

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JACOB CORMAN, in his official capacity as )  
Majority Leader of the Pennsylvania Senate, )  
MICHAEL FOLMER, in his official capacity )  
as Chairman of the Pennsylvania Senate )  
State Government Committee, LOU )  
BARLETTA, RYAN COSTELLO, MIKE )  
KELLY, TOM MARINO, SCOTT PERRY, )  
KEITH ROTHFUS, LLOYD SMUCKER, )  
and GLENN THOMPSON, )  
Plaintiffs, )

v. )

ROBERT TORRES, in his official capacity )  
as Acting Secretary of the Commonwealth, )  
and JONATHAN M. MARKS, in his official )  
capacity as Commissioner of the Bureau of )  
Commissions, Elections, and Legislation, )  
Defendants, )

and )

CARMEN FEBO SAN MIGUEL; JAMES )  
SOLOMON; JOHN GREINER; JOHN )  
CAPOWSKI; GRETCHEN BRANDT; )  
THOMAS RENTSCHLER; MARY )  
ELIZABETH LAWN; LISA ISAACS; DON )  
LANCASTER; JORDI COMAS; ROBERT )  
SMITH; WILLIAM MARX; RICHARD )  
MANTELL; PRISCILLA MCNULTY; )  
THOMAS ULRICH; ROBERT )  
MCKINSTRY; MARK LICHTY; and )  
LORRAINE PETROSKY, )  
Intervenor-Defendants. )

Civil Action No. 1:18-cv-00443

Judge Jordan  
Chief Judge Conner  
Judge Simandle

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**INTERVENORS' BRIEF IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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## INTRODUCTION

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Foundational principles of federalism prohibit this Court from enjoining a state court’s decision striking down a state law on state constitution grounds. The claims in this case—that the Pennsylvania Supreme Court’s decision striking down Pennsylvania’s 2011 congressional map violated the Elections Clause, and that the state court failed to give the state legislature sufficient time to enact a new map—were raised with the U.S. Supreme Court last month. The U.S. Supreme Court has declined to stay the state court’s judgment and remedial process. The same lawyers represent both Plaintiffs here and the state-court defendants who sought U.S. Supreme Court review. Their request for a preliminary injunction is effectively a request not only to overrule the Pennsylvania Supreme Court, but the U.S. Supreme Court.

This Court should decline the invitation. Plaintiffs have no likelihood of success. As fully addressed in Intervenors’ concurrently filed motion for judgment on the pleadings, Plaintiffs lack standing. Among other problems, they are not even proper parties to raise Elections Clause claims on behalf of the Pennsylvania General Assembly. And a host of other jurisdictional and procedural bars doom this lawsuit, not least of which is the prohibition on lower federal courts interfering with judgments of state courts.

As addressed fully in this brief, moreover, Plaintiffs' claims lack any substantive merit. Their first claim asserts that the Pennsylvania Supreme Court lacked power to invalidate the 2011 map based on its construction of the Pennsylvania Constitution. But "[i]t is fundamental that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions," *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). And the U.S. Supreme Court has held in an unbroken line of decisions dating back a century that nothing in the Elections Clause permits a state legislature to enact a congressional map that violates the state's constitution. Plaintiffs cannot obtain the extraordinary remedy of a preliminary injunction based on their disagreement with the Pennsylvania Supreme Court's construction of the Pennsylvania Constitution.

Plaintiffs' second claim—that the state court needed to give the state legislature more time to enact a new map—is equally baseless. Plaintiffs cite no authority for the notion that the federal constitution required the state court to give the state legislature any particular amount of time to enact a new map, much less more time than was afforded here. The General Assembly was and is a party to the state court action, and it never raised any objection to the state court's remedial process. Meanwhile, House Speaker Turzai and Senate President Pro Tempore Scarnati specifically told the state court that they wanted at least three weeks. They got what they asked for, and it was ample time to pass a new map.



Nor can Plaintiffs establish irreparable harm, especially given that granting the injunction would not result in the restoration of the old map. A federal statute, 2 U.S.C. § 2a(c), bars the use of a congressional map that violates state law. Instead, if a state lacks a map that comports with state law and there is not enough time to develop a new map before the next election, the state must conduct at-large elections. Thus, were this Court to enjoin the state court's remedial map, § 2a(c) would require Pennsylvania to conduct 18 at-large elections in 2018. Finally, the balance of the equities and public interest weighs decidedly against granting relief.

## **COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY**

### **A. Pennsylvania's 2011 Congressional Districting Map**

In the 2010 elections, Republicans gained exclusive control over Pennsylvania's legislative and executive branches, and thus controlled congressional redistricting following the 2010 census. 02/07/18 Pa. S. Ct. Op. 6 (hereinafter, "Op.") (ECF Nos. 1-2, 1-3). In 2011, leaders of the General Assembly crafted a congressional map in secret and then suspended the ordinary rules of procedure to rush it through in just 8 days. Op. 6-7.

The 2011 map "packed" Democratic voters into five districts that Democrats would win by wide margins, and "cracked" the remaining Democratic voters by spreading them across 13 districts that would reliably elect Republicans. This resulted in bizarre districts that ripped apart Pennsylvania's communities to an

unprecedented degree, as described in detail in the Pennsylvania Supreme Court’s opinion, in an intentional effort to disadvantage Democratic voters. Op. 8-26, 127-28. Counsel for Speaker Turzai admitted to the Pennsylvania Supreme Court that “[v]oters were classified and placed into districts based upon the manner in which they voted in prior elections.” Oral Arg. Tr. 111:7-16 (attached as Ex. A).

It worked. In each of the three election cycles under the 2011 map, Republican candidates won 13 of Pennsylvania’s 18 congressional seats—the same 13 seats each time. Op. 29. These results held even when Republicans won only a minority of the total statewide vote. *Id.* at 31.

**B. The Ongoing Pennsylvania State Court Proceeding**

On June 15, 2017, Intervenors filed suit in Pennsylvania Commonwealth Court challenging the 2011 map exclusively under the Pennsylvania Constitution, including its Free and Equal Elections Clause, Pa. Const. Art. I, § 5. The suit named as defendants, among others, the General Assembly, Speaker Turzai, Senator Scarnati, and the Pennsylvania election officials named as defendants here. Republican voters and congressional or potential congressional candidates intervened as defendants. Op. 3 n.5.

On November 9, 2017, the Pennsylvania Supreme Court exercised plenary jurisdiction under 42 Pa. Cons. Stat. § 726 and ordered the Commonwealth Court to hold a trial and issue recommended findings of fact and conclusions of law.

On the eve of a pretrial conference in the Commonwealth Court, Senator Scarnati (represented by attorneys who represent Congressional Plaintiffs here) frivolously removed the case. After Judge Baylson called an emergency hearing, Senator Scarnati withdrew the removal and agreed to a remand to state court “with prejudice.” *League of Women Voters v. Com. of Pa.*, ECF No. 22 at 4, No. 17-cv-5137 (E.D. Pa.).

Judge Brobson of the Commonwealth Court held a five-day trial in December 2017. Intervenors presented extensive evidence of the 2011 map’s invalidity. Judge Brobson credited all of Intervenors’ experts and found the legislative leaders’ experts not credible. Ultimately, Judge Brobson found “intentional discrimination,” *i.e.*, “the 2011 Plan was drawn through a process in which a particular partisan goal—the creation of 13 Republican districts—predominated.” ECF No. 7 at 71, 128. The Commonwealth Court nonetheless recommended upholding the map.

At oral argument in the Pennsylvania Supreme Court, Speaker Turzai and Senator Scarnati’s counsel—who also represents Plaintiffs here—stated that, if the 2011 map were struck down, these legislative leaders wanted “at least three weeks” to pass a new map. Oral Argument Tr. 104:4-7. Counsel also admitted that the Pennsylvania Supreme Court had previously applied the traditional districting criteria of compactness, contiguity, and avoiding splitting political subdivisions in

assessing congressional maps, and assured the Court that the defendants did not dispute that those criteria were applicable. *Id.* at 87:3-10, 89:8-90:2.

On January 22, 2018, the Pennsylvania Supreme Court struck down the 2011 map on the “sole basis” that it violated the Pennsylvania Constitution. 01/22/18 Order at 2 (ECF No. 1-2). The court gave the General Assembly nearly three weeks (until February 9) to submit a remedial map to the Governor, and another week (until February 15) for the Governor to consider such a submission. If they failed to agree on a valid map, the court stated that it would “proceed expeditiously to adopt a plan.” *Id.* The court declared that there would be a remedial map in place by February 19, *id.*, in line with Commissioner Marks’ earlier affidavit explaining that the May 15 congressional primaries would need to be postponed, at a cost of \$20 million, if a new map were adopted after February 20.

The Pennsylvania Supreme Court’s January 22 order set clear criteria for any remedial map. It had to “consist of: congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population.” 01/22/18 Order at 3. Neither the General Assembly, Speaker Turzai, nor Senator Scarnati requested clarification of these criteria following the January 22 order.

On January 26, 2018, Speaker Turzai and Senator Scarnati, as well as the Republican voter and congressional-candidate intervenors, filed separate emergency applications asking the U.S. Supreme Court to stay the Pennsylvania Supreme Court's judgment and remedial process. The General Assembly did not seek a stay. Speaker Turzai and Senator Scarnati argued that the state court exceeded its authority under the Election Clause because the criteria it imposed constituted "legislation" and "judicial activism," that the Elections Clause required the court to afford the legislature a "genuine opportunity" to enact a new map, and that the court had failed to provide such an opportunity. Stay Appl. 11, No.17A795, 20, [goo.gl/sGnHhA](http://goo.gl/sGnHhA). In other words, precisely the arguments they make here. The Congressional Plaintiffs here filed an *amicus* brief in support of the applications. Justice Alito denied the stay applications on February 5.

Thereafter, Senator Corman (the lead Plaintiff here) admitted that, in the weeks since the state court's January 22 order, the General Assembly had done little to begin drawing a new map. J. Lai & L. Navratil, *SCOTUS denies Pa. GOP lawmakers' attempt to delay drawing new congressional map*, Philadelphia Inquirer, Feb. 9, 2018. "Corman said that leaders [would] decide whether they have the desire to try to draw a new one." *Id.* He added: "There is some thought that the Supreme Court is going to throw out anything we give them anyway, so what's the purpose of us going through all of this work." *Id.*

True to Corman's word, the General Assembly did nothing to pass a new map. It held no hearings or debates. No draft maps were introduced. Instead, Senator Scarnati openly refused to comply with the state court's order to provide certain data. *See* [goo.gl/tPsSaa](http://goo.gl/tPsSaa).

On February 7, 2018, the Pennsylvania Supreme Court issued its opinion explaining that the 2011 map violated the Pennsylvania Constitution's Free and Equal Elections Clause. The court's holding centered on the same traditional criteria set forth in the January 22 order: when the "neutral criteria" of equal population, contiguity, compactness, and avoiding splitting political subdivisions "have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates" Pennsylvania's Free and Equal Elections Clause. Op. 123. The court rejected Speaker Turzai and Senator Scaranti's argument that the Elections Clause deprives state courts of power to review and remedy congressional maps. *Id.* at 137 n.79.

Speaker Turzai and Senator Scarnati alone submitted a proposed map to the Governor on February 9. The Senate's top lawyer said publicly that "the map will be turned into legislation but a decision about whether to bring it up for floor votes early next week will partially depend on the response from Wolf." *GOP leaders unveil revamped Pa. congressional map*, Associated Press, Feb. 9, 2018. The

Governor rejected the map because it was another gerrymander, and neither it nor any other map was turned into legislation or even brought to a vote.<sup>1</sup>

On February 19, the Pennsylvania Supreme Court adopted a remedial map (the “Remedial Plan”) developed with the assistance of a nonpartisan expert. The court explained that “[t]he Remedial Plan is based upon the record developed in the Commonwealth Court, and it draws heavily upon the submissions provided by the parties, intervenors, and amici.” 02/19/18 Op. & Order at 6 (ECF No. 1-3, 1-4). The Remedial Plan strictly adheres to the criteria set forth in the court’s January 22 order. *Id.* It splits 13 counties, compared to 27 under the 2011 map. *Id.* It splits 19 municipalities, compared to 68 under the 2011 map.<sup>2</sup> And it is far more compact than the 2011 map. *Id.* at 7.

Empirical analysis of the Remedial Plan confirms that it exhibits no partisan bias in favor of either party. If anything, it slightly favors Republicans. Under the Remedial Plan, 10 districts favored Donald Trump in the 2016 presidential election, while 8 favored Hillary Clinton. Objective metrics that redistricting scholars commonly use to evaluate districting plans similarly produce results slightly in Republicans’ favor. *See* Brief of Amicus Campaign Legal Center.

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<sup>1</sup> 02/15/18 Petrs.’ Br. in Supp. of Proposed Remedial Plans at 12-15, [goo.gl/uQyNk8](http://goo.gl/uQyNk8).

<sup>2</sup> *See* Pa. Supreme Court, [goo.gl/1FRrxy](http://goo.gl/1FRrxy) (click on “Remedial Plan Reports”).

**C. This Federal Collateral Attack on the State Court’s Remedy**

Even before the Pennsylvania Supreme Court released the remedial map, Speaker Turzai and Senator Scarnati began formulating a plan to attack it in the federal courts. On February 21, Speaker Turzai announced the plan in an email to his General Assembly colleagues: First, Speaker Turzai and Senator Scarnati would file yet another emergency stay application with the U.S. Supreme Court. Second—and key here—“House and Senate Republican leadership will be initiating action in the Federal Court in the Middle District of Pennsylvania.”<sup>3</sup>

Speaker Turzai and Senator Scarnati put the plan into action. On February 21, they again asked the U.S. Supreme Court for an emergency stay. The next day, Plaintiffs filed this lawsuit. The application to the U.S. Supreme Court and the motion for injunctive relief in this Court were filed by the same counsel and sought identical relief based on identical legal arguments.

**COUNTER-STATEMENT OF QUESTION PRESENTED**

Are Plaintiffs entitled to a preliminary injunction setting aside a state supreme court’s judgment and requiring state officials to conduct elections under a map that violates the state constitution?

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<sup>3</sup> [goo.gl/LmkaUv](http://goo.gl/LmkaUv).



## ARGUMENT

To obtain a preliminary injunction, a party must establish: “(1) a likelihood of success on the merits; (2) that [he] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.” *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). “A party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity.” *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994). Plaintiffs cannot meet their heavy burden here.

### **I. Plaintiffs Have No Likelihood of Success on the Merits**

#### **A. Jurisdictional and Procedural Bars to this Suit Are Dispositive**

This action is barred by multiple jurisdictional and procedural defects. All these defects are fully addressed in Intervenors’ motion for judgment on the pleadings, and each also is a reason to deny the preliminary injunction. To preserve these arguments in the context of the preliminary injunction inquiry, but in line with the Court’s direction at the March 1 scheduling conference to avoid unnecessary duplication, Intervenors set forth the arguments only in summary:

**Plaintiffs Lack Standing.** If “standing is doubtful,” that “factor should weigh strongly against granting a preliminary injunction.” *Holland v. Rosen*, 277 F. Supp. 3d 707, 726 (D.N.J. 2017). “[M]ere allegations will not support standing at the preliminary injunction stage.” *Doe v. Nat’l Bd. of Med. Examiners*, 199 F.3d

146, 152-53 (3d Cir. 1999). Plaintiffs “must ‘set forth’ by affidavit or other evidence ‘specific facts’” supporting standing, *Cacchillo v. Insmmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011), and “a party who fails to show a ‘substantial likelihood’ of standing is not entitled to a preliminary injunction,” *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). Neither State nor Congressional Plaintiffs are proper parties to raise Elections Clause claims that rest on the purported legal rights of the General Assembly. Nor does any Plaintiff allege, much less show, cognizable Article III injury. As to Count II, Plaintiffs fail to allege causation, and they certainly do not set forth “specific facts” supporting causation, as required for a preliminary injunction. And none of Plaintiffs’ purported injuries are redressable because this Court cannot reinstate a congressional map that violates the state constitution.

***Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).** Under *Pennzoil*, federal courts may not issue injunctions that “interfere with the execution of state judgments,” particularly where the federal lawsuit “challenge[s] the very process by which [the state court] judgments were obtained.” *Id.* at 14-16. That doctrine prohibits the issuance of a preliminary injunction in this case, because Plaintiffs’ interests are “inextricably intertwined with,” and “essentially derivative [of],” the interests of the defendants in the state court action. *Spargo v. N.Y. State Comm’n on Judicial Conduct*, 351 F.3d 65, 82-84 (2d Cir. 2003).

**Issue Preclusion.** Plaintiffs’ Elections Clause arguments were fully litigated in the Pennsylvania Supreme Court, which rejected them. Op. 137 n.79; 02/19/18 Order 3 n.2, 5 n.6. This Court must give the state court’s judgment preclusive effect. 28 U.S.C. § 1738. Plaintiffs are in privity with the state court defendants—Speaker Turzai, Senator Scarnati, and the General Assembly. They represent the same legal rights—indeed, the legal rights they claim are entirely derivative of the purported rights of the General Assembly.

**Judicial Estoppel.** Speaker Turzai and Senator Scarnati obtained a stay in *Diamond v. Torres*, 5:17-cv-05054-MMB (E.D. Pa. 2017), another challenge to the 2011 map, based on arguments that are inconsistent with those advanced here. They persuaded the *Diamond* court to grant a stay on the theory that federal courts must defer to the “state judicial branch,” which is an “agent[] of apportionment,” in reviewing congressional maps. *Diamond*, ECF No. 26-4 at 22, 24; ECF No. 692-16. They made this argument even after the Pennsylvania Supreme Court ordered the schedule they now challenge, ECF No. 81 at 2, 5, and it worked, *Diamond*, ECF No. 84. Because Plaintiffs are in privity with Speaker Turzai and Senator Scarnati, Plaintiffs are judicially estopped from asserting that the state court lacked authority to strike down the 2011 map and impose its remedial process.

***Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).** This Court should abstain under *Colorado River* because parallel state-

court proceedings raising identical legal claims and functionally identical parties are pending before the U.S. Supreme Court. That lawsuit was filed first; proceeding here would result in piecemeal litigation; and Plaintiffs' claims raise questions of state legislative process and separation of powers that are better adjudicated by the state courts. Alternatively, the Court should stay this case pending the conclusion of U.S. Supreme Court review.

*Rooker-Feldman*. It is a “fundamental principle” that “a federal district court may not sit as an appellate court to adjudicate appeals of state court proceedings.” *Port Auth. Police Benev. Ass’n, Inc. v. Port Auth. of N.Y. & N.J. Police Dep’t*, 973 F.2d 169, 179 (3d Cir. 1992). That authority rests *solely* with the United States Supreme Court. 28 U.S.C. § 1257. *Rooker-Feldman* precludes Plaintiffs' attempts to evade this proper procedure.

**B. Plaintiffs' Elections Clause Claims Are Meritless**

Plaintiffs assert two claims under the Elections Clause—first, that the Pennsylvania Supreme Court lacks power to strike down the 2011 map under the Pennsylvania Constitution, and second, that the state high court needed to give the General Assembly more time to pass a new map. Neither claim will succeed.

**1. Plaintiffs' Claim That the Pennsylvania Supreme Court Lacked Power to Strike Down the 2011 Map Has No Merit**

The Pennsylvania Supreme Court held that the 2011 map violates the Pennsylvania Constitution's Free and Equal Elections Clause—a provision that has

no federal counterpart. It is a cornerstone of the American judicial system that federal courts cannot review a state court's construction of the state's constitution. *Nat'l Tea*, 309 U.S. at 557.

Nothing in the Elections Clause alters the state court's unreviewable authority to invalidate the 2011 map—a state law passed by the state legislature—for violating the state constitution. Not only do Plaintiffs fail to cite a single case from any court anywhere accepting their position, the Supreme Court has repeatedly rejected it. This is clear from nearly a century's worth of Supreme Court case law interpreting the Elections Clause.

In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that the Elections Clause does not “render[] inapplicable the conditions which attach to the making of state laws” *Id.* at 365. It does not “endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted.” *Id.* at 368.

In companion cases decided the same day as *Smiley*, the Court reiterated that state courts have authority to strike down congressional plans for violating “the requirements of the Constitution of the state in relation to the enactment of laws.” *Koenig v. Flynn*, 285 U.S. 375, 379 (1932); *accord Carroll v. Becker*, 285 U.S. 380, 381-82 (1932). The Court also expressly affirmed state courts' authority to implement remedial congressional plans where the prior plan violated the state

constitution. *Carroll*, 285 U.S. at 381-82; *Koenig*, 285 U.S. at 379.

In *Grove v. Emison*, 507 U.S. 25 (1993), the Court held that state courts not only have authority to review and remedy congressional plans, but that federal courts must not interfere with state courts in this arena. After a Minnesota state court invalidated the state's prior congressional map, the state court "adopted final criteria for congressional plans and provided a format for submission of plans in the event the legislature failed to enact a constitutionally valid congressional apportionment plan." *Cotlow v. Grove*, C8-91-985 (Minn. Special Redistricting Panel Apr. 15, 1992).<sup>4</sup> A federal court then enjoined the state court from adopting a new plan and adopted its own remedial plan. *Grove*, 507 U.S. at 30-31. The state court subsequently released a provisional remedial plan, subject to the federal injunction, that used the traditional criteria of "minimiz[ing] the number of municipal and county splits" and promoting "compactness." *Cotlow*, C8-91-985, *supra*. But the federal injunction blocked the state court's plan from taking effect for the 1992 elections.

The U.S. Supreme Court reversed the federal court's injunction. Writing for a unanimous Court, Justice Scalia explained that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's ... federal congressional

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<sup>4</sup> Available at <https://www.senate.mn/departments/scr/REDIST/COTLO415.HTM>.

districts.” *Grove*, 507 U.S. at 42. The Court repeatedly emphasized that state courts have the power to review and remedy congressional districting plans:

- “The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.” *Id.* (quotations omitted).
- “[T]he District Court’s December injunction of state-court proceedings ... was clear error. It seems to have been based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State’s courts. Thus, the January 20 deadline the District Court established was described as a deadline for the legislature, ignoring the possibility and legitimacy of state judicial redistricting. *Id.*
- “The Minnesota [court’s] issuance of its plan (conditioned on the legislature’s failure to enact a constitutionally acceptable plan in January), far from being a federally enjoined ‘interference,’ was precisely the sort of state judicial supervision of redistricting we have encouraged.” *Id.*

Following the Supreme Court’s decision in *Grove*, the state court’s remedial plan governed Minnesota’s 1994 congressional elections.<sup>5</sup> And consistent with these principles, state courts frequently set the district boundaries for congressional elections; indeed, at least one-eighth of the members of the U.S. House of Representatives are currently in districts drawn by state courts.<sup>6</sup>

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<sup>5</sup> *Minnesota Redistricting Cases: the 1990s*, *supra* note 4.

<sup>6</sup> The following states currently have congressional districts that were drawn by state courts, in some cases after those courts struck down maps passed by the state legislature under the state constitution: *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258 (Fla. 2015); *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012); *In re Reapportionment Comm’n*, 36 A.3d 661 (Conn. 2012); *Hippert v. Ritchie*, 813

Continued on following page

Just three years ago, *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 135 S. Ct. 2652 (2015), again rejected the notion that the “Elections Clause renders the State’s representative body the sole component of state government authorized to prescribe regulations for congressional redistricting.” *Id.* at 2673 (quotations and alterations omitted). “Nothing in that Clause instructs, nor has [the] Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State’s constitution.” *Id.*

Congress has codified this principle, providing that congressional districting plans are not valid unless they are adopted “in the manner provided by [state] law.” 2 U.S.C. § 2a(c). In *Arizona State Legislature*, the Court explained that congressional maps are valid under § 2a(c) where they are “established . . . in whatever way [states] may have provided by their constitution and by their statutes.” 135 S. Ct. at 2669. Conversely, a map is invalid under § 2a(c) where it does not comply with state law, however the state defines it. *See id.*

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Continued from previous page  
 N.W.2d 391 (Minn. 2012); *Egolf v. Duran* (N.M. Dist. Ct. Dec. 29, 2011), <http://www.nmlegis.gov/lcs/redcensus/docs/Court%20Decision%20-%20Congressional.pdf>; *Guy v. Miller* (Nev. Dist. Ct. Oct. 27, 2011), <http://redistricting.ills.edu/files/NV%20guy%2020111027%20final%20order.pdf>, *aff’d*, 373 P.3d 943 (Nev. 2011)).



In short, it is well-settled that state legislatures may not pass congressional maps that violate the “provisions of the State’s constitution.” *Arizona State Legislature*, 135 S. Ct. at 2673, and in Pennsylvania, the state supreme court determines the requirements of the state constitution, *Emerick v. Harris*, 1 Binn. 416, 1808 WL 1521 (Pa. 1808). Here, the Pennsylvania Supreme Court has held that the 2011 map, a state law, violates the Free and Equal Elections Clause of the Pennsylvania Constitution because it subordinated in whole or in part the traditional districting criteria of population equality, contiguity, compactness, and avoiding the split of political subdivisions for partisan political aims.

In light of all of the above authority, Plaintiffs concede that they “do not as a general proposition challenge the Pennsylvania Supreme Court’s ability to declare the 2011 Plan unconstitutional under Pennsylvania’s constitution.” ECF No. 31 at 3. Rather, they make the extraordinary claim that a federal court can adjudicate whether a state high court engaged in “judicial overreach,” and “legislative action ... cloaked as an exercise in judicial review,” and violated the Elections Clause by “apply[ing] criteria found nowhere within Pennsylvania’s Constitution or statutory framework for Congressional districting.” *Id.* at 4; PI Mot. 8 (ECF No. 3-2).

But inflammatory rhetoric does not transform a state court’s interpretation of the state’s own constitution into a federal question. Plaintiffs basically argue that

the Elections Clause permits state courts to strike down state districting plans under the state constitution unless a federal court thinks the state court misinterpreted the state constitution. Foundational principles of federalism forbid federal courts from engaging in any such inquiry. Federal courts are, “of course, bound to accept the interpretation of [state] law by the highest court of the State.” *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass’n*, 426 U.S. 482, 488 (1976). As Plaintiffs’ repeated quotations of the dissenting state high court Justices makes clear, Compl. ¶¶ 39-46, 70-85, their entire argument is nothing more than a request for this Court to overrule a majority of the Pennsylvania Supreme Court on a question of the interpretation of Pennsylvania’s Constitution.

There is simply no likelihood of success on Count I of the complaint. The 2011 map is a dead letter that no federal court can revive.

**2. Plaintiffs’ Claim That the General Assembly Was Denied an Adequate Opportunity to Pass a New Map Has No Merit**

Plaintiffs claim a “separate Elections Clause violation” on the theory that the General Assembly was denied an “adequate opportunity” to pass a new map. PI Mot. 9-10. Last month, the U.S. Supreme Court declined to stay the state court’s judgment on the basis of this same argument, and rightly so.

To begin with, Plaintiffs cite no case—and we are aware of none—recognizing a cause of action under the Elections Clause to challenge the amount of time a state court gives the state legislature to draw a congressional map after

holding that the legislature previously enacted an unconstitutional map. Plaintiffs offer no judicially manageable standard for adjudicating such a cause of action. They do not say how federal courts should evaluate whether a legislature was given enough time in a particular case. Nor do they say how much time would have been adequate here. Federal courts should not be refereeing disputes between the legislative and judicial branches of a state's government over the timing of state legislative process. Besides, federal courts have given a state legislature only two weeks to remedy unconstitutional congressional districts. *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016).<sup>7</sup>

In any event, Plaintiffs should hardly be heard to argue that the General Assembly needed more time here. Intervenors' opening brief in the Pennsylvania Supreme Court suggested giving the legislature two weeks, and neither the General Assembly, Speaker Turzai, nor Senator Scarnati objected to that timeframe in their

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<sup>7</sup> Indeed, it is dubious whether Pennsylvania's General Assembly was constitutionally entitled to any time at all. As three-judge federal panels have held, when a state legislature previously "disrespect[ed] historical political units and other traditional redistricting criteria," and reacted to a finding of unconstitutionality by crafting a "physically modified but conceptually indistinguishable" new district, a court may adopt a remedial map without delay. *Hays v. State*, 936 F. Supp. 360, 372 (W.D. La. 1996). "In its record of doggedly clinging to an obviously unconstitutional plan, the Legislature has left [the court] no basis for believing that, given yet another chance, it would produce a constitutional plan." *Id.* That is precisely the case here.

response brief. At oral argument, Speaker Turzai and Senator Scarnati’s counsel Mr. Torchinsky, who represents Plaintiffs here, said his clients “would like at least three weeks” to enact a new map. Oral Argument Tr. 104:4-7. The state court gave them what they asked for—19 days for the General Assembly to pass a bill and six days after that for the Governor to sign or veto it. And even then, the General Assembly, Speaker Turzai, and Senator Scarnati never asked the state court for more time. Nor did they raise any purported state legislative procedural obstacle.

In fact, the General Assembly—which is the actual institution empowered to enact a map—is a separate party represented by separate counsel in the state court action, and has raised no argument to this day that its authority was usurped or that it was not afforded sufficient time. The General Assembly notably did assert its institutional rights on other issues in the state court case, filing a lengthy brief on legislative privilege. But the General Assembly never once suggested to the state court that it lacked an adequate opportunity to carry out its institutional prerogative to pass a new map. Plaintiffs are not proper parties to argue that the General Assembly was not given enough time or that its powers were otherwise stolen where the actual General Assembly has made no such argument.

In any event, the notion that the General Assembly procedurally could not pass a new map in the time allotted is demonstrably false. The 2011 map was

passed in less time. Leaders in the General Assembly first revealed the 2011 map on December 14, 2011, and within eight days the bill had been passed and signed into law. If eight days was long enough to pass the 2011 map, surely 25 days was enough to pass its replacement.

Plaintiffs' argument that there was insufficient time "as a function of simple arithmetic" rests on the false premise that the General Assembly could not begin work on a new map until the state high court issued its opinion on February 7. PI Mot. 10-11. As Plaintiffs allege in the Complaint, legislative leaders in fact introduced a shell bill on January 29 that enabled the legislature to comply with Pennsylvania procedural requirement of considering a bill on three different days. Compl. ¶¶ 58-59; Op. 6-7. And the state court's January 22 order provided the General Assembly express guidance: the remedial map must have "congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population." Compl. Ex. B at 3.

The claim that the Pennsylvania Supreme Court's February 7 opinion altered these requirements is patently false. PI Mot. 12-13. The opinion centered on the subordination of the traditional districting criteria that the court previously listed in its January 22 order. Plaintiffs do not identify a single thing the Legislature would

have done differently in crafting a map in light of the opinion as opposed to the earlier order. And this point just highlights that Plaintiffs are improper parties and lack standing to bring this claim. They assert that “the Legislature ... could not have been expected to” draw a map based on the order, but they are not the Legislature.

And contrary to Plaintiffs’ claim, the traditional criteria were neither “nebulous” nor “novel.” *Cf.* PI Mot. 13. More than 25 years ago, in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), the Pennsylvania Supreme Court adopted a remedial *congressional* map using these very criteria, including “avoid[ing] splitting of political subdivisions and precincts,” “preserv[ing] communities of interest,” and “compactness.” *Id.* at 208, 215-25. Counsel for Speaker Turzai and Senator Scarnati conceded in oral argument before the Pennsylvania Supreme Court that these criteria had been used before in reviewing Pennsylvania congressional maps and were appropriate here. Oral Argument Tr. 87:3-10, 89:8-90:2. Plaintiffs’ suggestion that the Pennsylvania Supreme Court invented these criteria from whole cloth has no grounding in reality and is not a cognizable argument in federal court.<sup>8</sup>

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<sup>8</sup> Plaintiffs offer a host of hard-to-follow arguments about various other purported Pennsylvania state procedural requirements. None of these create a *federal* Elections Clause claim. Plaintiffs cite *Smiley*, 285 U.S. at 367, but it stands for the

Continued on following page

Even if the state high court's February 7 opinion were the relevant date (which it is not), Plaintiffs' assertion that the General Assembly could not pass a map at that point is belied by the statements and actions of the General Assembly's leaders. When Speaker Turzai and Senator Scarnati submitted their proposed remedial map to Governor Wolf on February 9, the Senate's top lawyer stated publicly that "the map will be turned into legislation but a decision about whether to bring it up for floor votes early next week will partially depend on the response from Wolf." *GOP leaders unveil revamped Pa. congressional map*, Associated Press, Feb. 9. The General Assembly was on standby to pass a new map but was never called into session. That is because Governor Wolf rejected the map proposed by Speaker Turzai and Senator Scarnati because it was an egregious

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Continued from previous page

opposite proposition. It holds that state procedural requirements as interpreted by the state courts apply without regard to the Elections Clause. *Id.* at 368. They are a "matter of state polity." *Id.* In any event, Plaintiffs' arguments about the lack of adequate time for the Governor to consider a veto are nonsense. *Cf.* PI Mot. 13-15. Plaintiffs have no standing to object that the Governor should have been given more time to veto a map, especially when the Governor himself has raised no such objection and no map was even passed. *Scarnati v. Wolf*, 173 A.3d 1110, 1120 (Pa. 2017), does not require the Governor to consider a bill for 10 days before that bill becomes law. *Cf.* PI Mot. 11, 14. It just notes that if the Governor does *not* veto the bill within 10 days, it becomes law. The Pennsylvania Supreme Court never suggested that a remedial map could not be enacted pursuant to a veto override (PI Mot. 14); again, this concern is entirely hypothetical since no map was ever passed in the first place. And nothing in the state court's order prevents the legislature from maintaining a legislative journal. PI Mot. 15.

gerrymander. Indeed, to this day, the General Assembly has not passed a map even though its legislative leaders claim that only the General Assembly is empowered to make a map. The problem here was not that the General Assembly lacked adequate time, it was that its leaders could not or would not produce a non-partisan map that the Governor would sign.

In all events, the Pennsylvania Supreme Court's timeline was entirely proper and precisely what federal law *requires*. The U.S. Supreme Court has made clear that courts should adopt a remedial congressional map without delay when, as here, a state lacks any valid map for an imminent election. In *Branch v. Smith*, 538 U.S. 254 (2003), the Court held that Congress, acting under the second part of the Elections Clause, has authorized "state and federal courts" to develop remedial congressional maps in these precise circumstances. *Id.* at 266-72 (majority). When a congressional election is approaching, "a court, state or federal, [may] redistrict[] pursuant to § 2c" to prevent the "last-resort remedy" of at-large elections under 2 U.S.C. § 2a(c)(5). *Branch*, 538 U.S. at 274-75 (plurality); *see infra* pp.28-29 (discussing § 2a(c)(5)).

Here, Pennsylvania's chief election officials attested that a new map needed to be in place no later than February 20 to avoid postponing the May congressional primaries, which would cost \$20 million to the Commonwealth. Based on that deadline, the Pennsylvania Supreme Court gave the General Assembly and the



Governor all the time that was available, setting a schedule that would have a new map in place by February 19. As *Branch* instructs, the Elections Clause not only does not preclude the state high court's schedule, but Congress acting under the second part of the Elections Clause has specifically authorized courts to proceed in such an expeditious manner. The Pennsylvania Supreme Court did precisely what *Branch* instructed. See also, e.g., *Favors v. Cuomo*, 2012 WL 928223, at \*1 n.4, 3 (E.D.N.Y. Mar. 19, 2012) (adopting remedial congressional map drawn by Dr. Persily acting as special master, to avoid at-large elections under § 2a(c)(5)).

## **II. Plaintiffs Cannot Establish Irreparable Harm**

Plaintiffs have no irreparable harm. With respect to the State Plaintiffs, it is well settled that individual legislators do not suffer “personal” injury from a purported usurpation of the legislature’s authority. *Ariz. State Legislature*, 135 S. Ct. at 2664-65. Likewise, the Congressional Plaintiffs “suffer[] no cognizable injury” from having to run in a different congressional district. *City of Phila. v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980). “While the voters in a representative’s district have an interest in being represented, a representative has no like interest in representing any particular constituency. It is only the voters, if anyone, who are ultimately harmed.” *Id.* at 672. In any event, an inability to run in an unconstitutional district is not a cognizable harm, much less irreparable harm.

Even more fundamentally, Plaintiffs' entire theory that they will be irreparably harmed by the loss of "the boundaries established by the 2011 Plan," ECF No. 3-2 at 17, rests on the false premise that this Court can reinstate the 2011 map for the 2018 elections. It cannot. A binding federal statute forbids the use of any congressional map that was not enacted "in the manner provided by [state] law." 2 U.S.C. § 2a(c)(5); *see Ariz. State Legislature*, 135 S. Ct. at 2670. And the Pennsylvania Supreme Court held that the 2011 map was not enacted in the manner provided by the Pennsylvania Constitution. That state law conclusion is unreviewable. Federal law therefore precludes the 2011 map's use in 2018.

Were this Court to enjoin the current remedial map, § 2a(c)(5) instead would require at-large elections for all 18 of Pennsylvania's congressional seats in 2018. "Section 2a(c) sets forth congressional-redistricting procedures ... if the State, 'after any apportionment,' ha[s] not redistricted 'in the manner provided by state law.'" *Ariz. State Legislature*, 135 S. Ct. at 2670. In particular, § 2a(c)(5) prescribes mandatory procedures where (i) a state lost a congressional seat from the prior decade's reapportionment (as occurred in Pennsylvania); (ii) the state does not have a congressional plan enacted "in the manner provided by the law thereof"; and (iii) "there is no time for either the State's legislature or the courts to develop one." *Branch*, 538 U.S. at 275 (plurality op.); *see Ariz. State Legislature*, 135 S. Ct. at 2670. In those circumstances, § 2a(c)(5) requires at-large elections

for a state's entire congressional delegation. At-large elections would only exacerbate the Congressional Plaintiffs' claimed injury, meaning that they cannot show entitlement to a preliminary injunction because it is not the absence of the injunction that causes their claimed injury.

### **III. The Balance of Equities and the Public Interest Weigh Overwhelmingly Against an Injunction**

Even if this Court could reinstate the 2011 map, Intervenors and millions of other Pennsylvanians would suffer grave injury from being forced to vote in unfair elections under districts that violate their rights under the Pennsylvania Constitution. The 2011 map was the worst partisan gerrymander in Pennsylvania's history and among the worst in American history. The map was designed to maximize the political advantage of Republicans and diminish the representational rights of Democratic voters. The mapmakers sorted Democratic voters into particular districts on the basis of their political views and their voters. They sought to predetermine the outcome of congressional elections for a decade. And for three election cycles, it worked. Without fail, the 2011 map gave Republicans 13 of 18 seats—the same 13 seats. These results held even when Democratic candidates won a majority of votes statewide. The map was impervious to the will of voters. To go back to the gerrymandered 2011 map now, after it has been struck down by the Pennsylvania Supreme Court under the Pennsylvania Constitution, would be deeply harmful and unfair to Pennsylvania voters.

The public interest strongly militates against an injunction. To begin with, the election process is already underway. The nomination petition circulation period began February 27. As Plaintiffs' own *amici* argue, "[c]hanging congressional districts during the nomination petition circulation period could cause a higher risk that voters may sign a nomination petition for the voting district." McCann Br. 5 (ECF No. 66). Voters would be confused by conflicting federal and state court orders ping-ponging back and forth between congressional maps, particularly after the Pennsylvania Supreme Court's widely publicized judgment and remedial map. And because it is too late to implement a different map before the May primaries, an injunction would cost the Commonwealth at least \$20 million to move the congressional primaries.

Courts are extremely reluctant to impose last-minute changes just before an election that may result in "voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). "Comity between the state and federal governments also counsels against last-minute meddling." *Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396, 405 (E.D. Pa. 2016). "This important equitable consideration goes to the heart of our notions of federalism," and thus "[f]ederal court intervention that would create . . . a disruption in the state electoral process is not to be taken lightly." *Page v.*

*Bartels*, 248 F.3d 175, 195-96 (3d Cir. 2001); *see also United States v. City of Philadelphia*, No. 2:06CV4592, 2006 WL 3922115, at \*2 (E.D. Pa. Nov. 7, 2006).

A federal court injunction blocking a state high court's remedy, and reinstating a congressional map that the state high court struck down, would offend core principles of federalism. Plaintiffs would have this federal court affirmatively order state election officials to violate the state constitution by holding the 2018 elections under the 2011 map. That would be unprecedented. And Plaintiffs ask this Court to take this unprecedented step on the eve of an election, after the state election officials have already made herculean efforts to implement the Pennsylvania Supreme Court's remedial map and at a point where election officials would have to postpone the primaries at a cost to the taxpayers of \$20 million if an injunction were granted. All of this would be done to reinstate an historically extreme gerrymander that made a mockery of representative democracy. Regardless of one's view of the precise test for gerrymandering (the U.S. Supreme Court has not agreed on one although it holds that gerrymanders are actionable), "partisan gerrymanders ... are incompatible with democratic principles." *Ariz. State Legislature*, 135 S. Ct. at 2658. There is zero public interest in granting the relief Plaintiffs request.

## **CONCLUSION**

For the foregoing reasons, the Court should deny a preliminary injunction.

Dated: March 2, 2018

Respectfully Submitted,

/s/ Thomas B. Schmidt III

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*Attorneys for Proposed Intervenors*

**CERTIFICATE OF COMPLIANCE WITH WORD LIMIT**

Pursuant to Local Rule 7.8(b)(2), I, Thomas B. Schmidt III, hereby certify that the foregoing Brief in Support of Motion to Intervene as Defendants, contains 7,444 words, calculated using Microsoft Word's word count feature.

/s/ Thomas B. Schmidt III  
Thomas B. Schmidt III

**CERTIFICATE OF SERVICE**

I, Thomas B. Schmidt, III, hereby certify that on March 2, 2018 I caused a true and correct copy of the foregoing Intervenors' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction to be served on all counsel of record with the CM/ECF system.

/s/ Thomas B. Schmidt III  
Thomas B. Schmidt III



# **Exhibit A**

PENNSYLVANIA SUPREME COURT

audiotaped hearing of

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA et al.,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA et al.,

Respondents.

-----  
BEFORE: CHIEF JUSTICE THOMAS SAYLOR and the  
JUSTICE PANEL

A P P E A R A N C E S:

DAVID GERSCH, ESQUIRE

for Petitioners

MARK ARONCHICK, ESQUIRE

for Governor Wolf

CLIFFORD LEVINE, ESQUIRE

for Lieutenant Governor Stack

KEITH MARC BRADEN, ESQUIRE

for Speaker Turzai

JASON TORCHINSKY, ESQUIRE

for President Pro Tem of the Senate

Lawrence Davis, ESQUIRE

MR. TABAS, ESQUIRE,

for Intervenors

1 P R O C E E D I N G S

2 COURT CRIER: The Honorable Chief  
3 Justice and Justices of the Supreme Court of  
4 Pennsylvania.

5 Oyez! Oyez! Oyez! All man or persons  
6 who stand (inaudible), who otherwise have  
7 business may now appear and they shall be  
8 heard.

9 God save the Commonwealth and this  
10 Honorable Court. Please be seated.

11 CHIEF JUSTICE SAYLOR: Good morning. We  
12 have a single case listed for this argument  
13 session, so I'd ask the Court Crier to call  
14 the case and then I'll try to state the case  
15 briefly before we begin arguing.

16 COURT CRIER: League of Women Voters  
17 versus the Commonwealth of Pennsylvania,  
18 Mr. Dave Gersch (ph), Mr. Mark Aronchick  
19 (ph), Mr. Clifford Levine (ph), Mr. Keith  
20 Marc Brady (ph), Mr. Jason Torchinsky (ph),  
21 Mr. Lawrence Davis (ph).

22 THE COURT: Mr. Gersch, you start the  
23 argument.

24 This Court has exercised extraordinary  
25 jurisdiction to entertain a challenge by

1 petitioners, the League of Women Voters, and  
2 a group of Democratic voters, to the present  
3 congressional districting plan in  
4 Pennsylvania.

5 The Commonwealth Court has lent its  
6 assistance in addressing factual matters and  
7 offering proposed conclusions recommending  
8 that this challenge be rejected. As I  
9 understand it, petitioners intend to present  
10 the main argument in support of the  
11 challenge.

12 Counsel for the respondents  
13 Governor Wolf and Lieutenant Governor Stack  
14 will follow with brief arguments supportive  
15 of the petitioner's position.

16 We will then hear from counsel for  
17 respondent's President Pro Tem of the Senate  
18 Scarnati, and Speaker of the House Turzai who  
19 opposed relief. Counsel for intervenors, a  
20 group of Republican voters, will follow with  
21 a brief supplemental argument.

22 The case has been well and ably briefed.  
23 The parties are all represented by  
24 experienced appellate advocates. The Court  
25 has studied the submissions and is very aware

1 of both the issue involved -- or implicated  
2 and the arguments of counsel which -- all of  
3 which is going to help us move this matter  
4 along.

5 While we do have six lawyers who are  
6 going to make oral presentations to the  
7 Court, as always since it is an overarching  
8 issue, we very much suggest and appreciate  
9 avoiding redundancy.

10 With that, I'd appreciate you  
11 introducing yourself and beginning argument.

12 MR. GERSCH: Thank you, Your Honor.  
13 David Gersch on behalf of petitioners,  
14 Members of the Court.

15 To begin this case, I'd ask the Court to  
16 imagine one of our petitioners, Bill Marks  
17 (ph), high school civics teacher, former U.S.  
18 Army helicopter pilot, imagine him standing  
19 on line waiting to vote and a gentleman comes  
20 up to him and says, good morning, Mr. Marks,  
21 we decided to move your district.

22 We don't want you to vote in this  
23 district. We passed a law that says you're  
24 going to vote in a different district. The  
25 reason we decided to do that is because we

1 think that you and your neighbors are likely  
2 to vote for the opposition candidate. If you  
3 vote for the opposition candidate in this  
4 district, the government's candidate, or the  
5 ruling party's candidate, might lose, and so  
6 we're moving you to a different district.

7 Just to be clear, we're not doing this  
8 to equalize population, we're not doing this  
9 to maintain contiguity of districts, we're  
10 not doing it because it will avoid municipal  
11 or county splits, and we're certainly not  
12 doing it to maintain compactness. Indeed,  
13 your new district will be the opposite of  
14 compact. We're doing it because we don't  
15 like the way you vote. Now, that's this  
16 case.

17 Of course they didn't come to Mr. Marks  
18 while he was standing on line. I took a  
19 liberty there. Of course they didn't admit  
20 that that's what they were doing, but that is  
21 in fact what happened and that is what the  
22 Commonwealth Court found, that this is a case  
23 of intentional discrimination and that the  
24 boundaries of the districts were made so as  
25 to advantage the republicans and disadvantage

1 the democrats.

2 Your Honor, it's our position that this  
3 is a straightforward case of viewpoint  
4 discrimination. The government under  
5 Pennsylvania's Constitution is not permitted  
6 to sort voters into districts, groups of  
7 voters into districts, based on whether or  
8 not the government thinks that it's going to  
9 like the way the voters cast their ballots.

10 FEMALE JUSTICE: Mr. Gersch, would you  
11 pull your mic to the center, please.

12 MR. GERSCH: To the center?

13 FEMALE JUSTICE: Closer to your face.  
14 Thank you.

15 MR. GERSCH: Certainly. So this case is  
16 brought -- our main count is a claim of  
17 viewpoint discrimination. It's brought under  
18 the Pennsylvania Constitution, Article 1,  
19 Section 7.

20 We've canvassed the history of that in  
21 the brief. There's an excellent amicus brief  
22 from the AFL and related unions doing an  
23 Edmond's analysis of this. The Court of  
24 course has done an extensive Edmond's  
25 analysis in the Papps' (ph) case, and the

1 bottom line is that the Pennsylvania's  
2 protection for free speech and free  
3 expression goes back to the 1776  
4 Constitution, which of course predates the  
5 U.S. Constitution.

6 This Court has held that the  
7 Constitution of Pennsylvania provides broader  
8 protection, in particular it expressly  
9 protects freedom of expression by reference  
10 to the textual language free communication.

11 The Court has held in the Papps' case,  
12 that expressive conduct -- that infringements  
13 on expressive conduct are to be evaluated  
14 under the strict scrutiny test, that was a  
15 case of course involving nude dancers in  
16 DePaul. The Court went the additional step  
17 and said for campaign donations, political  
18 expressive conduct, those -- infringements on  
19 those would also be judged under strict  
20 scrutiny.

21 Here we deal with the right to vote,  
22 which is the core fundamental freedom. As  
23 the Court said in Bergdog versus Kane (ph),  
24 it's important because it preserves all other  
25 rights.



1           So this is a case where we say strict  
2           scrutiny applies, because voting is  
3           expressive conduct. I don't understand the  
4           other side to object that that is the correct  
5           test that an ordinary freedom of speech or  
6           free expression case, that's not going to be  
7           their objection.

8           Their objection, which I will come to,  
9           is that there should be an exception in this  
10          instance. What I have recited so far is just  
11          a traditional application of the law. Strict  
12          scrutiny should apply here.

13          The other reason of course strict  
14          scrutiny should apply is because not only  
15          does this involve a burden on the right to  
16          vote, but this is an act by the government  
17          which threatens to undermine the essence of  
18          representative democracy. So those are all  
19          reasons why strict scrutiny should apply  
20          here.

21          Was this a case of discriminating in the  
22          voters, yes, the Commonwealth Court found so  
23          and there was an enormous amount of evidence  
24          on which the Commonwealth based its finding.

25          I know the Court is familiar with the

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1 record. I'll be brief on this point, but we  
2 can think of the record -- the evidence as  
3 falling into essentially three categories --  
4 the maps themselves, the results, and the  
5 objective metrics presented by various  
6 political scientists and mathematicians.

7 On the shapes of the maps themselves,  
8 the first thing I would commend to the Court  
9 is the map of the 7th District. The map is I  
10 think almost nationally infamous as an  
11 example of a non-compact map.

12 We have a version of it in the record.  
13 It's Petitioner's Exhibit 83. It's on page  
14 11 of our brief. What you can see there,  
15 because we've color coded the election  
16 results from 2010 Pennsylvania Senate  
17 election and you can see that what they did  
18 was they appended the eastern half of the  
19 map -- I'm sorry, the eastern half of the  
20 map, which is more democratic leaning to a  
21 very red western half of the map with a  
22 sliver, which is as wide as a single medical  
23 facility. The map is barely contiguous. In  
24 another place, it's as wide as a single  
25 restaurant, Creed's Seafood & Steaks.

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1           There's no explanation for why the map  
2           is presented -- is made that way from  
3           legislative response --

4           MALE JUSTICE: Counsel, before you move  
5           on from District 7 or District 12, in the  
6           federal cases there's a raging question of  
7           whether you can attack the statewide map  
8           where you have to attack as in racial  
9           gerrymandering the individualized district.

10           Is that issue in this case at all?

11           MR. GERSCH: We don't believe so,  
12           Your Honor. That decision was -- that issue  
13           was decided in Urfer (ph). In Urfer this  
14           Court said you should attack the entire map  
15           or challenge the entire map. I think the  
16           Court was quite correct in its reasoning that  
17           the map is like a jigsaw puzzle and it  
18           doesn't make sense to take it one district at  
19           a time.

20           So with respect to the maps, that's the  
21           seventh. We also have -- I think it would be  
22           useful to think about the map of the 4th  
23           District, which includes where we're sitting  
24           now.

25           The 4th District is this entirely ruby

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1 red district and then they attach at the very  
2 top of it, the blue Harrisburg, but not all  
3 of Harrisburg, just a part of Harrisburg.

4 This is unprecedented. Again, no  
5 explanation from legislative respondents as  
6 to why this was done. You can see what  
7 happened is they cracked Harrisburg in half  
8 and put it into a district which is entirely  
9 republican.

10 The 6th District -- I'm not going to go  
11 through them all. This will be the last one.  
12 But the 6th District is another example. You  
13 can see there's a hole in the 6th District  
14 where they extracted Reading, which is the  
15 county seat of Berk County, always been  
16 together with the rest of Berk County. They  
17 extracted and they attached it to the 16th  
18 through this narrow column.

19 Again that's -- if you look at the  
20 color-coded map, which is on page 18 of our  
21 brief, you'd see it intends to get the blue  
22 Reading out of the rest of the 6th and attach  
23 it to a republican leaning 16th District.

24 So the maps themselves are enormously  
25 powerful evidence. They're visually not

1 compact. They're visually -- you can see the  
2 cracking. And, again, no evidence at all  
3 from the other side suggesting that this was  
4 done for anything other than partisan  
5 purposes.

6 FEMALE JUSTICE: Counsel, might I ask at  
7 this point, the Commonwealth Court seemed to  
8 indicate that in the redistricting context,  
9 there were essentially no criteria that  
10 needed to be followed, because the  
11 Pennsylvania Constitution did not so provide  
12 for a Congressional Redistricting and there's  
13 no other statutory basis for that.

14 Your argument is based upon the  
15 presumption that traditional districting  
16 criteria do apply, compactness, contiguity,  
17 equal, don't split political subdivisions.

18 From where do you draw that conclusion  
19 that those traditional criteria in fact apply  
20 in this context?

21 MR. GERSCH: Yeah, so that's not --  
22 there's a Constitutional provision of course  
23 in Section 16, which applies this to the  
24 legislative maps. There's not a  
25 complimentary provision for the congressional

1 maps, but this Court has said -- I'm  
2 forgetting whether it was Mellow or Holt --

3 THE COURT: Mellow.

4 MR. GERSCH: In Mellow that those are  
5 the, thank you, Your Honor, that those same  
6 principals would apply in a congressional  
7 race. The other reason they're important is  
8 they give you a neutral guidepost, which  
9 enables you to -- and maybe I'll go out of  
10 order here and skip ahead.

11 For someone like Dr. Chen (ph) who  
12 simulates maps, he's able to use those  
13 principals to simulate neutral maps and then  
14 compare them to Act 131.

15 So now you have a context. You can say  
16 to yourself, well, what would the maps look  
17 like if they'd been drawn without  
18 partisanship, what would they look like if  
19 they respected the traditional criteria for  
20 Mellow.

21 What Dr. Chen found was that -- he drew  
22 500 maps at random, respecting those  
23 traditional criteria, and not one of them  
24 looks remotely like Act 131. The 500 maps  
25 are all much more compact. They don't split

1 as many counties. They don't split as many  
2 municipalities. Of course they don't produce  
3 the 13-5 republican/democratic split that  
4 we've had for the last three congressional  
5 elections. When Dr. Chen scored those maps,  
6 the most common outcome is a 9-9 even  
7 republican/democratic split. The next most  
8 common is a 10-8 democratic split.

9 So by creating a neutral map, or neutral  
10 set of maps, that can be compared to Act 131,  
11 we can see just how partisan Act 131 is.

12 MALE JUSTICE: Mr. Gersch, is any Court,  
13 state or federal, ever said that there can't  
14 be as a matter of either state or federal  
15 constitutional law a partisan aspect to  
16 redistricting?

17 MR. GERSCH: I don't know a court has  
18 ever said there can never be one, but neither  
19 has a court upheld -- neither has a court had  
20 occasion to have to deal with that issue in  
21 the context of a freedom of expression case.  
22 Our position is you can't have a little bit  
23 of discrimination against the voters.

24 FEMALE JUSTICE: You're asking us to  
25 decide that no partisan considerations may be

1 a part of the drawing of the map?

2 MR. GERSCH: Not partisan -- certainly  
3 not partisan by which we mean the use of --  
4 as a basis for discriminating against voters  
5 based on partnership; that is, the lines of  
6 the district should not be drawn based on  
7 how -- which party the voters favor.

8 FEMALE JUSTICE: So you are asking us to  
9 go further than any other court has gone on  
10 that issue?

11 MR. GERSCH: I think the North Carolina  
12 comes close, the decision that came out last  
13 week. I don't think they phrased it in those  
14 terms necessarily.

15 MALE JUSTICE: Mr. Gersch, this plan's  
16 obviously been in effect for five-and-a-half  
17 years. But currently what is the  
18 registration breakdown in our 18  
19 congressional districts, Republican versus  
20 Democrat? In other words, of the 18, how  
21 many have a Republican majority registered  
22 voters and how many of the 18 have a  
23 Democratic majority of registered voters?

24 MR. GERSCH: I don't believe the exact  
25 number. I believe the Democrat -- there are



1 more Democratic registered -- there are more  
2 counties with Democratic registered voters.

3 THE COURT: You're talking counties.  
4 We're only interested --

5 MR. GERSCH: I'm sorry, districts,  
6 districts.

7 THE COURT: There's 18 congressional  
8 districts. Maybe you could consult your  
9 cocounsel, or whoever you need to, and tell  
10 me how many of these of our 18 districts have  
11 majority Democrat and majority Republican.

12 MR. GERSCH: I'm not sure I know the  
13 answer, Your Honor.

14 MALE JUSTICE: Isn't that salient?

15 MR. GERSCH: No, because what the  
16 political scientists in the case testified to  
17 is that the way people in today's world  
18 determine voting preference is by actual  
19 votes over the past year.

20 So in other words, the most predictive  
21 way to look at how an individual voter or  
22 group of voters -- they actually say groups  
23 of voters.

24 The most predictive way to determine how  
25 a precinct is going to vote in the next

1 election is how they vote in the past  
2 elections, not how they're registered.

3 MALE JUSTICE: Let's say hypothetically,  
4 and somebody will know, because we have able  
5 counsel and this is Congressional  
6 Redistricting, so hopefully some lawyer in  
7 our lineup is going to know between the 18  
8 congressional districts.

9 Let's say hypothetically, and we'll get  
10 the answer, nine of them have a majority of  
11 Democratic registered votes and nine of them  
12 have a majority of Republican registered  
13 voters, it's not bad, is it?

14 MR. GERSCH: Well, again, for purposes  
15 of our claim, and I may not be  
16 understanding -- I may not be taking the  
17 Court's question and I want to make sure I  
18 understand it --

19 MALE JUSTICE: It may not be a good  
20 question, but it seems to me that if I'm a  
21 Democrat running in a congressional district  
22 that has a majority Democrats, that's good,  
23 same for Republicans.

24 MR. GERSCH: I do understand the  
25 question. We don't think the record supports

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1           that conclusion. What the record says is  
2           that the way you determine whether the  
3           district is likely to go Democratic or  
4           Republican is to look at actual prior votes  
5           cast, not registration.

6           Dr. Chen testified to that. No one --  
7           they had two eminent political scientists,  
8           they were found not credible, but they have  
9           real credentials, neither of their political  
10          scientists contended that registration is a  
11          thing you look at. It's not. What political  
12          scientists look at and what politicians look  
13          at are how do people vote in actual  
14          elections.

15          If I may, also part of the evidence in  
16          this case was Dr. Chen's testimony with  
17          respect to what are called the Turzai files.  
18          They're the files that Speaker Turzai  
19          produced in the Aiger (ph) case.

20          In those files what you can see is they  
21          rated every county, they rated  
22          municipalities, and they rated down to the  
23          precinct level. Yes, they do have some  
24          registration data, but most of the data they  
25          have for those divisions -- county,

1           municipality, down to the precinct level --  
2           is how did these people vote in other  
3           elections. So that's where we think the  
4           proper focus should be.

5           MALE JUSTICE: May I ask you, sir, the  
6           Federal Constitution relegates the state  
7           legislature's redistricting; correct?

8           MR. GERSCH: States are supposed to  
9           create the districts under the Constitution.

10          MALE JUSTICE: Through their  
11          legislatures?

12          MR. GERSCH: That's what the text of the  
13          Constitution says. I think there are court  
14          cases that make clear that state courts get  
15          to review the acts of legislatures.

16          MALE JUSTICE: I'm not asking about  
17          that. You're anticipating. It's okay. My  
18          point -- and I'm not an originalist or  
19          textus, goodness knows, but when the framers  
20          said legislatures should draw these maps, I  
21          bet they knew legislatures were political  
22          bodies.

23          So isn't it implicit in that design that  
24          some amount of partisanship, you can cross  
25          the line and that's why you get judicial

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1 review for constitutionality, but some amount  
2 of partisanship was necessarily contemplated  
3 when this was provided not to an independent  
4 commission, not to the judiciary, but to the  
5 legislature.

6 MR. GERSCH: Your Honor, that is -- I  
7 appreciate the question, because that's an  
8 argument made by the other side. We reject  
9 that proposition.

10 I think a great case to look at is Elrod  
11 versus Burns (ph), that was a case in which  
12 in Cook County the custom was -- whichever  
13 sheriff won the election, he got to -- if  
14 they changed parties, he got to fire all the  
15 employees who had been there before.

16 So when a Democratic sheriff was elected  
17 in Cook County, he fired the Republican  
18 employees and they sued. The concept of  
19 patronage dates back all the way. Indeed the  
20 decision of the sheriff was struck down by  
21 the majority in that case and what  
22 Justice Powell wrote in his dissent -- the  
23 first sentence of his dissent is, the Court  
24 holds unconstitutional practice that dates to  
25 the founding of the Republic.

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1           The reason that happened -- the case  
2           played out the way it does is because  
3           confronted with what I'll call modern notions  
4           of what the First Amendment means, and for  
5           purposes of Pennsylvania, freedom of  
6           expression, we don't let the government make  
7           those sorts of decisions based on people's  
8           political preferences.

9           We don't allow the government to decide,  
10          no, you won't be able to get this job,  
11          because you're a Republican and the same --  
12          we're asking for the same thing here. We're  
13          asking for the same thing.

14          Reynolds versus Simms (ph), very similar  
15          case. I think the comment of the Supreme  
16          Court when confronted with the fact was  
17          understood at the time that all of the  
18          districts in the United States, virtually all  
19          the districts, had this very malapportioned  
20          population, typically the rural districts  
21          would be favored at the expense of the urban  
22          districts, and the Court says, it's not --  
23          it's not history that's on trial. What we're  
24          evaluating is the practice. Of course  
25          Reynolds versus Simms struck that down in

1 favor of the one person, one vote.

2 FEMALE JUSTICE: Counsel, can I just ask  
3 for some clarification, because I was not of  
4 the impression coming in here today that it  
5 was petitioner's position that there could be  
6 no partisan considerations, no political  
7 considerations in the redistricting process,  
8 that was not my understanding.

9 Let me just give you an example. In  
10 order to have equal populations, the  
11 legislature needs to pick up 7,000 votes.  
12 They have a choice. They could pick up 7,000  
13 votes from a contiguous county to the east or  
14 they could pick up 7,000 votes at a  
15 contiguous county to the west.

16 The county to the west favors Democrats.  
17 It's a Democratic legislature and a  
18 Democratic governor. Can they not in fact in  
19 order to meet the equal population  
20 requirement choose the 7,000 voters to the --  
21 to be -- to the east?

22 MR. GERSCH: The Democrats -- favor the  
23 Democrats?

24 FEMALE JUSTICE: Yes.

25 MR. GERSCH: That's what we're arguing

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1           against. I want to draw a distinction --

2           FEMALE JUSTICE: Let me just ask you  
3 why. If in general -- if in general, which  
4 is -- actually I thought I was articulating  
5 what your argument was.

6           If as a matter of generality in doing  
7 the redistricting, the traditional criteria  
8 are followed and there is an attempt to  
9 follow the traditional criteria but as part  
10 of that overriding essence of the traditional  
11 criteria there is a partisan choice made in  
12 order to keep a district compact or in order  
13 to keep the district of equal population, I  
14 was of the understanding that as long as the  
15 partisan intent did not subjugate all of the  
16 traditional criterion, then that amount of  
17 partisanship is acceptable in this process  
18 that has been recognized as a political  
19 process?

20           MR. GERSCH: I think what Your Honor is  
21 correctly picking up was our fallback  
22 position. We said if the Court -- our main  
23 position is that the Court should rule that  
24 there is no -- that partisanship shouldn't be  
25 used -- that people shouldn't be allowed to



1 discriminate based on how voters vote, but if  
2 the Court felt the need to limit that  
3 principal, that the way the Court could limit  
4 it would be to provide that -- the map would  
5 only offend constitutional principals if the  
6 traditional districting criteria were  
7 subordinated.

8 JUSTICE TODD: As I understood your  
9 argument, Mr. Gersch, and this is in  
10 follow-up to Justice Donohue's question, your  
11 argument is that based on existed -- existing  
12 constitutional principals as articulated by  
13 our courts in Pennsylvania and by the U.S.  
14 Supreme Court, you prevail regardless of  
15 whether we go that extra mile but that you  
16 are asking us to go further than other courts  
17 have gone and say that no partisanship  
18 principals may be considered; is that  
19 correct?

20 MR. GERSCH: Justice Todd, I think  
21 that's a fair statement. Again, we prefer to  
22 phrase it in terms of you can't discriminate  
23 based on partisanship, but yes --

24 JUSTICE TODD: If I add the adjective  
25 discriminatory partisanship principals, then

1           you would agree with me?

2           MR. GERSCH: Yes, yes. I do want to  
3           distinguish between partisan and politics.  
4           So there are lots of political decisions that  
5           don't involve legislatures or Executive  
6           Branch making decisions that discriminate on  
7           the basis of how people are going to vote.  
8           If you have to draw a line, say, in  
9           Philadelphia, the line's going to have to be  
10          drawn no matter what and it doesn't mean that  
11          it has to be drawn by reference to how people  
12          are likely to vote in that election, or in  
13          any election. It's going to be a political  
14          decision.

15          There may be issues of trading with  
16          politicians that have nothing to do with  
17          partisanship. There may be, you know, one  
18          representative -- legislator, this would be  
19          the legislator's decision, legislator who is  
20          particularly powerful or is giving a favor or  
21          wanting a favor, all the things that go on in  
22          politics.

23          Not all political decisions involve  
24          discriminating against people based on what  
25          their affiliation is. We take the position

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1           that that shouldn't be allowed in the voting.

2           JUSTICE BAER: Counsel, in furtherance  
3           of Justice Donohue and Justice Todd, I think  
4           we're on the same (inaudible), I want to  
5           change the calculus. I think what you're  
6           saying is politics is distinct from  
7           partisanship and partisanship equals  
8           viewpoint discrimination.

9           I'm not sure respectfully I buy that,  
10          but I have an open mind to listen to that,  
11          but here's what I want. Instead of sort of  
12          picking at it, I don't -- personally I don't  
13          believe that this case is as easy as if  
14          there's partisanship, there is unlawful  
15          invidious viewpoint discrimination.

16          So assuming that that doesn't carry the  
17          day, what has alluded every court that has  
18          looked at this is a test. So when we're  
19          deciding whether we have intentional  
20          viewpoint discrimination, which I think is  
21          your gravamen, do you have a test that we  
22          should apply? I mean, is the test as easy as  
23          is there partisanship or is there more to it?

24          MR. GERSCH: No, the test is whether  
25          there is intentional discrimination based on

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1           how people vote that burdens the voters by  
2           diluting their vote in in some way and  
3           devaluing their vote.

4           As I said, we've offered that as a  
5           fallback. The Court can add the limiting  
6           principal that the plaintiff would also --  
7           the petitioner would also have to show that  
8           the traditional districting principals were  
9           subordinated.

10           In other words -- and I think we make --  
11           this goes I think to your point,  
12           Justice Baer. I think we make the point that  
13           we would satisfy that test as well; that is,  
14           in this case, you can see -- that's why we  
15           refer to these maps, like Map 7 and also  
16           Professor Chen's work in which he compares  
17           maps which comply with traditional principals  
18           versus Act 131. In this case, we would meet  
19           the subordination test and we would meet it  
20           easily.

21           JUSTICE BAER: Assume we find that there  
22           was no intent on behalf of the legislature,  
23           does that impact anything?

24           MR. GERSCH: If there was no intent?

25           JUSTICE BAER: No intent.

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1           MR. GERSCH: Well, then there wouldn't  
2           be a violation. I think the Commonwealth  
3           Court found that and I think the evidence  
4           would abundantly support that.

5           JUSTICE BAER: I'm trying to explore a  
6           test. We have to write this. Again a test  
7           is I think alluded every court that's tried  
8           to grapple with this. I hope it doesn't  
9           allude us.

10           Again, I respectfully start from the  
11           premise I don't think it's as easy as  
12           partisanship. So now we have partisanship.  
13           We look at traditional redistricting  
14           principals, continuity, compactness,  
15           contiguousness. I'm not splitting up copies  
16           (ph) or municipalities.

17           But beyond all that, does the efficiency  
18           gap matter, does partisan symmetry matter,  
19           does the mean medium test matter, does the  
20           Macroff's (ph) chain matter, is it a totality  
21           of the circumstance, or do you pick a  
22           linchpin from any of this beyond, again  
23           assuming we reject that the linchpin and the  
24           be all and the end all is partisanship?

25           MR. GERSCH: So the factors you were

1 mentioning, those things are evidence. We  
2 don't think they incorporated into the test.  
3 Those are the ways in which you prove your  
4 case by a preponderance of the evidence.  
5 I'll come back to them for a moment.

6 The suggestion that we're making, our  
7 view of the case is, is there viewpoint  
8 discrimination that burdens the voters and  
9 maybe you add on the limiting principal that  
10 the traditional criteria also -- the  
11 traditional districting criteria were  
12 subordinated as well.

13 The question of what does the efficiency  
14 gap show us, what does Dr. Chen's work show  
15 us, those go to whether we proved that the --  
16 that the voter's expression was burdened.  
17 Those go to whether we met the test.

18 In this case, as I said, I think the  
19 evidence is overwhelming. Dr. Worshor (ph),  
20 for example, found that this was, under the  
21 efficiency gap, this is the worst map in  
22 Pennsylvania's history. In one year, it was  
23 the second worst map in the entire country.

24 CHIEF JUSTICE SAYLOR: Mr. Gersch, could  
25 you move toward a summation and then we're

1 going to move on and hear from the other  
2 lawyers.

3 FEMALE JUSTICE: May I ask him one more  
4 question?

5 CHIEF JUSTICE SAYLOR: Yes.

6 FEMALE JUSTICE: Before you sum up,  
7 Mr. Gersch, if we are to -- if we were to  
8 accept the petitioner's argument here as to  
9 constitutionality, then we have a whole  
10 second layer of analysis with respect to  
11 remedy.

12 Are you arguing remedy for us today or  
13 will your colleagues be addressing that?

14 MR. GERSCH: I can address it briefly,  
15 but I know the Executive Branch --

16 FEMALE JUSTICE: I'm not asking for  
17 anybody to be redundant. I just wanted to  
18 make sure before you sat down that if that  
19 was part of your argument, you had an  
20 opportunity to address it.

21 MR. GERSCH: Our request of the remedy  
22 is that the case be -- the map be declared  
23 unconstitutional, that the legislature should  
24 be given two weeks to come up with another  
25 map subject obviously to the governor's

1 review. It was also our suggestion, but  
2 obviously this is for the convenience of the  
3 Court, that the Court employ a master now in  
4 the event that the legislature is unable to  
5 come up with a map.

6 I know that since we filed our brief,  
7 our moving brief, in which we set out this  
8 procedure, the North Carolina Court last week  
9 adopted the exact same procedure that we're  
10 recommending here.

11 FEMALE JUSTICE: In all fairness to all  
12 sides here, isn't that a mighty extraordinary  
13 remedy to ask this to be done in two weeks?

14 MR. GERSCH: The map can be done in a  
15 day. I understand the political  
16 difficulties. As I said, the North Carolina  
17 Court has recommended the exact same thing.

18 I don't know that they did it, because  
19 they read our brief, but they recommended --  
20 I'm sorry, they didn't recommend, they've  
21 ordered the exact same thing.

22 In districting cases -- in cases such as  
23 they have in Texas where the maps go up and  
24 down, frequently legislatures are given short  
25 time frames. So, yes, it's a serious task,



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1 but, no, we don't believe it's unreasonable.

2 Let me conclude by saying this: We're  
3 asking the Court to rule under Pennsylvania  
4 law. Pennsylvania law is unique. The  
5 provisions of its Constitution are not the  
6 same as the U.S. Constitutions.

7 This Court has ruled in Papps and later  
8 cases that the protections afforded  
9 expressive conduct are broader than under the  
10 U.S. Constitution. The United States Supreme  
11 Court has not come up with a test, and we  
12 suggest to this Court that it not wait for  
13 the U.S. Supreme Court nor should it try and  
14 predict what the U.S. Supreme Court is doing.

15 We're asking this Court to rule as a  
16 matter of Pennsylvania law irrespective of  
17 what the U.S. Constitution says.

18 Finally I'm going to finish with a  
19 practical reason. I read in the newspapers  
20 where opposing counsel says they will try and  
21 seek Supreme Court review of this case. I  
22 think this Court and certainly Judge Brobson  
23 (ph), the Commonwealth Court, have worked  
24 mightily to get this case to a point where it  
25 could be resolved promptly.

1           It would be a shame if that were to be  
2           undone by some misapprehension of the U.S.  
3           Supreme Court that this case was decided on  
4           something other than Pennsylvania law.

5           MALE JUSTICE: Does it change your  
6           (inaudible) if North Carolina's case is  
7           stayed today by the Supreme Court of the  
8           United States?

9           MR. GERSCH: No, we're asking this case  
10          to be decided on the Pennsylvania law no  
11          matter what. Thank you, Your Honor.

12          CHIEF JUSTICE SAYLOR: Thank you.

13          Mr. Aronchick (ph), on behalf of  
14          Governor Wolf.

15          MR. ARONCHICK: May it please the Court,  
16          Mark Aronchick for the executive defendants.

17          We had divided the arguments here where  
18          Mr. Gersch was going to address the merits  
19          and I was going to address remedy issues.

20          Unless the Court has some questions,  
21          that's what I will try to do. But let me say  
22          right at the outset, I know that I've been  
23          asked to keep my comments brief and I will  
24          try to do so, and a lot of you are familiar  
25          with my sometimes failure to do so, but I

1 will try.

2 Should this Court find the map  
3 unconstitutional, which we urge, the  
4 executive defendants urge, and we urge it for  
5 the fallback position that Mr. Gersch  
6 presented, the position that Justice Donohue  
7 was developing in her -- in her argument.

8 You are being told that there is nothing  
9 you can do to remedy that, that it's just too  
10 late. The interveners and the legislative  
11 defendants have filed collectively about 20  
12 or 30 pages of briefing trying to raise all  
13 matter of chaos and unfairness and  
14 impossibility from ordering a new map this  
15 close to the election.

16 We think those points are  
17 mischaracterizations and they're flat wrong.  
18 I am now going to spend some time taking the  
19 two main questions that would then come up;  
20 one would be Justice Todd's question, is this  
21 -- can we get a map done in the time that's  
22 involved, can a map get done and get done  
23 properly, that's question one --

24 FEMALE JUSTICE: Properly is the big  
25 part of that. Can something be done, yes,

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1 but we -- haste make waste. We want to make  
2 sure that if we were to order that, we're not  
3 ordering the impossible or something that  
4 would just end up being more difficult down  
5 the road faced with challenges.

6 MR. ARONCHICK: I understand that and I  
7 will address at least our views on that, can  
8 it be done, can it be done properly.

9 Then the second basket of remedy issues  
10 is once it's done, can the election proceed  
11 smoothly for the congressional primaries,  
12 let's say for the May 15th primary, assuming  
13 this Court wouldn't be entertaining moving,  
14 which is a possibility, all of the primaries  
15 in order to get things done right.

16 FEMALE JUSTICE: I thought the Executive  
17 Branch was recommending that as a  
18 possibility?

19 MR. ARONCHICK: There are two  
20 possibilities. We're recommending that if  
21 the map is in place by February 20 or before,  
22 that we can show you that we can run this  
23 election. We can run the congressional  
24 portion of the primary and all the  
25 up-and-down ballot seats by May 15th, and I

1 will show you that and I'll answer any  
2 questions.

3 But if it can't be done and the map be  
4 put in place by February 20, we are saying  
5 that you have the ample power, complete  
6 power, to order moving the primary. In fact,  
7 you can move the primary as late as the end  
8 of July if you wanted to and still run -- and  
9 we can still run the general election in the  
10 proper fashion as long as the primary was  
11 completed then.

12 We would be recommending that you in  
13 that case move the complete primary rather  
14 than bifurcating, run it all together,  
15 whatever the new date is, if it's in June or  
16 a few weeks later a month later, or whatever  
17 you choose --

18 FEMALE JUSTICE: Well, the cost of  
19 having separate primaries would be  
20 astronomical.

21 MR. ARONCHICK: Well, it's not  
22 astronomical. It's \$20 million shared both  
23 at the state and county levels.

24 JUSTICE WECHT: Why would they have to  
25 be separate? Number one, why would there

1 have to be any separate primaries, why  
2 couldn't we just move all the primaries?

3 MR. ARONCHICK: That's what we --

4 JUSTICE WECHT: And by the way, why  
5 can't they move to August if necessary?

6 MR. ARONCHICK: Well, Justice Wecht, if  
7 you start to move it into August, we run into  
8 the military ballot problems and mailing for  
9 the general election.

10 We've submitted an affidavit and --  
11 uncontested by the way, from Mr. Marks in the  
12 record that demonstrates why the end of July  
13 would be --

14 JUSTICE WECHT: There are states that  
15 have primaries in August. I think there's a  
16 state or two that have primaries in  
17 September, I could be wrong. I'm just  
18 exploring the outer bounds here, assuming  
19 other dates -- reporting and other dates the  
20 secretary states. The police can also be  
21 moved back.

22 MR. ARONCHICK: Let me recommend this to  
23 you, Justice Wecht, that if it became  
24 necessary to think about August, we'll go  
25 back to the drawing board and figure out if

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1 we can get this all done if the primary was  
2 the beginning of August.

3 When we looked at this and looked at it  
4 carefully, we thought the end of July we know  
5 we can do that. If you say you need us to go  
6 back and sharpen our pencils up a little bit  
7 more, I guarantee you we'll do this.

8 Because one pledge that we're making  
9 here is that the experts that know how to run  
10 these elections, not the people throwing  
11 darts but the one who know how to run these  
12 elections, will do everything possible to  
13 accommodate an order directing that we  
14 finally have a constitutional map that  
15 voters, if there was ever a time in our  
16 democracy, could vote on --

17 MALE JUSTICE: In fact, your position --  
18 I'm sorry, Mr. Aronchick, just to follow up.  
19 Your position would be in fact that there are  
20 constitutional maps that have already been  
21 done in profusion here in the form of the  
22 experts that Judge Brobson saw.

23 MR. ARONCHICK: So let me go to the  
24 first basket of --

25 FEMALE JUSTICE: Excuse me, before you

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1 switch gears, could I just throw in a quick  
2 question?

3 MR. ARONCHICK: Absolutely.

4 FEMALE JUSTICE: Given the breath of the  
5 remedy that you're seeking before this Court,  
6 is it any concern to the Court the fact that  
7 these maps were drawn up in 2011 and that  
8 there has been three congressional elections  
9 held since the institution of these maps and  
10 now this suit was brought in 2017?

11 MR. ARONCHICK: I don't think it should  
12 be any concern. In fact I think it should be  
13 frankly for the ruling, sort of a solace, a  
14 comfort in that you know for sure that you  
15 have adorably unconstitutional map. Then in  
16 three elections, there's evidence now, it's  
17 not a prediction, it's a fact that 13 to 5,  
18 13 to 5, and 13 to 5, no matter what's  
19 happening with all the other elections on the  
20 ballots.

21 So durability, if that's part of your  
22 test, you don't have to rely on expert  
23 predictions, which other courts do. You can  
24 rely on those, because they were clear in  
25 this record. You can also rely on the fact.



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1           If you know that as a court in  
2           Pennsylvania under our Constitution, if you  
3           know that, I suggest respectfully that to  
4           close your eyes and allow yet another  
5           unconstitutional election to occur, we should  
6           be doing everything possible, everything  
7           possible, to avoid that. So to get to the  
8           issue of --

9           FEMALE JUSTICE: I'm sorry, Mr.  
10          Aronchick, one more thing before you get to  
11          your main issue. Could we just put to bed  
12          the outlier so that we're all clear.

13          The special election for the Tim Murphy  
14          seat in the 18th is not a part of this  
15          argument at all, that special election would  
16          occur regardless of what we decide?

17          MR. ARONCHICK: Yes, I want to put that  
18          aside completely. I'll explain for the rest  
19          -- but that would be my basket too, can we  
20          run the election, would it be chaotic.

21          This is a complete -- my opponents say  
22          it will produce unfathomable chaos, because  
23          we have a special election if we also have a  
24          new map. I'm -- it's unfathomable to me what  
25          they're even talking about to tell you the

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1 truth. The election, there already are two  
2 candidates. They're clear -- and a minor  
3 candidate, they're clear, so we're not --  
4 there's no petitions.

5 FEMALE JUSTICE: ...district that was  
6 already represented?

7 MR. ARONCHICK: It's in the current  
8 district. It's nine-and-a-half months left  
9 for a current seat. It's two months before  
10 the May 15th primary.

11 If those candidates want to also run for  
12 a new term in a new district next time, they  
13 have as much right to petition and file and  
14 run as any other citizen does.

15 So this notion of chaos, it was what  
16 they used to try to bring this case up to the  
17 U.S. Supreme Court a couple months ago and  
18 slowed the process down at the Commonwealth  
19 Court and now they're using it again, and  
20 it's weird.

21 CHIEF JUSTICE SAYLOR: Mr. Aronchick, on  
22 this issue of remedy, and we understand the  
23 election calendar can be, you know --

24 MR. ARONCHICK: You do it all the time.

25 CHIEF JUSTICE SAYLOR: So we have that

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1 point loud and clear. But part of the remedy  
2 is to send this back and ask the legislature  
3 to redraw the congressional maps without any  
4 political consideration.

5 Now, that -- how hard would that remedy  
6 ever work? You're asking a legislative body  
7 to draw congressional maps with no notions of  
8 political -- and I don't understand the  
9 semantic difference between partisanship and  
10 politics. It's quintessentially political.

11 But your remedy would ask that they be  
12 directed to draw maps with no political  
13 considerations, Democrat or Republican; is  
14 that correct?

15 MR. ARONCHICK: Mr. Chief Justice, no.  
16 I said at the beginning that while I  
17 wasn't --

18 CHIEF JUSTICE SAYLOR: ...you said.

19 MR. ARONCHICK: -- while I wasn't  
20 addressing the merits, that I -- our position  
21 as the executive defendants is what they call  
22 their fallback position, which is when you  
23 have traditional criteria which were  
24 recognized in Mellow subordinated -- and here  
25 it's egregious. No one is doubting that

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1           there was complete subordination. When there  
2           was subordination to that extent, that  
3           partisanship overwhelms every other factor.

4           In my view, will there be places where  
5           partisanship has perhaps a role on the edges.  
6           Your Honor, Justice Donohue suggested one  
7           possibility. There are many other kinds of  
8           possibilities.

9           When you're looking at whether we're  
10          going to divide a municipality or divide a  
11          county in some fashion, when you're looking  
12          at true -- to the extent that you factor in  
13          true incumbency protection, not make believe  
14          incumbency protection, that happened in 2011  
15          when there were four or five, I think it was  
16          five, freshmen one year -- not even one year,  
17          ten months in place, Congressmen, that were  
18          all protected, seniority protected.

19          Seniority means do you have -- do you  
20          have props in Washington, are you running a  
21          committee, are you in the leadership. It  
22          doesn't mean seniority creation, which is  
23          what they did in that map. They were  
24          creating ten years of seniority for a bunch  
25          of freshmen.

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1           So in an incumbency world, it might be  
2           that you look a little bit at where does the  
3           person live, what is the voting districts.  
4           I'm not saying that we're talking about a  
5           completely a partisan system, but where you  
6           can start at this Court is just like you do  
7           in every constitutional case when you put  
8           down a constitutional provision, buffer zones  
9           for abortion clinics, time place and manner  
10          restrictions under the First Amendment.

11          There are so many where you start and  
12          say, this is wrong, this is a standard under  
13          our Constitution that does not work, we're  
14          not going to accept it, it violates viewpoint  
15          discrimination, it violates any notions that  
16          we have of fairness and fair elections, and  
17          then you see what evolves in the world of  
18          litigation in determining how you refine that  
19          standard.

20          All of these tests, Justice Baer, that  
21          you recommended, those are evidence,  
22          evidentiary points. They all coalesce here  
23          in one conclusion. Every test you look at,  
24          ends in the same place that this produced  
25          four, five, or six more Republican seats than

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1 any kind of fair process would have produced.

2 MALE JUSTICE: But under that theory,  
3 supposing the Court would adopt your remedy,  
4 strike this map, order the legislature to  
5 come up with another one, approve it, you  
6 wouldn't know if that's was any good until  
7 you held some elections?

8 MR. ARONCHICK: No, no.

9 MALE JUSTICE: That's what you just  
10 said.

11 MR. ARONCHICK: No, I did not say that.  
12 I said that knowing whether you have  
13 elections or not helps evaluate the map, but  
14 Courts have said on a regular basis that  
15 experts who are highly refined can look at  
16 the data and the maps and predict outcomes  
17 and four or five different perspectives on  
18 it --

19 MALE JUSTICE: Counsel, also if I could  
20 just follow up. You've been asked here to  
21 hypothesize very close cases. According to  
22 Judge Brobson's finding of fact, we don't  
23 have a close case; isn't that right?

24 MR. ARONCHICK: It's not even remotely  
25 close --

1 MALE JUSTICE: So we need to decide this  
2 case and articulate those principals that  
3 govern this case. And as your brief explains  
4 future cases will hash out refining of  
5 standards --

6 MR. ARONCHICK: Completely.

7 THE COURT: -- isn't that right?

8 MR. ARONCHICK: Totally right. If you  
9 take -- if you decide we're going take this  
10 up to February 20 because we want to see if  
11 we can do the primary on May 15th, the  
12 congressional primary, that is around a  
13 month, depending upon when you rule --

14 But presumably since everything has been  
15 handled on a very expedited fashion, perhaps  
16 you will rule in an expedited fashion and use  
17 that month.

18 -- if you apply -- if you appoint a  
19 distinguished special master, that person, he  
20 or she, has available the best experts as  
21 consulting experts, the best, and we know  
22 from the record in this case that maps can be  
23 produced hundreds and hundreds of them in a  
24 day.

25 All the part -- all the voter

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1 information, the population information, all  
2 the voter information, all that data is  
3 available.

4 MALE JUSTICE: They have been produced.  
5 They have in fact been produced.

6 MR. ARONCHICK: In fact they were in  
7 this record. All of the -- but if the master  
8 was then saying, here's what I'm going to do,  
9 I'm going to look at all the data that is  
10 available -- it's completely available to  
11 everybody. I'm going to look at map  
12 hardware, available, completely available --  
13 the political science professors tell you  
14 that in the amicus brief, Krofman and Ghadi,  
15 the other professors, tell you that in their  
16 amicus brief.

17 They're not disputing that, nobody can,  
18 because in a more primitive way, that's what  
19 they did in 2011. They had map creation,  
20 they had data, they put it together. Now  
21 it's even better, it's even better as  
22 Justice Cappy (ph) predicted in Urfer, as  
23 Justice Kennedy predicted and Vieth (ph),  
24 it's even better. It's high refined computer  
25 information data availability and experts.



1           FEMALE JUSTICE: Mr. Aronchick, may I  
2           just follow up. This is somewhat responding  
3           to -- or asking you to respond, because of  
4           the Chief Justice' question. The maps that  
5           were produced by Dr. Chen, 500 of them, that  
6           did not take into account incumbency, because  
7           that would be not fair in this case. Because  
8           incumbents as we currently sit, we're elected  
9           based upon potentially your argument is an  
10          unconstitutional map.

11           But 500 maps were produced by Dr. Chen.  
12          There is a partisan choice that could be made  
13          if legislature decided just to use those  
14          maps, because some of them resulted in ten  
15          Republican districts, others nine, some 11,  
16          now that's a partisan choice.

17           So those maps which were drawn based  
18          upon traditional redistricting criteria,  
19          resulted in a situation where in a partisan  
20          fashion a map that resulted in more  
21          Republican districts could be chosen over one  
22          that resulted in an equal number of  
23          Democratic and Republican districts?

24           MR. ARONCHICK: Absolutely. When I got  
25          to that point, I was going to exactly suggest

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1           that, that you're not starting from scratch,  
2           you're starting from a record, a record that  
3           you asked to be developed that was developed  
4           that was not even rebutted.

5           And the special master could work in  
6           parallel to having the General Assembly try  
7           to do a remedial plan. You could give the  
8           General Assembly a period of time to try to  
9           do a remedial plan. Courts have done that.

10           Yes, the North Carolina case was perhaps  
11           taken or stayed but the remedy part of it is  
12           instructive for this Court to look at, not  
13           the merits part, the remedy part. And if  
14           this General Assembly produces a compliant  
15           plan, our governor will sign it immediately.  
16           If they produce a noncompliant plan, what you  
17           have different in this case than you had in  
18           2011 is you don't have that red flag of  
19           gerrymandering, one-party control, have you a  
20           governor who will not sign it and who will  
21           give the reasons, as he's supposed under the  
22           Constitution, for not doing that.

23           Meanwhile, you could have a special  
24           master that is develop -- is taking input.  
25           There's six experts on both sides that

1 testified below. There's several more in the  
2 Aiger case in the federal court who just  
3 recently all studied this map.

4 There's 40 pages of findings by the  
5 Aiger court Justice Baylson, Judge Baylson  
6 rather, in his findings that while the Court  
7 split in where they were going to go, there  
8 are findings that a special master could take  
9 a look at. There are all sorts of things  
10 that could be done very rapidly where if  
11 there's a will, there's a way.

12 MALE JUSTICE: In fact with respect --

13 JUSTICE BAER: Can I ask you, we can't  
14 shoot at a moving target. It's hard enough  
15 to hit a still target. So Mr. Marks'  
16 affidavit said to have a July 31st primary,  
17 you need a map by April 1st.

18 As I gain this out day after day -- and  
19 you have to recall, we have internal  
20 processes. Even if we issue an order, we  
21 circulate it among ourselves. There may be a  
22 dissenting statement, that might cause a  
23 concurrent statement, that may cause a  
24 revision, so we can't necessarily get  
25 something out tomorrow, just internally.

1           Then of course there's motions for  
2           reconsideration, there's appeals to the U.S.  
3           Supreme Court or a Federal District Court,  
4           there's stays, there's this, there's that,  
5           the other.

6           So as I gain that out, I have doubts  
7           that we can do this by April 1st. I take  
8           your clients at their word, which you need a  
9           map by April 1st.

10          So you -- but you had said earlier,  
11          well, we don't need a map by April 1st, you  
12          tell us when you can get a map and we'll  
13          figure out how to do this.

14          MR. ARONCHICK: No, what I said was  
15          actually what the Marks' affidavit says,  
16          early April. And it didn't pick a date, it  
17          picked a target, early April if we're going  
18          to have a July 31st primary without  
19          alterations to the weeks that are set up in  
20          the statutory primary calendar.

21          But you could -- if you said -- if you  
22          said that it was more important to take a  
23          little more time to resolve all these  
24          internal issues that you raised,  
25          Justice Baer, you also could say that instead

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1 of three weeks of circulating for petition  
2 signatures, we're going to -- we're going to  
3 order two; instead of X amount of time for  
4 objections, we're going to shorten it. You  
5 can do all sorts of things in your power.  
6 You have done them in election after election  
7 after election. There's nothing different  
8 about doing this.

9 All of the questions that you raised,  
10 Justice Baer, I view respectfully in the way  
11 I look at this case in the category of issues  
12 that can be managed, but what can't be  
13 managed is looking the other way at this  
14 unconstitutional map and then saying at this  
15 point in time, Pennsylvania, which has become  
16 a national joke, a cartoon, Goofy kicking  
17 Donald, we're a cartoon in the country when  
18 we were the pride of the country with our  
19 Constitution.

20 You can't say, let it go again, because  
21 we haven't figured out how to manage these  
22 various issues. In the Mellow case --

23 FEMALE JUSTICE: I need to -- I need to  
24 interrupt you, because we can say things that  
25 are not -- we're just not going to deal with

1           it. We could theoretically agree with your  
2           constitutional arguments and we could decide  
3           that a remedy that puts the state into a  
4           tailspin and rearranges the entire election  
5           calendar and gives the legislature two or  
6           three weeks to do this task is unwieldy.

7                     We could say that. We could say the map  
8           is unconstitutional and that we are going to  
9           require it to be fixed well in advance of the  
10          2020 election. We could do that and I'd like  
11          to you address that.

12                    MR. ARONCHICK: Sure you could, but this  
13          Court faced that question in Mellow at a  
14          later stage in the primary election calendar  
15          and chose not to do that and fashioned an  
16          appropriate remedy that everyone bought into  
17          in Mellow. In Holt this Court --

18                    FEMALE JUSTICE: ...portion of the  
19          cases.

20                    MR. ARONCHICK: I understand. In Holt,  
21          this Court did the same -- my colleague wants  
22          me to make one correction as soon as I finish  
23          answering your question.

24                    Here's what I've been trying to say:  
25          You can devise a special master process that

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1 can work rapidly and you can monitor that,  
2 you can ask the General Assembly if they want  
3 to do a remedial plan and if they do, fine.

4 If you want to operate within this  
5 primary, we are saying February 20 or so is  
6 about the right target to get the map and we  
7 will then give you very minor, very minor,  
8 requests for adjustments to the certain  
9 deadlines in the statute that you have  
10 ordered in the past all the time.

11 And that wouldn't be chaos if the  
12 special master in your estimation would be  
13 ready with a recommendation and a remedy for  
14 you if the General Assembly was noncompliant.

15 MALE JUSTICE: Mr. Aronchick, the  
16 argument -- the argument's always going to be  
17 made, well, it's too late to grant relief.

18 That argument was made in front of  
19 Judge Pellegrini, wasn't it?

20 MR. ARONCHICK: It was made in front of  
21 Judge Pellegrini --

22 MALE JUSTICE: He rejected that.

23 MR. ARONCHICK: It's made in every  
24 single solitary election case, whether you're  
25 talking about redistricting or striking

1 ballots.

2 MALE JUSTICE: One more thing -- one  
3 more thing on timing that I was trying to ask  
4 before, isn't it true -- is it an upshot of  
5 the expert work here that it's far less time  
6 consuming to draw a map that's compact,  
7 contiguous, and respects subdivision lines  
8 than it is to scientifically craft an extreme  
9 partisan gerrymander, which slices and dices  
10 districts and precincts?

11 MR. ARONCHICK: That's a perfect  
12 statement. Dr. Chen demonstrated that. I  
13 want to make one correction while I'm talking  
14 about that and Dr. Chen is that in his 500  
15 simulations, there were not -- there were  
16 none that produced 11 Republican seats.  
17 There was a small number at 10, but yes.

18 We are way past the day with our  
19 technology and our experts to really have to  
20 be even be stumped by that question. You put  
21 that information, in a day you're going to  
22 have 500 choices or two days, you're going to  
23 have a lot of choices.

24 You then present them to all the  
25 stakeholders, let them react, let them write



1 in their objections, their qualifications as  
2 was done in Mellow with then chief judge --  
3 or President Judge Craig who acted as a  
4 special master in that case.

5 He got all the objections, he got  
6 everything -- then produced a report for the  
7 Supreme Court. Everything happened very --  
8 this was at a time of primitive technology  
9 and we were talking about voter registration  
10 as a measure, which nobody talks about  
11 anymore, because it's -- the partisan -- the  
12 data analytics are so much more refined.

13 JUSTICE BAER: Mr. Aronchick, may I ask  
14 you, in 2011 of course we had Republican  
15 legislature and Republican governor. In  
16 looking at the jurisprudence in the area, one  
17 of the elements for this case, it's been  
18 suggested, is one-party government. We now  
19 have a Democratic Governor.

20 So if we get -- if we give the  
21 legislature an opportunity and the  
22 legislature passes a (inaudible) and the  
23 governor signs it, does the fact that we have  
24 natural antagonism between the Democratic  
25 governor and Republican legislature end the

1 case?

2 If it's okay to both sides, it's no  
3 longer -- it should no longer -- I wouldn't  
4 say it's not judicable but it no longer meets  
5 the elements of an overwhelmingly gerrymander  
6 ship.

7 MR. ARONCHICK: Justice Baer, I think --  
8 let me answer it like this, let me answer it  
9 like this: I think that there will be a very  
10 compelling position that if the legislature  
11 produces a compliant map, the governor  
12 believes it's compliant and the governor  
13 signs it, that we have a map that we can go  
14 through.

15 But I can't eliminate the fact that when  
16 you present that, would there be objectors  
17 that want to be heard, maybe, but I think  
18 that it would be a compelling case.

19 Because in this jurisprudence as the  
20 Brennan Center said -- these amicus briefs by  
21 the way, I hope that you've had a chance to  
22 study them. They're amazingly good. They  
23 hit so many points. They were only filed on  
24 one side of the case. I don't know that  
25 anybody believes them as much on the other

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1 side of the case, because there are none.

2 But you will see that the badges of  
3 gerrymander, one-party control, previous  
4 competitive elections that suddenly are  
5 noncompetitive at all, the protection of  
6 people who are barely incumbents, they're  
7 puppies in the process and now they're being  
8 called incumbent seniority that needs to be  
9 protected. I mean, please.

10 You can see these kinds of excuses --  
11 the fact that, as in this case, our  
12 opponent -- the opponents, legislative  
13 defendants, produced no explanation  
14 whatsoever for this map, not one compelling  
15 governmental interest explanation other than  
16 we get to do and you don't get to review it.

17 JUSTICE TODD: You're going back  
18 again -- pardon me, you're going back again  
19 to the constitutional arguments when I  
20 thought we were focused on remedy.

21 One of the things that I don't want to  
22 see happen, as amenable as I am to your  
23 argument, is that we just assume that we are  
24 now in a world of such high technology that  
25 minds and hearts and reason and the role of

1 the legislature and the role of the courts  
2 and order -- an orderly process gets set  
3 aside, simply because we have the technology  
4 to make it happen.

5 The legislature is not a computer and we  
6 are not robots. There still are  
7 considerations of thought and time and  
8 mindfulness that need to go into a remedy  
9 should we find for you on the  
10 constitutionality.

11 MR. ARONCHICK: Justice Todd, I couldn't  
12 agree with you more. But I'm suggesting that  
13 because there is technology and highly  
14 refined minds on this subject, that you can  
15 have a period of thoughtfulness, you can  
16 listen to objections or ideas that are being  
17 made about a map and decide whether they make  
18 sense. This is an area that's been highly  
19 studied. This is not a brand-new area.

20 And you can have that period of time if  
21 this Court puts together the kind of remedy  
22 that the petitioners have been proposing and  
23 recognizes that the governor will have a role  
24 in this. No question, the governor will have  
25 a role in this.

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1 CHIEF JUSTICE SAYLOR: Mr. Aronchick, I  
2 think Justice Dougherty had a question, then  
3 we're going to move on to Attorney Levine.

4 MR. ARONCHICK: Chief Justice, I just  
5 want to make sure I'm answering. I've been  
6 moved around --

7 CHIEF JUSTICE SAYLOR: We understand  
8 your point.

9 JUSTICE DOUGHERTY: That's exactly my  
10 point. My point is you as petitioner, you're  
11 here to tell us what your remedy is, you've  
12 given us the options that we're familiar  
13 with, but I'm asking you: What is it that  
14 you believe is the remedy that we should  
15 consider, what is it, your party's position?

16 MR. ARONCHICK: The executive  
17 defendant's position is that you should  
18 engage a highly respected -- or appoint a  
19 highly respected special master. You -- I'm  
20 not going to suggest who that is.

21 That master would have available a  
22 consulting expert. There are many in this  
23 area. That master would start a parallel  
24 process, meaning taking information that's  
25 already available with the idea of producing

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1 a report and recommendation for you.

2 If at the same time, the second part of  
3 the remedy is, the General Assembly in a  
4 defined period of time, two or three weeks,  
5 whatever you choose --

6 JUSTICE DOUGHERTY: I'm asking you what  
7 you think we should -- we can make our own  
8 decision. I'm asking you as the party. Be  
9 specific. You're the petitioner asking us  
10 for remedy, could you give it to me?

11 MR. ARONCHICK: I think you can give the  
12 General Assembly three weeks, three weeks.  
13 Two weeks, yes; three weeks, we go either way  
14 on that. To be truthful, we will go either  
15 way.

16 It all depends on how fast you move and  
17 whether you want to try to meet the  
18 February 20 deadline. The General Assembly  
19 can act in either period of time. They can  
20 do it. They did it here.

21 JUSTICE DOUGHERTY: Taking into  
22 consideration the military's absentee --

23 MR. ARONCHICK: Then let me go -- let me  
24 go forward, because that gets to the second  
25 part that I really didn't -- that I really

1           didn't address.

2           If on February 20 there's a map in place  
3           and you want -- and we're aiming -- we're  
4           meeting the May 15th primary, the critical  
5           date that the department needs to work around  
6           or work with is the March 26th and 30th  
7           military ballot mailings, overseas and  
8           military ballot mailings.

9           So that means from February 20 to  
10          basically March 26th or so, there's about six  
11          weeks -- there's actually about five weeks.  
12          The department would want two of those weeks  
13          to input all the data into the computers,  
14          produce all the information that everybody  
15          needs, advertise the new districts, give all  
16          the voter rolls out to anybody who wants to  
17          run so they can get organized for their  
18          petitions, tell them what precincts are in  
19          which districts, that would take about two  
20          weeks.

21          If you said, do it faster, we'll put  
22          more people on and do it faster. But we're  
23          telling you what would normally be three  
24          weeks, we can do in two. If you say do it in  
25          one and a half, we'll do it in one and a

1 half.

2 Then you have only three activities that  
3 occur before the military ballots are  
4 mailed -- petition circulating, filing of  
5 objections, withdrawal of candidates. The  
6 Election Code provides six weeks for that  
7 period of time. We can give you simple  
8 amendments that would have those activities  
9 occur in three weeks. There is all sorts of  
10 accommodations you can make as a Court to  
11 enable that to happen, which we will provide  
12 to you, if that's what you want, so they're  
13 in your order and the elections will run as  
14 fairly and smoothly as they possibly can.

15 One last point that's important. All  
16 the other elections will go on the normal  
17 calendar. What you do with regard to the  
18 congressional primary will not have any  
19 effect on the up-and-down ballot elections on  
20 the -- aiming at the May 15th primary.

21 MALE JUSTICE: Wait a minute, I'm sorry,  
22 I didn't understand that to be -- let me  
23 clarify. We could just move all the dates  
24 back and save the Commonwealth any  
25 substantial-added cost.



1 FEMALE JUSTICE: \$200 million.

2 MALE JUSTICE: I mean, there's nothing  
3 holy -- is there something holy about May 8  
4 or May 7, or May 15?

5 MR. ARONCHICK: No, no, no. If you  
6 decide -- you asked in connection with that  
7 remedy. The second proposal that we make to  
8 you is just that, you can change the primary  
9 date. We're early in the country, as you  
10 said. You can change the primary date for  
11 all races. You can change it we believe  
12 safely, not a problem, until July 31 call it.

13 If you say go back, I'm telling you,  
14 Justice Wecht, and figure out whether there's  
15 more time into August, we will sit down and  
16 come back to you and tell you that with an  
17 addendum to our affidavit.

18 MALE JUSTICE: There must be, because I  
19 know for a fact Connecticut votes in August.  
20 I think New York is later.

21 MR. ARONCHICK: I understand that.  
22 Nobody below asked us to do that, so there  
23 was no contest in what we put into the  
24 record.

25 So if you, of course, the Supreme Court,

1 asks us to pull out the pencils and take a  
2 second look at that, we will certainly do  
3 that rapidly. We'll comply, we'll submit our  
4 report to you rapidly.

5 MALE JUSTICE: Thank you.

6 MR. ARONCHICK: Thank you very much.

7 One last comment, please, just to wrap up and  
8 that is what I said before, I really mean.  
9 We were the pride of the country with our  
10 Constitution. We're not now with the way  
11 we're running this part of our democracy.  
12 Please in as broad based as possible, as  
13 steadfastly as possible, please correct that.  
14 Thank you.

15 CHIEF JUSTICE SAYLOR: Mr. Levine on  
16 behalf of the respondent lieutenant governor,  
17 what's the different interests between the  
18 governor and the lieutenant governor?

19 MR. LEVINE: Well, the lieutenant  
20 governor actually has the role both with the  
21 Senate and the Executive Branch. The  
22 lieutenant governor has felt that it's  
23 important also to have a special master  
24 involved in this process as a remedy for that  
25 reason. The lieutenant governor has

1           advocated the use of a particular map  
2           associated with this.

3           To follow up on Justice Wecht's  
4           question, Dr. Chen offered many maps that  
5           were done under the traditional criteria.  
6           The one map that we included in the brief,  
7           which was highlighted as Chen Figure 1, that  
8           was a map that actually not only was designed  
9           under the traditional criteria, but actually  
10          addressed every single community of interest  
11          issue.

12          So when you look at that map Erie is not  
13          split, Harrisburg is not split, Berks is not  
14          split with Reading coming out. In other  
15          words, Montgomery County doesn't have five  
16          splits. That was a map that through  
17          traditional criteria addressed every  
18          legitimate issue, and that goes to the  
19          question that Justice Donohue asked about  
20          this partisan political distinction.

21          Absolutely, Delaware County for instance  
22          has 500,000 people. A congressional district  
23          is 705,000 people. It is within a reasonable  
24          basis to go either east or west or north and  
25          you could support that.

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1           What did not happen here, and this is  
2           the critical distinction, that's why this  
3           case is really not all that complicated for  
4           all the discussion.

5           There's a freedom of expression  
6           challenge here. It is incumbent upon the  
7           government to show the compelling state  
8           interest. There was no evidence to support  
9           that.

10           The traditional criteria, which were  
11           enunciated by this Court in Holt, based on  
12           Reynolds versus Sims and historically going  
13           way back before then, the traditional  
14           criteria could be used to justify.

15           So if there was a witness, which there  
16           was not, that witness would hold up a map and  
17           say in Delaware County we had a compact  
18           district. We could have gone to Chester  
19           County or we could have gone to Philadelphia  
20           or Montgomery County, there might have been  
21           different options, but this is how we  
22           legitimize that decision.

23           And over and over again in having this  
24           map, there is no defensible explanation for  
25           why you have these bizarrely shaped

1 districts.

2 CHIEF JUSTICE SAYLOR: Mr. Levine, let  
3 me try again. I know the lieutenant  
4 governor's sued in his legislative and  
5 executive capacity, but in terms of result or  
6 remedy, where do the governor and lieutenant  
7 governor differ?

8 MR. LEVINE: We're generally the same.  
9 The only thing that I think -- generally  
10 speaking, Your Honor.

11 CHIEF JUSTICE SAYLOR: I'd really like  
12 to know. Is the lieutenant governor's  
13 position different than the governor's on  
14 remedy?

15 MR. LEVINE: It's generally the same.  
16 The only difference I would offer is that we  
17 could have a situation where the legislature  
18 is given the two weeks or so to develop a  
19 map, and the legislators have indicated that  
20 they don't really want to change the map.

21 So as a practical situation, the  
22 legislators might come up and say we've just  
23 combined Erie, isn't this a nice new map,  
24 that's only change we made.

25 So I think it's imperative to ensure the

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1 constitutional of the map that there's a  
2 special master that is proceeding  
3 contemporaneously. I think we don't have to  
4 reinvent the wheel, because of all of the  
5 extensive evidence that we had, and the map  
6 we included in our brief, it addresses every  
7 single issue of communities of interest.

8 The other thing that it does wonderfully  
9 in our short time frame, it really  
10 essentially avoids all issues of incumbency.  
11 We have a unique situation this year. We  
12 have a number of Congressmen who are not  
13 running for reelection who have announced  
14 they have resigned and this map actually  
15 addresses virtually every one of those  
16 Congressmen.

17 I would direct the Court's attention to  
18 Stack Exhibit 9 where we actually pinpoint on  
19 this map where the incumbent reside. It  
20 actually addresses the special election, both  
21 Conor Lamb, Rick Saccone, where the  
22 candidates in that special election would  
23 reside in the new Tim Murphy district -- what  
24 was Tim Murphy's district there.

25 I think there is are one or two

1 situations that people are on the border and  
2 a special master can resolve that. But the  
3 question is: What's our remedy and what's  
4 our result in contrast to the perpetuation of  
5 an unconstitutional map.

6 There's an old -- there's an old joke  
7 about a guy who goes to a tailor and he takes  
8 his beautiful suit in and gets it measured  
9 and he fits the tailor and he finds out his  
10 sleeve is up to here and one is down here,  
11 and the tailor said if you stand like this,  
12 it fits perfectly.

13 That's where we are now. We have a  
14 state that is in a contorted, twisted way,  
15 and we've stood that way for three elections  
16 now, producing the result 13 to 5 even where  
17 more Democrats have voted for congressional  
18 Democratic candidates statewide than  
19 Republican, 13 to 5, no matter what happens.

20 It's twisted, it was distorted. They  
21 will make this argument that we haven't  
22 identified a class, we don't know who these  
23 people are. This map was specifically  
24 designed by looking election district by  
25 election district at voting preferences.

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1           They looked at those voting preferences  
2           and then they determined a way to split those  
3           voters so that they would not have a voice.  
4           That is a classic freedom of expression case.  
5           The test is not that hard. They had to come  
6           up with a compelling state interest, they  
7           came up with no state interest. They came up  
8           with no justification in a five-day trial,  
9           nothing.

10           There's not -- nobody got up there --  
11           and again this Court knows, I do a lot of  
12           land use cases. There's discretion that's  
13           often given in zoning maps. There's a lot of  
14           latitude in terms of where you put a  
15           commercial district or not, but you've got to  
16           come forward and justify that. In so many  
17           areas of the law, you've got to come forward  
18           and justify that.

19           Here we have the highest standard of  
20           review, a strict scrutiny review, they didn't  
21           do it, they didn't come up with anything, and  
22           we shouldn't have to stand in this twisted,  
23           contorted way for an election where so much  
24           is at stake in our country and the voice of  
25           so many people should be heard.



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1 MALE JUSTICE: (Inaudible).

2 MALE JUSTICE: In your brief and in your  
3 argument, you have been stressing Article  
4 7 --

5 MR. LEVINE: Yes.

6 MALE JUSTICE: -- I should say Section 7  
7 as well as Section 26. You also cite Section  
8 5, the free and equal election. Why don't  
9 you address that, because Mr. Gersch did not.  
10 Why don't you address despite the fact that  
11 that is part of the substance of your  
12 argument for us to consider, that  
13 Constitution.

14 MR. LEVINE: Yes, and I think that is a  
15 unique aspect of the Pennsylvania  
16 Constitution and in consort with the freedom  
17 of expression and equal protection, free and  
18 equal election.

19 So what does that mean? A great example  
20 of that would be if you -- we have an  
21 Election Code and if there's a tie vote,  
22 there's a tie vote, we draw lots, that just  
23 happened in Virginia in fact, and we draw  
24 lots.

25 Democrat would pick a lot, a Republican,

1           50/50 chance. If the General Assembly were  
2           to pass a law that said the Republican would  
3           actually get two chances. If they don't win  
4           at first, they get to do it again. That  
5           would be outrageous, because you're changing  
6           the odds from 50 percent to 75 percent. It  
7           would be an Election Code and the free and  
8           fair elections, that would just so violate  
9           that.

10                 Here we've taken a map that really  
11           should be basically a 50/50 delegation and  
12           we've changed that to 75/25 percent  
13           delegation and we've done it through the same  
14           heavy hand of government tipping the scale of  
15           that election playing field.

16                 We are not looking for proportionality,  
17           we are not looking for special favors, we are  
18           looking for an equal level playing field,  
19           which can be done by offering a design based  
20           on the traditional criteria.

21                 I think that that section that you  
22           reference actually elevates us and clearly  
23           distinguishes us from a federal situation.

24                 MALE JUSTICE: May I ask you, actually I  
25           have two questions, but first to the remedy.

1           If the -- I ask the question of  
2           Mr. Aronchick.

3                   Given that we have -- we do not have  
4           one-party government, if we remand this or we  
5           direct this to the legislature, which I think  
6           is the proper thing to do, and the  
7           legislature puts together a plan that the  
8           governor signs to make it an acting statute,  
9           does that conclude the case because the  
10          natural political forces have aligned with  
11          tension to create a map that just has to be  
12          deemed constitutional, can't be  
13          overwhelmingly partisan, because the governor  
14          is the guardian of other side, if you will?

15                   MR. ARONCHICK: Well, it certainly  
16          changes equation. Obviously this Court has  
17          ruled a number of laws to be  
18          unconstitutional. These were laws that were  
19          signed by legislatures and governors.

20                   FEMALE JUSTICE: We cannot presume, sir,  
21          that nobody in the Commonwealth is going to  
22          disagree with the governor, because they're  
23          Democrats?

24                   MR. LEVINE: Right, there could be that  
25          change, but I think this is -- so there's a

1 greater likelihood that you're going to have  
2 a fair map.

3 My concern is with the General Assembly,  
4 to be blunt politically, they do not want to  
5 change the map. They're not going to come in  
6 with Chen Figure 1 and they're going to come  
7 in with probably something less, and that  
8 would be my supposition.

9 Now, if we get to the final day of our  
10 period, what do you do, what does the  
11 governor do, it becomes a difficult equation.

12 I think it would be very, very helpful  
13 for the process if this Court said here's a  
14 special master who's going to proceed. The  
15 General Assembly certainly has every right to  
16 go we're going to go two weeks or so and  
17 we're welcoming that map, we're welcoming  
18 that involvement, but we have for instance a  
19 map Chen Figure 1. We have that map that  
20 will offer balanced communities of interest  
21 that actually offers a fairly balanced result  
22 and most importantly, it follows all the  
23 traditional criteria.

24 We're going to have that interest and I  
25 think actually that will elevate the

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1 conversation knowing, the General Assembly  
2 knowing, that this Court also has a special  
3 master track. It will elevate the  
4 conversation and vastly increase the chances  
5 that we're actually going to have a  
6 meaningful map come out of the General  
7 Assembly that the governor could sign.

8 If not, we've wasted no time. In two  
9 weeks this Court can accept that map of the  
10 special master.

11 Again, I go back to the situation, this  
12 has been for three consecutive terms, but as  
13 Mr. Aronchick said, no matter what happens,  
14 it's a 13-5 vote. It is amongst the worst  
15 ever a partisan gerrymandering and I think  
16 this Court has an opportunity to say, no,  
17 you've identified Democratic voters. It's  
18 not necessarily dependent on your voter  
19 registration. It's  
20 election-district-by-election-district  
21 analysis, which is exactly what they have  
22 done and where -- and all of our experts have  
23 done.

24 For that reason, we respectfully urge  
25 the Court to take the opportunity so that our

1 voices can be heard bluntly. Thank you.

2 CHIEF JUSTICE SAYLOR: I think we'll  
3 turn to the respondents now and hear first I  
4 believe from Torchinsky -- Attorney  
5 Torchinsky representing the President Pro Tem  
6 of the Senate.

7 MR. TORCHINSKY: Thank you, Your Honor.  
8 May it please the Court, I'm  
9 Jason Torchinsky. I'm actually representing  
10 Speaker Turzai and Senator Scarnati.

11 Presenting for respondents today will be  
12 myself, Mr. Mark Braden representing  
13 Speaker Turzai, and Mr. Tabas representing  
14 the interveners.

15 I'd like to make some brief opening  
16 remarks, go through a couple of the factual  
17 questions, and then address the equal  
18 protection claims, and the Article 1, Section  
19 4 arguments.

20 Mr. Braden is going to address free  
21 inspection claims and our remedies position,  
22 and then Mr. Tabas would like about five  
23 minutes for his argument.

24 FEMALE JUSTICE: Don't rush. Take your  
25 time.

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1 MR. TORCHINSKY: Thank you, Your Honor.

2 History in Pennsylvania seems to repeat  
3 itself. Here we are again after three  
4 election cycles held under the current map  
5 with the parties bringing a claim challenging  
6 a congressional districting map to pass  
7 through the legislature with bipartisan  
8 support.

9 And once again the petitioners assert  
10 that there is a near certainty that the  
11 Democratic Party will hold only five seats  
12 under this redistricting map. Once again  
13 they're claiming the map is an  
14 unconstitutional gerrymander.

15 Once again we're in a situation where  
16 the Democratic Party is robustly challenging  
17 several congressional districts in the  
18 Commonwealth in 2018.

19 Once again history repeats itself and  
20 doom and gloom predictions by challengers,  
21 and a partisan gerrymandering case allege  
22 their party may never well succeed, may well  
23 get proven wrong again.

24 Going back to the 1990s, plaintiffs in a  
25 North Carolina partisan gerrymandering case

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1           claimed they could never win. Five days  
2           after the decision affording relief, the only  
3           case that the U.S. Supreme Court cited in  
4           Vieth that provided relief under Bandimere,  
5           the opposite party -- the party of the  
6           plaintiffs in that case prevailed in the  
7           elections prompting remand from the Fourth  
8           Circuit.

9           In Bandimere, the plaintiffs insisted  
10          that the map was so durable that their party  
11          could never prevail in the State House, and  
12          they proved wrong the next election when the  
13          Democrats tied the Indiana State House and  
14          under the same map, two cycles later, took  
15          over majority.

16          In Urfer and in Vieth, plaintiffs came  
17          before this Court and the U.S. Supreme Court  
18          insisting that their party could never take a  
19          majority of the congressional seats under the  
20          current map.

21          MALE JUSTICE: But, Counsel, we've had  
22          three elections under the current map. We  
23          have the identical Democrat and Republican,  
24          the identical congressional caucus that we  
25          had in 2011.



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1           How long do we have to elect the same  
2           people again and again. Obviously  
3           Representative Murphy has retired, but with  
4           that exception, how long before you get to  
5           durability?

6           MR. TORCHINSKY: Your Honor, I guess if  
7           I could just finish my thought, in 2006 and  
8           2008, five congressional seats flipped the  
9           other way. And for two cycles in a row,  
10          Democrats controlled the congressional  
11          delegation with 12 seats of the 19, and that  
12          was under the map that they came before this  
13          Court and said we could never take control,  
14          because it's such a crazy partisan  
15          gerrymander.

16          So my point is, it doesn't take very  
17          long before social science runs into actual  
18          voters who defy social science. It's not  
19          like combining an oxygen and a hydrogen  
20          molecule where you know exactly at what  
21          temperature it's going to change from water  
22          to water vapor or to ice. Voters vote  
23          differently in every election. And social  
24          science can make predictions, but social  
25          scientist predictions are often wrong about

1 voters. Because that's the thing, voters  
2 don't follow scientific rules and that's --

3 MALE JUSTICE: Do you want us to upend  
4 Judge Brobson's findings of fact with respect  
5 to intent and effect, two prongs of the Urfer  
6 test?

7 MR. TORCHINSKY: Well, I don't think  
8 that Judge Brobson --

9 MALE JUSTICE: You seem to be  
10 contradicting his findings of fact with  
11 respect to the intent and the effect of this  
12 gerrymander.

13 MR. TORCHINSKY: I don't think that we  
14 are taking issue with many of Judge Brobson's  
15 factual findings. I think our arguments  
16 really go to the legal point.

17 I'd like to address a couple of the  
18 factual questions that the Court raised.  
19 First of all in 2011 with respect to voter  
20 registration in the districts as they were  
21 enacted, there were seven districts that had  
22 majority Democrat registration, five  
23 districts that had plurality Democrat  
24 registration, two districts that had majority  
25 Republican registration, and four districts

1           that had plurality Republican registration.

2           Although there has been a trend towards  
3           more Republicans since 2010, I do not have  
4           the current statistics about how many of the  
5           districts are the same majority plurality  
6           stats with the current registration.

7           MALE JUSTICE: It has some resonance, at  
8           least with me, that the voter registration's  
9           irrelevant, that people register in college  
10          or shortly thereafter, and then people  
11          change.

12          So if you want to know how people are  
13          voting look at how they voted in the last few  
14          elections, not how they registered 30 years  
15          or 50 years ago.

16          MR. TORCHINSKY: Your Honor, that's  
17          correct, but I was trying to address the -- I  
18          think it was Justice Saylor who had a  
19          question about where the registration stood  
20          at the time of the map, so I was just trying  
21          to address that.

22          I want to go into a little bit of the  
23          expert findings. Dr. Chen did all these  
24          simulations and he sort of did these random  
25          simulations, and I would focus primarily on

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1 his Set 2.

2 When you consider what his Set 2 came up  
3 with this so-called nonpartisan criteria, or  
4 what he deemed was nonpartisan criteria, over  
5 50 percent of his maps paired  
6 Congressman Brady with another incumbent  
7 member of Congress.

8 Sometimes it was with  
9 Congressman Fattha, sometimes it was with one  
10 of the other Congressmen from South Eastern  
11 Pennsylvania. But in over 50 percent of his  
12 simulations, Congressman Brady, the senior  
13 most Democrat in the congressional  
14 delegation, who if the Democrats take over  
15 majority in the house is very likely to chair  
16 the House Appropriations Committee, would be  
17 paired with someone else.

18 It is unrealistic to believe that a  
19 political body like a legislature would pair  
20 one of the senior most members of Congress  
21 from the state with someone else.

22 So Dr. Chen's maps, while they might  
23 have been sort of neutral and nonpartisan,  
24 didn't consider political reality at all.  
25 Again, I think that that's really important.

1           When social scientists attack these  
2           things, they don't necessarily realize the  
3           political reality on the ground. Frankly for  
4           this state, Congressman Brady's position as  
5           the current ranking member on the  
6           Appropriations Committee in the House of  
7           Representatives and the likely chairman of  
8           the Appropriations Committee if Democrats do  
9           take over a majority in the State House is  
10          critically important to this state, and so  
11          the notion --

12           MALE JUSTICE: Question on that, see  
13          you're asking -- you're framing that as if we  
14          were sitting here in a legislative caucus  
15          room drawing a district, but we're not.

16           We're here viewing a challenge to a  
17          gerrymander that's alleged to be extreme  
18          partisan in nature and violation of our  
19          Constitution. We're not here concerned with  
20          Congressman X or Congresswoman Y or this  
21          particular incumbent or that particular  
22          incumbent.

23           It's our job to assess what your clients  
24          have done against our Constitution. So why  
25          should we concern ourselves with this

1 particular member of Congress or that  
2 particular member of Congress when we're  
3 applying our Constitution?

4 MR. TORCHINSKY: Sure. Because this  
5 Court in Mellow when it laid out what it  
6 considered to be traditional districting  
7 criteria for Congress -- and, again, we  
8 recognize that there is expressed  
9 constitutional criteria with respect to state  
10 legislatures. In Mellow, this Court said you  
11 look at protension of cores of existing  
12 districts and avoiding pairing of incumbents,  
13 so --

14 MALE JUSTICE: You could do that -- your  
15 clients could have done that --

16 MR. TORCHINSKY: Yes, and this Court did  
17 that in Mellow.

18 MALE JUSTICE: -- but now -- but now  
19 they've done what they've done. Now, it's  
20 not our job to protect incumbents, is it,  
21 it's that it might have been permissible for  
22 your clients to do it, but it's not required  
23 of a Court to protect incumbents in the event  
24 of a constitutional violation; isn't that  
25 correct?

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1 MR. TORCHINSKY: Your Honor, I think I  
2 would point out to you that the Supreme Court  
3 and federal courts that have ordered remedies  
4 have included avoiding pairings of incumbents  
5 where possible in their remedy orders.

6 If you look at Karcher versus Daggett,  
7 if you look at this Court's apportionment  
8 case in Mellow, if you look at the criteria  
9 that North Carolina three-judge court just  
10 laid out for the North Carolina state  
11 legislature when it appointed its special  
12 master, one of its criteria was, and because  
13 it is considered a traditional districting  
14 criteria, to avoid pairing of incumbents.

15 MALE JUSTICE: No event would you  
16 elevate that to the level of compactness,  
17 contiguity, and avoiding dividing  
18 subdivisions and municipalities; is that  
19 correct?

20 MR. TORCHINSKY: Well, that depends. I  
21 mean, if you're in a state that has expressed  
22 criteria with respect to Congress, then yes.  
23 But when you're in a state like Pennsylvania  
24 where there is nothing express in the  
25 Constitution or in the state statutes that

1 provide an order of criteria, no, there's no  
2 legal requirement for that.

3 I mean, this Court in Mellow did say  
4 that contiguity is required by federal law as  
5 are single-member districts and equal  
6 population, but compactness and avoiding  
7 splitting political subdivisions were things  
8 that this Court identified in Mellow when  
9 this Court identified what criteria it was  
10 going to use when adopting --

11 MALE JUSTICE: Just one more question  
12 and then I'll hold back, but just one more  
13 question. Are you telling this Court that as  
14 a matter of Constitution -- as a matter of  
15 Pennsylvania Constitutional law it is as  
16 important if Congressman Jones or  
17 Congressman Smith or Congressman Brown  
18 survives as it is that a district be compact,  
19 contiguous, and avoids dividing counties and  
20 municipalities except where necessary?

21 MR. TORCHINSKY: There is no provision  
22 to Pennsylvania law that speaks to  
23 compactness or avoiding municipality or  
24 political subdivision splits with respect to  
25 Congress.



1           If you go back to the formation of the  
2           Pennsylvania Constitution, there was -- there  
3           was expressed criteria adopted with respect  
4           to state legislatures, but that same body  
5           that put this into the state Constitution for  
6           the state legislative seats, didn't put that  
7           same criteria in for congressional seats. If  
8           you look nationally --

9           CHIEF JUSTICE SAYLOR: Could I ask you a  
10          question?

11          MR. TORCHINSKY: Sure.

12          CHIEF JUSTICE SAYLOR: Maybe I could ask  
13          you to -- we don't have a stenographer, but  
14          if you could just slow down a little bit, it  
15          would be easier to follow.

16          The legislature has a notwithstanding  
17          the lack of any expressed criteria in our  
18          state Constitution, in terms of these norms,  
19          the legislature is bounded by expressions of  
20          the United States Supreme Court in terms of  
21          congressional redistricting, is it not?

22          MR. TORCHINSKY: Zzz yes, what the  
23          Supreme Court --

24          CHIEF JUSTICE SAYLOR: Some of these  
25          notions have come through the federal cases?

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1 MR. TORCHINSKY: That's true. And,  
2 Your Honor, 2011 map split I believe one or  
3 two fewer counties than 2002 map and split  
4 about 30 fewer municipalities than the 2002  
5 map. So it's not like traditional  
6 districting criteria were totally ignored by  
7 the enactment of this map.

8 MALE JUSTICE: I want to follow up on  
9 all the questions. I'm trying to get what  
10 your position is. Is it your position  
11 respectfully that compactness,  
12 contiguousness, lack of splitting municipal  
13 county lines or the like, that those are not  
14 criteria that this Court should apply in  
15 deciding the evidentiary standards to  
16 determine if there's overwhelming  
17 partisanship or invidious viewpoint  
18 discrimination or the like?

19 MR. TORCHINSKY: Not at all, Your Honor.  
20 Again, we looked to what the Court said in  
21 Mellow, which is preserving cores of  
22 districts, protecting incumbents, respecting  
23 compactness, minimizing splits of political  
24 subdivisions, and we submit that the 2011 map  
25 did split fewer counties than the 2002 map

1 and did split fewer political subdivisions  
2 than the 2002 map.

3 MALE JUSTICE: You also argue that the  
4 districts are compact and contiguous?

5 MR. TORCHINSKY: When you average the  
6 compactness scores across the state, there's  
7 actually not too big of a difference in the  
8 compactness scores between the 2002 map and  
9 2011 map.

10 I mean, compactness scores are a  
11 mathematical model that generally you average  
12 across the state. So when you get to sort of  
13 densely populated areas, it's much easier to  
14 draw a compact district than if you are in an  
15 area that is less densely populated, so  
16 that's a challenge for mapmakers.

17 For example, what Dr. Chen's sort of  
18 algorithm did was prioritize those  
19 mathematical percentages over any other  
20 considerations.

21 That's how he was able to develop maps  
22 that minimize county slits and minimize  
23 municipal splits, but sort of didn't consider  
24 how to weigh those different factors, because  
25 his algorithm just mechanically prioritized

1 one over another.

2 MALE JUSTICE: You view the mechanism of  
3 a land bridge as sufficing for  
4 contiguousness, I found that bothersome.

5 MR. TORCHINSKY: Your Honor, the Supreme  
6 Court has recognized that over and over  
7 again -- I mean, I point this Court to  
8 Cromartie versus Hunt -- or Cromartie versus  
9 Easley, sorry, from the U.S. Supreme Court,  
10 where the Supreme Court approved as a  
11 partisan gerrymander, as a permissible  
12 partisan gerrymander.

13 The snake-like district that ran from  
14 the southern part of North Carolina into like  
15 I think it was three different forms or three  
16 different little fingers at the top, and the  
17 Supreme Court said that's a permissible  
18 partisan gerrymander. The Supreme Court had  
19 struck down a similar one when it was a  
20 racial gerrymander but --

21 MALE JUSTICE: We do a district that  
22 comprises a Democratic portion of the city of  
23 Pittsburgh and a Democratic portion of the  
24 city of Philadelphia and connect it with a  
25 land bridge, which is the Pennsylvania

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1 Turnpike and the Schuylkill (ph),  
2 constitutional or at least arguably  
3 constitutional?

4 MR. TORCHINSKY: Your Honor, there's a  
5 district that looks almost like that in Cook  
6 County, Chicago, that's been challenged in  
7 federal court about three times and approved.  
8 They call it the barbell district and it  
9 literally looks like a barbell where you've  
10 got sort of two pockets connected by a land  
11 bridge, and the federal courts have approved  
12 that. I think there have been at least three  
13 cases challenging that map.

14 FEMALE JUSTICE: But it didn't include  
15 the Schuylkill.

16 MR. TORCHINSKY: Well, Your Honor, I  
17 point you to -- actually I was a --  
18 represented a group of African-Americans  
19 challenging Maryland's map in 2011 in a case  
20 called Fletcher v. Lamone and there are --  
21 there is one district there, Maryland's 3rd  
22 District, that is only contiguous in two  
23 places by water and the federal court  
24 approved it. The federal court said we just  
25 really don't have the power to -- to override

1           this.

2                   MALE JUSTICE: Do those cases get  
3           into -- I don't want to just think out loud.  
4           Do those cases get into whether it's a  
5           judicable question or a political question as  
6           opposed to actually saying that these are  
7           contiguous?

8                   MR. TORCHINSKY: If you look at the --  
9           if you look at the concurring opinion in  
10          Fletcher v. Lamone, the Court said these are  
11          judicable, but there are no readily developed  
12          or manageable judicial standards recognizing  
13          what this -- what the Supreme Court said in  
14          Vieth, which again followed this Court in  
15          Urfer.

16                  I'd like to turn, if I could, to the  
17          equal protection arguments. In Urfer,  
18          although it appears that most of the argument  
19          from the petitioners focused on the First  
20          Amendment.

21                  I think the petitioners have essentially  
22          acknowledged that under this Court's test in  
23          Urfer, assuming Urfer is still good law  
24          following Vieth, that they do not and cannot  
25          prevail under Urfer's test.

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1           While they may have -- or at least the  
2           Commonwealth Court concluded that there was  
3           intentional discrimination, or at least  
4           intentional partisanship. The Court did not  
5           reach a conclusion about Democrats being an  
6           identifiable political group. What they're  
7           really asking you to do is treat race and  
8           politics the same.

9           Part of the reason that the Supreme  
10          Court, for example, in the voting rights  
11          cases has identified minorities as a  
12          protectable group is the history of real  
13          discrimination and the fact that race can't  
14          change.

15          Political party is not a protected class  
16          that has ever been recognized by the U.S.  
17          Constitution or under the Equal Protection  
18          Clauses of the U.S. Constitution.

19          MALE JUSTICE: Counsel, on this  
20          identifiable class argument you're making,  
21          doesn't the durability of what your clients  
22          did proven over three elections, producing  
23          the exact same fraction in the delegation  
24          each time itself give the best proof of the  
25          identifiable class?

1 MR. TORCHINSKY: Except, Your Honor, I  
2 would point out that Republican registration  
3 in Pennsylvania has been rising and  
4 Democratic registration in Pennsylvania has  
5 been declining.

6 So it's not -- and that gets to my point  
7 that people are not immutable. If you're a  
8 Democrat when you're born, you're not  
9 necessarily a Democrat when we die.

10 We had Arlen Specter switch parties  
11 while he was a Senator. We had  
12 President Reagan who was a Democrat before he  
13 became a Republican. We have Donald Trump as  
14 president who's a Republican who used to be a  
15 Democrat. Party is not an immutable  
16 characteristic like race and they're asking  
17 you to conclude that it is.

18 I also would point you to  
19 Justice O'Connor's concurrence in Bandimere  
20 where she pointed out that the Democratic and  
21 Republican Parties are not helpless. The  
22 Democratic and Republican Parties in the  
23 United States and in Pennsylvania are in fact  
24 very powerful.

25 They're not a minority -- neither one is



1 a minority group that needs the  
2 Constitutional protection that the Supreme  
3 Court has afforded to racial groups.

4 With turning to the second prong of the  
5 Urfer test, which is working disproportionate  
6 results at the polls such that there was lack  
7 of political power and denial of fair  
8 representation, which effectively shuts a  
9 political party out of the process.

10 That's not happened in Pennsylvania.  
11 This Court didn't conclude that way in Urfer.  
12 Democrats had, at least of the elections that  
13 were run under 2011 map, a higher percentage  
14 of the seats than they had under the 2002  
15 plan.

16 And I would point out that several of  
17 these districts -- in the 11th -- in the 12th  
18 and the 18th District, there's more  
19 registered Democrats than Republicans, but  
20 they're voting Republican. There are  
21 Democratic candidates registered to run in  
22 the 7th Congressional District, the one that  
23 Mr. Gersch criticized because of its shape.  
24 But there's four Democrats that are actively  
25 competing for that seat, why, because they

1 think they can win.

2 Go to the 12th District there are five  
3 -- I'm sorry, the 10th District, there are  
4 five Democratic candidates in that district.  
5 There's another Democratic candidate that's  
6 raised almost a million dollars under the  
7 restrictive federal campaign finance law.  
8 Why, because these are actually competitive  
9 elections.

10 We have a winner-take-all system, right,  
11 it's 50 percent plus one, if there's only two  
12 candidates, or a plurality if there's a third  
13 party, but these are really -- some of these  
14 are actually really competitive seats. I  
15 mean, look, we've got a competitive election  
16 right now for this special election for  
17 Tim Murphy's seat.

18 I mean, these are not immutable numbers  
19 and these numbers can change. In every  
20 partisan gerrymandering case that has  
21 happened so far, they've changed shortly  
22 thereafter even after the Courts upheld the  
23 maps.

24 So I submit to you that the second prong  
25 of Urfer hasn't been met. In fact, I think

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1 the petitioners acknowledge in their briefing  
2 that they don't believe they can meet the  
3 second prong of the Urfer test, because  
4 they're asking this Court to abandon it.

5 They're also asking this Court to  
6 abandon 50 years of following the United  
7 States Supreme Court on these questions of  
8 partisan gerrymandering.

9 Back in the '60s, this Court followed  
10 the U.S. Supreme Court on these cases. Back  
11 in to 2002 -- back in Urfer, this Court  
12 followed Bandimere, but this Court has never  
13 had an opportunity to evaluate Urfer since  
14 the Supreme Court's plurality in Vieth  
15 rejected the conclusions of Bandimere --

16 MALE JUSTICE: Would you maintain,  
17 Counsel, that they're -- putting the Voting  
18 Rights Act cases aside, would you maintain  
19 there is no map that would violate  
20 Pennsylvania's Constitution, because that  
21 seems to be the upshot of your argument? If  
22 this map is not in violation of our  
23 Constitution, what map would be?

24 MR. TORCHINSKY: Well, Your Honor, there  
25 were -- the 2002 map was upheld in Urfer on a

1 -- where Democrats had -- where Democrats  
2 admitted they had at least five safe seats,  
3 and that was 5 of 19. This is 5 of 18,  
4 that's a higher percentage.

5 I mean, if this Court wasn't ready to  
6 conclude in 2002 in Urfer that that map  
7 violated the Pennsylvania Constitution, this  
8 map is arguably better because of the higher  
9 percentage.

10 So is it possible that there is a map  
11 that could violate the Urfer test, yes, but  
12 it hasn't been found yet. If you look at  
13 every court case that has been brought since  
14 Bandimere, until 2016 there was not a court  
15 that afforded relief.

16 So far of the courts that have afforded  
17 relief, you've got Whitford, which has been  
18 stayed by the United States Supreme Court  
19 suggesting a likelihood of reversal.

20 The petitioners in Rucho (ph) have their  
21 response due to Justice Kennedy today by noon  
22 on the Rucho case. There's just been -- and  
23 the Maryland Court after denying summary  
24 judgment, denied a preliminary injunction, so  
25 there's really --

1 MALE JUSTICE: If I could just follow up  
2 briefly. It seems as a matter of principal  
3 and given what you said in response to  
4 Justice Baer's question about the  
5 Pennsylvania Turnpike District, that there's  
6 no principal basis for distinguishing this  
7 gerrymander that brings us here today from  
8 one that would have three Goofy, Donald Duck  
9 districts, or five, or would result in one  
10 Democratic Congress person being elected.

11 In other words, I don't see the  
12 principal stopping point between the argument  
13 you're making and the argument that there is  
14 no such thing as an unconstitutional partisan  
15 gerrymander.

16 MR. TORCHINSKY: Your Honor, I think  
17 what I would say is that no court has yet  
18 come up with any set or standard. I mean,  
19 Judge Brobson pointed that out.

20 Some politics is clearly permissible in  
21 redistricting. Drawing the line between  
22 where politics is permissible and  
23 impermissible has never been articulated  
24 by -- by the petitioners in this case.

25 Judge Brobson pointed out what are the

1           unanswered questions that the petitioners not  
2           in their arguments in front of him and not in  
3           their arguments in front of this Court have  
4           answered, for example, what's a  
5           constitutionally permissible deficiency gap,  
6           how many districts have to be competitive to  
7           go to your point to pass constitutional  
8           muster?

9           I mean, the Supreme Court has rejected  
10          notions of proportionality and yet your  
11          question seems to say, well, isn't some  
12          proportionality required.

13          Until someone -- until a court comes up  
14          with a manageable line, that's a really tough  
15          thing, which is again why every Court that  
16          has looked at these cases since Bandimere --

17          MALE JUSTICE: The difficulty, Counsel,  
18          apropos of Justice Wecht's question, the  
19          difficulty is that by that reckoning,  
20          candidates and voters are both fungible.

21          We can take any candidate -- if you're  
22          permitted as you suggest to have overwhelming  
23          partisanship and you haven't gone so far to  
24          say women may not vote or only one party may  
25          be on a ballot, which I presume you would

1           concede as unconstitutional.

2           MR. TORCHINSKY: Yes, Your Honor.

3           MALE JUSTICE: So you haven't done that,  
4           but you've set this up so that at least for  
5           three continuous elections, the candidates  
6           who happen to have been there in the  
7           Democratic districts and Republic districts  
8           have won every time, closed the same votes.  
9           And the voters have broken the same way every  
10          time, so it almost doesn't matter who the  
11          candidate is and it almost doesn't matter who  
12          the voter is, because the result's  
13          preordained and that's their lament that  
14          we're eliminating meaningful elections in  
15          Pennsylvania with a map that preordains  
16          results. They point to three elections as  
17          proof of that.

18          MR. TORCHINSKY: I think that's where I  
19          -- that's where we differ with them. There's  
20          no such thing as preordination in an  
21          election, because if you look at history,  
22          every time a court has declared -- or  
23          petitioners have come in front of a court  
24          declaring something was preordained, the  
25          results never work out that way. I point you

1 to the North Carolina case from the '90s --

2 CHIEF JUSTICE SAYLOR: We're coming full  
3 circle here. That's where we started out.  
4 If you have another point or two, I'd  
5 appreciate you making them. And then absent  
6 some questions, we'll move to the Speaker.

7 MR. TORCHINSKY: Yes, Your Honor, just  
8 real briefly. Article 1, Section 4 of the  
9 United States Constitution directs state  
10 legislatures the authority to draw  
11 congressional districts, and to the extent  
12 that this Court attempts to impose some sort  
13 of new requirement, we believe that that  
14 would violate the constitutional delegation  
15 of authority to the state legislature.

16 So this Court needs to tread carefully  
17 to make sure that it doesn't violate the  
18 provisions of Article 1, Section 4 and impose  
19 something on the legislature that doesn't  
20 appear in the Constitution or in the  
21 statutes.

22 MALE JUSTICE: I know you're finishing  
23 up, but you haven't spoken at all to remedy.  
24 Assume reluctantly that you do not prevail on  
25 constitutionality, is three weeks a fair



1 opportunity for a legislature to redraw these  
2 maps? Because I think it should get the  
3 opportunity.

4 MR. TORCHINSKY: Your Honor, as I  
5 mentioned at the beginning, I'm going to  
6 defer to Mr. Braden on remedy, but I think we  
7 would like at least three weeks.

8 With that I will turn to Mr. Braden to  
9 advance our free expression and remedy  
10 arguments. Thank you, Your Honor.

11 CHIEF JUSTICE SAYLOR: Thank you.

12 MR. BRADEN: I had to check my watch to  
13 make sure I could say good morning still.  
14 May it please this Court, I'm Mark Braden, I  
15 represent the Speaker.

16 The First Amendment argument is a  
17 political policy argument masquerading as a  
18 legal argument. I think everybody knows on  
19 this Court that the analysis at the lower  
20 court by Brobson is in fact correct under the  
21 First Amendment.

22 What they're asking you to do is invent  
23 a new interpretation of the Free Expression  
24 Clause in the First Amendment that's not be  
25 recognized anywhere to the best of my

1 knowledge except in North Carolina as a  
2 secondary consideration in that case, which  
3 in all likelihood is going to get stayed in a  
4 couple days.

5 So they're inviting you into the  
6 political thicket, because what their client  
7 wants, the League of Women Voters, is a  
8 nonpartisan, nonpolitical line drawing  
9 process, (inaudible) League of Women Voters  
10 nationwide has that position.

11 Your Constitution provides that the  
12 lines are supposed to be drawn by a political  
13 body. In shock of shock, they use politics  
14 to do that. At every stage the United States  
15 Supreme Court, that is when they've talked  
16 about this -- in the vast majority of the  
17 cases, they actually started out by talking,  
18 well, we only go into this area with great  
19 trepidation, because the political body  
20 should be doing this. They only in very  
21 limited circumstances unweighting the votes,  
22 equal population, and race have they decided  
23 they're willing to go in the political  
24 thicket.

25 Now, this invitation is one you need to

1 not accept. It's damaging in any number of  
2 reasons. You're not just going into the  
3 political thicket, you're impaling this Court  
4 and the judiciary on the political thorns and  
5 you will effectively be bleeding out blood of  
6 your establishment as a judicial body by  
7 doing this political action.

8 You cannot have a position where a  
9 process is assigned to a political body and  
10 then take the position if they do what  
11 political bodies do, that's unconstitutional.

12 MALE JUSTICE: That sounds a lot like  
13 the argument made by the defendants in Brown  
14 versus Board of Education.

15 We in Topeka know best about the  
16 education of our students. Don't get  
17 involved -- don't get involved in this  
18 thicket. So it seems to me much more  
19 corrosive of our democracy, sir, that a Court  
20 stay its hand when constitutional rights have  
21 been violated then to allow the political  
22 branches of government to create districts  
23 that look like Goofy kicking Donald Duck.

24 MR. BRADEN: You know, I think it's  
25 outrageous to think that race, which the

1 first -- the Equal Protection Clause comes  
2 from a Civil War where 7,000 people --  
3 700,000 people died.

4 Everyone in this Court knows, as  
5 everyone involved in the jurisprudence knows  
6 that the main aim of the Equal Protection  
7 Clause was race and that we should somehow  
8 recognize and be concerned about the same  
9 level there as between these two equally  
10 powerful opponents in this process, the  
11 Republican Party and the Democratic Party.

12 MALE JUSTICE: We indicate our equal  
13 protection principals under our constitution,  
14 sir, outside of the racial context, we  
15 recently issued the opinion in William Penn  
16 School District, which was not a racial case,  
17 vindicating our equal protection principals  
18 under our Constitution.

19 So is it your argument that we don't  
20 apply equal protection rights outside of  
21 racial gerrymanders?

22 MR. BRADEN: Absolutely not. I'm just  
23 saying if we go through traditional equal  
24 protection analysis, which has the notion of  
25 you only get to strict scrutiny if you have a

1 suspect classification.

2 Oh, by the way, we don't have a suspect  
3 classification here. We have a  
4 classification that is specifically and  
5 expressly recognized in the Constitution.  
6 This is a political argument.

7 People want to make the redistricting  
8 process nonpolitical in your state, even  
9 though it is expressly is assigned by the  
10 U.S. Constitution --

11 MALE JUSTICE: Counsel, may I stop you  
12 for a second. Just succinctly, are you  
13 arguing that this is not judicable apropos of  
14 the plurality in Vieth or are you arguing  
15 that it's judicable but under these facts  
16 there's no viewpoint discrimination?

17 MR. BRADEN: Under these facts there's  
18 no viewpoint discrimination. The judicable  
19 question, it could actually change. There  
20 are four members of the U.S. Supreme Court  
21 who believe it's non-judicable. There's one  
22 member who in his last time he spoke about  
23 this indicated he had some severe doubts as  
24 to whether that's possible.

25 But do I think it's judicable and do I

1 think that under the prior standard, which I  
2 think actually as we stand here right now is  
3 your existing standard, which is the  
4 Bandimere standard, I actually think you  
5 could -- you could in certain circumstances,  
6 and there have been circumstances in the  
7 past, where that shutout standard, which is  
8 really the Bandimere standard, could be met.

9 FEMALE JUSTICE: Counsel, may I just  
10 follow up so that I'm clear on what your  
11 argument is. The evidence through the  
12 experts that were heard in the Commonwealth  
13 Court established that districts were drawn  
14 based upon the manner in which citizens of  
15 Pennsylvania expressed themselves at the  
16 voting box.

17 So that if a citizen voted Democratic in  
18 four out of last four elections, they were  
19 classified in one category. If they were --  
20 voted Republican in those elections, they  
21 were classified in another way and they were  
22 placed in districts so that if you were a  
23 Democrat, your vote was diluted.

24 Now, my understanding is that you are  
25 arguing on behalf of the respondents on

1 Pennsylvania's Free Expression and  
2 Association Clause.

3 Is it your position that it is  
4 defensible under our Free Expression Clause  
5 for the legislature to punish a voter by  
6 diluting a vote by placing them into a  
7 district where their vote isn't going to  
8 carry equal weight?

9 MR. BRADEN: I beg the answer to two  
10 pieces there. If the question is do I  
11 believe that the legislature made political  
12 decisions, the answer to that is of course.

13 FEMALE JUSTICE: Well, that wasn't --

14 MR. BRADEN: But, no, let me get to the  
15 second part. Do I believe that that was  
16 viewpoint discrimination, no, I don't think  
17 that's viewpoint discrimination.

18 FEMALE JUSTICE: What is it then, if you  
19 place someone -- if you classify someone  
20 based upon the manner in which they have  
21 spoken at the ballot box, what is that if  
22 that is not viewpoint discrimination?

23 MR. BRADEN: To be viewpoint  
24 discrimination, we could easily identify it  
25 if we decided the Democratic voters didn't

1 get to vote or we were to make it more  
2 difficult for them to vote.

3 What you're talking about here is  
4 identifying discrimination, because they  
5 don't get to vote for a winning candidate or  
6 the candidate --

7 FEMALE JUSTICE: No, not at all. No,  
8 I'm talking about the evidence, sir, that was  
9 presented by the experts before the  
10 Commonwealth Court, which the Commonwealth  
11 Court found to be credible. Voters were  
12 classified and placed into districts based  
13 upon the manner in which they voted in prior  
14 elections.

15 MR. BRADEN: The answer to that is yes,  
16 they were. People made political decisions,  
17 that's the essence of the process from day  
18 one. If you decide you want to reject that,  
19 then that's easily done and many states have  
20 done that.

21 Many states have changed their laws,  
22 they've changed their laws. But so long as  
23 it's assigned to the political body, then you  
24 will expect because it's been going on for  
25 more than 200 years -- gerrymandering in



1 Pennsylvania if you look at Scalia's  
2 plurality opinion in Vieth predates the U.S.  
3 Constitution.

4 FEMALE JUSTICE: If we could just get  
5 back -- if we could get back to the point at  
6 hand. If this Court decides that it is  
7 unconstitutional to classify voters based  
8 upon the manner in which they have spoken in  
9 the ballot boxes, then that would be a  
10 decision for this Court to make.

11 Do you agree with that?

12 MR. BRADEN: This Court -- let's be  
13 clear and I thought it was very clear in the  
14 answer, which it's very clear that political  
15 considerations were taken in regard here, and  
16 it's clear that that resulted as it did in  
17 Holt with -- this is just four years ago.

18 Realize that what you're talking about  
19 here is changing your opinion from four years  
20 ago when you said the intention to gather  
21 together certain targeted blocks of voters  
22 was acceptable under your law. Now four  
23 years later, you're going to identify simply  
24 this is a political process --

25 MALE JUSTICE: If you're talking about

1 Holt as I take you are from you're -- that  
2 also presupposes compliance with the other  
3 provisions, which Judge Brobson found are  
4 clearly violated here -- compactness,  
5 contiguity, and subdivision.

6 So I come back to my question I asked of  
7 your cocounsel. It seems to me there's no  
8 limiting principal and it seems to me the  
9 force of your argument in principal has to be  
10 that there is no, there can be no  
11 constitutional violation until partisan  
12 gerrymandering context, assuming equipopulous  
13 districts and assuming no Voting Rights Act  
14 violation; isn't that correct?

15 MR. BRADEN: No. First of all, your  
16 reference to Holt actually makes my case,  
17 because you have actual statutory language  
18 that directs you there.

19 What you're being asked about and what  
20 you're saying is, oh, we should take the  
21 statutory provisions, these constitutional  
22 provisions, and impose them and create them  
23 as a requirement under your law, which  
24 doesn't exist now and hasn't existed for 200  
25 years.

1           And the Supreme Court, this  
2           classification that we're concerned about, is  
3           exact classification in Gaffney versus  
4           Cummings that the Supreme Court absolutely  
5           approves, specifically approves. This is the  
6           exact classification --

7           CHIEF JUSTICE SAYLOR: Justice Todd has  
8           some questions.

9           JUSTICE TODD: Could you go back to your  
10          response to Justice Donohue's question. You  
11          seem to be agreeing with her characterization  
12          of how the political process worked in this  
13          case and these maps.

14          Are you concluding, though, that that  
15          does not -- that that process does not  
16          constitute viewpoint discrimination?

17          MR. BRADEN: Absolutely -- absolutely  
18          not viewpoint discrimination.

19          JUSTICE TODD: Please explain.

20          MR. BRADEN: First of all, to be  
21          viewpoint discrimination, you have to have  
22          something discriminatory happening to  
23          someone. So if you had a right to  
24          proportional representation or if you had a  
25          right to vote for somebody who wins, that

1 right would make -- and that might be  
2 actually we were impacting negatively that  
3 right.

4 What you're talking about here again is  
5 a classic policy decision. We decide the  
6 plaintiffs here who are suing because they  
7 want more Democratic members of Congress, we  
8 shouldn't -- that's exactly what they say and  
9 they want a new map, because they think it  
10 will elect more Democrats.

11 So that right that, that decision as to  
12 whether we should have the safe districts --  
13 or actually what they're arguing for are  
14 competitive districts is a standard policy  
15 decision. It's the type of policy decision  
16 that some states have decided to put in their  
17 statutory provisions we should have  
18 competitive races.

19 Some have said -- and there's an  
20 argument for actually having safe seats,  
21 because more voters are comfortable being  
22 represented by someone who shares their  
23 political view.

24 FEMALE JUSTICE: And that's your  
25 position regardless of the extent to which an

1 individual party's votes are diluted?

2 MR. BRADEN: Individual party's vote, I  
3 don't believe are diluted whatsoever.

4 FEMALE JUSTICE: I'm sorry, individual  
5 members of a party.

6 MR. BRADEN: Absolutely not. I don't  
7 agree with that analysis whatsoever. First  
8 of all, it's difficult to identify who they  
9 are because when our Democratic voters --

10 FEMALE JUSTICE: Counsel, there was  
11 evidence abundant before the Commonwealth  
12 Court that it is not difficult to identify  
13 who these voters are and how they vote. That  
14 is precisely how the it the maps were drawn.

15 MR. BRADEN: Identifying the voters how  
16 they voted in prior elections is easy to do.  
17 We don't need any sophisticated computer to  
18 do that. In this building sharing space with  
19 you are 203 members of the House who  
20 undoubtedly know their particular geographic  
21 and how it votes better than any political  
22 scientist from anywhere.

23 So, yes, absolutely. In the absolutely  
24 political process, the Supreme Court has  
25 repeatedly recognized a political process

1 being one that sorts voters on politics and  
2 that doesn't violate the Constitution.

3 MALE JUSTICE: May I ask you sir, I  
4 think we're getting really involved. I think  
5 your argument is really simple, it's  
6 judicable, there's a test, and they failed to  
7 meet the test and therefore they lose.

8 But here's what's missing in that to me,  
9 which is in a phrase or in a sentence, what  
10 is the test that they failed to meet? We  
11 have put the rabbit in a hat if you say the  
12 test is invidious discrimination.

13 I mean, is the test overwhelming  
14 partisanship, is it more than that, what's  
15 the test?

16 MR. BRADEN: Well, I believe the test as  
17 it exists right now, and this is --  
18 reasonable minds can disagree. The only  
19 standard that appears to be present right now  
20 is the notion of being totally shut out of  
21 the political process.

22 People say, well, that's a standard that  
23 can't be met, and I would suggest to you that  
24 that involves no memory of American History  
25 to say that a political party can't --

1 MALE JUSTICE: We got it. You answered  
2 my question.

3 MALE JUSTICE: Let me take you down a  
4 different constitutional avenue. Your entire  
5 argument as been centered and premised on the  
6 Equal Protection Clause. Petitioners have  
7 raised Article 1, Section 5, free and equal  
8 elections.

9 Now, very specific to our Constitution,  
10 our Constitution that particular Section 5  
11 predates the 14th Amendment by 92 years.

12 Urfer in 2002 at that juncture left open  
13 the possibility that Article 1, Section 5 can  
14 be viewed as being more expansive than the  
15 federal Constitution.

16 If that being so and this Court finds  
17 same, we could avoid an Edmond's analysis and  
18 we could apply whatever definition we so  
19 believe we should give to that clause and we  
20 can look to Article 2, Section 16 for  
21 direction.

22 That completely eviscerates your  
23 argument, would you address that for me?

24 MR. BRADEN: No, I don't think it does  
25 whatsoever. I think that's just simply --

1           what we're trying to hear in all these  
2           arguments is the same thing, which is we're  
3           trying to take a political process assigned  
4           by the U.S. Constitution and understood  
5           before -- this is a process.

6           Again I point you to Scalia's opinion  
7           describing the process of trying to do  
8           partisan gerrymandering in Pennsylvania prior  
9           to the adoption of any of these provisions.

10          So this is a political process assigned  
11          by the Constitution. Any effort to do  
12          something else will inevitably require you to  
13          do it in a different political way.

14          There are ways to get there. Many  
15          states have in fact done that, but it's  
16          fundamentally anti-Democratic for this Court  
17          to take the existing law and decide to change  
18          it.

19          MALE JUSTICE: If that's the case -- I  
20          understand the argument. But if that's the  
21          case, why did this Court in *Urfer*, in *SCOTUS*,  
22          in *Vieth*, particularly Justice Kennedy  
23          specifically and expressly envision a day,  
24          and we may not be at that day, when breakneck  
25          speed advancements in technology have changed



1 the game such that your arguments are  
2 relating to a prior world before voter files.

3 Voter files are something that every  
4 justice up here knows about. There's nobody  
5 here who hasn't run in the last  
6 four-and-a-half years in front of the voters.

7 So how do you reconcile your argument  
8 with the current day of technology, which  
9 arguably was envisioned in Vieth and Urfer.

10 MALE JUSTICE: In all due respect, I  
11 think those technology arguments are  
12 troglodyte arguments.

13 MR. BRADEN: The reality is if you go  
14 back to Bandimere, you'll see that the  
15 plaintiffs argued that there was  
16 sophisticated computer program that got them  
17 to predict elections going forward.

18 If you go through the process, you go to  
19 Battom v. U (ph), which some people argue the  
20 congressional plan there was one of the great  
21 gerrymanders in American History in the sense  
22 of its endurance and the protection of  
23 Democratic incumbents.

24 That was drawn with the work of a  
25 Caltech computer, but the reality is you

1 don't need a computer when you have 203  
2 members making political decisions. This  
3 process that we have is a political process,  
4 and it is a little bit of, as you know, a  
5 little bit of the (inaudible).

6 What's happening, we're saying this is  
7 really this partisan plan, but did nobody  
8 notice that 36 members of Democratic Party  
9 voted for it and it was endorsed by the  
10 senior member of the congressional  
11 delegation, who's a Democrat. You think he  
12 wasn't involved in drawing the plan.

13 MALE JUSTICE: I think his seat was  
14 safe.

15 MR. BRADEN: His seat was safe so long  
16 as it wasn't drawn by a computer. Let it be  
17 drawn by a computer and it won't be safe.  
18 It's important we make this incumbent  
19 argument and I think that's a very important  
20 argument to understand.

21 Let's use the computer, and we don't  
22 have to go too far. There's a recent  
23 decision in Virginia. One of my clients is  
24 the state of Virginia. They lost a racial  
25 gerrymandering case on a congressional plan.

1           Now, I will have to admit that the  
2           congressional district was only contiguous if  
3           you're a very strong swimmer. It was  
4           offensive to the eye, and so they hired a  
5           gentleman we've already heard some about,  
6           Bernie Grofman (ph) and I know him quite  
7           well. He's a distinguished political  
8           science, he provided you one of the amicus  
9           briefs, and he drew the plan and solved  
10          interocular -- or the racial gerrymandering  
11          of how that plan looked and got a nice, good  
12          district down there. That district included  
13          of course moving around parts of Norfolk.

14                 And the incumbent Republican member from  
15          Norfolk was close to being -- the next  
16          election was likely to be the chairman of the  
17          Armed Services Committee.

18                 So this nonpartisan plan and Dr. Grofman  
19          in all good respects following, he made a  
20          decision that no politician in Virginia in  
21          their right mind would have done and was not  
22          in the best interest I would suggest to you,  
23          even if this was a bad Congressman, was not  
24          in the interest of the Norfolk, the largest  
25          military installation arguably in the world

1           that the person who's likely to send money  
2           there, we're going to remove him from office  
3           because this political scientist decided to  
4           draw a plan that looks better to the eye.

5           MALE JUSTICE: Counsel, I don't think  
6           that's helpful. I think there's been almost  
7           unanimity among all counsel and the Court  
8           that we're going to give -- if this is  
9           unconstitutional, we're going to let the  
10          legislature fix it.

11          Now, if they decline to fix it, which  
12          has happened around the United States, that's  
13          not our fault.

14          MR. BRADEN: That's great, but of course  
15          what you're doing is you're sending it back  
16          with how do we do this without politics. I  
17          guess we could do a lobotomy on the 203  
18          members --

19          MALE JUSTICE: There's a distinction --  
20          again I'm not going to argue with you.

21          There's a distinction, if you will,  
22          between partisanship, which first counsel  
23          argued, and overwhelming partisanship, which  
24          Mr. Aronchick argued. We can set forth --

25          MR. BRADEN: That's a good point --

1 (Talk over)

2 MR. BRADEN: The problem we have of  
3 course there is the same problem we've had at  
4 every stage, which I would describe as a  
5 Goldilocks problem -- what temperature is the  
6 right temperature, how much partisanship is  
7 too much partisanship, yeah, well, you've --  
8 but you have to send it back to the  
9 legislature and you have to tell them and you  
10 got to give them directions.

11 MALE JUSTICE: But your client bought  
12 that problem. In other words, your client  
13 had the opportunity to protect that Norfolk  
14 military base senior chairman. Your client  
15 had the chance to protect Congressman Y or  
16 Congresswoman X and arguably your client blew  
17 it by being too greedy.

18 Now, it's our job to measure this  
19 product, including Goofy and Donald Duck,  
20 against our Constitution, and I don't  
21 necessarily think you can be heard to argue  
22 now, well, some politics needs to be in  
23 there.

24 It will be incumbent if we get there for  
25 your client to pick up the pieces, but we

1           have to decide this case. We don't have to  
2           hypothesize a closed case. We have to deal  
3           with this case, Counsel.

4           MR. BRADEN: All due respect, if you're  
5           going to send it back to the legislature with  
6           some chance of them adopting a plan that's  
7           constitutional, you have to tell them what  
8           that is, so you have to identify the  
9           standard. The process with this isn't --  
10          people have to draw plans going forward.

11          MALE JUSTICE: How is that distinct from  
12          equal protection, is it compelling state  
13          interest, is it narrowly drawn, First  
14          Amendment --

15          MR. BRADEN: It's straightforward --

16          THE COURT: Due process, substantive due  
17          process. I mean we provide tests -- courts  
18          provide tests for all of these broad maxims  
19          and then we evaluate whether the test whether  
20          the test -- we'll do that here.

21          MR. BRADEN: The problem here is the one  
22          I started out with. I know that it's an  
23          uncomfortable argument, but I just have to  
24          make it here.

25          We have a process that's been expressly

1 and clearly assigned to the political branch  
2 of the government. There are many options  
3 available --

4 CHIEF JUSTICE SAYLOR: We understand  
5 that. We've come full circle, so we  
6 certainly appreciate your advocacy and  
7 understand your overarching point that it's  
8 quintessentially political and commanded by  
9 the United States and state Constitution to  
10 the political branch. Thank you.

11 MR. BRADEN: Let me just real quickly, I  
12 know I was to address the remedy. I would  
13 suggest the remedy first is actually to send  
14 it back. Once you identify a standard, then  
15 it would seem to me then you need to send it  
16 back to the district Court to make a factual  
17 finding as to whether this plan is invalid  
18 under that standing.

19 Now, I'm under the impression that  
20 that's likely not to be one that this Court's  
21 willing to agree to, but that would be the  
22 logical way of doing it so we could actually  
23 address something in the argument that we  
24 knew existed, since whatever you create will  
25 have not existed before.

1           But if we're actually talking where you  
2           decide that you can under the new standard  
3           decide this is unconstitutional and some  
4           amount of politics is too much politics and  
5           you figure out where that temperature is,  
6           then it should go back to the legislature who  
7           then will draw a plan, not for this election  
8           cycle, but the next election cycle would be  
9           my basic argument.

10           Again, I think it's unlikely this Court  
11           is going to accept that. My notion is if  
12           this was such a severe violation of the  
13           Constitution and that you needed to deal with  
14           this, then of course a suit would have been  
15           filed in 2011.

16           So I would suggest there's no reason to  
17           disrupt the political process, which is a  
18           real process here, people running and  
19           deciding where to run and are actually  
20           running right now as we speak, and that any  
21           remedy should be for the next election.

22           If you're saying we're not going to do  
23           that, they need a month, give them a chance  
24           to do the politics here. This notion of we  
25           can just do one of these maps, here's the bad



1 news about those computer maps. Most of  
2 those are unconstitutional. A lot of those  
3 computer simulations have population ranges  
4 of one or two percent. So we throw a dart at  
5 one of them and you decide to do that, then  
6 that will be unconstitutional.

7 Maps, I'll stop here real quick and walk  
8 away and not to go too far afield here, but  
9 if you read Plato's Republic, and I know  
10 people are scratching their heads going, you  
11 notice in the Republic, Plato I would suggest  
12 you could argue certainly the first political  
13 philosopher, maybe the first political  
14 scientist who we are familiar with, that has  
15 a written record of.

16 And in the Republic what a shock. This  
17 philosopher at the end of it decides that the  
18 best person to govern is a philosopher, and  
19 so what a shock that we have political  
20 scientists who think the best people to draw  
21 the lines are other political scientists.

22 And I would suggest to you, we could do  
23 that, but to do that what you need to do is  
24 change your law, actually change your law,  
25 pass a statute, and assign it to masters or

1           some type of group like that, which is the  
2           case in many states.

3           CHIEF JUSTICE SAYLOR: We understand.  
4           Thank you.

5           Now, my understanding is that Tabas has  
6           just a few brief words on behalf of the  
7           interveners. Hopefully that's the correct  
8           understanding.

9           MR. TABAS: When it comes from the  
10          Chief Justice, it is. Mr. Chief Justice, and  
11          may it please this Honorable Court, I'm  
12          Lawrence Tabas on behalf of the interveners.

13          I have two equally important arguments  
14          that I want to make, both of which are in  
15          recognition that we are on the eve of this  
16          election and primarily deal with the issue of  
17          remedy should this Court determine that a  
18          remedy needs to be fashioned.

19          Let me just say at the outset before I  
20          tell you my two arguments, the interveners  
21          did not participate in the drafting of the  
22          map and they were not consulted, but they  
23          absolutely had the right these last three  
24          election cycles and the right to go into this  
25          fourth election cycle to rely on the

1 presumption of the constitutionality of that  
2 map.

3 MALE JUSTICE: So they're convenience  
4 trumps petitioner's constitutional rights?

5 MR. TABAS: No, Justice, no, Your Honor.  
6 It's not their convenience, it's their  
7 Pennsylvania constitutional rights. The  
8 petitioners, Your Honor, are not the only  
9 individuals in this case who have rights at  
10 stake.

11 MALE JUSTICE: How about this then. I  
12 understand. So how about this, Topeka,  
13 Kansas, the school board relied on the  
14 long-standing segregated schools, and they  
15 only ordered X number of schoolbooks, and now  
16 the Supreme Court says desegregation. Well,  
17 we've relied for our purchase of schoolbooks  
18 on the existing map.

19 Why weren't they entitled to rely, but  
20 your clients are entitled to rely?

21 MR. TABAS: Because our clients are  
22 entitled to have their free speech, free  
23 association, Pennsylvania constitutional  
24 rights not wiped out simply because the  
25 petitioners who waited three cycles, and who

1 unlike in Sprague, had knowledge well in  
2 advance of their potential claims. Even  
3 their experts, Your Honor, refer to data that  
4 was available in 2011.

5 That as a result of that, our client's  
6 constitutional rights are no less equal than  
7 those of the petitioners. The petitioners  
8 are asking you to choose theirs over ours.

9 MALE JUSTICE: Is your concern satisfied  
10 if, again hypothetically, we find that this  
11 is an unconstitutional map, we permit under  
12 the Butcher case, we permit this election to  
13 go forward with this unconstitutional map,  
14 and there is law that I just said, Butcher,  
15 that says you do that if it's so far along  
16 that it disrupts the democratic process and  
17 we put this in place for 2020?

18 MR. TABAS: Your Honor, that is exactly  
19 what we're saying. The Butcher Rule, which  
20 is this Court's rule, is that when the  
21 election is imminent and a primary is defined  
22 under the Pennsylvania Election Code as an  
23 election.

24 In fact the primary is one of the most  
25 important aspects of an election, because it

1 determines who will be the actual candidates  
2 going into November. We're on the eve of  
3 that.

4 MALE JUSTICE: Aren't we always on the  
5 eve of an election? I mean, every one of us  
6 had to begin running long before the primary.  
7 There are people already running for  
8 elections that aren't even on the ballot this  
9 year. The election cycle never ends.

10 Won't we always be on the eve of an  
11 election, won't this argument always be  
12 available to your clients or people like  
13 them?

14 MR. TABAS: Your Honor, we are living,  
15 you're correct, in a world of 24/7  
16 campaigning and elections sad to say, even  
17 though that's part of my business.

18 But, Your Honor, look, if this had been  
19 brought in 2012 or shortly thereafter, we  
20 understand that the whole world knows the  
21 first couple of years after a reapportionment  
22 plan, they are subject to challenge.

23 But it went through '14, it went through  
24 '16, we even went through the historic  
25 election of '16 and they didn't even bring

1 the case until June and didn't even ask this  
2 Court for emergency relief for October.

3 MALE JUSTICE: Mr. Tabas, wouldn't you  
4 then be arguing had they brought it in 2011  
5 or 2012, wouldn't you be arguing we don't  
6 know the results yet, this isn't baked in,  
7 this may not be durable, this may be an  
8 idiosyncrasy or an anomaly as opposed to now  
9 when we have baked in three-cycle durability?

10 MR. TABAS: Although historically,  
11 Your Honor, almost every challenge to a  
12 redistricting plan occurs shortly after the  
13 plan has been adopted, either by a  
14 legislature or by a commission, or whatever  
15 force is available in that particular state  
16 and people understand that.

17 In fact, Your Honor, I'll go so far as  
18 to say had the petitioners brought their case  
19 in December of 2016, my argument would not be  
20 the same today.

21 But now we are in the middle of January.  
22 We're just less than four weeks from signing  
23 and circulating petitions.

24 Listening to the Executive Branch  
25 counsel go through what they say they can do,

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1           it's not important what the Executive Branch  
2           says they can do. Because even a few  
3           changes, let alone the massive ones that they  
4           are suggesting, have serious consequences.

5           This is not the same as you think of  
6           just maybe dropping a pebble in some water,  
7           because the pebble was small there was not  
8           much of a consequence. The ripples from this  
9           will be severe and significant.

10           It's not just changing dates, because  
11           it's not just new dates. It also new  
12           districts, new candidates, the need to  
13           educate voters as to all these changes.  
14           You've seen in cases before you how long and  
15           hard it is to educate just a voter when their  
16           voting district and polling place changes let  
17           alone an entire congressional district, it's  
18           the need to retrain the circulators who take  
19           the nomination petitions around. You all  
20           know what a fun process that is.

21           Finally it's the increased workload that  
22           the Executive Branch put into the record.  
23           They said it would be an increased workload  
24           and they also said in the record but there  
25           would be a decrease in the amount of time

1 available to do it.

2 And then finally, the increased  
3 substantial cost. Those are the practical  
4 factors that right now jeopardize the  
5 election process and the integrity of it and  
6 at the same time run the risk of wiping out  
7 our client's constitutional rights.

8 They have no remedy anymore. If you  
9 change the map this year, our client's  
10 constitutional rights are lost for 2018  
11 forever.

12 MALE JUSTICE: Can you explain how they  
13 would be shut out in a way that the  
14 petitioners are not currently shut out?

15 MR. TABAS: Because the new map for a  
16 2020 election would give them the opportunity  
17 to have a map that this Court believes is  
18 constitutional if that's the way this Court  
19 goes in this.

20 We have no second chance, we are done.  
21 If you rule in favor of the petitioners for  
22 2018, you have effectively wiped out once and  
23 for all these constitutional rights that we  
24 have been exercising, as the record shows,  
25 since November and December of 2016.



1           Again, a justifiable reliance on the  
2           presumed constitutionality of a map that's  
3           been through three cycles.

4           Your Honor, in some of your questioning  
5           of the other counsel, you made a point about  
6           the maps and the particular time, now we've  
7           had three elections to kind of assess them.

8           Every map, Your Honor, is a snapshot in  
9           time. That map that was drawn back then in  
10          2011, nobody in this room I would say, me  
11          included, would have predicted the results of  
12          the election in 2016.

13          The world has changed dramatically.  
14          Elections change. Three counties the record  
15          show that had voted for President Obama in  
16          both elections switched and voted for  
17          President Trump.

18          That district that the petitioners like  
19          to go around saying is a Disney cartoon  
20          character kicking each other, that district  
21          overwhelmingly voted for Secretary Clinton --

22          MALE JUSTICE: In the congressional it  
23          doesn't change, that proves the point.  
24          Regardless of those swings, the congressional  
25          proportion has remained exactly what your

1 clients -- or the other respondents designed,  
2 exactly.

3 And it proves, doesn't it, the genius,  
4 political genius, what the respondents  
5 designed that notwithstanding these other  
6 swings, their gerrymander has proved durable?

7 MR. TABAS: Absolutely it doesn't,  
8 Your Honor. With all due respect, it proves  
9 the opposite. It proves that the voters went  
10 in there independently in that district and  
11 chose candidates.

12 They chose Secretary Clinton for  
13 president of the United States, they chose  
14 the Congressman Meehan for Congress. If they  
15 proved that point that you said, Your Honor,  
16 then not only would Secretary Clinton have  
17 won, but so would have been the Democrat  
18 challenging Pat Meehan.

19 MALE JUSTICE: We're to assume that the  
20 respondents who are professional politicians  
21 don't know about ticket splitting?

22 MR. TABAS: But that's just the very  
23 point. Any one of these maps, you look at  
24 them. There were 24 counties in Pennsylvania  
25 that have a Democratic registration edge, but

1 11 of them didn't vote for their candidate --  
2 only 11, excuse me, voted for their candidate  
3 for president.

4 So to say that these congressional maps  
5 absolutely determine an outcome based on a  
6 snapshot from 2011, takes -- doesn't take  
7 into account the political reality of  
8 changing electoral environments.

9 FEMALE JUSTICE: Except for the fact  
10 that the evidence before the Commonwealth  
11 Court was to the contrary. Dr. Chen  
12 predicted 54 out of 54 congressional  
13 elections using the information that was  
14 available in 2011 and used. 54 out of 54  
15 elections for Congress were statistically  
16 (inaudible). It was unchallenged. It was  
17 unchallenged evidence.

18 MR. TABAS: Again, Your Honor, our  
19 clients not having drawn the map, but I will  
20 answer and say this: First in particular,  
21 even though that was the predictions that he  
22 maybe put into the record, the fact of the  
23 matter is, again going back to this district  
24 with Congressman Meehan, if it was such a map  
25 that was drawn so cleverly and so ingeniously

1 to protect the Congressman, even though it  
2 voted for Secretary Clinton, why have five  
3 Democrats in the record declared to run  
4 against Mr. Meehan in the 2018 election?

5 FEMALE JUSTICE: Because hope springs  
6 eternal.

7 MR. TABAS: I think the president --

8 FEMALE JUSTICE: But that's not the  
9 basis that we're using.

10 MR. TABAS: It isn't. But the point is  
11 that again when you look at the remedy that  
12 would come here at this particular stage, the  
13 disruption would be not only to our client's  
14 constitutional rights, to the election  
15 process as a whole, to numerous other  
16 candidates running for office statewide, the  
17 legislature at the same time, and also,  
18 Justice --

19 MALE JUSTICE: May I ask you, Mr. Tabas,  
20 you're about to finish up and actually you've  
21 segued to exactly what I exactly wanted to  
22 ask you.

23 Appreciate this goes beyond the interest  
24 of your client. But does it benefit the  
25 generalized concern you expressed if we

1 direct the spending of the \$20 million and  
2 let the governor's race, the United States  
3 Senator's race, half the House -- I'm sorry,  
4 half of the Senate, all of the House, just go  
5 forward with a normal election and run a  
6 congressional election on a separate  
7 calendar?

8 MR. TABAS: Your Honor, if this Supreme  
9 Court did that, I believe the Court would be  
10 directly involving itself in an election  
11 process beyond the scope of what it should be  
12 doing, because you would now have two  
13 separate kinds of races -- people running for  
14 governor, the State House, the U.S. Senate,  
15 Congress.

16 There are calculus and issues that  
17 involve in bringing voters out. You have two  
18 separate primaries, the turnouts could be  
19 significantly different.

20 Having people have primaries in July and  
21 August, Your Honor, could end up with people  
22 on vacations. You can't -- there is -- you  
23 change and split this, you are actually  
24 making political determinations as to the  
25 outcome of the election and who will be the

1 candidates.

2 To your point, Justice Wecht, that you  
3 made to some of the counsels for the  
4 petitioners, why not the primary be in August  
5 or September. Other than the vacation  
6 schedule, there's another good reason.

7 To run for Congress, it takes a long  
8 time and unfortunately an enormous amount of  
9 money. If I think to myself I don't even  
10 know if I'm going to be the candidate until  
11 September and then I'm going to have to go  
12 out and raise \$10 million, I may not choose  
13 to run for office because of that.

14 You are changing -- this Court would  
15 change the calculus of the entire election  
16 process. You don't have to do that if you  
17 believe a remedy is warranted in this case.

18 You can do it for 2020, preserve the  
19 integrity of the 2018 election, and protect  
20 the constitutional rights of the interveners.  
21 Again, there will be nowhere else for them to  
22 go if you order the remedy this year.

23 CHIEF JUSTICE SAYLOR: Thank you.

24 MR. TABAS: Thank you, Your Honors.

25 CHIEF JUSTICE SAYLOR: Thanks to all  
counsel and with that we'll adjourn this  
(The hearing concluded)

1 STATE OF FLORIDA

2 COUNTY OF SANTA ROSA

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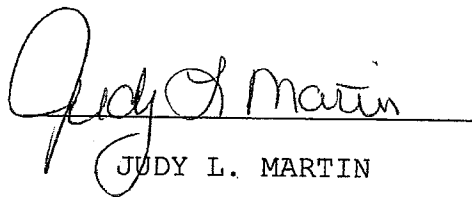
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