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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, et al,

Plaintiffs,

v.

CASE NO: 1:22-CV-54

JOCELYN BENSON, in her
official capacity as the
Secretary of State of
Michigan, et al,

Defendants.

* * * *

HEARING on MOTION FOR PRELIMINARY INJUNCTION

* * * *

BEFORE: THE HONORABLE RAYMOND M. KETHLEDGE
United States Circuit Court Judge

THE HONORABLE PAUL L. MALONEY
United States District Judge

THE HONORABLE JANET T. NEFF
United States District Court Judge

Grand Rapids, Michigan
March 16, 2022

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7 * * * *

8
9
10 Grand Rapids, Michigan

11 March 16, 2022

12 at approximately 3:04 p.m.

13 PROCEEDINGS

14 JUDGE MALONEY: Be seated. Thank you.

03:04:26 15 This is File Number 22-54; Banerian vs. Benson, et

16 al. This matter is before the Court on the plaintiffs'

17 motion for a preliminary injunction.

18 The record should reflect that Attorneys

19 Torchinsky, Sheehy, Wenger and Spies represent the

03:04:51 20 plaintiff. Attorneys Fink and Raile represent the defendant

21 commissioners. Attorney Meingast represents the Secretary

22 of State. Attorney Pauwels represents voters not

23 politicians and the remaining lawyers Prescott, Graber and

24 Diaz represent the defendant Michigan voters.

03:05:16 25 We have allocated 30 minutes per side, 30 minutes

1 total for the plaintiff, 30 minutes in total shared among
2 the defendants. If plaintiff wishes to reserve rebuttal,
3 just let us know.

4 And with that, we are ready to proceed. I'm joined
03:05:35 5 by Circuit Judge Ray Kethledge and my colleague from the
6 Western District of Michigan bench Janet Neff, pursuant to
7 the appointment of Chief Judge Sutton. We are ready to
8 proceed.

9 And Mr. Torchinsky, you may proceed, sir.

03:05:52 10 Good afternoon.

11 MR. TORCHINSKY: Thank you, your Honor.

12 May it please the Court, I'm Jason Torchinsky here
13 on behalf of the plaintiffs.

14 Article I, Section 2 of the U.S. Constitution as
03:06:02 15 interpreted by the Supreme Court makes it clear that
16 equality of population within congressional districts is
17 paramount. As applied to the facts of this case, all
18 parties here agree that Karcher controls this Court's
19 determination, and it requires the application of a two-part
03:06:16 20 burden-shifting test. Karcher Step One is satisfied when
21 plaintiffs show that population can, as a practical matter,
22 balance populations, and we did so by submitting a remedy
23 map, our remedy map is Exhibit A. That map demonstrates
24 that population can be equalized, and in Paragraph 54 of the
03:06:33 25 statement of undisputed material facts, all parties agree

1 that the plaintiffs' remedy map equalizes populations.

2 Moving on to Step Two. The defendants bear the
3 burden of demonstrating with specificity each deviation.

4 Both the U.S. Constitution and the Michigan Constitution

03:06:49 5 make equal population the paramount requirement. Because

6 the Michigan Constitution expressly assigns equal population

7 to the poll position, it's necessary -- it necessarily

8 follows that the commissioners were not at liberty to use

9 any subordinate state criteria, any subordinate state

03:07:06 10 constitutional requirement to deviate from absolute

11 population equality.

12 JUDGE KETHLEDGE: Well, I mean certainly the fact

13 that they enumerated six others would imply that the

14 commission could consider those other things, and

03:07:21 15 particularly if one looks at Karcher and Tennant, wouldn't

16 that imply that they would have some room for minor

17 deviations based on those other things?

18 MR. TORCHINSKY: They would except that their

19 theory here would basically allow their exception to swallow

03:07:37 20 the rule. As this Court noted in dismissing Count Two of

21 the complaint, the concept of communities of interest is

22 very hard to articulate or quantify or, frankly, put on a

23 map. And --

24 JUDGE KETHLEDGE: But is the rule in that phrase as

03:07:50 25 you just used it, is that equality of population?

1 MR. TORCHINSKY: I'm sorry?

2 JUDGE KETHLEDGE: You said that if the
3 Commissioners are able to consider the other six --

4 MR. TORCHINSKY: Yes.

03:08:04 5 THE CLERK: -- criteria, and you know, against the
6 backdrop of Karcher and Tennant, they might look at that or
7 one might look at that and say, okay, we have some room for
8 minor deviations from the first criterion in the Michigan
9 Constitution to account or to advance some of these other
03:08:24 10 criteria. And you said that in this case, if they did that,
11 the exception would swallow the rule. I was just trying to
12 follow. I don't mean to get tedious, but I was trying to
13 follow like what is the rule in that.

14 MR. TORCHINSKY: Your Honor, I think it's the
03:08:39 15 Karcher Step Two Rule, that any deviation has to be
16 justified in a neutral and non-arbitrary manner.

17 JUDGE KETHLEDGE: Well, okay. Neutral and
18 consistent. The Court doesn't use the term arbitrary there.
19 They talk about neutral and consistent application of the
03:08:56 20 criteria.

21 MR. TORCHINSKY: Yes. And that is true, your
22 Honor. But I think the problem here is that the Commission
23 can't articulate a neutral reason why, for example, District
24 Three here that is 235 -- where we sit here in Grand Rapids
03:09:08 25 is 235 people overpopulated, yet is bordered by two

1 districts that are underpopulated. The Commission hasn't
2 articulated, as they bear the burden at Karcher Step Two of
3 articulating with specificity why they couldn't have moved
4 one of those lines to move 235 people to the neighboring
03:09:26 5 underpopulated districts.

6 JUDGE KETHLEDGE: We are talking about District
7 Three?

8 MR. TORCHINSKY: Yes. District Three is 235 people
9 overpopulated. It is bounded to the south by District Four
03:09:37 10 and to the north and east by District Two. Both District
11 Two and District Four are underpopulated.

12 Even --

13 JUDGE KETHLEDGE: Now --

14 Oh, please go ahead.

03:09:45 15 Oh, I thought -- I misheard something.

16 Well, do they answer that in your, you know,
17 arguably in Paragraph 9 of the Eid declaration where they
18 say that, all right, well, you know, your solution to it,
19 being the plaintiffs' plan, would include some rural areas
03:10:06 20 in Barry County, and they wanted to be in a different
21 district that was more rural, not District Three, and so
22 they are sort of, you know, trying to honor that wish to
23 retain a particular community of interest.

24 MR. TORCHINSKY: Well, your Honor, there is a
03:10:21 25 couple things about the Eid declaration. First of all, the

1 Eid declaration is a declaration from a single commissioner.

2 JUDGE KETHLEDGE: I know. I get that point. But
3 what about the point I just raised?

4 MR. TORCHINSKY: So, your Honor, I think the answer
03:10:32 5 is equal population can be solved in a whole lot of
6 different ways. The remedy map that we provided also
7 reduced the number of county splits from 15 to 10. If we
8 are not going to essentially address the Count Two issues we
9 have raised, there are lots -- there are probably a thousand
03:10:48 10 different ways to combine the parts of Muskegon County,
11 Ottawa County, and Kent County that make up District Three,
12 that still honor, even if you credit for a moment
13 Commissioner Eid's declaration about keeping Muskegon and
14 Grand Rapids together, that still moves those 235 or 234 or
03:11:07 15 236 people to the neighboring districts. There is nothing
16 about keeping even Muskegon and Grand Rapids whole that with
17 specificity explains why the line in Ottawa County, which
18 doesn't include any of Muskegon or any of Grand Rapids,
19 can't be drawn differently, and borders District Four, which
03:11:25 20 is underpopulated.

21 JUDGE KETHLEDGE: I mean that might all be true,
22 but I mean the Court has said -- I mean the headwinds you've
23 had in this case all along is what the Court said in Tennant
24 and Karcher, which is that drawing district lines typically
03:11:40 25 involves political judgment, and that's okay, the Court

1 said. You know, it's totally okay as to partisan line
2 drawing in the sense that the court is not going to review
3 that in Rucho. But in these cases, they say it's political
4 judgment, and that is okay, as long as they're advancing
03:11:59 5 some legitimate objective. And so I agree with you. You
6 know, you can draw this innumerable ways. But why, you
7 know, why isn't -- The question on the table is whether the
8 line they drew, not whether some other line could be drawn,
9 whether the line they drew is supported by some legitimate
03:12:20 10 state interests.

11 MR. TORCHINSKY: Yes, your Honor, and --

12 THE CLERK: Right. I mean you would agree with
13 that, right?

14 MR. TORCHINSKY: Yes. And their requirement in
03:12:26 15 Karcher Step Two is with specificity to explain why a
16 particular line is where it is. Take --

17 JUDGE KETHLEDGE: Yes, with some specificity, which
18 seems to vary, doesn't it? I mean doesn't the amount, the
19 showing seem to vary based on the degree of the deviation?
03:12:44 20 They say it's a flexible thing and it depends on how big the
21 deviation is and how important the interests are, so we have
22 a very small deviation here.

23 MR. TORCHINSKY: Well, your Honor, except that we
24 have nine of thirteen districts overpopulated in this plan.

03:12:59 25 JUDGE MALONEY: What court has thrown out a

1 deviation?

2 MR. TORCHINSKY: The Vieth court in the Middle
3 District of Pennsylvania threw out deviation of 19 people
4 which was substantially less than .14 percent.

03:13:10

5 JUDGE KETHLEDGE: Is that one-person, one-vote
6 holding there?

7 MR. TORCHINSKY: Yes. Vieth had a couple of rounds
8 through the district court.

03:13:18

9 JUDGE KETHLEDGE: They got reversed through in the
10 end, didn't they?

11 MR. TORCHINSKY: The Vieth case got -- not the 19
12 person deviation, because what happened is, when the Court
13 struck down the 19 people, they remanded it to the
14 legislature. The legislature fixed it and brought it down
15 to a one person deviation, and then the rest of the Vieth
16 case about partisan gerrymandering.

03:13:28

17 JUDGE KETHLEDGE: So the district court in Vieth
18 did that. The Supreme Court hasn't turned anything this
19 small around?

03:13:40

20 MR. TORCHINSKY: But it did cite the district
21 court's initial opinion in the Vieth case that the Supreme
22 Court decided, it cited the original panel that struck down
23 the 19 person map with approval. So we don't have any
24 indication from the Supreme Court that it believed the
25 striking down of the 19 person deviation map was unlawful.

03:13:53

1 And frankly, your Honors, if you look armed the country,
2 every other state has been able to, with the exception of
3 perhaps West Virginia, which kept their counties whole, and
4 Iowa, which keeps their counties whole, nearly every other
03:14:09 5 state has been able to keep their deviations to within a
6 single person with the exception -- and I think maybe there
7 is, I think, Rhode Island has a 641 person deviation between
8 their two districts. Why? I don't know. I have not
9 studied Rhode Island. But other than -- other than Iowa and
03:14:29 10 West Virginia, which again, keep county lines whole
11 entirely, I'm not aware of anybody that has a .14 percent
12 deviation or a .79 percent deviation. And again, those are
13 understandable, because in Iowa, it's a state constitutional
14 requirement to keep counties whole. And obviously, the
03:14:47 15 Supreme Court in Tennant recognized that West Virginia has a
16 long tradition of keeping counties whole. Here, you know,
17 following, if you are talking about long-time state
18 traditions, I mean Muskegon and Grand Rapids haven't been in
19 the same district since 1890, and now apparently the state
03:15:03 20 is asserting that there is some community of interest that
21 requires a deviation of 235 people to keep --

22 JUDGE KETHLEDGE: It's political judgment, you
23 know. And I think -- I mean, it's a point well taken about
24 other states. But the fact is, the law as it comes to us is
03:15:18 25 Karcher and Tennant, and they allow for some deviation and

1 point -- you know, a deviation five times bigger in Tennant
2 than the one here, and they waived that through.

3 MR. TORCHINSKY: They waived it through, but the
4 state was able to articulate with specificity why they did
03:15:33 5 what they did. Why the line in Muskegon County or in Kent
6 County or Ottawa County can't be different to equalize the
7 population.

8 JUDGE KETHLEDGE: That's a fair point. They had
9 clear cut reasons there.

03:15:42 10 MR. TORCHINSKY: Correct.

11 JUDGE KETHLEDGE: I mean this factor by its nature
12 is sort of amorphous. But you would agree -- I mean you
13 seem to recognize that the community of interest is a
14 traditional directing criteria, right? You basically said
03:15:55 15 that the Michigan Constitution sort of --

16 MR. TORCHINSKY: Incorporates that.

17 JUDGE KETHLEDGE: -- incorporates that.

18 MR. TORCHINSKY: But you've got to be able to
19 articulate it in a way that a court can evaluate, and they
03:16:05 20 haven't done that.

21 JUDGE KETHLEDGE: Right. So 24 states use
22 community of interest is my understanding.

23 MR. TORCHINSKY: And they were all equal -- and
24 they were all able to equalize their populations.

03:16:11 25 JUDGE KETHLEDGE: Okay. Well, be that as it may --

1 JUDGE MALONEY: What about the community of
2 interest in the district that you criticized because it goes
3 from Lake Michigan over to Lake Erie? The Commission
4 asserts that the community of interest there is effectively,
03:16:26 5 my words, not the Commission's, that they are border
6 counties to the states of Indiana and Ohio, and that
7 commerce between the states of -- the State of Michigan
8 along those counties and those other states, essentially
9 they say economic community of interest. Is that
03:16:45 10 legitimate?

11 MR. TORCHINSKY: Your Honor, I mean the way
12 Commissioner Eid articulated it, where he asserted, for
13 example, that the southern counties share a single media
14 market is just factually not true. As Mr. Bryan pointed out
03:16:56 15 in his -- in our response, there is actually five media
16 markets that divide the southern border of Michigan into
17 five different media markets.

18 JUDGE MALONEY: Let's focus on economics, okay.

19 MR. TORCHINSKY: Sure.

03:17:07 20 JUDGE MALONEY: I recognize that the southern part
21 of Monroe County, which is in that district, I think it
22 would be a surprise to those individuals who live in
23 southern Monroe County, that they are a suburb of Detroit,
24 but leaving that aside for a moment. The fact is, is that
03:17:25 25 all of those counties in that district are border counties

1 to Indiana and Ohio, correct?

2 MR. TORCHINSKY: That is true. Except there is not
3 a single highway that unites those counties. There is no
4 indication even from the -- on the map to site at the Census
03:17:41 5 Bureau that there are economic connections between Monroe
6 County and Berrien County. You know, about the best you
7 could say is that people from Berrien County, you know, go
8 down to Indiana, and people from Monroe County go to Ohio,
9 you know, to work. It's hard to see how that connects
03:17:58 10 Berrien and Monroe Counties.

11 JUDGE MALONEY: Why isn't that within the
12 discretion of the -- and the judgement of the Commission to
13 make that judgment in terms of concluding that those border
14 counties have a community of interest based on where they
03:18:13 15 are located vis-a-vis the State of Michigan and vis-a-vis
16 the State of Ohio and the State of Indiana?

17 MR. TORCHINSKY: Your Honor, that may be. But when
18 they adjust deviations to -- get down to that district --
19 when they adjust the deviations, and District Five is 635
03:18:32 20 people underpopulated, and it touches -- let's see, it
21 touches three counties that are overpopulated -- or three
22 districts that are overpopulated, and it splits three
23 different counties including Berrien County, they haven't
24 explained how they can't -- why they can't maintain that
03:18:49 25 community of interest along those and not -- not equalize

1 the population, borrow 600 people from one of the three
2 neighboring districts and equalize the population. That
3 doesn't-- Their assertion of communities of interest does
4 not have to be undermined by a remedy in this case. They
03:19:05 5 just have not done what was done in the Larios case or in
6 the Tennant case or in the Vieth case where they bring the
7 map chart in and explain with specificity why they did the
8 deviations they did.

9 In West Virginia in the Tennant case, they were
03:19:21 10 able to come in and say, we tried not pair incumbents and we
11 maintained our county lines and we moved one county to
12 correct the 1.5 percent deviation, and the best I could come
13 up with was .79.

14 JUDGE KETHLEDGE: In fairness, we are kind of at
03:19:34 15 the pleading stage, you know. I mean I know this is a
16 different kind of case in terms of it's expedited, and so
17 you guys need an answer quickly and all of that. But we
18 really, you know, we haven't had discovery in this case.

19 What we are doing in this motion is making a
03:19:50 20 prediction about whether they are going to show with
21 specificity. And so, you know, it's really about whether
22 they are going to be able to make that showing, I guess, is
23 that a fair characterization of kind of the posture we are
24 in here?

03:20:04 25 MR. TORCHINSKY: I think, you know, because the

1 burdens at the preliminary injunction stage mirror the
2 burdens at trial with the burden shifting of Karcher in Step
3 Two, I don't think they've met their burden. They haven't
4 said why they can't --

03:20:16 5 JUDGE KETHLEDGE: It's still your burden to show an
6 entitlement. So you have a burden to show they are not
7 likely to show, you know. And maybe, you know -- anyway, I
8 think that's kind much how it shakes out.

9 MR. TORCHINSKY: It is, and I think, your Honor,
03:20:29 10 you know, if you sort of set aside Count Two, which you
11 have, it's not that much of a map making exercise. It's
12 more of a mathematical exercise, to actually balance the
13 populations among the 13 districts with nine that are
14 overpopulated and four that are underpopulated. You don't
03:20:47 15 have to destroy their map and redo their map, as we did in
16 remedy A, which was also to remedy Count Two in order to
17 equalize these populations. Population equalizing is an
18 exercise that map makers can do relatively quickly. And I
19 think where I fault the Commission here is that they did not
03:21:06 20 take the step of saying, well, we tried to move 235 people
21 out of District Three, but we couldn't because to do so
22 would have -- the only way to do it was to cut the highway
23 between Muskegon and Grand Rapids, they didn't do that.
24 That is the kind of specificity I think they would need to
03:21:23 25 justify these kind of population deviations or to say in

1 District Five, if we were going to maintain District Five,
2 the only way we could not take or add 600 people to that
3 district would be to cut the highway or to split another
4 county. They haven't attempted to make those showings.
03:21:40 5 They just assert these broad communities of interest.

6 And when you look at every one of these, when you
7 look at the overpopulated districts, every single one of
8 them touches multiple other districts that are under -- that
9 are overpopulated, so it's not hard to move some population
03:21:56 10 between these districts. They just didn't do it and they
11 haven't come forward to this Court and said well, we can't
12 move 600 people into this district because it destroys a
13 community of interest.

14 JUDGE NEFF: They haven't been put to that proof
03:22:09 15 yet.

16 MR. TORCHINSKY: No, but it becomes their burden at
17 step two of Karcher in order to do so, and they haven't done
18 it. We have an affidavit from their map drawer. The
19 affidavit from their map drawer does nothing to say I
03:22:18 20 couldn't equalize those populations. All it does is attack
21 the plaintiffs' remedy map, which again, substantially
22 addressed Count Two.

23 JUDGE KETHLEDGE: So that burden at Step Two really
24 kicks in fully at the summary judgment stage, which as Judge
03:22:32 25 Neff points out here is a long ways from where we are now.

1 And so we are in this kind of hybrid situation where you
2 have an obligation to show that you're very likely to
3 prevail on claim one, which means that you have to show that
4 it's very likely they won't be able to show an adequate
03:22:50 5 justification for these deviations.

6 MR. TORCHINSKY: That's right. And their failure
7 to put forth any evidence.

8 JUDGE KETHLEDGE: This case got filed like, you
9 know, I mean we are in the pleading stage, so procedurally
03:23:01 10 it's a little tricky.

11 MR. TORCHINSKY: But their failure to come forth
12 with any specifics about why any particular community, even
13 if you accept the assertions of Commissioner Eid's
14 declarations that explains why you can't move 235 people out
03:23:14 15 of this overpopulated district into a neighboring district.
16 They have just not articulated anything, other than to
17 assert --

18 JUDGE NEFF: Where is it written that they have to
19 do that when they adopt the map? Where is it written that
03:23:29 20 they have to justify what they are doing?

21 MR. TORCHINSKY: Karcher Step Two says that they
22 have to identify with specificity the reason for the
23 deviations.

24 JUDGE NEFF: But where? When? When? When? Did
03:23:37 25 they have to do it when they adopt the map? I don't think

1 it says that anywhere.

2 MR. TORCHINSKY: No. I think they have to adopt it
3 after -- I think they have to advance it after they're
4 challenged, and they failed to do so.

03:23:48

5 JUDGE NEFF: Exactly. And they haven't. I mean
6 here we are. We are just at the beginning.

03:24:02

7 MR. TORCHINSKY: Yes. And they have not put forth
8 a single shred of evidence that shows why they can't
9 maintain even their asserted community of interest by moving
10 235 people to the surrounding districts from Grand Rapids
11 that are the underpopulated. Every single piece of District
12 Three cuts some county. They have not explained how or why
13 they didn't change the shape of one of the cuts of one of
14 the three counties that are already split to equalize
15 population. And I think at Karcher Step Two that becomes
16 their burden, and they haven't --

03:24:24

17 JUDGE KETHLEDGE: All right. So if I may. It's --
18 The argument you're making now, I understand the argument,
19 and it's an important argument. It's that, hey, even if we
20 accept their characterizations of the different communities
21 of interest that they want to advance, you haven't shown why
22 you couldn't sort of, you know, take 200 people from this
23 district and add it to this other district and still advance
24 those same communities of interests, right?

03:24:37

03:24:55

25 MR. TORCHINSKY: That is correct. Yes, your Honor.

1 JUDGE KETHLEDGE: Okay. And so that argument, if
2 we agreed with you, and we said okay, you know, you haven't
3 explained why you couldn't add the 200 here and move it over
4 here or whatever. I mean the relief you would get, if that
03:25:11 5 argument prevailed, is not your map. The relief you would
6 get is we enjoin them to kind of trim and tailor their map
7 to make it equal while preserving these communities as best
8 they can. Is that fair?

9 MR. TORCHINSKY: Yes, your Honor. And I think
03:25:26 10 that's precisely what we are here today asking.

11 JUDGE KETHLEDGE: That's what you want? I mean
12 really that's was going to --

13 MR. TORCHINSKY: Yes, your Honor.

14 JUDGE KETHLEDGE: Okay.

03:25:33 15 MR. TORCHINSKY: I mean given this Court's --

16 JUDGE KETHLEDGE: Your map is just for Step One and
17 then put it in the circular file?

18 MR. TORCHINSKY: That is correct. And your Honor,
19 our map also addressed some of the concerns that were raised
03:25:44 20 in Count Two that this Court dismissed, so what we are left
21 is, you know, is Michigan going to be allowed to continue
22 now and forever in the future with districts that are not
23 equally populated because of a vague assertion of
24 communities of interest or is Karcher and the command of
03:25:58 25 Article I, Section 2 going to have supremacy over the state

1 law and require equality of population just like the vast
2 majority of all of the other states, with the exception of
3 the two that keep counties whole.

03:26:14 4 JUDGE MALONEY: Well, recognizing your map works
5 mathematically, what considerations did that map include as
6 far as community interests were concerned?

7 MR. TORCHINSKY: Your Honor, as we articulated in
8 our complaint and our preliminary injunction motion, with
9 respect to Count Two, it gave a priority to what we believe
03:26:33 10 is a more defined community of interest, namely, existing
11 jurisdictional lines.

12 JUDGE MALONEY: Okay. But that's Factor 6 --

13 MR. TORCHINSKY: Yes.

14 JUDGE MALONEY: -- in the state constitutional
03:26:44 15 provision, and the community of interest provision is Number
16 3, correct?

17 MR. TORCHINSKY: Yes, your Honor, except that --

18 THE COURT: So if we -- Your fix to the border
19 county districts would be what?

03:26:59 20 MR. TORCHINSKY: I believe that our remedy map
21 actually divided -- divided the southern border about in the
22 middle of the state and kind of -- it had a lot of changes
23 from the current map. But your Honor, with the dismissal of
24 Count Two, I don't think that that is required anymore.

03:27:16 25 But, you know, the changes that it would take to equalize

1 the populations under this map are not dramatic. But I
2 think are required under the Constitution because they have
3 failed here to articulate why they can't -- why they can't
4 actually equalize the populations and respect their
03:27:35 5 communities of interest. And I think that's what this Court
6 has to decide, because if you allow just a broad assertion
7 of communities of interest to justify a .14 population
8 deviation, what is to stop the Commission a decade from now
9 coming in and saying well, you know, we had to go up to .18
03:27:53 10 and that's exactly what the Supreme Court warned against in
11 Karcher when it said, look, population equality has to be
12 the paramount consideration, because if it's not, every body
13 charged with drawing the lines would push the boundaries of
14 that. And so if you allow it here, you don't put any --
03:28:09 15 there is no definitional limitation to it. Next time the
16 Commission could come in and say well, we are at two percent
17 deviation because, you know, we had communities of interest.

18 JUDGE MALONEY: The test for equal -- on the equal
19 population issue is as nearly as practical, correct?

03:28:25 20 MR. TORCHINSKY: That is correct, your Honor.

21 And I guess what I'm saying is, is practicable to
22 move 234 people from this district to one of the two
23 neighbors districts, bring those neighboring districts up to
24 population, bring this one down to population. It is
03:28:41 25 practicable to move 684 people into District Five and bring

1 District Five up to population.

2 JUDGE KETHLEDGE: You you start to lose
3 compactness, I would think. You don't have these nice
4 square lines that both of your plans have. Now you're
03:28:55 5 having these sort of little, you know, little barnacles
6 carved in and taken out different districts.

7 MR. TORCHINSKY: Your Honor, there is barnacles and
8 carvings in here. I mean if you look at, for example, the
9 finger of District Four that loops around and takes in the
03:29:11 10 northeastern corridor -- the northeastern corner of Berrien
11 County, or you look at District Six where it takes a finger
12 south and goes along and takes in southern Wayne County all
13 of the way to the border.

14 JUDGE MALONEY: Let's talk about Berrien County for
03:29:28 15 a minute.

16 It would come as a surprise to a Hagar Township
17 resident that they are in the northeast corner of Berrien
18 County. Hagar Township is on the lake. It's in the
19 northwest corner.

03:29:45 20 MR. TORCHINSKY: Right. But what I'm saying is
21 District Four comes in and takes the northeastern corner of
22 Berrien County, that's what I meant to say, your Honor.

23 JUDGE MALONEY: District Four, is that the one that
24 runs up to Holland?

03:29:58 25 MR. TORCHINSKY: Give me one second, your Honor.

1 JUDGE MALONEY: I think that's right.

2 MR. TORCHINSKY: District Four is the one that goes
3 up to Holland. District Four goes to the east, comes down
4 and then comes back along and take in the northeastern
03:30:12 5 corner of Berrien County.

6 JUDGE MALONEY: How do you define northeastern
7 corner of Berrien County. St. Joseph is in that district.
8 How is that in the northeast corner of Berrien County?

9 MR. TORCHINSKY: Give me one moment, your Honor.
03:30:35 10 Let me get over to the map.

11 JUDGE MALONEY: Trust me, St. Joseph is not in the
12 northeast corner of Berrien County.

13 MR. TORCHINSKY: I'm not disagreeing with your
14 understanding of the populations, but every single one of
03:30:46 15 these counties is split. For example, also in District Five
16 -- District Five also splits Calhoun and Kalamazoo, both
17 counties that also don't necessarily have to be split
18 precisely as they drew them in order to equalize the
19 populations. And, you know, and then you look at the lines
03:31:08 20 here in District Three that split Kent County, Ottawa
21 County, and Muskegon County.

22 JUDGE NEFF: Mr. Torchinsky, isn't this a little
23 bit about like asking how many angels can dance on the head
24 of a pin? I mean we could be here from now until whenever
03:31:25 25 looking at different maps and different configurations and

1 speculating well, maybe we can take 350 people from here and
2 put them over here, and maybe we can take 600 from here and
3 put them over here. It is an exercise in tediousness. They
4 have laid out what they think is a valid map that addresses
03:31:53 5 the constitutional requirements, and all you're doing is
6 niggling over a few little people here and there. That's
7 all you're doing. And you are not making -- you are not
8 advancing any constitutional argument that I can think of.

9 MR. TORCHINSKY: Your Honor, if the district court
03:32:12 10 in Vieth struck down a map that had a 19-person deviation,
11 they are not asking this Court to approve a map that has a
12 1,200 person deviation. I think there is a real
13 constitutional interest there.

14 JUDGE NEFF: You cannot -- You cannot compare
03:32:26 15 apples and oranges. You have to look at the exact
16 configuration of whatever state or district you're looking
17 at. Maybe 19 is a lot in Rhode Island, it isn't in
18 Michigan.

19 MR. TORCHINSKY: Well, it was Pennsylvania.

03:32:44 20 JUDGE NEFF: Well, Pennsylvania.

21 MR. TORCHINSKY: Pennsylvania and Michigan have
22 about the same number of people. Pennsylvania has, I think,
23 15 districts now, I think it had 16 then. This state had 14
24 and now has 13. I don't think they are that difficult to
03:32:57 25 square up with each other.

1 JUDGE MALONEY: We have peppered you with
2 questions, counsel. You've got seven minutes left on your
3 time, so if you want to stop now and reserve seven, that's
4 fine. If you want to keep going, that's okay too.

03:33:10 5 MR. TORCHINSKY: I think I will wait and save my
6 seven minutes for my rebuttal.

7 JUDGE MALONEY: Thank you, sir.

8 Mr. Raile, ahead.

9 MR. RAILE: Thank you, your Honor.

03:33:20 10 My it please the Court, I'm Richard Raile for the
11 Commissioner defendants.

12 I would like to reorient this conversation around
13 the motion that is in front of the Court this morning --
14 this afternoon, excuse me, which is a motion for a
03:33:31 15 preliminary injunction. This is not closing arguments after
16 trial.

17 As the Supreme Court held in The University of
18 Texas vs. Camenisch, the question before the Court today is
19 not whether any party has met its burden. The question is
03:33:48 20 whether to take the exceptional and extraordinary step of
21 issuing provisional injunctive relief to preserve the
22 relative state of the parties pending a final disposition of
23 this case on the merits. Right out of the gates, my friends
24 on the other side slip and fall because they can't identify
03:34:06 25 what status quo they are intending to preserve in this case.

1 In fact, they cite no decision in five preliminary
2 injunction briefs that actually afforded the relief sought
3 in this case. I am not aware of any redistricting case that
4 offered, gave a plaintiff a new map, a new redistricting at
03:34:31 5 the provisional stage outside of the context of Section 5 of
6 the Voting Rights Act, which had the effect of preempting
7 state law until it was pre-cleared. That is a unique
8 context. That was the case in Perry vs. Perez, it's not the
9 case here.

03:34:47 10 JUDGE KETHLEDGE: But it's -- The type of claim is
11 totally valid, all right. I mean it's not like Count Two
12 situation where, you know, it's not justiciable.
13 One-person, one-vote, that's the nature of this claim. That
14 is justiciable. We do have Supreme Court caselaw that lays
03:35:02 15 out rules and, you know, showings necessary, and so the
16 question is whether they are able to -- it's not this
17 categorical thing, there is never -- you know, nobody has
18 ever given this relief before, that's really not the test.
19 The test is whether they have made a showing under the
03:35:17 20 applicable case law is really what we are dealing with, and
21 so, you know, how about that?

22 MR. TORCHINSKY: Well, I think that's correct. We
23 are not arguing Count One is non-justiciable. We didn't
24 move to dismiss it on that basis. We are here litigating on
03:35:32 25 that, but there is an equitable question of status quo. And

1 so I want to put -- the point here there is not a
2 preservation of the status quo. They are asking for a
3 redistricting. That's what you get when you win the case.
4 You get a new redistricting when you win the case.

03:35:44 5 JUDGE KETHLEDGE: But you wouldn't say that in
6 preliminary injunctive relief is just categorically
7 unavailable in a one-person, one-vote case, right?

8 MR. RAILE: I am not necessarily saying that. I
9 don't think we need to say that. I think the question of
03:35:57 10 what a court can do in an exceptional case doesn't mean the
11 court does it in every case. I think we turn to the
12 likelihood of success here. I mean, we see that this is not
13 an exceptional case. We know at Step Two, and we have
14 arguments on Step One, but I will focus on Step Two, because
03:36:12 15 I think it's the cleanest path to victory for us.

16 We know there is a four factor test, and it starts
17 with the size of the deviation, and that's very critical.
18 Because as this Court knows, the question in any equal
19 protection type case that the Court has to confront at the
03:36:28 20 outset is what is the standard of scrutiny? We have
21 everything from rational basis on the one hand to strict
22 scrutiny on the other hand. And the level of scrutiny will
23 dictate the degree to which the Court is at liberty to
24 second guess state policy judgments, it will also dictate
03:36:47 25 the extent to which an evidentiary showing is required. At

1 the strict scrutiny level, there has to be a strong basis
2 and evidence all the way on the other end of rational basis.
3 The Court can actually hypothesize justifications on no
4 evidence.

03:37:02

5 JUDGE KETHLEDGE: Okay. But the Supreme Court has
6 not brought those tears of scrutiny per se into this
7 doctrine, right? I understand you're reading between the
8 lines, and I'm not quarreling with you, but I just want to
9 be analytically clean. I don't think the caselaw gives us
10 license to sort of peg it into a category. It's a sliding
11 scale based on the degree of deviation how important the
12 interests are, whether they could be vindicated otherwise,
13 right?

03:37:19

14 MR. RAILE: Right. And what I'm saying is, the
15 closer you are to zero, the more akin it is to rational
16 basis.

03:37:31

17 JUDGE KETHLEDGE: That's fair.

03:37:43

18 MR. RAILE: The higher that you get, the more akin
19 it is to strict scrutiny. So my friend, Mr. Torchinsky,
20 just told the court that if the Commission wins this case,
21 anything goes. It can start ratcheting up the deviations.
22 That's not true. Because as soon as the deviations start to
23 go up, the level of scrutiny increases. And you get all the
24 way to where the court got in the Kirkpatrick case, where
03:37:55 25 the Supreme Court was looking at six percent population

1 deviation, and it rejected all of the justifications that
2 the state could pose, including county lines, saying they
3 are not wavy enough or why is that? Because the deviation
4 was so high, at some point, the deviations are too high,
03:38:13 5 there's no state justification. We are on the other end.
6 We know point that a .79 deviation is small. We are at .14,
7 it's smaller than small. So we are on the far end. It may
8 not be rational basis, the Court doesn't have to call it
9 that, we don't need that to win, but we are close to that.

03:38:32 10 Now, that brings us to the next two factors, which
11 are the legitimacy of the state interests and the
12 consistency. And the plaintiffs' contend, first of all, I
13 want to address --

14 JUDGE KETHLEDGE: Does --

03:38:44 15 Well, go ahead. You go ahead.

16 MR. RAILE: I would like to address their arguments
17 and I'm happy to answer questions.

18 JUDGE KETHLEDGE: No, you keep going.

19 MR. RAILE: Their first argument is that the
03:38:56 20 testimony of a state official, a state legislative actor is
21 not sufficient to do that. That's not true, and we know
22 that from Tennant.

23 All of the justifications established in the
24 Tennant case were established at a trial by the testimony of
03:39:10 25 a single state senator. We know that's legitimate, because

1 the Supreme Court in the Village of Arlington Heights case
2 said that testimony from legislators is a highly probative
3 way to get at the question of legislative intent.

4 That is the question here. For example, in the
03:39:28 5 case Bethune-Hill vs. The Virginia State Board of Elections,
6 the state was able to establish strict scrutiny, meet the
7 strict scrutiny standard in a race case, based on the
8 testimony of a single state legislator who crafted the plan.
9 That satisfied strict scrutiny. It happened in Tennant, it
03:39:47 10 happened there. My friends on the other side are citing
11 statutory interpretation cases. They are not relevant here.

12 Next my friends argue that it had to be some kind
13 of group testimony. I'm not exactly sure what that means,
14 in court individuals raise their right hand and give
03:40:02 15 attestations, but in any event, that was the position of the
16 district court in Tennant. I commend to the Court's
17 attention the district court decision in Tennant. It
18 adopted most of the positions that my friends on the other
19 side are arguing. At Footnote 7 in that case, it adopted
03:40:19 20 the argument of Mr. Torchinsky that there would have to be
21 some type of a formal ment of justifications. The Supreme
22 Court said no, it doesn't have to be a formal statement.
23 There is no requirement at the time of redistricting to
24 establish the justifications. So that argument stands
03:40:38 25 rejected as well.

1 Finally, let me address the issue of specificity.
2 The district court in Tennant demanded that. And I think we
3 need to be very clear about what Tennant held. My friends
4 on the other side want to characterize it as a case about
03:40:53 5 county lines. That's actually not really accurate. That
6 was one of the justifications, but it didn't work on its
7 own. Why not? Because the district court found that there
8 were six plans at the time of redistricting available to the
9 West Virginia legislature that met every county line goal of
03:41:12 10 the legislature at a lower population deviation. So the
11 state needed more, and it had more. What did it use? It
12 used an argument about core retention. Preservation of the
13 prior districts, minimizing movement of population. On that
14 question, the district court simply disagreed with the
03:41:31 15 legislature's policy choice. It credited testimony of an
16 expert opining that they used the wrong method of defining
17 core retention. On appeal, the Supreme Court said that's
18 not the question. The question is simply what was their
19 policy choice. The district court also --

03:41:49 20 JUDGE KETHLEDGE: So on that point, it didn't
21 matter if they made a mistake in implementing it, it's just
22 if they made a legitimate policy choice and kind of did
23 their best and that's good enough?

24 MR. RAILE: Yes. There is not a basis, especially
03:42:03 25 when we are at the low end of deviations for the Court to

1 come and say that's not the right community of interest,
2 there's this other community of interest you could have
3 picked as well. The one-person, one-vote principle is not
4 like a dog getting its nose under the fence so it can run
03:42:17 5 wild with policy choices. It still has to look and defer to
6 the state policy judgment. In fact, the opening salvo of
7 Tennant Supreme Court decision found that the district court
8 erred by failing to defer to the policy judgments of the
9 state legislature of Virginia. One of those policy
03:42:31 10 judgments was core retention, which the district court said
11 was too arbitrary, it was done in the wrong way. How do you
12 know that this group of people should be moved versus that
13 group of people? It disagreed with it. The Supreme Court
14 had no patience for that.

03:42:47 15 Importantly, the district court also required in
16 Tennant the kind of specificity that my friend, Mr.
17 Torchinsky, just said is required, and the Supreme Court
18 said no, it's not. There is not a requirement. Specificity
19 does not mean that the legislature has to go line by line
03:43:03 20 and identify this group of people just had to be here and
21 there just had to be a deviation. The question -- That
22 question really comes out at Step Four of the Tennant test,
23 the availability of alternative remedies. Well, we know --

24 JUDGE KETHLEDGE: Same interests, right?

03:43:20 25 MR. RAILE: Yes, yes, exactly. Vindicating or

1 approximately vindicating the states's policy choices. Mr.
2 Torchinsky has just admitted that their alternative plan
3 does not do this. He used the word "destroy," and that's
4 true. The alternative plan in this case is not designed --

03:43:36 5 Yes, your Honor.

6 JUDGE KETHLEDGE: We get that. And I think the
7 alternative plan is sort of set aside here for a moment
8 here. It seems to be a Step One device and basically
9 irrelevant in Step Two.

03:43:47 10 MR. RAILE: I agree. And I think that means that
11 we have one -- we have Factor One, size of deviation favors
12 the state. Step Four, there are no alternative remedies.

13 JUDGE KETHLEDGE: Well, I want to talk to you about
14 that, okay.

03:43:59 15 So if we can just go to that, you know, question
16 whether there are alternative remedies or, you know,
17 alternative remedies, alternative lines that would equally
18 advance the state's policy goal while coming closer to
19 population equality, which I think we have to view as really
03:44:25 20 something the state has to strive towards. It can't just
21 sort of, you know, say okay, we are, you know, at 0.14 of
22 one percent, and let's just not worry about it. And so I
23 hear the plaintiffs making -- having maybe a different
24 emphasis today, which is not give us our plan, but which is
03:44:49 25 sort of, let's do a little sort of fine surgery on the

1 borders of your plan -- of the Commission's plan, and get
2 these 300 people moved over here and the 400 moved over
3 there. So that really goes to Step Four, right? Tennant.
4 You know, they are saying this is an alternative that would
03:45:10 5 vindicate communities of interest, they think. You know,
6 you are not -- you are not doing a lot of damage to keeping
7 these rural communities together, etcetera, it's like a
8 finely tailored approach to get to equality without doing a
9 lot of damage to communities of interest, and I'm interested
03:45:29 10 to hear your response at the Step Four part of this.

11 MR. RAILE: Yeah, I'm happy to, your Honor. There
12 is no such map. The question is not whether --

13 JUDGE KETHLEDGE: Do they have to come forward with
14 a map or can they just say, your Honors, order the
03:45:39 15 Commission to add these numbers, you know, and just tweak
16 their existing plan the way they want to. They could ask
17 for that relief.

18 MR. RAILE: Well, that is the relief, but I'm
19 talking about the fourth Tennant factor, which is different,
03:45:51 20 the availability of alternative plans. And what that means,
21 in some cases you wouldn't have to do that, because they
22 might exist on the record. In Tennant, there were plans
23 that were already in front of the legislature, so they may
24 not have to do it, but there has to be an actual plan. And
03:46:06 25 the problem with assuming that this can be done is we have

1 no idea. That's bald speculation. The plaintiffs could
2 have tried to do that. For all I know, they did. For all
3 we know, they tried that and it didn't work. And the reason
4 for that is, it's simply not necessarily true that you can
03:46:26 5 just make minor adjustments on the edges of districts
6 without significant changes. A redistricting plan is like a
7 Rubik's Cube. Basically you're sitting up here and you're
8 saying, well, gee, this red square could easily be on the
9 other side. Well, sure. Once you move that, you have to
03:46:43 10 move other population, and that's particularly so in the
11 context of redistricting, because in redistricting -- the
12 redistricting authorities working with census blocks. These
13 are not fungible people. You don't just grab -- oh, I need
14 19 people from this district and that is the right amount.
03:46:59 15 You're working with the census blocks. That runs from
16 anywhere from zero people to over a thousand people. So
17 you've got to scan the line and find a census block that
18 meets your need, and so --

19 JUDGE KETHLEDGE: Is that the smallest unit, you
03:47:13 20 know, that you can move around in a districting plan?

21 MR. RAILE: Yes.

22 JUDGE KETHLEDGE: Why is that? Just as an
23 administrative matter, the Secretary of State?

24 MR. RAILE: Yes, as a practical matter,
03:47:23 25 redistricting authorities do not split census blocks, that's

1 never done.

2 JUDGE KETHLEDGE: How many people, I guess, it
3 varies, right?

4 MR. RAILE: Yeah, it varies dramatically.

03:47:32 5 JUDGE KETHLEDGE: How many, you know, like Queens
6 versus the upper peninsula? I suppose different numbers.

7 MR. RAILE: It has nothing to do with the
8 geography. It's the choice of the -- I mean you could have
9 a census block in Queens of three people, you could have a
03:47:43 10 census block in rural Iowa of a thousand people. It's the
11 Census Bureau's choice.

12 JUDGE KETHLEDGE: Oh, so that's done at the federal
13 level?

14 MR. RAILE: Yes. That is the Census Bureau.

03:47:51 15 JUDGE KETHLEDGE: Okay.

16 MR. RAILE: So they have these blocks and that's
17 developed for the administrative convenience of
18 administering the census. So you're using these blocks.
19 It's like playing with Legos, right. You need the right
03:48:02 20 size to fit into a given place, and so all of this bald
21 speculation -- oh, obviously you could do it, we don't know
22 that. They are coming in, they are asking for exceptional
23 relief on an exceptional timetable after the Supreme Court's
24 Merrill ruling, which I would like to get to, if I have
03:48:21 25 time, and they are saying we want the Court to assume that

1 this exists. I don't think the Court can issue an
2 injunction and find out what it means later.

3 JUDGE KETHLEDGE: You know, just before we go off
4 to some other precinct here.

03:48:36 5 JUDGE MALONEY: Census block.

6 JUDGE KETHLEDGE: Yeah, no pun intended.

7 On the question of specificity, first of all, I get
8 your point. I understand your argument regarding, in your
9 view, the sufficiency of the Eid affidavit standing alone,
03:48:52 10 particularly at this stage of the case. But, you know, the
11 court does -- The court does demand some specificity as to
12 why the lines needed to be drawn a certain way to preserve,
13 in this case, the community of interest. And I understand
14 your argument that we have deferential review. But it would
03:49:15 15 seem to me that we ought to, frankly, just have some
16 citations to the Commission's -- that perhaps you should
17 have a chance to give us some citations to the Commission's
18 records that support Eid's characterizations of these
19 comments from citizens at the hearings. I mean a through
03:49:39 20 thread of the declaration is, we are doing what people told
21 us they wanted us to do at the hearings, right?

22 MR. RAILE: Yes.

23 JUDGE KETHLEDGE: Okay. It would be -- I don't
24 think we should have to take Mr. Eid at his word on that.
03:49:54 25 And I would suggest that we ought to get the citations that

1 support those representations about what the -- the citizens
2 said at these hearings or through the portal, and on the
3 other hand, they ought to have a chance to show us that
4 actually the thrust of the comments, on these specific
03:50:15 5 points that he is raising, not just generic stuff, that he
6 is raising, that he is wrong, in saying people in like
7 northern county "X" wanted to be kept with this other area.
8 Are you tracking me on that?

9 MR. RAILE: I understand what you are saying. I
03:50:31 10 have 40 pages of comments right here that support what he
11 said. We could do a supplemental filing or supplemental
12 declaration. For example, Mr. Torchinsky said it's not true
13 that they all have shared media markets. I have a 9/14
14 transcript at Pages 5 through 6 that has a public commenter
03:50:48 15 saying they share media along the southern border of the
16 state. So we are happy to do that. We can do that. I'm
17 not sure it's legally required under Tennant, but if the
18 Court disagrees, we can supplement the declaration.

19 JUDGE KETHLEDGE: I mean, you know, Tennant is not
03:51:01 20 a French code as the showing necessary, right? I mean it's
21 sort of using -- it's laying out standards. It's not giving
22 us super fine detail. It's not giving us detail at this
23 level of, you know, you would need to have record support
24 for what the guy is saying or not. And I think that, you
03:51:21 25 know, the PI ruling is an important ruling in this case.

1 Obviously, we are making a prediction about what you're
2 going to be able to show or not show at a later point in the
3 case. And I think subject to approval of my colleagues
4 here, we are going to ask each of you to give us
03:51:44 5 supplemental briefing that tells us whether the record
6 supports or does not -- or refutes what Mr. Eid is saying
7 about why people wanted these lines drawn the way he said he
8 wanted them drawn in his declaration.

9 MR. RAILE: We are happy to oblige on the
03:52:04 10 Commission's part, your Honor.

11 JUDGE MALONEY: Counsel, I've used 18 minutes.

12 MR. RAILE: I just want to say one word of about
13 Merrill.

14 The plaintiffs are making an apples to oranges
03:52:14 15 comparison. I think this is very important, because they
16 are contending that we are not on the time line of Merrill.
17 We are actually almost identical. If you actually make an
18 apples to apples comparison, the last day of the PI hearing
19 in Merrill was January 12th, that was four and a half months
03:52:30 20 or 132 days off of the primary election date, the in-person
21 date of May 24th. Today, March 16, we are four and a half
22 months, 139 days off of the in-person date.

23 JUDGE KETHLEDGE: That's what I thought.

24 MR. RAILE: They are comparing the mail-in date.
03:52:48 25 They are looking at our date for mail-in is June 23rd, we

1 are almost exactly the same. The Supreme Court has
2 announced its closing time on redistricting litigation this
3 year. You don't have to go home, but you can't stay here.

4 Thank you, your Honors.

03:53:05 5 JUDGE MALONEY: Counsel, you may proceed.

6 MS. MEINGAST: Good afternoon. Heather Meingast --
7 Assistant Attorney General Heather Meingast on behalf of
8 Secretary of State Jocelyn Benson.

9 As the Court knows from our briefing, the Secretary
03:53:23 10 really has two functions with respect to the redistricting
11 process, neither of which has anything to do with drawing
12 maps or approving plans.

13 First, under the Constitution, the Secretary has a
14 duty to provide administrative and technical support to the
03:53:38 15 Commission with respect to its map making process, and she
16 has done that.

17 And second, as the state's chief elections officer,
18 she and her staff have a duty to implement the new plans
19 with respect to conducting elections in Michigan going
03:53:53 20 forward. And principally with respect to that function,
21 that means updating the state's electronic voter list, our
22 qualified voter file, to ensure that it's over eight million
23 registered voters are properly placed within the new
24 districts. It's a Herculean task. It's time intensive,
03:54:13 25 it's labor intensive.

1 And there are also other duties at issue here
2 implicated by this litigation. Again, under the Secretary's
3 election supervisor hat, she's also the filing official for
4 Congressional candidates -- certain Congressional candidates
03:54:29 5 and other candidates which affect nominating petitions. So
6 it's her job to accept those petitions, canvas those
7 petitions, and present those to the Board of State
8 Canvassers for approval.

9 And more significantly, as supervisor of elections,
03:54:42 10 the chief elections officer, she has a duty to ensure that
11 all Michigan elections are conducted in an orderly and
12 secure manner. And so we think that those latter duties are
13 implicated with respect to this litigation, particularly
14 with respect to, I guess, the relief that seems to be
03:55:00 15 requested now at this preliminary injunction stage.

16 As you can tell from our briefing, we really don't
17 have a position on the substance, that's not the Secretary's
18 duty here, but we are concerned about the potential remedy
19 at a preliminary injunction stage given the election
03:55:16 20 calendar. So what we did in our brief was we attempted to,
21 you know, describe the calendar going forward and express
22 our concerns with respect to what ordering the preparation
23 of a new map would do going forward. And as I sit here
24 today, and to me it wasn't necessarily clear what plaintiffs
03:55:34 25 wanted for relief, and I think it's now that was pointed

1 out, it's not to adopt their remedy map, which of course,
2 would have been probably the most expedient thing to do, but
3 it would be to some sort of mandatory injunction to send the
4 Commission back to tinker with the borders, as was sort of
03:55:53 5 indicated earlier. And I think standing here today, you
6 know, the filing deadline is April 19th for these
7 candidates. There isn't any way that we can envision the
8 Commission being able to be remanded back drawing new maps,
9 getting those maps approved or at least even tinkering with
03:56:12 10 the side lines, getting those approved, and then for the
11 Bureau of Elections and its staff to then go through the
12 three phase process that we need to do to implement new maps
13 -- new Congressional maps into the qualified voter file.
14 There isn't going to be a way for us to do that and meet the
03:56:31 15 April 19th filing deadline.

16 And so that's, you know, if we were going to go
17 beyond that, we would have to get into this concept of
18 enjoining statutory deadlines, picking new deadlines for
19 filing. I'm happy to go on with the parade of horrors if
03:56:51 20 anybody has specific questions, but you know, as we stand
21 here today, with the relief that seems to be being requested
22 would be to go back, allow the Commission to draw at least
23 new borders, all of that, even small tinkering puts us back
24 at the three phase process of implementing the maps into the
03:57:10 25 QVF. And we have got about five weeks left before April

1 19th, and there isn't going to be a way for the state to do
2 that and ensure that there is not sort of chaos with respect
3 to nominating petitions as they come in.

4 So I will save time, I know I think our intervenors
03:57:30 5 each wanted to have a couple minutes, if that's all right
6 with the Court.

7 JUDGE MALONEY: Thank you.

8 MR. DIAZ: Good afternoon, your Honors. Jonathan
9 Diaz on behalf of Voters Not Politicians. I want to clarify
03:57:46 10 for the record that Mr. Gaber and myself also represent VNP
11 in addition to Mr. Pauwels, not the voter intervenors. So
12 get that out of the way to start.

13 I'll be very brief. We agree with the Commissioner
14 defendants on the merits and don't believe that a PI is
03:58:03 15 warranted at this stage. But I do want to say a few quick
16 words about the remedy.

17 It's Voters Not Politicians' position that any
18 changes to the map should be made by the commission, that is
19 the official policy of the state, that's what the Michigan
03:58:17 20 Constitution says should be -- they should be the ones to
21 draw any maps, whether it's the initial enacted map or any
22 revisions to it. And any injunction that emanates from this
23 Court should be narrowly tailored to meet the harms that are
24 alleged in the remaining count in this case.

03:58:36 25 I know we have been over the remedy map and how it

1 doesn't really apply to the remaining claim as it did to
2 Count Two, but I do want to point the Court's attention to
3 the recent case out of Wisconsin, Johnson vs. Wisconsin's
4 Election Commission, in which the Court ordered at least
03:58:53 5 change its remedy. And we believe --

6 JUDGE KETHLEDGE: When was that case decided?

7 MR. DIAZ: That was earlier this year.

8 JUDGE KETHLEDGE: Is that one-person, one-vote
9 case?

03:59:01 10 MR. DIAZ: I believe so. Yes. And it's at 2022
11 Westlaw at 621082.

12 JUDGE KETHLEDGE: Okay. And they granted relief to
13 a plaintiff in that case?

14 MR. DIAZ: They adopted -- They asked all of the
03:59:16 15 parties to submit least changes maps and chose, I believe,
16 the governor's plan.

17 And that's all I have. If the Court has no
18 questions, I'll take my seat.

19 JUDGE MALONEY: Thank you, counsel.

03:59:32 20 MS. PRESCOTT: Good afternoon, your Honors. Sarah
21 Prescott on behalf of the voter intervenor defendants.

22 I also will be very brief and my comments will be
23 of a similar type speaking to remedy.

24 As reflected in our briefing, we have not taken a
03:59:50 25 position on the merits on Count One, however, our concern

1 would be that if the Court were interested in any kind of a
2 remedy after today's hearing, that the appropriate remedy
3 would be remand to the Commission. I've heard brother
4 counsel at this podium earlier today say that his map is --
04:00:09 5 this is no longer a map making exercise, this is at most a
6 math problem. Also, that due to the dismissal of Count Two,
7 that the map of the plaintiffs is not required. I think
8 those are certainly consistent with what we have heard here
9 today.

04:00:22 10 And so to add to what you've already heard, I would
11 only commend to the Court's attention two cases, both are
12 controlling. The first is Howe vs. The City of Akron, it's
13 a Sixth Circuit case in 2015. It's cited in our brief at
14 Footnote 1. Simply stands for the proposition that the
04:00:42 15 Court's duty, if it is to provide the sort of relief
16 requested here, would be to be as narrow and specific as
17 possible. That's -- it's a more general point.

18 The second case is from the Supreme Court, it's
19 Abrams vs. Johnson, and it's a 1997 case in which it was a
04:01:01 20 voter -- one-voter -- one-person, one-vote case, your Honor,
21 and relief was granted. The Court said, however, that it
22 would be inappropriate, even if granting a new plan, to do
23 anything other than ask for the narrowest possible remedy.
24 The Court said that at most, we would require some very
04:01:23 25 minor changes in a plan, a few shifting of precincts to even

1 out districts rather than a revision or redrawing of a map.

2 So that case --

3 JUDGE KETHLEDGE: What is the -- I think you're
4 echoing what your colleague just said. What is the upshot
04:01:39 5 of that for purposes of our decision?

6 MS. PRESCOTT: Yes, so the question would be just
7 to reiterate from the plaintiffs' point of view, I think
8 what they have conceded here today -- what they have
9 conceded here today, that this is not -- that the Court
04:01:53 10 could not adopt a particular map or be ordering a relief of
11 adoption of a map. At most the request would be, and our
12 position is that the appropriate remedy here at most, if any
13 remedy, would be remand to the Commission to do this narrow
14 as possible, as brother counsel called it, math problem.

04:02:14 15 Thank you.

16 JUDGE MALONEY: Thank you, Ms. Prescott.

17 Mr. Torchinsky, go ahead, sir.

18 MR. TORCHINSKY: Yes, your Honor.

19 Let me just address a couple things. The Wisconsin
04:02:25 20 case that my -- counsel for defendants just cited was a
21 State Supreme Court case where there was no enacted map
22 remedying the population changes from the last decade passed
23 by the political branches, and so it fell to the judiciary.
24 And in that case, there was actually an impaneled
04:02:39 25 three-judge panel which stayed its hand pending what

1 happened at State Supreme Court, and ultimately what the
2 State Supreme Court said in that case is, because there is
3 no agreement between the governor executive, we are going to
4 basically tell the parties that we are going to adopt
04:02:53 5 essentially a least changes map from the current existing
6 map to equalize these. But Wisconsin was in a different
7 situation than Michigan, in that Wisconsin was maintaining,
8 at least at the congressional level, the same number of
9 congressional districts, and obviously they weren't changing
04:03:09 10 the size of their state legislature. So a least changes
11 from the existing was much easier to do in Wisconsin than it
12 would be from the 2010 map in Michigan because of the loss
13 of a congressional district.

14 That said, I do think I agree with counsel for the
04:03:25 15 defendants in that if this Court is going to grant relief, I
16 think under Grove v. Emison, the appropriate relief from
17 this Court is, at least in the first instance, to offer the
18 Commission an opportunity to make the changes that are
19 necessary to its map to comply with one-person, one-vote
04:03:41 20 requirements. I think what we are asking here, your Honors,
21 is for small surgical changes that can fix the population
22 deviations for two-thirds of the district in the state.

23 In Tennant, the reasons for the deviations were
24 ascertainable. The Supreme Court could tell whether those
04:03:56 25 deviations were applied neutrally and consistently, and

1 here, the communities of interest are, at least according to
2 what they say, whatever they say they are.

3 JUDGE KETHLEDGE: Well, let's say that's right.
4 Let's say, I mean, you know, the law does permit certain
04:04:10 5 kinds of arbitrary action. That just means where there
6 aren't legal bounds on what the actor decides to do, and
7 political judgments are by definition those kinds of
8 judgments. And those are the very kinds of judgments that
9 are at issue in these cases. So they can -- they can define
04:04:31 10 this term probably more or less as they want. We have
11 already said that, in an opinion. The question is whether
12 they are being consistent and not arbitrary. That word just
13 confuses matters. Whether they are being consistent and
14 neutral in their application of this concept that they are
04:04:49 15 allowed to define. And I guess on that point, setting aside
16 the lack of record support, okay, in the Eid affidavit, you
17 know, pointing us to the particular comments so we can see
18 them and so on. I know you have a different view about some
19 of these things that he is saying, you know, seventy people
04:05:09 20 said something else.

21 MR. TORCHINSKY: Yep.

22 JUDGE KETHLEDGE: But where is the inconsistency or
23 the lack of neutrality, in your view, in Mr. Eid's
24 declaration with respect to how he says they are applying
04:05:25 25 communities of interest in drawing these lines?

1 MR. TORCHINSKY: When you look at the deviations as
2 they are spread around the state, the four districts that
3 are underpopulated and the nine districts that are
4 overpopulated, there is nothing uniform between those that
04:05:40 5 says why some of the districts are overpopulated and why
6 some of the districts are underpopulated.

7 JUDGE KETHLEDGE: That's a little different
8 question than I'm asking. Okay.

9 I mean they could be consistent and neutral in
04:05:52 10 applying their communities of interest concept, is really
11 probably, you know, the right word given the vagueness of
12 what we are dealing with. They could be pretty consistent
13 and pretty neutral, but maybe a little bit sloppy. And, you
14 know, you've got an extra 200 here or 400 there, but I'm
04:06:10 15 asking a different question. I know you think they are
16 sloppy. My question is: How are they being non neutral?
17 How are they being inconsistent in their application of the
18 idea of a community of interest, period?

19 MR. TORCHINSKY: I think that -- I think the answer
04:06:28 20 is --

21 JUDGE KETHLEDGE: There is an incoherency.

22 MR. TORCHINSKY: In the answer is, in Tennant, the
23 reasons for the deviations were ascertainable. The Court
24 could look at it and say, okay, they kept the county lines
04:06:38 25 whole. They Court could look at it say okay, they didn't

1 pair incumbents together.

2 JUDGE KETHLEDGE: But Mr. Eid has, you know, a
3 fairly lengthy affidavit. He goes through every district,
4 he gives reasons for each district, why they drew the lines
04:06:50 5 they did and problems with the plaintiffs' plan. Okay. And
6 let's say our review is pretty deferential, because it's
7 one-fourth of one percent of a deviation. Let's just say it
8 is pretty deferential. Where is the inconsistency in the
9 application of communities of interest? I think this is a
04:07:08 10 very important question for you.

11 MR. TORCHINSKY: Yes, and I think the answer is,
12 because there is nothing consistent across the state. He
13 says oh, the southern district shares a media market, and
14 Muskegon --

04:07:21 15 JUDGE KETHLEDGE: And cross border, you know, kind
16 of working and commuting, and not just the media market.

17 JUDGE MALONEY: In the definition of community of
18 interest in the state constitutional provision, is broad in
19 it's four squares, but it also says, but shall not be
04:07:38 20 limited to. So do you disagree that it's legitimate to
21 consider the economic impact by way of example for the
22 border counties and then consider historical characteristics
23 or cultural characteristics in some other portion -- in some
24 other part of the state?

04:08:00 25 MR. TORCHINSKY: Your Honor, that may be true, but

1 it still doesn't explain why they had to leave 685 people
2 out of the southernmost district, why they had to add 234
3 people into this district. Nothing has explained those
4 inconsistencies in Commissioner Eid's declaration or Mr.
04:08:18 5 Brace's declaration.

6 JUDGE KETHLEDGE: I think you're really talking
7 about Step Four of Tennant in the framework that Mr. Raile
8 was talking about, which I think is a fair -- you know, I
9 mean you know the caselaw obviously very well.

04:08:26 10 MR. TORCHINSKY: Right.

11 JUDGE KETHLEDGE: So Tennant, you know, okay, we
12 are looking at how big is the deviation, not very, one fifth
13 of the deviation of Tennant. How important are the state
14 interests? Well, you know, the state seems to think they
04:08:42 15 are important. They are in the Constitution as number three
16 of six, or whatever -- seven. And then what is -- what is
17 the third one? It's not the one I want to talk to you
18 about. The fourth one is can we vindicate this, you know,
19 with a different district line and yet preserve the
04:09:04 20 legitimate state interests here, the communities of interest
21 and you are saying basically they could do that.

22 MR. TORCHINSKY: Yes, your Honor, they could.

23 JUDGE KETHLEDGE: But I'm going to the antecedent
24 question whether there is a legitimate state interest that
04:09:18 25 is supporting what they are doing here. And I'm -- it seems

1 like Mr. Eid describes reasons, you know, reasonably and
2 sort of concrete, you know, as far as this sort of concept
3 goes. He gives us some decent reasons why these lines are
4 supported by the community of interest criterion, and your
04:09:38 5 lines retard that criterion. And so like, how is he wrong
6 on that part of the analysis? Not Step Four, that part.

7 MR. TORCHINSKY: Your Honor, I think because this
8 Court has dismissed Count Two, I think we have conceded that
9 our original remedy map is not -- should not factor into
04:09:58 10 this Court's consideration. I think that this Court, as
11 counsel for two of the defendants pointed out, could remand
12 to this Commission and ask for small surgical, least changes
13 to comport this map with one-person, one-vote, which is a
14 U.S. constitutional requirement and the number one
04:10:14 15 requirement in the State Constitution.

16 JUDGE KETHLEDGE: Why don't you, at this stage,
17 have an obligation to have, frankly, anticipated that and
18 said okay, if you blow out Claim Two in our kind of heavy
19 redraw, here is our more -- now we are hearing all this
04:10:29 20 about narrow tailoring today that, frankly, I haven't heard
21 about in the 19 briefs that we read for this hearing. So I
22 mean why don't you have an obligation? You are the one who
23 ultimately bears the burden to get the relief you want. Why
24 don't have you an obligation to give us that map that moves
04:10:46 25 the 300 people around here and the 200 there, which they can

1 shoot at and say wait, a minute, your Honor, you know, every
2 time you do this, you are going to mess up the Rubik's Cube
3 and it's actually not doable. Why shouldn't you have to
4 show us something that is doable before we blow up the
04:11:04 5 status quo as to the Michigan election plan?

6 MR. TORCHINSKY: Your Honor, Count Two wasn't
7 dismissed until after briefing was concluded in this case.

8 JUDGE KETHLEDGE: But still, you know, you could
9 have foreseen maybe we are not going to win on Count Two,
04:11:17 10 almost nobody wins on these thing so, you know, that was a
11 long shot.

12 MR. TORCHINSKY: Your Honor, if you gave us until
13 Friday at 5:00, we could come up with a least changes map
14 that made these -- and give us 48 hours. I'm telling you,
04:11:28 15 it really doesn't take that long to play the Rubik's Cube
16 game.

17 JUDGE KETHLEDGE: But what it does -- What takes
18 awhile, you know, is then they have to analyze it and
19 respond and say, that's a whole different kettle of fish.

04:11:39 20 MR. TORCHINSKY: No, it's actually not that hard,
21 your Honor. The census blocks, as Mr. Raile said, can vary.
22 But when you look around the borders of these districts and
23 you look around the precincts that border these districts,
24 they also vary in size. Right. So you can look around and
04:11:53 25 say, okay, if I swap this precinct and that precinct, I can

1 add a couple hundred people there and subtract a couple
2 hundred people there without separating Grand Rapids and
3 Muskegon, and you can solve the problem. This is not an
4 unsolvable problem. This is, if you are going to -- if
04:12:08 5 you're only looking at Count One and not looking at our
6 Count Two complaints, coming up with a map that actually
7 equalizes the population using a least changes sort of
8 rubric to equalize the populations is not hard, and I think
9 this goes to -- this goes to the footnote in Justice
04:12:26 10 Kavanaugh's opinion in Merrill where he said the degree of
11 what it takes to solve the Constitutional problem is
12 something that this Court should absolutely consider. Take
13 in the Milligan case. In the Milligan case, it was an
14 entire redraw of the state's maps. To solve this problem of
04:12:43 15 moving a couple of hundred people between districts to
16 equalize the populations, is not hard.

17 JUDGE NEFF: But if you do that, don't you also
18 have to speak to what effect that will have on the
19 communities of interest and the other factors?

04:12:58 20 MR. TORCHINSKY: Your Honor, I think even if you
21 accept for a moment Commissioner Eid's communities of
22 interest, I think you can move 235 people out of District
23 Three and into District Two or District Four.

24 JUDGE MALONEY: Aren't you insisting on
04:13:11 25 mathematical precision vis-a-vis the Karcher case, when the

1 standard is as nearly as practicable?

2 MR. TORCHINSKY: Right. And, your Honor, I'm
3 saying it is practicable to respect even Commissioner Eid's
4 asserted communities of interest and equalize the
04:13:27 5 populations among these districts.

6 JUDGE KETHLEDGE: I mean, but you're just offering
7 your sort of your own sense of that. You are telling -- you
8 are telling, not showing. And, you know, it's too late, in
9 my view, for you to give us another map and then to have a
04:13:44 10 chance to respond and so on, and to give you guys an answer
11 in the time frame you want for this motion. It's just too
12 late for that.

13 My question again is not about that, I'm not
14 necessarily saying that's fatal. Okay. That you haven't
04:13:59 15 given us one. I mean I think it's a problem that, you know,
16 we don't have the alternative that you think should be the
17 districts in our state, but my question itself really -- I
18 haven't heard an answer to it, which is how is Mr. Eid wrong
19 or how is he inconsistent in his application of communities
04:14:24 20 of interests? That's a different question than whether he
21 could have pursued those interests and tweaked, you know,
22 the line in a tiny place.

23 MR. TORCHINSKY: I think, your Honor, this goes to
24 the -- in the Court's dismissal of Count Two, the
04:14:37 25 communities of interest notion is so vague, it is nearly

1 impossible to ascertain.

2 JUDGE KETHLEDGE: It's vague in a legal sense.

3 MR. TORCHINSKY: And that is the problem.

4 JUDGE KETHLEDGE: I read Justice Markman's very
04:14:50 5 thoughtful memo, he is a wise man, but it's basically
6 hortatory probably. You know, he is saying just use
7 counties, don't go farther, it's going to be sort of be a
8 mess. And I understand what he is saying, but the Michigan
9 Constitution does not limit the Commission in that way.
04:15:12 10 They have discretion, they can exercise it. Communities of
11 interest is a very multi-faceted thing. And I guess I'm
12 just not seeing the inconsistency or the non-neutrality in
13 what he is saying. Now, whether what he is saying is an
14 accurate description of the record, that's another matter,
04:15:32 15 but I'm inviting you to tell me why he is being inconsistent
16 and non-neutral in his explanation. And I -- you know, you
17 don't have to make that argument, but I'm just saying it
18 looks like it is.

19 MR. TORCHINSKY: Because his explanation
04:15:47 20 cherry-picks what he wants to hear in a record of, you know,
21 hundreds of people and thousands of comments in front of a
22 Commission that met for, you know, almost a year and a half
23 taking input from around the state. But just take District
24 Three, he says well, we wanted to, you know, combine
04:16:04 25 Muskegon and Grand Rapids and, you know, there were 40

1 people who said keep Kent County whole. There were 70
2 people who said don't put Grand Rapids and Muskegon
3 together. And he says well, you know, this one comment says
4 Muskegon and Grand Rapids share cultural identity. I'm not
04:16:20 5 really sure what that means, but you know, and then says oh,
6 well, you know, the southern border counties the state share
7 an identity because there is one comment at one meeting
8 where someone says they share a media market, which turns
9 out to be factually not true. You know, that is the
04:16:33 10 arbitrariness that was involved in Commissioner Eid's
11 assertion of communities of interest, and that's why it's
12 not neutral and consistent across the state.

13 JUDGE NEFF: Are you saying that when he does say
14 what he relied on, if it's not the same thing as he relied
04:16:49 15 on in a different community of interest that's inconsistent?

16 MR. TORCHINSKY: So it's culture here, it's media
17 market here.

18 JUDGE NEFF: Does it have to be the same on every
19 one? How can it be?

04:17:01 20 MR. TORCHINSKY: That's exactly what shows that
21 it's not neutrally applied across the state.

22 JUDGE MALONEY: No. No. I disagree with you,
23 counsel. Look at the definition of community of interest.
24 It's got -- I lost it.

04:17:17 25 JUDGE KETHLEDGE: It's got economic, cultural.

1 JUDGE MALONEY: Historical, including all kinds of
2 considerations, and in addition to that, the state
3 Constitution provision says, "but not limited to." So are
4 you suggesting that -- I gather you're suggesting that the
04:17:37 5 Commission did not make a good faith effort to achieve
6 population equality when they looked at these community of
7 interest. Is that what you are saying?

8 MR. TORCHINSKY: Your Honor, I think when you look
9 at the state Constitution that puts population equality as
04:17:52 10 number one, and then you look at how they defined
11 communities of interest, which just to -- take me with a
12 grain of salt for a moment -- it varies across the state,
13 but it still doesn't explain why there is nothing in the
14 community of interest definition that, as Mr. Eid -- or
04:18:10 15 Commissioner Eid described it, that explains why District
16 Five in order to unify the southern border counties, when it
17 divides at least two or three counties to do so, was
18 required to meet his definition to be 685 people
19 underpopulated or why District Three unified Grand Rapids
04:18:29 20 and Muskegon had to be 235 people overpopulated. And
21 that's --

22 JUDGE KETHLEDGE: That is Mr. Raile's argument
23 that, you know, the showing that you're demanding is akin to
24 the one that district court demanded there, the very fine
04:18:43 25 grain and, you know, we are kind of running the software at

1 this point about whether we could really smooth these things
2 out without messing something else up. And, you know, his
3 argument was, that's kind of what the district court did
4 there, you saw what happened to them. And the Supreme Court
04:19:00 5 says not -- the scrutiny isn't that close. I mean, you
6 know, the summary is, you know, failed to apply appropriate
7 deference. So we owe more deference here than there,
8 because of the much lesser deviations. So why doesn't that
9 get like washed away in the deference?

04:19:22 10 MR. TORCHINSKY: I think it doesn't get washed away
11 in the deference because it's not, as this Court pointed out
12 in dismissing Count Two, this assertion is not
13 ascertainable. What was critical to the Supreme Court in
14 Tennant was that the states defense of their deviations was
04:19:36 15 ascertainable. You could look at a map and see that they
16 didn't split counties. You could look at a map and see that
17 they didn't separate -- they kept incumbents in separate
18 districts. Here, you know, Commissioner Eid's definition is
19 all over the place, he uses various things and makes
04:19:55 20 assertions about various communities of interest. I mean
21 it's like a warshak blot, everybody that looks at the phrase
22 "communities of interest" is going to have a different
23 definition, and that can't possibly justify violating a
24 fundamental U.S. constitutional principle for congressional
04:20:09 25 districts that is priority number one in the state

1 Constitution. If you accept that, at some point, the next
2 Commission is going to draw wider deviations, and they are
3 basically going to assert that communities -- that asserting
4 communities of interest to justify population deviations is
04:20:26 5 sufficient, and that's kind of, unfortunately, where I think
6 the panel appears to be leaning. I mean this notion that
7 you can assert a vague communities of interest standard and
8 obviate what has been since the 1960s, the fundamental
9 one-person, one-vote concept in congressional districts when
04:20:41 10 every -- nearly every other state in the country is able to
11 have them with plus or minus one person is a stunning
12 conclusion for this Court to draw.

13 JUDGE KETHLEDGE: Well, I mean, you could have come
14 in here earlier and said not going for the fences, you know,
04:20:56 15 but instead said hey, you know, if what you really want is
16 to move 200 voters here and 400 voters there, you could have
17 come in with a plan that does that, at least for this
18 motion. Doesn't tube your case. But at least for this
19 motion, you could have done that. But now, you know, we are
04:21:12 20 considering the advisability of ordering an abstraction.
21 And an abstraction we don't know how it's going to play out,
22 and that's not our fault.

23 MR. TORCHINSKY: Your Honor, and that's why in
24 Grove, the Court would require this Court to remand it back
04:21:29 25 to the Commission to fix.

1 And with respect to why we didn't come up with a
2 map that just addressed Count One, again, I believe that
3 this Court's scheduling order said no further filings would
4 be permitted and then dismissed Count Two, so we didn't have
04:21:42 5 an opportunity to come up with a remedy map that only
6 addressed Count One.

7 JUDGE KETHLEDGE: You don't have to go over the
8 litigation strategy. But I mean I think there was a clean
9 slate before the motion for a PI was filed, and you know,
04:21:55 10 whatever. People make choices.

11 MR. TORCHINSKY: That's right, your Honor. And,
12 you know, we think that one-person, one-vote is a
13 fundamental principle that this commission is just
14 overriding and this Court shouldn't countenance it.

04:22:08 15 JUDGE MALONEY: All right. Thank you, counsel.
16 The panel will deem the matter to be submitted.
17 Justice -- or Judge Kethledge.

18 Let's get these submissions that Justice -- I said
19 it again. See, this is how a district judge thinks of
04:22:38 20 circuit judges.

21 JUDGE KETHLEDGE: No.

22 JUDGE MALONEY: Let's get those in by Tuesday at
23 noon, and we will obviously consider those.

24 MR. RAILE: May I query, your Honor, what precisely
04:22:57 25 is being requested? Is this a brief supplemental

1 declaration? Do you want us to annotate the existing
2 declaration?

3 JUDGE MALONEY: We want citations to the record,
4 that from your perspective, counsel, support Mr. Eid's
04:23:15 5 assertions as it relates to the matters in his affidavit.

6 JUDGE KETHLEDGE: And subject to what the presiding
7 judge and Judge Neff has to say, I mean, I don't think it
8 matters whether you just sort of, you know, add a footnote
9 or something to each representation in that declaration that
04:23:36 10 gives us the backup, so we can go look at the comments and
11 so on, or whether you think it would be helpful to have some
12 sort of narrative that explains maybe some comments one
13 needs to explain how that actually supports something.

14 And you folks, I mean the door is wide open for you
04:23:56 15 to show he is wrong about what the Commission's record says
16 with respect to the representations he is making about, you
17 know, what people said and whether people wanted to be
18 joined together or not. And so, you know, you can point to
19 other things or whatever. You know, you can make your case
04:24:17 20 on those points.

21 MR. TORCHINSKY: Your Honor, may I just inquire,
22 you know. There was discussion about whether we could
23 submit a map that just remedies Count One is that an
24 acceptable submission?

04:24:28 25 JUDGE MALONEY: I agree with Judge Kethledge on

1 that. It's too late.

2 JUDGE NEFF: Given the time constraints, I would
3 suggest we have page limits for these supplemental
4 submissions.

04:24:39 5 JUDGE KETHLEDGE: Yes, I mean --

6 JUDGE NEFF: 15 pages.

7 JUDGE KETHLEDGE: Yes, I mean it's just -- We do
8 want to know what is in the record, you know.

9 JUDGE NEFF: They can cite to the record. But I
04:24:51 10 think the briefs themselves should be limited.

11 JUDGE KETHLEDGE: Yes, any narrative that
12 accompanies this, I would say even ten pages.

13 JUDGE NEFF: That's good with me.

14 THE CLERK: In narrative. And then for the
04:25:02 15 citations themselves, those are just as numerous as they
16 are, you know, as the materials are. But, yeah.

17 JUDGE NEFF: Ten pages.

18 JUDGE MALONEY: Ten pages narrative, as many
19 citations to the record as you want.

04:25:19 20 MR. TORCHINSKY: Thank you, your Honor. Appreciate
21 it.

22 JUDGE MALONEY: Maybe the way to do it would be to
23 take Mr. Eid's submission, and plaintiff can say this is
24 inaccurate and then point to another part of the record, and
04:25:33 25 Commission members can point to well, this is -- this piece

1 of the record supports the assertion, and maybe that is the
2 way to do it. That way we --

3 JUDGE KETHLEDGE: Separate the citations from the
4 narrative or whatever.

04:25:47 5 JUDGE MALONEY: We will leave that to you.

6 MR. RAILE: We will do something intelligent, your
7 Honor. Thank you.

8 JUDGE NEFF: We can only hope.

9 JUDGE MALONEY: Thank you very much.

04:25:56 10 JUDGE KETHLEDGE: Thank you for your arguments.

11 COURT CLERK: All rise, please.

12 Court is adjourned.

13 (At 4:26 p.m., proceedings concluded.)

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C E R T I F I C A T E

I, Kathleen S. Thomas, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/

Kathleen S. Thomas, CSR-1300, RPR
U.S. District Court Reporter
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