

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

MICHAEL GONIDAKIS, et al.,	)	
	)	
PLAINTIFFS,	)	CASE NO. 2:22-CV-773
	)	
vs.	)	
	)	
OHIO REDISTRICTING COMMISSION,	)	
et al.,	)	
	)	
DEFENDANTS.	)	
	)	

TRANSCRIPT OF LOCAL RULE 65.1 STATUS CONFERENCE PROCEEDINGS  
BEFORE THE HONORABLE ALGENON L. MARBLEY  
UNITED STATES DISTRICT JUDGE  
MARCH 14, 2022; 9:30 A.M.  
COLUMBUS, OHIO

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MONDAY MORNING SESSION  
MARCH 14, 2022

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THE COURT: Good morning.

Ms. Stash, would you please call the case.

THE DEPUTY CLERK: Case No. 22-CV-773, Michael  
Gonidakis, et al., versus Ohio Redistricting Commission, et al.

THE COURT: Would Counsel please identify themselves  
for the record beginning with Counsel for the plaintiff. Since  
there are multiple counsel for different groups of defendants,  
when you identify yourself, would you please identify the  
defendants whom you represent.

Mr. Brey.

MR. BREY: May it please the Court. My name is Donald  
Brey. I represent the plaintiffs. I'm here with Matthew  
Aumann and with Trista Turley who also represent the  
plaintiffs.

THE COURT: Counsel for the defense.

MS. COONTZ: Good morning, Your Honor. Bridget Coontz  
on behalf of Secretary of State Frank LaRose. And with me  
today is Julie Pfeiffer and Mike Walton also with the Ohio  
Attorney General's Office.

THE COURT: Counsel for the defense from my left to  
right. Mr. Ellis?

MR. ELLIS: Good morning, Your Honor. Peter Ellis on

1 behalf of the Intervenor Ohio Organizing Commission, along with  
2 Christina Marshall.

3 MR. MCTIGUE: Donald McTigue, Your Honor, on behalf of  
4 the Bria Bennett intervenors, along with David Fox from the  
5 Elias Law Group seated to my right.

6 MR. CAREY: David Carey on behalf of the Intervenor  
7 Defendants League of Women Voters and A. Phillip Randolph  
8 Institute.

9 MR. SQUIRE: Good morning, Your Honor. May it please  
10 the Court. Percy Squire on behalf of Plaintiff Intervenor  
11 Reverend Kenneth L. Simon, Lewis Macklin, and Helen Youngblood.  
12 Thank you.

13 MR. COOPER: Good morning, Judge. Ben Cooper on  
14 behalf of Intervenor Defendants Allison Russo and Senator  
15 Vernon Sykes.

16 THE COURT: Ms. Cherry?

17 MR. COOPER: Ms. Cherry is legal counsel to Ms. Russo  
18 and Senator Sykes.

19 THE COURT: All right. Did I miss anyone?

20 We're convened here today pursuant to Local Rule 65.1  
21 based on the plaintiffs' motion for a preliminary injunction.  
22 However, the real animating factor for us to be here is whether  
23 the three-judge panel should be convened. There may be other  
24 issues that Mr. Brey wishes to raise.

25 But before we begin, I will -- just as a housekeeping

1 matter, you all probably know the court's current masking  
2 policy. As a court, we no longer require masking in the common  
3 areas; it's optional. In my court, if you have been fully  
4 vaccinated, then you need not mask. If you have not been, you  
5 need to be masked unless you're talking. Because of the number  
6 of counsel we have today, I'm going to have Counsel address the  
7 Court from the podium.

8 I know, Mr. Brey, you have issues to raise. And as the  
9 movant, I'm going to give you an opportunity to define the  
10 issues that you have to raise today. But we're going to begin,  
11 of course, with the issue of the stay that this Court  
12 previously imposed.

13 MR. BREY: Thank you, Your Honor. It's unclear. Does  
14 the Court wish me to address the three-judge panel now in  
15 connection with the stay or not?

16 THE COURT: Well, they're inextricably linked; so,  
17 yes.

18 MR. BREY: I have three points I would like to make.  
19 First of all, that we believe that 28 U.S.C. 2284 requires a  
20 three-judge panel. And we'll explain that.

21 Secondly, we believe that under United States Supreme  
22 Court precedent, the failure of the State to complete timely  
23 the apportionment gives authority to federal courts to do so.

24 Thirdly, I would argue that although this is really a  
25 matter for the preliminary injunction hearing since it requires

1 evaluation of evidence, that we believe there has been a  
2 failure to timely reapportion; so this Court, or a three-judge  
3 panel of this court, would have authority.

4 First point, the language of 28 U.S.C. 2284 is not in  
5 dispute. Its meaning perhaps needs to be fleshed out. We have  
6 filed a complaint challenging the apportionment, or lack of  
7 apportionment, of the general assembly of the State of Ohio.  
8 And when we file such a case and request three judges, which we  
9 have, Revised Code 28 U.S.C. 2284(b)(1) says, "Upon filing of a  
10 request for three judges, the judge to whom the request is  
11 presented shall, unless he determines that three judges are not  
12 required, immediately notify the chief judge of the circuit who  
13 shall designate two other judges."

14 THE COURT: Isn't the threshold question  
15 justiciability, though, Mr. Brey?

16 Certainly, this Court doesn't question whether a  
17 three-judge panel should decide the merits of the case. I  
18 don't think that that's a matter in dispute. The question is  
19 does the case have to be ripe before the three-judge panel  
20 acts, and is ripeness an issue that is to be determined by a  
21 single judge as *Shapiro* suggests, or by the three-judge panel  
22 as you suggest?

23 MR. BREY: I would also suggest the United States  
24 Supreme Court in *Shapiro v. McManus*, a 2015 case, sort of  
25 defined what the limits are in terms of what justiciability

1 means. There's some earlier cases that use justiciability in  
2 ways that were somewhat confusing about what authority a single  
3 judge had to immediately dismiss without invoking the  
4 three-judge panel. And that clarity was given in that 2015  
5 case which said the constitutional issues will not lightly be  
6 found insubstantial for purposes of the three-judge panel.

7           Essentially, as I read that case, if there is patently  
8 no jurisdiction, no federal jurisdiction, then it can be  
9 dismissed. And that can also include a case that's wholly and  
10 substantially frivolous. But consistent with the principle  
11 previously enunciated --

12           THE COURT: *Shapiro* didn't overturn *Grove*, did it?

13           MR. BREY: I'm sorry. *Roe*?

14           THE COURT: *Grove*.

15           MR. BREY: No, it didn't overturn *Grove*. It was  
16 dealing with a different issue. *Grove* had a three-judge panel.  
17 There was a three-judge panel in *Grove*, and there was also a  
18 three-judge panel in *Branch v. Smith*. So that issue did not  
19 come up.

20           THE COURT: I only raise the question because I want  
21 to be clear that under *Grove*, the Supreme Court was clear that  
22 the federal courts should defer to the states, to give them and  
23 the organs of state government an opportunity to make a  
24 determination as to what is an appropriate apportionment map.

25           Now, at this point, the Supreme Court is still



1 undertaking consideration of the map. For all we know -- and  
2 my law clerks have the website up as we are speaking today  
3 because a decision may issue at any moment. So it will be  
4 improvident for this Court to weigh in pursuant to *Grove* and  
5 its progeny while the Supreme Court is doing its work.

6 Why is that not, at base, a waste of judicial resources?  
7 Are we at a point, Mr. Brey, where if we don't act today at  
8 this moment, both the state and federal elections will be  
9 thrown into disarray, would be placed in jeopardy? Is there  
10 any such timetable at issue here?

11 MR. BREY: Your Honor, you've asked two different  
12 questions.

13 THE COURT: I know.

14 MR. BREY: If I may respond to the first one first.  
15 The first question was about *Grove*. If you look at pages 36  
16 and 37 of the *Grove* case, they state that in that instance, the  
17 three-judge panel -- because you had a three-judge panel --  
18 found that you had more time to give the State. The U.S.  
19 Supreme Court said in *Grove*, "Of course, the district court  
20 would have been justified in adopting its own plan if it had  
21 been apparent that the state court, through no fault of the  
22 district court, would not develop a redistricting plan in time  
23 for the primaries."

24 And that was also a matter that was discussed in a  
25 subsequent U.S. Supreme Court case in *Branch v. Smith* in 2003

1 where they said, unlike in *Grove*, there's no suggestion that  
2 the district court failed to allow the state court adequate  
3 opportunity to develop a redistricting plan.

4 This goes to the merits of the preliminary injunction  
5 hearing. But here's where we are. At the time our complaint  
6 was initially filed on February 18, over three weeks ago, the  
7 second plan had been rejected by the Ohio Supreme Court. There  
8 had been no third plan. Since then a third plan has been  
9 approved four to three by the Ohio Redistricting Commission,  
10 and it's been pending in front of the Ohio Supreme Court for a  
11 couple of weeks.

12 When this Court continued the 65.1 conference a week, it  
13 expressed the confidence or the hope that if the conference is  
14 continued to March 14, a decision on a third map likely will  
15 have been issued, potentially bringing the state processes to a  
16 conclusion. Unfortunately, we all hoped that. It didn't  
17 happen. And we have a situation where defendant has said,  
18 well, we have a third map that the secretary of state is  
19 running with and it's okay for now, and a situation where a  
20 number of the intervenors have said that third map is  
21 unconstitutional and have asked the Ohio Supreme Court to  
22 prevent right now the secretary of state from following.

23 As the Court knows, we stated before our preference  
24 would be the second map. But the reality is right now, if we  
25 go to a different plan than the third plan, it will be

1 thoroughly disruptive of Ohio's election process for the  
2 May 3rd primary no matter who does that. Right now we have two  
3 situations where the first plan, the second plan had been  
4 rejected already. And I don't want to be cynical, but even  
5 Charlie Brown should have stopped trying to kick the football  
6 expecting a different result.

7 We're also in a situation where according to *Grove* and  
8 the other U.S. Supreme Court case, we're past the time for the  
9 State to finalize what its plan will be through both the  
10 Supreme Court process and the redistricting process. The  
11 deadline to certify partisan petitions is today. The deadline  
12 to protest them is this Thursday. The deadline to have the  
13 absentee ballot for overseas and military is this Friday.

14 THE COURT: Doesn't the secretary of state have the  
15 authority and certainly the capacity to extend all of the  
16 deadlines you identified?

17 MR. BREY: No. He has a capacity to extend some of  
18 the deadlines but not others. And there's carve-outs.

19 THE COURT: Isn't there legislation also pending that  
20 would extend that one deadline to which you refer that you  
21 believe that the secretary of state does not have the authority  
22 to extend?

23 MR. BREY: Well, I will have to check the codified  
24 legislation, but I think there is some hard deadlines and  
25 there's some soft ones; you're right. And obviously, right

1 now, it is the law, either law that the secretary of state can  
2 change or law the secretary of state cannot change. Obviously,  
3 the secretary of state cannot change the May 3rd primary. The  
4 secretary of state cannot change -- he asked for permission and  
5 permission was denied to change this Friday's hard deadline for  
6 the absentee ballots to be prepared.

7           If you send absentee ballots on the third plan, as is my  
8 understanding the plan of the secretary of state, and that plan  
9 changes, those people will, to a greater or lesser degree, have  
10 been disenfranchised, which is why at this point we think that  
11 we need -- the State and citizens of Ohio need an injunction  
12 saying what the secretary of state is currently doing shall  
13 continue regardless of whether the Supreme Court adopts or  
14 rejects the third plan for this May 3rd primary. That is sort  
15 of immediate relief that we need.

16           Right now we have something where it's at least  
17 confusing as to whether or not what the secretary of state is  
18 doing is lawful. The secretary of state thinks it is. We kind  
19 of agree with that, but the intervenors say it's not lawful;  
20 it's unlawful. He's breaking the law by providing and  
21 implementing a third plan that the intervenors, many of them,  
22 believe is unlawful.

23           The citizens of Ohio have to know whether or not the  
24 district plans that they are going through are going to be  
25 treated as lawful or not for purposes of the May 3rd primary,

1 and right now they don't have that.

2 And just to go back briefly, the *Shapiro v. McManus* case  
3 said even if you think that ultimately we will fail on the  
4 merits, as the Court pointed out -- and the merits include  
5 ripeness, the merits include are we going to fail under  
6 12(b)(6) or not. Obviously, plaintiffs don't think we are.  
7 But I've been wrong about my predictions on legal matters  
8 before. I hope I'm not, but I might be.

9 Nonetheless, that is a decision that needs to be made,  
10 at least according to the United States Supreme Court, by a  
11 three-judge panel, and justiciability determination be limited  
12 to matters in which a court utterly lacks jurisdiction for one  
13 reason or another, in which case, the Court's duty is to  
14 dismiss the case, not to grant or deny motions to intervene and  
15 other things. I don't fault the Court because I believe there  
16 is some jurisdiction to do something subject to appealing to a  
17 three-judge panel. So I think the Court correctly understood  
18 that it is exercising jurisdiction. But by doing so, it  
19 implicitly acknowledges that there is jurisdiction. And if it  
20 believes it was mistaken about that, obviously all decisions  
21 get vacated and the case gets dismissed.

22 THE COURT: As we stand, the Court has not abstained  
23 but deferred as required by *Grove*. And I think that you are  
24 aware that once a three-judge panel is convened -- and I'm  
25 assuming at some point in this process a three-judge panel will

1 be convened -- it can certainly undo some of the things that  
2 the one judge did with respect, let's say, to intervenors. You  
3 can certainly present that issue to the three-judge panel as to  
4 whether the intervenors I've allowed into the case were  
5 properly allowed, et cetera, as we reach a merit-based  
6 determination.

7 Mr. Brey, anything further?

8 MR. BREY: No. I would only suggest --

9 THE COURT: And I'm going to give you an opportunity  
10 to respond to the defendants, of course.

11 MR. BREY: I appreciate that, Your Honor.

12 The only other two things I would suggest is *Grove* and  
13 *Branch* do indicate when the time has -- hard deadlines have  
14 passed or in danger of passing, there's at least one that's  
15 unchangeable -- perhaps all three this week, but at least one  
16 by this Friday is unchangeable by any state authority. That's  
17 time when it is appropriate for a federal court to step in to  
18 ensure the stability and predictability of Ohio's elections.

19 THE COURT: Thank you, Mr. Brey.

20 Ms. Coontz?

21 MS. COONTZ: Thank you, Your Honor. Good morning. So  
22 the Court's question really hit the nail on the head with  
23 respect to the propriety of not staying this case. There are  
24 pending, obviously, before the Ohio Supreme Court objections to  
25 the February 24th plan.

1           The State's position is that the state court process  
2 should be allowed to proceed. Not staying this case and  
3 appointing a three-judge panel and going full steam ahead in  
4 this case is not going to clear up any of the confusion that  
5 Mr. Brey points out.

6           There is confusion at this point. It's not ideal that  
7 at this point in time we don't have a map -- or have a map  
8 that's being challenged, I should say. But that third plan has  
9 been enacted. It is being challenged. Those challenges are  
10 decisional. We are waiting with our computers as well to try  
11 to see if a decision comes from the Supreme Court of Ohio.

12           But what needs to happen at this point with this  
13 particular case is that it be stayed and that the state court  
14 processes continue as they have been for the past several  
15 months. This is consistent with the process -- or excuse me --  
16 well, the process --

17           THE COURT: Ms. Coontz, would you agree that the Court  
18 should not defer beyond a certain point?

19           MS. COONTZ: Yes. There will hit a point where  
20 potentially federal court intervention and a three-judge panel  
21 is necessary.

22           THE COURT: What point is that, Ms. Coontz?

23           MS. COONTZ: I had a feeling that was going to be the  
24 next question. Honestly, I wish I had an answer. I don't  
25 know. I think we're in a situation where if the Supreme Court

1 ultimately upholds this third plan today, there's no need for a  
2 three-judge panel. I think the best way to proceed at this  
3 point is almost a day by day where we see if a decision comes  
4 out from the Supreme Court of Ohio. If the Court again says --  
5 would invalidate the February 24th plan and give the Commission  
6 a certain time period to reconvene and repass a plan, then  
7 maybe we can take it from there.

8 With respect to the deadlines that the Court inquired  
9 about and that Mr. Brey spoke of, yes, there was a federal  
10 deadline of March 18th for the UOCAVA ballots. Those are the  
11 overseas ballots. The secretary and the general assembly have  
12 been working with the Department of Justice to get an agreement  
13 where those ballots would be sent out no later than April 5th,  
14 and those UOCAVA voters would be given an additional ten days  
15 to return their ballots. That was through legislative fixes.  
16 So that is all in the works as well. And that's taken quite a  
17 bit of negotiation.

18 THE COURT: But it hasn't reached a conclusion.

19 MS. COONTZ: Well, what I can say is the general  
20 assembly has passed the statutes that would give the authority  
21 to -- or that would allow the extension of those deadlines.

22 THE COURT: It doesn't have the force of law yet.

23 MS. COONTZ: Well, until the agreement with the DOJ is  
24 finally hammered out, that would be correct. We are working on  
25 that. That's one of the many irons in the fire at this point.



1 At least that particular fire has been dealt with and we're  
2 waiting to see what the Supreme Court does with the third plan.

3 The Court's question is very well taken. At what point  
4 do we say we need federal court intervention?

5 THE COURT: You represent the secretary of state,  
6 right?

7 MS. COONTZ: Correct, Your Honor.

8 THE COURT: If the secretary of state doesn't know,  
9 then is there anyone in this courtroom who would or should?

10 MS. COONTZ: Know at which date we pull the trigger on  
11 a three-judge panel?

12 THE COURT: That's right. There has to be a date at  
13 which -- if there is no conclusion reached, then based on *Grove*  
14 and *Branch*, don't I have to step in?

15 MS. COONTZ: Yes, Your Honor. I think at some point,  
16 if the state legislative redistricting process fails, then,  
17 yes, the federal court would have to step in to assist.

18 THE COURT: And my question is directed to the state's  
19 chief election officer. What is that date? Your office has --  
20 not your office, Ms. Coontz, but Secretary LaRose's office has  
21 considered the date on which he has to act in order to ensure  
22 that there will be an election irrespective of the map. My  
23 question to you is what is that date?

24 MS. COONTZ: I don't have an answer for the Court  
25 today. I can follow up with supplemental briefing with

1 obviously some sort of final date at which a three-judge panel  
2 would need to be convened. But I don't have an answer for the  
3 Court today. I can provide that.

4 THE COURT: When can the secretary provide me with  
5 that information? What's the earliest at which Secretary  
6 LaRose can provide me with that information?

7 MS. COONTZ: I could have something for the Court  
8 within the next couple of days.

9 THE COURT: By close of business Wednesday?

10 MS. COONTZ: That will work, Your Honor.

11 THE COURT: That's just in the event that we don't  
12 have a decision by the Ohio Supreme Court.

13 MS. COONTZ: Yes, Your Honor.

14 THE COURT: Or it may be irrespective of whether we  
15 have a decision because there may be other proceedings  
16 attendant to that.

17 MS. COONTZ: That is a possibility, Your Honor.

18 THE COURT: All right. Anything further, Ms. Coontz?

19 MS. COONTZ: Nothing further on behalf of the  
20 secretary, Your Honor.

21 THE COURT: And Ms. Pfeiffer and Mr. Walton are also  
22 here on behalf of the secretary; is that right?

23 MS. COONTZ: That is correct.

24 THE COURT: Mr. Ellis?

25 MR. ELLIS: Good morning, Your Honor.

1 THE COURT: Good morning, Mr. Ellis.

2 MR. ELLIS: On behalf of the Intervenor Defendant Ohio  
3 Organizing Coalition, we do believe that Your Honor's position  
4 has been very sound in that stay at this point is the  
5 appropriate position for the Court to take under *Grove*. At  
6 this point we do believe that this would be a waste of judicial  
7 resources for the Court to engage pending a decision by the  
8 Ohio Supreme Court, and we'll just await order from the Court,  
9 from the Supreme Court, under consideration currently.

10 THE COURT: Mr. Ellis, not that you would have any  
11 authority in this regard, but has OOC given any consideration,  
12 as I asked Ms. Coontz, to what might be the drop-dead date  
13 where the Court has to intervene if the Supreme Court has not  
14 acted?

15 MR. ELLIS: I will tell you, Your Honor, I've probably  
16 seen no less than 30 emails over the last 24 hours trying to  
17 address that issue. And very similar to Ms. Coontz, we have  
18 been unable to determine what that drop-dead date would be but  
19 recognize that there is one.

20 THE COURT: All right. Thank you, Mr. Ellis.

21 MR. ELLIS: Thank you, Your Honor.

22 THE COURT: Do you have anything further?

23 MR. ELLIS: Nothing further, Your Honor.

24 THE COURT: Mr. McTigue?

25 MR. MCTIGUE: With your permission, I'd like to defer

1 to my colleague, Mr. Fox.

2 THE COURT: Mr. Fox, please come forward and state  
3 your position.

4 MR. FOX: Thank you, Your Honor. David Fox on behalf  
5 of the Bria Bennett intervening plaintiffs. We are in the rare  
6 position of almost completely agreeing with Secretary LaRose on  
7 this matter. We think it's correct that the Court should  
8 continue to defer.

9 The one thing I would like to add is that in addition to  
10 the issues that Your Honor has identified and that Secretary  
11 LaRose has identified, there currently is simply -- aside from  
12 *Grove*, there is no live federal claim at this time. The  
13 complaint and the preliminary injunction motion are both based  
14 on malapportionment. Currently, there is a properly  
15 apportioned plan. We think it's unconstitutional under the  
16 state constitution. We have that claim pending in front of the  
17 Ohio Supreme Court.

18 But there is no reasonable prospect of a  
19 malapportionment plan at this time, and so there's really no  
20 federal claim. And that goes to the justiciability and the  
21 propriety of convening a three-judge panel. That would be  
22 another reason why the Court should not convene a three-judge  
23 panel. Aside from the *Grove* issue, there just is no federal  
24 claim.

25 I heard plaintiffs' counsel say that what they want is

1 an order essentially enjoining the Ohio Supreme Court process  
2 that challenges the third plan. It's not clear to me what the  
3 federal basis for that order would be, but it certainly would  
4 not be a malapportionment claim or a claim that is currently  
5 contained in plaintiffs' complaint or in their preliminary  
6 injunction motion. So whatever the next step is once the Ohio  
7 Supreme Court rules, I think the first piece of it needs to be  
8 a new preliminary injunction motion and most likely a new  
9 complaint explaining what the federal basis is for the claims  
10 in this case.

11 THE COURT: Mr. Fox, I will ask you the same thing  
12 that I've asked other Counsel. Have you contemplated what the  
13 drop-dead date should be?

14 MR. FOX: Your Honor, unfortunately, you're going to  
15 hear from me a similar answer which is it really does depend on  
16 what the Ohio Supreme Court does. In particular, we and other  
17 petitioners in those proceedings have asked for a variety of  
18 remedies. We've urged the Ohio Supreme Court that it has the  
19 authority to move deadlines if it needs to. We've asked it to  
20 consider adopting its own map, to consider a special master, to  
21 consider various things that would speed it along in the event  
22 it agrees with us that the current plan is unconstitutional.

23 The drop-dead date, I can't tell you today what is it  
24 because it depends on what the status is once we no longer have  
25 a map. Currently there is a map. We think it's

1 unconstitutional. But until we know what is happening and why  
2 that map is no longer in force, I really cannot give you an  
3 answer.

4 THE COURT: Do you dispute, based on the position that  
5 you've taken -- and I understand it was notwithstanding  
6 *Grove* -- that once the Supreme Court passes on the map -- let's  
7 say assume for the purposes of my question that the Supreme  
8 Court accepts this third iteration. Do you agree that at that  
9 point, a three-judge panel should assemble assuming that  
10 plaintiffs continue to oppose the apportionment map?

11 MR. FOX: If the Supreme Court -- Ohio Supreme Court  
12 accepts the third map -- which to be clear, our clients do not  
13 believe it should. If that occurs, then our position would be  
14 the Court should dismiss this on its own for lack of a  
15 substantial federal question. The only claim here is  
16 malapportionment. There's no claim, as far as I can tell, that  
17 the third map is a malapportionment plan.

18 THE COURT: In its amended complaint, the plaintiffs  
19 have alleged a First Amendment violation.

20 MR. FOX: But it's not clear to me what -- my  
21 understanding is that is based on a lack of districts. If  
22 there are districts in place that are going to be put in force  
23 under Ohio law, I don't understand -- and perhaps the Court  
24 could ask plaintiffs. But it's not clear to me what the  
25 factual or legal basis is for a federal challenge to that plan.

1 THE COURT: Wouldn't a three-judge panel have to be  
2 assembled to determine, let's say, a motion to dismiss that you  
3 would file? Because what they allege under the First Amendment  
4 is that there's a denial of -- a denial, if you will, or an  
5 abrogation of freedom of association. So if that's the case,  
6 then that would not go to any -- that wouldn't go to  
7 justiciability, for instance. That would be a merit-based  
8 determination. Given that is the case, under 2284, wouldn't  
9 the Court have to convene a three-judge panel?

10 MR. FOX: The Supreme Court precedent interpreting  
11 2284 is clear, that if there is not a substantial federal  
12 question, then the Court does not need to convene a three-judge  
13 panel. Based on what you've described and my understanding of  
14 plaintiffs' amended complaint, if the third map is in force,  
15 going to govern the election, they have districts, they're  
16 properly apportioned, our position would be, at least most  
17 likely subject to what the Ohio Supreme Court says, it seems to  
18 me there is no substantial federal question.

19 THE COURT: Thank you, Mr. Fox. Do you have anything  
20 further?

21 MR. FOX: No, Your Honor, I do not. Thank you.

22 THE COURT: Thank you very much.

23 Mr. Cooper?

24 MR. COOPER: Good morning, Judge. May it please the  
25 Court.

1 THE COURT: Good morning, Mr. Cooper.

2 MR. COOPER: I think it probably at this point makes  
3 sense to give our answer to what I'm sure will be the Court's  
4 initial question. And it may come as no surprise that it will  
5 be something similar to that. The only thing I'd add -- to  
6 what's been said before. What I'd add, Judge, just for the  
7 Court's benefit is I think the case law framework that the  
8 Court can ground its drop-dead date in is language from *Grove*  
9 itself.

10 *Grove* says, of course, that there is a strong  
11 presumption of deferral when there is a state court proceeding  
12 going on. That's very clear here. So the default is defer.  
13 The exception is if there is evidence that the state court is,  
14 quote, unwilling or unable to adopt a plan.

15 So, Judge, I think that's the standard the Court should  
16 be looking to, is there evidence that the state court is  
17 unwilling or unable to adopt a plan.

18 THE COURT: And it's not just whether I disagree with  
19 the plan. It's whether they would be unable to act. So that  
20 leads to the question that you know that I'm going to ask you,  
21 Mr. Cooper.

22 MR. COOPER: That's exactly right.

23 THE COURT: I'll give you an opportunity to continue.

24 MR. COOPER: What I can say, Judge, is certainly right  
25 now there's no evidence that the state court process is unable



1 or unwilling to adopt a plan. Unfortunately, we're in the  
2 position with the Ohio Supreme Court truly at any minute might  
3 issue its new decision. It may not be a good use of judicial  
4 resources at this point to even try to put a specific date on  
5 that until we see what the Ohio Supreme Court case does.

6 THE COURT: Mr. Cooper, I know that you're a trial  
7 lawyer, and that one thing that all trial lawyers absolutely  
8 disdain is the speculative question. So, at this point, it's  
9 speculative.

10 MR. COOPER: I think that's true, Judge. And I  
11 also -- to Mr. Fox's point as well, unlike in the second  
12 decision or the decision by the Ohio Supreme Court on the  
13 second maps, in this round, the petitioners and Senator Sykes  
14 and Leader Russo have asked the Ohio Supreme Court for a  
15 variety of different remedies. I think it's likely that we  
16 will see something beyond just the third map is invalid. I  
17 think it's probably wise to wait to see what the Ohio Supreme  
18 Court does at this point.

19 THE COURT: Mr. Cooper, is there a drop-dead date?

20 MR. COOPER: There may be once we see what the Ohio  
21 Supreme Court does. I think that would then allow the Court to  
22 decide what is the Court unwilling or unable to do. What is  
23 the state court process unwilling or unable to do at that  
24 point?

25 Judge, we also agree with the point Mr. Fox raised that

1 at this point, it does seem that the factual basis for the PI  
2 motion and the complaint is no longer true. And so we do think  
3 that the next kind of proper procedural step, after the Ohio  
4 Supreme Court issues its upcoming decision, would be for some  
5 sort of amended complaint and updated PI motion.

6 And finally, Judge, as a very minor point for us, we  
7 think our responsive pleading under Rule 12, there is an  
8 argument it could be due as early as today. If the Court would  
9 issue an order today, we ask we be given some clarity on  
10 whether we can hold off on filing that or whether the Court  
11 would like us to file something today.

12 THE COURT: How much time do you need, Mr. Cooper?

13 MR. COOPER: If you would like, we're happy to file  
14 something today. Ideally, for us, the responsive pleading  
15 would be tied to whenever the opposition to preliminary  
16 injunction motion is due. We think, for simplicity, we intend  
17 to file a single document making a single point that the Court  
18 should defer under *Grove*. And that would serve as the basis  
19 for our responsive pleading, our opposition to the PI motion,  
20 and our response to the stay request.

21 THE COURT: Thank you, Mr. Cooper.

22 MR. COOPER: Thank you, Judge.

23 THE COURT: Mr. Squire?

24 MR. SQUIRE: Good morning, Your Honor. May it please  
25 the Court.

1           Your Honor, I would say on behalf of my clients, the  
2 so-called Simon plaintiffs or parties, our position is somewhat  
3 different than those expressed by the other parties here today.  
4 The Court has been willing to permit the Simon parties  
5 permission to intervene conditionally. That is based upon  
6 whether the Court determines how it's going to proceed with  
7 respect to the claim that's been filed here.

8           The position of the Simon parties, unfortunately, is  
9 different than the other parties here because the Simon parties  
10 are taking the position that by reason of the filing of an  
11 action earlier than this action in the Northern District of  
12 Ohio, that that case is the first to file, should proceed to  
13 judgment before this case is decided. The alternative to that,  
14 of course, is the Court permits the Simon parties to intervene,  
15 and the intervening parties can proceed here.

16           The difference in the position of the Simon parties and  
17 the other parties here is that the Simon parties not only are  
18 challenging the plans that have been presented by the  
19 redistricting commission and the general assembly that are  
20 under review by the Supreme Court, the Simon parties have  
21 specifically objected to the process that's been followed in  
22 connection with all of these plans. And it's even if the Ohio  
23 Supreme Court came out today and said they approve the third  
24 plan, the claim of the Simon parties would still persist for  
25 the reason there's been a total repudiation of any duty to

1 comply with Section 2 of the Voting Rights Act in connection  
2 with all of these maps.

3 And it is our position that a federal court at some  
4 point should inform the state actors that there is a duty to  
5 comply with the mandate of Section 2 of the Voting Rights Act  
6 of 1965 as amended, something that the State has specifically  
7 stated they had no duty to comply with. That is the gravamen  
8 of our complaint. And none of the processes that have been  
9 followed in connection with the development of these plans have  
10 complied with Section 2.

11 So, unfortunately, while the wisdom of deferring until  
12 the state actors have been given a chance to operate, in my  
13 opinion, makes abundant sense. The problem is they continue to  
14 go through a process where they're ignoring the mandate of the  
15 Voting Rights Act. Our objection is not only to the outcome of  
16 this process but the process itself.

17 THE COURT: But the relief that you seek under Section  
18 2 of the Voting Rights Act is being sought in the Northern  
19 District case; is that right?

20 MR. SQUIRE: That's correct.

21 THE COURT: So the relief you seek here is different  
22 and is aligned with the intervenor defendants as well as the  
23 initial defendants. Is that also correct?

24 MR. SQUIRE: Your Honor, it is aligned to the extent  
25 that we don't dispute that waiting to see what the Ohio Supreme

1 Court does makes sense. However, our concern is the process  
2 that's being followed or that was followed to develop those  
3 plans in the Ohio Supreme Court. Whether we wait or not, it's  
4 still unconstitutional.

5 THE COURT: And you're a plaintiff in the Northern  
6 District; is that right?

7 MR. SQUIRE: That is right, Your Honor.

8 THE COURT: So you're seeking that affirmative relief  
9 there?

10 MR. SQUIRE: Yes, Your Honor.

11 THE COURT: Here you don't dispute that under 2284  
12 that a three-judge panel is the only panel that could give you  
13 the relief that you seek? Or do you aver otherwise?

14 MR. SQUIRE: No, I don't dispute that. I think a  
15 three-judge panel would need to be convened. The question is  
16 when it needs to be convened and whether or not if a panel is  
17 convened here, then our status as conditional intervenors, we  
18 would become full intervenors and the choice would be whether  
19 we proceed here or in the Northern District and what would make  
20 the most sense from the standpoint of the Court's resources and  
21 so forth.

22 THE COURT: I won't be bound by this, but it just  
23 appears to me based on the state of the record here that your  
24 relief with respect to the processes which varies from the  
25 defendants here, given the timing, would be in the Northern

1 District. Your relief here would be different, I believe. But  
2 again, I'm going to reserve the right to modify that opinion  
3 after the issue is fully briefed.

4 MR. SQUIRE: That's fine.

5 THE COURT: But I'm just talking about the state of  
6 the record as we speak.

7 MR. SQUIRE: Yes, Your Honor. And I understand that,  
8 Judge, and that's fine.

9 That's it, Judge, unless you have any questions.

10 THE COURT: Well, just for the sake of completeness,  
11 do you -- based on the positions that you've taken both here  
12 and in the Northern District, Mr. Squire, do you have a  
13 position with respect to the drop-dead date by which you  
14 believe if the Court -- if the Supreme Court has not acted,  
15 it's incumbent upon this Court, under *Grove* and *Branch*, for  
16 this Court to act?

17 MR. SQUIRE: It's our position that the process that's  
18 currently being followed in the state court is void *ab initio*  
19 because it was stated inexplicitly by the state actors that  
20 basically they didn't consider racial demographics in  
21 connection with the configuration of these districts. It's our  
22 position that this court, a federal court, can basically  
23 suspend or invalidate all of these deadlines, if it's  
24 necessary, in order to develop a plan that complies with both  
25 state and federal law.

1           So it's our position that the drop-dead date actually  
2 has passed. That's our position. Our position is, as they  
3 drew these maps, they should have been considering the Voting  
4 Rights Act. And they continue to draw maps where they are  
5 ignoring the Voting Rights Act. So whenever they get to the  
6 end of that process, it's our position that those maps are  
7 going to be unconstitutional.

8           So the Court is going to have to, if those deadlines  
9 have passed, impose its own schedule. And state law is not an  
10 impediment to whatever schedule the Court comes up with.

11           THE COURT: I know that your Northern District  
12 complaint is grounded in the Voting Rights Act. Do you also  
13 make First Amendment associational claims as does the  
14 plaintiffs here?

15           MR. SQUIRE: We do not make a First Amendment claim.  
16 However, we do make a Fifteenth Amendment claim. And the  
17 reason we make the Fifteenth Amendment claim is because  
18 unlike -- I know of no other jurisdiction in the State of Ohio  
19 where, in connection with redistricting, a Court has  
20 determined -- a federal court has determined that the State  
21 engaged in intentional discrimination. That's the status of  
22 the plaintiffs in the Simon case.

23           They are proceeding not only on the basis of a violation  
24 of the Voting Rights Act, but on the violation of an injunction  
25 that we contend still has the force of law, that a remedy is

1 appropriate because the State intentionally violated the  
2 Fifteenth Amendment. So we have a Fifteenth Amendment and we  
3 have a Fourteenth Amendment claim because it's our position  
4 under Section 3 of the Fourteenth Amendment where the State  
5 engages in intentional discrimination, they also are subject to  
6 a claim to have the number of districts that they're entitled  
7 to in Congress reduced. So we have a Fourteenth Amendment  
8 claim, a Fifteenth Amendment claim, and a Voting Rights Act  
9 claim, Your Honor.

10 THE COURT: Thank you, Mr. Squire. Mr. Brey?

11 MR. BREY: Thank you, Your Honor.

12 Your Honor, I just have a couple of points on behalf of  
13 plaintiff in response to the various comments that have been  
14 made.

15 First of all, there was a reference to the substantial  
16 federal question. I would just point out that that word  
17 substantial that was used in some prior United States Supreme  
18 Court decisions has been narrowed and limited in the *Shapiro v.*  
19 *McManus* case.

20 Secondly, I was able to track down the portion of House  
21 Bill 93 -- Ohio House Bill 93 which allows some deadlines to be  
22 extended by the secretary of state. It does, among other  
23 things, expressly prohibit the secretary of state under current  
24 statute. Obviously, statutes can be changed any time. But the  
25 current statute prohibits any overseas, absentee voter ballots



1 from being changed. The deadline can't be changed under that  
2 substitute House Bill No. 93.

3 Thirdly, as a matter of necessity, you have to certify  
4 the candidates and resolve any protests before you know who is  
5 going to be on the ballot that needs to be printed currently by  
6 this Friday. So although theoretically you can change -- it  
7 could have been last Thursday, it could have been next  
8 Thursday. It's today the deadline to certify ballots. They  
9 have to be done. Before you know what's going to be on the  
10 ballot, you have to certify the candidates to the ballot. And,  
11 likewise, you have to resolve the protests before you mail  
12 those out.

13 And, therefore, we think that we have a pretty hard  
14 deadline coming up. We can hope things will change. The law  
15 might change. The general assembly can change. But this is  
16 the same situation that we had in the *Branch v. Smith* case  
17 where there was negotiations going back and forth between the  
18 Chancery Court of Mississippi and the Department of Justice and  
19 they just weren't panning out. They just weren't resolved in  
20 time for a deadline that, theoretically, if there was an  
21 agreement and legislative change could be changed but wasn't  
22 changed of March 1st of whatever year they were dealing with  
23 that, and therefore the federal court had to step in.

24 If the Ohio Supreme Court today or tomorrow, next  
25 Thursday, adopts the third plan, we're not going forward with

1 this case. And I don't have a problem with that if they do  
2 that because that's the train that's already going forward  
3 fairly quickly with the secretary of state's office. If they  
4 do something else or if they don't do anything, then we're  
5 probably going to have to have federal court intervention to  
6 grant the clarity; similarly, if they get an agreement with the  
7 feds and so forth.

8 My suggestion, Your Honor -- I believe this is in our  
9 briefs, we reference the parallel track notion. We don't need  
10 to have a preliminary injunction perhaps today, but I suggest  
11 we have a briefing schedule today and have it teed up and set  
12 up so when it becomes a drop-dead date -- and we think,  
13 frankly, from our point of view, the drop-dead date is before  
14 this Friday because that's when the absentee ballots are due.  
15 If that changes, if they work out a deal, they can suggest some  
16 other date. But right now that is the drop-dead date. You  
17 have to know what the district is going to be in order to have  
18 candidates for those districts and in order to know who you're  
19 going to mail the ballots, that they can vote for candidates in  
20 their district. Right now that's this Friday.

21 And I would respectfully suggest we have a fairly short  
22 briefing schedule so that in the event the Ohio Supreme Court  
23 doesn't act, in the event we don't get a deal extending that  
24 deadline with the feds or whoever, that we're going to be in a  
25 position where we can have a three-court panel essentially

1 certify that since there's been no action, presumably -- if  
2 there has, we'll do it differently. The third plan, the one  
3 the secretary of state and all the citizens of Ohio are relying  
4 on as of today, as tentative as that is and with all the  
5 objections the intervenors have to it, that needs to be used  
6 for this May 3rd primary, which, by the way, is not the plan my  
7 clients would prefer. We prefer the second plan. We  
8 understand that the third plan is really the only option if we  
9 don't want to totally destroy and disrupt the May 3rd primary.  
10 That's why at this point it seems like the least battle of  
11 alternatives.

12 THE COURT: Mr. Brey, thank you very much. I'm going  
13 to take a 15-minute recess until 10:40 to review my notes and  
14 then come back and give an oral opinion as to how we'll  
15 proceed. And it will, of course, be followed by a written  
16 opinion that I intend to docket hopefully by the end of the  
17 day. But if not by the end of the day, certainly by noon  
18 tomorrow. I'm going to act as expeditiously as possible.  
19 We'll stand in recess until 10:40.

20 (Recess taken from 10:23 a.m. to 10:40 a.m.)

21 THE COURT: Thank you, and certainly thank you for  
22 your patience. I am going to issue a written order. And I  
23 believe that upon reflection, it would be more prudent to issue  
24 the order after I get the secretary's statement as to what the  
25 latest date at which he can still run an election based on the

1 actions of the Ohio Supreme Court. And that will drive  
2 Mr. Cooper, your schedule.

3 And Mr. Brey, I am going to include in that written  
4 opinion a schedule going forward. It won't address substantive  
5 issues, but it will at least have -- I intend to have a  
6 schedule that will set forth the dates due for responses to  
7 your motion for preliminary injunction, as well as for those  
8 parties who have not yet answered to answer their amended  
9 complaint.

10 But having considered the arguments, I'm of the opinion  
11 that a brief stay should be entered while the Ohio Supreme  
12 Court renders its decision on the third map. The United States  
13 Supreme Court has long held that, quote, reapportionment is  
14 primarily the duty and responsibility of the State through its  
15 legislature or other bodies, rather than of a federal court,  
16 quotes closed. As all of you who have been working on this  
17 case recognize, that's from *Chapman v. Meier*.

18 Also, the *Grove* court stated the Constitution leaves  
19 with the states primary responsibility for apportionment of  
20 their state legislative districts. Thus, the Supreme Court has  
21 required federal judges to defer consideration of disputes  
22 involving redistricting where the State, through its  
23 legislative or judicial branch, has begun to address that  
24 highly political task itself.

25 True, deference under *Grove* has its limits. As the

1 Court in *Grove* stated, "Absent evidence that these state  
2 branches will fail timely to perform that duty, a federal court  
3 must neither affirmatively obstruct State reapportionment nor  
4 permit federal litigation to be used to impede it." But this  
5 case is not at the point where *Grove's* command of deference  
6 could be set aside. Objections to the Commission's third map  
7 are fully briefed before the Ohio Supreme Court, and a decision  
8 is expected imminently.

9 Indeed, the flurry of developments in the last three  
10 weeks since plaintiffs' original complaint proves why deference  
11 is required here. The same day that plaintiffs filed this case  
12 citing an impasse at the Commission, the Supreme Court ordered  
13 the Commission to show cause why it should not be held in  
14 contempt. Within a week, the impasse ended when the Commission  
15 adopted a third map. The lapsing election-related deadlines,  
16 which plaintiffs repeatedly have invoked as overriding this  
17 Court's duty to defer to state processes, have been adjusted by  
18 state officials without any need for intervention by this  
19 Court.

20 Secretary LaRose utilized his delegated authority to  
21 reset deadlines related to candidate petitions and protests  
22 while the Ohio Senate has approved bipartisan legislation to  
23 address military and overseas voting. It defies reasoning to  
24 think that Ohio's redistricting process would have benefited  
25 from a federal court proceeding in parallel, especially when

1 the claim for relief would see this court unwind all progress  
2 related to the Commission's third map by enjoining adoption of  
3 the second.

4 None of the plaintiffs' arguments require this Court to  
5 forge ahead in disregard of *Grove* and the core principles of  
6 federalism and comity embodied in *Grove*. First, the  
7 plaintiffs' argument for an immediate three-judge panel  
8 misapplies the language in *Shapiro* that, quote, All the  
9 district judge must determine is whether the request for three  
10 judges is made in a case covered by Section 2284(a), no more,  
11 no less. That passage concerned a district court's decision to  
12 forego a three-judge panel and to grant a motion to dismiss  
13 under Rule 12(b)(6).

14 Continuing from that quoted passage, the Court observed  
15 that the statute, quote, Command that a single judge shall not  
16 enter judgment on the merits, quotes closed, which the district  
17 court had done in dismissing the action. In the same decision,  
18 the Supreme Court quoted with approval a passage from *Gonzales*  
19 *v. Automatic Employees Credit Union* that, quote, A three-judge  
20 panel is not required where the district court itself lacks  
21 jurisdiction of the complaint or the complaint is not  
22 justiciable in the federal courts, quotes closed. Thus, the  
23 entire discussion in *Shapiro* is premised on there being a  
24 justiciable case in controversy before the district court.

25 As I noted in my opinion denying emergency relief, the

1 ongoing nature of state processes implicates the ripeness of  
2 the plaintiffs' case and thus blunts the immediacy of their  
3 panel request.

4           Secondly, the plaintiffs' reliance on *Branch* is  
5 misplaced. In *Branch*, Mississippi's redistricting plan was  
6 subject to preclearance under Section 5 of the Voting Rights  
7 Act. And at the time the district court intervened, the state  
8 court's plan had no prospect of being precleared in time for  
9 the 2002 election. Up until that point, the district court did  
10 not interfere with the State Chancery Court's efforts to  
11 develop a redistricting plan, citing *Grove*, and deferred ruling  
12 on the federal plaintiffs' motion for preliminary injunction.

13           Here, a decision of the Ohio Supreme Court is likely  
14 days away, and a decision affirming the third map would bring  
15 state processes to a close. The plaintiffs here frame the  
16 issue improperly when they claim the state processes have  
17 continuously failed for six months. They ignore the progress  
18 that has been achieved on a third map, even since the  
19 plaintiffs initiated this lawsuit. Perhaps a third remand to  
20 the Commission with an indeterminate path forward would  
21 generate the, quote, serious doubts, quotes closed, that led  
22 the district court in the *Branch* case to intervene.

23           At this point, however, there is no evidence that state  
24 branches will fail timely to perform. So this Court must  
25 neither affirmatively obstruct state reapportionment nor permit

1 federal litigation to be used to impede it.

2 Third, the plaintiffs' pragmatic arguments for  
3 instituting parallel proceedings fall short. Some raise issues  
4 that they lack standing to assert, such as the efficient use of  
5 state tax dollars or the deadline for preparing military and  
6 overseas ballots. Others relate to the injuries occasioned by  
7 ongoing delay and uncertainty which are predicated on the same  
8 branches failing to adjust election-related deadlines as  
9 necessary. And in the event those state processes fail,  
10 plaintiffs' injuries would be remedied through the stayed or  
11 revised deadlines they seek in a preliminary injunction.

12 This Court therefore concludes that a brief stay is  
13 warranted to permit the Ohio Supreme Court to issue a decision  
14 on the third map. If that decision reveals serious doubts that  
15 state processes will yield a map in time for the primary  
16 election, then the stay will be lifted and this case will  
17 proceed. As the case stands today, however, it is still  
18 nonjusticiable under *Grove*, and the Court should defer.

19 Ms. Coontz, if Secretary LaRose comes to a conclusion  
20 earlier than Wednesday, the Court will not object to that in  
21 any respect. The sooner you get me an answer, the better  
22 prepared I will be to look at it. And that answer will  
23 certainly drive the schedule that I will include in my written  
24 opinion, but I will maintain some flexibility because none of  
25 us knows what that schedule may be.



1 I'm sure he's someplace now not knowing the task that is  
2 at hand as a result of this proceeding, but at least I hope  
3 that that will help us all focus on what we have going forward.

4 MS. COONTZ: Understood, Your Honor. I'll do  
5 everything I can to get that before Wednesday.

6 THE COURT: Mr. Carey, I apologize. I did not realize  
7 that you were overlooked. I'm just not accustomed to having  
8 the lawyers in the gallery. Please accept my apologies.

9 For the record, Mr. Carey indicated to me that he had  
10 nothing to add unless I had specific questions. And based on  
11 the arguments that have been made and the papers that have been  
12 submitted, I had no specific questions which is why he was not  
13 called upon before the Court issued its oral ruling.

14 So thank you, Mr. Carey, and please accept my sincere  
15 apologies.

16 MR. CAREY: Thank you, Your Honor.

17 THE COURT: Are there any other matters we need to  
18 take up from the plaintiff, Mr. Brey?

19 MR. BREY: No, Your Honor.

20 THE COURT: Anything from the State, Ms. Coontz?

21 MS. COONTZ: Nothing further, Your Honor. Thank you.

22 THE COURT: From the OOC defendants, Mr. Ellis?

23 MR. ELLIS: Nothing, Your Honor. Thank you.

24 THE COURT: Mr. McTigue, from your defendants?

25 MR. MCTIGUE: Nothing, Your Honor.

1 THE COURT: Mr. Carey?

2 MR. CAREY: Nothing, Your Honor. Thank you.

3 THE COURT: Mr. Squire?

4 MR. SQUIRE: No, sir.

5 THE COURT: Or Mr. Cooper?

6 MR. COOPER: No, Your Honor.

7 THE COURT: Thank you very much, everyone. And thank  
8 you for your patience.

9 (Proceedings concluded at 10:53 a.m.)

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C E R T I F I C A T E

I, Shawna J. Evans, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Algenon L. Marbley, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Shawna J. Evans  
Shawna J. Evans, RMR, CRR  
Official Federal Court Reporter

March 15, 2022