

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

LOUIS AGRE, et al,) 17-CV-04392 (MMB)
)
Plaintiffs,)
vs.) P.M. Session
)
THOMAS W. WOLF, et al,) Philadelphia, PA
) December 7, 2017
)
Defendants.)

TRANSCRIPT OF TRIAL DAY 3
BEFORE THE HONORABLE D. BROOKS SMITH, CHIEF JUDGE
THE HONORABLE MICHAEL M. BAYLSON
THE HONORABLE PATTY SHWARTZ
UNITED STATES JUDGES

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1 (The following was heard in open Court at 1:02 p.m.)

2 JUDGE SMITH: Please be seated. A question and
3 several informational matters: The Panel discussed at midday,
4 when we recessed, the outstanding motions, the sanctions motion
5 and the motions seeking a protective order and I guess our
6 first inquiry is whether or not the parties talked about those
7 and whether we still have to deal with them.

8 MS. GALLAGHER: Your -- Your Honor, if I may, my
9 understanding was with counsel a few days ago, when we went
10 through, in groups, an in-camera review at lunchtime, that
11 there were no outstanding issues with respect to that
12 portion and that counsel was comfortable with the doc -- you
13 know, there were no additional documents requested to be
14 produced.

15 JUDGE SMITH: Let me again -- begin with the
16 sanctions motion. Does it remain outstanding for this Court to
17 rule on will it be withdrawn?

18 MR. PERSON: This is Michael Person, Your Honor.
19 I'm not sure. Maybe I misunderstood something about who Ms.
20 Gallagher spoke to. I'm -- I'm not aware of that.

21 MS. HARDWICK: It --

22 MR. PERSON: Okay.

23 MS. HARDWICK: Okay.

24 MR. PERSON: We'll ask -- ask Ms. Hardwick, too,
25 approach.

1 MS. HARDWICK: Sorry, Your Honor. Okay. So, Your
2 Honor, we have resolved the issues concerning the documents as
3 to which attorney/client privilege and work produce privilege
4 were asserted. So, that -- that has been taken care of. I
5 believe that there is possibly an outstanding question
6 concerning documents that should have been produced, such as
7 those that were identified of drafts of maps kept on a computer
8 that's available to the Republican Caucus. And it's been
9 testified that the Republican Caucus and the Republican
10 leadership are essentially the same and those documents were
11 never produced. So, I, maybe, need assistance from co-counsel
12 on the extent to which we want to pursue the sanctions motion
13 on that.

14 MR. PERSOON: Yes, Your Honor, I think the
15 outstanding issue is these documents that were on the separate
16 server that was identified in the Arneson deposition. You
17 know, Judge Baylson, in particular raised the question of
18 whether Senator Scarnati, you know, was the leader of the
19 caucus or whether Senator Pileggi is the leader of the caucus.
20 That was the discussion.

21 From our perspective, as it was read in the record
22 this morning from the deposition of Mr. Arneson, Senator
23 Scarnati had the ability to go in there and get these
24 documents. I read the --

25 JUDGE SMITH: It -- it never ceases to amaze me how

1 Judges can still rarely get direct answers to what seem to be
2 relatively direct questions.

3 MR. PERSON: The motion I made --

4 JUDGE SMITH: Correct?

5 MR. PERSON: -- is pending, Your Honor.

6 JUDGE SMITH: All right. Thank you. Folks, --

7 MS. GALLAGHER: If I --

8 (Judges conference)

9 JUDGE SMITH: The -- with respect to the motions for
10 sanctions, the view of the Panel is that the plaintiff should
11 not have rested with that matter outstanding and, therefore, we
12 regard it as having been waived as of that time. There is,
13 then, also the outstanding motion for protective order and let
14 me ask my colleague to my right to pursue that with -- with
15 counsel.

16 JUDGE SMITH: The two motions that we received,
17 they're virtually identical. They came from the Legislative
18 Defendants and the essence of the motions was, basically, a --
19 a request to require that any evidence produced during the
20 discovery period that was not introduced on the record as part
21 of the trial be destroyed at the conclusion of the trial.

22 The Panel has conferred about how to handle this
23 matter and we are, of course, sensitive to discovery being
24 produced in this case be used for this case and I think that's
25 really the essence of what the defendants are trying to ensure.

1 It would be unusual to order a destruction at the conclusion of
2 a trial when there are many proceedings that could occur as a
3 result of the trial and things that could happen after that.
4 So, what the -- the Panel has decided to do was not require
5 anything to be destroyed nor returned, but simply that:

6 Discovery that was produced that did not result in
7 evidence produced in the trial be used only for the purposes of
8 this litigation and if in case that something comes up during
9 proceedings that may occur after this trial and that they not
10 be disclosed beyond the order we had already entered.

11 I believe the order we had entered before said that
12 information disclosed during the discovery process could be
13 shared with counsel, their agents, the experts and their
14 clients, and I -- I incorporate, by reference, the actual
15 language of the order and that would remain in effect. And
16 that's how we were planning on to resolving the protective
17 orders which were ECF-171 and 174. I see both -- we have all
18 counsel standing. So, since we don't hear from the Executive
19 Chief, may I call upon counsel, as --

20 JUDGE SMITH: Please.

21 JUDGE SCHWARTZ: -- the Executive? Go ahead.

22 MS. HANGLEY: Thank you, Your Honor. I understand
23 that the ruling has been made. For the record, the Executive
24 Defendants do oppose putting any limitations on the discovery
25 taken in this case. The Pansy factors have not been met. They

1 haven't even been stated. We believe in transparency that this
2 is an important public -- public event, this trial, and it's
3 important public proceedings and that the public and that
4 litigants in related cases have a right to know what has
5 happened in this case.

6 JUDGE SCHWARTZ: Well, there's nothing that's
7 limiting, of course, what's happened in the -- during the
8 course of the trial or anything filed on the public docket.
9 But, we're treating discovery material like discovery material
10 is often treated in cases, which is usually used -- not -- not
11 that there are restrictions; but, it's usually used between the
12 parties. It's not -- discovery is not a public process.
13 People don't get to come to depositions and, so, we don't view
14 the -- kind of, the limitations on how it could be used
15 implicating Pansy in the sense of confidentiality or sealing.
16 We're not doing that. We're just limiting how it could be used
17 and we are limiting to whom it can be disclosed if it was not
18 material that was introduced in this case.

19 The Panel is not insensitive to the fact that there
20 is a trial starting next week where this Court applying federal
21 law found the privilege not applicable. But, we have -- we are
22 respectful of our colleagues in the State Court who have come
23 to a different conclusion applying different law. And our --
24 our goal and -- and I, of course, call my -- call on my
25 colleagues to -- to amplify; but, our goal is to ensure that we

1 are being respectful of -- of those proceedings at the same
2 time, not limiting counsel for their ability to use materials
3 as a part of this case in the way that we've described.

4 MS. HANGLEY: And, Your Honor, --

5 MR. ARONCHICK: Could -- could I just amplify a
6 minute, just -- just to say?

7 JUDGE SMITH: Ver -- very quickly, sir.

8 MR. ARONCHICK: Very quickly. So, that in the -- in
9 the record, for example, of this case, there were many
10 references to things like, excuse me, the Turzai data and
11 expert reports, I mean, those kinds of things that weren't
12 actually marked as exhibits and introduced as exhibits, but,
13 they were referenced frequently throughout the record in this
14 case. And is it our understanding that if they were involved
15 in the record in this case that that's in the public domain,
16 even if the actual document that they were referring to wasn't
17 marked and put into the record?

18 JUDGE SMITH: The reference is in the public domain.
19 The underlying document is not.

20 MS. BALLARD: Your Honor, if I may?

21 JUDGE SMITH: Quickly, please.

22 MS. BALLARD: The -- we understood the Court's order
23 regarding not -- not sharing documents to cover the -- the
24 defendants' depositions and any exhibits used at their
25 depositions. That's what the order referred to. Many of the

1 things that Your Honors have alluded to or that Mr. Aronchick
2 has alluded to, they are cats that are long out of the bag.
3 They were not covered by the original order. So, we can't go
4 back. There's no way that we can now institute some sort of a
5 confidentiality agreement.

6 JUDGE SCHWARTZ: I know. And that was the -- that
7 was not the Court's intention and if that's what you understood
8 it to be, we are not looking to retrofit past evidence. If
9 there was a reference in this public record to material and
10 that material was admitted into evidence, then, it's within the
11 public purview.

12 MS. BALLARD: Oh, no. We're --

13 JUDGE SCHWARTZ: Do you want to give me a concrete
14 example?

15 MS. BALLARD: -- we're not talking -- I'm not talking
16 about that. I'm talking about material that was produced in
17 discovery that was not covered by the Court's original order
18 that said we could not share deposition transcripts of the
19 Legislative Defendants or any exhibits that were used in those
20 depositions. That's what the order covered. It was not our
21 understanding that the order covered everything else that was
22 produced in discovery and everything else that was produced in
23 dis -- discovery is gone, out. It's -- you know, there's no
24 way we can get it back.

25 JUDGE SCHWARTZ: I respect that and -- and I will

1 be -- stand corrected --

2 MS. BALLARD: Thank you.

3 JUDGE SCHWARTZ: -- in terms of the past order. The
4 big concern was what happened with the Legislative Defendants
5 and what the Legislative Defendants produced, right?

6 MS. GALLAGHER: Your Honor, if we can --

7 MS. BALLARD: That's what we're talking about, --

8 MS. GALLAGHER: -- if I -- if --

9 MS. BALLARD: -- Your Honor.

10 MS. GALLAGHER: If I may, Your Honor. From the time
11 we got -- excuse me -- the original order went to the exhibits
12 and the --

13 JUDGE SCHWARTZ: And the deposition testimony.

14 MS. GALLAGHER: -- evidence and went to the
15 deposition. Now, subsequent to that, there was a very
16 significant production, the one which was the subject, I
17 believe and part of the motion for sanctions, from Speaker
18 Turzai and that was the reason, you know. And, again, that is
19 the evidence, also, to which we're referring. It was produced
20 subsequent to the Court's order and it was our understanding at
21 that time that everything, exhibits, we didn't know what would
22 be what, all right, and that that production should be subject
23 to it.

24 I understand --

25 JUDGE SCHWARTZ: I think my problem is I don't know

1 what that production is because when you gesture with your
2 hand, it -- and you pointed to the side of the bench, --

3 MS. GALLAGHER: Okay.

4 JUDGE SCHWARTZ: -- that was the privileged material
5 that I --

6 MS. GALLAGHER: Oh, and if you will recall, the
7 order that Judge Baylson issued on the date of Speaker
8 Turzai's deposition dealt with everything that was produced
9 subject to the privileged material. Originally, those
10 privileges had gone to legislative privilege as well as
11 attorney/client and work product. It would be our concern that
12 those would also be disseminated. They were not introduced
13 into evidence and there was a claim of privilege. They -- they
14 postdate --

15 JUDGE SMITH: Which privilege, though, counsel, the
16 attorney/client privilege?

17 MS. GALLAGHER: And legislative privilege, which I
18 thought was the impetus of this -- of the Court's decision with
19 respect to Judge Bronson's order in the case in Pennsylvania,
20 which upholds privilege.

21 JUDGE SCHWARTZ: It's not an impetus of the order.
22 It's just a cons --

23 MS. GALLAGHER: Okay. Sorry.

24 JUDGE SCHWARTZ: -- you know, we're not -- we're not
25 ignoring the fact that that order is there and we want to be

1 respectful of that.

2 MS. GALLAGHER: And that's all I'm asking, Your
3 Honor. Those were, you know -- documents were produced subject
4 to -- I mean, we had made a claim of legislative privilege in
5 those documents. We know that some of that information has
6 already been shared. It has showed up on proposed stipulations
7 from out in the --

8 JUDGE SCHWARTZ: Well, I don't -- I would not
9 consider that to be in violation of any order, right?

10 MS. GALLAGHER: No.

11 JUDGE SCHWARTZ: They -- they were -- they
12 didn't -- at the time the order was drafted and the way it
13 was, focusing on getting through the deposition and the
14 production of -- identification of the exhibits during the
15 deposition.

16 MS. GALLAGHER: What we would just ask, and that was
17 the motion that we put -- we filed on Sunday, I believe it was,
18 to cover the additional information which had been filed --
19 which had been exchanged.

20 JUDGE SCHWARTZ: But, it wasn't covered by the order
21 that we originally had issued.

22 MS. GALLAGHER: Not the original order. It was --

23 JUDGE SCHWARTZ: So, they're not -- they're not in
24 de -- default of that order.

25 MS. GALLAGHER: No, I'm not claiming they are.

1 All I'm asking is that the Court extend now.

2 JUDGE SCHWARTZ: We can't extend something that that
3 was not covered by the order before. We're just talk -- we're
4 trying to freeze-frame things, I think is the best way I can
5 describe it. If it hasn't already been put out and it wasn't
6 subject by that order, that's how we should proceed. But, I
7 will certainly turn to --

8 JUDGE SMITH: Our --

9 JUDGE SCHWARTZ: -- Judge Baylson.

10 JUDGE SMITH: -- our directive is intended to be
11 prospective and we're cutting it off here. To the extent we
12 need to readdress the matter maybe later this afternoon, time
13 permitting, we'll do so.

14 We're now going to move to closing arguments. The
15 order of those closing arguments will be as follows, given the
16 points that were made before the midday recess: The
17 Legislative Defendants will go first, with 30 minutes available
18 to them. However, what we have done is split the baby. The
19 Legislative Defendants may reserve such time as they wish to
20 respond to the Executive Defendants who will close second. So,
21 it will be Legislative Defendants, Executive Defendants, any
22 "rebuttal" from the Legislative Defendants right afterward and,
23 finally, closing by the Plaintiffs. Are the Legislative
24 Defendants ready to proceed?

25 MR. TORCHINSKY: Yes, Your Honor, we are. Oh, Your

1 Honor, I'm sorry, before I begin my closing, there's one more
2 item. The Court asked before we -- the Court asked before the
3 recess that we identify on the House Journals the pages that we
4 wanted to draw your attention to. We have -- Ms. McGee has
5 those available.

6 JUDGE SMITH: Yes, just submit them at the end -- at
7 the end of the day.

8 MR. TORCHINSKY: Okay. Thank you, Your Honor.
9 Your Honor, I'll be using the Elmo for -- for part of my
10 closing.

11 May it please the Court, democracy is hard. It
12 requires lots of give and take by all sides. It requires that
13 the con -- the constitutional processes be respected by
14 everyone and that the Constitutions that balance an allocation
15 of power between the Federal and State Governments be adhered
16 to. It means accepting the results of elections, even when we
17 might not like the outcomes. It means that from time to time,
18 we will be represented by Presidents, Senators, Congressmen,
19 Governors, Mayors, and City Council Members we sometimes like
20 and sometimes, we don't. And when we're confronted with
21 election official -- elected officials on a jurisdiction-wide
22 or a district-wide basis that we disagree with, we as Americans
23 are free to speak out, advocate and vote how we choose. We're
24 lucky to live in a country where you -- where we have the
25 freedom to do all of this.

1 We understand that Plaintiffs have brought forward
2 the complaints that they have about the political process. We
3 understand that Plaintiffs are frustrated by the lack of
4 progress they perceive on issues they believe are important to
5 them. We understand that some of the Plaintiffs are unhappy
6 with how their representatives voted or not voted on certain
7 issues. We get it. However, the federal courts are not the
8 proper forum to resolve political grievances. Both the
9 Constitution and the Supreme Court suggest that the federal
10 judiciary must leave this to the -- the discretion of state and
11 local Governments.

12 Plaintiffs should not prevail on several grounds.
13 First, the Plaintiffs have failed to demonstrate or prove that
14 private Plaintiffs have standing under the Elections Clause.
15 Second, Plaintiffs have failed to demonstrate the kind of
16 individualized harm that the Supreme Court has required to
17 maintain a federal case. Third, the Plaintiffs have not
18 established this Court has authority under the Supreme Court
19 precedence to order a remedy that would satisfy their claims.
20 And, finally, even they survive these hurdles, the evidence in
21 this case shows that they have not satisfied the elements of
22 the claim even as they have proposed them. And I'm going to
23 address these in reverse order.

24 Let's start with the merits of the claim. The
25 Elections Clause reads as follows:

1 "The times, places and manner of holding
2 election for Senators and Representatives shall be
3 prescribed in each state by legislature thereof; but,
4 the Congress may, at any time, by law, make or alter
5 such regulations except as to the places of choosing
6 Senators."

7 The Federal Government has enacted only one statute currently
8 in effect, specially for Congressional districts.
9 Congressional districts and states with more than one district,
10 like the commonwealth, must be composed of single member
11 districts under 2 U.S.C. 2

12 Plaintiffs began this case asserting that the
13 Elections Clause of the United States Constitution prohibits
14 any consideration of political information in drawing
15 Congressional districts. They told this Court at the first two
16 hearing in this matter that none means none and that they win
17 if they show that even the slightest use political information
18 was involved in the creation of this map. This asserted
19 prohibition is not and has never been found in the text of the
20 constitutional provision that they cite.

21 After oral argument on the motion to dismiss,
22 Plaintiffs pivoted away from "none means none" when this Court
23 pointed out the protection of incumbents has been historically
24 recognized in constitutionally approved consideration in
25 redistricting. While Plaintiffs at the start of trial and in

1 their first elements brief claim they are not presenting a case
2 like Gill v. Whitford, or like VanderMeer or like Vieth, the
3 filing of their proposed evidence on the eve of trial and their
4 opening statements appear to indicate that they are, in
5 essence, presenting this Court with an intent and effect test
6 just like those cases. I say appear, because it's ultimately
7 unclear what the standard the Court is supposed to adopt in
8 this case as their test is full of unsupported and
9 unsupportable language based on Supreme Court precedent.

10 Plaintiffs' counsel, in opening argument, made a lot
11 of promises to this Court about what it would demonstrate
12 during the course of the trial. The Plaintiffs' counsel told
13 this Court they would make significant showings of both intent
14 and effect. The Plaintiffs promised and, I quote, "a deep
15 dive into many of these issues." The Plaintiffs have failed
16 to do that by any standard on which the Court wishes to
17 consider.

18 Plaintiffs have made grand proclamations about
19 showing sophisticated intent to do essentially nothing but
20 maximize the number of the Republican Congressional seats in
21 Pennsylvania. They made grand claims about the showing the
22 effect of the 2011 statutes on elections for Congress. They
23 made grand claims about sophisticated technology they asserted
24 were employed to draw the maps in question. And they fell flat
25 on all of these.

1 So, I'm going to turn to the -- the two intent
2 prongs of the test that they submitted to the Court on Sunday.
3 Defendants presented to this Court the bur -- the --
4 Professors McCarty of Princeton and Gimpel of the University of
5 Maryland, at College Park, both from neighboring states.
6 Combined, these experts have over 50 years of specialized
7 knowledge, research, training, writing and teaching in the
8 concepts and methodologies fundamental to the redistricting
9 and political process.

10 Plaintiffs, by comparison, give you two individuals,
11 one who has admitted the field of redistricting was a hobby
12 and another who, while he may be talented in the use of GIS
13 systems, offered nothing but pure conjecture based on a visual
14 inspection of some pieces of some of the 18 district borders.
15 While both sets of experts were qualified to testify by this
16 Court, I submit that there is an obvious difference in the
17 level of expertise and we ask that the Courts properly weight
18 the evidence of these experts as the Court determines the
19 appropriate weight to give their testimony.

20 Plaintiffs made grand claims that they were going to
21 demonstrate a scheme to maximize the number of Republican seats
22 in the 2011 plan and did so through what counsel claimed was a
23 sophisticated technology. At best, the evidence shows that
24 those actually involved in the map drawing process were
25 struggling to comply with numerous redistricting requirements,

1 such as equal population requirements, preserving existing
2 districts, the Voting Rights Act, pairings of incumbents and
3 coming up with a plan that could actually pass the Pennsylvania
4 legislature and be signed by the Governor.

5 The equal population problem was significant.
6 Pennsylvania was fitching -- fitch -- ah -- facing a situation
7 where its original post-2000 Congressional plan was struck down
8 because of population deviated by 19 people, not 1900, not
9 19,000, 19 individuals. In addition, because of Pennsylvania's
10 population relative to other states, an entire Congressional
11 district had to be eliminated. This posed a significant
12 challenge. Professors McCarty and Gimpel both told this Court
13 about the ripple effect this had across the state, requiring
14 adjustments to the boundaries of all 18 of the remaining
15 districts.

16 The two testifying Legislative staffers explained
17 that the Equal Protection Rules were driving changes and
18 challenges. A district had to come out of western
19 Pennsylvania, as within the state -- its population within the
20 state shifted from west to east. There was testimony from
21 Professors McCarty and Gimpel and from the Legislative staffers
22 testifying that the Voting Rights Act impacted the map.
23 Professor Gimpel identified that a majority/minority district
24 was required in the Philadelphia area. Even the Plaintiffs'
25 own witnesses, although unable to say why, acknowledged that

1 one or two majority/minority districts needed to be drawn in
2 Philadelphia.

3 Professors McCarty and Gimpel both explained that
4 there was only the minimal number of incumbent pairings in the
5 map and that the pairings of incumbents took place in an area
6 of the state that lost the most population. Plaintiffs'
7 witnesses, Hanna and McGlone, both acknowledged that the map
8 only paired the minimal number of incumbents mathematically
9 possible.

10 Professors McCarty and Gimpel both testified that the
11 Congressional districts in the map were not effective
12 gerrymanders. Professor McCarty testified that many of the
13 districts in the 2011 map in the commonwealth are very
14 competitive races and stand a reasonable chance of being won by
15 a candidate of either party. Professor Gimpel testified to the
16 same, indicating that voter registration and performance mean
17 that many Congressional districts in Pennsylvania are, in fact,
18 pretty competitive.

19 As for why Democrats haven't won more than five seats
20 since 2011, Professor McCarty testified that this represents a
21 historic under-performance of Democratic candidates that could
22 be explained by a variety of factors, ranging from national
23 trends which favor the Republican Party in 2014 and 2016 to --
24 to issue positions, to quality of candidates. This testimony
25 was uncontroverted by the Plaintiffs' evidence.

1 The House Legislative staffer testified that the
2 starting point of the new map was what he called exiting
3 patterns of representation. Mr. McGlone's report consisted of
4 maps putting the 2002 and 2011 districts side-by-side and
5 comparing them, in fact, demonstrated that there was a
6 significant degree of continuity between the 2011 plan and the
7 2002 plan -- sorry, between the 2002 and 2011 plan. Professor
8 Gimpel testified that for most redistricting, the map makers
9 start with the existing map and make adjustments for
10 populations first. This is precisely what the Legislative
11 staffers explained was the initial starting point driving the
12 mapmaking process.

13 The Plaintiffs' only evidence which they claim
14 indicates an intent to gerrymander was that publically
15 available election data and publically available census data
16 were in the hands of House and Senate, Democratic and
17 Republican caucuses and the Governor's Office, and that this
18 data had been provided by the Department of State and the
19 Legislative Data Processing Center. Plaintiff's experts, Hanna
20 and McGlone, made much of the fact that they found fields and
21 very large data files with this publically available
22 information and that some fields in this file added or
23 subtracted election results.

24 The two Republican Legislative staffers testified
25 that while they had the data, input from stakeholders,

1 including but not limited to, Congressmans (sic) Brady and
2 Shuster, the senior most members of Congress from the
3 commonwealth from each political party, were involved in
4 providing input in the process of drawing the maps. And they
5 testified that equal population requirements and that the
6 existing districts were essential focus of their efforts to
7 create a map that could pass the Legislature. The Plaintiffs
8 here suggested that certain conversations or meetings that took
9 place between legislators and elected officials of both parties
10 should somehow be equated with proof of the -- proof positive
11 of a nefarious partisan gerrymander.

12 In fact, consulting with people with an interest in
13 leg -- pending legislation is a normal and vital part of the
14 legislative process for any kind of legislation. Discussions
15 of this type without any evidence as to their content or effect
16 on the map do not give this Court any warrant to overturn duly
17 enacted legislative. At best, the Legislative staffer --
18 staffers testified that the political data was available, but
19 there was no indication that this data was actually the driving
20 force behind the boundary changes. And despite some opposition
21 to the map from some Republicans and Committee and the Senate,
22 it was the vote of one Democratic Senator, Senator Tartaglione
23 from right here in Philadelphia, that actually moved the map
24 out of the Senate Committee and towards the Senate floor, even
25 on the Senate floor, the staffer who testified indicated that

1 his driving motivation was creating a map that would garner 26
2 votes in the Senate. On the Senate floor, three Republicans
3 actually opposed the bill and it passed by a narrow 26 to 24
4 vote.

5 You heard some testimony from the Senator who
6 testified that this was a shell bill and he did his best to
7 deny that this sort of bill is actually quite common in the
8 Senate. And you heard in the testimony from the Senate staffer
9 that he -- who explained that after his 20 years in the Senate,
10 this is actually quite a common procedure. And over on the
11 House side, despite some opposition from Republicans and some
12 Democrats in the State House, the fact of the matter is that 40
13 percent of the Democrats in the House, for a total of 36, voted
14 in favor of the map. This is hardly a picture of a Democratic
15 shut-out from the process.

16 I also want to address Plaintiffs' assertions about
17 the use of technology and consultants. The Legislative
18 staffer, who drew part of the map, testified that adding and
19 removing municipalities from districts one by one on a manual
20 basis to attempt to meet equal population requirements (sic).
21 There was no evidence of the alleged sophisticated technology
22 or automated methods the Plaintiffs suggested were in use. In
23 fact, the testimony in the record is that the software
24 program used by the legislature is called AutoBound, a program
25 whose own website reflects that it's used in more than 30

1 states.

2 There was no evidence in the record of outside
3 consultants or high cost of data acquisition or analysis. In
4 fact, the testimony was quite the opposite. Both Legislative
5 staffers denied any outside consultants were involved in the
6 legislature's map drawing. There was no evidence of the cost
7 or expenses alleged by Plaintiffs associated with this
8 technology. And Plaintiffs, throughout much of their complaint
9 and many of their proposed findings of fact, refer to something
10 called "REDMAP." But, in fact, no evidence of out-of-state
11 influence or consultants or nefarious plans from partisans in
12 Washington, D.C. was actually produced at trial.

13 The Plaintiffs make much of Mr. McGlone and Ms.
14 Hanna's overlay of political data and district boundaries to
15 make their arguments that a hunt and peck style visual test
16 around the borders of the state with 18 districts and more than
17 12 million people can identify minute boundary changes or
18 precinct block geographic units and draw a conclusion that the
19 map makers had an overwhelming intent to draw the map driven by
20 partisan considerations. Professors Gimpel and McCarty
21 established that -- that this methodology is, in fact, no
22 methodology and proves nothing.

23 Plaintiffs make much of the notion that other states
24 do better, in their view, at creating districts than
25 Pennsylvania did based on their visual test and the conclusions

1 they drew from basic shapes to draw conclusions as to intent.
2 Professor Gimpel's moving circle example around Allegheny
3 County demonstrates clearly for this Court that a perfectly
4 compact district, even when moved to different parts of the
5 same county, can have a significantly different political
6 effect.

7 Plaintiffs suggest that many times that the shape of
8 districts in other states outside of -- and that the shapes of
9 the districts in Pennsylvania are wild outliers compared to
10 other states. And in oral argument on our motion to dismiss,
11 the Court inquired as to the shapes of districts in other
12 states. I'd like to draw your attention to the legislative --
13 Defendants' exhibit 14 and show the Court two of these --
14 certainly.

15 I'd like to show the Court Legislative Defendants'
16 exhibit 14 and show a few of these to the Court without any
17 explanation other than to tell the Court the legal process that
18 each of these states used to create these Congressional
19 districts. First is Arizona. This map was created by an
20 independent commission, survived multiple court challenges,
21 including two cases that went to the United States Supreme
22 Court. This map of California, and these -- these are all in
23 the -- in the Legislative Defendants' exhibit. This was
24 drafted by an independent commission and approved after a
25 challenge in -- in the California Supreme Court.

1 This map from New Jersey, as soon as I can find New
2 Jersey, -- did I -- oh, I'm sorry. This map from New Jersey
3 shows the shapes that were created as a result of a
4 commissioned process and you'll note in the north, you'll see
5 some districts that are actually only contiguous by water and
6 that they, sort of, dive in and out of each other. I don't
7 know, but that state borders this state and I'm sorry. Some of
8 these were double-sided and I can't --

9 I'd like to show the Court the map of Ohio. You'll
10 note that there's a district in Ohio, a Congressional district
11 in Ohio, that goes all the way across the top of the state,
12 almost from the eastern side to the western side. And you'll
13 see around here, in the Cleveland area, very dis -- you know,
14 districts that have very, let's call them, unique shapes, as
15 they stretch down. And you'll see the same around the city of
16 Columbus.

17 I'd also like to show the Court Connecticut, where
18 the Court can see that even in a square, relatively square or
19 rectangular state like Connecticut, you'll see an interlocking
20 pattern of districts in the central area of the state. I only
21 have two more of these, Your Honors, and, then, I will continue
22 with the rest of my -- once I can find them.

23 I draw your attention to the map of Illinois and
24 you'll note here the inset of Cook County. Whoop, here we go.
25 And you'll see the inset of Cook County. This -- the shapes

1 here survived not one, but two partisan gerrymandering
2 challenges in federal court in Illinois.

3 And, lastly, I'd like to leave the Court with the
4 districts in Maryland. I know Judge Baylson mentioned that --
5 that there is a pending political gerrymandering district in
6 Maryland; but, I'll note that that is a -- a pending challenge
7 that is focused only on the Sixth Congressional District. I'd
8 like to show the Court the other two. And we cited this case
9 a couple of times; but, there was actually a case called
10 Fletcher v. Lamone, a case I was actually counsel, where we
11 challenged the map primarily on the Voting Rights Act grounds,
12 but which -- and which was affirmed by the United States
13 Supreme Court, where the three Judge panel was critical of the
14 shapes of the map, but, ultimately, held that addressing this
15 was just not within their power. None of the courts reviewing
16 these maps looked at the shapes of the districts and struck
17 them down because of non-compact shapes. As Professor Gimpel
18 noted, simply looking at any of these shapes, whether regular
19 or irregular, where seemingly compact or noncompact, tells you
20 nothing about the districts.

21 Next, turning to the effect prongs of the -- of the
22 Plaintiffs' arguments: The Plaintiffs claimed that they would
23 show that the 2011 Congressional map was, in their view, voter
24 proof and that the people could not change who their members of
25 Congress are. This is shockingly similar to the plain --

1 claims made by Plaintiffs in the VanderMeer case who told the
2 Supreme Court that there was no way they could win a majority
3 in the Indiana House. But, what happened two years after
4 VanderMeer, the Indiana House tied in the 1988 election and in
5 the 1990 election, under the map the Court declined to reject
6 in VanderMeer, flipped majorities. The 2002 map from
7 Pennsylvania, the Plaintiffs, who claimed was a gerrymander as
8 they acknowledged, resulted in a number of seat, majority
9 changes after the Supreme Court rejected that political
10 gerrymandering case in Vieth.

11 The Plaintiffs did present some evidence that the
12 split between rep -- Democrats and Republicans didn't change
13 since the 2011 map. However, none of their evidence looked
14 at how competitive any of the elections since 2012 actually
15 were. Did the incumbents of both parties all win '12, '14 and
16 '16 elections by wide margins or were one or more races very
17 close? Were one or more candidates in various districts
18 unopposed? The Plaintiffs presented no evidence with respect
19 to how competitive or non-competitive these districts have been
20 since 2011 and they provided this Court with no evidence to
21 show that voter shifts of a few points in one way or another in
22 one or more districts wouldn't have made a significant change
23 in the composition of the delegation.

24 The best --

25 MALE VOICE: Excuse me for one moment.

1 MR. TORCHINSKY: The best evidence the Plaintiffs
2 presented of this alleged durability of the 2011 plan is the
3 2017 PVI calculations provided by Mr. McGlone. What this
4 evidence actually shows is when comparing the 2017 PVI to the
5 probabilities of Democrats winning those districts is that
6 Democrat actually have a reasonable chance of winning several
7 districts. Additionally, the evidence presented by Professors
8 McCarty and Gimpel demonstrate that many Pennsylvanian
9 Congressional districts are actually quite competitive.

10 Professor McCarty testified that Democrats stand a
11 reasonable probability of winning slightly more than eight of
12 the 18 Congressional districts based on his application of the
13 PVI to his long-term study of more than 2000 Congressional
14 elections when compared to their PVI. Professor Gimpel
15 testified that voter registration is a significant indication
16 of party affiliation and demonstrated that party registration
17 and identification data shows that many of Pennsylvania's
18 Congressional districts are actually quite competitive.

19 Plaintiffs make much of their numbers showing that
20 the total of votes cast for Democrat candidates when aggregated
21 from each of the 18 elections into a single statewide number
22 show that Democrats won a majority of the vote for statewide --
23 statewide for Congress, but that they don't hold a majority of
24 the Congressional seats. This, they submit, shows that there
25 is a problem with the map. What this fails to take into

1 account, and what Professors Gimpel and McCarty testified to,
2 is that the Republican and Democratic likely voters are not
3 evenly distributed and that simple fact has a large impact on
4 the total aggregate statewide votes for Congress and the
5 individual district-by-district outcomes. Even Mr. McGlone
6 admitted that Republican likely voters and Democratic likely
7 voters are not distributed geographically evenly across the
8 Commonwealth of the Pennsylvania.

9 I want to note for the Court the one graphic in Mr.
10 McGlone's report that demonstrates his statewide aggregation of
11 votes he admits overstates Democratic performance by utilizing
12 only an average of statewide and national votes across the '04,
13 '06 and '08 elections. At least two of those elections are
14 elections that Mr. McGlone, himself, acknowledged were
15 Democratic waive years. We submit that there are lots of
16 plausible explanations for this other than the effect of any
17 particular statewide districting map.

18 One of the biggest problems facing the Democrat party
19 in Pennsylvania and elsewhere around the country is the high
20 concentration of Democrat voters in urban areas. Like --
21 likely Democratic voters are not evenly distributed across the
22 geographic area that constitutes the Commonwealth of
23 Pennsylvania. Professors McCarty and Gimpel both testified to
24 this. Mr. McGlone acknowledged it. The color-coded map
25 submitted by Ms. Mc -- by McGlone and Hanna both illustrate

1 this visually. Simply looking at the red versus blue of
2 Pennsylvania paraded before this Court over the last three days
3 shows that there are discrete areas of very dark blue on
4 opposite sides of the state. And Professor Gimpel testified
5 that it not unusual for Democrats to win a high proportion of
6 votes in Congressional districts located in urban areas because
7 of the high concentration, according to his political geography
8 research, of Democratic voters in these highly concentrated
9 geographic areas.

10 In the end, Plaintiffs really seem to be claiming
11 that they are demonstrating a sufficient effect by showing a
12 lack of proportionality between aggregated statewide votes for
13 Congress from across the 18 individual contests and the split
14 of Congressional seats between the two major political parties.
15 As we noted before, the problem with this argument is that the
16 United States Supreme Court has squarely rejected
17 proportionality as a basis for invalidating districting plans.
18 And in large part, the reason for the Supreme Court's
19 rejections of this notion is that Congressional elections are,
20 in fact, conducted on a single member district and not a
21 statewide basis. Just last decade in Vieth, a case arising out
22 of this very district, seven Justices of the United States
23 Supreme Court held that a lack of proportionality does not
24 present a cognizable claim. And I'd like to turn briefly to my
25 remaining points.

1 With respect to proposed remedy, Plaintiffs have
2 asked this Court to effectively assert the power of the federal
3 judiciary to alter Pennsylvania State constitutional process
4 for enacting legislation. Plaintiffs ask this Court to direct
5 the Executive Branch to develop and submit a plan to the
6 General Assembly for its approval that complies with their
7 concept of compliance with the Elections Clause. We are aware
8 of no redistricting case ever where a federal court ordered a
9 State Government to use some process other than the process
10 outlined in the State's Constitutions or Statutes to enforce
11 the use of some different method for adopting Congressional
12 districting plans.

13 The last time we were aware of where a federal
14 court ordered a state to change its election process outside
15 of a Voting Rights Act claim or a claim involving racial
16 minority voting rights, was New York State Board of Elections
17 v. Lopez-Torres. In that case, the 2nd Circuit had affirmed a
18 District Court order compelling New York to use a different
19 primary process for judicial elections. The Supreme Court
20 reversed, clearly holding that these are precisely the kinds of
21 policy decisions that federal courts are required to leave to
22 the state's political branches.

23 Even in redistricting cases where the federal courts
24 have drawn a map because of the failure of the political
25 branches to adopt a map following the decennial census or

1 following a Voting Rights Act or 14th Amendment violation,
2 the Supreme Court has required the federal court to apply all
3 of the legally permissible state criteria or policy goals
4 that are lawful and embodied in the map. This case was
5 Uppin v. Seaman (phonetic), and its progeny. In other words,
6 even if this Court, like the Court in Fletcher v. Lamone, has
7 concerns about the shapes of the districts as a policy matter,
8 those are simply not something the federal courts have the
9 power to address absent a violation of the Constitution or
10 federal law.

11 With respect to individual harm, there's a need to
12 show a concrete or particularized harm under Lujan and none of
13 the Plaintiffs have made the appropriate showing. Plaintiffs
14 each had concerns about certain policy issues that they find
15 personally important. They've expressed their pleasure or
16 displeasure with particular Congressmen. They've expressed
17 concerns about whether they have a commonality of interest
18 with Philly people if they live in Chester, or rural farmers if
19 they live in the norther suburbs of Philadelphia, or not
20 wanting to be placed with other voters that they perceive to
21 have interests different from them in other parts of the
22 district.

23 In the evidence presented at trial, Plaintiffs'
24 various complaints ranging from the election of a President
25 they appear to disagree with, who I -- who was, I'll note,

1 elected under a federal election system that involves no
2 decennial map drawing, to concerns about the environment,
3 minority rights, unions, gun control, taxes, North Korea and
4 healthcare. The problem for the Plaintiffs is that
5 Congressional districts in Pennsylvania each have about 710,000
6 people. That is a big number and generally requires a lot of
7 territory. Is there any group of 710,000 Americans in
8 geographically connected territory who have the same interests,
9 professions, family situations, socioeconomic characteristics,
10 concerns and views on policy or unanimity of views about
11 various elective officials in the political parties? I submit
12 to that the answer is no.

13 Each one of the people who live in these districts
14 have their own policy preferences. Each one of these people
15 have their own views of their own Congressmen and those -- and
16 many who live close to a district that border -- who live close
17 to district borders have positive or negative views of the
18 neighboring Congressmen. Some Plaintiffs express an interest
19 in living in a district where their member of Congress sees
20 eye-to-eye with them on everything so that their voices are
21 heard or other expressed a desire to live in a competitive
22 district so they have a choice. Others want to live in a
23 district where everyone is like them. Others express the
24 concern that they didn't want to live in a district that
25 combines suburban areas with rural areas or suburban areas with

1 urban areas. Other expressed an opinion that gerrymandering
2 contributes to gridlock in the political system. This, of
3 course, ignores the fact that the kinds of obstacles to
4 advancing legislation that regularly confront the House of
5 Representatives are also present regularly in the United States
6 Senate, where there's no decennial redistricting to create or
7 even contribute to the claimed gridlock.

8 Counsel proffered that at least one plaintiff was a
9 candidate for Congress and was placed in a district where she
10 couldn't win. The fallacy of this Plaintiffs' harm is that
11 the U.S. Constitution only requires that you be a resident of
12 the state where you run for Congress, unlike the requirements
13 of -- of the State legislative office. There is no
14 Congressional residency requirement, no Congressional
15 district residency requirement in the Constitution. Even
16 though this plaintiff lives in and ran a losing campaign for
17 office under a prior map, even that is not a cognizable harm
18 because she could have simply run in a district where she
19 didn't reside.

20 In the end, there was no unifying harm of any sort
21 presented to this Court by the Plaintiffs. At best, they have
22 each expressed some sort of generalized grievance about the
23 conduct of the Federal Government and the Supreme Court has
24 over and over again failed -- or held that this fails to meet
25 the requirements that allow them to maintain case or

1 controversy requirements of Article III standing.

2 I have just about another minute or two. Lastly,
3 there's the final insurmountable hurdle facing the Plaintiffs.
4 This double-hurdle is the United States Supreme Court's
5 decisions in Lance v. Coffman from 2007 and Arizona State
6 Legislature v. Arizona Independent Redistricting Commission
7 from I believe 2015 or '16. In Lance, as I noted for this
8 Court in our -- in our Rule 50 motion, the Supreme Court found
9 the four private citizens did not have standing under the
10 Elections Clause to maintain an action in federal court
11 challenging the constitutionality of State Government actions
12 under the Elections Clause. These Plaintiffs are identically
13 situated to the Plaintiffs in Lance.

14 Unlike the Plaintiffs in Arizona State Legislature,
15 where the Court did find standing to bring a case under the
16 Elections Clause, these Plaintiffs are not the State -- State
17 Officials or any State legislative body. As a result, this
18 Court is compelled by that precedent to enter judgment for
19 defendants, because the Plaintiffs lack standing under the
20 Elections Clause.

21 While it is true that Plaintiffs in this case have
22 brought what this Court has identified as a novel claim, not
23 all novel claims are valid claims. And this is certainly one
24 of those cases where a novel claim is not a valid claim. In
25 this case, Legislative Defendants have laid out for the Court

1 the Plaintiffs lack of Article III standing. The Plaintiffs
2 have not demonstrated the requisite concrete and particularized
3 harm required under Lujan. They have not demonstrated that
4 this Court can afford them any remedy to address what they
5 perceive is a violation of law. They have not demonstrated
6 that they can overcome or distinguish themselves from the
7 Supreme Court's holdings in Lance or Arizona State Legislature,
8 confirming that private citizens lack standing under the
9 Elections Clause.

10 Finally, even if Plaintiffs' overcome all of these
11 procedural hurdles, then, the Court would be confronted with
12 the most recent version of the intent and effects test they
13 proposed. While our Rule 552 motion makes clear our continuing
14 concerns about the legal viability of these elements, for all
15 of the reasons that I outlined here, the Plaintiffs fall far
16 short of presenting evidence to this Court that would permit
17 this Court to find that they satisfied proof on their four
18 stated elements of their articulated claim. And with that, we
19 respectfully request that this Court enter final judgment for
20 the defendants.

21 JUDGE SMITH: All right. You'll have three minutes
22 to address by way of response the arguments of the executive
23 defendant.

24 MR. TORCHINSKY: Thank you, Your Honor.

25 JUDGE SMITH: Mr. Aronchick.

1 MR. ARONCHICK: Thank you, Your Honors. I'm glad I
2 get a chance to talk now. Our defense at the outset was based
3 on two principles. One was that the executive will enforce
4 this statute in the absent of a court order that we shouldn't
5 and, second, that we wanted to give our legislative coordinate
6 branch the opportunity to defend its work. And, believe me, I
7 found myself in an unusual position throughout this case, an
8 unusual place for me, largely letting the record develop as the
9 parties themselves thought it should develop and not
10 interfering and not intervening. I want my remarks today to --
11 to -- to be understood that I'm basing them only on this
12 record, the record that was developed in this court, what was
13 proffered here. That's what I'm reacting to, not what it could
14 be in some other case at some other time.

15 The viability of the Plaintiffs' legal test is a
16 whole -- is a separate question; but, factually, the
17 Legislative Defendants think that the Plaintiffs have
18 presented compelling evidence that the 2011 map was a partisan
19 gerrymander, a map that was created for the Congressional
20 districts where a significant factor was the intention to favor
21 one political party over another and have the effect of doing
22 so. Thus, we are not contesting the factual case that the
23 Plaintiffs have made.

24 In fact, that case suggests that the -- the
25 diminishment of traditional redistricting criteria, that they

1 were diminished and the notion of incumbency protection was a
2 convenience, exaggerated, used in a way to create a partisan or
3 a party guarantee, both Republican and Democrat, by the way.
4 So, the open issue appears to be whether the Plaintiffs have
5 presented a legal theory to support a finding of
6 unconstitutionality and until the Court rules on that
7 fundamental question, we're going to be in the odd position of
8 having to implement and enforce this map.

9 Now, let me explain to some degree our position
10 concerning the facts in this record. First, let me just
11 address, briefly, the Plaintiffs' factual case. I know they
12 will probably address it in much more detail. But, let's start
13 with that the Legislative Defendants produced under order of
14 this Court the data that was used to produce the 2011 map.
15 This was a November 8th order that said that the Legislative
16 Defendants shall produce the requested facts and data
17 considered in creating the map." This was an order from Judge
18 Schwartz for the Panel.

19 Now, they tried to disown that production several
20 times in this hearing, walk away from what they produced as the
21 data that was used to produce the map. It may be that there
22 are some other data somewhere in the server we've heard of or
23 some other place. They have not produced it. They have not
24 brought it forth. What we know in this record is what was
25 called the "Turzai data set." Now, they could have produced

1 and I believe if -- if this Court finds that they -- they had
2 the burden to do so, the -- the burden shifts, they should have
3 produced Mr. Memmi or the server or a lot of other things that
4 they did -- chose not to produce.

5 Now, that data was unscrambled by the Plaintiffs. It
6 was in a scrambled fashion. You heard that testimony and the
7 Plaintiffs unscrambled it. And, according to Mr. McGlone, the
8 census blocks were added and subtracted for dis -- from
9 districts for the purpose of distributing registered Democrats
10 in non-competitive Democratic districts, packing and, also,
11 spreading other Democrats into less competitive Republican
12 leaning districts, cracking. And when you look at the map, as
13 he went through the testimony in great detail, it makes sense.
14 Because you see, lines that were drawn around cities, Reading
15 and drawn through other cities, Harrisburg, and it makes no
16 other sense in this record, than that they were done so on --
17 based on the partisan data that was produced here and for
18 partisan reasons.

19 And there's no explanation that the Legislative
20 Defendants offered for why these GIS shapefiles from Speaker
21 Turzai's production had census block level partisan data. And
22 their own expert, Mr. Gimpel, testified with great enthusiasm,
23 overwhelming enthusiasm, if you will, that you can only draw
24 conclusions about intent with regard to the use of partisan
25 data, if someone affirmatively sought that data out. That's

1 what he said. And that's exactly what happened here.

2 The -- the Republic -- the -- the -- what we have is
3 the Republican Caucus produced data that they sought out.
4 Whether it was available publically or not is not the point.
5 They sought it out and they took the extra affirmative step
6 of gathering up that data and loading it into their
7 redistricting software. Whether it was sophisticated or not
8 is not the point. They used the software to load the data
9 to, then, produce the information that Mr. McGlone and Ms.
10 Hanna tied to how the little -- the maps were drawn whenever
11 they needed to make little cuts and changes. They were
12 always partisan Democratic cuts and changes. That's what this
13 record shows.

14 Now, the -- and -- and that's just my brief reaction
15 to what McGlone and Hanna said. I know we'll probably hear
16 more from them. But, here's some additional points: There's
17 great use here by my friends who represent the Legislative
18 Defendants about how terrific their experts were in support of
19 their case; but, that's not what I heard. I heard Mr. McCarty,
20 after conceding that he made a middle school computational
21 error, middle school computational error, when he was
22 predicting a lower number of Democratic seats and said, "Oh,
23 yes, based on all my data and reports, I predict that under
24 the 2011 map, the Democrats should have had eight seats, could
25 have had eight seats." Well, they've only had five. What

1 happened? Mr. McCarty doesn't answer. No answer to that
2 question.

3 And McCarty says, "Well, but they were competitive."
4 And when he was tested, "What's competitive in this
5 districts?" He said, "Well, a sure shot would be an R+9."
6 That's what he said, "a sure shot." He back off at some point
7 and he said, "Well, maybe an R+5." Look at his appendix to his
8 report that was admitted earlier where he lists what -- based
9 on his big study, what is competitive or not. And, sure, at
10 R+9, and I'm not going to go over what that means. That was in
11 the testimony. I don't want to take my time to do that. But,
12 he was certain that an R+9, that's going to result in maybe a
13 10 percent chance for a Democrat to win a seat, probably not
14 even that. And, so, therefore, he said, "Well, that's a sure
15 shot." Districts like that are not competitive and they're so
16 very few of them.

17 But, look down to the rest of his chart. An R+2
18 produces a 27 percent chance for a Democrat to win a seat, just
19 two points redrawn, worked into that map, favoring Republicans.
20 The Democrat has a one out of four shot. And when you go to
21 three, it's a one of five shot. Look at his chart and, then,
22 ask yourself, is that a reasonably competitive map? That's the
23 standard my friends here just proposed that Mr. McCarty said.
24 There's a reasonably competitive map if you draw it in a way
25 where your opponent is going to win maybe one out of four or

1 one out of five times? That's not -- that -- that testimony
2 does not help their case. And Mr. McCarty, himself, conceded
3 that the 2002 map, which they say was the genesis or the
4 beginning of -- of this map drafting, itself, was probably
5 gerrymandered. He didn't study it. But, we know from the
6 Vieth case about that map.

7 Mr. Gimpel helped the Legislative Defendants?
8 Seriously? With great enthusiasm, I said, he talked about how
9 you can infer intent from the use of data. He called this an
10 incumbency protection plan. So, did Mr. McCar -- remem --
11 they're all talking about incumbency protection. By the way,
12 my opponents didn't even raise that when they just made the
13 presentation to you as the most significant factor that was
14 operating here. They talked about all sorts of other things.
15 But, all of their witnesses said the primary factor here was
16 incumbency protection.

17 Well, Mr. Gimpel goes on to say, but it's e -- this
18 is in the record. It's easy to conflate incumbency protection
19 to partisanship protection. He said it's easy to conflate and
20 is -- and if there is any place in the country that's easy to
21 conflate, it's this 2011 map. It's the poster child because
22 what does incumbency protection mean? Mr. Gimpel said, "Well,
23 the primary issues would be seniority and extensive knowledge
24 of the people you represent." Look at Exhibit P-4, Plaintiffs'
25 P-4. It's a list of who won each election, each cycle, leading

1 into the first cycle under this 2011 map.

2 You will see that there were four freshman
3 Republicans at that time who were protected: Meehan,
4 Bartolotta, Marino and Kelly. They had all served only one
5 term. And, then, however you want to look at Mike
6 Fitzpatrick, he had previously been a Congressman and, then, he
7 was out of office for two terms. Now, he's back in for one
8 term. So, you can decide whether he is a sort of freshman with
9 an asterisk. But, he was out of office for two terms. And
10 they eliminate two Democratic incumbents in this plan, Altmire
11 and Critz, are put together in a district that favors
12 Republicans. Incumbency protection? This freshman incumbent
13 protection? That's not incumbency protection. That's
14 protecting the Republican seats that they held at the time of
15 the drawing of this map.

16 Now, I heard Ms. Hanna say, you know, incumbency,
17 yes, I'll recognize that as a factor. But, it's got to be
18 based on real seniority. I heard Mr. Gimpel say it has to be
19 based on real seniority. Let's not talk about historic
20 traditions. The basis of those traditions is what's
21 important, real seniority. You cannot call this map an
22 incumbency protection plan and that -- and you -- and in words
23 of Mr. Gimpel, it does conflate to a partisan party protection
24 plan.

25 Now, the defendants' witnesses also, in our

1 estimation, helped the Plaintiffs' case. Mr. Arneson and Mr.
2 Schaller both conceded that partisan data was used. They
3 didn't say to what extent; I -- I grant that, but that it was
4 used. But, each one of them really said something very
5 different. They said in -- this was all about incumbents.
6 That's what we were interested in. Mr. Schaller was evasive
7 for probably 40 pages, as you sat here and listened.

8 But, at the end -- and -- and -- and, at the end,
9 he makes a huge concession at the end of his direct -- the
10 direct that was read at page 76 and '7, he says -- the
11 question was:

12 "Is it fair for me to say that the information you
13 got about the discussion among Republican
14 stakeholders and the legislative process was probably
15 the most important factor that you used in drawing
16 the maps?" "Yes, I would say so."

17 And there was some testimony in -- in an effort to make -- you
18 know, to -- to -- to re -- rehabilitate him that:

19 "Did you do a simulation of districts more likely to
20 vote Republican?"

21 "I don't remember."

22 "Did you use the Cook PVI?"

23 "No."

24 He was never asked a direct question which was: was
25 partisan voter data a factor in the drawing of these maps?

1 That was the direct question. They evaded that and went all
2 the way around that. And, to me, this kind of evasion, not
3 producing the server information, Mr. Memmi, all of these kinds
4 of things, inform -- help, at least, inform me in the position
5 that we're taking on this record of what this map was and what
6 it looks like.

7 You know, Mr. Schaller and Mr. Arneson, when you --
8 when you pin it all down, you pair it all down, what are they
9 saying? They're saying that their real job here was to please
10 the Republican stakeholders. Mr. Brady may have had some
11 input, but it was the Republican stakeholders and to get 26 of
12 those votes and to listen to what they had to say and Mr.
13 Memmi, to tinker with the map, based on what that input was all
14 about. That's what was really going on here. And -- and to
15 dress it up with these generalities about, well, we were
16 waiting and considering all kinds of other things and -- they
17 never tied that down: How? Where? How?

18 If -- if the burden shifts to them, they have
19 utterly failed in either rebutting the Plaintiffs' case or in
20 establishing their burden of how this map was actually created.
21 They have the information. My friends on the other side of --
22 of, you know, on this table behind me here who represent the
23 legislature, several of those lawyers were involved as legal
24 counsel to the Caucuses at that time.

25 You know what was one of the more amazing -- I mean,

1 I -- to me, bombshell, was yesterday, learning that Mr. Memmi
2 is actually a consultant to one of the law firms in this case
3 representing the Legislative Defendants and that he was
4 advising Mr. Gimpel in his expert report and that wasn't
5 disclosed. We learned that in court. Because this Court had
6 the -- well, made the order that these depositions should
7 occur while this case was going on, depositions that they were
8 hoping would never occur, I suppose. We never knew about these
9 people until the end. And what comes out, Mr. Memmi is not
10 here as a witness. He's not here to talk about what hap --
11 happened. He's here as a consultant to feed something to Mr.
12 Gimpel.

13 Now, they said that Gimpel and -- and Mr. McCarty
14 justified, they looked at this map and told -- and -- and said
15 that -- explained why this map is legal. They didn't do that.
16 They weren't either -- either one of them were given anything
17 about this map. They weren't given the data. They weren't
18 given the server information. They -- they -- they said,
19 themselves, they were just here to rebut McGlone and Hanna, not
20 to do a report supporting the legality, constitutionality,
21 correctness, the factors, whatever you want to say, about this
22 matter.

23 I under -- I -- I heard some discussion, rapid
24 discussion here in this last presentation, that somehow they
25 were converted to experts who actually undergird and support

1 this map. But, that's not what happened and you heard it and
2 we all heard it. And on top of that, Mr. Arneson conceded at
3 the end, I heard, and -- and asked, I -- quote,

4 "I didn't particularly consider to what degree to
5 respect incumbency. Because that was important to
6 the Caucus. I was trying to get 26 votes."

7 A worthwhile thing, but trying to round up 26 votes doesn't
8 allow you to round-up those votes over a partisan gerrymandered
9 map. You have to round up the votes over a properly drafted
10 map. So, rounding up votes doesn't really get them anywhere.

11 I know that this Court expected, at least I heard,
12 more transparency. They were hop -- I -- I -- I assume order
13 after order, at the beginning of this case, no legislative
14 privilege. Three orders you had to -- to -- to make to make it
15 clear that the legislative privilege wasn't applied. And only
16 days before this Court proceeding do we start to get more
17 rolling production, over the weekend, before this Court
18 proceeding starts. I think that that approach to litigating is
19 not transparent. I said at the beginning we were looking for
20 transparency. I wanted them to have every effort to establish
21 this map, hear all that I could possibly hear on behalf of my
22 clients, and I think that inferences and -- and -- run against
23 people who don't produce what they have available to
24 demonstrate the legality of that map.

25 (Transcriber change)

1 Let me just go over quickly some of their other
2 attempts to rebut because they're so weak. Some democrats were
3 also protected. Okay, maybe they shouldn't have been. But
4 when you have 54 percent of the Congressional vote, you've got
5 to put them somewhere. They've got to be in some districts,
6 and, so, they wind up in five districts.

7 Somehow or other that -- this map creates
8 competition, I assume, if there's no incumbents. But if you
9 look at P-4 again, you will see that three incumbent
10 Republicans either resigned or chose not to run, and three new
11 Republicans were elected: Costello, Smucker, and -- I'll get
12 the other. There's a third. And all three filled in the spots
13 of those incumbents.

14 Now, there isn't a vote total in this record; the
15 Plaintiffs didn't put that in there. You can decide whether
16 you can take judicial notice of those vote totals. But we know
17 in these supposedly competitive districts that we still had
18 13-5, 13-5, 13-5, even if there were no incumb -- even when the
19 long-term incumbents stopped -- you know, had left -- left
20 office. That doesn't work.

21 They talk about the Voting Rights Act and its
22 importance and, sure -- surely, it's important. But, so what?
23 There is a district that covers it. That doesn't mean
24 everything else you do can be a partisan gerrymander.

25 They say that Mr. Gimpel, "Well, these carveouts,

1 yes, they look like they're all Democratic little spots,"
2 every -- you know, the ones that Mr. McGlone talked about.
3 "But voters are people." How many times did he scream and yell
4 that, "Voters are people?" Of course, they're people. Of
5 course, they're people. But -- and they -- and -- and voters
6 make decisions for all sorts of reasons. Where's the
7 Republicans' data set of all the sociological reasons that they
8 incorporated into redrawing this map? The only data set we
9 have is the partisan voting data. That's what it boiled down
10 to.

11 The -- they -- well, they worked off 2002. I already
12 said it, 2002, their own experts couldn't say whether that was
13 a gerrymandering map.

14 Fewer county and municipal splits show up in 2011
15 than 2002; but, you know, what's not calculated here and,
16 there -- therefore, this can't really be credited: Was
17 Montgomery County split three times maybe in a pervious map and
18 five times now, and so that's only one county split both times?
19 Or is it three and five? We don't know how you're adding up
20 splits. You can't tell from this record. So certainly the
21 legislative defendant can't get -- can't get any credit for
22 that.

23 I want to go very quickly -- I'll come back to some
24 of these additional points, but I -- I do want to go quickly to
25 some of these other arguments, the last one that my friends

1 made about standing. I have to tell you, I don't want to
2 associate myself with those arg -- with those in any way, shape
3 or form with those -- with those points.

4 We saw citizens in here, people who talked about
5 their harms. One person whose medical condition is such that
6 she wishes she could talk to be involved in a competitive
7 location where she can -- can advance her particular point of
8 view. A high school teacher who -- who said, "I'm -- I'm not
9 in a competitive place, but I've got to teach my students
10 civics and they are losing interest in everything about this
11 democracy; each generation is -- is more turned off."

12 Witness-wide. I mean seriously, witness-wide.
13 People who said their votes are diluted. "I don't have
14 meaningful competition. I don't have people I can really vote
15 for." And what did the Legislative Defendants say? They said,
16 "Well, but you voted for somebody and you called your
17 congressman and your voice -- you made your voice heard, didn't
18 you? And you don't have any right, you don't have any right to
19 have your viewpoints considered."

20 You know what that is? That's taking people who
21 haven't yet lost the hope and faith in this democracy, who
22 still think notwithstanding they are in the most difficult
23 situation, they're not in competitive districts, and they are
24 still believing enough in the system to go to these people
25 that don't -- that they have to vote for, that -- that it --

1 that they're -- that it doesn't matter who they vote for, and
2 try to urge their points. And because they're still active or
3 because somebody's act -- activism was generated by the last
4 presidential election or maybe because they slipped and fell
5 on the floor, who cares. But, their activism is recent and
6 they want to fight in this system. And you say, "Well, what
7 harm do you have, you're still fighting. You're still voting.
8 You're still talking." That is the most callous look at
9 citizen participation and citizen standing than I can possibly
10 imagine.

11 These are people who said their votes have been
12 diluted. They don't have competitive people to vote for.
13 Judge Baylson asked several times, and Gimpel agreed, "Isn't it
14 true that if you have gerrymandering maps, you turn voters off?
15 It lowers turnout. It chases them away from the system."
16 That's harm. That is harm.

17 This case is important to all Pennsylvanians, not
18 just Democrats. Some other day it could be equally important
19 to Republicans. The judiciary is where we have to look to now.
20 Of all the times that I at least have been alive, now, the
21 judiciary. Partisan gerrymandering has eroded trust. It has
22 produced a lack of transparency. It's turning off those high
23 school students. And this brings me to the second point, the
24 legal arguments.

25 These are what separate my clients' role from yours

1 in our democracy. My clients have to enforce this map, unless
2 and until they are ordered not to, or unless it is palpably and
3 plainly unconstitutional. That's what we will do. But you
4 make the decision about whether we have to.

5 These are novel theories, there's no question. My
6 friend's arguments on the novelty of the theories must be
7 weighed. I grant them that, they have to be weighed, as well
8 as the Plaintiffs' arguments.

9 Your decisions on the facts and law, however it comes
10 out, will matter. Your views about the factual record, about
11 the law, however it comes out, will matter. It will be noticed
12 in that parallel case. It will be noticed. And you have
13 another case here, the Diamond case, that you haven't decided
14 what to do with yet that might produce a fuller record. And
15 that gets to me to the next point, timing and remedy.

16 I said at the outset our stipulated facts, and that's
17 why I wanted to make sure the full facts were in, talk about
18 the current election calendar dates. Currently, our primary is
19 currently calendared in a way that we would need to know if
20 there's a new plan by January 23rd. But I also said there's
21 flexibility.

22 I know we haven't had a remedy hearing, so I -- and
23 there's no record for me to go into that. But all I can say is
24 that if there was, we could and would be willing to demonstrate
25 some degree of flexibility, and we could talk about that. We

1 have all the interests in the room and we could see whether
2 that mattered.

3 If we are meeting the current schedule, the
4 Legislative Defendants, if you order this plan to be changed,
5 will pledge whatever it takes to help develop a new plan under
6 whatever proper remedy and direction the Court wants that to
7 proceed.

8 Your Honors, I think that's -- that's all I want to
9 address right now. Thank you.

10 JUDGE SMITH: Thank you very much, Mr. Aronchick.

11 You have three minutes, Mr. Torchinsky.

12 MR. TORCHINSKY: Thank you, Your Honor. I thought
13 they were on our side of the V. That was quite a speech by the
14 Governor's counsel, who basically just utterly abandoned the
15 state's duly enacted law, a law that was enacted with support
16 of 36 democrats in the state house.

17 Half of his presentation was about what legislative
18 discovery -- what Legislative Defendants purportedly didn't do
19 in discovery. Legislative defendants violated no order.
20 There's no argument on -- this was not an argument on a motion
21 to compel. Where was the Legislative Defendants' discovery?
22 Where were their motions to compel, if they thought this was so
23 important?

24 We were ordered to turn over documents on November
25 28th. We turned over everything by November 30th, within 48

1 hours of this Court's order. Legislative defendants did
2 everything to comply with every discovery request and every
3 discovery order of this Court.

4 Turning back to the merits, because I don't want
5 to -- I don't want to belabor the -- the campaign-like speech
6 made by the -- the Governor's counsel, Legislative Defendants
7 here said that the map was drawn to account for a myriad of
8 factors, including one person, one vote, the loss of a
9 district. Where in the record is there evidence of this map
10 drawn by the partisanship you just heard from my apparently
11 co-defendant? I mean simply because -- I mean the loss of the
12 district and the protection of incumbents was clearly
13 important. Arnes - Arneson and Schaller both testified and
14 said lots of things impacted this map. There was no one single
15 driving factor.

16 The Plaintiffs have the burden here of proving that
17 the map was a result of something that violated the law. They
18 haven't done that. They haven't established their standing.
19 They haven't established the elements of their claim, and they
20 haven't established any violation of the United States
21 Constitution. Thank you, Your Honor.

22 JUDGE SMITH: Thank you, sir. Mr. Geoghegan, you're
23 arguing for the Plaintiffs?

24 MR. GEOGHEGAN: I am, Your Honor.

25 JUDGE SMITH: Proceed, please.

1 MR. GEOGHEGAN: Plaintiffs, first of all, want to
2 thank this Court for the opportunity to present our case. To
3 bring -- just having these hearings has brought some measure of
4 accountability to a gerrymandering scheme that was concealed
5 from the citizens of this state, rammed through in one day in
6 the respective chambers of the Pennsylvania state legislature.
7 For that, we thank the Court.

8 And I want to note at the outset that there is an
9 area where we certainly agree with Mr. Torchinsky, the
10 Legislative Defendants' counsel, who was just up here quoting
11 Professor Gimpel and presenting as the Legislative Defendants'
12 own explanation for this 13 to 5 ratio, the fact that it all
13 comes down to the geographical distribution of Republican and
14 Democratic voters throughout the state. We agree and that is
15 why a districting scheme that deliberately put more of the Rs,
16 if I may call them that, the Republican voters, than the Ds,
17 Democratic voters, systematically, in one district after
18 another, has exactly what the Legislative Defendants just told
19 this Court, an outcome determinative effect.

20 In example after example -- and we do rely very
21 prominently on Mr. McGlone's report -- this Court can see a
22 pattern of shoving Democratic voters or precincts with
23 Democratic voting histories into these super Democratic
24 districts in ratios of something like 70, 75 percent or
25 higher, and using nooks and extensions and crannies of all

1 kind, to pull in voters from other districts that are much more
2 evenly divided between Democrats and Republicans. And in the
3 case of one Republican-leaning district after another, almost
4 with like a tweezer, picking out little clumps of Republican
5 voters to push that pers -- and taking out clumps of Democratic
6 voters to get that percentage up to 55 percent Republican, 60
7 percent Republican, as efficiently throughout the state as
8 possible.

9 And to do this, to have this scheme, really have an
10 effect at a statewide level, you had to have very sophisticated
11 microanalysis so that the deals could be cut among the people
12 that Mr. Schaller called the stakeholders, so that they all had
13 just their share to have their support for a gerrymandering
14 scheme that has this consistent pattern over and over, that is,
15 the movement of Republican precincts, the movement of
16 Democratic precincts to reach a certain percentage in district
17 after district in the Republican side in an efficient way, 55
18 percent, 60 percent, and 75 or higher on the Democratic side.
19 That was the scheme, and it does matter where you put the Rs
20 and the Ds. And geographic distribution does have an outcome
21 determinative effect.

22 The elements of our claim is as follows: That there
23 was a one-sided partisan gerrymander by stakeholders who are
24 largely Republican congressmen, and certainly the house
25 Republican and Senate Republican Caucuses, that had the intent

1 of maximizing the election not of incumbents, but of
2 Republicans in the state delegation, that had the intent of
3 targeting two Democratic incumbents in the west side of the
4 state, Mr. Altmire and Mr. Critz, discouraging another up in
5 Erie County from running, and generally putting up hurdles to
6 challengers, to those likely to hold Republican seats, whether
7 incumbents or otherwise. And that this scheme did have an
8 outcome determinative effect, an important causal effect, in
9 the current repetition of this 13 to 5 cycle in 2012, 2014,
10 2016. It is an important explanatory factor. And the best
11 witnesses on behalf of the effectiveness of the scheme are the
12 Legislative Defendants themselves, the so-called stakeholders.
13 They intended it and they intended it because they did think it
14 had an outcome determinative effect as, in fact, it objectively
15 has.

16 It is also our contention that this partisan
17 gerrymander, with the intent and effect of maximizing the
18 election of Republicans and targeting certain Democratic
19 incumbents while protecting others, is beyond the authority of
20 the state under the Elections Clause, Article I, Section IV.
21 And it's beyond the authority of the Elections Clause for three
22 reasons, and there are three sources of authority about what
23 the Election Clause means that we would like to direct this
24 Court to at the close of this case.

25 The first, of course, is Thornton and Cook, which are

1 the term limit cases. In the case of Thornton, there is an
2 actual dictate, a decree that really bars incumbents from
3 remaining in office for more than a certain number of terms.
4 In Cook, it's different; it's a statement on the ballot urging
5 voters not to support candidates who don't favor term limits to
6 the United States Congress. Those cases set out our
7 understanding of the Elections Clause, which is that it is a
8 grant of procedural regulations, time, place and manner, and
9 not a source of authority for dictating electoral outcomes or
10 favoring or disfavoring a class of candidates.

11 How does our case line up in terms of Thornton versus
12 Cook? Thornton, of course, is an outright ban on certain -- a
13 certain class of congressmen from remaining in office beyond a
14 specific term. But at least it's neutral on its face; it's not
15 partisan. At least it's expressed; the voters know that it's
16 there. This case, by contrast, is partisan. It's a
17 discriminatory regulation saying that electing Republicans, not
18 neutral across the board and it's not express. The voters
19 don't even know or the citizens don't even know it happens.

20 I mean go back to how this law was passed, the 2011
21 plan. One day, introduced on December -- in the case of the
22 Senate, introduced on the morning of December 14th, 2011,
23 enacted 2000 -- December 14th, 2011 after 11:00 at night.

24 The citizens of this state just missed, if they
25 blinked, a decision that is effectively going to determine the

1 outcome of the state's Congressional delegation for the next
2 five election cycles, all happening in less than 24 hours, just
3 jammed through like that. At least the Thornton case, the law
4 is there and the voters know what it means. So, in that sense,
5 this is worse than Thornton.

6 Let's take Cook. Cook is only a nudge. It is a
7 statement on a ballot expressing the view of the state
8 legislature that the citizens of Missouri should be electing to
9 the Congress people who support term limits. It's just a
10 statement saying this is what we think you should do.

11 This case then falls in the middle between Thornton
12 and Cook. Thornton is an absolute dictate; Cook is a nudge.
13 What we have in Agre versus Wolf is a hard shove. It's shoving
14 surreptitiously, without any kind of transparency, Republican
15 voters into districts to affect the outcome of the election and
16 other Democratic voters into super Democratic districts to
17 affect the outcome of the election. It's concealed. It's a
18 much more direct intervention in the election outcome than Cook
19 is. And it is --

20 In -- in some ways, I tried to imagine in terms of
21 Cook the state legislature putting on the ballot the following
22 information: We like the election of incumbents and we want
23 you to vote for incumbents and we think it's a good idea that
24 you the people of the state do that. The state legislature has
25 no authority to give that kind of instruction to the voters of

1 Missouri and it would have no instruction to give that
2 authority to the voters of Pennsylvania. Is there any doubt
3 that a federal court would strike down an attempt like that?
4 But that's exactly what they've been arguing here at various
5 times. Oh, incumbent protection is -- that is so important and
6 the state has a right to promote it.

7 I -- I want to say something about incumbent
8 protection because it keeps coming up. First of all, we don't
9 think this is an incumbent protection scheme. We think it's a
10 scheme to elect the maximum number of Republicans and target
11 certain Democratic incumbents. But, we certainly agree that
12 there's some legitimacy to incumbent protection.

13 One of the worst aspects of gerrymandering over the
14 years that incumbent protection is a legitimate objective, is
15 to prevent state drafters from taking boundary lines to push
16 incumbents out of their districts and, effectively orphaning
17 them on their side and depriving the voters of their
18 opportunity to keep their incumbents. That's a legitimate form
19 of incumbent protection, to take into account where they live
20 and make sure they're not being pushed out for some politically
21 discriminatory reason.

22 There's also another side of incumbent protection
23 that is legitimate, and that is when you have protect core
24 constituencies and protect the course of the districts, if you
25 have compactness, if you have contiguity, if you respect

1 political communities, if you respect legislative boundaries,
2 necessarily, it's going to have a positive effect for the
3 incumbents who have been representing those areas before
4 because it's keeping communities together. It's keeping a
5 kind of relationship between incumbent and voter together.
6 That's all legitimate. And to that -- if that is what
7 incumbent protection means, we agree that that's a legitimate
8 object.

9 What is not legitimate and what this case is all
10 about, even though we have to keep emphasizing we don't think
11 this was an incumbent protection scheme, what is not
12 legitimate, even in an incumbent protection scheme, which
13 this is not, is to go the next step and to say we're going to
14 use -- we the state are so certain that you should be
15 reelecting incumbents that we're going to take Republicans out
16 of here and put them over here just to make sure that this guy
17 goes back to Washington. And that is taking away the right of
18 the voters to make that decision. It might be appropriate for
19 those voters to keep returning incumbents, but it's also
20 appropriate for those voters to hold their incumbents
21 accountable for what they're doing or not doing. And to the
22 extent that incumbent protection goes beyond these legitimate
23 aspects that we've identified and becomes entrenching of
24 political elites in power, it is beyond the authority of the
25 Elections Clause.

1 And one of the things that I -- areas where the court
2 has specifically addressed this, and we urge you to pay close
3 attention to the Supreme Court words. And -- and this is in
4 Arizona Indepen -- State Legislature v. Arizona Independent
5 Redistricting Commission. Judge Shwartz asked me at -- in
6 earlier oral argument, "Why hasn't the Supreme Court made some
7 notice of the Elections Clause and its effect on
8 gerrymandering," and that's been in the briefs of the
9 Defendants. But the Supreme Court has discussed the Elections
10 Clause in terms of gerrymandering, and I don't mean the
11 plurality, I mean quite recently in Arizona State Legislature
12 v. Arizona Independent Redistricting Commission, 135 Supreme
13 Court, 2652 in 2015, a case that the defendants cited.

14 Here's what the court states at page 2672, which sums
15 up our concern in this case and why we think this
16 gerrymandering is beyond the authority of the state under the
17 Elections Clause. The Supreme Court stated in that case that,
18 "The Elections Clause" -- I'm quoting --

19 "The Elections Clause was also intended to act as a
20 safeguard against the manipulation of electoral rules
21 by politicians and factions in the state to entrench
22 themselves and to place their interests over those of
23 the electorate. As Madison urged, without the
24 Elections Clause," --

25 And here they're quoting Madison:

1 -- "whenever the state legislatures has had a
2 favorite measure to carry, they would take care to
3 mold their regulations as to favor the candidates
4 they wished to succeed."

5 Quoting from the records of the Federal Convention. As the
6 court continued:

7 "Madison spoke in response to a motion by South
8 Carolina's delegates to strike out the federal power
9 to prescribe overrides by Congress of state election
10 regulations. Those delegates," the Court said, "so
11 moved because South Carolina's coastal elite had
12 malapportioned their legislature and wanted to retain
13 the authority to do so."

14 Quoting Jay Rakove, Original Meanings: Politics, and Ideas in
15 the Making of the Constitution. The court concludes,

16 "The problem Madison has identified has hardly
17 lessened over time. Conflict of interest is inherent
18 when legislators draw lines that they ultimately have
19 to run in."

20 And later in that opinion, and I won't read from it, the court
21 notes the great promise of independent redistricting
22 commissions in eliminating the kind of gerrymandering that is
23 such a scourge in our country today.

24 So, the Supreme Court has invited this Court to go
25 the next step. Yes, the Elections Clause applies to partisan

1 gerrymandering, and no court until now has had the Elections
2 Clause since Arizona State Legislature v. Arizona Independent
3 Redistricting Commission presented to it and in light of the
4 court's decision that that Elections Clause does apply to
5 partisan gerrymandering, making a decision as to how it
6 applies. Well, if ever there was a partisan gerrymander to
7 which it applies, this one is it. It is systematic. It has
8 the effect of -- even when the majority of the state voters are
9 voting Democratic, you still get this 13 to 5 ratio over and
10 over and over again.

11 They don't even deny that it's a gerrymander. All
12 they do in this case, the Legislative Defendants, pardon me,
13 is to try to beat up Mr. McGlone with two so-called experts
14 whose testimony does not meet the standards of Rule 702, which
15 says that, "The testimony to be admissible" -- and we
16 challenged the admissibility of this testimony -- "The
17 testimony to be admissible is -- has to be based on sufficient
18 facts or data."

19 Well, they didn't even ask the Legislative Defendants
20 for information about how they put together the districts.
21 They came in and opined about it. There is Mr. Memmi, the main
22 consultant bringing them in. They have all the facts and data
23 as to what they did, and these so-called experts never bothered
24 to ask as to what facts or data were being used to conduct
25 these gerrymanders. That, in itself, to -- would -- should

1 exclude it.

2 The second is that the testimony is the product of
3 reliable principles and methods. Well, here Mr. McCarty,
4 Professor McCarty came and made this predictive value for his
5 methodology, which turns out to be completely in error. Not
6 only does he make simple computational mistakes in applying it,
7 but it's just plain wrong. He said at the end of his
8 testimony, "Well, maybe it really only holds good for 2012,"
9 the year immediately following the particular gerrymander,
10 where he thought that the Democrats should get eight seats at
11 least.

12 2012 happened to be the bonanza year for the
13 Democrats in this state. They carried the Presidential level.
14 The majority of the citizens of the state voted for Democrats.
15 And what was the outcome of that under his model? The outcome
16 was that the Democrats lost two seats, even as the Republicans
17 were losing statewide in a substantial degree. This is a model
18 that has no predictive value.

19 And as -- finally, the third requirement, as the rule
20 says, is that the expert has reliably applied the principles
21 and methods to the facts of the case. First of all, he doesn't
22 know what the facts of the case are. He's not that familiar
23 with Pennsylvania. He didn't ask the defendants as to what
24 they actually did. And he makes simple computational mistakes
25 in applying his model. That testimony should be excluded.

1 It's unreliable. It was unreliably applied, and it has no
2 basis in the facts or data of the case that they could have had
3 access to.

4 And Professor Gimpel is even worse. Here he is, an
5 expert, opining as follows: "Well, the particular gerrymander
6 that is involved here wasn't all that great because they only
7 had a slight Republican advantage. They only put so many --
8 with a tweezer, they only put so many Republican dots into the
9 map and they didn't put enough to make it an effective
10 gerrymander." But then he goes on to say that "Incumbency has
11 this enormous effect." Well, what is the effect, Professor
12 Gimpel? "Oh, it's 10 to 15." A few minutes later in his
13 testimony, he said it was "5 to 8." This is an expert?
14 What -- what are his methods?

15 It's -- not only did he not inquire into the facts
16 and evidence of the case to make any kind of rational opinion
17 about this, but he also stated that in fact where the dots are
18 placed, the Rs and the Ds does have an outcome determinative
19 effect, but that there weren't enough to really make that good
20 of a gerrymander, but then left out the whole incumbency effect
21 that he then went on to say was so important. I mean you
22 couldn't make anything out of his methods, except his shouting
23 at the end that, "People are people," which we agree with.
24 But we don't need an expert under Rule 702 to tell the Court
25 that.

1 What is significant about this case is that their own
2 experts have amply testified as to one thing that we have
3 consistently been saying in this case, which is that this is a
4 statewide gerrymander and it requires a statewide decision.
5 That is, if you change one district, you have to change all of
6 them. Professor Gimpel testified to that. Professor McGlone
7 testified to that. Mr. Arneson said, you change one district
8 boundary, it's going to have a ripple effect through the state.

9 This is a plan that can't be revised on a district by
10 district basis. Their own evidence says so. All the map
11 makers say so. All the professors and experts, no matter how
12 unreliable their methods, at least agree on that. You change
13 one thing, you change everything. And that is what -- the kind
14 of relief that we're seeking here. And what we're seeking
15 specifically is that this Court should issue a declaratory
16 judgment that what the defendants attempted to do here was to
17 dictate electoral outcomes and/or favor or disfavor a class of
18 candidates, namely Republicans, and that they engaged in
19 conduct that frustrates the checks that the Elections Clause
20 wanted to place on the abuses of state authority in the conduct
21 of federal elections.

22 And that's the third area. I identified, first of
23 all, the term limit cases, then the Arizona Independent
24 Redistricting Commission. And I think it's important not to
25 leave out the Federalist Papers themselves, where in Federalist

1 52, you heard Professor and Senator Dinniman talk about the
2 suffrage requirement. In Federalist 52, Madison states that,
3 "In mandating the suffrage requirement" -- and what they tried
4 to do, Your Honors, is to tie the suffrage requirement and the
5 state constitutional requirement for suffrage so that there'd
6 be no adjusting it for purposes of federal elections.

7 "To have submitted the eligibility to vote to
8 legislative discretion of the states," Madison says,
9 "would have rendered too dependent on the state
10 governments the branch of the federal government
11 which should be dependent on the people alone, and it
12 cannot be feared because of this objective tie-in,
13 that the people of the states will alter this part of
14 their constitution in such a manner as to abridge the
15 rights secured to them by the federal constitution,
16 that is to vote for their own members of Congress."

17 And in Federalist 59, which I think is the most
18 important example of where this concern is expressed by the
19 framers about the outcome of the Constitution really, if states
20 have their way to manipulate these election rules, Mr. Hamilton
21 states:

22 "The drafters of the constitution have submitted the
23 regulation of elections for the federal government in
24 the first instance to the local administrations" --
25 namely the state administrations --

1 "which in ordinary cases and when no improper views
2 prevail may be both more convenient and more
3 satisfactory, but they have reserved to the national
4 authority a right to interpose whenever extraordinary
5 circumstances might render that interposition
6 necessary to its safety."

7 Well, these extraordinary circumstances have arrived. The
8 increased sophistication of software, the availability of
9 data down to the precinct level and census flock level creates
10 a situation where the states have authority for a kind of
11 micro-gerrymandering, making deals with all sorts of
12 "stakeholders" throughout the state that threatens not only the
13 rights of the individual citizens, their voting rights, their
14 rights to have some control over the process, but really the
15 whole structure of the Constitution. And that's why in this
16 situation, it is proper for this Court to act.

17 It has been said that, well, Congress has a veto over
18 these regulations, in fact it's the only place in the
19 Constitution where Congress is specifically given a veto power
20 over a state law. That veto power has been exercised in this
21 respect, that under 2 U.S.C., Section 2, Congress directed the
22 states to engage in single member districting. There is
23 nothing in that statute that gives them the authority to
24 gerrymander.

25 And also Congress has delegated the power to keep

1 watch over these states to this Court. That's exactly why
2 three judges are on this panel. You're here because of 28
3 U.S.C. 2284 where Congress says you are the people who are
4 supposed to figure out whether or not these predations by the
5 state are consistent with the structure of the United States
6 Constitution. That's your role. You are here to hear
7 constitutional challenges to redistricting. It's not something
8 where you're usurping something that Congress doesn't want you
9 to be involved in.

10 Congress is saying, we can't do it, and properly so,
11 because Congress people are really picked by the state
12 legislatures. At least they have the decency to turn it over
13 to what is in effect a kind of version of an independent
14 redistricting commission, namely the federal courts, to
15 determine when a state has gone too far in threatening the
16 structure of the constitution, as Madison has laid it out and
17 as Hamilton has laid it out in the Federalist -- Federalist
18 Papers, and as the Supreme Court in Arizona State Legislature
19 has encouraged this Court to consider, which is keeping some
20 limit on the authority of the states to engage in partisan
21 gerrymanders.

22 So that's why we're here, and that's why you're here.
23 We're all here to really to determine, to have an accounting as
24 to whether the State of Pennsylvania is interfering with a
25 privilege and immunity of federal citizenship, of these

1 citizens that we're representing.

2 Well, who are we representing? Well, we're
3 representing this high school coach from Boyertown. And I
4 apologize, being out of state, I've probably blown the name of
5 the town, whose students are telling him they're blowing out
6 the system because, you know, it's all red.

7 Imagine, if you will, and this gets to the injury. I
8 can talk about injury to the individual rights to vote, and I
9 can cite constitutional cases. We can do that in argument, and
10 there are lots of cases that say that the right to vote is not
11 a general right, it's an individual right, it's been impaired
12 here.

13 We can cite verdict about the way election
14 regulations have an inherent impairment of every voting right
15 and there has to be a sliding scale scrutiny. We can go into
16 all that. But let's -- to put it in more, as Professor Gimpel
17 might say, people language, let's imagine for a second that
18 this court hearing has been videotaped and you're showing it to
19 the students of the high school coach from Boyertown. What
20 would those kids think at seeing the rigging of this election?
21 I think it might be an R-rated kind of production. You know,
22 you don't want -- you don't want young people to see this
23 without some adult supervision.

24 It's -- it's a classic case of why things have been
25 taken away from people, and that's the anguished cry, and it

1 wasn't very articulate all the time, and sometimes it was
2 articulate, the anguished cry of all these Plaintiffs who came
3 to testify.

4 There are two injuries that are at stake here. First
5 is the injury identified by Justice Kennedy in Thornton, and
6 the injury that I'm going to quote, identified by Justice
7 Souter. The Justice Kennedy injury is this interference
8 between the people and the national legislature, the only true
9 national branch of Government, the House of Representatives.
10 If the state legislatures are effectively casting a vote once
11 every 10 years that is deciding these cycle of elections over
12 and over again, that is substantial interference with that
13 direct relationship of the people to the one branch of
14 government that is supposed to represent the people and not the
15 states. The paradox at the moment is that it's probably the
16 branch of government that is most under the heel and dominion
17 of the states in terms of gerrymandering. What a paradox.
18 That's the Justice Kennedy injury.

19 But there's another injury which I think that you can
20 capture as sort of subtext of all the testimony of the
21 Plaintiffs in this case, and that's the Justice Souter injury.
22 After he retired from the Supreme Court, there was an interview
23 by Justice Souter, and you can find it on Google. It's been
24 sort of -- it went viral a couple of years ago, where he was
25 asked, well, you're not in the Supreme Court anymore, you know,

1 what -- what is it that disturbs you the most, what do you
2 think is the greatest threat that this country faces today?
3 And Justice Souter said, well, I don't think it's nuclear war
4 or globalization or threats to our security of that kind.
5 Here's the greatest threat that is facing the United States
6 right now. I'm paraphrasing his remarks. It's that the people
7 of this country don't know who to hold accountable.

8 And this is a case where all of these citizens came
9 in here and made clear to you that they know something is
10 wrong. They know this government is dysfunctional. They know
11 that they don't have any control over it. They know in some
12 way that they can't prove by a preponderance of the evidence
13 themselves personally without counsel that the system is
14 rigged. They know that. And they don't care if they're
15 getting the Democratic representatives they wanted. They know
16 that they've lost some critical quantum of the right of self
17 government.

18 That's what we're here to try to restore, self
19 government in the Commonwealth of Pennsylvania. And we urge
20 this Court to take up the invitation of the United States
21 Supreme Court in Arizona State Legislature v. Independent
22 Redistricting and take up the invitation that Madison and
23 Hamilton have made to you, and take up the invitation that
24 Congress made to you when it put you three judges in charge of
25 hearing challenges to redistricting schemes that might threaten

1 the structure of the constitution, and declare that this
2 constitutional gerrymandering scheme is unlawful, illegal, and
3 a violation of our right of self government.

4 JUDGE SMITH: Thank you, Mr. Geoghegan.

5 We'll take a 10-minute recess.

6 (Recess at 2:44 p.m. to 3:03 p.m.)

7 JUDGE SMITH: Please be seated. I trust we may now
8 mark the record of the trial closed to all of counsel?

9 MR. TORCHINSKY: Yes, Your Honor.

10 MR. B. GORDON: Yes, Your Honor.

11 JUDGE SMITH: Very well. Let me, lest there is any
12 misunderstanding, indicate, having consulted with my -- my
13 colleagues, we -- we have ruled on the motion for protective
14 order. I trust that that ruling is now clear, if it was not
15 before.

16 MR. B. GORDON: It's clear and will be honored. It
17 is respected, and it will be honored, Your Honor.

18 JUDGE SMITH: Very well. Thank you.

19 Counsel, thank you all very much. Believe me, the
20 Panel knows, not from having been present with all of you and
21 the extraordinarily busy pace you have had to pursue but, we
22 know, even from a distance, the hard work each of you has done
23 to prepare for this trial. We know the lengths to which you
24 have gone in the courtroom to cooperate and remediate matters
25 where possible, while not sacrificing any trial interests. And

1 we know the importance of this matter to all of the parties
2 represented here and we hope you know we, too, regard those
3 interests as extraordinarily important in -- to our system and
4 at a time when our judicial system faces particular challenges
5 and, perhaps, there is the Democratic process as well.

6 In some ways it's been heartening to sit here on this
7 panel and to sit with two very respected colleagues, one from
8 the District Court, one from the Court of Appeals. So, we
9 thank you all for your able representation, for your sincere
10 representation of the interests that are at stake here. Be
11 assured that we will take you very seriously.

12 We indicated -- I indicated earlier about the
13 prospect of supplemental submissions in the wake of trial, just
14 because trial did take place and evidentiary productions took
15 place, and that there might be a need in the view of counsel to
16 supplement what has previously been filed with us recently. It
17 is not a requirement. We have decided we will leave that to
18 each of you to file, not in responsive fashion, but --

19 (Judges conference)

20 JUDGE SMITH: Because we feel under the gun, too, at
21 this point and, also, because we have indicated that any
22 supplemental is optional for you, despite the fact that rumor
23 has it that there's another proceeding going on next week, our
24 schedules are going to require that we ask that any
25 supplemental be provided to us by the close of business next

1 Friday, that is by 4 p.m. next Friday, and that no submission
 2 exceed 10 pages. Sorry, we can't afford more time, but that'll
 3 be -- we feel compelled to proceed quickly toward an
 4 adjudication.

5 So is there anything further before we adjourn the
 6 proceedings?

7 MR. TORCHINSKY: Nothing from us, Your Honor.

8 MR. ARONCHICK: Nothing from us, Your Honor.

9 MR. B. GORDON: Nothing, Your Honor.

10 JUDGE SMITH: Thank you very much.

11 JUDGE SHWARTZ: Thank you all.

12 JUDGE BAYLSON: Thank you.

13 (Proceedings concluded at 3:08 p.m.)

14 * * * * *

15 C E R T I F I C A T I O N

16 We, the court approved transcribers, certify that the
 17 foregoing is a correct transcript from the official electronic
 18 sound recording of the proceedings in the above-entitled
 19 matter.

20 _____ December 8, 2017

21 LISA WILSON

22 _____

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