

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

TRANSCRIPT OF PROCEEDINGS

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:
JEFFERSON COUNTY COMMISSION; : CIVIL ACTION
PATRICIA NOLAND, as an : NO. 2:11-CV-00989
individual and on behalf of :
all others similarly :
situated; and DALE MANUEL, :
as an individual and on : December 28, 2011
behalf of all others :
similarly situated, :
:
Plaintiffs, and :
:
THORNTON COOPER, :
:
Intervening Plaintiff, :
:
vs. :
:
NATALIE E. TENNANT, in her :
capacity as the Secretary of :
State; EARL RAY TOMBLIN, in :
his capacity as the Chief :
Executive Officer of the :
State of West Virginia; :
JEFFREY KESSLER, in his :
capacity as the Acting :
President of the Senate of :
the West Virginia :
Legislature; and RICHARD :
THOMPSON, in his capacity :
as the Speaker of the House :
of Delegates of the West :
Virginia Legislature, :
:
Defendants. :
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THREE-JUDGE SPECIAL COURT SESSION BEFORE:

THE HONORABLE ROBERT BRUCE KING
UNITED STATES CIRCUIT JUDGE
FOR THE FOURTH CIRCUIT

THE HONORABLE IRENE CORNELIA BERGER
UNITED STATES DISTRICT JUDGE
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

THE HONORABLE JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

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Court Reporter:

Lisa A. Cook, RPR-RMR-CRR-FCRR

Proceedings recorded by mechanical stenography; transcript produced by computer.

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P R O C E E D I N G S

JUDGE KING: Good morning.

I want to welcome each of you to this special court of the District Court for the Southern District of West Virginia. For me it's a distinct honor to, to be here with my friends Judge Bailey and Judge Berger.

This is Civil Action 2:11:0989, *Jefferson County Commission vs. Tennant* with some et ceteras or et als. in there. And I think we first should secure the appearances of counsel, beginning with the plaintiffs.

MR. HAMMER: David Hammer here on behalf of the plaintiffs.

MR. SKINNER: Stephen Skinner on behalf of the plaintiffs.

MR. COOPER: Thornton Cooper, intervening plaintiff pro se.

JUDGE KING: And the defendants?

MR. MAJESTRO: Anthony Majestro on behalf of Richard Thompson, Speaker of the House.

MR. CARENBAUER: George Carenbauer on behalf of Senate President Jeff Kessler. And with me is Adam Tomlinson, my colleague.

MR. RODD: I'm Tom Rodd, Assistant Attorney General, here for Secretary of State Natalie Tennant and Governor Earl Ray Tomblin.

1 JUDGE KING: Thank you. Thank you very much.

2 We issued a brief order yesterday describing what we
3 thought might be a good way to commence these proceedings.

4 Is there anything that counsel have before we get to
5 that?

6 (No Response)

7 JUDGE KING: There was a motion made on behalf of
8 Speaker Thompson. Was that --

9 MR. MAJESTRO: Yes, Your Honor. We had two.

10 One was that we asked that both Speaker Thompson and
11 President Kessler be not required to be here today and be
12 available, but they would be available by phone should the
13 Court need them.

14 And the second motion we filed yesterday was substitute
15 one of our witnesses and allow that witness to appear by
16 telephone. And the basis for that motion is that Delegate
17 Boggs, who was the Chairman of the redistricting committee,
18 had a death and illness in the family and is unable to be
19 here today.

20 Because of the holiday, we, we've -- it's difficult --
21 it was difficult finding someone on the committee that would
22 be available. Judge Frazier -- sorry -- Delegate Frazier
23 has graciously agreed to testify, but he's in North Carolina
24 with his grandchildren and would only be available by
25 telephone.

1 JUDGE KING: Is that Delegate John Frazier of
2 Mercer County?

3 MR. MAJESTRO: Yes, Your Honor.

4 JUDGE KING: Former Judge Frazier?

5 MR. MAJESTRO: Former Judge Frazier.

6 JUDGE KING: Why don't we defer the aspects of it
7 related to the witness, the witnesses -- correct? -- as to
8 Speaker Thompson and President Kessler. I would defer -- I
9 think we should defer to you-all, but you need to understand
10 that we -- you speak for them with full authority to bind
11 them.

12 With that understanding, you're the ones that need them
13 more than we do unless the plaintiffs, the Court at some
14 point wants to directly ask them some questions. But, but I
15 just wanted to stress that to counsel.

16 MR. MAJESTRO: Yeah, we, we have --

17 JUDGE KING: Otherwise, we'll defer to you.

18 MR. MAJESTRO: Thank you, Your Honor. We've
19 consulted -- Mr. Carenbauer and I have consulted with them.
20 We have representatives of our staff here also today.

21 JUDGE KING: Very good. Thank you.

22 MR. RODD: Your Honor, --

23 JUDGE KING: Yes, sir.

24 MR. RODD: -- Tom Rodd for the Governor and the
25 Secretary of State. We had previously filed a motion

1 indicating that we would let the -- prefer to let the
2 defense in this case be advanced by counsel for the other
3 defendants. And we don't intend to offer any argument or
4 testimony today or to participate in the proceedings except
5 as the Court requests. And I can sit here or I can go into
6 the courtroom as --

7 JUDGE KING: No, you sit right there.

8 MR. RODD: Okay.

9 JUDGE KING: We're glad to have you here. And if
10 we have questions for you, you understand also that you
11 speak for your clients and you have full authority to bind
12 them.

13 MR. RODD: Absolutely, Your Honor.

14 JUDGE KING: Very good.

15 Then the plaintiffs, we're pleased to hear from you.
16 Mr. Skinner.

17 MR. SKINNER: Good morning.

18 Being mindful of the order that was entered yesterday,
19 we will attempt to be brief.

20 The legal authority that we rely on begins and ends
21 essentially with *Karcher vs. Daggett*. And I say that it is
22 the majority opinion of *Karcher* that we rely on because it
23 would appear today that it is the dissent in *Karcher* that
24 the defendants rely on for their justification of their
25 redistricting plan.

1 We do not believe that we need go much further from
2 *Karcher* when we look at the facts to understand, first off,
3 that the plan that was adopted by the Legislature and signed
4 by the Governor goes outside of the bounds of what's
5 required by *Karcher* and one person, one vote.

6 We believe as, as we discuss the legal issues that a
7 new standard should be adopted when reviewing cases under
8 *Karcher vs. Daggett* when the variance is more than zero that
9 a legislature must, within its enacted bill, explain why or
10 what its reasons are for going beyond the one person, one
11 vote standard.

12 As we examine the bill that was passed here, we'll see
13 that the bill is silent as to what the reasons were to have
14 the variance at issue. The Legislature is perfectly capable
15 of putting its reasons and putting its findings --

16 JUDGE KING: Now, *Karcher* had that two-prong test;
17 right?

18 MR. SKINNER: Yes, sir.

19 JUDGE KING: In the first prong, the burden is on
20 you.

21 MR. SKINNER: That's correct.

22 JUDGE KING: And what do you understand that prong
23 to be?

24 MR. SKINNER: Well, we understand that prong to be
25 that there is a requirement for a, for the bill adopted if,

1 to have a zero population variance among districts. And
2 once, once we get to the point where we see that they did
3 not do that, that's where the burden shifts. And, quite
4 frankly, I don't think that we have that as an issue, the
5 first prong of the test here.

6 JUDGE KING: You have a footnote in your reply
7 brief where you say that you, you think perhaps the
8 defendants have conceded that point. But then you, you
9 indicate that it's more implied than express I think.

10 MR. SKINNER: I certainly think that it may or may
11 not be an issue here today. And it may be the basis of --

12 JUDGE KING: And that's one of the things we need
13 to ascertain this morning I think. But, but you recognize
14 that the burden is on you with respect to the first prong.

15 MR. SKINNER: We agree.

16 JUDGE KING: And if you are -- and if you're right
17 that it's satisfied here based on the submissions as they
18 presently stand, then you, you would agree there's no
19 evidence necessary to be heard from any witness stand.

20 MR. SKINNER: I agree.

21 JUDGE KING: And the second prong would be the
22 important issue of the day, is that correct, as to Count One
23 and Count Two? Do you agree with that?

24 MR. SKINNER: I agree.

25 JUDGE KING: Okay. Go ahead.

1 MR. SKINNER: So, I don't believe -- I believe
2 that the briefs, although relatively short, they are to the
3 point and we do not need much more argument on the law here.
4 We do have --

5 JUDGE KING: What do you do -- how are you going
6 to deal with the *Stone* case?

7 MR. SKINNER: Well, one of the things that we need
8 to realize about *Stone* is the variance. And what we have
9 when we look at *Stone* --

10 JUDGE KING: It was decided post-*Karcher*; right?
11 You've got the *Karcher* case of 1983. Then you've got *Stone*
12 in 1991.

13 MR. SKINNER: And the, the variance in *Stone* is
14 .09 which is very small to the variance that we're
15 considering here today.

16 And under *Karcher*, the greater the variance, the
17 greater the need to provide a good reason for the variance,
18 which we don't see anywhere within the bill here today.

19 So, *Stone* -- what, what we see from the *Rockefeller*
20 case and the *Stone* case is that *Karcher* is a variance that
21 grows and grows and grows. And we're at the point where we
22 are beyond *Karcher* right now and --

23 JUDGE KING: And the variance here is --

24 MR. SKINNER: .79.

25 JUDGE KING: .79.

1 JUDGE BAILEY: But the variance in *Rockefeller* was
2 .78. Correct?

3 MR. SKINNER: Well, as, as -- yes, I agree. But
4 we -- that, of course, was pre-*Karcher* and was --

5 JUDGE BAILEY: But was cited by *Karcher* as being a
6 minor deviation.

7 MR. SKINNER: It was, it was cited as an example
8 of a case where a justification for a variation was put --
9 was acceptable. It didn't -- as, as we all have read the,
10 the reference, it doesn't explain or bless the actual
11 finding as varied or, or how the process took place. But I
12 absolutely agree.

13 And there are reasons for variances. We agree with
14 that. One of the things that, I think that we should
15 examine is something that was found in the defendants'
16 argument.

17 They, they say that the policy choices advanced by the
18 plaintiffs and the intervening plaintiff are ones rejected
19 by the Legislature in the balancing process. They
20 participated in the political competition and lost.

21 When, when we take their argument and we actually look
22 at the concurrence in the *Karcher* decision, what we see is,
23 from Justice Stevens is that the Equal Protection Clause --
24 and, granted, this is not an equal protection case, but it's
25 a relevant point.

1 The Equal Protection Clause requires every state to
2 govern impartially. Whether a state adopts rules governing
3 its election machinery or defining electoral boundaries,
4 those rules must serve the interests of the entire
5 community.

6 If they serve no purpose other than to favor one
7 segment, whether racial, ethnic, religious, economic, or
8 political, that may occupy a position of strength at a
9 particular point in time or disadvantage or politically weak
10 segment of the community, they violate the constitutional
11 guarantee of equal protection.

12 So, what effectively the defendants are saying is that
13 Jefferson County participated in the political process and
14 lost, and too bad for the Eastern Panhandle.

15 I think that that is relevant to the examination of how
16 we look at the reasons. What is Jefferson County -- or is
17 the Eastern Panhandle cut intentionally because it can be?
18 What are the reasons? And does -- do -- as we get here
19 today, do three wrongs make a right? Because obviously we
20 have much to, we have much to review from the record. But
21 on its face, the bill doesn't give any reason for the
22 variance.

23 Now, we see in the record that there's a great deal of
24 discussion about how can we fix this to make, to make this
25 bill review proof. And there was no -- the votes on those

1 bills and the discussions on those bills went nowhere. So,
2 today we still do not know the reason for the variance.

3 Now, we believe that there are four issues of disputed
4 fact and they're blended with the law.

5 JUDGE KING: Well, from my reading, I figured the
6 reason for the variance is they, they wanted, didn't want to
7 disturb things much. And, so, they just moved one county
8 over.

9 MR. SKINNER: Well, that's the stated reason.
10 But, of course, they've never addressed the population shift
11 within the Second District. So, what we see is that the
12 Eastern Panhandle's exploding.

13 JUDGE KING: Well, that's what they did. They
14 moved one county. They moved Mason County -- right?

15 MR. SKINNER: Right.

16 JUDGE KING: -- out of your district and into
17 another district.

18 MR. SKINNER: And, and --

19 JUDGE KING: You still say your district is
20 top-heavy, right, by, what, 4800 votes, 4800 persons?

21 MR. SKINNER: Yes, sir. And, so, so, what we see
22 is there's no examination of what has actually happened in
23 terms of the population within the Second District or within
24 the state.

25 So, to say that we're preserving the core districts

1 without explaining what a core district is, what the core of
2 any district is, without examining the population shifts
3 within that district, one can't simply generalize.

4 As *Karcher* makes clear, you can't make general
5 statements of intent. You actually have to find -- make
6 findings of what it is you're talking about.

7 Saying that one is preserving the core of a district
8 when you have such extraordinary population shifts, and
9 we'll hear about some this morning, makes no sense because
10 they need to account for that in terms of their argument
11 about the core. The --

12 JUDGE KING: And they also wanted to preserve
13 county lines. You say -- you're saying they can't do that?

14 MR. SKINNER: Well, they -- certainly they could
15 do that. That could be a possible reason for a variance.
16 But it's, it's curious, as, as we pointed out in our brief,
17 that now in congressional redistricting there's a claim that
18 county lines must be preserved, whereas under the West
19 Virginia State Constitution there's a requirement for State
20 Senate districts to remain within boundaries. And the
21 Legislature has cut right through Berkeley County in State
22 Senate redistricting.

23 JUDGE KING: When did the Legislature first go
24 across county lines and state legislative --

25 MR. SKINNER: I don't know the answer to that

1 question.

2 JUDGE KING: Well, was it after *Stone* or before
3 *Stone*?

4 MR. SKINNER: For State Senate districts?

5 JUDGE BAILEY: Before.

6 JUDGE KING: Judge Bailey says before. Do you
7 agree with that?

8 MR. SKINNER: I would defer to Judge Bailey.

9 JUDGE KING: But you don't know.

10 MR. SKINNER: I don't know.

11 JUDGE KING: All right.

12 JUDGE BAILEY: Ohio County split in 1980.

13 JUDGE KING: He says Ohio County split in 1980.

14 MR. SKINNER: Okay. And, obviously, that's been
15 litigated through the State Court.

16 JUDGE KING: So, the state's been going across
17 county lines for over 30 years.

18 MR. SKINNER: But now when it comes to
19 congressional redistricting, it becomes of such great
20 importance --

21 JUDGE KING: How many states do it this way if you
22 know right now?

23 MR. SKINNER: I do not know, but our geographer,
24 I'm sure, can answer that question.

25 JUDGE KING: Well, Judge -- or Professor Bastress

1 said there were two in his testimony to the Legislature. He
2 said there were Iowa, West Virginia, and Arkansas until last
3 year. And then Arkansas was, had dropped away from the
4 county line observance. So, it's Iowa and West Virginia
5 according to what he said to the Legislature, at least my
6 recollection is. You, you don't know that.

7 MR. SKINNER: And I think Professor Martis will,
8 will give some explanation of that who is our primary
9 witness today.

10 JUDGE KING: But I thought you, you didn't want to
11 put on any evidence. You wanted to say that the burden is
12 on them.

13 MR. SKINNER: Well, I do believe the burden is on
14 them. But, obviously, we don't want to --

15 JUDGE KING: Pardon?

16 MR. SKINNER: I said obviously the burden is on
17 them, but we don't want to --

18 JUDGE KING: Yeah, but you said that you, you
19 prevail on the first prong and then it goes over -- it would
20 be their move then.

21 MR. SKINNER: I agree.

22 JUDGE KING: That's your first position.

23 MR. SKINNER: I agree. But, obviously, we want to
24 be able to meet --

25 JUDGE KING: Well, sure.

1 MR. SKINNER: -- their arguments and their
2 witnesses.

3 JUDGE KING: Okay.

4 MR. SKINNER: Returning to the issues of the
5 disputed fact which includes some law within, whether the
6 Legislature attempted to achieve equality, whether the
7 Legislature had a legitimate state objective in choosing the
8 current plan, whether the current plan was necessary to
9 achieve that goal, and whether the plan was discriminatory
10 to a region.

11 Now, we -- as I've just indicated, Professor Martis
12 from WVU is here to testify today.

13 JUDGE BAILEY: That last one, whether it's
14 discriminatory towards a region, doesn't appear in *Karcher*,
15 does it?

16 MR. SKINNER: No, although what I just suggested
17 when I talked about the concurrence in *Karcher* and
18 discriminatory intent I think is relevant because the
19 defendants raised the issue that for some reason the
20 Jefferson County Commission participated in the political
21 process and lost.

22 So, the, the question is raised whether, in fact, we,
23 we participated -- my client participated in the political
24 process and lost, and whether this is somehow an attempt to
25 dilute the Eastern Panhandle's political power. That's,

1 that's the sole reason why that's there based on their
2 concluding statements in their responsive brief.

3 Professor Martis from West Virginia University is here
4 as a geographer and a nationally known expert on
5 redistricting. We will not be calling, unless it's in
6 rebuttal, --

7 JUDGE KING: Do you have an expert report or
8 anything like that?

9 MR. SKINNER: No, sir, we do not.

10 JUDGE KING: Under the rules here, you're supposed
11 to have an expert report that you've provided to the other
12 side.

13 MR. SKINNER: Well, Your Honor, I think as someone
14 who's participated in a redistricting suit for the first
15 time, and some of us participate every ten years, we are
16 learning the, the rules as we go. And --

17 JUDGE KING: Well, that's not just the rule for
18 redistricting cases. That's just the rule, Rule 26 I think.

19 MR. SKINNER: And, and we could have --

20 JUDGE KING: You could have a report, but that
21 could be -- go ahead. I'm sorry.

22 MR. SKINNER: And, and I, I understand that we
23 are, we are operating on tight time lines and --

24 JUDGE KING: Well, yeah, you are. We all are.

25 MR. SKINNER: Yes. And then, of course, Mr.

1 Cooper will provide testimony. And, and what we'll do in
2 order to aid the flow of things today is we will examine Mr.
3 Cooper so he may give his testimony which --

4 JUDGE KING: Does all this evidence you're talking
5 about, does that go to the first prong?

6 MR. SKINNER: No. We don't, we don't believe
7 there's any evidence --

8 JUDGE KING: What's it go to? Rebuttal on the
9 second prong?

10 MR. SKINNER: Yes, sir.

11 JUDGE KING: So, it would come after whatever they
12 present.

13 MR. SKINNER: Well, it also has --

14 JUDGE KING: Is that right?

15 MR. SKINNER: It also has to do with the remedies.

16 JUDGE KING: Well, and all that would come -- I'm
17 talking about the orderliness of this thing. You -- your
18 view is that you're, you're entitled to prevail on the first
19 prong --

20 MR. SKINNER: That is correct.

21 JUDGE KING: -- and move the Court to the second
22 prong. The burden is on the defendants on the second prong;
23 that you would come back with this evidence that you're
24 talking about in response to the second prong showing and on
25 the remedy.

1 MR. SKINNER: Yes, Your Honor.

2 JUDGE KING: Okay. I just want to make sure I
3 understand you.

4 MR. SKINNER: And I will -- after I address the
5 remedies, I will make the motion on those terms.

6 The -- for the remedies, which you asked us to discuss
7 at this point, --

8 JUDGE KING: No one briefed that, or I didn't find
9 it in the briefs.

10 MR. SKINNER: It was not briefed.

11 JUDGE KING: That's the reason -- right. I wanted
12 to get you to thinking about it.

13 MR. SKINNER: And --

14 JUDGE KING: If you'd happen to prevail, what is
15 it that the Court should or could do?

16 MR. SKINNER: We --

17 JUDGE KING: What are the options? What should
18 the Court do in your view?

19 MR. SKINNER: In, in our view, there are three
20 options.

21 JUDGE KING: In view of the timetables as well.

22 MR. SKINNER: In view of the timetables.

23 The, the first would be to simply adopt what's called
24 the perfect plan, which is the absolute zero variance plan.

25 JUDGE KING: Is that the Unger plan?

1 MR. SKINNER: We can call it the Unger plan. It's
2 Exhibit R on the defendants' brief.

3 JUDGE KING: It's the -- it's referred to in the
4 stipulation and in your complaint, I think Paragraph 16 or
5 something.

6 MR. SKINNER: And I think that it's legally
7 justifiable to adopt the zero variance plan.

8 JUDGE KING: You call it the perfect plan --

9 MR. SKINNER: The perfect plan.

10 JUDGE KING: -- because of the numbers.

11 MR. SKINNER: Yes, sir.

12 JUDGE KING: Okay.

13 MR. SKINNER: The -- second, we would actually
14 urge the adoption of the Facemire plan which is Exhibit U.
15 And the Facemire plan has a low variance, and we'll discuss
16 that further. It's, it's simply one of the options with a
17 lower variance.

18 And, third, we would urge the Court to adopt the lowest
19 variance that it finds palatable given the compactness issue
20 too for immediate adoption, and then defer to the
21 Legislature if they do not like the plan that would be
22 adopted, that they could come back for 2014 with a new
23 congressional --

24 JUDGE KING: So, your proposition, though, is that
25 this Court adopt some plan.

1 MR. SKINNER: Yes, sir. Well, I mean, we believe
2 that the Legislature has failed to adopt a plan where --

3 JUDGE KING: Why couldn't they go back and do it?
4 We have to ask them that. But that's --

5 MR. SKINNER: They certainly could.

6 JUDGE KING: I mean, a Court should only, seems to
7 me, my instincts are, step in and adopt some redistricting
8 plan for a state as a last resort. A Federal Court
9 shouldn't do it except as a last resort.

10 MR. SKINNER: As a practical matter, that's going
11 to be a very difficult thing to accomplish and keep the time
12 lines that we have in front of us because --

13 JUDGE KING: As a practical matter it's going to
14 be difficult. But that --

15 MR. SKINNER: As a practical matter.

16 JUDGE KING: But you didn't say it's impossible.

17 MR. SKINNER: No, it's not.

18 JUDGE KING: That's right.

19 MR. SKINNER: So -- but, but I believe that
20 adopting a plan and then sending it back to the Legislature
21 to make the corrections would satisfy two things. It would
22 deal with the time element and it would also give the power
23 back to the Legislature to --

24 JUDGE KING: And you're thinking the time
25 element -- we can ask -- they know more about it than, than

1 I do and you do maybe. But you're talking about there's a
2 January the 9th filing deadline?

3 MR. SKINNER: Well, the filing begins on January
4 the 9th and goes to January 29th.

5 JUDGE KING: Yeah, but it opens up on January 9th.
6 So, you think something ought to be in place by January 9th?

7 MR. SKINNER: I think that that would make sense.

8 JUDGE KING: Which is, what, next week or the week
9 after next or something?

10 MR. SKINNER: Yes. So, so -- but the other thing
11 that happens is if it is immediately sent back to the
12 Legislature and it goes through the process again, it
13 doesn't guarantee that at the other end of the process that
14 that's not going to be open to challenge as well. So, I,
15 I --

16 JUDGE KING: You mean they might adopt something
17 that's still wrong, in your view wrong.

18 MR. SKINNER: Yes.

19 JUDGE KING: Okay. Well, in that case, it could
20 come back.

21 MR. SKINNER: That's right.

22 JUDGE KING: I mean, the case could be held in
23 abeyance until you could come back here and challenge
24 something.

25 MR. SKINNER: Yes. I'm saying as a practical

1 matter, given the May primary, unless -- and we've seen
2 courts throughout the country do this -- unless we have new
3 deadlines set which I would imagine becomes fairly difficult
4 to start not only --

5 JUDGE KING: You, you don't know whether that can
6 be done or not.

7 MR. SKINNER: I do not know.

8 JUDGE KING: Somebody else would have to answer
9 that.

10 MR. SKINNER: Yes.

11 JUDGE KING: Let me ask you this about that
12 perfect plan, as you call it, the Unger plan. Are there
13 other versions of that that have different geographical
14 configurations that still come up with the perfect numbers?

15 MR. SKINNER: Your Honor, I think that Mr. Cooper
16 can speak to this, but there are -- we could create many,
17 many plans with the use of the computer technology.

18 JUDGE KING: That's what I was thinking.

19 MR. SKINNER: Simply looking for --

20 JUDGE KING: There ought to be a lot of versions
21 of, of a -- geographically that would meet the -- that
22 would, that would be perfect.

23 MR. SKINNER: If the goal is simply to get to zero
24 variance and not consider anything else, there can be any
25 number of plans.

1 JUDGE KING: Well, *Karcher* can be read to say
2 that. And then you can take into account all these other
3 things, political considerations, where the incumbents are
4 and county lines and whatever you need, whatever you want to
5 take into account.

6 MR. SKINNER: And I believe what *Karcher* is saying
7 is you need to achieve this and you need to take these other
8 things into consideration to do it.

9 JUDGE KING: But there's no *de minimis* rule.
10 Isn't that what *Karcher* said? Isn't that right?

11 MR. SKINNER: Yes, sir.

12 JUDGE KING: Pardon?

13 MR. SKINNER: Yes, sir.

14 JUDGE KING: But you don't know of any other plans
15 that, that somebody's come out of a computer with that are
16 perfect from the standpoint of numbers other than the one
17 that I called the, the Unger plan - I think that's the way
18 you pronounce his name - and you call the perfect plan.

19 MR. SKINNER: There are -- to my knowledge, there
20 are no other perfect plans. Mr. Cooper may know of other
21 perfect plans.

22 JUDGE BERGER: Mr. Cooper came up with a plan
23 since this litigation began that has the same variance as
24 the plan that you're referring to as the perfect plan, did
25 he not?

1 MR. SKINNER: I, I apologize. We have been -- one
2 of the things that, that the Jefferson County Commission has
3 been concerned with is less about getting the remedy --
4 asserting a, an agenda of a particular remedy and more about
5 correcting the process.

6 JUDGE BAILEY: In the perfect plan, as you refer
7 to it, Harrison County is split. How was Harrison County --
8 where is Clarksburg?

9 MR. SKINNER: Clarksburg is within the Second --
10 is within the district that Jefferson County is in.

11 JUDGE BAILEY: So, Bridgeport would be as well.

12 MR. SKINNER: I believe, yes.

13 JUDGE BAILEY: And in Kanawha County, Charleston
14 is in the First District; is that correct?

15 MR. SKINNER: I believe.

16 JUDGE BAILEY: Okay.

17 JUDGE KING: That's in the Unger plan?

18 JUDGE BAILEY: Yes.

19 MR. SKINNER: Yes.

20 JUDGE KING: And that was --

21 MR. SKINNER: There are two counties that are
22 split.

23 JUDGE BAILEY: And the -- am I correct that the
24 Unger plan was never introduced by any senator or delegate?

25 MR. SKINNER: I think that we would dispute that.

1 It's, it's unclear from the record what happened in the
2 committee and whether it was introduced or not.

3 JUDGE KING: Well, how did Senator Unger's name
4 get on it?

5 MR. SKINNER: Well, it was -- he put it forward as
6 the originating plan.

7 JUDGE KING: Do you, do you -- did he draw it up
8 or did he have some mathematician?

9 MR. SKINNER: It was drawn up --

10 JUDGE KING: Pardon?

11 MR. SKINNER: It was drawn up by the redistricting
12 office.

13 JUDGE KING: It was drawn up by the redistricting
14 office here in Charleston, the legislative redistricting
15 office as a possibility.

16 MR. SKINNER: Yes.

17 JUDGE KING: Okay.

18 MR. SKINNER: And, and with that, I would make
19 the, the motion that --

20 JUDGE KING: A motion?

21 MR. SKINNER: A motion that the -- on the first
22 prong of the *Karcher* test that the -- based on the record in
23 front of the Court, that we have met our initial burden
24 under *Karcher* and we should prevail and the burden should be
25 shifted.

1 JUDGE KING: Thank you, Mr. Skinner.

2 Mr. Cooper, Mr. Skinner has used most of your time, but
3 we'll give you a few minutes.

4 MR. COOPER: How much do I have?

5 JUDGE KING: I said we'll give you a few minutes.

6 MR. COOPER: Thank you. And I'll be very brief.

7 First, yes, we have the -- we submit that the, both the
8 intervening plaintiff and the original plaintiffs have met
9 the first prong of the *Karcher* test.

10 For example, I submitted three plans that the -- that
11 are Cooper plans numbers 1, 2, and 3, copies of which were
12 attached to the intervenor's complaint which were several
13 hundred in variance from numerical perfection; then Cooper
14 Plan Number 4 which I developed after this litigation began.
15 The, the maximum difference is four, four people from the
16 smallest to the largest.

17 JUDGE KING: But it's not as perfect as the Unger
18 plan.

19 MR. COOPER: It's, it's not as numerically perfect
20 as, as what you call the Unger plan. It's almost. I didn't
21 want to split anymore counties than necessary, so I split
22 one.

23 JUDGE KING: So, so then your explanation for it
24 not being as perfect as the Unger plan is that you didn't
25 want to split a county.

1 MR. COOPER: I wanted to -- yes, sir.

2 JUDGE KING: Now, which is the most important,
3 though, the Equal Protection Clause or the county line?

4 MR. COOPER: The Equal Protection Clause is the
5 most important, numeric equality. But, obviously, having
6 been a witness in the, the *Stone vs. Hechler* case, I know
7 that judges do not always go with necessarily the closest
8 plan.

9 So, I submitted four that have a smaller variance than
10 the, the plan that was approved by the Court in *Stone vs.*
11 *Hechler* 20 years ago.

12 As for the -- I think there was a question about when
13 they started splitting counties in the legislative
14 redistricting. That occurred as a result of the 1972 case
15 that was styled *Goines vs. Rockefeller*. And then in the --
16 it was extended after Jay Rockefeller was no longer
17 Secretary of State. Hike Heiskell was the Secretary and it
18 was called *Goines vs. Heiskell*.

19 It was at that point that the -- it was determined that
20 there was no way under the Equal Protection Clause that you
21 could have variances of less than -- you could meet the, the
22 variances under the Equal Protection Clause that applied to
23 legislative redistricting.

24 Now, that's a completely different test from the test
25 before us now which is exact numerical equality. But I'm

1 saying that's when they began splitting counties in the
2 Legislature. Up until the decision in 1972, they have not
3 split counties among different senatorial or delegate
4 districts.

5 JUDGE KING: So, you're saying they've been
6 splitting counties in the legislative, Legislature for 40
7 years?

8 MR. COOPER: Yes, since 1973, I believe, if you
9 look at *Goines vs. Heiskell* which is cited under the --

10 JUDGE KING: Is there, is there a distinction that
11 you know of between splitting a county for, for the House of
12 Delegates or for the State Senate as opposed to the
13 congressional district?

14 MR. COOPER: It's just -- it's never been done --
15 before this year, nobody has ever come up with a plan in
16 West Virginia. I mean, I've been a witness in the last two
17 Federal Court cases on congressional redistricting. This is
18 the first year that anyone has adopted -- has offered a plan
19 to the Legislature that split any counties. So, it wasn't
20 done and the plan --

21 JUDGE KING: That's not the question I'm asking
22 you.

23 MR. COOPER: I'm sorry.

24 JUDGE KING: I'm asking you if there's any basis
25 that you know of for making a distinction, a rational basis

1 for making a distinction between splitting the county for a
2 House of Delegates map or a Senate map as opposed to a
3 congressional district map.

4 MR. COOPER: As of 2011 --

5 JUDGE KING: You say they've been doing it for the
6 House of Delegates and the Senate for nearly 40 years.

7 MR. COOPER: Yes, sir.

8 JUDGE KING: They've never done it for a
9 congressional district.

10 MR. COOPER: Yes, sir. And --

11 JUDGE KING: Do you know of any reason that, that
12 could justify not doing it for congressional districting?

13 MR. COOPER: Well, if I may, 20 years ago in the
14 *Stone* case, if you look at the two maps attached to the
15 opinion, the one that I had offered had a variance of only
16 15 people from the smallest to the largest.

17 In that particular year, because of kind of a fluke, it
18 was possible to come very, very close so that, that -- from
19 the ideal population, there were fewer than ten people in
20 either direction. But that's not possible -- at least
21 nobody's come up with any plans that don't split counties
22 that are closer to the three plans that were attached to the
23 intervenor's complaint. So -- but those were all in the
24 hundreds.

25 So, we have a different situation. It's a lot easier

1 to meet the first prong of the *Karcher* test because there
2 you had -- the plan passed by the Legislature had a variance
3 of 556 from the largest to the smallest. Here in 2011 you
4 have a variance of over 4000 from the largest to the
5 smallest. So, it's much, much easier to meet the first
6 prong of the *Karcher* test.

7 And it was a question also with respect to the *Wells*
8 vs. *Rockefeller* case and, and several things that
9 distinguish that from this case. One is that you had four
10 congressional districts. If you're not going to split
11 counties --

12 JUDGE KING: In that year they were going from
13 four to three; right?

14 MR. COOPER: No. In 1972 they were going from
15 five to --

16 JUDGE KING: Five to four and then four to three.

17 MR. COOPER: Right. In terms of -- as I explained
18 in one of my briefs, you basically only have -- if you don't
19 split counties, you only have 48 building blocks because you
20 have to put Jefferson, Berkeley, Morgan, and Hampshire in
21 one congressional district, and you have to put Hancock,
22 Brooke, Ohio, Marshall, and Wetzel in one congressional
23 district.

24 So, instead of 55 possible building blocks, you only
25 have 48. So, it's a lot easier to approach the numerical

1 equality when you're, you have 48 building blocks with three
2 congressional districts. But if you have 48 building blocks
3 with four congressional districts, you can't come -- in
4 terms of probability, it's a lot harder to come up with the
5 same degree of variance that -- I mean, if you had a
6 computer do it, in most years you would not be able to come
7 as close with, with four congressional districts for the 55
8 counties as you do now. So, that's one, one difference.

9 The other difference in the 1972 case was that the
10 plaintiffs in that case, the West Virginia Civil Liberties
11 Union and the three, one or two or three individuals, they
12 didn't want the Court to adopt the, the most, the closest
13 plans. What they wanted was to have an at-large election.

14 Basically, the -- what -- if you look at the
15 congressional districts before and after, you'll see that
16 Ken Hechler had been placed in, in the plan with -- I
17 believe her name is Elizabeth Kee or Kees who was the
18 congresswoman.

19 And the closest plan when I researched this 30 years
20 ago -- and you can -- this is my recollection from 30 years
21 ago. My recollection is one of the closer plans was putting
22 John Slack and Ken Hechler in the same district.

23 So, the people who were, you know, behind it didn't
24 want to go with the closest plan. Now, I specifically
25 embraced all four plans that I've offered and would gladly

1 have the Court put any of those into effect. But that's a
2 different situation from the one --

3 JUDGE KING: Did you ever find -- you referred in
4 your brief to an opinion of Judge Hall in the early '80s.

5 MR. COOPER: Yes, sir.

6 JUDGE KING: Did you ever find that?

7 MR. COOPER: I don't have -- the case file?

8 JUDGE KING: Well, the opinion. You, you referred
9 to it, said it was an unpublished opinion --

10 MR. COOPER: Yes, sir.

11 JUDGE KING: -- that Judge Hall opined that
12 whatever they did in 1980 was unconstitutional.

13 MR. COOPER: Yes.

14 JUDGE KING: Did you ever find it?

15 MR. COOPER: I don't have a copy of the file. My
16 brother John was the counsel in that case.

17 JUDGE KING: But you don't have it then?

18 MR. COOPER: I don't have it.

19 JUDGE KING: Was it in the District Court in
20 Charleston?

21 MR. COOPER: Yes, United States District Court for
22 the Southern District of West Virginia. Judge K.K. Hall was
23 one of the justices, one of the judges. And I'm trying to
24 remember who the other two were.

25 JUDGE KING: That's all right.

1 MR. COOPER: I believe Judge Kidd may have been
2 one of the others.

3 JUDGE KING: Maybe we can find that somewhere.

4 MR. COOPER: Yes, sir. But I --

5 JUDGE KING: But you think that if you can find
6 it, it helps you.

7 MR. COOPER: It, it was only giving a historical
8 reference. This is the third congressional redistricting
9 case that's gone before a Federal Court during the last --

10 JUDGE KING: What do you think, what do you think
11 about the remedy situation? You say you join in the motion.

12 MR. COOPER: I join in the motion. Obviously,
13 I've offered four different plans than the one that was,
14 that was submitted by the original plaintiffs.

15 Now, there is a problem with the original plaintiffs'
16 plan in that we don't know from the, from the record that
17 I've seen, and there could have been a late filing that I
18 haven't seen, but it doesn't actually list the -- in the
19 plan it doesn't indicate whether any precincts are split.

20 That's the first question because if there are any
21 split precincts, then you're going to have to go through a,
22 a process with the Secretary of State or the County
23 Commission of the counties are going to have to split
24 precincts.

25 JUDGE KING: Does your Plan 4 split precincts?

1 MR. COOPER: No, sir, no split precincts. Six
2 precincts go in with the First Congressional District.

3 JUDGE KING: You abide by -- you go from the
4 county down to magisterial districts?

5 MR. COOPER: I just went by precincts.

6 JUDGE KING: You went by precincts?

7 MR. COOPER: Yes, sir.

8 JUDGE KING: You respect precinct lines --

9 MR. COOPER: Yes, sir.

10 JUDGE KING: -- but you don't change any precinct.

11 MR. COOPER: Yes. That was one of the, one of the
12 things --

13 JUDGE KING: What do you think the Court should do
14 if it finds there's a problem with the present plan? What
15 should the Court do?

16 MR. COOPER: Well, the first thing -- I mean, you
17 have two choices. One, go to the Legislature, which is
18 what --

19 JUDGE KING: Right, or adopt a plan.

20 MR. COOPER: The other is adopt a plan.

21 JUDGE KING: Which one should we do?

22 MR. COOPER: I would prefer you adopt one of the,
23 one of the plans.

24 JUDGE KING: So, you agree with Mr. Skinner.

25 MR. COOPER: Sir?

1 JUDGE KING: You agree with Mr. Skinner.

2 MR. COOPER: Because of the time frame right
3 now -- today's the 28th of December. I've run for Congress
4 once before. So, if you don't make -- if the Legislature
5 doesn't come up with a plan by mid January, the
6 congressional candidates are not exactly going to know in
7 which districts they want to file, even though any
8 congressional candidate in West -- anybody who lives in West
9 Virginia who is over the, the appropriate age can run in
10 that district. I could run -- if I wanted to run for
11 Congress, I could run in Congressman Rahall's current
12 district or I could run in Congressman McKinley's or I could
13 run in Congresswoman Capito's. Still, considering the fact
14 at some point candidates have to make a decision, it's
15 important to get this matter resolved expeditiously.

16 JUDGE BERGER: Mr. Cooper, --

17 MR. COOPER: Yes, Your Honor.

18 JUDGE BERGER: -- your Plan 4, I think, splits
19 Taylor County; is that correct?

20 MR. COOPER: Yes, ma'am.

21 JUDGE BERGER: The three plans that were
22 originally attached to your petition to intervene split no
23 counties; is that correct?

24 MR. COOPER: You're correct, Your Honor.

25 JUDGE BERGER: All right.

1 MR. COOPER: And the closest I could come was a
2 variance of several hundred. I couldn't get down to single
3 or double digits.

4 JUDGE KING: Very good, sir.

5 MR. COOPER: Thank you.

6 JUDGE KING: Let me ask you one other thing.

7 MR. COOPER: Yes, sir.

8 JUDGE KING: You say you were an expert witness in
9 two of these earlier proceedings?

10 MR. COOPER: I, I was qualified as an expert. I
11 testified in both, but I -- they actually qualified me as an
12 expert.

13 JUDGE KING: Were you an intervening plaintiff in
14 either of the proceedings in which you testified?

15 MR. COOPER: No, Your Honor. I was just the one
16 who helped --

17 JUDGE KING: Were you a lawyer in either of the
18 cases in which you testified?

19 MR. COOPER: My -- in the first case, my brother
20 John was. I was not. In the second --

21 JUDGE KING: But here you --

22 MR. COOPER: I was the state attorney. I could
23 not, I could not sue the state. I worked for the department
24 of -- first the --

25 JUDGE KING: I don't need an explanation.

1 MR. COOPER: Okay.

2 JUDGE KING: But the point I'm getting to is that
3 here, though, you are an intervening plaintiff.

4 MR. COOPER: Yes, sir.

5 JUDGE KING: And you're counsel to an intervening
6 plaintiff.

7 MR. COOPER: Yes, sir.

8 JUDGE KING: And you want to be an expert witness.
9 Well, lawyers normally don't testify in proceedings in which
10 they're lawyers. Do you know that?

11 MR. COOPER: Yes, sir.

12 JUDGE KING: So, you must think you can carve out
13 some exception where you, in a case in which you are
14 counsel, and you're speaking now as counsel from that
15 lectern, that, that there's -- it's proper for you to be
16 accepted as an expert witness in that same case. And that's
17 a new one to me. And I just wanted to put that out there
18 for thought.

19 MR. COOPER: I didn't plan to, to adduce, have a
20 lot of testimony adduced from me. I just basically --

21 JUDGE KING: I mean, you can make -- you can say
22 the same thing from that lectern that you could say from the
23 witness stand. You probably already have said a lot of it.
24 But we don't even like lawyers making affidavits or
25 declarations in cases in which they are counsel, much less

1 getting on the witness stand.

2 MR. COOPER: I understand. But since somebody had
3 to make the affidavit, I was, I was the --

4 JUDGE KING: But, but lawyers are, as officers of
5 the court, we, we, they've taken an oath.

6 MR. COOPER: Yes, sir.

7 JUDGE KING: And --

8 MR. COOPER: The things of which I'm an affiant
9 are not ones of material dispute. I mean -- so, that was
10 basically to move the process along.

11 JUDGE KING: Okay.

12 MR. COOPER: I wasn't -- I did observe what
13 occurred with respect to the origination of the bill that
14 passed the, the West Virginia State Senate. So, I certainly
15 know what went on in the committee. I was there. But if
16 you don't allow me to testify --

17 JUDGE KING: We have lots of records about all
18 that.

19 MR. COOPER: Yes, sir.

20 JUDGE KING: You've all given us a lot of
21 materials about that, and we have a lot of material. But,
22 anyway, I just wanted you to think about that. Let's see
23 what the defendants have to say.

24 Mr. Majestro.

25 MR. MAJESTRO: Thank you, Your Honor.

1 May it please the Court, my name again is Anthony
2 Majestro. I'm here representing Speaker of the House
3 Richard Thompson. Today the presentation of the defense of
4 the congressional redistricting plan enacted by the
5 Legislature, I'm sharing that with Mr., Mr. Carenbauer who
6 is here representing Senator Kessler.

7 And with respect to Your Honor's questions, we sort of
8 split those up. So, I'm going to handle some of them and,
9 and he's going to, he's going to handle some of them if
10 that's, that's okay with the Court.

11 And I think what I, what I would like to do is start
12 off discussing our view of what the law is. And we think
13 it's not quite as simple as, as the plaintiffs.

14 I'd like to start out with the idea behind the
15 conclusion in our brief which I drafted, this idea of they
16 participated in the legislative process and lost.

17 Now, they want to argue that that is some sort of
18 discrimination. But, in essence, this is the second
19 redistricting case I've had. I had to do the -- I had the
20 honor of defending the House in the legislative
21 redistricting case involving the House of Delegates.

22 And what I learned in that case and I learned in this
23 case is what this Court said in both *Deem vs. Manchin* and in
24 *Stone vs. Hechler*. And, that is, redistricting involves
25 trade-offs. And the Supreme Court has recognized this in

1 several cases.

2 And what happens is everybody has a different view of
3 what is best. And generally what they think is best is what
4 is best for their particular area or their particular
5 constituents. So, if we, for example, keep all of the
6 Eastern Panhandle whole like the Unger plan did, then we
7 have to do things like split Kanawha County and split
8 Harrison County.

9 So, in essence, what happens in the legislative process
10 is the Legislature, as this Court has said in *Deem vs.*
11 *Manchin* and *Stone vs. Hechler*, and as the Supreme Court has
12 said in the *Wise vs. Lipscomb* case, redistricting is a
13 legislative decision. Legislatures make political decisions
14 and, and make these judgments. And the role of the courts
15 in this process is to only intervene if there's a clear
16 constitutional violation.

17 So, that's why we're not here to figure out the best
18 plan. We're here to figure out whether the plan that was
19 adopted by the Legislature after careful study, after
20 consideration of amendments, was, is a constitutional plan.

21 JUDGE KING: Whether it satisfies the Equal
22 Protection Clause --

23 MR. MAJESTRO: Well, --

24 JUDGE KING: -- and, and the principles
25 established by the Supreme Court.

1 MR. MAJESTRO: Well, actually, Your Honor, it's
2 Article I of the Constitution. And what -- when I finish, I
3 want to talk a little bit about how equal protection is
4 different than Article I and why it shouldn't be. But, in
5 essence, it's whether it establishes the United States
6 Constitution in Article I which provides for the selection
7 of congressmen.

8 I guess the next point I would make is that we hear a
9 lot about this gigantic variance. Now, we're talking about
10 .79 of one percent. That is a small variance. It is not a
11 large variance. And that is one of the themes that the
12 defendants will present today.

13 The Supreme Court has never said there is a variance
14 too large to be justified in *Karcher*. In fact, what we do
15 know -- what they say in *Karcher*, as Judge Bailey, Judge
16 Bailey explained previously, is that they cited the
17 *Rockefeller* opinion. And I want to read a quote that the
18 court used when they cited the *Rockefeller* opinion.

19 They cited the point -- what Mr. Cooper says was a
20 .788 percent variance. The opinion only says .78. In Mr.
21 Cooper's brief he did the math at .788, pretty close to .79.

22 And what they said about that variance was that it was
23 an example of a small deviation that could be justified.
24 That's the United States Supreme Court in *Karcher* talking
25 about *Rockefeller* as a small deviation.

1 In addition, there was another -- there was an Illinois
2 case called *Skolnick* that had already been decided prior to
3 *Karcher*. There was a .75 percent variance in that case.

4 We've cited other examples in our brief. There is an
5 Arkansas case in 1982 with a .78 percent variance. There
6 are actually -- and then another Arkansas case in 1991 with
7 a .73 percent variance.

8 JUDGE BERGER: Mr. Majestro, how helpful to us is
9 this discussion about whether the deviation is small or
10 large when the Court says there's no *de minimis* variance?
11 You know, you can compare them. You can cite case law to us
12 where the Court has said this variance is acceptable with
13 justification.

14 But when we're talking numbers or the percentage of the
15 variance, I don't know how helpful that is when there is no
16 *de minimis* variance, or there is no variance that does not
17 require some justification under case law.

18 MR. MAJESTRO: I would agree with you, Your Honor,
19 that there is -- that under *Karcher* there is -- there has to
20 be justification shown. But what *Karcher* says is --

21 JUDGE KING: You'd also agree under *Karcher* that
22 there's no *de minimis* rule.

23 MR. MAJESTRO: That's what the case says.

24 JUDGE KING: That's exactly what the case says.

25 MR. MAJESTRO: I would agree with that, Your

1 Honor.

2 JUDGE KING: Okay. But that seems to be the theme
3 of your presentation so far that this .79 in this present
4 plan is *de minimis*.

5 MR. MAJESTRO: Well, I believe it is *de minimis*.
6 But I think even under *Karcher* --

7 JUDGE KING: But that doesn't make any difference
8 under *Karcher*.

9 MR. MAJESTRO: Well, and that's, that's -- and
10 I -- but in answer to Judge Berger's question, the reason we
11 believe it's significant that it's considered small is
12 because what the Court said in *Karcher* is the amount of
13 showing you make depends on the size of the variance.

14 In *Rockefeller*, based solely on, on how, on keeping
15 the, the districts compact, the court said a .79 variance is
16 okay. And the United States Supreme Court said that was
17 okay based solely on that one consideration.

18 We would contend the record in this case has other
19 state policies that are, that are political under *Karcher*,
20 but that's why it's important -- I mean, Mr. Cooper filed a
21 motion saying as a matter of law, .79 is too high. That's
22 why we believe it's important for the Court to understand in
23 deciding whether we've met our burden under part two that
24 this .79 percent variance is not large.

25 JUDGE BERGER: Do you agree when you mention

1 burden that the plaintiff has met the initial hurdle under
2 *Karcher*, Mr. Majestro?

3 MR. MAJESTRO: With respect to the claim on
4 variance, yes. They also bring a claim under the State
5 Constitution arguing that it violates Article I of the State
6 Constitution's requirement that congressional districts be
7 compact.

8 We, we believe that if they're going to make that
9 argument and, and try to prevail on that here today that
10 they bear the burden of showing that the district that was
11 adopted is not compact.

12 JUDGE KING: So, you, you agree they've met the
13 first prong of *Karcher* with respect to what are denominated
14 in the complaint as Counts One and Two.

15 MR. MAJESTRO: If -- and I, I --

16 JUDGE KING: But not on Count Three.

17 MR. MAJESTRO: And I don't want to -- I want to
18 make sure -- I probably -- yes, but I want to make -- I want
19 to put one qualification, Your Honor. I want to, I want
20 to -- we believe that, as we expressed in our brief, that
21 *Karcher* was a bad idea, and that we reserve -- we're not
22 conceding --

23 JUDGE KING: *Karcher* was a bad idea?

24 MR. MAJESTRO: Yes. We, we, we think Justice
25 White got it right in the dissent. It's a five-four

1 opinion.

2 JUDGE KING: *Karcher* is bad law.

3 MR. MAJESTRO: Bad law, and we --

4 JUDGE KING: But we, but we, but we have to, all
5 of us, follow it for now. And you can preserve your
6 position with respect to Justice White and take this case to
7 the Supreme Court and get it all straightened out.

8 MR. MAJESTRO: Right. I -- or if they, they
9 decide to take it to the Supreme Court --

10 JUDGE KING: For now, since 1983 we've all had to
11 abide by it.

12 MR. MAJESTRO: I would agree with that, Your
13 Honor. And that's why -- and I'm not trying to mince words
14 on this. We acknowledge *Karcher* governs the case here
15 today. We just want to reserve our right if after this
16 Court approves this plan they decide to appeal, we'd
17 probably like to convince the Supreme Court that we
18 shouldn't have to do this again in ten years.

19 Now, *Karcher* recognized four factors. And I think in
20 the law it's important to also recognize under *Karcher* that
21 *Karcher* itself was a departure from *Kirkpatrick*, which the
22 dicta in *Kirkpatrick* says, well, you can't, you can't use
23 splitting counties and these other things as justifications
24 for, for variances.

25 *Karcher* is clear, and as Justice White's dissent in

1 *Karcher* makes clear, that there are four, at least four
2 grounds that are permissible to justify a, a small variance
3 like the variance here.

4 And that's making districts compact, respecting
5 municipal boundaries, preserving the cores of prior
6 districts, and avoiding contests between incumbent
7 representatives. *Karcher* is clear that that, that's
8 allowed.

9 I -- with respect to the law, I want to talk a little
10 bit about the law with respect to some of those factors.

11 On compactness, what -- go back to the *Rockefeller* and
12 the *Stone* opinions. And they verify that, that trying to
13 keep a district as compact as possible, given the other
14 considerations, is a valid, is a valid state purpose that
15 justifies a deviation under *Karcher*.

16 Again, as I said before, the Court found that
17 compactness alone was sufficient in *Rockefeller*.

18 The next factor I'd like to talk a little bit about is
19 recognizing municipal boundaries. The state policy approved
20 in *Karcher* in this case involves West Virginia's
21 Constitution, Article I, Section 4, which requires
22 congressional districts to be formed of contiguous counties.
23 It's a constitutional requirement. Clearly, that's a state
24 policy since 1863. And I think --

25 JUDGE KING: Contiguous counties?

1 MR. MAJESTRO: Counties, not parts of counties.

2 JUDGE KING: Contiguous counties.

3 MR. MAJESTRO: Right.

4 JUDGE KING: And you say that means what?

5 MR. MAJESTRO: We say that means that you, you
6 build the districts out of counties, not parts of it.

7 JUDGE KING: So, that is -- you say there's a
8 constitutional basis, West Virginia constitutional basis for
9 recognizing the county lines.

10 MR. MAJESTRO: Exactly. And that that -- and that
11 as the Court recognized in *Stone* and in *Rockefeller*, that is
12 a, that is a state policy that justifies a deviation.

13 The next policy we believe is applicable is preserving
14 the cores of, of the previous districts. *Stone* -- this
15 Court in *Stone vs. Hechler* recognized that as a, as a
16 policy. It's clear -- Mr. Carenbauer is going to go through
17 the history of these districts and show you some maps, but
18 it's clear that's what was happening here.

19 And the other point I make, in *Stone vs. Hechler* the
20 Court said what a core means -- now, we're going to -- I
21 guess we're going to hear expert testimony on how we're not
22 preserving the cores.

23 But we would contend that testimony is irrelevant
24 because what *Hechler* says is what a core means is what the
25 Legislature decides it means. You know, maybe in geography

1 up at WVU it means something different. But this Court has
2 recognized in *Stone* that the -- that it should defer to the
3 legislative definitions of these, of these terms of what is
4 compact and what is core.

5 All right. Let's move to the second claim, the
6 compactness claim. There's a real long quote, and I won't
7 read it to the Court, but it's obvious to anybody who's ever
8 lived in this state, but it's a long quote from *Stone vs.*
9 *Hechler* talking about the geography of the State of West
10 Virginia. We have panhandles, rivers, mountains, large
11 cities next -- large counties next to small counties.

12 So, the Legislature, when it has to decide how to
13 configure districts and add these counties together to
14 configure those districts, has to keep in mind these
15 geographic limitations that are inherent in the state based
16 on its geography.

17 So, it's not as easy as it would be, say, in Wyoming
18 where if you wanted to draw four contiguous districts, you'd
19 maybe just draw two lines across the state. And, you know,
20 they would be compact and meet all those requirements. In
21 West Virginia it's much more difficult to do that.

22 With respect to compactness, the *Stone* --

23 JUDGE KING: You'd say West Virginia is not
24 compact.

25 MR. MAJESTRO: West Virginia is not compact.

1 That's exactly right, Your Honor. And I think if you took
2 the state as one district and drew -- and tried to put some
3 of these measurements that, as opposed to these mathematical
4 equations the supposed experts present, you'd come up with a
5 non-compact state.

6 JUDGE KING: So, if we only had one district, we'd
7 be in violation of our own constitution.

8 MR. MAJESTRO: I think we probably would.

9 Two points I want to make on the law on compactness.

10 One is that in *Stone vs. Hechler*, this Court recognized
11 that, that the Legislature could ignore those math equations
12 that nobody understands and, and take the common sense view
13 of compact.

14 And that's, that's what we contend the Legislature did
15 here. It's permissible. I don't think the equations that
16 we're going to hear testimony about today, if we hear it,
17 were the kinds of things the drafters of our Constitution
18 had in mind when the Constitution was passed. I think they
19 think, they thought of compactness as the way you and I
20 would think of compactness.

21 JUDGE KING: You're talking about the West
22 Virginia Constitution.

23 MR. MAJESTRO: Exactly. And this is solely a West
24 Virginia constitutional requirement.

25 The second point I would like to make on the law on

1 compactness -- we've said a lot about the Senate districts.
2 And I have up on the screen -- that is the West Virginia
3 Senate districts under the, the bill that was passed and
4 approved by the Supreme Court in *State ex rel. Cooper vs.*
5 *Tennant*.

6 Now, the Supreme Court hasn't written its opinion, so
7 we don't know exactly what the reasoning is, but we do know
8 that Mr. Cooper's challenge in that proceeding that these
9 districts were not compact was rejected.

10 So, I, I think if we want to know what compactness
11 means in the State Constitution, we know our Supreme Court
12 has approved some districts which, based on my common sense
13 definition of the word "compact," are relatively less
14 compact than the districts at issue here.

15 The -- you know, if you take a look at, for example,
16 the 6th District in Southern West Virginia runs in a --

17 JUDGE KING: The one down there on the Big Sandy
18 and the Tug River?

19 MR. MAJESTRO: Yes, Your Honor. That, that one --

20 JUDGE KING: It runs from Huntington to Bluefield?

21 MR. MAJESTRO: I -- in the, in the -- you know, I
22 think Mr. Cooper -- and I was not counsel -- I did not
23 defend the Senate plan. Mr. Rodd did. But I, but I believe
24 the compactness of these districts was challenged in that
25 plan and was -- and that challenge was rejected by the

1 Supreme Court.

2 And, lastly, on --

3 JUDGE KING: How many counties does that district
4 split?

5 MR. MAJESTRO: I think Mr. Rodd would know the
6 answer to that. We might inquire of him.

7 Do you remember, Mr. Rodd?

8 MR. RODD: I'm afraid I don't.

9 MR. MAJESTRO: Looks like three from, from --

10 JUDGE KING: At least three.

11 MR. MAJESTRO: Yes.

12 JUDGE KING: And is Mercer County intact there?

13 MR. MAJESTRO: What's, what's --

14 JUDGE KING: Mercer County is intact and the
15 others are split?

16 MR. MAJESTRO: That's what it looks like to me,
17 Your Honor, from the map.

18 But I want to tell you why -- I want to answer the
19 question you asked Mr. Cooper as to why it's different with
20 respect to why the Legislature does things differently with
21 the State Senate districts in its compactness requirement
22 versus the, the legislative districts.

23 And that is because the districts are smaller, so it's
24 necessary to split the districts to come up with -- to meet
25 the equal protection guidelines. When you're dealing with

1 the bigger congressional districts, you can have variances
2 less than one percent without splitting districts.

3 JUDGE KING: Can you have them -- can you have
4 them that are precise without splitting counties?

5 MR. MAJESTRO: I don't -- I mean, I don't
6 believe --

7 JUDGE KING: Apparently you can.

8 MR. MAJESTRO: I don't believe you can.

9 JUDGE KING: You agree that Mr. Cooper's plan,
10 whatever number it is, 3 or, that that is the best you can
11 do keeping county lines intact?

12 MR. MAJESTRO: I did not -- it's the best that's
13 been presented I think.

14 JUDGE KING: The best that's been presented.

15 MR. MAJESTRO: I, I would not pretend to, to be
16 able to come up with all of the various permutations that
17 are necessary --

18 JUDGE KING: Okay.

19 MR. MAJESTRO: -- to, to, to do that.

20 The other important thing about the -- I had one more
21 point on the Senate districts. I think it's important to
22 understand when we started splitting districts. The state
23 started splitting districts because the Federal Courts told
24 them they had to.

25 JUDGE KING: Splitting counties you mean?

1 MR. MAJESTRO: Splitting counties.

2 JUDGE KING: Splitting counties for state
3 legislative, or the House of Delegates and for the State
4 Senate races.

5 MR. MAJESTRO: Exactly.

6 JUDGE KING: They did it because some Federal
7 Court told them to.

8 MR. MAJESTRO: In the '70s -- prior to the '70s,
9 prior to the equal protection jurisprudence becoming the
10 law --

11 JUDGE KING: They first did it in the '70s?

12 MR. MAJESTRO: I think Mr. Cooper -- my memory is
13 Mr. Cooper was correct on that.

14 JUDGE KING: Okay.

15 MR. MAJESTRO: And, so, that's why they're
16 splitting districts. It's, it's not that the state adopted
17 some different policy. The state was forced to adopt that
18 policy in order to comply with equal protection. We don't
19 believe that's necessary, that that's necessary with respect
20 to congressional districts.

21 And lastly, Your Honor, and then I want to defer to Mr.
22 Carenbauer who wants to talk a little bit about some of the
23 facts in these different plans, is that the, the opinion in
24 the 1980s, I think the Judge Hall case that there's been
25 some discussion about, our research -- we haven't found the

1 opinion, but our research and the collective memory of our,
2 of our clients and the staff is that what happened in 1980
3 was the state was sued because it didn't redistrict after
4 the 1980 Census at all.

5 So, you had the, the plan that was approved in
6 *Rockefeller* that was .79 then. By 1980, it was even a
7 greater variance and the state didn't change until that
8 lawsuit was filed. The Legislature -- then the Legislature
9 went into session after the ruling, I believe. And, I mean,
10 I have not seen the records. It's based on my
11 understanding. And then the redistricting -- the 1980 plan
12 which was not challenged. I think I'm correct on that.

13 So, I -- in terms of the -- I guess I would like to
14 turn the presentation over to Mr. Carenbauer who's going to
15 talk about the various -- options on various maps. And then
16 after he finishes that, if Your Honor still gives me some
17 more time, I'll answer the questions on remedy unless you
18 would like me to do that now.

19 JUDGE KING: Let's hear from Mr. Carenbauer first.
20 I think that would be more orderly.

21 Mr. Carenbauer.

22 MR. CARENBAUER: May it please the Court, my name
23 is George Carenbauer and I'm here on behalf of Senate
24 President Jeff Kessler.

25 I'd like to begin by putting this in the historical

1 context. This is not the first time this has ever happened
2 in what we refer to as the modern era. Since the one
3 person, one vote decision of the '60s, the Legislature has
4 redistricted -- this will make the fifth time.

5 In the previous four times, two of those redistricting
6 plans have been challenged before a federal bench very
7 similar to this. And in both cases, the state prevailed.
8 So, that's putting that in context.

9 I'd also like to put in the historical context that key
10 members of the Legislature are familiar with this. They,
11 they -- many members of the Legislature who participated
12 this time, particularly those in leadership positions, were
13 in the Legislature when the same process occurred ten years
14 ago and they include every principal that we're talking
15 about right here.

16 Governor Tomblin was the Senate President. My client,
17 Senator Kessler, was in the Legislature. The House Speaker,
18 Richard Thompson, was, was in the House. Senator Unger was
19 a member of the Senate. And Senator Snyder, who is here
20 today, was a member also. So, this is not something brand
21 new to legislators either. I just wanted to put that in
22 that context.

23 And prior to the beginning of this session, the
24 Legislature took a lot of steps to be prepared for what they
25 knew was coming. Everyone knows that the census is

1 conducted every ten years, and that the, that the results
2 are going to be presented to the Legislature. And the
3 Legislature is so familiar with the process that they knew
4 that West Virginia would be among the last states to receive
5 the census numbers.

6 And the reason for that is that some other states have
7 requirements that the redistricting be done in the same year
8 that they receive the, the, the records from the Census
9 Bureau.

10 So, our Legislature, which has a permanent
11 redistricting office and has had it now for the past 20
12 years, they were fully prepared when the information came
13 from the Census Bureau. And they were in consultation with
14 the Governor who had been the Senate President the last
15 time. And they didn't proceed until they believed that they
16 were ready to proceed, until they had all the information.
17 And then the Governor called a special session in August of
18 this year.

19 So, just to put in the context that they were ready;
20 that this is not a new process to many of them; that the,
21 that the -- they were familiar with the fact that there have
22 been challenges before. The challenges were brought on
23 exactly the same kinds of grounds. The challenges were
24 brought that the variance was too great; that the
25 compactness standards were not met; and in the more recent

1 case -- of course, *Karcher* had already been decided. But
2 even prior to that, the earlier cases had been decided that
3 had one person, one vote. So, this is not, this is not the
4 first time at the dance with respect to the Legislature.

5 But going back historically, I want to address a
6 statement that Mr. Skinner made. Mr. Skinner asked you to
7 adopt the new standard in requiring the Legislature to
8 incorporate findings in the bills that it has with respect
9 to redistricting.

10 There has been a pattern. It is well established that
11 every time the Legislature passes a bill like this, it does
12 something very similar. It takes the same section of the
13 Code, 1, 2, 3. And it says here is District 1 and here are
14 the counties in District 1. Here is District 2 and here are
15 the counties in District 2. And here's District 3 and here
16 are the counties in District 3. And that is the way it has
17 been done.

18 And in a way, it would be a fairly radical departure to
19 require the Legislature now to come in with legislative
20 findings and they'd be second-guessing exactly how far they
21 have gone to meet those findings.

22 So, what the courts have done in the past, in the past
23 two times that the redistricting plans were challenged, in
24 the 1970 plan and in the 1990 plan, what has happened is
25 when, when it has been brought, when a challenge like this

1 has been brought, then the Legislature has been afforded the
2 opportunity to present the information that fully describes
3 why they did what they did. There's not, there's not a
4 requirement for a separate legislative finding.

5 And the Court has gone back and taken a look at the
6 very material, the kinds of material that --

7 JUDGE KING: The legislative record.

8 MR. CARENBAUER: The legislative record to the
9 extent that it exists. We have an unusual -- well, not
10 unusual. We have a different procedure in West Virginia
11 than let us say what people would be familiar with in the
12 Congress where every last word that is stated on the floor
13 of the Senate or the House of Representatives is transcribed
14 and it's put in a journal. We don't have something like,
15 you know, the Congressional Record.

16 So, when something like this occurs, we have to do
17 something a little bit different. The remarks are put in
18 the appendix to the journal. And those you have in front of
19 you. And then we provided to the Court, to the extent we
20 could, the transcript of the committee which we think gives
21 a pretty good basis and establishes why the Legislature did
22 what they did this year.

23 And it's very clear from the discussions that were had,
24 they had a full discussion within the Senate Committee and
25 on the Senate floor as to all of the issues that we're

1 talking about, all of the steps that are listed in *Karcher*.
2 They were all fully considered and discussed, and the
3 Legislature properly arrived at a conclusion.

4 Just before we get to the remedy, I do want to
5 emphasize that my client is very emphatic that redistricting
6 is a legislative process; that this is something that is
7 properly done by the Legislature.

8 So, I just want to emphasize that this is something
9 that he feels very passionate about and that, that he did
10 take all the proper steps. He put legislative redistricting
11 in the command of the Task Force, and he put Senator Unger
12 in charge of that Task Force, and then later in charge of
13 the committee.

14 And Senator Unger did a great job in holding
15 informational sessions around the state and allowing
16 committee members to, to proceed and to, to begin the
17 process in the committee with the so-called perfect plan,
18 with a plan that had a zero variance.

19 So that when it was in the committee, the piece of
20 paper that they started with was a plan that had perfectly
21 equal numbers among the three districts except the fact you
22 can't divide three evenly, but perfectly even numbers. And
23 that is what they worked with.

24 Had they not adopted amendments to that, they would
25 have moved forward with that. So, they, they gave full

1 deliberation to all of these issues. They invited in a
2 professor, Professor Robert Bastress, to discuss the legal
3 issues. Robert Bastress was also not exactly a newcomer to
4 this. He had participated in earlier legal challenges and
5 fully explained what was going on.

6 So, in that context, the Legislature was fully
7 apprised, to the extent that lay people can be fully
8 apprised without the legal considerations and the past
9 history. They specifically asked, "Didn't we do a, a bill
10 similar to this in 1991?" The Second Congressional District
11 was very similar in its geography to what was passed in this
12 bill.

13 They looked into those issues fairly completely given
14 that it's a part-time Legislature and that they're lay
15 people. But to the extent that one could, they made a very
16 good effort.

17 Now, if I could, I'd just like to visually, if I can,
18 go through a few things because this is the way that the
19 legislators see things. They see things on maps. They see
20 them in color. And it often makes a greater impact when you
21 see what is happening here, when you see it on a map.

22 JUDGE BERGER: Mr. Carenbauer, let me interrupt
23 you please. I want to make sure that I understand.

24 You're saying that although there was no vote on what
25 I'm going to refer to as the perfect plan, or the Unger

1 plan, that the Legislature actually began with that plan.
2 In its consideration of the other issues that have been
3 presented on behalf of your client and others, they started
4 with that perfect plan in contemplating what the ultimate
5 decision of the Legislature was going to be, even though it
6 was not presented for vote.

7 MR. CARENBAUER: That is correct. It was
8 presented for a vote in the sense that the committee had a
9 piece of paper in front of them from which they were
10 working. And that had none of the amendments.

11 JUDGE KING: This is where the committee started.

12 MR. CARENBAUER: This is where the committee
13 started.

14 JUDGE KING: And the committee amended it and
15 reported something else out.

16 MR. CARENBAUER: That is correct, Your Honor. And
17 it's also very clear from the record -- it was always made
18 very clear by Senator Unger who was chairing the committee
19 that this was something that one could amend in committee
20 and then amend again on the floor.

21 JUDGE KING: How many amendments were placed, were
22 made in the committee?

23 MR. CARENBAUER: There were four amendments
24 offered in the committee.

25 JUDGE KING: Four offered.

1 MR. CARENBAUER: Four offered in the committee.
2 So, in effect, you had five different plans in the
3 committee: A plan that was first presented which was the
4 working document, plus four proposed amendments. And the
5 final amendment was the one that was adopted. The final
6 amendment was offered by Senator Barnes who is one of the
7 six Republicans in the Senate.

8 JUDGE KING: Was that the one that changed Mason
9 County?

10 MR. CARENBAUER: Yes, Your Honor, it is.

11 JUDGE KING: But it had to go -- there had to be
12 some amendments before that --

13 MR. CARENBAUER: Yes, yes, Your Honor.

14 JUDGE KING: -- because you had to jiggle Harrison
15 County and Kanawha County.

16 MR. CARENBAUER: Yes. I can go through all the
17 amendments.

18 JUDGE KING: Yeah, that would make more sense. I
19 was just trying to understand what happened the same as
20 Judge Berger. The Unger plan never -- was never on the
21 floor of the Senate.

22 MR. CARENBAUER: That is correct.

23 JUDGE KING: That's what I think we're trying to
24 get straight. It was only considered in the committee. And
25 the committee was what committee? What's it called?

1 MR. CARENBAUER: It was a special committee on --

2 JUDGE KING: Special committee on redistricting.

3 MR. CARENBAUER: Right.

4 JUDGE KING: Chaired by Senator Unger.

5 MR. CARENBAUER: Chaired by Senator Unger.

6 JUDGE KING: And that's how he got his name on it
7 for purposes of this.

8 MR. CARENBAUER: For purposes of this, yes. You
9 may characterize it that way, but that was the plan that was
10 presented and they said, "Now, let's work from this."

11 JUDGE KING: That was the start, the starting
12 point.

13 MR. CARENBAUER: Yes, Your Honor, that was the
14 starting point.

15 JUDGE KING: Were there other -- I asked a
16 question here earlier to somebody. Were there other
17 configurations generated by computers or whatever --
18 technology has been improving a lot over these last few
19 years as you and I both know. Were there other
20 configurations of potential districts in that committee that
21 would have achieved that same numerical perfect situation?

22 MR. CARENBAUER: None was offered, Your Honor.

23 JUDGE KING: None were offered?

24 MR. CARENBAUER: None were offered.

25 JUDGE KING: Were there any generated out of a

1 computer that were in somebody's file somewhere?

2 MR. CARENBAUER: The ones that we know of, and
3 this is just from the record that we have that we have
4 established, that Mr. Cooper had gone to Senator McCabe, and
5 Senator McCabe had produced at that point I think three
6 different plans. And I'm not conversant as to whether they
7 were all perfect variance plans or how close they came. I
8 think they're the ones that we're talking about here that
9 Mr. Cooper has the first three. But those were, those
10 were --

11 JUDGE KING: But those don't qualify --

12 MR. CARENBAUER: Those don't qualify --

13 JUDGE KING: -- as the perfect plans?

14 MR. CARENBAUER: Well, --

15 JUDGE KING: I'm talking about the, where the
16 numbers are, are on the money, on the money, and one person
17 off. That's what the Unger plan --

18 MR. CARENBAUER: I think Mr. Cooper had some
19 perfect plans, but every perfect plan has down sides to it.

20 JUDGE KING: Oh, I know they all -- that's,
21 that's -- there are people that say all of them have down
22 sides to them. But from a, from a numerical standpoint,
23 from the mathematics, the arithmetic, are, are there other
24 configurations that someone has generated somewhere in the,
25 in the Legislature like the Unger plan that is, that the

1 numbers are perfect?

2 MR. CARENBAUER: The only ones that I know of
3 would be those that would have been done at the request of
4 Senator McCabe via Mr. Cooper.

5 JUDGE KING: But you don't know that those are
6 perfect.

7 MR. CARENBAUER: Well, we do have a chart here.
8 None of them is perfect.

9 JUDGE KING: They aren't perfect.

10 MR. CARENBAUER: None of them.

11 JUDGE KING: So, to the best of your knowledge,
12 the Unger one is the only one that came up with a perfect
13 number.

14 MR. CARENBAUER: Yes, Your Honor. However, with
15 computer technology, that is not an impossible task.

16 JUDGE KING: Well, that's what I was thinking. I
17 would think there would be multiple versions that would be
18 on the money; that they could, that they could jiggle
19 precincts around and come up with, with the very number they
20 need.

21 MR. CARENBAUER: Yes, if you're willing to split
22 counties.

23 JUDGE KING: They do that in other states.

24 MR. CARENBAUER: Yes, they do. And they do it
25 with many different districts. So, arriving at a perfect

1 mathematical plan is not a formidable challenge if you're
2 willing to, to do trade-offs.

3 JUDGE KING: Right. And that's what I was getting
4 at, whether there were others like Unger. But they started
5 with Unger and you're going to tell us how they ended up,
6 where we are.

7 MR. CARENBAUER: Yes, Your Honor.

8 So, what I'd like to do very quickly is to just run
9 through the historical context that they were familiar with
10 because they -- the same principles apply starting back in
11 1971, the same principles. Doing as little change as
12 possible, preserving the core to the fullest extent possible
13 is something that is consistent. Not splitting counties is
14 consistent. Not putting incumbents to run against each
15 other is consistent.

16 And, so, we're looking here first at the 1971 plan.
17 And there you can see the Second Congressional District as
18 it existed. And I think what is very interesting is there's
19 an argument that --

20 JUDGE KING: Is that when we went from five to
21 four?

22 MR. CARENBAUER: Yes, Your Honor, it is. And this
23 is with the four.

24 JUDGE KING: Right. But there had been five in
25 the '60s.

1 MR. CARENBAUER: Yes. And, and one of the issues
2 was the, the issue of compactness. And if you look at the
3 Second Congressional District, which was determined to be
4 compact -- and there are, there are mathematical formulae,
5 as you know, but there are also common sense formulae.

6 If you take a look at the Second Congressional District
7 at that time, what's interesting about it is that it was, it
8 had 9,822 square miles. And that, that, that area was
9 40 percent of the state's area.

10 In that time, we had four districts. We didn't have
11 three. We had four districts. It was 40 percent of the
12 state's area, which was 162 percent larger than what the
13 average district would be.

14 If you took 24,000 square miles, which is what the
15 State of West Virginia has, and you divide it by 40, you
16 come up with about 60. And this one was 160 percent
17 greater. And that's the district that they, that they --

18 JUDGE KING: That's going by acreage. That's just
19 going by acreage.

20 MR. CARENBAUER: That's just going by acreage.

21 JUDGE KING: And a lot of that acreage is in the
22 national forest owned by the federal government.

23 MR. CARENBAUER: It probably is.

24 JUDGE KING: Well, if you factor that out, how
25 much, how did it come out, Mr. Carenbauer?

1 MR. CARENBAUER: Now, that I don't know. I
2 haven't subtracted the forest. But what we can see is that
3 the distance to go from, let's say from Charles Town down to
4 the very southern, southeastern part of the state is pretty
5 far given they had, they could have divided it by four, but
6 now you can only divide it by three.

7 So, then, ten years later when the -- I do not have a
8 map of this, but ten years later all they did was take those
9 20 counties that were in the Second Congressional District
10 and they moved three. So, now we have 17 counties in the
11 congressional district. And I'm sorry I do not have the
12 map.

13 But what I want to emphasize is that they made very
14 little change. They took only three counties and they moved
15 them.

16 JUDGE KING: You're talking about the 1980 map
17 that we don't have here.

18 MR. CARENBAUER: Which I do not have.

19 JUDGE KING: And then there were still four
20 districts.

21 MR. CARENBAUER: There were still four districts.
22 They took three counties out. They took out -- if you're
23 looking at the map, they took out Lewis, Ritchie, and Taylor
24 for a total population of about 36,000. And they reduced
25 that area, of course. It became a little bit smaller. But

1 it was still 145 percent bigger than what the average would
2 be in square miles.

3 JUDGE KING: Acreage.

4 MR. CARENBAUER: In acreage. And the population
5 variance, I do want -- the population variance in the first
6 one that we just went was .79. The population here,
7 variance here is .5.

8 JUDGE KING: It was .5 in '80?

9 MR. CARENBAUER: .5. And, Your Honor, what did
10 happen in 1980 the best we can, we can reconstruct is that
11 there was only one bill passed by the Legislature following
12 the 1980 Census. And that was done in early 1982.

13 And it appears when you read the case of *Browning vs.*
14 *Manchin*, which is a state case that really has nothing to do
15 with redistricting, but it does help, help one determine
16 what the history was, is that, as Mr. Majestro indicated, it
17 is apparent that the Legislature simply missed a deadline,
18 in effect, of doing redistricting.

19 Some plaintiffs went to Federal Court and said, "You
20 can't hold this election under the 1970 Census." And that
21 was, that was what it was about. It's not about the
22 configuration of the districts.

23 So, then in 1982, early 1982 they did. And the only
24 change they made was they took the 1971 plan and moved three
25 counties out of the Second Congressional District. So, it

1 was a very minimal change.

2 This is the history. The history is to preserve the
3 core as much as you can, to make as little change as you
4 can.

5 And by the time they came to 1991, we had unfortunately
6 lost another member of the House of Representatives. So, we
7 were down to three. And this is where the change came that
8 I think is really at the core of the plaintiffs' unhappiness
9 about the whole system. They've been unhappy since 1990.

10 And one can understand this. One can understand if
11 you're in the panhandle that something is being done and I'm
12 going to be in with people that, you know --

13 JUDGE KING: Well, but they're not just unhappy
14 with the shape of it. They're unhappy about the numbers,
15 and they're unhappy -- the numbers make their vote worth
16 less than the numbers otherwise. There are more -- 4,800
17 more people in that district than you have now under this,
18 under this Barnes plan.

19 MR. CARENBAUER: You're correct.

20 JUDGE KING: So, I mean, their case is not just
21 about what it looks like.

22 MR. CARENBAUER: No, but the --

23 JUDGE KING: The compactness. It's first and
24 foremost about the numbers I think.

25 MR. CARENBAUER: Well, I think when you read what

1 the statements are, the numbers are there. I'm not
2 disputing that. The numbers -- the variance is an issue.
3 There's absolutely no question. That's what allows them to
4 bring a lawsuit.

5 But when you get to the, the sort of, this basic
6 unhappiness with being in the Eastern Panhandle and
7 connected with someone else is something that's
8 understandable.

9 If you were in the Northern Panhandle, you'd get the
10 same sense; that whenever you have a panhandle, you have a
11 situation that exists, and only in a few states such as this
12 where the panhandles are a little bit different than the
13 center. But we don't have the numbers to sustain giving
14 each panhandle its own representative in Congress.

15 So, the, the compactness issue -- and there are really
16 two separate things going on here. One is the compactness
17 under the State Constitution as Mr. Majestro said, and the
18 other one is the variance and the other kinds of principles
19 that go toward the, the variance that may allow a state to,
20 to justify something other than absolute perfection in the
21 number.

22 So, we've got the State Constitution --

23 JUDGE KING: Under Justice White's dissent in
24 *Karcher*.

25 MR. CARENBAUER: Well, no. Under *Karcher*, under

1 *Karcher*, Your Honor, we do not think that *Karcher* needs to
2 be changed in order to succeed here, not at all. What the
3 Legislature has done is perfectly consistent with what was
4 established by the Supreme Court in *Karcher* in which they
5 say if you don't do absolute perfection, then you have to
6 justify some other policy objectives. And we believe that
7 we have justified the other policy objectives.

8 So, in, in the 1991 plan, as you can see, that really
9 is where the current Second Congressional District came into
10 being. And it was 20 counties and it extended from
11 Jefferson County over to Mason County.

12 Then in, in 2000, which was ten years later, --

13 JUDGE KING: What was the variance in 1990?

14 MR. CARENBAUER: In 1990 it was .09. And that
15 is --

16 JUDGE KING: .09. That's the one that was in the
17 *Stone* case.

18 MR. CARENBAUER: Yes, Your Honor. And there
19 were -- so, that -- and that was a fairly substantial
20 reconfiguration because of the need to go from four to
21 three. But the Court still looked at various plans.

22 And the plan that was adopted by the Legislature was in
23 effect, the one that had the least dramatic effect when
24 you're going from four to three. They had various plans and
25 they would talk about them in the, in the *Stone* case. And,

1 so, the Legislature was trading off.

2 But what they -- it's hard to encapsulate this, but
3 when you're dealing with four down to three, it's the least
4 changes you can make consistent with the other objectives,
5 of course keeping, keeping counties intact.

6 There were at that point four representatives in the
7 House of Representatives and it had to come down to three.
8 There was necessarily going to be a district created in
9 which two of the incumbents lived.

10 And that's what they did. They didn't, they didn't
11 make it a map that would have displaced, so to speak, all
12 four incumbents. They did as little as they could with
13 respect to that. They had to make some change somewhere.

14 So, that happened in 1991 and it went to Federal Court.
15 And the issue, the issue was decided by the, by the Federal
16 Court that the compactness standard had been met under the
17 West Virginia Constitution.

18 And if you take a look at that map in 1991, you can see
19 it, it crossed the state. And the, the Court referred to
20 that as the horizontal aspect of the redrawing of the
21 redistrict. So, you had three basically horizontal maps.

22 Then in 2001 the only thing they did was that they
23 moved two counties. And I think we maybe highlighted them.
24 But they were Gilmer and Nicholas counties. I think we have
25 a map in there that does highlight them. But that was the

1 only change that was made. So, now we're down to --

2 JUDGE KING: What was the variance then?

3 MR. CARENBAUER: The variance became .22, .22.

4 JUDGE KING: .22?

5 MR. CARENBAUER: Yes, Your Honor.

6 JUDGE KING: It went up a little bit.

7 MR. CARENBAUER: Yes, it went up a little bit.

8 And the size of the district went down. And it was
9 basically exactly what had happened with -- what had been in
10 place before with the exception that now we've got --
11 viewing the two counties that are highlighted with an X,
12 that used to be in the larger district. And, again, that
13 population was 33,000.

14 What I'm trying to emphasize to the Court is that both
15 with respect to counties and with respect to the number of
16 people who are moved from the core, the Legislature always
17 does the minimal that it can.

18 And, so, that was in 2001. And then in the plan that
19 was passed by the Legislature this year, there is only one
20 change and that is over in Mason County, and that's on the
21 far west. It has an X in it.

22 Mason County was moved from one district to the other,
23 again reducing the size of the Second Congressional
24 District. It also reduced it not only in square miles and
25 in area, Your Honor, but it also reduced it in the length

1 and width so that in the past, the plaintiffs or people
2 similar to the plaintiffs would say you have to drive from
3 Charles Town to Point Pleasant. They can't say that
4 anymore. They can say Charles Town to Ripley, but they
5 can't say Charles Town to Point Pleasant because the western
6 most county has been reduced.

7 So, with respect to compactness, it's, it's a good
8 thing that the, that the one that is on the far edge has
9 been, has been removed from the, the county and, again, from
10 the district. And, again, the population that has changed,
11 people that are affected by this in the move from one
12 congressional district to the other is very small. It's
13 around 27,000 the population of Mason County.

14 So, that's historically what the Legislature has done.
15 They have historically not split county lines, avoided races
16 between incumbents, preserved the core of the district. And
17 I'd say that preserving the core is something that is really
18 consistent throughout. And the core is what was there
19 immediately before, what are constituents familiar with
20 within a district.

21 So, now what I would like to do is just run through the
22 plans that were considered by the Legislature this time.

23 This is the zero variance plan. This is the plan that
24 was presented to the congressional -- sorry -- the
25 Congressional Redistricting Committee of the West Virginia

1 Legislature. And, again, its 17 members is half of the
2 entire Senate. And it is referred to by some as the perfect
3 plan, what is called the zero variance plan. There is no
4 such thing -- I would offer there is no such thing as a
5 perfect plan. It does not exist in the sense that computers
6 may be fantastic, but they cannot be so good that they
7 achieve every single legislative objective.

8 JUDGE KING: They can be -- when I use the term, I
9 think others perhaps, we're talking about numbers,
10 mathematically perfect.

11 MR. CARENBAUER: Mathematically perfect but not
12 perfect when you take the entirety of the circumstances.

13 JUDGE KING: We understand what you're saying. We
14 understand.

15 MR. CARENBAUER: So, Your Honor, --

16 JUDGE KING: So, this is the zero variance is what
17 you prefer to call it.

18 MR. CARENBAUER: We're calling it the zero
19 variance.

20 JUDGE KING: Somebody called it -- I call it the
21 Unger plan. That's what it's called in some of these papers
22 because he was the chairman of the committee.

23 MR. CARENBAUER: That's correct. So, this
24 plan was the one that was presented and was the working
25 document of the committee. And as you can see, while it is

1 perfect numerically, it has, does not meet the consistent
2 objective, policy objectives that the Legislature has
3 honored over the years. So, first, it puts two incumbents
4 in the same district.

5 JUDGE KING: It does?

6 MR. CARENBAUER: Yes. If you -- here we can take
7 a look at -- this one is a little bit better at showing all
8 the different down sides from this plan from the policy
9 consistency of the Legislature.

10 So, if you're looking at this, it puts -- there's a new
11 First that's in purple. The Second is in red. And the
12 Third is in blue. So, in the First, two incumbents are
13 placed within the same district, Representative Capito and
14 Representative McKinley. So, that is one issue.

15 Then there's another issue and that has to do with how
16 many counties and how many people will find themselves in a
17 different district. And this would be -- it's about a third
18 of all the counties, 34 and a half percent. There's 19
19 counties moved. And the number of residents moved, number
20 of people who wake up in the morning and find themselves in
21 a different district is 636,000.

22 So, both the percent of the number of counties and the
23 number of people in West Virginia, approximately one-third
24 would find themselves in a different district. That is
25 completely inconsistent with what the Legislature has done

1 in the past where they have moved as few counties and as few
2 people from one district to the other.

3 So, that is the, the perfect plan, so to speak, with
4 respect to how it looks. And I think that the hash marks
5 and so forth give you a, a better feel for how much change
6 is actually being made.

7 Then there were two plans that were offered by Senator
8 Roman Prezioso. And Senator Prezioso has submitted an
9 affidavit which is before this Court in which he said that
10 the two plans that he offered he did so at the specific
11 request of the Democratic Congressional Campaign Committee.

12 One thing that makes West Virginia very different from
13 other states is that we have a Legislature that is heavily
14 Democratic dealing with a congressional delegation that is
15 two-thirds Republican.

16 So, it is no coincidence that the Democratic
17 Congressional Campaign Committee would come to West
18 Virginia, and this is a relatively easy task. You have --
19 on the State Senate that's 82 percent Democratic, you've
20 just had a contest in the First Congressional District
21 that's one of the closest in the country where a Republican
22 defeated a Democrat. So, it's perfectly legitimate too,
23 Your Honor, when you're dealing with numerical perfection
24 that politics can play a part in this.

25 So, they came in -- the Democratic Congressional

1 Campaign Committee came in and they did not have numerical
2 perfection, but they did have a plan. And Senator Prezioso
3 presented them at the request of the D Triple C it's called.
4 And plan number one, as you can see, moved a lot of people
5 in a lot of counties and made some very significant changes.
6 And, let's see, I have numbers here for you. It moved nine
7 counties and 140,000 people.

8 JUDGE KING: What was the variance?

9 MR. CARENBAUER: The variance was .44. So, .44
10 variance with that and with something that could --

11 JUDGE BAILEY: I thought the Prezioso one was
12 1.22.

13 MR. CARENBAUER: Yeah, the second one I believe
14 is -- well, this -- I'm sorry, this is -- yes, one is 1.22.
15 I'm sorry. You're right, Your Honor. The first plan we're
16 looking at is 1.22. It moved nine counties and 143,000
17 people. I'm jumping between the two plans.

18 So, the first plan introduced by Senator Prezioso was,
19 had a variance of 1.22 and moved nine counties and 143,000
20 people.

21 The second amendment that he offered also at the
22 request of the Democratic Congressional Campaign Committee
23 was very similar. It just moved Tucker County and Ritchie.
24 But it had a variance of .44. So, it had improved that
25 variance. It moved nine counties and 140,000 people.

1 And the point that I want to make is even when
2 something is overtly stated, this is what the National
3 Democratic Party would like you to do, it's not really taken
4 up. It's not, it's not a great consequence for the
5 Legislature. Its own historic principles are greater than
6 the parties involved.

7 And then there was an amendment offered by Senator
8 Facemire. And during the course of the committee -- I think
9 this is one that was really advocated by Senator Snyder who
10 was not a member of the committee but came in to discuss it.

11 And one of the things that Senator Snyder said was that
12 the district configuration here resembled the kind of
13 configuration that the state had much earlier on in its
14 history after the Civil War.

15 But, again, you can see that there's a lot of counties
16 that are moved. It moves 20 counties and moves 717,000
17 people which is, again, about a third of the state and
18 was --

19 JUDGE KING: What was the variance?

20 MR. CARENBAUER: Oh, and the variance -- I do have
21 that, Your Honor. The variance is .42.

22 And then, finally, Senator Barnes who is, as I said,
23 one of the only six Republicans out of the 34-member State
24 Senate, he offered the amendment that ultimately became
25 enacted. And that simply moved Mason County and 27,000

1 people. And when the Legislature did this -- when the
2 committee did this, they did this with an understanding of
3 what *Karcher* is. I mean, to the extent that one can explain
4 it well, Professor --

5 JUDGE KING: Now, was that the plan that was
6 reported to the floor?

7 MR. CARENBAUER: Yes, Your Honor.

8 JUDGE KING: It was reported to the floor and
9 passed, enacted.

10 MR. CARENBAUER: Yes, Your Honor. And the word
11 "originated" is kind of a technical word in the Legislature.
12 So, when you look at the bill itself, it will say
13 "originating in the select committee on redistricting."

14 So, that word "originating" is usually used in the
15 context of a bill that came out of the committee and was
16 presented to the floor. But it has other common meanings as
17 well. But that, but that is the sort of technical meaning
18 used within the Legislature.

19 This one I also want to point out that Senator Palumbo,
20 who is from Kanawha County, he offered an amendment -- I'm
21 sorry. He discussed. He did not offer an amendment. He
22 said, you know, maybe we could get this to perfection by
23 tweaking a few counties.

24 So, we could just take a few people out of one county
25 and a few people out of another county and we could take

1 this basic plan and split a few counties along the way with
2 small numbers of people because we're talking only in the
3 overall effect here of about 4,000 people from the, from the
4 district with the fewest number of people to the district
5 with the greatest number of people.

6 Senator Palumbo threw out a concept of just taking a
7 couple of these counties and tweak them. Just cut out a few
8 people here, a few people there in the counties. And that
9 was not taken up, was not pursued further. And I think it's
10 quite obvious because that involves splitting counties.

11 And one perspective that I would offer from Jefferson
12 County or from Hancock County is that the concept of
13 splitting counties is never really going to be their
14 problem. So, if every time you come in with a plan that's
15 splitting some county, some county somewhere, if the Court
16 or the Legislature, however it would happen that a county is
17 split, some county is going to be the first sacrificial lamb
18 county. But it's not going to be counties in the
19 extremities.

20 So, it's somewhat of a different perspective. And the
21 reason is that, that if you take Jefferson County or you
22 take Hancock County, put them both in the same category
23 looking at the rest of the state, is that in order to have,
24 to meet the constitutional requirements of contiguous
25 counties, you're going to start from the far edges and move

1 in.

2 So, one would not start by splitting the extremity.
3 That would be a very difficult assignment in order to do
4 that and keep contiguous counties moving along. So, that --
5 it's really extremely unlikely that Jefferson County -- if
6 they wanted to be discriminatory, that is a way to be
7 discriminatory is to split Jefferson County.

8 So, when the perfect plan came and it split Harrison
9 County and it split Kanawha County, I think it's quite
10 understandable that the representatives from those areas
11 would have an immediate reaction of why are we having to
12 give up our long-standing, since 1863, practice of having
13 whole counties in congressional districts.

14 And, by coincidence, if this -- if a plan were to go in
15 next year, it would be the year 2013, exactly 150 years
16 after the state was founded, that for the first time a
17 county would be split.

18 JUDGE KING: So, you view that as, splitting
19 counties -- not splitting counties as sacrosanct?

20 MR. CARENBAUER: Well, --

21 JUDGE KING: Or the Legislature does? Is that
22 what you're telling me?

23 MR. CARENBAUER: We believe that -- I mean, the
24 Legislature did it before the state senatorial districts
25 because they had to.

1 JUDGE KING: Well, they've done it --

2 MR. CARENBAUER: They've done it for senatorial
3 districts. They have never done it for congressional
4 districts.

5 JUDGE KING: They've done it for House of
6 Delegates, haven't they?

7 MR. CARENBAUER: Well, the House of Delegates is
8 different because you have single-member districts. Many,
9 many of the districts -- there's a very good policy where
10 you have single-member districts. There's also nothing in
11 the Constitution about, about splitting districts for the
12 purposes of the House of Delegates.

13 JUDGE KING: But the State Constitution has to
14 give way to the U.S. Constitution.

15 MR. CARENBAUER: Yes, sir.

16 JUDGE KING: I mean, there's a supremacy clause in
17 the U.S. Constitution.

18 MR. CARENBAUER: Yes, Your Honor, you're
19 absolutely correct. And that's part of what we're talking
20 about here.

21 JUDGE KING: We've all taken the same oath to that
22 Constitution.

23 MR. CARENBAUER: Yes, Your Honor, we have. And we
24 believe that what the Legislature has done is absolutely
25 consistent with what was anticipated by the Supreme Court in

1 *Karcher* when they said you can make minor variances if you
2 pursue certain policy objectives. And those are the exact
3 policy objectives that our Legislature has historically
4 followed.

5 JUDGE KING: Now, you agree that we need to go to
6 prong two. Prong one has been satisfied. We need to focus
7 on prong two, the justification.

8 MR. CARENBAUER: Yes, we would not waste the
9 Court's time --

10 JUDGE KING: Okay. Let's make sure we've got
11 everything on the record on that.

12 JUDGE BERGER: Mr. Carenbauer, before you move to
13 the next point, Judge King earlier asked Mr. Majestro
14 whether or not there were any policy reasons that he wanted
15 to tell us for splitting with respect to state legislative
16 races as opposed to United States congressional races,
17 splitting of counties. Anything further that you want --

18 Did I understand your question correctly?

19 JUDGE KING: Yes.

20 JUDGE BERGER: Anything further you want to add to
21 that?

22 MR. CARENBAUER: Yes, Your Honor, I'd like to add
23 this: That with respect to the State Legislature, as, as in
24 the case of the congressional districts, there is a
25 long-standing policy of making little change. They do make

1 change, but they don't make drastic change.

2 So, if you were to look at the House of Delegates --
3 and there was a lot of debate this year about the House of
4 Delegates and the State Senate -- that much of that
5 deliberation was how far should we go in making change.

6 And, so, that would be -- it's characterized, I guess,
7 under *Karcher* as preserving the core. But it's somewhat
8 different because you're talking about smaller areas and so
9 forth. But that would be a kind of policy that would be
10 utilized in explaining why when you go from one legislative
11 redistricting to another is not a drastic change.

12 JUDGE BERGER: Sounds like you were content with
13 Mr. Majestro's answer.

14 MR. CARENBAUER: Mr. Majestro is a fine lawyer.
15 I've come to realize that a lot.

16 JUDGE BERGER: Thank you.

17 MR. CARENBAUER: And then when the, when the bill
18 then went to the floor, to the Senate floor, there was one
19 amendment offered, and we can show that also. And that
20 amendment was offered by Senator Snyder.

21 And as you can see, that amendment moved seven counties
22 and 124,000 people, which is about four or five times as
23 many as the plan that was ultimately adopted. And this
24 amendment was defeated on a roll call floor vote. And it
25 was defeated on a vote of 14 to 17. But, again, as Your

1 Honor points out, it's not a numerically perfect plan. It
2 has a variance of .39.

3 And, so, then when all that happened and they came to a
4 final vote, I want to explain this because when you read the
5 Senate Journal, it's kind of hard to understand exactly what
6 happened with respect to the vote.

7 The final passage of this bill, of Senate Bill 1008 was
8 really considered twice. First, there was a vote on final
9 passage early in the day, and that vote was 27 to 4 if I
10 remember correctly. And the four consisted of the following
11 individuals: Senator Unger, Senator Snyder, Senator Green,
12 and one other. The name will come to me.

13 And then what happened is that it went over to the
14 House. So, you had four individuals, four state senators
15 having voted no. It went over to the House. They made a
16 minor technical amendment. It had nothing to do with
17 redistricting itself. It had to do with some dates,
18 precinct changes and so forth.

19 And it came back. And when it came back, it was 27 and
20 there was one against. But three of the four who had been
21 in the earlier vote of no now voted yes. Senator Miller.
22 It was Senator Green, Senator Miller, Senator Snyder had
23 voted no earlier. But when it came back again with this
24 minor technical correction, they voted yes.

25 So, in the end, the only -- there were three people who

1 are in the Senate who either did not vote on the bill or
2 voted no in the end. The Senate President, the Governor, is
3 not participating in the Senate votes this year because of
4 his role as acting Governor.

5 Senator Wells is in the armed forces and serving our
6 country in Afghanistan I believe.

7 And then Senator Unger voted no.

8 So, in the end, the bill had yes votes from everybody
9 that could vote yes.

10 JUDGE KING: So, it passed 30 to 1?

11 MR. CARENBAUER: In effect, that's what that is,
12 yes, Your Honor.

13 So, that, that was how that proceeded in the Senate.
14 And then over in the House the vote was 90 to 5. And the
15 five were -- I should emphasize also this is all bipartisan.
16 This is completely bipartisan. We have a Legislature that,
17 that is 28 Democrats and 6 Republicans.

18 So, when this bill passed and you had the 30, there
19 were the six Republicans and all the other members with the
20 exception of Senator Unger, Senator Tomblin, and Senator
21 Wells voted yes.

22 When it went over to the House, the vote was 90 to 5.
23 And, again, that was completely bipartisan. The House is
24 not quite as Democratic in percentage terms as the Senate
25 is, still pretty heavily Democratic, 65 to 35. But even the

1 nos were bipartisan, and they were localized.

2 So, there were three, three members of the House from
3 the far Eastern Panhandle. And the other two vote no votes
4 were from Mason County which isn't like being changed.

5 So, to put this all in the historical context and what
6 the Legislature did, the Legislature fully thought through
7 the process. They made a complete determination, and they
8 discussed all of the issues that we're talking about. They
9 discussed preserving the core. They discussed communities
10 of interest. They discussed keeping it -- avoiding
11 incumbent races. They discussed everything that -- county
12 lines, compactness, everything was discussed. Everything
13 was considered. And these are the policy -- this is the
14 ultimate policy decision that was made by the Legislature
15 for the upcoming redistricting.

16 JUDGE KING: Thank you, Mr. Carenbauer.

17 MR. CARENBAUER: Thank you.

18 JUDGE KING: I appreciate it.

19 Mr. Majestro.

20 MR. MAJESTRO: Yes, Your Honor. I'll be real
21 brief on the remedy question.

22 As an initial matter, while I'm here today with the
23 authority of the Speaker of the House and Mr. Carenbauer is
24 here with the authority of the President of the Senate,
25 they're two members of a 134-member body and they don't have

1 the ability to commit them to make decisions.

2 So, with that understanding, though, I think we'll give
3 you our thoughts on what we believe is important in
4 remedies.

5 The first thing that's important is what remedy we
6 would suggest would depend on when the Court rules and what
7 the Court rules. And I think those, those ideas will
8 dictate.

9 We anticipate a quick ruling, but if there's going to
10 be potential for legislative change, the sooner that
11 happens, the better. If we get far enough out, we believe
12 the appropriate thing to do is to run the election on the
13 bill as passed, or under existing law in effect if the Court
14 would stay the ruling, and we could deal with the proper
15 ruling on the next, on the next legislative cycle.

16 And the reason for that is we believe that we aren't --
17 if the Legislature isn't going to pick the remedy, we aren't
18 the only ones that are necessary to be, to be involved. If
19 the Court is thinking -- I mean, one option suggested by
20 them is just pick a plan. Well, in a democratic society,
21 you know, what happened is the people's representatives
22 picked a plan that was overwhelmingly approved. If that
23 plan wasn't an option, there were many other potential
24 options that could have been considered.

25 So, we believe that if this Court thinks it's necessary

1 to impose a judicial plan, the Court should do what a number
2 of other courts have done and, that is, give interested
3 parties the chance to file additional plans.

4 Because of that, because of either legislative or
5 judicial plans, we don't believe either one of them can just
6 be snap your fingers and adopted. Likely the best result if
7 the Court does what we don't think it should do and say that
8 there's a constitutional defect in the plan as adopted is
9 that the Court should stay its ruling. There's also the
10 potential for appeals. And let the election proceed under
11 either the existing plan, under the existing law or the new
12 plan. And I want to talk a little bit about that.

13 There's a federal statute that is, that is applicable,
14 2 U.S.C. 2(a)(c) which, which in that statute the Congress
15 has enacted that in the case where there is no proper plan,
16 the -- and it depends on whether there is -- you're
17 increasing or decreasing districts. But when the districts
18 remain the same, what the statute says is that you just
19 implement the existing law.

20 Now, so, that is a potential remedy to the Court, just
21 leave it as it is. Move Mason County back in the Second and
22 have the election that way.

23 JUDGE KING: But that would skew the population
24 variance by 27,000 more.

25 MR. MAJESTRO: Exactly, Your Honor. And we

1 believe that instead what the best solution would be, given
2 the time constraints, if the Court for some reason does not
3 approve this plan, which we think it should, is that just
4 stay the ruling, let the election happen, let whatever
5 appeals happen, let -- and then have an orderly process to
6 decide what the new plan for the next eight years will be.

7 So, that's essentially our, our position. Like Senator
8 Kessler, Speaker Thompson is very -- sorry, I'm losing my
9 voice here. Speaker Thompson is also a strong proponent and
10 this is a legislative decision. But the functional place we
11 find ourselves makes implementing either a legislative
12 decision or a judicial decision at this stage difficult.

13 And the final point I would make along those lines is
14 the reason we're here in late December, 2011, is because
15 these proceedings weren't instituted promptly after the bill
16 was passed in August.

17 We went all the way through full appeals and the West
18 Virginia Supreme Court in an orderly briefing flash because
19 Mr. Cooper and the others filed prompt challenges. I don't
20 know why it took so long for these challenges to be filed,
21 but their delay in filing these proceedings should not force
22 this Court into rush, into a decision that doesn't let
23 everybody who has an interest in whatever plan that might
24 get adopted, if the Court does what we think it shouldn't
25 and, and strike down this plan, have the ability for input,

1 either whether that happens in the legislative process or
2 that happens through court plans. So, that's, that's where
3 we are on remedies.

4 And I want to talk a little bit about the Court's issue
5 on -- the Court asked questions about disputed facts and
6 where do we go from here.

7 We don't believe any of the statements Mr. Carenbauer
8 made, the ones that are in our brief, the attachments to our
9 brief are in dispute. We have some facts -- I would call
10 them historical facts that are, where they are not disputed
11 by the plaintiffs, but they refuse to stipulate to them.

12 For example, that the members of the House and Senate
13 went out -- staff members went out to be trained by the
14 National Council of State Legislatures. So, we have a list
15 of, of what we consider undisputed facts that aren't
16 conceded that, that we need to put into evidence. And we
17 think it's awkward to do it by testimony. We would prefer
18 just letting us submit affidavits because we don't believe
19 they have any, any -- these facts that they have any reason
20 to contest them.

21 JUDGE BERGER: Do you know if that's the result of
22 not having sufficient information to stipulate or not, if
23 you know?

24 MR. MAJESTRO: I think part of it is the lack of
25 time to verify the facts, and part of it is their dispute

1 over relevancy of some of the facts.

2 JUDGE KING: Do you have those affidavits?

3 MR. MAJESTRO: We can, we can get those.

4 JUDGE KING: You don't.

5 MR. MAJESTRO: We don't have them right here.

6 JUDGE KING: What you need is a window to
7 supplement the record. Is that what you're talking about
8 then?

9 MR. MAJESTRO: I think we can certainly do it by
10 the end of this week. And the facts we're talking about
11 are -- like I said, they're not the facts, the kinds of
12 facts that are, would be in dispute.

13 Delegate Fleischauer went to a national seminar.
14 Mr. Bastress went to a -- Professor Bastress went to a
15 national seminar. The staff did seminars. The House
16 members went to the Senate, Senate redistricting meetings,
17 public meetings, those sorts of facts.

18 I could play the videos from all the Senate Judiciary
19 meetings and we could count the House members in the
20 audience, but I don't think that would be an efficient use
21 of anybody's time. So, those are the level of those sorts
22 of facts we believe.

23 In terms of orders of proof, should anybody believe
24 testimony is necessary on the compactness issue, they have
25 the burden of proof. We suggest that they, they call

1 whatever witnesses they want to present on that, although we
2 reserve our right to object to undisclosed expert testimony.
3 I have no idea what this expert is going to testify to.

4 So, that's our, that's our procedure.

5 JUDGE KING: Do you have any experts on
6 compactness, counter experts?

7 MR. MAJESTRO: No, Your Honor. We believe the
8 compactness question is based on *Stone* as pretty much
9 decided as a matter of law.

10 JUDGE KING: You think we're bound by *Stone*?

11 MR. MAJESTRO: Bound? I think that it's very
12 persuasive. I think very simply if the district in *Stone*
13 was compact under the State Constitution, especially given
14 the State Supreme Court's recent approval of the current
15 Senate districts, that the districts -- that the legislative
16 judgment that goes into the decision ought to be deferred to
17 by this Court and, and found compact.

18 On the compactness question, it's not can we pick the
19 most compact question. Does it meet the requirement of
20 compactness and you check that box off. We believe that,
21 that there is sufficient facts in the record for you to
22 conclude that it is based on both *Stone* and the *Cooper vs.*
23 *Tennant* Supreme Court decision that we don't have an opinion
24 in yet.

25 JUDGE KING: That's the legislative decision

1 you're talking about?

2 MR. MAJESTRO: Yes.

3 JUDGE KING: You said they initiated that, you
4 said promptly, and they waited. This one was started on
5 November the 4th.

6 MR. MAJESTRO: Yes.

7 JUDGE KING: When was that one initiated?

8 MR. MAJESTRO: It was October. They just
9 initiated that one in October.

10 JUDGE KING: In October, but you don't know when
11 in October. The legislation was in August?

12 MR. MAJESTRO: Yes.

13 JUDGE KING: At the end of August?

14 MR. MAJESTRO: Yes.

15 JUDGE KING: Is that what you said?

16 MR. MAJESTRO: Uh-huh. I mean, frankly, there
17 wasn't any reason that both suits couldn't have been filed
18 in September, but I guess it takes a while to draft things
19 up. But, you know, we're -- I don't think there's any
20 secret what the arguments were going to be in this case.

21 And, so, I mean, for whatever reason, we're here where
22 we are. It's -- who the people's representatives are are
23 too important to, to rush a decision about letting, letting
24 anybody who's interested in a decision different than the
25 one that the people's representatives adopted have input

1 into it.

2 I mean I, I don't -- Mr. Cooper worked really hard, but
3 I imagine that there are other people who might have an
4 opinion as to what districts get put in place if the one
5 that the Legislature passed doesn't get enacted. And those
6 people ought to be given the right to present something if
7 the Court does what we think it shouldn't do and strike,
8 strike these plans down.

9 JUDGE KING: Okay. Now, if we, if we agree, I
10 think with you-all, that the first prong of *Karcher* is
11 satisfied on this record, that shifts the burden of proof to
12 the defendants. If we come back here after lunch, do you
13 contemplate on calling any witnesses?

14 MR. MAJESTRO: I would probably talk to Mr.
15 Carenbauer. I guess the question I have for the Court is
16 are we going to, are we going to have -- and for the
17 plaintiffs, are we going to have testimony on the
18 compactness? Because I think some of the witnesses overlap.

19 JUDGE KING: On the Counts One and Two --

20 MR. MAJESTRO: Correct.

21 JUDGE KING: -- you, you would not have any
22 witnesses. As I see it, compactness only relates to Count
23 Three.

24 MR. MAJESTRO: Yes. And the question of whether
25 we will -- we, we anticipated the plaintiffs would go first

1 and --

2 JUDGE KING: Well, they normally do go first. But
3 under *Karcher* on what I call the equal protection claim,
4 which I think covers Counts One and Two, they -- if they
5 prevail on the first prong, that shifts the burden to you to
6 justify. And you're satisfied with this record -- if you're
7 satisfied with this record on justification, subject to your
8 request to be able to submit some additional affidavits, --

9 MR. MAJESTRO: I think the answer to that question
10 is one that I would like to discuss with my clients.

11 JUDGE KING: You don't want to commit yourself to
12 it.

13 MR. MAJESTRO: Because that's not, that's not a
14 question that we had, had thought about. Our -- to be
15 honest, Your Honor, we were going to let them go first and
16 then make the decision and see what they put on.

17 JUDGE KING: They've said they already went first
18 and you conceded that they prevailed.

19 MR. MAJESTRO: And, and I, and I apologize for not
20 anticipating --

21 JUDGE KING: We haven't ruled on their motion yet.

22 MR. MAJESTRO: And, and, and, I mean, if the Court
23 rules, wants us to go first, we will be happy to do that.

24 JUDGE KING: What they're saying is they have gone
25 first. If they prevail on the first prong under *Karcher*,

1 the burden shifts. That's what the law is even though you
2 don't like that.

3 MR. MAJESTRO: I agree. I would just apologize to
4 the Court that we didn't anticipate going first. So, the
5 decision -- we would -- I would want some time to talk to my
6 co-counsel, or my counsel for the co-defendant and my
7 clients.

8 JUDGE KING: That's fine. What we're going to do,
9 if it's all right with Judge Berger, --

10 JUDGE BERGER: It is.

11 JUDGE KING: -- is, is we're going to take a short
12 break, 10, 15 minutes. And you-all confer and then we're
13 going to talk with -- we'll resume this proceeding and
14 discuss how we're going to proceed after lunch or tomorrow,
15 whatever we need to do.

16 MR. MAJESTRO: Okay. Thank you, Your Honor.

17 JUDGE KING: Thank you. We'll stand in recess for
18 15 minutes.

19 (Recess taken from 11:35 a.m. until 11:55 a.m.)

20 JUDGE KING: The Court has determined to agree
21 with you-all at this point that the first prong of *Karcher*
22 is satisfied on the basis of the record as it now stands.

23 We're going to agree with Mr. Majestro's suggestion
24 that the plaintiffs ought to go forward with whatever else
25 they have that might relate to what I refer to as Count

1 Three on the compactness point. And you said you had a
2 fellow here from West Virginia University. Now, we'll come
3 back after lunch and hear the evidence.

4 And I understand, Mr. Majestro, you and Mr. Carenbauer
5 maybe want to be heard on whether he can testify or not. Do
6 you want to say anything now?

7 MR. MAJESTRO: I think our question is -- they
8 provided us with -- I mean, I'm willing to dispense with all
9 of the, the formalities regarding 26(a)(2) expert
10 disclosures. You know, we don't have a list of all his
11 testimony for the past 10 years, but that sort of stuff I
12 don't care about. I'd just like to know what his opinions
13 are.

14 And, and from my understanding, there was a one-page --
15 report is probably a bad description of it -- a one-page
16 description of some of his opinions on this subject. You
17 know, our objection would be to opinions that stray away
18 from that one page.

19 JUDGE KING: Have you had access to this one page?

20 MR. MAJESTRO: Yes. They filed that. They did
21 file that.

22 JUDGE KING: Is that something we have here in
23 these papers?

24 MR. HAMMER: Yes, Your Honor. It's part of the
25 official record. It's titled "West Virginia Congressional

1 Redistricting, Mason County Flop Plan," signed by Kenneth C.
2 Martis. It is part of the official record that we filed in
3 this case.

4 JUDGE KING: Okay. And his direct testimony would
5 track that.

6 MR. HAMMER: Very closely it would track that,
7 yes.

8 JUDGE KING: Okay.

9 And then after that, then, Mr. Cooper, have you thought
10 about how you're going to resolve your problem?

11 MR. COOPER: Your Honor, what I was trying to -- I
12 just want to tell you how, how minute what I was trying to
13 put into the record was.

14 I mean, basically one was to have an exhibit of the --
15 since I, I mentioned it in my briefs, just -- one of my
16 exhibits was just to show the, the composition of three
17 congressional districts during the '50s, '60s and '70s --

18 JUDGE KING: Uh-huh.

19 MR. COOPER: -- which one of them was a, was
20 basically to make a rather minute point that since the, the
21 area of the, the Second Congressional District had dropped
22 that -- and you still had the same circle that required a
23 circumscribed -- that you actually had a slightly less
24 compact district which is going like from .20 to .18, I mean
25 .12. I mean, it's a very small -- it was a mathematical

1 point simply because the other side has asserted that
2 it's -- that the Second Congressional District is more
3 compact now. I'm saying it's less compact under the Reock
4 test. It's a pretty fine point of the law. And, and --

5 JUDGE KING: That's what you were going to testify
6 about?

7 MR. COOPER: Yes.

8 JUDGE KING: Why don't you -- whatever the
9 document is -- is it in the record?

10 MR. COOPER: Not yet, no.

11 JUDGE KING: All right. Get copies of that to
12 give to the other side and supply it to the Court, and after
13 lunch after -- is it Martis?

14 MR. HAMMER: Yes, Your Honor.

15 JUDGE KING: After Mr. Martis testifies, you can
16 stand right up there and explain it as best you can.

17 MR. COOPER: All right.

18 JUDGE KING: And we'll -- if we have questions
19 about it, we'll ask somebody.

20 MR. COOPER: Thank you, Your Honor.

21 JUDGE KING: And that would satisfy your interest.

22 MR. COOPER: Should I hand copies to whom? Hand
23 them to the Court?

24 JUDGE KING: Well, we've got these law clerks over
25 here. I suggest you give them to them or give them to the

1 clerk. They'll give them to us.

2 MR. COOPER: You want three copies of each
3 exhibit; right?

4 JUDGE KING: That's right, one for each of us.
5 Yeah, that would be fine. That would be fine. And give
6 them to the other side too.

7 MR. COOPER: Yes, sir.

8 JUDGE KING: And, Mr. Rodd, I didn't ask you if
9 you had anything you wanted to add, did I, --

10 MR. RODD: No, I do not.

11 JUDGE KING: -- before we went out.

12 But, now, beyond that, Mr. Skinner, Mr. Cooper, do
13 you-all have any additional witnesses that you'd put on
14 after lunch?

15 MR. HAMMER: We would reserve the right to call to
16 the stand Senator Unger and Senator Snyder. But given the
17 Court's ruling on the first prong of *Karcher*, we would not
18 put them up in our case in chief.

19 JUDGE KING: So, you might use them in rebuttal.

20 MR. HAMMER: We might use them in rebuttal.

21 JUDGE KING: Okay. So, then the case switches
22 over to you fellows on the defense side, and that will be
23 not long after lunch. And if you have witnesses, you need
24 to have them available. We want to get as much accomplished
25 today as we can, perhaps everything.

1 MR. MAJESTRO: Certainly.

2 JUDGE KING: Yes, sir.

3 MR. HAMMER: I, I hate to interfere with anyone's
4 desire for lunch, but Professor Martis does have to leave
5 this afternoon. And, so, we're going to call him as our
6 first witness.

7 JUDGE KING: I understand.

8 MR. HAMMER: We have a five-plus-hour drive to get
9 back yet this evening. I actually have to appear before
10 Judge Bailey tomorrow afternoon.

11 JUDGE KING: We can probably work that out. Judge
12 Berger and I will work that out for you, that part.

13 MR. HAMMER: I simply wanted to offer that from
14 the plaintiffs' perspective, we are willing to forego lunch
15 to keep moving forward.

16 JUDGE KING: I understand. But I don't know that
17 I'm interested in putting my colleagues to even making that
18 choice. I'll make it that we're going to break for lunch.

19 And where was I? If we have additional evidence from
20 the defendants' side, we'll hear it after we --

21 MR. MAJESTRO: Yes, Your Honor, we'll be ready to
22 go.

23 JUDGE KING: Do you have any problem with what I
24 proposed with Mr. Cooper?

25 MR. MAJESTRO: That's fine. And, Your Honor, the

Ken Martis - Direct (Hammer)

1 way we treated Mr. Cooper in this case is we believe he's
2 appearing pro se. And I'm not sure we think there's much of
3 an issue in terms of, of testifying, being a pro se
4 participant. He signed everything pro se, not as counsel.
5 So, I don't think there's the ethical issues that --

6 JUDGE KING: Well, I'm not saying, I'm not saying
7 there is. I'm just saying that I've never had this scenario
8 where the lawyer is the party, is his own lawyer and he's
9 also a proposed expert witness. Have you ever had
10 experience with that?

11 MR. MAJESTRO: I have not, but we don't -- if he,
12 if, if there's a need for him to testify, we don't object to
13 it is my point.

14 JUDGE KING: I understand. I appreciate that.
15 So, we'll reconvene at 1:15. So, we'll break for lunch
16 until 1:15.

17 (Recess taken from 12:05 p.m. until 1:15 p.m.)

18 JUDGE KING: Mr. Skinner, are you-all ready to
19 proceed?

20 MR. HAMMER: Yes, Your Honor, we are. The
21 plaintiff would call Professor Ken Martis to the stand.

22 JUDGE KING: Come forward.

23 **KEN MARTIS, PLAINTIFFS' WITNESS, SWORN**

24 DIRECT EXAMINATION

25 BY MR. HAMMER:

Ken Martis - Direct (Hammer)

1 Q. Welcome, Professor Martis. Please introduce yourself
2 to the panel.

3 A. My name is Ken Martis. I'm Professor of Geography at
4 West Virginia University. I have spent since 1972 examining
5 the history, configuration, election, apportionment for the
6 United States Congress. I -- if you want me to go deeper
7 into some of my other publications, I would.

8 Q. Yes. Please describe what some might call your central
9 publication.

10 A. My first publication was called *Historical Atlas of*
11 *Congressional Districts in the United States Congress*. It
12 was the first book in American history to map every
13 congressional district for every state, for every election,
14 for all of American history. It was the first book in
15 American history to list in a cogent form every
16 redistricting law passed by every legislature for all of
17 American history.

18 Q. Did you win any awards for that publication?

19 A. Numerous awards including the American Historical
20 Association. I'm a geographer. They award every five years
21 the best reference book in all of history for all of the
22 world. And they -- this book won that award. Only five or
23 six books now have ever won that award.

24 Q. You mentioned that you currently teach. Where do you
25 teach at?

Ken Martis - Direct (Hammer)

1 A. Pardon me?

2 Q. Where do you teach?

3 A. I teach at West Virginia University Department of
4 Geology and Geography.

5 Q. And your status there is what? As full professor?

6 A. Yes, sir.

7 Q. Now, the book that you mentioned, have you brought that
8 with you today?

9 A. I have, sir.

10 Q. And can you show that to the three-judge panel, please.

11 (Pause)

12 Q. And would you explain to the panel what you're able to
13 do with that book for any period of time in West Virginia
14 history going back to the founding of the state.

15 A. Including all states but, yes, in West Virginia you can
16 look at the, each congressional district law and see what
17 counties are within each congressional district. You can
18 look at the configuration of every congressional
19 redistricting from 1863, the very first one, to the -- this
20 book was published in 1980, so it only goes up to the end of
21 the '70s or early '80s.

22 MR. HAMMER: Your Honor, at this point I would
23 move that Professor Martis be recognized as an expert in the
24 area of historical political geography.

25 JUDGE KING: Defendants?

Ken Martis - Direct (Hammer)

1 MR. MAJESTRO: No objection, Your Honor.

2 MR. CARENBAUER: No objection, Your Honor.

3 JUDGE KING: So ordered. Go ahead.

4 MR. HAMMER: Thank you, Your Honor.

5 BY MR. HAMMER:

6 Q. Professor Martis, in the course of your profession and
7 within your professional expertise, are you able to explain
8 for the three-judge panel the meaning of the term
9 "compactness"?

10 A. Yes.

11 Q. And can you explain what that term means in, in the
12 area of your expertise.

13 A. Well, you have many ways of explaining compactness and
14 defining compactness. I mean, I would go to the *Oxford*
15 *English Dictionary*, number one, to look at the word
16 "compactness," and I'm going to use the word "elongated."
17 And there is a standard American English that defines what
18 these words mean.

19 Also, in the mathematical field there are models that
20 can look at any different shape and give a number, a
21 numerical number on that shape and its compactness.

22 Q. Let me interrupt you for a second. I've seen the term
23 used in the briefing in this case "quantitative compactness
24 versus qualitative compactness." Can you explain the
25 difference, if any, between those two terms?

Ken Martis - Direct (Hammer)

1 A. Well, you could say that qualitative compactness is
2 using the standard English definition of words, looking at a
3 particular shape and having -- using the words as your
4 basis, describing that particular shape. So, that would
5 call that a qualitative look.

6 A quantitative look would be the mathematical models
7 I'm discussing which give numbers to different kinds of
8 shapes.

9 Q. Okay. Now, when you're considering qualitative
10 compactness, what are the types of factors that you consider
11 in evaluating whether or not a district is qualitatively
12 compact?

13 A. The most compact shape is a circle. And, therefore, if
14 you're looking at a congressional district or any
15 geopolitical shape, which -- in political geography we have,
16 we use these terms and they have very specific meaning. But
17 when you're looking at compactness, you would think that a
18 circle is the most compact shape. So, you use that as a
19 basis of visually looking at compactness.

20 Q. And, and describe some of the other shapes. Let me
21 back up. I think you prepared a report that was submitted
22 to the West Virginia Legislature in this case.

23 A. Yes.

24 MR. HAMMER: And, Your Honors, for your reference,
25 it's part of the official record in this case.

Ken Martis - Direct (Hammer)

1 BY MR. HAMMER:

2 Q. Do you have that report with you?

3 A. I don't. I have it in my briefcase, but not on me
4 right now.

5 MR. HAMMER: May I approach, Your Honors?

6 JUDGE KING: Please. That's what's called the
7 Mason County Flop Plan?

8 MR. HAMMER: Yes, Your Honor.

9 THE WITNESS: Thank you.

10 MR. HAMMER: As part of the official record, Your
11 Honors, I believe it's self-authenticating, but I would make
12 that Plaintiffs' Exhibit 1.

13 JUDGE KING: Very good.

14 BY MR. HAMMER:

15 Q. And, sir, can you, can you describe the report that you
16 provided to the West Virginia Legislature?

17 A. Sure. First, you get into words. And the geopolitical
18 words I used are the standard. There's more than these
19 five, but I looked at what is compact, what is elongated,
20 what is protruded, fragmented, and proliferated. And I
21 think the words "compact" and "elongated" are the operative
22 words here.

23 Compact: Boundaries smooth and equal distance from a
24 common center. Elongated: Drawn out in one direction.
25 Now, these are from political geography. They've been used

Ken Martis - Direct (Hammer)

1 for decades and decades as the standard words to describe
2 geopolitical shapes.

3 The second part of my report was that mathematical
4 models were run on what is Congressional District Number Two
5 now. And six of the seven, or seven of the eight models
6 showed that it had a very low compactness score. And I, I'm
7 not an expert on quantitative modeling or topology, but --

8 Q. Let me stop you. You say a low compactness score.
9 Differentiate that from what you mean by a high compactness
10 score.

11 MR. MAJESTRO: Your Honor, I object to that
12 question. The witness has just testified that he's not an
13 expert in this field. He shouldn't be allowed to give
14 opinions regarding these scores. He's not an expert on
15 quantitative compactness.

16 JUDGE KING: Overruled. You go ahead.

17 MR. HAMMER: Thank you.

18 BY MR. HAMMER:

19 Q. Can you explain what you mean by the term low
20 compactness versus high compactness?

21 A. Well, I mean, in plain terms, a circle may have a
22 compactness score of one. And then as you go down lower
23 than one, you can go -- if it's .8, it's not as compact as a
24 circle. And if it's .4, it's less compact because .1 is
25 less compact than that.

Ken Martis - Direct (Hammer)

1 Q. So, the lower the number, the less compact. Is that
2 your testimony?

3 A. The lower the score, the less compactness.

4 Q. Thank you.

5 A. And, and, and not only these models, but being very
6 familiar for many decades looking at compactness models, it
7 seemed like the mathematical and numerical scores that were
8 given seemed logical to me.

9 The next part of my report was the history of the, of
10 the Second Congressional District in the State of West
11 Virginia. Oddly --

12 Q. Let me stop you. I brought with me a map that I think
13 you've told me is from your book; is that correct?

14 A. Yes, sir.

15 Q. Shall I display that map for the Judges and the
16 opposing counsel?

17 A. We start in 1863. The -- interestingly, we had three
18 congressional, three members of the U.S. Congress assigned
19 to us. And the founders --

20 JUDGE KING: By "us" you mean the Second District?
21 Oh, you mean West Virginia.

22 THE WITNESS: Yes, in 1863 three members were
23 given to the State of West Virginia, oddly what we have
24 today.

25 The very first map described the First Congressional

Ken Martis - Direct (Hammer)

1 District as the Northern Panhandle and southward. The
2 Second Congressional District was the Eastern Panhandle and
3 westward. And the Third Congressional District was
4 generally southern West Virginia.

5 Q. Now, I think we can all recognize that this original
6 map done at the time of West Virginia's founding was not the
7 product of Maptitude software or any other computer
8 software; is that correct?

9 A. Yes, sir.

10 Q. And does this reflect the founders' understanding of
11 the term "compactness" as used in the West Virginia
12 Constitution?

13 A. It, it was simultaneously -- they almost did the
14 Constitution simultaneously to drawing this map. So, we
15 considered that a good indication that they felt this was
16 compactness.

17 Q. Now, I want to speak to you for a few moments about the
18 notion of qualitative compactness as used then and as used
19 now. What types of factors would you look at to assess
20 whether or not a district is qualitatively compact?

21 A. You know, to answer that question, I'd like to go
22 through the process of 1990, 1991 to answer that question if
23 that's acceptable.

24 Q. Let me back up for a moment. Do you recognize the
25 *National Demographics Corporation, Communities of Interest*

Ken Martis - Direct (Hammer)

1 *in Redistricting: A Practical Guide* as an authoritative
2 source for communities of interest?

3 A. It's one source, sir, yes, sir.

4 Q. It's one source.

5 MR. HAMMER: And, Your Honors, that material is
6 included within the designation of exhibits that we filed.
7 I believe that's Document Number 40. So, Your Honors should
8 have that and opposing counsel has that as well.

9 BY MR. HAMMER:

10 Q. Do you have that with you by chance, sir?

11 A. I don't in front of me, no, sir.

12 Q. Let me pull that out.

13 (Pause)

14 Can you explain for the three-judge panel what this
15 document is?

16 A. Basically, in geography and generally in social
17 science, but in geography you -- when social science
18 identifies communities of interest, what geographers do is
19 map this, the spatial aspect of this. But it basically says
20 there are things called communities of interest in social
21 science. They outline political, geographic, social,
22 economic, cultural variables that can be used to look at
23 communities of interest.

24 There's many ways of looking at it. There's many ways
25 of organizing this. But I'd like to say that there's -- and

Ken Martis - Direct (Hammer)

1 it's called *Tobler's First Law of Geography*. And that is
2 that every place is related to every other place. But
3 places closer to one another are related more than those
4 distant.

5 And, so, communities of interest has a connotation of
6 the geographical area of common interest of some sort.

7 Q. What types of common interests might one look for if
8 you're examining whether or not there is a community of
9 interest such as the residents of that district belong
10 together?

11 A. Well, one of the classic in social sciences is the
12 census definition of metropolitan area. As we know, you can
13 have a, what's called a center county or a large city such
14 as Kanawha County and Charleston. And then you have other
15 counties that are related to this somehow.

16 And, so, we use computer -- commuter patterns,
17 employment patterns, shopping patterns that the U.S. Census
18 does, and they have a very good definition of what a
19 metropolitan area is. A metropolitan area is not just a big
20 city, but many times counties that relate to that.

21 So, in social science we have ways of measuring
22 communities of interest and this is one way of doing it as
23 far as metropolitan areas go.

24 Q. Okay.

25 MR. MAJESTRO: Your Honor, I, I think we're

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1 getting way beyond the disclosure here. I don't even see
2 the words "community of interest" in this report, and now we
3 have a multi-page exhibit that I presume the witness is
4 going to give testimony about. This is -- I mean, I'm
5 willing to give the plaintiffs some leeway, but this is
6 completely undisclosed testimony that this witness was going
7 to be offering these opinions on this subject. I ask it be
8 excluded.

9 MR. HAMMER: In our designation of witnesses, we
10 designated this as a specific topic that he would testify
11 about, and we provided these exhibits in advance of today.

12 JUDGE KING: Under the circumstances, I'm going to
13 let you go on and Mr. Majestro will be given ample
14 opportunity to cross-examine the witness.

15 MR. HAMMER: I would move the admission of
16 Communities of Interest in Redistricting that I had marked
17 as Number 2 I think.

18 JUDGE KING: Okay.

19 BY MR. HAMMER:

20 Q. And, sir, I'm --

21 JUDGE KING: It's admitted.

22 MR. HAMMER: Thank you, Your Honor.

23 If I may approach, I'm going to hand you the census
24 information that you were just talking about and ask that be
25 marked as Exhibit Number 3.

Ken Martis - Direct (Hammer)

1 BY MR. HAMMER:

2 Q. Can you identify this document, please, sir?

3 A. Pardon me?

4 Q. Can you identify what I've just handed you marked as
5 Exhibit Number 3?

6 A. Yes.

7 Q. What is this? Please, sir, go ahead and identify that.

8 A. Well, what this map says is exactly what I was talking
9 about with respect to metropolitan areas.

10 Q. Okay. So, this is what you were just identifying?

11 MR. HAMMER: So, if I may move its admission, I'll
12 display it on the screen.

13 JUDGE KING: What, what -- state on the record
14 what it is.

15 MR. HAMMER: It's a document called "West Virginia
16 - Core Based Statistical Areas, District of Columbia,
17 Counties, and Independent Cities." It shows a map of West
18 Virginia.

19 JUDGE KING: Was that in the earlier submissions
20 that you-all made?

21 MR. HAMMER: Yes. It was Number 7 on that earlier
22 list.

23 JUDGE KING: Very well. It's admitted.

24 MR. HAMMER: If I may display it on the screen,
25 Your Honor.

Ken Martis - Direct (Hammer)

1 BY MR. HAMMER:

2 Q. Okay. Now, please explain to the panel what this is.

3 A. It's the census map of West Virginia showing
4 metropolitan areas. For example, the more -- I'm most
5 familiar with my county, Monongalia and Preston County.

6 When Monongalia County went over 50,000 threshold
7 metropolitan, they did certain studies to look at employment
8 commuter patterns, shopping patterns. And they discovered
9 that a large amount of residents in Preston County commuted
10 to Monongalia County to work every day. A large amount of
11 residents also commuted for other types of entertainment,
12 social and shopping activities.

13 Therefore, Preston County is linked with Monongalia
14 County with respect to this one definition of community of
15 interest, and that is the metropolitan interest.

16 So, I would say if congressional districts were being
17 drawn in the State of West Virginia that Monongalia and
18 Preston County in this one measurement only would be linked
19 and should be kept intact.

20 Q. Okay. And what would you say about the Eastern
21 Panhandle of West Virginia?

22 A. I would say the same thing, that the metropolitan zones
23 in there should be kept intact.

24 JUDGE KING: You'd say that the Eastern Panhandle
25 needs to be in another state probably, wouldn't you, from

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1 the looks of that?

2 THE WITNESS: Pardon me, sir?

3 JUDGE KING: I'd say you'd have to say that the
4 Eastern Panhandle ought to be in some other state.

5 THE WITNESS: As I remember the map, some of the
6 Eastern Panhandle counties, their metropolitan core is in
7 another state. I think there's one from -- I forget the
8 city in Maryland, but there's one that links Maryland.

9 BY MR. HAMMER:

10 Q. In considering communities of interest, is it also
11 appropriate to consider what counties themselves have done
12 in terms of linking their common interests?

13 A. Yes. It's called vernacular regions where counties get
14 together on their own and do this.

15 MR. HAMMER: I'll have this one marked, if I may
16 approach, Exhibit 3 I think.

17 THE CLERK: You're on 4.

18 MR. HAMMER: 4. Thank you. I lose count.

19 BY MR. HAMMER:

20 Q. Can you identify for the Judges what Exhibit 4 is,
21 please?

22 A. This is the Upper Kanawha Valley Enterprise Community
23 where people on their own -- again, this is called in
24 geography vernacular regions -- say that there's a common
25 area of interest or a common, in this case, economic zone

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1 where economic development is shared, and economic
2 development in one particular county and one location is
3 good for all these counties. And, so, rather than be in
4 competition, they've come together as a community to work
5 together.

6 Q. And if we go through this document and turning, I
7 guess, three, four pages from the end, there's a description
8 of community participation in determining the economic
9 development zone. Do you see that?

10 A. Yes, I'm familiar with this document.

11 Q. All right. And this has a description of the efforts
12 made by Kanawha County to link itself with Fayette County;
13 is that correct?

14 A. Correct.

15 MR. HAMMER: I'd move the admission of this
16 document Number 4, Your Honor.

17 JUDGE KING: May be admitted.

18 MR. MAJESTRO: Hold on just a second. Can you
19 identify these based on your exhibits? We're having
20 trouble.

21 MR. HAMMER: This is Number 3 on my exhibit list.

22 BY MR. HAMMER:

23 Q. Is it appropriate to consider geological features when
24 considering communities of interest?

25 A. Yes.

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1 Q. And I'm going to hand you what's been previously
2 produced as Number 5 on the exhibit list and have this
3 marked as Exhibit 5. Can you identify Exhibit 5 for the
4 panel, please?

5 A. This is the karst region of the State of West Virginia.
6 And you'll notice that most of the karst topography, as we
7 call it, is in Eastern West Virginia and the Eastern
8 Panhandle.

9 Q. And, if you know, why is consideration of the karst
10 geography important in considering communities of interest?

11 A. They share many common natural resources and many
12 common problems with respect to tourism, with respect to
13 water resources, with respect to the kind of geology beneath
14 the surface, waste water disposal, many different items such
15 as that.

16 Q. Now, the map that's on the screen shows the karst
17 region of West Virginia looks to be primarily in the Eastern
18 Panhandle, the eastern side of the state, with a few reaches
19 across the Northern Panhandle; is that correct?

20 A. Yes, sir.

21 Q. All right. Do we see any karst geology in the central
22 to western part of West Virginia?

23 A. No, sir.

24 Q. I'm going to hand you --

25 MR. HAMMER: I move the admission of that exhibit,

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1 Your Honor.

2 JUDGE KING: It will be admitted.

3 MR. HAMMER: Thank you.

4 BY MR. HAMMER:

5 Q. I'll show you what's been produced as Number 6.

6 MR. HAMMER: May I have this marked -- I'm sorry.

7 I have the wrong one. Excuse me.

8 BY MR. HAMMER:

9 Q. I'll show you what's been produced as Number 9. And
10 I'll have this marked as Exhibit 5? Six. I can't keep
11 track.

12 JUDGE KING: Six.

13 BY MR. HAMMER:

14 Q. Six. Thank you. I don't know why I can't keep track.
15 And in considering the, the geology, can you explain to the
16 panel what the significance of this map is?

17 A. This map is a map of employment in the mining sector.
18 The mining sector could be quarrying. It could be
19 limestone. Primarily in this particular picture it's -- or
20 particular map, it's coal mining. And it shows the
21 employment in each county with respect to the percent of
22 employment I will say in the mining sector.

23 So, it shows a very hard core in Southern West Virginia
24 of, of the economic value or the economic activities that go
25 in there. Mining is extremely important. In counties with

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1 the lighter shade, it's not so important.

2 I would point out that in the Eastern Panhandle there
3 are mining activities, but many of these are in the
4 limestone and, and other surface extractive industry, not in
5 coal.

6 For example, in Monongalia County, if you can see where
7 that is, from my county in the north, eastern Monongalia
8 County is where WVU and Morgantown is. There's less
9 employment in the mining sector in that particular part of
10 my county. But western Mon County where we still have a
11 large deep mine in Blacksville, there's a very high
12 unemployment -- or high employment in the coal industry.

13 So, within counties and within the state there are
14 variances. There are communities of interest with respect
15 to inside Monongalia County itself.

16 Q. Okay. And, so, is it appropriate, in your view as an
17 expert, to group communities of interest together based in
18 part upon coal mining activity?

19 A. That would be one variable, yes, sir.

20 Q. And it would be appropriate, then, to group Southern
21 West Virginia together because of the intensity of coal
22 mining employment in that region of the state?

23 A. It would be a very strong variable.

24 Q. I'll show you what has been produced as Number 11 on
25 the exhibit list.

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1 MR. HAMMER: I'll have this marked as Exhibit 7.

2 And, Your Honors, I would move the admission of Exhibit 6 as
3 well, please.

4 JUDGE KING: May be admitted.

5 BY MR. HAMMER:

6 Q. Can you identify for the panel this document, sir?

7 A. It's the Chesapeake Bay Protection Plan. It would be
8 much better, I might add, if we had a Chesapeake Bay
9 Watershed map here, but it, it is that Chesapeake Bay
10 Protection Plan which has the connotation of, of the
11 Chesapeake Watershed.

12 Q. Okay. Now, Exhibit 7 is Executive Order 13508 dated
13 May the 12th, 2009; is that correct, sir?

14 A. I believe so.

15 Q. And that is after the date of the last redistricting,
16 is it not?

17 A. Yes, sir.

18 Q. And if one reads this document carefully, one finds
19 that the, the National Government as a matter of priorities
20 has established the importance of restoring and protecting
21 the Chesapeake Bay as exemplified in this document; is that
22 correct?

23 A. Yes.

24 Q. And, sir, in geographical terms, what part of West
25 Virginia contributes to water quality of the Chesapeake Bay?

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1 A. We're talking about the Eastern Continental Divide.
2 Many of us see this on I-68 and other places crossing West
3 Virginia. There's a part of West Virginia where all the
4 water flows to the Atlantic Ocean, and that is in the
5 Chesapeake Bay watershed. And on the west of that line, all
6 the water flows to eventually the Gulf of Mexico side.

7 And, so, to protect the watershed, you must protect
8 every -- to protect the bay, you must protect every inch of
9 the watershed that flows into that. So, the Eastern
10 Panhandle of West Virginia is very important to the life and
11 quality of the bay.

12 JUDGE KING: How many counties of West Virginia
13 are in the Chesapeake Bay Watershed?

14 THE WITNESS: I'd have to have a map to show you
15 that, Your Honor. But there's very -- it's a very specific
16 part of the Eastern Panhandle.

17 JUDGE KING: I remember from the biography of John
18 Marshall that it was reported that there were seven that
19 were originated in the Lord Fairfax estate. Would that make
20 sense? That seven counties of West Virginia were east of
21 the fall line and had water that went to the Potomac.

22 THE WITNESS: Again, sir, to be very exact, which
23 I want to do, I would have to see a Watershed map.

24 BY MR. HAMMER:

25 Q. I have a map up on the screen that we've identified.

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1 It's not a Watershed map. I don't really know if this is
2 helpful to you or not in identifying the Watershed, but you
3 can see the county names if that's of any assistance.

4 A. This particular map shows that there are two, two
5 districts in the Watershed of the Chesapeake Bay.

6 Q. All right. And, so, essentially what we're talking
7 about is the Eastern Panhandle contributes to the water
8 quality of the Chesapeake Bay. And pursuant to the
9 Executive Order, the national plan is subject to regulation
10 with regard to water quality.

11 A. Yes.

12 Q. Now, sir, when you provided your report to the
13 Legislature, did you give an opinion as to whether or not
14 the Second District as formulated in 1991 and again in 2001
15 and yet again as formed now is compact?

16 A. Yes. And I'd like to give a history of why I said
17 that.

18 Q. Okay. Well, first, tell, tell the panel what your
19 opinion is and then tell the basis for it.

20 A. The Second Congressional District of West Virginia is
21 elongated. It is not compact.

22 Q. And why do you say that, sir?

23 A. Again, I'm going to start with the history now. In the
24 1990 Census, as has been said here this morning, the State
25 of West Virginia was reduced from four to three

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1 representatives.

2 In 19 -- in the 1990 election, the last election
3 before, we had four Democrats elected: Mr. Wise,
4 Mr. Mollohan, Mr. Staggers, and Mr. Rahall. The state
5 Legislature -- and it's very odd in the history of
6 congressional district history and political geography
7 history to have not only reduction in number, but the entire
8 Legislature and the entire, and the governorship controlled
9 by one party.

10 So, I want to use a word that has not been used today
11 to explain what's going on. That Second Congressional
12 District in 1991 was gerrymandered. It was gerrymandered to
13 take a particular representative out of the picture.

14 And to gerrymander, if you look at the definition of
15 gerrymander, it's to take political power away from a
16 particular racial group, a particular political party, or a
17 particular individual or set of individuals.

18 And, so, the State Legislature had made a decision that
19 one party had to go. And they drew the congressional
20 districts in 1991 in a way to make sure that person was out.
21 And that person did lose in the primary.

22 To do this, they drew an elongated, circuitous route
23 that went from the Virginia, Maryland border to the State of
24 Ohio border. In no way can you say that that is compact
25 when you're going from the extreme Eastern Panhandle across

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1 the middle of this state to the Ohio River.

2 So, this is a classic case of what's called intra-party
3 gerrymandering. Again, it doesn't happen very much in
4 American historical history.

5 And, so, they could not do this following the State
6 Constitution that sets compact. And here is the origin of a
7 problem that we are here today with. This drawing in 1991
8 was an abomination. It's an abomination in '91. It was an
9 abomination in 2001 when it was allowed to stay. It is an
10 abomination now. It flies in the face of qualitative,
11 quantitative, and linguistic definition that is in the State
12 Constitution.

13 Q. Thank you. That's all the questions I have for you.
14 The defendants' counsel may have some questions for you.
15 So, please remain seated.

16 Your Honor, just an order of business. If I didn't
17 move the admission of one of those exhibits, I move the
18 admission of those exhibits now.

19 JUDGE KING: Number 7 I think is the one you
20 missed.

21 JUDGE BAILEY: I'm not sure 1 went in according to
22 the clerk.

23 JUDGE KING: Number 1 and Number 7 if they haven't
24 been admitted are admitted.

25 MR. HAMMER: Thank you, Your Honor.

Ken Martis - Cross (Majestro)

1 MR. MAJESTRO: Your Honor, would it be okay if I
2 ask questions from here?

3 JUDGE KING: Absolutely.

4 MR. MAJESTRO: Thank you.

5 CROSS EXAMINATION

6 BY MR. MAJESTRO:

7 Q. Professor, you provided a report to the West Virginia
8 Legislature did I understand from your testimony?

9 A. Yes, sir.

10 Q. Were you retained by the West Virginia Legislature?

11 A. Did I say anything what? I couldn't hear you, sir.
12 I'm sorry.

13 Q. I'm sorry. Were you retained by the West Virginia
14 Legislature?

15 A. Yes.

16 Q. And the report that we have in evidence is the sum
17 total of all of the opinions that you provided to the
18 Legislature prior to the passage of the redistricting bill
19 that we're here now on?

20 A. I believe that -- yes, that is the sum total of the
21 written report.

22 Q. And, in fact, there was a hearing where you were
23 invited to come and give testimony; correct?

24 A. I, I was out of town. I could not provide testimony at
25 that time, sir.

Ken Martis - Cross (Majestro)

1 Q. And, so, at no time other than provide your written
2 report, which you'll agree has a lot fewer of the opinions
3 you've offered here today, did you provide any other
4 information to the West Virginia Legislature prior to the
5 enactment of --

6 A. I asked, I asked -- I provided what was asked for.
7 They asked me to look at the quantitative models and I did.

8 Q. Okay. So, you'll agree with me this, all this
9 testimony about watersheds, coal mining employment,
10 political geography definitions, and all that was not before
11 the Legislature when they passed the current bill; correct?

12 A. Yes.

13 Q. Compactness is, can have different terms in geography
14 than in the law; correct?

15 A. I don't know what you mean by "different terms." We
16 have standard terms in political geography that defines
17 compactness. You have that in front of you. There are
18 more -- you know, we have one definition of compactness, and
19 places are more or less compact than others if that's what
20 you're asking.

21 Q. Okay. Well, let me ask this question. You're not here
22 to testify what the legal definition of compactness is under
23 the West Virginia Constitution, are you?

24 A. I am not a lawyer. I am here to give you what a
25 historical political geographer considers compactness in a

Ken Martis - Cross (Majestro)

1 qualitative and quantitative way.

2 Q. Fair enough. With respect to the legal definition of
3 compactness, are you, have you had occasion to review the
4 *Stone vs. Hechler* opinion of this Court?

5 A. I -- are you talking about this Court or *Stone vs.*
6 *Hechler* or --

7 Q. Well, let me, let me back up. Do you have an
8 understanding that after the 1991 redistricting that the
9 compactness of the district was challenged in a proceeding
10 like this one?

11 A. Yes.

12 Q. And, and have you ever had occasion to read that
13 opinion?

14 A. Are you talking about *Stone vs. Hechler*?

15 Q. Yes.

16 A. I have read that.

17 Q. And you'll agree with me that as, on the legal question
18 of whether the district in 1991 violated the West Virginia
19 Constitution's legal compactness definition, the Court ruled
20 that it did not.

21 MR. HAMMER: Let me object, Your Honor. He's not
22 being offered as a legal expert, solely as a political
23 historical geographer. He has read the decision, as the
24 Court has, and he can certainly testify as to what he read.
25 But he's not being offered for an opinion on the law.

Ken Martis - Cross (Majestro)

1 JUDGE KING: I think we understand that, what he's
2 offered for and we can understand his testimony. Go ahead.

3 BY MR. MAJESTRO:

4 Q. Okay. And, so, you'll agree with me the Court applied
5 a different definition than the one you've applied here
6 today; correct?

7 A. They sure did, sir.

8 Q. The 2001 redistricting, and -- well, you know, since I
9 have the Senate map up, let's talk a little bit about that.
10 Compactness in the West Virginia Constitution appears as a
11 requirement for a State Senate district, doesn't it?

12 A. Say that again, sir. I'm sorry.

13 Q. Compactness as a requirement appears in the West
14 Virginia Constitution for State Senate districts, doesn't
15 it?

16 A. I believe so.

17 Q. I have in front of the screen the map of the most
18 recent Senate redistricting. Have you ever seen that
19 before?

20 A. Only today, sir.

21 Q. Okay. In your opinion, are -- let's take District 6 in
22 Southern West Virginia. Does that meet your definition of
23 compactness?

24 A. Some are more compact than others.

25 Q. Well, let's look at District 6, the one of Southern

Ken Martis - Cross (Majestro)

1 West Virginia, Mercer, McDowell. Can you see that?

2 JUDGE KING: That's the green one at the bottom?

3 MR. MAJESTRO: Yes.

4 BY MR. MAJESTRO:

5 Q. Can you see the screen? I'm sorry.

6 A. I can see the screen there.

7 Q. The green one at the bottom. Let's take it that way.

8 MR. HAMMER: Let me note my objection. We're not
9 asking whether a qualitative compactness or quantitative
10 compactness. So, I would just ask that he clarify what he's
11 asking.

12 JUDGE KING: You go ahead.

13 BY MR. MAJESTRO:

14 Q. Well, first of all, let's make sure we're talking about
15 the same thing. Do you understand it's the district I'm
16 pointing to?

17 A. I can see better now. Do you have a specific district
18 in mind, sir?

19 Q. District 6, the one in Southern West Virginia that
20 includes Mercer, McDowell, Mingo counties.

21 A. That is an elongated district, sir.

22 Q. It is. District 12 in the middle of the state,
23 Harrison, Lewis, Braxton and Clay.

24 A. Elongated.

25 Q. District 3, Wirt, Wood, Roane.

Ken Martis - Cross (Majestro)

1 A. It's what's called protruding but, you know, --

2 Q. Is that not -- would that be -- that would be another
3 category of districts?

4 A. There would be a -- protruded means that there's a
5 compact core with something sticking out of it.

6 Q. Okay. And a protruded district is not compact;
7 correct?

8 A. That's correct.

9 Q. So, these districts that in your opinion as a political
10 geographer are not compact, the West Virginia Supreme Court
11 of Appeals has found them compact. Are you aware of that?

12 A. Am I aware of that?

13 Q. Yes.

14 A. I am now, sir.

15 Q. And, so, the legal definition under the West Virginia
16 Constitution as it applies to Senate districts, using that
17 same phrase, has been applied by the highest court of the
18 State of West Virginia in a different manner than you're
19 testifying here today; correct?

20 A. Yes, very different manner.

21 Q. The first district at the top of the state, is that an
22 elongated district too?

23 A. I imagine it goes all the way to the Northern
24 Panhandle.

25 Q. It does. Would that be an elongated district?

Ken Martis - Cross (Majestro)

1 A. It's, it's elongated. But as was pointed out before,
2 we have two panhandles in this state. Many states have one.
3 There are many other states with panhandles and, and odd
4 shapes.

5 In these particular areas, it is hard not to, you know,
6 to draw a compact district. So, I would say it's elongated
7 only because of the set boundaries with respect that, that
8 this line needs to be drawn to.

9 Q. And, in fact, it would be difficult to draw a district,
10 a congressional district that included the Eastern Panhandle
11 without it being at least partially elongated for that
12 reason too; correct?

13 A. Well, I'm glad you brought that up because I was
14 thinking of this this morning. When -- the two panhandles
15 in West Virginia are going to give quantitative
16 measurements, and, and I guess qualitative visual
17 measurements too, of, of protruded areas. And, so, you have
18 to use quantitative methods to look at is the district that
19 you've drawn, such as I would contend the Second District
20 which you have right there, is it even further exacerbated
21 or lowering the compactness score by being stretched out in
22 this manner.

23 And, so, the models are going to show that because of
24 the configuration of the Northern Panhandle, the Eastern
25 Panhandle, a lower compactness score. But what you have in

Ken Martis - Cross (Majestro)

1 the Second District is an extremely low compactness score
2 because of the stretching out of the district.

3 Q. With, with respect to -- so the answer is "yes" it's
4 going to be --

5 A. The panhandles will skew some of the quantitative
6 models.

7 Q. And some of the qualitative models?

8 A. Yes, definitely.

9 Q. And with respect to redistricting, you can't just look
10 at one district, can you, when you have three districts?

11 A. Say that again, sir.

12 Q. You can't just look at one district, can you? If
13 you're a legislature redistricting, you have to keep in mind
14 the effect your changes have on -- when you make a change to
15 one district to make it less compact or more compact, you
16 change the other district, compactness scores of the other
17 district. Correct?

18 A. I think as I read compact in the State Constitution
19 that all districts as best possible be compact. And being
20 compact means, and what we were driving at earlier, what I
21 believe in, is that if you use *Tobler's First Law of*
22 *Geography*, the compact districts necessarily have
23 communities of interest because of their geographical
24 distance and speaking as a geographer. So, I think we want
25 all congressional districts to be compact.

Ken Martis - Cross (Majestro)

1 Q. Okay. And, and your example was -- let's take your
2 example of the perfect compact district, a circle. It would
3 be impossible to have three perfect compact districts as
4 circles.

5 A. Yes, practically in every state.

6 Q. Exactly. So, when you take away -- if, if you were to
7 make a circle district in West Virginia, you would make the
8 other districts less compact to the extent you tried to
9 be --

10 A. Not necessarily, no, not necessarily.

11 Q. Okay. Well, let's talk about other factors.
12 Compactness is only one factor a legislature has to
13 consider; correct?

14 A. Correct.

15 Q. Population is another?

16 A. Of course.

17 Q. The State Constitution's requirement that county
18 boundaries be respected is another?

19 A. I don't know the State Constitution said what the
20 county boundaries -- you know, I've heard the discussion
21 this morning. We want equity in our congressional
22 districts. To have perfect equity or very close to equity,
23 some county boundaries are going to have to be affected or
24 ignored. There's just -- it's almost mathematically
25 impossible as was suggested in the testimony this morning.

Ken Martis - Cross (Majestro)

1 Q. But right now we're getting beyond your area of
2 expertise, though; correct? We're getting beyond your area
3 of expertise. You're not here to talk about
4 mathematically --

5 A. Exactly.

6 Q. My question is, though, the Legislature has to -- to
7 the extent that county boundaries are required under the
8 Constitution to be kept together, that's a consideration the
9 Legislature has to take into account.

10 A. And you can make compact districts with our current
11 county boundaries, yes.

12 Q. But it's something that has to be taken into account?

13 A. It has to be something --

14 Q. It's something that has to be taken into account when
15 you're, when you're redistricting.

16 A. As was said this morning, this was not taken into
17 account by several of the redistricting for senatorial
18 districts with respect to county boundaries. It's something
19 they should consider, yeah. A county is -- there's many
20 definitions that can be used second to counties of
21 communities of interest.

22 Q. And that was going to be my next question. In your
23 book that has every congressional district of West Virginia
24 since its history began in 1863, can you show us one example
25 where the Legislature has split a county in creating

Ken Martis - Cross (Majestro)

1 congressional districts?

2 A. I don't think so.

3 Q. In fact, they've never done it; correct?

4 A. Yes.

5 Q. The 1863 map, what exhibit was that? Exhibit 2? Now,
6 the -- with respect to the communities of interest you
7 described, a number of them are different in 2011 than they
8 were in 1863, aren't they?

9 A. Communities of interest?

10 Q. Yes.

11 A. Yes, sir.

12 Q. And, in fact, population is vastly different in 2011
13 than it was in 1863.

14 A. Yes, sir.

15 Q. In fact, the Legislature in 1863 and up until the 1970s
16 was free to redistrict without the federal constraints of
17 population and equality; correct?

18 A. Yes, that was the national trend.

19 Q. In fact -- so, it's a lot easier to draw congressional
20 districts and make them compact if you don't have to care
21 about population and equality; correct?

22 A. I think you can draw congressional districts and make
23 them compact and have equal numbers of individuals.

24 Q. Okay. Well, that's not my question. My question is
25 it's a lot easier to do it when you don't have to worry

Ken Martis - Cross (Majestro)

1 about population.

2 A. It is easier.

3 Q. With respect to the 2001 congressional district we have
4 on the screen here today, comparing 2001 with 2011, the
5 current, the current bill, you'll agree with me that it is
6 relatively more qualitatively compact.

7 A. Slightly.

8 Q. Okay. It's an improvement.

9 A. Very slightly.

10 JUDGE KING: You mean 2011 is an improvement.

11 MR. MAJESTRO: Yes. That's my question.

12 BY MR. MAJESTRO:

13 Q. Do you agree with me 2011 is more compact?

14 A. You know, when it's, it's -- if you probably did a
15 quantitative model of this, it would be slightly compact.
16 But it would be so insignificant in statistical terms that
17 I'd hesitate to say that. But if you want a number that's
18 going from .099 to .0100, you know, draw your conclusions
19 from that.

20 Q. Okay. Well, my question is it's, it's quantitative --
21 qualitatively, which is what your area of expertise is,
22 looking at the district it looks more compact to me.

23 A. To be qualitatively, it's the same. It's elongated.
24 It has a narrow neck connecting one part. The Eastern
25 Panhandle is divided. In the history of the Second

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1 Congressional District, if you look at all the districts up
2 until 1991, the Eastern Panhandle has been kept intact.

3 And in 1991, because Mineral County was the residence
4 of a person who was targeted, the Eastern Panhandle has been
5 divided. The Eastern Panhandle is a community of interest.
6 It has always been considered that in the history of the
7 State of West Virginia. And this map shows that a, a very
8 defined area of the state has been split. And it was split
9 in '91 for very specific reasons.

10 Q. Okay. I know you've given that testimony a couple of
11 times. Well, let me ask this question another way. It
12 basically is your opinion that all three of these
13 redistrictings that have happened since West Virginia went
14 to three are not compact.

15 A. Correct.

16 Q. And the basis --

17 A. The Second District.

18 Q. The Second District.

19 A. Second District.

20 Q. Okay. Now, in terms of this urban area, the Eastern
21 Panhandle counties aren't really related to -- in terms of
22 these statistical areas, they're not really related to any
23 of the other statistical areas in the state; correct?

24 A. You mean for the rest of the state?

25 Q. Yes.

Ken Martis - Cross (Majestro)

1 A. They're geographically separated as many of the other
2 metropolitan areas are.

3 Q. Now, with respect to factors like employment in mining,
4 these other factors that you, that you testified about, you
5 aren't here today to present a plan that keeps this
6 community of interest together that doesn't cause other
7 communities of interest to be split.

8 A. My, my purpose of being here today and my purpose of
9 testifying for the Legislature is, is one. And, that is,
10 that as a geographer, I see in the State Constitution the
11 word "compact." The founders put it there so that mischief
12 could be avoided by those who are going to draw boundaries.
13 It was a message sent.

14 So, I am here, and where the chips may fall is to say
15 that I believe in compact districts because in the long run,
16 gerrymandering is a bastardization of democracy and that we
17 have some tools such as compactness which prevents
18 activities like gerrymandering.

19 So, my purpose here today is to -- and my purpose this
20 summer in the Legislature was to say that let us strive for
21 compact districts that can be done. And in the normal way
22 of compactness, you're going to have communities of interest
23 that are geographically close clumped together. That is my
24 purpose.

25 Q. Okay. And, again, the question is, you aren't here to

Ken Martis - Cross (Majestro)

1 present a plan that contains three compact districts.

2 A. No, I have no plan. But I urge, I urge the Court and I
3 urge the State Legislature to come up with compact
4 districts.

5 Q. Okay. One last question. Are you being paid for your
6 testimony here today?

7 A. Pardon me, sir?

8 Q. Are you being paid for your testimony here today?

9 A. No, I'm, I have agreed to work on contingency because I
10 believe in the effort that's being made.

11 Q. Can you explain what you mean by that?

12 A. Pardon?

13 Q. Can you explain what you mean by that?

14 A. I don't have to be here today. I volunteered to come
15 because I believe in, that the Second District is
16 gerrymandered and elongated.

17 Q. Well, let me, let me -- my question is you used the
18 word "contingency." What do you mean by you're here today
19 on contingency?

20 A. That I may be paid in the future.

21 Q. Based on what? Based on whether you win?

22 A. I'm just telling you what my counsel said. But I'm not
23 sure. I've never testified before. But I'll let my counsel
24 answer that.

25 Q. Well, I'm asking you what you were told. You're

Ken Martis - Cross (Cooper)

1 here -- your understanding is that sometime in the future
2 you may get paid for your testimony here today?

3 A. Yes.

4 Q. Based on a contingency of whether or not this action is
5 successful and they recover?

6 A. Yes.

7 MR. MAJESTRO: That's all the questions I have.

8 JUDGE KING: Redirect? Oh, Mr. Thornton --

9 MR. COOPER: Am I allowed to --

10 JUDGE KING: Mr. Cooper wants to inquire.

11 MR. COOPER: Yes.

12 CROSS EXAMINATION

13 BY MR. COOPER:

14 Q. To clarify the record, the term Eastern Panhandle has
15 been used a number of times. So, by Eastern Panhandle do
16 you mean everything due south of Maryland that's in West
17 Virginia or do you mean something else?

18 A. I think that, that, the western border of Maryland
19 south is a good definition.

20 Q. The --

21 A. And it would follow county boundaries, but yes.

22 Q. And Mr. Majestro asked you a question about the,
23 whether it was less --

24 JUDGE KING: How many counties is that? Let's get
25 a little bit, be a little more specific. What's the Eastern

Ken Martis - Cross (Cooper)

1 Panhandle? What counties?

2 MR. COOPER: You want me to --

3 JUDGE KING: Yeah, I want you to find out, or the
4 witness can tell us. I just want a clarification.

5 MR. COOPER: Okay. That's fine. This term is
6 used different ways in West Virginia.

7 JUDGE KING: Right. I think it's a good question.

8 BY MR. COOPER:

9 Q. Do you consider Jefferson County in the Eastern
10 Panhandle?

11 A. What county?

12 Q. Jefferson.

13 A. Yes.

14 Q. Berkeley?

15 A. I'm going to say I don't know all the counties, but I
16 do know that the eight counties there on this particular map
17 that's being showed there I would say, I would consider
18 that, the Eastern Panhandle, perhaps the seven counties.

19 I'm not an expert on what the Eastern Panhandle is, but I, I
20 believe it's the -- panhandles are a very specific
21 definition in political geography. But you could say it's
22 those seven counties, perhaps eight counties. I think
23 that's Hardy there.

24 Q. Seven would then be the seven easternmost counties plus
25 Pendleton?

Ken Martis - Cross (Cooper)

1 A. I would, I would go along with that.

2 Q. Sometimes some of those counties are also called the
3 Potomac Highlands and that's why I was trying to --

4 JUDGE KING: Well, Pendleton doesn't touch
5 Maryland. If you were confining it to Maryland, Pendleton
6 doesn't touch it. I think the water from Pendleton runs
7 into the Potomac River.

8 MR. COOPER: I'm just -- sometimes on public radio
9 they refer to the Potomac Highlands. I was just trying to
10 get a clarification.

11 BY MR. COOPER:

12 Q. You weren't just referring to the three easternmost
13 counties?

14 A. Oh, no, definitely not.

15 Q. The next question relates to this compactness issue,
16 the question about whether the current district is more
17 compact or less compact. And since this isn't yet in
18 evidence, let me ask you a hypothetical question.

19 If, if the measure of compactness were to be determined
20 by, by dividing the area of the district by the smallest
21 circle that circumscribes the district --

22 A. Right.

23 Q. -- and if each of 1991, 2001, and 2011 the, the radius
24 of the small circle circumscribing the Second Congressional
25 District was exactly the same but the -- that would be the

Ken Martis - Redirect (Hammer)

1 denominator. But if the numerator dropped in terms -- that
2 is, if the area of the population decreased, under that test
3 wouldn't that be a less compact district under that
4 particular --

5 A. That is possible, definitely.

6 MR. COOPER: That's all the questions I have.
7 Thank you.

8 JUDGE KING: Yes. Go ahead, sir.

9 REDIRECT EXAMINATION

10 BY MR. HAMMER:

11 Q. Professor Martis, first let's clarify how you're being
12 paid in this case. What is your hourly rate?

13 A. \$150.

14 Q. And is that the rate you quoted to plaintiffs as your
15 charge for this case?

16 A. My expenses, yes.

17 Q. Plus your expenses?

18 A. Yes.

19 Q. And the contingency you referred to is that if there is
20 no recovery on this case, you may agree to write off your
21 hourly charges; is that correct?

22 A. Correct.

23 MR. MAJESTRO: Objection to leading.

24 JUDGE KING: What's the objection?

25 MR. MAJESTRO: I'll withdraw it, Your Honor.

Ken Martis - Redirect (Hammer)

1 JUDGE KING: Pardon?

2 MR. MAJESTRO: I withdraw it, Your Honor. I'm
3 sorry.

4 JUDGE KING: Go ahead, Mr. Hammer.

5 BY MR. HAMMER:

6 Q. If I understood Mr. Majestro correctly, he said that
7 prior to the 1960s there was no requirement in West Virginia
8 that congressional districts be equal in population. Do you
9 recall that question?

10 A. Yes. I was answering on a national scale.

11 Q. Yes. And, in fact, under the Constitution of West
12 Virginia, Article I, Section 4, is it not true that each
13 district shall contain as nearly as may be an equal number
14 of population to be determined according to the rule
15 prescribed in the Constitution of the United States?

16 A. I believe what you just read is from the book.

17 MR. HAMMER: And I would ask judicial notice be
18 taken of Article I, Section 4, the requirement that the
19 districts be equal in population.

20 JUDGE KING: Was that in effect as of 1863?

21 MR. HAMMER: This is the original Constitution as
22 it existed then and now. To my knowledge, this section has
23 never been amended.

24 JUDGE KING: Very good.

25 BY MR. HAMMER:

Ken Martis - Redirect (Hammer)

1 Q. Okay. Now, earlier I showed to you from your book the
2 way West Virginia was divided when it first came into
3 existence, the Eastern Panhandle being District 2 going
4 through the whole panhandle, and then north and south a
5 little bit of that western Maryland imaginary line if you
6 drop a plumb-bob down the western side of Maryland, slightly
7 to, slightly to the west of that, but generally the whole
8 panhandle and a little bit west.

9 And you -- and it was your opinion that this was a
10 compact -- a qualitatively compact district; is that right?

11 A. Yes.

12 Q. Now, I want to show you -- I guess I'll have this
13 marked as an exhibit. I've marked this as Exhibit 8. And
14 it's a little bit bigger than the screen it appears. You
15 can see it's called on this document the perfect plan, and I
16 think it's been referred to here today as the Unger plan or
17 as the mathematically perfect plan. In your opinion as an
18 expert, is the perfect plan compact as required by the West
19 Virginia State Constitution?

20 A. Yes, and infinitely more than the current law.

21 MR. HAMMER: I'll have this marked as Exhibit 9,
22 what came up during the Senate Select Committee. It's
23 sometimes referred to as the Facemire Amendment, or Senator
24 Snyder also discussed it during that committee. Your Honors
25 will see that in the official record, the official

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1 transcript, you'll see a discussion of the Facemire plan.

2 So, this is that plan.

3 BY MR. HAMMER:

4 Q. And, sir, do you notice any similarity between this
5 plan and what the, how West Virginia was originally cut up
6 into three districts back in 1863?

7 A. Somewhat similar.

8 Q. And in your professional opinion, is the Facemire plan
9 a compact plan as required by the West Virginia
10 Constitution?

11 A. I would say it strives at compactness and it's
12 infinitely better than the current plan.

13 MR. HAMMER: That's all the questions I have. I
14 move the admission of Exhibits 8 and 9, Your Honors.

15 JUDGE KING: They are admitted.

16 Mr. Majestro.

17 MR. MAJESTRO: Yes, Your Honor. Thank you.

18 RE CROSS EXAMINATION

19 BY MR. MAJESTRO:

20 Q. The West Virginia Constitution says each district shall
21 contain as nearly as may be equal number of population --
22 wait a minute. Each district shall contain, as nearly as
23 may be, an equal number of population to be determined
24 according to the rule prescribed in the Constitution of the
25 United States.

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1 Prior to the 1860s, you'll agree with me that the
2 Constitution -- the 1960s, I'm sorry -- you'll agree with me
3 that the Constitution of the United States had not been
4 interpreted to require equality of population.

5 A. Constitution of the United States?

6 Q. Yes. The Constitution of the United States says
7 congressional districts shall be chosen by the people or, or
8 based on a vote of the people. Correct? That's all it
9 says. It doesn't say they have to be equal, does it?

10 MR. HAMMER: Your Honor, we'll stipulate to what
11 Article I, Section 2 of the United States Constitution says
12 in its full text. It does not say what Mr. Majestro said.

13 MR. MAJESTRO: I'll agree to the stipulation.

14 JUDGE KING: We can figure out what the
15 Constitution says. That's the easiest part of this case.

16 MR. MAJESTRO: And I think -- let me ask the
17 witness this question.

18 BY MR. MAJESTRO:

19 Q. If the West Virginia Constitution prior to the 1860s
20 required equality of population, why was there an 83,000
21 person difference in the districts prior to them being held
22 unconstitutional based upon the modern equal protection
23 jurisprudence?

24 A. Are you asking me that question?

25 Q. Yes.

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1 A. I mean, I'm going to give you a generic answer.

2 Q. They were ignoring --

3 A. There was malapportionment rampant in the 1900s up
4 until the 1960s Supreme Court ruling that malapportionment
5 became so egregious that the Court felt that it needed to
6 step in and, and make districts equal in population.

7 Q. And, so, once they did that, that was a factor that the
8 Legislature had to take into account and balance against
9 compactness, correct, because they were ignoring it?

10 A. I think the Legislature had an obligation to have
11 compact districts of somewhat equal population.

12 Q. And before that, they didn't have -- no one was making
13 them make the districts of equal population. So, it was
14 easier to keep the districts --

15 A. I, I --

16 Q. Wait. Why don't you let me finish asking the question
17 before you answer.

18 A. Okay.

19 Q. The Legislature didn't have anybody forcing them to
20 keep the population equal, so it was easier to keep the
21 districts in their historical shapes, correct, because they
22 didn't have to look at population?

23 A. I would agree with that.

24 Q. Okay. Now, the perfect plan -- now, I understood your
25 testimony to say that the communities of interest analysis

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1 of keeping districts intact required keeping Monongalia and
2 Preston County together. Did I remember that correctly?

3 A. Yes, they're a -- they're considered one metropolitan
4 area.

5 Q. Okay. And, so, then the perfect plan, for example,
6 doesn't do that, does it?

7 A. No.

8 Q. The perfect plan -- you'll agree with me that the
9 communities in Putnam County are a different community of
10 interest than the communities in Summers, Mercer, and Monroe
11 County; correct?

12 A. It depends on what community of interest -- specific
13 communities of interest that you're talking about. There
14 are a whole variety of communities of interest, so I can't
15 say "yes" or "no" to that.

16 Q. Okay. Well, Putnam County is more urban than any of
17 those counties; correct?

18 A. Tucker County is --

19 Q. Putnam County.

20 A. Putnam County.

21 Q. Yes.

22 A. So, your question is --

23 Q. It's, it's a relatively urban county. It has larger --
24 it has an urban population; correct?

25 A. It's becoming more urbanized.

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1 Q. And based upon your core base statistical areas, Putnam
2 County should be kept with Kanawha County; correct?

3 A. I'd have to look at my map again, but --

4 Q. Why don't you pull your map out. I think it's Exhibit
5 3.

6 A. It looks like Putnam and Kanawha are in the same
7 metropolitan statistical area.

8 Q. Okay. But they're not in the same congressional
9 district under the perfect plan, are they?

10 A. They're --

11 JUDGE KING: The perfect plan -- what I earlier,
12 some of us called the Unger plan?

13 MR. MAJESTRO: The Unger plan. I believe it
14 was --

15 JUDGE KING: It's been called two or three
16 different things here.

17 BY MR. MAJESTRO:

18 Q. The perfect plan you just testified in response to --

19 JUDGE KING: Exhibit 8.

20 BY MR. MAJESTRO:

21 Q. Exhibit 8. Do you have Exhibit 8 in front of you?

22 A. So, your question is, sir?

23 Q. Under the perfect plan, Exhibit 8, Kanawha County are
24 in different congressional districts, aren't they?

25 A. All I can say --

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1 Q. Kanawha and Putnam.

2 A. -- is Kanawha and Putnam are in the same metropolitan
3 statistical area.

4 Q. And under the perfect plan, however, they're not in the
5 same congressional district.

6 A. Part of Kanawha County is not.

7 Q. Fair enough. Now, you also indicated, I thought, that
8 Fayette and Kanawha County shared some community of
9 interest. Did I remember that correctly?

10 A. They were in the same economic development area, but
11 not in the same metropolitan statistical area.

12 Q. The same economic development area. And, and Putnam
13 County is also in that same economic development area,
14 correct, that same one?

15 A. I'm not sure.

16 Q. Well, do you have an exhibit that lets us see that?
17 Well, let's move on. At least with respect to the community
18 of interest that, the one you just identified, they're in
19 separate congressional districts, correct, under the perfect
20 plan? And under the Facemire amendment, aren't they? Isn't
21 that correct? Both of those amendments split Kanawha and
22 Fayette Counties.

23 A. Sir, I'm not sure -- say that again.

24 Q. Under both Exhibit 7 and Exhibit 8 --

25 A. The perfect plan.

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1 Q. -- the perfect plan and the Facemire amendment, both of
2 those have Kanawha and Fayette Counties in separate
3 congressional districts; correct?

4 A. Yes.

5 Q. And then I believe you said that -- well, with respect
6 to the statistical metropolitan area, all of Kanawha County
7 is in the same statistical metropolitan area; correct?

8 A. Yes.

9 Q. But the perfect plan splits Kanawha County into two
10 congressional districts; correct?

11 A. Yes.

12 Q. And I believe your map shows that Raleigh and Fayette
13 County are in the same statistical metropolitan area;
14 correct?

15 A. Yes.

16 Q. The perfect plan, however, has got them in different
17 congressional districts, doesn't it?

18 A. Yes.

19 Q. So, I mean, there, there are -- a reasonable legislator
20 trying to come up with balancing, even in terms of
21 compactness, there's going to be trade-offs between all
22 these various factors you've identified; correct?

23 A. Compactness does have trade-offs.

24 MR. MAJESTRO: I think that's all the questions I
25 have. Thank you.

1 JUDGE KING: Thank you, Mr. Majestro.

2 Mr. Cooper.

3 MR. COOPER: No, no examination of this witness.

4 JUDGE KING: Thank you.

5 MR. HAMMER: Nothing further, Your Honor. May
6 this witness be excused?

7 JUDGE KING: He can be excused.

8 MR. HAMMER: Thank you, Your Honor.

9 THE WITNESS: Thank you, Your Honor.

10 JUDGE KING: Thank you very much, sir. Good to
11 see you.

12 MR. HAMMER: Mr. Martis, you may remain in the
13 courtroom, but you won't be recalled as a witness.

14 That's all the witnesses we have on the issue of
15 compactness, Your Honor. Pursuant to your earlier ruling,
16 then, we leave it to the defendants to proceed under the
17 second prong of *Karcher*.

18 JUDGE KING: I think we're going to -- I was
19 thinking I was going to let Mr. Cooper do his part here.

20 MR. COOPER: Pursuant to your directive prior to
21 the lunch break --

22 JUDGE KING: I don't know that I made a directive.
23 You go ahead. I made a suggestion.

24 MR. COOPER: I handed out three copies. So, you
25 have those. And since I've not electronically pre-filed

1 these, I want to make sure that I do whatever is necessary
2 to get them in the record. Do I have to have the court
3 reporter mark them or do I just -- do I hand an additional
4 copy to the court reporter, or what's, what's your
5 preference in terms of my getting them into the record?

6 JUDGE KING: Why don't you just mark them as
7 Cooper 1, 2, and 3.

8 MR. COOPER: That would be fine. Do you need
9 additional copies of those?

10 JUDGE KING: I have a copy. You need to give them
11 to the clerk. You can give her whatever it is you want to
12 file here.

13 MR. COOPER: Redistricting Exhibit Prepared by
14 Thornton Cooper will be Exhibit Number 1.

15 JUDGE KING: Which is which? What's that called?

16 MR. COOPER: Redistricting Exhibit Prepared by
17 Thornton Cooper. That would be Exhibit 1.

18 JUDGE KING: All right, Exhibit 1.

19 MR. COOPER: Then Congressional District Number
20 Two Exhibit Prepared by Thornton Cooper will be Number 2.

21 And then Compactness Exhibit Prepared by Thornton
22 Cooper would be Number 3.

23 So, the -- if I may proceed, the first exhibit, Cooper
24 Exhibit Number 1, is very simple. Does that show up? And
25 basically it is copies of the, of pages from the 1956 *Blue*

1 Book, the 1963 *Blue Book*, and the 1974 *Blue Book*, each
2 depicting maps of the congressional districts in existence
3 in 1956, 1963, and 1974 respectively and their populations.

4 And what those -- the basic reason for that is to show
5 that the -- if you look on Page 3 of that exhibit, the
6 district that was composed of Kanawha, Raleigh, Logan, and
7 Boone County was District 6. And its population was
8 446,466. And as I recall from going over this, it was
9 about, over 160,000 variance between the populations of the
10 districts that year.

11 If you go to the next, the next page, it shows the five
12 districts and there was a variance of over 80,000 from the
13 largest to the smallest that year.

14 And then, of course, 1974 relates to the redistricting
15 plan that passed muster in *Wells vs. Rockefeller* which I
16 think it was about 3,000 population difference from the
17 largest to the smallest.

18 So that it's important to understand the context that
19 the Federal Court ruled in 1972 in light of what had been
20 the -- what had been the congressional redistricting
21 population disparities before that time.

22 So, that's -- I offer that into evidence as marked.

23 JUDGE KING: Any objection on the part of any of
24 the other parties?

25 MR. HAMMER: No objection, Your Honor.

1 MR. MAJESTRO: No objection, Your Honor.

2 JUDGE KING: It's admitted.

3 MR. COOPER: Thank you.

4 The second exhibit called Congressional District Number
5 Two Exhibit Prepared by Thornton Cooper, the, it's basically
6 a list of the counties in the Second Congressional District
7 after the 1990 Census, the 2000 Census, and the 2010 Census
8 after the apportionments in each of those years which shows
9 the drop in pop-, in the area from 9,507 by the numbers that
10 I had, had listed in my motion for summary judgment based on
11 the *Blue Book* figures.

12 So, after 1991 the total population -- the total area
13 of the district was 9507 square miles. After 2001 it was
14 8513 square miles. And after 2011, 8068.

15 And then the bottom part of that is simply a division
16 problem, the results of the division problem wherein, as I
17 measured it, the smallest circle circumscribes the Second
18 Congressional District all three times is exactly the same
19 circle because even though Mason was removed this time, the,
20 the, the southwestern part of Putnam is on one end of the
21 circle and the, there's some appendages on Berkeley County
22 on the other end. So, you haven't actually shrunk the
23 smallest circumscribing circle.

24 So, under the Reock test --

25 JUDGE KING: It's as long as it ever was. Is that

1 what you're saying?

2 MR. COOPER: I'm saying that the, the circle has
3 been the same, but the numerator has dropped. Therefore,
4 under the Reock test, the compactness of the district has
5 dropped from .21 to .18.

6 JUDGE KING: Does that mean it's better or worse?

7 MR. COOPER: That means it's less compact.

8 JUDGE KING: It's worse.

9 MR. COOPER: It's worse.

10 JUDGE KING: In your view, it's worse.

11 MR. COOPER: Yes, under the Reock test. There are
12 other tests that might go the other way. I mean, the Reock
13 test is one that you can use with a compass. You don't have
14 to have a computer. You can simply get out a compass and
15 state road map and that measures elongation. Some of the
16 other tests measure indentation, but that measures
17 elongation.

18 The third -- and I would request that be received into
19 evidence.

20 JUDGE KING: Without objection, it's admitted.

21 MR. COOPER: The third is called the compactness
22 exhibit, and it's a little more complicated, which basically
23 describes -- what I have done, I've created a, a variant in
24 the Reock test, which the Reock test is one for each
25 district. What I did was a weighted Reock test for the

1 three districts together whereby you would, you would divide
2 the area of West Virginia by the combined areas of the
3 circles circumscribing each of the districts under the
4 congressional, under the plan passed by the Legislature by
5 the so-called perfect plan, the Unger plan, the, the plan
6 that splits two counties, and the four plans that I have
7 offered that I have, three of which I submitted to
8 intervening Cooper's complaint and the last one, the notice
9 that I submitted 11 days ago, Cooper Plan Number 4. And
10 also in there there's a map of West Virginia.

11 I did want to make one point from, from a geometrical
12 perspective. There's a footnote in *Stone vs. Hechler* that
13 states that the small -- that basically in Reock you just
14 find the two most distant points in the perimeter and draw a
15 circle around it.

16 That is, that is not mathematically true in some cases.
17 If you take the case of an equilateral triangle, say if you
18 had one 10 inches, 10 inches, 10 inches, if you started from
19 any point there, the most distant point is one of the other
20 points of the triangle.

21 If you, for example, go from -- if you were to, to have
22 one laid like this so that it would be flat and then have
23 the point at the top of the paper, if you were actually to
24 get out a compass and find a midpoint between the two, the
25 10-inch side, the midpoint would be five inches.

1 But if you tried to draw a circle from that midpoint,
2 you would not touch the top point because under the
3 pythagorean theorem, you've got -- the hypotenuse, in
4 effect, is 10. The -- one of the parts of the right
5 triangle is five. And, so, for -- you have to have five
6 squared plus X squared equals 10 squared. So, it's
7 basically the square root of 75.

8 So, you'd be shy about 3.66 inches if you tried to draw
9 the smallest circle that, that was in the midpoint of one of
10 the sides of an equilateral triangle.

11 So, whenever I drew my, my circles in arriving at this
12 district, sometimes it took a lot of work to find the
13 various points of each district. But what is on the
14 picture -- the map of West Virginia depicts the
15 congressional redistricting plan passed by the Legislature
16 this year. And then the, the circles around it basically
17 are the ones that I measured using the state road maps so
18 that the Congressional District Two is the, obviously the
19 one that has the longest -- it's the longest diameter and
20 longest radius of the circle circumscribing it. It would be
21 120 miles. If you look at West Virginia itself, it's about
22 135 miles.

23 So, the smallest circle that circumscribes the Second
24 Congressional District includes the entire First
25 Congressional District you can see from that, that drawing.

1 And, basically, much of the Third Congressional District,
2 there are only three counties that are wholly outside of
3 that circle which are Wayne, Mingo, McDowell and portions of
4 Mercer, Wyoming, Logan, Lincoln, and Cabell.

5 The last two pages of the exhibit are simply the, what
6 I call the weighted Reock score again which is -- the
7 exhibit itself is self-explanatory, but basically it's the
8 sum of the area of each circumscribing circle, and then that
9 is -- that's the denominator. The numerator is the area of
10 square miles of West Virginia.

11 So, the, the lower your weighted Reock score, the less
12 the, the plan overall is compact. And the greater the
13 weighted Reock score, the more it is compact.

14 And, as I said, this is just basically simple math and
15 drawing the circles. But I request that that be received
16 for whatever it's worth as, as Cooper's Exhibit Number 3.

17 JUDGE KING: Without objection, it's admitted.

18 MR. COOPER: That's all I have, Your Honor.

19 JUDGE KING: Thank you very much, Mr. Cooper.

20 Defense.

21 MR. MAJESTRO: Your Honor, would it be an
22 appropriate time to take a quick personal break?

23 JUDGE KING: Very appropriate.

24 MR. MAJESTRO: Thank you.

25 JUDGE KING: Court will stand in recess for 10

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1 minutes.

2 (Recess taken from 2:35 p.m. until 2:50 p.m.)

3 JUDGE KING: Mr. Majestro, Mr. Carenbauer.

4 MR. MAJESTRO: Yes, Your Honor. Thank you. At
5 this time, the defendants would, on behalf of my client and
6 Senator Kessler, we would like to call Senator Herb Snyder,
7 please, to the stand.

8 **HERB SNYDER, DEFENDANTS' WITNESS, SWORN**

9 DIRECT EXAMINATION

10 BY MR. MAJESTRO:

11 Q. Good morning, Senator Snyder. How are you?

12 A. Good afternoon.

13 Q. Good afternoon. It's been a long day for me. You just
14 took an oath. But you also took an oath as a member of the
15 West Virginia Legislature, didn't you?

16 A. Absolutely.

17 Q. And in that oath you, you swore that you would uphold
18 both the United States and the West Virginia Constitutions.

19 A. Absolutely.

20 Q. And every member of the Legislature takes that same
21 oath.

22 A. Yes.

23 Q. And that oath applied to the legislators' actions with
24 respect to passing the congressional redistricting
25 legislation that we're here about today; correct?

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1 A. As it does all of our official responsibilities, yes.

2 Q. In terms of preparation to make sure that senators
3 were -- and delegates were able to uphold that oath in this
4 case, the Legislature did preparation to prepare both the
5 staff and the members on the particular legal requirements
6 for congressional redistricting; correct?

7 A. I was not a -- I can't answer that completely, only
8 from my own involvement. I was not a member of the Select
9 Committee on Redistricting. So, what knowledge and so forth
10 they got, I know only my personal experience in contacting
11 the Majority Leader's office who was the chair of
12 redistricting and worked through the Senate and our own
13 redistricting office which is in the basement of the
14 Capitol. They were all very helpful in responding to
15 questions and so forth. And what the Select Committee
16 members went through, I can't testify to.

17 Q. Okay. Well, let's talk about what you do have
18 knowledge of. You indicated that the, that the Legislature
19 has a redistricting office; correct?

20 A. Yes.

21 Q. And that's a permanent office. That's just not
22 something that was put up over the summer.

23 A. Absolutely.

24 Q. And that's an office that's available to both delegates
25 and senators; correct?

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1 A. Absolutely. In fact, I used that office quite a while
2 before this in anticipation of this upcoming redistricting.
3 I was there at least a year in advance.

4 Q. Okay. And, so, I take it you weren't the only one who
5 put that kind of thoughtful effort into this redistricting.

6 A. Congressional?

7 Q. Yes.

8 A. Actually, I was surprised that there were very few
9 inquiries to much magnitude about congressional -- very few
10 early -- in, in fact, I was probably the only -- in the year
11 ahead of time, I had maps run. I believe I was the first
12 member to have that done. I shared them with Senator Walt
13 Helmick of the congressional redistricting mapping staff.
14 It was the only place in the building you could get these
15 proposed maps.

16 And at that time, Congressman Mollohan was still in
17 Congress and we did not have the final numbers. We only had
18 some projected numbers of what they might be, but thought
19 that it was not too early, and never too early. And I knew
20 that I was the first and the only for quite a while that was
21 getting some very preliminary projected maps run.

22 And I don't know that there was -- until we actually
23 got into the redistricting session, it's my understanding
24 there was a few that had real desire to, to have maps and so
25 forth of the congressional districts done. They were

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1 definitely all very engaged in Senate and House of Delegates
2 configuration because they were drawing their own districts
3 in other words.

4 Q. Okay. With respect to the plan that was ultimately
5 adopted, the, switching Mason County, that plan was
6 discussed in public prior to the adoption to the start of
7 the session; correct?

8 A. It was discussed very early on, some media accounts and
9 so forth, that a simple plan, Mason County flipped, et
10 cetera, that -- but, actually, I was quite surprised as a
11 member who was quite engaged and as not being a member of
12 the committee, but I got personally engaged in congressional
13 redistricting. I wasn't really engaged that much in my own
14 Senate redistricting because we had nothing to do but
15 shrink. I had the luxury of having my district shrink quite
16 a bit because of the population growth.

17 And we just simply had to -- where that shrunk too up
18 in Jefferson County into the panhandle. So, I didn't have a
19 lot to worry about at that point. That was a rather minor
20 change for me to just simply shrink it back.

21 Q. Senator, the question, though, is the Mason County
22 proposal was on the table long before the special session
23 even started; correct? People were discussing it in the
24 public.

25 A. There, there was discussion about it, possibly a little

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1 in the media, just party events, et cetera, yes.

2 Q. Okay. That's my, that's my question. Now, you, you --
3 the Legislature set up websites for the public.

4 A. To my knowledge, yes.

5 Q. And I take it you probably visited those websites.

6 A. Perhaps once or twice.

7 Q. But the public -- they were available to the public.

8 A. Oh, absolutely they were available.

9 Q. Now, the Senate itself conducted hearings throughout
10 the state; correct?

11 A. The Select Committee on Redistricting, the Senate
12 committee did. Then I believe the House followed through
13 and did some others. But the only one that I -- actually, I
14 went to two of those which was the Senate Redistricting
15 Committee, and I believe the first one was in Berkeley
16 County. And then I was here in Kanawha County and came to
17 the Kanawha County one.

18 Q. Okay. The Kanawha County one, not only did senators
19 attend those, but members of the House of Delegates attended
20 too.

21 A. Oh, absolutely. And the same is true for Martinsburg.

22 Q. Okay. Now, you also attended the Senate hearings once
23 the session started. You said you, you -- the Select
24 Committee held hearings; correct? I'm sorry. The
25 Redistricting Committee held hearings; correct?

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1 A. I don't recall hearings, no. They had their formal
2 committee meetings.

3 Q. And I, and I apologize for my terminology. That,
4 that's what I'm referring to.

5 A. Formal committee meetings. I believe there were just
6 two of those.

7 Q. And you attended those; correct?

8 A. Yes.

9 Q. And at those -- at least at one of those meetings, the
10 committee presented Professor Bob Bastress, West Virginia
11 Constitutional law expert, to help the committee understand
12 and presumably others like you who were watching what the
13 legal principles involved were.

14 A. A good overview, yes.

15 Q. And based -- I take it from your, your discussions
16 that -- did you do independent research as to what was
17 required?

18 A. Oh, absolutely. On congressional?

19 Q. Yes.

20 A. Yes, I had worked on this for a year.

21 Q. Okay. And, and based on Professor Bastress'
22 presentation and your independent research, you were aware
23 of the, what we've been calling the *Karcher* test?

24 A. Absolutely.

25 Q. And you were aware that the Legislature could adopt

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1 plans that had small variances if they provided a
2 justification based on some state principle; correct?

3 A. I believe the correct terminology was if they showed a
4 compelling interest of the state to adopt a higher, a plan
5 with a higher variation.

6 Q. And, so, in the -- here in the, the, the meeting of the
7 committee, the, there was a lot of discussion over the
8 various plans and which ones of those factors -- that, that
9 one plan might be better as to one of those factors and
10 another plan might be better as to another; correct?

11 A. Each -- to answer that correctly, each plan -- and,
12 again, I'm in attendance. I'm not on the committees, but I
13 certainly took it in.

14 During the first meeting of the two meetings of the
15 redistricting committee, the perfect plan that some refer to
16 as the Unger plan was given to the committee. And then I
17 believe they recessed until the next day so that everyone
18 could take a look at it, and in the meantime get any, any
19 amendments together that, that you want to make. If you
20 have plans, et cetera, it was up to the members.

21 And as being not a member of that committee, each
22 senatorial district could only have -- each senatorial
23 district, all 17, had one member on the committee. So, I
24 was not on the committee.

25 But I had then asked Senator Doug Facemire from Braxton

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1 County, a very close friend of mine who was a member of the
2 committee, to make the amendment which is now known as the
3 Facemire amendment which was my formal amendment that I
4 brought to the Legislature after working on it for a year.

5 Q. Okay. And, so, you sat through the hearing while all
6 those various amendments to the perfect plan were discussed.

7 A. Absolutely, one at a time, yes.

8 Q. And the -- with respect to the perfect plan, one of the
9 faults with the so-called perfect plan was that it split
10 counties; correct?

11 A. I guess fault is in the eyes of the beholder. I don't
12 know that it was told that a committee was at fault. I
13 think each plan -- well, now, particularly when that plan
14 was unveiled as the originating bill in the committee, it
15 was given a little different treatment because it was the
16 first. "Here's the originating bill." And each one of the
17 plans thereafter was handled a little differently. That's
18 the process it would go through.

19 And then anything, any strike, any sur-amendment to
20 that, they had to adopt by majority vote. And we went
21 through four or five of those. And I believe the previous
22 display here in the court today showed whether it was the D
23 Triple C crab claw amendment or the Facemire Snyder
24 amendment, and I personally explained with very large maps
25 what that amendment was and what it did.

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1 And everyone was given some time, took more time than I
2 did in committee to explain their different amendments. It
3 was done on a slide show very similar to what you have here
4 in the courtroom when it came up and they voted them up or
5 down one at a time.

6 Q. And, and in terms of the discussion of the plans, one
7 of the factors that was discussed in the various plans was
8 whether or not counties were split.

9 A. That was certainly discussed.

10 Q. And that there were some objections by senators
11 because -- there was effort by senators to keep counties
12 together in most of the plans; correct?

13 A. I think -- obviously, the question arose as to whether
14 you could legally cut counties, what does our State
15 Constitution and statute actually say. So, there was a
16 scurry after that to try to answer that. The language was
17 ambiguous, again, that we were cutting them for Senate
18 districts but does it apply.

19 So, being so many of us that are non-attorneys - I'm a
20 chemist - it's, you just sometimes have to ferret out the
21 answers to those things because I do think that there was an
22 honest effort to find out whether you could cut counties or
23 not. It had never been done.

24 Q. And that was going to be my next question. And there
25 was an effort to refrain from cutting counties because the

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1 senators believed that counties are communities of interest
2 that ought to be kept together if possible; correct?

3 A. I think that's a decision each would have to make in
4 their own mind. It was discussed, whether there was an
5 effort to refrain from it, but I think we just come up to
6 the vote and maybe that's why plans passed and failed.

7 Q. And, and is it fair to say that of the plans being
8 considered, only the zero variance plan split counties?

9 A. I believe that's correct.

10 Q. Okay. And --

11 A. Everyone is shaking their head at your table yes.

12 Q. So, all of the other proposals, including your own,
13 kept counties together?

14 A. Yes.

15 Q. And I take it you kept counties together because in
16 your mind, that was something historically, a traditional
17 state interest that we had tried to do since the history of
18 our state; correct?

19 A. Being a non-attorney, I thought that was what we had to
20 do. I was under the assumption, as I think many were, that
21 you had to keep counties whole.

22 Q. Now, in considering the various plans, one of the
23 factors that was debated was what the variances were for
24 each of the plans as they compared to the perfect plan;
25 correct?

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1 A. That is correct.

2 Q. So, so, the senators didn't ignore the variances of the
3 plan. They, in fact, affirmatively considered the variances
4 of all the options they created; correct?

5 A. They were certainly aware of it with the, the -- part
6 of my folder that I haven't referred to yet brought those
7 forth, the summaries of each plan. And that, that was
8 brought to the committee as I did for my Facemire Snyder
9 plan.

10 I had a summary of what the overall range and variance
11 and so forth is. So, the, the -- each committee member --
12 and it went through the full Senate, but each committee
13 member was armed with the information, the summary, the, all
14 the component data of what counties were in these. All that
15 data was given with each plan.

16 Q. And included in that was the, the numerical,
17 quantitative compactness measurements that we heard the
18 professor talk about.

19 A. It's not on, not on the data generated by -- I've never
20 seen the compactness data. There was compactness talked
21 about, and I can refer to my notes. But from memory, I
22 don't believe compactness was in each one of those.

23 Q. Okay. But that was available --

24 A. I never knew -- again, as a chemist, I do a lot of
25 math. I never knew that there were formal calculations for

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1 compactness that, that there was testimony here today. The
2 first I learned of that was during the special session on
3 redistricting that there were actually quantitative and
4 qualitative ways to measure that. It's an interesting
5 principle.

6 Q. And determining compactness in your mind when you voted
7 aye or nay on these various plans, in your mind did you
8 apply the qualitative compactness that the professor talked
9 about?

10 A. Again, I was not on the select committee, so I didn't
11 have a vote there. I let Senator Facemire do my bidding
12 there and I appreciated that. But I'd, I'd say just in a
13 common sense factor, the eyeball test of whether it looks
14 compact, I mean, one can argue -- I've heard this argued
15 every way till Sunday on what is compact. But I think the,
16 the eyeball test, is it elongated or is it compact --

17 Q. Okay.

18 A. -- and how much that matters and what weight each
19 member gave that in their vote, each member would have to
20 testify to that.

21 Q. Now, the 2001 plan that you-all were amending, you were
22 aware of -- and I have it here on the screen. You were
23 aware of the contours of the district when you were
24 proposing your amendment?

25 A. On -- now we're talking about floor amendment after --

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1 Q. When you, when you were coming up with your plan.

2 A. Oh, absolutely, absolutely, --

3 Q. And --

4 A. -- positively.

5 Q. And, so, the 2001 plan, did you have an opinion as to
6 whether or not it complied with the compactness requirements
7 of the West Virginia Constitution?

8 A. I had not in 2001 spent -- and it was a promise to
9 myself and my constituents, which I never told them, but a
10 promise to myself that I would become -- if I was still at
11 the Legislature, get more involved in the redistricting
12 process. I had only been there a few years. My first
13 redistricting experience --

14 Q. I'm going to stop you because I don't think you're
15 answering the question that, that, --

16 A. Okay.

17 Q. -- that I'm asking. My question is, did you think the
18 2001 plan was compact?

19 A. Absolutely not.

20 Q. So, you did not think it complied with the West
21 Virginia Constitution?

22 A. The compactness clause in the West Virginia
23 Constitution, I really wasn't even aware of West Virginia
24 Constitution or paid much attention to it, said that it had
25 to be compact until this round of redistricting 10 years

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1 later.

2 Q. So, when you voted for the 2001 plan, you voted for a
3 plan you did not believe was compact.

4 A. Yes.

5 Q. The Senate Bill 1008, the one that has us here today,
6 you'll agree with me that in terms of keeping the
7 districts -- the cores of the districts the same, that
8 Senate Bill 1008 does that better than any of the other
9 alternatives that were presented to the Legislature.

10 MR. HAMMER: Let me object to the undefined term
11 "core of the districts" and ask that he clarify the
12 question.

13 JUDGE KING: I thought you were going to object to
14 the leading question.

15 MR. HAMMER: I could, Your Honor, but I'll let him
16 move along.

17 JUDGE KING: Go ahead if you understand. He can
18 answer if he understands the question.

19 BY MR. MAJESTRO:

20 Q. You discussed --

21 A. I don't know what the core of a district means. I
22 literally don't know whether that might mean the overall
23 existing district in its structure. Is that the core, or is
24 the core the population center, the community center? I've
25 never -- and I'm certainly not trying to avoid your

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1 question. I've never knew, known what that means.

2 Q. Okay. Well, let's take your, let's take your, your
3 different terms. On the floor when you presented your
4 amendment and you said it respected the cores of the
5 district, --

6 A. Right.

7 Q. -- what did you mean by that?

8 A. What I meant -- after the long process of -- the
9 year-long process of developing the Facemire Snyder map
10 that -- part of the argument against that was that the cores
11 of the district, it would change. It's a large change from
12 what we currently have.

13 A lot of that was from the dissatisfaction of what we
14 had that generated that. But at the same time, then I had
15 lost that, that battle graciously in committee. And we then
16 the next day would have -- our last chance before it left
17 the Senate was floor amendments.

18 And out of courtesy to the other members, I would not
19 try to resurrect an amendment that was already killed that
20 I'd worked on for a number of months, but to try to improve
21 the Barnes amendment which is ultimately what was adopted.
22 It's on the screen today. The Mason County flip bill, take
23 all of Mason County out to try to improve that --

24 Q. Senator Snyder, I hate to interrupt you --

25 A. That's fine.

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1 Q. -- but the question is, is -- you're getting afar of
2 the question. My question is, on the floor you said, your
3 amendment -- and we can talk about your amendment a little
4 bit. But you said your amendment preserved the cores of the
5 districts because that was what was discussed as being
6 important in the committee.

7 A. That was --

8 Q. What did you mean by cores of the district when you
9 made that statement on the floor?

10 A. I assume what that, what the committee meant by cores
11 was the existing districts. And there seemed to be --
12 obviously, this Barnes amendment won in committee, that
13 that's similar to something they wanted to keep.

14 Q. Okay. Let's stop there. Now, let's go back to my
15 question. If you take what you assume was the committee's
16 meaning of the term "cores of the district," will you agree
17 with me that the bill that passed based on the Barnes
18 amendment does that better than any of the proposals in
19 front of the Legislature?

20 A. To keep the existing?

21 Q. Yes.

22 A. I would say that that was the reason for my floor
23 amendment to further improve upon that.

24 Q. Well, that's not my question. My question is, even
25 compared to your floor amendment, if the aim was to keep the

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1 cores the same, or keep the district as similar to the
2 existing districts as possible, Senate Bill 1008 does that
3 better than your amendment or any of the other proposals;
4 correct?

5 A. I don't know that I can agree to cores because I
6 haven't defined cores. But it certainly maintains the
7 status quo of what we have as closely as would be possible.

8 Q. Okay. And if that's the definition of cores that the
9 committee was applying, that that bill did it better than
10 the other one.

11 A. If the status quo means cores, I would agree with that.

12 Q. Okay. Now, you'll agree with me that Senate Bill 1008
13 keeps the three incumbent representatives in different
14 districts.

15 A. The map that was adopted?

16 Q. Yes.

17 A. Yes.

18 Q. And that there were other proposals that didn't do that
19 that caused both criticism in the public and criticism among
20 members; correct?

21 A. Yes.

22 Q. The Republicans, for one, weren't too happy about the
23 idea of putting Representative Capito and Representative
24 McKinley in the same district, were they?

25 A. Several that I had personal discussions with, and then

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1 it became apparent that you didn't have to live in the
2 district and several of them said, "We didn't know that."

3 Q. Well, but there still was opposition to that; correct?

4 MR. HAMMER: Objection, argumentative and leading,
5 Your Honor.

6 MR. MAJESTRO: I think I'm entitled -- under the
7 rules, I'm entitled to lead this witness. He's clearly
8 identified with the other side. And by his --

9 JUDGE KING: He's identified with the other side?

10 MR. MAJESTRO: He's, he's identified --

11 JUDGE KING: You called him as an adverse witness?

12 MR. MAJESTRO: What?

13 JUDGE KING: Is he an adverse witness?

14 MR. MAJESTRO: I believe he is, Your Honor.

15 JUDGE KING: Did you call him as an adverse
16 witness? That's the first I've heard.

17 MR. MAJESTRO: It's the first time he's objected.

18 JUDGE KING: I noticed you've been leading him.
19 Did he vote -- I thought he voted for this.

20 MR. HAMMER: He did.

21 JUDGE KING: I thought, according to Mr.
22 Carenbauer, only Senator Unger voted against. So, he voted
23 for the bill. This is his bill.

24 MR. MAJESTRO: He voted against it before he voted
25 for it.

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1 JUDGE KING: I'm not going to declare him an
2 adverse witness. You're doing all right. He is too. So
3 we'll -- you both are very sophisticated.

4 MR. MAJESTRO: I don't even remember what my
5 question was. What was my question? Can somebody -- can
6 you tell me what my last question was?

7 (Whereupon, the court reporter read back the previous
8 question, after which the following occurred:)

9 JUDGE KING: Go ahead.

10 BY MR. MAJESTRO:

11 Q. Was there opposition to putting, to putting two
12 incumbents in the same district after -- public opposition
13 after the, it was talked about that they didn't have to live
14 in the district?

15 A. Yes.

16 Q. And can you, can you ever -- can you give me one
17 example of a congressional candidate in West Virginia
18 history that's ran from the district they didn't preside in?

19 A. I'm not a historian. It could be -- none that I know
20 of, but I, I'm not the person to ask that.

21 Q. And I take it as a -- well, as a politician, do you
22 believe that there is an advantage to running in the
23 district you live in?

24 MR. HAMMER: Objection, Your Honor.

25 JUDGE KING: Overruled. I don't know what -- we

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1 could probably take judicial notice of that. But --

2 MR. MAJESTRO: If you're going to do that, I'll
3 move on, Your Honor. I think, I think I've made that point.

4 BY MR. MAJESTRO:

5 Q. And *Karcher*, in fact, says -- you know that *Karcher*
6 says that that is a factor you can take into account. The
7 U.S. Supreme Court says that's permissible; correct?

8 JUDGE KING: What do you mean by "that"?

9 MR. MAJESTRO: That, that -- keeping
10 representatives in separate districts, that that is a factor
11 in *Karcher*.

12 THE WITNESS: The only part of *Karcher* that I
13 remember is particularly on the variance that I paid
14 particular attention to, and the fact that if you had formal
15 plans presented with a lower variance, you had to show a
16 compelling interest of the state of why you didn't accept
17 that. That's -- I'm not an attorney.

18 BY MR. MAJESTRO:

19 Q. You don't believe that one of those compelling
20 interests would be to keep representatives separate?

21 A. It, it could very well be.

22 Q. In fact, when you proposed your amendment on the floor,
23 did you provide, provide the fact that it did keep a
24 representative separate as a reason to vote for your plan?

25 A. Oh, absolutely in that -- if I might follow through

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1 with that, realizing that I had lost with the, the Facemire
2 amendment, in attempting to better the plan that we were on
3 the verge of adopting -- there were no other floor
4 amendments. And it would be an improvement to, to what is
5 shown here today by at least filling in the panhandle and
6 getting that split, the horse's neck in the panhandle split
7 between two congressional districts. It would improve the
8 map. That was what I was attempting to do. I was certainly
9 not totally in support of adopting it, but it was an
10 improvement which was my last effort before it left the
11 Senate.

12 Q. Okay. The -- let's talk about the split of the
13 panhandle. Now, the, the two counties that aren't in the
14 Second Congressional District that are split into the First
15 by your testimony, now, they have their own senator, don't
16 they?

17 A. Own Senator?

18 Q. They have their own senators in, in the Legislature.

19 A. State? State senators?

20 Q. Yes.

21 A. Oh, absolutely.

22 Q. And did their senators vote against this proposal?

23 A. They -- I know Walt Helmick did. I'm not sure about --
24 I don't have the roll call vote in front of me.

25 JUDGE KING: What counties are you talking about?

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1 I can see the map here, but you two understand yourselves
2 but --

3 MR. MAJESTRO: It's Mineral and Tucker Counties.

4 JUDGE KING: What's that?

5 MR. MAJESTRO: Mineral and Tucker County.

6 JUDGE KING: Mineral and Tucker.

7 MR. MAJESTRO: I'm sorry, Mineral and Grant.

8 JUDGE KING: You mean Mineral and Grant.

9 MR. MAJESTRO: Yes, Mineral and Grant, Your Honor.

10 JUDGE KING: Mineral and Grant. You say they're
11 in the panhandle but they're not in the Second District.

12 BY MR. MAJESTRO:

13 Q. That's your testimony. Is that your testimony, Senator
14 Unger? Mineral and Grant are the two counties you want to
15 put in the, together with the other counties in the
16 panhandle.

17 A. It's Senator Snyder and, yes, you're correct.

18 Q. Senator Snyder. I'm sorry.

19 A. It's to take out -- to be more explicit in what the
20 amendment did, it was to add into the Second and take from
21 the First Grant, Mineral, and Tucker, add those into the
22 Second to fill in the panhandle and then down above Kanawha
23 County to remove Jackson, Roane, and Wirt.

24 And in doing that, the, the variance was actually less
25 than what I had proposed to committee the day before which

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1 was .42. That configuration as the Snyder floor amendment
2 was .39. Just in an attempt to better what we were -- that
3 clearly we were going to see the realists that were going to
4 adopt this and that could make it better, we just ran
5 quickly that night some maps to see what if you just moved
6 these counties to fill in the panhandle. And I was quite
7 surprised that it was .39 variance and, therefore, the floor
8 amendment.

9 Q. Okay. The .39 was greater than zero; right?

10 A. Oh, .39 obviously is.

11 Q. And, so, in your mind, by proposing this bill, which I
12 take it you believed was constitutional --

13 A. Oh, absolutely. I -- both the .42 map that the, the
14 Facemire map that I did the day before was -- I was very
15 serious about it and would not have offered anything that
16 wasn't equal to or better in variance because I thought,
17 particularly with *Karcher*, that the variance was important.
18 That was part of the reason I did all this.

19 Q. Okay. But my question is, the variance in both your
20 plans was greater than the perfect plan.

21 A. Oh, without a doubt. But it was about half of the
22 Mason County only plan.

23 Q. And I, and I take it you believed that the, keeping the
24 delegates from the same district with respect to the floor
25 amendment was the justification for being better than the

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1 perfect plan which didn't; is that right?

2 A. Could you rephrase that again?

3 Q. Well, let me withdraw and ask a question. What
4 substantial factor, to use your terminology, under *Karcher*
5 did you believe allowed the Legislature to pass your
6 amendment instead of the perfect plan?

7 A. Well, in my year leading up to this, none of us had
8 seen the perfect plan. And all of my planning and moving
9 forward was to come up with -- and I had assumed that
10 counties had to be kept whole.

11 Q. Okay. Well, --

12 A. There's debate on that, but that was my personal
13 assumption, and started looking at counties, particularly
14 the Facemire plan, that literally kept us close in the
15 Eastern Panhandle over -- the cutoff was the western half of
16 Monongalia County, that you can get anywhere in the district
17 in two, two and a half hours. It's only seven to get to the
18 other end of the district. I drive five hours and 25
19 minutes to get here.

20 Q. So, making the district more compact you believe
21 justified the, the deviations in the plan?

22 A. Oh, without a doubt, yes. But I was attempting -- and
23 the Mason County map, as your earlier question, we knew that
24 that concept was out there, didn't know who was going to
25 offer it. It ended up Senator Barnes. But we knew that

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1 concept was out there, and I was comparing the variance of
2 .79 to see if I could get lower predominantly because of the
3 *Karcher* ruling that said if you have lower plans presented,
4 you have to show a compelling interest of the state to adopt
5 the lower, the higher variance. And all -- both plans that
6 I did both in the floor amendment and the Facemire Snyder
7 amendment in committee both had about half of the range of
8 variance.

9 Q. The Snyder plan, that's yours; right?

10 A. That's, that's the floor amendment.

11 Q. Yes. Do you believe that the Second Congressional
12 District is compact under your plan?

13 A. No, absolutely not. As I had earlier stated, that was
14 an attempt to -- we were on the verge of passing -- of
15 suspending the rules, which we had done, getting ready to
16 pass this over to the House in a matter of minutes. It was
17 a last ditch effort to fill in the panhandle where the
18 population was and at least improve, make an improvement for
19 the citizens over in my area that -- and also it improved
20 the First Congressional District by getting rid of that fish
21 hook where you had Grant and Mineral hooked on going up the
22 panhandle in Congressional District One.

23 So, it actually helped the compactness a little in the
24 Second District, but it also cut that fish hook off of Grant
25 and Mineral off of the First District.

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1 Q. Is it fair to say that your plan is -- well, let me ask
2 this question. Do you believe your plan was constitutional?

3 A. State or federal?

4 Q. Both.

5 JUDGE KING: Is that going to help us any? He's
6 not an expert in constitutional law, is he? He's not even a
7 lawyer.

8 MR. MAJESTRO: I, I think the answer, the answer
9 to the question --

10 JUDGE KING: He's probably going to say "yes." He
11 voted for it.

12 MR. MAJESTRO: Well, I don't know.

13 JUDGE KING: He didn't think he violated his oath.

14 MR. MAJESTRO: Well, that's my question.

15 BY MR. MAJESTRO:

16 Q. Did you violate your oath by presenting the plan?

17 A. Well, I guess -- politics is the art of compromise. In
18 so many of these things, you literally have to find a middle
19 ground. And this is the perfect example, even though I was
20 not at all pleased and had worked for nearly a year to
21 change -- to not have to live with that Second Congressional
22 District for another ten years.

23 After losing in committee, I offered the floor
24 amendment to make it better for the -- fill in the gap,
25 make, at least put the panhandle together whole as we were

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1 about to adopt the Barnes amendment on the floor. I was
2 trying to improve it.

3 Q. Okay. But you believe -- I guess what I hear you
4 saying is that while in your mind this wasn't the best plan,
5 this was a constitutional plan that was better than the
6 Barnes amendment you didn't like.

7 A. There's a common saying around the, the halls of the
8 Legislature that it's constitutional until the courts say
9 otherwise.

10 Q. But you wouldn't propose a plan you did not believe,
11 that a court wouldn't say is constitutional, would you?

12 A. I certainly wouldn't try to do anything that, that I
13 feel was blatantly unconstitutional. But if there is a gray
14 area in this map, I, quite frankly, think it is not compact,
15 but I was working with trying to improve the amendment that
16 was about to be passed. That's why I did the floor
17 amendment.

18 Q. So, your testimony is you submitted an amendment you
19 believe was not in accordance with the West Virginia
20 Constitution?

21 MR. HAMMER: Asked and answered, Your Honor.

22 MR. MAJESTRO: If he gives me a "yes" or "no" I'll
23 move on.

24 JUDGE KING: Go ahead.

25 THE WITNESS: No.

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1 BY MR. MAJESTRO:

2 Q. Okay. The Barnes plan was adopted. Do you believe it
3 is in accordance with the West Virginia Constitution and the
4 United States Constitution?

5 A. It is not compact.

6 Q. Okay. So, you think it violates the compactness clause
7 of the West Virginia Constitution?

8 A. Yes, in my opinion, but I'm not a practicing attorney.

9 Q. And, yet, despite taking the oath to uphold the State
10 Constitution, you voted for the final passage of the bill
11 that included the Barnes --

12 JUDGE KING: Haven't we been through this before?
13 He's not a lawyer.

14 MR. MAJESTRO: I don't believe I've asked this
15 question.

16 JUDGE KING: He voted for it.

17 THE WITNESS: I voted for it, yes.

18 JUDGE BERGER: Just a second, sir. I'm sorry. Go
19 ahead.

20 JUDGE KING: You go right ahead.

21 JUDGE BERGER: No, I was just trying to make the
22 witness be quiet until you finish. That's all.

23 MR. MAJESTRO: That's all. I'll pass the witness,
24 Your Honor.

25 JUDGE KING: Cross-examination?

Herb Snyder - Cross (Cooper)

1 MR. HAMMER: We have none, Your Honor.

2 JUDGE KING: Mr. Cooper.

3 CROSS EXAMINATION

4 BY MR. COOPER:

5 Q. Good afternoon, Senator Snyder. When you were in the
6 redistricting committee hearing with respect to the
7 different amendments being offered, did you see me in the
8 audience?

9 A. Certainly.

10 Q. Right. The plan that was -- the, the so-called perfect
11 plan, the plan that Senator Unger unveiled, was that ever
12 actually offered during that meeting as, in terms of the
13 Senate saying, "I moved, move to report that out"?

14 A. The bill had to be moved. It was moved by Senator
15 Stollings from Boone County to get the bill before the
16 committee is my recollection.

17 Q. Then there were amendments made to it. That was the
18 posture.

19 A. The posture was -- I believe there was a recess and it
20 came back and it dealt with amendments.

21 Q. And what was reported out was the one that had been,
22 that Senator Barnes --

23 A. That's correct.

24 Q. Would it be fair to say that your, your posture as a
25 legislator is after you fight a battle and you think that

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1 the matter is resolved, you don't go back and fight it again
2 if you think it's not going to get you anywhere?

3 A. I learned that early on, yes, sir.

4 MR. COOPER: I have no further questions. Thank
5 you.

6 MR. MAJESTRO: That's all I have, Your Honor.

7 JUDGE KING: Hold on just a second.

8 You were present when Professor Bastress testified?

9 THE WITNESS: I was in the audience, yes.

10 JUDGE KING: During the entirety of it. You
11 remember he was a lawyer actually in the 1991 case, the
12 *Stone* case?

13 THE WITNESS: I believe I've heard that, yes.

14 JUDGE KING: And he actually testified in
15 committee that he thought it was wrong. He said that
16 doesn't count much because he lost. Do you remember that?

17 THE WITNESS: I believe I do. I was -- Your
18 Honor, I apologize for talking over you earlier, but I --

19 JUDGE KING: And he, and he testified that there
20 had been a national trend for almost perfect equality that
21 had been enabled by the development of very sophisticated
22 software. He emphasized that.

23 THE WITNESS: I absolutely do remember that, Your
24 Honor.

25 JUDGE KING: And he said, explained to the

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1 Legislature that respect for local government boundaries is
2 not as great an interest in the context of congressional
3 elections as it would be in state legislative races. Do you
4 remember that?

5 THE WITNESS: Yes, sir.

6 JUDGE KING: I think that's all I have. Anybody
7 else?

8 MR. HAMMER: No, Your Honor.

9 JUDGE KING: Thank you very much, Senator.

10 THE WITNESS: Thank you.

11 JUDGE KING: Next witness.

12 MR. MAJESTRO: At this time, Your Honor, we would
13 call Senator John Unger.

14 **JOHN UNGER**, DEFENDANTS' WITNESS, SWORN

15 DIRECT EXAMINATION

16 BY MR. MAJESTRO:

17 Q. Good afternoon, Senator Unger.

18 A. Good afternoon.

19 Q. Can you explain to the Court your role in the
20 redistricting process in the Senate?

21 A. Yes. The acting president had selected me as the Chair
22 of the Task Force initially. That later evolved into the
23 Select Committee on Redistricting.

24 Q. So, you were, in fact, the Committee Chair of the
25 redistricting process.

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1 A. Yes, sir.

2 Q. As -- in part -- in your role as Committee Chair, did
3 you have a staff you supervised?

4 A. I supervised several staff. We utilized the attorneys,
5 any of them we needed, also the Legislative Redistricting
6 Office whenever called upon. But we had several staff
7 working on this very initiative.

8 Q. And as part of your role as Chairman, were you
9 satisfied that your staff and your attorneys were adequately
10 trained in the legal principles that underlie the
11 redistricting process?

12 A. I believe so. I mean, I think they received the
13 training. We tried to give them the utmost training.
14 Primarily, the training centered around using the software
15 Maptitude that was very sophisticated. As far as the legal,
16 we just assumed that the law schools had prepared them for
17 that.

18 Q. You said that you sent several legislators and several
19 staff members and attorneys to conferences regarding the
20 redistricting law, did you not?

21 A. Yes, that's right. I mean, we've tried to attend as
22 much as we can and read as much as we can on the
23 redistricting process.

24 Q. And the House brought someone from the National
25 Conference of State Legislatures in to, to speak to them.

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1 Were you aware of that?

2 A. I was, yeah. I knew that they had brought in someone
3 to testify to help brief them on the redistricting process.

4 Q. And, again, you'll, you'll agree with Senator Snyder
5 that the Senate set up a website and the House set up a
6 website for the public to be able to understand what the
7 process was?

8 A. Yes, sir. I ordered that. Matter of fact, when I took
9 over as Chair, the first thing that I did is I wanted it
10 open and transparent. So, we established a website. We
11 established Facebook. We even started Twitter. And we held
12 12 meetings across the state in order to receive input
13 before our committee or Task Force ever met and started
14 discussing the redistricting process ourselves.

15 Q. And, and while the House did not have those meetings
16 across the state -- did you go to all 12 of those meetings?

17 A. I did attend all 12 of the meetings, yes, sir.

18 Q. And, and would I be correct in assuming that there were
19 House members in attendance at all of those meetings?

20 A. No, sir, there wasn't House members at all the
21 meetings, but they, they were welcomed. We had sent out
22 letters to each of the members inviting them to come. And
23 some of them did come to those meetings and were able to
24 hear what was going on.

25 Q. And, and some of them had spoken at meetings too;

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1 correct?

2 A. Yes. Some of them had signed up to speak at those
3 meetings.

4 Q. All right. I take it you personally made an effort as
5 Chairman to study what the legal requirements were with
6 respect to both the state and federal constitutions; is that
7 correct?

8 A. I did. I'm not a practicing attorney. I'm not a
9 lawyer. But I tried to do that. And, also, I was trying to
10 make sure the members were well-educated on those things as
11 well.

12 The two overarching principles that we communicated, at
13 least to the senators, first was the one person, one vote
14 principle out of the U.S. Constitution. And the second was
15 the compactness principle out of the West Virginia
16 Constitution.

17 Q. Okay. And with respect to the one person, one vote
18 principle, you've been here today while it's been described
19 by the attorneys for both sides, were you? I'm not -- I
20 believe you were. Is that correct?

21 A. What's that? I'm sorry.

22 Q. You were here when the attorneys offered their
23 arguments to the Court as to what the legal requirements
24 were.

25 A. Earlier this morning?

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1 Q. Yes.

2 A. Yes, sir, I was here.

3 Q. And you heard the description of the, of the various --
4 of the two parts to the *Karcher* test?

5 A. Yes, sir.

6 Q. And that was something that you and the other members
7 of the Legislature were aware of in considering the various
8 proposals for congressional redistricting?

9 A. I can't speak for all the members. I mean, you can
10 lead a horse to the water, but you can't make him drink.
11 But I'll let you know that they did have available to them
12 these types of legal arguments before them.

13 Number one, my attorney, the counsel, Mack Markovich
14 [sic], or Mark Matkovich prepared a memo, an abstract that
15 outlined those very principles both in the area of Senate
16 redistricting as well as congressional redistricting.

17 We invited also comments from Professor Martis where,
18 of course, that's been given to this Court, and that was
19 distributed among our members, as well as we invited Bob
20 Bastress to come and speak to us and again reiterate those
21 legal principles.

22 Q. And Professor Bastress told you that under the *Karcher*
23 test, if you didn't pick the smallest plan, you had to come
24 up with valid state reasons that justified not doing that,
25 didn't he?

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1 A. I think he referred more to it -- if we go -- if we
2 deviate away from zero, then we have to have justification
3 to do so. And then the issue came up about the, the '91
4 case being -- what was it, .39? Was that what it was? And,
5 also, when I asked the question about .79, he said, "Oh,
6 well, that would necessitate even more justification on
7 behalf of the Legislature."

8 Q. Okay. And, and then the '91 case, the justification
9 was compactness. Is that, is that the way you remember it?

10 A. I don't remember the idea of the compactness, but I do
11 know that the variance was focused in on because to us that
12 was the first litmus test. We had to get as close to zero,
13 not zero.

14 Then we moved to compactness. And then these other
15 considerations of communities of interest and all like that
16 would come into play once we met those two requirements.

17 Q. And the debates over the various plans centered around
18 all of those factors; right?

19 A. I don't think there was much debate about the variance
20 because I think the variance, the numbers speak for
21 themselves and you can't have much of a debate on that.

22 In regards to compactness, I think there was an
23 assumption that Senator Snyder expressed by members that we
24 couldn't cut counties, and that was clear. I presented that
25 to the committee and to the Senate that you could, but that

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1 was a whole different mind-, mind-shift for them because
2 they were always under the assumption and always told that
3 we don't do that.

4 Q. And --

5 A. So, we just found -- basically, many members found out
6 that they could cut counties, that other states have done
7 it. There are only two now that exist in West Virginia and
8 Iowa that had not. Arkansas had cut theirs this year in
9 order to meet the one person, one vote requirement and their
10 compactness issue.

11 And, so, there wasn't anything in our West Virginia
12 Constitution that would prohibit it, nor in the U.S.
13 Constitution to do so.

14 Q. And after being informed of this, assuming it's
15 correct, how many plans were -- amendments were proposed
16 that split counties?

17 A. I don't know -- the originating bill, the so-called
18 perfect plan which, by the way, isn't necessarily my plan,
19 the way that came about is I had instructed the staff --

20 Q. Let's -- why don't we stick with the question I'm
21 asking, Senator.

22 A. Well, that's the only one that I think cut the counties
23 and I was trying to explain --

24 Q. Okay.

25 A. -- the origin of that particular bill.

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1 Q. Well, we -- if that's important, we can get to that
2 later. I'm more concerned with the question of whether
3 there was any desire on the part of any member to introduce
4 a bill that split counties after the perfect plan was, was
5 not accepted.

6 A. Sure, there was.

7 Q. It wasn't a desire enough that any of those bills were
8 introduced; right?

9 A. Well, I know that Senator Palumbo had expressed it in
10 committee to try to get to the variance. However, he had
11 opportunity to offer it up as far as amendments.

12 I even think that Senator Barnes had talked about doing
13 it on the floor. But then there was a, kind of an argument
14 between the two of them of which county they would split.
15 Senator Palumbo wanted to split Randolph, which is the
16 county he's from, and Senator Barnes wanted to split Kanawha
17 which was the one with Corey Palumbo. So, they started
18 fighting with each other.

19 And I'll tell you the truth. The bill flew out of the
20 Senate so fast, I don't think they resolved the argument
21 before it was passed.

22 Q. So, I think it's fair to say that most members would
23 object to having their county split.

24 A. Well, I think that you always have "not in my
25 backyard." As you indicated -- I think one of your counsel

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1 indicated the Mason County delegates ultimately voted
2 against this because they didn't want to go to the Third
3 Congressional District. They didn't want to move.

4 So, I think, you know, you may have the arguments about
5 it. I would think that a member would want to be part of
6 that splitting if their county was going to be split as far
7 as deciding if that was going to be the case.

8 Q. Let's talk about another one of the factors under
9 *Karcher*, keeping the cores of the district intact. You just
10 gave an example that there was opposition in the House to,
11 by those members to moving, to moving their district.

12 Among the, the -- well, let me ask this question, the
13 same question I asked Senator Snyder. The plan that was
14 adopted did the least moving of counties and voters between
15 districts. Is that right?

16 A. Are you, are you -- which plan are you referring to?
17 The one that was actually adopted?

18 Q. Yes.

19 A. I would say probably out of those plans, that was
20 correct.

21 Q. And that was important to a lot of the members?

22 A. I can't speak for all the members, but I know that that
23 was something that was discussed.

24 Q. That was something that was debated both in committee
25 and on the floor?

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1 A. I wouldn't call it debated. I would just say it was
2 expressed.

3 Q. Okay. And the end of that expression led to the
4 adoption of the plan that moved the fewest number of
5 counties?

6 A. Yeah, and you could term it as it was the most
7 politically expedient. It was one that we could do and move
8 out and get out of town, easiest.

9 Q. Okay. And several of the proposals required the
10 incumbent representatives to run against each other;
11 correct?

12 A. There were proposals that required that -- not
13 necessarily that they would have to run against each other,
14 but their residence would end up in the same congressional
15 district because as communicated and demonstrated to the
16 Senate, it's, it's not a requirement that you reside in the
17 congressional district where you run.

18 Q. Well, I'll ask you the same question I asked Senator
19 Snyder. It's not a legal requirement, but are you aware of
20 anyone in the history of West Virginia ever running in the
21 district they didn't live in?

22 A. I don't know -- I remember there was a candidate from
23 Clarksburg that ran in the Second Congressional District at
24 one time. I believe she was a county commissioner. I don't
25 know if she ultimately ran or not. But, but I know she, she

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1 was over in the Eastern Panhandle campaigning. And that was
2 several years ago. It was many elections ago and I've
3 forgotten her name. But she was a county commissioner I
4 believe with the Harrison County Commission.

5 Q. Okay. And I, I take it from the fact you can't
6 remember her name, we all can agree that that effort was not
7 a successful one?

8 A. Well, she, she's definitely not one of our Congress
9 persons today.

10 Q. Nor was she ever; correct?

11 A. I -- no, I know she wasn't.

12 Q. Okay. Do you believe the 2000 -- well, let me just ask
13 this question. Do you believe the plan that was adopted is
14 constitutional?

15 A. No.

16 Q. Yet, you voted for it?

17 A. I'm sorry. You asked me if the plans were
18 constitutional --

19 Q. I asked you --

20 A. -- that we adopted.

21 Q. Uh-huh.

22 A. And the answer is "no." And, no, I did not vote for
23 it.

24 Q. Oh, I'm sorry. I'm off. The plan in 2000 -- my
25 question is the plan of 2001. Do you believe that one was

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1 constitutional?

2 A. I was a freshman and I don't believe it was
3 constitutional. And my vote was a mistake back in 2001.
4 Now that I've learned more and I've been in the legislative
5 process and I've studied it, I have found that the, that
6 that was, was not proper. So, if I could take that vote
7 back and recast it, I would.

8 Q. If we take the perfect plan, is it fair to say that in
9 terms of the -- that there are political choices that that
10 plan got adopted. For example, while the residents of the
11 Eastern Panhandle may prefer that plan, the residents of
12 Kanawha County and Harrison County might be opposed to
13 having their county split into two districts.

14 A. Well, this is where I should explain what the purpose
15 of the perfect plan was --

16 Q. Well, why don't you --

17 A. -- because I was never --

18 Q. Senator, I'd like an answer to that question and then I
19 will let you explain.

20 A. Okay. What's the question again?

21 Q. My question is that there are trade-offs in these
22 plans; right? That they -- that the, that the perfect plan
23 brings back together, to use the phrase that's been used
24 here today, the Eastern Panhandle at the cost of splitting
25 Kanawha County and Harrison County.

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1 A. In regards to the first principle, the one person, one
2 vote, there was no trade-off. It was zero variance except
3 for negative one person in one of the districts; zero
4 variance, zero difference within the population.

5 In regards to compactness, there was no trade-off. We
6 worked with -- or the staff worked with Professor Martis to
7 make sure that it was compact, it was in line with what the,
8 what is it, the 1863, at least as close as we could, with
9 the Watershed and karst terrain and everything.

10 In regards to other things, with any public policy
11 there's always trade-offs. But as I mentioned, the two
12 overarching principles we drove on was the one person, one
13 vote in compactness. Everything else was up for discussion
14 and debate.

15 Q. Okay.

16 A. But those two principles were not.

17 Q. Okay. And the Legislature resolved that debate by
18 enacting Senate Bill 1008; correct?

19 A. I don't think the debate is resolved or we wouldn't be
20 here.

21 Q. Well, it's resolved -- we're in court. We're not in
22 the Legislature anymore; correct?

23 A. Yes, sir. But I think that the issue of upholding
24 those two constitutional principles is under discussion
25 right now, and that's what we're all upholding the

John Unger - Cross (Hammer)

1 principles of.

2 Q. But the Legislature resolved the debate by enacting
3 Senate Bill 1008; correct?

4 A. I'm not sure what you mean by that. Did they pass the
5 bill?

6 JUDGE KING: Why don't you substitute "its" for
7 "the." It resolved its debate.

8 MR. MAJESTRO: I'll, I'll -- Judge King I'm sure
9 is still a better trial lawyer than I am.

10 BY MR. MAJESTRO:

11 Q. The Senate resolved its debate by passing the bill.

12 A. The Senate resolved the, the congressional
13 redistricting by the passage of that bill unless the courts
14 find otherwise. And then that -- then we would be
15 instructed to continue to work.

16 Q. Okay.

17 MR. MAJESTRO: I'll pass the witness, Your Honor.

18 CROSS EXAMINATION

19 BY MR. HAMMER:

20 Q. Good afternoon, Senator Unger.

21 A. Good afternoon.

22 Q. You were questioned by Mr. Majestro about winners and
23 losers in congressional races. Isn't it fair to say that in
24 every congressional race that's opposed, there is at least
25 50 percent winners and 50 percent losers?

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1 A. I believe that's in most races. But, yes, sir, that's
2 in all races.

3 Q. And if there's primary opponents, then the number of
4 losers is even greater than the number of winners because
5 ultimately we have but one winner.

6 A. That's right. But that's not something that we as the
7 legislative branch as we go through our constitutional
8 requirement of redistricting should consider.

9 Q. So, that wasn't even a factor for how to redistrict
10 West Virginia, was it?

11 A. That was not the original, the intentional, or even the
12 one that we put forward. Now, I'll tell you there are
13 underlying political aspects of various members being
14 influenced or what their thinking may have entered into it.
15 But in regards to the redistricting process, I was very
16 clear in laying out those constitutional principles that we
17 had to follow and that I felt we were bound by as a
18 legislative body.

19 Q. And, in fact, did you not have the opportunity to
20 attach to the record your vote explanation explaining in its
21 entirety the process and how the vote was obtained?

22 A. Yes, sir. I entered in, a lot of things into the
23 record in order for the truth be told and what the process
24 was so that it was very clear. So, I made into the record a
25 lot of the documents so that future generations could review

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1 what we had done and see if we had done the right thing.

2 MR. HAMMER: And if I may direct the Court to a
3 document that's part of the official record in this case
4 and, therefore, I believe self-authenticating and should be
5 admitted is the Appendix of Vote Explanation, Reapportioned
6 Congressional Districts, Vote Explanation of the Honorable
7 John R. Unger, Pages 1 through 15.

8 JUDGE KING: Is that not already filed?

9 MR. HAMMER: I'm sorry?

10 JUDGE BAILEY: It is.

11 JUDGE KING: Is that not already --

12 MR. HAMMER: It's part of the official record
13 already. So, we believe --

14 JUDGE KING: You don't have to file it again.

15 MR. HAMMER: I do not. I just wanted to direct
16 Your Honors' attention to that.

17 JUDGE KING: Yeah, okay.

18 BY MR. HAMMER:

19 Q. And if we turn to Page 14 of your official vote
20 explanation --

21 JUDGE BERGER: Senator, it's on the screen to your
22 left if that's helpful.

23 BY MR. HAMMER:

24 Q. -- can you explain to the Court what that document is?

25 A. Yeah. That's a poor copy. If it please the Court,

John Unger - Cross (Hammer)

1 I've got actually good copies. It's blurred on the screen.

2 But this, this document was provided to us by the
3 National Conference of State Legislatures. And it was also
4 given out to every member of the Senate, and particularly
5 reviewed by every member of the redistricting committee.

6 Q. Why did you hand this document out to every member?

7 A. Wanted to demonstrate what the other states were doing
8 in regards to the one person, one vote and the zero
9 variance. You know, so often in political conversation,
10 everybody always says West Virginia's out of whack. I mean,
11 it talks about the judicial system all the way to policies,
12 that somehow we're all different and we need to get in line
13 with the rest of the states.

14 I thought this was a compelling piece of document that
15 said we needed to start getting in line with the other
16 states as far as the zero variance.

17 And as you can see, many of the states have gone to
18 zero variance. And this was the 2000, and technologies have
19 improved in ten years since that time. So, you'd think that
20 even this would be even better.

21 MR. HAMMER: Let me have this next document marked
22 as Exhibit 9 if I may approach. Number 10. I'm sorry, Your
23 Honors.

24 BY MR. HAMMER:

25 Q. Can you identify this document, please, Exhibit 10?

John Unger - Cross (Hammer)

1 A. Yes. This was provided by the National Conference of
2 State Legislatures to us as well looking at the present
3 redistricting as far as congressional deviation and
4 basically what other states were doing with that.

5 So, this -- the first document had to do with
6 redistricting 10 years ago. This one is states are coming
7 on line and they're doing their redistricting. This is what
8 they have come up with.

9 Q. And what is the pattern amongst other states in terms
10 of their numerical variance?

11 A. The pattern is 0.0 percent ranging from one person
12 to -- well, mostly the deviation of one person or exact
13 number. Now, there's some exception, West Virginia being
14 the major one.

15 JUDGE BAILEY: How about Arkansas?

16 THE WITNESS: Yes, sir, Arkansas is an exception
17 as well. And I'm not sure of all the details. I know they
18 split up their counties.

19 JUDGE KING: Now, this is for 2010.

20 MR. HAMMER: Yes, sir.

21 JUDGE KING: And this is prepared as of when?

22 BY MR. HAMMER:

23 Q. When did you request this document from the National
24 Conference of Legislatures?

25 A. We, we requested it during that time. But then as more

John Unger - Cross (Hammer)

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1 states came on, I requested a copy of it maybe a week or so
2 ago.

3 JUDGE KING: So, it's fairly current. It's within
4 a week.

5 MR. HAMMER: Yes, sir. Yes, Your Honor.

6 JUDGE KING: Okay. That's what I was getting at.

7 MR. HAMMER: We move the admission of Exhibit 10,
8 Your Honor.

9 JUDGE KING: It's admitted.

10 BY MR. HAMMER:

11 Q. Now, you mentioned during your direct testimony that
12 the redistricting office uses software called Maptitude for
13 redistricting?

14 A. That's right. Both the redistricting office and the
15 Senate, as well as the House, all use those, the same
16 software to draw their maps.

17 Q. Exhibit 11, please. Please, Senator Unger, for the
18 panel identify Exhibit 11.

19 A. It looks like it's the Maptitude for redistricting
20 features. It lays out basically, I guess, all the bells and
21 whistles and all the technology that goes into that program.
22 I haven't had a chance to review it, but, but it seems like
23 it lays it out. And as far as the --

24 Q. If we turn to Page 4 of the document, do you see that
25 the West Virginia Legislature is identified as a user or

John Unger - Cross (Hammer)

1 customer of this software? And I'll represent to you it's
2 there. You can't see it very well.

3 MR. MAJESTRO: We'll stipulate that the
4 Legislature has Maptitude software. I mean, I'm not sure
5 where we're going with this. This is --

6 JUDGE KING: Well, maybe --

7 MR. MAJESTRO: -- irrelevant to getting to the
8 zero variance which we've already --

9 MR. HAMMER: I'm going to establish the precision
10 and the speed with which new maps can be generated.

11 JUDGE KING: Okay. Go right ahead.

12 THE WITNESS: To answer your question, I see West
13 Virginia Legislature and I see a number of other
14 Legislatures. And what's interesting is I don't see
15 Arkansas on this one.

16 BY MR. HAMMER:

17 Q. Okay. Now, with regard to what it takes to generate a
18 new map, if the map redistricting office is given directions
19 on what to do, how fast typically can they generate a new
20 map with this software?

21 A. Within seconds we can do a new map. Now, it takes time
22 to turn that into printed legislation. But within seconds
23 they can do maps.

24 Q. Okay. And within seconds you can divide by counties;
25 is that correct?

John Unger - Cross (Hammer)

1 A. Yes, sir. We can divide by counties. We can divide by
2 precincts. We can even divide by census block. Now, when
3 you go below a census block, you can't go any further.

4 That's, that's the smallest unit that the U.S. Census allows
5 us to go into and hone into as far as redistricting.

6 Q. So, within seconds, the map office can drill down to
7 the finest block provided, allowed in order to generate a
8 new map; is that correct?

9 A. Yes, sir. And also I'd like to add -- I believe Judge
10 King mentioned about other maps. Other maps can be drawn in
11 a split of a second. It doesn't have to be a perfect map.
12 It could have been variations of that.

13 And that's one of the reasons why after we originated
14 the perfect map and it was voted on -- so the motion was
15 done by Senator Stollings to originate that bill. It was
16 voted on, unanimously adopted as the originating bill, and
17 then I adjourned for a day to give members an opportunity to
18 work with staff to make amendments using this Maptitude and
19 drawing those maps.

20 Q. Am I correct that the Maptitude software for
21 redistricting also allows or provides the ability to
22 calculate quantitatively the amount of compactness?

23 A. That's correct. It does a printout on that, and it
24 also gives you the variances and, and even down to the
25 number within a precinct, if you divide a precinct, of how

John Unger - Cross (Hammer)

1 many are on each side. It's very, very sophisticated.

2 Q. And am I correct on Page 2 of the exhibit it also
3 allows for the identification of communities of interest so
4 that the map drawers can designate which communities ought
5 to be together in order to generate a new map?

6 A. That's correct. Already entered into that are, are
7 townships, cities, things like that. Even, even natural
8 boundaries are entered into it so that you can really hone
9 down.

10 I believe it even has a feature to go over Google maps
11 where you can have a satellite image and it can actually
12 zoom down and see. And you can even zoom into a person's
13 house it got so sophisticated. And if you want to draw a
14 line around that house, you could do it. It's that
15 sophisticated of software.

16 Q. And it can do all of that within seconds?

17 A. Yes, sir.

18 MR. HAMMER: I move the admission of Exhibit 11,
19 Your Honors.

20 JUDGE KING: It's admitted.

21 BY MR. HAMMER:

22 Q. Senator, would you agree with me that sources of
23 compelling state interests for redistricting are, one, the
24 Constitution of the United States? Is that correct?

25 A. Yes, sir. We take an oath to uphold the U.S.

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1 Constitution and the West Virginia Constitution. I believe
2 Your Honors have mentioned that each of you as an attorney
3 take an oath as well, and we, we also hold that very
4 seriously.

5 Q. And would you agree that the other source of public
6 policy are the statutes of West Virginia?

7 A. Of course.

8 Q. And would you agree with me that there is no statute or
9 state constitutional provision in West Virginia that
10 requires counties be kept whole?

11 A. In regards to the congressional redistricting, that is
12 correct.

13 Q. All right.

14 A. That's my understanding.

15 Q. Now, when we're talking about Article 6, Section 4 of
16 the West Virginia Constitution, the section that governs
17 senatorial redistricting, in that section am I correct that
18 the Constitution quite clearly shows states that counties,
19 that districts shall be bounded by county lines?

20 A. That's correct. It does state that.

21 Q. And, so, the drafters of the State Constitution knew
22 quite clearly how to indicate that county lines shall be
23 boundaries and senatorial districts, but no such language
24 appears in the section governing congressional
25 redistricting, Article I, Section 4.

John Unger - Cross (Hammer)

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1 A. That is correct. And that was an enlightenment for the
2 entire Senate when that was explained to them.

3 Q. Now, let's talk for a moment about qualitative
4 compactness. Okay? During the redistricting discussions
5 for the congressional districts, was there discussion about
6 communities of interest with regard to, for example, the
7 karst geology of the state?

8 A. In regards to during the committee meetings?

9 Q. During the committee or on the floor. Do you recall
10 any such discussions about communities of interest having to
11 do with karst?

12 A. No, I don't, I don't recall.

13 Q. Do you recall any such discussion during congressional
14 redistricting with regard to Marcellus shale?

15 A. No, I don't remember anybody ever discussing that
16 publicly or privately.

17 Q. And would you agree with me that Marcellus shale and
18 the gas that's found in that shale is an issue for the
19 western part of the state and is not present in the Eastern
20 Panhandle?

21 A. That, that is right. There isn't Marcellus shale that
22 I know of in the Eastern Panhandle.

23 Q. So, all the issues having -- all the community of
24 interest issues having to do with landowner surface rights,
25 water quality, air quality, noise, none of those issues that

John Unger - Cross (Hammer)

1 are so important to the western part of the state have any
2 bearing on the Eastern Panhandle of West Virginia.

3 A. I'm sorry. Repeat that again.

4 Q. Yes. Would you agree that all the issues that are so
5 important when discussing Marcellus shale, specifically
6 surface owner rights, air pollution, water pollution, noise,
7 those issues are very important to the western part of the
8 state where Marcellus shale is located, but are of
9 relatively minimal importance to the Eastern Panhandle?

10 A. Well, I would say that it doesn't have a direct impact
11 on our residents. However, as West Virginians, we are
12 interested -- and I know that Senator Snyder served on that
13 Task Force being a trained chemist. And, so, you know, we,
14 we have interest in making sure we do the right thing.

15 But in regards to your question as far as impacting the
16 residents directly, there is no impact directly to our
17 residents.

18 Q. And, conversely, when we're discussing issues regarding
19 karst and Chesapeake Bay protection issues, would you agree
20 with me also that the part of the state that's on the
21 eastern side of the Eastern Continental Divide is affected
22 by those issues and national priorities with regard to
23 Chesapeake Bay, whereas there's part of the state on the
24 western side of the Continental Divide, its water doesn't
25 even flow to the Chesapeake Bay. It goes out to the

John Unger - Cross (Hammer)

1 Mississippi into the Gulf of Mexico.

2 A. Yeah, there's no question about that because that was
3 demonstrated by Senator Miller, who's from Greenbrier, who
4 was successful eventually in getting an amendment that would
5 pertain particularly to karst terrain in regards to a
6 Marcellus shale bill that we just passed.

7 So, Senator Miller, who also was one of the ones that
8 voted against the initial congressional, also had a very
9 much interest in this karst terrain. And, yes, I would say
10 that that would be the case as far as I understand it.

11 Q. All right. Now, there's a document in evidence that
12 deals with a Kanawha Valley -- and I forget the title, but
13 economic growth region. And according to the document,
14 Kanawha County Commission and Fayette County Commission have
15 collaborated to draw down millions of dollars of federal
16 funds in an economic growth area. Is that an issue for the
17 Eastern Panhandle of the state?

18 A. No, not directly it wouldn't be.

19 Q. Okay. So, with regard to community of interest issues,
20 would you say that there was a good faith discussion of
21 those issues or not when it came to congressional
22 redistricting?

23 A. I would say that there, there wasn't much discussion
24 surrounding communities of interest. I will say that what I
25 found interesting, and I guess this is part of the record,

John Unger - Cross (Hammer)

1 Senator Brooks McCabe, when he spoke against Senator
2 Snyder's amendment, one of the justifications he gave of why
3 the Kanawha County delegation was going to not support
4 Senator Snyder -- and I'll read it here. And I think, Your
5 Honors, you have this.

6 "This particular amendment requires seven counties to
7 be moved from one district to another. We have heard that
8 this is like a long string, this unbelievable long district.
9 As best as I can tell, the amendment before us in no way
10 affects the length of the district. It still runs from
11 Putnam County all the way up to Jefferson County. So, we
12 still have a long district."

13 And I think that it's evident that the reason, and
14 particularly if you read on, is that Senator Snyder's
15 amendment was that those counties that would go into the new
16 congressional district, which were primarily Eastern
17 Panhandle counties, had nothing in common with Kanawha
18 County. And that's why he voted against it.

19 Q. Would you agree with me that the Legislature did not
20 state as a body any official reason for why they deviated
21 from a numerically perfect redistricting?

22 A. There's nothing official stated. If you read my vote
23 explanation, there were no legislative findings in law
24 proposed, amended, or put forward in the Legislature,
25 although we speak by our legislation.

John Unger - Cross (Hammer)

1 But I think there was some indication by somebody
2 earlier that that's not necessarily common practice. Well,
3 you can look at a lot of the bills we do pass with a lot of
4 legislative findings. It's pretty common practice that we
5 put legislative findings in the legislation in order to help
6 clarify policy decisions, or at least justify why what we're
7 doing what we're doing.

8 Q. So, in this instance when we're talking about the
9 United States Supreme Court's mandate expressed in *Karcher*
10 *vs. Daggett* and the predecessor cases upholding the
11 principle of one man, one vote --

12 JUDGE KING: Why don't you say one person, one
13 vote.

14 MR. HAMMER: That's correct. As an employment law
15 attorney, I should know better. So, I thank you.

16 BY MR. HAMMER:

17 Q. With regard to the constitutional principle of one
18 person, one vote, the Legislature declined to put into the
19 record any substantial justification or any justification at
20 all for why it deviated from that constitutional principle.

21 A. That's correct. There's nothing in the record as far
22 as the legislation that would give any justification for the
23 act of the Legislature in this regard.

24 Q. Thank you.

25 MR. HAMMER: That's all the questions I have.

John Unger - Cross (Cooper)

1 THE COURT: Mr. Cooper.

2 MR. COOPER: Thank you.

3 CROSS EXAMINATION

4 BY MR. COOPER:

5 Q. Good afternoon, Senator Unger. How are you?

6 A. Good afternoon.

7 Q. How many meetings were there of the Senate
8 Redistricting Task Force?

9 A. I believe there was 12. And you could probably answer
10 that as well as I could because you attended all 12.

11 Q. And did you give me some type of award for that?

12 A. I did, perfect attendance.

13 Q. Did any, did any citizen push for trying to have as
14 near population quality as possible at those hearings?

15 A. Yes. At those hearings, people had pushed on, raised
16 various issues. And that was raised, I believe, a couple
17 times.

18 Q. Did I raise that?

19 A. I believe you were one of a couple --

20 Q. Right.

21 A. -- that did that, yes.

22 Q. Did you -- before the public comment began at each of
23 these meetings, was there a little kind of lecture by one of
24 the members of the legislative staff as to the, the
25 appropriate purported amount of, of population variance for

John Unger - Cross (Cooper)

1 state senatorial districts, House of Delegates districts,
2 and congressional districts?

3 A. Yes, sir. I would do an opening, kind of lay out what
4 our purpose was to be there. And then we would open up with
5 a person from the legislative services that would outline
6 the population and go over, go over the House, the Senate,
7 and the congressional as far as the type of, amount of
8 people that should be in each district.

9 Q. And was one of those people Aaron Allred?

10 A. That's correct. Aaron Allred was one. Jo Vaughan of
11 the legislative redistricting office, she also attended some
12 meetings as well. And I believe Teresa Burns from that
13 legislative redistricting office had attended a meeting or
14 two as well.

15 Q. Do you recall Mr. Allred stating at some of the
16 meetings that a variance up to one percent in congressional
17 redistricting was justified?

18 A. I don't know if he, if he indicated up to one percent,
19 but the theme was always the strict adherence to zero
20 variance as we could, but I don't know if he referred up to
21 one percent or not. I don't recall.

22 Q. The plan that was unveiled after these 12 meetings were
23 over, the so-called perfect plan, also called the Unger
24 plan, I call it the split two counties plan, when it was --
25 you were -- you did -- that's, that's not your plan? I

John Unger - Cross (Cooper)

1 mean, you didn't actually dictate which counties went into
2 it?

3 A. No, sir, I did not. The only instructions I gave to
4 the staff to prepare it was that it would be zero variance
5 because I knew it could be done, and also as compact as
6 possible.

7 And as far as those counties that were split, I believe
8 they were chosen partly from your testimony where you had
9 indicated if any counties were going to be split, it ought
10 to be the larger ones and not the smaller ones because they
11 do have different communities of interest.

12 For example, Kanawha. The northern part of Kanawha,
13 the urban area, is one type of community of interest. And
14 then in the southern part of Kanawha, it relates more to the
15 coalfields as far as coal mining and coal mining operation
16 as well.

17 And, so, I think that's what they took out of that
18 consideration and they had come up with this, this plan and
19 then we, we went with it.

20 Q. All right. When that, that plan was unveiled, did you
21 know whether -- in Harrison and Kanawha Counties whether
22 that involved splitting any precincts?

23 A. I don't believe it does but, again, I'm not sure. I
24 tried to -- when that question came up earlier, I was trying
25 to look through the legislation to see. I believe it sticks

John Unger - Cross (Cooper)

1 with precincts.

2 Q. So, if, if the Court decided to order that into effect,
3 is there some document that actually lists all the precincts
4 that would go with -- for example, Harrison County with the
5 First Congressional District and all the precincts that
6 would go with the Second Congressional District?

7 A. I believe, I believe -- and I could be wrong. I think
8 one of the exhibits submitted to the Court is the actual
9 legislation of the originating bill which would have all
10 that information, precinct numbers and goes all the way
11 down. And I believe that's part of the huge packet. I
12 could be wrong. But there is a bill out there that has all
13 that, that we could implement immediately.

14 Q. So, to the best of your knowledge, then, you split no
15 precincts in either -- precinct lines in either Harrison or
16 Kanawha Counties when you --

17 A. That's my understanding is they stuck with the precinct
18 level.

19 Q. Right. And regardless of whether someone agrees or
20 disagrees with your interpretation of the State Constitution
21 as to whether counties, you know, may be split or not, is it
22 your understanding the Federal Constitution trumps the State
23 Constitution?

24 A. Oh, no question the U.S. Constitution trumps the West
25 Virginia Constitution.

John Under - Redirect (Majestro)

1 Q. I was having a little trouble following your testimony.
2 I heard something -- a word that sounded like cars [sic]
3 before the word "terrain." Will you spell that word because
4 I was having trouble understanding.

5 A. Oh, my. It's k-a-r-s-t, karst. Is that correct?
6 K-a-r-s-t. It means caves -- my understanding -- and I'm
7 not a, I'm not a scientist on this, but I understand it's
8 caves and sinkholes and the underground is such where water
9 can move freer than in normal conditions. So, I think it's
10 karst.

11 Q. All right. Thank you.

12 MR. COOPER: That's all I have.

13 JUDGE KING: Mr. Rodd, we haven't asked you for a
14 while if you wanted to participate.

15 MR. RODD: I appreciate your asking, Judge, but I
16 have nothing.

17 JUDGE KING: Okay. Thank you.

18 REDIRECT EXAMINATION

19 BY MR. MAJESTRO:

20 Q. Senator Unger, with respect to the issue of findings,
21 as Chair of the committee and as Majority Leader, you had
22 counsel that would have prepared such findings should you,
23 had they been necessary; correct?

24 A. Well, because we introduced the perfect plan with zero
25 variance and compactness, we did not need to find any

John Under - Redirect (Majestro)

1 findings because we didn't deviate from the constitutional
2 requirement.

3 Q. At, at any time did you inform anyone in the
4 Legislature of your belief that if the bill that was going
5 to pass passed, it needed to have findings?

6 A. I didn't inform anybody of any amendments that they
7 should or shouldn't make. As a Chair of the committee, I
8 remained impartial and took the amendments as they were
9 presented and did not necessarily try to dictate what those
10 amendments should be.

11 Q. But at no time on the floor or in committee did you
12 say, "If we pass this bill, we need to have official
13 findings."

14 A. I believe it's in my voter explanation which is
15 attached to the appendix of the journal.

16 Q. Which was attached after the bill had passed?

17 A. That's correct.

18 Q. In terms of the comments by Professor Bastress, my, my
19 memory and my reading, it has no mention of him saying it's
20 necessary to have these explicit findings on the part of the
21 Legislature. Do you recall anything different?

22 A. I believe that I recall that he made some reference to
23 the fact that when the question was proposed that we were
24 going down to .79, there was a pause. And the question was
25 asked would that violate the constitutionality of the bill.

John Under - Redirect (Majestro)

1 He refrained from answering because he said he may have
2 to be involved in defending it, but he'd say that the
3 justification had to be higher as far as deviating from the
4 zero variance.

5 Q. But he didn't say, "And you need to put those in
6 express findings in the legislation."

7 A. I don't, I don't recall if he had done that or not.

8 Q. With respect to Senator McCabe, in his opposition to
9 the Snyder amendment on the floor, he also opposed the
10 moving of the certain, of the counties north of Kanawha
11 County into the different districts as a reason for opposing
12 the bill; correct?

13 A. I believe he mentioned something about referring to
14 Roane County.

15 Q. Roane and Clay I believe was what he --

16 A. Roane and Clay.

17 Q. Yeah. Didn't he oppose moving those counties?

18 A. He had indicated that -- I'm going to try and read it
19 here. Yes, he was -- he -- I guess he was opposed to moving
20 those.

21 And, you know, he referred to the fact that that has an
22 effect on how we view the world, how our economy and how our
23 counties interact immediately around us. Okay? That's what
24 he says, interact immediately around us.

25 And then he goes on at the end, he finishes it by

John Under - Redirect (Majestro)

1 saying, "The amendment does not work with moving seven
2 counties between districts and having a significant
3 population shift from our immediate economic area to another
4 part of the state that is more distant and less interactive
5 with us."

6 I think that goes to communities of interest, and I
7 think he's referring to the Eastern Panhandle, do you not
8 think?

9 Q. I, I think he's opposing the amendment because it --
10 the way I read it, he's opposing the amendment because he
11 believes it takes communities of interest away from Kanawha
12 County. But --

13 A. I think he's also saying that the Eastern Panhandle is
14 not part of the communities of interest with Kanawha County.
15 I think it's very clear here.

16 Q. Yeah. Is it fair to say the Eastern Panhandle is
17 really a different community of interest from every other
18 area of the state?

19 A. Sir, we're all unique in some ways. And I forget the
20 term that the, that Professor Martis used about the first
21 principle of geography was that, you know, we're all
22 connected, but some of us are a little connected more than
23 others and those people around us. I mean, I'm just
24 paraphrasing it. I think that the Eastern Panhandle has a
25 very unique situation, as well as the Northern Panhandle, as

John Under - Redirect (Majestro)

1 well as Southern West Virginia.

2 Q. So, so, whatever community of interest you attach
3 Eastern Panhandle counties to, there's going to be some
4 divergence.

5 A. Whenever you go outside a small community even within,
6 even within a city, the City of Charleston, there's
7 different communities of interest. You have the west side.
8 You have the east side.

9 So, the idea is to try to keep them as close as
10 possible. And, therefore, they're -- it's more likely that
11 the communities of interest are more intensified the closer
12 they are than spread out.

13 Q. But my question is, though, the Eastern Panhandle
14 communities are different in a way that the east side and
15 the west side of Charleston aren't. The Eastern Panhandle
16 communities of interest are different from all of the other
17 parts of the state in a way that those --

18 A. I would answer that the Eastern Panhandle is different,
19 just like the Northern Panhandle is different, just like the
20 coalfields of West Virginia are different. I wouldn't say
21 they're -- I mean, we all come together as West Virginia.
22 But I would say they do have their unique challenges and
23 also unique opportunities.

24 Q. Okay. With respect to one last factor and that's -- we
25 talked about having these districts be small so the

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1 representative can visit with its -- he or she can visit
2 with their constituents. Is that the reason why we want to
3 have smaller, more compact districts?

4 A. I think we want to -- well, I think we want to have
5 small and compact districts because it's required by the
6 West Virginia Constitution, and the drafters had originally
7 thought of that. We have seen the -- we have seen an
8 example of the map that they drew back in 1863 when they
9 actually formed the Constitution.

10 And the other indication also is all these county
11 courthouses we have, the many counties. That's an
12 indication that they wanted government to be close to their
13 people. And, so, that's why we have so many courthouses so
14 that the people would be close to the county seats of where
15 they live.

16 I would say that that would translate both in, all the
17 way through our political system. And that was the original
18 intent of the drafters of the Constitution.

19 Q. And, and you'll agree with me that counties involve
20 communities and put another community of interest in the
21 state.

22 A. I'd say at one time I think that they were. I think
23 they are an indication. But, also, you've got to find that
24 even the larger counties are very unique in different
25 sections.

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1 I'd say Kanawha County, the southern part with the
2 coalfields are a little bit different than, say, the urban
3 areas of, of Charleston. And even the northern part is a
4 little different from Charleston.

5 So, even within a county, I would say that you do have
6 distinct communities of interest. So, I wouldn't say
7 necessarily that Kanawha County would be a, one community of
8 interest. I think you have communities of interest within,
9 within a county today.

10 Q. And, and that is true -- that's the same -- Kanawha
11 County has been more urban in Charleston than the coalfields
12 throughout the existence of the county, or at least the, the
13 past certain number of decades; correct? That's not
14 something new; correct?

15 A. I don't know. I haven't studied the history of Kanawha
16 County, but I'd say that probably Charleston has grown, I
17 mean, as far as the boundaries of the city over time, but I
18 would imagine that you had various communities of interest
19 when you had immigrants moving into West Virginia and
20 settling in certain areas.

21 Q. Thank you, Senator.

22 MR. MAJESTRO: That's all.

23 JUDGE KING: Anyone else?

24 MR. HAMMER: No, Your Honor. Thank you.

25 MR. COOPER: No, Your Honor.

1 JUDGE KING: Senator, did you explain everything
2 you wanted to explain about the perfect plan? You were in a
3 discussion there with Mr. Majestro.

4 THE WITNESS: Oh, yes, sir. I just wanted to say
5 that what, what I intended to present was a, a plan, or
6 actually legislation that we start off of that would meet
7 the constitutional requirements put before us.

8 And then at that point, members could look at community
9 of interest, look at incumbency protection, look at all
10 these other factors, and then make the justification of why
11 they're moving and hoping to keep the zero variance and
12 keeping it compact. That whole attempt was to start off
13 demonstrating that it can be done.

14 JUDGE KING: It was your understanding that once
15 you got it to the zero variance, you could take these other
16 factors into account however you wanted to if you kept it at
17 zero variance.

18 THE WITNESS: Yes, sir, with compactness, if we
19 could try to keep it as compact --

20 JUDGE KING: I know you're not a lawyer, but you
21 understand that the compactness was, was more of a state
22 interest than a federal interest?

23 THE WITNESS: Yes, sir.

24 JUDGE KING: And the one person, one vote was a
25 federal interest as well as a state interest.

1 THE WITNESS: Yes, sir, because that's -- the
2 first and foremost principle we took was the one person, one
3 vote. The second principle we took was the compactness and
4 that was complying with the West Virginia Constitution.

5 JUDGE KING: And, and you -- there's been a lot of
6 reference to Professor Bastress. Just for the record, he's
7 a law professor at West Virginia University who's an expert
8 that teaches constitutional law. Is that correct?

9 THE WITNESS: Yes, sir.

10 JUDGE KING: Robert Bastress. The perfect plan,
11 did you -- to your knowledge, did anybody up there figure
12 out how many perfect plans they could come up with to take a
13 look at, or did you-all just come up with one?

14 THE WITNESS: Well, the staff, I think, came up
15 with several different models.

16 JUDGE KING: Of the perfect plan?

17 THE WITNESS: Yes, sir.

18 JUDGE KING: Where are they?

19 THE WITNESS: They're probably on the computer
20 back there with the staff members. And, again, --

21 JUDGE KING: So, there may be some other perfect
22 plans around.

23 THE WITNESS: Well, it was never discussed by the
24 Legislature, but they could be generated very quickly.

25 JUDGE KING: They, they would have been created by

1 this system that you discussed?

2 THE WITNESS: Maptitude, yes, sir. I don't know
3 that they exist because, again, I only instructed the staff
4 to come up with one we could start off with thinking that
5 the senators would take into consideration these
6 constitutional --

7 JUDGE KING: But if you could come up with a
8 perfect plan by splitting Kanawha and Harrison, you could
9 come up with a perfect plan, I would assume, by fiddling
10 around with other counties too as long as you cross county
11 lines. That's what you, that's what you'd had to do to get
12 there; right?

13 THE WITNESS: Yes, sir.

14 JUDGE KING: That was your biggest problem was
15 crossing county lines to get to that perfect plan; right?

16 THE WITNESS: It had to be done in order to get
17 the zero variance.

18 JUDGE KING: Right. To get to the zero variance,
19 you had to be able to split counties or go across county
20 lines.

21 You, you-all discussed whether Professor Bastress ever
22 recommended or talked about findings by the Legislature in
23 order to justify somekind of deviation or variance. It's
24 fair to say that Professor Bastress in his testimony
25 emphasized the, the requirement of perfect equality. He

1 used that term multiple times. Correct?

2 THE WITNESS: Yes, sir.

3 JUDGE KING: Do you remember that?

4 THE WITNESS: That's what I understand.

5 JUDGE KING: Do you remember he also said, though,
6 that you cannot deviate at all from perfect equality. What
7 he said was the Court has said that -- the Court being the
8 Supreme Court. You can't deviate at all from perfect
9 equality unless you've made a good faith effort to avoid any
10 deviation, and that the Legislature has found that any
11 deviation whatsoever is necessary to achieve some legitimate
12 interest.

13 THE WITNESS: That's right.

14 JUDGE KING: So, he used the word "found" right
15 there in his testimony --

16 THE WITNESS: That's right.

17 JUDGE KING: -- on Page 17. Okay. So, he did
18 talk about -- I assume "found" and "findings" were related.

19 THE WITNESS: Yes, sir. That's how we communicate
20 to the courts is through our findings.

21 JUDGE KING: That's all I have.

22 Anybody want to follow up on any of that?

23 MR. MAJESTRO: No, Your Honor.

24 JUDGE KING: Thank you, Senator.

25 THE WITNESS: Thank you, sir.

1 JUDGE KING: Next witness.

2 MR. MAJESTRO: Your Honor, may I inquire how late
3 we plan on going?

4 JUDGE KING: Pardon?

5 MR. MAJESTRO: How late do we plan on going?

6 JUDGE KING: What do we have left? I mean, that
7 would help us. If we can get it -- if we can finish it
8 here, we'll plow forward.

9 MR. MAJESTRO: I have one more witness that I
10 think is going to go fairly, you know, fairly long. We're
11 going to go -- I would -- as long as these other two, at
12 least as long as these other two for today. And then I
13 think we probably -- you know, I think at that point we're
14 dealing with documents to the question of whether or not
15 we're going to have testimony from Delegate Frazier over the
16 telephone and those sorts of things. But I don't -- we're
17 certainly not going to get that done today.

18 JUDGE KING: So, the other witness does not
19 include Delegate Frazier then.

20 MR. MAJESTRO: That's right.

21 JUDGE KING: So, you have at least two more.

22 MR. MAJESTRO: Right. If we do --

23 JUDGE KING: Would it help you if we take a short
24 break?

25 MR. MAJESTRO: Yeah, I think so.

1 JUDGE KING: Mr. Hammer.

2 MR. HAMMER: Thank you, Your Honor. I have dental
3 surgery at 9:30 tomorrow morning in Martinsburg, and I have
4 to appear before Judge Bailey tomorrow afternoon.

5 JUDGE KING: I can't help you with the dentist.

6 MR. HAMMER: If you would give me an excuse not to
7 go, that would be fine. But I need some direction on what
8 to do because --

9 JUDGE KING: Well, if Mr. Skinner is comfortable
10 with you not being here, we can go forward without you. I
11 mean, there's no question we gave you--all lots of notice.
12 I'm sorry about your surgery. But we'd like to get -- I
13 mean, we're on a tight schedule and everybody has to agree
14 to that. You have to drive back tonight?

15 MR. HAMMER: Yes, Your Honor.

16 JUDGE KING: Well, why don't we take a short break
17 and you see what -- would it help you better figure out what
18 you need to do?

19 MR. MAJESTRO: Yeah.

20 JUDGE KING: Okay. We'll take 10 minutes.

21 (Recess taken from 4:35 p.m. until 4:45 p.m.)

22 JUDGE KING: We would prefer to press on. Is that
23 all right with counsel?

24 MR. MAJESTRO: Fine, Your Honor.

25 THE COURT: Mr. Majestro.

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1 MR. MAJESTRO: Thank you, Your Honor. At this
2 time, we would call Senator Corey Palumbo.

3 **COREY PALUMBO**, DEFENDANTS' WITNESS, SWORN

4 DIRECT EXAMINATION

5 BY MR. MAJESTRO:

6 Q. Senator Palumbo, can you introduce yourself to the
7 Court.

8 A. Sure. My name is Corey Palumbo.

9 Q. And are you a member of the West Virginia State Senate?

10 A. I am.

11 Q. And do you hold any positions in the West Virginia
12 State Senate?

13 A. I currently hold the position of Senate Judiciary
14 Chair.

15 Q. Are you -- in connection with redistricting, did you
16 have any special role in the redistricting process?

17 A. I don't know that I had a special role. I was on the
18 redistricting committee. If you consider that special,
19 then, yes. But I was one of 17 members of the committee I
20 think.

21 Q. As a part of the members of that committee, are you
22 familiar with the actions that the committee took to
23 consider the legislation that ultimately resulted in the
24 congressional redistricting bill that we're here to, we're
25 here to discuss today?

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1 A. I would say that I am familiar, but I don't recall
2 every intimate detail.

3 Q. Prior to committee consideration, did the, the Senate
4 undertake to educate its members regarding the legal
5 principles that were applicable to the districting?

6 A. I think so.

7 Q. And as part of that, did the -- as part of that, did
8 the Senate -- were you made aware of the *Karcher* case, the
9 United States Supreme Court?

10 A. I believe we were made aware of that case.

11 Q. And what's your understanding of what *Karcher* required
12 the Senate to do?

13 A. Well, I don't recall the different, specific things
14 from different cases. I mean, I can tell you generally. I
15 recall that legal precedent having been established in the
16 Constitution and in case law that we needed to honor the
17 principle of one person, one vote. We needed to try to make
18 the districts as compact as we could. We needed to consider
19 things like having communities of interest together and not
20 making big changes in districts. And there are several
21 things we needed to consider as I recall.

22 Q. And, and were you aware that under the *Karcher* test
23 that if you were going to have variations that were larger
24 than zero that those had to be justified by some state
25 policy?

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1 A. I, I think that we did have to make other
2 considerations. We had to consider other things. We
3 couldn't just arbitrarily have a large variance without
4 having some specific reason for doing so.

5 Q. Okay. And I'm going to -- at the top of the page is a
6 quote from our brief in this case. It's a quote from
7 *Karcher*. Are you familiar with that passage? It starts out
8 "any number."

9 A. I am.

10 Q. Okay. And in connection with passing the congressional
11 redistricting bill that we're here about today, Senate Bill
12 1008, did the Senate follow the dictates of that *Karcher*
13 case?

14 A. I believe we did.

15 Q. And in this case, there were several bills under
16 consideration that had different variances; is that correct?

17 A. Yes.

18 Q. In choosing between those -- the first bill -- what was
19 the first bill that was presented to the committee?

20 A. As I recall, it was the one that Senator Unger referred
21 to as the perfect plan that had a slightly greater than zero
22 variance, but it was very close to a zero variance.

23 Q. And in choosing -- and the Legislature chose not to
24 adopt that plan.

25 A. That's right.

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1 Q. In choosing not to adopt that plan, it -- did the
2 Legislature choose the plan that had -- choose a plan that
3 had a larger variance?

4 A. You mean ultimately?

5 Q. Yes.

6 A. Yes.

7 Q. And did the Legislature -- what were the justifications
8 that led to the Legislature's adopting that, that plan and
9 considering other plans that had larger variances?

10 A. Well, I think it's a lot of the things listed in this
11 *Karcher* decision. I think we considered not making dramatic
12 shifts in the current districts that, that were already in
13 place. I think we considered, you know, communities of
14 interest. I think we considered not trying to be partisan
15 and having current members of Congress run against each
16 other. And, particularly, it would have probably been, most
17 of the plans I recall, the two Republican members of
18 Congress.

19 Q. In terms of -- let's take those one step at a time.
20 Let's talk about the partisan issue. The -- in openings
21 before you got here, Mr. Carenbauer described to the Court
22 the two Prezioso plans. Do you recall those?

23 A. I do.

24 Q. And do you remember who it was that asked Senator
25 Prezioso to introduce those plans?

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1 A. I don't remember specifically who it was, but I believe
2 it was someone from the D triple C.

3 Q. And, for the record, can you explain what the D triple
4 C is?

5 A. I believe it is a committee that's established to elect
6 Democrat members of Congress.

7 Q. Is it the Democratic Congressional Campaign Committee?
8 Does that refresh your recollection?

9 A. That's my understanding of what they're called.

10 Q. And they're -- and, and what was their intent as was
11 expressed to you for, for the proposal, for these two
12 proposals?

13 A. Well, I don't remember if I had a specific conversation
14 with anyone, but everyone understood the intent of those
15 proposals was to, to elect a Democrat to the First District
16 in, of Congress in West Virginia.

17 Q. And given the majority -- and, for the record, can you
18 tell, tell the Court what the, the Democrat to Republican
19 ratio is in the West Virginia Senate?

20 A. I believe it's 28 Democrats to six Republicans.

21 Q. And, so, had the Senate wanted to act in a partisan
22 manner, it, it had the sufficient majority to do so?

23 A. Absolutely.

24 Q. Now, you used to be a member of the House; correct?

25 A. That's right.

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1 Q. Currently are you familiar with what the, the House
2 ratio is, Democrat to Republican?

3 A. Not exactly, but I would guess it was somewhere in the
4 neighborhood of 66-34, somewhere roughly in that range.

5 Q. Likewise, a sizeable majority.

6 A. Yes.

7 Q. And at the time this bill was passed, the bill was
8 passed prior to the recent gubernatorial election; correct?

9 A. Prior to the general election is right.

10 Q. And at that time, who was acting as Governor?

11 A. It was Governor Tomblin.

12 Q. And Governor Tomblin is a Democrat himself; correct?

13 A. That's correct.

14 Q. So, we have all three branches of government in
15 effective control of the Democratic party.

16 A. If by all three branches you mean the House --

17 Q. All three legislative branches I should say.

18 A. You mean the two legislative and the executive.

19 Q. Yes.

20 A. Yes.

21 Q. The three, the three entities that are responsible for
22 passing legislation in the state.

23 A. That's right.

24 Q. So, those entities rejected the partisan plan which
25 would have increased the Democratic performance of the

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1 districts?

2 A. Yes. As I recall, there was very thin and limited
3 support for those plans.

4 Q. Okay. And why was that?

5 A. Well, I think that most members of the Senate -- I can
6 speak for us more capably than I can the House -- did not
7 feel like we should pass a congressional plan to benefit
8 certain, a certain person or persons. I felt like -- I know
9 I felt that our redistricting should be as nonpartisan as
10 possible. And from conversations with other folks, I think
11 that that thought was shared by others.

12 Q. Okay. And let's, let's move on to the specific *Karcher*
13 factor, and that is avoiding contests between incumbent
14 representatives. Did the plan that was passed accomplish
15 that goal?

16 A. It did.

17 Q. Was that a factor in the discussion that led to the
18 passage of that plan?

19 A. When you say the discussion, I don't know if you're
20 talking about informal discussions or discussions in the
21 committee or on the floor. I do recall having discussions
22 with several people. I don't remember, again, if it was in
23 committee or on the floor. But that was a definite and
24 distinct part of the thought process that went into adopting
25 the plan we did.

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1 Q. Now, there were plans proposed that, as you testified,
2 that had Delegate Capito and Delegate McKinley in residences
3 in the same district.

4 A. That's correct.

5 Q. Was there a public response to that outside the
6 Legislature?

7 A. I don't remember if there was or not. There may have
8 been newspaper articles discussing that as a possibility,
9 and negatively, but I don't specifically remember anything
10 for sure.

11 Q. Do you recall in the committee meeting Senator Unger
12 responding to those, those press inquiries?

13 A. I don't specifically recall him responding to those as
14 I sit here today, no.

15 Q. Okay. Now, there's been some discussion that
16 representatives don't have to live in their congressional
17 district. Does that, in, in your mind, change this goal to
18 avoid contests between incumbent representatives as a
19 legitimate factor?

20 A. It does not.

21 Q. And that's a congressional requirement that -- that's a
22 requirement of the U.S. Constitution that's true throughout
23 the United States; correct?

24 A. I'm sorry. What requirement?

25 Q. The, the United States Constitution doesn't require any

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1 representative to live in their district.

2 A. Right. That's my understanding.

3 Q. And, so, the U.S. Supreme Court is setting forth this
4 factor for the entire nation where it applies to the entire
5 nation, including West Virginia, despite the fact that
6 representatives don't have to live in their district.

7 A. That's my understanding.

8 Q. Are you aware of anyone running for Congress in the
9 State of West Virginia from a district outside the district
10 in which they reside?

11 A. I'm, I'm not a congressional scholar, but I don't
12 recall anyone having done that.

13 Q. As a politician, do you believe that, that the reason,
14 that the reason that that is important to avoid is because
15 that's something that candidates would generally avoid
16 because of the advantages of running in their own district?

17 A. I don't like the name politician but, yeah, I do think
18 folks would like to avoid running in the district in which
19 they do not live.

20 Q. Okay. The other *Karcher* factor that we've discussed
21 today is respecting municipal boundaries. In this case in
22 enacting the Senate -- in enacting the congressional
23 redistricting bill, did the Senate respect congressional --
24 I'm sorry -- municipal boundaries?

25 A. Well, I know that, that it was important to, to a lot

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1 of people, whether it was a specific requirement or not, to,
2 to try to avoid splitting up counties, the county
3 boundaries.

4 Now, municipal boundaries, I think that that was, that
5 was a consideration too, but I recall as I'm sitting here
6 today more discussion about county boundaries than municipal
7 boundaries.

8 Q. Okay. And if you would -- if county boundaries would
9 be included in municipal boundaries, you would agree with me
10 that the proposal that was adopted did not split up any of
11 those county boundaries?

12 A. I would agree with that, yes.

13 Q. And some of the alternate proposals required county
14 boundaries be split.

15 A. Yes.

16 Q. Was the sense of the members of the Senate and the
17 debate that county -- it was a good -- it was a plus to
18 preserve county boundaries even if it wasn't required under
19 the Constitution?

20 A. That was certainly my sense and I think, I think others
21 shared that, but I'm speaking for other members of the
22 Senate who aren't here.

23 Q. And in West Virginia do county boundaries serve as
24 communities of interest?

25 A. I think most people would, would agree with that

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1 statement, yes.

2 Q. Another factor we've discussed is compactness. On the
3 screen we have the 2001 plan. Well, we start, we start with
4 the 1991 plan. Were you aware that a Court similar to this
5 Court had approved the 1991 plan as being compact under the
6 West Virginia Constitution?

7 A. Yes.

8 Q. And, in fact, were you aware that the Court had found
9 that the compactness of this district as shown on, on the
10 screen and adopted in 1991 was part of the justification for
11 adopting a plan with a higher variance than some of the
12 others under consideration?

13 A. Yes.

14 Q. The 2001 plan, were you in the Legislature in 2001 when
15 that was adopted?

16 A. I was not.

17 Q. Okay. You're familiar with that existing plan, though?

18 A. Yes.

19 Q. The one that you replaced. And then we go to the, the
20 current plan, Senate Bill 1008. Was there discussion in the
21 Legislature and was the -- was making the Second District
22 more compact one of the aims in adopting Senate Bill 1008?

23 A. I think so because clearly we're taking the western
24 most county in the Second and moving it into a different
25 district, thereby making the Second more compact.

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1 Q. Okay. Was -- in terms of the term "compactness," the
2 debates that happened in the Senate, the statements made by
3 the members, your understanding, can you tell us what is
4 meant by compactness?

5 A. Well, I know some people consider some sort of
6 mathematical equation to be how you determine compactness.
7 I think I have more of a layman's understanding of
8 compactness, and that just means a tighter geographic area.

9 Q. And, and in terms of comparing Senate Bill 1008 to the
10 2001 plan, did you believe that you were increasing the
11 compactness of the district by passing that plan?

12 A. Absolutely.

13 Q. Did you believe that Senate Bill 1008 complied with the
14 Constitution's requirement that, that congressional
15 districts be compact?

16 A. Yes.

17 Q. Now, the West Virginia Constitution, does it require
18 the Legislature to pick the most compact plan?

19 A. Not that I recall.

20 Q. It just has to meet the standard of compactness.

21 A. That's my understanding.

22 Q. In committee you had a discussion with Professor
23 Bastress; correct?

24 A. I believe so.

25 Q. And Professor Bastress, from the testimony,

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1 explained -- is a professor who was brought to explain some
2 of the legal principles to the committee. And you
3 discussed -- in terms of variance versus splitting counties,
4 do you recall the question you asked Professor Bastress?

5 A. I don't recall the specific question I asked. If you,
6 if you have it there, it would probably refresh my
7 recollection.

8 Q. Okay. Well, do you recall questioning Professor
9 Bastress as to whether the law had changed from the 1991
10 case that approved the district?

11 A. I do. And I believe his answer was it had not.

12 Q. In terms of variance and with respect to Senate Bill
13 1008, you also asked whether it was possible to decrease the
14 variance by taking some of the population out of the
15 northern and southern counties of the district and moving
16 them into the First and the Third. Do you recall that?

17 A. I do, but not, not particularly well.

18 Q. Okay. The question you -- the question to Professor
19 Bastress on the screen, does that refresh your recollection?

20 A. It does.

21 JUDGE KING: What page is that on?

22 MR. MAJESTRO: Page 53, Your Honor.

23 JUDGE KING: I'm sorry?

24 MR. MAJESTRO: 53.

25 JUDGE KING: Is that the number at the bottom of

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1 the page?

2 MR. MAJESTRO: Yes.

3 BY MR. MAJESTRO:

4 Q. What did you understand Professor Bastress' issue in
5 the State Constitution to be if you would, had done that
6 proposal of moving the fifteen or sixteen hundred people?

7 A. I understood him, as I recall, that we would still have
8 maybe compactness issues. We would potentially have issues
9 of, you know, moving the, moving the districts, moving too
10 many people. I think there were, there were potentially
11 other issues that would come up if we made a change like
12 that.

13 Q. Including issues regarding splitting counties?

14 A. That's correct.

15 Q. Now, the bill under consideration, procedurally you
16 could have moved to amend the bill to enact the hypothetical
17 you offered Professor Bastress to move the fifteen or
18 sixteen hundred people to decrease the variance; correct?

19 A. Yes.

20 Q. Is there a reason why you didn't?

21 A. Well, at the end of the day, I thought it was important
22 to do a couple of things. I mean, first of all, the plan
23 that we had from 1991 had already been approved as being
24 sufficiently compact and having a sufficiently narrow
25 variance.

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1 So, I think I went into this thinking that if we, you
2 know, had a similar variance and made it a little more
3 compact and didn't put incumbents against each other and
4 make dramatic shifts in the district that we would be
5 meeting the constitutional requirements that we had.

6 Q. Okay. And let's -- the last *Karcher* factor we didn't
7 talk about, and that is keeping the cores of the existing
8 districts the same, was that an important state interest
9 that the Legislature had in enacting Senate Bill 1008?

10 A. I believe it was. It was certainly important to me and
11 it was important to other folks that I had discussions with
12 during the course of the process.

13 Q. And there was also a debate about this in both the
14 committee and the floor about whether or not keeping the
15 districts the same was enough to justify the variance;
16 correct?

17 A. I think there was.

18 Q. And, ultimately, the conclusion of the Legislature was
19 that it was important enough -- well, the conclusion of the
20 Legislature was to reject the opponents of, of changing the
21 district and enact Senate Bill 1008.

22 A. Yes, that's what we ultimately did.

23 Q. We've had some discussion today regarding findings. In
24 your review of, of different legislation as Senate Judiciary
25 Chair, is it fair to say that sometimes the Legislature does

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1 findings, explicit findings in bills and sometimes it
2 doesn't?

3 A. Yes.

4 Q. There's no explicit requirement that the Legislature
5 enact findings that you're aware of in order to express its
6 intent of legislation?

7 A. Not that I'm aware of.

8 Q. And Professor Bastress in his statement indicated to,
9 to you in committee that in order to justify deviations, it
10 was necessary for the Legislature to have found certain
11 matters. Did you take that to mean that you needed to have
12 legislative findings in the, in the statute?

13 A. I did not take it to mean that.

14 Q. Are you aware that there, there's not been -- there
15 were not legislative findings in the 1991 statute that was
16 approved by the, by the Court?

17 A. That's my understanding, yes.

18 Q. And we have also discussed earlier today the 1970s
19 redistricting case, the, the *Rockefeller* case. Are you
20 aware that there were no findings in that opinion that, that
21 was, that, where the Legislature was successful in
22 justifying to the Court a .7888 variance?

23 A. That's also my understanding.

24 Q. The variances we're talking about that -- the variances
25 under one, was it the general consensus that those were all

Corey Palumbo - Cross (Skinner)

1 small variances based on existing federal precedent?

2 MR. SKINNER: Objection to the use of "consensus."

3 The votes are of record. His speaking about consensus is
4 without a basis.

5 BY MR. MAJESTRO:

6 Q. Okay. What was your understanding as to whether or not
7 variances under one were, were -- did you have an
8 understanding that variances under one were the kind of
9 small variances that could be justified under the *Karcher*
10 test?

11 A. That was my understanding. And we knew for a fact that
12 a, that a variance of .788, whatever, whatever you said it
13 was, was already found to be a variance that could be
14 justified.

15 Q. Thank you, Senator.

16 MR. MAJESTRO: That's all I have for now.

17 THE WITNESS: Thank you.

18 CROSS EXAMINATION

19 BY MR. SKINNER:

20 Q. Senator, as a member of the committee, did you go to
21 any of the public meetings throughout the state?

22 A. I went to the one in Kanawha County.

23 Q. Okay. Did you -- so, you live in Kanawha County?

24 A. That's correct.

25 Q. And that's in the Second District.

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1 A. That's correct.

2 Q. Okay. Did you go to the public meeting also in the
3 Second District in the Eastern Panhandle?

4 A. I did not.

5 Q. Did anyone report to you about the dissatisfaction
6 expressed at that meeting as to the congressional plan?

7 A. I don't specifically recall that, but I received
8 reports from all the meetings. So, I'm sure I did get that
9 message at some point.

10 Q. So, you're aware that the public particularly in the
11 Eastern Panhandle is not happy with the current
12 congressional plan.

13 A. I have been made aware of that, yes.

14 Q. I want to ask you some questions about compactness.

15 A. Okay.

16 Q. Can you take a look -- let's see if we can get this
17 right. You can take a look -- this is what's been called
18 the perfect plan. Can you tell me whether you think that
19 these three districts are compact?

20 A. I mean, quite honestly, none of the maps that I saw
21 look compact to me. With our, the shape of our state and
22 the population we have, it's hard to, I think, make any
23 districts look compact. So, those, those districts, you
24 know, look about as compact as what we have now, but none of
25 them jump off the page at me as being overly compact.

Corey Palumbo - Cross (Skinner)

1 Q. Okay. So, you would agree that the plan we have now is
2 not overly compact?

3 A. Well, I would agree -- I would -- what I'm trying to
4 say is I think with the shape of our state and our
5 population, it's impossible to come up with a map that's
6 overly compact. I think the map we've got now is as, just
7 about as compact as we can make it. This I think would fall
8 in the same category.

9 Q. Now, you'd agree that a map like this, the distance
10 within any one district is less than the current distance
11 from one end to the other end of the Second District?

12 A. I don't think I can agree or disagree with that just
13 looking at a picture.

14 Q. Okay. Can you give us an example of, of a district
15 that you would think in West Virginia would not be compact?

16 A. I mean, I guess if you had a district that ran from
17 Jefferson County up to Hancock County and then down to
18 McDowell County, that would not be compact.

19 Q. It's basically the whole state.

20 A. Well, you cut out some of the eastern parts but --

21 Q. If we had perhaps two districts and it looped all the
22 way around, that would be not compact?

23 A. You know, I sort of think that if we had two districts,
24 it might be a little easier to make them compact.

25 Q. I think we'll all agree that we don't want two

1 districts.

2 A. I would certainly agree with that.

3 Q. Would you agree that 20 years ago, the Second District
4 was the, created as a product of an attempt to gerrymander
5 Congressman Staggers out of office?

6 A. I've heard people say that, but I certainly don't know
7 that to be a fact.

8 Q. Okay. What is, what is the specific reason the, from
9 your understanding, the State Senate adopted the plan with
10 the variance that it did? What is the specific reason?

11 A. Well, I think the -- as best as I can explain it, I
12 think that we knew a similar variance had been approved by a
13 Court before. We knew that as far as compactness goes,
14 getting rid of the westernmost county of the Second District
15 was going to do nothing but make it more compact. And we
16 also considered keeping counties intact, not making dramatic
17 shifts in the district, and keeping communities of interest
18 together as best we could.

19 Q. So, there wasn't one specific reason?

20 A. I don't think so.

21 Q. Okay. And --

22 A. I don't know if I mentioned -- did I mention keeping
23 incumbents in their individual districts and not putting
24 them against each other?

25 Q. No, you didn't mention that.

Corey Palumbo - Cross (Skinner)

1 A. That was a significant part of the discussion as well.

2 Q. Was the map as drawn necessary to achieve all of those
3 purposes, or could there have been another map that achieved
4 all those purposes?

5 A. The map as drawn that we ultimately passed?

6 Q. Yes.

7 A. I certainly can't sit here and say that's the only map
8 that could have accomplished that. It's the only one that I
9 recall us considering that would have accomplished that.

10 Q. Okay. And are you aware of the software that's being
11 used in the redistricting office?

12 A. I'm aware of it, but I'm not intimately knowledgeable
13 about it.

14 Q. At any point in time did you ask the redistricting
15 staff to generate any maps for you? I'm talking about
16 congressional maps, not State Senate maps.

17 A. I did not.

18 Q. Okay. Now, you -- your new Senate, State Senate
19 district, it actually crosses over county lines, does it
20 not?

21 A. The one that I'm in actually does not.

22 Q. It does not. The current one or the new one?

23 A. Either one.

24 Q. Okay.

25 A. The other district in Kanawha County, the one in which

Corey Palumbo - Cross (Skinner)

1 I do not live, goes into Putnam County, but that's not the
2 district that I'm in.

3 Q. Okay. Why doesn't that stay within the county
4 boundary?

5 A. Well, Kanawha County lost a sufficient number of
6 citizens where we could no longer maintain two districts
7 within Kanawha County.

8 Q. Would you agree that there's a constitutional
9 requirement to have Senate districts be within the
10 boundaries of counties?

11 A. Sure. But sometimes, sometimes, you know, the
12 requirements can't be followed based on the circumstances
13 that you have.

14 Q. Did anyone suggest to you at any time that there should
15 be no findings adopted as a part of the, the bill, 1008?

16 A. I don't recall there being any discussion regarding
17 findings, either to have them or to not have them. That's
18 not to say that they didn't occur. I just don't recall any
19 discussions one way or the other about them.

20 Q. It's not unusual for there to be legislative findings
21 in any piece, in any bill. Is that fair?

22 A. Yeah, that is fair.

23 Q. In fact, the bill just passed, the Marcellus bill, has
24 legislative findings in it; is that right?

25 A. I think that is correct.

Corey Palumbo - Cross (Cooper)

1 Q. Okay. Do you know who Debbie Wasserman Schultz is?

2 A. That name sounds familiar. Who is that?

3 Q. She's the Chair of the Democratic party, the DNC. Are
4 you aware that she is a congresswoman who does not live in
5 the district in which she represents?

6 A. I'm not aware of that.

7 MR. SKINNER: That's all.

8 JUDGE KING: Mr. Cooper I think has something.

9 MR. COOPER: My turn. I'll be brief.

10 CROSS EXAMINATION

11 BY MR. COOPER:

12 Q. Good afternoon, Senator Palumbo. How are you?

13 A. Good afternoon. How are you doing?

14 Q. All right. In the, the district in the State Senate to
15 which you were elected, that was the whole county of
16 Kanawha; is that correct?

17 A. That is correct.

18 Q. And you are -- you will still represent that, that
19 whole county until your term is up. And then if you decide
20 to run for re-election, you'll represent the smaller
21 district. Is that correct?

22 A. Yes, it will be a smaller district.

23 Q. Right. Now, are you familiar with the municipality of
24 Montgomery?

25 A. I am.

Corey Palumbo - Cross (Cooper)

1 Q. And is part of it in Kanawha County?

2 A. It is.

3 Q. And part of it's in Fayette County. Am I correct?

4 A. I believe you are.

5 Q. And they're both -- they're in two separate
6 congressional districts. Am I correct?

7 A. I believe you are correct.

8 Q. When you were stating your opinion that by voting to
9 adopt a plan whereby Mason County would be removed, you
10 would be making the congressional district that you're
11 living in more compact, are you familiar with the various
12 tests for compactness that have been discussed by the U.S.
13 Supreme Court?

14 A. I'm sure I have looked at them at one point in time. I
15 can't recite them to you now. I'm speaking more from a
16 layman's perspective of a district that was deemed to be
17 sufficiently compact now having the westernmost county
18 removed, thereby making it more compact. And that's what
19 I'm talking about.

20 Q. Well, if I were to tell you that there's one test
21 whereby you -- to determine compactness, you, you divide the
22 area of the district by the area of the smallest
23 circumscribing circle around that district, known as the
24 Reock test, you're not familiar with that test?

25 A. I've heard discussions about it but, no, I can't say

Corey Palumbo - Redirect (Majestro)

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1 I'm, I'm very familiar with that.

2 Q. But without being familiar with the exact facts, if
3 someone were to demonstrate to you that, in fact, the
4 smallest circumscribing circle around the, the new Second
5 Congressional District is exactly the same as the smallest
6 circumscribing circle around the old Second Congressional
7 District, and there's been actually a loss of the
8 population -- I mean, not loss -- loss of the area of the
9 district with Mason County no longer in that, thereby
10 reducing the area of the district, which is the numerator in
11 the Reock test, you would agree that under that test, we
12 would actually have a, that the Congressional District Two
13 would be less compact under that particular test.

14 A. To me, that's an absurd conclusion to reach by getting
15 rid of the most western county. I mean, that may be what
16 the test says, but I would certainly disagree with the
17 conclusion reached by that test if that's what the
18 conclusion would be.

19 Q. All right. I will state in fact that test has been
20 explicitly discussed by the U.S. Supreme Court. Thank you.

21 REDIRECT EXAMINATION

22 BY MR. MAJESTRO:

23 Q. In *Stone vs. Hechler* the Court allowed the Legislature
24 to come up with its own definition of compactness; correct?

25 A. I believe that is correct.

Corey Palumbo - Redirect (Majestro)

1 Q. And the -- let's start with the 1863 founders who wrote
2 our Constitution. Do you know of any evidence to believe
3 that when they put compactness as a requirement on a
4 congressional district, they were referring to those kinds
5 of tests that Mr. Cooper was talking about?

6 A. I don't have any evidence or indication of that.

7 Q. And the -- your work as a legislator and Senator and
8 your watching the discussions over compactness, did they
9 focus on these numbers or did they focus on the sort of
10 common sense we can look at it and see whether it's more or
11 less compact?

12 A. Certainly, my focus was more on the look at the map and
13 common sense. And I think when I discussed it with other
14 people, that seemed to be the general focus of others.

15 Q. And the debates that occurred over the various bills, I
16 can't recall any discussion of, of these kinds of numbers.
17 Do you recall any?

18 A. Well, I do, I do recall a little bit of a discussion
19 about some mathematical formula, but I don't recall people
20 really digging into what that, what that meant.

21 Q. And was that because in the mind of the legislators
22 they believed this more common sense view was what they
23 should be applying?

24 A. That's my --

25 MR. SKINNER: Objection to him asking for what's

Corey Palumbo - Redirect (Majestro)

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1 in the minds of the legislators.

2 JUDGE KING: That's all right. Go ahead.

3 BY MR. MAJESTRO:

4 Q. Did anyone say that -- in their testimony or in their
5 arguments for or against the plan that we should draw
6 circles around districts and calculate mathematical averages
7 of area and such that when you remove a county from the
8 westernmost edge of the district that the result is it's
9 less compact?

10 A. I don't recall that argument being made.

11 Q. Now, there was a, a political geographer from WVU that
12 submitted a report. Do you recall that?

13 A. I, I do. I don't recall him being there, but I do
14 recall him submitting a piece of paper of some sort.

15 Q. And do you recall the conclusion of the report was the
16 same as Mr. Cooper's that removing Mason County made the
17 Second District less compact?

18 A. Yes.

19 Q. Or, or not anymore, not anymore compact.

20 A. Yes.

21 Q. Was there anyone in the Legislature you included that
22 credited that report to your memory or knowledge?

23 A. Did you say that credited?

24 Q. Yes, that credited that conclusion.

25 A. I certainly didn't agree with that conclusion, and I'm

Corey Palumbo - Redirect (Majestro)

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1 not aware of anyone else who did, although there may have
2 been others, other people who did perhaps. No one expressed
3 that opinion to me that I recall.

4 Q. And, finally, you talked about the city of, of Fayette,
5 Montgomery in Fayette County. Over the most recent history,
6 has the, the county line been respected between Montgomery
7 and Fayette County with respect to congressional districts
8 such that Fayette County has been in the Third and Kanawha
9 County, including the portions of Montgomery, have been in
10 the Second?

11 A. I believe so.

12 Q. And, and with respect to other, other municipalities,
13 for example, Weirton which is in, I believe, Hancock and
14 Brooke Counties, is that all within one district?

15 A. I believe it is.

16 Q. And the same with Paden City. Is that all in one
17 congressional district?

18 A. I believe so.

19 Q. So, other than the historic county -- the historic
20 split of the City of Montgomery, the, there's no other
21 examples that you're aware of where a city is, is between
22 two congressional districts?

23 A. That's right, not that I'm aware of.

24 Q. And, and in this case, not splitting Kanawha County and
25 moving part of Montgomery -- moving Kanawha County and part

Corey Palumbo - Redirect (Majestro)

1 of Montgomery into the Third Congressional District
2 supported the goal of keeping the districts the, the same as
3 they were, keeping counties, keeping county lines together?

4 A. Yes.

5 Q. Do you know, have any knowledge as to what the
6 population of Montgomery is that's in Kanawha County?

7 A. I don't think I can quote that to you.

8 Q. Is it safe to say that it, that it's not a large number
9 that would, would move the variance numbers in a
10 significant, in a significant manner?

11 A. I think it is safe to say that.

12 Q. Thank you, Senator.

13 MR. MAJESTRO: That's all I have.

14 THE WITNESS: Thank you.

15 MR. SKINNER: Nothing further.

16 JUDGE KING: Mr. Rodd.

17 MR. RODD: Nothing, Your Honor.

18 JUDGE KING: Mr. Palumbo, you were the -- you were
19 chairing the committee when Professor Bastress testified.

20 THE WITNESS: No. He testified in the
21 redistricting committee and I was not the Chair then.

22 JUDGE KING: So, the references to the Chair are
23 not to you. That's Mr. Unger?

24 THE WITNESS: Yes, I believe so.

25 JUDGE KING: Okay. Now, the *Stone* case, do you

Corey Palumbo - Redirect (Majestro)

1 remember the nature of the variance in the *Stone* case, the
2 1991 case?

3 THE WITNESS: If I recall correctly, I think that
4 was the .788 --

5 JUDGE KING: No, that's -- no. *Stone* was .09.

6 THE WITNESS: .09, okay.

7 JUDGE KING: .09. It involved 556 people. In
8 this one that's .79, it involves 4,871. And Mr. Bastress,
9 Professor Bastress was asked what the courts might think of
10 that as a matter of fact. And he said that's a fairly
11 significant deviation, particularly when, as mentioned
12 earlier, with modern technology. The .79 is, of course,
13 larger than the .64 in *Karcher*, the Supreme Court case. It
14 would take more of a justification, significantly more,
15 substantial justification to support a .79 deviation.

16 Were you present when that testimony was given?

17 THE WITNESS: I believe I was.

18 JUDGE KING: And he said during that testimony,
19 the portion I have here, he continuously refers to the need
20 to strive for perfect equality. He didn't cabbage over that
21 term. Do you agree with that?

22 THE WITNESS: I do recall him making statements
23 like that.

24 JUDGE KING: That's all I have. Anyone else?

25 MR. MAJESTRO: I'd like to just follow up a little

Corey Palumbo - Re-Redirect (Majestro)

1 bit on that last point, Your Honor.

2 JUDGE KING: Go right ahead.

3 RE-REDIRECT EXAMINATION

4 BY MR. MAJESTRO:

5 Q. Now, of course, Professor Bastress was the losing
6 attorney, one of the losing attorneys in *Stone*.

7 A. Yes.

8 Q. And did he point out any language in *Karcher* that
9 indicated that the Supreme Court had specifically cited the
10 *Rockefeller* opinion that approved the .7888 variance?

11 A. I, I do remember that point being made to us. I don't
12 remember if Professor Bastress made it or not.

13 Q. And in terms of the greater justification in this case,
14 you've expressed the Legislature, in addition to compactness
15 and keeping cores together, keeping counties together --
16 well, there are four justifications in this case and in
17 *Stone* there's only two.

18 A. I believe that's correct.

19 Q. So, it is a greater justification even to use Professor
20 Bastress' terms.

21 A. Absolutely. I think all those four factors weighed
22 heavily on my mind and others' minds and, you know, we
23 considered all those things in reaching our final
24 conclusion.

25 Q. In terms of specific findings, is the act of just

Corey Palumbo - Re-Redirect (Majestro)

1 taking Mason County away, is that a finding that the
2 Legislature believes that we want to keep it as close to the
3 way it was before as we can? I mean, isn't that implied in
4 just the decision to do what they did?

5 A. Sure. I think that's pretty clear that's what that
6 means. That's not an official specific finding, but I think
7 anyone can look at that and see that making that change we
8 were trying to keep the core districts intact and make as
9 small changes as possible.

10 Q. Is that why there was not seen any need for findings
11 because it was obvious what the Legislature was doing?

12 A. I think that could have been a reason, yes.

13 Q. Is that the -- are those the kinds of circumstances the
14 Legislature doesn't use findings?

15 A. Sure. I think, you know, when there's legislation
16 that, that is obvious and no need for any clarification, a
17 lot of times you have no, no findings at all.

18 Q. Okay. Thank you.

19 JUDGE KING: So, there was a conscious decision
20 not to make any findings?

21 THE WITNESS: Oh, I'm not sure I said that. I
22 think that as I recall from earlier questions, I don't
23 remember there being necessarily discussions one way or the
24 other about having findings. Now looking back, I can, I can
25 think maybe that's why there weren't any.

Corey Palumbo - Recross (Skinner)

1 JUDGE KING: You had never read the *Karcher*
2 decision at that time.

3 THE WITNESS: I think that's correct.

4 JUDGE KING: Anyone else?

5 MR. SKINNER: Just, just one final question.

6 RECCROSS EXAMINATION

7 BY MR. SKINNER:

8 Q. You are a lawyer; right?

9 A. Yes.

10 JUDGE KING: Thank you, Mr. Palumbo, Senator
11 Palumbo.

12 THE WITNESS: Thank you. It's an honor to appear
13 before you-all today. I appreciate you having me.

14 JUDGE KING: Appreciate you being here. Thank
15 you.

16 Mr. Majestro.

17 MR. MAJESTRO: Your Honor, how -- I guess I want
18 to clarify some things and I think we might be done with
19 witnesses if I get the right, right clarifications.

20 JUDGE KING: You want clarification from the
21 Court?

22 MR. MAJESTRO: Well, and maybe from the plaintiffs
23 whether there are objections. We talked earlier this
24 morning about submitting some affidavits with, with some,
25 what I, what I called undisputed non-stipulated facts.

1 JUDGE KING: This is about people going off to
2 training school?

3 MR. MAJESTRO: Things that, things of that nature.

4 JUDGE KING: How many people went?

5 MR. MAJESTRO: I believe it was five.

6 JUDGE KING: Five. And they worked for the
7 legislative redistricting office?

8 MR. MAJESTRO: There were a couple legislators
9 that went.

10 JUDGE KING: Did you ask Senator Unger something
11 about that?

12 MR. MAJESTRO: He didn't have a real good memory
13 of it.

14 JUDGE KING: Well, can -- on the plaintiffs' table
15 over here, will you accept the representation of Mr.
16 Majestro that five of them went to a redistricting training
17 program?

18 MR. SKINNER: Absolutely.

19 MR. MAJESTRO: Okay. That's, that solves that
20 issue.

21 JUDGE KING: If you want to specify it any further
22 as to what the programs were and where it was.

23 MR. MAJESTRO: Well, including Delegate
24 Fleischauer and it, the program was sponsored by the
25 National Conference on State Legislatures.

1 JUDGE KING: What year? Was it in 2010?

2 MR. MAJESTRO: We believe it was September of
3 2010.

4 JUDGE KING: September of 2010. That was after
5 the legislation was enacted.

6 MR. MAJESTRO: No, Your Honor.

7 JUDGE KING: 2010. 2011, all right.

8 MR. MAJESTRO: Then another one was in January of
9 2011.

10 JUDGE KING: The second one. Okay. And five
11 different folks went. And how many are on the staff up
12 there?

13 MR. MAJESTRO: I think -- well, all of them are
14 either on staff or Delegate Fleischauer.

15 JUDGE KING: Okay. Do you want to ask -- do you
16 want any further clarifications?

17 MR. SKINNER: I'd like to know where it actually
18 was.

19 MR. MAJESTRO: One in Washington and one in
20 Providence, Rhode Island.

21 JUDGE KING: Washington, D.C. and Providence,
22 Rhode Island. Okay. No need for any affidavits.

23 MR. MAJESTRO: Okay. The next --

24 JUDGE KING: Their representations are taken as
25 fact.

1 MR. MAJESTRO: The next question or point of
2 clarification, in the record we had 30 some exhibits. I
3 would now move -- attached to our briefs. We haven't marked
4 any exhibits here today.

5 JUDGE KING: These are the ones that you submitted
6 with your brief or with, --

7 MR. MAJESTRO: Yes.

8 JUDGE KING: -- with the stipulation? With your
9 brief?

10 MR. MAJESTRO: The ones with the stipulation and
11 the ones with our brief.

12 JUDGE KING: The package of those materials.

13 MR. MAJESTRO: Yes. And we would move both all of
14 the, the exhibits attached to the stipulation, plus all the
15 exhibits attached to our brief, into evidence.

16 MR. HAMMER: We have no objection to the official
17 record being made part of the evidence because it's
18 self-authenticating.

19 JUDGE KING: Well, that doesn't answer the
20 question.

21 MR. HAMMER: But there are other exhibits in
22 there --

23 JUDGE KING: Can you say which ones you don't
24 accept?

25 MR. HAMMER: It would take me a few moments to

1 page through them.

2 (Pause)

3 MR. HAMMER: I'll just go through them in order if
4 that suits the Court.

5 Exhibit A, no objection.

6 I think there's an Exhibit B. No objection.

7 Exhibit C, no objection.

8 Exhibit D, no objection.

9 Exhibit E, no objection.

10 Exhibit F, no objection.

11 Exhibit G, objection. It's a *Gazette* newspaper
12 article. It can't be authenticated. The statements in it
13 are not admissible. They're inadmissible hearsay. We
14 object to Exhibit G.

15 JUDGE KING: Do you want to withdraw that one, Mr.
16 Majestro?

17 MR. MAJESTRO: I want to find it here. What page
18 is that on?

19 MR. HAMMER: It is Page 23 and 24 of Document 42.

20 MR. MAJESTRO: I think they're reporting
21 historically what happened. I mean, my argument for
22 acceptance is I've often heard that the -- my argument for
23 entry into evidence on this is that it's often spoken that
24 the *Charleston Gazette* is the legislative history of the
25 West Virginia Legislature.

1 JUDGE KING: Is what?

2 MR. MAJESTRO: It is the legislative history of
3 the West Virginia Legislature, the *Charleston Gazette*. And
4 there are statements here reporting what the committee did
5 and, you know, I think it's admissible, especially given we
6 have three judges who are considering this evidence and I
7 believe Your Honor can, Your Honors can give it the weight
8 it deserves.

9 MR. HAMMER: It's inadmissible hearsay. It's an
10 out-of-court statement offered to prove the truth of some
11 statement. We have the official record. We have the
12 transcript of the proceedings which is part of the official
13 record. These statements should not be admissible.

14 JUDGE KING: What others?

15 MR. HAMMER: Exhibit H, I don't know where it's
16 from. I can't -- it looks official, but --

17 JUDGE KING: What number is that?

18 MR. HAMMER: H. I'm sorry.

19 MR. MAJESTRO: It's the Secretary of State's
20 website.

21 MR. HAMMER: If that's on the website, no
22 objection.

23 Exhibit I, no objection.

24 Exhibit J, I don't know what its source is. I don't
25 know what -- I simply don't know where this document is

1 from, so I --

2 MR. MAJESTRO: It's also the Secretary of State's
3 website.

4 JUDGE KING: It's what?

5 MR. MAJESTRO: Secretary of State's website.

6 MR. HAMMER: Then we have no objection.

7 Exhibit K, no objection.

8 Exhibit L has no relevance whatsoever. This is an FEC
9 report of Senator John R. Unger with regard to a principal
10 campaign committee called Unger for Congress. We perceive
11 no relevance to this record whatsoever. And if he wanted to
12 ask questions of Senator Unger about it, he had that
13 opportunity. He didn't do so.

14 JUDGE KING: Want to withdraw that one?

15 MR. MAJESTRO: Yeah, we'll withdraw that one.

16 JUDGE KING: Okay. We'll exclude the newspaper.

17 MR. HAMMER: Exhibit M, no objection.

18 Exhibit N, no objection.

19 Exhibit O is the transcript of proceedings before the
20 select committee. It's part of the official record. No
21 objection.

22 Exhibit P, no objection.

23 Exhibit Q, no objection.

24 Exhibit R, no objection.

25 Exhibit S, no objection.

1 Exhibit T, no objection.

2 Exhibit U, no objection.

3 Exhibit V, no objection.

4 Exhibit W, no objection.

5 Exhibit Y, no objection.

6 MR. MAJESTRO: How about X? X is Cooper Number 1.

7 MR. COOPER: I don't object to it.

8 MR. MAJESTRO: You skipped X. X is Cooper Number
9 1.

10 MR. HAMMER: No objection. Sorry about that.

11 Exhibit Z, no objection.

12 Exhibit AA, no objection.

13 I believe that's all of them, Your Honor.

14 MR. MAJESTRO: There's also --

15 JUDGE KING: Are there others?

16 MR. MAJESTRO: Yes, the one attached to the reply
17 brief.

18 JUDGE KING: There are some attached to the reply
19 brief, the reply brief.

20 MR. HAMMER: I believe that's Document 51 in the
21 record.

22 JUDGE KING: Is there just one of them?

23 MR. MAJESTRO: A through L.

24 MR. HAMMER: Exhibit A, I don't know what the
25 source of this document is.

1 MR. MAJESTRO: It's a summary of all the plans
2 created by counsel.

3 MR. HAMMER: We were not provided advance notice
4 of any summary of other data whatsoever. So, that would not
5 be in compliance with the rules requiring an advance notice
6 of a summary of evidence. So, we object to this document.

7 MR. MAJESTRO: They were provided with it. That's
8 why he has it. I mean, I think it's -- you know, we could
9 put this in our brief. It's more argument than it is
10 evidence.

11 JUDGE KING: It's a summary of the plans?

12 MR. MAJESTRO: Yeah. I'll just --

13 JUDGE KING: We'll take that under advisement. Go
14 ahead with the rest of them.

15 MR. HAMMER: Exhibit B is a newspaper article
16 from, it looks like the State of Maryland. So, again, we
17 believe the same ruling that applies to the *Gazette* article
18 applies to Exhibit B.

19 MR. MAJESTRO: We're not -- B, C and D are
20 newspaper articles. They're cited in our brief. We're not
21 asking -- they're part of our argument for painting the
22 picture of what's happening somewhere else. We're not
23 introducing them into evidence. They're just --

24 JUDGE KING: You've got them in there as, as
25 exhibits with your brief. They're in, they're in the file

1 with your brief. What makes the difference whether we admit
2 them or not?

3 MR. MAJESTRO: I, I don't -- that's my point, Your
4 Honor. I agree with you. If he wants to object to it,
5 that -- I mean, I don't think it matters.

6 MR. HAMMER: He moved them as exhibits --

7 JUDGE KING: I know he moved those, but the ones
8 on the stipulation, or whatever that first group was, is a
9 different matter. I don't think these make any difference.
10 They're here.

11 MR. HAMMER: Right.

12 JUDGE KING: Can we take care of them that way?

13 MR. HAMMER: We can, indeed, Your Honor.

14 JUDGE KING: They're submitted to the Court for
15 whatever weight the Court wants to give them, if any.

16 What else you got, Mr. Majestro?

17 MR. MAJESTRO: E is the -- okay. Well, H is the
18 Prezioso affidavit.

19 JUDGE BERGER: H to what, Mr. Majestro?

20 MR. MAJESTRO: To the reply brief.

21 JUDGE KING: I thought we took care of all of the
22 exhibits to the reply brief.

23 MR. MAJESTRO: Oh, has he? So, you don't have any
24 other --

25 MR. HAMMER: The Court said they're part of the

1 record.

2 JUDGE KING: I said you've submitted them.
3 They're in the record and we'll give them any weight --

4 MR. MAJESTRO: Okay.

5 JUDGE KING: -- that we see fit.

6 MR. MAJESTRO: Okay. Then that resolves all that.

7 At this time, Your Honor, with respect to our, to our,
8 to our case in chief on the second part of *Karcher* and our
9 response to the plaintiffs' argument with respect to the
10 compactness, we would rest.

11 JUDGE KING: Very well. Any rebuttal?

12 MR. SKINNER: No rebuttal.

13 MR. COOPER: No, Your Honor.

14 JUDGE KING: Okay. So, we will consider the
15 matter submitted.

16 Is there any -- anyone have a desire to refile any
17 other papers if we give you 24 hours?

18 MR. SKINNER: I think that you-all have plenty to,
19 to work with. You don't need more paper.

20 MR. MAJESTRO: I would agree with that, Your
21 Honor.

22 JUDGE KING: You agree with that?

23 MR. MAJESTRO: Yes.

24 JUDGE BERGER: I love lawyers with good judgment.

25 JUDGE KING: Then we want to express our

1 appreciation for the hard work that you've all put into this
2 matter. We will take it under advisement and try to give
3 you an answer as soon as we can.

4 We will, as we close court, exercise the time-honored
5 tradition of the Fourth Circuit Court of Appeals, and upon
6 court being closed we will come down and greet counsel
7 before the judges depart the courtroom.

8 We thank each of you and appreciate having you here and
9 thank you for the good work.

10 (Proceedings concluded at 5:50 p.m.)
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I, Lisa A. Cook, Official Reporter of the United States District Court for the Southern District of West Virginia, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter.

s\Lisa A. Cook

January 3, 2012

Reporter

Date

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