

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

TURTLE MOUNTAIN BAND OF CHIPPEWA
INDIANS, *et al.*,

Plaintiffs,

v.

MICHAEL HOWE, in his official capacity as Secretary
of State of the State of North Dakota,

Defendant.

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

PLAINTIFFS' TRIAL MEMORANDUM

I. Statement of the Case

The 2020 Census revealed that North Dakota Legislative District 9, which had for decades been wholly contained within heavily Native American Rolette County and had for decades elected three Native American-preferred candidates to the state legislature, needed to geographically expand to satisfy population equality requirements. The configuration the legislature selected in its 2021 Redistricting Plan violates Section 2 of the Voting Rights Act (“VRA”) in two ways.

First, the legislature added parts of two counties to the east, Towner and Cavalier Counties, that are nearly 100% white and whose voters cast ballots in the polar opposite direction of Rolette County’s Native American voters. This choice reduced District 9’s Native American voting age population (“NVAP”) by twenty points and nearly doubled its white VAP, resulting in a district with a bare majority of Native American eligible voters. Among actual voters in usual electoral conditions, however, white voters constitute a sizeable majority of the newly enacted District 9. The legislature chose this configuration over one that would expand District 9 south to include

Benson County—home to the Spirit Lake Tribe and with a VAP closely split between Native American and white voters.

Second, having dramatically reconfigured District 9 and its racial demographics, the legislature then subdivided the district into two state house districts—something the Turtle Mountain Band of Chippewa Indians (“Turtle Mountain”) never requested—with District 9A packed with Native American voters, having a nearly 80% NVAP, and leaving a sizeable population of Native American voters cracked apart in two neighboring districts (District 9B and District 15) in which their voting strength is overwhelmed by a white majority.

As Plaintiffs’ demonstrative plans show, the Native American population on and around the Turtle Mountain and Spirit Lake Reservations is sufficiently large and geographically compact to form an effective majority in a single state-Senate district and a multi-member at-large House District. Moreover, as Defendant concedes, voting in North Dakota and in this particular region of the state is racially polarized, with white voters preferring one candidate and Native American voters preferring a different candidate. As a result of this polarization, and the cracking of Native voters into House and Senate Districts where white bloc voting usually defeats the Native American candidate of choice, Native Americans in the region saw their opportunity to elect preferred candidates decrease from two state house members and one state senator to just a single representative in the state house. The dilutive effects of the plan are evidenced most notably by the most recent election results from 2022, in which the majority white voting populations in Senate Districts 9 and 15 and House Subdistrict 9B overwhelmingly defeated Native American-preferred candidates.

The discriminatory effects of the 2021 Redistricting Plan interact with social and historical conditions in North Dakota to create an unequal opportunity for Native American voters to elect

their preferred candidates. This includes North Dakota's well-established history of official discrimination against Native Americans, including discrimination in the electoral process, as well as the wide-ranging socioeconomic disparities between Native American and white citizens in North Dakota. Moreover, the dilutive effect of the plan was the product of a lack of responsiveness to Native American voters. Indeed, the legislative record of the redistricting process shows that the legislature failed to honor Tribal Leaders' requests to hold redistricting committee hearings on Tribal Lands, and utilized a blunt, one-size fits all subdistrict policy to address concerns about litigation over Native vote dilution, despite the fact that doing so substantially degraded the Native voters' opportunity to elect candidates of their choice in northeast North Dakota. Whatever the legislature's intent, the enacted plan minimizes Native American voting strength such that for the first time since 1990, not a single member of the North Dakota state senate is Native American. This is so despite the fact that the Native Americans share of the population increased since the last decennial census to nearly six percent of the State's total population. Under these circumstances, the 2021 Redistricting Plan's configuration of districts 9, 9A, 9B, and 15 violates Section 2 of the VRA.

II. Procedural History

On February 7, 2022, Plaintiffs Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown filed this lawsuit against the Secretary of State of North Dakota, alleging that the 2021 Redistricting Plan violates Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. *See* ECF No. 1, Compl. at 29-31. Defendant Jaeger moved to dismiss Plaintiffs' complaint, *see* ECF No. 17, Mot. to Dismiss, Apr. 15, 2022, and on July 7, 2022, the Court denied Defendant's motion. *See* ECF No. 30, Order Denying Mot. to Dismiss, Jul. 7, 2022. Plaintiffs supplemented their complaint on December 7, 2022, to add allegations relating to

the 2022 elections for the state legislature. *See* ECF No. 44, Supp. Compl., Dec. 7, 2022. Defendant subsequently moved for summary judgment, asking the Court to find that Plaintiffs had failed to establish two of the three necessary preconditions for a Section 2 claim. *See* ECF No. 59, Mot. for Summary Judgment, Feb. 1, 2023; ECF No. 60, Mem. in Support of Mot. for Summary Judgment, Feb. 1, 2023. The Court denied the motion on April 11, 2023. *See* ECF No. 89, Order Denying Mot. for Summary Judgment, Apr. 10, 2023.

III. Citation to Authority for Legal Issues

Aside from pending motions in limine, the only unresolved legal issue is the ultimate question of vote dilution. The following are the principal authorities on that issue: *Thornburg v. Gingles*, 478 U.S. 30 (1986); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); and *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006). The Supreme Court’s pending decision in *Allen v. Milligan*, expected to be released by the end of June, may bear on the case as well.

Section 2 of the VRA prohibits states from enacting a redistricting plan that results in an “inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred candidates.” *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1018 (8th Cir. 2006) (quoting *Cottier v. City of Martin*, 445 F.3d 1113, 1116 (8th Cir. 2006)). A Section 2 violation “occurs when: ‘based on the totality of circumstances, it is shown that the political processes leading to nomination or election ... are not equally open to participation by members of a [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’” *Bone Shirt*, 461 F.3d at 1018 (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425 (2006)).

To establish a Section 2 violation, Plaintiffs must “prove by a preponderance of the evidence three elements, often referred to as the ‘*Gingles* preconditions’: (1) [T]he racial group is

sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.” *Id.* Once the three *Gingles* Preconditions are established, the court must consider whether “the totality of the circumstances indicates minority voters ha[ve] ‘less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice[.]’” *Id.* at 1021 (quoting 52 U.S.C. § 10301(b)). To determine whether the totality of the circumstances are met, courts may consider “the extent to which members of the [racial minority group] have been elected to office in the State,” 52 U.S.C. § 10301(b), as well as the following factors (referred to as the “Senate Factors”):

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

...

[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

[9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Thornburg v. Gingles, 478 U.S. 30, 36–37 (1986) (quoting S. Rep. No. 97-417 at 28–29 (1982)); *see also Bone Shirt*, 461 F.3d at 1021-22. “There is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.” *United States v. Marengo Cnty. Comm’n*, 731 F.2d 1546, 1566 n.33 (11th Cir. 1984) (quoting S. Rep. No. 97-417, at 29 (1982)). Finally, while “proportionality is not dispositive” in a Section 2 claim “it is a relevant fact in the totality of circumstances to be analyzed when determining whether members of a minority group have ‘less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’” *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994).

IV. General Statement of Evidence

Plaintiffs will offer expert and lay testimony as well as video and documentary evidence to establish that the 2021 Redistricting Plan violates Section 2 of the VRA, in that all three *Gingles* factors are satisfied and the totality of circumstances shows that the plan unlawfully dilutes Native American voting strength in northeastern North Dakota.

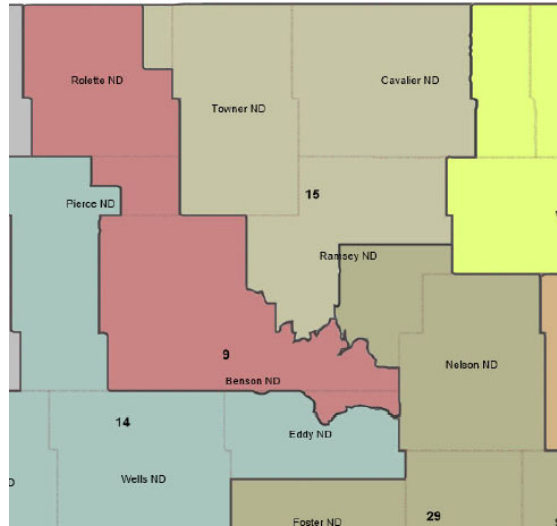
A. *Gingles* 1: Native American voters in the region are geographically compact so as to constitute a majority of eligible voters in an alternative district configuration.

Plaintiffs submitted two demonstrative maps showing that it is possible to draw a reasonably compact majority Native legislative district in northeast North Dakota. P105 (Plaintiffs’

Demonstrative Plan 1 Map); P106 (Plaintiffs' Demonstrative Plan 2 Map). Both plans satisfy *Gingles* prong 1, but Plaintiffs will focus their presentation on Plaintiffs' Demonstrative Plan 1.¹

Plaintiffs' Demonstrative Plan 1 creates a new District 9 centered primarily in Rolette and Benson Counties. This district is shown in both a regional view and set into the enacted plan:

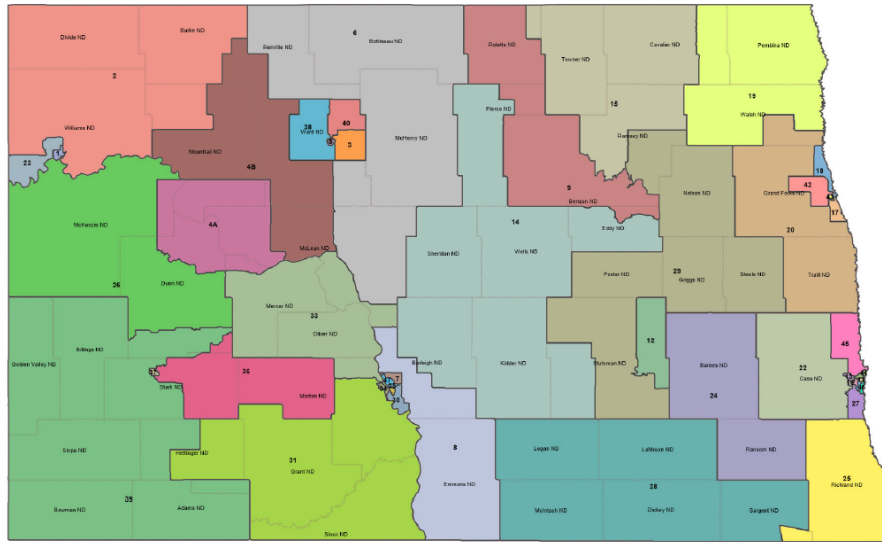
Plaintiffs' Demonstrative Plan 1 Regional View



P045 (L. Collingwood Rebuttal Report Map 1 – Plaintiffs' Demonstrative Plan 1 District 9)

¹ The primary difference between the two plans is that Plaintiffs' Demonstrative Plan 2, by splitting two precincts, reduces the number of neighboring districts that would need to be adjusted.

Plaintiffs’ Demonstrative Plan 1 Statewide View



P105 (Pls. Demonstrative Plan 1 Map).

Plaintiffs’ Demonstrative Plan 1 contains a proposed District 9 with a NVAP of 66.1%. P042 at 5 (Rebuttal Report of Dr. Loren Collingwood). The NVAP of District 9 is almost precisely the median NVAP of the 31 Native American majority state legislative districts nationwide, and lower than the NVAP of District 9 in the 2012-2020 state legislative plan (“benchmark plan”). P042 at 5 (Rebuttal Report of Dr. Loren Collingwood).

As Dr. Collingwood will testify, Demonstrative Plan 1 performs substantially better for Native Americans in northeast North Dakota than enacted Districts 9 and 15, winning all but three contests. P001 at 32 (Expert Report of Dr. Loren Collingwood).

Under Plaintiffs’ Demonstrative Plan 1, District 9 does not split any voting precincts or municipalities. P042 at 16 (Rebuttal Report of Dr. Loren Collingwood). As Dr. Collingwood will testify, although the water boundaries of Devil’s Lake and the Sheyenne River have a distortionary lowering effect on Plaintiffs’ Demonstrative District 9’s mathematical compactness scores, *see* P042 at 10 (Rebuttal Report of Dr. Loren Collingwood), the district still scores as more compact

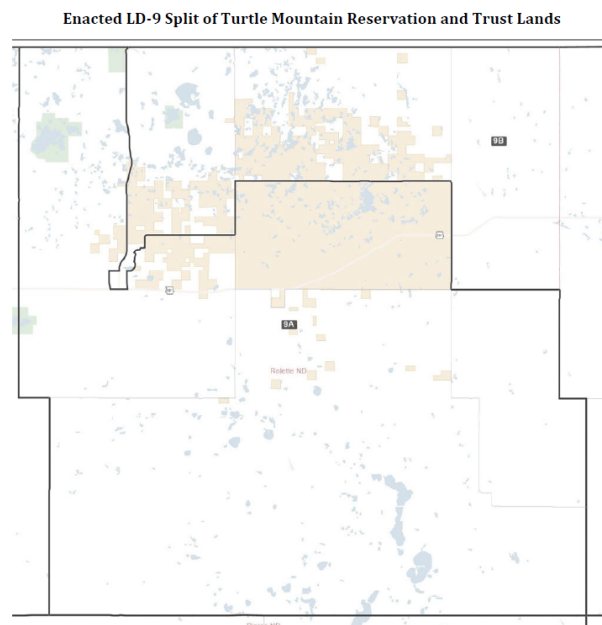
than several other state legislative districts in the 2021 enacted plan, P042 at 9-11 (Rebuttal Report of Dr. Loren Collingwood).

Dr. Collingwood’s testimony will also establish that Plaintiffs’ Demonstrative District 9 scores higher on mathematical compactness metrics than several congressional districts the Supreme Court has held to be “reasonably compact” for purposes of *Gingles* prong one. P042 at 12 (Rebuttal Report of Dr. Loren Collingwood). Even Defendant’s expert, Dr. M.V. “Trey” Hood, testified at his deposition that under the methodology he had previously used to evaluate compactness in a Virginia redistricting case, all of the enacted North Dakota districts *and* Plaintiffs’ Demonstrative District 9 are “reasonably compact.” Ex. A at 143:25-144:8 (Hood Dep.); *see id.* at 189:2-6 (“Q: [U]nder your own metric from Virginia and applied here, . . . [Plaintiffs’ demonstrative] district is sufficiently or reasonably compact, correct? A: Correct.”); *see also* P124 (Virginia 2012-2020 State Senate Plan).

Plaintiffs’ Demonstrative District 9 adheres to other traditional districting criteria as well. As Dr. Collingwood will explain, the district splits the same number of counties (three) as does enacted District 15 and the enacted state house version of District 9 (9A and 9B). P042 at 19-20 (Rebuttal Report of Dr. Loren Collingwood). Demonstrative District 9 has the same Eddy County split as the enacted map to follow the Spirit Lake Reservation boundary—a principle the legislature declared important. P042 at 20 (Rebuttal Report of Dr. Loren Collingwood). Demonstrative District 9 spans about the same distance north-to-south as the enacted District 9 does east-to-west. P042 at 18 (Rebuttal Report of Dr. Loren Collingwood). And a number of North Dakota’s legislative districts are geographically large—including many that are larger than Plaintiffs’ Demonstrative District 9—because of the sparse population in rural areas of the state. P042 at 18 (Rebuttal Report of Dr. Loren Collingwood).

A whole Pierce County voting precinct links Rolette to Benson County in Plaintiffs’ Demonstrative District 1. P120 (Precinct Maps for Benson, Eddy, Pierce, and Rolette Counties). This precinct is larger than a number of connecting points in other enacted districts in the state. P042 at 14-16 (Rebuttal Report of Dr. Loren Collingwood). Indeed, as Dr. Collingwood explains, the Pierce County precinct included in Plaintiffs’ Demonstrative District 9 “spans 180 square miles and is itself larger than a majority of the other districts in the plan.” P042 at 13 (Rebuttal Report of Dr. Loren Collingwood). Moreover, Rolette and Benson Counties, which are linked in Plaintiffs’ Demonstrative Plan 1, are geographically closer to one another than Rolette and Cavalier Counties, which were linked together in the enacted plan. Ex. A at 177:3-20 (Hood Dep.).

Unlike the enacted plan, which splits the Turtle Mountain Reservation and its trust lands between Districts 9A and 9B, Plaintiffs’ Demonstrative District 9 keeps the Reservation and the trust lands together—a feature Dr. Hood agreed at his deposition was important and could be a community of interest consideration. Ex. A at 169:5-24 (Hood Dep.). Below is the map illustrating how the enacted plan splits the Reservation from the trust lands (shown in tan):



P042 at 21 (Rebuttal Report of Dr. Loren Collingwood).

Finally, Plaintiffs' demonstrative districts comply with the traditional redistricting criteria of preserving communities of interest by reuniting the Turtle Mountain Reservation with the Turtle Mountain Trust Lands, and uniting Native American voters living on and around the Turtle Mountain Reservation with Native American voters living on and around the Spirit Lake Reservation. Spirit Lake and Turtle Mountain—as well as their members and voting public—share many common characteristics and interests that relate to their common representational needs in the state legislature. The two reservations are just 55 miles apart. P042 at 17 (Rebuttal Report of Dr. Loren Collingwood). Chairman Azure of Turtle Mountain and former Chairman Yankton of Spirit Lake will testify at trial about the shared values and beliefs of their Tribes, the “similar socio-economic statuses” of their members, and the similar representational needs from the state legislature related to economic investment, state-sponsored services, and legislative appropriations that differ from other North Dakota rural communities, where agricultural and energy interests predominate, and from the state's urban areas. They will likewise testify to the joint ventures the Tribes have engaged in, including funding for tribal colleges, negotiating the tribal-state gaming compact, taxation on tribal lands, hunting and fishing regulation, tribal and state law enforcement, and funding for education, foster care, and health care.

Defendant will likely contend that a district that includes both Turtle Mountain and Spirit Lake is a “racial gerrymander.” But this is a baseless claim. A party alleging a racial gerrymander must show that race was the “predominant factor” in the decision to “place a significant number of voters within or without a particular district. *Cooper v. Harris*, 581 U.S. 285, 291 (2017). This requires a showing that other factors, like compactness, respect for political subdivisions, and others, were “subordinated . . . to racial considerations.” *Id.* (internal quotation marks omitted).

Defendant cannot meet this burden. Moreover, even if race does predominate in the drawing of a district, compliance with Section 2 of the VRA is a compelling interest sufficient to justify the use of race, which precludes such a district from being deemed an Equal Protection violation. *Id.* at 292.

As the above discussion regarding *Gingles* prong one shows, Plaintiffs' Demonstrative District 9 satisfies the traditional redistricting criteria as well or better than enacted Districts 9, 9A, 9B, and 15, and many other enacted districts. It also beats out districts that the Supreme Court has found to comply with traditional districting principles for VRA purposes. Dr. Hood testified at his deposition that Plaintiffs' Demonstrative District 9 is reasonably compact and satisfies a host of traditional districting criteria. He likewise testified he has no evidence to suggest the proposed district is a racial gerrymander, and that enacted District 9 might just as easily be a racial gerrymander given that the legislature added so many white voters to the district. Moreover, Spirit Lake and Turtle Mountain have a host of shared needs and interests having nothing to do with race, and thus are properly combined in a VRA district. *See LULAC*, 548 U.S. at 434-35. In addition, a *Gingles* 1 demonstration plan merely shows that a discriminatory result may be afoot. Such a plan shows that there is the potential to draw a district in which Native American voters will constitute a sufficient majority to elect their preferred candidates—unlike in the enacted plan. The legislature will have the first opportunity to draw a remedial plan, and need not even look at race to draw a district that combines Rolette and Benson Counties—which Dr. Hood acknowledged are closer in proximity than are Rolette and Cavalier Counties, which the enacted plan joins.

B. *Gingles* 2: Native American Voters in North Dakota and in Districts 9 and 15 are politically cohesive.

As Dr. Collingwood will testify, voting in North Dakota and in Districts 9 and 15 is racially polarized, meaning that Native American voters vote cohesively for one set of candidates while

white voters vote cohesively against those candidates. P001 at 4-16 (Expert Report of Dr. Loren Collingwood). Defendant's expert, Dr. Hood, agrees. P080 at 4-6 (Expert Report of Dr. M.V. Hood III) (Walen v. Burgum)); P081 at 2, 4 (Expert Report of Dr. M.V. Hood III (Turtle Mountain)).

C. *Gingles 3: White Bloc voting usually defeats the Native American candidate of choice in enacted Senate Districts 9 and 15 and House District 9B.*

Under the benchmark plan, Native American voters in northeastern North Dakota elected their candidate of choice to all three seats in District 9. P042 at 7 (Rebuttal Report of Dr. Loren Collingwood). Under the enacted plan, Native American voters in the region were able to elect just *one* candidate of choice—Jayme Davis—to the state house in District 9A. P001 at 14-15 (Expert Report of Dr. Loren Collingwood). Notably, the total NVAP share of the statewide population grew from 5.1% to 5.9% from the 2010 to 2020 census. Dr. Collingwood will testify that if Native Americans elected candidates to the state legislature in proportion to their share of the overall statewide population, that would equate to three state senate seats and six state house seats. Because of the configuration of districts in the new redistricting plan, for the first time in over thirty years, no member of a North Dakota Native American Tribe serves in the state senate today, and just two Native American representatives are currently serving in the state house. P042 at 6 (Rebuttal Report of Dr. Loren Collingwood).

This is because white bloc voting defeats Native American voters' candidates of choice in Districts 9, 9B, and 15. At the outset, it is important to note that there no longer is any dispute between Plaintiffs and Defendant on this score. Defendant has always acknowledged that *Gingles 3* is satisfied in Districts 9B and 15. P081 (Expert Report of M.V. Hood III). When Defendant filed his motion for summary judgment in this case, he disputed whether *Gingles 3* was satisfied as to Senate District 9. But after Defendant's expert Dr. Hood was deposed (during which he acknowledged that his *own* analysis would establish *Gingles 3* is present in Senate District 9),

Defendant reversed course, and filed a summary judgment brief in the *Walen* case contending that the removal of the subdistrict lines would result in a VRA violation because, in the full District 9, white voters would usually defeat Native American voters' preferred candidates. P098 (Walen Summ. J. Brief). That is, Defendant *agrees Gingles 3* is present in District 9, he just thinks the solution is a subdistrict that reduces Native American voters' opportunity to elect their preferred candidates to a single state house seat, rather than maintaining Native American voters' opportunity to elect in three legislative seats, as in the 2012-2020 plan.

In any event, even if there remained some factual dispute as to *Gingles* prong 3, Plaintiffs will establish the precondition is satisfied at trial. As Dr. Collingwood (and Dr. Hood) will testify, three categories of elections are most probative for determining whether the white majority block votes against Native American voters' candidates of choice: (1) "endogenous" elections, or elections for the office that is at issue (here state legislative elections as opposed to statewide, or "exogenous" elections), (2) more recent elections, and (3) elections featuring a Native American candidate. P042 at 5-7 (Rebuttal Report of Dr. Loren Collingwood); P001 at 21 (Expert Report of Dr. Loren Collingwood). Dr. Collingwood will testify that white bloc voting defeats the Native American preferred candidates in 100% of the endogenous elections in District 9, in 100% of the most recent (2022) elections in District 9, 71% of elections in the most recent two cycles 2022 and 2020, 57% of elections in the most recent three election cycles that lack special circumstances making them nonprobative (2022, 2020, and 2016), and in 60% of elections in District 9 featuring a Native American candidate. P042 at 7 (Rebuttal Report of Dr. Loren Collingwood). Dr. Collingwood will also testify that across 30 contests between 2014 and 2022, the block rate by which white voters prevent the Native American preferred candidate from prevailing in District 15 is 97%. P001 at 26 (Expert Report of Dr. Loren Collingwood). And in District 9B, Dr. Collingwood

will testify that the block rate by which white voters prevent the Native American preferred candidate from winning is 81%. P001 at 16-21.

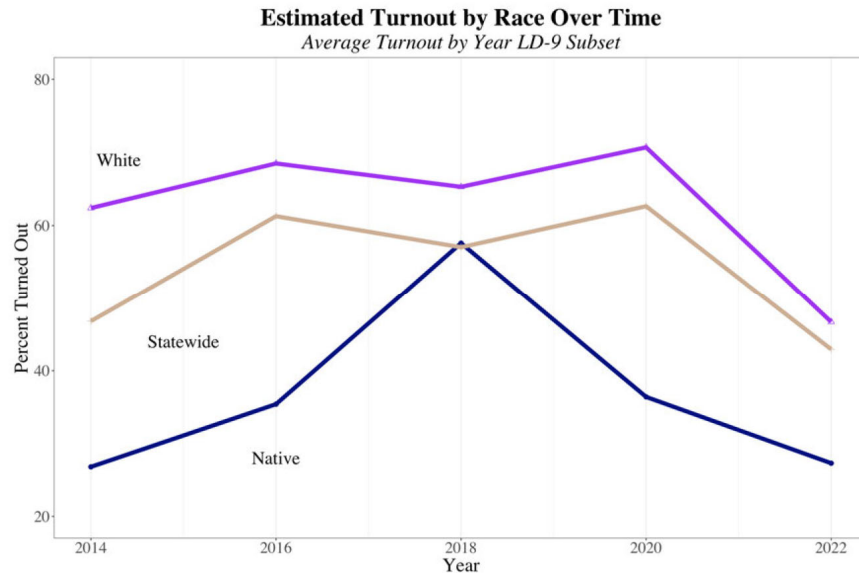
Dr. Collingwood will further testify that the 2018 elections exhibited “special circumstances” and “it would be appropriate to entirely disregard the 2018 elections” or at least give them “very little weight” in assessing white bloc voting. P042 at 8 (Rebuttal Report of Dr. Loren Collingwood). The special circumstances of the 2018 Election are most evident when analyzing Native American voter turnout rates. Although the redrawn District 9 has a small majority NVAP (down twenty percentage points from the benchmark district), its voting electorate is, under usual circumstances, substantially majority white. P042 at 5 (Rebuttal Report of Dr. Loren Collingwood). The chart below shows the demographic composition of the voting electorate in District 9 for the past five election cycles:

Enacted District 9 Electorate Demographic Composition

Election	White Electorate Share	Native American Electorate Share
2014	67%	33%
2016	63%	37%
2018	50%	50%
2020	63%	37%
2022	60%	40%

P042 at 4-5 (Rebuttal Report of Dr. Loren Collingwood). As Dr. Collingwood will testify, Native American voter turnout nationwide, in North Dakota, and specifically in District 9, is typically substantially lower than white voter turnout. P042 at 3-4 (Rebuttal Report of Dr. Loren Collingwood). In District 9, Native American voter turnout is “usually in the neighborhood of 20-30 percentage points” lower than white turnout. P042 at 4 (Rebuttal Report of Dr. Loren Collingwood). For all categories of voters, turnout in presidential election cycles exceeds turnout in midterm election cycles as a general rule. P042 at 4 (Rebuttal Report of Dr. Loren Collingwood).

As the graph below shows, however, Native American turnout in 2018 skyrocketed to 57.6% in District 9, exceeding statewide overall turnout and approaching (but not reaching) white turnout in the district. P042 at 4 (Rebuttal Report of Dr. Loren Collingwood).



P042 at 4 (Rebuttal Report of Dr. Loren Collingwood).

As Dr. Collingwood explained in his rebuttal report and will explain at trial, “[i]n all the many elections in different jurisdictions that I have studied, I have never seen a Native American turnout number begin to approach 60% in a federal, state, or local contest. Rather, the figures often hover around 30% - which is in line with my estimates in every other election year in LD-9.” P042 at 4 (Rebuttal Report of Dr. Loren Collingwood). Furthermore, the general pattern of lower turnout for midterm versus presidential cycles is “strikingly inverted” with respect to Native American turnout in the 2018 election. *Id.*

Chairman Azure of Turtle Mountain and Chairman Yankton of Spirit Lake will testify that the 2018 election featured unique circumstances. The state’s voter ID law, which required proof of residential street addresses—something many Native American voters lacked—had previously been enjoined by this Court but was permitted to go in effect by the U.S. Supreme Court just before

the 2018 election. The Chairmen will testify to the resulting substantial amounts of money spent by national, local, and regional organizations focused on educating and turning out Native voters. In addition, national celebrities like Dave Matthews Band and Mark Ruffalo toured North Dakota Reservations and held get-out-the-vote events. As the Chairmen will testify, this type of sustained spending and electoral education focused on Native American voters had never occurred prior to the 2018 election and has not happened since.

Defendant may contend that *Gingles* prong 3 in the full District 9 is not satisfied, as he did in his summary judgment motion (while conceding it is satisfied in District 9B and 15). But this would be contrary to the litigation position Defendant has taken in the *Walen* case and would be contrary to Dr. Hood's own testimony. At his deposition, Dr. Hood conceded that his own analysis in his *Walen* expert report with respect to District 9, if updated to include the 2022 elections he viewed most probative, would show the presence of *Gingles* prong 3 with respect to District 9, with a 60% block rate for Native American preferred candidates.

4. An analysis of the Senate Factors indicates that Native American voters have less opportunity than other members of the electorate to participate in the political process.

Plaintiffs will present the following evidence demonstrating that an analysis of the Senate Factors shows that Native Americans are denied an equal opportunity to participate in the electoral process in North Dakota.

i. There is a history of official voting-related discrimination against Native Americans in North Dakota.

Dr. Daniel McCool will testify about the extensive history of official voting-related discrimination against Native Americans in North Dakota, which continues to this day. P064 at 7-27, 33-35 (Expert Report of Dr. Daniel McCool). As Dr. McCool will explain, this history is rooted in a broader history of discrimination against Native Americans in North Dakota that dates back

to its days as a territory, and stems in large part from the conflict over land between white settlers and Native peoples. P064 at 7-10 (Expert Report of Dr. Daniel McCool). After statehood, Native Americans were openly and explicitly denied the right to vote unless they qualified as “civilized persons” who had “severed their tribal relations two years next preceding” the election in which they sought to vote. P064 at 10 (Expert Report of Dr. Daniel McCool). Dr. McCool will testify that the demand that Native people give up their culture as a condition of voting was unique in American history. P064 at 10 (Expert Report of Dr. Daniel McCool). Dr. McCool will also testify about how the long history of generalized discrimination against Native Americans in North Dakota affects their ability to participate in the electoral process. P064 at 21 (Expert Report of Dr. Daniel McCool). Finally, Dr. McCool will testify about the well documented contemporary history of voting-related discrimination against Native Americans in North Dakota, which has forced Native voters and Tribes to regularly appeal to the courts to vindicate their fundamental right to vote. P064 at 21-27 (Expert Report of Dr. Daniel McCool).

ii. The legislature’s exercise of its discretionary authority to create House subdistricts enhanced the opportunity for discrimination against Native Americans in northeast North Dakota.

Plaintiffs will present substantial evidence showing that the legislature’s discretionary authority to create House subdistricts enhanced the opportunity for discrimination against Native Americans in northeast North Dakota.

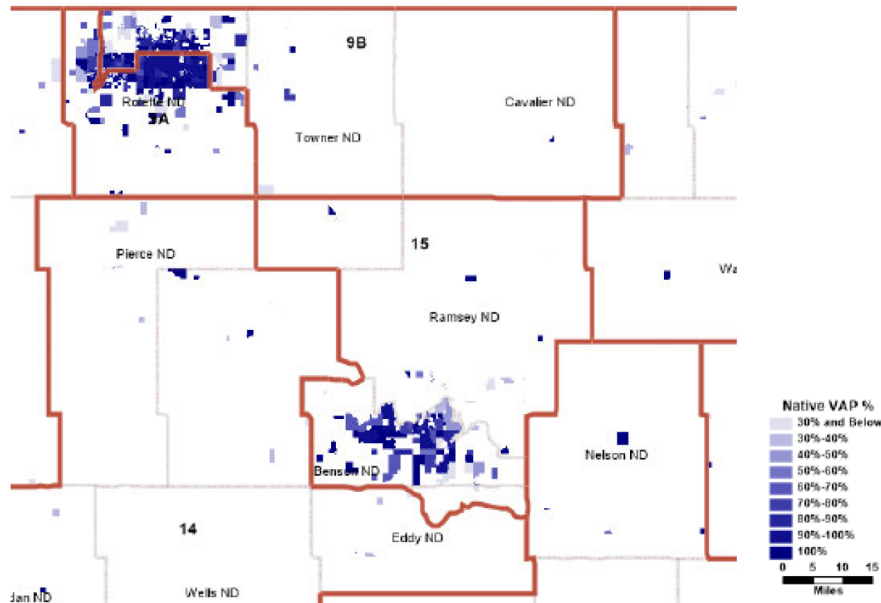
The 2021 Redistricting plan enacted by the legislature substantially changed the districts in northeastern North Dakota and in particular the districts in which the Turtle Mountain and Spirit Lake reservations are located. Parts of Towner and Cavalier Counties—the VAP of which are 96.0% and 95.6% white respectively—were added to District 9. P100 (2021 Enacted N.D. State Senate Map); P103 (2012-2020 N.D. Legislative Plan Map); P001 at 16 (Expert Report of Dr.

Loren Collingwood). By extending District 9 east into overwhelmingly white counties, the enacted plan dramatically changed the demographic makeup of the district, reducing its NVAP by twenty percentage points, from 74.4% to 54.5%. P001 at 31 (Expert Report of Dr. Loren Collingwood). Among the 31 Native American-majority state legislative districts in the country, the enacted version of District 9 has the second lowest NVAP share nationwide. P042 at 5 (Rebuttal Report of Dr. Loren Collingwood). The average NVAP of a majority-Native American legislative district nationwide is 68.1% and the median is 66.7%. P042 at 5 (Rebuttal Report of Dr. Loren Collingwood). The Spirit Lake Reservation was separated from all of the counties with which it previously shared a district and placed in District 15, which neighbors District 9. P100 (2021 Enacted N.D. State Senate Map); P103 (2012-2020 N.D. Legislative Plan Map).

Citing the VRA the legislature divided District 9 into two subdistricts that each elect one state representative seat, Districts 9A and 9B, D431 at 17:16-18:23 (Nov. 9, 2021, Redistricting Comm. Hr'g Tr.). Presumably this was because, as Defendant asserted in the *Walen* matter, the full District 9 violated the VRA. *Walen* MSJ at 40. District 9A has a Native American VAP of 79.8%. P042 at 5 (Rebuttal Report of Dr. Loren Collingwood). This is the fifth highest NVAP among the 31 Native American-majority state legislative districts nationwide. P042 at 5 (Rebuttal Report of Dr. Loren Collingwood); D491 (Native American Majority State Legislative Districts). The remaining Native American population in northeastern North Dakota is split across Districts 9B and 15. District 9B has a NVAP of 29.4%. P143 (Maptitude Report for District 9B). District 15 has a NVAP of 20.39%. P145 (Maptitude Report for District 15).

A map illustrating the fragmenting of northeastern North Dakota's Native American voters among Districts 9A, 9B, and 15 is shown below, with concentrations of Native Americans shown in blue and the district lines shown in red.

Enacted Plan Fragmenting of Native American Population



P059 (L. Collingwood Rebuttal Report Appendix A – 2021 Enacted Plan Native American VAP Shading).

The first election under the new legislative redistricting plan was held on November 8, 2022. Native American preferred candidates lost every state legislative contest in Districts 9 and 15 except for District 9A's state house seat. The Native American incumbent state senator Richard Marcellais lost his contest for the state senate seat in District 9. Native American candidates Collette Brown and Heather Lawrence-Skadsem lost their contests for state senate and state house in District 15. And incumbent Native American preferred candidate Marvin Nelson lost his contest for state house in District 9B. P001 at 17 (Expert Report of Dr. Loren Collingwood).

In addition to quantitative evidence of the discriminatory impact of the legislature's linedrawing, Plaintiffs will present testimony from Dr. Daniel McCool about the differences between how the legislature effectively utilized its discretionary authority to create subdistricts to ensure the 2021 Plan did not discriminate against Native voters on the MHA Reservation but failed

to do the same for Native voters living on and near the Turtle Mountain and Spirit Lake Reservations. P064 at 33-35 (Expert Report of Dr. Daniel McCool).

- iii. **Native Americans in North Dakota generally and in Rolette, Ramsey, and Benson Counties specifically bear the effects of discrimination in the areas of income, poverty, education, health insurance coverage, computer ownership and access, housing, employment, and mortality, which hinders their ability to effectively participate in the political process.**

Dr. Weston McCool will testify that he reviewed data from the Census Bureau's 2015-2019 five-year American Community Survey on seven socioeconomic variables—income, poverty, education, computer ownership and access, homeownership, and employment. P073 at 1-3 (Expert Report of Dr. Weston McCool). He will further testify that he looked at how Native Americans and white North Dakotans in Rolette, Ramsey, and Benson Counties compare on each of these variables, and found that the Native American population is at a statistically significant disadvantage when compared to the white population on each of these factors, across all three counties. P073 at 5-13 (Expert Report of Dr. Weston McCool). Dr. Weston McCool will further testify that he reviewed data from the Kaiser Family Foundation on the rates at which white residents and Native American residents in North Dakota avoid health care due to costs. P073 at 3 (Expert Report of Dr. Weston McCool). He will testify that Native Americans in North Dakota are more than three times as likely as white residents to report avoiding seeking medical care because of cost. P073 at 8, 10, 13 (Expert Report of Dr. Weston McCool). Based on these findings, Dr. Weston McCool will testify that there is a systemic and statistically significant race-based bias that disadvantages the Native American population when compared with the white population in northeast North Dakota. P073 at 13 (Expert Report of Dr. Weston McCool). Dr. Weston McCool will further testify that, when combined with evidence of depressed participation by Native Americans in the political process, a reasonable expert would conclude that the socioeconomic

disadvantage suffered by Native Americans in North Dakota hinder their ability to participate in the political process. P073 at 13 (Expert Report of Dr. Weston McCool).

iv. It is rare to find Native Americans holding any kind of elected office in North Dakota outside of tribal government.

Plaintiffs will offer testimony from Dr. Daniel McCool that “it is very rare to find American Indians holding any kind of public office in the state other than in tribal government.” P064 at 50-57 (Expert Report of Dr. Daniel McCool). Dr. McCool reviewed data from the North Dakota Indian Affairs Committee and found that prior to the 2022 election, Senator Richard Marcellais was the only Native American state legislator representing a “Tribal District” in North Dakota. P064 at 50 (Expert Report of Dr. Daniel McCool). He further found that all seven members of the Tribal State Relations Committee are white. P067 at 51 (Expert Report of Dr. Daniel McCool). Of the twenty members of the Governor’s cabinet, Dr. McCool identified just two individuals who are Native American. P064 at 51 (Expert Report of Dr. Daniel McCool). Dr. McCool will testify that it is similarly rare to find Native Americans serving in elected office at the county and local levels, particularly in urban areas and even where there is a substantial Native population. P064 at 52-53, 54-57 (Expert Report of Dr. Daniel McCool).

v. The North Dakota legislature is not responsive to the needs of Native Americans.

Plaintiffs will offer expert testimony from Dr. Daniel McCool demonstrating that there is a consistent pattern of state and local officials failing to respond to the needs of Native Americans and Tribal Members in North Dakota. P064 at 50-57 (Expert Report of Dr. Daniel McCool). Dr. McCool will testify about the Redistricting Committee’s refusal to hold hearings in Indian Country, and the impact this had on Native participation in the process. P064 at 58-59 (Expert Report of Dr. Daniel McCool). He will also offer testimony about the legislature’s imposition of a subdistrict

Turtle Mountain did not request and its rejection of the joint request by Turtle Mountain and Spirit Lake to be placed in a unified district, as well as the impact of these decision on Tribal members. P064 at 60-61 (Expert Report of Dr. Daniel McCool). And he will testify that the legislature took these actions despite warnings that they would be detrimental to Native voters in the region. P064 at 61 (Expert Report of Dr. Daniel McCool).

In addition to testifying about the legislature's lack of responsiveness during the redistricting process, Dr. McCool will offer testimony about the legislature's reaction to the conflict over the DAPL pipeline, and its impact on tribal-state relations in North Dakota. P064 at 50-57 (Expert Report of Dr. Daniel McCool). Plaintiffs will also offer testimony by Chairman Azure, Chairman Yankton, and Collette Brown about the legislature's failure to respond to the needs of the Turtle Mountain and Spirit Lake, and the respective Tribes' members during the redistricting process.

Finally, Plaintiffs intend to present evidence from the Legislative record that demonstrates the legislature's lack of responsiveness during the redistricting process, including with respect to the Plaintiffs, and their members.

Defendant may contend that the legislature *was* responsive to Native Americans during the 2021 redistricting process because some Native Americans and Native American Tribes (*i.e.*, MHA, Standing Rock, and Spirit Lake) requested (prior the release of Census data) that subdistricts be considered, and the legislature then drew two subdistricts—one for MHA (which had requested one) and one for Turtle Mountain (which had not). But this does not evince a responsive legislature, particularly considering the legislature's rejection of Turtle Mountain and Spirit Lake's request for a unified legislative district in which they could retain the opportunity to elect three Native American preferred candidates. Moreover, Defendant may contend that

Governor Burgum has sought to improve upon prior administrations' relations with North Dakota's Tribes. But any such efforts are recent and do not overcome the totality of circumstances, historical and contemporaneous discrimination and disparate statuses, that together with the districting configuration here provide less opportunity for Native American voters to participate equally in the political process. Moreover, evidence of increased responsiveness by the executive branch has little to no bearing on whether the state legislature is adequately responsive to Native Americans.

vi. The policy underlying Districts 9 and 15 is tenuous.

In addition to the evidence summarized above, which demonstrates that the enactment of Districts 9, 9A, 9B, and 15 bears no functional relationship to the Legislature's stated policy of creating subdistricts around Native populations to avoid VRA litigation, Plaintiffs will offer testimony from Dr. Daniel McCool that the enacted plan is tenuous policy that makes it more difficult for Native Americans to elect candidates of their choice. P064 at 67-69 (Expert Report of Dr. Daniel McCool).

V. Evidentiary and Procedural Issues

A. Plaintiffs' Motion in Limine

Plaintiffs have moved to exclude the testimony of attorney Matt Campbell, who serves as counsel of record for the Plaintiffs in this case. ECF 96. The motion is fully briefed and ripe for resolution. The Court should grant the motion for the reasons stated in Plaintiffs' Memorandum and Reply in support of the same. ECF 97; ECF 101. *See also Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986).

B. Defendant's Motion in Limine

Defendant has moved to exclude the expert reports submitted by the parties' retained experts in this case, to exclude certain data relied on by Plaintiffs' experts Dr. Loren Collingwood

and Dr. Weston McCool, to exclude the conclusion made by Dr. McCool that socioeconomic disparities hinder North Dakota Native Americans' ability to participate effectively in the political process, and to limit the scope of testimony that may be offered by Chairwoman Lonna Jackson Street. ECF 93, ECF 94. The motion is fully briefed and ripe for resolution. The Court should deny the motion for the reasons stated in Plaintiffs' Response in Opposition to the motion and the authority cited therein. ECF 98.

C. Erika White, Bryan Nybakken, and Bryan Newby

Defendant listed current and former Secretary of State employees Erika White, Bryan Nybakken, and Bryan Newby as expert witnesses on the witness list he submitted to the Court and disclosed to Plaintiffs on May 24, 2023. Ex. B (Def. Exhibit List). While Defendant identified these individuals as potential non-retained expert witnesses on his initial and supplemental disclosures, to date he has not complied with his obligation under Rule 26 to provide a "summary of the facts and opinions to which" any of these witnesses are "expected to testify." Fed. R. Civ. P. 26(a)(2)(C); *see also* ECF 97-2 (Defs' Initial Rule 26(a)(1) Disclosures); ECF 97-1 (Defs' Supp. Rule 26(a)(1) Disclosures). Plaintiffs noted this omission in their motion in limine, *see* ECF 97 at 10 n.6, and subsequently brought the omission to Defendant's attention again during a meet and confer on May 24, prior to Defendant's submission of his witness list to the Court. Defendant has not supplemented his disclosures or otherwise provided the required information. As such, Plaintiffs object to Defendant's tender of these witnesses as experts and ask that the Court preclude them from offering opinion testimony. *See* Fed. R. Civ. P. 37(c)(1); *see, also e.g., Vanderberg v. Petco Animal Supplies Store, Inc.*, 906 F.3d 698, 703 (8th Cir. 2018).

D. Representative William “Bill” Devlin

Plaintiffs served Representative Devlin with both document and deposition subpoenas during the discovery period in this case. Representative Devlin moved to quash the subpoenas, and after this Court denied the motion in a well-reasoned decision, Representative Devlin filed a petition for mandamus with the Eighth Circuit and sought a stay of this Court’s order setting a deadline for him to comply with the subpoenas. On the same day that Plaintiffs filed their response to the petition, and without waiting for Plaintiffs’ response to the request for a stay, the Circuit Court issued an administrative stay of the deadline to comply. The matter remains pending before the Eighth Circuit, and as such Plaintiffs have not obtained any of the responsive documents, nor have they had the opportunity to depose Representative Devlin.

At this late hour, even if the Eighth Circuit denies the petition for mandamus and affirms this Court’s orders, Plaintiffs do not expect to be able to obtain and review the relevant documents and to subsequently depose Representative Devlin before trial begins, especially without disrupting trial preparation. As such, Plaintiffs request that the Court make time at the end of trial to discuss the status of Representative Devlin’s petition and its relation to the trial record.

D. *Allen v. Milligan*

The Supreme Court will soon release its decision in *Allen v. Milligan*, an appeal from an Alabama district court’s decision concluding that the Alabama legislature violated Section 2 of the VRA by failing to draw a second majority Black congressional district. The state in that case has made a number of arguments challenging various aspects of Section 2 precedent regarding *Gingles* prong 1. The *Milligan* decision, which is expected to be announced by the end of June, may bear on this case and require supplemental post-trial briefing or further proceedings.

VI. Plaintiffs' Objections to Defendant's Exhibits

While the parties are still conferring on exhibits, Plaintiffs intend to stipulate to the admission of the vast majority of Defendant's exhibits, a large portion of which consists of the legislative record of the 2021 redistricting process, upon which Plaintiffs also intend to rely. Plaintiffs intend to stipulate as to foundation with respect to Defendants' remaining exhibits. Consistent with the Court's pretrial order, *see* ECF 34 at 3, Plaintiffs reserve the right to object under Fed. R. Evid. 402 and 403 with respect to these exhibits based on the purpose for which they are offered. Plaintiffs do not intend to object to any of Defendant's exhibits on other grounds.

June 5, 2023

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CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system.

/s/ Mark P. Gaber

Mark P. Gaber

Counsel for Plaintiffs

EXHIBIT A



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Transcript of M.V. Hood, Ph.D.

Date: February 13, 2023

Case: Turtle Mountain Band of Chippewa Indians, et al. -v- Howe, et al.

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February 13, 2023

<p style="text-align: center;">1</p> <p>1 IN THE UNITED STATES DISTRICT COURT</p> <p>2 FOR THE DISTRICT OF NORTH DAKOTA</p> <p>3 ----- x</p> <p>4 TURTLE MOUNTAIN BAND OF : 5 CHIPPEWA INDIANS et al., :</p> <p>6 Plaintiffs : Civil No.</p> <p>7 vs :3:22-cv-00022-PDW-ARS</p> <p>8 MICHAEL HOWE, in his official : 9 capacity as Governor of the : 10 State of North Dakota, et al.,:</p> <p>11 Defendants :</p> <p>12 ----- x</p> <p>13</p> <p>14 Oral deposition of 15 M.V. HOOD, Ph.D.</p> <p>16</p> <p>17 VIA VIDEO/TELECONFERENCE</p> <p>18 MONDAY, FEBRUARY 13, 2023</p> <p>19 10:35 a.m. EASTERN TIME</p> <p>20</p> <p>21</p> <p>22</p> <p>23 Job No.: 481134</p> <p>24 Pages: 1 - 205</p> <p>25 Reported by: Lisa V. Feissner, RDR, CRR, CLR</p>	<p style="text-align: center;">3</p> <p>1 A P P E A R A N C E S:</p> <p>2 ON BEHALF OF PLAINTIFFS:</p> <p>3 MARK GABER, ESQUIRE</p> <p>4 MOLLY E. DANAHY, ESQUIRE</p> <p>5 NICOLE HANSEN, ESQUIRE</p> <p>6 CAMPAIGN LEGAL CENTER</p> <p>7 1101 14th Street NW</p> <p>8 Suite 400</p> <p>9 Washington, DC 20005</p> <p>10 202.736.2222</p> <p>11 mgaber@campaignlegal.org</p> <p>12 mdanahy@campaignlegal.org</p> <p>13 nhansen@campaignlegal.org</p> <p>14</p> <p>15 ON BEHALF OF DEFENDANTS:</p> <p>16 DAVID R. PHILLIPS, ESQUIRE</p> <p>17 BAKKE GRINOLDS WIEDERHOLT</p> <p>18 300 West Century Avenue</p> <p>19 Bismarck, ND 58503</p> <p>20 701.751.8188</p> <p>21 dphillips@bgwattorneys.com</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: center;">2</p> <p>1</p> <p>2</p> <p>3 Oral deposition of M.V. HOOD, Ph.D.,</p> <p>4 held remotely, via Zoom, on Monday, February 13,</p> <p>5 2023, beginning at 10:35 a.m. Eastern time,</p> <p>6 pursuant to Notice, before Lisa V. Feissner, RDR,</p> <p>7 CRR, CLR, Notary Public.</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: center;">4</p> <p>1 A L S O P R E S E N T:</p> <p>2 LaVAR TAYLOR, A/V Technician</p> <p>3 MICHAEL S. CARTER, ESQ., NARF</p> <p>4 SAMANTHA BLENCKE KELTY, ESQ., NARF</p> <p>5 ALLISON NESWOOD, ESQ., NARF</p> <p>6 BRYAN L. SELLS, ESQ.</p> <p>7 LAURIE STIRLING, paralegal, NARF</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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5	7
<p>1 C O N T E N T S</p> <p>2 EXAMINATION OF M.V. HOOD, Ph.D. PAGE</p> <p>3 By Mr. Gaber 7</p> <p>4</p> <p>5 E X H I B I T S</p> <p>6 (Attached to transcript)</p> <p>7 HOOD DEPOSITION EXHIBIT PAGE</p> <p>8 1 Expert Report of M.V. Hood III 18</p> <p>9 2 Expert Report of M.V. Hood III (Walen) 26</p> <p>10 3 LD9 Hypothetical 2020 President 29</p> <p>11 4 LD9 Hypothetical 2018 US Senate 33</p> <p>12 5 Rebuttal Declaration (Rios-Andino) 39</p> <p>13 6 HOOD-0244 - HOOD-0257 88</p> <p>14 7 Expert Report of M.V. (Trey) Hood III 118</p> <p>15 (Vesilind)</p> <p>16 8 Virginia 2012-2020 plans 127</p> <p>17 9 2021 Enacted ND Legislative Plan 132</p> <p>18 Fargo Close-Up View</p> <p>19 10 2021 Enacted ND Legislative Plan 135</p> <p>20 Grand Forks Close-Up View</p> <p>21 11 2021 Enacted ND Legislative Plan 137</p> <p>22 Bismarck Area Close-Up View</p> <p>23 12 Hood-00001 141</p> <p>24 13 Plaintiffs' Demonstrative Plan 1 154</p> <p>25 14 HOOD-0211 - HOOD-0240 159</p>	<p>1 P R O C E E D I N G S</p> <p>2 M.V. HOOD, Ph.D.,</p> <p>3 having been first duly sworn, was examined and</p> <p>4 testified as follows:</p> <p>5 EXAMINATION</p> <p>6 BY MR. GABER:</p> <p>7 Q Good morning, Dr. Hood.</p> <p>8 My name is Mark Gaber. I am an attorney</p> <p>9 with the Campaign Legal Center, and I am counsel</p> <p>10 for the plaintiffs in this case. And I will be</p> <p>11 taking your deposition today.</p> <p>12 I suspect you've done this a number of</p> <p>13 times before, so this might just be more of a</p> <p>14 reminder for me.</p> <p>15 But it's important, obviously, that we</p> <p>16 not talk over each other to allow the court</p> <p>17 reporter to be able to get our answers down. And</p> <p>18 also important that we perhaps talk a little</p> <p>19 slower than we might otherwise, for Lisa's ease.</p> <p>20 If at any point today you need a break,</p> <p>21 please let me know. And again, I may need them</p> <p>22 before you do. I just ask that if there are any</p> <p>23 questions pending, that you provide the answer to</p> <p>24 that question, and then we'll proceed to the</p> <p>25 break.</p>
6	8
<p>1 E X H I B I T S (cont'd)</p> <p>2 (Attached to transcript)</p> <p>3 HOOD DEPOSITION EXHIBIT PAGE</p> <p>4 15 2021 Enacted State Legislative Plan 162</p> <p>5 16 2012-2020 Legislative Plan 178</p> <p>6 17 HOOD-0002 - HOOD-0013 180</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 Does that sound good?</p> <p>2 A Yes, sir.</p> <p>3 Q And I know you've been deposed before.</p> <p>4 How many times would you say?</p> <p>5 A Unknown. More than 40, probably.</p> <p>6 Q How are you employed?</p> <p>7 A I'm currently a professor of political</p> <p>8 science at the University of Georgia.</p> <p>9 Q And how long have you held that</p> <p>10 position?</p> <p>11 A Well, not rank, but job here, since</p> <p>12 1999.</p> <p>13 Q And how long in that rank?</p> <p>14 A I think 2013. It's on my vita.</p> <p>15 Q Now, you're here today pursuant to a</p> <p>16 deposition -- a subpoena for a deposition and for</p> <p>17 documents.</p> <p>18 Is there anything from your file that</p> <p>19 you relied upon in your expert opinions that you</p> <p>20 have not produced?</p> <p>21 A No.</p> <p>22 Q Now, you're also a retained expert for</p> <p>23 the state in the parallel Walen versus Burgum</p> <p>24 proceeding.</p> <p>25 Is that right?</p>

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<p>9</p> <p>1 A Correct.</p> <p>2 Q Now, aside from your expert retention in</p> <p>3 these two cases, have you ever been retained by</p> <p>4 any North Dakota entity before?</p> <p>5 A No.</p> <p>6 Q And in addition to these two cases, are</p> <p>7 you currently a retained expert in any other</p> <p>8 litigation?</p> <p>9 A Yes.</p> <p>10 Q And what cases is that?</p> <p>11 A Well, I don't know that there's a case.</p> <p>12 Q Okay. What matters?</p> <p>13 A It's a matter in New York state.</p> <p>14 Q And what is the topic of that matter?</p> <p>15 A Noncitizen -- actually -- well,</p> <p>16 noncitizen voting, or the ability of noncitizens</p> <p>17 to vote.</p> <p>18 Q And is that a case that's in litigation</p> <p>19 right now, or is it sort of a pre-litigation</p> <p>20 matter?</p> <p>21 A No, I don't believe it's in litigation.</p> <p>22 Q And who have you been retained by?</p> <p>23 A I'd have to look. This is very recent.</p> <p>24 Q Is it by folks who intend to file a</p> <p>25 lawsuit or by a governmental entity?</p>	<p>11</p> <p>1 In both those cases, though, you're</p> <p>2 defending the existing map against the challenges</p> <p>3 under Section 2 of the Voting Rights Act.</p> <p>4 Is that right?</p> <p>5 A Correct.</p> <p>6 Q When were you first retained by the</p> <p>7 State of North Dakota in this matter?</p> <p>8 A I would say last spring.</p> <p>9 Q And was that in relation to the</p> <p>10 preliminary injunction motion that was filed by</p> <p>11 the plaintiffs in the Walen case?</p> <p>12 A I believe so.</p> <p>13 Q And just to clarify, I'll use the terms</p> <p>14 Walen and Turtle Mountain, and we can use</p> <p>15 something else if that is easier for you. But</p> <p>16 when I refer to the Walen case, I'm referring to</p> <p>17 the challenge to subdistrict 4A in the MHA Nation</p> <p>18 and 9A in Turtle Mountain that was brought by</p> <p>19 plaintiffs alleging a racial gerrymander.</p> <p>20 Does that sound right to you?</p> <p>21 A Yes. Please just use the Walen matter.</p> <p>22 (Reporter interruption.)</p> <p>23 Q And then I'll refer to this matter</p> <p>24 challenging district 9 under Section 2 of the</p> <p>25 Voting Rights Act as either this matter or the</p>
<p>10</p> <p>1 A It's a plaintiff group.</p> <p>2 Q And what jurisdiction in New York?</p> <p>3 A I think the city.</p> <p>4 Q New York City?</p> <p>5 A New York City, yes.</p> <p>6 Q In addition to that matter, are there</p> <p>7 any other matters in which you're currently</p> <p>8 retained for existing or potential litigation?</p> <p>9 A Yes.</p> <p>10 Q And which ones is that?</p> <p>11 A Well, there are a number of cases that</p> <p>12 are just on hold currently. So the Alabama</p> <p>13 redistricting matter that's ongoing, which is a --</p> <p>14 before the U.S. Supreme Court currently. And a</p> <p>15 similar case in Louisiana involving redistricting.</p> <p>16 Q Any others?</p> <p>17 A No.</p> <p>18 Q And the Alabama and the Louisiana case,</p> <p>19 you're an expert for the state.</p> <p>20 Is that correct.</p> <p>21 A Some state entity, yes. Sometimes it's</p> <p>22 the secretary of state. Sometimes it's the</p> <p>23 legislature. It's difficult for me to keep it</p> <p>24 straight.</p> <p>25 Q It does change from state to state.</p>	<p>12</p> <p>1 Turtle Mountain matter, if that works for you.</p> <p>2 A Okay. "This matter" is fine.</p> <p>3 Q So you were retained around the time of</p> <p>4 the preliminary injunction proceeding in the Walen</p> <p>5 matter.</p> <p>6 Was that also at that time to be an</p> <p>7 expert in this matter?</p> <p>8 A I believe so, you know, if necessary.</p> <p>9 Q And who reached out to you to retain</p> <p>10 you?</p> <p>11 A Mr. Phillips.</p> <p>12 Q And had you previously corresponded with</p> <p>13 or known Mr. Phillips?</p> <p>14 A No.</p> <p>15 Q What was the scope of work that you were</p> <p>16 asked to perform?</p> <p>17 A Well, in this particular matter, the</p> <p>18 main scope was to respond to Prof. Collingwood's</p> <p>19 report.</p> <p>20 Q And prior to receiving</p> <p>21 Prof. Collingwood's report, had you done any work</p> <p>22 in this matter?</p> <p>23 A Well, I had done some consulting work,</p> <p>24 which I guess touched upon this matter.</p> <p>25 Q And for whom were you doing consulting</p>

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1 work?
2 **A The state.**
3 Q And that was after your retention --
4 **A Yes.**
5 Q -- last spring?
6 **A Yes.**
7 Q Were you involved at all in advising the
8 North Dakota legislature about redistricting?
9 **A No.**
10 Q And how many times have you testified,
11 would you say, in redistricting cases?
12 **A I really don't know. Maybe half the**
13 **times I've testified in court involved**
14 **redistricting, which would include Section 2**
15 **cases, or I would include Section 2 cases. So...**
16 Q And as your expert testimony work
17 generally been on behalf of governmental entities
18 or defendants defending maps?
19 **A Typically, although I have testified for**
20 **plaintiffs. And I've testified for both**
21 **Democratic and Republican administrations. So...**
22 Q And in terms of your plaintiff work,
23 what were some examples of that?
24 **A There was a case in Dallas, a Section 2**
25 **case, involving the county court, which are like**

14

1 **county commissioners other places. So Dallas**
2 **County. I remember that case.**
3 **I worked for the Democratic**
4 **administration in the state of Virginia on a**
5 **redistricting matter.**
6 Q Any others that come to mind?
7 **A Not that are jumping out at me right**
8 **now.**
9 Q The Dallas case, that was the Harding
10 versus Dallas County case?
11 **A Correct, that sounds familiar.**
12 Q And the claim in that case was on behalf
13 of white voters who were alleging a Section 2
14 violation, that the minority voters were diluting
15 the white voters' vote.
16 Is that correct?
17 **A Yeah. In a nutshell, yes.**
18 Q And in Virginia, is that the Vesilind
19 case?
20 **A Yes.**
21 Q And one of the main topics of that case
22 was whether or not the Virginia 2011 state senate
23 districts complied with the compactness
24 requirement of the state constitution.
25 Is that right?

15

1 **A Yes. It was a very, very specific kind**
2 **of case.**
3 Q Have you testified in any case in which
4 the plaintiff was a minority group alleging a
5 violation of Section 2?
6 **A Yes. I mean, not -- again, if you**
7 **include a larger set of cases, yes.**
8 Q And what do you mean by that?
9 **A Well, outside of redistricting.**
10 Q Okay. In the context of redistricting,
11 when the claim has been on behalf of racial
12 minority groups, you've always been on the side of
13 the defendants in your expert work.
14 Is that right?
15 **A From what I recall, yes.**
16 Q Now, I gather from your CV that the bulk
17 of your scholarship has been about -- or the
18 specialty has been about politics in the south and
19 vote dilution in the context of southern states.
20 Is that a fair assessment?
21 **A Well, I would say big picture, I do**
22 **southern politics and election administration are**
23 **two of the sort of topical areas under American**
24 **politics that I study.**
25 Q And to the extent you focus in, it's

16

1 mostly in the south.
2 Is that correct?
3 **A Well, sometimes -- election**
4 **administration is not necessarily in the south.**
5 **But, you know, I mean, obviously southern politics**
6 **is in the south. So...**
7 Q It doesn't appear to me, and correct me
8 if I'm wrong, that you've written any articles,
9 books, or other scholarly works about Native
10 American voting patterns.
11 **A That would be fair, yes.**
12 Q And is the same true with respect to
13 tribal and state relations?
14 **A Yes.**
15 Q And Native American voting rights?
16 **A Correct.**
17 Q And I don't think I saw anything in
18 particular about North Dakota or the Great Plains
19 states in terms of their voting patterns or
20 political behavior.
21 Is that right?
22 **A Correct.**
23 Q So I gather you don't consider yourself
24 an expert in Native American politics?
25 **A No. I've never claimed that.**

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<p>17</p> <p>1 Q And topics such as anthropology or 2 sociology or history related to Native Americans? 3 A No. No. I'm a political scientist. 4 Q Do you have any expertise related to the 5 Turtle Mountain band of Chippewa Indians? 6 A Not specifically. 7 Q And the same is true with respect to 8 Spirit Lake Nation? 9 A Correct. 10 Q Have you ever been to North Dakota? 11 A No. 12 Q Have you ever spoken to a member of the 13 Turtle Mountain or Spirit Lake tribes? 14 A No. 15 Q And so you're not opining on anything 16 related to those two tribes with respect to their 17 shared interests or common interests or 18 socioeconomic status or anything of the like. 19 Is that right? 20 A Correct. 21 Q And you wouldn't have any knowledge or 22 basis to do that, right? 23 A Correct. 24 Q You're also not providing any opinion 25 with respect to the totality of the circumstances</p>	<p>19</p> <p>1 A Yes. 2 Q You don't anticipate giving any opinions 3 that are not set forth in the report? 4 A I don't anticipate, you know, unless I'm 5 asked to perform some additional work, perhaps. 6 Q At this time, you haven't done. 7 Is that right? 8 A That's correct. 9 Q And you didn't do any additional 10 analysis in this case after submitting your 11 report? 12 A Correct. 13 Q I might, during today's deposition, ask 14 you to do a little math, too. 15 Do you have a calculator in your office? 16 A I do. 17 Q Okay. Good. Keep that nearby. I 18 promise it won't be too taxing. Nothing more than 19 I can do. So it's not going to be too hard. 20 A Okay. 21 Q So let's start, and I'm going to kind of 22 walk through -- we're going to bounce back and 23 forth between your report and some other exhibits, 24 but let's start on page 2 of your report, if you 25 don't mind. And I want to ask you about section 3</p>
<p>18</p> <p>1 factors for this case. 2 Is that right? 3 A That's correct. 4 Q And you have no opinion on that? 5 A I didn't offer an opinion in my report, 6 so no. 7 MR. GABER: I am going to mark as 8 Exhibit 1 the document Hood TM Expert Report. 9 (Exhibit Hood-1 marked for 10 identification and attached to the transcript.) 11 BY MR. GABER: 12 Q Do you have a copy? 13 A I do want to disclose I do have an 14 unwritten-on copy of my expert report so I can 15 look at that. 16 Q That's good. I'm happy about that. 17 We'll pull it up as well on the screen, but it 18 will be easier for you if you have it with you. 19 So we've pulled up on the screen your 20 expert report. 21 Do you recognize this as your expert 22 report in this case? 23 A Yes. 24 Q Now, are all of your opinions in this 25 matter contained in your expert report?</p>	<p>20</p> <p>1 at the top. 2 You set forth the Gingles factors there. 3 Is that right? 4 A Correct. 5 Q And I have it, so I don't need to see 6 it. But I think, LaVar, it's page 2, the numbered 7 page 2, which is probably the third page of the 8 PDF. In case anyone in the audience here wants to 9 follow along. 10 So in this section, you just set forth 11 the test under Thornburg versus Gingles for a 12 Section 2 claim. 13 Is that right? 14 A Yes. 15 Q And with respect to the first 16 precondition, the requirement is that the minority 17 group be sufficiently large and geographically 18 compact to form a majority in a new single-member 19 district. 20 Is that fair? 21 A Yes, yes. 22 Q Now, with respect to the first prong of 23 Gingles, the focus of the analysis is on a 24 potential alternative district. 25 Is that correct?</p>

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<p>21</p> <p>1 A Well, yes, although it can be used to 2 analyze an existing district as well, I would say. 3 Q But to the extent someone is -- a 4 plaintiff is challenging an existing district as 5 being dilutive, the Court would look to see 6 whether there was an alternative district that met 7 the Gingles 1 threshold, right? 8 A An illustrative district, yes. 9 Q Now, the second factor is whether the 10 minority group is politically cohesive. I think 11 that, to my understanding, your -- you aren't 12 disputing Gingles prong 2 in this case. 13 Is that right? 14 A I am not. 15 Q And the third Gingles prong is about 16 whether or not the minority group's candidates of 17 choice are usually or typically defeated by the 18 candidate of choice of the majority bloc. 19 Is that right? 20 A Yes. 21 Q And in this case, the majority bloc is 22 white voters; the minority group is Native 23 American voters. 24 Right? 25 A Yes.</p>	<p>23</p> <p>1 Native American voting age population. 2 That figure -- the source for that is 3 the state legislature's website. 4 Is that right? 5 A Yes. 6 Q And your understanding is that the state 7 reported the demographic data based upon 8 single-member minority groups. So it's someone 9 who identified on the census as being exclusively 10 Native American? 11 A Single-race Native American. 12 Q And so that doesn't include -- 13 A I would say, just to be transparent, 14 that it's more than my belief; that I checked into 15 this, and that is how Native American is being 16 measured in this context. 17 Q And when you say that, you mean how the 18 State of North Dakota, the legislature, how they 19 measured it? 20 A Correct, yes. 21 Q Now, in the second sentence you say, As 22 such, under Section 2 of the Voting Rights Act, it 23 would be described as a minority, 24 opportunity-to-elect district. 25 Do you see that?</p>
<p>22</p> <p>1 Q So with respect to the third Gingles 2 prong, the focus of the analysis there is on the 3 districts that are alleged to be diluting Native 4 American votes, correct? 5 A Yes, that's correct. 6 Q And so to the extent there are claims 7 that districts are packed with too many Native 8 Americans, Gingles prong 3 is not focused on those 9 districts. 10 Is that your understanding of the law? 11 A Well, my understanding would not that 12 that would not be an effect that you would see 13 necessarily in a district that you describe like 14 that. 15 Q In a packed district, you would expect 16 the minority candidate of choice to almost always 17 win and probably by a large margin, right? 18 A Well, just in a generic sense, yes. 19 Q Now I want to move down into part 4 of 20 your -- on page 2, and focusing, to begin with, on 21 the first two sentences of that section. And this 22 is, I think, still on the same page, page 3 of the 23 PDF. Analysis of LD 9. 24 Now, you say that, LD 9 in the enacted 25 legislative plan is comprised of 51.7 percent</p>	<p>24</p> <p>1 A Yes. 2 Q What is the basis for your conclusion in 3 that regard? 4 A Just simply the fact that it's a 5 majority Native American district and is defined 6 by the Supreme Court under Bartlett v. Strickland. 7 That would be a minority opportunity-to-elect 8 district. 9 Q Now, with respect to the citation to 10 Bartlett, Bartlett is a case that required 11 plaintiffs raising Section 2 challenges to show 12 that they could draw an alternative district that 13 was 50 percent plus 1 of a minority group. 14 Is that right? 15 A It's been a while. I mean, from what I 16 remember, yes. But I do remember that the Court 17 set out, and there were definitions within that 18 case. And that's what I'm really referring to 19 there. 20 Q And those definitions were about 21 distinguishing between claims for crossover 22 districts or claims for influenced districts and 23 claims for coalition districts. 24 Is that your recollection? 25 A Yes.</p>

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25

1 Q Now, whether or not a district actually
 2 functions to provide minority voters an
 3 opportunity to elect their candidate of choice is
 4 based upon more than just the demographics of the
 5 district.
 6 Do you agree with that?
 7 **A Yes.**
 8 Q And so a district that has a slight
 9 majority may not, in fact, function as an
 10 opportunity district based on factors such as
 11 turnout or other factors.
 12 Is that fair?
 13 **A Hypothetically, yeah, I think that's**
 14 **fair.**
 15 Q And the Supreme Court has addressed that
 16 issue in cases before, like the LULAC versus Perry
 17 case.
 18 Are you familiar with that?
 19 **A Yes.**
 20 Q And so to the extent you're calling it a
 21 minority opportunity-to-elect district, that's
 22 based just upon the 51.7 percent and nothing more.
 23 Is that correct?
 24 **A Well, that sentence is based on that**
 25 **fact, yes. Now, later, I do look at what**

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1 **Prof. Collingwood analyzed for that district as a**
 2 **whole. So there's some evidence one way or the**
 3 **other there as well, I would say.**
 4 Q Okay. And we'll get into that there.
 5 But I just wanted to understand the -- sort of the
 6 nomenclature.
 7 **A That would be correct, yes.**
 8 Q The key, then, is combining the
 9 demographic data with election data to determine
 10 whether or not there's an actual opportunity to
 11 elect in the district.
 12 Is that correct?
 13 **A Well, yes, at some point, you have to**
 14 **look at some type of election data or -- you know,**
 15 **whether it's vote tallies or results or something**
 16 **related to an election, yes.**
 17 MR. GABER: I'm going to mark as
 18 Exhibit 2 the file Hood Walen versus Burgum expert
 19 report.
 20 (Exhibit Hood-2 marked for
 21 identification and attached to the transcript.)
 22 BY MR. GABER:
 23 Q Dr. Hood, do you recognize this -- and
 24 maybe we can scroll down a little bit to where it
 25 has the title.

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1 Do you recognize this as your expert
 2 report in the Walen matter?
 3 **A Yes.**
 4 Q Do you have a copy of that one with you?
 5 **A No, I do not.**
 6 Q If I need to direct you somewhere, I'll
 7 do that. But we're probably going to set this one
 8 aside for a moment.
 9 But in the Walen case, it's my
 10 understanding that you did conduct a bit of an
 11 analysis about District 9 in terms of the Gingles
 12 preconditions.
 13 Is that right?
 14 MR. PHILLIPS: I'll just object to this
 15 question and probably line of questions to the
 16 extent it's outside the scope of Dr. Hood's
 17 opinion in this case.
 18 **A Well, I performed a functional analysis,**
 19 **what I called a functional analysis. I didn't**
 20 **coin that. I'm not arguing I coined that term.**
 21 **I'm just saying that's what I would call it.**
 22 Q Yeah. And that works. And I may
 23 have -- my question might have been a little off
 24 there.
 25 What you were doing was, you looked at

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1 voter turnout; you analyzed that.
 2 Is that right?
 3 **A As part of this, yes.**
 4 MR. PHILLIPS: I'll object again.
 5 Mr. Gaber, can we agree to have a
 6 standing objection to this line of questioning --
 7 MR. GABER: Sure.
 8 MR. PHILLIPS: -- on the same basis as I
 9 stated before?
 10 MR. GABER: Yep.
 11 Q And you looked in particular at three
 12 elections from 2018, three state-wide elections,
 13 and three state-wide elections from 2020 to
 14 determine whether or not the Native American
 15 preferred candidates would have prevailed in the
 16 newly enacted District 9 in those elections.
 17 Is that right?
 18 **A That was part of it, yes. I also looked**
 19 **to see if there was racially polarized voting, for**
 20 **one thing, before that, before that step.**
 21 Q And you found that there was racially
 22 polarized voting in the district.
 23 Is that right?
 24 **A More often than not, yes. Can't**
 25 **remember without looking if it was a hundred**

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1 percent, but...
 2 (Cross-talk.)
 3 A **Certainly more often than not. So...**
 4 Q I'll just represent, in the six
 5 elections you looked at, the Gingles prong 2, it
 6 appears, at least to me, was your opinion that it
 7 was established.
 8 Does that sound right?
 9 A **Yes. I mean, yeah, that's fair.**
 10 MR. GABER: I'm going to mark two more
 11 exhibits that relate to this. I'll mark as
 12 Exhibit 3 the file LD 9 Hypothetical 2020
 13 President.
 14 (Exhibit Hood-3 marked for
 15 identification and attached to the transcript.)
 16 BY MR. GABER:
 17 Q And I'll represent to you, Dr. Hood,
 18 this is one of the Excel spreadsheets for
 19 District 9 for the 2020 presidential race.
 20 I did -- because the spreadsheet didn't
 21 have any title within it, it was just a file name
 22 and, like, the folder it was saved in that was
 23 titled, I did add that title you see at the top of
 24 the page and then converted this to a PDF.
 25 But otherwise, does this look like the

30

1 spreadsheet you produced with data related to the
 2 2020 presidential election for District 9?
 3 A **Yes.**
 4 Q And in the first column -- the first
 5 column is about District 9; the second column is
 6 Subdistrict 9A; and the third column is
 7 Subdistrict 9B, correct?
 8 A **Correct.**
 9 Q And in column 1 for the full district, I
 10 guess two sort of sections down, you report the
 11 turnout percentage and then the number of voters
 12 by Native American, white, and other.
 13 Is that right?
 14 A **Yes, correct.**
 15 Q And so your analysis showed that in the
 16 2020 presidential election, within the boundaries
 17 of the new District 9, 38.8 or 38.9 percent of the
 18 electorate was Native American.
 19 Is that right?
 20 A **Yes, correct.**
 21 Q And -- I'm sorry.
 22 (Cross-talk.)
 23 Q That's wrong. The turnout among Native
 24 Americans was 38.9 percent.
 25 Is that right?

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1 A **Yes, that's correct.**
 2 Q And then the turnout rate among white
 3 voters was 69.7 percent.
 4 Is that right?
 5 A **Correct, correct.**
 6 Q And among other voters, it was 50.0
 7 percent?
 8 A **Yes, correct.**
 9 Q And so this is where I'm going to ask
 10 you to do a little math. I have already done it,
 11 but if you want to check my work, I would
 12 encourage that.
 13 So you show the number of voters, and so
 14 then we can calculate by dividing by the total the
 15 percentage of the electorate that was of each
 16 racial group.
 17 Is that fair enough?
 18 A **That's fair, yes.**
 19 Q And so I have calculated that if we take
 20 the 2250 for Native American voters and divide it
 21 by the total of 5955, that yields 37.8 percent of
 22 the electorate in enacted District 9 for the 2020
 23 presidential race as being Native American.
 24 Does that sound right?
 25 A **Correct. That's what I'm getting, yes.**

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1 Q And then if we do the same for white
 2 voters, that yields 57.7 percent of the electorate
 3 in the district being white voters.
 4 Is that correct?
 5 A **Correct.**
 6 Q And so in the presidential election,
 7 despite the fact that the district has 51.7
 8 percent Native VAP, voting age population, a
 9 substantial majority of the electorate was
 10 actually white voters, right?
 11 A **In this scenario, yes.**
 12 Q And this is the type of information that
 13 is important to consider in whether or not a
 14 district actually performs to elect -- or to
 15 provide an opportunity for Native American, or
 16 whatever the minority group is, to elect their
 17 candidate of choice, right?
 18 A **Well, there has to be some information**
 19 **like this. I mean, I guess different people may**
 20 **measure this factor in different ways. I mean,**
 21 **Prof. Collingwood doesn't do this.**
 22 **But yes, there has to be some**
 23 **information related to this.**
 24 MR. GABER: And I'm going to mark as
 25 well, as Exhibit 4, LD 9 Hypothetical 2018 U.S.

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1 Senate.
 2 (Exhibit Hood-4 marked for
 3 identification and attached to the transcript.)
 4 BY MR. GABER:
 5 Q And so again, because there were --
 6 there wasn't a title within the Excel spreadsheet,
 7 and rather the folder had the title, I have added
 8 that to this PDF at the top and converted it to a
 9 PDF.
 10 Otherwise, do you recognize this as the
 11 backup files for your turnout analysis for the
 12 2018 U.S. Senate race in District 9?
 13 A Yes.
 14 Q And then just so the record is clear,
 15 this is District 9 as it was redrawn in the last
 16 redistricting cycle with the election results sort
 17 of reconstituted in the new lines.
 18 Is that fair?
 19 A Yes. **And same thing for the 2020 race**
 20 **we just talked about as well.**
 21 Q And so in the 2018 U.S. Senate race, if
 22 we look in column 1 at the turnout figures, we see
 23 that 60.4 percent of Native Americans eligible
 24 voters turned out in your analysis.
 25 Is that right?

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1 A Correct.
 2 Q And 68.3 percent of white voters?
 3 A Correct.
 4 Q And 49.8 percent of other race voters?
 5 A Correct.
 6 Q And then -- so if we do the same
 7 calculations here, I show that Native American
 8 voters in the 2018 U.S. Senate election
 9 constituted 49 percent of the electorate.
 10 Does that look right to you?
 11 A Yes.
 12 Q And --
 13 A **49.0, I guess, if you round it off, yes.**
 14 Q And white voters, I show as 47.3 percent
 15 of the electorate.
 16 A Yes.
 17 Q So in neither the 2018 U.S. Senate race
 18 or the 2020 presidential race were Native American
 19 voters an actual majority of the electorate.
 20 Is that right?
 21 A Correct.
 22 Q Okay. I'm going to set these two
 23 exhibits aside virtually for the moment. But we
 24 will probably come back to that a little bit
 25 later.

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1 I think I already asked you this, but I
 2 just want to confirm.
 3 You don't disagree with
 4 Prof. Collingwood that in Northeastern
 5 North Dakota and specifically in districts 9 and
 6 15, Gingles prong 2 is satisfied.
 7 Is that right?
 8 A **I don't disagree that racially polarized**
 9 **voting exists more often than not in that part of**
 10 **North Dakota.**
 11 Q Now, for your expert report in this
 12 matter, you did not conduct your own racially
 13 polarized voting analysis, right?
 14 A **Correct. I was just responding to what**
 15 **Prof. Collingwood had done.**
 16 Q Now, I know that you disagree with some
 17 of Prof. Collingwood's conclusions. But you don't
 18 have any criticism of the methodology or the way
 19 that he conducted his racially polarized voting
 20 analysis, right?
 21 A **No. That's correct. I mean, you know,**
 22 **again, at step 3 perhaps, or prong 3, as we just**
 23 **saw, you know, I don't do exactly what he did.**
 24 **But I recognize there are different ways to do the**
 25 **same thing, I guess is what I'm saying. So...**

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1 Q So you don't -- it's not your opinion
 2 that his methodology for conducting ecological
 3 inference, for example, was flawed?
 4 A **No, no. I didn't say that.**
 5 Q And you don't have any issues with his
 6 data collection or the way that he inputted the
 7 data into his analysis?
 8 A **No, not that I saw.**
 9 Q Did you seek to replicate
 10 Dr. Collingwood's analysis using the data he
 11 produced?
 12 A **No, I did not, for a number of reasons.**
 13 **One, I was using election data from the state. He**
 14 **was apparently using election data from a slightly**
 15 **different source, Election Data Hub, I think. And**
 16 **so, I mean, it's not easy to exactly replicate**
 17 **things sometimes.**
 18 **And so, I mean, right off the bat there,**
 19 **we're using different election data.**
 20 **And again, at step 3, I would diverge a**
 21 **little bit anyway, and I'm estimating what turnout**
 22 **is and decomposing the electorate by racial group**
 23 **and then by vote and then recomposing it into**
 24 **that which partisan candidate would have won or not.**
 25 **So long answer to your question, no, I**

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1 **did not try to replicate what he did.**
 2 Q But you didn't see any -- basically,
 3 you're not challenging the methodology or the
 4 quality of his work as a matter of an expert
 5 opinion?
 6 **A No. I mean, I use ecological inference**
 7 **as well. So...**
 8 Q Now, the next part of your report on
 9 pages 2 to 3 -- 2 to 4, actually, and that would
 10 be PDF pages 3 to 5, I think, is your review of
 11 Dr. Collingwood's Gingles prong 3 analysis for
 12 District 9.
 13 Is that right?
 14 **A Yes, that's fair.**
 15 Q And so my understanding of your analysis
 16 here is essentially that you took the
 17 reconstituted election results that
 18 Dr. Collingwood showed for every election from
 19 2014 through 2022, and then summed them up to see
 20 whether the Native American candidate of choice
 21 was -- or the percentage of elections in which the
 22 Native American candidate of choice was defeated.
 23 Is that fair?
 24 **A Yeah, that's through the end point.**
 25 **So...**

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1 Q And the Table 1 -- you have two tables
 2 in this section, right? Table 1, you combine the
 3 races -- or the elections in District 9, 9A, and
 4 9B, and then report the rate at which Native
 5 American candidates were defeated when all three
 6 of those districts are summed together.
 7 Is that right?
 8 **A Correct.**
 9 Q In reporting this analysis, you weigh
 10 each of the elections equally.
 11 Is that right?
 12 **A Well, yes, that's true. I think that's**
 13 **true. It does matter whether or not racially**
 14 **polarized voting was present in the election in**
 15 **question or not, so sort of backing up a step**
 16 **there. But --**
 17 (Cross-talk.)
 18 Q There's two elections that you took out
 19 because there was not racially polarized voting,
 20 right?
 21 **A Yes, according to Prof. Collingwood's --**
 22 Q But with respect to the -- I guess this
 23 is across three districts, a total of 108
 24 elections in which there's racially polarized
 25 voting, each of those elections, your analysis

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1 gives equal weight, correct?
 2 **A Yes, that's true.**
 3 Q Now, it's the case, isn't it, that
 4 different elections in vote dilution contexts have
 5 differing probative values, right?
 6 **A Yes, that's correct.**
 7 Q So for example, endogenous elections,
 8 those are elections in which the election is for
 9 the type of district that is at issue in the
 10 challenge. Endogenous elections -- is that your
 11 understanding of endogenous?
 12 **A Yes. So they would be legislative**
 13 **elections in this particular matter.**
 14 Q So as a methodological matter,
 15 academically and in your understanding of how
 16 courts look at this, endogenous elections have a
 17 much higher probative value in terms of Gingles
 18 prong 3 than do exogenous elections.
 19 Is that right?
 20 **A I think that's fair, yes. They have a**
 21 **higher probative value.**
 22 MR. GABER: I'm going to mark as
 23 Exhibit 5 the file Hood Rios-Andino versus Orange
 24 County Expert Report.
 25 (Exhibit Hood-5 marked for

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1 identification and attached to the transcript.)
 2 BY MR. GABER:
 3 Q Dr. Hood, do you recall being a retained
 4 expert in this case, Rios-Andino versus Orange
 5 County?
 6 **A I do.**
 7 Q And I don't know if this is -- this
 8 might be sort of a database version of your
 9 report.
 10 Does this -- or is this what your report
 11 looked like?
 12 **A That was a long time ago. To be**
 13 **honest -- I mean, it looks like something I would**
 14 **have done --**
 15 Q Okay.
 16 **A -- but I can't -- you know, I haven't**
 17 **looked at this in a long time.**
 18 Q This is something you still have?
 19 **A I probably could find it, yes --**
 20 Q Okay.
 21 **A -- with a little time.**
 22 Q Well, I'm not going to make you do that.
 23 But if you have any reason to doubt the statements
 24 here, we can obviously go and look for that.
 25 But I want to direct your attention to

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1 page 3, and then it's section E towards the bottom
 2 part of the document.
 3 And then in the first paragraph, you
 4 talk a bit about endogenous and exogenous
 5 elections.
 6 Do you see the second sentence says,
 7 Endogenous elections examine contexts from the
 8 same office as those under legal scrutiny and,
 9 because of their relevance, should be given more
 10 probative value?
 11 MR. PHILLIPS: I'll just -- I'm sorry.
 12 Go ahead and finish your question, then I'll
 13 insert my objection.
 14 Q Do you still agree with that statement?
 15 MR. PHILLIPS: I'll object that it's
 16 outside the scope of Dr. Hood's opinion and work
 17 in this case. And can we just agree to have a
 18 standing objection to this line of questioning
 19 about this report?
 20 MR. GABER: Sure.
 21 MR. PHILLIPS: You can go ahead and
 22 answer.
 23 **A I certainly seem to have written that**
 24 **statement.**
 25 Q And then we'll skip the next sentence.

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1 But the sentence after that, you say, Exogenous
 2 elections, on the other hand, could include almost
 3 any other contest from local boards to
 4 presidential elections. As these elections are
 5 not as directly relevant to the question at hand,
 6 they should be accorded far less weight in
 7 reaching a conclusion concerning vote dilution
 8 claims.
 9 Do you recall having that opinion here?
 10 **A Yes.**
 11 Q And does that remain your opinion today
 12 methodologically, that exogenous elections have
 13 far less weight in reaching conclusions for vote
 14 dilution?
 15 **A I've written this more than once, I'm**
 16 **sure, in academic work. So yes, I have to stand**
 17 **by that statement.**
 18 MR. GABER: Okay. We can take down that
 19 exhibit.
 20 Q Now, in addition to endogenous elections
 21 being more probative than exogenous elections,
 22 there are other considerations that might make an
 23 election more or less probative.
 24 Is that right?
 25 **A Well, let's -- I guess let's discuss it.**

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1 **It's possible. I mean, certainly, there is a**
 2 **distinction, I've agreed, between exogenous and**
 3 **endogenous elections.**
 4 Q So another example would be that more
 5 recent elections are generally considered more
 6 probative than elections that are further in time?
 7 **A True.**
 8 Q And elections that have a candidate who
 9 is a member of the same minority group of the
 10 group that is challenging the district are more
 11 probative than elections that are between, say,
 12 two white candidates.
 13 Is that also true?
 14 **A Yes, that can be true.**
 15 Q So in this case, elections where there
 16 is a Native American candidate are more probative
 17 to determine whether Gingles prong 3 exists than
 18 elections where both of the candidates are white,
 19 correct?
 20 **A Correct.**
 21 Q So with respect to the elections that
 22 Dr. Collingwood reported, the most probative
 23 contests would be the most recent for endogenous
 24 elections in which there was a Native American
 25 candidate.

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1 Is that right?
 2 **A Correct.**
 3 Q And that sort of combination is about as
 4 probative as you can get because it ticks off all
 5 three of those factors that are considered more
 6 probative than other types of elections.
 7 Is that right?
 8 **A Correct.**
 9 Q And is it your -- I gather it's your
 10 understanding that incumbency adds another benefit
 11 to a candidate and their likelihood of success.
 12 Is that a fair statement, sort of
 13 generally, as a political science proposition?
 14 **A So we're talking about another topic**
 15 **here, right?**
 16 Q Yeah, yeah.
 17 **A Okay. Yes, incumbency typically**
 18 **benefits the incumbent officeholder, although in**
 19 **more recent history, what we call the incumbency**
 20 **advantage has diminished to some degree. This is**
 21 **an ongoing debate in political science. So...**
 22 Q But if you -- so moving back to looking
 23 at analyzing vote dilution, if you have an
 24 election that's an endogenous election, that is
 25 the most recent election, features a candidate of

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1 the minority group that's challenging the
 2 district, and that candidate is also an existing
 3 incumbent, then if that candidate loses, that
 4 would be even more indicative of the effect of
 5 white bloc voting.
 6 Is that a fair statement?
 7 **A Well, I don't know that I would include**
 8 **incumbency in that list necessarily. Again, it's**
 9 **something that we're seeing some changes related**
 10 **to in terms of, you know, how much of an advantage**
 11 **it is or isn't in more recent history. So...**
 12 Q Okay. But the other three, you agree
 13 with?
 14 **A Yes, as we've discussed.**
 15 Q So in the context of the elections that
 16 Dr. Collingwood analyzed, would you agree that the
 17 single most probative contest would be the 2022
 18 election -- at least with respect to District 9,
 19 the 2022 election for the state senate in
 20 District 9, that's the most probative under
 21 Gingles prong 3 because it features an endogenous
 22 election with a Native American candidate and it's
 23 the most recent election?
 24 **A Yes.**
 25 Q And in District 9B, that -- for the 2022

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1 election for the U.S. -- sorry -- for the state
 2 house, is also -- that's an endogenous context,
 3 right?
 4 **A 2022?**
 5 Q 2022.
 6 **A Yes, yes.**
 7 Q And that is the most recent contest for
 8 the state house in District 9B?
 9 **A Yes, correct.**
 10 Q And the difference between that election
 11 and the state senate is, the Native American
 12 preferred candidate was a white incumbent.
 13 Is that your understanding?
 14 **A I don't recall, just sitting here. I'm**
 15 **not saying that's incorrect.**
 16 Q The candidate was Marvin Nelson.
 17 Does that sound right?
 18 **A Well, I guess what I'm saying is, I**
 19 **don't -- in order to infer who the Native American**
 20 **preferred candidate is, there would have to be**
 21 **some analysis performed. I did not do that**
 22 **analysis in 2022.**
 23 Q You didn't have any reason to disagree
 24 or criticize Dr. Collingwood's determinations as
 25 to who the Native preferred candidates were in

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1 2022?
 2 **A I don't remember that as being part of**
 3 **his report. I'm just not recalling.**
 4 MR. GABER: Okay. Let's mark as --
 5 well, I'm not going to mark it yet because I don't
 6 want to get my numbers out of order. But let's
 7 pull up, if we can, the file -- I think it's
 8 probably TM Collingwood report, or -- yeah, TM
 9 Collingwood Expert Report. And we won't mark it
 10 as an exhibit for now. We may not mark it.
 11 THE WITNESS: Okay.
 12 Q All right. And let me just find it in
 13 my copy.
 14 So if we can go to page 15 of the PDF.
 15 Do you see here that Dr. Collingwood reports the
 16 racially polarized voting assessment for all the
 17 statewide and the endogenous 2022 elections for
 18 District 9?
 19 **A Yes, I see that, yes.**
 20 Q And would you agree that from this
 21 table, you can identify who the candidates of
 22 choice were for Native American voters?
 23 **A Yes, that's fair.**
 24 Q And do you see in -- and this is for the
 25 full District 9. You see that Richard Marcellais

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1 is the candidate of choice for Native American
 2 voters in the state senate race in 2022?
 3 **A Yes, I do.**
 4 Q And then do you understand -- I don't
 5 know if it says it on this page, but the asterisk
 6 next to his name indicates that he is himself a
 7 Native American.
 8 Do you understand that?
 9 **A Yes.**
 10 Q And then --
 11 MR. PHILLIPS: Mark, it's been about an
 12 hour. If we could take a small break when it
 13 makes sense in the near future.
 14 MR. GABER: Okay.
 15 Q And then if we pull up page 21 of the
 16 PDF and go to the paragraph underneath -- scroll
 17 down just a little bit. In that paragraph under
 18 the table, towards the bottom of that paragraph,
 19 do you see where Dr. Collingwood refers to the
 20 defeat of Marvin Nelson, the Native American
 21 preferred candidate, in Subdistrict 9B in 2022?
 22 **A Yes, I see that.**
 23 Q Do you have any reason to disagree with
 24 Dr. Collingwood's conclusion that Marvin Nelson or
 25 Richard Marcellais were the candidates of choice

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1 of Native American voters in those two elections?
 2 **A Well, I think this is what I was**
 3 **remembering. I mean, so in terms of Marcellais, I**
 4 **mean, a statistical analysis was conducted that**
 5 **showed that he was the Native American preferred**
 6 **candidate of choice. The same statistical**
 7 **analysis was not conducted for Nelson. It's just**
 8 **being inferred.**
 9 **That's what I was remembering, yeah.**
 10 Q And part of the reason for that is that
 11 the subdistricts don't have a sufficient number of
 12 precincts to do a complete -- or at least the same
 13 type of RPV analysis that you would do in the
 14 district as a whole.
 15 Is that right?
 16 **A I would agree with that.**
 17 Q But what you can do is look at the
 18 election returns within the precincts and
 19 correlate them with the demographic data from that
 20 precinct and can make a reasonable inference as to
 21 who the candidates of choice are.
 22 Is that fair?
 23 **A Well, again, you know, that's why we**
 24 **test for these things, and that's not the**
 25 **procedure that we use to test to determine whether**

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1 **or not racially polarized voting exists or not.**
 2 **So that's not the typical procedure.**
 3 **If there's not enough statistical power,**
 4 **there's just not enough statistical power. And I**
 5 **probably would agree there's not.**
 6 Q With respect to the Subdistrict 9B, it
 7 covers part of Rolette County and then parts of
 8 Towner and Cavalier County to the east of Turtle
 9 Mountain.
 10 Is that your understanding?
 11 **A So B is the one to the east, if I'm**
 12 **remembering right, yes.**
 13 Q Right. And so the Native American --
 14 are you familiar with the demographic makeup of
 15 District 9B geographically?
 16 **A A little bit, yes.**
 17 Q So is it your understanding that the
 18 populations of Cavalier and Towner counties are
 19 close to 100 percent white?
 20 **A Well, from my memory, this is what I**
 21 **would say, you know, outside of the reservation in**
 22 **that particular legislative district, in the areas**
 23 **right around the reservation, the rest of the**
 24 **district does not contain many, if any, Native**
 25 **Americans.**

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1 Q So the -- for the most part, the only
 2 Native Americans in District 9B are all
 3 concentrated in the area that's in 9B but close to
 4 the border of 9A.
 5 Is that your understanding?
 6 **A From what I remember, yes.**
 7 Q And so to the extent those voting
 8 precincts have a high concentration of Native
 9 American voters and is also the precinct in which
 10 Marvin Nelson prevailed, and if Marvin Nelson lost
 11 by large margins, the precinct in the white
 12 counties, there is a fair inference that can be
 13 drawn as to who the candidate of choice is in
 14 those -- in that race.
 15 Wouldn't you agree?
 16 **A Well, I would respectfully, I guess,**
 17 **disagree. I mean, you know, there are different**
 18 **methods you can use to uncover racially polarized**
 19 **voting, one of those being homogeneous precinct**
 20 **analysis, which is a very old method.**
 21 **I didn't detect, from my memory at least**
 22 **sitting here, any precincts in the area where**
 23 **you're describing that had a high enough**
 24 **percentage of Native American population to make**
 25 **that kind of inference using, say, homogeneous**

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1 **precinct analysis.**
 2 Q With respect to the white voters, there
 3 is homogeneous precincts --
 4 (Cross-talk.)
 5 **A That's true, yes. But there has to be**
 6 **homogeneous precincts for both groups or however**
 7 **many groups you're analyzing. So...**
 8 Q So to the extent -- so do you understand
 9 that Marvin Nelson was the incumbent state house
 10 rep from the prior District 9?
 11 **A Yes, I recall that.**
 12 Q And so one way to test whether he's the
 13 candidate of choice of Native American voters, to
 14 the extent you have a dispute over the correlation
 15 method, is to look in the past elections in which
 16 he's been elected to determine whether he was the
 17 candidate of choice using the more traditional
 18 statistical analysis.
 19 Is that fair?
 20 **A If it's possible. You know, I would**
 21 **have to see if it were possible in the past.**
 22 Q And if there's a consistent pattern of
 23 him being the Native American voters' candidate of
 24 choice, then you would expect that to be the case
 25 for 2022 as well, right?

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1 **A Well, again, I'm going to just have to**
2 **push back on that. I mean, that's why we test**
3 **things.**
4 **So it would make logical sense perhaps**
5 **if that were the case. But again, we -- we don't**
6 **just make inferences without testing for things.**
7 **So...**
8 Q If we combined that data showing that he
9 was the candidate of choice in the prior state
10 representative elections for District 9 Native
11 American voters with the inferences that can be
12 drawn from the demographics and the election
13 results for the 2022 election, that would provide
14 at least a preponderance of evidence that he was,
15 in fact, the candidate of choice in 2022 as well.
16 Wouldn't you agree with that?
17 **A I don't -- I mean, I'm not trying to be**
18 **flippant. I don't know that what you just said is**
19 **all that much different from what we just talked**
20 **about previously. So...**
21 Q Are you aware that former Representative
22 Nelson was the Democratic candidate for governor
23 in the 2016 election?
24 **A No, I was not aware of that.**
25 Q And Dr. Collingwood reports that he was

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1 the candidate of choice of Native American voters
2 in the region.
3 Do you have any reason to disagree with
4 that?
5 **A Not on its face.**
6 Q And it's your view that in the entire
7 District 9, there's a clear pattern of the
8 Democratic candidate being the candidate of choice
9 of Native American voters, right?
10 **A That's true, yes.**
11 Q And so -- and that's true regardless of
12 where they are -- where the Native American voters
13 reside in District 9. There's no evidence to
14 suggest that there's a difference among candidates
15 of choice.
16 Is that right?
17 **A I'm not following -- I didn't follow**
18 **what you just said.**
19 Q Well, if Native American voters are --
20 have a clear candidate of choice in District 9,
21 then there is not a basis to conclude that that
22 fact varies depending on where in District 9
23 you're looking?
24 **A Well, I don't know that that's the case**
25 **or not. I just don't know.**

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1 Q Okay. If all the Native American voters
2 are essentially in one county, then we can look at
3 that county, and if it's possible, perform an
4 analysis to try and make that determination.
5 Is that right?
6 **A Well, again, if the data are present to**
7 **make that determination, I don't know. You know,**
8 **there would have to be -- even if we were looking**
9 **at a single county, there would have to be enough**
10 **precincts within the county to make a proper**
11 **inference, I guess. So...**
12 Q You haven't done that analysis in your
13 report.
14 Is that right?
15 **A That's correct.**
16 Q And you don't have any -- you don't
17 opine anything with respect to Dr. Collingwood's
18 selection of who the candidates of choice of white
19 or Native American voters are in his report,
20 correct?
21 **A Well, except for this example we're**
22 **talking about where he's making an inference about**
23 **a subdistrict where there's not been statistical**
24 **testing that's been performed. Otherwise, no.**
25 Q Okay. But for your report, you don't,

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1 in your report, make any criticism of
2 Dr. Collingwood's analysis of Subdistricts 9A or
3 9B, right?
4 **A I don't believe I do specifically, no.**
5 Q And you haven't done any analysis to
6 show that he's incorrect in his conclusions?
7 **A No.**
8 Q Sorry, I missed that. What was that
9 answer?
10 **A No. It was just "no."**
11 Q And you don't dispute in your report
12 that Dr. Collingwood's conclusion that in the
13 endogenous elections in District 9, there is a
14 100 percent defeat rate for the Native American
15 candidates of choice?
16 **A Well, again, with the caveat that if we**
17 **can determine specifically who the Native American**
18 **candidate of choice is, then yes.**
19 Q And for District 9 as a whole, you agree
20 with Dr. Collingwood's analysis that Richard
21 Marcellais is the candidate of choice of Native
22 American voters in the 2022 election?
23 **A I didn't dispute that. So yes.**
24 Q And so that is -- that's a 100 percent
25 defeat rate for that -- for endogenous elections

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1 in District 9?
 2 **A Well, that's, yes, one race, yes.**
 3 Q And in your report, you don't dispute
 4 Dr. Collingwood's similar analysis for endogenous
 5 elections in District 9B?
 6 **A Well, again, I don't think he did the**
 7 **testing for racially polarized voting in either**
 8 **subdistrict.**
 9 Q But if he's correct in identifying who
 10 the candidate of choice is in those elections,
 11 then he would also be correct that there was a
 12 100 percent defeat rate in District 9B for the
 13 endogenous election?
 14 **A Well, if he's correct, yes. But, you**
 15 **know, I guess I would argue we don't know if he's**
 16 **correct or not without testing.**
 17 Q So is it your view, then, that it's not
 18 possible to determine who the Native American
 19 preferred candidate in District 9A is either?
 20 **A From what I recall, I don't believe --**
 21 **and again, I think Prof. Collingwood said this as**
 22 **well -- that there are enough precincts to yield a**
 23 **useable analysis in the subdistricts, in either**
 24 **subdistrict.**
 25 Q Well, to do a racially polarized voting

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1 analysis using ecological inference, right?
 2 **A Correct. Or even homogeneous precinct**
 3 **analysis, perhaps.**
 4 Q In District 9A, do you agree that there
 5 is homogeneous Native American precincts?
 6 **A Yes, although I have typically defined**
 7 **homogeneous as being 90 percent of a single racial**
 8 **group. So I don't know -- I don't recall -- I**
 9 **don't believe that any of the precincts reached**
 10 **that level for Native Americans, that I can recall**
 11 **sitting here. And that's the typical sort of**
 12 **cutoff I've used.**
 13 Q We'll take a break in a moment. I just
 14 want to check something.
 15 And I'm just representing this to you.
 16 The Belcourt, which is the city that is contained
 17 within the Turtle Mountain reservation or
 18 precinct, has a 2022 Native voting age population,
 19 according to Dave's Redistricting App --
 20 Are you familiar with that website?
 21 **A I am.**
 22 Q Have you used it before?
 23 **A Yes.**
 24 Q And do you --
 25 **A I've not used it for a court case.**

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1 Q Okay.
 2 (Cross-talk.)
 3 **A But I've fiddled around with it.**
 4 Q And you understand that they import the
 5 demographic data from the census bureau?
 6 **A That's my understanding, yes.**
 7 Q And then they combine that together with
 8 the precinct boundaries as set by the local
 9 jurisdictions or the state?
 10 **A Well, this is where things can get a**
 11 **little fuzzy. Sometimes I believe they're using**
 12 **precinct boundaries that have been identified by**
 13 **the census bureau as VTD boundaries, which at**
 14 **times may or may not be congruent with present**
 15 **precinct boundaries, if I'm making sense. So...**
 16 Q So the precinct, according to Dave's, is
 17 93.7 percent Native VAP.
 18 If that's correct or roughly correct,
 19 that would count as a homogeneous Native American
 20 precinct under your understanding of that.
 21 Is that true?
 22 **A Yes. But it would just be one. And we**
 23 **usually want more than one precinct to do some**
 24 **analysis with. So...**
 25 Q Okay. So is it your opinion that

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1 there's no way to determine whether the Native
 2 American who won the state representative race in
 3 Subdistrict 9A is the candidate of choice of the
 4 Native American voters in the district?
 5 **A Well, given conventional methods, I'm**
 6 **not sure how it would be done, I guess is what I**
 7 **would say.**
 8 Q That's important information to
 9 determine whether the candidate of choice is being
 10 elected in District 9A?
 11 **A That's true. I mean, that's how we**
 12 **would make that determination.**
 13 Q But in the absence of enough precincts,
 14 you can certainly make inferences that may not
 15 have the same high level of rigor as the EI
 16 analysis would, but at some point, it just is
 17 common sense, right?
 18 If there's essentially only one
 19 demographic group in the district, then the
 20 candidate who wins by a large majority would
 21 necessarily be that group's candidate of choice.
 22 Does that seem fair?
 23 **A Again, I mean, I'm just going to have to**
 24 **differentiate between common sense or what may**
 25 **appear on the face to be something versus, again,**

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1 rigorous statistical testing that we usually go
2 through in these types of cases. I mean,
3 sometimes the data are just not there to make
4 inferences with.
 5 Q In your report in the Walen case, you
 6 reached the conclusion, based on six statewide
 7 elections, that Native American voters in
 8 District 9A were able to elect their candidates of
 9 choice.
 10 Am I right about that?
11 A Yes.
 12 MR. PHILLIPS: I'll object to the extent
 13 that it is outside of Dr. Hood's opinion and work
 14 in this case.
 15 Q How did you make that determination?
16 A Well, I think I specifically said I was
17 making an inference from District 9 at large, and
18 you apply that to the subdistrict.
 19 Q And the inference there was that the
 20 Democratic candidate was the candidate of choice
 21 of Native American voters in District 9, and so,
 22 therefore, it stood to reason that that person was
 23 the candidate of choice in District 9A as well,
 24 correct?
25 A That was the inference I was making,

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1 yes.
 2 Q And do you stand by that inference?
3 A Well, it's in writing, so I have to,
4 yes.
 5 Q And so applying that same inference to
 6 Dr. Collingwood's report, we would reach the
 7 conclusion that -- we can infer that the
 8 Democratic candidate in these races for the state
 9 senate and the state house is the Native American
 10 candidate of choice, and the Republican candidate
 11 is the white voters' candidate of choice, correct?
12 A Correct.
 13 Q And so, therefore, Marvin Nelson, in
 14 District 9B, would be the Native American
 15 candidate of choice, correct?
16 A Well, he would be the Democratic
17 candidate, correct. So yes.
 18 Q And his white Republican opponent in
 19 that election would be the white voters' candidate
 20 of choice in District 9B?
21 A Correct.
 22 MR. GABER: Let's take a break now.
 23 (Recess from 11:53 a.m. until 12:09
 24 p.m.)
 25 MR. GABER: Let's go back on the record.

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1 THE WITNESS: I do want to just clarify
 2 my position on that last line of questioning in
 3 that I think it's very important to be able to
 4 statistically determine, using rigorous testing,
 5 who the candidate of choice is for various groups.
 6 BY MR. GABER:
 7 Q But nevertheless, in your Walen report,
 8 you found it reliable and sufficient to draw the
 9 inferences, given the clear pattern in the
 10 district as a whole with respect to District 9?
 11 MR. PHILLIPS: I'll object to the extent
 12 that reference to the Walen report is outside of
 13 Dr. Hood's opinion and work in this case. I'll
 14 just have a standing objection on that line of
 15 questioning.
16 A I did do that in that particular matter,
17 and perhaps I should have relied more on
18 statistical testing before I made those inferences
19 as well. So...
 20 Q But nevertheless, you made those
 21 inferences, and that's your opinion in that
 22 report, correct?
23 A Yes, it is.
 24 Q And you don't see any evidence to
 25 suggest that those inferences are wrong, right?

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1 A Well, again, not necessarily wrong, but
2 based on, you know, my own position, which I don't
3 think has changed over the years, that sort of
4 mandates more rigorous statistical testing, you
5 know, maybe I shouldn't have gone that far in that
6 particular -- making that inference in that
7 particular matter, I guess. So...
 8 Q We can talk about it a little bit. I
 9 don't think you should be so down on yourself. If
 10 you -- if all of the Native American voters are
 11 concentrated in one part of District 9 as a whole,
 12 and we're able to apply the statistical analysis
 13 to the district as a whole, then the component
 14 parts must add up to that district as a whole,
 15 right?
16 A True, they do add up. But as I talked
17 about previously, sometimes we don't know how they
18 add up under the surface.
 19 Q Given the high level of polarization
 20 that Dr. Collingwood reports and that you find
 21 with respect to Native American voting preferences
 22 in District 9 as a whole, it would be surprising
 23 if the data showed the opposite within either of
 24 the subdistricts, right?
25 A Well, that would be counter to the

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1 pattern uncovered at the district level. That's
2 true. I can say that.
 3 Q Okay. And would you agree with me that
 4 it would be unlikely that the subdistricts would
 5 have a different voting pattern than the district
 6 as a whole?
 7 MR. PHILLIPS: Objection, calls for
 8 speculation.
 9 A **Again, I guess this is where I-- you**
10 know, it's difficult to make inferences without
11 testing.
 12 Q But that is -- and we've agreed, that is
 13 the inference that you found reliable to make in
 14 the Walen report?
 15 A **I made that inference, yes.**
 16 Q Now, given that endogenous elections,
 17 more recent elections, and elections featuring a
 18 Native American candidate are more probative than
 19 other elections -- exogenous elections, more
 20 distant elections, and elections featuring only
 21 white candidates -- would you agree with me that
 22 equally weighing them in an analysis is not
 23 methodologically correct?
 24 A **Well, again, I freely admit endogenous**
25 elections are more probative, certainly. I mean,

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1 Prof. Collingwood provided these same sort of
2 global stats that I do in this report that I
3 turned in. So...
 4 Q But in terms of interpreting the
 5 election results, the proper methodology is to
 6 accord greater weight to the endogenous elections,
 7 the elections featuring Native American
 8 candidates, and the more recent elections.
 9 Do you agree with that?
 10 A **Yes, as we've discussed.**
 11 Q And so when we get to the point of
 12 reaching a conclusion about Gingles prong 3,
 13 either an academic or a court should not weigh the
 14 elections equally?
 15 MR. PHILLIPS: Objection to the
 16 extent -- I'll say speculation and calls for a
 17 legal conclusion.
 18 A **Well, I can't speak for the Court,**
19 but -- and again, this sort of gets into another
20 issue we have sometimes in vote dilution cases of
21 how many, you know, endogenous elections there are
22 to compare with the rest of the elections out
23 there.
 24 **If there's -- I'm just saying**
25 hypothetically, if there's two, then that's hard

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1 to really make an inference from that. So...
 2 Q But nevertheless, you would give greater
 3 weight to that -- when you're looking individually
 4 at each election, you would give significantly
 5 greater weight to the endogenous election, to the
 6 extent it points in a different direction than the
 7 exogenous election?
 8 A **I think someone like the Court would be**
9 better positioned to do that than I would,
10 necessarily. So...
 11 Q And so the Court would need to be the
 12 one to make those determinations about probative
 13 value between the elections?
 14 MR. PHILLIPS: Objection, calls for a
 15 legal conclusion.
 16 A **Well, yes, and again, to the extent of**
17 which how many elections are -- how many
18 endogenous elections do we have versus exogenous,
19 what type of exogenous elections, you know, what
20 time period. I mean, there's a lot of factors to
21 weigh here.
 22 **So I typically don't -- I guess what I'm**
23 saying is, as a political scientist, I typically
24 am looking for a pattern, not for, you know, a
25 detailed dive into a single election, per se.

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1 Q If there's a limit to the number of
 2 endogenous elections and there are more recent
 3 exogenous elections available, you would agree
 4 that the better approach -- or a good approach
 5 would be to go to those first because they have
 6 more probative value than more distant exogenous
 7 elections, correct?
 8 A **Yeah. I mean, typically, in these kinds**
9 of analyses -- and I've written about this
10 academically -- I typically don't go back more
11 than ten years, just as sort of a general rule. I
12 mean, that's not -- there's no principle on that.
13 But I typically don't go back further than ten
14 years. So...
 15 Q And you would agree, within that ten
 16 years, the probative value increases as you get
 17 closer to today?
 18 A **Yes, as we've discussed, yes. I think**
19 that's fair.
 20 Q Now, if the endogenous election and the
 21 more recent exogenous elections and the elections
 22 in which there are Native American candidates of
 23 choice point in favor of a Gingles prong 3
 24 finding, and the less probative elections point in
 25 the opposite direction, then the Court would need

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1 to consider more probative, in your view, or
 2 academics would need to consider more probative
 3 the elections pointing in favor of a Gingles
 4 prong 3 conclusion.
 5 Is that a fair statement?
 6 MR. PHILLIPS: Objection, speculation,
 7 calls for a legal conclusion, and object to form.
 8 **A So this is -- I guess this is what I**
 9 **would say. As a researcher, you know, looking**
 10 **into a vote dilution matter, I would make a**
 11 **determination of what elections I'm going to**
 12 **analyze up front.**
 13 **And, you know, I don't disagree, legally**
 14 **speaking, that some elections may be more**
 15 **probative than others. But a researcher has**
 16 **chosen a set of elections, and you can't just pick**
 17 **and choose at that point which ones are going to**
 18 **be included or not.**
 19 **So if -- we have to, like -- you know,**
 20 **if we're going to make an argument not to include**
 21 **certain elections in our analysis that we've**
 22 **already analyzed, or we're saying that they're**
 23 **less probative for whatever, I mean, that's really**
 24 **a matter for the Court to weigh, if that makes**
 25 **sense.**

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1 Q So another way of saying that is that
 2 that's a factual determination about how much
 3 probative value to give each particular election?
 4 **A Yes. That's not something I think I can**
 5 **do or any other researcher can do necessarily. I**
 6 **mean, Prof. Collingwood chose these races to**
 7 **analyze, and yes, within that subset, some may be**
 8 **more probative than others, as we've discussed. I**
 9 **don't disagree with that.**
 10 **But nevertheless, he analyzed all these**
 11 **races, and so they should be included in the**
 12 **prong 3 component of the Gingles analysis. I**
 13 **guess that's what I would say. So...**
 14 Q And the question then is how much weight
 15 to give each particular election in terms of what
 16 it says about whether white voters are usually
 17 defeating the Native preferred candidates.
 18 **A Yes. Which is, I think, outside the**
 19 **scope of what I normally would do personally.**
 20 Q But in order to make a determination
 21 about whether Gingles prong 3 is satisfied or not,
 22 that's a necessary part of that determination,
 23 right, how much probative value to give the
 24 individual elections?
 25 **A Well, if a court decided to give certain**

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1 **cases more or less weight, then yes. But at that**
 2 **point, that's the Court making that determination,**
 3 **not a researcher.**
 4 Q And the Court, in doing so, would be
 5 following, however, the generally accepted
 6 methodology, which, as we've discussed, involves
 7 placing, I think in your words, far greater weight
 8 on endogenous elections and more probative value
 9 to more recent elections and to racially contested
 10 elections, right?
 11 **A Yeah. I don't disagree with those**
 12 **points, as we've discussed. I've written about**
 13 **that academically, in fact. So...**
 14 Q Now, Dr. Collingwood, in his report,
 15 though he presented the -- all of the election
 16 results from 2014 to 2022 for the statewide
 17 contests reconstituted in the new districts, did
 18 provide opinion and discussion about how to
 19 interpret that for purposes of Gingles prong 3,
 20 given the differences in the probative value of
 21 different types of elections.
 22 Do you recall reading that?
 23 **A He provided some -- he provided some**
 24 **context, yes.**
 25 Q And you don't -- in your report, you

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1 didn't dispute any of that, correct?
 2 **A I don't think I disputed it directly. I**
 3 **may have disputed it indirectly in the way that I**
 4 **treated that set of races that he analyzed.**
 5 Q And that was by equally weighing the
 6 races that he analyzed, correct?
 7 **A That's correct.**
 8 Q But as we've discussed, the Court will
 9 have to ferret out what probative value to give
 10 those races to make a Gingles prong 3 conclusion,
 11 right?
 12 **A Yes.**
 13 Q And it's your view that, given the
 14 differing probative values that should be afforded
 15 different types of elections, you can't make that
 16 Gingles prong 3 determination for the Court,
 17 correct?
 18 **A Well, I mean, yes, that's correct.**
 19 **So, you know, a similar example would be**
 20 **hypothetically, and I'm speaking just**
 21 **hypothetically here, if we had two experts in a**
 22 **particular vote dilution case like this present**
 23 **the Court with two different sets of elections**
 24 **they had analyzed, maybe some overlap in a Venn**
 25 **diagram, but some don't, same thing. The Court**

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1 would have to determine which elections analyzed
2 by those researchers were more probative than the
3 others.
 4 Q And that type of determination is
 5 probably all the more important when there's mixed
 6 signals, right, where the endogenous, the more
 7 recent, and the racially contested elections, say,
 8 point in favor of white bloc voting, and the other
 9 types of elections that are given less probative
 10 weight point in the other direction. That's a
 11 factual determination for the Court to make with
 12 respect to Gingles prong 3?
13 A I would say --
 14 MR. PHILLIPS: Objection, calls for a
 15 legal conclusion.
16 A I would say that the Court would have to
17 make that determination.
 18 Q You don't have any reason -- or you
 19 don't, in your report, dispute Dr. Collingwood's
 20 conclusion that within District 9 as a whole, the
 21 elections in which there's a Native American
 22 candidate, that the Native American candidate is
 23 defeated in 60 percent of those contests.
 24 Is that right?
25 A I don't remember that fact in

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1 particular, just sitting here. I did not dispute
2 it in my report, I can say that.
 3 Q Okay. And in your report in the Walen
 4 case, you analyzed six elections to -- six
 5 statewide elections to reach your conclusion.
 6 Is that right?
7 A That's correct.
 8 MR. PHILLIPS: I'll object to this line
 9 of questioning in a standing objection, outside
 10 the scope.
 11 Q And that was a sufficient number, you
 12 thought, to reach your conclusion regarding vote
 13 dilution there?
14 A That's how many I got done. You know,
15 certainly, I probably would have wanted to have
16 done more. That's how many I got completed. Some
17 of this is pretty time-intensive sometimes. So...
 18 Q But as a methodological matter, you were
 19 able to draw a conclusion from six elections?
20 A Well, that's how many elections were
21 utilized in that report, that's true.
 22 Q And you felt comfortable reaching that
 23 conclusion?
24 A I probably would have liked to have
25 gotten more done, to be honest.

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1 Q How did you select those six contests?
 2 A Well, they were from -- not 2022, but
 3 when I had been working on those, 2022 had not
 4 occurred yet. And so they were recent, you know,
 5 2020, 2018, high-profile statewide elections, even
 6 though I was sort of cutting it down to the
 7 district, you know.
8 But that's how I choose those elections.
9 And they were some of the same elections,
10 obviously, that Dr. Collingwood had also utilized.
 11 Q Am I correct that none of the six that
 12 you chose for the Walen report included elections
 13 in which there was a Native American candidate on
 14 the ballot?
15 A I don't think so.
 16 Q You don't think I'm correct, or you
 17 don't think --
18 A No, I think you're correct. I don't
19 think I did.
 20 Q Is there a particular reason why you
 21 didn't analyze the 2022 elections?
22 A Just time.
 23 Q Now, you don't dispute, I believe,
 24 Dr. Collingwood's analysis of the 2022 elections
 25 reconstituted into the District 9.

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1 Am I right about that?
 2 A Well, he used the same method he had
 3 used previously for the, you know, subsequent
 4 election cycles that were before that. So...
5 And again, as we've talked about,
6 there's different ways to do that. And that's
7 certainly one of the ways that some researchers
8 utilize.
 9 Q So -- and there's eight elections that
 10 he reports for 2022.
 11 Do you recall that?
12 A I think that's correct.
 13 Q And that includes -- one of those is an
 14 endogenous race for the state senate district
 15 itself, right?
16 A That's correct. That's correct.
 17 Q And in all eight of those contests from
 18 2022, the Native American preferred candidate
 19 loses District 9 as a whole.
 20 Is that your recollection?
21 A I don't remember. I believe that's
22 correct. I mean, we could look at it again.
 23 Q Yeah. If we want to pull up, again,
 24 it's TM Collingwood expert report which we have
 25 not marked as an exhibit, and may not until the

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1 end.
 2 And it's page 17 of the PDF. So if you
 3 go to the far right tab at the top there, TM
 4 Collingwood, page 17, and then show that graphic.
 5 So you see the full District 9 is
 6 reported on the far left column, and the Native
 7 American preferred candidate is shown in blue, the
 8 white preferred candidate is shown in green.
 9 Do you see that the white preferred
 10 candidate wins all eight elections within the
 11 bounds of District 9 for the 2022 elections?
 12 **A Yes, I do.**
 13 Q So this is actually more elections than
 14 you analyzed in your Walen report, correct?
 15 **A Correct.**
 16 Q And so on the basis of this, we could
 17 reach the opposite conclusion that you reached in
 18 your Walen report with respect to Gingles prong 3
 19 in District 9 as a whole?
 20 MR. PHILLIPS: Object to form, calls for
 21 speculation.
 22 **A Well, I haven't analyzed these**
 23 **specifically. But, you know, on its face, yes.**
 24 Q Now, in addition to the varying -- we
 25 can take this down for a moment so we can see each

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1 other better.
 2 In addition to the varying probative
 3 values that different types of election contests
 4 have, when we -- when an academic is analyzing
 5 vote dilution cases with respect to Gingles
 6 prong 3, it's also possible that certain elections
 7 could be characterized by special circumstances
 8 that make them less relevant to the determination.
 9 Do you agree with that?
 10 **A Well, again, we've talked about what may**
 11 **make an election more or less probative. And I**
 12 **stand by that.**
 13 **I think, as a researcher, if you're**
 14 **going to include an election, you know, it's more**
 15 **of a statistical matter at that point as opposed**
 16 **to assigning some kind of qualitative factors to**
 17 **the race to increase its significance or decrease**
 18 **it. That's not typically what I do. So...**
 19 Q You understand, though, that courts, in
 20 reviewing the presence of Gingles prong 3, part of
 21 the test is whether the election has the absence
 22 of special circumstances, correct?
 23 **A Correct.**
 24 Q Now, Dr. Collingwood in his report talks
 25 about the 2018 elections and discusses that those

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1 elections featured special circumstances that
 2 caution against equally weighing them or
 3 potentially weighing them at all.
 4 Do you recall that discussion?
 5 **A I do. I do.**
 6 Q In your report, you don't dispute that,
 7 correct?
 8 **A Not directly. Again, I guess indirectly**
 9 **dispute that by including the elections. I don't**
 10 **really agree with his -- respectfully agree with**
 11 **his line of reasoning about 2018.**
 12 Q You don't express that opinion in your
 13 report, correct, other than to --
 14 **A Not directly, no.**
 15 Q So you haven't studied the 2018
 16 North Dakota elections, correct?
 17 **A Not specifically, no. Well, I mean,**
 18 **outside of what I've done and disclosed in this**
 19 **case and the other case that we're discussing,**
 20 **clearly.**
 21 Q Right. So the extent of your study was
 22 to gather the election data and report it for
 23 2018?
 24 **A And analyze it, I would say, yes.**
 25 Q And by "analyze," you mean analyze the

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1 results in terms of what the numbers report -- the
 2 vote totals report within the district?
 3 **A Well, I mean, the racially polarized**
 4 **voting analysis is part of that.**
 5 Q Right. I guess what I mean is, you
 6 didn't study anything about the underlying
 7 campaigns or the voter turnout. I take that back.
 8 You did actually look at the voter
 9 turnout, right?
 10 **A Correct.**
 11 Q But you didn't analyze the facts
 12 surrounding the campaigns or why that might have
 13 affected the turnout.
 14 Is that correct?
 15 **A That's fair.**
 16 Q And you didn't study any of the
 17 get-out-the-vote efforts for the 2018 elections?
 18 **A No, I did not.**
 19 Q Are you familiar with any of the
 20 get-out-the-vote efforts that occurred during the
 21 2018 elections in North Dakota?
 22 **A Well, just from what I've read.**
 23 Q And what have you read?
 24 **A Well, that there was a larger effort on**
 25 **the -- with Native Americans, especially in terms**

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<p style="text-align: right;">81</p> <p>1 of that kind of effort in that election cycle. 2 That's my understanding, sitting here. 3 Q And is that from Dr. Collingwood's 4 report, or did you have independent awareness of 5 that? 6 A Probably from his report. 7 Q Beyond reading what Dr. Collingwood 8 wrote, have you done any other examination to test 9 whether or not you think there were unique 10 circumstances in the 2018 election in North 11 Dakota? 12 A No. 13 Q So you're not offering an opinion one 14 way or the other whether there were special 15 circumstances that made it unique from another 16 election or the usual election in North Dakota? 17 A Well, not outside of the generic things 18 I've said about, you know, including or not 19 including elections, for instance. 20 Q Now, as a political scientist, I assume 21 you agree with this statement, that voter turnout 22 is typically higher in presidential elections than 23 it is in midterm elections. 24 A Most of the time, yes. 25 Q And it's pretty unusual for more voters</p>	<p style="text-align: right;">83</p> <p>1 Q And then let's pull up Exhibit 3, which 2 is the 2020 presidential election. 3 And do you see that the Native American 4 turnout in District 9 dropped from over 60 percent 5 to 38.9 percent? 6 A Correct. By those estimates, yes. 7 Q And at the same time, in the 2020 8 presidential election, we see that white turnout 9 and other turnout ticked up slightly in the 2020 10 presidential election compared to the 2018 11 election. 12 A Correct. 13 Q Can you identify -- or does any example 14 come to mind anywhere else in the country where 15 you've seen a particular group have over 16 20 percent higher turnout -- or 20 percentage 17 points more turnout in a midterm election than in 18 a presidential election? 19 A I mean, I can't think of an example, 20 just sitting here. 21 Q You study elections frequently, right? 22 A I do, yes. 23 Q That's what you do all day long? 24 A Some days. 25 Q So it's 20 percentage points higher</p>
<p style="text-align: right;">82</p> <p>1 to turn out in a midterm election than turn out in 2 a presidential election? 3 A Most of the time, yes, that's true. I'm 4 just saying that generically. 5 Q Right. It would not be the usual fact 6 pattern to encounter higher turnout in a midterm 7 election than in a presidential election? 8 A Not typically. That's correct. 9 Q Now I want to go back a little bit to 10 Exhibits 3 and 4, which are the calculations of 11 the voter turnout for District 9 that you did for 12 the 2018 and the 2020 elections. And let's start 13 with Exhibit 3 to refresh our recollection. 14 And again, this -- I don't remember 15 whether this is Exhibit 3 or 4, but what I do know 16 it is is the 2018 U.S. Senate election data that 17 was reconstituted in the new District 9 and your 18 internal analysis. 19 Is that right? 20 A Yes. 21 Q So in the midterm 2018 election, we see 22 that Native American voters in District 9 turned 23 out at a rate of 60.4 percent compared to 68.3 for 24 white voters and 49.8 for other, right? 25 A That's correct.</p>	<p style="text-align: right;">84</p> <p>1 turnout in 2018 for Native Americans in the 2 district than in 2020. 3 That's unusual, right? 4 A Well, I mean, as a general 5 proposition -- I mean, I haven't -- this is the 6 only study I've done of this particular 7 legislative district and turnout. 8 As we discussed, as a general 9 proposition, among most groups, you know, turnout 10 in presidential elections is typically higher than 11 midterm elections. 12 Q And I'm going to ask you to do a little 13 math with me again. 14 A Okay. 15 Q So it's 20 percentage points higher, but 16 we can calculate the percentage increase, right, 17 if we take the -- let's see here. Going to the 18 other exhibit, the Exhibit 4, which is the 2018. 19 So if we take the difference between 20 Native turnout in 2018, 3493, and then subtract 21 the Native turnout in 2020, which is 2250, we see 22 that, as a raw number, there's 1,243 more 23 estimated Native Americans who turned out in 2018 24 in District 9 than turned out in 2020? 25 Is that correct?</p>

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1 **A Yes.**
 2 Q And then if we divide 1243 by the 2020
 3 turnout, which is 2250, we see that there's a
 4 55 percent higher turnout rate among Native
 5 American voters in the 2018 midterm than there was
 6 in the 2020 presidential election in District 9.
 7 Does that -- did I do that right?
 8 **A Well, I mean, I guess there are**
 9 **different ways to do this. If you're calculating**
 10 **a rate of increase or decrease, it's -- it would**
 11 **be 2020 minus 2018 divided by 2018.**
 12 **So, I mean, that's how I would calculate**
 13 **a rate of increase or decrease.**
 14 Q So you would take -- say that again.
 15 You would take 2020 minus 2018?
 16 **A Right.**
 17 Q And is that because 2020 happened after
 18 2018?
 19 **A Yes.**
 20 Q You see what I'm getting, like, that
 21 would be a negative number, then, right?
 22 **A Well, it is a negative rate of increase**
 23 **because turnout --**
 24 Q Decreased.
 25 **A I mean, it just did.**

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1 Q So -- but it's correct --
 2 **A It would be a negative. It would be a**
 3 **negative in that case. That would be correct,**
 4 **though.**
 5 Q Okay. But it is also correct to say
 6 that the turnout in 2018 among Native American
 7 voters was 50 percent higher than it was in the
 8 2020 presidential election?
 9 **A So it's 60.4, and what was the other --**
 10 Q 38.9 percent.
 11 **A Okay. So what did you -- how did you**
 12 **want to calculate this, I guess?**
 13 Q What I did is the raw number of Native
 14 American voters in 2018 minus the raw number in
 15 2020 to get the difference. And then I divided by
 16 the total number in 2020 to see what the
 17 percentage increase is.
 18 **A Well, you could do that. But we have**
 19 **the percentage. We have the turnout rate, or at**
 20 **least an estimate of that. So...**
 21 Q So it should be the same either way,
 22 right? It's a 55 percent increase?
 23 **A Yeah.**
 24 Q You would agree that that's a pretty
 25 striking and unusual characteristic, comparing the

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1 midterm to the presidential election for this
 2 district?
 3 **A Well, again, I would agree that**
 4 **typically turnout in presidential election years**
 5 **is higher than in midterm years, for most groups.**
 6 Q Actually, that was the case for -- in
 7 District 9 for white voters and for other voters,
 8 right?
 9 **A Yes.**
 10 Q And sitting here, you're not able to
 11 think of another example elsewhere in the country
 12 where you've seen a turnout difference that high
 13 where the midterm turnout among a racial group is
 14 so much higher than it was in a presidential
 15 election?
 16 **A Well, I can't recall an example. That**
 17 **doesn't mean that there's not one that exists, but**
 18 **I can't recall of one.**
 19 Q And you would agree that given the fact
 20 that courts that study vote dilution cases -- or
 21 that adjudicate vote dilution cases are tasked
 22 with determining whether special circumstances
 23 make a certain election or set of elections ones
 24 that should not be given great weight, that this
 25 is the type of information that would be relevant

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1 to that determination?
 2 MR. PHILLIPS: Objection, calls for a
 3 legal conclusion.
 4 **A I would agree that's the Court's**
 5 **decision to weigh, yes.**
 6 Q And would you agree that your own
 7 analysis shows significant evidence that should --
 8 the Court should consider, this unusual pattern of
 9 turnout with respect to the 2018 election for
 10 Native American voters in District 9?
 11 **A Well, it shows a turnout differential,**
 12 **that's true. It's in black-and-white numbers**
 13 **here.**
 14 Q And that's -- those numbers are relevant
 15 to the ultimate Gingles prong 3 determination?
 16 MR. PHILLIPS: Objection, calls for a
 17 legal conclusion.
 18 **A They could be.**
 19 MR. GABER: I'm going to mark as
 20 Exhibit 6 the file that's titled Hood Notes.
 21 (Exhibit Hood-6 marked for
 22 identification and attached to the transcript.)
 23 BY MR. GABER:
 24 Q Do you recognize these as some of your
 25 notes that you produced in this case?

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1 **A Yes.**
2 Q It would be the second to the last page
3 of the PDF, which is going to be 13, that's Bates
4 stamped HOOD-0256.
5 Now, is this the sort of underlying work
6 that you did to create the table for your report
7 that is on page 3?
8 **A It should be, yes.**
9 Q So what you show here is that -- and
10 this is, again, LD 9, LD 9A, LD 9B, and the total,
11 the total being the number of elections that were
12 available statewide or for endogenous in that
13 given election year?
14 **A Yes, yes.**
15 Q And so just looking at LD 9, there's
16 eight elections available to be analyzed in 2022,
17 correct?
18 **A Yes.**
19 Q And the Native American preferred
20 candidate lost all eight of those, right?
21 **A Yes.**
22 Q If we add the 2020 elections to the 2022
23 elections, then we have 14 total contests.
24 Is that right?
25 **A Yes, correct.**

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1 Q And that would include a mix of at least
2 one endogenous race and then the most recent two
3 election cycles of statewide contests?
4 **A Correct.**
5 Q And so if the time period we're looking
6 at is 2022 and 2020, then the Native preferred
7 candidate would have won 4 out of the 14 contests.
8 Is that correct?
9 **A Based on these notes, yes.**
10 Q And then if we skip over 2018 but add in
11 the 2016 to the 2020 and the 2022, then there are
12 nine contests for those three election cycles in
13 which the Native preferred candidate prevailed.
14 Am I right?
15 **A Yes, that's correct.**
16 Q And that's 9 out of 21 contests, right?
17 **A Yes.**
18 Q So setting aside 2018, for the other
19 most recent three election cycles, the white
20 candidate prevailed in District 9 in the majority
21 of the elections in those three election cycles,
22 correct?
23 **A That would be correct.**
24 Q And that's -- we said -- is that 21
25 contests, right?

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1 **A I believe so.**
2 Q You would agree that's a larger sample
3 size than the six that you analyzed for your Walen
4 report?
5 **A That's true, yes.**
6 Q And, in fact, just the 2022 contests
7 alone would be a larger sample size than what you
8 looked at in the -- in your Walen report?
9 **A Correct.**
10 Q And as a general matter, the more
11 elections -- looking at more elections is better
12 than looking at fewer elections.
13 Is that a generally fair statement?
14 **A Typically. Again, you know, as long as**
15 **they're somewhat probative.**
16 Q Well, in fact, if you're looking at --
17 **A I'm not saying 2022 wasn't. I'm just**
18 **adding that qualifier to that general statement.**
19 **(Inaudible) any election at any time, you know.**
20 **So...**
21 Q Yeah. And, in fact, as we discussed,
22 the more probative elections would be the more
23 recent, endogenous, and those featuring a minority
24 candidate of the minority group challenging the
25 map?

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1 **A Yes.**
2 Q Now, both in these notes but also in
3 your report on page 3, Table 1 on page 3 -- so I
4 guess what you've done here is, you have combined
5 District 9, District 9A, and District 9B and
6 summed up all the elections in those three
7 districts to report the defeat rate for Native
8 American preferred candidates across these five
9 election cycles.
10 Is that right?
11 **A In Table 1, yes. That's correct.**
12 Q So there's 108 elections where there's a
13 clear Native American candidate of choice.
14 Is that right?
15 **A Yes.**
16 Q And that's -- you get there by adding up
17 District 9, District 9A, and District 9B, right?
18 **A Correct.**
19 Q Now, we've discussed a bit that
20 District 9A has a very high Native American voting
21 age population.
22 Would you agree with that?
23 **A Yes.**
24 Q It's nearly 80 --
25 (Reporter interruption.)

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1 Q It's nearly 80 percent.
 2 Is that your understanding?
 3 **A It's high. I don't remember the**
 4 **exact -- I mean, unless I put it in my report**
 5 **somewhere, I don't remember the exact number. But**
 6 **it's high.**
 7 Q Okay.
 8 **A Subdistrict 9A is 77.0 percent Native**
 9 **American VAP. That's what I wrote.**
 10 Q Okay. Now, we talked a bit earlier when
 11 we were talking about sort of your presentation of
 12 the three Gingles factors that one typically would
 13 not include a district with such a high minority
 14 population in the Gingles prong 3 analysis because
 15 the purpose of the Gingles prong 3 analysis is to
 16 determine whether white voters are blocking Native
 17 preferred candidates in an area where there aren't
 18 enough Native voters.
 19 Is that correct?
 20 **A Well, I mean, I included this because I**
 21 **was responding to Prof. Collingwood, and he**
 22 **included it.**
 23 Q But Dr. Collingwood didn't add 9A, 9B,
 24 and 9 together, right? You did that.
 25 **A I did that, yes.**

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1 Q Okay. And so do you agree with me,
 2 though, that in a district with a large minority
 3 population, well above a majority and over
 4 three-quarters of the population of voters, that
 5 conducting a Gingles prong 3 analysis doesn't even
 6 make sense for that district?
 7 **A Well, it makes sense insofar as it**
 8 **confirms that where there's racially polarized**
 9 **voting and the district contains that many of a**
 10 **racial group, the time their preferred candidate**
 11 **of choice should win.**
 12 Q Do you understand the plaintiffs to be
 13 alleging that District 9A is packed with Native
 14 American voters, and the surrounding districts,
 15 there's cracked Native American voting population?
 16 **A I mean, are you representing that that**
 17 **is the case?**
 18 Q Yes. So the allegation is that
 19 District 9A is packed; there is cracked population
 20 in District 9B and in neighboring District 15.
 21 **A So it's not District 9 is packed, then.**
 22 Q The allegation is that District 9 is
 23 dilutive because it has an insufficient effective
 24 Native population, but the allegation is that 9A
 25 is packed and Native voters are cracked in the

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1 surrounding voters.
 2 Does that make sense?
 3 **A Yes, yes.**
 4 Q So you would not -- the Gingles prong 3
 5 doesn't get at whether white voters are defeating
 6 the Native candidate of choice in a packed
 7 district, right? The purpose is to look at the
 8 districts where there's allegedly too few Native
 9 American voters, given the way that the lines were
 10 drawn?
 11 MR. PHILLIPS: Objection, calls for a
 12 legal conclusion.
 13 **A Well, again, I mean, I guess I would say**
 14 **it's just something that can be analyzed. That's**
 15 **probably not going to be the case where the Native**
 16 **American preferred candidate of choice is losing**
 17 **in a district that's packed in a hypothetical**
 18 **sense, no.**
 19 Q And, in fact, when we look at your notes
 20 here that are on the screen, which I think is
 21 Exhibit 6, on page 13 of the notes, you show that
 22 the Native preferred candidate wins 100 percent of
 23 the tested elections in District 9A, right?
 24 **A Yes.**
 25 Q And so that doesn't tell us what's

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1 happening in the cracked -- the allegedly cracked
 2 populations outside of District 9A, right?
 3 **A That's correct.**
 4 Q And so if we're trying to determine
 5 whether or not white voters usually defeat Native
 6 preferred candidates in those areas outside of the
 7 packed district, we would most appropriately
 8 confine our Gingles prong 3 analysis to those
 9 areas outside the packed district.
 10 Do you agree with that?
 11 MR. PHILLIPS: Objection, calls for a
 12 legal conclusion.
 13 **A Again, I don't disagree necessarily.**
 14 **But to the extent to which 9A is part of this set**
 15 **of districts that's being analyzed, I included it.**
 16 Q Yeah, I get that.
 17 And it is being challenged insofar as
 18 the allegation is that it's been packed so heavily
 19 that that's the only district in which a Native
 20 preferred candidate would win.
 21 But to examine whether white bloc voting
 22 is usually defeating the candidates of choice in
 23 more districts than what was drawn, you would not
 24 look at the allegedly packed district for Gingles
 25 prong 3?

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1 MR. PHILLIPS: Same objection.
 2 **A Well, I would just say that the district**
 3 **under challenge, I did look at it.**
 4 Q Okay. But let's take my proposition and
 5 assume that's true. And I think you've said you
 6 didn't necessarily disagree with that, right?
 7 **A Correct.**
 8 Q And if we exclude District 9A, the
 9 allegedly packed district, and look just at
 10 District 9 and District 9B in combination, then
 11 there are -- across the five analyzed years, there
 12 are -- is it 72 total elections?
 13 **A I guess it would be.**
 14 Q And among those 72 elections, the Native
 15 preferred candidate wins 30, and the white
 16 preferred candidate wins 40.
 17 Is that correct? Or 42, rather.
 18 **A Yes. 40, right? If I'm looking at this**
 19 **right.**
 20 Q Maybe it's 40. So it's -- I'm just
 21 trying to help myself do math here.
 22 So there's 23 Native -- you counted 23
 23 Native victories in LD 9. And is that 7 in 9B?
 24 **A Yes, looks like 7 to me.**
 25 Q So that's 30 for the Native preferred

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1 candidates. And there's -- there are 72
 2 elections. Maybe it's the case -- we're trying to
 3 get at whether it's 40 or 42 victories for the
 4 white preferred candidate. It's possible that
 5 those are the two elections that didn't feature a
 6 racially polarized voting, perhaps. But --
 7 (Cross-talk.)
 8 **A I don't think those two races are being**
 9 **counted in this table I drew out by hand.**
 10 Q Okay. So then it would be 42 contests
 11 in which the white preferred candidate prevailed
 12 when we sum up District 9 and District 9B, and 30
 13 in which the Native preferred candidate prevailed?
 14 **A I believe that's correct, yes.**
 15 Q So that would be 58 percent of the time
 16 when we look at the districts that are alleged to
 17 have too little Native population to provide an
 18 equal opportunity to elect; 58 percent of the
 19 time, the white preferred candidate is winning,
 20 and 42 percent of the time, the Native preferred
 21 candidate is winning.
 22 Is that correct?
 23 **A Based on those calculations, that would**
 24 **be correct, yes.**
 25 Q And that would be indicative of a

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1 Gingles prong 3 being present that the white
 2 preferred candidate is usually defeating the
 3 Native preferred candidate?
 4 MR. PHILLIPS: Objection, calls for a
 5 legal conclusion.
 6 **A In 9 and 9B added together, yes.**
 7 Q Okay. Now, you understand, based on our
 8 discussion earlier -- did you review the Complaint
 9 and the supplemental Complaint that were filed by
 10 plaintiffs in this case?
 11 **A I probably did. I can't tell you that I**
 12 **can remember much from it.**
 13 Q But you understand and you did some
 14 analysis -- or rather, you reviewed
 15 Dr. Collingwood's analysis and understand that
 16 District 15, the neighboring district, is also
 17 part of the claim in this case, right?
 18 **A Yes, yes.**
 19 Q And to the extent that plaintiffs claim,
 20 which I can represent it is, is about vote
 21 dilution as a regional matter, and not with regard
 22 to, you know, the particular district lines,
 23 because the challenge is to the lines, one could
 24 also add in District 15's results to District 9
 25 and District 9B to get a full picture of the

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1 racially polarized voting and the Gingles prong 3
 2 factors for the whole challenged area, correct?
 3 MR. PHILLIPS: Object to the form,
 4 compound question.
 5 Q That was very compound. Let me break it
 6 down.
 7 So to the extent -- given that
 8 plaintiffs are challenging the regional drawing of
 9 the districts, then it would be -- it would make
 10 sense to -- as you did to some extent, to add
 11 together the challenged election results from both
 12 Districts 9 and 15?
 13 **A Well, I mean, one could make that**
 14 **argument. I don't know that two -- I mean, we're**
 15 **using this term "region." I don't know that two**
 16 **legislative districts are a region, per se.**
 17 **I mean, you can do what you're saying,**
 18 **certainly. I mean, it's just a matter of**
 19 **arithmetic.**
 20 Q And given the results that you saw in --
 21 given what we just saw with respect to District 9
 22 and District 9B, if we add in the results in
 23 District 15, there's an even stronger indication
 24 of the presence of Gingles prong 3 using that
 25 approach, correct?

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1 MR. PHILLIPS: Object to form, calls for
 2 speculation.
 3 **A From what I remember in terms of the**
 4 **outcome of those races in LD 15, yes.**
 5 Q And, in fact, in your report, you don't
 6 dispute that Gingles prong 3 exists in LD 15,
 7 correct?
 8 **A Correct.**
 9 Q Now, in your notes, you have the 2022
 10 election results. I think it's perhaps the
 11 page -- let's see -- it's Bates stamped 0252, and
 12 it would be pages 9 to 10 of the PDF, I believe.
 13 So you see here on page 9, you write
 14 down the general election results for the 2022
 15 election in District 9, 9A, and 9B?
 16 Do you see that?
 17 **A Yes, yes.**
 18 Q And then on page -- well, just stick
 19 with this page. Is there a reason why you didn't
 20 include this most recent and endogenous election
 21 results in your Walen report?
 22 MR. PHILLIPS: Objection. To the extent
 23 it applies to the Walen case, it's outside the
 24 scope of Dr. Hood's opinion and work in this case.
 25 **A I did not get to a full analysis. I**

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1 **mean, these are just some notes I took down off of**
 2 **the Secretary of State's election website. I did**
 3 **not -- I will state, I did not perform any kind of**
 4 **statistical analysis on the 2022 elections.**
 5 Q The reason for that was just simply a
 6 matter of the timing you had available before you
 7 had to submit the report?
 8 **A Yes, yes.**
 9 Q And do you agree that it would have been
 10 preferable to include all of the 2022 elections in
 11 that report, given that they're the most recent
 12 and some of them contain endogenous elections
 13 including endogenous elections with Native
 14 American candidates?
 15 **A Well, as we discussed, they certainly**
 16 **are the most recent set of elections held, yes.**
 17 Q And your report would have been more
 18 complete or would have been more fulsome had it
 19 added in these -- the eight 2022 contests for
 20 District 9?
 21 **A Well, I don't know that I would have**
 22 **done eight. I mean, Prof. Collingwood did eight.**
 23 **But some 2022 elections.**
 24 Q Which of the 2022 elections would you
 25 have included, if you had had time?

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1 **A I would have to honestly look at that.**
 2 **I'm sure I would include some of the statewide**
 3 **races. Probably the -- probably LD 9 as a whole.**
 4 Q So the 2022 LD 9 endogenous election is
 5 one that you would have included?
 6 **A Yes, probably so.**
 7 Q The 2022 public service commissioner
 8 race had a Native American candidate, Ms. Moniz.
 9 Is that an election that it would have made sense
 10 to include?
 11 **A I certainly would have considered that**
 12 **factor, yes.**
 13 Q There were statewide elections for the
 14 U.S. Senate in 2022 and the U.S. House in 2022.
 15 Would those be ones that would have made sense to
 16 include?
 17 **A Probably so. I mean, probably the**
 18 **senate race.**
 19 Q Not the house race?
 20 **A Well, again, I didn't do this, so I will**
 21 **just say that I certainly would have included some**
 22 **statewide races. In the case of North Dakota, the**
 23 **house is a statewide race. So...**
 24 Q I think you had included the 2018
 25 Attorney General race.

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1 Is that right?
 2 **A Yes, I think that's correct.**
 3 Q I assume it would have made sense, then,
 4 to also include the 2022 Attorney General race?
 5 **A Yes, and perhaps the gubernatorial race.**
 6 Q I can tell you, North Dakota elects the
 7 governor in the presidential cycle.
 8 **A Okay. Well, scratch that, then.**
 9 Q So then the other option is the 2022
 10 agricultural commissioner race, there was a second
 11 public service commissioner race in addition to
 12 the one that featured the Native American
 13 candidate, and the secretary of state rate race.
 14 Are there any among those that you have
 15 any reason to believe that you would not have
 16 included?
 17 **A I don't know that I would or wouldn't**
 18 **have included some of those other races. I guess**
 19 **it would just depend. So...**
 20 Q What would it depend on?
 21 **A Well, I mean, usually, if I'm doing a**
 22 **statewide race, I would probably start out with**
 23 **the higher profile statewide races like U.S.**
 24 **Senate, for instance. So...**
 25 Q So just so I can get a sense here, the

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1 U.S. Senate race, you definitely would include
 2 that?
 3 **A Well, I guess if we were going back in**
 4 **time, yes.**
 5 Q And you included the U.S. Senate race
 6 from 2018, right?
 7 **A Yes.**
 8 Q So there's no reason not to include the
 9 2022?
 10 **A No. Certainly, if I had included a race**
 11 **from a previous analysis, from a previous election**
 12 **cycle, I probably would include it again. As long**
 13 **as it's contested. I mean, we don't learn a lot**
 14 **from uncontested races in these types of analyses.**
 15 **So...**
 16 Q And do you understand from
 17 Dr. Collingwood's report that all of these
 18 eight -- or sorry -- seven statewide elections
 19 from 2022 were contested that he included?
 20 **A I think in 2022, there were, yes. I**
 21 **guess I would say I typically use a two-party**
 22 **contested. So, you know, there's a Democrat and**
 23 **Republican candidate running.**
 24 Q Okay. So the U.S. House race, my
 25 understanding, featured an independent candidate

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1 who had the backing of the Democratic party.
 2 Does that match your understanding?
 3 **A Well, it's not -- these are choices that**
 4 **a researcher is going to make. Again, I probably**
 5 **would not have included that if there was an**
 6 **independent candidate versus it being two-party**
 7 **contested.**
 8 Q But what if the RPV analysis showed that
 9 that candidate was the candidate of choice of the
 10 Native American voters in the district?
 11 **A Well, it could. But I mean, I'm making**
 12 **decisions about what races to analyze up front, I**
 13 **mean, is the way I do it.**
 14 Q So you start by excluding races that
 15 don't have a Democratic or Republican candidate?
 16 **A I typically -- I think I've been pretty**
 17 **consistent in these types of analyses in saying**
 18 **that I typically don't include races that aren't**
 19 **two-party contested.**
 20 Q But you agree, right, that if there is a
 21 clear candidate of choice and racially polarized
 22 candidates of choice in an election that doesn't
 23 have both political parties represented, there's
 24 nothing wrong with including that?
 25 **A I didn't say that. I'm just telling you**

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1 **how I would go about doing this. That's what we**
 2 **were talking about.**
 3 Q So I have the U.S. Senate race from
 4 2022, the Attorney General race from 2022, the
 5 endogenous District 9 election, and then we also
 6 discussed that the statewide race featuring the
 7 Native American candidate for the public service
 8 commission would also be one that would be one to
 9 include.
 10 Is that right?
 11 **A Probably in that case, yes. I'm**
 12 **assuming, without knowing, that that was a**
 13 **two-party contested race.**
 14 Q It was, yes. The Republican candidate
 15 prevailed statewide, and then the Democratic
 16 candidate was Ms. Moniz, the Native American.
 17 So that would be one to include? Did
 18 you agree that that would be one to include?
 19 **A Yes, yes.**
 20 Q What about the Secretary of State
 21 position?
 22 **A You know, certainly, it would be a**
 23 **possibility if it's two-party contested.**
 24 Q And it was.
 25 **A Okay.**

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1 Q So that would be one to include as well?
 2 **A Well, it would be one to consider**
 3 **including, certainly.**
 4 Q Any reason you can think of not to
 5 include it?
 6 **A Well, I mean, we're moving down ballot**
 7 **at this point. So...**
 8 Q So if we had done as we just discussed
 9 and added the 2022 U.S. Senate, the 2022 Attorney
 10 General, the endogenous District 9 state senate
 11 election, and the public service commissioner
 12 election featuring the Native American candidate,
 13 that would add four additional races to the six
 14 that you analyzed in the Walen report.
 15 Is that right?
 16 **A Yes.**
 17 Q And do you understand, from
 18 Dr. Collingwood's report, that the Native
 19 preferred candidates lost all four of those 2022
 20 elections?
 21 **A According to his report, yes.**
 22 Q And you don't have any reason to dispute
 23 that?
 24 **A Well, I don't have any reason to dispute**
 25 **the calculations that he made. Again, I guess I**

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1 had a little more detailed calculation I would
2 make at that stage. So...
 3 Q In your Walen report, you found that of
 4 the six elections that you analyzed, that the
 5 Native preferred candidate won four of those six.
 6 Is that your recollection?
 7 **A That's my recollection sitting here,**
8 yes.
 9 Q And so the Native preferred candidate
 10 would have lost two of them, right, won four and
 11 lost two?
 12 **A Right. Yes, yes.**
 13 Q So if we were to add the elections that
 14 we discussed that you agreed would make sense to
 15 add from 2022, that would be six elections in
 16 which Native preferred candidates lost and the
 17 four elections in which the Native preferred
 18 candidate won in District 9, correct?
 19 **A Well, again, the losses are based on**
20 Prof. Collingwood's report. I mean, I would,
21 again, go through my calculations, as we detailed
22 in the spreadsheets, before -- I mean, I could
23 come to the same conclusion; I might not. So...
 24 Q Well, assume for me that Dr. Collingwood
 25 has accurately determined for the 2022 elections

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1 which candidate would have prevailed in
 2 District 9. Assuming he's correct about that,
 3 then that would yield six elections for your -- to
 4 add to your -- six total elections in which the
 5 Native preferred candidate lost in the district,
 6 and the four elections that you already reported
 7 in which the Native preferred candidate prevailed,
 8 correct?
 9 **A Correct.**
 10 Q And so that would be 60 percent of the
 11 time, the white preferred candidate would have
 12 defeated the Native preferred candidate in the
 13 district?
 14 **A Well, under those calculations, yes. I**
15 mean, with the caveat that I didn't do that.
16 So...
 17 Q So the caveat is that -- is whether or
 18 not Dr. Collingwood is correct about the results.
 19 But you agree that it would make sense to add
 20 those elections to the analysis you already
 21 conducted?
 22 **A I would agree they could be added,**
23 certainly, yes.
 24 Q And to the extent Dr. Collingwood is
 25 right about who won in District 9 in those 2022

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1 elections, then that would show 60 percent defeat
 2 rate for the Native American preferred candidates
 3 in District 9?
 4 **A Well, if I went -- again, with the**
5 caveat that I went through the same exercise and
6 made my calculations and came to the same
7 conclusion he did, then yes.
 8 Q And a 60 percent defeat rate for Native
 9 preferred candidates would constitute usually
 10 being defeated by white bloc voting, correct?
 11 **A Well, I guess it would meet the**
12 definition of more typically than not.
 13 Q And that's the definition that you apply
 14 to your Gingles prong 3 analysis?
 15 **A Correct, yes.**
 16 Q Now, when we discussed that if you add
 17 District 9 and District 9B together, the districts
 18 that are alleged to have insufficient voting
 19 population for Native American voters, and we
 20 found that 42 out of the 72 elections, the white
 21 preferred candidates prevailed -- do you recall
 22 that exercise we did just before this one?
 23 **A Yes.**
 24 Q That was just equally weighing each
 25 election, right? So from 2016 -- or rather,

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1 equally weighing each election across all five
 2 years?
 3 **A That's correct.**
 4 Q And so if we were to give more weight to
 5 the more recent 2022 elections, more weight to the
 6 elections in which there was Native American
 7 candidates, and more weight to the endogenous
 8 elections, then the evidence showing white bloc
 9 voting usually defeating the Native preferred
 10 candidates would be even greater, correct?
 11 **A If you subset those elections based on**
12 those criteria, then I believe that's correct.
 13 Q For 9 and 9B together, it's 42 out of 72
 14 where the white preferred candidate wins,
 15 including all of the 2018 elections that
 16 Dr. Collingwood has opined feature special
 17 circumstances that warrant excluding them?
 18 **A If we were not excluding those, yes. I**
19 mean, I think we came to those calculations. I
20 don't disagree with the calculations as they were
21 made in that exercise. So...
 22 Q And if we were --
 23 **A The numerical result of those**
24 calculations. So...
 25 Q If we were to take out the 2018

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1 elections, then the evidence in favor of white
 2 bloc voting would be even higher than the 42 out
 3 of 72 that we see including those elections,
 4 right?
 5 **A If we took out 2018, there would be**
 6 **fewer Native preferred candidates who would have**
 7 **won under those criteria, so yes.**
 8 MR. GABER: I think this is a good time
 9 for us to break.
 10 (Recess from 1:25 p.m. until 2:02 p.m.)
 11 MR. GABER: Back on the record.
 12 BY MR. GABER:
 13 Q Dr. Hood, welcome back from lunch. Did
 14 you have a chance to get something to eat?
 15 **A I did. Thank you.**
 16 Q So I'm going to shift gears this
 17 afternoon, but just a couple more points on the
 18 racially polarized voting topic.
 19 Is it your understanding that the state
 20 legislature adopted subdistricts in District 9 and
 21 in District 4 because of its belief that the
 22 Voting Rights Act would have required -- or might
 23 have been violated had elections occurred with the
 24 full district?
 25 MR. PHILLIPS: Objection, calls for

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1 speculation and outside the scope of Dr. Hood's
 2 opinion and work on this case.
 3 **A Well, I mean, all I have to rely on in**
 4 **regard to that particular question is the**
 5 **legislative record and the transcripts I read from**
 6 **meetings that were held with the redistricting**
 7 **committee and various groups around the state.**
 8 **And I mean, again, this is just my**
 9 **opinion, obviously, from the outside looking in.**
 10 **But yes, I believe that the redistricting**
 11 **committee thought they were complying with the**
 12 **Voting Rights Act by creating these subdistricts.**
 13 Q And the reason for that is, the concern
 14 that in the absence of the subdistricts, if the
 15 state house elections were conducted in the full
 16 district, the Native American voters in the full
 17 district would not have the opportunity to elect
 18 their candidate of choice?
 19 MR. PHILLIPS: Objection. You're asking
 20 him to just speculate about what the legislature
 21 did and why. The question is pure speculation.
 22 **A I'm not sure if I can answer the second**
 23 **question as to what they believed. I was able to**
 24 **glean enough from the records I read on the first**
 25 **point, but I honestly am not very comfortable with**

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1 **trying to discern what, you know, a group of**
 2 **people were thinking exactly. So...**
 3 Q Doesn't that just -- isn't it just
 4 purely logical? So if what you did glean was that
 5 they believed they needed to draw the subdistrict
 6 to comply with the Voting Rights Act and the
 7 subdistricts are a portion of the full districts,
 8 the only reason to do that would be because there
 9 was concern that the full district would not
 10 provide an opportunity and, therefore, there
 11 needed to be at least one state house seat, or
 12 there was that opportunity.
 13 Is there any other reason why one would
 14 do that to comply with the Voting Rights Act?
 15 MR. PHILLIPS: I'll object that it
 16 misstates his testimony and that it's a compound
 17 question and calls for speculation.
 18 **A Well, you know, splitting the**
 19 **legislative district as a whole into subdistricts**
 20 **in this case does provide for two single-member**
 21 **house districts, as we know.**
 22 **And given the fact that the Native**
 23 **American population is geographically sort of**
 24 **close to each other in terms of where they're**
 25 **located, you know, if you draw a subdistrict -- in**

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1 **a lot of cases, I guess there are many different**
 2 **possibilities or permutations.**
 3 **But if you draw a subdistrict like the**
 4 **legislature did or the redistricting committee**
 5 **did, then you're certainly going to increase the**
 6 **odds that a Native American candidate of choice**
 7 **can be elected from a subdistrict.**
 8 Q But if it's the case that the rationale
 9 was to comply with the Voting Rights Act, then the
 10 belief would have to be that there's a problem
 11 under the Voting Rights Act with the full
 12 district, right? There's no other explanation, at
 13 least with respect to the VRA rationale?
 14 MR. PHILLIPS: I'll object to the extent
 15 it misstates his testimony.
 16 I believe his testimony was that it did
 17 comply with the Voting Rights Act and that the
 18 legislature thought it was in compliance with the
 19 Voting Rights Act. I think you've sort of
 20 misstated his testimony.
 21 So that's my objection.
 22 Q I'm not trying to state your testimony
 23 at all. What I'm trying to ask is, to the extent
 24 the VRA is the reason that the legislature adopted
 25 the subdistricts, then it follows that the concern

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1 was that the full district with respect to
 2 District 9 and with respect to District 4 would be
 3 potentially in violation of the VRA.
 4 Do you understand what I'm saying?
 5 **A I guess you can infer that, you know.**
 6 **Again, I'm not -- I didn't interview this group of**
 7 **people, for instance. So...**
 8 Q But that would be -- if the VRA is the
 9 purpose and if the purpose is being logically
 10 applied, then the rationale is because there is
 11 concern that the full district might violate the
 12 VRA?
 13 MR. PHILLIPS: Objection, calls for
 14 speculation.
 15 He has not opined on this issue in his
 16 report. So you're veering pretty far off into
 17 what other people believe, and these are things
 18 that Dr. Hood has not opined on.
 19 That's my objection.
 20 **A Okay. So what was the last -- sorry.**
 21 **What was the last question?**
 22 Q I think it's the point that if you're
 23 logically applying the purpose to comply with the
 24 VRA to draw the subdistrict, then the necessary
 25 antecedent is that there's a belief that the full

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1 district is a problem under the VRA?
 2 MR. PHILLIPS: Same objection.
 3 **A I guess you could say could be a**
 4 **problem, potentially. Not an absolute that it is**
 5 **a problem.**
 6 Q So let's shift gears. I think we
 7 discussed a little earlier, you have testified as
 8 an expert about the compactness of districts in
 9 previous cases, right?
 10 **A Yes.**
 11 MR. GABER: So I'm going to mark as
 12 Exhibit 7 the document Hood Vesilind versus
 13 Virginia State Board of Elections Expert Report.
 14 (Exhibit Hood-7 marked for
 15 identification and attached to the transcript.)
 16 BY MR. GABER:
 17 Q Dr. Hood, do you recognize this as your
 18 expert report in the Virginia State court case,
 19 Rema Ford Vesilind versus Virginia State Board of
 20 Elections?
 21 **A Yes.**
 22 Q And you were retained by the
 23 Commonwealth of Virginia there to defend them for
 24 the 2011 state senate plan as compliant with the
 25 Virginia constitution's requirement that districts

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1 be compact.
 2 Is that right?
 3 **A Yes.**
 4 MR. PHILLIPS: I'll just object to the
 5 whole line of questioning to the extent that it
 6 exceeds Dr. Hood's opinion and work in this case.
 7 And if we can just agree that there's a
 8 standing objection for the whole line of
 9 questioning.
 10 MR. GABER: Yeah, I'll agree to the
 11 standing objection. I don't agree to the
 12 objection.
 13 MR. PHILLIPS: Understood. I don't want
 14 to object after every question.
 15 MR. GABER: Fair enough.
 16 Q So Dr. Hood, do you recall that the crux
 17 of the plaintiff's case in Vesilind was a
 18 challenge to six particular state senate districts
 19 as being non-compact as contrary to law?
 20 **A From what I -- I guess contrary to the**
 21 **Virginia state constitution. I think that's what**
 22 **it was technically.**
 23 Q Okay. And your ultimate opinion in that
 24 case was that the six districts that the
 25 plaintiffs challenged were, in fact, compact.

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1 Is that right?
 2 **A I honestly have not looked at this in**
 3 **quite some time. I'm sure I have some kind of**
 4 **summary statement in the report.**
 5 **I think I argued that the districts**
 6 **certainly were not -- that the districts were not**
 7 **compact to the extent to which it was a violation**
 8 **of the state constitution, I guess. But again, I**
 9 **haven't looked at this in a while.**
 10 Q Let's turn to page 6 of the report,
 11 which I think is probably page -- no, it's page 6
 12 of the PDF as well.
 13 And one of the things you note is
 14 that -- so you have two tables here. They list
 15 the districts that are being challenged, right?
 16 **A Yes, correct.**
 17 Q And those were -- and this is the 2011
 18 Virginia state senate plan, Districts 19, 21, 28,
 19 29, 30, and 37, correct?
 20 **A Correct.**
 21 Q And so looking at -- you have the
 22 baseline plan, the one that preceded the 2011
 23 plan, and then you have the 2011 plan, right?
 24 **A Correct.**
 25 Q And you note that there was a decrease

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1 in the compactness of these particular districts
 2 from the prior plan to the 2011 plan?
 3 **A That's correct.**
 4 Q Now, the Reock -- so you report the
 5 Reock scores, the Polsby-Popper scores, and the
 6 Schwartzberg scores.
 7 Is that right?
 8 **A Correct.**
 9 Q And am I correct that Reock compares the
 10 area of the district to the -- basically the
 11 smallest circle that will encompass the district?
 12 Is that a fair --
 13 **A Certainly, cliff note version, yeah.**
 14 **That's fine.**
 15 Q And Polsby-Popper does the same thing
 16 except it compares the length of the perimeter of
 17 the district to the area of the circle that
 18 encompasses it?
 19 **A Yes.**
 20 Q And the Schwartzberg one, I'm not going
 21 to remember.
 22 What is that?
 23 **A It's a perimeter to perimeter, compares**
 24 **the perimeter of the district to the perimeter of**
 25 **a circle with equal area.**

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1 Q Okay. With respect to the six districts
 2 that were challenged in this case, the 2011
 3 versions, the Reock scores ranged from 0.15 to
 4 0.22.
 5 Is that correct?
 6 **A Looks like it, yes.**
 7 Q And the Polsby-Popper scores ranged from
 8 0.08 to 0.14.
 9 Is that right?
 10 **A Yes.**
 11 Q And the Schwartzberg scores ranged from
 12 0.1 to 0.16.
 13 Is that right?
 14 **A Yes. Yes.**
 15 Q Now, one of the -- there were three
 16 basic methodologies that I gathered that you
 17 followed in reaching the conclusion that these
 18 districts were compact.
 19 The first is that you compared the --
 20 each of the districts to previous districts that
 21 courts had upheld as compact, and then compared
 22 their compactness scores.
 23 Do you recall that?
 24 **A Yes.**
 25 Q And that would be -- in your view,

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1 that's an appropriate, reliable methodology for
 2 determining whether an enacted district satisfies
 3 a compactness requirement?
 4 **A Well, I mean, if that scenario exists.**
 5 **Sometimes that scenario would not exist. But if a**
 6 **court in a particular state has spoken to this**
 7 **question, then yes, I think that's probative.**
 8 Q And that's with respect to a state law
 9 requirement of compactness, so you'd look to that
 10 state's courts to see what it had previously
 11 approved, right?
 12 **A Well, I mean, this particular case was a**
 13 **state case.**
 14 Q Right.
 15 **A So yes.**
 16 Q And along a similar vein, if the -- if
 17 federal courts or if the U.S. Supreme Court has
 18 deemed a particular district to be reasonably
 19 compact for purposes of the Voting Rights Act,
 20 then that would be a probative comparison to make
 21 in determining whether a proposed district, under
 22 the VRA, is reasonably compact?
 23 **A Well, yes, I think, but with the caveat**
 24 **that in this particular case, a court had spoken**
 25 **to some actual numbers, not just a district as**

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1 **being compact, but, you know, what is compactness.**
 2 **What's compact and what's not compact.**
 3 **Again, I'm trying to remember what I did**
 4 **here. This was a while ago. But I think there**
 5 **was some particular numbers that were actually**
 6 **laid out by a court.**
 7 Q Okay. And the second sort of
 8 methodology that you employed was to compare the
 9 challenged districts to see whether there were
 10 other districts in the plan that had similar or in
 11 some cases lower compactness scores.
 12 Is that right?
 13 **A Yes, correct.**
 14 Q And then third methodology was to apply
 15 a metric that was from the scholarship from
 16 Profs. Pildes and is it Niemi?
 17 **A "Niemi."**
 18 Q "Niemi."
 19 Do you recall that?
 20 **A Yes.**
 21 Q And since it's kind of specific, I want
 22 to just draw your attention to the Pildes and
 23 Niemi method, and that's on page 13 of the
 24 Vesilind report. And then so we can see the
 25 bottom paragraph, please.

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1 And I'll let you take a look at those.

2 **A Okay.**

3 **Okay.**

4 Q The methodology that you applied here

5 and that's written about in the Profs. Niemi and

6 Pildes report is in response to the racial

7 gerrymandering line of cases, right?

8 **A Correct, correct.**

9 Q And the methodology here is that if the

10 Reock score is above 0.16, or if the Polsby-Popper

11 score is above 0.06, or if the sum of those two is

12 above 0.22, then the district is considered

13 compact.

14 Is that correct?

15 **A Well, that's not how I would term it. I**

16 **would term it as what these two political**

17 **scientists are saying is that if it's below -- if**

18 **it's at this level or below, it's certainly**

19 **non-compact. I guess that's how I would phrase**

20 **it.**

21 Q The conclusion you reached -- an example

22 here is Senate District 28 from Virginia. You

23 noted that it had a Reock score of 0.15, which was

24 below the cutoff for compactness for the Reock

25 measure alone, but you concluded that it was, in

126

1 fact, compact because it satisfied the composite

2 index that they propose.

3 Is that right?

4 **A I'm reading.**

5 Q Sure.

6 **A Well, again, it's -- compactness is hard**

7 **to judge. We know it ranges on a lot of these**

8 **measures from 0 to 1.**

9 **So what's being said here is that this**

10 **particular district, at least under a composite**

11 **score, didn't reach a point to where these**

12 **researchers, Pildes and Niemi, would say that it**

13 **was not compact. So it was above that threshold.**

14 **It doesn't mean that it's compact, I**

15 **mean, because you can go quite further up the**

16 **scale, right. But it doesn't meet this threshold**

17 **that they're talking about here.**

18 Q And you considered this threshold and

19 this article by these professors to be a reliable

20 methodology that you used in your -- as one of the

21 bases for your conclusion in the Vesilind case,

22 right?

23 **A I did make use of it, yes.**

24 Q And, in fact, with respect to that

25 Senate District 28, it was only through the

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1 composite score, that that alone allowed you to

2 opine, with respect to this methodology, that it

3 was a compact district, because if you'd just

4 looked at the Reock cutoff point, it would have

5 been in the non-compact category, right?

6 **A Yes, yes, yes. Using these various**

7 **cutoff points that are provided for this**

8 **particular methodology, yes.**

9 MR. GABER: I'm going to introduce as

10 Exhibit 8. Exhibit 8 will be the file Virginia

11 2012 to 2020 Maps.

12 And David, I will send that to you now.

13 (Exhibit Hood-8 marked for

14 identification and attached to the transcript.)

15 BY MR. GABER:

16 Q Dr. Hood, in the appendix to your

17 Vesilind report, you included sort of composite

18 maps that showed in that case the plaintiffs'

19 alternative plans overwritten over the enacted

20 ones. And we can look at those, too, if it's

21 necessary. But I've pulled the 2011 enacted plan

22 without that alternative map mapped onto it so we

23 could see it better.

24 Do you recognize this as -- we can zoom

25 in if you need to -- but as the 2011 Virginia

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1 state senate plan?

2 **A From what I remember. I mean, again,**

3 **it's not -- I haven't looked at this lately.**

4 Q Okay. I assume you spent a fair bit of

5 time with it at the time.

6 **A Well, yeah, at the time.**

7 Q Okay.

8 **A There's been many maps drawn since then.**

9 **So...**

10 Q Yeah. So the -- let's scroll down to

11 the second page of this, please. And Districts 19

12 and 21 were among the maps -- or among the

13 districts that were challenged by the plaintiff in

14 the case.

15 Is that right?

16 **A From what I remember, yes.**

17 Q And your opinion was that Districts 19

18 and 21 were compact districts.

19 Is that correct?

20 **A Well, I don't know exactly what I said**

21 **about them without looking at the report.**

22 Q We can come back to it, but -- give me

23 one second.

24 MR. PHILLIPS: Just to be clear, my

25 standing objection relating to this prior case

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1 applies to this exhibit as well as any others
 2 related to this former case.
 3 Q For the moment -- we're going to come
 4 back to this in a second, but can you go back to
 5 the Vesilind report, which is the previous
 6 exhibit. And then if you can go to page 24 and
 7 scroll down so the whole -- to the bottom part of
 8 this page in the overall opinion, the last
 9 sentence there.
 10 So Dr. Hood, your ultimate opinion was
 11 that after conducting your own analysis, it was
 12 your opinion that the 2011 Senate plan creates
 13 districts which are sufficiently compact and
 14 contiguous as required by the Virginia
 15 constitution.
 16 Is that your opinion?
 17 A Okay. I'm not saying it wasn't; I
 18 just -- I don't remember what I said.
 19 Q Sure, sure. And this was 2017, it looks
 20 like.
 21 Does that sound right?
 22 A I know it was pre-pandemic. So...
 23 Q Yeah. The next page says it was
 24 executed on January 12th, 2017.
 25 Okay. So let's go back -- now that

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1 we've seen that, let's go back to the maps.
 2 So as part of your opinion, given that
 3 Districts 19 and 21 were among the six that were
 4 being challenged, your opinion was that they were
 5 sufficiently compact?
 6 A They would have had to have been, yes,
 7 based on what we just read.
 8 Q And if we could scroll down to the next
 9 page, please. This is getting close to where I am
 10 right now, to the D.C. area, and this view shows
 11 Districts 28, 29, 30, and 37, among others, but
 12 all four of those were among the ones that were
 13 challenged by the plaintiffs in the district as
 14 non-compact.
 15 Is that correct?
 16 A Yes.
 17 Q And do you see District 28 there?
 18 A Yes.
 19 Q That is a district that you opined was
 20 sufficiently compact, correct?
 21 A Correct.
 22 Q And do you see District 29?
 23 A Yes, yes.
 24 Q That's also a district that you opined
 25 was sufficiently compact, correct?

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1 A Correct.
 2 Q And do you see District 30?
 3 A Yes.
 4 Q And that one, you can see it swings
 5 around -- what is that -- District 36.
 6 That's a district that you also opined
 7 was sufficiently compact?
 8 A Yes.
 9 Q What word would you use to describe how
 10 the southernmost part of that district is
 11 connected to its northernmost part?
 12 A Possibly duck continuity. But I don't
 13 know, and I don't remember specifically.
 14 Q Would you characterize that as a narrow
 15 connecting point?
 16 A Yes, it is.
 17 Q And is the same true with respect to
 18 District 28 where it -- where 29 has a finger that
 19 comes into it?
 20 A Yes.
 21 Q Nevertheless, that wasn't too much of an
 22 incursion or a thinness of connection for you to
 23 conclude that the districts were sufficiently
 24 compact, right?
 25 A Correct. I mean, that was my conclusion

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1 in this case.
 2 Q And then do you see District 37 here as
 3 well?
 4 A Yes.
 5 Q And your conclusion there was that
 6 District 37 was sufficiently compact as well,
 7 correct?
 8 A Yes.
 9 Q And I think there -- is this the last
 10 page? Yeah. So that's the four were on this
 11 page, and the two were on the previous page.
 12 And all six of these districts were ones
 13 that you opined to be sufficiently compact?
 14 A Correct.
 15 Q And you haven't changed that opinion
 16 since you testified to that in court at the time?
 17 A No.
 18 MR. GABER: I'm going to mark as
 19 Exhibit 9 the document titled Fargo Close Up
 20 Enacted Plan.
 21 And I will send that to you now, David.
 22 (Exhibit Hood-9 marked for
 23 identification and attached to the transcript.)
 24 BY MR. GABER:
 25 Q Now, Dr. Hood, one of the North Dakota

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1 legislature's stated goals in the committee report
2 that you included -- or that you cited to was that
3 districts be compact, correct?
4 **A Yes.**
5 Q And is it your view that the legislature
6 satisfied that goal?
7 **A Well, I did not do a complete state**
8 **analysis of the 2021 plan.**
9 Q Did you have any indication to believe
10 that the legislature failed to meet that
11 requirement in some respect?
12 **A Not necessarily, no.**
13 Q What I'm showing you here is -- as with
14 any area of the map where there's cities, it can
15 be kind of hard to see the particular districts
16 because they're smaller. There's more dense
17 population. So I've narrowed in to the Fargo,
18 North Dakota area.
19 Do you see that here?
20 **A Yes.**
21 Q Are there any districts here that you
22 see that appear to you to be not reasonably
23 compact?
24 MR. PHILLIPS: I'm going to object that
25 this is outside the scope of Dr. Hood's opinion

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1 and work in this case.
2 Again, maybe so I don't have to object
3 every question about it, can we agree to a
4 standing objection on that?
5 MR. GABER: With respect to this
6 exhibit?
7 MR. PHILLIPS: Yes.
8 MR. GABER: Sure.
9 **A Not necessarily. Again, I mean, one of**
10 **the reasons we calculate compactness scores is so**
11 **we're not just using our eyes, though.**
12 Q But just part of it is looking at the
13 districts, right? That plays a role?
14 **A It can. I mean, again, visuals don't**
15 **play a role with compactness scores necessarily.**
16 **Compactness scores may be a reflection of what**
17 **someone's seen.**
18 Q But just looking at these Fargo area
19 districts, you're not identifying any that appear
20 to you to be unreasonably -- to not be reasonably
21 compact?
22 MR. PHILLIPS: Objection, asked and
23 answered.
24 **A Not necessarily, no.**
25 MR. GABER: Let's mark as Exhibit 10 the

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1 file, Grand Forks Close Up Enacted Plan.
2 And let me send that to you, David.
3 (Exhibit Hood-10 marked for
4 identification and attached to the transcript.)
5 MR. PHILLIPS: I'll just object to any
6 questioning to this exhibit for the same reason,
7 it's outside the scope of Dr. Hood's opinion and
8 work in this case.
9 BY MR. GABER:
10 Q Okay. This is Exhibit 10. So this is a
11 close-up of the Grand Forks area districts and the
12 legislature's enacted plan.
13 And maybe -- is it possible to zoom in a
14 bit on this so Dr. Hood doesn't have to get so
15 close to his computer. Thank you.
16 Are there any districts here in the
17 Grand Forks area that appear to you to be not
18 reasonably compact?
19 **A Not necessarily, just looking at what --**
20 **looking at it with my eyes.**
21 Q You wouldn't expect to conclude that
22 something here was not compact?
23 **A Well, again, I would not just use my**
24 **eyes; I would calculate the compactness scores.**
25 **That's what they're for. So we sort of have an**

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1 **apples-to-apples comparison that we can use.**
2 **Because sometimes things you're looking at with**
3 **your eyes can be slightly deceiving in terms of**
4 **how compact it is, you know, based on which score**
5 **you're using.**
6 Q And some of the things that can affect
7 the score as opposed to what you're looking at are
8 the use of, for example, rivers as boundaries.
9 Is that right?
10 **A It can. Rivers or coastlines. So**
11 **obviously there's no coastline in North Dakota,**
12 **but rivers could.**
13 Q And the way it would affect it is
14 generally to decrease the compactness score if
15 there's a natural boundary that's a squiggly line
16 as opposed to a straight line?
17 **A Some of them. Probably not Reock as**
18 **much as Polsby-Popper or Schwartzberg. They're**
19 **measuring different things. So...**
20 Q The Reock score, it would, to the extent
21 that the area of the district is smaller to where
22 there are the indents of the river, right, as
23 opposed to a straight line that went from the very
24 edge of all of the --
25 (Cross-talk.)

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1 **A Right, right. But, you know, I guess it**
 2 **depends on how much the river is winding and how**
 3 **many indents there are. It might not make a huge**
 4 **difference. It might make a difference.**
 5 MR. GABER: And let's pull up as
 6 Exhibit 11 the Bismarck Close Up Enacted Plan.
 7 MR. PHILLIPS: I'll just object to any
 8 questioning on this exhibit for the same reason,
 9 it's outside the scope of Dr. Hood's opinion and
 10 work on this case.
 11 (Exhibit Hood-11 marked for
 12 identification and attached to the transcript.)
 13 BY MR. GABER:
 14 Q And this is a close-up of the enacted
 15 districts passed by the legislature in the
 16 Bismarck area.
 17 Are there any districts here that appear
 18 to you to be not reasonably compact?
 19 **A Well, I don't know about reasonably.**
 20 **Again, I would calculate the scores for these. 34**
 21 **is going to be less compact by some measures.**
 22 Q Any other ones?
 23 **A Well, I mean, we would derive scores for**
 24 **all of these, and we can make comparisons. But**
 25 **let's say 34 in this map is probably the least**

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1 **compact. I mean, I can't see all of 31, 33,**
 2 **et cetera, 8, so I don't know about those.**
 3 Q So here you would say 34 is less compact
 4 than the others, but you wouldn't go so far as to
 5 say that it's not reasonably compact?
 6 **A Not necessarily. But again, I would**
 7 **probably need some more information on this.**
 8 Q So in your Virginia report, one of the
 9 things you did is compare to other districts in
 10 the state to see whether the challenged districts
 11 were at or perhaps better than some of the other
 12 districts in the state, right?
 13 **A That's correct, yes.**
 14 Q So that is actually the type of analysis
 15 that one would do -- it's one type of analysis you
 16 could do in determining whether a district is
 17 sufficiently or reasonably compact?
 18 **A Yes, and it's certainly a comparison**
 19 **I've made in the past. So...**
 20 Q And, in fact, in your report in this
 21 case, you compared the plaintiffs' proposed
 22 districts to the other districts enacted by the
 23 legislature?
 24 **A Yes. That was the primary comparison I**
 25 **was making, yes.**

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1 Q Okay. So in your view, looking at the
 2 maps and comparing them is actually totally within
 3 the scope of the work that you did?
 4 **A I believe so, yes.**
 5 Q Okay. Now -- and I can pull up the
 6 compactness report if that would be helpful, or I
 7 could pull up the spreadsheet that you created.
 8 But is it your understanding that each
 9 of the enacted districts in the North Dakota state
 10 legislative plan exceed the compactness scores
 11 that you analyzed for the challenged districts in
 12 the Virginia case?
 13 Let me rephrase that because I'm not
 14 sure that's entirely correct.
 15 That the least compact district in the
 16 Virginia case that you found to be compact had a
 17 lower compactness score than all of the enacted
 18 North Dakota state legislative districts.
 19 Does that sound right to you?
 20 **A It sounds right, but I don't know. I**
 21 **mean --**
 22 MR. PHILLIPS: Just note my objection.
 23 Objection, outside the scope of the opinion and
 24 calls for speculation.
 25 Q So you recall the one district had a

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1 Reock score of .15. Do you recall that, in the
 2 Virginia case?
 3 **A Yes.**
 4 Q I think that was District 28.
 5 **A We can certainly make that comparison,**
 6 **obviously.**
 7 Q And if we make that comparison, that
 8 district had a lower compactness score than any of
 9 the North Dakota enacted districts?
 10 **A Well, again, if I can see, then I could**
 11 **tell you.**
 12 Q Yeah. Let me do that for you.
 13 This is not an exhibit that I sent to
 14 the court reporter, but what I'm going to do, if
 15 I'm allowed to, is share my screen and show you
 16 the spreadsheet that you produced in discovery.
 17 Does that work?
 18 **A Sure.**
 19 MR. PHILLIPS: Is this the one that was
 20 produced in response to the subpoena to Dr. Hood?
 21 MR. GABER: It came with the -- I think
 22 that's the same as the one that came with the
 23 initial report. But that's what it is.
 24 THE WITNESS: I think I sent it again,
 25 possibly.

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1 MR. PHILLIPS: I'm sorry, Mark. I think
2 we named that file with, like, a Bates stamp
3 number for just reference purposes, the one that
4 Dr. Hood produced. That might be a good way to
5 reference it.
6 MR. GABER: All right. That works.
7 (Reporter interruption.)
8 MR. GABER: So this is Bates stamped
9 HOOD-0001. I put it in the chat, and I am going
10 to -- since I put it in the chat, can you all do
11 the screen share? Let me do it because I'm going
12 to do some sorting functions.
13 A/V TECH: Not a problem. I can also
14 allow you to control the PC.
15 MR. GABER: That's a bad idea.
16 (A discussion was held off the record.)
17 (Exhibit Hood-12 marked for
18 identification and attached to the transcript.)
19 BY MR. GABER:
20 Q So this is the Excel spreadsheet that
21 you produced -- or you created with the
22 compactness scores for the enacted districts in
23 the North Dakota legislative plan.
24 Is that right?
25 A Yes.

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1 Q So I'm going to use the sort function
2 here and sort the Reock scores from -- well, let's
3 see. I don't want to sort it alphabetically.
4 Let's see if this works.
5 All right. So in the enacted plan, do
6 you see that the lowest Reock score is 0.17 for
7 District 34?
8 A Yes.
9 Q And that's higher than the District 28
10 from the Virginia case that was 0.15, correct?
11 A Correct.
12 Q And in the Virginia case, you found that
13 District 28 was compact, correct?
14 A I think I said reasonably compact was
15 the term. So...
16 Q Okay. So using that measure, then it
17 would appear as though the North Dakota
18 legislature -- every one of the districts would
19 satisfy that metric of reasonable compactness
20 because they're all higher than the score for the
21 Virginia district you likewise found to be
22 reasonably compact.
23 Is that fair?
24 A That's a true statement. They're all
25 higher than 0.15.

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1 Q And then I'm going to sort by the
2 Polsby-Popper scores. And here, the lowest
3 Polsby-Popper score is again District 34, and
4 actually, it matches District 46. They're both
5 0.19.
6 Do you see that?
7 A Right.
8 Q Now, we can pull it up again, but in the
9 Virginia case, the challenged districts, the
10 Polsby-Popper scores ranged from 0.08 to 0.14.
11 Does that sound right to you?
12 A If that's -- if you're representing
13 that's what it is, then --
14 Q I have it in front of me.
15 A Okay. Okay.
16 (Cross-talk.)
17 Q So assuming that's correct -- and I
18 think we actually -- when it was up in front of
19 you, I think you testified about it.
20 The 0.19 that's the lowest in the
21 enacted plan for North Dakota would be higher than
22 any of the six that were challenged in Virginia
23 that you found to be reasonably compact?
24 A Yes.
25 Q And so using that comparison, under that

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1 framework you employed, all of the North Dakota
2 enacted districts would likewise be reasonably
3 compact?
4 A Under that framework, yes.
5 Q And you don't see anything wrong with
6 that framework, right? It was the framework you
7 adopted and applied in the Vesilind case?
8 A Yes, that's correct.
9 Q And so to the extent a district falls
10 within the range of the enacted North Dakota
11 legislative districts, it too would qualify as a
12 reasonably compact district?
13 A Well, at least compared to those
14 Virginia districts.
15 Q And compared to the North Dakota
16 districts?
17 A Well, I mean, we can make a comparison
18 within the North Dakota districts if we're looking
19 within a state plan.
20 Q But to the extent that the lowest North
21 Dakota district is reasonably compact by the
22 method that you have applied in cases, then a
23 district that's higher than that district, or at
24 least equal to or higher, would itself be
25 reasonably compact?

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1 MR. PHILLIPS: Objection, calls for a
 2 legal conclusion, calls for speculation.
 3 **A Based on that Virginia comparison I did,**
 4 **yes. Again, that was in Virginia. So it was a**
 5 **state-specific comparison.**
 6 Q Although part of that was not
 7 state-specific; it was looking at -- one of the
 8 three methods you employed was to use the paper
 9 that Prof. Pildes and Niemi had written, correct?
 10 **A That's correct. I did look at that.**
 11 Q And all of the North Dakota enacted
 12 state legislative plans are reasonably compact
 13 under that metric, correct?
 14 **A Virginia?**
 15 Q All of the North Dakota --
 16 **A All the North Dakota -- well, they're**
 17 **all higher than that, yes.**
 18 Q And so employing that methodology, which
 19 you have in the past, would lead you to conclude
 20 that all of the enacted North Dakota state
 21 legislative districts are reasonably compact?
 22 MR. PHILLIPS: Objection, outside the
 23 scope of his opinion.
 24 **A Well, I think it was, quote,**
 25 **sufficiently compact, unquote, but...**

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1 Q Okay. Do you see a different between
 2 sufficiently compact and reasonably compact?
 3 **A I don't know. I mean, for some reason,**
 4 **I chose to use that qualifier, so I'll stick with**
 5 **it.**
 6 Q So in your expert report, when you were
 7 assessing District 9 -- or rather plaintiffs'
 8 demonstrative versions of District 9, you compared
 9 it to the other enacted legislative districts, and
 10 then you also narrowed and compared it to the
 11 enacted version of District 9 in terms of
 12 compactness.
 13 Does that sound right to you?
 14 **A Yes, that's correct. That's fair.**
 15 Q And I take your point on the first score
 16 to be that when compared to other North Dakota
 17 districts, the demonstrative districts were on the
 18 lower end of the statewide districts.
 19 Is that fair?
 20 **A In terms of ranking, yes.**
 21 Q But they were not the lowest, right?
 22 **A I don't think -- I don't think any of**
 23 **them were ever the lowest, no.**
 24 Q And we've established that, by your own
 25 methodology that you've employed in the past, that

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1 all of the North Dakota enacted districts are
 2 sufficiently or reasonably compact?
 3 MR. PHILLIPS: Object to the form.
 4 **A Well, again, comparing it to that**
 5 **Virginia case, they're above those threshold**
 6 **levels, yes.**
 7 Q And so the same would hold true for
 8 plaintiffs' demonstrative districts; they are both
 9 above the Virginia level that you found to be
 10 compact, but they're also above other districts
 11 within the North Dakota plan that you also find to
 12 be sufficiently compact.
 13 Is that right?
 14 **A That's correct. None of the**
 15 **demonstrative districts are at the -- are the**
 16 **lowest -- literally the lowest in the state plan.**
 17 Q And with respect to your -- and they're
 18 higher than the Virginia plan as well, correct?
 19 **A Yes, that's correct.**
 20 Q Now, you spend a bit of time comparing
 21 plaintiffs' demonstrative districts to the enacted
 22 version of District 9 in terms of compactness,
 23 correct?
 24 **A Yes.**
 25 Q And in terms of the other districting

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1 principles that you looked at, that's your main
 2 comparison is between the proposed District 9 by
 3 the plaintiffs and the enacted version of
 4 District 9, right?
 5 **A Yes.**
 6 Q The enacted version of District 9 is a
 7 rectangle, more or less, right?
 8 **A Fair, yes.**
 9 Q And do you understand the question, in
 10 terms of compactness for Voting Rights Act
 11 purposes, to be a comparison to a perfect
 12 rectangle, or is it about whether or not the
 13 district is reasonably compact standing alone?
 14 MR. PHILLIPS: Object to form.
 15 **A My understanding is that it would be**
 16 **reasonably compact on its own.**
 17 Q And so the real comparison that we would
 18 want to do is determine whether or not the
 19 proposed district standing on its own is
 20 reasonably compact?
 21 **A Well, and we can do that from my report.**
 22 Q Correct.
 23 **A It places the demonstrative districts**
 24 **within the statewide plan as a whole. So...**
 25 Q Right. And I think we just established

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1 that compared -- given that the -- your conclusion
 2 that all of the enacted districts are reasonably
 3 compact or sufficiently compact, whichever term we
 4 want to use, given that the demonstrative
 5 districts fall within that range, they too would
 6 be characterized as sufficiently or reasonably
 7 compact?
 8 **A Again, with the caveat based on what I**
 9 **said in the Virginia case, yes.**
 10 Q On page 6 of your report -- and this is
 11 with respect to demonstrative District 1. In the
 12 first paragraph under part A there, the last
 13 sentence, you note that the part of the boundary
 14 for the Spirit Lake reservation is contiguous with
 15 a portion of the demonstrative District 1
 16 boundary.
 17 Do you see that?
 18 **A Yes.**
 19 Q What is the salience of that
 20 observation?
 21 **A I don't know that it's -- I don't know**
 22 **how important that is. That's just an**
 23 **observation, which is the case, that part of the**
 24 **reservation boundary is part of the boundary for**
 25 **the district. I'm just -- it's just a statement.**

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1 Q I just want to know what your -- I need
 2 to know what your opinions are about it. So I
 3 guess I didn't understand --
 4 **A Right. I don't know that it means any**
 5 **more than literally what it says.**
 6 Q Okay. That actually -- one of the
 7 state's -- or one of the legislature's criteria
 8 from its report is respecting the boundaries of
 9 the reservations in the state.
 10 Do you recall that?
 11 **A Yes, that's correct.**
 12 Q And we'll bring up the map in a bit, or
 13 we can do that now if you'd like. But the enacted
 14 plan, District 15 also follows the boundary of the
 15 Spirit Lake reservation in the same manner that
 16 plaintiffs' demonstrative plan does.
 17 Does that seem right to you?
 18 **A Yeah. I do recall that, yes.**
 19 Q In your analysis of the compactness of
 20 plaintiffs' proposed demonstrative districts, you
 21 did not seek to compare the scores to other
 22 districts that courts have upheld under the VRA as
 23 reasonably compact, correct?
 24 **A That's correct, yes.**
 25 Q That's the type of analysis that you did

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1 in the Vesilind case -- or that's one of the types
 2 of analyses that you did in the Vesilind case,
 3 however, right?
 4 **A Well, in that -- again, in that**
 5 **particular case, there was a Virginia state court**
 6 **that had made certain specific observations about**
 7 **compactness in districts. So...**
 8 Q If the -- say the U.S. Supreme Court has
 9 determined a particular district to be reasonably
 10 compact for VRA purposes, one thing that could be
 11 done is to look at the compactness scores of that
 12 district and compare it to a proposed district to
 13 see whether it satisfies the test for reasonable
 14 compactness for VRA purposes, right?
 15 MR. PHILLIPS: Objection, speculation,
 16 calls for a legal conclusion.
 17 **A That comparison could be made, yes.**
 18 Q And that would be a similar type
 19 comparison to what you did in Virginia except in
 20 the context of the VRA rather than the state
 21 constitution, right?
 22 **A Yes.**
 23 Q That's not something that you did here,
 24 right?
 25 **A Correct.**

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1 Q Now, Dr. Collingwood noted in his report
 2 that the overall compactness score for the plan as
 3 a whole in the enacted plan was the same as that
 4 in plaintiffs' demonstrative plans.
 5 You don't dispute his report in that
 6 regard, correct?
 7 **A Yeah, I think he was just looking at**
 8 **maybe the mean score for the state.**
 9 **Is that correct?**
 10 Q I think so.
 11 **A Something like that. No, not**
 12 **necessarily, no.**
 13 Q And one of the things you noted in your
 14 Vesilind report -- and we can pull that back up,
 15 for you to see, page 22.
 16 MR. PHILLIPS: Same objection on this
 17 exhibit, that it's outside the scope.
 18 Mark, maybe a short bio break whenever
 19 it makes the most sense.
 20 MR. GABER: Yep.
 21 Q So in this part of your report,
 22 Dr. Hood, for Vesilind, for the Virginia case, you
 23 were responding to Prof. McDonald's analysis where
 24 he had reported the degradation in compactness
 25 scores from alternative districts that the

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1 plaintiffs were proposing to those same numbered
2 districts in the enacted plan.
3 Does that sound familiar?
4 **A A little bit, yes.**
5 Q And the point you make here is that, you
6 know, sometimes it doesn't make sense to compare a
7 numbered district in one plan to a numbered
8 district in another plan because those district
9 boundaries are different, and it might make sense
10 to look more at the statewide results for the map
11 as a whole.
12 Does that fairly describe the point
13 you're making here?
14 **A Let me look at this for a second.**
15 Q Sure.
16 **A Yeah, I do say that here.**
17 Q So it does make sense, in this context
18 as well where the similar situation is happening,
19 to -- where there's a numbered district compared
20 to another numbered district in a different plan
21 that covers different territory, that looking as
22 well at the plan as a whole is a useful piece of
23 information to help disentangle those differences.
24 Is that fair?
25 **A Well, I think that's fair.**

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1 **Again, I'm responding to a particular**
2 **measure that Prof. McDonald has been utilizing in**
3 **this particular -- in that case that we've been**
4 **talking about in Virginia.**
5 Q And that's the degradation from --
6 **A Yes, yes.**
7 Q -- from the alternative map to --
8 **A Degradation measure.**
9 MR. GABER: Well, let's go ahead and
10 take a break now.
11 (Recess from 3:08 p.m. until 3:19 p.m.)
12 BY MR. GABER:
13 Q Dr. Hood, welcome back from the break.
14 Now, I am going to mark as an exhibit --
15 I think we are on 13 -- a document that's titled
16 Plaintiffs Demonstrative Plan 1 Map.
17 (A discussion was held off the record.)
18 (Exhibit Hood-13 marked for
19 identification and attached to the transcript.)
20 BY MR. GABER:
21 Q Dr. Hood, do you recognize this as the
22 enacted plan statewide view of -- I'm sorry. Let
23 me start that over.
24 Do you recognize this as Plaintiffs'
25 Demonstrative Plan 1 for the entire state view?

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1 **A Yes, from what I recall, yes.**
2 Q And if you look at District 9 in this
3 plan, in Benson County, do you see that it is --
4 the northern border of Benson County is a very
5 squiggly line that is the Devils Lake boundary?
6 **A Okay. I mean, I see what you're talking**
7 **about, yes.**
8 Q And then just below that, do you see
9 another river boundary that's the Sheyenne River
10 in Eddy County?
11 **A Well, I'm just going to take your word**
12 **for it.**
13 Q You didn't look --
14 **A I couldn't tell you where the Sheyenne**
15 **River was necessarily. So...**
16 Q So in looking at the map, you didn't
17 look to any of the -- well, when you were doing
18 the compactness analysis, did you look at the
19 visual -- did you have a visual look at the map?
20 **A Sure, sure.**
21 Q And did you notice the river and lake
22 boundaries?
23 **A Yes, I did.**
24 Q Did you do anything to determine whether
25 those natural boundaries were affecting the

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1 compactness scores?
2 **A Well, those boundaries, if they are**
3 **affecting the scores, are going to get picked up**
4 **in the scores that I ran. So...**
5 Q Right. But the effect wouldn't, right;
6 you would just get the score?
7 **A Well, to compare -- yeah, to compare an**
8 **effect, though, you'd have to have some**
9 **hypothetical to compare against it, I guess is**
10 **what I would say.**
11 Q So as we discussed earlier, I think you
12 said in particular the Polsby-Popper and maybe the
13 Schwartzberg, because those are based on
14 perimeter, those scores decreased as a result of
15 these types of squiggly river boundaries?
16 **A More so than Reock would, yes.**
17 Q So if this were a straight line, the
18 compactness score for proposed District 9 here
19 would be higher?
20 **A Well, most likely -- I mean, this map is**
21 **not super detailed, but most likely, if this were**
22 **a straight line instead of following a river**
23 **boundary, then yes, the perimeter scores would**
24 **probably be higher.**
25 Q And this river -- sorry -- the Devils

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1 Lake boundary, that is actually the county
 2 boundary as well; the county itself has that --
 3 Benson County itself has that sort of squiggly
 4 Devils Lake boundary.
 5 Is that right?
 6 **A From what I recall, yes.**
 7 MR. GABER: Okay. We can take this down
 8 for now.
 9 Q Now, looking back at your report,
 10 page 4, this is the analysis of LD 15 section of
 11 your report?
 12 **A Okay.**
 13 Q It's correct, right, that in your
 14 report, you don't contest that with respect to
 15 just looking at District 15, that Gingles prongs 2
 16 and 3 are established there.
 17 Is that right?
 18 **A So say that one more time.**
 19 Q That Gingles prongs 2 and 3, you agree,
 20 are established with respect to District 15 in the
 21 enacted plan?
 22 **A Well, I state that, so yes.**
 23 Q Okay.
 24 **A Yeah, I mean, it's stated there in the**
 25 **report.**

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1 Q What you do say, though, is that Gingles
 2 prong 1 is not established because District 15 is
 3 not a majority Native American district.
 4 Do I have that right?
 5 **A Yeah, that's correct.**
 6 Q Now, I think we talked a little bit
 7 earlier at the beginning of our conversation today
 8 about this, but you understand that Gingles
 9 prong 1 is focused on whether or not an
 10 alternative district to the enacted one that's
 11 challenged can be drawn in which there would be a
 12 majority Native population.
 13 Is that correct?
 14 **A Yes.**
 15 Q And so this conclusion about Gingles
 16 prong 1 here in your report isn't actually about
 17 Gingles prong 1; it's just an observation that
 18 enacted District 15 isn't itself a majority Native
 19 voting age population district, correct?
 20 **A Correct.**
 21 Q And you don't dispute that the
 22 plaintiffs' demonstrative plans are majority
 23 Native voting population districts, correct?
 24 **A Correct. They are.**
 25 Q And they include the Native population

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1 that's currently included in enacted District 15,
 2 right?
 3 **A Correct. I guess I would say most of**
 4 **it. You know, I'd have to do, like, a detailed**
 5 **analysis to say everybody was included. But most**
 6 **people, yes, are included.**
 7 Q And so in that respect, the
 8 demonstrative districts are themselves Gingles
 9 prong 1 demonstrative districts that satisfy the
 10 requirement there, right?
 11 **A Well, they're majority Native American**
 12 **districts, yes.**
 13 MR. GABER: I'll mark as Exhibit 14 the
 14 document titled Government Admin Committee Report.
 15 (Exhibit Hood-14 marked for
 16 identification and attached to the transcript.)
 17 BY MR. GABER:
 18 Q Dr. Hood, do you recognize this as --
 19 it's a long report of the legislature, but it
 20 includes other things. But among what it includes
 21 is the joint redistricting committee's discussion
 22 of the history of redistricting in North Dakota,
 23 the legal framework, and then a discussion of the
 24 priorities that guided this legislative
 25 redistricting process.

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1 **A Yes, from what I recall, that's correct.**
 2 Q And if we can turn to page 28 of the
 3 document, please. And maybe scroll down a bit,
 4 please. Down to the Population Deviation section.
 5 So you see the section here titled
 6 Population Deviation?
 7 **A Yes.**
 8 Q And do you see that the legislature sets
 9 as its goal that the overall range for the plan be
 10 within 10 percent population deviation?
 11 **A Correct.**
 12 Q And they note that in the plan being
 13 considered by the committee -- and I think you
 14 would agree that that's the plan that actually was
 15 adopted -- the overall deviation was 9.87 percent
 16 with the largest district being 4.88 percent over
 17 ideal and the smallest 4.99 below.
 18 Do you see that?
 19 **A Yes.**
 20 Q Now, nowhere here does the legislature
 21 indicate that it has some preference for being
 22 close to zero as opposed to being within the
 23 10 percent range, right?
 24 **A Correct.**
 25 Q If you could turn to your report on

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1 page 6, please. And this is again with respect to
 2 demonstrative District 1. The 3.14 percent that
 3 demonstrative District 1 deviates, that's within
 4 the goal of the legislature, right?
 5 **A It would be in that plus or minus**
 6 **5 percent, yes.**
 7 Q Have you looked to rank demonstrative
 8 District 1 with respect to the other districts as
 9 you had done for the compactness scores?
 10 **A I don't recall doing that comparison.**
 11 Q Would you be surprised to find that it's
 12 about in the middle of the districts in terms of
 13 population deviation?
 14 **A Not necessarily, no.**
 15 Q It's actually about within the middle of
 16 the 5 percent -- 0 to 5 percent, right?
 17 **A Right.**
 18 Q So the demonstrative district satisfies
 19 the legislature's goal for population deviation?
 20 **A Again, it certainly falls within those**
 21 **bounds.**
 22 Q And that's the case with respect to both
 23 demonstrative districts?
 24 **A I believe so, yeah. The other was plus**
 25 **4.53 percent. So...**

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1 MR. GABER: Now, if we could mark as
 2 Exhibit 15 the file Enacted Map Statewide.
 3 And let me get that over to you, David.
 4 (Exhibit Hood-15 marked for
 5 identification and attached to the transcript.)
 6 BY MR. GABER:
 7 Q Dr. Hood, do you recognize this as the
 8 2021 Enacted State Legislative Plan for North
 9 Dakota?
 10 **A Yes.**
 11 MR. GABER: And LaVar, would you mind
 12 zooming in to the top right part of this with the
 13 yellow and pink district. Thank you.
 14 Q Now, for the district -- I'm sorry. For
 15 the state house map, District 9A -- District 9
 16 splits Rolette County, Towner County, and Cavalier
 17 County.
 18 Do you see that?
 19 **A Yes.**
 20 Q So that's three out of three of the
 21 counties that are included, the enacted plan
 22 splits for the state house map.
 23 Is that right?
 24 **A It's a little hard to see. Is Rolette**
 25 **County split within District 9?**

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1 Q Yeah. You see the area north of 9A
 2 there, the gray kind of more faded lines represent
 3 the county borders.
 4 **A Right. But is Rolette County wholly**
 5 **contained within LD 9, I guess is the question.**
 6 Q So I'm talking about the state house
 7 version of the map.
 8 **A Okay. Fair enough. Yes.**
 9 Q So for purposes of the state house,
 10 within District 9, Rolette, Towner, and Cavalier
 11 County are all split?
 12 **A Yes, yes.**
 13 Q Now, if you could look at -- we'll keep
 14 this up on the screen, please. But if you can
 15 look at page 7 of your report. In the Communities
 16 of Interest section on the bottom of page 7.
 17 **A Okay.**
 18 Q You talk about county splits, and then
 19 you say, In the enacted plan, LD 9 splits only
 20 Towner County.
 21 Do you see that?
 22 **A Yes.**
 23 Q Now, setting aside the state house
 24 version where all three of the counties are split,
 25 with respect to the state senate version of

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1 District 9, the entire district, your statement in
 2 your report, that's not correct, right? You see
 3 that it splits both Cavalier and Towner counties?
 4 **A It should say Cavalier as well.**
 5 Q So that's two of the three counties are
 6 split in the state senate version of District 9?
 7 **A Right.**
 8 Q And that's an error in your report, I
 9 gather?
 10 **A Yeah, it definitely should say Cavalier**
 11 **County.**
 12 Q And then let's pull up -- let's pull
 13 back up, please, Exhibit 13. We're going to go
 14 back and forth between these. 13 is the
 15 Demonstrative Plan 1. If you could zoom in to the
 16 District 9 and 15 area.
 17 So you note that plaintiffs'
 18 demonstrative plan 9 -- in your report, you note
 19 that it splits Eddy County, Pierce County, and
 20 Rolette County, right, so that's three of the four
 21 counties it covers.
 22 **A Yes.**
 23 Q Now, the split that's contained in Eddy
 24 County, that's the same exact split that the
 25 enacted plan District 15 has for Eddy County,

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1 right?

2 **A Right.**

3 Q And that's to adhere to the boundaries

4 of the Spirit Lake reservation, which is along the

5 Sheyenne River.

6 Is that right?

7 **A Right. That's where the reservation**

8 **boundary would be, yes.**

9 Q And that's one of the state's -- in its

10 committee report, that's one of the criteria,

11 adhering to the boundaries of reservations?

12 **A Yes, yes.**

13 Q So --

14 (Cross-talk.)

15 Q Sorry, go ahead.

16 **A I'm saying, that's correct, it was in**

17 **that report.**

18 Q So one of the four splits -- sorry. One

19 of the three counties that are split in

20 plaintiffs' demonstrative plan, plan 1, is to

21 adhere to the requirement of the legislature to

22 follow the reservation boundary, and that's why

23 Eddy County is split?

24 **A Well, it certainly keeps the reservation**

25 **within 9, yes.**

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1 Q And by comparison to enacted plan's

2 state house map, the same number of counties are

3 split in plaintiffs' demonstrative plan for the

4 state house, which is the whole district, as in

5 the enacted plan, correct?

6 **A Three and three, yes.**

7 Q Let's switch back to the enacted map,

8 please, which was Exhibit 15. And take a look at

9 District 15 here.

10 District 15 includes all of Ramsey

11 County, but then part of Towner County, part of

12 Benson County, and part of Eddy County, right?

13 **A Right.**

14 Q So District 15 has three split counties

15 and one whole county?

16 **A Yes.**

17 Q And that's the exact same count as

18 Plaintiffs' Demonstrative Plan 1, correct, three

19 counties that are split and one whole county?

20 **A For demonstrative District 1, right?**

21 Q Right.

22 **A Yes.**

23 Q And as we mentioned earlier, one of

24 those boundaries is exactly the same. That's the

25 Eddy County split.

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1 **A Right. That's correct.**

2 Q So on this score of county splits,

3 plaintiffs' Demonstrative District 1 is

4 essentially the same on that score as the enacted

5 Districts 9 and 15?

6 **A Well, in 9, I guess if you go to the**

7 **house districts, if that's what we're talking**

8 **about, yes.**

9 Q And for the state senate, two-thirds of

10 the counties in District 9 are split, two of the

11 three?

12 **A That's correct.**

13 Q And it's the same entirely as

14 District 15, three split counties and one whole

15 county, right?

16 **A Correct.**

17 Q And the plaintiffs' demonstrative

18 District 1 puts Benson County back together whole,

19 right?

20 **A I believe so, yes.**

21 Q And we can take a look at that if you'd

22 like to see it.

23 **A Okay. I mean, I think that's correct.**

24 MR. GABER: That's Exhibit 13. The

25 third to the last tab there, LaVar. Thank you.

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1 Q So you see Benson county is whole there?

2 **A Yes, yes.**

3 Q Your Communities of Interest discussion

4 in your report focuses on county splits, right?

5 **A Yes.**

6 Q That term means more than split

7 counties, right?

8 **A Well, communities of interest can be**

9 **more than counties, certainly.**

10 Q Did you analyze any communities of

11 interest in your report other than counties?

12 **A No.**

13 Q Did you -- we've talked about how

14 respecting reservation boundaries is a priority of

15 the legislature, right?

16 **A Correct, yeah.**

17 Q And did you look to see whether the

18 enacted plan respected both the reservation

19 boundaries and the off-reservation trust land for

20 the Turtle Mountain tribe?

21 **A Well, I believe it did. I'm not sure**

22 **about the trust land. But the reservation was**

23 **contained within the district.**

24 Q And -- but you don't -- I guess earlier

25 we talked about how you don't have any particular

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1 knowledge or experience about Native American
2 issues generally or voting patterns or
3 sociological history or whatnot, right?
4 **A That's correct.**
5 Q Would it surprise you to know that the
6 trust lands are important, you know, holdings for
7 the Turtle Mountain tribe?
8 **A No.**
9 Q But you didn't look to see whether the
10 enacted plan keeps those in one district?
11 **A Well, I used the reservation boundaries**
12 **as defined by the census bureau, and under that**
13 **definition, it is contained within the district.**
14 Q You would agree that --
15 **A I'm not sure -- you know, I'm honestly**
16 **not sure that -- whether that contained these**
17 **trust lands that we're talking about or not. I**
18 **just don't know the answer to that. So...**
19 Q Okay. Would you agree that that would
20 be a type of community of interest consideration
21 that could be taken into account, whether the
22 reservation and the trust lands are included in a
23 single district?
24 **A Well, certainly, it could.**
25 Q Now, looking --

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1 MR. GABER: Maybe, LaVar, if you don't
2 mind zooming out a little bit here so we can see
3 the full map.
4 Q Now, is it your understanding that aside
5 from -- this is Plaintiffs' Demonstrative Plan 1.
6 Aside from the changes to District 9, 15, and then
7 some minor changes to 14 and 29, the rest of the
8 plan reflects the plan that was enacted by the
9 legislature?
10 **A From what I recall, outside of those**
11 **changes, that would be correct, yes.**
12 Q Now, with respect to some of the other
13 districts in the plan, you understand that rural
14 North Dakota is somewhat sparsely populated,
15 right?
16 **A Certainly, yes.**
17 Q So when that's the case, the
18 geographical size of districts has to increase
19 because there's -- you have to go further to find
20 population to get an equally populated district.
21 Does that seem fair?
22 **A Yes.**
23 Q And there are other districts in the
24 state's enacted plan that span a larger geographic
25 distance than does District 9 in plaintiffs'

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1 demonstrative plan, correct?
2 **A Yes.**
3 Q One example is its neighboring district,
4 I believe that's 8.
5 MR. GABER: Can you Zoom into the gray
6 district for me, LaVar.
7 Q I think it's actually not 8, I think
8 it's 6.
9 Do you see that?
10 **A 6.**
11 Q So 6 is larger in geographic size than
12 demonstrative District 9, right?
13 **A Looks to be, yes.**
14 Q It stretches further north to south than
15 does District 9 in this map?
16 **A Yes.**
17 Q And let's zoom out again, please.
18 District 14 stretches from Pierce
19 County -- the northern boundary of Pierce County
20 all the way to the southern boundary of -- is that
21 Kidder County?
22 Do you see that?
23 **A Yes.**
24 Q And that's a larger geographic distance
25 than demonstrative District 9, correct?

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1 **A Yes.**
2 Q If you look at District 28, the
3 teal-colored district in the southeastern part of
4 the state, that district looks to be similar or
5 possibly slightly larger in its east-west span as
6 is demonstrative District 9 in its north to south
7 span, right?
8 **A Well, they certainly look on par. I**
9 **mean, I don't know without measuring. So...**
10 Q District -- the green district in the
11 corner, I believe -- is that 39?
12 MR. GABER: Can you zoom to the
13 southwest corner for me, please, LaVar. Yeah,
14 District 39, north to south. Maybe scroll back
15 out so we can see the whole state again. Sorry.
16 Q That looks to be slightly larger north
17 to south than demonstrative District 9 in this
18 plan, right?
19 **A Potentially, yes.**
20 Q Do you see, in the western part of the
21 state, District 23, the kind of grayish-blue
22 colored district?
23 **A Yes.**
24 Q How would you describe the shape of that
25 district?

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1 **A I don't know. I think it would be --**
 2 **it's difficult to come up with an adjective.**
 3 Q I think it looks like a dinosaur.
 4 **A Okay. Well -- I don't know. That's not**
 5 **what was coming to my mind.**
 6 Q Or maybe a baby dinosaur.
 7 What about the -- you see the sort of
 8 neck that connects its body to its head?
 9 **A Yes, I see that.**
 10 Q How would you characterize that?
 11 **A Well, a neck. I mean, I think that's**
 12 **probably a pretty good way to describe it. A**
 13 **bridge.**
 14 Q Would you describe that as a narrow
 15 bridge?
 16 **A Well, it's fairly narrow. I mean, the**
 17 **district itself is not huge geographically. But**
 18 **that's certainly -- I mean, I guess I could fairly**
 19 **say that's probably the narrowest part of the**
 20 **district.**
 21 Q And you describe in your report
 22 plaintiffs' demonstrative District 9 as having a
 23 land bridge.
 24 Do you recall that?
 25 **A Yes.**

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1 Q Can you tell me on the map what the land
 2 bridge is?
 3 **A Well, on this map, for instance, here,**
 4 **it would be that area to the right or to the east**
 5 **of where it literally says Pierce, North Dakota,**
 6 **where that lettering is there. So that's sort of**
 7 **the bridge at that point. So...**
 8 Q And do you understand that that's a
 9 complete voting precinct from Pierce County?
 10 **A Well, I didn't -- I don't know that I**
 11 **would recall that, just sitting here.**
 12 Q Did you look to see -- I notice that you
 13 produced split reports for municipalities.
 14 You didn't encounter any municipal
 15 splits in Plaintiffs' Demonstrative Plan 1?
 16 **A Not that I recall.**
 17 Q It wasn't in your report, but it was in
 18 the data, I noticed.
 19 **A Right, right.**
 20 Q And did you analyze to see whether there
 21 were precinct splits? I noticed that there were
 22 notes that you'd written about precinct splits.
 23 **A I don't think I ever got that far.**
 24 Q And so adhering to voting tabulation
 25 precincts is also a traditional districting

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1 principle.
 2 Is that fair?
 3 **A It's one of the things that can be**
 4 **looked at, yes. I mean, precincts aren't**
 5 **necessarily communities of interest. But**
 6 **sometimes courts have looked at whether precincts**
 7 **are split or not. That's true.**
 8 **I say they're not communities of**
 9 **interest because most people don't think about,**
 10 **you know, a precinct as a community -- as a local**
 11 **community necessarily. They could be, but not**
 12 **necessarily. So...**
 13 Q It eases the burden on election
 14 administrators to not change the precincts.
 15 Is that fair?
 16 **A It probably makes that part of things**
 17 **easier, yes.**
 18 Q And so to the extent -- Dr. Collingwood
 19 noted in his report that demonstrative plan 1
 20 adheres to all of the precinct lines -- the new
 21 precinct lines that it touches.
 22 Do you recall that?
 23 **A Not precisely, but...**
 24 Q You don't have any reason to dispute
 25 that?

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1 **A Not necessarily, no.**
 2 Q And to the extent it does that, that's
 3 one of the criteria that is often followed as a
 4 traditional districting criteria?
 5 **A It is one of the things that is looked**
 6 **at sometimes, yes.**
 7 Q The land bridge that you identify, that
 8 voting precinct in Pierce County, that is not
 9 narrower than -- in fact, it's wider than other
 10 land bridges you see in this map.
 11 Is that fair?
 12 **A Well, it's wider than the one we were**
 13 **talking about in 23, certainly.**
 14 Q Do you see District 8 down there in the
 15 south central part of the state, the purplish-gray
 16 district?
 17 **A Yes.**
 18 Q And do you see how that moves up in sort
 19 of a step pattern to the northwest?
 20 **A Yes.**
 21 Q The bridge that you identify -- the land
 22 bridge you identify in Pierce County in
 23 demonstrative District 9 is larger in size than
 24 District 8's bridge.
 25 Is that fair?

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1 A Looks to be, yes, just looking at the
2 map here.
3 Q Now, you see on the map here, Rolette
4 County and Benson County, they're pretty close to
5 one another.
6 Would you agree?
7 A Yes. Yeah.
8 Q They're just separated by that one
9 voting precinct in Pierce County; the distance of
10 that precinct is the whole distance between
11 Rolette and Benson County?
12 A If that's one precinct, then yes.
13 Q Do you agree that Benson County is
14 physically more proximate to Rolette County than
15 is Cavalier County?
16 A Yes.
17 Q And the enacted version of District 9
18 stretches from Rolette County to Cavalier County,
19 correct?
20 A Correct.
21 Q Do you see that in the enacted plan, the
22 proposed District 15, which is altered to
23 accommodate proposed District 9, is changed to
24 include all of Towner County?
25 A So you said in the enacted plan. You

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1 mean this --
2 Q I'm sorry. I'm reaching the point of
3 the muddled brain.
4 So in the demonstrative plan,
5 plaintiffs' proposed demonstrative plan 1,
6 District 15 includes all of Towner County.
7 Do you see that?
8 A Yes, it appears that that's the case.
9 MR. GABER: And then, LaVar, if you
10 don't mind switching to the enacted map, which is
11 the last tab.
12 Q Do you see that the enacted map,
13 District 15 splits Towner County with District 9?
14 A Yes.
15 MR. GABER: I'm going to mark as
16 Exhibit 16 the file 2012 through 2020 North Dakota
17 Legislative Map.
18 (Exhibit Hood-16 marked for
19 identification and attached to the transcript.)
20 BY MR. GABER:
21 Q So this is -- do you recognize this,
22 Dr. Hood, as the prior decade's legislative plan
23 for North Dakota that was in effect from 2012 to
24 2020?
25 A Yes, yes.

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1 Q Now, do you see that in the prior
2 decade's plan, District 15 included all of Towner
3 County?
4 A Yes.
5 Q And so in plaintiffs' -- in the enacted
6 plan in 2021 splits Towner County between 15 and
7 9.
8 Is that right?
9 A That is correct.
10 Q And so one of the benefits of
11 Plaintiffs' Demonstrative Plan 1 is it returns
12 Towner County in whole to the district in which it
13 previously was retained?
14 A It does do that, yes.
15 Q Now, Benson County, in the prior
16 decade's plan, was split between District 14 and
17 District 23.
18 Do you see that?
19 A Yes. Yes.
20 Q And you'll recall, District 23 in the
21 enacted plan -- and we can look at it if you'd
22 like -- that's that dinosaur district that's now
23 been moved all the way to the other side of the
24 state?
25 A Right, right.

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1 Q And the part of Benson County that
2 includes the Spirit Lake reservation is no longer
3 in District 23, which is now on the other side of
4 the state; instead, it's in District 15.
5 Does that seem right?
6 A So say that one more time. Sorry.
7 Q Yeah. So do you know on this map where
8 the Spirit Lake reservation is?
9 A Yes, yes.
10 Q You see in Benson County there, it's
11 previously in District 23?
12 A Right.
13 Q And so it's now in District 15, right?
14 A Correct, correct.
15 MR. GABER: Let's mark as Exhibit 17 the
16 document Enacted versus Benchmark Core
17 Constituencies Report.
18 (Exhibit Hood-17 marked for
19 identification and attached to the transcript.)
20 BY MR. GABER:
21 Q Dr. Hood, do you recognize this as a
22 report that you produced to us that compares the
23 enacted district boundaries to the -- I'm going to
24 call it the benchmark, the prior decade's map, and
25 reports the percentage of the population of the

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1 district with the highest remaining population in
 2 that district or core constituency?
 3 Is that fair?
 4 **A Yes.**
 5 Q And if we could scroll down, I don't
 6 know what page it is, but it's District 9. So
 7 it's probably page 2 or 3. Looks like right there
 8 at the top of page 3.
 9 So in your report, you talk about core
 10 retention, right, as one of the traditional
 11 districting principles and one of the
 12 legislature's goals?
 13 **A Right.**
 14 Q And so you report that there is a
 15 75 percent core retention for the enacted plan
 16 District 9.
 17 Is that correct?
 18 **A Yes.**
 19 Q And so -- and just so we understand,
 20 from the report, what that means is that the -- in
 21 the new version of enacted District 9, the largest
 22 component of it is old District 9, and that
 23 accounts for 75 percent of new District 9's
 24 population.
 25 Do I have that right?

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1 **A Yes, yeah. Not geography, but**
 2 **population, yes.**
 3 Q Right. Now, in the prior decade, all of
 4 the voters in District 9, which was -- you
 5 understand that was -- mapped the boundaries of
 6 Rolette County, right?
 7 **A Right.**
 8 Q With respect to the state house core
 9 retention, this is only a report for the state
 10 senate core retention, right?
 11 **A Right, correct.**
 12 Q With respect to --
 13 **A I wasn't looking at the subdistricts.**
 14 Q Okay. And with respect to the
 15 subdistricts, some of the -- you know, half or
 16 maybe a little bit more than half of Rolette
 17 County's voters remained in, let's call it the
 18 same -- I guess they're both in new districts for
 19 the house, right?
 20 **A Right.**
 21 Q So essentially, there's zero percent
 22 retention with respect to people staying in the
 23 same district for the state house?
 24 **A For that county?**
 25 Q For District 9's -- for prior

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1 District 9's state house voters. They're entirely
 2 in new state house districts?
 3 **A Well, I mean, so District 9, which**
 4 **includes the house districts, obviously, was**
 5 **comprised in part from its former self. Now, I**
 6 **didn't divide this up into the house districts.**
 7 **So I don't know exactly how that would parse out**
 8 **is what I'm saying.**
 9 Q Yeah. Now, but with respect to
 10 Plaintiffs' -- Plaintiffs' Demonstrative Plan 1,
 11 with the exception of one voting precinct, all of
 12 the Rolette County voters who were previously the
 13 entirety of District 9 are retained within the
 14 same district in plaintiffs' demonstrative plan,
 15 both for the state house and the state senate?
 16 **A Yes, that's correct.**
 17 Q Now, in your report, you talk about how
 18 core retention is a good indicator of incumbency
 19 protection.
 20 Is that right?
 21 **A It's one of them, yes.**
 22 Q The incumbent District 9 state senator,
 23 Richard Marcellais, who was a Native American,
 24 lost re-election in the most recent election,
 25 correct?

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1 **A Yes.**
 2 Q And so at least with respect to him, the
 3 legislature's enacted plan does not satisfy the
 4 incumbency protection goal, correct?
 5 **A Well, he -- I just want to make sure I**
 6 **get all this straight. He previously represented**
 7 **District 9; is that correct?**
 8 Q Since 2006.
 9 **A And so again, 75 percent of his**
 10 **constituents should have followed him across the**
 11 **redistricting cycle into the new District 9.**
 12 Q And so in that respect, the 25 percent
 13 are pretty important that you add, right? Who you
 14 add to the district that needs to expand can play
 15 a big role, depending on voting patterns, in how
 16 the election will have an outcome?
 17 **A Well, it could. I mean, a 75 percent**
 18 **retention is not horrible, I will say. It's not.**
 19 Q What would you --
 20 (Cross-talk.)
 21 **A Three out of four of his former**
 22 **constituents are still with him in the new**
 23 **district. So...**
 24 Q Well, it's a little different than that,
 25 right? 100 percent of his former constituents are

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1 with him in the new district, but three out of
 2 four voters in the new district are new to him.
 3 **A No, three out of four --**
 4 Q Sorry, one out of four.
 5 **A Yes, I would -- okay. You really had me**
 6 **thrown there. I thought maybe I was --**
 7 Q All right. No, no, that was my fault.
 8 But in any event, it wasn't sufficient
 9 for him to be retained as an incumbent?
 10 **A Well, again, core constituencies are one**
 11 **part of incumbent protection or incumbent**
 12 **reelection, but they're not everything related to**
 13 **incumbent reelection. So...**
 14 Q Did you look to -- beyond District 9 in
 15 assessing the enacted plan's performance in terms
 16 of core retention?
 17 **A It doesn't look like it. I mean, it**
 18 **looks like I'm making comparisons here between the**
 19 **enacted plan in specific districts and the enacted**
 20 **plan, specifically LD 9, in the demonstrative**
 21 **districts.**
 22 Q Do you think that the legislature
 23 followed -- or satisfied its goal with respect to
 24 core retention for the plan as a whole?
 25 **A Well, probably so, I would say. You**

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1 **know, in the case of some districts being moved**
 2 **across the state -- and you have to do that. I**
 3 **mean, this doesn't trump other redistricting**
 4 **factors, especially population equality. You're**
 5 **not going to necessarily be able to maximize this**
 6 **in every case.**
 7 Q And do you have, like, a threshold for
 8 what you consider to be a strong core retention?
 9 Is it 50 percent?
 10 **A I don't know -- honestly, I don't know**
 11 **that I've ever come up with a threshold. You**
 12 **know, it ranges -- it's pretty easy to grasp**
 13 **because it ranges from zero to 100, zero percent**
 14 **to 100 percent. I mean, if you're at 50 percent,**
 15 **it would mean that 50 percent of your new**
 16 **constituents are new to you; they didn't follow**
 17 **you across with the old district boundaries.**
 18 **So, you know, so every one of two new --**
 19 **one of two voters in the new cycle are not your**
 20 **prior constituents.**
 21 Q You did not, as part of your report,
 22 examine any of the prior -- other than maybe the
 23 benchmark 2012 to 2020 plan -- did you look at the
 24 2012 to 2020 plan as part of your analysis?
 25 **A Just to the extent to which I needed it**

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1 **to make comparisons.**
 2 Q Did you look at any prior decade's
 3 districting plans for North Dakota legislative
 4 seats to make any comparisons to district
 5 configurations?
 6 **A I did not.**
 7 Q To the extent that there -- is that
 8 something that is relevant, to see how the
 9 legislature has in the past configured districts
 10 to see whether -- to compare districts and see if
 11 they're similar configurations?
 12 **A It could be, but, you know, every**
 13 **redistricting cycle is new, and in this particular**
 14 **case, the job was given over to an ad hoc**
 15 **commission. And of course, the legislature had to**
 16 **approve what the commission did, obviously.**
 17 **But my point being, there are different**
 18 **people in charge of redistricting every time, and**
 19 **so things are not necessarily going to look the**
 20 **same.**
 21 **And they're not going to be the same,**
 22 **period, when you take into account that population**
 23 **has shifted across the state, which it had, and**
 24 **certain -- certain things have to be rectified in**
 25 **terms of making sure that the districts are within**

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1 **constitutional bounds in terms of population**
 2 **deviations.**
 3 Q When you say "ad hoc commission," what
 4 do you mean by that?
 5 **A Well, I don't mean that in any kind of**
 6 **negative sense. I just mean there was a**
 7 **commission put together charged by the legislature**
 8 **with developing a redistricting plan.**
 9 Q Who served on the commission?
 10 **A Well, I believe they were all**
 11 **legislators.**
 12 Q On page 9 and 10 of your report, in your
 13 Summary and Conclusions, towards the end, you note
 14 that there's been a degradation -- or that that --
 15 the demonstrative District 9 performs worse on
 16 some traditional redistricting criteria compared
 17 to enacted version of District 9.
 18 Do you see that?
 19 **A Yes.**
 20 Q And you would agree, we've gone through
 21 all of those different criteria?
 22 **A Correct.**
 23 Q And plaintiffs' proposed District 9
 24 satisfies the population deviation legislative
 25 goal, correct?

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<p>189</p> <p>1 A Correct.</p> <p>2 Q We talked about how, under your own</p> <p>3 metric from Virginia and applied here, that the</p> <p>4 district is sufficiently or reasonably compact,</p> <p>5 correct?</p> <p>6 A Correct.</p> <p>7 Q And with respect to county splits, we</p> <p>8 noted that there was an error in your report with</p> <p>9 respect to the number of counties, right, that the</p> <p>10 enacted plan splits?</p> <p>11 A Correct. That's correct.</p> <p>12 Q And demonstrative District 9 has the</p> <p>13 same number of county splits as does District 15,</p> <p>14 which is also under challenge in this case, right?</p> <p>15 A Correct.</p> <p>16 Q And it has the same number of county</p> <p>17 splits as the state house map for District 9,</p> <p>18 correct?</p> <p>19 A Correct.</p> <p>20 Q It splits Eddy County only to adhere to</p> <p>21 the boundaries of the Spirit Lake Nation, correct?</p> <p>22 A Correct.</p> <p>23 Q And that's the same split of Eddy County</p> <p>24 that the enacted District 15 makes, correct?</p> <p>25 A Correct.</p>	<p>191</p> <p>1 Q And demonstrative -- sorry -- enacted</p> <p>2 District 9, in fact, from east to west is just</p> <p>3 about as long as plaintiffs' demonstrative</p> <p>4 District 1 is from north to south, correct?</p> <p>5 A From what I remember, yes.</p> <p>6 Q And the two most populous counties</p> <p>7 included in plaintiffs' demonstrative District 9</p> <p>8 are Benson County and Rolette County, correct?</p> <p>9 A I don't think we talked about that. I</p> <p>10 mean, I don't have -- I'm just being up front. I</p> <p>11 don't have the population figures in front of me.</p> <p>12 So...</p> <p>13 Q Well, it includes all of Benson County,</p> <p>14 a precinct from Pierce County, and then Rolette</p> <p>15 County, and then that small piece of Eddy County</p> <p>16 that's to adhere to the reservation boundary.</p> <p>17 So does it sound right to say that</p> <p>18 Benson and Rolette are the most populous</p> <p>19 components of the district?</p> <p>20 A Well, I would assume, but, you know, one</p> <p>21 doesn't need to make assumptions. I mean,</p> <p>22 geography doesn't necessarily equate to</p> <p>23 population, obviously. So...</p> <p>24 Q Okay. We discussed how Benson County</p> <p>25 and Rolette County are closer geographically than</p>
<p>190</p> <p>1 So I mean, it's two -- should be two</p> <p>2 county splits in the enacted plan versus three,</p> <p>3 right. So...</p> <p>4 Q For District 9 at the state senate</p> <p>5 level, right?</p> <p>6 A Yeah.</p> <p>7 Q And at the state house level, it splits</p> <p>8 all three counties in the district?</p> <p>9 A If you go down to the subdistricts, yes.</p> <p>10 Q And we discussed how plaintiffs'</p> <p>11 demonstrative plan restores Towner County to its</p> <p>12 prior configuration in terms of core retention,</p> <p>13 moving it to District 15 entirely.</p> <p>14 A That is true.</p> <p>15 Q We've discussed how the enacted map has</p> <p>16 features in terms of land bridges or necks or</p> <p>17 connecting points in districts that are a fair bit</p> <p>18 smaller than what you termed the land bridge in</p> <p>19 plaintiffs' demonstrative District 9, right?</p> <p>20 A Correct.</p> <p>21 Q And a number of the enacted districts in</p> <p>22 the map span much larger -- either similar or</p> <p>23 larger geographic distances than does enacted --</p> <p>24 than demonstrative District 9, correct?</p> <p>25 A That's correct, yes.</p>	<p>192</p> <p>1 Rolette County is to Cavalier County, right?</p> <p>2 A That's true, yes.</p> <p>3 Q And so on all of these measures,</p> <p>4 demonstrative -- plaintiffs' demonstrative</p> <p>5 district is similar to or in some instances better</p> <p>6 in terms of traditional districting criteria than</p> <p>7 either District 9 in the enacted plan, District 15</p> <p>8 in the enacted plan, or other districts in the</p> <p>9 state.</p> <p>10 Is that fair?</p> <p>11 MR. PHILLIPS: Objection, that's</p> <p>12 ambiguous and compound.</p> <p>13 A Well, on some traditional redistricting</p> <p>14 criteria, it might be; on some, it's certainly</p> <p>15 not.</p> <p>16 Q Now, Dr. Hood, at the end of your</p> <p>17 report, you say that the use of a land bridge and</p> <p>18 some of the districting criteria we just discussed</p> <p>19 coupled with the fact that the demonstrative</p> <p>20 District 9 joins two Native American reservations</p> <p>21 raises the question of whether the creation of</p> <p>22 LD 9 under plaintiffs' demonstrative plan results</p> <p>23 in a racial gerrymander.</p> <p>24 Can you explain to me what you mean by</p> <p>25 "results in a racial gerrymander."</p>

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1 **A I guess the question is, why was LD 9**
2 **drawn -- or why was demonstrative District 1 or 2**
3 **drawn the way they were drawn.**
4 Q What do you understand to be the test
5 for whether a district is a racial gerrymander?
6 **A Typically, it's if race is the**
7 **predominant factor in drawing the district lines.**
8 Q And how do courts assess whether or not
9 that's occurred?
10 **A Well, one of the things --**
11 MR. PHILLIPS: I'll just state my
12 objection.
13 Calls for a legal conclusion.
14 Q What do you understand to be the
15 analysis there?
16 **A Well, one of the things that's typically**
17 **done is an analysis of traditional redistricting**
18 **criteria.**
19 Q And those are all the ones that we've
20 talked about here today?
21 **A Yes, certainly. I mean, there could be**
22 **some others. But yeah, those are -- the ones we**
23 **talked about certainly are.**
24 Q One of the hallmarks throughout the case
25 law -- and you've read racial gerrymandering case

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1 decisions, I gather, right?
2 **A Yes.**
3 Q You're familiar with the Shaw case from
4 the Supreme Court?
5 **A Right.**
6 Q The Miller case from the Supreme Court?
7 **A Right.**
8 Q You're familiar with the Cooper versus
9 Harris and Bethune-Hill?
10 **A Yes.**
11 Q Have you seen the districts from those
12 cases?
13 **A Some of them, yes. I probably have seen**
14 **all of them. I can remember some of them on the**
15 **top of my head, yes.**
16 Q I assume you're familiar -- I think
17 it's -- is it the Shaw case or the Miller case,
18 the Georgia district?
19 **A The Miller case.**
20 Q Are you familiar with the way that
21 district looked?
22 **A Yes, I am.**
23 Q It's not your testimony that the
24 district from Miller looks anything like
25 plaintiffs' demonstrative districts in this case,

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1 is it?
2 **A I don't think I said that, no.**
3 Q Okay. In the Supreme Court's racial
4 gerrymandering cases, one of the typical features
5 is split precincts where the census bloc level is
6 split along racial lines. So on one side of the
7 line is a bloc that, say, has white folks, and on
8 the other side of the line is a census bloc that
9 has black or other minority folks. That's
10 typically one of the fact patterns that we see in
11 those cases?
12 **A That's one of the factors that's looked**
13 **at, yes.**
14 Q That's not the case in plaintiffs'
15 demonstrative districts, right? In fact,
16 demonstrative District 1 keeps all the precincts
17 entirely whole, correct?
18 **A I believe so, yes.**
19 Q And so what is the basis for your
20 conclusion that plaintiffs' demonstrative plans
21 raise questions about whether they result in a
22 racial gerrymander?
23 **A Well, again, my argument would be**
24 **looking at some traditional redistricting**
25 **criteria, there was a diminishment on at least**

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1 **some of those factors with the demonstrative**
2 **districts compared to the original LD 9 or the**
3 **enacted LD 9.**
4 Q Anything else?
5 **A Well, that's primarily it.**
6 Q But is there anything else?
7 **A No. That's my primary argument or**
8 **thoughts on that.**
9 MR. GABER: Okay. Let's go ahead and
10 take about a ten-minute break, and that will bring
11 us back at 4:32.
12 (Recess from 4:22 p.m. until 4:33 p.m.)
13 MR. GABER: Dr. Hood, unless I have to
14 ask you any follow-up questions if Mr. Phillips
15 has any, I don't have any further questions for
16 you. Thank you so much for your time and for
17 appearing right after your class today. I
18 appreciate it.
19 THE WITNESS: Thank you.
20 I guess I would like to add maybe one or
21 clarification from that last discussion that we
22 were having about, you know, what could or could
23 not be a racial gerrymander in terms of
24 districting.
25 And obviously, in the report, I included

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1 these maps. And so I think it's also important to
 2 look at how the district's configured and how it
 3 connects to concentrations of racial minorities
 4 across a distance.
 5 So I guess that's -- you were asking
 6 me -- I was thinking about this. You're asking me
 7 why I came to that conclusion or the possibility
 8 of that conclusion. So obviously, I included the
 9 maps for a reason. So...
 10 BY MR. GABER:
 11 Q Did you talk to Mr. Phillips during the
 12 break?
 13 A Yes.
 14 Q Now, you said "across a distance." We
 15 talked about how the distance -- the length of
 16 District 9 in plaintiffs' demonstrative plan is
 17 the same, or in many instances, it's shorter than
 18 the distances of other districts in the state's
 19 plan, right?
 20 A Correct. That's true.
 21 Q And it's about the same distance as the
 22 enacted version of District 9 is across from
 23 Rolette County to Cavalier County, right?
 24 A Correct.
 25 Q And it can be a racial gerrymander to

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1 include white voters in a district instead of
 2 other races of voters, right?
 3 A That is correct, certainly.
 4 Q And so to the extent that enacted
 5 District 9 stretches across to include rural white
 6 voters instead of Native American voters, under
 7 your view, that too could be an indication of a
 8 racial gerrymander?
 9 A Potentially.
 10 Q Now, just the fact that there are two
 11 Native American tribes in a district does not on
 12 its own mean that the district is a racial
 13 gerrymander, right?
 14 A No. I'm not arguing that.
 15 Q And in order for that to be the case,
 16 race would have had to have been the predominant
 17 consideration across the entire district, right?
 18 That's the test the Supreme Court applies?
 19 A Yes. It has to -- that's my
 20 understanding, it has to be the predominant
 21 factor.
 22 Q And the traditional districting
 23 principles would each need to be subordinated to
 24 race such that race was the inflexible goal, and
 25 traditional districting criteria fell by the

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1 wayside in service of that racial goal. That's
 2 basically what a racial gerrymandering is.
 3 Is that your understanding?
 4 MR. PHILLIPS: I'll object that it calls
 5 for a legal conclusion.
 6 A Yes, that's my understanding.
 7 Q Okay. And so what you're saying here in
 8 your addendum is that the fact that there are two
 9 Native American reservations within plaintiffs'
 10 demonstrative District 9 is the additional reason,
 11 in addition to the comparison of some traditional
 12 criteria to the enacted version of 9, that is
 13 leading you to make this statement about racial
 14 gerrymandering?
 15 MR. PHILLIPS: Objection, misstates the
 16 prior testimony.
 17 A Yes, I think that's correct. I mean,
 18 I --
 19 Q But -- go ahead.
 20 A Well, say -- sorry. Say that one more
 21 time.
 22 Q You've offered two reasons that are --
 23 would you say -- are you saying it's a racial
 24 gerrymander? Your report says it raises questions
 25 about whether or not it results.

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1 A No, I can't make that determination.
 2 Q And when you say --
 3 A So no, I'm not saying that.
 4 Q Okay. So it's not your testimony that
 5 it is a racial gerrymander, plaintiffs'
 6 demonstrative District 9?
 7 A No, I can't make that -- I don't believe
 8 I can make that determination.
 9 Q You don't have the evidentiary basis to
 10 say that.
 11 Is that fair?
 12 A I think that's fair, yes.
 13 Q And we've gone through the traditional
 14 districting criteria. It's not seriously your
 15 testimony that the plaintiffs' demonstrative
 16 District 9 subverts traditional districting
 17 principles, right?
 18 A Well, no. It was that they were
 19 degraded to some degree.
 20 Q From one comparison district, enacted
 21 District 9, right?
 22 A Correct. That's correct.
 23 Q Not standing alone?
 24 A I'm sorry. What standing alone?
 25 Q Only in comparison -- we've gone through

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1 these at length, and it turns out some of them
 2 you've testified that plaintiffs' demonstrative
 3 district does better or as good as the other
 4 districts in the area, including 9 and 15?
 5 **A Sometimes.**
 6 Q And we talked about, with respect to
 7 compactness, that the proper framework is to look
 8 standing alone whether the district is reasonably
 9 compact?
 10 **A Well, we talked about a lot in terms of**
 11 **compactness and fairness. And that was one**
 12 **comparison. But that's not the only comparison to**
 13 **be made.**
 14 Q And your conclusion, based on the types
 15 of analysis you've done in this case and in other
 16 cases, is that plaintiffs' demonstrative
 17 District 9 is, in fact, reasonably compact?
 18 **A Well, again, based on what I said in**
 19 **that Virginia case, it has a higher level of -- or**
 20 **the compactness scores are higher than in that**
 21 **Virginia case.**
 22 Q Did you have pause as to whether any of
 23 the districts in the Virginia case were racial
 24 gerrymanders? I didn't see that in your report
 25 there.

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1 **A No. No. That was -- let me be clear.**
 2 **That was not an issue in that case. It was**
 3 **literally just compactness.**
 4 Q Do you understand that Native American
 5 reservations are more than just racial groups;
 6 that they are sovereign nations?
 7 **A Yes, yes.**
 8 Q And do you understand that they have
 9 interests that are different than purely racial
 10 interests?
 11 **A Yes.**
 12 Q And do you understand that Native
 13 American tribes might have shared interests that
 14 relate to issues with respect to representation in
 15 the state legislature?
 16 MR. PHILLIPS: Objection.
 17 **A Certainly.**
 18 Q You said "certainly," right?
 19 **A Yes.**
 20 Q And so to the extent that a district
 21 respects the boundaries of Native American
 22 reservations, it's not merely making racial
 23 classifications, but rather, it's accounting for a
 24 sovereign political boundary, correct?
 25 **A Well, to the extent to which that's the**

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1 **case -- it does that, yes.**
 2 Q And your testimony with respect to
 3 traditional districting criteria is not that
 4 plaintiffs' demonstrative district subordinates
 5 those criteria in favor of a racial
 6 classification, right? You don't have that
 7 evidence?
 8 **A No, I didn't say that.**
 9 Q It does not subordinate traditional
 10 redistricting criteria?
 11 MR. PHILLIPS: I'll object that it
 12 misstates his testimony. And his report says that
 13 it raises a question. He's testified that he's
 14 not opining on that specifically, and I believe
 15 that it would be for the Court to decide.
 16 Q So the question was, the demonstrative
 17 District 9 does not subordinate traditional
 18 districting criteria; you don't believe it does,
 19 correct?
 20 MR. PHILLIPS: Objection, outside the
 21 scope of his opinion, calls for a legal
 22 conclusion.
 23 **A Again, I guess I think my testimony was**
 24 **that certain traditional redistricting criteria**
 25 **have been degraded compared to the enacted LD 9.**

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1 **I mean, I think that's what I've said.**
 2 Q And certain redistricting criteria are
 3 better in the demonstrative plan.
 4 That's fair?
 5 **A Or the same, essentially.**
 6 MR. GABER: Okay. I have no further
 7 questions.
 8 MR. PHILLIPS: Thank you.
 9 I don't have any follow-ups myself.
 10 COURT REPORTER: Anything else for the
 11 record?
 12 MR. GABER: I do not believe so.
 13 (Transcript orders discussed.)
 14 COURT REPORTER: I think that's all we
 15 need. Thank you.
 16 (Off the record at 4:44 p.m.)
 17
 18
 19
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 25

February 13, 2023

205

CERTIFICATE

1
2
3 I, Lisa V. Feissner, RDR, CRR, CLR, do
4 hereby certify that the witness was first duly
5 sworn by me and that I was authorized to and did
6 report said proceedings.

7 I further certify that the foregoing
8 transcript is a true and correct record of the
9 proceedings; that said proceedings were taken by
10 me stenographically and thereafter reduced to
11 typewriting under my supervision; that reading and
12 signing was not requested; and that I am neither
13 attorney nor counsel for, nor related to or
14 employed by, any of the parties to the action in
15 which this deposition was taken; and that I have
16 no interest, financial or otherwise, in this case.

17
18 IN WITNESS WHEREOF, I have hereunto set my
19 hand this 15th day of FEBRUARY, 2023.

20
21 
22 Lisa V. Feissner, RDR, CRR, CLR

23 (The foregoing certification of this
24 transcript does not apply to any reproduction of
25 the same by any means, unless under the direct
control and/or supervision of the certifying
reporter.)

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EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION**

Turtle Mountain Band of Chippewa Indians,
Spirit Lake Tribe, Wesley Davis, Zachery S.
King, and Collette Brown

Plaintiffs,

vs.

Michael Howe, in his official capacity as
Secretary of State of North Dakota,

Defendant.

Case No. 3:22-cv-00022

**DEFENDANT MICHAEL HOWE'S
WITNESS LIST FOR TRIAL**

Michael Howe, in his official capacity as Secretary of State of North Dakota (hereinafter “Howe” or “Defendant”), by and through his attorneys, state that the following are witnesses that Defendant intends to call at trial or reserves the right to call at trial:

Plaintiffs:

1. Matthew Campbell
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3. Collette Brown
- **May Call**

4. Wesley Davis
- **May Call**

5. Zachery S. King
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10. Michael Howe
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20. Senator Richard A. Burckhard
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42. Senator Ronald Sorvaag
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44. Former Senator Richard Wardner

- **May Call**

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45. Nicole Donaghy
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46. Marietta Kemmet
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- **May Call**

Defendant reserves the right to call any and all witnesses listed by Plaintiffs, to the extent not objected to. Defendant also further reserves the right to call any additional witnesses that may be located or discovered prior to the trial, any witnesses disclosed in discovery responses or depositions in this case, and any witnesses disclosed during completion of discovery in this matter, to the extent not objected to.

Defendant further reserves the right to call any witnesses necessary to establish foundation for exhibits to the extent the parties cannot agree on foundation. In addition, Defendant reserves the right to call Plaintiffs' custodian(s) of records and director(s) of Plaintiffs' information technology regarding records kept by defendants in the ordinary course of business and/or electronically stored information (ESI) and/or production of the same in this lawsuit. The Court and counsel will be notified, if possible, of any additional witnesses prior to trial.

Dated this 25th day of May, 2023.

By: /s/ David R. Phillips

David R. Phillips
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Attorney for Defendant Michael Howe, in his
official capacity as Secretary of State of
North Dakota

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2023, a true and correct copy of the foregoing **DEFENDANT MICHAEL HOWE'S WITNESS LIST FOR TRIAL** was emailed to the following:

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By: /s/ David R. Phillips
DAVID R. PHILLIPS

EXHIBIT A



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Transcript of M.V. Hood, Ph.D.

Date: February 13, 2023

Case: Turtle Mountain Band of Chippewa Indians, et al. -v- Howe, et al.

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February 13, 2023

<p style="text-align: center;">1</p> <p>1 IN THE UNITED STATES DISTRICT COURT</p> <p>2 FOR THE DISTRICT OF NORTH DAKOTA</p> <p>3 ----- x</p> <p>4 TURTLE MOUNTAIN BAND OF : 5 CHIPPEWA INDIANS et al., :</p> <p>6 Plaintiffs : Civil No. 7 vs :3:22-cv-00022-PDW-ARS</p> <p>8 MICHAEL HOWE, in his official : 9 capacity as Governor of the : 10 State of North Dakota, et al.,:</p> <p>11 Defendants : 12 ----- x</p> <p>13</p> <p>14 Oral deposition of 15 M.V. HOOD, Ph.D.</p> <p>16</p> <p>17 VIA VIDEO/TELECONFERENCE 18 MONDAY, FEBRUARY 13, 2023 19 10:35 a.m. EASTERN TIME</p> <p>20 21 22</p> <p>23 Job No.: 481134 24 Pages: 1 - 205 25 Reported by: Lisa V. Feissner, RDR, CRR, CLR</p>	<p style="text-align: center;">3</p> <p>1 A P P E A R A N C E S:</p> <p>2 ON BEHALF OF PLAINTIFFS:</p> <p>3 MARK GABER, ESQUIRE 4 MOLLY E. DANAHY, ESQUIRE 5 NICOLE HANSEN, ESQUIRE 6 CAMPAIGN LEGAL CENTER 7 1101 14th Street NW 8 Suite 400 9 Washington, DC 20005 10 202.736.2222 11 mgaber@campaignlegal.org 12 mdanahy@campaignlegal.org 13 nhansen@campaignlegal.org</p> <p>14</p> <p>15 ON BEHALF OF DEFENDANTS:</p> <p>16 DAVID R. PHILLIPS, ESQUIRE 17 BAKKE GRINOLDS WIEDERHOLT 18 300 West Century Avenue 19 Bismarck, ND 58503 20 701.751.8188 21 dphillips@bgwattorneys.com</p> <p>22 23 24 25</p>
<p style="text-align: center;">2</p> <p>1</p> <p>2</p> <p>3 Oral deposition of M.V. HOOD, Ph.D., 4 held remotely, via Zoom, on Monday, February 13, 5 2023, beginning at 10:35 a.m. Eastern time, 6 pursuant to Notice, before Lisa V. Feissner, RDR, 7 CRR, CLR, Notary Public.</p> <p>8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: center;">4</p> <p>1 A L S O P R E S E N T:</p> <p>2 LaVAR TAYLOR, A/V Technician 3 MICHAEL S. CARTER, ESQ., NARF 4 SAMANTHA BLENCKE KELTY, ESQ., NARF 5 ALLISON NESWOOD, ESQ., NARF 6 BRYAN L. SELLS, ESQ. 7 LAURIE STIRLING, paralegal, NARF</p> <p>8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

February 13, 2023

5	7
<p>1 C O N T E N T S</p> <p>2 EXAMINATION OF M.V. HOOD, Ph.D. PAGE</p> <p>3 By Mr. Gaber 7</p> <p>4</p> <p>5 E X H I B I T S</p> <p>6 (Attached to transcript)</p> <p>7 HOOD DEPOSITION EXHIBIT PAGE</p> <p>8 1 Expert Report of M.V. Hood III 18</p> <p>9 2 Expert Report of M.V. Hood III (Walen) 26</p> <p>10 3 LD9 Hypothetical 2020 President 29</p> <p>11 4 LD9 Hypothetical 2018 US Senate 33</p> <p>12 5 Rebuttal Declaration (Rios-Andino) 39</p> <p>13 6 HOOD-0244 - HOOD-0257 88</p> <p>14 7 Expert Report of M.V. (Trey) Hood III 118</p> <p>15 (Vesilind)</p> <p>16 8 Virginia 2012-2020 plans 127</p> <p>17 9 2021 Enacted ND Legislative Plan 132</p> <p>18 Fargo Close-Up View</p> <p>19 10 2021 Enacted ND Legislative Plan 135</p> <p>20 Grand Forks Close-Up View</p> <p>21 11 2021 Enacted ND Legislative Plan 137</p> <p>22 Bismarck Area Close-Up View</p> <p>23 12 Hood-00001 141</p> <p>24 13 Plaintiffs' Demonstrative Plan 1 154</p> <p>25 14 HOOD-0211 - HOOD-0240 159</p>	<p>1 P R O C E E D I N G S</p> <p>2 M.V. HOOD, Ph.D.,</p> <p>3 having been first duly sworn, was examined and</p> <p>4 testified as follows:</p> <p>5 EXAMINATION</p> <p>6 BY MR. GABER:</p> <p>7 Q Good morning, Dr. Hood.</p> <p>8 My name is Mark Gaber. I am an attorney</p> <p>9 with the Campaign Legal Center, and I am counsel</p> <p>10 for the plaintiffs in this case. And I will be</p> <p>11 taking your deposition today.</p> <p>12 I suspect you've done this a number of</p> <p>13 times before, so this might just be more of a</p> <p>14 reminder for me.</p> <p>15 But it's important, obviously, that we</p> <p>16 not talk over each other to allow the court</p> <p>17 reporter to be able to get our answers down. And</p> <p>18 also important that we perhaps talk a little</p> <p>19 slower than we might otherwise, for Lisa's ease.</p> <p>20 If at any point today you need a break,</p> <p>21 please let me know. And again, I may need them</p> <p>22 before you do. I just ask that if there are any</p> <p>23 questions pending, that you provide the answer to</p> <p>24 that question, and then we'll proceed to the</p> <p>25 break.</p>
6	8
<p>1 E X H I B I T S (cont'd)</p> <p>2 (Attached to transcript)</p> <p>3 HOOD DEPOSITION EXHIBIT PAGE</p> <p>4 15 2021 Enacted State Legislative Plan 162</p> <p>5 16 2012-2020 Legislative Plan 178</p> <p>6 17 HOOD-0002 - HOOD-0013 180</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 Does that sound good?</p> <p>2 A Yes, sir.</p> <p>3 Q And I know you've been deposed before.</p> <p>4 How many times would you say?</p> <p>5 A Unknown. More than 40, probably.</p> <p>6 Q How are you employed?</p> <p>7 A I'm currently a professor of political</p> <p>8 science at the University of Georgia.</p> <p>9 Q And how long have you held that</p> <p>10 position?</p> <p>11 A Well, not rank, but job here, since</p> <p>12 1999.</p> <p>13 Q And how long in that rank?</p> <p>14 A I think 2013. It's on my vita.</p> <p>15 Q Now, you're here today pursuant to a</p> <p>16 deposition -- a subpoena for a deposition and for</p> <p>17 documents.</p> <p>18 Is there anything from your file that</p> <p>19 you relied upon in your expert opinions that you</p> <p>20 have not produced?</p> <p>21 A No.</p> <p>22 Q Now, you're also a retained expert for</p> <p>23 the state in the parallel Walen versus Burgum</p> <p>24 proceeding.</p> <p>25 Is that right?</p>

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<p>9</p> <p>1 A Correct.</p> <p>2 Q Now, aside from your expert retention in</p> <p>3 these two cases, have you ever been retained by</p> <p>4 any North Dakota entity before?</p> <p>5 A No.</p> <p>6 Q And in addition to these two cases, are</p> <p>7 you currently a retained expert in any other</p> <p>8 litigation?</p> <p>9 A Yes.</p> <p>10 Q And what cases is that?</p> <p>11 A Well, I don't know that there's a case.</p> <p>12 Q Okay. What matters?</p> <p>13 A It's a matter in New York state.</p> <p>14 Q And what is the topic of that matter?</p> <p>15 A Noncitizen -- actually -- well,</p> <p>16 noncitizen voting, or the ability of noncitizens</p> <p>17 to vote.</p> <p>18 Q And is that a case that's in litigation</p> <p>19 right now, or is it sort of a pre-litigation</p> <p>20 matter?</p> <p>21 A No, I don't believe it's in litigation.</p> <p>22 Q And who have you been retained by?</p> <p>23 A I'd have to look. This is very recent.</p> <p>24 Q Is it by folks who intend to file a</p> <p>25 lawsuit or by a governmental entity?</p>	<p>11</p> <p>1 In both those cases, though, you're</p> <p>2 defending the existing map against the challenges</p> <p>3 under Section 2 of the Voting Rights Act.</p> <p>4 Is that right?</p> <p>5 A Correct.</p> <p>6 Q When were you first retained by the</p> <p>7 State of North Dakota in this matter?</p> <p>8 A I would say last spring.</p> <p>9 Q And was that in relation to the</p> <p>10 preliminary injunction motion that was filed by</p> <p>11 the plaintiffs in the Walen case?</p> <p>12 A I believe so.</p> <p>13 Q And just to clarify, I'll use the terms</p> <p>14 Walen and Turtle Mountain, and we can use</p> <p>15 something else if that is easier for you. But</p> <p>16 when I refer to the Walen case, I'm referring to</p> <p>17 the challenge to subdistrict 4A in the MHA Nation</p> <p>18 and 9A in Turtle Mountain that was brought by</p> <p>19 plaintiffs alleging a racial gerrymander.</p> <p>20 Does that sound right to you?</p> <p>21 A Yes. Please just use the Walen matter.</p> <p>22 (Reporter interruption.)</p> <p>23 Q And then I'll refer to this matter</p> <p>24 challenging district 9 under Section 2 of the</p> <p>25 Voting Rights Act as either this matter or the</p>
<p>10</p> <p>1 A It's a plaintiff group.</p> <p>2 Q And what jurisdiction in New York?</p> <p>3 A I think the city.</p> <p>4 Q New York City?</p> <p>5 A New York City, yes.</p> <p>6 Q In addition to that matter, are there</p> <p>7 any other matters in which you're currently</p> <p>8 retained for existing or potential litigation?</p> <p>9 A Yes.</p> <p>10 Q And which ones is that?</p> <p>11 A Well, there are a number of cases that</p> <p>12 are just on hold currently. So the Alabama</p> <p>13 redistricting matter that's ongoing, which is a --</p> <p>14 before the U.S. Supreme Court currently. And a</p> <p>15 similar case in Louisiana involving redistricting.</p> <p>16 Q Any others?</p> <p>17 A No.</p> <p>18 Q And the Alabama and the Louisiana case,</p> <p>19 you're an expert for the state.</p> <p>20 Is that correct.</p> <p>21 A Some state entity, yes. Sometimes it's</p> <p>22 the secretary of state. Sometimes it's the</p> <p>23 legislature. It's difficult for me to keep it</p> <p>24 straight.</p> <p>25 Q It does change from state to state.</p>	<p>12</p> <p>1 Turtle Mountain matter, if that works for you.</p> <p>2 A Okay. "This matter" is fine.</p> <p>3 Q So you were retained around the time of</p> <p>4 the preliminary injunction proceeding in the Walen</p> <p>5 matter.</p> <p>6 Was that also at that time to be an</p> <p>7 expert in this matter?</p> <p>8 A I believe so, you know, if necessary.</p> <p>9 Q And who reached out to you to retain</p> <p>10 you?</p> <p>11 A Mr. Phillips.</p> <p>12 Q And had you previously corresponded with</p> <p>13 or known Mr. Phillips?</p> <p>14 A No.</p> <p>15 Q What was the scope of work that you were</p> <p>16 asked to perform?</p> <p>17 A Well, in this particular matter, the</p> <p>18 main scope was to respond to Prof. Collingwood's</p> <p>19 report.</p> <p>20 Q And prior to receiving</p> <p>21 Prof. Collingwood's report, had you done any work</p> <p>22 in this matter?</p> <p>23 A Well, I had done some consulting work,</p> <p>24 which I guess touched upon this matter.</p> <p>25 Q And for whom were you doing consulting</p>

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13

1 work?
2 **A The state.**
3 Q And that was after your retention --
4 **A Yes.**
5 Q -- last spring?
6 **A Yes.**
7 Q Were you involved at all in advising the
8 North Dakota legislature about redistricting?
9 **A No.**
10 Q And how many times have you testified,
11 would you say, in redistricting cases?
12 **A I really don't know. Maybe half the**
13 **times I've testified in court involved**
14 **redistricting, which would include Section 2**
15 **cases, or I would include Section 2 cases. So...**
16 Q And as your expert testimony work
17 generally been on behalf of governmental entities
18 or defendants defending maps?
19 **A Typically, although I have testified for**
20 **plaintiffs. And I've testified for both**
21 **Democratic and Republican administrations. So...**
22 Q And in terms of your plaintiff work,
23 what were some examples of that?
24 **A There was a case in Dallas, a Section 2**
25 **case, involving the county court, which are like**

14

1 **county commissioners other places. So Dallas**
2 **County. I remember that case.**
3 **I worked for the Democratic**
4 **administration in the state of Virginia on a**
5 **redistricting matter.**
6 Q Any others that come to mind?
7 **A Not that are jumping out at me right**
8 **now.**
9 Q The Dallas case, that was the Harding
10 versus Dallas County case?
11 **A Correct, that sounds familiar.**
12 Q And the claim in that case was on behalf
13 of white voters who were alleging a Section 2
14 violation, that the minority voters were diluting
15 the white voters' vote.
16 Is that correct?
17 **A Yeah. In a nutshell, yes.**
18 Q And in Virginia, is that the Vesilind
19 case?
20 **A Yes.**
21 Q And one of the main topics of that case
22 was whether or not the Virginia 2011 state senate
23 districts complied with the compactness
24 requirement of the state constitution.
25 Is that right?

15

1 **A Yes. It was a very, very specific kind**
2 **of case.**
3 Q Have you testified in any case in which
4 the plaintiff was a minority group alleging a
5 violation of Section 2?
6 **A Yes. I mean, not -- again, if you**
7 **include a larger set of cases, yes.**
8 Q And what do you mean by that?
9 **A Well, outside of redistricting.**
10 Q Okay. In the context of redistricting,
11 when the claim has been on behalf of racial
12 minority groups, you've always been on the side of
13 the defendants in your expert work.
14 Is that right?
15 **A From what I recall, yes.**
16 Q Now, I gather from your CV that the bulk
17 of your scholarship has been about -- or the
18 specialty has been about politics in the south and
19 vote dilution in the context of southern states.
20 Is that a fair assessment?
21 **A Well, I would say big picture, I do**
22 **southern politics and election administration are**
23 **two of the sort of topical areas under American**
24 **politics that I study.**
25 Q And to the extent you focus in, it's

16

1 mostly in the south.
2 Is that correct?
3 **A Well, sometimes -- election**
4 **administration is not necessarily in the south.**
5 **But, you know, I mean, obviously southern politics**
6 **is in the south. So...**
7 Q It doesn't appear to me, and correct me
8 if I'm wrong, that you've written any articles,
9 books, or other scholarly works about Native
10 American voting patterns.
11 **A That would be fair, yes.**
12 Q And is the same true with respect to
13 tribal and state relations?
14 **A Yes.**
15 Q And Native American voting rights?
16 **A Correct.**
17 Q And I don't think I saw anything in
18 particular about North Dakota or the Great Plains
19 states in terms of their voting patterns or
20 political behavior.
21 Is that right?
22 **A Correct.**
23 Q So I gather you don't consider yourself
24 an expert in Native American politics?
25 **A No. I've never claimed that.**

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<p>17</p> <p>1 Q And topics such as anthropology or 2 sociology or history related to Native Americans? 3 A No. No. I'm a political scientist. 4 Q Do you have any expertise related to the 5 Turtle Mountain band of Chippewa Indians? 6 A Not specifically. 7 Q And the same is true with respect to 8 Spirit Lake Nation? 9 A Correct. 10 Q Have you ever been to North Dakota? 11 A No. 12 Q Have you ever spoken to a member of the 13 Turtle Mountain or Spirit Lake tribes? 14 A No. 15 Q And so you're not opining on anything 16 related to those two tribes with respect to their 17 shared interests or common interests or 18 socioeconomic status or anything of the like. 19 Is that right? 20 A Correct. 21 Q And you wouldn't have any knowledge or 22 basis to do that, right? 23 A Correct. 24 Q You're also not providing any opinion 25 with respect to the totality of the circumstances</p>	<p>19</p> <p>1 A Yes. 2 Q You don't anticipate giving any opinions 3 that are not set forth in the report? 4 A I don't anticipate, you know, unless I'm 5 asked to perform some additional work, perhaps. 6 Q At this time, you haven't done. 7 Is that right? 8 A That's correct. 9 Q And you didn't do any additional 10 analysis in this case after submitting your 11 report? 12 A Correct. 13 Q I might, during today's deposition, ask 14 you to do a little math, too. 15 Do you have a calculator in your office? 16 A I do. 17 Q Okay. Good. Keep that nearby. I 18 promise it won't be too taxing. Nothing more than 19 I can do. So it's not going to be too hard. 20 A Okay. 21 Q So let's start, and I'm going to kind of 22 walk through -- we're going to bounce back and 23 forth between your report and some other exhibits, 24 but let's start on page 2 of your report, if you 25 don't mind. And I want to ask you about section 3</p>
<p>18</p> <p>1 factors for this case. 2 Is that right? 3 A That's correct. 4 Q And you have no opinion on that? 5 A I didn't offer an opinion in my report, 6 so no. 7 MR. GABER: I am going to mark as 8 Exhibit 1 the document Hood TM Expert Report. 9 (Exhibit Hood-1 marked for 10 identification and attached to the transcript.) 11 BY MR. GABER: 12 Q Do you have a copy? 13 A I do want to disclose I do have an 14 unwritten-on copy of my expert report so I can 15 look at that. 16 Q That's good. I'm happy about that. 17 We'll pull it up as well on the screen, but it 18 will be easier for you if you have it with you. 19 So we've pulled up on the screen your 20 expert report. 21 Do you recognize this as your expert 22 report in this case? 23 A Yes. 24 Q Now, are all of your opinions in this 25 matter contained in your expert report?</p>	<p>20</p> <p>1 at the top. 2 You set forth the Gingles factors there. 3 Is that right? 4 A Correct. 5 Q And I have it, so I don't need to see 6 it. But I think, LaVar, it's page 2, the numbered 7 page 2, which is probably the third page of the 8 PDF. In case anyone in the audience here wants to 9 follow along. 10 So in this section, you just set forth 11 the test under Thornburg versus Gingles for a 12 Section 2 claim. 13 Is that right? 14 A Yes. 15 Q And with respect to the first 16 precondition, the requirement is that the minority 17 group be sufficiently large and geographically 18 compact to form a majority in a new single-member 19 district. 20 Is that fair? 21 A Yes, yes. 22 Q Now, with respect to the first prong of 23 Gingles, the focus of the analysis is on a 24 potential alternative district. 25 Is that correct?</p>

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<p>21</p> <p>1 A Well, yes, although it can be used to 2 analyze an existing district as well, I would say. 3 Q But to the extent someone is -- a 4 plaintiff is challenging an existing district as 5 being dilutive, the Court would look to see 6 whether there was an alternative district that met 7 the Gingles 1 threshold, right? 8 A An illustrative district, yes. 9 Q Now, the second factor is whether the 10 minority group is politically cohesive. I think 11 that, to my understanding, your -- you aren't 12 disputing Gingles prong 2 in this case. 13 Is that right? 14 A I am not. 15 Q And the third Gingles prong is about 16 whether or not the minority group's candidates of 17 choice are usually or typically defeated by the 18 candidate of choice of the majority bloc. 19 Is that right? 20 A Yes. 21 Q And in this case, the majority bloc is 22 white voters; the minority group is Native 23 American voters. 24 Right? 25 A Yes.</p>	<p>23</p> <p>1 Native American voting age population. 2 That figure -- the source for that is 3 the state legislature's website. 4 Is that right? 5 A Yes. 6 Q And your understanding is that the state 7 reported the demographic data based upon 8 single-member minority groups. So it's someone 9 who identified on the census as being exclusively 10 Native American? 11 A Single-race Native American. 12 Q And so that doesn't include -- 13 A I would say, just to be transparent, 14 that it's more than my belief; that I checked into 15 this, and that is how Native American is being 16 measured in this context. 17 Q And when you say that, you mean how the 18 State of North Dakota, the legislature, how they 19 measured it? 20 A Correct, yes. 21 Q Now, in the second sentence you say, As 22 such, under Section 2 of the Voting Rights Act, it 23 would be described as a minority, 24 opportunity-to-elect district. 25 Do you see that?</p>
<p>22</p> <p>1 Q So with respect to the third Gingles 2 prong, the focus of the analysis there is on the 3 districts that are alleged to be diluting Native 4 American votes, correct? 5 A Yes, that's correct. 6 Q And so to the extent there are claims 7 that districts are packed with too many Native 8 Americans, Gingles prong 3 is not focused on those 9 districts. 10 Is that your understanding of the law? 11 A Well, my understanding would not that 12 that would not be an effect that you would see 13 necessarily in a district that you describe like 14 that. 15 Q In a packed district, you would expect 16 the minority candidate of choice to almost always 17 win and probably by a large margin, right? 18 A Well, just in a generic sense, yes. 19 Q Now I want to move down into part 4 of 20 your -- on page 2, and focusing, to begin with, on 21 the first two sentences of that section. And this 22 is, I think, still on the same page, page 3 of the 23 PDF. Analysis of LD 9. 24 Now, you say that, LD 9 in the enacted 25 legislative plan is comprised of 51.7 percent</p>	<p>24</p> <p>1 A Yes. 2 Q What is the basis for your conclusion in 3 that regard? 4 A Just simply the fact that it's a 5 majority Native American district and is defined 6 by the Supreme Court under Bartlett v. Strickland. 7 That would be a minority opportunity-to-elect 8 district. 9 Q Now, with respect to the citation to 10 Bartlett, Bartlett is a case that required 11 plaintiffs raising Section 2 challenges to show 12 that they could draw an alternative district that 13 was 50 percent plus 1 of a minority group. 14 Is that right? 15 A It's been a while. I mean, from what I 16 remember, yes. But I do remember that the Court 17 set out, and there were definitions within that 18 case. And that's what I'm really referring to 19 there. 20 Q And those definitions were about 21 distinguishing between claims for crossover 22 districts or claims for influenced districts and 23 claims for coalition districts. 24 Is that your recollection? 25 A Yes.</p>

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1 Q Now, whether or not a district actually
 2 functions to provide minority voters an
 3 opportunity to elect their candidate of choice is
 4 based upon more than just the demographics of the
 5 district.
 6 Do you agree with that?
 7 **A Yes.**
 8 Q And so a district that has a slight
 9 majority may not, in fact, function as an
 10 opportunity district based on factors such as
 11 turnout or other factors.
 12 Is that fair?
 13 **A Hypothetically, yeah, I think that's**
 14 **fair.**
 15 Q And the Supreme Court has addressed that
 16 issue in cases before, like the LULAC versus Perry
 17 case.
 18 Are you familiar with that?
 19 **A Yes.**
 20 Q And so to the extent you're calling it a
 21 minority opportunity-to-elect district, that's
 22 based just upon the 51.7 percent and nothing more.
 23 Is that correct?
 24 **A Well, that sentence is based on that**
 25 **fact, yes. Now, later, I do look at what**

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1 **Prof. Collingwood analyzed for that district as a**
 2 **whole. So there's some evidence one way or the**
 3 **other there as well, I would say.**
 4 Q Okay. And we'll get into that there.
 5 But I just wanted to understand the -- sort of the
 6 nomenclature.
 7 **A That would be correct, yes.**
 8 Q The key, then, is combining the
 9 demographic data with election data to determine
 10 whether or not there's an actual opportunity to
 11 elect in the district.
 12 Is that correct?
 13 **A Well, yes, at some point, you have to**
 14 **look at some type of election data or -- you know,**
 15 **whether it's vote tallies or results or something**
 16 **related to an election, yes.**
 17 MR. GABER: I'm going to mark as
 18 Exhibit 2 the file Hood Walen versus Burgum expert
 19 report.
 20 (Exhibit Hood-2 marked for
 21 identification and attached to the transcript.)
 22 BY MR. GABER:
 23 Q Dr. Hood, do you recognize this -- and
 24 maybe we can scroll down a little bit to where it
 25 has the title.

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1 Do you recognize this as your expert
 2 report in the Walen matter?
 3 **A Yes.**
 4 Q Do you have a copy of that one with you?
 5 **A No, I do not.**
 6 Q If I need to direct you somewhere, I'll
 7 do that. But we're probably going to set this one
 8 aside for a moment.
 9 But in the Walen case, it's my
 10 understanding that you did conduct a bit of an
 11 analysis about District 9 in terms of the Gingles
 12 preconditions.
 13 Is that right?
 14 MR. PHILLIPS: I'll just object to this
 15 question and probably line of questions to the
 16 extent it's outside the scope of Dr. Hood's
 17 opinion in this case.
 18 **A Well, I performed a functional analysis,**
 19 **what I called a functional analysis. I didn't**
 20 **coin that. I'm not arguing I coined that term.**
 21 **I'm just saying that's what I would call it.**
 22 Q Yeah. And that works. And I may
 23 have -- my question might have been a little off
 24 there.
 25 What you were doing was, you looked at

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1 voter turnout; you analyzed that.
 2 Is that right?
 3 **A As part of this, yes.**
 4 MR. PHILLIPS: I'll object again.
 5 Mr. Gaber, can we agree to have a
 6 standing objection to this line of questioning --
 7 MR. GABER: Sure.
 8 MR. PHILLIPS: -- on the same basis as I
 9 stated before?
 10 MR. GABER: Yep.
 11 Q And you looked in particular at three
 12 elections from 2018, three state-wide elections,
 13 and three state-wide elections from 2020 to
 14 determine whether or not the Native American
 15 preferred candidates would have prevailed in the
 16 newly enacted District 9 in those elections.
 17 Is that right?
 18 **A That was part of it, yes. I also looked**
 19 **to see if there was racially polarized voting, for**
 20 **one thing, before that, before that step.**
 21 Q And you found that there was racially
 22 polarized voting in the district.
 23 Is that right?
 24 **A More often than not, yes. Can't**
 25 **remember without looking if it was a hundred**

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1 percent, but...
 2 (Cross-talk.)
 3 A **Certainly more often than not. So...**
 4 Q I'll just represent, in the six
 5 elections you looked at, the Gingles prong 2, it
 6 appears, at least to me, was your opinion that it
 7 was established.
 8 Does that sound right?
 9 A **Yes. I mean, yeah, that's fair.**
 10 MR. GABER: I'm going to mark two more
 11 exhibits that relate to this. I'll mark as
 12 Exhibit 3 the file LD 9 Hypothetical 2020
 13 President.
 14 (Exhibit Hood-3 marked for
 15 identification and attached to the transcript.)
 16 BY MR. GABER:
 17 Q And I'll represent to you, Dr. Hood,
 18 this is one of the Excel spreadsheets for
 19 District 9 for the 2020 presidential race.
 20 I did -- because the spreadsheet didn't
 21 have any title within it, it was just a file name
 22 and, like, the folder it was saved in that was
 23 titled, I did add that title you see at the top of
 24 the page and then converted this to a PDF.
 25 But otherwise, does this look like the

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1 spreadsheet you produced with data related to the
 2 2020 presidential election for District 9?
 3 A **Yes.**
 4 Q And in the first column -- the first
 5 column is about District 9; the second column is
 6 Subdistrict 9A; and the third column is
 7 Subdistrict 9B, correct?
 8 A **Correct.**
 9 Q And in column 1 for the full district, I
 10 guess two sort of sections down, you report the
 11 turnout percentage and then the number of voters
 12 by Native American, white, and other.
 13 Is that right?
 14 A **Yes, correct.**
 15 Q And so your analysis showed that in the
 16 2020 presidential election, within the boundaries
 17 of the new District 9, 38.8 or 38.9 percent of the
 18 electorate was Native American.
 19 Is that right?
 20 A **Yes, correct.**
 21 Q And -- I'm sorry.
 22 (Cross-talk.)
 23 Q That's wrong. The turnout among Native
 24 Americans was 38.9 percent.
 25 Is that right?

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1 A **Yes, that's correct.**
 2 Q And then the turnout rate among white
 3 voters was 69.7 percent.
 4 Is that right?
 5 A **Correct, correct.**
 6 Q And among other voters, it was 50.0
 7 percent?
 8 A **Yes, correct.**
 9 Q And so this is where I'm going to ask
 10 you to do a little math. I have already done it,
 11 but if you want to check my work, I would
 12 encourage that.
 13 So you show the number of voters, and so
 14 then we can calculate by dividing by the total the
 15 percentage of the electorate that was of each
 16 racial group.
 17 Is that fair enough?
 18 A **That's fair, yes.**
 19 Q And so I have calculated that if we take
 20 the 2250 for Native American voters and divide it
 21 by the total of 5955, that yields 37.8 percent of
 22 the electorate in enacted District 9 for the 2020
 23 presidential race as being Native American.
 24 Does that sound right?
 25 A **Correct. That's what I'm getting, yes.**

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1 Q And then if we do the same for white
 2 voters, that yields 57.7 percent of the electorate
 3 in the district being white voters.
 4 Is that correct?
 5 A **Correct.**
 6 Q And so in the presidential election,
 7 despite the fact that the district has 51.7
 8 percent Native VAP, voting age population, a
 9 substantial majority of the electorate was
 10 actually white voters, right?
 11 A **In this scenario, yes.**
 12 Q And this is the type of information that
 13 is important to consider in whether or not a
 14 district actually performs to elect -- or to
 15 provide an opportunity for Native American, or
 16 whatever the minority group is, to elect their
 17 candidate of choice, right?
 18 A **Well, there has to be some information**
 19 **like this. I mean, I guess different people may**
 20 **measure this factor in different ways. I mean,**
 21 **Prof. Collingwood doesn't do this.**
 22 **But yes, there has to be some**
 23 **information related to this.**
 24 MR. GABER: And I'm going to mark as
 25 well, as Exhibit 4, LD 9 Hypothetical 2018 U.S.

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1 Senate.
 2 (Exhibit Hood-4 marked for
 3 identification and attached to the transcript.)
 4 BY MR. GABER:
 5 Q And so again, because there were --
 6 there wasn't a title within the Excel spreadsheet,
 7 and rather the folder had the title, I have added
 8 that to this PDF at the top and converted it to a
 9 PDF.
 10 Otherwise, do you recognize this as the
 11 backup files for your turnout analysis for the
 12 2018 U.S. Senate race in District 9?
 13 A Yes.
 14 Q And then just so the record is clear,
 15 this is District 9 as it was redrawn in the last
 16 redistricting cycle with the election results sort
 17 of reconstituted in the new lines.
 18 Is that fair?
 19 A Yes. **And same thing for the 2020 race**
 20 **we just talked about as well.**
 21 Q And so in the 2018 U.S. Senate race, if
 22 we look in column 1 at the turnout figures, we see
 23 that 60.4 percent of Native Americans eligible
 24 voters turned out in your analysis.
 25 Is that right?

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1 A Correct.
 2 Q And 68.3 percent of white voters?
 3 A Correct.
 4 Q And 49.8 percent of other race voters?
 5 A Correct.
 6 Q And then -- so if we do the same
 7 calculations here, I show that Native American
 8 voters in the 2018 U.S. Senate election
 9 constituted 49 percent of the electorate.
 10 Does that look right to you?
 11 A Yes.
 12 Q And --
 13 A **49.0, I guess, if you round it off, yes.**
 14 Q And white voters, I show as 47.3 percent
 15 of the electorate.
 16 A Yes.
 17 Q So in neither the 2018 U.S. Senate race
 18 or the 2020 presidential race were Native American
 19 voters an actual majority of the electorate.
 20 Is that right?
 21 A Correct.
 22 Q Okay. I'm going to set these two
 23 exhibits aside virtually for the moment. But we
 24 will probably come back to that a little bit
 25 later.

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1 I think I already asked you this, but I
 2 just want to confirm.
 3 You don't disagree with
 4 Prof. Collingwood that in Northeastern
 5 North Dakota and specifically in districts 9 and
 6 15, Gingles prong 2 is satisfied.
 7 Is that right?
 8 A **I don't disagree that racially polarized**
 9 **voting exists more often than not in that part of**
 10 **North Dakota.**
 11 Q Now, for your expert report in this
 12 matter, you did not conduct your own racially
 13 polarized voting analysis, right?
 14 A **Correct. I was just responding to what**
 15 **Prof. Collingwood had done.**
 16 Q Now, I know that you disagree with some
 17 of Prof. Collingwood's conclusions. But you don't
 18 have any criticism of the methodology or the way
 19 that he conducted his racially polarized voting
 20 analysis, right?
 21 A **No. That's correct. I mean, you know,**
 22 **again, at step 3 perhaps, or prong 3, as we just**
 23 **saw, you know, I don't do exactly what he did.**
 24 **But I recognize there are different ways to do the**
 25 **same thing, I guess is what I'm saying. So...**

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1 Q So you don't -- it's not your opinion
 2 that his methodology for conducting ecological
 3 inference, for example, was flawed?
 4 A **No, no. I didn't say that.**
 5 Q And you don't have any issues with his
 6 data collection or the way that he inputted the
 7 data into his analysis?
 8 A **No, not that I saw.**
 9 Q Did you seek to replicate
 10 Dr. Collingwood's analysis using the data he
 11 produced?
 12 A **No, I did not, for a number of reasons.**
 13 **One, I was using election data from the state. He**
 14 **was apparently using election data from a slightly**
 15 **different source, Election Data Hub, I think. And**
 16 **so, I mean, it's not easy to exactly replicate**
 17 **things sometimes.**
 18 **And so, I mean, right off the bat there,**
 19 **we're using different election data.**
 20 **And again, at step 3, I would diverge a**
 21 **little bit anyway, and I'm estimating what turnout**
 22 **is and decomposing the electorate by racial group**
 23 **and then by vote and then recomposing it into**
 24 **that which partisan candidate would have won or not.**
 25 **So long answer to your question, no, I**

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1 **did not try to replicate what he did.**
 2 Q But you didn't see any -- basically,
 3 you're not challenging the methodology or the
 4 quality of his work as a matter of an expert
 5 opinion?
 6 **A No. I mean, I use ecological inference**
 7 **as well. So...**
 8 Q Now, the next part of your report on
 9 pages 2 to 3 -- 2 to 4, actually, and that would
 10 be PDF pages 3 to 5, I think, is your review of
 11 Dr. Collingwood's Gingles prong 3 analysis for
 12 District 9.
 13 Is that right?
 14 **A Yes, that's fair.**
 15 Q And so my understanding of your analysis
 16 here is essentially that you took the
 17 reconstituted election results that
 18 Dr. Collingwood showed for every election from
 19 2014 through 2022, and then summed them up to see
 20 whether the Native American candidate of choice
 21 was -- or the percentage of elections in which the
 22 Native American candidate of choice was defeated.
 23 Is that fair?
 24 **A Yeah, that's through the end point.**
 25 **So...**

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1 Q And the Table 1 -- you have two tables
 2 in this section, right? Table 1, you combine the
 3 races -- or the elections in District 9, 9A, and
 4 9B, and then report the rate at which Native
 5 American candidates were defeated when all three
 6 of those districts are summed together.
 7 Is that right?
 8 **A Correct.**
 9 Q In reporting this analysis, you weigh
 10 each of the elections equally.
 11 Is that right?
 12 **A Well, yes, that's true. I think that's**
 13 **true. It does matter whether or not racially**
 14 **polarized voting was present in the election in**
 15 **question or not, so sort of backing up a step**
 16 **there. But --**
 17 (Cross-talk.)
 18 Q There's two elections that you took out
 19 because there was not racially polarized voting,
 20 right?
 21 **A Yes, according to Prof. Collingwood's --**
 22 Q But with respect to the -- I guess this
 23 is across three districts, a total of 108
 24 elections in which there's racially polarized
 25 voting, each of those elections, your analysis

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1 gives equal weight, correct?
 2 **A Yes, that's true.**
 3 Q Now, it's the case, isn't it, that
 4 different elections in vote dilution contexts have
 5 differing probative values, right?
 6 **A Yes, that's correct.**
 7 Q So for example, endogenous elections,
 8 those are elections in which the election is for
 9 the type of district that is at issue in the
 10 challenge. Endogenous elections -- is that your
 11 understanding of endogenous?
 12 **A Yes. So they would be legislative**
 13 **elections in this particular matter.**
 14 Q So as a methodological matter,
 15 academically and in your understanding of how
 16 courts look at this, endogenous elections have a
 17 much higher probative value in terms of Gingles
 18 prong 3 than do exogenous elections.
 19 Is that right?
 20 **A I think that's fair, yes. They have a**
 21 **higher probative value.**
 22 MR. GABER: I'm going to mark as
 23 Exhibit 5 the file Hood Rios-Andino versus Orange
 24 County Expert Report.
 25 (Exhibit Hood-5 marked for

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1 identification and attached to the transcript.)
 2 BY MR. GABER:
 3 Q Dr. Hood, do you recall being a retained
 4 expert in this case, Rios-Andino versus Orange
 5 County?
 6 **A I do.**
 7 Q And I don't know if this is -- this
 8 might be sort of a database version of your
 9 report.
 10 Does this -- or is this what your report
 11 looked like?
 12 **A That was a long time ago. To be**
 13 **honest -- I mean, it looks like something I would**
 14 **have done --**
 15 Q Okay.
 16 **A -- but I can't -- you know, I haven't**
 17 **looked at this in a long time.**
 18 Q This is something you still have?
 19 **A I probably could find it, yes --**
 20 Q Okay.
 21 **A -- with a little time.**
 22 Q Well, I'm not going to make you do that.
 23 But if you have any reason to doubt the statements
 24 here, we can obviously go and look for that.
 25 But I want to direct your attention to

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1 page 3, and then it's section E towards the bottom
 2 part of the document.
 3 And then in the first paragraph, you
 4 talk a bit about endogenous and exogenous
 5 elections.
 6 Do you see the second sentence says,
 7 Endogenous elections examine contexts from the
 8 same office as those under legal scrutiny and,
 9 because of their relevance, should be given more
 10 probative value?
 11 MR. PHILLIPS: I'll just -- I'm sorry.
 12 Go ahead and finish your question, then I'll
 13 insert my objection.
 14 Q Do you still agree with that statement?
 15 MR. PHILLIPS: I'll object that it's
 16 outside the scope of Dr. Hood's opinion and work
 17 in this case. And can we just agree to have a
 18 standing objection to this line of questioning
 19 about this report?
 20 MR. GABER: Sure.
 21 MR. PHILLIPS: You can go ahead and
 22 answer.
 23 **A I certainly seem to have written that**
 24 **statement.**
 25 Q And then we'll skip the next sentence.

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1 But the sentence after that, you say, Exogenous
 2 elections, on the other hand, could include almost
 3 any other contest from local boards to
 4 presidential elections. As these elections are
 5 not as directly relevant to the question at hand,
 6 they should be accorded far less weight in
 7 reaching a conclusion concerning vote dilution
 8 claims.
 9 Do you recall having that opinion here?
 10 **A Yes.**
 11 Q And does that remain your opinion today
 12 methodologically, that exogenous elections have
 13 far less weight in reaching conclusions for vote
 14 dilution?
 15 **A I've written this more than once, I'm**
 16 **sure, in academic work. So yes, I have to stand**
 17 **by that statement.**
 18 MR. GABER: Okay. We can take down that
 19 exhibit.
 20 Q Now, in addition to endogenous elections
 21 being more probative than exogenous elections,
 22 there are other considerations that might make an
 23 election more or less probative.
 24 Is that right?
 25 **A Well, let's -- I guess let's discuss it.**

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1 **It's possible. I mean, certainly, there is a**
 2 **distinction, I've agreed, between exogenous and**
 3 **endogenous elections.**
 4 Q So another example would be that more
 5 recent elections are generally considered more
 6 probative than elections that are further in time?
 7 **A True.**
 8 Q And elections that have a candidate who
 9 is a member of the same minority group of the
 10 group that is challenging the district are more
 11 probative than elections that are between, say,
 12 two white candidates.
 13 Is that also true?
 14 **A Yes, that can be true.**
 15 Q So in this case, elections where there
 16 is a Native American candidate are more probative
 17 to determine whether Gingles prong 3 exists than
 18 elections where both of the candidates are white,
 19 correct?
 20 **A Correct.**
 21 Q So with respect to the elections that
 22 Dr. Collingwood reported, the most probative
 23 contests would be the most recent for endogenous
 24 elections in which there was a Native American
 25 candidate.

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1 Is that right?
 2 **A Correct.**
 3 Q And that sort of combination is about as
 4 probative as you can get because it ticks off all
 5 three of those factors that are considered more
 6 probative than other types of elections.
 7 Is that right?
 8 **A Correct.**
 9 Q And is it your -- I gather it's your
 10 understanding that incumbency adds another benefit
 11 to a candidate and their likelihood of success.
 12 Is that a fair statement, sort of
 13 generally, as a political science proposition?
 14 **A So we're talking about another topic**
 15 **here, right?**
 16 Q Yeah, yeah.
 17 **A Okay. Yes, incumbency typically**
 18 **benefits the incumbent officeholder, although in**
 19 **more recent history, what we call the incumbency**
 20 **advantage has diminished to some degree. This is**
 21 **an ongoing debate in political science. So...**
 22 Q But if you -- so moving back to looking
 23 at analyzing vote dilution, if you have an
 24 election that's an endogenous election, that is
 25 the most recent election, features a candidate of

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1 the minority group that's challenging the
 2 district, and that candidate is also an existing
 3 incumbent, then if that candidate loses, that
 4 would be even more indicative of the effect of
 5 white bloc voting.
 6 Is that a fair statement?
 7 **A Well, I don't know that I would include**
 8 **incumbency in that list necessarily. Again, it's**
 9 **something that we're seeing some changes related**
 10 **to in terms of, you know, how much of an advantage**
 11 **it is or isn't in more recent history. So...**
 12 Q Okay. But the other three, you agree
 13 with?
 14 **A Yes, as we've discussed.**
 15 Q So in the context of the elections that
 16 Dr. Collingwood analyzed, would you agree that the
 17 single most probative contest would be the 2022
 18 election -- at least with respect to District 9,
 19 the 2022 election for the state senate in
 20 District 9, that's the most probative under
 21 Gingles prong 3 because it features an endogenous
 22 election with a Native American candidate and it's
 23 the most recent election?
 24 **A Yes.**
 25 Q And in District 9B, that -- for the 2022

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1 election for the U.S. -- sorry -- for the state
 2 house, is also -- that's an endogenous context,
 3 right?
 4 **A 2022?**
 5 Q 2022.
 6 **A Yes, yes.**
 7 Q And that is the most recent contest for
 8 the state house in District 9B?
 9 **A Yes, correct.**
 10 Q And the difference between that election
 11 and the state senate is, the Native American
 12 preferred candidate was a white incumbent.
 13 Is that your understanding?
 14 **A I don't recall, just sitting here. I'm**
 15 **not saying that's incorrect.**
 16 Q The candidate was Marvin Nelson.
 17 Does that sound right?
 18 **A Well, I guess what I'm saying is, I**
 19 **don't -- in order to infer who the Native American**
 20 **preferred candidate is, there would have to be**
 21 **some analysis performed. I did not do that**
 22 **analysis in 2022.**
 23 Q You didn't have any reason to disagree
 24 or criticize Dr. Collingwood's determinations as
 25 to who the Native preferred candidates were in

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1 2022?
 2 **A I don't remember that as being part of**
 3 **his report. I'm just not recalling.**
 4 MR. GABER: Okay. Let's mark as --
 5 well, I'm not going to mark it yet because I don't
 6 want to get my numbers out of order. But let's
 7 pull up, if we can, the file -- I think it's
 8 probably TM Collingwood report, or -- yeah, TM
 9 Collingwood Expert Report. And we won't mark it
 10 as an exhibit for now. We may not mark it.
 11 THE WITNESS: Okay.
 12 Q All right. And let me just find it in
 13 my copy.
 14 So if we can go to page 15 of the PDF.
 15 Do you see here that Dr. Collingwood reports the
 16 racially polarized voting assessment for all the
 17 statewide and the endogenous 2022 elections for
 18 District 9?
 19 **A Yes, I see that, yes.**
 20 Q And would you agree that from this
 21 table, you can identify who the candidates of
 22 choice were for Native American voters?
 23 **A Yes, that's fair.**
 24 Q And do you see in -- and this is for the
 25 full District 9. You see that Richard Marcellais

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1 is the candidate of choice for Native American
 2 voters in the state senate race in 2022?
 3 **A Yes, I do.**
 4 Q And then do you understand -- I don't
 5 know if it says it on this page, but the asterisk
 6 next to his name indicates that he is himself a
 7 Native American.
 8 Do you understand that?
 9 **A Yes.**
 10 Q And then --
 11 MR. PHILLIPS: Mark, it's been about an
 12 hour. If we could take a small break when it
 13 makes sense in the near future.
 14 MR. GABER: Okay.
 15 Q And then if we pull up page 21 of the
 16 PDF and go to the paragraph underneath -- scroll
 17 down just a little bit. In that paragraph under
 18 the table, towards the bottom of that paragraph,
 19 do you see where Dr. Collingwood refers to the
 20 defeat of Marvin Nelson, the Native American
 21 preferred candidate, in Subdistrict 9B in 2022?
 22 **A Yes, I see that.**
 23 Q Do you have any reason to disagree with
 24 Dr. Collingwood's conclusion that Marvin Nelson or
 25 Richard Marcellais were the candidates of choice

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1 of Native American voters in those two elections?
 2 **A Well, I think this is what I was**
 3 **remembering. I mean, so in terms of Marcellais, I**
 4 **mean, a statistical analysis was conducted that**
 5 **showed that he was the Native American preferred**
 6 **candidate of choice. The same statistical**
 7 **analysis was not conducted for Nelson. It's just**
 8 **being inferred.**
 9 **That's what I was remembering, yeah.**
 10 Q And part of the reason for that is that
 11 the subdistricts don't have a sufficient number of
 12 precincts to do a complete -- or at least the same
 13 type of RPV analysis that you would do in the
 14 district as a whole.
 15 Is that right?
 16 **A I would agree with that.**
 17 Q But what you can do is look at the
 18 election returns within the precincts and
 19 correlate them with the demographic data from that
 20 precinct and can make a reasonable inference as to
 21 who the candidates of choice are.
 22 Is that fair?
 23 **A Well, again, you know, that's why we**
 24 **test for these things, and that's not the**
 25 **procedure that we use to test to determine whether**

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1 **or not racially polarized voting exists or not.**
 2 **So that's not the typical procedure.**
 3 **If there's not enough statistical power,**
 4 **there's just not enough statistical power. And I**
 5 **probably would agree there's not.**
 6 Q With respect to the Subdistrict 9B, it
 7 covers part of Rolette County and then parts of
 8 Towner and Cavalier County to the east of Turtle
 9 Mountain.
 10 Is that your understanding?
 11 **A So B is the one to the east, if I'm**
 12 **remembering right, yes.**
 13 Q Right. And so the Native American --
 14 are you familiar with the demographic makeup of
 15 District 9B geographically?
 16 **A A little bit, yes.**
 17 Q So is it your understanding that the
 18 populations of Cavalier and Towner counties are
 19 close to 100 percent white?
 20 **A Well, from my memory, this is what I**
 21 **would say, you know, outside of the reservation in**
 22 **that particular legislative district, in the areas**
 23 **right around the reservation, the rest of the**
 24 **district does not contain many, if any, Native**
 25 **Americans.**

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1 Q So the -- for the most part, the only
 2 Native Americans in District 9B are all
 3 concentrated in the area that's in 9B but close to
 4 the border of 9A.
 5 Is that your understanding?
 6 **A From what I remember, yes.**
 7 Q And so to the extent those voting
 8 precincts have a high concentration of Native
 9 American voters and is also the precinct in which
 10 Marvin Nelson prevailed, and if Marvin Nelson lost
 11 by large margins, the precinct in the white
 12 counties, there is a fair inference that can be
 13 drawn as to who the candidate of choice is in
 14 those -- in that race.
 15 Wouldn't you agree?
 16 **A Well, I would respectfully, I guess,**
 17 **disagree. I mean, you know, there are different**
 18 **methods you can use to uncover racially polarized**
 19 **voting, one of those being homogeneous precinct**
 20 **analysis, which is a very old method.**
 21 **I didn't detect, from my memory at least**
 22 **sitting here, any precincts in the area where**
 23 **you're describing that had a high enough**
 24 **percentage of Native American population to make**
 25 **that kind of inference using, say, homogeneous**

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1 **precinct analysis.**
 2 Q With respect to the white voters, there
 3 is homogeneous precincts --
 4 (Cross-talk.)
 5 **A That's true, yes. But there has to be**
 6 **homogeneous precincts for both groups or however**
 7 **many groups you're analyzing. So...**
 8 Q So to the extent -- so do you understand
 9 that Marvin Nelson was the incumbent state house
 10 rep from the prior District 9?
 11 **A Yes, I recall that.**
 12 Q And so one way to test whether he's the
 13 candidate of choice of Native American voters, to
 14 the extent you have a dispute over the correlation
 15 method, is to look in the past elections in which
 16 he's been elected to determine whether he was the
 17 candidate of choice using the more traditional
 18 statistical analysis.
 19 Is that fair?
 20 **A If it's possible. You know, I would**
 21 **have to see if it were possible in the past.**
 22 Q And if there's a consistent pattern of
 23 him being the Native American voters' candidate of
 24 choice, then you would expect that to be the case
 25 for 2022 as well, right?

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1 **A Well, again, I'm going to just have to**
2 **push back on that. I mean, that's why we test**
3 **things.**
4 **So it would make logical sense perhaps**
5 **if that were the case. But again, we -- we don't**
6 **just make inferences without testing for things.**
7 **So...**
8 Q If we combined that data showing that he
9 was the candidate of choice in the prior state
10 representative elections for District 9 Native
11 American voters with the inferences that can be
12 drawn from the demographics and the election
13 results for the 2022 election, that would provide
14 at least a preponderance of evidence that he was,
15 in fact, the candidate of choice in 2022 as well.
16 Wouldn't you agree with that?
17 **A I don't -- I mean, I'm not trying to be**
18 **flippant. I don't know that what you just said is**
19 **all that much different from what we just talked**
20 **about previously. So...**
21 Q Are you aware that former Representative
22 Nelson was the Democratic candidate for governor
23 in the 2016 election?
24 **A No, I was not aware of that.**
25 Q And Dr. Collingwood reports that he was

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1 the candidate of choice of Native American voters
2 in the region.
3 Do you have any reason to disagree with
4 that?
5 **A Not on its face.**
6 Q And it's your view that in the entire
7 District 9, there's a clear pattern of the
8 Democratic candidate being the candidate of choice
9 of Native American voters, right?
10 **A That's true, yes.**
11 Q And so -- and that's true regardless of
12 where they are -- where the Native American voters
13 reside in District 9. There's no evidence to
14 suggest that there's a difference among candidates
15 of choice.
16 Is that right?
17 **A I'm not following -- I didn't follow**
18 **what you just said.**
19 Q Well, if Native American voters are --
20 have a clear candidate of choice in District 9,
21 then there is not a basis to conclude that that
22 fact varies depending on where in District 9
23 you're looking?
24 **A Well, I don't know that that's the case**
25 **or not. I just don't know.**

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1 Q Okay. If all the Native American voters
2 are essentially in one county, then we can look at
3 that county, and if it's possible, perform an
4 analysis to try and make that determination.
5 Is that right?
6 **A Well, again, if the data are present to**
7 **make that determination, I don't know. You know,**
8 **there would have to be -- even if we were looking**
9 **at a single county, there would have to be enough**
10 **precincts within the county to make a proper**
11 **inference, I guess. So...**
12 Q You haven't done that analysis in your
13 report.
14 Is that right?
15 **A That's correct.**
16 Q And you don't have any -- you don't
17 opine anything with respect to Dr. Collingwood's
18 selection of who the candidates of choice of white
19 or Native American voters are in his report,
20 correct?
21 **A Well, except for this example we're**
22 **talking about where he's making an inference about**
23 **a subdistrict where there's not been statistical**
24 **testing that's been performed. Otherwise, no.**
25 Q Okay. But for your report, you don't,

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1 in your report, make any criticism of
2 Dr. Collingwood's analysis of Subdistricts 9A or
3 9B, right?
4 **A I don't believe I do specifically, no.**
5 Q And you haven't done any analysis to
6 show that he's incorrect in his conclusions?
7 **A No.**
8 Q Sorry, I missed that. What was that
9 answer?
10 **A No. It was just "no."**
11 Q And you don't dispute in your report
12 that Dr. Collingwood's conclusion that in the
13 endogenous elections in District 9, there is a
14 100 percent defeat rate for the Native American
15 candidates of choice?
16 **A Well, again, with the caveat that if we**
17 **can determine specifically who the Native American**
18 **candidate of choice is, then yes.**
19 Q And for District 9 as a whole, you agree
20 with Dr. Collingwood's analysis that Richard
21 Marcellais is the candidate of choice of Native
22 American voters in the 2022 election?
23 **A I didn't dispute that. So yes.**
24 Q And so that is -- that's a 100 percent
25 defeat rate for that -- for endogenous elections

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1 in District 9?
2 **A Well, that's, yes, one race, yes.**
3 Q And in your report, you don't dispute
4 Dr. Collingwood's similar analysis for endogenous
5 elections in District 9B?
6 **A Well, again, I don't think he did the**
7 **testing for racially polarized voting in either**
8 **subdistrict.**
9 Q But if he's correct in identifying who
10 the candidate of choice is in those elections,
11 then he would also be correct that there was a
12 100 percent defeat rate in District 9B for the
13 endogenous election?
14 **A Well, if he's correct, yes. But, you**
15 **know, I guess I would argue we don't know if he's**
16 **correct or not without testing.**
17 Q So is it your view, then, that it's not
18 possible to determine who the Native American
19 preferred candidate in District 9A is either?
20 **A From what I recall, I don't believe --**
21 **and again, I think Prof. Collingwood said this as**
22 **well -- that there are enough precincts to yield a**
23 **useable analysis in the subdistricts, in either**
24 **subdistrict.**
25 Q Well, to do a racially polarized voting

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1 analysis using ecological inference, right?
2 **A Correct. Or even homogeneous precinct**
3 **analysis, perhaps.**
4 Q In District 9A, do you agree that there
5 is homogeneous Native American precincts?
6 **A Yes, although I have typically defined**
7 **homogeneous as being 90 percent of a single racial**
8 **group. So I don't know -- I don't recall -- I**
9 **don't believe that any of the precincts reached**
10 **that level for Native Americans, that I can recall**
11 **sitting here. And that's the typical sort of**
12 **cutoff I've used.**
13 Q We'll take a break in a moment. I just
14 want to check something.
15 And I'm just representing this to you.
16 The Belcourt, which is the city that is contained
17 within the Turtle Mountain reservation or
18 precinct, has a 2022 Native voting age population,
19 according to Dave's Redistricting App --
20 Are you familiar with that website?
21 **A I am.**
22 Q Have you used it before?
23 **A Yes.**
24 Q And do you --
25 **A I've not used it for a court case.**

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1 Q Okay.
2 (Cross-talk.)
3 **A But I've fiddled around with it.**
4 Q And you understand that they import the
5 demographic data from the census bureau?
6 **A That's my understanding, yes.**
7 Q And then they combine that together with
8 the precinct boundaries as set by the local
9 jurisdictions or the state?
10 **A Well, this is where things can get a**
11 **little fuzzy. Sometimes I believe they're using**
12 **precinct boundaries that have been identified by**
13 **the census bureau as VTD boundaries, which at**
14 **times may or may not be congruent with present**
15 **precinct boundaries, if I'm making sense. So...**
16 Q So the precinct, according to Dave's, is
17 93.7 percent Native VAP.
18 If that's correct or roughly correct,
19 that would count as a homogeneous Native American
20 precinct under your understanding of that.
21 Is that true?
22 **A Yes. But it would just be one. And we**
23 **usually want more than one precinct to do some**
24 **analysis with. So...**
25 Q Okay. So is it your opinion that

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1 there's no way to determine whether the Native
2 American who won the state representative race in
3 Subdistrict 9A is the candidate of choice of the
4 Native American voters in the district?
5 **A Well, given conventional methods, I'm**
6 **not sure how it would be done, I guess is what I**
7 **would say.**
8 Q That's important information to
9 determine whether the candidate of choice is being
10 elected in District 9A?
11 **A That's true. I mean, that's how we**
12 **would make that determination.**
13 Q But in the absence of enough precincts,
14 you can certainly make inferences that may not
15 have the same high level of rigor as the EI
16 analysis would, but at some point, it just is
17 common sense, right?
18 If there's essentially only one
19 demographic group in the district, then the
20 candidate who wins by a large majority would
21 necessarily be that group's candidate of choice.
22 Does that seem fair?
23 **A Again, I mean, I'm just going to have to**
24 **differentiate between common sense or what may**
25 **appear on the face to be something versus, again,**

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1 rigorous statistical testing that we usually go
2 through in these types of cases. I mean,
3 sometimes the data are just not there to make
4 inferences with.
 5 Q In your report in the Walen case, you
 6 reached the conclusion, based on six statewide
 7 elections, that Native American voters in
 8 District 9A were able to elect their candidates of
 9 choice.
 10 Am I right about that?
11 A Yes.
 12 MR. PHILLIPS: I'll object to the extent
 13 that it is outside of Dr. Hood's opinion and work
 14 in this case.
 15 Q How did you make that determination?
16 A Well, I think I specifically said I was
17 making an inference from District 9 at large, and
18 you apply that to the subdistrict.
 19 Q And the inference there was that the
 20 Democratic candidate was the candidate of choice
 21 of Native American voters in District 9, and so,
 22 therefore, it stood to reason that that person was
 23 the candidate of choice in District 9A as well,
 24 correct?
25 A That was the inference I was making,

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1 yes.
 2 Q And do you stand by that inference?
3 A Well, it's in writing, so I have to,
4 yes.
 5 Q And so applying that same inference to
 6 Dr. Collingwood's report, we would reach the
 7 conclusion that -- we can infer that the
 8 Democratic candidate in these races for the state
 9 senate and the state house is the Native American
 10 candidate of choice, and the Republican candidate
 11 is the white voters' candidate of choice, correct?
12 A Correct.
 13 Q And so, therefore, Marvin Nelson, in
 14 District 9B, would be the Native American
 15 candidate of choice, correct?
16 A Well, he would be the Democratic
17 candidate, correct. So yes.
 18 Q And his white Republican opponent in
 19 that election would be the white voters' candidate
 20 of choice in District 9B?
21 A Correct.
 22 MR. GABER: Let's take a break now.
 23 (Recess from 11:53 a.m. until 12:09
 24 p.m.)
 25 MR. GABER: Let's go back on the record.

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1 THE WITNESS: I do want to just clarify
 2 my position on that last line of questioning in
 3 that I think it's very important to be able to
 4 statistically determine, using rigorous testing,
 5 who the candidate of choice is for various groups.
 6 BY MR. GABER:
 7 Q But nevertheless, in your Walen report,
 8 you found it reliable and sufficient to draw the
 9 inferences, given the clear pattern in the
 10 district as a whole with respect to District 9?
 11 MR. PHILLIPS: I'll object to the extent
 12 that reference to the Walen report is outside of
 13 Dr. Hood's opinion and work in this case. I'll
 14 just have a standing objection on that line of
 15 questioning.
16 A I did do that in that particular matter,
17 and perhaps I should have relied more on
18 statistical testing before I made those inferences
19 as well. So...
 20 Q But nevertheless, you made those
 21 inferences, and that's your opinion in that
 22 report, correct?
23 A Yes, it is.
 24 Q And you don't see any evidence to
 25 suggest that those inferences are wrong, right?

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1 A Well, again, not necessarily wrong, but
2 based on, you know, my own position, which I don't
3 think has changed over the years, that sort of
4 mandates more rigorous statistical testing, you
5 know, maybe I shouldn't have gone that far in that
6 particular -- making that inference in that
7 particular matter, I guess. So...
 8 Q We can talk about it a little bit. I
 9 don't think you should be so down on yourself. If
 10 you -- if all of the Native American voters are
 11 concentrated in one part of District 9 as a whole,
 12 and we're able to apply the statistical analysis
 13 to the district as a whole, then the component
 14 parts must add up to that district as a whole,
 15 right?
16 A True, they do add up. But as I talked
17 about previously, sometimes we don't know how they
18 add up under the surface.
 19 Q Given the high level of polarization
 20 that Dr. Collingwood reports and that you find
 21 with respect to Native American voting preferences
 22 in District 9 as a whole, it would be surprising
 23 if the data showed the opposite within either of
 24 the subdistricts, right?
25 A Well, that would be counter to the

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1 pattern uncovered at the district level. That's
2 true. I can say that.
 3 Q Okay. And would you agree with me that
 4 it would be unlikely that the subdistricts would
 5 have a different voting pattern than the district
 6 as a whole?
 7 MR. PHILLIPS: Objection, calls for
 8 speculation.
 9 A **Again, I guess this is where I-- you**
10 know, it's difficult to make inferences without
11 testing.
 12 Q But that is -- and we've agreed, that is
 13 the inference that you found reliable to make in
 14 the Walen report?
 15 A **I made that inference, yes.**
 16 Q Now, given that endogenous elections,
 17 more recent elections, and elections featuring a
 18 Native American candidate are more probative than
 19 other elections -- exogenous elections, more
 20 distant elections, and elections featuring only
 21 white candidates -- would you agree with me that
 22 equally weighing them in an analysis is not
 23 methodologically correct?
 24 A **Well, again, I freely admit endogenous**
25 elections are more probative, certainly. I mean,

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1 Prof. Collingwood provided these same sort of
2 global stats that I do in this report that I
3 turned in. So...
 4 Q But in terms of interpreting the
 5 election results, the proper methodology is to
 6 accord greater weight to the endogenous elections,
 7 the elections featuring Native American
 8 candidates, and the more recent elections.
 9 Do you agree with that?
 10 A **Yes, as we've discussed.**
 11 Q And so when we get to the point of
 12 reaching a conclusion about Gingles prong 3,
 13 either an academic or a court should not weigh the
 14 elections equally?
 15 MR. PHILLIPS: Objection to the
 16 extent -- I'll say speculation and calls for a
 17 legal conclusion.
 18 A **Well, I can't speak for the Court,**
19 but -- and again, this sort of gets into another
20 issue we have sometimes in vote dilution cases of
21 how many, you know, endogenous elections there are
22 to compare with the rest of the elections out
23 there.
 24 **If there's -- I'm just saying**
25 hypothetically, if there's two, then that's hard

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1 to really make an inference from that. So...
 2 Q But nevertheless, you would give greater
 3 weight to that -- when you're looking individually
 4 at each election, you would give significantly
 5 greater weight to the endogenous election, to the
 6 extent it points in a different direction than the
 7 exogenous election?
 8 A **I think someone like the Court would be**
9 better positioned to do that than I would,
10 necessarily. So...
 11 Q And so the Court would need to be the
 12 one to make those determinations about probative
 13 value between the elections?
 14 MR. PHILLIPS: Objection, calls for a
 15 legal conclusion.
 16 A **Well, yes, and again, to the extent of**
17 which how many elections are -- how many
18 endogenous elections do we have versus exogenous,
19 what type of exogenous elections, you know, what
20 time period. I mean, there's a lot of factors to
21 weigh here.
 22 **So I typically don't -- I guess what I'm**
23 saying is, as a political scientist, I typically
24 am looking for a pattern, not for, you know, a
25 detailed dive into a single election, per se.

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1 Q If there's a limit to the number of
 2 endogenous elections and there are more recent
 3 exogenous elections available, you would agree
 4 that the better approach -- or a good approach
 5 would be to go to those first because they have
 6 more probative value than more distant exogenous
 7 elections, correct?
 8 A **Yeah. I mean, typically, in these kinds**
9 of analyses -- and I've written about this
10 academically -- I typically don't go back more
11 than ten years, just as sort of a general rule. I
12 mean, that's not -- there's no principle on that.
13 But I typically don't go back further than ten
14 years. So...
 15 Q And you would agree, within that ten
 16 years, the probative value increases as you get
 17 closer to today?
 18 A **Yes, as we've discussed, yes. I think**
19 that's fair.
 20 Q Now, if the endogenous election and the
 21 more recent exogenous elections and the elections
 22 in which there are Native American candidates of
 23 choice point in favor of a Gingles prong 3
 24 finding, and the less probative elections point in
 25 the opposite direction, then the Court would need

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1 to consider more probative, in your view, or
 2 academics would need to consider more probative
 3 the elections pointing in favor of a Gingles
 4 prong 3 conclusion.
 5 Is that a fair statement?
 6 MR. PHILLIPS: Objection, speculation,
 7 calls for a legal conclusion, and object to form.
 8 **A So this is -- I guess this is what I**
 9 **would say. As a researcher, you know, looking**
 10 **into a vote dilution matter, I would make a**
 11 **determination of what elections I'm going to**
 12 **analyze up front.**
 13 **And, you know, I don't disagree, legally**
 14 **speaking, that some elections may be more**
 15 **probative than others. But a researcher has**
 16 **chosen a set of elections, and you can't just pick**
 17 **and choose at that point which ones are going to**
 18 **be included or not.**
 19 **So if -- we have to, like -- you know,**
 20 **if we're going to make an argument not to include**
 21 **certain elections in our analysis that we've**
 22 **already analyzed, or we're saying that they're**
 23 **less probative for whatever, I mean, that's really**
 24 **a matter for the Court to weigh, if that makes**
 25 **sense.**

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1 Q So another way of saying that is that
 2 that's a factual determination about how much
 3 probative value to give each particular election?
 4 **A Yes. That's not something I think I can**
 5 **do or any other researcher can do necessarily. I**
 6 **mean, Prof. Collingwood chose these races to**
 7 **analyze, and yes, within that subset, some may be**
 8 **more probative than others, as we've discussed. I**
 9 **don't disagree with that.**
 10 **But nevertheless, he analyzed all these**
 11 **races, and so they should be included in the**
 12 **prong 3 component of the Gingles analysis. I**
 13 **guess that's what I would say. So...**
 14 Q And the question then is how much weight
 15 to give each particular election in terms of what
 16 it says about whether white voters are usually
 17 defeating the Native preferred candidates.
 18 **A Yes. Which is, I think, outside the**
 19 **scope of what I normally would do personally.**
 20 Q But in order to make a determination
 21 about whether Gingles prong 3 is satisfied or not,
 22 that's a necessary part of that determination,
 23 right, how much probative value to give the
 24 individual elections?
 25 **A Well, if a court decided to give certain**

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1 **cases more or less weight, then yes. But at that**
 2 **point, that's the Court making that determination,**
 3 **not a researcher.**
 4 Q And the Court, in doing so, would be
 5 following, however, the generally accepted
 6 methodology, which, as we've discussed, involves
 7 placing, I think in your words, far greater weight
 8 on endogenous elections and more probative value
 9 to more recent elections and to racially contested
 10 elections, right?
 11 **A Yeah. I don't disagree with those**
 12 **points, as we've discussed. I've written about**
 13 **that academically, in fact. So...**
 14 Q Now, Dr. Collingwood, in his report,
 15 though he presented the -- all of the election
 16 results from 2014 to 2022 for the statewide
 17 contests reconstituted in the new districts, did
 18 provide opinion and discussion about how to
 19 interpret that for purposes of Gingles prong 3,
 20 given the differences in the probative value of
 21 different types of elections.
 22 Do you recall reading that?
 23 **A He provided some -- he provided some**
 24 **context, yes.**
 25 Q And you don't -- in your report, you

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1 didn't dispute any of that, correct?
 2 **A I don't think I disputed it directly. I**
 3 **may have disputed it indirectly in the way that I**
 4 **treated that set of races that he analyzed.**
 5 Q And that was by equally weighing the
 6 races that he analyzed, correct?
 7 **A That's correct.**
 8 Q But as we've discussed, the Court will
 9 have to ferret out what probative value to give
 10 those races to make a Gingles prong 3 conclusion,
 11 right?
 12 **A Yes.**
 13 Q And it's your view that, given the
 14 differing probative values that should be afforded
 15 different types of elections, you can't make that
 16 Gingles prong 3 determination for the Court,
 17 correct?
 18 **A Well, I mean, yes, that's correct.**
 19 **So, you know, a similar example would be**
 20 **hypothetically, and I'm speaking just**
 21 **hypothetically here, if we had two experts in a**
 22 **particular vote dilution case like this present**
 23 **the Court with two different sets of elections**
 24 **they had analyzed, maybe some overlap in a Venn**
 25 **diagram, but some don't, same thing. The Court**

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1 would have to determine which elections analyzed
2 by those researchers were more probative than the
3 others.
 4 Q And that type of determination is
 5 probably all the more important when there's mixed
 6 signals, right, where the endogenous, the more
 7 recent, and the racially contested elections, say,
 8 point in favor of white bloc voting, and the other
 9 types of elections that are given less probative
 10 weight point in the other direction. That's a
 11 factual determination for the Court to make with
 12 respect to Gingles prong 3?
13 A I would say --
 14 MR. PHILLIPS: Objection, calls for a
 15 legal conclusion.
16 A I would say that the Court would have to
17 make that determination.
 18 Q You don't have any reason -- or you
 19 don't, in your report, dispute Dr. Collingwood's
 20 conclusion that within District 9 as a whole, the
 21 elections in which there's a Native American
 22 candidate, that the Native American candidate is
 23 defeated in 60 percent of those contests.
 24 Is that right?
25 A I don't remember that fact in

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1 particular, just sitting here. I did not dispute
2 it in my report, I can say that.
 3 Q Okay. And in your report in the Walen
 4 case, you analyzed six elections to -- six
 5 statewide elections to reach your conclusion.
 6 Is that right?
7 A That's correct.
 8 MR. PHILLIPS: I'll object to this line
 9 of questioning in a standing objection, outside
 10 the scope.
 11 Q And that was a sufficient number, you
 12 thought, to reach your conclusion regarding vote
 13 dilution there?
14 A That's how many I got done. You know,
15 certainly, I probably would have wanted to have
16 done more. That's how many I got completed. Some
17 of this is pretty time-intensive sometimes. So...
 18 Q But as a methodological matter, you were
 19 able to draw a conclusion from six elections?
20 A Well, that's how many elections were
21 utilized in that report, that's true.
 22 Q And you felt comfortable reaching that
 23 conclusion?
24 A I probably would have liked to have
25 gotten more done, to be honest.

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1 Q How did you select those six contests?
 2 A Well, they were from -- not 2022, but
 3 when I had been working on those, 2022 had not
 4 occurred yet. And so they were recent, you know,
 5 2020, 2018, high-profile statewide elections, even
 6 though I was sort of cutting it down to the
 7 district, you know.
8 But that's how I choose those elections.
9 And they were some of the same elections,
10 obviously, that Dr. Collingwood had also utilized.
 11 Q Am I correct that none of the six that
 12 you chose for the Walen report included elections
 13 in which there was a Native American candidate on
 14 the ballot?
15 A I don't think so.
 16 Q You don't think I'm correct, or you
 17 don't think --
18 A No, I think you're correct. I don't
19 think I did.
 20 Q Is there a particular reason why you
 21 didn't analyze the 2022 elections?
22 A Just time.
 23 Q Now, you don't dispute, I believe,
 24 Dr. Collingwood's analysis of the 2022 elections
 25 reconstituted into the District 9.

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1 Am I right about that?
 2 A Well, he used the same method he had
 3 used previously for the, you know, subsequent
 4 election cycles that were before that. So...
5 And again, as we've talked about,
6 there's different ways to do that. And that's
7 certainly one of the ways that some researchers
8 utilize.
 9 Q So -- and there's eight elections that
 10 he reports for 2022.
 11 Do you recall that?
12 A I think that's correct.
 13 Q And that includes -- one of those is an
 14 endogenous race for the state senate district
 15 itself, right?
16 A That's correct. That's correct.
 17 Q And in all eight of those contests from
 18 2022, the Native American preferred candidate
 19 loses District 9 as a whole.
 20 Is that your recollection?
21 A I don't remember. I believe that's
22 correct. I mean, we could look at it again.
 23 Q Yeah. If we want to pull up, again,
 24 it's TM Collingwood expert report which we have
 25 not marked as an exhibit, and may not until the

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1 end.
 2 And it's page 17 of the PDF. So if you
 3 go to the far right tab at the top there, TM
 4 Collingwood, page 17, and then show that graphic.
 5 So you see the full District 9 is
 6 reported on the far left column, and the Native
 7 American preferred candidate is shown in blue, the
 8 white preferred candidate is shown in green.
 9 Do you see that the white preferred
 10 candidate wins all eight elections within the
 11 bounds of District 9 for the 2022 elections?
 12 **A Yes, I do.**
 13 Q So this is actually more elections than
 14 you analyzed in your Walen report, correct?
 15 **A Correct.**
 16 Q And so on the basis of this, we could
 17 reach the opposite conclusion that you reached in
 18 your Walen report with respect to Gingles prong 3
 19 in District 9 as a whole?
 20 MR. PHILLIPS: Object to form, calls for
 21 speculation.
 22 **A Well, I haven't analyzed these**
 23 **specifically. But, you know, on its face, yes.**
 24 Q Now, in addition to the varying -- we
 25 can take this down for a moment so we can see each

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1 other better.
 2 In addition to the varying probative
 3 values that different types of election contests
 4 have, when we -- when an academic is analyzing
 5 vote dilution cases with respect to Gingles
 6 prong 3, it's also possible that certain elections
 7 could be characterized by special circumstances
 8 that make them less relevant to the determination.
 9 Do you agree with that?
 10 **A Well, again, we've talked about what may**
 11 **make an election more or less probative. And I**
 12 **stand by that.**
 13 **I think, as a researcher, if you're**
 14 **going to include an election, you know, it's more**
 15 **of a statistical matter at that point as opposed**
 16 **to assigning some kind of qualitative factors to**
 17 **the race to increase its significance or decrease**
 18 **it. That's not typically what I do. So...**
 19 Q You understand, though, that courts, in
 20 reviewing the presence of Gingles prong 3, part of
 21 the test is whether the election has the absence
 22 of special circumstances, correct?
 23 **A Correct.**
 24 Q Now, Dr. Collingwood in his report talks
 25 about the 2018 elections and discusses that those

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1 elections featured special circumstances that
 2 caution against equally weighing them or
 3 potentially weighing them at all.
 4 Do you recall that discussion?
 5 **A I do. I do.**
 6 Q In your report, you don't dispute that,
 7 correct?
 8 **A Not directly. Again, I guess indirectly**
 9 **dispute that by including the elections. I don't**
 10 **really agree with his -- respectfully agree with**
 11 **his line of reasoning about 2018.**
 12 Q You don't express that opinion in your
 13 report, correct, other than to --
 14 **A Not directly, no.**
 15 Q So you haven't studied the 2018
 16 North Dakota elections, correct?
 17 **A Not specifically, no. Well, I mean,**
 18 **outside of what I've done and disclosed in this**
 19 **case and the other case that we're discussing,**
 20 **clearly.**
 21 Q Right. So the extent of your study was
 22 to gather the election data and report it for
 23 2018?
 24 **A And analyze it, I would say, yes.**
 25 Q And by "analyze," you mean analyze the

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1 results in terms of what the numbers report -- the
 2 vote totals report within the district?
 3 **A Well, I mean, the racially polarized**
 4 **voting analysis is part of that.**
 5 Q Right. I guess what I mean is, you
 6 didn't study anything about the underlying
 7 campaigns or the voter turnout. I take that back.
 8 You did actually look at the voter
 9 turnout, right?
 10 **A Correct.**
 11 Q But you didn't analyze the facts
 12 surrounding the campaigns or why that might have
 13 affected the turnout.
 14 Is that correct?
 15 **A That's fair.**
 16 Q And you didn't study any of the
 17 get-out-the-vote efforts for the 2018 elections?
 18 **A No, I did not.**
 19 Q Are you familiar with any of the
 20 get-out-the-vote efforts that occurred during the
 21 2018 elections in North Dakota?
 22 **A Well, just from what I've read.**
 23 Q And what have you read?
 24 **A Well, that there was a larger effort on**
 25 **the -- with Native Americans, especially in terms**

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<p style="text-align: right;">81</p> <p>1 of that kind of effort in that election cycle.</p> <p>2 That's my understanding, sitting here.</p> <p>3 Q And is that from Dr. Collingwood's</p> <p>4 report, or did you have independent awareness of</p> <p>5 that?</p> <p>6 A Probably from his report.</p> <p>7 Q Beyond reading what Dr. Collingwood</p> <p>8 wrote, have you done any other examination to test</p> <p>9 whether or not you think there were unique</p> <p>10 circumstances in the 2018 election in North</p> <p>11 Dakota?</p> <p>12 A No.</p> <p>13 Q So you're not offering an opinion one</p> <p>14 way or the other whether there were special</p> <p>15 circumstances that made it unique from another</p> <p>16 election or the usual election in North Dakota?</p> <p>17 A Well, not outside of the generic things</p> <p>18 I've said about, you know, including or not</p> <p>19 including elections, for instance.</p> <p>20 Q Now, as a political scientist, I assume</p> <p>21 you agree with this statement, that voter turnout</p> <p>22 is typically higher in presidential elections than</p> <p>23 it is in midterm elections.</p> <p>24 A Most of the time, yes.</p> <p>25 Q And it's pretty unusual for more voters</p>	<p style="text-align: right;">83</p> <p>1 Q And then let's pull up Exhibit 3, which</p> <p>2 is the 2020 presidential election.</p> <p>3 And do you see that the Native American</p> <p>4 turnout in District 9 dropped from over 60 percent</p> <p>5 to 38.9 percent?</p> <p>6 A Correct. By those estimates, yes.</p> <p>7 Q And at the same time, in the 2020</p> <p>8 presidential election, we see that white turnout</p> <p>9 and other turnout ticked up slightly in the 2020</p> <p>10 presidential election compared to the 2018</p> <p>11 election.</p> <p>12 A Correct.</p> <p>13 Q Can you identify -- or does any example</p> <p>14 come to mind anywhere else in the country where</p> <p>15 you've seen a particular group have over</p> <p>16 20 percent higher turnout -- or 20 percentage</p> <p>17 points more turnout in a midterm election than in</p> <p>18 a presidential election?</p> <p>19 A I mean, I can't think of an example,</p> <p>20 just sitting here.</p> <p>21 Q You study elections frequently, right?</p> <p>22 A I do, yes.</p> <p>23 Q That's what you do all day long?</p> <p>24 A Some days.</p> <p>25 Q So it's 20 percentage points higher</p>
<p style="text-align: right;">82</p> <p>1 to turn out in a midterm election than turn out in</p> <p>2 a presidential election?</p> <p>3 A Most of the time, yes, that's true. I'm</p> <p>4 just saying that generically.</p> <p>5 Q Right. It would not be the usual fact</p> <p>6 pattern to encounter higher turnout in a midterm</p> <p>7 election than in a presidential election?</p> <p>8 A Not typically. That's correct.</p> <p>9 Q Now I want to go back a little bit to</p> <p>10 Exhibits 3 and 4, which are the calculations of</p> <p>11 the voter turnout for District 9 that you did for</p> <p>12 the 2018 and the 2020 elections. And let's start</p> <p>13 with Exhibit 3 to refresh our recollection.</p> <p>14 And again, this -- I don't remember</p> <p>15 whether this is Exhibit 3 or 4, but what I do know</p> <p>16 it is is the 2018 U.S. Senate election data that</p> <p>17 was reconstituted in the new District 9 and your</p> <p>18 internal analysis.</p> <p>19 Is that right?</p> <p>20 A Yes.</p> <p>21 Q So in the midterm 2018 election, we see</p> <p>22 that Native American voters in District 9 turned</p> <p>23 out at a rate of 60.4 percent compared to 68.3 for</p> <p>24 white voters and 49.8 for other, right?</p> <p>25 A That's correct.</p>	<p style="text-align: right;">84</p> <p>1 turnout in 2018 for Native Americans in the</p> <p>2 district than in 2020.</p> <p>3 That's unusual, right?</p> <p>4 A Well, I mean, as a general</p> <p>5 proposition -- I mean, I haven't -- this is the</p> <p>6 only study I've done of this particular</p> <p>7 legislative district and turnout.</p> <p>8 As we discussed, as a general</p> <p>9 proposition, among most groups, you know, turnout</p> <p>10 in presidential elections is typically higher than</p> <p>11 midterm elections.</p> <p>12 Q And I'm going to ask you to do a little</p> <p>13 math with me again.</p> <p>14 A Okay.</p> <p>15 Q So it's 20 percentage points higher, but</p> <p>16 we can calculate the percentage increase, right,</p> <p>17 if we take the -- let's see here. Going to the</p> <p>18 other exhibit, the Exhibit 4, which is the 2018.</p> <p>19 So if we take the difference between</p> <p>20 Native turnout in 2018, 3493, and then subtract</p> <p>21 the Native turnout in 2020, which is 2250, we see</p> <p>22 that, as a raw number, there's 1,243 more</p> <p>23 estimated Native Americans who turned out in 2018</p> <p>24 in District 9 than turned out in 2020?</p> <p>25 Is that correct?</p>

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1 **A Yes.**
 2 Q And then if we divide 1243 by the 2020
 3 turnout, which is 2250, we see that there's a
 4 55 percent higher turnout rate among Native
 5 American voters in the 2018 midterm than there was
 6 in the 2020 presidential election in District 9.
 7 Does that -- did I do that right?
 8 **A Well, I mean, I guess there are**
 9 **different ways to do this. If you're calculating**
 10 **a rate of increase or decrease, it's -- it would**
 11 **be 2020 minus 2018 divided by 2018.**
 12 **So, I mean, that's how I would calculate**
 13 **a rate of increase or decrease.**
 14 Q So you would take -- say that again.
 15 You would take 2020 minus 2018?
 16 **A Right.**
 17 Q And is that because 2020 happened after
 18 2018?
 19 **A Yes.**
 20 Q You see what I'm getting, like, that
 21 would be a negative number, then, right?
 22 **A Well, it is a negative rate of increase**
 23 **because turnout --**
 24 Q Decreased.
 25 **A I mean, it just did.**

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1 Q So -- but it's correct --
 2 **A It would be a negative. It would be a**
 3 **negative in that case. That would be correct,**
 4 **though.**
 5 Q Okay. But it is also correct to say
 6 that the turnout in 2018 among Native American
 7 voters was 50 percent higher than it was in the
 8 2020 presidential election?
 9 **A So it's 60.4, and what was the other --**
 10 Q 38.9 percent.
 11 **A Okay. So what did you -- how did you**
 12 **want to calculate this, I guess?**
 13 Q What I did is the raw number of Native
 14 American voters in 2018 minus the raw number in
 15 2020 to get the difference. And then I divided by
 16 the total number in 2020 to see what the
 17 percentage increase is.
 18 **A Well, you could do that. But we have**
 19 **the percentage. We have the turnout rate, or at**
 20 **least an estimate of that. So...**
 21 Q So it should be the same either way,
 22 right? It's a 55 percent increase?
 23 **A Yeah.**
 24 Q You would agree that that's a pretty
 25 striking and unusual characteristic, comparing the

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1 midterm to the presidential election for this
 2 district?
 3 **A Well, again, I would agree that**
 4 **typically turnout in presidential election years**
 5 **is higher than in midterm years, for most groups.**
 6 Q Actually, that was the case for -- in
 7 District 9 for white voters and for other voters,
 8 right?
 9 **A Yes.**
 10 Q And sitting here, you're not able to
 11 think of another example elsewhere in the country
 12 where you've seen a turnout difference that high
 13 where the midterm turnout among a racial group is
 14 so much higher than it was in a presidential
 15 election?
 16 **A Well, I can't recall an example. That**
 17 **doesn't mean that there's not one that exists, but**
 18 **I can't recall of one.**
 19 Q And you would agree that given the fact
 20 that courts that study vote dilution cases -- or
 21 that adjudicate vote dilution cases are tasked
 22 with determining whether special circumstances
 23 make a certain election or set of elections ones
 24 that should not be given great weight, that this
 25 is the type of information that would be relevant

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1 to that determination?
 2 MR. PHILLIPS: Objection, calls for a
 3 legal conclusion.
 4 **A I would agree that's the Court's**
 5 **decision to weigh, yes.**
 6 Q And would you agree that your own
 7 analysis shows significant evidence that should --
 8 the Court should consider, this unusual pattern of
 9 turnout with respect to the 2018 election for
 10 Native American voters in District 9?
 11 **A Well, it shows a turnout differential,**
 12 **that's true. It's in black-and-white numbers**
 13 **here.**
 14 Q And that's -- those numbers are relevant
 15 to the ultimate Gingles prong 3 determination?
 16 MR. PHILLIPS: Objection, calls for a
 17 legal conclusion.
 18 **A They could be.**
 19 MR. GABER: I'm going to mark as
 20 Exhibit 6 the file that's titled Hood Notes.
 21 (Exhibit Hood-6 marked for
 22 identification and attached to the transcript.)
 23 BY MR. GABER:
 24 Q Do you recognize these as some of your
 25 notes that you produced in this case?

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1 **A Yes.**
2 Q It would be the second to the last page
3 of the PDF, which is going to be 13, that's Bates
4 stamped HOOD-0256.
5 Now, is this the sort of underlying work
6 that you did to create the table for your report
7 that is on page 3?
8 **A It should be, yes.**
9 Q So what you show here is that -- and
10 this is, again, LD 9, LD 9A, LD 9B, and the total,
11 the total being the number of elections that were
12 available statewide or for endogenous in that
13 given election year?
14 **A Yes, yes.**
15 Q And so just looking at LD 9, there's
16 eight elections available to be analyzed in 2022,
17 correct?
18 **A Yes.**
19 Q And the Native American preferred
20 candidate lost all eight of those, right?
21 **A Yes.**
22 Q If we add the 2020 elections to the 2022
23 elections, then we have 14 total contests.
24 Is that right?
25 **A Yes, correct.**

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1 Q And that would include a mix of at least
2 one endogenous race and then the most recent two
3 election cycles of statewide contests?
4 **A Correct.**
5 Q And so if the time period we're looking
6 at is 2022 and 2020, then the Native preferred
7 candidate would have won 4 out of the 14 contests.
8 Is that correct?
9 **A Based on these notes, yes.**
10 Q And then if we skip over 2018 but add in
11 the 2016 to the 2020 and the 2022, then there are
12 nine contests for those three election cycles in
13 which the Native preferred candidate prevailed.
14 Am I right?
15 **A Yes, that's correct.**
16 Q And that's 9 out of 21 contests, right?
17 **A Yes.**
18 Q So setting aside 2018, for the other
19 most recent three election cycles, the white
20 candidate prevailed in District 9 in the majority
21 of the elections in those three election cycles,
22 correct?
23 **A That would be correct.**
24 Q And that's -- we said -- is that 21
25 contests, right?

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1 **A I believe so.**
2 Q You would agree that's a larger sample
3 size than the six that you analyzed for your Walen
4 report?
5 **A That's true, yes.**
6 Q And, in fact, just the 2022 contests
7 alone would be a larger sample size than what you
8 looked at in the -- in your Walen report?
9 **A Correct.**
10 Q And as a general matter, the more
11 elections -- looking at more elections is better
12 than looking at fewer elections.
13 Is that a generally fair statement?
14 **A Typically. Again, you know, as long as**
15 **they're somewhat probative.**
16 Q Well, in fact, if you're looking at --
17 **A I'm not saying 2022 wasn't. I'm just**
18 **adding that qualifier to that general statement.**
19 **(Inaudible) any election at any time, you know.**
20 **So...**
21 Q Yeah. And, in fact, as we discussed,
22 the more probative elections would be the more
23 recent, endogenous, and those featuring a minority
24 candidate of the minority group challenging the
25 map?

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1 **A Yes.**
2 Q Now, both in these notes but also in
3 your report on page 3, Table 1 on page 3 -- so I
4 guess what you've done here is, you have combined
5 District 9, District 9A, and District 9B and
6 summed up all the elections in those three
7 districts to report the defeat rate for Native
8 American preferred candidates across these five
9 election cycles.
10 Is that right?
11 **A In Table 1, yes. That's correct.**
12 Q So there's 108 elections where there's a
13 clear Native American candidate of choice.
14 Is that right?
15 **A Yes.**
16 Q And that's -- you get there by adding up
17 District 9, District 9A, and District 9B, right?
18 **A Correct.**
19 Q Now, we've discussed a bit that
20 District 9A has a very high Native American voting
21 age population.
22 Would you agree with that?
23 **A Yes.**
24 Q It's nearly 80 --
25 (Reporter interruption.)

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1 Q It's nearly 80 percent.
 2 Is that your understanding?
 3 **A It's high. I don't remember the**
 4 **exact -- I mean, unless I put it in my report**
 5 **somewhere, I don't remember the exact number. But**
 6 **it's high.**
 7 Q Okay.
 8 **A Subdistrict 9A is 77.0 percent Native**
 9 **American VAP. That's what I wrote.**
 10 Q Okay. Now, we talked a bit earlier when
 11 we were talking about sort of your presentation of
 12 the three Gingles factors that one typically would
 13 not include a district with such a high minority
 14 population in the Gingles prong 3 analysis because
 15 the purpose of the Gingles prong 3 analysis is to
 16 determine whether white voters are blocking Native
 17 preferred candidates in an area where there aren't
 18 enough Native voters.
 19 Is that correct?
 20 **A Well, I mean, I included this because I**
 21 **was responding to Prof. Collingwood, and he**
 22 **included it.**
 23 Q But Dr. Collingwood didn't add 9A, 9B,
 24 and 9 together, right? You did that.
 25 **A I did that, yes.**

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1 Q Okay. And so do you agree with me,
 2 though, that in a district with a large minority
 3 population, well above a majority and over
 4 three-quarters of the population of voters, that
 5 conducting a Gingles prong 3 analysis doesn't even
 6 make sense for that district?
 7 **A Well, it makes sense insofar as it**
 8 **confirms that where there's racially polarized**
 9 **voting and the district contains that many of a**
 10 **racial group, the time their preferred candidate**
 11 **of choice should win.**
 12 Q Do you understand the plaintiffs to be
 13 alleging that District 9A is packed with Native
 14 American voters, and the surrounding districts,
 15 there's cracked Native American voting population?
 16 **A I mean, are you representing that that**
 17 **is the case?**
 18 Q Yes. So the allegation is that
 19 District 9A is packed; there is cracked population
 20 in District 9B and in neighboring District 15.
 21 **A So it's not District 9 is packed, then.**
 22 Q The allegation is that District 9 is
 23 dilutive because it has an insufficient effective
 24 Native population, but the allegation is that 9A
 25 is packed and Native voters are cracked in the

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1 surrounding voters.
 2 Does that make sense?
 3 **A Yes, yes.**
 4 Q So you would not -- the Gingles prong 3
 5 doesn't get at whether white voters are defeating
 6 the Native candidate of choice in a packed
 7 district, right? The purpose is to look at the
 8 districts where there's allegedly too few Native
 9 American voters, given the way that the lines were
 10 drawn?
 11 MR. PHILLIPS: Objection, calls for a
 12 legal conclusion.
 13 **A Well, again, I mean, I guess I would say**
 14 **it's just something that can be analyzed. That's**
 15 **probably not going to be the case where the Native**
 16 **American preferred candidate of choice is losing**
 17 **in a district that's packed in a hypothetical**
 18 **sense, no.**
 19 Q And, in fact, when we look at your notes
 20 here that are on the screen, which I think is
 21 Exhibit 6, on page 13 of the notes, you show that
 22 the Native preferred candidate wins 100 percent of
 23 the tested elections in District 9A, right?
 24 **A Yes.**
 25 Q And so that doesn't tell us what's

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1 happening in the cracked -- the allegedly cracked
 2 populations outside of District 9A, right?
 3 **A That's correct.**
 4 Q And so if we're trying to determine
 5 whether or not white voters usually defeat Native
 6 preferred candidates in those areas outside of the
 7 packed district, we would most appropriately
 8 confine our Gingles prong 3 analysis to those
 9 areas outside the packed district.
 10 Do you agree with that?
 11 MR. PHILLIPS: Objection, calls for a
 12 legal conclusion.
 13 **A Again, I don't disagree necessarily.**
 14 **But to the extent to which 9A is part of this set**
 15 **of districts that's being analyzed, I included it.**
 16 Q Yeah, I get that.
 17 And it is being challenged insofar as
 18 the allegation is that it's been packed so heavily
 19 that that's the only district in which a Native
 20 preferred candidate would win.
 21 But to examine whether white bloc voting
 22 is usually defeating the candidates of choice in
 23 more districts than what was drawn, you would not
 24 look at the allegedly packed district for Gingles
 25 prong 3?

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1 MR. PHILLIPS: Same objection.
2 **A Well, I would just say that the district**
3 **under challenge, I did look at it.**
4 Q Okay. But let's take my proposition and
5 assume that's true. And I think you've said you
6 didn't necessarily disagree with that, right?
7 **A Correct.**
8 Q And if we exclude District 9A, the
9 allegedly packed district, and look just at
10 District 9 and District 9B in combination, then
11 there are -- across the five analyzed years, there
12 are -- is it 72 total elections?
13 **A I guess it would be.**
14 Q And among those 72 elections, the Native
15 preferred candidate wins 30, and the white
16 preferred candidate wins 40.
17 Is that correct? Or 42, rather.
18 **A Yes. 40, right? If I'm looking at this**
19 **right.**
20 Q Maybe it's 40. So it's -- I'm just
21 trying to help myself do math here.
22 So there's 23 Native -- you counted 23
23 Native victories in LD 9. And is that 7 in 9B?
24 **A Yes, looks like 7 to me.**
25 Q So that's 30 for the Native preferred

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1 candidates. And there's -- there are 72
2 elections. Maybe it's the case -- we're trying to
3 get at whether it's 40 or 42 victories for the
4 white preferred candidate. It's possible that
5 those are the two elections that didn't feature a
6 racially polarized voting, perhaps. But --
7 (Cross-talk.)
8 **A I don't think those two races are being**
9 **counted in this table I drew out by hand.**
10 Q Okay. So then it would be 42 contests
11 in which the white preferred candidate prevailed
12 when we sum up District 9 and District 9B, and 30
13 in which the Native preferred candidate prevailed?
14 **A I believe that's correct, yes.**
15 Q So that would be 58 percent of the time
16 when we look at the districts that are alleged to
17 have too little Native population to provide an
18 equal opportunity to elect; 58 percent of the
19 time, the white preferred candidate is winning,
20 and 42 percent of the time, the Native preferred
21 candidate is winning.
22 Is that correct?
23 **A Based on those calculations, that would**
24 **be correct, yes.**
25 Q And that would be indicative of a

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1 Gingles prong 3 being present that the white
2 preferred candidate is usually defeating the
3 Native preferred candidate?
4 MR. PHILLIPS: Objection, calls for a
5 legal conclusion.
6 **A In 9 and 9B added together, yes.**
7 Q Okay. Now, you understand, based on our
8 discussion earlier -- did you review the Complaint
9 and the supplemental Complaint that were filed by
10 plaintiffs in this case?
11 **A I probably did. I can't tell you that I**
12 **can remember much from it.**
13 Q But you understand and you did some
14 analysis -- or rather, you reviewed
15 Dr. Collingwood's analysis and understand that
16 District 15, the neighboring district, is also
17 part of the claim in this case, right?
18 **A Yes, yes.**
19 Q And to the extent that plaintiffs claim,
20 which I can represent it is, is about vote
21 dilution as a regional matter, and not with regard
22 to, you know, the particular district lines,
23 because the challenge is to the lines, one could
24 also add in District 15's results to District 9
25 and District 9B to get a full picture of the

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1 racially polarized voting and the Gingles prong 3
2 factors for the whole challenged area, correct?
3 MR. PHILLIPS: Object to the form,
4 compound question.
5 Q That was very compound. Let me break it
6 down.
7 So to the extent -- given that
8 plaintiffs are challenging the regional drawing of
9 the districts, then it would be -- it would make
10 sense to -- as you did to some extent, to add
11 together the challenged election results from both
12 Districts 9 and 15?
13 **A Well, I mean, one could make that**
14 **argument. I don't know that two -- I mean, we're**
15 **using this term "region." I don't know that two**
16 **legislative districts are a region, per se.**
17 **I mean, you can do what you're saying,**
18 **certainly. I mean, it's just a matter of**
19 **arithmetic.**
20 Q And given the results that you saw in --
21 given what we just saw with respect to District 9
22 and District 9B, if we add in the results in
23 District 15, there's an even stronger indication
24 of the presence of Gingles prong 3 using that
25 approach, correct?

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1 MR. PHILLIPS: Object to form, calls for
 2 speculation.
 3 **A From what I remember in terms of the**
 4 **outcome of those races in LD 15, yes.**
 5 Q And, in fact, in your report, you don't
 6 dispute that Gingles prong 3 exists in LD 15,
 7 correct?
 8 **A Correct.**
 9 Q Now, in your notes, you have the 2022
 10 election results. I think it's perhaps the
 11 page -- let's see -- it's Bates stamped 0252, and
 12 it would be pages 9 to 10 of the PDF, I believe.
 13 So you see here on page 9, you write
 14 down the general election results for the 2022
 15 election in District 9, 9A, and 9B?
 16 Do you see that?
 17 **A Yes, yes.**
 18 Q And then on page -- well, just stick
 19 with this page. Is there a reason why you didn't
 20 include this most recent and endogenous election
 21 results in your Walen report?
 22 MR. PHILLIPS: Objection. To the extent
 23 it applies to the Walen case, it's outside the
 24 scope of Dr. Hood's opinion and work in this case.
 25 **A I did not get to a full analysis. I**

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1 **mean, these are just some notes I took down off of**
 2 **the Secretary of State's election website. I did**
 3 **not -- I will state, I did not perform any kind of**
 4 **statistical analysis on the 2022 elections.**
 5 Q The reason for that was just simply a
 6 matter of the timing you had available before you
 7 had to submit the report?
 8 **A Yes, yes.**
 9 Q And do you agree that it would have been
 10 preferable to include all of the 2022 elections in
 11 that report, given that they're the most recent
 12 and some of them contain endogenous elections
 13 including endogenous elections with Native
 14 American candidates?
 15 **A Well, as we discussed, they certainly**
 16 **are the most recent set of elections held, yes.**
 17 Q And your report would have been more
 18 complete or would have been more fulsome had it
 19 added in these -- the eight 2022 contests for
 20 District 9?
 21 **A Well, I don't know that I would have**
 22 **done eight. I mean, Prof. Collingwood did eight.**
 23 **But some 2022 elections.**
 24 Q Which of the 2022 elections would you
 25 have included, if you had had time?

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1 **A I would have to honestly look at that.**
 2 **I'm sure I would include some of the statewide**
 3 **races. Probably the -- probably LD 9 as a whole.**
 4 Q So the 2022 LD 9 endogenous election is
 5 one that you would have included?
 6 **A Yes, probably so.**
 7 Q The 2022 public service commissioner
 8 race had a Native American candidate, Ms. Moniz.
 9 Is that an election that it would have made sense
 10 to include?
 11 **A I certainly would have considered that**
 12 **factor, yes.**
 13 Q There were statewide elections for the
 14 U.S. Senate in 2022 and the U.S. House in 2022.
 15 Would those be ones that would have made sense to
 16 include?
 17 **A Probably so. I mean, probably the**
 18 **senate race.**
 19 Q Not the house race?
 20 **A Well, again, I didn't do this, so I will**
 21 **just say that I certainly would have included some**
 22 **statewide races. In the case of North Dakota, the**
 23 **house is a statewide race. So...**
 24 Q I think you had included the 2018
 25 Attorney General race.

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1 Is that right?
 2 **A Yes, I think that's correct.**
 3 Q I assume it would have made sense, then,
 4 to also include the 2022 Attorney General race?
 5 **A Yes, and perhaps the gubernatorial race.**
 6 Q I can tell you, North Dakota elects the
 7 governor in the presidential cycle.
 8 **A Okay. Well, scratch that, then.**
 9 Q So then the other option is the 2022
 10 agricultural commissioner race, there was a second
 11 public service commissioner race in addition to
 12 the one that featured the Native American
 13 candidate, and the secretary of state rate race.
 14 Are there any among those that you have
 15 any reason to believe that you would not have
 16 included?
 17 **A I don't know that I would or wouldn't**
 18 **have included some of those other races. I guess**
 19 **it would just depend. So...**
 20 Q What would it depend on?
 21 **A Well, I mean, usually, if I'm doing a**
 22 **statewide race, I would probably start out with**
 23 **the higher profile statewide races like U.S.**
 24 **Senate, for instance. So...**
 25 Q So just so I can get a sense here, the

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<p style="text-align: right;">105</p> <p>1 U.S. Senate race, you definitely would include 2 that? 3 A Well, I guess if we were going back in 4 time, yes. 5 Q And you included the U.S. Senate race 6 from 2018, right? 7 A Yes. 8 Q So there's no reason not to include the 9 2022? 10 A No. Certainly, if I had included a race 11 from a previous analysis, from a previous election 12 cycle, I probably would include it again. As long 13 as it's contested. I mean, we don't learn a lot 14 from uncontested races in these types of analyses. 15 So... 16 Q And do you understand from 17 Dr. Collingwood's report that all of these 18 eight -- or sorry -- seven statewide elections 19 from 2022 were contested that he included? 20 A I think in 2022, there were, yes. I 21 guess I would say I typically use a two-party 22 contested. So, you know, there's a Democrat and 23 Republican candidate running. 24 Q Okay. So the U.S. House race, my 25 understanding, featured an independent candidate</p>	<p style="text-align: right;">107</p> <p>1 how I would go about doing this. That's what we 2 were talking about. 3 Q So I have the U.S. Senate race from 4 2022, the Attorney General race from 2022, the 5 endogenous District 9 election, and then we also 6 discussed that the statewide race featuring the 7 Native American candidate for the public service 8 commission would also be one that would be one to 9 include. 10 Is that right? 11 A Probably in that case, yes. I'm 12 assuming, without knowing, that that was a 13 two-party contested race. 14 Q It was, yes. The Republican candidate 15 prevailed statewide, and then the Democratic 16 candidate was Ms. Moniz, the Native American. 17 So that would be one to include? Did 18 you agree that that would be one to include? 19 A Yes, yes. 20 Q What about the Secretary of State 21 position? 22 A You know, certainly, it would be a 23 possibility if it's two-party contested. 24 Q And it was. 25 A Okay.</p>
<p style="text-align: right;">106</p> <p>1 who had the backing of the Democratic party. 2 Does that match your understanding? 3 A Well, it's not -- these are choices that 4 a researcher is going to make. Again, I probably 5 would not have included that if there was an 6 independent candidate versus it being two-party 7 contested. 8 Q But what if the RPV analysis showed that 9 that candidate was the candidate of choice of the 10 Native American voters in the district? 11 A Well, it could. But I mean, I'm making 12 decisions about what races to analyze up front, I 13 mean, is the way I do it. 14 Q So you start by excluding races that 15 don't have a Democratic or Republican candidate? 16 A I typically -- I think I've been pretty 17 consistent in these types of analyses in saying 18 that I typically don't include races that aren't 19 two-party contested. 20 Q But you agree, right, that if there is a 21 clear candidate of choice and racially polarized 22 candidates of choice in an election that doesn't 23 have both political parties represented, there's 24 nothing wrong with including that? 25 A I didn't say that. I'm just telling you</p>	<p style="text-align: right;">108</p> <p>1 Q So that would be one to include as well? 2 A Well, it would be one to consider 3 including, certainly. 4 Q Any reason you can think of not to 5 include it? 6 A Well, I mean, we're moving down ballot 7 at this point. So... 8 Q So if we had done as we just discussed 9 and added the 2022 U.S. Senate, the 2022 Attorney 10 General, the endogenous District 9 state senate 11 election, and the public service commissioner 12 election featuring the Native American candidate, 13 that would add four additional races to the six 14 that you analyzed in the Walen report. 15 Is that right? 16 A Yes. 17 Q And do you understand, from 18 Dr. Collingwood's report, that the Native 19 preferred candidates lost all four of those 2022 20 elections? 21 A According to his report, yes. 22 Q And you don't have any reason to dispute 23 that? 24 A Well, I don't have any reason to dispute 25 the calculations that he made. Again, I guess I</p>

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1 had a little more detailed calculation I would
2 make at that stage. So...
 3 Q In your Walen report, you found that of
 4 the six elections that you analyzed, that the
 5 Native preferred candidate won four of those six.
 6 Is that your recollection?
 7 **A That's my recollection sitting here,**
8 yes.
 9 Q And so the Native preferred candidate
 10 would have lost two of them, right, won four and
 11 lost two?
 12 **A Right. Yes, yes.**
 13 Q So if we were to add the elections that
 14 we discussed that you agreed would make sense to
 15 add from 2022, that would be six elections in
 16 which Native preferred candidates lost and the
 17 four elections in which the Native preferred
 18 candidate won in District 9, correct?
 19 **A Well, again, the losses are based on**
20 Prof. Collingwood's report. I mean, I would,
21 again, go through my calculations, as we detailed
22 in the spreadsheets, before -- I mean, I could
23 come to the same conclusion; I might not. So...
 24 Q Well, assume for me that Dr. Collingwood
 25 has accurately determined for the 2022 elections

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1 which candidate would have prevailed in
 2 District 9. Assuming he's correct about that,
 3 then that would yield six elections for your -- to
 4 add to your -- six total elections in which the
 5 Native preferred candidate lost in the district,
 6 and the four elections that you already reported
 7 in which the Native preferred candidate prevailed,
 8 correct?
 9 **A Correct.**
 10 Q And so that would be 60 percent of the
 11 time, the white preferred candidate would have
 12 defeated the Native preferred candidate in the
 13 district?
 14 **A Well, under those calculations, yes. I**
15 mean, with the caveat that I didn't do that.
16 So...
 17 Q So the caveat is that -- is whether or
 18 not Dr. Collingwood is correct about the results.
 19 But you agree that it would make sense to add
 20 those elections to the analysis you already
 21 conducted?
 22 **A I would agree they could be added,**
23 certainly, yes.
 24 Q And to the extent Dr. Collingwood is
 25 right about who won in District 9 in those 2022

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1 elections, then that would show 60 percent defeat
 2 rate for the Native American preferred candidates
 3 in District 9?
 4 **A Well, if I went -- again, with the**
5 caveat that I went through the same exercise and
6 made my calculations and came to the same
7 conclusion he did, then yes.
 8 Q And a 60 percent defeat rate for Native
 9 preferred candidates would constitute usually
 10 being defeated by white bloc voting, correct?
 11 **A Well, I guess it would meet the**
12 definition of more typically than not.
 13 Q And that's the definition that you apply
 14 to your Gingles prong 3 analysis?
 15 **A Correct, yes.**
 16 Q Now, when we discussed that if you add
 17 District 9 and District 9B together, the districts
 18 that are alleged to have insufficient voting
 19 population for Native American voters, and we
 20 found that 42 out of the 72 elections, the white
 21 preferred candidates prevailed -- do you recall
 22 that exercise we did just before this one?
 23 **A Yes.**
 24 Q That was just equally weighing each
 25 election, right? So from 2016 -- or rather,

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1 equally weighing each election across all five
 2 years?
 3 **A That's correct.**
 4 Q And so if we were to give more weight to
 5 the more recent 2022 elections, more weight to the
 6 elections in which there was Native American
 7 candidates, and more weight to the endogenous
 8 elections, then the evidence showing white bloc
 9 voting usually defeating the Native preferred
 10 candidates would be even greater, correct?
 11 **A If you subset those elections based on**
12 those criteria, then I believe that's correct.
 13 Q For 9 and 9B together, it's 42 out of 72
 14 where the white preferred candidate wins,
 15 including all of the 2018 elections that
 16 Dr. Collingwood has opined feature special
 17 circumstances that warrant excluding them?
 18 **A If we were not excluding those, yes. I**
19 mean, I think we came to those calculations. I
20 don't disagree with the calculations as they were
21 made in that exercise. So...
 22 Q And if we were --
 23 **A The numerical result of those**
24 calculations. So...
 25 Q If we were to take out the 2018

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1 elections, then the evidence in favor of white
 2 bloc voting would be even higher than the 42 out
 3 of 72 that we see including those elections,
 4 right?
 5 **A If we took out 2018, there would be**
 6 **fewer Native preferred candidates who would have**
 7 **won under those criteria, so yes.**
 8 MR. GABER: I think this is a good time
 9 for us to break.
 10 (Recess from 1:25 p.m. until 2:02 p.m.)
 11 MR. GABER: Back on the record.
 12 BY MR. GABER:
 13 Q Dr. Hood, welcome back from lunch. Did
 14 you have a chance to get something to eat?
 15 **A I did. Thank you.**
 16 Q So I'm going to shift gears this
 17 afternoon, but just a couple more points on the
 18 racially polarized voting topic.
 19 Is it your understanding that the state
 20 legislature adopted subdistricts in District 9 and
 21 in District 4 because of its belief that the
 22 Voting Rights Act would have required -- or might
 23 have been violated had elections occurred with the
 24 full district?
 25 MR. PHILLIPS: Objection, calls for

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1 speculation and outside the scope of Dr. Hood's
 2 opinion and work on this case.
 3 **A Well, I mean, all I have to rely on in**
 4 **regard to that particular question is the**
 5 **legislative record and the transcripts I read from**
 6 **meetings that were held with the redistricting**
 7 **committee and various groups around the state.**
 8 **And I mean, again, this is just my**
 9 **opinion, obviously, from the outside looking in.**
 10 **But yes, I believe that the redistricting**
 11 **committee thought they were complying with the**
 12 **Voting Rights Act by creating these subdistricts.**
 13 Q And the reason for that is, the concern
 14 that in the absence of the subdistricts, if the
 15 state house elections were conducted in the full
 16 district, the Native American voters in the full
 17 district would not have the opportunity to elect
 18 their candidate of choice?
 19 MR. PHILLIPS: Objection. You're asking
 20 him to just speculate about what the legislature
 21 did and why. The question is pure speculation.
 22 **A I'm not sure if I can answer the second**
 23 **question as to what they believed. I was able to**
 24 **glean enough from the records I read on the first**
 25 **point, but I honestly am not very comfortable with**

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1 **trying to discern what, you know, a group of**
 2 **people were thinking exactly. So...**
 3 Q Doesn't that just -- isn't it just
 4 purely logical? So if what you did glean was that
 5 they believed they needed to draw the subdistrict
 6 to comply with the Voting Rights Act and the
 7 subdistricts are a portion of the full districts,
 8 the only reason to do that would be because there
 9 was concern that the full district would not
 10 provide an opportunity and, therefore, there
 11 needed to be at least one state house seat, or
 12 there was that opportunity.
 13 Is there any other reason why one would
 14 do that to comply with the Voting Rights Act?
 15 MR. PHILLIPS: I'll object that it
 16 misstates his testimony and that it's a compound
 17 question and calls for speculation.
 18 **A Well, you know, splitting the**
 19 **legislative district as a whole into subdistricts**
 20 **in this case does provide for two single-member**
 21 **house districts, as we know.**
 22 **And given the fact that the Native**
 23 **American population is geographically sort of**
 24 **close to each other in terms of where they're**
 25 **located, you know, if you draw a subdistrict -- in**

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1 **a lot of cases, I guess there are many different**
 2 **possibilities or permutations.**
 3 **But if you draw a subdistrict like the**
 4 **legislature did or the redistricting committee**
 5 **did, then you're certainly going to increase the**
 6 **odds that a Native American candidate of choice**
 7 **can be elected from a subdistrict.**
 8 Q But if it's the case that the rationale
 9 was to comply with the Voting Rights Act, then the
 10 belief would have to be that there's a problem
 11 under the Voting Rights Act with the full
 12 district, right? There's no other explanation, at
 13 least with respect to the VRA rationale?
 14 MR. PHILLIPS: I'll object to the extent
 15 it misstates his testimony.
 16 I believe his testimony was that it did
 17 comply with the Voting Rights Act and that the
 18 legislature thought it was in compliance with the
 19 Voting Rights Act. I think you've sort of
 20 misstated his testimony.
 21 So that's my objection.
 22 Q I'm not trying to state your testimony
 23 at all. What I'm trying to ask is, to the extent
 24 the VRA is the reason that the legislature adopted
 25 the subdistricts, then it follows that the concern

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1 was that the full district with respect to
 2 District 9 and with respect to District 4 would be
 3 potentially in violation of the VRA.
 4 Do you understand what I'm saying?
 5 **A I guess you can infer that, you know.**
 6 **Again, I'm not -- I didn't interview this group of**
 7 **people, for instance. So...**
 8 Q But that would be -- if the VRA is the
 9 purpose and if the purpose is being logically
 10 applied, then the rationale is because there is
 11 concern that the full district might violate the
 12 VRA?
 13 MR. PHILLIPS: Objection, calls for
 14 speculation.
 15 He has not opined on this issue in his
 16 report. So you're veering pretty far off into
 17 what other people believe, and these are things
 18 that Dr. Hood has not opined on.
 19 That's my objection.
 20 **A Okay. So what was the last -- sorry.**
 21 **What was the last question?**
 22 Q I think it's the point that if you're
 23 logically applying the purpose to comply with the
 24 VRA to draw the subdistrict, then the necessary
 25 antecedent is that there's a belief that the full

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1 district is a problem under the VRA?
 2 MR. PHILLIPS: Same objection.
 3 **A I guess you could say could be a**
 4 **problem, potentially. Not an absolute that it is**
 5 **a problem.**
 6 Q So let's shift gears. I think we
 7 discussed a little earlier, you have testified as
 8 an expert about the compactness of districts in
 9 previous cases, right?
 10 **A Yes.**
 11 MR. GABER: So I'm going to mark as
 12 Exhibit 7 the document Hood Vesilind versus
 13 Virginia State Board of Elections Expert Report.
 14 (Exhibit Hood-7 marked for
 15 identification and attached to the transcript.)
 16 BY MR. GABER:
 17 Q Dr. Hood, do you recognize this as your
 18 expert report in the Virginia State court case,
 19 Rema Ford Vesilind versus Virginia State Board of
 20 Elections?
 21 **A Yes.**
 22 Q And you were retained by the
 23 Commonwealth of Virginia there to defend them for
 24 the 2011 state senate plan as compliant with the
 25 Virginia constitution's requirement that districts

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1 be compact.
 2 Is that right?
 3 **A Yes.**
 4 MR. PHILLIPS: I'll just object to the
 5 whole line of questioning to the extent that it
 6 exceeds Dr. Hood's opinion and work in this case.
 7 And if we can just agree that there's a
 8 standing objection for the whole line of
 9 questioning.
 10 MR. GABER: Yeah, I'll agree to the
 11 standing objection. I don't agree to the
 12 objection.
 13 MR. PHILLIPS: Understood. I don't want
 14 to object after every question.
 15 MR. GABER: Fair enough.
 16 Q So Dr. Hood, do you recall that the crux
 17 of the plaintiff's case in Vesilind was a
 18 challenge to six particular state senate districts
 19 as being non-compact as contrary to law?
 20 **A From what I -- I guess contrary to the**
 21 **Virginia state constitution. I think that's what**
 22 **it was technically.**
 23 Q Okay. And your ultimate opinion in that
 24 case was that the six districts that the
 25 plaintiffs challenged were, in fact, compact.

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1 Is that right?
 2 **A I honestly have not looked at this in**
 3 **quite some time. I'm sure I have some kind of**
 4 **summary statement in the report.**
 5 **I think I argued that the districts**
 6 **certainly were not -- that the districts were not**
 7 **compact to the extent to which it was a violation**
 8 **of the state constitution, I guess. But again, I**
 9 **haven't looked at this in a while.**
 10 Q Let's turn to page 6 of the report,
 11 which I think is probably page -- no, it's page 6
 12 of the PDF as well.
 13 And one of the things you note is
 14 that -- so you have two tables here. They list
 15 the districts that are being challenged, right?
 16 **A Yes, correct.**
 17 Q And those were -- and this is the 2011
 18 Virginia state senate plan, Districts 19, 21, 28,
 19 29, 30, and 37, correct?
 20 **A Correct.**
 21 Q And so looking at -- you have the
 22 baseline plan, the one that preceded the 2011
 23 plan, and then you have the 2011 plan, right?
 24 **A Correct.**
 25 Q And you note that there was a decrease

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1 in the compactness of these particular districts
 2 from the prior plan to the 2011 plan?
 3 **A That's correct.**
 4 Q Now, the Reock -- so you report the
 5 Reock scores, the Polsby-Popper scores, and the
 6 Schwartzberg scores.
 7 Is that right?
 8 **A Correct.**
 9 Q And am I correct that Reock compares the
 10 area of the district to the -- basically the
 11 smallest circle that will encompass the district?
 12 Is that a fair --
 13 **A Certainly, cliff note version, yeah.**
 14 **That's fine.**
 15 Q And Polsby-Popper does the same thing
 16 except it compares the length of the perimeter of
 17 the district to the area of the circle that
 18 encompasses it?
 19 **A Yes.**
 20 Q And the Schwartzberg one, I'm not going
 21 to remember.
 22 What is that?
 23 **A It's a perimeter to perimeter, compares**
 24 **the perimeter of the district to the perimeter of**
 25 **a circle with equal area.**

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1 Q Okay. With respect to the six districts
 2 that were challenged in this case, the 2011
 3 versions, the Reock scores ranged from 0.15 to
 4 0.22.
 5 Is that correct?
 6 **A Looks like it, yes.**
 7 Q And the Polsby-Popper scores ranged from
 8 0.08 to 0.14.
 9 Is that right?
 10 **A Yes.**
 11 Q And the Schwartzberg scores ranged from
 12 0.1 to 0.16.
 13 Is that right?
 14 **A Yes. Yes.**
 15 Q Now, one of the -- there were three
 16 basic methodologies that I gathered that you
 17 followed in reaching the conclusion that these
 18 districts were compact.
 19 The first is that you compared the --
 20 each of the districts to previous districts that
 21 courts had upheld as compact, and then compared
 22 their compactness scores.
 23 Do you recall that?
 24 **A Yes.**
 25 Q And that would be -- in your view,

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1 that's an appropriate, reliable methodology for
 2 determining whether an enacted district satisfies
 3 a compactness requirement?
 4 **A Well, I mean, if that scenario exists.**
 5 **Sometimes that scenario would not exist. But if a**
 6 **court in a particular state has spoken to this**
 7 **question, then yes, I think that's probative.**
 8 Q And that's with respect to a state law
 9 requirement of compactness, so you'd look to that
 10 state's courts to see what it had previously
 11 approved, right?
 12 **A Well, I mean, this particular case was a**
 13 **state case.**
 14 Q Right.
 15 **A So yes.**
 16 Q And along a similar vein, if the -- if
 17 federal courts or if the U.S. Supreme Court has
 18 deemed a particular district to be reasonably
 19 compact for purposes of the Voting Rights Act,
 20 then that would be a probative comparison to make
 21 in determining whether a proposed district, under
 22 the VRA, is reasonably compact?
 23 **A Well, yes, I think, but with the caveat**
 24 **that in this particular case, a court had spoken**
 25 **to some actual numbers, not just a district as**

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1 **being compact, but, you know, what is compactness.**
 2 **What's compact and what's not compact.**
 3 **Again, I'm trying to remember what I did**
 4 **here. This was a while ago. But I think there**
 5 **was some particular numbers that were actually**
 6 **laid out by a court.**
 7 Q Okay. And the second sort of
 8 methodology that you employed was to compare the
 9 challenged districts to see whether there were
 10 other districts in the plan that had similar or in
 11 some cases lower compactness scores.
 12 Is that right?
 13 **A Yes, correct.**
 14 Q And then third methodology was to apply
 15 a metric that was from the scholarship from
 16 Profs. Pildes and is it Niemi?
 17 **A "Niemi."**
 18 Q "Niemi."
 19 Do you recall that?
 20 **A Yes.**
 21 Q And since it's kind of specific, I want
 22 to just draw your attention to the Pildes and
 23 Niemi method, and that's on page 13 of the
 24 Vesilind report. And then so we can see the
 25 bottom paragraph, please.

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1 And I'll let you take a look at those.

2 **A Okay.**

3 **Okay.**

4 Q The methodology that you applied here

5 and that's written about in the Profs. Niemi and

6 Pildes report is in response to the racial

7 gerrymandering line of cases, right?

8 **A Correct, correct.**

9 Q And the methodology here is that if the

10 Reock score is above 0.16, or if the Polsby-Popper

11 score is above 0.06, or if the sum of those two is

12 above 0.22, then the district is considered

13 compact.

14 Is that correct?

15 **A Well, that's not how I would term it. I**

16 **would term it as what these two political**

17 **scientists are saying is that if it's below -- if**

18 **it's at this level or below, it's certainly**

19 **non-compact. I guess that's how I would phrase**

20 **it.**

21 Q The conclusion you reached -- an example

22 here is Senate District 28 from Virginia. You

23 noted that it had a Reock score of 0.15, which was

24 below the cutoff for compactness for the Reock

25 measure alone, but you concluded that it was, in

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1 fact, compact because it satisfied the composite

2 index that they propose.

3 Is that right?

4 **A I'm reading.**

5 Q Sure.

6 **A Well, again, it's -- compactness is hard**

7 **to judge. We know it ranges on a lot of these**

8 **measures from 0 to 1.**

9 **So what's being said here is that this**

10 **particular district, at least under a composite**

11 **score, didn't reach a point to where these**

12 **researchers, Pildes and Niemi, would say that it**

13 **was not compact. So it was above that threshold.**

14 **It doesn't mean that it's compact, I**

15 **mean, because you can go quite further up the**

16 **scale, right. But it doesn't meet this threshold**

17 **that they're talking about here.**

18 Q And you considered this threshold and

19 this article by these professors to be a reliable

20 methodology that you used in your -- as one of the

21 bases for your conclusion in the Vesilind case,

22 right?

23 **A I did make use of it, yes.**

24 Q And, in fact, with respect to that

25 Senate District 28, it was only through the

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1 composite score, that that alone allowed you to

2 opine, with respect to this methodology, that it

3 was a compact district, because if you'd just

4 looked at the Reock cutoff point, it would have

5 been in the non-compact category, right?

6 **A Yes, yes, yes. Using these various**

7 **cutoff points that are provided for this**

8 **particular methodology, yes.**

9 MR. GABER: I'm going to introduce as

10 Exhibit 8. Exhibit 8 will be the file Virginia

11 2012 to 2020 Maps.

12 And David, I will send that to you now.

13 (Exhibit Hood-8 marked for

14 identification and attached to the transcript.)

15 BY MR. GABER:

16 Q Dr. Hood, in the appendix to your

17 Vesilind report, you included sort of composite

18 maps that showed in that case the plaintiffs'

19 alternative plans overwritten over the enacted

20 ones. And we can look at those, too, if it's

21 necessary. But I've pulled the 2011 enacted plan

22 without that alternative map mapped onto it so we

23 could see it better.

24 Do you recognize this as -- we can zoom

25 in if you need to -- but as the 2011 Virginia

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1 state senate plan?

2 **A From what I remember. I mean, again,**

3 **it's not -- I haven't looked at this lately.**

4 Q Okay. I assume you spent a fair bit of

5 time with it at the time.

6 **A Well, yeah, at the time.**

7 Q Okay.

8 **A There's been many maps drawn since then.**

9 **So...**

10 Q Yeah. So the -- let's scroll down to

11 the second page of this, please. And Districts 19

12 and 21 were among the maps -- or among the

13 districts that were challenged by the plaintiff in

14 the case.

15 Is that right?

16 **A From what I remember, yes.**

17 Q And your opinion was that Districts 19

18 and 21 were compact districts.

19 Is that correct?

20 **A Well, I don't know exactly what I said**

21 **about them without looking at the report.**

22 Q We can come back to it, but -- give me

23 one second.

24 MR. PHILLIPS: Just to be clear, my

25 standing objection relating to this prior case

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1 applies to this exhibit as well as any others
 2 related to this former case.
 3 Q For the moment -- we're going to come
 4 back to this in a second, but can you go back to
 5 the Vesilind report, which is the previous
 6 exhibit. And then if you can go to page 24 and
 7 scroll down so the whole -- to the bottom part of
 8 this page in the overall opinion, the last
 9 sentence there.
 10 So Dr. Hood, your ultimate opinion was
 11 that after conducting your own analysis, it was
 12 your opinion that the 2011 Senate plan creates
 13 districts which are sufficiently compact and
 14 contiguous as required by the Virginia
 15 constitution.
 16 Is that your opinion?
 17 A Okay. I'm not saying it wasn't; I
 18 just -- I don't remember what I said.
 19 Q Sure, sure. And this was 2017, it looks
 20 like.
 21 Does that sound right?
 22 A I know it was pre-pandemic. So...
 23 Q Yeah. The next page says it was
 24 executed on January 12th, 2017.
 25 Okay. So let's go back -- now that

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1 we've seen that, let's go back to the maps.
 2 So as part of your opinion, given that
 3 Districts 19 and 21 were among the six that were
 4 being challenged, your opinion was that they were
 5 sufficiently compact?
 6 A They would have had to have been, yes,
 7 based on what we just read.
 8 Q And if we could scroll down to the next
 9 page, please. This is getting close to where I am
 10 right now, to the D.C. area, and this view shows
 11 Districts 28, 29, 30, and 37, among others, but
 12 all four of those were among the ones that were
 13 challenged by the plaintiffs in the district as
 14 non-compact.
 15 Is that correct?
 16 A Yes.
 17 Q And do you see District 28 there?
 18 A Yes.
 19 Q That is a district that you opined was
 20 sufficiently compact, correct?
 21 A Correct.
 22 Q And do you see District 29?
 23 A Yes, yes.
 24 Q That's also a district that you opined
 25 was sufficiently compact, correct?

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1 A Correct.
 2 Q And do you see District 30?
 3 A Yes.
 4 Q And that one, you can see it swings
 5 around -- what is that -- District 36.
 6 That's a district that you also opined
 7 was sufficiently compact?
 8 A Yes.
 9 Q What word would you use to describe how
 10 the southernmost part of that district is
 11 connected to its northernmost part?
 12 A Possibly duck continuity. But I don't
 13 know, and I don't remember specifically.
 14 Q Would you characterize that as a narrow
 15 connecting point?
 16 A Yes, it is.
 17 Q And is the same true with respect to
 18 District 28 where it -- where 29 has a finger that
 19 comes into it?
 20 A Yes.
 21 Q Nevertheless, that wasn't too much of an
 22 incursion or a thinness of connection for you to
 23 conclude that the districts were sufficiently
 24 compact, right?
 25 A Correct. I mean, that was my conclusion

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1 in this case.
 2 Q And then do you see District 37 here as
 3 well?
 4 A Yes.
 5 Q And your conclusion there was that
 6 District 37 was sufficiently compact as well,
 7 correct?
 8 A Yes.
 9 Q And I think there -- is this the last
 10 page? Yeah. So that's the four were on this
 11 page, and the two were on the previous page.
 12 And all six of these districts were ones
 13 that you opined to be sufficiently compact?
 14 A Correct.
 15 Q And you haven't changed that opinion
 16 since you testified to that in court at the time?
 17 A No.
 18 MR. GABER: I'm going to mark as
 19 Exhibit 9 the document titled Fargo Close Up
 20 Enacted Plan.
 21 And I will send that to you now, David.
 22 (Exhibit Hood-9 marked for
 23 identification and attached to the transcript.)
 24 BY MR. GABER:
 25 Q Now, Dr. Hood, one of the North Dakota

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1 legislature's stated goals in the committee report
 2 that you included -- or that you cited to was that
 3 districts be compact, correct?
 4 **A Yes.**
 5 Q And is it your view that the legislature
 6 satisfied that goal?
 7 **A Well, I did not do a complete state**
 8 **analysis of the 2021 plan.**
 9 Q Did you have any indication to believe
 10 that the legislature failed to meet that
 11 requirement in some respect?
 12 **A Not necessarily, no.**
 13 Q What I'm showing you here is -- as with
 14 any area of the map where there's cities, it can
 15 be kind of hard to see the particular districts
 16 because they're smaller. There's more dense
 17 population. So I've narrowed in to the Fargo,
 18 North Dakota area.
 19 Do you see that here?
 20 **A Yes.**
 21 Q Are there any districts here that you
 22 see that appear to you to be not reasonably
 23 compact?
 24 MR. PHILLIPS: I'm going to object that
 25 this is outside the scope of Dr. Hood's opinion

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1 and work in this case.
 2 Again, maybe so I don't have to object
 3 every question about it, can we agree to a
 4 standing objection on that?
 5 MR. GABER: With respect to this
 6 exhibit?
 7 MR. PHILLIPS: Yes.
 8 MR. GABER: Sure.
 9 **A Not necessarily. Again, I mean, one of**
 10 **the reasons we calculate compactness scores is so**
 11 **we're not just using our eyes, though.**
 12 Q But just part of it is looking at the
 13 districts, right? That plays a role?
 14 **A It can. I mean, again, visuals don't**
 15 **play a role with compactness scores necessarily.**
 16 **Compactness scores may be a reflection of what**
 17 **someone's seen.**
 18 Q But just looking at these Fargo area
 19 districts, you're not identifying any that appear
 20 to you to be unreasonably -- to not be reasonably
 21 compact?
 22 MR. PHILLIPS: Objection, asked and
 23 answered.
 24 **A Not necessarily, no.**
 25 MR. GABER: Let's mark as Exhibit 10 the

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1 file, Grand Forks Close Up Enacted Plan.
 2 And let me send that to you, David.
 3 (Exhibit Hood-10 marked for
 4 identification and attached to the transcript.)
 5 MR. PHILLIPS: I'll just object to any
 6 questioning to this exhibit for the same reason,
 7 it's outside the scope of Dr. Hood's opinion and
 8 work in this case.
 9 BY MR. GABER:
 10 Q Okay. This is Exhibit 10. So this is a
 11 close-up of the Grand Forks area districts and the
 12 legislature's enacted plan.
 13 And maybe -- is it possible to zoom in a
 14 bit on this so Dr. Hood doesn't have to get so
 15 close to his computer. Thank you.
 16 Are there any districts here in the
 17 Grand Forks area that appear to you to be not
 18 reasonably compact?
 19 **A Not necessarily, just looking at what --**
 20 **looking at it with my eyes.**
 21 Q You wouldn't expect to conclude that
 22 something here was not compact?
 23 **A Well, again, I would not just use my**
 24 **eyes; I would calculate the compactness scores.**
 25 **That's what they're for. So we sort of have an**

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1 **apples-to-apples comparison that we can use.**
 2 **Because sometimes things you're looking at with**
 3 **your eyes can be slightly deceiving in terms of**
 4 **how compact it is, you know, based on which score**
 5 **you're using.**
 6 Q And some of the things that can affect
 7 the score as opposed to what you're looking at are
 8 the use of, for example, rivers as boundaries.
 9 Is that right?
 10 **A It can. Rivers or coastlines. So**
 11 **obviously there's no coastline in North Dakota,**
 12 **but rivers could.**
 13 Q And the way it would affect it is
 14 generally to decrease the compactness score if
 15 there's a natural boundary that's a squiggly line
 16 as opposed to a straight line?
 17 **A Some of them. Probably not Reock as**
 18 **much as Polsby-Popper or Schwartzberg. They're**
 19 **measuring different things. So...**
 20 Q The Reock score, it would, to the extent
 21 that the area of the district is smaller to where
 22 there are the indents of the river, right, as
 23 opposed to a straight line that went from the very
 24 edge of all of the --
 25 (Cross-talk.)

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1 **A Right, right. But, you know, I guess it**
 2 **depends on how much the river is winding and how**
 3 **many indents there are. It might not make a huge**
 4 **difference. It might make a difference.**
 5 MR. GABER: And let's pull up as
 6 Exhibit 11 the Bismarck Close Up Enacted Plan.
 7 MR. PHILLIPS: I'll just object to any
 8 questioning on this exhibit for the same reason,
 9 it's outside the scope of Dr. Hood's opinion and
 10 work on this case.
 11 (Exhibit Hood-11 marked for
 12 identification and attached to the transcript.)
 13 BY MR. GABER:
 14 Q And this is a close-up of the enacted
 15 districts passed by the legislature in the
 16 Bismarck area.
 17 Are there any districts here that appear
 18 to you to be not reasonably compact?
 19 **A Well, I don't know about reasonably.**
 20 **Again, I would calculate the scores for these. 34**
 21 **is going to be less compact by some measures.**
 22 Q Any other ones?
 23 **A Well, I mean, we would derive scores for**
 24 **all of these, and we can make comparisons. But**
 25 **let's say 34 in this map is probably the least**

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1 **compact. I mean, I can't see all of 31, 33,**
 2 **et cetera, 8, so I don't know about those.**
 3 Q So here you would say 34 is less compact
 4 than the others, but you wouldn't go so far as to
 5 say that it's not reasonably compact?
 6 **A Not necessarily. But again, I would**
 7 **probably need some more information on this.**
 8 Q So in your Virginia report, one of the
 9 things you did is compare to other districts in
 10 the state to see whether the challenged districts
 11 were at or perhaps better than some of the other
 12 districts in the state, right?
 13 **A That's correct, yes.**
 14 Q So that is actually the type of analysis
 15 that one would do -- it's one type of analysis you
 16 could do in determining whether a district is
 17 sufficiently or reasonably compact?
 18 **A Yes, and it's certainly a comparison**
 19 **I've made in the past. So...**
 20 Q And, in fact, in your report in this
 21 case, you compared the plaintiffs' proposed
 22 districts to the other districts enacted by the
 23 legislature?
 24 **A Yes. That was the primary comparison I**
 25 **was making, yes.**

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1 Q Okay. So in your view, looking at the
 2 maps and comparing them is actually totally within
 3 the scope of the work that you did?
 4 **A I believe so, yes.**
 5 Q Okay. Now -- and I can pull up the
 6 compactness report if that would be helpful, or I
 7 could pull up the spreadsheet that you created.
 8 But is it your understanding that each
 9 of the enacted districts in the North Dakota state
 10 legislative plan exceed the compactness scores
 11 that you analyzed for the challenged districts in
 12 the Virginia case?
 13 Let me rephrase that because I'm not
 14 sure that's entirely correct.
 15 That the least compact district in the
 16 Virginia case that you found to be compact had a
 17 lower compactness score than all of the enacted
 18 North Dakota state legislative districts.
 19 Does that sound right to you?
 20 **A It sounds right, but I don't know. I**
 21 **mean --**
 22 MR. PHILLIPS: Just note my objection.
 23 Objection, outside the scope of the opinion and
 24 calls for speculation.
 25 Q So you recall the one district had a

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1 Reock score of .15. Do you recall that, in the
 2 Virginia case?
 3 **A Yes.**
 4 Q I think that was District 28.
 5 **A We can certainly make that comparison,**
 6 **obviously.**
 7 Q And if we make that comparison, that
 8 district had a lower compactness score than any of
 9 the North Dakota enacted districts?
 10 **A Well, again, if I can see, then I could**
 11 **tell you.**
 12 Q Yeah. Let me do that for you.
 13 This is not an exhibit that I sent to
 14 the court reporter, but what I'm going to do, if
 15 I'm allowed to, is share my screen and show you
 16 the spreadsheet that you produced in discovery.
 17 Does that work?
 18 **A Sure.**
 19 MR. PHILLIPS: Is this the one that was
 20 produced in response to the subpoena to Dr. Hood?
 21 MR. GABER: It came with the -- I think
 22 that's the same as the one that came with the
 23 initial report. But that's what it is.
 24 THE WITNESS: I think I sent it again,
 25 possibly.

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1 MR. PHILLIPS: I'm sorry, Mark. I think
 2 we named that file with, like, a Bates stamp
 3 number for just reference purposes, the one that
 4 Dr. Hood produced. That might be a good way to
 5 reference it.
 6 MR. GABER: All right. That works.
 7 (Reporter interruption.)
 8 MR. GABER: So this is Bates stamped
 9 HOOD-0001. I put it in the chat, and I am going
 10 to -- since I put it in the chat, can you all do
 11 the screen share? Let me do it because I'm going
 12 to do some sorting functions.
 13 A/V TECH: Not a problem. I can also
 14 allow you to control the PC.
 15 MR. GABER: That's a bad idea.
 16 (A discussion was held off the record.)
 17 (Exhibit Hood-12 marked for
 18 identification and attached to the transcript.)
 19 BY MR. GABER:
 20 Q So this is the Excel spreadsheet that
 21 you produced -- or you created with the
 22 compactness scores for the enacted districts in
 23 the North Dakota legislative plan.
 24 Is that right?
 25 A Yes.

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1 Q So I'm going to use the sort function
 2 here and sort the Reock scores from -- well, let's
 3 see. I don't want to sort it alphabetically.
 4 Let's see if this works.
 5 All right. So in the enacted plan, do
 6 you see that the lowest Reock score is 0.17 for
 7 District 34?
 8 A Yes.
 9 Q And that's higher than the District 28
 10 from the Virginia case that was 0.15, correct?
 11 A Correct.
 12 Q And in the Virginia case, you found that
 13 District 28 was compact, correct?
 14 A I think I said reasonably compact was
 15 the term. So...
 16 Q Okay. So using that measure, then it
 17 would appear as though the North Dakota
 18 legislature -- every one of the districts would
 19 satisfy that metric of reasonable compactness
 20 because they're all higher than the score for the
 21 Virginia district you likewise found to be
 22 reasonably compact.
 23 Is that fair?
 24 A That's a true statement. They're all
 25 higher than 0.15.

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1 Q And then I'm going to sort by the
 2 Polsby-Popper scores. And here, the lowest
 3 Polsby-Popper score is again District 34, and
 4 actually, it matches District 46. They're both
 5 0.19.
 6 Do you see that?
 7 A Right.
 8 Q Now, we can pull it up again, but in the
 9 Virginia case, the challenged districts, the
 10 Polsby-Popper scores ranged from 0.08 to 0.14.
 11 Does that sound right to you?
 12 A If that's -- if you're representing
 13 that's what it is, then --
 14 Q I have it in front of me.
 15 A Okay. Okay.
 16 (Cross-talk.)
 17 Q So assuming that's correct -- and I
 18 think we actually -- when it was up in front of
 19 you, I think you testified about it.
 20 The 0.19 that's the lowest in the
 21 enacted plan for North Dakota would be higher than
 22 any of the six that were challenged in Virginia
 23 that you found to be reasonably compact?
 24 A Yes.
 25 Q And so using that comparison, under that

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1 framework you employed, all of the North Dakota
 2 enacted districts would likewise be reasonably
 3 compact?
 4 A Under that framework, yes.
 5 Q And you don't see anything wrong with
 6 that framework, right? It was the framework you
 7 adopted and applied in the Vesilind case?
 8 A Yes, that's correct.
 9 Q And so to the extent a district falls
 10 within the range of the enacted North Dakota
 11 legislative districts, it too would qualify as a
 12 reasonably compact district?
 13 A Well, at least compared to those
 14 Virginia districts.
 15 Q And compared to the North Dakota
 16 districts?
 17 A Well, I mean, we can make a comparison
 18 within the North Dakota districts if we're looking
 19 within a state plan.
 20 Q But to the extent that the lowest North
 21 Dakota district is reasonably compact by the
 22 method that you have applied in cases, then a
 23 district that's higher than that district, or at
 24 least equal to or higher, would itself be
 25 reasonably compact?

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1 MR. PHILLIPS: Objection, calls for a
 2 legal conclusion, calls for speculation.
 3 **A Based on that Virginia comparison I did,**
 4 **yes. Again, that was in Virginia. So it was a**
 5 **state-specific comparison.**
 6 Q Although part of that was not
 7 state-specific; it was looking at -- one of the
 8 three methods you employed was to use the paper
 9 that Prof. Pildes and Niemi had written, correct?
 10 **A That's correct. I did look at that.**
 11 Q And all of the North Dakota enacted
 12 state legislative plans are reasonably compact
 13 under that metric, correct?
 14 **A Virginia?**
 15 Q All of the North Dakota --
 16 **A All the North Dakota -- well, they're**
 17 **all higher than that, yes.**
 18 Q And so employing that methodology, which
 19 you have in the past, would lead you to conclude
 20 that all of the enacted North Dakota state
 21 legislative districts are reasonably compact?
 22 MR. PHILLIPS: Objection, outside the
 23 scope of his opinion.
 24 **A Well, I think it was, quote,**
 25 **sufficiently compact, unquote, but...**

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1 Q Okay. Do you see a different between
 2 sufficiently compact and reasonably compact?
 3 **A I don't know. I mean, for some reason,**
 4 **I chose to use that qualifier, so I'll stick with**
 5 **it.**
 6 Q So in your expert report, when you were
 7 assessing District 9 -- or rather plaintiffs'
 8 demonstrative versions of District 9, you compared
 9 it to the other enacted legislative districts, and
 10 then you also narrowed and compared it to the
 11 enacted version of District 9 in terms of
 12 compactness.
 13 Does that sound right to you?
 14 **A Yes, that's correct. That's fair.**
 15 Q And I take your point on the first score
 16 to be that when compared to other North Dakota
 17 districts, the demonstrative districts were on the
 18 lower end of the statewide districts.
 19 Is that fair?
 20 **A In terms of ranking, yes.**
 21 Q But they were not the lowest, right?
 22 **A I don't think -- I don't think any of**
 23 **them were ever the lowest, no.**
 24 Q And we've established that, by your own
 25 methodology that you've employed in the past, that

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1 all of the North Dakota enacted districts are
 2 sufficiently or reasonably compact?
 3 MR. PHILLIPS: Object to the form.
 4 **A Well, again, comparing it to that**
 5 **Virginia case, they're above those threshold**
 6 **levels, yes.**
 7 Q And so the same would hold true for
 8 plaintiffs' demonstrative districts; they are both
 9 above the Virginia level that you found to be
 10 compact, but they're also above other districts
 11 within the North Dakota plan that you also find to
 12 be sufficiently compact.
 13 Is that right?
 14 **A That's correct. None of the**
 15 **demonstrative districts are at the -- are the**
 16 **lowest -- literally the lowest in the state plan.**
 17 Q And with respect to your -- and they're
 18 higher than the Virginia plan as well, correct?
 19 **A Yes, that's correct.**
 20 Q Now, you spend a bit of time comparing
 21 plaintiffs' demonstrative districts to the enacted
 22 version of District 9 in terms of compactness,
 23 correct?
 24 **A Yes.**
 25 Q And in terms of the other districting

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1 principles that you looked at, that's your main
 2 comparison is between the proposed District 9 by
 3 the plaintiffs and the enacted version of
 4 District 9, right?
 5 **A Yes.**
 6 Q The enacted version of District 9 is a
 7 rectangle, more or less, right?
 8 **A Fair, yes.**
 9 Q And do you understand the question, in
 10 terms of compactness for Voting Rights Act
 11 purposes, to be a comparison to a perfect
 12 rectangle, or is it about whether or not the
 13 district is reasonably compact standing alone?
 14 MR. PHILLIPS: Object to form.
 15 **A My understanding is that it would be**
 16 **reasonably compact on its own.**
 17 Q And so the real comparison that we would
 18 want to do is determine whether or not the
 19 proposed district standing on its own is
 20 reasonably compact?
 21 **A Well, and we can do that from my report.**
 22 Q Correct.
 23 **A It places the demonstrative districts**
 24 **within the statewide plan as a whole. So...**
 25 Q Right. And I think we just established

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1 that compared -- given that the -- your conclusion
 2 that all of the enacted districts are reasonably
 3 compact or sufficiently compact, whichever term we
 4 want to use, given that the demonstrative
 5 districts fall within that range, they too would
 6 be characterized as sufficiently or reasonably
 7 compact?
 8 **A Again, with the caveat based on what I**
 9 **said in the Virginia case, yes.**
 10 Q On page 6 of your report -- and this is
 11 with respect to demonstrative District 1. In the
 12 first paragraph under part A there, the last
 13 sentence, you note that the part of the boundary
 14 for the Spirit Lake reservation is contiguous with
 15 a portion of the demonstrative District 1
 16 boundary.
 17 Do you see that?
 18 **A Yes.**
 19 Q What is the salience of that
 20 observation?
 21 **A I don't know that it's -- I don't know**
 22 **how important that is. That's just an**
 23 **observation, which is the case, that part of the**
 24 **reservation boundary is part of the boundary for**
 25 **the district. I'm just -- it's just a statement.**

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1 Q I just want to know what your -- I need
 2 to know what your opinions are about it. So I
 3 guess I didn't understand --
 4 **A Right. I don't know that it means any**
 5 **more than literally what it says.**
 6 Q Okay. That actually -- one of the
 7 state's -- or one of the legislature's criteria
 8 from its report is respecting the boundaries of
 9 the reservations in the state.
 10 Do you recall that?
 11 **A Yes, that's correct.**
 12 Q And we'll bring up the map in a bit, or
 13 we can do that now if you'd like. But the enacted
 14 plan, District 15 also follows the boundary of the
 15 Spirit Lake reservation in the same manner that
 16 plaintiffs' demonstrative plan does.
 17 Does that seem right to you?
 18 **A Yeah. I do recall that, yes.**
 19 Q In your analysis of the compactness of
 20 plaintiffs' proposed demonstrative districts, you
 21 did not seek to compare the scores to other
 22 districts that courts have upheld under the VRA as
 23 reasonably compact, correct?
 24 **A That's correct, yes.**
 25 Q That's the type of analysis that you did

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1 in the Vesilind case -- or that's one of the types
 2 of analyses that you did in the Vesilind case,
 3 however, right?
 4 **A Well, in that -- again, in that**
 5 **particular case, there was a Virginia state court**
 6 **that had made certain specific observations about**
 7 **compactness in districts. So...**
 8 Q If the -- say the U.S. Supreme Court has
 9 determined a particular district to be reasonably
 10 compact for VRA purposes, one thing that could be
 11 done is to look at the compactness scores of that
 12 district and compare it to a proposed district to
 13 see whether it satisfies the test for reasonable
 14 compactness for VRA purposes, right?
 15 MR. PHILLIPS: Objection, speculation,
 16 calls for a legal conclusion.
 17 **A That comparison could be made, yes.**
 18 Q And that would be a similar type
 19 comparison to what you did in Virginia except in
 20 the context of the VRA rather than the state
 21 constitution, right?
 22 **A Yes.**
 23 Q That's not something that you did here,
 24 right?
 25 **A Correct.**

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1 Q Now, Dr. Collingwood noted in his report
 2 that the overall compactness score for the plan as
 3 a whole in the enacted plan was the same as that
 4 in plaintiffs' demonstrative plans.
 5 You don't dispute his report in that
 6 regard, correct?
 7 **A Yeah, I think he was just looking at**
 8 **maybe the mean score for the state.**
 9 **Is that correct?**
 10 Q I think so.
 11 **A Something like that. No, not**
 12 **necessarily, no.**
 13 Q And one of the things you noted in your
 14 Vesilind report -- and we can pull that back up,
 15 for you to see, page 22.
 16 MR. PHILLIPS: Same objection on this
 17 exhibit, that it's outside the scope.
 18 Mark, maybe a short bio break whenever
 19 it makes the most sense.
 20 MR. GABER: Yep.
 21 Q So in this part of your report,
 22 Dr. Hood, for Vesilind, for the Virginia case, you
 23 were responding to Prof. McDonald's analysis where
 24 he had reported the degradation in compactness
 25 scores from alternative districts that the

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1 plaintiffs were proposing to those same numbered
2 districts in the enacted plan.
3 Does that sound familiar?
4 **A A little bit, yes.**
5 Q And the point you make here is that, you
6 know, sometimes it doesn't make sense to compare a
7 numbered district in one plan to a numbered
8 district in another plan because those district
9 boundaries are different, and it might make sense
10 to look more at the statewide results for the map
11 as a whole.
12 Does that fairly describe the point
13 you're making here?
14 **A Let me look at this for a second.**
15 Q Sure.
16 **A Yeah, I do say that here.**
17 Q So it does make sense, in this context
18 as well where the similar situation is happening,
19 to -- where there's a numbered district compared
20 to another numbered district in a different plan
21 that covers different territory, that looking as
22 well at the plan as a whole is a useful piece of
23 information to help disentangle those differences.
24 Is that fair?
25 **A Well, I think that's fair.**

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1 **Again, I'm responding to a particular**
2 **measure that Prof. McDonald has been utilizing in**
3 **this particular -- in that case that we've been**
4 **talking about in Virginia.**
5 Q And that's the degradation from --
6 **A Yes, yes.**
7 Q -- from the alternative map to --
8 **A Degradation measure.**
9 MR. GABER: Well, let's go ahead and
10 take a break now.
11 (Recess from 3:08 p.m. until 3:19 p.m.)
12 BY MR. GABER:
13 Q Dr. Hood, welcome back from the break.
14 Now, I am going to mark as an exhibit --
15 I think we are on 13 -- a document that's titled
16 Plaintiffs Demonstrative Plan 1 Map.
17 (A discussion was held off the record.)
18 (Exhibit Hood-13 marked for
19 identification and attached to the transcript.)
20 BY MR. GABER:
21 Q Dr. Hood, do you recognize this as the
22 enacted plan statewide view of -- I'm sorry. Let
23 me start that over.
24 Do you recognize this as Plaintiffs'
25 Demonstrative Plan 1 for the entire state view?

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1 **A Yes, from what I recall, yes.**
2 Q And if you look at District 9 in this
3 plan, in Benson County, do you see that it is --
4 the northern border of Benson County is a very
5 squiggly line that is the Devils Lake boundary?
6 **A Okay. I mean, I see what you're talking**
7 **about, yes.**
8 Q And then just below that, do you see
9 another river boundary that's the Sheyenne River
10 in Eddy County?
11 **A Well, I'm just going to take your word**
12 **for it.**
13 Q You didn't look --
14 **A I couldn't tell you where the Sheyenne**
15 **River was necessarily. So...**
16 Q So in looking at the map, you didn't
17 look to any of the -- well, when you were doing
18 the compactness analysis, did you look at the
19 visual -- did you have a visual look at the map?
20 **A Sure, sure.**
21 Q And did you notice the river and lake
22 boundaries?
23 **A Yes, I did.**
24 Q Did you do anything to determine whether
25 those natural boundaries were affecting the

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1 compactness scores?
2 **A Well, those boundaries, if they are**
3 **affecting the scores, are going to get picked up**
4 **in the scores that I ran. So...**
5 Q Right. But the effect wouldn't, right;
6 you would just get the score?
7 **A Well, to compare -- yeah, to compare an**
8 **effect, though, you'd have to have some**
9 **hypothetical to compare against it, I guess is**
10 **what I would say.**
11 Q So as we discussed earlier, I think you
12 said in particular the Polsby-Popper and maybe the
13 Schwartzberg, because those are based on
14 perimeter, those scores decreased as a result of
15 these types of squiggly river boundaries?
16 **A More so than Reock would, yes.**
17 Q So if this were a straight line, the
18 compactness score for proposed District 9 here
19 would be higher?
20 **A Well, most likely -- I mean, this map is**
21 **not super detailed, but most likely, if this were**
22 **a straight line instead of following a river**
23 **boundary, then yes, the perimeter scores would**
24 **probably be higher.**
25 Q And this river -- sorry -- the Devils

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1 Lake boundary, that is actually the county
 2 boundary as well; the county itself has that --
 3 Benson County itself has that sort of squiggly
 4 Devils Lake boundary.
 5 Is that right?
 6 **A From what I recall, yes.**
 7 MR. GABER: Okay. We can take this down
 8 for now.
 9 Q Now, looking back at your report,
 10 page 4, this is the analysis of LD 15 section of
 11 your report?
 12 **A Okay.**
 13 Q It's correct, right, that in your
 14 report, you don't contest that with respect to
 15 just looking at District 15, that Gingles prongs 2
 16 and 3 are established there.
 17 Is that right?
 18 **A So say that one more time.**
 19 Q That Gingles prongs 2 and 3, you agree,
 20 are established with respect to District 15 in the
 21 enacted plan?
 22 **A Well, I state that, so yes.**
 23 Q Okay.
 24 **A Yeah, I mean, it's stated there in the**
 25 **report.**

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1 Q What you do say, though, is that Gingles
 2 prong 1 is not established because District 15 is
 3 not a majority Native American district.
 4 Do I have that right?
 5 **A Yeah, that's correct.**
 6 Q Now, I think we talked a little bit
 7 earlier at the beginning of our conversation today
 8 about this, but you understand that Gingles
 9 prong 1 is focused on whether or not an
 10 alternative district to the enacted one that's
 11 challenged can be drawn in which there would be a
 12 majority Native population.
 13 Is that correct?
 14 **A Yes.**
 15 Q And so this conclusion about Gingles
 16 prong 1 here in your report isn't actually about
 17 Gingles prong 1; it's just an observation that
 18 enacted District 15 isn't itself a majority Native
 19 voting age population district, correct?
 20 **A Correct.**
 21 Q And you don't dispute that the
 22 plaintiffs' demonstrative plans are majority
 23 Native voting population districts, correct?
 24 **A Correct. They are.**
 25 Q And they include the Native population

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1 that's currently included in enacted District 15,
 2 right?
 3 **A Correct. I guess I would say most of**
 4 **it. You know, I'd have to do, like, a detailed**
 5 **analysis to say everybody was included. But most**
 6 **people, yes, are included.**
 7 Q And so in that respect, the
 8 demonstrative districts are themselves Gingles
 9 prong 1 demonstrative districts that satisfy the
 10 requirement there, right?
 11 **A Well, they're majority Native American**
 12 **districts, yes.**
 13 MR. GABER: I'll mark as Exhibit 14 the
 14 document titled Government Admin Committee Report.
 15 (Exhibit Hood-14 marked for
 16 identification and attached to the transcript.)
 17 BY MR. GABER:
 18 Q Dr. Hood, do you recognize this as --
 19 it's a long report of the legislature, but it
 20 includes other things. But among what it includes
 21 is the joint redistricting committee's discussion
 22 of the history of redistricting in North Dakota,
 23 the legal framework, and then a discussion of the
 24 priorities that guided this legislative
 25 redistricting process.

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1 **A Yes, from what I recall, that's correct.**
 2 Q And if we can turn to page 28 of the
 3 document, please. And maybe scroll down a bit,
 4 please. Down to the Population Deviation section.
 5 So you see the section here titled
 6 Population Deviation?
 7 **A Yes.**
 8 Q And do you see that the legislature sets
 9 as its goal that the overall range for the plan be
 10 within 10 percent population deviation?
 11 **A Correct.**
 12 Q And they note that in the plan being
 13 considered by the committee -- and I think you
 14 would agree that that's the plan that actually was
 15 adopted -- the overall deviation was 9.87 percent
 16 with the largest district being 4.88 percent over
 17 ideal and the smallest 4.99 below.
 18 Do you see that?
 19 **A Yes.**
 20 Q Now, nowhere here does the legislature
 21 indicate that it has some preference for being
 22 close to zero as opposed to being within the
 23 10 percent range, right?
 24 **A Correct.**
 25 Q If you could turn to your report on

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1 page 6, please. And this is again with respect to
 2 demonstrative District 1. The 3.14 percent that
 3 demonstrative District 1 deviates, that's within
 4 the goal of the legislature, right?
 5 **A It would be in that plus or minus**
 6 **5 percent, yes.**
 7 Q Have you looked to rank demonstrative
 8 District 1 with respect to the other districts as
 9 you had done for the compactness scores?
 10 **A I don't recall doing that comparison.**
 11 Q Would you be surprised to find that it's
 12 about in the middle of the districts in terms of
 13 population deviation?
 14 **A Not necessarily, no.**
 15 Q It's actually about within the middle of
 16 the 5 percent -- 0 to 5 percent, right?
 17 **A Right.**
 18 Q So the demonstrative district satisfies
 19 the legislature's goal for population deviation?
 20 **A Again, it certainly falls within those**
 21 **bounds.**
 22 Q And that's the case with respect to both
 23 demonstrative districts?
 24 **A I believe so, yeah. The other was plus**
 25 **4.53 percent. So...**

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1 MR. GABER: Now, if we could mark as
 2 Exhibit 15 the file Enacted Map Statewide.
 3 And let me get that over to you, David.
 4 (Exhibit Hood-15 marked for
 5 identification and attached to the transcript.)
 6 BY MR. GABER:
 7 Q Dr. Hood, do you recognize this as the
 8 2021 Enacted State Legislative Plan for North
 9 Dakota?
 10 **A Yes.**
 11 MR. GABER: And LaVar, would you mind
 12 zooming in to the top right part of this with the
 13 yellow and pink district. Thank you.
 14 Q Now, for the district -- I'm sorry. For
 15 the state house map, District 9A -- District 9
 16 splits Rolette County, Towner County, and Cavalier
 17 County.
 18 Do you see that?
 19 **A Yes.**
 20 Q So that's three out of three of the
 21 counties that are included, the enacted plan
 22 splits for the state house map.
 23 Is that right?
 24 **A It's a little hard to see. Is Rolette**
 25 **County split within District 9?**

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1 Q Yeah. You see the area north of 9A
 2 there, the gray kind of more faded lines represent
 3 the county borders.
 4 **A Right. But is Rolette County wholly**
 5 **contained within LD 9, I guess is the question.**
 6 Q So I'm talking about the state house
 7 version of the map.
 8 **A Okay. Fair enough. Yes.**
 9 Q So for purposes of the state house,
 10 within District 9, Rolette, Towner, and Cavalier
 11 County are all split?
 12 **A Yes, yes.**
 13 Q Now, if you could look at -- we'll keep
 14 this up on the screen, please. But if you can
 15 look at page 7 of your report. In the Communities
 16 of Interest section on the bottom of page 7.
 17 **A Okay.**
 18 Q You talk about county splits, and then
 19 you say, In the enacted plan, LD 9 splits only
 20 Towner County.
 21 Do you see that?
 22 **A Yes.**
 23 Q Now, setting aside the state house
 24 version where all three of the counties are split,
 25 with respect to the state senate version of

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1 District 9, the entire district, your statement in
 2 your report, that's not correct, right? You see
 3 that it splits both Cavalier and Towner counties?
 4 **A It should say Cavalier as well.**
 5 Q So that's two of the three counties are
 6 split in the state senate version of District 9?
 7 **A Right.**
 8 Q And that's an error in your report, I
 9 gather?
 10 **A Yeah, it definitely should say Cavalier**
 11 **County.**
 12 Q And then let's pull up -- let's pull
 13 back up, please, Exhibit 13. We're going to go
 14 back and forth between these. 13 is the
 15 Demonstrative Plan 1. If you could zoom in to the
 16 District 9 and 15 area.
 17 So you note that plaintiffs'
 18 demonstrative plan 9 -- in your report, you note
 19 that it splits Eddy County, Pierce County, and
 20 Rolette County, right, so that's three of the four
 21 counties it covers.
 22 **A Yes.**
 23 Q Now, the split that's contained in Eddy
 24 County, that's the same exact split that the
 25 enacted plan District 15 has for Eddy County,

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1 right?

2 **A Right.**

3 Q And that's to adhere to the boundaries

4 of the Spirit Lake reservation, which is along the

5 Sheyenne River.

6 Is that right?

7 **A Right. That's where the reservation**

8 **boundary would be, yes.**

9 Q And that's one of the state's -- in its

10 committee report, that's one of the criteria,

11 adhering to the boundaries of reservations?

12 **A Yes, yes.**

13 Q So --

14 (Cross-talk.)

15 Q Sorry, go ahead.

16 **A I'm saying, that's correct, it was in**

17 **that report.**

18 Q So one of the four splits -- sorry. One

19 of the three counties that are split in

20 plaintiffs' demonstrative plan, plan 1, is to

21 adhere to the requirement of the legislature to

22 follow the reservation boundary, and that's why

23 Eddy County is split?

24 **A Well, it certainly keeps the reservation**

25 **within 9, yes.**

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1 Q And by comparison to enacted plan's

2 state house map, the same number of counties are

3 split in plaintiffs' demonstrative plan for the

4 state house, which is the whole district, as in

5 the enacted plan, correct?

6 **A Three and three, yes.**

7 Q Let's switch back to the enacted map,

8 please, which was Exhibit 15. And take a look at

9 District 15 here.

10 District 15 includes all of Ramsey

11 County, but then part of Towner County, part of

12 Benson County, and part of Eddy County, right?

13 **A Right.**

14 Q So District 15 has three split counties

15 and one whole county?

16 **A Yes.**

17 Q And that's the exact same count as

18 Plaintiffs' Demonstrative Plan 1, correct, three

19 counties that are split and one whole county?

20 **A For demonstrative District 1, right?**

21 Q Right.

22 **A Yes.**

23 Q And as we mentioned earlier, one of

24 those boundaries is exactly the same. That's the

25 Eddy County split.

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1 **A Right. That's correct.**

2 Q So on this score of county splits,

3 plaintiffs' Demonstrative District 1 is

4 essentially the same on that score as the enacted

5 Districts 9 and 15?

6 **A Well, in 9, I guess if you go to the**

7 **house districts, if that's what we're talking**

8 **about, yes.**

9 Q And for the state senate, two-thirds of

10 the counties in District 9 are split, two of the

11 three?

12 **A That's correct.**

13 Q And it's the same entirely as

14 District 15, three split counties and one whole

15 county, right?

16 **A Correct.**

17 Q And the plaintiffs' demonstrative

18 District 1 puts Benson County back together whole,

19 right?

20 **A I believe so, yes.**

21 Q And we can take a look at that if you'd

22 like to see it.

23 **A Okay. I mean, I think that's correct.**

24 MR. GABER: That's Exhibit 13. The

25 third to the last tab there, LaVar. Thank you.

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1 Q So you see Benson county is whole there?

2 **A Yes, yes.**

3 Q Your Communities of Interest discussion

4 in your report focuses on county splits, right?

5 **A Yes.**

6 Q That term means more than split

7 counties, right?

8 **A Well, communities of interest can be**

9 **more than counties, certainly.**

10 Q Did you analyze any communities of

11 interest in your report other than counties?

12 **A No.**

13 Q Did you -- we've talked about how

14 respecting reservation boundaries is a priority of

15 the legislature, right?

16 **A Correct, yeah.**

17 Q And did you look to see whether the

18 enacted plan respected both the reservation

19 boundaries and the off-reservation trust land for

20 the Turtle Mountain tribe?

21 **A Well, I believe it did. I'm not sure**

22 **about the trust land. But the reservation was**

23 **contained within the district.**

24 Q And -- but you don't -- I guess earlier

25 we talked about how you don't have any particular

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1 knowledge or experience about Native American
 2 issues generally or voting patterns or
 3 sociological history or whatnot, right?
 4 **A That's correct.**
 5 Q Would it surprise you to know that the
 6 trust lands are important, you know, holdings for
 7 the Turtle Mountain tribe?
 8 **A No.**
 9 Q But you didn't look to see whether the
 10 enacted plan keeps those in one district?
 11 **A Well, I used the reservation boundaries**
 12 **as defined by the census bureau, and under that**
 13 **definition, it is contained within the district.**
 14 Q You would agree that --
 15 **A I'm not sure -- you know, I'm honestly**
 16 **not sure that -- whether that contained these**
 17 **trust lands that we're talking about or not. I**
 18 **just don't know the answer to that. So...**
 19 Q Okay. Would you agree that that would
 20 be a type of community of interest consideration
 21 that could be taken into account, whether the
 22 reservation and the trust lands are included in a
 23 single district?
 24 **A Well, certainly, it could.**
 25 Q Now, looking --

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1 MR. GABER: Maybe, LaVar, if you don't
 2 mind zooming out a little bit here so we can see
 3 the full map.
 4 Q Now, is it your understanding that aside
 5 from -- this is Plaintiffs' Demonstrative Plan 1.
 6 Aside from the changes to District 9, 15, and then
 7 some minor changes to 14 and 29, the rest of the
 8 plan reflects the plan that was enacted by the
 9 legislature?
 10 **A From what I recall, outside of those**
 11 **changes, that would be correct, yes.**
 12 Q Now, with respect to some of the other
 13 districts in the plan, you understand that rural
 14 North Dakota is somewhat sparsely populated,
 15 right?
 16 **A Certainly, yes.**
 17 Q So when that's the case, the
 18 geographical size of districts has to increase
 19 because there's -- you have to go further to find
 20 population to get an equally populated district.
 21 Does that seem fair?
 22 **A Yes.**
 23 Q And there are other districts in the
 24 state's enacted plan that span a larger geographic
 25 distance than does District 9 in plaintiffs'

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1 demonstrative plan, correct?
 2 **A Yes.**
 3 Q One example is its neighboring district,
 4 I believe that's 8.
 5 MR. GABER: Can you Zoom into the gray
 6 district for me, LaVar.
 7 Q I think it's actually not 8, I think
 8 it's 6.
 9 Do you see that?
 10 **A 6.**
 11 Q So 6 is larger in geographic size than
 12 demonstrative District 9, right?
 13 **A Looks to be, yes.**
 14 Q It stretches further north to south than
 15 does District 9 in this map?
 16 **A Yes.**
 17 Q And let's zoom out again, please.
 18 District 14 stretches from Pierce
 19 County -- the northern boundary of Pierce County
 20 all the way to the southern boundary of -- is that
 21 Kidder County?
 22 Do you see that?
 23 **A Yes.**
 24 Q And that's a larger geographic distance
 25 than demonstrative District 9, correct?

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1 **A Yes.**
 2 Q If you look at District 28, the
 3 teal-colored district in the southeastern part of
 4 the state, that district looks to be similar or
 5 possibly slightly larger in its east-west span as
 6 is demonstrative District 9 in its north to south
 7 span, right?
 8 **A Well, they certainly look on par. I**
 9 **mean, I don't know without measuring. So...**
 10 Q District -- the green district in the
 11 corner, I believe -- is that 39?
 12 MR. GABER: Can you zoom to the
 13 southwest corner for me, please, LaVar. Yeah,
 14 District 39, north to south. Maybe scroll back
 15 out so we can see the whole state again. Sorry.
 16 Q That looks to be slightly larger north
 17 to south than demonstrative District 9 in this
 18 plan, right?
 19 **A Potentially, yes.**
 20 Q Do you see, in the western part of the
 21 state, District 23, the kind of grayish-blue
 22 colored district?
 23 **A Yes.**
 24 Q How would you describe the shape of that
 25 district?

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1 **A I don't know. I think it would be --**
2 **it's difficult to come up with an adjective.**
3 Q I think it looks like a dinosaur.
4 **A Okay. Well -- I don't know. That's not**
5 **what was coming to my mind.**
6 Q Or maybe a baby dinosaur.
7 What about the -- you see the sort of
8 neck that connects its body to its head?
9 **A Yes, I see that.**
10 Q How would you characterize that?
11 **A Well, a neck. I mean, I think that's**
12 **probably a pretty good way to describe it. A**
13 **bridge.**
14 Q Would you describe that as a narrow
15 bridge?
16 **A Well, it's fairly narrow. I mean, the**
17 **district itself is not huge geographically. But**
18 **that's certainly -- I mean, I guess I could fairly**
19 **say that's probably the narrowest part of the**
20 **district.**
21 Q And you describe in your report
22 plaintiffs' demonstrative District 9 as having a
23 land bridge.
24 Do you recall that?
25 **A Yes.**

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1 Q Can you tell me on the map what the land
2 bridge is?
3 **A Well, on this map, for instance, here,**
4 **it would be that area to the right or to the east**
5 **of where it literally says Pierce, North Dakota,**
6 **where that lettering is there. So that's sort of**
7 **the bridge at that point. So...**
8 Q And do you understand that that's a
9 complete voting precinct from Pierce County?
10 **A Well, I didn't -- I don't know that I**
11 **would recall that, just sitting here.**
12 Q Did you look to see -- I notice that you
13 produced split reports for municipalities.
14 You didn't encounter any municipal
15 splits in Plaintiffs' Demonstrative Plan 1?
16 **A Not that I recall.**
17 Q It wasn't in your report, but it was in
18 the data, I noticed.
19 **A Right, right.**
20 Q And did you analyze to see whether there
21 were precinct splits? I noticed that there were
22 notes that you'd written about precinct splits.
23 **A I don't think I ever got that far.**
24 Q And so adhering to voting tabulation
25 precincts is also a traditional districting

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1 principle.
2 Is that fair?
3 **A It's one of the things that can be**
4 **looked at, yes. I mean, precincts aren't**
5 **necessarily communities of interest. But**
6 **sometimes courts have looked at whether precincts**
7 **are split or not. That's true.**
8 **I say they're not communities of**
9 **interest because most people don't think about,**
10 **you know, a precinct as a community -- as a local**
11 **community necessarily. They could be, but not**
12 **necessarily. So...**
13 Q It eases the burden on election
14 administrators to not change the precincts.
15 Is that fair?
16 **A It probably makes that part of things**
17 **easier, yes.**
18 Q And so to the extent -- Dr. Collingwood
19 noted in his report that demonstrative plan 1
20 adheres to all of the precinct lines -- the new
21 precinct lines that it touches.
22 Do you recall that?
23 **A Not precisely, but...**
24 Q You don't have any reason to dispute
25 that?

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1 **A Not necessarily, no.**
2 Q And to the extent it does that, that's
3 one of the criteria that is often followed as a
4 traditional districting criteria?
5 **A It is one of the things that is looked**
6 **at sometimes, yes.**
7 Q The land bridge that you identify, that
8 voting precinct in Pierce County, that is not
9 narrower than -- in fact, it's wider than other
10 land bridges you see in this map.
11 Is that fair?
12 **A Well, it's wider than the one we were**
13 **talking about in 23, certainly.**
14 Q Do you see District 8 down there in the
15 south central part of the state, the purplish-gray
16 district?
17 **A Yes.**
18 Q And do you see how that moves up in sort
19 of a step pattern to the northwest?
20 **A Yes.**
21 Q The bridge that you identify -- the land
22 bridge you identify in Pierce County in
23 demonstrative District 9 is larger in size than
24 District 8's bridge.
25 Is that fair?

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1 A Looks to be, yes, just looking at the
2 map here.
3 Q Now, you see on the map here, Rolette
4 County and Benson County, they're pretty close to
5 one another.
6 Would you agree?
7 A Yes. Yeah.
8 Q They're just separated by that one
9 voting precinct in Pierce County; the distance of
10 that precinct is the whole distance between
11 Rolette and Benson County?
12 A If that's one precinct, then yes.
13 Q Do you agree that Benson County is
14 physically more proximate to Rolette County than
15 is Cavalier County?
16 A Yes.
17 Q And the enacted version of District 9
18 stretches from Rolette County to Cavalier County,
19 correct?
20 A Correct.
21 Q Do you see that in the enacted plan, the
22 proposed District 15, which is altered to
23 accommodate proposed District 9, is changed to
24 include all of Towner County?
25 A So you said in the enacted plan. You

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1 mean this --
2 Q I'm sorry. I'm reaching the point of
3 the muddled brain.
4 So in the demonstrative plan,
5 plaintiffs' proposed demonstrative plan 1,
6 District 15 includes all of Towner County.
7 Do you see that?
8 A Yes, it appears that that's the case.
9 MR. GABER: And then, LaVar, if you
10 don't mind switching to the enacted map, which is
11 the last tab.
12 Q Do you see that the enacted map,
13 District 15 splits Towner County with District 9?
14 A Yes.
15 MR. GABER: I'm going to mark as
16 Exhibit 16 the file 2012 through 2020 North Dakota
17 Legislative Map.
18 (Exhibit Hood-16 marked for
19 identification and attached to the transcript.)
20 BY MR. GABER:
21 Q So this is -- do you recognize this,
22 Dr. Hood, as the prior decade's legislative plan
23 for North Dakota that was in effect from 2012 to
24 2020?
25 A Yes, yes.

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1 Q Now, do you see that in the prior
2 decade's plan, District 15 included all of Towner
3 County?
4 A Yes.
5 Q And so in plaintiffs' -- in the enacted
6 plan in 2021 splits Towner County between 15 and
7 9.
8 Is that right?
9 A That is correct.
10 Q And so one of the benefits of
11 Plaintiffs' Demonstrative Plan 1 is it returns
12 Towner County in whole to the district in which it
13 previously was retained?
14 A It does do that, yes.
15 Q Now, Benson County, in the prior
16 decade's plan, was split between District 14 and
17 District 23.
18 Do you see that?
19 A Yes. Yes.
20 Q And you'll recall, District 23 in the
21 enacted plan -- and we can look at it if you'd
22 like -- that's that dinosaur district that's now
23 been moved all the way to the other side of the
24 state?
25 A Right, right.

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1 Q And the part of Benson County that
2 includes the Spirit Lake reservation is no longer
3 in District 23, which is now on the other side of
4 the state; instead, it's in District 15.
5 Does that seem right?
6 A So say that one more time. Sorry.
7 Q Yeah. So do you know on this map where
8 the Spirit Lake reservation is?
9 A Yes, yes.
10 Q You see in Benson County there, it's
11 previously in District 23?
12 A Right.
13 Q And so it's now in District 15, right?
14 A Correct, correct.
15 MR. GABER: Let's mark as Exhibit 17 the
16 document Enacted versus Benchmark Core
17 Constituencies Report.
18 (Exhibit Hood-17 marked for
19 identification and attached to the transcript.)
20 BY MR. GABER:
21 Q Dr. Hood, do you recognize this as a
22 report that you produced to us that compares the
23 enacted district boundaries to the -- I'm going to
24 call it the benchmark, the prior decade's map, and
25 reports the percentage of the population of the

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1 district with the highest remaining population in
 2 that district or core constituency?
 3 Is that fair?
 4 **A Yes.**
 5 Q And if we could scroll down, I don't
 6 know what page it is, but it's District 9. So
 7 it's probably page 2 or 3. Looks like right there
 8 at the top of page 3.
 9 So in your report, you talk about core
 10 retention, right, as one of the traditional
 11 districting principles and one of the
 12 legislature's goals?
 13 **A Right.**
 14 Q And so you report that there is a
 15 75 percent core retention for the enacted plan
 16 District 9.
 17 Is that correct?
 18 **A Yes.**
 19 Q And so -- and just so we understand,
 20 from the report, what that means is that the -- in
 21 the new version of enacted District 9, the largest
 22 component of it is old District 9, and that
 23 accounts for 75 percent of new District 9's
 24 population.
 25 Do I have that right?

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1 **A Yes, yeah. Not geography, but**
 2 **population, yes.**
 3 Q Right. Now, in the prior decade, all of
 4 the voters in District 9, which was -- you
 5 understand that was -- mapped the boundaries of
 6 Rolette County, right?
 7 **A Right.**
 8 Q With respect to the state house core
 9 retention, this is only a report for the state
 10 senate core retention, right?
 11 **A Right, correct.**
 12 Q With respect to --
 13 **A I wasn't looking at the subdistricts.**
 14 Q Okay. And with respect to the
 15 subdistricts, some of the -- you know, half or
 16 maybe a little bit more than half of Rolette
 17 County's voters remained in, let's call it the
 18 same -- I guess they're both in new districts for
 19 the house, right?
 20 **A Right.**
 21 Q So essentially, there's zero percent
 22 retention with respect to people staying in the
 23 same district for the state house?
 24 **A For that county?**
 25 Q For District 9's -- for prior

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1 District 9's state house voters. They're entirely
 2 in new state house districts?
 3 **A Well, I mean, so District 9, which**
 4 **includes the house districts, obviously, was**
 5 **comprised in part from its former self. Now, I**
 6 **didn't divide this up into the house districts.**
 7 **So I don't know exactly how that would parse out**
 8 **is what I'm saying.**
 9 Q Yeah. Now, but with respect to
 10 Plaintiffs' -- Plaintiffs' Demonstrative Plan 1,
 11 with the exception of one voting precinct, all of
 12 the Rolette County voters who were previously the
 13 entirety of District 9 are retained within the
 14 same district in plaintiffs' demonstrative plan,
 15 both for the state house and the state senate?
 16 **A Yes, that's correct.**
 17 Q Now, in your report, you talk about how
 18 core retention is a good indicator of incumbency
 19 protection.
 20 Is that right?
 21 **A It's one of them, yes.**
 22 Q The incumbent District 9 state senator,
 23 Richard Marcellais, who was a Native American,
 24 lost re-election in the most recent election,
 25 correct?

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1 **A Yes.**
 2 Q And so at least with respect to him, the
 3 legislature's enacted plan does not satisfy the
 4 incumbency protection goal, correct?
 5 **A Well, he -- I just want to make sure I**
 6 **get all this straight. He previously represented**
 7 **District 9; is that correct?**
 8 Q Since 2006.
 9 **A And so again, 75 percent of his**
 10 **constituents should have followed him across the**
 11 **redistricting cycle into the new District 9.**
 12 Q And so in that respect, the 25 percent
 13 are pretty important that you add, right? Who you
 14 add to the district that needs to expand can play
 15 a big role, depending on voting patterns, in how
 16 the election will have an outcome?
 17 **A Well, it could. I mean, a 75 percent**
 18 **retention is not horrible, I will say. It's not.**
 19 Q What would you --
 20 (Cross-talk.)
 21 **A Three out of four of his former**
 22 **constituents are still with him in the new**
 23 **district. So...**
 24 Q Well, it's a little different than that,
 25 right? 100 percent of his former constituents are

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1 with him in the new district, but three out of
 2 four voters in the new district are new to him.
 3 **A No, three out of four --**
 4 Q Sorry, one out of four.
 5 **A Yes, I would -- okay. You really had me**
 6 **thrown there. I thought maybe I was --**
 7 Q All right. No, no, that was my fault.
 8 But in any event, it wasn't sufficient
 9 for him to be retained as an incumbent?
 10 **A Well, again, core constituencies are one**
 11 **part of incumbent protection or incumbent**
 12 **reelection, but they're not everything related to**
 13 **incumbent reelection. So...**
 14 Q Did you look to -- beyond District 9 in
 15 assessing the enacted plan's performance in terms
 16 of core retention?
 17 **A It doesn't look like it. I mean, it**
 18 **looks like I'm making comparisons here between the**
 19 **enacted plan in specific districts and the enacted**
 20 **plan, specifically LD 9, in the demonstrative**
 21 **districts.**
 22 Q Do you think that the legislature
 23 followed -- or satisfied its goal with respect to
 24 core retention for the plan as a whole?
 25 **A Well, probably so, I would say. You**

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1 **know, in the case of some districts being moved**
 2 **across the state -- and you have to do that. I**
 3 **mean, this doesn't trump other redistricting**
 4 **factors, especially population equality. You're**
 5 **not going to necessarily be able to maximize this**
 6 **in every case.**
 7 Q And do you have, like, a threshold for
 8 what you consider to be a strong core retention?
 9 Is it 50 percent?
 10 **A I don't know -- honestly, I don't know**
 11 **that I've ever come up with a threshold. You**
 12 **know, it ranges -- it's pretty easy to grasp**
 13 **because it ranges from zero to 100, zero percent**
 14 **to 100 percent. I mean, if you're at 50 percent,**
 15 **it would mean that 50 percent of your new**
 16 **constituents are new to you; they didn't follow**
 17 **you across with the old district boundaries.**
 18 **So, you know, so every one of two new --**
 19 **one of two voters in the new cycle are not your**
 20 **prior constituents.**
 21 Q You did not, as part of your report,
 22 examine any of the prior -- other than maybe the
 23 benchmark 2012 to 2020 plan -- did you look at the
 24 2012 to 2020 plan as part of your analysis?
 25 **A Just to the extent to which I needed it**

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1 **to make comparisons.**
 2 Q Did you look at any prior decade's
 3 districting plans for North Dakota legislative
 4 seats to make any comparisons to district
 5 configurations?
 6 **A I did not.**
 7 Q To the extent that there -- is that
 8 something that is relevant, to see how the
 9 legislature has in the past configured districts
 10 to see whether -- to compare districts and see if
 11 they're similar configurations?
 12 **A It could be, but, you know, every**
 13 **redistricting cycle is new, and in this particular**
 14 **case, the job was given over to an ad hoc**
 15 **commission. And of course, the legislature had to**
 16 **approve what the commission did, obviously.**
 17 **But my point being, there are different**
 18 **people in charge of redistricting every time, and**
 19 **so things are not necessarily going to look the**
 20 **same.**
 21 **And they're not going to be the same,**
 22 **period, when you take into account that population**
 23 **has shifted across the state, which it had, and**
 24 **certain -- certain things have to be rectified in**
 25 **terms of making sure that the districts are within**

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1 **constitutional bounds in terms of population**
 2 **deviations.**
 3 Q When you say "ad hoc commission," what
 4 do you mean by that?
 5 **A Well, I don't mean that in any kind of**
 6 **negative sense. I just mean there was a**
 7 **commission put together charged by the legislature**
 8 **with developing a redistricting plan.**
 9 Q Who served on the commission?
 10 **A Well, I believe they were all**
 11 **legislators.**
 12 Q On page 9 and 10 of your report, in your
 13 Summary and Conclusions, towards the end, you note
 14 that there's been a degradation -- or that that --
 15 the demonstrative District 9 performs worse on
 16 some traditional redistricting criteria compared
 17 to enacted version of District 9.
 18 Do you see that?
 19 **A Yes.**
 20 Q And you would agree, we've gone through
 21 all of those different criteria?
 22 **A Correct.**
 23 Q And plaintiffs' proposed District 9
 24 satisfies the population deviation legislative
 25 goal, correct?

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1 **A Correct.**
 2 Q We talked about how, under your own
 3 metric from Virginia and applied here, that the
 4 district is sufficiently or reasonably compact,
 5 correct?
 6 **A Correct.**
 7 Q And with respect to county splits, we
 8 noted that there was an error in your report with
 9 respect to the number of counties, right, that the
 10 enacted plan splits?
 11 **A Correct. That's correct.**
 12 Q And demonstrative District 9 has the
 13 same number of county splits as does District 15,
 14 which is also under challenge in this case, right?
 15 **A Correct.**
 16 Q And it has the same number of county
 17 splits as the state house map for District 9,
 18 correct?
 19 **A Correct.**
 20 Q It splits Eddy County only to adhere to
 21 the boundaries of the Spirit Lake Nation, correct?
 22 **A Correct.**
 23 Q And that's the same split of Eddy County
 24 that the enacted District 15 makes, correct?
 25 **A Correct.**

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1 **So I mean, it's two -- should be two**
 2 **county splits in the enacted plan versus three,**
 3 **right. So...**
 4 Q For District 9 at the state senate
 5 level, right?
 6 **A Yeah.**
 7 Q And at the state house level, it splits
 8 all three counties in the district?
 9 **A If you go down to the subdistricts, yes.**
 10 Q And we discussed how plaintiffs'
 11 demonstrative plan restores Towner County to its
 12 prior configuration in terms of core retention,
 13 moving it to District 15 entirely.
 14 **A That is true.**
 15 Q We've discussed how the enacted map has
 16 features in terms of land bridges or necks or
 17 connecting points in districts that are a fair bit
 18 smaller than what you termed the land bridge in
 19 plaintiffs' demonstrative District 9, right?
 20 **A Correct.**
 21 Q And a number of the enacted districts in
 22 the map span much larger -- either similar or
 23 larger geographic distances than does enacted --
 24 than demonstrative District 9, correct?
 25 **A That's correct, yes.**

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1 Q And demonstrative -- sorry -- enacted
 2 District 9, in fact, from east to west is just
 3 about as long as plaintiffs' demonstrative
 4 District 1 is from north to south, correct?
 5 **A From what I remember, yes.**
 6 Q And the two most populous counties
 7 included in plaintiffs' demonstrative District 9
 8 are Benson County and Rolette County, correct?
 9 **A I don't think we talked about that. I**
 10 **mean, I don't have -- I'm just being up front. I**
 11 **don't have the population figures in front of me.**
 12 **So...**
 13 Q Well, it includes all of Benson County,
 14 a precinct from Pierce County, and then Rolette
 15 County, and then that small piece of Eddy County
 16 that's to adhere to the reservation boundary.
 17 So does it sound right to say that
 18 Benson and Rolette are the most populous
 19 components of the district?
 20 **A Well, I would assume, but, you know, one**
 21 **doesn't need to make assumptions. I mean,**
 22 **geography doesn't necessarily equate to**
 23 **population, obviously. So...**
 24 Q Okay. We discussed how Benson County
 25 and Rolette County are closer geographically than

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1 Rolette County is to Cavalier County, right?
 2 **A That's true, yes.**
 3 Q And so on all of these measures,
 4 demonstrative -- plaintiffs' demonstrative
 5 district is similar to or in some instances better
 6 in terms of traditional districting criteria than
 7 either District 9 in the enacted plan, District 15
 8 in the enacted plan, or other districts in the
 9 state.
 10 Is that fair?
 11 MR. PHILLIPS: Objection, that's
 12 ambiguous and compound.
 13 **A Well, on some traditional redistricting**
 14 **criteria, it might be; on some, it's certainly**
 15 **not.**
 16 Q Now, Dr. Hood, at the end of your
 17 report, you say that the use of a land bridge and
 18 some of the districting criteria we just discussed
 19 coupled with the fact that the demonstrative
 20 District 9 joins two Native American reservations
 21 raises the question of whether the creation of
 22 LD 9 under plaintiffs' demonstrative plan results
 23 in a racial gerrymander.
 24 Can you explain to me what you mean by
 25 "results in a racial gerrymander."

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1 **A I guess the question is, why was LD 9**
2 **drawn -- or why was demonstrative District 1 or 2**
3 **drawn the way they were drawn.**
4 Q What do you understand to be the test
5 for whether a district is a racial gerrymander?
6 **A Typically, it's if race is the**
7 **predominant factor in drawing the district lines.**
8 Q And how do courts assess whether or not
9 that's occurred?
10 **A Well, one of the things --**
11 MR. PHILLIPS: I'll just state my
12 objection.
13 Calls for a legal conclusion.
14 Q What do you understand to be the
15 analysis there?
16 **A Well, one of the things that's typically**
17 **done is an analysis of traditional redistricting**
18 **criteria.**
19 Q And those are all the ones that we've
20 talked about here today?
21 **A Yes, certainly. I mean, there could be**
22 **some others. But yeah, those are -- the ones we**
23 **talked about certainly are.**
24 Q One of the hallmarks throughout the case
25 law -- and you've read racial gerrymandering case

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1 decisions, I gather, right?
2 **A Yes.**
3 Q You're familiar with the Shaw case from
4 the Supreme Court?
5 **A Right.**
6 Q The Miller case from the Supreme Court?
7 **A Right.**
8 Q You're familiar with the Cooper versus
9 Harris and Bethune-Hill?
10 **A Yes.**
11 Q Have you seen the districts from those
12 cases?
13 **A Some of them, yes. I probably have seen**
14 **all of them. I can remember some of them on the**
15 **top of my head, yes.**
16 Q I assume you're familiar -- I think
17 it's -- is it the Shaw case or the Miller case,
18 the Georgia district?
19 **A The Miller case.**
20 Q Are you familiar with the way that
21 district looked?
22 **A Yes, I am.**
23 Q It's not your testimony that the
24 district from Miller looks anything like
25 plaintiffs' demonstrative districts in this case,

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1 is it?
2 **A I don't think I said that, no.**
3 Q Okay. In the Supreme Court's racial
4 gerrymandering cases, one of the typical features
5 is split precincts where the census bloc level is
6 split along racial lines. So on one side of the
7 line is a bloc that, say, has white folks, and on
8 the other side of the line is a census bloc that
9 has black or other minority folks. That's
10 typically one of the fact patterns that we see in
11 those cases?
12 **A That's one of the factors that's looked**
13 **at, yes.**
14 Q That's not the case in plaintiffs'
15 demonstrative districts, right? In fact,
16 demonstrative District 1 keeps all the precincts
17 entirely whole, correct?
18 **A I believe so, yes.**
19 Q And so what is the basis for your
20 conclusion that plaintiffs' demonstrative plans
21 raise questions about whether they result in a
22 racial gerrymander?
23 **A Well, again, my argument would be**
24 **looking at some traditional redistricting**
25 **criteria, there was a diminishment on at least**

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1 **some of those factors with the demonstrative**
2 **districts compared to the original LD 9 or the**
3 **enacted LD 9.**
4 Q Anything else?
5 **A Well, that's primarily it.**
6 Q But is there anything else?
7 **A No. That's my primary argument or**
8 **thoughts on that.**
9 MR. GABER: Okay. Let's go ahead and
10 take about a ten-minute break, and that will bring
11 us back at 4:32.
12 (Recess from 4:22 p.m. until 4:33 p.m.)
13 MR. GABER: Dr. Hood, unless I have to
14 ask you any follow-up questions if Mr. Phillips
15 has any, I don't have any further questions for
16 you. Thank you so much for your time and for
17 appearing right after your class today. I
18 appreciate it.
19 THE WITNESS: Thank you.
20 I guess I would like to add maybe one or
21 clarification from that last discussion that we
22 were having about, you know, what could or could
23 not be a racial gerrymander in terms of
24 districting.
25 And obviously, in the report, I included

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1 these maps. And so I think it's also important to
 2 look at how the district's configured and how it
 3 connects to concentrations of racial minorities
 4 across a distance.
 5 So I guess that's -- you were asking
 6 me -- I was thinking about this. You're asking me
 7 why I came to that conclusion or the possibility
 8 of that conclusion. So obviously, I included the
 9 maps for a reason. So...
 10 BY MR. GABER:
 11 Q Did you talk to Mr. Phillips during the
 12 break?
 13 A Yes.
 14 Q Now, you said "across a distance." We
 15 talked about how the distance -- the length of
 16 District 9 in plaintiffs' demonstrative plan is
 17 the same, or in many instances, it's shorter than
 18 the distances of other districts in the state's
 19 plan, right?
 20 A Correct. That's true.
 21 Q And it's about the same distance as the
 22 enacted version of District 9 is across from
 23 Rolette County to Cavalier County, right?
 24 A Correct.
 25 Q And it can be a racial gerrymander to

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1 include white voters in a district instead of
 2 other races of voters, right?
 3 A That is correct, certainly.
 4 Q And so to the extent that enacted
 5 District 9 stretches across to include rural white
 6 voters instead of Native American voters, under
 7 your view, that too could be an indication of a
 8 racial gerrymander?
 9 A Potentially.
 10 Q Now, just the fact that there are two
 11 Native American tribes in a district does not on
 12 its own mean that the district is a racial
 13 gerrymander, right?
 14 A No. I'm not arguing that.
 15 Q And in order for that to be the case,
 16 race would have had to have been the predominant
 17 consideration across the entire district, right?
 18 That's the test the Supreme Court applies?
 19 A Yes. It has to -- that's my
 20 understanding, it has to be the predominant
 21 factor.
 22 Q And the traditional districting
 23 principles would each need to be subordinated to
 24 race such that race was the inflexible goal, and
 25 traditional districting criteria fell by the

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1 wayside in service of that racial goal. That's
 2 basically what a racial gerrymandering is.
 3 Is that your understanding?
 4 MR. PHILLIPS: I'll object that it calls
 5 for a legal conclusion.
 6 A Yes, that's my understanding.
 7 Q Okay. And so what you're saying here in
 8 your addendum is that the fact that there are two
 9 Native American reservations within plaintiffs'
 10 demonstrative District 9 is the additional reason,
 11 in addition to the comparison of some traditional
 12 criteria to the enacted version of 9, that is
 13 leading you to make this statement about racial
 14 gerrymandering?
 15 MR. PHILLIPS: Objection, misstates the
 16 prior testimony.
 17 A Yes, I think that's correct. I mean,
 18 I --
 19 Q But -- go ahead.
 20 A Well, say -- sorry. Say that one more
 21 time.
 22 Q You've offered two reasons that are --
 23 would you say -- are you saying it's a racial
 24 gerrymander? Your report says it raises questions
 25 about whether or not it results.

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1 A No, I can't make that determination.
 2 Q And when you say --
 3 A So no, I'm not saying that.
 4 Q Okay. So it's not your testimony that
 5 it is a racial gerrymander, plaintiffs'
 6 demonstrative District 9?
 7 A No, I can't make that -- I don't believe
 8 I can make that determination.
 9 Q You don't have the evidentiary basis to
 10 say that.
 11 Is that fair?
 12 A I think that's fair, yes.
 13 Q And we've gone through the traditional
 14 districting criteria. It's not seriously your
 15 testimony that the plaintiffs' demonstrative
 16 District 9 subverts traditional districting
 17 principles, right?
 18 A Well, no. It was that they were
 19 degraded to some degree.
 20 Q From one comparison district, enacted
 21 District 9, right?
 22 A Correct. That's correct.
 23 Q Not standing alone?
 24 A I'm sorry. What standing alone?
 25 Q Only in comparison -- we've gone through

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1 these at length, and it turns out some of them
 2 you've testified that plaintiffs' demonstrative
 3 district does better or as good as the other
 4 districts in the area, including 9 and 15?
 5 **A Sometimes.**
 6 Q And we talked about, with respect to
 7 compactness, that the proper framework is to look
 8 standing alone whether the district is reasonably
 9 compact?
 10 **A Well, we talked about a lot in terms of**
 11 **compactness and fairness. And that was one**
 12 **comparison. But that's not the only comparison to**
 13 **be made.**
 14 Q And your conclusion, based on the types
 15 of analysis you've done in this case and in other
 16 cases, is that plaintiffs' demonstrative
 17 District 9 is, in fact, reasonably compact?
 18 **A Well, again, based on what I said in**
 19 **that Virginia case, it has a higher level of -- or**
 20 **the compactness scores are higher than in that**
 21 **Virginia case.**
 22 Q Did you have pause as to whether any of
 23 the districts in the Virginia case were racial
 24 gerrymanders? I didn't see that in your report
 25 there.

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1 **A No. No. That was -- let me be clear.**
 2 **That was not an issue in that case. It was**
 3 **literally just compactness.**
 4 Q Do you understand that Native American
 5 reservations are more than just racial groups;
 6 that they are sovereign nations?
 7 **A Yes, yes.**
 8 Q And do you understand that they have
 9 interests that are different than purely racial
 10 interests?
 11 **A Yes.**
 12 Q And do you understand that Native
 13 American tribes might have shared interests that
 14 relate to issues with respect to representation in
 15 the state legislature?
 16 MR. PHILLIPS: Objection.
 17 **A Certainly.**
 18 Q You said "certainly," right?
 19 **A Yes.**
 20 Q And so to the extent that a district
 21 respects the boundaries of Native American
 22 reservations, it's not merely making racial
 23 classifications, but rather, it's accounting for a
 24 sovereign political boundary, correct?
 25 **A Well, to the extent to which that's the**

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1 **case -- it does that, yes.**
 2 Q And your testimony with respect to
 3 traditional districting criteria is not that
 4 plaintiffs' demonstrative district subordinates
 5 those criteria in favor of a racial
 6 classification, right? You don't have that
 7 evidence?
 8 **A No, I didn't say that.**
 9 Q It does not subordinate traditional
 10 redistricting criteria?
 11 MR. PHILLIPS: I'll object that it
 12 misstates his testimony. And his report says that
 13 it raises a question. He's testified that he's
 14 not opining on that specifically, and I believe
 15 that it would be for the Court to decide.
 16 Q So the question was, the demonstrative
 17 District 9 does not subordinate traditional
 18 districting criteria; you don't believe it does,
 19 correct?
 20 MR. PHILLIPS: Objection, outside the
 21 scope of his opinion, calls for a legal
 22 conclusion.
 23 **A Again, I guess I think my testimony was**
 24 **that certain traditional redistricting criteria**
 25 **have been degraded compared to the enacted LD 9.**

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1 **I mean, I think that's what I've said.**
 2 Q And certain redistricting criteria are
 3 better in the demonstrative plan.
 4 That's fair?
 5 **A Or the same, essentially.**
 6 MR. GABER: Okay. I have no further
 7 questions.
 8 MR. PHILLIPS: Thank you.
 9 I don't have any follow-ups myself.
 10 COURT REPORTER: Anything else for the
 11 record?
 12 MR. GABER: I do not believe so.
 13 (Transcript orders discussed.)
 14 COURT REPORTER: I think that's all we
 15 need. Thank you.
 16 (Off the record at 4:44 p.m.)
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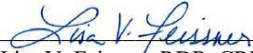
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CERTIFICATE

1
2
3 I, Lisa V. Feissner, RDR, CRR, CLR, do
4 hereby certify that the witness was first duly
5 sworn by me and that I was authorized to and did
6 report said proceedings.

7 I further certify that the foregoing
8 transcript is a true and correct record of the
9 proceedings; that said proceedings were taken by
10 me stenographically and thereafter reduced to
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12 signing was not requested; and that I am neither
13 attorney nor counsel for, nor related to or
14 employed by, any of the parties to the action in
15 which this deposition was taken; and that I have
16 no interest, financial or otherwise, in this case.

17
18 IN WITNESS WHEREOF, I have hereunto set my
19 hand this 15th day of FEBRUARY, 2023.

20
21 
22 Lisa V. Feissner, RDR, CRR, CLR

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EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION**

Turtle Mountain Band of Chippewa Indians,
Spirit Lake Tribe, Wesley Davis, Zachery S.
King, and Collette Brown

Plaintiffs,

vs.

Michael Howe, in his official capacity as
Secretary of State of North Dakota,

Defendant.

Case No. 3:22-cv-00022

**DEFENDANT MICHAEL HOWE'S
WITNESS LIST FOR TRIAL**

Michael Howe, in his official capacity as Secretary of State of North Dakota (hereinafter
“Howe” or “Defendant”), by and through his attorneys, state that the following are witnesses that
Defendant intends to call at trial or reserves the right to call at trial:

Plaintiffs:

1. Matthew Campbell
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3. Collette Brown
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4. Wesley Davis
- **May Call**

5. Zachery S. King
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12. Brian Nybakken
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- **Will Call**

13. Erika White
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14. Brian Newby
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Legislative Witnesses:

15. Former Senator Howard Anderson
721 21st Avenue NW
Turtle Lake, ND 58575-9606
- **May Call**

16. Senator Brad Bekkedahl
P.O. Box 2443
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- **May Call**

17. Representative Larry Bellew
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- **May Call**

18. John Bjornson
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19. Representative Joshua A. Boschee
517 First Street N.
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20. Senator Richard A. Burckhard
1837 15th Street SW
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- **May Call**

21. Representative Bill Devlin
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- **May Call**

22. Senator Robert Erbele
6512 51st Avenue SE
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- **May Call**

23. Representative Sebastian Ertelt
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- **May Call**
24. Representative Craig Headland
4950 92nd Ave. SE
Montpelier, ND 58472
- **May Call**
25. Senator Jason G. Heitkamp
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Wahpeton, ND 58075-4341
- **May Call**
26. Former Senator Ray Holmberg
- **May Call**
27. Former North Dakota Representative Terry Jones
P.O. Box 1964
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- **May Call**
28. Senator Jerry Klein
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- **May Call**
29. Samantha Kramer
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- **May Call**
30. Representative Gary Kreidt
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- **May Call**
31. Representative Mike Lefor
P.O. Box 564
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- **May Call**
32. Senator Richard Marcellais
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- **May Call**

33. Representative David Monson
P.O. Box 8
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- **May Call**

34. Representative Mike Nathe
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- **May Call**

35. Representative Marvin Nelson
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Rolla, ND 58367
- **May Call**

36. Claire Ness
Office of the Attorney General
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- **May Call**

37. Former Senator Erin Oban
- **May Call**

38. Senator Nicole Poolman
3609 Bogey Drive
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- **May Call**

39. Representative Mike Schatz
400 East Nineth Street
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- **May Call**

40. Representative Austen Schauer
110 West Beaton Drive
West Fargo, ND 58078
- **May Call**

41. Representative Kathy Skroch
10105 155th Avenue SE
Lidgerwood ND 58053-9761
- **May Call**

42. Senator Ronald Sorvaag
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Fargo, ND 58102

- **May Call**

43. Emily Thompson
Legal Division Director, Legislative Council
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- **May Call**

44. Former Senator Richard Wardner

- **May Call**

OTHERS

45. Nicole Donaghy
Executive Director
North Dakota Native Vote
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Bismarck, ND 58504

- **May Call**

46. Marietta Kemmet
Executive Assistant, Indian Commission
600 East Boulevard Avenue
Bismarck, ND 58505-0360

- **May Call**

Defendant reserves the right to call any and all witnesses listed by Plaintiffs, to the extent not objected to. Defendant also further reserves the right to call any additional witnesses that may be located or discovered prior to the trial, any witnesses disclosed in discovery responses or depositions in this case, and any witnesses disclosed during completion of discovery in this matter, to the extent not objected to.

Defendant further reserves the right to call any witnesses necessary to establish foundation for exhibits to the extent the parties cannot agree on foundation. In addition, Defendant reserves the right to call Plaintiffs' custodian(s) of records and director(s) of Plaintiffs' information technology regarding records kept by defendants in the ordinary course of business and/or electronically stored information (ESI) and/or production of the same in this lawsuit. The Court and counsel will be notified, if possible, of any additional witnesses prior to trial.

Dated this 25th day of May, 2023.

By: /s/ David R. Phillips

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official capacity as Secretary of State of
North Dakota

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2023, a true and correct copy of the foregoing **DEFENDANT MICHAEL HOWE'S WITNESS LIST FOR TRIAL** was emailed to the following:

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