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

GEORGIA STATE CONFERENCE OF THE NAACP; GEORGIA COALITION FOR THE PEOPLES' AGENDA, INC.; GALEO LATINO COMMUNITY DEVELOPMENT FUND, INC.,	)	Docket Number 1:21-CV-5338-ELB-SCJ-SDG
Plaintiffs,	)	Atlanta, Georgia May 30, 2023 10:05 a.m.
v.	)	
STATE OF GEORGIA; BRIAN KEMP, in his official capacity as the Governor of the State of Georgia; BRAD RAFFENSPERGER, in his official capacity as the Secretary of State of Georgia,	)	
Defendants.	)	

TRANSCRIPT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BEFORE CIRCUIT JUDGE ELIZABETH L. BRANCH; STEVEN C. JONES; and STEVEN D. GRIMBERG, UNITED STATES DISTRICT JUDGES

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; May 30, 2023, at 10:05 a.m.; in open court)

JUDGE BRANCH: The Court now calls the following actions for oral argument. The Georgia State Conference of the NAACP and others vs. State of Georgia and others, Civil Action Number 1:21-CV-5338, and Common Cause and others vs. Brad Raffensperger, Civil Action Number 1:22-CV-90. Thank you all for being here on this day after a lovely Memorial Day weekend here in Georgia. But, again, back to business and so here we go.

As you all know, we are hearing two pending motions from the State and both motions for summary judgment in both of these cases. The parties have 45 minutes each side. You may proceed.

MR. TYSON: Good morning, Your Honors. Bryan Tyson for the defendants. Just to roadmap for you all this morning. I'm going to be covering standing, the constitutional claims, and the *Gingles* 1st precondition of the Section 2 claims. Mr. Jacoutot will then proceed with the *Gingles* 2 and 3 issues in the case.

So we're also aware -- obviously, Judge Jones, we spent a lot of time together a few weeks ago.

JUDGE JONES: I've missed you. I've only seen you two weeks ago.

MR. TYSON: I know. We'll try not to duplicate too much, Your Honor, we'll work on that.

JUDGE JONES: Do what you need to do, Mr. Tyson.

MR. TYSON: Thank you.

So I thought I'd begin with our standing arguments. This is an unusual case. As Judge Jones is aware, we didn't raise standing in the Section 2 cases before him because those were brought as what we see as traditional Section 2 cases - individual voters who bring the cases, the injury of the vote dilution, in their district. Here in the NAACP case we only have organizations. In the Common Cause case we have a mix of organizations and individuals. *Gill vs. Whitford* tells us that the injury or the alleged injury in a redistricting case is district-specific.

So first as to the organizational standing issue. We don't see a way where a normal diversion of resources type of injury would apply in a redistricting case unless the organization had maybe some very specific thing they were doing about a particular district, maybe you could say that was a diversion that would get there. There's not evidence of that here and so we don't see that there's any basis to have organizational standing to challenge particular districts because the injury can't be tied to a district.

JUDGE BRANCH: But that theory that you're advancing, there's no case that squarely states that, that would be an issue of first impression; correct?

MR. TYSON: That's correct, Your Honor. And I think it's an issue of first impression because this case is unusual because historically we've always done these cases with individual voters and that's how we've known what we were dealing with. The *Larios* case was

that way in this court, other cases over time. This we see as an attempted expansion of organizational standing, at least as a diversion of resources.

JUDGE JONES: Would you agree *Gill* does not say you cannot do it organizational?

MR. TYSON: Certainly, Your Honor, it doesn't say that at all.

JUDGE JONES: Associational?

MR. TYSON: Correct. So the associational standing is probably the more interesting of the two because, again, there's also not a whole lot of precedent on this. There's a little bit with *Alabama Legislative Black Caucus*. From our perspective, associational standing could work as a basis for standing because you can, obviously, stand in the shoes of your members. The question, I think, at that point is a question of fact of what has the organization done to determine whether it has members in various places.

JUDGE BRANCH: Why are there submissions on summary judgment saying that they have a member in each of the challenged districts insufficient to establish standing?

MR. TYSON: Your Honor, the reason is because that wasn't disclosed during the discovery process and so the problem for us is the declarations that have been submitted now vary the 30(b)(6) testimony.

JUDGE JONES: Explain this deal to me that you all made. It seems simple. That you all have one understanding and the

plaintiffs have another understanding. Explain, from your point of view, what was the deal.

MR. TYSON: Certainly, Your Honor. Obviously, I want to make sure -- I take very seriously an accusation that we're trying to play fast and loose with somebody.

JUDGE JONES: I'm not saying that.

MR. TYSON: I understand. I just want to be clear.

If you look at the interrogatory and the interrogatory that the meet and confer was about, the issue was identify a member that you're going to rely on for associational standing because that was the basis, that's what *Georgia Republican Party vs. FCC* required, that's what the line of cases require - identify at least one member. At that point we're not going to challenge the associational standing basis on you failed to identify a member because you identified one. But that alone doesn't get you, from our perspective, to then what is the plaintiffs' burden of you've got to show you have members in every district you're challenging.

The agreement that took place there was November 2022. We didn't get to the 30(b)(6) depositions until the spring of '23. There was plenty of time. Obviously, in those 30(b)(6) depositions we asked a lot of questions about the process that the organizations went through to determine if they had members in those districts and that's where we were met with objections about associational privilege that you can't inquire into what we've done to determine this, just take our word for it.

What we have now in the declarations is affirmative evidence - hey, we've gone and looked, we have members in the districts - but our issue there is it varied the 30(b)(6) testimony when we tried to inquire about that and weren't allowed to. That also distinguishes *Alabama Legislative Black Caucus*. In that case the district court raised the issue *sua sponte* and there was no challenge by the State or request for that information. In this case we have requested that and weren't provided it so, from our perspective, there's a failure of proof in terms of associational standing.

JUDGE BRANCH: You're questioning the timing of the disclosure?

MR. TYSON: Yes, Your Honor.

JUDGE BRANCH: I'm assuming that if the summary judgment disclosures by plaintiffs had been made during the 30(b)(6), that would have resolved your concern about associational standing?

MR. TYSON: Yes, Your Honor. That's correct.

JUDGE BRANCH: Is your concern that you haven't had a chance to take a deposition dealing with these new disclosures?

MR. TYSON: Our concern is that we haven't been able to inquire the process the organization went about to determine how it had members in those districts. They didn't look at home addresses; they didn't have home addresses. They didn't look at zip codes only. Zip codes may be enough for a congressional map. It may not be enough for a legislative map, that's the issue for us. Those are the types of questions we attempted to ask in the 30(b)(6) and weren't allowed

into that process.

JUDGE JONES: I was going to ask you this question. The NAACP says they have 26,000 members in the state of Georgia. It's really impractical to think that they don't have at least one person in all 159 counties of Georgia.

MR. TYSON: Your Honor, it's very logical to think they have members in every county in Georgia, we don't question that. I think the question is - especially for the state House districts - you're getting down to such a small level of geography. In determining whether you have a member in that particular district you're going to have -- you know, even one zip code's not going to tell you that. So while, obviously, they do have a lot of members in a lot of places we don't think that that alone is going to get you there. It's probably enough for the congressional districts if we're just looking at that, but not for the legislative districts.

JUDGE JONES: We're talking about five legislative districts? 5 and 3 --

MR. TYSON: And that's a little unclear for us, too, Your Honor, which is why I think this is important. The court can adhere closely on standing of which districts are actually being challenged because Dr. Duchin's report goes through a variety of different districts that are challenged as racial gerrymanders. There's some that are challenged on a Section 2 basis that we live in an area --

JUDGE JONES: I imagined this question would come from

this panel, but possibly somebody else up here. Plaintiffs will have to answer that question?

MR. TYSON: Yes, Your Honor. And I think, again, it just goes back to -- the one other piece I'll add on the discussion about associational standing for us is obviously we can't consent to this court having jurisdiction over everything. Like the court has to inquire into its own ability to have jurisdiction as to those particular districts. It's also why having the organizational plaintiffs versus the individual plaintiffs in Common Cause still matters. If the individual plaintiffs end up moving, trying to fall back to associational standing is still relevant even in that case which is distinct from *Alpha Phi Alpha* where in that discovery process there was some inquiry into if you're allowed to inquire how they determined they had members in those districts.

JUDGE GRIMBERG: The agreement that you're referring to, that pertains to the NAACP plaintiffs, right, not Common Cause?

MR. TYSON: Yes, Your Honor.

JUDGE GRIMBERG: There was no agreement there?

MR. TYSON: Correct.

JUDGE GRIMBERG: There was a discovery request made and there was an assertion of associational privilege and there was no attempt to get that resolved by the court?

MR. TYSON: That's correct, Your Honor.

JUDGE GRIMBERG: Why not?

MR. TYSON: The reason was we didn't see it as our

burden to make the plaintiffs' case on standing. If they were going to assert a privilege objection over something that's part of their burden of proof, then they couldn't later offer that as evidence. We didn't bring that to the court because we didn't see it was our obligation to solve the plaintiffs' privilege objection or make their case there.

JUDGE GRIMBERG: But their objection was based on it being an overbroad request for every member on its rolls, which goes way beyond the standing inquiry. And so you made this request, it was met with a privilege objection, and there was no attempt to pursue it. So, yes, plaintiffs have the burden of establishing standing, but why was it their burden to produce that in discovery?

MR. TYSON: Your Honor, I think that, for us, the interrogatory responses were less important than the 30(b)(6) testimony because in the 30(b)(6) deposition we inquired about the process. I think for us -- we're not looking for names of all the members, that's not what we're trying to get to. But we do believe that plaintiffs were under an obligation to put forward some process whereby they verify they had members that they could stand in the shoes of in the particular districts they're challenging.

JUDGE GRIMBERG: Did you make that request?

MR. TYSON: In the deposition we did, Your Honor, yes, and that was met by an associational privilege objection in the deposition as well and the deponents were instructed not to answer. From our perspective, we've satisfied our obligation to ask, the

plaintiffs asserted an objection and wouldn't get us that information and can't now provide that in discovery.

So with that, Your Honor, let me move to the constitutional claims. So I think as we look at the constitutional issues it's important to keep in mind - and we talked with Judge Jones about this a few weeks ago - what is it the legislature was supposed to have done because the federal court can't intervene in districting decisions, we're told, until there is some violation of federal law and so the State obviously -- we're here about two of the five cases. In the three cases before Judge Jones the allegation is we didn't draw enough majority-black districts, we should have drawn more based on race. Here there's an allegation we should have drawn less based on race, that there was racial gerrymanders in existence and then the NAACP has this claim as well about coalition districts and that those should have been drawn, instead, of majority-black districts.

So in terms of working through that, I want to walk through the evidence the plaintiffs have presented under *Miller* because they have two ways - as we talked about in the briefing - they could establish a racial predominance. One is through direct purpose, and I think plaintiffs have largely conceded they don't have evidence of direct purpose, that they didn't really offer anything in response. The other is demographics and the shapes of the districts and so we brought a few maps just because it's a redistricting case and we have some maps to look at so you all have this in front of you. The shapes of the districts, both in the *Shaw* case and the *Miller* case, versus

the shapes of the districts in this case. So when we look at the district boundaries that are involved, *Shaw* and *Miller* involved very bizarrely-shaped districts, districts that didn't make a lot of sense from any explanation apart from race. And so when we talk about racial predominance we're looking for - did race predominate over traditional districting principles in the creation of the plans? The plaintiffs rely on Dr. Duchin's report for their evidence on this front. Our submission in our summary judgment motion is there is not enough evidence to support the plaintiffs' claims even to get us to trial on this issue of racial predominance.

So first we have the displacement and the moving of people from one place to another. There's a couple examples of that that Dr. Duchin gives in her deposition. She agreed that politics could have been the motive of all of those swaps. She never looked at political data, she didn't look at other potential causes. She only identified these swaps of population occurred and she testified that that was some evidence of racial predominance. It's important to note, too, Dr. Duchin never said that race definitely predominated over traditional districting principles, that wasn't the opinion she offered. She said a factfinder could make that conclusion based on the evidence that was there.

She also looked at racial splits of counties and precincts and, as an example, she continued to refuse to look at politics in that analysis as well. So in the next slide we have an example from her report where she talks about the split of Bibb County being split

along racial lines and the statistic she reports indicates that's the case. But if you go to the appendices of her report, she reports that same split was almost exactly a partisan split with a heavily Democratic area placed into the Democratic district to Congressman Bishop's district, and the more heavily Republican area placed into Congressman Scott's district, which is a Republican district, and Dr. Duchin refused to look at those specific political causes of what those splits might have been, instead just asserting that she found race-based splits.

JUDGE JONES: In trying to make the partisan gerrymandering, you moved too many minorities, and that's her argument that shows it was racial gerrymandering?

MR. TYSON: Your Honor, I think that is definitely her argument and I think that, then, when you look at what is the actual evidence she presented what you see is a couple of county splits, you see a couple of -- a handful of precinct splits. On the legislative plans you see 14 out of 159 counties, she says, 17 out of almost 3,000 precincts, it's a vanishingly small number where --

JUDGE JONES: That was different than the map that she drew?

MR. TYSON: I'm sorry, Your Honor?

JUDGE JONES: It's not gerrymandering on the map of precinct splits?

MR. TYSON: Yes, Your Honor, it's not. And, again, I think when Dr. Duchin testified about her map-drawing process she said

she would go back and fix things to make her overall metrics look better, more similar to the enacted plans.

JUDGE JONES: We're at summary judgment right now. This is not a disputed fact -- a materially disputed fact at this point, not trial. She said you're moving too many and you're saying, no, we didn't?

MR. TYSON: And, Your Honor, I don't think it is and the reason why is we'd have to have a genuine dispute about a material fact. We have disputes about a lot of different things on the maps, but in terms of what Dr. Duchin actually found -- she didn't testify you moved too many. She just testified you moved people. I think the absence of an opinion from her that, yes, race predominated in this decision over traditional districting principles, she doesn't offer that opinion.

JUDGE GRIMBERG: Wouldn't that be an inappropriate opinion to make? That goes to the ultimate issue which would not be admissible in any circumstance; would it?

MR. TYSON: I believe an expert can opine as to the ultimate issue. I think what we would look for from an expert like this is an indication of what traditional districting principles were subjugated to race and so in these situations she saw, well, here's an example of what I think is a racial split, I didn't look at other causes. But she's not testifying as to which particular splits were subjugated like this happened in violation of some traditional districting principle. And obviously from the *Bethune-Hill* case and

those cases we know you don't have to have a direct conflict with the traditional redistricting principles. I think it was encumbent on Dr. Duchin to offer something of here's an example of how race predominated over this particular decision.

JUDGE JONES: Didn't she do that? Congressional District 4, Congressional District 10, she points out racial disparities in Newton County. She points out there's evidence that race predominated in the drawing of these districts such that black voters in Congressional District 4 were packed and black votes in Congressional 10 were cracked. Now, you may not agree with that, but she did get specific; did she not?

MR. TYSON: So, Your Honor, yes, she offered that opinion, but I think the key problem is she was willfully blind to every other potential cause. So she didn't look at, you know, geographic boundaries, she didn't look at politics, she didn't look at any precinct split, any of the other things you would look at to say, aha, there may be some other explanation here.

JUDGE GRIMBERG: It sounds like great cross-examination.

MR. TYSON: Your Honor, yeah.

JUDGE JONES: Maybe at trial. But at this point can I say definitely she's got a different opinion and I'm going to accept Tyson's opinion and not accept her opinion?

MR. TYSON: Well, yes, Your Honor, you can't weigh evidence at this stage, definitely.

JUDGE JONES: Right.

MR. TYSON: So if you feel like that is a weighing of evidence to get to that point, as opposed to an absence of evidence in support of a case, then, yes, I think we're going to trial on that point, I think that's the case. Our belief is that it's an absence of evidence in support of the plaintiffs' case, but I can understand if the court believes that needs to go on trial to resolve that issue.

So maybe what I can do next is briefly touch on the rebuttal report, as well. The ensemble analysis is there, the 100,000 maps that do different things. Dr. Duchin didn't look at any other traditional principles in drawing those districts and so, again, that may be a subject for cross-examination we can explore, but we would submit that is --

JUDGE JONES: Two weeks ago, Mr. Tyson, you and I talked about the eye test, does it pass the eye test, these districts, in the compactness? Does it pass the eye test?

MR. TYSON: Yes, Your Honor.

JUDGE JONES: That was your argument. I thought it was a great argument.

MR. TYSON: And, Your Honor, our argument is that that's the case here on these plans, as well, from Dr. Duchin on her partisan versus racial, her 100,000 plans. She didn't look at other traditional principles. We don't think there's any explanation for why you put Jackson and Clark County down with Dublin down in Lawrence County, Georgia. We don't think there's any reasonable explanation

that a legislature would have drawn these districts consistent with traditional principles and Dr. Duchin's testimony was that she only looked at one measure of compactness that the legislature did not use and only prioritized a single traditional principle instead of all others so that's why we believe there's a failure of proof on that point as well.

So let me move next to the intent claim for the NAACP, I think this is one of the more unusual ones here where the argument is *Arlington Heights* somehow has some role to play on intentional racial discrimination. We think that that legal standard alone is incorrect. This is a districting case, *Miller* and *Shaw* control, and the way you prove your redistricting case is either direct evidence or circumstantial evidence. I'm trying to fit *Arlington Heights* into this kind of analysis, it doesn't make sense for us, it's just a legal analytical principle. The plaintiffs have not cited to you a single court that has used an *Arlington Heights* analysis as part of a redistricting case. So for Count Three of the NAACP complaint we don't see where there's any basis to move forward with that claim independent of the standard under *Miller*.

The other challenge for the plaintiff is even under *Arlington Heights* they haven't offered sufficient evidence and so their expert, Dr. Bagley, looked at the process that happened and testified there were no procedural or substantive departures from the 2011 process or the 2001 process. The only departure he found procedurally was that people asked for something different at the

hearings and the legislature didn't follow that.

Similarly for Representative Rich's comment, a contemporary comment, we put her whole quote in our reply brief because, in context, she's clearly answering a constituent, not bemoaning the application of the Voting Rights Act.

Ultimately, the other evidence they offer is primarily the same things they would offer under *Miller* so we don't see any reason for that count to travel separately and independently from the racial-gerrymandering claim, the separate, independent claim removed from that. So if the racial-gerrymandering claim still goes to trial we still think there's a basis to dismiss Count Three of the intent claim just because the legal standard is incorrect and the plaintiffs have asserted it.

With that, Your Honor, let me move to the Section 2 claim in the NAACP case. I know we're all waiting for *Milligan* and for *Rose* that may have some issue with these cases in terms of where we go from here, probably a month out from that. But we had shared these slides with Judge Jones last week that a traditional Section 2 case is a multi-member case. It was a county that had an at-large method of election for five members of a county commission. There was a white population in a suburban area with a city center that had a black population in it that wasn't able to elect a candidate of choice because the surrounding white voters outvoted that particular area. And so the solution in *Gingles* and other Section 2 cases was we draw five districts that allows the city center, the black population, to

elect a candidate of choice without having their votes drowned out or diluted by the surrounding white votes that happen around them.

The challenge is when we move Section 2 from a multi-member context to a single-member context it adds to the challenge. I know we've been through Section 2 cases recently on this front, but ultimately the question for a single-member district challenge is not, you know, should you move from multi-member districts but are these districts enough or are more districts required? So it's a different kind of analysis from either no success to some success versus some success to more success, that's what we're talking about here.

So one of the major differences in this case versus the other cases is, first of all, the coalition district claim, the idea that the State should have been required to draw coalition districts combining black and Latino voters together in the creation of districts and Dr. Duchin's report offers a variety of maps that reduce the number of majority-black districts and adds coalition districts. In terms of the precedent on that, the plaintiffs don't cite to you a court that has required a state to draw coalition districts under Section 2 and that's because we can't find that either. We know a federal court can't draw coalition districts as part of a remedy, that's not part of the process. It would also undermine a lot of the logic from *Bartlett* vs. *Strickland,* which is the idea behind the Voting Rights Act, is assisting a single minority group that is facing some limitation on their right to vote so we would submit that the coalition district claim doesn't need to move forward in this case.

The Section 2 claim, though, about additional majority-black districts now kind of overlaps with the cases with Judge Jones. As we've outlined, the first *Gingles* precondition requires a remedy the court can order, that's the purpose there. What we have -- what's interesting about Dr. Duchin's plans under Section 2 is they're completely different than the plans that we have in the other cases with Judge Jones. So the testimony in those cases is the State should have drawn a district on one side of the state. Dr. Duchin draws the district in a district that runs from Atlanta down to Callaway Gardens, the Atlanta airport area, that's her district that she creates. Does the Voting Rights Act require that?

The other pieces on her legislative maps, as we pointed out in our brief, create districts that are 89 percent black, 90 percent black districts that Dr. Duchin doesn't believe were packed and so trying to figure out what were the traditional principles that went behind that is where we would say there's an absence of evidence. Dr. Duchin couldn't explain but for the racial goals of those particular regions what her traditional redistricting principles were in the creation of those maps. Dr. Duchin's a mathematician, but maps are a lot more than math, and trying to work through the communities that have to be represented there is a critically important part of the process.

JUDGE GRIMBERG: Do they need to show a viable remedy at the summary judgment stage?

MR. TYSON: I believe they do, Your Honor, because it's

a necessary element of their proof.

JUDGE GRIMBERG: Based on what case law?

MR. TYSON: So that would be *Nipper*, primarily. *Nipper* is primarily the judicial cases in the Eleventh Circuit that talk about a remedy.

JUDGE GRIMBERG: The Eleventh Circuit's binding?

MR. TYSON: So, Your Honor, we believe the Eleventh Circuit is highly persuasive for you as a court. We don't believe the Eleventh Circuit is binding on you as a court. But we recognize that other three-judge panels in the district have used the Eleventh Circuit as binding.

JUDGE JONES: (Inaudible.)

MR. TYSON: And Judge Branch may want to bind the other members of the panel, I don't know what her plan is on that.

But I think that, again, the key point to the district maps, the only undisputed fact about them is every one of Dr. Duchin's alternate maps increases Democratic performance, reduces Republican performance on every map that she drew, that's in Mr. Morgan's report, not disputed by Dr. Duchin. So at the end of the day, if this is ultimately a partisan gerrymandering case masquerading as a racial-gerrymandering case, it's not the duty of the Court to intervene in that situation.

With that, Your Honor, I'll hand things off to Mr. Jacoutot to cover the second and third prong of *Gingles*, unless there are other questions. Thank you.

MR. JACOUTOT: Good morning, Judge Branch, Judge Jones, Judge Grimberg. Good to see you all again.

Plaintiffs' claim that they can avoid summary judgment here in *Gingles* 2 and 3 is because, as they state in their brief, these are issues that are issues of fact that remain and they must be resolved at trial, but they're wrong for at least three reasons.

First, the plaintiffs admit in their brief no dispute as to the data provided by plaintiffs' sole expert on racial polarization, Dr. Schneer.

Second, the defendants' position here fits well within existing precedent in the Eleventh Circuit and elsewhere.

Finally, plaintiffs acknowledge that they might be wrong in their reading of *Gingles* 2 and 3 and the evidentiary requirements associated with that; but if they are, we should punt that issue to trial and totality of circumstances, but there's no reason to wait.

Turning to the data provided by Dr. Schneer in your packets in front of you. Again, no dispute as to this underlying analysis and also Dr. Schneer's data pertains only to general elections and not primaries. So the only thing that's at issue is the legal conclusion that can be drawn from that data. In other words, does Dr. Schneer's analysis prove legally significant racially-polarized voting? If you look at the slide, there's remarkable cohesion and stability among black voters for a preferred candidate, regardless of the race of that candidate. The candidate is indicated by the asterisk next to the office that they're running for. You see 2012, U.S. President, that

was Barack Obama, and so on and so forth.

Cohesion remains, regardless of the race of the candidate. You likewise see strong, though somewhat less, cohesion among white voters voting overwhelmingly for Republican candidates and this is true regardless of the race of the candidate. In Georgia, Republicans still tend to win so that is why you're seeing the Republican majority overcome the Democrat majority traditionally so this is clear evidence - probably irrefutable evidence - of partisan polarization.

So what does legally significant racial polarization look like? If turn to your next slide. I use the *Wright* vs. *Sumter County* case as kind of a great example. These are nonpartisan elections so that sort of controls the disparate party out of the gate. But what you see is, again, that remarkable cohesion for black support -- excuse me, black electorate support of black candidates which are, again, indicated by an asterisk. And this is obviously not all of the data, but it's pretty indicative of the data that was considered at the Eleventh Circuit. Again, strong minority or black support for black candidates, very little black support for white candidates, and strong white support for white candidates, very little white support for black candidates. If you look down at the bottom there there's an election with only white candidates and if you look at the cohesion it utterly melts away and you get down to 54/46 cohesion, 54/44, so arguably not cohesive at all.

We can compare this data on the next slide with Dr. Schneer's data. Again, on the left we have what clearly is

partisan polarization. You have remarkable cohesion, regardless of the race of the candidate. On the right you have what we would call legally significant racial polarization where that cohesion depends upon the race of the candidate.

The *Sumter County* case fits with the cases examined in the Eleventh Circuit that have found racially-polarized voting in the past. In every case that's made its way up to the Eleventh Circuit and racially-polarized voting was found the data provided by plaintiffs on voting patterns show that there was clearly something beyond mere partisanship that was driving those patterns and this was borne out directly in the statistics examined by the court and this is not what we have here.

So we know what partisan polarization looks like now, we know what racial polarization looks like now. Why is this distinction significant? As the *Nipper* Court found, Section 2 restores the precedential value of the Supreme Court cases of *Whitcomb* v. *Wright* and those cases, quote, establish that proof of invidious discrimination was an essential element of a voting rights claim like this one. As racial polarization and an available remedy are sort of the lion's share of what's required to win a Section 2 claim - i.e., *Gingles* 1, 2, and 3 - the requirement of invidious discrimination necessitates more than just partisan-voting patterns where black voters vote for the minority party in a given jurisdiction and white voters vote for the majority party in that jurisdiction. Otherwise, we've reached an effective requirement of proportionality which we

know that Section 2's text expressly disclaims and this is one of the things that Justice O'Connor was concerned about in her concurring opinion. This is why she clearly found a pattern like that shown in *Sumter County* to be relevant to the issue of racial polarization, that that pattern was demonstrated in the *Gingles* trial court, which is *Gingles v. Edmisten*. In fact, the trial court looked a lot -- the evidence examined by the trial court looked a lot like the evidence put before you here and *Sumter County* where the electorate-voting behavior was altered based on the race of the candidate.

Plaintiffs say that this doesn't matter and that this court should just follow the mechanical rule handed down by Justice Brennan that causation is always and everywhere irrelevant but of course this rule did not carry the day in *Gingles*. In fact, in Section 3C of the opinion the Court felt quite sure of the majority and Section 3C deals with what evidence is necessary to establish racially-polarized voting.

A majority of the justices, including Justice White and Justice O'Connor, flatly disagreed with Justice Brennan on what type of evidence was necessary to show legally significant racially-polarized voting and the Eleventh Circuit has stated just recently that we should be careful about confusing or conflating partisanship with race and that case involved a Section 2 claim. That was the *League of Women Voters* case out of the Eleventh Circuit that came down April 27th, I believe.

JUDGE GRIMBERG: Let me ask you this, Mr. Jacoutot,

because we've lived through the *Rose* case together.

JUDGE JONES: Certainly.

JUDGE GRIMBERG: These sound like very similar arguments that were made at summary judgment in the *Rose* case and I denied summary judgment and we went to trial. Tell me why the facts here warrant summary judgment compared to *Rose* or was I just wrong in *Rose*?

MR. JACOUTOT: I certainly wouldn't say anything of the sort, Your Honor. I do think, though, that the evidence is very clear here that it's just partisanship. I understand that the Court sort of did not find that enough and I know that I believe summary judgment was granted on 2 and 3 in that particular case but we feel that, and the Court may have felt, it was bound by Eleventh Circuit precedent. But I think, as articulated here, the Eleventh Circuit precedent does show that you need more than just that partisan polarization and the Eleventh Circuit -- the trial court that came up to the Eleventh Circuit, they all had that, and the partisanship that we see here they simply didn't have. And, again, as we've discussed, the three-judge panel isn't bound, necessarily, by the Eleventh Circuit so in that case you did feel somewhat bound then I think you're actually more -- you had a little more leeway.

JUDGE GRIMBERG: Why don't you believe we're bound by Eleventh Circuit? We're sitting here as a district Court so why aren't we bound by the Eleventh Circuit?

MR. JACOUTOT: The general nature of precedent requires that a review -- precedent really only binds the Court below it and so

if you're not below the Eleventh Circuit in any way, shape, or form, we have direct appeal as of right to the Supreme Court.

JUDGE BRANCH: But the Eleventh Circuit opinion binds the Eleventh Circuit unless it is overturned *en banc*.

MR. JACOUTOT: Yes. The Eleventh Circuit opinion does bind other panels but then that court has the ability to do an *en banc* hearing and reverse it so that's a little distinction between what we have here where you only go up to the Supreme Court.

JUDGE GRIMBERG: It seems like you're conflating two things. The fact that you have a direct review of this case to the Supreme Court is different -- it's a different question than what precedent we're bound by; isn't it?

MR. JACOUTOT: I don't know if it's a different question. I think that they're sort of intimately intertwined. Again, I think this sort of puts aside the fact that the Eleventh Circuit, we believe, is perfectly in line with this analysis so we may be making a mountain out of a molehill because I think that this court can perfectly apply Eleventh Circuit precedent and rule in the defendants' favor. I hope that answers your question.

JUDGE BRANCH: Let me ask you a question about -- you have pointed to the fact that the plaintiffs have only provided analysis of general election data and not the data from primary elections. Are you suggesting that that failure to provide that data is fatal or it is just one more point in your favor?

MR. JACOUTOT: I wouldn't say it's fatal, but it is one

more point in our favor because we have no comparator to judge voting behavior in the way that we do -- let's say the *Gingles*' trial court where they were examining primaries and they saw that white Democrats -- when a black Democrat made it through and became the nominee of the party, those Democrats were saying, well, we're going to vote for the white Republican because that's what we want to do so they were actually opting out of their party on the basis of the race of the candidate so we think that's important.

JUDGE BRANCH: Is it a failure of the plaintiffs to provide that or is it a failure of the defendants to provide the primary data and say, look, this works in our favor?

MR. JACOUTOT: We think the evidentiary burden is on the plaintiffs, the failure of the plaintiffs.

I do want to wrap up because it looks like I'm running out of time. But just the totality of circumstances is not the appropriate stage of the case to consider this evidence. If you look at the last slide, *Nipper* quoting a page in *Holder v. Hall*, which was eventually appealed, but that panel circuit -- or panel of the circuit recognized that the *Gingles* majority did not limit the manner in which the 2nd and 3rd factors may be proven and that the totality of the circumstances surrounding a Section 2 claim may be properly considered when determining whether they've established *Gingles* 2 and 3, that's very important. So if the sort of vacuum of data that you have here from Dr. Schneer's analysis where you don't see that party switching, the inference that you can make is that all you have is partisan

polarization. We do not need to wait until trial to consider the exact same issue again, it's redundant and it's unnecessary.

JUDGE JONES: Your argument is that the plaintiffs have to show causation?

MR. JACOUTOT: Plaintiffs have to show data allowing for the inference of some sort of causation beyond mere partisanship and I think that is borne out in the *Nipper* case.

JUDGE JONES: Is that what *Gingles* says, that they have to show causation?

MR. JACOUTOT: Well, *Gingles*, again, was putting -- reestablishing -- excuse me. Section 3C of Brennan's opinion didn't abide by *Whitcomb* v. *Wright* and the five justices that disagreed.

JUDGE JONES: Eight of the justices say you don't have to show causation. You're arguing, I think, if I'm hearing it right, that they do have to show causation. My question is -- we did this two weeks ago; all right?

MR. JACOUTOT: And I enjoy it every time.

JUDGE JONES: I love your answers. Two weeks ago you said a majority says you did have to show causation. When you read the Plaintiffs' brief, plaintiffs say eight of the justices say you don't have to show causation. So if I take your argument this morning like two weeks ago you're saying they do. Two weeks ago I thought you were definitely saying they do. You are all good lawyers, you know I was going to ask this question. Which one is it?

MR. JACOUTOT: So there is some evidence that must be--

you have to be able to draw some evidence of racially invidious discrimination in the voting patterns of the electorate in order to establish *Gingles* 2 and 3 because, again, it's asking the same question as the Senate factor is - is there racial polarization? So in order to do that you have to get to some degree of evidence of invidious racial discrimination and that is borne out in cases like *Sumter County* where the electorate shows those patterns. *Gingles*' trial court, same thing, that's why Justice O'Connor didn't have a hard time voting in favor of the actual ruling because she saw it. Here we do not see that, we simply do not, it's partisanship all the way down, regardless of the race. It's incredibly stable over time, it's incredibly stable across elections, and incredibly stable across the state. So we think with just that evidence and given *Nipper* Footnote 37 that you all are able to make that call here, make that inference here and realize that -- or make the decision that that's not enough.

JUDGE BRANCH: Let me ask you about your abrogation argument that the State should be dismissed from the Georgia State Conference of the NAACP case as a defendant. We obviously have the Fifth and Sixth Circuits that would take the opposite approach and we have my dissent to the *Alabama State Conference of the NAACP* and then Judge Wilson's opinion has been vacated as moot. Have there been any other cases since the vacating of the Eleventh Circuit opinion that would help shed light, on this other than the Fifth and Sixth Circuits?

MR. JACOUTOT: I think my colleague was going to answer that, but I would say that we certainly agree with your dissent in that.

JUDGE BRANCH: Well, I would gather that. But can you point to any other three-judge panels?

MR. JACOUTOT: I cannot at this time.

So I'm going to wrap up. We would also say, as sort of a last point, that the analysis by plaintiffs, if it's accepted, it potentially imperils the constitutional viability of Section 2 because privilege is a political party over another and that's not congruent and proportional to the exercise of authority under the Fourteenth and Fifteenth Amendments. Thank you very much.

JUDGE GRIMBERG: Thank you.

(off-the-record discussion)

JUDGE BRANCH: I just want to make sure that everybody watches time. I would also let the counsel know - when you're not speaking I would suggest turning your microphone off. We have not been able to discern words, but we can hear conversations.

The plaintiffs may proceed.

JUDGE GRIMBERG: You have to hold it down.

JUDGE BRANCH: If we'd been able to discern words, I would have advised you before.

JUDGE GRIMBERG: You just have to hold it down while you're speaking.

JUDGE BRANCH: You may proceed.

MR. DAVIS: Good morning, Your Honors. Alex Davis for the Lawyers Committee for Civil Rights Under Law on behalf of the NAACP, Galeo, and the Georgia Coalition for the Peoples' Agenda. I plan to present for about 20 minutes and I'll do my best to watch the time. My eyesight isn't very good so it's hard to see, but I've got my watch here so I'll do my best.

On standing and the Section 2 claims, my colleague, Ms. Berry, plans to present for about 10 minutes on attempted racial gerrymandering and then my colleague, Ms. Love, plans to present for about 15 minutes for the Common Cause case.

So if I could start on standing and maybe just responding first to the process point and kind of explaining our understanding of the agreement and the course of the discovery.

JUDGE GRIMBERG: Are you addressing only the NAACP case?

MR. DAVIS: Only the NAACP. Ms. Love will address any questions on Common Cause.

JUDGE JONES: Before you get started, let me ask you this basic question. This could have been very well done away with, the standing argument. Why did you not allow your clients to answer the questions when defense asked them where they lived? In other words, why did you tell them you were not going to allow them to answer?

MR. DAVIS: So I actually am not sure that's what the deposition testimony reveals and I have it here. I have the

deposition testimony they cited here.

JUDGE JONES: Right now you're saying to the three of us we will tell you in camera, but we don't want you to tell the defendants. It's kind hard for me to believe that it went different during the deposition. If you're telling us, oh, if you need to know this, we'll tell you in camera, but we won't tell the defendants. To me, it's kind of creating a problem here. There's no way you can tell us this in camera and we don't tell the defendants. Tell me what procedure says we do it that way. They have a right, don't they, to challenge who these individuals are? So if you tell us in camera and they don't know, we're still in the same boat. I look at it like it's a problem that could have been resolved very easily.

MR. DAVIS: So I think there's two points there. The first is, you know, what we would have to disclose and so when it comes to naming names our clients, in their declarations, they set forth that if they reveal First Amendment concerns about membership lists and just for the NAACP's membership list, that list has, you know, been protected under the First Amendment going back to the 1960s so that's the first point. First, we don't think that we have to name names.

The second point - when it comes to identifying members or creating facts that, you know, we have members in certain challenged districts, on that point, you know, we read *Alabama Legislative Black Caucus* to say you have to disclose to the defendants what they specifically request.

JUDGE JONES: Don't you have to show you have someone in each congressional district in each state House or Senate district, don't you have to show that?

MR. DAVIS: Yes. We think the declarations that we submitted do and the reason we didn't submit those earlier, Your Honor, is because defendants specifically limited, in our view - and we have two attorney declarations to this effect - that we only had to deal with one member. If I could turn to the deposition testimony, because I think it's actually instructive particularly --

JUDGE JONES: I'll admit - and I apologize to Judge Branch and Judge Grimberg, I don't mean to dominate it - but, to me, it seems like this is an issue that should have been resolved very easily.

MR. DAVIS: Defendants cite two -- I'm going to start with the NAACP deposition testimony. Defendants cite two questions in their objections to our declarations in their response to our Statement of Facts. The first was 79, I think 1 to 24, in President Griggs' NAACP declaration. They said "Are you able to testify on how many members of the conference were affected by the redistricting?" and we didn't object to that question.

The answer was - "No, I can't give a single number because I haven't seen that research, but I do know it was a lot."

And then the next question was - "Do you know what would be involved in trying to find out that number?"

And the answer to that was - "Talking to the individual

units."

The first point I want to make on this is that our declarations do not alter the deposition testimony to the extent that President Griggs said there was a lot, but he didn't know the exact number and the question was how many members are affected. It wasn't district-specific.

JUDGE BRANCH: So the defendants should have filed a motion to compel; is that what you're saying?

MR. DAVIS: Exactly. So our view is if they didn't, you know, view the agreement the way we did they would have filed motions to compel.

You know, the second question in the NAACP's deposition was I believe on Page -- I'm not going to give you the deposition cite, I only have the numbers. I don't want to give you the wrong page. It's in our response to their -- it's in the -- but the question was topic 10. "What are the methods used by the organization to determine which districts it would challenge in this action?"

Then Mr. Boyle for defendants' counsel said, "My understanding is that you are not allowing testimony on this topic," the methods used by the organization. This is not asking what members we have, methods used. "You are not allowing testimony on this topic based on privilege?"

We said - "Yes."

Mr. Boyle said - "I'll just note for the record, unless I've missed something, we don't concede to that, but we'll just move on for

today's purposes," but they never filed any motion to compel anything.

JUDGE GRIMBERG: Even a motion to compel isn't needed. I mean, we have a streamlined process for resolving discovery disputes, the parties took advantage of that on the legislative privilege issue so it was really just reaching out to chambers to get this resolved.

MR. DAVIS: Right. And I'm very sorry you had to deal with all those legislative privilege issues here, I know you're intimately familiar with those. So our point is, listen, their actions comported with the agreement that they were only going to inquire about one member for each of the plaintiff organizations so then the next question --

JUDGE JONES: You all could not get the name of just one member? I told Mr. Tyson already that logic says 26,000 members of the NAACP in the state of Georgia, there's probably at least one, if not a whole lot more than one, in all 159 counties.

MR. DAVIS: A little bit of a different point, Your Honor. So I understand what you're saying. Our point on this is the court has to be satisfied as to jurisdiction, but not defendants. We were always planning to introduce evidence at the first time that we were required to do so, that we were under the impression that this was being challenged or at trial. The first time we had any impression that defendants were going to challenge associational standing was after the summary judgment motion and we responded with the declarations that, in our view, more than meet the standards set

forth in *Alabama Legislative Black Caucus*.

If I could quickly address, you know, why we think the declarations are sufficient. What *Alabama* Black Caucus said was because the Democratic Conference - which was one of the organizations in that case - had members in almost every county and that it was a statewide organization with members, you know, standing up for the rights of black voters and voters of color, that that was enough in that case sufficient to meet the burden of associational standing. We've gotten beyond that here. We've given specific numbers of people in districts.

Our second point on *Alabama* is to extent you disagree with us, you know, we think we're right on this but --

JUDGE JONES: I guess my concern is maybe because I dealt -- I dealt with a case called *Fair Fight Action* - they're not the NAACP, but they had a lot of members - and they had no problem with individuals coming forth that say here I am, I'm in this position.

MR. DAVIS: So, you know, our clients believe very strongly that the membership lists are protected, they're extremely confidential, that if members would have to reveal their names in litigation it would chill membership in their organizations because of the threats that people get for being associated --

JUDGE BRANCH: But certainly you see the difference. We're not talking about revealing the entire membership list. This would be a voluntary disclosure. The organization would talk to the

members, make sure that you have a member in each county. And surely there's one member in each of these challenged districts that would agree to be named.

MR. DAVIS: So our final plan on this, Your Honors, is if you don't agree with us, that what we've given is enough, we are willing to work with the court and defendants and with our clients to identify members who are willing to reveal their names, you know, with their permission.

JUDGE JONES: Then you've got to reopen discovery.

MR. DAVIS: Yes.

JUDGE JONES: Once you do that, it was already settled. Judge, we want to talk to them.

MR. DAVIS: So our view is they didn't ask for this in discovery, A, that's point one. Point two, we don't think we need to do this because we think under *Alabama*, specifically, no names were required. There was not a single name given. In that case the court said two pieces of evidence were enough. One, trial court testimony that the conference had members in every district -- in almost every county, not every district, almost every county. Two, posttrial briefs with an affidavit attached that said, you know, we are a statewide organization founded in 1960, we represent black voters and people of color.

First of all, we think our declarations go far beyond that. But to the extent that the court believes that it needs more we would be willing to reopen discovery and we think *Alabama* provides grounds

for that because the second part of *Alabama* is, look, we think you did enough. But at the Supreme Court, you know, for the first time you've given us some membership information and, at the very least, procedural fairness where defendants weren't challenging this during the discovery process should allow the court to be able to consider additional information. So, you know, to sum it up, we think we've done enough. If we didn't, we'd be willing to work with the court. We need a little bit of time to figure out the best process for having members allow to have their names used, but we would be willing to do that.

If I could turn to the *Gingles* 1 arguments, Your Honors. You know, I want to start with the fact that their racial gerrymandering argument, the argument that you port cases like *Miller* and *Bethune-Hill* onto *Gingles* 1 remedial maps is kind of foreclosed in the Eleventh Circuit by *Davis v. Chiles* which explicitly says you don't use a racial-predominance analysis on *Gingles* 1 maps because the purpose of *Gingles* 1 is to demonstrate that a remedy is feasible, it's not a remedial map, it's plaintiffs' evidence, and Davis *v. Chiles* specifically says don't conflate those two things. You have to show 50 percent plus 1 so your maps have to be race conscious.

To address, you know, the rather big elephant in the room, this issue is before the Supreme Court. We think everything we've done is in line with how we view the law on this under *Davis v. Chiles* in this circuit the law, you know, generally, but the Supreme Court, you know, will have a say soon and we recognize that. Just to address

that elephant in the room.

The second point on *Gingles* 1 is that there is un-rebutted expert testimony in this case - it's un-rebutted - that it's possible to draw additional, reasonably configured majority-minority districts in each of the clusters. Their mapping defendant for experts did not opine and stated at his deposition he had no basis to opine because he hadn't done any analysis on any of Dr. Duchin's maps. At the very least, the fact that we have on one side, you know, hundreds and dozens -- you know, I think it's over 100 pages of expert report and probably way more than that in deposition testimony stating that it was her expert opinion that it's possible to create reasonably configured maps, at least, gets us to summary judgment. There's no dispute that her districts are compact. You know, the list of districting scores are set forth in Section 6 of her report, they don't challenge those findings.

You know, their only argument here is that because Dr. Duchin was trying to get to 50 percent plus 1, as she's required to do under *Bartlett*, that it's racial gerrymandering. So, you know, we think the overwhelming fact evidence here is on our side and there's a reason these kind of very complex mapping processes is very suitable to trial and to testimony and credibility determinations.

On the coalition claim point, the Eleventh Circuit has ruled that coalition claims are permissible under Section 2, that's the *Hardee* case. Defendants, you know, haven't really responded to that. You know, in their briefs they point out three cases. *Bartlett*, which

on Pages 13 to 15, explicitly says we are not ruling on coalition districts - explicitly says that.

Then they cite to the *Perez* case, which is the Section 5 remedial case. In that case the court found that a court who is drawing a plan for Section 5 remedial purposes had no basis for drawing a coalition district and that it hadn't adequately explained the basis for doing so. We're not aware of any case that has ever ruled that case to mean that you can't bring, under Section 2 for *Gingles* 1 purposes, a coalition claim district -- a coalition claim.

You know, our final point on this, you know, the only district that relies -- that's reliant on a coalition claim is our HD Southeast cluster. So if you do disagree with us that's the only claim that would be at issue. You know, on *Gingles* 1, you know, we think it's pretty clear, there's unrebutted expert testimony, and on the other side there's this racial-gerrymandering argument which is simply not the state of the law.

JUDGE JONES: Mr. Tyson argues that Dr. Duchin does not provide any evidence or facts that show, you know, the demographics are similar other than just race. His argument is that she's not familiar with the state of Georgia and she provides no evidence of fact showing that she put these districts, congressional districts, together and these state House and Senate districts together other than based on race. Point out to me where he's wrong.

MR. DAVIS: Sure. I have a few things to point you to. The first is in her deposition testimony she explained that she

reviewed all of the community testimony that was provided in the redistricting process and that it informed her map drawing throughout, that's point one. Point two is that she determined that the most salient concern of the community was that populace counties don't get splintered and that she kept in mind both that specific issue and also kind of touched on community-of-interest concerns of political subdivisions. It's analysis of political subdivisions that informs all of her map-drawing processes. She looks at-county splits, she looks at precinct splits, she looks at city splits.

JUDGE JONES: One thing I meant to ask you at the beginning. Now, let's make sure. What districts are you specifically challenging under - well, you're talking about *Gingles* right now - the Fourteenth and Fifteenth Amendments? I guess I'll wait. Go ahead and finish.

MR. DAVIS: Yeah. I don't want to steal my colleague, Ms. Berry's, thunder. I can preview it very quickly just because you're asking.

We specifically list all the districts we're challenging racial-gerrymandering districts in our opposition brief and you can also see it in, for example, President Griggs' declaration, the solid districts, too, so those are the specific ones.

JUDGE JONES: I guess this is what I thought about. We're talking about compactness and how you put them together. Defendants are saying they're based on race and before I interrupted you, and I apologize, you were talking about the similarities because

there are a couple of them I said what's the similarity between the people in this county and this county?

MR. DAVIS: So I think I was talking about political subdivision splits, that's an incredibly important community of interest, and Dr. Duchin clearly analyzed all those. The final point is, you know, the actual districts themselves are compact and, you know, the court in *Bush v. Vera* explained that district shape is also important evidence of this kind of cultural compactness idea. These are not districts like the ones in *LULAC* that, you know, spread out 500 miles and connect, these districts are compact.

JUDGE JONES: If I understood Mr. Tyson correctly, one of the districts is 89 percent.

MR. DAVIS: I believe one of the districts was about 89 percent. Now, Dr. Duchin was asked about that at her deposition testimony. What she said was because what she's doing is, you know, creating these remedial maps, just human geography -- and this was the answer in her deposition --

JUDGE JONES: Is that packing; 89 percent?

MR. DAVIS: It would be -- so not, per say. It could be packing if it was a remedial plan -- you know, if this was a remedial plan. But, again, the purpose here was to show that the remedy is feasible and all the un-rebutted expert testimony in this case -- and they didn't have an expert to say this is packing, none of that.

JUDGE JONES: I guess my concern is if you have 89 percent in one district you're affecting some other districts in a

major way.

MR. DAVIS: Yes. I mean, that's true, Your Honor. But, again, if you look at all these districts as a whole, I don't --

JUDGE JONES: That's what we're doing.

MR. DAVIS: Yeah. The clusters as a whole, I think, you know, there are some higher -- there's also multiple examples of ways to create --

JUDGE JONES: Why do you need 89 percent? You don't think 89 percent is too big, too high, and the effect of surrounding districts is not going to be a major effect?

MR. DAVIS: I don't think that 89 percent in one district is enough to render a *Gingles* 1 map infeasible in terms of showing that a remedy is possible. Remember, the touchstone here is is the minority community geographically compact and sufficiently numerous to form a district and if you show that -- essentially we were showing that there's a possibility of vote dilution, that's the purpose of *Gingles* 1. So what we're saying is, listen, the un-rebutted expert testimony is that the minority community is sufficiently numerous and geographically compact to create additional districts.

JUDGE JONES: How many splits do you have in your maps compared to the enacted maps?

MR. DAVIS: I don't know that by heart. I have it with me somewhere here. There is a specific comparison table in Section 6 and they're rather similar. But, again, these are just *Gingles* 1

maps, you know, these are not the ultimate remedy.

But to the extent that you're interested, you know, Dr. Duchin opined that she thought the massive splits were similar and I think, you know, very often the political subdivision splits were lower. Sometimes they were a little bit higher. But Section 6 has a full breakdown and she considered that and that's the important thing here is that the only evidence is an expert saying I've considered all of these facts and, in my view, remedy's feasible, you know, that at least gets us to trial and Mr. Tyson is an excellent lawyer, I've had the pleasure of working with him a lot, I'm sure on cross-examination he'll be able to, you know, point some of these things out, but we think we've done enough for the precondition stage.

JUDGE BRANCH: Let me ask you about one claim that is made in the State's motion for summary judgment. It points out that-- this is about Dr. Duchin's proposed maps dealing with the proposed House plans, either increase the number of majority-black VAP districts by 1 or decrease them by 12 when compared to the enacted plan. Does that not present a problem for you?

MR. DAVIS: So I actually don't think that's a correct reading. It is a little confusing because there's multiple maps like multiple examples of how to show -- our Alt 1 maps in the House, there's only one that creates an additional black and Hispanic coalition district that we're relying on which is our HD Southeast District. The other examples is HD East, HD Southwest, HD Atlanta. The first map is only creating an additional majority-black district.

If I could move quickly to the polarization issue. Our friend framed it as a fact dispute but, really, our argument is their legal argument is wrong here under *Nipper*, which is the case they cite a lot. *Nipper*, in my reading at least, is crystal clear. At the *Gingles* precondition stage plaintiffs have the obligation to show political cohesion of the minority group and to show white bloc voting. They don't dispute that those two things exist. They're saying as a matter of law that plaintiffs have to rule out politics. *Nipper* specifically says plaintiffs, quote, "don't have to rule out a negative," cites to *Marengo County*. *Marengo County* says, you know, these politically cohesive voting patterns are the surest indication of race-conscious politics so at the *Gingles* stage we've met our obligation and we've made our sufficient evidentiary showing.

Nipper then says at the totality stage which is designed to objectively analyze an intensely local appraisal of these areas you can consider causation evidence in connection with Senate Factor 1, history of discrimination; Senate Factor 5, socioeconomic disparities; Senate Factor 6, racial appeals.

JUDGE JONES: You're saying you don't consider causation at the precondition phase?

MR. DAVIS: No. That's our position. First of all, we don't know any case anywhere that has ever held that plaintiffs have the burden. There's only one case I'm aware of that has ever considered causation evidence at the *Gingles* stage and that's the *LULAC v. Clements* case that they cite in their brief. But that case

that the court ruled that defendants -- that the trial court erred in not allowing defendants to produce affirmative evidence of that something other than race was causing polarization.

JUDGE JONES: That case took a more proportionality; did it not?

MR. DAVIS: I'm sorry?

JUDGE JONES: In *LULAC*, they're more proportion?

MR. DAVIS: I think so. There's so many *LULAC* cases, quite frankly, I mix them up.

JUDGE JONES: I know there's a bunch of them.

MR. DAVIS: I'm talking about the Fifth Circuit *LULAC vs. Clement* case. That's very possible. You know, the part they cite in their brief is about this exact issue. You know, as far as we're aware, you know, the First Circuit has rejected their approach. The Second Circuit has rejected their approach. The Fourth Circuit has rejected their approach. The Eleventh Circuit has rejected their approach in *Nipper* which is a plurality, I have to admit, and the Supreme Court in *Gingles*, eight justices rejected their approach.

The last point I want to make -- I'm impinging on my colleagues' time so I think we're happy to rest on the briefs for everything else.

JUDGE BRANCH: Who's handling abrogation?

MR. DAVIS: Ms. Berry. Thank you, Your Honors.

JUDGE JONES: Thank you.

MS. BERRY: Good morning. Crinesha Berry for the

Georgia NAACP plaintiff.

Plaintiffs' racial gerrymandering and intent claims are not suitable on a motion for summary judgment. Plaintiffs have put forth ample evidence that there are material facts in dispute.

With respect to racial gerrymandering, I want to highlight two points for the court. First, Dr. Duchin's report establishes, at a minimum, that there are material facts in dispute as it relates to whether race predominated traditional districting principles. That alone is sufficient to defeat defendants' motion. Specifically, Dr. Duchin -- in her report, she goes through a district-by-district analysis of all of the challenged districts and, as my colleague indicated, all of the districts we're challenging is in Dr. Griggs' declaration. For example, what she noted is that during her core retention analysis, as well as her political subdivision split analysis, that there is evidence of racial splits as well as cracking and packing. Specifically, she points out -- well, she discusses all of these, but I'll point out a few for the court.

For example, in Congressional District 6, which is the ideal population, she shows -- it's also mostly a black and Hispanic district in metro Atlanta. She shows that blocs of black and Hispanic voters were removed out of that district and white voters were brought into that district and this is done even though it was that ideal population which indicates there was no real reason to move as many black and Hispanic voters outside of the district.

She also discussed Congressional District 14 which was

mostly a rural district and she observes that black and Hispanic communities such as cities such as Austell and Powder Springs was moved into this rural district and this is an example where she says that you see that communities of interest -- the principle of community of interest was not observed

JUDGE JONES: So you're arguing there's no direct evidence of racial gerrymandering or predominance, that you're basing your argument totally on circumstantial evidence?

MS. BERRY: Correct, Your Honor. We're arguing that there was evidence that Dr. Duchin put forth that there's circumstantial evidence that race predominated and under *Miller* circumstantial evidence --

JUDGE JONES: Let's make sure we're on the same page. You are agreeing with the defendant that there's no direct evidence of racial gerrymandering or predominance? In other words, direct evidence that somebody in the General Assembly said we don't need all these people of color? No direct evidence?

MS. BERRY: If the question is whether we have evidence that someone from the General Assembly --

JUDGE JONES: Excuse me. It just doesn't have to be from the General Assembly. Direct evidence.

MS. BERRY: If the question is whether there's explicit evidence that someone commented that we need to move black or Hispanic voters, no, but however -- you know, the question that Dr. Duchin is dealing with in her analysis is even if the movement was based on

political reasons that doesn't mean --

JUDGE JONES: Demographics. She's arguing demographics, which you can do. Circumstantial evidence can be one of the reasons showing racial gerrymandering or predominance. I just want to make sure that you all agree with defendants that there's no direct evidence; it's all based on circumstantial evidence.

MS. BERRY: We have circumstantial evidence which, you know, under the standard is also sufficient. So with that evidence -- so she also discusses Senate District 56 which was previously a performing district and also a district where the first Asian-American senator was elected and she shows that two-thirds of that population was moved out of that district. About 40 percent of the individuals moved were black and Hispanic voters.

JUDGE BRANCH: Let me actually return a little bit to the question that Judge Jones was asking you. There has been evidence introduced that when Director Wright was preparing the maps there was political data that would appear on the screen but there was also racial data. You're not suggesting that the mere fact that racial data would appear on her screen as she was working through the initial maps and then the revised maps that that was somehow impermissible to have the racial data available; correct?

MS. BERRY: That is correct. Our understanding -- you know, one of the reasons why, you know, race can be considered when you are drawing these maps but race can't be the predominant purpose and here plaintiffs' argument is that we've produced sufficient

evidence that race predominated traditional districting principles and we established this through Mr. Duchin's analysis of the district.

JUDGE BRANCH: In fact, the State might, in fact, argue that they would need to have racial data because they have obligations under the VRA; correct?

MS. BERRY: That is correct. So the second point I would like to make with respect to racial gerrymandering addresses the defendants' point that this was all about political preference. Dr. Duchin, which I must add, her expert testimony is also un-rebutted. Defendant's expert, Dr. Morgan, testified that he had not even read her report in full and he has no opinion about her racial-gerrymandering analysis.

JUDGE JONES: All right. Let's go back then.

MS. BERRY: Sure.

JUDGE JONES: If we're eliminating direct evidence and we're just talking about circumstantial evidence of demographics, in my understanding Dr. Duchin refused to opine whether the districts were drawn primarily based on race. Is that correct?

MS. BERRY: No, it's actually not. It's incorrect and it's also misleading. First, it's misleading because Dr. Duchin -- what she was asked to do was determine whether there was evidence that race predominated and so she had no obligation to affirmatively opine that it, in fact, did. But in her deposition when she was specifically asked about Senate Districts 56, 48, 17 - this is Pages 181 through 182 of her deposition - she said she was comfortable

concluding that race did predominate. She also was asked specifically about her conclusions with respect to Senate District -- excuse me -- Congressional Districts 14 and 16 and on Page 182 of her deposition she also says in that instance that she's comfortable concluding that race predominated.

JUDGE JONES: So defendants just wrong, then, when they said she did not opine that race played a different part in drawing up district maps?

MS. BERRY: That is correct, the defendants are wrong.

So with respect to the political preference, the defendants indicated that Dr. Duchin, when she generated the 100,000 maps, that she didn't observe traditional districting principles and she focused mainly on compactness, that's also not true. She stated in her deposition that she did observe traditional districting principles. In the citation that the defendants referred to she's discussing Figure 4 in her rebuttal report and she's talking about how she chose to highlight compactness but she still observed traditional districting principles.

What she did not include in those 100,000 maps was any racial data. She created these maps using an algorithm that was designed to increase the number of Trump-supporting districts and once these maps were generated she analyzed them to see if the type of racial sorting that she saw in the other maps were present in her maps and she found that there wasn't and so plaintiffs' position is that's also sufficient to show that there's a disputed fact as to whether the

racial swapping that we see in these enacted plans was based on political preference.

JUDGE GRIMBERG: May I ask you - and I think Judge Jones was alluding to this earlier - what Senate districts are you exactly pursuing because there seems to be a disconnect between what was alleged in the complaint and what was argued at summary judgment?

MS. BERRY: Sure.

JUDGE GRIMBERG: We counted at least over 25 Senate districts where there was no argument made about racial gerrymandering and there was at least one, SD 59, which was argued that's not even included in your complaint.

MS. BERRY: So the Senate districts that -- so obviously we've refined the districts and the analysis through Dr. Duchin's since the filing of our complaint. We're specifically challenging Senate District 56, 1, 2, 4, 17, 26, and 48. The districts that we are challenging are identified in our response brief to defendants' motion for summary judgment, as well as Dr. Griggs' declaration for the NAACP. NAACP is challenging every district and so they're all also laid out in that declaration.

JUDGE GRIMBERG: So you've abandoned the rest? So you have three, four, five, six Senate districts. You've abandoned the rest that are alleged in your complaint?

MS. BERRY: That's correct.

JUDGE JONES: 56, 1, 2, 4, 17, 26, and 48?

MS. BERRY: Yes. House Districts 44, 48, 49.

JUDGE JONES: Wait, wait. Hold on.

MS. BERRY: I'm sorry.

JUDGE JONES: I don't write as fast as I used to. 48, 40 what?

MS. BERRY: 44, 48, 49, 52, and 104.

JUDGE JONES: Congressional districts.

MS. BERRY: Congressional Districts 13, 14, 2, 8, 3, 4, 10, and 6.

JUDGE JONES: Thank you.

MS. BERRY: So if Your Honors do not have any more questions -- I'm sorry.

JUDGE JONES: I have one question.

MS. BERRY: Sure.

JUDGE JONES: Defense says you used the wrong standard. You used the *Arlington Heights* standard and it should be the *Miller* standard.

MS. BERRY: Correct.

JUDGE JONES: Which one are you using?

MS. BERRY: We're using the *Arlington Heights* standard.

JUDGE JONES: Why is *Arlington Heights* correct and you're using that standard in this matter?

MS. BERRY: Prior to getting into *Arlington Heights*, *Rodgers v. Lodge*, which is the case that was cited in our brief, on Page 617 of that opinion it discussed that when looking at racial-discrimination claims that you have to determine whether

there's a discriminatory purpose and intent and it cites *Arlington Heights* and when it says that that has long been the standard for discriminatory intent claims based on race and then it also cites *Wright v. Rockefeller* was a redistricting case that stands for the same standard. So our position, which we believe is consistent with the case law, that racial-gerrymandering claims require that you identify that race predominated, but we're looking at discriminatory intent about whether there was a racial purpose.

JUDGE JONES: Do you get the same results if you use the *Miller* standard?

MS. BERRY: Well, based on the defendants' motion, even if *Miller* does apply here we're still entitled -- excuse me. If *Miller* was to apply here because there are material facts in dispute, then the defendants' motion should still be denied.

JUDGE JONES: So you get the same effect?

MS. BERRY: No. I think you'd get the same effect because we would have to show that race -- if we were to apply *Miller* for intent, we would have to show that race predominated as opposed to race was a motivating factor.

JUDGE JONES: Well, which one was the districting -- did *Arlington Heights* deal with redistricting or did the *Miller* deal with redistricting?

MS. BERRY: *Arlington Heights* was not a redistricting case, but it cites *Wright vs. Rockefeller* which was a redistricting case, when it's discussing what's required to be proved for

discriminatory intent and so that's the case that we cite and we believe that that's controlling. I'm sorry.

JUDGE JONES: Thank you.

JUDGE BRANCH: Can we talk abrogation?

MS. BERRY: Yes.

JUDGE BRANCH: So my question - and this, again, goes to whether the State is the proper defendant. There are other defendants, of course. In your brief, it was a very quick paragraph responding to the defendants' argument and pointing simply to the Fifth and Sixth Circuit cases. But certainly my dissent while that case has been vacated from the Eleventh Circuit goes into great detail not following the Fifth and Sixth Circuits and saying, in fact, there was really no analysis in those cases, they were just paragraphs reaching a conclusion. Other than the fact that the Fifth and Sixth Circuits have gone a different way than I did in my now vacated dissent what, on the merits, is wrong with my dissent?

MS. BERRY: Well, Your Honor, just to re-ask the question. You said other than the Fifth or the Sixth Circuit, it's kind of challenging for me to answer the question without referring to the Fifth and Sixth Circuit because our view is their analysis of whether Congress abrogated state sovereign immunity was appropriate.

JUDGE BRANCH: But in those cases -- and maybe that's your answer, that they got it right and that's all we're going to say and that's fine, too.

MS. BERRY: Thank you. I'm going to wrap up. I'll just

wrap up by saying based on the evidence that the plaintiffs have put forth in the record we request that this court denies defendants' motion for summary judgment as it relates to racial gerrymandering and intent. Thank you.

MS. LOVE: Good morning, Your Honors, Cassandra Love for the Common Cause plaintiffs. This morning I'm going to be going through associational standing, as well as organizational standing and our racial-gerrymandering claims for you.

Beginning with associational standing. As a preliminary matter, defendants' attacks on our organizational standing don't end any claims in this litigation, we do have individual plaintiffs who are members of each of the districts that we challenge for the Common Cause plaintiffs, that's Congressional Districts 6, 13, and 14. But nevertheless, both of our organizations, Common Cause and the League of Women Voters, have put forth evidence that detailed the specific members will be injured and that they have a member that resides in each of the challenged districts, the very standard that defendants concede applies in this case, and we rest on our co-plaintiffs' argument on the law.

As Your Honors know, we did also submit declarations in support of our opposition and so really the two questions before you today are whether our organizational plaintiffs are required to name names and, second, whether you can consider the names that are in our declarations attached to our opposition. We submit that we're not required to name names but that you can consider those declarations if

you feel that we are.

When defendants got up here before you they said that, you know, for a congressional map zip codes may be enough. There's probably enough for congressional districts. For Common Cause, that's all we challenge is congressional districts. They sort of sleight the court when they tell you that we objected to our organizational plaintiffs providing any testimony on identification of members in those districts or how they came up with that. If I can quote for Your Honors, from the League of Women Voters' deposition testimony our organizational rep said - "We have a membership chair who has a roster of all the places where our members live. We can put that against the Congressional maps to see if we have members in all of those districts. We have members in every district."

Common Cause testified we have identified members who live within the boundaries of the challenged districts. We match them via looking at zip codes and if those zip codes are within the challenged districts. We have identified, I believe, over 1500 members. This should end inquiry right there. Defendants have not contested that those numbers are not credible or not legitimate and we never heard from them again after the depositions.

It is true that during the deposition --

JUDGE JONES: Well, they are challenging them. They are challenging them.

MS. LOVE: Right. They're challenging them now, Your Honor. So it's true that during the deposition they requested that

the representatives identify by name a specific individual member, that was not a noticed deposition topic, and we did object on the basis of associational privilege at that time and we met and conferred off record and asked defendants' counsel to submit a formal discovery request if they still felt that they needed that information at the conclusion of the deposition after they heard the testimony. They never did. We never heard from them again on this issue until they submitted these motions for summary judgment and so at our first opportunity on opposition, for the court's time and efficiency we did submit those declarations. They don't change, they don't alter the deposition testimony. The organizational plaintiffs that testified they have members in every district, now they've given names to support that fact, there's no contradiction.

JUDGE GRIMBERG: In fact, the League's 30(b)(6) witness did testify that she lives in District 6.

MS. LOVE: Correct, Your Honor. The League of Women Voters' 30(b)(6) deposition -- excuse me, organizational representative testified that she lives in Congressional District 6 and she provided her address at the deposition.

We think that there's nothing inconsistent about the declarations and should Your Honors find that we did need to name names those can be considered to find that our organizational plaintiffs have standing.

For organizational standing, we'll rest on our papers. We think the law, as explained in our papers, is clear. The one point

that I would make is that it's not necessarily a case of first impression. There was a case in, granted, a different circuit in Texas that did find organizational standing to exist in every districting case - that case is *Perez v. Abbott* and that's cited in our brief as well - finding that there was standing based on diversion of resources for time and volunteer hours as there is alleged here. Our plaintiffs gave ample testimony, pages and pages of testimony, during their organizational depositions about their diversion.

Turning to the substantive racial-gerrymandering claims, this is summary judgment, Your Honors, and I say that because when defense was up here we heard a lot about all of the reasons they think we can't make out our claims, but we also heard about a lot of facts in dispute and that's all that's required to surpass the summary judgment stage. The defense that they've put forth is that the maps that they drew were based on partisan politics and that they wanted partisan performance. The evidence that we've put forth suggests that it was predominantly based on race and, as my co-counsel, co-plaintiffs' counsel, has adequately summarized for you all we only need circumstantial evidence to make out our claim on gerrymandering.

JUDGE JONES: You agree there's no direct evidence --

MS. LOVE: We don't necessarily agree that there's no direct evidence, Your Honor.

JUDGE JONES: You don't necessarily agree? What direct evidence is there, then?

MS. LOVE: Yes. So as was mentioned earlier, it is true

that during the redistricting process, as legislators were moving the lines and creating the maps, they were able to look at racial data up on the screen and that data changed in real time as they moved lines. We think that that gives rise to an inference that racial data was considered and that that, combined with deposition testimony - specifically the deposition testimony of Stangia and Gina Wright - who talked about how they allocated election data and political performance down to the bloc level where it doesn't exist in part based on demographics and in part using racial data supports that race was considered and was predominant in the decisions that were made.

JUDGE JONES: Race was considered in coming up with illustrative maps; were they not?

MS. LOVE: I'm sorry?

JUDGE JONES: The other maps you all came up with, wasn't race considered?

MS. LOVE: Right. I mean, certainly our expert analyzed the racial statistics and certainly race, in order to comply with the VRA, needs to be considered. However, we would submit that a typical process would be for the maps to be drawn blindly, not based on race, and then you would do a VRA check and make alterations as needed, that's not what happened here.

JUDGE BRANCH: You're not suggesting that because they didn't follow what you have viewed as the ideal approach - do it blind and then do a VRA check - you're not suggesting that the mere fact that racial data was available on the screen when they were doing

their first maps is impermissible in all circumstances?

MS. LOVE: No, Your Honor. I think it gives rise to the inference that it was used and it could have been used in an impermissible way and when combined with our expert and her analysis, her report, her rebuttal, her deposition testimony, as well as the other indicators of the demographics of the map itself, the lines of the map itself, the combined totality of the evidence here would suggest that race predominated.

JUDGE BRANCH: So you're saying it opens the door?

MS. LOVE: Correct, Your Honor.

JUDGE BRANCH: But would you not be making the same argument if the defendants had drawn maps blindly and then done a VRA check on racial data and made adjustments? Wouldn't you still potentially be up here claiming the same thing? I mean, how does the State avoid the challenge?

MS. LOVE: By drawing maps that don't crack and pack minority voters, Your Honor. Certainly, if they made adjustments that were appropriate and that could survive analysis and inquiry as to how voters were allocated then we wouldn't be here, but they couldn't.

The fact is that Dr. Duchin did opine that race predominated, she stated so clearly in her deposition, and she explained all of the reasons, as she goes through her report, why she found that race was a predominating factor, including that when she looked at partisan performance and compared it to racial disparity, in several cases the way that minority people were moved severely

outweighed the partisan performance. My colleague, Ms. Berry, talked a little bit about in her rebuttal report where she came up with 100,000 alternate maps that were --

JUDGE JONES: Time.

MS. LOVE: For those reasons, we will ask that you deny defendants' motion for summary judgment.

JUDGE GRIMBERG: Before you go, let me ask one question, if I may.

JUDGE JONES: I'd like to ask one question after Judge Grimberg.

JUDGE BRANCH: Sure.

JUDGE JONES: Go ahead.

JUDGE GRIMBERG: Perhaps I have a narrower view of what constitutes direct evidence, but I didn't hear direct evidence.

JUDGE JONES: That's my question.

MS. LOVE: Your Honor, we think that the racial data and the fact that legislators and the LCRO itself admitted to using that racial data constitutes direct evidence. But even if Your Honor disagrees, circumstantial evidence, as defendants concede, is all we need here.

JUDGE JONES: But the process that they used in 2021 was no different than the process they used in 2001 and 2011 and you got preclearance by the Justice Department at that time with Section 5. So to follow up on Judge Grimberg's question -- in other words, you're saying that they didn't differ. I'm just trying to put it

together. I'm not disagreeing with you on the circumstantial evidence part. The reason why I ask the question on direct evidence, it's important to me because I'm trying to separate out how can it be direct evidence if the procedures didn't change and you got a preclearance on one -- on two.

MS. LOVE: Your Honor, whether or not the evidence -- whether or not there's evidence that then turns into an outcome that would not allow for preclearance or an impermissible map are two different questions, I think. There can be direct evidence and you can wind up with a map that maybe it can obtain preclearance, right, because it's not cracking and packing minority voters the way that the current enacted map does.

JUDGE JONES: Thank you.

MS. LOVE: Thank you, Your Honor.

JUDGE BRANCH: Mr. Tyson, you may proceed, but let me ask you a question right out the gate. Just to reiterate, at the very beginning of your initial remarks you talked about standing and how you were saying that you're not challenging the sufficiency of the evidence that the plaintiffs have presented. Now, in response to summary judgment, it seems to be more of a timing concern. I just want to make sure that that is correct, that you're not suggesting there's any information that's missing on standing, as we sit here.

MR. TYSON: That's correct, Your Honor. I think, again, the issue for us is just the timing of the disclosure of when that was done. I want to be very clear. We're not asking for naming of names,

this idea that we're asking for membership lists. What we thought we were entitled in discovery - and this court may tell us we're wrong about that and maybe we should have done more - is that the plaintiffs had to come forward with some affirmative way when we asked about how they determined they had people in these various districts so we knew which districts we were dealing with, that's the issue for us. If what the testimony was is quoted as sufficient in terms of that process, I mean, it is what it is.

From our perspective, though, if you're going to try to rely on associational standing as an organization you've got to affirmatively put forward here's exactly how we check to make sure especially as to the Legislative districts.

JUDGE JONES: You didn't ask for that. They said if you had asked for that they would have been more than happy to give it to you. You didn't ask for it.

MR. TYSON: If we didn't, Your Honor, then we didn't. I understand the court's view on that.

JUDGE JONES: If you didn't, then that means they have standing.

MR. TYSON: If we didn't ask a question that was specific enough to get the information that's been provided in the declaration today then I agree that we would be in a situation where that's not altering the deposition testimony.

JUDGE GRIMBERG: I mean, it seems to me you asked a broad question that rendered an objection and you didn't try to narrow

that request to get more specifically-tailored information that goes to standing and you didn't come to the court to ask for a remedy.

MR. TYSON: I can understand the court's perspective on that and we will work towards that on our next associational standing issue on that front.

Let me just touch on a couple of pieces, Your Honor. I'm going to go check Dr. Duchin's deposition as soon as we finish here today because I remember her being very careful not to testify to intent. If it is, as we represented here, that she testified as to racial predominance for the some of the districts, I want to make sure I've got that right, as well. My recollection is she specifically did not look to intent. She was very careful to say that some factfinder could determine race predominated but she wasn't affirmatively making the statement. So I'll look to that.

In terms of the court's questions on-county splits and various pieces, generally deviations in all cases that population deviations are higher on Dr. Duchin's plans except for the Congressional plan. -county splits are generally the same or higher. There are a couple of exceptions but those are the districts that reduced the number of majority-black districts so, again, the interplay we have of these districts, I think, makes it difficult to determine where some of those points are.

We had a discussion of just the *Arlington Heights* versus *Miller* issues. The *Rodgers vs. Lodge* case was a pre-*Miller* case. I don't think it is binding at this point in terms of what the right

standard is. I don't see how you'd use *Arlington Heights* in a districting case except maybe as direct evidence.

JUDGE JONES: You get the same results even if you use *Miller?*

MR. TYSON: Correct, Your Honor, because --

JUDGE JONES: I apologize. I don't mean to point, I'm sorry.

MR. TYSON: Your Honor, I think that's right, that you still can use your circumstantial evidence and maybe some of those *Arlington Heights* factors are things you'd use. But you don't conduct an *Arlington Heights* analysis as part of your intent and determination under *Miller*.

JUDGE JONES: The argument is that even if they used the *Miller* analysis you come out with the same results on behalf of the plaintiff.

MR. TYSON: Your Honor, we would, frankly, disagree on that. I think the best fit would be direct evidence at that point. The circumstantial evidence that's referenced in *Miller* is shape and demographics of the districts and the surrounding areas, not all the process issues that are at issue in *Arlington Heights*.

JUDGE BRANCH: What about the fact that the plaintiffs have said that you do not wrestle with the *Hardee* case dealing with coalition districts?

MR. TYSON: Yes, Your Honor. In our reply we addressed *Hardee*. *Hardee* was a case where there were issues of significant

white-crossover support so it's not a coalition district so we view any comments that are made by the Eleventh Circuit as *dicta* about whether there could be a coalition, it wasn't necessary to that holding. The key issue on that one was the impact of white-crossover voting which has now been settled conclusively by *Bartlett* so we don't see that *Hardee* has any application here in terms of coalition districts.

Also, on the *Davis* case there's a claim that that doesn't allow you to import the racial-predominant standards into *Gingles* 1. If you look at what *Davis vs. Chiles* actually addressed, there was testimony about alleged racial predominance. The court found there wasn't racial predominance but made the comment about bringing things in. Again, we're looking at -- we've seen today how difficult it is to measure all these different pieces - what's politics? What's race? What's-county splits? What's not? This court may ultimately conclude and that's why it's a trial issue because it's a disputed fact. Our position continues to be that it's a failure of proof of the plaintiffs. If they're going to come in and attack the State's redistrict plans as racial gerrymanders, they're required to come forward with more evidence than what they've come forward with at this point which is why we believe summary judgment should be granted to the defendants.

JUDGE GRIMBERG: Let's go back to the standing question, if I may. Do you see any difference between what the Common Cause plaintiffs submitted to establish standing in response to summary

judgment as opposed to the NAACP plaintiffs?

MR. TYSON: Yes, Your Honor. The Common Cause plaintiffs did provide a little more context. We didn't view it as sufficient context for how they made their determinations especially with the zip code issues and those kind of things. I understand the argument and I would agree that's probably enough for a Congressional map, especially for the districts they're challenging, but I think it is distinct from the NAACP plaintiffs which were more aggressive in asserting the privilege objections about the processes they used to look at the membership lists.

JUDGE GRIMBERG: I mean now, in response to summary judgment, what they have put forth to establish standing and respond to your standing argument at summary judgment do you see any difference between the sufficiency of the evidence?

MR. TYSON: Understood, Your Honor. I'm going to look to my co-counsel. I don't believe we see any distinction. We don't see a distinction between those two.

JUDGE GRIMBERG: All right. Thank you.

MR. TYSON: If there are no further questions, Your Honor, we'd ask for a ruling in our favor.

JUDGE BRANCH: Thank you. Thanks to both sides for ably arguing these motions today and Court is adjourned.

(Proceedings conclude at 11:40 a.m.)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

CERTIFICATE OF REPORTER

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

This the 16th day of June, 2023.

/S/ Alicia B. Bagley
ALICIA B. BAGLEY, RMR, CRR
OFFICIAL COURT REPORTER
THE HONORABLE STEVEN D. GRIMBERG