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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-1600

[Filed June 6, 2023]

In re: North Dakota Legislative Assembly; William R. Devlin; Senator Ray Holmberg; Senator Richard Wardner; Senator Nicole Poolman; Michael Nathe, Representative; Terry Jones, Representative; Claire Ness, Senior Counsel at the North Dakota Legislative Council,	)
Petitioners,	)

Appeal from United States District Court
for the District of North Dakota - Eastern

Submitted: April 17, 2023
Filed: June 6, 2023

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

COLLOTON, Circuit Judge.

We consider here a petition for writ of mandamus filed by several current or former members of the North

Dakota Legislative Assembly and a legislative aide. The petitioners seek relief from orders of the district court directing them to comply with subpoenas for documents or testimony in a civil case brought against the State of North Dakota. *See Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-0022 (D.N.D.). The underlying lawsuit alleges violations of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301(a). The plaintiffs seek to develop evidence of alleged "illicit motive" by legislators who enacted a redistricting plan for state legislative districts. The petitioners argue that the discovery orders infringe on legislative privilege and that the subpoenas should be quashed.[*]

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[*] The plaintiffs issued a subpoena for testimony to former state representative William R. Devlin. They issued seven document subpoenas to current or former legislators and one legislative aide, seeking documents and communications regarding the following:

(1) Native Americans and/or Indian Reservations and the 2021 Redistricting Process or Maps.

(2) Tribal input, including regarding written submissions or verbal testimony from tribal representatives, with respect to the 2021 Redistricting Process or Maps.

(3) Redistricting criteria for the 2021 Redistricting Process or Maps.

(4) District 4, District 9, or District 15, and, where applicable, any subdistricts of these districts, including documents and communications regarding the applicability of the Voting Rights Act to these districts and subdistricts.

(5) Trainings provided to legislators in preparation for or as part of the 2021 Redistricting Process.

(6) The identity of map drawers in the 2021 Redistricting Process.

(7) Racial polarization or demographic studies conducted by the Redistricting Committee or Legislature as part of or in preparation for the 2021 Redistricting Process.

Three conditions must be satisfied for this court to issue a writ of mandamus. First, the party seeking the writ must have no other adequate means to attain the relief desired. Second, the petitioner must show that his or her right to relief is clear and indisputable. Third, this court must be satisfied that the writ is appropriate under the circumstances. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004). Mandamus is an appropriate remedy where a claim of privilege is erroneously rejected during discovery, because the party claiming privilege has no other adequate means to attain relief, and the enforcement of the discovery order would destroy the privilege. *See Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1053 (8th Cir. 2000); *In re Gen. Motors Corp.*, 153 F.3d 714, 715 (8th Cir. 1998).

The petitioners rely on a claim of legislative privilege. State legislators enjoy a privilege under the federal common law that largely approximates the protections afforded to federal legislators under the Speech or Debate Clause of the Constitution. And a privilege that protects legislators from suit or discovery extends to their aides. *Gravel v. United States*, 408 U.S. 606, 616 (1972); *Reeder v. Madigan*, 780 F.3d 799, 804 (7th Cir. 2015). Although state legislators do not enjoy the same privilege as federal legislators in criminal actions, *United States v. Gillock*, 445 U.S. 360, 372-73 (1980), the Supreme Court otherwise has generally equated the legislative immunity to which state legislators are entitled to that accorded Members of Congress under the Constitution. *Sup. Ct. of Va. v. Consumers Union*, 446 U.S. 719, 733 (1980). In civil litigation, there is no reason to conclude that state

legislators and their aides are "entitled to lesser protection than their peers in Washington." *Reeder*, 780 F.3d at 805; *see Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018). Legislative privilege, like legislative immunity, reinforces representative democracy by fostering an environment where public servants can undertake their duties without the threat of personal liability or the distraction of incessant litigation. *See Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998); *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011).

Legislative privilege applies where legislators or their aides are "acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). When legislators are functioning in that sphere, the privilege is an "absolute bar to interference." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). The privilege "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972). The bar to interference extends beyond immunity from liability to the compelled discovery of documents or testimony, because legislators "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam). This protection applies whether or not the legislators are parties in a civil action: "A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive." *MINPECO, S.A. v. Conticommodity*

Servs., Inc., 844 F.2d 856, 859 (D.C. Cir. 1988); *see Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. The degree of intrusion is not material; "any probing of legislative acts is sufficient to trigger the immunity." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 419 (D.C. Cir. 1995) (emphasis omitted).

The conditions for legislative privilege are plainly satisfied here. The plaintiffs in the underlying lawsuit seek documents and testimony from legislators and an aide concerning acts undertaken with respect to the enactment of redistricting legislation in North Dakota. The district court did not dispute that the acts were undertaken within the sphere of legitimate legislative activity. The acts are therefore privileged from inquiry. Absent a waiver of the privilege, the subpoenas should have been quashed based on legislative privilege.

We conclude that the district court's conclusion to the contrary was based on a mistaken conception of the legislative privilege. In its order enforcing the document subpoenas, the district court reasoned that legislative privilege did not apply because the subpoena sought communications between legislators and third parties. The legislative privilege, however, is not limited to a bar on inquiry into communications among legislators or between legislators and their aides. The privilege is not designed merely to protect the confidentiality of deliberations within a legislative body; it protects the functioning of the legislature more broadly. Communications with constituents, advocacy groups, and others outside the legislature are a legitimate aspect of legislative activity. The use of compulsory evidentiary process against legislators and

their aides to gather evidence about this legislative activity is thus barred by the legislative privilege. *See Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007); *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980). The authority on which the district court relied for a narrower understanding of the privilege has since been reversed on this basis. *See Jackson Mun. Airport Auth. v. Harkins*, 67 F.4th 678, No. 21-60312, 2023 WL 3333607, at *5 (5th Cir. May 10, 2023). The dissent endorses the district court's order requiring the production of "nonprivileged communications," but does not acknowledge that the order was premised on a mistaken conclusion that the legislative privilege affords no protection against discovery of communications between a legislator and third parties.

With respect to the order enforcing a subpoena for testimony from Representative Devlin, the district court did not simply consider whether the subpoena would inquire into acts within the legitimate legislative sphere, but instead applied a five-factor test akin to that used to determine the scope of the deliberative process privilege. The district court reasoned that redistricting legislation "presents a particularly appropriate circumstance for qualifying the state legislative privilege because judicial inquiry into legislative intent is specifically contemplated as part of the resolution of the core issue that such cases present." R. Doc. 71, at 3 (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015)). The cited authority, in turn, relied on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), where the Supreme Court addressed a challenge to restricting

legislation based on the Equal Protection Clause of the Fourteenth Amendment. In that context, the Court said that "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." *Id.* at 268. The Court further observed that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government," and are "usually to be avoided." *Id.* at 268 n.18 (internal quotation omitted).

The potential for "extraordinary instances" in which testimony might be compelled from a legislator about legitimate legislative acts does not justify enforcing a subpoena for testimony in this case. Dicta from *Village of Arlington Heights* does not support the use of a five-factor balancing test in lieu of the ordinary rule that inquiry into legislative conduct is strictly barred by the privilege. Even where "intent" is an element of a claim, statements by individual legislators are an insufficient basis from which to infer the intent of a legislative body as a whole. *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996). And here, the underlying case does not even turn on legislative intent. A claim under § 2 of the Voting Rights Act does not depend on whether the disputed legislative districts were adopted "with the intent to discriminate against minority voters," for the statute repudiated an "intent test." *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986). Any exception to legislative privilege that might be available in a case that is based on a legislature's alleged intent is thus

inapplicable. *See Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 88-89 (1st Cir. 2021). The dissent's proposal to order a deposition during which a legislator could "invoke legislative privilege" does not sufficiently appreciate that compulsory process constitutes a "substantial intrusion" into the workings of a legislature that must "usually be avoided." *Vill. of Arlington Heights*, 429 U.S. at 268 n.18; *see Lee*, 908 F.3d at 1188.

For these reasons, we grant in part the petition for writ of mandamus, and direct the district court to quash the subpoenas for petitioner Devlin to testify, and for petitioners Holmberg, Wardner, Poolman, Nathe, Devlin, and Ness to produce documents and other information. We deny the petition with respect to the subpoena for petitioner Jones to produce documents. The district court enforced that subpoena on the alternative ground that Jones waived his legislative privilege by testifying at a preliminary injunction hearing in another case concerning redistricting legislation. R. Doc. 72 at 5 & n.1; R. Doc. 63, at 5. The petitioners do not discuss or dispute the district court's conclusion of waiver, so we have no occasion to address it. But Jones—having declined even to challenge an independent ground for the district court's order regarding his subpoena—has not demonstrated a clear and indisputable right to relief.

KELLY, Circuit Judge, concurring in part and dissenting in part.

I respectfully dissent from the grant of mandamus relief in this case. The legislative petitioners have not shown that this "drastic and extraordinary" remedy is

appropriate. Cheney, 542 U.S. at 380 (citation omitted). In my view, this case involves neither "a judicial usurpation of power" nor "a clear abuse of discretion" by the district court. Id. (cleaned up).

The subpoenas at issue here sought documents and communications from the legislative petitioners regarding allegations that the 2021 redistricting plan enacted by the North Dakota Legislature violated the Voting Rights Act. When the legislative petitioners objected, the plaintiffs, among whom include the Turtle Mountain Band of Chippewa Indians and Spirit Lake Nation (the Tribes), moved to enforce the subpoenas. From there, the district court identified three categories of relevant evidence based on a search the legislative petitioners conducted of their official email accounts and personal phones: (1) communications between the legislative petitioners and another legislator; (2) communications between the legislative petitioners and legislative council staff; and (3) communications between the legislative petitioners and an individual who was neither a legislator nor a legislative council staff member. The Tribes only sought disclosure of materials that fell in the third category—communications that the Tribes argue are nonprivileged because they have been shared with "third parties." In short, the Tribes sought documents and communications for which any privilege had been waived.

In its petition for mandamus, the legislative petitioners contend broadly that, where the United States is not a party, any and all "request[s] for discovery . . . in a civil case [are] barred by common-law

legislative privilege." The legislative petitioners acknowledge that the privilege is "qualified," but their argument recognizes no exception for discovery in a case like this one. At a minimum, however, the state legislative privilege can be waived. See Jackson Mun. Airport Auth., 2023 WL 3333607, at *5 (noting that the "legislative privilege can be waived when certain conditions apply"). And the legislative petitioners fail to address the issue of waiver. As a result, this court has no basis to determine whether the legislative petitioners believe they have, or have not, waived privilege as to any of the documents and communications shared with third parties. An order quashing the subpoenas here is likely to prohibit the discovery of at least some nonprivileged materials relevant to the pending litigation. That result sweeps too broadly.

Moreover, the legislative petitioners fail to explain how a privilege log would not adequately prevent disclosure of documents and communications that are protected by the state legislative privilege. They bear the burden of establishing the privilege. See Fed. R. Civ. P. 45(e)(2)(A) ("A person withholding subpoenaed information under a claim that it is privileged" must "expressly make the claim" and "describe the nature of the withheld documents . . . in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim."). And here, the district court instructed the legislative petitioners to produce a privilege log, "sufficient to distinguish privileged from non-privileged" materials, that would describe "the general nature of the document, the identity of the author, the identities of all recipients,

and the date on which the document was written" for any communications they sought to withhold based on a claim of legislative privilege. The legislative petitioners' assertion that a privilege log is "not required with respect to a claim of legislative privilege" ignores that the district court ordered the disclosure of only nonprivileged materials. See Jackson Mun. Airport Auth., 2023 WL 3333607, at *5 (agreeing with the district court that a privilege log was "necessary to determine which of the requested documents and communications are protected by legislative privilege"). A privilege log is an appropriate mechanism for resolving any privilege disputes that may arise, and the district court is best placed to determine whether and for what documents the state legislative privilege could apply.

Finally, the legislative petitioners argue that they would face an "undue burden" if compelled to produce the requested communications, which they assert number over 64,000 and would require 640 hours to review. See Fed. R. Civ. P. 45(d)(3)(A)(iv) (requiring that a court "quash or modify a subpoena" that "subjects a person to undue burden"). But the district court identified just 2,655 responsive materials in their possession, and of these, the legislative petitioners would need to produce about 558 documents and communications. As such, the district court concluded that the record did not support the petitioners' contention that the production of these materials would require the amount of work they claimed. These findings by the court are not clearly erroneous, and I see no reason to disturb them. See Silverman v. Silverman, 312 F.3d 914, 916 (8th Cir. 2002) (stating

that where the district court's underlying finding is "solely a question of fact," we review it for clear error). All told, the district court recognized that some of the requested communications may be protected by the state legislative privilege. And in granting the motion to enforce the subpoenas, it directed the petitioners to produce only those materials that are nonprivileged. The district court did not abuse its discretion.

Nor did the district court abuse its discretion in denying the motion to quash the subpoena for testimony directed at Representative Devlin. The legislative petitioners broadly assert that Devlin's deposition is "barred by legislative privilege." But Representative Devlin remains free to invoke legislative privilege and decline to answer questions that intrude on the legislative process. And the petitioners do not contend that such limitations placed on Devlin's deposition, if imposed, would be insufficient to protect his assertion of privilege.

The district court thus acted well within its authority when it granted the motion to enforce the subpoenas to produce nonprivileged communications directed to the legislative petitioners, including Representative Jones, and denied the motion to quash the deposition subpoena directed to Representative Devlin. Mandamus relief, under these circumstances, is not warranted.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

[Filed December 22, 2022]

Case No. 3:22-cv-22

Turtle Mountain Band of Chippewa Indians, et al.,

Plaintiffs,

vs.

Alvin Jaeger, in his Official Capacity as Secretary of State of North Dakota, et al.,

Defendants.

Case No. 1:22-cv-31

Charles Walen, an individual, et al.,

Plaintiffs,

vs.

Doug Burgum, in his official capacity as Governor of the State of North Dakota, et al.,

Defendants,	)
and	)
Mandan, Hidatsa, & Arikara Nation, et al.,	)
Defendant-Intervenors.	)

ORDER

In the above-captioned cases, the Turtle Mountain Band of Chippewa Indians (Turtle Mountain Band) and Mandan, Hidatsa, & Arikara Nation (MHA Nation) subpoenaed members of North Dakota's Legislative Assembly to appear at depositions and testify about recent redistricting legislation. North Dakota's Legislative Assembly, a non-party, moved to quash the subpoenas on the basis of the state legislative privilege. For the reasons discussed below, the court denies the motions.

Background

On November 10, 2021, the North Dakota Legislative Assembly passed House Bill No. 1504, which altered the state's legislative districts. H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021). Governor Doug Burgum signed the bill into law the following day. Id. Before the redistricting legislation, voters in North Dakota's 47 legislative districts elected one state senator and two representatives at-large. The redistricting legislation retained that procedure for 45 of the 47 districts. (Walen, Doc. 12-1).

Districts 4 and 9 are now different from the other 45 districts. Those two districts were subdivided into single-representative districts, labeled House District 4A, 4B, 9A, and 9B. Id. Voters in each of these subdivided districts elect one senator and one representative, instead of one senator and two representatives at-large. House District 4A traces the boundaries of the Fort Berthold Reservation of the MHA Nation. House District 9A contains most of the Turtle Mountain Indian Reservation, with the remainder in House District 9B. The Spirit Lake Nation, which is located near the Turtle Mountain Reservation and a plaintiff in Turtle Mountain, is in the undivided District 15. Id. at Doc. 19-3, pp. 2-4).

In February 2022, complaints in the above-captioned cases were filed. Both sets of plaintiffs argue the redistricting plan is an illegal racial gerrymander. The Turtle Mountain plaintiffs allege a violation of the Voting Rights Act, asserting the redistricting plan simultaneously "packs" some Native American voters in subdivided districts and "cracks" others across divided and undivided districts. (Turtle Mountain, Doc. 1, p. 30). The Walen plaintiffs allege a violation of the Equal Protection Clause, asserting race was the predominate factor behind the redistricting legislation. (Walen, Doc. 1, p. 9).

The Walen plaintiffs moved for a preliminary injunction. A three-judge panel held a hearing on that motion in May 2022. Id. at Doc. 36. State Representative Terry Jones—who the MHA Nation has now subpoenaed—testified at the hearing. See id. at Doc. 58-1. The three-judge panel denied the motion for

a preliminary injunction on May 26, 2022. Id. at Doc. 37. The Turtle Mountain defendants brought a motion to dismiss for failure to state a claim and lack of jurisdiction. (Turtle Mountain, Doc. 17). The presiding district judge denied that motion on July 7, 2022. Id. at Doc. 30.

Both cases proceeded to discovery. In November 2022, the Turtle Mountain Band (plaintiffs in Turtle Mountain) and the MHA Nation (defendant-intervenors in Walen) served subpoenas on two state representatives to testify at depositions.[1] The Turtle Mountain Band subpoenaed Representative William Devlin, who served as chair of the redistricting committee when the challenged legislation was passed. Id. at Doc. 38. The MHA Nation subpoenaed Representative Terry Jones, who represented one of the districts altered by the challenged legislation and who testified at legislative hearings and at the preliminary injunction hearing. (Walen, Doc. 53, p. 1).

North Dakota's Legislative Assembly, Representative Devlin, and Representative Jones (together, "the Assembly") moved to quash the subpoenas in both cases on the basis of the legislative privilege.[2] (Walen, Doc. 52; Turtle Mountain, Doc. 37).

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[1] In both cases, subpoenas were also served for production of documents. The Assembly does not challenge those subpoenas in its motion but notes it has conveyed its objections to plaintiffs. (Turtle Mountain, Doc. 38, p. 7 n.3)

[2] The Assembly also asserts the subpoenas should be quashed on the basis of the attorney-client privilege. (Turtle Mountain,

The Turtle Mountain Band and MHA Nation (together, "the Tribes") filed a response in their respective cases, and the Assembly filed replies. (Walen, Doc. 58; Doc. 65; Turtle Mountain, Doc. 41; Doc. 45).[3] The Tribes filed a notice of supplemental evidence in Walen, together with transcripts of depositions of the two plaintiffs. (Walen, Doc. 71).

Law and Discussion

Federal Rule of Civil Procedure 45 provides a court must "quash or modify a subpoena that . . . requires disclosure of privileged or other protected matter." The Assembly argues this court should quash the subpoenas because the legislative privilege prohibits state legislators from being compelled to testify about their legislative activities. (Doc. 38). The Tribes do not dispute that, if applicable, the state legislative privilege would cover the representatives' testimony. Rather, the Tribes contend the privilege is overridden by the circumstances of this case. (Doc. 41). Because these cases involve federal claims, privileges are governed by federal common law unless a rule prescribed by the Supreme Court, a federal statute, or the United States Constitution provides otherwise. See Fed. R. Evid. 501.

Doc. 38, p. 16). For reasons discussed in this order, quashing the subpoenas on that basis would be premature.

[3] The briefs in both cases are similar. Unless otherwise indicated, the court will hereinafter cite only to the briefs filed in Turtle Mountain.

The primary dispute is under what circumstances—if any—the state legislative privilege yields to countervailing interests. "This is a thorny issue." League of Women Voters of Fla., Inc. v. Lee, 340 F.R.D. 446, 455 (N.D. Fla. 2021). "[T]he Supreme Court has not set forth the circumstances under which the privilege must yield to the need for a decision maker's testimony." Lee v. City of L.A., 908 F.3d 1175, 1187 (9th Cir. 2018). Nor has the Eighth Circuit addressed the question. And other federal courts are split about the strength of the privilege. See e.g., Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 335 (E.D. Va. 2015).

One point of agreement is that the state legislative privilege is different in source and purpose from its federal counterpart. These differences are important and make "determining whether a state legislator is entitled to invoke legislative privilege in federal court . . . not as simple as it would be . . . if the legislator were a member of Congress." Jackson Mun. Airport Auth. v. Bryant, No. 3:16-CV-246, 2017 WL 6520967, at *3 (S.D. Miss. Dec. 19, 2017). To understand this contrast, the court turns to the legislative privilege afforded to federal lawmakers.

1. The Constitutional Federal Legislative Privilege

The legislative privilege for federal lawmakers is explicit in the United States Constitution. The federal Speech and Debate Clause, found in Article I, Section VI of the Constitution, provides that "for any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other Place."

With roots in the English Bill of Rights of 1689, "the central role of the Clause is to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502 (1975) (internal quotation marks omitted). The Clause also guards against the potential for litigation to "delay and disrupt the legislative function." Id. at 503.

To effectuate these purposes, the Supreme Court has interpreted the Clause as providing federal lawmakers with both immunity from liability and an evidentiary privilege.[4] See Am. Trucking Ass'ns, Inc. v. Alviti, 14 F.4th 76, 86 (1st Cir. 2021). Legislative immunity shields federal lawmakers from criminal and civil liability for legislative activities "such as the production of committee reports, the passage of resolutions, and the act of voting." Bethune-Hill, 114 F. Supp. 3d at 331. Legislative privilege relieves federal lawmakers from "the burden of defending" themselves and protects against, among other things, "the use of compulsory process to elicit testimony from federal legislators . . . with respect to their legislative activities." Id. at 332. These protections are absolute. If the lawmaker's activity is "within the legitimate legislative sphere," then "balancing plays no part" and

[4] Some cases speak of only a legislative "privilege" to refer to both immunity from liability and an evidentiary privilege. See e.g., Tenney v. Brandhove, 341 U.S. 367, 372 (1951). This court separates the two concepts—immunity refers to protections against liability and privilege refers to evidentiary protections. See Am. Trucking, 14 F.4th at 86 (doing the same).

the federal lawmakers' protection applies. Eastland, 421 U.S. at 510 n.16.

2. The Common Law State Legislative Privilege

The legislative privilege for state lawmakers "stand[s] on different footing." Am. Trucking, 14 F.4th at 87. The federal Speech and Debate Clause "by its terms" only applies to federal legislators; the state legislative privilege is not derived from the same source as the federal privilege. See United States v. Gillock, 445 U.S. 360, 374 (1980). What is more, the Supreme Court has rejected the argument that "our constitutional structure" compels the existence of a state legislative privilege on par with its federal counterpart. Id. at 366.

Without federal constitutional status, federal courts apply the state legislative privilege as a matter of federal common law. Id. at 374. In addressing a privilege under the federal common law, the court begins with Federal Rule of Evidence 501. See id. Rule 501 "authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'" Jaffee v. Redmond, 518 U.S. 1, 8 (1996) (citation omitted).

Defining a privilege under Rule 501 proceeds in two steps: "[F]irst [determining] whether 'reason and experience' justify recognizing a privilege at all, and if so whether the privilege should be qualified or absolute and whether it should cover the communications at issue in this case." In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1168 (D.C. Cir. 2006) (Tatel, J., concurring). "By insisting on a two-step process, courts

guide their discretion with rules developed from accumulated wisdom about the situations that justify a privilege." In re Grand Jury, 821 F.2d 946, 955 (3d Cir. 1987).

3. Recognition of a State Legislative Privilege

Whether to recognize a privilege depends upon a "broad-based view of how the privilege will work in general." Id. Factors traditionally considered are whether the privilege would serve significant private and public interests, the evidentiary benefit that would result from rejection of the privilege, and the policy decisions of the states. See Jaffee, 518 U.S. at 10-12.

As the Assembly points out, Article 4, Section 15 of the North Dakota Constitution contains a clause that reads, "Members of the legislative assembly may not be questioned in any other place for any words used in any speech or debate in legislative proceedings." A state's recognition of a privilege "indicates that 'reason and experience'" support its recognition in federal court. Id. at 13 (citation omitted).

The only Supreme Court case to address the state legislative privilege, Gillock, declined to recognize the privilege under Rule 501 in a federal criminal proceeding. 445 U.S. at 373. There, a state legislator, Gillock, was charged by federal prosecutors with bribery for accepting money in exchange for supporting certain legislation. Id. at 362. The issue was whether Gillock's legislative acts—his introduction of certain legislation and statements he made on the floor of the state senate, among others—could be introduced at trial as evidence against him. Id. at 365. Gillock argued

for a state legislative privilege on par with the privilege granted to federal lawmakers through the Speech and Debate Clause.

In Gillock, the Supreme Court began its analysis by looking to the "language and legislative history of Rule 501." Id. at 367. The court noted the state legislative privilege was not one of the nine privileges enumerated in the Judicial Conference's original draft of Rule 501. Id. Though not dispositive, the state legislative privilege's omission from the draft suggested "that the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism." Id. at 368.

Next, the Supreme Court contrasted the purposes of the state legislative privilege with those of the federal Speech and Debate Clause. The federal Speech and Debate Clause has two interrelated purposes: to avoid intrusion by the Executive and Judiciary into the affairs of a coequal branch and to avoid disruption of the legislative process. Id. at 369. The first, separation-of-powers rationale, "[gave] no support to the grant of a privilege to state legislators in federal criminal prosecutions." Id. at 370. The court stated, "[U]nder our federal structure, we do not have the struggles for power between the federal and state systems [that] inspired the need for the Speech or Debate Clause as a restraint on the Federal Executive to protect federal legislators." Id. As to the second rationale, disruption of the legislative process, the court recognized that "denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function" but that impact was offset "when balanced

against the need of enforcing federal criminal statutes." Id. at 373.

Ultimately, the court found "although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." Id. The court concluded, "We believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process." Id. In sum, Gillock held there was no state legislative privilege in federal criminal proceedings. The Supreme Court did not "recognize" the privilege under Rule 501. See e.g., Jaffee, 518 U.S. at 14 ("In United States v. Gillock . . . our holding that Rule 501 did not include a state legislative privilege relied, in part, on the fact that no such privilege was included in the Advisory Committee's draft.").

Gillock's holding was limited to federal criminal proceedings, but the Assembly and the Tribes here both presume existence of a state legislative privilege in federal civil cases. There is well-developed case law recognizing legislative immunity in civil cases. See Tenney, 341 U.S. at 369; Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391 (1979); Bogan v. Scott-Harris, 523 U.S. 44 (1998). Courts often find that from this civil immunity "springs a limited legislative privilege against supplying evidence, including testimony." Kay v. City of Rancho Palos Verdes, No. CV 02-03922, 2003 WL 25294710, at *9

(C.D. Cal. Oct. 10, 2003). Though the Supreme Court has never explicitly recognized the state legislative privilege under Rule 501, it has suggested such a privilege would be available in civil cases. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977) ("In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."). Because the Assembly and the Tribes do not argue otherwise, the court recognizes a state legislative privilege in federal civil cases.

4. Strength of a State Legislative Privilege

Having recognized a state legislative privilege in federal civil cases, the court now considers "whether the privilege should be qualified or absolute and whether it should cover the communications at issue in this case." In re Grand Jury Subpoena, Judith Miller, 438 F.3d at 1168. The Assembly and the Tribes agree the state legislative privilege is qualified rather than absolute. (Doc. 41, p. 1; Doc. 45, p. 4). Used here, a qualified privilege simply means one that "may be overcome by an appropriate showing." See In re Grand Jury Subpoena, Judith Miller, 438 F.3d at 1150. The Assembly and the Tribes, however, assert different interpretations of how the state legislative privilege is qualified.

The Tribes argue the state legislative privilege is qualified in a manner similar to the deliberative process privilege, advocating for balance of their need for evidence against the Assembly's interest in non-disclosure. (Doc. 41, p. 2). The Assembly argues no such

balancing is warranted, asserting the state legislative privilege includes categorical exceptions and none of those exceptions apply here. (Doc. 45, p. 4). Both the Assembly and the Tribes marshal extensive case law in support of their respective positions.

A. The Assembly's Argument

The Assembly relies on four cases that emphasize Gillock's conclusion that "where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." 445 U.S. at 373. These cases ask a threshold question of whether there are "important federal interests" at stake and generally contrast the weightier federal interests in criminal prosecutions, like in Gillock, with the lesser-federal interests in private civil cases.

In the most recent of those cases, American Trucking, trucking companies and other private parties brought a Dormant Commerce Clause challenge to a Rhode Island law that authorized tolls on bridges and roads within the state. 14 F.4th at 81. The trucking companies sought to depose members of the state legislature on the theory that law was passed with a purpose of discriminating against out of state businesses. Id. at 82. The First Circuit Court of Appeals quashed the subpoenas on the basis of state legislative privilege. The court began its analysis by citing Gillock for the proposition that "federal courts will often sustain assertions of legislative privilege by state legislatures except when important federal interests are at stake, such as in a federal criminal prosecution." Id. at 87. The court then noted, "We have before us neither a federal criminal case nor a civil case

in which the federal government is a party." Id. at 88. In addition, the court stated the private plaintiffs' case did not "implicate important federal interests" by seeking to enforce the Dormant Commerce Clause because were "a mere assertion of a federal claim sufficient[,] . . . the privilege would be pretty much unavailable largely whenever it is needed." Id. Finally, the court noted "the need for the discovery requested here is simply too little to justify such a breach of comity." Id. at 90.

In another case on which the Assembly relies, In Re Hubbard, an Alabama teachers union subpoenaed members of the state legislature for documents related to legislation the union claimed was in retaliation for its members exercise of their First Amendment rights. 803 F.3d 1298 (11th Cir. 2015). The Eleventh Circuit quashed the subpoenas on the basis of the state legislative privilege. As in American Trucking, the court began its analysis by stating "a state lawmaker's legislative privilege must yield in some circumstances where necessary to vindicate important federal interests such as the enforcement of federal criminal statutes." Id. at 1311 (internal quotation marks omitted). The court then discussed the "fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government." Id. at 1312. In the end, the court held the plaintiffs' claim was not cognizable under the First Amendment and therefore did not implicate an important federal interest.[5] Id. at 1315.

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[5] The In Re Hubbard court emphasized the limited nature of its holding: "Our decision should not be read as deciding whether, and

Two cases the Assembly cited address claims brought under the Equal Protection Clause and the Voting Rights Act. In Florida v. United States, the court denied motions to compel depositions of state legislators in proceedings related to federal preclearance of legislation under the Voting Rights Act. 886 F. Supp. 2d 1301, 1302 (N.D. Fla. 2012). At that time, section 5 of the Voting Rights Act required covered jurisdictions to obtain federal preclearance from the federal government by proving that a change in their voting procedures had neither the purpose nor the effect of denying or abridging the right to vote on account of race.[6] The court recognized "a state legislator's privilege is qualified, not absolute," but determined

> there is no reason not to recognize the privilege here. Voting Rights Act cases are important, but so are equal-protection challenges to many other state laws, and there is nothing unique about the issues of legislative purpose and privilege in Voting Rights Act cases.

Id. at 1304.

In Lee, the plaintiffs brought an Equal Protection challenge to Los Angeles's redistricting of city council

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to what extent, the legislative privilege would apply to a subpoena in a private civil action based on a different kind of constitutional claim than the one [plaintiffs] made here." 803 F.3d at 1312 n.13.

[6] That section of the Voting Rights Act was later held unconstitutional by the Supreme Court. See Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 537 (2013).

districts. 908 F.3d at 1179. The Ninth Circuit upheld protective orders prohibiting depositions of city officials on the basis of the state legislative privilege. The court recognized that "although the Supreme Court has not set forth the circumstances under which the privilege must yield to the need for a decision maker's testimony, it has repeatedly stressed that 'judicial inquiries into legislative or executive motivation represent a substantial intrusion.'" Id. at 1187 (citation omitted). The court then concluded "the factual record falls short of justifying the 'substantial intrusion' into the legislative process." Id. at 1188. The court also rejected the plaintiffs' "call for a categorial exception whenever a constitution claim implicates the government's intent" because "that exception would render the privilege of little value." Id.

Drawing on these cases, the Assembly argues the state legislative privilege is "qualified" only in the sense that it does not apply to federal criminal proceedings but otherwise stands as an "absolute bar to deposition testimony of local lawmakers in a racial gerrymandering case." (Doc. 45, p. 4). According to the Assembly, "[A] private lawsuit attacking a legislative action does not invoke the incredibly limited exceptions to a state lawmaker's legislative privilege." (Doc. 38, p. 8). Even if the state legislative privilege might yield in civil cases where important federal interests are at stake, the Assembly contends this case does not present sufficient federal interests and the Tribes have not shown sufficient need for the evidence they seek. Id. at 15.

B. The Tribes' Argument

The Tribes argue this court should apply a five-factor test imported from the deliberative process privilege context to determine when the state legislative privilege must yield to a need for evidence. (Doc. 41, p. 3). Those factors are (a) the relevance of the evidence sought to be protected, (b) the availability of other evidence, (c) the seriousness of the litigation and the issues involved, (d) the role of government in the litigation, and (e) the purposes of the privilege. Bethune-Hill, 114 F. Supp. 3d at 338. Several federal district courts, predominantly in redistricting cases, have applied this five-factor balancing test, or a similar test, to assess whether a need for evidence overrides the state legislative privilege. See S.C. State Conf. of NAACP v. McMaster, 584 F. Supp. 3d 152, 163 (D.S.C. 2022); League of Women Voters, 340 F.R.D. at 456; Benisek v. Lamone, 263 F. Supp. 3d 551, 553 (D. Md. 2017), aff'd, 241 F. Supp. 3d 566 (D. Md. 2017); Bethune-Hill, 114 F. Supp. 3d at 332; Doe v. Nebraska, 788 F. Supp. 2d 975, 985 (D. Neb. 2011); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003), aff'd, 293 F. Supp. 2d 302 (S.D.N.Y. 2003).

In South Carolina State Conference of NAACP, for example, the plaintiffs alleged South Carolina redistricting legislation violated the Fourteenth Amendment and brought a motion to compel discovery and depositions from several state legislators. 584 F. Supp. at 157. The state legislators asserted legislative privilege. The court interpreted Gillock as rejecting the proposition that a state legislator's evidentiary privilege is "co-extensive" with their immunity from

liability. Id. at 161. Rather, the court determined the "privilege is not without limit," rejected a sharp line between criminal and civil cases, and determined that when "constitutionally rooted public rights are at stake, legislative evidentiary privileges must yield." Id. at 162. The court applied the five-factor test to "balance the substantial interests at issue" and concluded the plaintiffs' need for evidence overcame the privilege and permitted discovery, including depositions of state legislators. Id. at 163, 166.

In this court's opinion, it is appropriate to apply the five-factor test the Tribes propose. Nearly all cases to consider the issue, including those cited by the Assembly, recognize the state legislative privilege as qualified. See e.g., Florida, 886 F. Supp. 2d at 1303 ("To be sure, a state legislator's privilege is qualified."). And this court does not read Gillock's rejection of the state legislative privilege in federal criminal proceedings as establishing an absolute privilege in civil cases.[7] Gillock does not address the contours of the state legislative privilege in civil cases. Rather, several courts have looked to the deliberative process privilege, which applies to the executive branch, to inform the contours of the state legislative privilege. See In re Grand Jury, 821 F.2d at 959 n.8 ("[S]ubpoenas directed

[7] If anything, Gillock cuts against recognition of a strong state legislative privilege. See In re Grand Jury, 821 F.2d at 958 (holding the state legislative privilege is similar to the deliberative process privilege); see also Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011) ("Since Gillock, a number of courts have rejected the notion that the common law immunity of state legislators gives rise to a general evidentiary privilege.").

at executive agencies arouse less direct concerns about separation of powers than subpoenas directed . . . at Congress . . . and therefore provide a more useful model for a privilege mediating federal/state relations."); see also Doe, 788 F. Supp. 2d at 984 (collecting cases).

This court will balance, as with other qualified privileges, "the interests of the party seeking the evidence against the interests of the individual claiming the privilege." Favors v. Cuomo, 285 F.R.D. 187, 209 (E.D.N.Y. 2012). In applying the five-factor test, the court recognizes only in an "extraordinary instance" will testimony of a state legislator not "be barred by privilege." See Arlington Heights, 429 U.S. at 268.

5. Application of the Five Factor Balancing Test

The five-factors described above provide an "analytical framework to balance the substantial interests at issue." S.C. State Conf. of NAACP, 584 F. Supp. 3d at 163. If the balance of interests weighs in favor of non-disclosure, the state legislative privilege shields Representatives Devlin and Jones from providing testimony about their legislative acts and the subpoenas will be quashed. If, on the other hand, the balance of interests weighs in favor of disclosure, the Tribes' need for evidence outweighs the state legislative privilege and the court will decline to quash the subpoenas.

A. Relevance of the Evidence Sought

The Assembly argues that testimony from a single legislator does not shed light on whether the legislation at issue was passed with a discriminatory purpose.

(Doc. 38, p. 13). Further, the Assembly argues, even if such testimony would be relevant, the representatives subpoenaed in these cases have no relevant testimony to provide. Id. The Tribes contend "information related to the purpose and circumstances of the plan's adoption are . . . relevant to the totality of circumstance factors courts consider in Section 2 litigation." (Doc. 41).

"[P]roof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence." See Bethune-Hill, 114 F. Supp. 3d at 339. Of course, "the motivations of individual legislators in supporting a particular law are not necessarily representative of those of the entire Legislature." S.C. State Conf. of NAACP, 584 F. Supp. 3d at 163. But that does not mean individual motivations "cannot constitute an important part of the case presented against, or in favor of, the districting plan." Bethune-Hill, 114 F. Supp. 3d at 340. Other courts to consider this issue in redistricting cases have determined similar evidence to be relevant. See League of Women Voters, 340 F.R.D. at 457. Further, Representative Jones's extensive testimony at the preliminary injunction hearing in Walen cuts against the notion that his testimony would now be irrelevant. This factor weighs in favor of disclosure.[8]

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[8] The Assembly argues the Tribes have not made a threshold showing of relevance under Rule 26. (Doc. 45, pp. 2-3). "The scope of permissible discovery is broader than the scope of admissibility." Kampfe v. Petsmart, Inc., 304 F.R.D. 554, 557 (N.D. Iowa 2015). "Discovery requests are typically deemed relevant if there is any possibility that the information sought is relevant to any issue in the case." Id. For the same reasons this factor weighs in favor of

B. Availability of Other Evidence

The Assembly points to publicly available evidence, including the "agendas, minutes, and video documentation" of the redistricting committee's meetings. (Doc. 38, p. 13 n.13). In addition to seeking testimony, the Tribes have subpoenaed Representatives Devlin and Jones for production of documents relating to the redistricting legislation. (Doc. 38-2). The Assembly indicates it has objected to that request but does not challenge it here. (Doc. 38, p. 7 n.3). The Tribes contend that while circumstantial evidence may be available, parties in a redistricting litigation "need not confine their proof to circumstantial evidence alone." (Doc. 41, p. 3).

In general, "the availability of alternate evidence will only supplement—not supplant—the evidence sought by the Plaintiffs." Bethune-Hill, 114 F. Supp. 3d at 341. The Assembly might produce the Tribes' requested documents without court involvement. The court is unaware of the extent of the discovery produced to date and thus unable to assess the other evidence available. This factor weighs in favor of neither disclosure nor non-disclosure.

C. Seriousness of the Litigation

"All litigation is serious. But . . . voting-rights litigation is especially serious." League of Women Voters, 340 F.R.D. at 457. "[T]he right to vote and the rights conferred by the Equal Protection Clause are of

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disclosure, the court finds the representatives' testimony meets the standard of Rule 26 relevancy.

cardinal importance." Page v. Va. State Bd. of Elections, 15 F. Supp. 3d 657, 667 (E.D. Va. 2014). Moreover, "[i]n redistricting cases, . . . the natural corrective mechanisms built into our republican system of government offer little check upon the very real threat of legislative self-entrenchment." See Bethune-Hill, 114 F. Supp. 3d at 337 (citation and internal quotation marks omitted). The court recognizes the Assembly cites cases that do not distinguish redistricting claims from other federal claims. See e.g., Florida, 886 F. Supp. 2d at 1304 ("[T]here is nothing unique about the issues of legislative purpose and privilege in Voting Rights Act cases."). But other courts to consider the matter have found the claims at issue in redistricting "counsel in favor of allowing discovery." Favors, 285 F.R.D. 187, 219; see also S.C. State Conf. of NAACP, 584 F. Supp. 3d at 165. This court agrees and therefore finds this factor weighs in favor of disclosure.

D. The Role of the Legislature

This factor considers whether the legislature as an entity, rather than individual legislators, is the focus of the litigation. See Bethune-Hill, 114 F. Supp. 3d at 341. If so, then an individual legislator's "immunity is not under threat, [and] application of the legislative privilege may be tempered." Id. "This is not a case where individual legislators are targeted by a private plaintiff seeking damages." S.C. State Conf. of NAACP, 584 F. Supp. 3d at 165. Because no individual legislator is threatened with individual liability in this case, this factors weighs in favor of disclosure.

E. Purpose of the Privilege

The purpose of the state legislative privilege is to ensure litigation does not "delay and disrupt the legislative function." Eastland, 421 U.S. at 502. The court recognizes a subpoena for a deposition may be more burdensome than a subpoena for documents, and the threat of disruption to the legislative process is "not one to be taken lightly." See Bethune-Hill, 114 F. Supp. 3d at 342. "[T]he need to encourage frank and honest discussion among lawmakers favors nondisclosure." League of Women Voters, 340 F.R.D. at 458 (internal quotation marks and citation omitted). Accordingly, this factor weighs against disclosure.

F. Balancing of the Factors

Having considered each of the five factors, the court finds the Tribes' need for evidence outweighs the Assembly's interest of non-disclosure. The court will therefore decline to quash the subpoenas on the basis of the state legislative privilege.

6. Waiver of Representative Jones's Legislative Privilege

The Walen plaintiffs argue Representative Jones waived any legislative privilege by testifying about his legislative activities at the preliminary injunction hearing. (Walen, Doc. 58, p. 4). "[T]he legislative privilege can be waived when the parties holding the privilege share their communications with an outsider." Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *10. "[T]he waiver of the privilege need not be . . . explicit and unequivocal, and may occur either in the course of the litigation when a party testifies as

to otherwise privileged matters, or when purportedly privileged communications are shared with outsiders." Favors, 285 F.R.D. 187, 211-12.

During the preliminary injunction hearing, Representative Jones testified at length about the development of the challenged legislation. (Walen, Doc. 58-1). He testified about his motivations, his conversations with other legislators, staff, outside advisors, and attorneys, and the work of the redistricting committee. See id. Thus, even if Representative Jones would have been protected by the state legislative privilege, the privilege was waived by his testimony at the preliminary injunction hearing.

7. Attorney-Client Privilege

The Assembly also asserts the Tribes' subpoena should be quashed because the Tribes' purpose is to inquire about conversations between the Assembly's members and Legislative Council staff attorneys.[9] (Doc. 38, p. 16).

The attorney-client privilege protects "confidential communications between a client and her attorney made for the purpose of facilitating the rendition of legal services to the client." United States v. Yielding,

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[9] North Dakota's Legislative Council performs a wide variety of duties for the Assembly, including research, bill drafting, and providing legal advice, and its staff consists of attorneys and non-attorneys. See N.D. Legislative Branch, https://www.ndlegis.gov/legislative-council (last visited Dec. 22, 2022). Depending on the nature of the communication, conversations between legislators and Legislative Council staff attorneys who provide legal advice could be protected by the attorney-client privilege

657 F.3d 688, 707 (8th Cir. 2011). This includes communications between government officials and government attorneys. See United States v. Jicarilla Apache Nation, 564 U.S. 162, 169 (2011) ("The objectives of the attorney-client privilege apply to governmental clients."). Applying the attorney-client privilege to government officials encourages "governmental attorneys to respond with frank, candid advice." North Dakota v. United States, 64 F. Supp. 3d 1314, 1342 (D.N.D. 2014). That said, to be protected by the privilege, the communications must be for legal, as opposed to policy, advice. See e.g., In re Cnty. of Erie, 473 F.3d 413, 420 (2d Cir. 2007).

The record does not demonstrate that the Tribes will seek information about conversations between legislators and Legislative Council staff attorneys during the deposition. The court will therefore decline to quash the Tribes' subpoenas on this basis.

The Walen plaintiffs also contend Representative Jones waived his attorney-client privilege by testifying about his conversations with outside redistricting counsel and a Legislative Council staff attorney. (See Walen, Doc. 58-1, pp. 31, 33, 36). It appears most of these conversations, which occurred during public redistricting committee meetings, would not be privileged because they were not confidential. See id. at 31, 33. In his testimony, Representative Jones mentioned a private conversation with a Legislative Council staff attorney but did not provide enough to detail to allow the court to evaluate whether the communication would be protected under the attorney-client privilege. See id. at 36. Accordingly, the court

cannot determine whether Representative Jones has waived the attorney-client privilege as to that communication.

Conclusion

Representatives Devlin and Jones are, in general, protected from providing compelled testimony about their legislative acts by a state legislative privilege. This privilege is recognized under Rule 501 and applied as a matter of federal common law. The privilege is qualified, not absolute, meaning it must yield when outweighed by countervailing interests. Applying a five-factor balancing test, the court finds the representatives' state legislative privilege is outweighed by the Tribes' need for evidence. Even if the representatives were protected by the privilege, Representative Jones waived any privilege by providing extensive testimony at the preliminary injunction hearing in Walen. For those reasons, the motions to quash the Tribes' subpoenas are **DENIED**.

IT IS SO ORDERED.

Dated this 22nd day of December, 2022.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Case No. 3:22-cv-22

[Filed February 10, 2023]

Turtle Mountain Band of Chippewa Indians, et al.,	)
Plaintiffs,	)
vs.	)
Michael Howe, in his Official Capacity as Secretary of State of North Dakota, et al.,	)
Defendants.	)

ORDER

The Turtle Mountain Band of Chippewa Indians and other plaintiffs (hereafter Turtle Mountain) subpoenaed six current and former members of North Dakota's Legislative Assembly and a former Legislative Council staff attorney to produce documents about

recent redistricting legislation.[1] The subpoenaed legislators, each of whom was identified by defendants as possessing relevant information, objected on several grounds. Turtle Mountain now moves to enforce the subpoenas. (Doc. 47). The six legislators (hereafter Respondents) filed a brief opposing the motion. (Doc. 50). The subpoenaed attorney has not responded to the motion, though Respondents' brief includes argument on her behalf. Id. at 17-19.

Background

On November 10, 2021, the North Dakota Legislative Assembly passed House Bill No. 1504, which altered the state's legislative districts. H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021). Governor Doug Burgum signed the bill into law the following day. Id. Before the redistricting legislation, voters in North Dakota's 47 legislative districts elected one state senator and two representatives at-large. The redistricting legislation retained that procedure for 45 of the 47 districts. (Doc. 1, p. 2).

Districts 4 and 9 are now different from the other 45 districts. Those two districts were subdivided into single-representative districts, denominated House Districts 4A, 4B, 9A, and 9B. Voters in each of these subdivided districts now elect one senator and one representative, instead of one senator and two representatives at-large. House District 4A traces the boundaries of the Fort Berthold Reservation of the

[1] The subpoenaed attorney no longer works with the Legislative Council but is now Deputy Attorney General. Five of the six subpoenaed legislators are no longer serving in the legislature.

Mandan, Hidatsa, and Arikara Nation. House District 9A encompasses most of the Turtle Mountain Indian Reservation, with the remainder of that reservation in House District 9B. The Spirit Lake Nation, which is located near the Turtle Mountain Reservation, is in undivided District 15. Id.

In February 2022, Turtle Mountain filed a complaint alleging violation of the Voting Rights Act. Turtle Mountain asserts the redistricting plan simultaneously "packs" some Native American voters in subdivided districts and "cracks" others across divided and undivided districts. Id. at 30.

In September 2022, Turtle Mountain served third-party document subpoenas on three state senators and three state representatives who had served in the Legislative Assembly when the redistricting plan was adopted and on a former Legislative Council staff attorney. (Doc. 47-8). Initially, Respondents objected on the basis the discovery sought was publicly available, unduly burdensome, and was protected by the deliberative process privilege, state legislative privilege, and the attorney-client privilege. (Doc. 47-2).

In a December 1, 2022 supplemental objection, Respondents produced results of an initial search of their official email accounts, Microsoft Teams accounts, and personal phones for certain keywords like "redistricting," "race," and "Voting Rights Act."[2] The

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[2] Microsoft Teams is an instant messaging application for organizations. Microsoft, What is Microsoft Teams? https://support.microsoft.com/en-us/topic/whatis- microsoft-teams-3de4d369-0167-8def-b93b-0eb5286d7a29 (last visited Feb. 8, 2023).

results of the searches are shown on a table indicating the total number of keyword "hits" for each Respondent's communications.[3] Each communication containing a keyword was then classified into one of three categories: (1) communications between the Respondent and another legislator, (2) communications between the Respondent and Legislative Council staff, and (3) communications between the Respondent and an individual who was neither a legislator nor a Legislative Council staff member. The court will refer to an individual who is neither a legislator nor a Legislative Council staff member as a "third party."

There may be multiple keyword "hits" in a single communication. To take one example, the search of a subpoenaed state senator's email found 181 "hits" for the keyword "redistricting" across ten communications between the senator and another legislator, seven communications between the senator and Legislative Council staff, and eight communications between the senator and a third party. (Doc. 47-4, p. 10). The court calculated, across all subpoenaed individuals, 64,562 total keyword hits across at most 2,655 communications, with at most 857 communications between a Respondent and a legislator, 1,217

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[3] Respondents' counsel sent a list of keywords to the Respondents so they could conduct an initial search of their personal phones. Respondents' counsel selected the search terms without input from Turtle Mountain, but Turtle Mountain does not challenge the selection of those terms. In their supplemental objection, Respondents produced the results as to four of the seven individuals and stated that "the search results for the other remaining subpoenaed individuals' personal phones will be relayed as they are received." (Doc. 47-4, p. 4).

communications between a Respondent and Legislative Council staff, and 558 communications between a Respondent and a third party. (Doc. 47-4; Doc. 50-1).[4]

On December 6, 2022, after Respondents relayed their objections to Turtle Mountain, the parties conferred.[5] Unable to resolve the dispute in conferral, Turtle Mountain moved to enforce its subpoenas on December 22, 2022. (Doc. 47). Respondents filed a response, (Doc. 50), and Turtle Mountain filed a reply, (Doc. 53).[6]

Law and Discussion

This is the second subpoena compliance dispute raised in this litigation. In November 2022, Turtle Mountain subpoenaed former Representative William

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[4] The court's calculation differs from Turtle Mountain's, (see Doc. 47, p. 4), because the court's calculation includes additional results included in an exhibit to Respondents' responsive brief, while Turtle Mountain's calculations included only Respondents' initial search results, (see Doc. 50-1, p. 2).

[5] Civil Local Rule 37.1 did not require an informal conference with the court before Turtle Mountain moved to enforce its subpoenas because the subpoenas were directed to third parties. Federal Rule of Civil Procedure 45(d)(2)(B)(ii) requires only that the moving party provide notice to the subpoenaed party.

[6] Respondents' brief refers to the court as "magistrate." The correct title is magistrate judge. More than thirty years ago, Congress changed the title "United States Magistrate" to "United States Magistrate Judge." Judicial Improvements Act of 1990, 104 Stat. 5089, Pub. L. No. 101-650, §321 (1990) ("After the enactment of this Act, each United States Magistrate . . . shall be known as a United States Magistrate Judge.").

Devlin—one of the current respondents—to testify at a deposition. Representative Devlin and the Legislative Assembly moved to quash the subpoena on the basis of the state legislative privilege.[7] In a December 22, 2022 order, the court recognized a qualified state legislative privilege. But, applying a five-factor balancing test, the court determined Turtle Mountain's need for evidence outweighed Representative Devlin's state legislative privilege and therefore declined to quash the subpoena. (Doc. 48). Representative Devlin and the Legislative Assembly appealed the December 22 order; that appeal is pending before the presiding judge. (Doc. 49).

The primary dispute addressed in the December 22 order was whether the legislative privilege could be overcome by Turtle Mountain's need for evidence. (Doc. 48, p. 4). Both parties had agreed Representative Devlin's testimony was subject to the state legislative privilege; the issue was the extent to which the privilege was qualified rather than absolute. Id.

This dispute is different in an important respect; it concerns the scope—not the strength—of the state legislative privilege. Turtle Mountain emphasizes it "do[es] not seek to overcome Respondents' assertion of legislative privilege." (Doc. 53, p. 3). Rather, Turtle Mountain requests Respondents produce only documents where "legislative privilege does not exist or has been waived." Id. at 3. Turtle Mountain contends

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[7] Respondents' brief was filed by the same law firm that represented the Legislative Assembly in the earlier dispute, but the brief is not identified as filed on behalf of the Legislative Assembly.

the state legislative privilege does not protect communications between a subpoenaed individual and a third party. Turtle Mountain also argues former Representative Terry Jones—one of the current respondents—waived his state legislative privilege by testifying at a preliminary injunction hearing in another case concerning the redistricting legislation and thus his communications cannot be withheld on the basis of privilege. Id. at 3-6. As to communications where privilege may exist and has not been waived, Turtle Mountain requests Respondents produce a privilege log describing withheld documents. Id. at 10-11.

Respondents argue three circuit courts—the First, Ninth, and Eleventh—have held "legislative privilege bars the exact type of discovery the Plaintiffs seek." (Doc. 50, p. 4). Respondents further argue the December 22 order conflicts with the Eighth Circuit policy of giving great weight and precedential value to reasoned decisions of other circuits. Id. This court of course recognizes the importance of giving weight and precedential value to decisions of other circuits. But, as discussed in the December 22 order, none of the three circuit court decisions Respondents cite supports their assertion that the legislative privilege bars any discovery from state legislators in civil cases. And close reading of each of the three cases shows that none involved the "exact type of discovery" Turtle Mountain now requests.

In American Trucking Association, Inc. v. Alviti, the First Circuit recognized a qualified state legislative privilege, subject to an exception when "important

federal interests are at stake." 14 F. 4th 76, 87 (1st Cir. 2021). The discovery sought in American Trucking was depositions of state legislators on the theory that a state law was passed with a purpose of discriminating against out-of-state businesses. The First Circuit concluded no important federal interest was at issue. Id. at 88. Here, an important federal interest—the right to vote without racial discrimination—is at issue, and the discovery Turtle Mountain seeks is limited to documents not covered by legislative privilege or as to which any legislative privilege has been waived.

The Ninth Circuit case which Respondents cite challenged a redistricting plan alleging racial considerations predominated in the redistricting process. Lee v. City of L.A., 908 F.3d 1175 (9th Cir. 2018). Though recognizing there are circumstances in which a legislative privilege must yield to a decision-maker's testimony, the plaintiffs' request for depositions of city officials was denied because of inadequacy of the factual record. Id. at 1188. In the present case, the factual record is adequate to consider Turtle Mountain's motion.

In re Hubbard, like American Trucking, recognized a qualified state legislative privilege but concluded no important federal interest was at stake in the litigation. 803 F.3d 1298, 1313 (11th Cir. 2015). And, unlike the issue presented in this case, the Hubbard court found it was apparent from the face of the document subpoenas that none of the requested information could have been outside the legislative privilege.

Because Respondents are non-parties, Turtle Mountain moves to compel subpoena compliance under Federal Rule of Civil Procedure 45(d)(2)(B)(i). That rule provides "the serving party may move the court for the district where compliance is required for an order compelling production." But, under Rule 45(d)(3)(A), a court "must quash or modify a subpoena" that "requires disclosure of privileged or other protected matter" or "subjects a person to undue burden." "A person withholding subpoenaed information under a claim that it is privileged" must "expressly make the claim" and "describe the nature of the withheld documents . . . in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." Fed. R. Civ. P. 45(e)(2)(A).

1. Communications with Third Parties

The court first considers whether Respondents must produce communications between themselves and third parties. In their objection, Respondents asserted the subpoenaed communications were protected by the state legislative privilege, deliberative process privilege, and attorney-client privilege.[8] (Doc. 47-4,

[8] Respondents asserted the deliberative process privilege in their initial and supplemental objections, but that privilege is unavailable to legislators. See Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011). ("[T]he deliberative process privilege applies to the executive branch, not the legislature."). Some courts, including one cited by Respondents in their objection, characterize the state legislative privilege as a type of "deliberative process privilege." See Doe v. Neb., 788 F. Supp. 2d 975, 984 (D. Neb. 2011) ("[T]he only evidentiary legislative privilege regarding the production of documents available to state legislators . . . is a very

p. 2). Turtle Mountain argues communications between a Respondent and a third party must be produced "because no reasonable claim of privilege exists with respect to communications that involve or were shared with third parties." (Doc. 53, p. 2).

A. State Legislative Privilege

The state legislative privilege protects against disclosure of "confidential documents concerning intimate legislative activities." Comm. for a Fair & Balanced Map, v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *9 (N.D. Ill. Oct. 12, 2011). "[T]he privilege applies to any documents or information that contains or involves opinions, motives, recommendations or advice about legislative decisions between legislators or between legislators and their staff." Jackson Mun. Airport Auth. v. Bryant, No. 3:16-CV-246-CWR-FKB, 2017 WL 6520967, at *7 (S.D. Miss. Dec. 19, 2017). "The privilege therefore also applies to any information that would reveal such opinions and motives." Hall v. Louisiana, No. CIV.A. 12-657-BAJ, 2014 WL 1652791, at *10 (M.D. La. Apr. 23, 2014).

"As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider." Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *9. Even if the subject matter of a communication between a

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narrow and qualified one, sometimes referred to as a 'deliberative process privilege.'"). These courts use "deliberative process privilege" rather than "legislative privilege." See id. But regardless of label, there is only one such privilege potentially available—not two.

legislator and a third party would otherwise fall within the scope of the state legislative privilege, the legislator's communication with the third party results in waiver of the privilege. See Mich. State A. Philip Randolph Inst. v. Johnson, No. 16-CV-11844, 2018 WL 1465767, at *7 (E.D. Mich. Jan. 4, 2018). Thus, communications between legislators and third parties are generally not protected by the state legislative privilege. Id.

Respondents argue the state legislative privilege is an absolute "bar to conducting discovery on state lawmakers" in civil cases. (Doc. 50, p. 4). In support, they cites cases where circuit courts quashed subpoenas that sought information from state lawmakers. See Am. Trucking, 14 F.4th at 86; Lee, 908 F.3d at 1187; In Re Hubbard, 803 F.3d at 1311. But none of those cases addressed the scope of the state legislative privilege because the parties agreed the subpoenas at issue sought only privileged information, and none addressed communications with third parties. In In re Hubbard, the court acknowledged "[n]one of the relevant information sought in this case could have been outside of the legislative privilege." 803 F.3d at 1311. And in American Trucking, "no party dispute[d] that the subpoenas issued . . . sought evidence of the [s]tate [o]fficials' legislative acts and underlying motives." 14 F.4th at 87. Here, Turtle Mountain contends Respondents are refusing to produce documents that are not within the scope of the legislative privilege.

In sum, the state legislative privilege protects certain communications—not all state legislators'

communications concerning work of the Legislative Assembly. Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 344 (E.D. Va. 2015) ("[T]he proponent of a privilege must demonstrate specific facts showing that the communications were privileged."). And the state legislative privilege does not protect information a legislator discloses to a third party. Thus, Respondents cannot withhold information on the basis of the state legislative privilege where a communication has been disclosed to a third party.

B. Attorney-Client Privilege

Respondents also assert Turtle Mountain's subpoenas seek documents protected by the attorney-client privilege. (Doc. 50, p. 18). The attorney-client privilege protects "confidential communications between a client and her attorney made for the purpose of facilitating the rendition of legal services to the client." United States v. Yielding, 657 F.3d 688, 707 (8th Cir. 2011). This includes communications between government officials and government attorneys. See United States v. Jicarilla Apache Nation, 564 U.S. 162, 169 (2011) ("The objectives of the attorney-client privilege apply to governmental clients.").

To be protected by the attorney-client privilege a communication must be (1) between an attorney and client, (2) confidential, and (3) for the purposes of obtaining legal services or advice. See e.g., In re Cnty. of Erie, 473 F.3d 413, 419 (2d Cir. 2007). When the client is an organization, the communications may be distributed to multiple individuals within the organization. But in order to maintain confidentiality, distribution of a communication must be limited to

those employees who "need to know its contents" and the subject matter of the communication must be "within the scope of the employee's . . . duties." See Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977),

Communications between a Legislative Council staff attorney and a third party (an individual who is neither a legislator nor the Legislative Council staff member) would likely not be privileged for lack confidentiality. Respondents offer no argument that communications between a Legislative Council staff attorney and a third party are protected by the attorney-client privilege.

C. Respondents' Obligations Regarding Third Party Communications

Respondents' tables show approximately 581 communications between them and a third party. They are directed to review their communications with third parties in light of the principals articulated above and produce all communications between Respondents and third parties.

2. Representative Jones' Waiver of the State Legislative Privilege

Turtle Mountain argues Representative Jones waived any legislative privilege by testifying about his legislative work during the preliminary injunction hearing in Walen v. Burgum, 1:22-cv-31 (D.N.D. Feb. 16, 2022). Turtle Mountain argues Representative Jones cannot "waive the privilege by revealing only that information he deems beneficial to his cause and then refuse to produce documents and communications

and preclude the parties from probing his public, non-legislative statements on those matters." (Doc. 47, pp. 10-11). Respondents "do not concede that Representative Jones waived his legislative privilege." (Doc. 50, p. 17 n.6).

"[T]he legislative privilege can be waived when the parties holding the privilege share their communications with an outsider." Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *10. "[T]he waiver of the privilege need not be . . . explicit and unequivocal, and may occur either in the course of the litigation when a party testifies as to otherwise privileged matters, or when purportedly privileged communications are shared with outsiders." Favors v. Cuomo, 285 F.R.D. 187, 211-12 (E.D.N.Y. 2012).

During the preliminary injunction hearing, Representative Jones testified at length about the development of the challenged legislation. (Doc. 47-5). He testified about his motivations, his conversations with other legislators, staff, outside advisors, and attorneys, and the work of the redistricting committee. Id. During depositions, the Walen plaintiffs testified they spoke to Representative Jones about the redistricting process. (Doc. 47-6, p. 9; Doc. 47-7, p. 10). For these reasons, this court reiterates the conclusion made in the December 22 order that Representative Jones waived his state legislative privilege by testifying at the Walen preliminary injunction hearing. (Doc. 48, p. 20).

Respondents cite Cano v. Davis, 193 F. Supp.2d 1177 (C.D. Cal. 2002), to argue Representative Jones cannot be compelled to produce communications as to

"the legislative acts of legislators who have invoked the privilege or to those staffers or consultants who are protected by the privilege." (Doc. 50, p. 17). A three-judge panel in Cano held a legislator who waives their state legislative privilege

> may testify only to his own motivations, his opinion regarding the motivation of the body as a whole, the information on which the body acted, the body's knowledge of alternatives, and deviations from procedural or substantive rules typically employed. He may also testify to his own legislative acts and statements, but may not testify to the legislative acts of legislators who have invoked the privilege or to those of staffers or consultants who are protected by the privilege.

193 F. Supp. 2d at 1179. Turtle Mountain argues it seeks "precisely the type of information" permitted by the Cano court—information concerning Representative Jones' motivation, the information on which the legislature acted, Representative Jones' knowledge of alternatives, and deviations from procedural or substantive rules typically employed. (Doc. 53, p. 5).

Accordingly, Representative Jones may not withhold documents on the basis of his own state legislative privilege. At the time Turtle Mountain filed its reply brief, Respondents had not provided data on a keyword search of Representative Jones' personal phone. See id. at 6. That search must be conducted immediately if it has not yet been completed. To the extent Representative Jones withholds documents on

the basis of another legislator's state legislative privilege, he must produce a privilege log describing the documents in a manner that allows plaintiffs to assess his claims of privilege as required by Rule 45(e)(2)(A).

3. Production of Privilege Logs

The court next addresses communications, like those between a respondent and another legislator or a Legislative Council staff member, where privilege may justify non-disclosure. Turtle Mountain states it "do[es] not seek to overcome Respondents' assertion of legislative privilege." Id. at 3. Rather, Turtle Mountain requests that Respondents "produce a privilege log containing individualized descriptions of each responsive document Respondents are withholding on the basis of privilege."[9] Id. at 11.

Rule 45(e)(2)(A) requires a non-party withholding documents on the basis of privilege to "expressly make the claim" and "describe the nature of the documents" that are withheld. In general, "the privilege must be proved for each document withheld as privileged." Bethune-Hill, 114 F. Supp. 3d at 344. Thus, to comply with Rule 45(e)(2), a non-party will often produce a privilege log describing each document withheld and the justification for the assertion of privilege. See Tx.

[9] Elsewhere in its brief, Turtle Mountain argues Respondents should produce a privilege log for documents withheld only on the basis of the attorney-client privilege and deliberative process privilege. (Doc. 47, p. 11). It appears that reference to deliberative process privilege is intended to refer to the state legislative privilege.

Brine Co., LLC & Occidental Chem. Corp., 879 F.3d 1224, 1229 (10th Cir. 2018).

That said, Rule 45(e)(2)(A) does not always require a document-by-document invocation of privilege. See In re Imperial Corp. of Am., 174 F.R.D. 475, 477 (S.D. Cal. 1997) ("[A] privilege log is one of a number of ways in which a party may sufficiently establish the privilege."). In some instances, document-by-document invocation of privilege may be unduly burdensome or inappropriate given the nature of the withheld documents. Id.

Respondents argue Turtle Mountain's request for a privilege log is inappropriate given the nature of the withheld documents. (Doc. 50 p. 16). In support of their argument, Respondents cite two Eleventh Circuit cases—In Re Hubbard and Jordan v. Commissioner—where the court determined a subpoenaed party was not required to produce a document-by-document privilege log.

In the case of In re Hubbard, an Alabama teachers' union subpoenaed members of the state legislature for documents related to legislation the union claimed was in retaliation for its members' exercise of their First Amendment rights. 803 F.3d at 1298. The Eleventh Circuit quashed the subpoenas on the basis of the state legislative privilege. In doing so, the Eleventh Circuit reversed a district judge who held the state lawmakers had waived their privilege by not, among other things, providing "a specific designation and description of the documents claimed to be privileged" and "precise and certain reasons for preserving" the confidentiality of

the documents.[10] Id. at 1308 (citing United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980)).

The Eleventh Circuit reversed the district judge, in part, because those requirements were "inappropriate given the circumstances." In re Hubbard, 803 F.3d at 1308. The Eleventh Circuit stated a "document-by-document invocation of the legislative privilege" was inappropriate because "[n]one of the relevant information sought in this case could have been outside of the legislative privilege." Id. at 1311. Thus, it was unnecessary for the state lawmakers to "specifically designate and describe which documents were covered by the legislative privilege, or to explain why the privilege applied to those documents." Id.

In Jordan v. Commissioner, the Eleventh Circuit upheld a district court's quashal of a subpoena served on the Georgia Department of Corrections by two Mississippi inmates. 947 F.3d 1322 (11th Cir. 2020). The subpoena had sought information regarding Georgia's lethal injection protocol. On appeal, the inmates argued the district court should have required the Georgia Department of Corrections to submit a privilege log before granting the motion to quash. The Eleventh Circuit stated a document-by-document

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[10] The district judge also held the state lawmakers were required to personally review the documents and raise privilege claims by affidavit. See In re Hubbard, 803 F.3d 1308 (citing United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980)). The Eleventh Circuit held those requirements were contrary to circuit precedent. Id. at 1309. Turtle Mountain does not request the subpoenaed individuals fulfill these requirements and thus this portion of Hubbard is not relevant to the current dispute.

privilege log was unnecessary because it was "apparent from the face of the subpoena" that the information sought was protected by the relevant statute. Id. at 1328 n.3. Further, the court stated that "the remainder of the information sought [was] either readily available to the public . . . or of limited relevance." Id.

Drawing on these cases, Respondents argue a privilege log is unnecessary because "the requested information falls within the scope of [the state legislative privilege] and the non-privileged information requested by a subpoena is readily available to the public or of limited relevance to [Turtle Mountain's] burden." (Doc. 50, p. 16). Thus, Respondents contend "[m]erely asserting legislative privilege through counsel by written response was the only requirement." Id.

Unlike in Hubbard and Jordan, Respondents' communications with third parties and Representative Jones' waiver of the state legislative privilege suggest Turtle Mountains' subpoenas seek information outside of the state legislative privilege and attorney-client privilege. Thus, Respondents' broad invocation of privilege has not sufficiently enabled Turtle Mountain to assess the privilege claim as required by Rule 45(e)(2)(A)(ii). The court will therefore direct Respondents to produce a privilege log sufficient to distinguish privileged from non-privileged documents.

4. Undue Burden Under Rule 45

Under Rule 45(d)(3)(A)(iv), a court "must quash or modify a subpoena" that "subjects a person to undue burden." The scope of discovery permitted under

Rule 45 is the same as that permitted under Federal Rule of Civil Procedure 26. Beinin v. Ctr. For Study of Popular Culture, No. C06-2298JW(RS), 2007 WL 832962, at *2 (N.D. Cal. Mar. 16, 2007). The court determines whether a subpoena causes an undue burden by considering, among other things, the "relevance of the information requested" and "the burden imposed." See Am. Broad. Cos., Inc. v. Aereo, Inc., No. 13-MC-0059, 2013 WL 5276124, at *7 (N.D. Iowa Sept. 17, 2013). "Discovery requests are typically deemed relevant if there is any possibility that the information sought is relevant to any issue in the case." Id.

Respondents argue "the subpoenaed information is not needed to prove the elements of [Turtle Mountain's] claims under the Voting Rights Act and the requested information lacks probative value in assessing the validity of a legislative act." (Doc. 50, p. 12). Turtle Mountain responds, "Under the totality of the circumstances test, communications demonstrating 'illicit motive' by one or more legislators would certainly be relevant and probative evidence of an ongoing history of voting-related discrimination, the extent to which voting is racially polarized, and the use of racial appeals in the political process." (Doc. 53, pp. 7-8).

In its December 22 order, this court found testimony of Representatives Jones and Devlin about the redistricting legislation met the Rule 26 standard for relevancy. (Doc. 48, p. 17 n.8). In doing so, this court joined other courts in finding such information relevant for discovery purposes. See League of United Latin Am.

Citizens v. Abbott, No. 21CV00259, 2022 WL 1570858, at *2 (W.D. Tex. May 18, 2022); League of Women Voters of Fla., Inc. v. Lee, 340 F.R.D. 446, 457 (N.D. Fla. 2021); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 102 (S.D.N.Y.), aff'd, 293 F. Supp. 2d 302 (S.D.N.Y. 2003). Though legislative intent is not central to Turtle Mountain's claims, such evidence may nonetheless be relevant. See Rodriguez, 280 F. Supp. 2d at 102 ("While evidence of discriminatory animus may not be an essential element of all of the plaintiffs' claims, it certainly is something that can be considered."). Accordingly, the court finds Turtle Mountain's subpoenas seek relevant information.

The court now turns to the potential burden imposed by Turtle Mountain's subpoenas. Turtle Mountain seeks documents from seven individuals. (See Doc. 47-8). As described above, Respondents' supplemental objection to Turtle Mountain's subpoenas includes the results of searches of individuals' official email accounts, instant messaging application, and personal phones for certain keywords like "redistricting," "race," and "Voting Rights Act." The table shows the total number of keyword "hits" for each individual's communications. The court calculated, across all subpoenaed individuals, 64,562 total keyword hits across at most 2,655 communications, with at most 857 communication between a subpoenaed individual and a legislator, 1,217 communications between a subpoenaed individual and Legislative Council staff, and 558 communications between a subpoenaed individual and a third party.

Respondents submitted an affidavit of a Legislative Council staff attorney that explained the burden of the initial search and the burden that full compliance with Turtle Mountain's subpoenas would impose on Legislative Council staff. (Doc. 52). The affiant states eight attorneys assisted in the initial keyword search and "[t]he combined time required to conduct the cursory keyword review averaged a full 8 hours per attorney." Id. at 2. If the Legislative Council is mandated to fully comply with Turtle Mountain's subpoenas, the affiant estimates it would take approximately "ten 8-hour days for eight attorneys" or "640 hours of Legislative Council's time." Id. The affiant also notes the Legislative Assembly is in session and Legislative Council staff, the primary drafters of bills and resolutions, had received, as of January 4, 2023, 748 drafting requests for the 2023 session. Id. at 3.

Respondents have not provided sufficient information to establish an undue burden. As Turtle Mountain notes, Respondents' initial keyword search does not appear to account for communications that contained more than one keyword. (Doc. 47, p. 4). For example, the court understands the sentence "the 2021 Redistricting Plan subdivides Senate District 9 into House Subdistrict 9A and 9B" would result in three keyword "hits" for the words "redistrict," "district," and "subdistrict," and thus be counted as three separate communications on Respondents' table.[11] See id. at 4 n.2. Moreover, some of the results of the initial

[11] Respondents do not address possible duplication in their supplemental objection or briefing.

keyword search appear unreliable. One subpoenaed state senator, for example, had thirty-two keyword "hits" for the phrase "Voting Rights Act." Yet apparently the phrase did not occur in any communication between the senator and another legislator, the senator and Legislative Council staff, or the senator and a third party. (See Doc. 47-4, p. 12). Additionally, the assertion that compliance with Turtle Mountain's subpoenas would require 640 hours of Legislative Council staff attorney time is not adequately explained. In the court's experience with electronic discovery disputes, it is likely IT staff could identify duplicate documents, and it appears many documents identified on the initial search are duplicative of each other. The court recognizes the demand the ongoing legislative session imposes on Legislative Council staff. But Respondents have not explained that Legislative Council staff attorneys, rather than Respondents' counsel and their staff, would need to review the documents at issue. Accordingly, the court finds the Respondents have not shown compliance with Turtle Mountain's subpoenas would result in an undue burden under Rule 45(d)(3)(A)(iv).

Conclusion

Trial of this case is scheduled to begin June 12, 2023, most discovery deadlines have passed, and thus discovery cannot be delayed any further. (Doc. 34; Doc. 40). Respondents are directed to produce their communications with third parties. Further, Representative Jones has waived his state legislative privilege and therefore any documents withheld on that basis must be produced. Any other documents withheld

on the basis of privilege, including documents Representative Jones may have withheld based on another legislator's state legislative privilege, must be adequately described on a privilege log.

Privilege log descriptions should include the general nature of the document, the identity of the author, the identities of all recipients, and the date on which the document was written. Accordingly, Turtle Mountain's motion to enforce its subpoenas, (Doc. 47), is **GRANTED**.

IT IS SO ORDERED.

Dated this 9th day of February, 2023.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Case No. 3:22-cv-22

[Filed March 14, 2023]

Turtle Mountain Band of Chippewa Indians, et al.,	)
Plaintiffs,	)
vs.	)
Alvin Jaeger, in his Official Capacity as Secretary of State of North Dakota, et al.,	)
Defendants.	)

ORDER

Representative William Devlin (a member of the North Dakota Legislative Assembly) and the North Dakota Legislative Assembly appeal an order of United States Magistrate Judge Alice R. Senechal denying a motion to quash subpoena. Doc. No. 49. Representative Devlin was subpoenaed to testify at a deposition but moved to quash (along with the Legislative Assembly), asserting that state legislative privilege barred his testimony. Judge Senechal denied the motion. For the

reasons below, the order denying the motion to quash is affirmed, and the appeal is denied.

I. BACKGROUND

This case arises from the redrawing of certain North Dakota legislative districts pursuant to the legislative redistricting plan in House Bill 1504. At issue here are legislative districts 9, which was subdivided into single-representative districts 9A and 9B, and 15. District 9A contains most of the Turtle Mountain Indian Reservation, with the remainder in district 9B. District 15 encompasses the Spirit Lake Nation. The Turtle Mountain plaintiffs assert a Section 2 violation of the Voting Rights Act. Doc. No. 1; Doc. No. 44.

In November of 2022, the Turtle Mountain plaintiffs subpoenaed Representative Devlin to testify at a deposition. They subpoenaed Representative Devlin because he served as chair of the redistricting committee when House Bill 1504 was passed. Doc. No. 38. Representative Devlin and the North Dakota Legislative Assembly (together, the "Assembly") moved to quash the subpoena. Doc. No. 37. As grounds to quash, the Assembly argued that the state legislative privilege is "an absolute bar to deposition testimony of local lawmakers" and is "qualified" only in that it does not apply to federal criminal proceedings, which does not apply here. For their part, the Turtle Mountain plaintiffs argued the state legislative privilege is not absolute and is more akin to the deliberative process privilege, which uses a five-factor test to balance the need for evidence against the legislative body's interest in non-disclosure.

After considering the parties' arguments, Judge Senechal denied the motion to quash. Doc. No. 48. She analyzed the relevant cases forming the basis of the state law legislative privilege and addressed (and distinguished) the many cases raised by the parties. Id. Judge Senechal concluded it was appropriate to apply the five-factor test. In weighing the factors, she determined the Turtle Mountain plaintiffs' need for the testimony outweighed the Assembly's interest of non-disclosure and declined to quash the subpoena based on the state law legislative privilege. Id.

II. LAW AND DISCUSSION

Under Federal Rule of Civil Procedure 72(a) and District of North Dakota Civil Local Rule 72.1(B), a magistrate judge is permitted to hear and determine non-dispositive matters in a civil case. Any party may appeal the determination to the district court judge assigned to the case who "must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); see also D.N.D. Civ. L. R. 72.1(D)(2). "A district court conducts an 'extremely deferential' review of a magistrate judge's ruling on a nondispositive issue." Carlson v. BNSF Ry. Co., No. 19-CV-1232, 2021 WL 3030644, at *1 (D. Minn. July 19, 2021). As such, a magistrate judge's decision will not be disturbed unless it is "clearly erroneous" or "contrary to law." See Fed. R. Civ. P. 72(a).

On appeal, the Assembly primarily challenges the choice and application of the five-factor test imported from the deliberative process privilege, and the

relevancy of the testimony under Federal Rule of Civil Procedure 26. Doc. No. 49.

A. The Choice and Application of the Five-Factor Test to State Legislative Privilege

After careful review of the case law and the parties' arguments, Judge Senechal's order is not clearly erroneous or contrary to law. First, as to the choice and application of the five-factor test to the state legislative privilege, neither the United States Supreme Court nor the Eighth Circuit Court of Appeals has directly addressed the contours and qualifications of the state legislative privilege. Having reviewed the decisions of the federal courts that have addressed the issue, the majority conclude, as Judge Senechal did here, that "the privilege is a qualified one in redistricting cases." See Bethune-Hill v. Va. State Bd. Of Elections, 114 F. Supp. 3d 323, 336-37 (collecting cases). That is because "[r]edistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege because judicial inquiry into legislative intent is specifically contemplated as part of the resolution of the core issue that such cases present." Id. at 337. From there, the question is the strength of the qualified privilege, and most courts that have reviewed qualified privilege challenges in redistricting cases have used the five-factor balancing test derived from the deliberative process privilege. Id. at 337-38 (collecting cases). In those cases, courts have explained that "whether the privilege should cover the factual bases of a legislative decision, protect the process of fact-finding, or extend in varying concentric

degrees to third parties are questions to be addressed within the qualified balancing analysis rather than with any kind of 'per se' rule." Id. at 339.

The qualified balancing analysis (five-factor test) is a better fit in this type of redistricting case, as opposed to the per se rule and absolute bar the Assembly advocates for. This case requires at least some judicial inquiry into the legislative intent and motivation of the Assembly. An absolute bar on the testimony of members of the Assembly makes little sense and could preclude resolution on the merits of the legal claim. Given the particular facts of this redistricting case, and the available case law, the Court cannot conclude that Judge Senechal's decision to use the five-factor test in assessing the Assembly's assertion of state law privilege is clearly erroneous or contrary to law.

The Court disagrees with the Assembly's argument that this result ignores the directives from the United States Supreme Court in Tenny v. Brandhove, 341 U.S. 367 (1951), Eastland v. U.S. Serviceman's Fund, 421 U.S. 491 (1975), and United States v. Gillock, 445 U.S. 360 (1980). Tenny and Eastland are factually distinguishable. In Tenny, the Supreme Court addressed the issue of whether certain defendants were acting in the sphere of legislative activity for the purposes of assessing civil liability (341 U.S. at 378-79), and Eastland involved the federal legislative privilege under the Speech and Debate Clause of the United States Constitution, which is not at issue here. Eastland, 421 U.S. at 501. Eastland also involved Congress issuing, not receiving, the subpoena. Id. Gillock is also distinguishable. In that case, the

Supreme Court limited the privilege granted to state legislators in federal criminal prosecutions. Gillock, 445 U.S. at 373.

Turning to the application of the five-factor test itself, the Court does not find Judge Senechal's application of the five-factor test to the facts of this case clearly erroneous or contrary to law. First, the testimony is relevant in assessing the Assembly's discriminatory intent (or lack thereof) and motivations presented against or in favor of the redistricting plan. Representative Devlin served as the chair of the redistricting committee. The second factor, availability of other evidence, is neutral, given the state of discovery and the record at this time. Third, because these cases concern voting rights litigation, the litigation is "especially serious" and weighs in favor of disclosure. League of Women Voters of Fla., Inc. v. Lee, 340 F.R.D. 446, 457 (N.D. Fla. 2021). Fourth, since this is not a case where individual legislators are threatened with individual liability, the role of the legislature factor weighs in favor of disclosure. Finally, the purpose of the privilege does weigh against disclosure. On balance, the five factors weigh in favor of allowing the Turtle Mountain plaintiffs to depose Representative Devlin, and Judge Senechal's conclusion that the Turtle Mountain plaintiffs need for evidence outweighs the Assembly's interest of non-disclosure is not clearly erroneous or contrary to law.

B. Motion to Quash and Federal Rule of Civil Procedure 26

The Assembly next argues that Judge Senechal erred generally in denying the motion to quash and

concluding that the testimony of Representative Devlin is relevant under Federal Rule of Civil Procedure 26. And even if relevant, the Assembly asserts Judge Senechal erred by not weighing the exceptions to relevance in Rule 26. Rule 26 states that "[e]ven if relevant, discovery is not permitted where no need is shown, or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information." Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 925 (8th Cir. 1999).

Judge Senechal addressed the relevancy issue as a part of assessing the relevance factor under the five-factor test. Moreover, the Court agrees the testimony is relevant because "proof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence" in redistricting cases. See Bethune-Hill, 114 F. Supp. 3d at 339. And, as noted above, the testimony of Representative Devlin, as chair of the redistricting committee, is relevant to the claim here. None of the exceptions in Rule 26 apply either. The Turtle Mountain plaintiffs have shown a need, compliance would not be unduly burdensome, and the harm to Representative Devlin and the Assembly does not outweigh the need of the plaintiffs in obtaining the testimony. Judge Senechal's conclusion as to relevancy under Rule 26 is not clearly erroneous or contrary to law.

III. CONCLUSION

The Court has carefully reviewed the order denying the motion to quash, the parties' filings, the applicable

law, and the entire record. Judge Senechal's order denying to the motion to quash the subpoena as to Representative Devlin is not clearly erroneous or contrary to law. The order (Doc. No. 48) is **AFFIRMED**, and the appeal (Doc. No. 49) is **DENIED**.

IT IS SO ORDERED.

Dated this 14th day of March, 2023.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Case No. 3:22-cv-22

[Filed March 14, 2023]

Turtle Mountain Band of Chippewa Indians, et al.,	)
Plaintiffs,	)
vs.	)
Alvin Jaeger, in his Official Capacity as Secretary of State of North Dakota, et al.,	)
Defendants.	)

ORDER

The North Dakota Legislative Assembly, Senators Ray Holmberg, Richard Wardner, and Nicole Poolman, Representatives Michael Nathe, William R. Devlin, and Terry Jones, and former Senior Counsel to the North Dakota Legislative Council Claire Ness (collectively, the "Assembly") appeal an order of United States Magistrate Judge Alice R. Senechal granting a motion to enforce third-party subpoenas. Doc. No. 64. The

Turtle Mountain plaintiffs subpoenaed the six current and former members of the Assembly, along with a former attorney for Legislative Council, to produce documents about the redistricting legislation at issue in this case. The Assembly objected, and the Turtle Mountain plaintiffs moved to enforce the subpoenas. Judge Senechal granted the motion. For the reasons below, the order granting the motion to enforce is affirmed, and the appeal is denied.

I. BACKGROUND

This is the second appeal of a discovery order in this case, and the Court will not repeat its summary of the issue and claims here. See Doc. No. 71 (summarizing the redistricting legislation and Voting Rights Act claim in this case). As relevant to this appeal, in September 2022, the Turtle Mountain plaintiffs served third-party document subpoenas on Senators Holmberg, Wardner, and Poolman, Representatives Nathe, Devlin, and Jones, and former Legislative Council attorney Ness. Doc. No. 47-8. These individuals were served because they served in the Assembly and on Legislative Council when the redistricting bill at issue was vetted and adopted. The Assembly raised several objections, including initially that the discovery was publicly available, the requests were unduly burdensome, and that discovery was protected by the deliberative process privilege, state legislative privilege, and the attorney-client privilege. For their part, the Turtle Mountain plaintiffs argued the document requests are limited to a small number of communications where state legislative privilege does not exist or was waived.

After considering the parties' arguments and filings, Judge Senechal granted the motion to enforce the subpoenas. Doc. No. 63. She analyzed the relevant cases and addressed (and distinguished) the cases raised by the parties. Id. She ordered the production of communications with third parties, determined Representative Jones waived his state legislative privilege and ordered the production of documents withheld on that basis, and ordered the Assembly to produce a privilege log as to any documents withheld based on privilege. Id.

II. LAW AND DISCUSSION

Under Federal Rule of Civil Procedure 72(a) and District of North Dakota Civil Local Rule 72.1(B), a magistrate judge is permitted to hear and determine non-dispositive matters in a civil case. Any party may appeal the determination to the district court judge assigned to the case who "must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); see also D.N.D. Civ. L. R. 72.1(D)(2). "A district court conducts an 'extremely deferential' review of a magistrate judge's ruling on a nondispositive issue." Carlson v. BNSF Ry. Co., No. 19-CV-1232, 2021 WL 3030644, at *1 (D. Minn. July 19, 2021). A magistrate judge's decision will not be disturbed unless it is "clearly erroneous" or "contrary to law." See Fed. R. Civ. P. 72(a).

On appeal, the Assembly raises two issues: (1) state legislative privilege bars the Assembly's compliance with the subpoena, and (2) the Assembly's compliance

is unduly burdensome under Federal Rule of Civil Procedure 45. Doc. No. 64.

A. State Legislative Privilege and Third Parties

After careful review of the case law and the parties' arguments, Judge Senechal's order is not clearly erroneous or contrary to law as it relates to the state legislative privilege and how the privilege applies to communications with third parties. The state legislative privilege is designed to protect against disclosure of "confidential documents concerning intimate legislative activities." Comm. for a Fair & Balanced Map v. Ill. State Bd. of Election, No. 11 C 5065, 2011 WL 4837508, at *9 (N.D. Ill. Oct. 12, 2011). "The privilege applies to any documents or information that contains or involves opinions, motives, recommendations or advice about legislative decisions between legislators or between legislators and their staff." Jackson Mun. Airport Auth. v. Bryant, No. 3:16-CV-246-CWR-FKB, 2017 WL 6520967, at *7 (S.D. Miss. Dec. 19, 2017). In a prior order in this case, the Court explained the contours and qualifications of the state legislative privilege in a redistricting case in the context of subpoenaing members of the Assembly for depositions. See Doc. No. 71. That order also rejects the notion that the state legislative privilege is an absolute bar to seeking discovery from legislators. Id. So, to the extent the Assembly persists in its argument that the state law privilege is an absolute bar to seeking discovery from legislators, the prior order resolves that issue.

This appeal also presents a slight twist on the state legislative privilege issue because the subject matter is a document subpoena seeking communications. But recall that the communications the Turtle Mountain plaintiffs are seeking are communications by the individual legislator(s) with third parties. These communications, if they exist, are not protected by the state legislative privilege because the communications are with third parties, not between members of the Assembly or between members of the Assembly and their staff. See Jackson, No. 3:16-CV-246-CWR-FKB, 2017 WL 6520967, at *7. Given that, Judge Senechal's conclusion that the Assembly cannot withhold information based on state legislative privilege where the communication was disclosed to a third party is not clearly erroneous or contrary to law.

B. Undue Burden and Federal Rule of Civil Procedure 45

The Assembly next argues that Judge Senechal erred in concluding that the subpoenas did not subject the Assembly to an undue burden. Doc. No. 64. Federal Rule of Civil Procedure 45(d)(3)(A)(iv) states a court "must quash or modify a subpoena that . . . subjects a person to undue burden." Several factors must be considered in assessing undue burden, including the "relevance of the information requested" and "the burden imposed." Am. Broad. Cos., Inc. v. Aereo, Inc., No. 13-MC-0059, 2013 WL 5276124, at *7 (N.D. Iowa Sept. 17, 2013). When (as here) non-parties are subpoenaed, the Court is "particularly mindful of Rule 45's undue burden and expense cautions." Id.

Consistent with this Court's order on the other discovery appeal in this case, the information sought by the Turtle Mountain plaintiffs is relevant. See Doc. No. 71. As to the burden imposed on the Assembly, the Court recognizes (as Judge Senechal did as well) that the subpoenas come with poor timing for the Assembly, as the North Dakota Legislative Assembly is currently in session. That said, the subpoenas were served in September of 2022, and the Assembly has identified at least some documents already, which cuts against there being an undue burden. And while not necessarily dispositive of the issue, what is also missing from the record is a simple estimate from the Assembly as to the number of documents at issue. For its part, the Assembly did provide an estimate of the total number of hours of time it would take to comply, but that number is contradicted by certain facts in the record, including that some documents have already been identified and that many documents are likely duplicative.

On these facts, the Court cannot say that Judge Senechal's conclusion that the Assembly's compliance with the subpoenas would not result in an undue burden under Federal Rule of Civil Procedure 45(d)(3)(A)(iv) is clearly erroneous or contrary to law. It is worth noting and keeping in mind that Judge Senechal's order required three actions: (1) disclosure of communications to third parties (because privilege cannot apply); (2) production of documents from Representative Jones (who waived state legislative

privilege[1]); and (3) production of a privilege log for any documents withheld based on privilege. None of those directives are extraordinary or unusual, nor do they require disclosure of any privileged documents. Again, given the facts here, Judge Senechal's conclusion on the undue burden of the subpoenas is not clearly erroneous or contrary to law.

III. CONCLUSION

The Court has carefully reviewed the order granting the motion to enforce subpoenas, the parties' filings, the applicable law, and the entire record. Judge Senechal's order is not clearly erroneous or contrary to law. The order (Doc. No. 63) is **AFFIRMED**, and the appeal (Doc. No. 64) is **DENIED**. Given this order, the Court **FINDS AS MOOT** the related motion to expedite discovery appeals (Doc. No. 67).

IT IS SO ORDERED.

Dated this 14th day of March, 2023.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

[1] The Assembly did not raise this issue in this appeal. Nonetheless, Representative Jones's waiver of state legislative privilege was squarely addressed by the three-judge panel in Walen, et al. v. Burgum, et al., Case No. 1:22-cv-31. Doc. No. 110, Case No. 1:22-cv-31.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 23-1600

[Filed September 6, 2023]

In re: North Dakota Legislative Assembly, et al. Petitioners	)

Appeal from U.S. District Court for the District of North Dakota - Eastern

(3:22-cv-00022-PDW)

ORDER

The petition for rehearing *en banc* is denied. The petition for rehearing by the panel is also denied.

Judge Kelly would grant the petition for rehearing *en banc*. Judge Erickson did not participate in the consideration or decision of this matter.

September 06, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

File No. 3:22-cv-00022-PDW-ARS

[Filed June 14, 2023]

Turtle Mountain Band of Chippewa Indians, et al.,	)
Plaintiffs,	)
vs.	)
Michael Howe, in his Official Capacity as Secretary of State of the State of North Dakota,	)
Defendant.	)

TRANSCRIPT OF BENCH TRIAL
Volume III
Pages 1 - 206

Taken at
United States Courthouse
Fargo, North Dakota
June 14, 2023

BEFORE THE HONORABLE PETER D. WELTE
-- UNITED STATES DISTRICT COURT JUDGE --

Ronda L. Colby, RPR, CRR, RMR
U.S. District Court Reporter
220 East Rosser Avenue
Bismarck, ND 58501
701-530-2309

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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[*** Index Omitted in this Appendix ***]

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(The above-entitled matter came before the Court, the Honorable Peter D. Welte, United States District Court Judge, presiding, commencing at 9:00 a.m., Wednesday, June 14, 2023, in the United States Courthouse, Fargo, North Dakota. The following proceedings were had and made of record in open court with the parties present:)

THE COURT: Okay. We are on the record, and we're back in trial here in Turtle Mountain v. Howe.

The record will reflect that it is Wednesday, the 14th of June. And we are ready to commence with the next witness of the plaintiffs.

I had instructed the parties to be here at 8:45 and ready to roll on what I'm going to call the proffer request of the plaintiffs and -- the offer of proof request of the plaintiffs. And then I changed my mind and decided that we would just commence at 9:00.

However, I have reviewed the plaintiffs' motion for leave to make the offer of proof, and I have reviewed the defendant's response, which was filed yesterday in this matter as well.

Mr. Sells, would you be the plaintiffs' counsel who would be speaking to this issue?

MR. SELLS: Yes, Your Honor.

THE COURT: Would you care to come to the microphone and address the issue, please? And by "address it," I mean go

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ahead and speak to your motion and make any argument that you wish to make.

I am curious, the motion that was put together and submitted to the Court is very clear what it is that you're seeking, and I have to candidly say at the time that you addressed this on Monday, I wasn't exactly sure if that's what -- my thoughts of what you were requesting didn't match what was in your written motion, so I appreciate the clarification.

In the plaintiffs' eyes, how would this look mechanically, and when would you like it addressed.

MR. SELLS: So we think an offer of proof simply has to happen before the end of the trial record, so whenever.

THE COURT: It could be any time. It could be today. It could be at the end of the defendants' case.

MR. SELLS: That's right. And I apologize if I was unclear on Monday morning. It wouldn't be the first and probably won't be the last. But I think what we're asking here is pretty simple. Offers of proof are part of virtually every trial I've been involved in.

And under Rule 103 there's a procedure laid out for doing that. It's -- we're not entirely sure that it's required here for us to preserve our appeal. The procedural posture here is very, very complicated, but it's our responsibility to create the record in order to preserve that argument. And so

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kind of belts and -- belts and suspenders, we figure that we should make the offer of proof.

I've read the defendants' response to our motion, and, you know, frankly, I think that his arguments are ones better directed at the Eighth Circuit about the adequacy of an offer of proof, not whether this Court should allow us to make one.

As to that issue, Rule 103 of the Federal Rules of Evidence doesn't really provide any justification for refusing an offer of proof. And if you look at Wright &

Miller: Federal Practice and Procedure, Section 5040.6, it -- the commentators there point out that it would be error and reversible error for a trial court to refuse an offer of proof. And we realize that that's just a treatise, but it's a pretty authoritative one.

So we think that the Court should and probably must allow us to make our offer of proof. Whether it's necessary is something for -- or sufficient is something for another Court on another day.

THE COURT: Well, and you're certainly right on Wright & Miller on 5040.6. That is something that it -- it's a useful resource for any federal district court as well, so very good. Thank you, Mr. Sells.

Mr. Phillips.

MR. PHILLIPS: Good morning, Your Honor.

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THE COURT: Good morning.

MR. PHILLIPS: Rule 103 requires that a party inform the Court of the substance of an offer of proof. You know, this is usually, "Here's my evidence. This is the substance of it. This is why it's admissible." And that's just not what this is. The plaintiffs are seeking to say, "We think there's evidence out there. We don't have access to it. If we ever get access, we surmise that it may support our claims in this case." It's just simply speculating as to what that evidence may be.

I would argue, Your Honor, that this isn't really an offer of proof at all, and it doesn't meet any of the criteria -- criteria to be so. In this case I would say the

offer of proof is just clearly inadequate on its face. Ultimately, the Secretary of State doesn't have a stake in an Eighth Circuit appeal after this trial is over.

And so what I care about is that we have a clear trial record and a clean trial record. The parties are here presenting their evidence at this trial, and the plaintiffs can certainly attempt to meet their burden of proof with the evidence that they're presenting at this trial. We shouldn't muddy the waters of the record with an offer of proof about speculative evidence that we don't know if it exists or not or what it may contain.

THE COURT: And, Mr. Phillips, I -- the Court

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understands and appreciates your position. I think that one of the things that's interesting that -- you know, it's clear from reading your six-page response is that you are saying, "Well, this really isn't an offer of proof." And I -- as a former trial attorney, I understand that. I actually think that that's part of where the plaintiffs are at too when Mr. Sells says, "We're not sure if this is something that needs to be done, but in order to protect our client, we believe it needs to be done."

And so some of this gets pretty esoteric, and we start talking about the number of angels that we can fit on the head of a needle, and it's very nuanced. And I do think that, from the Court's position, it's reasonable, and in the manifest interest of justice, that the Court permit the offer of proof.

And the reason for that is that to not do so is, as pointed out by Mr. Sells, is possibly reversible error if

it's required that it be done. And I don't believe that permitting the offer of proof muddies up this record so long as the District Court is very clear, the reasons for permitting the offer of proof and that the offer of proof will not be considered in determining the facts or the law in this particular trial. And so that will be the way that we will move forward on this, that I will permit the offer of proof.

And when that happens, I think that a logical place for it to happen would perhaps be at the end of the plaintiffs'

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case in chief. And we will permit the offer of proof for the limited purpose of preserving the record. Given the plaintiffs' intent to request a rehearing, I will let Mr. Sells spell that out for the record as well.

I am going to let the parties know, and you can chew on this for a while, that I take very seriously the idea that the District Court has been directed by the Eighth Circuit Court of Appeals not to consider this, any evidence that was sought. So I believe that I would permit the offer of proof without any ruling. I think that that's -- my understanding is that that's permitted.

And I will also make it crystal clear, Mr. Phillips, that it is not going to be something that is considered for purposes of this trial, and I think that helps to mitigate the concern of muddying up the record on this.

So anything further, Mr. Phillips?

MR. PHILLIPS: No. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Sells, I realize you're -- oh, you've got a handheld there. Go ahead and fire that puppy up. Mr. Purdon can help you. He's familiar with that.

MR. PURDON: He's got it.

THE COURT: Is there anything further, Mr. Sells, in that regard?

MR. SELLS: No, Your Honor.

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THE COURT: Very good. Thank you.

Okay. So let's proceed with the next witness. I believe it would be Chair Azure. Mr. Carter, you appear to be the one who will be handling this, so I will let you proceed. Thank you.

MR. CARTER: Thank you, Your Honor. The plaintiffs call Chairman Jamie Azure to the stand.

THE COURT: If you would come forward, sir, and if you stop in front of my Lori -- she's my courtroom deputy -- and she will administer an oath.

JAMIE AZURE,

having been first duly sworn, was examined and testified as follows:

THE COURT: Have a chair.

MR. CARTER: And, Your Honor, water for the witness?

THE COURT: Thank you. Yes, please.

THE WITNESS: Good morning.

THE COURT: Good morning. You can go ahead and pull that mic down. There you go. And you may need to adjust, but I'll let you and Mr. Carter have some interplay on that, so thank you. Proceed.

MR. CARTER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. CARTER:

Q. And good morning, Chairman. Thanks for coming down to

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Fargo to testify today. I'm going to ask you a few questions. Could you start by introducing yourself to the Court?

A. My name is Jamie Azure, and I am the current Turtle Mountain Band of Chippewa Tribal Chairman.

Q. And are you an enrolled member of the Turtle Mountain Band?

A. Yes.

Q. And do you live on the Turtle Mountain Reservation?

A. Yes.

Q. And how long have you been -- how long have you served as chairman?

A. I was voted into tribal government in 2016, and I've been serving as tribal chairman since 2017.

Q. And what was your role serving in tribal government when you first started in 2016?

A. District 1 tribal councilman.

Q. And how many times have you been elected as tribal chairman?

A. Well, I was appointed in 2017, and I was elected in 2018, 2020, and 2022; so three straight terms as tribal chairman.

Q. Okay. And now I just want to give the Court a little background about yourself. Can you tell us where you were born?

A. I was actually born in Rolla, North Dakota, right off the reservation.

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Q. And did you grow up on the Turtle Mountain Reservation?

A. Yes, I did.

Q. And have you lived anywhere else in your life?

A. I actually lived in Fargo, North Dakota, for, I'd say, 12 to -- well, 13 to 14 years.

Q. And when did you move to Fargo?

A. I was 22, so that would have been -- oh, I don't want to age myself in front of the Court.

Q. That's fine. When you were --

A. But it would have been 1999, I believe.

Q. And so had you lived on the Turtle Mountain Reservation for the first 22 years of your life, essentially?

A. Yes.

Q. And why did you move to Fargo?

A. Job opportunities.

Q. And when did you move back to the reservation?

A. In 2008.

Q. And what's your educational background?

A. My educational background, I have an Associate's degree in business, with a marketing track. I do have a minor in political science. I moved on to a -- actually, a Master's in leadership through the University of California that I was able to do a majority online through a tribal leadership class.

Q. Nice. What did you do when you moved back to the reservation in 2008?

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A. Business owner, construction business owner.

Q. And did you run that company until you were elected to council in 2016?

A. Yes, I did.

Q. Do you have children?

A. I have two, two daughters.

Q. What are their ages?

A. Eleven and sixteen.

Q. Do you regularly vote in tribal, state, and federal elections?

A. Absolutely.

Q. Now I want you to -- could you share some information about the Turtle Mountain Band for the Court?

A. Oh, well, we are a unique tribe. We are a very small land base with a very large densely populated membership. We are smack dab in the center of North Dakota, but off of the -- 15 miles off the Canadian border, so we're right in the center, but right off the Canadian border.

Q. And is Turtle Mountain a sovereign Indian nation?

A. Yes.

Q. And is it a federally recognized tribe?

A. Yes, it is.

Q. Are the tribal headquarters located in Belcourt, North Dakota?

A. Yes.

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Q. And what would you estimate the tribal enrollment to be?

A. The total enrollment? The last exact count that came from the Bureau of Indian Affairs was 34,642. Obviously it's spiked a little after -- after the pandemic.

Q. And was -- I'm sorry. Is the reservation in Rolette County?

A. Yes, it is.

Q. And is it in District 9 of the legislature's redistricting plan?

A. Yes.

Q. And what's -- about -- the size of the reservation? Just the reservation itself, not including trust lands around the reservation.

A. Yeah. Yeah. Well, the old saying back home is the old 6-by-12; so 6 miles by 12 miles. 72 square miles is the approximate size.

Q. Do you know about how many tribal members live on and around the reservation?

A. Yes, a little over 19,000.

Q. Are a substantial portion of the tribal members at Turtle Mountain eligible to vote in federal, state, and local elections?

A. Yes.

Q. How did the tribe come to be on that -- on their reservation?

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A. Oh, short answer would be the Ten-Cent Treaty.

Q. And could you just elaborate a little bit on that?

A. I guess there's a lot of emphasis on the word "band" in Turtle Mountain Band of Chippewa Indians. At one point our tribe was part of a bigger tribe, an Ojibwe tribe. When treaties were put into effect, you can easily follow the migration of everything from wild rice through hunting seasons. And our portion of the tribe happened to be where we are located when the treaties were put into place by the federal government.

Q. And is there tribal trust land adjacent to the reservation boundaries?

A. Yes.

Q. And can you just say for the -- tell the Court what trust land is, summarize it briefly?

A. Yeah.

Q. If possible.

A. Trust land is what the federal government holds -- it's land that the federal government holds for the benefit of tribes, I guess would be the easiest way to say it.

Q. And where is the trust lands for Turtle Mountain located relative to the reservation?

A. Adjacent and within the reservation borders.

Q. And is there trust lands to the north of the reservation?

A. Yes.

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Q. And to the west?

A. Yep.

Q. And to the south?

A. Yes.

MR. CARTER: I'd like to pull up Plaintiffs' Exhibit 57, Your Honor.

Q. (MR. CARTER CONTINUING) And hopefully it will pull up on the screen in front of you too, Chairman. Are you able to see this okay on your screen, Chairman?

A. Yes.

Q. This is an exhibit in this case. Does it look like a map of Rolette County?

A. Yes.

Q. And does it show -- does it look like it shows the reservation and its surrounding trust land colored in tan?

A. Yes.

Q. Do a large number of tribal members live on the trust land and around the reservation?

A. Yes, that's a -- we have a very dense population into that small area.

Q. So now under the state's new -- under the state's new redistricting plan, was much of this trust land split apart from the Turtle Mountain Reservation into a separate House subdistrict?

A. Yes.

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Q. And this -- I'll submit that this map shows the district -- the subdistrict line going through the trust land. Does that look accurate to you?

A. Yes.

Q. Now, I'd like to pull Plaintiffs' Exhibit 59. This map shows the population density of Native American voters around the Spirit Lake and Turtle Mountain Reservations. I want to zoom in on the Turtle Mountain Reservation, please.

So does this essentially look like the same map showing the boundaries of the legislative districts but with population instead of trust land?

A. Yes.

Q. Do you see the subdistrict line in this map?

A. I do.

Q. Would it be fair to say that this map shows a large density of Native American voters on both sides of the subdistrict boundary?

A. Yes.

Q. Does that match with your own understanding of the population on and around the reservation?

A. It does.

Q. And so in the version of District 9 that existed from 2011 to 2021, so under the prior plan, were the tribal trust lands split apart from the reservation into another district under that plan?

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A. I'm sorry. Could you repeat that?

Q. Sure. So not under this plan, but under the prior plan that was in effect for the previous decade.

A. Yes.

Q. Did that plan split apart the reservation from its trust lands?

A. No, it did not. I believe it encompassed all of Rolette County.

Q. Do you know people who live on these trust lands in Subdistrict 9B?

A. Yes.

Q. Have you campaigned there?

A. Yes.

Q. Is there any major difference, in your mind, between the tribal members who live near the Turtle Mountain

Reservation compared to the tribal members who live on the Turtle Mountain Reservation?

A. No.

Q. Do the tribal members who reside in Subdistrict 9B participate in tribal cultural practices and events?

A. Yes.

Q. Are they eligible to run for tribal council?

A. Yes, they are.

Q. Do any current tribal council members live in Subdistrict 9B?

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A. Yes.

Q. In your experience as tribal chairman and as a tribal council member previously and having spent your vast majority of your life around the -- on and around the reservation, do those tribal members and sub -- who live in Subdistrict 9B tend to share political positions and tend to vote for the same candidates as tribal members living on the reservation?

A. Yes, they do.

Q. Do the tribal members who live on the reservation in Subdistrict 9A and the tribal members who live near the reservation in Subdistrict 9B, in your opinion, share a community of interest together?

A. Yes.

Q. Do you believe that the tribe's trust land should have been split apart from the reservation into another subdistrict?

A. No.

Q. Did you or the tribe ever request the legislature to do that?

A. No.

Q. Thank you. You can pull the exhibit.

I want to switch topics briefly to the 2018 election. What is your understanding, generally, of voter turnout rates among Turtle Mountain tribal members?

A. Historically it's been low.

Q. What was the difference -- what was different about the

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2018 midterm elections regarding voter turnout of Turtle Mountain tribal members?

A. We had a record turnout of voters.

Q. And why do you -- why was that?

A. Many reasons. I would say the easiest reason was because we were told that we couldn't vote. And if you want to inspire Native nation to get out and rise up, tell them that they can't do something.

Q. And how were they told they couldn't vote?

A. We were told that -- across the board that we needed to have physical addresses on our ID's that we had not previously needed in the past. I think it's been very well-documented on the struggles of a lot of our Native people and getting that physical address and making sure that they followed all those rules to get in. There's just a lot of barriers to entry to -- for Native nations to begin with, and then to keep adding really inspired a lot of people, and it inspired our youth to rise up and make a difference, so it was a great time to be part of a Native nation.

Q. Were there also -- was there also a lot of national attention and resources being directed at tribes in North Dakota?

A. There was a lot of attention. You know, I think sovereignty was probably mentioned quite a bit this week. You know, it's important to remember that you can sum up a

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sovereign nation into one single sentence, basically by stating that we're a nation within a nation with the right to govern ourselves. And with that came a lot of different assets going to different sovereign nations. So we weren't all the same, but we did get a lot of publicity. We did get a lot of attention that really helped, you know, bring an issue to light.

Q. And up to that point in your life, had you ever seen Native voter engagement at that level before?

A. I had not.

Q. Have you ever seen it since?

A. I have not.

Q. Right now I'd like to pull up Plaintiffs' Exhibit 43. Can you see this chart, Chairman?

A. Yes.

Q. This is a graph created by one of the experts in this case showing a large one-time spike in voter turnout among Native Americans in District 9 during the 2018 midterm election. Do you see that?

A. Yes.

Q. Does this 2018 Native voter turnout spike on this graph match your observations in District 9 at that time in 2018?

A. Yes, it does.

Q. Okay. Thank you. So to switch gears again, now I want to talk about Turtle Mountain and Spirit Lake. Can you -- do you

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know about how far apart the reservations are from each other?

A. To quote Chairman Yankton, I would say approximately 50 miles as the crow -- or as the eagle soars, he likes to say.

Q. And what are some of the shared values between the two tribes?

A. We have quite a few. Actually, we have a lot of tribal members that are, well, part of both tribes. Our cultural activities match on many levels, our powwow, our celebrations, the cultural aspects of bringing our language back, bringing our culture back.

Our two tribes have really -- in the last decade especially, have really come together to work together and share a cultural match on bringing a lot of our culture back, you know. And I know I've spoken quite a bit on it in other areas, but they are the closest proximity to our tribe, so we tend to reach out quite a bit and vice versa.

Q. Do Spirit Lake and Turtle Mountain partner together in any organizations?

A. Quite a few.

Q. Do you know any off of the top of your head?

A. Off the top of my head, I would say the United Tribes and a separate United Tribes Technical College Board and United Tribes Gaming Association Board, so --

Q. Oh, sorry to interrupt. Could you just briefly describe what those boards are?

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A. United Tribes of North Dakota, that is the five federally recognized tribes within the State of North Dakota. We meet once a month. It is all of the chair-people of each tribe and one delegate, and that's usually a council member. We meet once a month at

United Tribes Technical College to discuss issues that affect all tribes.

And we also meet with the United Tribes Technical College. We are the board of that college -- it's the same delegates -- and the United Tribes Gaming Association, so every month those three meetings take place on the same day with all tribes present.

Q. And who's the chairperson of the United Tribes in North Dakota?

A. I am.

Q. And who was the chairperson immediately before you of that board?

A. Immediately before myself was Chairman Yankton.

Q. Does Turtle Mountain have a college on the reservation?

A. Yes, we do.

Q. And what is that?

A. The Turtle Mountain Community College.

Q. Does Spirit Lake have a -- also have a college on their reservation?

A. Yes, they do.

Q. Is -- and then what is the North Dakota tribal college

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system?

A. I believe all tribes have tribal colleges, and they actually have a group that meets every month also that consists of the presence of each college. Turtle Mountain Community College representative would be Dr. Donna Brown. She is the president of our college. And United Tribes Technical College would be Leander McDonald.

Q. What is the North Dakota Native Tourism Alliance?

A. That is another group of -- that have representatives from all tribes. All of our tribes have those representatives into that group that do meet every -- I believe they meet more than once a month. And their focus is on really enhancing Native tourism within the State of North Dakota.

Q. Chairman Yankton testified regarding a cooperative drug task force between -- between your tribes. Would -- could you briefly explain what that is?

A. So one of the macro issues facing Native nation are, unfortunately, narcotics issues within our tribes. Spirit Lake had moved forward with a narcotics division that was under tribal control. We were also moving forward in the Turtle Mountains without the knowledge that Spirit Lake was moving forward.

Once the two directors that were put in place -- the director in the Turtle Mountains relayed the information that Spirit Lake was also moving forward. At that point our two

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tribes contacted each other and talked about how we could share assets and how we could provide safety to a lot of the officers.

And basically it's a -- you know, tribes are unique. We share a lot of information that -- the good and the bad, right? So we don't want to make mistakes. Especially with the narcotics division, the mistakes could be very high. And when I say "very high," that is endangering our officers or their families. So it only made sense that we work together with Spirit Lake if we're moving together with a similar project.

And, you know, and we're still -- I don't really want to say a whole lot about it, but that's where we are. We are working together with a common goal of really making an impact to an issue that's happening on both of our sovereign nations and at the same time providing as much safety to the people that will be doing the groundwork in our nations.

Q. Thank you. And has there been talk between the tribes about entering into a cross-deputization agreement where officers from each tribe would have jurisdiction to enforce the laws?

A. Yes, there has been extensive discussion, and again, that goes back to the safety of our officers and their families.

Q. Now, do Turtle Mountain and Spirit Lake interact together with the North Dakota legislature on issues?

A. Yes, we do.

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Q. Any off of top of your head you can think of?

A. Oh, gaming would be the first that comes to mind.

Q. And in what way with gaming?

A. Oh, every two years -- well, it's not even every two years, but every two years through North Dakota legislation, the tribes have to band together to have a unified front to protect our gaming rights and our -- Spirit Lake and the Turtle Mountains are so close in proximity that we are usually the first two that reach out to each other about similar issues.

We bring that forward to the United Tribes meetings -- the United Tribes meetings and the United Tribes Gaming Association. All tribes then bring their concerns in, and we have a strategic plan throughout those two years leading up to legislation on how we protect our gaming rights.

Q. Do Spirit Lake and Turtle Mountain come together with the state to negotiate the tribal and state gaming compact?

A. Yes, we do.

Q. Are there also similar issues between Spirit Lake and Turtle Mountain with the state legislature on taxation issues on tribal lands?

A. Yes.

Q. What about the road maintenance? Is that an issue that comes up that both tribes share with the legislature?

A. Absolutely. Not even so much road maintenance as road safety. There are a lot of -- you know, you wouldn't think it,

[p.27]

but streetlights, huge concern. And in the Turtle Mountains, we have Highway 5 that runs right through our sovereign nation, and that is actually maintained by the State of North Dakota. So it's always a unified fight to bring in that funding, especially for safety onto our reservations.

Q. Are you familiar with the North Dakota state's new Indian Child Welfare Act Bill that was recently adopted?

A. Yes.

Q. Did Turtle Mountain and Spirit Lake come together to support that bill?

A. Yes, we did.

Q. Did Turtle Mountain and Spirit Lake also come together on an amicus brief before the United States Supreme Court to defend the federal Indian Child Welfare Act?

A. Yes.

Q. Do the legislature's tribal and state relations committee interact with all five tribes in the state, including Turtle Mountain and Spirit Lake?

A. Yes.

Q. So that committee does not just focus -- is not -- the purpose of that committee is not just to focus on one tribe, but all the tribes in the state, correct?

A. Yes.

Q. What is the North Dakota Indian Affairs Commission?

A. The North Dakota Indian Affairs Commission is a -- I would

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describe it as a facilitator to the executive branch of the State of North Dakota --

Q. Does --

A. -- between the tribes. Sorry.

Q. Does this office work with all five tribes in the state, including Turtle Mountain and Spirit Lake, or just with one tribe?

A. All tribes.

Q. And yourself, having grown up on the reservation, spending most of your adult life there and being a tribal leader for the past eight years, are you also familiar with the non-Indian population around the reservation?

A. Yes.

Q. And based on that same experience, would you say that you've gotten familiar with the Spirit Lake Tribe and a lot of its members?

A. Yes.

Q. Would you say that the Turtle Mountain tribal members share more in common with the Spirit Lake tribal members or with non-Indians in rural North Dakota?

A. Spirit Lake.

Q. Would you say that the tribal members on both reservations are politically cohesive, meaning they tend to share political positions and tend to vote for the same candidates?

A. Yes.

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Q. How would you describe the representation that Turtle Mountain and its tribal members received from Former District 9 Senator Richard Marcellais?

A. I would describe it as an open-door policy, as an information facilitator, that when interests do arise at the legislature -- now, you have to remember that when I spoke of the location of the Turtle Mountain Band of Chippewa, we are the most northern and the most rural of the tribes, so it's an asset to the tribes to have representation that are continuously watching for the betterment of our tribe.

Q. What do you know about the current District 9 state senator and House representative for Subdistrict 9B?

A. Not a lot.

Q. Have they reached out to the tribe on any issues since they've been elected, to your knowledge?

A. Not since they've been elected.

Q. How would you compare the representation of the Turtle Mountain Tribe and its members between Senator Marcellais and the current District 9 senator?

A. A complete 180. It's -- there was no information sharing.

Q. So the last thing I want to talk about is the redistricting process from 2021. Do you recall a meeting of the tribal and state relations committee held on August 17, 2021, at the Turtle Mountain Community College?

A. Yes, I do.

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Q. Were you present for that meeting?

A. Yes, I was.

Q. To your knowledge, is the tribal and state relations committee the committee that was responsible for developing the legislature's redistricting plan?

A. No.

Q. Who was responsible for developing the state's redistricting plan?

A. I believe they had a redistricting committee.

Q. What was the purpose of the tribal and state relations committee meeting?

A. Overall concerns with our community and our tribe. A lot of it usually is based off of taxation issues. It was

important -- that was the first time that they had met at the Turtle Mountain Community College, so it was important for the tribal council and myself to -- we actually called it a council meeting at the same time. And it was important that we brought people to our community so they could see a lot of the issues that we were speaking of. A lot of it was social issues. There were funding issues. There were road issues, so an overall.

Q. Was redistricting discussed at this meeting?

A. Briefly.

Q. Do you know how it got added to the agenda?

A. I believe that Senator Wardner added it the morning of.

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Q. I'd like to pull up now Exhibit 418 -- Defendant's Exhibit 418. Specifically on page 17, I'd like to cull out lines 18 through 21.

And this is a -- Chairman, this is a transcript from that tribal and state relations committee meeting on August 17, 2021, and this is a quote from Chairman Senator Wardner, where he says, "Thank you, Chairman. I don't want to mess up your agenda, but there's one thing we slipped in, and it's talk -- it's about redistricting. We'd like to discuss that." And when did you say you found out about redistricting being on the agenda for that meeting?

A. Right before this meeting, that morning.

Q. What -- and you can take that down. Thank you.

What do you recall about the redistricting discussion at this meeting?

A. Not a whole lot. Once the subject was brought up -- you have to remember, at that time we didn't have a whole lot of information, so we shifted -- my -- my immediate response when that -- something is brought up in an official meeting is to shift to our legal team, and I believe that is what I did. I shifted to our inhouse legal, Alysia LaCounte.

Q. Did you bring up concerns about the census undercount during that discussion?

A. Yes, I did.

MR. CARTER: And, Your Honor, I want to play a video

[p.32]

clip from Defendant's Exhibit 433. The transcript for this video clip is found in Defendant's Exhibit 418, from line -- from line 20 on page 28 to line 2 on page 30.

(D-433, a video clip, played in open court.)

Q. (MR. CARTER CONTINUING) Chairman, is it your understanding that Nicole Donaghy was at this tribal and state relations committee meeting?

A. Yes.

Q. And who is she?

A. She is the director of North Dakota Native Vote. I believe director. I maybe wrong with the title.

Q. And do you know about -- what North Dakota Native Vote is?

A. I believe that they are a group that really brings out information. They try to enhance education to our -- not only our Native people with the importance of getting out the vote, but also -- how do I say this nicely -- educate the mis-educated with a lot of what a tribe is and what tribal people are.

Q. Is it your understanding that she made a statement at this meeting regarding redistricting and subdistricts?

A. That is my understanding, but I was not present.

Q. And why -- why weren't you present?

A. I did not know that this occurred until afterwards. We were on a break, and Ms. -- I believe she made the comments before myself or tribal council came back into the room.

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Q. Does Ms. Donaghy work for or represent the Turtle Mountain Band in any capacity?

A. No.

Q. Is Ms. Donaghy authorized to speak on behalf of the Turtle Mountain Band?

A. No.

Q. To your knowledge, is Ms. Donaghy a member of the Turtle Mountain Band?

A. No, she is not.

Q. Did you, yourself, ever make any statements in favor of the legislature drawing a House subdistrict for District 9?

A. No.

Q. To your knowledge, did any of the tribal council members make any statement in favor of a subdistrict?

A. No.

Q. During the redistricting process as a whole, did you or the tribe ever make any statement in favor of a subdistrict for the tribe?

A. No.

Q. And why didn't the tribe request a subdistrict?

A. We had proper representation for well over a decade before. We don't believe that there was a need. We believed that the population and the voter output sufficed.

Q. You testified earlier about how Turtle Mountain and Spirit Lake are a community of interest and politically cohesive, but,

[p.34]

of course, you'd agree that both are separate sovereign governments, right?

A. Yes.

Q. It's been said throughout this trial by the defendants that the tribes requested subdistricts. Would you say that there are also situations where the tribes of North Dakota are often lumped together even if it's about something that does not apply to all tribes?

A. Absolutely. Yes.

Q. Do you think that the defendants' statements broadly saying that the tribes requested subdistrict is an example of this?

A. Absolutely.

Q. And so, as has already been previously testified in this court on September 29, 2021, the redistricting committee published its proposed redistricting map for the state, which placed Turtle Mountain into a -- the Turtle Mountain Reservation into a single subdistrict and placed Turtle Mountain trust lands to the north and to the west of the reservation into a separate subdistrict. Did you see this map when it came out?

A. I seen it when it came out, yes.

Q. What did you think about the map when it came out?

A. Exactly what is being said today. It split our community.

Q. Does it also have the affect of reducing the

[p.35]

representation of tribal members in District 9?

A. I'm sorry. Can you repeat that?

Q. Does it also have the affect of reducing the representation --

A. Oh, yes.

Q. -- of tribal members in District 9?

A. Yes. I'm sorry. I misheard you.

Q. And after this map was published, what steps did Turtle Mountain take in response to it?

A. We contacted legal.

Q. And then what happened next?

A. I believe that we -- our two tribes -- well, Chairman Yankton contacted myself. We contacted legal. And then we drafted a letter to present to the redistricting committee with a viable alternative.

Q. And so the viable alternative you're talking about, what did that propose?

A. Where it would connect through the -- through all the bullet points of what it needed to be with a redistricting map, where it would connect our two communities, and -- and we also made sure that we followed underneath the -- the Native American voting laws.

Q. And when you say "connect our two communities," do you mean it would combine both reservations into a single legislative district?

[p.36]

A. Yes.

Q. And so was that the letter on November 1 that was sent to the legislature and the governor from both yourself and Chairman Yankton?

A. Yes, it was.

Q. And did this letter contain a map of the tribe's proposed district?

A. Yes.

Q. And why do the tribes want to be in the same district?

A. The commonality, the mindsets, the need for strong representation.

Q. Now, did you appear at the redistricting committee meeting to advocate -- did you appear at a redistricting committee meeting to advocate for the combined reservation district?

A. Yes, I did.

Q. Was that meeting on November 8, 2021?

A. Yes.

Q. Was Spirit Lake Chairman Yankton with you that day to also advocate for the combined reservation district?

A. Yes, he was.

Q. Did you testify that day that Turtle Mountain and Spirit Lake are a community of interest?

A. Yes.

Q. Did Chairman Yankton testify to the same thing?

A. Yes.

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Q. Did you testify that Turtle Mountain Band was opposed to the redistricting committee's proposed map?

A. Yes.

Q. Did Chairman Yankton testify to the same thing?

A. Yes.

Q. Did you testify in favor of the redistricting committee revising its proposed plan to adopt a plan that combined the Turtle Mountain and Spirit Lake Reservations?

A. Yes.

Q. Did Chairman Yankton testify to the same thing?

A. Yes.

Q. Did you testify about the timing of the tribe's request?

A. Yes, I did.

Q. Do you recall generally what you said about that?

A. I briefly tried to explain how difficult it is to bring two sovereign nations together. And it's one thing for

both chairmen to speak to each other, then to shift to legal counsel, then to bring it back to our legislature branches of our respected governments.

And you also have to remember that I, as a chairman, represent 36,000 people, so we have to make sure that all the I's are dotted and the T's are crossed, and then to actually come together with another sovereign nation to have a unified response all within a month's span, which was rather historical in its own right.

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Q. And so what had been testified to was that the committee's map was published on September 29, and the tribe's response was provided on November 1, so around a month, or so.

A. Yep.

Q. And so this one-month timing for all of this to happen, what would you say about that timing, the one month between the redistricting publishing its proposed map and the tribes coming together to propose their own map?

A. I think it was rather impressive that we were able to bring it all together within one month and present to a committee.

Q. And how did the committee respond to your request?

A. I believe it was voted down.

Q. During that meeting do you recall the redistricting committee considering other changes to their proposed redistricting plan?

A. Yes. Before my testimony there were amendments to their plan with people that were providing testimony ahead of us.

Q. So does that mean that the committee at that meeting you were at adopted other changes to their redistricting plan, but denied your requested change?

A. Yes.

Q. And so what is your recommendation -- how would you summarize your recommendation to the redistricting committee on behalf of your tribe?

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A. From that day?

Q. Yes.

A. Well, it was a viable option that did not violate any laws or any rights.

Q. Do you still believe that the legislature should follow the tribes' request and create a legislative district that places both tribes in the same legislative --

A. Yes.

Q. -- district?

MR. CARTER: Thank you, Chairman Azure. Your Honor, I'll pass the witness.

THE COURT: Thank you, counsel.

Mr. Phillips?

MR. PHILLIPS: Mr. Wiederholt is going to --

THE COURT: Or, Mr. Wiederholt.

CROSS-EXAMINATION

BY MR. WIEDERHOLT:

Q. Good morning, Chairman Azure.

A. Good morning.

Q. I'm one of the attorneys for Secretary of State Michael Howe, and I've got some questions for you. And pardon my kind of jumping around a bit, but I'm going to try to hit some of the points your attorney raised with you. But am I right, were you -- were you here at trial on either Monday or Tuesday of this week?

[p.40]

A. I was not.

Q. Okay. I thought maybe you were here on Monday.

I think I want to hit some of the last points first here. You had talked during your testimony about contacting legal, and I thought you said that you had contacted legal when you discovered that Senator Wardner had kind of slipped in this redistricting at the August 17 meeting that was conducted at the Turtle Mountain Community College. Did I hear you right?

A. Yes, sir, inhouse legal.

Q. So you did kind of lawyer up at that point; is that right?

A. Our -- our attorney is always present when we're dealing with the State of North Dakota.

Q. Okay. So was your attorney present there at that meeting?

A. Yes, she was.

Q. Okay. And then you said Nicole Donaghy of North Dakota Native Vote was at that meeting as well, correct?

A. I believe so, yes.

Q. Yeah, and Nicole Donaghy did discuss redistricting and subdistricts and those types of things at that meeting is your understanding?

A. Yes, as a -- it was an open, public meeting, so she was not called by the tribe or the state.

Q. Sure. Would you happen to know how your legal counsel or Nicole Donaghy may have obtained notice that redistricting would be discussed?

[p.41]

A. I do not.

Q. And I think you said that Nicole Donaghy gave her testimony that was not official tribal testimony on behalf of Turtle Mountain, but that you and other tribal members were out of the room at that point on a break?

A. Yes.

Q. So if we can pull up the transcript, 418, and I want to go to page 70. Do you see that language there from Ms. Donaghy? I think her last name is misspelled, but that appear to be Nicole Donaghy's testimony?

A. Yes.

Q. You don't recall hearing any of that testimony?

A. No.

Q. And then if we could scroll down to about page 76 in looking at this transcript, Chairman Azure, I think she gave testimony from about pages 70 to 76. And there's also video of this testimony from this meeting, and that's Defendants' 433. That's the whole testimony.

A. Yeah. I'm sorry, but you could see on 23, when he comments that I walked back in, and then we talk about the drug situation in our community.

Q. Yeah, I was going to ask you -- and then if we can look at the index -- I mean, I just look at the index quick to see where Azure is discussed in the index, and that's at page 197. See "Azure" on the left-hand side, towards the bottom?

[p.42]

A. Yes.

Q. And the testimony starts at page 2 and really continues, it appears to me, throughout a lot of that hearing, culminating at page 188. And I note for the record, 189 is the last page of the testimony from that hearing. Does that refresh your recollection? It appears

you were in the room when Nicole Donaghy gave her testimony?

A. I believe that when she states "chairman," she was not speaking of me. We had a simultaneous meeting, so the tribal council called a meeting to order, and the state called a meeting to order, so I believe she was speaking of Wardner when she mentions "chairman." And if you look right past that, he does mention that she should maybe speak to me. And immediately after that he says that I walked through the door. So, no, I did not hear her section.

Q. You don't -- you don't think you're in the room for that?

A. I did not hear the testimony as -- and I'm not sure it was even testimony. It wasn't on our side.

MR. WIEDERHOLT: Let's play the video of that. Let's do 433-2.

(D433-2, a video clip, played in open court.)

Q. (MR. WIEDERHOLT CONTINUING) Okay. Did you see Senator Marcellais in the room there?

A. Yes, I did.

Q. It certainly appears to me that the meeting was happening,

[p.43]

right?

A. But not on the tribal council side. There was -- you can see by the video that there wasn't a quorum for tribal council.

Q. Yeah, so the tribal council had left the meeting at that point? That's your testimony?

A. I believe it was right after -- and I may be mistaken, but I believe this was right after lunch.

Q. Sure, but you would agree with me that Nicole Donaghy was asking for legislative subdistricting in order to comply with the Voting Rights Act, right?

A. I believe she was speaking to Senator Wardner.

Q. Yeah. Was she -- was she advocating that the State of North Dakota use subdistricting where Native populations were high enough to have subdistricting? Is that what she was asking for?

A. I'm not sure. She was not representing the Turtle Mountain Band of Chippewa.

Q. Yeah, I understand your position, Chairman Azure, on that, but if you can try to just answer my question, I'd appreciate it.

A. Well, it's a little difficult since this is the first I've seen the video. So maybe if we want to play it back and I can listen to her again, I might have a better understanding of what she's asking, but --

Q. Sure.

[p.44]

A. I'm not trying to be difficult.

Q. Yeah. But she was generically asking for subdistricting.

A. Okay.

Q. Do you agree, in what you saw?

MR. CARTER: Your Honor, I think it's been asked and answered. He said he's not sure.

THE COURT: The question has been asked and answered. The witness has been accommodating in his response. The objection is sustained.

Mr. Wiederholt, please move on.

MR. WIEDERHOLT: Thank you, Your Honor. My apologies.

Q. (MR. WIEDERHOLT CONTINUING) Did Ms. Azure [sic] appear to be advocating for Native American tribes to be considered communities of interest before Senator Wardner?

A. Unless my ex-wife was in the room, I don't think Ms. Azure was present.

Q. I'm sorry. Ms. Donaghy.

A. Can you repeat?

Q. Yeah. Would you agree with me, though, that based on the video you watched, Ms. Donaghy was advocating that Native American tribes be considered communities of interest?

A. If I can watch the video again, I would have a better understanding of what she was asking.

Q. Well, we don't have -- we don't have time to watch the

[p.45]

video again, but I appreciate your responses, Chairman Azure. You do agree that you and the tribe --

THE COURT: Mr. Wiederholt, just so you know -- it's your call, but there's time to play the video again if you want. It's your call, but don't -- don't feel like the Court is trying to rush you through this, so please proceed.

MR. WIEDERHOLT: Yeah. I appreciate that, Your Honor.

Q. (MR. WIEDERHOLT CONTINUING) And, Chairman Azure, I think I understand your position on this, and I think the Court understands your position on this with Nicole Donaghy, so I think I'm going to move on to some of the other --

A. Okay.

Q. -- points you raised. But I just wanted to make sure, when you were responding to Mr. Carter, your attorney, that you said the tribal council had called a tribal council meeting to order during that tribal and state relations committee meeting, correct?

A. Yes.

Q. Was there any point in that meeting where you made a record of recessing the meeting for the tribal council?

A. I don't believe we did. We just went on to a lunch break.

Q. Do you remember, was that announced somewhere in that transcript, that you were going on a lunch --

A. It would be in ours, yes, when -- when we take the break,

[p.46]

we announce that we're taking a break.

Q. And that's your recollection as you sit here today as to what you did in that -- in that meeting?

A. Yeah. Yep.

Q. So you testified you contacted legal before that meeting on August 17, but then I thought you also said that you contacted legal sometime before a redistricting committee meeting in Bismarck that happened on September 15.

MR. CARTER: Your Honor, I think that misstates the testimony. I don't believe Mr. -- Chairman Azure said that.

MR. WIEDERHOLT: I was going to ask if that was what I heard.

THE COURT: I will overrule the objection and permit the witness to answer the question; the question being, "was that what he heard."

THE WITNESS: I'm not quite sure what you heard, but, no, I don't believe so. Which one was 7 -- or September 15th?

Q. (MR. WIEDERHOLT CONTINUING) Let me ask a better question.

A. Okay.

Q. There was a September 15 meeting in Bismarck of the legislative redistricting committee. Does that sound fair?

A. I'm not aware.

Q. Okay. And then there was the November 1st letter that was a joint letter between yourself and Chairman Yankton, correct? You talked about that?

[p.47]

A. Yes.

Q. Right. So certainly by August 27 you had engaged the assistance of attorneys. That's your testimony.

A. Yes.

Q. And for the purpose of advocating for the -- for your tribe in relation to the redistricting that was occurring at the state, correct?

A. Yes.

Q. Let's -- let's look at -- well, let me ask you this: Do you recall after that August 17 meeting, having a discussion with Senator Marcellais about what happened in relation to redistricting at that meeting?

A. I am not sure on the dates, but I do believe that there were discussions after.

Q. Including with Senator Marcellais?

A. I can't recollect exactly.

Q. Yeah. Did you have a discussion with Senator Marcellais about what Nicole Donaghy had said to Senator Warford [sic] at that meeting?

A. I don't believe so.

Q. You didn't have a discussion about her advocating for individual tribes being considered communities of interest then?

A. Maybe in a quick passing discussion, but there was never an actual sit-down or a meeting requested.

[p.48]

Q. Were you having any discussions with anybody around that time, August 17 into early September, about Turtle Mountain and Spirit Lake being treated as a single community of interest?

A. No.

Q. When was the first time you kind of came to that conclusion, that that would be the position your tribe should take?

A. Once we seen the redistricting maps.

Q. And I think you said that that happened in September of 2021, late September?

A. I believe so.

Q. That's when the redistricting committee came out with that map that ultimately was enacted that you're opposing here today, correct?

A. Yes.

Q. Or about that time.

A. About then.

Q. Yeah. So it -- to that issue of the -- kind of the joint communities of interest between yourself and the Spirit Lake Tribe -- yourself meaning Turtle Mountain Band of Chippewa Indians, and the Spirit Lake Tribe, you talked about some of those things that you feel make the two tribes a single community of interest. Do you recall that testimony?

A. A single mindset of interest, yes.

Q. I'm sorry. I didn't hear that.

[p.49]

A. A single mindset of interest.

Q. Single mindset of interest?

A. Yes, with our two tribes.

Q. Yeah. Are you familiar with that term, "communities of interest," as used in the redistricting process in this case?

A. Yes, it -- yes.

Q. So I'm going use that term, but when you say "single mindset," is that kind of what you mean?

A. Well, I'm speaking of the -- yeah, maybe the mindset comment is not best used in this context. But I'm always making sure that you understand how sovereign nations work and how we -- even though we have a single mindset, we are two separate, you know, nations and communities.

Q. Yeah. So Turtle Mountain, Spirit Lake are two different sovereign nations, right?

A. Yes.

Q. Two different languages are spoken, indigenous languages? Is that fair to say?

A. There are multiple languages spoken even within the Turtle Mountains.

Q. So are they -- are the multiple languages spoken in the Turtle Mountains essentially different than the multiple language spoken among the Spirit Lake Tribe?

A. I believe Spirit Lake Tribe would be Lakota, and Turtle Mountains would be Ojibwe, would be the two main --

[p.50]

Q. So somewhat different languages, correct?

A. Yes. Yes.

Q. And fair to say, somewhat different cultures?

A. Different and the same. It's -- we share a lot of the same cultures. We have a lot of the same membership

and -- but the Sioux and the Chippewa, the Ojibwe, are the main differences, yes.

Q. So when you testified about, you know, the organization of the reservation system by the federal government, and essentially your band or tribe was where it would be at that time of year based on its practices -- migratory practices, that region of North Dakota, where the reservation is located and the trust lands are located, was that hunting grounds for your band?

A. Hunting and gathering. We have a very unique -- we're small, but we have a very unique piece of land.

Q. Is most of the population of your -- the enrolled-member population of your tribe near the reservation in Rolette County?

A. We very high percentage, yes.

Q. Yeah. And then for Spirit Lake, are you aware of their populations and those types of things?

A. Not exact numbers, but they are less than ours.

Q. Yeah. So if Collette Brown talked about the enrolled membership on the Spirit Lake Reservation being around 4,000,

[p.51]

does that sound about right?

A. If Collette said it, yes, I would agree.

Q. And if she said that the enrolled members that are off the reservation are about 75 to 77 hundred -- and

I'm giving a little bit of a range here -- does that sound right to you?

A. I'm not exactly sure on what -- their membership numbers, but I would go with what their leadership said.

Q. Would you agree with me that a high percentage of that difference; in other words, the off-reservation enrolled members of Spirit Lake, live in and around the Devils Lake area?

A. I could not say that with any confidence. I'm not sure what their off-population is or where they would be located. I know the Turtle Mountains, not Spirit Lake so much.

Q. Do you have any family members living in the Devils Lake area?

A. Not close, but yes.

Q. Cousins?

A. Cousins or second cousins, third cousins. When you become tribal chairman, you find out you have a lot of cousins.

Q. I've heard that. In some sense you're in the same tribe, you're all related fairly closely, correct?

A. We're related in our cultures, both cultures. That's one of the similarities where we -- especially in the last century, we've all come together, and we actually call Spirit Lake our

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sister tribe, so we're all related.

Q. Sure. But based on, you know, interactions with your cousins or more distant family members that live in the Devils Lake area, do you understand that there's a fairly good population of enrolled members of the Spirit Lake Tribe living there? Is that fair to say?

A. Yeah, a little spread out more than what we are.

Q. And so those members that might be living in and around Devils Lake would have similar culture and language with those on the reservation of Spirit Lake? Would you agree with me?

A. I would assume.

Q. Are there any powwows that happen every year in the state of North Dakota? I think you talked about that.

A. Oh, numerous.

Q. Do you frequent those?

A. I do. I try.

Q. And what areas are powwows held? I know there's one in Bismarck every summer, right?

A. Yeah, United Tribes. That's the big one. We have two in the Turtle Mountains. Spirit Lake had one around a month ago that I was able to pop in, and I tried to -- I stayed in the background a little bit. It's kind of nice to see everybody without being noticed every once in a while. I know Standing Rock had one

last weekend. I was not able to attend that for physical reasons, but my daughter went to that, and she had a

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blast.

So each -- each tribe has at least two powwows every year, and that's not counting the graduation powwows, the sobriety powwows. You know, it's a celebration. It's a time to come together and really support each other.

Q. Yeah. So the powwow that was in Spirit Lake Reservation last, whereabouts was that?

A. In their gym at the -- I believe it's the Four Winds.

Q. Near Fort Totten?

A. Yeah. Yep.

Q. Okay. Let's pull up Exhibit 59 -- Plaintiffs' Exhibit 59, and then kind of zoom in. So recall -- do you recall this exhibit, Chairman Azure, talking about it earlier?

A. Yes.

Q. I know you said, because I wrote it down, that Turtle Mountain Tribe is a unique tribe?

A. Yes.

Q. It's small geographically. I think you said about 6-by-12 miles?

A. Yes.

Q. And it's highly dense, correct?

A. Yes.

Q. Population on the reservation and the trust lands, I think -- I think I wrote down what you had said, that the BIA estimated that at 34,642?

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A. Total. That's total membership, and that's an older number now.

Q. Yeah. So that could be folks that are not living in Rolette County, correct?

A. Yes.

Q. Elsewhere in North Dakota, like Fargo, like you lived there when you were younger?

A. Yeah, that's -- around the world.

Q. Okay. Do you know the total population of the reservation -- Turtle Mountain Reservation and the trust lands, approximately?

A. It was approximately 19,000 on or right off the reservation.

Q. Okay.

A. In the surrounding communities.

Q. So comparing that with Spirit Lake, even if we go with the higher number with folks off the reservation, you know, 7,500, 7,700, it's fair to say that Turtle Mountain is quite a bit larger population-wise and much more dense, correct?

A. Yes.

Q. Aren't there different -- different concerns and issues with a tribe like yours that's highly dense and kind of more packed in geographically than with Spirit Lake?

A. Yeah, we definitely have different micro issues.

Q. What are -- what are some of those?

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A. Oh, the housing situations, the lack of available lands to expand a city sewer system, the law enforcement. Even though we both have issues, our issues are a little bit different with our lack of law enforcement officers in the highly dense population compared to what Spirit Lake would be. They have longer distances to travel to each call, where ours is numerous calls, you know, so we have a lot of the -- a lot of different micro issues like that.

But it's -- well, it's strange that 574 federally recognized tribes, that we all seem to have the same macro issues, which speaks to why we come together a lot of the times.

Q. Yeah, and I appreciate that, certainly. I think I heard somebody talk about a gas tax issue specific to Turtle Mountain that came up at the North Dakota legislature. Are you familiar with something like that?

A. I am familiar with our gas tax, yes.

Q. I'm sorry. I didn't hear you.

A. I'm familiar with our gas tax, yes.

Q. Yeah. Can you just tell me what that was and what happened?

A. What the issue would be?

Q. Yeah.

A. I'm not sure what legislative issue that would've been.

Q. Fair to say that a bill was passed at the North Dakota

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legislature giving the Turtle Mountain Tribe some kind of a gas tax credit?

A. Each -- I believe each tribe has a different agreement with the state. Standing Rock, for instance, decided to do it all within their tribe, and we do a flow-through with the state.

Q. Okay. So some of the tribes do that gas tax issue differently.

A. Yes.

Q. Do you know when the last legislative effort for Turtle Mountain to do that with the state was, approximately?

A. I am not aware, no.

Q. Well, within recent times, the last ten years?

A. We always -- it's always on the radar. It's always a discussion. It's one of the taxation issues that we focus on.

Q. And so let's look at that map again, Exhibit 57 -- well, 59 is good, and why don't you focus in on the Turtle Mountain area.

So, Chairman Azure, would you agree with me that most of the reservation enrolled members -- oh, no. I got that wrong. Would you agree with me that District 9A that encompasses the reservation, right, 9A?

A. Yes.

Q. And 9B is trust lands and then other areas into Towner and Cavalier Counties, correct?

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A. Yes.

Q. Would you agree with me that 9A, itself, has a high Native American population?

A. Yes.

Q. Even without 9B?

A. Yes.

Q. Just looking in my notes here, and I'm going to try to hit the last few things, Chairman Azure, and thanks for -- thanks for your patience.

You know, you testified that you were at the November 8 redistricting committee meeting in Bismarck, right?

A. Was it November 8th?

Q. Yeah.

A. Yes. I'm sorry. Yeah, I was thinking of a different meeting for a second there. But, yeah, you're right. I was.

Q. So just a little timeline that's in my head, and let's see if we're on the same page. November 1 was the joint letter between yourself and Chairman Yankton that was presented to the governor and others, correct?

A. Yes.

Q. And then November 8 there's a hearing of the redistricting committee, and then you and Chairman Yankton testified at that meeting, correct?

A. Yes.

Q. And then November 9th and 10th, the House and the Senate,

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they actually considered and debated and voted on House Bill 1504? Does that kind of comport with your understanding as well?

A. Yes.

Q. And the governor signs it on November 11. Approximately what you believe happened?

A. Yeah.

Q. Okay. So prior to that November 8 redistricting committee meeting, had you -- had you, on behalf of the tribe, ever advocated for Turtle Mountain and Spirit Lake to be considered a single community of interest?

A. No.

Q. You talked about being currently the chairman of the United Tribes -- United Tribes and the United Tribes College Board and the United Tribes Gaming Board, correct?

A. I am not the chairman of the gaming association, no.

Q. Okay. But the other two you are the chairman?

A. Other two I am, yep.

Q. What opportunities exist for Native American youth and others to -- you know, as far as educational opportunities through the United Tribes system?

A. I'm sorry. Can you repeat that?

Q. Yeah. I'm wondering about the educational opportunities for Native youth and for other Native Americans that they have available through that United Tribes College system?

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A. Yeah, it's a -- it's an option for higher education.

Q. Right. And another option would be the North Dakota state schools or private schools?

A. Yes.

Q. Is there -- is there money for Native American youth through the United Tribes system if they want to go to those schools?

A. Through scholarship?

Q. Sure.

A. I believe so.

Q. If a child wants to get that educational system, there's probably a scholarship that could help achieve that for that person? Is that fair to say?

A. Well, it's different for every individual, but I would assume, yes, that if you put in the work and you look hard enough, you can find an option for yourself, an opportunity.

Q. Did you go to college?

A. I did.

Q. Yeah. Did your parents go to college?

A. Later in life, yes.

Q. Both of them?

A. My mother did. My father did not.

Q. Okay. And you even achieved a Master's?

A. Through, yes, late higher education.

Q. And you owned a construction business.

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A. I did.

Q. What kind of things did you build?

A. We built -- started with remodels and moved up to -- in the region, building homes.

Q. Fair to say that each of your tribes, Turtle Mountain and Spirit Lake, has its own casino, correct?

A. Yes.

Q. Spirit Lake really has kind of a different maybe focus tourism-wise, would you agree, with the region it's in, with Devils Lake?

A. Yes. Absolutely.

Q. And you did talk a little bit about being involved in Native American tourism issues through the tourism alliance. Do you recall that testimony?

A. I believe, yeah, I gave a description of what the tourism -- North Dakota Indian Tourism Alliance is.

Q. And -- yeah, and are you on the board or on the alliance as a member?

A. I am not.

Q. Were you at some point?

A. I believe I was an honorary member of sorts when it first kicked off, and I honestly believe -- I think I was in-council at the time. I think that was in 2016, early '17.

Q. Is it fair to say that Turtle Mountain has a certain focus when it's sort of advertising itself for Native American

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tourism issues? Is there a -- kind of a bad question. Is there a target market that Turtle Mountain focuses on, if you're aware?

A. Well, we're all different. That's why having that group come together was important. Yeah, we promote different than what the other tribes would.

Q. Do you promote in the Minot area? Is that fair to say?

A. I believe we have Sky Dancer billboards, and even in the airport we have some signage. And we give a -- we give donations to Minot State University for their powwow every year. Going back to the powwow question, colleges actually have them now too, so -- which is very inspiring to see.

Q. Sure. Back to those road safety issues you talked about, fair to say that the road safety issues in and around Turtle Mountain are a little different than the Spirit Lake? It's a little more rural?

A. Well, we all have the safety issues. It's just ours is a little bit unique to who we are, the high density again.

Q. And, really, who does the tribe -- your tribe deal with on those road safety issues? Is that the state or the feds or maybe a combination?

A. It's a small combination through the Bureau of Indian Affairs, I believe a small portion through the State of North Dakota, but mostly through tribal funds.

Q. You talked about a streetlight issue particular to your

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tribe?

A. Yes.

Q. And -- and what was that? Basically a lack of streetlights?

A. Lack of streetlights and lack of stoplights.

Q. And streetlights are necessary why?

A. We, unfortunately, have a lot of people that continue to walk, and walking at night gets very dangerous. Even trying to build walking trails is extremely expensive. It's -- unless you deal with it, it's -- you wouldn't think that three lights are going to cost $3 million just to, you know, set up.

Q. So has -- has that problem become better? Has something happened?

A. No, that is still a discussion with the state. The road that I'm speaking of is Highway 5 that runs through our reservation that is maintained by the state. And that is the argument, that we need to have streetlights. If it was a tribal road, we would have already moved forward with different means.

Q. So are there discussions between your tribe and the BIA for that issue to kind of --

A. No. No. The bureau provides road maintenance funds. They would not be part of that discussion. There's a lot of layers to a tribe.

Q. Yeah, it really sounds like it. What about taxation

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issues between -- you know, I know we talked about gas tax, but other taxation issues generally between your tribe and the Spirit Lake Tribe? Are there differences that you're aware of?

A. Well, even with our gas tax, that -- a good point made is that our gas tax revenue goes directly to our road department, you know. So we, as a tribe, we have a limited amount of resources that we have to dedicate to certain things, and I would assume that Spirit Lake does the same where they have to take that portion of that lump sum and prioritize, which is very, very difficult. But, no, we do not partner on any taxation agreements.

Q. Okay. So just a few more things I've got for you, Chairman Azure. One is, Senator Wardner, back in 2021, do you know his role at the North Dakota legislature at that time?

A. I know he was chairman of that committee.

Q. Are you aware that he was the majority leader at that time?

A. Yes. Yes.

Q. To your mind, he had quite a lot of power in the legislature?

A. I would assume he did, yes.

Q. You also talked when you were answering questions from Mr. Carter about the census and the undercount. I think you said something like "a spiral of trauma" or something similar. Did I hear that right?

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A. A social cycle, yes, caused by historical trauma.

Q. And you talked about quite a bit of mistrust of the federal government because of what happened?

A. Historically. Historically, yes, and that's part of historical trauma getting passed down, which also -- when they were asked about our record-keepers, and that's our elders that pass that information down so that that same trauma turns into generational trauma being passed down from family to family, and it's something that we still deal with to this day.

Q. I'm assuming you get out among your people and your constituents and ask them about the issues that are affecting them, right?

A. Tribes are very unique. My door is open for -- oh, geez. I was once asked what it's like to be a tribal chairman, and I -- my response was, imagine everybody that walks through your door to talk to you, it's the biggest emergency of their lives. It's -- I get everything from broken windows to dog bites to taxation issues and sovereignty issues on a daily basis.

Q. Sure. Do you still hear attitudes of mistrust to the federal government from your people?

A. I hear mistrust with all forms of government from our people, depending on the person.

Q. Do you hear about any mistrust of tribal government?

A. Absolutely.

MR. WIEDERHOLT: So I just want to talk, before I

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end, about your November 8th testimony before the joint redistricting committee in Bismarck. The transcript is 429, but let's play Video 444.

(D-444, a video clip, played in open court.)

Q. (MR. WIEDERHOLT CONTINUING) So that was you testifying, correct?

A. Yes.

Q. Are you aware of when the information from the federal government came out that gave the census numbers?

A. Not specifically, no.

Q. Like mid-September, does that sound about right?

A. Sounds about right.

Q. Are you aware that the MHA Nation came up with its own redistricting maps fairly quickly after that information came out?

A. I am not.

Q. Your maps came out, that you proposed, as part of the November 1 letter we talked about, correct?

A. Yes.

MR. WIEDERHOLT: That's all the questions I have. Thank you.

THE COURT: Thank you, Mr. Wiederholt.

MR. CARTER: No questions, Your Honor.

THE COURT: Very good. Mr. Wiederholt, I don't know if Chair Azure plans to stick around, but do you intend to call

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him in your case?

MR. WIEDERHOLT: No, Your Honor.

THE COURT: All right. Chair Azure, thank you for your testimony. Thank you for being here and for participating. You do not need to stick around, but you certainly are welcome to. Thank you.

THE WITNESS: Okay. And I want to thank you for getting my name right right off the -- that doesn't happen a lot. That's impressive. I felt comfortable coming up as soon as you had the name right.

THE COURT: When your last name is Welte, you're sensitive to that.

THE WITNESS: All right. Well, thank you, sir.

THE COURT: Thank you. Mr. Gaber.

MR. GABER: Your Honor, plaintiffs have no further witnesses. This may be a good time for Mr. Sells to do the proffer or if you want to take a break.

THE COURT: Let's take a break, and then we'll do the proffer. Does that work, Mr. Phillips?

MR. PHILLIPS: That's fine, Your Honor. Thank you.

THE COURT: Thank you. We will resume at 11:00 o'clock. Thank you. We're in recess.

(Recess taken from 10:42 a.m. to 11:09 a.m.)

THE COURT: We're back on the record, and at this time we are going to address Document Number 109. Document 109

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is a motion by the plaintiffs requesting leave to make an offer of proof in order to preserve their right to seek further review of the recent Eighth Circuit decision in this matter granting a writ of mandamus quashing the plaintiffs' subpoenas for certain members of the North Dakota legislature. This is pursuant to Rule 103 of the Federal Rules of Evidence. It is fleshed out well in Document Number 109.

Document 111 was defendants' response in opposition to this motion for leave to make an offer of proof. It was filed promptly after the plaintiffs' motion was filed.

The Court has earlier indicated to the parties that it will permit leave to make the offer of proof

accordingly, and that the Court is also going to be mindful of the Eighth Circuit's decision in this matter. So the purpose of the offer of proof in the eyes of the court is strictly to preserve the record and to permit further action by the plaintiffs if that is, indeed, permissible.

So I want to clarify for the parties that whatever is done in this component of the trial substantively or procedurally pertaining to this offer of proof is not going to be considered by the Court at all in rendering its verdict in this matter.

I think that that frames the issue fairly well. The Court will note that Mr. Sells is up at the podium, and the court will now hear his presentation. Mr. Sells, to the extent

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that the Court was framing this up, if you have modifications on that, feel free.

MR. SELLS: No, Your Honor. I think you got it exactly right.

THE COURT: Thank you. Please proceed.

MR. SELLS: So I don't want to make this any longer than it needs to be, Your Honor. An offer of proof has five elements: substance, purpose, relevance, admissibility, and sufficiency. So let me just very quickly touch upon each of those elements.

As to substance, we're in a little tricky posture here because we don't know what the substance of the documents are. We haven't had access to them, and we

don't have access to a privileged log. But what we've asked for are communications between legislators who were involved in the redistricting process and third parties about the redistricting process.

And what we think that some of those documents will show is communications concerning the legislature's justification for the map that it drew and for rejecting the map that was proposed by the two tribes at issue in this case.

There's also an outstanding subpoena for witness testimony, and we think that the witness testimony would sort of be complementary to the documents that we're looking to receive in -- subject to those subpoenas.

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The purpose, as I said, is to show the legislature's nonresponsiveness to the concerns that were presented by Turtle Mountain and Spirit Lake and to show that the justifications that the Secretary of State has given here and that were given during the legislature process are tenuous.

Those factors are relevant under the totality of circumstances test that applies to this case. It's well set out in *Thornburg versus Gingles*. Both nonresponsiveness and tenuousness are among the Senate Factors that have been applied by Courts and that the Supreme Court has found are typically probative of vote dilution under Section 2.

Admissibility, of course, any such documents would be hearsay, but they would not be offered for the truth of the matters asserted in the documents, but really

only to show state of mind and the purpose behind the legislature's actions, not for the truth of any assertions that are in those documents.

And then the last element is sufficiency, and that questions whether the evidence, if produced, would be sufficient for the Court to make the findings that we think would be supported, and that, I think, is a very low bar for us. If there were smoking-gun documents in the material that was produced, certainly this Court could make a finding of unresponsiveness or tenuousness.

So unless you have questions, that's my offer.

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THE COURT: And do you believe, Mr. Sells, that it's necessary for the Court to make any other ruling on that offer other than to accept it for the record?

MR. SELLS: No, I do not, Your Honor.

THE COURT: And the Court will accept it for the record and accept your offer, and it will be duly noted.

Mr. Phillips, your response.

MR. PHILLIPS: Your Honor, having heard the offer, I have no new objection to make. I would stand by my original objection, but certainly understand and accept the ruling of the Court and appreciate the indication that the Court won't consider this in its decision in this case.

THE COURT: Very good. Thank you, Mr. Phillips. Thank you, Mr. Sells. And the Court will consider the

record developed with regards to Document 109 and Document 111.

Mr. Gaber, do the plaintiffs have further testimony or evidence to present?

MR. GABER: No, Your Honor. The exhibits, I believe, have all been admitted, and we have no further witnesses. So I always loath to say this, but the plaintiffs would rest, Your Honor.

THE COURT: And the exhibits have all been received, as indicated earlier, but it's good to summarize that.

I will ask the parties if -- before we go to the defendant's case in chief, if there are any motions that the

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parties desire to make. Mr. Gaber?

MR. GABER: Not at this time, Your Honor.

THE COURT: Mr. Phillips?

MR. PHILLIPS: I don't wish to make any motions at this time.

THE COURT: Thank you.

Mr. Phillips, your first witness.

MR. PHILLIPS: Your Honor, I wonder, before I call my first witness, if I might just introduce a new face at our table.

THE COURT: Yes, please. And I've already been advised by Lori that this is Erika White, but please proceed.

MR. PHILLIPS: That's correct, Your Honor. This is Erika White at the far end of the table. She is the state elections director, employed by the Secretary of State. She'll be sitting at counsels' table for the remainder of the day as our client representative, and I'll be calling her, but not as my first witness.

THE COURT: Thank you, Mr. Phillips. And welcome.

MR. PHILLIPS: And, Your Honor, I would call Dr. M.V. "Trey" Hood, III.

DR. M.V. TREY HOOD, III,

having been first duly sworn, was examined and testified as follows:

THE COURT: Please proceed.

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DIRECT EXAMINATION

BY MR. PHILLIPS:

Q. Good morning, Dr. Hood.

A. Good morning.

Q. Could you please state your name for the record?

A. M.V. Hood, III.

Q. What is your current occupation?

A. I'm currently a professor of political science at the University of Georgia, and also serve as the director of the SPIA Survey Research Center. SPIA stands for School of Public and International Affairs.

Q. And how long have you been a faculty member at the University of Georgia?

A. Since 1999.

Q. What courses do you teach?

A. I teach a variety of courses in American politics and policy. I've taught the introductory American government course that we offer. I've taught undergraduate methods courses over the years. I've taught courts -- courses on the legislature.

More recently I've been teaching courses in southern politics, and sometimes I teach that -- I have taught that at both the undergraduate and graduate level. I've taught a course in election administration at the graduate level a couple of times.

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So, I mean, in this context it may sound strange, but the southern politics course that I teach does include a healthy dose or a module on redistricting and, of course, the Voting Rights Act.

Q. Do you serve on any editorial boards?

A. Currently I'm on the editorial boards for *Social Science Quarterly* and *Election Law Journal*. *Election Law Journal* deals specifically with election administration issues, including redistricting.

Q. Have you received any research grants related to election administration?

A. I've received a couple of research grants from the National Science Foundation, the Pew Charitable Trust, the Center for Election Innovation and Research, and from the MIT Data Science Lab.

Q. Can you please explain to the Court generally your educational background?

A. Sure. I have three degrees in political science, a BS from Texas A&M, an M.A. from Baylor, and a Ph.D. from Texas Tech.

Q. Let's pull up Defendant's Exhibit 452. Is this your CV that was produced in this case, along with your expert report?

A. Yes.

Q. Is everything in this CV accurate and current?

A. Well, it was accurate as of January 2023, so --

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Q. What would be new since this was produced?

A. I think there's another publication. There have been a couple of conference presentations that should -- either that have been added or that I have participated in since this time.

Q. Have you published any peer-reviewed books, journal articles or other publications in the area of election administration?

A. Yes.

Q. And are those -- we'll go to -- we'll kind of scroll through pages 1 through 7. Are those listed on pages 1 through 7 of your CV?

A. Yes, they are.

Q. There's quite a few of them.

A. I published some articles specifically -- you know, redistricting would be considered a subpart or a component of election administration, so I have published a few articles specifically on redistricting.

Q. In the last five years have you testified in any other election-related cases?

A. Yes.

Q. And are those cases listed in your expert report in this case?

A. Yes, they are.

Q. How many times have you testified as an expert at a deposition or trial?

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A. Within the last -- I think it's five years, as it was listed in the expert report, I think ten times.

Q. Out of those ten cases, how many of them specifically involved redistricting?

A. I think about half of them.

Q. Have you performed racially polarized voting and functional analyses for courts or as part of your job as an academic?

A. Yes.

Q. Based on your education, training and experience, do you hold yourself out as an expert?

A. In certain things. I mean, generally I perform research and teach courses in American politics and policy; more specifically within that area, election administration, again, southern politics, racial politics, senate electoral politics.

Q. In forming your opinions in this case, have you drawn on your education, training, and experience as a social scientist?

A. Yes.

Q. And any opinions that you provide in this case, will you be offering those to a reasonable degree of certainty?

A. Yes.

Q. And you'll be offering your own opinions in this case?

A. Yes.

Q. As well as a critique of Dr. Collingwood's opinion?

A. Yes.

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MR. PHILLIPS: Your Honor, I'd request that Dr. Hood's testimony be accepted by the Court as expert testimony.

THE COURT: Any objection, Mr. Gaber?

MR. GABER: No, Your Honor.

THE COURT: It will be accepted accordingly. Thank you.

MR. PHILLIPS: Thank you.

Q. (MR. PHILLIPS CONTINUING) Let's pull up Exhibit P-81. Dr. Hood, I'm showing you Plaintiffs' Exhibit 81. Is this your written report in the current case?

A. Yes.

Q. And this report was disclosed to the plaintiffs during discovery?

A. Yes.

Q. We're going to go through quite a few questions about the information in this report. It's my understanding you would like to have a hard copy with you at the witness stand there to look at. We'll show things on the screen, but would it assist your testimony to have a hard copy?

A. It would be helpful. I'm, I guess, a little old-fashioned.

THE COURT: Any objection, Mr. Gaber?

MR. GABER: No objection.

THE COURT: Please proceed accordingly, Mr. Phillips.

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Thank you.

MR. PHILLIPS: Thank you, Your Honor. And if I may approach?

THE COURT: You may.

THE WITNESS: Thank you.

Q. (MR. PHILLIPS CONTINUING) And I'll ask, while you're under oath today, do you adopt the statements in your report as true and correct?

A. Yes.

Q. Before we dive into the details of your report, can you explain to the Court your understanding of what's known as the *Gingles* test and its preconditions?

A. Certainly. There are three prongs to the *Gingles* test that were developed in a Supreme Court case, *Thornburg v. Gingles* in 1936. The first component of the *Gingles* test or the first prong asks the question: Is the minority group in question sufficiently numerous and compact enough to be able to constitute a majority in a single-member district.

The second prong examines vote cohesion among the major -- minority group in question. This is the stage where sometimes we use the phrase "racially polarized voting," so we're looking to see whether or not

there's a clearly defined candidate of choice for the minority group in question; so are they lining up specifically behind a certain candidate? And on the other side, is the White voting bloc lining up aside a

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different candidate?

The third prong asks the question, you know: If there's evidence of Prong 2 -- if there's racially polarized voting, the third prong then asks the question: Is the minority candidate of choice typically defeated by the majority White voting bloc?

So those are sort of in a nutshell the three prongs of the *Gingles* test.

Q. To prevail on a vote dilution claim, is the plaintiff required to prove all three *Gingles* preconditions?

A. Yes.

Q. Can you explain to the Court your understanding of the totality of the circumstances test?

A. Well, once the *Gingles* test has been conducted, then you move on in the vote dilution case to what's called the totality of the circumstances test, which is based on what are known as the Senate Factors. The Senate Factors were developed by a committee in the U.S. Senate during the 1982 renewal of the Voting Rights Act.

And so there's a number of factors related to the totality of the circumstances test that look at things like economic disparities, health disparities, so you're

looking for lingering effects of discrimination potentially.

Q. Is the plaintiff required to establish that all three prongs of the *Gingles* preconditions are met before the analysis

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shifts to the totality of the circumstances test?

A. That's my understanding.

Q. Was your analysis in this case focused on the *Gingles* test?

A. Yes.

Q. Please explain to the Court the type of analysis that you performed in this case.

A. Well, my primary duty in this particular case was to provide a rebuttal report to a report that Professor Collingwood had originally submitted in this matter.

Q. Are you familiar with the term "ecological inference"?

A. Yes.

Q. And what is that?

A. Ecological inference or EI is a statistical tool that's commonly used to derive estimates of individual-level behavior from aggregate-level data. So, you know, because the vote is secret, we can study things using aggregate-level data when you're studying voting behavior at the precinct level, for instance. And we can

also match precinct voting-level data with racial data, especially from the census.

And so using EI as a statistical tool, we can derive estimates of racial voting patterns, and in doing so, make individual-level inferences about how racial minority groups or Whites are voting.

Q. Is it important to use ecological inference?

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A. It is, yes. I mean, you have to use some kind of statistical tool to derive those estimates. Again, we don't have it at the individual level. The only exception would be if we had survey data, we'd actually gone out and surveyed people. Then we could have their individual-level voter preferences and their racial identification, but we don't have that in this particular matter.

So it's important to use a statistical tool or technique to derive those estimates. And for quite some time it's my understanding that the Courts have accepted estimates generated using EI or ecological inference for that purpose.

Q. I'm going to ask you a little bit about what I call a "functional analysis." I've heard it referred to in this case as a performance analysis. Am I correct that those two things are one and the same?

A. Yeah. Yes. They're synonymous.

Q. What is a functional analysis?

A. Well, a functional analysis might tell us how a district might perform out into the future, so we're trying to make a -- I don't want to use the word "guess," but we're trying to extrapolate out in terms of how this district is going to perform electorally speaking.

Q. Do you use turnout data as part of a functional analysis?

A. I do. Not everyone does, but I do. You know, turnout and vote choice are the two components that determine elections, so

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I like to, at that stage, include data on turnout.

Q. Let's take a look at a map of District 9 as enacted. Let's go to Exhibit P-80 and scroll to page 3 and maybe just zoom in on the image, please.

Dr. Hood, what are we looking at here?

A. This is a map of enacted Legislative District 9, and it also -- it also has the subdistrict boundaries. LD9 is subdistricted into 9A and 9B, and so the very small blocks that you see there are actually census blocks, and they've been shaded to denote the percentage of the Native American population within each one of those census blocks. And so the darker shades of green would indicate a higher level or density of Native American population.

Q. Is the Turtle Mountain Reservation located completely within District 9?

A. Yes. In fact, it's completely within Subdistrict 9A of District 9.

Q. Did you read the legislative testimony and reports as part of your review of the file in this case?

A. Yes.

Q. Was it a goal of the redistricting committee to keep reservations whole within legislative districts?

A. It was.

Q. What is the Native American voting-age population in District 9 overall?

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A. So this is from memory. I think it's 54.5 percent any-part Native American.

Q. What does "any-part Native American" mean?

A. Well, with the census, again, you're allowing people to describe themselves in racial and ethnic terms, and so someone could be in this particular case just Native American or they could choose to be Native American plus some other racial category as well. So that measure would include everyone that's a single race, Native American, and anyone that's Native American plus some other racial category, again, as defined by the people taking the census.

Q. Is District 9 a minority opportunity-to-elect district?

A. Well, it's a majority Native American district, yes.

Q. And you would consider that an opportunity to elect?

A. Yes.

Q. Is that based on any case law?

A. Well, for instance, *Bartlett v. Strickland* defines an opportunity-to-elect district as a majority-minority district, so --

Q. Does the Voting Rights Act require the creation of a district with 91 to 93 percent chance of Native Americans electing their candidate of choice?

A. No.

Q. Can you explain how the subdistricts within District 9 function?

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A. Well, District 9 overall at-large elects one state senator, and then within each subdistrict there's a state House member elected. So there's one state House member elected from 9A, and one state House member elected from 9B.

Q. What's the Native American voting-age population in districts -- or Subdistricts 9A and 9B?

A. So I think 9A is 79.80 percent, and I think 9B is 32.2 percent, if I'm remembering correctly.

Q. Those numbers are, in fact, stipulated to in this case; is that right?

A. Yes. If I misstated it accidently, yes.

Q. I think you stated it --

A. I think that's correctly.

Q. I think you stated it correctly. I want to take a look at your critique of Dr. Collingwood's analysis of Legislative District 9. Did you create as part of your analysis of this case summary tables of Dr. Collingwood's analysis?

A. Yes, I did.

Q. Let's go to page 3 and show Table 1. Oh, I'm sorry. Are we on Exhibit -- Plaintiffs' Exhibit 81? All right. Looking at Plaintiffs' Exhibit 81, page 3, showing Table 1, which races are included in this summary table?

A. So these would be the races that were analyzed in Professor Collingwood's original report in this matter.

Q. Are these -- does this represent all of the races analyzed

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by Dr. Collingwood?

A. Yes.

Q. Please explain to the Court what this table shows.

A. This is a summary table I created to try to determine whether or not Prong 3 of the *Gingles* test was met or not. So again, this particular table, Table 1, looks at the races analyzed for LD9 as a whole, LD9A and LD9B. So there are 110 total races. Professor Collingwood found that in almost all of these races there was evidence of racially polarized voting.

So there were only two races where there was no clear Native American candidate of choice. In other words, there wasn't racially polarized voting. So in 1.8 percent of this 110 number, there was no clear candidate of choice for Native Americans.

The rest of the races is 108. There was racially polarized voting, and by definition there was a clear candidate of choice for Native Americans. And of those, the Native American candidate would win 66 out of 110 times or 60 percent of the time, and the Native American candidate would be defeated 42 of 110 times, for 38.2 percent of the time.

Q. And you did this analysis as part of your *Gingles* Prong 3 analysis?

A. Yes.

Q. Did you reach any conclusion?

A. Well, again, as we discussed earlier, Prong 3 -- when

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racially polarized voting is present, Prong 3 asks the question, is the -- and in this particular case would ask the question: Is the Native American candidate of choice typically defeated by the majority White voting bloc; so typically meaning more often than not. The way I define that is at least the majority of the time. So in this case the Native American preferred candidate of choice is only defeated 38.2 percent of the time, so not a majority of the time.

Q. Did you select the races that are included in this chart?

A. No.

Q. Who did?

A. These are the races that Professor Collingwood analyzed.

Q. Is it important to be selective at the beginning of an analysis when choosing the races to analyze?

A. I believe so, yes.

Q. After you've selected a race to analyze, can you just disregard it and focus only on more probative races?

A. I don't believe so, no.

Q. When should weighting factors be considered as part of a proper analysis?

A. Well, I would consider, you know, if certain weights are going to be given to certain types of elections over others, you know, my strategy is to do that upfront. So, for instance, just completely hypothetically, not even related to this matter, but if I believe that endogenous races were the most

[p.86]

important races to analyze in a particular matter, then I would probably start out there, and I might not -- I might not analyze any exogenous races.

Q. Why is it important to do that analysis upfront?

A. Well, I mean, once an election is utilized and analyzed in a report, it just can't be completely discounted.

Q. Should races from 2018, when there was a high Native American voter turnout, be excluded from the analysis?

A. I don't necessarily believe so. It's true I -- you know, there's been a lot of evidence presented on that particular point, that Native American turnout was higher in 2018, and my own work also corroborates that. But, again, for me that proves that Native American turnout can be that high. It was that high in 2018, not that it would -- you know, is never going to be that high again, for instance, so --

Q. Is it fair to say the Voting Rights Act provides an opportunity to elect?

A. An opportunity to elect, not a guarantee, per se.

Q. Just to be clear, does this table mean that Prong 3 of the *Gingles* test is not met?

A. Based on these data, yes, that's correct.

Q. And does this confirm that Legislative District 9 is functioning as a district where the Native American community can typically elect its candidates of choice?

A. Yes.

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Q. Let's look at another table on this report. I believe it's on the same page, if we could just scroll down. We'll look at Table 2 on the same page. What races were included in this table?

A. Again, these were races that Professor Collingwood analyzed. These are races for just Legislative District

9 at-large, so I'm not including any races from 9A or 9B here, so there were 38 races that were analyzed. Again, in two of those there was no clear Native American candidate of choice. There was an absence of racially polarized voting. That would constitute 5.3 percent of that total.

For the rest of the cases, 36, there was a clear Native American candidate of choice, so in 95 percent of the races analyzed there was racially polarized voting. Of those the Native American candidate of choice won 23 or 60.5 percent of the time, and the Native American candidate was defeated in 13 or 34.2 percent of the time.

So, again, similar to Table 1 that we just looked at, more often than not the Native American preferred candidate of choice is not being defeated by the majority White voting bloc.

Q. Why did you do this analysis and prepare this Table 2?

A. It's just a different way of looking at things. You know, if someone had objections to including races from the subdistricts, you know, here's a table that just looks at elections from Legislative District 9 at-large as a whole.

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Q. Did you reach any overall conclusion?

A. Well, again, even from these data in Table 2, it doesn't appear that Prong 3 is being met.

Q. Am I correct that plaintiffs are required to show a pattern of vote dilution with respect to both the second and third prongs of the *Gingles* test?

A. Yes.

Q. And how would you define the pattern of vote dilution?

A. Well, again, there's -- first, a necessary precondition, there has to be racially polarized voting. You know, if there's a complete absence of racially polarized voting or Prong 2 is not there, then Prong 3, obviously, can't be met.

But in this case there is racially polarized voting. And so, again, the question asked for Prong 3 is, where there is a clearly defined Native American candidate of choice, are those candidates typically, again, more often than not, the majority of the time, losing or being defeated by the candidate supported by the majority White voting bloc.

Q. With respect to District 9, does Dr. Collingwood's analysis satisfy Prong 3 of the *Gingles* test?

A. Not in my opinion.

Q. And why not?

A. Well, again, there's not a pattern of vote dilution evidenced.

Q. Before we move on to talk about other portions of your

[p.89]

report, I just want to make sure your final conclusions are clear to the Court and for the record. What's your opinion of the *Gingles* 1 factor in District 9?

A. Well, *Gingles* 1 would be met. District 9 is 54.5 percent Native Americans, so it is a majority-minority district.

Q. What's your opinion of the *Gingles* 2 factor in District 9 as a whole?

A. There is evidence of racially polarized voting in LD9.

Q. Do you have an opinion on whether the *Gingles* 2 factor is met in the subdistrict specifically within District 9 of District 9A and 9B?

A. Not specifically, necessarily. There's not enough data to really analyze to derive those estimates.

Q. Is there enough data -- let me ask this. Is there enough precinct-level data to produce reliable estimates of racially polarized voting using ecological inference in the subdistricts?

A. I don't believe so. That's my opinion.

Q. What's your opinion of the *Gingles* 3 factor in District 9?

A. Well, again, my opinion is that *Gingles* 3 is not met because the Native American candidate of choice is not typically being defeated by the majority White voting bloc.

Q. Did Dr. Collingwood also analyze voting patterns in Legislative District 15 in the enacted plan?

A. Yes.

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Q. Are we still on Plaintiffs' Exhibit 81? Let's go to page 5 and look at Figure 1.

What does this depict, Doctor?

A. This is a similar figure to the one we looked at for LD9. This is LD15. Again, there's block-level census data plotted for the percentage of Native Americans with -- census block within this district. You can see the district outlined, and then the red outline at the bottom part of the district is the Spirit Lake Reservation.

Q. Can you generally describe the Native American population within District 15?

A. Most of it is confined within the reservation boundary in this case. I mean, there's a few scattered census blocks here and there you can see that are -- that are some shade of green outside of the reservation, but most of them are contained within the reservation.

Q. And what is the Native American voting-age population in District 15?

A. I believe it's 23.1.

Q. And just for the record, that is the stipulated percentage.

Could District 15 be subdistricted to benefit Native American voters?

A. Well, even if a subdistrict was drawn, say, around the Spirit Lake Reservation, the subdistrict would not constitute a

[p.91]

majority of Native American population within that district.

Q. It's fair to say a subdistrict would not help Native American voters elect their candidates of choice?

A. No. That's correct. That's correct.

Q. As related to *Gingles* Prong 1, do Native Americans within District 15 comprise the majority of the voting-age population?

A. No.

Q. Is the first prong of the *Gingles* test met with respect to Legislative District 15?

A. Well, it is not a majority Native American district, no.

THE COURT: Dr. Hood, you're just a little bit hard to hear. If we could --

THE WITNESS: Sorry, Your Honor.

THE COURT: Thank you.

Q. (MR. PHILLIPS CONTINUING) In his report, Doctor -- or Professor Collingwood, he concludes that

racially polarized voting exists in 30 of 32 races analyzed for District 15. Do you disagree with that?

A. No, I don't.

Q. Dr. Collingwood also concludes that Native American candidate of choice would win in only one of the 30 election contests analyzed where racially polarized voting is present in District 15. Do you disagree with him on that?

A. No.

Q. You don't dispute Prongs 2 or 3 of the *Gingles* test are

[p.92]

met with respect to District 15?

A. Correct.

Q. What about Prong 1?

A. Well, again, it's not a majority-minority district.

Q. Does the plaintiff need to establish all three *Gingles* factors to establish vote dilution and move on to the totality of circumstances test?

A. Yes.

Q. What are the traditional redistricting criteria considered by North Dakota's legislature?

A. There were a number. Of course, population equalization is the most important -- it always is -- compactness, contiguity, core preservation, incumbency protection, respect for communities of interest in

existing political subdivisions, including counties and reservations, for instance. I believe that was -- I believe those were the factors that the legislative redistricting committee considered in its work.

Q. Are those typical factors that are considered by states in redistricting?

A. Certainly, yes.

Q. Let's go to Plaintiffs' Exhibit 1 and scroll to page 31. Is this Plaintiffs' Demonstrative Map 1 from Dr. Collingwood's report?

A. Yes, it is.

Q. I'm going to go back to your report now. Let's go back to

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Plaintiffs' Exhibit 81 and go to page 6. As part of your analysis, did you compare the as-enacted map of District 9 with a demonstrative map that Dr. Collingwood prepared?

A. Yes, I made some comparisons between those two districts.

Q. And did you compare them with respect to population deviation?

A. Yes.

Q. And is that shown on this page?

A. It is. It's lowercase Roman numeral i.

Q. What is population deviation?

A. Well, any time you start to draw a districting plan for a state or any other component, say, county commission districts within a county, you take the total population and you simply divide it by the number of seats, for instance, or the number of county commission seats, whatever -- whatever you're trying to redistrict for, and you come up with what's known as an ideal district size in terms of population. And so, you know, you want to try to hit as close as possible that ideal district size, and that gets to the point of districts having equal population.

Q. And what did you find?

A. In regard to LD9 -- I should say the enacted LD9, the population deviation is negative 2.5, so it's slightly underpopulated according to the comparison to the ideal district size. Plaintiffs' Demonstrative District 1, LD9 would

[p.94]

be 3.1 -- 3.14, I guess, to be more exact, so it would be slightly over the ideal district size.

Q. Overall, how does the enacted map compare to the demonstrative map?

A. The enacted map has a slightly lower population deviation than the plaintiffs' Demonstrative District 1, LD9.

Q. Let's talk about compactness, and this is a little bit further down, it looks like, on sort of the bottom of page 6 and on to page 7. Did you compare the as-enacted

District 9 map with Demonstrative Map 1 with respect to compactness?

A. Yes, I did.

Q. What is compactness?

A. Compactness is, you know, a mathematical measure to determine -- and maybe the easiest way to start out to talk about this is that a circle would have a compactness score of one. It would be a very compact shape. So there are many, many compactness scores. I believe there's maybe over 50 now.

So I made use of three scores that are more commonly used, especially in court cases, the Reock, the Polsby-Popper, and the Schwartzberg compactness scores, and each one of these scores ranges from zero to one. So as you approach zero, that would be less and less compact. As you approach one, that would be more and more compact. I had to rescale the Schwartzberg score so it would range from zero to one, but I've done that here, so we can sort of compare across these

[p.95]

compactness scores.

Now compactness scores are calculated using different formulas, and so that's why you usually don't just rely on a single compactness score.

Q. How many measures of compactness did Dr. Collingwood rely on?

A. I think two, Reock and Polsby-Popper, I believe.

Q. You added the Schwartzberg measure?

A. I did. And there's a -- I've included a brief description on page 6 of -- just very briefly about what these measures are using in terms of, you know, what's being compared to what, you know, area to perimeter, area to area of a circle, et cetera, so --

Q. If you could give the Court a brief -- a description of that for these different measures. We have the Reock, Polsby-Popper, and Schwartzberg.

A. Correct.

Q. Explain to the Court what the difference is between those.

A. Reock is more of an area-based measure, so formally -- or more formally Reock is the ratio of the district area to the area of the minimum circumscribing circle. So you draw a circle around the district, and you compare the two -- you know, using a mathematical formula, you compare the two areas of the circle and then the area of the district, so -- and you get a ratio.

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Again, Polsby-Popper and Schwartzberg are more perimeter-based measures as opposed to area-based measures. In fact, Polsby-Popper is a perimeter-to-area comparison, and it calculates the ratio of the district area to the area of a circle with the same perimeter.

And in the Schwartzberg measure, it's a ratio that compares the perimeter of a district to the perimeter of a circle of equal area to the district.

Q. Let's look at Table 3 on page 7 of your report. Can you explain this chart to the Court -- or table?

A. It's a comparison I put together based on compactness scores, Demonstrative District 1 from the plaintiffs, their LD9 Demonstrative District 1 as compared to enacted LD9, and so I've got the scores here.

For instance, if we look at the Reock column -- and, again, these scores all range from zero to one, so the Reock score for Demonstrative District 1 is .25, which makes it rank 45th. So as the ranking gets higher in comparison to the other districts in the legislative plan, it would be less compact. So ranking it first would be the most compact; 47th would be the least compact.

Enacted LD9 has a Reock score of .39, which ranks it 33rd among the 47 districts, and there's a difference of .14 between those two scores.

The Polsby-Popper measure is in the middle column

[p.97]

there. Demonstrative District 9 has a Polsby-Popper score of .22, which gives us a rank of 44th. Enacted LD9 has a Polsby-Popper score of .59, which makes it fifth overall.

And then, finally, the Schwartzberg for Demonstrative District 1 is .28 compared to the Schwartzberg score for enacted LD9 which is .59; so that goes from a ranking of 45th to sixth for the enacted LD9.

Q. Overall, how does the as-enacted District 9 compare to the Demonstrative Map 1?

A. Well, in terms of compactness, the enacted LD9 is more compact using any of these various compactness measures as compared to Demonstrative District 1.

Q. A little bit further down on this same page there's a section called "communities of interest."

A. Yes.

Q. Are counties communities of interest?

A. Yes, certainly.

Q. Do states usually try to avoid splitting counties?

A. Typically, yes.

Q. And why do they do that? Why do they avoid that?

A. Counties are important political subdivisions within states within the United States, and it's, you know, a traditional redistricting criteria that's been utilized for a long time, is that where possible, you would not split county boundaries when drawing a plan.

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Q. Would a reservation be a community -- or a community of interest similar to a county?

A. I certainly would think so, yes. And, again, the redistricting committee considers them to be communities of interest; reservations, that is, so --

Q. Does your report contain a mistake in this section, this communities-of-interest section?

A. Yes. So it should say LD9 splits Towner and Cavalier Counties, so it's LD9 -- enacted LD9 splits two

counties. Demonstrative District 1 from the plaintiffs splits three counties, so that's what it should say.

Q. The enacted map splits two counties --

A. Yes.

Q. -- including Cavalier which was left out of this report.

A. Right. Yes. Correct.

Q. With that correction in mind, what did you find with respect to the splitting of counties when comparing the enacted Legislative District 9 with the Demonstrative Map 1?

A. Well, you have two in the enacted versus three in the demonstrative plan.

Q. Let's look at a map of the enacted. We'll go to Exhibit -- or Plaintiffs' Exhibit 101. And, Kate, if we could zoom in on District 9.

This is the enacted District 9. Dr. Hood, can you explain the county splits in this map?

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A. So as we can see, yeah, this is enacted District 9, LD9. Towner County is split, as is Cavalier County. Rolette County is whole within District 9.

Q. And let's go look at the demonstrative map again. It's Plaintiffs' Exhibit 1, at page 31. Maybe zoom in just a little bit more, please.

This one may be slightly harder to see, Dr. Hood, but can you explain the county splits in this map?

A. So in this particular case, for Demonstrative District 1 from the plaintiffs, Eddy, Pearce, and Rolette Counties are split.

Q. Overall, how do the two maps compare?

A. Well, again, two splits -- two county splits for the enacted plan versus three for the demonstrative plan.

Q. Let's go back to Dr. Hood's report at Plaintiffs' Exhibit 81. We'll go to page 8, and we'll look at core retention.

Dr. Hood, what is "core retention"?

A. Core retention is a measure that basically looks at how much of the new district's population was carried over from the previous district's population, so it's a percentage. It can range from zero to 100 percent.

So zero would literally mean that no one in the new district resided in the old district. So that might be a case where, for instance, a district is completely moved across the

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state. I'm just talking hypothetically here, not about any particular district.

A hundred percent would mean everyone in the old district was present in the new district, so that might be a case where district sizes had to be cut down, for instance.

So it ranges, again, from zero to a hundred percent, and it can be calculated using different metrics. I used both total population and voting-age population.

Q. And what did you find in this case comparing the enacted District 9 with Proposed Map 1?

A. So what I found in this particular case is that the enacted district -- the core retention measure for the enacted district using total population was 75 percent. So 75 percent of those present in enacted LD9 were present in the benchmark LD9. When I say "benchmark," I'm referring to LD9 under the 2011 map, the previous redistricting cycle.

Demonstrative District 1, the core retention score is, total population, 63 percent and also 63 percent using the voting-age population. So core retention is higher in this particular case under LD9 in the enacted plan as compared to the demonstrative district.

Q. And to be clear, for core retention analysis -- please correct me if I am wrong -- you're generally comparing the previously enacted map with the newly enacted map.

A. Yes. The benchmark to the enacted map, yes.

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Q. So in this case you compared the benchmark with the enacted map and then separately compared the benchmark with the plaintiffs' Demonstrative Map 1?

A. That's exactly right, yes.

Q. Would it be proper methodology to compare the enacted map with plaintiffs' proposed demonstrative map?

A. Not in my opinion, no.

Q. Why not?

A. Well, you're looking at the old district, so you got to start with the benchmark and then move from there.

Q. What we're looking at is populations being retained in the same district that they used to be in, correct?

A. Correct. Correct.

Q. On these various traditional redistricting criteria that we've looked at on District 9, is it proper methodology to compare the enacted map with plaintiffs' proposed map?

A. That's a comparison point that can be made, certainly, yes.

Q. Yeah. Why should that be made?

A. Well, both -- again, both the enacted map and the demonstrative district, which is not in effect, obviously, but it's hypothetical, you know. Those are both changes from what was in the benchmark map.

Q. Is that part of a *Gingles* 1 analysis?

A. What specifically?

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Q. The comparison of the enacted map with the proposed maps.

A. It can be, yes.

THE COURT: Mr. Phillips, would -- are we close to a breaking point, a natural breaking point?

MR. PHILLIPS: Yes, Your Honor.

THE COURT: Okay. Let's do that, then. We'll take a break now, and we'll come back at 1:30 after lunch, and we'll start again. And Dr. Hood will be back on the stand and will remain under oath. And everybody can take a break, and we'll be back here at 1:30. We're in recess.

(Recess taken from 12:07 p.m. to 1:34 p.m.)

THE COURT: We will -- we will proceed. Mr. Phillips.

MR. PHILLIPS: Yes. Thank you, Your Honor.

Q. (MR. PHILLIPS CONTINUING) Good afternoon, Dr. Hood.

A. Good afternoon.

Q. Before the lunch break we had talked about the traditional redistricting criteria, comparing the as-enacted District 9 with the proposed Demonstrative Map 1; is that correct?

A. Correct.

Q. I'd like to talk about your comparison of the as-enacted District 9 with the Demonstrative Map 2 that the plaintiffs have created, okay?

A. Okay.

Q. Can we pull up Plaintiffs' Exhibit 1 and go to page 38?

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Dr. Hood, is this plaintiffs' Demonstrative Map 2?

A. Yes.

Q. And we'll go back to Plaintiffs' Exhibit 81 at page 8. And we're back to your report, Dr. Hood, and we'll scroll to the population deviation. Did you compare the as-enacted District 9 map with the Demonstrative Map 2 with respect to population deviation?

A. I did.

Q. What did you find?

A. Again, the as-enacted District 9 has a population deviation of negative 2.52. The Plaintiffs' Demonstrative District 2, LD9, has a population deviation of 4.53.

Q. And what did you conclude?

A. The enacted LD9 has less population deviation than Plaintiffs' Demonstrative District 2.

Q. Let's look at compactness. We'll scroll down a little bit. Did you compare the as-enacted map for District 9 with Demonstrative Map 2 with respect to compactness?

A. I did.

Q. And let's scroll down to Table 4 on page 9, please. I'm sorry. Was that maybe page 10? Did I say that wrong for the record? Okay. On page 10 is Table 4.

Can you please explain to the Court what this table is?

A. This is a summary table, as we looked at with Table 3,

[p.104]

comparing -- this particular table compares Demonstrative District 2, LD9, to enacted LD9 on these three compactness scores.

So, again, if we just went through this, looking at the first column for Reock, Demonstrative District 2 has a Reock score of .20, which is 45th out of the 47 districts. Enacted LD9 has a Reock score of .39, which is 33rd. On the Polsby-Popper score, Demonstrative District 2 has a Polsby-Popper score of 0.19, which is 46th. Enacted LD9 has a Polsby-Popper score of .59, which is fifth overall.

And then on the Schwartzberg scores, Demonstrative District 2 has a compactness score of .24, which is 46th, compared to .59 for enacted District 9, which is sixth overall.

Q. And what do you conclude as far as compactness?

A. Enacted LD9 is more compact than Demonstrative District 2.

Q. On that same exhibit -- it's Plaintiff's Exhibit 81 -- we'll go to page 9, and we'll look at communities -- I

may be off by a page. You may have to go down, communities of interest.

On page 10 there's a communities-of-interest section. Did you do a comparison of county splits between the as-enacted District 9 and the Demonstrative Map 2?

A. Yes, I did.

Q. You testified earlier today about a mistake that was in your report with respect to this section in your prior

[p.105]

comparison. Is that same mistake present in this portion?

A. Yes.

Q. And what was that mistake again?

A. I left off Cavalier County, so it should be Towner County and Cavalier County are split. That's going to be in the enacted plan.

Q. And how many counties are split in the proposed Demonstrative Map 2?

A. Benson, Eddy, and Pierce, the three.

Q. And we'll look at that really quick on Plaintiffs' Exhibit 1 on page 38. Does this show the county splits in the plaintiffs' Demonstrative Map 2?

A. Yes.

Q. Which counties are split?

A. Benson, Eddy, and Pierce.

Q. We'll go back to your report. It's Plaintiffs' Exhibit 81, and go to page -- stay on this same page and just scroll a little bit. We'll look at core retention.

Did you conduct a core retention analysis with respect to the enacted District 9 and Demonstrative Map 2?

A. I did.

Q. And what maps did you compare?

A. I compared Plaintiffs' Demonstrative District 2 to the benchmark plan and enacted LD9 to the benchmark.

Q. And what did you find?

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A. Core retention, again, for the enacted LD9 is 75 percent using total population or 72 percent using the voting-age population. Core retention for Demonstrative District 2 is 70 percent using total population or 71 percent using the voting-age population.

Q. And what did you conclude?

A. So I concluded that enacted District 9 has slightly higher core retention scores as compared to Plaintiffs' Demonstrative District 2.

Q. Let's look at Plaintiffs' Exhibit 81, at page 11. And I'm sorry. I meant to say -- is that 10? I'm not sure how

I got off by a page, but this is page 10. And then let's scroll down to the next, page 11.

Okay. These two maps that you just looked at on pages 10 and 11, what are these?

A. These are the Plaintiffs' Demonstrative Districts 1 and 2 with the Turtle Mountain and Spirit Lake Reservations drawn into them, superimposed in them.

Q. The outline on this is -- on this map is of the proposed district submitted by Dr. Collingwood?

A. Well, they were in Dr. Collingwood's report, yes.

Q. These maps have not yet been passed -- or have not been passed by our legislature, correct?

A. They're just illustrative maps.

Q. Is it possible to know at this stage if -- whether this

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map would've been drawn with race as a predominant factor?

A. No.

Q. Ultimately, is that up to the Court?

A. Yes.

Q. That said, does this map raise any concerns with you regarding whether race may be deemed a predominant factor in drawing the district if the state were to pass this map?

A. Well, it does raise a few questions, especially considering that there are two population densities at either end of the district connected by a land bridge.

Q. How far apart are the Turtle Mountain and Spirit Lake Reservations?

A. Centroid to centroid -- and what I mean by that is the middle of the Spirit Lake Reservation to the middle of the Turtle Mountain Reservation, I believe, is 77 miles as the crow flies.

Q. Is there anything about the shape of this map that we're looking at give you any concern?

A. Well, again, there's a -- you know, what I've described in my report at least is a land bridge that's connecting the upper and lower part of the district.

Q. With a high concentration of Native Americans at each end?

A. Yes.

MR. PHILLIPS: Thank you. I don't have any further questions at this time, and I'll pass the witness.

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THE COURT: Thank you, counsel.

Mr. Gaber, cross-examination?

MR. GABER: Yes, Your Honor.

THE COURT: Thank you.

CROSS-EXAMINATION

BY MR. GABER:

Q. Good afternoon, Dr. Hood. How are you?

A. I'm well. Good afternoon.

Q. It's nice to see you again.

Now, you've testified in a number of redistricting cases; is that right?

A. Yes.

Q. And typically you testify on behalf of governmental entities who are seeking to defend their plans against a challenge; is that right?

A. More often than not, yes.

Q. And we discussed before that there was one example where you had testified on behalf of a plaintiff in a Section 2 case, and that was the Harding versus Dallas County case in Texas?

A. Yes.

Q. And the claim in that case was on behalf of White voters who were plaintiffs, and they were suing to challenge the Dallas County commissioner's court map alleging that it discriminated against them in that Black and Hispanic voters were diluting the White voters' voting strength. Is that a

[p.109]

fair explanation?

A. That's correct.

Q. When a racial minority group has been a plaintiff, you've only ever testified on behalf of the defendants, correct?

A. In a redistricting matter, yes. I think that's correct.

Q. And your scholarship generally focuses on southern politics and not, for example, Native American voting patterns. Is that fair?

A. Well, it's fair to say it doesn't focus on Native American voting patterns, but I also do research in the area of election administration, not just southern politics.

Q. Right. Now, you talked a little bit with Mr. Phillips about whether or not District 9 was a minority opportunity district, and I think you mentioned the *Bartlett versus Strickland* case from the Supreme Court. Do you recall that?

A. Yes.

Q. Now, whether or not a district actually provides an opportunity for a minority group to elect its preferred candidate depends on more than just the demographic number. Do you agree with that?

A. I do.

Q. And so if the minority group, for example, has a lower turnout relative to the White population, that's a factor that might make a majority-minority district actually not provide that opportunity. Do you agree?

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A. Hypothetically it's possible, yes.

Q. And, in fact, you're aware that the Supreme Court in cases like *LULAC versus Perry* have discussed this issue, how you might have a district that looks like it's a majority by its numbers for the minority group but actually doesn't work in terms of the electoral performance; is that right?

A. The *LULAC* case?

Q. The *LULAC* case.

A. Yes.

Q. Now, I think I heard you say that the enacted plan, the full Senate district version of District 9, because that is a majority-minority district, and I believe because you believe it's reasonably compact, that that alone satisfies *Gingles* 1 in this case; is that correct?

A. Well, I believe that's evidence of *Gingles* 1, yes. I mean, it's clearly possible to create a majority-minority district because it is.

Q. And whether or not the demonstration plan were the -- were the enacted plan or some other version, it doesn't change whether or not *Gingles* 1 is satisfied in a case.

A. You lost me. Could you restate that, please?

Q. Sure. So I guess if *Gingles* 1 is satisfied because of the enacted plan's characteristics, if the Court were to determine that some other configurations were

necessary to provide a real opportunity to elect, that's more of a remedial question than

[p.111]

it is necessarily a *Gingles* 1 question. Do you agree with that?

A. Yes.

Q. Now, nevertheless, plaintiffs did produce two demonstration plans, and you analyzed those in your report, right?

A. Correct.

Q. Now -- and if we could, Ms. Stirling, please pull up Plaintiffs' Exhibit 105.

Dr. Hood, do you see Plaintiffs' Exhibit 105 on the screen in front of you?

A. I do.

Q. Do you recognize this as plaintiffs' Demonstrative Plan 1?

A. Yes.

Q. And you agree that District 9 in plaintiffs' Demonstrative Plan 1 is, in fact, a majority Native voting-age population district?

A. It is, yes.

Q. Now, *Gingles* -- the first precondition in *Gingles* is about whether or not an alternative plan satisfies the majority-minority requirement; is that right?

A. Could a district be created, yes.

Q. In your report and in your discussion with Mr. Phillips, you spoke about whether or not the enacted version of District 15 was a *Gingles* 1 district? Do you recall that conversation?

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A. Yes.

Q. And given that the *Gingles* 1 focuses on an alternative plan and not necessarily on the enacted plan to the extent it's below 50 percent, that discussion about how enacted District 15 is below 50 percent Native, that's more of an observation about its current demographics and not necessarily a statement about *Gingles* 1 with respect to that district. Do you agree with that?

A. Well, yes, another district would have to be created if it was going to be a majority-minority district.

Q. And the district that you see in front of you, plaintiffs' Demonstrative Plan 1, District 9, accomplishes that majority-minority status, and it also includes the Spirit Lake Nation and the Turtle Mountain Band of Chippewa Indians. Do you agree with that?

A. I do, yes.

Q. Now, I recall from your deposition and your testimony earlier today that you believe that plaintiffs' demonstrative plan, District 9, degrades to some degree traditional districting principles as compared to the enacted version of District 9, correct?

A. I think -- yeah, that's fair. Yes.

Q. Ms. Stirling, could we please pull up Plaintiffs' 100?

Dr. Hood, do you see P-100 on your screen?

A. Yes, I do.

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Q. And do you recognize this as the enacted North Dakota state Senate plan that has the full District 9 in blue there?

A. Yes.

Q. Now, District 9 in the enacted plan is essentially a rectangle. Do you agree with that?

A. Pretty close to it, yes.

Q. Most legislative districts in the country, in your experience, are not drawn as rectangles. Do you agree?

A. There's a huge number of different shapes they could be. I mean, I've seen some other rectangles.

Q. Right.

A. I mean, they're certainly not all rectangles. I agree with that.

Q. And, in fact, as you look at the screen and you look at the state of North Dakota, most of the districts in front of you there are not rectangles. Do you agree with that?

A. Yes, most of them are not.

Q. Now, the factors that you analyzed for purposes of traditional districting principles, I think they were population deviation, compactness, county splits, and core retention. Do I have that right?

A. I believe that's all, yes.

Q. Let's start with population deviation. You agree that both of plaintiffs' Demonstrative District 9 are within the acceptable population deviation, as defined by Court cases and

[p.114]

within the range of the enacted plan?

A. The -- my understanding is the current legal safe harbor would be plus or minus 5 percent, so yes.

Q. And there's a number of districts in the enacted plan that have a larger deviation than is the deviation for plaintiffs' Demonstrative Plan 1, District 9, correct?

A. Yes.

Q. In fact, I think --

A. From my memory, yes. I don't have all that in front of me.

Q. I believe that Plaintiffs' Demonstrative Plan 1, District 9, falls at about the 22nd out of 47. Does that sound about right to you?

A. It was in the middle. I mean, I couldn't tell you exactly where.

Q. Now I'll move on to compactness. And, Ms. Stirling, if you could please pull up Demonstrative 1, page 1. And if you could -- thank you.

Now, this is a -- Dr. Hood, this is a provision from the North Dakota Constitution. It's Article IV, Section 2. And do you see that it requires that districts drawn by the legislature be compact and contiguous, among other things?

A. Yes.

Q. Now, is it your testimony that all of the districts that were enacted by the 2021 legislature comply with this

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requirement, that they are all, in fact, compact?

A. I would assume, since that was a criteria used by the redistricting committee, that they considered it.

Q. You didn't -- in looking at the plan, are there any that -- in the enacted plan that jumped out to you in your experience and have caused you to believe that they violate this compactness requirement?

A. Not necessarily. I mean, there's certainly a range in compactness across the 47 districts.

Q. And are any of them on the bottom end of that range, ones that you thought in examining them to be non-compact?

A. Not necessarily. I mean, there certainly were some that were on the bottom range, you know.

Q. Now, both of the demonstrative versions of District 9 that plaintiffs submitted are -- have compactness scores that are higher than other districts in the enacted plan, correct?

A. Yes. That's correct.

Q. And to the extent that it's your conclusion that none of the districts in the enacted plan are necessarily non-compact, is it, therefore, also your conclusion that plaintiffs' demonstrative versions of District 9 are, likewise, not -- non-compact, correct?

A. Well, to be consistent, yes.

Q. Thank you. We can take that down -- or, actually, Ms. Stirling, if you could scroll to page 2 of the

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demonstrative.

Now, Dr. Hood, in 2011 you testified -- issued an expert report and testified in a case titled *Vesilind versus The Virginia State Board of Elections* . Do you recall that?

A. Yes.

Q. And in that case you'd been retained by the State of Virginia to issue a report in a lawsuit in which the compactness of the state's -- of six of the state's -- state Senate districts were challenged. Do you recall that?

A. That sounds correct, yes.

Q. Now, ultimately, it was your conclusion in that case that the challenged districts satisfied the compactness requirement of state law in that case, right?

A. That was my conclusion, yes. I mean, this was a state legislative plan in state court, and I don't remember all the details of this. This was a while ago, maybe 2017. I'm not sure.

Q. Okay.

A. But I think the Virginia State Supreme Court at some previous point had spoken about some levels of compactness that were necessary.

Q. All right. Now, the districts that were at issue, two of them are on the screen in front of you there. Do you recognize those districts, 19 and 21?

A. Well, I'm going to take your word for it. I've not looked

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at this any time recently.

Q. Okay. So I will represent to you, and we talked about this at your deposition too, that the yellow and the green district in front of us, Districts 19 and 21, are two of the districts that you opined to be sufficiently compact. Would you agree with me that at least visually plaintiffs' Demonstrative District 9, Plan 1, that you see in front of you next to it is more compact than the two districts of Virginia state Senate Districts 19 and 21 that you opined to be compact in that case?

A. Probably using the -- what we call the ocular test, yes. I mean, of course, that is why we have statistics as well, but --

Q. And if we could scroll to page 2 of that demonstrative, please. Now there are four more districts from that case, Districts 26, 29, 30, and 37 -- I'm sorry. It's actually 28, 29, 30, and 37. And do you recall that it was your testimony that these districts were, likewise, sufficiently compact to comply with state law in that case?

A. Yes. That's correct.

Q. And would you agree with me again that Plaintiffs' Demonstrative District 9 from Plan 1 in this case is visually more compact than the four state Senate districts from Virginia that you opined to be compact in that case?

A. Again, looking at it with the eye, yes.

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Q. And one of the things you talked about with Mr. Phillips was that in your view there was a land bridge between Rolette County and Benson County. In plaintiffs' demonstrative district, that's the Pierce County precinct it includes; is that right?

A. Yes.

Q. Now, if you look at the Virginia state Senate districts that were at issue in that case, you would agree with me that there's a number of narrow connecting points and -- I don't know what the right adjective or word is to call them, but there's a number

of locations on those districts that are substantially narrower than what you see in the Pierce County precinct there.

A. I don't -- I mean, I don't know that these are drawn to scale. I would say there are some narrow components to these Virginia state Senate districts, yes.

Q. Now, do you recall from your report in the *Vesilind* case that -- and we talked about this as well previously, that the Reock and the Polsby-Popper scores for all six of the Virginia districts at issue in that case are, indeed, lower than the Reock and Polsby-Popper scores for Plaintiffs' Demonstrative District 9?

A. I recall discussing that, yes.

Q. And do you recall that that is the case, that the Reock and Polsby-Popper scores are lower for all six of the Virginia

[p.119]

state Senate districts?

A. Yeah, I do recall that, yes.

Q. Now, you haven't changed your opinion with respect to the Virginia state Senate districts, right?

A. No.

Q. And so I gather by using the metrics that you've applied in that case, it's your determination that in this case Plaintiffs' demonstrative versions of District 9 are, indeed, reasonably compact as well, correct?

A. Well, they don't fall below the threshold levels as we were discussing in the Virginia case.

Q. And I gather those are the thresholds that you would use to analyze compactness, right?

A. Well, again, there was some more -- there was some clearer dividing lines in Virginia because their state courts had provided some actual levels for compactness there, so --

Q. One of the things you relied on in that report was an article by two professors who had sort of a national proposal for what would be a cutoff point for compactness. Do you recall that?

A. Pildes and Niemi --

Q. That's right.

A. -- I believe. P-i-l-d-e-s and N-i-e-m-i.

Q. And all six of the districts in Virginia that you analyzed were above the threshold from the Pildes and Niemi article?

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A. They were above that level, yes.

Q. And that was sort of a national standard. That wasn't something specific to Virginia, right?

A. Correct. That was the suggestion of the scholars for what some cutoff points should be for compactness.

Q. And so, therefore, Plaintiffs' Demonstrative District 9 in this case likewise exceeds that threshold and by more of a margin than the Virginia districts, right?

A. I believe so, yes.

Q. We can pull that down, please, and if we could pull up Plaintiffs' Exhibit 81. Now,

Dr. Hood, do you recognize this as your report in this case?

A. Yes. Yes.

Q. And if we could turn to page 8 of that, please, and in the compactness -- or, I'm sorry, in the communities of interest, I believe. It's hard to see from the podium.

But while we find that, Dr. Hood -- and you discussed this on your direct examination. There's an error in your report. The number of counties that are split in District 9 -- the full version of District 9 in the enacted plan is actually two, not one, correct?

A. That's correct, yes.

Q. Now, Ms. Stirling, if you don't mind pulling up -- sorry -- pulling up on two screens Plaintiffs' Exhibit 105 and

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Plaintiffs' Exhibit 101.

Now, Dr. Hood, on the screen in front of you we have a split screen. The first, which is Plaintiffs' Exhibit 105, do you recognize that as Plaintiffs' Demonstrative Plan 1?

A. Yes.

Q. And then at P-101 on the right-hand side, that is the state House version of the enacted plan, correct?

A. Yes.

Q. Now, now Demonstrative Plan 1's version of District 9 splits the same number of counties as does the enacted plan's version of District 15; is that right?

A. I didn't perform that analysis on District 15, to be honest.

Q. Well, you see that it includes part of --

A. I'm not saying you're just -- you're not correct. I just didn't do that analysis.

Q. Sure. But if we do it right now, we see that Towner County is split in District 15, Benson County is split, and Eddy County is split. Do I have that right?

A. I'm sorry. Are we looking at the enacted plan first?

Q. Yes.

A. Okay.

Q. And we can zoom into it if you -- if that would help.

A. It might help a little bit. Okay.

Q. Okay. So you see there that District 15 includes all of

[p.122]

Ramsey County, part of Towner County, part of Benson County, and part of Eddy County?

A. Yes.

Q. So that would be three county splits out of the four counties contained in District 15, correct?

A. Correct.

Q. And you understand that District 15 is one of the two districts that are under challenge in this case, correct?

A. Correct. Right.

Q. Now, and we can keep zoomed in in this screen. Do you see that in the state House version of District 9 where there's the Subdistricts 9A and 9B, there are three counties split in that configuration as well, correct? That's Rolette, Towner, and Cavalier Counties.

A. If you're comparing the subdistricts to the subdistricts, yes.

Q. And that would, in fact, be all of the counties in District 9 for 9A and 9B?

A. Yes.

Q. Now, in Plaintiffs' demonstrative version of District 9, the split of Eddy County is to adhere to the boundaries of -- the southern boundary of the Spirit Lake Nation, the reservation; is that correct?

A. From my memory it does drop down into that county, yes.

Q. And that's the precise same split that the enacted plan

[p.123]

makes in District 15, correct?

A. It looks to be, yes.

Q. And Plaintiffs' demonstrative plan returns Towner County to being whole within District 15 instead of being split between District 9 and District 15, correct?

A. Yes.

Q. Now, Ms. Stirling, if we could pull up Plaintiffs' Exhibit 10 -- or 106, which is the -- yes, 106 and then 101, side by side. Sorry.

Now, Dr. Hood, do you see on the left -- do you recognize that Plaintiffs' Exhibit 106 as the second demonstrative plan submitted by the plaintiffs in this case?

A. Yes.

Q. And then on the right-hand side again we have the state House version of the enacted plan, and that's Plaintiffs' Exhibit 101?

A. Yes.

Q. Now, do you see in the second demonstrative plan that plaintiffs have submitted, District 15 only has a split in Cavalier County? Do you see that?

A. I believe -- okay. I see that, yeah. I see that now.

Q. And the Ramsey County and Towner County are whole within District 15 in that plan?

A. In that plan, yes.

Q. And then District 9 in the second Plaintiffs' proposal has

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the same number of county splits as it does in the first proposal, three, correct?

A. That is correct.

Q. Now, the -- having one county split for District 15 is an improvement over the enacted plan which has three splits in District 15. Do you agree with that?

A. For that district, yes.

Q. And so, in fact, the Plaintiffs' second demonstrative plan actually splits fewer counties than the enacted plan.

A. Overall?

Q. In this region at least.

A. Well, looking at those two districts, yes.

Q. And do you recall from Dr. Collingwood's report that Plaintiffs' Demonstrative Plan 2 has the precise same number of county splits overall as does the enacted plan?

A. Statewide?

Q. Statewide.

A. Yes, I believe that's correct from my memory.

Q. Ms. Stirling, if we could pull up, please, Plaintiffs' Exhibit 57.

Dr. Hood, do you recall discussing with me earlier this year about how reservations and nearby trust lands could be a community of interest.

A. I do remember talking about trust lands, yes.

Q. And I believe it was your view at the time that the trust

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lands in the reservation could, indeed, form a community of interest that would be important to keep whole?

A. I honestly don't remember. I may have said that.

Q. Okay. Sitting here today, do you agree with that statement?

A. It's possible, yes.

Q. Now, you were here for the -- you've been here for the duration of the trial, right?

A. Most of it. I wasn't here yesterday afternoon.

Q. Okay. You heard Chairman Azure testify this morning from the Turtle Mountains?

A. I did, yes.

Q. Do you have any reason to dispute his testimony about the trust lands and the reservation forming a community of interest for the Turtle Mountain Band?

A. No, I don't.

Q. Now, in your report the only community-of-interest topic that you analyzed was the county splits, correct?

A. Correct. I did mention that the reservations were kept intact, I think, as well.

Q. But you agree that this issue, the trust lands and the reservation, is a community-of-interest issue.

A. It could be, yes.

Q. Are you aware of any other community-of-interest issues in this region of the state?

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A. I'm not aware of any, no.

Q. So the one that you have become aware of, this issue of the trust lands being separated from the reservation, that community-of-interest concern is corrected or improved upon in Plaintiffs' demonstrative plans over the enacted plan. Do you agree with that?

A. Yes. I mean, it's all within LD9, to be fair, but it is split between the subdistricts.

Q. And the enacted plan, by contrast, doesn't improve upon any of these other community-of-interest concerns to the extent that you're not aware of any other ones, right?

A. Correct.

Q. Now, you testified as well in another case pending in Louisiana about the congressional redistricting there, the *Robinson versus Ardoin* case? Does that sound familiar?

A. Yes.

Q. And that's a Section 2 challenge brought on behalf of Black voters who are seeking a second congressional district in the state?

A. Yes.

Q. And in that case you were testifying on behalf of the State of Louisiana; is that right?

A. Yes. I couldn't tell you the exact -- you know, if it was the secretary of state or who, but --

Q. I don't know if it's *Robinson* or *Ardoin* --

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A. Right.

Q. -- for example.

A. Right.

Q. If we -- and in that case, one of the -- one of the factors you testified about in terms of traditional districting principles was this idea of core retention; is that right?

A. Yes.

Q. And that's something that you and Mr. Phillips talked about a little earlier?

A. We did.

Q. And that's one of the factors that you've listed in your report as well, correct?

A. Correct.

Q. Ms. Stirling, if we could pull up Demonstrative 2-A, page, 4. And if we could make it a little larger, the paragraph.

Dr. Hood, have you had an opportunity to read the Fifth Circuit's decision following the trial court determination in that case?

A. I have not.

Q. Okay.

A. This is new to me.

Q. So this is a passage from the Fifth Circuit's decision at 36 F4th 208, pages 220 to 221. And do you see here that the Fifth Circuit said about the core retention analysis, that you had testified as to it, but in terms of *Gingles* Prong 1, that

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it, quote -- or, rather, that that analysis, quote, "has little value for the defendants have not explained why Louisiana's previous districting should be used as a measuring stick for compactness. Accordingly, Dr. Hood's analysis has little value in evaluating whether the plaintiffs have satisfied the compactness requirement." Do you see that?

A. Yes.

Q. Have you had an opportunity to read the Supreme Court's decision from last week in the *Allen versus Milligan* case?

A. I've honestly just skimmed it.

Q. Okay. Well, I want to --

A. I've not read it in detail, certainly. I've not read it in detail.

Q. Okay. I want to draw your attention to a particular passage. And, Ms. Stirling, if you could scroll to the second page of this demonstrative, and, again, if you could zoom on the text.

And I'll give you an opportunity to just read it to yourself since you may not have to date.

A. Okay.

Q. And do you see, again, that the Supreme Court now is rejecting the idea that core retention is relevant to the *Gingles* 1 analysis and specifically stating that if core retention were the rule, a state could immunize from challenge a new racially discriminatory redistricting plan simply by

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claiming that it resembled an old racially discriminatory plan? That is not the law. Do you see that?

A. I do, yes.

Q. So I gather you would agree with me that as of today, we now know that the core retention part of your expert report and your testimony here today is not relevant to what we have to decide in this case.

MR. PHILLIPS: Objection. It calls for speculation. And he testified he has not read the case in any detail, and he's only relying on the statements of counsel.

THE COURT: The objection is sustained insofar as the comments from counsel were that it was not relevant. I will sustain the objection. You may move on.

MR. GABER: Thank you.

Q. (MR. GABER CONTINUING) So, Dr. Hood, to summarize the *Gingles* 1 discussion that we've had, you agree that the plaintiffs' demonstrative plans are reasonably or sufficiently compact by the metrics you've used in other cases and by comparison to the statewide plan as a whole, correct?

A. On some metrics, yes.

Q. And the reporting of county splits -- and the report at least had an inaccuracy.

A. True.

Q. And in some respects Plaintiffs' demonstrative plans improved the county split measure, correct?

[p.130]

A. It depends on what you want to compare to what, right? I mean, in terms of LD9, no.

Q. But --

A. If you want to group, you know, different districts together, that might be the case.

Q. And the population deviation is within the range of acceptable deviations?

A. Yes.

Q. And there's an improvement at least in the community interest consideration with respect to the trust lands and the reservation being kept whole.

A. In the demonstrative plans, yes, the trust lands and the reservation are together.

Q. Thank you. I'd like to move on to the second *Gingles* prong. You agree with Dr. Collingwood that Native American voters are politically cohesive in Districts 9 and 15, correct?

A. Yes.

Q. Now, the maximum number of voters -- or, rather -- excuse me. The maximum number of votes that any group can receive in a district is 100 percent, right, or a candidate can receive? That's the maximum that they can get?

A. Correct.

Q. Now, you're an expert in the *Walen* case on behalf of the state, correct?

A. Correct.

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Q. And in your *Walen* report -- or for your *Walen* report, rather, you calculated the total number of Democratic votes cast by Native Americans for each of the elections you analyzed in the full District 9?

A. I did a functional analysis, if that's what you're referring to.

Q. That's right.

A. Yes.

Q. And one of the steps to getting there for you was to calculate the total number of votes cast by Native American voters for the Democratic candidate.

A. That is an intermediate step, correct.

Q. And another step was to estimate the total number of Native American voters who cast a ballot in Subdistricts 9A and 9B. That's one of the things you reported.

A. Yes.

Q. Now I'd like you to assume for me that 100 percent of the Native American voters in District 9A cast their ballots for the Democratic candidate. Does that make sense?

A. So far.

Q. Now, if we were to take that number and subtract it from the total number of Democratic votes that were cast by Native American voters in the full district, we would then know what the minimum number of votes that must have been cast by Native American voters in the other subdistrict, Subdistrict 9B. Do

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you follow that?

A. Yes.

Q. And the reason that that's the minimum number that must have come from 9B is that's the floor. If they didn't receive that many votes -- the Democratic

candidate didn't receive that number of votes, then there wouldn't be enough votes from 9A to have reached the total we know exists for District 9. Do you agree with that?

A. I mean, you're just basically decomposing the Democratic vote of Native Americans by subdistrict? Is that what we're getting at here? Is that fair?

Q. Right. And, well, the goal is to identify the fact that we can identify the floor, right? We know what the lowest possible number is if we assume that in the other subdistrict, 100 percent of the Native American voters cast their ballot for that Democratic candidate.

A. Well, if we make that assumption, yes. I don't know if that's a tenable assumption.

Q. Right, and I -- so normally there wouldn't be a hundred percent. It would be something less than that, right?

A. Yes. Yes.

Q. And if it -- if that were the case, if the District 9A support for the Democratic candidate from Native American voters decreased, that means that in 9B, the Democratic vote share from Native American voters would have to increase from

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that floor to make up that difference, correct?

A. If we're talking about an overall total number of Democratic votes, yes.

Q. Okay. If we could please, Ms. Stirling, pull up Plaintiffs' Exhibit 84.

Dr. Hood, do you recognize this as the sort of backup analysis that you did for the 2020 presidential contest, functional analysis for your *Walen* report?

A. Yes. I mean, I wouldn't call it a backup. I mean, it was the spreadsheet I used to come up with some numbers.

Q. That was just my word. I apologize. So this is the spreadsheet that sort of formed the background of the data you reported in the report itself?

A. Yes.

Q. And, Ms. Stirling, if you could highlight the three numbers.

I'm going to have Ms. Stirling highlight for you the total Democratic ballots cast by Native American voters in the full district as well as the total number of Native American voters in Districts 9A and in 9B. Do you see those three things highlighted?

A. Yes.

MR. GABER: Now, Your Honor, may I approach the witness and --

THE COURT: You may.

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MR. GABER: And I will promise not to speak as I do it.

Q. (MR. GABER CONTINUING) Now, Dr. Hood, I have handed you a demonstrative exhibit that I've provided a copy to counsel and to the Court titled, "Dr. Hood, District 9, 9A, 9B, Election Turnout and Voting Data." And I've also given you a calculator; is that correct?

A. Yes.

Q. I'm going to perhaps ask you to do a little bit of light math or at least check the math that I've done, if you wish. And so what I've done here is I've taken the numbers from your spreadsheet. So do you see that I have the total District 9 Native American voters at 2,250 for this election?

A. Yes. I see that, yes.

Q. And then you reported that within District 9, 2,009 of those voters cast their ballot for the Democratic candidate, in this case President Biden?

A. Yes.

Q. And then you also reported that there were 1,565 Native American voters in District 9A?

A. Yes.

Q. And 685 Native American voters in District 9.B?

A. Yes.

Q. Now, if we were to do the calculation that I -- that we just discussed before we put this exhibit up, and assume that

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all 100 percent of the 9A Native American voters cast their ballot for President Biden, and we were to subtract that from the total number of Native American votes that were given to Biden in the full district, that would leave for us the number that President Biden must have received from District 9B's Native American voters, and I put that calculation here. Do you see that?

A. Yes.

Q. And when we do that calculation -- and that's in the second of the two districts that we've listed here for you. Do you see that President Biden must have received, under that scenario, at least 444 votes of the 685 Native American voters in District 9B?

A. I see your calculations here, yes.

Q. And have I -- have I calculated it correctly?

A. Well, again, I don't know that he would have received 100 percent.

Q. Right, and I agree with that. So the purpose of this is not to suggest that President Biden received 100 percent of the vote in 9A. It's, rather, to determine what the lowest possible number of votes he could have gotten from 9B from Native American voters. Do you agree with that?

A. Yes.

Q. And so in this scenario, do you agree that given those calculations, the floor of support in District 9B for President

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Biden was that he received 64.8 percent of the Native American votes in District 9B?

A. Well, based on these calculations, yes.

Q. And you don't see anything with the calculations that look incorrect to you?

A. Well, this is all new to me, to be honest, so I'm trying to digest some of this.

Q. And if you want, I have the calculator there, if you want to take your time to do that. But the formula is the 2,009 total votes in District 9 by Native American voters cast for the Democrat, minus the 1,565, that would represent 100 percent of District 9A's Native American votes cast for Democrats, and that should yield 444.

A. Okay.

Q. And that's right?

A. Well, again, there's some assumptions being made. The mathematical calculation -- the arithmetic seems to be correct.

Q. And so we can also do the opposite, which is what -- above that, which is the lowest possible vote share among Native American voters in District 9A for the Democratic candidate, and it just reverses it, right? We make the assumption that 100 percent of 9B's Native

American voters cast their ballots for the Democratic candidate, subtract that figure from the total cast by Native American voters for the Democrat in the full district, and that will tell us what the floor is, the

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minimum number of votes that must have come from District 9A's Native American voters. Do you see that?

A. Yes.

Q. And when we do those calculations, that would be 2,009, which again, is the total Native Democratic vote that you calculated for District 9, minus the 685 total Native American voters in District 9B, and that yields 1,324 that at a minimum had to have come from District 9A's Native American voters. Do you see that?

A. Yes.

Q. And have I done that calculation correctly, the arithmetic?

A. Yes.

Q. And do you agree, then, that if we take that figure, 1,324, and divide it by the total number of Native American voters in District 9A, which is 1,565 by your estimate, that that yields a number -- a figure of 84.6 percent as the floor for Native American support for President Biden in District 9A?

A. Yes.

Q. And so back to your point about the assumption that's built into this, that assumption, of course, is that

100 percent of the Native American voters in either of the districts cast their ballot in one direction, right?

A. Correct.

Q. And I think we agree that's not likely, correct?

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A. No, probably not.

Q. And so what that means, then, is that it is likely the case that in this election the Native American support for President Biden in District 9B was north of 64.8 percent, correct?

A. It could have been.

Q. And, likewise, in District 9A, the math means that if the 100 percent assumption of the vote coming from 9B is not correct, it's something less than that, then 9A's level had to go up from 84.6 percent, correct?

A. Correct.

Q. Now, if you just assume for a moment that these minimum numbers are true, 64.8 percent for President Biden among Native American voters in District 9B and 84.6 percent from Native American voters for President Biden in District 9A, that would demonstrate *Gingles* Prong 2 cohesion, correct?

A. Well, if these numbers were correct, it would indicate that there was a cohesive choice for the Native Americans.

Q. And that's the case in both subdistricts.

A. Right. Although, I will say, you know, going back to the spreadsheet, that what I had to do here to calculate the votes by subdistrict was to make the assumption that the distribution of votes across racial groups mirrored LD9 as a whole. I mean, I'm making that assumption, which --

Q. And that was a turnout estimate, right, that -- I think in

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this election it was 38.8 percent Native turnout?

A. Well, it was both turnout and the overall vote distribution because there's not enough data to derive accurate estimates, as we talked about.

Q. But there was enough data to get the estimates for both the total Democratic vote share from Native Americans in the full district and to estimate the turnout, correct?

A. For the full district, yes.

Q. And so in this discussion we haven't been -- we aren't relying on your assumption for the EI racial vote share in the two subdistricts. We're just using the turnout assumption of 38.8 percent to determine the total number of Native American voters. That's a comparison of turnout to total VAP, which we know from the census, correct?

A. That part is correct, yes.

Q. Okay.

A. But to get the Democratic vote distribution, we do have to rely on those numbers up above again.

Q. Now, you would have -- if we can pull up Plaintiffs' Exhibit 80.

Dr. Hood, do you recognize this as your expert report in the *Walen* matter?

A. Yes.

Q. And if we could turn to page 6, please, and if we could zoom in to the table.

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Now, Dr. Hood, in your report in the *Walen* case you concluded that Native American voters cohesively supported Democratic candidates in both Subdistricts 9A, 9B, and in the overall District 9, correct?

A. Correct. Again, I'm making the assumption, though, in the subdistricts that the vote distribution mirrors the overall district.

Q. And that was -- that's your inference that you made for your report, correct?

A. Yes, I'm just -- want to be clear on that.

Q. And you stand by that conclusion from your report?

A. I stand by this report, yes.

Q. And the conclusion with respect to Districts 9A and 9B also demonstrating *Gingles* Prong 2 cohesion, that's similar to the conclusion that Dr. Collingwood reached, correct?

A. Yes. I don't think we disagree on that point.

Q. And in the math exercise that I apologize for making you endure, that supports or confirms that inference that you both made, correct?

A. I mean, the exercise was about the subdistricts, I'm assuming, right?

Q. Right.

A. Well, again, there's some caveats that I mentioned that -- you know, those all have to be true, so --

Q. And the caveat, to be clear, that's the 100 percent

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support in both districts and the turnout estimate.

A. That, the turnout estimate, and, again, the vote distribution estimate as well is copied across those subdistricts.

Q. But, nevertheless, you felt comfortable making that conclusion and that inference for your report in the Walen matter.

A. Well, that's fair. I did, yes.

Q. Now, Dr. Collingwood went a step further than this, right? He reported in his initial report the precinct-level -- precinct-level results for all of the five precincts that are in Subdistrict 9B and the three precincts that are in Subdistrict 9A and showed the correlation between the Native VAP in the precinct and the vote share for the Democratic candidate in that precinct, correct?

A. That's correct.

Q. And that extra information he provided likewise added additional support for the inference that the picture we see for District 9 as a full holds true within the subdistricts as well, correct?

A. Well, that's -- I mean, correlations aren't exactly inferential. Again, I'm making -- as I clearly stated, I'm making assumptions about how I'm getting these numbers for the subdistricts.

Q. But that was an extra thing -- an extra step that

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Dr. Collingwood --

A. It was in his report, yes.

Q. Okay. So I then -- I take it, then, that you agree -- we established that you agree that there's *Gingles* 2 cohesion for Native American candidates in District 9, District 15, and as you reported in the *Walen* case, for Districts 9A and 9B as well?

A. Yes.

Q. Okay. I would like to move on to the third *Gingles* precondition. Thankfully there are only three, so I won't put you through this for too much longer. Dr. Hood, you agree that endogenous elections are more probative for purposes of assessing the third *Gingles* prong than are exogenous elections, correct?

A. I believe I've written that, in fact.

Q. Yeah, and you have actually criticized opposing experts in other cases for not -- for over-considering exogenous elections instead of endogenous elections, correct?

A. Correct.

Q. And you've written about that principle in your academic work as well, right?

A. Yes.

Q. In addition to the endogenous elections, elections that are more recent are also more probative, correct?

A. Typically, yes.

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Q. And then the third sort of probative consideration is elections that feature a candidate of the same minority group that is bringing the Section 2 claim, correct?

A. Correct.

Q. And in this instance that would be elections that feature Native American candidates?

A. Correct.

Q. So in this case the election that is the single most probative is the 2020 -- or the 2022 District 9 state Senate election. Do you agree with that?

A. Yes, but there's only one election, so --

Q. Okay. And the reason it's the single most probative is that it hits -- it checks all three of these probative boxes, right? It's endogenous. It had a Native American

candidate. And it's the most recent -- from the most recent election cycle.

A. That's all true, yes.

Q. Ms. Stirling, if we could pull up Plaintiffs' Exhibit 81, please.

And, again, Dr. Hood, do you recognize this as your report in the Turtle Mountain case?

A. Yes.

Q. And if we could, please, turn to page 3 and zoom in to Table 1 if you don't mind.

Now, Dr. Hood -- and you discussed this table with

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Mr. Phillips. This is where you report the 108 elections in which Dr. Collingwood identified racially polarized voting, and that 108 number comes by adding together the contests from the full District 9, District 9A, and District 9B; is that right?

A. That's correct.

Q. Now, in this table you did not accord any different weight to different categories of elections; am I right?

A. Correct. These were the races that Professor Collingwood analyzed.

Q. So in this table, the older elections, the exogenous elections, and the elections featuring only White candidates received the same weight as does the probative categories of elections we just discussed.

A. Everything is weighted equally, yes.

Q. Ms. Stirling, if we could please pull up Plaintiffs' Exhibit 83. We will zoom into this in a moment.

But, Dr. Hood, do you recognize these as your handwritten notes that you produced in response to a subpoena issued by the plaintiffs?

A. Yes, that looks like my handwriting.

Q. And if you --

A. It's pretty distinct.

Q. I have to compliment you. I was able to read it very well.

A. Maybe I should --

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Q. I can't even read what's on the page in front of me. If we can turn to page 13, please, Ms. Stirling, and then if we could zoom in to the column chart thing and maybe even just a little bit more than that.

Okay. Dr. Hood, is this the sort of backup work that you did -- the calculations that went into Table 1 in your report?

A. Probably so. I mean, I can't say for certain this is the final copy or calculations, or anything, but I was -- I was making some calculations here, yes.

Q. Okay.

A. That's certainly true.

Q. Now, what this shows is that in District 9 there were 23 elections in which the Native-preferred candidate won. In District 9A there were 36, and in District 9B there were seven. Do you see that?

A. Yes.

Q. Now, we talked at your deposition about this, about the inclusion of District 9A in this calculation. Do you recall us talking about that?

A. I do, yes.

Q. And at the time you said you didn't necessarily disagree with me that including 9A in this calculation doesn't make a whole lot of sense because 9A has an 80 percent, roughly, Native voting-age population. Do you agree with that?

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A. I don't exactly remember what I said, to be honest. I'm sure you'll refresh me if necessary.

Q. I can do that. So if we could pull up from Dr. Hood's deposition page 96, lines 4 through 15.

Do you recognize this as -- I don't know if you've seen the transcript of your deposition, but it --

A. Yes. I mean, I have at some point.

Q. Okay. And if we could, to page 96, and then if you could zoom in from 4 to 15, please.

And so the question was: "And so if we're trying to determine whether or not White voters usually defeat Native-preferred candidates in those areas outside of

the packed district, we would most appropriately confine our *Gingles* Prong 3 analysis to those areas outside the packed district. Do you agree with that?"

Mr. Phillips objects.

And your answer was: "Again, I don't disagree necessarily, but to the extent to which 9A is part of this set of districts that's being analyzed, I included it."

Does that refresh your recollection as to what our exchange was?

A. Yes.

Q. And does that hold true today? You don't necessarily disagree that taking 9A -- or putting 9A into that calculation for *Gingles* 3 doesn't necessarily make sense?

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A. Well, I mean, I'm just going to honestly say that these races were all analyzed, and I was doing an analysis of the races that were analyzed, and --

Q. But --

A. -- 9A was -- I understand the plaintiffs are arguing that 9A is packed, but clearly 9A is performing as well, so --

Q. And it performed in 100 percent of the elections, right?

A. Yes.

Q. And so there's not some concern that White bloc voting is usually defeating the Native American-preferred candidate in 9A, right?

A. No, that's not what's happening.

Q. And so that -- but that is what the *Gingles* 3 prong looks to ferret out, right?

A. Yes. Yes.

Q. Okay. Now if we could go back to the handwritten notes, which was P-83, at page 13, and if we could zoom back into the chart.

If we were to remove District 9A from this chart, that would eliminate 36 contests, right?

A. Yes, that would be true.

Q. And that would drop the numerator. Let's see. Keep the number 36 in your head, if you don't mind, Dr. Hood. Let's go back to your report, which is P-81, at page 3, yes, Table 1, please.

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So if we take the 36 elections from 9A out of this chart, it reduces the numerator of elections in which the Native-preferred candidate won from 66 to 30, correct?

A. Yes.

Q. And then if we, likewise, remove 36 elections from the 108, then the denominator becomes 72, correct?

A. Well, 74.

Q. Okay. And I think that might -- maybe I've -- I think we had this same issue at the deposition. It's something to do with the 108 and the 110, but whether it's --

A. There's 110 total. The percentages are based off of that total number in this table.

Q. Got it. Okay. So 36 -- I'm sorry. 30 divided by 74, can you do that math for me?

A. 40.5.

Q. 40.5. So that would mean that in 59.5 percent of the elections, if we remove District 9A from your Table 1, that in that percentage of elections -- was it 59.5 -- that the Native American-preferred candidate loses.

A. That would be correct, right.

Q. And that would establish the third *Gingles* prong for purposes of the more-typically-than-not losing, correct?

A. Correct. I'm not necessarily arguing we should remove 9A, but, yes.

Q. And that would be the case without even weighing elections

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differently, right? Without giving more probative value to the 2022 elections or to Native American-preferred elections or elections featuring Native American candidates, correct?

A. Correct.

Q. And that would be without looking to see whether there's special circumstances that warrant the elimination of, say, the 2018 elections?

A. Correct.

Q. Now, if we could pull up, please, Ms. Stirling, Plaintiffs' Exhibit 80.

And, Dr. Hood, this, again, is the report that you issued in the *Walen* case, correct?

A. Yes.

Q. And if we could turn to page 6, please, and Table 2. Thank you. You read my mind.

So the table here reports the functional analysis that you performed to determine the number of elections in which the Native American-preferred candidate would have won in Districts 9, 9A and 9B, correct?

A. Correct.

Q. And you analyzed six elections, three each from 2018 and 2020, correct?

A. Correct.

Q. And I think I heard you testify earlier that when you go about doing this, you make a determination at the outset of

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which elections that you think are the ones that most ought to be considered to reach your *Gingles* 3 analysis, right?

A. These were -- yeah. These were the only elections I analyzed.

Q. But there was -- I took from your testimony that there was thought put into that, right?

A. Yes.

Q. And you excluded some, and you included others, and that was sort of -- that's the point in time in which you make the determination that's similar to the determination that Dr. Collingwood makes where he just does it in reverse. He includes all of the elections, and then from that then makes the analysis for what he thinks is the one to look at; is that fair?

A. I certainly put some thought into it ahead of time. I mean, at this point in time, when I was doing this, 2022 had not occurred, so these were the last two election cycles.

Q. Fair. But at least with respect to the 2018 and 2020 elections, you picked some, and those were the ones that you thought should be analyzed, right?

A. Yes.

Q. Okay. Now, in this analysis for the 2018 and the 2020 elections, you concluded that *Gingles* Prong 3 would be established in District 9B, but based on these

elections, it would not in 9A and in 9 as a full district, correct?

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A. Correct.

Q. And in District 9 as a full Senate district, you found that the Native American-preferred candidate won four out of the six contests that you looked at, correct?

A. Yes.

Q. Now, all six of these were exogenous elections, right?

A. That is true, yes.

Q. All six of them were elections in which there were no Native American candidates, correct?

A. I believe that's correct, yes.

Q. And as we just discussed, at the time you did this, that was -- it included the most recent elections, but today it does not include the most recent elections, right?

A. That's true, but at the time it did.

Q. Now, Dr. Collingwood, in his report, included eight elections from November of 2022, correct?

A. I don't have that memorized. He included a number of elections from 2022, that's fair.

Q. I can pull it up if you'd like. The number is eight, but --

A. Okay.

Q. -- if you'll just take it from me, then that would be easier for everyone. So the eight elections, then, that Dr. Collingwood would have analyzed from 2022, that's more than the total number from these two years that you took a look at,

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right?

A. True.

Q. And we spoke a bit about this -- well, I guess back up to one question. When did you draft this report?

A. Well, I'm sure it's dated.

Q. Do we have the date on the first page?

A. On the last page?

Q. Or would it be the last page?

A. The last page.

Q. So this -- this was submitted to plaintiffs on January 17, 2023? Does that sound right?

A. Yes.

Q. And that was actually in response to Dr. Collingwood's report, which was from late November. Does that sound right?

A. I think so.

Q. So the 2022 elections had happened by the time you served this report, correct?

A. Yeah. I'm not saying they hadn't happened. I just said when I was doing the analysis, it was earlier than the 2022 elections. That's all I'm saying.

Q. Sure.

A. I didn't have time to do any more.

Q. Okay. But as we discussed back when we met -- whatever month that was, a couple months ago -- you agree that it -- that there should be elections from 2022 added to your analysis

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here, right?

A. If I were doing this today, yes, I would add the 2022 elections.

Q. And at the time you identified four among the eight that you thought should be included in this analysis, correct?

A. At my deposition?

Q. Yes.

A. I don't recall. I mean, if that's what you're representing to me.

Q. And we can actually pull that up. That's Dr. Hood's deposition at page 107, and lines 3 through 13, please.

Okay. And this is after we've kind of been talking about the various options for 2022 elections. And do you see that I ask: "So I have a U.S. Senate race from 2022, the Attorney General race from 2022, the

endogenous District 9 election, and then we also discussed that the statewide race featuring the Native American candidate for the Public Service Commission would also be one that would be one to include; is that right?"

And then you answer: "Probably in this case, yes. I'm assuming without knowing that that was a two-party contested race."

And then if you recall, we went on to establish that that was, in fact, the case.

A. Okay.

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Q. Does that sound right? So these are four elections that you agree should be added, correct?

A. If I were sitting here today working on this, I would probably add those, yes.

Q. And doing that would improve the initial analysis in a couple ways, right? It would add additional elections, and more elections is better than fewer elections, right?

A. Typically.

Q. So that would raise the number of elections from six to ten, correct?

A. Correct.

Q. And it would also tick off, at least for some of the contests, each one of those three probative categories, right?

A. Yes. That's correct.

Q. We'd have the most recent, we'd have an endogenous election, and we'd have an election featuring a Native American candidate, right?

A. Correct.

Q. Now, you were here for Dr. Collingwood's testimony during this case, right?

A. Yes.

Q. And did you hear Dr. Collingwood testify that he pulled the 2022 election results directly from the North Dakota Secretary of State?

A. Yes.

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Q. And you're aware from Dr. Collingwood's testimony and his report, that he shows that within District 9, the Native American-preferred candidate lost all eight of the elections on the ballot that year, correct?

A. I believe that was his testimony, yes.

Q. Do you have any reason to doubt Dr. Collingwood's reporting of the 2022 election results reconstituted into District 9?

A. Well, not on its face. Again, I didn't do the -- I didn't replicate the analysis myself, obviously, so --

Q. But sitting here today, do you have any reason to doubt it?

A. Well, again, not on its face.

Q. Okay. I have the election results for 2022, which I will -- which I will bring to you if Your Honor would allow.

THE COURT: You may. Is this being offered as an exhibit?

MR. GABER: I was going to have him go through it first and then offer it.

THE COURT: Please proceed.

MR. GABER: And I just wanted to ask, Your Honor, in terms of timing, did you want to take a break at -- this probably would be a -- if you wanted to, a time --

THE COURT: This would actually be fine. We'll take a break right now, and we'll come back in 20 minutes and finish

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up the day, so let's come back at 3:20. We'll be in recess.

(Recess taken from 2:58 p.m. to 3:23 p.m.)

THE COURT: Thank you, Mr. Gaber. Please proceed.

MR. GABER: Thank you, Your Honor.

Q. (MR. GABER CONTINUING) Dr. Hood, before the break I had handed you a document with the title "District 9 2022 Election Results," which is a chart calculating the results for the U.S. Senate, Attorney General, and Public Service Commission races, a

subset within the new District 9 boundaries. Do you recall that?

A. Yes.

Q. And then attached to that document are the North Dakota Secretary of State's official results with the precinct-level results for Towner, Cavalier County, and then the county results for Rolette County; is that right?

A. Well, we hadn't gotten that far, but --

Q. I was going to ask, did you -- did you take a chance to look at the document during the break?

A. I didn't.

Q. Okay. So what I'd like to do then is, if you could, put the -- I think it'll be easiest if you put the chart from the first page in front of you on the piece of paper there, and then I will have Ms. Stirling scroll through the Secretary of State's result pages. And I'd just like to ask you to confirm that the precinct-level results have been accurately reported

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on the chart.

A. Okay.

MR. PHILLIPS: Your Honor, I'll just object to the extent this exhibit has not been admitted into evidence.

MR. GABER: And, Your Honor, this is both a rebuttal and an impeachment exhibit. And at the moment I would just like to ask questions from the

Secretary of State's election results from the website, which I think is judicially noticeable as well, and then at the end of the discussion with the document, move for its admission.

MR. PHILLIPS: Your Honor, may I respond?

THE COURT: You may.

MR. PHILLIPS: Your Honor, this wasn't included on the exhibit list. Dr. Hood has testified today completely consistent with his report. This should have been included on the exhibit list if it was going to be used as an exhibit at trial.

THE COURT: And additionally, Mr. Gaber, who generated this exhibit?

MR. GABER: The -- this first page --

THE COURT: Yes.

MR. GABER: -- is generated by me coming from the Secretary -- all the remaining pages are printouts from the Secretary of State's -- the North Dakota Secretary of State's website, the election results website from the Secretary of

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State. And so the first page could just be a demonstrative exhibit, but the remainder pages are directly from the Secretary of State's website.

MR. PHILLIPS: Your Honor, if I may, in light of counsel's comments, I would expand my objection to include foundation.

THE COURT: Yeah. I -- I'm going to sustain the objection, and I will not permit testimony from the exhibit. It should have been on the exhibit list. It's been generated by counsel, at least page 1 has.

Certainly if you wish to have the witness testify with regards to his knowledge to his report or anything like that and cross-examine him -- if you can find a way to get this in through cross-examination, you may try, but I will sustain the objection.

Q. (MR. GABER CONTINUING) Dr. Hood, we talked earlier that you have -- that you have -- you've reviewed Dr. Collingwood's election results that he reports in his report, correct?

A. Correct.

Q. And his election results for 2018 and 2020 are consistent with the election results that you report in your report, correct?

A. Are we talking about the racially polarized voting analysis or --

Q. The -- no, I'm talking about -- well, start there. So the

[p.159]

racially polarized voting analysis is the same between the two of you, correct?

A. Well, similar. I mean, nothing's ever exactly the same.

Q. Right. There wasn't anything that you found inconsistent in what Dr. Collingwood reported with what you reported in your EI analysis, correct?

A. Correct.

Q. And, similarly, for your functional analysis for the 2018 and the 2020 election results in your *Walen* report, those results were consistent with what Dr. Collingwood showed for those same elections, correct?

A. That, I just can't tell you off the top of my head. I mean, I'm not saying they're not.

Q. Okay. So you -- you found that the Democratic candidate in District 9 lost in two of the six elections that you looked at from 2018 and 2020; is that right?

A. That is correct, yes.

Q. And if we could pull up Exhibit -- give me one second. Plaintiffs' Exhibit 80, please, and if we could turn to page 6.

Now, you find, Dr. Hood, that the Democratic candidate lost the 2020 U.S. House race within District 9 and the 2020 governor race within District 9, correct?

A. That's correct.

Q. And if we could pull up Plaintiffs' Exhibit 1, please, and if we could turn to page 18, and if we highlight the 2020

[p.160]

governor.

You understand, Dr. Hood, that the Native-preferred candidate is in blue here?

A. Yes.

Q. And you see for both the governor's race and the U.S. House race, Dr. Collingwood reports the same fact that the Democratic candidate lost in those elections, correct?

A. That would be correct, yes.

Q. And that's within the boundaries of District 9?

A. Yes.

Q. And those are the two races of the -- the third one you looked at was the Senate race; is that right?

A. In 2020 I looked at the presidential race.

Q. President. President. And so you -- the three of you [sic] came to the same result for the president, the House and the Senate -- and the governor in terms of the winner within District 9, correct?

A. For 2020, yes, it looks like so.

Q. Thank you. You can take that down.

And on that basis of the similarity of conclusions with respect to the election results between your two reports, do you have any reason to doubt that Dr. Collingwood accurately counted up the election results for 2022 within the boundaries of District 9?

MR. PHILLIPS: Objection. It calls for speculation.

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THE COURT: Sustained.

Q. (MR. GABER CONTINUING) Nevertheless, Dr. Hood, Dr. Collingwood is the only expert in this case who has done that calculation, correct?

A. He is the only one that analyzed 2022 races, that is correct.

Q. Okay. So if -- assume for me, please, that Dr. Collingwood has correctly done that for the four elections that you selected to add to your six for the District 9 *Gingles* analysis, okay?

A. Okay.

Q. If Dr. Collingwood has accurately done that, then the *Gingles* 3 analysis is that the Native-preferred candidate loses six out of the ten races that you selected from 2018, 2020, and 2022, correct?

A. Well, if all those assumptions are correct. I mean, that's why we have competing experts in these cases, right? So I didn't -- I'm just saying I didn't do the 2022 races, so --

Q. You said "all those assumptions." There's one assumption, right, and that's that Dr. Collingwood was able to accurately add up the election results for 2022, correct?

A. Well, the racially polarized voting analysis has to be done to determine whether or not there's a preferred candidate of choice before you get to the functional

analysis in that case, so there's at least two assumptions.

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Q. And your conclusion is that the Native American-preferred candidate is the Democratic candidate, right?

A. Well, that's why we test things, in fairness. From what I've -- from the races I've run, that is the case, that's true.

Q. So you agree with Dr. Collingwood about that.

A. Well, for 2018 and 2020, I have overlap with him, yes.

Q. You just -- you didn't look at 2022.

A. I did not.

Q. But the 2022 elections were available at the time that you issued your report.

A. I don't deny that. It is a true statement that I did not analyze any elections from 2022, though.

Q. Now, the assumption -- with those assumptions in mind, that Dr. Collingwood is correct about the -- what the 2022 election results show and that it is still the case in 2022 that the Native American-preferred candidate was the Democratic candidate, a 60 percent defeat rate for Native American-preferred voters within the full District 9 would satisfy *Gingles* 3, correct?

A. Yes. That would be correct.

Q. And that's using the elections that you selected as the most probative to look at, correct?

A. Well, those would be some of the ones I would look at. I don't know that it would cut off there necessarily.

Q. But that -- so --

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A. I mean, there are other races that could have been analyzed is what I'm saying.

Q. Those are the ones that you chose to either analyze or chose that should be -- should have been analyzed to bring it up to 2022.

A. Those -- I mentioned that in my deposition, yes. Correct. There could have been others that were added to that list, though.

Q. And that would satisfy the more-often-than-not defeat rate for Native American voters that's necessary under *Gingles* 3 in the full District 9?

A. With all these caveats we've talked about, yes.

Q. Now, on page 10 of your report -- and you spoke a bit about this with Mr. Phillips -- you say that "plaintiffs' demonstrative plans may result in a racial gerrymander." Do you recall that?

A. I don't think I said that today. I said -- the question is, is race the predominant factor or not, so --

Q. And you have no evidence that that is the case with respect to Plaintiffs' demonstrative plan?

A. Correct. This is an illustrative plan. I have not analyzed it, so it's not been implemented.

Q. And it's not your testimony that the demonstrative districts proposed by the plaintiffs subordinate traditional districting principles, correct?

[p.164]

A. Not completely, no.

Q. If we could pull up Dr. Hood's deposition at page 19, lines 4 through 7. That is not correct. I'm sorry, page 193, lines 14 through 18. Give me one moment, please. Third time's the charm, Your Honor. Page 203, lines 2 through 8. I apologize.

Okay. Dr. Hood, do you recall at your deposition I asked you: "And your testimony with respect to traditional districting criteria is not that plaintiffs' demonstrative district subordinates those criteria in favor of a racial classification, right? You don't have that evidence?"

Answer: "No, I didn't say that." Correct?

A. Correct. Yes.

Q. And that remains your testimony today?

A. Yes. Yes.

Q. And we talked earlier about the district. You agree it's sufficiently compact by your own metrics, correct?

A. It's not the most -- it's not the least compact district I've ever seen, certainly.

Q. And there's no split municipalities in plaintiffs' demonstrative district, in District 9?

A. I -- honestly, I didn't analyze that. I didn't look at split municipalities, so I can't answer that.

Q. And in Plaintiffs' Demonstrative Plan 1, District 9, there are no split voting precincts; is that correct?

[p.165]

A. I didn't analyze precinct splits specifically either.

Q. Are -- in the -- you've studied racial gerrymandering cases, and you've testified in cases with gerrymandering claims before, correct?

A. Correct.

Q. Some of the pieces of evidence that are most relevant to that claim is whether municipalities or precincts are split along racial lines. Is that a fair statement?

A. That's -- those factors are looked at, yes. I'm just being honest in saying I didn't look at those in this case.

Q. Right. And one of the things that we often see when a district has been racially gerrymandered is that the precinct is split, and then racial data is available at the census bloc level that wouldn't otherwise be available for, say, political data, correct?

A. Yes.

Q. And then sometimes you'll see that the line has been drawn such that there's a division between White

voters and then whatever the minority is in the case that goes along those census bloc lines, whether they're in the district or out of the district, correct?

A. We're just talking hypothetically here, right?

Q. Yes.

A. Yes.

Q. So in reaching your conclusion that the district may

[p.166]

result in a racial gerrymander, which was your conclusion in your report, you didn't see fit to look at those considerations with municipalities or voting precincts; is that right?

A. Again, I didn't analyze those factors.

Q. In Plaintiffs' Demonstrative District 9, and we'll say the first plan, it stretches about as far north to south as the demonstrative version of District 9 does from east to west. Is that a fair statement?

A. Well, just looking at it with one's eyes, probably so.

Q. And you agree that -- or did you read Dr. Collingwood's rebuttal report?

A. At some point.

Q. Do you have any reason to disagree with his analysis that the Pierce County precinct that connects Rolette and Benson Counties in plaintiffs' Demonstrative District 9 in Plan 1, that that voting

precinct is larger than a majority of the legislative districts in the state?

A. Well, I didn't analyze that. I don't -- I don't have anything to rebut that with, necessarily.

Q. If we could please pull up P-106, I think -- I'm sorry, 105, and if we could zoom into the region under discussion here.

Dr. Hood, you agree with me that Benson County is geographically more proximate to Rolette County than is Cavalier County, correct?

[p.167]

A. Yes. Yes. It's closer.

Q. And I think we talked at your deposition that it's also possible that the enacted plan, by stretching eastward two counties into nearly 100 percent White voting population, could also be a racial gerrymander, correct?

A. I remember some discussion about that, yes.

Q. And do you agree with that statement?

A. I don't know what I said exactly at the deposition at this point.

Q. "Possibly," I believe was your answer.

A. Okay.

Q. Does that sound right?

A. Probably so, yes.

Q. Now, you agree that Native American tribes can have shared interests other than the race of their members, correct?

A. Correct.

Q. And you were here for the testimony of Chairman Yankton and Chairman Azure during the course of this trial?

A. That's correct.

Q. You heard a fair bit about that testimony, correct?

A. Oh, I heard all of the testimony, yes.

Q. You have no basis to dispute that testimony; is that right?

A. No. Correct.

Q. And, indeed, you have no evidence that plaintiffs'

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demonstrative plans are a racial gerrymander, correct?

A. Correct.

MR. GABER: Your Honor, I'll pass the witness. I do want to -- for the record, I had neglected to mention the exhibit numbers that corresponded with the demonstrative that compared plaintiffs' demonstrative plan to the Virginia Senate districts from Dr. Hood's *Vesilind's* report. That was a comparison between Plaintiffs' Exhibit 105 and 124.

Likewise, I don't know if I convinced the Court during my examination that the exhibit should be

admitted. I did want to note that the pretrial order specifically says that rebuttal exhibits and impeachment exhibits, I believe, need not be numbered or listed.

And the purpose of that exchange was to impeach Dr. Hood with respect to his direct examination testimony that one needed to conduct an ecological inference analysis in Districts 9A and 9B, and also with respect to his conclusion that there was not a *Gingles* Prong 3 determination that he could make in District 9.

MR. PHILLIPS: I'll maintain my objections, Your Honor.

THE COURT: Yeah, and the objections are sustained, and the Court is unpersuaded.

MR. GABER: Thank you.

THE COURT: Thank you.

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Mr. Phillips.

REDIRECT EXAMINATION

BY MR. PHILLIPS:

Q. Dr. Hood, when you testified earlier, plaintiffs' counsel suggested that a *Gingles* 1 analysis looks only at alternative plans, not as enacted plans. Do you recall that?

A. Yes.

Q. And I believe you were shown a portion of the *Allen versus Milligan* opinion of the U.S. Supreme Court that very recently came out?

A. Correct.

Q. I believe that was a demonstrative exhibit, and I'd like to show you a portion of that as well. If I remember your testimony correctly, you've at least skimmed this, I believe; is that correct?

A. I did skim it. Again, I haven't read it in detail.

Q. Did you read the syllabus?

A. I did read the syllabus, yes.

Q. I'm not going to be able to read it from here, and I would like the record to reflect it, Dr. Hood. Can you read the portion on your screen there?

A. "The extensive record in these cases supports the District Court's conclusion that plaintiffs' Section 2 claim was likely to succeed under *Gingles*.

"As to the first *Gingles* precondition, the District

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Court correctly found that Black voters could constitute a majority in a second district that was 'reasonably configured.' The plaintiffs adduced 11 illustrative districting maps that Alabama could enact, at least one of which contained two majority Black districts that comported with traditional districting criteria.

"With respect to the compactness criteria, for example, the District Court explained that the maps

submitted by one expert 'performed generally better on average than did HB1' and contained no bizarre shapes or any other obvious irregularities. Plaintiffs' maps contained equal populations, were contiguous, and respected existing political subdivisions. Indeed, some of the plaintiffs' proposed maps split the same or even fewer county lines than the state's."

Q. And is it your understanding that in this case HB1 would be the state law that enacted the as-enacted maps?

MR. GABER: Your Honor, may I just -- I want to object just to the extent that I believe this is the syllabus from the Supreme Court that's being read, to the extent that that's not actually the Court's decision.

MR. PHILLIPS: Your Honor, I do agree, and I do believe I established and asked him if he'd read the syllabus.

THE COURT: The Court receives it as the syllabus. And I understand and appreciate the objection, Mr. Gaber, but I will overrule the objection. It was qualified appropriately.

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And certainly the Court is also aware of the decision and will assign the appropriate weight to this testimony regarding the syllabus.

Please proceed.

THE WITNESS: HB1 was the Congressional districting plan put in place by the Alabama legislature in 2021.

Q. (MR. PHILLIPS CONTINUING) Is it your opinion that it's correct methodology in a *Gingles* 1 analysis to compare the as-enacted map with the proposed maps?

A. I certainly think that's a comparison that can be made, yes.

Q. And you did make that comparison in this case?

A. Yes.

Q. In your testimony, opposing counsel asked you questions that sought comparisons between the proposed or demonstrative map with other enacted districts in North Dakota. Do you remember that?

A. Yes.

Q. And also comparing the demonstrative map with the other districts in other parts of the country. Do you recall that?

A. Yes.

Q. Is it correct methodology under *Gingles* 1 analysis to compare the demonstrative maps with other regions in the state or other regions in the country?

A. Well, I guess I would say the most apt comparison would be

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to compare it to the district -- the illustrative district to the district in question.

Q. That's the area in dispute in the lawsuit, right?

A. Yes.

Q. Is it your understanding that the plaintiffs are requesting in this case, the Court to order North Dakota to do a redistricting and to enact a map the same or similar to the demonstrative map?

A. It would have to be something similar to one of the demonstrative maps that were presented, yes.

Q. Those demonstrative maps don't perform as well on some of the traditional redistricting criteria, correct?

A. In comparison to enacted LD9, no.

Q. Opposing counsel asked you some questions about some Virginia state Senate district maps that you had analyzed in a different case. Do you recall that?

A. Yes.

Q. Did any of those Virginia state Senate districts contain a concentration of minority populations at each end of the district connected by a land bridge?

A. Not to my knowledge.

Q. When opposing counsel asked you some questions about comparing compactness with various districts, I think you'd said that you used the ocular test during your testimony; is that correct?

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A. Sometimes called the eyeball test, yes.

Q. Basically it looks like it, right?

A. Right.

Q. Is that what you would normally do in a compactness analysis?

A. Well, that's why we have compactness measures specifically.

Q. Those would include things like Polsby-Popper, Schwartzberg --

A. Reock.

Q. -- Reock?

A. Yes.

Q. You were asked some questions as well about whether the Turtle Mountain Reservation and the surrounding trust lands are collectively a community of interest. Do you recall that?

A. Yes.

Q. Do you have any personal knowledge of whether the reservation land itself and the surrounding trust lands are a community of interest?

A. Not personally, no.

Q. Did you read the legislature testimony that was submitted to our legislature as part of your analysis in this case?

A. Yes.

Q. Did you see any legislative testimony where anybody testified about the Turtle Mountain Reservation being a

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community of interest, along with its surrounding trust lands?

A. Not that I can recall.

Q. Subdistrict 9A contains all of the Turtle Mountain Reservation; is that right?

A. That is correct.

Q. It has a very high chance of electing the Native American candidate of choice? Is that a fair statement?

A. That's a fair statement.

Q. So the residents of Turtle Mountain Reservation have a high chance of electing the Native American candidate of choice?

A. Yes.

Q. And that's true even without including the surrounding trust lands in District 9A?

A. Correct. I mean, they're not included as it is presently, so --

Q. The state didn't have to include the trust lands in District 9A to give Native Americans an opportunity to elect their candidate of choice within 9A; is that fair?

A. Correct.

Q. You did a lot of math with opposing counsel. Do you recall that testimony?

A. Yes.

Q. That whole process that you walked through with opposing counsel, was that ecological inference?

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A. No.

Q. Was that the rows-and-columns variant of ecological inference?

A. No.

Q. There was some discussion during your cross-exam on whether District 9A should be included in your analysis. Do you recall that?

A. Correct.

Q. 9A, if I understand your testimony correctly, is part of a functioning District 9 that grants to Native Americans the opportunity to elect their candidates of choice; is that right?

A. Correct. Certainly for that state House seat, yes.

Q. Is your understanding that 9 and its subdistricts operate as a unit?

A. That's correct.

Q. Is it your understanding -- or is it your opinion that it's correct methodology to include 9A in your analysis?

A. Yes.

Q. And you did so in this case?

A. Yes.

Q. I'm going to pull up Exhibit D-472 and have you go to page 17, please. I'll just represent to you, Dr. Hood, that this is a portion of Dr. Collingwood's opinion in the *Walen* case. What is this?

A. It appears to be a performance analysis that

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Dr. Collingwood did for District 4, 4A, and 4B.

Q. Can you derive any conclusion as to whether Dr. Collingwood analyzed District 4A in his analysis of District 4 in the *Walen* case?

A. Apparently so, yes.

Q. Based on what you're looking at on this exhibit?

A. Yes.

Q. If you take 9A out of District 9, District 9 is no longer going to function as an opportunity-to-elect district, correct?

A. I wouldn't think so, no.

Q. It's the natural result of taking out the one subdistrict that has a high population of Native Americans?

A. Correct.

Q. You had said at one point in your testimony that Dr. Collingwood is the only one who analyzed 2022 races. Did I hear that right?

A. Well, I didn't, so I guess that would leave him.

Q. You agreed with opposing counsel on a question.

A. Yes.

Q. I want to make sure this is clear, though. In your opinion in this case, you analyzed the same races that Dr. Collingwood analyzed in his initial report, correct?

A. I created those summary charts in my report, Tables 1 and 2 from the races that Dr. Collingwood analyzed in his initial report, yes.

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Q. And his initial report included those 2022 races?

A. Yes.

Q. You were asked some questions about whether the demonstrative maps are a racial gerrymander, or probably more specifically, if race is the predominant factor in generating those. Do you recall that testimony?

A. Yes.

Q. Is it your opinion that that is a decision ultimately for the Court?

A. Of course it is.

Q. You've raised concerns, though, that a Court might -- you've raised concerns, correct?

A. Correct.

MR. PHILLIPS: Thank you. No further questions.

THE COURT: Thank you, Mr. Phillips.

Mr. Gaber, based on the scope of redirect, you may recross if you are inclined.

RECROSS-EXAMINATION

BY MR. GABER:

Q. Dr. Hood, you just talked with Mr. Phillips about the propriety of comparing the demonstrative plan to the district's -- that same district in the enacted plan, correct?

A. Correct.

Q. If plaintiffs had numbered their demonstrative plan "15" instead of "9," do I take it that you would have compared it to

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District 15 in the enacted plan, which is the other regional district that's under challenge here?

A. Not necessarily, no.

Q. Why not?

A. Well, looking at the district -- the demonstrative district, I think it would -- I mean, again, I don't have this measured out, but I think it would encompass more of currently enacted LD9.

Q. And so you -- was that the basis for the district that you chose to compare it to?

A. Well, that and the fact that it is District 9 in the plaintiffs' demonstrative plan as well.

Q. So the numbering of it does matter to your determination of which district you would compare it to?

A. Yes.

Q. If we could please pull up Plaintiffs' Exhibit 124, and if we could go to the third page, please.

Dr. Hood, do you know where the minority populations are that reside in Districts 28, 29, 30, and 37 in Virginia state Senate from 2011?

A. Not just looking at this map, no, I can't tell that you.

Q. Do you have any -- independent of this map, do you have any knowledge as to the location of those minority populations in those districts?

A. I probably did at one time. You know, this was about five

[p.179]

or six years ago now.

Q. But sitting here today, you can't tell the Court whether there are minority populations on either end of any of those four districts, correct?

A. Not conclusively, no.

Q. Now if we could please pull up Plaintiffs' Exhibit 1.

This is Dr. Collingwood's initial report. Do you recognize that?

A. Yes.

Q. And if we could, please, turn to page 17, and can we zoom in on the table, please?

Dr. Collingwood did not add together the three columns of 9, 9A, and 9B in his analysis, correct, in terms of determining the *Gingles* 3 analysis?

A. He didn't add anything together, period, from what I remember. I mean, these are in separate columns. That's a true statement.

Q. Right. Your analysis was to add up the contests to reach 110, with 108 that had RPV, correct?

A. In Table 1, yes. In Table 2 I did not.

Q. Now, Mr. Phillips also just asked you about Dr. Collingwood's analysis in the *Walen* case. Do you recall that?

A. Yes.

Q. And I'd like to take us to that. This is Defendants'

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Exhibit 472, and if we could please turn to page 17 and zoom in to the graph, please.

Now, Mr. Phillips pointed out to you that Dr. Collingwood analyzed the election results within District 4A, correct?

A. Correct.

Q. And the point of Dr. Collingwood's analysis there was to determine whether or not District 4A would

perform to elect Native American candidates of choice; is that right?

MR. PHILLIPS: Objection. It calls for speculation.

MR. GABER: I can rephrase, Your Honor.

THE COURT: I will sustain the objection, but please do rephrase.

Q. (MR. GABER CONTINUING) Dr. Hood, you read Dr. Collingwood's report in the *Walen* case; is that right?

A. I'm sure I did at some point, yes.

Q. And you see that this table is titled "Performance Analysis Results," right?

A. Correct.

Q. And a performance analysis, you understand it serves two purposes, right? It determines whether or not the third *Gingles* precondition is satisfied in a district, but it also shows whether or not a proposed district would satisfy -- or would allow a minority candidate of choice to be elected, correct?

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A. That is correct.

Q. Okay. So I gather, then, that you agree that the election results here for District 4A, one of the things that they could show is that in 4A, Native American-preferred candidates are elected, correct?

A. Correct.

Q. Now, with respect to District 4A -- and you're an expert in this case too, in the *Walen* case, right?

A. Yes.

Q. You've analyzed the -- the district that was enacted by the legislature, 4A and neighboring 4B, correct?

A. I took a look at it at some point. I don't believe that's included.

Q. Now --

A. I mean, I worked on 9 in that report.

Q. And I'm -- I believe that District 4 is part of your *Walen* report as well; is that right?

A. I'd have to look at this point. I just haven't looked at it lately. I'm not saying you're wrong.

Q. Pull up Plaintiff's Exhibit 80, please.

I think the state would not want you to be wrong because you're their expert in the case.

A. Okay.

Q. Okay. You recognize this as your report in the *Walen* matter, right?

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A. Yes.

Q. And let me just get to it too, please. One moment. I'm very farsighted, and I cannot see that far away. I have been since kindergarten.

Okay. If we could turn, please, to page 8 of the PDF, it's page 7 of your report. Do you see that you've included a racial heat map of District -- Subdistrict 4A, as well as the surrounding areas?

A. Yes, I see that.

Q. There is essentially zero Native American population around the borders of District 4A, correct?

A. Very little, I would say. I mean, there's a few green census blocks colors.

Q. Right. But not many, right?

A. Correct.

Q. So I take it you would agree with me that it's not the case that the creation of Subdistrict 4A was preventing nearby Native American voters from being in a performing minority-opportunity district, correct?

A. Correct.

MR. GABER: Your Honor, I have no further questions.

THE COURT: Thank you, Mr. Gaber.

MR. PHILLIPS: Nothing further, Your Honor.

THE COURT: Very good.

Dr. Hood, you may step down, and I believe that your

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obligation to testify is completed here in this trial. Is there any objection to that?

MR. GABER: No objection, Your Honor.

THE COURT: All right. Thank you very much, and be safe stepping down there.

THE WITNESS: Thank you. Thank you, Your Honor.

THE COURT: You're welcome. Mr. Phillips.

MR. PHILLIPS: Your Honor, the defense calls Erika White, and Mr. Wiederholt will be doing the direct examination.

MS. DANAHY: Your Honor, if I may, the plaintiffs would just like to renew their objection to any expert opinion testimony that may be offered by Ms. White during this examination. That was made initially in their motion in limine and raised with defense counsel in a meet-and-confer.

THE COURT: I didn't catch that last part.

MS. DANAHY: We had raised it also separately with defense counsel in a meet-and-confer.

THE COURT: Okay. In the May 24th meet-and-confer, I think it was referred to in your brief, right?

MS. DANAHY: Yes, and the basis for that is that there was no disclosure of the summary of facts and

opinions of the expert testimony under Rule 26(a)(2)(C)(2).

THE COURT: Mr. Wiederholt, do you care to address that at this time? It would probably be a good thing.

MR. WIEDERHOLT: Sure, Your Honor, and it's the

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position of the defendants that Erika White has been properly disclosed as both a fact and an expert witness. There's no motion in limine filed seeking to exclude her from testifying as an expert.

That said, I do not intend to ask Ms. White any questions that really delve into expert issues. She's really here to testify strictly as a fact witness, and I'm sure that opposing counsel will object if I get into those expert issues.

Now, I would note that we substituted Ms. White for Brian Newby, the former elections director at the State of North Dakota.

THE COURT: And I recall that you are not calling Brian Newby.

MR. WIEDERHOLT: Correct, Your Honor. Yeah, he's moved on within state government, and so Erika White has been substituted. The plaintiffs did not object to that substitution, and she was substituted for the expert disclosure we gave for Brian Newby, which does state the substance and factual basis of expert opinions. Again, we disclosed that, but I don't intend to get into expert issues with this witness, Your Honor.

THE COURT: I do want to clarify this. I don't -- it's not important to get too supercilious, but for plaintiffs' counsel, I don't recall if this was a -- the topic of the actual -- one of your motions in limine. Wasn't it more in

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your trial memorandum?

MS. DANAHY: No, Your Honor. We raised this -- I believe it was raised in footnotes in the motion in limine. We noted that we didn't object to the substitution of Ms. White for Mr. Newby, but that we did note that the defendants' disclosure of their nonretained experts --

THE COURT: That's right.

MS. DANAHY: -- did not include the summary of the facts and opinion as required by the rule.

THE COURT: All right. Thank you. The objection at this point -- based upon Mr. Wiederholt's comments, the objection is overruled as moot. But if we get to the point where you cross that line, Mr. Wiederholt, I'll be expecting the objection from plaintiffs' counsel at that time. She clearly can testify as a fact witness, correct?

MS. DANAHY: Yes, absolutely. We'd have no objection to that.

THE COURT: Thank you. Mr. Wiederholt, please proceed.

MR. WIEDERHOLT: Thank you, Your Honor.

ERIKA WHITE,

having been first duly sworn, was examined and testified as follows:

THE COURT: Have a chair. And is there an exhibit up there?

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THE WITNESS: Yes.

THE COURT: Mr. Wiederholt -- or, Mr. Gaber, would you please come and retrieve the exhibit? Thank you.

MR. GABER: My apologies.

THE COURT: And, Mr. Wiederholt, please proceed.

MR. WIEDERHOLT: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. WIEDERHOLT:

Q. Would you please state your name for the record?

A. Erika White.

Q. Are you employed by the State of North Dakota?

A. Yes.

Q. What is your position?

A. The state election director.

Q. How long have you been the state election director?

A. Since April 17, 2023.

Q. And who appointed you or hired you for this position?

A. Secretary Howe.

Q. Okay. So April 17, 2023, that's not too long ago, right?

A. Correct.

Q. So what were you doing before becoming the state election director?

A. Prior to being appointed, I was the Burleigh County election manager. I was in that position since January of 2018.

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Q. So what were some of your job duties at Burleigh County as the election manager there?

A. I administered and oversaw all elections within the county in accordance with state and federal law, training election workers, finding polling locations, setting precinct boundaries. I was heavily involved in the legislative redistricting in 2021, working with the legislative redistricting committee to, you know, ensure that legislative district boundaries were -- made sense within our county.

Q. So you had some -- you saw some maps today, right?

A. Yes.

Q. And one of those was the enacted map that's at issue here in this lawsuit?

A. Correct.

Q. So you worked somewhat with the Burleigh County portions of that map when you were at the Burleigh County -- when you were with Burleigh County, correct?

A. Yes, I worked with all legislative districts within Burleigh County.

Q. Okay. So -- and then what is the role of the Secretary of State in North Dakota with regard to elections?

A. The Secretary of State is the chief election official in the State of North Dakota, overseeing all statewide elections, prescribing the form of the statewide ballot, intake for petitions related to candidacy, certificates of endorsement,

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measures, just -- you know, the entire elections in the State of North Dakota are administered through the Secretary of State's Office.

Q. But, practically speaking, the secretary, himself, doesn't necessarily do those things day to day? He's got someone like you to do that?

A. Correct, the elections division within the North Dakota Secretary of State's Office handles all of those.

Q. And you lead the election division?

A. That's correct.

Q. And what are some of your job responsibilities as the election director?

A. Overseeing compliance with state and federal law related to election administration, leading the election team, training, and providing documentation for county auditors; really, just, you know, making sure that our elections are compliant with law.

Q. Okay. So how does your office -- how do you determine, you know, the requirements of election law or deadlines and those sorts of things? Is there a source you look to?

A. Yes, all of elections ran in North Dakota, we look to North Dakota Century Code for deadlines and guidance on how to administer elections.

Q. Are you fairly familiar in your job both at Burleigh County and now at the State of North Dakota with the various

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deadlines and other requirements set forth in Century Code with relation to elections?

A. Yes.

Q. You work with those provisions day to day?

A. Yes.

Q. So what -- what starts the whole process with election deadlines and other requirements?

A. So preceding any election year, December 31 is the deadline for counties to set precinct boundaries. At that

same time counties are generally setting their polling location -- polling locations as well just as a best practice. So that's the deadline before every election year, is December 31st, to get those precinct boundaries set.

Q. Sure. So those upcoming elections can trigger things to happen, right?

A. Yes, so --

Q. And can something else trigger that, something like the relief the plaintiffs are requesting in this case?

A. Yes. There's a whole slew of deadlines that happen, you know, post legislative redistricting or prior to an election year.

Q. So -- so some -- some deadlines and requirements became operative on November 11, 2021, when the new map was enacted, correct?

A. Correct.

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Q. Okay. And then with respect to those elections -- you know, I don't know a lot about elections, but aren't there kind of two kinds of elections?

A. Yes. There is a primary election, which is held the second Tuesday of any even-numbered year, and a general election, which is held the first Tuesday following the first Monday of any even-numbered year.

Q. That's pretty specific.

A. Law dictates that, those dates.

Q. There has to be a Monday in that -- for the general election before the first Tuesday for there to be an election?

A. Correct.

Q. And why is that?

A. That's what the law states.

Q. Sure.

A. So that's what we follow.

Q. Okay. So you had mentioned a December 31 deadline, so that's -- I guess that's what I'm interested in here, is for you to tell the Court some of those key deadlines you work with and will work with in the future and you did work with in the past at Burleigh County. So why don't you kind of run through those sequentially for us?

A. Sure. So after the December 31 deadline, January 1st is the next election deadline, and that's when candidates can begin circulating petitions to place their name on the ballot.

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After that January 1st deadline, we have the hundred day notice that the Secretary of State publishes, and that's where we publish all contests that are going to be on the statewide ballot.

Q. And let me just stop you there.

A. Yes.

Q. Let's go back to January -- or December 31.

A. Yes.

Q. I'm not sure I heard you. What -- what's the import of that date? And is that an even year or odd year?

A. Sorry. Yes. The December 31st deadline is in any odd-numbered year, so that's the December 31 before any general -- before any election, is when those precinct boundaries must be set. So this year, 2023, will be -- the counties will be setting precinct boundaries by December 31st for any -- for the next year's elections.

Q. So about seven, or so, months from now those county boundaries need to be set?

A. Correct.

Q. Okay. And then you were talking about a hundred day deadline, and I cut you off. Sorry about that. Can you explain that?

A. Yes, the hundred-day deadline, the Secretary of State must notice the contests that are going to be on the primary election ballot, so all contests that we'll see on the

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statewide level.

After that hundred-day deadline, we have the 64th day before the election -- before the primary election, which is a big deadline in the election world. That's when any certificates of endorsement or petitions need to be filed with the appropriate filing officer for

candidate names to be placed on the ballot or any measures to be placed on the ballot.

The 64th day is also when polling locations have to be set by Century Code, but, again, most counties are setting their polling locations when they're setting their precinct boundaries.

After the 64th day we have the 46th day before the election, which is when military or overseas citizen absentee ballots must be sent for anyone who has applied for -- it's a UOCAVA ballot, and it stands for the Uniformed Overseas Citizen Absentee Voting Act. So any military or overseas citizen who has applied for an absentee ballot by that date must be sent a ballot by that date, so that's the 46th day.

After the 46th day we have the 40th day before the election, which is when any qualified elector other than the military and overseas citizens, so myself included, any qualified elector, if they've applied for an absentee ballot by the 40th day, that's when these absentee ballots become available.

After the 40th day we have the 15th day before the

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election, which is when in-person early voting may begin. Not all counties offer that, but most of the larger ones do, so that's the 15th day.

After the 15th day we have the third-day deadline, which is when our absentee precinct may begin processing any absentee ballots that have been returned to the counties.

And then we have election day, and that's -- those are big milestones, and obviously elections are a complex situation, so there's a lot happening in between those deadlines too, but those are the high points for deadlines that are set by Century Code.

Q. Sure. And fair to say that those deadlines drive -- drive work by the Secretary of State's Office?

A. That's correct.

Q. By the candidates?

A. That's correct.

Q. By the counties?

A. Yes.

Q. Political parties?

A. Yes, also political parties.

Q. And some of those deadlines apply to both the primary and the general, correct?

A. Yes, most of the deadlines apply to both the primary and general. There is one deadline for candidates seeking independent nomination via petition for the general election.

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There's a different deadline for that. I believe they have 150 days before the 64th day before the general election. So math, 214 days before the general election to begin circulating petitions for independent nomination.

Q. So January 1, '24, candidates could begin circulating petitions if there were to be a new map enacted by the Court or ordered by the Court in this case?

A. Correct. They would still be circulating petitions January 1st. There's also political parties that endorse candidates as well.

Q. But before we'd get to that date, there would be a lot of work required at the legislature to enact a new map, correct?

A. That's correct. There's a lot of work for the legislature and for counties to have a new map.

Q. And then once that map becomes law, then we really have the counties and the political parties and the candidates and the Secretary of State doing their work, correct?

A. Correct.

Q. It can't start until that new map is enacted, correct?

A. Correct.

Q. The Secretary of State, does it track all of these deadlines and everything that's happening in some fashion?

A. Yes. We have an election calendar. And, you know, by Century Code we're tracking all of those dates to make sure we're hitting those deadlines.

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Q. Is there some sort of election management system or computerized system that the state uses?

A. Yes, we have a statewide election management system, which includes our central voter file that the state and all counties have access to to manage the elections.

Q. And my understanding is Brian Nybakken and somebody who works for you will be talking about that system in some more detail later, so I don't want to get into the weeds on that with you. But you were talking about some of the deadlines that apply to candidates and with petitions. Did you describe basically all of the deadlines that apply to those petitions?

A. Sure. So related to petitions and certificates of endorsement, following -- so any odd-numbered year the political parties need to reorganize to elect their district party chair, vice chairs, their executive boards for their legislative districts. Those legislative districts are the ones endorsing candidates to be placed on the ballot in an election year. So the deadline for those political parties to reorganize has already passed. The deadline was May 15th for the districts to reorganize.

And along with the districts, the statewide committee also needs to organize, and Century Code states that that has to happen by July 1st. The Dem NPL has already -- their statewide committee has already reorganized on April 22, and the ND GOP state committee will be organizing this weekend, on

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June 17.

And those statewide committees choose the statewide candidates, along with the legislative

districts are choosing candidates to be placed on the ballot. They're endorsing candidates for the party ballot.

Q. So some of that organizing has already happened under that enacted map?

A. Yes, it is complete under the enacted map.

Q. So if that map were to change or be required to change, some of that would have to be redone.

A. I believe the political parties would need to reorganize again if the map were to change. Century Code actually states that they would need -- if -- following legislative redistricting, those political parties would have to reorganize.

Q. Are there certain thresholds that apply if, for example, a new district changes by a certain amount?

A. Yes. The threshold for political parties to reorganize is -- the law states if it's all new -- if the area for the legislative district is completely new area or if the population deviates by 25 percent, that's when the political parties must reorganize in an even-numbered year following legislative redistricting.

Q. Okay. We've talked about some of the deadlines and requirements of candidates. We've talked about some of the

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deadlines and requirements of political parties. Now, what about deadlines and requirements of the counties themselves? Can you get into that?

A. Sure. So the counties -- at the same time legislative redistricting is taking place, counties are also redistricting. It's required by law. Once the census data is published, they have three months to consider redistricting. So a lot of the times the counties are looking at those legislative district boundaries and other jurisdictional boundaries when they're completing their county redistricting for their commission districts. So those are deadlines that the county has to follow.

And it's a pretty short turnaround for them, you know, with legislative redistricting and then the December 31st deadline. They have county redistricting, setting precinct boundaries, determining their polling locations. It's all a lot of work that needs to take place before December 31st in order for them to accomplish and hit that deadline.

Q. Sure. And, again, that can't start until there's a map.

A. There has to be a map before counties can begin that process, and that's because precinct boundaries cannot encompass two legislative districts. The precincts have to be within the legislative district, so that's why they wait for those maps.

Q. Is that a rule, or how does that work with the precinct

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boundaries?

A. Precinct boundaries staying within the boundary of a legislative district is law.

Q. In the Century Code?

A. I believe so.

Q. Do all of the counties in North Dakota have their own commission districts?

A. Counties have the choice to either redistrict at-large or by district. So I believe in the area that this case is looking at, five of the eight counties organize by district, so they have commissioned districts in those counties. So they're looking at other jurisdictional boundaries as well when they're setting those commission district boundaries to make sure there are no intersections, just to keep their ballot styles to a minimum at the polling locations.

Q. Okay. So a few different things, you talked about looking at other jurisdictions and then ballot styles. Can I -- can I just ask you to explain what is meant when you use the word "jurisdictions"?

A. Sure. So jurisdictions are basically all of the different jurisdictions that counties are conducting elections for, so from legislative districts to county commission districts, municipalities, school districts, ambulance districts, so any district that is going to be included on that county's ballot.

They're looking at those boundaries because the

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jurisdictions -- having multiple jurisdictions that intersect can create multiple ballot styles, increase costs for counties, and potentially increase errors at the polling location from election workers handing out incorrect ballot styles. So all of those jurisdictional boundaries are taken into consideration when drawing precinct boundaries and commission district boundaries.

Q. Sure. And can the counties just unilaterally do what they want and create this quickly, or does it take time?

A. It definitely takes time. In Burleigh County we created a committee and had stakeholders providing input on precinct boundaries and polling locations. It also is up to the county commission in conjunction with the county auditor to set those precinct boundaries.

Q. Okay. And then kind of the interaction with the precinct boundaries and these other jurisdictions, how does that really affect the ballots? Can you let the Court know how that works?

A. Sure. So legislative districts drive the precinct boundaries within a county and commission district boundaries. When we have, you know, a school district -- if you have an area of land that has school districts and not school districts that the county is running, those are two different ballot styles. So when you have, you know -- if you have three precincts within a county, that's -- that's three ballot styles. So the number of jurisdictions that you have and the

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number of intersections within those jurisdictions, the more ballot styles you're going have.

Q. Do some of the jurisdictions hold their general election at a different time than the statewide offices hold their general election?

A. Yes, so statewide general election is happening in November. School districts and cities are -- their general election is the primary election, so their candidates get elected in June.

Q. And that can affect the ballot style if there is a city election in June, for example?

A. Yes, typically in the primary election we have far more ballot styles than we do in a general election because of the different school districts and cities that are having -- conducting their elections at that time.

Q. In your experience do the counties make their decisions at public meetings of the county commissions?

A. Yes, the commission is making these decisions and setting these boundaries at their commission meetings.

Q. Do maps come into play at all in this process?

A. Yes.

Q. Besides the enacted map, what other kinds of maps might come into place?

A. Counties are looking at ambulance district maps, school district maps, where the ETA's of the city boundary is. All

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sorts of maps are being looked at and scrutinized while precinct boundaries and commission district boundaries are being drawn by the counties.

Q. Yeah. Who creates the maps?

A. Typically the GIS individuals at the counties. Not all counties have access to GIS resources, but that's really who's drawing those maps.

Q. So all of these requirements we've talked about, they apply to counties whether or not there are Native American reservations on parts of those counties; is that right?

A. Yes, all counties.

Q. What's the ultimate driver of all of this? What is the Secretary of State looking to achieve by these deadlines and all of this activity?

A. To give voters a positive voting experience and access to voting. I mean, that's our number-one goal.

Q. I'm just going to -- you've seen some maps, and I'm just going to show you a couple of maps just to explain visually maybe some of this to the Court. And if we can put up P-101, which is the enacted map, and can you put up P-029, which is LD9 Demonstrative 1? And then why don't you enlarge the right-hand enacted map. There you go.

Can you just talk about some of these changes that might happen if something like this map in LD9 were to be enacted by the State of North Dakota?

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A. Sure. So there would be a lot of work from the counties from a street-master perspective updating the boundaries.

Q. And then I'm sorry to interrupt you, but street master, we didn't talk about that before. What's that?

A. Yes, the street master is part of our central voter file that -- it ties an address to a precinct and a ballot style and ultimately the voter to ensure that the voter is receiving the right ballot style at the polling location, voting for proper candidates, contests, ballot measures.

So that's -- the street master is -- there -- it really is assigning, you know, the voter to a specific ballot style, and it has to be accurate because we don't want voters voting on candidates that aren't going to be representing them or voting on bond measures, for instance, that they won't be paying for. So ensuring that that street master is up to date so voters are receiving the correct ballot style is of utmost importance.

Q. Sure. Are you able to determine anything about precincts, precinct changes, if something like LD9 is enacted in North Dakota?

A. I would assume that there would be precinct changes just looking at -- the legislative district boundaries are changing significantly, so I would -- I

would venture to guess that the precinct boundaries are definitely changing and would create a lot of work for the counties involved.

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Q. Seem like there would be some work for the candidates as well?

A. Yes, the political parties would probably have to reorganize depending on where the members of the political parties lived. They have to be a qualified elector of the district in order to represent the district. And I know that there's a senator from District 15 who lives on the Spirit Lake Reservation who would no longer be qualified to represent District 15 should this map take place.

Q. Is there anything else you see that can illustrate some of the principles we've been talking about?

A. I'm not sure.

MR. WIEDERHOLT: Sure. Thanks. Thanks for your help. That's all the questions I have.

THE COURT: Counsel, I need to take a very brief recess. I will be right back. Just stretch your legs. It'll be less than five minutes. Thank you.

(Recess taken from 4:39 p.m. to 4:43 p.m.)

THE COURT: Counsel, cross-examination?

MS. DANAHY: We have no questions for Ms. White. Thank you, Your Honor.

THE COURT: Very good. Thank you. Ms. White, you may step down. Thank you.

Do the defendants wish to try to squeeze in another witness?

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MR. PHILLIPS: I'm going to defer to Mr. Wiederholt.

THE COURT: Mr. Wiederholt?

MR. WIEDERHOLT: Well, how long would Your Honor like to go? I could probably do it in 25, 30 minutes.

THE COURT: Well, I don't want to keep court staff past 5:00, especially given the court reporting situation here. I want to make sure that we are reasonable about that, so why don't we break for the day, and we will commence promptly at 9:00 tomorrow with the next witness.

I note in the final pretrial order there was a discussion by Judge Senechal or a directive that witnesses would be spoken about the day before or revealed the day before. Can you anticipate -- can you advise the Court what you anticipate for witness testimony tomorrow, Mr. Wiederholt?

MR. WIEDERHOLT: I'll defer to Mr. Phillips.

THE COURT: There we go.

MR. PHILLIPS: We'll be calling Brian Nybakken, and that'll be our last witness.

THE COURT: Very good. Okay. And does the plaintiff anticipate rebuttal witnesses?

MR. GABER: If we do, it would be Dr. Collingwood. We haven't had a chance to think about that yet, but it's possible not, but if we did, it would not be a long examination.

THE COURT: Very good. Well, as I mentioned at the

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beginning of the trial, counsel for both sides, I want to make sure that you don't sacrifice completeness for speed, so don't feel rushed or anything like that. Both sides have done a very professional job in presenting their cases, and so even though there may be light at the end of the tunnel, there's no need to race toward it, so --

MR. GABER: Can I ask, Your Honor, if the -- if we finish in the morning, is there a particular time at which the Court would like to receive closing arguments? Would it be right after they finish, or would there be some period of time between?

THE COURT: If you -- you know, it depends on when you finish. But, honestly, if you finished at 10:30 in the morning, I would probably look to just begin closing arguments right then. If it were maybe the 11:30 hour, I would take a break, maybe an hour-and-a-half break just for you to get organized, but I am open to -- in a Bench trial situation especially, Mr. Gaber, I am open to taking requests from counsel so long as they're reasonable.

MR. GABER: Okay. Maybe we can confer with defendants.

MR. PHILLIPS: Yes, Your Honor.

THE COURT: Makes sense to me.

MR. GABER: Thank you.

THE COURT: All right. Anything further from the

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plaintiff?

MR. GABER: No, Your Honor. Thank you.

THE COURT: From the defendants?

MR. PHILLIPS: Nothing further, Your Honor.

THE COURT: All right. Thank you, all. Have a good night, and we'll see you in the morning.

We're adjourned.

(Proceedings concluded at 4:46 p.m., that same day.)

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CERTIFICATE OF COURT REPORTER

I, Ronda L. Colby, a Certified Realtime Reporter and Registered Merit Reporter,

DO HEREBY CERTIFY that I recorded in shorthand the foregoing proceedings had and made of record at the time and place hereinbefore indicated.

I DO HEREBY FURTHER CERTIFY that the foregoing typewritten pages contain an accurate transcript of my shorthand notes then and there taken.

Dated at Bismarck, North Dakota, this 14th day of June, 2023.

/s/ Ronda L. Colby

_____

RONDA L. COLBY, RPR, CRR, RMR
United States District Court Reporter
District of North Dakota
Western Division