

EXHIBIT M

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

-----X
NORTH CAROLINA STATE
CONFERENCE OF THE NAACP, et al.,

Plaintiffs,

V.
PATRICK LLOYD McCRORY, in his
official capacity as Governor of
North Carolina, et al.,
Defendants.

1:13CV658

-----X
LEAGUE OF WOMEN VOTERS OF
NORTH CAROLINA, et al.,

Plaintiffs,

and
LOUIS M. DUKE, et al.,

Plaintiffs-Intervenors,

V.
THE STATE OF NORTH CAROLINA, et al.,

1:13CV660

Defendants.

-----X
UNITED STATES OF AMERICA,

Plaintiff,

V.
THE STATE OF NORTH CAROLINA, et al.,

1:13CV861

Defendants.

-----X

VIDEOTAPED DEPOSITION OF

J. MORGAN KOUSSER, PhD

Washington, DC 20005

Friday, June 20, 2014

Denise D. Vickery, RMR, CRR

Job No. 146811

1
2
3 Friday, June 20, 2014

4 9:27 a.m.
5
6
7

8 Videotaped Deposition of

9 J. MORGAN KOUSSER, PhD
10

11 Held at the law offices of:

12 KIRKLAND & ELLIS LLP

13 655 Fifteenth Street, NW

14 Washington, DC 20005
15
16
17

18 Pursuant to notice, before Denise D. Vickery,
19 Registered Merit Reporter, Certified Realtime
20 Reporter, and Notary Public in and for the District
21 of Columbia.
22

1 you tell me?

2 A. Yes.

3 Q. Okay. And you understand if we were
4 having a nice conversation in your living room over
5 some wine and cheese, we could shake heads with each
6 other and interrupt each other in the conversation,
7 but because the court reporter is taking this down,
8 when I ask a question, would you please let me
9 finish my question?

10 A. Yes.

11 Q. And I'll try to not interrupt you before
12 you're done answering.

13 A. Thank you.

14 Q. And also you need to make an audible
15 response for the court reporter. If you shake your
16 head, I understand what you're saying, but she needs
17 to take something verbal down.

18 A. Yes.

19 Q. Okay. And you're familiar with those
20 types of rules?

21 A. Yes.

22 Q. Okay. All right. I wanted to ask you

1 some questions about your background in elections

2 administration as a preliminary area of inquiry,

3 Dr. Kousser.

4 Have you ever worked in a precinct?

5 A. I don't think so.

6 Q. Okay. So you've never been a poll

7 worker in a precinct?

8 A. No.

9 Q. And have -- so you've never checked

10 voters in who have come to vote at a precinct or an

11 early voting center?

12 A. No.

13 Q. Have you ever been on -- in North

14 Carolina the elections are run by Boards of

15 Elections.

16 Are you familiar with that term?

17 A. Yes.

18 Q. And you live in California?

19 A. Yes.

20 Q. Do they have the equivalent of Boards of

21 Elections for the counties in North Carolina?

22 A. Yes.

1 Q. Have you ever been a member of a Board
2 of Elections?

3 A. No.

4 Q. Okay. I want to ask you a couple
5 questions about your -- if you have a political
6 affiliation.

7 Are you registered to vote?

8 A. I'm a Democrat.

9 Q. Okay. And have you ever made
10 contributions to candidates?

11 A. Yes.

12 Q. Can you tell me the candidates you've
13 made contributions to?

14 A. (Laugh).

15 Q. Say in the last eight years.

16 A. Oh, my.

17 Q. I don't expect you -- this is not a
18 memory.

19 A. No, I understand. It's just that I'm
20 sure that you get e-mails every day, as I do, from
21 large numbers of candidates across the country
22 asking for money, and sometimes I give and most

1 times I do not give. But I get a lot of e-mails.

2 So it's difficult for me to remember everybody.

3 I certainly contributed to President

4 Obama's campaigns. I have contributed to the

5 Democratic Senatorial Campaign Committee, Democratic

6 National Committee, Democratic Congressional

7 Committee, and Senators, Senatorial candidates, and

8 Congressional candidates in various places in the

9 country.

10 I think I have given money to Kay Hagan

11 in North Carolina, but I've given money to people

12 who are about to run. There's a guy who's going to

13 run for State Senator in my district in 2016, and

14 he's been raising money for two years already. I've

15 given him a little money. I've given money to City

16 Council candidates in nonpartisan races, school

17 board candidates.

18 So I -- I do give money to people.

19 Q. All right. And have you given money to

20 Senator Hagan in this election cycle?

21 A. Yes, I think I did.

22 Q. Okay. And in your report, you described

1 known and what evidence would have been before them
2 as to various issues that were taken up that were
3 concerned with 589 and its predecessor laws.

4 And I tried to synthesize these and
5 analyze the documents to make the best sense I could
6 of the story so that the court would have available
7 to it so the judge could make his own decisions on
8 the basis of this material in the way that I had
9 organized and presented it.

10 Q. Okay. So would you agree the role of
11 the expert witness is to provide information that
12 would be helpful to the fact finder?

13 A. Yes, and sort of informed conclusions.
14 As a historian, I know a lot about events in the
15 history of North Carolina that presumably a judge
16 well might not know about. He might, he might not.
17 I know a lot about election laws from other places,
18 other times. I've analyzed them in scholarly work
19 and in expert witness work all over the country.

20 So those, having -- having done that, I
21 can bring sort of specialized knowledge to the --
22 that the court can take into account.

1 Q. Okay. In this case, who is the ultimate
2 fact finder on the issue of intent? Is it you or is
3 it the court?

4 A. The court has to make its decision.

5 Q. Okay. And I wanted to ask you: What do
6 you view the role of a lawyer being in a case like
7 this?

8 A. (Pause).

9 Q. Let me see if I can narrow that
10 question.

11 Is it fair to say that a lawyer should
12 be serving as an advocate in a case for the people
13 they represent?

14 A. That's what lawyers do.

15 Q. Okay. Dr. Kousser, anywhere in this
16 report do you think that your testimony changed from
17 that of an expert witness to that of an advocate?

18 A. There's a sense in which whenever you
19 make an argument, you're an advocate for a
20 particular argument. Something convinces you and so
21 you become an advocate. I'm very self-conscious
22 about that and so in this work, as in all of my

1 Q. Well, are you an advocate for early
2 voting in the circumstances that exist in North
3 Carolina?

4 A. I think in North Carolina early voting
5 has done two things. One, it has gotten rid of the
6 terribly long lines that were, for example, in
7 Charlotte in the 1996 election. My understanding is
8 that there were lines two and a half hours in the
9 rain in 1996, and some people were quite perturbed
10 about that.

11 And if I had had to stand two and a half
12 hours in the rain, if it ever rains again in
13 Southern California -- I'm not sure it's ever going
14 to rain again in Southern California, but if I had
15 had to stand in two and a half hours of rain, I
16 would have been quite much in favor of early voting
17 so that I would have -- those lines wouldn't have
18 been so long. Certainly done that.

19 And the other thing that it has done,
20 given the evidence here, is that it has made it --
21 African-Americans have taken particular advantage of
22 it and they have made considerable use of it, and I

1 think that's a good thing. I think encouraging
2 people to vote, particularly minority people to turn
3 out in larger numbers, is a good thing.

4 So for these two reasons in this
5 particular context, it seems like a good thing.

6 Q. Okay. So --

7 A. I don't understand. In California,
8 early voting doesn't seem to have very much of an
9 effect. People don't do very much early voting. I
10 don't understand why that's the case and why it's so
11 popular in North Carolina. Maybe it's because it
12 never rains in Southern California and we don't have
13 to stand in the rain, and so we don't worry about
14 that.

15 Q. Okay. So, Dr. Kousser, if I ask you a
16 question that's a yes/no answer, would you say yes
17 or no and then you're happy to -- I'm happy to have
18 you explain your answer?

19 A. Okay.

20 Q. So -- so you are an advocate for early
21 voting in North Carolina?

22 MS. RIGGS: Objection.

1 THE WITNESS: I've said that there
2 were two things that I think --

3 BY MR. FARR:

4 Q. Well, yes or no?

5 A. I've said that there are two things that
6 I think are great advantages of it, and I -- I think
7 those -- those are good things.

8 Q. You don't need to repeat them.

9 A. So, yes, I think it's a good thing for
10 those two reasons.

11 Q. Okay. And are you an advocate of
12 same-day registration in North Carolina?

13 A. I've become convinced that same-day
14 registration is a very good thing.

15 Q. Okay.

16 A. There are -- there's a Caltech-MIT
17 Voting Project, and although I have not done very
18 much in it, the people in it have done studies of
19 same-day registration across the country and in
20 conversations with them, I've become convinced that
21 same-day registration is a good thing.

22 Q. Okay. Did you conduct cross-state

1 analysis of same-day registration in this case?

2 A. No.

3 Q. Okay. So you didn't look, for example,
4 at black turnout rates in states that do not have
5 same-day registration?

6 A. No.

7 Q. All right. And are you an advocate for
8 out-of-precinct voting in North Carolina?

9 A. I think it makes sense to count votes
10 where -- to the extent that they -- that the ballot
11 can be counted wherever the vote is cast. This is
12 something that has come up as a result of HAVA, the
13 Help America Vote Act, and it seems to me that it
14 makes a lot of sense, even if you vote out of your
15 precinct, to have the votes that are not
16 precinct-specific counted. So that seems to me a
17 good thing.

18 Q. Okay. All right. And are you an
19 advocate of preregistration of 16- and 17-year olds?

20 A. I think that's -- I think that is a very
21 good thing. I would have liked to have seen my
22 children register as early as possible, though

1 they're fairly political and they've always voted.
2 So I think they probably would always have done so,
3 but I have a lot of students at Caltech who are not
4 registered to vote, and it distresses me wherever
5 they are that they're not registered to vote. I
6 would have been very happy if they had registered to
7 vote in high school.

8 Q. Okay.

9 A. Because one of them was from North
10 Carolina who was in my Supreme Court class this
11 year, and I thought about failing her if she didn't
12 get registered to vote.

13 Q. Okay. It sounds reasonable to me.

14 So to kind of wrap up this line of
15 questioning, did you look at other states that did
16 or did not have early voting and determine whether
17 the lack of early voting had a prejudicial effect on
18 minority turnout?

19 A. No.

20 Q. Did you look at other states that did
21 not have same-day registration and determine whether
22 the lack of same-day registration had a negative

1 effect on black turnout?

2 A. No.

3 Q. Did you look at states that do not have
4 out-of-precinct voting to determine whether the lack
5 of out-of-precinct voting had a negative effect on
6 black turnout?

7 A. No.

8 Q. Did you did you look at states that did
9 not have preregistration of 16- to 17-year olds to
10 determine whether the lack of that practice had a
11 negative effect on black turnout?

12 A. No.

13 Q. Did you calculate how many states had
14 early voting versus those that didn't?

15 A. No.

16 Q. Did you calculate how many states had
17 same-day registration versus those that didn't?

18 A. No.

19 Q. Did you calculate how many states had
20 out-of-precinct voting versus those that did not?

21 A. No.

22 Q. Did you calculate how many states had

1 preregistration of voters as compared to those that
2 did not?

3 A. No.

4 Q. Okay.

5 A. Let me say that there are various ways
6 to make causal inferences about the institutional
7 effects of changes in election laws, and there are
8 pros and cons about doing various things. One is to
9 look at a series of states and to compare their
10 voting laws and then whatever dependent variable you
11 want. Could be the black percentage turnout. Could
12 be youth turnout. Could be senior citizen turnout
13 or whatever.

14 The difficulty about comparing things
15 across states is trying to figure out the index of
16 laws. If there's a voter ID law, is it exactly the
17 same as a voter ID law in another state, or do we
18 count all voter ID laws as -- as equivalent? That's
19 the difficulty. That's a real difficulty with voter
20 ID laws, but it's a difficulty with -- with other
21 facts, too. That's one sort of way of -- of doing
22 the analysis.

1 Another way is to look at the state over
2 time and see what happens to the state, particularly
3 in general, with regard to other states to see what
4 changes in the laws they make and what changes there
5 are in the dependent variables. For example, the
6 proportion of blacks who turn out to vote or the
7 proportion of blacks who register to vote.

8 The advantages of looking at the same
9 state is that you get -- you control for a lot of
10 different variables that you have difficulty
11 controlling for across states. You can look at --
12 you have the same demographic composition. It may
13 make a difficult -- you may have a difficulty if the
14 demographic compositions of two states are very
15 different because the -- because that may impact the
16 way that the state in general operates that you
17 can't entirely control for if you're looking across
18 states.

19 So here in effect what I did was to look
20 at one state across time and looked at it, in fact,
21 very much across time. Looked at it from the early
22 19th century to -- to the present, but particularly

1 looked at it from the 1990s to the time of the
2 passage of HB 589. So that's a different research
3 strategy.

4 There are some advantages to across
5 state research strategy. There's some advantages to
6 a within state strategy. I looked at it within
7 states. There are other expert witnesses on both
8 sides who are looking at -- looking at it across
9 states. That was not part of my -- the thing that I
10 did. I did not look at across states.

11 MR. FARR: Okay. Would you all
12 mind if we went off the record for a second.

13 MS. RIGGS: Sure.

14 THE VIDEOGRAPHER: Okay. Let's
15 pause tape 1. We're going off the record at 9:55
16 a.m.

17 (Recess taken - 9:55 a.m. -
18 10:05 a.m.)

19 THE VIDEOGRAPHER: We are resuming
20 tape 1. We're going back on the record at 10:05
21 a.m.

22 BY MR. FARR:

1 Q. Okay. Thank you, Dr. Kousser, for that
2 break.

3 You were saying that -- that you looked
4 in your study only at the voting results in North
5 Carolina and you didn't look at other states?

6 A. That's correct.

7 Q. So say, for example, Virginia and
8 Mississippi don't have any of these practices that
9 you're in favor of, and you didn't look to see if
10 the black turnout rates in those states were similar
11 to North Carolina?

12 A. I think I read something in some of the
13 reports that indicated that that was the case, but I
14 did not look at them.

15 Q. Okay. Now, so you've testified that
16 there was higher usage of these practices by
17 African-Americans in 2008 and 2012; is that correct?

18 A. I'm not sure that I said anything about
19 16-, 17-year old preregistration --

20 Q. Okay.

21 A. -- in the race.

22 Q. Okay. Right. That's fair enough.

1 report.

2 Q. Okay. But we'll agree that there was a
3 high participation rate by black voters in 2008 and
4 2012?

5 A. Yes.

6 Q. Okay. 2008 and 2012 were presidential
7 years?

8 A. Yes.

9 Q. Is the turnout typically higher in
10 presidential years than off-year elections?

11 A. Yes.

12 Q. Did you look or did you consider any
13 other possible factors that have -- that might have
14 contributed to the high usage of these practices by
15 African-Americans in 2008 and 2012?

16 A. By inference, yes. There's a section of
17 the -- of the report that looks at what the
18 potential effects would -- might be of repealing
19 these or changing these practices, and one of the
20 things that I say there is that there is an
21 interaction between campaign practices and laws, and
22 particularly I think in the 2008 election.

1 There's a book by Tova Wang -- T-o-v-a,
2 W-a-n-g -- that specifically looked at some of the
3 practices in North Carolina and said that the Obama
4 campaign targeted North Carolina in 2008 partly
5 because they thought that these laws gave them a
6 chance to carry the state and make the first really
7 successful Democratic campaign -- presidential
8 campaign since, I think, 1976 in the state.

9 So they -- they used -- they tried to
10 get people registered and they tried to get them to
11 vote early, and they targeted African-Americans in
12 the state because of the -- because the laws made
13 that a good campaign strategy.

14 So with regard to election laws -- and
15 this was the case also throughout the 20th century
16 in North Carolina -- it's the connection between
17 election laws and political strategies that account
18 for the larger effects of -- of the election laws.

19 To go back to what happened during the
20 disfranchisement after the 1900 constitutional
21 amendments, during the period of the late 19th
22 century, particularly from 1894 through 1900, the

1 Republican Party was very heavily contesting North
2 Carolina and doing so successfully. They elected a
3 governor in 1896, the only Democrat -- only
4 Republican governor in the South during that period.

5 Once the disfranchising laws -- the
6 literacy test, property test, poll tax, and expected
7 registration discrimination took place -- and black
8 turnout dropped precipitously, the Republican Party
9 basically stopped targeting North Carolina. They
10 stopped campaigning in North Carolina.

11 If you're trying to measure the effects
12 of the law, the devastating effect on black
13 political participation after 1900 in North
14 Carolina, the effect of the law is multiplied by the
15 way that it impacts the political party strategies.

16 Q. Okay.

17 A. The Republicans didn't contest North
18 Carolina again in presidential elections until 1928
19 when Al Smith got the Democratic nomination. So, of
20 course there are always multiple factors to explain
21 any particular phenomenon, but what should we -- how
22 much should we attribute to the election laws.

1 We have to attribute not only the gross
2 effect of the election law in effect, but also the
3 way that it interacts with the political strategies
4 that that election law makes possible.

5 Q. Okay.

6 A. And as a consequence, the relatively
7 liberal election laws passed from 1999 to through
8 2007 invited the Democratic -- Democrats from
9 outside and also inside North Carolina to contest it
10 much more heavily.

11 Q. Okay. Doctor --

12 A. There is every reason to believe because
13 of that long experience that the reversal of those
14 election laws will have a dramatic effect not only
15 because of the immediate effect of the election
16 laws, but also because it changes party strategies
17 in contesting those -- those candidacies and so the
18 election law always has a multiplier effect and that
19 ought to be taken into account.

20 Even if you might say, well, it's only
21 because the Democrats decided to contest North
22 Carolina much more heavily in 2008. It really ought

1 to be chalked up to the election law because the
2 interaction of the election law and the party
3 strategies, the political strategies multiply the
4 effect of the election law.

5 Q. Okay. Now, Dr. Kousser, was 1992 the
6 year Clinton was elected?

7 A. Yes.

8 Q. Am I remembering that right?

9 Do you remember who carried North
10 Carolina?

11 A. I do not remember whether Clinton
12 carried that or not. He may have.

13 Q. Okay. Well, if Clinton carried North
14 Carolina, he would have done so without all these
15 practices that you're testifying in favor of today?

16 A. Yes.

17 Q. Okay. And did the practices that you
18 are in favor of today, did they exist in Virginia in
19 2012?

20 A. All I know about that is what's in the
21 report of your expert.

22 Q. Okay. So if I tell you that they didn't

1 exist in Virginia, did you -- would you have any
2 reason to dispute that?

3 A. No.

4 Q. And who carried Virginia in 2012?

5 A. Obama carried Virginia in 2012.

6 Q. Okay. So was Obama able to adopt
7 different campaign strategies in Virginia that
8 allowed him to be successful, despite the fact that
9 Virginia did not have the practices that you're in
10 favor of here today? Yes or no?

11 A. Yes, but Virginia, as I said in an
12 answer to your earlier question, there are
13 difficulties in cross-state comparisons. Virginia
14 is rather different than North Carolina. Northern
15 Virginia, which has grown tremendously, and the
16 Norfolk Newport News area are much more heavily
17 populated and have grown a lot faster than even the
18 Research Triangle Area of North Carolina.

19 So there are different reasons why it's
20 possible for Obama to carry Virginia than to carry
21 North Carolina, and it's one of the difficulties in
22 making Cross State comparisons. Not everything is

1 the same.

2 Q. Okay. Did you check the black voter
3 turnout in Virginia versus North Carolina?

4 A. I did not look at that.

5 Q. Okay. Did you read Sean Trende's
6 deposition in this case?

7 A. I did, and let me say that the use of
8 the CPS figures for estimation of black turnout is
9 troubling. It's troubling to me. It's been
10 troubling to a lot of people. He mentioned it, I
11 think, as being troubling.

12 If you look at --

13 Q. I didn't ask you about the CPS figures.
14 I just asked you if you read his deposition. I
15 didn't ask you to give me a critique of his
16 deposition.

17 A. But that's what he compared. He
18 compared black turnout using the CPS figures, and if
19 you look -- if you take the CPS figures and you
20 compare them in North Carolina with the figures that
21 come out of the State Board of Elections as to the
22 number of blacks who voted and you use the census

1 CPS data?

2 A. I don't know.

3 Q. Okay. Did you -- in making your
4 determination about black participation in these
5 practices, did you evaluate the location of early
6 voting centers?

7 A. No.

8 Q. Did you evaluate get-out-the-vote
9 strategies of organizations dedicated to the turnout
10 of black voters related to taking voters to the
11 wrong precinct to vote?

12 A. I'm not sure I understand that question.

13 Q. Let's say there were some turnout
14 organizations who were dedicated to getting black
15 voters to vote.

16 MS. RIGGS: Objection.

17 BY MR. FARR:

18 Q. It's a good thing, okay?

19 MS. RIGGS: Objection to form.

20 BY MR. FARR:

21 Q. Okay. Let's say there were
22 organizations who were focused on getting black

1 voters to vote.

2 Do you know whether any of those
3 organizations took voters to precincts without
4 regard to whether they were actually registered in
5 the precinct?

6 A. I do not know.

7 Q. You didn't look at that?

8 A. No. I mean, in early voting, they would
9 not necessarily be in the precinct.

10 Q. I'm talking about Election Day.

11 A. No, I don't know anything about that.

12 Q. Okay. Now, I want to know: What did
13 you look at, what information did you rely upon to
14 make this report?

15 A. The information is given in the
16 footnotes of the report.

17 Q. Okay. Where did you get the
18 information?

19 A. Well, I looked at newspapers on my own
20 using something called NewsBank, and the parties
21 sent me copies of the hearings.

22 Q. The parties being the plaintiffs?

1 had presented. Thornton, Trende, Schroeder,
2 Hoffler.

3 Did I say that I read your legal papers?

4 Okay. What else did I look at? I don't
5 think I looked at any of the other plaintiffs'
6 reports.

7 MR. FARR: Okay. All right.

8 Let's now turn to your report, which we've marked as
9 what number?

10 THE REPORTER: 140.

11 MR. FARR: Okay. Could you
12 distribute that, please, Ms. Court Reporter, to the
13 other lawyers that are here.

14 BY MR. FARR:

15 Q. Okay. I want to start on page 5 and I
16 want to ask you some questions about the first
17 paragraph, and I want to focus in on your sentence
18 there that says:

19 "There were no credible charges of more
20 than minuscule fraud."

21 Do you see that sentence in the first
22 paragraph?

1 A. Yes.

2 Q. Okay. So prior to -- well, even in the
3 2014 primary, do you know what precinct workers do
4 when they check in a voter in North Carolina? Do
5 you have any knowledge of what they do?

6 A. Not any specific knowledge.

7 Q. Okay. Do you know what a voter has to
8 do to be allowed to vote when they come to the
9 precinct, what information they have to give to the
10 precinct worker?

11 A. I don't remember.

12 Q. Okay. Have you -- have you yourself
13 ever investigated allegations of voter
14 impersonation?

15 A. Other than reading reports and
16 treatises, no.

17 Q. Okay. Do you have any idea what tools
18 would be available to a precinct worker in North
19 Carolina today to evaluate whether a voter was
20 impersonating someone else when they -- when they
21 checked in to vote?

22 A. I do not -- I don't remember exactly

1 what has to be presented.

2 Q. Okay. So you don't know what tools
3 would be available to a precinct worker to make a
4 determination if someone showed up and claimed they
5 were a certain person and they really weren't?

6 A. I do not know specifically.

7 Q. Okay. Do you know how many
8 investigators the State Board of Elections had
9 through even the May primary of this year to
10 investigate allegations of voter fraud?

11 A. I do not know specifically.

12 Q. Do you know how much of a budget the
13 State Board of Elections had to investigate voter
14 fraud?

15 A. No.

16 Q. Do you know what, if any, steps North
17 Carolina had taken prior to 2014 to check their
18 voter rolls against the voter rolls in other states?

19 A. I don't remember whether prior to 2014
20 North Carolina was part of the sort of consortium
21 started by the Kansas Secretary of State. Don't
22 remember whether they were part of it and whether

1 they had done anything about that.

2 Q. Okay. Do you know that they've joined
3 that consortium as of 2014?

4 A. There were news stories that said that
5 they had joined that consortium. I'm very skeptical
6 of that consortium but...

7 Q. Okay. Do you know what, if any,
8 information North Carolina State Board of Elections
9 received back from that consortium in 2014?

10 A. I remember reading news stories and
11 there were -- there were allegations at least that
12 there were people with similar birth dates or the
13 same birth dates in more than one state and some in
14 North Carolina who had voted or were registered to
15 vote in other states.

16 Q. Okay. Do you recall that there, I
17 think, were about 700 people who had voted in two
18 states who had the same name, same birth date, and
19 same last four digits of their Social Security
20 number?

21 MS. RIGGS: Objection.

22 THE WITNESS: I read newspaper

1 reports of that.

2 BY MR. FARR:

3 Q. Okay.

4 A. That was in 2014.

5 Q. Yeah.

6 A. And so when I say there were no credible
7 charges prior to 2013, even if what you say were
8 true, that would not change the truth of that
9 statement.

10 Q. Okay. All right. Now I want to go to
11 your next paragraph and in that paragraph it starts:

12 "Nonetheless, when Republican landslide
13 swept in control of the state house."

14 Do you see that?

15 A. Yes.

16 Q. Okay. And you say that they -- you
17 recall Republicans wanted to repeal the laws that
18 you're in favor of that you're testifying about
19 today in 2000 -- after 2010?

20 MS. RIGGS: Objection.

21 THE WITNESS: We've talked about
22 "I am in favor of" and so we've already gone through

1 have five minutes left on this tape.

2 MR. FARR: Okay.

3 BY MR. FARR:

4 Q. So -- so bills similar to the bill
5 that's the subject of this lawsuit that was enacted
6 in 2013 were put before the General Assembly in
7 2011?

8 A. There were -- they did not cover
9 everything. Sometimes it's difficult to -- to find
10 all of the provisions of all of the bills in the
11 materials that I -- I used but, yes, in general,
12 that's the case.

13 Q. And you say "Although some Republicans
14 wanted to repeal all of the expansive laws"?

15 A. Yes.

16 Q. Okay. So that would include all of the
17 laws that are the subject of this lawsuit?

18 A. Yes.

19 Q. And that was -- that was known to
20 members of the General Assembly in 2011, according
21 to your report?

22 A. That there were some people who wanted.

1 They introduced bills to do that, yes.

2 Q. Okay. And then you say in the last
3 sentence:

4 "The fear that its obviously
5 retrogressive effect on African-Americans would
6 further" -- well, let's read the whole sentence.

7 "The prospects that such law would
8 survive the preclearance process of the Department
9 of Justice, even if it avoided a veto by Democratic
10 Governor Bev Perdue, and the fear that its obviously
11 retrogressive effect on African-Americans would
12 further taint a voter ID law apparently kept it
13 bottled up in the committee."

14 Do you see that sentence?

15 A. Yes.

16 Q. How do you -- how do you know that the
17 Republicans didn't pass the bill in 2011 because
18 they were afraid that it wouldn't preclear? Is that
19 just an assumption on your part, or do you have any
20 information to support that conclusion?

21 I'm asking you about the intent of the
22 Republicans.

1 A. I'm trying to remember whether there
2 were newspaper stories that said that specifically,
3 and I don't recall right now whether there were
4 newspaper stories that said that specifically.

5 But certainly in the context of the
6 2013, the way that the HB 589 developed in 2013, it
7 was clear that that was the driving motive of the
8 Republicans not to produce a comprehensive bill at
9 the very beginning.

10 Q. Well, we'll talk about that later
11 because that's in your report.

12 I'm talking about your understanding of
13 the intent of the Republicans in 2011.

14 That's just an assumption on your part,
15 is it not?

16 A. I don't recall whether there were
17 newspaper stories, if there were newspaper stories
18 that said that specifically and I cited them in the
19 later part of the report. This part is just a
20 summary. So it's hard to see from looking at just
21 this exactly what the evidence was there.

22 Q. Okay. And you say that these plans were

1 "obviously retrogressive"?

2 A. Yes.

3 Q. Okay. And you think they wouldn't have
4 precleared?

5 A. Yes.

6 Q. Okay. Are you familiar with Florida
7 early voting changes that took place in 2012?

8 A. Just by newspaper reports.

9 Q. Okay.

10 A. In general am familiar with them.

11 Q. Okay. And did -- did Florida reduce the
12 number of days for early voting?

13 A. It did.

14 Q. And was that ultimately precleared by
15 the Justice Department?

16 A. I think it was.

17 Q. Okay. And are you familiar with the
18 South Carolina challenge over the voter ID law that
19 was adopted in South Carolina?

20 A. Yes.

21 Q. And was that change ultimately
22 precleared?

1 A. When it was altered to change its
2 effect, it was precleared.

3 Q. Okay.

4 A. There was a bill in North Carolina --
5 there was an amendment in North Carolina to change
6 the voter ID law to what went into effect in South
7 Carolina, and it was defeated.

8 Q. Okay.

9 A. What I meant to say was that, if all of
10 these laws had been passed at the same time, the --
11 the likelihood of finding that there was
12 discriminatory intent under Section 5 and an
13 objection because there was discriminatory intent
14 and retrogression would have been, I think, very
15 high. Much higher than if they were simply passed
16 simply passed one at a time or one year they passed
17 one and another year they passed another.

18 The Justice Department increasingly in
19 the 1990s and 2000s made objections on the basis of
20 intent. I think Peyton McCrary did an article.
21 P-e-y-t-o-n M-c-C-r-a-r-y did an article that found
22 that eventually about 40% of the objections under

1 Section 5 were on intent.

2 When you put together all of these
3 changes at once, it's a red flag. It would have
4 been a red flag to the Department of Justice that
5 lots of stuff was going on, and they probably would
6 have been more likely to object than if these were
7 done piecemeal.

8 Q. But that's your opinion?

9 A. Yes, it is.

10 Q. Okay.

11 THE VIDEOGRAPHER: I have to
12 change tapes.

13 MR. FARR: Okay. Thank you.

14 THE VIDEOGRAPHER: This concludes
15 tape 1. We're going off the record at 10:35 a.m.

16 (Recess taken - 10:35 a.m. -
17 10:47 a.m.)

18 (Document marked, for
19 identification purposes, as Exhibit No. 141.)

20 THE VIDEOGRAPHER: This is the
21 beginning of tape 2. We're going back on the record
22 at 10:47 a.m.

1 BY MR. FARR:

2 Q. Okay. Dr. Kousser, have you had a
3 chance to look at Exhibit 141?

4 A. First 15 or 20 pages.

5 Q. Okay. Well, if -- if when I -- I'm not
6 going to ask you about the whole exhibit. So when I
7 ask you questions, if you feel like you want to read
8 some more of it when I ask you the question, let me
9 know.

10 A. Okay.

11 Q. Because I'm not going to grill you about
12 everything in this document.

13 I'm turning to your third paragraph on
14 page 5 where you say:

15 "An even larger Republican majority in
16 the legislature, greatly assisted by a restricting
17 that further packed blacks into districts that they
18 had shown they were capable of carrying with white
19 crossover votes, plus the election of the first
20 Republican governor in 18 years emboldened
21 Republicans, who pushed a photo ID bill through the
22 2013 House."

1 Okay. So I've got several questions to
2 ask you about this.

3 Is the term "emboldened" is that one
4 that would be associated with an expert witness, or
5 is that something that would be more associated with
6 an advocate?

7 A. I think it could be either.

8 Q. What does "emboldened" mean?

9 A. I don't have a dictionary, but it made
10 them more -- more eager and less reticent about
11 doing something.

12 Q. Okay. Now, you talk about the
13 redistricting plan. I've just handed you a decision
14 by a three-judge court in North Carolina in the case
15 of Dickson V. Rucho Lake County Superior Court 11
16 CBS 16896 that we've marked as Exhibit 141.

17 Have you ever read this before?

18 A. No.

19 Q. Okay. All right. When you say that the
20 Republicans "further packed blacks into districts,"
21 what do you mean by the term "packed"?

22 A. They increased the black percentage

1 beyond the current proportion, and the current
2 proportion, along with white crossover votes, had
3 allowed blacks to elect candidates of their choice,
4 often black in those districts.

5 Q. Okay. So you're saying that they put
6 more blacks in the districts than were needed for
7 the black voters to elect their candidate of choice?

8 A. Yes.

9 Q. All right. Is there a Supreme Court
10 case that you can think of that adopts that theory
11 of packing, a US Supreme Court case?

12 A. I don't recall one offhand.

13 Q. Okay.

14 A. There may be.

15 Q. Do you recall that the Supreme Court has
16 defined packing as something that may occur where a
17 legislature puts so many blacks in two districts
18 that it precludes the creation of a third majority
19 black district?

20 A. I suppose that that could be the case.
21 I can't recall immediately.

22 Q. Okay. But you can't think of a Supreme

1 Court case that defines packing the way you have
2 used that term on page 5 of your report?

3 A. I cannot now think of that but --

4 Q. That's all my question --

5 A. -- that definition of packing has been
6 used in redistricting long before it was applied to
7 race. It was applied to party. So you pack
8 Democrats in a particular district. You pack
9 Republicans in a particular district. That's --
10 that's a term that's been used with respect to
11 redistricting as long as I can remember.

12 Q. Okay. But you don't recall a Supreme
13 Court case where racial packing has been defined as
14 you understood it when you used this word on page 5
15 of your report?

16 A. I don't now recall that, no.

17 Q. Okay. Now, when you say they put more
18 minorities into a district than the prior districts,
19 are you talking about the legislative districts that
20 would have been enacted in the 2000s?

21 A. Yes.

22 Q. Okay. I want to ask you some questions

1 about those districts.

2 Have you studied those districts?

3 A. No. I was going on newspaper reports
4 of -- about the cases.

5 Q. Okay. And do you know how -- do you
6 know anything at all about the state criteria that
7 applies in North Carolina in the drawing of
8 legislative districts?

9 A. There are whole county criteria as they
10 are in Texas. They're, of course, subject to equal
11 population and so they can be broken from time to
12 time.

13 I recall from having done Shaw versus
14 Hunt that there were practices in North Carolina in
15 redistricting that I certainly had never heard of
16 before North Carolina. Very interesting practices.
17 I remember the term "double crossover" which I had
18 never heard before.

19 Q. Yes, we found those unusual also on our
20 side.

21 A. I am sure that you did and said so
22 during the Shaw versus Hunt litigation.

1 So there -- there are lots of practices,
2 formal and informal, that have gone on in North
3 Carolina, some of which I know about, unquestionably
4 some of which I don't know about, that have gone on
5 for a long time.

6 Q. Okay. So do you know -- can you explain
7 the county criteria formula that the legislature
8 must follow in North Carolina based upon North
9 Carolina Supreme Court decisions?

10 A. I do not know exactly what it is.

11 Q. Okay. And in terms of the -- the 2000
12 era legislative districts, you will agree that after
13 the 2010 census, one of the things the legislature
14 has to do is to bring the new districts into
15 compliance with the "one person, one vote"
16 requirement?

17 A. Yes.

18 Q. Okay. Do you know the prior districts
19 that you were referring to, do you know how much any
20 of those districts were underpopulated based upon
21 the 2010 census?

22 A. I have not studied the redistricting in

1 2011 in detail in North Carolina.

2 Q. Okay. So you don't know how much they
3 were underpopulated?

4 A. No.

5 Q. And did you study any of the election
6 results for any of these prior districts?

7 A. I know in general from newspaper reports
8 that there were districts that were under 50% black
9 where black candidates or obviously black candidates
10 of choice could be elected even if they were white.
11 I know that those existed.

12 Q. Okay. Do you know whether any of those
13 districts were -- that you just referred to were
14 majority non-Hispanic white districts?

15 A. I think that there were some that were
16 non -- majority non-Hispanic white districts.

17 Q. Okay. But you have not studied that?

18 A. But I have not studied that in detail.

19 Q. And is your reliance for that statement
20 newspaper stories?

21 A. Primarily newspaper stories, yes.

22 Q. If I told you that none of those

1 districts were majority non-Hispanic white under the
2 2010 census, do you have any reason to dispute that?

3 MS. RIGGS: Objection.

4 THE WITNESS: I simply don't know.

5 BY MR. FARR:

6 Q. Okay. And do you know how much the
7 black -- the black candidates in these districts,
8 what the actual difference was in terms of vote
9 totals for the winning black candidate of choice
10 versus a Republican or a Libertarian opponent?

11 A. I do not know specifically.

12 Q. Do you know whether the margins of
13 victory were less than the total amount of people
14 that the districts were underpopulated?

15 A. I don't know, and I don't know what
16 criterion of leeway was applied in North Carolina.
17 I don't know whether there was a 5% plus or minus
18 criterion of leeway applied or whether there was
19 some different criterion of leeway. I don't know
20 how you interpreted the decisions from Georgia in
21 2004. I don't know whether that was considered
22 controlling in North Carolina during the

1 redistricting or not.

2 Q. Okay. Well, if you read Exhibit 141, I
3 think you'll see that the "one person, one vote"
4 range was plus or minus 5. So that was the standard
5 that was used in North Carolina.

6 A. Okay.

7 Q. Okay. So you don't know whether the
8 amount the former districts were underpopulated
9 exceeded the winning margins of the candidates of
10 choice in the old districts?

11 A. I don't know.

12 Q. Okay. And did you study how much money
13 was raised and spent by the candidates of choice in
14 the old districts versus the challengers?

15 A. I did not.

16 Q. Okay. Are you familiar with the
17 Strickland V. Bartlett decision?

18 A. Generally.

19 Q. Okay. Is it -- is it true -- is it true
20 that the Strickland V. Bartlett decision states that
21 districts designed to protect a state from liability
22 under Section 2 need to have a 50% plus one voting

1 age population of the minority group?

2 MS. RIGGS: Objection.

3 THE WITNESS: Strickland states

4 that, yes.

5 BY MR. FARR:

6 Q. Okay. So would it be reasonable for the

7 General Assembly -- and we can get into this later,

8 but I know you've testified that the racially

9 polarized voting is still present in North Carolina?

10 A. Yes.

11 Q. Okay. So if the state was drawing

12 districts to protect the state from liability under

13 Section 2 in light of the Strickland decision, would

14 it have been reasonable to draw the districts up to

15 50% black population plus one?

16 A. They might have decided to do that.

17 Q. Would that be consistent with the

18 Strickland opinion?

19 A. They might -- I think they probably

20 wouldn't have faced liability if they had continued

21 to draw the district with the same percentage of

22 minorities as in the previous districts, but they

1 could conceivably have interpreted the decision to
2 force them to do that.

3 Q. Was it reasonable to follow a decision
4 by the United States Supreme Court?

5 A. It's reasonable to follow. What the
6 implications of that decision are exactly on
7 redistricting is quite another matter.

8 Q. Okay. Do you know whether or not the
9 North Carolina redistricting plans were precleared?

10 A. They were.

11 Q. Okay. And were they precleared by a
12 court or were they precleared by the United States
13 Department of Justice?

14 A. They were precleared by the Justice
15 Department.

16 Q. Okay. Now, somewhere in your report
17 you've made the statement that the Republican
18 legislature "packed blacks in a few districts" or
19 words to that effect.

20 Do you remember making a comment along
21 those lines?

22 MS. RIGGS: Objection.

1 THE WITNESS: I think I said that
2 here.

3 BY MR. FARR:

4 Q. When?

5 A. In what you've quoted already.

6 Q. Okay. Great.

7 Now, I want you to turn to page 25 of
8 Exhibit 141, and this is a table in the -- oh, by
9 the way, did you know that this decision was by a
10 three-judge court?

11 A. You said so.

12 Q. Okay. Did you know that two of the
13 judges on this court were Democrats?

14 A. I did not know that.

15 Q. Did you know that one of the judges was
16 a black female African-American Democrat?

17 A. I did not know that.

18 Q. Did you know the decision finding these
19 districts constitutional was a unanimous 3-0
20 opinion?

21 A. I did not know that.

22 Q. Now, if you turn to 25, Table 1, there's

1 A. The way that I would read that table --

2 Q. No, that wasn't my question.

3 My question was: Do you think Southern
4 Coalition for Social Justice -- would you expect
5 that they would pack too many blacks in too few
6 districts?

7 MS. RIGGS: Objection.

8 BY MR. FARR:

9 Q. Yes or no?

10 A. I actually don't know.

11 Q. Okay. What about the Legislative Black
12 Caucus? Would they pack too many blacks in too few
13 districts?

14 A. That I certainly do not know.

15 Q. Okay. Did you -- did you ever attempt
16 to study the percentage of the black population in
17 North Carolina that was included in the 10 enacted
18 Senate districts and compare that percentage against
19 the percentage of black population included in the 9
20 Senate districts proposed by Southern Coalition, the
21 7 districts proposed by the Senate leadership, which
22 is Fair and Legal, or the 8 Senate districts that

1 were proposed by the Legislative Black Caucus?

2 A. I did not.

3 Let me say that when I look at Table 1,
4 what I see -- you're looking at the third row. What
5 I look at is the first row.

6 Q. Uh-huh.

7 A. That's the one that attracts my
8 attention. Those are the districts that are over
9 50% black VAP.

10 Q. Uh-huh.

11 A. And there the expected plan has 9 of
12 those districts, and all of the other plans have
13 very much, many fewer of those districts. It
14 appears from this chart that the expected plan has
15 very few districts that are between 40 and 50%.

16 Those are presumably districts that
17 blacks had been able to elect candidates of their
18 choice in the past. The 2003 plan, if you look at
19 row 2, has 8 of those districts. The plan enacted
20 by the legislature or the -- the enacted plan has
21 one of those districts.

22 The difference in the strategies that's

1 read. I read a lot about redistricting. I copy
2 them to files, and if I'm not looking specifically
3 to include those in a report, I forget which
4 newspapers they were.

5 Q. Okay. So the question that we started
6 with was, you made -- you've made the argument that
7 the Republicans in these plans put too many blacks
8 in too few districts. You've made that statement in
9 your report?

10 A. Yes.

11 Q. Okay. So this is where we got
12 off-track.

13 Do you know what percentage of the black
14 population of North Carolina is included in the 10
15 enacted 2011 Senate districts?

16 A. I'm sorry. Can you repeat?

17 Q. Do you know what percentage of the black
18 population -- what percentage of the black
19 population in North Carolina is included in the 10
20 enacted Senate districts?

21 A. I do not know exactly.

22 Q. What percentage of the black population

1 was included in the 2003 plan 40% plus districts
2 under the 2010 census?

3 A. I do not know exactly.

4 Q. What percentage of the North Carolina
5 black population was included in the 9 Senate
6 districts proposed by the Southern Coalition of
7 Social Justice?

8 A. I do not know exactly.

9 Q. What percentage of the black population
10 was included in the 7 Senate districts proposed by
11 the Democratic leadership in the Fair and Legal
12 Senate plan?

13 A. I do not know exactly.

14 Q. What percentage of the black population
15 of North Carolina was included in the 8 Senate
16 districts proposed by the Legislative Black Caucus?

17 A. I do not know exactly.

18 Q. So you don't know, you can't say today
19 if a higher percentage of the black population in
20 North Carolina was included in the 10 Senate enacted
21 districts as compared to the other alternatives?

22 A. I do not know, but I can see from

1 Table 1 that there were fewer 50% plus districts in
2 all the other plans. And so there must have been a
3 smaller proportion of the total population total
4 black population of North Carolina included in 50%
5 plans in the alternatives than in the enacted plan.

6 Q. Do you know how much the difference was?

7 A. I do not know.

8 Q. Okay. And if we go down to Table 2, you
9 don't know what percentage of the black population
10 in North Carolina was included in the 25 enacted
11 House districts that had black population at 40% or
12 higher?

13 A. I do not know.

14 Q. And you don't know what percentage of
15 the state black population was included for all the
16 other plans for all their proposed House districts?

17 A. Of the over 40%. But, again, this table
18 is just like the other table. If you look at the
19 over 50% districts, there are twice as many or more
20 in the enacted plan than in any of the other plans.
21 There has to have been a higher proportion of total
22 population but, more importantly, in -- you vote by

1 they would draw the majority black districts with at
2 least 50% plus one black voting age population?

3 A. They might have done so. They might
4 have drawn it 50.1%. I don't know what -- it's over
5 50, but I don't know what -- how much over 50 it is.

6 Q. Okay. And then we got off-track again
7 about the question that I really started this
8 inquiry over, which is, the percentage of the
9 state's total black population included in the
10 districts proposed by all of these alternative plans
11 in 2011.

12 So you don't -- you don't know the
13 difference between the amount of black population
14 included in the enacted plan's 25 districts as
15 compared to the Legislative Black Caucus's 23
16 districts? You don't know the difference?

17 A. I don't.

18 Q. Okay. And you said -- you used the word
19 "maximize" the number of districts.

20 What does that mean to you?

21 A. It means create the largest number of
22 districts that you can that's over 50% black.

1 Q. Okay. Do you know whether the
2 legislature did that? Did they create the maximum
3 number of 50% districts that could have been created
4 in North Carolina?

5 A. I don't know. They might have packed
6 more people into even fewer districts.

7 Q. That wasn't my question.

8 My question is: Do you know if they
9 created the maximum number of majority black Senate
10 districts and the maximum number of majority House
11 districts?

12 A. I said, no, they might have created --
13 they might have packed each district even more than
14 that and so created a minimum number of 50% plus VAP
15 districts.

16 Q. So -- so you don't know whether they did
17 or they didn't create the maximum number of 50% plus
18 districts?

19 A. No.

20 Q. Okay. Now, I'm going to turn to the
21 next few pages.

22 Do you understand what -- what the term

1 be used, but it's not -- not absolutely conclusive.

2 BY MR. FARR:

3 Q. Have you ever advocated for
4 proportionality in legislative plans?

5 A. Maybe for rough proportionality, but it
6 depends on how -- it depends on how the population
7 is distributed.

8 Q. Right. But you've given testimony in
9 cases where you've advocated that the minority group
10 be given proportionality in a number of districts?

11 MS. RIGGS: Objection.

12 THE WITNESS: Rough
13 proportionality.

14 BY MR. FARR:

15 Q. Okay. And are you aware of the court's
16 conclusion in Dickson V. Rucho that the 2011 Senate
17 and House plans provided African-Americans with
18 rough proportionality?

19 MS. RIGGS: Objection. He said he
20 only read the first few pages.

21 BY MR. FARR:

22 Q. Well, we can read the rest of them.

1 If they did, will you dispute me in my
2 representation to you that they did so hold that?

3 A. If you say so, I'm sure that you're
4 telling the truth.

5 Q. Okay. And so now my question to you,
6 sir, is: We'll go over this later, but you have had
7 a lot of experience in voting rights cases and we
8 have statewide laws at issue in this case; correct?

9 A. Yes.

10 Q. Are you aware of any case where a state
11 has been found guilty of liability under either the
12 Equal Protection clause or Section 2 for a statewide
13 law where the state had provided proportionality for
14 African-Americans in the state legislature? That's
15 a yes or no question.

16 MS. RIGGS: Objection.

17 THE WITNESS: Usually the Supreme
18 Court and other courts will say that the legality of
19 a district is very specific to a particular area.

20 BY MR. FARR:

21 Q. Uh-huh.

22 A. And so they typically don't -- don't

1 make a decision on the basis of statewide
2 proportionality in redistricting cases.

3 Q. Didn't the court do that in De Grandy?

4 A. Well, they didn't. I mean, in De
5 Grandy, Justice Souter looked at that. Looked at a
6 part of the area of Florida, and they don't have to
7 create a majority-minority district there that
8 minorities are not free from the responsibility to
9 what, pull, haul and trade, I think.

10 So the discussion of proportionality
11 there is both region-specific and it doesn't require
12 a majority. At least as I remember De Grandy. It's
13 been a long time since I've read it.

14 Q. Why was it region-specific in De Grandy?
15 Isn't that because the parties focused on a region
16 in the case?

17 A. I will have to say that it has been a
18 long time since I've read De Grandy, and I'm sure
19 that your memory of that is better than mine.

20 Q. Okay. Has the Supreme Court in other
21 cases held that proportionality on a statewide basis
22 is a factor in a Section 2 case?

1 MS. RIGGS: Objection.

2 THE WITNESS: I'm trying to think.

3 Usually the discussion does not go that way.

4 BY MR. FARR:

5 Q. Have you read -- are you familiar with

6 League of United Latin American Citizens V. Perry

7 which is a 2006 decision by the Supreme Court?

8 A. Yes.

9 Q. Did they not say that proportionality

10 statewide was an issue in determining whether there

11 had been a discrimination claim proven statewide?

12 A. It was an issue, but they focused on

13 District 23 and that was what I testified about and,

14 in fact, the fact that it was majority, I think even

15 majority CVAP Latino, was -- didn't shelter the

16 state from liability in that particular case.

17 That -- that is quintessentially a case

18 where Justice Kennedy focused on one district, and

19 one of the things that he said was Texas was

20 claiming that they had created another district

21 which gave Latinos a chance to elect and that that

22 would -- would offset the fact that they had

1 diminished the Latino majority in District 23, and
2 Justice Kennedy said that's not good enough. Said
3 each district has got to be taken by itself.

4 Q. Okay. So in this case, Dr. Kousser, let
5 me represent to you that this court in Dickson V.
6 Rucho looked at all the districts and found that
7 they were legal, okay? Do you have any reason to
8 dispute that?

9 A. I'm sure that you're telling the truth.

10 Q. Okay. So my question to you is: Are
11 you aware of any case where a state has provided a
12 proportional number of districts to a minority group
13 where the districts had been found to be legal and
14 where the court, nevertheless, found either an Equal
15 Protection or a Section 2 violation based upon the
16 application of some other statewide law? And that's
17 a yes or no question.

18 MS. RIGGS: Objection to form.

19 BY MR. FARR:

20 Q. Well, you can object to the form, but
21 you can answer the question.

22 A. I'm sorry. It is too complicated. You

1 put -- there are too many --

2 Q. All right. Well, I'll try again.

3 A. Okay.

4 Q. We had -- we had proportional number of
5 districts.

6 A. Okay.

7 Q. They've been declared legal by a
8 three-judge court?

9 A. Okay.

10 Q. Are you aware of any case where a state
11 has provided a proportional number of legal
12 districts to a minority group where a court has
13 found liability under Section 2 or the 14th
14 Amendment for some other statewide voting law?

15 MS. RIGGS: Standing objection.

16 But you can answer if you can.

17 BY MR. FARR:

18 Q. The answer is yes or no.

19 A. I'm sorry. I'm still confused. It's
20 the last part of it that confuses me.

21 Q. Okay. I'll try it one more time.

22 A. Please.

1 Q. We have -- we have -- the legislature
2 has given the minorities a proportional number of
3 districts. The court --

4 A. The district -- the number of districts
5 is roughly proportional to the black population in
6 the state as a whole?

7 Q. Yes.

8 A. Okay. That's what you mean by that?

9 Q. Yes.

10 A. Fine.

11 Q. And then a court has found them all to
12 be legal.

13 A. Okay.

14 Q. My question is: Under those
15 circumstances, are you aware of a Section 2 case or
16 an Equal Protection case where a court has found
17 liability against that jurisdiction for some other
18 statewide voting law?

19 A. I'm sorry.

20 MS. RIGGS: Standing objection.

21 THE WITNESS: "For some other
22 statewide voting law." What kind?

1 BY MR. FARR:

2 Q. Anything.

3 A. Anything?

4 Q. Yeah. If you can't think of one, then
5 just say you can't think of one.

6 A. I'm -- let me try to -- let me try to
7 understand what you're saying.

8 The statewide voting law could be a
9 voting law about registration or about early voting
10 or about --

11 Q. Same-day registration.

12 A. Same-day registration?

13 Q. Yeah.

14 A. I'm unaware of that, but I don't know
15 that that's ever come up.

16 Q. Okay. Well, we're going to go into the
17 Gingles factors later, but isn't one of the Senate
18 Factors the degree to which minorities are able to
19 elect candidates of choice?

20 A. Yes.

21 Q. Okay. And that would include their
22 ability to elect candidates of choice in the

1 legislature?

2 A. Yes.

3 Q. And you didn't really look at that in

4 your report, did you? At what -- how many

5 candidates of choice could be elected by

6 African-Americans in North Carolina under the 2011

7 redistricting plans?

8 A. I did not specifically look at that.

9 MR. FARR: I'd like to take a
10 break, if that's okay.

11 MS. RIGGS: Fine.

12 THE VIDEOGRAPHER: We will pause
13 tape 2. We're going off the record at 11:28 a.m.

14 (Recess taken - 11:28 a.m. -
15 11:40 a.m.)

16 THE VIDEOGRAPHER: We're going to
17 continue tape 2. We're going back on the record at
18 11:40 a.m.

19 BY MR. FARR:

20 Q. Okay. Dr. Kousser, I just have a few
21 more questions here on page 5 and 6.

22 At the bottom of the paragraph of the

1 last paragraph on page 5, you make the comment that
2 eliminating some of these practices "would
3 disproportionately burden African-American voters."

4 You see that statement?

5 A. Yes.

6 Q. Okay. After the elimination of these
7 practices, can all voters register 25 days before
8 the election?

9 A. Yes.

10 Q. Okay. Can all voters -- do all voters
11 have the right to vote during the 10 days of early
12 voting?

13 A. Yes.

14 Q. Do all voters have the right to go vote
15 in their own precinct?

16 A. Yes.

17 Q. And do all voters -- I don't -- you
18 didn't testify about preregistration, I think you
19 told me. You didn't look at that?

20 A. I -- I talked about the passage of the
21 law.

22 Q. Uh-huh.

1 A. But that's, I understand, not an issue
2 in this case or at least in the Legal of Women
3 Voters lawsuit.

4 Q. Okay. Okay. So -- so all voters
5 without regard to race have the legal right to
6 register 25 days before the election?

7 A. Just as all voters after 1900 had the
8 right to vote if they -- if they paid a poll tax.
9 Yes, exactly the same.

10 Q. Do you see paying a poll tax as being
11 different than a deadline for registration? Is
12 there nothing different between that?

13 A. It is exactly the same in that all
14 voters have to do it, which is what your line of
15 questioning was about.

16 Q. Yeah, but a poll tax is a qualification
17 to vote. You couldn't vote unless you paid a poll
18 tax; right?

19 A. That's -- that's correct, but it is a
20 restriction on the suffrage, and it's a restriction
21 that makes it more difficult for minorities to elect
22 candidates of their choice and to participate in

1 politics.

2 Q. All right.

3 A. And the same thing, I think, is true
4 with the other restrictions that I've described and
5 that you just talked about.

6 Q. Okay. So has Congress violated the
7 Equal Protection clause or Section 2 by stating that
8 states can cut off their registration 30 days before
9 an election?

10 A. No, Congress has not done that.

11 Q. Well, they have passed a law saying that
12 states can cut off their registration books 30 days
13 before the registration; right?

14 A. That's correct.

15 Q. And is that a violation of Section 2 of
16 the Equal Protection clause?

17 A. No.

18 Q. Has Congress mandated early voting?

19 A. It has not mandated early voting.

20 Q. Okay. Has Congress violated the Equal
21 Protection clause or Section 2 by not mandating
22 early voting?

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

3 THE WITNESS: If Congress had done
4 what the state of North Carolina did, which was to
5 pass an early voting requirement of 17 days and cut
6 it back to 10 days and the other factors that one
7 would consider in looking at that were the same as
8 in North Carolina and, therefore, indicated some
9 racially discriminatory purpose, then it might be
10 that a court would decide that Congress had violated
11 the Equal Protection clause as it applies to the
12 federal government through the due process clause of
13 the Fifth Amendment.

14 BY MR. FARR:

15 Q. Are you familiar with the elections
16 clause of the Constitution?

17 A. Yes.

18 Q. Does that give states the right to set
19 regulations for holding elections absent some
20 preemptive law by Congress?

21 A. And the Reconstruction Amendments, yes.

22 Q. Okay. And so Congress has stated that

1 states can close their registration books 30 days

2 before the election?

3 MS. RIGGS: Objection. Asked and

4 answered.

5 THE WITNESS: It has, yes.

6 BY MR. FARR:

7 Q. Okay. Congress has not mandated

8 same-day registration?

9 A. That is correct.

10 Q. Okay. Now, when you say these changes

11 are going to have a suppressive effect, suppressive

12 effect on what?

13 A. On the participation of blacks and

14 Latinos.

15 Q. Okay. Have you made any calculations

16 about how the elimination of these practices is

17 going to reduce black voter turnout in the 2014

18 election?

19 A. I have made no calculations.

20 Q. Okay. Have you made any calculations

21 about how the elimination of these practices are

22 going to reduce Latino turnout in the 2014 election?

1 A. I've made no calculations.

2 Q. Okay. And you haven't made any

3 calculations for how black or Latino turnout will be

4 impacted in the 2016 presidential election because

5 of the elimination of these practices?

6 A. I haven't made any calculations on the

7 exact suppressive effect at all.

8 Q. Right. So it's your opinion that

9 they'll have a suppressive effect, but you have not

10 predicted what that effect would be?

11 A. That's right. The opinion is based upon

12 the increase in black participation. I don't -- we

13 don't really know much, I think, about Latino

14 participation, but the increase in black

15 participation that has evidently become because of

16 the passage of these laws and the interconnections

17 between the passage of the laws and the electoral

18 strategies that various parties, particularly the

19 Obama campaign, have adopted, the passage of these

20 laws increase black participation and it's a logical

21 inference that the repeal of these laws would

22 decrease it.

1 Q. All right, sir, but let's agree that
2 black participation increased in the 2008 and 2012
3 presidential elections. We agree to that?

4 A. It increased in 2004 as well.

5 Q. Okay. And they didn't have same-day
6 registration in 2004, did they?

7 A. They had early voting in 2004.

8 Q. Okay. What -- so there's a correlation
9 between the increase in black voting and some of
10 these laws.

11 Have you performed any study to show
12 that there's an actual -- a causal relationship?

13 A. There -- I have not performed a precise
14 study. What I have looked at is the -- the actual
15 facts. So you look at the actual facts. You see
16 black participation rose, particularly it started
17 rising in about 2000 and in successive presidential
18 campaigns, as more and more African-Americans
19 started to vote early in each election. And as the
20 laws liberalized again and again, there was
21 considerable increase in the black proportion
22 participating in politics.

1 I have argued that previously in this, I
2 argued in my report and I have talked about it here,
3 that that came because of a combination of political
4 strategies that took advantage of the liberalization
5 of the laws and of the laws themselves.

6 Participation turnout in North Carolina
7 as a proportion of the population -- of the voting
8 age population grew relative to other states during
9 that period of time, too. I think those facts are
10 sufficient to increase -- to lead to the conclusion
11 that this is not only a correlation, but that
12 there's -- that there's a legitimate causal
13 inference to make.

14 Q. Okay. Have you performed a statistical
15 analysis to show whether there's a statistically
16 significant causal relationship between these laws
17 and increased black voter participation?

18 A. No. That was not my part of the case.

19 Other people are doing that.

20 Q. Okay. All right. I'm going to turn to
21 paragraph 16 of your report.

22 MS. RIGGS: Page 16?

1 MR. FARR: Page 16. Thank you,
2 Allison.

3 BY MR. FARR:

4 Q. Okay. You have a heading there saying
5 "Democratizing North Carolina Election Law and
6 Increasing Turnout, 1995-2009"?

7 A. Yes.

8 Q. Is the term "democratizing" is that the
9 statement of an expert or is that the statement of
10 an advocate?

11 A. That's the statement of -- of an expert.
12 I mean, it made it easier to vote. It led to
13 greater participation. I would define that as -- as
14 more democracy.

15 Q. The states that don't have early voting,
16 are their processes not democratic?

17 A. They're less democratic.

18 Q. Okay.

19 A. They can be democratic.

20 Q. You think early voting makes an election
21 process more democratic than a system that doesn't
22 have early voting?

1 A. It can. In North Carolina, it obviously
2 did. In California, it doesn't seem to have that
3 effect.

4 Q. Okay.

5 A. Californians vote more by mail now, and
6 they don't engage in early voting to the extent --
7 same extent, and I really don't understand why
8 that's the case. Maybe we just don't make early
9 voting as easily available in California and maybe
10 we should. You have to -- you have to look at
11 things quite specifically, and that's what I tried
12 to do in North Carolina.

13 Q. Okay. But you don't have to have early
14 voting to have a democratic election process, do
15 you?

16 A. No, of course not, but more -- you would
17 have a more democratic process if you had that
18 available.

19 Q. Okay. What about in states where black
20 voter participation has increased without early
21 voting? Does that type of state have a democratic
22 process?

1 A. It may well. I would have to look at
2 the exact state and also the index of black
3 political participation. North Carolina is blessed
4 with wonderful statistics, and I wish every state
5 had statistics that were as terrific as North
6 Carolina's statistics have been for a long period of
7 time. If you need to look at discrimination, North
8 Carolina is a wonderful place to look.

9 Q. Okay.

10 THE VIDEOGRAPHER: We have five
11 minutes on this tape.

12 BY MR. FARR:

13 Q. All right. Let's see if I can finish up
14 on a few exhibits here.

15 I wanted to get you to explain to me
16 starting on page 20, Tables 1, 2, and 3 because I'm
17 not quite sure I understand those tables.

18 So let's start with Table 1.

19 A. Do you have a question?

20 Q. Yeah. What is it? My question is:
21 Explain to me what Table 1 is.

22 A. It gives the percentage turnout of the

1 voting-eligible population and it looks at the
2 national rank of the turnout of the voting-eligible
3 population. So North Carolina in 1988, 44.5% of the
4 voting-eligible population, the voting age
5 population or it's possible that I have CVAP in the
6 later -- C-V-A-P capitalized -- in the later
7 figures, I can't remember.

8 And it gives the national ranking by the
9 same index of North Carolina among the 50 states.
10 So in 1988, it was 48th in its proportion of turnout
11 by -- there's a big jump from 1996 to 2000 it got to
12 be 37th and by 2012 it's 11th --

13 Q. Okay.

14 A. -- in turnout.

15 Q. Are all the years that you tested here
16 election years or general -- or presidential
17 election years?

18 A. Yes.

19 Q. Okay. You didn't -- you didn't test
20 this for off-year elections?

21 A. I did not look at off-year elections in
22 this table.

1 Q. Okay. Just a question.

2 Where did California rate in 2008 and
3 2012 since you're from California?

4 A. I don't remember.

5 Q. Was it lower than?

6 A. I think it was lower.

7 Q. Okay.

8 A. California was not contested.

9 California has not been contested since probably --
10 in presidential elections since probably 1992.

11 Q. Okay. So -- so you would agree that the
12 increase in voter turnout in 2008 and 2012 in North
13 Carolina could be a function of the amount of money
14 and effort the presidential elections put into North
15 Carolina in 2008 and 2012 as compared to states that
16 weren't contested by the presidential candidates?

17 A. In North Carolina, as I've said before,
18 the election laws offered the Democrats for the
19 first time in a long time a good chance to carry
20 North Carolina so they put money into it. In
21 California, Democrats didn't have to put any money
22 into it.

1 Q. Okay. So the turnout in California
2 versus voting age population was lower than it was
3 in North Carolina?

4 A. I think so.

5 Q. In 2008 and 2012?

6 A. I think that's correct.

7 Q. What did Virginia rate?

8 A. I don't remember.

9 Q. Okay. I don't remember -- I don't
10 remember this. Who won Virginia in 2008? Did Obama
11 win?

12 A. Obama carried it in 2008.

13 Q. And he carried it in 2012?

14 A. That's correct.

15 Q. And so that was a state where Obama
16 thought he had a chance of winning in 2008 and 2012?

17 A. Obviously so.

18 Q. Okay. Do you know the -- can you
19 compare the amount of resources that the Obama
20 campaign put in Virginia versus North Carolina?

21 A. I don't remember.

22 Q. And the Obama campaign did put

1 substantial resources into Virginia in 2008 and
2 2012?

3 A. That was what news reports said at the
4 time.

5 Q. Okay. And they did so even though
6 Virginia doesn't have early voting, out-of-precinct
7 voting, or same-day registration?

8 A. As I said before, that's correct. As I
9 said before, Virginia has other things. It has
10 Northern Virginia.

11 Q. Okay. But Obama thought that he had a
12 chance of winning Virginia. So they put resources
13 into Virginia in 2008 and 2012, even though Virginia
14 did not have the practices that have been eliminated
15 in North Carolina?

16 A. Yes. It had a more favorable
17 environment. You would get more white votes in
18 Virginia in Northern Virginia than you could in any
19 place in North Carolina, I think.

20 Q. Okay. Have you studied how the voting
21 patterns in North Carolina have changed between
22 Republican and Democrat in the larger counties in

1 North Carolina?

2 A. I have not specifically studied that. I
3 can't remember for sure.

4 Q. Okay. If you looked at Raleigh and
5 Mecklenburg County, is there a possibility that the
6 white voters in those two counties may reflect in
7 some degree the political leanings of the white
8 voters in Northern Virginia?

9 A. Probably in Raleigh. I don't remember
10 from Charlotte, but I have not studied this
11 specifically so I ought not to opine.

12 Q. Okay. So you have not compared the
13 white voter in Northern Virginia versus the white
14 voter in the urban counties in the state of North
15 Carolina?

16 A. Except through news reports that say
17 that Northern Virginia white voters are -- it's an
18 outpost of the middle Atlantic states and they say
19 that a bit less about the Triangle.

20 Q. Okay. All right. Now, turning to
21 Table 2, can you tell me what this is?

22 THE VIDEOGRAPHER: I'm sorry,

1 Q. Okay.

2 A. It's a five-year estimate. 2012 --

3 Q. Right.

4 A. -- would be the end year.

5 Q. Okay. So in '96, 48.3% of the
6 citizen -- white citizen-age voting population voted
7 and 36.9% of the African-American citizen-age voting
8 age population voted?

9 A. Yes.

10 Q. Okay. And in 2008 and 2012, a higher
11 percentage of the black citizen-age voting age
12 population voted than the percentage of the white
13 citizen-age population?

14 A. Yes. By these figures, yes.

15 Q. But in 2006 and 2010, it was reversed
16 with the higher percentage of the white population
17 voted in 2006 and 2010?

18 A. That's correct.

19 Q. Okay. And in 2006, we had early voting
20 in North Carolina; correct?

21 A. Yes.

22 Q. And we had out-of-precinct voting?

1 A. Yes.

2 Q. We did not have same-day registration?

3 A. That's correct.

4 Q. In 2010 we had all three of those
5 practices?

6 A. Yes.

7 Q. Let's turn to Table 3, and I think we've
8 clarified this before, but 2006 and 2010 are
9 off-year elections and 2008 and 2012 are
10 presidential elections?

11 A. That's correct.

12 Q. All right. Tell me what Table 3 is.

13 A. Table 3 is the percentage of the people
14 who voted early of those who voted by race from 2004
15 in each of the elections through 2012.

16 Q. Okay. So in 2004 and 2006, a higher
17 percentage of white voters voted early than
18 African-Americans who voted early?

19 A. Yes. And in 2008, '10, '12 it's
20 reversed.

21 Q. Right. And in 2010, the difference is
22 33.3% of the whites who voted voted early and 36.2%

1 of the blacks who voted voted early?

2 A. Yes.

3 Q. All right.

4 A. And the trend is that blacks
5 increasingly voted early. If you compare the
6 off-year election 2006 and the off-year election
7 2010, the proportion of blacks voting early had
8 almost tripled. The proportion of whites who voted
9 early had gone up by 50%.

10 Q. Comparing what elections?

11 A. 2006 and 2010.

12 Q. Okay. Right. In 2006 they had early
13 voting because you're measuring early voting in
14 2006?

15 A. Right. People got used to early voting
16 and they got more used to early voting, and probably
17 campaigns changed their tactics to try to get people
18 to vote early. That was certainly the case in 2008.
19 We have discussions of that.

20 Q. Right.

21 A. And probably the case in 2006.

22 Politicians adapt. Political campaigns adapt to the

1 election laws that get passed.

2 Q. But the difference in the usage of early
3 voting by white voters versus black voters was much
4 higher in 2008 and 2012, which are presidential
5 years, as compared to 2010, which is an off-year
6 election?

7 A. That's correct.

8 Q. There's lots in here I'd like to have a
9 discussion with you about, but I'm going to save it
10 for maybe a beer some day. Perhaps if you'll let me
11 buy you a beer some day.

12 A. Well, let's talk about the history
13 and -- and we can just junk the rest.

14 Q. Well, I'll let your counsel talk with
15 you about the history. Although I may have a few
16 questions about the history.

17 A. Okay.

18 Q. Okay. Turn to page 30, and this is
19 getting into your discussion of the passage of the
20 out-of-precinct voting bill. So you're free to look
21 at the earlier paragraphs on this if you want.

22 A. Okay.

1 Q. But I just have a question about this
2 first full paragraph on page 30. So if I ask the
3 question and you want to look back on something,
4 please feel free to do it.

5 A. Okay.

6 Q. So the Republicans voted against the
7 out-of-precinct bill?

8 A. Yes, they did, and as -- as I say, what
9 they objected to most was the -- let me see. Let me
10 go back and look at this quickly.

11 Q. Sure.

12 A. What they objected to most was making it
13 retroactive. Making it apply to the election that
14 had already happened.

15 Q. Can I ask you a question about that?

16 A. Yes.

17 Q. When you say what they objected to most,
18 what's that based on? Statements by who?

19 A. They were statements by people in the
20 legislature that were quoted in the newspapers.

21 Q. Okay. Which legislator said that?

22 A. (Reviewing document).

1 I don't have the names now, but it is
2 referenced in the newspaper articles at note 68.

3 Q. Right.

4 A. Footnote 68.

5 Q. Okay. But the article doesn't cite
6 which legislator said -- made those comments?

7 A. I don't -- I think the articles do, but
8 I don't recall offhand who they were.

9 Q. Okay. So --

10 A. I didn't cite specific legislators here
11 in my text.

12 Q. Right. And you don't know whether other
13 Republicans who weren't quoted in the paper might
14 have voted against the bill for other reasons?

15 A. No, I do not know that.

16 Q. Okay.

17 A. I think the Republicans tried to pass --
18 they proposed an amendment making it nonretroactive,
19 and there was almost a party split or a complete
20 party split over that vote.

21 Q. Uh-huh.

22 A. And that seemed to be what they were

1 most concerned with at the time.

2 Q. But you don't know what the opinions of
3 all the Republican legislators were at the time this
4 bill was passed?

5 A. They eventually voted against the bill,
6 I think, in general, but I do not know every
7 Republican's opinion on this.

8 Q. So -- so Republicans may have had other
9 reasons for voting against the bill, other than the
10 fact that they lost their amendment to make it
11 prospective?

12 A. They may have.

13 Q. Okay. And now I have a question about
14 the first full paragraph on page 30.

15 You see where it says:

16 "As extra insurance, the Democratic
17 majority also passed another law reinstating a 19th
18 century law that had apparently been inadvertently
19 omitted from a 1971 codification. The law provided
20 a procedure to put into effect a state
21 constitutional provision mandating that the
22 legislature, and not the courts, would decide

1 contested elections for statewide offices."

2 You see that?

3 A. Yes.

4 Q. Okay. What's your basis for saying that

5 there was a law that was inadvertently omitted from

6 the 1971 codification? What's the 1971

7 codification? Is that the State Constitution?

8 A. I think the codification of laws, not

9 the Constitution.

10 Q. Okay. And how do you know that the --

11 that this was inadvertently omitted?

12 A. I said "apparently been inadvertently

13 omitted." I said that because in the newspapers

14 reporting the discussion in the legislature, some

15 legislator who was in favor of that law said that it

16 had been inadvertently omitted in the codification.

17 Q. Okay. But you don't -- you don't know

18 whether other legislators agreed that it had been

19 inadvertently omitted?

20 A. I don't know whether -- I don't know

21 every legislator's opinion.

22 Q. Right.

1 A. The majority of the legislature voted to
2 restore this.

3 Q. Well, a majority voted to pass the law?

4 A. Yes. The law that they said was
5 restoring -- well, it certainly restored an earlier
6 law.

7 Q. And what earlier law did it restore?

8 A. It restored a procedure that had been
9 set up by law. That's my understanding from reading
10 the newspapers.

11 Q. Okay. But did you actually study North
12 Carolina law to see whether the state courts or the
13 legislature in previous years ruled on election
14 contest or protest?

15 A. No. I was just reporting what was --
16 what was said at the time in the newspapers about
17 what had been said on the floor of the legislature.

18 Q. Okay. And what had been said by how
19 many legislators?

20 A. Newspaper reports don't usually say, I
21 talked to a majority of the legislators. They will
22 say, I talked to so and so, who was the sponsor of

1 the bill.

2 Q. Uh-huh. But you don't know for sure
3 whether there was a prior law or that it was
4 inadvertently omitted. You're just relying on what
5 the newspaper said?

6 A. I'm relying on the newspaper which
7 quoted legislative sources.

8 Q. Okay. And the next section you have in
9 your report is titled on page 30 "A Fair and Open
10 Process: Same-Day Registration, 2007"?

11 A. Yes.

12 Q. Okay. Is it fair to say that it is your
13 opinion that that was a fair and open process?

14 A. Yes.

15 Q. Do you know whether the Republican
16 legislators who were around when this was enacted in
17 2007 agreed that it was a fair and open process?

18 A. No, but they certainly didn't object to
19 it and the process -- the reason that I talked about
20 that, which is what I said in the report, is that
21 this is a very different process than the
22 Republicans followed in 2013 in the passage --

1 passage of HB 589.

2 The Democrats when a question of fact
3 was brought up and a statewide officer demanded that
4 they stop a legislative vote, stop the legislative
5 vote 26 minutes before it was supposed to be taken
6 or the legislative discussion that they expected to
7 have a vote on, and that was put off.

8 And he testified and the State Election
9 Commission director testified and the legislature
10 was apparently satisfied that his allegations of
11 registration fraud had no firm basis. The whole
12 procedure was ground to a halt.

13 I took that to be a good idea of what
14 the North Carolina legislature had done on certainly
15 important election laws that were passed in the
16 2000s, and that showed a big contrast with a
17 last-minute ramming a new bill through that took
18 place on HB 589. That's why I put it in there.

19 Q. Do you know how long -- when you say it
20 ground the process to a halt when Mayer asked to
21 speak to the legislature, do you know how long it
22 was between the time the same-day registration bill

1 was introduced and when it was enacted?

2 A. No, but I think it was they waited for
3 two weeks or so after he had made his objections so
4 that they would have a full hearing, which they did,
5 and that's -- that's a relatively long time in the
6 legislative process. Can be a long time in the
7 legislative process.

8 Bills take a long time. Bills get
9 introduced sometimes at the beginning of a session
10 and don't get passed until much later. But here
11 they had hearings, they heard the objections, they
12 decided whether they were well-taken, they tried to
13 get the facts straight, and they didn't do anything
14 until that had been taken place.

15 Q. Okay. When you say they had hearings,
16 does your report cite that they held any public
17 hearings where members of the public could speak?

18 A. I don't think that they had hearings. I
19 do not know whether they had hearings where the
20 public could speak, but there was a lot of public
21 there at that legislative hearing.

22 Q. Okay. Did you know whether there were

1 any Republican amendments to the same-day

2 registration provision?

3 A. I don't remember. I probably said -- I
4 said one way or another here. I would probably have
5 said that there were Republican amendments that got
6 -- yes.

7 There was -- there were Republican
8 amendments that tried to -- (noise) I thought that
9 was my phone going off.

10 "In the Senate in June, Republican
11 Minority Leader Phil Berger stated that 'If that
12 bill -- the same-day registration bill -- did not
13 include allowing someone to register and vote by
14 showing a utility bill as identification or showing
15 a bank statement as identification, I could support
16 the bill.'"

17 They tried -- Republicans tried, as I
18 say here, to include voter identification
19 amendments, and those were eventually rejected. I
20 cited that, as I say, to indicate that if Mr. Berger
21 was consistent in 2013 with a voter identification
22 amendment, he wouldn't have objected to continuation

1 of same-day registration.

2 So there were Republican amendments that
3 came close to passing. They didn't eventually pass.
4 They were eventually rejected.

5 Q. When you say they came close to passing,
6 do you remember what the votes were on the
7 amendments? Do you report that?

8 A. (Reviewing document).

9 I do not remember offhand.

10 Q. Okay. All right. I want you to turn to
11 page 35 of your report. I'm in the second full
12 paragraph and there's a sentence there. It says:

13 "During the 2008 presidential election,
14 early voters helped propel both President Barak
15 Obama and Gov. Bev Perdue to narrow victories. Many
16 of those were minority voters, who voted on Sunday
17 after leaving church."

18 And is your statement based upon the
19 newspaper article by Jim Morrill and Michael
20 Biesecker from the News & Observer on June 16, 2011?

21 A. Yes, it's a quotation from that article.

22 Q. Okay. Did you do anything to verify the

1 accuracy of that statement?

2 A. No.

3 Q. Do you know how many counties in North
4 Carolina had Sunday voting in 2008?

5 A. No.

6 Q. Okay. Do you know what the percentage
7 of the black population -- black voting age
8 population was in the counties that had Sunday
9 voting as compared to the statewide black voting age
10 population?

11 A. No, I do not know that offhand.

12 Q. Okay. All right. I want to talk to you
13 a little bit about the process that was followed in
14 the Senate during the enactment of HB 589 and I want
15 to -- I want to reference you first to page 38.

16 And you say there in the last paragraph:

17 "Operating with no publicity until
18 July 23, the Senate sprang upon the legislature in
19 the session's last week a much different bill, 57
20 pages long, instead of the original 14. Within a
21 period of 48 hours, the new bill was reported out of
22 committee, passed by both houses, and ordered

1 enrolled."

2 Do you see those statements by --

3 A. Yes.

4 Q. Okay. Now, what was -- what information
5 did you rely upon to -- to make the report you have
6 in this document about the process followed by the
7 Senate in 2013?

8 A. Well, I read newspapers and the citation
9 here on page 110 -- sorry -- note 110 is -- is
10 quoted from the Charlotte Observer the day before HB
11 589 was unveiled.

12 "It's still unclear -- Charlotte
13 Observer said -- whether the legislature will move
14 to enact restrictions on early voting and Sunday
15 voting. Proposals have been floated but aren't in
16 the bill being considered Tuesday by the Senate."

17 And it gives a citation. If the News &
18 Observer, which had reporters in the Capitol, says
19 that it didn't know what was going to be in the bill
20 the day before it was introduced, I think that
21 supports the statement that I made in the -- in the
22 report.

1 Q. Did you ever look at the actual
2 transcript of proceedings in the Senate?

3 A. Yes.

4 Q. Okay. Now, first of all, let me ask you
5 this, Doctor.

6 Did the Senate or the House violate any
7 of their rules of procedure in passing this
8 legislation?

9 A. So far as I understand, they did not
10 violate any of their explicit rules. They did seem
11 to a lot of people to violate norms. Norms are
12 often as important as rules in legislatures and
13 the -- if you violate norms, people yell and scream.
14 People often yell and scream in legislatures, but
15 this was seemingly particularly egregious, and they
16 had set up the norms themselves.

17 When HB 589 was introduced in the House,
18 it was a voter ID bill alone. The speaker,
19 Mr. Tillis, said this is going to be a slow process,
20 "a slow walk" (indicating), a newspaper report said.

21 The chair of the Elections Committee
22 said in a news conference which I listened to that

1 they were going to have plenty of hearings. They
2 wanted a bipartisan process. They were going to
3 allow people who were skeptical of voter ID bill to
4 have plenty of chance to say anything.

5 The whole process that was produced
6 was -- was promised was one of openness,
7 bipartisanship, full hearings, etc. For a major
8 change in election law, that was apparently taken by
9 the Republican leadership to be what the norm that
10 would be expected would be.

11 Even though they could have rammed this
12 through at the very beginning. They had large
13 enough majorities to do it. They didn't have to
14 have any hearings. They didn't have to listen to
15 anybody in the public. They didn't have to have any
16 experts coming in from Indiana and Florida and
17 Georgia.

18 They could have just done that, but they
19 didn't. They promised that this would be a reform
20 process and there would be plenty of evidence, and
21 people would be convinced and all that sort of
22 stuff. That's what they did.

1 And then after the House passed it after
2 having some hearings, listening to the public,
3 listening to experts, etc., they passed the bill
4 over the objections of all but four of the Democrats
5 in the House, and then they sent it to the Senate
6 Committee and it sat there.

7 There were for several months no
8 hearings. There's no indication that the bill would
9 be anything more, and then Shelby County hit. The
10 Supreme Court decided Shelby County and then the
11 world changed, and they didn't have to worry about
12 Section 5 preclearance anymore.

13 And they jammed a series of other bills
14 which they had not held any hearings on. They had
15 not held committee hearings or public hearings or
16 anything else. They jammed another 40 pages of --
17 of election laws into a bill that had been passed
18 several months before by the House. They held one
19 hearing. They passed the bill and that was it.

20 They set out their norms, what they
21 thought was necessary, apparently, for the
22 legitimacy of such a major reform when the House

1 bill was introduced as a simple voter ID bill, and
2 they did not follow those norms when they jammed the
3 rest of the provisions in at the end. So it's --
4 it's the proponents of HB 589 who set up the norms
5 that they then violated.

6 Q. All right, sir. Let me ask you this
7 question.

8 Did the -- did the House -- Speaker
9 Tillis is the head of the House?

10 A. Yes.

11 Q. And the chairman of the House Election
12 Committee is a member of the House?

13 A. Yes.

14 Q. Did they have public hearings on the
15 House side?

16 A. They had public hearings on the voter ID
17 bill.

18 Q. Okay. And that was all the House was
19 considering at that time; right?

20 A. Yes.

21 Q. Okay. And did anyone in the Senate ever
22 make the comments about what the Senate procedure

1 would be that was similar to what Speaker Tillis
2 said about how the House was going to handle the
3 voter ID bill?

4 A. Not so far as I know.

5 Q. Okay. So is it your experience that in
6 bicameral bodies that sometimes the procedure is
7 followed, as they say in the Congress, are different
8 than are followed in the United States Senate?

9 A. That can happen, yes.

10 Q. Okay. So nobody in the Senate said they
11 were going to have hearings or have experts in.
12 That was all stated on the House side?

13 A. So far as I know, yes.

14 Q. Okay. So now you say that the Senate
15 operated with no publicity until July 23rd.

16 Did you know that the Senate posted a
17 committee substitute on its Web page on July 18,
18 2013?

19 A. I don't think it included everything
20 that was in the final bill.

21 Q. Do you know what the difference was?

22 A. No.

1 Q. Okay. And do you know that once it was
2 posted on the Web page that that would make it also
3 available to the public?

4 A. If it's published -- if it's on a Web
5 page, it would.

6 Q. Okay.

7 A. To go back to the Charlotte Observer
8 report, they said the day before it was unveiled
9 that it is unclear -- proposals have been floated,
10 but the bill considered Tuesday did not have
11 restrictions on early voting and Sunday voting.

12 Q. Okay. But there was a committee
13 substitute posted on July 18th?

14 A. But it apparently didn't include those
15 parts of the bill.

16 Q. Based upon what the newspaper story
17 says?

18 A. Yes.

19 Q. Okay. And then -- you know,
20 incidentally, during the legislative process, did
21 any of the Democratic members make points of order
22 claiming that either the Senate or the House had

1 violated their rules?

2 A. I do not recall that they did.

3 Q. Okay. Is there anything in the rules
4 for either the Senate or the House that require that
5 either body have public hearings?

6 A. I don't think that there is.

7 Q. Okay. So on July 22nd, were you aware
8 that a second proposed committee substitute was
9 submitted to members of the Senate Rules Committee?

10 A. I don't remember the date, but I will
11 accept your characterization of that.

12 Q. Okay. And did you know that the
13 submission of that committee substitute was made in
14 a manner that was consistent with Senate Rule 45.1?

15 A. I'm sure that you must be correct about
16 that, but I don't know.

17 Q. Okay. So your statement here, you're
18 aware that the Senate rules committee held a meeting
19 to deliberate on the committee substitute on July
20 23rd?

21 A. Yes.

22 Q. And were you aware of the fact that

1 members of the public spoke at a Senate committee
2 hearing?

3 A. Yes, I think I read the transcript.

4 Q. Okay. So that was kind of like when the
5 auditor spoke to the legislature?

6 A. Well, eventually, yes, but they -- I
7 think they took a longer period of time when the
8 auditor finally spoke to the legislature. I think
9 this was called pretty quickly.

10 Q. Okay. But the Senate -- the Senate
11 didn't -- there was no requirement under their rules
12 to allow members of the public to speak at their
13 committee hearing?

14 A. You're more familiar with the Senate
15 rules than I am.

16 Q. Okay. Well, do you -- do you --

17 A. Certainly I have no reason to doubt what
18 you said.

19 Q. Okay. And do you know whether your
20 counsel spoke at that meeting?

21 A. I remember -- I think I remember that
22 she did.

1 Q. Okay. Do you know that there were three
2 amendments offered at that committee hearing and
3 that three were adopted?

4 A. I think that is in my report.

5 Q. Okay. And did you know that Senator
6 Clark, a Democrat, was a sponsor of one of those
7 amendments?

8 A. I think I discuss that.

9 Q. Okay. And I think you've said this, but
10 you'll agree that the provisions that appeared in
11 the committee substitute, which was eventually
12 enacted, appeared in other bills that had been
13 previously filed during the 2013 session?

14 A. Yes.

15 Q. Isn't that correct?

16 A. That's correct. But there were no
17 hearings on those bills, public or committee, and
18 there were no votes on those bills --

19 Q. Okay.

20 A. -- in 2013.

21 Q. Now, are you aware that the committee
22 substitute appeared on the Senate floor on July

1 24th?

2 A. Yes.

3 Q. And did you know there were three
4 amendments that were adopted?

5 A. I think I discuss that.

6 Q. Okay.

7 A. I'm certainly aware.

8 Q. And were you aware of the fact that one
9 of the amendments adopted was sponsored by Senator
10 Stein?

11 A. Yes.

12 Q. Okay. And then were you aware that the
13 bill was passed something called second reading on
14 July 24th?

15 A. I -- when I read the legislative
16 reports, I'm certainly -- certain I was aware of
17 that because it's in the legislative reports.

18 Q. Okay. Did you know -- did you know who
19 Senator Apodaca was?

20 A. This is a Republican. It's the only
21 Latino in the legislature, North Carolina
22 legislature, I think.

1 Q. Okay. I think he's American Indian, but
2 I may be wrong on that.

3 A. I understand --

4 Q. He's a minority.

5 A. -- there's a counting problem with him.

6 Q. Okay. (Laugh). Lots of people would
7 agree with that.

8 Did you know that Senator Apodaca
9 objected to there being a third reading on July 24th
10 so the bill could be carried over to the next day?

11 A. I vaguely remember that.

12 Q. Okay. And then on the Senate floor on
13 July 25th, did you recall that two amendments were
14 adopted?

15 A. I'm sure that when I read the bill
16 history I was. I don't recall it now, but I'll
17 accept your characterization of that.

18 Q. Okay. And did you know that the
19 amendment's sponsors were Senator Blue, a Democrat,
20 and Senator Rucho, a Republican?

21 A. I think that's in my report.

22 Q. And Senator Blue is an African-American?

1 A. Yes.

2 Q. Okay. So going back to the example that
3 you gave of an open and fair process which dealt
4 with -- I think it was the enactment of same-day
5 registration?

6 A. Yes.

7 Q. Were any amendments offered by the
8 Republicans adopted during that process?

9 A. The major amendments were not adopted.

10 Q. Were there any amendments adopted?

11 A. There could have been. I cannot recall
12 specifically, but if you say that there were not,
13 then I will accept that characterization. I just
14 have to look back at the bill history to make sure.

15 Q. Okay. Well, I'm not going to say that
16 because I don't know for sure.

17 A. Okay.

18 Q. But I don't think there were, and you
19 don't remember if there were?

20 A. I do not remember that there were.

21 Q. Okay. And in the case of HB 589, there
22 were several amendments which Democratic and

1 African-American members were allowed to make which
2 were then adopted by the Republican majority?

3 A. Yes. They were not major amendments,
4 but they were.

5 Q. How would you define "major amendment"?

6 A. Well, major amendment might have been
7 knocking out one of the changes. Keeping same-day
8 registration. Keeping early voting at 17 days.
9 There were proposals to keep it at 17 days. That
10 got knocked down.

11 I think I give someplace a series of
12 amendments that were offered and rejected by the
13 Democrats. Many of those I would have characterized
14 as major.

15 Q. Okay. And then wasn't one of the
16 amendments that was adopted an amendment proposed by
17 Senator Stein, a Democrat, to require that the hours
18 of early voting for presidential years in the future
19 be the same as those that were available in 2012?

20 A. I believe that's correct.

21 Q. And did not Senator Stein also offer an
22 amendment stating that the number of hours available

1 for off-year elections would be the same as in 2010?

2 A. I believe that's correct.

3 Q. And that amendment was adopted?

4 A. I think that's right.

5 Q. Do you think that was a major amendment?

6 A. It depends upon the degree to which the
7 legislature allowed for counties to opt out of that,
8 to opt out of the same early voting hours, the same
9 number of -- of polling places, etc. And my memory
10 is that there was -- there were a lot of -- there
11 had been a lot of proposals to cut down the number
12 of hours or the number of early voting places,
13 proposals to the State Board of Elections.

14 Q. Okay. Let's talk about that for a
15 second.

16 When early voting was first implemented
17 in North Carolina, do you recall whether county
18 boards had the authority to establish more than one
19 early voting site besides the county board office?

20 A. I think there was -- at first it was
21 just county board office and maybe one satellite,
22 but they were then allowed. They were given more

1 leeway.

2 Q. Okay. And originally didn't -- didn't
3 the law require that there be a unanimous decision
4 by the county board before additional sites could be
5 enacted?

6 A. Yes.

7 Q. Okay. Now, you understand that the
8 county -- the State Board of Elections is appointed
9 by the governor in North Carolina?

10 A. Yes.

11 Q. And you understand there's five members?

12 A. Yes.

13 Q. And you understand that three of the
14 five members are members of the governor's party?

15 A. Yes.

16 Q. And the other two are members of the
17 opposition party?

18 A. Yes.

19 Q. And are you aware that there are three
20 members of the county boards?

21 A. Yes.

22 Q. And do you know that they are picked by

1 the State Board of Elections?

2 A. Yes.

3 Q. And are you aware of the fact that two
4 members of the county board are to be members of the
5 governor's party and one member is to be of the
6 opposing party?

7 A. Yes.

8 Q. Okay. Now, originally to establish
9 early voting plans, do you agree that to create
10 additional sites, the law originally required a
11 unanimous vote by the County Boards of Elections?

12 A. Yes.

13 Q. And then that was changed so that in the
14 face of a dissenting vote, the State Board of
15 Elections could impose an early voting plan based
16 strictly on a majority vote by the State Board of
17 Elections?

18 A. Yes.

19 Q. Okay. Now, as far as waivers for early
20 voting time, are you aware that under the statute
21 that to get a waiver, each county board has to be
22 unanimous in requesting a waiver?

1 A. Yes.

2 Q. So that would mean that the member of
3 the minority party at a county board could basically
4 stop the county from asking for a waiver if they
5 voted against a reduction?

6 A. Yes.

7 Q. And are you aware that any reduction
8 then has to be approved by a unanimous State Board
9 of Elections?

10 A. I don't remember that.

11 Q. Okay.

12 A. But I'm sure you're right.

13 Q. I hope I am. (Laugh). I think I am,
14 but maybe I'm wrong.

15 Now, I want to ask you what -- how did
16 you decide which legislation to review to evaluate
17 past practices by the General Assembly in North
18 Carolina to compare whether or not there were
19 departures from past practices as compared to the
20 process followed by the legislation in 2013?

21 A. Well, my argument was that there were
22 departures from norms and so that would include

1 looking at the total package of the passage of HB
2 589. But apart from that, I decided simply because
3 I looked at all of the laws that had been passed
4 that got repealed and found an example of the
5 objection and the -- the deviation from ramming
6 something through in 2007.

7 So it was really incidental to -- my
8 choice of the laws was incidental to looking at the
9 laws that got repealed by 589, and just in one of
10 them there was a practice, there was a norm that
11 seemed to be followed and it seemed to be different
12 than 589. So I spotlighted it.

13 Q. Okay. Now, prior to today, I think it
14 was yesterday, maybe it was -- what is today?
15 Friday? It might have been Wednesday. We filed a
16 brief in federal court in opposition to the
17 plaintiffs' motion for preliminary injunction.

18 Did you happen to read that brief?

19 A. I did.

20 Q. And when did you first get that?

21 A. Wednesday night.

22 Q. Okay.

1 A. So I must have read it Thursday.

2 Q. Okay.

3 A. I was too tired to read it Wednesday
4 night.

5 Q. Now, do you think redistricting law is a
6 significant voting law?

7 A. Yes.

8 Q. Do you think the legislature ought to
9 have public hearings based upon what you consider to
10 be the norms for redistricting legislation?

11 A. Legislatures typically have -- have
12 redistricting hearings. State -- other bodies
13 typically have public hearings on redistricting. So
14 the ones that I'm used to, even Texas in 2011 had
15 redistricting hearings. I read a 900-page hearing
16 in Texas. So, yeah, I'm used to that and that's --
17 that's what seems to be the norm generally when
18 people are redistricting.

19 Q. Did you read our brief explaining the
20 process that was followed when the General Assembly
21 enacted the 2003 legislative redistricting plans?

22 A. 2003?

1 Q. Uh-huh.

2 A. I don't remember the 2003 redistricting
3 plans. I did read your brief, but there were parts
4 of it that I paid more attention to than others.

5 Q. Okay. All right. So do you know -- did
6 you know that in 2003 the legislature -- I think it
7 was on the House side -- introduced a proposed
8 redistricting plan on November 24, 2003?

9 A. I don't remember that, but I'm sure that
10 you're correct.

11 Q. Okay. And do you know whether the House
12 or the Senate held any public hearings on the
13 redistricting plans that were considered in November
14 of 2003?

15 A. I don't remember, but I'm sure you're
16 correct if you say that they didn't.

17 Q. Well, yes, I'll -- if I say they didn't,
18 do you have any reason to dispute that?

19 A. I have no reason to doubt.

20 Q. Okay. And do you know or would you
21 dispute if I told you that when the plan was
22 introduced in the House on November 24th, the

1 Speaker of the House would not allow any Republican
2 members or any other members to propose amendments?

3 A. I have no reason to dispute that.

4 Q. Okay. And would you dispute the fact
5 that the Speaker did not refer the bill to any
6 committee for a committee hearings?

7 A. I have no reason to dispute that.

8 Q. Okay. Would you have any reason to
9 dispute that the bill was passed by the House that
10 same day and sent to the Senate on the same day?

11 A. No reason to dispute that.

12 Q. Okay. Do you know on that same day that
13 the Senate November 24th proposed a committee
14 substitute?

15 A. I have no reason to dispute that.

16 Q. Okay. And would you dispute the fact
17 that no amendments were allowed to be offered by
18 Republican senators or were adopted?

19 A. No reason to dispute.

20 Q. Would you -- would you dispute the fact
21 that the Senate committee made significant changes
22 to the bill that it received from the House,

1 including adding Senate districts, creating a
2 three-judge panel for redistricting cases and
3 changing the standards for how redistricting
4 challenges were handled by courts?

5 A. I have no reason to dispute it. I
6 haven't studied the 2003 redistricting, so I'm just
7 relying on your facts.

8 Q. Okay. And then would you dispute my
9 representation to you that the Senate substitute was
10 then adopted the next morning on November 25th?

11 A. No reason to dispute.

12 Q. And then would you dispute the Senate
13 then sent its substitute to the House that same day?

14 A. I have no reason to dispute.

15 Q. And would you dispute my -- my
16 explanation to you that the House did not refer the
17 bill to a committee or form a committee as a whole?

18 A. I have no reason to dispute.

19 Q. And would you dispute it if I told you
20 that the House then passed the redistricting bill
21 and all the changes made by the Senate without
22 allowing debate or amendments?

1 A. No reason to dispute.

2 Q. Okay. And they adopted that on the same
3 day they received it back from the Senate?

4 A. No reason to dispute.

5 Q. And would you dispute it if I told you
6 that the governor in North Carolina signed that bill
7 on November 25th?

8 A. No reason to dispute.

9 Q. Okay.

10 THE VIDEOGRAPHER: We have about
11 five minutes, Mr. Farr.

12 MR. FARR: That's a good time to
13 take a break.

14 THE VIDEOGRAPHER: Okay. This
15 concludes tape 3. We're going off record at 1:56
16 p.m.

17 (Recess taken - 1:56 p.m. -
18 2:12 p.m.)

19 THE VIDEOGRAPHER: This is the
20 beginning of tape 4. We're going back on the record
21 at 2:12 p.m.

22 MR. FARR: Thank you very much.

1 Q. And when they win, that's what they
2 prove?

3 A. Yes.

4 Q. Okay. Now, let's just for reference
5 purposes, let's turn to -- on Exhibit 142, it would
6 be page 8 in the document and it starts on page 36
7 and 37 of the actual Supreme Court decision, and
8 there's a discussion of the Senate Factors there.

9 You see that?

10 A. Yes.

11 Q. And I'm just going to have that in front
12 of you so we both can refer to it as we go through
13 your report.

14 So in your report, you say the first
15 factor is you're referencing the extent of any
16 history of official discrimination in the state or
17 political subdivision that touched upon the right of
18 the members of the minority group to register to
19 vote or otherwise participate in the democratic
20 process?

21 A. Yes.

22 Q. Okay. Now, you said in your report that

1 in your opinion Factor 1 "Must be slightly
2 reinterpreted."

3 A. Yes.

4 Q. What did you mean by that?

5 A. When Gingles was decided, North Carolina
6 had not changed. North Carolina in the 1990s and
7 the early 2000s tried to overcome its history of --
8 of official discrimination in voting cases and tried
9 to expand the electorate in general; white, black,
10 native American, Latino, everybody. So there was a
11 reversal of the history of discrimination. There
12 was a history of attempting to overcome the
13 discrimination.

14 So it's a little different from the sort
15 of linear history of discrimination that had been
16 the case at the time that Gingles was decided. That
17 very change, that liberalization, that attempt to
18 overcome discrimination and its reversal by HB 589
19 makes the history of discrimination even more
20 relevant here than it was when there was a simple
21 dark story to tell.

22 Q. Okay. So since 1990, what are the

1 examples of official discrimination that you're
2 relying on that have taken place since 1990?

3 A. The discrimination got reversed after
4 1990.

5 Q. Reversed by what?

6 A. Reversed by legislative -- by the series
7 of legislative actions that I discussed extensively
8 in the previous part of the report, and then after
9 2010 there was -- there was a reversal of the
10 reversal.

11 Q. So -- so the official discrimination
12 that you're referring to that has taken place in
13 North Carolina since 1990 is the HB 589?

14 A. And the other sets of actions that were
15 taken, but concentrating on election laws.

16 Q. Uh-huh.

17 A. I tried to concentrate on election laws.
18 There are other laws that inform our judgment about
19 the general intentions of people who passed 589. I
20 discuss those a bit.

21 Q. Well, we'll get to those, but -- but the
22 first factor talks about legislation that touches

1 upon the minority group's right to register to vote
2 or otherwise participate in the democratic process.

3 So I want to know what -- what official
4 acts have taken place since 1990 that fit within the
5 definition of Senate Factor 1.

6 A. 589 and associated acts.

7 Q. What associated acts for on election
8 law?

9 A. On election law, 589 gathers it all
10 together.

11 Q. Okay. And 589 has not yet been ruled as
12 being discriminatory, has it?

13 A. That's correct.

14 Q. Okay. So other than 589, you're not --
15 you haven't cited any other official acts by North
16 Carolina that are discriminatory that touch upon a
17 minority group's right to register to vote or to
18 participate in the democratic process? You're
19 relying exclusively on 589?

20 A. Since 1990.

21 Q. Okay.

22 A. Since 1990 there was an attempt to

1 things. That if it had been -- she had been able to
2 make a decision three months later, she might well
3 have made a different decision.

4 So the 1991 redistricting was -- lost a
5 Section 5 judgment by the Justice Department. There
6 would have been a case had the events taken place
7 that I just described at a different time. So other
8 than those things, a court did not declare that
9 those are racially discriminatory.

10 I did a study in connection with Shaw
11 versus Hunt which concluded that the redistricting
12 of 1971 and 1981 had been discriminatory, and it's
13 on the basis of the evidence that I presented there,
14 which is a chapter of "Colorblind Injustice," that I
15 made that conclusion.

16 Q. So that was your opinion that there was
17 intentional discrimination in the drawing of the '71
18 and the '81 congressional districts?

19 A. And the '81 was also the opinion of the
20 Justice Department in refusing to preclear.

21 Q. Did they -- did they refuse to preclear
22 because of purposeful discrimination or because of

1 contention that it was retrogressive?

2 A. It wasn't retrogressive because there
3 weren't any majority or even 40% -- whether it was a
4 40%, 41% black second congressional district, and
5 this cut down the number of the proportion black, I
6 think.

7 Q. Okay.

8 A. But it may -- I don't remember the --
9 the wording of the letter. I think that it included
10 an intentional discrimination claim.

11 Q. Was the -- was there a congressional
12 plan precleared in the 1980s by Justice?

13 A. The -- the next plan was precleared.

14 Q. And it did not have a majority black
15 district in it, did it?

16 A. As Mickey Michaux, M-i-c-h-a-u-x, will
17 tell you, it did not have a majority black district.

18 Q. Right. And I remembered that because I
19 think he lost. He won a primary in that district
20 but didn't get 50%, and then he lost the runoff or
21 something like that.

22 Am I remembering that correctly?

1 North Carolina; isn't that correct?

2 A. They objected and that was certainly
3 before them. The Republicans proposed a district
4 that went along the South Carolina border --

5 Q. Right.

6 A. -- from Charlotte to Wilmington.

7 Q. And I'm glad to meet you, by the way,
8 because I've always referenced your report in the
9 Shaw case because your report is referenced in
10 Shaw 2, I believe?

11 A. It is.

12 Q. And in Shaw 2, doesn't the Supreme Court
13 reference the objection by Justice to the '91 plan
14 and its failure to create a majority-minority
15 coalition district running from Mecklenburg to
16 southeastern North Carolina?

17 A. I think that's correct.

18 Q. Okay. All right. Second point in your
19 report is racially polarized voting, and it's your
20 contention that racially polarized voting still
21 exists in North Carolina?

22 A. Yes, on the basis of the facts that I

1 showed from exit polls.

2 Q. Okay. I have no questions about that.

3 All right. What's the third Senate
4 Factor? Could you look at the case and read that
5 into the record, please?

6 A. It is enhancing. I think I quote the
7 whole factor in my report. So it doesn't matter
8 whether you read it from Gingles or from my report.

9 Q. Let's read it into the record.

10 A. Okay.

11 Q. In Gingles, it says that the third
12 Senate Factor is "the extent to which the state or
13 political subdivision as used unusually large
14 election districts, majority vote requirements,
15 anti-single shot provisions, or other voting
16 practices or procedures that may enhance the
17 opportunity for discrimination against the minority
18 group"?

19 A. Yes.

20 Q. Okay. Now, when they refer to
21 "unusually large election districts," does the court
22 mean by that large multimember districts?

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

3 BY MR. FARR:

4 Q. Or do you know what it is they're
5 referring to?

6 A. I know what was talked about at the
7 time. Talked about at the time was Rhode Island.
8 Mobile County is about as large as Rhode Island --

9 Q. Uh-huh.

10 A. -- and they -- the voting rights
11 attorneys at the time would always compare the
12 county, whatever county it was in whatever
13 jurisdiction that it was that they were suing, to
14 Rhode Island, and if it was bigger than Rhode
15 Island, they made a big deal of it. So it's
16 geographically large districts, and it can be
17 whatever.

18 Q. Okay.

19 A. There's a district in Alaska, state
20 Senate district in Alaska, that is approximately as
21 large as the eastern half of the United States.

22 Q. Okay. All right. Majority vote

1 requirements. What did that refer to?

2 Was that like what we just talked about
3 with Representative Michaux, that he had to get 50%
4 to win the Democratic primary?

5 A. Yes.

6 MS. RIGGS: Same objection,
7 though, as to the extent you're asking him about
8 what the court meant.

9 BY MR. FARR:

10 Q. Okay. What does majority vote
11 requirement mean to you?

12 A. It means that to get at that point, a
13 Democratic nomination, but now any nomination, you
14 have to get a majority of the vote in some election.
15 A primary election. That was what it was usually
16 used for, but it could be a general election.

17 In the jungle primary in Louisiana, it's
18 a general election that where people run without
19 party nominations.

20 Q. Okay. In North Carolina, we have party
21 nominations for legislature and Congress and such
22 things; is that correct?

1 A. Yes.

2 Q. Does the majority vote requirement for
3 primary still exist in North Carolina?

4 A. I think it's 40% now.

5 Q. And do you know when that was changed?

6 A. I did, but I cannot remember.

7 Q. Over 20 years ago?

8 A. (Nods head).

9 Q. Okay. Anti-single shot provision. What
10 does that mean?

11 A. If there's a multimember district, it
12 means that you have numbered posts. All of these
13 requirements, if you look at them, really only apply
14 to local elections. There are some runoff
15 requirements can apply statewide, but in general
16 this is aimed at local elections. And it comes very
17 much out of the Mobile versus Bolden case and the
18 Gingles case where you had county multimember
19 elections for the state legislature.

20 So as a consequence, when I looked at
21 that, I said, how would you interpret what this is
22 getting at best to apply to HB 589? And what I

1 concluded was that the best analogy was to look at
2 simply the multiplicity of factors. That was what
3 was enhancing (indicating). It enhanced
4 (indicating) discrimination because you put a lot of
5 changes together all at the same time, and I argue
6 there that when you have a lot of changes, all of
7 which take place at a certain time, that has a
8 multiplier effect on strategies and so on.

9 To go back to part of the report that
10 you didn't discuss about history, one of the things
11 that made the disfranchisement of the early 20th
12 century work in North Carolina was that everything
13 came at once and that made the disfranchisement much
14 more effective because it made it hopeless all at
15 once. It gave people no time to change their
16 political strategies little by little, fight back as
17 best they could. It was a final blow.

18 I hope this will not be a final blow to
19 black participation in the political process in
20 North Carolina, but it has more of that feeling.

21 So what I was trying to do was to take a
22 factor that was aimed at multimember districts,

1 usually in local jurisdictions, and to see how what
2 the Supreme Court was or what the Congress was
3 really concerned with, knowing what the -- what it
4 said and having testified in the 1981 hearings about
5 the renewal, I wanted to say how it could be best
6 applied here and so that's what I said.

7 Q. And you testified in front of
8 Congress --

9 A. Yes.

10 Q. -- during the process that led up to the
11 1982 amendments?

12 A. Yes.

13 Q. Okay. Let me ask you some questions
14 about that. And if I've asked you this before, I
15 apologize because this is the third day for me. So
16 it's all kind of blending together.

17 In 1982 how many states had early
18 voting?

19 A. I don't know.

20 Q. Was it a majority or a minority?

21 A. I'm sure it was a minority of states.

22 Q. What about same-day registration?

1 A. I'm sure it was a minority of states.

2 Q. And what about out-of-precinct voting?

3 A. I'm sure it was a minority of states.

4 Q. Okay. Did the -- did the Senate report

5 list early voting or the absence of early voting,

6 the absence of same-day registration, or the absence

7 of out-of-precinct voting as factors to be

8 considered under the totality of circumstances?

9 A. No.

10 Q. If you're in a district where blacks are
11 not in the majority and the district has racially
12 polarized voting, can blacks win a Democratic
13 primary when there's a 50% requirement for the
14 primary?

15 A. Depends upon the party composition of
16 the district.

17 Q. Okay. Let's say there's -- let's say
18 there's racially polarized voting within the --
19 amongst Democratic voters.

20 A. Okay.

21 Q. Could --

22 A. Within a primary?

1 the general election.

2 Q. Do you know the racial compositions of
3 the registered Democrats in the North Carolina
4 majority black legislative districts?

5 A. I do not know the racial compositions of
6 all of them. As I say, I have not studied in detail
7 the --

8 Q. Okay.

9 A. -- those matters.

10 Q. All right. So does North Carolina today
11 have unusually large election districts?

12 A. Unusually large -- it does not so far as
13 I know and unusually large election districts don't
14 have any relevance to HB 589, as I've said.

15 Q. Okay. But does North Carolina -- you
16 said that the majority vote requirement to win a
17 primary was removed over 20 years ago?

18 A. It's now a 40% requirement.

19 Q. Okay. And you think that's been gone
20 for at least 20 years, maybe longer?

21 A. I'll accept your characterization of
22 that.

1 Q. Okay. And when was the last time North
2 Carolina had an anti-single shot provision in place?

3 A. Gingles got rid of a lot of that, and
4 the subsequent litigation got rid of more of it at
5 the county level.

6 Q. Okay. And --

7 A. But, again, that's not relevant, I
8 think, to 589.

9 Q. Well, it's one of the Senate Factors.

10 It doesn't exist in North Carolina
11 anymore; right?

12 A. It's one of the Senate Factors, as I
13 have explained, applied to the multimember
14 districts. It doesn't have a very good application
15 to something that's not multimember districts or
16 redistricting. For that you take the spirit of the
17 requirement to look at enhancing requirements.
18 Things that make discrimination more likely to
19 happen, make discrimination worse, and so I had to
20 reason by analogy there.

21 Q. Okay. But no -- no court has ruled that
22 eliminating early voting is equivalent to one of the

1 Senate Factors?

2 A. Not yet.

3 Q. No court has ruled that eliminating
4 same-day registration is equivalent to a Senate
5 Factor?

6 A. Not yet.

7 Q. No court has ruled that out-of-precinct
8 voting is equivalent to a Senate Factor?

9 A. That eliminating --

10 Q. Yes.

11 A. -- out-of-precinct voting? Not yet.

12 Q. Okay. So that's your opinion that
13 they're equivalent?

14 A. I tried to make the best analogy I could
15 to make the factors tailored for something else fit
16 this particular case.

17 Q. Okay. Now, the fifth Senate Factor "is
18 the extent to which members of the minority group in
19 the state or political subdivision bear the effects
20 of discrimination in such areas as education,
21 employment and health, which hinder their ability to
22 participate effectively in the political process."

1 You see that?

2 A. Yes.

3 Q. Okay. What does it mean "which hinder
4 their ability to participate effectively in the
5 political process"?

6 A. If they -- we know that people who are
7 relatively less educated and who are relatively
8 poorer participate less than people who are
9 relatively richer and relatively better educated.

10 Q. Okay. Would one measure of that be
11 registration as far as participation in the
12 political process?

13 A. Registration would be one measure.
14 Turnout would be another.

15 Q. Okay. And isn't it true that there's a
16 higher percentage of black voting age population
17 registered in North Carolina now than white voting
18 age population?

19 A. It's possible that that's so. I have
20 some difficulty with some of the registration
21 figures. I'm not sure how up-to-date they are. I'm
22 not sure the extent to which -- particularly since

1 African-Americans move often. Their registration
2 purging is a little more. Blacks get purged or will
3 get purged from voting or particularly they may not
4 be able to vote in their precinct because they don't
5 live in their precinct. They don't live in the
6 precinct that they are registered in anymore because
7 they move more often.

8 Q. Have you -- have you tested that in
9 North Carolina?

10 A. I looked at the geographic mobility. I
11 discuss it here. The geographic mobility of blacks
12 in North Carolina.

13 Q. But have you looked at the registered
14 voter list in North Carolina to determine what
15 percentage of registered blacks have moved?

16 A. I have not looked at that.

17 Q. Okay.

18 A. But I looked at moving.

19 Q. Did you look at the list of the
20 African-Americans who voted out-of-precinct to
21 determine if any of those people had moved?

22 A. Well, some of them reregister because

1 they've moved and that's a larger proportion than of
2 whites.

3 Q. Right.

4 A. I did look at that.

5 Q. Okay. But, I mean, have you -- have you
6 checked the actual registration lists in North
7 Carolina to see if you can determine how many
8 African-Americans have moved based upon their
9 address listed for their registration?

10 A. No, but there were some figures on the
11 numbers who reregistered using same-day registration
12 because they had moved.

13 Q. Okay.

14 A. Some aggregate figures that I quote, I
15 think.

16 Q. All right. But the percentage of black
17 voters that are registered in North Carolina is
18 pretty close to their percentage in the voting age
19 population?

20 A. I think that's right.

21 Q. In fact, it might be a little higher?

22 A. It may be a little higher.

1 Q. Okay. And would ability to participate
2 in the political process also include turnout in
3 elections?

4 A. Would include turnout. It might include
5 -- the ability to participate can include the
6 ability to elect somebody depending upon what the
7 election districts look like. It could include that
8 as well.

9 Q. Okay. And the current plan for
10 legislative districts, according to the court,
11 provides black voters with proportionality in state
12 and House legislative districts, does it not?

13 A. I have -- as I say, I did not read that
14 whole opinion, but I'll accept your characterization
15 of what they decided.

16 Q. Okay. And a higher percentage of black
17 voters turned out -- a higher percentage of
18 registered black voters turned out to vote in the
19 2008 and 2012 presidential elections than the
20 percentage of white registered voters who turned out
21 to vote?

22 A. Yes. We discussed that.

1 Q. Okay. All right. Number 6, whether
2 political campaigns have been characterized by
3 subtle or overt racial appeals.

4 What do you mean by "racial appeal"?

5 A. I use examples from the Willis Smith and
6 Jesse Helms campaigns. They're familiar to anybody
7 who knows anything about North Carolina history and
8 politics. The "white hands" appeal. The "white
9 hands" television commercial was a quintessential
10 racial appeal.

11 Q. Okay. Have you cited any other racial
12 appeals since the 19 -- was that the 1992 election?

13 A. '90 I think.

14 Q. 1990. Have you cited any other racial
15 appeals?

16 A. No.

17 Q. Do black candidates ever engage in
18 racial appeals?

19 A. They may.

20 Q. Okay. Then the 7th factor is "the
21 extent to which members of the minority group have
22 been elected to public office in the jurisdiction."

1 Do you see that?

2 A. Yes.

3 Q. Did you go back to try to compare the
4 number of black officials who were elected in -- at
5 the time of Gingles to how many black officials have
6 been elected in North Carolina today?

7 A. I had looked at that in "Colorblind
8 Injustice" through most of the 1990s, I think. It
9 rose after Gingles.

10 Q. Is it -- how would you describe the
11 increase today versus the numbers in Gingles?

12 A. Well, I think there were more, a good
13 many more. In the -- I discuss this -- discuss the
14 numbers in the legislature after 1992, which was the
15 big shock to the southern political system in terms
16 of the election of African-Americans and Latinos to
17 the state legislatures and to Congress.

18 Q. Uh-huh.

19 A. So I discussed there was a big -- a big
20 increase.

21 Q. Okay. Now, Gingles says additional
22 factors in some cases have probative value as part

1 of plaintiffs' evidence to establish a violation,
2 and one of the -- one of those factors is stated as
3 whether there is a "significant lack of
4 responsiveness on the part of elected officials to
5 the particularized needs of members of the minority
6 group."

7 Okay. Have you cited any evidence of
8 that in your report?

9 A. Yes.

10 Q. Okay. What does that mean "lack of
11 responsiveness on the part of elected officials"?

12 A. Well, if there's a large need of the
13 minority group -- for example, it used to be the
14 case that in a lot of southern towns, streets in the
15 black areas were not paved. There were not sewers
16 in the black areas, etc., etc. There are always
17 calls from local black leaders. We want -- we want
18 sewage. We want indoor toilets, etc.

19 But also education is -- is very
20 important, increases in educational expenditures,
21 particularly ones that are targeted to inner city
22 schools or school integration. Healthcare.

1 Increases in the availability of healthcare for poor
2 and working class people.

3 The -- in North Carolina, certainly
4 unemployment insurance and around the country in
5 general, unemployment insurance where there's a lot
6 of long-term unemployment. An increase in the
7 general benefit level and an increase in the number
8 of weeks and months that you can continue to get
9 unemployment insurance if you can't find a job when
10 you're looking for one. These are all very
11 important things.

12 In North Carolina, there was also
13 singularly the Racial Justice Act.

14 Q. What does the Racial Justice Act do?

15 A. It allowed somebody who was on Death Row
16 to appeal his conviction on the grounds that there
17 was racial bias in the judicial process that
18 convicted him.

19 Q. Okay. Okay. Now, I'm going to ask you
20 some hypotheticals.

21 I didn't -- I didn't vote. I'm not a
22 member of the legislature.

1 A. Okay.

2 Q. So I didn't vote for any of this stuff,
3 but let's say you're a Libertarian, like someone
4 like Tom Sowell.

5 What if you genuinely believe that
6 cutting unemployment benefits is a good thing for
7 people who are out of work because it will give them
8 the incentive to go find a job? You could be
9 completely wrong, but what if you genuinely think
10 that? Does that mean you're unresponsive to the
11 needs of -- of poor people or black people?

12 A. If they articulate those needs and say,
13 we don't care if you're a Libertarian or a
14 plutocrat, or whatever, we need to have this, then
15 objectively you're being unresponsive to their -- to
16 their needs.

17 You are -- you may be doing it because
18 you think their articulation is wrong or they're
19 wrong about their needs. They have false
20 consciousness. You can believe all of those things,
21 but you're still being unresponsive.

22 Q. Are you being unresponsive to their

1 needs, or are you being unresponsive to their
2 political point of view?

3 A. You're being unresponsive to their
4 articulated needs. I don't know how you know what
5 their needs are unless you listen to them. That's
6 always been -- that's always been a problem to try
7 to figure this out. There are lots of people who
8 say that white working class people don't really
9 understand their best interests.

10 There are liberal Democrats who say
11 white working class people -- a lot of white working
12 class people don't understand their best interest.
13 They would understand that they're working class
14 first and white second. Well, maybe so.

15 Maybe one would like to believe that
16 under certain circumstances, but it's -- it's hard
17 to go against what they articulate and it's hard to
18 decide in some global sense what their needs are.

19 Who are you -- who are we to say what
20 their needs are? Why not listen to them? There's
21 an objective sense in which listening to them is the
22 right way to determine their needs, and I have --

1 I've always had difficulty trying to come out with
2 another criterion for that.

3 Q. Okay.

4 THE VIDEOGRAPHER: Sorry. Four
5 minutes left.

6 MR. FARR: All right. I'm going
7 to -- let me finish up this line of questioning.
8 Then we can switch the tape.

9 BY MR. FARR:

10 Q. So do you think that people of good will
11 who have different views and good faith can have
12 different opinions on what type of legislation is
13 responsive to the needs of any group, including
14 black people?

15 A. As I said, I think the best measure of
16 what is responsive is what the group articulates as
17 its needs and the way that it articulates its
18 interest.

19 MR. FARR: Okay. I understand
20 your testimony.

21 Let's go off the tape at this
22 point in time.

1 Are you aware of any court that has
2 found liability of a state under -- under Arlington
3 Heights where the majority party accepted amendments
4 from minority members as well as from members of the
5 minority party?

6 A. I do not recall any cases offhand, but I
7 have not read everything that's been cited under
8 Arlington Heights and so there may be such cases.

9 Q. But you're not aware of them as you sit
10 here today?

11 A. No, I don't think so.

12 Q. Okay. Similar question.

13 Are you aware of any finding by a court
14 of liability of a state under Arlington Heights
15 where the state legislature has followed its own
16 rules of procedure?

17 A. Following its own rules and procedures
18 is only one of many things that go into an intent
19 case. There are cases -- there surely must be
20 cases -- I can't think of anything offhand -- in
21 which the rules were all followed, but they -- they
22 found intentional discrimination.

1 Well, okay, let's go back to Shaw versus
2 Hunt. Shaw versus Reno. The legislature
3 followed -- of North Carolina followed all its
4 normal procedures, and I at least would interpret
5 Shaw versus Reno as an intentional discrimination
6 case. Whether it is exactly on the same grounds
7 as -- as Arlington Heights --

8 Q. That was my question. Pardon my
9 interruption.

10 A. -- I'm not sure.

11 Q. That was my question.

12 A. But Arlington Heights articulates a lot
13 of reasons that go into an intent case, but there
14 are intent cases that have been decided without real
15 specific reference to Arlington Heights. Shaw
16 versus Reno I interpret as an intent case.

17 Q. But you're not an attorney; right?

18 A. No, but I've written about it --

19 Q. Okay.

20 A. -- and argued with people about whether
21 it should be considered an intent case.

22 Q. You've argued? With whom have you

1 "darkened"?

2 A. Yes.

3 Q. Okay. "Republican threat." What are
4 you talking about there?

5 A. The Republicans got more votes. A
6 larger proportion of votes. So the Republican
7 threat to the Democrats by beating them became
8 larger.

9 Q. Okay. Down a little bit further, the
10 third paragraph. It's the last sentence, I believe.

11 "At that point, Republicans framed a
12 new, much larger bill, containing all of their
13 anti-participation wish list items."

14 I want to explore that for a second.

15 "Anti-participation wish list." What do
16 you mean by that?

17 A. There had been things that had been
18 included in various bills, particularly in 2011, and
19 they had been discussed in various reports which
20 were available to the -- to the legislature. What
21 is the organization?

22 It's late in the afternoon. I've been

1 doing this all day and my mind is -- is mush now.
2 I'm sorry. I've forgotten what the name of the
3 organization is, but it's a relatively conservative
4 activist organization that's very active in voting
5 matters and other things for the legislature. John
6 Locke Foundation is -- is associated with it or
7 connected with it, but I've forgotten the name of
8 the organization.

9 Anyway they published some newsletter
10 which I reference in this report, and they -- at the
11 beginning of the legislative session in 2013, they
12 said, here are a series of voting laws that we want
13 changed.

14 Q. And they used the phrase
15 "anti-participation wish list"?

16 A. No, they didn't. They did not, but that
17 was their wish list. All the things that they
18 listed. They listed a huge -- a large number of
19 things that they wanted to see repealed and they got
20 put into HB 589.

21 Q. So you didn't interview any members of
22 the Republican Party in the legislature for that to

1 come up with that sentence, did you?

2 A. No.

3 Q. Okay. The "anti-participation"
4 description of the legislation, that's your opinion;
5 correct? That's not -- that's not -- that's not --
6 that's not a fact. Isn't that just your opinion?

7 A. It is my opinion based upon the fact
8 that the participation grew quite dramatically when
9 all of these provisions were put into effect and
10 provisions, therefore, logically which repealed them
11 would diminish participation and so they would be
12 anti-participation.

13 Q. But you came up with that phrase.
14 Nobody in the Republican caucus or associated with
15 John Locke Foundation used that phrase; correct?

16 A. That's correct.

17 Q. Okay. The sentence goes on to say
18 "which they sprang on the public and the legislature
19 in late July and passed in two days without hearings
20 and with absolutely minimal Republican participation
21 in debate."

22 You mean Democrat?

1 A. No.

2 Q. "Minimal Republican participation in the
3 debate"?

4 A. In the last two or three days. Yes, I
5 mean Republican.

6 Q. Okay.

7 A. In the House, I think one guy said one
8 Republican participated in the debate at all. Lots
9 of Democrats, but only one Republican.

10 Q. Okay. And is there a minimum
11 requirement of a political party's elected officials
12 to have certain number of -- of speeches or debate
13 pursuant to the legislative rules in North Carolina?

14 A. Not in the legislative rules, but there
15 was nobody available to answer questions. There was
16 nobody available to put out rationales.

17 Q. Well, pardon my interruption. What do
18 you mean "nobody available"? The chamber was
19 vacant?

20 A. I mean that the Republicans did not
21 stand up to justify things. I think that -- that
22 it's -- it's hard for -- for this case in some

1 sense. The rationales that -- that are being
2 produced now by your side for lots of the provisions
3 might well have been produced as part of the
4 legislative process, but they're not. They weren't.
5 It would have been more usual legislative debate if
6 the rationales and the debate had gone on at the
7 time before the legislature.

8 When -- when I produced a report after
9 the redistricting of 1991/92 and there were
10 justifications for the -- offered for the particular
11 shape of the districts, the Chief Justice Renquist
12 said in Shaw versus Hunt that the sorts of things
13 that I produced couldn't have been taken into
14 account by the legislature and so the reasons had to
15 be discounted. This -- it seems that this has
16 happened again. Courts may well make a decision
17 similarly.

18 Q. In the next paragraph, it says that
19 "Republicans passed the new, more comprehensive HB
20 589" and I'm going to skip all the stuff here, but
21 I'll paraphrase. If I misparaphrase it, let me
22 know. With the full knowledge that the bill "would

1 knowledge" -- that the law would disproportionately
2 burden African-American voters?

3 MS. RIGGS: Object.

4 Mischaracterizes earlier testimony.

5 BY MR. BOWERS:

6 Q. You can answer it.

7 A. It does mischaracterize my testimony.

8 I was talking about the first part of it
9 then.

10 Q. Well --

11 A. They --

12 Q. Go ahead.

13 A. As I talk about in the body of the
14 report, this is just a summary. As I talk about in
15 the body of the report, there was plentiful
16 information available to the legislature at the
17 time, and it was discussed in hearings, it was
18 publicized in newspapers. The civil rights leaders
19 talked about it all the time. Black legislators
20 talked about it. White Democrats talked about it.
21 That all of these things, all of these
22 provisions had disproportionately impacted blacks.

1 That it made -- they had made more use of it. As a
2 consequence, if you get rid of them, knowing with
3 that on the record before you, you must be assumed
4 to know that that would disproportionately burden
5 black. That was all. That's why the record was
6 produced and that's why I document again and again,
7 here's what was in the public record.

8 It was in the public record that blacks
9 disproportionately used all of these things. That
10 is a major part of the reasoning for the conclusion
11 that they knew that it would have a disproportionate
12 burden.

13 Q. Sir, you didn't interview any Republican
14 legislators about this. You testified to that
15 earlier; correct?

16 A. That's right. I have never interviewed
17 a legislator about anything, particularly with -- at
18 the time of pending legislation -- litigation
19 because no matter who they were.

20 Q. There was no litigation when they passed
21 this law.

22 A. There was litigation when I wrote the

1 report.

2 Q. Okay.

3 A. Particularly with pending litigation,
4 nobody is believable. Everybody operates in saying
5 what will -- what will work for their side. I think
6 it's a -- it's a big mistake to try to do that.

7 I was forced to do that in one case. To
8 interview somebody who had been around when some
9 legislation passed and the judge said you should --
10 he's still alive, you should interview him. And I
11 didn't want to do it and I was pressed by the
12 attorneys to call him up, and he didn't remember
13 what had happened. It was 30 years ago. He
14 wouldn't remember what was happening.

15 But the more important thing was that it
16 happened when litigation was -- was pending and
17 people are just not going to say, yes, I did this
18 because I wanted to disadvantage blacks. Or, of
19 course, the other side did it because they wanted to
20 disadvantage blacks. Neither side is believable in
21 that sort of situation. So I would never interview
22 somebody under those circumstances.

1 If I read what was in the newspapers at
2 the time before there's litigation when newspaper
3 reporters who don't have a horse to pull are
4 reporting what they think of as facts drawn from
5 their interviews with people, and lots of them say
6 the same thing, that's -- that's much more
7 believable than if I interviewed anybody.

8 Q. You rely heavily on newspaper reports in
9 this report, do you not?

10 A. I do.

11 Q. Okay. And it's your testimony that you
12 believe that newspaper reporters don't have a horse
13 to pull in -- in political matters? Do you really
14 believe that sitting here today under oath?

15 A. I believe --

16 MS. RIGGS: Objection.

17 Argumentative.

18 BY MR. BOWERS:

19 Q. You can answer.

20 A. I believe that there are lots of
21 newspaper reporters and that if you -- if you read
22 all of the newspaper reports that you possibly can,

1 you find a lot of disparate -- you find some
2 disparate views. You essentially find -- you
3 essentially find something that comes out as a
4 consensus view. Newspaper reporters -- let me tell
5 you a story, a story about this.

6 Q. No, that's okay. I think a story would
7 be nonresponsive.

8 A. It's not nonresponsive. It is very
9 responsive. It's the reason I became a historian.

10 Q. Hold on for a second.

11 A. The reason I became a historian is --

12 MS. RIGGS: Let him answer.

13 MR. BOWERS: Hold on for a second.
14 I don't think he's answering my question. All I --

15 MS. RIGGS: He says he is. So
16 let's hear if he is.

17 BY MR. BOWERS:

18 Q. All I'm asking you is: You really
19 believe that reporters, all reporters don't have a
20 horse to pull -- I'm using your words, not mine --
21 in covering politics?

22 A. Not all reporters. I'm putting them all

1 together. Let me explain to you why I became a
2 historian.

3 Q. Go ahead.

4 A. I grew up in Nashville, Tennessee.
5 Nashville, Tennessee at that point had two
6 newspapers. Had The Tennessean and The Banner.

7 Q. Uh-huh.

8 A. The Tennessean was liberal Democrat.
9 The banner was conservative Democrat at that point.
10 In 1964 they shifted to Goldwater. I grew up. I'm
11 hold older than you. So I was older than you at
12 that point.

13 Q. (Laugh).

14 A. I grew up reading these two newspapers
15 whose newspaper reports were diametrically opposed
16 to each other. You would read a report about the
17 same event and it would be described from two
18 different points of views, and I thought as a young
19 kid and a teenager: What's the truth of this? How
20 do I find that out?

21 You have to learn to read between the
22 lines. You have to learn to read both of these

1 sorts of things, and you have to try to figure out
2 even who's ahead in a political race. And I became
3 a historian because I liked doing that and it --
4 doing that was something that I did well.

5 And I looked -- I considered all of
6 these things and thought: That's what I want to do.
7 I want to be able to read documents and come up with
8 the truth which maybe is in none of the documents
9 themselves particularly, but in all the documents
10 put together, I can find it.

11 Q. So you, based on that story, which I
12 appreciate, if I understood you correctly, you
13 recognize that some newspapers have a -- have an
14 editorial bent in one direction or another; correct?

15 A. And sometimes it really infects the news
16 columns and often it doesn't. Mostly what newspaper
17 reporters are trying to do is to get a story and
18 they're more objective than The Banner The
19 Tennessean were.

20 Q. I noticed that you relied on and just
21 based on your footnotes that you relied on a number
22 of editorial columns, not just news articles, but

1 Q. I'm glad you used the phrase "major
2 newspaper" because I noticed you didn't just rely on
3 the major newspapers. You also used, referenced the
4 Southern Pines Pilot in footnote 122.

5 What is the Southern Pines Pilot?

6 A. I actually don't know. If you use
7 NewsBank and you look at -- you use whatever phrases
8 I was using to find things, you come up with a lot
9 of newspapers.

10 Q. Okay. Well, the Southern Pines Pilot
11 you used an editorial and let's -- let's go to it
12 real quick while I'm talking about it. It's
13 footnote 122, which I believe is on page 42.

14 "Editorial, 'Election 'Reform' Stacks
15 the Deck.'"

16 That's -- that's probably an editorial
17 opposed to HB 589; correct?

18 A. What I used that for is the statement by
19 Bob Rucho saying fraudulent votes "never seem to get
20 recorded or reported." That's how -- that's what I
21 used the editorial for.

22 Q. Okay. But --

1 A. I quoted a Republican making an argument
2 that would undoubtedly please your client.

3 Q. How about the Elizabeth City Daily
4 Advance, which was an editorial from -- you used an
5 editorial in footnote 103.

6 Do you know what that is?

7 A. No.

8 Q. So you didn't even know where these
9 newspapers are or what they are; is that your
10 testimony? How do you find them?

11 A. I found them using NewsBank.

12 Q. What is NewsBank? I heard you refer to
13 that earlier. What is NewsBank?

14 A. It's a -- it's an aggregator and you can
15 use index terms, and you find a lot of things in it.
16 I mean, look at the editorial. Look at the use of
17 the Elizabeth City Daily Advance. I use it to -- as
18 to say that the Attorney General issued an opinion
19 stating this. That's just a fact. If it came from
20 an AP report or any other report, it's just a fact.
21 That's not a matter of opinion.

22 Q. How about the name of the editorial?

1 "Republicans should give up voter photo ID effort."

2 That's opinion; right?

3 A. That's opinion, but all I cite it for is
4 the fact that the Attorney General issued an opinion
5 saying that local voter ID laws would violate the
6 State Constitution's provision. That's just a fact.
7 I mean, it could have come from the opinion in
8 general and, in fact, then I do cite the opinion in
9 general. Roy Cooper to Mark Davis.

10 Q. But you didn't source any editorials in
11 favor of the photo ID, did you?

12 A. I didn't. I guess I didn't quote any
13 here, but these -- I'm just using those to, in these
14 two cases at least, for matters of fact. They're
15 not matters of facts that you deny.

16 Q. I'm not talking about the matters of
17 fact. I'm just talking about your sources to --
18 let's back up for a second.

19 You already testified that you relied
20 heavily on newspaper reports; correct?

21 A. Yes.

22 Q. Okay. My count could be off, but I

1 counted 92 of the 202 footnotes, which is about 45%,
2 relying on newspapers. I could be off a little bit
3 but --

4 A. No, I'm sure that you're -- that you're
5 correct about that. I've used newspapers all of my
6 scholarly career. If you look at the shaping of
7 Southern politics, the vast majority of things that
8 I discuss, the vast majority of sources that aren't
9 scholarly treatises are newspapers. Most of the --
10 there weren't committee hearings. There weren't
11 legislative transcripts at that point. So you're
12 stuck with using newspapers for a lot of things.

13 Q. Okay. Let's say you used the newspaper
14 as an initial source.

15 Did you -- any of the footnoted sources
16 that are newspapers in this report, did you do any
17 independent verification of the facts as reported in
18 the report?

19 A. Here was an example. The footnote 103.
20 The newspaper said that Attorney General Cooper
21 issued such an opinion, and I managed to find the
22 opinion. So that's an example of following these

1 sorts of things up but, you know, where I've done
2 that, I've tried to cite those.

3 Q. There are a couple of -- I don't want to
4 belabor this, but I noticed a couple of footnotes by
5 or referring to a reporter named John Frank with the
6 News & Observer.

7 Do you recall citing him?

8 A. I don't, but I'm sure that if you say I
9 did, I did.

10 Q. Let's go to page 65 footnote 193.

11 You see that?

12 A. Yes.

13 Q. The title of the article "GOP changes
14 'breathtaking' = With a friendly governor, agenda
15 became more ambitious in second session."

16 Did I read that correctly?

17 A. Yes.

18 Q. Okay. And you use that to source a
19 comment that -- a statement that:

20 "And as Rep. Garland Pierce, chairman of
21 the Legislative Black Caucus, remarked, the
22 legislature repealed the Earned Income Tax Credit, a

1 benefit to lower-income working families with
2 children, and decided to reject the 100% federally
3 funded expansion of Medicaid in Obamacare."

4 All right. Did you do any independent
5 verification of that, or did you just accept
6 Mr. Frank's reporting as fact?

7 A. I accepted it as a fact that he said
8 that Rep. Pierce said that.

9 Q. Okay. Have you ever met Mr. Frank?

10 A. No.

11 Q. Okay. I've met Mr. Frank. He's a nice
12 fella.

13 Do you know what his title is at the
14 newspaper?

15 A. No.

16 Q. "Political Reporter and Craft Beer
17 Columnist." All right. So he spends at least some
18 of his time, I don't know how much, but some of his
19 time investigating and writing about craft beers in
20 North Carolina.

21 And so you deem his reporting on
22 political matters so reliable that you don't have to

1 verify them through anybody else?

2 A. I have no reason to disbelieve. I've
3 read elsewhere probably that the Earned Income Tax
4 Credit was repealed, and I've certainly read
5 elsewhere that Medicaid -- the Medicaid expansion
6 was -- was turned down in North Carolina. I know
7 those to be facts from other sources.

8 Q. Other popular media sources?

9 A. Other newspapers. There are lots of
10 reports about the number of governors who have
11 turned down the Medicare expansion -- Medicaid
12 expansion.

13 Q. What is TPM Muckraker?

14 That's a source that you rely on in
15 footnote 126.

16 A. It's a website and they were simply
17 discussing the activities of "True the Vote" in
18 Houston in 2010.

19 Q. Do you consider -- do you know much
20 about TPM Muckraker, or did you just find that on
21 NewsBank as well?

22 A. No, I've run into it in other contexts,

1 I think. It's often referenced on -- on Rick Hasen,
2 H-a-s-e-n, has an Election Law Blog.

3 Q. Uh-huh.

4 A. And he links to lots of articles, and
5 every once in a while there's an article in TPM
6 Muckraker, that's how I ran into it in the first
7 place, and I think that's how I ran into this
8 article.

9 Q. In your view, is TPM Muckraker neutral
10 and unbiased, or does it have a political bent?

11 A. It has a liberal political bent.

12 Q. Okay. Dr. Kousser, your report is
13 really an advocacy piece, isn't it?

14 A. No.

15 Q. It's not?

16 A. I discussed this with Mr. Farr earlier.

17 Q. And we're getting into it a little bit
18 more with your reliance on popular media that you
19 don't independently verify that carries the view
20 that's consistent with your own and not the opposing
21 view.

22 That seems like an advocacy piece to me,

1 did you -- you're talking about their knowledge.

2 How can you testify to somebody's full knowledge
3 without talking to them?

4 You're assuming they're aware of this
5 stuff and you're assuming that they agree with you
6 on the interpretation of it, are you not?

7 A. Historians -- historians have to do lots
8 of things. They have to write about lots of things
9 where they can't talk to the people. I wrote about
10 disfranchisement. I started off my life writing
11 about disfranchisement, or it seems like that's when
12 my life started, and those people were dead at the
13 time.

14 There were almost none of those people
15 left when I started writing, but I had to write
16 about them and I had to use all the information that
17 I could to try to determine what they thought, what
18 they felt, why they acted, and all that sort of
19 stuff.

20 Historians do that all the time.
21 Talking to people particularly when litigation is
22 pending or when you know litigation is going to be

1 pending is, as I've argued before, misleading and it
2 may well lead to much less information than you can
3 have from if you look at sources that aren't
4 involved in the litigation or don't expect to be
5 involved in the litigation in the first place.

6 So if somebody had come -- if somebody
7 came along and they said, look, I talk to the
8 legislators, I talk to the legislators or I talk to
9 the governor and they said, we just had no idea that
10 this was going to have any impact on -- on
11 African-Americans, I would not think that that was
12 credible. I would think that that was much less
13 credible than relying on the sorts of sources that I
14 did. So I didn't do it.

15 Q. Well --

16 A. So historians' practices are an in
17 general not to do that sort of thing because we
18 can't, and there is particular reason to expect bias
19 in the context of litigation and so I think it would
20 be an error to do it.

21 Q. To do what?

22 A. To talk to people and to say --

1 Q. Okay.

2 A. -- why did you do this?

3 Q. You know what? For purposes of this
4 discussion, let's say that I agree with you and I'll
5 accept that.

6 A. Okay.

7 Q. You don't need to talk to them, but then
8 how can you -- without talking to them and with --
9 how can you say they have full knowledge of
10 disproportionate impact?

11 I, frankly, look, you're talking about
12 what historians do. If historians do that in a
13 history book or in a treatise or some academic
14 piece, that's one thing, but that's not what this
15 is. This is an expert report.

16 And so you're telling me and you're
17 telling this federal -- the federal judge in this
18 case that in your expert opinion the North Carolina
19 legislature had full knowledge of disproportionate
20 impact. That's what you're saying here.

21 Not -- you don't couch it in any
22 qualified terms, not perhaps they had knowledge or

1 maybe they did. You're saying unequivocally they
2 had full knowledge of it.

3 A. Yeah. I am.

4 Q. And that's your expert opinion?

5 A. That is my expert opinion.

6 Q. Based on what?

7 A. What was available, what was testified
8 to, what was in the newspapers, what was in reports.
9 Exactly as I laid it out.

10 Q. Okay.

11 A. And let me say that I approach an expert
12 report in exactly the same way as I approach
13 historical treatise or political science article
14 and, in fact, if you look at "Colorblind Injustice,"
15 you will find that five of the chapters started out
16 and more parts of other chapters started out as
17 expert witness reports. I do it exactly the same
18 way.

19 I set out all of my information. I
20 footnote it extensively. I make all of my reasoning
21 as clear as I possibly can. Sometimes I don't, I
22 fail, but I try. I lay out the factors in a

1 systematic framework that I had developed before
2 this litigation and as a result of other cases that
3 I've participated in or read about, and I try as
4 best I can to put my thesis at risk to test my
5 hypothesis versus other theses.

6 It is exactly the same procedure I would
7 do if I were looking at the same thing as a
8 historian, which is exactly how I got into this
9 business.

10 I was asked by an ACLU attorney whether
11 I had an opinion about whether a particular section
12 of the Alabama Constitution of 1901 was passed with
13 a racially discriminatory intent, and I did because
14 I had done research that was in my dissertation and
15 first book. I had looked at it and I looked at it
16 exactly the same way and pulled out the exactly the
17 same information, maybe more intensively because I
18 was looking at just that one provision, when I did
19 an expert report in Hunter versus Underwood.

20 I work exactly the same way. You make a
21 distinction between scholarly treatises, which you
22 are allowed to do anything, to take into account and

1 do anything that you want to without interviewing
2 people, or whatever, and expert witness reports. I
3 don't. I treat expert witness reports exactly the
4 same way.

5 Q. Okay. So in your academic work, you'll
6 rely on public media, like TPM Muckraker and
7 editorial columns, but only presenting one view, not
8 another and you deem that reliable?

9 A. I use them as an example --

10 Q. And -- and you don't independently
11 validate the sources, and you deem that to be
12 reliable to present an opinion in front of a federal
13 judge?

14 A. In examples that you found here, the
15 editorials that I used were for statements of fact,
16 not statements of opinion. TPM --

17 Q. So is it just a coincidence that they're
18 all one-sided? Is that just a coincidence?

19 A. That was what turned up when -- when I
20 used the search terms.

21 Q. Okay.

22 A. And with respect to validating sources,

1 paragraph. I won't -- I'm not going to read it all,
2 but you say and it refers to Table 5 that in your
3 words "shows that HB 589 (2)" -- I guess that means
4 the 2.0, the --

5 A. The amended bill.

6 Q. The amended bill "is vastly more
7 restrictive than the Georgia and Indiana laws," and
8 then you also refer to the Texas law.

9 To your knowledge, are any of those laws
10 that you compare the North Carolina photo ID
11 provision to, did those have a delayed
12 implementation of two years?

13 A. No.

14 Q. Okay. Page 60. There's a lot of white
15 space there, but right above the white space, the
16 last sentence in the last paragraph you say:

17 "Clearly, the majority party in the
18 legislature chose the more restrictive option in
19 every case, and they did so with full knowledge of
20 their discriminatory impact."

21 We talked about this earlier.

22 So you still stand by the -- as fact

1 that the legislature had full knowledge of the
2 discriminatory impact of the legislation?

3 MS. RIGGS: Objection. Asked and
4 answered.

5 BY MR. BOWERS:

6 Q. You can answer it again.

7 A. (Laugh). I'm not going to answer it in
8 full again.

9 Q. Thank you.

10 A. I've said -- I've said -- I do want to
11 get home.

12 Q. (Laugh).

13 A. I have said -- I've said already what my
14 evidence for that and reasoning for that was, and I
15 stand by the statement.

16 Q. Okay. And is it not possible that a
17 person of good will could just have a different
18 opinion than you and not believe that requiring 10
19 days of early voting instead of 17 doesn't have a
20 discriminatory impact?

21 A. There was evidence. The only evidence
22 before them was that it would have a discriminatory

1 impact. So they didn't have any evidence that it
2 wouldn't.

3 Q. So you don't have -- you don't believe
4 that anybody could reasonably disagree with your
5 conclusion and believe that 10 days of early voting
6 versus 17 would not have a discriminatory impact?

7 A. They had evidence before them that
8 African-Americans were particularly likely to vote
9 the first week, and they had evidence before them
10 that they were particularly likely to engage in
11 early voting, and they didn't have any evidence that
12 contradicted that. So if you looked at those two
13 pieces of evidence, which is the only thing before
14 them, I don't think a reasonable person could come
15 to any other conclusion.

16 Q. Okay. If that's your testimony, that's
17 your testimony.

18 Move on to page 63. Section 5 the
19 "Climate of Racial Politics." The second sentence
20 is kind of a long sentence. I won't -- I'll make
21 sure I get -- we sort of sparred over this earlier.
22 I want to make sure I get the main idea of the

1 sentence or at least one of the ideas of the
2 sentence and that is that a market -- marked growth
3 of a Latino population was evidence that it partly
4 motivated HB 589.

5 Is that what you're saying there?

6 A. Yes.

7 Q. And there is evidence -- well, you say
8 there is evidence that the growth of Latino
9 population partly motivated HB 589.

10 What evidence are you relying on there?

11 A. I cite a newspaper article, I think, in
12 the News & Observer that reports as a matter of fact
13 that Republicans in discussing the voter ID law
14 referred to "illegal immigrants voting."

15 Q. Well, let's look at your report. It's
16 actually not a news report. It's an editorial in
17 the News & Observer that you use as support for that
18 and they said -- and in it you quote the N&O
19 editorial board as saying:

20 "In making their case for voter ID,
21 Republicans conjured visions of people (including
22 illegal immigrants) sneaking into the polls to cast

1 illegitimate ballots."

2 And that counts as evidence to you to
3 support that conclusion?

4 A. Yes. I mean, it's evidence that
5 somebody was talking about that and presumably these
6 are people in the legislature. That's -- it's not a
7 great deal of evidence but --

8 Q. Is --

9 A. -- what do I say? "There is evidence
10 that it partly motivated HB 589." That's the
11 evidence and it only partly is responsible. That's
12 a very qualified sentence.

13 Q. So an editorial, you don't even know if
14 somebody said that. It could have been the
15 editorial writer saying that; right? Because that's
16 an editorial. It's not a news article.

17 A. It was reported as a matter of fact that
18 they said it. They didn't quote somebody. If they
19 had quoted somebody or if I had found a quotation, I
20 would put it in. This is by no means as strong as
21 the evidence was in Texas.

22 Q. But this is the only evidence you rely

1 on in this provision. The "Climate of Racial
2 Politics." That's -- this is the evidence that you
3 rely on?

4 A. That's the evidence about Latinos. The
5 evidence intense -- the traditional antagonism
6 between whites and African-Americans in the state,
7 there's a lot of evidence of that. I have evidence
8 of that in "Colorblind Injustice." I have evidence
9 of this -- that in the first part of this report.

10 There is evidence of it in the reports
11 of Ms. Lawson, Mr. Leloudis. Any historical
12 treatise that you pick up, there's evidence of the
13 traditional antagonism between whites and
14 African-Americans in the state.

15 And for the intensification of the
16 climate of racial politics, after the election of
17 President Obama, there's just plentiful evidence.
18 If I cited that, I could have taken up a hundred
19 pages in the -- in the report. There are many books
20 on that. There are huge numbers of polls. It's
21 such a well-known fact that there's not even any
22 reason to cite anything on that.

1 So those two things and --

2 Q. That's a well-known fact?

3 A. Yes. It's a well-known fact that --
4 that there has been considerable -- considerably
5 more racial feeling, often anti-African-American
6 feeling, since Obama has been elected.

7 Q. In North Carolina?

8 A. Everywhere in the whole country.

9 Q. But we're talking about North Carolina
10 here.

11 A. True in North Carolina. It's true --
12 North Carolina is not not a part of the country.
13 It's been true everywhere.

14 Q. And you have evidence of that, hundreds
15 of -- of things that you could -- you could --

16 A. Large numbers of polls, etc. Look at
17 the --

18 Q. Let me finish my question.

19 But you didn't choose to include it in
20 this because it would have taken up too much room?
21 You couldn't have just included one or two?

22 A. I just thought it was completely

1 unnecessary at that point.

2 Most of the evidence that I summarize
3 here, I just take in the last two sections, two of
4 the last three sections. The section on the intent
5 factors and the section on the Senate Factors. I'm
6 basically just referring to in summary fashion the
7 things that I've covered in the body of the report.

8 So I didn't put it there, but surely
9 it's the case that racial politics has become more
10 intensified since the election of Obama everywhere
11 in the country.

12 Q. Okay. That's your opinion.

13 "Section 6. Background of Key
14 Decisionmakers." You start off that section with
15 reference to the background of Denmark Groover, a
16 politician in Georgia in the mid-1960s; is that
17 correct?

18 A. Yes.

19 Q. Okay. But Denmark Groover didn't have
20 anything to do with this piece of legislation in
21 North Carolina, did he?

22 A. No.

1 Q. Okay.

2 A. The reason that I put that in is that in
3 some cases, there is one guy who is overwhelmingly
4 in -- in charge and has responsibility for a
5 particular bill. I found no such person here and so
6 I don't spotlight one guy, as I have done in other
7 cases.

8 Q. Okay. So if -- if your rubric here for
9 determining intent is reliable -- and I'm not
10 acknowledging that it is, but for purposes of this
11 question -- if it is and the background of key
12 decisionmakers is one of the 10 important factors,
13 there's no evidence to show that a background of any
14 decisionmaker to suggest that the North Carolina
15 legislature had any mal intent, is there?

16 A. I have not found that any legislator,
17 any particular legislator was particularly
18 influential in the framing of the law, and so I
19 haven't looked at any particular legislator. Maybe
20 the further information that the state has been
21 required to turn over to the plaintiffs in this case
22 will allow me to spotlight somebody, and then I will

1 question. I'm almost finished.

2 BY MR. BOWERS:

3 Q. "Number 8. Statements by Important
4 Participants." You include it, but you don't have
5 anything there either to support your conclusion of
6 intent, do you?

7 A. No.

8 MR. BOWERS: Okay. You got
9 anything else?

10 MR. FARR: I'm just waiting for my
11 e-mails.

12 BY MR. BOWERS:

13 Q. Dr. Kousser, thank you for your time.
14 I'm going to turn you over to Ms. Riggs.

15 A. Okay.

16 MR. BOWERS: And, again, we'll
17 reserve the balance of our time for any recross if
18 we need it, but I don't think we will. Go ahead.

19 EXAMINATION

20 BY MS. RIGGS:

21 Q. Professor Kousser, I'm tired, too, so
22 we'll keep this very brief.

1 district, but incumbents have tremendous power, have
2 had tremendous power in the LA County Board of
3 Supervisors.

4 Q. Okay. Well, I just -- I'll get off this
5 right now, but I only have one more question.

6 My recollection of Garza was that intent
7 was found because the folks that were doing the
8 redistricting were trying to protect their political
9 majority instead of drawing another majority
10 Hispanic district. That wasn't it?

11 A. They were trying -- it wasn't protecting
12 their political majority. They were trying to
13 protect their political skins, and there was
14 considerable cooperation between Democrats and
15 Republicans in drawing those seats.

16 If the Republicans had wanted to get
17 Edelman into more trouble, they would have made the
18 district more Hispanic, but they didn't. They came
19 to a general agreement on that.

20 Q. So it was the incumbents protecting
21 their own districts at the expense of the Hispanic
22 population?

1 A. Yes.

2 Q. Okay. All right. Now, you said that --
3 you said something like, if these changes have the
4 impact they may well might was a quote. I put that
5 in quotation marks.

6 A. Sorry.

7 Q. Okay. Have you made any predictions
8 about how black turnout is going to drop in the
9 absence of these practices?

10 A. I haven't made any precise predictions,
11 but I think that the fact that it went up so much,
12 particularly in presidential elections, would lead
13 me to believe that it will, if all of these go into
14 effect in 2016, probably be less than it was in
15 2012.

16 It's presidential elections that these
17 particular laws had the major impact on, as you've
18 said and as the statistics that all of us are using
19 have shown, and we won't really know until the 2016
20 election exactly what the effects are if the law is
21 allowed to go into effect.

22 Q. Right. But you haven't made any

1 predictions about how black participation is going
2 to drop off in the 2014 election based upon the
3 elimination of these practices?

4 A. I have not made any precise predictions
5 at all, and I would expect that the drop-off in
6 off-year elections would be less than the drop-off
7 in presidential elections.

8 Q. Okay. And -- and you haven't made any
9 predictions about how the drop-off will be in the
10 2016 presidential election?

11 A. I have not made any precise predictions,
12 but I think they will be more than in the 2014
13 elections.

14 Q. Okay. But is it possible that whoever
15 is running for president for the Democratic party in
16 2016 will put just as many resources into North
17 Carolina in advertising and registration efforts and
18 get-out-the-vote and change their tactics to fit
19 with the new election laws that are in place?

20 A. It's conceivable. It's not -- if these
21 new election laws stay in place, North Carolina will
22 be for the Democrats a much -- a much less enticing

1 target.

2 Q. Was Virginia an enticing target?

3 A. Virginia will continue to be an enticing
4 target unless the laws are changed.

5 Q. Okay. What -- what polling data have
6 you looked at to determine the political balance in
7 the state of North Carolina at the present time?

8 A. Polling data. I don't know that I've --
9 I've seen polling data on the Senate race. That's
10 the only polling data I can remember.

11 THE VIDEOGRAPHER: We have five
12 minutes on this tape.

13 MR. FARR: I'm going to be done.

14 BY MR. FARR:

15 Q. I'm going to -- I'm going to cite the
16 News & Observer here.

17 A. Okay.

18 Q. I don't know the exact article, but I
19 read articles all the time by Rob Christiansen
20 saying that North Carolina is now a 50/50 state.

21 Would you take my word that he's written
22 articles like that?

1 Carolina. So I'm skeptical that CPS turnout used
2 across states leads to quite valid conclusions.
3 Sometimes it's all we've got. Sometimes it's you
4 have to use what you got.

5 Q. Okay. So what if -- what if the
6 Democratic candidate in 2016 is polling better in
7 North Carolina than whoever the Republican candidate
8 is? Would that indicate the Democrats would then
9 try to put money in North Carolina to win the state?

10 A. Dependent upon the turnout estimates
11 in -- in the polling. If --

12 Q. But that's --

13 A. If they're polling better and you can
14 believe the turnout estimates, then they might put
15 money into it.

16 Q. Right. And that's all two years down
17 the road and very speculative at this point in time.
18 Would you agree?

19 A. It's two years down the road. Whether
20 this will go into -- whether the laws will be
21 allowed to go into effect is very speculative.

22 Q. Well, I'm not denying that, but for you

1 to sit here and say that North Carolina won't be a
2 target state for the Democrats in 2016, isn't that
3 speculative opinion on your part?

4 MS. RIGGS: Objection. I think
5 that mischaracterizes what he said.

6 BY MR. FARR:

7 Q. Okay. Well, you can answer the
8 question.

9 A. I said it may not. Given if the effects
10 are as I have said they might be, given the add-on
11 effects of these laws. If they are simply reversed,
12 then the Democrats may decide that it's not --
13 doesn't make sense to spend much money in North
14 Carolina.

15 Q. So if the given effects are as you have
16 reported may be, then at that point in time the
17 Democrats may not target North Carolina, even though
18 you have not made any predictions about what the
19 exact effect would be in either 2014 or 2016?

20 A. That's correct.

21 Q. All right. That's all I have.

22 A. Okay.

1 MS. RIGGS: Ah, come on. I got
2 one more. Do we need to switch?

3 THE VIDEOGRAPHER: We have three
4 minutes left.

5 MS. RIGGS: Oh, I won't take three
6 minutes.

7 FURTHER EXAMINATION

8 BY MS. RIGGS:

9 Q. Professor Kousser, the discussion you
10 just had with Mr. Farr about the interplay between
11 party strategy and election laws, is that the only
12 reason that you have come to the conclusions that
13 you have come to in this report, that is, that the
14 law was enacted with a discriminatory intent and
15 will have a discriminatory effect?

16 A. No. I set out a lot more evidence at
17 much greater length. That's one piece of it, but
18 it's only one piece of it.

19 MS. RIGGS: That's all I have.

20 MR. FARR: I'll give up.

21 THE VIDEOGRAPHER: One more?

22 MR. FARR: No, I'm done.