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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH**

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COMMISSIONER AMELIA POWERS  
GARDNER, a registered Utah voter and  
elected official, et al.,

Plaintiffs,

v.

LIEUTENANT GOVERNOR DEIDRE  
HENDERSON, in her official capacity,

Defendant.

**PLAINTIFFS' RESPONSE  
TO INTERVENORS' NOTICE  
[DOC. 96] AND NOTICE  
OF CORRECTION OF  
STATEMENT MADE DURING  
FEBRUARY 18, 2026 HEARING**

Case No. 2:26-cv-00084-RJS-JCB

Circuit Judge Timothy M. Tymkovich  
District Judge Robert J. Shelby  
District Judge Holly L. Teeter

Magistrate Judge Jared C. Bennett

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Plaintiffs file this response to LWV Intervenors' Notice (Doc. 96) and to advise the Court of two events that have occurred since the February 18, 2026 hearing.

First, as the Panel is aware, late yesterday Intervenors filed a Notice with the Court that the Utah Supreme Court rejected the Legislature's appeal of Judge Gibson's January 6, 2026 order on jurisdictional grounds. *See* Doc. 96. The opinion does not address any of the substantive issues with the state-court injunction raised by Plaintiffs in this case. Given that the almost four-year-old state litigation will now continue for some indefinite period—a period that will stretch long beyond the Lieutenant Governor's deadline, the start of the candidate filing period, and even the November elections—there is no reason for this Court to stay its hand.

Second, yesterday afternoon Plaintiffs received the transcript of the February 18, 2026 hearing. In it, Plaintiffs note that Intervenors-Defendants claimed that Map C had repealed and replaced the 2021 map in the Utah Code. *See* Hr'g Tr. at 62–63 (Feb. 18, 2026) (Ex. A). This is, at best, a half-truth. Plaintiffs briefly correct that statement here.

The 2021 map was conditionally replaced by an amendment to the Utah Code, which the Legislature made under duress in the wake of Judge Gibson's August 2025 ruling. That amendment declares that the 2021 map is the operative map in the state, unless two conditions are met: the map is enjoined and Proposition 4 is given legal effect. *See* Utah Code § 20A-13-101.1(2)(b)(ii)(A), (B). Only then does Map C kick in.

The replacement, then, is only conditional and need not be permanent. And, contrary to Intervenor’s suggestion, the 2021 map is still in the Utah Code.

If this Court held that enjoining the 2021 map violated the Elections Clause under *Moore v. Harper*, 600 U.S. 1 (2023), then the 2021 map would be the operative map in Utah’s Code. Likewise, if this Court held that the 2021 map was the map Utah was required to use for the 2026 election because there was no time for the Legislature to draft another and some map had to be used, then so requiring would supersede the state court injunction under the Supremacy Clause. *See Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 670–78 (S.D. Ohio 2022) (three-judge panel) (rejecting a map provided by an advocacy organization and requiring the use of a legislatively-drawn map that had been enjoined by the Ohio Supreme Court for reasons of time and democratic accountability for the upcoming midterm election). And, with the state-court injunction without effect, the 2021 map would be the operative one in Utah Code.

February 21, 2026

Respectfully submitted,

/s/ Gene C. Schaerr  
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**CERTIFICATE OF SERVICE**

I certify that on February 21, 2026, the foregoing motion was filed with the Clerk of the Court by this CM/ECF filing system, which will cause all counsel of record to be served electronically.

Dated: February 21, 2026

/s/ Gene C. Schaerr  
Gene C. Schaerr (*pro hac vice*)  
D.C. Bar No. 416368

*Counsel for Plaintiffs*

# **EXHIBIT A**



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1 February 16, 2025

9:00 a.m.

2 P R O C E E D I N G S

3  
4 JUDGE SHELBY: Good morning, everyone, and  
5 welcome.

6 We'll go on the record and call case number  
7 2:26-CV-84, Powers Gardner and others versus Henderson and  
8 others.

9 Counsel, why don't we start with our appearances,  
10 should we? For the plaintiffs?

11 MR. SCHAERR: Your Honor, Gene Schaerr and James  
12 Phillips.

13 JUDGE SHELBY: Welcome.

14 For the defendant?

15 MS. HOIDEL: Your Honor, Anikka Hoidal. With me  
16 is Lance Sorenson.

17 JUDGE SHELBY: Welcome to both of you.

18 For the proposed intervenors?

19 MR. REYMANN: Good morning, Your Honor. David  
20 Reymann and Cheylynn Hayman from Parr Brown and Mark Gaber  
21 from the Campaign Legal Center for the intervenors.

22 JUDGE SHELBY: Terrific. Thank you, everyone.

23 As a housekeeping matter at the outset, we have  
24 carefully considered and reviewed the proposed intervenors'  
25 motion to intervene, Docket 17, as well as the opposition to

1 that motion.

2 We conclude it is well taken and that motion is  
3 granted.

4 We signaled yesterday in our email communication  
5 to the lawyers how we anticipated we would be proceeding  
6 today. What we had in mind is we thought we would allot up  
7 to 15 minutes for each party to provide any additional  
8 opening sort of argument that you wish to make. Then I  
9 think we'll have some questions for all of you. We'll  
10 proceed probably one party at a time in the way that you're  
11 familiar with in this court.

12 We'll say we have read your papers more than once,  
13 and there is some redundancy in the papers. We are  
14 familiar, we think, with your arguments. We have some  
15 questions. We'll be eager to hear what you have to share  
16 with us. It is your time. We encourage you to try to think  
17 if there is something that you would like to share with us  
18 besides reiterating what you have already told us in your  
19 papers. We would be eager to hear that.

20 We don't have the fancy clocks that we have in the  
21 Tenth Circuit, but I will keep an eye on things and try to  
22 give you some sense for where we are.

23 Should we begin with the plaintiffs, Mr. Schaerr?

24 MR. SCHAERR: Thank you very much. Let me  
25 especially thank the panel for what I know is an enormous

1 effort involved in convening this panel and reviewing all of  
2 the briefing on an exceptionally expedited schedule. On our  
3 side of the bench we are still reeling from that a bit, as  
4 you can imagine, but we certainly appreciate the enormous  
5 effort that has gone into that on your side as well.

6 As the Court is well aware, we challenge the  
7 decision of Utah's lieutenant governor to acquiesce, however  
8 reluctantly, to a series of state court decisions that  
9 purported to invalidate the congressional map passed by the  
10 Utah Legislature in 2021 and without any finding that its  
11 districts are substantively unlawful. And then ultimately  
12 the state court adopted its own map which it called Map 1  
13 that was proposed by the interveners here in that state  
14 court action. We believe that the L.G.'s plan to implement  
15 the map drawn by the state court instead of the  
16 Legislature's own 2021 map is foreclosed, not just by the  
17 terms of the Elections Clause, but by the Supreme Court's  
18 latest decision interpreting that clause in *Moore against*  
19 *Harper*.

20 Now, that plan imposes a series of irreparable  
21 costs on the plaintiffs, including two of Utah's sitting  
22 Congressmen and candidates for reelection, and we detailed  
23 those costs in our complaint, our P.I. motion and the  
24 declarations that we have submitted with that motion. And  
25 especially after the Supreme Court's *Bost* decision we don't

1 think there is any doubt that we have at least one plaintiff  
2 with standing here. We think all of them have standing.

3 None of the many injuries identified in the  
4 plaintiffs' declarations are compensable or reparable by any  
5 court decree or otherwise, and, therefore, there is  
6 obviously no damages remedy against the Lieutenant Governor  
7 or the state court for what they did or what they are  
8 proposing to do, and so we think irreparable injury is clear  
9 as well.

10 Now, my sense from the Lieutenant Governor's  
11 filing is that she would be happy to follow the plain  
12 language of the Elections Clause and *Moore versus Harper* and  
13 go back to the 2021 map that was drawn by the Legislature.  
14 So the principal question before this Court and the key to  
15 our likelihood of success on the merits is whether the  
16 intervenors in their amici have identified any valid  
17 exception to the Election's Clause's general requirement of  
18 legislative map drawing and some exception that would  
19 justify the use of a map drawn by a state judge rather than  
20 the Legislature.

21 In my time today I would like to address those  
22 possible exceptions, beginning with *Moore versus Harper*,  
23 which, obviously, outlines a possible exception and the  
24 other Supreme Court decisions on which the intervenors rely.

25 And, finally, I will briefly address the remaining

1 preliminary injunction factors as well as the intervenors'  
2 arguments about such things as abstention and *Purcell* and  
3 the relief that this Court can order.

4 Turning to *Moore versus Harper, Moore*, of course  
5 was a broad challenge by the North Carolina Legislature to  
6 the idea that state courts had any constitutionally  
7 permissible role in federal redistricting. I think they  
8 called it legislative supremacy or autonomy or something  
9 like that.

10 Now, all nine of the justices on the Supreme Court  
11 agreed that, as the chief justices majority opinion put it,  
12 and I quote, "State courts do not have free rein in  
13 redistricting because the Elections Clause expressly vested  
14 power to carry out its provisions in the legislature of each  
15 state, a deliberate choice that courts must respect."

16 Now, yes, there was some disagreement about how  
17 far that principle goes, with Justices Gorsuch and Thomas  
18 urging that the clause precludes any review by state courts  
19 of the legislature's redistricting, but of course the  
20 majority rejected that broad position and concluded instead  
21 that what they called "ordinary judicial review" by state  
22 courts is not categorically precluded under the Elections  
23 Clause.

24 The court didn't define that term, "ordinary  
25 judicial review," but they did note that its purpose is to

1 prevent courts from "abrogating redistricting power to  
2 themselves."

3 Here we believe that *Moore* forecloses the state  
4 court's actions for three independent reasons: Number one,  
5 the crafting and imposition of a new map by a state judge  
6 cannot fairly be characterized or considered as an act of  
7 ordinary judicial review, especially when there has been no  
8 finding that the existing districts are in any way  
9 substantively illegal.

10 Certainly, when the Elections Clause was written  
11 and drafted, a state judge's drawing and imposing a new map  
12 against the legislature's wishes would certainly not have  
13 been considered ordinary judicial review. In an article  
14 that we have cited, Professor McConnell and coauthors have  
15 shown that judicial involvement in legislative map drawing  
16 didn't even begin until about the middle of the last  
17 century, more than 150 years after the Constitution was  
18 adopted, and almost all of that activity, as this Court is  
19 probably aware, was in response to Congress using its own  
20 authority under the Elections Clause to regulate the state  
21 legislature's regulation of elections and subject to review  
22 in federal courts. So judicial review of legislative  
23 redistricting by state courts wasn't -- and even remains  
24 very rare.

25 But even if ordinary judicial review creates an

1 evolving standard that looks to the practices in other  
2 courts, neither the intervenors nor their amici have  
3 identified even one case in which a state court has created  
4 and imposed a map without finding any of the legislature's  
5 existing districts substantively unlawful.

6 And here the August order by the state court judge  
7 didn't find any substantive illegality. That order merely  
8 found that there had been a violation of certain procedural  
9 requirements of what is called Proposition 4. There was no  
10 finding of any substantive invalidity. And the November  
11 order which the other side claims did find substantive  
12 invalidity in the 2021 map -- in fact, the portion of that  
13 order that they cite in their papers was actually not  
14 addressing the 2021 map, it was addressing a different map  
15 known as Map C.

16 So there has never been any finding by the state  
17 court that the 2021 legislative districts adopted by the  
18 Legislature are substantively unlawful in any respect. So  
19 we think that that alone makes it impossible to square the  
20 state court's attempt to invalidate the 2021 map with *Moore*.

21 Second, and, in any event, the state court here  
22 violated the ordinary judicial review standard in another  
23 way, and that is by retroactively invalidating the  
24 Legislature's map, which had been enacted in a law called  
25 HB-2004, as a remedy for, in her view, improperly passing a

1 separate statute known as SB-200 that effectively amended  
2 some of the provisions of Proposition 4.

3 Now, here again, the intervenors in their amici  
4 have pointed to no decision in which any court has done that  
5 to a legislature, especially on an elections issue. While  
6 it is true that a court can invalidate an unconstitutional  
7 law, that does not invalidate other laws that may have been  
8 passed pursuant to that law.

9 Remember that the Legislature's authority, over  
10 redistricting of congressional elections at least, flows  
11 from the Elections Clause of the Constitution directly. It  
12 does not flow from the state constitution or from any law  
13 passed by the Legislature. They have authority to  
14 redistrict directly under the Elections Clause.

15 I have been struggling to find an example of why  
16 this sort of fruit of the poisonous tree approach that the  
17 state court took is so perverse. One example that comes to  
18 mind is the congressional budget process. You are all  
19 probably aware that every year when Congress decides to  
20 spend money, they first pass a budget resolution that kind  
21 of serves as a framework for all of the other spending  
22 bills.

23 Now, imagine that a judge decides that the budget  
24 framework is unlawful in some respect. Well, does that mean  
25 that all of the spending bills that have been passed under

1 that budget framework are now automatically unlawful just  
2 because the framework has been found unlawful? No. You  
3 would look at the individual -- assuming that the court  
4 could do it, which, of course, they can't -- but if judicial  
5 review were there, you would have to look at each of the  
6 individual spending bills and figure out whether there was  
7 something unlawful about that bill. You can't just  
8 invalidate a subsequent bill because the master legislative  
9 framework is in your view deficient in some fashion.

10 For that reason, too --

11 JUDGE SHELBY: About four minutes.

12 MR. SCHAERR: For that reason, too, the fruit of  
13 the poisonous tree approach is not only far beyond ordinary  
14 judicial review, but it is inconsistent -- flatly  
15 inconsistent with the respect for the legislative  
16 prerogatives that are required by *Moore*.

17 Third, in any event, *Moore*'s authorization for  
18 state court judicial action on federal redistricting is  
19 expressly limited to state constitutions. That is on page  
20 37 of *Moore*. Yes, the state court here arguably relied on  
21 the Utah Constitution and the alter or amend clause as part  
22 of her chain of reasoning in invalidating the 2021 map. As  
23 I have mentioned, that depends on this fruit of the  
24 poisonous tree idea.

25 But, as I mentioned, she didn't find the 2021

1 districts were substantively unlawful under the Utah  
2 Constitution at all, and she didn't purport to apply the  
3 Utah Constitution in creating Map 1. What she purported to  
4 apply there was Proposition 4, which all agree merely has  
5 statutory status. It does not have constitutional status.  
6 And because the redistricting was purportedly based on  
7 Utah's statutory law rather than its constitution, for that  
8 reason, too, that decision falls outside the state judicial  
9 review that is authorized by *Moore*.

10 So for each of these independent reasons, the  
11 state court decisions that the Lieutenant Governor is  
12 currently planning to implement are invalid under the  
13 Elections Clause as understood in *Moore*.

14 I will take just a moment to discuss a couple of  
15 the other Supreme Court decisions raised by the other side.

16 *Grove* obviously does not really apply here. We  
17 are not asking the Court to enjoin any state proceeding or  
18 to find the state court's redistricting unlawful under any  
19 federal statute. We are just seeking an order that excuses  
20 the Lieutenant Governor from complying with the state  
21 court's decision on the ground that those decisions violate  
22 the Elections Clause.

23 *Branch* is an interesting case. We think *Branch*  
24 clearly supports our position, and we have explained that in  
25 the papers, but let me add one additional point that we just

1 discovered since our papers were filed. I urge the Court to  
2 read this.

3 There was a three-judge panel opinion that led to  
4 *Branch* and that was one of the three or four decisions that  
5 were reviewed by the Supreme Court in *Branch*. I urge the  
6 Court to look at the February of 2002 decision in *Smith*  
7 *versus Clark* in the Southern District of Mississippi, which  
8 really provides a road map -- a kind of road map for what we  
9 are asking the Court to do here.

10 What the three-judge panel did in that case was  
11 they basically held, as we are urging this Court to hold,  
12 which is that the state court lacked authority under the  
13 Elections Clause to draw its own maps. It issued that  
14 ruling as an alternative to another ruling, which was that  
15 maps violated Section 5 of the Voting Rights Act.

16 One minute?

17 JUDGE SHELBY: Okay.

18 MR. SCHAERR: Thank you.

19 What the Supreme Court did is they said, Okay.  
20 We're going to adopt your Section 5 ruling and, therefore,  
21 we don't even have to opine on your ruling under the  
22 Elections Clause. That was that. The Supreme Court didn't  
23 disagree with that aspect of the three-judge panel's ruling.

24 And then when the same case, basically, got before  
25 the Mississippi Supreme Court, that court said, Oh, yeah, we

1 agree with the three-judge panel. What the state court did  
2 was plainly unconstitutional under the Elections Clause. I  
3 think that that is an interesting and important precedent to  
4 look at.

5 For all of these reasons, we urge the Court to  
6 grant our preliminary injunction motion in order to  
7 vindicate both the language of the Elections Clause and also  
8 the underlying concern about respect for legislative  
9 prerogatives.

10 Thank you.

11 JUDGE SHELBY: Thank you, Mr. Schaerr.

12 Should we hear next from the Lieutenant Governor?

13 MS. HOIDEL: Good morning, Your Honors.

14 Anikka Hoidal with the Utah Attorney General's  
15 Office on behalf of Defendant Lieutenant Governor Henderson.

16 First of all, thank you for being here to hear  
17 this matter on an expedited basis. Thank you also for the  
18 15 minutes. I intend to take just one or two.

19 As indicated in the Lieutenant Governor's response  
20 to the plaintiffs' motion for a preliminary injunction, the  
21 Lieutenant Governor takes no position on the merits here. I  
22 want to mention that the Lieutenant Governor is also a  
23 nominal defendant in the state court litigation the League  
24 of Women Voters versus the Utah Legislature. In that state  
25 court litigation she also has taken no position on the

1 merits.

2 I will highlight just two points from the  
3 Lieutenant Governor's response. First is the Lieutenant  
4 Governor's role. As chief elections officer, she must  
5 administer the state elections which involves administering  
6 the congressional election. In order to do so there needs  
7 to be a map identifying the congressional district  
8 boundaries. As of now the Lieutenant Governor is following  
9 a court order to use what is known as Map 1, which leads to  
10 my second point, which is the February 23rd date. That is  
11 the date by which the Lieutenant Governor needs to know  
12 whether to use Map 1, which is currently in place to be used  
13 for this election, or if she needs to use what is known as  
14 the 2021 map.

15 The details of why the February 23rd date is  
16 necessary is because of the nine business days that it will  
17 take to logistically implement it or reinstate it before  
18 March 9th and the beginning of the candidate filing period.  
19 That is detailed in the response and also in the notice of  
20 the 2026 congressional filing timeline that the Lieutenant  
21 Governor has also filed.

22 With that, I will be available for additional  
23 questions.

24 JUDGE SHELBY: Thank you, Ms. Hoidel.

25 Mr. Gaber.

1 Did I pronounce that correctly?

2 MR. GABER: Yes, you did, Your Honor. Thank you.

3 Good morning, Your Honors.

4 May it please the Court, Mark Gaber for the League  
5 of Women Voters, intervenors.

6 I think it would help to back up and discuss how  
7 we got here. The Utah Supreme Court ruled that its state  
8 constitution provided a claim for the plaintiffs in that  
9 case, the plaintiffs that I represent, that the repeal of  
10 Proposition 4 had violated the alter or reform clause of the  
11 Utah Constitution. The Utah Supreme Court said that that  
12 claim encompassed not just the repeal of Proposition 4, but  
13 also the challenge to the 2021 congressional map, which was  
14 not enacted under Proposition 4's requirements.

15 In August of last year, the state district court  
16 issued its ruling enjoining the repeal of Proposition 4  
17 declaring that that was the redistricting law of the land in  
18 Utah going back to 2018 when it was enacted because of the  
19 the void ab initio ruling, and under both the Utah  
20 Constitution and under Proposition 4's requirements enjoined  
21 the 2021 map, and that it was part of the alter or reform  
22 clause violation that occurred and that the plaintiffs in  
23 the case, the intervenors here, had proven that the map  
24 violated the procedural requirements of Proposition 4.

25 The Court also noted, as the U.S. Supreme Court

1 did in its *Moore* decision, that procedural requirements are  
2 often substantive in nature and ruled that in this case  
3 these were important and substantive -- you know, at the  
4 line of substance and procedure for what the voters were  
5 attempting to accomplish in Proposition 4. The court,  
6 having enjoined the map, provided the Legislature with, I  
7 think, 40-plus days to enact an alternative map that would  
8 comply with Proposition 4's requirements. The Legislature  
9 agreed to a process that would include the plaintiffs in the  
10 case, the intervenors here, proposing alternative maps in an  
11 evidentiary hearing in late October on all aspects of the  
12 maps.

13 After that hearing, the Legislature's map, Map C,  
14 was enjoined as violating Proposition 4 and its substantive  
15 requirements -- all of them, actually. In doing so, the  
16 Court commented and made factual findings that the 2021 map  
17 also violated the county split minimization requirement and  
18 the prohibition on partisan gerrymandering.

19 At that point it was November 10th and that was  
20 the deadline that the Legislature had given for when a map  
21 needed to be finalized. Under the Supreme Court's --  
22 decades of U.S. Supreme Court precedent, the state court at  
23 that point was obligated to impose a map. Under statutes  
24 that Congress enacted pursuant to the Elections Clause, the  
25 *Branch* case holds that both state and federal courts when

1 they are in this predicament have an obligation under 2 USC  
2 2c to ensure that there is a lawful single-member district  
3 plan in place. The court specifically said that state  
4 courts are empowered under the statute Congress enacted to  
5 do that and should.

6 They also said that when they are doing that  
7 pursuant to 2 USC 2a(c) they should follow the substantive  
8 requirements of the state's redistricting law. That is what  
9 the district court did here. It imposed a map that complied  
10 with Proposition 4.

11 The U.S. Supreme Court from the *Germano* case to  
12 the *Grove* case to *Branch* has repeatedly held that not just  
13 that state courts can do this, but they have the obligation  
14 to and that federal courts cannot interfere with state  
15 courts imposing lawful congressional maps. That is  
16 precisely what the plaintiffs ask you to do here.

17 Now, I want to back up. There was a lot mentioned  
18 by opposing counsel about the 2021 map injunction. You will  
19 look at the plaintiffs' complaint in this case and you will  
20 not see a single challenge to the injunction against the  
21 2021 map. The complaint is framed entirely as a challenge  
22 to the authority of the state district court to impose any  
23 map at all, ever, and specifically Map 1.

24 So what they are asking this Federal Court to do  
25 is to order the State of Utah to impose a map, the 2021 map,

1 that a state district court has permanently enjoined as  
2 violating the State Constitution and Proposition 4, and  
3 order the State to use that map even though their claim does  
4 not say that there is a federal law violation with the  
5 underlying state court injunction. That would be an  
6 egregious violation of a Federal Court's remedial power to  
7 order a remedy that goes well beyond the scope of the  
8 plaintiffs' claimed violation of law.

9 But it does not even make sense under the statutes  
10 that they cite. 2 USC 2a(c)(1) says if no redistricting has  
11 occurred -- it has occurred here. Map 1 is in place, as  
12 *Branch* recognizes. But if no redistricting has occurred to  
13 use the then-prescribed-by-law plan. Well, under the *Branch*  
14 decision "by law" means court decisions as well, so there is  
15 an injunction against the 2021 map. It is not the law of  
16 Utah.

17 If you look at the Utah Code, it is not the law of  
18 Utah. Map C is. The plaintiffs are not asking for Map C.  
19 Map C is enjoined. They don't challenge that injunction, so  
20 they are left with saying that the district court should  
21 have sent it back to the legislature again after the  
22 district court enjoined Map C, but there was no time. The  
23 precedent establishes that in that situation where the  
24 Legislature has failed to enact a lawful map, it has the  
25 obligation to impose that map.

1 Now, another problem with the argument that I  
2 heard from opposing counsel is that, Well, the district  
3 court in its August injunction didn't find a substantive  
4 violation of the 2021 map. First, as I said, that would  
5 need to be a claim that was made in their Federal Court  
6 complaint. But it is interesting to me that they challenge  
7 the fact that the state district court found procedural  
8 violations, because on page 23 of their opposition to the  
9 motion to dismiss, they identified procedural violations in  
10 the lawmaking process as one of the only ways that a state  
11 court could enforce state law under *Moore vs. Harper*.

12 Now, that is wrong. In *Moore vs. Harper* the U.S.  
13 Supreme Court explicitly rejected the idea that only  
14 procedural and not substantive state law requirements could  
15 be enforced by state courts. But if that is their position,  
16 they can't then say there was something in violation of the  
17 Elections Clause, because the state district court found  
18 procedural violations with how the 2021 map was adopted and  
19 not in compliance with the requirements from the Legislature  
20 under Proposition 4.

21 I also want to address the interpretation of  
22 *Branch vs. Smith* and the lower court's decision in *Smith vs.*  
23 *Clark*. The U.S. Supreme Court in *Branch* addressed the  
24 Elections Clause, it addressed the power of state courts to  
25 impose maps, it addressed Congress's Elections Clause

1 statutes, and it addressed the underlying decision of the  
2 *Smith vs. Clark* district court that the Elections Clause  
3 prohibited the Mississippi Chancery Court from imposing a  
4 map.

5 Its conclusion was, We're vacating the rationale  
6 stated by the *Smith vs. Clark* case, that the plaintiffs now  
7 ask this Court to follow, and warning litigants not to rely  
8 on that case in the future and saying that the Mississippi  
9 Chancery Court in the future shouldn't think that it is  
10 bound not to impose a map because of that decision. And  
11 then in that same decisio,n interpreting the Elections  
12 Clause concluded that state courts had an obligation to  
13 impose maps.

14 There is no way to finish reading *Branch* and  
15 arrive at the conclusion that a state court does not have  
16 the power to impose a map and that the Federal Elections  
17 Clause says that. In fact, Congress's superior power under  
18 the Federal Elections Clause has been held to require that.

19 Now I want to address as well the *Purcell* issue on  
20 the preliminary injunction motion. The Lieutenant Governor  
21 has stated the position that in order to recode the voters  
22 in the database they need at least nine days. *Purcell* is  
23 not about just how long does it take to recode voters in the  
24 state database. It is about the effect on candidates who  
25 are running in a primary campaign, on voters who are

1 participating in that campaign and trying to decide who they  
2 want to vote for.

3 By February 23rd we are, like, two weeks or three  
4 weeks away from the March caucuses, which is the first step  
5 of the convention process. Not only is that relevant to  
6 candidates, but anyone in Utah who wants to run for a party  
7 office depends on the precinct lines that are in place now.  
8 Those precinct lines were changed to accommodate Map 1.  
9 They would need to be radically changed again to accommodate  
10 the 2021 map, affecting everyone who might be wanting to run  
11 for their neighborhood precinct to be a party officer.

12 From the candidate perspective you have the  
13 declaration from former Congressman McAdams and two  
14 supporters which lays out in detail the effect that it would  
15 have on the ongoing primary campaign and millions of  
16 dollars, at least, since the last filing deadline that have  
17 already been raised and are being spent, and campaign  
18 activity happening on the basis of these lines, and physical  
19 structures, renting campaign offices based on the  
20 boundaries, having volunteers come in, training volunteers  
21 for the convention based on these boundaries.

22 And here we are where the map was imposed on  
23 November 10th and three months go by before the plaintiffs  
24 come to this court and raise a federal law challenge to that  
25 map. It is merely two weeks before the absolute deadline

1 simply to change where the voters are located in the  
2 computer system. There is no explanation for why these  
3 three months have gone by other than to say that *Grove*  
4 prevented us from filing it.

5           Again, there is no way to finish reading *Grove* and  
6 come to the conclusion that you are barred from filing a  
7 Federal Court challenge until the state court's map is in  
8 place. And, in any event, it has been in place since  
9 November 10th. So, you know, at least under Justice  
10 Kavanaugh's conception of the *Purcell* doctrine, the undue  
11 delay is a serious problem for the plaintiffs under *Purcell*,  
12 and even under the regular preliminary injunction standard  
13 it is a serious problem, because you cannot show irreparable  
14 harm if you wait until the twelfth hour to come into court  
15 and ask for preliminary injunction relief.

16           Under the Supreme Court's most recent case  
17 applying *Purcell* -- I was counsel on this case, in fact, and  
18 we were challenging Texas's redistricting. We won a  
19 decision in the District Court. It was four months before  
20 the primary. The Supreme Court in a published opinion,  
21 which does not often happen on a state docket, held that the  
22 district court had inserted itself into an active primary  
23 campaign, thereby violating the *Purcell* Principle. That is  
24 when Texas was four months away from the primary, the exact  
25 period of time we have standing here today from Utah's

1 primary, and when there was an active primary campaign.

2 Notably, at that time Texas was still implementing  
3 its 2021 map. There were ongoing special elections for  
4 Congress -- for Congressional District 18 in Houston that  
5 were happening after the Supreme Court issued its decision.  
6 I think maybe just a couple of weeks ago was that special  
7 election for that congressional district.

8 So the largest county in Texas was still  
9 implementing the 2021 map and the Supreme Court said, No, it  
10 is too late. You're interfering with an active primary  
11 campaign. You can't get an injunction right now.

12 That is not the situation here. The 2021 map is  
13 not being implemented. That is why the Lieutenant  
14 Governor's office would have to hurry and recode the  
15 computer program to do that. That was not the case in  
16 Texas, yet the Supreme Court said it is too late. There has  
17 been no explanation for how the *Purcell* Principle could be  
18 overcome in this scenario when apparently it was not too  
19 much of an emergency in November.

20 I can stop there. I will give the Court back some  
21 time and I will take Your Honors' questions.

22 JUDGE SHELBY: We'll gladly take back the time.

23 MR. GABER: Thank you.

24 JUDGE SHELBY: Thank you.

25 Mr. Schaerr, why don't we invite the plaintiff

1 back to the podium.

2 We appreciate those preliminary remarks from  
3 everyone. Thank you.

4 JUDGE TEETER: Mr. Schaerr, what the panel has  
5 talked about doing is kind of just asking questions by  
6 subject matters. So I think we're going to start with  
7 subject matter jurisdiction and talk a little bit about some  
8 of the arguments and issues that have been raised in that  
9 regard.

10 Just to kind of get things kicked off, I am,  
11 obviously, very familiar at this point with the Supreme  
12 Court's opinion in *Bost*. It seems like the Court was taking  
13 pains to kind of draw some type of a limitation saying, We  
14 are not creating candidate standing, but where is the line  
15 in your opinion between what the Supreme Court held in *Bost*  
16 versus what is allowable under *Bost* but does not cross that  
17 line into just creating kind of per se candidate standing  
18 that they seem to be rejecting?

19 MR. SCHAERR: Well, certainly we wrote our  
20 complaint and our motion in light of *Bost*, and we think that  
21 the injuries that we have asserted are clearly the types of  
22 injuries that the court identified in *Bost* as providing  
23 standing for candidates.

24 I can't tell you exactly where the line might be.  
25 I don't think the Supreme Court has yet tried to identify

1 that, but certainly the harms that we have alleged we  
2 believe fall well within the principles articulated in *Bost*.

3 JUDGE TYMKOVICH: Wouldn't those harms, though, be  
4 true for any partisan redistricting? I mean, you're just  
5 shifting around voters, but you ordinarily would not think  
6 of that as a harm because they have to plead for those votes  
7 anyway.

8 What is the actual injury?

9 MR. SCHAERR: Well, as we set out in our motion  
10 and in the declarations by the plaintiffs, the harms go far  
11 beyond just having to possibly campaign in a different  
12 district. There are lots of out-of-pocket costs associated  
13 with that. There is uncertainty about, you know, What  
14 district am I going to run in? Obviously it is a problem  
15 for candidates sometimes if they don't live in the district  
16 that they want to run in.

17 It may well be that under *Bost* congressional  
18 candidates challenging congressional redistricting pretty  
19 much always have standing to challenge congressional  
20 redistricting. That does not mean that every candidate  
21 would have standing to challenge every kind of election  
22 regulation that might be passed under state or federal law.

23 But, you know, it may well be that the implication  
24 of *Bost* is that candidates for Congress have standing to  
25 challenge changing Congressional boundaries.

1 JUDGE TYMKOVICH: That is because, why? You're  
2 alleging that the state court process was unreasonably  
3 unfair. Be more specific about what the problem is with the  
4 process. In *Bost* we have counting after election day or  
5 whatever and here we have redistricting.

6 Is it because the district court exceeded her  
7 powers, or is it something else?

8 MR. SCHAERR: Well, that, of course, gets to the  
9 merits. I think, you know, we have identified three  
10 independent reasons why what the district court did was  
11 contrary to the Elections Clause as interpreted in *Bost*.

12 One of those, of course, was purporting to  
13 invalidate a map drawn by the Legislature and not relying  
14 on the constitution but, instead, relying on statutory law  
15 and using statutory law to create a new map. That is  
16 certainly one of our reasons.

17 Then I talked about the two reasons why we think  
18 the state court's decision was far beyond ordinary judicial  
19 review. Both of those points, it seems to me, are genuine  
20 outliers. I have never seen a court decision that did  
21 either of those two things that we identify.

22 JUDGE TYMKOVICH: Do you think there is  
23 reputational harm here to the incumbent congressional  
24 candidates, and, if so, how would you articulate that?

25 MR. SCHAERR: I don't know that there is any

1 particular reputational harm to them. You know, one of the  
2 interesting aspects of this whole redistricting effort is  
3 that it has been pushed by forces aligned with the  
4 Democratic party in Utah. And, of course, the Democratic  
5 party prides itself on protecting minorities and yet, you  
6 know, the ironic impact of what they are doing here is that  
7 if this succeeds, they will essentially unseat the only  
8 minority member of Congress from Utah.

9 JUDGE SHELBY: I didn't see addressed in the  
10 papers anywhere the additional elements of -- well, I think  
11 the words are in the papers, but there is not really any  
12 discussion about, I think, the requirement that a litigant  
13 establish that the injury that is complained of is concrete  
14 and particularized and actual and imminent. It seems as I  
15 read through your recitation of the harms to -- let's focus  
16 on the congressional candidates. It all seemed like it was  
17 potentially speculative. This might happen. This could  
18 happen.

19 Do we consider whether the injury is actual and  
20 imminent, concrete and particularized?

21 MR. SCHAERR: Well, I guess I would respectfully  
22 disagree with the Court's characterization of the  
23 allegations. I think they are not speculative harms. We  
24 have explained concrete harms that they are going to face  
25 and concrete expenses that they are going to have to incur

1 as a result of the state court's unlawful rejection of the  
2 Legislature's maps.

3 JUDGE SHELBY: Is there a redressability issue  
4 here?

5 MR. SCHAERR: No, I don't think so.

6 JUDGE SHELBY: What if we find that the 2021 map  
7 is not a map that we can lawfully impose, but we grant you  
8 the relief you're seeking and we enjoin the use of Map 1?  
9 Where do the congressional applicant plaintiffs find  
10 themselves and how can we redress any injury here under  
11 those circumstances?

12 MR. SCHAERR: Well, we have also asked that the  
13 Court reinstate the 2021 map.

14 JUDGE SHELBY: Right.

15 MR. SCHAERR: But if the Court finds that the  
16 Court can't do that, then another option would be to send  
17 the issue back to the state Legislature.

18 JUDGE SHELBY: We couldn't go under the 2011 map.  
19 I think everybody agrees about that in the state court and  
20 nobody is saying otherwise here. So there would be no map,  
21 and we would be at the date that the Lieutenant Governor has  
22 said, We need to have a map.

23 So have we helped the plaintiffs or have we not?

24 MR. SCHAERR: Well, you certainly would have  
25 redressed the violation of the Elections Clause in doing

1 that and helped the plaintiffs as well. You know, it is  
2 very likely that if the Legislature has an opportunity to  
3 pass a new map, it is going to look more like the 2021 map  
4 than the map adopted by the state court here. That is  
5 something that the Legislature can do very quickly.

6 The Legislature also has the ability to make some  
7 adjustments to the schedule to accommodate that kind of a  
8 decision if the Court decided that, yes, it is going to  
9 enjoin Map 1, but it is going to send the whole issue back  
10 to the Legislature to decide. In some ways, obviously, that  
11 would be the best outcome because that would be giving the  
12 Legislature the opportunity to solve the problem.

13 JUDGE TYMKOVICH: I don't disagree with that, but  
14 we have a deadline of February 23rd and I don't think the  
15 Legislature has made any representations to this panel that  
16 it is able and willing to extend deadlines or craft a new  
17 map, and it has not done so in the several months that these  
18 proceedings have been pending here and in the Utah Supreme  
19 Court.

20 MR. SCHAERR: Well, actually, they did adjust the  
21 candidate filing date. I can't remember what the prior date  
22 was, but --

23 JUDGE TYMKOVICH: Yes, I realize that, but they  
24 have not said, If you grant a stay, if not an injunction,  
25 we'll get this done by March 1st. So we really don't have

1 any reason to know or believe that they can get it done in  
2 time.

3 MR. SCHAERR: Well, except that they have done it  
4 in the past. We're still several months out from the  
5 designated date of the primary election, which can also be  
6 adjusted by the Legislature if need be.

7 Again, that is not the principal relief we're  
8 asking for. I'm just responding to the hypothetical --

9 JUDGE TYMKOVICH: Right.

10 MR. SCHAERR: -- that you find that you cannot  
11 reinstate the 2021 map.

12 JUDGE TYMKOVICH: One last standing question.

13 Has the implementation of Map 1 caused the  
14 candidates to expend any money that would not have been  
15 expended under either Map C or the 2021 map?

16 MR. SCHAERR: Yes.

17 JUDGE TYMKOVICH: In particular, I am just looking  
18 at Justice Barrett's concurrence in *Bost*.

19 MR. SCHAERR: Yes. Right.

20 In fact, if you look at Representative Maloy, for  
21 example, her current district includes southern Utah and a  
22 part of the western side of the state, but under Map 1 her  
23 district would include all of southern Utah and then the  
24 entire east side of the state. I think she would have,  
25 like, 21 -- she would have the vast majority of Utah

1 counties and the vast majority of the geographic areas.

2 Yes, she has already had to spend money in  
3 anticipation of possible, you know, running in a district  
4 that includes the entire eastern part of the state rather  
5 than the western part of the state.

6 JUDGE TEETER: This is my last question on  
7 standing.

8 My understanding is that only one of the  
9 plaintiffs has to have standing for this case to move to the  
10 next step.

11 Which plaintiff in your opinion has the best case  
12 for standing in this case?

13 MR. SCHAERR: Certainly in light of *Bost* both of  
14 the congressional candidates do. I think their standing  
15 arguments are equally strong.

16 JUDGE SHELBY: Why don't we turn to the *Purcell*  
17 issue.

18 How do the plaintiffs thread the needle between  
19 *Purcell* and *Abbott*? Where is there daylight here to find  
20 that we are not too close to the primary election to disrupt  
21 confidence in the proceedings?

22 MR. SCHAERR: Well, there is a fundamental  
23 difference between this case and *Abbott*. That is, in *Abbott*  
24 the candidate filing deadline had already passed and  
25 candidates had already filed and they were already actively

1 campaigning. In this case the candidate filing deadline is  
2 still in the future.

3 As I said, what is past is prologue and the  
4 candidate filing deadline could still be conceivably moved  
5 by the Legislature. I am not speaking for them, obviously,  
6 but we know that in the past they have done that. To me  
7 that is the fundamental difference between this case and  
8 *Abbott*.

9 JUDGE SHELBY: Where do you find support for the  
10 proposition that that is the relevant consideration under  
11 *Purcell*? I mean, I read *Purcell* to be speaking more broadly  
12 about proximity to the election and voter certainty and  
13 clarity.

14 MR. SCHAERR: Well, we are still a long way out  
15 from the election. Except for in *Abbott* where the candidate  
16 filing deadline had already passed, I am not aware of any  
17 other decision that has invoked *Purcell* to avoid providing  
18 relief for a violation of any election related law, much  
19 less the Elections Clause, when we have as much time before  
20 the election as we have right now. I mean, we are still  
21 quite a ways out from the beginning of the election.

22 JUDGE SHELBY: Do you think that the merits of the  
23 underlying suit are relevant under *Purcell*, that is, the  
24 clam? Is that what you just said?

25 MR. SCHAERR: No. I'm saying that as far as the

1 timing is concerned, I'm not aware of any court decision  
2 that has invoked *Purcell* to avoid providing relief on a  
3 timetable that is still as far from the election as we are  
4 now. The cases where courts have invoked *Purcell* for that  
5 purpose, with the exception of *Abbott*, which was a special  
6 case, have uniformly been much closer to the election.

7 JUDGE TYMKOVICH: What do we do about the fact  
8 that we do have these candidates and prospective candidates  
9 already actively campaigning and setting up offices and  
10 spending money and that sort of thing? Isn't that one of  
11 the problems that *Purcell* was designed to protect?

12 MR. SCHAERR: Well, you know, many candidates  
13 start campaigning years before the election. In fact,  
14 people who are in Congress are pretty much campaigning  
15 constantly. So people who are interested in running for  
16 public office are always going to be trying to set that up  
17 as early as they can. I don't think that that is  
18 dispositive or even very important. I think the key date is  
19 the candidate filing deadline. I mean, that is the first  
20 point at which any perspective candidate really has the  
21 right to know exactly what the lines are going to be.

22 JUDGE TYMKOVICH: For *Purcell* purposes does it  
23 matter that -- I mean, the currently operative map is  
24 state-drawn Map 1 versus a legislative-created map, and in  
25 *Abbott* you did have, arguably, two legislative maps. Here

1 you have a legislative map, if we go the path you have  
2 requested --

3 MR. SCHAERR: Yes.

4 JUDGE TYMKOVICH: -- versus a state judicial  
5 remedy. Does that matter for *Purcell* purposes?

6 MR. SCHAERR: I would think it matters  
7 substantially.

8 JUDGE TYMKOVICH: Why?

9 MR. SCHAERR: Again, because of the principle  
10 underlying the Elections Clause and reinforced and  
11 emphasized in *Moore versus Harper*, which is respect for  
12 legislative prerogatives. If the election is going to  
13 proceed based on Map 1, that is going to be a constant,  
14 longterm affront to the prerogative of the Legislature under  
15 the Elections Clause. Reinstating the 2021 map or giving  
16 the Legislature an opportunity to do another one, both of  
17 those options would respect the legislative prerogative that  
18 is embedded in the Elections Clause.

19 Yeah, I think that is a very important factor in  
20 the *Purcel* analysis.

21 JUDGE TYMKOVICH: Where is the Utah Supreme Court  
22 in this? It seems like an important matter of state law has  
23 been pending for several months and, to my knowledge, the  
24 panel has not heard a peep from them and we're rapidly  
25 approaching some very important deadlines. A central issue

1 of your argument is an interpretation of state law that we  
2 would greatly benefit from the Utah Supreme Court's primary  
3 role in this matter.

4 What is going on there?

5 MR. SCHAERR: Well, two responses.

6 First of all, procedurally, my understanding is  
7 that there is a motion for stay pending before the Utah  
8 Supreme Court to stay the decision of the lower state court.  
9 The Legislature has asked the Utah Supreme Court to rule on  
10 that motion for stay by February 20th, so two days from now.  
11 We don't know whether they will, but that request has been  
12 made and, you know, my guess is that they are taking that  
13 seriously.

14 As to your other point about the issues of state  
15 law, we are really not asking this Court to decide issues of  
16 state law. All we are asking the Court to do and the most  
17 we are asking the Court to do with respect to state law is  
18 to find, as *Moore Versus Harper* says the Federal Court can  
19 and must do, but we are just asking this Court to determine  
20 whether the state court's approach to this problem satisfies  
21 the requirement of ordinary judicial review. That is not a  
22 state law issue. That is a federal issue under both the  
23 Elections Clause and *Moore versus Harper*.

24 JUDGE SHELBY: That is only part of it, though,  
25 isn't it? You also ask us indirectly, I think, to determine

1 that the state trial court's injunction of the '21 Map under  
2 state law was unlawful.

3 That was a purely state law determination by the  
4 state court judge, was it not?

5 MR. SCHAERR: That was a purely state law  
6 determination, but what we're asking the Court to do is not  
7 to decide whether the state court was right as a matter of  
8 state law, but to determine whether her approach to deciding  
9 the issue satisfied the ordinary judicial review requirement  
10 in *Moore versus Harper*. That is an important condition,  
11 right, and, I mean, in a sense you can view *Moore versus*  
12 *Harper* as kind of a compromise position between the very  
13 strong position taken by Justices Gorsuch and Thomas that  
14 there is no role consistent with the plain language of the  
15 Elections Clause for state court review of what legislatures  
16 have done in federal congressional redistricting.

17 The majority, obviously, didn't go that far, but  
18 their requirement that those state court decisions be  
19 consistent with ordinary judicial review is an important  
20 requirement, a federal law requirement that is, as the court  
21 said, is designed to ensure that state courts, when they do  
22 engage in review of legislative decision-making about maps,  
23 to ensure that they are exercising the appropriate respect  
24 for legislative prerogatives and that they are not  
25 abrogating to themselves the authority to redistrict.

1           If you look at what happened here, that is exactly  
2 what the state court did.

3           JUDGE TEETER: My understanding of the *Purcell*  
4 Principle is essentially that Federal Courts shouldn't  
5 tinker at the last minute with an election's administrative  
6 workings when doing so would threaten to create last-minute  
7 chaos.

8           If I understand your argument and position  
9 correctly, in your view no chaos would result if we were to  
10 grant the relief you're seeking because 2 USC 2a(c) would in  
11 a sense revive the 2021 map and put it back in play.

12           Is that the only scenario where you think the  
13 chaos that *Purcell* is seeking to avoid would be prevented,  
14 the 2021 map getting revived?

15           MR. SCHAERR: Well, I think that is the -- I think  
16 that you have well summarized *Purcell*, but I think that that  
17 is the only scenario that is a risk here. I mean, the  
18 Lieutenant Governor has said that, I can easily go back to  
19 the 2021 map. It will take me nine days to do it, but I can  
20 easily do that. It is not going to create massive confusion  
21 or anything like that.

22           Again, it is still before the candidate filing  
23 deadline, so people who want to run for office are still  
24 going to know exactly what their districts look like before  
25 they have to file. To me, under *Purcell* the risk of chaos

1 is just minimal here given what the Lieutenant Governor has  
2 told us. And, of course, the Legislature also has some  
3 ability to prevent chaos if it looked like something else  
4 was going to happen.

5 Given the timing, I don't think we are in the land  
6 of *Purcell* problems.

7 JUDGE TYMKOVICH: If you are done on *Purcell*,  
8 let's move to the merits. I guess the merits really center  
9 on *Moore versus Harper*, and that is your principal case  
10 here. You have distinguished *Grove* and *Branch* from your  
11 perspective. I am interested in your juxtaposition of  
12 compliance with state constitutional law versus compliance  
13 with state statutory law. I think you can read *Moore* to  
14 suggest that state courts or even federal courts can look at  
15 both as a part of this process.

16 But if I understand your argument correctly, if  
17 there is not a role for the state court to draw a map in the  
18 state constitution, it really does not matter what the  
19 auxillary state statutory provisions provide. Here, of  
20 course, we have the state statutory provision of Prop 4 --

21 MR. SCHAERR: Right.

22 JUDGE TYMKOVICH: -- that provides this overlay.  
23 Prop 4 does delegate or provide specifically for state court  
24 review of partisan maps, right --

25 MR. SCHAERR: Right.

1 JUDGE TYMKOVICH: -- and the authority to impose  
2 an injunction, which more or less has happened here.

3 MR. SCHAERR: Right.

4 JUDGE TYMKOVICH: We do have that grant of  
5 authority under Prop 4 that I think is an obstacle for  
6 granting relief under a purely constitutional framework.  
7 I'm not aware of any state that actually empowers state  
8 courts to do anything in redistricting or state  
9 constitutions. Tell me if I am wrong. You can imagine  
10 other state procedural problems like a super majority clause  
11 for a redistricting map or some special processes that give  
12 it some additional authority.

13 MR. SCHAERR: Right.

14 JUDGE TYMKOVICH: What do we do about that reading  
15 of *Moore* that suggests that those statutory provisions have  
16 some moment versus your argument that says, Well, as an  
17 original matter the Elections Clause does not sanctify state  
18 procedural add-ons that go too far?

19 MR. SCHAERR: I think that is a fair question.  
20 Why would the Supreme Court draw a distinction between state  
21 constitutional law and state statutory law? I think that  
22 that is maybe the heart of the question. I think the answer  
23 to that is quite clear from the opinion itself and its  
24 emphasis on deference to legislatures, and, you know,  
25 required not just by general federalism principles, but also

1 by the Elections Clause itself.

2 I think the reason for the distinction and the  
3 reason the distinction makes sense is that statutes are  
4 within the domain of the legislature, whereas the  
5 constitution of the state is not. The constitution  
6 obviously overrides everything else. The legislature is  
7 subject to the constitution, but, you know, in a typical  
8 state the legislature is not subject to statutory law.  
9 Statutory law is a creature of the legislature.

10 I think that that same distinction actually is  
11 apparent in the Arizona redistricting case, right, where it  
12 was important to the court that the independent  
13 redistricting commission there had actually been made part  
14 of the legislature. So it wasn't exercising just statutory  
15 authority. It was exercising legislative authority. I  
16 think that supports the distinction as well.

17 JUDGE TYMKOVICH: What do you hypothetically here  
18 where you have the Utah Legislature dishes out a partisan  
19 map and it gets judicial review under Prop 4, enjoined,  
20 ping-pongs back to the Legislature, new map, same partisan  
21 problem, and back and forth and back and forth and then  
22 deadline?

23 Can the legislature under your theory continue to  
24 follow state procedure law and get away with it under the  
25 Elections Clause?

1 MR. SCHAERR: Well, there is certainly the  
2 possibility of an impasse. That leads me to another  
3 decision that we found since we filed our papers that the  
4 Court ought to be aware of. That is a decision apparently  
5 written by Judge Thapar of the Sixth Circuit. He was  
6 sitting as a member of the three-judge panel in a case  
7 called *Gonidakis versus LaRose*. The opinion, I think, was  
8 from 2022, the Southern District of Ohio. It will be easy  
9 to find. Judge Thapar was on the panel.

10 That panel dealt with a similar situation where  
11 there was kind of a ping-pong back and forth between the  
12 courts and the legislature. The three-judge panel said,  
13 Okay. We're going to give the state actors as much time as  
14 possible, but here is a date by which a map has to be in  
15 place. So the three-judge panel actually chose a map that  
16 had been ruled unconstitutional by the Ohio Supreme Court.  
17 They acknowledged that, This is not ideal and we don't like  
18 the idea of imposing a map that has been ruled  
19 unconstitutional by the Ohio Supreme Court, but we have got  
20 to have a map and we don't have anything else that we can  
21 do.

22 JUDGE TYMKOVICH: Unconstitutional under a state  
23 constitution or federal?

24 MR. SCHAERR: Under state law, yes.

25 JUDGE TYMKOVICH: Yes.

1 MR. SCHAERR: So the panel said, you know, on  
2 such-and-such a date this map that has already been reviewed  
3 by the Ohio Supreme Court and found unlawful under state law  
4 is going to go into effect unless the state actors come to  
5 an agreement.

6 JUDGE TYMKOVICH: Are you saying that we are at an  
7 impasse now and we need to chose between --

8 MR. SCHAERR: I don't think we are at an impasse  
9 now. I wouldn't interpret this as being an impasse now.

10 I think that is part of the problem with the state  
11 court's decision here, maybe another reason and maybe a  
12 fourth independent reason why that state court's decision  
13 departed from the standard of ordinary judicial review,  
14 because once the state court concluded that Map C was  
15 unlawful, there would have been time to send it back to the  
16 Legislature and say, you know, You need to try again.

17 JUDGE SHELBY: You gave a citation, I think, for  
18 the case you just mentioned, but I was elsewhere and I  
19 didn't have my pen. What is that case? Did you --

20 MR. SCHAERR: I will give you the exact citation  
21 in a moment. It is called *Gonidakis versus LaRose*, Southern  
22 District of Ohio. I think it was in 2022. I will give you  
23 the exact Reporter citation in a moment.

24 JUDGE TEETER: I think this kind of builds on what  
25 Judge Tymkovich has been asking about. Essentially, the way

1 I understand your argument between drawing a distinction  
2 between constitutional and statutory violations would  
3 essentially mean that although a judge may be able to enjoin  
4 a map, there is really no form of judicial review for  
5 violations of Prop 4. Basically, what you're arguing is  
6 that while Prop 4 might be the law, it is, nevertheless,  
7 incapable of being enforced without just always giving it  
8 back to the Legislature.

9 MR. SCHAERR: Well, that is an issue of state law  
10 and, you know, I think the state court got that issue wrong  
11 as well. I think the state court violated the Utah Supreme  
12 Court's opinion which made clear, you know, that it is the  
13 Legislature that has to draw maps.

14 In the *Gonidakis* case that I mentioned, Ohio had  
15 an express constitutional prohibition, which I think Utah  
16 also has, but it was enforced in Ohio, an express  
17 constitutional prohibition on courts drawing maps. So the  
18 only remedy if they thought the legislature had violated the  
19 law was to send it back to the legislature. To some extent  
20 that is why this ping-pong situation occurred.

21 It is not that uncommon for state courts, if they  
22 think a map is unlawful or unconstitutional, to send it back  
23 to the legislature. And there might be multiple iterations.  
24 As *Gonidakis* shows, at some appropriate point federal courts  
25 can step in and resolve the impasse if needed. I think

1 those kinds of impasses are quite rare.

2 And, of course, it is also something that the  
3 Congress can fix, right? Congress has the authority if  
4 something like that happens to step in and say, Okay. We,  
5 Congress. Are going to draw the map. I don't know that it  
6 has happened, but they certainly have that authority under  
7 the Elections Clause.

8 JUDGE SHELBY: You mentioned ordinary judicial  
9 review under *Moore*. I am just reading the chief justice's  
10 opinion in a couple of places sort of framing the question  
11 that was before the court. In one instance I am reading  
12 from page 19 of the decision. The chief justice says, "The  
13 question on the merits is whether the Elections Clause  
14 insulates state legislatures from review by state courts for  
15 compliance with state law."

16 I think a moment ago in response to Judge Teeter's  
17 question that you agreed that at least one of the central  
18 issues in the state case, and now I think what you have  
19 indirectly incorporating into this case, is a purely state  
20 law question.

21 Later on, a page or two later, on page 22 of the  
22 decision in *Moore*, referencing the history and tradition of  
23 judicial review of state court actions, the chief justice  
24 goes on to say, "We are asked to decide whether the  
25 Elections Clause carves out an exception to this basic

1 principle," a state judicial review of legislative actions.  
2 "We hold that it does not. The Elections Clause does not  
3 insulate state legislatures from the ordinary exercise of  
4 state judicial review."

5 What could be more ordinary in the history and  
6 tradition of state court review than reviewing legislation?

7 MR. SCHAERR: We are not claiming that that in and  
8 of itself went beyond the --

9 JUDGE SHELBY: It is the remedy I think that you  
10 say -- that is where the trial court exceeded ordinary  
11 review?

12 MR. SCHAERR: Yes, that is exactly right.

13 We do in our complaint, by the way. We challenge  
14 both of those remedial decisions, the invalidation of the  
15 2021 map and the creation of the new one, yes.

16 JUDGE TEETER: If this panel disagreed with you on  
17 the district court judge exceeding her authority to enjoin  
18 the 2021 map, then that map at that point becomes kind of a  
19 legal nullity because it is enjoined, which would then mean  
20 that the last lawfully passed map would be the 2011 map,  
21 which everyone agrees was malapportioned. So wouldn't it,  
22 almost regardless of state law, kick over to 2 USC 2c where  
23 the district court judge was required to impose a map  
24 consistent with the Voting Rights Act because the deadline  
25 was upon us?

1 I understand your argument, Well, the legislature  
2 could have moved it. The reality is at the time she ruled,  
3 the deadline was upon her.

4 MR. SCHAERR: It wasn't immediately upon her.

5 JUDGE SHELBY: Five minutes away.

6 JUDGE TEETER: Five minutes away.

7 My question, therefore, is there is a bunch of  
8 discussion about state law and there is bunch of ink that is  
9 spent discussing whether or not state law gives her the  
10 authority to impose a map.

11 But my question is if she was right to enjoin the  
12 2021 map, at that point the last legislatively enacted map  
13 that was available was the 2011 map, which was  
14 malapportioned, which 2 USC 2c, under *Branch*, in particular,  
15 would seem to require her at that point to impose a map.

16 Tell me where I am wrong there.

17 MR. SCHAERR: Well, our objection to the  
18 invalidation of the 2021 map is not the mere fact that she  
19 invalidated it; it is the manner in which that was done.

20 First of all -- well, for the two main reasons  
21 that I have described earlier, invalidating the map without  
22 any finding that the districts were substantively unlawful  
23 under any law and that -- I think my example of the budget  
24 resolution to me speaks to that issue. If you have got a  
25 situation where one piece of legislation sort of sets up a

1 framework for other legislation, it is the height of  
2 disrespect for the Legislature to say, I'm going to  
3 invalidate your framework-setting legislation and then  
4 automatically invalidate everything that you have done under  
5 that framework. That is especially true here when we are  
6 talking about a power that is expressly given to state  
7 legislatures in the Elections Clause of the U.S.  
8 Constitution.

9 JUDGE TYMKOVICH: I want you to answer Judge  
10 Teeter's question, but by substantive review do you mean  
11 walking through the convoluted statistical analysis of Prop  
12 4, or something else? If she had done that, if she had done  
13 a substantive review like she did for Map C, you know, ad  
14 nauseam, and a little bit less for Map 1, but if she had  
15 done that would your claim still be viable?

16 MR. SCHAERR: That particular departure from  
17 ordinary judicial review would not a concern if she had done  
18 that. If she had looked at the substantive standards in  
19 Prop 4 and had said, you know, I find that the way this  
20 district has been drawn violates the standard of Prop 4  
21 because it was, you know, driven by bipartisan  
22 considerations, or, you know, it improperly moved different  
23 populations from one place to another where I don't think  
24 they should have been moved. If she had applied the  
25 substantive standards in Prop 4, then I wouldn't have that

1 argument under *Moore*. I would still have two other  
2 arguments under *Moore*, but I wouldn't have that one.

3 JUDGE TYMKOVICH: Sorry to interrupt you.

4 JUDGE TEETER: No.

5 Just to refocus it, assume in my question that the  
6 Court found she was correct to enjoin the 2021 map. I  
7 understand you disagree with that and I understand the  
8 argument there, but if the panel were to say that she was  
9 correct in the ordinary course of judicial review to enjoin  
10 the 2021 map, do you agree that, given that the deadline was  
11 five minutes away and the 2011 map was malapportioned, that  
12 2 USC 2c gave her the authority to impose a map?

13 MR. SCHAERR: No.

14 JUDGE TEETER: Why?

15 MR. SCHAERR: I don't think 2 USC gives that  
16 authority to state judges.

17 JUDGE SHELBY: What is your authority for that  
18 proposition? What case says that?

19 MR. SCHAERR: Well, I don't know that it has been  
20 litigated, but what should have happened is that she should  
21 have given the legislature an opportunity to redraw it.

22 Again, you know, I think the *Gonidakis* case is  
23 instructive on that point as well, because even if you think  
24 that the 2021 map was validly declared unlawful, given the  
25 fact that you have got a binary choice here between two

1 maps, you can still impose it as the three-judge panel did  
2 in the *Gonidakis* case as a second solution, right?

3 We realize that this is not ideal because this map  
4 has been declared unlawful by a state court judge, but, you  
5 know, we only have two options here. We need to have a map  
6 and so we're going to go with the 2021 map, unless -- and,  
7 again, this would be the model with the *Gonidakis* case --  
8 we're going to go with the 2021 map unless the Legislature  
9 acts before a date certain.

10 JUDGE SHELBY: Maybe standing in front of the  
11 question Judge Teeter just asked is a question about Judge  
12 Gibson's determination about Map C. I'm reading your claim  
13 in your complaint and I'm reading your prayer for relief.  
14 You have not asked us in this complaint to take any action  
15 with respect to her determination about the viability of  
16 that map.

17 Am I wrong? If I am wrong, where in your  
18 complaint do we find that? There is reference to it in the  
19 factual recitation of the history of the case --

20 MR. SCHAERR: Right.

21 JUDGE SHELBY: -- but you have not placed that  
22 question in front of us, have you?

23 MR. SCHAERR: No. We have not challenged her  
24 invalidation of Map C in part because, you know, in the  
25 current setting it is not a viable map and it is not one

1 that the Lieutenant Governor thinks could be implemented  
2 quickly. The advantage of the 2021 map is that it was the  
3 map that was already in place and everybody knows how to  
4 implement that map.

5 JUDGE SHELBY: Okay.

6 We try to give our court reporter a chance to  
7 stretch his fingers about every hour and a half. We're  
8 coming up on an hour and a half. Why don't we take about a  
9 12-minute recess. Why don't we plan to come back at 10:30,  
10 and we'll look forward to hearing from the other parties.

11 Thank you.

12 MR. SCHAERR: Thank you.

13 (Recess.)

14 JUDGE SHELBY: Thank you and welcome back.

15 I think I infer from Ms. Hoidel's opening remarks  
16 that the Lieutenant Governor probably does not have much to  
17 add to this discussion that has been ongoing on the merits  
18 of the briefing.

19 Is that true, Ms. Hoidel?

20 MS. HOIDEL: Yes, Your Honor.

21 JUDGE TYMKOVICH: I actually did have one, if you  
22 can approach and just clarify how the Lieutenant Governor  
23 would implement the 2021 map if we accept the plaintiffs'  
24 theory of the case and what the deadlines are for candidates  
25 filing for the primary and those sorts of questions.

1 MS. HOIDEL: Just to clarify, Your Honor, the  
2 question is how would the Lieutenant Governor implement the  
3 2021 map?

4 JUDGE TYMKOVICH: Yes.

5 MS. HOIDEL: So that would begin as soon as the  
6 final decision was issued and the Lieutenant Governor was  
7 ordered to use the 2021 map. Then the process starts as  
8 indicated in the declaration of Daniel Wade. So the  
9 Lieutenant Governor would coordinate with the Utah  
10 Geospatial Resource Center to reinstate the map, which first  
11 involves reinstating each of the 29 county maps.

12 Then the second part or the next part of that is  
13 each county map would then have to be uploaded into the  
14 Lieutenant Governor's election management system. That  
15 could take some time, particularly with the larger county  
16 maps such as Salt Lake County. Even days is what that can  
17 take, nine days at a minimum.

18 Then the counties will verify or reimplement the  
19 congressional district maps. That is manual. They will  
20 have to verify or reassign and make sure that the precinct  
21 assignments are correct.

22 Then there will be proofreading to identify  
23 mistakes, but it will be a reinstatement of the 2021 map.

24 JUDGE TYMKOVICH: When is the primary candidate  
25 filing deadline?

1 MS. HOIDEL: It begins March 9th at 8:00 a.m. and  
2 runs until March 13th.

3 JUDGE TYMKOVICH: I think the Lieutenant Governor  
4 has represented that she can meet those deadlines if ordered  
5 to do so.

6 MS. HOIDEL: Yes, with the 2021 map.

7 JUDGE SHELBY: I think I heard this in your answer  
8 already, but redrawing the precincts would be accomplished  
9 as part of what you have just described, so that would all  
10 happen in time for the implementation of the 2021 map as  
11 well?

12 MS. HOIDEL: Correct.

13 JUDGE SHELBY: Thank you.

14 MS. HOIDEL: Thank you, Your Honor.

15 JUDGE SHELBY: Mr. Gaber.

16 MR. GABER: I have things to say, but I can wait  
17 for questions, too.

18 JUDGE SHELBY: There will be no shortage of  
19 questions.

20 JUDGE TEETER: I will start again with subject  
21 matter jurisdiction. I am going to go back to *Bost*. *Bost*  
22 seems to suggest that the injury in fact is sort of a  
23 procedural or process-based harm that concerns the  
24 candidate's particularized interest in competing in a fair  
25 election. If this understanding of *Bost* is correct, help me

1 understand why a map drawn, as the plaintiffs allege  
2 unlawfully, that includes a pool of voters different from  
3 the pool that they would otherwise have doesn't prevent that  
4 type of competitive harm identified in *Bost*?

5 MR. GABER: I think that, Your Honor, the position  
6 advocated by the plaintiffs and perhaps isn't inherent in  
7 the question takes too broad a view of what the Supreme  
8 Court was holding in *Bost*. All of the examples it gave  
9 flowed from the vote counting. What happens when there is  
10 an alleged problem with how the votes are counted? That is  
11 why the court sort of hung onto the reputational injury that  
12 its cases had found to be a classic Article III harm.

13 It gave examples in *Bost*. Say the election was  
14 decided by flipping a coin or we disregard a random ten  
15 percent of the cast votes. All of its examples flowed from  
16 what happens when the actual election result of how the  
17 people voted, the tabulation of those results might be  
18 wrong, and what happens then to the candidate whose  
19 reputation has literally been calculated incorrectly and  
20 reported to the public incorrectly? I think that the  
21 Supreme Court -- that is why it was careful in its footnote  
22 at the end of the decision to say, No dissent, you know, the  
23 parade of horrors is not going to happen because we decide  
24 here only that when the system of counting the votes is  
25 challenged as unlawful, that gives the candidate who is

1 participating in that election a cognizable harm.

2 I think it is critical that plaintiffs' counsel  
3 acknowledged that there is no reputational harm to  
4 Representatives Maloy or Owens on account of the fact that  
5 the state court following *Branch* imposed a remedial map. No  
6 one in Utah would say that, I view Representative Maloy  
7 unfavorably now because a state court judge imposed the map.  
8 That is just implausible that someone would attribute that  
9 to the candidate who is running. I think that is the clear  
10 distinction in *Bost*.

11 JUDGE TYMKOVICH: On that score and just thinking  
12 about *Bost*, and if he is currently in a district where he  
13 might win 60-40 and then in the new district he is going to  
14 win 55-45, so it might look to outside observers that he has  
15 lost his mojo and he is less popular in Utah all of sudden  
16 where that is not necessarily true, doesn't the injury on  
17 the vote counting kind of flow into a scenario like that  
18 one?

19 MR. GABER: I think that that is where we run into  
20 the problem of alleging an injury that is based on partisan  
21 electoral composition of the districts with *Rucho*, because  
22 while the Supreme Court has said the electoral consequences  
23 might be a harm when it is about the access to voting or  
24 tabulating the voting or fencing off voters from  
25 participation in the eviction, and they have been very

1 clear -- and I wish they hadn't been -- they have very clear  
2 that when what you are alleging is that there is something  
3 about the partisan way in which the lines are drawn, Article  
4 III does not allow federal courts to touch that.

5 JUDGE TYMKOVICH: Notwithstanding that Utah law  
6 does identify partisan redistricting as a specific harm, and  
7 I understand that with Prop 4 anybody can litigate that  
8 issue, and why isn't that an injury that might be  
9 encompassed, just because it is a state injury and not an  
10 Article III injury?

11 MR. GABER: I think if the representatives thought  
12 that there was something improper with the electoral manner  
13 in which the lines were drawn, the partisan composition of  
14 Map 1, they could file a state court lawsuit challenging it  
15 under Prop 4. I think they would run into a problem, as the  
16 judge's decision in the state court revealed, but that is an  
17 Article III standing hurdle and that just does not work.

18 Judge Tymkovich, you had asked about whether there  
19 was a monetary harm to Representative Maloy. If you look at  
20 her declaration, which is at ECF 19-12, she actually alleges  
21 that she has not spent money because she says she is unsure  
22 of what the map will be. So I don't think it works to say  
23 that she has spent some money and that money is now gone.

24 JUDGE TYMKOVICH: She is holding back.

25 MR. GABER: Right.

1           The only candidate that is before the Court with a  
2       declaration says, I spent money and I will be harmed by the  
3       Federal Court acting is former Congressman Ben McAdams, who  
4       has put evidence in front of the Court of the financial  
5       resources that he has spent.

6           JUDGE TYMKOVICH: And he won't be a formal  
7       candidate nor any of them will be until the candidate filing  
8       deadline?

9           MR. GABER: The candidates have all declared with  
10      the Federal Elections Commission, so they are raising money  
11      and they are spending money. There is the filing for the  
12      primary, but separate from the primary, Utah has the caucus  
13      and convention system. So what we have heard from the  
14      Lieutenant Governor is in order to get the voters assigned  
15      to run the primary, and it was at a minimum nine days, and  
16      nine days is Monday the 23rd.

17           That assumes that nothing goes wrong in the  
18      process. So to the extent the minimum becomes no longer  
19      what is needed, then we're already too late to just reassign  
20      the voters. But the Lieutenant Governor's declaration is  
21      not about the caucus or convention aspect of running for the  
22      primary in Utah. The work is already happening to get the  
23      delegates to attend that caucus, to attend the convention,  
24      to get your folks elected to be the delegates to the  
25      convention. So that is just an entirely different aspect of

1 the state's primary system that the Lieutenant Governor does  
2 not touch on because that is not run by her office.

3 JUDGE SHELBY: What about this language in *Bost*?  
4 It is near the end of the chief justice's opinion. The  
5 first part of it I understand is cabined in the way that  
6 you're arguing about candidates for office having a concrete  
7 and particularized interest in the rules that govern the  
8 counting of votes in their election. But if we continue on,  
9 and I didn't finish there, but the next sentence says,  
10 "Their interest extends to the integrity of the election and  
11 the democratic process by which they earn or lose the  
12 support of the people that they seek to represent."

13 Isn't that what the plaintiffs are contending  
14 here, that this is a faulty process and doesn't that give  
15 rise to standing for at least the congressional candidates?

16 MR. GABER: I think that the problem with that is  
17 that that is the very sentence that then follows by the  
18 court with its footnote saying, What we decide here is about  
19 vote counting. That is a level of generality where you can  
20 understand why how the votes are tabulated flows from this  
21 interest that is articulated, but it is hard to see how that  
22 flows from the state court imposing a map, particularly when  
23 the allegations are that there is no objection to the actual  
24 map. They only object to the fact that the state court  
25 imposed it. So if they don't have an objection to the

1 actual lines of the map, then I don't see how this language  
2 could apply to articulate that injury.

3 So given the clear difference between the  
4 redistricting context versus the vote counting context, I  
5 think we should be talking about *Lance versus Coffman* where  
6 the Supreme Court unanimously held that plaintiffs who are  
7 not relators on behalf of the State lack Article III  
8 standing to say -- the challenge the fact that a state court  
9 imposed a map and the legislature did not draw it, and so I  
10 don't know how we get around that very direct holding of the  
11 Supreme Court.

12 JUDGE SHELBY: What do you make of the fact that  
13 the heart of the injury that the plaintiffs are complaining  
14 about here is an unconstitutional process that deprives the  
15 Legislature of its -- at least in the plaintiffs' view --  
16 its exclusive right to redistrict and the Legislature is not  
17 here?

18 MR. GABER: Yes, I think -- that is curious to me.  
19 The Legislature is making some of the new arguments that are  
20 being made about the 2021 injunction. Those are arguments  
21 that are being made by the Legislature in the state court.  
22 I have assumed the reason that they have not challenged  
23 it -- Your Honor, you had asked whether Map C was challenged  
24 in the prayer for relief. It isn't. But the 2021 map  
25 injunction is not challenged in the prayer for relief.

1 JUDGE SHELBY: That is right.

2 MR. GABER: I assume that they have done that to  
3 try to keep the case separate from what is in the state  
4 court so that they could, you know, defend against our  
5 argument that we ought to wait for what the state court  
6 does. They don't challenge the 2021 map. It is in the  
7 injunction against the 2021 map. Nowhere in the complaint  
8 is that there.

9 I have lost track of your question. I may have --

10 JUDGE SHELBY: It wasn't a piercing question to  
11 begin with.

12 MR. GABER: But what I did want to say is -- maybe  
13 we are not done with standing. I wanted to just make this  
14 point. There was a lot of argument about whether a state  
15 court can interpret state statutes that regulate federal  
16 redistricting. First, that argument would flow from an  
17 argument that the injunction against the 2021 map was  
18 unlawful under federal law. I can't repeat this enough,  
19 that there is no challenge in this case in the complaint  
20 that that is the case. So the question of whether or not  
21 the Elections Clause permits a state court judge to  
22 interpret state statutory law versus state constitutional  
23 law really is just not before this Court. We don't get to  
24 that argument because they don't claim that the injunction  
25 was a violation of federal law.

1 JUDGE TEETER: I have one last question on  
2 standing.

3 In preparing for this hearing today and doing some  
4 of my own research, I came across *Whittman vs.* --

5 MR. GABER: *Personhubullah.*

6 JUDGE TEETER: Yes. So you are familiar with the  
7 case.

8 So the part to me that kind of jumped out is kind  
9 of the tail end of 544 to 545 where it talks about the two  
10 representatives who were challenging -- basically, in their  
11 opening brief they argued that they have standing to  
12 challenge the district court's order because unless  
13 the inactive plan is reinstated, a portion of their base  
14 electorate will necessarily be replaced with unfavorable  
15 democratic voters, thereby reducing the likelihood of the  
16 representatives' reelection. The court says even assuming,  
17 without deciding this kind of injury is legally cognizable,  
18 Representatives Whittman and Brat have not identified record  
19 evidence establishing their alleged harm.

20 Now, I realize that they are not deciding, but do  
21 you agree that in this case Congressman Owen has at least  
22 come forward with some evidence that the electorate in his  
23 district would at least change? I believe the Cook report  
24 suggested up to a 26-point swing.

25 MR. GABER: Well, I don't know where

1 Representative Owens lives. He identifies CD1 in his  
2 declaration but also says he does not know where he wants to  
3 run yet. So it is speculative, I think, that he would even  
4 choose to run in CD1, as opposed to there being a primary  
5 between Republican incumbents in the neighboring district.  
6 I don't think that evidence -- similarly to *Personhuballah*,  
7 I don't think that evidence is actually in the record here  
8 as well.

9 I think had the court gone a little bit further  
10 and had that evidence, it would have run into, I think, a  
11 *Rucho* problem with that being an Article III injury.

12 There is one more thing on standing. I can't  
13 remember which of Your Honors asked it -- perhaps it was  
14 Judge Gibson about the redressability point. It is not  
15 redressable because the relief they are asking for is  
16 illegal and is not actually something that their complaint  
17 makes possible. This Court cannot order the 2021 map to be  
18 into effect, because under *Branch* and under 2 USC 2c and  
19 under 2 USC 2a(c) it is just not a lawful map. The state  
20 court has enjoined it. They don't challenge that injunction  
21 in their complaint. If you look at the Utah Code, it has  
22 been repealed. So if we're talking about, Well, what is the  
23 Legislature's preference? We look at the code. The code  
24 repealed it whenever there was an injunction against it and  
25 whenever Proposition 4 was in effect and it replaced that

1 with Map C. So that is the expression of the legislature's  
2 preference. But, again, they are not challenging the state  
3 court's injunction against Map C.

4 JUDGE SHELBY: Your answer about not yet knowing  
5 where Congressmen Owens might run is a nice entre to *Purcell*  
6 and *Abbott* maybe. The plaintiffs argue that in this case  
7 *Abbott* is of no moment here because we are in a different  
8 posture and there are a lot of factual differences.

9 Why do you think *Abbott* is controlling, or do you?

10 MR. GABER: I do.

11 For one, there was a mistaken representation about  
12 the candidate filing period in *Abbott*. Texas has a  
13 month-long candidate filing period when the district court  
14 issued its injunction and the candidate filing period was  
15 going on for quite a while longer. In fact, the Supreme  
16 Court issued its decision before the candidate filing period  
17 ended even.

18 But what the Supreme Court said in *Abbott* was  
19 nothing about the candidate filing period and nothing about  
20 the ability of, in that case, the Secretary of State to  
21 implement the 2021 map again, which was the relief that the  
22 district court had ordered. The reason is because the Texas  
23 State defendants did not allege that it was too late to  
24 switch back to the 2021 map. There was no evidence. In  
25 fact, the evidence at trial was that they could very easily

1 switch back at that time to the 2021 Texas map. What the  
2 Supreme Court instead said is that the district court had  
3 inserted itself into an active primary campaign.

4 The evidence before this Court is that there is a  
5 very active primary campaign underway, and the actual  
6 State-run primary election is the same period of time away  
7 as it was in *Abbott*, and you layer onto that something that  
8 wasn't present in *Abbott*, which is an earlier caucus and  
9 convention process that is underway in Utah, so the  
10 situation is significantly worse here than it was in *Abbott*  
11 under those circumstances.

12 JUDGE TEETER: Isn't there a risk -- and I  
13 recognize that you are not representing the Legislature, but  
14 wouldn't there be a risk to some extent that if *Purcell* was  
15 to begin applying this far out, it basically creates a road  
16 map for legislatures to enact maps that are then insulated  
17 from any type of review until almost a year before the  
18 actual election and isn't that a problem?

19 MR. GABER: Judge Teeter, I have made that  
20 argument so many times and I have ended up losing at the  
21 Supreme Court on all of them. Representing the plaintiffs  
22 in the Texas case, that is the exact argument we made in the  
23 Texas case. In my application or the response to the  
24 application for a stay, I made the argument that the  
25 election is in November of 2026, there are four months until

1 the primary; the candidate filing has not closed; everyone  
2 knew where the prior lines were. And, nevertheless, the  
3 Supreme Court said no, that the primary campaign was  
4 underway; it was four months way until the election occurred  
5 and so it was too late for a Federal Court to intervene at  
6 that point. I would love for that to have been the rule,  
7 but it just is not.

8 Judge Tymkovich, you had asked whether it matters  
9 that this is a state court imposed map as opposed to a  
10 legislative one --

11 JUDGE TYMKOVICH: Yes, wondering whether *Purcell*  
12 should matter with whether we respect the legislative  
13 pronouncement which was true for both of the maps in *Abbott*,  
14 but it is only true for one of the maps today.

15 MR. GABER: I think the precedent from the Supreme  
16 Court is not focused on that. It is focused on what is the  
17 time period until the election machinery is underway? Map 1  
18 has been implemented since November 10th. Under *Grove* and  
19 under *Germano* and under *Branch*, all three of those decisions  
20 recognize that the Federal Court should give respect to  
21 state court judicial districting. So I don't see how you  
22 could read sort of an exception into *Purcell* if the map that  
23 is being challenged is one that a state court imposed.

24 JUDGE TYMKOVICH: Is there a *Purcell* Principle  
25 case with that fact pattern that gives deference to the

1 state court imposed map?

2 MR. GABER: I would have to think about that.

3 JUDGE TYMKOVICH: I was looking for one, but I  
4 didn't find one. It sounds like you have surveyed all of  
5 them.

6 MR. GABER: It is not coming to mind, but there is  
7 also nothing in the court's *Purcell* Principle pronouncements  
8 to suggest that it would depart from the rule as set forth  
9 in *Germano* and *Grove* and *Branch* that federal courts need to  
10 respect state court judicial redistricting.

11 JUDGE TYMKOVICH: I just wonder if there was kind  
12 of a federalism implication here, and setting aside the  
13 merits question, under the Elections Clause, at least, which  
14 does use the term "legislature," and that maybe you get  
15 primary deference when there are two competing maps to  
16 choose from.

17 MR. GABER: So I do think there is a federalism  
18 issue. I think it is a federalism issue as between the  
19 Federal Court and the state court, but as to the Elections  
20 Clause it says that the time, place, and manner shall be set  
21 by the legislature thereof. Then Congress can pass  
22 regulations that supercede those.

23 Two things here. One is that, and we say this in  
24 the papers, the Arizona case said that the legislature  
25 refers to the state lawmaking process, not just the body

1 that calls itself the legislature. Well, under Article VI  
2 Section 1 of the Utah Constitution, there is a legislative  
3 department. That is the body that is the legislature and it  
4 is the people via their initiative power to enact "any  
5 desired legislation."

6 So under the Arizona Independent Redistricting  
7 Commission case, when the people of Utah enacted Proposition  
8 4, they were exercising their Elections Clause power to  
9 regulate the time, place and manner of congressional  
10 elections.

11 Included in that law is state court judicial  
12 review. One of the provisions says, and this is Utah Code  
13 20A-19-301 says that When there is a determination by the  
14 state court judge that the legislature did not abide by or  
15 comply with -- there are three words -- requirements,  
16 something, and procedures in Proposition 4, then the  
17 District Court shall issue an injunction.

18 Now, the argument, I take it -- again, we  
19 shouldn't be talking about this because the 2021 injunction  
20 is not in the plaintiffs' complaint, but the argument is  
21 that somehow it violates the Elections Clause for the state  
22 court to interpret state law that was enacted pursuant to  
23 the Elections Clause. That does not make any sense.

24 Then when you layer on top of that Judge Teeter's  
25 question, which is when a state district court found itself

1 having enjoined the 2021 map, having enjoined Map C, and the  
2 deadline being -- I think it was actually 24 minutes away.  
3 I was out waiting. What then?

4 What *Branch* says is that Congress exercised its  
5 superior Election Clause power under 2c to require state  
6 courts to impose Congressional maps at that juncture. So it  
7 really does not matter what article -- we think they are  
8 wrong about Article IX. It is just a temporal obligation on  
9 the Legislature to act to redistrict, and we think they are  
10 wrong about their interpretation about the state court's  
11 power to impose a map under Proposition 4, but at that point  
12 the Supremacy Clause takes over and the state court must  
13 follow 2 USC 2c and ensure that there is a lawful  
14 redistricting map in place. So that is why the reference to  
15 the *Gonidakis versus LaRose* -- for the Court, it is 599  
16 F.Supp. 3d 642.

17 JUDGE SHELBY: I'm sorry. One more time.

18 MR. GABER: 599 F.Supp. 3d 642.

19 That case is entirely different than this. What  
20 happened there is that there was a series of maps that were  
21 passed by a commission in Ohio that was set up under its  
22 state constitution. The state constitution expressly says  
23 that the only remedy that is available is an injunction, a  
24 prohibitory injunction, and that a state court cannot impose  
25 its own remedial map.

1           Now, I think that the litigants in that case  
2 missed the fact that under the Supremacy Clause 2 USC 2c  
3 actually would have required the state supreme court to  
4 impose a map. I wasn't there. There was nothing that I  
5 could do about that. That is the scenario that that case  
6 was in, was that no map existed. There was no map in place.  
7 So the Federal Court said, We're going to look at the series  
8 of maps that had been passed and struck down and pick one of  
9 those.

10           I think that that was a serious violation not just  
11 of 2 USC 2c but also of principles of federalism that a  
12 Federal Court would chose a remedial map that had been  
13 determined by the state supreme court to be unconstitutional  
14 under state law. I can't fathom that that is an appropriate  
15 judicial remedy for a federal court to do.

16           Nevertheless, there was no argument in that case  
17 that *Branch* or 2 USC 2c would kick in and require the state  
18 court to act.

19           JUDGE SHELBY: Your eagerness to argue the merits  
20 is not lost on me, but --

21           MR. GABER: I'm happy to --

22           JUDGE SHELBY: -- I want to steer you back to  
23 *Purcell* for just a moment. I think we don't often get a lot  
24 of guidance from the Supreme Court in many of these cases,  
25 but temporally where else do you find cases that you think

1 are analogous to where we are in the election season?

2 MR. GABER: Well, I think the preliminary  
3 injunction that was issued in the lower court in the  
4 *Milligan* case, and this is challenging Alabama's map under  
5 Section 2 of the Voting Rights Act, and this is where  
6 Justice Kavanaugh sort of proposed with Justice Alito  
7 joining the four-part test that is in his decision. At that  
8 point I think the lower court perhaps -- the lower federal  
9 court had moved the candidate filing as part of its order,  
10 but we were similarly close to the voting happening in the  
11 primary in that case and campaigns were underway, and  
12 Justice Kavanaugh opined that they were beyond the *Purcell*  
13 deadline.

14 That case is, I think, interesting because, you  
15 know, he devised the clear-cut on the merits requirement as  
16 part of that and said, you know, they don't satisfy that  
17 here. As we all know, the plaintiffs ended up winning in  
18 the Supreme Court in the *Milligan* case and Alabama is now  
19 under a court-imposed congressional remedial map. There was  
20 a stay application sent to the Supreme Court that was  
21 denied.

22 So the idea that court imposed maps are unlawful  
23 is --

24 JUDGE TYMKOVICH: In *Milligan* wasn't the map that  
25 the court deferred to the state legislative map at the time?

1 Am I remembering that wrongly?

2 MR. GABER: Well, what the Supreme Court did was  
3 stay the decision. I don't think they got to the remedial  
4 phase in the district court. I think it stayed the decision  
5 so that the 2021 or 2022, whatever year --

6 JUDGE TYMKOVICH: They stayed the decision of the  
7 three-judge panel?

8 MR. GABER: Correct.

9 JUDGE TYMKOVICH: It allowed the state legislative  
10 map to go forward?

11 MR. GABER: That is right, yes.

12 Perhaps not from the Supreme Court, but the Fifth  
13 Circuit in another case that I had about the Galveston  
14 County Commission district and precincts, there the Fifth  
15 Circuit found in a similar timeline to the subsequent Texas  
16 congressional case of *Abbott*, in an en banc decision that  
17 *Purcell* -- they applied Justice Kavanaugh's test and found  
18 that *Purcell* was not overcome in that case.

19 I think it is important to understand that because  
20 of the primary system and caucus system here in Utah, we are  
21 not justing talking the June primary. We are talking about  
22 a process that starts on March 17th. You will not find a  
23 Supreme Court decision that allows a federal court  
24 injunction this close to that process.

25 JUDGE SHELBY: Do you find any Supreme Court

1 precedent talking about precincts at all in connection with  
2 *Purcell*?

3 MR. GABER: I haven't, but, you know, what they do  
4 say is that it is unfair to candidates, and it is unfair to  
5 campaigns, and it is unfair to voters, and it is unfair to  
6 political parties. Here because of this unique system and  
7 the changing of the precincts, that is the basis for how  
8 Utah's political parties organize themselves, and they hold  
9 precinct officer elections based on these lines. It is a  
10 not insignificant change to go from Map 1 to the 2021 map.  
11 The reason, of course, is that the 2021 map cuts through,  
12 like, 15 or 16 municipalities as opposed to one in Map 1.  
13 So all of those municipalities would have to, I assume,  
14 revert to the precincts they had for the 2021 map, although  
15 what this is skipping over is that the Utah Code actually  
16 has a whole process for how precincts are to be redrawn.

17 It has to be adopted and it has to be proposed by  
18 the county clerk. It has to be adopted by the legislative  
19 body of the county. All of those counties changed with the  
20 exception of one, Washington County, and they changed their  
21 local ordinances to comply with the precincts that are in  
22 place for Map 1. This Federal Court would just be skipping  
23 over that process in Utah law for redrawing precinct  
24 boundaries, which I think is another problem.

25 No, because this is unique to Utah, there is not a

1 *Purcell* case that is specifically about that, that I'm aware  
2 of at least.

3 JUDGE TEETER: I just want to correct it in my own  
4 head because I am not as familiar with the campaign process  
5 in Utah and other states.

6 In *Abbott* the primary campaign was underway,  
7 correct?

8 MR. GABER: Yes.

9 JUDGE TEETER: It was a case that involved a  
10 legislative map versus a three-judge panel map, correct?

11 MR. GABER: The three-judge panel -- its order was  
12 to use the 2021 map rather than the new mid-decade map.

13 JUDGE TEETER: So those legislative maps, but the  
14 three-judge panel imposed the other one?

15 MR. GABER: Right. Correct.

16 JUDGE TEETER: The primary was four months away,  
17 correct?

18 MR. GABER: Correct.

19 JUDGE TEETER: And the actual election was 11  
20 months away?

21 MR. GABER: That is correct.

22 JUDGE TEETER: In our case when did the primary  
23 campaign season begin?

24 MR. GABER: I think on November 11th. The first  
25 candidate announced in the CD1, I think, on November 11th.

1 And then former Congressman McAdams announced on the 13th, I  
2 want to say. Maybe it was on November 12th and the 13th for  
3 the first two, but days after and then several more  
4 candidates announced in CD1. There are primary candidates  
5 in CD4, the northern Utah district, and recently a  
6 Republican candidate announced in CD1. So in November is  
7 when it started.

8 JUDGE TEETER: Then the primaries are in June.  
9 Is that correct?

10 MR. GABER: The primary election is in June. The  
11 caucus is on March 17th. The convention is in mid-April. I  
12 am not exactly sure off the top which day.

13 JUDGE TEETER: Did the *Abbott* case have any kind  
14 of a caucus system?

15 MR. GABER: No. It was only the primary that was  
16 four months away that was at issue there.

17 JUDGE TEETER: So one of the distinctions that you  
18 are drawing is that the caucus system that is in place in  
19 Utah starts mid-March --

20 MR. GABER: Right.

21 JUDGE TEETER: -- whereas *Abbott* didn't have  
22 anything along those lines. It was just a primary that was  
23 four months away?

24 MR. GABER: That is right.

25 JUDGE TEETER: Again, here we have an argument

1 between the legislative map and a court-imposed map?

2 MR. GABER: That is right.

3 JUDGE TEETER: Sometimes it is just easy to get  
4 those facts succinctly laid out. Thank you.

5 JUDGE SHELBY: Why don't we reach the subject you  
6 have been eager to get to, the merits.

7 JUDGE TYMKOVICH: I guess I will get started. And  
8 I have the same question I had for the plaintiffs. Where is  
9 the Utah Supreme Court on this important issue of state law  
10 and, you know, crediting both sides' theories and what are  
11 we supposed to do? Must we wade into this thicket without  
12 guidance from the Utah Supreme Court, or could we ask a  
13 certified question to them? What is the intervenor's view  
14 on where that process is and whether we are going to get any  
15 guidance in this case?

16 MR. GABER: Of course, we have moved to dismiss or  
17 stay. So my first answer would be that this Court should  
18 not do anything until the state court process is resolved.  
19 The Lieutenant Governor asked the State Supreme Court to  
20 issue a decision on the pending motion -- there are three  
21 motions actually pending before the State Supreme Court  
22 right now. The Lieutenant Governor asked for a decision by  
23 February 23rd.

24 The Legislature asked the State Supreme Court for  
25 a decision by this Friday, the 20th. So it is not the case

1 that the State Supreme Court has been sort of dawdling. It  
2 was asked for those dates as the deadlines. Perhaps the  
3 reason that those are the dates is that this federal  
4 litigation was not filed until after the briefing in the  
5 State Supreme Court -- at least the first round of it was  
6 done. That is the deadline it is working on.

7 I think it would be more proper for this Court to  
8 send a certified question to the State Supreme Court than it  
9 would be for this Court to issue some sort of ruling,  
10 although I guess I would wonder what that question would be,  
11 because the argument that principally I heard today was this  
12 question of whether under *Moore* a state court can interpret  
13 state statutes and enforce state statutes on federal  
14 redistricting.

15 Of course, as I perhaps have said too many times,  
16 there is no challenge in the complaint to the injunction  
17 against the 2021 map, and that is the issue that that  
18 question flows from. The sole question before this Court  
19 based on the complaint is can a state court impose a  
20 remedial map. Once it has enjoined a map as unlawful, can  
21 it impose a remedial map? *Germano*, *Grove* and *Branch* answer  
22 that question repeatedly and directly. So I don't know that  
23 there is a certified question to ask.

24 JUDGE TYMKOVICH: Wouldn't a state court ruling,  
25 at least as framed in the pleadings before the Utah Supreme

1 Court, basically answer the hardest questions here about  
2 whether the district court exceeded her authority under Prop  
3 4 and --

4 MR. GABER: Yes.

5 The legislature is asking those questions. That  
6 is the issue. That is one of the issues that the  
7 Legislature is appealing in the State Supreme Court is  
8 essentially whether or not Proposition 4 violates the  
9 Elections Clause and then whether or not the state court's  
10 interpretation of it does.

11 So that question is being decided by the State  
12 Supreme Court, but that is a question that I think is not  
13 actually a part of this case.

14 JUDGE TYMKOVICH: The last thing we want to do is  
15 wade into an unanswered and important issue of Utah --

16 MR. GABER: Yes.

17 JUDGE TYMKOVICH: -- substantive law.

18 If we issued a stay, what would happen?

19 MR. GABER: Currently the proceedings in the state  
20 court is currently on stay in the state proceeding.  
21 Eventually there is going to be a determination on the  
22 merits on that appeal. Once that happens, then this Court  
23 could determine whether or not there was some Elections  
24 Clause violation that happened in this case. We are not  
25 talking about the 2026 election now because it is our

1 position that it is already too late for that.

2 JUDGE TYMKOVICH: There is this dispute between  
3 whether there was ever any substantive review of the 2021  
4 map, and the pleadings are a little convoluted to me about  
5 what your original complaint looked like and whether it  
6 included a request that 2021 be declared unconstitutional or  
7 unlawful under Prop 4. I don't think it was there, yet  
8 somehow in the last eight months, arguably -- not  
9 arguably -- the district court briefed that she had the  
10 authority to review the 2020 map and declare it unlawful,  
11 which she did.

12 One concern that I have is that her remedy is a  
13 map that she claims satisfies the requirements of Prop 4,  
14 but there has never been any substantive determination that  
15 the 2021 map is a partisan gerrymander under the rubric of  
16 Prop 4.

17 There is 50 pages on Map C, right, but there is  
18 really nothing on the 2021 map. I would have liked to have  
19 seen that in a case when she is going to pick and choose  
20 between maps put together by biased parties that are  
21 advocating for their interests, and she didn't appoint a  
22 special master or neutral arbiter to generate a map. As I  
23 understand it, there are three maps.

24 Did anybody else file a map that she could pick  
25 from? It just seems like that process seems unusual and not

1 really designed to get a neutral court order, but she is  
2 kind of picking between two partisan objectives. The  
3 defendant's map was partisan in favor of the Republicans and  
4 they argue that Map 1 is partisan in favor to the Democrats,  
5 and we are kind of at the place where Prop 4 does not want  
6 us to be.

7 Can you tell me why does it matter that she never  
8 did a review of the partisan makeup of the 2020 map under  
9 Prop 4?

10 MR. GABER: I will wind back a little bit further  
11 in answering Your Honor's question. Our state court  
12 complaint in the prayer for relief requested an injunction  
13 against the 2021 map, and particularly on the basis of  
14 Article I Section 2 and other articles -- there were several  
15 claims in the case, but one of them was Article I Section 2  
16 of the Utah Constitution which is the alter and reform  
17 clause. So our Count V did encompass -- Count V is the one  
18 about repealing Prop 4.

19 JUDGE TYMKOVICH: The '21 map violated the  
20 Constitution because of the procedural defects or because of  
21 the substantive line drawing?

22 MR. GABER: Both, in that by passing SB-200 -- the  
23 whole purpose SB-200 was passed was so that they could pass  
24 a map not subject to Proposition 4's requirements. So what  
25 the state court found was that it is part of the violation

1 of the alter and reform clause of the constitution, that  
2 infringement of plaintiff -- intervenor here, plaintiff  
3 there -- their right to have repealed Proposition 4 and then  
4 immediately enacted a map that was not in compliance with  
5 Proposition 4, that that was a violation of the alter and  
6 reform clause. But more to the point, the Court found that  
7 it was a violation of Proposition 4.

8 Now, the Utah Supreme Court did not interpret  
9 plaintiffs' complaint as Your Honor set out in the question.  
10 The Utah Supreme Court reviewing on an interlocutory appeal  
11 from the motion to dismiss proceedings in the state court  
12 twice said that Count V was the broadest count in the  
13 complaint that the plaintiffs had brought, and specifically  
14 said it encompassed both issues in the case, the repeal of  
15 Proposition 4 and the congressional map that was enacted as  
16 a result.

17 So the State Supreme Court has interpreted the  
18 plaintiffs' complaint in the state case to challenge under  
19 Count V the 2021 Congressional map. The state district  
20 court judge taking that interpretation of the plaintiffs'  
21 complaint ruled on a summary judgment motion that we filed.  
22 That summary judgment motion specifically asked in the  
23 remedies section for an injunction against the 2021 map as a  
24 part of the constitutional violation and because of the  
25 independent violation of Proposition 4's procedural

1 requirements which were undisputed not to have been  
2 followed.

3 So on the basis of an undisputed summary judgment  
4 motion, the State District Court issued an injunction, as  
5 the literal text of Proposition 4 required of it, because  
6 there was a finding of a violation of Proposition 4's  
7 procedures.

8 So from everything I have said to now I can't spot  
9 something that was outside of the bounds of ordinary  
10 judicial review, unless summary judgment has now become  
11 outside the bounds of ordinary judicial review. In my  
12 experience when a litigant does not oppose an issue on  
13 summary judgment, that is it. That is your opportunity to  
14 challenge that, and the Legislature did not challenge that  
15 they had not followed Proposition 4 procedures.

16 What they did is after the fact say, It is not in  
17 the complaint and it is not in the motion. But it was in  
18 the motion. You can only object so long to what has been  
19 moved until you have to respond to it. The Legislature  
20 didn't do that. So there is nothing unordinary about  
21 following a state statute passed by the voters pursuant to  
22 their Elections Clause power that gives judicial review and  
23 requires the injunction.

24 With respect to Your Honor's question about  
25 whether or not there was a special master, the Legislature

1 stipulated to the remedial process in the case. They  
2 stipulated that there would be an October 6th deadline for  
3 the Legislature to adopt its map. That built in a ten-day  
4 period that is required under Proposition 4 for public  
5 review. They stipulated that the plaintiffs would propose  
6 alternative remedial maps.

7 In fact, earlier in their papers in the case they  
8 said, Oh, we can't. It is too late to have this proceeding  
9 because redistricting remedial proceedings involve maps  
10 proposed by the parties. Having stipulated to a process  
11 that involved the plaintiffs proposing remedial maps and  
12 specifically no one else proposing remedial maps, it is too  
13 late to come and now say that there was something wrong with  
14 a judicial process and the remedial process that involved  
15 court-imposed remedial maps from the parties.

16 Also, the Supreme Court in *Grove* specifically said  
17 that the Federal Court had gone too far by not allowing a  
18 state court remedial process in which the process was for  
19 the parties to submit proposed maps. That is what was going  
20 to happen in *Grove*.

21 JUDGE TYMKOVICH: I wonder if Judge Gibson was  
22 inclined to strike down Map 1, whether she would have issued  
23 an order and said, I'm going to stay this and give the  
24 Legislature a chance to analyze all of the many problems I  
25 found with Map 1 and try to submit a conforming map instead

1 of picking the other one.

2 I say that because the language of Prop 4 is  
3 extensive and in my mind inscrutable on many levels, but  
4 what it does not say is that a state court can draw its own  
5 map. It does not empower the state court to do anything of  
6 the sort, nor does any other provision of state law.

7 It seems like you're taking the injunction  
8 authority that Prop 4 gives, but you're not accepting the  
9 fact that the entire scheme envisions that it is going to be  
10 a legislative process with kind of a quasi-supervisory role  
11 by the courts.

12 MR. GABER: I disagree with that interpretation of  
13 Proposition 4, but, more importantly, the state court  
14 disagreed with that interpretation of Prop 4.

15 JUDGE TYMKOVICH: Well, I know she did. Yeah.

16 MR. GABER: If the state court who has the  
17 authority to interpret state law found that the first  
18 section of Proposition 4 sets out five circumstances, I  
19 think, when redistricting can occur. Two of them are upon  
20 an injunction and a final order of the court. The court  
21 found that that was not specific to the Legislature and that  
22 that did not prohibit a court-imposed map; in fact, it  
23 authorized it.

24 Also, Article I Section -- I am forgetting the  
25 number -- I think it is 6 or 8 of the Utah Constitution, the

1 open courts provision requires that there should be a remedy  
2 for all wrongs and cited that provision as authorizing a  
3 judicial remedy. That provision is similar to the one in  
4 the Oklahoma Constitution that the Oklahoma Supreme Court  
5 held that provided the authority for a state court to impose  
6 a lawful map in the absence of a legislatively enacted one.

7 I think there is a problem when the Legislature  
8 agreed to the process and agreed to what the deadline was  
9 and never suggested to the court that there would be time  
10 for another legislative process, and when the Legislature  
11 then changed the candidate filing period from January to  
12 March, which is the source of the injuries that is alleged,  
13 the Legislature didn't come back to the state court and say,  
14 We have changed the candidate filing deadline. Vacate your  
15 order imposing Map 1 and let us try again.

16 That has never happened, so I don't know what the  
17 State District Court was supposed to do. Federal law says  
18 that you have to impose a lawful map when time has run out,  
19 and it couldn't.

20 JUDGE SHELBY: I read this part of your papers,  
21 and I was wondering which legal category you were drawing  
22 to. Is it a waiver? Of course it is the Legislature in  
23 that case. It is not the plaintiffs here.

24 There is not a waiver of the argument here, is  
25 there?

1 MR. GABER: Well, I think I would say there is  
2 privity between -- they are putting themselves in the shoes  
3 of the Legislature. I think Lance kind of acknowledges  
4 that. But I think you can't come into court as a private  
5 plaintiff under an Elections Clause theory that the  
6 Legislature's powers have been infringed and say, You're not  
7 subject to what the Legislature agreed to in the state court  
8 litigation.

9 We can't have it both ways here. If the  
10 Legislature agreed to a process that has court-imposed maps,  
11 if there is found to be a violation, then private plaintiffs  
12 can't come in and say that the legislature's power has been  
13 abrogated. The legislature exercised that power.

14 JUDGE SHELBY: I understood there Mr. Schaerr to  
15 say two things that had never happened before. That there  
16 is no case where a state court judge throws out a  
17 legislatively fashioned map without making a determination  
18 that it is substantively illegal. The second thing he said,  
19 if I got this correctly, is that there is no case where a  
20 state court judge has retroactively invalidated a map  
21 because the legislature ran afoul of some different statute.

22 Are there any such cases and does it matter?

23 MR. GABER: I don't think it matters. I would  
24 have to -- I heard that, too, for the first -- I would have  
25 to think about that.

1 I think it is just not factually correct that the  
2 District Court never found there to be a substantive  
3 violation of the 2021 map. At least as of the November 10th  
4 order, and we cite this in our papers, there are a number of  
5 times where the District Court makes findings, factual  
6 findings, that the 2021 map was both an extreme partisan  
7 gerrymander -- it was worse than Map C. There are charts  
8 all over in the State District Court's opinion showing how  
9 it is more of an extreme outlier than Map C was.

10 The Legislature tried to scale back how extreme  
11 the 2021 map was with the Map C and failed at that. So the  
12 district court specifically said that the four-way split of  
13 Salt Lake County appeared to be designed to be a partisan  
14 gerrymander to benefit the majority party. The state court  
15 also found that that was a violation of the county's  
16 splitting requirement.

17 This happened in the context of Map C because the  
18 court had already enjoined the 2021 map. Of course, that is  
19 why most of the proceedings at the October hearing were  
20 about Map C. But the evidence in showing why Map C was a  
21 violation encompassed evidence of the substantive violation  
22 of the 2021 map.

23 The legislature's expert, the map drawer of Map C  
24 and the litigation expert, Dr. Sean Trende, testified that  
25 the 2021 map violated Proposition 4. So what the plaintiffs

1 here would have you do is impose a map that the  
2 legislature's own expert witness testified was a violation  
3 of Proposition 4, while claiming that there is no evidence  
4 that there is a substantive violation of Proposition 4. I  
5 don't think we need to get to that question because the  
6 record is clear in the case that there was a substantive  
7 violation.

8 In Utah and the voters of Utah, acting as the  
9 legislative department and acting pursuant to their  
10 Elections Clause power, determined that following the  
11 procedures that they set forth as mandatory and that if they  
12 were not followed, the court was mandatorily required to  
13 issue an injunction. Utah is allowed to do that. They are  
14 allowed to regulate. Congress has not told them that they  
15 cannot have that time, place, and manner regulation for  
16 their congressional elections.

17 That would be an affront to the Elections Clause,  
18 would be for a Federal Court to say that the legislative  
19 department of Utah was disempowered from deciding that its  
20 Congressional map had to be enacted in the manner set forth  
21 in Proposition 4 and that a federal court has to enjoin the  
22 state court's enforcement of that provision under the  
23 Elections Clause. That simply does not -- unless the  
24 plaintiffs can find a congressional statute that says that  
25 the people of Utah were not allowed to require requirements

1 in adopting a map in the congressional redistricting  
2 process, then there is no Elections Clause argument here.  
3 The plaintiffs are asking for the violation of the Elections  
4 Clause.

5 JUDGE TYMKOVICH: Does it flow from your argument,  
6 then, that Prop 4 prohibits the division of Salt Lake  
7 County?

8 MR. GABER: Salt Lake County is larger than a  
9 congressional district, and so what the Legislature's  
10 expert, Dr. Trende, testified was that the law require it to  
11 be split into no more than two districts. That is how  
12 the --

13 JUDGE TYMKOVICH: Is that what Map C did?

14 MR. GABER: Map C split Salt Lake County into two  
15 districts. It split Utah County into three districts. Utah  
16 County is smaller than --

17 JUDGE TYMKOVICH: Which one is Utah County?

18 MR. GABER: South. Davis is north.

19 Here is another reason why the district court made  
20 a finding about the 2021 map. It interpreted Proposition  
21 4's requirement to minimize the division of counties across  
22 multiple districts and to require not just a minimization of  
23 the total number of county splits, but the number of times  
24 any one county is split into multiple districts. That is  
25 why Dr. Trende very honestly on the stand said, Of course

1 the 2021 map violates Proposition 4. It splits Salt Lake  
2 County four times and it split, like, six or seven other  
3 counties, which is more than twice what is necessary  
4 to equally --

5 JUDGE TYMKOVICH: Does that county splitting and  
6 respect for boundaries, does that trump natural communities  
7 of interest?

8 MR. GABER: Yes.

9 JUDGE TYMKOVICH: And is there a hierarchy there  
10 that governs that?

11 MR. GABER: Yes. Proposition 4 lists maybe six or  
12 so items in priority order. The first one is first  
13 minimizing the division of municipalities and counties but  
14 with a priority for municipalities, and then it goes down  
15 the list with compactness, continuity, following natural  
16 borders, and towards the bottom is communities of interest.

17 JUDGE TYMKOVICH: Can it use communities of  
18 interest to explain why it had three county splits instead  
19 of two and things like that?

20 MR. GABER: That isn't the explanation that was  
21 given. I don't think so because of the priority order, so  
22 they would have to minimize -- they might use communities of  
23 interest to explain why they split it the way they did, but  
24 they would still have to minimize the division of counties.  
25 I don't think any of them -- the legislature ever suggested

1 that the way the 2021 map split Salt Lake County into four  
2 pieces served the communities of interest.

3 JUDGE TEETER: I have a few questions.

4 One, I want to go back and make sure I understand  
5 your argument. Doc 17-2 is the complaint that was filed at  
6 the state court. If I understand your position correctly,  
7 Count V outlines the challenge to SB-200. The last portion  
8 of Count V says, if I remember correctly, the declaratory  
9 and injunctive relief spelled out below, and then in the  
10 remedy section and the second bullet point for the remedy  
11 was the one seeking to have the 2021 map enjoined.

12 Is that your position?

13 MR. GABER: That is my memory. I don't have that  
14 in front of me. That is my memory of the complaint, yes.

15 JUDGE TEETER: All right. I want to ask a  
16 question that is kind of the opposite of what I asked  
17 opposing counsel.

18 So my understanding is that your position is that  
19 if this Court were to find that Judge Gibson was acting  
20 within her ordinary judicial review by enjoining the 2021  
21 map under Proposition 4, that at that point it does not  
22 really matter what state law says specifically about her  
23 ability to impose a map; 2 USC 2c would kick in because the  
24 only other available map was the 2011 map and federal law  
25 would give her that authority.

1 Is that correct?

2 MR. GABER: Yes, authority and responsibility.

3 JUDGE TEETER: So here is my question to you to  
4 push on that a little bit. If that is your position, how  
5 far does it go? If a state supreme court or a state  
6 constitution specifically does not allow a state district  
7 court to impose a map, does 2 USC 2c still trump in that  
8 situation, arguably here, if the Court was to agree with  
9 your position on the 2021 map?

10 MR. GABER: I think the Supremacy Clause, which  
11 specifically says that state courts are to apply the U.S.  
12 Constitution and the laws enacted thereunder, would require  
13 the state court to follow 2 USC and follow *Branch* and to do  
14 that.

15 JUDGE TEETER: So in that regard does it matter  
16 what the Utah Supreme Court would say with respect to  
17 whether or not a district court judge had the authority  
18 under state law to impose a map in this situation or would  
19 federal law kick in and under the Supremacy Clause require  
20 it?

21 MR. GABER: I don't -- I don't want to minimize  
22 the importance of understanding what the Utah Constitution  
23 requires, but *Branch* could not have been clearer that  
24 Congress passed that statute under its Elections Clause  
25 power and *Branch* interpreted that to mean that state courts

1 should impose a map in the exact situation that the State  
2 District Court found itself in here.

3 Judge Gibson said as much in the decision. The  
4 decision says that the state court is not remedying only a  
5 violation of Proposition 4. At this point there is no map.  
6 There is either no map or there is the 2011 map, and cited  
7 to 2c. The court cited to 2 USC 2c and said, I have to.

8 JUDGE TEETER: The last couple of questions I had  
9 is there has been discussion about whether or not there were  
10 substantive findings by Judge Gibson regarding the 2021 map.  
11 I know that in the reply brief there was some citation to  
12 the November order where your client suggests that she did  
13 make substantive findings, and I want to make sure I have  
14 identified the passage that you were talking about because  
15 it was citations but not direct quotes.

16 So the citations in your brief were to the WestLaw  
17 citations. I instead have been using the citations and the  
18 pages that are attached to Doc 17. So by my count, if I am  
19 matching it up correctly, the citations you are referring to  
20 in Doc 17-4 would be on page 62. I think you're referring  
21 to the line where she says, "By cracking Salt Lake County  
22 and dividing it between the four districts like what was  
23 done in the 2021 Congressional map, this impairs the  
24 minority party's ability to translate its statewide support  
25 and representation enabling the favored party to

1 entrench its advantage by winning every seat."

2 Is that the specific quote you're talking about?

3 MR. GABER: That is one of them.

4 JUDGE TEETER: I know there is another one later  
5 on, but with respect to the first one, is that the portion  
6 you were discussing?

7 MR. GABER: There is the one that Your Honor just  
8 mentioned, and I don't have the page number of the District  
9 Court -- I could get it for Your Honor. The court on  
10 November 10th also found with respect to Dr. Trende's  
11 drawing of Map C -- and this is on page 7 of our response to  
12 the preliminary injunction, Doc 56 in this Court -- "Dr.  
13 Trende testified that the starting point for Map C now  
14 enjoined the 2021 map which did not comply with the  
15 procedural or substantive requirements of Proposition 4.  
16 Map C, nevertheless, perpetuated many of the existing  
17 dividing lines and problems with the 2021 map that appear to  
18 be designed to favor the Republican party and disfavor the  
19 Democratic party."

20 JUDGE TEETER: I believe that is on page 82 of Doc  
21 17-4. That is all I was trying to verify and make sure that  
22 I was understanding what portions you were trying to cite  
23 to. So if I am correct -- and you can tell me if I am  
24 wrong -- you are citing to statements in Doc 17-4 at page 62  
25 and Doc 17-4 on page 82.

1 Is that correct?

2 MR. GABER: Could you do me a favor? Doc 17 --

3 JUDGE TEETER: Doc 17-4 is, I believe, the  
4 preliminary injunction motion. It is the motion to  
5 intervene.

6 MR. GABER: Okay. Yes.

7 So on page 62 in the middle paragraph the court  
8 talks about dividing Salt Lake County into four pieces in  
9 the 2021 congressional map and how that impairs the minority  
10 party's ability to translate its vote.

11 And then again on page 82 of the State District  
12 Court's November 10th decision -- again, the paragraph that  
13 I just read and Your Honor said it correctly. Then on top  
14 of that, given the State District Court's interpretation of  
15 the county division requirement and that no more than one  
16 split is what is permitted, and the finding that it was  
17 split four ways would be a violation of that particular  
18 provision as well, which Dr. Trende admitted.

19 JUDGE TEETER: Thank you.

20 JUDGE SHELBY: I have a 2c question that is just  
21 one out of ignorance.

22 Reading between the lines of some of the  
23 plaintiffs' submissions -- and I am thinking about  
24 preclearance cases and the like -- a lot of the maps that  
25 get drawn by the judicial branch are three-judge panels.

1           Is there a line of cases where state court judges  
2 are drawing those kinds of maps?

3           MR. GABER: Well, I think in the preclearance  
4 context that is actually -- the lower court case in *Branch*  
5 was an example of that. It had drawn a map with the  
6 intention that it complied with Section V and the issue was  
7 just the timing of getting the DOJ's preclearance was  
8 insufficient, and so actually as a matter of federal law  
9 there actually was no state court map because Section V --  
10 Section IV maybe -- Section V provides that the law is not  
11 operative until it has been precleared. So as a technical  
12 legal matter there was no state court map even though there  
13 was in practice, so that's an example of that.

14           I am not sure that many of the cases where there  
15 have been court-imposed -- state court-imposed maps where  
16 there has been a claim under the Voting Rights Act, that  
17 what the court does is ensure that it is complying with the  
18 Voting Rights Act and preclearance is no longer an issue.  
19 That is gone. The state courts are always making sure that  
20 Section 2 of the Voting Rights Act is complied with.

21           The current Wisconsin congressional map and the  
22 state legislative maps were court imposed by the state  
23 supreme court and the court undertook an analysis under the  
24 Voting Rights Act there that ended up going up to the U.S.  
25 Supreme Court and back down about the state legislative

1 maps. But the court ensured that the congressional map  
2 complied with Section 2 and there was never a dispute that  
3 it did.

4 So it is -- it, along with the prohibition on  
5 racial gerrymandering under federal law, and the requirement  
6 to have single-member districts are always part of what a  
7 state court has to consider and just as a result of the  
8 Supremacy Clause.

9 When the state court here had the obligation under  
10 2c, as Justice Scalia set out in the plurality section of  
11 the *Branch* decision, that meant that it needed to follow  
12 Proposition 4's requirements under 2a(c), because that is  
13 what the manner of the law of the state is. So what the  
14 plaintiffs ask here would be particularly egregious for all  
15 sorts of reasons, but one of them is that there has been --  
16 as we have just gone through, there are specific findings  
17 that it violated not just the substantive requirement, but  
18 there is an injunction on the basis of it violating the  
19 procedural requirements. So this Federal Court would be  
20 violating 2a(c) if it imposed a map that was not enacted in  
21 the manner prescribed by Utah law, which is the 2021 map.

22 JUDGE SHELBY: Let's pause for a moment.

23 Don't surrender the podium.

24 MR. GABER: I can go on for a little bit.

25 (Time lapse.)

1 JUDGE SHELBY: Thank you, Mr. Gaber.

2 Mr. Schaerr, the plaintiffs are the ones with the  
3 burden here, at least on the substantive claims, and that is  
4 a lot of water under the bridge, and I gather you didn't  
5 agree with everything you heard.

6 MR. SCHAERR: You're right, Your Honor.

7 JUDGE SHELBY: Come on up, would you, please, for  
8 a little rebuttal.

9 MR. SCHAERR: I recognize the time, but let me  
10 just briefly respond on five specific points.

11 First of all, with respect to standing, the *Bost*  
12 decision, of course, did say that the candidates suffer what  
13 seemed to be almost a per se reputational harm just by  
14 participating in an election that was deemed unlawful or  
15 where the maps were incorrectly drawn or something like  
16 that. And they can also suffer additional reputational harm  
17 if they are put in a district where they get a lower  
18 percentage of the vote. So those things are clear in *Bost*  
19 and they are virtually inevitable.

20 When I said earlier that I didn't see particular  
21 reputational harm that our clients would suffer, I was not  
22 meaning to exclude those that were mentioned in *Bost*. I am  
23 not claiming that they would suffer any additional  
24 reputational harm beyond that.

25 Then with respect to whether our complaint

1 adequately claims that the state court acted unlawfully in  
2 invalidating the 2021 map, we actually say that or strongly  
3 imply it by my count in four different places in the  
4 complaint: In paragraph 3 where we complain about the court  
5 not using the 2021 map, paragraph 5, and then in paragraph  
6 88 we say that the 2021 map is the last lawful map; then in  
7 the prayer for relief we specifically ask for reinstatement  
8 of the 2021 map in the event that the Legislature does not  
9 step in and offer a map of their own.

10 Now, with respect to the 2021 map, I think it is  
11 fair to say that our allegations are as extensive as the  
12 intervenor's allegations in their state court complaint were  
13 with respect to the 2021 map, but if for some reason the  
14 Court does not think that those allegations are adequate, we  
15 are more than happy to amend, and we can do that in ten  
16 minutes and have it on file.

17 I think our position about the 2021 map is at  
18 least fairly implied in what is already in the complaint.

19 JUDGE TYMKOVICH: What is your position on whether  
20 we should stay this case until the Utah Supreme Court weighs  
21 in? If they don't, we can always issue an opinion.

22 MR. SCHAERR: Well, you know, a stay until Friday  
23 would probably be okay. But, you know, if they don't act on  
24 the stay request by Friday, then, you know, there is going  
25 to be a real need for this Court to act in order to redress

1 what we think is quite a clear violation of the Elections  
2 Clause, and that is as interpreted in *Moore versus Harper*.

3 *Moving on to Purcell, Purcell*, of course, is  
4 grounded in the State's interest in its elections.  
5 Certainly the Legislature's prerogatives assigned to them in  
6 the Elections Clause of the U.S. Constitution have to be an  
7 important part of the analysis, so it matters whether the  
8 map that is allegedly insulated from redress because of  
9 *Purcell* was a legislatively drawn map or a court-drawn map.  
10 That is important to keep in mind, I think, as we consider  
11 *Purcell*.

12 With respect to 2 USC 2, I just reviewed that  
13 statute again and I don't see anything in the statute that  
14 gives any authority whatsoever to state courts to draw maps.  
15 It simply specifies a standard that would apply.

16 JUDGE SHELBY: What does *Branch* say about that,  
17 though? The Supreme Court told us that --

18 MR. SCHAERR: The Supreme Court left that question  
19 open. Yes, it was addressed in the plurality opinion, but  
20 that is a controversial issue. I would suggest that, you  
21 know, in light of the rise of the Major Questions Doctrine  
22 in the Supreme Court that, you know, one should not assume  
23 that a statute that does not mention any role for state  
24 courts in implementing it are, you know, empowered by that  
25 statute to draw their own maps. I mean, you know, talk

1 about hiding an elephant in a mouse hole -- that would be a  
2 classic example of that.

3 JUDGE SHELBY: Justice Scalia and reading from  
4 page --

5 MR. SCHAERR: I love Justice Scalia, but it was a  
6 plurality opinion.

7 JUDGE SHELBY: Hold on.

8 The opinion of the court with respect to parts 1,  
9 2 and 3a -- I think I am reading here from 3a.

10 That is not the opinion of the court? Am I  
11 misreading it?

12 MR. SCHAERR: Well, I don't have it in front of  
13 me.

14 JUDGE SHELBY: "To the contrary, every court that  
15 has addressed the issue has held that Section 2c requires  
16 courts when they are remedying a failure to redistrict  
17 constitutionally to draw single-member districts whenever  
18 possible." He is not drawing a distinction between  
19 three-judge federal court panels or single-judge federal  
20 court panels. Every court --

21 MR. SCHAERR: He is also not holding anything  
22 there either. He is recounting the practice, but, you  
23 know -- I mean, one of the main points of *Branch* was that  
24 the three-judge panel had two alternative grounds, right,  
25 for ruling the way they did. One was that the state court

1 didn't have the authority to draw maps. The other was the  
2 Section 5 point. So when the case got to the Supreme Court,  
3 the majority opinion said, Okay. We agree with the lower  
4 court's rationale on Section 5 and we're going to find that  
5 that is sufficient to sustain their judgment, and,  
6 therefore, we don't have to reach the more controversial  
7 question of whether the state court violated the Elections  
8 Clause in drawing a map at all. I am not even sure that --

9 JUDGE SHELBY: This may be the last question on  
10 this, but I am still reading from the opinion of the court  
11 and it is the final paragraph of the opinion of the court.  
12 "In sum, Section 2c is as readily enforced by courts as it  
13 is by state legislatures and is just as binding on courts,  
14 federal or state, as it is on legislatures."

15 That is not the Supreme Court saying states don't  
16 do this, states don't draw maps?

17 MR. SCHAERR: It is binding on them, but it does  
18 not say that state courts can draw maps. I mean, it is  
19 binding on them in the sense that, you know, in their legal  
20 rulings they are bound by it, but it does not empower them  
21 somehow with authority to draw a map that the legislature  
22 has not drawn.

23 JUDGE SHELBY: I know that we touched on this  
24 earlier -- and I am walking up to the horse and maybe this  
25 is a kick -- and if the legislature just won't, then what?

1 How does a state court give effect to that federal mandate?  
2 If the state Legislature has not produced a viable map, do  
3 we just not have an election?

4 MR. SCHAERR: Well, a Federal Court can step in,  
5 and obviously the Federal Court acting under the Elections  
6 Clause can do that. Congress itself could step in. One  
7 reason that we are unlikely to see a genuine impasse is that  
8 no state legislature is going to want to see a congressional  
9 seat unfilled, right, because that reduces their influence  
10 in Washington. So at some level these parade of horrible  
11 impasses are going to get resolved with a map that is going  
12 to elect congressmen to go to Washington.

13 Finally, if I could just go back to the state  
14 court litigation, and this has been touched on in some of  
15 the questions earlier, the big problem with the litigation  
16 about the 2021 map is that the issue of the map's  
17 substantive validity was not litigated. It was not called  
18 into question in Claim 5, which was an attack on SB-200. It  
19 was not an attack on HB-2004, which was the 2021 map.

20 That attack appeared later in Counts VI and VII in  
21 the state court complaint, but those never actually got  
22 litigated. That may be one reason why the portions of Judge  
23 Gibson's decision that we were reading earlier don't say  
24 that the 2021 map was unlawful. It talks about the 2021 map  
25 by analogy or with historical reference to Map C, which is

1 what she was analyzing, but there is never any analysis of  
2 the legality of the 2021 map, which, by the way, was passed  
3 before Proposition D. There is never any substantive  
4 analysis of that map's validity and no finding that it is  
5 substantively invalid under the standards of Proposition D.

6 Unless the Court has --

7 JUDGE TYMKOVICH: What about the expert's  
8 concession below that the 2021 map was a partisan  
9 gerrymander under Prop 4? What do we do with that?

10 MR. SCHAERR: Well, I think if Judge Gibson had  
11 incorporated that concession into a finding and a holding  
12 that map 2021 was invalid, then, you know, then we wouldn't  
13 have that as one of our arguments under *Moore versus Harper*.  
14 That argument would go away. That is not what she did.

15 JUDGE SHELBY: I want to back you up just a little  
16 bit.

17 MR. SCHAERR: Sure.

18 JUDGE SHELBY: I'm getting old and I forget.

19 Maybe I misunderstood what you just said about  
20 Count V and what it did and did not include. At paragraph  
21 61 the Utah Supreme Court said that the claim also  
22 encompasses the constitutionality of the Congressional map  
23 that resulted from SB-200 and was not subject to Proposition  
24 4's requirements.

25 Is your statement and that statement in conflict,

1 or did I misunderstand what you said?

2 MR. SCHAERR: No. I don't recall what exactly the  
3 Utah Supreme Court said about it. I just know that Count V  
4 itself did not specifically challenge the 2021 map. It was  
5 directed at SB-200.

6 JUDGE SHELBY: Was the 2021 map a result of  
7 SB-200?

8 MR. SCHAERR: I think it was.

9 JUDGE SHELBY: And so if the Supreme Court has  
10 spoken on this question, do we credit the Supreme Court or  
11 do we accept what you're saying today?

12 MR. SCHAERR: I don't think there is any reason to  
13 disagree with the Supreme Court on that, but the fact  
14 remains that the state court held the 2021 map unlawful  
15 without a finding that it -- it invalidated the map without  
16 a finding that it was substantively unlawful, that the  
17 districts were substantively unlawful.

18 Again, that is just one of the three ways -- in  
19 fact, I would also urge the Court to review the  
20 Legislature's amicus brief which well articulates a couple  
21 of additional reasons why the state court's decision was not  
22 within the requirement of *Moore versus Harper* to engage only  
23 in ordinary judicial review and why the state court's  
24 decision was outside of that requirement.

25 For all these reasons, unless the Court has

1 further questions, I would just urge you to issue the  
2 preliminary injunction that we have requested. That is the  
3 only way that this Court can vindicate the Elections Clause  
4 and the important principle of respect for state  
5 legislatures in the redistricting process that that  
6 provision commands.

7 Thank up.

8 JUDGE SHELBY: Thank you.

9 (Time lapse.)

10 JUDGE SHELBY: Mr. Gaber, I always get nervous  
11 when I say briefly and the lawyers here speak quickly and we  
12 have a court reporter who is trying to take down what we  
13 have to say, but take two minutes and tell us your final  
14 thoughts.

15 MR. GABER: I just want to go to *Branch* for a  
16 moment. In the majority opinion section of *Branch* -- and  
17 this is at page 272 -- the court says, "We think, therefore,  
18 that while Section 2c assuredly envisions legislative  
19 action, it also embraces action by state and federal courts  
20 when prescribed legislative action has not been  
21 forthcoming."

22 Earlier in the decision the court specifically  
23 talks about judicially imposed maps. The entire premise of  
24 this case is about courts imposing maps and whether they  
25 have to follow 2c or 2a(c)(5) when they do it. Throughout

1 the majority opinion the court is clear to say both federal  
2 and state courts, so it could not more clearly interpret  
3 what Congress wrote in its Elections Clause statutes as  
4 requiring court-imposed maps. It did it by interpreting the  
5 phrase "by law, imposed by law."

6 I guess I would just underscore, again, that if  
7 you read the complaint, the request is phrased very narrowly  
8 about the authority to impose a map. When a state court has  
9 enjoined a map, it does not have the authority to impose a  
10 map. All of this *Moore vs. Harper* and about what is in the  
11 state court complaint and what Count V says, whether it is  
12 just ordinary judicial review to enforce statutes or the  
13 Constitution, none of that is encompassed within the  
14 plaintiffs' complaint in this case. Reaching it I think  
15 would be a problem for a Federal Court to start parsing out  
16 how a state court interpreted pleadings in the state  
17 proceeding.

18 JUDGE TYMKOVICH: Well, you did read from *Branch*  
19 and it did punt on the alternative holding about mapmaking  
20 authority. So, I mean, isn't that still an open question  
21 and a question of first impression that is lingering out  
22 there?

23 MR. GABER: I have read a lot of Supreme Court  
24 opinions and I don't know that I have ever seen the Supreme  
25 Court have a paragraph of its opinion vacating the rationale

1 that was stated, an alternative rationale that was stated in  
2 a lower court's decision while affirming the injunction, and  
3 then going on to say, "The District Court's alternative  
4 holding is not to be regarded as supporting the injunction  
5 we have affirmed on the principal ground or as binding upon  
6 state and federal officials should Mississippi seek in the  
7 future to administer a districting plan adopted by the  
8 chancery court."

9 And then the whole premise of this majority  
10 decision is that state courts are required by federal law to  
11 impose maps in a decision that is talking about the  
12 Elections Clause. So I would not hang my hat on this  
13 paragraph if I were the plaintiffs. I think it is pretty  
14 clearly telling everyone, Don't do that. That would be a  
15 problem because the Supreme Court has held for decades that  
16 state courts are authorized and obligated to impose maps.

17 JUDGE TYMKOVICH: It is a hard question and they  
18 are finally getting around to asking us and the Supreme  
19 Court to dive in.

20 JUDGE SHELBY: It is not lost on us how much work  
21 you have all done in the last week and a half or so under  
22 very tight deadlines that we imposed to try to put ourselves  
23 in a position to try to accommodate the Lieutenant Governor.

24 I think I can safely say on behalf of all three of  
25 us that we appreciate the quality of the briefing and the

1 arguments that you have all made, and the briefing,  
2 especially under the circumstances, was just really  
3 terrific, and your argument today has been helpful.

4 Thank you.

5 We'll be in recess.

6 (Proceedings concluded.)

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