1 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
2

3 THE CITY OF GREENSBORO, et al., Civil Action No. 1:15CV559
4
Plaintiffs,
5
vs. Greensboro, North Carolina
6 February 7, 2017
GUILFORD COUNTY BOARD OF
7 ELECTIONS,

8 Defendant.

9 _____/

10

11 DAY II
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
12 BEFORE THE HONORABLE CATHERINE C. EAGLES
UNITED STATES DISTRICT JUDGE
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PROCEEDINGS

THE COURT: Good morning.

It looks like you filed an amended designation of deposition testimony reflecting what was read into the record yesterday for Mr. Austin's and Ms. Kasica's testimony. That's on the docket at 128-1.

Are we ready?

MS. RIGGS: We are, Your Honor. The individual plaintiffs call Goldie Wells.

(GOLDIE WELLS, INDIVIDUAL PLAINTIFFS' WITNESS, WAS SWORN.)

MS. RIGGS: Your Honor, may I approach the bench and the witness stand?

THE COURT: You may.

DIRECT EXAMINATION

BY MS. RIGGS:

Q. Good morning, Ma'am. Could you please introduce yourself to the Court and tell us where you live.

A. Good morning. My name is Goldie Wells, 4203 Belfield Drive, Greensboro, North Carolina.

Q. What part of the City of Greensboro is that?

A. That's in Northeast Greensboro.

Q. And what district do you live in?

A. District 2.

THE COURT: You're talking about City Council

1 District 2?
2 **THE WITNESS:** City Council District 2.
3 **BY MS. RIGGS:**
4 **Q.** How long have you lived in Greensboro?
5 **A.** Since 1967.
6 **Q.** Can you tell the Court briefly about your professional
7 background?
8 **A.** I am a retired educator. I served as a classroom teacher,
9 an elementary supervisor and a principal.
10 Do you want to know about where I went to school and
11 all of that?
12 **Q.** Where in the country did you go to school?
13 **A.** I went to school in Hamilton, Virginia, Hamilton
14 Institute.
15 **Q.** Did you receive any advanced degrees?
16 **A.** Yes. I have two masters from North Carolina A&T State
17 University and a doctorate from Chapel Hill, University of
18 North Carolina Chapel Hill.
19 **Q.** Have you been involved in community organizations in
20 Greensboro?
21 **A.** Quite a bit. My community activism started in December of
22 1988. Living in Northeast Greensboro, we had a grocery store
23 that closed after being been in the community for about 30
24 years, and I gathered our community together to try to fight
25 the closing of the store.

Q. Why was the closing of the store concerning to you?
A. Because it would create a food desert. We would not have a store near us, so I was quite concerned, and so were the rest of the neighbors.
Q. Tell us a little bit more about your organizing background after that.
A. I learned about the store closing on Tuesday. By Friday night, we had a meeting at Peeler Center, and as a result of that, I became -- they called me the spokesperson for that group. And we have been meeting the first Thursday night of every month since 1998. Of course we met many times when we were organizing, but the organization continues.
Q. What is the name of the organization?
A. Concerned Citizens of Northeast Greensboro.
Q. Have you been involved in any other community organizations besides Concerned Citizens of Northeast Greensboro?
A. Yes. Concerned Citizens of Northeast Greensboro, Greensboro Voter Alliance, Citizens For Economic and Environmental Justice, The NAACP, the League of Women Voters, and probably some more. I can't think of all of them now. And of course my church. I'm very active in my church.
Q. Have you ever served as an elected official?
A. Yes.
Q. Tell us about that.

A. Because of working with the Concerned Citizens for eight years, I was asked by my community and by the former council representative who was retiring, if I would run to be the District 2 representative, and that was in 2005.

Q. How long did you serve on City Council?

A. I served for two terms, to 2009.

Q. Ms. Wells, do you know Trudy Wade personally?

A. Yes. We served on the council together.

Q. How would you characterize your relationship with Trudy Wade, both from your time on council and since then?

A. On council, we were cordial to each other as fellow council members, but we were always seemingly on the different sides of the track. She was more very conservative, and I'm more of a liberal, and we kind of fought for different things on the council.

Q. Did you -- have you had battles with her since you left the council?

A. Oh, yes, Ma'am. I've called her sometimes about rumors that I've heard that, you know, once she left and gone down to Raleigh. I called her when I heard the rumor that she was going to do something to reopen the landfill. The most recent conversation I had with her was after this redistricting, when this bill came forth.

Q. Let me first ask you, explain this landfill issue for the Court, please.

A. Well, Northeast Greensboro is where the landfill is located. It is the White Street Landfill. It is a thousand acres that was used for waste, household waste. The community had experienced a lot of cancer and respiratory problems, the stench from the landfill, and the community just felt it was unjust. So when Claudette Boroughs White was our representative, we had the landfill closed to solid household waste.

This continued -- well, that was a fight, because they act like money had to be spent to build a transfer station and the waste had to be transported to another city, so it cost a lot of angst on the City Council among the members, and Ms. Wade was one of those who felt like it should be reopened.

Q. So when did this discussion happen about reopening the landfill?

A. It was closed in eight, and then in 2011.

Q. I'm sorry, it was closed when?

A. In 2008 completely to the household waste.

Q. Okay.

A. In 2011, the rumors started, because one of the council members said that that was the worst decision that the council had ever made.

THE COURT: Okay. I'm sorry. This just needs to be shortened, unless this has something to do with this case in a way that I don't understand.

MS. RIGGS: I am laying a foundation to talk about the interactions with respect to the map later, of the relationship.

THE COURT: Okay. Well --

MS. RIGGS: Can I move more quickly through it?

THE COURT: Yes, you can.

MS. RIGGS: Thank you, Your Honor.

BY MS. RIGGS:

Q. What was Trudy Wade's role in trying to reopen the landfill?

A. She thought that it would be advantageous economically. One of the things that she always was thorough about was facts and figures and so she thought it would be better.

Q. Who was in the running to reopen the landfill?

THE COURT: What do you mean? I don't know who is, "in the running."

BY MS. RIGGS:

Q. What companies were in the running to run the reopened landfill?

A. Waste Management, Advanced Disposal and Gate City.

Q. Are you aware of -- were you aware of any connection between Trudy Wade and the companies that were in the running to operate the reopened landfill?

A. Yes. Gate City was connected to the DH Griffin. DH Griffin was one of her major contributors.

Q. How do you know that DH Griffin was one of her major contributors?

A. Public knowledge with the -- you know, records being open.

Q. What happened with the landfill ultimately?

A. Ultimately, it was not reopened, because we filed a suit against the City and it stopped that with an injunction.

Q. Was there a political organizing in Northeast Greensboro around the landfill issue?

A. Yes. Once we found out and we knew who the opponents were -- proponents of opening the landfill, we said that we will remember in November. That's a slogan that, you know, I kind of started, we'll remember in November.

So what we did, we organized so that we could get voters on the books so we could get rid of those who weren't in favor of what we wanted.

Q. Did that political organizing have an affect on who was elected to the City Council in November of the 2011?

A. Yes. Yes. Those who were all for the landfill reopening, were voted out.

Q. Are you familiar with House Bill 263 and Senate Bill 36 proposals to redistrict the Greensboro City Council?

A. Yes.

Q. Based only on your interactions with Ms. Wade over the years, what was your reaction to hearing that Senator Wade was sponsoring a bill to redistrict the Greensboro City Council?

1 **A.** My first reaction was, she's trying to get rid of our
2 council. She's still mad with us and she wants to get rid of
3 the mayor.
4 **Q.** When you looked at the actual bill that was filed, Senate
5 Bill 36, did that change your perception or your initial
6 reaction?
7 **A.** No.
8 **Q.** Why not?
9 **A.** Because it kind of reinforced what I believed, because it
10 would get rid of our present council members.
11 **Q.** How would it get rid of the present council members?
12 **A.** They were double-bunking and putting people in the same
13 district so they would have to run against each other.
14 **Q.** What did the Senate Bill 36's treatment of the mayor --
15 how did that effect whether your -- whether your initial
16 reaction was confirmed or not?
17 **A.** I felt like this is really, really, aimed at getting after
18 the mayor.
19 **Q.** Did you have the opportunity to speak out against the
20 legislature's efforts to redistrict Greensboro in Raleigh?
21 **A.** Yes, I did.
22 **Q.** Tell me about that.
23 **A.** I went down to Raleigh, I think it was March 10th, and I
24 spoke to the committee, redistricting committee, telling them
25 that I thought there were communities of interest that were

1 going to be divided, and I thought it was going to delude our
2 political power. That's what I told them.
3 **Q.** Did you ever discuss Senator Wade's effort to redistrict
4 the City Council at any of the meetings that you regularly
5 participated in?
6 **A.** Yes, yes, yes. Especially the CEEJ, because I still serve
7 as chair of that. That came up quite a bit. We had people to
8 come in and talk to us and explain it so that we would know
9 what was actually happening with the bill.
10 **Q.** Tell me a little bit more. What is the CEEJ?
11 **A.** Citizens for Economic and Environmental Justice.
12 **Q.** And who's members of CEEJ?
13 **A.** Members from all over Greensboro. We have about maybe 50
14 people that meet monthly.
15 **Q.** What is the race of most of the people who attend the
16 meetings?
17 **A.** Black, white and others.
18 **Q.** Based on these discussions you had at CEEJ meetings and
19 the people you invited in, what was your perception of what
20 members of CEEJ thought about the proposal to redistrict
21 Greensboro?
22 **A.** They were all opposed to it. They couldn't see the logic
23 in it. I think the thing that mostly upset them was the fact
24 that nobody had asked for it. They were, well, who asked for
25 this bill? And, why would Raleigh decide what is happening in

1 Greensboro. Why can't we vote on what we want and why can't we
2 ask for what we want.
3 **Q.** Did you discuss the proposed redistricting plan at any
4 other community organization meetings?
5 **A.** NAACP. It was a concern of all of the groups that I am a
6 part of.
7 **Q.** And the Concerned Citizens of Northeast Greensboro, who's
8 members of that group?
9 **A.** There are ten neighborhoods that come under the umbrella
10 of the Concerned Citizens of Northeast Greensboro.
11 **Q.** Are the groups predominantly of one race?
12 **A.** Predominantly one race, but not all one race.
13 **Q.** What is the predominant race?
14 **A.** African-American.
15 **Q.** Based on all of these interactions you had with community
16 organizations and your fellow citizens, did the black voters
17 that you interacted with believe that this bill was designed to
18 benefit black voters?
19 **A.** No. Quite the opposite. It looks like it is against
20 black voters.
21 **Q.** Why do you say that?
22 **A.** Because some of the districts divided -- precincts were
23 divided and it was just causing -- well, I guess you could just
24 say, kind of deluding and disenfranchising and it just seems as
25 if it was going to take away some of the unity and the things

that we had worked for. We worked to get political strength among -- you know, in these different precincts, but they were going to be divided, which would cause us to lose power.

Q. So if you'll turn with me now and look at the eight district map that's to your left. Can you describe some of these areas where you were describing precincts being split up and communities being --

A. The blue is District 2. If you look over here, District 2 is divided in kind of a salmon color, and it just goes real crazy. And down here for District 68 -- Precinct 68, 72 and all of those have been in one district. They've been divided. A&T and Bennett would be in three different precincts.

If you look way up to the north, that's where Reedy Fork is. I thought it was strange that Reedy Fork ends up being pink now and then all -- that's a lake in the middle, but they are separated from the rest of them. They used to be District 2. That used to be in District 2. Why would it be separated?

Q. So let me break up those different areas that you just talked about. I'll start with the last one first. Do I understand you correctly, you're talking about the satellite annexation connected by the lake in the northeast part of the City; is that right?

A. Yes.

Q. And tell me how you know that area.

A. Because that was the area I served. And the Reedy Fork area is like a new development. It hasn't been there that long. It is a very nice neighborhood, homes like $160,000 up there. It seems to me that they kind of got put really strategically in another district.

Q. Which district is the Reedy Fork neighborhood in?

THE COURT: When? Which plan are you talking about?

MS. RIGGS: We're -- I'm sorry. I think we're both pointing at the map of House Bill 263.

THE COURT: I'm following you, but you are pointing, so the record is not clear. We still need to describe.

THE WITNESS: All right. I will describe it. I'm looking at the new map. The color where Reedy Fork is, is that little purplish color. If you look at the old map, it is all blue over here.

BY MS. RIGGS:

Q. In the new map?

A. In the new map it is up there by itself, that little purple, then it comes down here in District 8. On the old map, it is all in District 2. On the new map it is down here in District 3. On the old map, these folk are in District 2, but right in this little part of it --

THE COURT: You can step down.

THE WITNESS: Can I? Okay. This little area here.

THE COURT: Can you just say the precinct number?

THE WITNESS: Precinct 67, the old map right in here, that's Market Street. We have 68, 1, 67, 70, 69 all together. Over here, 68 is in one. Sixty-seven is in one. Seventy is in four. Four is in two.

MS. RIGGS: In the old map.

THE COURT: I just want to be sure I understand what you are saying. Those are the precincts around A&T and Bennett?

THE WITNESS: Yes.

THE COURT: A&T and Bennett are very close together?

THE WITNESS: Yes. And politically they have worked together, the students, in organizing and getting out to vote.

THE COURT: And there is lots of neighborhoods around it, is that true?

THE WITNESS: Yes.

BY MS. RIGGS:

Q. What is the harm in splitting A&T and Bennett from each other and putting it in multiple districts?

A. Well, politically, socially, these are black colleges, historic black colleges. There needs to be, and we are fighting for historical black colleges. We want them to be strong, so we need them to work together. That's the social part.

Politically, it kind of divides. People now don't know which precinct to go to to vote. And it is just a lot of

confusion, if you ask me. I don't know.

Q. Based on what you know about the precinct in District 2 in the current plan, what affect will the new plan have on political organizing in those communities in current District 2?

A. In current District 2, I think it would just cause us to have a bit of challenges in organizing now if we went to this new map.

Q. Why is that?

A. People are known in districts. People have reputations and have been working together. They build new involvements and new -- I guess you have to just start building again things that have been established, relationships and everything.

Q. I want to go back to Reedy Fork. If you'll turn with me to tab three in your notebook. This is Plaintiff's Exhibit 132. It is page 150 of Exhibit 132. It is the map of the North Madison precinct.

Can you explain for the Court where the Reedy Fork development is on this precinct map?

A. On this precinct map it is down on the lower left down where it says here, MON-2B.

Q. Is it along the road that's marked Reedy Fork Parkway?

A. Yes.

THE COURT: In tab three of this notebook?

MS. RIGGS: Yes.

THE WITNESS: It is little.

THE COURT: I see it. Go ahead.

BY MS. RIGGS:

Q. What part of the Reedy Fork development is there in the North Madison precinct?

A. The lower part. This is the first part that was built. Recently there are some newer houses in the upper part.

Q. Will you turn with me now to tab four or -- yes, tab four in your notebook, which is the same exhibit. It is Exhibit 132, but this is page 164 of Exhibit 132. This is the South Madison precinct.

Can you explain to the Court where on this map the Reedy Fork development is?

A. It is down in the lower part of the map, which would be south, and it goes up to --

THE COURT: I'm sorry, where? It looks like it is north to me. Is that the same Reedy Fork Parkway?

THE WITNESS: I'm sorry. I had my map turned wrong. The arrow goes north. It is in the upper corner. I had the map turned wrong. It is up in the upper left-hand corner.

BY MS. RIGGS:

Q. So the Reedy Fork neighborhood is in the South Madison precinct as well?

A. Yes. In two precincts.

Q. Do you know people who live in the Reedy Fork

neighborhood?
A. Yes.
Q. Have you spent time driving around up there?
A. Yes. The lower part, I've had friends that have lived there since it first opened, but recently, a month or so, I've gone up further into the part and there are many homes that have been built in the northern part past the parkway.
Q. Is there any predominant race of people who live in the Reedy Fork neighborhood, based on your observations?
A. Yes. Predominantly white.
Q. Ms. Wells, now I want to ask you about the part of that northeast piece of Greensboro that is split between District 2 and District 8 in the current map. Tell me about who lives in the orange part, the bottom part of that satellite annexation that was assigned to District 2.
A. That's predominantly black.
Q. What kind of -- what streets or neighborhoods are in that area?
A. That's over in -- it is down the Hicone. I think that kind of divides it in there, but that's where more African-Americans live, in that area. That purple part of it up there is where more white people live.
Q. Ms. Wells, I would like to talk to you briefly about the history of African-American political success in the Greensboro area. First, can you tell me if any organizations have

1 developed in Greensboro to help promote African-American
2 candidates or candidates supportive of African-American issues?
3 **A.** There are two packs. The Simpson Pack that's been for
4 decades and then there is the Guilford Community Pack.
5 **Q.** What do these packs do?
6 **A.** They have interviews with the candidates and then they
7 prepare a suggested list of candidates that they think would be
8 best for the African-American communities.
9 **Q.** Do these packs promote African-American candidates?
10 **A.** Some African-Americans, but it is according to who is the
11 best candidate. It is not according to race.
12 **Q.** Ms. Wells, are you generally aware of African-Americans
13 who have been elected to city and county office in the area?
14 **A.** Yes.
15 **Q.** Will you turn with me to tap five in your notebook. This
16 is marked Plaintiff's Exhibit 245, and it is a two page
17 demonstrative exhibit. Have you seen this exhibit before?
18 **A.** Yes.
19 **Q.** Have you had a chance to look at it and confirm its
20 accuracy?
21 **A.** Yes.
22 **Q.** Would this chart help you to explain to the Court the
23 history of African-American success in local elections?
24 **A.** This chart begins in 1959, and it tells the
25 African-Americans that have been voted -- members of the City

Council.

Q. Let me slow you down there and ask, have African-Americans been elected to City Council in at-large seats?

A. Yes.

Q. And when did that start?

A. In 1959. From '59 to '83, there was an at-large -- an African at-large member of the council.

Q. Who are some of the African-Americans who were elected at-large prior to 1983?

A. Waldo C. Falkner, Jimmy I. Barber, Vance Chavez and Reverend Prince Graves.

Q. Since the City moved to the current 5-3-1 system in the early 1980's, tell me how African-Americans have fared running for City Council office.

A. They fared well. Districts 1 and 2 are majority minority districts any way, so it has always had someone from one or two on the Council, but it has been -- we have now someone who is elected in three, District 3.

Q. I'll get to that. Let me ask you, in the last 20 years or so, have African-American candidates won at-large elections to City Council?

A. Yes.

Q. Tell me about that.

A. In 1993 to 2009, Yvonne Johnson was elected as an at-large city council member, and she served as the mayor of the city.

She came off the board -- I mean off the council and she's now, since 2011, she's mayor pro tem.

Q. And you mentioned something about District 3. Is District 3 majority black?

A. No.

Q. Who currently represents District 3?

A. Justin Outling.

Q. What race is Mr. Outling?

A. He's black.

Q. Okay. In your experience working in Greensboro City politics, can white candidates be the candidates that African-American voters prefer?

A. Yes.

Q. How do you know that?

A. Well, we have a council member now, including our mayor, that the African-Americans voted for. It is about who the candidate is, what the candidate promises and what we believe they will do.

Q. And so why do you say that Mayor Vaughan is the candidate of choice of black voters?

A. Well, because she's fair and it is -- when she was first elected, it was Northeast Greensboro, we fought hard because we felt East Greensboro had been left behind for so long and the candidates that we said we would remember in November, the candidates that were chosen, were ones who said they were going

to fight for East Greensboro, and they've proven that.

Q. Does Mayor Vaughan win in majority black precincts in your neighborhood?

A. Yes.

Q. Turn with me to the second page of that demonstrative exhibit, if you will. Are you aware of any African-Americans elected countywide in Guilford County?

A. Yes, yes. Countywide, we presently have Lisa Johnson Tonkins, who is serving as the clerk of court. We have Patrice Hinnant who serves in superior court. Laura Cubbage who is a district court judge. Tonia Cutchin, who is a district court judge. Angela Foster, who is district --

THE COURT: Can I ask, the superior court judges aren't elected countywide in Guilford County, unless something has changed. I mean, I have personal knowledge of this from having been elected to superior court several times. Where did you get this information that this was countywide? Maybe something has changed and I don't know.

MS. RIGGS: We, working with Ms. Wells, printed off a chart online from the NC Courts website that showed District 18 corresponding perfectly with the Guilford County boundaries.

THE COURT: Well, you are going to have to show that to me some other way. I'll check. We can check the statutes on that. I believe that the county is divided into five superior court districts, unless they changed it. But you're

basing that on a website from the State Board of Elections?

MS. RIGGS: The NCCourts.org.

THE COURT: Okay. I mean, I'm not disputing -- there is actually more African-American district court judges than you got listed here that are elected countywide, I think, but, you know, go ahead.

BY MS. RIGGS:

Q. Do you remember anything about Lisa Johnson Tonkins' race in 2014?

A. The thing that was interesting about it, she unseated a person who had been there for many years, and succeeded a person who had been there for many years, and it was a white person, and she unseated her. So that was --

Q. How -- where did she get support in running in that countywide election?

A. From all over. From all over the city and the county.

Q. And Lisa Johnson Tonkins is African-American, is that right?

A. Yes.

MS. RIGGS: No further questions, Your Honor.

THE COURT: Questions for the City?

MR. STARRETT: No, Your Honor.

THE COURT: For the Board?

MR. PAYNE: No, Your Honor.

THE COURT: Do you happen to know, Mr. Payne -- I'm

not going to rely on my personal knowledge, obviously that would be inappropriate.

MR. PAYNE: I wouldn't trust my recollection, either, but I believe that the superior court judges are from districts.

THE COURT: Okay.

MS. RIGGS: We're happy to eventually give you the document that we used when we prepared the demonstrative for Ms. Wells.

THE COURT: Thank you, Ms. Wells. You can step down. Okay. Call your next witness.

MS. RIGGS: Your Honor, the individual plaintiffs call Dr. Jowei Chen.

(DR. JOWIE CHEN, INDIVIDUAL PLAINTIFFS' WITNESS, WAS SWORN.)

MS. RIGGS: Your Honor, may I approach the witness with a notebook?

THE COURT: You may.

DIRECT EXAMINATION

BY MS. RIGGS:

Q. Good morning, sir. Could you introduce yourself to the Court and tell us where you live.

A. My name is Jowei Chen, and I live in Ann Arbor, Michigan.

Q. How are you currently employed?

A. I'm an associate professor of political science,

1 Department of Political Science at the University of Michigan
2 Ann Arbor.
3 **Q.** How long have you held that position?
4 **A.** I've been a professor at the University of Michigan since
5 the fall of 2009.
6 **Q.** Dr. Chen, will you turn to tab one in your notebook for
7 me. Is this your most recent CV?
8 **A.** Yes, it is.
9 **Q.** And does it reflect your academic background and scholarly
10 work?
11 **A.** Yes, it does.
12 **Q.** Briefly tell the Court about your educational background.
13 **A.** I have a bachelors in ethics politics and economics from
14 Yale University. I have a masters of science and statistics
15 from Stanford University, and I have a Ph.D. in political
16 science from Stanford University.
17 **Q.** Briefly summarize for the Court your relevant areas of
18 scholarship.
19 **A.** My areas of research and expertise are geographic
20 information systems, partisan of -- or geographic information
21 systems statistics, political and racial gerrymandering, as
22 well as political geography and legislatures in elections.
23 **Q.** What is political geography?
24 **A.** Political geography is the study of the geography of
25 political phenomenon, but in my particular case what I study is

1 the geography of voters, of voters of different parties, of
2 different races, and how the geography; in other words, where
3 those voters reside, affects legislative districting.
4 **Q.** Dr. Chen, have you ever served as an expert witness in
5 court cases before?
6 **A.** Yes, I have.
7 **Q.** Can you tell the Court about a few of those cases?
8 **A.** Sure. In Florida, I've served as an expert on the various
9 redistricting lawsuits involving the Congressional plan, the
10 state legislative plans that went on in Florida involving
11 partisan gerrymandering claims.
12 In St. Louis, I served as an expert in the *NAACP*
13 *versus Ferguson Florissant School District*, a districting case.
14 In Wake County, served as an expert in the *RWCA*
15 redistricting claims involving the County Board of
16 Commissioners and school board election district cases.
17 **Q.** What general areas of inquiry were you engaged in in the
18 *RWCA* case?
19 **A.** In the *RWCA* case, I was asked to analyze issues of
20 malapportionment as well as racial gerrymandering.
21 **Q.** Have you testified at trial in any of these cases?
22 **A.** Yes. In the *RWCA* case.
23 **Q.** When you testified at trial, did the Court accept you as
24 offered as an expert witness?
25 **A.** Yes, it did.

1 **Q.** Dr. Chen, have you published on these topics that we just
2 discussed in peer review journals?
3 **A.** Yes, I have.
4 **Q.** Approximately how many publications do you have?
5 **A.** Three publications.
6 **MS. RIGGS:** Your Honor, individual plaintiffs tender
7 Dr. Jowei Chen as an expert in political geography, statistics,
8 geographic information systems, redistricting and elections.
9 **THE COURT:** Does the City have questions about his
10 qualifications?
11 **MR. STARRETT:** No, Your Honor.
12 **THE COURT:** The Board?
13 **MR. PAYNE:** No, Your Honor.
14 **THE COURT:** All right. He may so testify.
15 **BY MS. RIGGS:**
16 **Q.** Dr. Chen, what were you asked -- actually, before I get
17 there, can you turn with me to tab two in your notebook, which
18 is Exhibit 133.
19 Is that the report you produced for this case?
20 **A.** Yes, it is.
21 **Q.** What were you asked to do for this case?
22 **A.** I was asked to analyze the eight district plan enacted by
23 House Bill 263 for Greensboro City Council elections, and
24 specifically, in being asked to analyze this plan, I was asked
25 by plaintiffs' counsel to address two questions.

I was first asked to analyze what factors motivated the population deviations that are exhibited in the single member districting plan.

Second, I was asked to analyze whether race was a predominant factor in the drawing of any of the eight districts.

Q. Before you began your analysis, what kinds of observations did you generally make about the enacted House Bill 263 plan?

A. I always start by analyzing boundaries as well as various characteristics demographically of any districting plan that I am asked to analyze, and certainly I did so here.

So with this eight district plan, I first analyzed the populations of the individual districts.

Q. Let me interrupt. Did you create a demonstrative to help the Court understand how you first -- what characteristics you looked at first?

A. I did, yes.

Q. And can we display that demonstrative now.

So tell the Court now what characteristics you first looked at with respect to House Bill 263.

THE COURT: So is this an exhibit?

MS. RIGGS: It is not. We're going to use it for demonstrative purposes.

THE COURT: Where is the evidence that it summarizes or that it demonstrates?

MS. RIGGS: It is in his report. I'm asking him what the first thing he did is when he looked at the map. This is introductory.

THE COURT: Go ahead.

THE WITNESS: These are various characteristics that I first analyze when I look at any districting plan. So I looked at the eight individual city council districts in the HB-263 plan.

I've aligned a chart here, a table, which there is one row for each of the eight districts, and for the eight districts, I looked at the various characteristics in terms of their population, as well as their partisan composition. So specifically, I'm looking at the population of each individual district, as well as the number of Democratic voters and Republican voters in each of the eight districts.

Specifically in this particular table, I'm looking at Democratic and Republican voters as measured by how many voters supported Elaine Marshall as the Democrat in the 2010 U.S. Senate election, versus how many voters supported Richard Burr, the Republican candidate, in the 2010 election.

So for each district, first I just look at the population, and I ask whether or not the population in District 1, District 2, et cetera, was over or under the ideal district population for the entire city.

An ideal district, an equally populated ideal

1 district for the Greensboro eight district City Council plan is
2 about 33,630 voters. So I first just want to determine which
3 districts are overpopulated and which are underpopulated.
4 As you can see here in the first two columns, five of
5 the districts are underpopulated, and three are overpopulated.
6 So we can see in this table that Districts 2, 3, 5, 7 and 8,
7 are the underpopulated districts, and then there are three
8 other districts that are overpopulated. So that just tells me
9 a basic characteristic about the malapportionment of the
10 districting plan.
11 From that, I can of course calculate various
12 statistics regarding what is the total deviation, what is the
13 maximum deviation, and it is a simple math question. The
14 maximum deviation of this plan as a whole is about 8.2 percent.
15 So next, I want to look at whether or not this
16 malapportionment occurred in a partisan biased manner, not just
17 what the total maximum deviation was, but whether the voters
18 were systematically malapportioned in a way that favored one
19 party or disfavored the other party. That's why I look to
20 partisanship of the voters within those individual districts.
21 So again, we know that Districts 2, 3, 5, 7 and 8 are
22 the underpopulated districts. So let's look at who was
23 assigned into those unpopulated districts, and that's what we
24 see in the two columns on the right; number of Democratic
25 voters in each district and the number of Republican voters in

each of these underpopulated districts.

For example, we can look at District 2, and we can see that District Number 2 had 5,707 Democratic voters. We can see that District 3 had 4,819 Democratic voters and so on.

So what I specifically did in analyzing the malapportionment of this plan is, I calculated the following quantity: I wanted to know what percentage of Republican voters were assigned to an underpopulated district, as opposed to an overpopulated district.

Now in Greensboro City as a whole, there are a total of 29,642 Republican voters. Of those 29,642, 86 percent of them were assigned into an underpopulated district. That means that only 14 percent of them were assigned into an overpopulated District.

Q. How is performing -- or making these initial observations, how is that helpful in your overall analysis?

A. The reason that being assigned into an underpopulated versus an overpopulated district matters is, because when a district is underpopulated, then its voters have greater weight in elections. Its voters have greater electoral weight in determining who gets elected to the Greensboro City Council. Voters in underpopulated districts have greater weight. Voters in overpopulated districts have relatively lesser weight.

So what we want to determine is, whether a districting plan is malapportioned in a way that systematically

gives greater weight to the voters of one party rather than the other.

So what I found here in calculating that quantity was, that 86 percent of Republican voters were assigned into an underpopulated district, thus giving them greater electoral weight in determining the members of the Greensboro City Council, and only 14 percent of them were assigned into an overpopulated district, giving them lesser weight.

The reasons I calculate this statistic is, that in general, if a districting plan has only very small population deviations, and those population deviations occur in a random partisan neutral manner, occur just randomly throughout the districting map, then in general, about half, about 50 percent of a party's voters should be assigned into an underpopulated district and about 50 percent should be assigned into an overpopulated district.

So we start by looking for that 50 percent benchmark and again of course here, I found that 86 percent of Republican voters are assigned into an underpopulated district, thus giving them greater electoral weight in Greensboro City Council elections.

Q. After you made these initial observations, what is your next step in analyzing a redistricting plan?

A. So having analyzed this very basic characteristic of the partisan malapportionment of the Greensboro City Council Plan

of the HB-263 plan, I want to ask how statistically likely was such an outcome, this 86 percent outcome to occur just by statistical chance, just by random chance. Is it something that could have arisen from -- by chance, from a partisan neutral map drawing process.

In order to answer that question, in order to determine whether or not that 86 percent outcome, that 86 percent favoring of Republican voters could have just happened by chance, what I always do in districting cases like this is, I conduct a very large number of computer simulations, computer simulations that simulate the drawing of a districting plan following nothing but neutral traditional districting criteria.

Q. Let me interrupt you and clarify. What do you mean by, "a computer simulation"?

A. A computer simulation is something that is not done by a human. It is a computer algorithm. It is a computer program that follows traditional districting criteria and draws districts that are designed to follow those traditional districting criteria.

The important part of doing that is, that we are specifically instructing the computer to follow these criteria, the traditional criteria, and be completely partisan neutral, be partisan blind and be race blind, and only follow traditional criteria, like equal population, holding communities of interest and geographic compactness in

1 districts.
2 **MS. RIGGS:** Before I move on to my next question, I
3 wanted to let you know, Your Honor, we will mark this as
4 Demonstrative 253, and we'll update the exhibit list so that
5 you have that record.
6 **THE COURT:** All right.
7 **BY MS. RIGGS:**
8 **Q.** Dr. Chen, in order to explain to the Court how your
9 computer simulations work, did you create another demonstrative
10 to walk us through that process?
11 **A.** I did, yes.
12 **Q.** We'll put that up now. It is not marked, but we will mark
13 it Demonstrative Exhibit 254. Dr. Chen, walk us through how a
14 computer simulation is created.
15 **A.** There are several steps along the way. And so the first
16 thing that we do, when the computer simulates a districting
17 plan, it starts with the 113 precincts that comprise the City
18 of Greensboro. So Greensboro is 113 precincts. And eventually
19 what the computer is going to do is, to divide these 113
20 precincts into a total of eight equally populated districts.
21 So the first step along the way was to start with
22 those 113 precincts. The next step, step two here is, to
23 move -- to divide all of these 113 precincts into two halves.
24 So we're just going to divide the entire city and its 113
25 precincts into two equally populated portions. The computer

1 does this, again, in a random way, with no regard to
2 partisanship or racial composition of those various
3 neighborhoods, of those various precincts. That was the second
4 step.
5 We've now divided the City of Greensboro into two
6 equally populated halves. The next step is, that we're going
7 to take each of these halves and we're going to divide them
8 again into two other fourths. So we have two halves, and now
9 we're going to divide each half into another half. Now we're
10 going to end up with two-fourths, or two-quarters.
11 So at this point after the third step, we've now
12 divided the entire City of Greensboro into four equally
13 populated quarters. Again, they're -- of course it is
14 graphically contiguous. They are equally populated and as you
15 can see on the map here, those are relatively compact
16 districts, or rather they are not fully districts yet, they are
17 really just quarters. They are really just fourths. So we now
18 divided Greensboro into four equally populated fourths.
19 The final step is, that we're going to take each of
20 those fourths and divide them again; each one into two pieces,
21 also equally populated. So when you take those four-fourths
22 and you divide each one of them again into two pieces, we now
23 end up with a total of eight groups of eight-eighths, eight
24 groups. Those eight groups, again, are now geographically
25 contiguous. They are equally populated, and of course as you

can see on the map here, they are all quite geographically compact as well.

So that's the end of the districting plan, Greensboro City Council's eight districts. So that's how the computer divides the City of Greensboro into eight equally populated, pretty geographically compact districts. That is a single run of the simulation.

Of course as I said, I do a very large number of independent runs of the simulation process, each time starting anew, following that process from the first step.

Q. How many simulations did you start with in your analysis here?

A. I started my analysis by conducting 100 independent simulations, so 100 separate independent districting plans, all following very close equal population boundaries. In other words, trying to make them as equally populated as I could, following all of those traditional redistricting criteria that I just described there.

Q. So let me break that down a little bit. Tell me what instructions you gave the computer when it was generating independently these maps. What instructions did you give the computer about different traditional redistricting criteria?

A. As I said, I followed a couple of different traditional redistricting criteria. I'll start with population equality. I basically instructed the computer to try to make districts as

equally populated as possible, while still using precinct boundaries, but basically trying to make the districts as equally populated as possible.

I specifically instructed the computer, make sure that no district is greater than two percent away from the ideal district population of 33,630. So if it was greater -- if it had been greater than two percent, then the computer would have flagged and rejected such a plan as being malapportioned.

Now in practice, I found that the computer had no trouble at all staying well within those boundaries and, in fact, the computer never had to reject a plan for exceeding that two percent threshold.

Q. If you told the computer, don't deviate more than two percent from the ideal population, what was the overall deviation range you saw in these computer-drawn maps?

A. The maximum deviation, which I'm just using the definition from *Daily versus Hunt*, the maximum deviation from the lowest to the highest populated district is, potentially as much as four percent. In practice, I think I observed between about 1.87 percent to about 3.9 percent, maximum deviation.

Again, maximum deviation just means the difference between the lowest and the highest district so, again, all of these are districts that are staying well within plus or minus two percent of the ideal district population of 33,630.

Q. How did you decide to tell the computer to keep its simulated maps within plus or minus two percent or four percent overall deviation?

A. In choosing that initial threshold, I looked to the benchmark map. I looked to the current Greensboro City Council map. I analyzed the populations of five single member districts in the current Greensboro City Council map. I noted that in those five districts, the highest population deviation is about two percent. So I took that as an indication that in Greensboro, it seems quite possible, quite reasonable, to draw districts that are within two percent of the ideal district population.

Q. What was the overall deviation in the current plan?

A. I don't remember. It is something like 3.87 percent.

Q. So that's what you told the computer, instructed the computer with respect to equal population.

What was another traditional redistricting criteria that you gave the computer instructions on?

A. Population equality was the most important, but I had two other criteria. Next I wanted to make sure that the districts were geographically compact. As we saw in the maps that I just showed, it was pretty natural for the computer to end up producing quite compact districts to begin with, but I wanted threshold criteria. I wanted to make sure I checked the compactness by imposing it as a threshold criteria.

Specifically what I did was, I looked at the compactness of the enacted HB-263 map. I found that it had a geographic compactness as measured by something that we call Reock Score. I found that it had a geographic compactness, a Reock Score, of approximately .28. So what I did, I looked at all of the simulated maps, and I instructed the computer to make sure that every simulated plan achieves a compactness score at least as good, or hopefully better, than the districting plan in HB-263. Make sure it achieves at least as high, and preferably higher, on compactness scores.

Again, I found that in practice, the computer had very little trouble meeting this threshold. It was quite easy, as we just saw on the map that we looked at a couple minutes ago, for the computer to produce quite compact districts, in many cases far exceeding the geographic compactness of the HB-263 districts.

Q. Why did you decide to use the compactness level seen in the House Bill 263 map as the threshold or goal for the simulations, rather than the compactness of the current plan?

A. Well, we can't really compare it to the current plan, the five district plan, because that's a five district plan. What we're drawing here is a new eight district plan, so we want an apples-to-apples comparison. We want a direct comparison of what a reasonable compactness score would look like in an eight district plan, taking into account all the quirks of

1 Greensboro's local geography, its boundaries and the
2 implications that that has on an eight district plan, as
3 opposed to a five district plan.
4 This is especially relevant in some of the outlying
5 areas where there is satellites in areas that they annexed,
6 causing the outer portions of the various parts of Greensboro
7 to have jagged edges.
8 So that's why it is very important to have a direct
9 apples-to-apples comparison looking at the compactness score
10 achieved by the eight district HB-263 plan as a benchmark.
11 **Q.** Did you give your computer running the simulations any
12 other instructions with respect to traditional redistricting
13 criteria?
14 **A.** Yes. There is one other traditional redistricting
15 criterion, and that was holding precincts intact. As I said,
16 the computer simulations started with Greensboro's 113
17 precincts. The simulation process instructs the computer to
18 try and keep those precincts intact by starting with them as
19 the basis of the simulation process.
20 The only time the computer was allowed to deviate
21 from holding those precincts intact was, when there are a
22 couple of cases where Greensboro actually has a number of
23 precincts that are themselves geographically noncontiguous,
24 individual precincts that contain some outlying satellite
25 islands and, therefore, the precinct as a whole is not really

geographically contiguous.

In those cases, the computer was allowed to break up those satellite islands, if doing so was necessary to preserve the contiguity of the districting plan.

In general, the computer was instructed to start with the base of those precincts, in other words, to try and hold those precincts intact as much as possible.

Q. In the simulated plans produced by your computer, how many precincts were usually split?

A. Sometimes it is as few as zero. Very often as few as zero. Sometimes up to about five, but in general, less than, no more than five.

Q. None of the 100 hundred simulations you ran at this point split anymore precincts than five?

A. I think that the vast majority -- there might have been a small number that were more than five, because I think that is theoretically possible because of the precincts that have outlying islands, but the vast majority contain five or fewer.

Q. Did you use precincts or voter tabulation districts when you were doing this part of your analysis?

A. I entirely used precincts for all of my analysis.

Q. Can you explain to the Court in Greensboro what is the correlation between precincts and VTDs?

A. They are quite often the same thing, except in a very small number of cases. Greensboro has a total of 113

precincts. Greensboro also has a total of 108 VTDs. These, in most cases, in the vast majority of cases, are exactly the same thing. So of those VTDs, 103 of the VTDs, are exactly the same. The geographic boundaries are exactly the same as 103 of the precincts. It is only the remaining ten precincts that are different from the remaining couple of VTDs.

So we end up here with a situation of where I believe that five or six VTDs are split into, divided up into a total of ten precincts but, again, the vast majority -- 103 VTDs are exactly the same as their respective precincts, 103 precincts. So for the most part, with a couple of -- with a handful of exceptions, precincts and VTDs are exactly the same thing in Greensboro.

Q. This methodology that you just described, running simulations and telling the computer to respect certain traditional redistricting criteria, what does this allow you to do when you are analyzing a new redistricting plan?

A. Well, as I said a couple minutes ago, the first thing that I noticed about this new redistricting plan was that 86 percent number that I cited. I looked at the partisan bent of the malapportionment in the districts. And want to know whether or not that 86 percent is a number that could have possibly arisen just by random chance. And so the way I get at that question is by looking at a very large number of computer simulations that look at these traditional redistricting criteria that

we've just been talking about, and I want to know if I can conduct a very large number of simulations, will I ever, even just a single time, reach that 86 percent partisan malapportionment number.

So the broader goal here in conducting simulations is to determine whether or not possibly by chance we could have had under traditional redistricting criteria, something as extreme as that 86 percent partisan malapportionment that I just saw in the enacted HB-263 map.

Q. So now I want to go through how that methodology was applied in this instant case, and will you turn with me to figure 1A in your report, which is separately marked as Exhibit 135. It is displayed on your screen in front of you.

Looking at this map, I want you to -- or this figure, I want you to explain it to the Court, but I want you to start first with explaining what that red dot is in the upper right-hand corner of the figure.

A. That red star, that is the enacted map, the HB-263 map.

Q. What are the blue circles?

A. Those blue circles, there are a hundred blue circles, and each of those hundred blue circles represents one of the hundred simulations that I conducted with low population deviations that we just talked about.

So that red star up in the upper right corner, that's the enacted plan. That's the HB-263 plan, and this is a

figure -- this is a diagram here that tells you two things about that enacted HB-263 map. On the horizontal axis, I'm measuring the total maximum deviation, the population deviation as defined by *Daily versus Hunt*. The whole maximum deviation of that plan.

The enacted HB-263 plan has a maximum population deviation of 8.2 percent, meaning that difference between the lowest and the highest districts in the enacted plan, comprises about 8.2 percent of the ideal district population.

So that's the first thing we know about that enacted map. The HB-263 map, that's what that red star tells else us in the upper right corner.

Q. Can you tell us about the Y axis, what the Y axis of this figure tells us about the enacted plan?

A. Yes. The Y axis, the vertical axis, that tells us the percentage of Republican voters that were placed into an underpopulated district.

We walked through a couple minutes ago how I calculated that number for the enacted plan, and we walked through how I analyzed each of those districts and I found that 86 percent of Republican voters are placed into an underpopulated district in the enacted map. That's why on the vertical axis we see that that red star, that red star in the upper right corner, it is plotted along the Y axis, along the vertical axis at about 86 percent.

So we know two things about the enacted plan: 86 percent partisan malapportionment. 86 percent of voters assigned into an underpopulated district. And we also of course know that it had a maximum population deviation of 8.2 percent.

THE COURT: Excuse me just one second.

Mr. Payne, would you mind moving your notebooks sort of over to the side to make it easier for the people in the audience to see. I apologize to the observers. I think between counsels -- the screens on counsels' desks, perhaps the observers can see a little bit better now. Everybody is nodding. Proceed.

BY MS. RIGGS:

Q. Dr. Chen, I want to ask you some questions about what this figure, what characteristics this figure tells us about your simulated district plans, but first can you explain to the Court why you used the 2010 U.S. Senate election for measuring Republican voters for the Y axis?

A. I started that off as the base measure of the partisanship of voters using the 2010 U.S. Senate elections. The reason I chose that election is, I looked at the statistical pack available to the legislature in 2015 when it was redrawing the Greensboro City Council districts. I noted that the most recent election available, most recent election available to the City -- to the state legislature, was that 2010

Marshall/Burr election. So I started by using that as the most recent statewide election available to the state legislature in the stat pack.

Q. Okay. Tell us a little bit about what kinds of results you saw with the simulated plans.

THE COURT: So can I just ask a question about that? So they didn't have the 2012 presidential election available to them, is that what you are saying?

THE WITNESS: Right. I looked at the stat pack, and it had elections up to -- available to state legislature when it was redrawing in 2015, that stat pack latest election was 2010 U.S. Senate, so I took that as, this is what the legislature had available to it to measure the partisanship of different precincts, different areas, different neighborhoods, et cetera.

THE COURT: Thank you. Go ahead.

BY MS. RIGGS:

Q. So tell the Court what observations you made about placement of Republican voters into underpopulated districts with the simulated plans.

A. So I calculated the exact same statistic, that partisan malapportionment statistic that we walked through in detail a while ago, and I calculated that statistic not just for the enacted HB-263 plan, but also for each of the 100 simulations that I conducted and are shown here in this figure.

So for each one of these 100 simulations, I'm calculating the same thing: What percentage of Republican voters were placed into an underpopulated district.

As I said at the outset, the reason this is such an important statistic to look at is, that in general, if a district's malapportionment -- if its population deviations are all relatively small, relatively minor and those population deviations occur with no regard to partisanship, if they are occurring in a random manner, then in general, we should expect about 50 percent of your voters -- about 50 percent of your partisan voters will be placed into an underpopulated district, and about 50 percent will be placed into an overpopulated district.

So let's look at how the simulations did in that sense. So again, what we're going to do here is, we're going to look at where are these blue circles in relation along that Y axis, the vertical axis that tells us what percentage of Republican voters were placed into an underpopulated district.

In general, the simulations all center around the area of about 50 percent. They range from as low as about 30 percent to 70 percent. Most of the simulations are within about 35 to 40, all the way up to about 60, 65 percent. On average, they are about around 50 percent, and that's exactly what we would expect, because my computer simulation process paid no attention to partisanship of voters.

So in general, when you have a computer simulation that's just following traditional districting criteria, just by random chance, approximately 50 percent of voters will be placed into an underpopulated district, and approximately 50 percent of Republican voters will be placed into an overpopulated district. That's just what happens naturally when you follow traditional criteria.

It is not always going to be exactly right at 50 percent. That's what we see in this figure. It is not always exactly at 50 percent. Sometimes it goes down to 35, 40 percent. Sometimes it goes up to 60 or 65 percent, but it is roughly in that right range. So that's the first thing that I do in looking at the simulations.

Q. What conclusion did you draw in comparing how the enacted plan fell on this comparison chart, compared to how the simulated maps fell on this chart?

A. We were able to conclude with extremely high statistical certainty, as you can easily see on this figure, that a districting process that follows traditional criteria and is conducted in a partisan blind manner, is statistically very, very unlikely to ever achieve as extreme of a partisan malapportionment as is exhibited in the HB-263 plan, that extreme partisan malapportionment of putting 86 percent of voters -- of Republican voters into an underpopulated district. That's an outcome that is statistically impossible when we

follow tight strict population boundaries as I did in this first computer simulation process.

Q. After you saw that, after you found that the enacted plan fell completely outside the distribution seen in the computer drawn maps, what was the next step in your analysis?

A. The next step was, that I wanted to determine whether or not the malapportionment was somehow related to, enabled or caused the extreme partisan bias observed in the HB-263 plan.

Q. I'll have you flip to figure 1B in your report, which is separately marked as Exhibit 136. Explain to the Court what you did next.

A. I went back and conducted a completely separate second set of computer simulations. I made one change, one tweak. In the second set of simulations I again conducted 100 computer simulations, but this time I did something a little bit different. I told the computer, don't worry about population equality, so long as the population deviations are between eight to 10 percent maximum population deviation. In other words --

Q. Why did you do that?

A. I chose that threshold, eight to 10 percent population deviation because, again, I observed the enacted HB-263 map and I saw that it did in fact have quite significant population deviations, total maximum deviation of 8.2 percent. I took that as a benchmark, or something that I wanted to generate

computer simulations to compare that against.

So I used that benchmark and I told the computers, all right, I want you to produce a bunch of computer simulations within that range. So I chose eight to 10 percent. I said to the computer, I want you to generate a bunch of plans that are intentionally containing malapportionment such that the maximum deviation ends up being eight to 10 percent.

So all of the hundred simulations that we see in this figure here, were computer simulations that are otherwise exactly just like the first set of simulations I've just been describing, except this time, population deviation is going to be between eight to 10 percent.

Q. So let me ask some follow-up questions there. Between Exhibit 135 and 136, figure 1A and 1B, was compactness held constant between the two analyses?

A. Yes. I treated compactness in exactly the same way and, in fact, when I went back and analyzed the geographic compactness of this second set of simulations, I found that the districts were easily, in all cases, in a hundred percent of the cases, higher than, more compact than the geographic compactness of the HB-263 plan.

I found that compactness was never a problem at all for the computer simulation process. Even though I instituted it as a requirement, it was never a requirement that the computer had any difficulty achieving.

Q. The same thing with the instruction to keep precincts whole where possible, was that consideration held constant between the two analyses?

A. Exactly. Everything was the same. Started with the precinct boundaries, so those traditional districting criteria were followed in the same way, except for that tweak regarding population deviations.

Q. Tell us what you saw with the 100 simulations you ran, where the population deviations were higher, comparable to the enacted plan.

A. This figure, figure 1B, is set up exactly like the last figure was, where on the horizontal axis we're measuring the maximum population deviation, and on the vertical axis, the Y axis, we're measuring the percent of Republicans that happen to be placed into underpopulated districts.

So of course as I said, on the horizontal axis, the population deviations here are all between eight to 10 percent. We already know about the enacted plan.

THE COURT: Excuse me just a second. I'm sorry, can you folks stop whispering. Can you folks stop whispering? It is distracting to me and prevents me from listening to the witness.

Can you repeat?

THE WITNESS: Sure, Your Honor. So we look at the hundred simulations in this figure, and we're looking first

just at the population deviations. As I said, the computer simulation process was set up so that the maximum population deviation of these simulations is going to be eight to 10 percent. Of course we already know about the enacted plan. That enacted plan has a maximum deviation of 8.2 percent. So the enacted plan has a population deviation that is similar to the simulations here in this figure.

Now we're going to look at the vertical axis. What percent of Republican voters were placed into an underpopulated district. We already know about the enacted plan. We started that at the outset, and we calculated, of course, a long time ago here today that the enacted plan has 86 percent of Republican voters being placed into an underpopulated district.

Now let's look at the hundred blue circles, the hundred computer simulations. Once again, because this is a partisan neutral computer simulation process, on average, about 50 percent of Republican voters are going to be placed into an underpopulated district across these hundred simulations, but there is a lot more random chance that that can happen. There is a lot more permissible deviations that are possible, because I have designed these computer simulations explicitly to employ significantly higher population deviations of eight to 10 percent.

So what we see here is, that the blue dots exhibit a much wider distribution along that vertical axis. We can see

that there are simulations that achieve as low as about 8 percent of Republicans being placed into an underpopulated district. That's what you see at the very bottom right. You see one circle way down there at around 8 percent. We see that as high as about 90 percent sometimes. About as high as 90 percent of Republican voters could be placed into an underpopulated district.

So why is that range so large? It is because you can do a lot more things, you can take a lot more liberties when you are not requiring the computer simulation to adhere to strict population equality standards.

Here, some of the districts can be very underpopulated or very overpopulated, and a lot more is possible when you don't have to adhere to strict standards.

Q. Let me ask you some followup questions there, Doctor Chen. Where does the enacted plan's partisan impact, that is the percent of Republicans placed in underpopulated districts, where does that fall in comparison to the partisan effect you see in the simulations?

A. Well, we know that the enacted plan has 86 percent Republicans placed in underpopulated districts. What we see is, that in general, the simulations exhibit a very wide range. The average is going to be around 50 percent. The mean, the average of those simulations about 50 percent, but it varies quite widely, from as low as 8 percent, to as much as 90

1 percent.
2 So the enacted plan is actually within that possible
3 range. Now, it is at the very outlying edges of that range,
4 but it is within the range. As you can see at the very top
5 right of this figure, there are three or four simulations,
6 three or four blue circles that actually are right around that
7 area of the red star at the upper right of this figure. What
8 that is telling us is, that out of 100 simulations, about three
9 or four times the computer was actually able to achieve
10 approximately the same level of partisan malapportionment as
11 the enacted plan.
12 **Q.** What did doing this second set of simulations with greater
13 overall deviations allow you to conclude about the enacted
14 plan?
15 **A.** Doing the second set of simulations, comparing it to the
16 first set of simulations that we showed a couple minutes
17 earlier, it allowed me to reach the following conclusion: What
18 it suggests is that:
19 Number one, of course we know that the enacted plan
20 has a significant level of partisan malapportionment, but
21 specifically what we're able to conclude is these partisan
22 malapportionments, the malapportionment in the districting
23 plan, in the HB-263 plan, with very high statistical certainty,
24 were motivated by an effort to use malapportionments to achieve
25 a level of partisan bias, that 86 percent number, and that that

partisan bias would not have been possible had it not been for the use of population deviations.

It is a level of partisan bias that is not achievable when districting plans have to adhere to stricter population equality. Only when we loosened the level of population equality, only when we used larger population deviations in the districting plans was that extreme level of 86 percent Republican assignment into malapportioned districts, was that number possible. It was only possible when we used very loose population requirements.

Q. When you use the term population -- or when you use the term "malapportionment," are you referring to overall deviation?

A. I am referring to overall deviation. I didn't mean that as a legal judgment, because that's obviously outside of my expertise.

Q. And then for figures 1A and 1B, you used the 2010 U.S. Senate elections. Did you use any other elections to check the accuracy of the results that you got using the 2010 U.S. Senate election?

A. I did. I conducted all of these calculations that we've seen here today, I conducted them all over again, using the 2012 -- 2012 U.S. presidential election looking at the number of voters in each district that supported Barrack Obama versus Mitt Romney.

1 **Q.** What did -- using the 2012 election data as a check, did
2 that change your conclusions?
3 **A.** It did not. I found that the results were exactly the
4 same. I believe that it turned out to be instead of 86
5 percent, I believe it was 87 percent of Republican voters
6 measured by the 2012 results were assigned into an
7 underpopulated district.
8 I found very similar results regarding simulations,
9 and so looking at the 2012 elections, I reached the exact same
10 conclusion, that the malapportionments that the population
11 deviations exhibited in HB-263 were motivated by an effort to
12 achieve a level of partisan bias favoring Republican voters,
13 and that the level of bias would not have been achievable if
14 the plan had adhered to stricter levels of population equality.
15 **Q.** Beyond this connection between malapportionment or overall
16 deviations and the placement of Republican voters into
17 underpopulated districts, did you do any further analysis of
18 the malapportionment in the enacted plan?
19 **A.** I did. Using those two elections that we just talked
20 about, I also calculated for each plan, for each simulated plan
21 and for the enacted HB-263 plan, I simply calculated how many
22 districts are favoring Republicans, versus how many districts
23 lean Democrats. So I just counted up the number of districts
24 out of eight total districts that had more Republicans or more
25 Democrats.

1 **Q.** As you are talking about that, let me turn you -- turn
2 with me to figure 3A, which is Exhibit 139.
3 Explain to the Court why you chose this measure of
4 partisan effect.
5 **A.** We just wanted to look at what is the partisan composition
6 of the districts. We want to know how many districts are
7 Republican districts, how many are Democratic districts. So
8 using the two elections that we're analyzing here, I'm just
9 counting up how many districts have more Republican voters
10 versus how many districts have more Democratic voters. I just
11 wanted to know the composition, the partisan composition of
12 these districts.
13 **Q.** What did you notice with respect to that about the enacted
14 plan?
15 **A.** The enacted plan here again, is shown in a red star. What
16 I calculated with the enacted plan is, that looking at 2010
17 Senate elections, there are four districts in which the
18 Republican candidate defeated -- or gained more votes than the
19 Democratic candidate. So there are four districts in which the
20 Democrats had more than Republicans. So there are four
21 Republican and four Democratic districts. That's what I saw
22 with the enacted map.
23 **Q.** And then what set of simulations did you start with to
24 compare and analyze the --
25 **THE COURT:** Excuse me. Can I just be sure I

1 understood exactly what you said. You mean in the enacted plan
2 you looked at those districts, and in four of them Senator Burr
3 defeated Secretary Marshall, and in four, presumably the other
4 way around?
5 **THE WITNESS:** Yes, Your Honor. That's correct. So
6 there are four districts in which Burr beat Elaine Marshall.
7 **BY MS. RIGGS:**
8 **Q.** What set of simulations did you first use to compare to
9 the enacted plan?
10 **A.** Again, I started with the simulations in which the
11 computer was trying to draw as equally populated districts as
12 possible. These are simulations in which the maximum deviation
13 is under four percent. In other words, districts are within
14 plus or minus two percent of the ideal district population. So
15 these are districts that are as equally populated as possible.
16 **Q.** Just to clarify that, is that level of deviation
17 comparable to what is seen in the current plan?
18 **A.** It is not. The current plan -- you're talking about the
19 current five district plan?
20 **Q.** Yes.
21 **A.** Okay. The current plan, the one currently in place, not
22 the HB-263 plan, has deviations that are all also under a four
23 percent maximum deviation. I believe it is 3.87 percent. I
24 can't remember the exact number, but certainly the current plan
25 has districts that are all within plus or minus two percent for

a maximum deviation of a little bit under four percent.

Q. So what did you notice about the simulations drawn using a smaller overall deviation comparable to what we see in the current plan? What did you observe about the number of Republican districts created?

A. I analyzed the hundred simulations. Those are the hundred blue circles that we see in this figure. For each plan, each simulated plan, I analyzed the number of districts that favored the Republican Burr over the Democrat Elaine Marshall, and in all hundred of the simulations, I counted that either two or three districts favored the Republican over the Democrat. In other words, in all hundred of the simulations, we have an outcome where there are either going to be two, usually three, but sometimes as few as two Republican leaning districts.

Q. What conclusion did you draw looking at the results seen in the enacted plan compared to the results seen in the simulated plans?

A. Well, the simulated plans produced either two or three Republican districts. The enacted plan produces four Republican districts. So I'm able to conclude with extremely high statistical certainty, because four Republican districts is an outcome that never occurs in the simulations, I'm able to conclude with extremely high statistical certainty that the enacted plan achieves a level of partisan bias favoring Republicans that is not achievable under a simulation process

that follows stricter levels of population equality.

Q. Having made that conclusion, what did you then do next?

A. I then turned to looking at the same quantity for the simulations where I'm asking the computer to employ higher population deviations. So these are --

Q. As you are discussing that, I'll have you turn to figure 3B in your report, which is separately marked as 140. We will display that on the screen.

Tell the Court about the next step in your analysis.

A. So we are looking again at the simulations that use high populations, and these simulations are depicted in the 100 blue circles on the right side of this figure, figure 3B. Once again, I've depicted the enacted plan with a red star that you see in the upper right corner of figure 3B. So we're again going to compare the enacted plan against the simulations.

Now what is most striking about these simulations is, that when we employed higher levels of population deviation here in the figure 3B results, again, these are a hundred simulations, but when we employ a higher level of population deviations, the range of possible Republican districts created in these plans is a little bit wider.

Once again as before, most of the simulations create exactly three Republican districts, three districts in which Burr defeated Elaine Marshall, but the range is a little bit wider. Sometimes the simulations create as few as two

Republican districts. That's what you see in the lower right corner of this figure. Sometimes, a small number of times, they also achieve as many as four Republican districts. So the range is a little bit wider, again, because when you use a higher level of population deviations, you take more liberties in drawing the districts and, therefore, a wider range of partisan outcomes is possible when you employ these liberties in population apportionment.

Q. What did you then conclude about the enacted plan when you conducted these second set of simulations with the higher deviations?

A. I first concluded that the enacted plan's creation of four Republican districts, as I said earlier, is not possible under stricter levels of population equality. I then concluded that the enacted plan's use of a looser level of population equality, the enacted plan's use of significant population deviations was motivated by an effort to achieve a partisan bias in the partisan distribution of seats, the four Republican seats, and that this partisan bias would not have been possible under stricter, tighter levels of population equality.

In other words, you can achieve four Republican districts if you use larger population deviations in your plan. You cannot achieve four Republican districts if you adhere to stricter levels of population equality.

Therefore, I'm able to conclude with really high

statistical certainty that the use of larger population deviations was motivated by an effort to achieve a level of partisan bias favoring Republicans, that was not achievable under stricter levels of population equality.

Q. After coming to that conclusion like you did with the analysis on the number of Republican voters in an underpopulated district, did you then use any other election data to test the validity of your conclusion?

A. I looked again at the 2012 U.S. presidential election, and I did the same calculations. I calculated the number of Republican leaning districts which in this case would be the districts in which Mitt Romney gained more votes than Barrack Obama. I counted the districts again up using that election.

Q. Did your conclusion differ any using a different election?

A. They did not. They were exactly the same conclusions. I found that the calculations were substantially the same. I found that under tighter levels of population equality, a simulation, a nonpartisan, nonracially motivated simulation process would achieve either two or three, usually three districts in which Romney defeated Obama, Republican leaning districts.

I found that four never occurred, four Republican districts never occurred under tighter levels of population equality. I found that the enacted plan's achievement of four Romney favoring districts, Republican districts, was an outcome

that was only achievable when the simulation process used looser levels of population, used population deviations.

The enacted plan, of course as I found, has four Republican leaning districts using the 2012 presidential election. This was an outcome that was only achievable by the enacted plan's use of large population deviations.

Q. Dr. Chen, did you do any other analysis of the malapportionment in the enacted plan?

THE COURT: Are you moving to a new --

MS. RIGGS: Yes.

THE COURT: Let's take a break before we move into that. I'm going to try to look through his report over this recess, so let's take a 20 minute recess.

(Recess taken from 11:10 a.m. to 11:35 a.m.)

THE COURT: You can continue with your questions.

MS. RIGGS: Thank you, Your Honor.

BY MS. RIGGS:

Q. Dr. Chen, we talked about two different ways that you analyzed the malapportionment in the enacted plan, and how it was related to partisan bias you observed. Did you do any other analysis?

A. I did. I looked at the racial composition of the malapportionment as well. In other words, the racial bias in the malapportionment, specifically focusing on whether or not voters of one race were systematically placed into

underpopulated districts.

Q. As we talk about this analysis, if you'll turn with me to figure 4A in your report, separately marked as Exhibit 141. We'll display it on the screen.

How did you start this analysis about the racial composition of the malapportioned districts.

A. Again, I started by looking at the enacted HB-263 map, and this time I'm not going to use that 86 percent number that we've been talking about so often today. I'm going to instead look at what percentage of white voters, what percentage of white residents were placed into an underpopulated district, so I'm going to calculate that statistic with respect to the enacted map, as well as the simulated maps. So that's what we see in the right-hand corner, upper right-hand corner of figure 4A here. We have a red star again depicting the enacted map. That map, of course, has the maximum deviation of 8.2 percent, which is what we see.

THE COURT: 8.2 percent?

THE WITNESS: 8.2 percent maximum deviation in the enacted plan, and that's what we see on the horizontal access.

Along the vertical axis, we're going to have a different quantity presented in this figure. What we're looking at in the vertical axis here is the percentage of white residents that are placed into an underpopulated district.

Now for the enacted map, I calculated it using the

same steps that we went through, step-by-step at the outset today, where I went through each district, looked at whether it was an overpopulated or underpopulated district, and then counted up whether white residents were being placed into over versus underpopulated districts.

THE COURT: You are saying "residents."

THE WITNESS: Total population, Your Honor. This time I'm no longer looking at partisan voters, I'm looking at white residents.

THE COURT: Voting age population?

THE WITNESS: Not voting age, total population. I don't think it probably would have made a whole lot of difference whether I used voting age or total population. There is a little bit of difference, but the numbers would be largely the same, Your Honor.

So I looked at total population and looked at white residents, which is mostly just non-African-American non-Hispanic. So I counted up what percentage of these white residents, these white individuals were placed into an underpopulated district.

For the enacted plan, 79.1 percent of white residents were placed into an underpopulated district, meaning that approximately 20.9 percent were placed into an overpopulated district. Systematically, that tells us that white residents are generally being placed into underpopulated districts where

they have greater voting weight in elections, in the City Council elections.

So that enacted plan is plotted here in this figure, in figure 4A, and you can see that red star in the upper right corner where it is marked with 79, it is depicted along the Y axis as having 79.1 percent white residents assigned to an underpopulated district.

BY MS. RIGGS:

Q. And then for this analysis, what set of simulations were you using to plot on figure 4A?

A. In figure 4A, I started just by looking at the simulations with low population deviations, population deviations of two -- of under four percent.

Q. And what characteristics did you observe about the percentage of white residents in underpopulated districts using these low deviation simulations?

A. I calculated that statistic for every one of these hundred simulations, and I found that in general, under the computer simulated race neutral, partisan neutral drawing process, in general about 50 percent, but the number ranges from about 35 to as much as 65, occasionally a little over 70 percent, but in general, on average of 50 percent of white residents were placed into an underpopulated district. The mean is about 50 percent, in other words.

As I said, the number does deviate a little bit from

that and it sometimes goes to the mid 30's, sometimes as high as the upper 60's.

Q. What did you observe to be the relationship between the percentage of white residents placed into an underpopulated district in the enacted plan as compared to in the simulation?

A. Well, in the enacted plan, that range is from between 30 to 70 percent -- sorry, I'm going to start over again.

In the simulations that we're looking at in figure 4A, the hundred simulations, and in those 100 simulations, the percentage of white residents placed into an underpopulated district ranges from 30 to 70 percent.

In the enacted plan, that number goes all the way up to 79.1 percent. So the enacted plan is producing a racial malapportionment of white voters into underpopulated districts at a level that is never achieved by the simulations, when the simulations adhere to low population deviations.

In other words, I am able to conclude with extremely high statistical confidence that this extreme racial malapportionment of white voters into underpopulated districts could not have been the result of a race blind, partisan blind districting process following traditional districting criteria.

Q. After reaching that conclusion, what next step in the analysis did you perform?

A. I then wanted to ask by going back to the second set of simulations with high population deviations, whether or not the

use of high population deviations might have possibly enabled the legislature to achieve this high level of racial bias in the apportioning of voters into over and underpopulated districts.

Q. If you'll turn with me to figure 4B in your report, which is separately marked as Exhibit 142. Please tell the Court what you found when you used the higher deviation simulations.

A. This figure is set up exactly as the previous one, except this time we're going to look at the simulations in which the maximum deviation goes from eight to 10 percent. Same set of simulations that I had shown earlier today using the same process.

So this time we're going to compare the enacted plan to 100 simulations with intentionally high population deviations. So now I'm going to describe those hundred simulations. They are depicted in blue circles on this figure that you can see on the right side of this figure. Those blue circles are telling us that when a computer is drawing simulations and intentionally allowing for these large population deviations of eight to 10 percent, the percentage of white voters -- I'm sorry, the percentage of white residents placed into an underpopulated district ranges much more widely; in other words, a lot more racial bias is possible in the possible range of outcomes under such a process.

Specifically, the simulations go from as low as 8.5

1 percent, to as high as 83.5 percent, in terms of the percentage
2 of white people placed into an underpopulated district.
3 Now the enacted plan, as I said earlier, has exactly
4 79.1 percent of white residents placed into an underpopulated
5 district. That number, the enacted plan's 79.1 percent is
6 actually within the range of the simulated outcomes.
7 What this tells us is, that if you employed large
8 population deviations in districting, then it is occasionally
9 possible, not common, but it is statistically very much
10 possible to achieve such an extreme outcome of placing 79
11 percent of white residents into an underpopulated district but,
12 again, this was only possible in the second set of simulations
13 where we employed very large population deviations.
14 **Q.** So, Dr. Chen, comparing the simulation -- comparing figure
15 4A to figure 4B, what did running those two sets of simulations
16 with the different deviations, what did it allow you to
17 conclude about the relationship between malapportionment and
18 racial bias?
19 **A.** Together when we look at figure 4A and 4B, what we just
20 looked at, what that allows me to conclude is -- first of all,
21 we know that the enacted plan achieved 79 percent of white
22 residents placed into an underpopulated district, and that this
23 racial level of malapportionment, this racial skew in the
24 malapportionment of the districts, was enabled by the enacted
25 plan's use of large population deviations.

It is a racial skew that was not achievable when we adhered to stricter standards of population equality, but the use of large population deviations made possible this racial skew in the assignment of white voters systematically into underpopulated, rather than overpopulated districts.

Q. Dr. Chen, through the past three analyses that we've just talked about, you used a hundred simulations each for the low deviation range and the high deviation range. My question, is:

How do you know that a hundred simulations is enough to ensure that you can draw reliable conclusions?

A. When we conduct statistical analysis -- I'll just explain some of the statistical detail and then summarize what I can conclude from it.

When we do statistical analysis, we do what is called power analysis, and we analyze a confidence interval, and that is basically just a very fancy technical way of saying, how much information, how certain can we be of our conclusions when we have a hundred simulations versus 10 simulations versus 50 simulations. When we do this sort of analysis, we want to look at the entire distribution, not just the range, not just the extreme outcomes, but the entire distribution. We have various fancy statistics that we use to analyze those.

The short of it, the most important part is, that taking into account how many and what the distribution looks like, allows us to calculate various statistics that tell us

1 how constant are we in our conclusions.
2 So when you do the math and you get the results and
3 you look at those distributions and you calculate these various
4 statistics, we're able to conclude a lot of certainty with
5 actually just about 10 or 15 simulations, and going to a
6 hundred simulations is a way of allowing us to get to extreme
7 levels of statistical certainty. We're actually able to
8 achieve quite a bit of statistical certainty just with about 10
9 simulations alone.
10 **Q.** Dr. Chen, I now want to turn to the second question.
11 **THE COURT:** Before you do that, can I ask some
12 questions about this underpopulation? So you didn't
13 look -- when you showed me that very first demonstrative
14 exhibit, which I think might have been 253 -- is it possible
15 for somebody to put that up so I can see if that's the right
16 one?
17 So it shows that District 2 under House Bill 263 is
18 underpopulated, but it has -- it is heavily skewed for
19 Democratic voters in that 2010 election that you used. So that
20 seems to cut against your conclusion. So to the extent it
21 doesn't, can you explain why it doesn't to me?
22 The same thing about five and eight. Five and eight
23 are underpopulated, and those are two that you say skew --
24 appear to be more Republican, but they are just really not very
25 much underpopulated. So can you explain to me how the

specifics interact with your larger statistical analysis?

THE WITNESS: You are absolutely right, Your Honor, and that's why we don't draw any conclusions from any individual districts. So what we have to do is aggregate all the evidence together and look at whether or not those small pieces, those small districts aggregate to a systematic bias.

So I draw absolutely no conclusion from just looking at one district and whether it is a malapportioned district, and whether it is Republican leaning or Democratic leaning district.

What matters here is not just systematically how many districts were underpopulated and how many, but by how much they were underpopulated. Part of what makes this statistic notable is, that they are underpopulated to a more significant degree, meaning that the partisan bias and the malapportionment at 86 percent statistic, ends up looking more extreme as a result of those malapportionments.

You are absolutely right, Your Honor, that District 2, which is underpopulated, is actually a Democratic leaning district. So we don't draw anything from that individual district alone. We look at all of the underpopulated districts, aggregate all of the voters together, and see whether the evidence in the aggregate supports whether or not -- or tells us whether or not there is a partisan bias.

So that's why we look at that 86 percent number in

the aggregate, because what we are doing is, adding up voters across all of these underpopulated districts.

Another way of putting it, Your Honor, is that if the underpopulation is occurring at very small levels, in other words, the districts don't deviate from the ideal population by very much, and if the deviations occur in a partisan random manner, then in general, about 50 percent of the Republican voters will be assigned to an underpopulated district, and about 50 percent will be assigned into an overpopulated district, just by random changes. That's what happens in the computer simulations.

So the important thing for us to look at is not an individual district, but instead the plan as a whole, and compare that against the distribution of all of the hundred simulations.

THE COURT: Okay.

BY MS. RIGGS:

Q. All right. There was a second piece, a second question that you were asked to examine for this report. Can you restate what the second question you were asked to examine was?

A. I was asked to examine the eight district plan and determine whether I could determine if there were any racial motivations for the drawing of any of the individual districts.

Q. Did you start out looking at any district in particular?

A. No, I did not. I analyzed each one. I analyzed all eight

of them individually. This was an individual district level analysis, and so I had to necessarily pay equal attention to all eight of the districts.

Q. Okay. So turn with me to figure five in your report, which is separately marked as Exhibit 143.

Explain to the Court how -- what you did to look at the racial composition of each of the districts.

A. What this figure does is, I'm going to depict on this figure the racial composition, specifically the percentage of each district that is African-American. The racial composition of every district in every districting plan, including the enacted plan, so let's just start with the enacted plan.

This figure has eight stars, eight red stars corresponding to the eight districts in the enacted HB-263 plan. For these eight districts, I calculated the African-American share of the voting age population of each of the eight districts, and that's what I depicted in the red stars plotted along the horizontal axis. The horizontal axis, you can see it ranges from 10 to 90 percent there. It tells us what is the African-American share of the voting age population in each of the enacted districts. You can see at the very top, that top row is the most African-American district. It is approximately 70 percent African-American.

Q. What is the purpose of ranking the districts from most African-American to least African-American?

A. We want to rank them so I can do a direct comparison, a direct apple-to-apple comparison here, of comparing the enacted plan's most African-American district to the most African-American district in each of the 100 simulations. And then I want to look at the second most African-American district in the enacted plan, which is District 4, and I want to compare that against the second most African-American district in each of the hundred simulations again, and so on, and do that for all eight of the enacted districts.

What it allows us to do is a very meticulous, a very careful direct comparison of the African-American share of each district's population in a way that controls for the unique demographics, geography, demographic characteristics of Greensboro and its various neighborhoods and how race is spread out geographically.

Q. Let's start at the top row, the most African-American district in each plan. Explain to the Court what we see represented in this figure in the top row.

A. So as I said, District 1, it has an African-American share of the voting age population of approximately 70 percent. Next I want to compare that number, 70 percent, to the African-American share of the most African-American districts in each of the 100 simulated plans. The simulated plans are depicted in that first row with 100 blue circles, just like I've done in previous figures.

So when we look at the blue figures, the blue circles, we see that the most African-American district in each one of these plans, has an African-American share of the population of approximately 66, to as much as about 84, 83 percent. So that's a reasonably wide range.

We can see that District 1 from the enacted plan is certainly within that range. So what that tells us is, that District Number 1 is really -- even though 70 -- even though 70 percent is certainly a large African-American share, this is not an extreme statistical outlier. In every single plan there is going to be one district that is about as racially concentrated as District 1.

In other words, I'm concluding that there is nothing statistically outlying in terms of the racial composition of District 1. It does not appear to have been overtly drawn for racial purposes. So that's what I concluded about District 1.

Q. Did you then do that same analysis for each district?

A. I did. I went down the row, down these eight rows and then I analyzed the second most African-American district in each plan, including the enacted plan, and I did exactly that same comparison that we just did, and I'm comparing that red star, that enacted plan, which is District 4, and I'm comparing it to the hundred blue circles in the second row.

So here is what we see from the second row of this figure. We can see that the African-American share of District

4 is a little bit lower. It is a little bit -- it might be a little bit under 70 percent, but that number is completely within the simulated range, completely within the range of the blue circles here, those hundred blue circles in that second row. You can see that that second row produces districts in the simulations where the second most African-American district in each of the simulated plans ranges from about 52 percent to as much as about 73 percent African-American. That's a pretty wide range.

The blue and the red star, District Number 4 in the enacted plan, is well within that range. It is within the upper range, but it is within the range, and that tells us, again, that there is nothing amiss here. There is nothing statistically outlying about District 4's racial composition.

Q. So after going through each of the eight districts and doing this analysis, were there any districts where the racial composition of the district was a statistical outlier?

A. There was. Only one, but there was. So I found that the third row that we see in this figure here, again, third row means that what we're looking at here in the third row is the third most African-American district in each districting plan, including in the enacted plan.

So let's just start with the enacted plan here in the third road. That red star on the third row, third row from the top, it tells us that the enacted plan has a district, District

Number 2, it is the third most African-American district, and it is about 61 percent African-American share of the voting age population. So about 61 percent. A little over 61 percent of the voting age population is African-American.

Now let's look at the simulations, the blue circles on this third row. What we see in the simulations is, that the third most African-American districts in each of the 100 simulations, is a district that has an African-American voting age population ranging from about 50 to about 58.9 percent African-American share of the voting age population. Fifty to 58.9 percent. Again, as I said, the enacted plan, District Number 2, it is 61, a little bit over 61 percent African-American share of the VAP.

So what are we able to conclude from that? Nothing with extreme certainty without any further analysis, but all we're able to see is, that it is a racial outlier.

Now, we don't quite know yet, because we haven't looked at the partisan composition of these districts, what exactly caused District Number 2 to be a statistical outlier in terms of race. The simulations say that such a district should be about 50 to 58.9 percent African-American, but in reality, District Number 2 in the enacted plan is 61 percent, a little bit over 61 percent African-American share.

So we need to do a little bit of further investigation into the partisanship of the district to truly

1 understand why was this district is drawn this way. In other
2 words, I want to answer whether or not a possible partisan
3 motivation might have been behind the drawing of District
4 Number 2.
5 **Q.** Dr. Chen, as you talk about that next step, if you'll turn
6 with me to figure six in Exhibit 144. Before you explain to
7 the Court what next analysis you did, can you first explain why
8 you need to question if it is partisan or race motivated, the
9 racial composition.
10 **A.** Well, I want to study this very carefully, and
11 specifically what I want to do is, to give the legislature the
12 benefit of the doubt, I want to see if there is a possible
13 partisan motivation, rather than a racial motivation for the
14 district being drawn in the way it was.
15 I don't want to be very cavalier in jumping to any
16 conclusions about racial intent here, so I want to look for
17 another possible motivation, possibly regarding partisanship,
18 and see if that might explain why the legislature might have
19 wanted to draw District 2 in the way that it does.
20 So the way I'm going to do this here in figure six
21 is, I'm going to specifically try as hard as I can to help the
22 legislature by trying to see if District Number 2 could have
23 been motivated by an effort to create a district with the
24 partisanship of District 2.
25 **Q.** How did you assess the partisanship of District 2? What

metric did you use?

A. As before, I'm looking at the Republican vote share from the 2010 U.S. Senate election. District Number 2 was a district in which a little over 22 percent, I think it is something like 22.3 percent of voters supported the Republican candidate, so obviously it was a heavy Elaine Marshall supporting district. 22.3 percent supported Burr. It is obviously a very Democratic leaning district.

What I did here in this figure is to say, let's suppose that the district had been drawn entirely for partisan purposes. Let's give the legislature the benefit of the doubt and suppose that they were not trying to draw a racially motivated district. Let's suppose instead they were just trying to achieve a 22.3 Republican district, nothing more than that, no racial intent at all. What would have been the racial composition of such a district, had it been motivated as a pure Republican gerrymander. If it had purely been motivated by the desire to achieve a 22.3 percent Republican district, what would the racial composition of that district have looked liked.

Q. Is another way to think of that -- you used the 22 percent Republican vote share. Is another way to look at it whether this district was packed with Democrats?

A. Yes. That is another way of thinking about it. I'm trying to give the legislature the benefit of the doubt and

say, I really take racial -- any conclusions about racial intent very, very carefully here. I don't want to jump to any conclusions like that, so let's give the legislature the benefit of the doubt and suppose they had just been trying to pack Democrats into that district.

Q. How did you do that? How did you find some data to give the legislature the benefit of the doubt?

A. I went back to those simulations that we just looked at in the previous figure, the same 100 simulated districts that we saw in that third row, and I said, okay, I'm going to look at all of these districts, and I'm specifically going to pick out and only look at districts that achieved something very close to a 22.3 percent Republican vote share. In other words, districts that achieved the same partisanship as we actually see in enacted District Number 2.

The reason we're doing that is, again, we're trying to give the legislature the benefit of the doubt. We're trying to construct as much evidence for their story, for a possible story that the district was not motivated by race, but instead motivated by a desire to achieve a particular partisan composition of District 2.

Q. How many districts out of the 100 simulated districts achieved that same partisan effect seen in the enacted District 2?

A. About 25 simulations. So there are 25 simulations I found

1 out of the 100, where the district is very, very close to the
2 22.3 percent Republican vote share achieved in the enacted plan
3 District Number 2. Twenty-five simulations, in other words,
4 that were within about two percent, two percentage points of
5 the same partisanship as District Number 2, so I'm going to
6 zoom in. I'm going to focus --
7 **THE COURT:** Two percent either way?
8 **THE WITNESS:** Yes. Two percent either way, so plus
9 or minus two percent.
10 So I'm looking at districts in the simulated plans
11 that achieved very close to the same partisanship as enacted
12 plan's District Number 2, and the reason I'm doing that, again,
13 is to say, let's suppose that the legislature had entirely just
14 been motivated to draw a partisan district, a partisan
15 gerrymander or partisan motivated district. We're going to
16 ask, what would the racial composition of such a district have
17 looked like, if it had just been motivated by partisanship and
18 not by race.
19 **BY MS. RIGGS:**
20 **Q.** What did you see in this figure -- explain to the Court
21 where the enacted District 2 fell with respect to the racial
22 composition you saw in the 25 simulated districts that had a
23 similar partisan performance.
24 **A.** In figure six here, we're just going to look at those 25
25 simulations, and that's what I zoomed in on here, what you can

see between the two dashed lines in the lower half of figure six.

THE COURT: The circles, not the triangles?

THE WITNESS: Correct. The circles and not the triangles, Your Honor.

We're going to look at those 25 simulations here and the circles are located between those two dashed lines. That's the range where we're looking at districts with very similarly partisanship to enacted plan District Number 2.

Again, the question we're asking here is the following: Suppose hypothetically, that the legislature had purely been motivated by partisanship in the drawing of District 2, not by anything else; not race, not packing together voters of a particular race, what should have been the racial composition of a district drawn under those conditions? What should have been the hypothetical racial composition of a district that is just motivated by the legislature's hypothetical desire to draw a District 2 with a 22.3 percent Republican vote share.

What those blue circles on this figure tells us is, if the legislature had purely been motivated by partisan considerations to draw a 22.3 percent Republican district or something very similar to that, then such a district would have entailed drawing a district with a racial composition of about 50 to 58.9 percent African-American share of the voting age

population, 50 to 58.9 percent of African-American share. In other words, that is a normal range if the legislature, if the map drawer had just been motivated by partisan considerations alone.

So now we're going to look at the enacted District Number 2, the red star. We of course know that it had a Republican vote share for about 22.3 percent, that's why you see it right there on the figure. What was its African-American composition? It was a little bit over 61 percent. Little over 61 percent of the voting age population in District 2 is African-American.

So again, the simulated range was about 50 to 58.9 percent African-American share. The enacted District 2 had an African-American share of a little over 61 percent.

BY MS. RIGGS:

Q. Dr. Chen, what does the fact that the enacted plan's black voting age population is just a little over two percent higher than what is seen in the range in the simulation, what does that mean?

A. What it tells us is, that the drawing of the boundaries of District 2 cannot be explained by partisanship alone. It is a racial outlier and it could not have been drawn this way without racial intent.

So we're able to conclude with very high statistical certainty, because we've eliminated partisanship as the driving

force, as the sole driving force behind the drawing of District 2, we're able to conclude with extremely high statistical certainty, that the drawing of District 2 was motivated by the map drawer's desire to pack African-American voters into District 2, at levels higher than could have been achieved if either of the simulations had been race blind or had been motivated purely by partisanship.

In other words, what we've just done is, we've considered as much as possible a potential partisan motivation for the drawing of District 2. We found that the evidence didn't support that, and thus we're able to conclude with very high statistical certainty that District Number 2 was motivated by a desire to pack African-American voters in at a statistically high level that would not have otherwise been achievable without racial intent.

Q. Does the fact that the black voting age population in enacted District 2 only exceeds the range seen in the simulated plans by a little over two percent, does that effect the level of confidence that you have that this was motivated by race, not partisanship?

A. We can't infer anything from that two percent gap by itself. What we have to do is look at the entire distribution, and you can see that the mean of that entire distribution, the average of that entire distribution is certainly not at 58.9 percent. It is actually between about 54 to 55 percent. So

the gap is actually quite a bit higher.

Again, what we do is a lot of fancy statistical analysis where we get into issues of statistical power and constructing what in technical terms we call a constant interval, using, again, what we technically call a key test. That's not really important here. The important point is, that we look at this entire range, and after we analyze that entire range, we're able to conclude with extremely high statistical certainty that the enacted plan's District 2 has a racial composition that could not have been achieved by a race neutral map drawer.

Q. Dr. Chen, just one last topic here. How does your conclusion in the first part of your analysis relating to malapportionment, how is your conclusion that partisanship drove the deviations in the challenged plan, consistent with your conclusion that race and not partisanship drove the construction of the District 2?

A. They are completely consistent with each other. The question that I was asking in the first part of my analysis was, whether I could determine the factors that motivated the use of malapportionment -- of population deviations, rather, across the entire plan. I was analyzing the entire plan as a whole and that's why I had said a minute ago, that I was analyzing not just an individual district's deviation, but instead the deviation of the plan as a whole. So that first

question was just looking at the plan as a whole and specifically, it was focused on the motivations for population deviations in that plan, which is a very specific feature of the entire plan.

Now in the second analysis, the second part which we just talked about regarding race, the question that I was asking was quite a bit from a different angle. It was specifically looking at individual districts, and I was asking whether or not I could discern that there was any racial intent in the drawing of the boundaries of individual districts. That is a characteristic of individual districts, not of the plan as a whole, and is specifically a characteristic of the geographic boundaries as a relates to race, and so that's why that is a completely separate question.

So it is very much possible, and in fact I found statistically very strong evidence on both questions for a plan to both exhibit partisan bias malapportionment, which we talked about earlier, as well as one district having been drawn predominantly on the basis of a desire to pack African-American voters. It is just a drawing of that one district, so that's why those two conclusions are completely consistent with one another.

MS. RIGGS: I have no further questions for the witness, unless Your Honor does.

THE COURT: Does the City have questions?

MR. STARRETT: No, Your Honor.

THE COURT: Does the Board?

MR. PAYNE: No, Your Honor.

THE COURT: Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: That's your last witness?

MS. RIGGS: It is, Your Honor. If it pleases the Court, I would like to move the admission of our exhibits now.

THE COURT: Can you just tell me group exhibits and what are those numbers?

MS. RIGGS: We'll walk-through the exhibit list.

THE COURT: All right. Go ahead. Can I ask you, in your closing argument are you going to be referring to exhibits on the screen?

MS. RIGGS: Yes. We'll pull up a few exhibits.

THE COURT: While you all are getting organized, let me speak to the clerk for a moment.

Go ahead.

MS. SEAWELL: Thank you, Your Honor. If it's agreeable with the Court, I'll break them into small batches and move them in that way.

THE COURT: That would be great.

MS. SEAWELL: Exhibits 1 through 6 are the redistricting bills.

THE COURT: If anybody has any objections, when she

pauses like that, just speak, otherwise I'll assume no objections.

They'll be admitted.

MS. SEAWELL: Exhibit 7 and 8 are City documents about the current districts.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibits 9 through 11 are timelines of the legislative process.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibits 12 through 36 are legislative materials and transcripts.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibit 37 is a compilation of local acts effecting local government.

THE COURT: Is that similar to what you all submitted at the motion for judgment on the pleading converted to summary judgment?

MS. SEAWELL: Yes, Your Honor, that is exactly what we submitted.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibit 38 is blank. Would you like me to read the blank ones or skip them?

THE COURT: Just skip them.

MS. SEAWELL: Exhibit 39 through 48 are City documents pertaining to the redistricting plan.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibit 50 is an academic article on municipal redistricting.

THE COURT: That will be admitted.

MS. SEAWELL: Exhibits 51 through 77 are campaign finance reports for City Council members.

THE COURT: They will be admitted.

MS. SEAWELL: In this next range there are a number of blank exhibits, so I'll just read the numbers that exist.

Exhibits 78, 80 through 81, 83 through 84, 86 through 87, 89 through 90, 92 94, 96, 98, 100 --

THE CLERK: Can you slow down.

THE COURT: Just slow down a little bit for the clerk.

MS. SEAWELL: 89 through 90, 92, 94, 96, 98, 100, 102, 104 are Greensboro election results and candidate information.

THE COURT: Okay. They'll be admitted.

MS. SEAWELL: Exhibits 107 and 108 are voter registration data.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibits 115 through 117, 119 through 121, and 125 through 126 are demographic information on Greensboro.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibits 127 through 131 are documents related to annexation in Greensboro.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibit 132 is precinct maps for Guilford County.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibits 133 through 164 are expert reports and associated appendices.

THE COURT: Expert reports beyond the two experts I've heard from?

MS. SEAWELL: No, Your Honor. For the two experts who have testified.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibits 165 through 171 are correspondence from legislators and legislative staff.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibits 172 and 173 are emails from citizens groups about the bill.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibits 174 through 199 are emails from City officials about the bill.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibits 200 through 203 are newspaper articles about the bill.

THE COURT: Can I ask you about these emails and

newspaper articles. You're not necessarily offering them for the truth of the information in there, but to show that the emails were sent or --

MS. SEAWELL: The emails --

THE COURT: I haven't looked at them, so I don't know what they say.

MS. SEAWELL: We're moving admission of a number of emails from legislators and legislative staff. Those are the only evidence we've been able to get from those legislators. For others, we would move for the fact that they were sent.

THE COURT: So like the emails from City officials, it is to show that, I assume, the City officials were opposing the bill.

MS. SEAWELL: Yes, Your Honor.

THE COURT: But as to any facts asserted in there, that would normally be hearsay. I'm just trying to figure out -- I don't really know what is in there and, you know, newspaper articles, with all due respect to the media, usually they don't -- if we don't have sworn testimony from a witness with personal knowledge we don't let it come in for the truth, unless there is some hearsay exception that applies. So I just am trying to get the purpose of the newspaper articles.

MS. RIGGS: First let me address with respect to the emails with City Council officials, some of them testified live about those very emails. With respect to those emails, I would

put them in a separate category.

With the respect to the others, I think we're moving their admission for the fact that they were sent and the fact that they conveyed positions that the City Council had.

With respect to the newspapers, we viewed them as corroborating support for some of our live witness testimony. So they don't need to -- I think when Your Honor looks at them and reviews them, you won't need to consider them for the truth of the matter asserted, but may consider them as corroborating evidence to some of the live witness testimony you heard.

THE COURT: All right. Well, I'll admit them. I'll take a look as to what they say and what they are offered for and whether they are material.

Go ahead.

MS. SEAWELL: Exhibit 204 is a presentation on the structure of City government in Greensboro.

THE COURT: Presentation?

MS. SEAWELL: By the city manager, Your Honor.

THE COURT: It will be admitted.

MS. SEAWELL: Exhibits 205 and 206 are local acts affecting the form of local governments.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibits 207 and 208, are legislative committee materials.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibit 209 is a map of the current council districts.

THE COURT: Is it the same as that map we've been looking at?

MS. SEAWELL: No, Your Honor. But they will be on the list.

THE COURT: Okay.

MS. SEAWELL: Exhibits 210 and 211 are newspaper articles about the redistricting plan.

THE COURT: They will be admitted.

MS. SEAWELL: Exhibits 212 and 213 are documents related to the City's 2011 redistricting process.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibits 214 and 215 are deposition designations that we read in yesterday. They are also at ECF number 128.

THE COURT: They'll be admitted.

MS. SEAWELL: Exhibit 216 is a letter from the North Carolina Department of Justice regarding intervention in this case. That's also is at ECF number 3-12.

THE COURT: It will be admitted.

MS. SEAWELL: Exhibit 217 is a compilation of constituent emails to legislators.

THE COURT: It will be admitted.

MS. SEAWELL: Exhibit 218 is legislative transcript.

THE COURT: It will be admitted.

MS. SEAWELL: Exhibit 219 is the League of Women Voters advertisement in the News and Record.

THE COURT: It will be admitted.

MS. SEAWELL: Exhibits 220 and 221 are two maps of current and proposed districts that have been displayed in the courtroom.

THE COURT: Of the big map?

MS. SEAWELL: Yes, Your Honor.

THE COURT: It will be admitted.

MS. SEAWELL: Exhibits 222 through 224 are documents related to the City's 2011 redistricting process.

THE COURT: That will be admitted.

MS. SEAWELL: Exhibit 225 is legislative maps. These were late produced maps from the General Assembly, and it is a compilation of those maps, alternative maps for the -- maps related to this redistricting process, Your Honor.

THE COURT: Can you explain to me in more detail where these -- wait. Maybe it's -- you got an affidavit in there?

MS. SEAWELL: Yes, Your Honor.

THE COURT: Saying exactly where it came from?

MS. SEAWELL: Yes, Your Honor. Your Honor, these were produced in response to Judge Webster's last order.

THE COURT: Right. Okay. So it's not just the maps,

it is also the declaration that says who it was produced by and the identifying information provided by the person or entity producing it.

MS. SEAWELL: Yes, Your Honor.

Exhibit 225 is two legislative maps along with a declaration about the origin of those maps.

THE COURT: That will be admitted.

MS. SEAWELL: Exhibits 226 through 243 are correspondence with legislators and legislative staff.

THE COURT: It will be admitted.

MS. SEAWELL: Exhibit 244 is a demonstrative timeline of public meetings in Greensboro.

THE COURT: It will be admitted.

MS. SEAWELL: Exhibit 245 is the City Council election demonstrative and we'll be moving admission of page one only.

If Ms. Riggs may explain.

MS. RIGGS: Your Honor, this is the demonstrative that caused some problems this morning. We've been able to go back and check and confirm that the district court elections are conducted countywide. What you said was of course correct with respect to superior court elections. So three out of the four were correct, but we don't want to put into evidence something we know is not.

Our proposed solution would be in post-trial

1 briefing, it is something you can take judicial notice of and
2 we'll provide you with the statute that designates how district
3 court judges are --
4 **THE COURT:** So 245 is just page one?
5 **MS. RIGGS:** Just page one.
6 **THE COURT:** All right. That will be admitted.
7 **MS. SEAWELL:** Exhibits 246 through 249 are
8 demonstratives used with Tony Fairfax during his testimony.
9 **THE COURT:** They'll be admitted to complete the
10 record as demonstrative exhibits.
11 **MS. SEAWELL:** Exhibit 250 is the demonstrative of
12 Reedy Fork Ranch and Elementary used with Goldie Wells.
13 **THE COURT:** It will be admitted.
14 **MS. SEAWELL:** Exhibit 251 is the demonstrative of the
15 City Council campaign finance reports used with MariKay
16 Abuzuaiter during her testimony.
17 **THE COURT:** It will be admitted.
18 **MS. SEAWELL:** Exhibit 252 is a legislative email.
19 **THE COURT:** It will be admitted.
20 **MS. SEAWELL:** Exhibits 253 and 254 are demonstratives
21 used during Dr. Chen's testimony.
22 **THE COURT:** It will be admitted.
23 **MS. RIGGS:** Your Honor, if I can make one correction.
24 The three racial density maps that Tony Fairfax produced were
25 produced and used as substantive evidence, not demonstratives.

THE COURT: 246 through 249?

MS. RIGGS: They were mislabeled in the exhibit list. My apologies. 246 to 249.

THE COURT: These are ones you are offering substantively, not demonstratively?

MS. RIGGS: Yes.

THE COURT: I'll note that correction and admit them in the absence of objection.

MS. SEAWELL: Your Honor, that concludes the exhibits. We would also like to move admission of the Amended Joint Stipulations of Fact which are ECF number 126.

THE COURT: I'll take these into account and admit them as evidence in the case. I forgot to admit 200 through 203 as you were going through them, apparently. So those are admitted, too.

MS. SEAWELL: Thank you.

THE COURT: That's your evidence?

MS. SEAWELL: That's our evidence.

MS. RIGGS: Individual plaintiffs rest.

THE COURT: Is the City going to have anything? I know your one count is out of the case. I mean, was handled by dispositive motion.

MR. STARRETT: If the Court will allow us, Your Honor, the City will have a few moments of closing argument after the individual plaintiffs, but otherwise, the City rests.

THE COURT: What about the Board?

MR. PAYNE: Your Honor, the County Board of Elections, at the conclusion of the evidence, we would like to make a motion for directed verdict in favor of the defendants, or in the alternative, a motion for directed verdict with regard to defendants with respect to prayers for relief F, G and H.

The comments I would like to make in connection with that motion for directed verdict would be virtually identical to my closing argument. I can make them in lieu of or as my closing argument.

THE COURT: If they are the same, maybe -- if I were to deny the motion for directed verdict, would you have any evidence? Are you going to have any evidence?

MR. PAYNE: No.

THE COURT: It seems like maybe we can just consolidate it. Okay. So F, G and H, that's attorney's fees and costs and other relief as the Court deems just and appropriate.

MR. PAYNE: It is the damages, attorney's fees pursuant to 42 U.S.C. 1988. And tax the cost of this action against defendant, is H.

THE COURT: All right. In terms of the attorney's fees and costs, I would normally handle those if and when the plaintiffs' win on the merits.

MR. PAYNE: I understand. And this being an unusual case in almost every respect, I do believe that at least in my opinion, that it is ripe for discussion for a motion for directed verdict. I understand that there is -- that there are some uncertainties that may or may not occur down the road, but I do think at this point based upon the evidence that's been presented, that motion for directed verdict on those is appropriate.

THE COURT: Okay. I'm trying to think about the best way to deal with this logistically. We can come back -- what I would say is, come back at two and have closing arguments on the claims in the second amended complaint, claims two and three, the political -- the one person, one vote and the racial gerrymandering claim. Then we can certainly have discussion about the request for relief in terms of costs and attorney's fees.

You would like to be heard on that today, right, Mr. Payne?

MR. PAYNE: Yes, Your Honor.

THE COURT: Okay. I'll be glad to hear from you about that. And then I can hear from the plaintiffs on that as well, perhaps after closing arguments. That's how it seems to me to make the most sense. Certainly I appreciate your moving --

MR. PAYNE: Frankly, Your Honor, I'm not sure what

the ideal positioning of it would be, but that's acceptable to me.

THE COURT: I mean, I can defer ruling on your motion as -- do you want to be heard on your motion for directed verdict as to the one person, one vote and racial gerrymandering claims on the merits?

MR. PAYNE: Your Honor, the way I -- the reason I positioned it the way I did, I think I am in fact making two motions. One is for directed verdict. The other would be in the alternative directed verdict for just those issues. The arguments are, in my opinion, intertwined, so it would be best to make them all at one time.

THE COURT: In terms of -- I'm just going to let you make your closing arguments the way you want to make them and address whatever you want to, whatever arguments you want to make. I'll let you go back and forth for a while until you start repeating yourself, then I'll stop you.

I just want to give everybody a chance to be heard. So to the extent you are moving for directed verdict on claims two and three, one person, one vote and the racial gerrymandering claim, I'll deny that. I think the plaintiff put forward their evidence, but that's mostly so you can tell me you don't have any evidence to present, which is what you said. Right?

MR. PAYNE: That is correct.

THE COURT: You want to renew your motion at the close of all of the evidence?

MR. PAYNE: Yes, Ma'am.

THE COURT: I'll take that under advisement and let you make closing arguments on everything you want to be heard on. I would propose to do that at 2 o'clock. I would ask any closing arguments to -- you know, some evidence is more important than other evidence, and a lot of evidence about agreement with the decisions to move from a system that had some at-large representation to one that had only district representation, I think is less important to me. Perhaps that's not so, but if you can tell me why that evidence is important, but that's not directly at issue, as I understand it.

So you can tell me about that and then a lot of this evidence about committee objections to the redistricting plan, I mean, I don't sit as some sort of super election overseer here, so I don't really know why that is important or how it is important. So if you can talk to me about that in the closing arguments, because that seems to be -- you know, there is political winners and political losers, and I'm not judging that. So if I'm misunderstanding how important that is, if you can tell me what you would contend about that, okay.

What else do you want to talk about before we go to lunch?

Mr. Payne?

MR. PAYNE: Nothing.

THE COURT: Anything from either plaintiffs? No. All right. We'll come back at 2 o'clock for closing arguments.

(Luncheon recess was taken from 12:35 p.m. to 2:00 o'clock p.m.)

THE COURT: Okay. I'm ready to hear closing arguments and arguments on motions.

The plaintiff may proceed.

MS. RIGGS: Thank you, and may it please the Court. On behalf of my clients, we thank you for your careful consideration of all of our previous briefing and for allowing us to present evidence these last two days.

Your Honor, I'm confident that I have the answers to the questions you posed before the break in my closing statements, but the short answer is, that we do believe such evidence is relevant, and I will explain to you the weight of the -- the weight you should consider it to have and where it fits into the overall scheme. But I do want to assure you that we agree that this Court is not tasked with making policy judgments.

The North Carolina General Assembly has a lot of latitude to act when passing laws affecting municipalities in this state. The legislature is allowed to create bad public policy. It is allowed to pass laws, even redistricting plans

1 that no one likes or no one wants. What it is not allowed to
2 do is, pass laws, including redistricting plans, that violate
3 the State and Federal Constitutions. That's where the General
4 Assembly's leeway ends and where this Court must intervene.
5 We're not asking you to make these policy decisions,
6 we're simply asking you to apply the well-settled one person,
7 one vote law and racial gerrymandering law to the facts in
8 front of you.
9 The Equal Protection Clause -- the Supreme Court has
10 recognized that the Equal Protection Clause forbids
11 sophisticated, as well as simpleminded modes of discrimination.
12 Session law 2015-138 represents a very sophisticated mode of
13 discrimination, operating as if it had a free pass to enact any
14 redistricting plan. So long as the overall deviation was under
15 10 percent, the legislature with this challenged plan has
16 manipulated the district lines to overpopulate districts where
17 the legislature liked or -- I'm sorry, to underpopulate
18 districts where the legislature liked how voters voted, and do
19 the opposite in other cases. They manipulated district lines
20 to assign voters by the basis of race.
21 This is quite sophisticated discrimination for sure,
22 but racial and partisan discrimination is nonetheless
23 unconstitutional and the legislature isn't permitted to engage
24 in discrimination, just as long as it is not too blatant.
25 Greensboro was targeted for this partisan and racial

1 discrimination because of its politics and because of its
2 people. Greensboro is a Democratic-leaning progressive city
3 with changing demographics. The population over the last 15
4 years has exploded, increasing by over 20 percent from 2000 to
5 2010, and it is becoming more diverse every day with the
6 relative percentage of white population decreasing. In
7 particular, the Latino and Asian-American populations are
8 exploding.
9 As Mayor Vaughan described on the stand the other
10 day, Greensboro is a blue bubble in the middle of a red sea,
11 and the legislature came out of nowhere to pop that bubble.
12 In my closing, I would like to review the legal
13 framework, how all the evidence we just heard fits in that
14 framework, and review some of the evidence that has been
15 admitted, but witnesses didn't talk about.
16 We want to be clear on the relevance of different
17 pieces of testimony and how it fits into the puzzle. So the
18 legal standard for analyzing a one person, one vote is pretty
19 well-established. It's been in place since the 1960s. I want
20 to spend a minute tracing the history of that juris prudence,
21 because I think it will help the Court see better where all the
22 pieces fit.
23 After the Supreme Court decided that unevenly
24 populated districts did create an equal protection problem and
25 challenges to malapportioned plans were justiciable, a 10

1 percent rule developed, that is, if a challenged plan has an
2 overall deviation of over 10 percent, that would be prima
3 fascia evidence that the plan was unconstitutional. If a plan
4 had less than a 10 percent overall deviation, that plan wasn't
5 immune from challenge, but plaintiffs couldn't rely on that
6 overall deviation number alone to prove their Constitutional
7 case.
8 Specifically in *Roman v Sincock*, in 1964, the U.S.
9 Supreme Court said, "minor deviations while to be expected, are
10 only okay if they are free from any taint, arbitrariness or
11 discrimination."
12 In *Daily v Hunt* in 1996, the Fourth Circuit fully
13 followed that rule and further explained that: "A plaintiff
14 challenging a plan with a less than 10 percent overall
15 deviation, has to produce further evidence to show that the
16 apportionment plan has a taint of arbitrariness, discrimination
17 or bad faith."
18 Your Honor asked Dr. Chen the difference between
19 looking at the overall plan deviation and the district plan,
20 and juris prudence has been clear, it is overall deviation that
21 you are looking at to see whether or not there is a systemic
22 bias in a plan, and the reason is, you could have one district
23 that looked like it was highly overpopulated, but then a bunch
24 of districts that were only a little bit underpopulated, and
25 really you want to understand the number of voters affected and

1 the range, like how far it goes. So that's why the social
2 science inquiry and legal inquiry is on the overall deviation
3 range.
4 So fast-forward to 2004. Redistricting is changing.
5 Increasing technology is making it easier to use the map
6 drawing programs to become more sophisticated in the
7 discrimination.
8 In Georgia, plaintiffs challenged a state legislative
9 redistricting plan drawn by Democrats with an overall deviation
10 under 10 percent. Heard in front of a three judge panel in
11 Georgia, plaintiffs showed that the way that the districts were
12 differently populated overall, created a systemic bias, whereby
13 Democratic incumbents were in underpopulated districts, where
14 they might be more easily re-elected and Democratic voters put
15 into underpopulated, giving their vote more weight.
16 There was a lot of pairing and double-bunking of
17 Republican incumbents to certain areas of the state. The Court
18 saw that districts were overpopulated in areas where Republican
19 growth would justify more Republican representations.
20 Ultimately, the Democratic population in the state
21 was waning and so Democrats trying to hold on to power and keep
22 the same number of seats, couldn't use population deviations to
23 do that, so the three judge panel struck down the state
24 legislative redistricting plans with under 10 percent
25 deviation.

The Supreme Court summarily affirmed that decision, which of course is not binding precedent, but is a strong indicator that the district court on those facts got it right.

In 2016, the Supreme Court in *Harris v Arizona Redistricting Commission*, reaffirms *Larios*, reaffirms *Daily v Hunt*. This whole line of precedent that we've seen, and it articulated the standards in maybe an even more precise way than it has ever done before.

The *Harris* court says, "those attacking a State approved redistricting plan must show that it is more probable than not that deviation of less than 10 percent reflects the predominance of illegitimate reapportionment factors rather than legitimate ones."

You can see already this is a very different standard of review and burden of proof than rational basis review.

Now in *Harris*, the challengers didn't succeed. The district court and the Supreme Court recognized that the record showed that the deviations in the Arizona Redistricting plan being challenged were linked to and caused by the State's attempt to maintain the same number of minority districts that it had previously, in order to comply with Section V of the Voting Rights Act.

Right after the *Harris* decision came down. The Fourth Circuit decided *Raleigh-Wake Citizens Association*, or *RWCA*. In *RWCA* we have an example of where the *Harris* standard,

1 consistent with the *Larios* and the *Hunt* standard is being
2 applied to strike down a plan with less than 10 percent
3 deviation. So there we get to see how -- what kinds of
4 evidence satisfies that *Harris* standard and what the Fourth
5 Circuit said satisfied it were three things, in essence.
6 The first one was expert testimony linking the
7 deviations seen in the challenged plan to the predominance of
8 illegitimate redistricting criteria.
9 The second thing was that the challengers had ruled
10 out legitimate redistricting criteria as the cause for the
11 deviations.
12 The last thing that the court looked at, went on to
13 examine was, whether the apportionment process as a whole was
14 tainted by arbitrariness, and the way the Fourth Circuit did
15 that, in part, was seeing if the justifications offered for the
16 reapportionment plan as a whole were pretextual. So the
17 reason, ultimately, that questioning whether justifications
18 were relevant, is relevant to this analysis is, because a one
19 person, one vote case is ultimately about a question of intent.
20 What were the intent -- what was the intent behind the
21 deviations, overall deviations in the plan.
22 Just like in a racial gerrymandering case, you can
23 determine legislative intent when it comes to drawing district
24 lines through circumstantial expert testimony, just like
25 Dr. Chen's testimony in the case today. That kind of evidence

is more than sufficient. It could end the inquiry. But looking to whether the process as a whole is tainted by arbitrariness, helps confirm that the motivations driving the deviations were actually illegitimate.

So you can think of it related to an *Arlington Heights* type analysis, where looking at circumstantial evidence surrounding the enactment of the challenged legislation might help ascertain what the intent was behind the legislation.

We don't have to disapprove that every proffered -- we don't have to disapprove every proffered justification, or prove that every single one of them was pretextual, but if some of the justifications seem wholly pretextual and just mask the illegitimate motives, then the Court can be even more certain in its conclusion based on the circumstantial expert testimony, that the deviations were in fact motivated by improper goals.

Turning to then what evidence we have to establish that the overall deviation in the enacted plan violates the one person, one vote guarantee. To start off, of course, this is mid decade redistricting. The current plan, the legal plan that is in effect now, has an overall deviation of only 3.86 percent. The enacted plan more than doubles that to 8.24 percent deviation overall, just below the 10 percent mark that may be treated as a safe harbor, but it is not.

The most critical evidence that demonstrates that the

1 deviations in the challenged plan were the result of the
2 predominance of illegitimate criteria was Dr. Jowei Chen's
3 testimony. So Dr. Chen's analysis causally linked the larger
4 deviations in the enacted plan with three particular improper
5 redistricting goals, and that the deviations were what enabled
6 the legislature to achieve those goals.
7 First, unevenly populating the districts allowed the
8 legislature to place an overwhelming majority of Republican
9 voters in the City into an underpopulated district, and so
10 being in an underpopulated district of course gives Republican
11 voters unfair advantage, because it gives their votes more
12 weight. You can't accomplish this goal or produce this effect
13 if you strive for equal population.
14 Dr. Chen's simulations that had minimal deviations
15 never produced such a partisan skew. It was only when he
16 relaxed the equal population standards and allowed plans to be
17 drawn that got closer to 10 percent deviation, could he even
18 achieve that outcome.
19 Favoring Republican voters is not a legitimate
20 redistricting criteria that justifies departing from equal
21 population, but importantly, favoring any voters on any basis,
22 is not a legitimate reason for departing from equal population.
23 This goes to the very heart of the one person, one
24 vote claim. It doesn't matter who is in charge and who is the
25 target. Favoritism doesn't work when it comes to evenly

1 populating districts.
2 Dr. Chen's analysis also showed that unevenly
3 populating districts allowed legislature to create a plan where
4 Republican voters would control the outcome in four districts,
5 four of the eight districts. This was an outcome that was
6 impossible if they stuck to levels of overall deviation that we
7 see in the enacted plan. It was only by increasing the
8 deviation that this was possible, and Dr. Chen concluded with
9 an extremely high level of statistical certainty that it was
10 the desire to create Republican advantage to control four seats
11 that drove that deviation.
12 Finally, a third improper consideration that
13 explained the deviation, overall deviation was a desire to
14 advantage white voters by placing almost all of them into
15 underpopulated districts, thus advantaging them compared to the
16 voters of color. So giving white voters disproportionate
17 electoral control in Greensboro City elections, and black
18 voters noticed this. It wasn't a surprise. Reverend Johnson
19 knew right away what this plan was about.
20 Racial and partisan favoritism can't justify
21 departures from population equality. In his concurrence to the
22 summary affirmance in *Larios*, Justice Stevens noted that
23 because the Supreme Court had not yet agreed upon a standard
24 for judging partisan gerrymandering, that the one person, one
25 vote principle, in essence, remained the only clear limitation

on improper districting practices.

The only evidence we had presented in the last two days, also clearly established that no legitimate traditional redistricting criteria explained the overall deviation seen in the enacted map. The deviation in the enacted map wasn't to keep precincts whole, because the enacted plan split more precincts than the current plan, and the enacted plan split more precincts than Dr. Chen's simulations, which in fact had smaller deviations any way. So we didn't only get to 8.24 percent overall deviation to keep eight precincts whole -- to only split eight precincts, because we know it was possible to split fewer.

The deviations -- the overall deviation in the plan isn't there because the legislature was trying to protect incumbents, because the enacted plan pairs six out of the eight incumbents.

Mr. Fairfax explained that that is something that map drawers traditional avoid as much as humanly possible. And there were two maps considered during the conference committee during the legislative process for House Bill 263 that paired fewer incumbents. Still created eight single member districts, but paired fewer incumbents. So we know the deviations couldn't have been to protect incumbents, because the plan doesn't protect incumbents.

The deviations also -- the overall deviation in the

1 enacted plan wasn't created out of an attempt to draw compact
2 districts, because unlike the current districts, the enacted
3 districts are much more visually non-compact with bizarre
4 appendages and awkward splits.
5 Dr. Chen's analysis essentially held compactness
6 constant. He looked at the -- he said if the legislature was
7 striving to achieve the particular level of compactness seen in
8 the enacted plan, they could achieve that and have much lower
9 deviations, so that's not a reason for the overall deviation in
10 the plan.
11 The overall deviation in the plan wasn't a result of
12 trying to respect the cores of previous districts or to respect
13 communities of interest. You heard testimony from just about
14 every lay witness that these plans completely disregard
15 important communities of interest and will reek havoc on
16 voters.
17 Finally, the overall deviation in the plan wasn't to
18 comply with the Voting Rights Act, because the Voting Rights
19 Act doesn't compel the drawing of three packed majority black
20 districts in Greensboro.
21 I just walked you through what I think are the first
22 two pieces that the Fourth Circuit looked at in *RWCA*, and I
23 think these are the pieces that are most important.
24 Once you have satisfied yourself that we've proven
25 that the deviation, overall deviation is linked to improper

1 redistricting motivations and that no traditional redistricting
2 criteria caused the deviations, I think you can rule for us,
3 but because *Daily versus Hunt* and *Roman v Sincock* are still
4 good law, it is still relevant to inquire as to whether the
5 apportionment process as a whole was tainted by arbitrariness,
6 discrimination or bad faith.
7 So that is why we've spent so much time in the last
8 two days focusing on Senator Wade. Senator Berger said to
9 Senator Robinson, "this is Trudy's bill."
10 We heard evidence that Senator Wade appeared to have
11 been nursing some sort of grudge against Greensboro's City
12 Council relating to the landfill issue and that she wouldn't
13 convene a legislative delegation in Raleigh to talk about
14 Greensboro's legislative agenda to figure out who would move
15 some of that agenda into bills. And this was a departure from
16 previous practice, even when Republicans chaired the Guilford
17 County Delegation.
18 So this appreciation of that arbitrariness, sets the
19 stage for how we look at the redistricting process as a whole.
20 So let's turn to a traditional *Arlington Heights* factor and
21 look at the legislative process.
22 From every one, from the City Council members to the
23 legislators who did testify, the Court has heard this was a
24 very unusual legislative process. First of all, this is a
25 local bill. By general practice, by longstanding history,

local bills are supposedly to be non-controversial. They are supposed to be something that the jurisdiction wants, and because of the immense power invested in the General Assembly, it is easier to get that via a local bill enacted by the legislature. It is usually something that a jurisdiction takes to its delegation and says, help us out with this. It is also something where the members of the legislature as a whole, respect what the local delegation says and factors that into how they consider the local bill. That's not at all what we saw with Senate Bill 36 or House Bill 263.

It was also unusual that the House decided to kill Senate Bill 36, to convey that if it had a referendum it would pass through the House, and if it didn't, it was going die.

We also saw that the conference committee later convened to try and iron out differences between the House and the Senate on House Bill 263 was improperly convened -- improperly composed of members. There should have been a majority of the members -- of the House members on the conference committee -- should have been people who opposed House Bill 263, because that was what the vote was in the House, and that didn't happen.

We also saw via the transcripts from the floor debate that after the conference committee report came out, Representative Blust and Representative Hurly led a heated debate on the floor of the House, and this is in Exhibit 31.

It is the transcript for the House floor debate on July 2nd. Particularly, if you look at pages 13 to 14 and 19, it is clear that what the conference conferrees agreed upon in conference, wasn't what was reported out to the house. So that's deeply concerning.

Finally, we saw there was an unusual recess after the House voted to not adopt the conference committee report, that during that recess, the Republican caucus met and it was only after that meeting, that enough Republicans changed their vote for the bill to pass.

In the debate on the floor after that, there are references to bullying and threatening and we actually got -- if you'll turn to slide two -- email production from legislators that confirmed those allegations made on the House floor.

This is an email from John Faircloth to a constituent who was unhappy with how Representative Faircloth voted. And Representative Faircloth is explaining to the constituent, I won't be able to get my bills through the Senate if I didn't vote for this, and my vote wasn't going to make a difference. So this confirms the comments made on the floor that bullying and threatening was at play.

During the legislative process, we also saw that the legislature, or at the very least the conference committee rejected alternatives that would have mitigated the

1 discriminatory effect observed in the enacted plan.
2 If you'll turn to slide three. The first plan that
3 didn't go anywhere was the Hardister map. So this was another
4 map we received in production pursuant to our subpoenas.
5 Representative Hardister wasn't shy about telling folk he was
6 trying to work out a compromise. His interactions with Mayor
7 Vaughan and Representative Harrison were all about, we don't
8 need to pair as many incumbents, there can be a compromise
9 here, but that compromise was rejected.
10 If you'll turn to the next slide. We also found --
11 we received pursuant to our subpoena late production of yet
12 another alternative map and this one was labeled -- Senator
13 Rucho sent it to Representative Hardister.
14 We didn't have any statistics associated with it, but
15 we just looked at it, and we can see which precincts are kept
16 whole and which precincts are not. Each of the little dots on
17 the map are where incumbents live. And the email was sent from
18 Senator Rucho to representative Hardister right before the
19 conference committee met. So we know they are looking at where
20 incumbents live and we know that there are two maps that are
21 less discriminatory, but those are rejected.
22 These are the facts, the very extreme and unusual
23 facts surrounding the legislative process. It is true that
24 there is dicta in *Harris v Arizona Redistricting Commission*
25 that suggest that challenges to apportionment plans with a less

1 than 10 percent overall deviation may not succeed often, but
2 this is one of those situations that justify striking it down.
3 Not every local redistricting plan that's been passed in recent
4 years has been the subject of a lawsuit, even if it was a mid
5 decade redistricting plan.
6 So in our earlier brief to the Court we discussed
7 some other local redistricting plans earlier in that session
8 for Trinity, which actually ended up being in the same bill.
9 For Albemarle, these were local redistricting bills
10 that were never the subject of litigation because they
11 weren't -- they didn't have that same discriminatory effect and
12 they weren't marked by this highly abnormal legislative
13 process.
14 So turning then now to the justifications offered and
15 whether they were pretextual. To start with, I think it is
16 important to remember that Senator Wade was on City Council
17 when the City redistricted in 2011. In fact, that was a rare
18 two year period where Republicans actually controlled the City
19 Council. There were more registered Republicans on council
20 than registered Democrats.
21 During that process, Senator Wade, then Councilwoman
22 Wade, drew the map that was ultimately enacted, so she was
23 driving the process. Never once during that 2011 redistricting
24 process did she ever raise any of these purported
25 justifications that she listed out in 2015 as necessitating

1 this local bill.
2 So it is hard to credit the idea that all of these
3 justifications made in 2015 were real and actual and not
4 pretextual, when none of them existed in 2011.
5 We've discussed some of the justifications --
6 **THE COURT:** Can I ask you about that, because -- I
7 mean, there are two parts of it, and I alluded to this before
8 lunch, perhaps a little too indirectly. You've got two
9 decisions here -- well, at least two. But one of them is going
10 from the 5, 3, 1 system to eight districts. Almost all of the
11 reasons I heard evidence about that were put forth during the
12 discussion, had to do with that, but what I have before me is,
13 these eight districts and the way that these lines were drawn,
14 and so the only one that I heard that potentially related to
15 that was, this too many people -- too many council members
16 lived close to downtown. That's the shorthand.
17 I guess I am just struggling a little bit with these
18 justifications that you're talking about don't seem to
19 really -- with that one possible exception, don't seem to
20 really have anything to do with how the lines were drawn. I
21 guess there was a reference to possibly benefiting
22 African-Americans.
23 **MS. RIGGS:** Let me explain it this way. It is
24 absolutely true that none of the purported justifications
25 explained the deviations in the plan, that's true. So even if

1 these were rational legitimate justifications, they don't help
2 in the central question, which is, did illegitimate
3 deviations -- did illegitimate considerations cause the
4 deviations, or was it legitimate considerations?
5 So if all of the purported justification -- if none
6 of them in any way effected the deviations between the
7 districts, which they didn't, if you want to draw eight single
8 member districts, you can draw eight single member districts,
9 and draw them evenly populated. I think that's where you start
10 is, that it doesn't help the defense of the law at all.
11 The next piece of it is, if some of these
12 justifications -- and I hear you and I agree that some of these
13 justifications can be lumped together as related to why shift
14 from a 5, 3, 1, to an eight single member district.
15 I do think it is significant that Senator Wade and
16 her supporters didn't just say, it's our prerogative, we're
17 switching. She said here are some reasons why the 5, 3, 1
18 system isn't working, so she said it is too expensive to run --
19 for candidates to run at-large for those at-large spots. She
20 said that, and she said, it brings -- actually, if you can go
21 to slide seven.
22 This is an email that Senator Wade sent to some folks
23 sort of explaining some of her reasons for the bill. She --
24 actually, this is in your exhibit a couple of times because she
25 was just copying and pasting to some people.

One of the justifications she said is, switching to single member districts, this plan will bring us in line with what other municipalities in the state do. So she's offering up these justifications.

When we go and look at these justifications, we can see that they are plainly false. If you go to the cost of running for at-large -- go to slide six -- this is what we talked about with Councilwoman Abuzuaiter. There are lots of examples of where district elections are more expensive, that is, the candidates spend more to win than at-large districts, so it has to do with how competitive the election is. The cost doesn't matter. It is just plainly not true that it is more expensive to run at-large.

So Senator Wade has set herself up by putting out these justifications to us looking at them and seeing if they ring true.

With respect to bringing Greensboro in line with the rest of how municipal governments are elected, Erika Churchill, who works for the legislative research division sent an e-mail -- and if you'll go to the next exhibit.

This is an email Erika Churchill sent very early earlier during the Senate Bill 36 request. If you look at the whole email, this is relating to Senate Bill 36. It was produced in response to our subpoena, and she asks the folks at the League of Municipalities, how do most municipalities in

1 North Carolina elect their city government. Well, it turns
2 out, the vast majority of municipalities in North Carolina use
3 at-large systems or a mixed system of at-large and district
4 systems. So Greensboro is already within the mainstream.
5 When Senator Wade offers that justification in the
6 legislative record and it turns out to be false, this raises
7 clear inference of bad faith of discrimination and of
8 arbitrariness, so that's why it is relevant.
9 There are other justifications related to why move
10 from the 5, 3, 1 system to eight single member districts. None
11 of them fare much better.
12 If you'll turn to slide nine. This is an email from
13 Representative John Blust to members of the House Republican
14 caucus and this was before the conference committee. This was
15 when the contents of Senate Bill 36 had been dumped into House
16 Bill 263, and he is castigating the process, all of the
17 justifications that Senator Wade and others had made. He says,
18 "so much inaccurate information has been put out there."
19 One of the justifications, and I think this goes to
20 the second question you asked about before the break. Senator
21 Wade got up in Senate committees and on the Senate floor and
22 said, I read a Rhino Times poll that said that voters in
23 Greensboro want this redistricting plan. She put it out there.
24 You've heard a little about that Rhino Times poll,
25 but ultimately, what Representative Blust is saying is, she

1 can't honestly believe that that is true, because she refuses
2 to allow us to attach a referendum to the bill.
3 So it is a contradiction to claim majority support
4 for the proposals and at the same time maintain that people
5 would never vote for it.
6 Again, this inconsistency with what Senator Wade is
7 saying publicly, versus what we know to be true, what she knew
8 to be true at the time, raises more than -- raises, establishes
9 that the apportionment process was tainted by arbitrariness and
10 discrimination.
11 Now I want to move to what I think is the last and
12 most offensive justification proffered, and that's that black
13 voters needed single member districts. They needed three
14 majority black districts in order to be elected -- in order to
15 elect their candidates of choice.
16 For many, many years, African-Americans have had
17 three African-American City Council members and, in fact, they
18 had been electing their candidates of choice to at-large seats
19 even when those candidates were white.
20 In Greensboro, the issues matter. Standing up
21 against the landfill matters to black voters, and black voters
22 support candidates who will stand up for them regardless of
23 their skin color. Black voters were not suffering.
24 During the legislative process of House Bill 263, a
25 fourth African-American member was appointed to fill the term

of a member who had resigned, and he is still serving, having continued -- having been re-elected in a district that is far from majority black. It is very much majority white.

One of Trudy Wade's few African-American supporters, Skip Alston, who was for a time an intervenor in the case, played into this justification. He pushed the issue of whether the NAACP should support the plan in the executive committee meeting and through some maneuvering that violated NAACP norms, got the executive committee to say that they supported Trudy Wade's proposal.

The next day -- so this happens one evening. The next day, Trudy Wade reads in the Senate Redistricing Committee, that the Greensboro NAACP supports this and wants this. You heard from several people that that is in fact not the case, that when the entire membership met and took a position on it, overwhelmingly, African-American voters opposed it.

African-American voters are not one uniform block. People have differing opinions, and that's good and that's fine, but to cynically manipulate the African-American committee to somehow say that partisan shenanigans are caused by, demanded by needs in the African-American community, really disrespects those communities and, again, creates this taint of discrimination as part of the apportionment process. That's hard to disregard.

1 Ultimately what our position is, this same process
2 that we see for redistricting the Greensboro City Council,
3 follows the process we saw for state legislative redistricting
4 in 2011: Put black voters in majority black districts and
5 limit their influence.
6 Now I just talked to you a lot about this taint of
7 arbitrariness element to a one person, one vote claim. In this
8 case because intent is so central to the one person, one vote
9 and to the racial gerrymandering case, the question has came up
10 whether Senator Wade's invocation of legislative privilege and
11 her refusal to produce evidence and provide testimony relating
12 to her intent in creating this redistricting plan should give
13 rise to an adverse inference that her testimony would be
14 helpful to my clients' case or would have somehow otherwise
15 provided circumstantial evidence supporting my client's case.
16 What I want to say on that matter is this: I don't
17 believe that you need to make an adverse inference because of
18 her invocation of privilege, that there is ample direct and
19 circumstantial evidence for you to reach the conclusion we're
20 asking you to reach, that illegitimate criteria drove the
21 motivations, not legitimate criteria, but if ever there was a
22 case where such inference was appropriate, this is it.
23 We read aloud the deposition designations from the
24 intervenors the other day, and it is very clear that Senator
25 Wade was intimately involved with how the intervenors got into

1 the case, how their participation in the litigation proceeded,
2 that she was coordinating with them and thanking them for
3 defending the lawsuit on her behalf.
4 So we see a system where she's orchestrating a
5 defense of her law, but she's letting herself stay cloaked
6 behind legislative privilege so she never he has to be held
7 accountable for the plan.
8 If you'll turn to slide 10, this is just yet another
9 example of the communications between intervenors and Senator
10 Trudy Wade.
11 Now, of course after the *RWCA* ruling, the intervenors
12 sought to get out of the case. They said they didn't want to
13 spend anymore money defending a law when they didn't think they
14 could win. But given the level of coordination that we've seen
15 through the designations and through the other exhibits in
16 evidence, the level of coordination between Senator Wade and
17 intervenors and Senator Wade's continued resistance to
18 production of documents and deposition after the intervenors
19 left the case, it is completely reasonable to infer that the
20 only reason she didn't pick up the mantle when they dropped out
21 is, because she knew that anything she might say would only
22 help our case.
23 I would like to move -- if you don't have any
24 questions on the one person, one vote claims, I would like to
25 move briefly to the racial gerrymandering claim.

As this Court is well aware, proving unconstitutional gerrymandering is a two-step process. In the first step, challengers have to prove that race predominated in the drawing of the district lines. If they satisfy that burden, then the burden shifts to defendants to prove that the use of race was narrowly tailored to advancing a compelling governmental interest.

In this situation, the inquiry ends after the first step. If we prove that race predominated, we win. This is similar to what the three judge panel in the Middle District found with respect to Congressional District 12 just last year.

The defense put on by the State was, it wasn't -- race didn't predominate, politics did, so they didn't put on any evidence that a Voting Rights Act remedy was necessary, so when the Court concluded that in fact race did predominate, the inquiry ended.

THE COURT: How can race predominant if partisanship predominates?

MS. RIGGS: Exactly. That's a great question. That's what I was trying to have Dr. Chen explain at the end, because I understand how that seems inconsistent. What it really is, is about -- there is two ways to think about this.

First, the first inquiry is about what explains the deviations across the plan as a whole. Remember, there were three improper motivations that Dr. Chen identified; two were

1 partisan and one was racial. All three are improper. None of
2 those are justification for having deviations. So, you know,
3 he concluded that each of those predominated, that these were
4 the goals and objectives that explained the deviations.
5 You know, this Court doesn't have to decide which of
6 the three predominated, because none of them are legitimate.
7 The Fourth Circuit's ruling in *RWCA* makes clear the first two,
8 the partisan ones are illegitimate.
9 Putting 90 percent of white voters into
10 underpopulated districts so that their votes count more, that
11 is not a racial justification related to the Voting Rights Act.
12 That's just racial bias and that can't possibly be a legitimate
13 reason for having districts be populated differently.
14 So, one, there is both race and party motivating the
15 deviations, but those are looking at what causes the deviations
16 across the entire plan, so the overall deviation of a plus or
17 minus.
18 What happened in District 2 was not what explains the
19 deviations, but why is the line drawn the way that it is drawn
20 to create the racial composition that it creates. It is a
21 completely different inquiry, and it is not inconsistent with
22 what was done in the first step, in part because it lines up.
23 Improper racial considerations were present in -- as a
24 motivator for the deviations as well, but more importantly, it
25 is a matter of why did the district line go here. Why did it

1 include this VTD, precinct, and exclude that precinct. That's
2 where the two pieces fit together.
3 Going back to sort of where we fit this in the legal
4 standard, we put on evidence that race predominated. No party
5 has put on any evidence that the use of race was necessary to
6 comply with the Voting Rights Act, and I think it is worth
7 noting, that even if there had been Senator Wade or someone
8 else in here defending this law, what we heard about whether
9 black voters who needed single member districts or not, all of
10 that evidence that demonstrated that that justification was
11 pretextual. That evidence is relevant here, too, because it
12 establishes that there didn't need to be three majority black
13 districts in order to satisfy the Voting Rights Act. There was
14 no Voting Rights Act violation here.
15 So I want to talk now about how we concluded that
16 District 2 was racial gerrymandering. We think District 2 is
17 oddly shaped, but we didn't say that's the district that's a
18 racial gerrymander. We asked Dr. Chen, should we be worried
19 about any of these districts as racial germanders. Is there
20 any objective indicia that race may have played a predominant
21 role in the black voting age population in any of these
22 districts? That's when he went through the very first step of
23 the analysis he did on the racial gerrymandering question. He
24 looked at what is the racial composition of all of the
25 districts, and do any of them fall out of the range of what we

1 would expect to see with race neutral redistricting principles
2 in place. For seven out of eight, he found these fell in the
3 range of what we would expect. So it wasn't either
4 unexpectedly high by voting age population or unexpectedly low,
5 except for one district, District 2. And District 2 fell
6 outside of what the range of black voting age population said,
7 any of his race neutral redistricting simulations done by his
8 computer produced. He said that doesn't answer the question.
9 I mean, he doesn't know just by that that race predominated,
10 because there is a correlation between race and politics, and
11 it is possible that if you draw a district to be packed -- a
12 packed Democratic district that it might have also a high
13 minority population.
14 The next step of his analysis was, trying to give the
15 legislature the benefit of the doubt. Would that narrative
16 explain the black voting age population we saw in District 2,
17 and so that's when he narrowed simulations to only those
18 districts that produced, essentially, the same partisan
19 performance in District 2 that we saw in the enacted district.
20 When he looked at those plans -- so these are
21 simulations that are -- essentially that are partisan
22 gerrymanders. They are cherry-picked, the most Democratic
23 packed districts. So he looks at those, but he knows it is a
24 race mutual plan, because he said his computer did it. His
25 computer wasn't trying to racially gerrymander.

1 So he looks at using these, essentially, partisan
2 gerrymandered simulations, what kind of black voting age
3 population would you expect if you were trying to draw a packed
4 Democratic district. What he saw is, this is outside of that
5 range. It is not 10 percentage points outside of the range,
6 but it is statistically significant. It doesn't happen by
7 accident and it means that it wasn't partisanship that
8 predominantly drove the construction of District 2, it was
9 race.
10 So this is how we picked District 2, and it is how we
11 landed on the circumstantial evidence does in fact show that
12 District 2 is a partisan gerrymandering. That's not the only
13 evidence we have. We have some direct evidence about the role
14 that race played in the redistricting process, so if you read
15 through all of the transcripts or if you read through them
16 again, I know you already read through them, if you read
17 through them again, race comes up almost every time the
18 legislature either in committee or the whole chamber convened,
19 that we needed to do this for black voters, that black voters
20 were being harmed and unable to elect their candidate of
21 choice. Over and over and over again. So this is an indicia
22 of how serious and how focused the legislature was on race. It
23 is not linked specifically to District 2, so it is not
24 probative in and of itself, but it is a piece of evidence you
25 can add to the pile.

We also have, if you go back to slide seven, this is at the bottom of the email, again, it is Senator Wade's email to constituents. This plan -- these districts are compelled by -- comply with the Voting Rights Act. So putting it out there that the Voting Rights Act was an important piece of that.

If you'll go to slide 11. That's the direct evidence that we have, and it is limited, but you don't need direct evidence to conclude that race predominated. The Supreme Court has been clear, you can do that solely through circumstantial evidence. But we have some. And we have Dr. Chen's testimony, which provides strong, strong statistical support for this conclusion.

We also have what our eyeballs can tell us, the intraocular test for: Does this look like sorting on the basis of race. This is the map that Mr. Fairfax created, and I want to be up-front that these district lines don't split a lot of precincts. They split some more than in the enacted plan, but if you are contrasting it to state legislative redistricting plan where there was an absurd number of split precincts, this is different, but that doesn't matter. You don't have to split a precinct on the basis of race to have race predominate.

In *Alabama Legislative Black Caucus*, the Supreme Court said what was strong evidence of race predominating was the decision to include voters who were black or minority and

1 the decision to exclude voters who were white, and they weren't
2 looking at split precincts there, they were just looking at
3 total population. You moved in, you know, 10,000 black voters
4 and you moved out 10,000 white voters, and you are already at
5 the right, you know, population size, any way.
6 Our position is, that this is what you see here. The
7 district line between District 2 and District 8 conforms
8 incredibly and accurately precisely to the contours of where
9 the minority population is, and the precincts that are more
10 heavily minority are put into District 2 and the precincts that
11 are more heavily white, are placed into District 8. Even
12 though one place where it sort of looks like from this map that
13 that pattern doesn't hold true up in the North Madison
14 precinct, we actually know it still holds true there.
15 Mr. Fairfax did the zoom and looked at the racial
16 shading on the census block level instead of the precinct
17 level, and it turns out, that is a very heavily white piece of
18 the precinct.
19 **THE COURT:** So when you to submitted your discovery
20 request to the legislature and various legislators, did they
21 produce anything that told you how they drew these lines?
22 **MS. RIGGS:** They did not.
23 **THE COURT:** Or what their criteria were?
24 **MS. RIGGS:** That was all material that was subject to
25 both, in their words, legislative immunity and legislative

1 privilege, and went to the question of the debate, the reasons
2 for voting for a bill or reasons for not.
3 What we did get, even with some fighting, what we did
4 get were emails or communications between the legislators and
5 constituents or other third parties.
6 **THE COURT:** So nothing was produced, and I assume you
7 asked for what were the criteria used to draw these eight
8 districts.
9 **MS. RIGGS:** We asked for everything related to racial
10 considerations with respect to how these districts were drawn.
11 All of the criteria used to create them, and, granted, they
12 were very -- I mean, we asked for a lot, and it is because this
13 is serious. This is sorting on the basis of race. This is
14 treating voters differently from each other by governmental --
15 it is a serious matter, and the legislature can't hide behind
16 legislative privilege when the Constitutional rights are at
17 stake.
18 So, we have nothing besides circumstantial evidence
19 that we're able to gather and the transcripts that we have,
20 what legislators said on the floor, and the occasional
21 emails -- Representative Blust gave us a few things, more than
22 the others. He did not invoke the same level of legislative
23 privilege or legislative immunity. But, you know, occasionally
24 we get a tidbit here and there. We get what Trudy Wade said to
25 her constituents that this is about complying with the Voting

1 Rights Act. That doesn't tell us a whole lot.
2 **THE COURT:** I guess I'm just trying to ask you a more
3 specific question. Did you say how did you -- what were your
4 criteria for drawing these districts?
5 **MS. RIGGS:** That wording, it wasn't that specific,
6 but our subpoena requests are -- the subpoenas are in the
7 docket, and certainly I think if the Court goes and looks at
8 specifically the race questions, what racial data did you have,
9 what racial data did you request, you know, that kind of thing.
10 What was the process involved coming to this plan. What
11 alternatives were considered, all of that. I think that gets
12 us to what you are asking. It gets us to that very place.
13 And, you know, it is consistent with the position that many of
14 these legislators have taken in recent years, which is, just a
15 very aggressive interpretation of legislative immunity and
16 privilege.
17 The last bit of circumstantial evidence in support of
18 our claim that race predominated goes along with what we see in
19 this racial density map, talking about how that satellite
20 annexation in North Madison and South Madison and Monroe
21 precincts that had always been together, that had always been
22 in District 2, the splitting of that satellite annexation in
23 the enacted plan and taking the far part of it and putting it
24 in the white district, and taking the bottom part of it and
25 putting it in the black district, is a deviating of voters on

1 the basis of race. That's a community that's been together
2 forever.
3 We learned more that the white voters -- the -- in
4 North Madison and South Madison we have Reedy Creek -- Reedy
5 Fork development, a growing development, nice homes,
6 predominantly white neighborhoods. That's -- it explains why
7 District 8 has that bizarre arm that's eventually contiguous
8 only via water and grabs the top part of that satellite
9 annexation. That's the evidence relevant to our racial
10 gerrymander claim.
11 I do want to briefly talk about the fact that we're
12 in a unique procedural posture. We lack a defendant that's
13 actively defending the statute. We would have liked to have
14 named Senator Wade, Senator Berger and Representative Moore as
15 defendants in this case. They are the source of the harm here.
16 The Fourth Circuits decision in *Wright v North*
17 *Carolina* in 2015, precluded us from doing that. It suggested
18 that those folks could intervene if they wanted to, but my
19 clients couldn't sue them.
20 So this unique posture that we find ourselves in,
21 seems to have given the Court pause at times, so I just want to
22 take a minute to review the evidence that we have in the record
23 that should reassure the Court that all of these parties have
24 had ample notice and have had in fact just declined to
25 intervene, and because they did not, this Court shouldn't feel

1 any hesitancy in engaging in the analysis before it, looking at
2 the evidence presented and applying the appropriate legal
3 standard.
4 If you look at slide 12, this is a letter from the
5 Attorney General's Office right after we filed the lawsuit in
6 this case. We, as we must, notified the attorney general that
7 we were challenging the constitutionality of a State enacted
8 law, and they notified us before this Court had ruled on the
9 preliminary injunction, that they were not going to participate
10 at the time.
11 If you'll turn to slide 13 -- and I apologize, this
12 is hard to read. It is from a fax. If you look at the entire
13 exhibit, Plaintiff's Exhibit 229, what this is, is one of the
14 intervenors reached out to the attorney general, again later,
15 and this was in -- several months later in 2015, and asked
16 again for the attorney general to intervene. The next page of
17 the exhibit is the actual letter the intervenor sent to the
18 attorney general and the letter attorney general sent back.
19 Ultimately, the attorney general said, we're not going to
20 intervene.
21 Legislative leaders, though, also knew about the
22 lawsuit, knew about the proceedings and never availed
23 themselves the opportunity to intervene in a timely fashion.
24 The next slide is -- this is just an excerpt, so we
25 read it. If you look at the entire Plaintiff's Exhibit 230,

1 this an email from Senator Trudy Wade to Andrew Tripp in
2 Senator Berger's office, the president pro tem's office,
3 updating him about the lawsuit. It was in 2016, but the
4 attachment is Your Honor's order on the preliminary injunction,
5 so there is no message associated with it.
6 I'm assuming there was a verbal conversation about
7 it, but clearly Senator Wade and Senator Berger are
8 communicating about this, and Senator Berger knows of the
9 lawsuit's existence and he's not intervened.
10 Slide 15 is a series of emails between a WRAL
11 reporter and Speaker Moore's office, and the reporter asks
12 Speaker Moore, why didn't none of the legislative leaders come
13 out to defend this law, and Representative Moore's office,
14 responds, "No comment." They knew. You know, they knew and
15 they were being asked, why didn't you appear and defend, and
16 they didn't.
17 So that's the reality of this situation. It is how
18 we've gotten to where we are today.
19 Finally, I wanted to conclude by talking about
20 severability and remedy in this case. The only proper remedy
21 here is a permanent injunction for the Greensboro portion of
22 Session Law 2015- 138, so Section Two of that statute. Under
23 North Carolina law, when one portion of a statute is declared
24 unconstitutional, the surviving portion will be given affect
25 only if the law is deemed to be severable. So the statute at

1 question doesn't contain a severability clause.
2 Representative Harrison testified that as far as she
3 knew, if you wanted it to be severable, you attached a
4 severability clause. Now of course that's not the law, but
5 that's her perception as a legislator. Legislators believe
6 that severability clauses are important to indicating their
7 intent on that front. Without a severability clause, of course
8 the Court can only decide that a bill is severable if there is
9 some clear indication of legislative intent that the
10 legislature wanted the bill to be severable. We have no such
11 indication here and, in fact, we have several clear indicators
12 to the contrary, that they didn't want the bill to be
13 severable.
14 First -- and this one is not as strong as the second
15 one. But, first, during the legislative process, Senator Wade,
16 whose bill this was, rejected time and time again, any efforts
17 to attach a referendum to the bill, and was essentially willing
18 to let it die in the House to avoid having to modify the
19 structure of the bill in any way.
20 I think this is some indicia that is perceived as a
21 piece of legislation an immutable hole. It indicates that the
22 legislature wasn't viewing this as severable.
23 More significantly, even after this Court entered the
24 preliminary injunction in 2015 indicating that it viewed that
25 part of this bill was likely to be unconstitutional, the

1 legislature didn't go back and add a severability clause. They
2 did go back in that Technical Corrections Bill and shorten the
3 length of time to which Greensboro would be subject to
4 unconstitutional disparate treatment. They went back and did
5 that. What they didn't do was add a retroactive severability
6 clause, but they did that for other bills in that same
7 Technical Corrections Bill.
8 So if you look within a page's distance from the
9 technical correction part -- the piece of the Technical
10 Correction Bill applicable to Greensboro, there is an amendment
11 to a law enacted earlier in the legislative session that adds a
12 retroactive severability clause to that law, and it is Section
13 81.(e) of the Technical Corrections Bill, which is at Exhibit
14 36 in the record. So clearly, they knew they could do it.
15 They did do it, but they didn't do that for Greensboro, even
16 when they knew part of the bill was likely to fall.
17 So given this lack of clear indication from the
18 legislature that they intended the Greensboro bill to be
19 severable, the Court should find that it is not severable and
20 invalidate the law in its entirety.
21 Based on all of the evidence that we've presented in
22 the last two days, we will respectfully ask this Court to enter
23 judgment in our favor and to rule that the deviations in House
24 Bill 263 are unconstitutional and violate the Fourteenth
25 Amendment and that District 2 was drawn predominately on the

basis of race and thus violates the Constitution.

I should add, we also strongly believe that the motion for directed verdict on the relief Sections F, G and H are not timely, but my colleague, Ms. Earls, will address those issues in response to Mr. Payne's motion after he argues it.

THE COURT: All right.

MS. RIGGS: Thank you, Your Honor.

THE COURT: Thank you.

The City indicated they wanted to be heard briefly. Since they are plaintiffs, too, I'll let them go ahead.

MR. STARRETT: Your Honor, again, Bryant Starrett for the City of Greensboro. I want to thank the Court for allowing the City to be present, given the posture of the case and the Court's ruling just Friday.

I want to be heard just briefly on the final position you heard from Ms. Earls with regard to severability and the effect of Your Honor's ruling --

THE COURT: I think that was Ms. Riggs.

MR. STARRETT: Pardon me. The effect of Your Honor's order this past Friday in the context of the evidence that the Court now has before it.

The City joins in the position of the individual plaintiffs that that ruling on Friday from the Court with regards to the unconstitutionality, granting the pending motion at that time, ought to bring down this act in its entirety.

As Ms. Riggs noted, the law in North Carolina is, that the severability of a provision is indicated by a couple of things. One is the presence of a severability provision in the act at issue or the intent of the legislature.

I just want to share with the Court a quote from one North Carolina case that I think really quite succinctly states what the law is on this issue. This is *Parker versus Stewart*, a case from the North Carolina Court of Appeals, which can be found at 29 NC AP 747. "Where a part of the statute is invalid, the remainder, if valid, will be enforced provided it is complete in itself and capable of being executed in accordance with the apparent legislative intent, but if the void clause cannot be rejected without causing the statute to enact what the legislature did not intend, the whole of it must fall. Even in a case where legal provisions may be severed in order to say the rule applies only when it is plain that the legislature would have enacted the legislation with the unconstitutional provisions eliminated."

Now that quote from *Parker*, Your Honor, that I've just shared, actually quotes in full a North Carolina Supreme Court case, *Commissioners versus Boring*, found at *175 NC 105*.

So as Ms. Riggs noted, there is no severability variable provision in this law, so the question for the Court is, what was the legislative intent here, and was it plain that the legislature would have intended the remainder of this act

1 to stay on the books, given the now unconstitutional provision
2 with regard to the referendum issue.
3 I think the best way to ascertain that legislative
4 intent, Your Honor, is the evolution of the law itself,
5 starting from the very beginning through its consideration and
6 enactment even after this Court entered its injunction order.
7 So when the bill was first introduced, Your Honor,
8 this is Exhibit 14 before the Court, it actually contained a
9 referendum provision much broader than the one now at issue.
10 The original version of the bill and edition number one of the
11 bill, had a referendum provision that purported to take the
12 referendum initiative rights away from all of the citizens in
13 all of North Carolina.
14 Now of course that seems odd, because this is a local
15 bill. That seems not to be something that is workable in a
16 local bill. So in edition two of the bill, which is Exhibit
17 17 -- I'm sorry it is Exhibit 4 before the Court, that
18 provision was changed. We believe it was changed thoughtfully
19 and with care to revise that provision not to take away
20 referendum and initiative rights from all of North Carolina
21 citizens, but only from the citizens of Greensboro. We think
22 that shows a thoughtful, targeted withdrawing of rights only
23 affecting Greensboro.
24 The Court also has before it transcripts from the
25 committee hearings on this bill and the General Assembly's

1 floor debates. One in particular is Exhibit 17. That is the
2 transcript of the Senate Redistricting Committee hearing on
3 this bill, when multiple members of the public were allowed to
4 share their thoughts or concerns. No less than five
5 individuals who shared their comments at that redistricting
6 committee, including one proponent of this bill, expressly
7 pointed out the Constitutional infirmity of this referendum
8 provision. They specifically said, that provision is a
9 problem. That provision is unconstitutional. Their concerns
10 were not met with any response from the bill sponsor. That
11 provision remained in the bill, despite the specific concerns
12 raised during that committee.
13 We think that that is further indicative of the fact
14 that the legislature intended that this was an important pillar
15 of the act.
16 Now, Your Honor, on July the 23rd of 2015, enjoined
17 this, that the entirety of the act on the basis of the
18 referendum on claim one and noted, "that as to the sections" --
19 and I'm quoting now, "as to the sections applicable to
20 Greensboro and its voters, the act is all of a piece,"
21 indicating that the act could be enjoined in its entirety based
22 on that provision. That's July the 23rd.
23 As Ms. Riggs noted, about nine or so weeks later, the
24 Technical Corrections Bill was passed in the General Assembly
25 on September the 30th. That can be found at Exhibit 36. There

1 are two sections in that bill with severability provisions.
2 One is at the very end of the act, at the very end of the
3 Technical Corrections Bill, which is the severability provision
4 applicable to the Technical Corrections Bill itself.
5 The second severability provision, Your Honor, as
6 Ms. Riggs alluded to is, with regard to another piece of
7 legislation from the General Assembly. The Technical
8 Corrections Bill in that Bill, the General Assembly is
9 recognizing and adding a severability provision to another law,
10 but they are not touching this bill, even though the
11 Constitutional infirmity of that particular provision has
12 already been noted by this Court some nine weeks previously.
13 They are not trying to resurrect or otherwise save the act by
14 adding a severability provision. Instead, they are doubling
15 down on the referendum provision in the act by leaving it as it
16 was.
17 We think the entire legislative history, the exhibits
18 before the Court and the plain language of the act, as the
19 Court already noted, made clear that it is not plain as the law
20 requires that the referendum provision is somehow severable
21 from the act. It is not plain that the General Assembly
22 intended that if that provision falls, the rest remains. We
23 think quite the opposite, Your Honor. We believe that the
24 General Assembly intended as Your Honor noted, that the act is
25 all of a piece.

1 Because the referendum provision falls, the entirety
2 of the act must fall and, therefore, the City joins in the
3 individual plaintiffs' request that the Court enjoin the
4 entirety of the act, whether on a referendum basis, on the
5 basis of claim two or three, or any combination thereof.
6 Thank you, very much.
7 **THE COURT:** Thank you.
8 Mr. Payne, do you want to talk now or after a break?
9 **MR. PAYNE:** I don't think I'll be anymore than 10 or
10 15 minutes.
11 **THE COURT:** All right. Go ahead.
12 **MR. PAYNE:** Your Honor, I'm going to speak to a few
13 things that are, frankly, obvious to the Court and everybody
14 that's been involved in this from the start. We have gone
15 through a lot of evidence. We've gone through quite literally,
16 volumes of evidence, days of testimony. What has been plain to
17 everybody is, that there has not been one single iota of
18 evidence that has linked the Defendant, Guilford County Board
19 of Elections, to any of the actions complained of in the
20 complaint. We had nothing to do with the actions which are
21 complained of in the complaint. We did not cause the cause of
22 actions.
23 In any other matter that I've ever been associated
24 with, we wouldn't be here right now. If you have a cause of
25 action that the defendant didn't do, well, the defendant gets

let go. I do recognize we have very a unusual situation here.

I understand the position, frankly, I sympathize with the position that the plaintiffs are under when you look at the *Wright versus Wake County Board of Elections* case. I think we need to take that discussion a little bit further. I think that it is -- as this case has progressed, as we look at this case, we -- I think we see that, quite frankly, if we are to interpret the *Wake County Board of Elections* case to say that not only is a local board of elections permitted to be the only defendant, but must be the only defendant, then that case is erroneous. I think there is no other way to look at it, that it presents legal impossibilities as the case moves forward.

I've said time and again --

THE COURT: You mean the *Wright* case?

MR. PAYNE: The *Wright* case, yes. I have said time and again, that I do believe that we are a proper party and I've elaborated on that on occasion to say, and the reason is, because it is necessary for the local board of elections to be there to effectuate any injunctive relief.

The fact of the matter is, if you look at the complaint, it seeks for something more than injunctive relief from the defendant. It seeks sanctions.

Now, I recognize that 42 U.S.C. 1988 does have a mechanism where that's first in your discretion and that you do have some -- that it does require a second look. I understand

1 the argument that I'm sure will be presented that that is not
2 right. The reason I believe I'm standing here and having this
3 discussion now is, I believe when you got a situation which is
4 fairly unprecedented, where the only defendant is a party that
5 took no action and no action can be pointed to them to create
6 any kind of basis for sanctions, then you have -- then that
7 rises to the level, or sinks to the level where it can be done
8 as a -- it's a matter of law and can be done at directed
9 verdict, that there is zero evidence that would possibly
10 justify any sanctions against the Board of Elections, and
11 that's why, I think, that's why I think, in effect, I'm going
12 to have this discussion twice, because I do believe it is
13 appropriate at this point for those reasons.
14 I want to look at a couple of points here. Look at
15 what this request, if it's made for sanctions --
16 **THE COURT:** Give me just one second. I apologize, I
17 was just checking on the heat. She's asking to turn it down.
18 I apologize, I'm trying to listen to you, but I had gotten a
19 little warm. Go ahead. I'm with you.
20 **MR. PAYNE:** Okay. What I would like to emphasize
21 is -- ask the Court a couple of things. One, let's assume that
22 the General Assembly, either through order or through their own
23 volition were sitting at this table. Would this Court ever
24 contemplate, even for a second, assessing attorney's fees
25 against the Guilford County Board of Elections? The answer to

that, I think, is manifestly, obviously, it wouldn't.

The other thing I would note --

THE COURT: Can you help me remember, because it has been a-year-and-a-half, maybe not quite that long, when I dealt with the motion. I may not call the same name exactly right, the motion to dismiss for lack of necessary parties, I don't remember the attorney's fee question coming up in that. Did it?

MR. PAYNE: No, it didn't.

THE COURT: I'm not saying you should have raised it, I'm just making sure I remember correctly.

MR. PAYNE: One other point to emphasize is that, in your -- in the presentation, of plaintiffs' presentation, she pointed to a legal principle about the race issue and said, if we prove that race predominated in drawing the district lines, then the burden shifts to the defendants, and you almost saw her catch herself and say, well, the burden doesn't shift to this defendant. So clearly, you have even the legal construct of the arguments that have to be made, you create legal impossibilities where: One, you have the *Wright* case, which can be interpreted to say, we are the only people that can sit at this table, but that creates legal inconsistencies that are just absolutely untenable in trying to work out the actual case law that's presented to you.

Again, I think the only conclusion that this Court

can reach at that point is, that that law is erroneous and --

THE COURT: I have a hard time reversing the Fourth Circuit.

MR. PAYNE: I understand that.

THE COURT: I appreciate you have to make the argument to me.

MR. PAYNE: I have to make the argument to you, and I have to tell you that because of the -- in effect, the legal impossibility it presents to us, I think that demonstrates that there is no possible grounds that would justify sanctions against a party who -- the only party by virtue of this determination.

One last point I want to make, and that is the severability issue that's been discussed here. I think that one thing that hasn't been mentioned here is, if you determine that the act has to be taken as a whole, that the severability issue should be found in the way the plaintiffs are arguing it, that makes the determination as to causes two and three moot, and the only impact of finding for the plaintiffs on causes two and three would be to subject the defendant to a possible sanction if they sought for attorney's fees.

So, in short, in my opinion, if you find severability, I don't think you have to reach those second and third causes of action, and the goal that everybody and all of plaintiffs have sought here would be satisfied.

I got to make one final point. Any determination -- if it comes down to it that the Guilford County Board of Elections should pay attorney's fees, has to be looked at, I think, in your analysis in practical terms. Plaintiffs have said time and again, the witnesses and the plaintiffs' arguments have said time and again, that the purpose of this is not for a few defendants -- I mean a few plaintiffs, it is to -- it is done on behalf of the citizens of Greensboro, and that the citizens of Greensboro have been negatively impacted by this new legislation.

In practical terms what you have at that point is, if there is a motion for attorney's fees, you're going to have the county taxpayers being asked to pay for something sought by the City of Greensboro taxpayers, and I think that creates another anomaly that makes it obvious that there is simply no legal justification for the attorney's fees and that, therefore, that you can't at this point, make a finding to that point.

I will say that I haven't argued on the damages issue. It is my understanding that plaintiffs are not going to -- are not going to contest my motion for directed verdict with regard to damages. If I mischaracterized that, I would like the opportunity to discuss that as well.

Thank you.

THE COURT: Thank you.

I don't want to rush you. How long do you think you

1 might take?
2 **MS. EARLS:** I will also, I think, take about 10 to 15
3 minutes.
4 **THE COURT:** Let's take a short break then. We'll
5 take a 15 minute recess.
6 (Recess taken from 3:25 p.m. to 3:40 p.m.)
7 **THE COURT:** Ms. Earls.
8 **MS. EARLS:** Thank you, very much, Your Honor. I want
9 to be clear about our position for motion for directed verdict.
10 If you look at page 27 of our amended complaint which is
11 document 109 in the record, F is the request to award
12 plaintiffs their damages in accordance with law. We conceded
13 this point, that we put on no evidence that plaintiffs were
14 damaged. We do not object to directed verdict on that claim
15 for relief.
16 We included -- because we -- it would be
17 irresponsible not to -- during discovery we may determine that
18 there is some damages, but at this point in the case, it is
19 clear we've put on no evidence, and given the posture and
20 claims that we have, the defendants are probably immune from
21 money damages any way, so, any way, we concede that.
22 G and H are entirely different, and it is really
23 important. These are not sanctions. G and H are legal
24 provisions that apply in civil rights cases and, in fact,
25 taxation of costs in every case -- and they're governed in the

first instance by Rule 54 of the Rules of Civil Procedure, which provide when those -- when motions for costs -- Rule 54 provides when those should be made, which is after judgment, and similarly for attorney's fees, the claim must be made by motion, and it is made -- there is a lot of the detail about the timing and contents of the motion under Rule 54, but then the local rules are even more specific.

Local Rule 504.1, provides when a bill of cost should be filed, which is after the expiration of time allowed for appeal. Rule 54.2 includes the time limit for award of statutory attorney's fees. It has a requirement that the Court will not consider a motion to award attorney's fees, statutory attorney's fees, which is what we are referring to here, until moving counsel shall first advise the Court in writing that after consultation the parties are unable to reach an agreement.

So there is a whole process in place for considering, and, in fact our position is, that we don't discuss attorney's fees until such time as there is a clear entitlement to them, and that's because doing so as attorneys for civil rights plaintiffs we are representing pro bono, we put ourselves in the position of having a conflict of interest if we start negotiating over fees at the same time the underlying substance of the case or the merits or types of relief they might get are still at issue. In other words, we're arguing against

1 ourselves and against our clients' interests if we're trading
2 off fees for remedies in a case. And this was actually
3 recognized by the Supreme Court in the *Evans versus Jeff D.*
4 case where the Court acknowledged that civil rights plaintiffs
5 and that their attorneys in these circumstances can face this
6 kind of tension.
7 The Supreme Court ultimately ruled that it's not
8 improper or impermissible, but I just wanted to acknowledge
9 that that's why our position all along with the defendants in
10 this case has been that we can make no commitments either way.
11 We can't tell you we will file for fees. We can't tell you we
12 won't file for fees. We prefer not to negotiate elements of
13 relief in connection with fees, and so that's kind of our
14 position at this point.
15 So if -- those are all the reasons why it is not
16 timely for Your Honor's consideration on a motion for directed
17 verdict.
18 I also just wanted, for a minute, because I
19 understand the equities of what Mr. Payne is arguing, because I
20 argued them myself in the *Wright* case. We initially sued the
21 State of North Carolina, and the District Court said the
22 State -- North Carolina came in and said we have sovereign
23 immunity, you can't sue us, and we said, okay, you have now
24 asserted your sovereign immunity, we will amend and name the
25 individual legislators in their official capacity, which allows

1 us to sue them under the civil rights statutes. The District
2 Court said, no, you can't sue the individual defendants -- the
3 legislative defendants. The only party you are allowed to sue
4 is the party that administers the law. We appealed that
5 determination to the Fourth Circuit, and we argued that not
6 only does it create an awkward situation if we are to prevail
7 and ultimately get fees, it also impacts the ability of the
8 defendant in the case to negotiate.
9 If you only have the entity that is administering the
10 law and not the entity that formulated the policy and is
11 responsible for it and in particular in these circumstances of
12 this case, the board of -- the Guilford County Board of
13 Elections can't bind North Carolina General Assembly, so how
14 can they negotiate with us.
15 We presented all of those equitable arguments at the
16 Fourth Circuit, and footnote three, as Your Honor is aware,
17 footnote three of *Wright versus North Carolina*, the Court
18 said -- this is 787 F.3d 262, note three. This says that they
19 rejected these arguments as reasons why we should be allowed to
20 sue the legislative defendants.
21 So we understand the equities involved, but we are in
22 this position through no lack of effort on our part. But to
23 finish that story, I do want the Court to be aware, which is
24 another reason to postpone the consideration of this, that this
25 issue now is squarely faced in the *RWCA* case because we have

1 made -- we have filed a petition for attorney's fees in that
2 case. The Wake County Board of Elections has resisted that and
3 argued that it is a special circumstance and we're not entitled
4 to fees. We don't have a ruling yet. It has been fully
5 briefed --
6 **THE COURT:** In the District Court?
7 **MS. EARLS:** District Court.
8 **THE COURT:** In that one, the Wake County Board
9 defended it substantively, did they not?
10 **MS. EARLS:** They did not present evidence. They
11 cross-examined witnesses and defended it in terms of briefing
12 and arguing that we were not entitled to relief.
13 **THE COURT:** Okay.
14 **MS. EARLS:** So I would say, yes, somewhat, but not
15 entirely.
16 **THE COURT:** All right.
17 **MS. EARLS:** So at some point this issue may be
18 resolved by that court or at least they're ahead of us on the
19 track than we are here.
20 So what I finally want to say, attorney's fees are
21 not a punishment. They are not a sanction. The Supreme Court
22 has repeatedly said that cases such as this one is exactly the
23 kind of case where attorney's fees are appropriate, and these
24 are the kinds of things that you could consider on a properly
25 briefed motion for attorney's fees after there is judgment. I

1 mean, you have to weigh things like, did we obtain relief for
2 our clients on all of our claims, and the standard is,
3 materially alters the legal relationship between the parties,
4 or modifying the defendant's behavior in a way that directly
5 benefits plaintiffs. Those are the kinds of things you can
6 only evaluate once there is a decision on the merits and there
7 is a final judgment, and we know what relief is in place.
8 More fundamentally, the Supreme Court says, "where
9 immunity doctrines and special defense is available only to
10 public officials preclude or severely limit the damage remedy
11 awarding counsel fees to prevailing plaintiffs in such
12 litigation is particularly important and necessary if federal,
13 civil and Constitutional rights are to be adequately
14 protected." That is from the *City of Riverside versus Rivera,*
15 477 U.S. 561 at 577. It's a 1986 case.
16 There are material cases looking at legislative
17 history according to U.S.C. Section 1988, which come to the
18 same conclusion.
19 In the Fourth Circuit, the notion that special
20 circumstances would preclude an award of attorney's fees has
21 been held to be a very narrow and limited exception, only
22 appropriate on rare occasions. And here, if the Court were to
23 conclude the facts that the defendant in the case is not the
24 party responsible for the unconstitutional act, and that that's
25 a special circumstance, meaning that plaintiffs are not, I

1 believe, entitled to any attorney's fees, that would
2 essentially mean when you put that alongside *Wright*, that no
3 plaintiff in any voting rights case would ever be entitled to
4 attorney's fees and that you could not have an exception that
5 completely swallows the rule and --
6 **THE COURT:** That would only be true if the state
7 chose not to defend.
8 **MS. EARLS:** Correct. But we're now in a position
9 where that's a circumstance that plaintiffs have no control
10 over.
11 So for all of those reasons, this is -- and I can
12 talk more about the types of cases where special circumstances
13 are found, but I think it is just not the time for that case
14 law to be brought before you and for you to be making that
15 consideration.
16 I mean, we certainly would be willing to further
17 brief this issue in a post-trial filing, but I think the better
18 course is to deny the motion for directed verdict on those two
19 claims for relief and address it if and when it becomes
20 appropriate, if and when the plaintiffs file a motion for
21 attorney's fees following final judgment.
22 Unless you have further questions, that's all.
23 **THE COURT:** All right. Thank you. Anything else you
24 want to say at this point, Mr. Payne?
25 **MR. PAYNE:** At this point I would only want to point

1 out one more thing. I hope it doesn't prompt further
2 discussion.
3 First, I do acknowledge that there is a mechanism
4 that's in place under the normal circumstances. It is my
5 argument that this is such an exceptional circumstance, that
6 findings -- that conclusions of law that would have the effect
7 of motion for directed verdict are appropriate. That's as much
8 in your discretion as in a motion for attorney's fees will be
9 later.
10 I would want to caution one thing. The sort of the
11 policy concern that if you determine that a defendant who
12 didn't do anything wrong shouldn't be hit with attorney's fees,
13 that that will have some sort of chilling effect on cases to
14 try to advocate civil rights matters, I think the Court would
15 also have to recognize the opposite may well be true, too, that
16 if the Court finds that somebody who has got absolutely no
17 control over a course of a litigation, whether litigation is
18 filed or the gravamen of the litigation itself is going to be
19 hit with attorney's fees every single time, then what is going
20 to happen is, you're going to have a miscarriage of justice,
21 because every complaint that is going to be filed, somebody is
22 going to say, I'm not going to pay for the General Assembly's
23 errors, I'm going to rollover and whatever they say I'm going
24 to admit to it and let's get this out as quickly as possible.
25 I mean, that may sound callus, but that's going to happen if

you have something like that. That's why you got to take each one of these cases -- this is a very unique case and everything you find is going to be a very unique finding.

That's all I have. Thank you.

THE COURT: All right. Well, I'll grant the motion for directed verdict as to subparagraph F for actual damages. It seems to me, the attorney's fees question is premature and I'll deny that motion without prejudice. If and when the plaintiffs win on the rest of the case or a motion is filed, I'll evaluate who bears the brunt of the unfairness of the situation, because as both of you -- everybody is recognizing about that, it is just very strange. I'm going to put that off until it is before me in a more concrete way. I'm going to take the matter under advisement.

MS. RIGGS: May we submit updated findings of fact and conclusions of law once we receive the transcript for your consideration of the matter and include anything else as to the record?

THE COURT: You can if you want, but I'm not going to wait on you. You know, I'm not promising a decision within a couple of weeks, but when is the filing period this year?

MS. RIGGS: It opens July 1st --

MR. PAYNE: July 7th.

THE COURT: July 7th. Part of the reason I wanted to get the trial done is so it would be in advance of this year's

municipal elections and nobody would be disrupted at the last minute. But, yes, you can certainly do that. I'm probably not going to wait to work on it until then, but I'm sure it will take me two or three weeks for that, at minimum, and that would be very fast, if I got it done that quickly.

So obviously as everybody in the room knows, I don't really like delay, so I'll be working on it and trying to get you all a decision as quickly as I can, but I do have to make findings of fact, so it is going to take me a little while, but I'm glad for you to do that within -- I don't know when she is going to get the transcript done. You file whenever you want, and whenever you file them I'll look at them, but I'm not going to wait on you.

Anything else?

MR. PAYNE: No, Your Honor.

THE COURT: I appreciate everybody being here in this unusual situation and presenting everything as clearly as you have.

I'll enter a written order after I've decided the matter and have time to get it all written up.

Court is adjourned.

(Court was adjourned at 3:55 p.m.)

C E R T I F I C A T E

I, J. CALHOUN, RPR, United States District Court Reporter for the Middle District of North Carolina, DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of the proceedings had in the above-entitled matter.

Date: 3-14-17

J. Calhoun, RPR
United States Court Reporter
324 W. Market Street
Greensboro, NC 27401