No. 19-3551

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

OHIO A. PHILIP RANDOLPH INSTITUTE; LEAGUE OF WOMEN VOTERS OF OHIO; LINDA GOLDENHAR; DOUGLAS BURKS; SARAH INSKEEP; CYNTHIA LIBSTER; KATHRYN DEITSCH; LUANN BOOTHE; MARK JOHN GRIFFITHS; LAWRENCE NADLER; CHITRA WALKER; RIA MEGNIN; ANDREW HARRIS; AARON DAGRES; ELIZABETH MYER; TERESA THOBABEN; CONSTANCE RUBIN; HAMILTON COUNTY YOUNG DEMOCRATS; TRISTAN RADER; NORTHEAST OHIO YOUNG BLACK DEMOCRATS; BETH HUTTON; THE OHIO STATE UNIVERSITY COLLEGE DEMOCRATS,

Plaintiffs-Appellees,

v.

LARRY OBHOF, President of the Ohio Senate, in his official capacity; LARRY HOUSEHOLDER, Speaker of the Ohio House of Representatives; FRANK LAROSE, Secretary of State, in his official capacity,

Defendants,

REPUBLICAN NATIONAL COMMITTEE; ADAM KINCAID; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE,

Movants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Ohio A. Philip Randolph Institute, League of Women Voters of Ohio, the Ohio State University College Democrats, Northeast Ohio Young Black Democrats, Hamilton County Young Democrats, Linda Goldenhar, Douglas Burks, Sarah Inskeep, Cynthia Libster, Kathryn Deitsch, Luann Boothe, Mark John Griffiths, Lawrence Nadler, Chitra Walker, Tristan Rader, Ria Megnin, Andrew Harris, Aaron Dagres, Elizabeth Myer, Beth Hutton, Teresa Thobaben, and Constance Rubin (hereinafter, "Plaintiffs") certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation, and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome. Plaintiffs are 17 individual registered voters in Ohio and five organizations involved in voter access and engagement in Ohio.

By: /s/ Theresa J. Lee
Attorney for Plaintiffs-Appellees

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STATEMENT REGARDING ORAL ARGUMENT

As the matter is moot and this Court has already heard the issues in the first appeal, No. 18-4258, Plaintiffs believe that "the decisional process would not be significantly aided by oral argument." Fed. R. App. P. 34(a)(2)(C). If the Panel nevertheless orders argument, Plaintiffs will present their case orally.

JURISDICTIONAL STATEMENT

As there remains no effectual remedy available to the Republican National Committee ("RNC"), National Republican Congressional Committee ("NRCC"), and Adam Kincaid ("Kincaid") (collectively, "Appellants"), who disclosed the documents and provided the testimony at issue, and then did not seek to seal the documents or the Kincaid deposition transcript under the terms of the entered Protective Order in the proceedings below, R.57, the matter is moot, and the Court lacks jurisdiction to hear this appeal.

STATEMENT OF ISSUES

1. As there is no effectual remedy available to Appellants, whether the case before the Court is moot?

2. As Appellants consented to the public disclosure of the documents and testimony in question as judicial records under the terms of the Protective Order below, whether Appellants waived any asserted privilege over the disclosed documents and testimony in this case?

3. Whether the three-judge district court acted within its discretion when it ordered Appellants to produce subpoenaed documents and deposition testimony?

STATEMENT OF THE CASE

After an eight-day trial, the three-judge panel below found that Plaintiffs proved that Ohio's congressional plan was an unconstitutional partisan gerrymander, in violation of the First and Fourteenth Amendments and Article I of the Constitution. Opinion and Order, R.262, PageID#23359. The panel issued a comprehensive and detailed 301-page decision that constituted its "findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1)." *Id*. In assessing whether Plaintiffs had proven the necessary discriminatory intent, the district court found that Appellants played a key role in drawing the challenged map:

> The Ohio map drawers did not work alone, but rather national Republican operatives located in Washington, D.C. collaborated with them throughout the process. These national Republicans generated some of the key strategic ideas for the map, maximizing its likely pro-Republican performance, and had the authority to approve changes to the map before their Ohio counterparts implemented them. Throughout the process, the Ohio and national map drawers made decisions based on their likely partisan effects.

Id. PageID#23360. In particular, Kincaid and Dr. Thomas Hofeller, RNC's Redistricting Consultant in 2011, were intimately involved in Ohio's map drawing process. *See, e.g.*, *id.* PageID#23375. The district court could not have reached

these and similar findings, outlined below, had Plaintiffs been unable to obtain the discovery at issue in this appeal.

I. Procedural History

In advance of discovery in this case, the district court entered a Protective Order holding that information designated as confidential could "be used for the sole purpose of preparing for or conducting this litigation." Protective Order, R.57 ¶ 3, PageID#603. The Order also provided mechanisms by which those who designated documents as confidential could move to keep them sealed from public disclosure. *Id.* ¶¶ 6, 9, PageID##605-06. It was against this backdrop that all discovery from Appellants took place.

Anticipating that Appellants possessed highly relevant documents, Plaintiffs served each with Rule 45 subpoenas in Summer 2018. *See* Subpoenas, R.1-3, PageID##42, 57, 73 (18-mc-31).[1] Appellants refused to produce the vast majority of responsive documents in their possession, asserting a First Amendment

[1] For the Court's convenience in navigating the record, Plaintiffs provide explanation regarding the dockets below. After the initial motion to compel was filed in the United States District Court for the District of Columbia pursuant to Federal Rule of Civil Procedure 45(d)(2)(B)(i), it was transferred to the Southern District of Ohio and placed on the miscellaneous docket at No. 18-mc-31. Following the transfer, the district court allowed for supplemental briefing. Min. Entry and Notation Order (Nov. 5, 2018); Appellant's Suppl. Br., R.96; Pls.' Suppl. Br., R.97. The filings originally docketed in the District of the District of Columbia and certain other submissions were filed only on the miscellaneous docket (18-mc-31) and are distinguished herein as such. Citations to the case docket below, 18-cv-357, are not followed by the case number.

privilege, and Plaintiffs filed a motion to compel on October 12, 2018. Pls.' Mot. to Compel, R.1 (18-mc-31).

While that motion was pending, Kincaid sat for his first deposition on December 4, 2018. During the deposition, his counsel claimed a First Amendment privilege and issued more than 100 instructions on that basis directing Kincaid not to answer questions about his role in drawing Ohio's congressional map, in full or in part. *See, e.g.*, Kincaid Dep. 1, R.230-27, PageID##15656-57 at 154:10-155:5 (Kincaid refused to explain the meaning of "Franklin County Sinkhole," a phrase he used to describe a map he proposed which packed Democratic voters around Columbus); *see also* Pls.' Suppl. Mem., R.112; Appellants' Suppl. Mem., R.126.

The district court directed Appellants to submit the withheld documents sought by Plaintiffs for *in camera* review, Order, R.101; R.116, and Appellants provided the documents to the district court. *See* Ex. A[2] (letter from Shawn Sheehy, counsel for Appellants, to district court); Ex. B (same).

On December 21, 2018, the district court granted Plaintiffs' motion to compel and directed Appellants to comply with the document subpoenas immediately. Order, R.128. Appellants filed an emergency motion to stay, R.129,

[2] Pursuant to 6th Cir. R.10(b), 6th Cir. I.O.P. 10(a), and 6th Cir. R. 28(c), attached are trial exhibits and other documents not on the electronic docket or appendix, which are necessary for the Court to consider this appeal. While some underlying documents are docketed, they are not as stamped trial exhibits as attached here, which are part of the record on appeal. Fed. R. App. P. 10(a)(1); 6th Cir. R.10(b).

and a notice of appeal, R.130, on December 24, 2018. During a December 28 status conference, the district court denied the stay and directed Appellants to produce the subpoenaed documents by noon on January 4, 2019. Min. Entry and Notation Order (Dec. 28, 2018). Appellants complied with the district court's order and produced 446 responsive documents (the "January 4 documents").

Kincaid agreed to sit for a second deposition and provide the testimony previously withheld. *See* Ex. C at 4 (Dec. 29, 2018 email from Sheehy). On January 11, 2019, Kincaid apparently reconsidered and sought a stay of his deposition from the Sixth Circuit. *See* Mot. for Stay, *Ohio A. Philip Randolph Inc. v. LaRose*, No. 18-4258, ECF No. 24-1. Appellants also sought the reversal of the district court's December 21 Order granting Plaintiffs' motion to compel.

Kincaid did not appear for his scheduled January 17, 2019 deposition. As he told the district court, Kincaid was "prepared to take the contempt citation and appeal the contempt citation." Jan. 15, 2019 Status Conf. Tr., R.142, PageID#14619, at 9:2-3; *see also U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 473-74 (6th Cir. 2006) (contempt citation of a third party creates an immediate right of appeal).

On January 18, 2019, this Court dismissed Appellant's appeal and denied the motion to stay Kincaid's deposition. *Ohio A. Philip Randolph Inst. v. LaRose*, 761 F. App'x 506 (6th Cir. 2019). The Court rejected Appellants' requests for relief

under the collateral order doctrine and refused to grant a writ of mandamus, in large part because it could "discern no error of law" in the district court's opinion regarding the January 4 documents. *Id*. at 514 & n.5 ("The district court therefore applied the legal standard articulated in [*Perry v. Schwarzenegger*, 591 F.3d 1147, 1161 (9th Cir. 2010)] and adopted by the Southern District of Ohio in [*Tree of Life Christian Schs. v. City of Upper Arlington*, No. 11-cv-0009, 2012 WL 831918, at *2 (S.D. Ohio Mar. 12, 2012)].").

Following that decision, Kincaid again reconsidered and agreed to sit for his deposition, thereby avoiding contempt. *See* Ex. D (Jan. 22, 2019 email from Sheehy). Days later, Appellants filed another motion with the district court, this time moving to block the re-opened deposition on First Amendment privilege grounds. Mot. for Protective Order, R.165, PageID#7367. On January 30, 2019, the district court denied the motion, rejecting the use of the privilege to prevent disclosure by applying the same law approved of by this Court in the earlier appeal. Order, R.188.

Specifically, the district court found that "Kincaid has not expressed any concern that his deposition might subject him to harassment or retaliation—the kinds of chilling effects with which the First Amendment privilege is primarily concerned." *Id.* PageID#11122. Nonetheless, the district court accepted that Kincaid had demonstrated some chill, albeit one "considerably less substantial

than" those in other cases involving assertions of the First Amendment privilege. *Id*. PageID#11121. The district court ultimately determined that Kincaid "established that his First Amendment interests are arguably implicated to some extent" due to the fact that the deposition "could conceivably result" in hindering his "exchange of ideas." *Id.* PageID#11123. But, Kincaid's "insubstantial" interest in preventing disclosure, *id.* PageID#11125, was outweighed by Plaintiffs' interest in obtaining information "highly relevant to an element of Plaintiffs' claim," *id.* PageID#11127. The district court found: "The 'state government' would not be excused from potential constitutional violations simply because it asked national Republicans to take care of the heavy lifting." *Id.* PageID#11126.

Following the decision, rather than "tak[ing] the contempt citation," R.142, PageID#14619, Kincaid sat for his re-opened deposition on January 31, 2019 (the "Kincaid deposition") and did not withhold testimony on the basis of the First Amendment privilege.[3]

II. Status of Information under the Protective Order

Now at issue are the January 4 documents and the Kincaid deposition transcript. All of the produced information was protected initially by the

[3] At the deposition, counsel for Kincaid made objections preserving the issue for appeal, but did not instruct Kincaid not to answer. *See* R.230-28, PageID#15755, at 253:2-12. Those objections, however, are immaterial given the subsequent waiver of privilege. *See infra* Argument, Section II.B.

Protective Order, R.57. That Order allowed parties and non-parties to designate material produced in discovery as "Confidential Information." *Id.* PageID##601-03. With this designation in place, the material could be used for the "sole purpose" of this litigation and the receiving party could only disclose such material to the individuals directly involved in the litigation. *Id.* PageID##603-05. If any party sought to file such information, the designating party had the opportunity to have the material filed under seal. *Id.* PageID#605.

While Appellants initially designated both the January 4 documents and the Kincaid deposition transcript as confidential, *see* Ex. E (Jan. 4 email from Phillip Gordon, counsel for Appellants); Kincaid Dep. 2, R.230-28, PageID#15755 at 253:13-16, they then relinquished those protections. Before trial, Plaintiffs informed Appellants that Plaintiffs intended to submit sixty-one of the January 4 documents as trial exhibits and designate large portions of the Kincaid deposition transcript as trial testimony. *See* Ex. F (Feb. 13, 2019 email from Jeremy Goldstein, counsel for Plaintiffs, to Appellants); Ex. G (attachment to Goldstein's Feb. 13 email in Ex. F listing 61 trial exhibits). Plaintiffs asked counsel for Appellants to "[p]lease let us know if you…intend to continue asserting that some or all of these materials are confidential." Ex. F. If Appellants continued to assert the confidentiality protections, the Protective Order gave them recourse to do so. R.57, PageID#605-06. Appellants expressly declined, informing Plaintiffs that

they would "***not*** be filing a motion to seal either the portions of Mr. Kincaid's deposition transcripts or the documents." Ex. F (Feb. 18, 2019 email from Sheehy) (emphasis in original).[4] Appellants freely chose not to seek the confidentiality protections of the Protective Order, and therefore withdrew the confidentiality designation of (i) the sixty-one January 4 documents on Plaintiffs' initial trial exhibit list; and (ii) the Kincaid deposition transcript. Those documents are now public judicial records.

The remaining January 4 documents not on Plaintiffs' exhibit list remain designated as confidential. Pursuant to the existing district court order, Plaintiffs will securely destroy those documents at the conclusion of the litigation. R.57 ¶ 16, PageID#608 (all documents "containing Confidential Information shall be returned to the party who produced them or securely destroyed by the party who received them").

[4] Nor is there any doubt that Appellants' waiver applied to the entire transcript. Plaintiffs notified Appellants that the entire transcript would be filed pursuant to the Court's February 4, 2019 notation order, and asked whether they would move to seal. Ex. F (Feb. 13, 2019 email from Goldstein). As noted, Appellants informed Plaintiffs that they would not be filing a motion to seal, Ex. F (Feb. 18, 2019 email from Sheehy), thereby waiving the confidentiality protections of the Protective Order. *See* R.57, PageID#605. Leaving no doubt as to the scope of the release, Appellants stated, "We will not, however, object to your designation since the Court ordered Plaintiffs to file the complete deposition transcript on February 20." Ex. F (Feb. 18, 2019 email from Sheehy). In accordance with these representations, Appellants did not move to seal, so the entire transcript was placed on the docket and is available to the public. R.230-28.

In sum, all of the materials at issue in this appeal are either judicial records, to which the public has both a common law and First Amendment right of access, or are set to be destroyed per the district court's order.

III. The District Court's Factual Findings Based on the January 4 Documents and the Kincaid Deposition

As Appellants admit, the district court's factual findings and conclusions of law relied heavily on the documents and testimony over which Appellants assert privilege. The panel found that "[t]he Ohio map drawers did not work alone, but rather national Republican operatives…collaborated with them throughout the process…generat[ing] key strategic ideas for the map [and] maximizing its likely pro-Republican performance." R.262, PageID#23360. That court concluded, "Republican map-drawing planning occurred at both the State and federal levels, and the two levels worked together, collaborated, and consulted one another throughout the process." *Id.* PageID#23364; *see also id.* PageID#23368 The work of the national Republicans, including Appellants, was essential to the district court's finding of discriminatory intent and, ultimately, partisan gerrymandering because the panel "conclud[ed] that the level of control asserted by national Republican operatives in a redistricting delegated to the State of Ohio's General Assembly raise[d] the inference that pro-Republican partisan intent dominated the process." *Id*. PageID#23537.

The district court's findings focused on specific individuals who Appellants claim to be part of the "association" whose purported First Amendment interests are at stake in this dispute. *See, e.g.*, *id.* PageID##23369-71, 23374, 23406. Two particular sets of findings are worth highlighting in detail given (i) the district court's heavy reliance on the documents and testimony that Appellants insist be protected from disclosure; and (ii) the degree to which the findings demonstrate Appellants' intimate role in Ohio's redistricting process. *First*, the district court explained that "[i]n another email criticizing changes that Kincaid had made to a map, Tom Hofeller wrote that '[t]he area Adam [Kincaid] has on his version included…some of the more 'downtown' area, which I took out of the map I sent—as it was 'dog meat' voting territory." *Id*. PageID#23540. The district court noted that Hofeller "later referred to the area he had removed as 'awful-voting territory in the 15th.'" *Id*. The district court then found that "'[g]ood' territory clearly meant Republican-leaning territory, 'bad' or 'awful' territory meant Democratic-leaning territory," continuing, "[t]he fact that mapmakers considered an area 'good' or 'bad' based on its partisan composition demonstrates the absolute centrality of partisanship to their map-drawing efforts." *Id*. Plaintiffs obtained this evidence in the January 4 documents and nowhere else. It would not have been presented to the district court had Appellants succeeded in their efforts to shield this and other critical evidence from disclosure.

Second, the district court repeatedly relied upon a spreadsheet associated with a draft map that was authored by Kincaid and labeled "Franklin County Sinkhole." *See id*. PageID##23360, 23374, 23409, 23560, 23585, 23636. The "Franklin County Sinkhole" was a map that created a new congressional district in Columbus that "allowed for safe quantities of Columbus's Democratic voter bloc to be absorbed by the neighboring Districts 12 and 15 such that those districts should maintain or achieve safe Republican majorities." *Id*. at PageID#23374. As the district court found, "Whatman and Kincaid had the idea to create the new District 3 in Columbus that would concentrate many of Columbus's Democratic voters into one district." *Id.* at PageID##23374, 23536. Kincaid admitted to authoring the original "Franklin County Sinkhole" spreadsheet. *Id.* at PageID#23374, n.69 (quoting Kincaid Dep. 2, R.230-28). Plaintiffs obtained evidence critical to the meaning and context of the "Sinkhole" map in the January 4 documents and the Kincaid deposition. Indeed, the district court cited both repeatedly, *see id.* PageID## 23364, 23370, 23374-76, 23381, 23383-84, 23540, 23542, before determining that "evidence in the record referring to the newly created [District 3] as the 'Franklin County Sinkhole' supports our finding that the map drawers created District 3 as a vehicle to pack Democratic voters." *Id*. PageID#23560. Regarding this key element, the district court found that national Republican operatives "generated foundational strategies that played key

roles in the map." *Id.* PageID#23536. The discovery now at issue was crucial to the district court's findings that the map drawers engaged in an extreme partisan gerrymander in Ohio.

SUMMARY OF THE ARGUMENT

Appellants plainly and explicitly waived any privilege regarding the Kincaid deposition transcript and any documents that were filed on the public docket or admitted as trial exhibits. By consenting to this public dissemination, they have clearly waived the privilege for those materials. But even setting that aside, the Court should dismiss this appeal for lack of jurisdiction because there is no "effectual remedy" that can be granted, so the case is moot. The materials remaining in question are subject to the terms of the entered Protective Order, under which they cannot be used outside of this litigation. Moreover, pursuant to the Protective Order, all materials remaining designated as confidential must be destroyed at the conclusion of this litigation, so there is no possible relief remaining. As such, even the narrow exception of *Church of Scientology of California v. United States*, 506 U.S. 9 (1992), is inapplicable here.

Were the Court to reach the merits—and it need not do so—it should affirm because the district court correctly weighed the competing interests in favor of disclosure. That court properly weighed any First Amendment infringement demonstrated by Appellants against Plaintiffs' demonstrated need for the highly-

relevant subpoenaed documents. *Perry*, 591 F.3d at 1160; *see also LaRose*, 761 F. App'x at 514 n.5. The panel also concluded that Plaintiffs could not obtain the information elsewhere, despite their sincere efforts. Moreover, the nature of the information sought here was distinct from that protected from disclosure in other cases. In other cases, disclosure was prevented for either truly internal communications, or membership lists, or investigatory materials sought via public records request unrelated to a closed investigation. The district court's reasoned determinations, applying the correct legal standard, are far from an abuse of discretion. They are manifestly correct and should not be disturbed.

ARGUMENT

I. Appellants Waived Any Claims of Privilege with Respect to the Deposition Transcript and the Documents Publicly Filed or Admitted as Trial Exhibits.

A. Appellants Consented to the Public Release of Their Information.

Appellants waived any privilege they might have had by consenting to the public filing of the produced documents and deposition transcript on the docket and admission as trial exhibits. Abiding by the Protective Order, Plaintiffs gave Appellants advance notice of all of the materials that would be filed on the docket and submitted as trial exhibits, thereby becoming public judicial records. Rather than take steps under the Protective Order to prevent public release of their information, R.57 ¶¶ 6, 9, PageID##605-06, Appellants acknowledged the public

disclosure and informed Plaintiffs that they would not move for the material to be sealed. *See* Ex. F. They willfully consented to the public disclosure of the documents over which they now try to re-assert privilege. This waiver of any continuing privilege over the information was "clear and compelling." *Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981).[5]

Moreover, though Appellants continue to pursue this appeal, by producing the documents and answering deposition questions in the first instance, rather than risking contempt, they waived the privilege. *See Fraser v. United States*, 145 F.2d 139, 144 (6th Cir. 1944) (holding that even though litigant first invoked privilege, by then complying with disclosure in lieu of hazarding contempt, he "ended by waiving it"). This conclusion makes perfect sense for the same reason as the rule that a finding of contempt is necessary to access appellate review: contempt carries "a significant penalty for failure. In discovery disputes…this difficulty is deliberate." *Pogue*, 444 F.3d at 473-74. By deciding not to hazard contempt,

[5] The "clear and compelling" standard is that required for the waiver of constitutional rights in the face of government action, not the waiver standard for privileges asserted against disclosure in a civil case. *Cf. G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1078 (6th Cir. 1994). In the context of civil discovery, the more appropriate waiver standard is that a privilege is waived "by conduct which implies a waiver of the privilege or a consent to disclosure." *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999). In any event, the waiver here is "clear and compelling," as Appellants took no steps to invoke continuing protection over their materials and expressly consented to their further disclosure.

Appellants waived their continued assertion of the privilege. *See Fraser*, 145 F.2d at 144. By taking "a careful 'second look' at the issue in question," they determined that it did not "truly warrant[] inviting a contempt citation." *Pogue*, 444 F.3d at 474. And they made this waiver all the more "clear and compelling," by explicitly consenting to the public filing and trial admission of their information and declining to move to keep them under seal. *See* Ex. F (Feb. 18, 2019 email from Sheehy).

B. The Materials Publicly Filed and Admitted at Trial Are Now Public Judicial Records.

All documents that were publicly filed on the docket or admitted as trial exhibits are now public judicial records, for which Appellants consented to the public dissemination. As such, there is no doubt now that the public at large have both a constitutional and a common law presumptive right of access to them. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983); *see also Waller v. Corder*, 178 F.3d 1297 (6th Cir. 1999) ("First Amendment guarantees the public access to judicial records."). While third-parties may have their documents guarded under a protective order and their privacy interests may be compelling enough to justify non-disclosure, *see, e.g.*, *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 478 (6th Cir. 1983), here Appellants relinquished that potential protection. They had access to the Protective Order's safeguards, but freely gave up the confidentiality of the documents, which then became judicial

records. *See* Ex. F (Feb. 18, 2019 email from Sheehy). By choosing not to move to seal, *see* R.57 ¶¶ 6, 9, PageID##605-06, Appellants followed the terms of the Protective Order and gave up any rights to non-disclosure as to those records.

II. This Appeal Is Moot and Should Be Dismissed.

"A case that becomes moot at any point during the proceedings is 'no longer a 'Case' or 'Controversy' for purposes of Article III,' and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018). As it is "impossible for the court to grant 'any effectual relief whatever,'" this case is moot and "must be dismissed." *Church of Scientology*, 506 U.S. at 12 (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

A. If *Catholic Conference* Applies, There Is No Jurisdiction and the Case Must Be Dismissed.

A federal court cannot decide any questions where there is no subject matter jurisdiction as that "comes to the same thing as an advisory opinion, disapproved by [the Supreme] Court from the beginning." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (citing *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 U.S. 408 (1792)). "Without jurisdiction the court cannot proceed at all in any cause." *Steel Co.*, 523 U.S. at 94 (citation omitted).

Ignoring the scope of Article III power, Appellants nevertheless contend that the district court's decision should be reversed and that the relief they seek on the merits should be granted under *U.S. Catholic Conference v. Abortion Rights*

Mobilization, Inc. ("*Catholic Conference*"), 487 U.S. 72, 76 (1988). Appellants' Brief ("RNC Br.") at 14, *Ohio A. Philip Randolph Inst. v. Obhof*, No. 19-3551, (6th Cir. Aug. 14, 2019), ECF No. 19. Appellants are wrong for two reasons. First, *Catholic Conference* does not apply here as contempt is a necessary precursor to its holding. *See Willy v. Coastal Corp.*, 503 U.S. 131, 137-39 (1992) (distinguishing *Catholic Conference* as applicable in the case of contempt and not more broadly). Second, if the Court determines that *Catholic Conference* does indeed apply, there is nothing more for the Court to do than to dismiss the case. Without jurisdiction, the Court has no judicial power with respect to any request for relief now pursued by Appellants. *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884).

B. There is No "Effectual Relief" Available to Appellants, So the Case Is Moot.

There is no "effectual relief" available to Appellants as under the Protective Order, all confidential documents must be returned or securely destroyed at the conclusion of the litigation. R.57 ¶ 16, Page ID#608. Appellants apparently seek an order mimicking that already in effect. Particularly as the documents are already ordered to be returned or destroyed, *id.*, "an order from this court" to "return or destroy any documents…is neither an available nor a necessary remedy," and the matter is therefore moot. *Cf. United States v. Jackson*, 771 F.3d 900, 903 (5th Cir. 2014). Additionally, as the material at issue cannot be used in

any other matter, this only serves to bolster the conclusion that there is no "effectual relief," and the case is moot.

1. The Current Case Is Not Governed by the Exception of *Church of Scientology* as There Is No Available Relief.

Where the court cannot "grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology*, 506 U.S. at 12. In their brief, Appellants claim that this case is not moot because Plaintiffs can use the materials "in other cases." RNC Br. at 16. That is plainly incorrect. All of the documents for which Appellants did not consent to becoming public judicial records are governed by the terms of the Protective Order, under which confidential materials can be "used for the sole purpose of preparing for or conducting *this* litigation." R.57 ¶ 3, PageID#603 (emphasis added). As such, those materials simply cannot be used "in other cases." Courts "will not assume that counsel would breach the duty of an officer of the court by disclosing [information] in violation of a protective order." *Truswal Sys. Corp. v. Hydro-Air Eng'g, Inc.*, 813 F.2d 1207, 1211 (Fed. Cir. 1987).[6]

[6] *See also, e.g., Gradillas Court Reporters, Inc. v. Cherry Bekaert, LLP*, No. 18-mc-80064, 2018 WL 2010978, at *2 (N.D. Cal. Apr. 30, 2018) ("The Court will not presume that attorneys will knowingly violate a protective order, opening themselves to sanctions and contempt of the court."); *InTouch Techs., Inc. v. VGO Commc'ns, Inc.*, No. 11-cv-9185, 2012 WL 7783405, at *1 (C.D. Cal. Apr. 23, 2012) ("Courts do not lightly assume that counsel will violate a protective order . . ."); *In re Grand Jury Matter*, No. 98-225, 2002 WL 1496993, at *2 (E.D. Pa. (continued…)

Furthermore, *Church of Scientology* was factually *sui generis*. There, the party complaining of disclosure did not produce the disclosed recordings. Rather, they were held by a different government actor—the clerk of the state court—who then produced them pursuant to subpoena. Even after *Church of Scientology*, Circuit Courts have held that when the party objecting to disclosure made the disclosure, the dispute is moot. *See, e.g.*, *Fed. Ins. Co. v. Me. Yankee Atomic Power Co.*, 311 F.3d 79, 82 (1st Cir. 2002) ("Appellants' decision to comply with the subpoenas thus mooted the dispute and forecloses our review."); *Nat.-Immunogenics Corp. v. Ferrell*, 766 F. App'x 435, 437 (9th Cir. 2019) ("[W]here the communications have been disclosed, either in compliance with a court order or inadvertently, an appeal from the order is rendered moot."). As such, the matter is moot. *Cf. Pogue*, 444 F.3d at 473-74 (holding that party's "status as both the privilege holder and document possessor seeking to prevent disclosure gives it powerful incentives to suffer such a contempt citation" rather than disclose the documents).

July 12, 2002) ("[T]he court will not assume that a citizen will not comply with court ordered discovery."); *Feature Films Servs., Inc. v. Arts & Entm't Network Corp.*, No. 91-cv-459, 1991 WL 290677, at *1 (N.D. Ill. Jan. 13, 1991) ("We will not assume that counsel would breach the duty of an officer of the Court by disclosing the [information] in violation of a protective order.").

2. Once Documents Are Made Public, There Is No Relief Remaining.

Once documents have become public, the mootness exception of *Church of Scientology* is inapplicable as there is no way for the court to even "effectuate a partial remedy." *Doe No. 1 v. Reed*, 697 F.3d 1235, 1239-40 (9th Cir. 2012). A "case seeking to keep a document secret is moot once third parties have control over copies of the document." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 834 (9th Cir. 2014). As the documents filed on the docket or admitted as exhibits at trial are now public judicial records, no available remedy remains.

Likewise, there is no recourse over the disclosure of the Kincaid deposition transcript. First, Appellants waived any interest in preventing that disclosure by consenting to the filing of the entire transcript on the public docket. *See supra* Section I. Second, as the transcript is publicly available, R.230-28, the dispute over it is necessarily moot. *Protectmarriage.com*, 752 F.3d at 834. Finally, unlike documents, over which parties may in some instances have a possessory interest, "words, once uttered, cannot" be retrieved. *In re Grand Jury Proceedings*, 142 F.3d 1416, 1422 (11th Cir. 1998). A "party cannot retrieve testimony once it is given; the party can only ask that the testimony be sealed against future use." *Office of Thrift Supervision v. Dobbs*, 931 F.2d 956, 959 (D.C. Cir. 1991). And Kincaid gave up any interest in preventing future use of the transcript by agreeing to its public filing.

III. The District Court Three-Judge Panel Did Not Abuse Its Discretion in Concluding that the First Amendment Privilege Did Not Militate Against Disclosure.

Even were the Court to reach the merits of this appeal, the district court properly applied the applicable law to the matter before it, and thus acted well within its discretion. The district court concluded that, although Appellants made the arguable prima facie showing that their First Amendment rights would be impacted by disclosure, it was insufficient to overcome Plaintiffs' overwhelming need for the highly relevant information. R.128, PageID##3472-76; R.188, PageID##11121-27. The discovery at issue goes directly to the heart of Plaintiffs' claims on the merits, as direct evidence of the process by which the challenged map was drawn and of the intent underlying its creation. It is no answer to claim that only the intent of the legislature matters, as Plaintiffs proved that the state farmed the work drawing the map out to unelected political operatives. R.262, PageID##23360, 23364-70. This evidence was not produced from any other source, despite efforts by Plaintiffs to obtain it.

The district court's decisions—one rendered after an *in camera* review of the documents,[7] R.128, PageID#3469, and another which limited the scope of

[7] Most often, the determination of the reach of the First Amendment privilege is made before the materials are disclosed. That the district court actually saw the documents in question in order to make its determination regarding whether they (continued…)

questioning in Kincaid's deposition, R.188, PageID##11127-28—were manifestly correct. Even accepting that Appellants have demonstrated infringement of their rights, they do not—and simply cannot—show that the district court erred in finding that Plaintiffs' interest in the subpoenaed information outweighed the deterrent effect of disclosure.

This is particularly so because if the Court here finds that the First Amendment interests override the need for the information sought by Plaintiffs, there will be virtually no scenarios where the First Amendment privilege would not prevent disclosure, effectively exempting all political organizations from any civil discovery. This would convert an admittedly qualified privilege into an absolute one. This outcome would be particularly troubling in the context of materials that document functions of the state. As the district court rightly determined, the state cannot "be excused from potential constitutional violations simply because it asked national Republicans to take care of the heavy lifting." *Id.*, PageID#11126. As Appellants' materials document functions of the state itself, *i.e.*, the drawing of district maps, they "are the people's records," and those "in whose custody they happen to be are merely trustees for the people." *Patterson v. Ayers*, 171 N.E.2d 508, 509 (Ohio 1960).

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should be produced to Plaintiffs bolsters its conclusion that the documents were highly relevant to the claims in the case.

A. Standard of Review

If the Court reaches the merits of this appeal, the Court reviews the "district court's discovery-related rulings under the highly deferential abuse-of-discretion standard." *Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 588 (6th Cir. 2014) (citation omitted). Appellants incorrectly cite the standard for analysis of only the attorney-client privilege, RNC Br. at 2, while this Court has been clear that in assessing other privilege determinations in discovery, the proper standard is abuse of discretion. *See Loyd* 766 F.3d at 588-89 (using abuse of discretion standard for privilege-related discovery rulings); *U.S. ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 525-26 (6th Cir. 2012) (reviewing district court's ruling on deliberative process privilege for an abuse of discretion); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006) (noting the different standard for attorney-client privilege, and holding that work-product privilege discovery decisions are reviewed for abuse of discretion); *Simon v. Cook*, 261 F. App'x 873, 878 (6th Cir. 2008) ("where privilege issues are discovery-related, we review for abuse of discretion" with only contrary citation being for attorney-client privilege); *see also Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004) ("We review the district court's decision to grant a protective order for an abuse of discretion."). Across this Court's precedent, the attorney-client privilege is considered differently from the other privileges in the discovery context. *Id.*

As to the present case, the First Amendment privilege is much more analogous to the deliberative process privilege of *Williams*, the peer-review privilege in *Loyd*, and the work product privilege, as in *Roxworthy*, than to the attorney-client privilege. *See, e.g.*, *Univ. of Penn. v. E.E.O.C.*, 493 U.S. 182, 195-96 (1990) (considering peer-review as a subset of First Amendment); *United States v. Nobles*, 422 U.S. 225, 237-39 (1975) (work product privilege is a qualified one); *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) ("The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need."). This is particularly so because the First Amendment privilege is a qualified privilege, thus it is much more analogous to these other privileges for which the abuse of discretion standard applies.

"Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment." *Landrum v. Anderson*, 813 F.3d 330, 334 (6th Cir. 2016) (citation omitted). "This standard is deferential." *City of Pontiac Retired Emplys. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014). Under this standard, "the relevant inquiry is not how the reviewing judges would have ruled if they had been considering the case in the first place, but rather, whether any reasonable person could agree with the district court." *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 511 (6th Cir. 1998) (citation omitted).

B. The First Amendment Privilege Is a Qualified and Limited Privilege.

The First Amendment "privilege is qualified, not absolute." *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *see also Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 307 (10th Cir. 1981) (holding the First Amendment privilege is "not absolute" and interests must be balanced); *Black Panther Party v. Smith*, 661 F.2d 1243, 1266 (D.C. Cir. 1981), *cert. granted, judgment vacated* by 458 U.S. 1118 (1982).[8] One way in which the privilege is limited is through the judicial process, since "[t]he courts have an interest in uncovering the truth and providing a resolution to the parties." *Dunnet Bay Constr. Co. v. Hannig*, No. 10-cv-3051, 2011 WL 5417123, at *4 (C.D. Ill. Nov. 9, 2011) (citing *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 561 (7th Cir. 1984)).

In assessing this qualified privilege, courts apply a balancing test. First, the party seeking to assert the privilege "must demonstrate…a prima facie showing of arguable first amendment infringement." *Perry*, 591 F.3d at 1160 (citation omitted); *see also Ohio Org. Collaborative v. Husted*, No. 15-cv-1802, 2015 WL 7008530, at *3 (S.D. Ohio Nov. 12, 2015); *Tree of Life*, 2012 WL 831918, at *3.

[8] "Even though the *Black Panther* decision was later vacated as moot, there is no suggestion in later case law…that its reasoning or analysis has been rejected or abandoned by [the] Court of Appeals. Indeed, it has been cited subsequently…in a unanimous per curiam opinion in *Steffan v. Cheney*, 920 F.2d 74 (1990), as well as in many other cases from outside [the D.C.] Circuit." *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 n.6 (D.D.C. 2002) (internal citations omitted).

If this hurdle is cleared, the burden shifts to the party seeking discovery to "demonstrate[] an interest in obtaining the disclosures it seeks which is sufficient to justify the deterrent effect on the free exercise of the constitutionally protected right of association." *Perry*, 591 F.3d at 1161 (internal alterations and quotation marks omitted) (citing *NAACP v. Alabama*, 357 U.S. 449, 463 (1958)); *see also Black Panther*, 661 F.2d at 1266 ("[T]he plaintiff's First Amendment claim should be measured against the defendant's need for the information sought."). The party seeking discovery does this by showing "that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1)." *Perry*, 591 F.3d at 1161.

This required balancing demonstrates that any First Amendment privilege is not absolute, and it may be overcome by a showing of need. *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003) ("[C]ourts therefore balance the burdens imposed on individuals and associations against the significance of the…interest in disclosure…").

In weighing the parties' competing interests, the district court properly "look[ed] to a variety of factors, including the importance of the litigation, the relevance of the evidence, whether the information is available from less-intrusive sources, and the substantiality of the First Amendment rights at stake." R.128,

PageID#3471 (citing *Perry*, 591 F. 3d at 1161; *Tree of Life*, 2012 WL 831918, at *3); *see also Ohio Org. Collaborative*, 2015 WL 7008530, at *3 (listing the relevant factors for deciding whether information should be disclosed); *Int'l Union v. Nat'l Right to Work Legal Def. & Educ. Found., Inc.*, 590 F.2d 1139, 1152 (D.C. Cir. 1978) (summarizing the test for disclosure).

Here, the district court conducted a deliberate review of Appellants' purported First Amendment interests and Plaintiffs' need for the information sought. The district court considered no fewer than seven sets of briefs along with hundreds of pages of exhibits, and it reviewed *in camera* hundreds more documents that are at the center of this dispute. Indeed, the district court was in a uniquely strong position to balance any interest of Appellants against Plaintiffs' demonstrated need for the information sought. Following this robust review considering the documents in question, the district court reviewed three more briefs considering Kincaid's deposition, along with the questions for which Plaintiffs sought answers in the first deposition, but were denied them by the assertion of this same privilege. There is no indication that the district court abused its discretion in balancing the relevant interests. Moreover, since this case reached final judgment, it is manifestly clear that information sought from Appellants was indeed highly relevant to Plaintiffs' claims. The district court extensively relied upon the evidence and testimony that Appellants now seek to

claw back. R.262, PageID##23360-77, 23382-84, 23406-07, 23524-65, 23613. Appellants all but admit this in their brief as they complain of the district court's pervasive citation to their information in its findings of fact and conclusions of law. *See* RNC Br. at 13.

C. Appellants Have Not Shown a Burden on Their First Amendment Rights.

While a prima facie showing may well be "light," RNC Br. at 25, it still must be made. To establish this prima facie showing, the party asserting the privilege bears the burden of showing that compliance with the discovery requests will result in "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which *objectively* suggest an impact on, or chilling of the members' associational rights." *Perry*, 591 F.3d at 1160 (internal quotations and citations omitted) (emphasis added); *see also Black Panther*, 661 F.2d at 1268 (party asserting privilege must show "there is some probability that disclosure will lead to reprisal or harassment"). Essentially, Appellants must show that "exposure of that association will make it less likely that association will occur in the future, or when exposure will make it more difficult for members of an association to foster their beliefs." *In re Motor Fuel Temperature Sales Practice Litig.*, 641 F.3d 470, 489 (10th Cir. 2011). Appellants failed to make such a showing

One's "political opponents" being made "privy to internal strategies" is not sufficient alone to demonstrate chilling effect on First Amendment associational rights. *Id.* at 490. This is the extent of the chill that Appellants have alleged. *See* RNC Br. at 30. The Supreme Court has consistently rejected similar generalized allegations of a chilling effect. *See Univ. of Penn.*, 493 U.S. at 200-01 (rejecting University's claim that a general chilling effect warranted a First Amendment privilege for peer review materials); *Branzburg v. Hayes*, 408 U.S. 665, 693-94 (1972) (rejecting claimed privilege against revealing identities of sources because claimed chilling effect on speech was incidental and speculative); *see also Bigelow v. Virginia*, 421 U.S. 809, 816-17 (1975) (holding that to show First Amendment burden must present "more than allegations of a subjective 'chill'").

Nonetheless, the district court accepted that Appellants made a prima facie showing. R.128, PageID#3473; R.188, PageID#11125. Plaintiffs disagree with the district court's ruling because Appellants have not shown "consequences which *objectively* suggest an impact on, or chilling of, the members' associational rights." *Perry*, 591 F.3d at 1160 (emphasis added); *see also* R.1-1, PageID##12-15 (18-mc-31) (arguing why Appellants have not shown a *burden* on their First Amendment rights resulting from compliance with the subpoenas); Pls.' Reply in Support of Mot. to Compel, R.14, PageID##523-24 (18-mc-31).

Indeed, Appellants own conduct below demonstrates that there was no objective impact on their associational rights. Given the opportunity to protect the Kincaid deposition transcript and produced documents from being publicly filed and turned into judicial records through admission at trial, Appellants declined to invoke the protections available to them through the Protective Order. R.57 ¶ 3, PageID#603; Ex. F; Ex. G. This cavalier stance in the face of public dissemination demonstrates that Appellants were not objectively chilled by disclosure in this case. This is particularly true as courts have recognized that "[a] protective order limiting the dissemination of disclosed associational information may mitigate the chilling effect and could weigh against a showing of infringement." *Perry*, 591 F.3d at 1160 n.6 & 1164. Moreover, now that the documents have been publicly disclosed, through Appellants' own choices not to risk contempt or to move for the documents and transcript to remain sealed under the Protective Order, it is evident that they have suffered no "objective[]," *id.* at 1160, impact or chill upon their associational rights. They can point to nothing that has occurred due to the public disclosure.

D. The Information Sought Was "Highly Relevant" to Plaintiffs' Claims and Thus Their Need Outweighed Any Deterrent Effect of Disclosure.

Assuming that Appellants made the requisite showing to shift the burden onto Plaintiffs to demonstrate their need for the information sought, the district

court correctly concluded Plaintiffs had done so. R.128, PageID##3473-76; R.188, PageID##11125-27. Plaintiffs "show[ed] that the information sought [was] highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1)." *Perry*, 591 F.3d at 1161. Plaintiffs' showing during the discovery dispute was borne out by the district court's reliance on the information disclosed by Appellants in its findings after trial. *See, e.g.*, R.262, PageID##23360-77, 23382-84, 23406-07, 23524-65, 23613; *see also* R.251-1, PageID##21946-22028, 22193-200. In considering the relevance of the information sought, courts look to whether "the information goes to the heart of the matter" and whether a litigant has "describe[d] the information they hope to obtain and its importance to their case with a reasonable degree of specificity." *Black Panther*, 661 F.2d at 1268. And this Court has already determined that the district court applied the appropriate legal test. *LaRose*, 761 F. App'x at 514 n.5.[9]

[9] "The RNC, [NRCC], and Kincaid spend much time laboring over the district court's phrasing to support their argument, that although the court articulated the proper standard, it actually applied something different. But the semantic differences to which the appellants point are tautological. When the district court concluded that it found the 'plaintiffs' interest in obtaining these documents to support a crucial element of their partisan gerrymandering claim,' it found that the information went 'to the heart of the matter'—that is, that the 446 documents were central to proving partisan intent in the redistricting of Ohio's congressional map. The district court therefore applied the legal standard articulated in *Perry I* and (continued…)

The district court explained that "Plaintiffs have shown that their interest in the information sought justifies the potential deterrent effect of disclosure." R.128, PageID#3473; *see also* R.188, PageID#11125-27. The district court properly concluded that the information sought went to the heart of Plaintiffs' claim that the challenged map was drawn—in coordination with national Republicans, including Appellants—with the intent to advantage Republicans and entrench their majority in Ohio's congressional delegation. R.128, PageID##3467, 3473; R.188, PageID#11125-27. No grounds exist to disturb those decisions here. Each of Plaintiffs' claims depended on showing discriminatory intent of those drawing the maps.

The bulk of Appellants' insistence that the information sought by Plaintiffs was not highly relevant is contingent upon their re-writing of the facts found by the district court. Their assertions about the relative importance of the information sought by Plaintiffs ignore what the district court actually found. But the district court's merits opinion plainly relied the information at issue in this appeal as crucial to the Plaintiffs' claims, and its findings of fact and conclusions of law are not subject to review on this appeal.

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adopted by the Southern District of Ohio in *Tree of Life Christian Schools*." *LaRose*, 761 F. App'x at 514 n.5 (internal citations omitted).

1. The Information Sought Demonstrates the Discriminatory Intent Necessary to Prove Plaintiffs' Claims.

Appellants concede that in order for Plaintiffs to establish their partisan gerrymandering claims, they had to present direct evidence of partisan intent from legislators, staffers, and outside retained experts. RNC Br. at 44. Whether the legislature's outside experts were "hired," *id.*, is irrelevant. Those experts were engaged in the drawing of challenged maps, and their information was critical to Plaintiffs' claims. And it is no answer for Appellants to say that only the intent of the legislature matters, because that is precisely what the information in dispute went to: demonstrating the manner in which the maps were drawn. *See* R.188, PageID#11126 ("The 'state government' would not be excused from potential constitutional violations simply because it asked the national Republicans to take care of the heavy lifting."). The legislature outsourced the work of drawing the challenged map to two state Republican operatives and two national Republican operatives, Whatman and Kincaid, both of NRCC at the time, under the direction of the team out of RNC, led by Hofeller, all with the oversight of the Ohio Senate President and House Speaker. R.262, PageID##23364-71.

While the Ohio legislature had the legal authority to enact the challenged map, Plaintiffs firmly established that the Republican Ohio legislative leadership was committed to enacting a map that was to the liking of the Ohio Republican congressional delegation, and deferred to the decisions of national Republicans.

Id. PageID##23369-71.[10] By proving these facts, Plaintiffs demonstrated that the intent of the map drawers was properly imputed to the legislature. *Id.* PageID##23524, 23529 ("Direct evidence of intent may include correspondence between those responsible for the map drawing…and testimony explaining '[t]he historical background of the decision,' including the 'specific sequence of events leading up to the challenged decisions.'"); *see also Common Cause v. Lewis*, No. 18 CVS 14001, slip op. ¶ 54 (N.C. Super. Ct. Sept. 3, 2019) (in partisan gerrymandering case, partisan intent of map drawer imputed to the legislature).

2. RNC's Documents are Highly Relevant to Plaintiffs' Claims.

a) The District Court's Findings of Fact and Conclusions of Law Establish the Heightened Relevance of the Information Sought from RNC to Plaintiffs' Claims.

The district court found that the state and national Republicans collaborated on drawing the maps with "national Republicans generat[ing] some of the key strategic ideas for the map" and "maximizing its likely pro-Republican performance." R.262, PageID#23360. RNC served as a clearinghouse for this assistance. *Id.* PageID##23369, 23374, 23380-81. A critical actor for RNC in the map drawing process was Hofeller, their redistricting expert. *See supra* Statement

[10] *See also, e.g.*, R.1-3, PageID#187 (18-mc-31) (President of the Ohio Senate, Tom Niehaus, wrote on September 11, 2011 that "I am still committed to ending up with a map that Speaker Boehner fully supports."); Ex. H, Trial Ex. P409 (Ohio legislative staff emailing the final map as enacted to Kincaid).

of the Case, Section I. The district court found that the "level of control asserted by national Republican operatives," including Hofeller, was indicative of discriminatory partisan intent. R.262, PageID#23537.

The information sought in discovery from RNC was also critically relevant to counter the state's purported justification for the map of compliance with the Voting Rights Act ("VRA"). *Id.* PageID##23532-34, 23607-15. Without disproving this justification, Plaintiffs could not have prevailed on their claims. Hofeller's input, which was discovered from the information sought from RNC, is highly relevant to the rejection of the state's VRA justification. *See* R.251-1, PageID##22193-94 (citing Trial Exs. P394, P396, attached here as Exs. I & J).

b) RNC Documents Themselves, Which Were Admitted at Trial, Establish their Heightened Relevance to Plaintiffs' Claims.

The contents of the previously withheld documents confirmed Plaintiffs' overwhelming interest in obtaining the information sought to support their claims. Among other revelations, the documents show that Hofeller, RNC's Redistricting Consultant, played a central role in the Ohio redistricting process.

For instance, in one of the more striking documents Plaintiffs discovered, Hofeller and Mark Braden, an outside consultant for the redistricting, exchanged a series of emails, which demonstrated not only the active and intimate involvement of these national Republicans in drawing Ohio's congressional map, but also the

discriminatory partisan intent that shaped the district boundaries. Ex. I (Trial Ex. P394).

Hofeller began the thread sending Braden a draft map[11] in which he "put Hamilton [County] back the way it was" and "gave the plan to Adam [Kincaid] as directed." *Id.* at 3. Hofeller informed Braden that Kincaid was working on a new draft of a district around Akron. *Id*. Hofeller identified an issue with a district he drafted, indicating it would not work as it moved "our incumbent." *Id.* at 2. Braden responded updating Hofeller to the incumbent's new street address, thus providing assurance that Hofeller's district would work after all. *Id.* Following these assurances, Hofeller explained that "[t]he area [Kincaid] has on his version included…some more of the 'downtown' area, which I took out of the map I sent - as it was 'dog meat' voting territory…unless there is some inexplicable reason they want that awful-voting territory in the 15th, the map I sent is OK." *Id*.

As NRCC trumpeted, one of the key achievements of the gerrymandered map was District 15, the district discussed in this exchange. *See* R.112-5, PageID#1286. According to NRCC, the map took that district and "[m]oved [it] out of play," *i.e.*, replaced a competitive district with a solidly Republican one. *Id*. Keeping downtown Democratic "'dog meat' voting territory" out of District 15

[11] In the exchange, they refer to DBF files, which is the file format of draft maps. *See* R.230-27, PageID##15517, 15716 at 15:15-16, 214:21-22.

was the contemporaneous partisan intent in drawing the map. Ex. I (Trial Ex. P394).

In addition, RNC documents show that Hofeller provided strategic advice about the map to ensure its enactment. *See, e.g.*, Ex. J (Trial Ex. P396) (Hofeller recommending to Mike Lenzo, counsel to the Ohio Republican majority, that it was not a good idea "for political purposes" to use only two elections for the "political indices"). The documents further demonstrate that Hofeller had regular access to insider information about the maps in Ohio. *See* Ex. K (Trial Ex. P410); Ex. L (Trial Ex. P411). These documents also show that Hofeller considered the enacted map as one that could secure Republicans' strength in Ohio. *See* Ex. M (Trial Ex. P403).

3. NRCC's and Kincaid's Documents and Kincaid's Testimony are Highly Relevant to Plaintiffs' Claims.

a) The District Court's Findings of Fact and Conclusions of Law Establish the Heightened Relevance of the Information Sought from NRCC and Kincaid to Plaintiffs' Claims.

The district court found that both state and national Republicans "worked together, collaborated, and consulted one another throughout" drawing the maps. R.262, PageID##23364. The national actors involved included individuals internal to NRCC, including Whatman and Kincaid. *Id.* PageID##23365-70. As Whatman and Kincaid undertook drawing of the maps, the information sought from NRCC

was necessarily highly relevant to Plaintiffs' claims. The information sought were evidence that, as this Court held, "were central to proving partisan intent in the redistricting of Ohio's congressional map" *LaRose*, 761 F. App'x at 514 n.5. The district court found that Kincaid "drafted proposed maps and district lines that incorporated Whatman's requests and sent them to DiRossi and Mann." R.262, PageID##23370. As such, the associations and communications that Appellants endeavor to characterize as "internal," were in fact inextricably engaged in drafting Ohio's congressional map.

The district court repeatedly cited the Kincaid deposition transcript in its findings of discriminatory intent. For example, the district court relied on Kincaid's testimony in finding that the drawing of the map was a joint effort between state and national actors. *Id.*, PageID#23364 (citing Kincaid Dep. 2, R.230-28). The district court also relied upon Kincaid's testimony that he "met repeatedly with members of Ohio's congressional delegation throughout the redistricting process to hear their concerns and keep them abreast of developments." *Id.* PageID#23370 (citing Kincaid Dep. 2, R.230-28).

The district court relied on Kincaid's testimony about the "Franklin County Sinkhole." Specifically, the district court cited his deposition testimony in finding that the Franklin County Sinkhole "allowed for safe quantities of Columbus's Democratic voter bloc to be absorbed by the neighboring Districts 12 and 15 such

that those districts could maintain or achieve safe Republican majorities." *Id.* PageID#23374 (citing Kincaid Dep. 2, R.230-28). The district court explicitly found that "evidence in the record referring to the newly created District 3 as a 'Franklin County Sinkhole' supports our finding that the map drawers created District 3 as a vehicle to pack Democratic voters." *Id.* PageID# 23560. The centrality of Kincaid's testimony in the district court's findings of fact is no surprise given the key role he played in drafting Ohio's 2011 congressional map.

b) Known Information About Kincaid Establishes the Heightened Relevance of the Information Sought from NRCC and Kincaid to Plaintiffs' Claims.

Information learned by the Plaintiffs from Kincaid's first deposition—where he refused to answer numerous questions—and from other discovery signaled his importance in drawing Ohio's congressional map. Based on this information, which had gaps that needed closing in order to make Plaintiffs' case, Plaintiffs continued to seek discovery from NRCC and Kincaid. In ordering Kincaid's deposition to proceed, the district court properly identified that the information sought was crucial as "the Ohio legislators worked closely with Kincaid in drawing the maps" and "that Kincaid was one of the 'primary draftsmen on the Ohio congressional map.'" R.188, PageID#11125. Kincaid was one of the primary drawers of the map that the Republican congressional delegation presented to the Ohio legislative leadership. *See, e.g.*, R.230-27, PageID##15654-55, at 152:14-

153:6 (Kincaid testified that he created a number of map proposals, including one labeled "Franklin County Sinkhole."); Kincaid Aff., R.120-1 ¶ 13, PageID#3164 (as NRCC Redistricting Coordinator, Kincaid "conducted, among other things, analyses of draft redistricting maps").

Through discovery, Plaintiffs obtained a spreadsheet which contained a proposal for new congressional districts in Ohio, which Kincaid authored. R.112-4 (spreadsheet); R.230-27, PageID#15655 at 153:2-6 (explaining he authored same). Above the columns for the newly proposed districts is the label "Franklin County Sinkhole." R.112-4. Kincaid confirmed he created this proposal during his first deposition, but refused to testify to the meaning of "Franklin County Sinkhole" on First Amendment grounds. R.230-27, PageID##15656-57 at 154:3-155:4.

The Franklin County Sinkhole spreadsheet proved to be critical evidence relied upon by the district court in finding that Plaintiffs demonstrated discriminatory partisan intent of the packing of Democratic voters into District 3. *See* R.262, PageID##23360, 23374, 23561, 23585, 23636. The strategic goal of Kincaid here was the same as that of Hofeller discussed above: pack Democrats into the "Sinkhole" so the surrounding districts could be solidly Republican, *i.e.*, "moved out of play."

Kincaid's work was not limited to the "Franklin County Sinkhole." He was engaged the whole redistricting and drew several drafts of the map himself. *See*,

e.g., R.1-3, PageID##198-209 (18-mc-131). Testimony taken prior to the discovery at issue here demonstrated that the activity of Kincaid and NRCC generally were highly relevant to establish impermissible partisan intent. First, Kincaid testified that as part of the map-drawing process, he prepared documents describing the partisan strength of districts for proposed maps. R.230-27, PageID#15638 at 136:7-12; PageID##15640-44 at 138:25-142:7. Second, Kincaid responded to eleventh-hour requests from U.S. House Speaker John Boehner's office to change district lines. *See id.* PageID##15712-13 at 210:14-211:12, PageID#15714 at 212:2-7, PageID#15716 at 214:7-18. Third, Kincaid confirms he was a primary liaison between congressional representatives and the technical map drawers in Ohio, thereby playing a crucial role over how congressional Republicans received information about and influenced the creation of Ohio's congressional districts. *See, e.g.*, *id.* PageID##15590-608 at 88:23-106:4. Fourth, Kincaid proposed and shepherded new map ideas through the redistricting process. *See, e.g.*, R.1-3, PageID#198 (18-mc-131); R.230-27, PageID##15651-53 at 149:3-151:3. As a primary actor in drawing the district maps, information from Kincaid and NRCC was necessarily crucial.

c) NRCC and Kincaid Documents Themselves and Kincaid's Testimony, Which Were Admitted at Trial, Establish their Heightened Relevance to Plaintiffs' Claims.

The contents of the previously withheld NRCC and Kincaid documents confirmed Plaintiffs' overwhelming need to obtain the information sought. For example, the production included three spreadsheets, all created by Kincaid, establishing that the national Republicans considered H.B. 369 a map that gave Republicans a 12-4 congressional seat advantage. The first spreadsheet included historical election and partisan voter index data, and represents a 12-4 Republican advantage. *See* Ex. N (Trial Ex. P498). The second spreadsheet, entitled "Ohio Congressional District Data," had a column for the "Current Party" in each district and included data demonstrating a 12-4 pro-Republican advantage. *See* Ex. O (Trial Ex. P479). The third spreadsheet includes the label "Scoreboard" and has "Before" and "After" columns for each state. *See* Ex. P (Trial Ex. P412); *see also* Ex. Q (Trial Ex. P414) (document produced by Kincaid stating Ohio's "new map should be a 12-4 map" and "[t]he map created a new Democrat seat in Franklin County").

As discussed *supra* Section III.D.3.a, Kincaid's testimony itself was highly relevant to Plaintiffs' claims. Kincaid testified to the "collaborative process" that was at the heart of the district court's discriminatory intent findings. R.230-28, PageID#15815, at 313:7-25. Likewise, his testimony provided important

information about the strategic decisions surrounding the so-called, "Franklin County Sinkhole," which was crucial to the district court's findings. *Id.* PageID##15865-69, 15872-73; R.262, PageID#23374.

* * * *

In finding that national Republican operatives, including Whatman and Kincaid, were drafters of the enacted congressional map, the district court concluded that the "national Republicans generated some of the key strategic ideas for the map, maximizing its likely pro-Republican performance." R.262, PageID#23360. This factual finding conclusively demonstrates that Appellants' information was indeed highly relevant to Plaintiffs' claims. Appellants insist that because in other partisan gerrymandering cases discriminatory intent was established with "only evidence from state legislators, legislative staff, and hired redistricting experts," RNC Br. at 44, that the information sought here cannot be critical to Plaintiffs' claims. Regardless of what occurred in any other case, here, the facts proven below show that this information was crucial. Plaintiffs do not know if national actors drew the maps in those states or made the key strategic choices underlying the districts, as the district court found the national Republicans did here. Moreover, Appellants admit that in other cases evidence from "hired redistricting experts" was needed to prove discriminatory intent. That the redistricting experts were offered free of charge for the Ohio redistricting, R.251-1,

PageID#21953; Ex. R (Trial Ex. P288); Ex. S (Trial Ex. P291); Ex. T (Trial Ex. P347), does not make their information any less crucial than that of the "hired" experts in other states to which Appellants refer, RNC Br. at 44.

Following the district court's determination of the central relevance of the information sought from Appellants by Plaintiffs, the district court properly weighed the other elements in determining the reach of the First Amendment privilege. R.128, PageID#3475; R.188, PageID##11126-27.

E. The Information Was Not Available From Other Sources.

The usual ex ante analysis of the First Amendment privilege might have made it a more difficult task to assess whether Plaintiffs could have obtained the information from other sources. However, as the analysis here is now ex post, it is inarguable that the information discovered from Appellants was highly relevant at trial and was not obtainable from any other party. And only Kincaid could provide first-hand testimony regarding his activities in constructing the map. Before obtaining the information at issue, Plaintiffs engaged in extensive discovery efforts, including taking more than 25 depositions and issuing over 40 document subpoenas.[12] The unavailability of these documents from other sources supports affirming the district court's decision. *See, e.g., Greyhound Lines, Inc. v. Int'l*

[12] Additionally, counsel sought relevant information via public records requests to Ohio officials who were in office at the time of redistricting. Lee Decl., R.1-2, PageID##35-36 ¶ 22 (18-mc-31).

Amalgamated Transit Union, 1992 U.S. Dist. LEXIS 10095, at *7-8 (D.D.C. July 9, 1992) (when movant "engaged in extensive discovery but was unable to learn" information, has satisfied duty to try to "obtain the information elsewhere").

There is a "'practical reality that officials seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate' against a particular group." *League of Women Voters of Mich. v. Johnson*, No. 17-cv-14148, 2018 WL 2335805, at *5 (E.D. Mich. May 23, 2018) (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323 (E.D. Va. 2015)). In addition, due to the shroud of secrecy surrounding redistricting generally, *see, e.g.*, Ex. U at 2 (Trial Ex. P346), R.262, PageID##23369, 23374 n.69—further evidenced by Appellants' attempts to prevent disclosure here—such intent evidence is not publicly available. *See also* R.1-3, PageID#237 (18-mc-131).

Despite Plaintiffs' best efforts to obtain the information from other means, Plaintiffs first secured the disputed documents from Appellants on January 4, 2019 and only obtained Kincaid's testimony through his deposition. The information had not been otherwise obtained during discovery. For example:

Braden, a key advisor to both national and Ohio Republicans, was subpoenaed and, following privilege disputes, produced over 200 documents and

sat for a deposition.[13] *See* Order, R.121; Order, R.124; Braden Dep., R.230-7. During his deposition, Braden testified that he did not draw maps and that "there[was] a good chance [he] didn't" even know Kincaid at the time of redistricting. R.230-7, PageID##12649, 12693 at 23:16-17, 67:19-21.

The information sought from Appellants were critical to answering the factual questions left open from the information that Braden provided to Plaintiffs and undermined Braden's effort to distance himself from the drawing of the congressional map. In contrast to Braden's testimony that he "d[id] not draw plans," the "dog meat voting territory" email admitted at trial demonstrates that a group of national Republicans, including Braden, not only discussed raw draft maps, but also directed certain boundaries be drawn. *See* Ex. I. Moreover, in direct contrast to Braden's recollection that he likely did not know Kincaid in 2011, the "dog meat" email shows Braden and Hofeller referring to Kincaid multiple times by his first name. *Id*. And to further underscore the point, this email was absent from the documents produced by Braden. Despite Plaintiffs' extensive efforts to obtain this information elsewhere, only Appellants have produced the "dog meat" email and others similar to it.

[13] The documents produced by Appellants on January 4, 2019 call into question information provided to Plaintiffs by Braden and, as outlined below, Heather Mann during their depositions.

Hofeller, working on behalf of RNC, as illustrated by his "@rnchq.org" email address, appears on more than 150 of the email threads produced by Appellants on January 4, 2019. Since the redistricting, Hofeller died.[14] Plaintiffs were therefore unable to obtain Hofeller's documents or any other information that may have been in his knowledge, custody, or control except by way of issuing subpoenas to Appellants. The district court rightly considered this very fact. R.188, PageID#11127.

Finally, Heather Mann was one of the map drawers and produced over 700 documents. She was also subpoenaed and deposed, but in response to questioning, offered no information about Kincaid's role in the redistricting process. *See* Blessing Dep., R.230-5, PageID##12390-91, at 58:22-59:13. Nonetheless, the information obtained from Appellants demonstrates Kincaid's active role in the drawing of the congressional map: a fact explicitly found by the district court in its decision on the merits. R.262, PageID##23370, 23374-75.

F. Nature of the Information

The nature of the information sought is not similar to other cases where courts have refused to order the production of documents. In those cases, courts have found that the First Amendment privilege prevents disclosure when the

[14] Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, N.Y. Times, Aug. 21, 2018.

information included: (1) truly internal campaign communications about highly contested political issues (marriage for same-sex couples), *Perry*, 591 F.3d at 1152-54; (2) membership lists, *NAACP v. Alabama*, 357 U.S. 449, 466 (1958), and *Black Panther*, 661 F.2d at 1264-65; and (3) public disclosure of internal materials produced to the government pursuant to an investigation to third parties in response to a public records request, *AFL-CIO*, 333 F.3d at 176.[15]

Appellants overstate the similarity of the present dispute with that in *Perry*. In *Perry*, the parties from whom the information was sought already had produced a vast amount of information. Specifically, there, the Proponents had "already agreed to produce all communications actually disseminated to voters, including 'communications targeted to discrete voter groups.'" *Perry*, 591 F.3d at 1164-65. The produced information was indeed highly relevant because there, the intent that was at issue in the claims was the intent of the voters. In a ballot initiative, the *voters*, not the Proponents, are the legislators. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659, 2662 and n.7 (2015) (holding that in

[15] *AFL-CIO* dealt not with ordinary civil discovery. Rather, in that case, the union disclosed documents as required to the FEC; its objection was to "public disclosure of an association's confidential internal materials" pursuant to a public records request *after* the government's investigation had concluded. *AFL-CIO v. FEC*, 333 F.3d 168, 172 (D.C. Cir. 2003). Disclosure under a public records request is pro forma; it must be released to all comers regardless of the cause for which it is sought.

Arizona, like California, legislative power is vested *in the people* through the initiative process). In *Perry*, information regarding the intent at issue was produced. Here, the district court found that the relevant intent was of those drawing the map, as the government could "not be excused from potential constitutional violations simply because it asked the national Republicans to take care of the heavy lifting," R.188, PageID#11126. The information sought demonstrated how the map was drawn and was thus direct evidence of the discriminatory intent that Plaintiffs had to prove to prevail. R.262, PageID##23524, 23529.

This is not a case where Appellants sought to protect a limited subset of the information sought, as in *Perry*. 591 F.3d at 1153, 1164-65. In *Perry*, the court found a First Amendment privilege sufficient to prevent disclosure where movants were seeking disclosure of truly internal documents and communications regarding California's Proposition 8, *id.*, a citizen referendum regarding the right to marriage for same-sex couples. Here, Plaintiffs are seeking information regarding individuals acting in concert with and directing government officials to enact partisan redistricting. By filling this role, Appellants made their information more similar to the disclosed communications with voters, the legislative body who enacts a ballot initiative, in *Perry*. Just as in *Perry*, here, such communications are highly relevant and must be disclosed.

If Appellants had operated at a distance from those drawing the Ohio congressional map, perhaps they could muster a persuasive argument that the documents do not go to the heart of Plaintiffs' case. But they did not. To the contrary, their arguments admit a broad association of both national and Ohio Republicans, which includes the map drawers and individuals "internal" to Appellants were map drawers themselves, *i.e.*, NRCC employees Whatman and Kincaid.[16] The mere invocation of the word "internal" does not convert the information here—which is much more like the produced communications with voters in *Perry*—into the information that was guarded in that case. The district court explicitly considered the nature of the information sought, and distinguished it from that in *Perry*. R.188, PageID#11123. Contrary to Appellants' assertions about the reach of *Perry*, in that case, only truly "internal campaign

[16] Appellants' own description of whom their documents were communicated and disseminated to demonstrates that they were not to a protected, internal group, as in *Perry*. Rather, the "[i]nternal" association included "fellow associated Republicans," *see* Oldham Aff., R.11-2 ¶ 8, PageID#461 (18-mc-31), a group including Lenzo, Ohio General Assembly staffer who worked on redistricting, Braden, who served as an outside consultant, drafted maps, and oversaw the work of the primary drawers, Mann, DiRossi, Kincaid, and Whatman, and those "internal" to the NRCC, a group which on its face included Whatman and Kincaid. Winkelman Aff., R.11-2 ¶¶ 8, 10 PageID##465-68 (18-mc-31); Kincaid Aff., R.120-1 ¶ 9, PageID##2701-02. Kincaid never asserted that he did not participate in drawing the Ohio congressional map, *see generally* Kincaid Aff., R.120-1; Kincaid Suppl. Aff., R.165-1, nor did he affirm that he never shared documents or communications with Whatman, Mann, or DiRossi, *id*., nor could he.

communications regarding the formulation of campaign strategy and messages" were protected, and the Circuit Court left it to the discretion of the district court to determine what fell into the protected category. *Perry*, 591 F.3d at 1165 n.12 (citation omitted).

As recognized by the district court, the very nature of the information at issue—the mapping of congressional districts as required by statute—undercut any privilege that might be asserted over them. Put simply, by interjecting themselves into the public process of drawing the congressional maps, the national Republicans waived any claim that their communications should remain confidential under the First Amendment:

> Kincaid's testimony would likely not be so much about substantive political campaign messaging (the campaign playbook), but instead will likely relate or pertain to the formulation of the districts in which subsequent campaigns will take place (the setting of the playing field). These two types of communications could be considered distinct: the former is possibly internal speech that could be chilled, the latter concerns a task that the Ohio Legislature is obligated to undertake (subject to constitutional constraints) and ultimately results in a public law passed by the Legislature and signed by the Governor.

R.188 PageID#11125.

The information sought by Plaintiffs was about activity "incompatible with democratic principles." *Ariz. State Legis.*, 135 S. Ct. at 2658 (citation omitted). While the "claim of privilege will ordinarily grow stronger as the danger to rights

of expression and association increases," *Black Panther*, 661 F.2d at 1267, the inverse is true as well. *AFL-CIO*, 333 F.3d at 176 (noting the difference in "the strength of the First Amendment interests asserted").

If the Court finds that any First Amendment privilege overrides the need for the information sought by Plaintiffs, then there will be few, if any, instances where the First Amendment privilege will not apply and political organizations will be exempt from civil discovery. If Appellants have their way, they will create a broad exception to civil discovery for political organizations, converting what is indisputably a qualified privilege into an absolute one for this subset of actors. Such a holding would encourage state governments to outsource any government functions for which intent would be an element of a challenge in order to prevent litigants from accessing the evidence that would be critical to sustaining a challenge, letting third parties use their purported First Amendment rights to stomp on the constitutional rights of the citizens of the state at issue. This is particularly troubling as, in most states, documents that "serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of" government action are public records. *See, e.g.*, *State ex rel. Glasgow v. Jones*, 894 N.E.2d 686, 690 (Ohio 2008). As materials like those sought here document functions of the state itself, *i.e.*, drawing district maps, they "are the people's

records," and those "in whose custody they happen to be are merely trustees for the people." *Patterson*, 171 N.E.2d at 509.

G. The Balance of Interests in Favor of Plaintiffs Is Clear.

Lastly, the absence of error in the district court's balancing analysis is demonstrated by Appellants' response to the district court's orders: they fully complied, producing the documents in question—even prior to the first appeal in this case—and sitting for the requested deposition.

By deciding to comply with the discovery in lieu of risking contempt, Appellants already took "a careful 'second look' at the issue in question," and they determined that it did not "truly warrant[] inviting a contempt citation." *Pogue*, 444 F.3d at 474. Additionally, all of Appellants' documents and the Kincaid deposition transcript were under the terms of the Protective Order, barred from any use other than in this litigation and unable to be made public without Appellants' consent or a court determination that the documents be unsealed. Appellants willingly forewent this protection for the documents that were admitted as trial exhibits and for the Kincaid deposition transcript. The remainder of the documents remain protected from public disclosure, cannot be used in any other matter, and are already ordered to be destroyed at the conclusion of this litigation by the district court. R.57 ¶¶ 3, 6, 9, 16, PageID##603-08.

Finally, the true injury here is to the public. Government functions, such as the drawing of district maps, are supposed to be documented and preserved as public records. Overturning the district court would doom all state citizens to be kept in the dark as their government farmed out its functions to third parties who would wield the First Amendment to keep public information from public view. This is the injury that must be balanced against Appellants' speculation, particularly as "[s]unlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting Justice Brandeis, Other People's Money 62 (1933)).

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal because it is moot and because Appellants have waived the privilege they now assert. Even so, the district court's determinations—informed by an unusual amount of briefing, a deliberate, *in camera* consideration of the documents at issue, and consideration of the testimonial questions for which the privilege had been improperly invoked—are correct, and thus well within its discretion. There is no basis on which to disturb the district court's rulings.

September 13, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because the brief contains 12,819 words, excluding the parts of the brief exempted by Rule 32(f). *See* Fed. R. App. P. 32(a)(7)(B).

This brief complies with the typeface requirements of Rule 32(a)(5)(A) and the type style requirements of Rule 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

The undersigned herby certifies that the Brief of Plaintiffs-Appellees was electronically filed with the Sixth Circuit Court of Appeals on September 13, 2019. The Brief of Plaintiffs-Appellees was served by ECF on September 13, 2019, on counsel for Appellants. The addresses for counsel for Appellants are:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS
No. 1:18-cv-357 (S.D. Ohio)

Document	Description	Page ID #
R.057	Stipulation & Protective Order	PageID##601-608
R.096	Appellant's Supplemental Brief in Opposition to Plaintiffs' Motion to Compel	
R.097	Plaintiffs' Supplemental Brief in Support of Motion to Compel	
R.101	Order for *In Camera* Review	
R.112	Plaintiffs' Supplemental Brief in Support of Motion to Compel	
R.112-4	Exhibit C to Plaintiff's Supplemental Brief in Support of Motion to Compel	
R.112-5	Exhibit D to Plaintiff's Supplemental Brief in Support of Motion to Compel	PageID#1286
R.116	Supplemental Order for *In Camera* Review	
R.120-1	Corrected Kincaid Affidavit	PageID##3164, 2701-02
R.121	Order Granting Plaintiffs' Motion to Compel Compliance with Subpoenas	
R.124	Order Denying Motion to Stay	
R.126	Appellants' Supplemental Memorandum in Opposition to Motion to Compel	
R.128	Order Granting Motion to Compel	PageID##3467, 3469, 3472-76
R.129	Appellant's Emergency Motion to Stay Order Granting Motion to Compel	
R.130	Appellant's Notice of Appeal	

Document	Description	Page ID #
R.142	Jan. 14, 2019 Status Conference Transcript	PageID#14619
R.165	Appellant's Emergency Motion for Protective Order	PageID#7367
R.165-1	Supplemental Kincaid Affidavit	
R.188	Order Denying Motion for Protective Order	PageID##11121-28
R.230-27	Kincaid Deposition Volume I	PageID##15517, 15590-608, 15638, 15640-44, 15651-57, 15712-14, 15716
R.230-28	Kincaid Deposition Volume II	PageID##15755, 15815, 15865-69, 15872-73
R.230-54	Blessing Deposition	PageID##12390-91
R.230-7	Braden Deposition	PageID##12649, 12693
R.251-1	Plaintiffs' Proposed Findings of Fact	PageID##21946-22028, 22193-200
R.262	Opinion & Order	PageID##23360-77, 23380-84, 23406-07, 23409, 23524-65, 23585, 23607-15, 23636

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS
No. 1:18-mc-31 (S.D. Ohio)

Document	Description	Page ID #
R.01	Motion to Compel	PageID#1
R.01-1	Brief in Support of Motion to Compel	PageID##12-15
R.01-2	Lee Declaration in Support of Motion Compel	PageID##35-26
R.01-3	Exhibits in Support of Motion to Compel	PageID##42, 57, 73, 187, 237
R.11-2	Exhibits in Support of Opposition to Motion to Compel	PageID##461, 465-68
R.14	Reply in Support of Motion Compel	PageID##523-24

EXHIBIT A

HOLTZMANVOGELJOSEFIAKTORCHINSKY PLLC
Attorneys at Law
45 North Hill Drive • Suite 100 • Warrenton, VA 20186

December 4, 2018

Honorable Circuit Judge Moore, Honorable Judge Black, and Honorable Judge Watson,

Please find enclosed documents responsive to this Court's order directed to the Republican National Committee, the National Republican Congressional Committee, and Adam Kincaid ("Respondents") in *Ohio A. Philip Randolph Institute*, *et al*. v. *Smith, et al.,* No. 18-cv-00357 (S.D. Oh. Dec. 3, 2018) (ECF 101) (Page ID 938-940). These documents are produced to the Court for in camera review.

These documents are provided to the Court both in PDF paper format and in searchable PDF format on a CD.

However, Rev_No. 23193 and 23194 are not produced in paper format or in searchable PDF format on a disc. Instead they are produced on the CD in native format. Additionally, to review these documents the Court will need licensed GIS software such as Maptitude or AutoBound software. These documents cannot be reviewed without the licensed software. Undersigned counsel can work with software providers to obtain this software for the Court if the Court so chooses.

Respectfully submitted,

/s/ Shawn T. Sheehy
Shawn T. Sheehy
Counsel to Respondents

CC: All counsel of record

EXHIBIT B

HOLTZMANVOGELJOSEFIAKTORCHINSKY PLLC
Attorneys at Law
45 North Hill Drive • Suite 100 • Warrenton, VA 20186

December 13, 2018

To the Honorable Circuit Judge Moore,
Honorable Judge Black, and
Honorable Judge Watson:

Please find enclosed documents responsive to this Court's order directed to the Republican National Committee, the National Republican Congressional Committee, and Adam Kincaid ("Respondents") in *Ohio A. Philip Randolph Institute*, *et al*. v. *Smith, et al.,* No. 18-cv-00357 (S.D. Oh. Dec. 11, 2018) (ECF 116) (Page ID 1360-1362). These documents are produced to the Court for in camera review.

These documents are provided to the Court both in PDF paper format and in searchable PDF format on a CD.

As with the previous in camera production, some documents require licensed and proprietary software to open. Accordingly, we cannot produce these documents in paper format or in searchable PDF format. Instead these documents are produced on the CD in native format. These documents are Rev_Nos. 63, 64, 69, 72, 73, 23345, 23346, 23433, 23434. Therefore, and similar to the previous in camera production, to review these documents the Court will need licensed GIS software such as Maptitude or AutoBound software. Undersigned counsel can work with software providers to obtain this software for the Court if the Court so chooses.

Also, Rev. No. 12 contains several hundred pages. Rather than producing that document in paper format, we have produced that document in native format on the CD.

Additionally, in preparing the documents for production, counsel realized that three documents were inadvertently not included on Mr. Kincaid's affidavit. This was due to a miscoding error in the document review software. Those documents are: Rev_No. 45, 74, and 75. These documents fall under the existing categories listed on Mr. Kincaid's affidavit.

Doc. No. 45 falls under Kincaid Affidavit paragraph 14(a) "Analysis of Final New Map;"

Doc. No. 74 falls under Kincaid Affidavit paragraph 14(a) "Analysis of Old Map;"
Doc No. 75 falls under Kincaid Affidavit paragraph 14(a) "Analysis of Old Map."

Paragraph 14(a) of Mr. Kincaid's affidavit now reads:

a. Analyses of Draft Ohio Congressional Maps and The Final Ohio Congressional Map

- Analyses of Old Map: Doc Nos. 9, 74-76
- Analyses of Final New Map: Doc. Nos. 16, 18-73

These three documents are included in the in camera production to the Court.

We sincerely apologize to both the Court and the Parties for this error. However, as these documents were not produced, are privileged, and are now being submitted for in camera review, we believe there is no prejudice to the Parties. Counsel will work expeditiously with Mr. Kincaid to supplement his affidavit and submit it via ECF.

Respectfully submitted,

/s/ Shawn T. Sheehy
Shawn T. Sheehy
Counsel to Respondents

CC: All counsel of record

EXHIBIT C

From: Shawn Sheehy
To: Fram, Robert
Cc: Tlee@aclu.Org; Erzhang@aclu.Org; Jason Torchinsky; Phil Gordon; Alora Thomas; Day, Robert; Canter, Jacob; Goldstein, Jeremy; Freda Levenson; Baker, Michael
Subject: Re: Redactions and the Kincaid Deposition
Date: Saturday, December 29, 2018 1:57:17 PM

Mr. Fram,

I agree with the process of filing documents pursuant to the protective order.

As for filing a stay with the Sixth Circuit, Respondents will not be filing a stay at this time.

Thank you.
Shawn

From: "Rfram@cov.Com" <Rfram@cov.Com>
Date: Saturday, December 29, 2018 at 1:02 PM
To: Shawn Sheehy <ssheehy@hvjt.law>
Cc: "Tlee@aclu.Org" <Tlee@aclu.Org>, "Erzhang@aclu.Org" <Erzhang@aclu.Org>, Jason Torchinsky <jtorchinsky@hvjt.law>, Phil Gordon <pgordon@hvjt.law>, "Athomas@aclu.Org" <Athomas@aclu.Org>, "Day, Robert" <RDay@cov.com>, "Canter, Jacob" <JCanter@cov.com>, "Jgoldstein@cov.Com" <Jgoldstein@cov.Com>, "Flevenson@acluohio.Org" <Flevenson@acluohio.Org>, "Mbaker@cov.Com" <Mbaker@cov.Com>
Subject: RE: Redactions and the Kincaid Deposition

Shawn,

We will get back to you on the timing of the reopened deposition.

As regards your question about the relationship of the deposition to a submission to the Court: it is of course the case that if there was protected information that needed to go into a Court submission it would be appropriately filed under seal consistent with the protective order. Do you disagree with that process?

Finally, I take it from your emails that you will not be filing a motion to stay with the Sixth Circuit. Is that correct?

Sincerely,

Rob

Robert Fram

Covington & Burling LLP
One Front Street, San Francisco, CA 94111-5356
T +1 415 591 7025 | rfram@cov.com
www.cov.com

From: Shawn Sheehy <ssheehy@hvjt.law>
Sent: Saturday, December 29, 2018 8:18 AM
To: Fram, Robert <rfram@cov.com>
Cc: Tlee@aclu.Org; Erzhang@aclu.Org; Jason Torchinsky <jtorchinsky@hvjt.law>; Phil Gordon <pgordon@hvjt.law>; Alora Thomas <athomas@aclu.org>; Day, Robert <RDay@cov.com>; Canter, Jacob <JCanter@cov.com>; Goldstein, Jeremy <JGoldstein@cov.com>; Freda Levenson <flevenson@acluohio.org>; Baker, Michael <MBaker@cov.com>
Subject: Re: Redactions and the Kincaid Deposition

Mr. Fram,

(1) Happy that the briefing schedule works for Plaintiffs. We will be drafting the Motion to Expedite with a goal of getting that on file by COB Monday. We will note Plaintiffs' concurrence with the briefing schedule and expedited decision.

(2) I have conferred with Mr. Kincaid. Unfortunately the two dates that worked for him were the ones that don't work for you, Jan. 14 and 17. Is there any flexibility on your end for the deposition to be on Jan. 14 or Jan. 17?

Question for you: If the docs and deposition testimony are for attorneys' eyes only and not to be publicly released in a court filing, why does this deposition need to happen before the pre-trial statement?

(3) yes, my omission of the two spreadsheets produced by Mr. Braden was unintentional. I agree that too is part of the reopened deposition.

(4) I am fine with discussing the time limitation issue on January 9. I will note that the district court's decision is being appealed. Whether my instructions were improper or not is yet to be determined.

Thank you.
Shawn

From: "Rfram@cov.Com" <Rfram@cov.Com>
Date: Saturday, December 29, 2018 at 11:02 AM

To: Shawn Sheehy <ssheehy@hvjt.law>
Cc: "Tlee@aclu.Org" <Tlee@aclu.Org>, "Erzhang@aclu.Org" <Erzhang@aclu.Org>, Jason Torchinsky <jtorchinsky@hvjt.law>, Phil Gordon <pgordon@hvjt.law>, "Athomas@aclu.Org" <Athomas@aclu.Org>, "Day, Robert" <RDay@cov.com>, "Canter, Jacob" <JCanter@cov.com>, "Jgoldstein@cov.Com" <Jgoldstein@cov.Com>, "Flevenson@acluohio.Org" <Flevenson@acluohio.Org>, "Mbaker@cov.Com" <Mbaker@cov.Com>
Subject: RE: Redactions and the Kincaid Deposition

Dear Shawn:

(1) The briefing schedule works.

(2) We look forward to receiving the documents at issue on Friday, January 4, 2019, subject to the redactions approach set forth below.

(3) As regards the re-opened Kincaid deposition:

<!--[if !supportLists]-->· <!--[endif]-->We need to secure the date for the deposition. As previously noted, the deposition needs to take place before the January 18, 2019 pretrial statement. Does January 16 work? We had also proposed January 15. (We are not available January 14 or January 17). So as between January 15 and January 16, which date works for you?

<!--[if !supportLists]-->· <!--[endif]-->As regards the scope of the deposition we note that you left out the two spreadsheets produced by Mr. Braden and identified in our December 26, 2018 letter and expressly noted in the call with the Court yesterday. We assume that was unintentional. Please confirm. Your email otherwise appropriately sets forth the scope of the re-opened deposition.

<!--[if !supportLists]-->· <!--[endif]-->As regards the length of the deposition, we do not believe that two hours is a reasonable limitation. 127 questions were blocked by the First Amendment Instructions and five bankers boxes of documents to be produced (per the Court's order). In light of these facts we in fact were anticipating a full day deposition. In the ordinary course, there are consequences for improper instructions, particularly when they are so pervasively interjected. Additional time is a relatively minor consequence. That said, we propose that we first have a chance to review the documents and then discuss the matter with you during the week of January 7. We are hopeful that this can be resolved without involving the Court.

Sincerely,

Rob

Robert Fram

Covington & Burling LLP
One Front Street, San Francisco, CA 94111-5356
T +1 415 591 7025 | rfram@cov.com
www.cov.com

From: Shawn Sheehy <ssheehy@hvjt.law>
Sent: Saturday, December 29, 2018 6:10 AM
To: Fram, Robert <rfram@cov.com>
Cc: Tlee@aclu.Org; Erzhang@aclu.Org; Jason Torchinsky <jtorchinsky@hvjt.law>; Phil Gordon <pgordon@hvjt.law>; Alora Thomas <athomas@aclu.org>; Day, Robert <RDay@cov.com>; Canter, Jacob <JCanter@cov.com>; Goldstein, Jeremy <JGoldstein@cov.com>; Freda Levenson <flevenson@acluohio.org>; Baker, Michael <MBaker@cov.com>
Subject: Re: Redactions

Mr. Fram,

Yes, we understand each other correctly on redactions.

We will make the production of documents by Friday, January 4 at noon. We will make the productions via electronic transfer.

Please let us know if the briefing schedule I proposed yesterday works for Plaintiffs. Again, that schedule is:

Respondents' Opening Brief: January 4
Plaintiffs' Response Brief: January 11
Respondents' Reply Brief: January 15.

I will get back to you concerning Mr. Kincaid's deposition. Both the documents and Mr. Kincaid's deposition will be pursuant to the Court's order limiting the dissemination of the documents Respondents' produce on January 4, Mr. Kincaid's deposition, and deposition transcript to attorneys' eyes only.

Finally, on Mr. Kincaid's deposition, we agree that Plaintiffs may ask Mr. Kincaid about the documents produced on Jan. 4, the questions that Mr. Kincaid was previously instructed not to answer on First Amendment privilege grounds, and any reasonable follow up questions.

But Respondents do not think that in re-opening the deposition, Plaintiffs get a new 7 hours to depose Mr. Kincaid. I believe we ended the December 4 deposition at approximately five hours. Mr. Kincaid's mid-January deposition will therefore be limited to approximately 2 hours.

Please let me know of Plaintiffs' position on this point.

Please feel free to call me between now and 2pm Eastern if you would like to discuss further.

Thank you.
Sincerely,
Shawn Sheehy
Senior Litigation Counsel
Holtzman Vogel Josefiak Torchinsky
45 N. Hill Drive
Suite 100
Warrenton, VA 20186
(w) 540-341-8808
(c) 571-296-3102
Ssheehy@hvjt.law

From: "Rfram@cov.Com" <Rfram@cov.Com>
Date: Friday, December 28, 2018 at 7:50 PM
To: Shawn Sheehy <ssheehy@hvjt.law>
Cc: "Tlee@aclu.Org" <Tlee@aclu.Org>, "Erzhang@aclu.Org" <Erzhang@aclu.Org>, Jason Torchinsky <jtorchinsky@hvjt.law>, Phil Gordon <pgordon@hvjt.law>, "Athomas@aclu.Org" <Athomas@aclu.Org>, "Day, Robert" <RDay@cov.com>, "Canter, Jacob" <JCanter@cov.com>, "Jgoldstein@cov.Com" <Jgoldstein@cov.Com>, "Flevenson@acluohio.Org" <Flevenson@acluohio.Org>, "Mbaker@cov.Com" <Mbaker@cov.Com>
Subject: Redactions

Shawn:
We agree to your redacting information regarding other states that are specific to those states. In our discussion you provided, by way of example, a multi-state survey that included a "blurb" on a state other than Ohio. Or perhaps several such blurbs. Those could be redacted.
On the other hand, we do not agree to the redaction of the following:

- Information in a document that might qualify/modify or otherwise affect something that is said about Ohio. One example we discussed: in the NRCC PPT, there is a reference to Districts being "Moved Out Of Play." That appeared on a slide that had Ohio and non-Ohio information on it, but applied to the Ohio CDs as well as the others.
- Information in a document that constitutes generic redistricting information that is not state specific. Thus even if this portion of the document does not expressly reference Ohio it should not be redacted as long as it is not limited to another state. By implication, such generic redistricting information could well be relevant to Ohio and therefore should not be redacted.
- Information in a document that has a bearing on the date of the document as a whole

even if that portion of the document does not expressly relate to Ohio.
Please let us know if this works for you.
Sincerely,
Rob

Robert Fram

Covington & Burling LLP
One Front Street, San Francisco, CA 94111-5356
T +1 415 591 7025 | rfram@cov.com
www.cov.com

EXHIBIT D

From: Shawn Sheehy <ssheehy@hvjt.law>
Sent: Tuesday, January 22, 2019 11:50 AM
To: Fram, Robert
Cc: Jason Torchinsky; Phil Gordon; Baker, Michael; Goldstein, Jeremy; Theresa Lee; Freda Levenson; Alora Thomas (athomas@aclu.org)
Subject: Re: Kincaid Deposition

Mr. Fram,

(1) The reopened Kincaid deposition will take place on Thursday, January 31, 2019 at the office of Covington & Burling in Washington, D.C. commencing at 8:30 am.

Yes, this is correct.

(2) Tomorrow you will be filing a motion for protective order regarding the deposition. The purpose of the motion is to preserve your record for an appeal after a judgment in this case. You will not be seeking an interlocutory appeal of any order denying your motion for protective order.

Yes, this is correct.

(3) To facilitate an expeditious resolution of your motion, and at your request that we file a brief on a shortened schedule, we will file our opposition to the motion on Monday, January 28.

Yes, this is correct.

(4) In your motion you can represent to the Court that the parties are requesting a ruling on the motion at the Court's earliest convenience in light of the fact that counsel is likely to be flying to D.C. as early as Tuesday, January 29 for the deposition.

Yes, this is correct.

(5) At the reopened deposition, you will not be instructing Mr. Kincaid to refuse to answer questions on the basis of the First Amendment privilege.

Yes, this is correct. I will add this: we are asking the Court to limit the deposition to questions about Ohio specifically and not about redistricting generally. This is consistent with the Court's December 21, 2018 order granting Plaintiffs' Motion to Compel. (Mem. Op. at 11).

(6) The deposition will be set for seven hours and the issue of the duration of the deposition will not be part of your motion for protective order.

Yes, this is correct.

(7) We will be getting back to you regarding your proposal regarding a confidentiality agreement regarding the deposition (only) and you will be getting back to us regarding your view on the present status of the confidentiality of the documents that were the subject of the Court's prior rulings.

Yes, this is correct. Additionally, it is our position that the 6th Circuit's order terminates the district court's Attorneys' Eyes Only provision. We do, however, designate the documents as protected under the Court's Protective Order ECF 57 (Aug. 9, 2018). We would also like the transcript of Mr. Kincaid's deposition to be covered under the Court's protective order. (ECF 57).

Thank you very much.
Sincerely,
Shawn Sheehy

From: "Rfram@cov.Com" <Rfram@cov.Com>
Date: Tuesday, January 22, 2019 at 2:26 PM
To: Shawn Sheehy <ssheehy@hvjt.law>
Cc: Jason Torchinsky <jtorchinsky@hvjt.law>, Phil Gordon <pgordon@hvjt.law>, "Mbaker@cov.Com" <Mbaker@cov.Com>, "Jgoldstein@cov.Com" <Jgoldstein@cov.Com>, "Tlee@aclu.Org" <Tlee@aclu.Org>, "Flevenson@acluohio.Org" <Flevenson@acluohio.Org>, "Athomas@aclu.Org" <Athomas@aclu.Org>
Subject: RE: Kincaid Deposition

Dear Shawn,

This is to confirm our telephone conversation of this morning:

(1) The reopened Kincaid deposition will take place on Thursday, January 31, 2019 at the office of Covington & Burling in Washington, D.C. commencing at 8:30 am.

(2) Tomorrow you will be filing a motion for protective order regarding the deposition. The purpose of the motion is to preserve your record for an appeal after a judgment in this case. You will not be seeking an interlocutory appeal of any order denying your motion for protective order.

(3) To facilitate an expeditious resolution of your motion, and at your request that we file a brief on a shortened schedule, we will file our opposition to the motion on Monday, January 28.

(4) In your motion you can represent to the Court that the parties are requesting a ruling on the motion at the Court's earliest convenience in light of the fact that counsel is likely to be flying to D.C. as early as Tuesday, January 29 for the deposition.

(5) At the reopened deposition, you will not be instructing Mr. Kincaid to refuse to answer questions on the basis of the First Amendment privilege.

(6) The deposition will be set for seven hours and the issue of the duration of the deposition will not be part of your motion for protective order.

(7) We will be getting back to you regarding your proposal regarding a confidentiality agreement regarding the deposition (only) and you will be getting back to us regarding your view on the present status of the confidentiality of the documents that were the subject of the Court's prior rulings.

If this email is inconsistent with your understanding of our agreements, please let me know at your earliest convenience.

Sincerely,

Rob

Robert Fram

Covington & Burling LLP
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T +1 415 591 7025 | rfram@cov.com
www.cov.com

-----Original Message-----
From: Shawn Sheehy <ssheehy@hvjt.law>
Sent: Tuesday, January 22, 2019 7:44 AM
To: Fram, Robert <rfram@cov.com>; Baker, Michael <MBaker@cov.com>; Goldstein, Jeremy <JGoldstein@cov.com>
Cc: Jason Torchinsky <jtorchinsky@hvjt.law>; Phil Gordon <pgordon@hvjt.law>
Subject: Kincaid Deposition

Mr. Fram,

Respondents are willing to produce Mr. Kincaid for his deposition. Would you please call me at 571-296-3102 to discuss timing and other issues?

Thank you
Shawn

Sent from my iPhone

EXHIBIT E

From:	Phil Gordon
To:	Fram, Robert; Baker, Michael; Day, Robert; Canter, Jacob; Goldstein, Jeremy; Freda Levenson; Alora Thomas; Erzhang@aclu.Org
Cc:	Jason Torchinsky; Shawn Sheehy
Subject:	Compelled Production Re: 1:18cv357 & 1:18mc31
Date:	Friday, January 4, 2019 11:27:06 AM

Counsel,

Pursuant to the Court's Order Granting Plaintiffs' Motion to Compel, (ECF No. 128), and the Court's December 28, 2018, verbal order and January 3, 2019, Notation Order representing the same, the RNC, NRCC, and Adam Kincaid produce documents.

The documents are produced subject to the Court's Attorney's-Eyes-Only provision pending the outcome of the RNC, NRCC, and Kincaid's appeal to the United States Court of Appeals for the Sixth Circuit. *See* (ECF No. 128). Furthermore, the RNC, NRCC, and Adam Kincaid hereby designate all documents contained within the production as CONFIDENTIAL INFORMATION pursuant to the Court's protective order. *See* (ECF No. 57).

To access the documents, click the link below and click "download" and a .zip file should begin its download process. To open the .zip file you will need to use the below password.

URL: https://lightspeedlegal.sharefile.com/d-sc6fbd9540f747e9b
Password: jt8=4W-tYc

Please contact me should you experience any issues downloading the documents.

Phillip M. Gordon
Holtzman Vogel Josefiak Torchinsky PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
PGordon@hvjt.law
(540) 341-8808 (phone)
(540) 341-8809 (fax)
(202) 329-2676 (cell)

* * * * * * * * * *

EXHIBIT F

From:	Shawn Sheehy
To:	Goldstein, Jeremy
Cc:	Fram, Robert; athomas@aclu.org; tlee@aclu.org; Freda Levenson; erzhang@aclu.org; Baker, Michael; Canter, Jacob; Phil Gordon
Subject:	RE: APRI v. Householder - Notice of Use of Deposition Designations and Exhibits
Date:	Monday, February 18, 2019 2:48:57 PM

Mr. Goldstein,

Thank you for your email.

We will ***not*** be filing a motion to seal either the portions of Mr. Kincaid's deposition transcripts or the documents.

I will note that Plaintiffs' designations of Mr. Kincaid's deposition transcript have largely removed Mr. Kincaid's objections to Plaintiffs' questions. We will not, however, object to your designations since the Court ordered Plaintiffs to file the complete deposition transcript on February 20. It is our position that the Feb. 20 filing will continue to preserve our record for appeal.

Finally, I anticipate emailing you tomorrow an errata sheet with Mr. Kincaid's corrections to the deposition transcript. These corrections do not impact the substance of Mr. Kincaid's testimony. The corrections merely address transcription errors.

Thank you.
Sincerely,
Shawn Sheehy
Senior Litigation Counsel
Holtzman Vogel Josefiak Torchinsky
45 N. Hill Drive
Suite 100
Warrenton, VA 20186
(w) 540-341-8808
ssheehy@hvjt.law

From: Goldstein, Jeremy [mailto:JGoldstein@cov.com]
Sent: Wednesday, February 13, 2019 11:57 PM
To: Shawn Sheehy
Cc: Fram, Robert; athomas@aclu.org; tlee@aclu.org; Freda Levenson; erzhang@aclu.org; Baker, Michael; Canter, Jacob
Subject: APRI v. Householder - Notice of Use of Deposition Designations and Exhibits

Shawn,

As you know, I represent Plaintiffs in *Ohio A. Philip Randolph Institute v. Householder*. Trial is set to begin March 4, and Plaintiffs wish to provide you with notice of the following.

First, Plaintiffs have designated deposition testimony from Mr. Kincaid's December 4, 2018 and January 31, 2018 depositions, which Plaintiffs will seek to enter into the trial record. Attached is a

list identifying the designated portions of Mr. Kincaid's deposition transcript. Note that Plaintiffs made no counter-designations of Mr. Kincaid's deposition testimony. While only certain portions of the transcript have been designated, the entire transcript will be filed with the Court on February 20, 2019. *See* February 4, 2019 Notation Order.

Second, Plaintiffs may seek to admit at trial documents that were produced by Mr. Kincaid, the RNC, and the NRCC. Attached is a list identifying those documents.

Paragraph 6 of the attached Protective Order governs the filing of material that has been designated as Confidential. Please let us know if you intend to file a motion to keep Mr. Kincaid's deposition under seal. In addition, Paragraph 9 of the Protective Order governs use of Confidential Information at trial, in the event that you intend to continue asserting that some or all of these materials are confidential.

Thank you for your time and attention. Please let me know if you would like to discuss.

Best,
Jeremy

Jeremy Goldstein

Covington & Burling LLP
One Front Street, San Francisco, CA 94111-5356
T +1 415 591 7049 | jgoldstein@cov.com
www.cov.com

COVINGTON

EXHIBIT G

Plaintiffs' Trial Exhibits Produced by Mr. Kincaid, the RNC, and the NRCC

1. REV_00000001
2. REV_00000003
3. REV_00000004
4. REV_00000015
5. REV_00000016
6. REV_00000019
7. REV_00000021
8. REV_00000022
9. REV_00000023
10. REV_00000024
11. REV_00000026
12. REV_00000027
13. REV_00000028
14. REV_00000029
15. REV_00000030
16. REV_00000032
17. REV_00000034
18. REV_00000036
19. REV_00000037
20. REV_00000038
21. REV_00000040
22. REV_00000041
23. REV_00000042
24. REV_00000043
25. REV_00000044

26.REV_00000045

27.REV_00000869

28.REV_00000887

29.REV_00023176

30.REV_00023184

31.REV_00023185

32.REV_00023186

33.REV_00023187

34.REV_00023188

35.REV_00023189

36.REV_00023190

37.REV_00023191

38.REV_00023192

39.REV_00023206

40.REV_00023214

41.REV_00023234

42.REV_00023241

43.REV_00023246

44.REV_00023317

45.REV_00023321

46.REV_00023334

47.REV_00023335

48.REV_00023337

49.REV_00023339

50.REV_00023341

51.REV_00023347

52.REV_00023377

53.REV_00023429

54.REV_00023430

55.REV_00023431

56.REV_00023432

57.REV_00023469

58.REV_00023479

59.REV_00023497

60.REV_00023516

61.REV_00023540

EXHIBIT H

From: Adam Kincaid <akincaid@NRCC.org>
To: Tom Hofeller - Redistricting; Mike Wild - Redistricting
Sent: 12/15/2011 2:28:38 PM
Subject: FW: Equivalency & Shape Files

They made a couple tweaks. Final, final Ohio map is attached.

From: Heather Mann [mailto:heathernmann@gmail.com]
Sent: Thursday, December 15, 2011 9:26 AM
To: 'Tom Whatman'; Adam Kincaid
Subject: Equivalency & Shape Files

Attached are the zipped shape files and equivalency file for HB 369 as Passed by the House and Senate, along with a "most populous county" breakdown.

***

Heather N. Mann
827 City Park Avenue, Apt. B
Columbus, Ohio 43206
(614) 352-5819
heathernmann@gmail.com

EXHIBIT I

From: Braden, E. Mark <MBraden@bakerlaw.com>
To: Tom Hofeller - Redistricting
Sent: 9/8/2011 8:06:15 PM
Subject: RE: New Idea III

I like III but is it being changed by Adam ?

From: Tom Hofeller - Redistricting [mailto:thofeller@rnchq.org]
Sent: Thursday, September 08, 2011 4:00 PM
To: Braden, E. Mark
Subject: RE: New Idea III

New idea III is 52.3% 18+ any part black and 51.23% 18+ BLK

From: Braden, E. Mark [mailto:MBraden@bakerlaw.com]
Sent: Thursday, September 08, 2011 3:53 PM
To: Tom Hofeller - Redistricting
Subject: RE: New Idea III

50.04 is lower than I want

From: Tom Hofeller - Redistricting [mailto:thofeller@rnchq.org]
Sent: Thursday, September 08, 2011 3:51 PM
To: Braden, E. Mark
Subject: RE: New Idea III

Well, it now just barely over 50%, but Adam is trying to raise it back up.

From: Braden, E. Mark [mailto:MBraden@bakerlaw.com]
Sent: Thursday, September 08, 2011 3:44 PM
To: Tom Hofeller - Redistricting
Subject: RE: New Idea III

The 11th really can not get any thinner NHBVAP

From: Tom Hofeller - Redistricting [mailto:thofeller@rnchq.org]
Sent: Thursday, September 08, 2011 3:42 PM
To: Braden, E. Mark
Subject: RE: New Idea III

Right, we know that now. It's all being factored in. Adam is changing the NE – including the Black district. I guess the incumbents are wanting preferences included. You are running into some "version" control. Maybe Adam should have the controlling map, but you need to talk with him directly about his changes in the NE.

From: Braden, E. Mark [mailto:MBraden@bakerlaw.com]
Sent: Thursday, September 08, 2011 3:39 PM
To: Tom Hofeller - Redistricting
Subject: RE: New Idea III

The address I send is the right one he just bought the house.

From: Tom Hofeller - Redistricting [mailto:thofeller@rnchq.org]
Sent: Thursday, September 08, 2011 3:18 PM
To: Braden, E. Mark
Subject: RE: New Idea III

For some reason Adam told me he lived in Grandview Heights instead of Upper Arlington, where you told me he lives (even though he has a Columbus address). He lives on the corner of Arlington Avenue and Concord. The area Adam has on his version included Grandview Heights and some more of the "downtown" area, which I took out of the map I sent – as it was "dog meat" voting territory. I guess then, unless there is some inexplicable reason they want that awful-voting territory in the 15th, the map I sent is OK. They should check though.

From: Braden, E. Mark [mailto:MBraden@bakerlaw.com]
Sent: Thursday, September 08, 2011 2:58 PM
To: Tom Hofeller - Redistricting
Subject: RE: New Idea III

Steve stivers address at 1971 concord road Columbus Ohio 43212 that is in Upper Arlington. do you have the right address ?

From: Tom Hofeller - Redistricting [mailto:thofeller@rnchq.org]
Sent: Thursday, September 08, 2011 2:51 PM
To: Braden, E. Mark
Subject: RE: New Idea III

Whoever's in 15

From: Braden, E. Mark [mailto:MBraden@bakerlaw.com]
Sent: Thursday, September 08, 2011 2:40 PM
To: Tom Hofeller - Redistricting
Subject: RE: New Idea III

who?

From: Tom Hofeller - Redistricting [mailto:thofeller@rnchq.org]
Sent: Thursday, September 08, 2011 2:25 PM
To: Braden, E. Mark
Subject: RE: New Idea III

My Franklin won't work because one of the cities I moved in the county has our incumbent in it.

From: Braden, E. Mark [mailto:MBraden@bakerlaw.com]
Sent: Thursday, September 08, 2011 1:10 PM
To: Tom Hofeller - Redistricting
Subject: RE: New Idea III

thank you

From: Tom Hofeller - Redistricting [mailto:thofeller@rnchq.org]
Sent: Thursday, September 08, 2011 1:05 PM
To: Braden, E. Mark
Subject: New Idea III

Mark:

Here is the DBF Plan File. I put Hamilton back the way it was except for 5 persons needed to reunite three cities. I gave the plan to Adam as directed. He is working on a new Akron now too – but to please an incumbent.

Tom

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EXHIBIT J

From: Michael Lenzo <mlenzo@gmail.com>
To: Tom Hofeller - Redistricting
Sent: 9/29/2010 11:41:24 PM
Subject: Re: Ohio Political Boundary Database Update

Tom,

Thank you for your comments on this.

I am going to pass this along to Troy and John and let them give me their thoughts. When it comes to the line drawing portion, they are far more knowledgeable than I am.

John is working to get an actual copy of the current work product that CSU has of the database. When/if he obtains that, I will share it with you.

-Mike

On Wed, Sep 29, 2010 at 5:30 PM, Tom Hofeller - Redistricting <thofeller@rnchq.org> wrote:

Michael:

Thanks for the information. Dale and I have a number of observations.

1. Are you sure, for political purposes, that only having the results of the last two general elections (2008 and 2010) will be sufficient to provide insight into the political geography of the state for purposes of drawing districts? Will you have enough statewide elections to determine what the line shifts mean? 2008 was certainly a low-water election. Perhaps 2010 will be a high-water election – but will that be enough? Perhaps you might want to talk to the Minority Leader (soon to be Speaker, I hope). He has a great deal of experience with this. Maybe 2004 would provide an additional confidence measure.

2. If you get into a deadlock, or are actually in full charge of redistricting, you may have minority, Section 2 issues in your three major counties. You might need databases of greater depth in those counties – including Democrat primary elections in which African-Americans faced white Democrats in the primary, or white Republicans in the generals. That could include county or municipal elections. These data are required for racial or ethnic block voting analyses. If you are going to be willing to create any and all minority districts that are possible, you still may need this data to protect yourselves against challenges.

3. If you're willing to live with a delivery date of April of 2011, that's fine – but what date in April, the 1st or 30th?

4. You should be expecting your CENSUS data, however, to be delivered about one day after it arrives, so you can begin demographic analyses asap.

Tom

EXHIBIT K

From:	Tom Hofeller - Redistricting </O=Republican National Committee/OU=RNC/cn=Recipients/cn=thofeller>
To:	Mike Wild - Redistricting
Sent:	9/16/2011 2:37:49 PM
Subject:	FW: Emailing: OHCD_2011_GOP-PROPOSAL-SEP14-BAF.zip

I think this is the new Ohio congressional map.

-----Original Message-----
From: Clark Bensen/POLIDATA [mailto:clark@polidata.org]
Sent: Thursday, September 15, 2011 8:10 PM
To: Tom Hofeller - Redistricting
Subject: Emailing: OHCD_2011_GOP-PROPOSAL-SEP14-BAF.zip

The message is ready to be sent with the following file or link attachments:

OHCD_2011_GOP-PROPOSAL-SEP14-BAF.zip

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

EXHIBIT L

From: Tom Hofeller - Redistricting </O=REPUBLICAN NATIONAL COMMITTEE/OU=RNC/CN=RECIPIENTS/CN=THOFELLER>
To: Daniel Leydorf - Redistricting
Sent: 9/26/2011 2:19:08 PM
Subject: Fw: Emailing: OHCD_2011_GOP-PROPOSAL-SEP14-BAF.zip

Dan:

This should be it. Put it up and see.

Tom

----- Original Message -----
From: Clark Bensen/POLIDATA <clark@polidata.org>
To: Tom Hofeller - Redistricting
Sent: Thu Sep 15 20:09:36 2011
Subject: Emailing: OHCD_2011_GOP-PROPOSAL-SEP14-BAF.zip

The message is ready to be sent with the following file or link attachments:

OHCD_2011_GOP-PROPOSAL-SEP14-BAF.zip

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EXHIBIT M

From:	Tom Hofeller - Redistricting </O=Republican National Committee/OU=RNC/cn=Recipients/cn=thofeller>
To:	Emily Cornell - Political; Mike Wild - Redistricting; Daniel Leydorf - Redistricting
CC:	Kayla Berube - Political
Sent:	11/15/2011 4:54:58 PM
Subject:	RE: OH

Here are the updated Ohio talking points.

From: Emily Cornell - Political
Sent: Tuesday, November 15, 2011 9:18 AM
To: Mike Wild - Redistricting; Tom Hofeller - Redistricting; Daniel Leydorf - Redistricting
Cc: Kayla Berube - Political
Subject: OH

Hey guys,

Wiley is speaking at a fundraiser for the OHGOP this evening. I know there have been very recent developments in redistricting issues there. Would it be possible to get an updated set of bullets for OH?

Em

16 Congressional Seats (losing 2 seats):

- There are presently 13 Republicans and 5 Democrats in the Delegation
- Congressional redistricting is conducted by statute. The GOP is the majority in both chambers. Plans are subject to a gubernatorial veto. The current Governor is Republican.
- Legislative redistricting is done by an apportionment board. Members include the Governor, State Auditor, Secretary of State, and two members selected by the legislative leaders of the two major parties, most likely one Republican and one Democrat. The GOP has control of the Board.
- Primary dates were moved from March, 2012 to May in order to give the Legislature more time to pass its maps.
- A congressional map has been passed by the Legislature (9-21-2011) and signed by the Governor. The proposed map contains 4 Democratic and 12 GOP seats. The GOP has also been able to strengthen a number of weak districts.
- The Democrats are threatening to qualify a referendum to subject the congressional map to a vote of the electorate next November. If they are successful in gaining enough signatures, the new map cannot go into effect for next year's elections and a state or federal court will end up drafting the new plan. This could result in much worse map for the GOP (possibly 8-8).
- The Senate added $2.75 million to the bill for local elections boards, a move aimed at protecting the map from a threatened Democratic referendum attempt. It is uncertain whether or not the State courts will allow this strategy.
- Both the Republican Secretary of State and the Republican Attorney General in their official capacities have stated that the bill is not referable. The issue will likely be decided in the Ohio State Supreme Court. That body is comprised of 6 Republicans and 1 Democrat.
- If the Ohio Supreme Court allowed the referendum it will require 231,000 valid signatures by late December. However, the filing deadline for congress is currently December 7th.

Emily Cornell
Deputy Political Director
202-863-8600 ▪ (w)
202-870-7926 (m)
ecornell@rnchq.org

OHIO

16 Congressional Seats (losing 2 seats):

- There are presently 13 Republicans and 5 Democrats in the Delegation
- Congressional redistricting is conducted by statute. The GOP is the majority in both chambers. Plans are subject to a gubernatorial veto. The current Governor is Republican.
- Legislative redistricting is done by an apportionment board. Members include the Governor, State Auditor, Secretary of State, and two members selected by the legislative leaders of the two major parties, most likely one Republican and one Democrat. The GOP has control of the Board.
- On September 27th, the Apportionment Board has enacted new legislative maps favorable to the GOP. Unlike the congressional map, the legislative maps are NOT subject to referendum.
- A congressional map was passed by the Legislature on September 9th and signed by the Governor. The proposed map contains 4 Democratic and 12 GOP seats. The GOP has also been able to strengthen a number of weak districts.
- The Democrats are threatening to qualify a referendum to subject the congressional map to a vote of the electorate next November. If they are successful in collecting 231,147 valid signatures by December 26th, the new map cannot go into effect for next year's elections and a state or federal court will end up drafting the new plan. This could result in much worse map for the GOP (possibly 8-8).
- The Senate added $2.75 million to the bill for local elections boards, a move aimed at protecting the map from a threatened Democratic referendum attempt. The Supreme Court ruled that the map is subject to referendum anyway.
- Negotiations between the two political parties failed to reach a compromise on a new congressional map. The GOP's next strategy is an attempt to convince the Supreme Court to allow elections to be held under the enacted map. Otherwise the courts will be forced to draft a temporary plan for the 2012 elections.

EXHIBIT N

DOCUMENT PRODUCED IN NATIVE FORMAT

HB369_Data

District	Voting Age Population			2008 President		2004 President		2010 Governor		2010 Att. Gen.		2006 Att. Gen.		2006 Auditor		PVI
	White	Hispanic	Black	McCain	Obama	Bush	Kerry	Kasich	Strickland	DeWine	Cordray	Mont.	Dann	Taylor	Sykes	
1 - Chabot	74.41%	2.17%	20.75%	51.77%	47.22%	56.81%	42.81%	55.80%	40.89%	53.68%	40.08%	55.92%	44.08%	60.08%	39.92%	R+6
2 - Schmidt	89.00%	1.34%	8.02%	54.23%	44.33%	59.42%	40.13%	55.06%	41.34%	52.84%	39.80%	54.57%	45.42%	57.88%	42.11%	R+9
3 - Open	61.96%	5.00%	29.59%	31.39%	67.33%	37.46%	61.78%	35.76%	61.16%	31.27%	64.38%	41.36%	58.67%	39.25%	60.78%	D+14
4 - Jordan	92.05%	2.47%	5.07%	54.43%	43.66%	59.91%	39.55%	54.52%	40.39%	54.53%	37.79%	51.84%	48.15%	56.16%	43.83%	R+9
5 - Latta	94.08%	3.43%	2.34%	52.20%	46.03%	59.75%	39.78%	51.91%	43.88%	54.97%	38.27%	50.39%	49.61%	58.87%	41.13%	R+8
6 - Johnson	96.14%	0.70%	2.23%	53.08%	44.67%	53.74%	45.72%	46.63%	49.51%	49.89%	43.73%	43.04%	56.95%	42.81%	57.19%	R+5
7 - Gibbs	94.22%	1.41%	3.61%	50.94%	46.87%	54.96%	44.48%	53.07%	41.71%	50.51%	41.70%	47.63%	52.37%	52.51%	47.49%	R+5
8 - Boehner	90.76%	2.29%	5.31%	60.25%	38.12%	63.42%	36.14%	60.19%	35.41%	60.87%	32.30%	57.01%	42.99%	60.56%	39.44%	R+14
9 - Kaptur/Kucinich	79.12%	7.49%	14.55%	31.58%	66.85%	35.59%	64.06%	35.86%	59.79%	35.99%	58.55%	35.19%	64.82%	40.80%	59.21%	D+15
10 - Turner/Austria	79.50%	1.84%	16.14%	49.31%	49.31%	52.03%	47.55%	51.01%	45.39%	53.35%	41.46%	52.80%	47.21%	54.26%	45.74%	R+2
11 - Fudge	43.19%	3.35%	51.31%	17.21%	82.03%	20.31%	79.01%	21.50%	75.64%	21.00%	75.79%	26.04%	73.97%	25.83%	74.17%	D+29
12 - Tiberi	90.67%	1.53%	4.51%	53.75%	44.74%	59.52%	39.97%	57.50%	39.20%	50.85%	42.96%	56.57%	43.43%	57.53%	42.46%	R+8
13 - Ryan	86.36%	2.16%	10.42%	35.77%	62.27%	36.91%	62.50%	34.55%	61.41%	32.35%	61.35%	29.67%	70.32%	35.46%	64.54%	D+12
14 - LaTourette	92.98%	1.71%	3.63%	49.45%	49.06%	52.35%	47.18%	52.93%	42.89%	49.58%	43.82%	46.86%	53.14%	53.29%	46.72%	R+3
15 - Stivers	92.36%	1.51%	3.71%	52.21%	46.09%	56.55%	42.80%	53.00%	43.55%	47.92%	46.27%	53.57%	46.42%	53.73%	46.26%	R+6
16 - Renacci/Sutton	95.07%	1.48%	1.73%	51.32%	47.20%	54.29%	45.28%	54.99%	40.84%	51.49%	42.06%	49.13%	50.88%	54.68%	45.33%	R+5

EXHIBIT O

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Ohio Congressional District Data

District	Current Party	Election Results				PVI	Voting Age Populations				
		McCain	Obama	Bush	Kerry		White	Hispanic	Black	Asian	AmIndian
1 - Chabot	R	51.77%	47.22%	56.81%	42.81%	R+6	74.41%	2.17%	20.75%	2.51%	0.20%
2 - Schmidt	R	54.23%	44.33%	59.42%	40.13%	R+9	89.00%	1.34%	8.02%	1.20%	0.25%
3 - Open		31.39%	67.33%	37.46%	61.78%	D+14	61.97%	5.00%	29.59%	3.25%	0.30%
4 - Jordan	R	54.43%	43.66%	59.91%	39.55%	R+9	92.05%	2.47%	5.07%	0.73%	0.23%
5 - Latta	R	52.20%	46.03%	59.75%	39.78%	R+8	94.08%	3.43%	2.34%	1.16%	0.23%
6 - Johnson	R	53.08%	44.67%	53.74%	45.72%	R+5	96.14%	0.70%	2.23%	0.36%	0.22%
7 - Gibbs	R	50.94%	46.87%	54.96%	44.48%	R+5	94.22%	1.41%	3.61%	0.55%	0.24%
8 - Boehner	R	60.25%	38.12%	63.42%	36.14%	R+14	90.76%	2.29%	5.31%	1.53%	0.21%
9 - Kaptur	D	31.58%	66.85%	35.59%	64.06%	D+15	79.12%	7.49%	14.55%	1.30%	0.33%
10 - Turner	R	49.31%	49.31%	52.03%	47.55%	R+2	79.50%	1.84%	16.14%	1.97%	0.24%
11 - Fudge	D	17.21%	82.03%	20.31%	79.01%	D+29	43.19%	3.35%	51.31%	2.32%	0.22%
12 - Tiberi	R	53.75%	44.74%	59.52%	39.97%	R+8	90.67%	1.53%	4.51%	2.97%	0.19%
13 - Ryan	D	35.77%	62.27%	36.91%	62.50%	D+12	86.36%	2.16%	10.42%	1.11%	0.21%
14 - LaTourette	R	49.45%	49.06%	52.35%	47.18%	R+3	92.98%	1.71%	3.63%	1.83%	0.12%
15 - Stivers	R	52.21%	46.09%	56.55%	42.80%	R+6	92.34%	1.51%	3.71%	2.03%	0.22%
16 - Renacci/Sutton	R/D	51.32%	47.20%	54.29%	45.28%	R+5	95.07%	1.48%	1.73%	1.87%	0.14%

EXHIBIT P

DOCUMENT PRODUCED IN NATIVE FORMAT

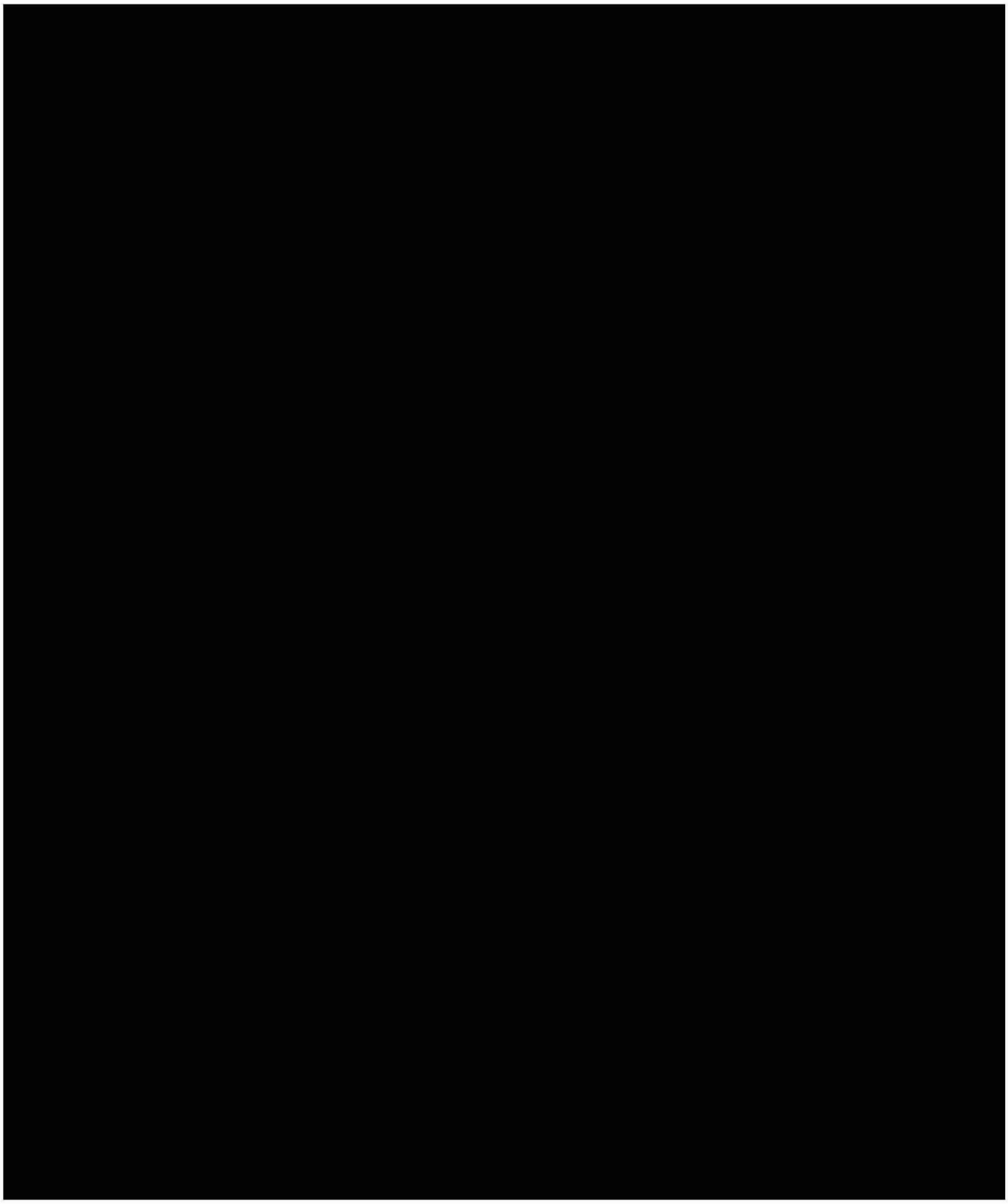
State	Before		After		Net
	R	D	R	D	
Alabama	6	1	6	1	0
Alaska	1	0	1	0	0
Arizona	5	3	5	4	-1
Arkansas	3	1	4	0	2
California	19	34	16	37	-6
Colorado	4	3	4	3	0
Connecticut	0	5	0	5	0
Delaware	0	1	0	1	0
Florida	19	6	19	8	-2
Georgia	8	5	10	4	3
Hawaii	0	2	0	2	0
Idaho	2	0	2	0	0
Illinois	11	8	6	12	-9
Indiana	6	3	7	2	2
Iowa	2	3	2	2	1
Kansas	***4***	***0***	***4***	***0***	***0***
Kentucky	4	2	4	2	0
Louisiana	6	1	5	1	-1
Maine	0	2	0	2	0
Maryland	2	6	1	7	-2
Massachusetts	0	10	0	9	1
Michigan	9	6	9	5	1
Minnesota	4	4	4	4	0
Mississippi	3	1	3	1	0
Missouri	6	3	6	2	1
Montana	1	0	1	0	0
Nebraska	3	0	3	0	0
Nevada	2	1	2	2	-1
New Hampshire	2	0	2	0	0
New Jersey	6	7	6	6	1
New Mexico	1	2	1	2	0
New York	8	21	7	20	0
North Carolina	6	7	10	3	8
North Dakota	1	0	1	0	0
Ohio	13	5	12	4	0
Oklahoma	4	1	5	0	2
Oregon	1	4	1	4	0
Pennsylvania	12	7	12	6	1
Rhode Island	0	2	0	2	0
South Carolina	5	1	6	1	1
South Dakota	1	0	1	0	0
Tennessee	7	2	7	2	0
Texas	23	9	25	11	0
Utah	2	1	4	0	3

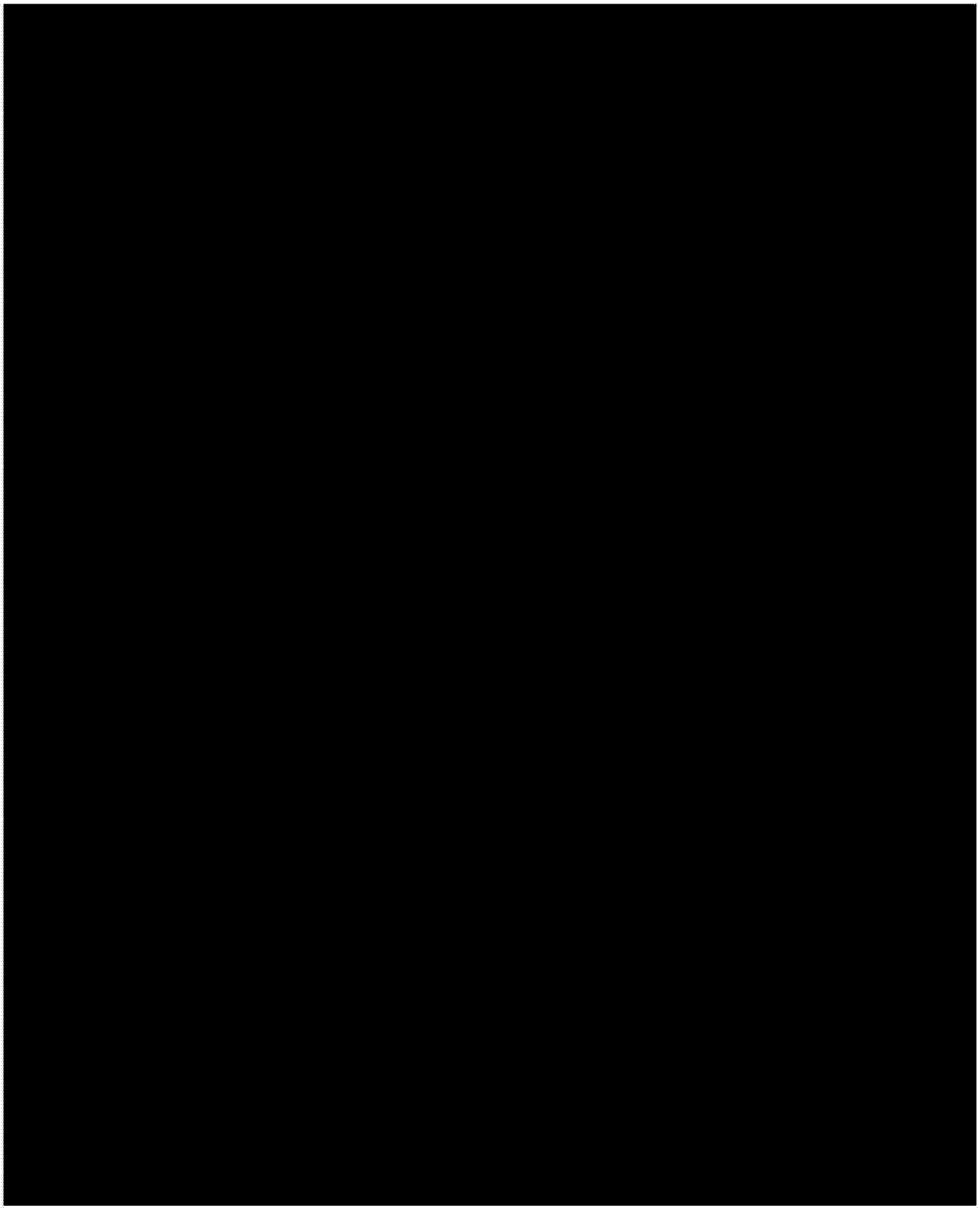
Vermont	0	1	0	1	0
Virginia	8	3	8	3	0
Washington	4	5	4	6	-1
West Virginia	2	1	2	1	0
Wisconsin	5	3	5	3	0
Wyoming	1	0	1	0	0

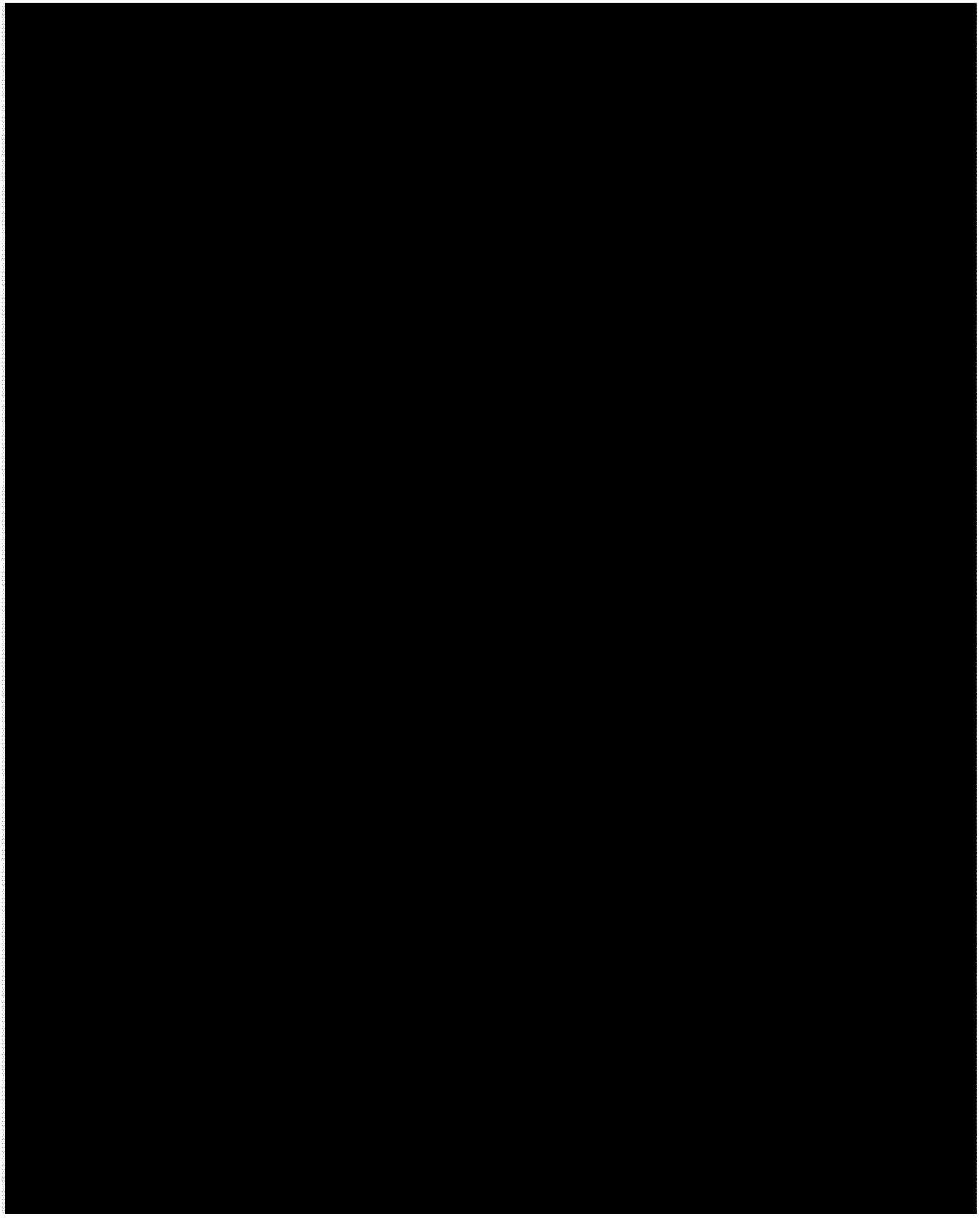
Total	**R**	**D**	**R**	**D**	**Net**
	242	193	244	191	2

EXHIBIT Q

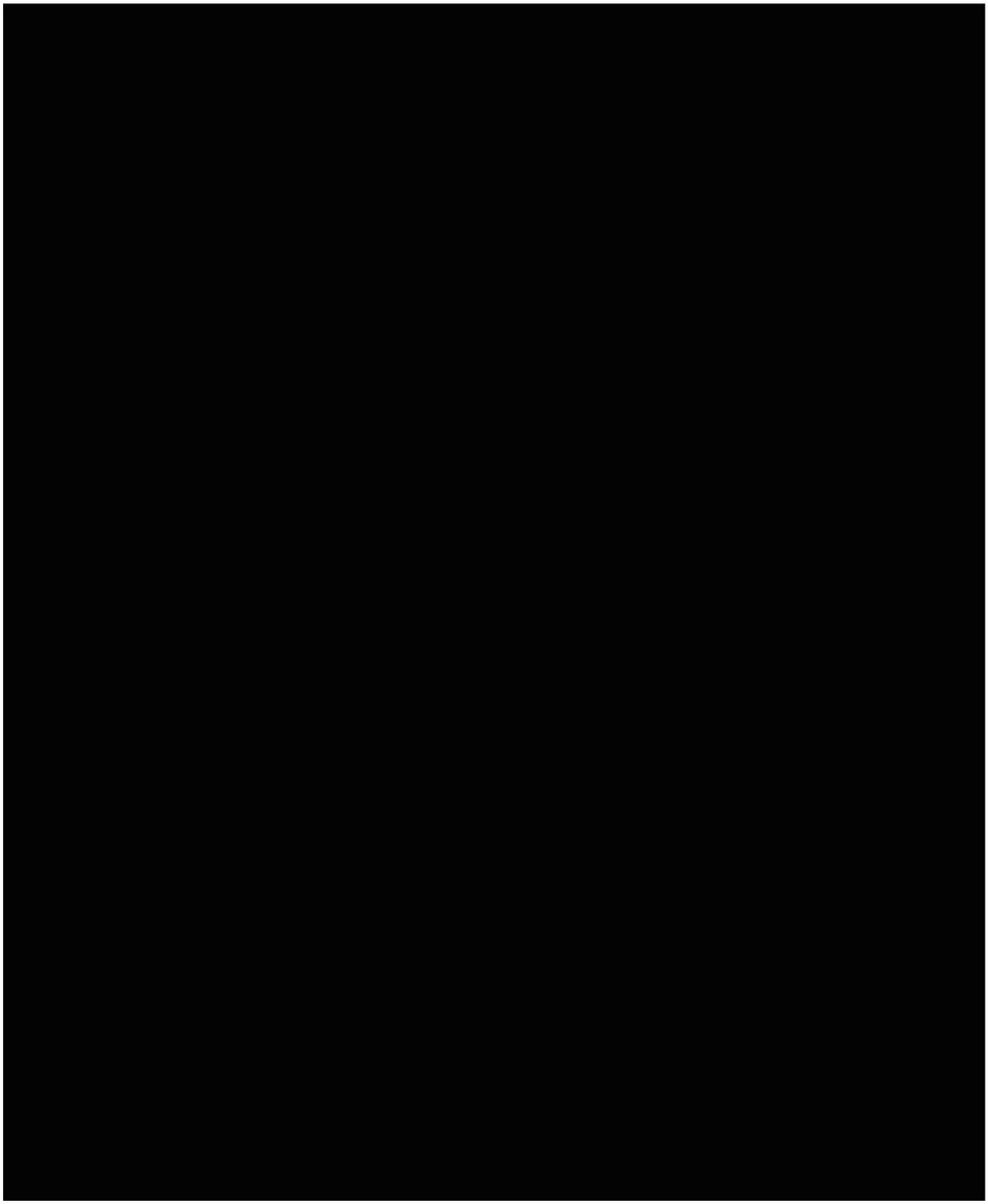
State-by-State Redistricting Summary







Ohio: Redistricting is complete. A new map has been passed and signed eliminating Ms. Sutton's seat, merging Mr. Kucinich and Ms. Kaptur, and merging Mr. Turner and Mr. Austria. The map created a new Democrat seat in Franklin County. The new map should be a 12-4 map. The current delegation is 13-5.



Results to Date:

- States Complete: 44 (including 7 At-Large states)
- Current Party Control: 197 Republicans, 156 Democrats
- Projected Party Control: 198 Republicans, 154 Democrats
- Net Change: +1.5 Republicans

EXHIBIT R

Dear Legislative Leaders:

As you well know, the decennial process of redistricting is underway in most states across the country. Some states have already concluded their redistricting processes and others have yet to begin. The RSLC continues to play an important role in gaining and keeping Republican majorities around the country and we are pleased that we now control 56 legislative chambers. We know the ongoing redistricting process will impact the legislative lines that we will have to defend in 2012 and beyond. Therefore, we have taken the initiative to retain a team of seasoned redistricting experts that we will make available to you at no cost to your caucus for assistance. We urge you to use them as a key resource for technical advice as you undergo this process.

Already, we are engaged in a number of states and believe we are playing a meaningful role in helping draw fair and legal lines that will allow us to run competitive elections in 2012 and in future cycles. Our team would be happy to assist in drawing proposed maps, interpreting data, or providing advice. Their practical solutions have been used through many decades of redistricting and their best practices help ensure that lines drawn take Voting Rights Act issues and statutory mandates into consideration. Our team can also provide strategic advice in cases of litigation as well.

Our redistricting team is led by Tom Hofeller. You can contact him at tom@rnchq.com or at _____.

The entirety of this effort will be paid for using non-federal dollars through our 501c4 organization, the State Government Leadership Foundation (SGLF). For more information about this effort, you can contact me at (571) 480-4860 or contact Tom directly. None of these resources will take away from our ability to help fund future state elections through the RSLC.

We appreciate the complexities of redistricting and hope that you will consider using our veteran team when crafting new legislative and Congressional boundaries during this critical time.

Sincerely,

Chris Jankowski
President & Chief Executive Officer

EXHIBIT S

STATE GOVERNMENT
LEADERSHIP FOUNDATION

February 29, 2012

Mr. Thomas Hofeller
Geographic Strategies, LLC
1119 Susan Street
Columbia, SC 29210

Dear Tom:

We have enjoyed working with you and your team. Thank you for your service to the State Government Leadership Foundation (SGLF) and all you have done and continue to do for redistricting.

As a formality, I am sending this written notification that the agreement dated April 18, 2011 between the SGLF and Geographic Strategies, LLC will terminate on March 31, 2012.

Sincerely,

Chris

J. Christopher Jankowski
Executive Director

Plaintiffs' Trial Exhibit
P291
Case No. 1:18-cv-00357

EXHIBIT 17
WIT: Jankowski
DATE: 11-30-18
Kinkade RDR CRR CSR

EXHIBIT T

Republican National Committee

January 12, 2011

Dear Colleague:

The Republican National Committee is providing this collection of reference materials to assist you in the upcoming redistricting process. Some of this material was provided in the resource book distributed at the RNC's 2010 GOP Redistricting Conference last April, but much of it is new or updated. For example, all of the legal papers and most of the maps have been revised, and therefore the earlier versions should be discarded.

The materials are organized into eight primary categories:

1. Legal articles
2. The process and partisan control
3. Maps and charts
4. Census information
5. Getting ready for the process
6. Information provided by Polidata
7. Redistricting ballot initiatives (both proposed and successful)
8. Miscellaneous items

The legal articles provide crucial information for attorneys and non-attorneys alike. The RNC strongly recommends that every participant in the redistricting process read all of these papers. Even if you do not expect to be directly involved in redistricting litigation, the work you do could become part of the legal record. Anything you do, write or say, including any maps you produce, could have a significant effect on legal outcomes.

These legal papers do not, however, constitute formal legal advice and do not create an attorney-client relationship. There is no substitute for having legal advice and counsel from your own attorney throughout ALL stages of the redistricting process. Engaging counsel after a conflict or problem has developed could be too late – as well as being a false economy. It is especially important to engage counsel with a proven track record in the redistricting process.

We hope you find these materials useful. The RNC's redistricting staff and counsel's office will be a resource for you throughout the entire process. Please do not hesitate to contact us at any time if we can be of assistance.

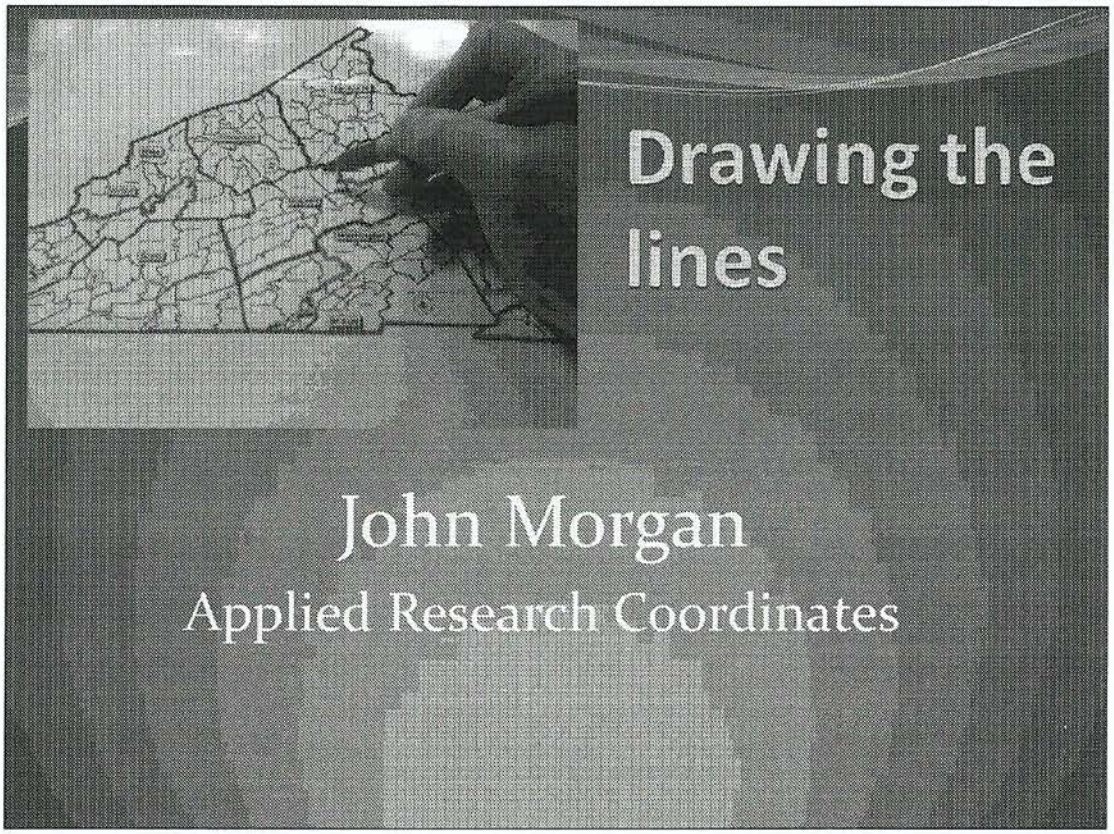
Sincerely,

Thomas B. Hofeller
RNC Redistricting Coordinator

Contacts:			
Tom Hofeller, Coordinator	(202) 863-8816 or (703) 623-0764	thofeller@rnchq.org
Dale Oldham, Counsel	(202) 863-5323 or (803) 237-0586	doldham@rnchq.org
Mike Wild, Deputy	(202) 863-8783 or (202) 309-1529	mwild@rnchq.org
General Redistricting Office	(202) 863-8644	redistricting@gop.com
Counsel's Office	(202) 863-8638	

LENZO_0004023

EXHIBIT U



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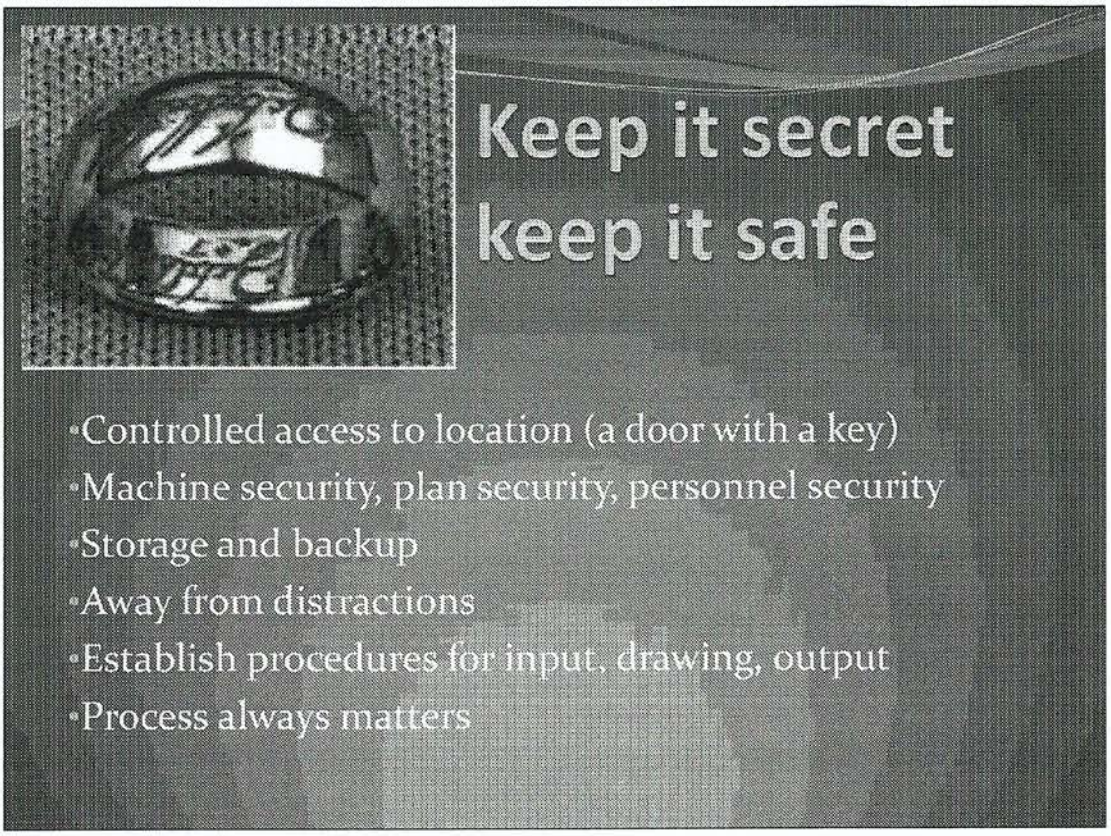
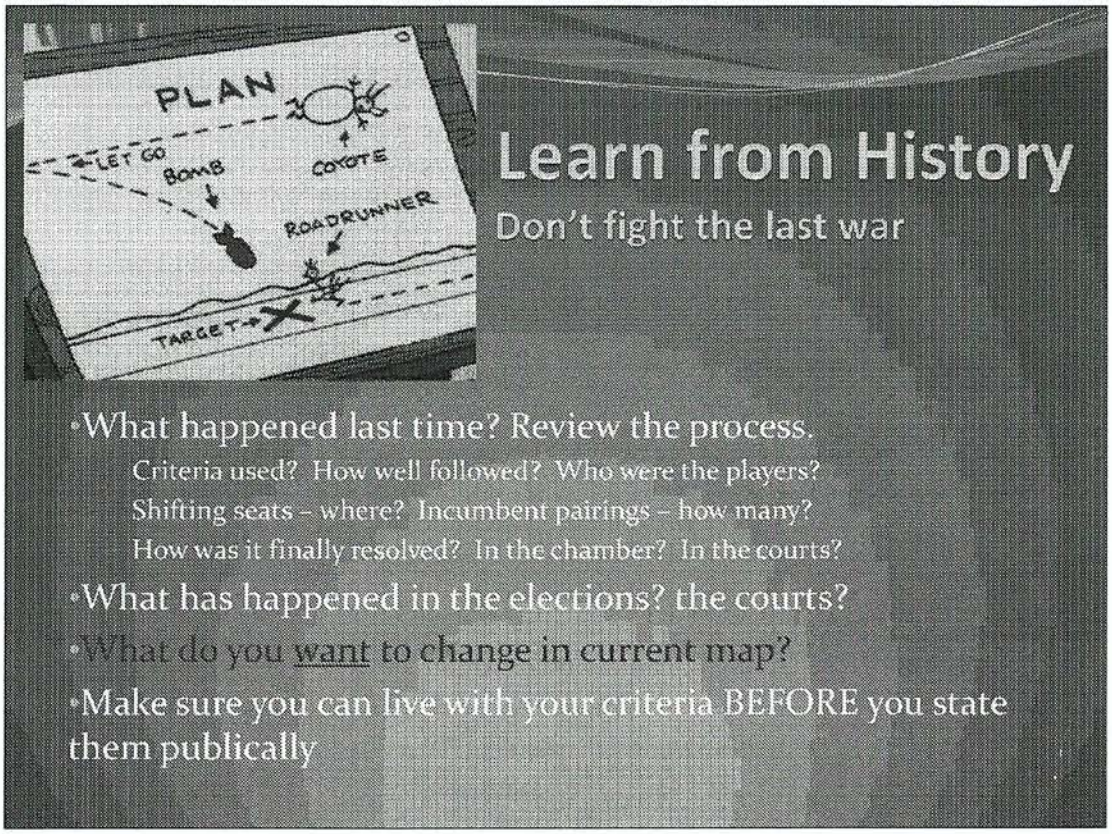
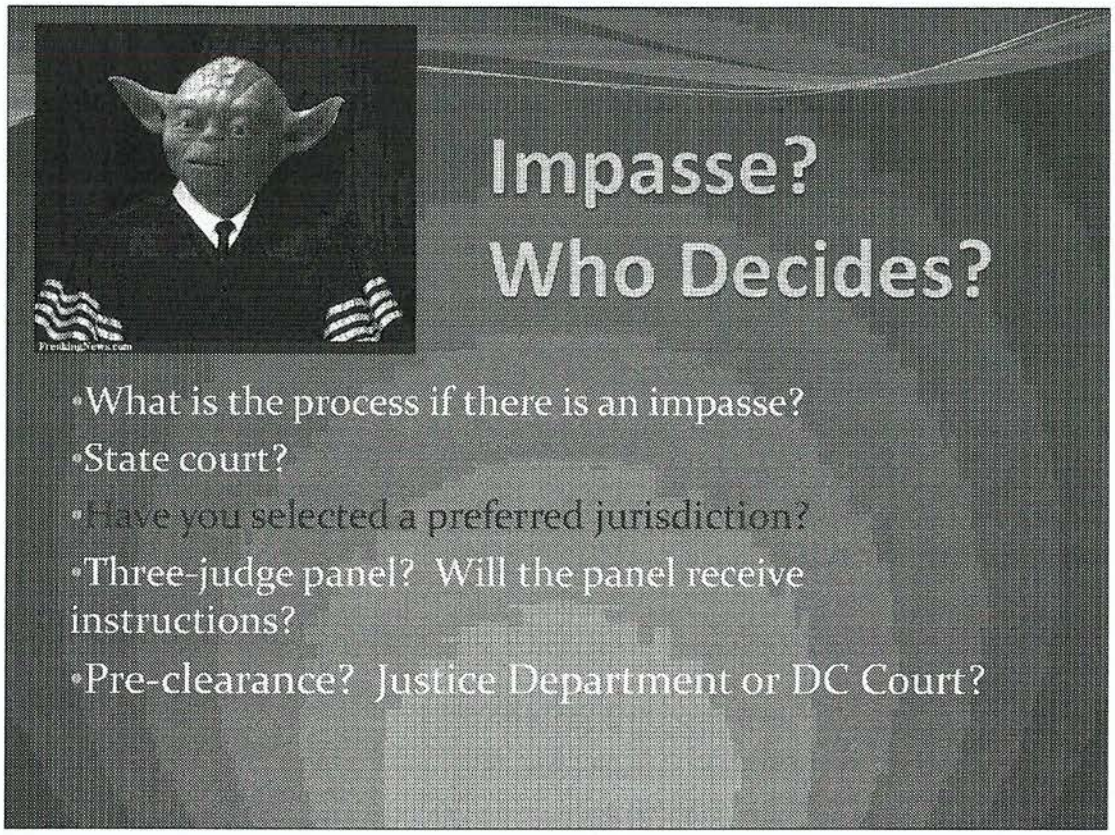

Keep it secret
keep it safe
•Controlled access to location (a door with a key)
•Machine security, plan security, personnel security
•Storage and backup
•Away from distractions
•Establish procedures for input, drawing, output
•Process always matters

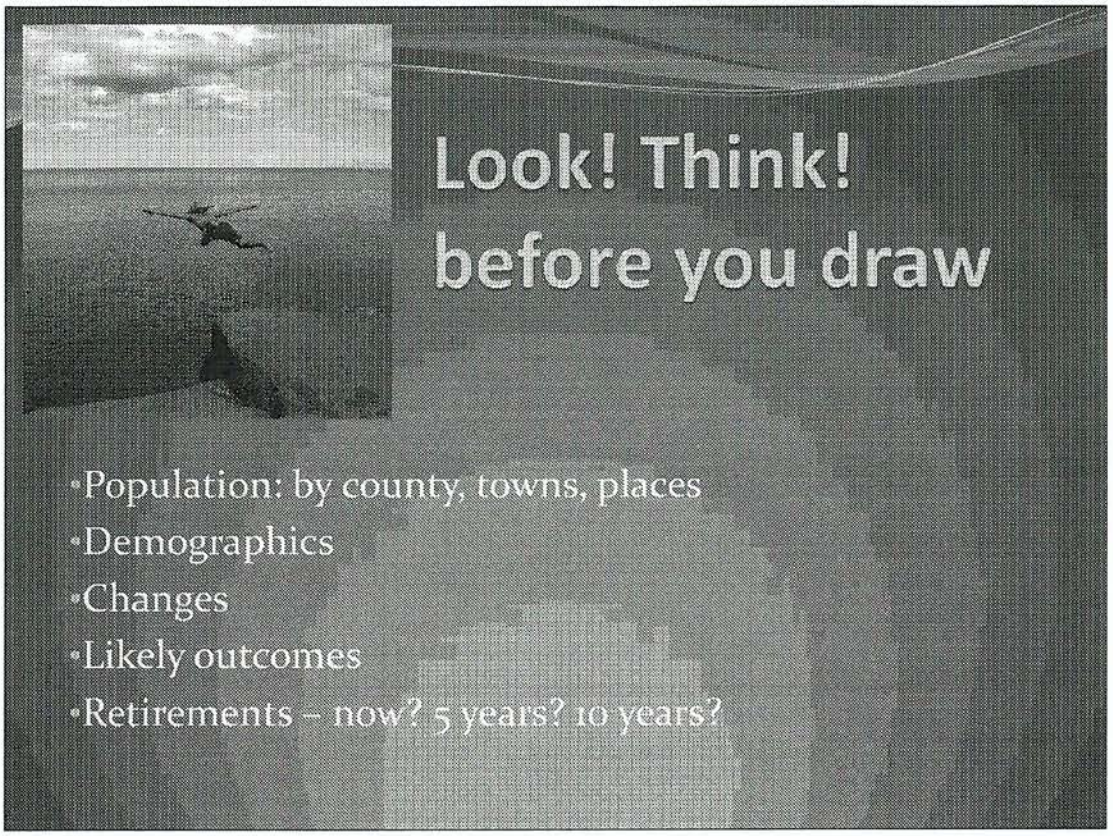

PLAN
LET GO
BOMB
COYOTE
ROADRUNNER
TARGET
Learn from History
Don't fight the last war
•What happened last time? Review the process.
Criteria used? How well followed? Who were the players?
Shifting seats – where? Incumbent pairings – how many?
How was it finally resolved? In the chamber? In the courts?
•What has happened in the elections? the courts?
•What do you want to change in current map?
•Make sure you can live with your criteria BEFORE you state them publically

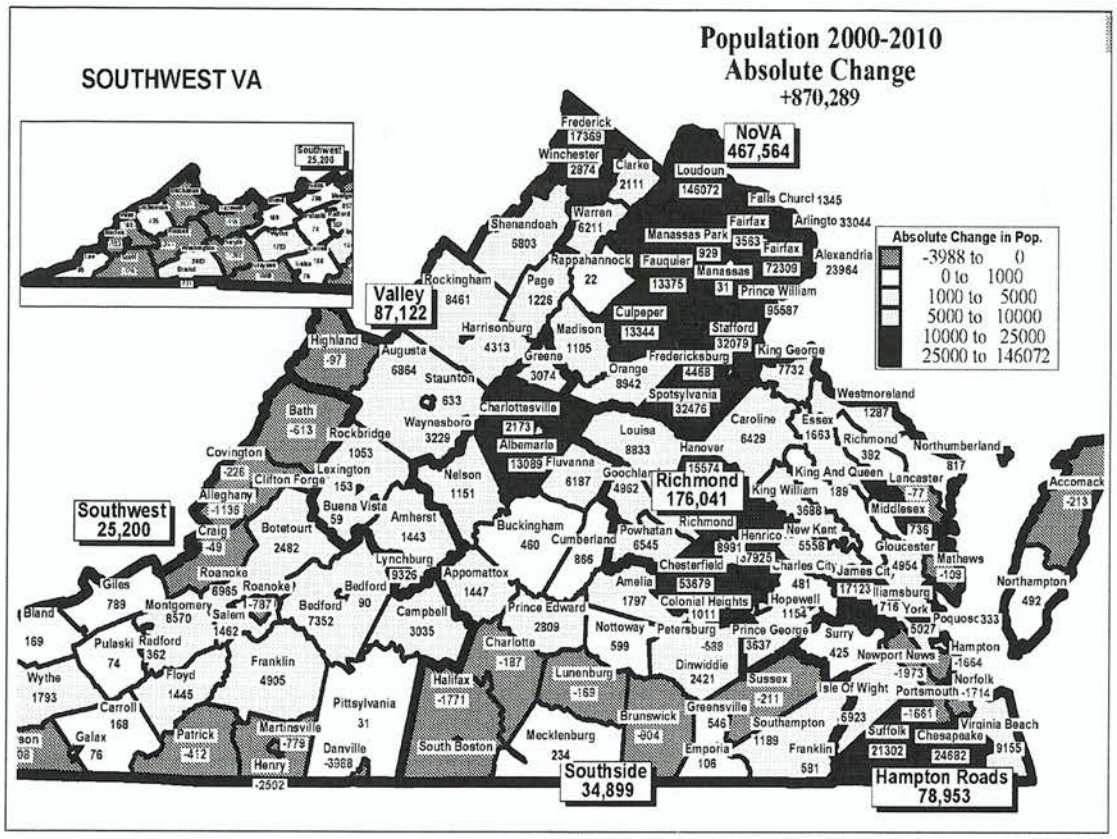
Never travel without counsel

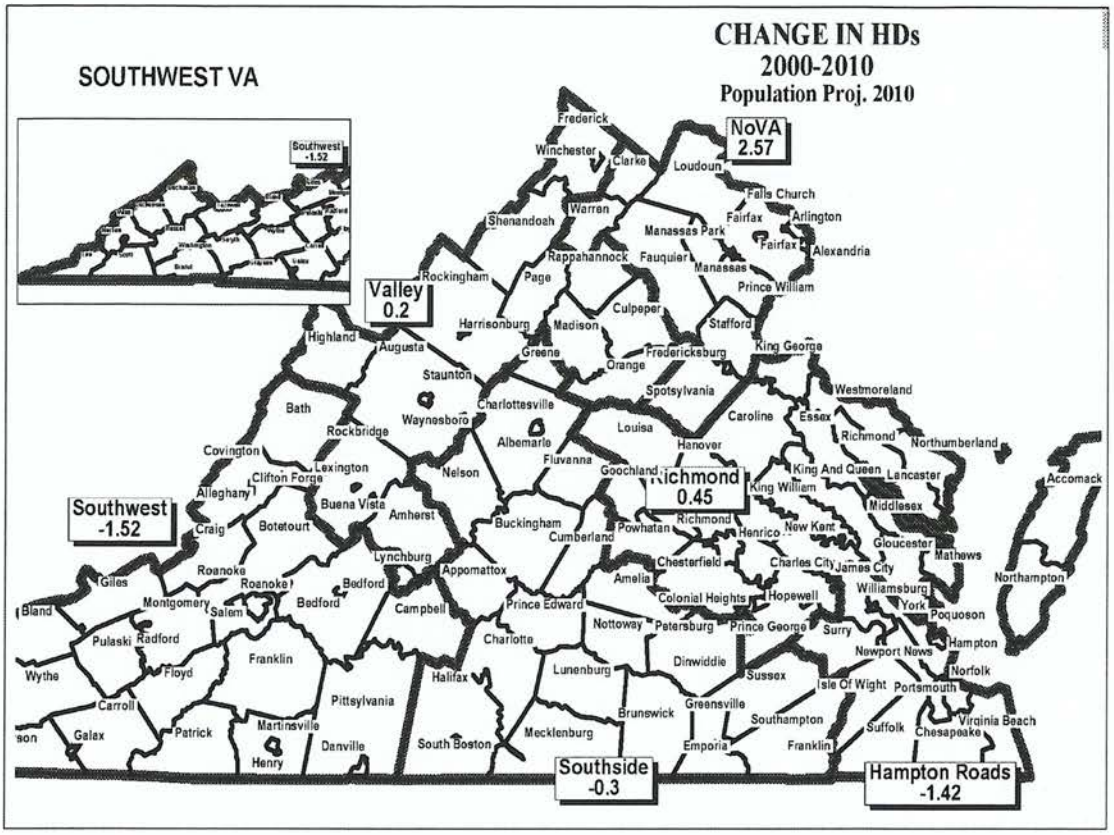
These aren't the droids you're looking for.
-These aren't the droids we're looking for.

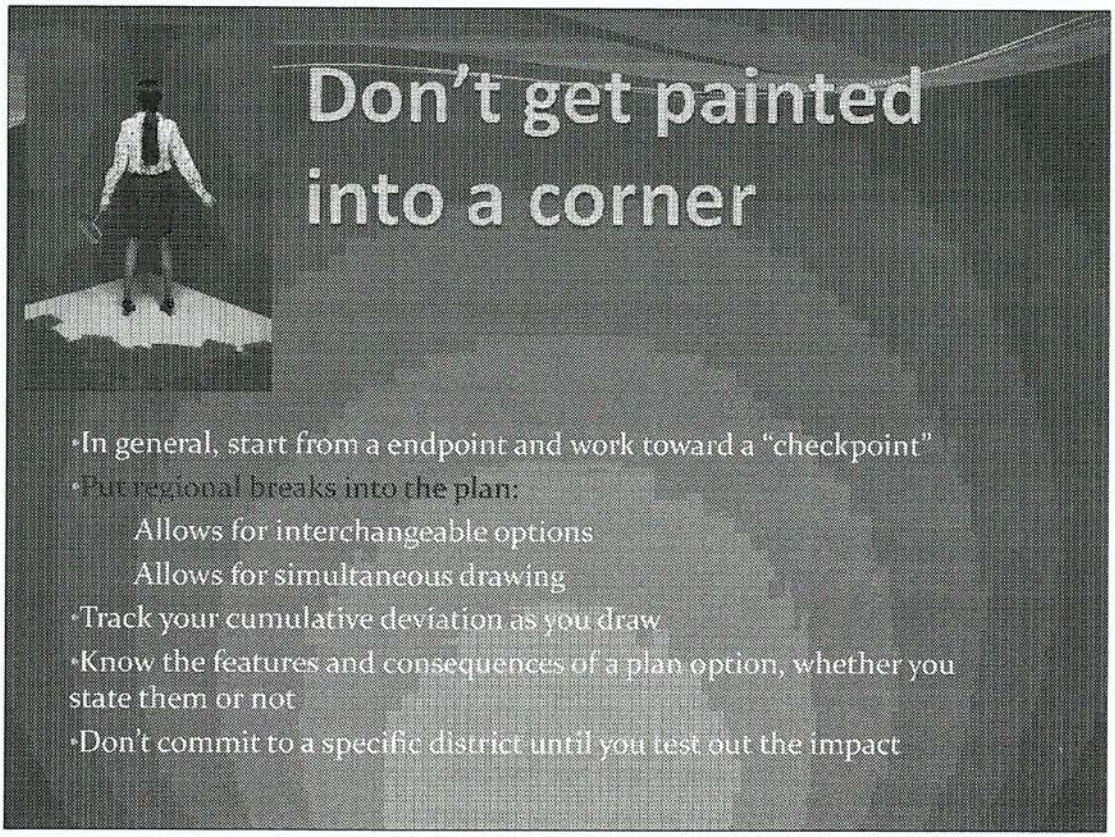
- Aspects of your redistricting will likely end up in court
- Legal counsel should advise early to set the parameters
- Get advice, draw a plan, critique, revise, repeat
- Be aware of the record that is building around your actions
- Parliamentary strategy should support and complement the legal strategy

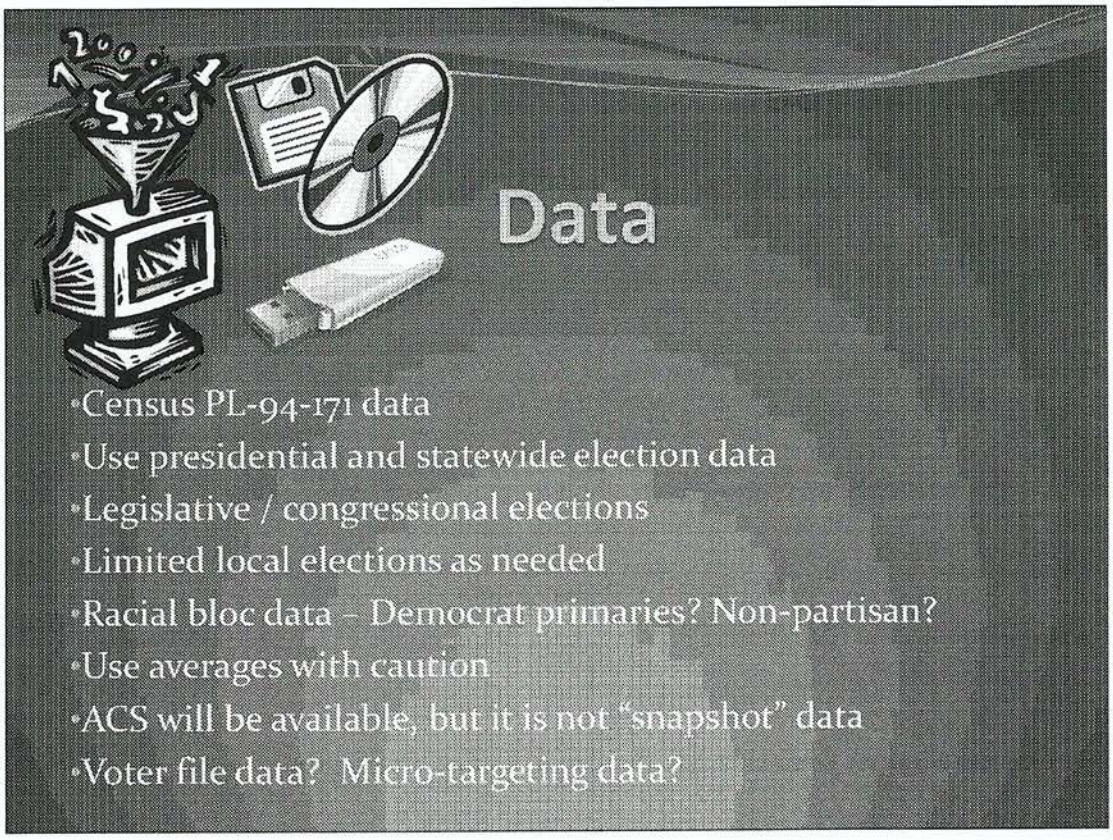

Impasse?
Who Decides?
•What is the process if there is an impasse?
•State court?
•Have you selected a preferred jurisdiction?
•Three-judge panel? Will the panel receive instructions?
•Pre-clearance? Justice Department or DC Court?

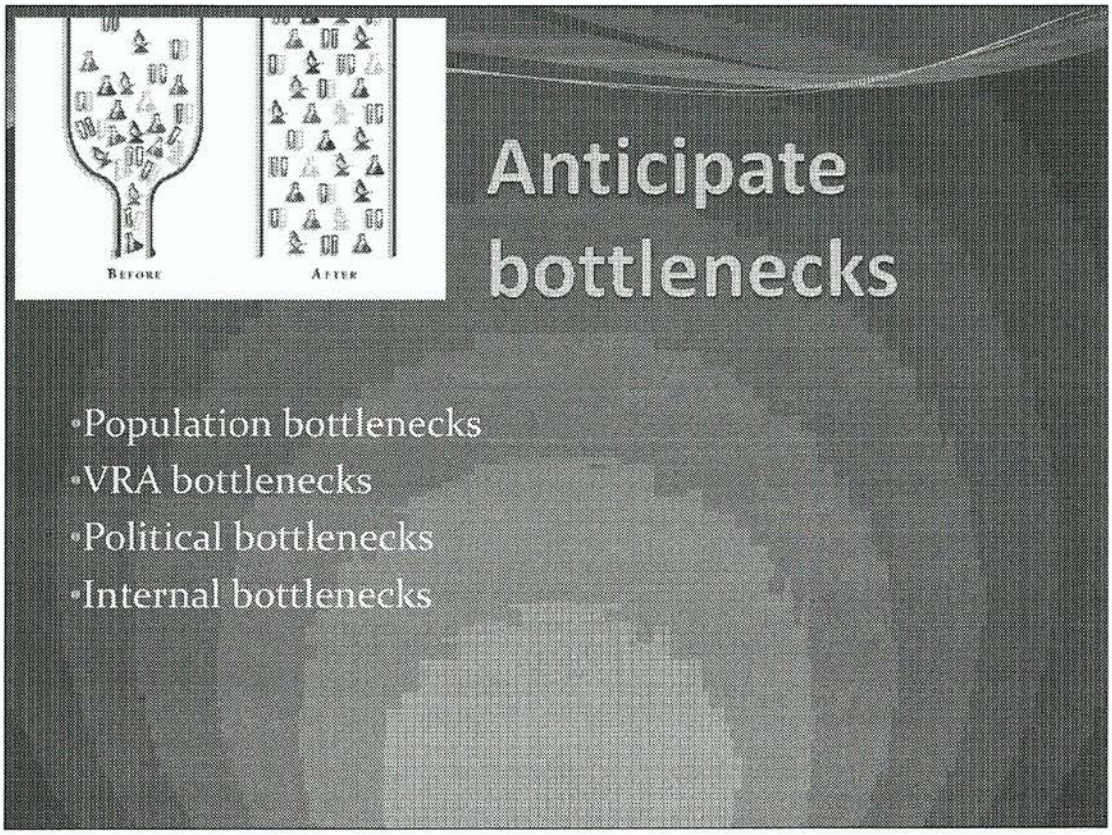

Look! Think!
before you draw
•Population: by county, towns, places
•Demographics
•Changes
•Likely outcomes
•Retirements – now? 5 years? 10 years?

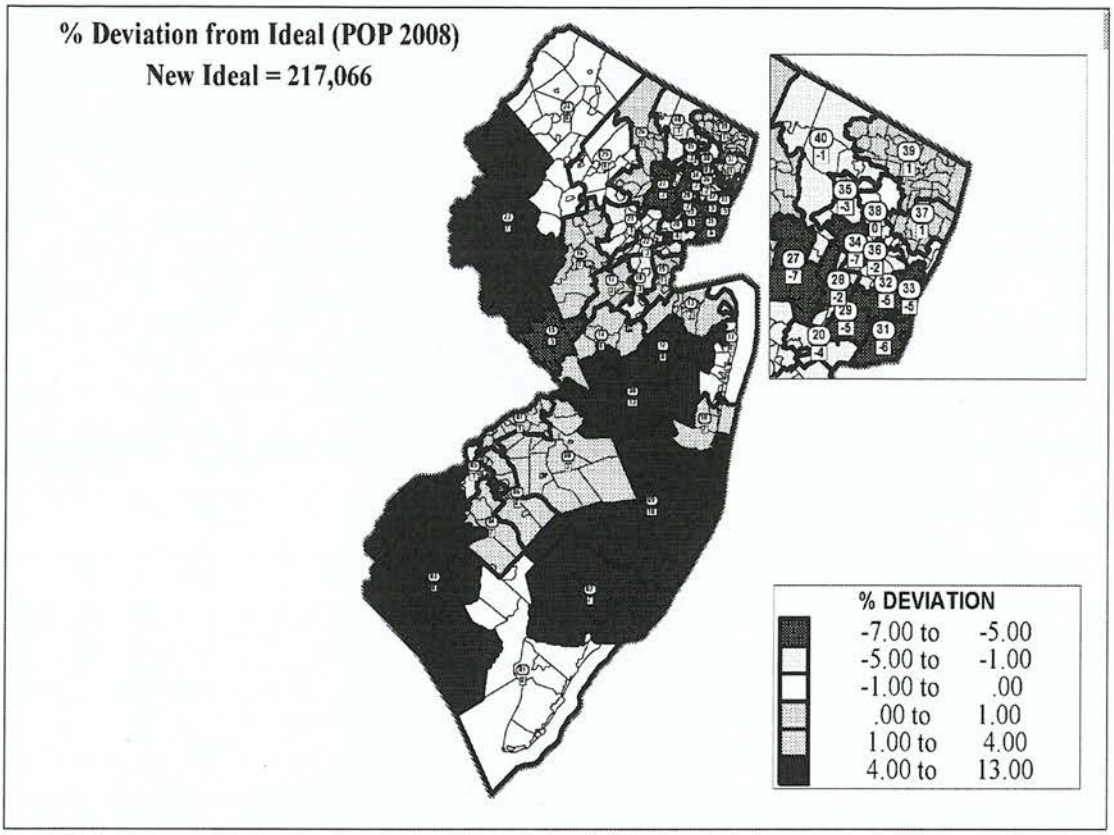

Population 2000-2010
Absolute Change
+870,289
SOUTHWEST VA
Absolute Change in Pop.
-3988 to 0
0 to 1000
1000 to 5000
5000 to 10000
10000 to 25000
25000 to 146072
NoVA
467,564
Valley
87,122
Southwest
25,200
Richmond
176,041
Southside
34,899
Hampton Roads
78,953

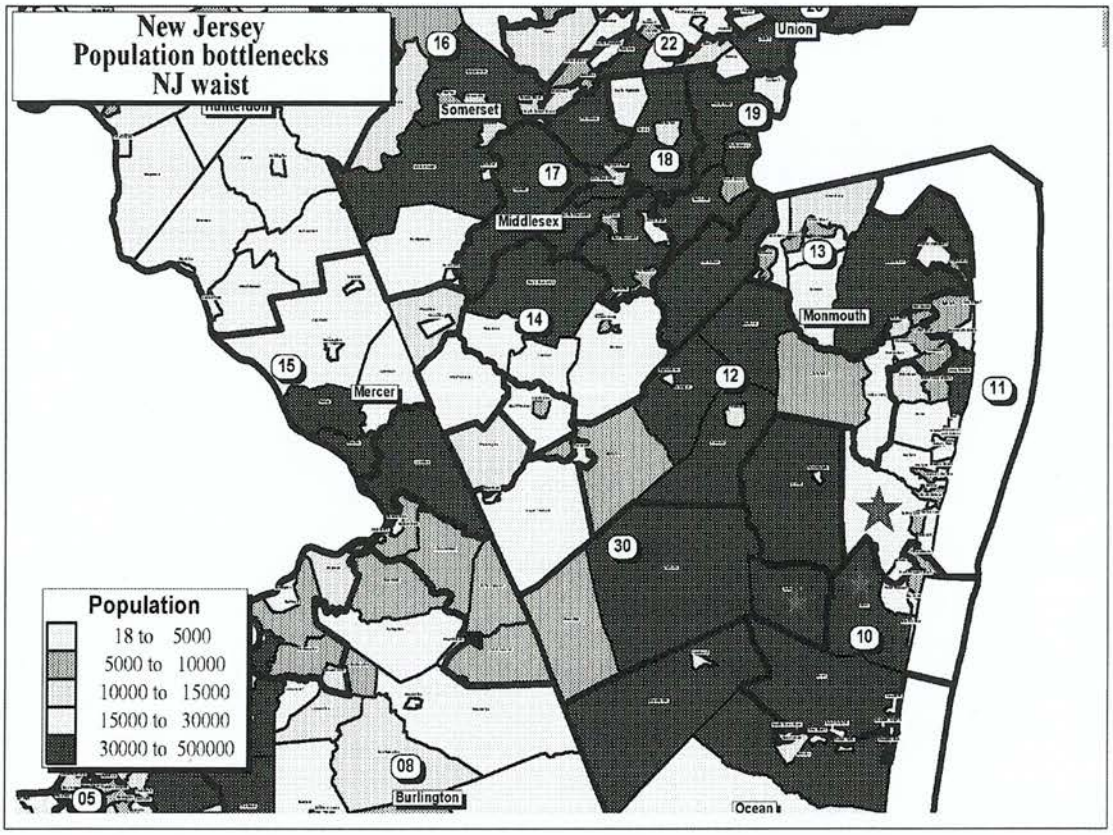

CHANGE IN HDs
2000-2010
Population Proj. 2010
SOUTHWEST VA
Southwest -1.52
NoVA 2.57
Valley 0.2
Southwest -1.52
Richmond 0.45
Southside -0.3
Hampton Roads -1.42
Frederick
Winchester
Clarke
Loudoun
Falls Church
Fairfax
Arlington
Alexandria
Shenandoah
Warren
Manassas Park
Fairfax
Rappahannock
Fauquier
Manassas
Prince William
Rockingham
Page
Culpeper
Harrisonburg
Madison
Stafford
Highland
Augusta
Greene
Fredericksburg
King George
Orange
Staunton
Spotsylvania
Westmoreland
Bath
Charlottesville
Waynesboro
Louisa
Caroline
Essex
Richmond
Northumberland
Rockbridge
Albemarle
Hanover
Covington
Fluvanna
Goochland
King And Queen
Lancaster
Lexington
Clifton Forge
Nelson
King William
Accomack
Allegheny
Buena Vista
Amherst
Middlesex
Craig
Botetourt
Buckingham
Cumberland
Powhatan
Richmond
Henrico
New Kent
Gloucester
Lynchburg
Chesterfield
Charles City
James City
Mathews
Giles
Roanoke
Appomattox
Amelia
Northampton
Roanoke
Bedford
Williamsburg
Bland
Montgomery
Salem
Bedford
Campbell
Prince Edward
Colonial Heights
Hopewell
York
Poquoson
Pulaski
Radford
Nottoway
Petersburg
Prince George
Surry
Hampton
Charlotte
Newport News
Wythe
Floyd
Franklin
Halifax
Lunenburg
Dinwiddie
Sussex
Norfolk
Isle Of Wight
Portsmouth
Carroll
Pittsylvania
Brunswick
Greensville
Southampton
Virginia Beach
Galax
Patrick
Martinsville
Mecklenburg
Suffolk
Chesapeake
Henry
Danville
South Boston
Emporia
Franklin

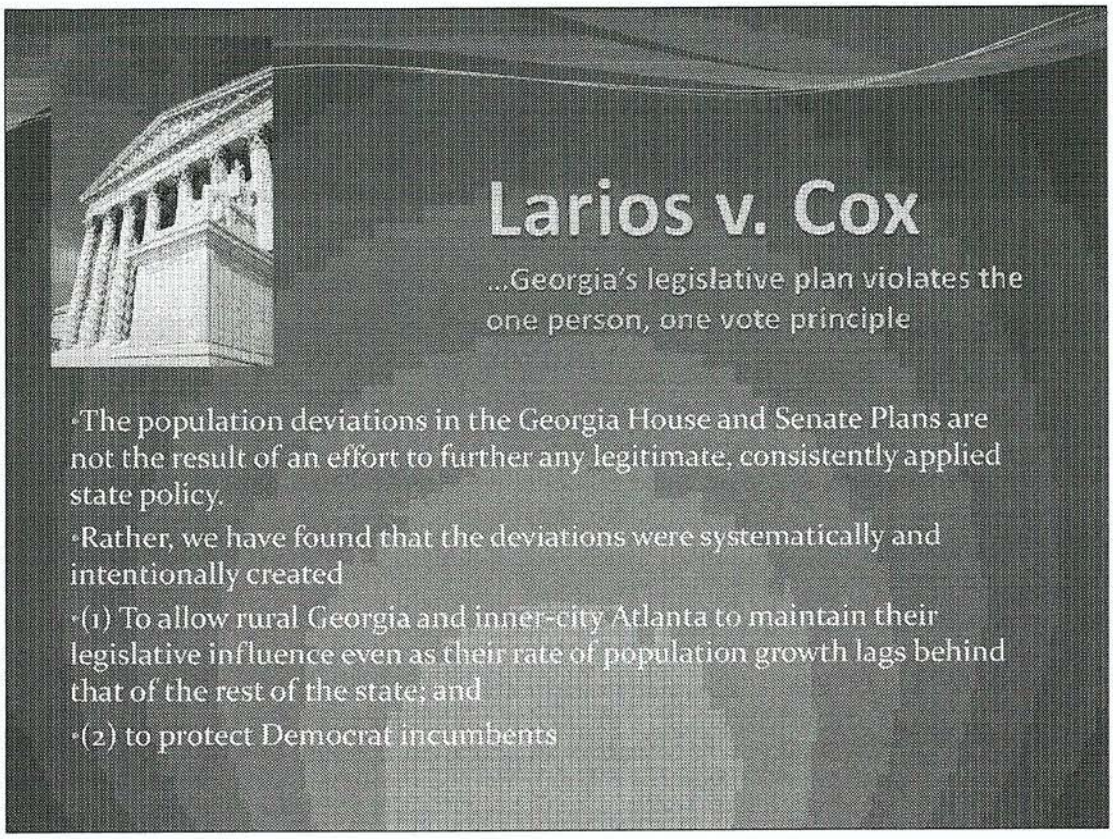

Don't get painted into a corner
•In general, start from a endpoint and work toward a "checkpoint"
•Put regional breaks into the plan:
Allows for interchangeable options
Allows for simultaneous drawing
•Track your cumulative deviation as you draw
•Know the features and consequences of a plan option, whether you state them or not
•Don't commit to a specific district until you test out the impact

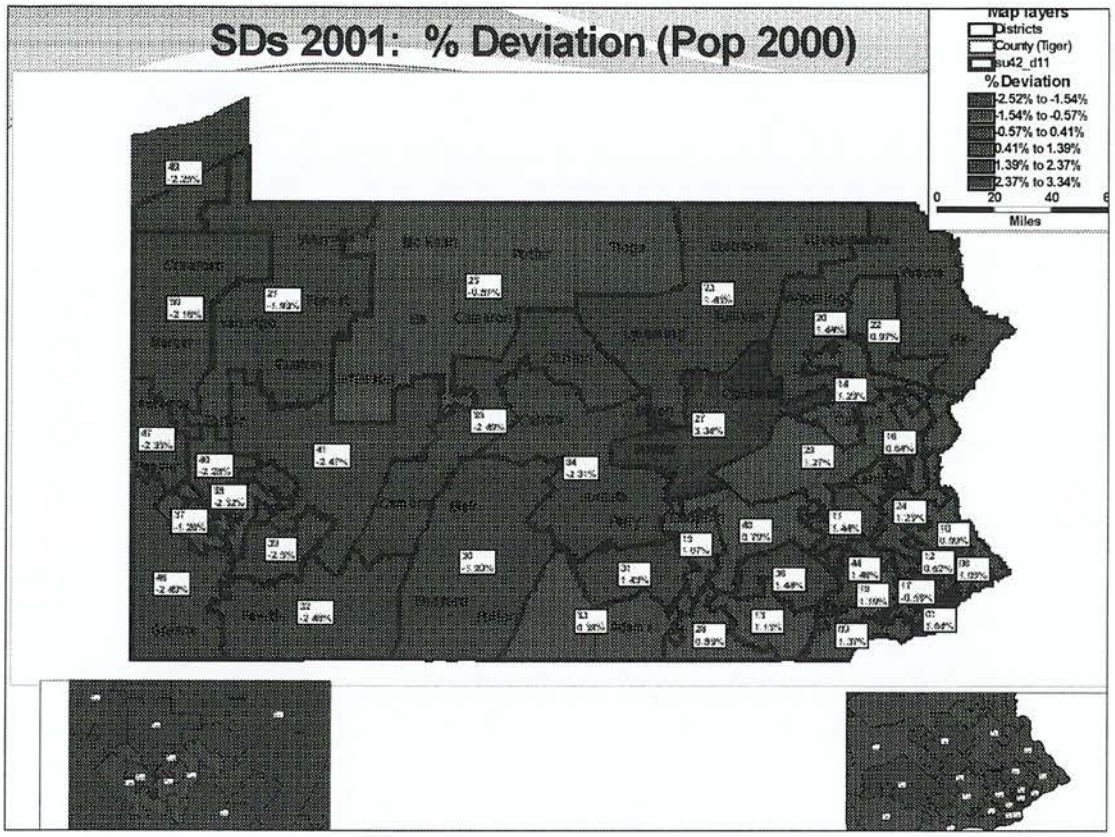

Data
•Census PL-94-171 data
•Use presidential and statewide election data
•Legislative / congressional elections
•Limited local elections as needed
•Racial bloc data – Democrat primaries? Non-partisan?
•Use averages with caution
•ACS will be available, but it is not "snapshot" data
•Voter file data? Micro-targeting data?

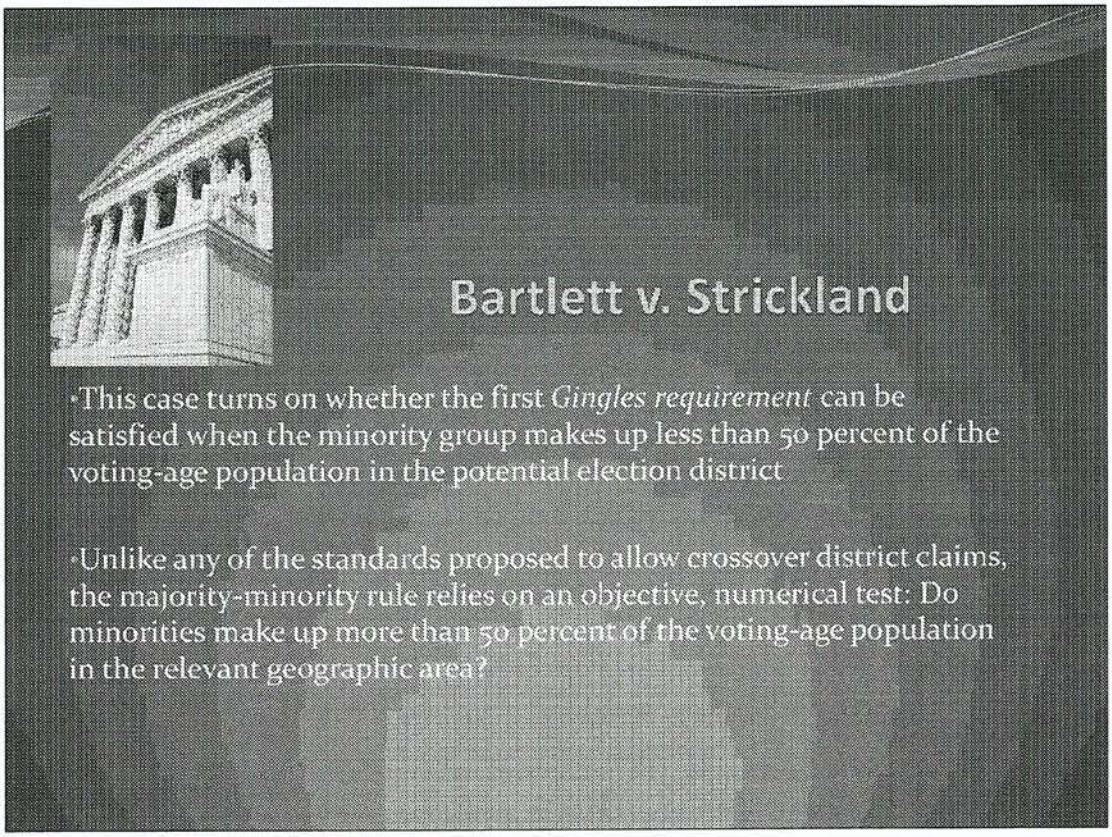

Before
After
Anticipate bottlenecks
•Population bottlenecks
•VRA bottlenecks
•Political bottlenecks
•Internal bottlenecks

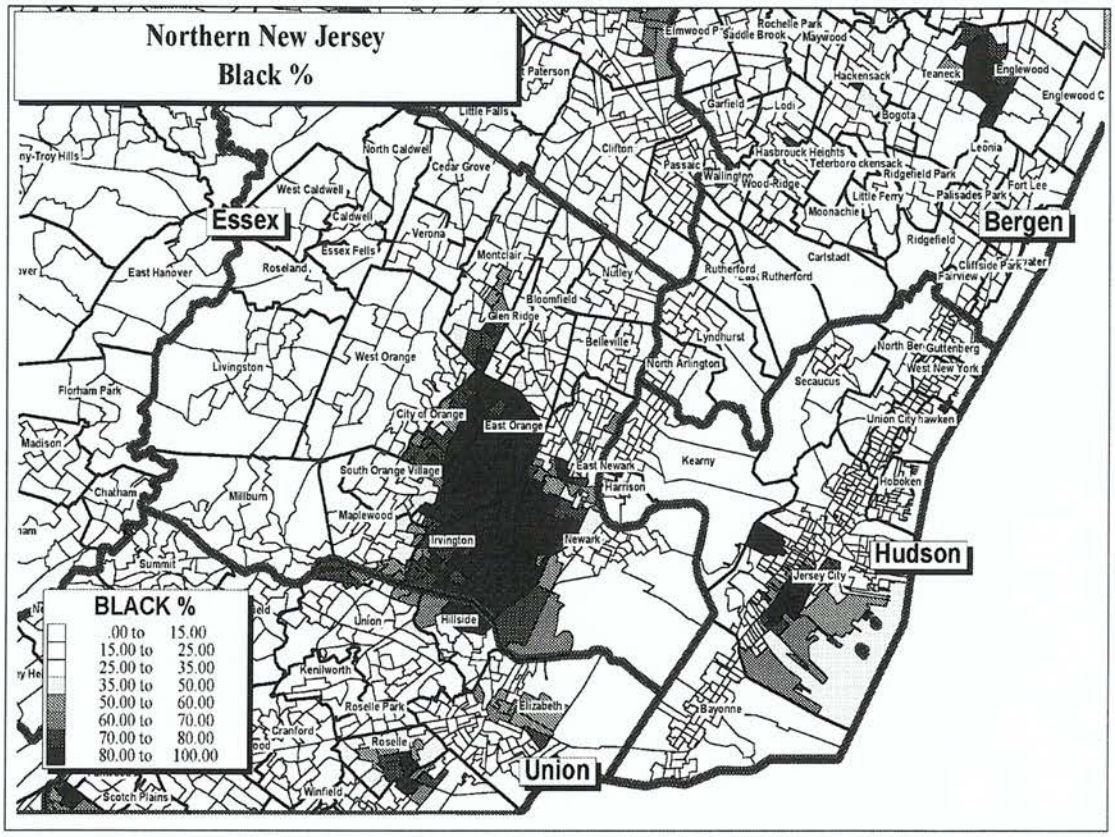

% Deviation from Ideal (POP 2008)
New Ideal = 217,066
40 -1
39 1
35 -3
38 0
37 1
34 -7
36 -2
27 -7
28 -2
32 -5
33 -5
29 -5
31 -6
20 -4
% DEVIATION
-7.00 to -5.00
-5.00 to -1.00
-1.00 to .00
.00 to 1.00
1.00 to 4.00
4.00 to 13.00

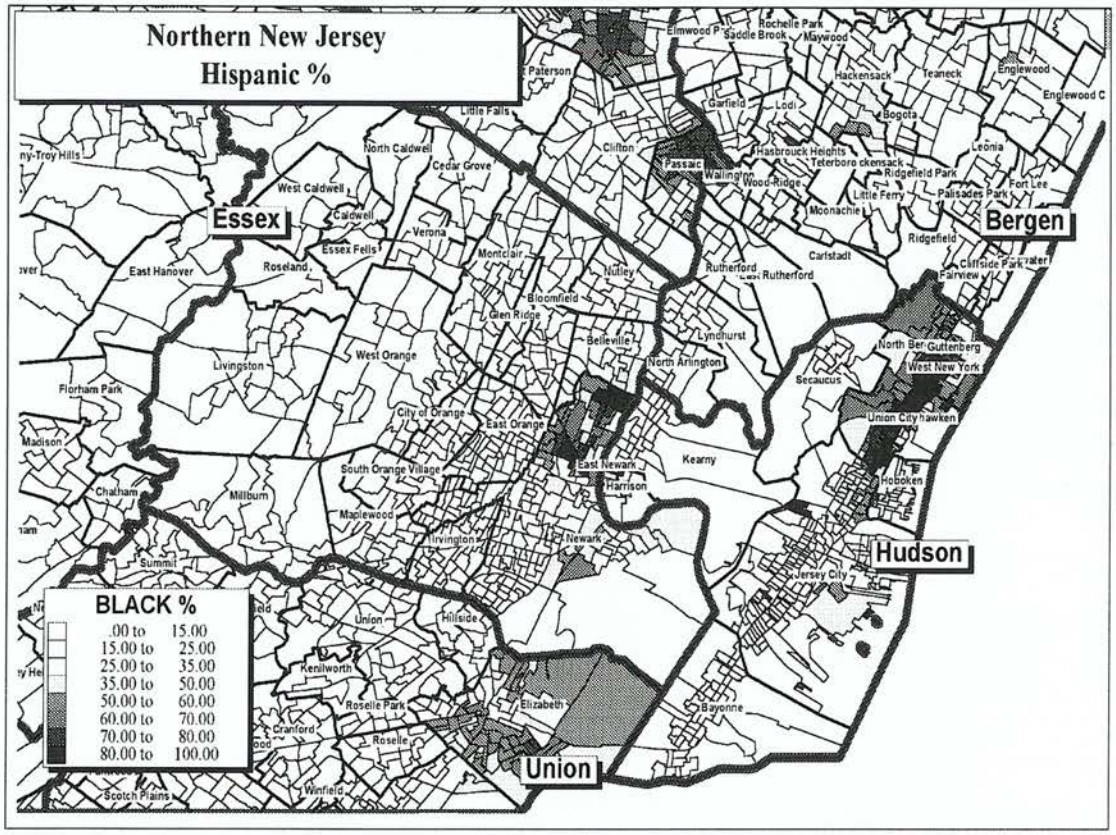

New Jersey
Population bottlenecks
NJ waist
Somerset
Middlesex
Mercer
Monmouth
Union
Burlington
Ocean
16
22
19
18
17
13
14
15
12
11
30
10
08
05
Population
18 to 5000
5000 to 10000
10000 to 15000
15000 to 30000
30000 to 500000

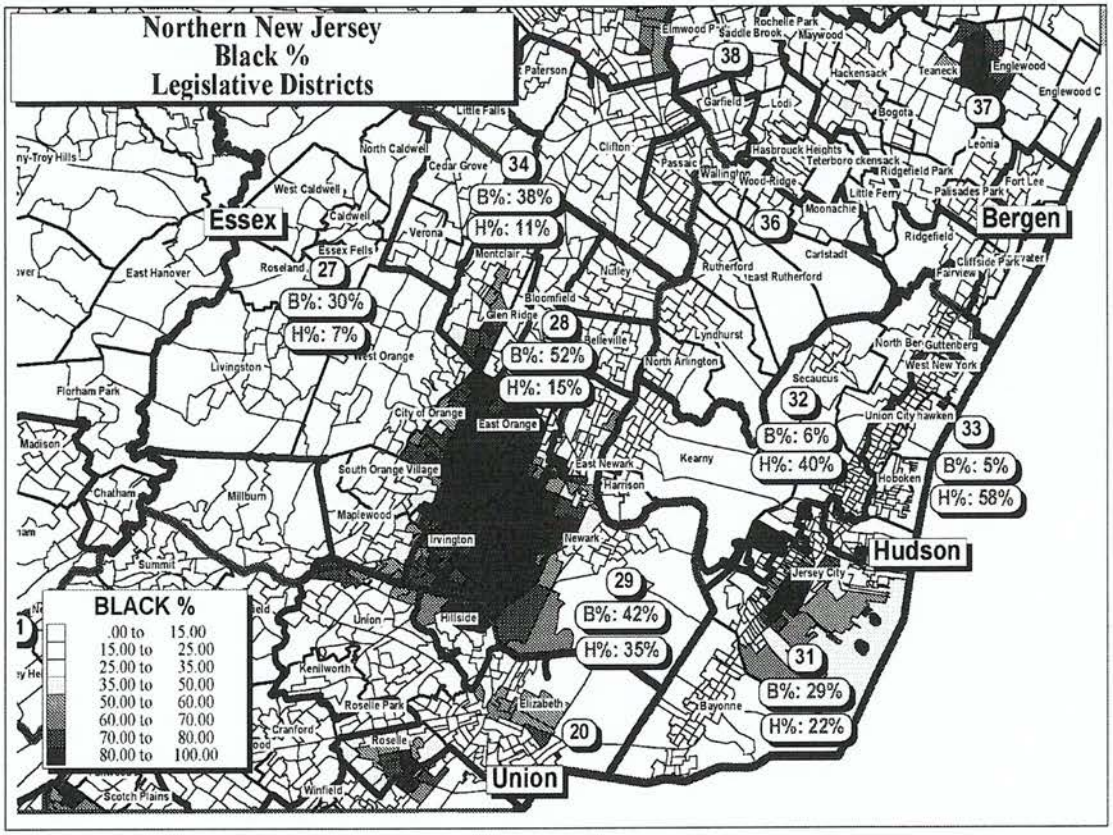

Larios v. Cox
...Georgia's legislative plan violates the one person, one vote principle
•The population deviations in the Georgia House and Senate Plans are not the result of an effort to further any legitimate, consistently applied state policy.
•Rather, we have found that the deviations were systematically and intentionally created
•(1) To allow rural Georgia and inner-city Atlanta to maintain their legislative influence even as their rate of population growth lags behind that of the rest of the state; and
•(2) to protect Democrat incumbents

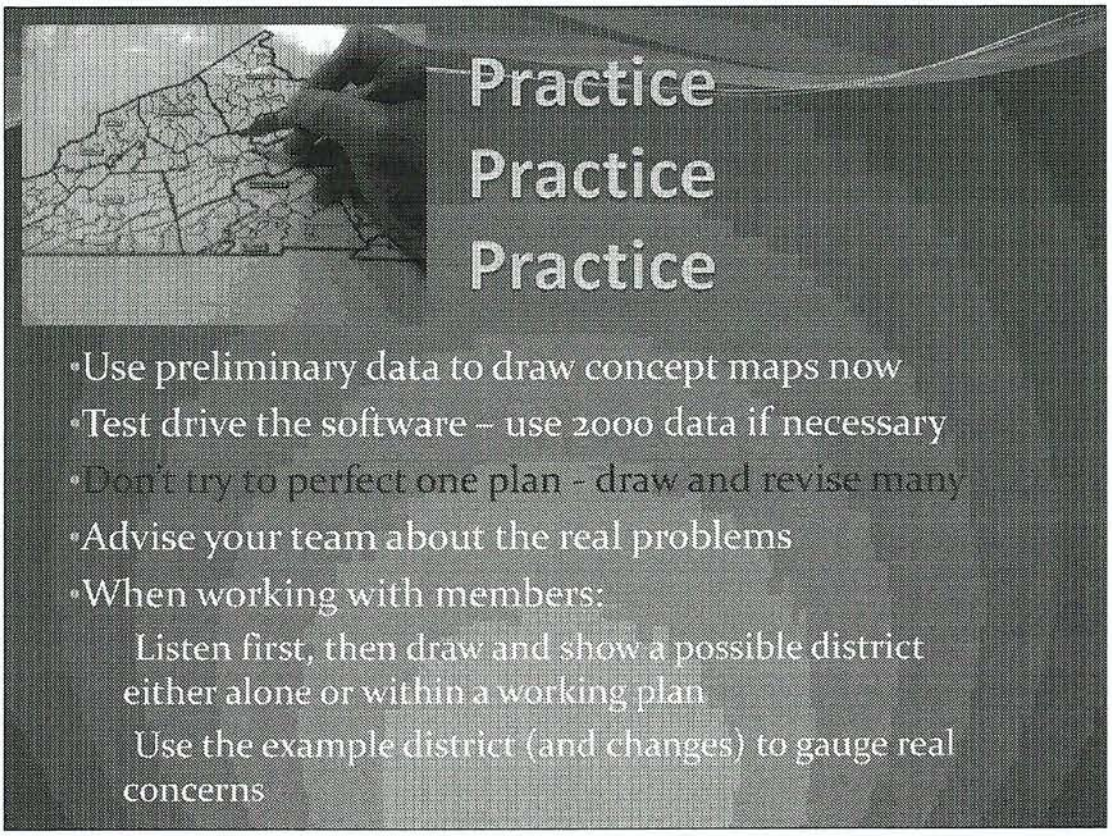

SDs 2001: % Deviation (Pop 2000)
Map layers
Districts
County (Tiger)
su42_d11
% Deviation
-2.52% to -1.54%
-1.54% to -0.57%
-0.57% to 0.41%
0.41% to 1.39%
1.39% to 2.37%
2.37% to 3.34%
0
20
40
Miles

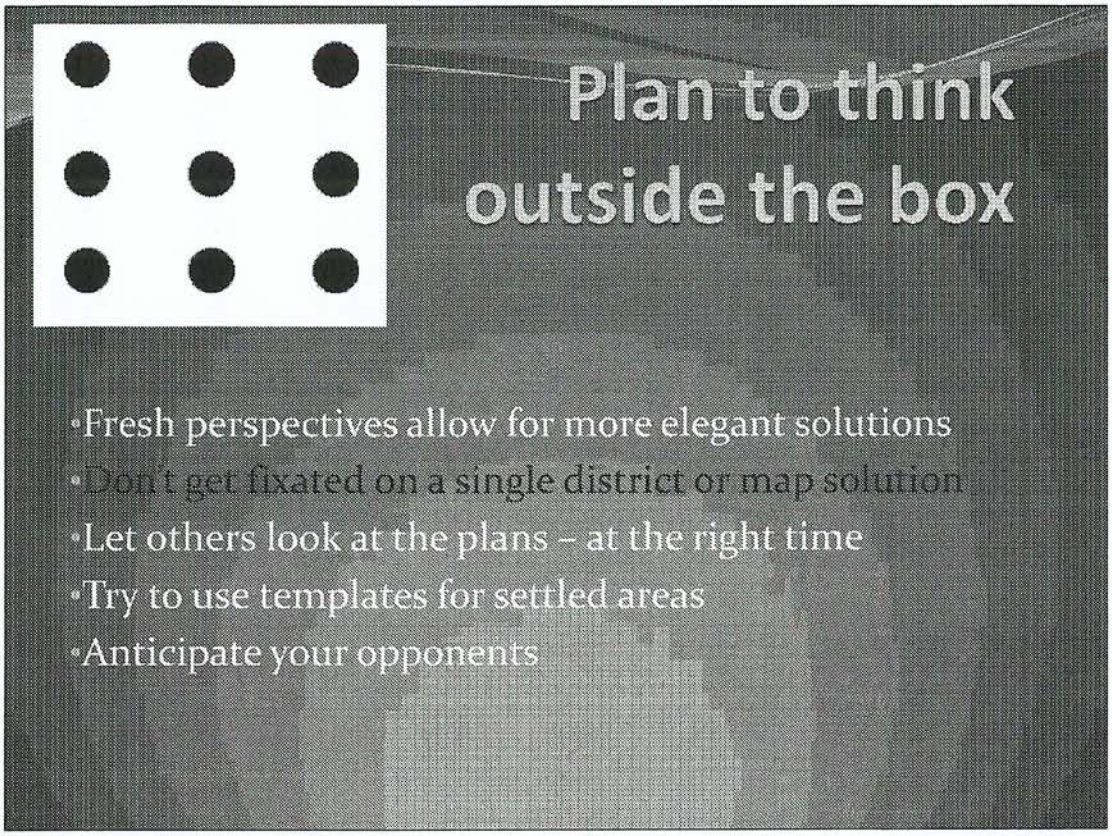

Bartlett v. Strickland
•This case turns on whether the first *Gingles requirement* can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district
•Unlike any of the standards proposed to allow crossover district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?


Northern New Jersey
Black %
Essex
Bergen
Hudson
Union
BLACK %
.00 to 15.00
15.00 to 25.00
25.00 to 35.00
35.00 to 50.00
50.00 to 60.00
60.00 to 70.00
70.00 to 80.00
80.00 to 100.00
Paterson
Little Falls
North Caldwell
Cedar Grove
West Caldwell
Caldwell
Verona
Essex Fells
Montclair
Roseland
East Hanover
Clifton
Passaic
Wallington
Wood-Ridge
Hasbrouck Heights
Teterboro
Hackensack
Ridgefield Park
Little Ferry
Moonachie
Fort Lee
Palisades Park
Ridgefield
Carlstadt
Rutherford
East Rutherford
Nutley
Bloomfield
Glen Ridge
Belleville
Lyndhurst
North Arlington
Secaucus
North Bergen
Guttenberg
West New York
Union City
Weehawken
Hoboken
Jersey City
Bayonne
Kearny
East Newark
Harrison
Newark
Irvington
Maplewood
South Orange Village
City of Orange
East Orange
West Orange
Livingston
Florham Park
Madison
Chatham
Millburn
Summit
Hillside
Union
Kenilworth
Roselle Park
Roselle
Cranford
Elizabeth
Scotch Plains
Winfield
Garfield
Lodi
Bogota
Teaneck
Englewood
Englewood C
Leonia
Elmwood P
Saddle Brook
Rochelle Park
Maywood


Northern New Jersey
Hispanic %
BLACK %
.00 to 15.00
15.00 to 25.00
25.00 to 35.00
35.00 to 50.00
50.00 to 60.00
60.00 to 70.00
70.00 to 80.00
80.00 to 100.00
Essex
Bergen
Hudson
Union
Paterson
Elmwood P
Rochelle Park
Saddle Brook
Maywood
Hackensack
Teaneck
Englewood
Englewood C
Garfield
Lodi
Bogota
Little Falls
Clifton
Passaic
Wallington
Wood-Ridge
Hasbrouck Heights
Teterboro
Ridgefield Park
Leonia
Fort Lee
Palisades Park
Little Ferry
Moonachie
Ridgefield
Carlstadt
Cliffside Park
Fairview
Rutherford
East Rutherford
North Caldwell
Cedar Grove
West Caldwell
Caldwell
Verona
Essex Fells
Montclair
Nutley
Bloomfield
Glen Ridge
Belleville
Lyndhurst
North Arlington
Secaucus
North Bergen
Guttenberg
West New York
Union City
Weehawken
East Hanover
Roseland
Livingston
West Orange
Florham Park
City of Orange
East Orange
South Orange Village
East Newark
Harrison
Kearny
Hoboken
Jersey City
Madison
Chatham
Millburn
Maplewood
Irvington
Newark
Summit
Union
Hillside
Kenilworth
Roselle Park
Elizabeth
Bayonne
Cranford
Roselle
Winfield
Scotch Plains

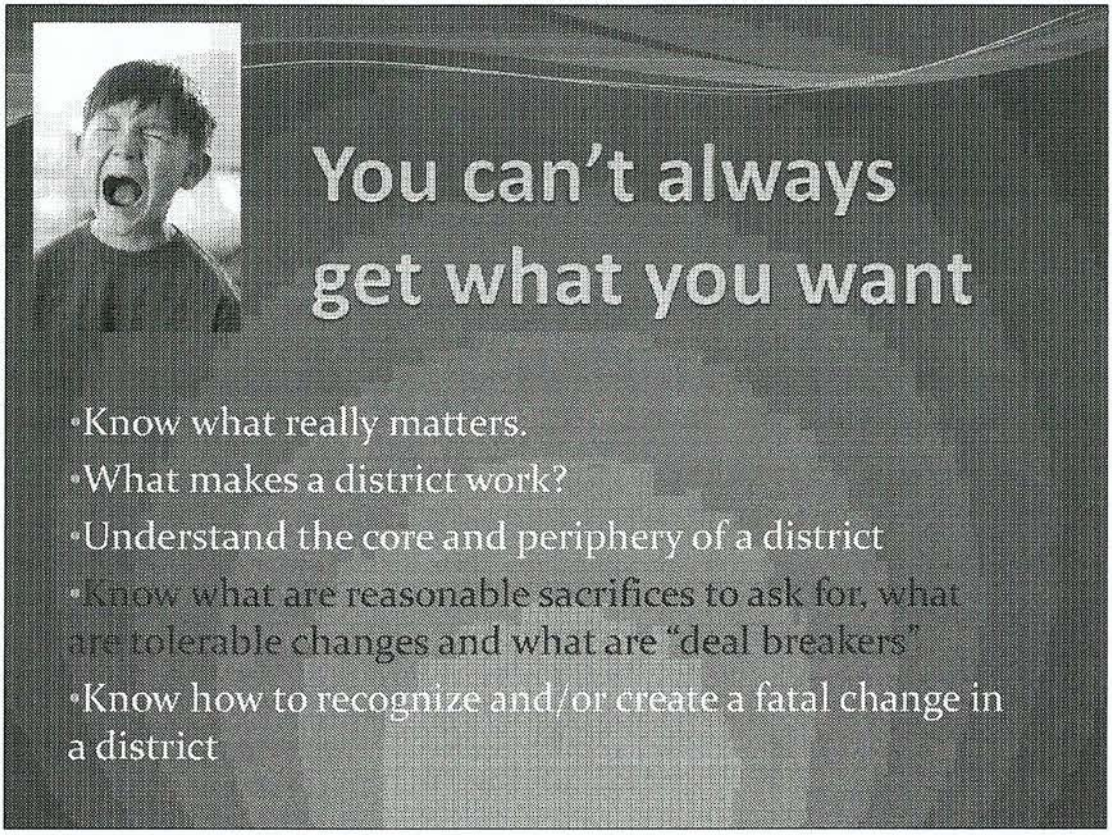

Northern New Jersey
Black %
Legislative Districts
Essex
Bergen
Hudson
Union
34
B%: 38%
H%: 11%
27
B%: 30%
H%: 7%
28
B%: 52%
H%: 15%
32
B%: 6%
H%: 40%
33
B%: 5%
H%: 58%
29
B%: 42%
H%: 35%
31
B%: 29%
H%: 22%
20
38
37
36
BLACK %
.00 to 15.00
15.00 to 25.00
25.00 to 35.00
35.00 to 50.00
50.00 to 60.00
60.00 to 70.00
70.00 to 80.00
80.00 to 100.00

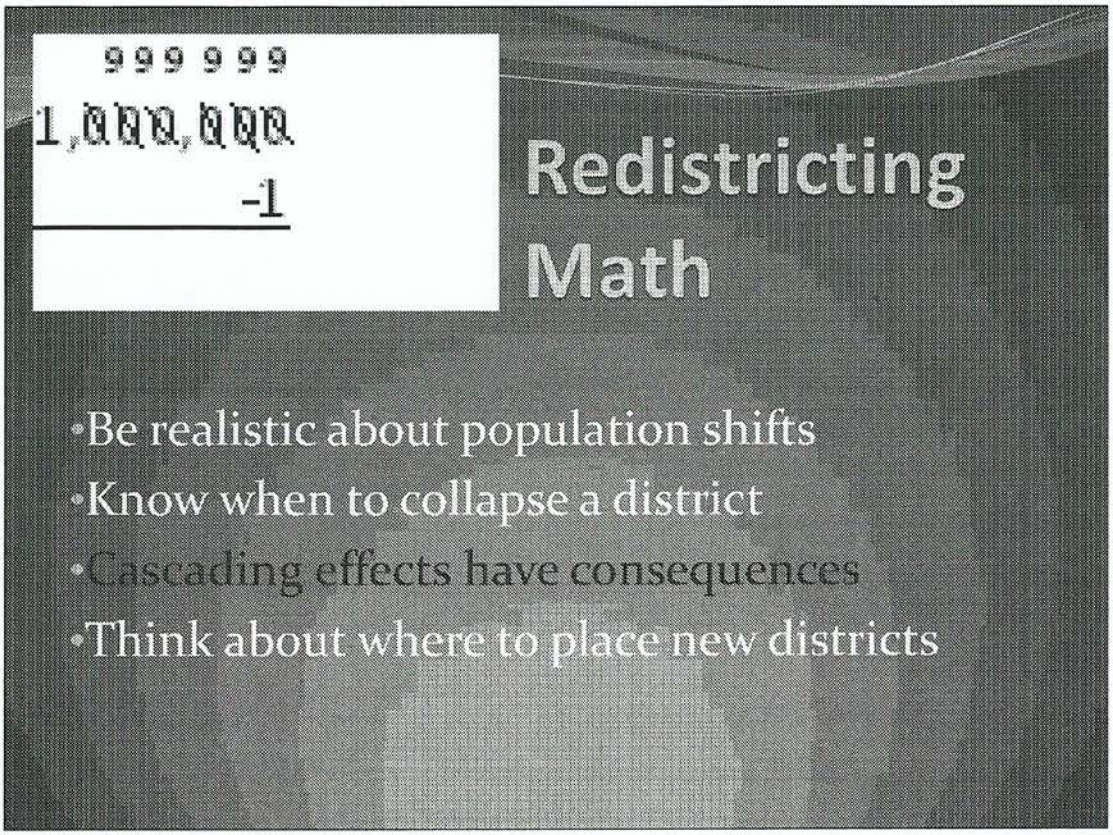

Practice
Practice
Practice
•Use preliminary data to draw concept maps now
•Test drive the software – use 2000 data if necessary
•Don't try to perfect one plan - draw and revise many
•Advise your team about the real problems
•When working with members:
Listen first, then draw and show a possible district either alone or within a working plan
Use the example district (and changes) to gauge real concerns


Plan to think outside the box
•Fresh perspectives allow for more elegant solutions
•Don't get fixated on a single district or map solution
•Let others look at the plans – at the right time
•Try to use templates for settled areas
•Anticipate your opponents

Take a break
Sleep on it

- When you reach a stopping point:
  - Save, backup, review
  - Keep moving to the next checkpoint
- When you complete a plan:
  - Save, backup, review, consistency check
  - STOP! Take a break, sleep on it, if possible
  - Review, regroup, redraw
- When you complete a family of plans:
  - What do you like and dislike about them?
  - Is the next plan a tweak, a redraw or a new family?
  - Ask for legal review?


You can't always get what you want
•Know what really matters.
•What makes a district work?
•Understand the core and periphery of a district
•Know what are reasonable sacrifices to ask for, what are tolerable changes and what are "deal breakers"
•Know how to recognize and/or create a fatal change in a district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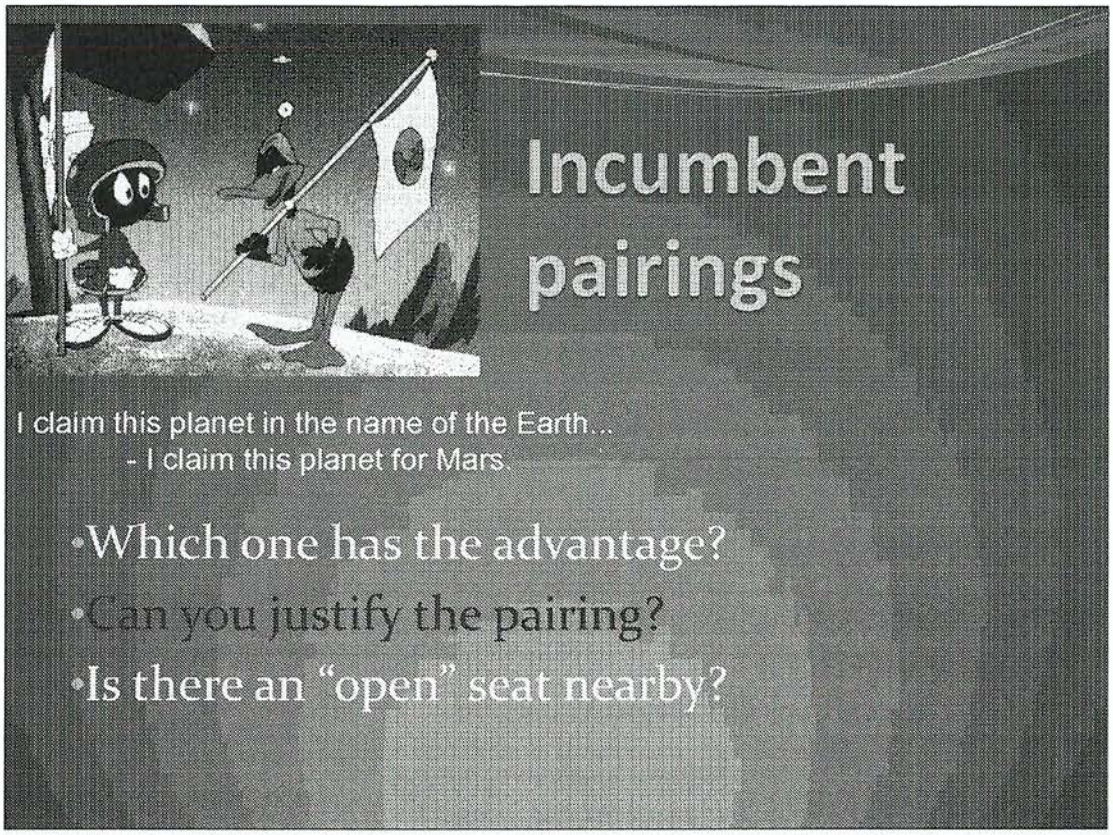
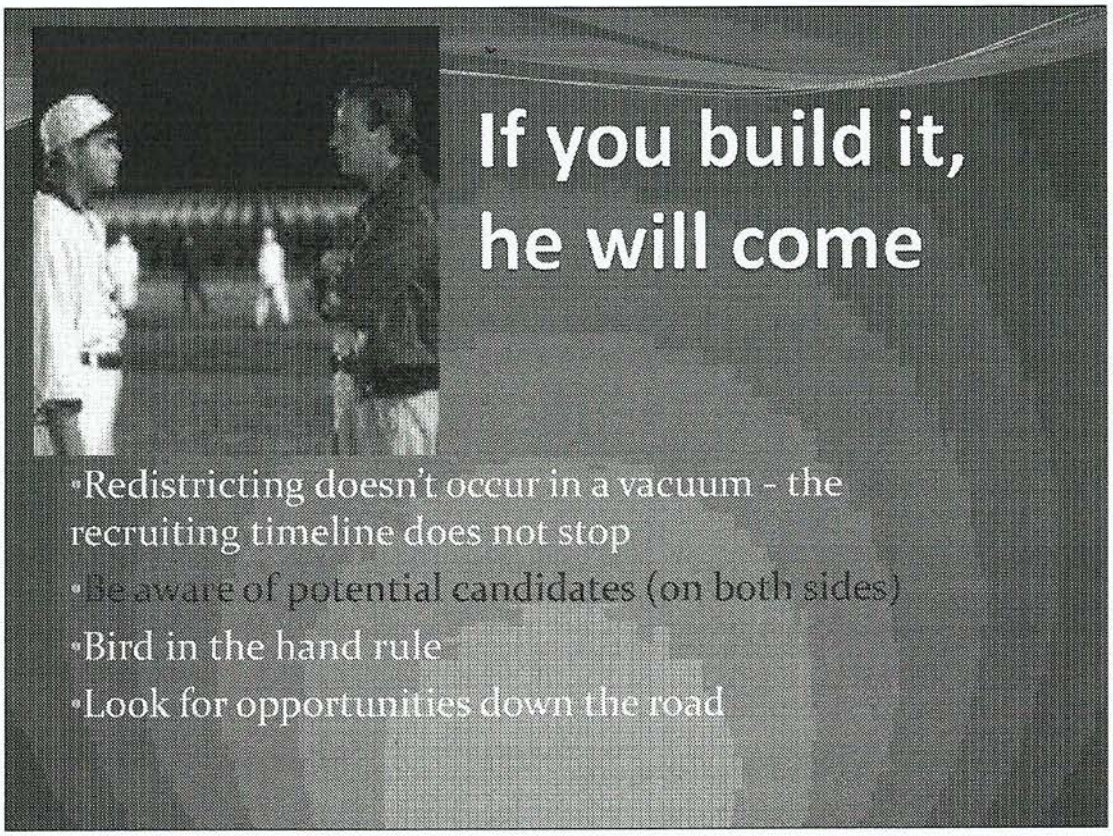
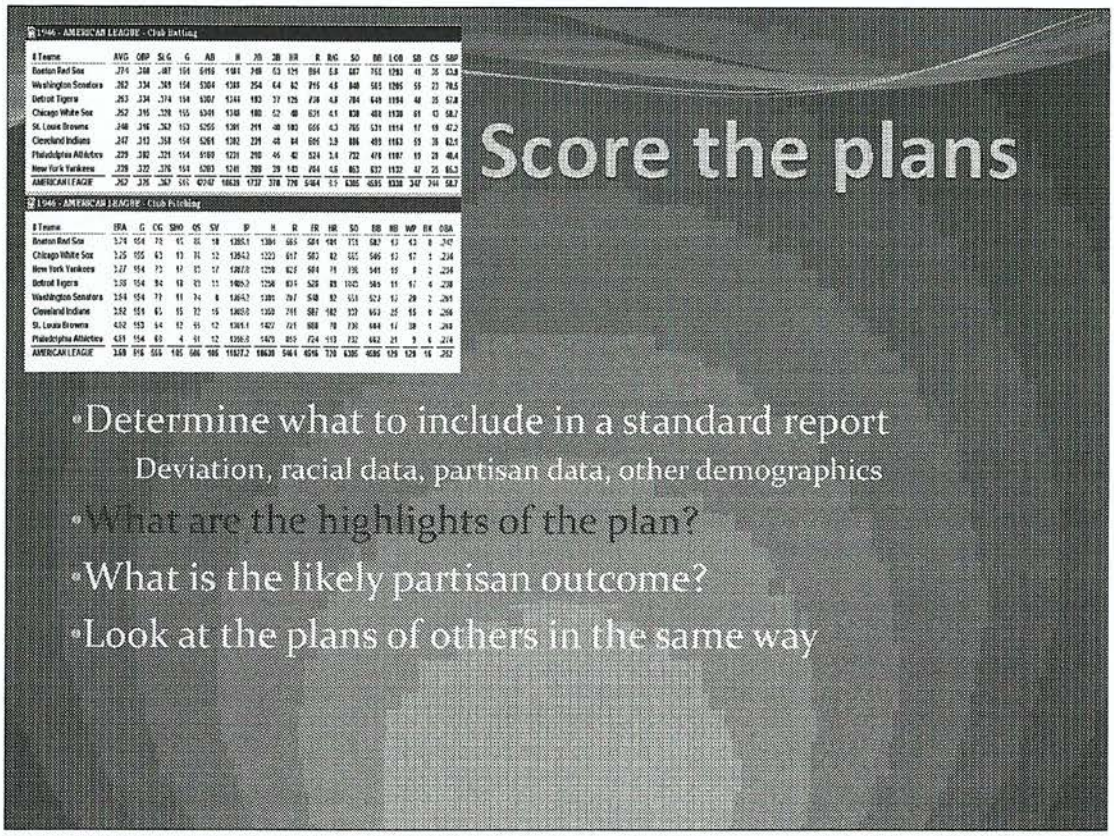
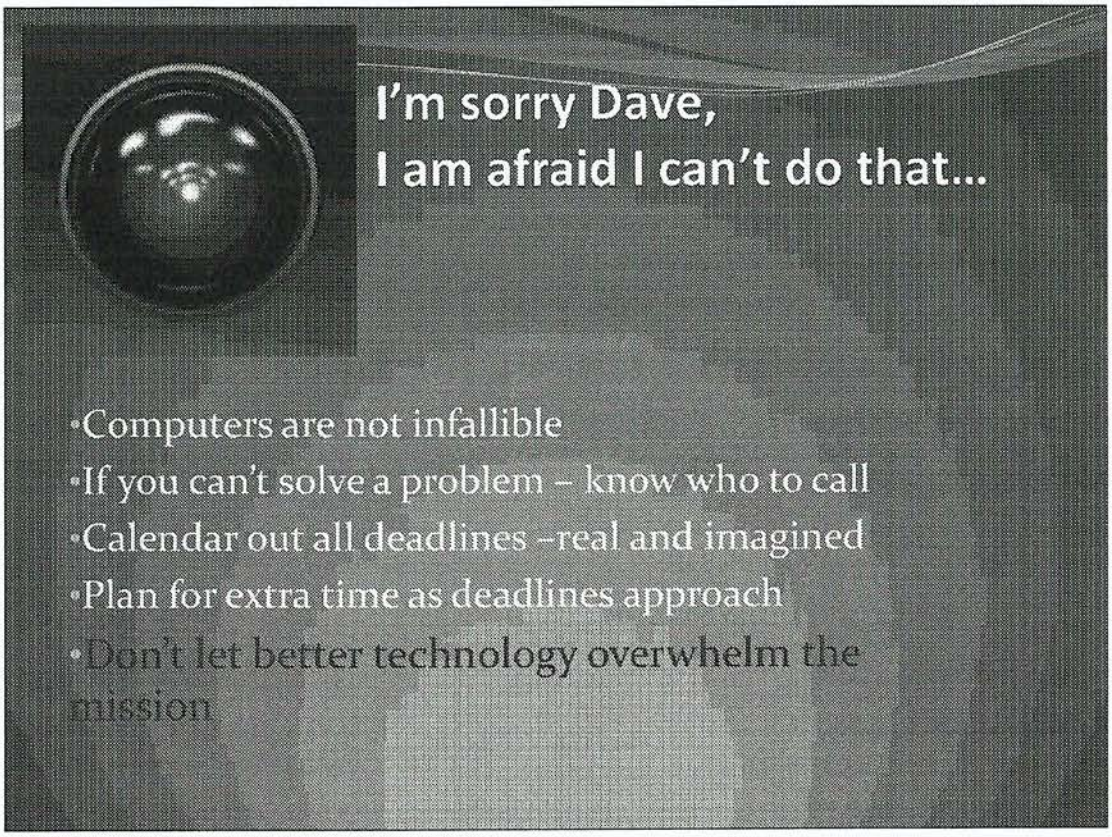
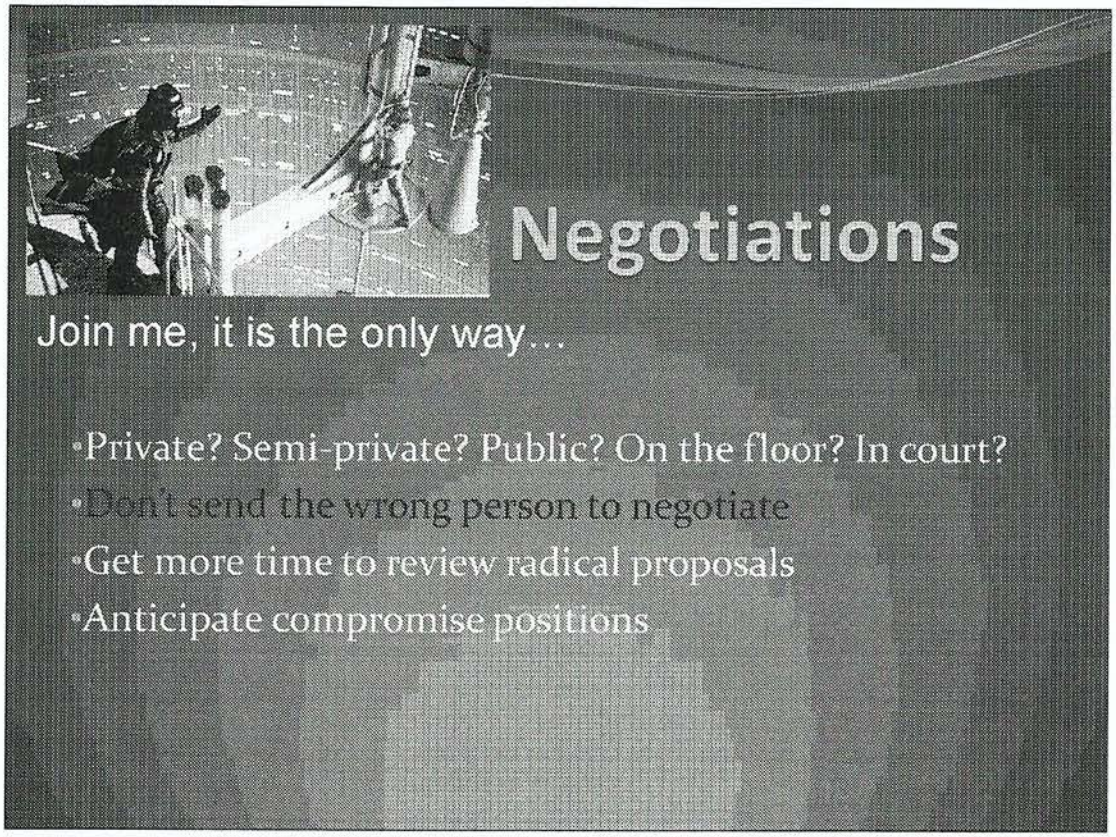
Redistricting Math
•Be realistic about population shifts
•Know when to collapse a district
•Cascading effects have consequences
•Think about where to place new districts

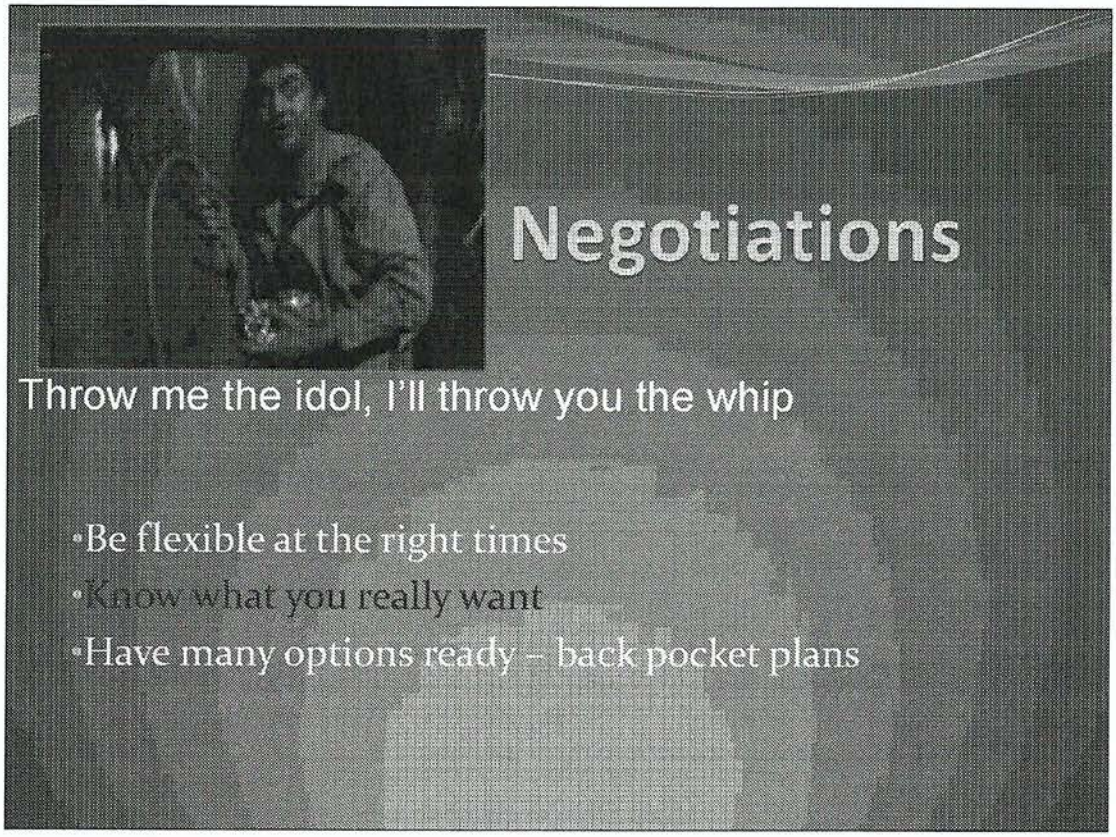

Incumbent pairings
I claim this planet in the name of the Earth...
- I claim this planet for Mars.
•Which one has the advantage?
•Can you justify the pairing?
•Is there an "open" seat nearby?

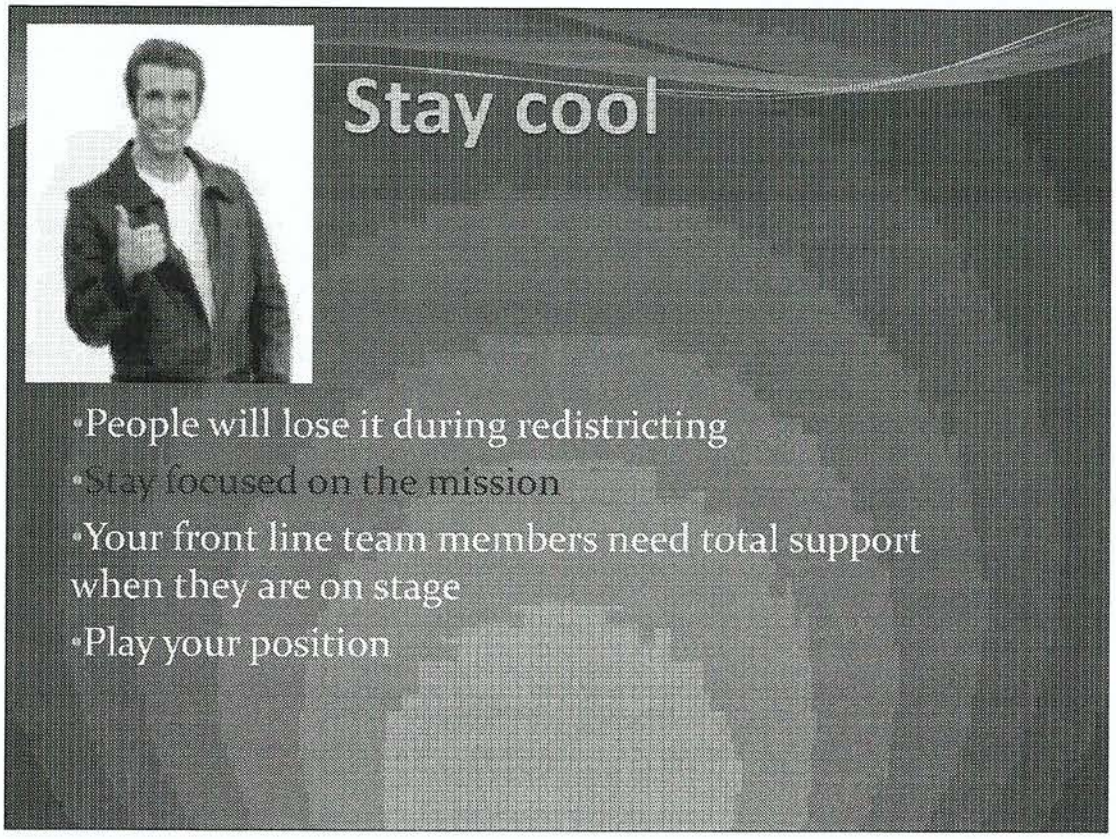

If you build it, he will come
•Redistricting doesn't occur in a vacuum - the recruiting timeline does not stop
•Be aware of potential candidates (on both sides)
•Bird in the hand rule
•Look for opportunities down the road

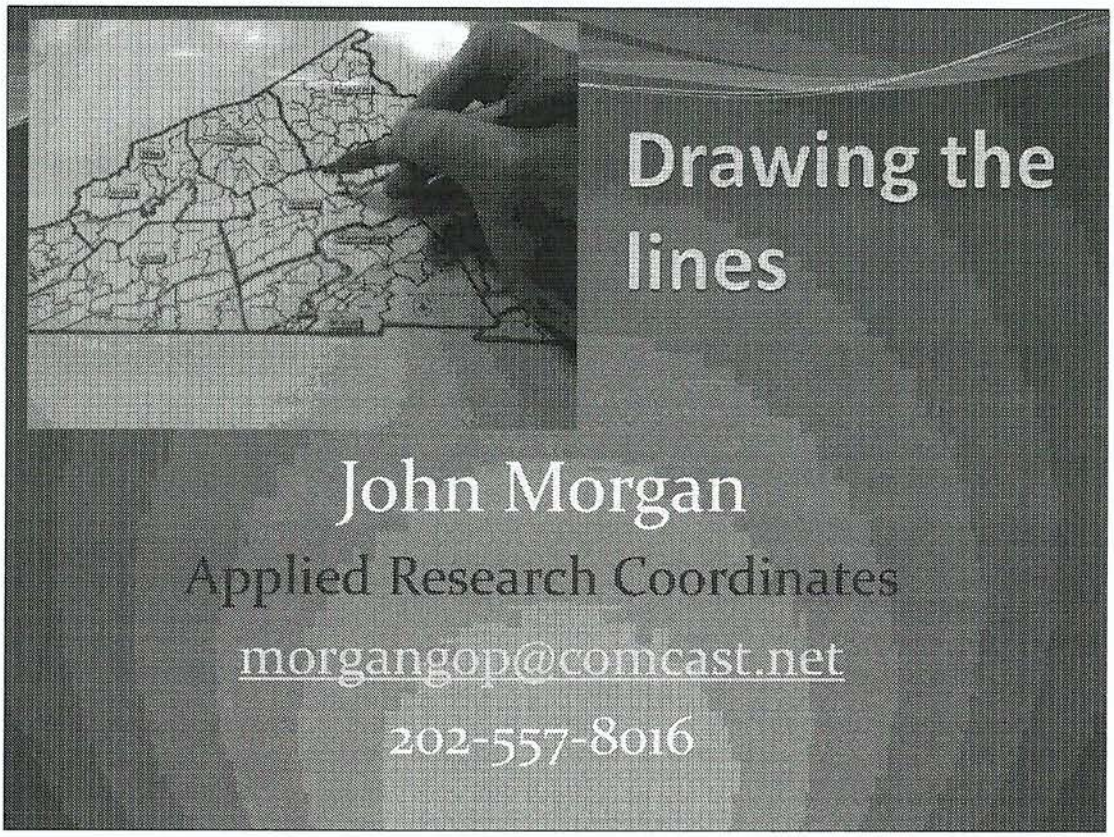

1946 - AMERICAN LEAGUE - Club Batting
1946 - AMERICAN LEAGUE - Club Pitching
Score the plans
•Determine what to include in a standard report
Deviation, racial data, partisan data, other demographics
•What are the highlights of the plan?
•What is the likely partisan outcome?
•Look at the plans of others in the same way


I'm sorry Dave,
I am afraid I can't do that...
•Computers are not infallible
•If you can't solve a problem – know who to call
•Calendar out all deadlines –real and imagined
•Plan for extra time as deadlines approach
•Don't let better technology overwhelm the mission


Negotiations
Join me, it is the only way…
•Private? Semi-private? Public? On the floor? In court?
•Don't send the wrong person to negotiate
•Get more time to review radical proposals
•Anticipate compromise positions


Negotiations
Throw me the idol, I'll throw you the whip
•Be flexible at the right times
•Know what you really want
•Have many options ready – back pocket plans


Stay cool
•People will lose it during redistricting
•Stay focused on the mission
•Your front line team members need total support when they are on stage
•Play your position


Drawing the lines
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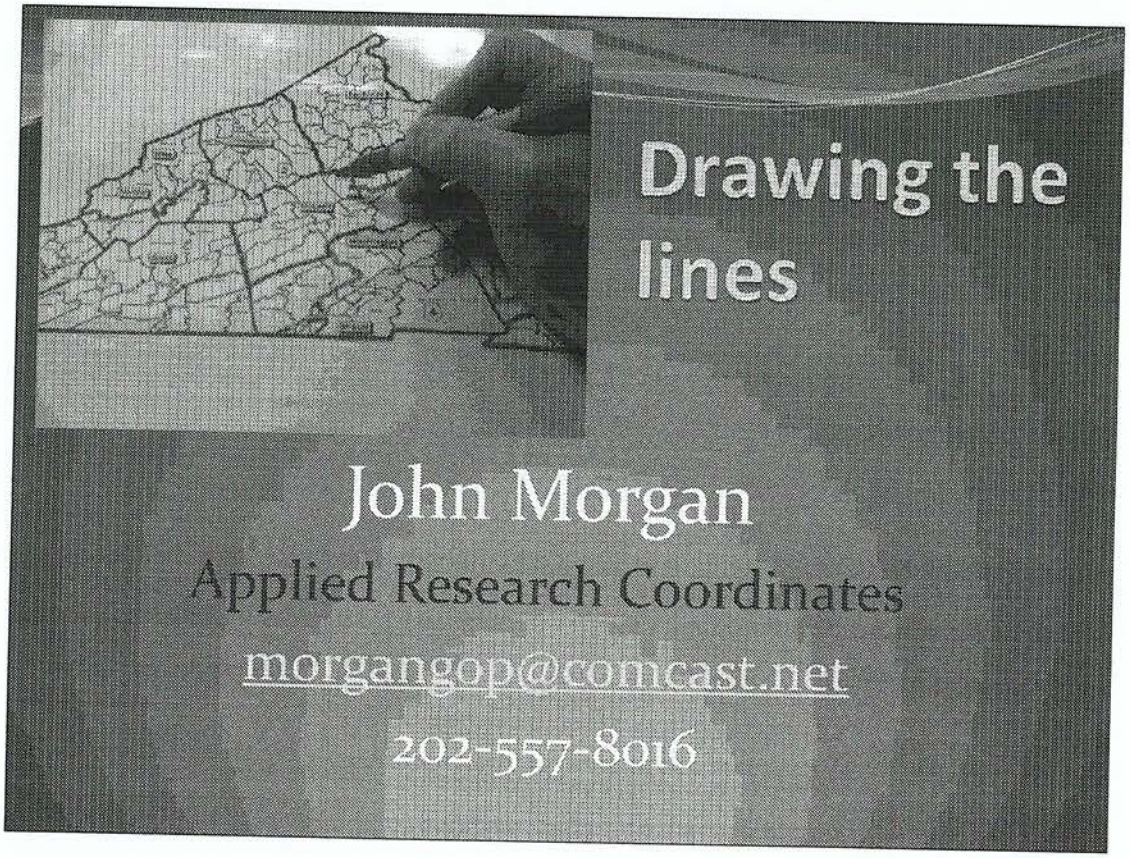
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