bill.

20 Q So that plan is not before this Court; correct?

21 A That is correct.

22 Q And the discussions we had in regards to the emails
23 involving the Richmond registrar, all those emails were in
24 reference to 5001?

25 A That is correct.

1 Q The matter at issue before this Court is HB 5005;
2 correct?

3 A Yes, sir.

4 Q And you made, to the best of your knowledge, the
5 changes that were requested by the registrar in the 5005
6 bill which is now the plan before this Court?

7 A To the best of my knowledge, yes.

8 Q I think there might be some question regarding some
9 names that you used, so in case the Court doesn't
10 recognize who they were, let me ask you two quick
11 questions. Can you tell me who Mary Spain is and who Jack
12 Austin is?

13 A Mary Spain, senior attorney in Legislative Services
14 who first came in the mid '70s, and she was doing
15 redistricting law then, and she went through the '80
16 cycle, the multi-member districts. I think we had three
17 years in a row that they ran. She was here in '90, 2000,
18 and then she was getting ready to retire in 2010. So Mary
19 was -- we called the queen of redistricting.

20 And Jack came from UVa, I think, via VCU to
21 Legislative Services in 1979. So they have collectively,
22 when we were doing the map, 60 years' experience between
23 the two of them.

24 Q And they worked for both Republican and Democratic
25 members?

1 A That is correct.

2 Q Unless my memory is wrong, they would have initially
3 been hired when the legislature was controlled by
4 Democrats?

5 A That is correct.

6 Q And you've inquired of them, and they have no memory
7 of the state ever doing any type of vote dilution --

8 MR. SPIVA: Objection, Your Honor. This calls
9 for hearsay.

10 JUDGE PAYNE: Sort of does, doesn't it?

11 JUDGE LEE: Sustained.

12 MR. BRADEN: It sort of does. I withdraw that
13 question.

14 JUDGE PAYNE: It's already ruled on.

15 Q If I could ask just really one more question which is,
16 in regards to -- I feel bad, because I feel that I
17 didn't -- he asked a number of questions I should have
18 asked of my witness, so let me go to one of the districts,
19 HD 90, and the question regards the minority candidate of
20 choice. Do you believe that Billy Robinson was the
21 minority candidate of choice in HD 90?

22 A He was. He was defeated in 2002.

23 Q And was he defeated by a Republican?

24 A A Republican black female.

25 MR. BRADEN: Thank you.

1 JUDGE LEE: I'm sorry. The name of that person
2 again?

3 THE WITNESS: That was Billy Robinson. He was
4 defeated by Winsome Sears who served, I think, one term in
5 the House. She was the first female elected black
6 Republican.

7 JUDGE PAYNE: Is that it?

8 MR. BRADEN: No further questions, Your Honor.

9 JUDGE PAYNE: I think the Court has some
10 questions. Judge Keenan, do you want to ask yours first?

11 JUDGE KEENAN: Delegate Jones, I have a couple
12 questions I'd like to ask you for clarification. Part of
13 your testimony yesterday about the difference between the
14 Division of Legislative Services metric for black
15 voting-page population and the Department of Justice's
16 different metric, when did you first become aware that
17 there was a difference in these two metrics?

18 THE WITNESS: I guess the day that the bill came
19 out which was really the day, I think, it went on the
20 floor. I can't remember exactly, but when they did their
21 compilation, their report that showed all the
22 population --

23 JUDGE KEENAN: You are saying when DLS --

24 THE WITNESS: Yes, ma'am, not until then.

25 JUDGE KEENAN: Did you ever discuss these

1 differences with the House members on the House floor?

2 THE WITNESS: No, ma'am. I did discuss it with
3 Kent Stigall who was running the computer program for DLS,
4 and he told me it included all black.

5 JUDGE KEENAN: Then I recall from your testimony
6 that you said that members of the black caucus asked for
7 55 percent, and then you mentioned former Delegate Dance
8 by name.

9 THE WITNESS: Yes, ma'am.

10 JUDGE KEENAN: Do you recall any other delegates
11 who specifically asked for 55 percent?

12 THE WITNESS: Delegate Tyler, to my knowledge, my
13 recollection, excuse me, and Delegate Spruill.

14 JUDGE KEENAN: Okay. And then I also wanted to
15 ask you, what role did 55 percent black voting-age
16 population, what role did that play in your map-drawing?

17 THE WITNESS: It was certainly a consideration of
18 what the community and the black members had indicated to
19 me that they thought was a sufficient population to elect
20 the candidate of choice by the community.

21 In my conversation, with Delegate Spruill, and he
22 might have mentioned it on the floor -- I even had a
23 conversation with Delegate McClellan. It's not about the
24 incumbent member. The way I understood the law was that
25 it's not -- because I could win in my district or Lionel

1 could win in his district with a much lower percentage
2 because I have the name recognition.

3 Their concern, especially when I talked to Dance,
4 Spruill, Tyler, and Kenny Alexander, I believe, I recall
5 correctly, was that -- because Kenny was going to run for
6 the Senate which he is a senator now -- was that there be
7 a sufficient population in that district in a primary for
8 the candidate of choice to be able to win.

9 So it was aspirational. It was a rule of thumb,
10 but the map that I created that I submitted to Legislative
11 Services had three that were actually in the 54 percent.

12 JUDGE KEENAN: Did you talk about the 55 percent
13 aspirational threshold with each of the incumbents,
14 delegates in the 12 challenged districts?

15 THE WITNESS: I can't say each of them, but it
16 was a conversation with the majority of them, I would say,
17 yes, ma'am.

18 JUDGE KEENAN: Do you remember which ones?

19 THE WITNESS: The ones I just mentioned, I
20 believe. I'm trying to recall because I met collectively
21 with Betsy Carr, Delegate McQuinn, and Delegate McClellan.
22 I think we discussed it in that meeting. I'm pretty
23 certain that we did, and I know that Delegate Spruill had
24 met with, I believe, Matthew James, Algie Howell, and
25 Kenny Alexander. They were in 80, 89, and 90. That was

1 his responsibility as far as talking with them, and I feel
2 confident that he brought that up with them.

3 I talked with Delegate Howell, I think, one or
4 two occasions, and I can't remember specifically if we
5 discussed that number, but he had a concern. He was a
6 barber, so he was not worried about getting reelected
7 because he had probably cut everybody's hair in his
8 district and had been there for 35 years.

9 So their concern was that there be enough vote
10 there, if they were not still around, to be able to elect
11 the candidate of their choice.

12 JUDGE KEENAN: Thank you. That's all I have,
13 Judge Payne.

14 JUDGE PAYNE: Judge Lee.

15 JUDGE LEE: Was there a reason you did not
16 mention on the floor the difference between the DLS 55 and
17 the DOJ black?

18 THE WITNESS: Well, I felt that it wasn't that
19 big -- it was between .1 percent difference to .4, or
20 maybe .3, if I recall, Your Honor. I think the 95th
21 District might have been a one percent drop, but I think,
22 as we discussed yesterday, Delegate McClellan's was a
23 .4 percent.

24 So I didn't think that it was statistically
25 significant based on the testimony that we had heard,

1 because DLS could not produce -- to my understanding, they
2 just -- that's the way that they had their computer
3 programed to be able to produce all black. It was in
4 their setup, I believe. I think that's the same way they
5 did it in 2001, but I was not aware they used a different
6 metric than what I did, and my reasoning for using DOJ
7 black was because we had to submit it to the Department of
8 Justice, and I guess through conversations from the
9 seminar I attended in Austin and talking, I guess, if I
10 recall, with maybe one of my attorneys, maybe Dale Oldham
11 about that. I just don't recall specifically. But mine
12 was set up for DOJ black, so mine did not match up with
13 theirs.

14 JUDGE PAYNE: Anything else? I have this
15 question, Delegate Jones. First, you said you had met
16 jointly with Delegates Carr, McQuinn, and there was a
17 third person --

18 THE WITNESS: McClellan.

19 JUDGE PAYNE: And did you discuss with them the
20 55 percent, the need for 55 percent to be able to maintain
21 enough to elect the minority candidate if they weren't
22 there?

23 THE WITNESS: I know I did with Delegate
24 McClellan specifically, I do recall that. But I don't --
25 I can't say 100 percent it was discussed in that joint

1 meeting, but I believe it was. Based on the testimony,
2 yes, sir.

3 JUDGE PAYNE: Where did the 55 percent figure
4 come from in the first place? How did we ever get that on
5 to the table for discussion?

6 THE WITNESS: Well, Delegate Tyler, I know, had
7 serious concerns, because I believe when she ran -- she
8 ran in 2005, I believe her district was about 55 percent
9 if I remember correctly from what it was four years
10 before.

11 That was a real concern because she struggled to
12 win. She had a five-way primary race and then a general
13 election race and barely won, won with less than
14 51 percent of the vote. That was important to her.

15 Delegate Spruill had mentioned it to me, and I
16 can't recall who else and at what specific time, but that
17 was what was gleaned out of the process.

18 JUDGE PAYNE: Is it fair to say that the
19 55 percent figure came from your discussions with members
20 of the black caucus?

21 THE WITNESS: I would say mainly, but also
22 comments that they might have shared with me about other
23 members in the community. I know that Delegate Spruill
24 had talked to the NAACP in Suffolk and Chesapeake and I
25 think Portsmouth as well, because I asked him to talk to

1 the community and come back with their concerns.

2 JUDGE PAYNE: Why was the decision made to use
3 plus or minus one percent as opposed to plus or minus two
4 percent which had been used in the 2001 plan or plus or
5 minus five percent which was constitutionally acceptable
6 at the time?

7 THE WITNESS: We felt it better represented the
8 one-person-one-vote, and one of our districts, Your Honor,
9 had actually doubled in population over the balance of the
10 decade, I think Prince William, and we had -- almost every
11 one of the African-American majority-minority precincts
12 had decreased in population except for one, I believe.

13 That was a trend that we saw, Your Honor, in
14 2001, and I think that had been a trend over the last
15 couple of decades with the shifts in populations.

16 JUDGE LEE: There was a table that somebody asked
17 a question about yesterday, table 13. Do you know which
18 document that was?

19 JUDGE PAYNE: I was the one that had the DLS
20 numbers at the top, we think.

21 JUDGE LEE: I'm trying to compare the black
22 voting-age population before the 2011 plan and then with
23 the 2011 plan.

24 MR. HAMILTON: Your Honor, it might be
25 Plaintiffs' 50, which is Dr. Ansolabehere's report.

1 THE COURT: Isn't it 56 and 57?

2 MR. HAMILTON: I think the report is 50 and 51.
3 I'm not sure that's the table --

4 JUDGE LEE: That's it.

5 MR. BRADEN: It might be Defendant Intervenors'
6 Exhibit.

7 JUDGE LEE: I'm looking at what appears to be
8 Plaintiffs' 50, says Dr. Ansolabehere's report, table
9 four, I believe. Yes, table four.

10 MR. HAMILTON: Your Honor, it's Exhibit 50.
11 Table four shows the black voting-age population for the
12 benchmark districts as compared to the HB 5005 districts.

13 JUDGE LEE: Correct, that's what I'm looking for.
14 Do you have that in front you?

15 THE WITNESS: Can you give me the page number,
16 Your Honor? I'm sorry.

17 JUDGE LEE: Page 72 of Plaintiffs' 50.

18 THE WITNESS: Yes, sir.

19 JUDGE LEE: I'm looking at the column that says
20 black voting-age population, and the left reflects what?
21 The left column, what does that reflect?

22 THE WITNESS: That would be the population. He's
23 got benchmark. That would be the population as it existed
24 when the plan -- when we got the census numbers from the
25 census bureau for the 2001 districts, as I understand it.

1 JUDGE LEE: So then before the 2011 plan, all
2 these districts, except for one, were over 50 percent.

3 THE WITNESS: Yes, sir, as far as -- that would
4 be column four, I guess, under black voting-age
5 population.

6 JUDGE LEE: Yes.

7 THE WITNESS: That would be correct.

8 JUDGE LEE: Then the changes are reflected, I
9 guess, in HB 5005.

10 THE WITNESS: That would be correct, Your Honor.

11 JUDGE LEE: Okay.

12 JUDGE PAYNE: Does that take care of what you
13 need?

14 JUDGE LEE: It does, I think.

15 JUDGE PAYNE: When you were answering yesterday
16 questions in response to Mr. Braden, you were referring to
17 benchmark populations and using two exhibits to do that
18 and to plan populations using DLS and black VAP. Am I
19 correct that those were Exhibits 56 and 57 that you were
20 referring to?

21 THE WITNESS: I believe so, Your Honor.

22 JUDGE PAYNE: A housekeeping thing I was trying
23 to get straight in my notes. I'm sorry to hold you up.
24 We'll take the morning recess, and if we have questions
25 we'll get them when we come back.

1 (Recess taken.)

2

3 NOTE: After the morning recess, the case
4 continues as follows:

5 JUDGE PAYNE: Your next witness, Mr. Braden.

6 MR. BRADEN: Yes, Your Honor.

7 JUDGE PAYNE: Oh, we didn't excuse you, did we?
8 I guess actually both sides have a right to cross-examine
9 based on any questions the Court asked, and we haven't
10 given you that right.

11 So does anybody have a question based on any of
12 the questions we asked?

13 MR. BRADEN: No, Your Honor.

14 JUDGE PAYNE: Mr. Spiva?

15 MR. SPIVA: No, Your Honor, we don't.

16 JUDGE PAYNE: All right. Thank you. Next
17 witness.

18 You are through, thank you very much. You are
19 welcome -- you can stay around.

20 MR. BRADEN: Is he excused?

21 JUDGE PAYNE: He's excused as far as -- Mr.
22 Hamilton, do you need him in your case, Mr. Jones?

23 MR. HAMILTON: We do not. Thank you, Your Honor.

24 JUDGE PAYNE: Okay. Delegate Jones, thank you
25 for being with us and giving us your testimony.

1 NOTE: The witness stood down.

2 MR. BRADEN: And we will call Dr. Jonathan Katz.

3 And, Your Honors, we have witness binders that I
4 think will assist the Court.

5 JUDGE PAYNE: Good, thank you.

6 NOTE: The witness is sworn.

7

8 **JONATHAN N. KATZ,**

9 a witness, called at the instance of the
10 defendant-intervenors, having been first duly sworn,
11 testified as follows:

12 DIRECT EXAMINATION

13 BY MR. BRADEN:

14 Q Can you provide the Court your name.

15 A Jonathan Neil Katz.

16 Q And briefly what your profession is.

17 A I'm the Kay Sugahara Professor of Social Sciences and
18 Statistics at the California Institute of Technology.

19 Q And I would like to bring up Defendant-Intervenors'
20 Exhibit number 16.

21 Could you identify this document for the Court.

22 A That's my report in this case.

23 Q And if we could turn to page 25 of that report.

24 And could you tell the Court what this is.

25 A That is my curriculum vitae.

1 Q And is it current and complete?

2 A Yes, sir.

3 Q And your expertise briefly is in what area?

4 A Excuse me one second while I pour some water, please.

5 My areas of expertise are statistical analysis and
6 quantitative political science.

7 Q Who were you originally employed by in this case?

8 A I was originally retained by attorneys for the
9 defendant.

10 Q And you prepared an expert report for them?

11 A I did.

12 Q And now you're testifying for the
13 defendant-intervenors?

14 A That is also correct.

15 Q And do you remember how many times you've been an
16 expert testimony in redistricting cases or voting rights
17 cases?

18 A I've testified about 15 or 16 times, and I have been
19 involved in numerous other cases as a consultant.

20 Q And am I correct in your experience that redistricting
21 is often contentious and often partisan?

22 A That would be true.

23 Q And so, from your experience, can you identify often
24 whether or not you're working for a Republican plan or for
25 a Democratic plan?

1 A Yes.

2 Q And have you been a witness for Republican and
3 Democratic stakeholders in the process?

4 A Yes, I have served an expert witness in cases employed
5 predominantly by Democratic stakeholders and predominantly
6 by Republican stakeholders.

7 And then in California we have had numerous sets of
8 election law cases where nonpartisan local jurisdictions
9 are sued, and I've been retained by them.

10 Q I would like to turn to the substance of your report.
11 What were you retained to do?

12 A I was retained primarily to respond to the report of
13 Dr. Stephen Ansolabehere, pardon my pronunciation, Steve.
14 Particularly paying attention to compactness, racially
15 polarized voting in elections for the House of Delegates
16 in Virginia, and Dr. Ansolabehere's analysis of inclusion
17 of VTDs in the 12 challenged districts.

18 I should say overall the focus of my report is on a
19 reply and on those 12 challenged districts.

20 Q And what work did you do in a general sense in
21 preparing for your opinions in this report and what
22 materials did you use?

23 A Fairly standard. I reviewed the other expert reports
24 that were available prior to my commencing work, election
25 data, demographic data, and so forth.

1 Q Did you examine a part of the doctor's report that
2 deals with the division of VTDs?

3 A I did.

4 Q And I would like to turn to Defendant-Intervenors'
5 Exhibit 16, your report, I believe it's page 19.

6 Actually, I believe it starts on, it's
7 Defendant-Intervenors' Exhibit -- page 19. As is often
8 the case, it's a little confusing because it shows up as
9 page 18 on your report, correct, at the bottom?

10 A Yes, the bottom of 19, correct.

11 Q So there is a section beginning at that mark 4.3.
12 What does that section do?

13 A That's my examination of inclusion of voting
14 tabulation districts in the 12 contested districts and the
15 impact -- particularly examining the impact of racial
16 composition of the districts and partisan electoral
17 performance.

18 Q And is this the part of your report that specifically
19 responds to the other doctor's claim -- and excuse me, I'm
20 trying to -- every time I pronounce Dr. Ansolabehere's
21 name, I pronounce it a different way.

22 JUDGE PAYNE: Let's call him Dr. A, he will
23 forgive you.

24 Q Dr. A. Accept my apologies. We need more Basques to
25 teach us how to say it.

1 And Dr. A.'s report, is this the section responding to
2 his VTD report section?

3 A That is correct.

4 Q And can you just give the Court a brief explanation as
5 to whether or not -- first of all, do you believe that
6 that section of his report is flawed?

7 A Yes. I have concerns with the underlying statistical
8 premise of that analysis.

9 Q And can you explain to the Court why it's flawed.

10 A Well, in his analysis the underlying, one of the
11 fundamental underlying assumptions is that a voting
12 tabulation district, a VTD, can be independently assigned
13 to a given district. That's just not true.

14 Think about drawing a map. It is like the kid's game
15 Othello, a for those of you who are math aficionados the
16 game Go, if I want to include the third VTD in a district
17 and I am starting at -- and I have already included VTD 1,
18 the only way I can include VTD 3 is also to include VTD 2
19 because I need a -- the districts need to be contiguous.

20 And so, there is an interrelated -- the assignment of
21 VTDs is interdependent.

22 Q So do you believe that his report provides anything of
23 value to this Court in showing any issue regarding a
24 relationship between race and the VTDs that are chosen to
25 be included and not included?

1 A Again, given that assumption, which is fundamental
2 analysis, I do not believe any valid inferences can be
3 drawn.

4 Q Can we bring up Table 1. It's on
5 Defendant-Intervenors' page 21.

6 And can you tell the Court what this table is an
7 attempt to do?

8 A Certainly I will do my best. And, Your Honors, if you
9 have any questions about the details, I am happy to fill
10 you in.

11 What this presents is similar to Dr. Ansolabehere's
12 report, presents a regression that predicts the
13 probability that a given voting tabulation district is
14 included in one of the 12 contested districts where the
15 predictors are the percent black voting-age population in
16 that VTD and the average Democratic vote for statewide
17 office.

18 What's different, how this analysis differs from Dr.
19 Ansolabehere's is that we also include, although not
20 reported here, another predictor, which is how far that
21 VTD is from the center of the district we're looking at.

22 Now, this is a not a perfect fix. This is sort of a
23 crude or poor approximation, the best I could do given the
24 time, that allows for this dependence between districts.

25 So as districts get farther and farther from the core

1 of the district, their probability of being included in
2 that district must decline. And that's what we find.

3 Q And --

4 JUDGE PAYNE: You mean as the VTD gets farther
5 and farther away in the district, it's less likely that
6 it's going to appear in the district?

7 THE WITNESS: That's correct, Your Honor. What
8 the model says is we take the core, the center of the
9 district, and we ask how far this VTD is.

10 So if you think about a district that is way on
11 the -- currently on the border of that district, that VTD
12 has a much lower probability of having been included in
13 that district, right, it could have been moved to the
14 adjacent district, than one that is very close to the
15 core. Because again, the ones that are very close to the
16 core, since we need to generate a compact and contiguous
17 district, we need to include -- with high likelihood would
18 need to include the surrounding VTDs.

19 Does that make sense, Your Honor?

20 JUDGE PAYNE: I understand. Thank you.

21 BY MR. BRADEN: (Continuing)

22 Q And can you tell the Court what the central finding
23 from this chart is as to race and party?

24 A Yes. So if you look at the -- let's pay attention to
25 just Specification 1, which includes both black voting-age

1 population and average Democratic vote performance. The
2 bold numbers, the first numbers, are their coefficients.

3 Sounds like a scary word. All it really means is
4 since we're predicting a probability, it says that a 1
5 percent -- so if we look at black voting-age -- the
6 coefficient on black voting-age population, which is
7 0.157, it says that a 1 percent increase in the black
8 voting-age population of that VTD increases the
9 probability that that VTD is included in one of the 12
10 contested districts by .15 percent.

11 And similarly, the average Democratic vote share,
12 as the vote share increases, say from 50 percent to
13 51 percent, that change increases the likelihood that that
14 voting tabulation district is included in the contested
15 district by about .136 percent.

16 JUDGE LEE: Go over that again.

17 THE WITNESS: Certainly. So take a --

18 JUDGE LEE: I just want you -- I'm sorry. I just
19 want you to explain what you just were saying using your
20 chart. I'm trying to follow you.

21 THE WITNESS: Sure. So the coefficient on
22 average Democratic vote share is 0.136. All that means is
23 if I took the same district and I just increased its
24 Democratic vote performance, hypothetically, by 1 percent,
25 the likelihood that that district would now be included in

1 the vote tabulation district, holding everything else
2 constant, that is the black voting-age population and its
3 distance from the center of the district, it would
4 increase by about .136 percent.

5 Does that make sense, Your Honor?

6 JUDGE LEE: Yes, it does, now that you have
7 explained it a second time. Thank you.

8 BY MR. BRADEN: (Continuing)

9 Q If you could explain the second column understood
10 Specification 2.

11 A Again, to get some feel for the overall effect --
12 because the issue is that, as we've heard before,
13 testimony before, and I don't think of any surprise,
14 African-Americans are more likely to vote for Democratic
15 candidates in the Commonwealth of Virginia.

16 There is a correlation between black voting-age
17 population in a VTD and its average Democratic vote
18 performance.

19 So you see when we include either one of them
20 individually, that's what happens in these two
21 specifications, the effect is about the same. That they
22 are taking the total effect of being either black -- an
23 additional black voting-age population or in average
24 Democratic vote performance, they are both about
25 .25 percent.

1 But the focus should really be on Specification 1,
2 which is similar to Dr. Ansolabehere's report, because
3 there the question is, is one of these two effects larger?
4 That is, in a formal sense, in the statistical sense, is
5 there a statistical difference between .157 and 0.136?

6 Substantively they are pretty close, but I am a
7 statistician, I care about are they statistically
8 different. And I do that by looking at the numbers in the
9 parentheses, which are a measure of standard error.

10 Standard error, since we are estimating a model,
11 I don't know it for sure. If we did, you don't need a
12 statistician. And it's like when you often see poll
13 report numbers, polling reported, they say the population
14 approves of President Obama at 49 percent plus or minus
15 three percentage points. That plus or minus three
16 percentage points is a measure of the statistical
17 uncertainty of that estimate.

18 So it says that the real number is highly likely
19 in the balance 49 percent plus or minus 3 percent. That
20 plus or minus 3 percent comes from those numbers on the
21 side here. Let me cut to the chase --

22 JUDGE PAYNE: So the parenthetical are the margin
23 of error?

24 THE WITNESS: Exactly. And so, given the margin
25 of error, these two numbers are not statistically

1 distinguishable. So that is, in perhaps simpler terms,
2 the impact of black voting-age population and average
3 Democratic vote performance have an equal-sized impact on
4 the likelihood that a VTD would be included in one of the
5 12 challenged districts.

6 BY MR. BRADEN: (Continuing)

7 Q Could you conclude from this chart that race was
8 predominant over politics in the choosing of VTDs that
9 were in or out of a district?

10 A You couldn't. Although I would say something
11 stronger. This is a very, one, very crude analysis.

12 And two, doesn't account for any other reasons we
13 might want to include or not include a figure of VTD in a
14 district.

15 But given this limited analysis, that's what this
16 analysis tells me.

17 Q And is your crude analysis better than Dr. A.'s
18 analysis?

19 A I clearly think so because, again, it allows for this
20 clearly obvious interdependence in the creation of a
21 district. You can't, you can't randomly or independently
22 select a precinct to be in a district because I need it to
23 look -- I need it to be contiguous, I need it to be
24 compact. There are other criteria. It needs to maybe
25 perhaps maintain some communities of interest and other

1 factors which are going to constrain and jointly affect
2 numerous VTDs about whether or not they're included in a
3 given congressional district -- given, sorry, a
4 legislative district.

5 JUDGE PAYNE: Does Specification 1 purport to
6 show the difference in the correlations between black
7 voting-age population and Democratic vote?

8 THE WITNESS: Could I -- I'm going to be
9 specific, and then I'm going to try and give a more
10 intuitive answer.

11 The answer is yes. What these are are not
12 correlations though. These are really what in Dr.
13 Ansolabehere's testimony are partial correlations or
14 regression coefficients.

15 So really what we care about is the difference
16 between these two numbers, which is about .021 percentage
17 points. So that's the difference between the effect.

18 And now one wants to ask is the difference, that
19 is that the black voting-age population is about -- has an
20 impact of about 0.21 percentage points, is that
21 statistically different from 0? And the answer is, given
22 the uncertainty that we have, given the data and the
23 estimation, the answer is no.

24 So statistically these are a tie. You should
25 treat these two numbers as if they're the same.

1 JUDGE PAYNE: Which two numbers?

2 THE WITNESS: The two numbers are 0.157 and
3 0.136.

4 JUDGE PAYNE: And those two numbers are equal --
5 157 is identified with BVAP, and 136 is identified with
6 average Democratic vote, is that right?

7 THE WITNESS: That's correct, Your Honor.

8 JUDGE PAYNE: Okay. I understand. Sorry.

9 JUDGE LEE: Can I ask a couple of follow
10 questions?

11 THE WITNESS: Of course, Your Honor.

12 JUDGE LEE: So then what you did in the bottom of
13 this Table 1, control for VTDs in challenged districts
14 under benchmark control for distance from the 12 benchmark
15 challenged districts, you analyzed the Democratic vote in
16 the 12 districts, is that right?

17 THE WITNESS: Yeah. It's actually all the
18 districts in the state, but yes.

19 JUDGE LEE: But for this chart you did the 12
20 districts?

21 THE WITNESS: Yes.

22 JUDGE LEE: So they were heavily Democratic at
23 the start?

24 THE WITNESS: Correct.

25 JUDGE LEE: And then race was also a factor you

1 analyzed in the top part. And you're saying that the
2 difference between being black and Democrat is basically
3 the difference between .15 percent and .13 percent in
4 terms of the performance of those districts, those 12
5 districts?

6 THE WITNESS: Good question. And so, I didn't
7 clearly explain this properly, so let me try one more
8 time, Your Honor.

9 So it is the case that the voting tabulation
10 districts in these 12 contested districts are on
11 average -- have higher black voting-age population and are
12 also higher, have higher Democratic vote performance. But
13 the VTD, the numerous VTDs that comprise these districts
14 vary quite substantially actually on their -- on both
15 those dimensions.

16 And what this analysis is trying to do is to ask
17 how does that -- how does either being -- having more
18 black voting-age population in that VTD or having higher
19 Democratic vote performance increase the likelihood that a
20 given VTD is included into one of the 12 contested
21 districts.

22 And so, this is not about -- so the coefficients
23 are not about vote performance or black -- this is
24 actually saying, we would like to know the likelihood that
25 a given VTD is included in one of these majority-minority

1 districts. And that becomes -- and not surprising, the
2 more African-Americans there are in that district, the
3 more likely that precinct is to be included in one of the
4 contested districts.

5 Also, probably not surprising, but probably maybe
6 less -- but maybe a little less, so is the higher the
7 Democratic vote performance is in a given VTD, the more
8 likely it is to be included in one of the
9 majority-minority districts in the Commonwealth of
10 Virginia House of Delegates map.

11 JUDGE LEE: Thank you for answering my question.

12 BY MR. BRADEN: (Continuing)

13 Q And again, let me make sure, I don't want to ask you
14 to explain something that's been explained to the Court,
15 but Specification 2, could you explain that again to the
16 Court.

17 A Again, it was just -- perhaps I should have -- for
18 clarity I should not have included it. But to look for
19 the overall -- it was just to show qualitatively --
20 actually quantitatively, pardon me, that the impact of
21 increasing independently and ignoring the other --
22 increasing either black voting-age population or average
23 Democratic vote performance, ignoring the impact of each
24 other, has about the same effect.

25 And that's statistically not a surprise because

1 black voting-age population is highly correlated with
2 voting -- high Democratic vote performance in a given VTD.

3 And so, another way of -- or maybe perhaps this
4 an easier way to think about it, .249 is basically the
5 same as 0.25, they are substantively close. And again,
6 given their uncertainty, they are identical.

7 That is another way of thinking about these. So
8 it is a different way of looking at the same thing in
9 Specification 1.

10 Does that help clarify things?

11 JUDGE LEE: I think I understand your premise to
12 be that you've compared party and race as predictors that
13 a particular VTD would be included in one of 12 districts,
14 that's the point of this whole exercise?

15 THE WITNESS: That's correct, Your Honor.

16 JUDGE LEE: I got it, I think. But don't quiz me
17 on it. I don't have to take a test, do I?

18 MR. BRADEN: Really?

19 JUDGE LEE: They said there would be no math.

20 BY MR. BRADEN: (Continuing)

21 Q Did you have an opportunity to review Dr. A.'s reply
22 expert report?

23 A I did. His central complaint -- pardon me. His
24 central complaint about this analysis is that -- I do this
25 at the level of the entire state of Virginia and not in

1 geographic regions as he did. But this actually misses
2 the point.

3 I don't disagree that if there is -- there might
4 be interesting local geography that might matter, but
5 breaking it up into subgeographies -- and I am not even
6 sure how he did it. I am not an expert in Virginia
7 political or social geography -- doesn't solve this
8 interdependence. That is, I can't -- if I want to have
9 VTD 1 in, it's in the precinct, and I want to have VTD 3
10 that's out here, the only way I can do that is by also
11 including VTD 2 in my map.

12 And so, that doesn't -- doing this by subregions
13 doesn't solve that problem.

14 Q And I would like to move to Defendants' Exhibit 16,
15 page 9. Actually, it would be -- in the exhibit it is
16 page 10. It is page 9 in the report.

17 And that section, beginning on page 9, it's number 3,
18 what does that deal with?

19 A This deals with our examining Dr. Ansolabehere's --
20 I'm sorry, Dr. Ansolabehere's polarized -- vote
21 polarization study or ecological regression.

22 Q Before we get to the simple stuff, the ecological
23 inference and ecological regression, let's do try
24 something more simple.

25 Do you think that Professor A. used the right

1 data in his analysis?

2 A I have two concerns with the data he used. First, we
3 were never -- myself and my RAs were never able to exactly
4 match the number of precincts he found. And we never
5 received his data, so I have no way of verifying why that
6 was so.

7 But the second issue regards to which elections he
8 examines. All of his focus is either on presidential
9 elections or gubernatorial elections in Virginia.
10 Presidential elections are on-year elections, whereas
11 House of Delegates elections are off-year elections in the
12 parlance of political scientists.

13 And there is no analysis about why voting in these two
14 types of elections are the same and, therefore,
15 informative of how -- whether or not there is racially
16 polarized voting in House of Delegates elections.

17 Q In your experience, are these usually the same?

18 A Typically not. But again, ultimately that's an
19 empirical question which can be examined.

20 Q And again, as a political scientist, I know you
21 haven't got the data, but would you think it's likely that
22 the fact that there was a black presidential candidate
23 might have influenced the turnout and results in some of
24 the elections?

25 A That's more likely than not.

1 Q You've been hired on many occasions in Section 2
2 litigation and asked to do vote dilution analysis.

3 What election data would you think you would need to
4 do that?

5 A Well, let me start with the general answer, and then
6 we'll talk about Virginia, which raises some interesting
7 complications.

8 Typically, although I'm not -- looking at other races,
9 that is races other than the jurisdiction -- other than
10 the election type under litigation, is fine, but primarily
11 and the first thing I would look at would be the elections
12 under contest.

13 So in this case I would look at elections for House of
14 Delegates. That's the general issue.

15 In practice, the problem in Virginia is that so few of
16 the House of Delegates races are contested. Actually, I
17 haven't done an exhaustive search, it might actually have
18 the lowest number of contested elections per election
19 cycle that I have ever seen.

20 Q In the general elections?

21 A In general elections.

22 Q So would primary data have been useful to you in this?

23 A Well, yes, again because in an uncontested election, I
24 don't know who the preferred candidate is. The voters
25 have not been given any choice. So in a sort of

1 statistical sense, that is unknowable unless I make up the
2 answer effectively.

3 So in this -- so, therefore, I might want to look at
4 primaries. Which again, from my rather casual perusal and
5 from hearing testimony, there seems to be at least more
6 challenged primaries. And it seems to be often the point
7 of real decision making, especially in these 12 contested
8 districts.

9 Q So if you had a report in a hypothetical case that had
10 no primary data and used a different election cycle, would
11 you be able to draw any conclusions from that?

12 A I would be reluctant to draw any firm confusions --
13 conclusions, not confusions, about whether or not there is
14 racially polarized voting in the election under question.

15 Q And what's the value of a report looking at
16 presidential data?

17 A By itself, an interesting academic exercise, but I
18 don't quite understand what it bears on voting in House of
19 Delegates elections.

20 Q Would knowing whether or not there were black
21 candidates in a primary and that information assist you in
22 doing it?

23 A It would.

24 Q So what other criticisms -- let me ask, using the data
25 that Dr. A. used, do you believe it's possible to do any

1 type of valid vote dilution analysis or retrogression
2 analysis of any type?

3 A Again, that's probably a bit stronger than I would put
4 it, counsel. I would say that that in isolation, without
5 further analysis showing that these elections were similar
6 in kind and in voting behavior, and without any actual
7 examination of House of Delegates elections, I would say
8 so.

9 Q So what other criticisms do you have of Dr. A.'s
10 report?

11 A One that the Court might find more pointed headed and
12 technical, it's the use of the statistical tools that he
13 used. He used a tool called ecological regression which
14 was developed in the 1950s by Leo Goodman. It was great
15 technology in 1950. The world has come a long way in
16 those intervening six decades.

17 And it was mentioned during his testimony the
18 state of the art in this is something called ecological
19 inference, which solves some of the problems and better
20 exploits, that is, makes better use of the available data
21 in this type of ecological -- this type of ecological
22 data.

23 Q If we can bring up Defendants' Exhibit 110, page 7.

24 Can you just briefly explain to the Court what this --
25 this is from -- can you tell the Court what this is.

1 A Yes. Again, I didn't have the underlying results from
2 Dr. Ansolabehere's report, so what we did is -- what I did
3 is we did ecological regression on the data, on our
4 replication -- on the data that we could put together on
5 the elections, in this case for House of Delegates
6 District 77, for the elections that we had data on.

7 So, for example, you see here, 2002 U.S. President.
8 And there are three points on this graph for that -- on
9 that vertical line. The circle is the percent of our
10 estimate using ecological regression, the percent of
11 African-Americans that voted for President Obama, the
12 Democratic candidate.

13 And here we say that estimate 1.07. That is
14 107 percent of African-Americans are estimated to have
15 voted for President Obama in this election in House
16 District 77.

17 I do not think elections in Virginia are fraught with
18 fraud, so that's not possible. More than 100 percent of
19 the African-Americans could not have voted for President
20 Obama.

21 Similarly, the triangle is our estimate of whites.

22 And the square is the estimate for
23 nonwhite/non-African-Americans.

24 Q Does this chart explain why most statisticians have
25 now probably replaced this method with ecological

1 inference?

2 A Yes. As you can --

3 MR. HAMILTON: Object to the form of the question
4 as leading. He can ask --

5 JUDGE PAYNE: Let me ask you to rephrase your
6 question.

7 BY MR. BRADEN: (Continuing)

8 Q Have most statisticians recently moved away from this
9 form of analysis?

10 A Yes, they have. Because, again, in part, as we see
11 here, we get blatantly incorrect answers. And again, more
12 importantly from my perspective, it doesn't make use of
13 all the available information in these types of aggregated
14 data.

15 Q Again I would like to move to Defendant-Intervenors'
16 111, figure 8.

17 And can you tell the Court what this chart is?

18 A So in an attempt to look for whether or not there is
19 racially polarized voting, particularly in the 12
20 contested districts, we examined -- we did ecological
21 inference, which is this alternative. Which again I am
22 happy to explain in detail if the Court would like. That
23 estimates the voting behavior of again African-Americans,
24 whites, and others in voting for House of Delegates
25 elections.

1 Now, recall, we had data going back to 2007 and there
2 are 12 districts. So in principle we could have had -- I
3 guess there is 12 times five, 60 possibly elections we
4 possibly could have examined. There are only 11 on this
5 chart. And that's because we can only do -- we can only
6 ask the voting preferences of the electorate in elections
7 where there was actually a contested election.

8 These are basically all the contested elections in the
9 12 districts that I had available data for.

10 Q Is there really sufficient data available to do an
11 analysis that would inform this Court on these issues?

12 A Again, given the lack of contested races, I am
13 reluctant to draw any firm conclusions. We can draw the
14 conclusions in the districts and elections for which we
15 can observe, which are these 11 on this chart, and they
16 are indicative, and we can go through details if you like,
17 of racially polarized voting, at least in half of them.

18 But I would be hesitant to draw it for the entire
19 state without some additional analysis.

20 Q If election data is thin or limited or unavailable,
21 are there other approaches that an individual might take
22 to reach conclusions on this?

23 A Again, you would then be forced to think about -- I
24 would say there is lack of quantitative evidence we can
25 bring to bear on this. Clearly politicians, pollsters,

1 there might be other available data to look at this. That
2 was not available to me and it is obviously not what I do.

3 Q So a member of a legislative body going to the
4 individuals who represented those particular districts and
5 asking them, would be a reasonable alternative approach?

6 MR. HAMILTON: Object to the form of the
7 question, Your Honor. A, it is not in his expert report,
8 so it is beyond the scope of this witness' knowledge that
9 he has been identified as an expert for.

10 And B, it's not in his area of expertise. He is
11 not an expert on what legislators do or do not consider in
12 doing redistricting.

13 JUDGE PAYNE: Sustained. If you want to lay a
14 foundation, perhaps you can.

15 MR. BRADEN: Sure.

16 BY MR. BRADEN: (Continuing)

17 Q You've been hired many times to do racial bloc voting
18 analysis?

19 A Yes.

20 Q And the goal of those analyses is to determine the
21 relationship between race and voting and the ability of
22 candidates of choice to be elected?

23 A That is correct.

24 Q So if you had an inability to come up with all the
25 data to do that type of analysis, would you recommend to a

1 legislature a different approach?

2 MR. HAMILTON: The same objection, Your Honor.
3 It is beyond the scope of the witness' identified
4 expertise. It is not in his report.

5 JUDGE PAYNE: Is it in his report?

6 MR. BRADEN: It's not in his report.

7 JUDGE PAYNE: Isn't that the rule? You don't
8 have it in your report, you can't testify to it.

9 MR. BRADEN: Yes, Your Honor.

10 JUDGE PAYNE: Sustained.

11 BY MR. BRADEN: (Continuing)

12 Q Let's turn to Dr. A.'s report, and this would be the
13 demonstrative that was presented to this Court. And it is
14 page 21 of 22, I guess of the pdf.

15 JUDGE PAYNE: Of which exhibit?

16 MR. BRADEN: It's in the back of the witness
17 binder. This was not an exhibit. This was a
18 demonstrative provided by the plaintiff to this Court.

19 JUDGE PAYNE: It's all the way in the back as a
20 demonstrative, right?

21 MR. BRADEN: All the way in the back.

22 JUDGE PAYNE: Okay.

23 BY MR. BRADEN: (Continuing)

24 Q Do you recognize this document?

25 A Yes, I saw it yesterday in court.

1 Q And do you know what it purports to do?

2 A Yes. It's similar to an exercise that plaintiffs'
3 counsel had me do during my deposition. Oh, there, thank
4 you.

5 And what it does is it takes my estimates, you see the
6 source on the bottom, of voting behavior in a given
7 election and asks the hypothetical question, what would
8 happen if we were to lower the percentage of the
9 African-American black voting-age population in that
10 district from whatever its current number is -- so, for
11 example, in House District 69, it is 55.2 percent black
12 voting-age population, and drop it down to 50 percent.

13 With the assumption that all the -- since we have to
14 maintain the overall constant population of the district,
15 that the increase would all go to whites.

16 And then ask the hypothetical question, what would the
17 election result have been in that district.

18 Q And how -- in what way would this inform the Court's
19 decision making on any of the issues you normally study in
20 a vote dilution analysis?

21 A Again, I think we need to back up a few steps.
22 Ecological inference or ecological regression for that
23 matter are asking a very particular question. They are
24 asking how did voters vote -- how did a set of voters who
25 showed up to vote actually vote in that election.

1 Now, there is the trouble, and why we have to
2 estimation is, we have secret ballots. And so, we try to
3 use statistical tools to basically back out how on average
4 various groups voted in that election.

5 What this table is being used for, as I understood it
6 during the testimony yesterday and in my deposition, was
7 as a way to characterize -- let's call it the normal or
8 expected Democratic vote performance. And that's not a
9 valid use of the ecological inference or ecological
10 regression estimates.

11 Q So is there any reference in this material to primary
12 elections?

13 A I want to add one more thing, if I might, to this. So
14 the key when you want to do this type of analysis, say ask
15 how a Democratic --

16 MR. HAMILTON: Objection, Your Honor,
17 nonresponsive. There is no question. The question was
18 about primary elections. And the witness is now
19 volunteering something else.

20 BY MR. BRADEN: (Continuing)

21 Q What was the key in this report?

22 JUDGE PAYNE: Sustained.

23 Q What's the key factor you haven't been able to address
24 because of my inarticulate questioning?

25 MR. HAMILTON: Well, that doesn't cure the

1 problem, Your Honor. Now he's just asking him to
2 volunteer. I think we have the same issue. So I object.

3 JUDGE PAYNE: Well, ask the question right.

4 BY MR. BRADEN: (Continuing)

5 Q What's the key factor you haven't been able to address
6 to the Court on this demonstrative.

7 JUDGE KEENAN: Mr. Braden, could you keep your
8 voice up, please.

9 MR. BRADEN: My apologies, Your Honor.

10 JUDGE KEENAN: Thank you.

11 A Look, this is not -- we can do an analysis that would
12 ask how a -- say how the Democrat -- how a Democratic
13 candidate would do in this election, say in House District
14 69, but we'd need to -- the model would be much more
15 complex than just the ecological inference or ecological
16 regression results which are presented here.

17 They would need to account for the fact of whether or
18 not incumbents were running. So in almost all of these,
19 all but one of these elections, incumbents are running.
20 And need to think -- because this is about a forecast of
21 how a district will perform over the election decade.
22 We'd want some measure of the uncertainty or the vote
23 swings between elections.

24 So we can think about it, there are good years for
25 Democrats, there are bad years for Democrats. And those

1 types of swings vary by state, and we would want to, using
2 statistical tools, model that to get a reasonable
3 inference.

4 I have done such analyses before, but this isn't it.

5 Q And how would you do such an --

6 JUDGE PAYNE: Excuse me. As I understand what
7 you're saying, is that this demonstrative is not a valid
8 use of the ecological inference reference because there
9 isn't enough data for it to be considered to be valid by
10 people in your profession? Is that what you're saying?

11 THE WITNESS: It's not the data. It's not the
12 appropriate statistical model because it doesn't control
13 for other things that we know affect elections and will
14 affect elections in the future.

15 So to do that analysis, we need to observe
16 multiple elections, say historically, to get an idea of
17 the ebbs and flows we see in political fortunes of the
18 parties at the district level, which this doesn't do.

19 This is like a -- think of this, Your Honor, as a
20 snapshot in time, we're observing one election, and these
21 are perfectly valid inferences about a given election, but
22 it's not fully informative in a statistically valid way
23 about what future elections might look like.

24 BY MR. BRADEN: (Continuing)

25 Q So does this demonstrative provide informative

1 information to the Court in regards to vote dilution, or
2 racial bloc voting, or the percentage of black voting-age
3 population necessary to elect a candidate of choice?

4 A Again, no for several reasons. One I've already
5 alluded to, which is we would like to know vote
6 performance not just in this election, but in future
7 elections.

8 A secondary problem, and obvious by the fact that we
9 only have seven districts up here, at the very least there
10 are 12 contested districts, so there are numerous
11 districts not here and actually numerous elections. I
12 don't actually know which elections these are from, but
13 they are only a scattershot of elections.

14 I had said, going back to a point I have already made,
15 the real problem in analyzing House of Delegates elections
16 in Virginia is there so many uncontested races. One would
17 want to look perhaps at primaries and other ways about the
18 political process because this is just not enough data to
19 draw any firm conclusions.

20 Q Were you present for the testimony of Dr.
21 Ansolabehere?

22 A I was.

23 Q I think, and I hope I am not mischaracterizing that
24 we've heard some testimony from him that this is a
25 relatively quick process.

1 How long would it take you to do it?

2 A Could you clarify what this is? Sorry.

3 Q Yeah, he did a racial bloc voting analysis for this
4 Court in his report. To do one that you would think was
5 statistically valid, how long would it take you to do?

6 A So there is multiple parts to that. So it would take
7 weeks to get the data matching a census and political data
8 and verifying it. That is typically not done by myself.
9 I typically ask counsel to hire data experts to do that.

10 Then once I received it, it would take -- the
11 ecological inference, one of the costs of it is that it is
12 very computationally intensive. So running each election
13 can take between two and eight hours on a very high
14 performance computer.

15 So if we had election results say for every House of
16 Delegates election that we wanted to examine, each one of
17 those takes between two and eight hours of computer time.
18 And probably a couple of days of my time to code up and
19 to -- to code up the analysis and then to run diagnostics
20 and check on the other end.

21 Q So have you ever been asked to do such an analysis
22 prior to the drafting of a redistricting plan?

23 A I haven't personally, no.

24 Q And how many years have you been involved in the
25 process?

1 A I have been involved in the redistricting process for
2 about 16 years, 15 years.

3 Q Could you find anything useful in Dr. Ansolabeher's
4 report in this area?

5 A No. Again, given that he did not examine House of
6 Delegates elections, and there are so few of them if he
7 had, I would draw serious concerns about any inferences
8 being drawn from his analysis.

9 Q I would like to bring up Defendant-Intervenors' 112,
10 figure 9.

11 Can you explain to the Court what this is.

12 A Yes.

13 Q It's on page 18.

14 A So, again, a concern and what I alluded to in my
15 discussion of that demonstrative is what you would really
16 like to know is the performance. That is, how does the
17 ability in this case of a candidate of choice, which in
18 this simple analysis is going to be an African-American
19 delegate winning election -- that's a very complicated set
20 of analysis. Which is challenged in the case of Virginia
21 in part because of the uncontested elections.

22 So what here is what I will call a crude or a poor
23 man's first take on this, it's probably the first thing I
24 would have done if I were retained in this case, which is
25 we just across all the elections we observed, we plotted

1 out on the horizontal axis is the percent black
2 voting-age population.

3 On the vertical axis is the -- it's misleading
4 because it goes from 0 to 1, but it's actually discrete.
5 That is, did the district elect an African-American
6 delegate in that election.

7 And so clearly a district is either on the horizontal
8 line at 1 or the horizontal at 0. And then we ask, what
9 sort of the -- this analysis is called a logit analysis,
10 l-o-g-i-t. And that curve in the middle is sort of the
11 best fitting curve we can do. And it's telling you how as
12 you -- in a simple way, given the observed elections, how
13 does the change -- how does changing black voting-age
14 population in a precinct -- sorry, in a district change
15 the probability of an African-American delegate being
16 elected.

17 And as you see, not surprising again I think to this
18 Court, as the black voting-age population increases, that
19 probability increases. That's why this curve is sloped
20 upwards.

21 In particular, at about -- since 55 percent seemed to
22 be an interesting number in this case, if you looked at
23 it, this curve, if you looked at 55 percent, it actually,
24 the probability that that district would elect an
25 African-American delegate is about 80 percent.

1 JUDGE LEE: What is it at 50 percent?

2 THE WITNESS: I would have to actually calculate
3 it, but it looks like at about 50 percent, it's actually
4 just close to 50 percent, maybe 52 percent.

5 JUDGE PAYNE: You mean when the black voting-age
6 population is 50 percent, the chance of electing a black
7 candidate is 50 percent, is that what you are saying?

8 THE WITNESS: That's correct, Your Honor, in
9 general election. These are general election data.

10 JUDGE KEENAN: Are you talking black candidate,
11 or minority-preferred, or are you drawing a distinction
12 between the two?

13 THE WITNESS: Again, since -- I'm sorry, I cut
14 you off.

15 JUDGE KEENAN: Are you drawing a distinction
16 between black candidates and minority-preferred
17 candidates?

18 THE WITNESS: Normally we would want to do that,
19 but given we observed so few contested elections, it's
20 very difficult to identify.

21 So how the analysis would really proceed if we
22 were not data challenged in this case, is we would do
23 ecological inference for all the observed contested
24 elections to find out who the preferred black -- which
25 candidate African-Americans preferred in every district.

1 We would then, instead of coding this as black,
2 we would code that candidate and then ask -- and then do
3 this analysis on who won. I didn't have the time, and
4 again, since we didn't have contested elections, that was
5 not possible.

6 So I really want to treat this analysis as a
7 crude, sort of best-we-can-do, short-notice analysis.

8 BY MR. BRADEN: (Continuing)

9 Q So is this chart, although -- am I correct, you said
10 this was a crude chart, crude analysis. Am I correct that
11 you just characterized this as a crude analysis?

12 A Yes, I did.

13 Q But is this chart alone better than anything in Dr.
14 Ansolabehere's report on this issue?

15 A I believe so.

16 JUDGE LEE: In your report on that same page you
17 have some summary there. And I wanted to make sure that I
18 understood what you were saying here.

19 THE WITNESS: Yes, Your Honor.

20 JUDGE LEE: You said if the districts were being
21 packed to 55 percent, there would be a 100 percent chance
22 that the African-American would be elected in your report?

23 THE WITNESS: That's correct, Your Honor. That's
24 a hypothesis. That's not what the data says.

25 JUDGE LEE: Oh. I thought just a moment ago you

1 said 80 percent?

2 THE WITNESS: Yes. So that was a hypothetical --
3 it's a hypothetical statement. It says that one claim
4 that you're overpacking African-Americans in that
5 district, then one would expect to see 100 percent or
6 close -- that is probably too strong. Close to
7 100 percent probability of electing an African-American
8 delegate.

9 What in fact we find from this simple analysis is
10 that it's actually about 80 percent.

11 JUDGE LEE: Thank you.

12 THE WITNESS: Is that clear, Your Honor?

13 JUDGE LEE: Yes, it is. Thank you.

14 BY MR. BRADEN: (Continuing)

15 Q And in the interests of time, I will just ask a couple
16 of brief questions in regards to your compactness
17 analysis.

18 Is compactness a useful measure?

19 A It's a problematic measure. So typically when one
20 wants to talk about quantitatively measuring things, you
21 have a well-defined concept. And then one asks, how does
22 a measurer or an estimator comport with that?

23 The problem is compactness is actually very neat
24 mathematically, but it's not what people mean in
25 redistricting.

1 So instead what happened is there has been 20-plus
2 suggested measures of compactness. And depending upon
3 which one you use, you get different results.

4 Q Is there any academic consensus as to what measure to
5 use?

6 A Unfortunately there is not. Again because there is no
7 underlying consensus but what the quantity -- what
8 compactness means formally in a mathematical sense.

9 Q Can you look at any individual single district in
10 isolation to examine compactness?

11 A Again, it's the same concern I raised with the
12 inclusion of a VTD in a given district. Take a part of
13 the state near the coastline in Virginia. It has a very
14 irregular shape. Suppose just inland from it I draw very
15 compact, say a circle or a square, rectangular district.
16 We will ignore any other factors that might come in.

17 Well, since I have to enfranchise the rest of that
18 population, the resulting district to its say east will
19 need to be relatively uncompact just given the coastline.

20 So typically one wants to think about compactness
21 measures across an entire state and typically comparing a
22 crossplan as opposed to saying there is any sort of
23 absolute number of --

24 Q Did it appear -- it appears that you used a different
25 measure for compactness. Would you explain why you used

1 that different measure to the Court and what it was.

2 A It's one called -- it's a center of -- it's the
3 Boyce-Clark measure, slightly modified to make it easier
4 to compute. And all that point was to show that with a
5 different measure, which I think has some nice properties,
6 but it doesn't -- it's not perfect, that you get a
7 different finding about the relative compactness of the
8 challenged districts than you do from the noncontested
9 districts.

10 Q Is there something about the shape of Virginia in
11 particular that makes that measure you think useful?

12 A Well, the nice thing of these -- they're called, a
13 technical term called inertia or center of inertia
14 measures is that they don't impose a geometric shape. So
15 that most of the, excuse me, Your Honors, most of the
16 compactness measures that have been discussed in the
17 reports are really about inscribing perfect shapes,
18 circles, mostly circles in this case.

19 The problem is, you actually can't draw a
20 circular district because since you can't have voters in
21 multiple districts, there is no way mathematically -- or
22 think about tiling your floor. You couldn't tile your
23 floor in circles and get every inch of the floor. There
24 would be leftover parts where there is grout, or in this
25 case leftover voters who are basically not allowed to vote

1 for a House delegate. So that's the concern with these
2 so-called encompassing circle measures.

3 The nice thing about these center of gravity or
4 inertia measures is they don't put an optimal size. They
5 just ask, how far is the farthest voter from the center of
6 the district.

7 Q And if we could bring up Defendant-Intervenors'
8 Exhibit 61.

9 Your Honors, I believe you have seen this before.

10 If we could help you out and pull up the Tidewater
11 area.

12 A I didn't know that was the Tidewater area. Always
13 nice to learn something.

14 This is the same point I made before. Which is, given
15 the sort of natural geography and the underlying county
16 structure in this part of Virginia, if you are going to
17 obviously not include the water and maintain some
18 semblance of these underlying counties, it can be very
19 hard to draw a pretty looking, i.e. compact districts.

20 Q Your Honors, I would like to turn now to
21 Defendant-Intervenors' Exhibit 16, page 10. It is the
22 report on page 10.

23 And am I correct on page 10 you have a summary of your
24 findings on these issues?

25 A That is correct, Your Honor -- sorry, counsel.

1 Q Could you just briefly provide the Court with the
2 summary of your findings on compactness.

3 A Sure. Essentially point one, in a comparison of the
4 challenged districts between the benchmark map, that is
5 the previous map, and in the new map, HB 5005, there is
6 essentially no substantive difference, about 4 percent
7 difference in compactness between those districts.

8 Point two --

9 JUDGE PAYNE: Excuse me, just for the record,
10 we're talking about page 9 of the document, is that right?

11 MR. BRADEN: Page 9 of the document, page 10 in
12 the exhibit.

13 JUDGE PAYNE: Go ahead.

14 THE WITNESS: Are you ready, Your Honor?

15 JUDGE LEE: Yes.

16 THE WITNESS: The second point, in the remaining
17 88 districts, those are the noncontested districts, again
18 there is basically no difference on this measure of
19 compactness between the benchmark map, i.e. the previous
20 map, and HB 5005.

21 The third point, there is no -- in the benchmark
22 map, there is no difference between -- there is no
23 substantial difference between the compactness of the
24 challenged districts -- sorry. Let me rephrase that.

25 In the benchmark map there is no appreciable

1 difference between the challenged districts and the other
2 88 nonchallenged districts in terms of their compactness.

3 There is a slight, in HB 5005 the challenged
4 districts are actually slightly more compact than they
5 were in the original benchmark map.

6 And then the final point is nine of the 12
7 challenged districts saw increased compactness in HB 5005,
8 as did 39 of the remaining 88 districts of the
9 nonchallenged districts.

10 BY MR. BRADEN: (Continuing)

11 Q Dr. Katz, did you have an opportunity to review the
12 reply report by Dr. Ansolabehere?

13 A I did.

14 Q And did you see where he indicated, I believe I'm
15 accurately summarizing, that he felt that your compactness
16 report was in some manner in conflict with the compactness
17 analysis provided by Dr. Hood and Dr. Hofeller?

18 A I do recall that, reading that.

19 Q Do you believe that this -- is this just a different
20 way of doing it, or are you in conflict with them?

21 A Again, this goes back to my original point about these
22 compactness measures. Which is, if you look at different
23 compactness measures, one will find different rankings and
24 amounts of compactness.

25 MR. BRADEN: Thank you.

1 JUDGE PAYNE: I think the criticism levied by Dr.
2 Ansolabehere was that you were in conflict with Hood
3 and -- what's the other person's name?

4 THE WITNESS: Hofeller.

5 JUDGE PAYNE: Hofeller. Do you think you are in
6 conflict with them? If so, why?

7 THE WITNESS: No, I don't. Again, it goes back
8 to this question. Which is, using different measures,
9 choose your favorite of one of the 20 measures. One will
10 come to different conclusions because there is not an
11 underlying consensus about what the right measure of
12 compactness should be.

13 JUDGE PAYNE: Were your conclusions different
14 than reached by Hofeller and Hood?

15 THE WITNESS: Yes, because I used a different
16 measure of compactness than they did.

17 JUDGE PAYNE: Are they statistically significant
18 differences in your judgment?

19 THE WITNESS: Again, the compactness measures
20 have no underlying statistical foundation, so there is no
21 way to make that claim.

22 JUDGE KEENAN: So you're saying it's apples and
23 oranges?

24 THE WITNESS: Yes, unfortunately.

25 JUDGE LEE: Is there some definitive rule

1 concerning compactness? That there is some special
2 measure that is authoritative that we should consider?

3 THE WITNESS: No. That's the whole problem, Your
4 Honor. Since there is no agreement about the fundamental
5 quantity that is being measured, there is no way to
6 adjudicate which of these 20 measures which have various
7 pluses and minuses -- so there is no consensus. Which I
8 know it doesn't do the Court any good, but in academic
9 literature there is no consensus.

10 JUDGE LEE: Thank you.

11 MR. BRADEN: If I can just ask one follow, two
12 follow-up questions.

13 BY MR. BRADEN: (Continuing)

14 Q Are you familiar with a well-known political scientist
15 in this area by the name of Bernie Grofman?

16 A Of course.

17 Q And do you remember what Bernie Grofman's test of
18 compactness is?

19 A Bernie said -- Professor Grofman said that basically
20 all these are are the intraocular test, people look at
21 districts maps, they figure out which districts they think
22 look ugly, and then they choose the compactness measure
23 which comports with their eyeball view of the mapping.

24 MR. BRADEN: Thank you, Your Honor.

25

1 CROSS-EXAMINATION

2 BY MR. HAMILTON:

3 Q Good afternoon, Dr. Katz. It's nice to see you again.

4 Let's start -- let's start right there. In your
5 professional opinion, there is no professionally accepted
6 measure of compactness, correct?

7 A That is correct.

8 Q So the opinions that you stated just a moment ago
9 about the relative compactness, there is no professionally
10 accepted measure of compactness upon which those opinions
11 rest, correct?

12 A No. Given that use of measure, those conclusions are
13 correct. There is no accepted measure.

14 Q All right. So, I mean, if we were to go to a
15 political science convention, there would be no consensus
16 on which of these measures to use, including the one you
17 used to generate those conclusions, correct?

18 A That's correct.

19 Q Okay. Now, you talked a little bit about, just a
20 moment ago in Defendant-Intervenors' Exhibit 112 -- do you
21 recall that? This was the crude or poor man's chart.
22 Looks like that.

23 A Yes, of course.

24 Q You recall that. And you said something about a
25 52 percent chance of electing a candidate?

1 A That was my eyeballing the intersection of 50 percent
2 black voting-age population and where that S curve crossed
3 it.

4 Q Based on this crude and poor man's graph, what's the
5 probability of electing -- the minority community electing
6 the candidate of their choice in House District 69?

7 A Again, the best estimate we would have would be about
8 52 percent.

9 Q And how about House District 63, a different district,
10 what's your estimate there?

11 A It would be identical.

12 Q How about House District 75, a different district?

13 A Again, they would all be the same, that's --

14 Q Okay. If I keep going --

15 JUDGE PAYNE: Wait a minute, Mr. Hamilton.

16 MR. HAMILTON: I'm sorry.

17 JUDGE PAYNE: He was answering. You all, don't
18 step on each other's lines. We can hear better and
19 understand better if you do. And the court reporter can
20 take it.

21 All right, go ahead.

22 MR. HAMILTON: Thank you, Your Honor.

23 JUDGE PAYNE: Now restate the question, please,
24 sir.

25 BY MR. HAMILTON: (Continuing)

1 Q I don't want to waste the Court's time or stand
2 between now and lunch, but if I were to go through all 12
3 of these districts and ask you specifically with respect
4 to this House district or that House district, the answer
5 would be exactly the same, right, 52 percent?

6 A Yes. That's why it's a crude analysis.

7 Q Okay. And it's crude analysis because part of the
8 limitations here is because we have a limited data set?

9 A That is also correct.

10 Q And the data set that is limited is because we're
11 looking at House of Delegates elections, is that correct?

12 A That is correct.

13 Q If we were to look at some larger universe of
14 elections, and I know you don't want to do that, but if we
15 did look at larger universe of elections, then we might be
16 able to get to district specific projections, correct?

17 A Actually, in this case I don't believe so.

18 Q Okay. But let me just ask you the abstract question.
19 If we look at a larger data set with more elections, then
20 we're going to get to specific predictions on a
21 district-by-district basis, or we could?

22 A No. You would have to have -- ultimately that
23 analysis, and I have done such analyses before, would rest
24 on creating a mapping between those higher level
25 elections, say federal elections, and district and House

1 of Delegates elections.

2 And since we don't observe contested House of
3 Delegates elections, there is no way to create that
4 mapping.

5 Q So there is simply no -- so your testimony is, there
6 is no way to determine the probability of electing a
7 candidate of choice for the minority community in any one
8 of the 12 specific House of Delegates elections here, the
9 data is just not available?

10 A The best you can do is some version of what I do in
11 that figure.

12 Q In the poor man's graph that we were just looking at?

13 A That is correct.

14 Q All right. Let's go back. You're not a lawyer,
15 correct?

16 A That's definitely so.

17 Q No legal training. In preparing for your testimony, I
18 gather then you didn't read the District Court opinion in
19 the *Page* case?

20 A I did not.

21 Q Or the Supreme Court's decision in the *Alabama* case?

22 A I did not.

23 Q Okay. Didn't review the floor debates in the House of
24 Delegates?

25 A No, I did not.

1 Q Didn't review any of the materials submitted by the
2 Commonwealth of Virginia to the Department of Justice in
3 connection with preclearance of this plan?

4 A No, I did not.

5 Q Didn't review any of the e-mails or other
6 communications between the parties -- I am sorry, among
7 the delegates during the map drawing process?

8 A No, I did not.

9 Q Of course, you didn't talk with any of the delegates
10 or do an investigation into what they said during the
11 process?

12 A That is also correct.

13 Q You didn't take into account any of the statements
14 made by Delegate Jones about the existence or the
15 application of a 55 percent BVAP threshold, or aspiration,
16 or goal, correct?

17 A With one slight caveat. That's why we examined the
18 55 percent in that graph.

19 Q Okay. But you weren't looking at the statements made?

20 A That's right.

21 Q You were just looking at the number 55 percent as a
22 function of the black voting-age population?

23 A That's correct.

24 Q Okay.

25 JUDGE PAYNE: Mr. Hamilton, we will take the

1 lunch recess at this time.

2 MR. HAMILTON: Thank you.

3 NOTE: At this point the lunch recess is taken;
4 at the conclusion of which the case continues as follows:

5 JUDGE PAYNE: Mr. Hamilton. Dr. Katz, I remind
6 you that you are under the same oath you took earlier
7 today.

8 THE WITNESS: Yes, Your Honor.

9 MR. HAMILTON: (resuming)

10 Q Dr. Katz -- well, first of all, good afternoon. I
11 hope you had a pleasant lunch.

12 Let's start with where we left off, your chart. If I
13 could ask Ms. Marino to put it up on the screen. This is
14 from Defendant Intervenors' Exhibit 112, and I believe
15 it's the S-shaped chart that you had prepared?

16 JUDGE PAYNE: Same thing as figure nine to his
17 report; is that right?

18 MR. HAMILTON: Correct. That's, in fact, what
19 we've blown up, Your Honor.

20 JUDGE PAYNE: Thank you.

21 MR. HAMILTON: 112, the intervenor defendants
22 have identified as a separate larger exhibit. We don't
23 have it electronically.

24 JUDGE PAYNE: Thank you.

25 Q So, Dr. Katz, if you take a look at that chart, this

1 is a chart you prepared; correct?

2 A That's correct.

3 Q On the bottom of that, all those little dots, those
4 are individual elections, aren't they?

5 A That's correct.

6 Q And they're individual elections that correspond to
7 individual House of Delegates races; right?

8 A That is correct.

9 Q So on the bottom, way over in the right-hand side,
10 there's four little dots. Do you see those?

11 A Yes. Right-hand side?

12 Q On the right-hand side.

13 A Yes.

14 Q On the bottom. That's Delegate Morrissey and Carr in
15 House District 74 and 69; correct?

16 A I believe that's correct.

17 Q They won the election?

18 A Yes.

19 Q They were -- both -- their race is both white;
20 correct?

21 A That's correct.

22 Q So let's take look at your report to see if they were
23 the black-preferred candidate of choice, and so what I'd
24 like to do is go to Intervenor Defendant Exhibit 16, table
25 four. That's your report, table four?

1 A I have it.

2 Q So let's look at Morrissey first. That's House
3 District 74, and it shows toward the bottom of table four;
4 right?

5 A That's correct.

6 Q And it shows in House District 74 that 93.1 percent of
7 the African Americans would have voted for that candidate;
8 correct?

9 A That's correct.

10 Q Fair to say that's the candidate of choice for the
11 African-American community?

12 A Yes.

13 Q Okay. Let's move to Delegate Carr in House
14 District 69. We're looking at the same chart here. We'll
15 start with 2013, 97.3 percent of the African-American
16 community voted for Delegate Carr; isn't that true?

17 A That's correct.

18 Q And so not a difficult decision to say here that
19 Delegate Carr was the African American candidate of
20 choice?

21 A In this election, that's correct.

22 Q Let's look at the other election in that same House
23 district since you brought it up, 2007. It's also the
24 data that's reported here, same House district,
25 92.9 percent of the African Americans voted for Delegate

1 Carr; correct?

2 A Yes, that's correct.

3 Q So in that election, too, Delegate Carr was the
4 African-American candidate of choice?

5 A Yes.

6 Q In both of these cases, even though Delegate Morrissey
7 and Carr were white, they were the African-American
8 candidate of choice?

9 A That's correct in these elections.

10 Q While we're looking at table four, there's -- you'll
11 agree with me there's nowhere on this table where you
12 account for incumbency; correct? There's no column here
13 that's labeled that?

14 A That's correct. These are just based on the actual
15 election data we observed.

16 Q And there's nothing here that accounts for whether it
17 was a good year for Democrats; correct?

18 A That's correct.

19 Q And there's nothing here that accounts for whether it
20 was a bad year for Democrats; correct?

21 A That's also correct.

22 Q And there's nothing here about any kind of future
23 elections.

24 A That's correct. As I said, this analysis is not
25 designed to do that.

1 Q And, in fact, when a legislature is drawing
2 districting maps, they don't have access to future
3 election results; right? You don't have that data?

4 A I can probably make some money if I did. We can,
5 however, generate forecasting models that do that.

6 Q But you haven't done that here.

7 A That is correct.

8 Q Table four doesn't reflect anything like that.

9 A That's correct.

10 Q All right. Now, your testimony today is based on --
11 your work in your report and your testimony before this
12 Court is based on an analysis of the maps, the census
13 numbers, demographic and racial data relating to the maps,
14 and related elections data; correct?

15 A I believe that's an exhaustive collection, yes.

16 Q And you also studied the expert reports from Dr. Hood,
17 Dr. Hofeller, and Dr. Ansolabehere; correct?

18 A I would say I studied Dr. Ansolabehere's report. I
19 read quickly the two other reports.

20 Q But you are not here to offer an opinion about whether
21 race was a predominate purpose in the drafting of the
22 House of Delegates plans; that's beyond what you were
23 asked to do in this case.

24 A That's correct. All my opinions are contained in my
25 report.

1 Q You simply just have no opinion on that subject that
2 you're here to offer the Court.

3 A Correct.

4 Q Okay. So let's go back to your prior experience.
5 You, yourself, were not involved in redistricting in
6 Virginia at the time that the General Assembly drew these
7 maps that are before the Court today.

8 A That's correct.

9 Q So in that sense, you are similarly situated to Dr.
10 Ansolabehere?

11 A I have -- I assume. I don't really know if he was
12 involved priorly, prior.

13 Q You weren't a consultant to any party, either the
14 Democrats or the Republicans, in the legislature during
15 the preparation of these maps?

16 A That's correct.

17 Q Didn't do an analysis for the state or anyone else at
18 the time the General Assembly was preparing these maps?

19 A That's correct.

20 Q And at the risk of beating a dead horse, you didn't do
21 any sort of polarized voting analysis for the General
22 Assembly at the time they were preparing the maps?

23 A That's also correct.

24 Q Okay. So let's turn to your opinions about
25 compactness which we heard this morning. This is the

1 first time that you've ever appeared in court offering an
2 opinion in a Voting Rights Act case with respect to
3 compactness; correct?

4 A No.

5 Q You've testified on other occasions on compactness in
6 a Voting Rights Act case?

7 A Well, I don't actually know if it was a voting rights
8 case. It was an early California case where the overall
9 criteria for drawing the state legislative maps was
10 involved, and compactness and traditional -- and I
11 testified about traditional redistricting criteria in that
12 case. It was 2001. It was one of my first cases.

13 Q Do you recall when I asked you this question in your
14 deposition?

15 A I do.

16 Q So what I asked you was, "Is this the first time
17 you've been asked to give your professional opinion with
18 respect to compactness in a Voting Rights Act case," and
19 your answer was, "That is correct, to the best of my
20 knowledge." Is that what you said in your deposition?

21 A Yes. Can I clarify?

22 Q Sure. Please do.

23 A In that case, I did not present any numbers. I was
24 asked in that case just to present to the Court what the
25 traditional redistricting criteria were that included

1 compactness.

2 Q I see. So you mentioned compactness in the course of
3 describing traditional redistricting criteria, but you
4 weren't offering an expert opinion about whether the
5 districts were compact or not?

6 A That's correct. So I just wanted to be explicit and
7 correctly answer your question.

8 Q Thank you. We covered this briefly, but in your
9 opinion, there's no generally accepted measure for
10 compactness?

11 A That is my opinion.

12 Q And you have fundamental problems with -- to the best
13 of your knowledge, there's about 20 different measures,
14 and the fundamental problem you have is that they all lead
15 to different answers?

16 A There are at least 20, but, yes, I do agree with that
17 statement.

18 Q And you have the same concern whether we choose
19 Boyce-Clark, the one you used, or Reock, the one that the
20 other experts used.

21 A That's correct.

22 Q I take it you disagree with the use of the Reock
23 measure by Dr. Ansolabehere?

24 A I do for the same grounds.

25 Q And you have the same objection to the use of the

1 Reock test by Dr. Hood?

2 A Again, my concern is with the general measures of
3 compactness, yes.

4 Q And you have the same concern with the use of the
5 Reock test by Dr. Hofeller?

6 A Yes.

7 Q Now, another compact measure is the Polsby-Popper
8 test; you know that one?

9 A Yes.

10 Q That measure compares the area of a district to its
11 perimeter?

12 A That's actually incorrect. Actually what
13 Polsby-Popper does is it takes the measured perimeter of
14 the district and asks -- compares the area of that
15 district to the area of a circle with the same size
16 perimeter.

17 Q You have the same conceptual problem with the use of
18 Polsby-Popper as a measure of compactness that you do with
19 Reock and the others; correct?

20 A That's correct.

21 JUDGE PAYNE: Excuse me a minute. The concern
22 that you have with respect to all of them is that there is
23 no definition of what compactness is?

24 THE WITNESS: That's correct, Your Honor.

25 JUDGE PAYNE: All right, thank you.

1 Q So you disagree with the use of the Polsby-Popper
2 measure by Dr. Hood?

3 A Disagree -- I disagree with the -- there's no accepted
4 measure, so, yes.

5 Q And you disagree with the use of the Polsby-Popper
6 measure by Dr. Hofeller?

7 A Again, for the same reasons.

8 Q And as between the measure you used and the measure
9 they used, it's basically a coin toss on which to use?

10 A As I said, the point of that was to show that using
11 different measures leads to different conclusions.

12 Q There's no compelling argument scientifically why one
13 should be preferred to the other, in your opinion?

14 A No compelling one. They both -- all these measures
15 have pluses and minuses.

16 Q Let's talk about the Schwartzberg test. You are
17 familiar with that one as well?

18 A I am.

19 Q That's an alternative measure, another one of these
20 many tests?

21 A Yes.

22 MR. HAMILTON: I promise I won't go through them
23 all, Your Honors.

24 A It's a bit more -- it's probably the most complicated
25 of the measures because it requires integral calculus. I

1 don't know if you remember that from high school or
2 college.

3 Q I don't.

4 A Yes, it's another measure similar to the Boyce-Clark.
5 Instead of looking at average deviations, it's looking at
6 a normalized standard deviation of the distance from every
7 point to the center of the district.

8 Q You have the same conceptual problem with the use of
9 this measure; right?

10 A That's correct.

11 Q And the same concern or same disagreement with its use
12 by Dr. Hood?

13 A Yes.

14 Q And the same concern or objection to the use by Dr.
15 Hofeller?

16 A Correct.

17 Q Okay. Now, one of the things you talked about this
18 morning, and you described this a little bit in your
19 expert report, is that one of your concerns with the Reock
20 test was what you described as tile theorem; do you recall
21 that portion of your report?

22 A I do.

23 Q Because the ideal shape, as you described it, for a
24 Reock test is a circle, and you can't create maps of the
25 entire state using just circles; is that basically

1 correct?

2 A Basically. You can't draw a map of circles and
3 include every piece of territory in the state.

4 Q Of course, Virginia isn't unique like that. That
5 objection would be true as to the use of the Reock test in
6 North Carolina, in South Carolina, in California, and
7 every state in the union; correct?

8 A Actually, it's a mathematical fact. That theorem is
9 an actual mathematical theorem from geometry.

10 Q You will agree with me that that mathematical theorem
11 of geography -- or geometry is equally true in every state
12 in the union; correct?

13 A That's correct.

14 Q Now, you mentioned earlier in Mr. Braden's examination
15 the shape of Virginia and that being a concern about using
16 compactness measures because Virginia, the way that it's
17 shaped; do you recall that testimony?

18 A Again, that's not exactly what I said. What I said
19 was there's concern about having absolute measures in a
20 state as irregularly shaped and especially with counties
21 as irregularly shaped as the Commonwealth of Virginia has.

22 Q Now, the Commonwealth of Virginia -- correct me if I'm
23 wrong on my history here -- the shape of that state, the
24 Commonwealth, hasn't changed in the last ten years, has
25 it?

1 A To the best of my knowledge, no.

2 Q So if we're looking at comparing the way that these
3 districts changed from one redistricting to another
4 redistricting, the shape of Virginia is a constant between
5 the two efforts.

6 A Yes. I think -- again, to be clear, what I said in my
7 testimony was, I'd be concerned about setting any absolute
8 standard, but in comparing two maps for the same state, in
9 this case the Commonwealth of Virginia, that's a perfectly
10 reasonable thing to do.

11 Q The shape of the State of Virginia is also going to
12 remain a constant regardless of which one of these
13 measures of compactness that we use; right? If we use
14 Reock, the shape looks like it looks, and if we use
15 Polsby-Popper, the State of Virginia remains the same;
16 correct?

17 A That's correct.

18 Q Now, Dr. Ansolabehere calculated the Reock score for
19 each of the challenged districts. Do you recall reading
20 that in his report?

21 A Yes, I do.

22 Q You don't disagree with Dr. Ansolabehere's actual
23 calculation of the scores; you have no reason to think
24 they're incorrect?

25 A I didn't verify them, but I have no reason to think he

1 did that incorrectly. They're a pretty straightforward
2 calculation.

3 Q You don't have any reason to think that his
4 calculation of the Polsby-Popper or Schwartzberg scores
5 for the 12 challenged districts are incorrect either;
6 correct?

7 A Not to the best of my knowledge, but, again, I did not
8 independently verify his numbers.

9 Q In your report, you use the Boyce-Clark measure;
10 right?

11 A That's correct.

12 Q This is the first time you've done a compactness
13 analysis?

14 A Yes.

15 Q So I can't really ask you whether you always use the
16 Boyce-Clark measure, because I guess you have. The one
17 time you've done it today, this is the one you used.

18 A That's correct.

19 Q At least as to the selection of which measure we're
20 going to use, you disagree with both of the other two
21 experts retained by the intervenor defendants, both of
22 whom didn't use the Boyce-Clark test.

23 A Again, my take on this was that different measures
24 will lead to different rankings and orderings of the
25 districts. That is what it was to illustrate. None of

1 them are to be prioritized since there's no agreement
2 about what they're measuring.

3 Q All right. Let's turn your attention to Plaintiffs'
4 Exhibit 44. It's in one of the notebooks behind you.

5 A Not much space up here.

6 JUDGE PAYNE: 44?

7 MR. HAMILTON: 44, Your Honor. Plaintiffs'
8 Exhibit 44, page ten.

9 Q I'll represent to you -- do you have that there in
10 front of you, sir?

11 A I do.

12 Q I'll represent to you this is an excerpt from the
13 State of Virginia's preclearance submission prepared for
14 consideration by the Department of Justice. On page ten,
15 it lists the average compactness scores for both the
16 benchmark and the enacted plan; do you see that?

17 A If those -- if the -- as long as those comply with the
18 current plan in chapter one, yes. The name is different.

19 Q It's the same. One of those measures is Reock; do you
20 see that?

21 A That's correct.

22 Q That's the one used by Dr. Ansolabehere?

23 A Yes.

24 Q And one of the measures that the Commonwealth used in
25 reporting to the Department of Justice for preclearance

1 purposes was the Polsby-Popper test; do you see that?

2 A Yes.

3 Q That was the one used by Dr. Hood and Hofeller?

4 A Yes.

5 Q And one of those measures was Schwartzberg?

6 A Yes.

7 Q And that's the one -- one of the ones used by Dr. Hood
8 and Hofeller?

9 A Correct.

10 Q And at least in this table, the state didn't use the
11 Boyce-Clark method at all?

12 A That's correct.

13 Q You can close that book. We're done with that one.
14 Might make you a little more comfortable there.

15 A It's a little tight fit.

16 Q You didn't conduct a comprehensive analysis of split
17 VTDs in your report, did you?

18 A That's correct.

19 Q No effort to determine whether there was a larger
20 number of VTD splits within the 12 challenged districts
21 rather than elsewhere in the state?

22 A That's correct.

23 Q And you don't dispute Dr. Ansolabehere's points on
24 that -- analysis on that point; right?

25 A Again, I haven't verified it, but I have no reason to

1 doubt it.

2 Q You have no reason to disagree with it?

3 A Correct.

4 Q Same is true with respect to contiguity. You didn't
5 analyze that; right?

6 A No.

7 Q And you don't dispute Dr. Ansolabehere's analysis on
8 that point.

9 A Again, no.

10 Q Okay. So let's turn to what I think is probably the
11 most fascinating part of this all, and that is the
12 difference between ecological regression and ecological
13 inference. You testified this morning about voting
14 behavior and racial polarization in the 12 challenged
15 districts; do you recall that?

16 A Yes, I do.

17 Q In your report, you said, "Central to the question of
18 whether or not increasing the African-American
19 voting-eligible population was warranted in the challenged
20 districts is an examination of whether or not African
21 Americans had the ability to elect the candidate of their
22 choice." Do you recall that?

23 A Yes.

24 Q That's what you were asked to examine statistically?

25 A In that part of my report in response to the analysis

1 of Dr. Ansolabehere, yes.

2 Q Looking at voting behavior is important in order to
3 determine -- to answer the question about ability to
4 elect; right?

5 A Yes.

6 Q We know from the census data the demographic profile
7 of legislative districts, that is are they majority black,
8 are they majority white, or something else?

9 A That's correct.

10 Q We know from the elections data the political
11 performance of legislative districts, whether they're
12 predominately Democrat or predominately Republican; right?

13 A Yes. We actually know more than that. We actually
14 know the quantity of numbers, but, yes.

15 Q And what we try and do with this estimation is to ask,
16 how do members of particular ethnic or racial groups vote
17 in a particular set of elections; correct?

18 A That is correct.

19 Q The problem is that we don't have the data directly
20 because of the darn secret ballot. We can't look it up
21 because it's all secret; right?

22 A That is correct.

23 Q So what we're doing is using census data and data
24 about ethnic or racial composition of a voting tabulation
25 district to infer what the voting rates were for various

1 members of ethnic or racial groups in a particular
2 election?

3 A Yes.

4 Q Now, if we're looking at election results through
5 whatever collection of elections we decide to pick, if we
6 look at 100 House of Delegates seats, the performance of
7 each district is going to be different from district to
8 district, the political performance; correct?

9 A Sort of. It will differ because the elections and the
10 candidates -- yes, it will differ for many reasons.

11 Q It will differ in an election; yes?

12 A Correct.

13 Q And it will differ between elections?

14 A Yes.

15 Q Almost by definition.

16 A I wouldn't say by definition but almost surely.

17 Q In fact, you'd be pretty surprised to find the exact
18 same vote share for the parties or the exact same
19 demographic profile in more than -- in more than one or
20 two House of Delegates districts; isn't that true?

21 A Exact -- if they were exact -- if you're talking about
22 exact matches, yes.

23 Q You expect to see variation.

24 A Yes, you do.

25 Q We can even be stronger than that, can't we? This is

1 an empirical question, and you can, in fact, affirm that
2 the demographic profile in each of the 12 House districts
3 that are at issue in this case, in fact, do vary from
4 district to district; correct?

5 A Yes, they do.

6 Q The same is true with respect to the actual observed
7 political results in the 12 House of Delegates districts
8 at issue in this case. They do, in fact, vary from
9 district to district?

10 A Yes.

11 Q So whether we use ecological regression or ecological
12 inference to infer the vote share by racial or ethnic
13 group within the 12 challenged districts, that analysis,
14 in fact, generates results that are different among the 12
15 districts; true?

16 A Potentially different, and in this case in practice,
17 for at least for the few elections we could check, they
18 are somewhat different.

19 Q They are different?

20 A Yes.

21 Q Not a one-size-fits-all sort of thing?

22 A What do you mean? That's a little strong. I don't
23 know what you mean by that.

24 Q If we define crossover voting as cases where white
25 voters in a district are voting for the candidate of

1 choice for the African-American voters, that, too, varies
2 from district to district within the 12 challenged House
3 districts, doesn't it?

4 A Just to correct your statement, I think you said --
5 when you say white voters voting for the black candidate
6 of choice, not black voters.

7 Q Correct.

8 A Yes, that would be crossover voting.

9 Q Thank you. You've heard the phrase racially polarized
10 voting before?

11 A I have.

12 Q When there isn't a lot of crossover voting and a
13 majority of blacks are voting one way and a majority of
14 whites are voting the other way, that's called racially
15 polarized voting; right?

16 A In a simple case of a two-candidate election, that's
17 correct.

18 Q The higher the level of racially polarized voting, the
19 more likely you're going to need a larger number of black
20 voting-age population in order to ensure the black
21 minority population has the ability to elect; right?

22 A That's correct.

23 Q And the opposite is also true. If there's a lower
24 degree of racially polarized voting, then you're not going
25 to need as high a black voting-age population to allow the

1 minority population the opportunity to elect the candidate
2 of choice; correct?

3 A Yes.

4 Q But in any event, when we're looking at the level of
5 racially polarized voting, that is likely to and, in fact,
6 does vary between the 12 House of Delegates districts at
7 issue in this case; correct?

8 A Again, I would put it differently. We can actually --
9 at least -- we can't say it across all 12. We can say it
10 across the elections that we observed in the handful -- in
11 the five districts we could actually estimate the voting
12 behavior. In those five, there was variability. I cannot
13 say anything about the other districts.

14 Q Okay. All right, well, let's take a look at your
15 report. I'm going to go back to Intervenor Defendants'
16 Exhibit 16. Do you have that there in front of you, sir?

17 A I do.

18 Q It's the same table we're going to look at there.
19 This is your ecological-inference-based estimates; right?

20 A Yes, for the entire set that I could run on the House
21 of Delegates elections that were contested in the 12
22 contested districts.

23 JUDGE LEE: Intervenor 16, page 24, is that what
24 you are looking at?

25 MR. HAMILTON: Yes. It's actually 23 of the

1 report. The bold print on the bottom says 24. That's
2 right.

3 JUDGE LEE: Thank you.

4 Q What's the projected white share of the vote in House
5 District 71 in 2013?

6 A So, again, it's not projected. It's the estimated
7 share of whites who voted for the democratic candidate,
8 and that election was, if I'm reading this correctly, 71
9 -- sorry, which district -- I just lost the district -- 71
10 in 2013, it was about 77.1 percent.

11 Q How about House District 95 in 2013?

12 A Approximately 56.9. That one is -- actually you
13 should take some care. We haven't spent much time talking
14 about it, but to the right are these measures of constants
15 intervals. It's a measure of uncertainty, and we actually
16 don't know if that's above a half or slightly below a
17 half.

18 JUDGE LEE: What line are you referring to again?

19 MR. HAMILTON: I think --

20 JUDGE LEE: I'm asking the witness. What line
21 are you referring to?

22 THE WITNESS: If you're looking at House election
23 95, it's the one that says black, white, 2011, District 95
24 for whites -- that's the vote race in the fifth column,
25 the estimate is .56, but if you look at the two estimates

1 labeled 2.5 percent and 97.5 percent, those are the lower
2 and upper estimates given the uncertainty of what the
3 number could be. So it could be that less than a half
4 voted for him, could be more.

5 JUDGE LEE: Okay.

6 Q I'm sorry. I think we misunderstood. I asked for
7 2013 in House District 95.

8 A I apologize.

9 JUDGE LEE: That's what I was trying to figure
10 out.

11 A That was about 62 percent.

12 Q 62.7 percent was the estimated white vote.

13 A Correct.

14 Q Now we're going to look at House District 74 in 2009.

15 A Okay. Do you want the white vote again?

16 Q Please.

17 A The estimated white vote is approximately
18 55.2 percent.

19 Q Can you look at House District 75 in 2011.

20 A Again, looking at the white vote, approximately
21 41.4 percent.

22 Q How about House District 90 in 2009?

23 A Again, the predicted white vote is approximately
24 35.3 percent.

25 Q So if I can direct your attention to the screen, we

1 prepared an illustrative exhibit displaying this data, the
2 numbers you just read to us, and we presented a bar chart.
3 This is what it would look like; correct?

4 A Yes, although it doesn't include all the data, but,
5 yes.

6 Q Sure. It just includes the data we just read into the
7 record.

8 A Correct.

9 Q So looking at the bar chart, this is the projected
10 white share of the vote in five of these House districts;
11 correct?

12 A Again, I want to be very specific --

13 Q What estimation?

14 A In the actual election, the estimated fraction of
15 whites who voted for the democratic candidate.

16 Q All right.

17 JUDGE PAYNE: Looking at past, not projecting the
18 future.

19 THE WITNESS: Yes, Your Honor.

20 Q Looking in the past. This is the estimated share of
21 the white vote. We can certainly conclude from looking at
22 this table that there's variation.

23 A Yes, there's some variation.

24 Q Well, we can be a little stronger than some variation.
25 It goes all the way from 71.1 percent all the way down to

1 about half of that, 35.3 percent; isn't it?

2 A Yes, again, but if you want to actually compare across
3 districts, you want to include the cost intervals, so.
4 Yes, as a simple bar chart, there is variability. Given
5 the statistical uncertainty, it's less than you think it
6 is.

7 Q All right. There's statistical uncertainty as to the
8 71 percent figure; correct?

9 A Correct.

10 Q And there's statistical uncertainty as to the
11 62 percent number; correct?

12 A Correct.

13 Q And there's statistical uncertainty as to every single
14 one of these five numbers; correct?

15 A That's correct.

16 Q All right. Well, we're just looking at the number
17 that you reported on your chart. If we were to plot it on
18 a bar chart, this is what it would look like.

19 A Just the means, yes.

20 Q All right. Now, Dr. Ansolabehere used a methodology
21 that we've been referring to as ecological regression.
22 That's sometimes called Goodman's regression; right?

23 A That's correct.

24 Q You know the Supreme Court utilized ecological
25 regression in the landmark case *Gingles v. Thornburg*;

1 right?

2 A I know from secondhand knowledge, yes.

3 Q Say that again?

4 A I've never read the case, but, yes, I know that from
5 secondhand knowledge.

6 Q You prefer an alternative sometimes called ecological
7 inference?

8 A I don't prefer. It is a better technology.

9 Q In your opinion.

10 A In my expert opinion, yes.

11 Q You are not aware of any U.S. Supreme Court decisions
12 that have cited or approved the use of that statistical
13 technique?

14 A Again, I don't often read Supreme Court decisions, so
15 I have no way of knowing that.

16 Q You don't know one way or the other; could be they do,
17 could be they don't?

18 A Correct.

19 Q I guess we'll figure that out. One of the -- the
20 issue that you discussed between these two statistical
21 measures is it is -- it has to do with bounding problems
22 in creating these estimations; right?

23 A That's one issue, yes.

24 Q EI combines information from Duncan and Davis methods
25 of bounds with statistical models to estimate average

1 support for particular candidates among members of
2 different racial groups throughout a district; right?

3 A That's correct.

4 Q The advantage, as you describe it, of EI, or
5 ecological inference, is that it uses information from all
6 districts and allows the comparison of the results between
7 the districts; is that right?

8 A That's correct.

9 Q So the first -- I'm going to leave it at that rather
10 than debate you on this. I'm sure it would be
11 fascinating, but let's go with, the first step of the
12 analysis, regardless of which one of these tools we're
13 going to use, is picking the universe of elections that
14 we're going to examine; correct?

15 A Yes. That would be the first stage.

16 Q And the elections that you selected to examine were
17 the general election results for the House of Delegates in
18 2007, 2009, 2011, 2013; right?

19 A Yes, because those are the elections that we had data
20 for given the time constraints, yes.

21 Q Didn't choose primaries?

22 A That's correct.

23 Q You didn't think that was necessary?

24 A Again, the point of this report was to examine what
25 Dr. Ansolabehere did, and he didn't look at any primaries,

1 so I didn't either.

2 Q And you didn't think it was necessary to look at any
3 primaries for the purposes of reaching the conclusions and
4 opinions that you are offering to this Court?

5 A With regard to Dr. Ansolabehere's report, that is
6 correct.

7 Q Do you know how many -- between 2001 and 2013, do you
8 know how many contested general elections there were in
9 these 12 challenged districts?

10 A I'm sorry, what are the years again?

11 Q Between the years 2001 and 2013.

12 A I don't. I only had data to 2007.

13 Q Do you know -- it's a fact, isn't it, that there's a
14 lot more contested general elections than there are
15 primary elections in these 12 districts?

16 A Again, I don't know since I haven't examined any
17 primary election data.

18 Q Okay. Let me ask you to assume that there's more than
19 twice as many contested general elections than there are
20 primary elections. With that assumption in mind, whatever
21 limitations there might be in analyzing House of Delegate
22 elections at the general election level, it would be even
23 worse if we looked at the primary elections on that
24 assumption; isn't that true?

25 A Worse is, again, a term. Given the sparsity of data,

1 I would want to examine both for a complete analysis.

2 Q Let's put it this way: It would exacerbate the
3 problem of scarcity of data if you had half as much data.

4 A I don't agree with the premise, so that's why I'm
5 saying no.

6 Q You don't agree with the premise there were half as
7 many primary elections? That was just a hypothetical.
8 I'll prove it later.

9 A I'm sure it's true as a matter of fact. You have no
10 reason to lie. What I'm saying is, if you were doing an
11 analysis, I would include both given the lack of data.
12 You'd want to use any available -- for complete analysis,
13 you want to use any data you could get your hands on.

14 Q Fair enough. But that's not what you did here. You
15 looked at the general elections.

16 A Again, that's correct.

17 Q And you didn't add the primary elections in because
18 you didn't think they were necessary.

19 A Not they weren't necessary. Given the time and what I
20 was asked to do, that was not -- not in my purview.

21 Q Do you recall when I asked you about primary elections
22 in your deposition?

23 A I recall we talked about it. I don't recall what I
24 exactly answered, because I don't know the exact question.

25 Q Let me read it and see if you agree. Question -- this

1 is page 73, line 18. "How about primary elections? Did
2 you examine primary election results?"

3 Your answer was, "I did not."

4 My question, "Why not?"

5 Your answer, "I didn't think it was necessary."

6 Do you recall that?

7 A I do since it's in front of me, but that's...

8 Q All right.

9 A It wasn't necessary because I wasn't asked to do it.

10 JUDGE PAYNE: Just so I understand it, when you
11 say you weren't asked to do it, are you referring to the
12 fact that you were asked to criticize Dr. Ansolabehere's
13 report? Is that what you are talking about when you say
14 that?

15 THE WITNESS: That's exactly correct, Your Honor.

16 JUDGE PAYNE: That was your charter, and because
17 he didn't, you didn't.

18 THE WITNESS: That is correct, Your Honor.

19 JUDGE PAYNE: All right.

20 Q Well, let's talk about that he didn't use House of
21 Delegates elections either, did he? Didn't use House of
22 Delegates general elections, he used a different set of
23 federal and state-wide state elections; isn't that true?

24 A Yes. I did the delegate analysis to show the
25 differences in voting behavior between federal, and that

1 was raising a particular concern I had with his report and
2 analysis he presented.

3 Q Sure, but I'm only asking you about the data
4 selection. You selected, you selected the general
5 election results from the House of Delegates elections.
6 You didn't select the primary elections because you didn't
7 think it was necessary; isn't that true?

8 A It was not necessary given my task was to critique the
9 report of Dr. Ansolabehere.

10 Q But you could have critiqued Dr. Ansolabehere's report
11 using both sets of elections and added them in, and since
12 data scarcity was the problem, that was a choice you made?

13 A Correct, it was a choice I made.

14 Q Let's -- it's different -- the approach you took was
15 different than the approach taken by Dr. Ansolabehere. He
16 looked at state-wide elections; right?

17 A That's correct.

18 Q It's also different than the approach taken by Dr.
19 Hood?

20 A I don't recall exactly what Dr. Hood did.

21 Q You read his report?

22 A Sometime ago, yes.

23 Q I'll represent to you that he analyzed election
24 results for state-wide elections including governor,
25 lieutenant governor, and attorney general. Assuming that

1 what I just said is true, that's different than what you
2 did?

3 A That is correct.

4 Q And assuming what I said is true, Dr. Hood's approach
5 is similar, or at least closer, to Dr. Ansolabehere's
6 approach than just looking at House of Delegate elections?

7 A Again, since I don't -- haven't -- I haven't read Dr.
8 Hood's report in quite some time. I don't know exactly
9 what he did, so I'm a little hesitant to say yes or no to
10 that question.

11 Q Rather than take the time to look at his report, let
12 me just ask you this: If we generalize it, looking at
13 state-wide elections as a general matter is something
14 that's closer to what Dr. Ansolabehere did rather than
15 what you did.

16 A In that very general context, yes.

17 Q Thank you. Now, in your view, since the question
18 we're asking is how voters in Virginia vote in House of
19 Delegate elections, we should look at House of Delegate
20 elections primarily. That's the reason you selected them;
21 right?

22 A That's correct.

23 Q Now, there's a difference between elections in 2007
24 and 2009 on the one hand and elections in 2011 and 2013 on
25 the other hand; right?

1 A Gubernatorial elections, yes. Different elections
2 above them, yes.

3 Q Those two sets of elections, one was done under the
4 benchmark plan, and the other set of elections was done
5 under the enacted plan; correct?

6 A That's correct.

7 Q Now, you've identified one problem with using House of
8 Delegate elections is that there's a limited data set;
9 right?

10 A Yes, because so few are contested.

11 Q So in 2011, for example, only two of the 12 challenged
12 districts had a contest in which both the Democrat and
13 Republican were running; right?

14 A That's correct.

15 Q And in 2013, only three of the 12 challenged districts
16 had a contest in which both the Democrat and Republican
17 were running?

18 A What year was that again?

19 Q In 2013, only three of the 12 challenged districts had
20 a contest in which there was both a Democrat and a
21 Republican running?

22 A That's correct.

23 Q So let's go back to your -- from the data set that you
24 created, table four of your report which is Intervenor
25 Defendants' Exhibit 16. This is the same data set we've

1 seen before. You actually calculated, on a
2 district-by-district basis, the ecological inference
3 estimate, and that's what's reported here?

4 A That is correct.

5 Q So we can look at these districts, and I won't take
6 the time to go through them all, but in House District 95
7 in 2013 --

8 A Yes.

9 Q -- your estimation is that -- not estimate. Your
10 inference-based estimate is that the Democrat would win
11 89 percent of the black vote; correct?

12 A That's correct.

13 Q And 62.7 percent of the white vote?

14 A Correct.

15 JUDGE PAYNE: Wait a minute. Your question was
16 would win. I thought you were referring backwards to did
17 win.

18 THE WITNESS: That is correct.

19 JUDGE PAYNE: We're going to avoid that problem
20 then in the future. One is a projection, and one is
21 looking backwards in time, and he's talking about things
22 that have been looking backwards in time, I thought.

23 MR. HAMILTON: With respect, Your Honor, I think
24 the estimate is used to project what, in a
25 two-candidates-running --

1 THE COURT: I'm just saying what he said it
2 meant. I haven't reached a conclusion on the bottom line
3 of what it does mean. Maybe you can offer different
4 evidence, but this is how he proposed or articulated it,
5 so you need to keep your questions on what he articulated.

6 MR. HAMILTON: Thank you, Your Honor.

7 Q According to your estimate, the Democrat is estimated
8 to have won 89 percent of the black vote; correct?

9 A In that election, correct.

10 Q And 62.7 percent of the white vote.

11 A That is correct.

12 Q So just focusing on that district, it really doesn't
13 matter how we configure it as long as we keep the
14 population in it the same, because the Democrat's always
15 going to win, because he's winning or she's winning a
16 majority of both the black and the white vote?

17 A I told you, this is how they voted in that particular
18 election with those particular candidates. One would do a
19 different analysis, which I have not done, to make a
20 forecast about how future elections would be done.

21 Q You provide estimates of the share of the vote for
22 seven of the challenged districts, seven of the 12?

23 A I provide estimates -- again, I'd like to be very
24 specific. I provide estimates for seven of the districts
25 in the elections where there were contests in those years.

1 Q Fair enough. Seven out of 12.

2 A Yes.

3 Q And to be precise for the record, the ones that you
4 provided data for were House District 69, 71, 74, 75, 80,
5 90, and 95?

6 A That's correct.

7 Q Now, there's --

8 JUDGE LEE: I have a question about this. When
9 you say contested election, do you mean that they were
10 contested in the sense that a Republican ran against a
11 Democrat, or do you just mean --

12 THE WITNESS: No. That at least one candidate
13 received -- yes, in this case, those were all Democrats
14 and Republicans, but what we mean by contested is that
15 there's at least -- besides the -- there's at least two
16 candidates who garner five percent of the vote, and these
17 elections, those were all a Democrat versus a Republican
18 to the best of my knowledge.

19 JUDGE LEE: Okay, Thank you.

20 Q You didn't do any analysis or report any results or
21 ecological inference estimates for the remaining five
22 districts.

23 A Again, that was not possible given there were no
24 observed contested elections.

25 Q So the answer is, correct, I didn't do any analysis

1 for those five districts?

2 A Yes.

3 Q And for the record, those are House District 63, 70,
4 77, 89, and 92. There's nothing in your report that
5 concerns any of those five districts at all.

6 A That is correct.

7 Q And, again, the reason why is because those are the
8 only ones that you had data -- you only had data for seven
9 because you were looking at contested House of Delegate
10 elections; right?

11 JUDGE PAYNE: Mr. Hamilton, he said that kind of
12 thing two or three times. Can we avoid some of the
13 repetition and get on with the particular points that you
14 wish to make?

15 MR. HAMILTON: Yes, Your Honor.

16 Q If we wanted to look at all 12 challenged districts
17 and either apply an ecological inference or an ecological
18 regression analysis to them, we would need to pick a
19 different set of elections with more complete data;
20 correct?

21 A Again, I disagree with the premise. An ecological
22 inference or regression to do what?

23 Q To develop an estimate just like you have here in
24 table four of Intervenor Defendants' Exhibit 16. If we
25 wanted to generate that sort of result for all 12

1 districts, we would need more data.

2 A You would need data that does not exist. If your goal
3 is to understand voting behavior of blacks, whites, and
4 others in the contested districts in House of Delegates
5 elections, this is all you have. I can say nothing for
6 any other district, and there's no other data I could
7 provide to do that.

8 Q Well, sir, it's possible that we could select, like
9 the other experts, both by intervenors and by Dr.
10 Ansolabehere, we could use state-wide election data --
11 your problem or concern with that is that it might not
12 accurately estimate voter behavior in House of Delegate
13 elections; right?

14 A I'm almost sure it wouldn't.

15 Q But you don't know, because you didn't examine that
16 question. You didn't examine the question whether a
17 particular set of federal or state elections aligned with
18 the observed results in House of Delegate elections? You
19 didn't do that analysis, did you?

20 A No, I did not.

21 Q So it could be that they align. You don't think it
22 does, but it could be?

23 A It could be.

24 Q And it could be that they don't align, but you don't
25 know?

1 A That is correct.

2 Q Okay. So let's look at the analysis that you did do
3 for the seven districts that you, in fact, examined. When
4 you were looking at them, of the seven that you looked at,
5 four of them you were looking at data under the benchmark
6 plan rather than under the enacted plan; correct?

7 A That is correct.

8 Q That's House District 71, 74, 80, and 90?

9 A Correct.

10 Q The set of VTDs in 2007 and 2009 in a given district
11 is going to be different than the set of VTDs that were
12 used in the same district in elections in 2011 and 2013?

13 A Yes, as are the voters who showed up to vote
14 potentially, as are the candidates who potentially ran,
15 yes.

16 Q Set of VTDs between the 2007 and 2009 elections in a
17 given district is different than the set of VTDs in the
18 same district in 2011, 2013; yes?

19 A Correct.

20 Q Now, there were only three districts out of the seven
21 that you analyzed under the ecological inference
22 methodology in which you found a majority of whites were
23 voting differently than a majority of black voters;
24 correct?

25 A Three districts, four elections, yes.

1 Q Another way to say that is, according to your
2 analysis, you only found three districts in which there
3 was racially polarized voting.

4 A In at least one election, yes.

5 Q And those were House Districts 80, 90, and 75?

6 A Correct.

7 Q So let's look at your table so we can make sure we
8 understand what that means. We're looking at table four,
9 Intervenor Defendants' Exhibit 16. With respect to House
10 District 80, and the year is 2009, 90.7 percent of the
11 African Americans you estimate voted for the democratic
12 candidate.

13 A Black democratic candidate, yes.

14 Q And 35.8 percent of the whites voted for the
15 democratic candidate.

16 A Correct.

17 Q And so -- because, if my math is right, 64.2 percent
18 of the whites were voting for the Republican and
19 90.7 percent of the African-American voters were voting
20 for the Democrat, that's polarization?

21 A Correct.

22 Q Okay, there's one. House District 90, 2009,
23 90.8 percent of blacks voted for the Democrat according to
24 your estimate?

25 A Correct.

1 Q 35.3 percent of whites voted for the democratic
2 candidate; correct?

3 A Correct.

4 Q So that means 64.7 percent of the whites voted for a
5 Republican while 90.8 percent of the blacks voted for the
6 Democrat; true?

7 A Correct.

8 Q That's polarization.

9 A Yes.

10 Q Last one, House District 75, 2011, 88.3 percent of
11 African-American voters voted for the Democrat; correct?

12 A Correct.

13 Q Only 41.4 percent of the whites voted for the
14 Democrat; correct?

15 A No. It's 34.8. I'm sorry -- we're in --

16 Q House District 75, the year is 2011.

17 A You're correct. Sorry, I looked at the wrong column.

18 Q That's all right. 41.4 percent of whites voted for
19 the democratic candidate.

20 A Yes.

21 Q Again, because the majority of the white voters,
22 58.6 percent, were voting for the Republican candidate
23 while 88.3 percent of the African-American candidates were
24 voting for the democratic candidate. That's another case
25 of polarization?

1 A Yes.

2 Q That's the only three in your table out of the seven
3 that are recorded here; correct?

4 A One second, please. There's four. There's another
5 2013 -- the ones that were racially polarized -- elections
6 that showed racially polarized voting were 2013,
7 District 75; 2011, District 75; 2009, District 90; and
8 2009, District 80.

9 Q So only three House districts?

10 A Correct.

11 Q You found racial polarization remained in House
12 District 75 consistent. It was polarized in 2011, it was
13 polarized again in 2013, but it's the same House district;
14 correct?

15 A That's correct.

16 Q So just three out of the seven that you -- there's 12
17 challenged districts. You looked at seven. Only three
18 you found racially polarized voting?

19 A Only three -- I found three were racially polarized.

20 Q Fair enough. And the corollary is true also. In
21 four, you found no racially polarized voting?

22 A That's correct.

23 Q In other words, if we look at those four, we're going
24 to see, according to your analysis, a majority of
25 African-American voters are voting for the same candidate

1 as the majority of the white voters?

2 A In those elections, yes.

3 Q And we can go through this, and I won't, but if we
4 were to go through all four of those non-polarized voting,
5 what we would see is majorities of both African-American
6 voters and white voters all voting for the same candidate?

7 A That's correct.

8 Q Now, in your report on page 15, you wrote, "Central to
9 the question of whether or not increasing the
10 African-American voting eligible population was warranted
11 in the challenged districts is an examination of whether
12 or not African Americans had the ability to elect the
13 candidate of their choice." You remember that?

14 A Yes.

15 Q That's the central question. And that's an easy
16 question where a majority of both black and white voters
17 are voting for the same candidate?

18 A In those particular elections. The statement is
19 actually about future elections, but, yes.

20 Q We can only look -- we don't -- we can all agree that
21 you can't tell us what's going to happen next year or the
22 year after, and if you can, maybe you can join me in Las
23 Vegas this weekend. You can't.

24 A We can generate statistical forecasting models which I
25 have not done in this case.

1 Q For the purposes of this sort of analysis, the only
2 thing we have is looking backwards.

3 A In my report, that's all we have, yes.

4 Q And according to your ecological inference model, if
5 we just take an example of House District 69, for example,
6 according to your analysis, they certainly have the
7 ability to elect the candidate of their choice either year
8 that's reported, 2007 or 2013?

9 A In those two years, yes.

10 Q The same is true in House District 74; correct? The
11 African-American population in House District 74 in 2009
12 had the ability to elect the candidate of their choice?

13 A That is correct.

14 Q That's an easy, easy question to answer.

15 A It's answered. I don't know easy or not. It's a lot
16 of work to do these tables.

17 Q The Democratic candidate won 93.1 percent of the
18 African-American vote; right?

19 A Correct.

20 Q And 52.5 percent of the white vote?

21 A Yes.

22 Q Same is true in House District 95; the
23 African-American voting population in House District 95
24 certainly had the ability to elect the candidate of their
25 choice in the 2013 election; isn't that true?

1 A Yes.

2 Q Democratic candidate won 89 percent of the
3 African-American vote?

4 A Correct.

5 Q And 62.7 percent of the white vote?

6 A That's the estimate, correct.

7 Q Same is true in House District 71?

8 A In which year?

9 Q Either one. Both years the African-American voting
10 population in District 71 had the ability to elect the
11 candidate of their choice?

12 A Yes. In neither year was there presence of racially
13 polarized voting, that is correct.

14 Q Democratic candidate won 97.5 percent of the
15 African-American vote?

16 A Again, can you tell me which year you are looking at?

17 Q Either one.

18 A They vary. That's why I asked.

19 Q Sorry. It's 2013.

20 A In District 95?

21 Q Democratic candidate won 97.5 percent of the
22 African-American vote in 2013 in House District 71?

23 A That's the estimate, correct.

24 Q And you estimate, according to your ecological
25 inference analysis, that the Democratic candidate won

1 77.1 percent of the white vote.

2 A Correct.

3 Q And that's another instance in that case where the
4 African-American population in that district certainly had
5 the ability to elect the candidate of their choice?

6 A In that election, yes.

7 Q In both of those elections.

8 A Yes.

9 MR. HAMILTON: Thank you, sir.

10

11 REDIRECT EXAMINATION

12 BY MR. BRADEN:

13 Q Some very brief redirect. I'd like to remain on table
14 four. Am I correct that table four deals simply with
15 general elections?

16 A That is correct.

17 Q And races all involved the districts that are the
18 challenged districts?

19 A That is also correct.

20 Q Those are all majority-minority black districts?

21 A That is also correct.

22 Q Am I right, or you can tell me I'm wrong, that these
23 would all, in a general election, be overwhelmingly safe
24 democratic districts?

25 A It looks that way, yes.

1 Q What does this chart tell us about polarized voting in
2 primaries?

3 A Absolutely nothing.

4 Q And in safe elections, general elections, candidate of
5 choice of the black and white communities are always
6 likely to be the same in a safe district, democratically
7 safe district? Occasionally polarized?

8 A Occasionally polarized. It would depend on the exact
9 fractions.

10 Q This doesn't provide the Court with any information in
11 regards to polarized voting in primary elections in these
12 districts.

13 A That is correct.

14 Q You were asked to do what?

15 A I was asked to essentially critique Dr. Ansolabehere's
16 report.

17 Q You were not asked to do a racial block voting
18 analysis in regards to the level of black vote population
19 needed in any district to meet the requirements of the
20 Voting Rights Act?

21 A I was not.

22 MR. BRADEN: Thank you, Your Honor.

23 THE COURT: Can he be excused?

24 MR. HAMILTON: I have a few questions on redirect
25 if it's allowed --

1 JUDGE PAYNE: I thought we settled it with Mr.
2 Raile that we don't do that here.

3 MR. HAMILTON: All right, Your Honor. Thank you.

4 JUDGE PAYNE: Is he through? Can he be excused
5 permanently?

6 MR. BRADEN: Yes, Your Honor.

7 THE COURT: All right, we'll take the afternoon
8 recess, 15 minutes. Thank you, Doctor. You are welcome
9 to stay if you'd like to.

10

11 (Recess taken.)

12

13 NOTE: After the afternoon recess is taken, the
14 case continues as follows:

15 JUDGE PAYNE: Your next witness, Mr. Braden.

16 MS. WALRATH: Defendant-intervenors call Dr. Trey
17 Hood.

18 JUDGE PAYNE: Who is it?

19 MS. WALRATH: Dr. Trey Hood.

20 JUDGE PAYNE: Thank you.

21 JUDGE LEE: We have the notebooks here. You have
22 already given us the notebooks. Thank you.

23 MS. WALRATH: Yes, we do have witness notebooks
24 to aid the Court.

25

1 **M.V. HOOD, III,**

2 a witness, called at the instance of the
3 defendant-intervenors, having first duly affirmed,
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MS. WALRATH.

7 Q Professor, are you ready?

8 A I'm ready.

9 Q All right. Would you please introduce yourself to the
10 Court.

11 A I'm M.V. Hood, III. Most people call me Trey since I
12 am the Third.

13 Q And for the benefit of the Court, we've already
14 identified a document, docket number 83, where in
15 paragraph 15 the parties have stipulated to Professor Hood
16 being an expert testimony in this case.

17 JUDGE PAYNE: An expert in what area, Ms.
18 Walrath? What is he an expert in, I think is what I was
19 trying to say and didn't say it very well.

20 MS. WALRATH: Yes. Well, our stipulation doesn't
21 specify.

22 BY MS. WALRATH: (Continuing)

23 Q So, Professor Hood, would you please note what your
24 expertise is.

25 A I'm an expert in issues revolving or relating to

1 election administration, including redistricting, Your
2 Honor.

3 JUDGE PAYNE: Do you agree with that, Mr.
4 Hamilton? Oh, excuse me, where did he go? Mr. Spiva?

5 MR. SPIVA: Yes, Your Honor.

6 JUDGE PAYNE: He is so accepted.

7 BY MS. WALRATH (Continuing)

8 Q And, Professor Hood, just briefly what do you do?

9 A I am a professor of political science at the
10 University of Georgia. I have been at the university
11 since 1999.

12 Q And do you have any particular focus at the
13 university?

14 A My general focus is in the area of American politics
15 and policy. More specifically, I do research and teach in
16 the areas of Southern politics, racial politics, and
17 electoral politics and election administration. And
18 redistricting is a special subset of election
19 administration.

20 Q And have you been an expert witness before?

21 A Yes.

22 Q Multiple times?

23 A Yes.

24 Q Have you been an expert for private parties or state
25 parties?

1 A Both.

2 Q Now, turning to the substance of your -- well,
3 actually, let me bring up Defendant-Intervenors'
4 Exhibit 15. Which I believe is in your witness book if
5 you want to, right there on your right, if you want to
6 take it and flip it open to DI-15.

7 And when you get there, if you could please identify
8 this document for me.

9 A It's a copy of my expert report in this case.

10 Q And if you could turn to the back of the report, it is
11 page i in your report, but also the trial exhibit number
12 page is 24.

13 A Okay.

14 Q What is that document?

15 A It's a copy of my curriculum vitae.

16 Q And is it current and complete?

17 A Yes.

18 Q Okay. So turning to the substance of your report, if
19 we could turn to page 2 of your report, which is trial
20 exhibit page 3.

21 And in the sake of expediency, the pagination of the
22 trial exhibit is one page ahead of the page report. I
23 will refer to the trial exhibit page for everyone's
24 convenience.

25 So looking at page 3, what were you retained to do?

1 A I was asked to respond to the report issued in this
2 case by Professor Ansolabehere. And in doing so, I
3 primarily looked at the benchmark plan and the enacted
4 plan and made comparisons between the two.

5 Q Did you do your own assessment of the plans?

6 A Yes.

7 Q And what work did you do in coming to your opinions in
8 this report?

9 A I gathered various data and performed different kinds
10 of analyses.

11 Q What data did you rely on?

12 A Several different, excuse me, several different pieces
13 of data, including census data, election data, and other
14 reports generated from the redistricting plans.

15 Q Was there any material from the DLS Web site?

16 A Yes, I did make use of I believe racial data from the
17 DLS Web site.

18 Q Flipping to page 4 of your report, section 4, entitled
19 Plan Comparisons. What did you compare?

20 A I compared the benchmark plan and the enacted plan on
21 a number of metrics, including population, communities of
22 interest, VTDs, whether VTDs were split or kept whole. I
23 made some partisan comparisons between the plans. I
24 calculated some statistics involving compactness,
25 specifically the Reock and the Polsby-Popper tests.

1 Q And we will go through those in a bit. Did you reach
2 any general opinions as to the two plans compared?

3 A Overall they were similar as we will see as we move
4 through the report.

5 Q So let's do that. Looking at the first subsection you
6 have here entitled Population Deviation. What did you
7 conclude?

8 A Well, I concluded the benchmark plan just prior to the
9 census cycle, districts -- population in the districts had
10 gotten off. And so, they needed to be -- population
11 needed to be redistributed. And I determined that looking
12 at what happened after the enacted plan was put in place,
13 that that did occur. Population was equalized across
14 districts, between plus or minus 1 percent deviation.

15 Q And I would like to bring up the next page of your
16 report, page 5, Table 1.

17 And could you please explain to the Court what this
18 table shows.

19 A The 2009 districts would be the benchmark plan in the
20 year 2009. And so, that's how far off the population had
21 gotten since 2001 when those districts were first drawn.

22 So negative 20 percent, approximately, to above
23 138 percent.

24 And the 2011 districts are after the plan was redrawn,
25 that's the enacted plan. And you can see the population

1 deviation there then ranges between minus 1 percent and
2 plus .99 percent.

3 Q Why was it necessary to bring the deviation to that
4 range?

5 A That was part of the criteria that had been drawn up
6 in the House of Delegates for their redistricting plan.

7 Q Is it fair to say that you had to redraw the benchmark
8 plan to get to that deviation?

9 A Certainly. It couldn't have been left as it was and
10 reach those numbers.

11 Q And just one point, to make sure it was the same page,
12 when you say 2009 districts, I think you said this, but
13 are you referring to the 2001, what we have been calling
14 the benchmark plan?

15 A Yes.

16 Q So turning to the next section of your report entitled
17 Maintaining Communities of Interest.

18 What did you consider in that section?

19 A Here I looked primarily at counties and independent
20 cities. Independent cities in Virginia have the same type
21 of designation as a county. And I was looking to see how
22 many counties and independent cities were split across
23 districts.

24 Q And what did you determine?

25 A I determined that they were essentially -- if you look

1 at the benchmark plan, which in Table 2 is labeled 2009
2 Plan --

3 Q And really quickly, before you move on, we will bring
4 up that table, it's on the next page, on page 6 of the
5 report.

6 A The number of counties and independent cities split
7 under the previous benchmark plan was 44 percent. And the
8 number of counties and independent cities split under the
9 enacted plan was also 44 percent.

10 Q And can you please explain what the not split or
11 unaffected portion of this table means.

12 A That is another category. So obviously if they are
13 split, they are split across counties or independent
14 cities.

15 There were a number of splits that occurred where
16 there was a geographic split but involved no population
17 split.

18 And so, I grouped any county or independent city that
19 was not split or was unaffected in terms of population in
20 that category.

21 Q So looking at this chart, it looks like the splits are
22 about the same across the cycle?

23 A Yes. They are exactly the same by this chart.

24 Q And is splitting of jurisdictions like this,
25 considering that, is this a traditional redistricting

1 criteria?

2 A Where possible you want to try to maintain communities
3 of interest. It's not always possible, especially when
4 you have other criteria like equalizing population, which
5 can sometimes trump that criteria.

6 Q So looking at the equalization of population in this
7 criteria, do you have any conclusion as to the balancing
8 of the two?

9 A Well, given that the population deviations in the
10 benchmark plan that were plus or minus two, then going
11 down to a population deviation of plus or minus one in the
12 enacted plan, it's -- I don't know if I should use the
13 word remarkable, but it's a positive that they were able
14 to keep the same number of essentially counties and
15 independent cities whole even while reducing the
16 population deviation across the plan.

17 Q So moving on to the next section of your report, it is
18 subsection C, we are still on page 6, it is entitled VTD
19 Splits.

20 What did you -- oh, actually, before we start, can you
21 explain what a VTD is.

22 A It's a voting district. It's a piece of census
23 geography used for tabulation for census purposes.

24 Q We've heard some mention of the term "precinct." Are
25 precincts and VTDs the same?

1 A They can, but they are not always the same.

2 Q We were just talking about counties and independent
3 cities. Are VTDs political subdivisions?

4 A No.

5 Q So going back to section C, looking at VTD Splits,
6 what did you look at?

7 A Well, similar to the previous table, instead of using
8 counties and independent cities, I'm looking at the number
9 of VTDs or voting districts that are split.

10 So again, the 2009 column heading is the benchmark
11 plan. There were 3.6 percent of all VTDs in that plan
12 were split.

13 Q If I can stop you for just one moment. For the
14 benefit of everybody, we're bringing up the Table 3 of his
15 report on page 7.

16 Please go ahead and continue explaining what this
17 table shows.

18 A Okay. So again, under the benchmark plan, which is
19 under the 2009 Plan heading there, you can see that
20 3.6 percent of the voting districts were split under that
21 plan. Versus 4.9 percent of the voting districts under
22 the enacted plan.

23 So the number of split VTDs went up just slightly
24 across the two plans.

25 Q And looking at the not split or unaffected category,

1 it look likes there is 95.1 percent for the 2011 plan.

2 A Right. For the enacted plan, 95.1 percent of VTDs
3 were unsplit or kept whole.

4 Q Is it fair to say that's a majority of VTDs not split?

5 A Yes.

6 Q If you will move on to the next section here.

7 Actually I did have one further, before we move on, you
8 mentioned that there was a slight increase of VTD splits
9 between the two plans.

10 Can you speak to the distribution of the split VTDs.

11 A The geographic distribution, is that fair?

12 Q Correct.

13 A They weren't necessarily cluttered in any one given
14 part of the state.

15 Q So moving on to section D entitled District
16 Compactness, what did you evaluate?

17 A Well, these are measures that we've discussed or that
18 have been discussed in court. They are designed to
19 measure compactness of legislative districts, and
20 specifically there are measures here for Reock and
21 Pilsby-Popper.

22 Q So we turn to Table 4 of your report, which is on
23 page 8.

24 Please explain what this table shows.

25 MR. SPIVA: Sorry, Your Honor, I should have

1 objected a little bit sooner. Just to the compactness
2 part of this. Because of the pretrial order, specifically
3 Schedule A that says there should be one expert witness
4 per discipline, and we've already had one expert from the
5 defendant-intervenors who has talked about compactness, so
6 I don't have any objection to the other things he is
7 talking about, but I do have objection to this portion of
8 the testimony.

9 MS. WALRATH: Your Honor, these are -- Dr. Katz
10 testified only to one measure of compactness. These are
11 different measures.

12 We will have a couple experts testifying as to
13 these measures, so we will keep it very brief so as not to
14 waste the Court's time. But particularly given that Dr.
15 Ansolabehere took issue with certain aspects of both
16 Professor Hood and Professor Hofeller's reports on this
17 subject, it is noteworthy and relevant to hear testimony
18 on this subject.

19 JUDGE PAYNE: I believe that we had a telephone
20 conference in which we discussed that he would not be able
21 to repeat Dr. Katz' testimony, but that people would be
22 able to address Dr. Ansolabehere's, the measures used in
23 Dr. Ansolabehere's testimony.

24 So that objection is overruled.

25 MR. SPIVA: Thank you, Your Honor.

1 JUDGE PAYNE: But that's all he can do. He can't
2 retrace the ground of Dr. Katz, you understood that?

3 MS. WALRATH: Understood.

4 BY MS. WALRATH: (Continuing)

5 Q Dr. Hood, just very quickly, what does this table show
6 the Court?

7 A This table shows the Court a comparison again of two
8 measures of compactness, Reock and Polsby-Popper, for all
9 districts in the enacted plan and in the benchmark plan.

10 And we can just run through a quick example. Looking
11 at the average or the mean for these measures across the
12 two plans, we can see that the benchmark plan had a Reock
13 score of .38. And the enacted plan had a Reock score of
14 .36.

15 So there was a very slight drop there of .02.

16 The benchmark plan had a Polsby-Popper score, average
17 score of .26. And the enacted plan had a Polsby-Popper
18 score of .24.

19 So again, there was just a very slight drop from .26
20 to .24 across the two plans.

21 Q And how would you characterize that difference?

22 A Well, I guess, as I just said, very slight. I mean,
23 we could calculate the difference of .02. Actually .02
24 and .02.

25 Q And we were just discussing Dr. Katz' testimony as to

1 the Boyce-Clark measure. I believe you heard his
2 testimony in this court?

3 A I did.

4 Q And is there anything fundamentally wrong with his
5 approach?

6 A I would agree with Professor Katz that there are quite
7 a few different types of ways or different measures for
8 compactness. And there is not really sort of an agreed
9 upon standard amongst experts or social scientists.

10 Q I think we will move on now to section E of your
11 report, which entitled Partisanship and Incumbent
12 Pairings.

13 What did you address in this section? And I am on
14 page 9.

15 A Here I looked at two different factors, they are
16 grouped under the same heading E. I looked at a measure
17 of district partisanship that I calculated. And I also
18 looked at the number of incumbents that were paired under
19 the enacted plan.

20 Q And if we could pull up your Table 5, which is on
21 page 10 of your report. There is quite a bit of
22 information in here.

23 Can you please explain to the Court what this table is
24 showing.

25 A Let me back up just one second and explain very

1 briefly how I came up with this measure of district
2 partisanship.

3 In Virginia there is not party registration, so we
4 have to come up with a way to estimate partisanship. I
5 did that by creating an index of the Democratic vote share
6 for three statewide elections in 2009. And those are for
7 the three state constitutional offices in Virginia,
8 governor, lieutenant governor, and attorney general. So
9 it is an average of those three.

10 Q And why did you choose those elections?

11 A They were the closest elections proximate to the end
12 of the benchmark plan and the beginning of the enacted
13 plan.

14 And they are also representative of the odd year
15 elections that Virginia has as opposed to using say a
16 mid-term congressional election or a presidential
17 election, those federal election cycles.

18 Q So then referring to the table if you need to, can you
19 explain what you concluded based on your calculation of
20 the Democratic partisanship index?

21 A Well, if you just look at the mean, so this would be
22 the mean Democratic vote share across all districts, if
23 you look at the average in 2009, it was 43.9. In 2011 it
24 was 43.6. So there is not much movement there.

25 And there is not much movement -- again, these

1 groupings are categorizing districts by the incumbent to
2 the party holding the seat. So that's what Democrat,
3 Republican, and Independent mean across the top of the
4 header there.

5 Just in terms of average Democratic partisanship, if
6 you group districts by the incumbent of the party holding
7 the seat, there is not much movement there either.

8 For instance, 2009, or the benchmark plan 57.2 percent
9 on average Democratic, versus 57.1 percent in the enacted
10 plan in 2011.

11 Q Is there any conclusion that we can draw from that?

12 A Well, just on average again across the different types
13 of districts, the partisanship, the average partisanship
14 level remained about the same.

15 Q In looking at your next table here, Table 6, what does
16 this table touch on?

17 A These are the number of incumbent pairings that were
18 produced by the enacted plan. And you can see that there
19 are six different incumbent pairings. And it gives the
20 parties of the incumbents paired there.

21 Q Is there any conclusion we can draw from this table?

22 A Well, one of them is simply I would say that out of
23 100 potential, there are very few incumbents that are
24 paired together against one another by the enacted
25 redistricting plan. Half of the incumbents paired are

1 Democrat, a Democrat versus a Democrat.

2 Q I would like to turn briefly to a document that we've
3 seen many times in this courtroom so far, the Plaintiffs'
4 Exhibit 16.

5 And, Professor Hood, do you recognize this document?

6 A Yes.

7 Q Have you had a chance to read through it?

8 A Yes.

9 Q I would like to draw your attention to the fifth
10 criteria, Communities of Interest. And in particular the
11 sentence that says, "These factors may include, among
12 others, economic factors, social factors, cultural
13 factors, geographic features, governmental jurisdictions
14 and service delivery areas, political beliefs, voting
15 trends, and incumbency considerations."

16 Is it fair to say that the tables that we were just
17 looking at in your report, Table 5 and Table 6, that they
18 show the plan takes into account things like political
19 beliefs, voting trends, and incumbency considerations?

20 A Yes.

21 Q I would like to go back to DI-15,
22 Defendant-Intervenors' Exhibit 15, the report. Back to
23 page 11, to move on to your subsection F titled District
24 Core Retention.

25 What did you evaluate in this section of your report?

1 A This particular section of the report looks at
2 district core retention, which can be thought of as the
3 percentage of the new district that is comprised of the
4 former district. And it's measured in terms of voting-age
5 population.

6 So one of the ways to think about it is how many
7 constituents the member took across the election cycle
8 with them to their new district.

9 Q If we could pull up what is marked as Table 7 on
10 page 12. It looks like we have some data on this.

11 What does this show the Court?

12 A I would say overall, overall the average across all
13 districts for district core retention would be two-thirds
14 or a little bit more than two-thirds, 67.2 percent.

15 So on average, the member would carry across about
16 two-thirds of their constituents from their former
17 district to their new district.

18 Core retention was a little bit higher for Republican
19 districts, Republican held districts. A little bit lower
20 for Democratic districts. And if we subdivide Democratic
21 districts by the race of the legislator, so minority
22 Democratic legislators versus white Democrats, white
23 Democratic districts actually had the lowest core
24 retention at 58 percent on average.

25 Q Does core retention have any bearing on incumbency?

1 A Core retention is an important component in
2 re-election for incumbents, especially across
3 redistricting cycles.

4 So, yes, it is related to the ability of incumbents to
5 get re-elected across redistricting cycles.

6 Q And moving on, I think we're leaving the plan
7 comparisons section of your report, turn to page 13, you
8 have a brief Section V here.

9 And just quickly, what did you look at in this
10 section?

11 A I looked at some documents, I believe they were on the
12 DLS Web site about preclearance for this plan. At the
13 time, Section 5 was still in effect, of course. And so,
14 the State of Virginia had to have the plan precleared by
15 the Department of Justice.

16 Q And was it?

17 A Yes.

18 Q And did it -- at the time, to your knowledge, did
19 Virginia also have to comply with Section 2 of the Voting
20 Rights Act?

21 A Yes, the plan needed to comply with that as well.

22 Q And moving on to section VI, it looks like we're
23 focusing on the challenged districts.

24 What did you evaluate in this section of your report?

25 A I did a little bit more specific analysis or pulled

1 together some more specific factors together just for the
2 12 challenged districts. I looked at population
3 deviations. Black voting-age population. Again the
4 compactness scores. I looked at my index of Democratic
5 vote strength or Democratic partisanship. Core retention.
6 And the number of incumbents in the challenged districts
7 that were paired against another incumbent by the plan.

8 Q So starting with the first couple of those, if we
9 could pull up Table 8 on page 14.

10 Which factors are addressed in this table?

11 A This table looks at population and black VAP for the
12 challenged districts.

13 Q So looking at just the population portion, what does
14 this table tell the Court?

15 A The negative signs indicate that one of the challenged
16 districts was underpopulated, and population needed to be
17 added by the redistricting plan to bring it up to the
18 ideal district size or close to the ideal district size.

19 You can see that most of the districts were
20 underpopulated to some degree.

21 Q Were there any districts that were more than 10
22 percent under the ideal population?

23 A Yes, a number -- let me, it looks like six were more
24 than 10 percent.

25 Q So half, is that correct?

1 A Excuse me. Yes.

2 Q Briefly, I would like to bring up what has been marked
3 as Defendant-Intervenors' 102. It is a demonstrative
4 exhibit.

5 What does this show?

6 A This is just a rendering of Table 8, the population
7 deviations that we just discussed in Table 8. So it's
8 just a graphic of that.

9 So that shows the degree to which these districts were
10 underpopulated, or maybe slightly overpopulated in at
11 least one case. That .2 percent, one district, it looks
12 like 74 was .2 percent above the ideal district size. The
13 others were underpopulated.

14 So it's just a graphic rendering of what we just
15 discussed.

16 Q Looking like 11 out of the 12 are under -- going left
17 across the sheet?

18 A Correct. So some degree in most of these cases, some
19 degree of population is going to have to be added back by
20 the redistricting plan.

21 Q Moving back to Table 8 on page 14 of your report. The
22 second right half of the report looks like it is entitled
23 Black VAP.

24 What does this part of the chart show the Court?

25 A This shows the Court the black voting-age population

1 in these 12 challenged districts just before enactment and
2 right after enactment of the new redistricting plan.

3 Q Where did you all obtain your data for this portion of
4 the table?

5 A This was from the Division of Legislative Services'
6 Web site page.

7 Q Looking at the last come there on the right, what does
8 that show?

9 A That just shows the difference between the two
10 columns, the 2009 and 2011 column. Whether the black VAP
11 was increased or decreased across the redistricting cycle.

12 So some went up, some went down in terms of their
13 black voting-age population. A few hardly changed at all
14 by maybe a fraction of a percentage point.

15 Q To maybe help make this a little more visual, we are
16 going to pull up what has been marked as
17 Defendant-Intervenors' 103, also a demonstrative exhibit.

18 Please explain to the Court what this shows.

19 A Again, this is just a graphic rendering really that
20 last column in Table 8, the plus or minus black VAP that
21 was added or subtracted to each one of these districts.

22 So you can see sometimes black VAP was added and
23 sometimes it was subtracted.

24 Q For the one that I'm looking at, District 71, I
25 believe, it looks like it's is a rather long lie. Is

1 there any reason why that one would have a greater jump?

2 A Well, it was, it was underpopulated by 7.3 percent.

3 And also, this was the district that by definition was
4 no longer a majority black district prior to the
5 redistricting cycle. So it was down at 46.3 percent.

6 Q Moving back to your report, to page 15. Pulling up
7 Table 9, and again we will be brief with this, what does
8 this table show?

9 A These are the same compactness measures we discussed
10 just a few minutes ago, the Reock and the Polsby-Popper,
11 although they are again just calculated in this case for
12 the 12 challenged districts. You can see what they were
13 at or where they were at on these measures with the
14 benchmark plan versus the enacted plan, and whether
15 compactness for each one of these districts increased or
16 decreased, that's the difference column there.

17 So again, similar to the black VAP, in some cases
18 compactness increased, in some cases it essentially stayed
19 the same, and in some cases it decreased.

20 Q And actually how would you characterize the difference
21 between the two plans generally?

22 A Well, I guess the easiest way to do that is to look
23 down at the mean, which would be the average of these 12
24 districts on these particular metrics.

25 And so, we can see for the Reock measure as a group,

1 the compactness score went from .37 to .32. So it went
2 down slightly.

3 And for the Polsby-Popper measure, the compactness
4 scores across the redistricting cycle went from .23 to
5 .19. So again, a slight decrease in compactness as a
6 group. We look at these as a group.

7 Q Were the challenged districts the only ones that had
8 lower scores or reductions in scores?

9 A No. I mean, there were other districts in the state
10 that also had low compactness scores.

11 Q So moving on to the next page of your report, page 16,
12 Table 10. This is discussing a number of metrics as well.

13 What does this table show the Court?

14 A This is the Democratic vote average or estimate of
15 partisanship for the districts that we discussed just a
16 few minutes ago as well. You can see if the DVA went up
17 or down across the redistricting cycle.

18 Again, if you look at the challenged districts as a
19 group, as a whole, the DVA went down just slightly from
20 68.3 percent to 67.6 percent.

21 And then again, there is another column that just
22 shows the difference in terms of whether the DVA,
23 Democratic vote average for the districts, went up or down
24 across the redistricting cycle.

25 The next column -- or do you want me to --

1 Q Well, actually, I was just sticking for a second with
2 the DVA. Is there any conclusion that we can draw from
3 the data that you show in this table on that subject?

4 A Well again, it doesn't seem as though that in terms of
5 trying to put additional Democrats in these districts, if
6 anything on average again, the Democratic -- the
7 Democratic vote average went down just slightly across the
8 redistricting cycle.

9 Q So moving on to the category of Core Retention.
10 What is this column showing?

11 A That's the same measure we talked about. And again,
12 it shows that on average for these challenged districts,
13 these members retained about 73 percent of their
14 constituents across the redistricting cycle. Which is
15 fairly high.

16 Q And briefly, if we could go over to
17 Defendant-Intervenors' -- actually, sorry, I shouldn't
18 leave that just yet. Can we pop back over to the table.

19 I want to focus in for a minute on the number for HD
20 63. Am I correct in saying that is 82.1 percent core
21 retention?

22 A Yes.

23 Q Okay.

24 A Yes.

25 Q So then bringing up Defendant-Intervenors' Exhibit 94,

1 page 1. This is in the exhibit book, the witness' exhibit
2 book here, but it's also in Map Book 1 if you would like
3 to have a bigger physical copy with you.

4 A I can see it. Thank you.

5 Q I think everyone has found it. Professor Hood, I
6 believe you were in the courtroom when we looked at these
7 earlier with Delegate Jones and some of the other
8 witnesses?

9 A Yes.

10 Q So you are generally familiar with what these maps
11 show?

12 A Yes.

13 Q And I won't belabor the point, but just that the parts
14 in yellow are the 2011 district?

15 A Yes.

16 Q And the parts that are in hatching and gray are the
17 parts that were removed from the district as between the
18 benchmark plan and the 2011 plan?

19 A Yes. The parts that are hatch marked without yellow
20 underneath, yes.

21 Q So looking at this particular district as an example,
22 it looks like a lot of the territory geographically was
23 removed from the district, is that correct?

24 A I couldn't give you a percentage, but geographically
25 these southern VTDs, yes, were removed from that district.

1 Q And we just looked at on your chart that the core
2 retention of this district was 82.1 percent. Which seems
3 rather high.

4 Could you explain to us how that works?

5 A Again, the core retention measure is a measure of
6 where populations are moving. The map is more a way of
7 looking at geography.

8 Now, we could code a map to show population density.
9 This is not coded for that. But I have to constantly
10 remind myself when looking at a map that population is not
11 necessarily equally dispersed across the map unless the
12 map is coded to show us that or not.

13 So it would tell me that these southern VTDs here
14 didn't contain a whole lot of population because this
15 member was able to retain again about 82 percent of their
16 constituents.

17 Q Thank you. I think we will go back to your --

18 JUDGE PAYNE: Are you basically saying that your
19 understanding is that the counties or the precincts --
20 VTDs, excuse me, that were cut out were basically not
21 populated? They are among the ones that were either
22 unpopulated and removed or didn't have much population, is
23 that what you're saying?

24 THE WITNESS: Well, from looking at the core
25 retention number and looking at the map, Your Honor, I

1 would have to infer that those VTDs that were removed
2 didn't have a lot of population.

3 JUDGE PAYNE: Okay.

4 BY MS. WALRATH: (Continuing)

5 Q Okay, going back to your report, which is
6 Defendant-Intervenors' Exhibit 15. And just one final
7 thing on Table 10 to finish it out.

8 Looking at the last column there, entitled Incumbent
9 Paired, what does that show the Court?

10 A That just shows that there were no incumbents
11 representing the challenged districts that were paired
12 against another incumbent by the enacted redistricting
13 plan. That's what no means in that case.

14 Q Okay. So is there any conclusion we can draw about
15 that as to incumbency protection?

16 A Well, obviously, if you are an incumbent paired
17 against another incumbent, you're going to be in for a
18 fight.

19 So the idea in terms of an incumbent protection plan
20 would be not to be paired against another incumbent.

21 Q And I won't pull them up on the screen, but we did
22 discuss the 2011 criteria and the communities of interest.

23 Is it fair to say that with respect to the challenged
24 districts, that what we've looked at shows that the plan
25 takes into account things like political beliefs, voting

1 trends, and incumbency considerations?

2 A Yes.

3 Q Are there any notable differences in the challenged
4 districts versus the plan overall, in your estimation?

5 A Well, I mean, obviously, they are majority black
6 districts. So that would be one difference.

7 None of the, none of the incumbents in the challenged
8 districts were paired. And they all had higher core
9 retention than the average district.

10 So there may have been a little bit more emphasis on
11 incumbent protection in these districts.

12 Q We are going to turn now to page 17 of your report in
13 section VI.

14 What did you evaluate in this section of your report?

15 A This was a legislative roll-call analysis that I
16 performed on the floor vote for HB 5005.

17 Q Maybe it will help if we pull up on page 18, Table 11.

18 And just quickly for the record, I know on the top of
19 this table it says HB 5005, and on the left it says HB
20 5001.

21 Should be that 5005?

22 A Yes. I apologize, that is a typo. The heading is
23 correct. This is the vote on HB 5005.

24 Q And what does this table shows with respect to the
25 vote on HB 5005?

1 A I know some of this has been discuss previously, but
2 this just sort of encapsulates everything into a chart
3 that there was really overwhelming bipartisan support for
4 HB 5005. Overall, just about 90 percent of members voted
5 in favor. 100 percent of Republicans. Just under
6 three-quarters of Democrats. Just under 85 percent of
7 black Democrats. And there were two unaffiliated members
8 in the House that also voted for this. So 100 percent of
9 the unaffiliated members.

10 Q Am I reading this correctly that there were only nine
11 votes against the plan?

12 A Nine total votes against the plan, yes.

13 Q And just, we won't pull it up, but looking at Table 12
14 on page 19, this looks like it is upon final adoption.

15 Was this vote essentially the same as the initial
16 adoption vote that we just looked at?

17 A Yes. That was, Table 12 gives the final adoption.
18 And the numbers are very, very close to those for Table
19 11, 90 percent overall for the bill, 100 percent of
20 Republicans, 75 percent of Democrats, and 90 percent of
21 black Democrats.

22 JUDGE PAYNE: Should HB 5001 be 5005 in Table 2
23 as it is in -- in Table 12 as it is Table 11.

24 THE WITNESS: Yes, Your Honor. I was at least
25 consistent in making the mistake.

1 JUDGE LEE: They call this practice for a reason.

2 THE WITNESS: Yes, Your Honor.

3 MS. WALRATH: Next time it will be perfect.

4 BY MS. WALRATH: (Continuing)

5 Q So turning to page 19, the section VIII entitled
6 Election Analysis.

7 Actually let me ask you first, is what happens in
8 elections useful to determining anything regarding the
9 drawing of a plan?

10 A Yes. Certainly after an election occurs we can often
11 times look back on things and perhaps get some incite into
12 what was going on when the plan was being drawn up.

13 Q Is that what you are looking at in this section of
14 your report?

15 A Yes. I am looking at the election cycle that occurred
16 right after enactment of HB 5005.

17 Q If you pull up Table 13 on page 19 of your report,
18 what does this table show?

19 A It basically shows from 2009 to 2011, which is the
20 across the redistricting cycle, this table just simply
21 shows that the number of Republican seats increased, the
22 number of Democratic seats decreased, and the number of
23 Independent members went from two to one.

24 Q And so, if we flip to the next page, Table 14, what
25 does this table show?

1 A This Table 14 shows a little more detailed breakdown
2 of Table 13. Here by race of the delegate. And so, we
3 can see what happens in terms of -- by race of the
4 delegates in terms of who is winning these seats across
5 these election cycles.

6 Q Is there any conclusion that we can draw from this
7 table?

8 A Well, the number -- there are a couple. The number of
9 black House of Delegates members remains the same across
10 the redistricting cycle at 13. The number of Hispanic
11 House of Delegates members goes from zero to one. And the
12 number of Asian House of Delegates members goes from one
13 to two. And the number of Democrats, overall the number
14 of white Democrats decreases from 26 percent to
15 17 percent.

16 Q And why did these Democratic seat losses occur?

17 A Well, I think we may need to talk about some
18 subsequent tables to flesh that out.

19 Q Of course. I will move on to Table 15 on page 21 of
20 your report. There are two tables here, but we'll start
21 with 15 and then move on to 16. We might bring them up
22 together here.

23 So first with Table 15, can you explain what these
24 tables are showing.

25 A Sure. I hope they are simple enough. What I have

1 done is taken my Democratic vote average and divided it up
2 into quartiles. So 0 to 25, 25 to 50, 50 to 75, and 75 to
3 100 percent.

4 And then I've also categorized seats by the party
5 holding the seat.

6 So this is what things looked like after the
7 redistricting but just prior to the election based on the
8 party holding the seat at that time.

9 And so, if I could -- a couple of points to make about
10 this particular table. And that is that no Republican
11 member at that time was in a district where there were a
12 majority of Democratic partisans. That's why the cells in
13 the 50 to 75 percent range and the 75 to 100 percent range
14 are zero. So --

15 Q So looking at this and looking at the 25 to 50 percent
16 quartile, it says there is 58 members there, is that
17 correct?

18 A Right. So those members were in a district that had
19 less, obviously less than a majority of Democratic
20 partisans. So by definition, they had a majority of
21 Republican partisans. As to that one member over there in
22 the 0 to 25 percent range.

23 Q A very safe seat.

24 A Yes. So that would be an extremely safe seat.

25 Q Looking at the Democrat line, what does that show

1 about the same types of numbers?

2 A Well, there were 28 Democratic held seats at that time
3 that were in districts where the Democratic vote share was
4 50 percent or greater. So 26 plus two there.

5 There were 11 Democratic seats though that were in
6 more marginable seats. They were in the Democratic vote
7 share of 25 to less than 50 percent, those 11 that are
8 there in bold.

9 And so, they are certainly in more marginal seats in
10 terms of partisanship.

11 Q Okay. So if we turn to look at what happened after
12 the election then in Table 16.

13 A So Table 16 shows the same thing, but after the
14 election occurs.

15 And what we see, again, is a drop in the number of
16 Democratic held seats in that marginal range of 25 to less
17 than 50 percent. Now there are only four. So it goes
18 from 11 to 4.

19 And as well, one of the Independent members also in
20 that DVA range also drops out. So we go from two
21 Independents in those marginally held Democratic seats to
22 one.

23 Q And I think you testified earlier about the fact that
24 there was some lost seats in the Democratic party.

25 Does this quartile here, this 12.5 percent, four

1 seats, remain? Is there any relationship between that
2 number and the number of seats lost?

3 A Well, from the 11 to the four, yes. Yes. So the 11
4 up above in Table 15 to the four here, yes. So I
5 definitely think there is a relationship here, a
6 correlation between Democrats holding more marginal seats
7 in terms of Democratic partisanship and Democratic losses
8 in the 2011 election cycle.

9 Q And turning to the next page of your report here,
10 page 22. This is the last section entitled Overall
11 Opinion.

12 So as the title suggests, what is your overall opinion
13 of the plan, including the challenged districts?

14 A Okay. Well, I guess I could back up and just say in
15 relation as well, that none of the incumbents in one of
16 the challenged districts lost, obviously, in 2011. So
17 they were all retained.

18 So overall, looking, comparing the benchmark plan to
19 the enacted plan and being able to look at the plan over
20 at least one election cycle, there seems to be a fair
21 degree of incumbency protection going on in these plans by
22 just the very low number of incumbents that are paired,
23 the high core retention figures.

24 Secondly, you know, again, it appears that
25 Republican voting strength was a little more concentrated

1 in some districts. Democratic voting strength was a
2 little more dispersed. That seems to have created a
3 number of Democratically held seats that were a little
4 more marginal. And all of those seats, I may not have
5 stated this, but all those seats were held by white
6 Democrats, which I believe in part at least led to some
7 Republican seat pick ups in the 2011 election cycle.

8 Other things we could say, for instance, about the
9 plan as a whole, excuse me, is that, you know, it did
10 accomplish the goal of going from plus or minus 2 percent
11 deviation in the previous cycle to plus or minus 1 percent
12 deviation in terms of population in the next cycle or in
13 the enacted plan.

14 Q And speaking of that, Professor Hood, are you aware of
15 any alternative plans to HB 5005?

16 A Yes.

17 Q And turning to your, back in your report a little bit,
18 to page 21. Looking at footnote -- footnote 19.

19 Does this footnote refer -- well, it is kind of small,
20 but does this footnote refer to those alternative plans?

21 A Yes.

22 Q And it looks like you're saying here that there were
23 23 incumbent pairings in one plan and one in 26 -- or one
24 contained 16, excuse me?

25 A Yes, that's what the footnote says.

1 Q Does this mean at minimum 46 and 32 members
2 respectively were paired in those plans?

3 A At a minimum. And that would be assuming that just
4 one incumbent was paired against another incumbent. It is
5 always possible to have more than that paired against one
6 another. Maybe three, for instance.

7 Q And in your opinion on that basis alone, would either
8 of these plans have met the criteria adopted by the House
9 that we were looking at before?

10 A No, I don't believe so. Not certainly in terms of
11 incumbent protection.

12 And not only that, of course, these are pieces of
13 legislation, and it would be very hard to pass a piece of
14 legislation I think that had that many incumbents paired
15 against one another because, of course, these are the
16 members voting on that piece of legislation.

17 Q I would like to turn now -- I mentioned earlier Dr.
18 Ansolabehere's, hopefully I pronounced that close to
19 correctly, reply report, which is Plaintiffs' Exhibit 51.
20 He makes on a number of occasions claims that you agree
21 with him or don't dispute some areas. I would like to
22 just discuss a few of those.

23 So if we could turn first to page 4 of Exhibit 51,
24 paragraph 9. And for the sake of brevity, I would like
25 you to read the paragraph. I will paraphrase for the

1 Court, but please do read it in its entirety.

2 A Would you like me to read that?

3 Q Yes, please. Well, read it to yourself. While you
4 are doing that, I will --

5 JUDGE PAYNE: What page?

6 MS. WALRATH: Page 4.

7 JUDGE PAYNE: Page 4, I'm sorry.

8 MS. WALRATH: Page 4, paragraph 9.

9 BY MS. WALRATH: (Continuing)

10 Q Where he states that you and he are in agreement that
11 there were minimal changes in the Democratic vote share of
12 the challenged districts.

13 Do you agree?

14 A Well, again, we were using different measures of
15 Democratic vote strength. I explained my index, and it
16 did differ from Professor Ansolabehere's.

17 But by my index again, looking back at, it was Table
18 10 in my report, yes, using my index, the Democratic vote
19 average went from 68.3 to 67.6. So I would call that
20 slight.

21 Q I am trying to stay on the same subject here. If we
22 turn to page 18, paragraph 53. He says that Professors
23 Hood and Katz have offered assessments of party
24 performance, and that they are at odds, that you and Dr.
25 Katz are at odds over the sorts of elections to be

1 examined.

2 Are you at odds with Dr. Katz?

3 A I don't believe so, no.

4 Q And why not?

5 A Well, I was calculating -- my measure was calculated
6 to be a proxy for Democratic voting strength or Democratic
7 partisanship in the legislative districts.

8 From Professor Katz' report and what he testified to
9 today, he was performing a different type of analysis.

10 Q In looking right to the next page, page 19, in
11 paragraphs 56 and 57, he points out again that you argue
12 that there is no change in the average partisanship of the
13 districts. And that your Table 10, that there is no
14 appreciable change in the Democratic performance in the
15 challenged districts between 2009 and 2011.

16 And he goes on to say that that analysis, although
17 using different elections than he chose, comports with his
18 conclusion that party was not an important factor in the
19 configuration of the challenged districts.

20 Do you agree with that?

21 A I don't think I ever stated that party was not an
22 important factor, for one thing. Again, if you just look
23 at the average scores, there is not a lot of change. If
24 you look at the scores across all districts though, and
25 again I'm talking about my Democratic vote average, in

1 Table 5 -- I mean, the means don't change all that much,
2 that's true, but there are again, as I stated, looking at
3 my before and after election analysis, you know, in terms
4 of the variability, there is more variability across
5 Democratically held districts than across Republican
6 districts.

7 So there are difference across the election cycle.

8 Q And then turning back to page 4 of Exhibit 51, look at
9 paragraphs 10 and 11.

10 Dr. Ansolabehere talks about how he provided a
11 correlation of analysis and the racial partisan
12 composition of VTDs and the likelihood that a VTD was or
13 was not included in a challenged district, and says that
14 you do not dispute his analysis about the VTDs.

15 Is that correct?

16 A Well, I did not perform that analysis.

17 Q Does that mean that you agree or disagree with his
18 analysis?

19 A I don't necessarily agree with it. I don't have a
20 basis to analyze it. I didn't perform the same kind of
21 analysis.

22 Q And turning to page 15, paragraph 44. Dr.
23 Ansolabehere acknowledges that you examined VTD splits on
24 a statewide basis, but says that you offered no analysis
25 of the challenged districts.

1 Is that accurate?

2 A Well, I provided an analysis for the challenged
3 districts on certain criteria. I did not look at that
4 particular criteria, no.

5 Q And why not?

6 A Just I didn't think it was germane.

7 Q Is there any reason why a statewide analysis is
8 better?

9 A Well again, I think part of the issue overall is that,
10 you know, districts are not drawn in isolation from
11 another one. It's part of a total plan, in this case
12 drawing 100 districts to represent the State of Virginia.
13 And that's one of the reasons I did an analysis primarily
14 of the entire benchmark plan versus the enacted plan.

15 Q In looking at paragraph 45 on the same page, he
16 addresses your analysis of the divided counties or
17 independent cities and notes that -- well, I should
18 probably just read this instead of trying to paraphrase
19 since I am not an expert.

20 He says, "He offers no analysis of the challenged
21 districts. In my analysis of the challenged districts, I
22 found an increase in the number of split counties from 17
23 to 19 and the number of divisions of counties created from
24 29 to 33. Hence, even though the state as a whole was
25 unchanged by this measure, the challenged districts

1 witnessed an increase in geographic divisions."

2 Is that accurate?

3 A That's an accurate reading of that paragraph, yes.

4 Q Oh, I apologize. Do you agree with that?

5 A Not necessarily. Again, I think it's important to
6 look at the challenged districts within the districting
7 plan as a whole.

8 Q And looking at paragraph 46, it is a similar statement
9 about the number of VTD splits in the benchmark VAP versus
10 the HB 5005. He says that there is no justification
11 offered for the increase in split VTDs.

12 Is that accurate?

13 A Well, I certainly just offered a justification here.
14 And that is again, if you're going from plus or minus 2
15 percent population deviation to plus or minus 2 percent,
16 you're probably going to increase the number of VTDs that
17 may have to be split.

18 And again, across the state, we're talking about a
19 very, very small increase in the number of VTD splits from
20 the benchmark to the enacted plan.

21 Q And briefly, I would like to go to Plaintiffs'
22 Exhibit 16 again. And this time I would like to go there
23 to look at a particular sentence. This is the 2011
24 criteria that we discussed earlier.

25 I'm going to look specifically at the last sentence of

1 Section V, which says, "Local government jurisdiction and
2 precincts lines may reflect communities of interest to be
3 balanced, but they are entitled to no greater weight as a
4 matter of state policy than other identifiable communities
5 of interest."

6 I think we talked about this earlier, are VTDs the
7 same as precincts?

8 A Not necessarily, no.

9 Q And so, do read this criteria as giving any particular
10 importance to splitting or not splitting VTDs?

11 A It doesn't seem to be referring, in my opinion, to
12 VTDs, no.

13 Q And going back to Dr. Ansolabehere's reply report,
14 Exhibit 51. I would like to go to page 18, paragraph 53.

15 Actually, we already did this one, I apologize.
16 Losing myself in my own pace here.

17 Let's go to page 8, paragraph 26. I'm looking at
18 paragraph 26. Dr. Ansolabehere references yourself and
19 your compactness report measures for the Commonwealth
20 under the benchmark map in HB 5005, and states that you do
21 not offer an average compactness for the challenged
22 districts with respect to the remainder of the state, and
23 that you offer no evidence contrary to his conclusions
24 that using his measures, the challenged districts are on
25 average less compact than the remainder of the state.

1 Do you agree with him?

2 A Well, I didn't provide those comparisons, no. I
3 compared average compactness of the challenged districts
4 before and after or across the redistricting cycle, and I
5 compared the entire state, all 100 House of Delegates
6 districts before and after the redistricting.

7 So I didn't provide that comparison, I didn't view
8 that, what he is describing, as being the more apt
9 comparison.

10 Q Does this mean anything in particular to the Court?

11 A I wouldn't compare things in this manner.

12 Q And why not?

13 A I just don't think it's the best way to compare
14 things, again.

15 Q And looking at the next paragraph, paragraph 27,
16 looking at the analysis that you did do of compactness.
17 He says that your analysis agrees with his analysis that
18 HD 74, 75, and -- excuse me, 74, 77, and 95 have certain
19 Reock scores and that the average compactness in the 12
20 challenged districts was decreased from the benchmark map
21 to 5005, and listed those districts that experienced
22 substantial reductions in compactness.

23 Do you agree with him?

24 A Again, I can agree with parts of that. The average
25 compactness score for the challenged districts does drop

1 slightly across the redistricting cycle. We went over
2 that previously.

3 Again, compactness in some of the challenged districts
4 goes up and in some of them they go down.

5 Q And did any other districts in the rest of the plan
6 experience similar reductions in compactness? And by any
7 other districts I do mean non-challenged districts.

8 A There were other districts statewide that had low
9 compactness scores as well.

10 Q And just briefly turning to page 10, paragraphs 32 and
11 33. If you could read them to yourself.

12 It looks like he is making similar points that he
13 did in paragraphs 26 and 27. Does that sound right?

14 A Yes. I guess I would quibble with maybe some of the
15 adjectives he uses. You know, we went over the mean --
16 let me just flip back here real quick.

17 So here we're talking about Polsby-Popper. Again, the
18 mean for the challenged districts goes from .23 to .19.

19 So, yes, you could say the compactness scores go down,
20 that's true. I don't know that on average that's a huge
21 drop.

22 Q Is there any way that you would characterize it?

23 A There is a slight reduction in compactness for the
24 challenged districts across the two plans.

25 Q And finally, if we could turn to page 34. This won't

1 be the last one, but it is the last topic. Looking at
2 paragraphs 92 through 94.

3 He is talking about his racial voting patterns
4 analysis. And can you please read paragraphs 92 and 93 to
5 yourself.

6 A Okay.

7 Q And in paragraph 94 he states that you do not dispute
8 his analysis or the conclusions derived therefrom.

9 Do you agree with that?

10 A Well, for one, I did not perform a racial bloc vote
11 analysis or a vote dilution analysis for this particular
12 report. I don't necessarily agree with his findings or
13 the way he conducted that analysis.

14 Q And if you had been asked to do the analysis, would
15 you have done it differently?

16 A Yes.

17 Q How so?

18 A Well, some of the things have been discussed today
19 already. I would have -- again, I would have relied on a
20 closer look at the endogenous elections. So the actual
21 House of Delegates elections versus other types of
22 elections or exogenous elections that are going on.

23 Typically if this were a sort of Section 2 vote
24 dilution analysis, those would be more probative.

25 Endogenous elections that is --

1 JUDGE KEENAN: Excuse me, sir, could you keep
2 your voice up a little bit.

3 THE WITNESS: Yes, Your Honor.

4 JUDGE PAYNE: Pull that microphone closer. Are
5 you saying endogenous?

6 THE WITNESS: Endogenous, yes, Your Honor.

7 JUDGE LEE: Meaning House elections?

8 THE WITNESS: Yes, yes, Your Honor.

9 BY MS. WALRATH: (Continuing)

10 Q And real quickly also --

11 JUDGE LEE: You just gave one answer. Were you
12 finished?

13 A Not quite.

14 Q Go ahead, please.

15 A You know. Again, I would also have relied on primary
16 elections as well. It's very common to look at primary
17 elections if you're trying to determine the minority
18 preferred candidate. Sometimes those candidates are found
19 in primary elections.

20 And I would have used as many election cycles as
21 possible, probably over something like a ten-year period
22 typically, to try to get a handle on that particular
23 issue.

24 Q And on that subject as well, Professor Hood, have you
25 ever been asked by a state legislature or a municipality

1 to do a racial bloc voting analysis during the drawing or
2 enactment of a plan?

3 A No.

4 Q Then turning to page 42 of Dr. Ansolabehere's reply
5 report here, Exhibits 1 -- excuse me, paragraphs 115 to
6 116. If you could please read paragraph 115 to yourself.

7 A Okay.

8 Q And just briefly, he references his ability to elect
9 analysis and his conclusion that in none of the House of
10 Delegates districts was a 55 percent threshold necessary
11 to have an expected vote in excess of 55 percent. This is
12 a number we have been hearing a lot about.

13 And then in paragraph 116 he says that you do not
14 dispute that analysis.

15 Do you agree with his conclusion?

16 A No. Again, I didn't perform that type of analysis.
17 It doesn't necessarily mean that I agree with his
18 conclusions, certainly.

19 Q And is there any particular reason why not?

20 A Well again, for some of the reasons we just discussed,
21 I would have performed the analysis differently from what
22 Professor Ansolabehere did.

23 MS. WALRATH: I have no further questions at this
24 time.

25 JUDGE PAYNE: Cross-examination.

1 MR. HAMILTON: Your Honor, Mr. Spiva is going to
2 do the cross-examination. I rise just to raise a question
3 about logistics because it's 4:30 and we're running short
4 on time.

5 We have a rebuttal witness that we intended to
6 call just to lay the foundation for those two documents,
7 Gerry Hebert. He is not available on Monday. So if we're
8 not going past 5 o'clock, we would ask the Court's leave
9 to interrupt the proceeding for a very brief witness to
10 lay the foundation to admit those two documents in a
11 rebuttal case out of turn.

12 JUDGE PAYNE: Any objection?

13 MR. BRADEN: Your Honor, we object to his
14 production. He was not noticed as a rebuttal witness.

15 JUDGE PAYNE: He was not noticed as a witness in
16 your 26 disclosures or in any of the witness lists, is
17 that right?

18 MR. HAMILTON: Well, of course not, Your Honor,
19 because he is a rebuttal witness.

20 JUDGE PAYNE: Yes.

21 MR. HAMILTON: We didn't know we needed him until
22 literally today when there was this issue. And as Your
23 Honor will recall, you said, you know, move on, lay a
24 foundation, and if you can do that, then you can get them
25 in in your rebuttal case.

1 That's exactly what we intended to do. I reached
2 out to Mr. Hebert, he is a former acting Chair of the
3 Voting section of the Department of Justice. I anticipate
4 his examination will consist of about ten questions at
5 most.

6 JUDGE LEE: From you, but then there will be
7 cross-examination.

8 MR. HAMILTON: True, but given the scope, there
9 is not going to be much.

10 JUDGE LEE: Well, I am not sure what you expect
11 us to do. If the defense won't allow this witness to step
12 down and complete his testimony before you start cross,
13 I'm not -- I guess we could force him to do it. I am not
14 sure that I would.

15 JUDGE PAYNE: I wouldn't be inclined to force him
16 do it. Just have him come on Monday.

17 MR. HAMILTON: See, that's the problem, Your
18 Honor. I wouldn't even ask for this, but Mr. Hebert is
19 not going to be in the Commonwealth on Monday and he is
20 not available. I suppose we could take his deposition --

21 JUDGE PAYNE: Take his deposition over the
22 weekend and do it that way then.

23 MR. HAMILTON: All right. Thank you, Your Honor.

24 JUDGE PAYNE: That's the way that you do it
25 usually, isn't it?

1 MR. HAMILTON: It is a pretty unusual situation.
2 I am happy to take his deposition over the weekend.

3 JUDGE PAYNE: That will be fine.

4 MR. HAMILTON: Okay, thank you.

5

6 CROSS-EXAMINATION

7 BY MR. SPIVA:

8 Q Good afternoon, Dr. Hood. Good to see you again.

9 A You as well.

10 Q I am going to try to be brief. Actually, Ms. Walrath
11 may have covered a number of the questions I had for you,
12 but I just want to make sure that I am clear.

13 You understand that one of plaintiffs' allegations in
14 this case is that the defendants engaged in racial
15 gerrymandering in the drawing of the 12 majority-minority
16 districts?

17 A Yes, that's the allegation, yes.

18 Q And if I refer to those as the challenged districts,
19 you understand what I am talking about?

20 A Yes.

21 Q Okay. And you have performed no analysis of whether
22 any of the 12 challenged House districts need to have a
23 black voting-age population of 55 percent or greater in
24 order to preserve the African-American community's present
25 ability to elect its preferred candidate of choice, is

1 that correct?

2 A That's correct.

3 Q I know that was a mouthful. And similarly, you have
4 not performed any analysis on whether any of the 12
5 challenged House districts needs to have any particular
6 BVAP percentage in order to preserve the minority
7 community's present ability to elect their candidate of
8 choice, correct?

9 A Those two questions seem pretty similar.

10 Q They are similar. The first one was about 55 percent,
11 the second one was about whether you had done any analysis
12 in terms of any percentage, whether it is 55 percent or
13 anything else?

14 A No, I have not performed that type of analysis.

15 Q Okay. And you would agree with me, Dr. Hood, that as
16 a general matter that there is no set BVAP percentage
17 required for an African-American community to elect its
18 candidate of choice, correct?

19 A It could vary greatly.

20 Q Right. There is no rule of thumb to be applied to all
21 majority-minority districts in all places, correct?

22 A Well, if it's a majority-minority district, there is
23 one rule at least.

24 Q What's that one rule?

25 A It has got to be 50.01 percent.

1 Q Other than that rule, would you agree that there is no
2 rule of thumb to be applied in all places?

3 A There is no strict rule, no.

4 Q Okay. And certainly no rule of thumb that would apply
5 for all time, would you agree with that?

6 A Things are not necessarily time bound, no.

7 Q That percentage may vary --

8 A Things can change.

9 Q I am sorry, I didn't mean to step on your--

10 JUDGE PAYNE: Be careful, you're stepping on each
11 other.

12 Q Yes, and it is my fault, Your Honor.

13 I apologize, Dr. Hood. Please, you answer.

14 A Things can certainly change over time, that's
15 possible.

16 Q And it might vary based on the degree of racially
17 polarized voting, if any, would you agree with that?

18 A Well, certainly that's one consideration, yes. The
19 voter cohesion amongst different minority groups compared
20 to the majority group, yes.

21 Q And it might vary in a state, let's take Virginia,
22 from place to place within the state, would you agree with
23 that?

24 A It's possible, yes.

25 Q Some parts of the state may have high degrees of

1 racially polarized voting and others may have lower
2 levels, is that correct?

3 A Well, we're speaking just hypothetically here at this
4 point. I have not conducted any type of subregional
5 analysis in the State of Virginia on that particular
6 question.

7 It's possible it could vary. It's possible racial
8 polarization could be fairly constant across the state as
9 well.

10 Q You would have to do a racially polarized voting
11 analysis to figure that out, wouldn't you?

12 A That's fair, yes.

13 Q And you've done that type of racial bloc voting
14 analysis previously, isn't that right?

15 A Yes. Maybe -- I sometimes use the term "vote dilution
16 analysis." I'm assuming we're talking about the same
17 thing. Trying to determine how one racial group is voting
18 and how another racial group is voting, and what kind of
19 effect that is having on the election, is that fair?

20 Q That's fair.

21 A Okay.

22 Q And you have done that type of analysis before,
23 correct?

24 A Yes.

25 Q Okay. And I take it in the analysis that you did do,

1 Dr. Hood, you didn't interview any of the particular
2 delegates in the challenged districts, is that correct?

3 A That's correct, yes.

4 Q And you didn't consider any statements by delegates on
5 the House floor, is that correct?

6 A Not directly. I saw some of the testimony, some of
7 the video testimony.

8 Q Oh, okay, all right. Did you consider that testimony
9 in forming your opinion?

10 A It really didn't go to forming my opinion. Again, the
11 primary purpose of my report was a comparison from the
12 benchmark plan to the enacted plan.

13 Q Now, you would agree with me that prior to the 2011
14 redistricting, three of the challenged districts had lower
15 than 55 percent BVAP, correct?

16 A Well, I could look in my report.

17 Q Sure, if you want to look, it is
18 Defendant-Intervenors' Exhibit 15, and it's at page 13,
19 Table 8, I think you will find that information.

20 And it should be in your witness book too because I
21 think Ms. Walrath went over it with you.

22 A Okay.

23 Q So the question was, Dr. Hood, that you would agree
24 with me that prior to the 2011 redistricting, that three
25 challenged districts had lower than 55 percent BVAP, is

1 that correct?

2 A Yes, that looks to be accurate.

3 Q All right. And the map drawers of the 2011 map, they
4 raised the BVAP in each of those three districts above
5 55 percent in the 2011 redistricting, that's true too,
6 isn't it?

7 A 71 went from 46.3 to 55.3.

8 Q Maybe take a look at 89.

9 A 80 from 54.4 to 56.3. And 89 went from 52.5 to 55.5.
10 So, yes, that would be an accurate answer to that
11 question.

12 Q All right. Thank you, Dr. Hood. And you anticipated
13 my next question. So I will move on to another one.

14 The map drawers did not lower the BVAP of any of the
15 challenged districts below 55 percent, is that correct?

16 A With the enacted plan?

17 Q Correct. With the enacted plan, they did not lower
18 the BVAP of any of the challenged districts below
19 55 percent?

20 A That's correct.

21 Q Okay. Now, you've opined, Dr. Hood, that
22 African-Americans were not packed into the 12 challenged
23 districts, isn't that right?

24 A Well, I think I only used that term in reference to
25 Democratic partisans.

1 Q Actually, can you take a look at your report, I think
2 it's in the same exhibit there, Defendant-Intervenors'
3 Exhibit 15 at 13. And the text there, I believe you say
4 closer examination of Table 8 refutes the idea that the
5 new plan packed the black voting-age population into
6 districts.

7 Do you see that?

8 A Okay, yes.

9 Q Okay. That's your opinion, isn't it?

10 A Yes, as is stated there.

11 Q And this is based in part on the fact that the average
12 BVAP across all 12 challenged districts increased by only
13 .1 percent, is that correct?

14 A That's part of it. I also make reference in the same
15 paragraph to the fact that the plan reduced the
16 concentration of black Virginians in the most heavily
17 black districts, the ones that were more than 60 percent.

18 Q Okay.

19 A So I guess that gets back also to that graphic I
20 showed that black voting-age population went up in some
21 districts and went down in the some of these districts.

22 Q But you didn't do any analysis of any of those
23 districts to determine whether the BVAP after the
24 redistricting was necessary to protect the
25 African-American community's present ability to elect

1 their candidate of choice, correct?

2 A No, I did not perform that type of analysis.

3 Q Okay. And so, you do not know whether the
4 African-American community in any of those challenged
5 districts could have elected -- could have had the ability
6 to elect the candidate of their choice with a lower BVAP
7 percentage than that chosen by the map drawers, is that
8 fair?

9 A Yes. Again, I did not perform that analysis.

10 Q You have opined in your report that the ability of
11 black Virginians to elect their preferred candidates was
12 retained by the new 2011 plan, is that correct?

13 And if you want to verify, just take a look at
14 page 20, I think it's the sentence right before Table 16.

15 A Well, that would be -- yes, I did make that statement.
16 That's in reference to this election analysis I performed
17 that showed that all the incumbents from the challenged
18 districts were returned.

19 Q Okay. But you would agree that black Virginians in
20 the challenged districts had the ability to elect their
21 preferred candidates prior to the new 2011 plan, isn't
22 that right?

23 A Well, I think to make that statement definitively I
24 would have -- to make that statement, I would have to
25 perform an analysis looking at that time period.

1 Q And that's an analysis that you have not done?

2 A Yes. I said I didn't do that. So --

3 Q Okay. And were you aware that every single delegate
4 representing a challenged district in 2009 was re-elected
5 in 2011?

6 A Yes.

7 Q Okay. And every single delegate representing a
8 challenged district after the 2000 elections had been
9 first elected either in 2009 or earlier, isn't that right?

10 A I would have to look that up to be honest with you.

11 Q You don't know the answer to that?

12 A I don't know the answer to that.

13 JUDGE PAYNE: Hold on a minute.

14 COURT REPORTER: Your Honor, I heard him say
15 2000.

16 Q Oh, let me get you the exact question. Actually, what
17 I said was every single delegate representing a challenged
18 district after the 2011 elections had been first elected
19 either in 2009 or earlier. Sorry, thanks.

20 In calculating Democratic vote average, you used
21 election data from the statewide races for governor, I
22 take it, is one of the statewide races that you used?

23 A Governor, lieutenant governor, and attorney general,
24 yes, from the 2009 election cycle.

25 Q Okay. Thank you. Those were going to be my next

1 couple questions, so you covered it.

2 Can you take a look at page 15 of your declaration.
3 And you opined on page 15 that the political composition
4 of the challenged districts stayed about the same before
5 and after redistricting, is that correct?

6 A Well, again, if you look at the means for those
7 districts as a whole, yes, there was little movement.

8 Q Right. In fact, in looking at the second sentence
9 from the top, you find that, "From 2009 to 2011 the
10 partisan composition of these challenged districts was
11 essentially unchanged."

12 That's your opinion?

13 A Yes.

14 Q Okay. And the average Democratic vote average in the
15 challenged districts went from 68.3 percent in 2009 to
16 67.6 percent in 2011, is that correct?

17 A That's correct.

18 Q So on average the challenged districts got a little
19 less Democratic, isn't that right?

20 A Just slightly, yes.

21 Q And you conclude in fact that the new plan did not
22 seek to pack Democratic voters in these districts, isn't
23 that right?

24 A Yes. Looking at that statistic, yes.

25 Q And you did not do any analysis of the extent to which

1 changes in any particular challenged districts --
2 district, I'm sorry, was driven by politics, correct?

3 A Could you --

4 Q Say it a little slower. Sorry.

5 A No, I got the question. I mean, I guess could you
6 give me an example.

7 Q No, I don't have an example. I was just saying -- I
8 was asking, you did not do any analysis of the extent to
9 which changes in any particular challenged district was
10 driven by politics? You didn't do that analysis?

11 A Correct.

12 Q All right. And you wouldn't claim and it's not part
13 of your opinion that any specific change was made to any
14 specific challenged district based on partisanship,
15 correct?

16 A Correct. I didn't perform an analysis at that level.

17 Q For HD 75 -- strike that.

18 You would agree that all but one of the challenged
19 districts was underpopulated according to the 2010 census,
20 correct?

21 A Yes.

22 Q Let me ask you to turn to Plaintiffs' Exhibit 50,
23 which is the initial expert report of Dr. Ansolabehere.

24 JUDGE PAYNE: What page?

25 MR. SPIVA: It is Table 4 on page 72, Your Honor.

1 And also, Dr. Hood, it's Table 4 on page 72 that I wanted
2 you to take a look at, please.

3 JUDGE PAYNE: I think it's also up on the screen,
4 Doctor.

5 MR. SPIVA: Yes, it's also on your screen, Dr.
6 Hood, if you want to look there.

7 THE WITNESS: Okay.

8 BY MR. SPIVA: (Continuing)

9 Q And you see that this has the population and racial
10 composition of the challenged districts in the benchmark
11 plan and in the new plan, HB 5005, is that correct?

12 A Yes.

13 Q And you see that HD 74 was very close to the ideal
14 population under the benchmark plan, correct?

15 A Yes, that's close, yes.

16 Q Can you take a look at, and I believe we can put it up
17 on the screen, at Table 5, which is on the next page,
18 page 73.

19 And you see that this table shows the numbers of
20 people moved into and out of each challenged district as
21 part of the 2011 redistricting, correct?

22 A Yes.

23 Q And you'll see that the map drawers removed 16,414
24 people from District 74 even though its population was
25 very close to ideal, correct?

1 A Correct. According to this table, yes.

2 Q And you don't know and you don't have an opinion on
3 why the map drawers removed over 16,000 people from
4 District 74, correct?

5 A Well, besides the fact that, again, I can just state
6 generally that altering one district, of course, has or
7 can have a ripple effect on surrounding districts.

8 So we heard testimony earlier to the fact that, you
9 know, in some areas a number of districts were
10 underpopulated. And so, not only that, but there are many
11 considerations with drawing district boundaries. And
12 there may have been, you know, a perfectly valid reason
13 for removing some of the population and then moving
14 population from other geographic areas into that district.

15 Q I appreciate that, but actually I have a narrower
16 question.

17 A Okay.

18 Q Which is that you have not looked at, and so,
19 therefore, you have no opinion on the reason for removing
20 16,414 people from District 74, isn't that correct?

21 A I did not do an analysis like this, no.

22 Q Okay. And turning back to Table 4. You see that HD
23 70 was also close to ideal under the benchmark plan.

24 Do you see that?

25 A Yes, yes.

1 Q And if you would look at Table 5, and we will put that
2 up on the screen again -- sorry, we're going to have to do
3 a little flipping back and forth just for a minute.

4 You have see the map drawers took almost 26,000 people
5 out of HD 70, correct?

6 A 25,946, yes.

7 Q Almost exactly 26,000, right?

8 A Yes.

9 Q Just a little below. And you haven't done an analysis
10 and have no opinion as to why 26,000 people were removed
11 from District 70 even though its population also was close
12 to the ideal population prior to redistricting?

13 A I can't comment specifically, no.

14 Q Okay. And we could go through a few more, but I take
15 it the answer would be the same, with respect to any
16 individual district, you can't opine on why population was
17 moved out or moved into any of these particular challenged
18 districts?

19 A Correct.

20 Q Okay. And you don't draw any conclusions in your
21 opinion concerning whether the map drawers sacrificed
22 compactness in any of the challenged districts in order to
23 attempt to comply with the Voting Rights Act?

24 A I don't draw any conclusions specifically on that
25 point, no.

1 MR. SPIVA: Okay. Thank you, Dr. Hood, I
2 appreciate it. I have no more questions.

3 JUDGE PAYNE: Any redirect?

4 MS. WALRATH: I have a few questions.

5
6 REDIRECT EXAMINATION

7 BY MS. WALRATH:

8 Q Given the time, I will keep this very brief.

9 Professor Hood, I would just like to turn briefly back
10 to your report, Defendant-Intervenors' Exhibit 15, and
11 your Table 8. It is on page 14 of the trial exhibit
12 stamped page numbers.

13 JUDGE PAYNE: What exhibit?

14 MS. WALRATH: Defendant-Intervenors' 15.

15 JUDGE PAYNE: His report?

16 MS. WALRATH: It is his report, yes. Page 14,
17 Table 8.

18 BY MS. WALRATH: (Continuing)

19 Q And I believe you testified to this earlier, but just
20 for the sake of reminding everyone, what is the source of
21 the numbers in this table for the black voting-age
22 population?

23 A These are DLS numbers.

24 Q So as between the discussion I think you have heard in
25 this courtroom, there is DLS numbers versus a DOJ number,

1 this is the DLS numbers?

2 A Yes. Yes.

3 Q And in this report I think we just heard you testify
4 that the black voting-age population of many of these
5 challenged districts was largely unchanged, is that
6 correct?

7 A Well, are we going district by district?

8 Q No, as a general proposition for the drawing of
9 districts.

10 A Yes, if look at the averages there, 57.1 percent in
11 the benchmark plan versus 57.2 percent in the enacted
12 plan.

13 So, yes, I would call a tenth of a percentage point
14 hardly any change at all.

15 Q And similarly, when we were speaking about the
16 Democratic performance of these districts, I believe that
17 was largely unchanged as well?

18 A Yes, that is accurate.

19 Q And isn't there in your opinion a correlation in
20 Virginia between race and politics?

21 A Yes. There is a correlation in most of the South
22 between race and politics, certainly.

23 Q And finally, we don't necessarily need to bring this
24 up on the screen, but we discussed the 2011 criteria
25 previously?

1 A Yes.

2 Q And that you had had a chance to review the criteria?

3 A Yes.

4 Q And in your opinion, are the challenged districts in
5 any way in conflict with the communities of interest in
6 any of the criteria that you evaluated in your report?

7 A I don't believe so, no.

8 MS. WALRATH: Thank you. I have nothing further.

9 JUDGE PAYNE: May he be excused?

10 MS. WALRATH: Yes.

11 JUDGE PAYNE: I don't see any reason why at this
12 juncture -- you have got another witness, Mr. Braden?

13 MR. BRADEN: Yes, we do, Your Honor.

14 JUDGE PAYNE: I don't see any reason why at this
15 juncture we couldn't let that fellow come testify since he
16 is not interrupting a witness.

17 JUDGE LEE: Well, the problem is that
18 cross-examination would have to occur. And if he is
19 not -- and we're not going to be here until 6 o'clock
20 because I have a docket tomorrow.

21 JUDGE PAYNE: Why do you need -- can't you
22 stipulate to authenticity? That's all you're going to do,
23 isn't it, Mr. Hamilton, with this witness, is the
24 authenticity? Yes or no?

25 MR. HAMILTON: Yes.

1 JUDGE PAYNE: Okay. Will you stipulate the
2 authenticity or --

3 JUDGE LEE: Can you come to the podium, Mr.
4 Hamilton. What is it you have?

5 JUDGE PAYNE: Why do you have ten questions?

6 JUDGE LEE: What is it you have?

7 MR. HAMILTON: We have two documents, Your Honor.
8 One of them is a letter from Senator McEachin to the
9 Department of Justice in connection with the preclearance
10 of the Senate plan in 2011.

11 And the second is an e-mail from Mr. Hebert, who
12 was then a private attorney representing Senator McEachin
13 and the black caucus in the Senate providing a racially
14 polarized voting study in connection with the preclearance
15 to the Department of Justice.

16 It is simply to prove the point that in fact in
17 Virginia racially polarized voting studies have been done
18 and have been submitted to the Department of Justice in
19 connection with preclearance. It is a simple point.

20 And so, if they will stipulate to authenticity --

21 JUDGE PAYNE: The rest of it is whether it can be
22 admitted, and you didn't mark it as an exhibit, et cetera.
23 Those are the issues that need to be argued later.

24 The only question I was trying to deal with was
25 his authenticity. Do you stipulate to the authenticity?

1 If you do, we don't have to worry the gentlemen. If not,
2 take his deposition.

3 JUDGE LEE: But that does not obviate any
4 objection he might have to relevance.

5 JUDGE PAYNE: Right, obviously not.

6 MR. BRADEN: I have no objection to the
7 authenticity of the document. Frankly, without him
8 present, I don't know how we would determine the date, the
9 date of the actual report itself. There is no date.

10 So I have no clue as to how we would know an
11 actual date on which the report is done. It is a matter
12 of some significance.

13 JUDGE PAYNE: So you do have objection to the
14 authenticity or not of that report?

15 MR. BRADEN: I have no objection to that.

16 JUDGE PAYNE: All right. Then we will deal with
17 the admissibility later.

18 MR. HAMILTON: Well, I think what he has just
19 said is he is reserving the ability or the admissibility
20 without the foundation. I mean, he is raising a
21 foundation problem that I am going to need the call the
22 witness for.

23 JUDGE PAYNE: Well, it's five minutes to 5, five
24 minutes until. I suggest maybe you just take his
25 deposition and let him be done with it later or bring him

1 in next week.

2 Come ahead.

3 JUDGE LEE: Well give you 15 minutes.

4 MR. HAMILTON: Okay. Thank you, Your Honor, that
5 should be all we need.

6 JUDGE LEE: Thank you, Dr. Hood.

7 THE WITNESS: Thank you.

8 NOTE: The witness stood down.

9 MR. HAMILTON: Your Honor, we would call Gerry
10 Hebert.

11 NOTE: The witness is sworn.

12

13 **JOSEPH GERALD HEBERT,**

14 a witness, called at the instance of the plaintiffs,
15 having been first duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. HAMILTON:

18 Q Thank you, Mr. Hebert, for being here.

19 Can you please state your name for the record.

20 A Joseph Gerald Hebert.

21 Q Where are you currently employed?

22 A I have several positions. I am an attorney in private
23 practice, solo practice here in Alexandria, Virginia.

24 I also am the executive director and director of
25 litigation at a nonpartisan nonprofit organization called

1 The Campaign Legal Center in Washington, D.C.

2 And I also teach law school at Georgetown University
3 Law Center and New York Law School in New York City.

4 Q Are you the former acting chief of the Voting section
5 of the Department of Justice?

6 A Yes.

7 Q I would like to direct your attention to two
8 documents, I believe you have them in your hand. Do you
9 have them?

10 A Yes, I do.

11 Q Okay. So could you identify them just briefly by
12 title. What are the two documents we're looking at here?

13 A The two documents that I have are first a fax cover
14 sheet sent to the Justice Department by the office of
15 Senator A. Donald McEachin which is dated May 31, 2011,
16 attaching to the fax cover sheet a four-page letter by
17 Senator McEachin to the chief of the Justice Department.

18 The second document is an e-mail that I had sent to
19 the Justice Department attorneys who were reviewing the
20 Senate redistricting map. And that e-mail is the cover
21 page.

22 And attached to it is a report by an expert that
23 I retained on behalf of the Senate Democratic caucus to
24 analyze the Senate redistricting plan. And that is Dr.
25 Lisa Handley's report which was attached to my e-mail

1 submitted to the Justice Department on June 1.

2 Q Are these -- you are familiar with both of these
3 documents?

4 A Yes, I am. I reviewed them, I reviewed Dr. Handley's
5 report, which was prepared at my request.

6 Q Let me stop you there. When was that report prepared?

7 A The initial analysis in the report was done before the
8 plan was introduced in the Senate, in the legislature. So
9 it was probably done sometime in April or May.

10 Q And do you know why it was done before the plan was
11 introduced in the Senate?

12 A Well, we had drawn a map and we had wanted to
13 determine whether the districts, the five majority
14 African-American Senate districts would continue to
15 perform as effective districts for African-American voters
16 under the plan.

17 JUDGE LEE: I'm not clear. So what was your job?
18 You hired Dr. Handley to do a report. Were you working
19 for the Virginia Senate or for the Department of Justice?

20 THE WITNESS: I worked for the Virginia Senate
21 Democratic caucus at that time.

22 JUDGE LEE: Okay.

23 THE WITNESS: My tenure at the Justice Department
24 ended a long time ago, in 1994.

25 JUDGE LEE: So you were working for the VA Senate

1 as a consultant?

2 THE WITNESS: That's correct, legal counsel.

3 JUDGE LEE: All right, legal counsel. Thank you.
4 I'm sorry.

5 BY MR. HAMILTON: (Continuing)

6 Q In the analysis --

7 MR. BRADEN: Your Honor, I hate to interrupt, but
8 I think that's a mischaracterization of what his position
9 was. I think there was a misunderstanding on your part.
10 I don't think he was actually working for the Senate. Am
11 I correct?

12 THE WITNESS: I worked for the Senate Democratic
13 caucus, which was the majority party in the Senate at that
14 time.

15 BY MR. HAMILTON: (Continuing)

16 Q Now let's turn to Senator McEachin's letter. Can you
17 -- you are familiar with this document as well, sir?

18 A Yes.

19 Q How are you familiar with this letter?

20 A Well, I was legal counsel to Senator McEachin. He
21 drafted this letter. And as his counsel, he asked me to
22 review it before he sent it.

23 Q Are these true and accurate copies of that letter and
24 the racially polarized voting analysis?

25 A Yes. They are true and accurate copies of those

1 documents.

2 MR. HAMILTON: Your Honor, I would offer these
3 two exhibits into evidence.

4 JUDGE LEE: I wasn't sure you were going to do
5 admissibility. Go ahead, Mr. Braden.

6 JUDGE PAYNE: I think he is entitled to -- you're
7 going to cross-examine -- you are offering testimony on
8 the authenticity and the predicate for admissibility.

9 MR. HAMILTON: Correct.

10 JUDGE LEE: Right.

11 JUDGE PAYNE: He gets a chance to cross-examine.
12 We cross the bridge of ruling on it later.

13 MR. HAMILTON: I would like to ask --

14 JUDGE PAYNE: The point being there may be
15 argument.

16 MR. HAMILTON: I am refraining from asking one or
17 two questions about the content of the analysis until it
18 gets admitted into evidence.

19 JUDGE PAYNE: The analysis is whatever it is, Mr.
20 Hamilton. You all don't -- we can read it.

21 Let's go, Mr. Braden.

22 JUDGE LEE: If it is admitted.

23 JUDGE PAYNE: If it comes in, we can read it.

24 Let's go, Mr. Braden, have you got a question?

25 MR. BRADEN: Your Honor, we will accept the

1 authenticity of the document, but we still object to its
2 admissibility.

3 JUDGE PAYNE: All right, we know that. We will
4 deal with that later.

5 We will see you all -- you have got a witness
6 that begins on Monday?

7 MR. BRADEN: Yes.

8 JUDGE PAYNE: How much longer is that witness?

9 MR. BRADEN: I would expect our witness on Monday
10 on direct to be about an hour-and-a-half.

11 JUDGE PAYNE: All right. How long is your
12 rebuttal? Recognizing that rebuttal in this district
13 really means rebuttal. It doesn't mean rehash everything
14 that has been done.

15 MR. HAMILTON: Understood, Your Honor. I have
16 tried a case in this district before, and I remember the
17 rules. We anticipate no longer than an hour in rebuttal.

18 JUDGE PAYNE: We would like to hear argument from
19 you.

20 JUDGE LEE: We have motions hearings and
21 sentencing in this courtroom tomorrow, so everything needs
22 to be cleared out. I think you can probably keep your
23 book shelves as long as they are organized.

24 I am a little concerned about them being so close
25 to the door where the lockup is because we will prisoners

