

Exhibit A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MARYLAND

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3 O. JOHN BENISEK, et al.,)
4 Plaintiff,)
5 vs.) CIVIL NO.: JKB-13-3233
6 LINDA H. LAMONE, et al.,)
7 Defendant.)
8

9 Transcript of Proceedings
10 Before the Honorable Paul V. Niemeyer
11 the Honorable James K. Bredar
12 the Honorable George Levi Russell, III
13 Friday, July 14th, 2017
14 Baltimore, Maryland

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P R O C E E D I N G S

JUDGE NEIMEYER: All right. Be seated, please.

Good morning. I came in this morning and on the radio they were singing La Marseillaise and celebrating Bastille day. And I was thinking, we're not getting into that, are we, in this case? But we are celebrating our democracy. So that's what we have here today.

And we have -- this morning we have the motion for preliminary injunction. Plaintiff's motion for preliminary injunction and the plaintiff's motion to advance the case on that final judgment. And we have the Court's invitation to respond to our questions to whether there should be a stay in light of the Supreme Court's decision in *Gill*. And we've received your papers on that.

The other thing, just as a preliminary matter, I want to compliment counsel on both sides about the materials, the high level of the materials, the completeness of them. It's been very helpful. It's a lot of reading. Every day we got something new. But it seems to me the points have been well-argued and prepared. And we don't often get such professional papers and complete papers. So that's a compliment to both sides.

I think it might be useful to begin by talking about our question as to whether we should stay this case in view of the Supreme Court's proceedings in the *Gill* case, *Gill versus*

1 *Whitford*. And as you know, that case came out of Wisconsin,
2 it's a redistricting case. And that case has been stayed and
3 they have arguments scheduled. I think they're intending to
4 hear it in the first hearings in the fall. And that, when we
5 would expect a decision in that is hard to predict, but
6 probably after the first of the year.

7 So why don't I begin with basically either side, if
8 you want to address it. We have read your papers on it and
9 you've made your points clear on it. And I'm not sure we need
10 a lot of debate on it. Neither one of you has really made a
11 motion on that, that's our inquiry. But we would be happy to
12 be enlightened with anything you have to say. Why don't we
13 begin with the plaintiffs.

14 MR. KIMBERLY: Thank you, Your Honor. So as we see
15 it, there are really I think two separate questions and I'll
16 try to address each related to the stay issue. The first is
17 whether the Supreme Court's consideration of the *Gill* case has
18 the potential to affect the outcome of this case. And then
19 there's a separate question that I think is implicated by the
20 State's brief on the stay question, which is whether a Supreme
21 Court stay of any injunction that may enter is effectively
22 inevitable, so this court should do it itself.

23 I'll start with the second issue, if I may. It's
24 really -- it's the crux of, at least as we read it, the
25 State's position that because the Supreme Court entered a stay

1 in *Gill*, it's very likely -- it necessarily will, or at least
2 is very probable, that it will enter a stay in this case. But
3 there are two principle reasons to think that isn't so.

4 The first has to do with the standard that the Court
5 applies, the Supreme Court applies, to applications for stays
6 on direct appeal. It's a balancing between the merits of the
7 claim and how likely the Court thinks it is that it will
8 reverse, and the burden on the State. And both of those
9 factors are fundamentally different than this case.

10 Recognizing, of course, that there is resemblance between the
11 two cases, in so far as they are both constitutional
12 challenges to redistricting maps, but recognizing that that is
13 essentially where the similarity ends.

14 JUDGE BREDAR: Well, they're both political
15 gerrymandering cases, aren't they? They're not race cases.
16 They're not one man, one boat cases. They're political
17 gerrymandering cases with overlapping, but not identical,
18 theories.

19 MR. KIMBERLY: I would push back on the idea even
20 that there is a whole lot of overlap, other than the question
21 of intent. The theory presented in *Gill* is an Equal
22 Protection Clause theory. It's true that the parties there
23 invoke the First Amendment. They would tell you -- and I'm in
24 close contact with the parties in that case, actually, on both
25 sides -- and I don't think anybody in that case would argue

1 that there's anything more than just one theory in that case.
2 And it is first and foremost an Equal Protection Clause theory
3 it's also a map wide theory.

4 JUDGE BREDAR: That's not what the panel in
5 Wisconsin said.

6 MR. KIMBERLY: Well --

7 JUDGE BREDAR: -- they called it a First Amendment
8 and Equal Protection Clause case and they're --

9 MR. KIMBERLY: This is true, as did the plaintiffs
10 in their papers. But, again, as I said, it's first and
11 foremost Equal Protection Clause. And regardless whether or
12 not it also comes under the First Amendment, we're not
13 disagreeing that there an implication of the First Amendment
14 in that case. It is one theory.

15 JUDGE BREDAR: And more broadly, it's still a
16 political gerrymander that has been allegedly created and that
17 two judges up there found was successfully created.

18 MR. KIMBERLY: That's correct. You know, having
19 said that, I think the distinction is that in *Gill* it has to
20 be a map-wide challenge. It's ultimately a question about
21 whether the map, when viewed as a whole, is fair under the
22 Equal Protection Clause. The metric that the plaintiffs in
23 that case invoke, as the proper metric for measuring fairness,
24 is something called the efficiency gap. It's a measure of
25 partisan asymmetry. There's no way, logically, to apply that

1 concept to a single district challenge like this.

2 And as we explain in our papers, it takes no more to
3 understand the distinction between the two theories to note
4 that in our case, which is ultimately an individual rights
5 First Amendment theory, that it would be no answer to the
6 injury that has been alleged in the complaint, we think now
7 proved in the evidence, to observe that republicans in the
8 first district on the Eastern Shore of Maryland were able to
9 elect a republican, therefore, the map is fair and balanced.
10 And the individuals whose rights were violated in the sixth
11 district don't actually have a claim.

12 But that is actually precisely the theory that is at
13 issue in *Gill*. That individuals in one district who maybe
14 were, like, overtly gerrymandered would not have a claim if
15 overall the map is not asymmetrical, that it doesn't cross
16 this seven percent threshold that the plaintiffs offer as what
17 they think ought to be the threshold for the efficiency gap.

18 JUDGE BREDAR: Whether it's the same theory down at
19 the tip of the spear is one issue. And you made good points
20 to distinguish them and your brief does as well. But what
21 about this fundamental similarity between the two, that
22 they're both political gerrymander cases, and the core
23 question --

24 MR. KIMBERLY: Sure.

25 JUDGE BREDAR: -- the first question, because of the

1 precedents that jurisdictional questions take, before the
2 Supreme Court is whether or not such a case is even
3 justiciable.

4 MR. KIMBERLY: So I would push back a little bit on
5 the characterization of these distinctions as just the tip of
6 the spear. And that's because, in fact, I think the core
7 argument at issue in *Gill* -- and this plays out in the briefs,
8 all one needs to do is look at the briefs to see this, is not
9 the argument that partisan gerrymandering at large is not
10 justiciable, these sorts of claims are not justiciable in
11 federal court, but that in fact statewide challenges,
12 predicated on something like the efficiency gap and partisan
13 asymmetry, that those, based on the Supreme Court's opinions
14 in *LULAC* and *Vieth* are not justiciable in federal court. In
15 fact, what the state argues in *Gill* --

16 JUDGE NEIMEYER: Well, the Court still hasn't
17 concluded that. The last speaking in the court is that it is
18 justiciable, five justices have so held. They just haven't
19 found a standard that looks at the result of political
20 gerrymandering and said, we can distinguish that from the
21 normal political process. But we would have to -- I would
22 think we would have to anticipate or suggest that
23 justiciability is something the Court might change its mind
24 on. As the law stands, and the Court has reminded us,
25 regularly in the 4th Circuit and other circuits, that we

1 should follow the law as it is when we write, not as we expect
2 the Court to come out.

3 MR. KIMBERLY: That's exactly right, Your Honor.
4 And I might add, in fact, that the concern that this broader
5 justiciability question might be reached in *Gill*, is a
6 reason, as we argue in our papers, for the Court to press
7 forward and not the other way. This is not an ordinary -- you
8 know, this isn't just a typical merits question that might
9 have bearing on how this case proceeds. It's a question about
10 whether this sort of claim is cognizable in court at all.

11 And in order to answer that question in a fully
12 informed way, we think it's really important that this case be
13 pending before the Supreme Court at the same time. It's not
14 reasonable to expect that the parties are going to argue our
15 theory as a basis for finding these sorts of claims
16 justiciable. And, indeed, that's played out in the briefing
17 so far in the Supreme Court. The State, unsurprisingly,
18 hasn't cited this case for our theory. The plaintiffs in
19 turn, in their motion to affirm, haven't cited this case for
20 our theory. And so there's very --

21 JUDGE NEIMEYER: You say they have not?

22 MR. KIMBERLY: They've cited our case. They are not
23 depending justiciable on the basis of our theory, I'll put it
24 that way. And to the extent --

25 JUDGE NEIMEYER: Well, the theory in this case is

1 sort of being advanced in any developed form for the first
2 time, as I can see in this case, in your papers. And we have
3 evaluated, at least in the abstract, and concluded you can go
4 ahead and make that case. But we still are contributing a
5 fresh approach to the debate.

6 MR. KIMBERLY: That's exactly right, Your Honor.
7 And it's our position that that, if anything, ought to be
8 before the Court. Before the Supreme Court in particular.

9 JUDGE BREDAR: Of course, the substance of your
10 position has already been treated quite extensively by this
11 court in this case in the litigation of the motion to dismiss;
12 right?

13 MR. KIMBERLY: Although that's true, Your Honor.
14 Again, I don't think it's reasonable to expect that the
15 parties would press our theory, which as we've described in
16 our papers, are actually -- is logically incompatible with
17 their theory, with any real force. But --

18 JUDGE NEIMEYER: -- your case is a single district
19 argument and theirs is a statewide, which presents different
20 problems.

21 MR. KIMBERLY: That's exactly correct.

22 JUDGE NEIMEYER: And this one is grounded in the
23 First Amendment, the other is Equal Protection, which also
24 presents some particularly different problems.

25 MR. KIMBERLY: Exactly right.

1 JUDGE BREDAR: I'm sorry.

2 JUDGE NEIMEYER: No, I was going to add one thing.
3 It seems to me in the discussions that have come from *Bandemer*
4 and all the ones up through there, they have all accepted that
5 racial discrimination in connection with a single district, or
6 even a statewide, is justiciable and does raise constitutional
7 problems. Then the debate becomes whether excessive political
8 gerrymandering does. And there's a distinction there too --

9 MR. KIMBERLY: That's correct.

10 JUDGE NEIMEYER: -- among the justices.

11 MR. KIMBERLY: That's right. If I may make just one
12 last observation as well. The Supreme Court's vote on the
13 question whether to stay the litigation -- and let me be also
14 clear, I think there are two different distinctions here,
15 whether we're talking about staying these proceedings and that
16 bleeds over into the Rule 65 question, the Rule 65(a)(2)
17 consolidation question, which I'm happy to deal with later on.

18 I think probably what's -- certainly what's on our
19 mind, perhaps, what's also on the Court's mind is whether the
20 injunction should be stayed, if it were to enter an
21 injunction. That was the issue that was presented to the
22 Supreme Court in *Gill*. And there the Court voted only 5 to 4
23 to stay the junction. And as I mentioned at the outset of my
24 remarks here, the balancing test asks the Court to evaluate
25 how likely it is they think that there's -- that it might

1 reverse the decision and also the burden on the State pressing
2 forward. I mentioned both of those things are different.

3 This case --

4 JUDGE NEIMEYER: It's interesting, this is just an
5 observation, but it seems that with when the Democrats
6 gerrymander, the republicans complain and sue. And when the
7 republicans gerrymander, the Democrats complain and sue. And
8 in some sense they both say if there was a mutual treaty, we'd
9 both quit doing it. Wisconsin is a republican gerrymandering
10 and Maryland is a Democrat. And it raises an interesting
11 question as to whether that shapes the issues at all or not.
12 I hope not, but it seems to be forgotten in some of these
13 cases that you tend to read. It's a who's ox is being gored
14 at the given time. And it's probably a reality of life, but
15 shouldn't be of legal analysis.

16 MR. KIMBERLY: I think that's right, Your Honor.
17 And yet another, I think, practical reason to want both cases
18 up at the Supreme Court at the same time. The one final thing
19 I'd mention is that this case really is, as Judge Neimeyer,
20 you noted at the outset, is the first case to take up Justice
21 Kennedy's opinion in *Vieth*. Justice Kennedy, of course, voted
22 in favor of a stay in *Gill*. Given that he is himself the
23 author of this theory, there's, I think, reasonable grounds to
24 think that he would not vote to stay an injunction in this
25 case, and a belief that it states a justiciable and

1 meritorious theory of unlawful partisan gerrymandering.

2 JUDGE BREDAR: But he just joined Justice Alito's
3 concurrence in *Cooper*, which was a ringing endorsement for the
4 notion that while, many, many in this country don't like it,
5 political gerrymandering has been a part of the process since
6 the founding, were Justice Alito's words. And Justice Kennedy
7 joined that without further comment. And that's within a
8 matter of weeks, that's not *Vieth* 12 years ago, that's a few
9 weeks ago.

10 MR. KIMBERLY: This is true. We wouldn't take that
11 as a statement of prejudgment of the issues that are presented
12 in this case for certain. And I guess, ultimately, what I
13 would say is, if the concern in staying any injunction that
14 might issue here is a concern that the Supreme Court may do it
15 itself in the end, our position is just let the Supreme Court
16 do it itself in the end. Ultimately, that question is one
17 about the management of the Supreme Court's docket, whether it
18 wants to push this case quickly forward and consider it
19 alongside *Gill* or not. And Justice Kennedy knows best of all,
20 which way he's likely to vote in this case. And it's --

21 JUDGE NEIMEYER: He stayed on for an extra year in
22 order to get this case.

23 MR. KIMBERLY: That's certainly my hope. And so
24 it's our position, really, that so long as, and especially as
25 long as the Court enters a final judgment and a permanent

1 injunction if it were to do that --

2 JUDGE NEIMEYER: Why don't we -- we're bleeding a
3 lot into the merits, and probably ought to do that in a more
4 organized fashion. Why don't I hear from -- will it be Ms.
5 Rice?

6 MS. RICE: Yes, it will.

7 JUDGE NEIMEYER: Hear from you just on this issue.
8 And it will probably -- this issue will probably be informed a
9 lot by the debate on the merits on the preliminary injunction
10 issue. So we can go for a while on this, but then more
11 formally get into the motion for a preliminary injunction
12 issues.

13 MS. RICE: Okay, great. So I think a few points
14 bear revisiting. And I think one of them we were kind of
15 getting to at the end there, and that's that the Supreme Court
16 is going to manage the docket the way that the Supreme Court
17 wants to manage its docket. And in the past the Supreme
18 Court, when faced with a potential new political
19 gerrymandering claim while they had one under consideration,
20 in *Vieth* and in *LULAC*, and that was the last time that this
21 happened, the Supreme Court actually vacated and remanded the
22 District Court's entry of, in that case I think it was the
23 final judgment, for reconsideration in light of *Vieth*. Even
24 though the two political gerrymandering theories were very
25 different.

1 LULAC raised the novel claim that there was
2 something inherently inappropriate with inter -- interstitial
3 redistricting, so redistricting in between the two censuses.
4 So that was totally distinct from the theory that was advanced
5 in *Vieth*. And yet the Supreme Court declined to take it up.
6 And, in fact, vacated and remanded to three judge district
7 panel of judgements that had been before it.

8 So the question for you here today is really is it
9 worth the expenditure of effort at this point to further these
10 proceedings when it's --

11 JUDGE NEIMEYER: Let me ask you about that. This is
12 just a very pragmatic question. Both parties have supplied us
13 the materials. And we've prepared. And we're going to argue
14 the merits today. Presumably, we'll come out with some kind
15 of decision and order on what happens today. Should we go
16 through with that process and then consider the stay, is that
17 what your view would be?

18 MS. RICE: So I think that depends -- gets into a
19 little bit of the question of preliminary injunction versus
20 65(a) hearing. And --

21 JUDGE NEIMEYER: Well, that's exactly right. You
22 oppose the 65(a)(2) advancement, I gather.

23 MS. RICE: Yes, exactly. We oppose --

24 JUDGE NEIMEYER: We'll go into that a little later.
25 But let's assume that we are with you on that, that we are not

1 going to advance it. So it's just the preliminary injunction
2 decision we would be coming out with at this point. At that
3 point we -- you would -- your argument accommodates the notion
4 that we decide this motion before us, and then consider the
5 stay or not, and leaving open the possibility that there still
6 will be a trial.

7 MS. RICE: I mean, I think that that is the question
8 of the Court's discretion of its management of its own docket.
9 There is still some effort and expenditure of resources that
10 go into determining the motion for preliminary injunction
11 today. And it may be that that effort ends up not being a
12 productive effort if whatever determination it is, either way,
13 is vacated and remanded in light of the *Wisconsin v. Gill* --
14 the *Wisconsin* case.

15 Because unlike, I think, the plaintiff's complaint
16 that these theories are very different, that is no kind of
17 substitute for the idea that no matter what happens in *Gill*,
18 we are going to learn something very important about the
19 contours of this case, so even though they're --

20 JUDGE NEIMEYER: Yeah, but you know that's -- I'm
21 not sure that's persuasive. You have some points to make, but
22 the Supreme Court every year takes up cases that inform
23 pending cases in the courts of appeals. And it's usually,
24 unless they take up the very same issue, we all sort of roll
25 along and let the Court manage that. And the difference in

1 theories is a legitimate ground to consider as to whether we
2 stay. I mean, if the Court had the same theory and the same
3 type of case, a single district under the First Amendment --

4 MS. RICE: I think it's because of --

5 JUDGE NEIMEYER: -- it seems to me the argument, it
6 really is duplication of effort. But here we're guessing.
7 And not only are we guessing, we're guessing in a context
8 where the main theory -- the Wisconsin theory is very novel
9 and I don't know -- I don't want to predict how the Court will
10 react to that, but I -- I'm not sure it's going to be that
11 kindly. But that is really completely different.

12 Now, the question is, do we put these plaintiffs in
13 a whole -- in a bind, and don't decide their legitimate First
14 Amendment claims. And, I mean, they may not succeed on them,
15 but at least they have made them. And they made it on a
16 totally different theory. And when they ask for an
17 injunction, presumably they are asking for a relief and not
18 delay. A stay would effectively deny the injunction --
19 preliminary injunction.

20 MS. RICE: So I think that, as Judge Bedar pointed
21 out, that the Court is going to be well aware of the theories
22 that are being advanced in this case, the fact that there are
23 these two competed statewide versus individual district
24 theories, the fact that there's attention presented in both
25 the Equal Protection and the First Amendment retaliation

1 claim, between individual and group rights, how those harms
2 are reflected in political reality, what it means to draw a
3 district line. All of those questions are inherently bound up
4 in each theory. Questions of proof of what evidence is
5 needed.

6 Those things -- I think that these two theories,
7 because the subject matter is the same, the two theories are
8 so closely related. And the fact that, as Judge Bedar
9 pointed out, this Court's opinion, which clearly sets out the
10 path, the required levels of proof and the theory --

11 JUDGE NEIMEYER: Let me ask you this: If we were --
12 I see this various practical possibilities. One is let us at
13 least let us decide the preliminary injunction motion and
14 consider the stay. And let the Supreme Court reverse us or
15 not on that. I guess what you're arguing for is even a little
16 more aggressive, you don't even want us to decide the
17 preliminary injunction motion that we're arguing today and
18 stay it, which in effect would be a denial of the injunction
19 and it would go up any way.

20 And so it seems to me the more pragmatic thing for
21 us to do, totally in your favor on this issue, would be to
22 decide the preliminary injunction motion, grant the stay, and
23 let it go up. That would be -- they, of course, don't want
24 the stay. They would like the whole ball of wax wrapped up.
25 But it seems to me the real distinction is the stay after we

1 decide. But I don't know how you react to that.

2 MS. RICE: No, I think that we are just looking for
3 a stay. And I don't think it makes a lot of practical
4 difference, from our perspective, whether it comes before or
5 after a decision on the preliminary injunction.

6 JUDGE NEIMEYER: Okay.

7 JUDGE BREDAR: It would be somewhat irresponsible,
8 really, wouldn't it, Ms. Rice, when the plaintiffs have
9 alleged a constitutional violation and made a motion for
10 preliminary relief -- even if it is not particularly timely,
11 they have now made it and they've stated it with some
12 clarity -- it would be a little bit irresponsible on the part
13 of this Court, wouldn't it, to just simply erect a stay and
14 say we're not going to address this apparently emergent issue,
15 or at least what the plaintiffs are alleging is an emergency,
16 and not get to the substance of at least a preliminary
17 injunction application, shouldn't we really resolve that?

18 MS. RICE: I mean, I think that if the Court is
19 inclined to resolve that, that it would serve us just as well
20 to enter a stay after the resolution of that motion.

21 And I think that the only other point that I wanted
22 to make is when the Supreme Court is going to be balancing
23 between the merits and the burden on the State, in any
24 consideration that they might have of a stay in this case, one
25 of the things to note is that in Wisconsin the three judge

1 panel actually worked very hard to craft their relief so that
2 it did not pose an excessive burden on the State. So they
3 made their relief contingent. They required a map to be
4 redrawn, but it wasn't going to go into effect no matter what,
5 until the Supreme Court affirmed their decision.

6 And the Supreme Court rejected even that as too much
7 effort for the State to have to go through to reconvene the
8 legislator and come up with a alternative map, even though it
9 wasn't -- even under the terms of the relief in *Gill* that was
10 granted, be self-executing. So I think there, again, the
11 dissent -- the number of dissenters on the Supreme Court from
12 the grant of the stay in *Gill* is not actually indicative or
13 directly related, necessarily, to their thoughts on the
14 merits. It could well be related to the fact that the
15 dissenters believed that it was an appropriate burden for the
16 State to have to come up with a plan and keep it in reserve.
17 So I don't think we can read too much into their thoughts on
18 the merits.

19 And I think we do need to very much take seriously
20 this question of justiciability, because of the uniqueness of
21 the way that the Court asked for views. So far in the
22 jurisdiction briefing, there was not much explication of the
23 state defendants view on justiciability, they listed it as
24 their fifth question, it was kind of a hanger-on question.
25 And the Supreme Court said, no, we really want to consider

1 justiciability, so we're not going to note probable
2 jurisdiction, we're going to defer it to argument, which
3 requires the parties to brief it. So I think we're going to
4 see something quite substantive on justiciability either way,
5 that could inform whether this cause of action, even though
6 it's different from *Gill*, falls within those criteria,
7 whatever they may be.

8 JUDGE NEIMEYER: Okay. Why don't we -- I think
9 we've got the picture on that. And I think it's wrapped up a
10 little bit in the merits issue. And why don't we get formally
11 into the motion for preliminary injunction. And I'll let
12 either side talk about the 65(a)(2) issue as they wish along
13 the way. But I think our major concern is the preliminary
14 injunction based on the papers and the record that has been
15 made.

16 We'll hear from, Mr. Kimberly, why don't you start
17 on this. We're at -- what time are we here? 10:00. How much
18 time for an opening argument would you like to talk? I'd like
19 to sort of give a little bit of a time period here, so that we
20 can keep this under control. 45 minutes enough right now?

21 MR. KIMBERLY: I think that would do the trick.

22 JUDGE BREDAR: Why don't we start with that. And
23 I'll ask the clerk to sort of give us a hi-ho on that.

24 MR. KIMBERLY: Great. So Your Honors will see with
25 the -- I understand the screen is in front of you, we've

1 prepared a Power Point presentation here, that digests what we
2 think are really the core nuggets of evidence. Obviously, we
3 aren't able to present the entire universe of the evidence.
4 I'll say that --

5 JUDGE NEIMEYER: Incidentally, just on that, this is
6 a very mechanical matter. I have read the transcripts of the
7 depositions, the important depositions.

8 MR. KIMBERLY: Great.

9 JUDGE NEIMEYER: I had a little thumbnail drive that
10 was given. And I put it in, and it gave the deposition of Mr.
11 Busch. And then when I went to the next one and the next one
12 and the next one, they were all Mr. Busch all the way down.
13 They were labeled Governor O'Malley, but then when I got it in
14 it was Mr. Busch. And I know the difference between the two.
15 Any way -- it's not that important. I didn't get to see
16 anything other than Mr. Busch, but we do have the
17 transcripts.

18 JUDGE BREDAR: Yeah, we have the written
19 transcripts.

20 JUDGE NEIMEYER: We have the written transcripts,
21 that's probably fine.

22 MR. KIMBERLY: I apologize for that --

23 JUDGE DNEIMEYER: No problem.

24 MR. KIMBERLY: -- technical issue. We'll do our
25 best to address it. And I will say, mindful of the Court's

1 note in its order that it prefers to read the transcripts --

2 JUDGE NEIMEYER: I think it's a waste of time to
3 read transcripts that we No. 1 have read. I think you can
4 bring to our attention excerpts that you want us to consider
5 and highlight. But just to go through, and especially in real
6 time, I'm not sure that's fruitful for you or for us. So you
7 can use your time as you wish, but that's my observation.

8 MR. KIMBERLY: I appreciate that, Your Honor. And
9 that's the approach that we've taken. Sparingly, we have
10 taken clips of video, because we think in a number of few
11 instances it's helpful to actually see the people speaking.
12 But we've done our best to keep that to a minimum, judging on
13 the based on the Court's order.

14 And now before we start, I'd also like to draw the
15 Court's attention to this sheet that I think is before each of
16 you. This is a -- something of a cheat sheet of the key
17 individuals in the redistricting, so Your Honors can keep up
18 as we tell this story, and aren't confused by either who each
19 of the key individuals is and what their roles are, or what
20 any of the acronyms that we may end up using may mean.

21 Now, according to the Court's decision on the motion
22 to dismiss, we have three elements to prove. The first is
23 that those who were responsible for drawing the map had a
24 specific intent to dilute republican votes by reason of their
25 affiliation with the Republican party or their past voter

1 history, and in particular their support for republican
2 candidates.

3 JUDGE BREDAR: But before you get to any of that,
4 you've got to have a justiciable dispute; right?

5 MR. KIMBERLY: This is correct.

6 JUDGE BREDAR: Okay. And to win a preliminary
7 injunction, you have to demonstrate a likelihood of ultimate
8 success. Or at least the Court has to make that finding;
9 right? The Court under *Winter* --

10 MR. KIMBERLY: For this Court, certainly, yes.

11 JUDGE BREDAR: This Court, under *Winter*, must
12 conclude that you are likely to prevail.

13 MR. KIMBERLY: Correct.

14 JUDGE BREDAR: Okay. How can a court in our
15 position conclude at this point that you are likely to prevail
16 on the justiciability question, that the Supreme Court has
17 expressly reserved in *Gill* for argument in the fall, not even
18 noting jurisdiction in the case? Now, that doesn't forecast
19 how that issue is ultimately going to come out, for sure. But
20 we would have to find, in that landscape, that you are likely
21 to prevail on justiciability.

22 MR. KIMBERLY: Well, so I think the answer to that
23 question, Your Honor, is this Court's decision on the motion
24 to dismiss, where it already definitively held, in light of
25 the Supreme Court's precedence, that our theory is in fact

1 justiciable. Our view is that, at this point, that is water
2 under the bridge. That has been the framework that has guided
3 the parties' discovery over the last several months. And so
4 this Court, already having resolved that issue, I don't think
5 it's a live one now. Unless the Court intends to reconsider
6 its motion to dismiss, which isn't something that's been
7 briefed by the parties.

8 So at least taken as given, the framework this Court
9 laid out in its motion to dismiss, our demonstration is
10 against that backdrop. If that's a helpful explanation. And
11 I should say also, just a brief point on the --

12 JUDGE BREDAR: It's a way to get from A to B. It's
13 not helpful to me.

14 MR. KIMBERLY: Well, I appreciate that, Your Honor,
15 in light of your dissent. You know, the one thing that I
16 would say about the postponement of jurisdiction in *Gill* is,
17 as I say, the primary argument, argument No. 1 in the brief on
18 jurisdiction from the State, is not that all partisan
19 gerrymandering claims are nonjusticiable. The point is
20 map-wide challenges to state legislative districts based on
21 partisan asymmetry is not justiciable. That is the primary
22 argument that's before the Supreme Court.

23 It's framed also, incidentally, in terms of
24 standing. And it is not unusual for the Court to postpone a
25 notation of jurisdiction, as it did for instance, in the

1 Arizona Independent Redistricting Commission case, when there
2 are legitimate questions of standing. And we think in --
3 certainly, the State of Wisconsin thinks, that there are
4 legitimate questions about standing, based on the State-wide
5 nature of the challenge.

6 JUDGE BREDAR: Given 50 years of litigation on this
7 issue, all the way back to *Baker versus Carr*, isn't this
8 justiciability question in political gerrymandering cases just
9 squarely in the Supreme Court's lap. There's little else that
10 can be said that can illuminate the issue that hasn't already
11 been said. Now they have got a case in front of them. A
12 vehicle where they evidently have concluded that they have to
13 address it. They've indicated that they will address it.
14 What is the utility in the lower courts in this country
15 continuing to knock their heads against a brick wall on this
16 justiciability question until the Supreme Court simply
17 resolves it and gives us guidance once and for all on where
18 we're going to go.

19 This is not a debate about the policy implications
20 of political gerrymandering. Something that many in the
21 country view as a cancer on our democracy, in terms of the
22 damage that it's causing. But the hurdle of justiciability
23 has to be overcome. And the lower courts are powerless to do
24 that until the Supreme Court gives the critical guidance. Now
25 they've taken the case, as they've had to. The mechanism is

1 there. Why don't we just let that play itself out and get our
2 answers so that we can then get down to resolving real live
3 issues in this case and others?

4 MR. KIMBERLY: Respectfully, Your Honor, I think
5 that gets things upside down. I don't think that it's that
6 the lower courts in a circumstance like this are relying on
7 the Supreme Court to give them the guidance. I think the
8 Supreme Court is relying on the lower courts to test theories
9 just like this one. And that's what we show -- what is
10 evident is happening here.

11 I like Your Honor's analogy to knocking heads
12 against walls, because that honestly is the way that I've
13 thought about this issue going back to *Baker against Carr* as
14 well. I think the difference in certainly how I see our case
15 is we are not, we as opposed to the plaintiffs in *Gill*, are
16 not knocking our heads against the wall, we're walking around
17 it with an entirely new theory --

18 JUDGE NEIMEYER: Well, I don't know if we have
19 justiciability before us for several reasons. One, we've
20 adjudicated it in this case. But No. two, the Supreme Court's
21 last word is that it is justiciable. No. 3, *Wesberry*,
22 *Reynolds*, and all the racial cases are all justiciable and
23 have all been decided. And under a First Amendment theory
24 it's clearly justiciable. The justiciability question has
25 arisen only in connection with a statewide assessment of

1 reapportionment under the Equal Protection Clause. And we
2 don't have that and we've adjudicated that. So I don't --

3 MR. KIMBERLY: That's more succinctly said than I --

4 JUDGE NEIMEYER: It's no problem for you to continue
5 arguing that. But it seems to me that we don't even have a
6 Supreme Court case that says it's not justiciable.

7 MR. KIMBERLY: That's right.

8 JUDGE NEIMEYER: And the Courts continue to decide
9 these things. They may take it up and they may change their
10 mind on an Equal Protection assessment of a statewide plan.
11 But I think that we are trying to read crystal balls. It
12 seems to me you call the shot the way you see it under the
13 existing law.

14 MR. KIMBERLY: Thank you, Your Honor. And I -- I
15 think the shot has been called in the decision on the motion
16 to dismiss. And with that I'll move on with our presentation.

17 So you'll note that I put a little asterisk next to
18 ""but for" causation." That's because there's a legal dispute
19 between the parties about who bears the burden on that. And
20 I'll cross that bridge when I get there.

21 Now what the evidence and I'll show you -- I'm going
22 to start with specific intent. What the evidence shows is
23 that the process here took place really with two parallel
24 processes. The first was the public facing process led by the
25 Governor's Redistricting Advisory Commission. The Commission

1 held a number of public hearings throughout the State where
2 people gave testimony. This led, by processes unknown by the
3 public, to ultimately a map that was introduced. It was
4 presented to the governor. And the governor then introduced
5 the map to the legislature.

6 What we now know is behind the scenes there was,
7 unsurprisingly unreported at the time, there was a process by
8 which actual decisions were made in how the map was produced.
9 The reason I mention this now is because we have evidence in
10 this case, coming from both of these processes. And we think
11 the Court should be skeptical of any evidence coming from this
12 public facing process. Because what the evidence suggests is
13 that that was really an effort to window dress what was really
14 going on, which was bare knuckle, ugly partisan politics that
15 folks didn't want to see out front. And so what you'll see is
16 a lot of the State's evidence comes from the public facing
17 part of it. But really what's relevant is this bottom part,
18 the behind the scenes process.

19 And where that started out was by a referral of the
20 redistricting process to Congressman Hoyer who Governor
21 O'Malley describes as the dean of the congressional
22 delegation. And here's evidence on this point.

23 (Video clip played.)

24 MR. KIMBERLY: And so this is Governor O'Malley
25 admitting and acknowledging that he referred the matter to

1 Congressman Hoyer to come up with a map. This is confirmed by
2 other testimony in the evidence, including the testimony of
3 John Willis, former Secretary of State and chair of the GRAC
4 in 2002, a man incidentally presented by the State as an
5 expert witness, but who we think is better understood as a
6 fact witness, because in fact, he communicated with insiders
7 during the 2011 redistricting as well. He was the chair of
8 the GRAC in 2002. And he's a man who's really at the heart of
9 redistricting in Maryland as well.

10 JUDGE BREDAR: Mr. Kimberly, do you perceive the
11 State to really, in any way, seriously contest your contention
12 that these political intentions motivated the entire process?

13 MR. KIMBERLY: Well, to an extent, yes. I mean, I
14 don't think that they disagree on fundamentally what was going
15 on. I think -- so they acknowledge that NCEC Services, which
16 is a group I'll come to in a moment -- and perhaps I can skip
17 over this, if the Court isn't concerned about whether or not
18 this is demonstrated in the evidence. But they acknowledge
19 that NCEC Services was involved. They acknowledge that Eric
20 Hawkins there was drawing the maps. They don't really
21 directly take on whether there was an intent to move from a,
22 quote, 6/2 plan to a 7/1 plan. We think the evidence proves
23 that quite clearly.

24 What they do say is that the difference -- there's a
25 difference between going from a 6 -- from intending to move

1 from a 6/2 plan to a 7/1 plan, which is, as they put it, an
2 effort to benefit Democrats, to make it easier for Democrats.
3 They say that is distinct and separate from an intent -- a
4 specific intent to burden Republicans and make it more
5 difficult for Republicans. But as we explained in our
6 briefing it's like saying heads is different from tails.
7 Ultimately, you have one coin.

8 The way they went about making it easier for
9 Democrats to win in the 6th District, which I think is an
10 acknowledged purpose that the State has admitted to. Indeed,
11 it's in their responses to request for admissions. The way
12 the decision makers went about bringing about that end was by
13 diluting Republican votes. It was by pulling Republican
14 voters out of the 6th District and replacing them with
15 Democratic voters.

16 Now, the way that they did this was NCEC Services
17 metric, called the Democratic Performance Index, something
18 that the State does not deny was a part and here's the slide,
19 that was a part --

20 JUDGE NEIMEYER: Who hired NCEC?

21 MR. KIMBERLY: I'm sorry?

22 JUDGE NEIMEYER: Who hired them?

23 MR. KIMBERLY: As we understand it, it was the
24 congressional delegation led by Steny Hoyer. Now what the
25 evidence shows, though, is that although NCEC was retained by

1 the congressional delegation, the Maryland lawmakers and their
2 staffers who were at the heart of the redistricting, worked
3 directly with and collaborated with and met with Mark Gersh
4 and Eric Hawkins from NCEC.

5 And in addition what the evidence shows is that
6 documents produced by, for instance, Speaker Busch, and here
7 we have an e-mail demonstrating those meetings, documents
8 produced by Speaker Busch show that Democratic Performance
9 Index, DPI, appears on documents held by these lawmakers, and
10 that they were evaluating maps on the basis of DPI. The
11 testimony shows that DPI is a proprietary metric that belongs
12 to NCEC.

13 The testimony of both Eric Hawkins and former GRAC
14 chair, Mr. Willis, confirmed that if you see DPI, if you see
15 Democratic Performance -- and this is the document produced by
16 Speaker Busch, hand annotated, so Fed DPFM means Federal
17 Democratic Performance Index, showing 53 percent for the 6th
18 District. If you see DPI, it comes from NCEC services and
19 Eric Hawkins. This is the testimony confirming that. We have
20 John Willis stating this and we have Eric Hawkins confirming
21 this. It's proprietary metrics.

22 So what the evidence shows is although NCEC was
23 retained by the congressional delegation, it was a
24 collaborative process with the Maryland lawmakers.

25 JUDGE RUSSELL: It seems to me that your strongest

1 case, your proof regarding the elements, is the first element,
2 intent, there is a significant amount of evidence which is
3 undisputed with regard to establishing intent. I'm looking at
4 the second and third elements.

5 MR. KIMBERLY: Okay. Certainly.

6 JUDGE RUSSELL: Certainly I don't want to cut off
7 your explanation, but much of the evidence supports intent.
8 And I'll certainly allow the State to argue the opposite. But
9 I'm -- one issue that I have is with regard to this second and
10 third element.

11 MR. KIMBERLY: So we'll move to that now --

12 JUDGE RUSSELL: I don't want to --

13 MR. KIMBERLY: Sure.

14 JUDGE RUSSELL: -- disrupt you.

15 MR. KIMBERLY: No, I appreciate that. And this is
16 something we've discussed as well. Because I think to a large
17 extent, this evidence isn't really in dispute. Ultimately,
18 you know, the one point I want to make, obviously, is
19 Governor O'Malley acknowledged this intent. Eric Hawkins time
20 and again acknowledged the intent. And Eric Hawkins'
21 testimony on this is relevant, because of course, he is the
22 one who is at the heart of the redistricting.

23 The one clarification I'll make on that point is the
24 State suggests that Eric Hawkins didn't draw the final map.
25 That isn't something we dispute. The evidence shows instead

1 that he drafted the blueprint for what became the map. And
2 that he worked with Jake Weissmann, among others, a staffer
3 for Senate President Miller to produce that final map. We
4 have e-mails showing the back and forth, indicating that the
5 two of them were working together.

6 So all of this is to say what Eric Hawkins had to
7 say about intent the is probative of intent. Here's that
8 e-mail showing the back and forth, where we have Jake
9 Weissmann saying, at the end of the process, that these small
10 tweaks at the end were probably done to clean up something
11 along the line by us or Eric, Eric being a reference -- Eric
12 Hawkins is in this e-mail chain, Eric being a reference to
13 Eric Hawkins.

14 All right. So let's, if the Court isn't as
15 concerned to hear about intent, let's move on to the question
16 of whether there was a concrete burden and "but for"
17 causation. The point of using Democratic Performance Index,
18 which is at its core a measure of voting patterns and
19 behavior, is to dilute or the opposite of dilute, amplify
20 voter strength. So, again, in the State's view they were
21 trying to amplify Democrats, well that's obviously the same as
22 diluting Republicans.

23 What the evidence shows is that DPI is an extremely
24 effective measure at using past voter history to dilute votes.
25 What you see here is -- and let me just briefly explain. DPI

1 is a metric that runs from zero to 100. 50 and above is
2 considered Democratic leaning. 49.9 and below is considered
3 Republican leaning. It's obviously a continuum. Districts
4 are given scores. In this case, after the redistricting, the
5 Maryland 6th Congressional District went from a DPI of 37.4 to
6 a DPI of 53.1.

7 Now that is not a prediction of vote share. That's
8 not to say that NCEC was predicting that in election it would
9 have been 37.4 percent for Democrats and now it's going to be
10 53 percent for Democrats. It's a metric that simply
11 correlates to elections outcomes. And as it turns out --

12 JUDGE BREDAR: It's a measure of probability?

13 MR. KIMBERLY: It's a measure of probability.

14 That's correct.

15 And what the probabilities show is that when you
16 have a DPI above 50, there's a 92.5 percent chance that the
17 district is going to go for a Democrat. And what the evidence
18 shows here, as I was mentioning before, so this shows the
19 benchmark district at 37.4 percent DPI. The map drawers
20 evaluated every other proposal that was submitted to figure
21 out what the sixth district DPI was, the Black Caucus proposal
22 was a 38.83, leaving it at Republican district. The GOP plan
23 was a 38.4. And, unsurprisingly, the options that the map
24 drawers actually considered were significantly higher.

25 We have from Jake Weissmann's computer, Jake

1 Weissmann, again, staffer to Senate President Miller, who was
2 at the heart of the redistricting, we have from his computer
3 two files called Congressional Option 1 and Congressional
4 Option 2, these are the two maps that were drawn by Eric
5 Hawkins. One was at 50.5, the other was at 51 and change.
6 And what we see is then, starting with those as the blueprints
7 moving forward, the DPI continued to creep up.

8 Let me go to the next one.

9 JUDGE BREDAR: So you've got politicians, who in
10 your view clearly want to pull off this political gerrymander.
11 You've got for-profit entities out there, these consultants,
12 these Beltway bandits, whatever they are, who they all then
13 hire, who persuade them, well, we can accomplish this for you
14 because we understand the information technology and the
15 metrics and statistics and so forth, and we'll do it for you.
16 So now they are all very pleased with each other. And they
17 start generating all these numbers and so forth.

18 MR. KIMBERLY: Right.

19 JUDGE BREDAR: And then the ultimate question then
20 is, but does it work? Does it work?

21 MR. KIMBERLY: And the answer is yes.

22 JUDGE BREDAR: Well, I know that's your answer. But
23 in two years there's a swing from a 21.5 percent majority, to
24 a 1.5 percent majority. That's just in two years. Did the
25 metrics predict that and show that? And then all of that

1 against the backdrop of what everybody in this country has
2 experienced just within the last year, in terms of the
3 capability of these computer wizards to predict how what is
4 otherwise an organic fluid process is going to go. And it
5 turns out they're not too good at it.

6 MR. KIMBERLY: So I would disagree. I actually
7 think the evidence, and particularly 2014, shows they're darn
8 good at it.

9 THE COURT: Well, what does the presidential
10 election in 2016 tell us?

11 MR. KIMBERLY: Well, if I may first, Your Honor,
12 just quickly address 2014, because this is an issue that the
13 State makes a lot of as well. 2014 was a year when, if ever,
14 a Republican was going to win in the new 6th District, it was
15 2014. We had, as the evidence shows, a wave election
16 throughout the country in favor of Republicans. They swept
17 the house. They picked up some, I think, it was over 30 seats
18 in the house. They picked up double digit governorships,
19 including in Maryland.

20 And what this shows is that, one, compare 2010 to
21 2012, you see an enormous swing in the outcome. Then you see
22 in 2014, when John Delaney is up for his first re-election,
23 when incumbents are most vulnerable, it is four times for
24 likely that a candidate up for re-election will lose in his
25 first re-election than in any other re-election. So John

1 Delaney is singularly vulnerable being up for the first time,
2 you have a wave election in favor of Republicans and what
3 happens --

4 JUDGE RUSSELL: How are you able to predict how and
5 why individuals, these map -- these experts, how and why an
6 individual voter voted the way they did? I mean, it seems to
7 me that there were a number of factors which may have
8 contributed to the defeat of Congressman Bartlett, some of
9 which were cited by the State; his political leanings, age,
10 his lessened popularity among his own party. There were a
11 number of factors that may or may not have contributed to his
12 defeat.

13 And then the experts are coming back and predicting
14 reasons why Dan Bongino did not get a significant majority.
15 And also, quite frankly, have to predict the 20 percent
16 unaffiliated vote and how those voters actually voted. And it
17 seems to me that an expert can't look into a voter's mind and
18 ask them why they voted for a particular candidate. Or
19 predict how they would have voted had they not been displaced.

20 And I don't see any evidence in the plaintiff's
21 documents or any evidence through the discovery, that there
22 was any canvassing, any affidavits from these displaced
23 voters, to be able to attest to the fact that had I not been
24 displaced I would have voted for Bartlett. I was a Bartlett
25 guy all along. Or, you know what, I was tired of Bartlett and

1 I would have voted for Delaney or I voted for Bongino. That
2 is concrete evidence that could demonstrate and ideally
3 because of expense, that may not be practical.

4 But certainly going out and getting the hard numbers
5 on the voters that they know of and getting and speaking to
6 them and finding out how they voted, or if they had the
7 opportunity to vote, who they would have voted for, would be
8 much more persuasive than an expert predicting merely upon
9 political affiliation and previous voting practices, that in
10 fact, the election would change. I mean, that's the concern I
11 have is there's just not the proof there that the Court would
12 consider reliable in determining whether or not you can
13 actually prove causation.

14 Because one person stating that "but for" causation
15 or but for the changing in this map, because of political
16 affiliation and/or prior voting histories and election results
17 alone, cannot go into the minds of those displaced voters to
18 determine precisely why it is or how they would have voted.

19 MR. KIMBERLY: So, Your Honor, it just isn't a part
20 of our case to have to show how or why voters voted one way or
21 the --

22 JUDGE RUSSELL: Well, then how are you going to
23 prove the "but for" causation or adverse impact, concrete
24 adverse impact, without some speculation that your claim is
25 very good and some speculation that might be considered just

1 an educated guess?

2 MR. KIMBERLY: So I think the answer is straight
3 forwardly, we're looking at actual election returns here.
4 It's --

5 JUDGE RUSSELL: But you're predicting the future.
6 In other words, I didn't mean to cut you off, but what you
7 have to do is demonstrate adverse impact, concrete adverse
8 impact in the next election.

9 MR. KIMBERLY: No, Your Honor --

10 JUDGE RUSSELL: In the 2012 election. Well, I think
11 you do, because you've got to demonstrate that the results
12 would have been different.

13 MR. KIMBERLY: Well, that's right, but so --

14 JUDGE RUSSELL: How are you going to do that.

15 MR. KIMBERLY: But that's a backward looking
16 question, it's not a forward looking question.

17 JUDGE BREDAR: But why would we do -- I understand
18 your point, I also understand Judge Russell's point. But you
19 want a remedy.

20 MR. KIMBERLY: That's correct.

21 JUDGE BREDAR: You want different boundaries. So to
22 that extent we do have to look to the future, don't we?

23 MR. KIMBERLY: Well, we have to look to the future
24 in so far as --

25 JUDGE BREDAR: Otherwise, the different boundaries

1 don't mean anything.

2 MR. KIMBERLY: That's true. I understand what
3 you're -- so you're raising it in terms of irreparable harm.

4 JUDGE BREDAR: Yes.

5 MR. KIMBERLY: And I understand that point. It's
6 true, as far as irreparable harm goes, we have to show that
7 there's a reasonable likelihood that the outcome of the
8 election will go for Democrats.

9 But the standard here is not certainly, No. 1, on
10 that question, which I think is separate and apart from "but
11 for" causation. So set aside irreparable harm for just a
12 moment and let me talk about "but for" causation. On the
13 question of "but for" causation -- and I'm also going to come
14 back and talk about who bears the burden on this.

15 What has to be shown is that if the map drawers who
16 harbored this intent to dilute Republicans, to prevent them
17 from electing another Republican in future elections, if they
18 had not harbored that intent, would the map in turn have
19 resulted in such a fundamental dilution of Republican votes,
20 that the outcomes of the elections would have gone to
21 Democrats.

22 And what we've shown is, for example, one map, and
23 this was one among hundreds of thousands that could have been
24 drawn, that did not take into account partisan past voting
25 conduct. This is a map produced by our expert. Shows that

1 the DPI, the political complexion of the district, had it been
2 drawn in a way that otherwise comported with every other goal
3 that the map drawers had, except in so far as it drew the line
4 between the 6th District and the 8th District, that it would
5 not have been won by a Democrat, that it would have come out
6 Republican.

7 The only difference between that map which we
8 present, and the map that was actually enacted, the only
9 conceivable, real difference between them is, one was
10 motivated by an intent to dilute Republicans and the other one
11 was not. If the election had been held under that map, our
12 expert showed, it would have come out the other way, because
13 it would have been primarily -- and well, we know because of
14 the way votes were cast in the election, but it was a
15 predominantly Republican district.

16 So the question is not why and how people voted the
17 way that they did. The question is whether the motivation to
18 move the lines in such a way changed the outcome of the
19 election, such that if you subtracted that out from the map
20 drawing calculus, it wouldn't have happened. That's what we
21 have to show.

22 JUDGE BREDAR: But you have to know what ultimately
23 motivates the vote puller, to complete the answer to Judge
24 Russell's question.

25 MR. KIMBERLY: Well, do you mean that in terms of

1 the forward-looking, irreparable harm question?

2 JUDGE BREDAR: Now I'm back on even looking
3 backwards, you still have to know --

4 JUDGE RUSSELL: Why they voted in the way that they
5 voted.

6 JUDGE BREDAR: Precisely.

7 JUDGE RUSSELL: In other words, did they vote for --
8 did they vote purely upon party lines and solely for party
9 lines, or was their vote cast for some other reason? And the
10 only way you would know that is to speak to them.

11 MR. KIMBERLY: So I understand, Your Honor, except
12 that obviously elections take place on a district-wide basis.
13 Elections and, of course, districts are comprised of
14 individuals. But I guess the point is, speaking again about
15 what the Standard is on "but for" causation, it isn't
16 certainty. We have to show by a preponderance of the evidence
17 that it is more likely than not, that without this effort to
18 dilute Republican votes, the outcome in this 6th District
19 would not have changed.

20 JUDGE NEIMEYER: -- that the record supports the
21 notion that without introducing DPI you needed to move the
22 line to accommodate 10,000 votes.

23 MR. KIMBERLY: That's right. That's exactly right.

24 JUDGE NEIMEYER: -- cut off 10,000 votes. And that
25 could have been done many ways, but getting rid of 10,000

1 votes without regard to DPI. What they did was got rid of
2 360,000 voters, who reshaped the political character. And
3 they based that, whether rightfully or wrong -- whether they
4 could predict the way people voted, they based that on the
5 DPI.

6 MR. KIMBERLY: That's exactly right.

7 JUDGE BREDAR: And the DPI, in effect, is clearly
8 more likely than not predictive of how people are going to
9 vote, because it's based on registration and past voting
10 records.

11 MR. KIMBERLY: That's exactly right. And there's a
12 critical additional element to that. We have Speaker Busch
13 confirming on the record that to achieve the other goals
14 identified by the GRAC as guiding the redistricting process,
15 it was not necessary to do that complete upending of the 6th
16 District, the complete re-arrangement of its population. He
17 said that very straightforwardly. Now we were accused of
18 mischaracterizing that testimony. I think we have the video
19 clip of it if Your Honors are interested to see it.

20 (Video played.)

21 MR. KIMBERLY: So it wasn't necessary. What this
22 suggests is the upending of the 6th Congressional District,
23 the taking out of 360 and putting back in of 350, was
24 necessary to achieve a different end. And that's the end
25 reflected in increasing the DPI to 51 percent.

1 JUDGE BREDAR: I just don't understand, Mr.
2 Kimberly, is that while you've done a wonderful job of
3 describing exactly what all of these people thought they were
4 doing, I think you've proven it, frankly, in this record
5 without a further trial. There's a whole other universe of
6 activity that's going on out there, which is the individual
7 voters deciding for themselves whether they want to adhere to
8 their prior voting pattern or whether they want to change it.

9 And I think we can take notice of a national
10 election that just occurred in this country, where you've got
11 millions of people who voted for President Obama in 2012, who
12 clearly voted for President Trump in 2016, in Pennsylvania, in
13 Michigan, in Ohio, in Wisconsin. That also, that fluid
14 process the simultaneously occurring. So how can you make,
15 with sufficient certainty, the causal link between all of this
16 nefarious activity -- and I'll use the word nefarious -- that
17 you have so expertly proven here, and the actual outcome when
18 there's another force at work?

19 MR. KIMBERLY: I mean, again, I think the answer to
20 that question is the actual electoral outcomes. If the lines
21 in 2012 had not been -- we know the way people voted in 2012,
22 it's on the record. We know the way --

23 JUDGE RUSSELL: But you don't know why they voted
24 the way they voted.

25 MR. KIMBERLY: Well, I mean, I guess --

1 JUDGE RUSSELL: You don't. I mean, no one polled
2 them as to why they voted the way they voted; correct?

3 MR. KIMBERLY: This is true, Your Honor. But I'm
4 not sure that that undercuts the necessity of our
5 demonstration that it was more probable than not, more likely
6 than not, that given the -- this is a 50-point swing, this is
7 an enormous margin --

8 JUDGE RUSSELL: -- that's making that assumption.
9 Every individual -- you can't group these individuals together
10 and expect that individuals have the same mindset.

11 MR. KIMBERLY: Well, so I think --

12 JUDGE NEIMEYER: If this were such an elusive
13 notion, it seems to me the line drawers wouldn't spend the
14 effort. They find the DPI highly predictive. They thought by
15 following the DPI and shifting 360,000 votes, they would be
16 able to shift the district. And, in fact, they were
17 successful. Now, the question is whether the people voted on
18 that basis or not is not, seems to me, is -- you don't have to
19 prove the certainty of that. They believe that that works
20 that way. As a matter of fact, every politician whether
21 Republican or Democrat, focuses on registration and how people
22 voted in the past to predict how they vote in the future. And
23 that's the way they acted and that's the way it resulted.

24 MR. KIMBERLY: It is a factual premise of the
25 gerrymandering process that in fact these predictions are

1 accurate. But you don't have to take our words for it --

2 JUDGE RUSSELL: But who predicted the presidential
3 election?

4 JUDGE NEIMEYER: That's not redistricting.

5 MR. KIMBERLY: Yeah, I mean --

6 JUDGE RUSSELL: But it's still going into how an
7 individual voted. And in predicting that, because that is
8 precisely what these folks here are doing.

9 MR. KIMBERLY: Your Honor, if I may, I'll just --
10 I'll point you to another metric, which I think is especially
11 helpful on this point. It's something called the Cook PVI,
12 it's the Partisan Voter Index. This is a really well-regarded
13 metric for understanding the way that voters vote. It is, if
14 you go to the next slide, maybe the one after that. Here.

15 So you'll see, this is an academic analysis of the
16 Cook PVI. And what it shows is districts are broken down,
17 they're given descriptors of either likely for one party, the
18 other, solid, leaning, toss up. And what the evidence shows,
19 this is in the record, and this is academic research, shows
20 that when a district is ranked solid Republican, 99.7 percent
21 of the time it comes out Republican. A Republican wins. When
22 a district is ranked likely Democrat, 94.0 percent of the time
23 for Democrats the Democrat wins.

24 Now what this suggests -- is it a certainty, Your
25 Honor? No, it's not. And the lack of certainty is built into

1 these numbers. 94 percent of the time a Republican would this
2 district, it's the --

3 JUDGE NEIMEYER: But your point, the real point is
4 that those numbers don't predict certainty, but they predict
5 enough of predictability on which the map players act. In
6 other words, every gerrymander is based on an assumption that
7 we can change. And virtually every gerrymander has
8 effectively changed.

9 MR. KIMBERLY: Not only is it enough to prove the
10 basis on which gerrymanderers act, it's enough to prove "but
11 for" causation. Because, again, our burden on "but for"
12 causation is not to show beyond any reasonable doubt, to an
13 absolute degree of certainty, it is to show that it is more
14 probable than not, that's all we have to show, that there's a
15 better than 50 percent chance that the outcome of this
16 election is attributable to the line drawing games that the
17 map drawers were playing.

18 That's exactly what the Cook DPI (sic) shows. It
19 went from 99.7 percent, based on past voter performance that a
20 Republican would win, to a 94 percent chance that a Democrat
21 would win. That is a function of no more than the way that
22 the lines were drawn, moving Democrats in and Republicans out.

23 What this also shows, incidentally, on the prior
24 slide, two slides back, is that this was the single largest
25 partisan swing anywhere in the country after the 2011

1 redistricting. Cook ranked the top 25 redistricting swings
2 against the incumbent party as a result of redistricting, No.
3 1 on that list, Maryland's 6th Congressional District, going
4 from solid Republican R plus 13, to likely Democrat D plus 2.
5 It's a 15.72 percent swing.

6 JUDGE RUSSELL: I didn't know, but is there evidence
7 with regard to the Bongino campaign as to the prediction as to
8 that margin, did the surveys indicate that the margin of
9 victory for Delaney would be much greater?

10 MR. KIMBERLY: It was still a likely Democrat
11 district, if that's what you mean. It was still 94 percent --

12 JUDGE RUSSELL: The margin of victory was 2,700
13 votes. And so did -- were the predictions of the outcome of
14 the Bongino/Delaney campaign, were they predicting a much
15 larger margin that Delaney would win by? Or did they
16 demonstrate -- were they wrong on that campaign?

17 MR. KIMBERLY: No, and I think the answer is these
18 metrics don't predict -- they predict outcomes. It's a binary
19 question. Is a Democrat going to win, is a Republican going
20 to win.

21 JUDGE RUSSELL: Wouldn't you expect that the margin
22 of victory by Delaney would be substantially greater based
23 upon the results from the Bartlett campaign?

24 MR. KIMBERLY: I mean, I don't think necessarily,
25 no.

1 JUDGE RUSSELL: You had Bongino, who's out of
2 district, at least according to the government, underfunded,
3 not necessarily well known. You've got Delaney, who is
4 incumbent, in a majority Democrat district, who trounced
5 Bartlett, a long-term incumbent, with the number of infused
6 Democrats into this district as a result of the plan, but yet
7 and still only won by 2,700 votes. Doesn't that suggest that
8 all the sudden the populace within the 6th District became
9 much more competitive than had been predicted?

10 MR. KIMBERLY: I mean, it does on its face. I guess
11 the issue, again, though is --

12 JUDGE RUSSELL: But we don't know how they voted or
13 why they voted the way they did.

14 MR. KIMBERLY: Your Honor, that's right. But I
15 just, I want to reorient the Court to our theory, which is
16 that the map drawers looked at the way people had participated
17 in the process before. And on the basis of that previous
18 voter history, on the basis of the fact that, you know, a
19 given precinct went overwhelmingly for the Republican
20 candidates in the past, they moved them out to change the
21 outcome of the election.

22 You know, whether or not in the end there's a close
23 race, isn't ultimately the point I don't think. The point is
24 that it resulted in extreme vote dilution of Republican
25 voters. And it resulted in a concrete impact. It -- but for

1 that effort to flip, to dilute Republican votes, I think we
2 can be confident that the outcome would not have happened the
3 way that it did. And I --

4 JUDGE RUSSELL: But what about the 20 percent
5 unaffiliated voters?

6 MR. KIMBERLY: Well, that again --

7 JUDGE RUSSELL: That would have flipped the other --
8 I mean, there was no prediction as to those; right?

9 MR. KIMBERLY: Well, so there again, because it's
10 backward looking, the behavior of those voters is built into
11 the analyses done by our experts on the question of vote
12 dilution.

13 I'll mention, incidentally, that Governor O'Malley
14 testified to this, that independents are generally regarded in
15 Maryland as more, I think the way he put it is, progressively
16 minded. And it was a goal of theirs not only --

17 JUDGE RUSSELL: That's his opinion; right?

18 MR. KIMBERLY: Well, true. But I think he
19 understands the way that, for instance, Montgomery County
20 works. And pushing voters in, I think they were happy to have
21 independents from Montgomery County just as well as
22 Democrats.

23 JUDGE NEIMEYER: But your theory is not that they
24 were predicting how independents would vote, but your theory
25 is that they were focusing on how Republicans voted and their

1 registration, and trying to dilute those --

2 MR. KIMBERLY: Exactly.

3 JUDGE NEIMEYER: -- so as to change the result.

4 MR. KIMBERLY: That's exactly right. Making it more
5 difficult and indeed thwarting the will of this element of the
6 populace.

7 JUDGE BREDAR: Mr. Kimberly, if Dan Bongino had eked
8 out the narrowest of victories, 100 votes, but he won it,
9 would that undercut your case?

10 MR. KIMBERLY: You know, I think it would -- it
11 would have a bearing on the concreteness of the injury that
12 we've proven. I think we would still be arguing in that
13 circumstance that it changed the outcome in 2012. You know, I
14 think then there's a question whether we would be entitled to
15 injunctive relief, because there's a question of irreparable
16 harm moving forward in that circumstance. I think it would
17 have some relevance, but it's more the relevance of our
18 entitlement to relief, and less relevant to whether we had
19 stated a claim.

20 JUDGE BREDAR: Because the other result is what
21 happened, Delaney eked out a victory. More than a hundred
22 votes for sure, but not a lot more than that. It's very
23 close.

24 MR. KIMBERLY: Yes. And that's just to say, you
25 know, as we said all along, that would not have happened if

1 this intent to dilute Republican votes in the 6th District
2 hadn't been present in the redistricting process in 2011. As
3 Judge Bredar said, if the DPI had not been --

4 JUDGE BREDAR: Judge Neimeyer.

5 MR. KIMBERLY: My apologies.

6 JUDGE BREDAR: I appreciate the promotion.

7 JUDGE NEIMEYER: Bredar is much higher in the
8 alphabet.

9 MR. KIMBERLY: As Judge Neimeyer suggested, if the
10 DPI hadn't been really the guiding light of what was going on
11 in the redistricting, we wouldn't have seen that outcome,
12 certainly not in 2012. We don't think we would have seen it
13 in 2014 or 2016 either. The evidence bears this out, in part
14 because, as we say, we've demonstrated that this district
15 could have been drawn in a far more sensible way.

16 And what's the -- this is the map submitted by our
17 expert. And what's the two differences between the map
18 submitted by our expert and the map that was actually enacted?
19 One is a through the roof DPI that flipped the district. And
20 the other is really ugly sort of nonsensical meandering lines.
21 The only sense of which that can be drawn is that they were
22 pulling out Democrats from the 8th District and pulling them
23 into the 6th District.

24 So, again, emphasizing Judge Russell, that our
25 burden is not to show to an absolute certainty, I don't think

1 the Court needs to look further than the DPI in its
2 performance, and the partisan voter index, which the State's
3 own expert testified was a very well-regarded metric for
4 understanding that the way elections work. That by itself, I
5 think, is enough to show the "but for" causation that we need
6 to prove. And I see I've taken about 44 minutes. I'm happy
7 to reserve.

8 JUDGE NEIMEYER: We'll give you some more time.
9 We're going to be a little loosey-goosey, but I was trying to
10 create a structure where we can get all our work done in the
11 bounds that we had initially set out. So why don't we hear
12 from Ms. Rice.

13 MR. KIMBERLY: Thank you.

14 MS. RICE: We are not blessed with the same level of
15 technology.

16 So the plaintiffs have asked for an extraordinary
17 remedy that is never worded as a right. In requesting
18 preliminary injunction what they're asking for is for the
19 general assembly of Maryland to convene a special session,
20 redraw the districts that have been in place throughout three
21 elections, redraw the districts that were overwhelmingly
22 approved by referendum by the people of Maryland, and redraw
23 the districts under unspecified terms. They haven't really
24 given us a set of standards that would be constitutional to
25 redraw the districts. And then perhaps those terms would

1 include the sole aim of ensures Republican success in any new
2 6th District.

3 JUDGE NEIMEYER: Let me ask you just on that, I had
4 thought about that in looking at the papers and the data and
5 the maps. And at one level you look at the State and you say
6 what's gone wrong? You look at the maps over history, and up
7 until the one person one vote, they basically drew lines with
8 counties, county lines. Then with the one person one vote
9 they started breaking apart counties a little bit. But now
10 you have -- you look at the State as a whole, and I guess I
11 characterized the 3rd District as that broken wing pterodactyl
12 lying prone in the center of the state. It looks horrible.

13 But in this case, I'm not sure you would even have
14 to touch any other part of the state and get into the equal
15 protection standard that everybody's trying to find. It seems
16 to me if there's a violation here of the First Amendment, then
17 the remedy would be just to redraw the line between the 8th
18 and the 6th, so -- without taking into account the DPI. And
19 to accommodate the census, which is a swing of 10,000 votes.
20 What they basically did is moved 360,000 votes in close
21 proximity, and put back in 350. If you were to just redraw it
22 and cut off 10,000 votes off the 6th, and leave it the way it
23 was, you could do that. And actually that has been done by
24 the plaintiff's experts.

25 So sure it's dramatic every time you redraw a line.

1 But I'm not sure it's -- this particular violation is a single
2 district violation. And the real question is, what would the
3 district have looked like had they redrawn it without a DPI.

4 And --

5 MS. RICE: I think --

6 JUDGE NEIMEYER: -- there are possibilities.

7 MS. RICE: -- that this might be helped if we take a
8 look at the map. And, again, the issue here is --

9 JUDGE NEIMEYER: Is this as actually enacted?

10 MS. RICE: This is as enacted, the map as enacted.
11 So if you take a look here at District 1, because there is an
12 issue when you're talking about moving 350,000 voters, you're
13 not talking about being able to remedy that. You wouldn't be
14 able to remedy that and only alter the line between the 6th
15 and the 8th District.

16 And that's because if you take a look at District 1.
17 And you can see how District 1 is now coming up over into
18 Carroll County. Here it goes all the way here, over that way.
19 And if you look at 2002, there's really no great way to do
20 this, because the resolution of the maps are so poor in
21 detail. But if you look at 2002. As you can see in 2002 the
22 1st District, first off, crosses over the Chesapeake Bay
23 bridge into Anne Arundel County to kind of a significant
24 degree there. And it really --

25 JUDGE NEIMEYER: Your argument is that it would

1 effect more than just a line, as I sort of suggested.

2 MS. RICE: Correct. So --

3 JUDGE NEIMEYER: -- the 1st District they need
4 additional voters in it. And the way they got it is coming
5 across the top.

6 MS. RICE: Yes.

7 JUDGE NEIMEYER: I understand that.

8 MS. RICE: There's another aspect to that. And I
9 think it's most helpful, actually, if we look at a chart that
10 Professor McDonald put together for the plaintiffs. So we see
11 here the numbers that are involved. So it's about half of
12 that interchange has to do with the movement into the 1st
13 which was underpopulated because of that change. The 2nd
14 which was underpopulated just because it was underpopulated.
15 The 7th, again, that was an area that also had underpopulation
16 elsewhere in the map. And then we get into the 6th and the
17 8th. But that number is, again, deceptive. And the
18 plaintiffs haven't done any further break down.

19 If you look into the gained portions. And we can
20 look at the map again, the 2011 map. You can see that the 4th
21 District no longer comes into Montgomery County. In the 2011
22 congressional redistricting map, and that was acknowledged in
23 Fletcher, as the result of a request by the Legislative Black
24 Caucus, to make sure that the 4th district was only in Prince
25 George's County and that the 8th district didn't cross into

1 Prince George's County. So sort of separating Prince George's
2 and Montgomery Counties.

3 And so that meant that 8th was going to have to
4 change in a significant respect. Look again at the 2002 map.
5 Because as you can see, the 4th District takes up a lot of the
6 territory of Montgomery County that would -- otherwise is
7 included in the 8th district today.

8 So the plaintiffs have not explained how much of
9 that population actually affected what they're talking about,
10 the kind of line between the 6th and the 8th. Or how that was
11 drawn, how those decisions were made, and with what intent
12 those decisions were made. So I think it's very misleading --

13 JUDGE NEIMEYER: Do you disagree with -- it looks to
14 me like they have a very strong evidence to suggest that the
15 effort was to convert the 6th into fertile ground for a
16 Democratic win, when before it was almost secure Republican.
17 And if that's the motive, I mean, if they started the map
18 without regard to that motive, they really needed just to cut
19 off 10,000 vote on the eastern end of the 6th District. And
20 then continue the map otherwise for other purposes.

21 The 1st and the 6th are contiguous on the east and
22 the west. The middle is where all the exchanges are taking
23 place. But the original -- the census, the 6th Circuit was
24 10,000 too many, 731,000, they had to bring it down to
25 721,000. And it seems to me without a DPI motive, that is a

1 fairly simple thing to do. The rest may not be so simple, how
2 that was accommodated. And I think you make that point. But
3 that central part is not simple any way. It's an ugly map, so
4 to speak. It's far worse than original gerrymandered, the
5 salamander look up in Massachusetts, or some of the others.
6 It's been often characterized as the worst gerrymandered area.

7 But we don't have that before us. The real question
8 is, in order to achieve the intent, they've had to move
9 360,000 votes. If they just are accommodating the census they
10 only had to move 10,000 votes. As a matter of fact, not only
11 they would be jettisoning 10,000, so that the 6th would be
12 even smaller than it is in the 2002 map.

13 MS. RICE: So that --

14 JUDGE NEIMEYER: My point -- I guess my point was
15 reaction to yours, which was this would be Draconian remedy,
16 and --

17 MS. RICE: Sure. And I think bringing back to the
18 remedy, I think that's really helpful to think about. What
19 would happen if the legislature, instead of intending as
20 Governor O'Malley testified, that they wanted to create
21 competitive districts where Democrats had a chance of success.
22 And instead of doing that, they intended instead to retain the
23 Republican characteristics of the 6th District, they would
24 have had to, in order to keep the whole rest of the map equal
25 as plaintiffs have kind of conceded that they may be a valid

1 thing for the legislature to have done.

2 If you look at Professor McDonald's map, you will
3 see that parts of the people that live in the 8th District,
4 because Professor McDonald's line drawing cuts Montgomery
5 County kind of from the northeast to the southwest, and goes
6 around both Rockville and Gaithersburg. So there's a
7 significant portion of western Montgomery County that was in a
8 Democratic district, where those voters had consistently
9 elected a Democrat to Congress for many years. And to draw
10 the line in that way, with the intent to advantage Republicans
11 by retaining the performance characteristics of the 6th
12 District, they would be inflicting the exact same harm as they
13 are today. So --

14 JUDGE NEIMEYER: Well, I think the suggestion, in a
15 pure -- a pure legal sense, is there shouldn't be an effort to
16 protect the Republicans either. The theory is that you should
17 be drawing districts without regard to how a person voted in
18 the past. And the remedy would be to require line drawing
19 without a DPI data point.

20 MS. RICE: Okay. I think that's interesting and
21 maybe a helpful --

22 JUDGE NEIMEYER: And the question is how that's
23 done. You can't -- we can't do that in the courtroom. I
24 mean, we can -- in the abstract we can talk about it. But I
25 don't think a court would have to accept the notion that it's

1 impossible to do. You can divide the state up into eight
2 districts without regard to DPI that are -- that do the normal
3 things.

4 MS. RICE: So I think that element without regard to
5 DPI is a helpful clarification to move us forward. Because
6 that's not what the opinion originally stated. They said that
7 some consideration of these metrics was, in fact, appropriate
8 and expected. Moreover --

9 JUDGE NEIMEYER: Why is that? You know, the Supreme
10 Court has said, as a matter of fact a majority have said, that
11 partisan line drawing is not appropriate. And the only time
12 they allowed the Court review of such inappropriate line
13 drawing when it was excessive. That's because they never had
14 a standard and they still don't have a standard. But this is
15 a -- this is a single district issue, really very similar to
16 the model of the racial, which have all been handled fairly
17 easily.

18 MS. RICE: So in the racial gerrymandering context,
19 you must have -- it must pass strict scrutiny if you're going
20 to look at those percentages, it must pass strict scrutiny for
21 your use of percentages in any line drawing. Here --

22 JUDGE BREDAR: Isn't the problem that in the
23 political cases, actually, the Supreme Court has said two
24 things. They've said in *Bandemer*, you can't do this. And
25 then in the context of every other case that has come after

1 that, they've implicitly said, well, you can, because there's
2 no way to stop you.

3 MS. RICE: I think that that is, in fact, part of
4 the difficulty here. And the no way to stop you, I think is
5 very important.

6 JUDGE NEIMEYER: Except, in *Vieth* they said you
7 can't do it. They quoted *Bandemer*. And five justices joined
8 that. Not only that, the plurality acknowledged it. So we
9 can't say we're totally in the dark. Where we're in the dark
10 is on the Equal Protection standards.

11 MS. RICE: So I think --

12 JUDGE NEIMEYER: We have a hard time looking at the
13 results, that is the shapes of the districts, and figuring out
14 what is an appropriate standard or the numbers. But they did
15 have the same problem when they had *Baker versus Carr*, they
16 had *Wesberry* and *Reynolds*, and they acknowledged that they had
17 no standard before then. And, yet, they adopted the standard
18 of one person, one vote, to take care of a particular problem.
19 So they've done it in one person, one vote, they've done it in
20 race. They have not done it under Equal Protection based on
21 the shape. Justice Powell tried to talk about the shape.

22 MS. RICE: I think there's something unique about
23 politics and it's this: We have multiple political operatives
24 in this case that have testified that they just know DPI.
25 That they've known about NCEC and NCEC Services since the

1 inception --

2 JUDGE NEIMEYER: Well, that's whether they follow
3 the law. But if you had a law that said they could not use
4 DPI in drawing lines, they would have to follow political
5 boundaries. And sure they know where their votes are and they
6 know where these are, but that's part of the political
7 process. But focusing on how particular people voted, and
8 then moving them from one to another to dilute their vote,
9 that's the theory of the plaintiff's case.

10 MS. RICE: Right. And I think that's, again, the
11 flaw in the plaintiff's case. Because DPI does not, as Judge
12 Russell has anticipated, does not reveal how individual people
13 voted. It is only a metric that is an aggregate --

14 JUDGE NEIMEYER: Well if you're right about that --

15 MS. RICE: -- a precinct --

16 JUDGE NEIMEYER: -- this is an extraordinary
17 statement, because if you're right about that then there would
18 be no gerrymandering. In other words, all politicians,
19 Republican and Democrat, assume that data like a DPI is the
20 basis for gerrymandering. And they rely on it and they're
21 mostly successful. It's not perfect, but you see the DPI --
22 the Democratic group NCEC had, a very likely, over 90 percent
23 accurate. And then you had the Cook index, very likely
24 accurate. So the notion that the DPI is not accurate and,
25 therefore, is not a basis to criticize means we would have no

1 gerrymandering. They don't believe that.

2 MS. RICE: I'm not saying that the DPI is accurate
3 or not accurate. We don't actually have any evidence about
4 the accuracy of these metrics --

5 JUDGE NEIMEYER: Sure you do. You have all the
6 data. You have the dot chart.

7 MS. RICE: We have a plot of certain elections. How
8 many --

9 JUDGE NEIMEYER: -- and they keep refining it and it
10 keeps refining itself. And so the dots are over 90 percent
11 consistent with the DPI. Over 90 percent. We don't have that
12 burden in any kind of civil case.

13 MS. RICE: But I think what I'm saying --

14 JUDGE RUSSELL: But they're also wrong with regard
15 to other elections, national elections. The gubernatorial
16 election, for every -- politics and predicting votes is
17 sometimes not as easy as we think it is. Correct?

18 MS. RICE: Yeah. And I think one of the things that
19 I think Judge Russell is getting at, I wasn't saying really
20 anything about the DPI's accuracy or inaccuracy, I'm saying
21 what it is. It is A compilation, and Eric Hawkins testified
22 to this, of actual election results, which means that the
23 smallest unit --

24 JUDGE NEIMEYER: But it's based on --

25 MS. RICE: -- of consideration is the precinct

1 level.

2 JUDGE NEIMEYER: -- the key point -- it's not the
3 polling, which Judge Russell suggested where they've gotten
4 things wrong, where they've looked at things. The DPI is
5 based on how people are registered to vote and have voted.
6 And they keep refining that. And so it is a reflection of
7 where people are now. The fact that a Republican can vote for
8 a Democrat later, is irrelevant. What's relevant is that when
9 you draw lines, you're doing it with the intent to dilute
10 people who voted Democratic or voted Republican, based on the
11 way they voted. And the question is whether they did that in
12 this case. And it looks like pretty clearly they did. As
13 everybody seems to agree, the question is did they show a
14 concrete result. And it's pretty hard to say there wasn't a
15 result of that in carrying out that plan.

16 MS. RICE: Sure. So I think that one sort of
17 disconnect in the way that people vote and, like, how they are
18 predicted to vote can be shown by these are just the election
19 day results from the 2014 general election. So this is a
20 spreadsheet that comes straight off the State Board of
21 Elections website, I didn't make it. But you can see here
22 that, if you look in Column P, Governor Hogan received 92,500
23 votes in the 6th District. And, unfortunately, they don't
24 have the data that would give you the early voting and the
25 provisional ballots. But if you scroll down --

1 JUDGE NEIMEYER: Let me ask you, I'm not quite sure
2 what you're arguing. You're sort of arguing an abstract
3 possibility that because the data -- the DPI is not perfect.
4 And it's violated in a lot of electional circumstances,
5 therefore, it's not a basis for gerrymanderers to draw lines?

6 MS. RICE: No. What I'm saying is a little bit more
7 fundamental than that --

8 JUDGE NEIMEYER: The politicians believe this is the
9 best data for predicting how the votes go. And they happen to
10 be right by over 95 percent of the time, in a particular
11 precinct, based on the way people voted in the past. And so,
12 I mean, it was a hundred percent, wasn't it, when you get down
13 to 34, 37 percent DPI?

14 MS. RICE: So that likelihood number, the predictive
15 number that they're talking about in the both the Cook
16 political voting index and DPI is -- it's modeled to a
17 nationwide scale. So it doesn't take -- it's not supposed to
18 be predictive of any particular election, it's just about the
19 performance --

20 JUDGE NEIMEYER: -- the planners talking about, why
21 are they doing? Why is Miller and Busch and O'Malley and the
22 committee, why are they fussing with this?

23 MS. RICE: Because they're talking about that
24 district's performance over time, whether it can be called
25 competitive or not competitive, for example. Those general --

1 JUDGE NEIMEYER: That isn't what they looked at,
2 they looked at --

3 MS. RICE: Those general characteristics of the
4 district, whether it's a competitive district or whether it's
5 not a competitive district, are more or less predicted by DPI.
6 But when it comes to proving causation and harm, the outcome
7 of any one election is not predicted by DPI or voting index.
8 And we don't have any information that it is --

9 JUDGE NEIMEYER: Let me ask you this, forget the
10 future, you have a district with 37 percent DPI for the
11 Democrats. The data shows and the Democrats believed this,
12 they don't have a shot at winning that. 99 percent or more,
13 they could never win that except some extraordinary
14 circumstance. So they now want to make the State with a 7/1
15 situation. They raise that 37.4 up to 53.1 percent, which is
16 over half. And now that the DPI predicts that's likely
17 Democrat.

18 If they're able to do that and carry out that intent
19 and then, in fact, the next election goes for a Democrat,
20 isn't that a concrete result as their plan? It may not be for
21 the future, whether it carries on in the future, because the
22 dynamics change. But with respect to their conduct in drawing
23 that map and the next election, it seems to me they were
24 highly successful in accomplishing exactly what they
25 planned.

1 MS. RICE: So the proof that's missing in this case
2 and Cure is that that entire swing, the entire increment was
3 due to that one intent. There's been no effort to prove that.
4 In fact, we see that the map that was submitted by the
5 congressionals had a lower DPI, but was rejected. The
6 affidavit of Jake Weissmann shows that it was rejected for a
7 number of reasons including that --

8 JUDGE NEIMEYER: It doesn't matter whether it's a
9 number of reasons. He didn't want to split the States -- the
10 cities his affidavit talked about. That's the main component
11 he added. But the question is the overall reason why to move
12 360 people (sic) out of the 6th District and move 350,000
13 people back into it, a switch of half the population, they all
14 agreed it was in order the make it a Democratic district.

15 MS. RICE: So I think that they did not agree that
16 the entire switch of population was to make it a Democratic
17 district. They said that one goal, among many that were held,
18 was to make this district a more Democrat district. And I
19 think that that's really important, because the Courts have
20 said time and time again, that the political results of any
21 districting map are going to be known to the decision makers.
22 And in that sense, whenever they vote for a map, they will
23 intend the --

24 JUDGE NEIMEYER: But that misses the plaintiff's
25 theory --

1 MS. RICE: -- political results of the map.

2 JUDGE NEIMEYER: That is an equal protection
3 argument. The plaintiff's theory is, under the First
4 Amendment, if you target somebody because of the way they vote
5 and dilute those votes, the only question -- and in this case
6 it seems to be the evidence is overwhelming they did that.
7 The only question in this case that Judge Russell raised is
8 there a concrete -- did that plan have a concrete result. And
9 the answer is the very next election swung more than any other
10 district in the country. And so the question is common sense.
11 Did they prove it a hundred percent? No there could have been
12 possibilities --

13 MS. RICE: So the swing wasn't --

14 JUDGE NEIMEYER: But isn't it common sense that they
15 were successful?

16 MS. RICE: -- in the election results.

17 JUDGE NEIMEYER: Just a minute. Isn't it common
18 sense that they were successful in their plan?

19 MS. RICE: I don't think that it is necessarily
20 common sense that they were successful in their plan.

21 JUDGE NEIMEYER: We're not talking about
22 necessarily, we're talking about probability.

23 MS. RICE: I don't even think that on this record
24 it's probable to say that they were successful in terms of
25 their intent to specifically move the needle in favor of

1 Democrats, that --

2 JUDGE NEIMEYER: Well, they did.

3 MS. RICE: -- that was the causal agent of the harm
4 of John Delaney being elected. I think that their
5 manipulation of DPI in particular, we actually have no
6 evidence about what lines were drawn where because of DPI as
7 opposed to because of these other reasons that they are
8 talking about.

9 JUDGE NEIMEYER: Then you're overlooking the
10 testimony of the map maker, Eric Hawkins. You're overlooking
11 the testimony of O'Malley. You're overlooking the testimony
12 of Miller. You're overlooking the testimony -- what you have
13 is you have some backfill affidavits now focusing on other
14 criteria. But that isn't what was on their mind. What was on
15 their mind was to make the State 7/1.

16 MS. RICE: But Governor O'Malley did not testify to
17 that. He said that there were multiple things on the mind and
18 this idea of making it more --

19 JUDGE NEIMEYER: Let's go down his multiple things.
20 His first thing was he had to do it because of the census and
21 the law. He had to do it because of the statutory law. He
22 had to -- he said we want to make the 6th safe, Democratic
23 safe. And we wanted to get a 7th. Now those were the things
24 he listed. Now was there another one you saw in his
25 deposition?

1 MS. RICE: Yes, he also listed to eliminate the
2 Chesapeake Bay crossing. He also listed, and as was
3 established in --

4 JUDGE NEIMEYER: -- talked about moving population
5 west, it did move west by 10,000 people. It moved -- 10,000
6 people moved northwest into his district. He was absolutely
7 right on that. But the idea the decennial law had required
8 him to get rid of 10,000 out of the district, but it didn't
9 require the wholesale flipping.

10 JUDGE BREDAR: Ms. Rice, is your argument that all
11 of the intention in the world, all of the proof of intention
12 that has been amassed by the plaintiffs in this case, some of
13 which you might disagree with, but even if this court finds
14 your position weak on that, and agrees with Mr. Kimberly, that
15 it is an overwhelming case of what the intention was here,
16 that that still doesn't answer the question of whether it
17 worked to the extent necessary that a court can conclude that
18 it is likely, ultimately, that you'll demonstrate the
19 concrete, "but for" cause, of the change in the representation
20 of that district. Isn't that what the problem is?

21 MS. RICE: Yes, Judge Bredar, that's exactly right.
22 That even for, if we assumed for purposes of just our
23 discussion here, that intent was completely established --

24 JUDGE NEIMEYER: So your argument, following up
25 on -- you agree with that, your argument would have to be that

1 if they moved, simply moved 10,000 people out of the 6th
2 District, left the district alone except on the eastern edges,
3 cut off 10,000 people, that there -- do you have any doubt
4 that would have been --

5 MS. RICE: So I don't think that has to be the
6 argument that we have, because they could have moved any
7 number of people for any number of reasons at any time. So
8 that connection between the intent and the harm is the only
9 thing that makes this claim able to be repeated.

10 JUDGE NEIMEYER: So you're ignoring the intent.
11 These politicians had the power to make that map the way they
12 wanted. They had the power. And they said why they exercised
13 that power. And if that's so, then they were just acting in
14 vain. They were just sort of talking politician talk. They
15 didn't really want a result. The fact of the matter they did
16 carry out, they did get a 7 to 1 majority. That's exactly
17 what they wanted. And they did it by targeting the
18 Republicans who -- based on the way they voted and registered
19 and moving them out and adding Democrats.

20 I mean, this fellow Hawkins kept saying, yeah,
21 Montgomery County is very Democratic. He keeps saying how
22 Democratic it is and moving that in there.

23 MS. RICE: So, I mean, I think that that itself
24 illustrates the problem here, is that Montgomery County is
25 very Democratic. So if the other changes that are made in the

1 map caused the 6th District to come into Montgomery County, as
2 it has throughout almost its entire history come into
3 Montgomery County --

4 JUDGE NEIMEYER: Here was a conscious effort to take
5 advantage of the Democratic registered voters and put them in
6 districts -- let me ask you this hypothetical: Maryland's
7 roughly, you can accept this for the hypothetical, 60 percent
8 Democrat voters and 40 percent Republican. If the map makers
9 came up with a eight district plan where they matched 60
10 Democrats with 40 Republicans, throughout the State, just
11 assigned voters at random to 8 districts, 721,000 people each
12 district. And they matched them up so that 60 Republicans
13 from -- 40 Republicans from Western Maryland would be matched
14 up with 60 Democrats from Baltimore City, you had pointillism,
15 there's no geographical limitation, would that be an
16 acceptable plan?

17 MS. RICE: I guess I am not quite sure the contours
18 of your hypothetical. I think that if they did that with this
19 sole --

20 JUDGE NEIMEYER: They matched 60 Democrats up with
21 40 Republicans throughout the State, and assigned them to
22 districts so that they had 60/40 in every district.

23 MS. RICE: So I think that as Dr. Lichtman said in
24 his report that this can be --

25 JUDGE NEIMEYER: My question is would that be legit?

1 MS. RICE: Sorry?

2 JUDGE NEIMEYER: Would that be a legitimate plan?

3 MS. RICE: Well, I think that that can be a natural
4 occurrence in a state, so it's very hard to say hypothetically
5 whether or not that would be constitutionally permissible or
6 not without looking at the particular --

7 JUDGE NEIMEYER: You mean you could --

8 MS. RICE: -- political geography of the state.

9 JUDGE NEIMEYER: -- you could put in the 1st
10 District, so to speak, you could put 40 Republicans from
11 Garrett County, in the district, and 60 Prince George's
12 Democrats in that district. And go around the State and match
13 them up, no geographical consideration. And create eight
14 districts where they had a 60/40 split, could you do that
15 legally?

16 MS. RICE: Like I said, I just don't think you can
17 say whether or not you can do that legally without examining
18 what the districts look like or --

19 JUDGE NEIMEYER: -- they don't -- it's pointillism.
20 There are no boundaries for the districts. There's just
21 people are assigned to districts, single districts, based on
22 their vote, the way they vote.

23 MS. RICE: So that wouldn't be constitutional for
24 other reasons.

25 JUDGE NEIMEYER: What other reason?

1 MS. RICE: It's pretty much been accepted that you
2 must have contiguous districts.

3 JUDGE NEIMEYER: Where did you get that?

4 MS. RICE: Well I do think it would probably be --
5 violate other kinds -- because, for example, in our state we
6 have two majority minority districts, you wouldn't be able to
7 make a map --

8 JUDGE NEIMEYER: You take the position that Equal
9 Protection analysis is not justiciable. And so you basically
10 make it a political issue that's not reviewable by a court.
11 And I'm asking you that hypothetical district, which is an
12 extreme, obviously, but it takes it away from the Court. The
13 politicians now assure that Maryland will always be 8/0.

14 MS. RICE: Well, what I'm saying here in Maryland,
15 when you're thinking about an 8/0 map, you have to be mindful
16 of the fact that you have to retain those majority and
17 minority districts and --

18 JUDGE NEIMEYER: Why?

19 MS. RICE: Because of the --

20 JUDGE BREDAR: Isn't that because of all of the law
21 that has evolved over the last 50 years --

22 MS. RICE: Correct.

23 JUDGE BREDAR: -- in the context of racial
24 gerrymanders.

25 JUDGE NEIMEYER: Well, you just say assign the

1 racial the same way. In other words, I'm suggesting that
2 there is no geographical aspect, no contiguousness, there is
3 no political boundaries consideration, there is no communities
4 of interest, except racial. And you can just go around the
5 State, and based on whether they're a minority, whether they
6 voted Republican, voted Democrat, and put them in these
7 districts. And you say that would not be legal?

8 MS. RICE: So with respect, I just think that that's
9 so far removed from any --

10 JUDGE NEIMEYER: It's way removed. It tests the
11 principle.

12 MS. RICE: Well, I'm not sure that it even tests the
13 principle, because that is just not the conditions under which
14 legislatures are ever working. They are always working with a
15 mind to communities of interest. And this map and any map
16 they are always respecting communities of interest.

17 JUDGE NEIMEYER: Aren't we talking about what's
18 legal constitutionally and what's not? In other words, I'm
19 suggesting to you the judicial analysis has to be based on a
20 constitutional principle. What's left after that, if it's
21 unregulated by the constitution, then they can do what they
22 want. And literally they could make the State a safe 8/0
23 state on that basis without regard to geography.

24 Now, you're saying, oh, it wouldn't happen. Of
25 course it wouldn't happen, it's an extreme. But it tests your

1 principle as to is there any constitutional supervision over
2 gerrymandering.

3 MS. RICE: So there, just sort of again, on Judge
4 Bredar's suggestion, taking intent as a given, just for
5 purposes of this discussion, you would have the case where the
6 harm was provable. That there -- it was provable -- and I
7 think you have to make some showing, for example, that if
8 everybody was elected, eight Democrats were elected, that they
9 were facing genuine Republican challengers for there to be a
10 harm. Or that I guess maybe you could find that there were no
11 candidates because of this scenario. But that hasn't been
12 shown here. There's nothing here that has proven any link
13 between intent and harm.

14 And I think we also need to be mindful that we're
15 here on the preliminary injunction. So likelihood of success
16 on the merits is just one of the issues that we need to
17 address today. And I also just want to quickly, I think this
18 is the right juncture to do so, say that the State does object
19 to any acceleration of the trial. The notice that we got for
20 this hearing of the case expressly said that it was going to
21 be a preliminary injunction hearing. It didn't mention the
22 65(a) or -- and the second order expressly said that we would
23 not be discussing summary judgment. So the implication was
24 there would be no final consideration of the merits. So we're
25 here on the preliminary injunction --

1 JUDGE NEIMEYER: On that issue, is there more that
2 you would like to put in the record?

3 MS. RICE: I think that, you know, there may be some
4 rebuttal evidence that we would like the opportunity to
5 present. The only -- the consent to not put on evidence today
6 was based on the premise this would be a hearing only on the
7 preliminary injunction and not an accelerated trial on the
8 merits. Because that was the information that we had from the
9 Court at that time. And the plaintiffs didn't renew their
10 request for 65(a) until Monday of this week. So any
11 acceleration of the trial at this point would require notice
12 and the ability to come back.

13 JUDGE NEIMEYER: Well, they did give notice. It was
14 in their initial motion and in their rebuttal.

15 MS. RICE: With all due respect, Judge Neimeyer, the
16 Court must give us the notice that this hearing will serve as
17 our --

18 JUDGE BREDAR: The Court issued a very concrete
19 order about exactly what was at issue during this hearing and
20 never modified it, did it?

21 MS. RICE: Correct. About the preliminary
22 injunction and the stay.

23 So and I think it's helpful now to think a little
24 bit about in what circumstances courts order preliminary
25 relief. And instructive on that matter is the decision in

1 *Cooper v. Harris*, where the Court stated that plaintiffs had
2 circumstantial and direct evidence of the requisite proof
3 necessary for the racial gerrymandering equal protection
4 claim. But they said, because of the other issues of
5 uncertainty of the State's defense, and because the harms to
6 defendants upon issuance of an order enjoining them from
7 proceeding with upcoming election under the present
8 districting plan, along with the public's interest in having
9 elections proceed in a timely manner with a minimal voter
10 confusion, outweighed any likelihood of success on the merits.
11 And so that --

12 JUDGE BREDAR: So even in the context of racial
13 gerrymandering, where the law has got so much more clarity
14 than we have in the context of political gerrymandering, and
15 in circumstance where is the Court concluded that the
16 plaintiffs had made a very substantial demonstration of their
17 case, and perhaps even demonstrated the ultimate likelihood of
18 success, the Court was nonetheless still reluctant to enter a
19 preliminary order of relief because of the practical
20 implications of doing so, the impact that that would have, the
21 disruptive impact that that would have on the otherwise
22 orderly nature of the electoral process and that stay.

23 MS. RICE: Correct, Judge. And I think also it's
24 helpful to think about it in terms of the upcoming 2018
25 elections. The candidate filing deadlines -- the candidate

1 filing has been open. Many people have already filed for
2 candidacy. There are ongoing election campaigns. The
3 primaries are coming up in June. So even if this Court were
4 to enter a preliminary injunction and stay its effect
5 immediately, that campaigning would be proceeding under a
6 cloud. So that kind of voter confusion that the three-judge
7 panel in *Harris* recognized, would definitely be present here
8 in Maryland and have a practical effect on the administration
9 of elections here.

10 It is also, I think, worth noting that the
11 plaintiffs delayed quite substantially in bringing their
12 preliminary injunction claim. And they make a few factual
13 assertions that I think bear clarification in their reply.
14 First off, they say that they were awaiting the outcome of
15 referendum. Await it they did. Instead of filing close in
16 time to the 2012 election, they waited an additional, I think,
17 approximately 13 months to file their claim. It wasn't filed
18 originally until 2013.

19 Also, many of the plaintiffs could have brought a
20 different case, while the original case here was on appeal.
21 The cause of action was really clarified in their second
22 amended complaint to be the First Amendment retaliation cause
23 of action. They did state that their first claim -- First
24 Amendment claim was stated, but they never had the retaliation
25 theory that the Court ultimately adopted.

1 JUDGE NEIMEYER: That's parsing it a little bit,
2 because when the Supreme Court sent it back, one of the bases
3 that they outlined as to why it was not totally frivolous was
4 the First Amendment claim. They said the Court has never --

5 MS. RICE: Right. And I'm not saying that they
6 didn't have a First Amendment claim. What I'm saying is they
7 didn't have a First Amendment retaliation claim. So to the
8 extent that the plaintiffs other than Mr. Benisek felt that
9 they had that First Amendment retaliation claim, they were
10 perfectly capable of filing that claim during the pendency of
11 the suit.

12 Also the plaintiffs make a misstatement in their
13 complaint. Their second amended complaint was filed on March
14 3rd, 2016. The primaries were commenced early voting April
15 14th, 2016. So they actually could have moved at this time
16 for preliminary relief. I don't know if it would have been
17 appropriate or not. But instead of doing that they've waited
18 until after the decision on their motion to dismiss.

19 And we've provided the Court with cases on First
20 Amendment retaliation claims where delays that are much
21 shorter in time, just a matter of months or weeks, have
22 precluded relief. And some of these cases even involved harms
23 that were periodic or recurring, such as the both the *Doe v.*
24 *Banos*, the harm there was a Lacrosse season that was going to
25 pass by. And the *Utah Gospel Mission*, where the protesters

1 were saying that they really needed a specific a temporal
2 ability to protest.

3 So it may be different in terms of the harm of an
4 election, but the *League of Women Voters* case is actually a
5 voter -- a ballot box case, access to -- voter access case.
6 And here the plaintiffs have said that they are impeded in any
7 way from exercising their right to vote. We're talking about
8 an indirect burden on the First Amendment right, not a direct
9 burden.

10 So for that reason too, it would be -- and the
11 plaintiffs haven't offered any case in which a First Amendment
12 retaliation claim was awarded after such a long time in
13 failing to seek relief, preliminary injunction for -- or
14 because of a failure to show irreparable harm. And I think
15 too that interacts with the possibility of a stay in this
16 case. It's not just that they have to show irreparable harm,
17 they have to be showed irreparable harm that could be remedied
18 by the entry of a preliminary injunction. And so to the
19 extent that the -- it's incredibly likely that the relief
20 would be stayed in any event, they've shown no viable path.

21 And it's their burden, on the preliminary
22 injunction, to make a clear showing on all four of the
23 elements. And they haven't shown a viable path to gain
24 appellate review in time for their December 19th deadline.
25 And I think that that's also really key here. We're talking

1 about an incredibly short amount of time. We all acknowledge
2 that an appeal is a certainty. So to not have laid out a path
3 of how that could possibly happen, I think is a failure on the
4 irreparable harm proof burden.

5 So I think that's close to where we are on time. So
6 if you have any other --

7 JUDGE NEIMEYER: I tell you what I propose to do, if
8 it's all right with counsel, we've heard opening presentations
9 from each of you. I think we ought to give each of you an
10 opportunity to do some responding. And we've built in that
11 time. And it's probably a good time now to take a mid-morning
12 break. And let everybody take care of other needs that are
13 not relevant to the issues. So we'll stand adjourned for a
14 short morning recess. Five minutes.

15 (A recess was taken.)

16 JUDGE NEIMEYER: Be seated please. Judge Bredar
17 questioned why I limited it to five minutes, because everybody
18 has different needs. I don't know if that's fair, what I
19 said.

20 JUDGE BREDAR: Nothing is sacred evidently in the
21 hallway.

22 JUDGE NEIMEYER: I just want to -- this has been an
23 interesting dialogue and I think it should continue to pick up
24 any pieces. And the materials you have presented have been
25 interesting. These are complex issues. Very complex issues.

1 And also complex judgments.

2 But why don't we do this: Why don't I go back and
3 give Mr. Kimberly, or anybody on his side, an opportunity to
4 rebut and take 15 minutes, say. And then I'll do the same
5 with Ms. Rice, give you a chance. And then we'll see if we've
6 pretty much finished the oral business for the day. But I'm
7 not going to put any firm guidelines, because we want to hear
8 from you until we've gotten a good handle of your positions.
9 But why don't we start with that way. And, Mr. Kimberly, you
10 can address us.

11 MR. KIMBERLY: Thank you, Judge Neimeyer.

12 JUDGE BREDAR: Mr. Kimberly, if we denied your
13 request for a preliminary injunction, wouldn't that be
14 immediately appealable?

15 MR. KIMBERLY: It would, yes, Your Honor. And any
16 decision on the motion for a PI would be immediately
17 appealable under Section 1253.

18 JUDGE BREDAR: So if we just entered a stay, but
19 didn't address the request for the PI, that puts you in a
20 little bit of a gray area. You might still be able to get
21 some appellate traction on the notion that functionally you've
22 been denied. But if we expressly denied you the PI, you've
23 got an immediately appealable question, don't you think?

24 MR. KIMBERLY: Yes, absolutely. And I think if the
25 Court did enter --

1 JUDGE NEIMEYER: And if we were to deny the
2 preliminary injunction, getting to the other issue, it might
3 be appropriate at that point to stay progress to a trial to
4 allow the appeal and to not have in play -- I mean, there
5 would be no injunction in place on a denial, and to stop the
6 proceedings here on the final materials that the State might
7 want to put in.

8 I must say, conceptually, I'm having a little
9 difficult time finding out what would be tried. But I
10 understand Ms. Rice sort of indicated that there maybe some
11 applications on evidence that they may wish to -- is that
12 right, what I was assessing on your part?

13 MS. RICE: Yes, Your Honor.

14 JUDGE NEIMEYER: And so until we actually make a
15 determination of our own here, just thinking out these
16 hypotheticals.

17 MR. KIMBERLY: Sure. And I'll address each of those
18 points, if I may. First, I'd like, on the merits I'll talk a
19 bit about "but for" causation. That seems to be the nub of
20 the Court's concerns here today. And then following that I'd
21 like to talk a little bit about 65(a)(2). And also some of
22 the other elements of our injunction motion.

23 JUDGE RUSSELL: I've got a question precisely on
24 that one.

25 MR. KIMBERLY: Sure.

1 JUDGE RUSSELL: Wouldn't the evidence be much
2 stronger had, let's say, both sides went out and canvassed a
3 neighborhood of the displaced voters, door to door, robocalls,
4 contacts together, and accumulated affidavits on how a person
5 would have voted or how a person did vote and why, to ensure
6 that the accuracy of this statistical analysis that was
7 conducted by the DPI is certainly accurate, wouldn't that make
8 your case much stronger if you had about 3,000, 4,000
9 affidavits from displaced registered Republicans stating that
10 I would have voted for Bongino, or I would have voted for
11 Bartlett, or better yet, you know, 300,000.

12 From a practical standpoint, I understand how
13 cumbersome that would be. And I can imagine how impractical
14 that would be for purposes of trial. And trying to assess the
15 credibility of those actual registered Republicans who would
16 be coming in to testify that, yes, in fact, I would have voted
17 in favor of Bartlett, or yes, in fact, I would have voted in
18 favor of Bongino. But wouldn't that just completely close the
19 door on any "but for" causation if you had that kind of
20 canvassing documentation or analysis?

21 MR. KIMBERLY: Certainly, Your Honor, that would be
22 a belt to our suspenders. And --

23 JUDGE RUSSELL: And it would be just as strong for
24 the other side if they -- if those voters did in fact --

25 MR. KIMBERLY: But I guess what I would say in

1 response, though, is that I don't think the Court should let
2 the perfect be the enemy of the good in this case. We have
3 very clear evidence here -- and if we could pull up slide
4 51 -- this is what I was discussing at the outset.

5 Again, so what the evidence here shows, and I really
6 don't think the Court has to stretch very far to get here, is
7 that the best predictor of future voting behavior is past
8 voting behavior. It's absolutely true and we do not suggest
9 otherwise, that it is not perfect. But perfection and
10 certainty is not our standard as I mentioned in my opening
11 statement.

12 What the evidence here shows, as Judge Neimeyer was
13 explaining before, is that the map drawers took out 360,000
14 members of the 6th District and replaced them with 350,000.
15 It is no coincidence that the net effect of that was to pull
16 out 66,417 net Republican voters and replace them with 24,460
17 net positive Democratic voters and 7,613 net positive
18 independent voters. What this reshuffling did was take, as
19 I've said repeatedly, is take Republicans out and replace them
20 with Democrats and independents.

21 What this shows, as a function of no more than that,
22 which was a product of a specific intent to bring about a
23 particular end, is that the probabilities went from virtually
24 certain to near -- virtually certain beforehand that it would
25 be a Republican, to nearly certain that it would be a

1 Democrat.

2 Now, when I say nearly certain, I am acknowledging
3 that baked into these numbers is a recognition that sometimes
4 politics plays out in unpredictable ways. But here -- I mean,
5 what we have here is so far and beyond what we need to show,
6 that it was more likely than not that the outcome here in
7 2012, 2014, and 2016, is attributable to the gerrymandering,
8 that is not a concession that troubles me in the least.

9 Now, I want to talk a little bit about this --

10 JUDGE RUSSELL: And this is solely, this data that
11 you're going to rely upon, in the event that this case were to
12 go to a trial on the merits.

13 MR. KIMBERLY: Well, I mean --

14 JUDGE RUSSELL: You're not going to seek to do any
15 of the polling. You're not going to seek any affidavits from
16 those displaced Republican voters to find out what their
17 intent is. You're not going to talk to the actual voters who
18 were displaced, which is your best evidence, your best
19 evidence on whether or not there's a concrete harm.

20 MR. KIMBERLY: Your Honor, I mean, I guess what I
21 would say is if the Court decides that further proceedings are
22 necessary and it wants to go to trial, we will, of course, do
23 our best to gather whatever evidence is going to persuade the
24 Court to rule in our favor, but I. --

25 JUDGE RUSSELL: It's your case. You know, we're not

1 going to tell you what you need for your case. But if you
2 need more time, if you think you need more time, to gather and
3 gather that evidence, then you put in a request for it. But I
4 was just asking whether this -- this is basically sum and
5 substance of everything that you're going to present for your
6 concrete impact and your "but for" causation. And you think
7 that that's enough.

8 MR. KIMBERLY: Let me be crystal clear about this, I
9 do think this is enough. Absolutely. Now, if the Court
10 decides to resolve the preliminary injunction in such a way
11 that a trial becomes necessary, that isn't to say we wouldn't
12 reconsider the comments that Your Honor is making. But I want
13 to be absolutely clear, that this is extremely strong
14 evidence. As I say, it groups voters, there's no question,
15 we're not going out and talking to Joe Voter on, you know,
16 Smith Street.

17 JUDGE RUSSELL: But they're not talking to anyone at
18 all. They're not talking to anyone at all.

19 JUDGE RUSSELL: No, they're looking at something
20 that's even better. Because here's where I want to push back
21 on the idea that polling was off in more recent elections.
22 This is not polling. Polling is what happens when some person
23 in a call center calls somebody up and asks them on the phone,
24 you know, who are you thinking about voting for. This is
25 substantially more accurate. This is who did you vote for in

1 the prior election. There is no better indicator of how
2 somebody is likely to vote in the next election than how they
3 have voted in prior elections.

4 JUDGE BREDAR: So if that doesn't predict the
5 outcome, then there is no better way to predict the outcome.
6 And when in the last presidential election, we have all of
7 these people who voted for President Obama in four or five
8 critical states, and were expected to stick by their guns and
9 vote as they had previously, and didn't, that undercuts the
10 whole method of proof.

11 MR. KIMBERLY: So I'm going to pause here and
12 respond to that in a legal way, before coming back to it in a
13 factual way. So if we could bring up the slide on Hartman.
14 This is a legal issue that we haven't yet addressed. In every
15 First Amendment context the law holds that when a plaintiff
16 comes forward with evidence of specific intent, and a
17 burden -- as a burden specific intent, that causation is
18 presumed in the law, that the outcome that obtains is
19 attributable to that specific intent.

20 And the idea behind this is that it is virtually
21 impossible -- although, I would say we've done it in this case
22 if the Court disagrees with us on this burden shifting
23 framework -- but it is substantially more difficult for a
24 plaintiff to prove a negative, than it is for the State to
25 come forward and say, look, here are these factors that

1 explain the outcomes. Noticeably absent from the record in
2 this case is a single bit of evidence indicating that the
3 outcome is attributable to some other factor. All we have is
4 speculation about Dan Bongino being a weak candidate in 2014,
5 on the basis of his underperforming Governor Hogan. But if
6 you look at the actual numbers if every single individual
7 voter who voted for Governor Hogan also voted for Dan Bongino,
8 the outcome of the election would have been the same. So it's
9 nothing but a red herring.

10 There is no evidence in this case, not a shred that
11 the State has put forward, to suggest that the outcomes are
12 attributable to anything else, other than the moving of
13 Republicans out and the moving of Democrats in.

14 JUDGE RUSSELL: Well, is that really the case?
15 Because I know in the state's brief they talk about Mr. --
16 Congressman Bartlett's age, the fact that he's far right
17 leaning, he lacked the monetary resources to be able to put up
18 a fight against Delaney. He was -- he had become, he got a
19 plurality in his own party, so he only got 42 percent in his
20 own party for the nomination. So those are other factors,
21 which certainly could have contributed to his defeat. Maybe
22 not the large -- as large a margin as you're suggesting. But
23 those are factors that were, in fact, suggested and promoted
24 by the State.

25 Delaney on the on the other hand was more of a

1 moderate -- been characterized as more of a moderate
2 conservative Democrat when compared to the politics of
3 Congress Bartlett. So even in that election there may have
4 been some factors, which could be attributed to the
5 significant spread that the Congressman was defeated by.

6 MR. KIMBERLY: So I guess what I would say about
7 that is certainly if the Court agrees with us that it's the
8 State's burden to prove that, they've come up short. I mean,
9 there's nothing but speculation that there are some factors
10 that were in play that made one candidate maybe less strong in
11 that election cycle than he had been in prior election cycles.
12 There's nothing to suggest, in the least, that the massive
13 swing that we saw from 2010 to 2012 is attributable to
14 anything other than, as I say again, pulling 66,000 Republican
15 voters out of the district and replacing them.

16 JUDGE RUSSELL: Well, Bartlett got 42 -- he didn't
17 even get 50 percent of his own party's vote.

18 MR. KIMBERLY: Your Honor, that's in the primary.

19 JUDGE RUSSELL: Right.

20 MR. KIMBERLY: No, I understand. But so let me
21 finish the thought, so Republicans may not have -- may have
22 favored, and in fact they didn't, he got most of the vote in
23 the primary, he got the nomination.

24 JUDGE BREDAR: He got the largest vote, he didn't
25 get most.

1 MR. KIMBERLY: Most, I mean he wasn't --

2 JUDGE RUSSELL: -- percent of his own parties
3 vote.

4 MR. KIMBERLY: He was the candidate who did best in
5 the election is what I mean, in the primary election. The
6 voters in the Republican primary -- there's no evidence that
7 the voters in the Republican primary, who voted for some other
8 nominee didn't or wouldn't have cast their vote for him in the
9 general election. That the voters were thinking about putting
10 forward, perhaps, a different nominee is no explanation for
11 what the Court sees right now, going from 28.2 for a
12 Republican down to 20.9 in 22. The idea that this is
13 attributable to anything other than the complete upending of
14 the political complex of the 6th District just doesn't stand
15 up to scrutiny. It certainly is not supported by any evidence
16 that the defendants have put forward in this case.

17 JUDGE RUSSELL: And you're suggesting it's not your
18 burden to prove that that 58 percent of the Republicans within
19 that district who did not vote for Bartlett, voted or
20 didn't -- voted for the Democrat or didn't vote at all.

21 MR. KIMBERLY: That's right. And I have to say 58
22 percent is a pretty large overstatement, because that's --

23 JUDGE RUSSELL: Oh, well, it's -- but he only got 42
24 percent of the vote, so that leaves 58 percent of people who
25 didn't vote for him.

1 MR. KIMBERLY: But of primary voters.

2 JUDGE RUSSELL: Of primary voters, in his own
3 party.

4 MR. KIMBERLY: Primary voters I think was about a 30
5 percent turn out, which is about half of the overall turnout.
6 So it's way lower, in terms of --

7 JUDGE RUSSELL: -- but the bottom line is 50 percent
8 of the people who voted in the Republican primary didn't vote
9 for him.

10 MR. KIMBERLY: This is true, Your Honor. So yes, it
11 is my suggestion that the State would have to come forward and
12 prove the, with respect, completely implausible suggestion
13 that Republicans who voted for some other candidate in the
14 primary didn't vote for the Democrat in the general election.
15 That is not generally the way that -- and I should say, this
16 is not speculative. This, again, is baked into the Democratic
17 Performance Index and the Partisan Voter Index, both of which
18 show, again, the best predictor for how voters behave in
19 elections -- in future elections, in upcoming elections, is
20 how they have behaved in the past. There is no --

21 JUDGE RUSSELL: Does it factor in by way voter
22 apathy, the 67 percent lack of voter turn out? In other
23 words, is that a factor as well?

24 MR. KIMBERLY: The short an --

25 JUDGE RUSSELL: -- the DPI takes into consideration.

1 And if that's the case, then how do they -- was there any
2 reconciliation with the DPI in the Obama one election, for
3 example, in which there was record turn out among Democrats,
4 including minorities, to support him. So how does that factor
5 into this metrics.

6 MR. KIMBERLY: So it factors in in two ways. First
7 of all, it is these sort of nonquantitative factors are taken
8 into account by the Cook PVI. But the other way that they're
9 factored in is a recognition that none of these metrics is
10 perfect. So it's factored in by looking at the fact that the
11 prediction is 94 percent, it's not 100 percent. It's a
12 recognition that it's not perfect. So there are outlier
13 elections in which the outcome of the election is attributable
14 to broader political influences that are not captured in these
15 metrics. That is not something that we deny.

16 But, again, those factors, the record shows, are
17 exactly what were in play in 2014, and nevertheless John
18 Delaney won. So, I mean, I guess from my perspective -- and
19 in fact, that 94 percent, again, doesn't take -- it's not
20 saying the margin's going to be enormous. If you see someone
21 likely -- an election handicapped likely Democrat, it's not to
22 say the Democrat is going to win by 20 points. It's saying
23 the Democrat is going to win. And that's exactly what
24 happened, despite a waive election in favor of Republicans
25 across the nation. And despite the fact this John Delaney was

1 a vulnerable candidate, being up for re-election the first
2 time.

3 So, again, I want to stress, I think the evidence is
4 more than sufficient to show that the outcome of the
5 elections -- that, first of all, there's no debate that the
6 gerrymandering resulted in vote dilution. That's the harm.
7 The question is whether it's sufficiently great to impose a
8 concrete impact. We think the evidence is more than
9 sufficient to show that, in fact, the outcome of these
10 elections in 2012 through 2016, that the gerrymandering was a
11 "but for" cause of these outcomes. That these outcomes would
12 not have happened if the lines had not been drawn with laser
13 like focus on DPI and getting it as high as it possibly could
14 go, on the basis of the way the voters had voted in the past.
15 And as Judge Neimeyer said, that's a premise for all
16 gerrymandering, that that is in fact the way it works.

17 JUDGE NEIMEYER: Okay. Are we at about 15 minutes?

18 JUDGE BREDAR: Yes.

19 JUDGE NEIMEYER: We're over. I want to be fair to
20 everybody, have you had your say here?

21 MR. KIMBERLY: I want to, just if I may, say
22 something quickly about 65(a)(2).

23 JUDGE NEIMEYER: Go ahead.

24 MR. KIMBERLY: I'm a little bit puzzled, honestly,
25 by the State's very technical effort to get around this, by

1 saying they're not on notice. We have been saying in meet and
2 confers for months and months that we were intending to move
3 this Court to advance a trial on the merits with the
4 preliminary injunction. This Court's order at Docket 185 says
5 "Now pending before the Court is the Plaintiff's Motion for
6 Preliminary Injunction and the Motion to Advance and
7 Consolidate the Trial," and that those would be the --

8 JUDGE BREDAR: Well, that was the name of the
9 motion.

10 MR. KIMBERLY: But the question is notice. It would
11 be -- I think it would be quite strange.

12 JUDGE BREDAR: What's the body of the order say?

13 MR. KIMBERLY: I think the body of the order says:
14 A hearing on the motion is set for Friday, July 14th. The
15 hearing will be of a particular duration. The Court will also
16 hear argument on a stay. And then in its later order, the
17 Court clarified that it would not be considering summary
18 judgment. We're not here arguing summary judgment. We're
19 here arguing --

20 JUDGE BREDAR: And clarified exactly what we would
21 be hearing.

22 MR. KIMBERLY: Well, I'll tell you, Your Honor, I
23 didn't understand it as saying the Court wasn't going to
24 considering the Rule 65(a)(2) motion.

25 JUDGE NEIMEYER: Well, 65(2)(a) (sic) also says that

1 we can raise it after the beginning of the hearing.

2 MR. KIMBERLY: That's right. I mean, I don't --

3 JUDGE NEIMEYER: The technical argument is not a
4 good one. I think it's better as a substantive question.

5 MR. KIMBERLY: And the substantive question is, you
6 know, I don't think -- certainly, if the Court is inclined to
7 enter an injunction, I don't think there's anything to be
8 gained by pushing on with summary judgment briefing and
9 *Daubert* briefing, all of which sort of, in basic substance,
10 will be asking the Court to weigh the evidence yet again. It
11 will be duplicative of what is pending before the Court at the
12 moment. And so then the only question is whether there's
13 anything to be gained from a trial. But I think, as the Court
14 has indicated, the evidence here is pretty clear, certainly,
15 on the first two elements. We think in light of the burden
16 shifting framework and the evidence we have on past voter
17 history predicting future voter history, the PVI and the DPI,
18 that we have more than enough on "but for" causation as
19 well.

20 JUDGE NEIMEYER: The rule says before or after
21 beginning the hearing on a motion for preliminary injunction,
22 the Court may advance.

23 MR. KIMBERLY: And it would be quite surprising, I
24 think, for the State really to stand up and say it wasn't on
25 notice that this was an issue, I mean this is something --

1 JUDGE NEIMEYER: I don't think that -- and I don't
2 think Ms. Rice is going to live and die on that. I think her
3 argument has to be is there more to try.

4 MR. KIMBERLY: Right. And our position is --

5 THE COURT: Because you get -- ironically your
6 burden is lower if it's ultimate relief; right? You don't
7 have to show likelihood and deal with all of these sort of
8 *Winter* preamble preliminary proceedings, it's just do we get
9 it or not.

10 MR. KIMBERLY: That's exactly right. And --

11 THE COURT: 51 percent probably carries the day on a
12 case where you're in court seeking a final permanent
13 injunction.

14 MR. KIMBERLY: That's correct.

15 JUDGE BREDAR: 51 percent probably doesn't carry the
16 day when you're in a preliminary proceeding seeking a PI.

17 MR. KIMBERLY: It might not. That's exactly right.

18 Now the other factors, the broader factors that Ms.
19 Rice addressed just a moment ago, before the break, about
20 public interest and hardships, I think those are probably
21 about the same. And, you know, I think those issues really
22 speak for themselves. If we are right -- and they follow from
23 the merits, if we are right from the merits that the drawing
24 of the 6th District is unconstitutional, and that Republican
25 voters there have been unconstitutionally penalized for having

1 voted in favor of Republicans in past elections, then it's
2 plainly in the public's interest to prevent further elections
3 under what is an unconstitutional map.

4 I want to talk also just very briefly about the
5 burden that's on the State. This is relevant also,
6 incidentally, to the *Whitford* case. What's going on in
7 *Whitford* is they have to into draw the entire state
8 legislative map. That's 99 districts they have to redraw.
9 Here, all we're asking for, is a map that redraws the lines of
10 the 6th District in a way Judge Neimeyer has suggested, that
11 does not take account of past voter history one way or the
12 other. We're not saying they have to take account Republican
13 voter history, make it better for Republicans. The point is
14 the process shouldn't take consideration of this factor at
15 all. That is, ultimately, as our expert has shown, a fairly
16 limited task. It can be done without upsetting the rest of
17 the map.

18 JUDGE BREDAR: And there's nothing wrong then with a
19 state being carved up in such a way that with respect to 10 or
20 20,000 voters, there's been no consideration whatsoever of
21 their past voting preferences by party, but with respect to
22 the other 95 percent of the state, where one assumes that
23 there has been such consideration, because the evidence you've
24 presented in this case, although your claim is just about the
25 6th, reveals how the whole state was actually gerrymandered,

1 they would be voting in districts that did have -- were still
2 infected.

3 MR. KIMBERLY: So that's --

4 THE COURT: And so now we're proceeding on to an
5 election with the State having two different theories having
6 motivated how lines were drawn. The special case, that was
7 the subject of your litigation, of your lawsuit, and that
8 having been remedied; and the rest, which wasn't, so it hasn't
9 been fixed.

10 MR. KIMBERLY: So there are two things to say about
11 that. Obviously, the first is standing. We don't have
12 plaintiffs from these other districts. And we would disclaim
13 any standing to complain about those other districts. But
14 beyond that also, I think as our colloquy over the past couple
15 of hours has indicated, "but for" causation is an element of
16 what has to be shown, either by the State -- lack of it by the
17 State or positive by us. And there hasn't been any evidence,
18 I think, about tying election outcomes in those other
19 districts. Our evidence certainly has been focused only --

20 THE COURT: But you're married to them. There's no
21 way you can change one district without changing other
22 districts, it's --

23 MR. KIMBERLY: That's true --

24 THE COURT: -- zero sum game.

25 MR. KIMBERLY: That's true as our expert Michael

1 McDonald demonstrated. That's true in this case only with
2 respect to the 8th District. The lines in this case -- now,
3 maybe those who are in charge of redrawing the map, if the
4 Court ends up ordering that, would want to redraw other lines
5 as well. We leave that to them. That is a policy question
6 for state legislatures. But it's at least possible. And we
7 don't think that an injunction from the Court ought to require
8 anything more, expressly or otherwise. It would be possible,
9 in a very limited way, to redraw the lines in the 6th and 8th
10 District without upsetting the rest of the map. Again,
11 whether the State decides to take on more than that, I think,
12 would be a policy judgment up to the State.

13 I think, I think that's the extent of -- and if I
14 may just by reference, it's page 21 of our opening brief that
15 shows this alternative map. Showing this alternative way of
16 drawing it in a way that reinstructed our experts not to look
17 at this sort of stuff. This is what they came up with. It's
18 one among many options that are possible.

19 JUDGE NEIMEYER: You say it's actually in your brief
20 here?

21 MR. KIMBERLY: It is reproduced in our brief on page
22 21.

23 JUDGE NEIMEYER: I've got it. I see it.

24 MR. KIMBERLY: And as you can see, all it does is
25 keep the 8th District together in Montgomery County. It dips

1 into Montgomery County, as the state has said deciding not to
2 cross the Chesapeake Bay would require. That isn't something
3 that we dispute. But the difference between this map and the
4 adopted map is this map would not have produced a Democratic
5 victory in 2012, 2014 or 2016.

6 JUDGE BREDAR: But you're only going to move 10,000
7 people. What about all those other Republicans that got moved
8 and they come to the end of this litigation, well, what about
9 me? I didn't get moved back to the 6th. I want to be moved
10 back to the 6th.

11 JUDGE NEIMEYER: You don't want to be in another
12 lawsuit, do you?

13 JUDGE BREDAR: Well, I have resisted pointing out
14 the implications of Mr. Kimberly's solution, which has him on
15 the quick Marc train back to Washington, D.C., with a nice
16 little solution to his problem and us left with a mess. But
17 we're not going there, because I understand your point.
18 You're only here on this litigation. But back to my point,
19 what about -- I mean 350-, 360,000 people got moved around,
20 you're going to only correct the situation for 10,000 of
21 them.

22 MR. KIMBERLY: Well, so let me be clear about --

23 THE COURT: You're going to strand those poor
24 Republicans out there in --

25 MR. KIMBERLY: Let me be a little more clear.

1 JUDGE BREDAR: -- in with all those Montgomery
2 County voters?

3 MR. KIMBERLY: Let me be a little more clear about
4 what I'm suggesting about the standard. First, the State
5 suggested that we haven't offered a clear rule to guide the
6 redistricting moving forward, so let me state it clearly for
7 the Court and for the State. The rule is, do not look at past
8 voter history with an intent to dilute members of any
9 particular -- dilute the votes of supporters of any particular
10 party on the basis of their past voting history.

11 JUDGE BREDAR: If that's the standard, how can we
12 draw a remedy that only effects 10,000 people?

13 MR. KIMBERLY: Again, I want to be clear, I don't
14 think it's the Court's job, at least at the outset -- it might
15 at later time, and that would be a subject of briefing -- but
16 at the outset it would not be the Court's job, it would be the
17 State's job.

18 JUDGE BREDAR: Okay. But wouldn't the State
19 necessarily have to then undo everything that they did do in
20 the 6th and 8th --

21 MR. KIMBERLY: Yes.

22 JUDGE BREDAR: -- that was rooted in the misconduct
23 that you allege and that we would have ratified and said,
24 yeah, that's right, that was misconduct.

25 MR. KIMBERLY: The answer is yes, Your Honor.

1 JUDGE NEIMEYER: All right. Why don't we hear from
2 Ms. Rice.

3 MR. KIMBERLY: Thank you.

4 MS. RICE: So I think first to note on the
5 alternative map, when we took the deposition of Professor
6 McDonald, which is attached to our briefing, he said that he
7 did not know if his assistant, who did the drafting for him,
8 he reviewed it, had consulted the political data or not. That
9 he had instructed him not to, but he didn't know one way or
10 the other if he did. And that he had that data available to
11 him. This ties directly into some of the practical problems
12 in saying --

13 JUDGE NEIMEYER: But, you know, it seems to me that
14 if you can make the numbers work, and apparently that map at
15 least makes the numbers work as between the 8th and the 6th,
16 and the State is told to redraw that line without regard to
17 how people voted, then the State could do something. I mean,
18 this wouldn't be an impossibility. But that's --

19 MS. RICE: Well, this goes right into the heart of
20 why it's so difficult to do it. Because if you look, there's
21 some -- at that map, you can see that it includes both
22 Rockville and Gaithersburg in the alternative 8th District.
23 If you know anything about Maryland political geography, you
24 know that both of those cities are places where there are a
25 lot of Democratic voters. The legislature can't scrub that

1 from its mind. So if it wants, for whatever reason, to
2 separate Gaithersburg and Rockville, it will do it with the
3 same level of intent of knowing that the outcome would be to
4 dilute votes.

5 JUDGE NEIMEYER: That's a cynical approach. I mean,
6 if we establish a rule and tell them to draw a line without
7 regard to how people voted, people can cheat or they don't
8 have to cheat. And I don't think we ought to presume that
9 because they're going to cheat, we shouldn't issue the order.
10 I mean, that --

11 MS. RICE: I think it's more --

12 JUDGE NEIMEYER: -- isn't the way we function as a
13 Court.

14 MS. RICE: -- pointing out the problem of the
15 definition of intent. Mr. Kimberly just read you the entire
16 sort of you need to not look at voter history, for the
17 purposes of burdening, or advantaging I guess in his
18 formulation, one party or the other. But what I'm saying is
19 that by doing that what you're really saying is that you can't
20 look at voter history at all. You have to make -- I guess
21 we're asking each individual legislator to put themselves
22 behind a curtain, erase everything that they know, and just
23 draw the lines on these other means. And I think that that's
24 a very difficult --

25 JUDGE NEIMEYER: -- you start drawing lines --

1 MS. RICE: -- proposition.

2 JUDGE NEIMEYER: -- first of all by finding 721,000
3 people who are contiguous. Now the question is how are you
4 going to draw those lines? You look at political boundaries,
5 you look at rivers, natural boundaries, and you look at
6 cities. Okay. Let's put the two cities together. Forget how
7 they did it. Now, sure the politicians may say, well, I don't
8 think -- they probably would say more, I don't think we should
9 put a Prince George's County voter with a Garrett County
10 farmer. I mean, their interests are so distinct.

11 But to tell them not to use as part of their data,
12 the -- how people voted in the past and how they're registered
13 to vote, is a rule, it's not going to be perfect, but it
14 certainly is going to diminish this whole practice that is not
15 just in Maryland, it's we're seeing it everywhere -- not
16 everywhere, but in numerous states. And both Democrats and
17 republicans decry it.

18 MS. RICE: So I think that this point goes a little
19 bit to Judge Bredar's point of what's going to happen if this
20 remedy is ordered, who's going to have a claim in the future.
21 Because, again, it's going to be whether anybody else can say,
22 with that same level of intent that we're establishing here in
23 the future, that that remedy actually inflicted the same level
24 of harm. So we're going to get the same testimony from these
25 same lawmakers, that they're aware from the DPI data that is

1 in their districts and the place they campaign. That even
2 without awareness of the DPI data, they just know the
3 performance statistics of the different precincts as they
4 walk. So these are things that are inseparable. They
5 can't --

6 JUDGE NEIMEYER: If they find that they can't draw a
7 line without regard to voter registration, then there are
8 people that can draw that line and courts can supervise that.
9 I mean, it starts off as a state project. In the state of
10 Maryland, it's really a Governor's project. But it starts off
11 as a state project. If the Governor says I can't do that, I
12 know the State too well, he can appoint a commission to do it
13 or he can let the Court do it. But the idea that --

14 MS. RICE: I think it's less that they can't --

15 JUDGE NEIMEYER: -- people are going to try to
16 circumvent what the Court orders, just doesn't seem to make
17 much sense --

18 MS. RICE: Judge Neimeyer, with all respect, I don't
19 think it's about whether or not they can do. I think the
20 legislators are perfectly capable of making that intellectual
21 line in their head. We have great legislators here in
22 Maryland. I'm sure that they're capable of doing that. My
23 point is that when somebody else comes with a claim, they're
24 going to be able to make out some -- a claim that would
25 survive a motion to dismiss --

1 JUDGE NEIMEYER: Well, why don't we wait until that
2 claim comes and see what kind of data they have, and what kind
3 of results they have, and whether it fits the rule, and
4 whether it's extreme and that type of thing. But that's a --
5 the fact that we're going to have other cases that may be
6 difficult or in grayer areas, we're on a case-by-case method,
7 let's stick to this one and let the next case take care of
8 itself.

9 MS. RICE: So I do think that here, coming back to
10 this case, that we also -- one thing that I wanted to point
11 out to you is that we have provided in our motion, because
12 actually the kind of natural experiment that Judge Russell is
13 looking for, and that's how Washington County voted in 2012.
14 Washington County, which has been a part of that Western
15 Maryland congressional district ever since before there was a
16 Washington County, actually flipped and voted for Delaney in
17 2012. So you can tell, because the entire of the Washington
18 County was in the old 6th and new 6th, that there's changing
19 voter sentiment, even within the territory that was formerly
20 part of the 6th district.

21 So that kind of analysis of we've split Frederick
22 County in half, but we have no evidence from the plaintiffs
23 about whether that part of Frederick County would have voted
24 for Delaney or not, or whether the part that's in Carroll
25 County voted Democratic -- or that's attached to Carroll

1 County now in the 8th, also voted Democratically. So we have
2 no information, for example, how Carroll County -- we may have
3 information about how the entirety of Carroll County came out,
4 but not the part that's in the 8th District or was formerly in
5 the 6th. So that's the kind of proof that's missing here, the
6 causal --

7 JUDGE NEIMEYER: -- they have quite a bit. They
8 have, for instance, not only the swing of the 350,000 voters,
9 360, they also have specific data that shows a swing among how
10 people are registered of roughly 90,000 voters. The 66 and a
11 half thousand Republicans removed from the district and 24 and
12 a half thousand Democrats added. Now, that's specific data.
13 And then they have the fact that with that switch of data
14 there was a switch of party. Now, sure you say it's not
15 perfect proof, well --

16 MS. RICE: So I think it's not just not perfect
17 proof, that some of those switches are completely explicable
18 by intents other than the intent that is at issue here like
19 the intent --

20 JUDGE NEIMEYER: So what were the politicians doing
21 when they were trying to get a 7/1 map? In other words, your
22 argument suggests they were just acting in vain, it didn't
23 have any effect. They intended it to have an effect. These
24 are smart politicians, they knew what they were doing and they
25 accomplished it. And you're saying, oh, the dynamics of the

1 6th District is good. We'll probably get this way or that
2 way. Why are they manipulating the voting records then?

3 It just doesn't sit. It's too abstract. The idea
4 that a group of very sophisticated politicians, who know all
5 the members of the state, and they want to convert the State
6 from a 6/2 to 7/1, and they move Republicans out and Democrats
7 in, and --

8 MS. RICE: So I think that the --

9 JUDGE NEIMEYER: -- you don't think that that's a
10 concrete result when they finally succeed?

11 MS. RICE: I think that some of that can be seen in
12 exactly how the politicians explain themselves, which is to
13 say, we meant to make the 6th Congressional District more
14 competitive with, if we could, an advantage for Democrats. So
15 that's the formulation over and over again that you see from
16 Governor O'Malley throughout his deposition. And I think that
17 that's really telling, because it shows that they held it in
18 balance.

19 JUDGE NEIMEYER: If they want to make it more
20 competitive because of their program, the platform, that's one
21 thing. If they want to make it more competitive by removing
22 Republican voters, that's another. And that's exactly -- the
23 latter is what they did, they're going to make it more
24 competitive by removing Republican voters. Now, that is the
25 purported illegality.

1 MS. RICE: So I think also it's important to note,
2 again, how you can't just look at these, like, numbers in the
3 aggregate. I had that voter file open before and it goes
4 directly to what Mr. Kimberly just brought up on rebuttal,
5 with regard to the election of Governor Hogan. And I'm afraid
6 that this confusion may have resulted in an unclear footnote
7 in our brief. So there are available total election results
8 that would include absentee, provisional, and other ballots
9 that go -- went to Dan Bongino in the congressional district
10 election in 2014.

11 We, in our brief, compared that number to the only
12 available data in the -- that the State board of elections
13 makes available on its website, which is election day data
14 only for Governor Hogan. And just on election day, so none of
15 the early voting, none of the absentee ballots, Governor Hogan
16 got 560 votes than Dan Bongino's entire voting. But if you're
17 comparing apples to apples, on election day Mr. Bongino
18 actually only received about 77,000 votes to Hogan's 92,500.

19 So if everybody -- contrary to the plaintiff's
20 assertion, if everybody on election day who had voted for
21 Governor Hogan, had voted for Mr. Bongino, then he would be
22 the representative today. So there are other factors at play,
23 whether it's a tendency to split tickets, whether it was a
24 flaw in Mr. Bongino's candidacy. But even if there were no
25 early voting, although this is pretty typical, Mr. Bongino

1 would have actually won. Because on election day he had an
2 advantage over Congressman Delaney. But that's fairly typical
3 amongst Democrats and Republicans that there's a disaggregate
4 proportion.

5 So I think we can see from some of the actual
6 election results that happened after this plan, that it's just
7 not so simple, when we're talking about such a small
8 difference in DPI and where all the academic literature calls
9 anything from 45 to 55 percent competitive, that we're talking
10 about a competitive district where, in the minds of
11 politicians, anything could happen.

12 JUDGE NEIMEYER: The Cook index said likely
13 Democrat.

14 MS. RICE: Correct. So, but when we're talking
15 about --

16 JUDGE NEIMEYER: And the same index said before it
17 was solid Republican.

18 MS. RICE: So those numbers are trained on a model
19 that takes into account the results of elections nationwide.
20 Almost all congressional elections involve incumbents --

21 JUDGE NEIMEYER: Well, that's what you were just
22 invoking, these DPI -- you said the DPI index just makes it
23 competitive. I'm suggesting to you these indices are used by
24 politicians. And whether you're using the DPI, which is a
25 Democrat index or you're using the Cook index, the data are

1 the same.

2 MS. RICE: So I think, again, with the Cook index
3 when they say likely, there's still the possibility --

4 JUDGE NEIMEYER: Sure.

5 MS. RICE: -- there's a dozen -- and it's not an
6 abstract possibility, it's a concrete possibility, that nine
7 or a dozen people hold seats that are in districts that are --

8 JUDGE NEIMEYER: Except the possibility is less than
9 10 percent. In other words, this data shows that it's 94.5
10 percent when you have that kind of DPI, that the Democrat's
11 going to win. Sure it's a possibility some Republicans will
12 win. And vice versa, it's 99 percent that the Republican is
13 going to win under the old configuration. So there's data to
14 support all this. And the gaps you're talking about, sure,
15 they're built into the data.

16 MS. RICE: So I think in a way what I'm saying is
17 actually there is too much built into the data, because it is
18 nationwide data, it's trained on nationwide model, that all of
19 these discussions of likelihood are baking in some of the
20 truths about our political, process which is that it's 90
21 percent likely that any incumbent is going to be re-elected at
22 any time. So all of that's also in that model. And I
23 think --

24 JUDGE RUSSELL: -- so in other words had -- in your
25 example, I find it interesting, had all the Hogan supporters,

1 who cast ballots for Hogan, cast them for Bongino, purely upon
2 party lines, then Bongino would have won. However, if
3 everyone, you could have had some Democrats who ended up
4 crossing over and didn't vote through their party affiliation,
5 and voted for Hogan, but didn't vote for Bongino; right? And
6 we don't know --

7 MS. RICE: Right. We don't know.

8 JUDGE RUSSELL: We don't know because we don't know
9 exactly who these voters are or why they voted or whether or
10 not they crossed over Democrats or Independents, because we
11 haven't talked to them. And those indexes don't pick up that
12 information; correct?

13 MS. RICE: Correct. Those indexes don't pick up
14 that information. And, in fact, the smallest unit that
15 they're looking at is a precinct. So a precinct, however the
16 electoral outcome comes out within a precinct, is as small as
17 you can get for voter outcome data. So you don't even -- when
18 we're talking about sort of looking at individual, voter
19 conduct, we're never looking at individual voter conduct. We
20 don't know if we're looking at Republicans who often vote
21 Democrat, or like what happens here in the City, a lot of
22 people register as Democrats, even if they consistently vote
23 Republican, so that they can participate in the Democratic
24 primary. And that's an effect --

25 JUDGE NEIMEYER: Do I take it then that you're

1 saying we should not rely on DPI evidence or Cook evidence
2 because it's unreliable?

3 MS. RICE: No, I'm not saying that it's unreliable.
4 What I'm saying is that it doesn't get to the question that
5 the Court is asking here, which is --

6 JUDGE NEIMEYER: I don't understand why. If it is
7 acceptable data, and if the politicians rely on it. And they
8 rely on it with a very high degree of success, they've been
9 proved right way over 90 percent, then why shouldn't a court
10 rely on it in a preponderance of the evidence case?

11 MS. RICE: Because the cause of action here is that
12 Republicans were retaliated against in a First Amendment
13 sense, so meaning that the government took some cognizance of
14 their First Amendment expression, and then acted in some way
15 to deny them a benefit or to impose a harm on them. And we
16 just don't have the thread there. We don't have the -- that
17 action. We don't have the government --

18 JUDGE BREDAR: Because there's a difference between
19 relevant evidence and dispositive evidence.

20 MS. RICE: Right. I think that's true. And in this
21 case we don't have the evidence that would prove more likely
22 than not, that the government took that individual tack and
23 imposed that burden. There's -- there are breaks in the
24 causation. And we've shown multiple different ways how that
25 causation -- that causal chain just hasn't been established.

1 And I think, if the Court is interested, it may be
2 helpful to talk just very briefly about this idea of whether
3 or not *Mt. Healthy* applies. I think it's our argument that
4 even if *Mt. Healthy* applies to this kind of case, which it
5 seemed from the Court's earlier opinion that really causation
6 was going to be the plaintiff's burden, but even if it is in
7 this kind of burden shifting framework, even in that burden
8 shifting framework under *Mt. Healthy* you have to prove in the
9 first instance that that link existed. So it's only a
10 mechanism from teasing out --

11 JUDGE NEIMEYER: You know, in the copyright law, I
12 think we have a principle that if somebody intended to copy
13 somebody else, and that is demonstrated, then the burden
14 shifts to the defendant to provide explanations. And I think
15 the argument out of *Hartman v. Moore*, is that if the earlier
16 elements are carried, if there's intentional targeting of
17 people because of their voting record, then it's hard for you
18 to say if they've deliberately targeted you because the way
19 you voted, then you should provide an explanation as to, no,
20 that didn't make any difference, they voted some other way.
21 That's the theory of that shift.

22 MS. RICE: So I think that under *Mt. Healthy* and the
23 way that it's been applied by courts, it's really in the case
24 where you have a singular action, so that's why it works so
25 well in employment. And that's why in *Hartman v. Moore* they

1 said this doesn't work for this particular -- and it's been in
2 other kinds of prisoner retaliation cases as well, but that
3 doesn't work for prosecutorial immunity. It's because we're
4 looking at one decision with multiple causes. And here we
5 have multiple decisions, multiple acts of line drawing,
6 multiple decision points, where someone said, you know what,
7 we're going to expand the 1st District into Carroll County,
8 that's one decision. Then we say, okay, we're going to push
9 the 4th District out of Montgomery County, that's the second
10 decision --

11 JUDGE NEIMEYER: Those are all decisions made in
12 order to carry out the one decision, which was to make the
13 state 7/1.

14 MS. RICE: That is what we do not have proof of in
15 this case. So we don't have --

16 JUDGE NEIMEYER: You don't think there's evidence to
17 prove that?

18 MS. RICE: I mean, we've given -- the plaintiffs
19 have not asserted that. They've given no explanation for why
20 those other explanations are not facially true. We've --

21 JUDGE NEIMEYER: Let me ask you --

22 THE COURT: In fact, they've quite strictly confined
23 themselves --

24 MS. RICE: Correct.

25 JUDGE BREDAR: -- in talking about the 6th, because

1 they, for strategic reasons, have wanted to really narrow the
2 focus.

3 MS. RICE: Correct. That is correct. So we don't
4 have any evidence about that --

5 JUDGE NEIMEYER: -- your position on this, you don't
6 have think the State has -- I mean, the plaintiffs have proved
7 that the State intended to make Maryland a 7/1 in redrawing
8 the districts?

9 MS. RICE: I think that the plaintiffs -- and that
10 are -- that the intent that they've proven is an intent to
11 create a competitive district that has the likelihood of --

12 JUDGE NEIMEYER: Can you answer my question yes or
13 no?

14 MS. RICE: No.

15 JUDGE NEIMEYER: Did they present evidence,
16 sufficient evidence to show that the intent was to make
17 Maryland a 7/1 state?

18 MS. RICE: No.

19 JUDGE NEIMEYER: That's remarkable.

20 JUDGE BREDAR: Because that was never what their
21 stated intention was --

22 MS. RICE: Correct.

23 JUDGE BREDAR: -- for strategic reasons. And Mr.
24 Kimberly has been quite clear, hasn't he, with the State and
25 with Court, that he doesn't have to take on the whole

1 enchilada --

2 MS. RICE: Correct.

3 JUDGE BREDAR: -- he's only got to deal with the
4 6th.

5 MS. RICE: Correct. And that is why.

6 JUDGE NEIMEYER: O'Malley said it, Hawkins who drew
7 the first map said it. I don't understand, the whole dialogue
8 in the beginning was basically two things; make sure you make
9 the new map safe for the 6th, and try to make it 7/1. And the
10 debate was do we use the 1st District or the 6th? And the
11 other debate was do we do 8/0. They rejected the 8/0, they
12 rejected doing the 1st, and they said, okay, make it 7/1. Now
13 you don't think that's --

14 MS. RICE: Judge Neimeyer, respectfully, I don't
15 think that that's the evidence before you --

16 JUDGE NEIMEYER: That's what I read.

17 MS. RICE: -- I think that there were multiple
18 debates on multiple issues that were raised by multiple
19 different interest groups. For example, we had an entire
20 separate case in Fletcher, where there was a lot of question
21 about the 4th coming out of Montgomery County, and how the 8th
22 was going to look. I mean, those things were on the minds of
23 the map makers. And they were real concerns that they may
24 have even prioritized over any of these other goals. And we
25 have no -- because Mr. Kimberly has chosen not to prove it, we

1 don't have proof of that in this case. That 7/1 predominated,
2 there's no proof of that, because Mr. Kimberly has not
3 attempted to prove that.

4 So, respectfully, I don't think that we do have that
5 level of proof of intent here. I'm not sure whether or not
6 it's necessary.

7 JUDGE NEIMEYER: Okay.

8 MS. RICE: But --

9 JUDGE NEIMEYER: I think we're about exhausted this
10 subject, unless you have something new and different.

11 MS. RICE: I do not.

12 JUDGE BREDAR: I think you've exhausted the
13 judges.

14 MR. KIMBERLY: Your Honor --

15 MS. RICE: We can all be exhausted.

16 MR. KIMBERLY: I wonder if I could have 30 seconds
17 for a very quick correction of the record.

18 JUDGE NEIMEYER: And if she needs 30 seconds after
19 you, we'll give her maybe another 30 seconds too, but go
20 ahead.

21 MR. KIMBERLY: I just wanted to clarify this went
22 through an exchange concerning Hogan versus Bongino, there are
23 two very quick things to say about it. First, Ms. Rice
24 suggested that there's no evidence that there was any way to
25 take account of these things. That's in fact false. There

1 were two DPIs. There's the State DPI, which takes account of
2 the way that voters vote in state elections. And there's a
3 federal DPI, which takes account of the way people vote in
4 federal elections. There's a recognition built into the NCEC
5 process that those two things are distinct. And what the map
6 drawers were focusing on was the federal DPI. And what the
7 federal DPI showed is that the 6th District would come up
8 blue.

9 Now, the other thing to mention about this in some
10 respects really I think --

11 JUDGE NEIMEYER: You mean even if the votes --

12 MR. KIMBERLY: Of the state DPI were lower. That's
13 right.

14 JUDGE NEIMEYER: No, but even if the Republican
15 candidate got all of Hogan's votes, they still would have
16 lost?

17 MR. KIMBERLY: That's right. So what I'm saying is
18 it's taken account for the fact that the federal candidate
19 would underperform. It's built into these two flavors of the
20 DPI that the federal candidate might underperform the State
21 candidate and vice versa, again, based on the same sort of
22 data that they used to develop the DPI in the first place. So
23 it just factually --

24 JUDGE RUSSELL: So they didn't use the state DPI?

25 MR. KIMBERLY: They did not. No, they were using --

1 and this is clear in the documentary evidence. It's on the
2 charts that we chose it's Fed DPI is what they're looking at.
3 It's federal performance. And that does take account of voter
4 behavior and splitting tickets, which is what Ms. Rice was
5 taking about and the difference between Bongino and Hogan in
6 2014.

7 JUDGE RUSSELL: What are the factors that go into
8 the State DPI?

9 MR. KIMBERLY: So there was limited discovery on
10 that, in part because Mr. Hawkins was asserting that it was a
11 proprietary metric. And we didn't want to press him hard on
12 things that he was going to resist talking about. I mean, I
13 can say that --

14 JUDGE RUSSELL: Are there unknowns -- are there
15 additional considerations in the state DPI that, for example,
16 that might be unique to Maryland?

17 MR. KIMBERLY: Certainly, yes.

18 JUDGE RUSSELL: For the issues related directly to
19 Maryland that wouldn't have any applicability to the way
20 citizens react to things on a national level.

21 MR. KIMBERLY: That's exactly right.

22 JUDGE RUSSELL: And so why wouldn't -- that in some
23 respects make the federal DPI arguably less reliable than the
24 State DPI, because the State DPI might take into account the
25 geographical norms that are uniquely associated with the state

1 of Maryland or western counties or southern counties or
2 eastern counties.

3 MR. KIMBERLY: So, Your Honor, I think it's the
4 other way around. Each are ultimately local measures. These
5 are measures that are broken down to a precinct-by-precinct
6 level. So when you're looking at the federal DPI, what the
7 map drawers are looking at is the way within each precinct,
8 and each precinct is about 2,000 voters, the way that those
9 voters have behaved in federal locations. But that is
10 inherently a local analysis, because it's looking at a very
11 small local district.

12 The distinction between federal and state DPI is
13 simply to recognize that voters do split tickets sometimes.
14 So they behave differently in state elections sometimes than
15 they do in federal elections.

16 JUDGE RUSSELL: And we don't know why that is.
17 Because it's up to the individual voter, you don't drill down
18 that far to ask that voter why they voted cast a split ticket
19 vote.

20 MR. KIMBERLY: There is not --

21 JUDGE RUSSELL: We don't know.

22 MR. KIMBERLY: There is not an answer to the why.
23 What there is is a prediction based on that difference in
24 behavior historically. And it's a recognition that looking at
25 the way that voters vote in state elections is not as

1 informative for predicting federal elections as it is to look
2 at the way that they have voted in federal elections, which
3 again is why they were looking at federal DPI.

4 JUDGE RUSSELL: It's hard to -- I'm just trying to
5 get a grasp on taking the human element out of this
6 statistical analysis. And I get it, I get the statistics and
7 the high percentage. But at the same time I'm having some
8 difficulty struggling with the fact that in a split ticket
9 context, that someone can come up with a statistic which would
10 indicate a likelihood of success, and not take into
11 consideration, arguably, the individual characteristics of
12 candidates, which caused a Republican who would vote
13 historically in a national election Republican, but then cause
14 them to vote for Democrat in a state -- a state election. And
15 what we have here is individuals voting overwhelmingly for
16 Governor Hogan in a state election, but then possibly those
17 same Republicans -- oh, I'm sorry, voting for Bongino in a
18 federal election, and then another 20,000 more voting for
19 Hogan in a state election in a Democratic state.

20 And I'm just -- and without knowing what went into
21 the thinking of those voters when they cast those ballots,
22 those displaced voters, I'm trying to figure out how I can
23 rely upon the methodology, especially when there's a
24 distinction -- that the experts recognize this distinction for
25 whatever reason for split ticket votes that are cast, but

1 can't tell me why.

2 MR. KIMBERLY: I guess what I would say about that
3 is certainly, as Judge Neimeyer was suggesting, the map
4 drawers have no problem whatsoever relying on these metrics
5 for these purposes, because the fact is, as an empirical
6 matter, they work.

7 THE COURT: Yeah, but between the Bartlett and
8 Bongino race. We got a shift of 19 points; right? We got a
9 shift of 19 points. If it had been 20.5 your whole case would
10 be decimated.

11 MR. KIMBERLY: Well, and this was going to be the
12 second point that I raise, because I don't think that's true.
13 2014, in this respect, is something of a red herring. There's
14 no -- look, the question is here did it result in vote
15 dilution? I don't think there's really any serious room for
16 dispute in this record, it resulted in vote dilution. The
17 question from our --

18 JUDGE BREDAR: But it wouldn't have had any concrete
19 consequence despite the dilution. So my point is still
20 accurate, your case would have been decimated. You would have
21 said, we were so close, but they didn't quite flip the
22 district. So we lose. We flat lose.

23 MR. KIMBERLY: But looking at, I guess my point is,
24 and this is why I think 2014 is a bit of a distraction, you
25 look at 2012 and 2016, and it very clearly is a concrete

1 manifestation of this vote dilution. It simply is not
2 consistent with any of the evidence to suggest --

3 JUDGE BREDAR: -- Tomato versus tomato. I mean,
4 yeah, it was really good predictor in those two years, but not
5 in one. Well, is that a really accurate portrayal of it? Or
6 is it just evidence of the fact that you can't predict very
7 well, and these things jump around, and voters are fickle.

8 MR. KIMBERLY: And so I guess what I would say is
9 what the evidence shows is although they do change their
10 minds, a fact we don't dispute, they actually are generally
11 not fickle. And although it's true it came close in 2014,
12 again, these are binary calls; does a Republican win, does a
13 Democrat win. Point in fact in this case, those two metrics
14 accurately predicted 100 percent of the elections that have
15 taken place under this map. To suggest that then the vote
16 dilution that was brought about by the drawing of the map in
17 this case wasn't sufficiently significant to result in a
18 concrete injury, I think just is not consistent with what the
19 evidence shows, which is that we have two very clear elections
20 in 2012 and 2016, won by very wide margins.

21 JUDGE BREDAR: Can you assure me that if we don't
22 change these lines, John Delaney is going to win in 2018, and
23 he's going to win in 2020, and he's going to win in 2022.

24 MR. KIMBERLY: We can show you, Your Honor, that
25 it's more probable than not. And that's our burden.

1 Absolutely. And it's the DPI --

2 JUDGE RUSSELL: But how do you know that unless you
3 know who the candidates are?

4 MR. KIMBERLY: Well, so taking as given --

5 JUDGE RUSSELL: Exactly, without the platform,
6 without the fund raising in place, without --

7 MR. KIMBERLY: No, no. But to be very clear about
8 this, this is what these people do. This is what Mr. Cook has
9 made his career doing is --

10 JUDGE RUSSELL: I get that and it might be -- but
11 you want me to consider that as dispositive evidence. And it
12 may not be.

13 JUDGE NEIMEYER: The argument, I suppose, is that if
14 you have somebody who is registered Republican, and has voted
15 Republican in the last four elections, it's likely that
16 person's going to vote Republican again.

17 MR. KIMBERLY: It's more likely than not.

18 JUDGE NEIMEYER: More likely than not. And that
19 probably is a common sense conclusion, regardless on what the
20 dynamics. There will be people flipping, but the charts take
21 that into account. That's shown that that is a predictor.

22 MR. KIMBERLY: That's correct. And, you know, as I
23 have said now several times, is it a basis to say with 100
24 percent certainty? We acknowledge no. But I'm unaware of any
25 other context --

1 JUDGE BREDAR: It's more probable than not that most
2 of the Republicans will vote Republican, because they voted
3 that way last time. And that most of the Democrats will. But
4 most isn't necessarily enough.

5 MR. KIMBERLY: Oh, but it is, Your Honor. I mean,
6 we don't have to show --

7 JUDGE BREDAR: Not when a race is divided by 1.5
8 percent.

9 JUDGE RUSSELL: What about voter turn out? I mean,
10 it very well could be that one party is not as enthused as
11 another, and it doesn't matter, as Judge Bredar indicated.
12 Most could be one number, but if you only have 20 percent turn
13 out in your party, then most of that party who voted, voting
14 with their party, wouldn't be enough.

15 MR. KIMBERLY: Well, and you know, so there are two
16 things to say about that. One, as I say, that's baked into
17 the less than certainty number here. That's built into the
18 model. That's the 6 percent. All right. So we acknowledge
19 six percent of the time it's not going to be an accurate call
20 of the outcome. But again, it's not our burden to show 100
21 percent.

22 THE COURT: Wouldn't one of the benefits of a trial
23 in a case like this, be the experts, rather than you Mr.
24 Kimberly, although, you are quite the expert, but nonetheless,
25 the actual scientists coming in here, sitting at the witness

1 stand there, and explaining this and then being subjected to
2 cross-examination, the great engine of truth finding that we
3 rely on in our system of justice, wouldn't that be a better
4 way to sort of fully illuminate this complex body of
5 information.

6 MR. KIMBERLY: I don't deny that it would be, Your
7 Honor, to the extent that the Court has lingering concerns
8 about how accurately, or how appropriate it is to use these
9 metrics as a basis for drawing a conclusion on "but for"
10 causation.

11 JUDGE BREDAR: Well, you know we do just listening
12 to the questions you're getting peppered with here. And you
13 probably have some frustration sitting there, you know, why
14 can't these judges just figure it out. It's so obvious. But
15 we're struggling.

16 MR. KIMBERLY: I appreciate that. I appreciate
17 that. And it may well be that getting Eric Hawkins, for
18 instance, here to sit down. And this is in the testimony, and
19 we'll make sure Your Honors have the video as well, you know
20 he explains that they make their living on this because the
21 DPI the accurate and it works. And I'm sure he, despite being
22 a witness for, it would seem, a witness who might be on the
23 side of the State, will be the first to tell you that these
24 are very accurate ways of producing sufficient certainty about
25 the elections that are going to take place under a new map,

1 that really this question of "but for" causation I think
2 would --

3 JUDGE RUSSELL: I'm wondering did he predict the
4 Hogan victory?

5 MR. KIMBERLY: Well, he wasn't asked to look at
6 that. Because, again, he was focused on federal DPI, he was
7 not looking at the State DPI.

8 JUDGE RUSSELL: -- state.

9 MR. KIMBERLY: He was not drawing a map for Hogan.
10 He was drawing a map for, ultimately, John Delaney. Thank
11 you.

12 JUDGE NEIMEYER: Let me -- do you have anymore, Ms.
13 Rice?

14 MS. RICE: I do not.

15 JUDGE RUSSELL: Thank you.

16 JUDGE NEIMEYER: Well, this has been very
17 interesting. And I think it's been very helpful. And, again,
18 I want to congratulate both parties for the thoroughness of
19 the materials and the briefs and the arguments. And whether
20 it leads directly to one result or another is an issue that we
21 now have to resolve among ourselves as a three-judge court.

22 So we'll -- you know, we have a tradition in the 4th
23 Circuit that we always come down and greet counsel after every
24 case. And I don't know of any other court in the country that
25 does that. And, often, when I preside or come to the district

1 court in Maryland I do that. When we swear in -- when we
2 swear in lawyers and so forth like that it gets a little
3 complex, because they're all over the place and then we have a
4 reception any way. But Judge Bredar suggested we follow that
5 tradition. I'm really happy to do so. We'll come down and
6 greet counsel after we adjourn.

7 MS. RICE: Just one procedural note.

8 JUDGE NEIMEYER: Yes.

9 MS. RICE: So our reply on the summary judgment
10 motion is due in approximately one week, and so I just wanted
11 to --

12 JUDGE NEIMEYER: How do you want to handle it
13 yourself? I mean, the briefing is in on that. We are not
14 taking that up, as you know there's a whole different dynamic
15 in summary judgments. If you want to just complete that
16 record, if you're pretty close on it, you may want to do that.
17 But you probably -- you want to let her see how we come out?

18 JUDGE BREDAR: Yes, I would say why don't you watch
19 the docket. And perhaps put in another inquiry based on the
20 State of the docket.

21 JUDGE NEIMEYER: We're not going to hold you to it,
22 the time limit in other words.

23 JUDGE BREDAR: Monday or Tuesday. And if it's -- if
24 your interests are such that you would prefer a little bit of
25 an extension because nothing's appeared on the docket, you

1 might make that point in a motion to the Court for an
2 extension.

3 MS. RICE: Thank you. We'll do that.

4 JUDGE NEIMEYER: Okay. We'll adjourn and then come
5 down and greet.

6 (The proceedings were concluded.)

7
8 I, Christine Asif, RPR, FCRR, do hereby certify that
9 the foregoing is a correct transcript from the stenographic
10 record of proceedings in the above-entitled matter.

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_____/s/_____
Christine T. Asif
Official Court Reporter

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