SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX A

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

CASE NO: 1:22-CV-54

[Filed: August 16, 2022]

MICHAEL BANERIAN, et al,

Plaintiffs,

v.

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

APPEARANCES:

APPEARING ON BEHALF OF THE PLAINTIFFS:

JASON B. TORCHINSKY
SHAWN TOOMEY SHEEHY
EDWARD M. WENGER
Holtzman Vogel Baran Torchinsky & Josefiak, PLLC
15405 John Marshall Highway
Haymarket, Virginia 20169

CHARLES R. SPIES
Dickinson Wright PLLC
1825 Eye Street, NW, Suite 900
Washington, DC 20006

APPEARING ON BEHALF OF THE DEFENDANTS:

RICHARD BRYAN RAILE
Baker & Hostetler, LLP
1050 Connecticut Avenue, NW, Suite 1100
Washington, DC 20036

NATHAN JOSHUA FINK
Fink Bressack
38500 Woodward Avenue, Suite 35
Bloomfield Hills, Michigan 48304

HEATHER S. MEINGAST
Assistant Attorney General
P.O. Box 30736
Lansing, Michigan 48909

APPEARING ON BEHALF OF INTERVENOR DEFENDANTS:

ANDREW MICHAEL PAUWELS
Honigman, LLP
220 First National Building
660 Woodward Avenue
Detroit, Michigan 48226

JONATHAN DIAZ
MARK GRABER
Campaign Legal Center
1101 14th Street, NW, Suite 400
Washington, DC 20005

SARAH S. PRESCOTT
Salvatore Prescott, PLLC
105 East Main Street
Northville, Michigan 48167

* * * *

Grand Rapids, Michigan

March 16, 2022

at approximately 3:04 p.m.

PROCEEDINGS

JUDGE MALONEY: Be seated. Thank you.

This is File Number 22-54; Banerian vs. Benson, et al. This matter is before the Court on the plaintiffs' motion for a preliminary injunction.

The record should reflect that Attorneys Torchinsky, Sheehy, Wenger and Spies represent the plaintiff. Attorneys Fink and Raile represent the defendant commissioners. Attorney Meingast represents the Secretary of State. Attorney Pauwels represents voters not politicians and the remaining lawyers Prescott, Graber and Diaz represent the defendant Michigan voters.

We have allocated 30 minutes per side, 30 minutes total for the plaintiff, 30 minutes in total shared among the defendants. If plaintiff wishes to reserve rebuttal, just let us know.

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

And Mr. Torchinsky, you may proceed, sir.

Good afternoon.

MR. TORCHINSKY: Thank you, your Honor.

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

Article I, Section 2 of the U.S. Constitution as interpreted by the Supreme Court makes it clear that equality of population within congressional districts is paramount. As applied to the facts of this case, all

parties here agree that Karcher controls this Court's determination, and it requires the application of a two-part burden-shifting test. Karcher Step One is satisfied when plaintiffs show that population can, as a practical matter, balance populations, and we did so by submitting a remedy map, our remedy map is Exhibit A. That map demonstrates that population can be equalized, and in Paragraph 54 of the statement of undisputed material facts, all parties agree that the plaintiffs' remedy map equalizes populations.

Moving on to Step Two. The defendants bear the burden of demonstrating with specificity each deviation. Both the U.S. Constitution and the Michigan Constitution make equal population the paramount requirement. Because the Michigan Constitution expressly assigns equal population to the poll position, it's necessary -- it necessarily follows that the commissioners were not at liberty to use any subordinate state criteria, any subordinate state constitutional requirement to deviate from absolute population equality.

JUDGE KETHLEDGE: Well, I mean certainly the fact that they enumerated six others would imply that the commission could consider those other things, and particularly if one looks at Karcher and Tennant, wouldn't that imply that they would have some room for minor deviations based on those other things?

MR. TORCHINSKY: They would except that their theory here would basically allow their exception to swallow the rule. As this Court noted in dismissing Count Two of the complaint, the concept of

communities of interest is very hard to articulate or quantify or, frankly, put on a map. And --

JUDGE KETHLEDGE: But is the rule in that phrase as you just used it, is that equality of population?

MR. TORCHINSKY: I'm sorry?

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

MR. TORCHINSKY: Yes.

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

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

JUDGE KETHLEDGE: Well, okay. Neutral and consistent. The Court doesn't use the term arbitrary there. They talk about neutral and consistent application of the criteria.

MR. TORCHINSKY: Yes. And that is true, your Honor. But I think the problem here is that the Commission can't articulate a neutral reason why, for

example, District Three here that is 235 -- where we sit here in Grand Rapids is 235 people overpopulated, yet is bordered by two districts that are underpopulated. The Commission hasn't articulated, as they bear the burden at Karcher Step Two of articulating with specificity why they couldn't have moved one of those lines to move 235 people to the neighboring underpopulated districts.

JUDGE KETHLEDGE: We are talking about District Three?

MR. TORCHINSKY: Yes. District Three is 235 people overpopulated. It is bounded to the south by District Four and to the north and east by District Two. Both District Two and District Four are underpopulated.

Even --

JUDGE KETHLEDGE: Now --

Oh, please go ahead.

Oh, I thought -- I misheard something.

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

MR. TORCHINSKY: Well, your Honor, there is a couple things about the Eid declaration. First of all, the Eid declaration is a declaration from a single commissioner.

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

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

JUDGE KETHLEDGE: I mean that might all be true, but I mean the Court has said -- I mean the headwinds you've had in this case all along is what the Court said in Tennant and Karcher, which is that drawing district lines typically involves political judgment, and that's okay, the Court said. You know, it's totally okay as to partisan line drawing in the sense that the court is not going to review that in Rucho. But

in these cases, they say it's political judgment, and that is okay, as long as they're advancing some legitimate objective. And so I agree with you. You know, you can draw this innumerable ways. But why, you know, why isn't -- The question on the table is whether the line they drew, not whether some other line could be drawn, whether the line they drew is supported by some legitimate state interests.

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

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

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

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

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

JUDGE MALONEY: What court has thrown out a deviation?

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

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

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

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

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

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

MR. TORCHINSKY: But it did cite the district court's initial opinion in the Vieth case that the Supreme Court decided, it cited the original panel that struck down the 19 person map with approval. So we don't have any indication from the Supreme Court that it believed the striking down of the 19 person deviation map was unlawful. And frankly, your Honors, if you look armed the country, every other state has been able to, with the exception of perhaps West Virginia, which kept their counties whole, and Iowa, which keeps their counties whole, nearly every other state has been able to keep their deviations to within a single person with the exception -- and I think maybe there is, I think, Rhode Island has a 641 person deviation between their two districts. Why? I don't know. I have not studied Rhode Island. But other than -- other than Iowa and

West Virginia, which again, keep county lines whole entirely, I'm not aware of anybody that has a .14 percent deviation or a .79 percent deviation. And again, those are understandable, because in Iowa, it's a state constitutional requirement to keep counties whole. And obviously, the Supreme Court in Tennant recognized that West Virginia has a long tradition of keeping counties whole. Here, you know, following, if you are talking about long-time state traditions, I mean Muskegon and Grand Rapids haven't been in the same district since 1890, and now apparently the state is asserting that there is some community of interest that requires a deviation of 235 people to keep --

JUDGE KETHLEDGE: It's political judgment, you know. And I think -- I mean, it's a point well taken about other states. But the fact is, the law as it comes to us is Karcher and Tennant, and they allow for some deviation and point -- you know, a deviation five times bigger in Tennant than the one here, and they waived that through.

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

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

MR. TORCHINSKY: Correct.

JUDGE KETHLEDGE: I mean this factor by its nature is sort of amorphous. But you would agree -- I mean you seem to recognize that the community of

interest is a traditional directing criteria, right? You basically said that the Michigan Constitution sort of --

MR. TORCHINSKY: Incorporates that.

JUDGE KETHLEDGE: -- incorporates that.

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

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

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

JUDGE KETHLEDGE: Okay. Well, be that as it may --

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

MR. TORCHINSKY: Your Honor, I mean the way Commissioner Eid articulated it, where he asserted, for example, that the southern counties share a single media market is just factually not true. As Mr. Bryan pointed out in his -- in our response, there is actually

five media markets that divide the southern border of Michigan into five different media markets.

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

MR. TORCHINSKY: Sure.

JUDGE MALONEY: I recognize that the southern part of Monroe County, which is in that district, I think it would be a surprise to those individuals who live in southern Monroe County, that they are a suburb of Detroit, but leaving that aside for a moment. The fact is, is that all of those counties in that district are border counties to Indiana and Ohio, correct?

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

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

MR. TORCHINSKY: Your Honor, that may be. But when they adjust deviations to -- get down to that

district -- when they adjust the deviations, and District Five is 635 people underpopulated, and it touches -- let's see, it touches three counties that are overpopulated -- or three districts that are overpopulated, and it splits three different counties including Berrien County, they haven't explained how they can't -- why they can't maintain that community of interest along those and not -- not equalize the population, borrow 600 people from one of the three neighboring districts and equalize the population. That doesn't-- Their assertion of communities of interest does not have to be undermined by a remedy in this case. They just have not done what was done in the Larios case or in the Tennant case or in the Vieth case where they bring the map chart in and explain with specificity why they did the deviations they did.

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

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

What we are doing in this motion is making a prediction about whether they are going to show with specificity. And so, you know, it's really about whether they are going to be able to make that showing, I guess,

is that a fair characterization of kind of the posture we are in here?

MR. TORCHINSKY: I think, you know, because the burdens at the preliminary injunction stage mirror the burdens at trial with the burden shifting of Karcher in Step Two, I don't think they've met their burden. They haven't said why they can't --

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

MR. TORCHINSKY: It is, and I think, your Honor, you know, if you sort of set aside Count Two, which you have, it's not that much of a map making exercise. It's more of a mathematical exercise, to actually balance the populations among the 13 districts with nine that are overpopulated and four that are underpopulated. You don't have to destroy their map and redo their map, as we did in remedy A, which was also to remedy Count Two in order to equalize these populations. Population equalizing is an exercise that map makers can do relatively quickly. And I think where I fault the Commission here is that they did not take the step of saying, well, we tried to move 235 people out of District Three, but we couldn't because to do so would have -- the only way to do it was to cut the highway between Muskegon and Grand Rapids, they didn't do that. That is the kind of specificity I think they would need to justify these kind of population deviations or to say in District Five, if we were going to maintain District Five, the only way we could not take or add 600 people

to that district would be to cut the highway or to split another county. They haven't attempted to make those showings. They just assert these broad communities of interest.

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

JUDGE NEFF: They haven't been put to that proof yet.

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

JUDGE KETHLEDGE: So that burden at Step Two really kicks in fully at the summary judgment stage, which as Judge Neff points out here is a long ways from where we are now. And so we are in this kind of hybrid situation where you have an obligation to show that you're very likely to prevail on claim one, which means that you have to show that it's very likely they won't be able to show an adequate justification for these deviations.

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

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

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

JUDGE NEFF: Where is it written that they have to do that when they adopt the map? Where is it written that they have to justify what they are doing?

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

JUDGE NEFF: But where? When? When? When? Did they have to do it when they adopt the map? I don't think it says that anywhere.

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

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

MR. TORCHINSKY: Yes. And they have not put forth a single shred of evidence that shows why they can't maintain even their asserted community of

interest by moving 235 people to the surrounding districts from Grand Rapids that are the underpopulated. Every single piece of District Three cuts some county. They have not explained how or why they didn't change the shape of one of the cuts of one of the three counties that are already split to equalize population. And I think at Karcher Step Two that becomes their burden, and they haven't --

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

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

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

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

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

MR. TORCHINSKY: Yes, your Honor.

JUDGE KETHLEDGE: Okay.

MR. TORCHINSKY: I mean given this Court's --

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

MR. TORCHINSKY: That is correct. And your Honor, our map also addressed some of the concerns that were raised in Count Two that this Court dismissed, so what we are left is, you know, is Michigan going to be allowed to continue now and forever in the future with districts that are not equally populated because of a vague assertion of communities of interest or is Karcher and the command of Article I, Section 2 going to have supremacy over the state law and require equality of population just like the vast majority of all of the other states, with the exception of the two that keep counties whole.

JUDGE MALONEY: Well, recognizing your map works mathematically, what considerations did that map include as far as community interests were concerned?

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

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

MR. TORCHINSKY: Yes.

JUDGE MALONEY: -- in the state constitutional provision, and the community of interest provision is Number 3, correct?

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

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

MR. TORCHINSKY: I believe that our remedy map actually divided -- divided the southern border about in the middle of the state and kind of -- it had a lot of changes from the current map. But your Honor, with the dismissal of Count Two, I don't think that that is required anymore. But, you know, the changes that it would take to equalize the populations under this map are not dramatic. But I think are required under the Constitution because they have failed here to articulate why they can't -- why they can't actually equalize the populations and respect their communities of interest. And I think that's what this Court has to decide, because if you allow just a broad assertion of communities of interest to justify a .14 population deviation, what is to stop the Commission a decade from now coming in and saying well, you know, we had to go up to .18 and that's exactly what the Supreme Court warned against in Karcher when it said, look, population equality has to be the paramount consideration, because if it's not, every body charged with drawing the lines would push the boundaries of that. And so if you allow it here, you don't put any -- there is no definitional limitation to it. Next time the Commission could come in and say well, we are at two

percent deviation because, you know, we had communities of interest.

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

MR. TORCHINSKY: That is correct, your Honor.

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

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

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

JUDGE MALONEY: Let's talk about Berrien County for a minute.

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

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

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

MR. TORCHINSKY: Give me one second, your Honor.

JUDGE MALONEY: I think that's right.

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

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

MR. TORCHINSKY: Give me one moment, your Honor. Let me get over to the map.

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

MR. TORCHINSKY: I'm not disagreeing with your understanding of the populations, but every single one of these counties is split. For example, also in District Five -- District Five also splits Calhoun and Kalamazoo, both counties that also don't necessarily have to be split precisely as they drew them in order to equalize the populations. And, you know, and then you

look at the lines here in District Three that split Kent County, Ottawa County, and Muskegon County.

JUDGE NEFF: Mr. Torchinsky, isn't this a little bit about like asking how many angels can dance on the head of a pin? I mean we could be here from now until whenever looking at different maps and different configurations and speculating well, maybe we can take 350 people from here and put them over here, and maybe we can take 600 from here and put them over here. It is an exercise in tediousness. They have laid out what they think is a valid map that addresses the constitutional requirements, and all you're doing is niggling over a few little people here and there. That's all you're doing. And you are not making -- you are not advancing any constitutional argument that I can think of.

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

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

MR. TORCHINSKY: Well, it was Pennsylvania.

JUDGE NEFF: Well, Pennsylvania.

MR. TORCHINSKY: Pennsylvania and Michigan have about the same number of people. Pennsylvania

has, I think, 15 districts now, I think it had 16 then. This state had 14 and now has 13. I don't think they are that difficult to square up with each other.

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

MR. TORCHINSKY: I think I will wait and save my seven minutes for my rebuttal.

JUDGE MALONEY: Thank you, sir.

Mr. Raile, ahead.

MR. RAILE: Thank you, your Honor.

My it please the Court, I'm Richard Raile for the Commissioner defendants.

I would like to reorient this conversation around the motion that is in front of the Court this morning -- this afternoon, excuse me, which is a motion for a preliminary injunction. This is not closing arguments after trial.

As the Supreme Court held in The University of Texas vs. Camenisch, the question before the Court today is not whether any party has met its burden. The question is whether to take the exceptional and extraordinary step of issuing provisional injunctive relief to preserve the relative state of the parties pending a final disposition of this case on the merits. Right out of the gates, my friends on the other side slip and fall because they can't identify what status quo

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

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

MR. TORCHINSKY: Well, I think that's correct. We are not arguing Count One is non-justiciable. We didn't move to dismiss it on that basis. We are here litigating on that, but there is an equitable question of status quo. And so I want to put -- the point here there is not a preservation of the status quo. They are asking for a redistricting. That's what you get when you win the case. You get a new redistricting when you win the case.

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

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

We know there is a four factor test, and it starts with the size of the deviation, and that's very critical. Because as this Court knows, the question in any equal protection type case that the Court has to confront at the outset is what is the standard of scrutiny? We have everything from rational basis on the one hand to strict scrutiny on the other hand. And the level of scrutiny will dictate the degree to which the Court is at liberty to second guess state policy judgments, it will also dictate the extent to which an evidentiary showing is required. At the strict scrutiny level, there has to be a strong basis and evidence all the way on the other end of rational basis. The Court can actually hypothesize justifications on no evidence.

JUDGE KETHLEDGE: Okay. But the Supreme Court has not brought those tears of scrutiny per se into this doctrine, right? I understand you're reading between the lines, and I'm not quarreling with you, but I just want to be analytically clean. I don't think the caselaw gives us license to sort of peg it into a category.

It's a sliding scale based on the degree of deviation how important the interests are, whether they could be vindicated otherwise, right?

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

JUDGE KETHLEDGE: That's fair.

MR. RAILE: The higher that you get, the more akin it is to strict scrutiny. So my friend, Mr. Torchinsky, just told the court that if the Commission wins this case, anything goes. It can start ratcheting up the deviations. That's not true. Because as soon as the deviations start to go up, the level of scrutiny increases. And you get all the way to where the court got in the Kirkpatrick case, where the Supreme Court was looking at six percent population deviation, and it rejected all of the justifications that the state could pose, including county lines, saying they are not wavy enough or why is that? Because the deviation was so high, at some point, the deviations are too high, there's no state justification. We are on the other end. We know point that a .79 deviation is small. We are at .14, it's smaller than small. So we are on the far end. It may not be rational basis, the Court doesn't have to call it that, we don't need that to win, but we are close to that.

Now, that brings us to the next two factors, which are the legitimacy of the state interests and the consistency. And the plaintiffs' contend, first of all, I want to address --

JUDGE KETHLEDGE: Does --

Well, go ahead. You go ahead.

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

JUDGE KETHLEDGE: No, you keep going.

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

All of the justifications established in the Tennant case were established at a trial by the testimony of a single state senator. We know that's legitimate, because the Supreme Court in the Village of Arlington Heights case said that testimony from legislators is a highly probative way to get at the question of legislative intent.

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

Next my friends argue that it had to be some kind of group testimony. I'm not exactly sure what that means, in court individuals raise their right hand and give attestations, but in any event, that was the position of the district court in Tennant. I commend to the Court's attention the district court decision in

Tennant. It adopted most of the positions that my friends on the other side are arguing. At Footnote 7 in that case, it adopted the argument of Mr. Torchinsky that there would have to be some type of a formal ment of justifications. The Supreme Court said no, it doesn't have to be a formal statement. There is no requirement at the time of redistricting to establish the justifications. So that argument stands rejected as well.

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

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

MR. RAILE: Yes. There is not a basis, especially when we are at the low end of deviations for the Court to come and say that's not the right community of interest, there's this other community of interest you could have picked as well. The one-person, one-vote principle is not like a dog getting its nose under the fence so it can run wild with policy choices. It still has to look and defer to the state policy judgment. In fact, the opening salvo of Tennant Supreme Court decision found that the district court erred by failing to defer to the policy judgments of the state legislature of Virginia. One of those policy judgments was core retention, which the district court said was too arbitrary, it was done in the wrong way. How do you know that this group of people should be moved versus that group of people? It disagreed with it. The Supreme Court had no patience for that.

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

JUDGE KETHLEDGE: Same interests, right?

MR. RAILE: Yes, yes, exactly. Vindicating or approximately vindicating the states's policy choices. Mr. Torchinsky has just admitted that their alternative plan does not do this. He used the word "destroy," and

that's true. The alternative plan in this case is not designed --

Yes, your Honor.

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

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

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

So if we can just go to that, you know, question whether there are alternative remedies or, you know, alternative remedies, alternative lines that would equally advance the state's policy goal while coming closer to population equality, which I think we have to view as really something the state has to strive towards. It can't just sort of, you know, say okay, we are, you know, at 0.14 of one percent, and let's just not worry about it. And so I hear the plaintiffs making -- having maybe a different emphasis today, which is not give us our plan, but which is sort of, let's do a little sort of fine surgery on the borders of your plan -- of the Commission's plan, and get these 300 people moved over here and the 400 moved over there. So that really goes to Step Four, right? Tennant. You know, they are saying this is an alternative that would vindicate communities of interest, they think. You know, you are not -- you are not doing a lot of damage to keeping

these rural communities together, etcetera, it's like a finely tailored approach to get to equality without doing a lot of damage to communities of interest, and I'm interested to hear your response at the Step Four part of this.

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

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

MR. RAILE: Well, that is the relief, but I'm talking about the fourth Tennant factor, which is different, the availability of alternative plans. And what that means, in some cases you wouldn't have to do that, because they might exist on the record. In Tennant, there were plans that were already in front of the legislature, so they may not have to do it, but there has to be an actual plan. And the problem with assuming that this can be done is we have no idea. That's bald speculation. The plaintiffs could have tried to do that. For all I know, they did. For all we know, they tried that and it didn't work. And the reason for that is, it's simply not necessarily true that you can just make minor adjustments on the edges of districts without significant changes. A redistricting plan is like a Rubik's Cube. Basically you're sitting up here and you're saying, well, gee, this red square could easily be on the other side. Well, sure. Once you move that, you have to move other population, and that's particularly so in the context of redistricting, because in

redistricting -- the redistricting authorities working with census blocks. These are not fungible people. You don't just grab -- oh, I need 19 people from this district and that is the right amount. You're working with the census blocks. That runs from anywhere from zero people to over a thousand people. So you've got to scan the line and find a census block that meets your need, and so --

JUDGE KETHLEDGE: Is that the smallest unit, you know, that you can move around in a districting plan?

MR. RAILE: Yes.

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

MR. RAILE: Yes, as a practical matter, redistricting authorities do not split census blocks, that's never done.

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

MR. RAILE: Yeah, it varies dramatically.

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

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

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

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

JUDGE KETHLEDGE: Okay.

MR. RAILE: So they have these blocks and that's developed for the administrative convenience of administering the census. So you're using these blocks. It's like playing with Legos, right. You need the right size to fit into a given place, and so all of this bald speculation -- oh, obviously you could do it, we don't know that. They are coming in, they are asking for exceptional relief on an exceptional timetable after the Supreme Court's Merrill ruling, which I would like to get to, if I have time, and they are saying we want the Court to assume that this exists. I don't think the Court can issue an injunction and find out what it means later.

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

JUDGE MALONEY: Census block.

JUDGE KETHLEDGE: Yeah, no pun intended.

On the question of specificity, first of all, I get your point. I understand your argument regarding, in your view, the sufficiency of the Eid affidavit standing alone, particularly at this stage of the case. But, you know, the court does -- The court does demand some specificity as to why the lines needed to be drawn a certain way to preserve, in this case, the community of interest. And I understand your argument that we

have deferential review. But it would seem to me that we ought to, frankly, just have some citations to the Commission's -- that perhaps you should have a chance to give us some citations to the Commission's records that support Eid's characterizations of these comments from citizens at the hearings. I mean a through thread of the declaration is, we are doing what people told us they wanted us to do at the hearings, right?

MR. RAILE: Yes.

JUDGE KETHLEDGE: Okay. It would be -- I don't think we should have to take Mr. Eid at his word on that. And I would suggest that we ought to get the citations that support those representations about what the -- the citizens said at these hearings or through the portal, and on the other hand, they ought to have a chance to show us that actually the thrust of the comments, on these specific points that he is raising, not just generic stuff, that he is raising, that he is wrong, in saying people in like northern county "X" wanted to be kept with this other area. Are you tracking me on that?

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

JUDGE KETHLEDGE: I mean, you know, Tennant is not a French code as the showing necessary, right? I mean it's sort of using -- it's laying out standards. It's not giving us super fine detail. It's not giving us detail at this level of, you know, you would need to have record support for what the guy is saying or not. And I think that, you know, the PI ruling is an important ruling in this case. Obviously, we are making a prediction about what you're going to be able to show or not show at a later point in the case. And I think subject to approval of my colleagues here, we are going to ask each of you to give us supplemental briefing that tells us whether the record supports or does not -- or refutes what Mr. Eid is saying about why people wanted these lines drawn the way he said he wanted them drawn in his declaration.

MR. RAILE: We are happy to oblige on the Commission's part, your Honor.

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

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

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

JUDGE KETHLEDGE: That's what I thought.

MR. RAILE: They are comparing the mail-in date. They are looking at our date for mail-in is June 23rd, we are almost exactly the same. The Supreme Court has announced its closing time on redistricting litigation this year. You don't have to go home, but you can't stay here.

Thank you, your Honors.

JUDGE MALONEY: Counsel, you may proceed.

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

As the Court knows from our briefing, the Secretary really has two functions with respect to the redistricting process, neither of which has anything to do with drawing maps or approving plans.

First, under the Constitution, the Secretary has a duty to provide administrative and technical support to the Commission with respect to its map making process, and she has done that.

And second, as the state's chief elections officer, she and her staff have a duty to implement the new plans with respect to conducting elections in Michigan going forward. And principally with respect to that function, that means updating the state's electronic voter list, our qualified voter file, to ensure that it's over eight million registered voters are properly placed within the

new districts. It's a Herculean task. It's time intensive, it's labor intensive.

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

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

As you can tell from our briefing, we really don't have a position on the substance, that's not the Secretary's duty here, but we are concerned about the potential remedy at a preliminary injunction stage given the election calendar. So what we did in our brief was we attempted to, you know, describe the calendar going forward and express our concerns with respect to what ordering the preparation of a new map would do going forward. And as I sit here today, and to me it wasn't necessarily clear what plaintiffs wanted for relief, and I think it's now that was pointed out, it's not to adopt their remedy map, which of course, would have been probably the most expedient thing to do, but it would be to some sort of mandatory injunction to

send the Commission back to tinker with the borders, as was sort of indicated earlier. And I think standing here today, you know, the filing deadline is April 19th for these candidates. There isn't any way that we can envision the Commission being able to be remanded back drawing new maps, getting those maps approved or at least even tinkering with the side lines, getting those approved, and then for the Bureau of Elections and its staff to then go through the three phase process that we need to do to implement new maps -- new Congressional maps into the qualified voter file. There isn't going to be a way for us to do that and meet the April 19th filing deadline.

And so that's, you know, if we were going to go beyond that, we would have to get into this concept of enjoining statutory deadlines, picking new deadlines for filing. I'm happy to go on with the parade of horribles if anybody has specific questions, but you know, as we stand here today, with the relief that seems to be being requested would be to go back, allow the Commission to draw at least new borders, all of that, even small tinkering puts us back at the three phase process of implementing the maps into the QVF. And we have got about five weeks left before April 19th, and there isn't going to be a way for the state to do that and ensure that there is not sort of chaos with respect to nominating petitions as they come in.

So I will save time, I know I think our intervenors each wanted to have a couple minutes, if that's all right with the Court.

JUDGE MALONEY: Thank you.

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

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

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

I know we have been over the remedy map and how it doesn't really apply to the remaining claim as it did to Count Two, but I do want to point the Court's attention to the recent case out of Wisconsin, Johnson vs. Wisconsin's Election Commission, in which the Court ordered at least change its remedy. And we believe --

JUDGE KETHLEDGE: When was that case decided?

MR. DIAZ: That was earlier this year.

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

MR. DIAZ: I believe so. Yes. And it's at 2022 Westlaw at 621082.

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

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

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

JUDGE MALONEY: Thank you, counsel.

MS. PRESCOTT: Good afternoon, your Honors. Sarah Prescott on behalf of the voter intervenor defendants.

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

As reflected in our briefing, we have not taken a position on the merits on Count One, however, our concern would be that if the Court were interested in any kind of a remedy after today's hearing, that the appropriate remedy would be remand to the Commission. I've heard brother counsel at this podium earlier today say that his map is -- this is no longer a map making exercise, this is at most a math problem. Also, that due to the dismissal of Count Two, that the map of the plaintiffs is not required. I think those are certainly consistent with what we have heard here today.

And so to add to what you've already heard, I would only commend to the Court's attention two cases, both

are controlling. The first is Howe vs. The City of Akron, it's a Sixth Circuit case in 2015. It's cited in our brief at Footnote 1. Simply stands for the proposition that the Court's duty, if it is to provide the sort of relief requested here, would be to be as narrow and specific as possible. That's -- it's a more general point.

The second case is from the Supreme Court, it's Abrams vs. Johnson, and it's a 1997 case in which it was a voter -- one-voter -- one-person, one-vote case, your Honor, and relief was granted. The Court said, however, that it would be inappropriate, even if granting a new plan, to do anything other than ask for the narrowest possible remedy. The Court said that at most, we would require some very minor changes in a plan, a few shifting of precincts to even out districts rather than a revision or redrawing of a map. So that case --

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

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

Thank you.

JUDGE MALONEY: Thank you, Ms. Prescott.

Mr. Torchinsky, go ahead, sir.

MR. TORCHINSKY: Yes, your Honor.

Let me just address a couple things. The Wisconsin case that my -- counsel for defendants just cited was a State Supreme Court case where there was no enacted map remedying the population changes from the last decade passed by the political branches, and so it fell to the judiciary. And in that case, there was actually an impaneled three-judge panel which stayed its hand pending what happened at State Supreme Court, and ultimately what the State Supreme Court said in that case is, because there is no agreement between the governor executive, we are going to basically tell the parties that we are going to adopt essentially a least changes map from the current existing map to equalize these. But Wisconsin was in a different situation than Michigan, in that Wisconsin was maintaining, at least at the congressional level, the same number of congressional districts, and obviously they weren't changing the size of their state legislature. So a least changes from the existing was much easier to do in Wisconsin than it would be from the 2010 map in Michigan because of the loss of a congressional district.

That said, I do think I agree with counsel for the defendants in that if this Court is going to grant relief, I think under Growe v. Emison, the appropriate relief from this Court is, at least in the first instance, to offer the Commission an opportunity to make the changes that are necessary to its map to comply with one-person, one-vote requirements. I think what we are

asking here, your Honors, is for small surgical changes that can fix the population deviations for two-thirds of the district in the state.

In Tennant, the reasons for the deviations were ascertainable. The Supreme Court could tell whether those deviations were applied neutrally and consistently, and here, the communities of interest are, at least according to what they say, whatever they say they are.

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

MR. TORCHINSKY: Yep.

JUDGE KETHLEDGE: But where is the inconsistency or the lack of neutrality, in your view, in

Mr. Eid's declaration with respect to how he says they are applying communities of interest in drawing these lines?

MR. TORCHINSKY: When you look at the deviations as they are spread around the state, the four districts that are underpopulated and the nine districts that are overpopulated, there is nothing uniform between those that says why some of the districts are overpopulated and why some of the districts are underpopulated.

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

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

MR. TORCHINSKY: I think that -- I think the answer is --

JUDGE KETHLEDGE: There is an incoherency.

MR. TORCHINSKY: In the answer is, in Tennant, the reasons for the deviations were ascertainable. The Court could look at it and say, okay, they kept the

county lines whole. They Court could look at it say okay, they didn't pair incumbents together.

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

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

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

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

MR. TORCHINSKY: Your Honor, that may be true, but it still doesn't explain why they had to leave 685 people out of the southernmost district, why they had to add 234 people into this district. Nothing has

explained those inconsistencies in Commissioner Eid's declaration or Mr. Brace's declaration.

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

MR. TORCHINSKY: Right.

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

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

JUDGE KETHLEDGE: But I'm going to the antecedent question whether there is a legitimate state interest that is supporting what they are doing here. And I'm -- it seems like Mr. Eid describes reasons, you know, reasonably and sort of concrete, you know, as far as this sort of concept goes. He gives us some decent reasons why these lines are supported by the community of interest criterion, and your lines retard that criterion. And so like, how is he wrong on that part of the analysis? Not Step Four, that part.

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

JUDGE KETHLEDGE: Why don't you, at this stage, have an obligation to have, frankly, anticipated that and said okay, if you blow out Claim Two in our kind of heavy redraw, here is our more -- now we are hearing all this about narrow tailoring today that, frankly, I haven't heard about in the 19 briefs that we read for this hearing. So I mean why don't you have an obligation? You are the one who ultimately bears the burden to get the relief you want. Why don't have you an obligation to give us that map that moves the 300 people around here and the 200 there, which they can shoot at and say wait, a minute, your Honor, you know, every time you do this, you are going to mess up the Rubik's Cube and it's actually not doable. Why shouldn't you have to show us something that is doable before we blow up the status quo as to the Michigan election plan?

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

JUDGE KETHLEDGE: But still, you know, you could have foreseen maybe we are not going to win on

Count Two, almost nobody wins on these thing so, you know, that was a long shot.

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

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

MR. TORCHINSKY: No, it's actually not that hard, your Honor. The census blocks, as Mr. Raile said, can vary. But when you look around the borders of these districts and you look around the precincts that border these districts, they also vary in size. Right. So you can look around and say, okay, if I swap this precinct and that precinct, I can add a couple hundred people there and subtract a couple hundred people there without separating Grand Rapids and Muskegon, and you can solve the problem. This is not an unsolvable problem. This is, if you are going to -- if you're only looking at Count One and not looking at our Count Two complaints, coming up with a map that actually equalizes the population using a least changes sort of rubric to equalize the populations is not hard, and I think this goes to -- this goes to the footnote in Justice Kavanaugh's opinion in Merrill where he said the degree of what it takes to solve the Constitutional problem is something that this Court should absolutely consider. Take in the Milligan case. In the Milligan case, it was an entire redraw of the state's maps. To

solve this problem of moving a couple of hundred people between districts to equalize the populations, is not hard.

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

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

JUDGE MALONEY: Aren't you insisting on mathematical precision vis-a-vis the Karcher case, when the standard is as nearly as practicable?

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

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

My question again is not about that, I'm not necessarily saying that's fatal. Okay. That you haven't given us one. I mean I think it's a problem that, you know, we don't have the alternative that you think should be the districts in our state, but my question

itself really -- I haven't heard an answer to it, which is how is Mr. Eid wrong or how is he inconsistent in his application of communities of interests? That's a different question than whether he could have pursued those interests and tweaked, you know, the line in a tiny place.

MR. TORCHINSKY: I think, your Honor, this goes to the -- in the Court's dismissal of Count Two, the communities of interest notion is so vague, it is nearly impossible to ascertain.

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

MR. TORCHINSKY: And that is the problem.

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

MR. TORCHINSKY: Because his explanation cherry-picks what he wants to hear in a record of, you know, hundreds of people and thousands of comments

in front of a Commission that met for, you know, almost a year and a half taking input from around the state. But just take District Three, he says well, we wanted to, you know, combine Muskegon and Grand Rapids and, you know, there were 40 people who said keep Kent County whole. There were 70 people who said don't put Grand Rapids and Muskegon together. And he says well, you know, this one comment says Muskegon and Grand Rapids share cultural identity. I'm not really sure what that means, but you know, and then says oh, well, you know, the southern border counties the state share an identity because there is one comment at one meeting where someone says they share a media market, which turns out to be factually not true. You know, that is the arbitrariness that was involved in Commissioner Eid's assertion of communities of interest, and that's why it's not neutral and consistent across the state.

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

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

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

MR. TORCHINSKY: That's exactly what shows that it's not neutrally applied across the state.

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

JUDGE KETHLEDGE: It's got economic, cultural.

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

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

JUDGE KETHLEDGE: That is Mr. Raile's argument that, you know, the showing that you're demanding is akin to the one that district court demanded there, the very fine grain and, you know, we are kind of running the software at this point about whether we could really smooth these things out without messing something else up. And, you know, his argument was, that's kind of what the district court did there, you saw what happened to them. And the Supreme Court says not -- the scrutiny isn't that close.

I mean, you know, the summary is, you know, failed to apply appropriate deference. So we owe more deference here than there, because of the much lesser deviations. So why doesn't that get like washed away in the deference?

MR. TORCHINSKY: I think it doesn't get washed away in the deference because it's not, as this Court pointed out in dismissing Count Two, this assertion is not ascertainable. What was critical to the Supreme Court in Tennant was that the states defense of their deviations was ascertainable. You could look at a map and see that they didn't split counties. You could look at a map and see that they didn't separate -- they kept incumbents in separate districts. Here, you know, Commissioner Eid's definition is all over the place, he uses various things and makes assertions about various communities of interest. I mean it's like a warshak blot, everybody that looks at the phrase "communities of interest" is going to have a different definition, and that can't possibly justify violating a fundamental U.S. constitutional principle for congressional districts that is priority number one in the state Constitution. If you accept that, at some point, the next Commission is going to draw wider deviations, and they are basically going to assert that communities -- that asserting communities of interest to justify population deviations is sufficient, and that's kind of, unfortunately, where I think the panel appears to be leaning. I mean this notion that you can assert a vague communities of interest standard and obviate what has been since the 1960s, the fundamental one-person, one-vote concept in congressional districts when every -- nearly every other state in the country is

able to have them with plus or minus one person is a stunning conclusion for this Court to draw.

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

MR. TORCHINSKY: Your Honor, and that's why in Growe, the Court would require this Court to remand it back to the Commission to fix.

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

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

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

JUDGE MALONEY: All right. Thank you, counsel.

The panel will deem the matter to be submitted.

Justice -- or Judge Kethledge.

Let's get these submissions that Justice -- I said it again. See, this is how a district judge thinks of circuit judges.

JUDGE KETHLEDGE: No.

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

MR. RAILE: May I query, your Honor, what precisely is being requested? Is this a brief supplemental declaration? Do you want us to annotate the existing declaration?

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

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

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

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

JUDGE MALONEY: I agree with Judge Kethledge on that. It's too late.

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

JUDGE KETHLEDGE: Yes, I mean --

JUDGE NEFF: 15 pages.

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

JUDGE NEFF: They can cite to the record. But I think the briefs themselves should be limited.

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

JUDGE NEFF: That's good with me.

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

JUDGE NEFF: Ten pages.

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

MR. TORCHINSKY: Thank you, your Honor. Appreciate it.

JUDGE MALONEY: Maybe the way to do it would be to take Mr. Eid's submission, and plaintiff can say this is inaccurate and then point to another part of the record, and Commission members can point to well, this is -- this piece of the record supports the assertion, and maybe that is the way to do it. That way we --

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

JUDGE MALONEY: We will leave that to you.

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

JUDGE NEFF: We can only hope.

JUDGE MALONEY: Thank you very much.

JUDGE KETHLEDGE: Thank you for your arguments.

COURT CLERK: All rise, please.

Court is adjourned.

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

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
410 West Michigan
Kalamazoo, Michigan 49007