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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF GEORGIA
3 ATLANTA DIVISION

4 DONNA CURLING, ET AL., :
5 :
6 PLAINTIFFS, :
7 vs. : DOCKET NUMBER
8 : 1:17-CV-2989-AT
9 BRAD RAFFENSPERGER, ET AL., :
10 :
11 DEFENDANTS. :

12 **TRANSCRIPT OF BENCH TRIAL - VOLUME 16B PROCEEDINGS**
13 **BEFORE THE HONORABLE AMY TOTENBERG**
14 **UNITED STATES DISTRICT SENIOR JUDGE**
15 **JANUARY 31, 2024**

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21 ***MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED***

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UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; January 31, 2024.)

THE COURT: Good morning, everyone.

MR. BELINFANTE: Good morning, Judge.

THE COURT: It is such a lovely, quiet morning,
relatively speaking.

Is your witness here?

MR. BELINFANTE: What's that, Your Honor?

THE COURT: Weren't you examining -- am I mistaken?
Weren't we in the middle of Mr. Sterling's testimony? Is he
planning to join us?

MR. BELINFANTE: Yes, Your Honor. I think somebody
went to get him.

MR. OLES: Good morning, Judge.

Just as a housekeeping matter, I just want to make
sure I understand how we're going to proceed after
Mr. Sterling.

THE COURT: I think you need to get near --

(There was a brief pause in the proceedings.)

THE COURT: Go ahead.

MR. OLES: Yes, Judge. I just want to make sure I
understand, as a procedural matter, how we're going to proceed
with rebuttal witnesses after the closing of the State's case.
Because we do have several, and I just want to make sure that I
can arrange for them to be here.

1 MR. CROSS: Your Honor, the plaintiffs on -- both
2 groups have objected. Mr. Oles will correct me. I don't think
3 any of these witnesses were on the pretrial order or disclosed
4 in advance. The topics that have been identified don't look
5 relevant either.

6 MR. BELINFANTE: For the State, Your Honor, I'm not
7 sure we know who all of them are. So I think we'll just
8 reserve until we find out.

9 THE COURT: All right. Would you provide me with a
10 list of who the witnesses are? I am going to assume that we're
11 not near through with the cross-examination here. So --

12 MR. OLES: I will, Judge. And I'll provide it to
13 counsel as well.

14 THE COURT: Okay. So if I could get that so that I
15 can look at it. And if any of them were on the list, please
16 put a check by their name.

17 MR. OLES: I will, Judge. Thank you.

18 THE COURT: Have you identified the subject matter of
19 their proposed testimony?

20 MR. OLES: Well, I have -- at least within the
21 plaintiffs' groups, I have identified the witnesses against
22 whom they are -- against whom they are -- whose testimony they
23 are going to be rebutting.

24 THE COURT: All right. Include that as well in the
25 list you provide so that -- if they haven't already been

1 identified in the pretrial order.

2 MR. OLES: I will, Judge.

3 MR. BELINFANTE: And, Your Honor, just so we are all
4 on the same page, I think we have some concerns about the folks
5 we have heard identified by the other two groups of plaintiffs.
6 But probably the appropriate time, unless the Court wants to
7 address that now, would be after Mr. Sterling's testimony.

8 THE COURT: That's fine.

9 **THE DEFENDANTS' CASE (Continued).**

10 MR. BELINFANTE: Okay.

11 Whereupon,

12 GABRIEL STERLING,

13 after having been previously duly sworn, testified as
14 follows:

15 DIRECT EXAMINATION (Continued)

16 BY MR. BELINFANTE:

17 Q. Welcome back, Mr. Sterling.

18 A. Morning.

19 Q. When we broke last time, I had asked you a question. I
20 just want you to go ahead, just given the interruption, and
21 we'll start there.

22 And it specifically is: If the Court were to issue an
23 order that required or allowed the use of printed ballots for
24 vote counting but prohibited the use of QR codes, how would
25 that impact the November 2024 general election?

1 **A.** I don't see a way to make it workable and safe to make
2 sure that everybody actually was able to vote, honestly. It
3 would not -- it could not function.

4 **Q.** Why?

5 **A.** Given the time lines it would take to prepare for that,
6 the costs to the counties, the potential need to add more
7 personnel, there's -- the rule changes potentially necessary.

8 And one of the biggest things is approximately 60 to
9 65 percent of all Georgians early vote. And assuring that they
10 got the proper ballot is much more difficult in that kind of
11 situation, especially now that we've gone to our cellular-based
12 Poll Pads that can guarantee that each voter is getting the
13 correct ballot style. And it moves quickly.

14 I mean, it is -- just for the training, the changes, the
15 cost, the time, and making these kind of changes as we're
16 already in an election season would just be highly disruptive
17 and dangerous.

18 **Q.** You mentioned cost. What would the cost be of prohibiting
19 the use of a QR code on a ballot in the November 2024 election
20 or is it -- well, let me answer that -- ask that. The
21 November 2024 election --

22 MR. CROSS: Objection. Foundation. There is no
23 foundation this witness knows anything about that cost or how
24 to calculate it.

25 MR. BELINFANTE: The witness has already testified

1 that the cost would be an issue. So the objection is waived.

2 But if you want me to try to lay more of a
3 foundation, I can.

4 MR. CROSS: Two different questions.

5 THE COURT: No. That is not the point. The question
6 is has he costed it out. I mean, what has he used to cost it
7 out. That is the question.

8 BY MR. BELINFANTE:

9 **Q.** Mr. Sterling, do you -- are you the chief financial
10 officer for the Secretary's office?

11 **A.** Yes.

12 **Q.** Have you looked at the issue of what it would cost to get
13 rid of the QR code in the November 2024 elections?

14 **A.** I have looked at -- there's one specific way we have
15 looked at. And there is another way we have indirectly looked
16 at it from past research on the costs of running -- either
17 moving to a BMD-based without a QR code or a hand-marked paper,
18 we have looked at both of those costs over my time in the
19 office.

20 **Q.** What would the cost be of using the BMD system but
21 removing the QR code?

22 MR. CROSS: Your Honor, again, foundation. We need
23 to understand what he did to look at this. Not just jump to a
24 number.

25 THE COURT: I agree.

1 BY MR. BELINFANTE:

2 Q. What did you do to look at what the cost would be,
3 Mr. Sterling?

4 A. We have worked with our vendors and internally worked to
5 see what it would -- okay. Let's start with the first one.

6 The first one would be if we were able to change the
7 software, which time does not allow for. But we have examined
8 the cost if we were forced to. And the -- we talked to the
9 vendors. We have looked at what it would take for State
10 resources and for vendor resources to achieve that change by
11 touching all 33,000 -- 34,000 ballot-marking devices, all the
12 EMSs, all the scanners, all the central scanners. And there is
13 a time and cost to that.

14 And if we moved to a BMD-created full-face ballot that
15 would match the look, feel, and size of the different --
16 multiple different sizes of hand-marked paper ballots, which is
17 14-inch, 18-inch, 22-inch -- there's various different sizes
18 you have depending on the number of contests and questions that
19 are on there.

20 To do all that we would have to change the printer. So
21 there is a physical, actual change that would have to happen
22 there on one route.

23 So that particular cost we have looked at from the vendor.
24 It is about ten and a half million. Actually, 5.3 million.
25 Then for our side it is about 5.2 million, our side being the

1 State. So it comes out to a little -- close to 11 million.

2 And then to change the printers out, the last cost we got,
3 which was within the last year but could have changed, was
4 around \$15 million on top of that.

5 So that is about \$25 million altogether.

6 Now, the secondary way --

7 **Q.** Hang on one second. Let me -- before you go there, I need
8 to ask you just some follow-up questions.

9 You said full-face ballot. Can you explain what that
10 means?

11 **A.** A full-face ballot would -- currently on the BMD, you have
12 a summary ballot, which has the QR code on top and the list of
13 your choices.

14 A full-face ballot would essentially have the exact same
15 look and feel of a hand-marked ballot but be printed through
16 the BMD system. And it would -- again, that is why you have
17 the different sizes. Because all the scanner is ever doing is
18 looking at the coordinates or looking at the QR codes to find
19 the coordinates that match the choices made by the voters.

20 **Q.** And what factors or considerations would determine the
21 size of the ballot?

22 **A.** Ballots are all -- in Georgia it is unique. The State
23 builds all the ballots for any county-run election. That goes
24 from full general elections all the way down to city council
25 races. And -- because a majority of our counties have the

1 cities contract with them for those.

2 We build all those. So it is a question of number of
3 contests, number of candidates, number of questions, length of
4 questions. Because in Georgia -- for instance, if you have a
5 SPLOST, you have to list all the projects on the SPLOST.

6 **Q.** And for the record, can you just define what a SPLOST is?

7 **A.** A SPLOST is a special local option sales tax that is used
8 for user -- specifically capital projects. So if you're
9 building a building or putting in a road. So you have to list
10 all the projects, so it would be under the SPLOST. Or in
11 Georgia, we have a TSPLOST --

12 **Q.** You need to slow down.

13 **A.** I just saw her.

14 We have TSPLOST, which is a transportation special local
15 option sales tax. So --

16 THE COURT: And SPLOST is S-P-L-O-S-T; right?

17 THE WITNESS: Correct. All caps.

18 And we have the ESPLOST as well, which is the
19 educational one, which would be if you want to build a school
20 building, you know, get capital for buses, IT projects, things
21 like that.

22 So those are very long. And constitutional
23 questions, there is back and forth on the length of how much to
24 explain and what needs to be on the ballot.

25 And then, crazily, we have this thing in primaries

1 where we allow county parties to put on questions as well,
2 which they can put on any question they want. And what they
3 invariably do is they ask questions that play to their
4 particular bases, and that just takes up space on the ballot.

5 So those are things that can feed to the size.

6 BY MR. BELINFANTE:

7 **Q.** Did I understand you to say that of the cost 5.3 million
8 would be from the vendor?

9 **A.** No. We have to pay the vendor because they have to have
10 additional personnel.

11 **Q.** Okay. So the State would pay the vendor \$5.3 million?

12 **A.** In the current, yes.

13 **Q.** Okay. And then there was another 5.2 million that you
14 said was assigned to the State.

15 What is the basis of 5.2 million?

16 **A.** It would be our staffing that would be necessitated to go
17 out and do the acceptance testing on everything. Because when
18 you do the changes of software on the system, it requires
19 changing out -- basically you're off-loading the entire
20 operating system, putting a new one on.

21 Then you are putting on the original version of the
22 software, the 5.1. Then you put whatever the subsequent would
23 be. And then they hand that over to the State to then do
24 acceptance testing, because we have to acceptance test --

25 **Q.** Slow down, Mr. Sterling.

1 **A.** I'm really trying.

2 We have to acceptance test every individual piece of
3 equipment. So it requires people to be on-site, hotels,
4 travel, contractors. Because we don't have enough staff to do
5 this, we would have to hire and train contractors to do this to
6 oversee it. It would be a monumental task.

7 **Q.** All right. Did I understand you that the printers would
8 cost \$15 million?

9 **A.** That's our understanding to replace the existing ones that
10 are there now, yes.

11 **Q.** And would that be a cost assigned to the State or to the
12 counties?

13 **A.** In our opinion right now, that would be the State buying
14 those printers --

15 **Q.** All right.

16 **A.** -- if we were funded to do so, which we are not currently.

17 **Q.** Okay. We'll get to that in a second.

18 The numbers you just suggested I think totaling about
19 25 million, would that be unique to the November 2024 election?

20 **A.** If -- again, as I stated at the beginning, this cannot be
21 done for the November 2024 election.

22 It would be a one-time cost if this direction was chosen.

23 **Q.** I see.

24 So what would -- and just again for the record, if the
25 State were not to implement that until, let's say, 2026 general

1 election, does the price you just articulated -- is that what
2 would apply?

3 **A.** More than likely, yes. There may be changes. Because
4 when you are dealing with HP printers that we deal with for
5 this, they, generally speaking, do not have 33- or 34,000 of
6 these upgraded larger printers sitting around. There has to be
7 an order placed. Have to know how it fits into their
8 production schedules.

9 And technology changes and moves, so I can't say for
10 certain what the cost of those would be potentially --

11 **Q.** Okay.

12 **A.** -- in the long run.

13 **Q.** Now, what is -- by comparison sake, do you know what the
14 annual budget is for the entire Secretary of State's office
15 that has been appropriated?

16 **A.** The State appropriated dollars?

17 **Q.** Yes.

18 **A.** It runs around 28 and a half million dollars for all five
19 of our divisions.

20 **Q.** Okay. And do you know what the budget appropriated for
21 the Elections Division is?

22 **A.** It runs a little under six. I think about 5.8 in the last
23 budget.

24 **Q.** One other question: You mentioned that 60 to 65 percent
25 of Georgians early vote.

1 Do you recall that?

2 **A.** Yes.

3 **Q.** Okay. Do you mean advanced voting in person?

4 **A.** Yes.

5 **Q.** Okay. And how do voters who choose to vote advanced vote?
6 What is the method by which they vote?

7 **A.** They vote in person on a ballot.

8 MR. CROSS: Objection to form.

9 MR. BELINFANTE: Form?

10 THE WITNESS: They don't have a choice.

11 MR. CROSS: Misstates the facts.

12 BY MR. BELINFANTE:

13 **Q.** When someone chooses to vote advanced in person, how --
14 what method do they use to vote?

15 **A.** On a ballot-marking device.

16 **Q.** Okay. And if someone wanted to exercise their choice to
17 use something other than a ballot-marking device, is that an
18 option afforded to them in Georgia?

19 **A.** Yes.

20 **Q.** And how do they do that?

21 **A.** We are a no-excuse absentee state where they can make a
22 request of their county to send them an absentee ballot either
23 on paper or through the absentee ballot portal provided by the
24 State.

25 **Q.** All right. If the Court were to order something

1 preventing the Secretary or the State Election Board from
2 enforcing the requirement that all elections in Georgia be
3 conducted with the use of scanning ballots marked by electronic
4 ballot markers and tabulated using ballot scanners for voting
5 at the polls, how would that impact elections for the 2024
6 general election?

7 THE COURT: I'm sorry. That would prohibit ballot
8 scanners, is there a plaintiff -- are the plaintiffs requesting
9 that? I didn't --

10 MR. BROWN: Your Honor, I was about to object to the
11 same question. Because it doesn't map to the relief that we're
12 seeking.

13 MR. BELINFANTE: Is that true for all plaintiffs?

14 MR. BROWN: We're not replacing the scanners.

15 MR. BELINFANTE: Mr. Oles, is that consistent with
16 your client as well?

17 MR. OLES: Yes.

18 MR. BELINFANTE: Okay.

19 THE COURT: Move on past that question.

20 Thank you.

21 BY MR. BELINFANTE:

22 **Q.** Mr. Sterling, what are Ballot on Demand printers?

23 **A.** Technically speaking, a Ballot on Demand is a trademark of
24 ES&S. A -- printing a ballot on-site, which will be done
25 through the Dominion system --

1 THE COURT: All right. Project.

2 Thank you.

3 THE WITNESS: Sorry.

4 The Ballot on Demand is a trademark of the ES&S
5 voting contractor.

6 What I think you're referring to is printing a ballot
7 as a voter comes in. We would use mobile ballot printers in
8 the Dominion system, which would be, basically voter would
9 arrive. They would ascertain the ballot style and print it in
10 real time as the voter is standing there.

11 BY MR. BELINFANTE:

12 Q. Okay. Do all voting precincts in Georgia used on election
13 day have -- I'll call it Ballot on Demand, understanding that
14 is an ES&S trademark, but that type of printer?

15 A. No, sir.

16 Q. Okay. If there -- why would a precinct need a Ballot on
17 Demand-type printer?

18 A. They would not.

19 Q. Okay. Do counties currently have Ballot on Demand-type
20 printers in Georgia?

21 A. Yes.

22 Q. Why do they have them?

23 A. In some parts -- there's particularly one county that uses
24 it to fulfill their absentee ballots and to print their
25 emergency and provisional ballots. They are there as a

1 potential backup in those situations.

2 And for smaller counties especially, they can be a good,
3 easy way for them to fulfill absentee ballot necessity. So
4 they are there for a handful of ballots being done, not for
5 millions of ballots being done.

6 **Q.** Okay. If the Court were to prevent the State from
7 enforcing the uniformity requirement to use ballot-marking
8 devices for in-person voting and a county were to choose to use
9 hand-marked paper ballots, would that county need the Ballot on
10 Demand-type printers for precincts on election day?

11 THE COURT: That's way too complicated of a sentence
12 for me to really understand what you're asking. So you've got
13 a lot of things packed in there.

14 MR. BELINFANTE: All right.

15 BY MR. BELINFANTE:

16 **Q.** Mr. Sterling, I would like you to make a presumption with
17 me. Okay. Presume the Court has ordered the State not to
18 enforce the uniformity requirement.

19 THE COURT: But with respect to what?

20 BY MR. BELINFANTE:

21 **Q.** With respect to ballot-marking devices used on election
22 day and on advanced in-person voting.

23 Now, presume that in response to that, a county says we
24 want to offer hand-marked paper ballots.

25 Would a county on election day that made that choice need

1 Ballot on Demand-type printers at the local polling locations?

2 MR. CROSS: Object to foundation.

3 THE WITNESS: It depends.

4 MR. CROSS: Object to foundation. There is no
5 evidence this witness has any knowledge about the county level
6 operation on this. And they have argued for three weeks that
7 the State actually doesn't run, operate, or manage that level.

8 MR. BELINFANTE: Your Honor, the witness has
9 testified that he has been at GAVREO training with county
10 election officials. It is part of his responsibilities in the
11 Secretary of State's office. He has also testified of having
12 decades of experience in elections in Georgia.

13 THE COURT: I'm going to allow him to testify about
14 it.

15 BY MR. BELINFANTE:

16 **Q.** Do you need me to walk through the question again,
17 Mr. Sterling?

18 **A.** No. I have the basis of the question.

19 And again, the answer is it depends. There's two ways
20 they could choose to address such an order. They could choose
21 to use mobile ballot printers, or they could preprint ballots.

22 Now, for early voting, that becomes highly complex and
23 would lead to a high amount of mistakes being made either
24 through -- if they preprinted ballots, which is the way many
25 states do it, or as we saw in Arizona there can be situations

1 of paper and issues that go around them, which could then lead
2 to --

3 THE COURT: All right. You were explaining how it
4 would be done. But now suddenly we've slipped into Arizona.
5 So it is -- this is going to be confusing to me. I mean -- or
6 what -- I understand what you're trying to say. But could
7 we -- you can proceed.

8 I mean, I'm just telling you the more organized your
9 response is rather than slipping into what Arizona, this or
10 that, it would be easier for me to understand your response.

11 THE WITNESS: I'm trying to give you a response but
12 also understand the real world that we -- feeds those responses
13 that we see.

14 THE COURT: I understand that. But --

15 THE WITNESS: I will attempt to go away from that and
16 just focus only on Georgia, but it is hard to do that because
17 we don't generally use mobile ballot printers. So I'm trying
18 to address two different issues.

19 We can preprint the ballots. Take a county like
20 Gwinnett, Fulton, or DeKalb. You will have literally thousands
21 of ballot styles to choose from. And oftentimes a ballot style
22 may look very similar for the first three or four or the top of
23 it. And the names are very similar.

24 Take Fulton County. You have -- where we live,
25 Mr. Belinfante, in Sandy Springs. You have -- every precinct

1 begins with the letter SS. The first nine begin with a zero.
2 Then you have things like I live in SS02B, which will get a
3 different ballot from SS02A. And you are relying on
4 10-to-15-dollar-an-hour temporary workers to make sure they are
5 getting the exact right ballot.

6 BY MR. BELINFANTE:

7 **Q.** Slow down.

8 **A.** Excuse me.

9 THE COURT: All right. So now you can go on to the
10 mobile one, which obviously was the one that plaintiffs
11 particularly focused on or some of the plaintiffs focused on
12 and which are used in larger jurisdictions across the country
13 also.

14 THE WITNESS: Again, it goes back to human error
15 being much more likely in early voting and the positive nature
16 we have now with the cellular-based Poll Pads guaranteeing the
17 person gets the proper ballot.

18 THE COURT: Slow down.

19 The problem is --

20 THE WITNESS: If you go into the check-in device, it
21 will state the ballot style you're supposed to get. You then
22 have to go to a separate device and type in or choose from a
23 menu the proper ballot to get.

24 And a similar issue arises, that you could very
25 easily pick the wrong one and the election worker would not

1 know. And oftentimes, most times, the voters would not know,
2 especially if it is a precinct-based situation and 90 percent
3 of their ballot is the same.

4 Because most voters, when you get towards the bottom
5 of their ballot, like most people I know, never know who the
6 judges are they are voting for or who their city council person
7 or their surveyor, those kind of things. There's -- people
8 will get the wrong ballots, again.

9 Under our system currently, it is almost impossible
10 for them to get the wrong ballot, unless a mistake was made at
11 the very, very front. And that mistake would be the same in
12 any of those systems.

13 So from our point of view, we have a very secure
14 system to make sure that no one is disenfranchised. With the
15 way it runs right now, you have a high probability for issues
16 coming up out of those.

17 And also with hand-marked, those are where we have
18 the most overvotes and undervotes. Undervotes obviously being
19 with a BMD, you are at least warned of the undervote. In a
20 hand-marked, you're not given additional warnings you're about
21 to undervote, especially on a large complex ballot.

22 BY MR. BELINFANTE:

23 **Q.** Okay. If in this hypothetical county that has chosen --
24 you know, pursuant to a court order preventing the State from
25 enforcing the uniformity requirement and this hypothetical

1 county has chosen to allow something other than voting on a
2 BMD -- and let's say they chose something that required these
3 mobile ballot printers, who would bear the cost of acquiring
4 any additional potential ballot printers, if they were
5 necessary?

6 **A.** As I understand it, and our position would be, that the
7 counties would have to do that, if they make that decision.

8 **Q.** Okay. Shifting to the question of audits.

9 Mr. Sterling, there has been argument of counsel in this
10 case that a change of Georgia law means that statewide RLAs
11 will no longer be conducted.

12 Is that the understanding and position of the Secretary of
13 State's office?

14 MR. CROSS: I'll just object to the extent that
15 misstates our arguments, but -- I don't think anybody has
16 argued that.

17 THE WITNESS: I'm not aware of anything in State law
18 that would -- I guess I'm lost. I don't understand the
19 question. There would be a change in State -- who is making a
20 change in State law I guess is my question?

21 BY MR. BELINFANTE:

22 **Q.** Well, that is mine too. But let me ask it this way.

23 THE COURT: Well, there was a change in State law.
24 It was modified, wasn't it, last year?

25 THE WITNESS: Not to go away from RLAs.

1 THE COURT: No. I'm not saying -- but the nature --

2 THE WITNESS: Not the nature of them.

3 THE COURT: Are you telling me that there was no
4 change in the RLA provisions in the State law?

5 THE WITNESS: There were additional contests added to
6 be done. But there were no changes in how they were done, no.

7 THE COURT: That is not how they were done. But
8 there was a whole set of different provisions relative to
9 counties doing -- the way they were going to conduct --

10 THE WITNESS: Not as far as I understand it, Your
11 Honor.

12 THE COURT: I'm just -- fine. Go ahead.

13 THE WITNESS: As I understand -- okay.

14 THE COURT: There are some limits in how this is
15 being useful if you don't have the law in front of us. If
16 you're going to basically be asking him to speak about the law,
17 then let's talk about something specific rather than a general
18 opinion.

19 BY MR. BELINFANTE:

20 **Q.** Mr. Sterling, does the Secretary's office have any
21 expectation of conducting or overseeing risk-limiting audits in
22 the November 2024 election?

23 **A.** Yes.

24 **Q.** Okay. Does the Secretary's office have any expectation
25 that it will continue beyond the November 2024 election with --

1 working with counties on risk-limiting audits?

2 **A.** Yes.

3 **Q.** Okay. Mr. Sterling, is it the Secretary's office position
4 that risk-limiting audits can be conducted in an election that
5 utilizes ballot-marking devices?

6 **A.** Yes.

7 **Q.** Does the State have an interest in the current
8 risk-limiting audits that are conducted by counties in Georgia?

9 **A.** Yes.

10 **Q.** And what is that interest?

11 **A.** We believe it increases voter confidence of the outcomes
12 and is a necessary part of the overall process and systems in
13 place to assure that outcome and to, again, make sure that the
14 machines are counting properly.

15 **Q.** Does the State have an interest in maintaining the use of
16 the QR code on ballot-marking device printed paper ballots?

17 **A.** Yes.

18 **Q.** What is that interest?

19 **A.** It is severalfold. First of all, it is the system in
20 place that we have trained for and used successfully the last
21 two cycles.

22 Secondarily, I have had discussions and our opinion is for
23 review purposes a BMD ballot is better than trying to rereview
24 either a full-face ballot produced by a BMD or a hand-marked
25 ballot.

1 Similar to when you go to a restaurant and have a big
2 menu, you order four things. They don't then bring you back
3 the big menu of the four things you ordered. They bring you
4 back a receipt, which your brain interprets a different way to
5 recall that you have made those right decisions again and it
6 matches what you did.

7 It also is -- by using that, we can contain costs for
8 counties. The contract guarantees with the 8-1/2 by 11 page
9 that we -- or the counties are only spending 13 cents per
10 ballot, which is a lot less expensive than any other type of
11 ballot, either paper size or preprinting of the ballots, if
12 they were the larger type or hand-marked type.

13 The memory necessity within the scanners themselves is
14 also important. If we go to larger ballots that have more
15 black on the white piece of paper and that paper is larger,
16 every scanner takes an image of that ballot. The amount of
17 data on a hand-marked or full-face ballot is much more than the
18 amount of data on a BMD summary ballot.

19 Even now in some large jurisdictions where we have
20 multiple ballot styles, we can only hold about, I think, 10,000
21 of the BMD ballots. If we go to larger full-face or
22 hand-marked ballot, that number would be cut significantly and
23 require changing out the memory cards more often, which is just
24 another fail point potentially of human beings doing something,
25 losing something, missing -- it adds more fail points, which is

1 something we don't like. We like our processes to have as few
2 human touch points as possible.

3 **Q.** Mr. Sterling, you said that it would be easier to
4 determine voter intent on a ballot-marking device.

5 Did I understand that?

6 **A.** Yes.

7 **Q.** Okay. And why is that?

8 And I'm sorry. Easier than as opposed to a traditional
9 hand-marked paper ballot?

10 **A.** Correct.

11 MR. CROSS: Your Honor, as long as this is coming in
12 for his belief and not an expert opinion, that is fine.

13 MR. BELINFANTE: We've not qualified him as an
14 expert.

15 THE COURT: All right.

16 THE WITNESS: Trying to discern the intent of the
17 voter is very clear on a BMD ballot. It is not always
18 100 percent clear on a hand-marked ballot especially.

19 I go back to the 2008 election in Minnesota between
20 Norm Coleman and Al Franken where they had to litigate down to
21 the very final couple of hundred ballots and they were not able
22 to seat Senator Franken until July of 2009.

23 That has been one of the larger breakdowns of using
24 hand-marked paper ballots because of not being able to discern
25 voter intent as easily as you could on a ballot-marking device

1 summary ballot.

2 BY MR. BELINFANTE:

3 Q. Okay. Mr. Sterling, I'm going to show you what we have
4 marked as State's Demonstrative Exhibit Number 3.

5 A. Do I look --

6 Q. It should be coming up on the screen.

7 A. Okay.

8 Q. Mr. Sterling, do you see that this is an absentee sample
9 ballot from Bartow County, Georgia?

10 A. Yes, sir.

11 Q. Okay. Does this -- can you give your best explanation of
12 what the voter's intent would be in the race for mayor?

13 A. I cannot.

14 Q. What about in the races for post -- or the race for post
15 one of the city council?

16 A. I can.

17 Q. And what would that be?

18 A. For Chad West.

19 Q. And how about for post two?

20 A. Erwin T. Holcomb.

21 Q. All right. Thank you, Mr. Sterling.

22 Mr. Sterling, are you familiar with the National
23 Academies?

24 A. Yes, sir.

25 Q. Are you familiar with the report that it issued in 2018

1 entitled Securing the Vote Protecting American Democracy?

2 **A.** Generally speaking, yes, sir.

3 **Q.** Okay.

4 MR. BELINFANTE: Mr. Montgomery, could we pull up
5 Exhibit 728 and turn to Page 11, XI.

6 BY MR. BELINFANTE:

7 **Q.** Do you see, Mr. Sterling, the second sentence of that
8 full -- I'm sorry, first sentence, second full paragraph
9 beginning however?

10 **A.** I was looking at it too closely.

11 **Q.** Can you just read that sentence that has been highlighted
12 there for you?

13 **A.** However, by the time the committee met for the first time
14 in April 2017, it was clear that the most significant threat to
15 the American elections system was coming not from faulty or
16 outdated technologies but from efforts to undermine the
17 credibility of election results.

18 **Q.** Do you agree with that assessment --

19 **A.** Yes.

20 **Q.** -- Mr. Sterling?

21 And that was in 2017, so that would have been after only
22 the 2016 election.

23 Do you recall what the -- do you have a sense of what they
24 are discussing when they say efforts to undermine the
25 credibility of election results from the 2016 general election?

1 **A.** There were multiple claims in the media and by certain
2 activists that foreign powers like Russia had hacked voting
3 machines and flipped votes to allow President Trump to win the
4 election in 2016.

5 **Q.** Has there been, in your experience in both elections and
6 now in the Secretary of State's office since 2016, an increase
7 in questioning of the credibility of election results?

8 **A.** We saw a spike of it post 20 -- well, there was obviously
9 an increase in 2018 in Georgia with the Abrams team. We saw an
10 increase nationwide in 2020. In Georgia, it fell off some in
11 2022. But across the country, it remained high. And it is
12 starting to ramp back up here in Georgia in 2024.

13 MR. BELINFANTE: We can take that down,
14 Mr. Montgomery.

15 BY MR. BELINFANTE:

16 **Q.** Mr. Sterling, we talked yesterday about factors that the
17 Secretary's office considers when entering into policy:
18 Cybersecurity, election administration, training, et cetera.

19 Is one of those factors also what the Georgia public
20 prefers?

21 **A.** Yes.

22 **Q.** And does the Secretary's office have an interest in
23 enacting policies that are supported by a majority of
24 Georgians?

25 **A.** Generally speaking, yes.

1 Q. And, Mr. Sterling, have you -- you were talking a moment
2 ago about efforts to undermine the credibility of election
3 results.

4 Have you been personally impacted by such efforts?

5 A. By the efforts to undermine?

6 Q. Yes.

7 A. Yes, absolutely.

8 Q. Can you just briefly tell the Court what those are?

9 THE COURT: Counsel, would you come up here for a
10 second.

11 (A bench conference ensued, as follows:)

12 THE COURT: I'm deeply sympathetic to what --
13 everything that the Secretary's -- people in the Secretary's
14 office went through and have gone through and have been for
15 years.

16 But I don't think that it is an appropriate subject
17 for you bringing out that at this juncture in terms of the
18 issues in this case.

19 And I don't -- I mean, I don't want to in any way
20 evince that I'm -- to the public at large that I'm not
21 sympathetic. But I don't want -- so I don't want to have to
22 overrule you in the public, unless there is something else that
23 you are getting at other than -- that then would seem obvious
24 from the question you posed.

25 MR. BELINFANTE: Understood. And, Your Honor, I want

1 to make very clear at the outset this is not in any way putting
2 any responsibility of what Mr. Sterling may talk about on the
3 Court. But I do think to the extent that the plaintiffs have
4 to show it is in the public interest to issue an injunction and
5 to the extent that the claims are based on the risk and, as I
6 believe we have understood, no specific findings of malware,
7 vote flipping, et cetera, it is relevant to determine how
8 arguments based on risk are impacting State officials and
9 State -- like Mr. Sterling. That is -- that is the purpose.

10 THE COURT: I think --

11 MR. CROSS: Is he going to talk about the swatting?

12 MR. BELINFANTE: Uh-huh.

13 MR. CROSS: Yeah. No absolutely not.

14 MR. BELINFANTE: Death threats. Swatting.

15 MR. CROSS: This is completely irrelevant and
16 inflammatory. And to suggest that that would result from an
17 order and to have that influence the Court is incredibly
18 inappropriate. That is not an appropriate argument.

19 MR. BELINFANTE: The witness --

20 MR. CROSS: It has no bearing on the issues of the
21 constitutional burdens, unless the argument is because there
22 might be some outcry from crazies we're not going to do
23 anything.

24 MR. BELINFANTE: The witness yesterday testified she
25 was -- had threats -- I didn't see an issue with that -- from I

1 think what she would probably call a crazy. So I think --

2 THE COURT: I don't even know what --

3 MR. BELINFANTE: Ms. Marks testified she had
4 concerns -- safety concerns about Scott Hall.

5 MR. CROSS: Which is why she didn't --

6 MR. BELINFANTE: But to Mr. Cross's point, the
7 evidence is not being used for the purpose of establishing a
8 constitutional burden. It is being used to address the
9 plaintiffs' requirement of showing that it is in the public
10 interest to enter an injunction.

11 MR. BROWN: Your Honor, the difficulty with this line
12 of questioning is that if that is going to be introduced, then
13 we will have to counter with what you, I think, accurately
14 described is more of a philosophical issue yesterday, and that
15 is whether that burden is greater than the burden of taking
16 a -- what we believe is an unconstitutionally fragile system
17 through these elections.

18 And asking the witness the question, well, are you
19 going to be better off if there is a crash or if there is a
20 malware or if there is a Northampton situation come November
21 than you are now or not -- and --

22 THE COURT: Well, let me just say this: I'm not
23 prepared to go, Counsel, where you want to go there. I'm not
24 prepared to go where you were suggesting either.

25 MR. BELINFANTE: Understood, Your Honor.

1 I will cease. May I just have the record reflect
2 that what I explained was a proffer?

3 THE COURT: Absolutely. And I will just state for
4 the record that the thing is, is that I understand your
5 thinking. But I think it takes us too far afield.

6 MR. BELINFANTE: Okay. And I just want to say again,
7 Your Honor -- and because I know it came up yesterday in
8 regards to the *Pearson* case. I want to make very clear to the
9 Court and to opposing counsel, I am not assigning blame to the
10 Court for what others do. Whether it is --

11 MR. CROSS: Come on. Don't point at us.

12 MR. BELINFANTE: I don't mean you.

13 MR. CROSS: You pointed to us.

14 MR. BELINFANTE: No, no. I mean, I'm not blaming the
15 Court for, you know, Sidney Powell. I'm not blaming the Court
16 for Scott Hall. I'm not blaming the Court for people that have
17 impacted Mr. Sterling's life. I just want to make that clear.

18 And I'm just trying to thread a needle of being able
19 to defend my client but also making clear to the Court that
20 that is not what I'm arguing.

21 MR. CROSS: What was the exact question?

22 MR. BELINFANTE: Have you been personally impacted, I
23 believe. I think that is as far as I got. And I think he said
24 yes. And then I was going to ask what, but I'll just leave it
25 at that.

1 MR. CROSS: Just thinking about appeal purposes, is
2 there an answer to that that doesn't have to get into the
3 swatting, something that --

4 MR. BELINFANTE: I don't -- well --

5 MR. CROSS: Or is that what you are trying to elicit?

6 MR. BELINFANTE: My belief is that is what he will
7 testify to, and I don't -- I don't want to have him under oath
8 and not give a complete answer. So I'm fine with yes.

9 THE COURT: Let me just say, if you want later on to
10 put on the record that, you know, you all -- I would be happy
11 to recognize, as I just have to you, that this was -- and I
12 don't know what has happened since '20. Of course I saw
13 Mr. Sterling on a daily basis.

14 I mean, the Court has acknowledged throughout this
15 process that it has been a -- obviously a period of turmoil and
16 stress. But if we get into the whole personal dynamics of
17 this, then it is just taking us too far afield.

18 MR. BELINFANTE: Understood.

19 THE COURT: But I have acknowledged that again and
20 again and again. And that is sort of a reality. But, of
21 course, historically many cases in the voting realm have
22 happened in an era of enormous -- of enormous turmoil with lots
23 of repercussions for everyone involved.

24 MR. BELINFANTE: Absolutely. And the only point
25 again -- and this is as much a proffer as anything -- is that

1 this, to the State's perspective, is a unique case because it
2 is based on risk as opposed to something else.

3 And I understand there is disagreement on that. But
4 I just want to make clear why I'm not saying we shouldn't have
5 affirmative voting rights act or something.

6 MR. CROSS: And your point is -- okay.

7 THE COURT: I think --

8 MR. CROSS: You are saying it is weighing risk? That
9 is what you are trying to say?

10 MR. BELINFANTE: Well, I'm saying that the injury is
11 risk --

12 MR. CROSS: I get it.

13 MR. BELINFANTE: -- and in a situation like that --

14 MR. CROSS: I get it.

15 MR. BELINFANTE: Thank you, Your Honor.

16 THE COURT: I'm sorry. You just went someplace else.
17 I had -- you are saying that the injury he is going to have --
18 that this a proposed risk to him they're saying?

19 MR. BELINFANTE: No, Your Honor. I'm sorry. Based
20 on the summary judgment order, the language is that there is a
21 risk that a voter's ballot is not counted as cast. As opposed
22 to, for example, a voter was affirmatively denied the ability
23 to vote.

24 I'm not -- that is -- that is the -- and so my -- the
25 link to the preliminary injunction or the permanent injunction

1 standard is that when you are weighing whether it is any public
2 interest to enjoin based on a risk as opposed to, you know,
3 poll taxes or something, that is different.

4 That was the line of thinking. But I think we've
5 addressed it.

6 MR. CROSS: Yeah.

7 **(The bench conference was thereby concluded.)**

8 BY MR. BELINFANTE:

9 **Q.** Mr. Sterling, the good news for you is I am just about
10 done. The bad news is for you that means you are going to be
11 cross-examined next.

12 You testified a moment ago that one of the factors that
13 goes into the Secretary's office consideration in determining
14 policy is public opinion.

15 As the chief financial officer and chief operating officer
16 of the Secretary of State's office, do you have any
17 understanding of the preference of Georgians as it relates to
18 the methods of voting?

19 **A.** There was a poll conducted post 2020 by the University of
20 Georgia and I think MIT together that showed that 90 percent
21 were very happy with the system they had and had good faith in
22 that system.

23 **Q.** To your knowledge, has there been any more recent polling
24 on that question?

25 **A.** AJC --

1 MR. BROWN: Object. Hearsay.

2 MR. CROSS: And best evidence.

3 MR. BELINFANTE: I'm happy to introduce what I think
4 he is going to talk about.

5 MR. CROSS: Could we see it? I don't think we have
6 seen it.

7 MR. BELINFANTE: Sure. Of course. Of course.

8 MR. CROSS: This is a news article.

9 Do you have a study?

10 **(There was a brief pause in the proceedings.)**

11 MR. BELINFANTE: I guess since I've shown opposing
12 counsel, would the Court like to see what I'm planning on
13 using?

14 So at this point I think the question was are you
15 aware of any more recent polls. And the objection was hearsay.
16 Mr. Sterling said the AJC.

17 And to the extent that the question is hearsay, I
18 would say that we would offer it for the effect of the
19 listener, here the Secretary's office, not the truth of the
20 matter asserted.

21 THE COURT: The effect of or -- I didn't --

22 MR. BELINFANTE: He has -- the effect that a more
23 recent poll has on the Secretary as it influences policy as
24 opposed to the accuracy of the poll.

25 THE COURT: That seems sort of a stretch, but --

1 MR. BELINFANTE: You know what, Your Honor? That's
2 fine. I'll withdraw that specific question.

3 BY MR. BELINFANTE:

4 Q. Mr. Sterling, how do most voters in Georgia currently
5 exercise the franchise? And by that, I mean the method of
6 voting.

7 A. Over 90 percent vote in person. The majority of which
8 vote early in person. About 60 to 65, depending on the county.
9 And then in person on election day, 30 to 35. Sometimes down
10 to 25, depending on the county. But the vast majority vote in
11 person on a BMD.

12 MR. BELINFANTE: Mr. Sterling, thank you again.

13 I have no further questions and reserve for redirect,
14 Your Honor.

15 THE COURT: All right. Counsel --

16 MR. BELINFANTE: Yes, Your Honor.

17 THE COURT: -- I'm just confused by -- on one -- so
18 the article actually includes the data. I thought it was just
19 from the percentage, that you cited the percentage from another
20 study, which was in 2020. Then this study has a variety of
21 data. And I'm -- so it is sort of, at this juncture, almost --
22 I didn't realize it had data in it, the actual polling data.

23 So it is sort of a little weird because, of course,
24 this polling -- and I don't, of course, know what the other one
25 really said. This one breaks it out so it is not -- it is far

1 from 90 percent.

2 So I'm a little bit concerned about the fact that we
3 have -- I cut you off because I thought it only was like a
4 summary -- you know, it wasn't quoting who the -- who it came
5 from, that it had been commissioned by the AJC, et cetera, and
6 was from the university system. I don't know that any of them
7 have that much relevance.

8 But from the perspective of -- if we're going to --
9 if you're going introduce the 90 percent and the effect on the
10 Secretary of State, then obviously I could have allowed you to
11 do this too, but I just didn't know there was data and they
12 commissioned a poll.

13 MR. BELINFANTE: Your Honor, I have withdrawn the
14 attempt to introduce that into evidence. If I'm not mistaken,
15 the 90 percent was a reference perhaps both to the 2020
16 MIT/UGA. But also he did say over 90 percent choose to vote in
17 person, and that is not a polling question.

18 THE COURT: I see.

19 MR. BELINFANTE: The Court has already seen evidence
20 on that through Mr. Evans, for example, when we -- that is when
21 we went through the exercise of putting up how people vote.

22 THE COURT: All right. Well, I'm just going to say,
23 if that really -- the question -- your questions opened a door
24 and I didn't mean -- once I saw the article, which is after we
25 talked, I think it still opens an issue.

1 But so be it. Fine. I will leave it open.

2 MR. BELINFANTE: All right. Thank you, Your Honor.

3 I'm sorry. Before -- and if I may, before I rest,
4 Mr. Oles and I had a brief conversation, while I was passing
5 out the information about the scanners.

6 And so I'm not speaking for you, Mr. Oles. Could you
7 just relay to the Court what the issue is.

8 MR. OLES: Thank you, Mr. Belinfante.

9 I just wanted to clarify on the record, because I had
10 misunderstood Mr. Belinfante's question awhile ago. When he
11 was asking about whether or not Mr. Davis' scope of relief
12 included the scanners, I indicated the negative.

13 Mr. Davis is including the scanners within the scope
14 of the relief he is requesting.

15 Thank you.

16 THE COURT: Well, when we're -- I think we'll need to
17 address that. Because I don't -- I need to go back in the
18 procedural posture of the case and finding out what exactly got
19 amended out or not. I mean, I think it is all because of
20 addition of counsel. And I know you have asked scanning
21 questions, and I've allowed you to ask some scanning questions.
22 But we're going to have to address that more fully.

23 MR. BELINFANTE: And there may be a --

24 THE COURT: I didn't mean allowing you to do it
25 necessarily. But we're going to have to address the procedural

1 posture of that claim.

2 MR. OLES: I understand, Judge. I just wanted to
3 make sure I didn't leave something incorrect on the record.

4 THE COURT: All right. That's fine. Thank you.

5 MR. BELINFANTE: And just to keep things moving, Your
6 Honor, I would suggest -- and it is the first time I am doing
7 it, so forgive. I haven't had a chance to talk to opposing
8 counsel about it.

9 But we have no issue allowing Mr. Sterling to be
10 cross-examined -- and as long as we would have an opportunity,
11 if the Court were to allow questioning on scanning, that we
12 would be able to address that with Mr. Sterling.

13 THE COURT: All right.

14 MR. BELINFANTE: Thank you, Your Honor.

15 THE COURT: Do you need to use the restroom?

16 THE WITNESS: I took advantage of y'all's discussion
17 a few minutes ago. So --

18 THE COURT: If you do at any time, let me know.

19 THE WITNESS: Yes, Your Honor.

20 But I'm glad you know me by now.

21 THE COURT: Well, I know myself about that.

22 CROSS-EXAMINATION

23 BY MR. CROSS:

24 **Q.** Good afternoon.

25 **A.** Morning.

1 Q. Still in the morning. Still in the morning.

2 A. I know it may feel that way, sir.

3 Q. Feels like a long day already.

4 All right. Well, good morning, Mr. Sterling.

5 You were asked a question on -- all right. You were asked
6 a question about Blake Evans, the current director -- state
7 election director, and testimony that he had given.

8 Mr. Belinfante represented to you that he had testified
9 that the Secretary of State trains election superintendents to
10 have poll workers encourage voters to check their ballots and
11 read the text below the QR code.

12 And putting aside whether Mr. Evans testified to that, is
13 that something the Secretary's office does?

14 A. I know it is currently a State Election Board rule. So it
15 is mandated. So we do go over, these are the things you have
16 to do as a county elections director. You need to make sure
17 there is a poll worker assigned to the scanner to tell people
18 to review their ballots.

19 That is a State Election Board rule. So yes.

20 Q. Why is it important to do that?

21 A. To make sure that they have made the correct selections.
22 Because in our experience, the old way of doing it was to
23 encourage them as they checked in to view their ballots. But
24 we -- but there were studies that have showed essentially that
25 at the end of the process was a better way to do it.

1 We also have posters up encouraging them to do it because
2 you want to make sure they have made the right choices.

3 **Q.** And do you, as the most senior official in the Secretary's
4 office testifying in this case, have confidence that the poll
5 workers comply with that rule, that they remind voters to do
6 that?

7 **A.** I would think that a vast majority do. Do 100 percent of
8 them do it? I'm sure that 100 percent of them do not. But I'm
9 confident the vast majority do.

10 **Q.** Okay.

11 MR. CROSS: Tony, let's pull up Exhibit 2.

12 Thanks, Mr. Martin.

13 I'm sorry. Curling Plaintiffs' Exhibit 51. Sorry.
14 I was looking at the wrong number, Tony. Not that one. There
15 we go.

16 BY MR. CROSS:

17 **Q.** And, Mr. Sterling, you're familiar with this study on
18 Georgia voter verification that your office actually
19 commissioned with the University of Georgia; right, sir?

20 **A.** Yes.

21 **Q.** In fact, your office has touted this study numerous times
22 in the press, including to the legislature; right, sir?

23 **A.** Yes, sir.

24 MR. CROSS: So if we flip, Tony, to Page 4, sir.

25

1 BY MR. CROSS:

2 Q. Do you see at the top vote behavior at the tabulator?

3 A. Yes.

4 Q. Have you read this study?

5 A. Yes. But it has been a minute. So you'll forgive me.

6 Q. If you look at what is written here at the top, it says in
7 this section, we examine voter behavior as voters moved from
8 the voting booth to deposit their ballot in the tabulator. At
9 this stage of the process, student observers recorded that
10 23.8 percent of voters were instructed to check their ballot by
11 precinct -- by precinct workers.

12 Do you see that?

13 A. Okay. I'm sorry. That threw me off for a moment.

14 Yes.

15 Q. So, in fact, contrary to your belief that the vast
16 majority of poll workers remind voters to review their ballot
17 before scanned, your own study found that less than a quarter
18 of the poll workers do that for the -- less than a quarter of
19 the voters are instructed to do that?

20 Do you see that?

21 A. From the 2020 time, yes, I do.

22 Q. Yeah. And this was a study that was performed in actual
23 elections in -- it was the general election in November of
24 2020; right, sir?

25 A. Correct.

1 Q. And then if we go to the last sentence, it reads, on the
2 other hand, almost all voters, 86.7 percent, were given
3 instructions by precinct workers on inserting their ballot into
4 the tabulator.

5 Do you see that?

6 A. Yes.

7 Q. And so what the study confirmed was there is, in fact --
8 there are poll workers that are there providing instruction.
9 It is just more than three quarters of the time they are not
10 providing instruction on reviewing the ballot.

11 Do you understand that, sir?

12 A. From three and a half years ago, yes.

13 Q. Okay. And you don't have any more recent study than this
14 one; right, sir?

15 A. No, sir.

16 Q. Okay.

17 A. Well, not about -- not about Georgia specifically. There
18 was a study done by the Center for Civic Design that compiled
19 various and sundry studies done on ballot review of BMD devices
20 that I have only had a cursory glance at. But I have seen
21 other studies. But basically, yes. That's the only more
22 recent one, and that is more of a compilation --

23 **(Reporter admonition)**

24 THE WITNESS: Sorry. It was cursory glance. I have
25 not had a chance to study the study.

1 MR. CROSS: If we come to the next paragraph, Tony.

2 BY MR. CROSS:

3 Q. The study that your office commissioned goes on. Of the
4 cases where observers were able to hear voters being instructed
5 to check their ballots, even of those individuals, 62.3 percent
6 did so at this point in the voting process, meaning that well
7 over a third did not.

8 Do you see that?

9 A. Yes.

10 Q. And then it goes on to make clear, this 62 percent,
11 however, equates to only 14.2 percent of the total number of
12 voters observed in the study, meaning only 14 percent or so
13 reviewed their ballot at all according to your study; right?

14 A. No, that is not exactly what it says. It says observed
15 the study most voters then did not check their ballots at this
16 stage of the voting process.

17 We have no way of knowing if they reviewed it as they
18 stood -- once they pulled it off the printer because of the way
19 we had to do the study. So actually we do not necessarily know
20 that.

21 Q. I think you want to read on here, sir. Let's keep going.

22 It goes on to the -- of the voters who did check over
23 their ballots before the tabulator, 85.7 percent had also been
24 recorded as having done so at the voting booth.

25 Do you see that? Are you with me?

1 **A.** Yes. I've got you.

2 **Q.** So, in fact, the study did look at whether they looked at
3 their ballots before they got to the tabulator, whether they
4 did it at the voting booth.

5 Do you see that?

6 **A.** Yes, sir.

7 **Q.** And it ends with only 80 voters, or two percent of the
8 total number of voters, observed checked their ballots at the
9 tabulator stage having not done so at the voting booth.

10 Do you see that?

11 **A.** Now I'm confused for a second. Because -- yes, I think I
12 got it.

13 **Q.** Now, you talked about the rollout of the current Dominion
14 BMD system.

15 MR. CROSS: You can pull that down, Tony.

16 BY MR. CROSS:

17 **Q.** And I believe you said -- I just want to make sure I have
18 the chronology and what was involved. That process had to be
19 completed by when?

20 **A.** In time for the March presidential preference primary. So
21 our goal had been to have all the equipment from the initial
22 purchase out by -- our initial goal, in my brain, was
23 February 7. But I had a push goal of February 14, which we did
24 reach.

25 **Q.** So February 14 of --

1 **A.** Valentine's Day. It is an easy one to remember.

2 **Q.** Right. February 14 of 2020.

3 And you said that took -- did I get it right? -- about
4 ten months?

5 **A.** From the award and signature of the contract. Now, you
6 can take it from the first delivery, which is October where we
7 made sure every county had, I believe, two BMDs and a scanner
8 and an EMS to begin learning and practicing on it.

9 So October to February was the bulk of the actual delivery
10 time.

11 **Q.** Got it.

12 So October of 2019 is when you took delivery of the
13 equipment. It was in place by February 14.

14 **A.** Not exactly. The initial -- the way it worked was there
15 were rolling inventories coming in to the Cobb County
16 warehouse. The Dominion workers would load the software and
17 test it. And then once they reached a point where they thought
18 it was okay, the State workers would come and take custody and
19 do the acceptance testing.

20 If there was an issue, they would push it back to the
21 Dominion side. If not, it would be loaded on to specific
22 pallets to go to specific counties in the most efficient way
23 that we could.

24 So we didn't take everything at one time and then
25 distribute it. It was sort of a rolling inventory coming in

1 over those periods of months.

2 **Q.** You talked a little bit about Spalding County. You said
3 that you had seen no evidence that SullivanStrickler had
4 accessed voting equipment in Spalding County; is that right?

5 **A.** That's correct.

6 **Q.** But you also made the same claim about Coffee County in
7 April of 2022; right, sir?

8 **A.** Yes.

9 **Q.** Are you aware there have been no documents produced --
10 well, let me ask you this way.

11 Are you aware of any documents that exist reflecting any
12 investigation into the similar concerns in Spalding County
13 regarding SullivanStrickler?

14 **A.** I would not be surprised at that because we had direct
15 conversations with the -- or our office had direct
16 conversations with the county attorney who basically told us
17 that it had been shut down. They were not supposed to do that.
18 So that was essentially where it was left. And we -- yeah.
19 That is correct.

20 **Q.** It would not surprise you that there are no documents
21 reflecting this?

22 **A.** No.

23 THE COURT: I'm a little confused. So there was an
24 investigation?

25 THE WITNESS: No.

1 THE COURT: All right. There was no investigation?

2 THE WITNESS: What I said was that our county
3 attorney and I believe our elections director talked to the
4 county attorney -- sorry. Our general counsel talked to the
5 county attorney who had called and said they are not --
6 essentially -- I'm boiling this down. They are not supposed to
7 do this. Right. Right. Don't do that. Okay. I believe that
8 is kind of how it went.

9 And I think Michael Barnes was somewhere in that, if
10 I remember correctly too. I can't remember exactly how it came
11 up.

12 THE COURT: Well, how long had they already been
13 there?

14 THE WITNESS: Nobody had been there. That was just
15 it. There was a request by SullivanStrickler through, I think,
16 their elections board. The county attorney saw it and was like
17 you can't do this and confirmed with us you can't do this. And
18 that was kind of where it was left.

19 BY MR. CROSS:

20 **Q.** So your office reached out to the election officials in
21 Spalding. They said we're not going to do this, and that was
22 the end of it; is that right?

23 **A.** I think Spalding reached out to Michael first. Again, I
24 hate to say this because -- I'm pulling from memory. I would
25 have to go back and refresh it for all of the exact timeline.

1 I remember essentially the county attorney got involved and
2 basically, for lack of a better word, instructed you can't do
3 this, don't even -- just stop. And that was the last of it.

4 **Q.** A similar concern about unauthorized access came up with
5 Ware County around the same time; right?

6 **A.** A claim of unauthorized access. Correct.

7 Again, the time of this, Mr. Cross, has been several
8 years. How these all -- the timelines of these, I -- they are
9 muddled in my brain at this point.

10 **Q.** And you said that nothing happened in Ware County either?
11 There was no unauthorized access; right?

12 **A.** Again, either we talked to the elections director or we
13 sent an investigator to talk to them or both of those things
14 occurred. I honestly can't remember at this point. Because
15 the elections director saw a Gateway Pundit article or
16 something like that claiming that they had gotten into Ware
17 County.

18 And he was like all of our equipment is here. Nothing --
19 because I think the claim on that one was we have taken
20 equipment out. And they inventoried. They said everything is
21 here. Nothing has been taken. We don't know what the hell
22 they are talking about. That was kind of where that one was.

23 And I think at the same time we were monitoring the live
24 blog of the Overstock.com CEO who was sort of leading the
25 charge on these things. I think he said we tried to get into

1 Georgia and we couldn't.

2 THE COURT: He tried to what?

3 THE WITNESS: Get into Georgia and we could not.

4 BY MR. CROSS:

5 Q. And one of the things you looked at was a blog on the
6 internet?

7 A. Well, I didn't -- somebody else looked at it, and then I
8 looked at it. I can't remember what it was called. But it was
9 the Overstock.com CEO whose name is just totally escaping me
10 right now was basically doing a live --

11 THE COURT: Some form of Linderberg or something?

12 THE WITNESS: That doesn't sound right.

13 THE COURT: All right.

14 THE WITNESS: Lenberg is an elections expert for
15 audits. So that is a different person.

16 (Unintelligible cross-talk)

17 THE COURT: -- thing.

18 THE WITNESS: Yeah.

19 BY MR. CROSS:

20 Q. And so I gather it would not surprise you that there are
21 no documents regarding an investigation into unauthorized
22 access in Ware County; is that right?

23 A. It would not surprise me, no.

24 Q. You also had a concern or an allegation concerning
25 unauthorized access in Butts County; right?

1 **A.** Not to my recollection.

2 **Q.** We will come back to that one.

3 Were you aware that Joseph Kirk alerted your office
4 through Chris Harvey in the late 2020, sometime in -- between
5 the November 2020 election and sometime around the events of
6 the breach of Coffee County, he alerted Chris Harvey that some
7 individuals had reached out to try to access his equipment?

8 **A.** Not that I recall.

9 **Q.** So you're not aware of any investigation into that either?

10 **A.** I don't recall it occurring. So I definitely don't recall
11 an investigation.

12 **Q.** Okay. You talked about your -- how you think of election
13 security, and you identified some specific things.

14 One of them was chain of custody.

15 Do you recall that?

16 **A.** Yes.

17 **Q.** Would that include the chain of custody of the equipment?

18 **A.** Yes.

19 **Q.** And you recall -- I think we talked about this before --
20 that according to the State on June 8th of 2021, they replaced
21 an election management server in Coffee County because it was
22 no longer accessible.

23 Do you remember that?

24 **A.** Yes.

25 **Q.** And there are no chain of custody documents available,

1 that exist, regarding replacing that document -- or that
2 server; right, sir?

3 **A.** I think we upgraded the chain of custody paperwork after
4 that date in part because of things like that.

5 **Q.** In fact, I think you testified in your October 2022
6 deposition you guys had decided to start using chain of custody
7 documents about a month before.

8 Do you remember that?

9 **A.** Something along those lines, yes. To the point where even
10 when we move a BMD from the government towers over to the
11 Capitol, we have -- we use documents to sign it in and sign it
12 out. Yes.

13 **Q.** And one of the things you have also explained before that
14 your understanding is when CES went down to replace that server
15 in Coffee County in the summer of 2021, they brought an extra
16 EMS server with them because that is something they sometimes
17 do to have on hand in case they have to replace it; is that
18 right?

19 **A.** I wouldn't go so far as to call it standard operating
20 procedure, but it is pretty common. If we're going down to
21 look into one they can't get into, it's better to just have a
22 replacement ready to go than have to leave and come back again.

23 COURT REPORTER: Slow down, please.

24 BY MR. CROSS:

25 **Q.** And so sometimes people from CES just drive around the

1 State with an EMS server sitting in the truck on the off-chance
2 they might have to swap it out, when you were not having any
3 chain of custody documentation; is that right, sir?

4 **A.** I didn't say they were randomly driving around with them.
5 I said if they're going to look at a problem EMS, it would make
6 sense to take one with you if you could not access it. So that
7 you could have -- they could have that to continue their work,
8 we could take it back to look at engineering to see if there is
9 a specific issue.

10 **Q.** And that was the process for years until you say you now
11 have chain of custody documentation beginning sometime in late
12 2022; right?

13 **A.** I can't speak to prior to our administration. I know we
14 have custody paperwork for when we do the acceptance testing.
15 And we have the sign-off documents from when we drop things off
16 to the counties.

17 But moving them from place to place, that has been a
18 difference in upgrade in the last -- within the last two and --
19 or two years.

20 **Q.** Does chain of custody also include ballots and paper that
21 goes into printers?

22 **A.** Yes, it should.

23 **Q.** And so what chain of custody and election security
24 protections do you have in place currently for dealing with
25 paper, whether that is hand-marked ballots, provisional

1 ballots, or the paper that goes into the BMD printer?

2 **A.** We have a single manufacturer of paper. It is a security
3 paper right now. That can be identified through use of a --
4 basically a laser wand. They can say yes, this is the right
5 paper or no, it is not.

6 In order to be a printer for the absentee ballots, you
7 have to be certified that you follow certain security
8 protocols. I think we have -- I could be off by one or two on
9 this. I think we have five that are approved now that can hold
10 this paper from the manufacturer. And then, of course, all the
11 counties are supposed to hold their paper in a secure location
12 as well.

13 They get the 8-1/2 by 11 precut sheets. And the printers
14 generally get like essentially the giant rolls that they can
15 then cut into different sizes of paper for absentee, emergency,
16 and provisional ballots.

17 And then once they are voted, there are chain of custody
18 documents from drop boxes and things like that. And they are
19 supposed to be signing them in and noting the numbers if they
20 open and close ballot boxes, that kind of thing, with the
21 numbered seals.

22 **Q.** You also mention another factor in election security for
23 you is training; is that right?

24 **A.** With that, you can't train -- if they are not trained,
25 they cannot be expected to know what to do.

1 Q. Right. And what is the -- right now, when voters are
2 voting in person -- well, let me ask you this way. Let me just
3 ask you an easier question.

4 What is the training that the State currently has that you
5 think of as going to election security for all manner of voting
6 in the State?

7 A. I'm not the best person to answer that question because I
8 don't do the day-to-day on the training side. That is about
9 two or three steps away from me directly.

10 Q. The State currently, by law, is required to have
11 hand-marked paper ballots on hand as a backup; is that right?

12 MR. BELINFANTE: Objection. Misstates the State is
13 required. Did you mean the State requires?

14 MR. CROSS: Yeah. I'll rephrase it. That is fair.
15 BY MR. CROSS:

16 Q. You understand right now that State law requires some
17 number of hand-marked paper ballots to be on hand at polling
18 sites for in-person voting as a backup; right?

19 A. I believe the final amount is ten percent of the
20 registered -- active registered voters. And I believe it is an
21 SEB rule specifically. I don't think it is in code directly,
22 but I can't recall honestly.

23 Q. And I gather from your prior answer, you are not the one
24 to explain to the Court what training exists to ensure that
25 everyone in the election system is fully trained to handle

1 those hand-marked paper ballots as a backup?

2 **A.** I will -- I can say this. We have a train -- the trainer
3 module, a system. We can't go through and train every poll
4 worker obviously. So we train the leadership and the top end
5 of people, whoever the counties choose to send to GAVREO.

6 We also have webinar training that we do pretty
7 consistently. But we can't go -- we don't train all the way
8 down to that level. That is the county's responsibility based
9 on some of the training that we do. And then their own
10 procedures internally.

11 And those procedures -- Fulton County is going to have
12 different procedures from Pierce County, essentially, for those
13 things at the bottom of that.

14 **Q.** Why would the counties have different training?

15 **A.** Because if you're in Fulton County, there is going to be a
16 lot more individuals and a lot more different ways to handle
17 both equipment and paper. As an example, Fulton County hires
18 Drayage to move their equipment and paper around.

19 THE COURT: All right. You are going very fast even
20 for me to understand, so just --

21 THE WITNESS: For an example, Fulton County hires
22 Drayage.

23 THE COURT: Hires?

24 THE WITNESS: Drayage, trucking companies.

25 THE COURT: Okay.

1 THE WITNESS: To move their equipment and paper and
2 those kind of items. Whereas, Pierce County -- I'm not saying
3 this specifically, but several counties use prisoners to move
4 some of these things under armed guards. Or, you know, they
5 bring in other county employees. Because different counties
6 have different resources and different ways they do these.

7 They all have to have chain of custody, but they
8 probably approach them slightly differently because of their
9 resourcing and what they have to do.

10 That is just the nature of having large, rich
11 counties and poor, small counties.

12 BY MR. CROSS:

13 **Q.** But given the SEB rule that corresponds to a statute that
14 you have to have a hand-marked paper ballot backup system in
15 place, there is no dispute that the State provides training at
16 some level to ensure the counties are ready for that; right?

17 **A.** I wouldn't think so. I mean, also it is a rule. It is
18 their responsibility to understand the SEB rules and execute
19 their -- they run elections. So they are responsible for
20 following those rules as they have been set. That is a rule
21 that has been set for a while.

22 **Q.** Okay. So I understand you said training was one of the
23 critical components of election security. And your testimony
24 now is you have left that entirely to the counties, you can't
25 describe what it is, and on the backup system you can't even

1 tell the Court whether it is done?

2 **A.** No. I believe what I said was I'm not the best person to
3 answer that because the training is done by the elections
4 division and specific training personnel within that division.
5 So I don't know exactly what everything says or what they focus
6 on in any given time.

7 So I'm not saying it is not done. I'm saying I'm not the
8 best person to ask that question of.

9 **Q.** Okay. But again, you're not disputing that the State
10 itself provides training for counties to help them be prepared
11 if they have to switch to hand-marked paper ballots as a
12 backup?

13 **A.** I'm not disputing that general claim, no.

14 **Q.** Okay. You also talked about, as another factor,
15 cybersecurity and cyber hygiene.

16 Do you remember that?

17 **A.** Yes.

18 **Q.** And one of the organizations you have talked about that
19 you work closely with on issues like cybersecurity as well as
20 physical security is CISA, part of DHS; right?

21 **A.** Work closely with -- I mean, we work -- DHS and CISA are
22 kind of together. On the physical side, I don't know if it is
23 CISA personnel directly or Homeland personnel who goes out and
24 does the physical inspections of the facilities. I just -- I
25 don't know the -- like I said, they are close together. But I

1 don't know where the walls are and who is what inside the
2 organization. I think -- everybody in CISA is part of DHS.
3 Not everybody in DHS is part of CISA.

4 **Q.** But fair to say the Secretary's office relies on CISA at
5 least in part to help manage and determine cybersecurity
6 protections for the voting system; is that right?

7 **A.** We don't -- we have conversations with CISA pretty
8 consistently about general threats, issues, situations. And
9 even -- and some of their contractors too. Like -- I guess the
10 most we've done lately -- I don't know what I'm allowed to talk
11 about because anytime I talk about some of these things y'all
12 shut me down.

13 For the mitigation on 5.17 and ways to do that while we
14 move to that for 5.5. We had Ryan Macias come down, and we
15 worked with him on how do we make sure these mitigations are in
16 place. I mean, we have talked to them and they feed this --
17 but we talked to lots of different people. And then our --
18 internally with elections officials at the county level what
19 can work --

20 **Q.** Mr. Sterling, I'm sorry to interrupt. It was a very
21 simple question.

22 **A.** It really isn't a simple question, Mr. Cross, which is why
23 I have to say it that way.

24 **Q.** Do you or do you not -- as the most senior official here
25 in the Secretary's office, do you or do you not rely on CISA to

1 any degree to help you determine appropriate cybersecurity
2 protocols as one of the key factors you identified in election
3 security?

4 **A.** Do we rely on them? Rely implies that whatever they say
5 you do. We do not rely on them that way. They inform our
6 decision-making by their own suggestions and basic information
7 of cybersecurity for systems across the country, which vary
8 greatly.

9 **Q.** And then your office makes your own decisions on what
10 recommendations you take from them and what you don't?

11 **A.** Yes. Based on a multitude of factors, including whether
12 they are feasible or not.

13 **Q.** And you also mentioned as the last factor physical
14 security.

15 Do you recall that?

16 **A.** Yes.

17 **Q.** And fair to say that the breaches that occurred in Coffee
18 County in January of 2021 revealed very serious deficiencies in
19 the physical security aspect of election security in Georgia;
20 right?

21 **A.** I think it showed the very serious issues with the
22 personal integrity of several individuals who are now under
23 indictment.

24 **Q.** Right. In fact, the physical security component depends
25 very heavily on people in the system; right?

1 **A.** Human beings have to operate the system, yes. But, of
2 course, that fault and that threat is the same regardless of
3 whatever your system is.

4 **Q.** And we've heard a lot of testimony in this case, for
5 example, from Blake Evans about how important it is that
6 election officials, poll workers take an oath.

7 You're aware they take an oath; right?

8 **A.** Yes.

9 **Q.** And certainly you don't disagree that the breaches in
10 Coffee County confirm that the oath itself is not a sufficient
11 detection?

12 MR. BELINFANTE: Objection. Misstates the evidence.
13 To my knowledge, there is no allegations of poll workers being
14 involved in Coffee County.

15 MR. CROSS: I wasn't asking about poll workers.

16 MR. BELINFANTE: You said poll workers take an oath
17 and then --

18 MR. CROSS: Okay. I'll clarify. That is fair.

19 BY MR. CROSS:

20 **Q.** There's no dispute in this case that the fact that someone
21 involved in an election system takes an oath -- that, in and of
22 itself, is not a protection against what they might do as
23 evidenced by Coffee County; right?

24 **A.** I would say either 158 counties seem to be doing okay
25 following their oath. And again, regardless of what system you

1 have, be it hand-marked paper, ballot machines, the old hanging
2 chads, if you have a bad human being who makes decisions that
3 are obviously against the law, that is the same for every
4 system. That threat remains the same regardless.

5 **Q.** Which is why it is so critically important to have ballots
6 that are verified by the voter; right, sir?

7 **A.** That is one of the reasons, yes.

8 **Q.** Okay. Now, we talked a little bit about -- going back to
9 DHS. One of the things you talked about in this -- your notion
10 of election security is physical inspections.

11 Do I understand correctly that DHS has done physical
12 inspections of each of the counties in Georgia and how they
13 store equipment and other things?

14 **A.** The last -- I'm going from memory here. I think they
15 reached 157 of the 159 counties physically. And there were two
16 counties where there was some issues getting there, but they
17 did some video items, and they're continuing to look to follow
18 up on those. I don't know the outcome of those two. And I
19 could not tell you what those two are right now sitting here.

20 That's the most recent one. They, of course, had
21 previously done all 159 two years ago. But several counties
22 have upgraded and changed facilities.

23 **Q.** Would it surprise you to learn that no one has provided
24 any reports coming out of these inspections to the Court?

25 **MR. BELINFANTE:** Objection. Vague. No one has

1 provided reports is unclear what exactly that is nor is it
2 linked to any type of request.

3 MR. CROSS: Well, we can make it clear.

4 BY MR. CROSS:

5 Q. You just testified that DHS two years ago inspected, what,
6 157 out of 159 counties?

7 A. No. What I said was they just completed 157 in the last
8 couple of months.

9 Q. Okay.

10 A. And they previously had done it two years earlier as well.

11 Q. Right. So they did it two years ago. They have done it
12 again.

13 And you are aware that when DHS does this it creates a
14 report of its findings; right?

15 A. I believe that is correct.

16 Q. Okay. So does it surprise you that no one from the State
17 has offered any of these reports into evidence?

18 MR. BELINFANTE: Objection. Lack of foundation.
19 There is no evidence that the reports go to the State.

20 BY MR. CROSS:

21 Q. Do you see the reports?

22 A. I was briefed on the reports. I have never actually read
23 the reports because I think they deal with the counties
24 directly on what you can do to make things better, if that is
25 necessary. Because most of them, I have been told, were in

1 very good shape.

2 **Q.** Were or were not?

3 **A.** Were.

4 THE COURT: So who briefed you?

5 THE WITNESS: I'm sorry?

6 THE COURT: Who briefed you?

7 THE WITNESS: Blake Evans.

8 BY MR. CROSS:

9 **Q.** In fact, Blake Evans testified that the State gets at
10 least a summary of those.

11 So have you seen that summary?

12 **A.** Blake just briefed me verbally.

13 **Q.** So the only evidence we have about these reports is
14 testimony that they happened but we don't get to see what they
15 say?

16 MR. BELINFANTE: Objection. Misstates the evidence.
17 If Mr. Cross can show me what -- where Mr. Evans testified to
18 that, I'm happy to be corrected. I just do not recall it.

19 MR. CROSS: It is in there, but I don't want to argue
20 about that. So I'll just ask the question again.

21 BY MR. CROSS:

22 **Q.** You, yourself, have not brought any reports; right?

23 **A.** No.

24 **Q.** Okay.

25 THE COURT: And you, yourself, haven't read any

1 reports?

2 THE WITNESS: No. Like I said, I took a verbal brief
3 from my director.

4 BY MR. CROSS:

5 Q. You talked about the ransomware attack that hit Fulton
6 County this week. You said the Secretary of State's office was
7 able to turn on a tool there that basically shuts down all of
8 their county users.

9 What tool is that?

10 A. It is not there. It is inside our GARViS, the Georgia
11 Registered Voter Information System, that basically cuts off
12 those users, the 148 Fulton County users from being able to
13 gain access while they ascertain what happened.

14 Q. And so this is a tool that the Secretary's office
15 controls?

16 A. Correct.

17 Q. Okay. Now, you talked a bit about Dr. Alex Halderman.
18 And I wrote this down. You said no election administration
19 people that I know would consider him to be somebody reliable
20 to work with.

21 Do you recall that?

22 A. Yes. I hadn't had a chance to finish my full statement on
23 it, but that was what I said.

24 COURT REPORTER: Wait a minute. Repeat what you
25 said.

1 And everybody slow down.

2 THE WITNESS: Yes, ma'am.

3 I said that, but I did not get a chance to complete
4 my statement, but that is what I said before I was cut off.

5 BY MR. CROSS:

6 **Q.** Are you aware that he has served as the co-chair of the
7 Michigan Secretary of State's Election Security Advisory
8 Commission since 2019?

9 **A.** Absolutely.

10 **Q.** Okay. Are you aware that he was engaged by the California
11 Secretary of State to do a top-to-bottom assessment of their
12 voting equipment?

13 **A.** Absolutely. And my statements still stand as to the
14 stature of the people I have talked to concerning working with
15 him, even if they have worked with him in the past.

16 **Q.** And are you aware that he has consulted with the Louisiana
17 Secretary of State's office on the use of BMDs?

18 **A.** I am not aware of that, no. That they have not been able
19 to figure out how to buy it.

20 **Q.** And have you -- you are aware that Eric Coomer of Dominion
21 has hired Alex Halderman as his own election security expert in
22 ongoing litigation involving the Dominion BMDs; right?

23 **A.** Yes.

24 **Q.** And you're also aware that Dominion itself tried to engage
25 Alex Halderman as a consultant regarding their BMDs and the

1 vulnerabilities he found; right?

2 **A.** Of course, they are not election administrators. But yes,
3 I am aware of that.

4 **Q.** Okay. That is what I just want to be clear on.

5 So when you say no election administration people, you are
6 not talking about Secretary of States like in Michigan,
7 California, Louisiana? You're not talking about the vendors
8 that make the products like Dominion and Mr. Coomer? You are
9 talking about somebody else?

10 **A.** If I am under oath, then yes, I am talking about some
11 people you just listed.

12 **Q.** You are talking about what? I didn't understand what you
13 just said.

14 **A.** Some of the people you just listed. And I'm uncomfortable
15 because I hate talking about other people on this particular
16 front. But yes, they are the Secretary of State specific to
17 your list who does not -- does not think that he is a good
18 person to work with.

19 **Q.** All right. Well, we'll just take your word on that. I'm
20 not diving into hearsay.

21 You were asked about the State interest in the current
22 voting system and you said uniformity.

23 Do you remember that?

24 **A.** Uniformity is an interest. Yes.

25 **Q.** If all the counties were using the State mandated backup

1 of hand-marked paper ballots, there would be uniformity, would
2 there not, sir?

3 **A.** By rule, they are already required to have ten percent of
4 those in their polling locations.

5 **Q.** And the SEB as a defendant in this case certainly has the
6 discretion to increase that ten percent by whatever margin they
7 want; right?

8 **A.** I would assume they have that discretion, yes. But I'm
9 not a lawyer.

10 **Q.** And it is the Secretary's position that only the State
11 gets to determine when that backup system is used; is that
12 right?

13 **A.** I don't believe that because -- the intention of having
14 the ten percent there is if there is a power outage. They are
15 not going to call us for permission to move to a hand-marked
16 paper. If they run out of the battery backup after two hours,
17 they will just do it.

18 **Q.** Is the Secretary's position that only the Secretary
19 determines whether the system is unsafe and that warrants
20 switching to the State mandated backup?

21 **A.** I don't know the answer to that question because I don't
22 fully understand the question. Because --

23 **Q.** Let me help. Let me help.

24 MR. CROSS: Can we pull up Plaintiffs' Exhibit 406,
25 please, Tony?

1 Go to the next page.

2 All right. Go to the first page first so we have the
3 context.

4 BY MR. CROSS:

5 **Q.** Do you see that this is an official notice from the Office
6 of the Secretary of State on August 1st of 2018?

7 **A.** Under the previous administration, yes.

8 **Q.** Okay. And it is addressed to county commissioners and
9 officials; right?

10 **A.** Yes.

11 **Q.** And while the Secretary of State changed, Chris Harvey was
12 the director of elections then and under Secretary
13 Raffensperger; right?

14 **A.** Through the 2020 election cycle, yes.

15 **Q.** Okay. So if we come down -- in fact, he points out in the
16 start of this, I am writing to you as the State of Georgia's
17 elections director, a position I have held since July 2015.

18 Do you see that?

19 **A.** Yes.

20 MR. CROSS: All right. Let's go to the next page,
21 Tony.

22 BY MR. CROSS:

23 **Q.** If we come down to the middle, you see where he writes in
24 2003 Georgia moved to a statewide unified system. And he
25 mentions OCGA 21-2-300.

1 Do you see that?

2 **A.** Yes.

3 **Q.** And then he goes on and mentions OCGA 21-2-381 regarding
4 absentee in-person ballots.

5 Do you see that?

6 **A.** Yes.

7 MR. CROSS: And then go back to the full screen,
8 Tony.

9 BY MR. CROSS:

10 **Q.** If we go down to the last paragraph, do you see here he
11 writes, there is a provision of Georgia law that allows the
12 State to move to paper ballots in the event that the machines
13 are inoperable or unsafe.

14 Do you see that?

15 **A.** Yes.

16 **Q.** If we --

17 MR. BELINFANTE: Your Honor, at this point I'm going
18 to object. I don't -- I think the witness has already
19 testified that this is under a prior Secretary of State and
20 what the -- Governor Kemp that was doing as Secretary of State
21 I don't see as relevant, particularly given that we're looking
22 at prospective injunctive relief.

23 MR. CROSS: I can examine the witness on whether
24 their policy has somehow changed.

25 MR. BELINFANTE: Yeah. That's a different question.

1 THE COURT: All right. Go ahead.

2 MR. CROSS: We're going to get there.

3 BY MR. CROSS:

4 Q. So he goes on. If we, meaning the Secretary's office,
5 ever reach a point where our office feels that these machines
6 cannot be trusted to accurately deliver election results, we
7 will invoke the statutory provision.

8 Do you see that?

9 A. Yes.

10 Q. So my question to you is: Is that still the position of
11 the Secretary's office today that the State determines whether
12 the machines are unsafe warranting a switch to the State
13 mandated hand-marked paper ballot backup?

14 A. Subsequent to this letter going out in 2018, there has
15 been the passage of HB 316 --

16 THE COURT: Slow down.

17 THE WITNESS: -- the passage of HB 316 and the
18 passage of SB 202. I have no clue if they affected any of
19 those code sections or if they are still there. And even if
20 they are, I'm not going to make a policy decision sitting in
21 this chair without discussing it with the deputy, the general
22 counsel, and the Secretary.

23 So, frankly, you're hitting me with this cold. I
24 have no idea, sir.

25

1 BY MR. CROSS:

2 Q. Okay. So as far as you know, sitting here as the most
3 senior official in this trial, that is still the policy today?

4 A. I believe I just said I have no idea.

5 Q. You just don't know one way or the other?

6 A. I don't -- because no one has ever asked me that question
7 before, sir.

8 Q. Okay. And you're not aware of any communication from the
9 Secretary's office to the counties conveying a different policy
10 than the one here where Mr. Harvey continued to serve as the
11 elections director in Secretary Raffensperger's administration;
12 right?

13 A. Again, I cannot know that.

14 Q. Well, you could. You just don't?

15 A. I just don't.

16 Q. Okay. And if there was a change to this policy, the
17 Secretary himself would have to sign off on that; right?

18 A. Obviously.

19 Q. So the only way to know if there was a change is somebody
20 would have to ask him?

21 A. Or just the team. It is kind of an unfair question to hit
22 me with because there is no way I would absolutely ever know
23 that, but ...

24 Q. Okay.

25 A. There might be discussion internally. And I don't want to

1 make a gut reaction guess without all the information in front
2 of me or our lawyers or the Secretary or think about the policy
3 implications. So yeah.

4 **Q.** But this is -- you're not aware of anybody in the office
5 having thought about the policy implications of a change to
6 this policy; is that right?

7 MR. BELINFANTE: Objection. Calls for speculation as
8 to what --

9 THE COURT: I think you made your point.

10 MR. CROSS: That is fair.

11 THE COURT: Move on.

12 BY MR. CROSS:

13 **Q.** Let me just ask you this way to make sure I understand.
14 Do you know whether it is the position of the Secretary's
15 office today that the counties -- I'm trying to think of a
16 clear way to ask it.

17 To your knowledge, is it the Secretary's position today
18 that the counties have discretion to determine whether to
19 invoke the hand-marked paper ballot backup system if they
20 determine that the BMDs are unsafe? Or you just don't know?

21 **A.** There's one specific example where Athens-Clarke attempted
22 to do that, and I believe the SEB said that would be violative
23 of the law.

24 So it wasn't the Secretary's decision. It was the State
25 Election Board who made them follow the law they were

1 attempting to break.

2 **Q.** So you're talking about the SEB took the position that the
3 counties could not determine for themselves whether the BMDs
4 were unsafe, sufficient to go to hand-marked paper backups?

5 **A.** All I know is that they -- Athens-Clarke County attempted
6 to do that. The SEB said they could not. And they did not.

7 I know the elections director did not want to. It was --
8 I don't know if it was the commission or the board that wanted
9 to. I can't recall now.

10 **Q.** But as you sit here, you're not aware of any similar
11 policy within the Secretary's office? Or you just don't know?

12 **A.** I just don't know.

13 **Q.** Okay.

14 THE COURT: How much more do you have?

15 MR. CROSS: A little bit more. I'm almost done with
16 the cross, but we do have him as a rebuttal witness. There is
17 a bit we will do on that.

18 THE COURT: Well, are you planning to do a rebuttal?
19 Are you planning to call him again later?

20 MR. CROSS: Yeah. Mr. Belinfante and I talked about
21 this. I'll finish the cross. They will rest.

22 THE COURT: All right. Well, move it through because
23 that was very long for me -- that last part. You were
24 getting --

25 THE WITNESS: And, Your Honor, can I ask a favor at

1 this point?

2 THE COURT: Yes. Your favor is granted.

3 We'll take a five-minute break.

4 THE WITNESS: Thank you.

5 **(A brief break was taken at 11:32 AM.)**

6 THE COURT: Have a seat.

7 Go ahead.

8 BY MR. CROSS:

9 **Q.** Mr. Sterling, you were asked a question about the cost of
10 eliminating QR codes and you talked about the need to upgrade
11 the software.

12 Do you recall that?

13 **A.** Yes.

14 I said it was two different ways. I never got to answer
15 the first one, but the second one I did.

16 **Q.** And the cost of upgrading the software you said sort of
17 all the cost built in to all the changes that come with that
18 would be around \$25 million; is that right?

19 **A.** Approximately, yes, sir.

20 **Q.** And you haven't provided any kind of documentation, no
21 written plan, no spreadsheets that walk the Court through how
22 you got there; right, sir?

23 **A.** No, sir.

24 **Q.** Okay. And, of course, if counties were no longer using
25 BMDs, you wouldn't have to pay for any of those upgrades;

1 right?

2 MR. BELINFANTE: Objection. I thought this was not
3 the relief being sought in terms of counties not offering BMDs
4 altogether. Maybe I misunderstood.

5 MR. CROSS: That is the relief sought, that the BMDs
6 are not used.

7 MR. BELINFANTE: Is it that they are prohibited? Is
8 that the basis of the question, or is it that they are an
9 option?

10 MR. CROSS: Let me --

11 THE COURT: That is a fair question.

12 MR. CROSS: Let me just ask the question.

13 BY MR. CROSS:

14 Q. If BMDs were being used only for accessibility purposes,
15 then you would only have to upgrade the software on those BMDs.

16 Do we agree on that?

17 A. If you wanted to eliminate the QR code?

18 Q. Yes.

19 A. No.

20 Q. Because there is a QR code on the hand-marked paper
21 ballots that would be used as a backup?

22 A. You would have to use -- you would have to upgrade all the
23 scanners, all the EMSs. You don't have to upgrade all the
24 BMDs, just those BMDs, but you have to upgrade the rest of the
25 equipment as well.

1 Q. Got it. That's fair. That's fair.

2 Fair to say using BMDs only for accessibility would be a
3 lot fewer than the 30,000 BMDs and 30,000 printers you
4 currently have; right?

5 MR. BELINFANTE: Objection. Calls to speculate on
6 what the counties would actually choose to do if we're
7 operating under the presumption that the relief sought is to
8 enjoin the State from enforcing uniformity as opposed to
9 banning BMDs. I think the cost estimate will differ. So that
10 is --

11 THE COURT: Why don't you try to go through each of
12 them. If he is going to -- I mean, I think this is belaboring
13 the point, making it all take longer, but --

14 MR. CROSS: I'll move on, Your Honor. I think it is
15 obvious to everyone.

16 But I don't quite get the speculation objection
17 since -- that's what I said he was doing.

18 MR. BELINFANTE: The speculation objection was to
19 what extent -- it goes to the nature of Mr. Cross' question and
20 it is to whether BMDs are banned, except for disabled voters or
21 to whether the State --

22 THE COURT: Why don't you just go through each
23 option. Does he have a projection even if -- I mean,
24 obviously -- I don't know what the basis of his first comment
25 was. But that still doesn't mean that you can't explore it

1 since it was offered.

2 MR. CROSS: I wasn't looking to build their case for
3 them. I'll move on, Your Honor.

4 THE COURT: I don't think it is building their case
5 for them. But that is fine.

6 MR. CROSS: Yeah. I guess I -- I understand, Your
7 Honor. I don't want to spend my time having him break down, go
8 into more detail.

9 THE COURT: All right. Fine.

10 BY MR. CROSS:

11 **Q.** All right. You were also asked if that cost estimate
12 would hold if you were going to do the same thing for 2026 and
13 you said you were uncertain. And I wrote it down. Technology
14 changes -- technology changes and moves, so I can't say for
15 certain what the cost of these would be potentially.

16 Did I get that right?

17 **A.** That was specifically to the printer. The underlying cost
18 of the 10-1/2 million or so would remain either way and
19 probably increase with inflation and things like that.

20 **Q.** But because technology moves and changes, you can't
21 predict whether in a year or two Dominion would have a newer
22 version of the software that they would encourage you to
23 install; right? You just don't know?

24 **A.** Even if they did, in order to move to fix some of the
25 potential vulnerabilities or theoretical vulnerabilities, you

1 have to change the operating system. That is one of the base
2 lines. And that would not change, no matter what, which would
3 still mean that every single device had to be touched,
4 et cetera, et cetera.

5 **Q.** You also testified -- you were asked a question if someone
6 wanted to exercise their choice to use something other than a
7 ballot-marking device is that an option afforded to them in
8 Georgia. You said yes, but not if they want to vote in person;
9 right? We're agreed on that?

10 **A.** Correct.

11 **Q.** And you, yourself, have emphasized how important it is to
12 Georgia voters in particular to vote in person; right?

13 **A.** Their behaviors seem to indicate that, yes.

14 MR. CROSS: Tony, could we play Slide 4 real quick.

15 BY MR. CROSS:

16 **Q.** This is you; right?

17 **A.** Yes, sir.

18 **(Playing of the videotape.)**

19 BY MR. CROSS:

20 **Q.** That is all true; right?

21 **A.** Yeah.

22 **Q.** In fact, as you pointed out, voting in person has
23 increased from about 75 percent in 2020 to over 90 percent in
24 2022 in the general elections; right?

25 **A.** I would say we have gone back to the norm as it was

1 90 percent the previous 20 years in person. We had a small
2 thing called COVID in 2020 which changed behaviors for a period
3 of time.

4 THE COURT: So you -- right now we've returned to
5 95 percent in person?

6 THE WITNESS: In general, yes. It's 93, 95, 96,
7 depending on county.

8 BY MR. CROSS:

9 Q. Because historically in person is the preference in
10 Georgia; right?

11 A. Seemingly, yes.

12 THE COURT: All right. Just simply because I assume
13 the video was a demonstrative or were you offering it as
14 evidence?

15 MR. CROSS: We were going to move it into evidence,
16 Your Honor, the clip.

17 What exhibit number was that, Tony?

18 We would move Exhibit 503 into evidence.

19 MR. BELINFANTE: No objection.

20 THE COURT: All right. It is admitted.

21 MR. CROSS: I'm almost done with the cross here,
22 Mr. Sterling.

23 BY MR. CROSS:

24 Q. You also testified -- you said, our opinion is a review
25 either of a full-face ballot produced by BMD or a hand-marked

1 paper ballot, but that review is not as reliable as what you
2 are doing currently.

3 Did I get that; right?

4 **A.** Yes. That's basic -- the basic outline of my opinion from
5 talking to some experts in the field.

6 **Q.** And you said -- and none of those experts have testified
7 in this case; right?

8 **A.** Not that I'm aware of.

9 **Q.** Okay. And you said it is like a food menu. You order off
10 the menu. Then you get a receipt. You don't go back to the
11 menu; right?

12 **A.** Correct.

13 **Q.** Of course, the patron knows what they just ate when they
14 get the receipt; right?

15 **A.** Yes. Hopefully. That is the intent of the review for the
16 paying of the bill.

17 **Q.** Have you ever ordered takeout, whole bunch of stuff;
18 right?

19 **A.** Yes.

20 **Q.** Okay. And common, right, when you order takeout, you have
21 got a long receipt. You compare the receipt to what is in the
22 bag so you actually see you got everything?

23 You have done that; right?

24 **A.** Sometimes yes. Sometimes no. If I go to Three Dollar
25 Cafe, I have lot of faith in them getting it correct so I don't

1 generally review.

2 **Q.** And voting on the BMD system today, once that screen goes
3 blank and they are holding a paper ballot, they cannot compare
4 the ballot to what they did on the screen; right?

5 They cannot put them side by side like you would with your
6 food receipt and your bag of food; correct?

7 **A.** Well, I think for the most part -- no, you can't, but --

8 THE COURT: You know, why don't we do it -- why are
9 we spending time on this? It is either so or not so. That is
10 what people are saying. I mean, you are asking his opinion
11 about this and going to argue about it? What is --

12 MR. CROSS: Okay. I'll move on, Your Honor.

13 THE COURT: All right.

14 BY MR. CROSS:

15 **Q.** Last point, you said that trying to discern the intent of
16 a voter is very clear on a BMD ballot. But that assumes that
17 the ballot has been printed correctly with respect to the
18 selections they made on the screen; right?

19 **A.** They would have to --

20 COURT REPORTER: I'm sorry.

21 THE WITNESS: You would have to operate under that
22 assumption, yes.

23 BY MR. CROSS:

24 **Q.** The last thing is, Mr. Belinfante handed you their -- or
25 put it up on the screen their demonstrative Exhibit Number 3.

1 And is this an example, in your mind, of the challenges that
2 you face with hand-marked paper ballots? You talked about the
3 undervote and the overvote.

4 **A.** That's one of many challenges, yes.

5 **Q.** And under city of Adairsville, there's two selections for
6 the mayor. Is that an overvote?

7 **A.** Correct.

8 **Q.** There is no scanner in the State of Georgia that would
9 accept this when put in; right?

10 **A.** That's correct.

11 **Q.** Thank you.

12 **A.** Except for the central scanner, which would have to accept
13 it because there is no way to fix it.

14 **Q.** Right. But the central scanner would flag this at the
15 moment they put it in as problematic; right?

16 **A.** It would. It would go to the adjudication module, and you
17 would not be able to discern the outcome from that.

18 **Q.** Exactly.

19 And there is no scanner in a precinct on election day or
20 advanced voting for in person that would accept a ballot like
21 this; right?

22 **A.** A scanner wouldn't. But after it is out of the scanner,
23 if there is, again, a bad actor, they could overvote those and
24 make it a serious problem after the fact.

25 **Q.** Or the bad actor could do what we saw in Coffee County?

1 **A.** Well, at that point you wouldn't have affected any votes.
2 That would have affected a vote or several, depending on the
3 bad actor.

4 **Q.** You are assuming that Coffee County didn't affect any
5 votes; right?

6 **A.** From all the investigation we have seen, there is no
7 evidence that it has.

8 MR. CROSS: Thank you.

9 CROSS-EXAMINATION

10 BY MR. BROWN:

11 **Q.** Good morning, Mr. Sterling. Bruce Brown again for the
12 plaintiffs.

13 **A.** Barely morning. But good morning.

14 **Q.** You were asked some questions on the new audit law. Isn't
15 it true that the new audit law only requires one contest
16 audited per ballot, not all the contests?

17 **A.** The new audit -- the previous audit law only had one
18 ballot contest per election. The new one has the same but more
19 elections to audit.

20 **Q.** And the counties get to choose which contests to audit,
21 correct, in the new law?

22 **A.** I don't believe that is correct. But I am not 100 percent
23 sure. Because I believe right now it has to be the Secretary
24 chooses. Because the counties -- to do a statewide audit,
25 which is a state -- I'm not totally familiar with the law. It

1 would be better if you had Ryan Germany up here for this one.

2 But we're doing statewide audits because it would be
3 federal contests that were statewide and the Secretary chooses
4 I know the general election one, but I can't remember the
5 mechanism by which -- like the PPP coming up, the presidential
6 preference primary, I believe this law requires an audit for
7 the Democrat or Republican of those.

8 MR. BROWN: Well, I don't want to belabor the Court
9 with this. Your Honor, we have outlined the changes in
10 Document 1673 for reference.

11 THE COURT: Well, just for -- since the public is
12 here, you might as well -- and for his benefit, you might as
13 well just let him review the law. And let's have it just all
14 out at this point.

15 MR. BROWN: I'll move on, Your Honor.

16 THE COURT: No. That is all right.

17 BY MR. BROWN:

18 **Q.** Mr. Sterling, you referenced the Al Franken election.

19 **A.** Yes, sir.

20 **Q.** And that was, I believe, in reference to the notion that
21 hand-marked ballots may be ambiguous as to voter intent.

22 Fair to say?

23 **A.** Yes, sir. Or one of the problems with it, yes.

24 **Q.** Did you know that of the 2.9 million hand-marked ballots
25 that were cast in the 2008 Minnesota race between Al Franken

1 and Norm Coleman for the U.S. Senate, between 99.95 percent and
2 99.99 percent of the ballots were unambiguously marked?

3 Did you know that?

4 **A.** I was aware it was a high percentage. But in a close
5 state like Minnesota and like Georgia, as you can see in the
6 actual outcome of 2008 election, that is a problem.

7 **Q.** Could you say that again? I didn't follow.

8 **A.** Georgia and Minnesota are both partisan-wise very close
9 now. You see the outcome of the 2008 election because of the
10 ambiguity of even a small percentage of ballots can cause a
11 very serious issue of knowing who the actual winner was, which
12 is why they could not seat Senator Franken until July of 2009,
13 I believe.

14 **Q.** Are you aware of the 2.5 to 3.7 error rate for
15 machine-marked ballots?

16 MR. BELINFANTE: Objection. Speaks to facts not in
17 evidence.

18 BY MR. BROWN:

19 **Q.** Have you looked at studies for the -- to do a comparison?
20 Have you looked at studies relating to the error rate on
21 machine-marked ballots?

22 You haven't, have you?

23 **A.** I have not reviewed them. But I also cannot know if every
24 hand-marked ballot was done the way the voter intended either.

25 **Q.** Have you reviewed -- one of the articles that we have

1 repeatedly cited -- and I believe the Court has cited in this
2 case -- is by a Dr. DeMillo from Georgia Tech, Dr. Appel from
3 Princeton, and Dr. Stark, Ballot-Marking Devices Cannot Assure
4 the Will of Voters. It is Exhibit 1287.

5 Have you reviewed that article?

6 **A.** Is that the one that basically said we can't know the
7 outcome from the 2020 election in Georgia?

8 **Q.** No.

9 **A.** Because that is the one I have seen with Philip Stark
10 saying something along those lines.

11 **Q.** No.

12 **A.** It is a different one from that?

13 I would have to look at it to know for certain.

14 **Q.** I'll just hand you this very quickly.

15 **A.** I think I may have seen this before. But it was, again,
16 several years ago. But I'm not positive. So I don't want to
17 necessarily say I have. Because those studies all tend to look
18 alike.

19 **Q.** In discussing the possibility of moving to a BMD full-face
20 ballot, you discussed the printing issues involving long
21 ballots that had the special purpose local option sales tax
22 descriptions on them; correct?

23 **A.** As an example of the reasons some could be longer than
24 others, 14 inches versus 22 inches, et cetera.

25 **Q.** And then in addition to the SPLOST, you also have

1 constitutional questions that can also be very long; correct?

2 **A.** And partisan primary questions which can be long as well.

3 **Q.** And the -- they are difficult to print on a page; right?

4 **A.** No matter what, yes, sir.

5 **Q.** And they are even more difficult for a voter to remember
6 if they have only a BMD print summary; right?

7 **A.** Potentially.

8 **Q.** Now, you understand that the plaintiffs in this case are
9 not asking the Court to order the State to move to a full BMD
10 full-face ballot; correct?

11 **A.** To be frank, I don't know what exactly y'all are asking
12 for at this point.

13 **Q.** But to improve the ballot, the State would have to spend
14 an enormous amount of money; correct? And it is not even
15 something you want to do?

16 **A.** To change the ballot, I wouldn't call it improvement. It
17 would cost a lot of money, yes.

18 **Q.** And it would cost the State an enormous amount of money,
19 both in software costs and in labor, to upgrade the software --

20 **A.** Potentially, yes.

21 **Q.** -- to address --

22 **A.** Sorry.

23 **Q.** I'm sorry. To address identified vulnerabilities in the
24 software; correct?

25 **A.** As you state, yes.

1 Q. And that is a process that is sort of evergreen? That is
2 a cost that is going to be continuing for the State; correct?

3 A. I couldn't speak to that for certain.

4 Q. And you do not have funding now from the legislature to
5 pay for any of that, do you?

6 A. Not at this point. But we are in budget cycle as we
7 speak.

8 Q. But if you move to -- if you did not use BMWs -- if you
9 did not use BMDs and you mothballed 32,000 BMDs, you are not
10 telling the Court that that is not going to be an enormous
11 savings, are you?

12 MR. BELINFANTE: Objection. Mr. Brown has repeatedly
13 stated they are not seeking to prohibit BMDs, which is what
14 that question presumes.

15 MR. CROSS: We have never said that. I don't
16 understand where that is coming from.

17 MR. BELINFANTE: Guys, we have got to figure out what
18 you want in remedies. I asked questions about this. And I was
19 told --

20 THE COURT: All right. Let's not -- this is not --

21 MR. BROWN: This is not an objection. I am examining
22 the witness. Mr. Cross and Josh can have it out separately.

23 MR. BELINFANTE: Sorry. The objection to your
24 question, Mr. Brown, was that it presumes that BMDs are not
25 existent, which as I understood it is not what the plaintiffs

1 are seeking, an order prohibiting BMDs, at which point that
2 question would be irrelevant.

3 MR. BROWN: Well, let's go to the cost.

4 BY MR. BROWN:

5 **Q.** Per BMD, however many are saved, you recognize that not
6 using as many BMDs would save the State an enormous amount of
7 money? You're not -- you're not contesting that, are you?

8 **A.** Since I really don't understand the full basis of it, I
9 don't feel comfortable saying it. Because I look at the
10 Georgia taxpayers as the same individuals, county taxpayers are
11 also Georgia taxpayers, and this would move an incredibly
12 expensive burden to the counties on paper costs.

13 We did an analysis in 2019 showing it was cheaper for the
14 Georgia taxpayers over a ten-year period to use the BMD system
15 as it currently is versus the ten years of using a hand-marked
16 paper ballot system. The cost crosses over at about year six
17 and a half or seven, given the normal number of elections that
18 are done, but we can't know because there are specials and
19 things like that.

20 But it is less expensive to use the system we have now,
21 especially as we have amortized five years or so of it,
22 especially for the counties.

23 The costs are higher to do a hand-marked paper ballot
24 system for the counties and for those taxpayers than continuing
25 to run the BMD system.

1 Does that make sense?

2 **Q.** It is.

3 And it is also the sunk-cost fallacy, isn't it? You have
4 already paid for the BMWs -- BMDs?

5 **A.** Are you car shopping recently, Mr. Brown?

6 **Q.** You have already paid for the BMDs. What you have
7 described is the sunk-cost fallacy, isn't it?

8 **A.** No, sir. What I'm describing is in any ten-year period
9 using the BMD system is cheaper for Georgia taxpayers than
10 going to hand-marked paper ballots, period.

11 **Q.** That's if you include the cost of the BMDs; right?

12 **A.** This is comparing using just the scanners and the EMSs
13 with hand-marked paper ballots versus using scanners and EMSs
14 with BMDs. So -- and, of course, there would be a handful of
15 BMDs, no matter what, for accessibility purposes. But the cost
16 of using a BMD system is less expensive than using a
17 hand-marked paper ballot system.

18 Regardless of sunk cost, forget -- pretend we are not --
19 there are no BMDs. We're having the policy discussion, which
20 is what this was at the time, of hand-marked paper versus BMDs.
21 It is less expensive for Georgia taxpayers in a ten-year period
22 to use the BMD system than it is to use a hand-marked paper
23 ballot system.

24 **Q.** When was -- that policy discussion was before the BMDs
25 were purchased; correct?

1 **A.** It was during the debate around HB 316.

2 **Q.** It was before the BMDs were purchased; correct?

3 **A.** Yes. We had to have the law in place.

4 **Q.** Just answer -- it was just yes or no?

5 **A.** Well, of course.

6 **Q.** Okay. And so an analysis of the cost and benefits before
7 the BMDs were purchased showed that BMDs were cheaper than
8 hand-marked paper ballots? Is that what you are saying?

9 **A.** The life cycle cost is less expensive, yes.

10 **Q.** Okay. Now, looking at the county's cost, who pays for the
11 logic and accuracy testing, the labor cost involved?

12 **A.** Counties.

13 **Q.** And today counties are supposed to test 35,000 BMDs every
14 election; correct?

15 **A.** Yes, sir.

16 **Q.** And they have to -- if they are doing it right, they have
17 to test each BMD for every race and every question before every
18 election; correct?

19 **A.** Correct.

20 **Q.** And to the extent that fewer BMDs are used, the labor cost
21 to the county would be decreased; right?

22 **A.** Correct.

23 **Q.** And I believe as you answered in response to questions by
24 Mr. Cross, the counties are already required to have emergency
25 supplies of paper ballots; correct?

1 **A.** Ten percent, correct. At the polling place on election
2 day. Yeah.

3 **Q.** Now, you're aware that the vast majority of American
4 jurisdictions that use BMDs use them in the standard
5 configuration which the plaintiffs are recommending, and that
6 is --

7 MR. BELINFANTE: Objection. Vague. What is the
8 standard configuration?

9 MR. BROWN: That is.

10 MR. BELINFANTE: Okay. Sorry, Mr. Brown.

11 BY MR. BROWN:

12 **Q.** -- one BMD for people who need assistance and for others a
13 hand-marked paper ballot?

14 Are you with me?

15 I'm going to call that standard configuration because it
16 is the configuration that is used by the vast majority of
17 American jurisdictions.

18 Are you with me?

19 **A.** Correct.

20 **Q.** Okay. And you are aware that your colleague, Blake Evans,
21 administered the standard configuration in Escambia County;
22 right?

23 **A.** Correct.

24 **Q.** And he described that as operating not the nightmare that
25 you described but seamlessly; right?

1 **A.** Because they have been doing it for 20-some-odd years at
2 this point.

3 **Q.** And you described, in the beginning of your testimony
4 yesterday, the Herculean efforts that your office -- that the
5 team that was under your leadership as the project manager
6 undertook to switch from DREs to BMDs in 2019 through the -- up
7 to the 2020 preference -- the presidential preference primary;
8 correct?

9 **A.** Yes.

10 **Q.** And that was an enormous effort in every respect? You had
11 software, machines, training, logistics, all the way through
12 159 counties; correct?

13 **A.** From a central hub location, yes.

14 **Q.** And you did it? You did it on time and probably within
15 budget; right?

16 **A.** Under.

17 **Q.** Under time and under budget?

18 **A.** Under budget, on time.

19 **Q.** But now in describing to the Court the difficulties that
20 you would have simply mothballing 32,000 BMDs, you just can't
21 do it; right? It just can't be done?

22 **A.** I -- my intention in answering that question is that
23 making massive changes in an election environment -- what
24 you've got to realize is there were two very specific things
25 happening when we rolled out the system. We already had --

1 basically people were used to using touch screens. And we had
2 a central location in which to pull the stuff out and to train.

3 It was still Herculean, yes, but there was no elections
4 occurring at that time. We had a handful of them in municipals
5 that we used -- five counties to use the BMDs to test them out.
6 The rest of the State was still using DREs.

7 We are in an election environment right now as we sit. So
8 trying to train people on how to deal with hand-marked paper
9 ballots for the November election while they are still
10 executing elections for the presidential preference primary --
11 we currently have two special elections. There will be a third
12 special election. The general primary in May and then the June
13 primary.

14 Trying to change out anything process-wise and train in
15 the middle of all these things, while trying to hire people and
16 change systems out is -- that is what I am referring to as
17 nightmarish.

18 If given a long timeline, you can train on some of these
19 things. But trying to do it by the 2024 election, which is
20 what the question was, is why I said it was nightmarish.

21 **Q.** You emphasized, I think appropriately, training on
22 hand-marked paper ballots; correct?

23 **A.** Training on how to handle them, how to do them, how to
24 deal with them, how to get them to the right -- yes, all that.

25 **Q.** They are already trained on hand-marked paper ballots,

1 aren't they, by law?

2 **A.** Okay. There is training on hand-marked paper ballots for
3 emergencies. But how do you set up systems in large counties,
4 like I said, to assure they are getting the right ballots?

5 Yes, you can work on that. But your systems are going to take
6 time to really figure out.

7 It is just very, very difficult. And the likelihood of
8 people voting in the wrong place and being disenfranchised is
9 extremely high.

10 **Q.** Well, let me ask it a different way.

11 If the Secretary trained poll workers or trained the
12 trainers as required by law now, they would be trained to do
13 that, wouldn't they?

14 **A.** No, sir.

15 **Q.** The law says --

16 **A.** Sir, I was explaining. It is one thing to know how to use
17 a paper ballot. All the processes and procedures of handling
18 that volume of hand-marked paper ballots. What you have to do,
19 especially in the early voter environment, which is where the
20 vast majority of Georgia voters vote, is a highly difficult
21 process.

22 Even in small counties who have single voting locations,
23 like Rabun, would have dozens and dozens of ballot styles. And
24 that is where we are going to -- running into the problem. I
25 think it is a misunderstanding of how our systems have to work

1 to assure that everybody gets the correct ballot.

2 **Q.** So if this -- if the BMD system went down in an election,
3 say the 2024 presidential election, you would not be able to do
4 what the law requires, and that is to switch to hand-marked
5 paper ballots?

6 **A.** When and where?

7 You're asking a hypothetical. If you tell me when and
8 where, I can tell you what would happen more than likely. You
9 said the BMD system goes down. I have no reason to believe
10 that is going to happen. But give me your example of where it
11 might happen and how it might happen and how we would address
12 it.

13 **Q.** Statewide election day 2024.

14 **A.** If there is a situation then -- and again, you've just
15 eliminated the entire biggest threat, which is early voting.

16 **Q.** No. You asked me where and when.

17 **A.** Okay. But I'm telling you, you just took out the biggest
18 single issue which was that.

19 Election day, power goes out everywhere --

20 COURT REPORTER: You have got to slow down.

21 THE WITNESS: Okay.

22 Election day and BMDs go down. Let's say there is an
23 electromagnetic pulse which knocks out power everywhere. They
24 would have ten percent of those ballots.

25 At that point, if there is an electromagnetic pulse,

1 we would have a very serious issue because there probably would
2 not enough be ballots to handle for everybody there, because
3 there would be no way to print them. They would handle the
4 emergency ballots by --

5 COURT REPORTER: Please, slow down. Just take a
6 breath.

7 BY MR. BROWN:

8 Q. We've got plenty of time.

9 A. They would have the ballot styles necessary for that
10 polling location. But only ten percent. You then would have
11 to go to mobile ballot printing or have had to preprinted a lot
12 more ballots earlier. We have not seen such a situation ever,
13 other than individual polling locations.

14 And you can, like I said, for the first two hours -- well,
15 EMP means that there is no battery either. But again, this is
16 wildly hypothetical. They could probably do it. But again,
17 people would get the wrong ballots.

18 It is about guaranteed -- especially in large polling
19 locations with multiple precincts. It is just -- that is going
20 to happen.

21 People will not -- they will be disenfranchised,
22 especially for the bottom parts of their ballots. That is the
23 situation.

24 Q. I wouldn't worry about it, because I bet the loser of that
25 election would take it graciously, wouldn't they?

1 **A.** I would assume not, especially if it was a close election.

2 **Q.** Now -- so, let me cut to the chase here.

3 **A.** Yes, sir.

4 **Q.** Are you ready for that emergency on November -- in
5 November 2024 or not?

6 **A.** We can be ready for a thing with the ten percent. But if
7 there is an electromagnetic pulse, we will probably have bigger
8 issues to deal with.

9 A situation similar to this can occur like we saw in two
10 different places --

11 **Q.** Are you -- let me cut you off. This is a yes-or-no
12 question. You --

13 **A.** If you know what EMP is --

14 **Q.** Mr. Sterling, you have a lot of words. I just want one
15 word in response to this. This is a yes-or-no question. Your
16 counsel can ask you to explain as long as you care to.

17 Your answer: Are you ready for that emergency in November
18 of 2024 or not?

19 MR. BELINFANTE: Objection. I think we've gone far
20 afield from the --

21 THE COURT: All right. You asked a lot of questions.
22 Let him answer this.

23 THE WITNESS: The State, again, doesn't run
24 elections. It is counties. And given the overriding
25 hypothetical you just gave, which essentially would be there is

1 an electromagnetic pulse which knocks out everything --

2 BY MR. BROWN:

3 Q. That was your hypothetical. I will give you --

4 A. Sir, you said the BMDs all go down. There is only one way
5 they go down across the entire state. And that is something
6 like that.

7 So, again, that means scanners are out. You have to use
8 the emergency -- the third tray and the scanner, which drops it
9 into the box for later scanning. They would use the first
10 ten percent.

11 And then we would probably have to figure out something
12 beyond that because there is no way to then print enough
13 ballots for something that over the top. And every county
14 would have to do it individually.

15 Q. I'll take that as a no, you would not be ready and --

16 A. I don't think anyone could be ready for something like
17 that. Because the majority of those jurisdictions use mobile
18 ballot printers, which means that those would be out too.

19 I mean, it's -- your hypothetical is not the real world in
20 which we operate in, generally speaking.

21 Q. Well, I didn't say it was an electromagnetic. That is not
22 what this lawsuit is about, is it?

23 A. I have no idea what this lawsuit is about, sir, at this
24 point.

25 Q. Seriously?

1 **A.** I'm being facetious because I am frustrated at this point.
2 And I apologize for that. But do understand that.

3 **Q.** Let me ask it this way, Mr. Sterling: Just to be fair and
4 a little bit more -- to understand your answer a little bit
5 better --

6 **A.** Yes, sir.

7 **Q.** -- is that doesn't the State need to be ready for that
8 emergency if it is caused by malware or electromagnetic pulse,
9 whatever?

10 **A.** The bigger things we generally need to be ready for is if
11 a hurricane hits or a tornado, which is why we have uniformity
12 and training in those kind of things. I mean --

13 **Q.** If it is ready for that, why can't it simply mothball
14 32,000 BMDs over the next couple of months, if it already has
15 its people trained?

16 **A.** Again --

17 **Q.** It has already paid for the BMDs.

18 **A.** You seem to refuse to accept my answer that the training
19 required for the absolute change in how you would be voting
20 overall and the processes attached to those, you're going to
21 disenfranchise, especially in Fulton, thousands of people. And
22 I don't think anybody wants that.

23 Our current system assures they get the correct ballot and
24 makes it easy for administration and they have been trained on
25 that.

1 MR. BROWN: Just a minute, Your Honor.

2 **(There was a brief pause in the proceedings.)**

3 MR. BROWN: Thank you, Mr. Sterling.

4 THE WITNESS: Your Honor, while the lawyer seems to
5 find himself, can I duck back here for a moment?

6 THE COURT: Yes.

7 THE WITNESS: Thank you, Your Honor.

8 THE COURT: Yes.

9 **(There was a brief pause in the proceedings.)**

10 MR. OLES: Judge, I have no questions for
11 Mr. Sterling.

12 REDIRECT EXAMINATION

13 BY MR. BELINFANTE:

14 **Q.** Mr. Sterling, you were asked questions about the
15 ten percent emergency ballot rule and then I'm guessing if
16 hand-marked paper ballots were the option for in-person voting.

17 Can you explain the difference in the type of training
18 that would be needed to comply with the ten percent rule versus
19 a full election being used -- being conducted with the use of
20 hand-marked paper ballots?

21 **A.** Only in the broadest terms because, like I said, I don't
22 create training materials.

23 But having to train people, especially in the environment
24 of the early voting, which is where the vast majority of
25 Georgians, around 65 percent or so, vote, especially in large

1 jurisdictions or those jurisdictions that have single vote
2 centers, like Rabun County, would require changes in how we do
3 check-in.

4 And then from that, changes in how they would assign or
5 give the actual ballot to the individual voter. And it would
6 probably be different in large jurisdictions. Because we don't
7 even know the processes necessarily to do that.

8 Like off the top of my head, they would probably have --
9 if you live, you know, north of Chattahoochee, if you are in
10 these three cities, you would have to go to this particular
11 section. If you live south of the City of Atlanta border, you
12 have to go to this section. It could be worked out.

13 But even with training, especially in large jurisdictions
14 where we see errors in their general way of approaching
15 elections, unfortunately, it would be a lot different than what
16 we have been working with the last four years.

17 And we made improvements even in that, like I said, with
18 our new cellular-based Poll Pads, which assure the individual
19 voter gets absolutely the correct ballot.

20 When you are pulling ballots -- especially they look very
21 similar. The precinct names are similar. It would require a
22 lot of attention to detail. You can train on that. But human
23 beings, even well trained human beings, will get tired. They
24 will -- they will lean to their right side more often than not
25 to grab things because they are right-handed for the most part.

1 There are so many processes and procedures, I can't
2 explain all of them now. I just do know it would require a
3 lot. And it would require a lot in the middle of an already
4 existing election season.

5 **Q.** And, Mr. Sterling, you have brought up the Poll Pads as
6 having a more accurate ballot.

7 How would the poll pads interact with an election that is
8 being run on hand-marked paper ballots?

9 **A.** It would still be the check-in device to verify the
10 identity and pull up the individual voter. And then on there,
11 there would simply be, in the corner, something that says this
12 ballot style or this precinct. I'm not exactly sure what the
13 screen says.

14 Then the poll worker or election worker would have to then
15 go to a series of boxes to say I'm grabbing this ballot for
16 this voter and giving it to them and moving on.

17 So that -- there is no log file. There is no transmission
18 to make sure that that individual human being grabbed the
19 correct ballot to give to that voter.

20 **Q.** And how is that different from the use of the Poll Pad
21 with the BMDs?

22 **A.** In the BMDs now, the individual voter is a check-in device
23 and it encodes the card at the same time. So that way the card
24 that they receive to go to the BMD absolutely has their correct
25 ballot style because it is attached to the check-in itself.

1 Q. If the -- you were asked a question about a voter being
2 able to remember what is on a ballot.

3 To your knowledge, are sample ballots made available at
4 the polling locations in Georgia?

5 A. Yes, sir.

6 Q. You were asked by Mr. Brown a question about the Al
7 Franken and Norm Coleman election.

8 Did I -- did I understand that it took months to calculate
9 less than one percent of hand-marked paper ballots that were
10 disputed?

11 A. Essentially, yes, because of the election challenge and
12 they had to go through every single ballot individually.

13 THE COURT: Just like you did?

14 THE WITNESS: No. Unfortunately, when we did, the
15 ballot intent was very, very clear on the vast majority of
16 them. And the small percentage here, they had to basically
17 fight in court over each of them.

18 THE COURT: Well, I understand that. But what
19 Georgia did in '20 was still do a full re-count.

20 THE WITNESS: In five days.

21 THE COURT: Yes.

22 THE WITNESS: This took seven months, so that is a
23 large difference.

24 BY MR. BELINFANTE:

25 Q. The ballots that were used in Georgia's re-count in

1 November of 2020, the majority of those ballots -- do you know
2 what the majority of those ballots were? Were they the
3 hand-marked paper or the BMD-printed?

4 **A.** 75 percent were the BMD-printed with a summary ballot.

5 **Q.** Okay. And how does one determine voter intent in a post
6 election audit using the BMD ballot?

7 **A.** By reading what is on the ballot itself.

8 **Q.** Okay. And how does one determine voter intent post
9 election using a hand-marked paper ballot?

10 **A.** By looking at the mark next to the writing on the ballot
11 itself.

12 **Q.** Okay.

13 THE COURT: I'm going to let you make your record,
14 but I think I've heard plenty. I mean, I just don't -- I'm
15 just saying you took a long time. They took a long time. I
16 don't feel like I'm learning anything new. That is all.

17 MR. BELINFANTE: All right.

18 THE COURT: So just streamline it to the extent
19 you're able to.

20 BY MR. BELINFANTE:

21 **Q.** You were asked about ransomware in Fulton County,
22 specifically what the Secretary of State controls.

23 What software does the Secretary of State control that it
24 shut down, so to speak, as you talked about?

25 **A.** It was GARViS, the Georgia Registered Voter Information

1 System, which is our new voting registration system.

2 **Q.** Okay. And what specifically did the Secretary's office do
3 in response to the ransomware -- like what shut down, so to
4 speak?

5 **A.** There is basically a tool within the GARViS itself which
6 lets the State, which is the superuser on the system, shut down
7 access to the 148 registered users from Fulton County for a
8 minimum of 48 hours to start.

9 THE COURT: You said 140 users?

10 THE WITNESS: Yes, ma'am.

11 THE COURT: Are we talking about the particular
12 jurisdictions?

13 THE WITNESS: Within -- the tool itself.

14 THE COURT: Just tell me what you meant by users.

15 THE WITNESS: It would be the election workers who
16 have user names and log-ins and passwords identified through
17 multifactor. There are 148 individuals Fulton County has
18 assigned to work within the GARViS system right now. We cut
19 off access to those users.

20 THE COURT: Okay.

21 BY MR. BELINFANTE:

22 **Q.** You were asked by Mr. Cross a series of questions about
23 training and election security. I just want to make sure the
24 record is clear.

25 Does the Secretary -- who does the Secretary train as it

1 relates to election protocols?

2 **A.** We train the elections directors and the supervisors who
3 attend GAVREO as well as any -- there's the big trainings we
4 have there in person. We also have webinars and stuff,
5 trainings all the time. But it is usually the top end of the
6 leadership within the counties.

7 **Q.** So would it be correct or incorrect to say that the State
8 or that the Secretary of State's office has no role in training
9 on election security?

10 MR. CROSS: Objection. Leading.

11 MR. BELINFANTE: Would it be correct or incorrect to
12 say. I don't think I am suggesting an answer.

13 MR. CROSS: I think we all know what answer you want.

14 THE WITNESS: Frankly --

15 THE COURT: Proceed. Proceed.

16 THE WITNESS: -- can you ask the question again
17 because I got lost for a second there?

18 BY MR. BELINFANTE:

19 **Q.** Sure. That's fine.

20 Would it be correct or incorrect to say that the State has
21 no role in training on election security?

22 **A.** I think that would be incorrect.

23 **Q.** You were asked about Ware County and allegations of
24 unauthorized access.

25 Do you recall that?

1 **A.** Yes.

2 **Q.** Okay. In the parlance of the Secretary of State's office,
3 is opening an investigation something -- what does it mean to
4 open an investigation?

5 **A.** That it has been internally kind of decided between --
6 normally the general counsel and the investigator that there is
7 enough evidence to rise to open a case file to then do further
8 investigation to kind of decide did anything really happen here
9 or not.

10 Oftentimes there are allegations and claims, as we saw in
11 2020, of hundreds of types of them that would never rise to
12 that level or it would take a quick phone call to say what
13 happened here, oh this, we're not going to bother opening a
14 file for that kind of thing.

15 **Q.** Can issues be resolved that are raised short of an
16 investigation?

17 **A.** Absolutely.

18 **Q.** Is that what happened in Ware County?

19 **A.** Yes.

20 **Q.** Okay. Is that what happened in Spalding County?

21 **A.** Yes.

22 MR. BELINFANTE: Mr. Montgomery, could we pull up
23 Plaintiffs' Exhibit 51, please.

24 BY MR. BELINFANTE:

25 **Q.** Mr. Sterling, you were asked a series of questions about

1 this UGA study.

2 MR. BELINFANTE: If we could turn to Page 3. I'm
3 sorry. The study, Page 3, Page 4 of the document. Right.

4 BY MR. BELINFANTE:

5 Q. Do you see that, Mr. Sterling?

6 A. Yes, sir.

7 Q. Do you see where it says voter behavior at the voting
8 booth?

9 A. Yes, sir.

10 Q. What does that paragraph say?

11 A. This section discusses the -- well, okay. This section
12 discusses the behavior of voters at the voting booth after
13 printing their paper ballot. The results of our analysis
14 indicates that 80.1 percent of the voters observed checked
15 their ballot compared to a fifth, 19.9 percent, who did not.

16 Q. Okay. And that is at the voting booth as opposed to at
17 the scanner.

18 Do I understand that?

19 A. Correct.

20 Q. And is that the Secretary's understanding of that as well?

21 A. Yes, sir.

22 Q. Okay. Also, could we turn to Page 4 of the article,
23 Page 5 of the number below.

24 Could you read Footnote 8 as well.

25 A. Are you going to make it big for me, or do I got to lean

1 in?

2 **Q.** We can zoom it in for you.

3 **A.** There we go.

4 It should be noted that in most precincts it was a very
5 short distance from voting booths to the tabulator. Those
6 voters who did check their ballot in the voting booth,
7 therefore, may have opted out of checking their ballot again
8 only seconds later.

9 **Q.** Okay. Is that -- what is the Secretary's understanding of
10 that -- or the Secretary's office's understanding of the
11 significance of that footnote?

12 **A.** That most people had already reviewed it and chose not to
13 review it when they were prompted to at the scanner. Because
14 of the time between the two. I just did this, so why do it
15 again.

16 **Q.** All right. Mr. Sterling, you were asked a series of
17 questions about --

18 MR. BELINFANTE: We can take that down.

19 BY MR. BELINFANTE:

20 **Q.** -- whether county poll workers or others at the -- poll
21 managers or whomever else, whether they comply with State
22 Election Board rules or the statutes.

23 What is your understanding of what can happen if counties,
24 through either poll workers or election managers, do not comply
25 with State Election Board rules or State statutes?

1 **A.** If it is discovered, there would be an investigation
2 opened. And then there would be -- the SEB operates somewhat
3 differently now, so it is harder for me to fully understand
4 because we're still trying to work this out now that the
5 Secretary is no longer chairman of the State Election Board.

6 Our investigators would work with the SEB to decide --
7 they would present the evidence to the SEB, basically, in a
8 meeting. And there is usually pre-meetings before then. And
9 you -- the SEB could then move to do nothing, do a letter of
10 instruction, do fines. There is a series of things the SEB
11 could do to enforce laws and rules and try to get the county to
12 act right.

13 **Q.** Okay. And you were shown a document from the time where
14 now Governor Kemp was Secretary of State. And I believe it was
15 2018.

16 What was the -- who was the chair of the State Election
17 Board in 2018, if you know?

18 **A.** I believe it might still have been Tex McIver.

19 **Q.** Okay. That is wrong.

20 Was the -- did the Secretary -- did the Secretary of State
21 have a role --

22 **A.** I'm sorry. That was Brian Kemp. Sorry, Tex McIver was on
23 it. Brian Kemp was the chairman.

24 **Q.** Okay. And since that 2018, does the Secretary of State
25 still have a seat on the State Election Board?

1 **A.** Ex officio nonvoting.

2 **Q.** Okay. And the entity that went to Athens, that you were
3 asked about, was that the State Election Board or the Secretary
4 of State's office?

5 **A.** State Election Board.

6 MR. BELINFANTE: Thank you, Your Honor. No further
7 questions.

8 MR. CROSS: Your Honor, could I ask literally one
9 question?

10 THE COURT: Yes.

11 MR. CROSS: Just one.

12 THE COURT: I hope it is just one.

13 MR. CROSS: It is one, because I am just not sure if
14 there was clarity on this.

15 REXCROSS-EXAMINATION

16 BY MR. CROSS:

17 **Q.** One question. Is Georgia prepared or unprepared to use
18 the legally mandated hand-marked paper ballot backup system if
19 only the BMDs and printers cannot be used on election day 2024
20 for any reason?

21 **A.** I would refer to my earlier answer, but basically the --

22 **Q.** I'm sorry to --

23 **A.** I'm about to give you your yes or no if you let me get to
24 it.

25 **Q.** Okay.

1 **A.** Given the wild hypothetical, no, I don't believe any state
2 could be.

3 **Q.** Okay. Thank you.

4 Sorry. The no is prepared or unprepared?

5 **A.** I thought I was going to get away with that. I'm kidding.

6 No. There is -- given the hypothetical with everything
7 breaking down, unless there was -- with the number -- it would
8 depend on what time of day. I mean, there's too many
9 hypotheticals there. I'm going to say no in general because
10 anything I answer you'll have an answer to. So that is -- I am
11 going to sit with that for right now.

12 **Q.** Okay. So unprepared?

13 **A.** Correct.

14 MR. CROSS: Okay. Thank you.

15 MR. BELINFANTE: Your Honor, I hate to do this, but I
16 have a feeling I know where this is going. I do have one
17 question.

18 REDIRECT EXAMINATION (Continued)

19 BY MR. BELINFANTE:

20 **Q.** Mr. Sterling, the answer you just gave Mr. Cross, what
21 scenario are you envisioning or responding to?

22 **A.** A wild one that in likelihood would never happen in real
23 life. And in my mind, there's only a few things that could do
24 that: Major catastrophe, nuclear attack, terrorist attack, any
25 series of those things that could shut down everything at one

1 time.

2 **Q.** And when you say everything, what do you mean?

3 **A.** Power, power grid, mobile ballot printing.

4 MR. CROSS: Your Honor, I just object. That wasn't
5 the question. I don't know what we're walking back here.

6 MR. BELINFANTE: Because I asked what his -- when he
7 was answering what he was considering. So that is -- because I
8 don't think the question was clear. I want the record to be
9 clear as to what his answer is reflecting.

10 MR. CROSS: No. The question was specifically only
11 to BMDs and printers. Not power grid, everything. And the
12 answer stands.

13 MR. BELINFANTE: No --

14 THE WITNESS: But the real life answer, the only way
15 that could happen, is if one of those other catastrophes
16 happen. It doesn't -- you can't just do it in a vacuum.

17 THE COURT: You have added another factor and you
18 have explained what you -- another way of looking at it. But
19 you also said what you said. So whatever it is.

20 I don't think it is helpful to the Court at this
21 juncture for you-all to spend more time quibbling about it.

22 MR. BELINFANTE: Your Honor, if I may.

23 THE COURT: This is it. That's it. We've concluded
24 the answer. You have elicited information. I don't know that
25 you -- you are asking for follow-up information now.

You asked one question. He asked one question.
Neither of them were particularly successful. And now we are
--

MR. BELINFANTE: What I don't want to happen, Your Honor, is for opposing counsel to argue that the State is unprepared to comply with a ten percent rule when what the witness was presuming he has now explained more fully in answering that question.

THE COURT: I haven't struck his answer.

MR. BELINFANTE: All right. As long as we're on the same page.

THE COURT: I haven't struck his answer. So I don't know what your problem is. We have two answers. Fine. You elicited an explanation from him now. And the Court will take it for whatever it is worth from both of you.

MR. BELINFANTE: Okay. Thank you, Your Honor.

Your Honor, at this point the State rests.

THE COURT: Okay. Well, I did have one question of the witness.

EXAMINATION

BY THE COURT:

Q. I mean, of the change -- you are the aware that the -- I guess you weren't aware, from your testimony, but when the 2000 -- the 2023 legislature adopted legislation that said that you didn't have to do risk-limiting audits, it was up to --

1 basically it could be just a sample.

2 And there is a difference. And I'm just trying to
3 understand whether -- and it is not clear who makes that
4 decision as to which -- when that would happen, when that
5 wouldn't, who gets to decide. And that is by county too.

6 So you indicated you don't really -- you didn't have any
7 knowledge.

8 **A.** There is one specific thing now that you have said --
9 explained it the much clearer way than was explained to me from
10 over there.

11 **Q.** Well, it is easy for me because I'm sitting here, to be
12 clear. But no, I don't --

13 **A.** Again, this is a -- I have some knowledge around this.
14 Part of the rationale for that specific change -- one of the
15 things we have done when we have constructed our audits is a
16 traditional RLA puts you on -- if you just did the straight
17 math, you would get a certain number of ballots regardless of
18 159 counties.

19 You could end up, if you chose a race with a wide enough
20 margin -- I'm spit-balling here -- you would have to look at
21 150 ballots maybe, which means there are counties that could
22 have multiple ballots you have to look at and some counties you
23 would have none.

24 What the Secretary has done with VotingWorks, we construct
25 it to where every county would have to pull something.

1 Now, I think part of the rationale on the RLA, if you went
2 to a smaller level jurisdiction, was there could be times to do
3 an RLA where you are looking at one batch in a tabulation --
4 basically re-counting a box or a batch fully would be what is
5 necessary to achieve the audit level.

6 That is what they were going for. I don't think they
7 necessarily achieved it. And that is why they are looking at
8 actually changing the audit law again.

9 Right now that is under discussion I think because I think
10 they realized there might be ambiguity to it as well.

11 **Q.** Well, that among other ambiguities. Would you agree?

12 **A.** Yes.

13 THE COURT: All right. May this witness be excused?
14 Is there anything else?

15 MR. CROSS: Your Honor, we may have some rebuttal.

16 THE COURT: You may call the witness again?

17 MR. CROSS: Right. So I think now, if it works for
18 Your Honor, is a lunch break. We'll confer and figure out
19 what, if anything, we have, and we'll keep it tight.

20 THE COURT: Okay. Well, that's fine.

21 We're going to excuse you. I would like to talk
22 about, briefly, the issue of your resting -- the
23 State's resting.

24 MR. BELINFANTE: Yes, Your Honor.

25 THE COURT: So I want to discuss the -- Mr. Oles'

1 request to -- or notice that he plans to proceed with calling a
2 number of witnesses.

3 And unless I'm incorrect, none of these people were
4 on the pretrial order, unless Ms. Voyles is actually Mr. Voyles
5 and there was a mistake. But Ms. Voyles was who, I understand,
6 you indicated you wanted to call.

7 MR. OLES: Yes, Judge. I believe she was on the
8 State's list as a may call.

9 THE COURT: I thought it was a Mr. --
10 Blake Voyles.

11 COURT REPORTER: I can't hear you.

12 THE COURT: Just come up here.

13 Thank you.

14 MR. OLES: If there is -- I don't have it right in
15 front of me. But if it said Blake Voyles, that is an error.
16 It was Suzi Voyles.

17 THE COURT: It was Suzi Voyles. Okay.

18 MR. OLES: Yes.

19 THE COURT: None of the people were on the list. And
20 I know that you -- it is not your fault that you came late to
21 the party or the funeral, whichever it was.

22 MR. OLES: I appreciate that, Judge.

23 THE COURT: But your client still proceeded here on a
24 relatively late basis. And to add all of these witnesses who
25 are not in the pretrial order, I mean, we -- people -- normally

1 it is completely not allowed. And sometimes if there is
2 something that is exceptional that happens very close in time,
3 not -- you know, not at the conclusion of a trial that I learn
4 of this or towards the end, it is -- it is not permissible.

5 And it seemed like the subject matters that they were
6 going to be talking about also were beyond the scope of the
7 issues as identified by all counsel in the pretrial order and
8 in preceding matters.

9 So I don't see a basis for your calling these folks.
10 And I'm telling you now, because if there is something you want
11 to say, I want to give you the opportunity to say it. You can
12 say it now or you can say it after lunch.

13 MR. OLES: Does that include Ms. Voyles as well?

14 THE COURT: Well, she's not on the list, unless she's
15 the same person.

16 MR. OLES: I checked before I sent that and I thought
17 she was on the defendants' may call list in the pretrial order.

18 LAW CLERK: There was a Blake Voyles.

19 MR. RUSSO: Your Honor, it is a different person.

20 MR. OLES: Then I'm sorry.

21 MR. RUSSO: Blake Voyles, who is Ed Voyles, who is
22 down in Coffee County. Not Suzi Voyles.

23 MR. OLES: All right. I would like to do a proffer
24 then, Judge. But not right at this moment.

25 THE COURT: That's fine. You can give me a proffer

1 later.

2 MR. OLES: All right.

3 THE COURT: And if you would like, just for purposes
4 of -- to give yourself more time, we can start obviously the
5 testimony of the other folks. And if you want to give a
6 proffer later in the day, you can do that.

7 MR. OLES: All right. Thank you, Judge.

8 MR. McGUIRE: Your Honor, just I would like -- if I
9 may, on behalf of the Coalition Plaintiffs, I would like to add
10 one argument on this point, since this whole trial is -- at
11 this point a lot of people are concerned about making a record.

12 Coalition plaintiffs had a number of claims that were
13 excluded from the trial, from the scope of the trial, by the
14 summary judgment order at Document 1705. And that order was
15 entered on November 10 of 2023, which I believe was before this
16 separation happened in the plaintiffs' group.

17 In that order, the Court excluded from the scope of
18 the trial a number of things that my client, the Coalition for
19 Good Governance, wanted to try. Among those were ballot
20 secrecy, scanner settings, and paper backups of pollbook
21 information.

22 And the Court -- we were very happy with the way the
23 Court handled that. Because although we were unhappy that our
24 issues had been excluded from the scope, we read the Court's
25 order as -- as guarding our ability to take those claims to

1 other forums, such as state, administrative, or judicial
2 proceedings, without having to be concerned about adjudication
3 in this case against us on the merits, which would create
4 issues of collateral estoppel or res judicata.

5 And our concern with allowing the scope to be
6 expanded at this point is that if we are not prepared to go
7 forward on issues that we thought were out of the scope, we may
8 then get tangled up in issues of collateral estoppel and res
9 judicata down the road that could prejudice our ability to
10 pursue those claims.

11 And so we think it is a correct ruling to exclude
12 these things not only because of the disclosure issue but also
13 because it will avoid prejudice to us from our inability to
14 proceed with the claims that we wanted to try but were not able
15 to.

16 Thank you.

17 THE COURT: All right.

18 MR. BEDARD: And, Your Honor --

19 Harry, is my mic on?

20 COURTROOM DEPUTY CLERK: Yes.

21 MR. BEDARD: Thank you.

22 Echoing something that Mr. McGuire just said, we were
23 going to raise this -- whether you want to do this now or after
24 lunch, I'll leave it up to the Court -- about the proper scope
25 of rebuttal as well.

1 We would have an objection to Mr. Oles' witnesses.
2 Not just because they weren't in the PTO but because we think
3 they are outside the scope of proper rebuttal. But it is not
4 limited to just Mr. Oles' witnesses. We have some concerns
5 about the other plaintiffs' witnesses as well.

6 I don't know if you want to talk about, you know, our
7 discussion about setting the ground rules for what counts as
8 proper rebuttal either now or after lunch. But I wanted to
9 flag that as well.

10 THE COURT: Mr. Oles, maybe you could move back to
11 where you were sitting so I can just get a better clear view of
12 counsel. So let me swap you off on the front of this desk.
13 Okay?

14 MR. OLES: Judge --

15 THE COURT: Is there something more you want to say?

16 MR. OLES: I would like to respond to that if you
17 don't mind when he is through. Thank you.

18 THE COURT: All right.

19 MR. BEDARD: So again, Your Honor --

20 THE COURT: So what are the matters that you --

21 MR. BEDARD: What are the concerns? Yeah.

22 So this first kind of got raised to us, I believe it
23 was, yesterday when plaintiffs proposed some deposition
24 designations that they intended to introduce on rebuttal.
25 Though it is not limited to that. I think we have some

1 concerns about some of the potential witnesses as well.

2 And what it raised for us, I think, was a realization
3 that maybe we were having some different understandings from
4 the plaintiffs about what rebuttal is. So I went back, you
5 know, and looked at the case law on it.

6 And I have got a case here. I think the courts have
7 been pretty clear. I'll just read it -- read the citation for
8 the record. This is *Bell v. Progressive Select Insurance*
9 *Company*, 2023 WL 5940306. It is out of the Middle District of
10 Florida. It's just talking about what rebuttal is.

11 And this is particularly on star three, Page 3, but
12 it is throughout the case. That rebuttal -- the rebuttal
13 portion of a case is for two -- only for two purposes. One is
14 to respond to some issue that the defendants had an affirmative
15 burden of proof on -- if we had an affirmative defense, for
16 example, something like that -- or to respond to something that
17 is truly unexpected.

18 So what the Court says -- and I'll just read it here,
19 as a matter of first principle, a rebuttal -- in that context
20 they are talking about expert opinions, but it is -- I think
21 the principle is broader than that. A rebuttal -- rebuttal
22 evidence must address new, unforeseen evidence in the other
23 party's case or must address matters in which the opposing
24 party bears the burden of proof, such as an affirmative
25 defense.

1 It goes on to plaintiff's rebuttal again, expert in
2 that case, may not simply raise evidence that goes to the
3 plaintiff's prima facie case and logically belongs in their
4 case in chief, which is particularly true when a plaintiff
5 knows the defendant intends on contesting that issue.
6 Otherwise -- and this is quoting I believe from the Seventh
7 Circuit here. Otherwise the plaintiff could reverse the order
8 of proof in effect requiring the defendants to put in their
9 evidence before the plaintiff put in his.

10 So with those principles in mind -- and again, this
11 may be witness by witness as we get into this about who they
12 are intending to offer and for what purposes.

13 But given some of the deposition designations we have
14 seen and just some informal conversations about some of the
15 potential witnesses in rebuttal, we have concerns that some of
16 the stuff that is going to be coming in on rebuttal is really
17 stuff that should have been in plaintiffs' case in chief.

18 And, you know, I think rebuttal in this context, even
19 these principles laid out in this case, differs a little bit
20 from like a reply brief or a reply argument where you get to
21 kind of have the last word and rehabilitate your argument.

22 That is not the purpose of rebuttal testimony in the
23 rebuttal portion of the case I think as the principles laid out
24 in *Bell* make clear. So I just wanted to again flag that if we
25 could get some ground rules, I think, on the purpose of the

1 rebuttal portion of the case, which I think is raised again by
2 some of the things Curling, Coalition plaintiffs have
3 identified as potential rebuttal testimony.

4 But also I think Mr. Oles' proffer of potential
5 witnesses raises that same concern as well, at least to some of
6 them. So I wanted to start there.

7 If we want to go witness by witness at some point as
8 they come up, that is fine. But however the Court would like
9 to proceed.

10 THE COURT: Okay. Well, I think we probably should
11 take a break now and -- unless plaintiffs want to respond right
12 away. But otherwise, I'll have you -- listen to you before we
13 begin hearing the testimony.

14 MR. CROSS: I think we can respond now.

15 Your Honor, I think the way to do it is witness by
16 witness. We're only anticipating still two definite live
17 witnesses. Kevin Skoglund definitely; right?

18 MR. BROWN: Yes.

19 MR. CROSS: Who you have seen before.

20 Dr. Andrew Appel, who is in this case as a rebuttal
21 expert. He put a declaration in rebutting Dr. Juan Gilbert and
22 also addressed Dr. Adida on the audit issues.

23 They both would be quite short. And as we told them,
24 I'm not quite sure why we have this issue. We told them
25 several times Dr. Adida will -- or sorry Dr. -- I'm tired.

1 Dr. Appel will respond specifically to Dr. Adida and
2 Dr. Gilbert on testimony they had that, candidly, we did not
3 expect.

4 For example, just to give you one example, I think it
5 was either Dr. --

6 THE COURT: I don't need to hear the examples right
7 now --

8 MR. CROSS: Okay. That is fine.

9 THE COURT: -- that you didn't expect. I'm going to
10 take your representation about that.

11 MR. CROSS: And on the deposition designations, we
12 provided those on Monday, Your Honor. My recollection of them,
13 they are very tight. And again, they are responding to very
14 specific things. Your Honor will be able to read them.

15 I can give you an example of that from James Barnes
16 on two very discrete things. It is limited testimony from him
17 testifying that the ICC password, in fact, did work when it was
18 taken by the State and that his understanding was the State
19 took that equipment, including the ICC, since it was still
20 working because there was a concern it was compromised and it
21 couldn't be used in future elections.

22 That is direct rebuttal to Mr. Barnes and others who
23 have provided contrary testimony. So it is very tight. But
24 Your Honor can review it and consider whether we have gone
25 beyond the scope.

1 THE COURT: Okay. Let's take a break.

2 MR. BEDARD: I have responses to that, but I'm happy
3 to do that after the break, Your Honor.

4 THE COURT: All right.

5 MR. CROSS: Your Honor, just to flag for you -- we
6 can do it later. There is one other thing which was the
7 Fortalice 2019 report. Your Honor had asked us whether we
8 wanted to come back at some point and raise that.

9 Now that they have closed their case and put on all
10 the evidence, we think there is no basis in the record for that
11 to remain privileged. And we're prepared to address that when
12 Your Honor is ready.

13 THE COURT: All right. Was your response very quick?
14 I mean, I cut you off, but that is only because I thought --

15 MR. BEDARD: No. Sure.

16 I mean, I think we could -- it could potentially go
17 longer, depending on back-and-forth. I can preview it for you.

18 I think the issue for some of these -- for the James
19 Barnes' deposition designation, for example, a lot of that
20 stuff came out in their case in chief. They had Mr. Barnes on
21 the stand. They had other people on the stand. They knew that
22 that was going to be an issue.

23 So I think that is an example of something that it is
24 part of their case in chief to prove and to come up with their
25 theory of the case and why there is constitutional violation

1 here. I don't think it is anything unexpected what our
2 response was to that, particularly given deposition testimony
3 throughout the case.

4 So I don't think it counts as something unexpected
5 given the principles in *Bell*.

6 For Dr. Adida --

7 THE COURT: I thought he didn't -- did you go into
8 Dr. Adida? I thought you went into something else.

9 MR. CROSS: Dr. Appel will respond to Dr. Adida and
10 Dr. Gilbert.

11 MR. BEDARD: Yeah.

12 So I think the issue with Dr. Adida -- well, it is
13 twofold. I think the only subjects on which Mr. Appel -- what
14 Dr. Adida spoke to in his testimony that Dr. Appel could
15 possibly rebut, given his reports in this case, are things that
16 came out on cross-examination from plaintiffs.

17 If you recall when Dr. Adida was on the stand, there
18 was an extended discussion about the extent to which he could
19 testify. And I think the only times where it went into
20 something again that Dr. Appel can respond to because -- again,
21 correct me if I'm wrong. I don't believe any of his
22 declarations respond to Dr. Appel. They have been to Joseph
23 Kirk, Dr. Gilbert, Professor Gilbert.

24 I don't think -- and again, I'm happy to be
25 corrected. I don't think any of his declarations specifically

1 respond to Adida.

2 So my concern is that if plaintiffs are bringing
3 something out on Dr. Adida's testimony in their
4 cross-examination that we did not bring out on direct given
5 their objections to that, they shouldn't then be able to come
6 back and do rebuttal testimony on that. Because, again, that
7 is changing up the order of proof again.

8 THE COURT: Okay. I think I'm really --

9 MR. BEDARD: Fair enough.

10 THE COURT: I thought -- what was your -- was there
11 something you wanted to say, Mr. Oles?

12 MR. OLES: Well, I would like to respond to counsel's
13 assertions about what we're --

14 MR. BEDARD: And I haven't gone into details about
15 his, so if you want to take it after lunch.

16 THE COURT: We'll continue this up after lunch.

17 But I just want to know, from Curling plaintiffs -- I
18 don't know whether we've got this from anyone else here --
19 whether the Coalition's counsel are going to call anyone else.

20 But how long are we talking about?

21 MR. CROSS: Short. If we can largely rely on
22 Dr. Appel's CV, it gets even shorter, because we don't have to
23 walk you through his long background. And then it is
24 responding to what -- how many points, Christian?

25 MR. ANDREU-VON EUW: Three, maybe four.

1 MR. CROSS: Discrete points. And they are directly
2 responsive to what was testified to in court. That is it.
3 Dr. Adida said this --

4 THE COURT: Give me -- be prepared to give me an
5 anticipated time frame, amount of time.

6 MR. CROSS: Ten minutes is what we're anticipating.
7 20 max. And again, it depends on how deep we get into his
8 background. But if we can do the CV --

9 THE COURT: We're not going to get deep into his
10 background. They have had his --

11 MR. CROSS: I figured.

12 THE COURT: -- CV forever. I mean, I will take
13 judicial notice of it if I have to.

14 MR. BEDARD: That's fine. We can talk about it
15 during the break.

16 MR. CROSS: Thank you, Your Honor.

17 THE COURT: I just am leery that we'll spend more
18 time fighting about this than proceeding.

19 So you can take 50 minutes.

20 **(A lunch break was taken.)**

21 THE COURT: Let me say, to cut to the quick, I
22 appreciate the concern flagged by defense counsel as to the
23 scope -- as to the additional witnesses.

24 That said, of course, it is -- the very case cited,
25 *Bell v. Progressive Select Insurance Company*, by defense

1 counsel is a thoughtful, well researched, and put-together
2 opinion. And it, of course, recognizes what -- the Eleventh
3 Circuit instruction that this is something that falls really
4 solely within the discretion of the trial judge in determining
5 what is appropriate under the circumstances of the case.

6 And the factual circumstances in *Bell* are, of course,
7 also very quite significantly different than here. And there
8 is a very thoughtful discussion of other cases as well.

9 But I think that the -- without knowing precisely all
10 that will be raised, we would spend more time arguing about it
11 and dancing around this than it is worth.

12 I think that some of this is at least -- or perhaps
13 all of the proffered testimony is proper rebuttal as
14 represented by the plaintiffs' counsel.

15 I may turn out to be wrong but if we have to go
16 through every kind of part of it, did this -- when did
17 Mr. Barnes say this, did he say it in -- when called here or
18 when he was being examined, for instance, while he was -- had
19 been -- gave testimony the second time when he was called by
20 the State -- it goes back and forth -- it is going to be --
21 we'll spend all our time going through this. So I'm not --
22 that doesn't make sense.

23 This does not seem like an excessive amount of
24 testimony. Counsel all are superb counsel here, and I'm going
25 to rely on their judgment. They know -- everyone knows what

1 the -- what rebuttal testimony is. If I feel like I am being
2 abused in this process, I will let you know.

3 So it is not unexpected testimony either, which is
4 another factor in this circumstance. It is not undisclosed in
5 any regard. So this is not a big lift.

6 Was there something more you wanted to address to
7 make your record?

8 MR. OLES: Yes, Judge.

9 THE COURT: Go ahead.

10 MR. OLES: Thank you, Judge.

11 Judge, as the Court knows, I did get into this case
12 rather late. And my client was represented by other counsel.
13 He has contentions that that representation was not effective.
14 But I'm going to leave that issue to between him and his prior
15 counsel.

16 The only issue for me getting into this case was
17 whether or not the case that he expected to present after
18 having been part of this case for six years was actually being
19 presented to this Court so this Court had an opportunity to
20 weigh the facts and apply the law and decide whether or not he
21 qualified for relief.

22 That is what I have focused on attempting to do since
23 getting into this court. Of course, that doesn't mean I can
24 ignore the orders of the Court that went before me. As part of
25 what I did coming into the case was to take a very careful look

1 at Your Honor's order on summary judgment, the proposed
2 pretrial order that was agreed to between the counsel in the
3 case, and other orders in this case.

4 What I have asked to do in this case, it was only
5 after having considered and read your orders and finding that
6 the scope of relief that the Court was willing to -- or not the
7 scope of relief -- the scope of issues that the Court was
8 willing to entertain was defined by the Constitution and
9 whether or not the current Dominion BMD system, as defined in
10 the order, unconstitutionally burdened the plaintiffs'
11 fundamental right to vote under both the First and the
12 Fourteenth Amendment, at least with respect to preexisting
13 complaint, which was Coalition group, which my client was part
14 of.

15 That is what we have focused on trying to introduce
16 evidence concerning. I have the utmost respect for this Court.
17 But I believe that everything that we have tried to do has
18 fallen squarely within the definition of what the orders of
19 this Court have stated is properly before this Court.

20 The same with the issues that we have brought here
21 today. It was stunning to me that the issue of the QR code,
22 which is produced by the ballot-marking device that has
23 repeatedly been the focus of this Court, we are not being
24 allowed to address. That would seem inconsistent, to me, with
25 all of the prior proceedings in this courtroom.

1 And to suddenly -- to tell us now --

2 THE COURT: Let me ask you about this that I told you
3 that you couldn't produce anything about the QR code. I don't
4 think that is so. It is just -- as I understood what you were
5 wanting to do is produce witnesses who have never been
6 identified before.

7 So if I -- if you had a question about the QR code
8 that I missed, I am apologetic, because I do think it is within
9 the embrace. Obviously there are a number of focuses that
10 everyone has here. But you are -- but if you could tell me
11 exactly where I stymied you in pursuing that, I would
12 appreciate that for just purposes of the record.

13 MR. OLES: Yes.

14 Judge, simply with respect to the issue of the QR
15 code, it has previously been the testimony in here and the
16 Court has heard it considering that there has been a QR
17 signature mismatch error that has been present. It has been
18 alleged to have been present here in Georgia. It was -- there
19 was testimony elicited to the fact that it was the basis for
20 Tennessee having basically eliminated the use of their Dominion
21 system because of the problems that they experienced with it.
22 We previously put that report out of Tennessee into the record.

23 One of the witnesses that we were bringing here today
24 in rebuttal was going to offer testimony squarely upon that.
25 And his testimony was going to be that, yes, those QR code

1 signature mismatches were present in not just one precinct here
2 in Georgia, not just one county, but in every county in every
3 precinct in this State since the system was adopted.

4 I appreciate that the State would like to suppress
5 this information. But this information needs to be before this
6 Court so it can consider whether or not this system is
7 constitutionally infirm.

8 And this is not -- this does not need to be expert
9 testimony. These printouts that have been reviewed will show
10 that it says right in the audit logs, QR code mismatch error,
11 QR code mismatch error, repeatedly. And that when these things
12 hit that they stop functioning and then they short count the
13 votes.

14 THE COURT: Okay. What did you mean in this
15 connection with the signature? Because I'm not aware of a
16 signature -- you may be using the concept in a broader way than
17 I am understanding in connection with the QR code. Are you
18 just saying that because -- I'm really not 100 percent sure.

19 MR. OLES: It means that for one reason or another
20 that the scanner was not able to read the code that was
21 produced by the ballot-marking device.

22 And so the question is, at that point does it then
23 just kick out the vote and ignore it, as it did in Williamson
24 County, Tennessee, or does it come in here?

25 The net upshot of it would be that it would produce

1 undercounts. And so votes would not get counted when they hit
2 the QR code mismatch error.

3 And this goes to something that I fundamentally don't
4 understand about this case. If one is talking about whether or
5 not an airplane's wing is defective, one can bring in experts
6 to say, yes, that wing may fail under stress and under cold
7 temperatures. But I think better proof would be that that
8 airliner fell out of the sky and hit the ground. Then we don't
9 have a question.

10 And so what we are talking about is audit logs that
11 many people in this State have reviewed, that show that these
12 errors occur, and the State wants to sweep it under the rug.
13 And they don't want to do it.

14 So we have things like Mr. Evans coming in here and
15 saying, well, he thought it was 5.5-A but 5.5-B. The
16 individual that I would be bringing in today on rebuttal would
17 say, no, in Tennessee they used 5.5-A, the exact same system
18 that was here. It wasn't. And when they went to B, it was
19 fixed.

20 But when they were using A, which is what Georgia
21 uses, it results in signature code mismatches, which result in
22 undercounts.

23 THE COURT: But by signature you mean the QR code?

24 MR. OLES: The QR code, yes.

25 THE COURT: Okay. That's fine. That's why I wanted

1 to --

2 MR. OLES: Yes, Judge.

3 So for this -- you know, I do appreciate the fact of
4 not having disclosed these witnesses earlier. But some of this
5 information has only been developed relatively recently.
6 Others of it we weren't aware that these -- that we were going
7 to need additional witnesses until these things came up in the
8 testimony, Judge.

9 And then we have tried very hard to organize people.
10 I have five people sitting out here all waiting to testify.
11 Experienced poll workers that have been working the polls for
12 20 years that have been watching things that just want an
13 opportunity to be able to talk to this Court about what it is
14 that they are experiencing, because they believe that this
15 system is fundamentally flawed.

16 And it is denying them the constitutional right to
17 have their vote counted accurately and not diluted by overvotes
18 or undervotes or other such things.

19 So that is all that we are here asking for, Judge. I
20 do appreciate the fact that this Court has to control the
21 conduct of the cases before it. And I get -- I respect that
22 completely.

23 But, you know, we have tried within the time frame
24 available to bring this stuff as expeditiously as possible. I
25 have been open about what we're doing. I have been saying

1 since the -- day one that we stepped into this case we were
2 trying to get the actual evidence of what was going on here.

3 And I appreciate the courtesy and the leniency that
4 the Court has shown to us up to this point. But, Judge, this
5 is the time when it matters most. And we're here asking this
6 Court to be the person of anybody in this State that cares
7 about whether or not our Constitution is enforced when it comes
8 to our elections and not being swept under the rug because it
9 is politically embarrassing for them to have deal with it at
10 this point.

11 You know, if it shows that it should have been known
12 all along, well, then the chips are going to have to fall where
13 they may, Judge. So ...

14 THE COURT: Well, first of all, I want to thank you
15 for your professionalism and capacity to walk into a very
16 complex, long-going case and navigate it with both -- both
17 skill to the extent that -- you know, you obviously have lots
18 of skills. This is not your -- necessarily your area of
19 expertise and you've really done an extraordinary job in
20 listening and in just manifesting the highest level of
21 professionalism in dealing with a difficult situation that you
22 have been put into by taking this on at more than the 11th
23 hour. 23rd hour plus. So -- and I know that you are just --
24 you are trying to serve the interest of your client. So I
25 understand that.

1 And it is -- obviously, given the fact -- the volume
2 of lawyers and interests here, it is a very complicated thing
3 to handle at this point to -- because the Court has always
4 endeavored, in this case, because of the matter of public
5 concern, to be as open as possible and give everyone an
6 opportunity.

7 It is just hard, under these circumstances -- we are
8 moving towards the end of the fourth week of trial, to say we
9 should do this. I am not aware of the evidence that you're
10 talking about. And I don't know whether you have discussed
11 this evidence also with plaintiffs' counsel. I don't even --
12 you know, I don't know -- or with defense counsel. I don't
13 know what it is.

14 And -- but it is kind of also -- even though you have
15 done everything you could do professionally -- and you have --
16 it is unbelievably late to be raising this evidence, which I
17 have never heard of in the course of the case. And I've got in
18 front of me plaintiffs' counsel who have been very industrious.

19 It may be they haven't approached the case as you
20 might have. And from my perspective, as you say, in terms of
21 the order I issued, I consider the QR issue was part of the
22 case. I mean, that is -- or part of the claims. They may
23 have -- you know, the relief issue of what everyone ultimately
24 wants is something else.

25 MR. OLES: Judge, may I ask this?

1 I was going to do a written proffer on this. Would
2 the Court at least delay a final resolution of this until I can
3 get that in? I can finish that tonight, file it this evening.
4 If the Court would at least --

5 THE COURT: Sure.

6 MR. OLES: Okay.

7 THE COURT: You can make a written proffer tomorrow.

8 MR. OLES: All right. And then if I haven't
9 convinced the Court that it is the right thing to do, then
10 we'll live with that.

11 All right. Thank you, Judge.

12 THE COURT: All right.

13 MR. CROSS: Your Honor, if I could just very briefly
14 on this -- only because we do have our own appeal concerns on
15 this. To be candid, part of the concern that we've been trying
16 to protect against is that if we are fortunate to get relief
17 out of the Court, we have a big concern that that is going to
18 get attacked by multiple sides, because obviously there is
19 relief being sought here that we're not seeking and don't think
20 is in the scope of the case on scanners.

21 So the only thing that I would just say, just to make
22 sure our position is clear, is QR codes have clearly been the
23 scope of the case. I don't think it is fair to suggest that
24 that has been limited in any way. What I would say is a lot of
25 what Mr. Oles has just said, that all sounds to me like that is

1 case in chief.

2 And so what he wants to develop -- the only witnesses
3 I recall him identifying before trial that he wanted to bring I
4 think were Lenberg and Cotton. Not these others. And this has
5 been an important issue to him and his client. We've had
6 testimony on mismatch. This really should have been developed
7 in the case in chief.

8 And again, the scanners are not part of it.

9 And just so we're all clear on the relief, Mr. Brown
10 said it very eloquently in the November 2023 teleconference we
11 had with the Court when the issue came up. And he said the
12 remedy that we seek is no secret and that is a prohibitory
13 injunction on the BMDs.

14 At the high level, that is what we want. We think
15 there are sort of lesser things that Your Honor could do if you
16 didn't get there along the lines of what is in your summary
17 judgment brief. That is at the high level. And then the small
18 things. The scanners had never been part of that.

19 So I'll just say with that, Your Honor, I don't think
20 it is -- I don't see that there is any prejudice to Mr. Davis
21 here. And we are where we are because of decisions that were
22 made along the way by Mr. Davis.

23 THE COURT: Well, not -- all right.

24 MR. BEDARD: Your Honor, just briefly, in
25 five seconds. I agree with Mr. Cross that I do believe these

1 are case-in-chief-type witnesses.

2 I think our point was that argument also applied to
3 some of the things plaintiffs wanted too.

4 THE COURT: I got it.

5 MR. BEDARD: I understand your ruling on that. I
6 just wanted to make the record clear.

7 MR. CROSS: I thought we were in agreement.

8 MR. BEDARD: So close. So close.

9 MR. CROSS: We were so close.

10 MR. MCGUIRE: Your Honor, this is Coalition
11 plaintiffs.

12 THE COURT: Yes.

13 MR. MCGUIRE: I spoke about this before the break.
14 But I just wanted to be very clear that from our perspective
15 this is -- also it raises a legal issue for us if the scope is
16 expanded at -- in any way beyond what we were restricted to.
17 Because it will -- we are just concerned about the possibility
18 of some kind of waiver if stuff is able to come in now that was
19 beyond the scope of what we thought the trial was limited to
20 and we do not then put on the things that we wanted to put on
21 that we were restricted from putting on after the summary
22 judgment ruling, our concern would be that that would in some
23 way complicate our lives with res judicata and collateral
24 estoppel.

25 THE COURT: Well, I'm not allowing it. But he is

1 making a proffer. And, you know, I don't know what -- I can't
2 conceive right now of what the proffer -- and I have given,
3 first of all, Mr. Oles an opportunity to make more time so he
4 is not writing while he is listening. And that is obviously
5 trying to allow him an opportunity to do his best job.

6 I'm not saying I'm in any way inclined to change my
7 mind about this. Because I know you wanted more. Everyone
8 wanted -- there were lots of things that everyone wanted more
9 of. It is just late. And it is not Mr. Oles' fault.

10 I obviously have articulated the fact that I'm --
11 given the circumstances which I'm -- that were presented by the
12 point of the pretrial order that -- and that Mr. Davis wanted
13 to change counsel, and all of you agreed that he should have
14 that right, that I've tried to handle that with fairness and
15 respect, but also with the knowledge that we have a highly
16 developed lengthy case that has been going on forever, it feels
17 like. And that you-all had -- it was going to be very, very
18 difficult to do anything other than what was already on our
19 plate and required under the pretrial order.

20 And that is just -- and limited by the pretrial order
21 absent agreement of the parties to something else. So that is
22 what we're doing.

23 But I think that Mr. Oles has every -- has the right
24 to make a record. And I know -- heard lots of passionate
25 arguments that were thoughtful and, you know, I think he has a

1 right to make an argument. Whether I accept it is another
2 matter. But I think he has every right to make an argument and
3 make the proffer. So ...

4 MR. OLES: Judge, may I step out to release my
5 witnesses for the afternoon?

6 THE COURT: Yes. Thank you.

7 **(There was a brief pause in the proceedings.)**

8 THE COURT: I don't want to commence without Mr. Oles
9 here.

10 MR. TYSON: Your Honor, should we go ahead and get
11 Mr. Sterling?

12 MR. CROSS: We were going to do Mr. Skoglund first
13 just because he has a time commitment and it will be short.

14 MR. RUSSO: And, Your Honor, before we get started, I
15 know you've addressed this issue of rebuttal testimony. In
16 terms of -- I don't want to necessarily be standing up and
17 objecting and interrupting the testimony the whole time. But I
18 mean --

19 THE COURT: You can have a standing objection.

20 MR. RUSSO: Okay. Mr. Skoglund, he is being offered
21 for rebuttal testimony, my understanding is, with regards to
22 Dr. Gilbert and Dr. Adida. He has never been identified as a
23 rebuttal witness to Dr. Adida. He has given a declaration back
24 in 2019 regarding Dr. Gilbert. And I don't think he has ever
25 been offered as an expert in risk-limiting audits and several

1 other issues.

2 THE COURT: Is that what he was testifying about?

3 MR. BROWN: He is not.

4 THE COURT: He is not.

5 MR. RUSSO: Okay.

6 THE COURT: Mr. Davis, would you do me a favor and
7 just check with your counsel and see if he wants me to wait for
8 him to come in for this or will he be -- how much longer he
9 will be?

10 MR. DAVIS: Will do.

11 THE COURT: Thank you very much. And we'll just wait
12 until you get back.

13 MR. BROWN: I'm sorry, Your Honor. I didn't
14 realize ...

15 MR. OLES: I'm sorry.

16 THE COURT: No problem. Now have we lost Mr. Davis
17 too? That is something different.

18 **(There was a brief pause in the proceedings.)**

19 THE COURT: Mr. Oles, just as a matter of curiosity,
20 is the Tennessee report or study that you referenced -- has
21 that been published? Is that something accessible to the
22 Court?

23 MR. OLES: Has it been published --

24 THE COURT: Yes.

25 MR. OLES: -- publicly? Yes, it is publicly

1 available, Judge.

2 THE COURT: Well, if you would just send to counsel
3 and Mr. Martin what the citation to it is, I would appreciate
4 it.

5 MR. OLES: All right. I will, Judge. I believe we
6 did admit it into evidence --

7 THE COURT: I just don't recall.

8 MR. OLES: -- in Mr. Evans' testimony. But I will do
9 that.

10 THE COURT: All right. If you did, that is -- but
11 then tell me what it was proffered as or maybe --

12 MR. OLES: I will.

13 **THE PLAINTIFFS' REBUTTAL CASE.**

14 **(There was a brief pause in the proceedings.)**

15 Whereupon,

16 KEVIN SKOGLUND,

17 after having been previously duly sworn, testified as
18 follows:

19 DIRECT EXAMINATION

20 BY MR. BROWN:

21 **Q.** Mr. Skoglund, I would like to remind you that you are
22 still under oath.

23 Do you understand that?

24 **A.** I do.

25 **Q.** Mr. Skoglund, I want to ask you several very specific

1 questions on the incident in Northampton, Pennsylvania, last
2 November.

3 Okay?

4 **A.** Okay.

5 **Q.** You testified in detail in our direct case about the basis
6 for your understanding about the events in Northampton; right?

7 **A.** Yes.

8 **Q.** And you were --

9 THE COURT: There is an objection on the part of
10 counsel.

11 MR. RUSSO: Your Honor, I just want to object that
12 this is not rebuttal testimony. Northampton -- he discussed it
13 several times during his direct and in cross last week. You
14 know, it is not an opportunity to bolster the case in chief to
15 the extent Northampton was relevant to begin with. But I think
16 that is -- I just want to get this moving along.

17 THE COURT: All right.

18 BY MR. BROWN:

19 **Q.** Mr. Skoglund, I want to direct your attention very
20 specifically to two statements that were made by Dr. Gilbert
21 and Dr. Adida.

22 Are you with me?

23 **A.** I am.

24 **Q.** And both testified that the mistakes that appeared on the
25 BMDs in that jurisdiction were quickly detected.

1 Do you recall that testimony?

2 **A.** I do. I read it from the transcript.

3 **Q.** And is that correct?

4 **A.** That is not correct.

5 **Q.** And how so, sir?

6 MR. RUSSO: Your Honor, I'm going to object under
7 703. This is not helpful for the Court that we've heard about
8 Northampton and what kind of machines they used. And so I
9 don't see how this is rebuttal expert testimony.

10 MR. BROWN: Your Honor, I don't know what we need to
11 do to please the defendants. This is specific rebuttal
12 testimony. The defendants brought up the Northampton incident
13 first in this case in the direct testimony of Gabe Sterling.

14 And then we have responded to it. And we think it is
15 fair for Mr. Skoglund to correct the record based upon his
16 knowledge. And this will be very quick.

17 MR. RUSSO: Your Honor, Mr. Skoglund testified after
18 Mr. Sterling in their case in chief. And they discussed
19 Northampton with him. And this is -- this isn't even an expert
20 issue, at the end of the day, relevant to Georgia. They are
21 just disputing -- I mean, this is a back-and-forth over, I
22 guess, a fact issue who said what. But I don't see -- go
23 ahead, Mr. Brown.

24 MR. BROWN: I have -- hang on. I have five
25 questions, Your Honor. They will correct the record for Your

1 Honor. And it will show how it does relate to Georgia.

2 MR. CROSS: Your Honor, I would just direct Your
3 Honor -- we did have a chance to look. *Little v. Ford Motor*
4 *Company* -- yeah. *Little v. Ford Motor Company*. I have a
5 Westlaw site, 2017 WL 6994586, at Star 8. It is out of this
6 district, December 21st, 2017.

7 In the quick look we did, it looks to be directly on
8 point where the Court held that neither the rules nor the
9 Eleventh Circuit has defined or explained the scope of rebuttal
10 testimony. As the parties have not identified binding
11 precedent on this issue, the court is persuaded by other courts
12 in this circuit that have held that rebuttal testimony must
13 contradict or respond to specific contentions made by the other
14 party's experts.

15 Because in this case it was focused on experts. And
16 then it goes on more broadly. Rebuttal evidence --

17 THE COURT: All right. Just give me the decision.
18 I'm going to get the five questions.

19 MR. CROSS: That is the decision. The point is it
20 held if you are -- in that context, if you are rebutting
21 contentions by an expert, it is definitely in scope. And that
22 is what this is. It is what Dr. Appel will do.

23 THE COURT: All right. I'm going to let the five
24 questions. I'm going to tell you all you have got to be very
25 focused and I'm -- you know, you can keep on reasserting the

1 objections. But I don't want to spend all afternoon having
2 objections and having the same discussion. I made very clear I
3 was allowing it, it had to be very tailored. We just need to
4 move through it.

5 MR. BROWN: Thank you, Your Honor.

6 THE COURT: Thank you.

7 BY MR. BROWN:

8 **Q.** Mr. Skoglund, the question was, was the mistake in
9 Northampton discovered quickly?

10 **A.** So what happened in Northampton was that two of the
11 precincts -- according to the county, two precincts notified
12 them -- I'm sorry. I'm getting really bad feedback.

13 THE COURT: All right. You are having --

14 THE WITNESS: My own words come back at me loudly.

15 THE COURT: You can't hear yourself talk or you can't
16 hear the question?

17 THE WITNESS: I can hear myself quite loudly.

18 THE COURT: Something is very loud.

19 MR. CROSS: I think it is because these two
20 microphones probably are both on.

21 MR. RUSSO: Your Honor, I'll just go ahead and again
22 object that this isn't expert testimony that he is about to
23 give.

24 THE COURT: Are you seeking expert testimony or --
25 what are you seeking here? Let me ask you this. I mean, I'm

1 just trying to get, again, what specifically is he rebutting
2 and is it -- was it factual representations made by the other
3 experts or a mixture of fact and expertise? What is it that
4 you are rebutting? Just so that I get a prism for it.

5 You have preserved your objection.

6 MR. RUSSO: I was just about to respond to where I
7 think he is about to go and --

8 MR. BROWN: We were rebutting essentially factual
9 statements by their experts.

10 THE COURT: By their experts?

11 MR. BROWN: By their experts.

12 THE COURT: That was the predicate of what they were
13 saying?

14 MR. BROWN: Yes.

15 THE COURT: All right. Again, very quick. Because I
16 need to know the basis of what he is -- what is the foundation
17 for his testimony also.

18 MR. BROWN: Your Honor, my first question was his
19 background and that he established that in the first testimony.
20 I didn't want to repeat that.

21 MR. RUSSO: Your Honor, they did say it was Gabe
22 Sterling he was responding to when he first started. So that's
23 a fact. That is just a fact. It is not -- he's not responding
24 to an expert.

25 MR. BROWN: Mr. Russo, we are responding to expert

1 testimony in their direct case that was incorrect. The topic
2 of Northampton was introduced by Sterling in our case early in
3 the case. We explained the foundation for Mr. Sterling's
4 testimony by incorporating by reference his prior testimony
5 because I didn't want to go through that again. I have very
6 few questions of this witness.

7 THE COURT: All right. Go forward.

8 BY MR. BROWN:

9 Q. Can you explain to the Court how long it took the voters
10 in Northampton to detect the mistake and explain that for us?

11 A. The detection of the mistake -- I'm sorry. I'm still
12 getting the feedback.

13 Q. Well, can you try to talk anyway through the feedback? I
14 just have a couple of questions.

15 A. Let me try and turn my volume down.

16 THE COURT: Can you turn the volume down more?

17 BY MR. BROWN:

18 Q. Go ahead.

19 A. Okay. The detection happened unevenly. The counties said
20 that two precincts of 156 notified them of the problem. There
21 were other precincts that did not know about it until the
22 county sent out systemwide notice to all precincts about an
23 hour and a half into voting.

24 And during that time, some of those precincts heard by
25 word of mouth about problems happening in other precincts. But

1 it appears that two out of 156 noticed it.

2 And keep in mind, this was a countywide error that all
3 precincts were experiencing on every single ballot, not an
4 intermittent issue.

5 **Q.** And one other question, Mr. Skoglund.

6 The description by both Dr. Adida and Dr. Gilbert was that
7 the problem in Northampton was successfully resolved and was a
8 good example for how a BMD system is resilient and can overcome
9 problems that might arise on election day.

10 Was that the case?

11 **A.** That was their testimony. I have the exact opposite
12 opinion.

13 **Q.** And what is that?

14 **A.** So the way that some of the polling places had to deal
15 with the problem, some shut down voting entirely. And we don't
16 know if those voters returned or not. Some were told to vote
17 against their preference so that the printed ballot would be
18 correct. That turned out to be tragic because it was later
19 determined that the issue was that the barcodes were correct
20 and the human text was wrong. So those voters voted a vote
21 against their preference.

22 And then on top of that, at the end of the night when the
23 poll tapes came out, they also were reversed so that there was
24 no clear legal solution for what to do with the votes on the
25 results tapes that were, you know, opposite of what the -- what

1 they should have been.

2 MR. RUSSO: Your Honor, I'm going to object and move
3 to strike. This is everything that was in his report that --
4 it is the article that they put into -- they showed him during
5 his direct, the November 2023 article. That is everything that
6 has been hashed out already in this case.

7 MR. BROWN: Would you like to admit that into
8 evidence?

9 MR. RUSSO: I don't remember where we stood on it,
10 Bruce.

11 MR. BROWN: It is not admitted. But we can admit it
12 into evidence.

13 MR. RUSSO: Well, I think it is still not relevant.
14 It wasn't relevant then. It is about ES&S machines. So I
15 would maintain my same objection, but this is just --

16 THE COURT: Your objection is maintained. I
17 understand it.

18 May the witness -- do you have any questions of the
19 witness? I mean, first of all, are you through?

20 MR. BROWN: I am through. Thank you, Your Honor.

21 THE COURT: Do you have any questions, Mr. Russo?

22 MR. RUSSO: I have one question.

23 THE COURT: All right.

24 CROSS-EXAMINATION

25

1 BY MR. RUSSO:

2 Q. Mr. Skoglund, can you hear me?

3 A. I can.

4 Q. Isn't it true that the error that you have just described
5 was discovered or reported at 7:15 A.M. on the election day?

6 A. By two precincts out of 156, it was.

7 Q. And it was discovered by voters?

8 A. According to the county.

9 Q. And it was discovered by voters; correct?

10 A. I don't know who discovered it.

11 MR. RUSSO: No further questions. Thank you.

12 THE COURT: All right. May the witness be excused?

13 MR. BROWN: Yes, Your Honor.

14 THE COURT: Thank you very much, Mr. Skoglund. Thank
15 you for your patience also.

16 THE WITNESS: Thank you for letting me appear
17 remotely.

18 MR. CROSS: Your Honor, before we get to
19 Mr. Sterling, I did want to just revisit on how we want to
20 handle the 2019 Fortalice report. Only because if we are going
21 to get it, I don't know that we would have questions for
22 Mr. Sterling or not. We haven't seen it. So I didn't know if
23 we should take that up now.

24 MR. MILLER: Your Honor, I would respectfully suggest
25 we go ahead and get Mr. Sterling's testimony done. He has been

1 here waiting.

2 THE COURT: I think that is right.

3 MR. CROSS: Okay.

4 **(There was a brief pause in the proceedings.)**

5 THE COURT: We are waiting for Mr. Sterling; right?

6 MR. BELINFANTE: Someone went to get him, Your Honor.

7 THE COURT: All right.

8 **(There was a brief pause in the proceedings.)**

9 THE COURT: You feel like you're in Groundhog Day?

10 THE WITNESS: Yes.

11 Under oath; right? So yes.

12 THE COURT: You haven't been here for six and a half
13 years.

14 THE WITNESS: It just feels that way.

15 Whereupon,

16 GABRIEL STERLING,

17 after having been previously duly sworn, testified as
18 follows:

19 CROSS-EXAMINATION

20 BY MR. CROSS:

21 **Q.** Mr. Sterling, you understand you are still under oath?

22 **A.** Yes, sir.

23 **Q.** Okay. All right. I'm going to try to move through this
24 like a commando raid. Not at speed. In efficiency.

25 All right, Mr. Sterling. Do you understand that the

1 defense in this case and claims from the Secretary have been
2 that the voting system that exists today in the State of
3 Georgia is safe and secure; right?

4 **A.** Yes.

5 **Q.** Okay. And are you familiar with Theresa Payton who works
6 with Fortalice that works with -- or used to work with the
7 Secretary's office?

8 **A.** I know the name. I couldn't pick her out of a crowd.

9 **Q.** But you're familiar with Fortalice as a vendor that the
10 Secretary's office has relied on for cybersecurity and other
11 support?

12 **A.** Yes.

13 **Q.** Okay. And do you agree with Ms. Theresa Payton that there
14 are two things every American voter can be sure of, eventually
15 every vote you cast in a U.S. election will be electronic and
16 one of those elections will be hacked, no doubt about it?

17 **A.** I don't know the context and I am assuming it must be
18 somewhere in something I have seen before.

19 **Q.** But do you agree or disagree with Theresa Payton that
20 eventually a U.S. election will be hacked and there is no doubt
21 about it?

22 **A.** I guess it depends on what you mean by hacked and an
23 entire U.S. election or a contest. I'm not trying to parse
24 words with you. It is just a broad statement.

25 **Q.** Okay. All right. Changing topics.

1 We also heard testimony in this case that in late
2 September of 2022 your office replaced additional voting
3 equipment, the BMDs, and some other equipment in Coffee County.

4 Do you recall that?

5 **A.** Yes.

6 **Q.** And were you --

7 MR. BELINFANTE: Objection, Your Honor. This is
8 improper rebuttal. He already asked Mr. Sterling questions
9 about Coffee County on his cross-examination of him after my
10 direct.

11 MR. CROSS: Two quick points. I had discussed with
12 Mr. Belinfante before that we might actually do our entire
13 cross as redirect -- or sorry, as rebuttal so that we wouldn't
14 get into discussion -- a debate on what is cross and what is
15 rebuttal. So I think it is a little unfair to raise that now
16 since we agreed we could have done the whole thing on rebuttal.

17 In any event --

18 THE COURT: Ask the question, too, and I'll
19 determine.

20 Have a seat. I got your objection.

21 MR. BELINFANTE: I understand. I just wanted -- I
22 wanted the Court to understand that is not my understanding of
23 our agreement.

24 THE COURT: I'm not even thinking about your
25 agreement. I'm thinking about what I'm observing.

1 MR. BELINFANTE: Yes, Your Honor.

2 THE COURT: All right. Thank you.

3 BY MR. CROSS:

4 Q. The reason that that was replaced was because of the
5 breach in Coffee County involving Cyber Ninjas; right?

6 A. The reason it was replaced was because the perception from
7 the unauthorized access, yes.

8 Q. Involving Cyber Ninjas and others?

9 A. And SullivanStrickler, yes.

10 Q. Right. And were you aware that Maricopa County where the
11 Cyber Ninjas had access to equipment in Arizona -- that
12 Maricopa replaced that equipment in July of 2021?

13 A. I recall basically the media coverage of that. Yes. I
14 think that's correct. But I couldn't speak to what they did
15 exactly.

16 Q. All right. Changing topics again, I asked you earlier
17 about Butts County and whether there was a similar concern
18 about unauthorized access. You said you didn't recall it.

19 MR. CROSS: Tony, can you pull up PX Exhibit 632,
20 please?

21 MR. BELINFANTE: Same objection, Your Honor.

22 THE COURT: Overruled.

23 MR. CROSS: Go to the second page, please, Tony.

24 BY MR. CROSS:

25 Q. And do you see here Michael Barnes indicates on

1 December 22nd of 2020, that he had just gotten a call from
2 Butts County indicating that there was a request to do a
3 forensic -- to bring in a forensic analyst to inspect their
4 election management computer?

5 Do you see that?

6 **A.** Yes.

7 **Q.** And then if we come to the bottom of the first page --

8 MR. CROSS: Tony.

9 BY MR. CROSS:

10 **Q.** -- you see Ryan Germany responded this would be against
11 the law. And then indicates that would be a huge security
12 breach.

13 Do you see that?

14 **A.** Yes.

15 **Q.** And so my question to you is: Do you recall any
16 investigation into whether there was any unauthorized access in
17 Butts County?

18 **A.** No.

19 **Q.** Okay.

20 **A.** I don't recall.

21 **Q.** And you can see at the top this is an email you received
22 yourself on December 22nd of 2020; right?

23 **A.** Yes.

24 MR. CROSS: Your Honor, we move Exhibit 632 in.

25 MR. BELINFANTE: Objection. Two grounds. One,

1 improper rebuttal testimony.

2 Two, includes hearsay. The text of the email being
3 hearsay from Lieutenant -- well, then Senator Jones, now
4 Lieutenant Governor Jones.

5 And, three, the witness has indicated he does not
6 recall anything about any investigation, so I don't see the
7 relevance of the document anyway.

8 MR. CROSS: The statements from the senator, now
9 lieutenant governor, Your Honor, we would not offer for the
10 truth. All the other statements are folks at the Secretary's
11 office.

12 MR. BELINFANTE: Your Honor, then that speaks exactly
13 to why it is irrelevant. Because if their point is that there
14 was something that came in from Butts County but they are not
15 going to say whether it is true or not, what is it relevant as
16 to whether there was a call to Butts County or not?

17 MR. CROSS: Because the defense we have heard in this
18 case is that they did not -- they did what they did in May of
19 2021 because they didn't think that there was a legitimate
20 concern there. And it shows that -- how the State responds
21 whether a concern about unauthorized access is raised.

22 Whether it is true or not, our response is they have
23 a job to investigate and figure out whether it is true or not.

24 THE COURT: For whatever limited value it may have, I
25 will allow it in. And to the extent that it is hearsay,

1 obviously I will not pay any attention to it, the hearsay, for
2 the truth of the matter.

3 I'm sorry. Just one second.

4 **(There was a brief pause in the proceedings.)**

5 BY MR. CROSS:

6 **Q.** Quickly, Mr. Sterling. You testified earlier that one of
7 the factors that the Secretary's office considers within the
8 scope of election security is cybersecurity?

9 **A.** Correct.

10 **Q.** And do you recall that on January 26 of 2022, Governor
11 Brian Kemp asked Secretary Raffensperger to immediately gather
12 all relevant information regarding Dr. Halderman's 2021 report,
13 thoroughly vet its findings, and assure Georgians he is doing
14 everything possible to ensure the system, procedures, and
15 equipment are completely secure?

16 **A.** No, I don't recall that but I -- specifically, but there
17 was something like that around January or February.

18 But if you state that, I take it as true, yes.

19 **Q.** Just grab the binder in front of you and flip to Tab 10 if
20 you would and tell me if that refreshes your recollection.

21 MR. CROSS: Don't pull it up.

22 THE WITNESS: Tab 10 is a Tweet from Mark Niese. Is
23 that what you are talking about?

24 BY MR. CROSS:

25 **Q.** Yeah. I wasn't going to read it. Just you see he's got a

1 statement from Governor Kemp.

2 Does that refresh your recollection that Governor Kemp
3 made that statement on or around January 26 of 2022?

4 **A.** Yes.

5 I don't recall it from the time, but I know things like
6 that have been said. So -- it looks like it is dated properly.
7 So yeah.

8 **Q.** I'm sorry. It looks what?

9 **A.** It is dated properly. I assume this is probably all
10 correct. But I don't recall it from the real time, no.

11 **Q.** And do you recall that the Secretary released the report
12 the next day, on January --

13 **A.** No, I don't. I mean, I -- you are telling me that is the
14 case, sure. I don't -- but I don't recall it.

15 **Q.** Okay. All right. Flip to Tab 12, if you would, please.

16 Do you see State Defendants' Responses and Objections to
17 Curling Plaintiffs' Third Set of Interrogatories?

18 Do you see that?

19 **A.** Yes, sir.

20 **Q.** And we've heard a lot of testimony from the State about
21 efforts to secure the voting system.

22 If you turn to the very last page, do you see that there
23 is a verification from you on those responses?

24 **A.** Yes, sir.

25 **Q.** Okay.

1 MR. CROSS: Your Honor, we move Exhibit 633 into
2 evidence.

3 THE COURT: What is 633 again?

4 MR. CROSS: It is interrogatory responses. We've
5 talked about them quite a bit.

6 MR. BELINFANTE: And therein lies the objection, Your
7 Honor. It is improper rebuttal evidence if we have talked
8 about them quite a bit.

9 MR. CROSS: It is his verification. He is the
10 witness to confirm them to put them in as rebuttal evidence for
11 what we have heard from them.

12 MR. BELINFANTE: They had them on in their case in
13 chief. They waived the opportunity to do this. I'm not sure
14 why we are putting up witnesses and discussing things that
15 were --

16 THE COURT: You've got a standing objection. I have
17 said that everything that is coming in here you have a standing
18 objection for. I have recognized it.

19 If you want to list them, all the different ones at
20 the end, or if you want to list them now, you can.

21 MR. BELINFANTE: I didn't realize I had a standing --

22 THE COURT: But what I don't want us to do is spend
23 three times as long. I am -- I will ask, when I have heard
24 everything, counsel to explain a few things as to -- you know,
25 with this I'm not quite -- and I will just use this as an

1 example. Why it is being introduced now rather than later?
2 Why it is rebuttal rather than not? And I don't need -- you
3 know, the thing about -- I have a lot of discretion in this
4 area. But I would like to understand why it is rebuttal.

5 Go ahead.

6 MR. CROSS: Because he verified it, so he is the
7 witness to put it in with the verification. They did not cover
8 this topic on their direct today. So I was trying to avoid an
9 objection that I was beyond the cross or the cross is beyond
10 the direct. And this is directly rebuttal to their case. So
11 this would be the witness to do it with.

12 THE COURT: All right.

13 BY MR. CROSS:

14 **Q.** We're almost done, Mr. Sterling. Just a few more things.
15 Can you flip to Tab 16, please?

16 So one of the things we heard a lot about in the defense
17 case was what they knew and when in May of 2021 when they
18 learned about the Cyber Ninjas card.

19 I just want to ask you: Do you recognize Exhibit 191? Is
20 this something you have seen before?

21 **A.** I don't believe so.

22 **Q.** Okay.

23 MR. CROSS: Tony, can you pull up Exhibit 647?

24 THE WITNESS: Are we done with 16, sir?
25

1 BY MR. CROSS:

2 Q. Yes. We are, since you didn't recognize it.

3 Mr. Sterling, have you seen Exhibit 647? Again, this
4 September 7, 2023, notice from the Biden Administration.

5 A. I have not read it, but I am aware of its existence.

6 Q. And is this something that, to your knowledge, the
7 Secretary's office has taken into account in approaching
8 election security as you have defined that term?

9 A. Yes, sir.

10 MR. CROSS: Your Honor, we move Exhibit 647 in. It
11 is a public record from the President of the United States. It
12 is self-authenticating, and it is not hearsay.

13 MR. BELINFANTE: Respecting the standing objection,
14 Your Honor, the only thing I want to say to the Court is, given
15 the ground we are covering and certainly did not expect, the
16 State may need to bring on surrebuttal if this continues to go
17 on.

18 MR. CROSS: I don't have any further questions, Your
19 Honor.

20 Thank you, Mr. Sterling.

21 THE COURT: The date of this is -- the President's --
22 President Biden's memo is September 7, 2023?

23 MR. CROSS: Yes, Your Honor. And it extends the
24 state of emergency for at least a year.

25 THE COURT: With respect to foreign interference in

1 undermining the public confidence in the United States
2 elections. Okay.

3 MR. CROSS: Right.

4 THE COURT: Okay.

5 MR. CROSS: Including through the unauthorized access
6 of election infrastructure.

7 THE COURT: May the witness be excused?

8 **(There was a brief pause in the proceedings.)**

9 THE COURT: May -- I'm sorry. May the witness be
10 excused?

11 MR. CROSS: I have no further questions.

12 THE COURT: Did you have any?

13 MR. BELINFANTE: No, Your Honor, except we reserve
14 the right to call him on surrebuttal if we need to do so.

15 THE COURT: That is fine.

16 MR. BELINFANTE: Thank you, Your Honor.

17 THE WITNESS: I'm almost actually released.

18 THE COURT: Almost actually.

19 COURTROOM DEPUTY CLERK: 647, are you admitting that,
20 Judge?

21 THE COURT: What we just were seeing? Yes.

22 MR. ANDREU-VON EUW: And, Your Honor, we would call
23 Dr. Appel via Zoom.

24 COURTROOM DEPUTY CLERK: Please raise your right
25 hand.

1 **(Witness sworn)**

2 COURTROOM DEPUTY CLERK: If you would, please state
3 your name and spell your full name for the record.

4 THE WITNESS: Andrew Appel. A-N-D-R-E-W,
5 W-I-L-S-O-N, A-P-P-E-L.

6 Whereupon,

7 ANDREW W. APPEL PH.D.,
8 after having been first duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. ANDREU-VON EUW:

11 **Q.** Dr. Appel, what is your middle name again?

12 **A.** Wilson.

13 **Q.** Dr. Appel, I know we were having Zoom feedback issues. I
14 have discovered a mute button on this microphone.

15 Does it help?

16 **A.** Yes. The feedback is only when I'm talking. And when you
17 are holding the mute like that, there is no feedback.

18 **Q.** I'm glad we found a solution.

19 I just want to ask you about one thing Dr. Adida said when
20 he was on the stand.

21 Have you reviewed his testimony?

22 **A.** Yes, I have. I read the transcript.

23 **Q.** Okay. Do you recall when he said if 50 percent of voters
24 check their ballots things are pretty good because they are
25 going to catch errors and it is going to escalate really fast?

1 **A.** Yes, I recall that.

2 **Q.** Let me tear that into two pieces.

3 The first part of his statement, about 50 percent of
4 voters checking their ballots, is that assumption borne out by
5 the research?

6 **A.** No, it is not.

7 **Q.** What does the research tell you?

8 **A.** I'll point to two specific research studies. One made by
9 a political scientist, survey expert at the University of
10 Georgia. Haynes, I believe, is the name of the first author.
11 They observed voters in a Georgia polling place using the
12 current equipment. And they found that only 18.8 percent of
13 voters looked at their paper ballot for as long as five seconds
14 before feeding it into the scanner.

15 **Q.** Is there any research on whether five seconds is long
16 enough to verify a ballot?

17 MR. BEDARD: Objection, Your Honor.

18 THE WITNESS: Yes, there is.

19 MR. ANDREU-VON EUW: I'm sorry, Dr. Appel. There is
20 an objection. Please give the Court a second to rule.

21 MR. BEDARD: Yes, Your Honor.

22 I was hoping we could skip past this with doing the
23 CV, though Mr. Appel has not yet been proffered as an expert,
24 but I think it is very clear in his rebuttal report. He states
25 in Paragraph 11 I am not an expert on human visual recognition.

1 He can't testify about what is sufficient to verify a vote. He
2 can only testify about how long people are actually verifying
3 it. He says it in his own declaration.

4 We had this same issue with Dr. Gilbert when he was
5 on the stand. That would be my objection.

6 MR. ANDREU-VON EUW: Your Honor, he speaks at length
7 about voter verification in many of his submissions, most
8 notably Paragraph 62 to 80 of his expert report.

9 Though counsel is right, I neglected to introduce the
10 CV, so I would like to back up and do that.

11 MR. BEDARD: Again, I have got no problem with his CV
12 coming in. I think it is just to the scope of his expert
13 testimony.

14 THE COURT: What is the field of visualization?

15 MR. BEDARD: So he says in Paragraph 11 of his
16 declaration, I'm not an expert in human visual cognition, but I
17 can understand that this limited time spent by real voters may
18 be roughly consistent with findings in other studies.

19 The only work that Mr. Appel has done throughout his
20 declarations and throughout his report is to opine on how long
21 voters look at their ballot. I can obviously cross him on
22 that. That is fine.

23 But by his own limitation, he has said he does not
24 know how long is necessary to verify a ballot. He is simply
25 speculating based on other people's work and research and by

1 his own limitation.

2 So that would be the objection to the scope of his
3 testimony.

4 MR. ANDREU-VON EUW: Your Honor, I think Mr. Bedard
5 is splitting hairs. But to make things easy, I'll withdraw the
6 question.

7 THE COURT: The one that has been --

8 MR. ANDREU-VON EUW: Correct.

9 THE COURT: Withdraw the question then.

10 Thank you.

11 BY MR. ANDREU-VON EUW:

12 **Q.** Let me back up a second, Dr. Appel.

13 Last night, I sent you a document -- a copy of your CV
14 whose print date on the top left-hand corner is January 30th,
15 2024, 12:52 P.M.

16 Do you see that?

17 **A.** Yes.

18 **Q.** Is that an accurate copy of your CV?

19 **A.** Yes.

20 **Q.** Does it accurately reflect your professional
21 accomplishments to date?

22 **A.** Yes.

23 MR. ANDREU-VON EUW: Your Honor, I move to move this
24 in as PX 644 and to admit Dr. Gilbert -- excuse me, Dr. Appel
25 as an expert on election security and voter verification.

1 MR. BEDARD: Well, first off, Christian, it is this
2 one? This same one?

3 MR. ANDREU-VON EUW: Yes.

4 MR. BEDARD: Okay. No objection to his CV coming in,
5 Your Honor. I would object again to the categorization of
6 Dr. Appel as a voter verification expert given the
7 conversation --

8 THE COURT: I'm not sure what voter verification
9 means, frankly -- voter verification expert. So ...

10 MR. ANDREU-VON EUW: On the research regarding how
11 often voters look at their ballots, how frequently, how long.

12 THE COURT: Okay. You just withdrew a question that
13 related to the same issue. So you need to -- either lay a
14 foundation for what the expertise he brings to it, because
15 I'm -- because you just withdrew the question when it was
16 objected to with another name. So I'm -- you're confusing me.

17 MR. BEDARD: Maybe I can -- just based on what
18 Mr. Andreu just said -- and maybe we can have an agreement on
19 here. If by voter verification Mr. Andreu and Dr. Appel mean
20 how long a voter looks at their ballot, then that is fine. I
21 can cross-examine him on that.

22 If it goes beyond that to what is sufficient or
23 necessary to verify a ballot, that is where my objection is.

24 So if we're on the same page, then I think that is
25 fine.

1 MR. ANDREU-VON EUW: I don't have any questions on
2 that second topic as of now, Your Honor.

3 THE COURT: All right. I accept -- you're
4 proceeding.

5 MR. BEDARD: Just, again, for the record, I know we
6 have a standing objection as to the --

7 THE COURT: You do have it, and everyone is
8 reasserting it every five minutes. So let's not keep on
9 reasserting it. Thank you.

10 A standing objection is meaningless if we have to
11 reassert it every five minutes or maybe every two minutes or
12 every one minute. Let's go on.

13 MR. BEDARD: Fair enough.

14 BY MR. ANDREU-VON EUW:

15 **Q.** Dr. Appel, turning to the second half of Dr. Adida's
16 statements where he said things are pretty good because they
17 are going to catch errors and it is going to escalate very
18 fast, have you personally conducted any peer-reviewed research
19 on the topic of error detection and what can be done, in the
20 context of voting?

21 **A.** Yes.

22 **Q.** Can you please describe your research?

23 **A.** My research was published in the Election Law Journal
24 2020 -- excuse me. I'm going to reduce my speaker volume. I
25 see you have turned on mute.

1 And it discusses what protocols can be used if some voters
2 detect that the votes printed on the paper ballot coming out of
3 a ballot-marking device are not the same as the ones that they
4 indicated on the touch screen.

5 And our analysis is predicated on the fact that not all
6 voters verify, that is not all voters carefully inspect the
7 paper ballot that comes out of the ballot-marking device.

8 So the subject that we addressed in that research is what
9 are the consequences of that for the accuracy of the outcome of
10 the election.

11 MR. BEDARD: Your Honor, just quickly object to the
12 scope of his testimony. There is obviously norm-laden words in
13 there about carefully or sufficiently inspect or -- I would
14 have to go back and look at the exact adjectives. But that is
15 I think the issue and the line here, Your Honor.

16 THE COURT: I'm going to allow him to proceed. You
17 can make motions afterwards. I can always strike things. I
18 just am trying to let folks -- you want to get this trial
19 through with this week. We can't persist this way because we
20 won't finish. You will have all that -- you can give me a list
21 of your objections like this. And I understand you have an
22 obligation to your clients. But we have to move forward.

23 BY MR. ANDREU-VON EUW:

24 **Q.** Can you describe your findings, please, Dr. Appel?

25 **A.** Yes. I'll describe them by means of example, but --

1 THE COURT REPORTER: I couldn't get --

2 BY MR. ANDREU-VON EUW:

3 Q. Could you start over Dr. Appel? We couldn't get --

4 A. I'm sorry. Can you repeat what you just said?

5 Q. Can you please start over?

6 A. Yes.

7 We studied the question of suppose hypothetically a
8 ballot-marking device were systematically altering the votes in
9 some contest on the ballot from candidate A to candidate B.
10 And suppose that it was altering some fraction of the votes,
11 for example, five percent. And suppose some proportion of the
12 voters inspect their paper ballots carefully enough to notice
13 that what is printed on the paper is not what they selected and
14 confirmed on the touch screen. Suppose, for example,
15 seven percent.

16 We studied what is the consequence of that for the
17 election. And the first consequence is that if you multiply
18 five percent times seven percent, you find that one out of
19 every 300 voters approximately will notice and perhaps inform
20 the poll worker that what is on the paper is not what they
21 selected on the screen.

22 And what the poll worker is supposed to do is tell the
23 voter that is all right, we can void that ballot and you can do
24 it again. And let's assume that the poll worker does what they
25 are supposed to do in that circumstance.

1 Then we find that that voter can correct their vote. But
2 the 93 percent of voters or whatever other proportion it is
3 that don't inspect their ballots carefully enough to notice
4 that there is one vote different from what they marked on the
5 screen will have their vote illegitimately altered by the
6 ballot-marking device. In this case, for example, 5 percent
7 times 93 percent, so about four and a half percent of the
8 votes, which is enough to swing an election if the margin of
9 victory is closer than something like 54-1/2 percent to 45-1/2
10 percent.

11 And you might think that, well, at least some voters did
12 detect that the ballot-marking device is altering their vote so
13 the hack is detected and everything will be okay, that you can
14 escalate something in some way. But that is not the case,
15 actually.

16 If a few voters -- let's say one out of every 300
17 voters -- informs the poll worker in a given polling place or
18 in every polling place in the county that what is marked on the
19 paper is not what they indicated on the screen, there is no way
20 for the voter to prove that to the poll worker. The voter
21 might indeed be mistaken about what they marked on the screen.
22 The voter might, in fact, be lying about what they marked on
23 the screen.

24 So it is inappropriate for an election official to, you
25 know, cancel the results of an election because a few voters

1 indicate that what they read on the paper is not what was
2 marked on the screen.

3 So even though it may be the case that some voters did
4 detect the hack, they have no way of proving it to anyone and
5 there is no consequence, there is no way to correct the outcome
6 of the election. And a risk-limiting audit or any inspection
7 of the paper ballots will not correct it either. Because the
8 fraudulent votes are already marked onto the paper ballots,
9 except for those small portion of voters who are careful enough
10 to inspect their ballots.

11 **Q.** Thank you, Dr. Appel.

12 I want to go back to where we started because you started
13 answering a question. You said you were going to point to two
14 research studies with regard to Dr. Adida's 50 percent
15 estimate.

16 In all the back-and-forth, we never got to the second one.
17 Can you tell us what that was?

18 **A.** The second one is by Matthew Bernhard and a few other
19 authors and Alex Halderman conducted at the University of
20 Michigan in which they took a real ballot-marking device but
21 not in a real election and deliberately hacked it so that it
22 would alter one contest on the ballot from what the voter
23 marked.

24 And they set up in a public library in Ann Arbor,
25 Michigan, and they asked citizens passing through if they would

1 like to try out a new voting machine. The ballot was the same
2 as a very recent election in that very city. So these are
3 voters familiar with the candidates on the ballot. The voters
4 marked their ballot on the touch screen. The touch screen was
5 hacked to deliberately change one vote on the ballot among the
6 very -- among the several contests and they measured how many
7 voters mentioned this to the poll worker.

8 And they also measured what kinds of interventions, such
9 as better signage would improve the rate at which voters
10 mentioned seeing an error to the poll worker.

11 And they found that without intervention about six percent
12 of the voters, or seven percent, would notice the error and
13 mention it. And with better signage they could raise that by
14 about half a percent. By better signage and a verbal reminder
15 from the poll worker, they could raise it to about 12 percent
16 of the voters, you know, noticing and reporting that something
17 was wrong on their ballot.

18 And the only intervention that they found was
19 substantially better than that was to have the voter -- to give
20 the voter a cheat sheet, you know, a premarked ballot. Some
21 studies refer to this as a slate, but it is a piece of paper
22 with all the selections made on it and they would use this
23 piece of paper when operating the touch screen and they would
24 use this paper again when checking the paper ballot.

25 And the slate by itself wasn't actually enough to

1 guarantee a really good rate of verification. The slate plus a
2 verbal reminder by the poll worker helped somewhat. And then
3 they had to tweak exactly the language of the verbal reminder.
4 And it turns out that signage plus the voter having a premarked
5 paper plus exactly the right verbal reminder from the poll
6 worker could bring the rate of detection up to something like
7 85 or 86 percent.

8 **Q.** So just to make sure I understood, the only way to get the
9 rate of detection above 20 percent was to give a voter a
10 premarked paper ballot to take with them and give them just the
11 right instruction; is that correct?

12 **A.** That is what the Bernhard study found.

13 MR. ANDREU-VON EUW: Thank you. I have no further
14 questions, Dr. Appel.

15 MR. BEDARD: Your Honor, just briefly. Again, for
16 the record I don't know when you --

17 THE WITNESS: You are muted so I can't hear you.

18 MR. BEDARD: Yes, I know, Dr. Appel. Sir, I was
19 talking to the Court. I didn't want you to get too much
20 feedback.

21 I don't know when you want me to raise this. I would
22 move to strike his testimony to the extent he opines on
23 election administration and what Georgia election
24 administrators can or cannot do in response to, you know,
25 allegations from voters.

1 Also, to the extent he is talking about, again, the
2 sufficiency of time necessary for voters to verify their
3 ballots.

4 And then, of course, on the rebuttal piece just to
5 the extent the Halderman -- the Bernhard-Halderman study was
6 discussed at length and Dr. Halderman's testimony when he was
7 here on their case in chief. So I'll just move to strike now.
8 I don't know if you want to take that up later but I figured I
9 would make that on the record now.

10 THE COURT: Thank you.

11 CROSS-EXAMINATION

12 BY MR. BEDARD:

13 **Q.** All right. Dr. Appel, can you hear me?

14 **A.** Yes.

15 **Q.** Okay. Great. My name is Ed Bedard. I'm a lawyer for the
16 State here. We have haven't had a chance to meet. I
17 appreciate you being here. Just want to -- a few quick
18 questions.

19 MR. BEDARD: I apologize, Your Honor.

20 BY MR. BEDARD:

21 **Q.** I want to start with the Georgia study that you
22 referenced.

23 That study was not peer-reviewed; correct?

24 **A.** The one from the University of Georgia?

25 **Q.** Correct.

1 **A.** I have no knowledge that it was peer-reviewed.

2 **Q.** Okay. I believe you said -- and correct me if I'm wrong.
3 I think you said only 18.8 percent of voters reviewed their
4 ballots in that study? Is that what you saw?

5 **A.** For five seconds or more.

6 **Q.** For five seconds or more.

7 But in that study, 80 percent of voters did review their
8 ballots at the voting booth, correct, of varying lengths of
9 time?

10 **A.** I think you're mischaracterizing what I said. But I can
11 refer to the study if you want.

12 **Q.** Sure. Let's --

13 MR. BEDARD: Jim, can you pull up Plaintiffs'
14 Exhibit 51, please? Let's go to Page 4 in the PDF. It is
15 Page 3 on the bottom.

16 Harry, can you share a screen with the witness? I
17 don't know how the --

18 THE WITNESS: I have a copy of that.

19 BY MR. BEDARD:

20 **Q.** Sure.

21 I just want to make sure we're looking at the same thing
22 for the record.

23 Okay. Do you see Plaintiffs' Exhibit 51 in front of you?

24 **A.** Yes.

25 **Q.** And do you recognize that document?

1 **A.** Yes.

2 **Q.** That is the Georgia study you were talking about; correct?

3 **A.** That is correct.

4 MR. BEDARD: All right. Let's go to Page 4 in the
5 PDF, Page 3 of the study.

6 Can you highlight that paragraph underneath voter
7 behavior at the voting booth?

8 And can you highlight the second sentence there?

9 BY MR. BEDARD:

10 **Q.** That sentence there says the results of our analysis
11 indicate that 80.1 percent of the voters observed checked their
12 ballot compared to a fifth, 19.9 percent, who did not; correct?

13 MR. ANDREU-VON EUW: Object. That misstates the
14 evidence.

15 I withdraw. I'm sorry.

16 BY MR. BEDARD:

17 **Q.** That is what the study says, correct, Dr. Appel?

18 **A.** That is what it says.

19 MR. BEDARD: Thank you. You can take that down, Jim.

20 BY MR. BEDARD:

21 **Q.** Let's go to your paper on BMD ballots that you reference.
22 And I think we've seen this a few times come up -- come up a
23 few times in this case.

24 In that paper, you said that you studied the possible
25 outcomes or consequences of voters raising an issue to election

1 administrators; correct?

2 **A.** Yes.

3 **Q.** Let's turn -- can you pull up -- well, actually before we
4 get there. In that study, though, for that section of your
5 paper, you did not cite any other studies, did you?

6 MR. ANDREU-VON EUW: Objection. Vague.

7 THE WITNESS: I'm not sure what section you are
8 referring to by that question.

9 BY MR. BEDARD:

10 **Q.** Let me back up. I'll come there first.

11 First, you didn't review any real world situations in
12 writing this paper; correct?

13 **A.** Part of what we studied was the observation of voter
14 behavior using BMD in a polling place just for the observation
15 that most voters do not carefully review their ballot.

16 **Q.** Again, I'll --

17 **A.** And our paper is a study of the consequences of that.

18 **Q.** Sure.

19 Did you characterize it as you were studying the
20 consequences of that?

21 **A.** We were analyzing the consequences.

22 **Q.** Analyzing.

23 What did you analyze in analyzing the consequences of
24 that?

25 **A.** We considered actions that election administrators could

1 take if voters detect that the ballot-marking device is
2 mismarking their ballot.

3 **Q.** But you didn't study any actual election procedures;
4 correct?

5 **A.** We were analyzing what election procedures could possibly
6 work.

7 **Q.** Could possibly?

8 **A.** Could possibly work to correct the problem if a
9 ballot-marking device is mismarking a fraction of the ballots.

10 **Q.** But again, you didn't study any actual election procedures
11 for that situation in the real world; right?

12 **A.** No. In part because at the time we did that study we
13 couldn't find any written election procedures --

14 COURT REPORTER: I'm sorry. The last three or four
15 words --

16 THE COURT: Can you state --

17 THE WITNESS: We could not find written election
18 procedures from any state who handled that situation.

19 BY MR. BEDARD:

20 **Q.** Did you talk to any election administrators?

21 **A.** I have talked to many administrators over the last
22 20 years.

23 **Q.** You didn't cite any of them in this paper though; right?

24 **A.** That's correct.

25 MR. BEDARD: Can we pull up Defendants' Exhibit 1041,

1 Jim?

2 BY MR. BEDARD:

3 Q. Let's go to page -- first off, is this the paper you were
4 referring to, Dr. Appel?

5 A. This seems to be the February 14 version of the paper.

6 Q. Fair enough.

7 This was a later version? You had an earlier version of
8 this; right?

9 A. Yes.

10 Q. Okay. So -- and correct me if I'm wrong. Is this the
11 most up-to-date version of the paper?

12 A. This is very close to the most up-to-date version.

13 Q. Okay. Any changes after this were fairly minor?

14 A. Or just, you know, made by the copy editors.

15 Q. Typographical sorts of edits?

16 A. Right.

17 MR. BEDARD: I believe this has already been entered
18 into evidence. But somebody correct me if I'm wrong.

19 MR. ANDREU-VON EUW: Would you give me a copy,
20 please?

21 MR. BEDARD: Yes.

22 **(A discussion ensued off the record.)**

23 MR. BEDARD: Your Honor, are you okay with looking on
24 the screen? Or I can give you 1041, which I don't think --

25 MR. ANDREU-VON EUW: I have a copy for the Court.

1 MR. BEDARD: Okay. You got a copy. There we go.

2 All right.

3 BY MR. BEDARD:

4 Q. Apologies for the delay there, Dr. Appel. As you can
5 imagine there is a lot of paper floating around here.

6 Let's turn to -- first off, this is the December 27, 2019,
7 version of that paper we were just discussing; correct?

8 A. Yes.

9 Q. Okay. Let's turn to Page 11 -- yeah. Page 11 of the
10 report. This is the section of the report where you talk about
11 the possible contestability of a BMD-style election; correct?

12 A. Yes.

13 Q. And this is the section of the paper that you were
14 referring to earlier?

15 A. No. You were referring to some section of the paper.

16 Q. I'm sorry. In your direct, though, with Mr. Andreu about
17 why a BMD-style election isn't contestable, this is the section
18 of the paper you were talking about; correct?

19 A. Yes.

20 Q. Okay. So I want to go through --

21 THE COURT: I'm sorry. What tab is it in?

22 MR. BEDARD: This is Tab 12.

23 THE COURT: All right. Thank you.

24 MR. BEDARD: Just to make sure we're looking at the
25 same thing, Your Honor, you have got the December 27th paper?

1 THE COURT: Yes.

2 MR. BEDARD: Okay. Great. Thank you.

3 BY MR. BEDARD:

4 Q. Okay. So I want to talk about the first -- again, just
5 briefly. The first section of this -- the first section of
6 this section -- first subsection talks about the studies that
7 you referenced before, right, about where voters -- that
8 studied the length of time that voters looked at their ballots
9 after casting them; right?

10 A. This one is referring to a different study done in 2018 by
11 researchers from Georgia Tech. It has later been confirmed by
12 other published studies, such as the --

13 COURT REPORTER: I didn't get the last sentence.

14 THE WITNESS: It has later been confirmed by other
15 studies, such as the one from the University of Georgia by
16 Haynes and another author that we were discussing earlier.

17 BY MR. BEDARD:

18 Q. Just briefly, that 2018 study you referred to, that was
19 one that was commissioned by the Coalition for Good Governance
20 and involved volunteers from the Coalition for Good Governance
21 collecting all of the data; correct?

22 A. I don't know. It was written by DeMillo, Kadel, and
23 Marks.

24 Q. And the Marks of that study is Ms. Marilyn Marks; correct?

25 A. Yes.

1 Q. And that came out in 2018 while this litigation was going
2 on?

3 A. Yes.

4 Q. Okay. Thank you.

5 All right. So the first section, as you talked about,
6 covers those studies that talked about the amount of time
7 voters looked at their ballots in those studies; correct?

8 A. The first study --

9 COURT REPORTER: I can't hear.

10 BY MR. BEDARD:

11 Q. Sorry, Dr. Appel. Can you slow down and repeat it for the
12 court reporter? I think you broke up a little bit.

13 A. Sure.

14 I studied two studies, one cited here as Reference 13 is
15 about the amount of time voters spent looking at the ballot.
16 Second study cited here is Reference 7 is the study by Bernhard
17 and Halderman and others which was not about the amount of
18 time. It was about the proportion of voters that actually did
19 catch an error when it was printed onto their ballot.

20 Q. Fair enough and fair distinction. I'll come back to that
21 in a second.

22 The second half of this section though where you move into
23 the contestability piece, you don't cite any other studies;
24 correct?

25 A. That is right. This is new computer science analysis.

1 Q. And by analysis, you just mean your own opinion; right?

2 A. My own opinion?

3 Q. Well, you don't -- let me rephrase.

4 A. The analysis -- the analysis speaks for itself to readers,
5 including other scientists, including peer reviewers. The way
6 we do this kind of science is we explain the analysis that
7 forms our opinions in a way that others can understand and
8 reference it.

9 Q. Maybe I can get at this a different way, Dr. Appel. You
10 didn't cite any authorities in this section of the piece;
11 right?

12 A. No. This is new science.

13 Q. And by new science, again, you haven't cited any studies,
14 any other authorities; right?

15 MR. BROWN: Asked and answered.

16 THE COURT: It is asked and answered.

17 THE WITNESS: Not for this result.

18 MR. BEDARD: Fair enough. I think you understand my
19 point, Your Honor.

20 BY MR. BEDARD:

21 Q. All right. This -- the Bernhard-Halderman study, again
22 just briefly, that was not a real world scenario; right? You
23 said that earlier?

24 A. It was not done during an election in a real polling
25 place.

1 Q. And it used -- well, let me back up. Are you aware of any
2 real world scenarios in which -- let me rephrase that.

3 You are aware of the events in Northampton, Pennsylvania;
4 right?

5 A. Yes.

6 Q. And you are aware that in that circumstance in a
7 down-ballot race that likely many people weren't paying that
8 much attention to --

9 MR. BEDARD: No offense, Your Honor, it was a
10 judicial election.

11 BY MR. BEDARD:

12 Q. But that voters still noticed within 15 minutes of the
13 polls opening; correct?

14 A. Nothing there is inconsistent with the concept that only
15 like seven percent of voters would notice an error printed on
16 the ballot. That of the many, many precinct polling places in
17 that county, voters can (Zoom interference). This is entirely
18 consistent with the findings of the Bernhard study --

19 COURT REPORTER: Judge --

20 BY MR. BEDARD:

21 Q. Sorry, Dr. Appel. Can you start over again? The court
22 reporter wasn't catching you.

23 THE COURT: It is just breaking up so much. Can we
24 start again? Would that help? I mean -- I don't mean having
25 you do everything.

1 But is it the line? Should we just try to do -- is
2 there any -- what are you saying? That you don't think it is
3 going to work?

4 **(A discussion ensued off the record.)**

5 MR. BEDARD: I may -- Mr. Andreu mentioned muting the
6 mic while he is talking may help. We'll see. I only have a
7 few more questions. So if we can soldier through. If it
8 becomes an issue, I'm happy to --

9 THE COURT: Well, if you didn't get the last -- his
10 answer to the last question, you have to do it again.

11 MR. BEDARD: Sure.

12 Actually, Your Honor, I'll withdraw and be done.

13 One piece of clarification. I know we handed up the
14 binder to you. Tab 12 is already in evidence. But the rest of
15 it, I don't know if it is or not. So --

16 MR. RUSSO: It is not.

17 MR. BEDARD: Is it not. So I didn't want to suggest
18 that that binder stay in the record for Your Honor. It was
19 just for reference.

20 THE COURT: But we have his -- we have --

21 MR. BEDARD: Yeah. That was already in. And I don't
22 need the version. That version is fine.

23 THE COURT: But you put his vita in. Not you, but
24 the plaintiffs' counsel.

25 MR. BEDARD: Yes, they did.

1 (A discussion ensued off the record.)

2 REDIRECT EXAMINATION

3 BY MR. ANDREU-VON EUW:

4 Q. Dr. Appel, just what is the difference between the older
5 version of the study we were talking about and the newer
6 version we were talking about?

7 Excuse me. The newer version you were asked about. Go
8 ahead.

9 A. I think the only material difference is the addition of a
10 new section regarding parallel testing.

11 MR. ANDREU-VON EUW: Your Honor, we just move that
12 into evidence for completeness because we have an incomplete
13 study so far.

14 THE COURT: What does parallel testing mean?

15 BY MR. ANDREU-VON EUW:

16 Q. Dr. Appel, did you hear the Court's question?

17 A. Yes, I did.

18 Some people have suggested that you could mitigate the
19 problem of BMDs mismarking ballots by trying to test them. And
20 it is well understood that testing them before election day is
21 not going to be effective because these machines know which day
22 it is. They have a real time clock, and they will easily be
23 programmed not to cheat on election day.

24 So the concept of parallel testing was the idea that you
25 could take some machines out of service and test them on

1 election day during the election day. That has been proposed.
2 We analyzed it and found that it would be impractical and
3 ineffective.

4 MR. BEDARD: Your Honor, I just move to strike all
5 that. I think it is outside, one, the scope of direct and his
6 opinions in the case.

7 And to Mr. Andreu's point, which elicited that, I
8 don't think there is a completeness issue because the only
9 thing we were talking about was Section 3 of that paper. I
10 understood Dr. Appel to say nothing substantively changed --

11 MR. ANDREU-VON EUW: No.

12 MR. BEDARD: -- other than typographical edits to
13 that section.

14 I would be happy to be corrected. Again, I was
15 prepared to use 1041, which was the newer version, but only
16 used whatever number that was because it was already in
17 evidence. I didn't want to be duplicative, but ...

18 MR. ANDREU-VON EUW: Your Honor, we're fine with the
19 existing exhibit already in evidence.

20 THE COURT: You are fine with it? All right.

21 Well, I have just a different question. Which was
22 not much of one. It is just simply, defense counsel asked you
23 some questions about the contestability or -- section of your
24 report.

25 MR. ANDREU-VON EUW: Your Honor, I think you might be

1 muted.

2 Dr. Appel, did you hear the Court's questions?

3 THE WITNESS: No. You were muted, but I can read it
4 from the transcript.

5 THE COURT: That's all right. I can --

6 MR. ANDREU-VON EUW: I will man the mute button for
7 you, Your Honor.

8 THE COURT: Thank you.

9 Well, there were a number of questions asked by
10 defense counsel regarding the section on contestability,
11 defensibility of BMDs.

12 My question was only -- this is -- essentially is,
13 you responded to his questions about your sources or appear in
14 this connection and you referred to no, this is new science.
15 And I just would ask you just for completeness in the record if
16 you would explain what you mean by new science or the
17 mathematical analysis, whatever it is, and its foundation.

18 THE WITNESS: Yes, I would be happy to do that.
19 Computer scientists since about 2002, 2003, have been sort of
20 universal in their consensus that paperless touch screen voting
21 machines are unacceptable because if they are hacked there is
22 no way to know and that computers are too easily hacked.

23 By 2000 -- and so different things were proposed such
24 as a touch screen with a paper trail or hand-marked paper
25 ballots counted by optical scan.

1 By 2008, the general consensus was that hand-marked
2 ballots with optical scan are the most secure way of running an
3 election from the cybersecurity point of view. But there was
4 no explicit analysis comparing that method to the notion of a
5 touch screen with a voter verifiable paper ballot.

6 The 2018 National Academy of Sciences study of which
7 I was a co-author pointed out the need for further research on
8 the use of ballot-marking devices and the reliability of
9 elections conducted with ballot-marking devices.

10 Until the middle of 2018, scientists had not
11 explicitly considered what does happen if voters using
12 ballot-marking devices see that the votes on a paper are not
13 what they marked on the screen.

14 There was -- it was not thought through what it means
15 if only some of the voters are checking their ballots. Perhaps
16 the reason that that hadn't been much studied is that before
17 about 2015 no state used ballot-marking devices for all voters.
18 It just wasn't necessarily something to be studied.

19 So what we studied was partly motivated by the use in
20 two or three states of ballot-marking devices for all voters
21 either statewide or in some counties. And the new observations
22 of voter behavior in such circumstances.

23 So we did this research. Published this paper. I
24 would say it is now the consensus of almost all experts who
25 study election cybersecurity that this is a fundamental flaw

1 with ballot-marking devices, that they are not securable. Like
2 any computers they can be hacked.

3 But unlike the scanners, which if they are hacked you
4 can just re-count the paper ballots and see what is marked on
5 them. Knowing what is marked on the output of a ballot-marking
6 device doesn't really tell you enough about what the voters
7 really did.

8 THE COURT: So the math, though, that you are doing
9 in Section 3, when you were saying new science, I mean is it --
10 are you doing math or are you just analyzing the information
11 that you have discussed and that are referenced in your
12 footnotes?

13 That is what I'm trying to partially get out, because
14 you did talk some -- about some mathematical assessments. So
15 that is why I am -- and maybe I am -- since I'm looking at it
16 quickly here, though I have read it before, I'm asking about
17 it.

18 THE WITNESS: Right. So the math is pretty simple.
19 It relies on two numbers. One is what fraction of the votes
20 did the hacker choose to make the ballot-marking device steal.

21 And the second number is what fraction of the voters
22 inspect their ballot carefully enough so that they would notice
23 if the ballot-marking device mismarked a vote.

24 And you can pick any two numbers. But for the second
25 number about voter behavior, we tried to pick numbers that are

1 actually consistent with the studies of real people.

2 The first number, the fraction that the hacker would
3 choose to steal is really up to the hacker. You can redo the
4 same analysis by plugging in different --

5 THE COURT: Wait a second. Wait just one second.

6 That last set of words, the court reporter didn't get
7 so just rewind by a few sentences. I hate to say that, but --

8 THE WITNESS: Sure.

9 The fraction of voters who carefully inspect their
10 ballots enough to notice an error, you would pick to match
11 studied results of real voters, as we did.

12 The fraction of votes that the hacker would program
13 the ballot-marking device to steal is up to the hacker and you
14 can plug in different numbers.

15 And essentially, no matter what fraction the hacker
16 programs the ballot-marking device to steal, the ballot-marking
17 device can steal 90 percent of that fraction because that is
18 about the percentage of voters who will not check their ballot
19 carefully enough to notice.

20 THE COURT: All right. Thank you.

21 MR. ANDREU-VON EUW: We have no further questions
22 still, Your Honor.

23 MR. BEDARD: I'll just come up here, Your Honor.

24 I think, first off, I object to -- not to your
25 question. I thought your question was a fair one, which was

1 kind of what I was getting at -- but his answer to your
2 question the first time around. I think you ended up re-asking
3 it. I don't have the lines in front of me. But Dr. Appel went
4 well back into the 2000s, into the NASEM report, all that sort
5 of stuff.

6 I think, one, that brings up the fact that, again,
7 this is improper rebuttal evidence. But putting that aside,
8 that opens up a whole lot of things that I can and should have
9 the ability to cross-examine him on about the consensus
10 changing and all of those sorts of things that were not
11 elicited on his direct.

12 The lines I have just been told are -- and I don't
13 know if these change, Shannon, but -- they do. I'll give you
14 what I have got, which is on the real time, 57, 23 through 59,
15 9.

16 So I would move to strike that.

17 And also --

18 THE COURT: I don't have any of those numbers.

19 MR. BEDARD: I think if you just go back to your
20 first question, Your Honor, and then his answer to your first
21 question, before you reasked it.

22 I would also move, again, to that contestability
23 piece on two grounds. One, again, he has testified he does
24 not -- he has not looked at any election administration rules.
25 He hasn't talked to anybody in that analysis. He calls it new

1 science. But it is not based on anything other than
2 hypothetical numbers. So I think under Rule 702, it is,
3 frankly, excludable.

4 And, two, again, I think outside the scope of his
5 expertise as he's talking about whether voters carefully rely
6 enough on -- you know, when they look at their ballots to be
7 able to verify it. He has already testified he can't opine as
8 to what is carefully enough to be able to verify their ballot.

9 So with that, I'll sit down, Your Honor.

10 MR. ANDREU-VON EUW: Your Honor, would you like a
11 response to either point?

12 THE COURT: If you want to give it, I'll let you make
13 your record.

14 MR. ANDREU-VON EUW: With regard to the NASEM report,
15 this is something the State has introduced over and over --

16 THE COURT: You need to come up here. It is so hard
17 when you are leaning over. And you are so much taller than
18 that.

19 Thank you.

20 MR. ANDREU-VON EUW: With regard to the NASEM report,
21 this is something that the State has introduced over and over
22 again. Dr. Appel's explanation gives context. And I believe
23 everything he said is in his expert report. So there's no
24 notice issue there.

25 With regard to how to take his study into account,

1 Your Honor, he provided his basis. He provided the reasoning.
2 I think the Court can weigh it however it wants to.

3 THE COURT: All right.

4 MR. BEDARD: And just briefly, Your Honor --

5 THE COURT: And you were one of the chairs of the
6 NASEM report; is that right?

7 THE WITNESS: I was a member. The chairs were --

8 COURT REPORTER: I can't understand him.

9 THE COURT: All right. That is fine.

10 MR. BEDARD: Your Honor, can you hear me on this mic
11 fine? Okay.

12 Just for the record, our objection is not to the
13 NASEM report coming in but his testimony about the consensus
14 changing in mid 2019. That is what we would have explored in
15 depth, but it didn't come out on his direct. And so that is
16 why I would move to strike it. It is not a notice issue, but
17 they didn't bring it out. So ...

18 MR. CROSS: Your Honor, that would mean that they
19 don't get to cover it because the scope of the cross is limited
20 to the direct. But they did cover this at length in his
21 deposition. So I'm not quite sure what the objection --

22 THE COURT: Are you introducing his deposition?

23 MR. CROSS: No. That is my point. There is no
24 unfairness because they covered at length in his deposition how
25 the consensus has changed over time. But we did not elicit

1 that as testimony on direct, which means they don't actually
2 get to ask about it on cross unless they want to bring it in
3 themselves. So the objection doesn't seem to have merit.

4 THE COURT: Here we are -- let me just say. We have
5 the professor on this not very good connection to say the
6 least. And I would let them do that. But we don't have a
7 viable connection for that discussion. And I don't know what
8 the professor's availability is. But we've got to get a viable
9 connection if we are going to go into a back-and-forth about
10 something -- about the consensus.

11 MR. CROSS: We have no objection if they want to ask
12 those questions. It's beyond the scope, but they are welcome
13 to examine him on that.

14 MR. BEDARD: I want to be clear. We didn't bring it
15 out on our cross either. It came out, I think, in a
16 nonresponsive answer to the Court's question. So that is why I
17 was moving to strike that section.

18 Otherwise, we will have to go into it. I'm not
19 saying he gets to bring it in either. Maybe we're aligned
20 here. That is the issue. It would be a -- you know ...

21 MR. MILLER: Your Honor, if it is coming in, then
22 we'll reserve the right to submit his deposition testimony when
23 he can't identify when the scientific consensus changed. But
24 if it is not coming in, which I don't think it should, then we
25 won't need to do that. But at this point, we just want this

1 trial to end.

2 MR. BEDARD: Agreed.

3 MR. ANDREU-VON EUW: Your Honor, we have no objection
4 to submitting testimony. We have might have counters. I don't
5 know what they want to submit.

6 MR. CROSS: Let us talk. We'll work it out.

7 THE COURT: Why don't we let the professor -- can I
8 excuse the professor at this point?

9 MR. CROSS: Yes, Your Honor.

10 THE COURT: Thank you very much. And thank you for
11 your patience. Good to get to meet you in person. Though you
12 can't see me, I can see you I think at this point. But thank
13 you very much, sir. And so you're free to go on with your life
14 now.

15 All right. Thank you. We're going to disconnect
16 you, and you can disconnect yourself.

17 You are going to talk about this yourselves?

18 MR. CROSS: Let us talk. We can probably work this
19 out, Your Honor.

20 THE COURT: All right. And there were no more
21 rebuttal witnesses otherwise?

22 MR. BROWN: No, Your Honor.

23 MR. CROSS: No, Your Honor.

24 THE COURT: All right. Did you want to talk now, or
25 what did you -- how did you want to proceed from here?

1 MR. CROSS: So the last piece is we do need to get to
2 the Fortalice report before we rest.

3 THE COURT: All right.

4 MR. CROSS: And then we can talk about this piece.

5 MR. RUSSO: Would it be easier to do this piece first
6 while we're still fresh in our minds and --

7 MR. CROSS: That is what I was saying. We can do --

8 MR. RUSSO: -- we can strike that testimony or we can
9 submit some designations real quick over his testimony.

10 MR. CROSS: I think we should talk off the record and
11 see if we can work that out.

12 MR. RUSSO: Okay. That's fine.

13 MR. CROSS: Fortalice.

14 THE COURT: Yeah. I'm just looking.

15 Did you bring me back the report?

16 Do I have a physical copy of it?

17 MR. CROSS: We do not. Because it was only submitted
18 in camera.

19 THE COURT: That's fine. She emailed it to me.

20 That's fine. Don't worry about it.

21 **(There was a brief pause in the proceedings.)**

22 THE COURT: Are you doing this on the public record
23 in the sense there are things that they say are confidential
24 and that is part of the argument? Do we need to do this -- are
25 we doing this in open court?

1 MR. CROSS: Yeah. I was going to do it in court
2 because we don't have access to the document so I don't have
3 anything confidential to say.

4 THE COURT: All right. That's fine.

5 MR. CROSS: I'm ready when you are, Your Honor.

6 THE COURT: Go ahead.

7 MR. CROSS: So, Your Honor, when you ruled on this
8 before, what you put in your order -- and this is Docket 858.
9 Your Honor was explicit that you are relying based on the
10 information before the Court at that time that it was subject
11 to the attorney work product doctrine.

12 And what was represented to the Court at that time,
13 principally at 838-5, was that the report was prepared for the
14 purpose of litigation.

15 And in Paragraph 7 of that declaration in particular,
16 it was represented that the report, and I quote, was not
17 undertaken to provide recommendations regarding cybersecurity
18 for the SOS network or applications. It goes on to say that
19 the report was for the purpose of litigation that we knew was
20 coming.

21 Now having the benefit of cross-examination, Your
22 Honor --

23 THE COURT: I'm just looking for the affidavit.

24 MR. CROSS: Oh, sorry. I have a copy if you need
25 that.

1 THE COURT: Thank you.

2 Go ahead.

3 MR. CROSS: Just pull out Tab 6. I don't know if she
4 needs the whole binder.

5 THE COURT: No. I have got the report. I just need
6 the --

7 MR. CROSS: The declaration.

8 THE COURT: -- the declaration.

9 MR. CROSS: We have one for you guys.

10 Paragraphs 5 and 7 is what I was principally focused
11 on, Your Honor, and the language that I just read.

12 So again, at a high level, the representation was
13 this was not for cybersecurity assessment. It was for the
14 purpose of preparing for litigation. What has happened at
15 trial has created a record that is the opposite of that, Your
16 Honor.

17 Mr. Germany, who provided that declaration, testified
18 under cross-examination that the purpose of the project was,
19 and I quote, to do a security assessment of the BMDs. And
20 while he previously had stated in a declaration that this was
21 done at his direction and that was the principal driver of the
22 litigation claim and the privilege claim, he testified under
23 cross, I do not recall being very involved. He thought that
24 Michael Barnes and Merritt Beaver may have been involved.

25 Merritt Beaver actually testified as well that this

1 was, and I quote, to conduct a security assessment of the BMDs
2 which were beginning to roll out.

3 He also testified -- that is at Volume 5A, 73,
4 Page 73. At Page 75, he said it was not done under a separate
5 contract. It was their standard contract. He also testified
6 that it was shared with Dominion.

7 We have heard repeatedly from the State that Dominion
8 is not their agent. And so sharing it outside the scope of the
9 Secretary's office would vitiate any privilege that would apply
10 in any event.

11 Mr. Beaver also indicated that the people who
12 coordinated this -- this is at Page 76 -- it was Fortalice and
13 some IT individuals, no lawyers, did not identify any lawyers
14 involved.

15 At Page 78, he testified that one key aspect of this
16 was to hack the BMDs. And we have an exhibit that we put in
17 that actually -- where Fortalice itself says they are going to
18 bring in their best hacker for that purpose.

19 At Page 126, Mr. Beaver was asked is it your
20 understanding that Mr. Barnes was involved in that project.

21 Mr. Beaver said he is not responsible for the
22 security. We have vended that to Dominion.

23 Mr. Beaver also testified at 127 he did not review
24 whatever report came out of it.

25 At 133, he was not aware of any results and that

1 instead to his knowledge everything was shared and coordinated
2 with Dominion.

3 So the record we have here, Your Honor, is nothing to
4 indicate at all that the document was privileged.

5 And, in fact, the other thing I would point Your
6 Honor to is Mr. Germany acknowledged in the document that was
7 originally redacted that indicates the scope of the work -- let
8 me just grab the reference here -- this is Plaintiffs'
9 Exhibit 589. And it was filed as Docket 84-2 under seal.
10 Portions were redacted as privileged.

11 And as Mr. Germany acknowledged, when the State later
12 produced another version of that document in discovery, which
13 is Exhibit 590, none of what there is privileged.

14 In fact, everything there shows that the privilege
15 claim never had a proper basis because what was redacted is
16 bullet points laying out the purpose of this assessment. All
17 of which, as Mr. Germany now acknowledges, and Mr. Beaver
18 testified, was part of a standard cybersecurity assessment for
19 the BMDs, one of which was to see if it could be hacked.

20 So our first portion, is, Your Honor, there is no
21 basis for the privilege.

22 Your Honor invited us the same day in the transcript
23 I've been talking about at Volume 5A at Page 223 to come back
24 to Your Honor for a request on this if they did not ultimately
25 lay the foundation that this is privileged.

1 We have now heard from all their witnesses, and there
2 is no evidence in the record to support the privilege claim.

3 But even if it were, Your Honor, under Rule 26 as to
4 work product, there certainly would be a substantial need for
5 it. This is as we've -- as far as we know in the record, it is
6 the only assessment that the Secretary's office has ever
7 authorized or commissioned to actually examine the equipment to
8 have a cybersecurity expert come in, put hands on the
9 equipment, assess it, try to hack it, and figure out whether it
10 is hackable.

11 And so one of the key arguments we have heard
12 throughout the defense is to say, as we heard from
13 Mr. Sterling, to dismiss the folks who have done this.

14 Dr. Halderman, in particular, to dismiss his report
15 as a load of crap.

16 If it turns out that they have had something from
17 their own cybersecurity consultant, Fortalice, for years, since
18 before they actually rolled this out in 2020 that showed that
19 it was hackable to any degree, then that would be very
20 important evidence, Your Honor, to rebutting one of their key
21 defenses that Dr. Halderman did not provide a real world
22 assessment.

23 Certainly they thought whatever came from Fortalice
24 was going to be appropriate and reliable and they provided it
25 to Dominion as the vendor, Your Honor.

1 So it gets to, one, what they knew and when about
2 whether this system is, in fact, safe and secure.

3 It gets to rebutting a core defense that they have
4 asserted in this case attacking our experts who are the only
5 ones to have ever examined the actual equipment beyond
6 Fortalice to our knowledge.

7 It also goes to whether there are additional
8 vulnerabilities that Fortalice may have identified beyond what
9 Dr. Halderman and CISA identified, Your Honor.

10 And at the very least, even if they could claim
11 privilege around communications involving it, which we don't
12 think they can, the analysis and ultimate findings would not be
13 privileged. Those would be issues of fact that should be
14 produced.

15 Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. TYSON: Thank you, Your Honor.

18 Just a couple of points here. Again, not to belabor
19 this. I think it is important to go back and set the context
20 of the Court's order. When this Court ordered the production
21 of the -- sorry.

22 When the Court determined that the Fortalice BMD
23 analysis from 2019 was subject to privilege and work product,
24 it was part of an order that also then required, because of
25 that finding, the disclosure of the Fulton BMD and the other

1 equipment to give access to Dr. Halderman. That because the
2 plaintiffs couldn't get access to this report they were then
3 entitled to get access to an actual BMD and actual equipment.
4 So I think it is important to remember these things travel
5 together.

6 Second, it is important to remember in terms of what
7 Mr. Cross has outlined, nothing Mr. Germany said on the stand
8 was inconsistent with what was in the declaration.

9 If you look at on the Volume 4, Pages 84 and 85, he
10 recalls that the review happened. He doesn't recall being very
11 involved, which is consistent with what he said in the
12 declaration. He was asked by counsel to undertake this. He
13 then directed other members of the Secretary's staff to make it
14 happen. Mr. Germany's answers on those pages continue to say I
15 don't know, I don't remember. Again, this is now four years
16 after this time.

17 The plaintiffs had opportunities during discovery if
18 they wanted to explore this issue to do this through deposition
19 testimony or otherwise. They chose not to do that.

20 In terms of the testimony of Mr. Beaver, Mr. Beaver
21 testified on a number of points about what happened. His
22 recollections, again, are consistent, you know, four years
23 later with Mr. Germany's declaration, which is he instructed
24 staff to engage Fortalice for this purpose.

25 There is nothing inconsistent with using an existing

1 contract if that has been the direction that was given along
2 the way. Further sharing it with Dominion as the vendor -- and
3 we have been back and forth and round and round about agent,
4 not agent, vendor or not, but to the extent it was shared with
5 Dominion there was, at the very least, a common interest
6 involved in the defense of the equipment that was involved
7 here.

8 So, Your Honor, we would submit --

9 THE COURT: Is that a legal doctrine common defense?
10 It is a common defense when people are co -- are parties or --

11 MR. TYSON: I think, Your Honor --

12 THE COURT: -- equally affected and have legal
13 liability. But I don't think that Dominion is in that
14 position.

15 MR. TYSON: And, Your Honor, I think Dominion, at the
16 very least, has a common interest with the State in terms of if
17 the State is enjoined from using this system it obviously has
18 an effect on Dominion. And then we don't necessarily limit
19 your common interest to a common defense. It doesn't have to
20 be -- necessarily mean you're all defendants together.

21 Further, Your Honor, we would --

22 THE COURT: I just was saying this relative to their
23 sharing of the -- of the report with Dominion. I mean, it is a
24 very different posture than the normal posture where you say,
25 well, we have -- we're in a common defense posture.

1 MR. TYSON: Yes, Your Honor.

2 And as you'll remember, obviously Dominion and
3 Dr. Coomer's testimony in 2020 was a key part of our defense in
4 that proceeding. They have obviously been part of working with
5 us at various points through this case. So I think we
6 definitely have a common interest in that sense. I don't
7 believe that was -- that any sort of work product was waived by
8 sharing that with them about their products that we are here
9 defending.

10 In addition to that, Your Honor, I believe in our
11 joint statement or somewhere we have cited that you don't have
12 to have -- even have to have a common interest to get at a work
13 product protection.

14 So we would submit that this issue has already been
15 addressed. It has already been addressed in 2019 and in 2020
16 with the Court's earlier orders. The testimony that has come
17 out is not inconsistent with what was presented to the Court at
18 that time. And there is no basis for the Court to now revisit
19 that issue and further require the disclosure of the report
20 that all the evidence still demonstrates was prepared regarding
21 litigation interests that were involved.

22 And, again, if there is lack of specificity, that is
23 usually preceded in these transcripts by not recalling or not
24 remembering an incident that happened almost four years ago at
25 this point.

1 So we would submit there is no basis for the Court to
2 revisit its earlier ruling. The plaintiffs haven't been
3 prejudiced. They received access to Dominion equipment because
4 of this Court's ruling in 2020 on this exact issue.

5 And so we don't believe there is any basis at this
6 point to conclude that those products -- those protections
7 should be lifted from the report and this Court should uphold
8 its prior ruling on this point.

9 Thank you, Your Honor.

10 THE COURT: Thank you.

11 MR. CROSS: Your Honor, Mr. Tyson's first point is
12 exactly -- highlights the prejudice. Because he's right. The
13 idea at the time was because we wouldn't get the report
14 Dr. Halderman would get to do his own assessment.

15 But their response to that assessment for years has
16 been it is completely unreliable. It is from someone they have
17 called a hack. They have called him an election denier. They
18 have gone to great lengths to discredit him both in this court
19 and in the public forum and in the General Assembly.

20 And so the most powerful refutation to that defense
21 would be a report generated by their own cybersecurity expert,
22 which they have relied on in this case, including Theresa
23 Payton, who they relied on in 2020 until she suddenly
24 disappeared from this case entirely.

25 If this report finds even one vulnerability, if they

1 are able to hack the BMD, that eviscerates the core defense
2 they have in this case, that the machines actually are not
3 hackable, which we have heard time and time again in the way
4 that Dr. Halderman or anyone else would say.

5 And if they have known that since 2019, that is
6 troubling.

7 If they had simply embraced Dr. Halderman's report as
8 someone who is, in fact, a leading expert, not tried to
9 discredit him and said, look, his findings are what they are
10 and here is how we will mitigate them, maybe we're in a
11 different world.

12 But we're entitled to a report from someone that they
13 have told this Court they respect, they have relied on for
14 years for this type of assessment, to see if they found any
15 vulnerabilities, that they can't then discredit the person who
16 did it.

17 Secondly, Your Honor, on the common interest piece, I
18 am not -- I looked back at the brief. I'm not aware of any law
19 that says you can have a common interest with an entity that is
20 not in litigation. The common interest is about defending
21 yourself in the litigation.

22 But even putting that aside, Your Honor, they
23 themselves have objected to, for example, statements coming in
24 from Dominion. Scott Tucker is someone that they have relied
25 on heavily in the course of elections. They told this Court

1 that Scott Tucker's statements and emails to people like Chris
2 Harvey and Michael Barnes, in the course of his work for the
3 State, are so untrustworthy that they are hearsay.

4 So they either trust Dominion or they don't. And if
5 they are saying we can't even get the statements of Dominion in
6 as non-hearsay because they are -- they don't even meet the
7 residual exception, then they can't turn around and say we
8 trust Dominion enough and have such a close relationship with
9 them that they fit within the tenet of privilege.

10 THE COURT: Would you remind me what you are
11 referencing.

12 MR. CROSS: Yeah. We can dig up the exhibit.

13 Jenna, do you know?

14 There is a particular exhibit where it came up where
15 Scott Tucker was in an exchange. I can't remember. I think it
16 may have been Chris Harvey.

17 We'll flag it for the Court, and we'll pull the
18 transcript portion.

19 In fact, I think Mr. Brown was the one who
20 interjected at the time and noted the irony that their
21 objection to statements from Dominion from Scott Tucker
22 meant -- since the very test of hearsay is, is it trustworthy.
23 And so what they were arguing was that it wasn't trustworthy.

24 And so what we have is sort of this sometimes
25 Dominion is trusted and sometimes it is not. That necessarily

1 means they cannot be within the scope of privilege, Your Honor.

2 And Dominion would have to agree to that, by the way.
3 There is no evidence -- no one from Dominion has ever come into
4 this court and said that they are in a common interest with the
5 State. Common interest agreements typically have to be reduced
6 to writing or at the very least somebody from Dominion would
7 have to say, we have a privilege with the State. And we have
8 not seen that. They had ample opportunity to do that, Your
9 Honor.

10 The last two points. Mr. Tyson says there's nothing
11 in the testimony that is inconsistent with the affidavit that
12 was provided and that the Court relied on.

13 Just to read the words, Your Honor, this was the core
14 point that the Court relied on in Paragraph 7 where Mr. Germany
15 stated the November 2019 Fortalice report at issue was not
16 undertaken to provide recommendations regarding cybersecurity
17 for the SOS network or applications we have now heard from
18 multiple witnesses, including Mr. Beaver, who was tasked with
19 coordinating this to the extent anyone was involved. That was
20 the exact purpose, a cybersecurity assessment of the equipment,
21 which was for Dominion.

22 Which gets to the last point, Your Honor. This
23 cannot be for litigation in this case when the only party here
24 involved in this purports to have never even seen the report.
25 There is no one who says we have seen this, we relied on it.

1 The claim that it was for litigation cannot be squared with the
2 fact that not one lawyer was involved with it. And the report
3 apparently only went to Dominion, which is all consistent with
4 it being a cybersecurity assessment.

5 And I will read from the State's own brief at 838
6 filed on August 31st, 2020, Your Honor, where they themselves
7 cite the standard. These are their words. The document must
8 have been prepared for litigation, which they italicize, and
9 not largely for a business purpose.

10 Let me make sure I'm reading their words because I
11 think they are the only ones that filed this, and this isn't a
12 joint dispute. So let me just make sure real quick, Your
13 Honor.

14 Yes. They filed State Defendants' objection to the
15 production of the Fortalice report. So that is how they
16 themselves articulated the standard, Your Honor. In the
17 un rebutted testimony at this point from Mr. Germany, from
18 Mr. Beaver, the only purpose they identified in Court is a
19 cybersecurity assessment having nothing to do with litigation.

20 The last point, Your Honor. The idea that we could
21 have explored this in discovery. We didn't have it. We took
22 as a given that what had been represented to the Court was
23 complete and accurate. And we now have a record that is
24 different.

25 And the last point, Your Honor, is they had every

1 opportunity to come in and establish a record for this. This
2 came up in Mr. Germany's examination in our case, one of the
3 earliest witnesses. If their position now is he just doesn't
4 recall, which is not what he said -- and it is hard to believe
5 that something of this significance, if he had directed it, he
6 would not recall have any significant involvement. They could
7 have refreshed his recollection. They could have refreshed
8 recollection of Mr. Beaver. They could have sat down and shown
9 them whatever they needed to show, but they did not ask a
10 single witness about this. And I think that, in and of itself,
11 is telling, Your Honor.

12 The -- here are some examples of what we're talking
13 about. PX 33, an email involving Dominion. PX 143, the May 6
14 notification from Dominion that spurred James Barnes' email
15 about Cyber Ninjas. PX 602, the Dominion advisory. The State
16 objected to all three as hearsay.

17 THE COURT: I'm sorry. 33 --

18 MR. CROSS: 33, 143, and 602.

19 And their argument was that all of those were
20 hearsay, which necessarily means that they believe the
21 statements are untrustworthy.

22 So we would ask Your Honor order it produced, let us
23 review it, and then we'll determine whether it is something
24 that we would seek to move into evidence. It is obviously
25 authenticated, and so there shouldn't be any issue in putting

1 it into evidence if we decided to use it.

2 Thank you, Your Honor.

3 THE COURT: Okay. You had something more to say,
4 naturally?

5 MR. TYSON: Just briefly, Your Honor.

6 I just, again, note, I think we're well past the time
7 for discovery motions on this. I think that even if there is
8 establishment of various pieces, I still haven't heard what the
9 special need is. And if we're going to be at a point where
10 we're reviewing everything the Secretary's office relied on at
11 various points -- and this is not to say -- I mean, the lawyers
12 have obviously reviewed this report. And I think the fact that
13 maybe others have not speaks to the litigation purpose.

14 But again, there is -- not trying to relitigate this
15 issue again, but the Secretary's office relied on the MITRE
16 report as well. So if we're going to get a complete picture,
17 we're either going to get a complete picture or we're not.

18 And we would submit there is no reason for the Court
19 to revisit its prior ruling.

20 THE COURT: All right. Well, I'm not going to do it
21 this moment. I will look at this again. I had looked at it
22 before knowing it was an issue. But that was many days ago,
23 another week ago at least or maybe more. So I'm not prepared
24 to rule on it at this moment.

25 And I need to look at Mr. Beaver's testimony also.

1 I'm not sure we've kept up with the drafts, as you have, in
2 terms of the transcript. I follow what we have in the day, but
3 I need to -- what was the day that he -- when was the time he
4 was testifying? Which days' testimony was it?

5 MR. TYSON: Mr. Beaver was Volume 5, Your Honor. And
6 I believe Mr. Germany's testimony on this was Volume 4.

7 MR. CROSS: That's right, Your Honor.

8 THE COURT: Okay. We'll get that and look.

9 What else do you want to deal with today, if
10 anything?

11 MR. BEDARD: Your Honor, we will need to deal with
12 the motion to strike issue for Dr. Appel's testimony. But we
13 haven't had a chance to talk yet on a break. So ...

14 THE COURT: You were going to discuss that?

15 MR. BEDARD: Yes.

16 THE COURT: Well, would you like to discuss it and
17 then -- is there anything else?

18 MR. CROSS: I don't think so, Your Honor.

19 MR. BROWN: No, Your Honor.

20 THE COURT: All right.

21 MR. TYSON: Your Honor, maybe we could take a
22 five-minute break and see if we can work this out.

23 THE COURT: All right. Thank you.

24 **(There was a brief break.)**

25 MR. CROSS: Your Honor will be happy that we get to

1 end the trial in an agreement. To Mr. Bedard's credit, you
2 want to --

3 MR. BEDARD: Sure. At least a partial agreement. I
4 don't want to get everybody's hopes up too high.

5 THE COURT: You don't want to say agreement.

6 That's just because you need a few more years on you.
7 Then you will be able --

8 MR. BEDARD: I don't know. I certainly have a little
9 more gray in my beard after this month.

10 But we have reached at least a partial agreement on
11 the motion to strike piece. I'll try and describe it as best
12 as I can for the record.

13 After Mr. Andreu completed his redirect, the Court
14 asked him a question regarding basically why this is new
15 science. The parties have agreed to strike his answer in
16 total, except for the phrase about halfway through his answer
17 that says, until the middle of 2018, through where he says, so
18 we did this research it published his paper.

19 Other than the testimony between those points --

20 THE COURT: I'm sorry. What lines?

21 MR. BEDARD: For the Court's reference on the real
22 time, it is 58, 14 through 59, 2. I understand that that will
23 change in the final. So I was trying to describe it as best as
24 I could.

25 THE COURT: All right. I have no idea.

1 MR. BEDARD: I can just read the part that will stay
2 in. Everything else will stay out.

3 Everything else will be stricken, except for the
4 following: Until the middle of 2018, scientists had not
5 explicitly considered what does happen if voters using
6 ballot-marking devices see that the votes on a paper are not
7 what they marked on a screen. There was -- it was not thought
8 through what it means if only some of the voters are checking
9 their ballots. Perhaps the reason is that there hadn't been
10 much studied before about 2015. No state used ballot-marking
11 devices for all voters. It just wasn't necessarily something
12 to be studied. So we studied -- excuse me.

13 What we studied was partly motivated by the use in
14 two or three states of ballot-marking devices for all voters,
15 either statewide or in some counties, the new observations of
16 voter behavior in such circumstances. So we did this research
17 and published this paper.

18 That part will stay in. Everything else to the
19 answer we referred to the parties have agreed to be stricken.

20 MR. CROSS: To be clear, Your Honor, just that one
21 answer.

22 MR. BEDARD: Correct.

23 THE COURT: Okay.

24 MR. CROSS: Your Honor, also to be clear, we're
25 agreeing to that to resolve any objection that was raised with

1 respect to that testimony.

2 MR. BEDARD: Yes. I guess the part of the agreement,
3 I want to be clear, is we still have our objections to -- on
4 the 702 piece, the rebuttal piece, the other things. But as
5 far as the -- that answer, yes.

6 THE COURT: Well, I don't know what all those are
7 but -- at the moment, frankly, what you're referencing. But
8 the fact that they presented the rebuttal testimony?

9 MR. BEDARD: Yes. If Your Honor will recall --

10 THE COURT: That's fine. That's fine.

11 MR. BEDARD: It is in the record.

12 THE COURT: All right. I know that we have a range
13 of other matters that were outstanding related to
14 Dr. Halderman, Mr. Persinger, and defendants' objection, which
15 sort of is a -- to alleged failure to provide requested
16 information or discovery. You know what I think -- counsel
17 know what I'm referring to I assume.

18 Unless you think you need a ruling on this prior to
19 the close of evidence, I'm not going to give it. I would
20 prefer to write -- give a reasoned order. Otherwise, I'll
21 just -- it would be preferable, in my mind. But if you need
22 one for whatever procedural reason, I will rule and write a
23 decision later.

24 MR. TYSON: Your Honor, for the State, we don't
25 believe we need a ruling on the Rule 26 issues and

1 Dr. Halderman prior to the close of evidence in the case.

2 I did want to note for the record for the Court that
3 we do plan to file a written response to the motion about the
4 Dominion 5.17 evidence just so the record is complete on that.

5 Again, I don't think we need to wait on the close of
6 evidence for that but wanted the Court to be aware we do plan
7 to respond.

8 MR. CROSS: Your Honor, we don't need a written
9 ruling on Rule 26.

10 We'll also confer with the State on the 5.17 because
11 I think we have a better understanding of what they were doing
12 with that. And it may be that we can withdraw that motion
13 because they took it in a different direction than we thought.
14 So let me -- we'll confirm with them and see if we might be
15 able to moot that motion.

16 MR. TYSON: And that's fine, Your Honor. We can have
17 that discussion.

18 I think the main thing for our perspective, just
19 candidly, is we want the record to be clear that from our
20 perspective we fully complied with our discovery obligations
21 related to that. So we'll at least perfect the record on that
22 point even if the overall issue is moot. We can talk about
23 that.

24 Or -- I'm sorry. And, Your Honor, the other option
25 is if they want to -- the plaintiffs want to withdraw the

1 motion, that could also resolve that issue for us.

2 THE COURT: Well, I assume y'all will talk about that
3 before you start spending time writing.

4 All right. You'll let me know, I guess, too.

5 So are you closing at this point?

6 MR. CROSS: We are prepared to close whenever it
7 works for you tomorrow.

8 THE COURT: Okay. But are you closing the evidence?

9 MR. CROSS: Oh, sorry. We are resting, Your Honor.

10 MR. TYSON: Then, Your Honor, I think just as a
11 matter of procedure, we would renew our 52(c) motion at the
12 close of evidence, understanding you would likely defer that
13 and want to hear closing arguments.

14 THE COURT: Right. Okay. I will defer it.

15 All right. So should we begin a little -- you said
16 it was going to be -- you wanted two hours for the plaintiffs
17 and two hours for the defendants.

18 And I think that given the fact that you had an
19 unexpected addition of counsel when Mr. Davis determined he
20 wanted to have new counsel, I think it would be appropriate not
21 to have -- I'm going to let Mr. Oles, of course, give some, but
22 I'm not going to have him take time from the -- what I will
23 call the original plaintiffs' two hours, under the
24 circumstances.

25 But -- and is 15 minutes sufficient, Mr. Oles?

1 MR. OLES: Is it possible to get 30?

2 THE COURT: No. Because all of this -- you know, if
3 you're running a little over 15, I don't mind. But 30 is too
4 much.

5 But how long are you dividing -- how are you dividing
6 your time?

7 MR. CROSS: We are still talking about that, Your
8 Honor. But we're dividing it in a non-duplicative way like we
9 did on the opening.

10 THE COURT: Aim for 15. If you go over a little bit,
11 I'm not going to jump on you.

12 MR. OLES: Thank you, Judge.

13 THE COURT: All right. Are you planning to save time
14 for responding? Is that what you are doing?

15 MR. CROSS: Yes, Your Honor.

16 THE COURT: All right. Well, I am going to -- given
17 everything that has happened, I am going to hold you to the
18 time, unless there is some huge issue that explodes. So I'm
19 going to -- you know, we will be doing time keeping, but we
20 expect you to do the time keeping too. All right.

21 I would -- I know you want to go home, but --
22 tomorrow, but I would really prefer not to begin at 9:30 in the
23 morning. So --

24 MR. BROWN: 8:30?

25 THE COURT: Sure. Come on over to my house.

1 There is nothing wrong with 9:30 in the morning. But
2 I feel like I might pay more attention to you. It is a lot to
3 absorb. And so I would rather be fresh. So we're going to
4 start at 10:30 instead, meaning because of the amount of time I
5 would really -- I'm not going to take a full lunch break.

6 I mean, definitely I'll give you enough of a break so
7 that you can -- if you are starving you can eat something. But
8 just have it up here because you can all go out and drink, go
9 back to wherever you are coming from. Go home. Go see your
10 children. Pick them up after school. Whatever you -- but
11 let's begin at a time that I get to absorb what we have. You
12 get to be fresh too.

13 All right. Thank you very much. I know we've had --
14 it has been quite a slog and everyone has done a lot of work.
15 As best as you can, try not to be repetitive tomorrow. Because
16 it is hard not to be. I realize that. But you wanted this
17 amount of time, which is a large amount of time, so that it
18 would be helpful to the Court. That is -- that is obviously
19 what I'm looking for as well.

20 The audience has been great. I'll tell you that
21 again tomorrow. You have been just really -- so obviously no
22 matter what happens in this case, there are a lot of interested
23 citizens. And I appreciate your -- your interest, your
24 concerns, and your conduct as well and your perseverance as
25 well.

1 Thank you, Counsel, for all the superb lawyering as
2 well.

3 All right. I think we're done for today. But I know
4 that the document team always comes up and are the cheery group
5 who get everything straight at the end.

6 All right. We're adjourned.

7 COURTROOM SECURITY OFFICER: All rise.

8 THE COURT: I just want to remind you that I still
9 have to rule on the outstanding motion that you made at the
10 end.

11 **(The proceedings were thereby adjourned at 5:06**
12 **PM.)**

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C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 233 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 31st day of January, 2024.



SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT

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