
IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

REPUBLICAN PARTY OF NEW MEXICO,
DAVID GALLEGOS, TIMOTHY JENNINGS,
DINAH VARGAS, MANUEL GONZALES, JR.,
BOBBY *and* DEE ANN KIMBRO, *and*
PEARL GARCIA,

Plaintiffs-Appellants,

v.

No.S-1-SC-40146

MAGGIE TOLOUSE OLIVER, *in her official capacity as New Mexico Secretary of State*, MIMI STEWART, *in her official capacity as President Pro Tempore of the New Mexico Senate*, *and* JAVIER MARTINEZ, *in his official capacity as Speaker of the New Mexico House of Representatives*,

Defendants-Appellees.

On Appeal From The Fifth Judicial District, County Of Lea,
Cause No.D-506-CV-2022-00041
The Honorable Fred T. Van Soelen, District Judge, Division III

APPENDIX TO PLAINTIFFS-APPELLANTS' BRIEF-IN-CHIEF

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically served on all counsel of record through the New Mexico Supreme Court's Odyssey filing system on October 28, 2023.

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1 STATE OF NEW MEXICO
2 COUNTY OF LEA
3 FIFTH JUDICIAL DISTRICT COURT

4 REPUBLICAN PARTY OF NEW MEXICO,
5 et al.,

6 Plaintiffs,

7 v. Case No. D-506-CV-2022-00041

8 MAGGIE TOULOUSE OLIVER,
9 et al,

10 Defendants.

11
12 **TRANSCRIPT OF PROCEEDINGS**

13 **September 27, 2023**

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18 HEARD BEFORE:

19 THE HONORABLE FRED VAN SOELEN

20
21 TRANSCRIBED BY:

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25 **Unless provided, spellings of all names
are phonetic.

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TRANSCRIPT OF PROCEEDINGS

1 THE COURT: Good morning, ladies and
2 gentlemen. Thank you all for your patience in
3 getting or technological issues solved. We have a
4 call in to work on the temperature and bring it down
5 a little bit. Apparently, that's controlled
6 somewhere completely different from here, so...

8 Let me call the case. This is in
9 Lea County Cause Number CV-2022-041.

10 I'll go ahead and let counsel announce
11 their presence for their apparently. Go ahead. For
12 the plaintiffs.

13 MR. HARRISON: Yes, your Honor. For the
14 plaintiffs, Carter Harrison, Misha Tseytlin and Molly
15 DiRago.

16 THE COURT: All right. And for the
17 executive defendants.

18 MS. AGJANIAN: Good morning, your Honor.
19 Holly Agjanian on behalf of Governor Michelle Lujan
20 Grisham (inaudible).

21 THE COURT: I guess if I was going in order,
22 I would have started with the secretary of state.

23 MR. AUH: Good morning, your Honor. Peter
24 Auh on behalf of the secretary of state.

25 THE COURT: All right. And for the

1 legislative defendants.

2 UNIDENTIFIED MALE: Your Honor, Richard
3 Olson, Sarah Sanchez, Lucas Williams and Ann Tripp on
4 behalf of the legislative defendants.

5 THE COURT: All right. Thank you, all.

6 We probably need to start with the
7 motions for a stay that had been filed. I think the
8 legislative and executive defendants both filed
9 motions.

10 For the legislative defendants, is there
11 anything else that needs to be raised on that? I
12 think the Supreme Court has ruled on that; is that
13 correct?

14 MS. SANCHEZ: Your Honor, this is Sarah
15 Sanchez on behalf of the legislative defendants.

16 In connection with the filing of the
17 writ ~~petition~~ on behalf of legislative defendants
18 yesterday afternoon, we did not file a motion for
19 stay. We did file a notice of automatic stay under
20 the statute --

21 THE COURT: Okay. I apologize.

22 MS. SANCHEZ: -- that provides for such.

23 THE COURT: I had it backwards. I see.

24 MS. SANCHEZ: That's fine, your Honor,
25 there's been a lot going on.

1 THE COURT: And so you may address that.

2 MS. SANCHEZ: Sure, your Honor. Absolutely.
3 Thank you.

4 That would, by the text of the statute
5 and the narrow issue on which that particular writ
6 petition was filed just on the legislative privilege
7 issues that the Court addressed in its letter
8 decision yesterday, the automatic stay, as we
9 understand it, under the statute, when the state
10 takes an appeal or a writ of error, is -- only
11 applies to the specific order decision that is
12 being -- that we've asked the Supreme Court to
13 review.

14 So we do not take the position that that
15 ought to stay these entire proceedings or inhibit in
16 any way us going forward with the trial today, but
17 that it would only affect the multitude, I suppose,
18 of motions, subpoenas, the discovery subpoenas, the
19 trial subpoenas that are impacted within the scope of
20 the Court's decision letter unless and until we do
21 hear some guidance from the Supreme Court, they take
22 up thank you writ.

23 But as far as everything else before
24 your Honor, the parties are prepared to present these
25 three days. We are ready to go forward.

1 THE COURT: Okay. All right. Thank you.

2 Mr. Harrison.

3 MR. HARRISON: Yes, your Honor. So I -- we
4 certainly agree the trial should go forward. And
5 Supreme Court, I think, on its order on the executive
6 defendant's petition made clear that the trial shall
7 go forward as scheduled.

8 We do not agree that there's an
9 automatic stay in place. The real significance of
10 that is the obligation of the subpoenaed legislators
11 to produce documents and then to appear at trial in
12 the interim before the Supreme Court does something.

13 We can -- I'm prepared to talk a little
14 bit about that. I mean, the -- if -- if the answer
15 from the legislative defendants is going to be that
16 these folks are not going to produce or sit for
17 testimony kind of regardless, then obviously it would
18 be more -- I can go into some of these details more
19 in a motion for I don't want to say sanctions, but a
20 motion for an adverse inference.

21 What we'll say is that we're fairly
22 confident there's not an automatic stay in place of
23 any part of this. So the rule of civil proceeding
24 governing stays is 1-62.A, more broadly, 1-62. And
25 they have cited Subdivision A, which provides that

1 when a government official or entity, quote, the
2 taking of an appeal shall, except as provided in
3 Paragraphs A and C of this rule, operate as a stay.

4 Well, now you go up into Paragraph A of
5 that rule and it says, quote, unless otherwise order
6 by the Court, an interlocutory of final judgment in
7 an action for an injunction shall not be stayed
8 during the period of its entry and until an appeal is
9 taken during the pendency of an appeal.

10 So all that rules means is that when you
11 get a money judgment against the government or a
12 government official, you can't go collect on it while
13 it's on appeal. It doesn't have any application
14 here.

15 Secondly, to the extent that they've
16 cited also a statute that has plainer language, and
17 that's at Section 39-3-23, that statute has been
18 expressly held to -- in this exact context to
19 conflict with the rule and thus be overruled by the
20 rule under what the Supreme Court calls its Ammerman
21 Doctrine, which is that Supreme Court has under its
22 power superintending control gets to regulate
23 procedure and not the legislature.

24 The case finding that was City of
25 Albuquerque versus Jackson, 1984-NMCA-062. And I'll

1 quote from Paragraph 5. Quote, Section 39-3-23
2 provides that the city's appeal automatically stayed
3 Judge Franchini's decision. This being a procedural
4 matter, however, the statute is not to be enforced
5 contrary to a Supreme Court rule. Civil procedure
6 Rule 62.E provides that an appeal by the state or any
7 political division operates in the stay except as
8 provided in Subdivisions A and C, which of course was
9 the argument that I just made, so I won't reiterate,
10 as it was made through that case.

11 So second -- and, again, that's one
12 perfect adequate on its own argument. Second,
13 Rule 1-62.E, in addition to incorporated the
14 injunctive relief carved out from Subdivision A, by
15 its terms, refers to, quote, unquote, appeals by
16 government entities, not petitions for writ of error.

17 And if -- well, maybe in some context,
18 you say, well, they say appeal, but they mean --
19 counted everything, you filed within an appellate
20 court. But if you look down, your Honor, in
21 subdivision F of 1-62, deals specifically with writs
22 of error, it's titled writs of error. So it wouldn't
23 make any sense for the rule to be loosey-goosey
24 losing appeal in a different situation to mean
25 appeals or petitions for writ of error. So by its

1 terms even, it doesn't apply.

2 So third, there's the appellate rule
3 governing writs of error. So the rule that governs
4 what they filed at the Supreme Court. And that's
5 Rule 12-503 has a specific subdivision on stays. And
6 that's Subdivision M -- Subdivision M, as in Molly.
7 It says, quote, on issuance of the writ -- so what
8 you do is you file a petition for writ of error and
9 the Court of Appeals, and really probably should be
10 the Court of Appeals, issues the writ and then
11 docket your appeal on the general calendar.

12 So on issuance of the writ, and, of
13 course, writs are things issued by a court, what they
14 file as a petition, on issuance of a writ, a party
15 seeking a stay of the order that is a subjected of
16 the writ of error or a stay of the proceedings
17 pending an appeal shall first seek an order from the
18 district court. And any party may, thereafter, seek
19 appellate review of the district court's ruling under
20 12-205, 12-206 or 12-207. That, again, is the rule
21 governing what they filed in the -- you know,
22 petitions for writs of error.

23 Of course, so that contemplates two
24 things that haven't happened here, which is the
25 appellate court grants the writ, and then secondly,

1 they go to the district court and ask for a stay here
2 and your Honor says no. Then they get to appeal that
3 decision. Obviously that's a far, far cry from a,
4 quote, unquote, automatic stay.

5 And then, more generally, a writ of
6 error is close to the right procedure, but A, it
7 normally would be filed in the Court of Appeals,
8 because that's the Court that has appellate
9 jurisdiction over -- direct appellate jurisdiction
10 over this case. But, you know, I -- that, I don't
11 think is necessarily for this Court to decide. But I
12 will also note that a mere order compelling discovery
13 has been held repeatedly to not actually be a
14 collateral order appealable through a writ of error.
15 They've got to be held in contempt first. And I'll
16 quote one of the, again, myriad cases out there
17 standing for this proposition.

18 This is King versus Allstate Insurance
19 Company, 2004-NMCA-031, and I'm quoting from
20 Paragraphs 18 and 19. Quote, an order compelling
21 discovery is not a collateral order. And then
22 ellipsis, a party who seeks to challenge an order
23 granting a motion to compel discovery or an order
24 denying a request for a protective order with respect
25 to discovery materials can either apply for an

1 interlocutory appeal or refuse to comply, be held in
2 contempt, and file an appeal as of right from both a
3 contempt judgment and the underlying discovery order
4 on which the contempt was based.

5 So there's a lot of reasons, your Honor,
6 that, you know -- and the only reason it matters to
7 us, if they're not going to have the folks we
8 subpoenaed produce the documents that we subpoenaed
9 and sit for -- to give testimony, it's too late for
10 us to depose them of course at this point, you know,
11 so be it. But they don't get to go through that and
12 have no -- no substantive case consequences for it.
13 We think that an adverse inference would be
14 appropriate and that they can't hide behind a
15 so-called automatic stay to justify noncompliance
16 with the subpoenas in the meantime.

17 And, of course, we'd like the Court to
18 decide this on the merits, and we think we have
19 plenty of evidence to make our case on the merits.
20 And this would go to prong one of Justice Kagan's
21 multi-prong test, the intent finding. But we think
22 that if we do a full-scale refusal to comply with the
23 subpoenas, it would be appropriate for the Court to
24 draw an adverse inference or default finding on prong
25 one. Although we, of course, would still want fact

1 finding, and we believe that we make a strong
2 evidentiary showing on prong one with the literally
3 three pages of discovery production we have because
4 they include -- they include the text from
5 Ms. Stewart, and then of course we have things that
6 we received outside of discovery, namely, public
7 statements made on Twitter to the Associated Press,
8 et cetera, that we've come across without the need
9 for discovery.

10 So for those reasons, your Honor, we
11 contend that there is no automatic stay in place.

12 THE COURT: All right. Thank you.

13 Ms. Sanchez.

14 MS. SANCHEZ: Thank you, your Honor. So a
15 few things. This is the first time that I've heard
16 the cases cited by Mr. Harrison, so I don't know what
17 they say. But I do know what the statute and the
18 rules say, and the statute and the rules are pretty
19 clear.

20 Section 39-3-23 is the statute, it's the
21 automatic stay statute, it says, quote, when the
22 appellant or plaintiff in error is the state, county,
23 or a municipal corporation, the taking of an appeal
24 or suing out of a writ of error operates to stay the
25 execution of the judgment, order or decision of the

1 district court without bond.

2 And that's a pretty clear statement by
3 statute. There's no notes in the statute that it's
4 been overruled or abrogated in any way.

5 And we notify, of course, the Supreme
6 Court of the fact that we have done that in our writ
7 petition. There has been no indication from them
8 that they disagree or believe that that isn't
9 effective, and no direction to this Court otherwise.

10 Second of all, this is not simply an
11 order compelling discovery. What is at issue here,
12 as I know the Court knows, is a matter of first
13 impression, construing and applying a constitutional
14 privilege, one of the only privilege that is
15 enshrined in our state Constitution and determining
16 what the scope of that privilege is and how it
17 applies to legislators who are being subpoenaed for
18 extensive documents, communications, testimony, both
19 in discovery and at trial.

20 And we appreciate the Court's
21 endeavoring to review the very large amount of
22 material that was submitted by both parties in that
23 regard and to decipher to the Court's judgment where
24 those lines R and we respect that. But we also know
25 that this is of such paramount importance to the

1 legislature as an institution, to the functioning of
2 that branch of government, that our courts have never
3 before had occasion to weigh in on, despite 40 years
4 of redistricting litigation in this state. This is
5 the first time we've seen this issue need to be
6 litigated because the plaintiffs have decided to
7 invade the e-mail in-boxes, text messages and other
8 accounts of the legislators who worked to pass this
9 enacted legislation.

10 So we think it's perfectly appropriate
11 to seek the Supreme Court's review. The Supreme
12 Court has made it clear in their amended order issued
13 in August, that this issue is going to come back to
14 them, this case is going to come back to them. Under
15 Rule 503, the Supreme Court has jurisdiction over
16 writs of error. We thought that was the most
17 efficient, effective way to get final word on what
18 the boundaries of this privilege are before we
19 proceed with that case if, in fact, legislators can
20 be compelled to be questioned about their work on
21 legislation, which I would contend to the Court is
22 exactly what the constitutional provision in Article
23 IV, Section 13, prohibits. They shall not be
24 questioned.

25 But we believe it's appropriate to

1 proceed with everything else that we're -- the
2 parties are ready to present to the Court and await
3 word from the Supreme Court if they're going to give
4 direction on this issue.

5 There is case law, including from the
6 United States Supreme Court, contrary to plaintiffs'
7 counsel's representation, that do not need to wait
8 for a contempt order or to have further proceedings
9 on this issue in this court before seeking review.

10 And I would point the Court to Eastland versus United
11 States Servicemen's Fund, 421 U.S. 491. It's a 1975
12 United States Supreme Court case. And there's a
13 quote from concurrence to that case speaking
14 specifically to issue requiring legislators to
15 negotiate protective orders or to suffer contempt
16 proceedings diminishes the purposes of the
17 legislative privilege. In addition, nonparties to
18 the litigation should not be expected to resist the
19 subpoena by placing themselves in contempt, end
20 quote, before having a determination on the scope of
21 this privilege, particularly considering that this is
22 the first court to weigh in on the issue.

23 So we respectfully ask that the Court
24 honor the automatic stay that has been effectuated by
25 statute and by rule. There's no exception in the

1 rule for this particular situation. This is a
2 political division. We represent the pro tem and the
3 speaker on behalf of the legislative as a body. And
4 we sought the review on that behalf. And that
5 triggers the protections both of Rule 62 and 39-3-23.

6 Thank you.

7 THE COURT: All right. Thank you.

8 As far as the motion for a stay, I think
9 that there are a couple things. I don't think the
10 rule or the statute are as clear on that granting of
11 an automatic stay or that would apply in this case,
12 which is -- I tend to agree with plaintiffs, that
13 it's more of an evidentiary or discovery type ruling
14 and not any type of judgment or interlocutory order.

15 So I'm not completely certain -- I'm not
16 certain it doesn't apply, but I'm not certain it does
17 apply in this case.

18 I also have some questions about
19 individual members of the legislature are actually
20 government entities. I know they are here on
21 behalf -- well, on their own behalf, but I just
22 don't -- I'm not certain that they represent the
23 entire body in this case.

24 And so -- and more practically, this
25 issue is before the Supreme Court now. I know

1 they've ordered expedited briefing on the matter. I
2 know that plaintiffs have already filed their
3 response. I think the more practical approach is to
4 proceed. If the Supreme Court does issue a ruling
5 that -- that my decision or my ruling on that issue
6 is in error, I'm sure they will let us know.

7 I think if there has been evident
8 presented at that time that would fall under that
9 ruling, I think that I'm and I think we all are
10 bright enough to figure out how to put aside or set
11 aside that evidence.

12 And so as of right now, I think that the
13 practical -- and on top of that, I think the Supreme
14 Court has made it very clear that they want this
15 proceeding to go forward. It's -- it would be a lot
16 easier to set aside evidence that may be should not
17 have come in, if that's what the Supreme Court
18 decides, rather than not allow and then later on find
19 out that it should have come in.

20 So with deadlines that we're on under
21 the Supreme Court, I think that for all those
22 reasons, I'm going to deny the motion for a stay.

23 For the executive defendants, this is
24 one I meant to before, do we need to address that
25 anymore?

1 MS. AGJANIAN: No, your Honor. We can
2 withdraw that motion. That's just fine.

3 THE COURT: Okay. So yeah, I think it -- in
4 all of these matters, unless and until the Supreme
5 Court tells me that this matter is stayed, we're
6 going to proceed forward.

7 Okay. So next let's bring up the most
8 recent motion that was filed to exclude Dr. Chen's
9 report. I know you filed a notice of brief will do
10 you want to speak any more on that?

11 UNIDENTIFIED MALE: Thank you, your Honor.
12 We filed the motion to exclude Dr. Chen on the basis
13 that his simulation analysis included a factor that
14 rendered them not a neutral baseline.

15 Therefore, under his own testimony at
16 the deposition and what Justice Kagan said about
17 (inaudible) analysis, his testimony is not helpful to
18 the Court.

19 Now, we are, of course, at a bench
20 trial. You know, I'm happy to argue that full
21 motion. You know, the other way to approach it would
22 be to have him, you know, provide his testimony, to
23 ask him about it, then your Honor could decide at
24 that point whether our objections to his
25 admissibility, his testimony makes sense. So, of

1 course, I would take the Court's guidance as to how
2 to court would like to proceed, as it is a bench
3 trial.

4 THE COURT: Before I ask for a response, I
5 was thinking maybe -- is that not the better way --
6 if you object to the foundation for his testimony,
7 wouldn't it be a better way just to object before he
8 puts it on, you know, as you stated, asking questions
9 about it and/or isn't it more towards argument about
10 how relevant his testimony would be in his report.

11 UNIDENTIFIED MALE: Certainly, one could
12 look at the objection that we raised as one confusing
13 to relevance. However, when you have, as we
14 respectfully submit, a partisan factor explicitly and
15 admittedly put into a simulations analysis, our
16 respectful submission that it just destroyed the
17 whole simulation abdominal. It's not about -- it's
18 not about what weight to give to it, it's just the
19 whole simulation analysis goes.

20 In fact, I didn't hear my friends in
21 their papers dispute that general proposition that,
22 in fact, if we could convince the Court that the oil
23 well considerations are a partisan factor that
24 Dr. Chen's testimony could then be admitted, their
25 point was that those are not partisan considerations.

1 We can argue about that. But I didn't hear any
2 objection (inaudible) papers to kind of a general
3 principle approximately that if we, in fact,
4 establish our core point on that motion that the oil
5 well considerations are just a partisan consideration
6 and that Dr. Chen could offer any useful testimony to
7 this Court based on his report.

8 THE COURT: All right.

9 Legislative defendants.

10 MR. OLSON: Judge Van Soelen, thank you.

11 While I disagree that this is an
12 evidentiary foundation issue, we have provided in our
13 response to that motion the foundational facts upon
14 which the instruction to Dr. Chen relied in taking
15 into account oil and gas considerations.

16 I think the fair thing that has been
17 said is there will be a dispute of fact as to whether
18 that instruction was based on a nonpartisan criteria
19 or, as the plaintiffs contend, a partisan criteria.

20 Under the New Mexico law that addresses
21 those issues, where you have a solid foundation that
22 is testable, that goes to the weight, the evidence
23 should come in and the fact finder should give it the
24 weight that the fact finder ultimately decides the
25 appropriate.

1 THE COURT: All right. Executive
2 defendants, do you wish to weigh in, at all.

3 MS. AGJANIAN: No position, your Honor.

4 THE COURT: Secretary of state?

5 MR. AUH: No, your Honor. Thank you.

6 THE COURT: Okay. Anything else.

7 MR. OLSON: No, your Honor.

8 THE COURT: Okay. I -- I tend to agree also
9 that it should come in. I think that if you want to
10 obviously make objections to the foundation when he
11 testifies, you can do that. But I also tend to agree
12 that it's more a weight of the evidence argument.
13 Who they are putting forward as their expert, they'll
14 be disagreements about that, and I think that's how
15 the Court should approach that, is it's a
16 disagreement about the weight of the evidence.

17 So I'm going to deny the motion to
18 exclude his report at this time.

19 Next, what I have, I issued the decision
20 letter on the legislative privilege issue. I did it
21 that way because, as I stated, it affects so many of
22 the other outstanding motions and issues of what type
23 of evidence will be presented, that after I issued
24 it, I probably thought, well, that doesn't -- I don't
25 know if it helps the parties all that much because

1 you still have your questions on the individual
2 motions.

3 So I don't want how you want to go
4 through with this. Do you want the address your
5 individual motions, or how do you want to address
6 your motions?

7 MR. HARRISON: I actually, your Honor,
8 (inaudible) remarkably good job. I mean, there are
9 still some margin cases. For example, we subpoenaed
10 two of the PRC members, the citizen redistricting
11 committee, members Lisa Curtis and Michael Sanchez.
12 And the legislative defendants objected on their
13 behalf saying that legislator CRC member committees
14 are within the privilege.

15 I think our -- I think under your
16 Honor's framework, the analysis would be is the CRC
17 part of -- I believe your Honor used the term part of
18 the legislative process. So I think that specific
19 issue could use an answer.

20 And then we have a factual ambiguity
21 about Ms. Leann Leith, who we had previously been
22 under the -- I had previously been under the
23 understanding was the paid -- the legislatively paid
24 staffer for the speaker, and we've since received
25 information, and I'm promising this is true, but I

1 now no longer believe that's the case. I believe she
2 was paid by the speakers PAC, and was a political
3 consultant, which to me would make the difference
4 between her being within the privilege under your
5 Honor's framework and not being within the privilege
6 under your Honor's framework.

7 So that's a factual question that we
8 don't necessarily need the Court for but we need
9 facts for.

10 But for the most part, I actually
11 thought that it answers the legal questions. Now,
12 procedurally, we're in the position of, you know, we
13 subpoenaed, admittedly, a lot of documents from a lot
14 of people. And we're now at first day of trial. I
15 don't know if the -- the few folks we've gotten to
16 ask have told us candidly that they didn't collect
17 the documents requested. We didn't get a privilege
18 log, which normally would be -- we would collect
19 privilege log things and so then you always -- you
20 have them if the privilege assertion the overruled.

21 So I didn't -- I actually think the
22 decision letter did a pretty good job of answering
23 the vast majority of the questions out there legally.
24 It's just the question of our -- you know, as I sit
25 here today, my understanding is that the legislative

1 defendants intend to kind of go all in on their
2 appeal to the Supreme Court and not produce in the
3 meantime. I don't know that for a 100 percent fact.
4 I don't know if it's been extended to -- I've reached
5 out to the lawyers for the consultants. I don't know
6 if they're planning on doing the same thing. But I
7 think the main questions that remain honestly of ones
8 of there clearly need to be production under the
9 Court's order unless the Supreme Court disagrees with
10 the Court, and how are we going to get it. And the
11 testimony version of that same question, which is are
12 they going to show up.

13 THE COURT: Okay. All right.

14 Legislative defendants, Ms. Sanchez.

15 MS. SANCHEZ: Thank you, your Honor. You
16 know, I think part of the issue that we're dealing
17 with, as a practical matter, your Honor, is that the
18 vast number of subpoenas that plaintiffs received and
19 issued in this case, each of within contains dozens,
20 if not hundreds of individual document requests.

21 To take the time to parse through what
22 of those requests might be protected under the
23 Court's decision letter, and what pieces of it might
24 now, when you're talking about (inaudible) word
25 searches or periods of time and who was communicating

1 with whom, I think just as a practical matter, would
2 be incredibly difficult for the parties, even if we
3 were able to agree on how to apply that, would just
4 as a practical matter be very difficult.

5 One aspect of this that I want to make
6 clear for the record is that we're not -- in response
7 to some of the Court's comments about, you know, as
8 evidence starts to come in that turns out to be off
9 limits, we can exclude that. There's into jury.

10 We're not just talking about
11 admissibility problem, your Honor, when we talk about
12 a privilege, a privilege against disclosure. Once
13 privileged material, information, communication, has
14 been disclosed, it's out of the bag, the genie is out
15 of the bottle. And the harm done, and this is part
16 of what we presented to the Supreme Court in the writ
17 petition and why we felt like that extraordinary
18 relief was needed, because once that disclosure has
19 been made, particularly if it's made in a public
20 circumstance, there's no getting that back. And
21 that's why it's so important to have guidance ahead
22 of time, before we know, not from just admissibility
23 standpoint, but from a disclosure standpoint, what
24 needs to be disclosed.

25 And that permeates throughout all of the

1 subpoenas to all of these individuals, whether they
2 be staff, consultants, legislators or members of the
3 CRC.

4 The CRC, for example, is a creation of
5 statute. The statute that created the citizens
6 redistricting committee specifies that their work is
7 to essentially take place of what would normally be
8 an interim legislative committee, that goes around
9 the state, develops proposed plans, recommends them
10 to the legislature, and then issues up to the
11 legislature whether or not to take those
12 recommendations or not of.

13 And the substitute actually specifies
14 that they step into that exact position with respect
15 to how their work is treated. That goes to the heart
16 of the legislative process. Even if those
17 individuals on the committee obviously were not
18 themselves elected lawmakers, they're there in a
19 legislative capacity preparing proposed legislation.
20 So obviously the public part of their work is public,
21 but the private communications that would normally be
22 covered by the legislative privilege, if they were
23 legislators, would be covered by that because of
24 their legislative role.

25 What we presented to the Court in much

1 of the briefing, we tried not to be too repetitive,
2 but these issues kept arising with every subpoena the
3 plaintiffs kept serving, is the analysis of when the
4 legislative privilege applies is really a functional
5 one that courts have applied.

6 In the states where they're looking at
7 speech and debate clauses like New Mexico's, they're
8 not looking at whose payroll are you on, who signs
9 your paycheck. They're looking at what is your role
10 in the legislative process. And I think the Court's
11 decision letter sort of touches on that in talking
12 about sort of roles -- you know, what was your role,
13 did you have an official role. But I think,
14 respectfully, that's a different analysis from who's
15 paying you, are you getting paid, who signs our
16 paycheck, who actually signed your employment
17 contract, if you have one. The question is what role
18 are you playing in the process.

19 And that's part of what we need guidance
20 from the Supreme Court on, is is it going to be a
21 functional approach, as these other courts have
22 taken? Is it going to be a paycheck question? Is it
23 going to be something else? And we don't know that.
24 But the risks inherent of making disclosures of what
25 turns out to have been privileged information, not

1 just for these legislators involved in this case, but
2 for the in the future for folks to know what's
3 privileged and what's not, is critical to their
4 functioning.

5 So those -- I think from a practical
6 standpoint and from a legal analysis standpoint, it
7 may just not be possible in the time that we have
8 here to apply the Court's reasoning to the 80
9 something, I haven't added them all up, to the
10 subpoenas that we talked about. And then, from the
11 standpoint of the trial subpoenas, compelling
12 testimony at trial, we face the same problem with a
13 disclosure, again, apart from the admissibility
14 issue, but a disclosure of privileged information
15 that turns out to have been in error. The harm from
16 that is something that we can't repair, so we really
17 do need guidance ahead of time. We can talk about
18 how to handle that from a practical standpoint here,
19 but that is why we have taken the repetition, that is
20 why we understand the notice of stay to apply to this
21 decision of the Court. It's clearly not just
22 applicable to final judgments.

23 THE COURT: All right. You said you didn't
24 ask the Supreme Court for a stay, correct?

25 MS. SANCHEZ: We notified them that we you

1 understand it to have been -- to triggered a
2 automatic stay under the statute. I haven't checked
3 my e-mail in the last few minutes, but I don't -- I
4 haven't seen --

5 THE COURT: Let me check mine.

6 MS. SANCHEZ: -- that there's been a
7 response from them on that particular issue.

8 THE COURT: I don't see anything yet. Just
9 the last thing I see is the responses filed by the
10 plaintiffs.

11 So all right, thank you.

12 MS. SANCHEZ: Thank you.

13 THE COURT: Executive defendants, any input,
14 secretary of state?

15 MR. AUH: No, your Honor.

16 THE COURT: Okay. Anything else?

17 MR. HARRISON: Just very, very briefly. So
18 I -- I didn't necessarily hear, other than again, the
19 CRC specific discrete CRC issue that we teed up,
20 necessarily anything saying that we needed more
21 clarity from your Honor. I think what the
22 legislative defendants want is clarity from someone
23 other than your Honor, from the Supreme Court on
24 this.

25 In terms of, you know, burden and

1 practicality of compliance, we served the subpoenas
2 back in July, and, you know, and as I mentioned, we
3 offered repeatedly to narrow them to the defendants,
4 the lawyers for every consultant, you know, to
5 negotiate to try and get -- that's how we got some
6 production from CCP, by dropping three-fourths, you
7 know, or more of what we subpoenaed them to do. We
8 dropped our entire 30(b)(6) request and every other
9 document, except for communication from legislators.
10 And they said, "Okay, fine."

11 And so we were ready to deal (inaudible)
12 defendants have taken a -- a position that privilege
13 is both absolute in the technical sense and huge in
14 the practical sense. And the only thing I'd like to
15 address is the problem with this, quote, unquote,
16 analysis that then goes back to, you know, the
17 problem -- the term "consultant." Anyone you consult
18 is a consultant. And the problem is now, frankly,
19 anyone that, for example, Mimi Stewart would care
20 enough to talk to about the SB-1 process, she then
21 can later say is obviously consulting with them, "As
22 part of my duties as a legislator."

23 So we don't think that's a workable
24 standard. We disagree that that's some kind of
25 majority approach anywhere. Frankly, this kind of

1 whole line of expanding this legislative privilege
2 outward into the world beyond the legislature and its
3 staff has been this one Abbott case out of Fifth
4 Circuit, which is kind of an outlier among the larger
5 bed of case law.

6 Thank you, your Honor.

7 THE COURT: All right. Well, if you're
8 asking for a specific ruling on the CRC, I can give
9 you that. I think that they are part of the
10 legislative process. They were created by the
11 legislature for this very purpose of coming up with
12 proposed districting. So I think that that is
13 definitely a part of the legislative process when it
14 comes to -- so I think they would fall under
15 legislative privilege.

16 More broadly, Ms. Sanchez and the
17 legislative defendants, I don't want to poo-poo your
18 concerns about this. I really understand what you're
19 saying, but my reading of case law from around the
20 country and other districts and jurisdictions that
21 have considered that issue, I put into my -- my
22 letter, I don't think it is an absolute privilege. I
23 think there have been states and cases where some
24 level of disclosure or some level of basically
25 forcing legislators to talk about their decision

1 making have been -- have been allowed or have been
2 required.

3 I think obviously legislative privilege
4 exists. Article IV, Section 13, I think is there.
5 And I think I incorporated it in my decision letter.
6 And I think really almost as a practical matter, I
7 think that's the best approach to take.

8 And so just to be clear, the way I view
9 it is anything, any communication, any of their
10 thoughts about the legislation that they passed are
11 privileged. And they can't be called to testify and
12 asked what their thoughts were during that process,
13 but any statements they made basically to the public
14 can be. So if they -- they held a press conference
15 or if they made a statement to what I would say is an
16 average citizen, if proper foundation is laid for
17 that, then that would come in, because I don't think
18 that is part of the legislative process that is
19 privileged under the New Mexico Constitution.

20 When it comes down to outside groups,
21 again, obviously their staff, other legislators --
22 the reason I talked about paid consultants, and what
23 I'm looking for is a formal relationship. I think
24 plaintiffs are correct, that if you look at it as
25 anybody a legislator talks to about this as part of

1 the process, then that would include everybody. That
2 would include, you know, constituents, that would
3 include citizens, someone stopping them on the street
4 and asking them about it. And I don't think that
5 that's necessarily what I think should be privileged.

6 And so I don't know about -- evidence
7 will have to be shown as to the role of Ms. Leith,
8 but if they were -- if they were paid by the
9 legislature or have some sort of formal role from the
10 legislature, I think that they would fall under
11 legislative privilege.

12 If they were just an advocacy group that
13 basically putting their two cents worth in, to me,
14 that's just like an average citizen putting their two
15 cents worth in, and therefore, they would not fall
16 under the legislative process.

17 So therefore, I don't know -- that's not
18 necessarily the answer you get. The Supreme Court
19 obviously is going to look at that. I think that
20 obviously they would understand the importance of
21 this and they'll probably give us a decision on that
22 as soon as -- as soon as they can.

23 MS. SANCHEZ: Your Honor, if I could just
24 ask for a brief clarification. And I'll also add one
25 clarification. And I appreciate the Court's

1 elaborating a little bit on your reasoning.

2 In the motion that we filed relating to
3 staff and consultants that was on August 14th, and
4 that was a motion to quash specifically subpoenas
5 that were served on Research & Polling, which is
6 Brian Sanderoff's job that had a formal contract with
7 the legislative council service to provide the
8 technical services that assist in preparing maps and
9 so forth and they're set up in the roundhouse and
10 actually provide the software that people use, as
11 well as Ms. Szczepanski, who is now a member of the
12 legislature, but at the time of redistricting she was
13 I believe the chief of staff for the speaker of the
14 house, and Ms. Leann Leith, I'm looking at our
15 motion, and we -- we noted that she's formally
16 employed by the house of representatives as a policy
17 advisor for the speaker of the house. So she had
18 a -- I truly don't know who signed her paycheck, but
19 she had a formal position with the house of
20 representatives and was there formally employed,
21 advising the speaker of the house. So I think that
22 falls within what the Court just identified as being
23 within the privilege under the Court's analysis.

24 As to the public type of statements that
25 the Court referred to, what I -- what I would ask for

1 clarification from the Court on is, is the Court
2 indicating that those statements, those
3 contemporaneous you statements to how you've defined
4 the public during the course of the legislative
5 process, those statements themselves I understand the
6 Court is deciding are not covered by the privilege
7 and may be admissible at trial if a proper foundation
8 is laid for them or if there's not an objection to
9 admissibility.

10 What is not entirely clear to me, and
11 maybe I might be missing something from the Court's
12 explanation or decision, is whether the legislators
13 can be compelled to be questioned about those
14 statements to the public, that the Court has defined
15 as statements to the public.

16 The statements themselves come in, we
17 understand that that would be the Court's ruling.
18 But what is not clear is if the legislators can be
19 compelled to sit for questioning about this.

20 THE COURT: And ask, "What were you thinking
21 when you said this or what was your reasoning?"

22 MS. SANCHEZ: Yeah. What were you talking
23 about, what were you thinking about, why did you say
24 this, you know, beyond just the communication that
25 exists.

1 THE COURT: My thought is no. The
2 statements will speak for themselves. But you can't
3 inquire into, you know, why did you say that or what
4 were you thinking when you said that. You know, I
5 think the statements have to speak for themselves.

6 MS. SANCHEZ: Okay. Thank you for that
7 clarification.

8 THE COURT: That's my thinking on that.

9 MS. SANCHEZ: Thank you.

10 THE COURT: As far as Research & Polling,
11 the other two, you do you want to address that?

12 MR. HARRISON: Yes, your Honor.

13 So Research & Polling, I would think, is
14 in a -- actually a very unique pox. So under your
15 Honor's ruling, I think they probably would count as
16 staff (inaudible) and then went and disclosed
17 Mr. Sanderoff who is the principal and the public
18 face of Research & Polling as an expert, which, you
19 know, we would say is unusual and waives attempt to
20 kind of use them as a sword while shielding his
21 factual involvement in the case. So that's a kind of
22 unique issue.

23 Ms. Szczepanski might -- with
24 Ms. Szczepanski and Ms. Leith, we would agree that
25 they're paid by the legislature under the Court's

1 (inaudible). We don't believe -- agree with the
2 Court, but we've got the Court's ruling and we want
3 to try to (inaudible) working with it. And so under
4 the Court's ruling, we would agree that if they're
5 paid by the legislature as part of legislatively paid
6 staff, like the -- in each house the majority and
7 minority each have their own staffer that is -- could
8 fairly be called a partisan, but are legislatively
9 paid. I believe that was Ms. Szczepanski. We'd like
10 an actual clarification of that in some way. But I
11 think they're right.

12 On Ms. Leith, I think they may be
13 incorrect. I think she may be a political person
14 paid just by the speaker's PAC, which is a large, you
15 know, political action committee.

16 THE COURT: How do you propose we resolve
17 that question?

18 MR. HARRISON: I mean, we -- it likely would
19 have been -- it certainly would have been something
20 we would have asked had she sat for a deposition, but
21 she declined. You know, we noticed her deposition
22 (inaudible) and she filed a notice of nonappearance
23 and declined. I mean, I would like to take her word
24 for it under oath. But I would say we expect
25 Ms. Leith to be a fairly important witness. The kind

1 of buzz that we're converting to admissible suggests
2 that she was important at the process of this
3 gerrymander.

4 THE COURT: All right. Well, let me just
5 ask, what was Ms. Leith's status during the
6 redistricting process?

7 MS. SANCHEZ: Well, I think as an advisor to
8 the speaker of the house and employed by the house of
9 representatives, she was integral to discussions with
10 staff -- with legislators and the process of
11 preparing legislation.

12 THE COURT: What was her official role? Was
13 she legislative aide?

14 MS. SANCHEZ: I think her official title was
15 policy advisor to the speaker.

16 THE COURT: Policy advisor to the speaker.
17 And Mr. Harrison brought up whether she was paid for
18 by the legislator or a packet, and do you think that
19 makes any difference?

20 MS. SANCHEZ: I don't, your Honor. I
21 haven't seen any --

22 THE COURT: Do you know which one it was?
23 Was she paid for by --

24 MS. SANCHEZ: I truly don't know the answer:
25 You know, I think we could -- over lunch, we could

1 get an affidavit or something to get some clarity on
2 that issue.

3 But I would submit to the Court that I
4 don't recall seeing any case law on legislative
5 privilege that is analyzing who signs the paycheck.
6 I think it's talking about what is their function.

7 Yes, if it's -- if it's somebody in off
8 the street or if it's somebody who flew in from some
9 D.C. group for the day to, you know advocate for a
10 position, I think that's very different than someone
11 who is working for the house of representatives on
12 behalf of the speaker in a legislative session. That
13 is pretty centrally a legislative role.

14 But I'm happy to get clarification on
15 some of these details for the Court. I don't want to
16 hold us up. I can probably do that over the course
17 of the day and get the Court (inaudible).

18 THE COURT: I think that would be helpful,
19 if we could get something just definitive on her
20 title and/or position. I'd like to know how she was
21 paid. I'm not sure that that is definitive because I
22 think it is more of a formal role issue, what role
23 did they play formally in the process. You know,
24 again, an outside advocacy group versus someone who
25 is engaged in some role, formal role to provide the

1 information and expertise on the issue. So that
2 would be helpful.

3 MR. HARRISON: And my only additional idea,
4 your Honor, is the legislative defendants did have
5 Raul Burciaga, who is the head of the legislative
6 council services, kind of the lead staffer for the
7 legislature.

8 Now, we had indicated that they were
9 only going to use him for authentication, and so we
10 had indicated that, "You don't need to do that, you
11 don't have to come." And he still doesn't, but I
12 would say I think we would -- if he knows, and I
13 suspect he would, we would accept his -- you know,
14 his statements about the role -- I would probably ask
15 who paid her, what was her title, was she a
16 government employee, did she have an office? You
17 know, kind of basic set of questions like that, and I
18 would think that he might be a good person who had
19 been prepared for trial to testify in this case --

20 THE COURT: Okay.

21 MR. HARRISON: -- on this type of thing.

22 THE COURT: All right. I think that would
23 be helpful.

24 All right. Anything else, Mr. Harrison?

25 MR. HARRISON: No, your Honor.

1 THE COURT: Legislative defendants, any
2 other issues or motions that you want a formal ruling
3 on?

4 MS. SANCHEZ: Just one moment, your Honor.
5 Sorry.

6 Your Honor, just a clarification
7 question, I suppose for plaintiffs' counsel, is
8 plaintiffs' council suggesting that you would accept
9 representations from Mr. Burciaga in an affidavit or
10 some form like that, or that we -- he's asking us to
11 bring Mr. Burciaga to court to testify on this issue?

12 THE COURT: Mr. Harrison.

13 MR. HARRISON: No, we'd -- we'd take him.
14 The only reason I'd like to have talk to him is, like
15 I said, I would have probably a -- I could think of a
16 better list, but, you know, off the top of my head,
17 who signs her paychecks, you know, are you considered
18 a government employee with, you know, PERA and all
19 this stuff that I don't know much about, having never
20 been a state employee, did you have an office in the
21 legislature, what was your job title? You know, if
22 she wasn't paid, who did -- was she paid by the
23 speaker's PAC, which is what they call his PAC. What
24 her, quote, unquote, title is, I don't know is
25 necessarily -- you know, when you work for the

1 speaker even in a political capacity, they throw
2 around the term speaker's PAC, for example. It's
3 just a PAC, right? It just has a speaker's title on
4 it.

5 So other than -- an affidavit would be
6 fine. Like I said, ideally, it would answer some
7 questions like that. And ideally, I'd have a little
8 more time than no time at all to think of the
9 questions. But we're certainly not saying we demand
10 him to be here. Even virtually.

11 THE COURT: All right. Does that answer
12 that?

13 MS. SANCHEZ: Yes. Thank you. I don't
14 believe we have anything else to address.

15 MR. OLSON: Your Honor, there is one other
16 thing. I don't know that we need to take it up now.
17 We can take it up anytime we're in trial. We can
18 take it up (inaudible). But we filed a motion to
19 strike or in limine on the discrete number of
20 exhibits that were attached to the annotated findings
21 of fact and conclusion of law.

22 The Court will recall, in the scheduling
23 order, we agreed that we would submit annotated
24 findings of fact and conclusions of law with
25 affidavits, speaker reports, evidence and the like.

1 And I believe I'm correct that the parties basically
2 are agreement with respect to everybody's submissions
3 and admissibility, with the exception of the Trende
4 and Chen reports. But then there's a couple discrete
5 items, none of which are probably not even going to
6 come up in our discussion over the next couple of
7 days, that we've got some objections to on foundation
8 and hearsay grounds.

9 So, you know, we can take that up
10 however you want to take it up. Well filed the
11 motion I think it was September 20th, your Honor, on
12 that issue. And there's just, like, four or five
13 exhibits that we raise a question about.

14 THE COURT: They're addendums to the
15 proposed findings and conclusions?

16 MR. OLSON: Yes, sir, they are discrete
17 exhibits attached to the plaintiffs' annotated
18 findings and conclusions that were filed. I think
19 the initial set was on 15th, I think it was, your
20 Honor, your Honor, which was September.

21 THE COURT: I think -- you know want to
22 address this?

23 MR. OLSON: Yes, your Honor. We're not sure
24 we're going to be introducing any of those in any of
25 our presentation.

1 THE COURT: All right.

2 MR. OLSON: If which decide to do so, I'm
3 sure they can object at that time.

4 THE COURT: Okay. Well, I --

5 MR. OLSON: Those things were mentioned
6 (inaudible).

7 THE COURT: What I think, also, just -- and
8 I appreciate the proposed findings from the parties
9 beforehand, at the end of the evidentiary portion,
10 I'm going to give each side an option or an
11 opportunity to amend those. And so I think that's
12 when we'll take that up. Okay?

13 All right. Anything else from the
14 legislative defendants.

15 MR. OLSON: Your Honor, we have (inaudible)
16 motion to exclude the testimony of Mr. Trende. We
17 received plaintiffs' response to that motion
18 yesterday. We have not filed a reply. But we are
19 prepared to argue that.

20 That motion, I think, could be
21 appropriately argued immediately prior to
22 Mr. Trende's anticipated testimony.

23 THE COURT: Okay.

24 Is that all right? All right.

25 Okay. That's what we'll go on that

1 issue.

2 All right. Anything else from
3 legislative defendants?

4 Executive defendants, anything else?

5 MS. AGJANIAN: No, your Honor.

6 THE COURT: Secretary of state?

7 MR. AUH: No, your Honor.

8 THE COURT: Okay. All right. I'm going to
9 take a quick break, and then when we come back, I'll
10 give either side the option of making your opening
11 statements.

12 Do you wish to make an opening
13 statement?

14 MR. HARRISON: Yes, your Honor.

15 THE COURT: Okay. And then defendants, you
16 can either make an opening statement, you can defer
17 till later, or you can waive opening statements.
18 I'll just go down the row with that. But let's take
19 about ten minutes. Okay?

20 (Recess held from 10:13 a.m.

21 to 10:26 a.m.)

22 THE COURT: Thank you. You may be seated.
23 Appreciate it.

24 All right. We are back on the record,
25 ready the begin. Do plaintiffs' wish to make an

1 opening statements.

2 MR. TSEYTLIN: Your Honor, do you mind if
3 I...

4 THE COURT: That's fine.

5 OPENING STATEMENTS

6 MR. TSEYTLIN: Thank you, your Honor. Misha
7 Tseytlin for the plaintiffs.

8 On Friday, we got more fulsome guidance
9 from the New Mexico Supreme Court, you know, about
10 the types of evidence and the types of inquiries that
11 we should take in the proceedings. And I want to
12 highlight three things the Supreme Court said.

13 First that -- we emphasize to the
14 touchstone here is Justice Kagan's three-part
15 (inaudible) justification test from Rucho, and that
16 we can use all types of evidence to prove up those
17 elements. We have (inaudible) on the first two
18 elements and they have obligation on the third.

19 Second, they said -- the Court said the
20 types of evidence that they would find very
21 compelling for a showing of egregious gerrymandering
22 is the types of evidence and the showings that were
23 made in the North Carolina and especially the
24 Maryland cases that were issued in Rucho. And it
25 suggested that we consider whether the evidence here

1 is of the same type, just as powerful as it was in
2 those cases.

3 And finally, the Court asked us to focus
4 on the cracking or packing of individual districts,
5 with a special focus on voter registration shifts, so
6 our other objective evidence.

7 So with that in mind, I'd like to
8 briefly talk this morning about eight categories of
9 evidence that we're going to present to your Honor
10 over the next couple of days that I think will
11 establish beyond serious dispute that we have
12 satisfied those first two elements, intent and
13 effect, and that my friends on this side cannot
14 satisfy the justification -- their justification
15 burden.

16 Now, the first category of elements
17 we'll discuss is the direct evidence of intent. And
18 I'm not discussing that because it's the most
19 important. And, in fact, as the Supreme Court said,
20 objective evidence is more important. But I want to
21 say that first because we have a piece of direct
22 evidence here that I think frames and puts in good
23 context a lot of the objective evidence that we're
24 going to discuss throughout the trial and present to
25 your Honor. And that piece of evidence we'll discuss

1 a little bit on Monday with your Honor, which is the
2 text messages from Senator Stewart to CCP.

3 And the reason that the text message is
4 to telling, so helpful, is that it frames kind of the
5 DNA of the gerrymander that occurred here.

6 A lot of times you'll get -- sometimes
7 in (inaudible) cases, you'll get the kind of evidence
8 that was revealed in the Benisek case, the Maryland
9 case, that Justice Kagan held was partisan
10 gerrymandering. There you have the governor in
11 Maryland admitting that he was trying to gerrymander.
12 That kind of high level, high level (inaudible) you
13 will get that.

14 What's so remarkable in these texts is
15 that she -- Senator Stewart not only admits that
16 gerrymandering was happening, but explains how and
17 why. She says, well, the Concept H map, that only
18 provides a 51.8 percent DPI, which is kind of the
19 composite measure of the parts of District 2. That's
20 not enough for a midterm. She's clearly referring to
21 the event upcoming midterm, where Democrats were
22 concerned that it was going to be a tough election
23 because it's the first election of a new presidency.

24 And she says, "What we did," excitedly
25 "we moved more voters into District 2 that were

1 Democrat, and we bumped that up to 53 percent
2 Democrat, 53.47." And then her -- on the other side
3 of the text, the question was, "Well, who takes the
4 hit?"

5 And the reason that question is
6 important is this principle that your Honor will hear
7 about, including from our expert, Mr. Trende, when
8 you have a small comparative state with a couple
9 districts, if you're going to make one district more
10 Democrat, you're going to end up making other
11 districts more Republican. It's this concept you got
12 to pay Peter to pay Paul or however Mr. Trende says
13 it.

14 And this person on the other side of
15 this text message said, "Well, what's going to happen
16 to the other districts?"

17 And Senator Stewart says, "Don't worry,
18 we balanced this out. So now we have 53 percent
19 District 1, we have 54 percent District" -- no,
20 "District 2, we have 54 percent District 1, you know,
21 55 percent District 3."

22 This is close to (inaudible)
23 gerrymandering, in other words, because you have
24 Democrat solid advantage across three districts,
25 pretty much as solid as you're going to get.

1 Now, my friends, in their opposition to
2 our statement, proposed statement of fact, and that's
3 (inaudible) during this trial, said you can't rely on
4 those statements. And they said some cases that say,
5 well, you look at -- you don't look at individual's
6 statements from individual senators, look at the
7 objective text of the legislation.

8 Now, that might be true in statutory
9 interpretation. You definitely don't want to look at
10 what an individual senator said about that. But when
11 you're talking about a case of invidious intent, it's
12 common to look at individual statements, especially
13 of the leadership. Justice Kagan certainly looked at
14 that in how much I don't. It's looked at in
15 (inaudible). It's (inaudible) across the country.
16 In fact, Maryland -- I mean, in fact, New Mexico
17 joined an amicus brief at the U.S. Supreme Court in
18 the Rucho case, so you've got to look at those kinds
19 of statements. So it's kind of (inaudible) to be
20 arguing contrary to now.

21 The second category of evidence that
22 we'll be presenting to your Honor is the completely
23 partisan dominated process. And this is something
24 that Justice Kagan also looked at in Rucho. You'll
25 hear evidence that Republicans were completely boxed

1 out of the process. This was a completely behind
2 closed doors, Democrat only driven process. This is
3 another factor that Justice Kagan and other courts
4 look at in determining partisan intent.

5 The third category of evidence that
6 we'll be presenting to your Honor will be something
7 that I highlighted that the New Mexico Supreme Court
8 on Friday said it was particularly important to hit,
9 which was the change in party registration
10 composition for the targeted district.

11 And here, you'll hear undisputed
12 evidence that District 2 went from an exactly even
13 party registration, Republicans to Democrat, to a 13
14 point advantage to Democrats as a result of this
15 gerrymandering. That's exactly the kind of evidence
16 that the New Mexico Supreme Court said we should be
17 looking at. They pointed that out with regard to the
18 Maryland case in footnote 13 of their opinion, and
19 we'll present that evidence.

20 The next category of evidence that we'll
21 be presenting, your Honor, is composite partisanship
22 of the districts. This is a more sophisticated way
23 of doing what the registration data does, and this is
24 what Senator Stewart is talking about in her text
25 message. This is DPI, or whatever you want to have

1 the acronym.

2 Basically, you take a series of
3 statewide elections, you average them out and you try
4 to determine the baseline partnership of each
5 district. And here, we have actually an incredible
6 amount of unanimity between our expert, Mr. Trende,
7 and their expert, which is essentially, just like
8 Senator Stewart's text says, what they did is they
9 created a 53, 54, and 55 percent three district
10 combination, which is a near perfect gerrymander.

11 Now, they don't have any basis to really
12 dispute (inaudible) their own experts give those kind
13 of numbers. They try to spin and it and say, "You
14 know, we're trying to make districts competitive."

15 Obviously that's not what they were
16 doing. If they wanted to make districts competitive,
17 she could have made two districts 50/50 or 51/49.
18 Instead, they came close to maximizing their partisan
19 advantage.

20 And so the other basis they say is
21 competitive, and they're going to say is competitive,
22 is look, we had a close election here in 2022. With
23 respect, that's exactly the argument that we made in
24 Benisek with regard to Maryland's district, where
25 also a very close election, and Justice Kagan had no

1 trouble finding that that was an egregious
2 (inaudible) gerrymander. And the reason for that is,
3 one election doesn't tell you much. Especially when
4 we've got a '22 election here, that was a favorable
5 year for Republicans, and there was an incumbent
6 running. In 2014, in the Maryland case, that was
7 another favorable year for Republicans, such as a
8 Democrat incumbent in the gerrymandering district
9 almost lost.

10 And so with that comparative argument,
11 and that specific argument was made a rejected in
12 Benisek, didn't carry the day. They certainly can't
13 carry the day here.

14 The next category of evidence that we'll
15 presents to your Honor is the unnecessary shifting of
16 large numbers of voters. This is, again, something
17 that Justice Kagan looked at with regard the Maryland
18 gerrymander where the Democrats in Maryland shifted
19 large amount of voters in and out their District 6 to
20 accomplish the gerrymander.

21 Here, you'll hear undisputed evidence
22 that because of the only minor shifts in New Mexico's
23 population between 2011 -- 2010 and '22, really
24 needed to move about 23,000 folks to get to the
25 perfect population quality. Instead the legislature

1 moved over 500,000 to accomplish the partisan ends,
2 over 120 something thousand with regard to
3 District 2. That is exactly the kind of evidence
4 that approved powerful in Maryland and similarly
5 powerful here.

6 Another category of evidence that your
7 Honor will hear about today is the specific DNA of
8 the gerrymander that jurisdiction here.

9 Now, Senator Stewart posted this in her
10 text message. She said we took Concept H, which
11 everyone agrees is the most favorable of the three
12 maps that came out of the redistricting committee,
13 and we made it more Democrat.

14 Well, our expert will testify that he
15 analyzed how exactly the difference are between
16 Concept H and SB-1 ensures that it was systematically
17 designed to change SB -- Concept H to a max
18 gerrymander by moving Democrat voters into D-2 and
19 moving Republican voters out of D-2. This is the
20 packing and cracking.

21 The next category of evidence we'll talk
22 about is the simulation analysis. Now, this is the
23 second where I've litigated a simulation analysis
24 case, and this is trendy in the last years. And it
25 is very complicated and technical.

1 So the way I like to think about it,
2 what you're trying to do with a simulation analysis,
3 is you're trying to come up with partisan neutral
4 criteria, and then tell a computer, what would a map
5 that's not a partisan map look like, based on these
6 partisan neutral criteria. And then you generate a
7 bunch of maps and you line them up in terms of how
8 favorable they are to party and you see where the
9 enacted map lines up.

10 Mr. Trende did that analysis with
11 2 million maps, and he found that SB-1 was more
12 partisan than 99.89 percent of those maps, which is
13 an extreme outlier.

14 Now, my (inaudible) testimony of
15 Dr. Chen who did -- who did a thousand simulations
16 and he seemed to come to a different conclusion.
17 Now, there's going to be some methodology (inaudible)
18 that Dr. Chen did that we'll explore with him. But
19 it was still -- what I saw, and I did a double take,
20 was a very surprising result, given all the other
21 objective evidence we have about a registration data
22 and perfect gerrymander, you know, DPI numbers, which
23 all the experts agree on, and I was like, what could
24 be going on here?

25 And you flip through their report and

1 you find out what's going on, is that counsel for
2 (inaudible) defendants in what I -- to my knowledge
3 is a (inaudible) instruction, told him to code a
4 partisan consideration into his instructions.

5 And the reason that -- the way that the
6 simulations work, the only reason they work, is
7 you're trying to extract away from the politics at
8 the moment. You're trying to figure out what would
9 neutral maps look like.

10 So they said, split up the oil and gas
11 wells. So we said how is that a partisan neutral
12 consideration. We said, is there anything in
13 New Mexico's history that would suggest that that is
14 a neutral criteria? No answer from the other side.
15 Is there anything in the law that would suggest that
16 the -- New Mexico law that was just splitting up oil
17 and gas wells? No answer. Is there even a
18 meaningful number of folks asking to split up -- and
19 by split up -- the technical term in redistricting is
20 actually called "cracking" -- to cracking the oil and
21 gas industry? No.

22 We said did anyone other than the
23 various gerrymanderers say anything about this? No
24 answer. And, in fact, if you look at the statements
25 of the alleged gerrymanderers, they're not all saying

1 that they want the oil and gas industry cracked.
2 Some of them are saying, "It would be nice to have
3 united." Other of them are just kind of generally
4 saying -- oh, and observed that the map -- that the
5 map did crack it. Nobody puts it (inaudible) place.
6 There's no mystery why of all the many things that
7 were said during the committee process or during the
8 legislative hearings, that they asked Mr. -- Dr. Chen
9 to code this hard wired to all his sims.

10 And the reason -- and that's a
11 (inaudible) consideration, is this is exactly what a
12 gerrymander would do, by having this oil well
13 consideration, which has no grounding in anything in
14 New Mexico, you assure that all those sims split the
15 Republican heavy district. But my friends just
16 didn't have the courage or conviction to actually
17 have a fair testing under their own expert's analysis
18 what neutral sims would look like, even under
19 Dr. Chen's analysis. So they essentially asked him
20 to cook the books.

21 Now, the final consideration and
22 category that we'll present to you, we'll talk about
23 with your Honor, is traditional redistricting
24 criteria. Now, Justice Kagan doesn't focus a lot on
25 that in her opinion, her notion being that a lot of

1 the traditional redistricting criteria are kind of
2 malleable, and so a gerrymander can achieve their
3 ends by pointing to this criteria and that criteria.

4 But I will say that there are some
5 redistricting criteria that are more malleable than
6 others. We'll present etched to your Honor that in
7 terms of compactness and cracking municipal
8 boundaries, this is either the worst or one of the
9 worst maps in New Mexico's history. Those are very
10 objective criteria.

11 My friends' considerations of
12 redistricting criteria are at odds with each other.
13 Sometimes they said it's good to unite communities on
14 interest. You know, like lifestyle, I think is one
15 of their communities of interest. But other times,
16 with the oil and gas wells, they want to crack the
17 communities of interest. So this kind of shows the
18 danger of going down that path, which Justice Kagan
19 also discussed.

20 So those are eight categories of
21 evidence that we'll present to your Honor. And we're
22 going to ask at the end of the trial for your Honor
23 to find that we have satisfied our burden to show
24 egregious partisan intent, egregious partisan effect,
25 and that my friends haven't a showed a justification

1 egregious partisan effect. And then we'll ask your
2 Honor to set a schedule for an immediate -- or
3 remedial proceeding.

4 All right. Thank you, your Honor.

5 THE COURT: All right. Thank you.

6 Legislative defendants.

7 MR. OLSON: Your Honor, let me sort of
8 address the Court regarding -- what we think the
9 evidence is going to show in the next couple of
10 days -- and keep in mind, your Honor, we submitted
11 quite a bit of evidence in the annotated findings and
12 conclusions supported by affidavits and documents
13 that have been stipulated to. And so frankly,
14 there's a lot of the material that I'm going to
15 discuss that's in there, and some of it's going to be
16 discussed here with these witnesses over the next
17 couple of days.

18 Your Honor, you know, I mean, something
19 to keep in mind as we're going through the next
20 couple of days is, the New Mexico congressional
21 districts haven't really been redistricted for 30
22 years. The last time the political bodies, the
23 legislature and executive were able to meet consensus
24 and redistrict the congressional districts was in
25 1990.

1 In 2000, in the (inaudible) case,
2 because the executive and the legislature was not
3 able to agree on a congressional district map, Judge
4 Frank Allen from Bernalillo County, did
5 redistricting. And he basically adopted what -- the
6 term a least change type analysis.

7 In 2010, after the 2010 census, again,
8 as I recall that one, your Honor, there wasn't even a
9 bill that got out of the legislature. And Judge
10 James Hall, who was sitting as a pro tem appointed by
11 the Supreme Court on that case, again, redistricted
12 the congressional district utilizing a least change
13 type of analysis, maintaining, in essence, the
14 districts that at that time that existed for 20
15 years, now, as of 2020, 30 years.

16 So for 30 years, the state's
17 policymakers did not have the ability, because of
18 stasis, to be able to come in and apply state policy
19 in determining what the best mix of the congressional
20 districts was.

21 So basically what plaintiffs are
22 advocating for is another ten years on our least
23 change analysis. Well, your Honor, that's not
24 mandated by law, that's not what's required to be
25 done. The political bodies have a part to play

1 obviously in this redistricting. In fact, they're on
2 the front line of it.

3 So what we're about here is an issue of
4 first impression say, in New Mexico and we're likely
5 significantly ahead of the curve with other states,
6 because there has been a determination by the Supreme
7 Court that there is a cause of action to be
8 considered under the New Mexico equal protection
9 clause as to whether there's been excessive partisan
10 gerrymandering and an a redistricting scheme.

11 And, of course, clear that political
12 considerations in redistricting are appropriate.
13 They occur and the Court acknowledges that. The
14 question is -- and -- and the Court acknowledges that
15 some partisan actions and some partisan effect is
16 permissible. And the Court's clear on that in its
17 opinion that it came down with last Friday.

18 The issue, as stated by the Court, and
19 what the plaintiffs must approve, is that there's
20 been egregious action that has affected a partisan
21 shift egregiously in the districting, egregious
22 partisan gerrymander, I think, is the term they used.

23 You need to look at whether it's
24 substantial vote dilution. And the touchstone, your
25 Honor, and all of it's replete in multiple points in

1 the Court's decision, first one that -- when it
2 referenced the Kagan (inaudible), and then at
3 multiple points in the decision that came down last
4 Friday, is whether there's been entrenchment, where,
5 in essence, the districting plan predetermines
6 elections.

7 At one point, the Court pointed out that
8 there has to be -- I think it's at Page 23 of the
9 opinion, Justice Bacon says. The consequences of
10 such entrenchment under a partisan gerrymander
11 include that (inaudible) elections are effectively
12 predetermined, essentially removing the remedy of the
13 franchise from a class of individuals whose votes
14 have been diluted.

15 Your Honor, we would submit that there
16 is no evidence whatsoever that reflects that there's
17 been a predetermination or entrenchment with respect
18 to the Senate Bill 1, and in particular focused on
19 the second congressional district.

20 So the Court adopted a three-part test.
21 You must approve the predominant purpose is to
22 entrench the dominant party by dilution of votes.
23 Secondly, you must prove that, in fact, the
24 entrenchment occurred as a result of substantial
25 dilution. And then, only if you do that, only if

1 you've established that, does the burden shift to the
2 state to articulate legitimate, nonpartisan
3 justifications. The first two steps are necessary to
4 establish an egregious gerrymandering. You have to
5 show entrenchment through intentional dilution.

6 The only place, of course, that
7 (inaudible) in egregious cases is articulated by our
8 Supreme Court and actually the legislature should not
9 be declared unconstitutional in a doubtful case.

10 So I want to discuss what we think the
11 evidence will show. First, your Honor, with respect
12 to the issue of whether the predominant purpose of
13 Senate Bill 1 is to entrench the predominant party in
14 power, we don't really have to look beyond the
15 legislation itself and its accompanied Democratic
16 data that was circulating through the legislature
17 through the process of debating and enacting Senate
18 Bill 1.

19 The congressional -- is second
20 congressional district was drawn with political
21 performance levels that fall well within the range
22 that experts, who you'll hear from over the next
23 couple of days and prepared reports that have been
24 submitted into evidence with your Honor, determined
25 and considered competitive, i.e., it's a race in the

1 congressional district that can be won by either
2 major party candidate. There's in entrenchment,
3 there's no predetermination of elections. In fact,
4 that was true, your Honor, before the 2020
5 redistricting -- or the 2021 redistricting. The
6 second congressional district had switched back and
7 forth between the parties a couple of times over the
8 last 15 to 20 years before 2020. So there's no
9 entrenchment, your Honor.

10 The stray comments by a few legislators,
11 some after the fact, are irrelevant and certainly
12 aren't determinative of legislative intent. Our law
13 in New Mexico is clear on that. The legislature acts
14 as a body. Stray comments by a few don't equate with
15 intent.

16 If the plaintiffs cannot establish the
17 (inaudible) purpose is to entrench, then per se,
18 Senate Bill 1 and specifically as focused on the
19 second congressional district, is not an egregious
20 gerrymander.

21 So the second question that the Court
22 posits, if you get past the first prong, is did the
23 entrenchment occur as a result of substantial
24 dilution. Well, your Honor, the most cogent evidence
25 of that is the result of the 2022 election.

1 There's a 1300 vote margin, seven-tenths
2 of a percent separating then Congresswoman Harrell
3 with Gabe Vasquez. We submitted in our supplemental
4 submission that was filed on the 20th of September,
5 your Honor, an affidavit from one of our experts, Kim
6 Brace, who is an expert in redistricting and census
7 matters from the Washington, D.C. area, and points
8 out that polls for the 2024 election show that former
9 Congresswoman Harrell is already ahead in the latest
10 polls. We already have under this redistricting
11 plan, the Senate Bill 1, that the plaintiffs are
12 contesting, a former Republican legislator met with a
13 Navajo Nation, announced a Republican nomination for
14 CD-3. If the intent was to entrench, then the
15 parties who were allegedly entrenching did a pretty
16 sorry job.

17 The registration numbers, your Honor,
18 you're going to hear in large part are meaningless.
19 You'll hear that from Brian Sanderoff. And I think
20 most of the experts will agree that what's of
21 significance is partisan performance numbers, how not
22 only how the district performs leaving aside
23 (inaudible) registration numbers, how they actually
24 get out and vote, how the vote gets split between
25 various parties.

1 And you're going to hear from a
2 performance standpoint, the differential in CD-2 is
3 well within a range of competition. Makes it a very
4 competitive swing district.

5 Your Honor, the other thing is, with
6 respect to vote dilution, if anything, the current --
7 the Republicans that are in the current iteration of
8 CD-2, their votes are even more important than they
9 used to be. If you look at the data, a lot of wasted
10 Republican votes in CD-2. Now their vote counts even
11 more. They need to get out and vote so they can get
12 their -- their chosen candidate in. And they came
13 very close with Congresswoman Harrell, and it's
14 indicated in the current polls are likely to turn
15 this seat again.

16 Your Honor, lastly, assuming
17 entrenchment, then the issue is whether there's
18 legitimate nonpartisan reasons for the policy
19 articulated in Senate Bill 1. And your Honor, the
20 record is replete with nonpartisan reasons.

21 There was discussion both at the CRC and
22 in the legislature about the interests of the
23 southern Rio Grande Valley from just south of
24 Albuquerque down to the border and affinities between
25 those areas. There was discussion amongst some of

1 the native nations, the Mescalero Apaches about
2 wanting to be split between two separate
3 congressional districts. There's always been the
4 districts centered around the core of the major urban
5 areas in the state, Las Cruces, Santa Fe and
6 Albuquerque. There was discussion about melding
7 urban with rural constituency.

8 And there was multiple discussions, your
9 Honor, at the senate rules -- senate floor debate by
10 Senator Cervantes, which is in part of Exhibit 27
11 that we've submitted, your Honor, where he notes that
12 likewise, each of the other two districts does the
13 same, captures some of the largest urban areas of our
14 state that, at the same time, brings in important
15 rural areas of our state that are so important to our
16 economy, the area that oil and gas communities of our
17 state, the farming communities of our state.

18 Again, on the -- senate rules committee,
19 Senator Ivey-Soto made similar comments about the
20 importance of the oil and gas industry and maximizing
21 its representation in Congress so that it had
22 multiple advocates for it at the federal level.
23 There was discussion about that from representative
24 Gail Chasey in the house -- house state government
25 elections and Indian affairs committee. There was

1 further discussion about that by Senator Cervantes in
2 the senate rules committee. There was discussion
3 about that by representative Antonio Maestas on the
4 house floor during the vote on Senate Bill 1 in the
5 house. Also by resident Nathan small on the house
6 floor in a discussion and vote on Senate Bill 1.

7 So contrary to what plaintiffs suggest,
8 the fact of the matter is, the oil and gas industry
9 and the concerns about the oil and gas industry and
10 the desire to maximize the representation at the
11 federal level was, in fact, a significant issue,
12 discussed and articulated by multiple of the
13 legislators as they were discussing Senate Bill 1.

14 Dr. Chen, utilizing those nonpartisan
15 public policy considerations, worked that into his
16 algorithm, and his analysis reflects that given the
17 nonpartisan policy considerations, Senate Bill 1
18 falls well within, from a partisan standpoint,
19 performance standpoint, what would be reasonably
20 anticipated. It's not a partisan outlier.

21 So, your Honor, in conclusion, we'd
22 submit that -- and then the New Mexico Supreme Court
23 has noted that some degree of partisan consideration
24 districting is permissible as a political process.
25 But if it's egregious, might be a product of

1 constitutional violation.

2 Well, that requires entrenchment,
3 effectively predetermining elections, and removing,
4 in essence, the franchise from allegedly diluted
5 voters.

6 The New Mexico Supreme Court has noted,
7 and as repeated multiple times by Justice Kagan in
8 the Rucho case, because of the political nature of
9 the issues, of course, only intervene in egregious
10 indications.

11 Your Honor, the evidence the almost
12 uncontroverted, there's no entrenchment. In fact,
13 the likelihood is that we'll be looking at a
14 competitive raise in CD-2 every two years.

15 The evidence is also uncontroverted,
16 your Honor, that multiple nonpolicy considerations
17 went into the drafting of the bill. And the analysis
18 by Dr. Chen highlights it's well within the
19 anticipated range from partisan standpoint it's not
20 an outlier.

21 The only logical conclusion, your Honor,
22 at the end of the day is that there's been no
23 egregious partisan gerrymander.

24 Thank you, your Honor.

25 THE COURT: Thank you.

1 Ms. Agjanian.

2 MS. AGJANIAN: Your Honor, I'd like to --
3 I'm probably going to waive, but I would like to
4 defer for now, please.

5 THE COURT: Okay. Mr. Auh. Before.

6 MR. AUH: Nothing from me, your Honor.

7 THE COURT: Okay. All right, then.

8 Plaintiffs, you may call your first
9 witness.

10 MR. HARRISON: Your Honor, the plaintiffs
11 call Jim Townsend.

12 THE COURT: If you'll come up around here.
13 Before you sit down, if you'll raise your right hand.

14 Do you solemnly swear or affirm under
15 penalty of perjury that the testimony you'll give
16 will be the truth, the whole truth and nothing but
17 the truth?

18 THE WITNESS: I do.

19 THE COURT: Thank you. Have a seat.

20 JIM TOWNSEND,
21 having first been duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. HARRISON:

24 Q. Good morning, Mr. Townsend. Can you please
25 introduce yourself and give your position in state

1 government?

2 A. My name is Jim Townsend. I live in Artesia,
3 New Mexico. I am a state representative for district
4 54 in the house of representatives.

5 Q. Okay. And were you in the house of
6 representatives at the time of the 2021 redistricting
7 session?

8 A. I was.

9 Q. Okay. And did you have any special
10 positions within the house caucus?

11 A. At that time, I was minority floor leader.
12 So caucus leader, if you may. But Republican leader
13 in the house of representatives.

14 Q. Okay. Can you very briefly describe, in
15 case anybody here doesn't know, what the duties of the
16 floor leader are?

17 A. My job is to represent my caucus in the
18 process of debate on bills and the negotiation of
19 those bills as they were vetted out.

20 Q. Okay. And would that often involve
21 important bills, discussions between you and
22 Democratic leadership of the house?

23 A. It did.

24 Q. Okay. I'd like to talk a little bit about
25 Senate Bill 1, which is what we're here today to

1 discuss.

2 So who -- how was San Mateo bill one
3 drafted, meaning, from when it came in the door the
4 first day, how did it get into that shape?

5 A. Well, Senate Bill 1 evolved from a piece of
6 legislation that came out of the senate into a senate
7 judiciary committee substitute for Senate Bill 1.

8 So it was a bill that was modified in
9 process.

10 Q. Okay. So let's talk about the bill that was
11 initially introduced. Who participated in the
12 drafting of that?

13 A. Senator Cervantes was the sponsor of that
14 bill. And he was the -- he was the drafter. I wasn't
15 involved and neither were any of the Republicans, to
16 my knowledge.

17 Q. Okay. Now, are you aware -- well, is it
18 your understanding that Senate Bill 1 has as its sort
19 of loses basis concept aged from the citizens
20 redistricting committee?

21 A. I believe that to be correct.

22 Q. Okay. But they -- but there were changes
23 that are -- am I correct, that there were changes that
24 I believe that sponsors put in around 14 percent from
25 Concept H to the entry to Senate Bill 1?

1 A. Yes, sir, that is correct.

2 Q. Okay. And whatever process was involved in
3 changing Concept H to the originally introduced Senate
4 Bill 1, what do you know about that process?

5 A. I don't know anything about it. That
6 occurred basically overnight and came back out as a
7 committee substitute. And we were not involved at all
8 in that process.

9 Q. Okay. And by "we," as far as you know,
10 there was no GOP representation at all in the sort of
11 behind closed doors aspects of crafting the
12 legislation?

13 A. That is correct. There were -- to my
14 knowledge, there were absolutely nowhere involved, not
15 from any of the minority.

16 Q. Okay. And so let's talk about the special
17 session. I think you -- I don't want to misstate what
18 you said. I think you mentioned the only -- the only
19 change that ever -- that happened to the bill during
20 the session was this committee substitute; is that
21 correct?

22 A. On SB-1?

23 Q. Yes, sir.

24 A. Yes, sir, that is correct.

25 Q. Now, did Republicans voice their displeasure

1 over various aspects of the bill?

2 A. Oh, yeah. When we heard the bill was out,
3 some of us were in senate judiciary that next morning.
4 It came over to the house. I think it was debated for
5 an extended period. I don't know that it went the
6 full three hours, but it was an extended period. And
7 Representative Nibert kind of led that debate and the
8 introduction of his floor committee substitute for
9 that bill.

10 But yeah, it was -- it was hotly
11 contested by many members of the house in -- both
12 informally and in the debate.

13 Q. Okay. Did any of those formal amendments
14 pass?

15 A. No, sir. Representative Nibert's amendments
16 was tabled and it went nowhere. So we were not able
17 to interject any modification whatsoever to what came
18 across.

19 Q. Were those bipartisan votes?

20 A. Those were party line votes, if my memory is
21 correct. In fact, I know they were party line votes.

22 Q. Okay. And same thing with the final package
23 of the bill. Was that a bipartisan in any way, or did
24 any Republican vote for the final bill?

25 A. I -- my memory is that when that bill passed

1 one Democrat, Representative Sweetser, from over in
2 Deming, voted with a minority. But we were not
3 successful. That bill passed as basically with all
4 Democratic votes, no Republican votes.

5 Q. So to be clear, one Democrat broke ranks and
6 agreed with the Republicans, but no Republicans
7 supported it?

8 A. That is -- that is correct.

9 Q. Okay. And in terms of informal, you know,
10 off the floor process, what was your impression from
11 talking to, I guess in particular, Democratic
12 leadership?

13 A. Well, I -- it was pretty clear to us that
14 that bill was going to be forced through as it was.
15 There was no --

16 UNIDENTIFIED MALE: Objection, hearsay.

17 THE COURT: Response.

18 MR. HARRISON: So we're asking for
19 discussion of the legislative process. I don't
20 understand why this should be hearsay.

21 THE COURT: I'm not sure I heard a request
22 for hears. If there was a request as to something
23 someone said, I think it was more of his
24 understanding. Objection overruled.

25 A. Yeah, it -- it was my understanding, and it

1 was the feeling of the caucus from their interactions
2 with members on the other side of the aisle, that that
3 bill was the bill, and it was going to be forced
4 through.

5 Q. In fact, that's exactly what happened, was
6 that went through based on party line votes, with no
7 modifications whatsoever.

8 THE COURT: Let me interrupt real quick. I
9 apologize. It's been -- I've been informed that a
10 person on the witness list is on Google Meets.
11 Nobody has asked the rule of exclusion to apply. I
12 wanted to bring it up.

13 UNIDENTIFIED MALE: Right. We're going to
14 ask that the rule be (inaudible), your Honor.

15 THE COURT: Anybody? Okay.

16 MR. HARRISON: I'm sorry. Was that no, I
17 don't --

18 THE COURT: Right.

19 MR. HARRISON: Okay. Thank you.

20 THE COURT: Okay. Thank you. Appreciate.
21 Go ahead.

22 BY MR. HARRISON:

23 Q. Okay. And then the -- I think we've
24 mentioned the SJC substitute, which was the one change
25 made to the bill throughout the legislative /PROESZ,

1 was that a Republican inspired change in any way?

2 A. No, it was not at all a Republican inspired
3 change.

4 Q. Okay. So let me -- I'm going to -- now,
5 you've been -- well, I'll just ask. Are you aware of
6 the discovery efforts that have been made in this
7 case?

8 A. I became aware yesterday of some of those.
9 But before that, no, sir.

10 Q. Okay. So are you aware that -- are you
11 aware if we sent out subpoenas to the Democratic
12 members of the 2021 legislature?

13 A. I am.

14 Q. Okay. Are you aware if we got back any
15 documents?

16 A. I am not.

17 MR. HARRISON: Okay. I'm going to quickly
18 (inaudible), your Honor, approach.

19 THE COURT: (Inaudible).

20 MR. HARRISON: I have a copy for him, as
21 well.

22 THE COURT: Okay. Just for identification?

23 MR. HARRISON: I was going to have him -- I
24 believe our process has been (inaudible).

25 MR. OLSON: (Inaudible)?

1 MR. HARRISON: This is, your Honor. And if
2 we can mark it, and if we're starting a new
3 plaintiffs using numbers, maybe, we can call this
4 Exhibit 1, plaintiffs' trial Exhibit 1.

5 THE COURT: All right. You said there was
6 proffer to pre-admit these.

7 MR. HARRISON: We have -- there were -- I
8 believe so, your Honor.

9 THE COURT: Okay.

10 MR. OLSON: I'm sorry, what's that, your
11 Honor?

12 THE COURT: Was there any type of agreement
13 on pre-admitting these, or...

14 MR. OLSON: Well, I think all the agreement
15 was all the exhibits that were attached to the
16 (inaudible) findings and conclusions --

17 THE COURT: Okay.

18 MR. OLSON: -- were admissible with the
19 exception of the -- we've got the Alberico motion
20 with Chen and the Trende report.

21 THE COURT: Okay.

22 MR. OLSON: And then the four or five items
23 that I had in my motion (inaudible).

24 THE COURT: Okay. That's fine. I just
25 wanted to make sure.

1 MR. HARRISON: Yeah, that's my
2 understanding, too, your Honor.

3 THE COURT: So this will be Plaintiffs'
4 Exhibit 1?

5 MR. HARRISON: I think we'd like to probably
6 make sense to start over numerically for the trial.

7 THE COURT: Okay.

8 BY MR. HARRISON:

9 Q. So, Mr. Townsend, or Representative
10 Townsend, you're looking at what we called Plaintiffs'
11 Exhibit 1. So this is one of, again, three pages of
12 documents that we got in discovery, and I -- I'm going
13 to ask you some questions -- well, I think you've said
14 you don't know anything about the process, and that's
15 your perspective. We do have some information on the
16 actual process we know was used.

17 So I'm going to go through here. So
18 you'll now see -- so you see text messages that are in
19 read from the president of the senate, Mimi Stewart,
20 who is a named defendant in this case, and then in
21 green with what I'll assert to you is a member of the
22 center for civic policy.

23 If you go down to her -- to the one,
24 two, three, fourth text messages from senate president
25 steward, where she says: We've improved the people's

1 map and now have CD-2 at 53 percent DPI, exclamation
2 mark.

3 Do you know what DPI means?

4 A. Yes. It's Democratic performance, I believe
5 is what is referenced.

6 Q. Okay. Now, when she's talking about making
7 that -- that improvement, was the GOP involved in that
8 process of improving Concept H?

9 A. No, sir, we were not.

10 Q. Okay. Now we do have a representative form
11 of government. Sometime people are -- can be
12 represented even when they're not present. Are GOP
13 interests reflected in that improvement?

14 A. No, sir, they are not.

15 Q. Okay. Now, this process that we now know to
16 be the process that converted Concept H into SB-1 also
17 had some findings. So if you go down to the very next
18 text message from senate president Stewart, you'll see
19 where it says: Sanderoff's DPI for your Map H is
20 51.eight percent. That's not enough for a midterm
21 election.

22 Okay. So that finding, did the GOP
23 participate in making that finding, that that was too
24 close for a midterm election?

25 A. No, sir. We were not involved in that

1 whatsoever.

2 Q. Okay. Does that finding seem like it
3 reflects the GOP's interests?

4 A. No, sir, it does not.

5 Q. Okay. And then, again, we have some more
6 talk about the process in the same text: That's not
7 enough for a midterm election, so we adjust some
8 edges, scooped up more of Albuquerque and are now at
9 53 percent. CD-1 is 54 percent. CD-3 is
10 55.4 percent.

11 So that process, was the GOP in any way
12 involved in that process of scooping and adjusting
13 edges?

14 A. No, sir, we were not.

15 Q. I'd like to shift gears a little bit and
16 talk about the southeastern part of the state. Is
17 there a community of interest in the southeastern part
18 of the state?

19 A. Sure, there is. More than one. But you
20 have all the gas communities that this, in my opinion,
21 is a community of interest. You have agriculture
22 that's a community of interest. So yes, we did have
23 communities of interests.

24 Q. Okay. And is the oil and gas industry
25 important to Southeastern New Mexico?

1 A. Yes, sir, very much.

2 Q. Okay. And that's because of the oil basin
3 in Lubbock, a large scale Permian Basin?

4 A. Number of jobs, revenue, school children
5 going to school. There's a lot of reasons for it, but
6 oil and gas is very important to southeast New Mexico,
7 and to New Mexico as a whole.

8 Q. Okay. So my next line of questions are
9 going to be, you may have heard in opening, the
10 legislative defendant's expert, in creating a
11 simulation, it created (inaudible) however many
12 100,000 maps, programmed a parameter that no district
13 should have more than 60 percent of the oil wells in
14 the state, which as far as you know, would that
15 require splitting up Southeastern New Mexico from
16 where the oil wells are in New Mexico?

17 A. It would seem to me that that's exactly what
18 it would do.

19 Q. Okay. And I want to clarify that this line
20 of questioning is not whether that is per se illegal,
21 but whether it is a necessary evil in the way that
22 lines always have to be drawn, or whether it is what
23 it's being presented as, which is a good, in and of
24 itself.

25 So as you were part of the legislative

1 process and going through things, did the Dems try to
2 sell to you that it was a feature, not a bug, of an
3 SB-1 map, that it split up what I'll call the oil
4 patch region of the state into three districts?

5 A. Yes, sir. We heard that in the debate on
6 the senate judiciary's substitute for SB-1, and a that
7 that would be beneficial.

8 Quite to the contrary. That is not
9 beneficial. And it isn't any counties or communities
10 of interest to be broke up in that manner. So it is
11 not in their best interests and it is not serving them
12 well.

13 Q. Okay. Are you aware -- has anyone in -- an
14 oil industry executive or any oil industry interest
15 group express the desire to be divide up into more
16 than one congressional district?

17 UNIDENTIFIED MALE: Hearsay, your Honor.

18 THE COURT: Mr. Harrison.

19 MR. HARRISON: So we're admitting it not for
20 whether it's -- frankly, it's whether it is good,
21 quote, unquote, for them to be divide, but to make
22 the point that we content that this 60 percent
23 parameter was added after the fact, was concocted in
24 litigation, and was not a part of the legitimate
25 considerations that were used in the legislature.

1 THE COURT: But your specific question was,
2 have you heard from any oil and gas person; is that
3 correct?

4 MR. HARRISON: That is correct, which would
5 then go to whether the -- and what I really want is
6 whether legislators heard anything, not so much
7 whether the oil industry executives said it, but
8 whether the legislature got that feedback, that it
9 was desirable to crack the oil patch.

10 THE COURT: I'm going to sustain the
11 objection. I think you can ask a more general
12 question, did you hear from the oil gas industry, not
13 specifically what they said.

14 MR. HARRISON: Okay.

15 BY MR. HARRISON:

16 Q. Well, I guess I'll start with you. Tell me
17 what your day job is when you're not legislating.

18 A. Well, I'm retired today, so I don't have a
19 day job, except taking care of legislative business.

20 Q. What was your day job?

21 A. My day job was I worked for an oil and gas
22 company.

23 Q. Okay. And can you give me a little more
24 detail? High level at --

25 A. High level. I was responsible for one of

1 the division of Holly Corporation, which was Holly
2 Energy Partners, a pipeline company, and that was my
3 responsibility, the day-to-day operations of that
4 entity.

5 Q. Okay. Did you or Holly Energy have any
6 dissatisfaction with being -- with the oil patch being
7 in a single congressional district?

8 A. No. I think it was -- it is a common
9 thought that being united in having an aggregate group
10 that can influence their legislature was in their
11 benefit. So I don't know of any oil and gas company
12 that thought being split up was in their best
13 interests.

14 Q. Okay. And as far as you're aware, did any
15 oil and gas -- anyone from the oil and gas industry or
16 trade groups testify at the legislature in support of
17 the SB-1?

18 A. No, sir.

19 Q. Okay. Now, you -- have you also done state
20 house redistricting?

21 A. We had -- in this process, we did state
22 house, and the senate did the state senate
23 redistricting.

24 Q. Okay. Now, this doesn't really come up with
25 congressional districts in New Mexico, but in the

1 process working with state house, were you made aware
2 or are you aware that federal Voting Rights Act
3 sometimes requires the drawing of majority/minority
4 racial districts?

5 A. Not intently, but I am aware of that, yes,
6 sir.

7 Q. Okay. Now, just as a -- by way of
8 comparison, so if you were informed and believed -- so
9 if you concluded that the federal VRA required you to
10 draw a majority Navajo district, would you ever
11 instead say, "No, I'm going to split this Navajo
12 community into three districts, where they don't have
13 a majority in any"?

14 A. No. That would seem to be counterintuitive
15 to that end.

16 Q. Okay. So you wouldn't say, "No, we love you
17 so much and you're so important, you need to have
18 three districts and three representatives"?

19 A. I would no and I don't believe it's in the
20 best interests of that entity for that to occur.

21 Q. Okay. And more generally, if you and your
22 neighbor share common values, are you each better off
23 having different representatives that share neither of
24 your values?

25 A. No, sir.

1 Q. Or voting together on a single
2 representative who shares your values?

3 A. Yeah, you're much better off to be united.

4 Q. Okay. And overall, just your gross
5 impression of having been through this process in a
6 leadership position, what was the overarching goal of
7 Senate Bill 1?

8 A. Senate Bill 1 was a judiciary substitute,
9 was -- the intent was to make sure that Democrats were
10 elected in those districts.

11 Q. In all three districts?

12 A. In all three districts.

13 MR. HARRISON: Nothing further, your Honor.

14 THE COURT: Mr. Olson.

15 CROSS-EXAMINATION

16 BY MR. OLSON:

17 Q. Representative Townsend, to follow up on
18 that last question, you'd agree that there's, what,
19 112 legislators in the -- between the senate and the
20 house; is that correct?

21 A. Pretty close.

22 Q. There's like 70 in the house and 42 in the
23 senate?

24 A. Correct.

25 Q. And so each one of those legislators voted

1 and each of one of those legislators had their own
2 reasons for voting for Senate Bill 1; isn't that
3 correct?

4 A. You would think so.

5 Q. Okay. So I want to ask you a few questions,
6 following up on some of your examination?

7 Do you have any idea how often
8 legislation passes in the house, because that's the
9 one you're most familiar with? You've been in the
10 house for how long?

11 A. This is ending my 5th term.

12 Q. Okay. How many times the legislation passes
13 in the house on party line votes?

14 A. There's a lot of votes that go through on a
15 bipartisan. I don't know what the percentage is, but
16 I see votes that go through bipartisan, as well, many
17 times.

18 Q. Okay. Sir, there's votes that go through
19 bipartisan, but there's also many votes that go
20 through on a party line basis; isn't that correct?

21 A. There are -- I don't think it's a majority,
22 but there are some.

23 Q. For instance, oftentimes, the appropriations
24 bills go through a party line vote, do they not?

25 A. No, sir. I think you'll see HB-2 that's

1 voted for in a bipartisan fashion. That's the first
2 bill that comes out, or the second bill that comes out
3 in the house. And although there may be a lot of
4 disagreement to it, there are members of the minority
5 that vote for it and have historically.

6 Q. Does the house Republican caucus (inaudible)
7 take a position on what the party position is on
8 voting on, for instance, House Bill 2, the general
9 appropriations bill?

10 A. Not typically. We do take a caucus position
11 sometimes, but I don't remember a time that we took a
12 caucus position on that bill.

13 Q. But, for instance, the house Republican
14 caucus generally will take a position on tax bills,
15 won't it?

16 A. Probably. It -- you know, it depends on
17 what the tax bill is. I mean, it is a bill that's
18 reducing tax? Yeah, we'll probably be for that one.
19 If it's a bill that raising tax, probably not.

20 Q. So a bill raising taxes, you'd likely see
21 party line type votes, would you not?

22 A. It would not surprise me.

23 Q. Okay. You mentioned that Southeastern
24 New Mexico, you consider it oil and gas industry and
25 agricultural interests to be a community of interest;

1 is that correct?

2 A. That is correct.

3 Q. And in New Mexico, we have oil and gas
4 activity concentrate had not only on the southeast
5 part of the state but also in the northwest part of
6 the state; isn't that right?

7 A. That is correct.

8 Q. And so, would you agree that there's a
9 community of interest between the oil and gas
10 producers in southeast New Mexico with those in the
11 northwest part of the state?

12 A. They are different in many ways, but common
13 in the fact that they are producers. That is correct.

14 Q. And in the federal level, they have my of
15 the same issues that they deal with, for instance,
16 with regulations from the bureau of land management;
17 isn't that correct?

18 A. I think that is true.

19 Q. And regulations dealing with things like
20 Endangered Species Act and the like; isn't that
21 correct?

22 A. I believe that to be correct.

23 Q. And, again, agricultural interests, you've
24 got agricultural interests in the southeast part of
25 the state, but they extend up the east side of the

1 state and over across the northern part of the state,
2 too, do they not?

3 A. They do.

4 Q. Okay. And, I mean, for an industry
5 standpoint, isn't it beneficial to have multiple
6 legislators that you can go visit with about concerns
7 about federal regulation, BLM regulations, getting
8 permits, things of that nature?

9 A. No, sir, it is not.

10 Q. You don't consider it to be worthwhile to
11 have multiple representatives supporting oil for you
12 in D.C.?

13 A. I think you have to dig deeper into that
14 question. And is your voice, is your voice to that
15 legislator meaningful. And if you have a small
16 segment of an industry that a representative really
17 has more of Albuquerque than they do or Lea County,
18 who are they going to listen to? They're going to
19 listen to where the votes are in Lea -- in
20 Albuquerque. They're not going to listen to that
21 small community. And that is the problem that we have
22 had in southeast New Mexico with splitting it up. It
23 has not been fractured, it has been destroyed. That
24 community of interest has been demolished.

25 Q. So you don't think it's worthwhile for

1 somebody who is representing the incident of northwest
2 producers to also have some involvement with the
3 southeast producers and enhance that representation
4 you have in D.C.?

5 A. If you're talking about representatives
6 working collectively, then you would have two
7 representatives that were working on the same issue.
8 That is different from fracturing a community and
9 weakening the ability of that industry to influence a
10 single legislator.

11 MR. OLSON: Just a minute, your Honor.
12 Nothing further, your Honor.

13 THE COURT: All right. Ms. Sanchez.

14 MS. SANCHEZ: Nothing, your Honor.

15 THE COURT: Mr. Auh?

16 All right. Redirect?

17 MR. HARRISON: No, your Honor.

18 THE COURT: Okay. Thank you, sir. You may
19 step down.

20 You may call your next witness. How
21 long do you think your next witness will be?
22 30 minutes?

23 MR. HARRISON: Probably.

24 THE COURT: Okay.

25 MR. HARRISON: So we're calling William

1 Sharer, and he is on the Google Meets. So I don't
2 know what the...

3 THE COURT: Mr. Sharer, can you hear me?

4 Am I muted?

5 THE COURT MONITOR: (Inaudible).

6 THE COURT: Mr. Sharer, if you'll press star
7 6, we can hear you.

8 Are we sure he's still on there?

9 THE COURT MONITOR: (Inaudible).

10 THE COURT: He's not on here right now. He
11 was earlier. That's who I was discussing. Let me
12 see if you can get him on.

13 There he is.

14 All right. Mr. Sharer, can you hear me?
15 Mr. Sharer, can you hear me?

16 THE WITNESS: I'm here, if anybody can hear
17 me.

18 THE COURT: Yes. Can you hear us?

19 Do you know why he wouldn't be able to
20 hear us?

21 THE COURT MONITOR: (Inaudible).

22 THE COURT: Can you hear us at all,
23 Mr. Sharer?

24 I don't think he's hearing us.

25 THE COURT MONITOR: (Inaudible).

1 THE WITNESS: Hello.

2 MR. HARRISON: Bill, can you hear me?

3 THE WITNESS: I can hear you now, yes.

4 MR. HARRISON: Not the Court.

5 THE COURT: All right. Mr. Sharer, this is
6 judge Van Soelen, can you hear me?

7 MR. HARRISON: Yes, your Honor. I can hear
8 you.

9 THE COURT: All right. You're being called
10 as a witness. Are you ready to testify?

11 THE WITNESS: I am.

12 THE COURT: All right. I'm going to ask you
13 to raise your right hand. I'm going to swear you in.

14 Do you solemnly swear or affirm under
15 penalty of perjury that the testimony you'll give
16 will be the truth, the whole truth and nothing but
17 the truth?

18 THE WITNESS: I do.

19 THE COURT: All right. Thank you.

20 MR. HARRISON: And, your Honor, I can't see
21 him on this, but I can see him on this. Would you
22 mind if I (inaudible)?

23 THE COURT: That's fine. Yeah, that's fine.

24 All right, Mr. Harrison. Go ahead.
25

1 WILLIAM SHARER,

2 having first been duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. HARRISON:

5 Q. Good morning, senator. How are you?

6 A. Excellent.

7 Q. All right. Thank you for joining us today.

8 Could you start off by giving me your background, what
9 your position in state government is?

10 A. So my name is William Sharer, but I do by
11 Bill. I'm the state senator for District 1, which is
12 mostly Farmington, and just a bit west of Farmington.
13 I've been in the senate since 2001. And I'm currently
14 the ranking member of senate finance committee.

15 Q. Okay. Did you participate in the 2021
16 redistricting session?

17 A. Oh, yes.

18 Q. Okay. And is that your first redistricting
19 session?

20 A. No. That's actually my third. So I
21 participated in 2001, 2007 and then 2021.

22 Q. Okay. Now, those past two rounds of
23 redistricting, if I'm not mistaken, they obviously
24 both were subjected to gubernatorial vetoes, but with
25 one exception, which I believe is the 2011

1 congressional map. The legislature, in fact, passed
2 maps for house and senate both redistricting sessions
3 in Congress in 2001. Am I correct about that?

4 A. Yes. We did.

5 Q. Okay. And I'll try to keep my questions
6 shorter. I apologize.

7 So I'm first going to start with asking
8 you some questions about, if on the senate side, from
9 your perspective on the senate side about the
10 legislative process about SB-1.

11 So I guess to start, is it your
12 understanding that SB-1 was based loosely on the
13 people's map Concept H from the CRC?

14 A. Oh, there's no doubt about that. Yes.

15 Q. Okay.

16 A. On page -- yes.

17 Q. Okay. But your understanding is there were
18 significant deviations made from H to SB-1?

19 A. Yes, there were.

20 MS. SANCHEZ: Your Honor, I'm going to
21 object to leading and ask that counsel be mindful
22 about that.

23 MR. HARRISON: I'll certainly try to limit
24 it. My apologies.

25 THE COURT: Okay. Go ahead.

1 BY MR. HARRISON:

2 Q. So that process of transforming Concept H
3 into SB-1, were any Republicans involved in that
4 process?

5 A. Well, of course during committees, yes. But
6 as far as I know building it and all of that, I do not
7 believe any Republicans were involved.

8 Q. Okay. And I'm even talking about the by
9 necessity, off the record process of however the
10 introduced bill was created, you know, which of course
11 would have been done not in the legislature itself.
12 Are you aware that the sponsors of SB-1, you know,
13 reached out to Republicans or formed a committee with
14 Republicans or anything like that?

15 A. I do not believe that happened at all with
16 any Republican.

17 Q. Okay. Now, post introduction and during the
18 session, did Republicans voice their complaints about
19 SB-1?

20 A. Oh, yes. Numerous times.

21 Q. Okay. Within were these complaints made
22 both on and off the record?

23 A. Yes. Most of them probably off the record.
24 But certainly, there were formal complaints, as well.

25 Q. Okay. Did you see anything done by the --

1 by the sponsors of the bill or Democratic leadership
2 to address Republican complaints?

3 A. Nothing. In fact, there are amendments that
4 were offered, but none of the amendments were
5 considered. In fact, I don't think most of them were
6 considered for more than a few seconds before there
7 was a motion to table it.

8 Q. Okay. And now I don't know if you were on
9 for Representative Townsend's testimony. But is it
10 correct that the only changes that were made to SB-1
11 throughout the legislative process or special session
12 were the SJC substitute made on December 10th?

13 A. Yes. So what was introduced had an
14 amendment -- or not an amendment, a substitute the day
15 after it passed committee. So it was brought back
16 again. And that substitute really incorporated
17 what -- what we knew of as the Indian (inaudible)
18 plan. So basically you have to put this in, so
19 Senator Cervantes put it in.

20 Q. Okay. Are you aware of any meetings that
21 culminated in the I guess off the floor deliberations
22 that culminated in the introduction of the committee
23 substitute?

24 A. Again, if there were meetings, they
25 certainly did include any Republicans. If a

1 Republican was going to be in that meeting, I would
2 probably be the guy. President Nez of the Navajo
3 Nation once referred to me as the best Indian he has
4 in the senate.

5 Q. So I guess to go into that a little bit, are
6 you -- you're one of the more active Republicans in
7 negotiating with the tribes on what you could either
8 call tribe relations or just issues where the tribes
9 have a distinct interest in the outcome of
10 legislation?

11 A. Oh, absolutely. I'm the only Republican
12 that actually bumps up against the Navajo Nation. And
13 not quite a third of District 1 that I represent is
14 Navajo.

15 Q. Okay.

16 A. So that's (inaudible).

17 Q. Did the tribes -- during the session, did
18 tribal leaders ever attempt to convene a meeting with
19 legislators over changes they wanted to see to SB-1?

20 A. Well, maybe legislators, but certainly not
21 Republican legislators. And I tried to -- to meet
22 with them over this. And they -- they would not.

23 Q. Okay. So I want -- so tell me more about
24 that. You were -- are you testifying that you all
25 were aware that there was a meeting being had between

1 Democratic legislators and tribal leaders?

2 A. Yes, there was. I believe this meeting was
3 on -- it may have been on the 8th or 9th of December,
4 I'm not sure. I was trying to find an exact date in
5 my phone because I've called several times to try to
6 get in to meet with the delegation, the Native
7 American delegation that was putting them together,
8 and they came up with this consensus plan.

9 And what I was told is they had a
10 consensus plan, they agreed to it, and they weren't
11 going to change it. So after that, I continued to try
12 to get in there by making phone calls. And
13 eventually, I was told, and I want to read this, if I
14 can, because it was -- it stuck in my mind so strong
15 at that time.

16 MS. SANCHEZ: I'm going to object to
17 hearsay.

18 MR. HARRISON: Your Honor, so what he's
19 going to say --

20 THE WITNESS: (Inaudible). It was sent to
21 me.

22 THE COURT: Hold on just a minute.

23 MR. HARRISON: I'm sorry. There was an
24 objection. I don't know if you can hear. I'll let
25 you continue in a second.

1 So, your Honor, what he's going to say s
2 he asked to be a part of this meeting and was told,
3 "Don't come. You can't come. It will be a waste of
4 our time." That obviously is not for the matter
5 asserted. It's a declarative/imperative statement
6 from individuals in the meeting, excluding him from
7 that part of the process, and that is also
8 significant, in and of itself.

9 What this vein of evidence is is to show
10 that the actual process that created and passed SB-1
11 and, in this case, the one actual change, which was a
12 committee substitute, you know, at one point it
13 wasn't just that we didn't ask, we -- Mr. Sharer --
14 or Senator Sharer asked and was told, "No, you can't
15 be a part of this meeting."

16 THE COURT: All right. So your answer to
17 the objection is that it's not hearsay. So there's
18 an exception?

19 MR. HARRISON: It's not hears, your Honor.

20 THE COURT: Ms. Sanchez.

21 MS. SANCHEZ: Well, your Honor, I'm
22 concerned because it sounds like the witness intends
23 to read from a statement we've never seen before from
24 somebody who hasn't been identified. And I don't
25 know what that statement is or who the supposed

1 declarant is in order to assess whether it's the
2 subject of a hearsay exception or not.

3 MR. HARRISON: We can have him not read, if
4 that -- I wasn't aware that he had --

5 THE COURT: Yeah, I think it would be
6 hearsay. It's -- the statement is, from what you've
7 said, going to go to the truth of the matter of what
8 he was told, he was told this.

9 MR. HARRISON: Okay.

10 THE COURT: So I'll sustain the objection.
11 You can probably get the information in another way.

12 MR. HARRISON: And to clarify, because I
13 don't want to seem like I'm just (inaudible), I can
14 ask him please put aside whatever you got in front of
15 you, what is your recollection of what you were told
16 when you asked to enter the meeting?

17 THE COURT: Yeah, that still would be --

18 MS. SANCHEZ: That's still hearsay.

19 MR. HARRISON: All right.

20 THE COURT: I understand what you're trying
21 to get in. I think you can ask if he --

22 MR. HARRISON: Was allowed?

23 THE COURT: -- was allowed.

24 BY MR. HARRISON:

25 Q. So, Mr. Sharer, without -- don't quote

1 anything you were told by any person, but am I
2 correct -- I think you've already testified, you
3 attempted to participate in a meeting of tribal
4 leaders and Democratic legislators in advance of the
5 committee substitute? Am I correct, is that what
6 you've testified to so far?

7 A. Yes. It would have been a waste of their
8 time, is what I was told.

9 Q. Okay.

10 MS. SANCHEZ: Objection (inaudible).

11 BY MR. HARRISON:

12 Q. Were you allowed to -- and just I think --
13 (inaudible) but yes or no, were you allowed to
14 participate in that meeting?

15 A. No.

16 Q. Okay. (Inaudible) I have for you, Senator
17 Sharer, so you've mentioned that you were -- you also
18 participated in the last two rounds of redistricting
19 legislation.

20 Can you compare, just give an overall
21 comparison of the atmosphere of collegiality on then
22 the approach of compromise in those past few sessions
23 versus the 2021 session?

24 A. Certainly. So in 2011, and I was brand new
25 then, we had our first session in January through

1 March, and then we had redistricting in September. So
2 I clearly was brand new, didn't have any experience
3 then. But I clearly remember sitting in rooms with
4 Brian Sanderoff, as well as multiple other
5 legislators, but he's not, so maybe two or three on
6 each side, where we were adjoining districts, talking
7 about, you know, if we move this district here, we
8 move that district here, how about these communities
9 of interest. And so those kind of conversations
10 happened. Certainly not formally, but they happened.

11 And then Brian Sanderoff would draw
12 those up and then we could look at them and so we
13 moved on.

14 In that case, because it was a close
15 chamber, there clearly was an effort to try to come up
16 with plans that worked.

17 In 2011, the chamber wasn't as close,
18 but there still was collegiality. We still met,
19 Democrats and Republicans, again with Brian Sanderoff,
20 where he drew up the maps that we discussed and we
21 moved forward from there.

22 But in both cases, I think the
23 difference was that there was a Republican governor
24 who could veto anything that we thought was unfair.
25 So there was a real effort I believe to come up with

1 fair districts during those two.

2 During this one, there wasn't even
3 pretending to be an effort. This is the way it is,
4 and you all can just take it or not.

5 Q. Okay. Thank you. And I have to go back and
6 clarify one thing. The meeting that you were not
7 allowed to attend between the tribal leaders and
8 Democratic legislators, did the one put that you had
9 or the proposed which I think to SB-1 that you had
10 and wanted to voice to those individuals, were they
11 like deeply significant issues, like don't split up
12 the southeast, or were they -- what kind of issues
13 were they?

14 A. So mostly, it was just moving of a few
15 precincts around. So at least from my perspective, it
16 wasn't any grand change. I mean, I wasn't trying to
17 redefine anything. I simply thought that there was
18 some opportunities there for make things more fair by
19 moving -- I think it was six precincts that I was
20 talking about total, through the whole state. Well,
21 (inaudible) was Congressional District 3 that I was
22 working. But (inaudible).

23 MR. HARRISON: Okay. I've got nothing
24 further, your Honor.

25 THE COURT: All right. Ms. Sanchez.

1 MS. SANCHEZ: Your Honor, any objection from
2 me doing this from the desk?

3 THE COURT: No. Go ahead.

4 MS. SANCHEZ: Thank you.

5 CROSS-EXAMINATION

6 BY MS. SANCHEZ:

7 Q. Good morning, Senator Sharer. My name is
8 Sarah Sanchez. I'm one of the attorneys for the
9 legislative defendants. I realize probably can't see
10 me or can't see any my face. But can you hear me
11 okay?

12 A. I can hear you, but you're right, I can't
13 see you.

14 Q. Okay. Now, I understand, Senator, you
15 represent senate District 1 up there in San Juan
16 county in the northwest part of the state; is that
17 right?

18 A. Yes.

19 Q. And that area is in congressional District
20 3, correct?

21 A. Yes.

22 Q. All right. And it's been in that district
23 for a long time, correct?

24 A. Since Congressional District 3 was created,
25 yes.

1 Q. All right. So nothing about that changed
2 under SB-1, the plan that we're talking about now,
3 correct?

4 A. Yes.

5 Q. Okay. Now, I think /KWRAOUFZ shared with us
6 your disappointment that the redistricting session or
7 the process or at least the conversations around SB-1
8 in the legislative redistricting session in 2021 was
9 not as bipartisan as collegial as your previous
10 experiences with redistricting over the previous two
11 decennials; is that right?

12 A. Yes.

13 Q. Okay. Now, you're not -- in saying that,
14 you're not suggesting that there was some kind of
15 procedural violation with how SB-1 moved through the
16 legislature or that it's package was not valid,
17 correct?

18 A. (Inaudible) it was valid.

19 Q. Okay. Now are you familiar, Senator, with
20 the citizens redistricting committee that was set up
21 by some earlier legislation that was passed?

22 A. I am.

23 Q. And are you aware that the citizens
24 redistricting committee, I'll just call it the CRC for
25 short, held a number of public meetings around the

1 state, including in your area?

2 A. Yes. And I was at the one in Farmington.

3 Q. Okay. And did you make -- did you make
4 comments at that meeting concerning the congressional
5 map in particular?

6 A. I don't recall, but I do -- certainly I make
7 comments, but I don't recall if I made them about the
8 congressional map.

9 Q. All right. And coming back to the
10 redistricting session in the legislature in December
11 of 2021, did any Republican --

12 A. I can't hear you.

13 Q. Oh, can you hear me now?

14 A. Yes.

15 Q. Okay. In the redistricting session in 2021,
16 did any Republicans introduce a bill for congressional
17 redistricting? I'm not talking about a floor
18 substitute or amendments. I'm asking if they -- if
19 any Republican lawmakers introduced a congressional
20 redistricting plan?

21 A. To tell you the truth, I don't -- I don't
22 know. I can't imagine that we didn't -- that Senator
23 Baca didn't, but I can't tell you one way -- posit one
24 way or the other if it was actually introduced. That
25 would certainly be on the record, though. You can

1 look and legislative council and see if it was
2 introduced.

3 Q. Would it surprise you to learn that Senator
4 Baca did not introduce a congressional happen?

5 A. It would surprise me to learn that no one
6 did, if that's the case.

7 Q. All right. And you mentioned in your
8 previous redistricting experience, you mentioned
9 Mr. Sanderoff, Brian Sanderoff and his Research &
10 Polling group that would -- was brought in there to
11 provide some services to the lawmakers in preparing
12 redistricting plans. Do you recall that testimony?

13 A. I do.

14 Q. Okay. And over the years in terms of your
15 work in the legislature and your involvement in
16 redistricting, did you ever have any problems or
17 concerns with how Mr. Sanderoff handled that work or
18 the capabilities and reliability of his staff?

19 A. Well, certainly he had the capabilities to
20 do that. I always felt that he leaned a little bit
21 left, but not -- not out of line.

22 Q. Okay. And you didn't have any concerns
23 about his knowledge or his understanding of what went
24 into what he needed to do to assist you all in
25 preparing maps?

1 A. No.

2 Q. Okay. Senator, are you aware that just
3 recently, last Friday, the New Mexico Supreme Court
4 issued an opinion in this case providing some
5 additional guidance to the district court about how to
6 decide this matter?

7 A. I don't -- I don't know what that guidance
8 is. I read that the Supreme Court had made some
9 decisions, but I really don't know what they were.

10 Q. Okay. So you haven't read that opinion?

11 A. No.

12 Q. Okay. One of the things that the Supreme
13 Court talks about in its decision is the importance of
14 the franchise, of the right to vote for New Mexicans.
15 And for that being a cornerstone of our democracy. Do
16 you agree with that concept?

17 A. Oh, the right to vote is absolute, yes.

18 Q. Okay. And that's something that you value
19 as a state senator and somebody representing
20 constituents in the roundhouse?

21 A. Absolutely. Everybody ought to have the
22 right to vote once.

23 Q. Okay. And I think you shared with us, I
24 want to make sure I heard you correctly on this, that
25 your senate District 1 up there is approximately about

1 30 percent Native American; is that correct?

2 A. At the (inaudible) districting, I was at 37.
3 Now, after redistricting, it's 30. Not significant
4 change.

5 Q. Okay. And you value the rights of your
6 Native American constituents to participate fully in
7 the political process?

8 A. Oh, absolutely.

9 Q. Okay. Senator, you've talked to us today
10 that you care about bipartisanship and voting rights
11 and Native American political participation.

12 Wasn't it just last year in the 2022
13 legislation that you single-handedly filibustered for
14 two hours to kill a voting rights bill that Democrats
15 had sponsored that would have established a Native
16 American Voting Rights Act?

17 MR. HARRISON: Objection, your Honor.

18 Don't answer, Bill. We're objecting.

19 Objection to relevance.

20 THE COURT: Ms. Sanchez, what is the
21 relevance?

22 MS. SANCHEZ: Your Honor, this goes to the
23 credibility of this witness in talking about the
24 criticisms that he has of this process. He engaged
25 in the same type of behavior that's being accused of

1 my clients here.

2 THE COURT: So you're questioning -- tell me
3 your question again.

4 MS. SANCHEZ: I can leave out the preamble,
5 your Honor. But the question is in the 2022 session,
6 did Senator Sharer filibuster for two hours to kill a
7 voting rights bill that would have included a Native
8 American Voting Rights Act that was defeated because
9 of his filibuster.

10 THE COURT: All right. I don't know what
11 the contents of that bill were -- are or were, so I'm
12 not sure how this relates to his credibility in this.

13 MS. SANCHEZ: Well, your Honor, I think it
14 relates to his testimony that he felt excluded from
15 this process, that this wasn't a bipartisan process
16 and that the Native American participation in it was
17 something that he was excluded from, when --

18 THE COURT: Did it have something to do with
19 districting for congressional districts?

20 MS. SANCHEZ: Well, it certainly has to do
21 with the voting rights that the Supreme Court are so
22 focused on in their decision in this case that go to
23 the heart of why the Court wants to entertain this
24 claim, I think.

25 MR. HARRISON: Your Honor, his vote on a

1 piece of legislation or his actions and words on the
2 floor debate on a piece after legislation clearly
3 don't, quote, unquote, go to credibility. They don't
4 go to anything than the very same principles that the
5 legislative defendants have been talking about
6 protecting, which is if we can't even get discovery
7 on what people said, we're allowed to harass them
8 over the way he voted on a piece of legislation that
9 who knows what it had in it, what kind of poison pill
10 it had in it, despite the fact that they slapped the
11 name on it Native American Voting Rights Act? It's
12 an inappropriate line of questioning and it's
13 irrelevant.

14 THE COURT: All right. I'm going to agree.
15 I'm going to sustain the objection more than anything
16 because I don't think that it would be beneficial to
17 get into an argument about why someone voted on some
18 other piece of legislation. So I'm going to
19 establish the objection. I don't think that's
20 relevant.

21 MS. SANCHEZ: Thank you, your Honor. I just
22 wanted to clarify. I'm not asking about his vote.
23 I'm asking about the act of filibustering. But I --

24 THE COURT: Same ruling.

25 MS. SANCHEZ: But I understand the -- I once

1 the Court's ruling. Could I have just a moment, your
2 Honor?

3 THE COURT: Yes.

4 BY MS. SANCHEZ:

5 Q. Senator, just coming back to the questions I
6 was asking you about, Research & Polling, you recall
7 the Research & Polling folks, Mr. Sanderoff's staff
8 was available there at the roundhouse during the
9 special redistricting session if any lawmakers had any
10 requests for them to process a map or answer questions
11 that came up in the process of redistricting?

12 A. Yes. He was there.

13 Q. Okay. And I'm not going to ask you if you
14 consulted with him at all. I don't want to get into
15 that. But you were aware that he was -- his services
16 or his staff's services were available to you if you
17 needed them?

18 A. Oh, yes. Absolutely.

19 MS. SANCHEZ: Okay. Thank you. I have
20 nothing further.

21 CHAIR BACA: Ms. Agjanian?

22 MS. AGJANIAN: No, your Honor.

23 THE COURT: Mr. Auh.

24 MR. AUH: No, your Honor.

25 THE COURT: Redirect.

1 MR. HARRISON: No redirect, your Honor.

2 Thank you, Senator Sharer.

3 THE COURT: Thank you, Senator Sharer.

4 You're free to go. Thank you.

5 THE WITNESS: All right. Thank you, your
6 Honor.

7 THE COURT: All right. Seeing that it's
8 about noon, I propose we take a break for lunch and
9 come back and be ready to go by 1:15. Is that all
10 right?

11 All right. We'll be in recess.

12 (Lunch recess held from 11:58 a.m.

13 to 1:15 p.m.)

14 THE COURT: All right. We are back on the
15 record in Lea County Cause Number CV-22-041.

16 Ms. Agjanian, I see you standing.

17 MS. AGJANIAN: I am, your Honor.

18 THE COURT: So you've received a copy of the
19 writ, correct?

20 MS. AGJANIAN: Correct, Judge.

21 THE COURT: All right so for the record, a
22 writ has been issued by the Supreme Court, directing
23 me to dismiss you and your clients from the case, so
24 you're hereby dismissed. I'll follow it up with a
25 written order later on today.

1 MS. AGJANIAN: Your Honor, may I make a
2 motion to be excused? That way the Court has to
3 grant one of my motions.

4 THE COURT: I'm already under order from the
5 Supreme Court to dismiss you, so you are dismissed,
6 and if you have. Have a good day.

7 All right. Mr. Harrison.

8 MR. HARRISON: Yes, your Honor. I don't
9 know if your Honor saw, but the Supreme Court issued
10 another writ --

11 THE COURT: Yes.

12 MR. HARRISON: -- as well, during the break.

13 THE COURT: They did issue an order denying
14 the writ of error, petition for writ of error,
15 correct?

16 MR. HARRISON: That's correct, your Honor.
17 They denied the petition for writ of error. And it
18 was further ordered that the petition did not stay
19 the district court's order or the proceeding from the
20 district court.

21 THE COURT: Okay. All right. And I assume
22 you have seen that also.

23 MS. SANCHEZ: I have, your Honor. And we're
24 kind of getting the declaration with regard to
25 Ms. Leith prepared for Mr. Burciaga, as discussed --

1 THE COURT: Okay.

2 MS. SANCHEZ: -- this afternoon. We should
3 have it for the Court shortly. May I -- since I
4 don't have a printer here, may I forward that to the
5 Court's Proposed Text e-mail and Mr. Harrison?

6 THE COURT: Yes. If you can help her with
7 that. My Proposed Text e-mail would goal to Clovis.

8 MS. SANCHEZ: Oh, that's true.

9 THE COURT: How else do you want to do that.

10 UNIDENTIFIED FEMALE: (Inaudible).

11 THE COURT: Okay.

12 MS. SANCHEZ: Whatever the Court prefers.

13 THE COURT: Okay. Yeah, she'll give you an
14 e-mail. Yeah, I think so, she'll give you an e-mail
15 to send it to.

16 MS. SANCHEZ: Thank you.

17 MR. HARRISON: And, your Honor, on that
18 front, we ask that the Court order full document
19 production of -- we reiterate after your Court's
20 latter decision, we sent an e-mail that, of course,
21 we copy the Court on, but saying, you know, that we
22 would accept from the legislators production on a
23 truncated privilege log, such that they don't have to
24 log it all communications post the day of pass age,
25 which I don't remember off the top of my head.

1 And then /TPOEU communications that are
2 predate of passage of the legislation, they can just
3 put the identities of the parties, like, so-and-so to
4 these people. And they don't need to summarize the
5 contents of the communication in the way that you
6 normally would for, like, an attorney-client
7 privilege log, because I don't think it's necessary
8 under the analysis laid out by the Court. But
9 anyway, which may be (inaudible), but would ease the
10 burdensome what, but we would ask, your Honor, that
11 the counter please order production by 8:00 a.m.
12 tomorrow, which I would normally feel bad about,
13 although the Supreme Court just ordered us to do two
14 briefs by 8:00 a.m. today, so it's, you know --

15 THE COURT: All right. So you've reissued
16 subpoenas shortening what you're asking for.

17 MR. HARRISON: No. We just reached that
18 informally to say we don't need --

19 THE COURT: Okay.

20 MR. HARRISON: -- a full privilege log. You
21 know, if it's post I believe December 18th, 2021,
22 which the Court said anything post enactment of
23 legislation is privileged, you don't need to log it
24 all, (inaudible) it is privileged. If it's pre-that
25 date and you claim that it's privileged, so it's the

1 legislator to legislator communication or legislator
2 to staff communication, all we need is the identity
3 of the parties.

4 Because that then establishes -- it
5 doesn't matter what the subject is. It's either
6 irrelevant or privileged and so that's good enough.
7 But we would like to see -- because, you know, the
8 reality is, there could be some additional folks that
9 are on that periphery where the legislative
10 defendants say they're within the privilege
11 (inaudible), but the -- you know, we litigate the
12 issue and it turns out they're not, for example, and
13 so we you had would still ask for that, but mostly,
14 you know, production and ideally production quickly
15 enough to where we can use it in our examination of
16 the legislators and the two consultants that we
17 subpoenaed for trial.

18 Thank you, your Honor.

19 THE COURT: Mr. Olson or Ms. Sanchez or --
20 any response?

21 MS. SANCHEZ: Yes, your Honor. A number of
22 responses.

23 First of all, I think the Court has
24 clarified that these individuals cannot be called and
25 questioned about the statements that if there are

1 responsive statements that the statement speaks for
2 themselves and the Court considers them outside the
3 privilege.

4 Second of all, from just a practical
5 standpoint in a burdensomeness standpoint, which is
6 the other issue we raise in subpoenas, and I think
7 we've heard from some pretty Frank admissions from
8 plaintiffs' counsel is that there was some strategic
9 overreaching in terms of what was asked for in terms
10 of these subpoenas, we presented declarations from
11 folks with the legislature that to do a search and
12 review for all the documents that have been
13 requested, hundreds of word searches and e-mail
14 searches would take months.

15 And so, you know, if there's a narrower
16 scope, which we understand from the Court's ruling,
17 that there's a much narrower scope, certainly in
18 terms of what the Court considers to be outside of
19 privilege, that hasn't been defined anywhere in these
20 subpoenas.

21 What I would propose to the Court is --
22 obviously I haven't had an opportunity, since we're
23 if trial, to confer with our client about the denial
24 of written what is even possible to do and how
25 quickly, I would ask that the Court give me the

1 evening to do that, and we would be ready first thing
2 tomorrow to report back with what we are able to do.
3 But I just can't, on the fly right now, commit to a
4 particular turn around time, particularly when these
5 subpoenas of what's being asked for here is the
6 privilege log for all privileged documents requested
7 and then subpoenaed, even if we just limit it to the
8 trial subpoenas. It's still an enormous scope, pages
9 and pages of documents.

10 THE COURT: Yeah, I guess I'm not completely
11 clear on what you're asking. Your original subpoena,
12 apparently, from what I've understood, asked for a
13 large amount of information. The Court has ruled,
14 has (inaudible) that narrows that somewhat.

15 Are you still asking for everything that
16 will be within that? Or are you just saying that you
17 wanted a list of people that they communicated with.

18 MR. HARRISON: So, your Honor, most of
19 the -- most of the subpoenas use -- you search terms.
20 Now, the overbreadth of the search terms has been
21 overstated. I've sat and ran on my own -- you know,
22 they can be run on an outlook or gmail system, and it
23 took me about an hour to run them on on a single
24 e-mail account. And I think there are a couple
25 (inaudible) multiple e-mail accounts. So it's been

1 overstated.

2 And I also understand that not every
3 legislator is not super text savvy and all that.
4 Again, we served these things back in July, which we
5 have not -- there's been no lack of diligence on the
6 plaintiffs' part in terms of seeking this discovery.

7 And the legislative defendants, who, in
8 fairness, had privileged communications that need to
9 be ruled on, you know, I think we admit, you know,
10 we're not game to narrow these things down and
11 produced, because their position was that privilege
12 covered essentially all that was requested, including
13 communications with third parties. So yes, what we'd
14 asked was production for -- the so the subpoenas ones
15 their face request communications with everyone. And
16 now, of course, the Court has -- that discuss SB-1
17 and Democrat, or SB-1 -- it's a set of search terms
18 designed to create in the aggregate things that would
19 be relevant to specifically congressional
20 redistricting, not one of the other bills that was
21 out there. And then, specifically, references to the
22 partisan tilt of the districts. So --

23 THE COURT: These would be communications
24 with people outside of the legislative privilege?

25 MR. HARRISON: And that's what we would get

1 at this point, is production of communications with
2 folks -- from a legislator to CCP to congressional
3 consultant, et cetera, so yes.

4 Now, we would ask -- I would even be
5 willing to go further and say we would log -- they
6 could leave off entirely just you as not being part
7 of the subpoena anymore, true legislator to
8 legislator communications. We'd still ask for a log
9 that just gives names of identities for anybody
10 they're contending is staff or consultant. Because
11 the problem is, there's still a lingering
12 disagreement about, you know, who is -- who is,
13 quote, unquote, a non-legislator person who is within
14 the privilege. And so we would, ideally, I guess get
15 production of folks -- of communications between
16 legislators and folks that they agree are not
17 legislative staff, and then a privilege log of any
18 pre-passage communication between legislators and
19 folks that they contend are legislative staff. So
20 they could leave off a true senator to senator
21 communication, they could leave off, since we know
22 that it's going to be privileged.

23 But if it's a legislator from the
24 outside, which, bear in mind, you know, the
25 legislature is not particularly well staffed, so

1 we're not talking about a ton of communication that
2 should fall into that. But there's going to be room
3 to -- I don't want to say you don't need to log
4 everything that's between a legislator and stuff,
5 because then the problem is, you get -- you know,
6 it's going to (inaudible) indicate their
7 interpretation of what a quote, unquote staffer is
8 that's different from ours.

9 And we'd like to at least know the
10 identity of the counter party to the communications.

11 THE COURT: All right. Okay.

12 Ms. Sanchez, how -- with those narrower
13 (inaudible), how much time would you think you need
14 to talk to your people about that? Did you say by
15 tomorrow morning?

16 MS. SANCHEZ: Well, I can certainly talk to
17 them tonight and we'll try to have -- and we'll have
18 in the morning for the Court a much better
19 understanding of what's even possible, considering
20 those parameters that were laid out for us.

21 I don't know -- I don't know that what
22 even counsel has just outlined is possible within --
23 to accomplish within a day or two.

24 THE COURT: Okay.

25 MS. SANCHEZ: And I appreciate that they

1 served these subpoenas a long time ago. We also
2 filed a motion to quash a long time ago. The Court
3 has had a lot of filings before it. And I don't want
4 there to be any suggestion that we're attempting to
5 do anything last minute here.

6 THE COURT: Right.

7 MS. SANCHEZ: We timely moved to quash based
8 on the constitutional privilege. So I will endeavor
9 to do everything that I can before 9 o'clock in the
10 morning to figure out what's possible, to communicate
11 with our clients about where we stand and what --

12 THE COURT: Okay.

13 MS. SANCHEZ: -- counsel is asking.

14 THE COURT: We'll do that. I'll hold off on
15 that until tomorrow morning and hear from you on
16 that. Okay?

17 MR. HARRISON: And may we make one, I guess,
18 additional request be that if they could get us by
19 tomorrow morning, the production of just the --
20 document production of just those individuals we
21 subpoenaed for trial. I believe they represent
22 five -- five individuals. That obviously -- I mean,
23 that's doable. I think fairly clearly, there may be
24 one person who happens to have left the country or
25 whatever. Although they got (inaudible).

1 THE COURT: Who are the 5?

2 MR. HARRISON: Senator Cervantes.

3 THE COURT: Oh, their witnesses?

4 MR. HARRISON: Yes. The ones we served
5 trial subpoenas on, which is only four legislators
6 and two consultants. And one of those consultants
7 has separate representation.

8 THE COURT: Okay.

9 MR. HARRISON: So if we could get production
10 of at least the document request to those five. That
11 would have us be at least, you know, cooking with
12 gas.

13 THE COURT: Okay. All right. So with maybe
14 that focus tomorrow morning, I'll still wait and hear
15 from you tomorrow morning.

16 MS. SANCHEZ: Thank you, Judge.

17 THE COURT: Okay? All right anything else
18 before we get back at it?

19 Okay. Mr. Harrison.

20 MR. HARRISON: Yes, your Honor. The
21 plaintiffs call Mr. David Gallegos.

22 THE COURT: Come around here, sir. And
23 before you sit down, if you'll raise your right hand.
24 Before.

25 Do you solemnly swear or affirm under

1 penalty of perjury that the testimony you'll give
2 will be the truth, the whole truth and nothing but
3 the truth?

4 THE WITNESS: Yes, sir.

5 THE COURT: Thank you. Have a seat.

6 DAVID GALLEGOS,

7 having first been duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MR. HARRISON:

10 Q. Good afternoon, Mr. Gallegos. How are you?

11 A. Doing well. Thank you.

12 Q. Can you give me your -- your position with
13 state government and your tenure in that position.

14 A. So I've a state senator for -- this is my
15 third year. I was in the house for eight years before
16 I moved to senate. So currently have district 41,
17 which is Eddy and Lea County.

18 Q. Okay. And what house did you represent?

19 A. District 61, which is similar in footprint,
20 but just in Lea County.

21 Q. Okay. Are you a plaintiff in this action?

22 A. Yes.

23 Q. Okay. And I'll go ahead and tell you that
24 there was some language in the Supreme Court that we
25 felt like we needed to call a plaintiff to testify,

1 and that's what we have you here to testify on today.

2 So tell me, under the old -- so the
3 pre-2021 redirecting -- or districting scheme in
4 New Mexico, what congressional district were you a
5 resident of?

6 A. In CD-2.

7 Q. Okay. And then under the current
8 districting, what district are you a resident of?

9 A. I reside in CD-2, but it split my
10 legislative district.

11 Q. I see. Okay. And then what's your
12 political party?

13 A. Republican.

14 Q. Okay. What is -- what is your view on the
15 SB-1, the 2021 redistricting map?

16 A. Well, you know, we looked at them. I know
17 they had meetings all over the state and had a lot of
18 input. When we got into Santa Fe, we started having
19 meetings on preferences and looking at the maps. I
20 have a real hard time with the current map because of
21 the division it caused in Lea County just with my
22 constituents, and everyone in my family. Eve got
23 family here in Lovington, and they don't feel like
24 they're being cared for.

25 And there's just a lot of difference

1 between here and Las Vegas, New Mexico and/or
2 Albuquerque, and maybe still in CD-2 now goes up into
3 the Albuquerque sector.

4 Q. Okay. Now you mentioned that your senate
5 district, your state senate district has been split
6 among two congressional districts?

7 A. Correct.

8 Q. Okay. Do you not feel that benefits your
9 constituents, they have two Congress people rather
10 than one?

11 A. It doesn't benefit. So the -- the issue is
12 in oil and gas, they've split the oil and gas sector.
13 When we had -- regardless of who it was, could speak
14 for all the industry in our part of the state. Now we
15 have two Congressman and one -- but in reality, it
16 makes it harder for them.

17 And then the other problem I have with
18 it is, it separated Hispanics, because a majority of
19 the large population of workforce in the oil field is
20 Hispanic. And there, again, they don't have a very
21 solid -- or don't feel they have a voice. And now
22 it's divide and it's makes it even harder for them to
23 be responded to by their congresswoman or Congressman.

24 Q. Okay. Now, you -- have you familiarized
25 yourself with areas of what's called is South Valley

1 of Albuquerque that are now part of CD-2?

2 A. I have. I actually have family there that
3 feel like they're victims in this same process. They
4 should be looked at as part of the metro Albuquerque
5 area. And I did a lot of not door to door there, but
6 some functions in the area, where they had people come
7 in just to -- first to meet them. And they just felt
8 sort of isolated from their own people because our --

9 MS. TRIPP: Hearsay.

10 THE COURT: Just a minute.

11 Mr. Harrison.

12 MR. HARRISON: I mean, he's giving the
13 gestalt, overall impressions of what his constituents
14 in the state say.

15 THE COURT: If you could ask it a way that
16 leans less on what they've told him or things of that
17 nature.

18 BY MR. HARRISON:

19 Q. Yeah, if you could steer clear, I guess, of
20 kind of reiterating what, especially specifics of what
21 people have told you, but -- and continue answering
22 the question.

23 THE WITNESS: Would it be better, your Honor
24 if I give you names? I've got cousins that actually
25 brought this topic up to me while in Albuquerque.

1 THE COURT: No. (Inaudible).

2 THE WITNESS: No names? Okay.

3 BY MR. HARRISON:

4 Q. We'll stick with your view of how to
5 redistricting affects this. So you mentioned that in
6 your view, the folks in the South Valley being locked
7 in with CD-2 basically, and let me know what your
8 testimony is, those folks, the actual concerns of
9 their day-to-day life are Albuquerque metro concerns,
10 like crime, traffic, et cetera, that will be handled
11 one way or the other by the -- by the Albuquerque
12 metro congressperson who they now don't get to vote
13 for? Is that...

14 A. It is. That's very clear, because of the
15 difference in lifestyles in Eunice and in South
16 Valley. They are part of the metro area.

17 Q. Okay. It's been raised so I'll ask you what
18 you think of it, what do you think of the claim that
19 folks in the South Valley tend to be Hispanic, and so
20 they belong in the southern district?

21 A. Well, again, just from the discussions I've
22 had, they don't feel like they belong. There's a
23 difference, just thinking through Las Cruces and
24 Albuquerque. They don't feel part of what happens in
25 the south -- southern corridor.

1 Q. Okay. And, you know, since I've got you up
2 here, and since you were in the senate, I'll very
3 briefly ask you about your experience in the
4 legislative process.

5 So representing kind of the area of
6 greatest concern for the SB-1 map, what was -- what
7 were your impressions of the process of the 2021
8 special redistricting session as it relates to SB-1?

9 A. Well, I was disappointed. So I look at the
10 process being open and honest with the people. As a
11 legislator, I was not invited to be part of the
12 discussions.

13 We had side discussions, you know, as
14 far as the maps and what we thought and our input,
15 where we would go with what the maps were there. But
16 when it came down to the actual decision of the maps,
17 I don't know of any Republicans that were ever asked
18 to be in the conversation. They were sort of forced
19 upon us, and we just have to live with the
20 consequences.

21 MR. HARRISON: If I may have a moment.

22 THE COURT: You the.

23 BY MR. HARRISON:

24 Q. And this may seem obvious, but in your view,
25 would -- post-redistricting, are you more or less apt to

1 be able to elect the congressperson of your choice?

2 A. I'd say that'd be impossible.

3 Q. And then to put a finer point on it, is CD-2
4 more or less apt to elect a Republican
5 post-redistricting?

6 A. Try that one more time.

7 Q. To say it, I guess, in a different way, or
8 different spin, is the CD-2 more or less apt to elect
9 a Republican post-redistricting?

10 A. Less. I'll leave it there. Less.

11 MR. HARRISON: Okay. And I'll pass the
12 witness, your Honor.

13 CROSS-EXAMINATION

14 BY MS. TRIPP:

15 Q. Good morning, Senator Gallegos. My name is
16 Ann Tripp, and I'm an attorney with the legislative
17 defendants office. Thank you for being here today.

18 Before we get started, I just wanted to
19 say congratulations on the baby box initiative. I saw
20 that in the news. And you were a sponsor of that
21 legislation, correct?

22 A. Yes, ma'am. Thank you.

23 Q. So the plaintiffs have asked you here today
24 to testify, and they covered a couple things. And
25 they mentioned a Supreme Court order or opinion and

1 that's why they called you. Have you read that
2 opinion?

3 A. No, ma'am, I have not.

4 Q. But you did say you've been a senator for
5 three years and a representative for eight years in
6 the state?

7 A. Yes, ma'am.

8 Q. And during that time, have you /REPB opposed
9 in your districts down here in Lea County?

10 A. Yes, ma'am.

11 Q. And what year was that?

12 A. 2012 and -- three years ago. 2022.

13 Q. Opposed -- I'm sorry. I should have said
14 opposed by a Democratic candidate?

15 A. Oh, 2012.

16 Q. 2012. So about 11 years ago?

17 A. Yes, ma'am.

18 Q. And you're also a voter in the
19 congressional -- the second congressional district; is
20 that right?

21 A. Yes, ma'am, I am.

22 Q. And were you a voter in the second
23 congressional district in 2018?

24 A. Yes, ma'am.

25 Q. And, again, in 2020, you were also a voter

1 in Congressional District 2?

2 A. Yes, ma'am, correct.

3 Q. And so you just mentioned that you were
4 disappointed in the process in which Senate Bill 1 was
5 based. And so when I'm referring to Senate Bill 1,
6 I'm referring to the redistricting legislation. And
7 if you were -- you were disappointed, but did you note
8 anything procedurally improper with that legislation?

9 A. No, ma'am. Just because I wasn't part of
10 the internal process for design the maps.

11 Q. Were you able to attend any of the committee
12 hearings and ask questions?

13 A. No, ma'am. Actually, my mother was very ill
14 and I was care giving for her.

15 Q. I'm sorry, I asked a poor question. Were
16 you able to attend any of the senate committee
17 hearings during the redistricting session?

18 A. Yes, ma'am. I stepped in -- I was not on
19 committee, but I stepped in to hear some of the
20 dialogue that went on.

21 Q. And you were able to ask questions; is that
22 correct?

23 A. No, ma'am, I did not. Well, I did not ask
24 to ask questions. I was there trying to absorb the
25 information.

1 Q. Okay. Were you also able to ask questions
2 or comment during the senate floor debate on SB-1?

3 A. I think we were available to, but I do not
4 remember asking any questions on it.

5 Q. And you didn't proper any amendments or maps
6 of your own during the redistricting session?

7 A. I did not. They had some prepared, other
8 legislators, and I thought they were adequate in their
9 direction. So I didn't duplicate their efforts.

10 Q. And when you refer to other legislators, are
11 you referring to Senator Moores, who prepared the
12 floor amendment to Senate Bill 1?

13 A. Correct. And I -- I'll just correct, yes,
14 ma'am.

15 Q. Were there any others that you're aware of?

16 A. And I think that Senator Sharer had some
17 ideas. And I think that in their discussions, they
18 stayed with Senator Moores'.

19 Q. I understand. So the only proposal from
20 amendment from Republican during the redistricting
21 session was from Senator Moores?

22 A. I believe that's correct.

23 Q. Thank you. And so I think earlier, you
24 mentioned -- when you -- when I said committee, you
25 assumed it was the citizens redistricting committee?

1 A. Right.

2 Q. And you voted in favor of that legislation
3 that established the independent redistricting
4 committee?

5 A. Yes, ma'am.

6 Q. And voting in favor of that legislation, you
7 realized at the time that it was forming the basis as
8 an interim committee? It wasn't creating binding
9 guidelines or plans on the legislature?

10 A. Correct. They -- oh, correct.

11 Q. Okay. But you didn't attend any of the
12 meetings or submit any comments to the citizens
13 redirect committee?

14 A. Correct.

15 Q. Okay. And so there's a declaration
16 submitted during this process of this litigation that
17 you signed. Are you familiar with that, or do you
18 remember --

19 A. Yes, ma'am.

20 Q. -- doing that? It was in -- it was
21 regarding a motions practice during the case, but I
22 wanted to go through a few things, because you said
23 that you made these statements based on your personal
24 knowledge?

25 A. Correct.

1 Q. Did you need a copy of it in the?

2 A. Pardon?

3 Q. Do you need a copy of your declaration, or
4 do you remember what you said?

5 A. Oh, no, that -- if you wouldn't mind, that'd
6 refresh my memory.

7 MS. TRIPP: May I approach the witness, your
8 Honor?

9 THE COURT: Yes.

10 MS. TRIPP: (Inaudible), your Honor?

11 THE COURT: I would. Thank you.

12 BY MS. TRIPP:

13 Q. All right. And so I just -- first, at
14 Paragraph 4, you say that you regularly vote for
15 Republican candidates. And so that's -- mentioned
16 earlier in your testimony that you voted in 2018 and
17 in 2020, and so does this statement apply to those
18 years, as well?

19 A. Yes, ma'am.

20 Q. Okay. And then in Paragraph 7, you state
21 that "Senate Bill 1 dilutes the power of my vote."
22 Did I read that correctly?

23 A. Yes, ma'am.

24 Q. And when you say "dilutes the power of my
25 vote," you're not referring to population deviation

1 between congressional districts, are you?

2 A. As a Hispanic, I would say that was a large
3 part of that, yes, ma'am.

4 Q. Okay, senator. In terms of dilution, the
5 phrase one person, one vote, you're not making an
6 allegation that Senate Bill 1 doesn't have a right
7 amount of people in each district; is that right?

8 A. Well, on the basis of constituents, it's
9 balanced.

10 Q. Okay.

11 A. But on the basis of my vote not having value
12 is where I come up with that as being diluted, or
13 feeling that I'm being diluted.

14 Q. And that feeling of being diluted, is that
15 based on any objective evidence, a number?

16 A. Not a number. But historical interactions
17 with the congressmen or Congress persons.

18 MR. HARRISON: Oh, I'm sorry.

19 A. Yeah. I was just going to state that within
20 the past, when we've had Democrat congressmen,
21 identify reached out to both on constituent issues,
22 and a state senator had never returned a call.

23 And my job as a senator or even a state
24 rep, was to be able to carry my message for my
25 constituents to my delegation if they were not able to

1 make that connection. And it doesn't work, I was not
2 able to make that contention.

3 Q. And --

4 MR. HARRISON: I'm sorry, my apologies. I
5 have a problem with her questioning off the
6 declaration. Could we possibly admit it into the
7 record if we're going to do that H.

8 THE COURT: I think it's filed, isn't it?

9 MS. TRIPP: It's filed. Do you need it --

10 THE COURT: Do you want it as an exhibit.

11 MR. HARRISON: If you wouldn't mind.

12 THE COURT: All right. That's fine.

13 MS. TRIPP: Are we using letters?

14 THE COURT: Call it Exhibit 2 as your
15 exhibit, or -- your exhibit is A.

16 MR. HARRISON: I guess we're just going to
17 do (inaudible).

18 THE COURT: Let me see here.

19 MS. TRIPP: Thank you, Mr. (Inaudible).

20 UNIDENTIFIED FEMALE: (Inaudible) Number 2
21 of ours, (inaudible).

22 THE COURT: All right. So we'll call this
23 Exhibit A.

24 UNIDENTIFIED FEMALE: Do you need that?

25 THE COURT: If this is the official one.

1 UNIDENTIFIED FEMALE: We'll make that
2 (inaudible) copy.

3 THE COURT: All right. Go ahead.

4 BY MS. TRIPP:

5 Q. All right. Senator Gallegos, so further on
6 in Paragraph 7, you state that -- and I'll summarize,
7 that, "Dilutes the power of my vote by cracking the
8 most concentrated block of Republican voters."

9 A. Yes, ma'am.

10 Q. And so that summation, which is based on
11 your Honor personal knowledge, that's not based on an
12 analysis of voter registration?

13 A. Well, in my purview, in my view of that,
14 I've been doing voter registration in Lea and Eddy
15 County for quite a few years, and we have a really
16 strong group of voters in the area. Not that they all
17 showed up to the election cycle, but we have quite a
18 few Republicans.

19 So my purview on that is when you split
20 off anything north Hobbs, in Lovington, Tatum, it
21 reduced the block of Republicans that we had here for
22 Lea County, for CD-2.

23 Q. Thank you, Senator. And so the
24 geographically concentrated block is based on voter
25 registration of registered Republican voters; is that

1 right?

2 A. Yes, ma'am.

3 Q. Thank you. And then also kind of part of
4 diluting the vote, you go on to speak about the -- in
5 Paragraph 8, that the -- the legislature eliminated
6 the only Republican member of Congress, making it --
7 and in your own testimony, you said it was impossible
8 to elect a Republican. Did I -- is that correct? You
9 said that was your statement earlier?

10 A. Yes, ma'am. I believe so. I know that the
11 numbers didn't show that much of a disparity in the
12 final vote. But I think that, from my view of this,
13 it'd be really hard for us to offset what the South
14 Valley did to us.

15 Q. And so I think you just referred to the
16 numbers maybe not reflecting. And so you're referring
17 to the 2022 election that was decided only by 1300
18 votes?

19 A. Yes, ma'am.

20 Q. And so when you say it's impossible, your
21 impossible is that 1300 votes?

22 A. It would take a huge voter mindset change.
23 We had a lot of people that did not come to the polls,
24 for whatever reason.

25 Q. So the problem in the 2021 election wasn't

1 necessarily the district, it was voter turnout?

2 A. Well, I guess from my view, there again, I
3 think we have a statewide problem of disenchantment by
4 voters, and it just seemed to be in the Republican
5 sector. But with the addition to the Democrat voters
6 in the Albuquerque sector, I think it pulls everything
7 that way unless there's a change in our thoughts on
8 Republican voting.

9 Q. Thank you. And -- and so when you voted in
10 2018 as a Republican voter, that was under the prior
11 redistricting map, was your vote diluted then?

12 A. I don't believe so. I think we had --
13 personally, I don't think at that time I was.

14 Q. But in 2018, a Democratic candidate won the
15 election in Congressional District 2; is that correct?

16 A. Yeah, I'm going to say I lost my time line.
17 That was two cycles back?

18 Q. Two cycles back.

19 A. I just know whenever the -- the maps were
20 created in what year?

21 Q. Okay. So under --

22 A. I apologize. I'm not supposed to ask
23 questions?

24 Q. So SB-1 creates the map for 2021 and
25 controlled the 2022 election; is that right?

1 A. Correct.

2 Q. Okay. And the prior map which was actually
3 created in 2011 --

4 A. Right.

5 Q. -- that would have been in effect during the
6 2018 election cycle?

7 A. Now I know where you're going. Yes, ma'am.

8 Q. All right. And during the 2018 cycle, I
9 believe Congressman Xochitl Torres Small won the
10 election.

11 A. Correct, she did.

12 Q. And so was your vote diluted during that
13 2018 election?

14 A. In -- in -- I'm going to say no. But the
15 caveat there was, when I went to bed in Alamogordo
16 that night, Yvette Harrell had won, and do not
17 understand the logistics behind surprises in the
18 morning where she had lost.

19 Q. Thank you, Senator. But to confirm, the
20 New Mexico Secretary of State's election results, it
21 was that a Democratic candidate did carry
22 Congressional District 2 in 2018?

23 A. Correct, if you believe that, yes, ma'am.

24 Q. Thank you. And so in terms of your vote
25 being diluted today, it's not based on voter

1 registration; is that right? It was based on more of
2 a feeling, I think is what you testified?

3 A. Well, and I guess my thought on that is,
4 it's determined by voter registration, that we didn't
5 have a the South Valley constituents in our CD-2 at
6 the time prior to the map.

7 Q. I believe your testimony earlier was that
8 Congressional District 2 under SB-1 is not only
9 impossible to elect -- you're a Congressman -- but is
10 less apt to reelect a Republican; is that correct?

11 A. I do believe that.

12 Q. And are you following the 2014 campaign or
13 election currently for Congressional District 2?

14 A. I have not. I know that they both -- those
15 voice their opinion that are running, as far as
16 current Congressman, and congresswoman Yvette Harrell
17 is seeking re-election, so yes.

18 Q. Would you disagree with common political
19 pundits that say it's a close race, and perhaps it's
20 even a 1 percent raise that Yvette Harrell is in the
21 lead?

22 A. I've seen polls that are (inaudible) and on
23 the last day, they have different outcomes. So I
24 don't put all my (inaudible) in a poll.

25 Q. But I think I heard you say earlier that

1 with voter turnout, that that result could be
2 different; is that right?

3 A. I truly believe that if we give I'm going to
4 say southeast New Mexico hope in a candidate, that our
5 voter numbers will increase and that would be possibly
6 the difference. Maybe that's what the pundit's
7 looking at.

8 Q. And so senator, would you agree that the
9 quality of the candidate greatly effects the outcome
10 of an election?

11 A. In a fair fight, I would say yes.

12 Q. Was it a fair fight in 2018?

13 A. I go back to the night when I went to bed,
14 Yvette Harrell had won, when I woke up, she had lost.

15 Q. Understood?

16 A. So I do not believe that was a fair fight.

17 MS. TRIPP: Thank you, Senator. Just a
18 second.

19 No further questions, your Honor.

20 Thank you, Senator.

21 THE WITNESS: Thank you.

22 THE COURT: Mr. Auh, do you wish to
23 question.

24 MR. AUH: No. Thank you, your Honor.

25 THE COURT: Okay. Redirect.

1 REDIRECT EXAMINATION

2 BY MR. HARRISON:

3 Q. So to clarify this hard, versus less apt,
4 versus impossible, you would agree that technically
5 speaking, anything the possible if a candidate is
6 indicted on a serious -- on serious criminal charges,
7 would you agree that that might lessen their chance of
8 winning an election?

9 MS. TRIPP: Your Honor, (inaudible).

10 THE COURT: I think we're kind of asking
11 about hypotheticals, so...12 MR. HARRISON: Yeah, I mean, this is exactly
13 what we were --14 THE COURT: I think this is the same ground
15 that you covered, so overruled.16 THE WITNESS: Would you like me to answer,
17 your Honor.

18 THE COURT: Yes. Go ahead.

19 A. So I do see that that would be a really hard
20 obstacle for them to overcome in an election cycle.

21 Q. And so would you agree that in a
22 circumstance like that, a Republican could lose in a
23 strongly Republican district, or a Democrat would lose
24 in a strongly Democratic district?

25 A. I do. I believe they could.

1 Q. And similarly, what do you think it would
2 take -- what does the picture look like in your mind
3 for a Republican winning the current CD-2?

4 A. With that configuration of the map, I still
5 think it would be have very hard, uphill battle. We
6 live on flat hand here, but it would be a sure climb
7 to the top to have to make a change over what the maps
8 did to us.

9 Q. Okay. And do you agree that -- well, do you
10 that Yvette Harrell lost in 2022?

11 A. There again, I'm not -- I don't have the
12 confidence ins our system that system do. I would say
13 I'm on the borderline if it was illegal or not. But I
14 think that regardless of if it was legal or not, on
15 the machines, the additions to the South Valley on
16 CD-2, made a huge impact in the voter counts.

17 Q. Okay. But I guess putting aside the
18 integrity of the process, you certainly -- do you
19 agree that Yvette Harrell was the congresswoman for
20 the CD-2 prior to the 2022 election and now is not?

21 A. Yes, I do.

22 Q. And that overall nationally, what kind of a
23 year was 2022 for Republican candidates?

24 A. It started out that it was going to be a
25 huge great wave, but it did not make it here to

1 New Mexico.

2 Q. Sure. But nationally, did Republican, for
3 example, take the house of representatives?

4 A. They did.

5 Q. Okay. And the U.S. House of
6 Representatives?

7 A. Yes.

8 Q. Okay. And are you aware of any general
9 trend of how elections often continued to go in the
10 recent past for the party out of power, that does not
11 have the white house in a midterm election?

12 A. And I've heard where that's usually a good
13 thing for us. But I just -- I still wonder on, again,
14 going back to the integrity issue, I still have
15 questions on the integrity. But I understand in the
16 mid terms, it should be a plus for us.

17 Q. And do you agree that there are generally
18 advantages to running as an incumbent candidate?

19 A. There is. It's really pretty hard to
20 displace an incumbent.

21 Q. Okay. So in 2022, Yvette Harrell was an
22 incumbent running in what I'll call a read year?

23 A. Yes, sir, that would be correct.

24 Q. Okay. And she still lost the election?

25 A. Small margin, but yes, sir, it was a loss.

1 Q. Okay. Thank you.

2 MR. HARRISON: I have nothing further, your
3 Honor.

4 THE COURT: Anything else, for this witness?

5 All right. Thank you, Senator. You may
6 step down.

7 THE WITNESS: Thank you.

8 THE COURT: You may call your next witness.

9 MS. DIRAGO: Your Honor, we call Sean
10 Trende, but I believe you wanted to hear the motions
11 before that.

12 THE COURT: Okay. Let's go ahead and
13 consider that. If I can read along, tell me again
14 the date that you filed.

15 UNIDENTIFIED MALE: One second, your Honor.

16 Well, of course I just closed all of my
17 documents, your Honor. Bear with me one second.

18 Your Honor, other initial motion was
19 filed on September 20th. And plaintiffs' response
20 was filed yesterday, 9/26.

21 THE COURT: All right. Go ahead.

22 UNIDENTIFIED MALE: Your Honor, defendant
23 owes motion is based upon Sean Trende having
24 destroyed the 2,040,000 simulations underlying his
25 expert report. Under New Mexico law, the default is

1 expert testimony is not admissible. It is only
2 admissible where the proponent can show that the
3 testimony is reliable.

4 Mr. Trende's expert report is scientific
5 evidence. It's scientific evidence that must be
6 testable. In this case, Mr. Trende believed, taking
7 him at his word, believed that he was producing
8 source code to the defendants that would have
9 generated reproducible results. He feels wrong.

10 Mr. Trende didn't understand the
11 software he was using would not create reproducible
12 results. It was very clear from his deposition that
13 he did not understand that.

14 So rather than save the 2,040,000
15 simulations that he says underlie his opinions that
16 form the basis of his analysis, he didn't save it.
17 They are gone and they are gone forever.

18 After this was brought in Mr. Trende's
19 attention in his first deposition, he initially
20 claimed that he were reproducible. And shortly
21 thereafter, a day or two later, plaintiffs produced
22 to us 2,040,000 simulations that they claimed were
23 the original simulations. They were not.

24 I took Mr. Trende's deposition a second
25 time. And in that deposition, he agreed, well, based

1 upon the documentation of the simulation software he
2 downloaded, and based upon the source code of the
3 simulation software he downloaded, that it would not
4 create reproducible simulations. We left it at that.

5 Yesterday, your Honor, plaintiffs filed
6 a response to our motion to exclude. In that motion
7 to exclude, plaintiffs included a 11 page declaration
8 of Sean Trende, that frankly, it looks like a revised
9 expert opinion. The deadline for expert opinions is
10 long past.

11 The upshot of plaintiffs' argument is
12 that by virtue of having generated an additional
13 2,040,000 simulations, and because Mr. Trende says,
14 "They're very similar in the ones I destroyed," and
15 that neither you nor we can test, your Honor, we need
16 to take Mr. Trende's word for it, that his report is
17 based on data that looks like what he said it did.
18 But we don't know that. And we can never know that.

19 Under the rules of evidence, there must
20 be an evidentiary foundation for the opinions. The
21 rules of evidence provide that when a scientific
22 expert testifies in court regarding the scientific
23 evidence, he may be required to produce it. And in
24 this case, Mr. Trende cannot because he destroyed his
25 evidence.

1 This has been addressed in State versus
2 Gutierrez. It's a state that came out of your
3 Honor's home court in Clovis. In that case, the
4 state was pursuing murder charges against the
5 defendant. Long before they brought charges against
6 that defendant, they had polygraphed what was then
7 their main suspect for this crime. The polygraph
8 came back as deceitful.

9 In the time that passed between the
10 polygraph of what was then their suspect and the
11 prosecution of the real defendant, the polygraph
12 materials were lost. All that was left was the
13 report.

14 Peculiarly, the criminal -- I guess not
15 peculiarly if I was the criminal defendant. I would
16 have wanted to admit that expert report, because it
17 would tend to exculpate me. Nonetheless, there were
18 some procedural shenanigans that went on, and this
19 issue went up to the New Mexico Supreme Court. And
20 they held that where the data underlying an expert
21 report has been destroyed, there are two remedies
22 available to the district court.

23 The first is the exclusion of that
24 evidence, and all evidence that could be impeached by
25 that evidence if it exist police department.

1 The second remedy is that there could be
2 an adverse inference associated with that destroyed
3 report -- or the destroyed evidence and the intended
4 report.

5 The differentiation is, the Court says
6 the district court has to evaluate the materiality of
7 that underlying evidence and the prejudice to the
8 party opposing.

9 In this case, unlike the criminal
10 defendant, we are not seeking admission of
11 Mr. Trende's simulation-based opinions because we
12 can't test them.

13 Your Honor, they are material, in fact,
14 they are fundamental to Mr. Trende's opinions.
15 Repeatedly throughout his expert report, he says he
16 generated millions of maps, and based upon those
17 millions of maps, he was able to conduct an analysis
18 against SB-1.

19 But we can't test that because the data
20 was destroyed. It's prejudicial because we can't
21 test it. In fact, we have nothing but Mr. Trende's
22 insurances today that the original 2,040,000
23 simulations that he claims support his opinion are
24 gone.

25 So plaintiffs have said, well,

1 Mr. Trende has generated new simulations, an
2 additional 2,040,000, and it makes him twice as
3 right. It's still based upon the premises that we
4 have to take his word for it that these new
5 simulations that are not the same as the old ones,
6 they can't be, he says are similar or identical in
7 analytical outcome as the original 2,040,000
8 simulations. We still have to take Mr. Trende's word
9 for it. We is not even test that hypothesis that
10 they are similar in the original 2,040,000.

11 So we end up in the exact same position
12 we were originally. The evidence is gone and we
13 cannot test it to see if Mr. Trende applied it
14 appropriately or if the data supports what he says it
15 used to say.

16 Under these facts, your Honor, the
17 evidence is inadmissible. Mr. Trende should not be
18 permitted to testify about his simulation based
19 opinions. Thank you.

20 THE COURT: Thank you.

21 MR. TSEYTLIN: Thank you, your Honor. I'll
22 try to be brief here. Mr. Trende is here. He is
23 fully able to explain what happened.

24 But briefly, there was absolutely,
25 absolutely, absolutely no destruction of any maps.

1 Mr. Trende, as he -- as he explained in his
2 supplemental declaration, as he's here ready to
3 explain now, his standard practice does not save
4 individual maps. And he also explained why that's
5 so. It's because in the state of the art, we are
6 creating 2 million maps, it makes no scientific sense
7 whatsoever to interrogate individual maps. What you
8 do is you look at the partisan distribution.

9 That is his standard practice, that's
10 also the standard practice of Dr. Imai, who is the
11 pioneer of this method. So while my friends say
12 repeatedly here, oh this destruction, which the way
13 was just a falsehood, this not -- it's standard
14 practice of not saving maps is prejudicial to them,
15 they have never even attempted to explain what they
16 would do with the 2 million maps, the original
17 2 million maps if they had them. And we know the
18 proof is in the pudding, because now they have
19 another 2 million maps. And they're not going to be
20 doing anything with them.

21 Because the whole point of the analysis,
22 if state of the or the, as Mr. Trende will testify,
23 is to look at the partisan distribution. And they
24 say, "No, that, well, we're concerned that, well,
25 maybe the initial 2 million didn't match the new

1 2 million," that is, again, a misunderstanding of the
2 method.

3 They have the code. They could
4 (inaudible) another 2 million, another 2 million,
5 another 2 million. And they would keep having the
6 same partisan distribution. Because that is the
7 entire point of the simulation analysis. When you
8 have a big enough sample, you're going to keep coming
9 out with the same distribution.

10 And each time you run that 2 million, if
11 you ran it again, another 2 million, if you ran it
12 again, another 2 million, you'd still have SB-1
13 manage an outlier in the same way.

14 Now, I assume this -- hear my friend
15 saying that some -- maybe he's not implying that
16 Mr. Trende is lying about the first 2 million or
17 something like that. Well, that's an issue that
18 guess to credibility and the weight. That's
19 certainly not an exclusion issue.

20 So what I would respectfully suggest and
21 obviously lay it out in for more detail in our
22 papers, is to have Mr. Trende come up here and
23 testify, explain to you what happened, how there was
24 absolutely, absolutely no destruction of any data,
25 how what he did was his standard practice, what

1 Dr. Imai recommends, which is to look at the
2 distributions and how the second 2 million generated
3 only further strengthens it's his conclusions.

4 And the only other thing that I would
5 say is, my friend (inaudible) exclusion for
6 destruction of evidence, all that involves an element
7 of purposeful destruction to keep the evidence away.
8 Here, there's no allegation, at least in the papers,
9 that anything purposeful happened. It is, on this
10 record, undisputed, that what Mr. Trende did was
11 standard practice. Mr. Trende is one of the lead
12 experts in this field.

13 The same simulation analysis was the
14 lead evidence that got the maps thrown out in
15 New York, was the lead evidence that got the map
16 thrown out in Maryland. And he's using the same
17 standard practice. If your Honor is concerned that
18 he -- that the standard practice, at least of not
19 saving the simulations and only looking at
20 distributions, that certainly can go to the weight of
21 credibility your Honor puts on Mr. Trende's
22 simulation methodology, but it certainly is no basis
23 for exclusion.

24 THE COURT: All right. Thank you.

25 UNIDENTIFIED MALE: (Inaudible), your Honor.

1 THE COURT: Well, let me ask you before you
2 start. So you got a second set of 2 million plus
3 maps.

4 UNIDENTIFIED MALE: That is correct, your
5 Honor.

6 THE COURT: Did you get the information that
7 you're saying the first time, did you get it with the
8 second.

9 UNIDENTIFIED MALE: We did not get the
10 information that was destroyed. We got different
11 information, your Honor.

12 THE COURT: Right. But did you -- but what
13 you got -- you said you got the first one, but you
14 wanted the underlying data?

15 UNIDENTIFIED MALE: No, your Honor. We got
16 a report, and the report has been filed with the
17 Court. The report purports to be based upon
18 2,040,000 simulations.

19 THE COURT: Right.

20 UNIDENTIFIED MALE: Those do not exist.
21 They were not provided to us. We asked for them.
22 They were not provided to us because they were
23 destroyed. So we have never received --

24 THE COURT: You got another 2 million?

25 UNIDENTIFIED MALE: We got a different

1 2,040,000 simulations.

2 THE COURT: Is the same issue present there,
3 where they're not saved?

4 UNIDENTIFIED MALE: No, no. He saved the
5 second time around. After he learned he destroyed
6 the ones that formed the basis of his report, he
7 generated additional maps. I don't know how he did.
8 But what he testifies to in his affidavit, in
9 response, is they're similar, he says, but we can't
10 test that, because we don't have the original data
11 that forms the basis of this expert opinion or his
12 expert report. So we're left with a complete lack of
13 an evidentiary foundation, your Honor. The data that
14 underlies his report is gone, doesn't exist. And is
15 he's generated, he says, an additional 2,040,000
16 simulations. And trust me, they look a lot like the
17 old once.

18 But we can't trust him. There must be
19 an evidentiary foundation under the rules of evidence
20 in order for expert testimony to be admissible. That
21 is why, your Honor, our expert saves his maps.
22 That's why we produce our maps, so people can test
23 them, they can look at them. That wasn't done in
24 this case.

25 Now, plaintiffs' counsel has said that

1 the maps were never destroyed. That is not
2 consistent with what Mr. Trende testified to. I'll
3 direct the Court to Exhibit C of our motion at Pages
4 22 and 23 of the deposition of Sean Trende.

5 At his deposition, I asked: Did you
6 generate any maps as part of your expert report.

7 Answer: Yes.

8 All right. Did you give them to
9 plaintiffs' counsel?

10 I gave them, as I believe I still have
11 them, which is to say, I don't.

12 All right. So you generated maps, but
13 you no longer have them?

14 Answer: I typically don't save the maps
15 I generate.

16 Question: When did you make the
17 decision to destroy those maps?

18 Answer: Well, the maps aren't destroyed
19 and the shape files are never created. They are
20 stored in an object NR, and when you turn it off, it
21 goes away.

22 But, Mr. Trende goes on, because the
23 codes is created with the seed set in it, it should
24 be replicable by plaintiffs' experts or defendants'
25 experts.

1 And therein lies the rub. That
2 testimony from Mr. Trende says it's not destroyed
3 because it's reproducible. It's not reproducible
4 because Mr. Trende's statement there was based on a
5 fundamental misapprehension of how his software
6 works. It's not reproducible. He thought he wasn't
7 destroying the evidence because it could be perfectly
8 reproduced at any time. It can't. It never will be.
9 And there is no evidentiary foundation, your Honor,
10 for his opinions in his report.

11 The best they can do is to produce
12 another set of simulations and pinky promise that
13 they're the same or similar to those underlying
14 Mr. Trende's report.

15 Now, what plaintiffs' counsel has said
16 is, the maps themselves aren't important, it's the
17 distribution. Your Honor, we don't get to check the
18 distribution. We don't have an ability to check
19 whether the distributions that are reflected in that
20 report are what was in those 2,040,000 maps that
21 Mr. Trende did not save and that are not
22 reproducible. There is no way to meet the
23 evidentiary foundation that is required for the
24 admission of expert testimony.

25 Your Honor, Mr. -- there's a lot in the

1 deposition testimony that cited to the Court in
2 Exhibit C. Mr. Trende acknowledged in that
3 deposition that he knew our experts would want to
4 look at his maps, and that's why he set a seed, so
5 that our experts, or whom could look at them.

6 I don't disbelieve Mr. Trende when he
7 says he doesn't -- he didn't understand what he was
8 doing, he didn't. But that doesn't change the fact
9 that the maps are destroyed. I can't look at one
10 map, I can't look at 2,040,000 maps. And I can't
11 check whether the distributions that are reflected in
12 his report are based upon the data he destroyed. He
13 can't play a foundation. And if he can't lay a
14 foundation, it is definitionally untestable and
15 unreliable. It doesn't matter whether it's 1 or
16 2 million. It's untestable at this point.

17 Thank you, your Honor.

18 THE COURT: All right. So you have
19 Mr. Trende here?

20 MS. DIRAGO: I believe he's in the witness
21 room. Oh, he's in the hallway.

22 THE COURT: Okay. I think we probably need
23 to hear from him. I'd like to know more about the
24 process of producing these as part of laying the
25 foundation.

1 Before we do that, though, we -- it's
2 been about an hour. How about we take about ten
3 minutes.

4 (Recess held from 2:16 p.m.
5 to 2:32 p.m.)

6 THE COURT: All right.

7 MS. DIRAGO: So, Judge --

8 THE COURT: Are we back on the record?

9 MS. DIRAGO: Well, are you going to go. So
10 what I was going to do originally is, you know, start
11 my testimony and go through his experience and his
12 credentials. And then he has -- he actually is
13 opining on a lot of issues that are not related or
14 relying on the simulation.

15 So it's -- I don't know if you want me
16 to do a voir dire just based on this issue, or if you
17 want me to go through all his experience and all that
18 first, and then get into like the background of his
19 simulations. I'll do it however you want.

20 THE COURT: Okay.

21 MS. DIRAGO: I was under the impression,
22 your Honor, correct me if I'm wrong, that we were
23 still going to -- (inaudible) working on this motion
24 rather than going into direct testimony.

25 It would seem to me that it would be a

1 much cleaner process to get the issue of the Section
2 6.4 system in addition, and then ones the Court has
3 ruled on that, let plaintiffs put on whatever
4 testimony they can at that point.

5 THE COURT: Okay. Yeah, let's do that.
6 Let's address that with this one partial issue, and
7 then we'll go (inaudible).

8 MS. DIRAGO: Okay. And do you want his -- I
9 think his experience in this industry is important.
10 Can I go through that, or do you not...

11 UNIDENTIFIED MALE: Your Honor, with respect
12 to opposing counsel, the issue is not his
13 qualifications as an expert. The issue is where is
14 the evident.

15 THE COURT: Okay.

16 UNIDENTIFIED MALE: And that's the very
17 narrow issue that we're presented with.

18 MS. DIRAGO: That's fine. I do think it's
19 germane in a couple areas, which maybe I can get into
20 that a little bit at that point.

21 THE COURT: Yeah, I'll let you see do that.
22 So let's go ahead and get started. Let me have you
23 raise your right hand, please.

24 Do you solemnly swear or affirm under
25 penalty of perjury that the testimony you'll give

1 will be the truth, the whole truth and nothing but
2 the truth?

3 THE WITNESS: Yes.

4 THE COURT: Thank you. Have a seat.

5 SEAN TRENDE,

6 having first been duly sworn, testified as follows:

7 VOIR DIRE EXAMINATION

8 BY MS. DIRAGO:

9 Q. So, Mr. Trende, I do think that we need to
10 just give a background about the simulation process
11 that you go through.

12 So if you don't mind, can you tell me
13 how a simulation-based analysis works?

14 A. So the idea for a simulation based analysis
15 is that you use a computer to generate thousands, tens
16 of thousands, hundreds of thousands, millions of maps,
17 depending on how you set it, that are drawn without
18 respect to whatever the issue you're interested in.
19 You can make so it's strong without any racial data.
20 You can make it, as I did here, drawn without /TPHEUZ
21 political data.

22 And the idea is that you're trying to
23 simulate what a neutral map maker would have done had
24 they not even had access to the political data.
25 You're basically trying to do a poll of maps that are

1 drawn political data.

2 And then you look at the inactive plan.
3 And you say, okay, do the features of the enacted plan
4 look anything like that like the plans that were drawn
5 without respect to politics. You can feed the
6 political data back into the simulated maps after
7 their drawn to see what the political -- what it would
8 look like politically if you were drawing without
9 knowing what you were doing.

10 And so you create what's called a
11 ensemble of maps. In this case, I did a million
12 ensemble maps, then another million under the
13 different set of circumstances, and then another
14 40,000 under a different set of constraints or
15 limitations on how people might draw the maps.

16 You get those ensembles, you look at the
17 enacted plan, and the enacted plan doesn't look
18 anything like the ensemble maps in terms of politics,
19 if the districts are way more Republican or way more
20 Democrat, you say, okay, they were almost certainly
21 using political data or heavily rely on it when they
22 drew the maps.

23 Q. And I do think it's relevant to just tell
24 us, you know, what you were doing on Monday.

25 A. So on Monday, I was defending my

1 dissertation, and I did pass.

2 Q. And so you have a degree or getting a
3 degree. I don't know how that work. But you will be
4 a doctor in what field?

5 A. I've fulfilled all the requirements for the
6 degree of Ph.D. in political science. December --

7 MR. WILLIAMS: Your Honor, I object to this
8 to the extent, again, we're not talking about
9 qualifications as an expert. We're not talking about
10 Mr. Trende's educational background. What we're
11 talking about here is the destruction (inaudible).

12 THE COURT: Okay.

13 MS. DIRAGO: Can I respond?

14 THE COURT: Yes. Except I'm going to modify
15 a little bit of what I just ordered.

16 We're talking about laying a foundation
17 for the admission of his expert testimony. And
18 you're saying it's not testable, therefore he can't
19 lay a foundation for it, right?

20 MR. WILLIAMS: That's correct, your Honor.

21 THE COURT: Okay. So to that extent, maybe
22 then we do need to get into laying the foundation and
23 ruling on whether or not it's admissible. So I'm
24 going to go ahead and retract what I said before and
25 say we need to go into -- lay the foundation for what

1 you want to submit for Mr. Trende.

2 MS. DIRAGO: Okay. Okay. Thank you.

3 BY MS. DIRAGO:

4 Q. So I don't know if you even answered. So
5 you have a Ph.D. from Ohio State University, and what
6 is it in?

7 A. It will be December 17th, 2022, a Ph.D. in
8 political science.

9 Q. Okay. /TKPWRET. And can you tell us about
10 your educational background before that?

11 A. Yeah. I graduated from Yale in 1995 in
12 history and political science. I graduated from Duke
13 in 2001 with a degree in -- with a J.D., and then I
14 also received a master's in political science at that
15 time.

16 In 2019, I got a -- I received a
17 master's in applied statistics from, and I apologize,
18 I do have to say it this way, the Ohio State
19 University, and then the Ph.D. is forthcoming.

20 Q. Okay. And are you currently employed?

21 A. Yes. I'm the senior elections analyst for
22 real clear politics.

23 Q. Is real clear politics a partisan
24 organization?

25 A. It is not.

1 Q. What does real clear politics do?

2 A. Real clear politics does a number of things.
3 It's meant to be a one-stop shop for political
4 information. So it aggregates polling data. It
5 aggregates from both of the left and the right
6 articles on issues. We go to great lens to try to
7 pair multiple perspectives on issues of the day. And
8 then we also produce original content.

9 Q. And what do you do for real clear?

10 A. I do some work on the rating of races, their
11 competitiveness, interpreting, you know, what it means
12 when a district is drawn a certain way, how
13 competitive it would be. And then I also write my own
14 content for them.

15 Q. Okay. And so does any of your work concern
16 redistricting?

17 A. Yeah. Redistricting's at the core of
18 understanding how competitive a congressional district
19 is or a senate seat and how it's likely to go in a
20 given political environment.

21 Q. Are you affiliated with the American
22 Enterprise Institute?

23 A. I am. I'm a visiting scholar there.

24 Q. Have you authored anything regarding
25 election analysis?

1 A. I've been writing about election business
2 for 13 years now.

3 Q. Okay. Any books?

4 A. I wrote a book called "The Lost Majority:
5 Why the Future of Government is Up For Grabs" and who
6 will take it.

7 I was the coauthor of the 2014 "Almanac
8 of American Politics," which covered the 2012
9 elections, which required me to go in and, since that
10 was a redirecting year, understand how the districts
11 had been drawn that we were writing about.

12 And I write a regular chapter in Larry
13 Sabato's books after the election's completed.

14 Q. Was the Almanac of American Politics cited
15 by anyone (inaudible)?

16 A. Yeah, it's regularly cited by political
17 scientists.

18 Q. Okay. Have you ever spoken on the topic of
19 American analysis?

20 A. Routinely.

21 Q. Such as?

22 A. Such as -- across the political spectrum.
23 At the Brookings Institution, at AEI, at Cato. It's,
24 you know, where I have the opportunity.

25 Q. What about abroad?

1 A. Yeah. So I was invited, after the 2016
2 elections, to -- the U.S. Embassies abroad with set up
3 program abroad with scholars can come on talk at local
4 universities and political organizations.

5 So I went to Sweden. I guess that was
6 after the 2018 elections. And I've also -- no, that
7 would have been after 2016 with Sweden. And after
8 2018 with Spain. And I was invited to Italy, but
9 couldn't because of my teaching schedule.

10 Q. So where do you teach?

11 A. I teach at Ohio state.

12 Q. Have you taught anywhere else?

13 A. I did teach for a semester as Ohio Wesleyan.

14 Q. And do you teach anything related to
15 redistricting, or have you?

16 A. Yeah. So for four semesters I have taught a
17 class called, "Voting: Political Participation" that
18 tracks -- it focuses on how people vote. The first
19 half is what motivates people to vote, make the
20 choices that they make. The second half focuses on
21 how that interacts with the law.

22 And so we probably spend a quarter of
23 the class talking about political redistricting,
24 redistricting simulations, how to run them. We also
25 talk about doing them in the racial context, as well.

1 But their final project is all about redistricting, as
2 well.

3 Q. Have you ever appeared on television as an
4 elections expert?

5 A. Yeah. I've on Chris Hayes. I've been on
6 C-SPAN. I've been on the -- I can't even think of the
7 fox morning show's name right now, but a number of
8 place as talking about elections.

9 Q. Okay. And radio?

10 A. Again, radio, kind of across the spectrum,
11 NPR, talk radio. Wide variety of places.

12 Q. And what about written news sources?

13 A. Most my writing is done at real clear
14 politics. Like I said, I've done the work for Larry
15 Sabato's books. I wrote for the center for poll six
16 at UVA for a while, done some publishing at national
17 review back in the early 2000s, a couple other places.

18 Q. And what about advisory panels, have you sat
19 on any advisory panels?

20 A. Yeah. So I sat on the States of Change
21 advisory panel, which was a joint effort between
22 American Enterprise Institute, Brookings, and the pie
23 partisan policy center.

24 And the goal of that was to look at
25 census information and demographic trends and try to

1 see how that would translate to political changes in
2 the upcoming dates.

3 Q. Have any courts ever appointed you to act in
4 any special capacity?

5 A. Yes. So one of the more random adventures
6 of my life, I was appointed by at the Supreme Court of
7 Belize in their version of Baker v. Carr as the
8 Court's expert. And I was asked by the Court, as part
9 of that process, to draw remedial maps that could be
10 used.

11 I was also appointed with Dr. Bernie
12 Grofman to draw the congressional state senate and
13 state house maps for Virginia when their redistricting
14 commission deadlocked. So the two of us drew almost
15 200 congressional -- or 200 legislative districts in
16 about a month together.

17 Q. What about Arizona?

18 A. So Arizona, I was -- I was not a
19 redistricter there, but I was appointed by their
20 redistricting commission as a voting right expert for
21 counsel in that process that they went through.

22 Q. And have you previously served as an expert
23 witness on matters concerning gerrymandering?

24 A. Multiple cases. They're listed in my CV,
25 but probably the most prominent are the decision that

1 struck down the New York congressional state senate
2 map, as well as the Maryland congressional map.

3 Q. So I'd like to go back to your -- the
4 simulations and what you did for this case.

5 So what type of simulation technique do
6 you use?

7 A. So there's a technique called Sequential
8 Monte Carlo, which is implemented through a package
9 calmed Redist, R-e-d-i-s-t, that can be run in the
10 computer programming language R, just the letter R.

11 Q. Okay. So how does Redist work?

12 A. So the way that Redist thinks about
13 redirecting is you can imagine a sequence of hexagons,
14 let's say. And there's a number of ways that you
15 could connect those hexagons so that you would be able
16 to travel to -- one hexagon to another on a map, but
17 only passing through a hexagon once. And that's
18 conceptually known as a spanning tree.

19 What Redist says is, okay, we have all
20 these -- if we thought of these hexagons instead as
21 precincts, you draw the spanning tree where all
22 precincts are connected to each other, but there's
23 only one path to get from one precinct to the other.

24 If you remove one of those lines, line
25 segments, called an edge, if you removed it, the

1 remaining -- you kind of break off a portion of the
2 districts -- of the precincts, and that's basically
3 your district.

4 And so Redist uses an algorithm called
5 Wilson's Algorithm to randomly draw spanning trees.
6 And then it will break off the edges until you have
7 equipopulous districts. And it will do so according
8 to -- you know, you can add constraints, such as
9 compactness, or county lines. But it will draw a
10 large number of random districts fairly quickly. So
11 that's the basics of how it works.

12 Q. Who developed it?

13 A. So it was developed by Dr. Imai at Harvard
14 University. He had a graduate student, Cory McCartan,
15 who did a lot of the work on it, as well.

16 Q. Are they well known in the field?

17 A. Very much so, especially Dr. Imai. He's one
18 of the most prominent political methodologists in the
19 country.

20 Q. So is this Redist package, you called it?

21 A. Yes.

22 Q. Is the Redist package publicly available?

23 A. It is. It is. Well, anyone who can program
24 an R can download it to the R environment.

25 What makes R unique, not unique, but

1 kind of different from a lot of statistical software
2 is that people write packages for it all the time.
3 They write certain sets of commands that have certain
4 properties. And so there's always different ways of
5 evaluating the data that come online to it.

6 And so when the Redist package was
7 created by McCartan and Imai, they put it up on a
8 server, and with a command install packages, you can
9 download the Redist package and run the software.

10 Q. So do you know R, can you --

11 A. Yeah, because people are constantly
12 updating -- no one knows everything R can do because
13 there's so many options available for it. But I'm
14 conversant in it. Just like I always learn that
15 there's new words in the English land, I always learn
16 new things about R. But I can get the job done.

17 Q. That's a good way to put it.

18 Okay. So the Redist package, you said
19 it was publicly available, and it is free?

20 A. It's free.

21 Q. So if there's flaws in the algorithm, can
22 people point that out?

23 A. They can point that out to the developers,
24 and there's usually pages you can post on to ask
25 questions and say, "Hey, it would be really /TKPWRET

1 to have this functionality added," or...

2 Q. Okay. So people can improve it, as well?

3 A. Yeah.

4 Q. So have you used Redist before?

5 A. Yeah, yeah. I've used it in a number of
6 court cases.

7 Q. In court cases?

8 A. Yeah. So in the -- first off, I've used it
9 for my dissertation. But I also used it in the
10 New York and Maryland court cases, and then some cases
11 that are pending.

12 Q. Okay. Has it been relied on -- or has an
13 analysis using Redist been relied by courts in
14 redistricting cases?

15 A. So the two that I was involved in in
16 Maryland and New York relied upon it. But it's also
17 been relied upon from other expert witnesses in
18 Kentucky, South Carolina. I believe -- I believe
19 Dr. Imai used SMC for Ohio, as well. But a number of
20 states.

21 Q. All right. So let's talk about what you did
22 specifically in this case.

23 So you put -- you created simulated
24 maps. How many did you create?

25 A. So 2,040,000. Well, now --

1 MR. WILLIAMS: Your Honor, I'm going to
2 object at this point. Pursuant to the rules of
3 evidence, I would like to see the 2,040,000 simulated
4 maps that we're talking about.

5 MS. DIRAGO: That's what -- that's the point
6 of this.

7 MR. WILLIAMS: He says that he's created
8 them. Under the rules of evidence, I'm entitled to
9 see them. I'm making that request right now.

10 THE COURT: Okay. I'm going to allow him to
11 testify to what he did first, and then we'll get
12 to -- to your motion.

13 Go ahead.

14 BY MS. DIRAGO:

15 Q. Okay. So you said 2 million and 40?

16 A. 2,040,000, and then a second set of
17 2,040,000.

18 Q. All right. Let's talk about the first set.
19 Why did you create that number?

20 A. Well, it's a set of a million, another set
21 of a million, and four sets of 10,000. And in
22 New York, one of the objections that had been raised
23 by an opposing expert witness was he thought the
24 number of simulations that were run were too small.
25 And so in our reply brief, we increased the number of

1 simulations. And then his testimony was, "Well, that
2 still isn't enough."

3 So I figured I would run as many
4 simulations as I could reasonably run. And I actually
5 did 500,000, and it ran pretty quickly, so I did a
6 million. And I figured no one could complain that a
7 million maps was too few.

8 Q. And how long did it take you then, like
9 total?

10 A. To run all of the sets doesn't take that
11 long on my computer. It was less than a day.

12 Q. Okay. And did you say your maps?

13 A. No.

14 Q. First -- yeah.

15 A. No, I didn't save them.

16 Q. Okay. How come?

17 A. Well, because the -- when you run these
18 maps, you're not interested in the individual man's.
19 What you're interested in -- Dr. Imai's testified
20 about this under oath and been emphatic about it.

21 MR. WILLIAMS: Objection, your Honor.
22 Hearsay.

23 THE COURT: Sustained.

24 MS. DIRAGO: Judge, I just -- I'd like --
25 he's offering it to show what's done in the industry

1 and the field, and that -- he's an expert in the
2 field, and that's --

3 THE COURT: If he going to testify to what
4 Dr. Imai has testified to, I don't think that
5 that's --

6 MS. DIRAGO: Okay. Okay.

7 THE COURT: -- admissible.

8 BY MS. DIRAGO:

9 Q. Sorry, I think you -- go ahead with your
10 answer.

11 A. Yeah. So it's -- it's not the actual maps
12 that you're interested in. It's the distribution
13 that's been published. Realistically, no one is going
14 to look through 2 million maps in a reasonable amount
15 of time.

16 So you're interested in the output and
17 the distribution. And that's what should be
18 reproducible from run to run, is the distribution. If
19 you run a second time or a third time and the
20 gerrymandering index changes wildly, or the -- you
21 know, in one set the maps look like an outlier, but in
22 the second set they don't look like an outlier, then
23 you've got a problem. But that's also why you run a
24 million maps. Because at that large number of
25 samples, very little, if anything, is going to change

1 from draw to draw.

2 Q. Have you ever exchanged maps in discovery
3 when you've been involved in a court case?

4 A. I have requested maps through times --

5 Q. Tell me the circumstances.

6 A. -- in a number of cases. This case, because
7 I found when I ran Dr. Chen's code it ran very, very
8 slowly, and I didn't think I would have the maps on
9 time to do an analysis.

10 I requested them in a case in South
11 Carolina, where Dr. Imai was using a different
12 approach that also took a very long time to run, and I
13 asked if he had them. And then the third case,
14 Dr. Duchon, in Texas, programs in Python, which I
15 don't program well in. And so she produced the
16 chains. But I don't know if they have the individual
17 maps in them, because I couldn't read them.

18 Q. And then before this case, have you ever
19 produced your maps to the other side?

20 A. I don't think I have. Because you don't
21 look at individual maps, you're looking at the
22 distribution, it's just not how you're supposed to
23 proceed.

24 Q. So would you say it was -- it typical in
25 these cases not to produce the maps?

1 A. Yes.

2 Q. So did you end up producing simulated maps
3 to the other side in this case?

4 A. Yes.

5 Q. Were they the exact same 1 million maps that
6 you relied on for your first report?

7 A. So I thought they would be the identical
8 maps, because I did something known as setting a seed
9 in R. And when you set a seed in R, it's something
10 they teach very early on, what it does is it
11 guarantees that all the random choices being made by
12 the program are the same every time that you run it
13 through.

14 And so since I set the seed, I thought
15 that if you ever, for some reason, needed to go back
16 and make a perfect reintroduction of the individual
17 maps, the seed would cover it.

18 It's been suggested in the deposition
19 that there's something unique about the Redist package
20 that doesn't work that way, that it only be fully
21 reproducible. So some of the individual maps may be
22 different. But the distributions, especially for the
23 larger sample maps, replicated almost perfectly.

24 Q. So does it matter that the second 2 million
25 and 40 -- 400 maps that you produced were not the

1 exact same as the first set?

2 A. For the purposes of analysis, it's really
3 not because the distributions came out the same.
4 Because the maps were the extreme outliers, no matter
5 what, if anything, it's stronger that now we have 4
6 million and 40,000 simulated maps.

7 MR. WILLIAMS: Objection, your Honor. At
8 this point, Mr. Trende is now receiving about his
9 supplemental expert report that was untimely under
10 your schedule.

11 So this testimony is inappropriate and
12 should not be received.

13 MS. DIRAGO: Judge, the whole purpose of
14 that -- of this questioning is that the second set
15 only confirms his findings. That's the scientific
16 method. The more you do it and you get the same
17 results over and over, the stronger it is.

18 And Mr. Trende produced, with the same
19 code, he produced another set of maps, was able to
20 analyze them and he determined and we gave them to
21 the other side, and the defendants can figure this
22 out, they have an expert who is fully capable to do
23 this, we determined that the results, meaning the --
24 and I can show all this to you, because it makes more
25 sense when you look at it. But there's a thing

1 called a gerrymandering index, for example, that
2 shows where this map, SB-1, lies, in comparison to
3 the other maps. That is remarkably, remarkably
4 similar from the second set.

5 So we don't have a situation where
6 they're saying, the second, "It's all wrong. Look,
7 oh, this gerrymandering is so much different from
8 your first set," and they can say that, and they
9 haven't.

10 So the whole point is that it can be
11 reproduced over and over and over, and that's what we
12 did.

13 THE COURT: Okay.

14 MR. WILLIAMS: Your Honor, the objection is,
15 yesterday, Mr. Trende tender essentially a
16 supplemental expert report, and right now he is
17 testifying out of the supplement expert report that
18 isn't timely under your scheduling order. His
19 opinions were supposed to be provided to us on August
20 11th. This was not in that. This testimony is not
21 properly received.

22 THE COURT: All right. So that was produced
23 yesterday?

24 MS. DIRAGO: Yes. Recently. And I don't
25 even -- for the purposes of right now, I don't think

1 it matters -- I don't need to even admit it for the
2 substance. But to show that what he did the first
3 time is -- the fact that those maps were not produced
4 the first time, to show that that is irrelevant on a
5 scientific basis. I think it's fair for him to talk
6 about his analysis of the second set of maps. That
7 is 100 percent germane to whether the first set of
8 maps is relevant here.

9 THE COURT: All right.

10 MS. DIRAGO: And reliable. Sorry. Reliable
11 here.

12 MR. WILLIAMS: Your Honor, what's happening
13 now is we are getting into a situation -- it's good
14 because, trust me, my second set of analyses, it
15 verifies the stuff that I can't give you from the
16 first. So we have the same evidentiary bootstrapping
17 problem.

18 MS. DIRAGO: No.

19 THE COURT: Okay.

20 MR. WILLIAMS: He can't vouch for it without
21 giving it to us. He's saying his second set
22 duplicates his first. I can't verify that unless I
23 get his first set of data.

24 Rule 11-705 says we should get it. And
25 they won't and can't get it.

1 THE COURT: Okay.

2 MS. DIRAGO: It's inaccurate that they can't
3 test it. Absolutely Dr. Chen can test it. He can
4 look, he can run the same analysis --

5 THE COURT: Okay.

6 MS. DIRAGO: -- and see that it's the same.

7 THE COURT: All right. This is what I want
8 to do right now. Talk about the -- the practice of
9 what Mr. Trende does and whether this is something
10 that is done. You talked about that in your
11 argument, this is something that is done. Talk about
12 that. I think that's where we need to get to to see
13 whether we're going to hear the results of --

14 MS. DIRAGO: Okay. That something is done,
15 sorry, what do you mean?

16 THE COURT: You mentioned that this is his
17 regular practice --

18 MS. DIRAGO: Okay.

19 THE COURT: -- it's a regular practice in
20 his industry, his line of work. So ask him about
21 that.

22 BY MS. DIRAGO:

23 Q. Okay. Dr. Trende, what is the regular
24 practice in your line of work when creating
25 simulations?

1 A. Yeah. When I receive code from Dr. Imai or
2 Dr. Duchen or whoever is the opposing expert, I
3 usually give the code and the data set that it's based
4 upon. And then I run the code and see if the results
5 pop out the same. That is always how I receive the
6 data.

7 And the reason is, I'm not interested in
8 the specifics of maps. I'm interested in making sure
9 that the distribution that pops out verifies what they
10 said.

11 The interpretation of the maps, frankly,
12 is factual matter. I have, you have the maps there
13 and you can -- when you're running the analysis to
14 creates the various charts and data in R, it's not
15 really opinion matter, it's factual matter that I'm
16 verifying from them.

17 Q. And so did you produce your code to
18 defendants?

19 A. I did.

20 Q. And what could Dr. Chen, or anyone else who
21 was in this field, what can they do with that code?

22 MR. WILLIAMS: Objection, your Honor.
23 Foundation. If they're going to talk about the code,
24 they're going to (inaudible).

25 THE COURT: Overruled. Go ahead.

1 A. Yeah. So the code is something that someone
2 who is a competent coder in R can run. I know that
3 Dr. Chen is more than competent because I've seen his
4 code and I know his work going back a long times. And
5 other experts could run it and say, okay, you know,
6 the gerrymandering index that gets plotted out is the
7 same one as the gerrymandering index that appears in
8 the report. I can look at the chart in the report and
9 look at the chart of what I reproduced, and it turns
10 out the map is, in fact, an outlier either way. Any
11 expert should be able to do that.

12 Q. So even though they perhaps could not
13 produce the same exact set of randomly generated maps,
14 they can produce their own set of randomly generated
15 maps and compare that to your report, right?

16 A. Absolutely. I mean, it's a way to hit an
17 opposing expert, in fact, if you can run it again
18 without the seeds and you get a wildly different
19 answer, it destroys the expert's credibility,
20 potentially.

21 Q. So is that typically why you don't exchange
22 the maps, you just exchange the code?

23 A. I think the reason the maps don't typically
24 get exchanged is just that they're large, bulky files
25 and you have the code and you assume the other side's

1 expert can run the code. I don't know. I just -- I
2 get the code, I have the data, and the first thing I
3 try to do is to run it.

4 Q. And the fact that -- you talked a little bit
5 about -- I think you talked a little bit about why the
6 maps didn't save. Can you -- was that intentional --
7 I'm sorry, not why the maps didn't save. But why the
8 code was written to not produce the exact same set of
9 random generated maps. Can you talk just a little bit
10 more about, you know, your intent there?

11 A. I honestly believe that by setting the seed,
12 nothing changed when you ran it from time to time.
13 But it wasn't anything I was particularly concerned
14 about or gave a lot of thought to because you
15 typically don't produce the maps. You just run the
16 code and replicate.

17 MS. DIRAGO: Okay, Judge. I think -- unless
18 you'll let me go into the second set and --

19 THE COURT: I know -- yeah.

20 We're at -- do you have any questions?

21 MR. WILLIAMS: Yes, your Honor.

22 THE COURT: Okay. Go ahead and voir dire
23 the witness.

24 MR. WILLIAMS: Do you want to rest of your
25 stuff?

1 MS. DIRAGO: I'm assuming I'm going to go
2 back up. I mean, I'm just going to leave it there,
3 because --

4 MR. WILLIAMS: I would -- I would like the
5 space.

6 MS. DIRAGO: Oh, sure. You should have just
7 said that.

8 THE COURT: Are you going to voir dire on
9 all his credentials or just --

10 MR. WILLIAMS: No. I'm just going to go to
11 the evidentiary issue, your Honor.

12 THE COURT: Okay.

13 VOIR DIRE EXAMINATION

14 BY MR. WILLIAMS:

15 Q. You don't dispute, do you, Mrs. Trende, that
16 we can't reproduce the 2,040,000 simulations that are
17 discussed in your expert report of August 11th, 2023;
18 is that correct?

19 A. The particular maps will not necessarily be
20 perfectly replicated.

21 Q. All right. And have you -- I believe you
22 testified a few minutes ago that you have never before
23 been asked to produce your maps to anyone else; is
24 that correct?

25 A. I don't think so.

1 Q. You don't --

2 A. I've only asked people on three occasions,
3 and I typically don't get asked.

4 Q. So would it be fair to say this is the first
5 time you've been asked to produce the work that is
6 underlying your expert reports?

7 A. I think I was asked to do it in Maryland,
8 and then the opposing expert admitted that he couldn't
9 interpret them anyway, so they weren't produced.

10 Q. Okay. So effectively then, with the
11 exception of Maryland, where apparently your expert
12 was unable to interpret the data, you've before been
13 asked to produce your work; is that correct?

14 A. That's my recollection on producing
15 particular maps.

16 Q. You mentioned that you are teaching a class
17 at the Ohio State University on how to run
18 simulation -- or excuse me -- gerrymandering
19 simulations; is that correct?

20 A. No. I'm teaching a class called voting
21 participation and turnout that covers a wide variety
22 of voter turnout. About a quarter of it is spent on
23 gerrymandering. And we do get into the various ways
24 of running -- of simulating maps and what they do.

25 Q. Within the coursework that you teach at the

1 Ohio State University regarding redistricting
2 simulations, do you teach about the Redist package?

3 A. Yes.

4 Q. Do you teach specifically about the Redist
5 underscore SMC function?

6 A. No.

7 Q. All right. And why is that, Dr. Trende --
8 or Mr. Trende? I'm going to keep promoting you from
9 time to time?

10 A. Because it's not really in the core of what
11 the class is about. The idea is for the students to
12 understand how it works. But it's not necessarily to
13 train them to run redistricting software.

14 Q. Now, I believe I have heard you say today
15 that the reason that it is okay that you don't have
16 your original 2,040,000 simulations is that we can run
17 additional simulations; is that correct?

18 A. Yes.

19 Q. All right. And I believe that I have heard
20 argument today, and this didn't come out of your
21 mouth, so I'm not going to represent to you that it
22 did, that because of that circumstance, we have not
23 suffered any prejudice, "we" being the defendants. Is
24 that a statement that you agree with?

25 A. That is a -- I mean, there's a lot of legal

1 stuff built in there, but I think from the bottom line
2 of being able to understand whether the map is an
3 outlier and to verify it, I guess that's how I argue
4 it. But I don't know what your arguments for
5 prejudice all are, either.

6 Q. You did testify on direct from Ms. DiRago
7 that you don't know why we would want the 2,040,000
8 maps because no one is going to look at them; is that
9 correct?

10 A. Getting through all 2 million maps in a
11 reasonable amount of time would certainly take a lot
12 of time.

13 MR. WILLIAMS: Your Honor, can I approach
14 the witness?

15 THE COURT: Okay.

16 BY MR. WILLIAMS:

17 Q. Mr. Trende, I have handed you a scholarly
18 article written by Dr. Kosuke Imai. Are you familiar
19 with that article?

20 A. Yes.

21 Q. And what is that article purporting to be?

22 A. This is the published article that lays the
23 foundation for understanding Sequential Monte Carlo.

24 Q. And that is the article that forms the basis
25 for the Redist SMC algorithm that you used to generate

1 2,040,000 simulations?

2 A. Correct.

3 Q. All right. Now, let's talk about why we
4 might want those 2,040,000 maps.

5 During your deposition, I asked you, I
6 hope you recall, what you did to test your code. Do
7 you recall that question?

8 A. Yes.

9 Q. And do you recall your answer?

10 A. I think you asked it a couple of times. I
11 didn't do anything to test the Redist software itself.
12 I did run a small number of maps, I think I said a
13 thousand or so, to make sure that things didn't get
14 completely jumbled up or get bizarre output.

15 Q. Did you recall your testimony that all you
16 did was make sure that the code ran to completion.

17 A. That may be in part of the testimony, but
18 there was a part where I also said I did print out a
19 couple maps to make sure -- because sometimes you have
20 something that happens during the data processing
21 phase where the counties will get completely messed up
22 and you'll get nonsense for your output. But as far
23 as actually looking to make this your that
24 Drs. McCartan and Imai wrote a competent R package, I
25 didn't look into that at all. I (inaudible) --

1 Q. Sir, and just to make clear. So now I
2 understand you actually did print out some of the
3 maps?

4 A. I didn't print any maps?

5 Q. Well, you literally just said you printed
6 out some out and looked at them?

7 A. No, you --

8 Q. Do you recall that testimony (inaudible)?

9 A. You don't print them out like on a printer,
10 but they are created, like, on the screen, yes. And
11 that was in my first deposition.

12 Q. Okay. So beyond that, you did nothing to
13 test the quality of the simulation as that you were
14 producing?

15 A. Correct.

16 Q. Okay. I want to turn your attention,
17 Mr. Trende, to Page 11 of Exhibit B.

18 MS. DIRAGO: Objection. Your Honor, he's
19 talking about the quality of the first maps, but he's
20 also complaining that he can't see the maps. How is
21 that relevant to a simple narrow question of voir
22 dire right now?

23 MR. WILLIAMS: Your Honor, the question is
24 evidentiary destruction. Section 4.4.4 of Dr. Imai's
25 article deals with diagnostics and the quality of

1 simulations that are put out there. It is absolutely
2 relevant to why we need this evidence and why the
3 destruction of the evidence is --

4 THE COURT: You can ask him about this.

5 MR. WILLIAMS: -- of critical importance.

6 Thank you.

7 BY MR. WILLIAMS:

8 Q. Have you read Section 4.4.4 of Dr. Imai's
9 article titled, "Diagnostics," Mr. Trende?

10 A. I think this is in the latest iteration of
11 the article. But yeah.

12 Q. You think what? I'm sorry?

13 A. This is in the latest iteration of the
14 article, but yes.

15 Q. All right. Have you read -- so you have
16 read this latest iteration of the article?

17 A. Yes.

18 Q. And this latest iteration of the article was
19 published before you did your expert work in this
20 case, correct?

21 A. Yes.

22 Q. All right. Now, in the paragraph that
23 begins with "Other diagnostics," do you see that?

24 A. Yes.

25 Q. All right. It talks about the requirement

1 of sample diversity. Do you see that?

2 A. Yes.

3 Q. What is sample diversity, Mr. Trende?

4 A. It's how the different -- how different
5 samples are from each other.

6 Q. And so I believe you testified during your
7 deposition, that of the 2,040,000 simulations that you
8 no longer can produce, that there was a 50 percent
9 duplication rate; is that correct?

10 A. Somewhere in that range, yes.

11 Q. And do you know what the similarity index
12 was on the remaining 50 percent?

13 A. I don't.

14 Q. All right. All right. It want to look at
15 the very last sentence of that paragraph that reads:
16 A nondiverse sample will have many samples of similar
17 or identical plans, which tends to increase sampling
18 error and reduces the interpretability of the
19 generated samples.

20 Do you see that?

21 A. Yes.

22 Q. And the second sentence says: One measure
23 of quality is sample diversity.

24 Do you see that?

25 A. Yes.

1 Q. Do you know if there is a way within the
2 Redist package to check sample diversity?

3 A. There was an update published on the package
4 that has a diagnostic. I did learn about that after I
5 ran the diagnostics -- or I ran the simulation in this
6 case.

7 Q. And that is called "Plans Underscore
8 Diagnostics"?

9 A. I don't know.

10 Q. Okay. Nonetheless, it was in the Redist
11 package and you did not use it; is that correct?

12 A. It wasn't in the Redist package that I had
13 in my computer at the time. But I did not use it.

14 Q. All right. And if we had been presented
15 with the 2,040,000 maps that were destroyed, we would
16 have been able to run that data against the function
17 you just described, correct?

18 A. I'm not sure if you would have.

19 Q. Do you know that we couldn't?

20 A. I'm skeptical.

21 Q. Why are you skeptical, Mr. Trende?

22 A. Because the way that you receive the maps is
23 in a bunch of CSPs, and I don't know if you can
24 repackage the CSPs into something that you run the
25 sample diversity score on.

1 Q. So you're not aware of the notion that an
2 object stored in RAM in the R programming language can
3 be unloaded into a CSV and then perhaps future back
4 into that same object?

5 A. I don't know if it can be put back into the
6 same object.

7 Q. So you don't know what the sample diversity
8 was, do you?

9 A. No.

10 Q. And you know that we certainly can't check
11 that; is that correct?

12 A. You can't check it on the exact same maps,
13 but since the output of the maps is virtually
14 identical from run to run, you could run it, which I
15 would guess you have, and run a sample diversity score
16 on it and say, "This doesn't look good," or "It does."

17 Q. Do you know what Dr. Imai believes a
18 nondiverse sample is?

19 A. I don't, since he wasn't -- since they
20 didn't put this function on until recently, he
21 wouldn't have used it in any of his testimony or any
22 of his cases. So I haven't heard from him.

23 Q. You do agree with Dr. Imai when he says that
24 it is important to run diagnostics?

25 A. That is what the latest version of the

1 article says, yes.

2 Q. And that's something that you didn't do?

3 A. That's correct.

4 Q. And that's something that now we cannot test
5 because the data was destroyed?

6 A. It's something that you can test by running
7 the code through, I'm guessing you've done this, and
8 one the sample diversity score on it.

9 Q. What's the basis for your guess, Mr. Trende?

10 A. Just a hunch.

11 Q. Okay. You do a lot of hunches?

12 A. Sometimes.

13 Q. Is the 2,040,000 simulations that we don't
14 get, is that a hunch?

15 MS. DIRAGO: Objection. It's argumentative.

16 THE COURT: I'm not sure I understand the
17 question.

18 MR. WILLIAMS: I'll let it go, your Honor.

19 BY MR. WILLIAMS:

20 Q. You're confident that the SMC algorithm
21 produces appropriate simulations in the absence of
22 diagnostics; is that correct?

23 A. I have no reason to doubt it.

24 Q. What why don't we look at Page 18 of
25 Dr. Imai's article. And look at under the heading, at

1 7, "Concluding remarks."

2 In the last paragraph, Dr. Imai writes:
3 One important draw back particular to the SMC
4 algorithm arises in situation with dozens or hundreds
5 or separate districts.

6 Now we don't have that here, do we?

7 A. No.

8 Q. No, we don't. In summary statistics, which
9 rely on these districts which rely on these districts
10 will have -- excuse me, I started -- while this is not
11 a problem with many SMC applications, such as by easy
12 inference for redistricting, this means that all of
13 the sample plans will share one or more district that
14 completely identical.

15 Do you see that?

16 A. Yes.

17 Q. And in your 2,040,000 maps, half of them
18 were identical, correct?

19 A. Yes.

20 MS. DIRAGO: Objection. Judge, he's going
21 into the substance, which I (inaudible) --

22 MR. WILLIAMS: I am not. I'm am getting
23 into why it's important that we should have received
24 the evidence so we could test it.

25 THE COURT: All right.

1 MS. DIRAGO: He's going into the substantial
2 of what the first maps showed, which is --

3 MR. WILLIAMS: We don't know what they
4 showed (inaudible).

5 THE COURT: Are you not basically trying to
6 impeach his report right now?

7 MR. WILLIAMS: I am trying to show --
8 plaintiffs have argued, your Honor, that we do not
9 need their 2,040,000 maps. And at this point, I am
10 showing the Court why we need the maps, why their
11 destruction is material, why it is prejudicial.

12 MS. DIRAGO: This is exactly why it goes to
13 the weight of the argument.

14 MR. WILLIAMS: It does not go to the weight.
15 It goes to the admissibility.

16 This is an issue of evidentiary
17 foundation. They would sure like to turn it into the
18 weight of the evidence. This is about admissibility.

19 And without being able to show the
20 evidentiary foundation, this doesn't come into
21 evidence, and we don't have to worry about weight.

22 THE COURT: All right. So your foundational
23 argument -- tell me your question again. You're
24 asking about the results of the second run, correct?

25 MR. WILLIAMS: No. I am asking that you we

1 don't know, because Mr. Trende testified at his first
2 deposition that on the destroyed maps, he had a
3 50 percent duplication rate.

4 THE COURT: Okay.

5 MR. WILLIAMS: And that's what I'm asking
6 about for right now. I don't care about the second
7 replacement set. We're talking about the set that's
8 at issue in his expert report.

9 THE COURT: Okay.

10 MS. DIRAGO: That is not an issue that has
11 anything to do with foundation. He's trying to
12 impeach his first set of maps.

13 THE COURT: I mean, she has a point. If
14 you'd gotten those maps, you still would have had the
15 50 percent duplication, correct?

16 MR. WILLIAMS: We would have. But what we
17 don't know, we don't know whether -- because we can't
18 run the diagnostics against them, we can't examine
19 them. So this gets to our motion, your Honor. Which
20 is admissibility and the remedy for destruction.
21 This is all squarely laid out in the motion.

22 THE COURT: I don't see how this goes to
23 admissibility. I think that you're getting more into
24 what weight we should give this evidence.

25 MR. WILLIAMS: It is still part of the

1 motion that we teed up, and I understand, your Honor.
2 Was part of this process that we're getting into now.

3 THE COURT: All right. Well, I agree with
4 counsel that this is -- doesn't go to admissibility.
5 So ask another question or ask a more generalized
6 question about destruction or whatever.

7 BY MR. WILLIAMS:

8 Q. All right. So fundamentally, your argument
9 today, Mr. Trende, is: Trust me. The second set of
10 data looks like the first. Correct?

11 A. No.

12 Q. All right. Can you show me the first set of
13 data so that I can verify your representation that the
14 second set looks like the first?

15 A. I can share it -- well the histogram is
16 recorded in the first report. And then I did a
17 declaration as a factual matter showing what the
18 histograms look on the maps that were produced to you.

19 And the maps, the large sample
20 simulations are virtually identical. And the smaller
21 sample simulations are close to identical. And that's
22 exactly what you would expect, that as you have
23 continuous draws, the similarity between draws
24 increases.

25 So no, you don't have to be trusting me.

1 You can look at the output of the distributions, which
2 is what you're really interested in when you're
3 running these simulations.

4 Q. Mr. Trende, what I think you just told me
5 is, it's not trust me, it's trust me because I signed
6 the declarations. How can I --

7 MS. DIRAGO: Objection. Misstates his
8 testimony.

9 BY MR. WILLIAMS:

10 Q. How can I --

11 THE COURT: I'm going to sustain the
12 objection.

13 BY MR. WILLIAMS:

14 Q. How can I test the replacement data against
15 the first data?

16 A. Well, you can look at the output that is
17 recorded in the expert report. And if you aren't
18 going to trust my data, you can -- or my factual
19 interpretation of the data, you could have Dr. Chen
20 create histograms of the maps that you received and
21 see if they -- if the output is similar or close to
22 identical.

23 I did that to illustrate that they are,
24 in fact, close to identical. But you don't have to
25 trust me, you can take those maps and compare

1 themselves yourself. The output that is in the first
2 report is set in stone and can't be changed. So I'm
3 not sure how trust comes into that at all.

4 Q. The trust comes in because we can't test
5 your data because it was destroyed; is that correct?

6 A. You can test it. I just explained to you
7 how you can test it.

8 Q. I can't test 2,040,000 maps that don't
9 exist; is that correct?

10 A. You can look at the other 2,040,000 maps
11 that were produced to you, and unless I had some --
12 honestly, unless I had some great stroke of luck
13 producing the first set of results, which is what
14 we're interested in in the opening report, you know
15 that it does the same thing. You can probably run it
16 a third and fourth time and probably have identical
17 results. You can run or diagnostics, if you would
18 like, on those outputs.

19 And because it's a large enough sample
20 that it's converged upon the true direction, nothing
21 substantive should change from run to run.

22 Q. As I appreciate it, your testimony is you
23 did 2,040,000 maps, they weren't you saved, they're
24 not reproducible. You then performed an additional
25 2,040,000 simulations, and they looked remarkably

1 similar to the ones we don't have; is that correct?

2 A. Yes.

3 Q. Is there anybody other than you, Mr. Trende,
4 that that's true or not?

5 A. Yes. You can take the maps that were
6 produced to you. You can generate the output from
7 them. You can compare them to the images that were
8 produced in a PDF file and can't be changed yourself.

9 MR. WILLIAMS: Your Honor, this gets into
10 the question of -- I'm going to have to go beyond the
11 scope of the maps themselves to demonstrate to the
12 Court that these assurances are themselves not
13 supported by his report.

14 So I'm going to need some latitude to
15 get in beyond the reports themselves.

16 THE COURT: Well, what do you mean by that?

17 MR. WILLIAMS: Mr. Trende's report, he just
18 testified that, well, one thing you can do rather
19 than just take his word it in this affidavit, that
20 they're similar, is we can look at his original
21 report and look at the histograms, the box plots, the
22 dot plots, and the figures in Section 6.4. And I
23 have a lot of questioning about that, where what's in
24 the source code is not what's in his report. So we
25 have all of these problems that cause a lot of

1 questions about the original 2,040,000 simulations.

2 THE COURT: Okay. I think I've got enough a
3 basis to make a decision on whether or not this will
4 come in.

5 MR. WILLIAMS: Okay.

6 THE COURT: If we need to --

7 MR. WILLIAMS: If the Court's made a, then
8 the Court has made a decision. I'm not going to flog
9 that horse.

10 THE COURT: Okay.

11 Do you have anything else?

12 MS. DIRAGO: Not from (inaudible).

13 THE COURT: All right. So I think I have
14 enough of a grasp of the situation to understand how
15 he produced his report. I understand the defense
16 argument about the maps not being saved. But based
17 upon his physical exam testimony about how the
18 process works, I don't think that the fact that those
19 were not saved is an evidentiary bar to his coming
20 in. I think he's testified that that's the normal
21 practice. And I understand -- I'm not saying that
22 they're going to come in. I understand what you're
23 saying about running a second -- running it through
24 again. And I'm not ruling on whether that's
25 admissible or not. But that that's the adequate or

1 appropriate way to analyze or test his initial run,
2 and so I'm going to deny the objection -- or the
3 motion to strike his report.

4 So do you want to get into the rest of
5 your testimony, the rest of your direct?

6 MS. DIRAGO: Yeah, if that's okay with you
7 in terms of timing.

8 THE COURT: Sure. How much more do you
9 have? Probably a while?

10 MS. DIRAGO: Yeah.

11 THE COURT: All right. Do you want to -- do
12 we need to take a break right now?

13 MS. DIRAGO: Sure.

14 THE COURT: Okay. Let's take about ten
15 minutes, and then we'll go forward with that.

16 (Recess held from 3:26 p.m.
17 to 3:37 p.m.)

18 THE COURT: Be seated. Thank you.

19 All right. Let's go back on the record.
20 I just want to make it clear, I am finding that the
21 lack of producing this does not bar his -- the
22 admittance of his opinion or his report, however, you
23 will be able to argue as to what weight the Court
24 should give to that.

25 Go ahead.

1 MS. DIRAGO: And I don't know if I have to
2 formally call Mr. Trende now, for the record.

3 THE COURT: Well, he's already --

4 MS. DIRAGO: And I can -- I assume for the
5 record, I can dispense with all the background that
6 I've already done through.

7 THE COURT: Yes.

8 MS. DIRAGO: Okay. Good.

9 DIRECT EXAMINATION

10 BY MS. DIRAGO:

11 Q. And actually, what I want to do, kind of
12 ironically, is focus on the stuff that is not based on
13 your simulations, first.

14 Okay. Mr. Trende, have you been
15 retained as an expert in this matter?

16 A. I have been.

17 Q. Who retained you?

18 A. I was retained by defendants -- by
19 plaintiffs in this case.

20 Q. Are you being paid for your services?

21 A. I am.

22 Q. How much?

23 A. I'm being paid \$450 an hour.

24 Q. And is any part of your compensation
25 department on the outcome of this case?

1 A. It is not.

2 Q. Did you render any written reports in
3 connection with this work?

4 A. I did. I filed one report.

5 MS. DIRAGO: Your Honor, can I approach the
6 witness?

7 THE COURT: Yes.

8 MS. DIRAGO: And I approach you.

9 THE COURT: Sure. Thank you.

10 BY MS. DIRAGO:

11 Q. So this will be -- well, after all, what did
12 I just hand you?

13 A. This is the expert report of Sean P. Trende
14 that is dated August 11th, 2023.

15 Q. And is this the report that you rendered in
16 this case?

17 A. It is.

18 Q. Your Honor, I move to admit his report,
19 which we will label Plaintiffs' Exhibit 2?

20 THE COURT: Any other comment?

21 MR. WILLIAMS: Your Honor, you've ruled that
22 you're going to let it in, so we'll --

23 THE COURT: Okay.

24 MR. WILLIAMS: I would -- I would like to
25 avoid just interrupting (inaudible) a standing

1 objection to any testimony that's related to Sections
2 6.4, 6.41, 6.42, anything that's in testimony.

3 THE COURT: Okay. I'll find that you have
4 adequately preserved any objection to those sections.

5 MR. WILLIAMS: Thank you, your Honor.

6 THE COURT: Exhibit 2 will be admitted.

7 BY MS. DIRAGO:

8 Q. So what were you asked to do by plaintiffs
9 in this case, Mr. Trende?

10 A. I was asked to examine the maps that were --
11 or the congressional map that was produced by the --
12 or enacted into law by the New Mexico Legislature and
13 evaluate them to see if they disadvantaged the
14 Democratic party -- or Republican Party.

15 Q. Okay. And I'm going to ask you what
16 information you relied on, and if you were -- and if
17 your Honor wants to follow along, this is on Page 5 of
18 your report.

19 So what information did you rely on to
20 reach your conclusions here?

21 A. So this was a little bit of a tough call,
22 but I just look closely at Justice Kagan's dissenting
23 opinion in *Rucho v. Common Cause*. Though I am an
24 attorney, I'm not admitted or practicing in this case,
25 so I didn't want to engage in out right legal

1 argumentation.

2 But at the same time, when trying to
3 craft the report, I thought it was necessary to
4 explain what I -- the reason I was doing what I was
5 doing and part of that is just understanding what
6 Justice Kagan's dissenting opinion meant for me to do.

7 The second thing I did, I looked at, was
8 block assignment files for the various plans. So what
9 a block assignment file is, is it's just a spreadsheet
10 that typically just has two columns. One labeled some
11 form of identification, one column labeled "District."

12 And so what it does is, for every census
13 block, which is the smallest geographic unit that the
14 census uses in its work, it will -- every census block
15 has its own unique identifier. And the block
16 assignment files will match the census block to every
17 district in which they're placed. So it's a way to
18 allow you to build the maps from the ground up,
19 effectively, for analysis.

20 I looked at congressional district shape
21 files, which are maintained at UCLA; voter
22 registration data from the New Mexico Secretary of
23 State; Supreme Court of New Mexico's order; and then
24 other documents and data referred to.

25 So the basic idea was, just look at all

1 the data I could so that I could adequately match
2 demographic and political information to the districts
3 that were created.

4 Q. Great. And based on your work, did you
5 reach any conclusions?

6 A. Yes. It -- based on the work, I -- it seems
7 to a reasonable degree of scientific certainty in my
8 field that these maps were constructed with the intent
9 of disadvantaging the Republican Party, and, in fact,
10 did so.

11 Q. How confident are you in these conclusions?

12 A. Very. It's almost inconceivable that these
13 maps were not drawn with heavy political
14 considerations behind them.

15 Q. All right. And then on Page 6, we have
16 methods and guiding principles. I'm going to go
17 through them in detail, but can you just list those
18 out for us?

19 A. Yeah. So there are kind of five just
20 background things that I felt needed to be established
21 before getting into the meat of the report.

22 The first was my opinion of Justice
23 Kagan's dissenting opinion on Rucho, which is not
24 binding on anyone, but it guided on how I performed my
25 report.

1 The second an a measure for measuring
2 directing partisanship, known as PBI.

3 The third talks about how to gerrymander
4 a state with few districts and some of the challenges
5 involved there.

6 I did an analysis of regions in
7 New Mexico and finally explained the simulation
8 technique, which I think I've already done that fifth
9 one.

10 Q. All right. So let's take Justice Kagan's
11 dissenting opinion first.

12 How did you use her dissenting opinion
13 in Rucho?

14 A. So I just read through it carefully. And
15 like I said, since I have practiced allow for eight
16 years before becoming a political analyst, I just -- I
17 gave my interpretation of it. And, again, to guide
18 the work that I would be doing.

19 Q. So you practiced law for eight years and
20 decided not to be a lawyer anymore?

21 A. Actually, I just -- I clerked on the Tenth
22 Circuit for Justice (inaudible) for a year, so I guess
23 it's technically nine, and then eight years in firms.

24 Q. Okay. Okay. And what -- does Justice Kagan
25 endorse any methods to analyze plans nor gerrymanders?

1 A. Yeah. So the first one is kind of counter a
2 bit to -- it's a check on the work that I was doing,
3 which is that judges shouldn't just strike down a map
4 because it shows some political motivation. There has
5 to be something that's extreme. So that kind of set a
6 standard for what I wanted to use for evaluating the
7 maps.

8 And then the second she has her
9 three-part test, which is intent, effect and
10 causation.

11 Q. And does Justice Kagan endorse a simulation
12 analysis?

13 A. She does. So in both the intent and to a
14 lesser stents is effects prong, she says that a
15 simulation analysis is one way, although not to only
16 way, that you can prove up a gerrymander.

17 Q. What's another way that she analyzed?

18 A. So she's explicit that it doesn't have to be
19 through these kind of -- I think she even uses the
20 term "fancy math." But it doesn't have to be these
21 complex simulations. You can do a qualitative
22 assessment. Look at how partisanship has been
23 changed, look at how voting data has been changed from
24 map to map, look at how the legislature moved votes
25 and people around when it drew the map.

1 And sometimes, and I think it's the case
2 here, even a qualitative analysis shows clear intent
3 and effect when drawing this map.

4 Q. Okay. So your second guiding principle is
5 elaborated on Page 10. What was that?

6 A. So the second guiding principle was measures
7 of partisanship. So if we're going to evaluate, if
8 we're going to evaluate something as to whether it's a
9 gerrymander or not, we have to have some understanding
10 of what these political numbers mean that we see.

11 So there's two things that are pretty
12 common. The first one is typical rule in political
13 science, which is using two-party vote share. And so
14 what two-party vote share is basically the votes from
15 presidential election without the third parties
16 included.

17 And the reason that we do this is -- so
18 1992, Bill Clinton wins 43 percent of the popular
19 vote, George H.W. Bush wins 37 and a half percent. A
20 few years earlier, Michael Dukakis has won 46 percent
21 of the popular vote. And so if you're only looking at
22 those numbers, you would include that the Democrat
23 vote share had declined by 3 points between 1988 and
24 1992. But while technically true, that gives a very
25 misleading view of what happened in that presidential

1 election.

2 So what political scientists will do and
3 what two-party vote share does is, okay, we're going
4 to take out Ross Perot's 19 percent of the vote and
5 just look between George H.W. Bush and Bill Clinton,
6 what was the vote share for the two parties.

7 And when you do this, you say, okay,
8 Bill Clinton won 53.4 percent of the two-party vote.
9 Which is a more accurate description of what happened
10 in the 1992 election.

11 The second thing I you'd, I do rely on
12 two different metrics for partisanship. The first the
13 looking at presidential vote share alone.
14 Presidential vote share, especially for Congress, is a
15 highly predictive tool. But I also use a partisan
16 index of statewide rises in New Mexico from 2016 to
17 2020. So what this allows us to do is kind of smooth
18 out the data. So if there's any quirky about the
19 data, using ten elections will smooth that out. It
20 kind of comes out in the wash.

21 The final thing that I use is what's
22 known as the partisan voting index. Now, the partisan
23 voting index is a tool to allow you to compare one
24 election to another. So if you were to look at
25 Massachusetts in 1984, Ronald Reagan won it with 52

1 percent of the vote. And so if all you knew was that,
2 you would say, wow, Massachusetts is a conservative
3 leaning swing state.

4 That 52 percent number has to be read in
5 the context of the fact, though, that he was winning
6 by 59 percent nationally. Massachusetts was still a
7 Democratic leaning state, but the national environment
8 was to favorable to Republicans was that it was enough
9 to flip that state.

10 So what you would say then is, okay,
11 Ronald Reagan wins 52 percent of the vote in
12 Massachusetts, he wins 59 percent nationally, so that
13 year, Massachusetts leaned towards the Democrats by 7
14 points. Okay?

15 And so if you think about it, you know,
16 a few years later Bill Clinton wins the state handily,
17 and so you would say, if you just look at the numbers,
18 "Wow, Massachusetts really swung to the left." If you
19 look at the PBI numbers, though, Massachusetts hardly
20 moves at all. It's about 7 or 8 percent more
21 Democratic than the rest of the country as a whole.

22 So it's just a way to compare across
23 elections accounting for different national
24 environments.

25 Q. Did you look at the PBI for New Mexico?

1 A. I did. I did a time series in the body of
2 my report that traces the PBI of New Mexico over time.
3 You can also look at it in the -- yeah, that traces it
4 over time.

5 Q. Okay. And what did it tell you?

6 A. That New Mexico has had a bit of a left ward
7 trend. But it's not at dramatic as you might see just
8 by looking at Democratic performance. It's been a
9 couple points to the left of the country, but not
10 overwhelmingly so.

11 Q. Okay. And is this PBI used by elections
12 analysts?

13 A. It's relevantly used by elections analysts.
14 And it's used in the political science community, as
15 well. I checked to make sure that it does get cited
16 to.

17 Q. Okay. So let's go on to your third guiding
18 principle approximately on Page 13. This is extreme
19 gerrymandering in a competitive state with few
20 districts. Does that describe New Mexico?

21 A. Yes. So as I said, New Mexico is a state
22 that favors Democrats, but, you know, it has been won
23 by a Republican president candidates in a good
24 Republican year recently from a neighboring state.
25 But still, you know, there have been competitive

1 statewide Republican candidates recently. So it's not
2 a place like New York or California, where it's just
3 blue pretty much top to bottom at this point.

4 Q. So do you analyze gerrymandering in a
5 competitive state with few districts differently than
6 you would, say, New York?

7 A. You have to. Because one important thing to
8 keep in mind with gerrymandering is that the statewide
9 average of the districts has to be the statewide
10 average overall. If the state is 53 percent Democrat,
11 you can't create for 54 percent Democratic seats.
12 Otherwise the statewide average would be 54. And so
13 there's kind of a cap to how high you can take the
14 partisanship of all the districts.

15 Past that, it's a bit of a rob Peter to
16 pay Paul engagement. Let's say you wanted to make an
17 incumbent a little bit safer, so you made one of those
18 districts slightly more Democratic. Those Democrats
19 have to have been taken out of somewhere. And so it
20 either has to come out of District 1 or 3, and so that
21 district is going become a little bit more Republican.
22 And the more Democratic you make that second state --
23 or second district, the more Republican the other
24 districts are going to become.

25 And so there's a cap of like a perfect

1 gerrymander, and then the more you deviate from that
2 cap, the more you deviate from that ideal and make it
3 less perfect.

4 Q. So does the chart on Page 15 help? I'm
5 sorry, the graphic is not that great. It's better
6 with glasses. Why don't you tell me what this chart
7 on Page 15 is showing us.

8 A. So this is -- it's called toy data.
9 Political scientists, if they want to illustrate
10 appoints will use political data to try to point
11 out -- it just shows a state in three different
12 scenarios.

13 So this is a state that overall is two
14 plus 3, right? The Republican gets 48 percent of the
15 vote nationally, 45 percent of the vote in the
16 districts. And as drawn in Scenario 1, they're all
17 going to tend to favor Democrats. They're all 55, 45
18 D plus 3 districts.

19 Well, let's say that the map maker
20 wanted to make Districts 2 and 3 a little bit more
21 Democratic, they wanted to protect an incumbent for
22 whatever reason. Think can do that. So they take
23 five residents out of each -- out of District 2 and 3
24 each -- I'm sorry, they put five Democrats into
25 Districts 2 and 3.

1 But to do that, to comply with equal
2 population, they have to push Republicans out. If
3 they push Democrats out, the partisanship doesn't
4 change. And those Republicans have to go somewhere;
5 they go into District 1.

6 So now district -- now in this Scenario
7 2, those two Districts 2 and 3 are a bit more
8 Democratic. But District 1 is a bit more competitive.
9 Well, let's say they think that's not good enough, an
10 incumbent complains, "I want my district more
11 Democratic."

12 So they say, "Okay. We'll push five
13 more Democrats into Districts 2 and 3 and push five
14 Republicans out." Those Republicans have to go
15 somewhere. Now District 1 is just 53/47. So it's not
16 big of a deviation from what a perfect gerrymander in
17 the state would be. But you've made one of the
18 districts look a little bit more competitive than it
19 is, but you're still very close to the best you can do
20 in the state.

21 Q. So does it make it more difficult for you to
22 assess whether a map has been gerrymandered, the fact
23 that the state is smaller and more competitive?

24 A. Well, put some nuance on it, especially on
25 an effects analysis, because you have to keep in mind

1 that there's a cap to what the legislature could have
2 done. But it's the same tools for analysis. You have
3 to see which partisans the legislature moved around,
4 which voters the legislature moved around. And then
5 you can do more quantitative stuff to see what they
6 actually came up with. You just have to remember what
7 the perfect map -- what the perfect gerrymander looks
8 like in that state.

9 Q. Okay. So two defendants experts have said
10 that SB-1 was not gerrymandered because the states --
11 the districts were made more competitive. What you do
12 say to that?

13 A. Well, there's two things. The first is it's
14 true that they were made more competitive in a sense,
15 that the Democrat vote share in two of the districts
16 came down. But competitiveness isn't a one-to-one
17 basis thing. It's not like for every state -- every
18 point that the district becomes more Democratic, it
19 becomes, you know, linearly more favorable to the
20 Democrats of.

21 At a certain point, and it's not a
22 hundred percent Democratic. At a certain point, it's
23 just a Democratic district. So the district that
24 leans towards the opposing party by more than 3 or 4
25 points, it's going to be very difficult for the party

1 to pick it up no matter what.

2 And the second thing s you have to
3 remember, like just -- because there's a cap on how
4 good of a gerrymander you can do in a state like
5 New Mexico, you have to keep in mind that having a
6 district that is, you know, just one or two points
7 favoring Democrats with the other ones four or five
8 points, that's pretty close to the ideal gerrymander
9 in the State of New Mexico, unless you just can't draw
10 a congressional gerrymander in New Mexico, which I
11 don't think would comply with the law.

12 Q. Okay. Show let's move on to your next
13 principle, which is regions of New Mexico. Can you
14 describe your approach in the different regions in
15 New Mexico that are in your report?

16 A. Sure. So if we're going to talk about the
17 state, I thought it would be useful -- sometimes you
18 want to break things down into different areas of the
19 state. While I could look at the state and come up
20 with guesses with regions what we talk about are, you
21 know, I -- that would be fertile grounds for
22 cross-examine, what New Mexico regions are.

23 So I looked around for what people have
24 used to talk about New Mexico and their regions, and I
25 actually found the New Mexico Tourism Board has

1 definitions of regions. And I utilized those regions
2 for discussing my report.

3 Now, these aren't intended to be the
4 only way you could look at regions in New Mexico. I'm
5 sure there are many ways you could look at the regions
6 of New Mexico. I just wanted to have something that
7 was grounded in someone else's opinion to use as a
8 baseline so it's not just my objective views of how
9 regions of the state should be analyzed.

10 Q. Okay. And as I said, I'm going to kind of
11 skip the simulation stuff right now, I know we already
12 went into it, and go to pages 23 to 25. You've got a
13 bunch of maps on these pages. Can you explain what
14 these are?

15 A. Okay. So these maps -- and I apologize for
16 the counter -- in a sense for the counter intuitive
17 color scheming. Instead of the red and blue, I have
18 what's called the viridis color palette. There's
19 actually a straightforward reason for this, which is
20 that red and blue maps don't print well on and
21 noncolor printer. This color scheme will print out on
22 a regular printer. The other is that I'm colorblind,
23 red/green colorblind, and viridis is good for
24 colorblind people. But I'm more concerned about the
25 printer issue.

1 So what these are is the presidential
2 vote center that center PBI vote measure by county and
3 region in New Mexico from 1984 to 2020. And so what
4 it allows us to do is kind of go through and see what
5 areas have been heavily Democratic over time and see
6 what areas have been heavily Republican over time.

7 And what you can see from these maps is
8 that for a very, very long time, Southeastern
9 New Mexico has been the most Republican portion of the
10 state.

11 Q. So I don't know if you can explain this.
12 But this lighter yellowish light green is more
13 Republican under your PBI, and then the darker, sort
14 of purple, is that more Democrat?

15 A. Yes. So the purple is sort of close to
16 blue, so that's what I anchored as the Democratic vote
17 share. Republican is yellow instead of red.

18 Q. So what is your conclusion, looking at the
19 history here of New Mexico?

20 A. Well, you can look at the area of the state
21 that's been voting the most heavily Republican. And
22 so if you were trying to crack an area of the state
23 when direct causing a map to disadvantage Republicans,
24 that is the place where you would go to try to split
25 up those votes. Because if those votes are kept

1 together, they're going to create a mass that allows a
2 district to elect a Republican member of Congress.

3 Q. Okay. And so the most recent map is on
4 Page 25, right?

5 A. That's right. That's the 2020 election.

6 Q. Okay.

7 A. You can also notice from these maps, and I
8 don't think it's any great surprise, that Bernalillo
9 County has been trending leftward over time. And
10 that's consistent. You know, the district elected
11 Steve Schiff for a long time, and Heather Wilson. And
12 it just doesn't anymore, so...

13 Q. Okay. And then what about Figure 8, what is
14 this showing us?

15 A. So this is kind of a summary table of those
16 maps. So this is looking at those regions and showing
17 the trend in those regions over time. And so you can
18 see that Southeastern New Mexico, at the top, has
19 always been very Republican. It's trended more so
20 over time.

21 There's some stability to the map
22 because a lot of the movements have canceled out. But
23 as far as kind of how the regions are ranked in terms
24 of partisanship, it's -- you know, the ranking has
25 been fairly stable.

1 Q. So PBI, I guess the numbers on the left,
2 what are these showing us?

3 A. So they're showing at the presidential level
4 how much -- how far to the right or the left of the
5 nation as a whole these regions were during a given
6 election. So, you know, Southeast New Mexico has
7 typically been 10 to 20 points more Republican than
8 the county as a whole. It's the foundation of
9 Republican voting in New Mexico.

10 Q. Okay. So that's that top line, green line,
11 dotted line?

12 A. Yes.

13 Q. Okay. And one thing that strikes me is that
14 all the lines sort of dip and rise sort of together.
15 Can you explain that?

16 A. Well, there others state effects, right?
17 Sometimes a presidential candidate will really mesh
18 with the state, and sometimes they won't. You know,
19 George W. Bush probably benefited from the affinity of
20 being -- you know, getting news coverage and such.
21 And other presidential candidates didn't fair as well
22 overall in the state practice. .

23 But, again, these are meant to show --
24 the whole point of having a summary map like this is
25 to show over time how things have gone. Yes, there's

1 ebbs and flows, but the consistent takeaway is that
2 Southeastern New Mexico is the bedrock of the state
3 Republican Party electoral coalition.

4 Q. Okay. And I see a big (inaudible) in 2008.
5 What was that?

6 A. That was Barrack Obama, who really connected
7 with (inaudible).

8 Q. (Inaudible).

9 A. Yeah. Oh, and -- yeah, yeah.

10 Q. Did you want to say anything?

11 A. No, I didn't.

12 Q. Okay. Let's see. You have several maps
13 also on Pages 27 to 31. What are these?

14 A. So this is getting into the history of
15 congressional districts in New Mexico. And so if you
16 want to understand where the legislature went in this
17 last three districting, it's good no know where it's
18 been.

19 And so, as you can see, going back to
20 1972, at this point, the state only had two
21 congressional districts. And while I understand that
22 the New Mexico Tourism Board hasn't adopted this
23 particular standard yet, they're probably on to
24 something with their regions. Because as it turns
25 out, the lines that the legislature drew in 1972 line

1 up with the regions of the state. They didn't split
2 them at all.

3 If you go on to 1982, there was a
4 significant redraw three, because the state received
5 three congressional districts for the first time. And
6 the first district was extended eastward a bit into
7 Southeastern New Mexico, but not overwhelmingly so.

8 If you get to 1992 -- and I'll just go
9 quickly through the next three maps, since they're
10 all -- the 1992 to 2010 line were virtually identical.
11 It's the same thing, there's one county that was taken
12 out of Southeastern New Mexico. But by and large, the
13 congressional districts followed the regional lines of
14 New Mexico. And most importantly, Southeastern
15 New Mexico wasn't cracked by these maps.

16 Q. Okay. So let's move onto your qualitative
17 analysis of the 2020 redistricting. So the very
18 bottom of Page 31, you talk about how New Mexico's
19 district lines were malapportioned by the ends of the
20 2010s. Was that was that a result of the 2020 census
21 results?

22 A. That's right. So the annual census was
23 conducted, we got the new numbers. And New Mexico
24 didn't gain or lose a congressional district, but the
25 congressional districts, of course, were no longer

1 equipopulous, and so they had to be changed.

2 Q. Okay. And there's a chart on Page 32. I
3 want to go over what this says. Maybe starting, I
4 don't know, district by district, probably (inaudible)
5 most helpful to the Court.

6 A. Of course. So the state was malapportioned,
7 but it wasn't badly malapportioned. So District 1,
8 the population was about 11,000 under the ideal
9 population size, to 1.6 percent. So it had to gain
10 residents.

11 District 2 was about 8,000 over the
12 ideal population, so it was going to have to lose
13 8,000 residents.

14 District 3 was about 3,000, 3100
15 residents over. So it also was going to have to give
16 up some residents. But it wasn't something that
17 required a massive redraw.

18 And so, you know, having used Justice
19 Kagan's opinion as a guideline as to how I conducted
20 my analysis, I noted that she had put in the Maryland
21 case a great degree of emphasis on the fact that
22 Maryland's congressional lines didn't have to change
23 significantly, and yet, hundreds of thousands of
24 people were moved around.

25 Q. Okay. So let's look at what did happen

1 here. I believe Page 34 has a chart for you to
2 explain this.

3 A. That's right. So Page 33 just gives the
4 district lines that were created.

5 Page 34, though, walks through -- it's a
6 what we call paralyzed comparison of the districts.
7 It shows the district as it existed in 2020, and then
8 traces the movements of the population between
9 districts.

10 So even though District 1 had to gain
11 population, it only retained 528,000 of its residents
12 from the last redistricting. Instead, 166,485
13 residents were moved out of the District 1, which was
14 supposed to gain population into District 2.

15 Q. And, Mr. Trende, was District 2 under
16 populated?

17 A. District 2 was overpopulated.

18 Q. So you're saying they took residents from a
19 district that was under populated and move it into a
20 district that was overpopulated?

21 A. That's exactly correct.

22 Q. And by how many people, did you say?

23 A. 166,485.

24 Q. Okay. And then what did -- what did they do
25 with the second district?

1 A. Okay. So the second district did have the
2 loss some population, about 8,000 people. You know, a
3 third of the population of Lea County. Instead, the
4 second district moves 55,518 residents into the first
5 district, and then gives 140,435 residents into the
6 third district.

7 Q. So that's almost 200,000?

8 A. Yes.

9 Q. What about the third district?

10 A. So, again, the third district only /#45D to
11 give up, I think, 2100 or 3100 residents from that
12 table.

13 Instead, it moved 122,222 residents into
14 the first district; 21,292 residents into the second
15 district.

16 Q. So were these large shifts of people
17 necessary to satisfy the one person one vote
18 requirement?

19 A. They were not.

20 Q. Okay. Do you know where these shifts
21 occurred geographically?

22 A. Yeah. So if you look on Page 35 of the
23 report, I've mapped this out, and the changes take
24 place in two areas. The first is in Southeastern
25 New Mexico. And so what this does -- it says shifted

1 districts, it should be shifted precincts in the
2 legend. I got it right in the title.

3 This shows that the in Southeastern
4 New Mexico, which is the most Republican part of the
5 state, that's where most of the shifts out of to
6 second district into the first and third districts
7 took place. That's where the second district was
8 giving up residents.

9 Northeast of the other shifts were
10 taking place in the Albuquerque area, where the second
11 district, you know, in Bernalillo County, Sandoval and
12 Valencia Counties. So this wasn't just a random
13 distribution of people being moved around -- along
14 around district borders or, you know, throughout the
15 state. It was a very concentrated efforts for moving
16 voters around, concentrated in the most Republican
17 area of the state and the fastest Democratic trending
18 area of the state.

19 Q. So these shifts were not politically
20 neutral?

21 A. They were not. And so what I've done next,
22 if you look on Page 36, you can look at the shift of
23 2020 presidential votes between the districts. So if
24 you counted how many -- by looking at the precincts
25 that were moved, you can sum up the number of Trump

1 votes that were moved from district to district and
2 how many Biden votes were moved. And the summary
3 statistics is on the right side, the net Democratic
4 shift.

5 So from District 1 to District 2, from
6 Democratic leaning District 2 a Republican district,
7 16,216 net Biden voters were moved into this second
8 district.

9 From the second district back into the
10 first district, the voters were moved out of 2 into 1,
11 was a net 6,600 -- it was a negative 6,640 Democratic
12 shift. Which means it gave up 6,640 Trump voters on
13 balance.

14 From District 2 to District 3, the
15 second district lost 23,976 Trump voters on balance.

16 From District 3 to district 1, pretty
17 neutral, 184 Democratic voters were shifted into 1.
18 And then, from District 3 to District 2, 800 Biden
19 voters were shifted into District 2.

20 So for all the -- for District 2, on
21 balance, it gained about 17,000 Biden voters from
22 Districts 1 and 3, and then it gave up about 28,000
23 Trump voters to Districts 1 and 3.

24 Q. Okay. Now, on Page 37, what is this /SHART
25 showing us?

1 A. So this is -- instead of using the -- just
2 the Biden/Trump approach, this is using the index of
3 ten statewide political races. And it shows the same
4 thing. On balance, Democrats were moved out of
5 District 1 into District 2. On balance, Democrats
6 were moved out of -- or Republicans were moved out of
7 District 2 and into District 1.

8 On balance, Democrats were moved out
9 of -- Republicans were moved out of District 2 into
10 District 3. And on balance, Democrats were moved out
11 of District 3 into District 2.

12 If you look across then elections, you
13 had about 137,000 Democratic votes moved into
14 District 2, and about 200,000 Republican votes moved
15 out of District 2.

16 Q. And then on Page 38, you have another much
17 bigger chart. That is this?

18 A. Yeah, so this --

19 Q. Much smaller, I'm sorry.

20 A. Yeah.

21 Q. (Inaudible) staples. I apologize for the --

22 A. No, no, no. That's my fault. I should have
23 printed it better. No, for the eye strain, I could
24 have printed that sideways and it would have been
25 better.

1 Anyway, so this is looking at the
2 registration advantage for the parties in the
3 congressional districts in New Mexico from 1988 to
4 2022. The data is taken right off of the secretary of
5 state's website.

6 And so what you can do is look in the
7 far right column, the far right three columns. That's
8 the summary column. Those are the summary columns
9 that show how to Democratic registration advantage in
10 the districts has changed of time. And so you can
11 see, by the end of the decade, before redistricting in
12 2021, in District 1, the Democrats registration
13 advantage was 18.7 percent. After the redistricting
14 took place, that was down to 9.1 percent. And that
15 has bounced up a little bit as people switched parties
16 or people have moved in.

17 In other words, the Democrats still
18 maintain a healthy advantage in the first district.
19 But if you want to think about it in gerrymander
20 verbiage, they're not wasting an as many of their
21 partisans, right? It doesn't matter if you win the
22 first district by two votes or 200,000 votes, you get
23 100 percent of the representation.

24 So a lot of those registrants are wasted
25 under the old map. They're moved into other

1 districts. The same story is true to a lesser extent.
2 Of the third district, Democrats had a 21 point
3 advantage. That gets reduced down to 18 points, 17.6.

4 The opposite, though, happens in
5 District 2. By the time of the 2022 redistricting,
6 the Republicans actually had, for the first time, a
7 small registration edge in the second district. It's
8 the first time it's happened in any congressional
9 district in New Mexico in the last 20 years.

10 Redistricting versus that. It gives Democrat a 13
11 percent registration edge in the district. So this is
12 consistent with what we've seen with the previous two
13 tables, that the result of the 2022 redistricting was
14 to move a large number of partisan, Democratic
15 partisans, out of Districts 1 and 3 and into
16 District 2. And then to move Republican partisans out
17 of District 2 into 1 and 3.

18 Q. Okay. And then what about the charts on
19 pages 39, 40 and 41?

20 A. So I guess this is my make up for this hard
21 to read chart. It's -- the data are summarized in
22 line chart, or -- yeah, line graphs.

23 So as you can see, the Democrat
24 registration advantage in that first district had been
25 growing over time. It reduces in 2022, but it's still

1 in substantial Democratic advantage.

2 On the next page, Page 40, you can see
3 that the Democratic registration advantage had been
4 steady declining over time, to the point that the
5 Republicans had a slight advantage. In fact, it's
6 sharply reversed in the 2022 redistricting.

7 If you look at Table 3, you can see that
8 the Democrats advantage had been slowly declining.
9 It's moved down below 20 percent in the districting.
10 Again, Democratic partisans on net being moved out of
11 Districts 1 and 3, Republican partisans on net being
12 moved out of District 2.

13 Q. All right. And then I just want to direct
14 you back to Page 9, because this is where you were
15 talking about Justice Kagan's dissent. And you
16 discuss it citing her dissenting opinion. And I'd
17 like to know if that's what you see happening here.

18 So she, in the middle of this third
19 second -- second full paragraph.

20 A. Yeah, so Justice Kagan is reading about
21 Maryland, which had eight districts and not three.
22 And I guess the line -- yeah, she does use the
23 verbiage "fancy evidence." She observes that
24 Maryland, rather than engaging in minimal change, what
25 she writes is that the legislature moves 360,000

1 residents out, and another 350,000 in. So in a state
2 that really just needed minimal changes between the
3 districts, she saw that there were massive numbers of
4 people being moved.

5 And then she noticed that this was not a
6 politically neutral move. She said that the upshot
7 was an a district with 66,000 fewer Republican voters,
8 and 24,000 more Democratic voters.

9 So when she would have struck down the
10 Maryland map, this is what she was looking at, that
11 the voters were being moved around in such a way that
12 it greatly diminished the partisanship advantage in
13 that district by moving Republican voters out and
14 Democratic voters in, which is the same thing that
15 happened here.

16 Q. Okay. And so you've sort of answered my
17 questions, but have you drawn any conclusions from
18 this shifts of data?

19 A. Yeah.

20 Q. Shifts of people. I'm sorry.

21 A. Yeah. The qualitative analysis is clear,
22 that the movement of voters under these lines punished
23 the Republican Party and advantaged the Democratic
24 party by taking a district that was becoming a
25 Republican registration advantage for the first time

1 of any district in the last 20 years and making it
2 much, much more Democratic.

3 Q. Have you read the expert reports that the
4 defendants have submitted?

5 A. I have.

6 Q. Do any of defendant's experts assess how to
7 legislature shifted between and among districts when
8 drawing SB-1?

9 A. I don't think there's any disagreement on
10 that.

11 Q. All right. We have a chart on Page 42.
12 What is this showing us?

13 A. So this is another way of looking at the
14 same data. This is the partisanship of the districts
15 pre and post. So 20 -- on the right side is the --
16 I'm sorry. On the left side we're looking at Biden
17 percentages. So the first district using two party
18 vote was 61.7 percent Biden. It comes down to 57.4
19 percent Biden. So this is still a district that
20 President Biden won by a healthy margin. Even using
21 the PBI, it's -- it would be five points to the left
22 of the country. District 3 the brought down to
23 55.5 percent. It's still a district that is 3 to 4
24 points more Democratic than the rest of the country as
25 a whole.

1 And then District 2, Biden vote shares
2 increased from 44 percent of the vote up to 53 percent
3 of the vote. So quite to the left of the country as a
4 whole. So while you had a situation where you had two
5 Democratic districts a fairly reliable Republican
6 district, you have three districts in the state that
7 lean towards the Democrats.

8 You can do the same analysis using the
9 ten statewide raises, our index. That's the right
10 side of that chart. The first district was taken down
11 from 60 percent to 56 percent using the Democratic
12 index. The third district was taken down from 59.9
13 to 57.3 percent. So this is, again, they're wasting
14 few are Democratic votes in these districts.

15 And then District Number 2, is taken
16 from one that is 46.1 percent Democrat, so leaning
17 towards the Republicans, to one that 54.6 percent
18 Democrat, giving the Democrats an advantage in the
19 district?

20 Q. So is this showing -- correct me if I'm
21 wrong, but is this showing that if the SB plan was in
22 place in 2020, that District 2 would have elected
23 Biden?

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

25 Q. Yeah. If the lines were -- with the SB-1

1 plan was in place in 2022, District 2 would have
2 elected Biden?

3 A. Yeah. District 2 would have voted for Joe
4 Biden.

5 Q. Yeah, not elected. But you got it. Okay.

6 So you mentioned this platonic idea of a
7 gerrymander here. Is that what you're seeing with
8 these numbers?

9 A. That's right. I mean, New Mexico is only as
10 Democratic as it can be. It's about 54 to 55 percent
11 Biden's state. This does deviate from this ideal
12 somewhat, but not very much. It is close to a perfect
13 Democratic gerrymander of the state. It's close to
14 maximizing the Democrats advantage in the state.

15 Q. All right. And then you have a chart on
16 Page 43. Can you explain what this one shows us?

17 A. So this is looking at those ten statewide
18 races that we talked about, how those ten candidates
19 fared in the in the different districts under both the
20 old lines and the new lines.

21 So under the old lines, in District 1,
22 the Democrats won all ten of those races. Under the
23 new lines, they won all ten of those races. This is
24 what I get at when I say they're wasting fewer votes.
25 Yes, they're bringing down the Democratic vote total

1 in District 1, but not so much that any statewide
2 Democrat would have lost that district in the last few
3 years.

4 Same thing with District 3. It was won
5 by all ten Democrats in my index under the old lines.
6 Same with the new lines. It becomes slightly less
7 Democratic, but not so much that it starts to coast
8 the statewide Democrats votes.

9 The second district on the other hand
10 goes from one that one statewide Democrat had carried
11 to one that the statewide Democrats carried of every
12 time. So all ten of them. So this is a district that
13 going back to 2016 and top of the tickets statewide
14 raises hasn't voted for a Republican.

15 Q. So looking at these changes and taking all
16 this data into consideration, is this a significant
17 change that they made?

18 A. Yes. It moves the state from one where, you
19 know, it's a 54, 55 Democratic state, and Democrats
20 would get 66 percent of the representation in
21 Washington, D.C., into one where Democrats are going
22 to tend to get all the representation in Washington,
23 D.C. And you can see that in the 2022 election
24 results. New Mexico has had a all Democratic
25 delegation three times since it had multi membered --

1 multiple districts.

2 2008, Democratic waive year. 2018,
3 very, very good Democratic year. And 2022, a year
4 where Republicans won control of Congress, and only
5 two Republican incumbents lost. One of whom was Steve
6 Chabot in Ohio, who had his district redistricted out
7 from under him. One of whom is Yvette Harrell. She's
8 one of two incumbent, Republican incumbent to lose
9 that year. You can argue for a third, because there
10 was a Republican who won a special election in
11 southern Texas, but we typically don't count people
12 who had won an independent special election against an
13 incumbent.

14 Q. And so that election, how many districts did
15 the Democrat take in New Mexico?

16 A. They took all three. They got 100 percent
17 of the representation off of 55 percent of the
18 statewide popular vote.

19 Q. And as you say in your report, impact is one
20 of Justice Kagan's prongs. What do you say about that
21 impact prong, looking at this data?

22 A. So now going forward, you know, the
23 Democratic incumbent -- or the current Democratic
24 incumbent showed that he could win in a Republican
25 leaning year. Now he's going to have the advantage of

1 incumbency. I guess it's possible that a substantial
2 rub public can wave election that he might lose, just
3 like Democrats could win it before in very good years.
4 But overall, this is going to be a district that
5 favors a Democrats, and it showed -- even though it
6 was a close election, given the overall environment,
7 where Republicans were winning control of the house of
8 representatives, winning majority of the popular vote
9 for Congress for I think the fifth time since the
10 1950s, it wasn't a great environment for him to be
11 running in, and yet he still managed to topple and
12 incumbent.

13 Q. So in your expert opinion, does this show
14 that the Democratic party is now entrenched in
15 District 2?

16 A. Yes.

17 Q. Okay. I would like to go ahead into the
18 simulations.

19 MS. DIRAGO: Judge, how are we looking on
20 time. Do you want me to go till 5:00?

21 THE COURT: Sure. That's fine.

22 MS. DIRAGO: Okay.

23 BY MS. DIRAGO:

24 Q. So I think you've talked about traditional
25 redistricting criteria. Can you explain some examples

1 of traditional redistricting criteria?

2 A. So traditional redistricting criteria,
3 different people have different definitions.
4 Contiguity, you want your districts to be contiguous.
5 Compactness, making the districts compact. Respect
6 for county or municipal lines is a tradition
7 redistricting principle. There's some disagreement
8 about communities of interest. I know Dr. Chen would
9 say no. The majority of the state agree with him, but
10 a bare majority, some would say yes. So there is some
11 wiggle room on what they are. But compactness,
12 ewuipopulation, county lines, contiguity are the big
13 ones.

14 Q. Okay. And did you use those criteria in
15 your simulations?

16 A. For the most part, yes.

17 Q. What about the population deviations, what
18 was -- what did you program your simulations to do
19 there?

20 A. So the simulations are meant -- so one
21 problem with running simulations with equal population
22 is that it's very difficult to get the simulation to
23 converge on perfect equality.

24 So what the peer-reviewed literature
25 does, what most of the testimony has done, is say,

1 okay, we're going to let the maps -- the simulations
2 run plus or minus 1 percent on the population
3 deviation.

4 The reason they do that is to make it
5 easier for the simulation redistricting programs to
6 converge. And then the idea is, once you got the map
7 to that point, moving census blocks in and out to make
8 the populations perfectly equal isn't going to change
9 the answer because it's not going to change the
10 partisanship of the districts enough to change your
11 answer.

12 So -- and that's consistent with my
13 experience drawing maps how you do it. You draw your
14 concept first, get everything pretty much in place.
15 And then you have to fine tune to meet the federal
16 population standard.

17 Q. Okay. You have a funny looking picture on
18 page 46. Can you tell me what this is?

19 A. Okay. So there are a lot of funny looking
20 pictures going forward. I'm just warn the Court right
21 now.

22 So what this is is what's called -- if
23 counsel wouldn't mind, this might be easier to explain
24 with reference to Page 48.

25 Q. Absolutely.

1 A. So after you draw your ensemble of 1 million
2 statewide maps, there's a question, okay, what do we
3 do with this. And so the first thing you can do is
4 create these dot plots. So what the dot plots do is
5 they'll take Map 1 -- the computer will take Map 1 in
6 your simulation, and it'll say, okay, now that I've
7 drawn these maps without respect to partisanship,
8 let's put the data back in through the precincts. We
9 know which precincts go to which congressional
10 district. What is the most Republican congressional
11 district, what's its partisanship? It will calculate
12 that and it will put one dot down.

13 It'll say, okay, what's the partisanship
14 of the second-most congressional -- second most
15 Republican congressional district in this map? It'll
16 place a dot down there.

17 What's the partisanship of the
18 third-most Republican district, the most Democratic
19 district in the map? It'll put a dot down there.

20 And say okay, let's take up the second
21 district, do the same thing, put down dots for that.
22 It does it a million times for 3 million total dots
23 that give you the partisanship of every district, of
24 every district of every map in the ensemble.

25 So what this does is it says in the maps

1 that have been drawn, the range of partisanship for
2 the most Republican district is somewhere between
3 60 percent Republican, 40 percent Democratic, and
4 about 55 percent Democratic, 45 percent Republican.
5 Okay. And then you can do the analysis for the second
6 and third districts.

7 Q. So these district numbers are not New Mexico
8 district numbers?

9 A. That's right. It's ranks.

10 Q. Right.

11 A. It's the most Republican district, the
12 second-most Republican district, the third-most
13 Republican district in a given map. So then, well, I
14 want to compare this in the enacted plan. So the
15 black dot represented the enacted plan.

16 So the first black dot, the most
17 Republican district, is the second District of
18 New Mexico. Partisanship about 53 percent. This is
19 presidential. The second-most Republican district is
20 District Number 3. Be then the most Democratic
21 district, the one plotted on the far right is District
22 Number 1.

23 And so you can now compare the most
24 Republican -- your can compare the range of most
25 Republican districts in this partisan neutral ensemble

1 to what the map makers produced.

2 Q. Talk about printer problems, there's
3 3 million dots on this page?

4 A. Yes.

5 Q. Okay. So how do you -- what do you do? I
6 think maybe -- what is it, Page 48 -- no, Page 49 I
7 think is your solution to how to show millions of
8 dots. And maybe you can explain this a bit.

9 A. Yeah, so one problem you get with -- when
10 you get to, like, through million dots, is that you
11 get over-plotting, right. You just get a blob like
12 you see here because it's trying -- even small dots
13 will fill up a page pretty quick. So this is another
14 way to display the data. It is not as intuitive at
15 dot plots.

16 But on Page 49, you can see box plots.
17 And so the way you read the box plot, there's four
18 things you need to know, the first is that the black
19 line is the median. Okay? The middle of the
20 distribution. So even though you have this, like,
21 basic blob that runs from 40 percent Democratic to 55
22 percent Democratic, the middle of it, it's not the
23 average, it's the middle of the distribution, is about
24 43 percent Democratic, for the most we public can
25 district, as opposed to 53 percent for the enacted

1 plan.

2 The box that is formed around that line,
3 50 percent of the dots are contained in that box.

4 Okay? So that's the middle half of maps that were
5 drown. Again, nowhere near what the enacted plan came
6 up with.

7 Those little lines that one up and down
8 are called whiskers. Okay. Those whiskers
9 represent -- there's a formula for calculating them
10 based off of the (inaudible) range, but the whiskers
11 represent maps that are outside that middle 50 percent
12 but weren't really all that unusual. And then the
13 dots represent out -- statistical outliers.

14 And so what this tells us is that -- you
15 know, you can intuit it District 1 being ten points
16 more Democratic than you would expect to get from a
17 politics neutral draw. That first district is an
18 outlier. Same thing with the second district. Same
19 thing with the third district.

20 And what's really important is the way
21 that those outliers occur. The Republican leaning
22 district is made much more Democratic. The two
23 Democratic districts are made more Republican
24 outliers, but not so Republican that they crossover
25 and become a Republican voting area.

1 This is some that Professor Herschlag
2 called the -- well, I have the exact quote written
3 down. I've used term the DNA of the gerrymander.
4 He's called it something very similar. This is what
5 you get when you're gerrymandering a map. Your taking
6 Republican areas and combining them with Democrats to
7 make it more Democratic. You're taking Democratic
8 areas and wasting republican votes to make them more
9 Republican.

10 Q. And I think that quote is on Page 50.

11 A. I was close, yes. He called it's the
12 signature of gerrymandering.

13 Q. Okay. And what you said, does this pattern
14 reflect the cracking on Democrats -- I'm sorry, the
15 packing of Democrats and cracking of Republican
16 districts?

17 A. So this is a map where Republican votes /RA
18 cracked. So yes, by taking the Republican votes and
19 spreading them out on multiple districts by cracking
20 the Republican vote in the most Republican area of the
21 state, splitting it up between three districts, the
22 Republican vote share is diluted. And then when you
23 place those Republican partisans into the Democratic
24 area, it does dilute the Democratic vote so much, but
25 not so much that they won't almost always elect

1 Democrats. That's why all three districts have been
2 carried by ten statewide deck accurate particular top
3 of the ticket office holders now since 2016.

4 Q. So can we -- I don't want to ignore the
5 gerrymandering index us because I like it. Can we go
6 back to 46, then, and tell me what this is showing?

7 A. So the big problem that people who have
8 tried to attack political gerrymandering get faced is
9 the question, okay, how much gerrymandering is too
10 much. That's what tripped up to five justices in the
11 Rucho majority.

12 And the gerrymandering index actually
13 gives us an answer to that. Because what you can do
14 is you can say -- and it's a little bit easier to see
15 this based off the box plot.

16 Q. Yeah.

17 A. So for District 1, we're going to look at
18 the middle map's partisanship for the Republican
19 district is. I think we set it somewhere around
20 44 percent Democratic. And so the first map in the
21 ensemble was -- we'll just call it 46 percent
22 Democratic. Okay. That's a miss of 2 points. Okay?

23 And then maybe the second district, the
24 middle district, actually ended up on the nose, right
25 on the middle of the distribution. So not a miss.

1 And then the third district, we'll say
2 it ended up 3 points off -- well, it would have to be
3 2 points off, so that's another 2 point miss.

4 So you have a 2 point miss, a zero point
5 miss and a 2 point miss. Square those two, 4 points
6 of miss, you add them together, 8. You take the
7 average. On average, that would be 2.6 points of miss
8 for the districts. And that's your gerrymandering
9 index. Okay?

10 You do that for all million maps in the
11 distribution, and what you ends up with are all
12 million maps in the ensemble. And what you end 1 is
13 this histogram on Page 46, which will give you a
14 summary of your million maps in the index. And how
15 many of them had a gerrymandering index of however
16 many points. So you can see the X axis on this with
17 you gerrymandering index of zero, gerrymandering index
18 of .02, gerrymander index of .04. And then their
19 plotted at 500th of a point in intervals. So each one
20 of these lines is the count of maps in our ensemble
21 that had a gerrymandering index of a given score.

22 Well, that's not so interesting, in and
23 of itself. What's interesting is you then calculate
24 the gerrymandering index for the enacted plan. And
25 you compare it to the gerrymandering index for the

1 ensembles. And as it turns out, the gerrymandering
2 index for our first set of maps is greater than almost
3 all of the maps in the ensemble. You can use, if we
4 want, a hard cutoff. We can say that it is, you
5 know -- the traditional cutoff in political science is
6 5 percent. And it is definitely more extreme than
7 95 percent of the maps in our randomly generated
8 ensemble.

9 And that's how we differentiate between,
10 say, Justice Kagan's run of the mill use of politics,
11 and extreme gerrymandering, something that that is far
12 outside from what you would expect from a party that
13 was drawing a map and not relying heavily on the
14 political data.

15 Q. And do others in your field endorse this
16 gerrymandering index method?

17 A. Yes. It was actually used by McCartan and
18 Imai to illustrate their sequential Monte Carlo
19 simulations. And it was developed in paper that had
20 multiple authors, (inaudible) in 2017.

21 Q. Okay. Your figures on Page 51, 52 and 53,
22 these look like more gerrymandering -- another
23 gerrymandering index in box plot and dot plot. Can
24 you explain what these are?

25 A. So if you got that basic story down, the

1 rest of the report is (inaudible) straightforward. So
2 just -- the next iteration is okay, let's look at
3 those simulated maps. But instead of using the
4 presidential vote share as our measure or partisan
5 share, let's use our index of ten raises as the
6 measure or partisan share. And if you do that, the
7 story doesn't change. It's still an extreme
8 gerrymander far beyond to distribution that's
9 generated from a politics neutral draw.

10 And then, if you look on pages 52 and
11 53, you see the dot plots and the box plots that tell
12 the same story about the maps being outliers in the
13 districts that are gone.

14 Q. All right. So moving on, on Page 54, you
15 explain a second set of analyses that you did, where
16 you froze or locked certain lines. Can you explain
17 that for us?

18 A. That's right. So we know that the map
19 drawers did not draw on a blank slate. You know, the
20 maps that we've seen so far, start with just a field
21 of 1800 precincts or however many there are. But
22 that's not how this map turned out, right. For the
23 most part, the cores of districts will retain intact.
24 For all of the moving of partisans that occur, these
25 districts still kept about 500,000 of their original

1 residents.

2 So the next analysis, what -- that'll
3 take place, is okay, let's take account of this
4 political course. Let's look only at the precincts
5 that the legislature decided to swap and see how
6 likely it is that someone who are just going to play
7 with the precincts that the legislature has decided to
8 play with, how likely is it that you whether ends 1 a
9 partisan outcome that the legislature ended up with?

10 And these are even more extreme. So if
11 you're not just drawing on a blank slate, if you're
12 only looking at the precincts that the legislature
13 moved around. It's incredibly unlikely that you would
14 have ended up with a map that looked like this one.
15 None of the million simulated maps have the
16 gerrymandering index that the enacted plan does.

17 And, again, we're -- we're granting the
18 legislature 500,000 people in every district. Put
19 them in the same district that you put them. We're
20 only going to look at the precinct that you moved
21 around. The odds of combining those precincts that
22 you moved around, that the legislature moved around,
23 and coming out with the partisan outcome that they
24 ended up with, mind-blowingly small. You can look at
25 the dots on 56.

1 You know, when we're drawing out a blank
2 slate, some of the dots fell within our box plots and
3 our dot plots. Not now. That first district is way
4 more Republican than any of the districts created by
5 the neutron ensemble, just looking at the precincts
6 that were actually moved.

7 Q. Did you just say way more Republican?

8 A. Probably not, but I meant way more
9 Republican -- it way more Democratic.

10 Q. Yeah.

11 A. I probably did say way more --

12 Q. I think you did.

13 A. That second district which is the most
14 Republican district, is way more Democratic than what
15 you would normally get when you're just looking at the
16 precincts that the legislature moved between the 2012
17 to 2020 map and the 2022 map.

18 Q. Okay. And then you have maps at 58, 59 and
19 60.

20 A. So this is the same set of maps. Except
21 instead of looking at the presidential election, we're
22 looking at our index of ten statewide races. And it's
23 the same story. The gerrymandering index is an
24 extreme outlier. The dot plots that -- the most
25 Republican district, the second district, is way more

1 Democratic than anything drawn by the politics neutral
2 maps. The box plot shows the same thing.

3 Q. All right. And you did additional
4 simulations to that. I think you explained that on
5 Page -- or starting at least on Page 61, with voter
6 registration data. Can you explain that a little bit?

7 A. Okay. So we've looked a lot at the
8 political outcomes. But Justice Kagan had also
9 mentioned voter registration data as a statistics. So
10 I ran another set. Ideally, I would have just been
11 able to take the voter registration data and put it
12 on, but I didn't watch it up until after the fact, so
13 I -- after I'd run the set of -- the first 2 million
14 simulations, so I matched up the registration data, I
15 ran 10,000 more simulations. And I used registration
16 as the measure of partisanship. Of.

17 And it's the same story. The maps that
18 are drawn are beyond that -- they have more of an
19 overlap, but we're still in a situation where only
20 2 percent of ensemble maps have larger gerrymandering
21 indices than the enacted plan. And when you look at
22 the dot plots on box plots, that second district, the
23 most Republic district in the state is more Democratic
24 than almost all the maps were drawn. It presents as
25 an outlier on the box plots?

1 Q. Okay. And Page 67 then you explain another
2 comparison you did. Can you detail that a little bit
3 for us?

4 A. So actually, the maps between -- I should
5 have said this, but the ones between 65, 66 and 67,
6 just like I looked at only the precincts that were
7 swapped, using presidential data and the ten statewide
8 maps, I looked at the -- only the precincts that were
9 swapped using the registration advantage, the data
10 tell the same story.

11 Now, on Page 67 -- so not only do we
12 know that the cores of the previous enacted districts
13 were largely maintained, but it appears, at least,
14 that the core of Citizens Plan H were also maintained.
15 There are only about 166 precincts swapped between
16 Citizens Plan H and the enacted plan. Okay?

17 So we wanted to evaluate what those
18 changes really mean. And so on Page 68, this is
19 similar to the table that I created earlier, showing
20 the movement of partisans from the previous plan to
21 the new plan. This shows the movement of partisans
22 from plan H to the enacted plan by district. And so
23 you can see on net, the partisans that were moved out
24 of Citizens Commission H into district -- Citizens H
25 District 1 into District 2 were 55 percent for Joe

1 Biden. And the partisans that were moved out of
2 District 2 into District 1, so out of the second
3 district, were almost 60 percent Donald Trump.
4 They're 59.1 percent Donald Trump voters.

5 So the voters that were moved out of 1
6 into 2 were Biden voters. The voters that were moved
7 out of 2 into 1 were Trump voters. If you compare
8 Citizens Commission H District 2 with the -- I'm
9 sorry, with Citizens H, Citizens Commission H
10 District 2 into the enacts plan, District 3, 34.1
11 percent Biden vote share. The voters that were moved
12 from District 2 into the citizens plan to the final
13 plan voted overwhelming for Donald Trump, 65.9 percent
14 of the two-party vote.

15 The voters that were moved out of three
16 into District 2 were a bit -- were swing here. They
17 were 51 percent for Joe Biden. But, again, these
18 voters that are 51 percent Joe Biden were replacing a
19 cohort of voters that were overwhelmingly in favor of
20 Donald Trump. So even from Citizens Commission H to
21 the enacted plan were citizens that were moved. It
22 was the same story. Move Republicans out of District 2,
23 move Democrats out of District 1 and 3 into
24 District 2.

25 And the next page, 69, shows the same

1 story, but with party registration. The registered
2 voters moved out of 1 into 2, were 61 percent
3 Democratic. The registered voters moved of 2 into 1
4 were 49 percent Democratic. The registered voters
5 moved out of 2 into 3 were 39 percent Democratic. And
6 the registered voters moved out of 3 into 2 were 48
7 percent Democratic.

8 So the movement of registered voters at
9 qualitative level, even setting the simulations aside,
10 tells them are remarkably consistent story over
11 multiple looks.

12 Q. So what about the figures following that? I
13 think 70, 71, 72.

14 A. So this was inspired on the simulations that
15 were run on just the precincts that were swapped
16 between the old lines and the new lines. This is the
17 simulations run only on the precincts that were moved
18 from Citizens H to the enacted plan.

19 It takes -- if it was in citizens 1 --
20 Citizens H in District 1, all those voters were kept
21 in the enacted plan District 1. All those voters were
22 kept together.

23 If it was in Citizens H District 2 and
24 in the enacted plan District 2, all those voters were
25 forced to be kept together. If it was in Citizens H

1 District 3, and the enacted plan District 3, those
2 voters are forced to be kept together.

3 The only voters that are allowed to move
4 are the voters in those precincts that were, in fact,
5 swapped between H and the final version.

6 So the question is, okay, just moving
7 these if you precincts around, how likely is it that
8 you would end up within a map that would look like the
9 enacted plan if you weren't pay attention to politics?
10 And the answer once again is exceptionally unlikely.
11 None of the resulting maps, 10,000 maps in the
12 ensemble looked like the enacted plan.

13 This is true if we look at the histogram
14 on Page 70. It's true if we look at the dot plots on
15 Page 71. It's true if we look at the box plots on
16 Page 72.

17 Q. Okay. And while we're discussing the
18 comparison of H to SB-1, I would like you to look at
19 what's already been marked as Exhibit 1?

20 MS. DIRAGO: Judge, do you have Exhibit 1?

21 THE COURT: I do.

22 MS. DIRAGO: I don't think -- I bet you
23 don't.

24 THE COURT: I have a copy (inaudible). Here
25 it is.

1 MS. DIRAGO: Okay. (Inaudible) that?

2 THE COURT: Yeah.

3 MS. DIRAGO: Okay. Yeah.

4 THE WITNESS: Thank you, your Honor.

5 BY MS. DIRAGO:

6 Q. As I said, this is admitted as Exhibit 1.

7 I'd like you to look at the text messages there on the
8 right. And at the top, it says "Senator Mimi Ste." I
9 think it's supposed to say Stewart.

10 Let's see. So Senator Stewart's first
11 text says: What is the number or the designation of
12 the CCP people's map?

13 Do you know what that's referring to?

14 A. Yes. That's Citizens Plan H, I believe.

15 Q. Okay. And the response is H.

16 And then, let me go down -- okay. Then
17 a few texts down, Senator says: We improved the
18 people's map and now have CD-2 at 53 percent DPI,
19 explanation point.

20 Does DPI meaning anything to you
21 (inaudible)?

22 A. I believe that's Mr. -- yes, it does.

23 Q. What does it mean?

24 A. I believe it's Mr. Sanderoff's Democratic
25 Performance Index.

1 Q. Okay. And then two boxes down, let's see,
2 the person whose messages these are says: We didn't
3 have -- that's good. You're using Sanderoff owes DPI,
4 right? We didn't have the benefit of that. And CEC
5 gave them at 53 percent, but their methodology is too
6 generous, Brian is better. Biden got 51 percent on
7 our map, and MLG 53.7 percent.

8 Do you know who MLG is?

9 A. I am guessing that is the governor.

10 Q. And then she says: Who takes the hit?
11 What's your map DPI for CD-1 and CD-3. There's only
12 so much DPI to go around, you know.

13 Does that mean anything to you, as an
14 expert in the field of redistricting and
15 gerrymandering?

16 A. Yes. That's similar to -- have I been
17 tender as that?

18 Q. I'm sorry?

19 A. Have I been tender as that?

20 Q. How? What? Have you -- oh, you know, I
21 haven't tender you I guess because of everything that
22 happened I maybe have not tender you as a witness,
23 although you've been accepted as a witness.

24 THE COURT: Yeah, I did not know -- I
25 thought it sounded like you all has been agreed upon

1 this beforehand. But there has been no tender at
2 this time.

3 MS. DIRAGO: Okay. Well, I would like to
4 tender Mr. Trende as an expert in election analyses
5 and redistricting?

6 THE COURT: Sir, comments?

7 MR. WILLIAMS: To the extent it relates to
8 the qualitative portion of his testimony, there's no
9 objection. To the extent that it relates to Section
10 6.41 and 6.42, yes, your Honor.

11 THE COURT: Okay. Well, I will -- based on
12 upon his testimony and his background, I will declare
13 him an expert in the area of -- say it again.

14 MS. DIRAGO: Elections analyses and
15 redirecting.

16 THE COURT: Elections analyses and
17 redistricting.

18 A. So yes, as an expert in elections analyses
19 and redistricting, that last sentence, there's last
20 sentence, "There's only so much DPI to go around, you
21 know," is exactly what I was talking about when I said
22 that in a Democratic leaning swing state, you have
23 your ideal gerrymander, and then there's some robbing
24 Peter to pay Paul that inevitably happens the more you
25 deviate from that.

1 So if we were going to raise the
2 Democratic performance of District 2 it's going to
3 come from someone else.

4 Q. Then Senator Stewart says: Sanderoff's DPI
5 for your Map H is 51.8 percent. That's not enough for
6 a midterm election, so we adjusted some edges, scooped
7 up more of Albuquerque and are now at 53 percent.
8 CD-1 is 54 percent, CD-3 is 55.4 percent.

9 Does that comport to what your data
10 found has happened in between -- in your comparison of
11 Map H and SB-1?

12 A. Yeah. I hadn't seen this when I did my
13 analysis, and I was kind of surprised, because that's
14 exactly the story that the data tell, that they made
15 District 1 and District 3 somewhat more Republican,
16 but not so Republican that's they're going to start
17 electing Republicans.

18 District 2 is taken and made even more
19 Republican -- or made for Democratic. And it's just
20 exceedingly unlikely that this happens by chance. The
21 only way this happens is by intentionally moving
22 Democrats and Republicans around to achieve this
23 partisan goal.

24 Q. All right. And if you turn back to Page 72
25 of your report to round out what you did with your

1 simulations, can you tell us what you did with the
2 Indian reservations there?

3 A. So the last thing I did was to keep Indian
4 reservations intact, run the simulations, see if it
5 was any different. And the answer is no, it's the
6 same story. The map presents as an extreme outlier.

7 Q. So you testified that you read Dr. Chen's
8 expert report in this case. Did you know Dr. Chen
9 before the case?

10 A. Yes.

11 Q. Do you remember Dr. Chen's expert conclusion
12 in this case?

13 A. I think he believed it was not a
14 gerrymander.

15 Q. Actually, I don't believe he did opine on
16 whether it was a gerrymander or not. But do you
17 know -- did defendant's expert, Dr. Chen, create
18 simulated maps, as well?

19 A. Yes, yes. He ran simulations using his own
20 algorithm.

21 MR. WILLIAMS: Objection, your Honor. Goes
22 beyond the scope of the expert report.

23 MS. DIRAGO: I don't see why he has to be
24 confined to the expert report. There is about their
25 expert's report.

1 THE COURT: Yeah. Is that not correct?

2 MR. WILLIAMS: It hasn't been disclosed, his
3 opinions, (inaudible). This is the first time we're
4 hearing about them right now.

5 MS. DIRAGO: Well, that's not true. But
6 also, he can testify to your expert did in his
7 report. That's exactly why we hired him.

8 THE COURT: Yeah. I mean, would that not be
9 correct? Wouldn't your expert also testify about his
10 opinion about Mr. Trende's report?

11 MR. WILLIAMS: We'll see what he says. If
12 you let him testify about my guy, we'll see what he
13 has to say about his testimony about my guy's work.
14 But we designated Dr. Chen for a very narrow purpose.
15 We designated Mr. Trende for a very narrow purpose.
16 And we got a report. And this goes beyond the scope
17 (inaudible).

18 MS. DIRAGO: I don't think there's any
19 reason why he has to stay in the scope of his report.
20 We both hired experts that did very similar analyses,
21 except there was one glaring difference that I'd like
22 my expert to discuss.

23 There's no way that you're going to hear
24 testimony about Dr. Chen to decide his credentials or
25 to decide what he did, how -- how it's going to

1 inform your opinion without hearing what my expert
2 has to say about that. It's very technical stuff.

3 MR. WILLIAMS: Your Honor, they haven't
4 designated him for this purpose. There's nothing in
5 the report that says he would be offering additional
6 testimony about my client's -- or my expert's
7 opinion. This testimony goes beyond the scope of the
8 report. The report was supposed to be complete. And
9 this goes well beyond.

10 THE COURT: All right.

11 MS. DIRAGO: There was no agreement here.
12 Nothing like that has been agreed on or set by your
13 Honor. That's just...

14 THE COURT: I agree. I don't think that
15 he's limited. I think he's been called as an expert
16 in this entire area, and I think that it's very
17 reasonable that he would look at other reports that
18 are going to come into evidence and be able to give
19 his opinion on those.

20 MS. DIRAGO: Okay.

21 BY MS. DIRAGO:

22 Q. So we're talking about traditional
23 redistricting criteria. Did you look at the criteria
24 that Dr. Chen used to create his simulated maps?

25 A. I did.

1 Q. Was there anything there that gave you
2 concern?

3 A. In particular, there's constraints set --
4 it's explicit in his report. But it's in his code
5 that sets it so that no district can have more than
6 60 percent of the oil wells in the state within a
7 single district.

8 Q. Okay. Hold on just a second (inaudible).

9 MS. DIRAGO: May I approach, your Honor?

10 THE COURT: Yes.

11 BY MS. DIRAGO:

12 Q. Do you know what this document is showing?

13 A. This is a summation that I did showing the
14 number of -- looking at Dr. Chen's produced data and
15 summarizing the number of oil wells in each county,
16 active in each county.

17 Q. And how did you create this chart?

18 A. In the R programming language.

19 Q. What data did you use to create it?

20 A. Dr. Chen's.

21 MS. DIRAGO: Your Honor, I move to admit
22 this as Plaintiffs' Exhibit 3.

23 MR. WILLIAMS: Your Honor, I'll object to
24 this being admitted. It does not purport to show
25 what Mr. Trende purports it to show. And I would

1 like the opportunity to cross-examine Mr. Trende with
2 regard to this exhibit.

3 MS. DIRAGO: You absolutely can
4 cross-examine him on that. I've laid the foundation.
5 There's no reason why it shouldn't be admitted.

6 THE COURT: Okay. The foundation is -- are
7 you saying you got this information from Dr. Chen's
8 report?

9 THE WITNESS: From his data.

10 THE COURT: His data?

11 MS. DIRAGO: And if you read like me to ask
12 him a couple more questions on how he extracted that?

13 THE COURT: Sure.

14 BY MS. DIRAGO:

15 Q. So how did you extract this data?

16 A. So there's a column in one of Dr. Chen's
17 spreadsheets. So he bases his simulations on a
18 shapefile, which is a special type of spreadsheet that
19 also has geographic coordinates for all of the
20 precincts in the database. It's what you use for the
21 creation of maps.

22 And there's a column in it that has the
23 number of oil wells in each precinct and so you can
24 sort it by county on this column for active or
25 inactive. You can sort it by county. You can then

1 summarize by county and take the total?

2 Q. And, Mr. Trende, I'm probably going to get
3 the exact language wrong. But did Dr. Chen provide
4 you the information to create this map, this chart?

5 A. It comes off of his data.

6 Q. Okay.

7 THE COURT: All right. I'll allow this to
8 come in. Obviously you can question him about its
9 relevance when you cross-examine him.

10 BY MS. DIRAGO:

11 Q. Okay. So what I see here, the counties, as
12 you said, on the left. And then what is the second
13 chart under the letter N?

14 A. The number of -- the number of wells in each
15 county.

16 Q. Oil wells?

17 A. Yes.

18 Q. And then on the third column, what is that
19 showing us?

20 A. That's the percentage of the statewide
21 total.

22 Q. Okay. And, again, was this programmed into
23 Dr. Chen's allege algorithm when he was creating
24 simulated maps?

25 A. He programmed it so that none of his -- so

1 that none of the districts in his map would have more
2 than 60 percent of the state's oil production
3 facilities active.

4 Q. Okay. No more than 60 percent. I see Lea
5 and Eddy, and there's percentage numbers there. Does
6 that add up to more than 60 percent?

7 A. Yes.

8 Q. Just barely, right?

9 A. Yep.

10 Q. So what does that mean, if somebody
11 programmed this into their code, creating simulated
12 maps, what would the effect be?

13 A. So if Lea and Eddy County were ever wholly
14 combined in a district, that district would have more
15 than 60 percent of the state's active oil production
16 and the district would be rejected. It ensures that
17 Lea and Eddy County would be placed in different
18 districts.

19 MS. DIRAGO: Okay. And I -- I'm sure the
20 Court is familiar, but I would like to just show you
21 this. And I need to admit this one into -- oh, I'm
22 sorry. Can I approach?

23 THE COURT: Yes.

24 MS. DIRAGO: I don't need to admit this into
25 evidence. But I think it would just be helpful

1 (inaudible).

2 BY MS. DIRAGO:

3 Q. And this was taken directly from defendant's
4 expert's report, and he purports it to be a map of the
5 2011 map for New Mexico. Does that comport with what
6 you think it is?

7 A. Yes.

8 Q. Okay. So it's -- show for the record where
9 Lea and Eddy County are? Or tell me for the record
10 where they are?

11 A. So Lea County is in the far southeast of
12 New Mexico, the extreme Southeastern New Mexico
13 region, and Eddy County is just to its west.

14 Q. Okay. So you're saying that when Dr. Clean
15 created a thousand maps, Lea and Eddy has to be in
16 different congressional districts for every one of
17 those thousand maps?

18 A. That's correct.

19 Q. Have you ever seen a redistricting criteria
20 like this?

21 A. I've never seen an industry request to be
22 split up between districts before, no.

23 Q. Did you look at Dr. Chen's maps to see, in
24 fact, if every one of those maps had Lea and Eddy in
25 different counties -- different districts?

1 A. I did.

2 Q. And did you find that that was true?

3 A. It is true.

4 Q. Dr. /TREP, are you -- I'm sorry, Mr., soon
5 to be doctor, are you an expert -- are you doing
6 expert work in Texas right now?

7 A. I am.

8 Q. Is the oil industry important in Texas?

9 A. Yes.

10 Q. But you still have never seen a
11 redistricting criteria that split an oil industry like
12 that before?

13 A. Not as an official criteria, no.

14 Q. So in your opinion, does splitting up a
15 community of interest into multiple districts maximize
16 that group's representation?

17 A. Not when it's reduced that much, no. It
18 makes it so the representative or representatives of
19 Southeastern New Mexico aren't as reliant on it. In
20 the process, splitting up, guaranteeing that in every
21 map that's drawn the most Republican area of the state
22 is going to be split up because you can never have Lea
23 and Eddy in the same county. So no matter whams,
24 there has to be a district that comes down and gets
25 Eddy, going into the most Republican area of the state

1 in those simulations. And then there has to be a
2 second district that comes into the most Republican
3 area of the state, event across Lincoln and Chavez,
4 into Lea, and splits that Republican area of the state
5 up. It's guaranteed in those simulations.

6 Q. And what you think that did to his results,
7 by comparing SB-1 to only maps that split Lea and Eddy
8 County?

9 A. It guarantees that there's going to be --
10 that you're not going to get the same type of
11 Republican vote showing as if you didn't have that
12 constraints put into place. If it's not something --
13 it definitely makes the districts that are created in
14 the simulations more Democratic than they would be if
15 you didn't have that constraint in place.

16 Q. And can you tell us, what is the definition
17 of cracking?

18 A. Cracking is when you take a group on you
19 dilute its votes by splitting them up among multiple
20 districts.

21 Q. And is the splitting up of the oil industry
22 in the southeast corner of New Mexico evidence of
23 cracking?

24 A. Yes.

25 Q. Is it evidence of the intent to crack?

1 A. Certainly, especially when you look at the
2 political distribution of voters in the state from the
3 early ages in my report.

4 Q. Is there anything else that you noticed
5 about Dr. Chen's maps that was odd?

6 A. They never split Lea County.

7 MS. DIRAGO: Your Honor, I would like to
8 admit, or at least go over his supplemental
9 affidavit. Mr. Trende, it is not, as defendant's
10 counsel characterizes it, a second report. It is in
11 response solely to concerns that were raised from
12 defendant's counsel. And we never had any kind of
13 agreement to submit to each side every exhibit that
14 we would use at trial. So I don't think that there
15 should be any parameters or any reason what I think
16 bring in that report, at least ask Mr. Trende about
17 the results. It's factual base. There's really no
18 opinions in it.

19 MR. WILLIAMS: Your Honor, we do object. We
20 received this late yesterday for the first time. We
21 haven't had a chance to look at it. It could have
22 been disclosed a whole bunch earlier. It wasn't, and
23 it is, notwithstanding the plaintiffs'
24 characterization of it -- they're saying it's not a
25 supplemental report. It is a supplemental report.

1 It is used to vouch for that report that's at issue.
2 It should not come into evidence.

3 MS. DIRAGO: Well, your Honor, the schedule
4 here has been so truncated. Typically experts will
5 submit rebuttal reports, especially when concerns are
6 raised by the other side. That's what we did.

7 THE COURT: When did you perform this
8 second?

9 MS. DIRAGO: It was in response to -- they
10 filed a motion to exclude him and --

11 THE COURT: Right.

12 MS. DIRAGO: How long did he perform it?
13 Can I ask him? I don't know.

14 THE COURT: When did you perform the second
15 analysis?

16 THE WITNESS: I performed it for the
17 purposes of writing this response towards the end of
18 last week. I don't know when the response was ready
19 to file.

20 MR. WILLIAMS: Your Honor, we filed our
21 motion to exclude Mr. Trende long before they filed
22 their motion to exclude --

23 MS. DIRAGO: No.

24 MR. WILLIAMS: -- Dr. Chen. Yet, we were
25 somehow able to get briefing completed, complete with

1 replies before we got this response yesterday. This
2 is an untoward delay. It's trial by ambush. This
3 exhibit should not come into the evidence.

4 MS. DIRAGO: Your Honor, from the beginning,
5 defendant's counsel has been asking us for more code,
6 more maps, a second deposition. We have complied
7 with everything for the sole purpose of being open
8 and because the work is sound and solid and shows
9 exactly what we say it does. This is -- it's like an
10 affidavit that you would attach to a response,
11 because we got a motion to exclude. This shows that
12 all of their issues in their motion can be put to
13 rest.

14 THE COURT: Well, I've already ruled on the
15 motion, so --

16 MS. DIRAGO: Okay.

17 THE COURT: -- as far as what it -- isn't it
18 really bolstering his testimony?

19 MS. DIRAGO: It would be showing that the
20 second set of maps has the same conclusions as the
21 first.

22 THE COURT: All right. Well, what I'm going
23 to rule right now is that it wouldn't be proper to
24 come in now. It just bolsters his report.

25 MS. DIRAGO: Okay.

1 THE COURT: I understand the defense might
2 question further on that. That seems to be a major
3 part of their objection to his report. And it's
4 possible it can come in later. I think you'd have to
5 recall him as a witness.

6 MS. DIRAGO: Okay. I understand. What
7 about I'm -- well, okay. On redirect, I assume if
8 they question him on it, they would be able to.

9 THE COURT: Depending on the questioning,
10 yes.

11 MS. DIRAGO: Yeah. Okay.

12 BY MS. DIRAGO:

13 Q. Okay. Mr. Trende, after completing your
14 qualitative and simulation analyses on SB-1, in your
15 expert opinion, did the drawers of SB-1 intend to
16 gerrymander the congressional plan in order to benefit
17 their own political party?

18 A. Yes.

19 Q. And as an expert in the field of elections
20 analysis and gerrymandering, in your expert opinion,
21 do you hold any doubt that the effects of that
22 gerrymander have and will continue to benefit the
23 Democratic party and disadvantage the Republican
24 Party?

25 A. No doubts. I absolutely believe that.

1 Q. And in your expert opinion, did that
2 gerrymander entrench the Democratic party in power in
3 the second congressional District of New Mexico?

4 A. Yes.

5 MS. DIRAGO: Okay. Then I have no further
6 questions.

7 THE COURT: All right. I expect contraction
8 will be lengthy.

9 MR. WILLIAMS: You might be right, your
10 Honor.

11 THE COURT: So it being 5:15, I propose we
12 come back tomorrow morning.

13 About how many more witnesses do the
14 plaintiffs have, do you think.

15 MS. DIRAGO: This is it.

16 MR. HARRISON: Well, depending on what
17 happens with the adverse legislators.

18 MS. DIRAGO: Oh, right.

19 THE COURT: Okay. I want to suggest we want
20 to get an earlier start. We start at 8:30.

21 MS. DIRAGO: That's fine with me.

22 THE COURT: If that's all right.

23 MS. DIRAGO: I'm on Central time, so that
24 works.

25 THE COURT: Just so that there's enough time

1 to get everything in. I know we have three days, but
2 just to make sure.

3 MS. DIRAGO: I think that's fine.

4 THE COURT: Okay. All right. So we'll
5 (inaudible) recess, and everybody be back here ready
6 to go 8:30.

7 MS. DIRAGO: Thanks judge.

8 (Proceedings adjourned at 5:16 p.m.)

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1 RE: REPUBLICAN PARTY OF NM, et al. v.
2 TOULOSUSE OLIVER, et al.

3 REPORTER'S CERTIFICATE

4 I, PAUL BACA, CCR #112, DO HEREBY CERTIFY
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1 STATE OF NEW MEXICO
2 COUNTY OF LEA
3 FIFTH JUDICIAL DISTRICT COURT

4 REPUBLICAN PARTY OF NEW MEXICO,
5 et al.,

6 Plaintiffs,

7 v.

Case No. D-506-CV-2022-00041

8 MAGGIE TOULOUSE OLIVER,
9 et al,

10 Defendants.

11
12 **TRANSCRIPT OF PROCEEDINGS**

13 **September 28, 2023**

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17
18 HEARD BEFORE:

19 THE HONORABLE FRED VAN SOELEN

20
21 TRANSCRIBED BY:

22 PAUL BACA PROFESSIONAL COURT REPORTERS
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25 **Unless provided, spellings of all names
are phonetic.

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FOR THE LEGISLATIVE DEFENDANTS:

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1 **TRANSCRIPT OF PROCEEDINGS**

2 THE COURT: Go ahead and be seated. Thank
3 you.

4 Mr. Trende, you can go ahead and -- is
5 there anything we need to take care of beforehand?
6 Okay. Let's -- let me get.

7 MR. HARRISON: Yes, your Honor. We were
8 just hoping to get an update on the document
9 production and the production of witnesses.

10 THE COURT: Okay. All right. So we are
11 back on the record in Lea County Cause Number
12 CV-22-041.

13 As far as the documents, Ms. Sanchez?

14 MS. SANCHEZ: Yes, thank you, your Honor. I
15 have several updates for the Court and plaintiffs'
16 counsel.

17 One, just wanted to close to loop on the
18 declaration from Raul Burciaga about Leann Leith. We
19 did provide that to the Court and plaintiffs' counsel
20 yesterday afternoon. I think that clarifies that on
21 the legislative session on redistricting, she was an
22 employee of the legislature.

23 She was paid by the legislature. She
24 had a title, I think, that was -- find it. Her
25 position was leadership analyst, and she had an

1 office in the roundhouse during that time. I think
2 that that captures the information that the Court
3 wanted some clarity on in terms of Ms. Leith's role.
4 I think it clarifies that she was not sort of an
5 outside advocate, outside of the process, but rather
6 was an employee of the legislature in that position
7 engaging in work on behalf of the legislature.

8 THE COURT: Mr. Harrison.

9 MR. HARRISON: Yes, your Honor. So, of
10 course, we're not waiving our original position.

11 THE COURT: Right.

12 MR. HARRISON: But under the Court's order,
13 we accept that. Now, that's still -- that puts her
14 within the privilege group, but we would still gets
15 her communications with outsiders, but just not with
16 Brian Egolf, et cetera. Your Honor, insiders to the
17 privilege is our understanding of what that means.
18 But we accept -- we don't like it, but we accept it.

19 THE COURT: Okay. All right. Ms. Sanchez.

20 MS. SANCHEZ: And we agree with that same
21 analysis. So we have been endeavoring to do, your
22 Honor, is burning the midnight oil to make sure we
23 get this done as quickly as we can. We know the
24 Court's on a tight time frame, and we want to
25 accomplish that as much as we can.

1 So we have -- let me just pull up thank
2 you right thing here. Sorry.

3 Okay. So -- and my understanding, based
4 on our discussions yesterday, is we're focusing on
5 the trial subpoenas, the document requests within
6 those trial subpoenas. I do have confirmation that
7 the -- those subpoenas have been served on three
8 legislators and Ms. Leith. Mr. -- Senator Cervantes
9 has not been served. He has been traveling out of
10 town or out of state for a week or two now. But the
11 others have been served.

12 The contours under the Court's ruling of
13 the legislative privilege, we've been looking at how
14 we can identify category -- documents that are
15 responsive within that category, sort of
16 communications with members of the public, using that
17 term the Court used generally, and trying to figure
18 out how we can do searches of those for these
19 individuals as quickly as possible to make production
20 as quickly as possible.

21 We have gathered, so looking at just the
22 year 2021, which was the redistricting year, the
23 total number of e-mails. So at the legislature,
24 there's a centralized IT person, department. And
25 they have administrative access. So without having

1 individual legislators have to actually go into their
2 e-mail accounts, which they may or may not know how
3 to do, the IT department can do that.

4 So the IT department has pulled the
5 e-mails for these individuals for 2021. That's over
6 32,000 e-mails total that would need to be searched.

7 What I am proposing to the Court, and,
8 again, this is keying off of the terms that are in
9 the plaintiffs' trial subpoenas, is that we use
10 really all or most of all of the search terms that
11 are included in those subpoenas. I'm just going to
12 get one in front of me for reference. And looking at
13 the legislative process, trying to define that, so we
14 have a date range that we don't have to search the
15 entire calendar year. Because I think that's -- it
16 would help to hone it down a bit.

17 If we use July 1st of 2021 as our
18 starting point, that's when this CRC really began its
19 work, sort of in that role with the interim
20 legislative committee having meetings, developing
21 plans, and then through the date of passage of SB-1,
22 which is on December 11th, 2021.

23 So we take that July one to December
24 11th, 2021, time frame, apply the search terms that
25 are contained in the plaintiffs' subpoena for, you

1 know, the -- I guess they call they'll bullion search
2 terms, but they're just word searches that you
3 conduct on the e-mails. And we would apply the same
4 thing to the -- to text messages, same date range,
5 word searches, to the extent you can search for text
6 by words.

7 The one problem that we're running into
8 as we've started applying these things overnight, and
9 one problem that we're running into is that some of
10 these are pretty overinclusive. Given the Court's
11 ruling on sort of which communications -- because
12 we're obviously going to be pulling up a lot
13 communications that are privileged and then having to
14 sort through that.

15 So what would help that process is if we
16 can identify individuals we're looking for
17 communications with. And those subpoena lists,
18 several of them that fall sort of into the Court's
19 category, and that would be the congresswoman from
20 CD-1 and CD-2, Stansbury and Leger Fernandez, their
21 respective staff people, I guess, Scott Forrester and
22 Kyra Ellis-Moore. And then there's an individual who
23 I believe is with Center for Civic Policy, Oriana
24 Sandoval is listed.

25 And so if we can use that list that's in

1 the subpoena as sort of the to/from list, then that
2 would be helpful.

3 And I'm just trying to be very
4 transparent and concrete with the Court about what
5 we're proposing to do. I don't -- I want to make
6 sure that we're doing everything we can to fulfill
7 the Court's order and to do it as quickly as we can
8 to get documents to plaintiffs' counsel before any
9 final submissions go to you, before you have to make
10 your decision.

11 THE COURT: Okay.

12 Mr. Harrison, as far as -- how do you
13 proposal that...

14 MR. HARRISON: Yes, your Honor. So the
15 time -- we had picked a couple of time frames, but we
16 would be willing to accept the start date of July
17 1st. I think one of -- we have three time frames,
18 but we'd be willing to forfeit the other two and use
19 our July 1st.

20 Now, we had our December 18th, which I
21 believe is the governor's signature date. And I
22 think the date quoted by Ms. Sanchez was the passage
23 of the legislature.

24 We'd ask for the 18, just because we
25 presented the Court with an e-mail from Senator

1 Cervantes that was immediately after passage.

2 THE COURT: December 18th, 2021?

3 MR. HARRISON: 2021, yes, your Honor. But
4 that -- we're close on that. And so, you know, if
5 there were -- unfortunately, without a sophisticated,
6 you know, like a third party, you know, IT vendor,
7 this could be done pretty easily, because you just
8 filter out -- you know, you list in the legislators
9 and you filter out anything that was exclusively
10 circulated to the legislators. Which here, I think,
11 probably the easiest way would be to eyeball it. Our
12 subpoenas, I do want to -- I don't know that they --
13 we do want to be avoid being ridiculous overbroad.

14 Now, what they are is they're law. And
15 if you think about it, to use an easy example, saying
16 give me docks that have the words X and Y and Z
17 captures a lot fewer documents that say give me all
18 the documents that capture X, right? But it's a
19 longer subpoena. And that's kind of what we have
20 with our subpoena.

21 We'd will willing at this point to
22 reconfigure and to give them something shorter. I
23 mean, we can keep it to a page easily and -- but I
24 don't know that it really is easier in the long run.

25 The only -- I guess actually, my biggest

1 concern from what was proposed, is we individually
2 served legislators as people, and we would like
3 (inaudible) we ask for any type -- you know, text
4 messages, Facebook. I don't necessarily every
5 legislative -- a legislator has four e-mail accounts,
6 to search all four. But they know and they have an
7 ethical obligation in any -- you know, any one a
8 subpoena in any case. They know what they use.
9 Like, they're -- I mean, I work with political
10 figures, and there are some people who always use
11 their campaign account.

12 Jay (inaudible), Jake for New Mexico
13 dot-com. There's some people who will use a personal
14 account set up for that purpose. You'll still run
15 into some older folks who use, like, the prodigy, you
16 know, legacy type accounts. I don't think I've ever
17 known anyone, I'm sure I can't think of anyone that I
18 transact my business with who uses their legislative
19 account probably because it is, as we learned in one
20 of the depositions of the IT people, they do conduct
21 IPRA searches of those periodically.

22 And so, you know, we would ask for each
23 legislator to go through. And, again, it doesn't
24 take forever. I ran one of these on mine. I may be
25 for tech savvy than the average legislator. And it

1 takes an hour. That didn't include -- that included
2 just doing the searches, not pulling the documents
3 over to a file. That wouldn't take that long either.

4 But, you know, we would ask that
5 legislators check their text messages, check the
6 e-mail accounts they know they use to conduct that
7 type of business. And, like I said, we can simply
8 this, and we'd certainly be willing to keep it to a
9 single date range to July 1st to December whatever,
10 whichever date the Court decides is the relevant
11 date, legislative passage or gubernatorial signature.
12 But we would ask for each legislator to make a
13 decision based on what they know they use. Right?

14 And for some that will be -- I'm totally
15 fine if, you know, a legislator who knows that they
16 don't have a text, you know, about politics, doesn't
17 check their text. But a legislator who does, should
18 check their texts and produce any text messages that
19 are responsive and non-privileged on the Court's
20 ruling.

21 THE COURT: All right. Did I hear earlier
22 that they -- you've already had them run a search and
23 there's thousands?

24 MS. SANCHEZ: So we're -- we've already
25 pulled the sort of universe of potential e-mails on

1 the legislative e-mails account, and there are --

2 THE COURT: Are those just government
3 accounts?

4 MS. SANCHEZ: Just in the legislative
5 account. That's the only one we have a centralized
6 IT for.

7 THE COURT: Okay.

8 MS. SANCHEZ: And that is the universe is
9 tens of thousands. But I'm confident that applying
10 search terms will narrow that down. Really, we're
11 just kind of in a race against the clock here, your
12 Honor. And really, the more we ask people to do,
13 especially if we're asking legislators to search,
14 some of them, I don't know if it's a gmail or an AOL,
15 or whatever people may have, searching those can be
16 pretty cumbersome and difficult.

17 I don't want to represent that there's
18 been a thorough search be of an e-mail account by an
19 individual who really is not familiar with how to
20 search that. You know, if -- if they can do it,
21 fine. But -- but I'm -- I want to propose something
22 where we are getting -- where we're making this
23 production, you know, no later than Tuesday, and not
24 an as a tight -- that's going to be tight already. I
25 mean, I have people already starting to apply terms.

1 I wanted to get a start overnight, but it's going to
2 be tight already.

3 I do agree. I think we should have
4 folks search their text messages. I'm not objecting
5 to that. I think that the text message searchings is
6 really only feasible if you can -- because you can't
7 do sort of one unified search of all our text
8 messages, at least not very capably when you're
9 searching for things two years ago back.

10 THE COURT: Mm-hmm.

11 MS. SANCHEZ: So if we can narrow that at
12 least to that sort of list of sender and recipients
13 that are contained in the trial subpoena, I think
14 that would make it easier for people to search text
15 messages and try to identify if they have any
16 responsive ones.

17 THE COURT: Okay. And I -- I don't know
18 what the subpoena is directed towards. Is it two
19 certain recipients?

20 MR. HARRISON: So -- and to be clear, are we
21 talking about the six -- the six trial subpoena...

22 MS. SANCHEZ: I think that's certainly what
23 I'm working off of. My understanding is the ship has
24 sort of sailed for the 80 discovery subpoenas. But
25 we're focusing on to be trial subpoenas.

1 For example, in the text message
2 section, I'm looking at one of the legislator
3 subpoenas. In the text message section, it asks for
4 text messages send or received by you, it says,
5 anytime in 2021. But if we're limiting it -- between
6 you and one or more of the following individuals.
7 And then I'll just read the ones that don't fall into
8 the privilege category: Kyra Ellis-Moore, Scott
9 Forrester, Teresa Leger Fernandez and Oriana Sandoval
10 and Melanie Stansbury.

11 So that -- if the -- I think if we -- if
12 we use that list for searching the text messages, I
13 mean, there -- the request goes on to be broader than
14 that. I mean, there's even a request for all text
15 messages during the period of the legislative session
16 that they sent to anybody who is not themselves or
17 immediate family member. I mean, we can't do that.

18 But if we limit to the individuals that
19 are being requested for, I actually think that that's
20 doable and that we can search text messages and
21 produce those.

22 THE COURT: Mr. Harrison.

23 MR. HARRISON: To be clear, the broadest in
24 scope was limited in time to a four-day period, what
25 we thought was the four most likely.

1 I mean, we did craft these with --
2 contemplating the fact that -- like, there are no
3 sophisticated search terms that we've asked to
4 conduct on text messages. We did things like, within
5 this time frame, give us your texts with so and so.

6 And the expectation was, if it happened
7 to be the case that /STPHEUB, you know, texts with,
8 you know, hey, I text with this person all the time,
9 I've got a thousand text messages, okay, sorry, "Can
10 you go in there" -- on an iPhone, for example, you
11 can run a simple word search, and, "Can you give us
12 everything that says district? Or, if you'd prefer,
13 just do a qualitative review and send up everything
14 that related to redistricting. Is that a manageable
15 number of texts?"

16 And that would normally be the type of
17 thing that would get talked about and we're doing
18 with Ms. Ellis-Moore. I expect to have her issues
19 resolved.

20 And, again, I want to both address the
21 situation I know we're at now, which is what's
22 important --

23 THE COURT: Mm-hmm.

24 MR. HARRISON: -- but to also, you know,
25 memorialize my complaint that we served these back in

1 July. The normal expectation is, and, you know,
2 there's case law on this, you collect the documents
3 and you call it a privilege log, call it what Rule 26
4 calls it, which is, you know, a -- shall describe the
5 nature of the documents, communications of things not
6 produced and disclosed in a manner without revealing
7 itself privilege or protected will unable other
8 parties to assess the applicant of the privilege or
9 protection.

10 That's from the rules of civil
11 procedure. You know, that process would have allowed
12 this to go smoothly. And there was more than enough
13 time. We would contend that even given that they had
14 a colorable privilege claim, the reality is that,
15 yeah, having to do everything now, starting on day
16 two of a three-day trial is going to be tough. And
17 we want to -- obviously, we (inaudible) work with the
18 situation that we're at, but not let it escape the
19 Court's notice because we're -- you know, anything is
20 impossible when you wait late enough before the
21 deadline.

22 THE COURT: Okay. And all of that is clear
23 and it's on the record, that you've raised that.

24 As far as practicality, I do have a
25 question about this. What -- you know, I think you

1 were saying by Tuesday you're hoping to have all this
2 done? What is the point of get all this after the
3 trial's over.

4 MR. TSEYTLIN: Well, your Honor, I think
5 with the reality -- with all candor, they should be
6 able to search all their personal e-mail accounts and
7 text messages and introduce everything by tomorrow
8 morning. It's not that hard over a short period of
9 time to search the accounts that we know that we use.

10 This is frankly, an attempt to run out
11 the clock on something that should have been done
12 since July. But I'm very cost you tell five people,
13 "Everything you sent about redistricting in a couple
14 month period, give that, court order, give that by
15 tomorrow morning," we'll get that information.

16 You know, if they have other things they
17 want to produce on a rolling basis thereafter and we
18 can supplement to the Court, that's fine. But I
19 think that there should be an order that by tomorrow
20 morning, at least for the trial deponents, they got
21 to search the personal text messages, e-mail
22 addresses, WhatsApp, Facebook that they use and
23 everything about redistricting to the public as
24 defined in the court, is turned to us by 8:00 a.m.
25 tomorrow, so that when these folks come in, we can --

1 we can ask them things like, "Were you sending
2 messages to other people about this?"

3 Obviously we can't inquire about the
4 contents of the messages they turn over, but we can
5 say, "Hey, you turned over this stuff to us," you
6 know, this person and that person texted this, "Did
7 you text anybody else?" Things of that sort.

8 So that, I think, is imminently
9 manageable. I think it's entirely not credible to
10 say that five people can't look at their commonly
11 used medium of communications in a 24-hour period in
12 order to comply with a court order.

13 THE COURT: All right. As far as the --
14 and, again, I don't know what the subpoena says. I
15 know it's broad. But you're saying that you're
16 willing to narrow it down to certain people they're
17 communicating with?

18 MR. HARRISON: Yes, your Honor. Well, I
19 mean --

20 THE COURT: Well, who are those people?
21 Tell me who they are.

22 MR. HARRISON: I think you're -- your Honor
23 said Lisa Curtis couldn't be asked. So Kyra
24 Ellis-Moore, Scott Forrester. Dominic Gabello is in
25 another gray area. Ms. Leger Fernandez, Oriana

1 Sandoval, and Melanie Stansbury. But -- go ahead.

2 So what my colleague pointed out, so
3 that is a way of doing, quote, unquote, search terms,
4 right? And so when we send it out to a large number
5 of people, the general rule is, if you've got a ton
6 of e-mails, if you do have 10,000 e-mails that are
7 potentially responsible on a given topic, search
8 terms are easier to use than a qualitative
9 description of, "Hey, give me everything that relates
10 to redistricting and mentions in any way political
11 composition." Right? If you have a small number, if
12 you're sitting there thinking, oh, yeah, I texted
13 with two people about this and I remember it, then
14 it's way easier to get a qualitative description like
15 the one I just gave, quote, any communications that
16 that relate to redistrict and mention in any way, you
17 know, the partisan composition of the districts.

18 We would take -- if the later is easier,
19 then we'd take it. Now, my expectation, and you send
20 out 80 subpoenas, is you're going to set at least
21 some people who say, "That's impractical for what I
22 have on my computer and my phone because," whatever,
23 "I was tasked with doing the map drawing."

24 So search terms for some people can be
25 easier, but if it is more manageable for the

1 legislators to do a qualitative search, we would be
2 willing to accept, like I said -- I think probably
3 what I just said, e-mails, text messages, whatever
4 form of, medium of communication you use within the
5 time frame of July 1st to December 18th of December
6 10th, depending on what the Court prefers, that
7 relate to the subject of redistricting and mention in
8 any way the political or election outcome likely mood
9 effect of the new district.

10 And I can clean up that language, but,
11 you know, that mention D v. R percentages or named
12 candidate percentages in connection with the
13 communication. So, I mean, we could probably trade
14 the admittedly far longer subpoenas that -- although,
15 again, I will push back to say they're overbroad,
16 they're just kind of are long.

17 We'd be willing to trade all that for
18 that kind of qualitative, you know, three-prong test.
19 The limited time frame and at -- you know, that you
20 search whatever accounts you use and then search --
21 do just a qualitative search based on a combination
22 of your memory and who you know you talked to and
23 eyeballing the communications and then produce those.
24 And, again, I think if it's conceptualized, the way
25 that we served these subpoenas, which is on

1 individual legislators, it just is not that
2 burdensome for Mimi Stewart or Joseph Cervantes to
3 sit down and take an hour or two doing this.

4 You know, it's unfortunate, they're
5 nonparties. But, your Honor, there are burdens of
6 litigation, and it just can't be the case that -- you
7 know, we were diligent in serving -- in fact, most of
8 these folks got -- the trial folks have gotten three
9 subpoenas requesting the same documents. They got a
10 document subpoena with everybody, a deposition
11 subpoena for a deposition they didn't sit for, that
12 reiterated the same document request, and then a
13 trial subpoena for a trial they haven't showed up to
14 that reiterated the exact same document request.

15 So it can't be the case, and we move to
16 compel, we've done all the right things, not just for
17 a redistricting trial. No trial works, right, if the
18 plaintiff can -- can do all the right things to
19 compel evidence, not get any evidence, and then be
20 penalized for not having any evidence?

21 THE COURT: Right. So the people that these
22 subpoenas are going to, you -- that's who you're
23 speaking for right now?

24 MS. SANCHEZ: Yes. I am speaking for
25 Senator Wirth, Senator Stewart, former Speaker Egolf,

1 and Ms. Leith. And Senator Cervantes has not been
2 served with a subpoena. So --

3 THE COURT: Didn't you say he was available?

4 MS. SANCHEZ: No. He's been traveling.
5 He's the one that's been traveling. He hasn't been
6 served with a subpoena.

7 THE COURT: Okay.

8 MS. SANCHEZ: I have a number of responses,
9 and I don't think it's worth rehashing the history of
10 how we got here. I am concerned that plaintiffs are
11 really raising criticisms of the Court and its
12 handling of these things, and I think that's not
13 appropriate.

14 But I -- I'm reiterating what the Court
15 made clear yesterday, which is given the Court's
16 ruling about the scope of the privilege and that
17 these individuals being considered within the
18 privilege are not compelled to be requested or asked
19 about these communications, what we're talking about
20 here is document production. We are not talking
21 about bringing people in to testify about their
22 communications. We are talking about contemporaneous
23 statements to the plaintiffs, which the Court said
24 those statements have to speak for themselves. And
25 we need clearly structured search terms on parameters

1 to comply with, so that I can make sure that we are
2 accurately complying with what the Court wants us to
3 do.

4 It sounds to me as if plaintiffs'
5 counsel aren't sure what they want. And at this late
6 juncture, it's very hard to tell people, "Well, just
7 use your memory and try to come up with what you
8 think is relevant." I don't feel comfortable as an
9 attorney giving people that instruction. So I think
10 we need a list of clear search terms.

11 And the other piece of this, your Honor,
12 and what makes it frankly impossible to produce
13 anything tomorrow, is that we have to review the
14 documents before they're produced. We have to review
15 for attorney-client privilege, we have to review them
16 for responsiveness to this search. I mean, we can
17 have people do a first cut, but they're not going to
18 exactly understand what the contours are of what's
19 responsive or what's not, or what's privileged and
20 what's not, you know, if there's an e-mail with a
21 staff member that slips through.

22 So we have to conduct a review. I'm
23 committed -- I'm spend my weekend doing this. If I
24 can get it out first thing Monday, I'll get it out
25 first thing Monday. But if the plaintiffs find that

1 there's something relevant in this production, they
2 still have time to make a something else, a
3 supplemental something else to the Court.

4 I think the Court was indicating that it
5 would be open to receiving some updated findings and
6 conclusions after the trial. If the plaintiffs find
7 something in here that they think is useful for their
8 case, they could submit it to the Court then in time
9 for the Court's final decision.

10 But we are talking about document
11 production under the trial subpoenas, and I'm trying
12 to --

13 THE COURT: So what terms would you all
14 propose for search?

15 MS. SANCHEZ: I would propose, and this is
16 taken from the subpoena, and I -- it's going to sound
17 a little funny, because they -- there's different --
18 search terms are sensitive to punctuation and
19 capitalization and spaces and all that sort of thing.

20 So I have -- well, we couldn't -- would
21 the Court like a copy of one of these trial subpoenas
22 to look at?

23 THE COURT: No.

24 MS. SANCHEZ: Okay. I get it. That's fine.

25 So here's the list that I started

1 putting together. S.B.-1 with periods after S and B.
2 SB1 with no periods and no spaces. No SB-1. We
3 should probably at SB space 1, Concept H, Concept E,
4 CCP map, People's map, Chaves map, CD-2, CD 2 without
5 a dash. We should probably add CD separation 2. The
6 word congressional, the word gerrymander, the name
7 Yvette and the name Harrell.

8 That's the list that I have so far. If
9 plaintiffs want to add some to that list, that's
10 fine. But I think we -- the more concrete we can be
11 about what we're searching for, the better.

12 THE COURT: Do you have anything you'd like
13 to at to that list?

14 MR. HARRISON: DPI.

15 You have something?

16 Sanderoff.

17 Is that okay?

18 I think -- I think that would be
19 acceptable, your Honor.

20 THE COURT: All right. So with those two
21 added terms, DPI and Sanderoff?

22 MS. SANCHEZ: I'm happy to include the
23 search term Sanderoff, the -- the under the Court's
24 ruling, Mr. Sanderoff isn't himself as a -- /SPHAOUPB
25 communicating with as a consultant.

1 THE COURT: Why Sanderoff.

2 MR. TSEYTLIN: Your Honor, we're obviously,
3 given their delay here, we're in a situation that the
4 best thing we have is those texts that we talked
5 about from Senator Stewart, and she mentions
6 Sanderoff.

7 THE COURT: Yeah.

8 MR. TSEYTLIN: So we think intuitively there
9 may be other folks that were discussing (inaudible)
10 matter. We're also saying, hey, Sanderoff said this
11 is -- we were going to DPI at -- up to this, or
12 according to Sanderoff, we're going to end up
13 capturing three districts in a typical year. That's
14 the kind of thing.

15 THE COURT: Actually, I think that if
16 they're going to talk about Sanderoff, they're going
17 to mention what else they're talking about, so I
18 think any other terms would be sufficient.

19 So to avoid bringing in things that are
20 privileged, we'll leave out Sanderoff.

21 So can you do it with the added term
22 DPI?

23 MS. SANCHEZ: Yes, we certainly can. And
24 then what I would ask is to -- I don't know that we
25 need to do this. Well, it would probably be helpful

1 to do this for the e-mail, as well as the text
2 message search, is then to use that list of senators
3 and recipients that I think -- I think we're in
4 agreement on who they are. Ms. Ellis-Moore,
5 Mr. Forrester, Ms. Leger Fernandez, Ms. Stansbury,
6 and Ms. Sandoval.

7 THE COURT: Who is the other person you said
8 there's a question about?

9 MR. HARRISON: There were others, your
10 Honor, but -- but again that was one of -- if it --
11 if they're just going to run the search terms that we
12 just ran, we ask them to run it on everybody and then
13 exclude those communications that are privileged
14 under the Court's ruling.

15 THE COURT: Just everybody?

16 MR. HARRISON: Just all is their e-mails
17 which makes the actual searches simpler, because
18 you're just putting in a search term parameters and a
19 time -- you know, within a time frame, as opposed to
20 adding other search parameter.

21 But the reality is, we don't know who --
22 I mean, some of these folks -- again, you know, you
23 can work buzz into admissible evidence. And some of
24 these folks we learned about, but there's no reason
25 that the relevance or lack of privilege is limited to

1 just a brief -- you know, a list of folks. The
2 reality is is there could be some, you know, DNC
3 person in D.C. that, your Honor, Peter Wirth Mimi
4 Stewart talked to whose name I don't know.

5 THE COURT: Okay. But I thought earlier you
6 said you were willing to limit it to those names.

7 MR. HARRISON: So that was within the
8 context, your Honor. I don't -- I'm sorry. So what
9 I -- I've got -- like, I believe this is Peter
10 Wirth's subpoena here, and text messages, we asked
11 for three categories. We asked for virtually all
12 nonimmediate family member text messages from that
13 four-day period. And secondly, we asked for
14 November 1st to December 7th, which is the
15 pre-legislative period; post CRC pre-legislature
16 period; texts with certain individuals; and -- and
17 then anytime in 2021, texts with a smaller number of
18 individuals.

19 Again, we did, like, a belt and
20 suspenders type of approach. We would ask if they're
21 running -- if we're talking about e-mail searches,
22 which I assume we are, which that's the most --
23 typically how you run search terms, then we would ask
24 how you produce -- they run the search terms on
25 everybody on obviously withhold those communications

1 that went exclusively to other members of the
2 privilege group, i.e. the legislature.

3 THE COURT: I may be wrong, but wouldn't
4 that increase the time that it will take to get this
5 done. If we limited it to those names, I think the
6 search would go a lot quicker.

7 MR. HARRISON: I think we'd be -- we'd be
8 more apt to agree to limit it to -- in time frame to
9 July 1st at the beginning of the CRC process, which
10 would actually probably capture a lot of, like, jilt
11 advocacy of the -- toward the CRC. We'd willing to
12 go to the end of the process, which is like November.
13 Which then now is very narrow. I mean, that -- that
14 is now like a -- well, I won't try to do math on the
15 fly, but from November first to the end of the
16 legislature is, you know, a less than two-month
17 period.

18 THE COURT: So they finished their process
19 November 20ed -- November 1st?

20 MR. HARRISON: I think the report was issued
21 November 2nd or some -- I don't know. Yeah, it's
22 basically November 1st.

23 THE COURT: Okay. All right.

24 Ms. Sanchez.

25 MS. SANCHEZ: So a narrower time frame

1 definitely helps, your Honor. That should help it go
2 more quickly. Although albeit, there's probably a
3 higher volume of communications during that time
4 ramping up to the session. But it still helps to
5 have a shorter time period.

6 I think that we can -- because applying
7 the word searches to e-mail is fairly
8 straightforward, we can probably do that without
9 limiting that to the -- to just those --

10 THE COURT: All right.

11 MS. SANCHEZ: -- senator recipients. But I
12 think for the text messages, in terms of searching
13 for them, if we can -- if we can limit it to those
14 five individuals for the text messages for that
15 period, that's going to allow us to do that much more
16 quickly. I'm not even sure from a technical
17 standpoint how to assist people with that, but we'll
18 figure it out.

19 THE COURT: Because you think they're going
20 to be just a hand search or scrolling through?

21 MS. SANCHEZ: I mean, we're talking about
22 messages that are going -- I mean, two years -- two
23 years back. I know that there's different
24 capabilities, whether you have an iPhone or an
25 android phone, and I'm not sure what these people

1 have.

2 But -- you know, so I just -- I really
3 don't know. I would be guessing if I told the Court
4 what the search capabilities are.

5 THE COURT: Right.

6 MS. SANCHEZ: But I know that when I look at
7 my text messages, I can see -- I can sort of search
8 be who they're to or from much more quickly that and
9 I can find a text from two years ago with a word in
10 it. So that's why I'm suggesting for the text
11 messages, that we use this sender/recipient list.
12 And again, it's the same names that are in the
13 subpoena.

14 I think the individual that Mr. Harrison
15 mentioned that he said was a gray area, I don't think
16 is a gray area at all. It's Dominic Gabello, who was
17 accounting on behalf of the governor. And my
18 understanding of the Court's decision letter on
19 privilege is that the governor and her staff are
20 within the scope of the legislative privilege,
21 they're part of the legislative process. Because
22 obviously the governor has to veto or sign off on any
23 legislation ultimately. So I don't think that's a
24 gray area and he shouldn't be included.

25 THE COURT: What about Mr. -- is it Gabello?

1 MR. HARRISON: It is, your Honor. So he --
2 he is the governor's person. Well, so he doesn't
3 have any role at all I think anymore in the formal
4 role.

5 THE COURT: But at the time, what was he
6 doing.

7 MR. HARRISON: But he is another one that --
8 again, I actually -- I've always thought that he was
9 a -- like a political -- someone paid by the Lujan
10 Grisham campaign arm. But, again, I'd accept the
11 same type of -- you know, I mean, they got the thing
12 from Burciaga within, your Honor, 30 minutes. And if
13 somebody -- if somebody could talk to the state
14 personnel office, or even Holly Agjanian, I could
15 take her representation that he was on the payroll of
16 the government.

17 THE COURT: Okay. All right.

18 Can you do that?

19 MS. SANCHEZ: I can try, your Honor. I know
20 that Mr. Gabello, he was represented by counsel and
21 he filed some motions in this case. I don't have
22 them in front of me. There maybe information in
23 there. But that's certainly my understanding, is
24 that any involvement he would have had occurring that
25 redistricting session would have been on behalf of

1 the governor. He's very -- he was very much in a
2 capacity of an advisor to her.

3 Again, I don't think it matters who
4 signs his paycheck or if he's getting a paycheck.
5 But that was his function and that was his purpose
6 for being there.

7 MR. HARRISON: And she actually reminded me.
8 He does -- he has Al Park. I got a (inaudible)
9 impression from Al Park. But I'll talk to him and
10 I'll accept his representation of what --

11 THE COURT: Okay.

12 MR. HARRISON: -- Mr. Gabello's rule.

13 THE COURT: All right.

14 MR. HARRISON: But I guess we would
15 reiterate. It sounds like we have an agreement, I
16 think, on the e-mail side, which is the narrow time
17 frame from November 1st to, we say, December 18th
18 of -- and then running the search terms that we -- we
19 agreed to for Ms. Sanchez about DPI.

20 And on the text side, however, we could
21 do a similar time narrowing. I guess would the
22 legislative defendants be -- think it would be
23 practical to do a similar time narrowing of, you
24 know, November 1st to enactment of legislation, and
25 just, again, do a qualitative all text messages

1 relating to redistricting that refer in any way to
2 the expected or projected partisan composition or
3 likely electoral results of the new districts?

4 The reality, I mean, you're going to
5 know, okay, there would have been -- yeah, maybe in
6 time period you have a thousand texts with your wife,
7 but you don't need to search those. I have --

8 THE COURT: I'm guessing that's probably a
9 thousand text messages back and forth between
10 legislators and their staff. And so you want them to
11 search through all of that?

12 MR. HARRISON: All right. And that's where
13 I think it actually easier with a text. Because most
14 texts are one-to-one things. So you don't even need
15 to look -- if you're Brian Egolf, you don't need to
16 look at your texts with Leann Leith or with Mimi
17 Stewart or whomever. But the folks outside of the
18 privilege group.

19 Again, he likely -- if there's someone
20 at DNC in Washington whose name I don't know, you
21 know, Mr. Egolf would know and would know to go and
22 look at it.

23 THE COURT: Technologically, are you saying
24 like a computer type searching, or are you saying
25 someone scrolling through their texts?

1 MR. HARRISON: I'll be talking about the
2 latter, which, again, is more practical and easier
3 when it's a manageable number of things. And as
4 we've narrowed this down both by time and by the fact
5 that now, for example, Mr. Egolf knows he doesn't
6 have to look at Leann Leith, he doesn't have to look
7 at Peter Wirth, et cetera, and also knows as a
8 practical matter, you know, the folks who I would
9 have talked to about this are Ms. So-and-so at the
10 DNC in Washington, and, you know, a prominent
11 demographer out of California that we're asked to run
12 all of -- I mean, he -- had reality is he knows. And
13 I guess my hope is that if there's relevant -- I
14 mean, as a citizen, my hope is that they're not
15 talking to 50 different people about, you know, a
16 gerrymander, they're talking to a relatively small
17 number folks whose opinions they value about this.

18 Now, if that's not the case, if it is,
19 in fact, true that within that time frame Brian Egolf
20 has 1,000 different text messages, you know, with
21 folks outside of to privilege group about
22 redistricting that reference, you know, the partisan
23 or electoral impact of the new districts, then they
24 can come back and we can fashion some search terms
25 for them to use. But I really doubt that's the case

1 now that we're talking about six people.

2 And on that front, I did want to say,
3 Senator Cervantes has been served twice. He was
4 served with a document subpoena, he was served with a
5 deposition subpoena. He went out of town before
6 trial, but they also, I believe, moved to quash on
7 his behalf, so --

8 THE COURT: All right.

9 MR. HARRISON: -- we would ask that he be
10 included in this.

11 THE COURT: Okay. One last thing,
12 Ms. Sanchez. As far as December 18th being the
13 signing of legislation, I think that's probably --
14 any comment on that?

15 MS. SANCHEZ: I don't know that that's a big
16 deal, your Honor. I think technically speaking and
17 then looking at the Court's decision, I think the
18 Court identified the ends of the legislative process
19 as the passage of the bill. That's the ends of the
20 legislature's work on it. The bill has passed and
21 then, frankly, statements made by legislators of the
22 passage of the bill really are kind of immaterial to
23 what we're talking about here.

24 But if the Court wants to go to December
25 17th or 18th or whatever the date is, we can include

1 that. But I think it's --

2 THE COURT: I don't think it'll put too much
3 extra burden on there to go to December 18. So we're
4 looking at November 1st to December 18th,
5 communications by e-mail, texting, any other form of
6 messaging that mention the agreed-upon terms. But
7 not with limiting to these six people named.

8 MR. HARRISON: That's correct, your Honor.

9 MS. SANCHEZ: Your Honor, could I speak to
10 the text message issue just one more time.

11 THE COURT: Yeah.

12 MS. SANCHEZ: I'll try to keep this brief,
13 but searching for text messages is qualitatively
14 different than searching e-mails. When I look at my
15 texts, they're not organized by year or by month or
16 by date. They're organized by sender and recipients.

17 And if it's somebody that I'm texting
18 with now, today, that I also texted with two years
19 ago, that could be the same text string that I've got
20 to go into and serve back two years ago to identify
21 whether there's anything responsive in that and then
22 take screenshots of it, which is laborious, but
23 really the only way to capture text messages.

24 So when we get these after people have
25 searched, in the hospital only are they going to have

1 to go through manually through their phone and try to
2 find these things, but we're also going to be getting
3 non -- nonelectronic just basically screenshot
4 pictures of text messages to review before
5 production.

6 And to try to make this happen in this
7 short of a period of time, if we don't limit the text
8 searches somehow, I don't know how to instruct people
9 to go through their phone through -- through text
10 strings that go back two years ago with different
11 people unless there's a clearer definition of who are
12 we looking for texts with. And frankly, these
13 subpoenas already identify the individuals and I
14 think we should just use the same names. And if we
15 start expanding this into any text with anybody
16 during this time frame, the search for it is going to
17 be that much more time consuming.

18 And I want to make sure that we're
19 fulfilling the Court's instructions and get the most
20 we can as quick as we can.

21 MR. TSEYTLIN: Your Honor, almost everyone
22 uses either iPhones or androids. I just searched --
23 you know, I'm a Detroit Lions fan. They're playing
24 today and they're going to win. I just searched
25 Lions on my iPhone in the texting. Every text I sent

1 about the Lions popped up. You press on it, it's
2 right on the screen. It's easy as pie. I don't have
3 an android, but I just did it a search. Apparently,
4 android works the same way. If someone has got some
5 windows phone or some old flippy Nokia thing, maybe
6 that will be more challenging. But it seems to me
7 that this is eminently doable and quite easy,
8 especially when you're just having those search
9 terms. You just put -- put DPI, it'll just pop right
10 up and all the text messages that you sends. Works
11 very easy.

12 THE COURT: All right. I don't -- I don't
13 know how to search for -- I've never once searched
14 through my text messages, so -- I mean, do you know
15 if that's something that your people can do? I
16 mean...

17 MS. SANCHEZ: I don't. I truly don't know
18 if it's something I can do. And that's why I want to
19 make this as doable. I don't have a basis to
20 disagree with counsel's representations, but I have
21 no experience with doing word searches on text
22 messages, particularly -- and I have no idea how
23 android phones work.

24 THE COURT: So they would have to search it,
25 then go through and look at -- I mean, I mean

1 guessing a legislator speaks to -- you said you think
2 it's a small group of people, I think it's a large
3 group of people, about these things, that are going
4 to be other legislators or legislative staff. I
5 think that's going to be 90 percent of what is
6 brought up when you run a search for those things.

7 MR. TSEYTLIN: I mean, look, I can just -- I
8 know it's unusual, but I can show your Honor and
9 counsel on an iPhone how easy it is.

10 THE COURT: Okay. But -- I'm going to take
11 your word for it, that it's easy. But then they'll
12 have to go through each one of those and decide which
13 once are protected by privilege, which ones aren't.

14 MR. TSEYTLIN: So --

15 MR. HARRISON: So here's what I would
16 expect, if it were me and who I imagine I would talk
17 to. I agree that I would talk to a large number of
18 my colleagues and staff in the legislature. So you
19 take out an iPhone. Obviously it's got your -- the
20 names of who you texted. You don't even go to those
21 folks.

22 THE COURT: Well, that's you searching just
23 all of your text messages?

24 MR. TSEYTLIN: Yes. So there's a search bar
25 on top, your Honor. You type in DPI.

1 THE COURT: Right.

2 MR. TSEYTLIN: It will pop up literally and
3 it will say, like --

4 THE COURT: Every text you ever sent with
5 that.

6 MR. TSEYTLIN: -- Jane Smith, blah, blah,
7 blah, and so obviously you know the ones that are
8 legislators, you just take those out. And then
9 you've got someone at the -- you know, at the CCP.
10 Oh, they're not a staffer, so you click on that,
11 screenshot, the screenshot, those two buttons on the
12 front, screenshot, turn it over to counsel.

13 It would take someone who knows what
14 they're doing 10 minutes. Someone that doesn't know
15 what they're doing, maybe an hour.

16 MR. HARRISON: And there's an alternative,
17 which is if we just give them a topic, which is the
18 traditional way to propound RFPs and subpoenas to get
19 what you're going to propose that are about
20 redistricting and mention partisanship or likely
21 electoral results.

22 THE COURT: Mm-hmm.

23 MR. HARRISON: Okay. I'm bringing it up.
24 Okay. I talked to a ton of people, they're mostly
25 legislators and my staff. I did talk to these four

1 people. Okay. I scroll down to those four people's
2 names, I scroll up to the time period, which is a
3 manageable time period, and I go through and okay,
4 yeah, for these people, within that month and a half,
5 okay, I've got, you know, 40 texts and 46 of them do
6 relate to --

7 THE COURT: Okay. So let me ask you about
8 that. You're -- because I was thinking the same
9 thing, that most of these people will probably know
10 who they talked to outside of the privileged people.

11 MR. HARRISON: Correct.

12 THE COURT: So why don't we just ask them,
13 basically, on their honor, you know, to identify
14 those and just get those instead of running it
15 through everything? I mean, that's, I think, a lot
16 easier than running these search terms that just look
17 for people they know are outside the privilege.

18 MR. HARRISON: And I -- for text messages, I
19 personally agree. I think that makes sense.
20 Because, again, you're effectively going to your list
21 of names and --

22 THE COURT: Okay.

23 MR. HARRISON: -- going to what I have to
24 imagine is a short /TPUB of folks who recollects are
25 not legislators or staff, and who you know you would

1 have talked to about -- candidly, about the partisan
2 equity of redistricting.

3 THE COURT: Right.

4 MR. HARRISON: And I've got to think that
5 even for the important legislators, it's a single
6 digit number of folks, you scope up to that time
7 periods, you give us the stuff within that time
8 period.

9 THE COURT: I tend to agree with that. I
10 think that the -- for text messaging, you can
11 instruct them to -- I mean, you explain to them who
12 the privilege -- I think that they can grasp that the
13 privilege is legislators, legislative staff,
14 consultants who are in a formal relationship with a
15 legislature, people who are in legislative agencies,
16 like the CRC, things of that nature. You can -- they
17 will understand that. And I think that they will
18 probably know who they spoke outside of is that group
19 and then be responsive to that.

20 MS. SANCHEZ: Within that time frame.

21 THE COURT: Within the time frame of
22 November 1st to December 18th of 2021. And that's
23 for text messages. I think the search would be
24 easier for the e-mails.

25 MR. TSEYTLIN: Just to clarify, including

1 personal e-mails, your Honor.

2 THE COURT: Any e-mails sent, not just
3 government account.

4 MS. SANCHEZ: Yeah, I have concerns about
5 that happening in the short time frame that we've
6 got.

7 THE COURT: Yeah.

8 MS. SANCHEZ: But we will --

9 THE COURT: No, I understand. What I'd ask
10 you to do is whoever you're going to have working on
11 this, next time we take a break or just get a report
12 from them about when they think that realistically,
13 with their best efforts, they can get this done. And
14 let me know. Okay.

15 MS. SANCHEZ: I will do that, your Honor.
16 One quick clarification. Plaintiffs' counsel keeps
17 referencing to the term redistricting. Obviously
18 during that session and the lead-up to it, there was
19 a lot of discussion about house redistricting, senate
20 redistricting PRC redistricting, all that. I
21 think --

22 THE COURT: I think the --

23 MS. SANCHEZ: And I assume we're focusing on
24 congressional redistricting.

25 THE COURT: Right. In SB-1, and I thought

1 that that was a good thing to look at, you know, for
2 a search terms, and all the iterations, you came up
3 with.

4 MS. SANCHEZ: Okay. Thank you.

5 MR. HARRISON: And we would agree for texts,
6 if they can look at and determine that the texts is
7 about exclusively house or senate redistricting, they
8 don't have to produce it.

9 THE COURT: Right, right.

10 MR. HARRISON: But we don't think it has to
11 "Congress." It's clear they're talking about
12 three -- you know.

13 THE COURT: Rights.

14 MR. HARRISON: And if they're talking about
15 Congress, if they're talking about something, one of
16 the other ones, exclusively, then they can withhold
17 it.

18 MS. SANCHEZ: Thank you, your Honor.

19 THE COURT: Okay? All right. Anything else
20 before we bring Mr. Trende back?

21 MR. HARRISON: Not from the plaintiffs, your
22 Honor.

23 THE COURT: Mr. Trende, do you want to come
24 up here.

25 UNIDENTIFIED MALE: Your Honor, we've been

1 going now for almost two and a half hours. I'm going
2 to need to set up some technology here. And can we
3 take a break?

4 THE COURT: Sure. All right. We'll take
5 10 minutes and then we'll start with Mr. Trende.

6 (Recess held from 9:38 a.m.
7 to 9:52 a.m.)

8 THE COURT: Back on the record.

9 Mr. Trende, you are still under oath.
10 And Mr. Williams.

11 MR. WILLIAMS: Yes, your Honor. Thank you
12 very much.

13 CROSS-EXAMINATION

14 BY MR. WILLIAMS:

15 Q. Dr. Trende, you've testified under oath,
16 Mr. Trende -- let's just say we'll call you
17 Dr. Trende, you've passed the tough hurdle.

18 A. Probably the nicest thing you're going to
19 say to me for the next two hours or so.

20 Q. No, no. We're going to be friends at the
21 end of this.

22 Dr. Trende, you've testified under oath
23 four times in this litigation via your verified
24 report, via your first deposition, via your second
25 deposition, and now in trial; is that right?

1 A. Yes.

2 Q. All right. And you were -- you testified
3 yesterday that you are a trained lawyer; is that
4 right?

5 A. Yes.

6 Q. And you understand the import or verifying a
7 report for truthfulness, correct?

8 A. Right.

9 Q. And you understand the import of taking the
10 oath during a deposition or at trial to tell the
11 truth, correct?

12 A. Correct.

13 Q. All right.

14 MR. WILLIAMS: Your Honor, I'm going to try
15 and to minimize my requests of you to change inputs
16 on your computer there. So I'm going to start by
17 using the ELMO right here. It's already set up to do
18 documents. But at some point, I pay need you to give
19 me permission to change to a laptop. You don't have
20 to do negative right this second.

21 THE COURT: All right.

22 MR. WILLIAMS: All right. Thank you, your
23 Honor.

24 BY MR. WILLIAMS:

25 Q. Mr. Trende, do you recall this exhibit that

1 plaintiffs put forward yesterday?

2 A. Yes.

3 Q. All right. Did you create that exhibit?

4 A. Yes.

5 Q. All right. And what does that exhibit
6 purport to show?

7 A. From Dr. Chen's you computer, from
8 Dr. Chen's shapefiles, the number of active oil wells
9 in each county.

10 Q. All right. And when you say Dr. Chen's
11 shapefiles, do you know if he generated those
12 shapefiles?

13 A. No.

14 Q. All right. Would you believe me if I told
15 you that shapefile came from the New Mexico oil
16 conservation division?

17 A. Yes.

18 Q. Okay. All right. What do you know about
19 Colfax and Harding counties, Mr. Trende?

20 A. Nothing.

21 Q. All right. Do you know if there's any oil
22 and gas production in Colfax or Harding County?

23 A. No.

24 Q. All right. Would it surprise you to know,
25 Mr. Trende, that there are no, no active oil and gas

1 wells -- or excuse me, there are no active oil wells
2 in Colfax or Harding County?

3 A. I wouldn't know one way or the other.

4 Q. Well, did you look in the shapefile to
5 determine whether -- you pulled your data off of a
6 column that was total number of wells as opposed to
7 separate columns that enumerated wells in each county
8 for oil, for example, or gas, for example, or CO₂, for
9 example, or produced water wells, for example, or
10 carbon sequestration wells, or brine wells?

11 A. I believe it was pulled off the oil column.

12 Q. All right. So your testimony is that that
13 represents oil wells in New Mexico?

14 A. I believe the way it was filtered was oil
15 and then active.

16 Q. If Dr. Chen testifies that he knows what you
17 did and you made a mistake, are you going to disagree
18 with him?

19 A. It would depend.

20 Q. Okay. All right. Well we'll keep that in
21 our pockets for Dr. Chen.

22 You recall in your verified report that
23 you wrote that -- on Page 47, that you performed
24 50,000 simulations; is that right?

25 A. Yes.

1 Q. And I believe in your deposition you
2 testified that wasn't correct, that was a mistake?

3 A. Correct.

4 Q. Correct? And I think you said it was
5 probably an artifact from an earlier report you had
6 drafted?

7 A. Yes.

8 Q. All right. And at Page 20 of your verified
9 report, you were very specific when you testified that
10 you used the Dell Alienware desktop with an immaterial
11 nine processor. Do you recall that?

12 A. Yes, ma'am.

13 Q. And it turns out that also wasn't true,
14 correct?

15 A. Has an AMD Ryzen processor, that's right.

16 Q. Okay. So that wasn't true. And if I had
17 not an opportunity to take your deposition to test you
18 on those issues, I would not have known about that
19 mistake in your report; is that correct?

20 A. I suppose.

21 Q. Yeah. At Page 21 of your report,
22 Mr. Trende, you stated that you instructed your
23 simulation to allow a population tolerance of plus or
24 minus 1 percent. Do you recall that?

25 A. Yes.

1 Q. And 1 percent of the New Mexico
2 congressional district is approximately 7,058 people;
3 is that right?

4 A. That sounds right.

5 Q. All right. And congressional districting,
6 as I appreciate it, requires virtually equal
7 populations, correct?

8 A. That's right.

9 Q. And so your plus or minus 1 percent
10 population deviation is well in excess of equal
11 populations?

12 A. That's right.

13 Q. By about 7,500 -- 7,058 people, right?

14 A. I'll accept that representation.

15 Q. And I believe you testified that
16 notwithstanding that differentiation, that's just how
17 it's done in simulations in the industry; is that
18 correct?

19 A. That's how it's typically done, that's
20 right.

21 Q. And these the way you do it; is that right?

22 A. Correct.

23 Q. All right. Were you an expert in a case
24 styled Szeliga versus Lamone?

25 A. That's right.

1 Q. And did you review a memorandum opinion and
2 order from Szeliga versus Lamone?

3 A. That's right.

4 Q. All right. You didn't use a plus or minus
5 1 percent population deviation in that engagement, did
6 you?

7 A. No. I think for that one, I did two-tenths
8 of a percent, maybe.

9 Q. Would you believe me if I today you it was
10 one-tenth of a percent?

11 A. I believe you.

12 Q. All right. So that is different than what
13 you did in this case; is that right?

14 A. It's a different percentage, but it's still
15 more than what the allowable population tolerance is
16 for one person, one vote. It's the same -- what's the
17 same is the concept that you get close enough to the
18 political distribution that fixing the districts to be
19 equipopulous wouldn't change their partisanship very
20 much.

21 Q. How do you pick between using one-tenth of a
22 percent and plus or minus 1 percent for a particular
23 engagement?

24 A. I started with 1 percent here. It is
25 typical threshold that's been used. Sometimes it's

1 been more. Sometimes it's been less. I suppose if
2 someone wanted to see if it was sensitive to that,
3 they could test it by running with a smaller
4 population threshold.

5 Q. Well, we'll get to testing your opinions in
6 a minute, Mr. Trende.

7 I believe, Mr. Trende, that you have
8 testified that your simulations that formed the basis
9 of your August 11th, 2023, opinion had a 50 percent
10 duplication rate; is that right?

11 A. Roughly, yes.

12 Q. Roughly? And you presented some charts to
13 the court, some dot plots in particular, that you
14 represented to the Court each contained 3 million
15 distinct dots. Do you recall that?

16 A. I don't think I said distinct. That's the
17 problem you would -- because they don't show up as
18 distinct at that number, that's why I also included
19 box plots.

20 Q. At a 50 percent duplication rate, there
21 could be at most, under an ideal circumstance,
22 approximately 1.5 million distinct dots. Would that
23 be true?

24 A. At most, yes.

25 Q. Yeah. So there couldn't have been 3 million

1 as you represented, right?

2 A. Well, of course, there's 3 million, it's
3 just two of them are placed on top of each other.

4 Q. Okay. Why didn't you discard your
5 duplicates?

6 A. Because that doesn't give you the true
7 distribution. Let's say you wanted to know the
8 distribution of the height of American males. You do
9 a poll and you get your sample and it ranges from 5'3"
10 to 6'7". If you discarded all the duplicate heights,
11 you would look at it and say 5'3" is the typical
12 height because it's within the range. You need to
13 know where the distribution peaks in order to make
14 that type of representation.

15 You would completely mess it up if you
16 did he duplicated. Something I've learned along the
17 way.

18 Q. And you've testified that you use the Redist
19 SMC algorithm based in large part upon Kosuke Imai's
20 SMC paper; is that right?

21 A. Correct.

22 Q. All right. And you have, I guess, recently
23 learned that Dr. Imai has some concerns about sample
24 diversity. Do you recall that testimony?

25 A. That's right, yeah.

1 Q. And Dr. Imai's concern is that with a large
2 number of duplicates and a lack of sample diversity,
3 there could be difficulties in interpreting results of
4 the simulations; is that right?

5 A. That's my understanding, yes.

6 Q. Now, in that same case, the Szeliga case, at
7 Paragraph 99, the trial court noted that you performed
8 250,000 simulations and you discarded your duplicative
9 maps and arrived at between 30,000 to 90,000 maps. Do
10 you see that?

11 A. I discarded the duplicative maps and the
12 maps that weren't consistent with the VRA. That's
13 right.

14 Q. Well, it doesn't say VRA there, does it?

15 A. It doesn't in the order, but it did in my
16 report.

17 Q. The order says that you discarded
18 duplicates, and that's not something you did in this
19 case, correct?

20 A. That's right. Like I said, I've learned
21 along the way that you shouldn't discard the duplicate
22 maps.

23 Q. I believe one of the things you testified
24 yesterday that will sequential Monte Carlo
25 algorithm -- or excuse me, the Sequential Monte Carlo

1 paper that I presented to you about the sample
2 diversity issues -- I'm going to show you what was the
3 Exhibit B we talked about yesterday, that you had read
4 a version of this paper, but you had not read this
5 version 5 that was residentially -- this 5th version
6 of a working draft paper that Dr. Imai has published.
7 Do you see that?

8 A. That's right.

9 Q. All right. When is the last time you read
10 one of Dr. Imai's Sequential Monte Carlo algorithm
11 papers?

12 A. I think what I -- if I didn't testify to
13 this, then I misspoke, but I didn't read that at the
14 time of my report. I read it subsequently.

15 Q. Okay. Had you read any earlier versions of
16 Dr. Imai's Sequential Monte Carlo paper before you
17 drafted your report?

18 A. Yes.

19 Q. Had you, for example, read the fourth
20 version of Dr. Imai's paper?

21 A. I don't believe so.

22 Q. All right. Well, that paper was drafted on
23 June 14th of 2022. That's well before you performed
24 your expert services in this case; is that right?

25 A. That's right.

1 Q. And on Page 11 of Dr. Imai's fourth draft,
2 he has the same concerns there that he does in his
3 fifth draft. Do you agree with that?

4 A. Yes.

5 Q. All right. So --

6 MS. DIRAGO: Can we get a copy of that?

7 MR. WILLIAMS: Sure.

8 MS. DIRAGO: Thank you very much.

9 BY MR. WILLIAMS:

10 Q. So for quite awhile Dr. Imai has been aware
11 of the problem of sample diversity, and he has
12 recommended for a long while that diagnostics be
13 performed on the data that is generated, and that's
14 something I don't do in this case; is that right?

15 A. That's right.

16 Q. All right. So we don't know, and there's no
17 way for us to know, that for the 2,040,000 maps that
18 form the basis of your expert report, there's no way
19 for us to run any diagnosis -- excuse me --
20 diagnostics against those maps; is that correct?

21 A. Not directly on those maps, but you could
22 run the simulation and see what it said.

23 Q. So, again, my question is, there's no way
24 for us to run diagnostics on those maps; is that
25 right?

1 A. The way you particularly phrase the
2 question, that's true.

3 Q. Dr. Kosuke Imai's Sequential Monte Carlo's
4 paper has not been published formally, has it?

5 A. It's forthcoming, but no, it hasn't been
6 formally published.

7 Q. So it's a working draft, correct?

8 A. It's been accepted at the annals of applied
9 statistics. So I don't think it's working anymore.

10 Q. Would you agree that it was a working draft
11 between versions 1, 2, 3, 4 and 5?

12 A. Yes.

13 Q. And when you generated your report in this
14 case, was it a final draft?

15 A. I don't know.

16 MS. DIRAGO: Objection, vague. I don't know
17 what's a final draft of what, the report or the
18 article.

19 THE COURT: He answered it.

20 MR. WILLIAMS: Yeah.

21 BY MR. WILLIAMS:

22 Q. So while it's a working draft, Mr. Trende,
23 do you think it's important to keep track of the most
24 current versions of his SMC article so that you can be
25 aware of his opinions regarding that article?

1 A. It could be.

2 Q. Would it have been useful to you to have a
3 read the fourth and fifth versions of Dr. Imai's
4 article before you performed your services in this
5 case?

6 A. It could have been.

7 Q. But you don't know?

8 A. But I don't know.

9 Q. And we can't know because we can't test the
10 data, correct?

11 A. You can't test the exact maps that were
12 produced to first time around.

13 Q. One of the things we've talked about over
14 the past couple of times, Mr. Trende, is that you've
15 told us that, well, you could reproduce a reasonable
16 facsimile of the 2,040,000 maps with the source code
17 that you produced; is that right?

18 A. That's right.

19 Q. Now, do you recall when I took your
20 deposition the first time, that when we reviewed the
21 source code that you produced, it wouldn't generate
22 2,040,000 maps? Do you recall that?

23 A. As it stood at the time of my deposition,
24 that's right.

25 Q. And at the time of your deposition was after

1 your report had been filed, correct?

2 A. Correct.

3 Q. And the code that you produced to us would
4 have generated 240,000 simulations; is that right?

5 A. That's right.

6 Q. And that's far less than the 2,040,000 that
7 are reflected in your report?

8 A. That's right.

9 Q. After your deposition, you changed your code
10 and produced it to us so that that changed version of
11 your code would produce 2,040,000 simulations,
12 correct?

13 A. Yeah. I changed it to it would be as it was
14 when I ran the code.

15 Q. All right. Do you recall testifying that
16 the version of the code you produced was some earlier
17 version, not the one that you used to generate your
18 opinions?

19 A. No.

20 MR. WILLIAMS: May I approach, your Honor?

21 BY MR. WILLIAMS:

22 Q. If you turn to Page 38 of your deposition,
23 Mr. Trende, I think we printed it on both sides to
24 limit the number of trees that would have to die for
25 this litigation, at Lines 6 through ten, you stated:

1 It probably would have been an earlier version of the
2 code, and then, when I produced it, I took the hash
3 tags out to it would create titles for you to
4 reference the titles in the report.

5 Do you see that?

6 A. Yes.

7 Q. And we did not get that earlier version of
8 the code, did we?

9 A. Right. The code that I ran was earlier, and
10 then I changed some things. That one, I changed so
11 that it would actually print titles for you, which I
12 thought would be useful in interpreting the maps.

13 Q. Well, let's talk about those titles. I
14 believe you testified that the histograms charts and
15 figures in your expert report are some collateral
16 indicia that you actually did do 2,040,000
17 simulations. Do you recall that testimony?

18 A. Yes.

19 Q. And you base that, I think, on the
20 histograms, suggesting that if we were to stack up all
21 the bars on the histograms, it would add up to
22 approximately 2 million?

23 A. That's right.

24 Q. All right. In all of your report, the
25 charts and figures within Section 6.4 have the word

1 simulated in them; is that right?

2 A. I think it's -- oh, in the report, yeah,
3 that's right.

4 Q. But in your code that generated those charts
5 and figures, it doesn't have the word simulated, it
6 has the word simultated, s-i-m-u-l-t-a-t-e-d; is that
7 right?

8 A. That's right.

9 Q. And that's different?

10 A. No, that's right.

11 Q. Yep. And that's not what we have in the
12 report, correct?

13 A. No. Like I explained in any deposition, the
14 function that creates the plot, when I ran the code
15 for the report, didn't print the report titles. For
16 you all, since I thought you'd want to try to run the
17 code and replicate, I made it so that it would print
18 the titles, so that you could match it with what is in
19 the report, instead of getting a bunch of blank maps.

20 Q. Well, let's talk about what you thought we
21 would want to do by running the code and replicate.

22 In your deposition, when I was asking
23 you questions about the lack of the 2,040,000
24 simulations, you twice testified that you had
25 anticipated that we would want to see those maps so

1 you had configured your code so that it could create
2 exact reproductions. Do you recall that testimony?

3 A. Yes.

4 Q. All right. And when you testified, we
5 weren't hearing about, well, you don't need to see the
6 simulations, you can just run it again and get the
7 distribution. You said specifically, you anticipated
8 that we would want to see those names, didn't you?

9 A. You know, I think I'd like to see the exact
10 quote on that.

11 Q. Sure. Why don't you turn to Page 23 of your
12 deposition. Look at Lines 1 through 3.

13 A. Yes.

14 Q. All right. You don't dispute that you said
15 that: But because the code is created with the seed
16 set in it, it should be replicable be plaintiffs'
17 experts or defendants' experts. That was your
18 testimony, right?

19 A. Oh, yeah. And I'm glad I asked about this,
20 because that's different than saying: I thought you
21 would want to look at the maps.

22 Q. Okay. Then let's look at Page 48
23 (inaudible)?

24 A. Actually, it's --

25 Q. That may be one of (inaudible).

1 At Line 6 through 10, you said: Well,
2 because presumably your expert will want to see and
3 reproduce the maps that were created, and noticing
4 that (inaudible) is 100,000, would realize that to
5 replicate that would be set to a million and would do
6 so, perhaps.

7 Do you see that?

8 A. I do see that.

9 Q. And so you acknowledged then that we would
10 want to see your maps?

11 A. Correct.

12 Q. But we can't do that, can we?

13 A. You can't. You can see the distribution
14 that's created.

15 Q. And that distribution, we can't check your
16 distribution because we don't have the maps?

17 A. No. You can run the code again and see if
18 the distribution looks the same.

19 Q. I can check a different distribution, that's
20 correct?

21 A. No. Because the distributions are printed
22 in the report, you can check it against what's printed
23 in the report.

24 Q. I recall you testifying yesterday, Dr. --
25 Mr. Trende, that you had reviewed all thousand of the

1 maps that Dr. Chen generated do you recall that?

2 A. Yes.

3 Q. And that was something you were able to do
4 so that you could offer testimony in this case because
5 we produced the work that Dr. Chen had saved to you;
6 is that right?

7 A. Right.

8 Q. And that is something that we have not been
9 able to do because you did not save your maps.
10 Although you have them, you created them, you say you
11 analyzed them, you say you generated charts and
12 figures, and then they went away; is that right?

13 A. Right. You got a second run of them that
14 you could use to check the maps, but --

15 Q. We would get a different run of a different
16 set of maps; is that correct?

17 A. You would get a different run of the maps.
18 I don't know how different they would be overall.

19 Q. You'd agree they wouldn't be the same?

20 A. They wouldn't be identical, that's right.

21 Q. Mr. Trende, I believe you have testified
22 that this is an egregious partisan gerrymander in
23 SB-1; is that right?

24 A. Yes.

25 Q. All right. The margin of victory for

1 Congressman Vasquez over Congresswoman Harrell was
2 1,350 votes; is that right?

3 A. That's right.

4 Q. Do you know a Senator Gallegos?

5 A. No.

6 Q. Do you know -- I guess no one has told you
7 about Senator Gallegos and his testimony in this case?

8 A. No.

9 Q. I'll represent to you that Senator Gallegos
10 is a state senator I believe in the Eunice area. And
11 he offered testimony yesterday regarding the current
12 climate for Republican voters in CD-2.

13 Would it surprise you to know that
14 Senator Gallegos thought that the Republicans could
15 win CD-2 if they would increase voter turnout?

16 A. I suppose that's literally true, but yes, it
17 would surprise me.

18 Q. Are you aware of recent polling regarding
19 CD-2 and the race between Congressman Vasquez and
20 Congresswoman Harrell?

21 A. No.

22 MR. WILLIAMS: Your Honor, may I approach
23 the witness?

24 THE COURT: Yes.

25 MS. DIRAGO: So what is this?

1 BY MR. WILLIAMS:

2 Q. Dr. Trende, this is a news story from
3 KOB-TV. Do you see that?

4 MS. DIRAGO: So I'm going to object on
5 relevance, on hearsay.

6 MR. WILLIAMS: Your Honor, experts can rely
7 upon hearsay. Relevance will become apparent.

8 MS. DIRAGO: He didn't rely upon this, and
9 it doesn't mean it admissible in court. He can rely
10 upon it if he wishes, it's not admissible in court.

11 MR. WILLIAMS: I haven't moved to at mitt --

12 MS. DIRAGO: I'm sorry.

13 MR. WILLIAMS: I haven't used to admit it,
14 your Honor. I'm using this to challenge the opinions
15 of Mr. Trende.

16 MS. DIRAGO: It's hearsay.

17 MR. WILLIAMS: Hearsay is admissible -- or
18 is usable by expert witnesses.

19 MS. DIRAGO: No, it's not.

20 THE COURT: (Inaudible) reports.

21 MR. WILLIAMS: Excuse me?

22 THE COURT: (Inaudible) the reports.

23 MR. WILLIAMS: And in rendering opinions.

24 MS. DIRAGO: But he didn't use it. It
25 doesn't mean it comes in at trial.

1 THE COURT: You're asking him to render his
2 opinion now?

3 MR. WILLIAMS: I just want to find out if
4 this will inform and change his opinion, your Honor.

5 MS. DIRAGO: But we don't know what it is.
6 We can't test -- I mean, this is a random piece of
7 paper with a poll.

8 MR. WILLIAMS: Oh.

9 MS. DIRAGO: Right, we don't know who did
10 this, we don't know what they were using to create a
11 poll. It's irrelevant and there's know
12 authentication and it's hearsay. I cannot
13 cross-examine the person who did this poll.

14 MR. WILLIAMS: Your Honor, if we're going to
15 start excluding evidence for not being testable, I'm
16 fine with that.

17 MS. DIRAGO: I am, too, in fact.

18 MR. WILLIAMS: Your Honor, I'd like to move
19 to exclude Mr. Trende's report.

20 THE COURT: No, we're not going to do that.
21 So as far as this, your wanting to question him about
22 a report. Lay your foundation for how this poll was
23 done.

24

25

1 BY MR. WILLIAMS:

2 Q. Mr. Trende, do you see in this article, a
3 reference to a poll that was performed?

4 A. Yes.

5 Q. All right. And are you familiar with survey
6 USA?

7 A. Yes.

8 Q. All right. Is that a reputable polling
9 organization?

10 A. Yes.

11 Q. All right. Do you have any reason to
12 disagree with the story that says that the current
13 congressional race between Congresswoman Harrell and
14 Congressman Vasquez is a neck and in the case race?

15 A. I don't have any reason to dispute that
16 that's what the article says.

17 Q. All right. The fact that there is polling
18 that suggestions the race is in the case and in the
19 case, does that in any way change your opinion about
20 entrenchment or extreme partisan gerrymander?

21 A. No. Because it also says that only 32
22 percent of the respondents has unfavorable -- I'm
23 sorry. Only 28 percent of respondents had an
24 unfavorable impression of Vasquez compared to 32 of
25 Harrell. And generally, incumbent with 28 percent

1 unfavorable don't lose. Those undecideds are going
2 to be voters who don't have unfavorable opinions of
3 the Congressman, are going to tend to break his way.

4 Q. So you don't necessarily disagree with the
5 poll, you just think it could be a more thorough?

6 A. No, you asked me if I changed my opinion.
7 It doesn't change my opinion, because those undecideds
8 are people who don't have unfavorable opinions of the
9 Congressman and are unlikely to throw him out.

10 Q. All right. Thank you, Mr. Trende?

11 MR. WILLIAMS: Your Honor, may I approach?

12 THE COURT: Okay.

13 BY MR. WILLIAMS:

14 Q. Mr. Chairman Trende, are you familiar with
15 the -- what the New Mexico Legislature is?

16 A. Yes.

17 Q. All right. And are you aware that it has a
18 legislative financial committee?

19 A. I am now.

20 Q. Okay. What I've handed you'd is a letter
21 from Senator George Munoz of the legislative finance
22 committee. Do you see that?

23 A. Yes.

24 Q. And in that letter, he talks about the
25 general fund. Do you see that?

1 A. Yes.

2 Q. And I believe he talks about \$9.57 billion
3 in the general -- in the recurring general funds. Do
4 you see that?

5 A. Yes.

6 Q. All right. In the attached document, which
7 is it is fiscal review and outlook from the
8 legislative financial committee, do you see a chart in
9 the left-hand side of the page?

10 A. Yes.

11 Q. And in that chart, it reflects that gross
12 receipts taxes from Eddy and Lea, as well as out of
13 state, are up to about 40 percent of our general
14 revenue; is that right?

15 A. That's right.

16 Q. All right. Would it be fair to say,
17 Mr. Trende, that based upon those numbers, all of
18 New Mexico has a pretty significant interest in oil
19 and gas production?

20 MS. DIRAGO: Objection. Foundation.

21 A. Yeah, I don't --

22 THE COURT: Mr. Trende.

23 THE WITNESS: I'm sorry.

24 THE COURT: The objection?

25 MR. WILLIAMS: The objection is foundation.

1 We've established this is a letter from the
2 legislative financial committee. This is a public
3 record generated in the ordinary course of business.
4 It's sort of evidence that an expert can consider
5 (inaudible).

6 THE COURT: You're asking his opinion
7 about --

8 MR. WILLIAMS: I'm asking whether that 40
9 percent number demonstrates essentially that there is
10 a larger community of it based upon oil and gas
11 production in Lea and Eddy County for the entire
12 State of New Mexico.

13 MS. DIRAGO: That was not the question. The
14 question was whether New Mexico cares about -- has a
15 vested interest in Lea and Eddy County.

16 MR. WILLIAMS: In oil and gas production
17 from Lea and Eddy County.

18 MS. DIRAGO: Okay. I mean, that's not a --
19 no, you didn't ask that.

20 THE COURT: So your question was, would you
21 agree that the -- all of New Mexico has an I object
22 in oil and gas in Eddy and Lea County?

23 MR. WILLIAMS: That sounds like a better
24 question than what I probably asked, but yes.

25 MS. DIRAGO: That's a better question but

1 I'm still objecting. How would he know? He's not an
2 expert in what New Mexico cares about.

3 THE COURT: I'll let him answer to whatever
4 extent he thinks he knows the answer.

5 A. Yeah, I'm really not an expert on the
6 New Mexico budget, and don't feel comfort in having
7 skimmed a few paragraphs in this in trial transcript
8 that going to follow me the rest of my life giving
9 that opinion.

10 Q. Hypothetically.

11 A. Hypothetically.

12 Q. Hypothetically then, Mr. Trende, would you
13 agree with me that it's fairly significant to any
14 state to have -- a state has an interest in where 40
15 percent of its revenue comes from?

16 MS. DIRAGO: Same objection.

17 THE COURT: I'll let him answer it, again,
18 to the state that he has an opinion.

19 A. Yeah, I don't have an opinion on how -- on
20 New Mexico's budget on how it allocates funds or what
21 this chart means. In the tax and revenue stuff,
22 there's always important nuances and I just don't feel
23 comfortable getting into that.

24 Q. How would you feel if 40 percent of your
25 revenue went away, Mr. Trende?

1 MS. DIRAGO: Objection.

2 THE COURT: Yeah, I'm going to sustain that
3 objection.

4 MR. WILLIAMS: All right.

5 BY MR. WILLIAMS:

6 Q. Mr. Trende if I am correct in what I've
7 heard in your testimony today, your expert report had
8 at least two errors in it that related to the machine
9 that you performed your simulations on and the /TPUB
10 of simulations performed; is that right?

11 A. That's right.

12 Q. Okay. And if I understand the testimony
13 that you've given over the past couple of days and in
14 your deposition, your initial testimony was that your
15 code preserved the 2,040,000 simulations by virtue of
16 a set seed a; is that right?

17 A. That's right.

18 Q. And it didn't do that, correct?

19 A. That's correct.

20 Q. I believe at your second deposition you
21 testified that -- or excuse me, at your first
22 deposition, you had testified that Dr. Chen's 1,000
23 maps had duplicates in them. Do you recall giving
24 that testimony?

25 A. I do.

1 Q. And do you recall then correcting your
2 testimony?

3 A. Yes.

4 Q. All right. So then I believe you testified
5 that -- excuse me -- that we could check whether you
6 actually did the work against the charts and figures
7 in your report that is spelled differently than would
8 have been generated by the codes you produced to us,
9 is that correct, simulated versus simultated; is that
10 right?

11 A. The titles are different. But I don't think
12 there's any dispute that the charts are the same.

13 Q. How would I know that, Mr. Trende? I don't
14 have the data?

15 A. I don't think you've accused me of changing
16 the contents of the chart.

17 Q. Well, Mr. Trende, would you agree with me
18 that the charts are the product of your analysis of
19 the data?

20 A. Yes.

21 Q. And you'd agree with me that we don't have
22 the data; is that right?

23 A. The original data, no.

24 Q. All right. Which is the data, correct?

25 A. I don't think so.

1 Q. Did you analyze any other data for your
2 report?

3 A. For the declaration, yes. I'm not going
4 to --

5 Q. I'm not asking you about your declaration,
6 Mr. Trende. My question was, did you analyze any
7 other data for your report?

8 A. Okay. So that's a different question than
9 you asked. No, for the initial report, I didn't
10 analyze any other data.

11 Q. That was the report on was due on August
12 11th, 2023, correct?

13 A. Yes.

14 MR. WILLIAMS: Your Honor, I know the Court
15 has ruled, but based upon Mr. Trende's testimony,
16 they cannot lay an evidentiary foundation for the
17 charts and figures or for the opinions in 6.41 or
18 6.42. There's no way anyone can test that data.
19 Mr. Trende has relied on the exact form of data to
20 criticize Dr. Chen that we have been deprived of in
21 this case, the maps.

22 Mr. Trende has testified that he knew we
23 would want to see the maps, and today we don't have
24 them and we will never have them.

25 The rules of evidence are very clear.

1 They have to set up an evidentiary foundation that is
2 testable. The rules of evidence contemplate the
3 production of the underlying data and we don't have
4 it.

5 I don't want to go to war with your
6 Honor's ruling, but I urge you, that now that we've
7 got the benefit of Mr. Trende's testimony, that there
8 is a full already record and that the Court could
9 revisit its ruling.

10 Thank you. I'll pass the witness.

11 MS. DIRAGO: I don't know if I need to
12 object on the record to that.

13 MR. WILLIAMS: Oh, your Honor, I --

14 MS. DIRAGO: If that was a motion or what,
15 but --

16 MR. WILLIAMS: I do have one other
17 housekeeping.

18 THE COURT: Okay. Was that a motion?

19 MR. WILLIAMS: It was a motion. But before
20 we get to that, can I do my housekeeping?

21 THE COURT: Okay.

22 MR. WILLIAMS: Your Honor, I would move the
23 admission of -- I'm in the wrong examination. I'm
24 very tired, your Honor.

25 THE COURT: Okay.

1 MR. WILLIAMS: All right. I am done. And
2 yes, we can do that motion right now.

3 THE COURT: All right.

4 MS. DIRAGO: I object to the motion maybe
5 the third or fourth time on the same basis that I
6 objected before, that Mr. Trende's results are
7 reproducible, they are testable. It's just -- this
8 is oversimplifying it a lot, but it's just like if I
9 gave you a recipe and I said, "This makes a chocolate
10 cake. You can do it yourself and see if it does
11 indeed make a chocolate cake and not a buttermilk
12 cake and not brownies."

13 And if that's something that Dr. Chen
14 wants to do, come in and say, "This recipe did not
15 make a chocolate cake," he free to do it. That is
16 not what I'm hearing. He is perfectly free to test
17 the results.

18 THE COURT: All right. I understand now
19 more how his report was produced. I understand your
20 objection to it. I don't think the rules of evidence
21 preclude its admission, so I'm not going to change my
22 ruling on that.

23 Obviously, your cross-examine, your
24 requesting him in deposition and here today brings
25 out what you view as shortcomings of his report, and

1 I'll take that into consideration. So I believe it
2 goes to the weight of his evidence, but not its
3 admissibility. So I'm not going to change my ruling.

4 MR. WILLIAMS: Thank you, your Honor.

5 THE COURT: Redirect.

6 MS. DIRAGO: Yes.

7 REDIRECT EXAMINATION

8 BY MS. DIRAGO:

9 Q. Okay. I would like to talk to you a little
10 bit about the population deviation that you programmed
11 in for your simulations. And can you remind me what
12 that deviation was?

13 A. Plus or minus 1 percent.

14 Q. And in your experience and as an expert in
15 this field, have you seen that 1 percent population
16 deviation employed before?

17 A. Yes.

18 Q. And have you, in fact, used a that
19 population deviation?

20 A. Yes.

21 Q. Did you read Dr. Cotrell's report -- first
22 of all, do you know who David Cotrell is?

23 A. Yes. He's another professor who works in
24 the simulation field. I shouldn't say. He is a
25 professor that works in the simulation field.

1 Q. And do you know if he did an expert report
2 for the CRC analyzing all of the maps that the CRC
3 adopted?

4 A. Yes.

5 Q. And do you know what population deviation he
6 used for the congressional districts?

7 A. I believe it was 1 percent.

8 Q. Why don't you remove duplicates from your
9 simulated maps? And we were talking about this just
10 this morning and you explained it well. So if you
11 could do that for the Court, please.

12 A. Right. So if you wanted to know what
13 typical distribution of anything in America is, but I
14 used the allege gentlemen of American male heights,
15 and you cut off all the simulations, you might -- I'm
16 sorry, all the duplicates -- it's been a day for me,
17 too, you get (inaudible) in your sample, or Shaq.

18 Q. Who is the first person you said?

19 A. (Inaudible), but --

20 Q. I don't know who that is?

21 A. -- (inaudible), so he's not a good example.

22 Shaq.

23 Q. I get Shaq. Okay.

24 A. If you include Shaq -- if you get Shaq in
25 your sample and you let me nature all the duplicates,

1 you're not going to know how much of an outlier he is.
2 And you're going to look at that distribution of
3 heights and say, well, you know, 7'3", it's within the
4 bounds. It's not until you include all the -- all the
5 American males who say they're 5'11", 5'10", 6-foot
6 that you can really see that Shaq is a duplicate -- or
7 is an outlier. So that's why I don't did he
8 duplicate.

9 Q. Okay. So if -- I guess if you were polling
10 American males, you would get -- my husband is 5'8".
11 He doesn't like me to say he's average, you would get
12 a bench of duplicates that say -- that are 5'8"?

13 A. That's correct.

14 Q. So does that affect your results in a
15 negative way?

16 A. If you're trying to detect outliers, it
17 makes it better.

18 Q. Okay. And what is the common practice now,
19 to remove duplicates or not?

20 A. It is not to remove duplicates.

21 Q. The titles -- the simulated versus
22 simultated in your titles, did that affect your
23 results?

24 A. Not at all.

25 Q. Did that affect the partisan distribution of

1 the maps that you created?

2 A. Not at all.

3 Q. What about your conclusions, did that affect
4 your conclusions?

5 A. Not at all.

6 Q. Oh, another issue that was brought up by
7 opposing counsel was this issue about Dr. Chen having
8 duplicate maps. Can you explain -- he said that
9 during your deposition you testified that he did have
10 a few duplicate maps. Can you explain what happened
11 there?

12 A. Yeah. I had gone through and looked and
13 done a visual inspection of the maps, and there were
14 maps that looked to be duplicated on the 29 that I
15 managed to produce -- or high 20s that I managed to
16 produce in a timely fashion.

17 During my deposition, counsel asked a
18 couple questions about things I had done or could have
19 done, and I thought they were well taken questions.
20 So at a break, I went back and tried the techniques
21 that he had described, and turned out that there were
22 some maps that were very, very similar were not, in
23 fact, duplicates, so I corrected myself. I was wrong.

24 Q. And did you correct yourself on the record?

25 A. I did.

1 Q. Do you know -- you know Dr. Chen?

2 A. Yep.

3 Q. Do you know Dr. Imai?

4 A. I don't know that I've met him.

5 Q. Okay. But you know of him?

6 A. Yeah, I know him. And I've conversed with

7 Dr. McCartan. I think he's Dr. McCartan now.

8 Q. Okay. Was Dr. Imai an opposing expert on a
9 case that you were on?

10 A. Yes.

11 Q. And is it typical between experts -- sorry,
12 you contested yesterday that you asked I think
13 Dr. Imai to produce some maps because they were
14 running slowly, right?

15 A. Correct.

16 Q. And then there was maps that were drawn in a
17 language you didn't code, so you asked for them?

18 A. Correct.

19 Q. So is that typical that experts,
20 professionally and collegially might point out some
21 differences or issues that they have with the code and
22 that the other experts will respond?

23 A. Typical, yeah.

24 MS. DIRAGO: Okay. That's it.

25 THE COURT: All right. Anything else for

1 this witness.

2 MR. WILLIAMS: No, your Honor.

3 THE COURT: All right. Thank you.

4 Mr. Trende. You may step down.

5 THE WITNESS: Thank you, your Honor.

6 THE COURT: Plaintiffs, call your next
7 witness.

8 MR. HARRISON: So, your Honor, we are done
9 with the witnesses, other than the witnesses that
10 we've subpoenaed for trial, which I guess brings us
11 to what's going to happen with those witnesses.

12 THE COURT: Okay.

13 MR. HARRISON: They've received subpoenas.
14 I believe all to be here today and tomorrow, received
15 two days of wants fee covering two days. And I guess
16 the normal practice anyway would be to pay them as
17 they need to stay an extra day, and so no one is
18 here.

19 THE COURT: So name one. Which one are you
20 talking about.

21 MR. HARRISON: The individuals -- so it is
22 true that we did not successfully serve for trial
23 Mr. Cervantes, although he's gotten two subpoenas for
24 (inaudible) documents. But Mr. Egolf, Ms. Leith,
25 Ms. Stewart and Mr. Wirt.

1 THE COURT: Okay. So if you were going to
2 call them, what would it be for?

3 MR. HARRISON: It would be for the purposes
4 of asking them about the conversations and other
5 communications that they have had regarding the
6 construction of Senate Bill 1, your Honor.

7 THE COURT: You want to address.

8 MS. SANCHEZ: Your Honor, I feel like we've
9 been over this a few times. And I specifically asked
10 tore clarification on this point when we were
11 discussing this yesterday, that the Court's privilege
12 ruling includes on your elaboration of it that these
13 witnesses are not subject to questioning and
14 compelled testimony on the subject of their
15 communications. We're talking about producing
16 contemporaneous statements within the period defined,
17 all the things we talked about this morning. And
18 those statements will speak for themselves and these
19 witnesses are not to be questioned about it.

20 So given that, my understanding is we
21 are not bringing these people in to testify. There
22 is not a non-privileged basis for doing that.

23 We are earnestly working on the
24 documentation production. I've been e-mailing this
25 whole time that we've been -- that the examination

1 has been going on to get this going and progressing
2 quickly.

3 But that's my understanding of where we
4 are based on my (inaudible).

5 THE COURT: All right. And so that's my
6 understanding, too. And I'm -- either I -- maybe I'm
7 not explaining it well enough. My reading of the
8 case law, I cited a certain case in my decision
9 letter where questioning of a legislator actually
10 came up, and wasn't necessarily legislative privilege
11 that was raised but they're contemporaneous thoughts
12 on statements on passage of legislation at the time
13 it was being made or admissible and relevant. But
14 anything afterwards, I would not.

15 And then with -- on top of that,
16 legislative privilege, which, again, has not been
17 ruled on in New Mexico, but I think that the way it's
18 been viewed around the country and other states and
19 the way it's written into our Constitution, I don't
20 think they can be called to question what -- "Why did
21 you pass SB-1, or why did you" -- "what were your
22 thoughts in passing SB-1?" That they can't be
23 questioned about that. I think that's what falls
24 under legislative privilege.

25 Statements that they made to the public

1 outside of that privilege can be. And, again, I
2 believe those statements just have to speak for
3 themselves. So, you know, if those statements are
4 admitted, those statement come into the record as to
5 what they said at that time about passage of SB-1.

6 And so I don't -- I kind of agree. I
7 don't see what you would get out of calling to the
8 stand now. I don't see what they could testify to
9 that is not privileged or is not already a public
10 statement.

11 MR. HARRISON: Certainly, your Honor. So we
12 agree with some of that sentiment, and (inaudible) we
13 understand within what's the Court's order was. So
14 we wouldn't be asking about their deliberative
15 process or whatnot. But just to use an example of
16 what we were -- continuing on our previous
17 conversation, I could probably give Ms. Sanchez a
18 list of folks to conduct document searches for if I
19 asked Brian Egolf, "Who did you talk to about" --
20 "outside of caucus and senate and Ms. Leith, and
21 whoever (inaudible), who did you talk about
22 redistricting with?"

23 And if he says, you know, "Sarah Jones
24 at the DNC," okay, first we could ask what
25 conversations did he have.

1 "Well, I flew out to D.C. They talked
2 about how they really wanted the southern district to
3 turn blue," we would know then to add Sarah Jones to
4 our list of folks for him to search for
5 communications with so we could ask -- again, the way
6 that we're defining public is not necessarily stuff
7 that you can Google, but stuff that, you know, we
8 would -- we believe we could ask them about. And
9 that's more natural for a deposition.

10 THE COURT: Right.

11 MR. HARRISON: That is -- you know, it was
12 always going to be -- the question was going to be a
13 little awkward, because we haven't deposed them, so
14 we're kind of flying blind. But we do think there's
15 nonpublished material that's perfectly relevant.

16 THE COURT: Okay. I guess I'm thinking that
17 that would not fall under public statements. It's
18 something that -- I don't know how to define it
19 exactly. But that it's known, it's -- you can -- you
20 can get it from another source, is what I'm saying.
21 So I don't -- I agree with the defendants that I
22 don't think there's anything relevant or
23 non-privileged that they can testify to.

24 MR. HARRISON: Okay. We've made our record,
25 obviously. We respectfully disagree with your Honor.

1 But I think with -- with your -- with the Court's
2 ruling, the plaintiffs rest.

3 THE COURT: Okay. All right. Let's take a
4 quick break, and then what are your plans on pursuing
5 this.

6 MR. WILLIAMS: Your Honor, we'll call
7 Dr. Chen and put his testimony (inaudible).

8 THE COURT: Okay. All right. Let's take
9 10 minutes and come back.

10 (Recess held from 10:43 a.m.
11 to 10:57 a.m.)

12 THE COURT: Dr. Chen, you'll raise your
13 right hand.

14 Do you solemnly swear or affirm under
15 penalty of perjury that the testimony you'll give
16 will be the truth, the whole truth and nothing but
17 the truth?

18 THE WITNESS: Yes, your Honor.

19 THE COURT: Thank you.

20 Go ahead.

21 JOWEI CHEN

22 having first been duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. WILLIAMS:

25 Q. Good morning, Dr. Chen. I appreciate you

1 coming out from Michigan for this trial.

2 MR. WILLIAMS: Your Honor, I'd like to
3 approach the witness and provide him a copy of his
4 expert report.

5 THE COURT: Okay.

6 MR. WILLIAMS: Thank you. I have marked
7 that as Exhibit C, your Honor. Would your Honor like
8 a copy?

9 THE COURT: Yes. Thank you.

10 BY MR. WILLIAMS:

11 Q. Dr. Chen, would you please state your name
12 for the record?

13 A. Jowei Chen.

14 Q. And how are you employed, Dr. Chen?

15 A. I am an associate professor in the
16 department of political science at the university of
17 Michigan in Ann Arbor, and I'm also a research
18 associate professor at the Center for Political
19 Studies at the Institute For Social Research at the
20 University of Michigan.

21 Q. What is your academic degree?

22 A. In 2004, I received a bachelor's degree in
23 ethics, politics and economics from Yale University.
24 In 2007, I received a master's in statistics from
25 Stanford University. And in 2009, I received a Ph.D.

1 in political science from Stanford University.

2 Q. Are you an accomplished author, Dr. Chen?

3 A. Yes, sir.

4 Q. And what are you published in?

5 A. I've written academic papers on legislative
6 districting and political geography and distributive
7 spending.

8 Q. Would it fair to say that some of those
9 publications relate to ensemble simulations?

10 A. Yes, sir.

11 Q. Based upon your academic work, your
12 published work, what are your areas of expertise?

13 A. My academic areas of expertise are
14 legislative elections, spatial statistics, geographic
15 information, systems data, redistricting, racial
16 politics, legislatures, and political geography.

17 MR. WILLIAMS: Your Honor, based on
18 Dr. Chen's background, I would like to move him as a
19 qualified expert witness in those areas.

20 MS. DIRAGO: No objection.

21 THE COURT: All right. I'll declare
22 Dr. Chen an expert in those stated areas.

23 BY MR. WILLIAMS:

24 Q. Dr. Chen, what questions have we retained
25 you to answer in this case?

1 A. Defense counsel to evaluate the partisanship
2 of the SB-1 plan. And specifically, defense counsel
3 asked me to determine whether or not to partisan
4 characteristics of the SB-1 plan are ones that could
5 have plausibly emerged from a partisan neutral map
6 drawing process that follows certain nonpartisan
7 district and criteria.

8 Q. And based upon the question that we present
9 to you, did you arrive at any conclusions?

10 A. Yes, sir. So I found that the partisan
11 characteristics of the SB-1 plan at both a district by
12 district level, as well as at a plan wide level, are
13 within the normal range of computer simulated
14 districting plans that follow these certain
15 nonpartisan district and criteria.

16 So I found, in summary, that the
17 partisan characteristics of the SB-1 plan could
18 reasonably have emerged from a partisan neutral map
19 drawing process that adheres to all of these
20 districting criteria in this computer system
21 algorithm.

22 Q. All right. A Paragraph 6 of your expert
23 report, Dr. Chen, the heading is: The use of computer
24 simulated districting plans.

25 Do you see that?

1 A. Yes.

2 Q. Could you explain that paragraph to us?

3 A. Yeah. I'm explaining how in my research I
4 use computer simulation techniques that allow me to
5 produce a large number of partisan blind districting
6 plans that adhere to any particular districting or
7 specified districting criteria that I program into the
8 algorithm and that normally I would use as geographic
9 building blocks for these computer simulations, things
10 like census precincts.

11 Q. What is the algorithm that you used to
12 perform your simulations?

13 A. It's an MCMC version of Sequential Monte
14 Carlo algorithm.

15 Q. And I'm sure that means something to someone
16 with a Ph.D. from Stanford. What does that mean to a
17 mere mortal like myself.

18 A. So in general, what the algorithm does is it
19 draws random districting plans. However, it doesn't
20 just draw these lines completely at random. In
21 drawing random lines on random borders, it is
22 nevertheless, still adhering to specific districting
23 criteria, nonpartisan districting criteria, that I'm
24 programming into the algorithm. These are districting
25 criteria like equal population, geographic contiguity,

1 and several others.

2 So I program the algorithm to follow
3 these criteria, but in following these criteria, it's
4 trying to draw a random districting plan. So every
5 time you run the algorithm and produce a new plan,
6 it's going to be a different map. But all of these
7 maps are still adhering to the set of criteria that
8 I've programmed into the algorithm.

9 Q. Dr. Chen, I've put on the screen, your Map 1
10 from Page 10 of your expert report. Can you kind of
11 walk us through at very lie level how your algorithm
12 would have gone about generating this map?

13 A. This here on Map 1 is just an example of a
14 computer simulated map that's been produced by the
15 algorithm that I was just describing. And so this is
16 just one example of the 1,000 computer simulated maps
17 that my algorithm produced.

18 So at a very high level, what this
19 algorithm is going is it's drawing these various
20 borders.

21 Now, to go into a little bit more
22 detail, it starts by taking all of these areas of
23 New Mexico, and so there are roughly 2000 precincts in
24 New Mexico, a little over 2,000 precincts, and it's
25 going to divide these areas up into three

1 congressional districts. But it's not just drawing
2 these three districts at random. It's following the
3 specific criteria that I've programmed into the
4 algorithm.

5 So as I said, one example of these
6 criteria is equal population. There's also geographic
7 continuity and several others. The algorithm starts
8 by taking all of these areas in New Mexico and
9 dividing them first into two parts. One that has one
10 district and a second part that has two districts
11 worth of population. Then the next step is to divide
12 that two district area up into single district areas.
13 And that's how you end up with three districts.

14 Now, an algorithm also uses what's
15 called MCMC iterations. And that's just a fancy way
16 of saying that the algorithm proposals iterative
17 random changes to the borders between two districts.
18 And it does so repeatedly a large number of times.
19 Not all of these proposed changes are accepted, are
20 actually put into -- set in stone, though. Some are
21 accepted and some rejected. And it's doing this in
22 order to pursue all the various nonpartisan district
23 criteria that I've programmed into the algorithm.

24 So the algorithm, every step along the
25 way, is directed at following, adhering to these

1 nonpartisan district and criteria.

2 Now, it gets me into the algorithm, and
3 then this is very important. The algorithm has a map,
4 a congressionally simulated map, and it outputs that
5 map, it saves that map, it makes a permanent record of
6 that map. So the algorithm saves the map and that way
7 we can look at the map and analyze the map. So it's
8 outputting the map, it's saving it permanently onto
9 the computer hard drive to that we can come back later
10 and actually look at exactly what that map looks like
11 that was just produced by the computer algorithm.

12 So that's how the algorithm works. It
13 generates and saves 1,000 computer simulated maps.
14 And you end up with 1,000 computer simulated maps that
15 are saved on your hard drive that you can then look at
16 and analyze.

17 Q. You've mentioned 1,000 computer simulated
18 maps. Are any of your maps duplicates, Dr. Chen?

19 A. No, they're not.

20 Q. And why is that?

21 A. This is a random computer simulation
22 algorithm, so it is designed to draw random
23 districting plans that are adhering to these certain
24 nonpartisan districting criteria. Every one of the
25 algorithm is different. It would be problematic, it

1 would not really be random if I were to run this
2 algorithm and find that it's producing the same exact
3 map over and over and over again. That's not a random
4 simulation. That's just producing the same map over
5 and over and over again.

6 So what's really important here is when
7 the algorithm has produced the map, it saves the map.
8 And it does that a thousand times. And that way we
9 can actually look at these 1,000 different maps and
10 verify, which I did, that they are actually all
11 different.

12 Now, they're not completely different.
13 They all still adhere to these certain nonpartisan
14 districting criteria. They, for example, are all
15 equally populated. They have some certain features in
16 common, like equal population and other criteria. So
17 they're not completely random, but they are all
18 different, they are all unique maps. And that's the
19 importance of it. That is a hallmark of having a
20 random simulation algorithm that's drawing random maps
21 while adhering to certain nonpartisan districting
22 criteria.

23 Q. Dr. Chen, you've mentioned the phrase
24 nonpartisan districting criteria a couple of times.
25 What does that mean?

1 A. There are a couple of different criteria
2 that I was asked to incorporate into my analysis.
3 I've talked about population equality, district
4 contiguity and there are several others.

5 But nonpartisan districting criteria
6 means that the algorithm is not using, is not
7 considering, is not inputting any partisan data. The
8 algorithm is partisan blind. It is blinded to
9 information about how many, say, Republican or
10 Democratic voters there are in a particular area.

11 That place no role in the algorithm.
12 That's what I mean by nonpartisan districting
13 criteria. The algorithm is not using partisanship as
14 a criteria. It is a nonpartisan algorithm.

15 Q. Let's walk through the criteria that we've
16 asked you to use to perform your work for us today,
17 Dr. Chen.

18 At Paragraph 9.A of your report, you
19 talk about population equality. Can you explain to
20 the Court what population equality means in the
21 context of your expert work?

22 A. Yes. So New Mexico, under the 2020 census,
23 has a population of about 2.1 million. And that means
24 that every congressional district has an ideal
25 district population of 705,840.7. And so that's

1 one-third of New Mexico's total population A that's
2 the ideal district population. And my understanding
3 is it's been the past practice in New Mexico to have
4 congressional districts that are virtually equally
5 populated. Not a deviation of, say, 1 percent, but
6 virtually equally populated.

7 And so the SB-1 plan, for example, has
8 populations such that the difference between the most
9 and the least populated district, the most populated
10 district is CD-2, and the least populated is CD-1, but
11 they have a difference of our 14 people, so it's
12 virtually equally populated, a total difference of
13 only 14 people from the most to the least populated
14 districts. So that is the virtual equal population
15 standard in the SB-1 plan.

16 So defendants' counsel expected me to
17 follow this same degree of population equality in all
18 the computer simulated maps. Every simulated map was
19 required to have a population of between 705,834 and
20 705,847. So that is a total difference of no more
21 than 14 people from the top to the bottom populated
22 district.

23 Q. Thank you, Dr. Chen. Paragraph 9.B
24 references the criteria we gave you on precincts
25 boundaries. Do you see that?

1 A. Yes.

2 Q. And I know you covered that in broad brush
3 strokes. Can you give us just a little snippet as to
4 what precinct boundaries, or how you instructed your
5 algorithm to deal with precinct boundaries?

6 A. In essence, don't split precincts. So
7 New Mexico's 2,163 precincts, don't take any one of
8 those precincts and split it between two or more
9 districts.

10 Q. I don't have a (inaudible) Ph.D., but I got
11 that.

12 Paragraph 9.C, contiguity, what does
13 that mean?

14 A. Contiguity means that all the areas of any
15 single district need to touch one another. So you
16 can't just jump, for example, from the southeast to
17 the northwest corner of the state if those are areas
18 that are not otherwise touching one another. So every
19 district needs to be composed of areas that all touch
20 one another.

21 Q. Paragraph 9.D addresses municipality
22 considerations. Can you explain that to the Court?

23 A. So I was instructed to consider municipal
24 boundaries by first making sure that the three largest
25 metro areas, Albuquerque, Las Cruces, and the Santa Fe

1 metro area, that are -- these three are each primarily
2 assigned to their own representative districts. So
3 there's going to be for example one district that has
4 the Santa Fe metro area. And that's going to be
5 different from the district that contains Las Cruces.
6 Las Cruces and Santa Fe metro area are to be kept
7 intact and to never be split apart into multiple
8 districts.

9 The Albuquerque metro area, certainly
10 larger than a single congressional district can hold,
11 but I made sure that Albuquerque had 60 percent of its
12 population assigned to a single district.

13 And then finally, South Valley and the
14 Rio Grande River valley were required to be kept
15 together in the same district.

16 But collectively what all this means is
17 that you're going to have, of course, three
18 congressional district in New Mexico in any computer
19 simulated plan. And one out of those will be the
20 Santa Fe metro area district. The second one will be
21 the Las Cruces district. And the third will be the
22 one that contains most of Albuquerque.

23 Q. Does that criteria, as it affects your
24 algorithm Dr. Chen, have the effect of combining urban
25 and rural communities?

1 A. Well, yeah, exactly. So like I said,
2 there's going to be one district that contains all
3 after Las Cruces, because Las Cruces isn't going to be
4 split apart. But of course that district is not going
5 to also include, say, Santa Fe. Instead, that means
6 Las Cruces district will combine Las Cruces with
7 surrounding rural areas and rural counties. And every
8 district is like that. It's going to be a /KPEUPBGS
9 of urban and rural.

10 Q. Your next criteria is titled I know January
11 reservation considerations. How did that impact your
12 work, Dr. Chen?

13 A. Defense counsel instructed me to treat
14 Indian reservations in a couple of different ways.

15 So first, the Mescalero Apache
16 reservation was always to be split apart so that
17 precinct 11 and precinct 56 in Otero County were to be
18 split apart.

19 I was also instructed to consider the
20 pueblo -- the Zuni Pueblo rest situation in such a way
21 that precinct 28 in McKinley County was split apart
22 from the rest of the Zuni Indian reservation.

23 And then finally, I was instructed to
24 always keep the Navajo Nation together and do that by
25 keeping San Juan County and most of McKinley County

1 together in the same district so that the Navajo
2 Nation wouldn't be split apart, with the exception of
3 the aforementioned Zuni Pueblo portion of McKinley
4 County. But basically, the Navajo Nation was to
5 believe kept together.

6 Q. All right. Dr. Chen, I'm going to skip the
7 oil industry considerations. We're going to come back
8 to it last.

9 At Paragraph 9.G, we have the
10 redistricting criteria of minimizing county splits.
11 How does that criteria impact your work?

12 A. So this criterion is saying, unless you need
13 to do so, unless the computer needs to do so in order
14 to follow one of the aforementioned criteria, try not
15 to split counties. So one of the times you might
16 actually -- the computer might actually need to split
17 counties, well, for example, to create equally
18 populated districts, you can't create perfectly
19 equally populated districts just by using county
20 boundaries alone. At some point, you can going to
21 have to split up a county in order to create equally
22 populated districts.

23 And so the computer algorithm bus allow
24 for that. It allows for county splits only when
25 necessary to avoid violating one of these

1 aforementioned criteria. But in general, it tries not
2 to split counties.

3 Q. The final criteria on your list,
4 Paragraph 9.H, is geographic compactness. How does
5 that criteria impact your expert report, Dr. Chen?

6 A. The computer tries to favor drawing
7 geographically compact districts. So intuitively,
8 what's geographic compactness. A compact district, is
9 a nice looking district, a nicely shaped district, a
10 cleanly shaped district. And so the algorithm is
11 trying to avoid oddly shaped districts and trying to
12 promote compactness in the drawing of the district
13 boundaries.

14 Q. All right. Let's return to what I think is
15 going to be the contentious criteria, Dr. Chen, which
16 is oil industry considerations, at Paragraph 9.F of
17 your report. Do you see that?

18 A. Yes.

19 Q. All right. Tell me how oil industry
20 considerations impacted the work you do?

21 A. So the instruction that I followed was to
22 require that no single district in any computer
23 simulated plan contains more than 60 percent of the
24 state's active oil wells. I programmed that criterion
25 into the simulation algorithm.

1 Q. And after running your simulations, do you
2 have an opinion as to how that criterion affected the
3 output of our simulations?

4 A. Well, yeah. I looked at -- I saved, of
5 course, the 1,000 simulated plans, the computer
6 algorithm saves -- permanently saves and outputs the
7 1,000 computer simulated plans so that I could analyze
8 them later with respect to -- with respect to oil
9 wells. And so that's what I did. I looked at the
10 number of oil wells in each simulated plan across the
11 various districts.

12 And I programmed that 60 percent oil
13 well rule, like I just said, and then I looked at the
14 distribution of oil wells in these simulated plans,
15 and I saw that indeed in these simulated plans, this
16 rule had the effect of spreading out the state's oil
17 wells across multiple congressional districts.

18 Q. Did you observe an effect of this criteria
19 on the splitting of Eddy and Lea counties?

20 A. Yeah. I can see that many times this
21 criterion results in Lea and Eddy will go placed into
22 different districts. Doesn't always happen, but at
23 that certainly happens many times.

24 Q. All right. To the extent that you've
25 testified today that it doesn't always happen, what do

1 you mean it doesn't always happen, Dr. Chen?

2 A. Well, it doesn't necessarily have to be the
3 case. There's no guarantee that all of Lea County is
4 one district and all of Eddy County is in a separate
5 district. It could be, for example, and it does
6 occasionally happen, that all of Lea County and a
7 portion of Eddy County can be placed into the same
8 district. So that does sometimes happen in the
9 simulated plans. But, like I said, most of the time,
10 certainly Lea County and Eddy County are placed two
11 different districts.

12 Q. Thank you, Dr. Chen. I'd like to talk to
13 you a little bit about your SMC -- excuse me, I think
14 you describe it as an MCMC version of SMC algorithm.
15 Am I getting that right?

16 A. Yes.

17 Q. All right. Can you tell me first, is your
18 MCMC version of SMC algorithm peer reviewed?

19 A. Yes.

20 Q. And where has it been peer reviewed,
21 Dr. Chen?

22 A. Most recently, until Yale Law Journal.

23 Q. Do you know who your pierce were who
24 reviewed your paper in the Yale Law Journal.

25 A. No. That's not the way that peer review

1 works. Peer review, in journal, is blind. So, for
2 example, when I review papers for the Yale Law
3 Journal, I am sent an anonymized manuscript, an
4 anonymized paper. So I don't know who the author is,
5 and I'm not supposed to consider who the author is,
6 which is why I'm not told. It's blind peer review.

7 And so I write up comments, I read the
8 paper, I write up comments, send them back to the
9 journal, and then the journal considers those peer
10 review comments in its publication process or in its
11 editorial process. So it's a blinded peer-review
12 process.

13 Likewise, when I am the one submitting a
14 paper to the Yale Law Journal, I don't know who the
15 peer reviewers are. And so it's pretty typical like
16 that. Peer review is typically, not always, but it's
17 very commonly blinded on both ends. Neither the
18 author nor the peer reviewers no the identity of the
19 other party.

20 Q. Now, in your deposition, Dr. Chen, I believe
21 Ms. DiRago asked you questions about peer review. And
22 in response to her question at your deposition, you
23 testified that you thought your document -- excuse me,
24 your paper and algorithm were peer reviewed in both
25 the Yale Law Journal and in the Cal Berkeley Law

1 Journal; is that right?

2 A. Yeah. I did say that. I went back and
3 checked after the deposition, so jail law journal is
4 peer reviewed, California Law Review, is not.

5 Q. Okay. Thank you, Dr. Chen.

6 Let's talk about what's different with
7 your algorithm than the SMC algorithm that's used in
8 Dr. Imai's Redist SMC?

9 A. Yeah, so like I said, my algorithm as an
10 MCMC. And as I explained earlier, I'll just briefly
11 explain it again, an MCMC is -- stands for Monte Carlo
12 Markov Chain. But what that means is there are
13 iterative changes, random changes that are proposed in
14 the algorithm, random changes that are proposed to do
15 borders between different districts.

16 And the fact that these are random
17 proposed changes is really important, the randomness
18 of it, and I'll explain in a minute why that's so
19 important. But they're random changes. Some are
20 proposed -- they're proposed. And some are accepted
21 and some are rejected, all in pursuit of the criteria
22 that I've built into the algorithm.

23 So why is this important to me, that
24 I -- I have MCMC, is because the SMC algorithm that
25 Imai and McCartan describe in their working paper, in

1 which they document and describe the Redist SMC code,
2 is -- it is a working paper, but more importantly, it
3 is code that is in progress. It's code that they're
4 proposing.

5 Now, the authors McCartan and Imai are
6 very honest and acknowledge that there are
7 limitations. And they're very helpful in describing
8 these limitations. So they note for example, and I've
9 certainly seen this in that Redist SMC code, that Imai
10 and his co-authors have developed, Imai and McCartan
11 are very honest in pointing out an important
12 limitation of their code, which is that in some
13 contexts, in some situations, in some settings, some
14 jurisdictions, some redistricting scenarios, the code
15 has a tendency to produce duplicate plans. And
16 sometimes, at a high rate. And they describe this as
17 plan diversity. So they are very open in discussing
18 this problem or this limitation of their code.
19 They're very helpful about it, too. They're very
20 helpful in cautioning the users of that Redist SMC
21 algorithm, that code that they put out there. They're
22 very careful in cautioning the user to not blindly
23 accept the results of their algorithm without
24 diagnosing and trying to fix duplicate problems.
25 They're very honest about this and helpful in

1 suggesting steps that you take if you have had that
2 you have a lot of duplicates that emerge from the
3 algorithm that they have developed.

4 And so they suggest some various steps.
5 One of these steps is that they simply suggest in
6 their working paper that future research could fry to
7 tackle this problem of plan diversity or duplicates.
8 And they suggest, for example, that future research
9 might incorporate MCMC into the SMC.

10 Now, back to my algorithm, what I do
11 here is the plan algorithm or the districting
12 algorithm combines SMC portion that sets up initial
13 districting blinds and then uses MCMC, uses MCMC
14 iterations, or an MCMC kernel to pursue these various
15 criteria that I've built into the algorithm.

16 Q. And does that have the effect of eliminating
17 or significantly reducing duplicates?

18 A. I checked and I found that in 1,000 plans,
19 it thousands zero duplicates.

20 Q. When you use the phrase plan diversity, does
21 the term plan diversity and sample diversity, are
22 those interchangeable?

23 A. Yeah. Plan diversity is basically saying,
24 you know, intuitively, if you're producing the same
25 plan over and over again, you're obviously not

1 producing a bunch of random plans. That's a lack of
2 plan diversity. So plan diversity is just a term that
3 Imai and McCartan use to describe that problem.

4 Q. All right. So absent the existence of some
5 externality, like a statute, is there a problem with
6 having a lot of duplicates?

7 A. Yeah. I mean, absence some kind of external
8 limitation, like what you're suggesting, a lack of
9 plan diversity or seeing a bunch of duplicates would
10 suggest that what you're running is not really a
11 random algorithm.

12 Q. And just so that we can clarify, when I'm
13 talking about an externality, have you see
14 externalities imposed upon redistricting that force
15 the existence of duplicates?

16 A. Yeah. In situations completely outside of
17 New Mexico, there may be statutory or constitutional
18 requirements that are very specific and very esoteric
19 that might require that a particular district or set
20 of districts be drawn in a very particular way in some
21 jurisdiction. But the examples I've seen are not in
22 New Mexico.

23 Q. Are you aware any externality that would
24 have caused duplicates in redistricting New Mexico?

25 A. No.

1 Q. Dr. Chen, I want to talk to you about a
2 portion of your expert report at Page 13 that is
3 titled measuring the partisanship of districting
4 plans. Tell me what that section of your work is
5 about.

6 A. I'm explaining in this section how I'm
7 boogie to compare the SB-1 plan and all of the 1,000
8 computer simulated plans in terms of their
9 partisanship. And I'm going to compare partisanship,
10 or I do compare partisanship in my report both at a
11 district level, district by district, as well as at a
12 plan wide level.

13 And so I explain in this section here
14 how I use two different ways, two different measures
15 of measuring the partisanship of districts. And so
16 one of these measures. And so one of these measures
17 is to use the former man's index, and a second measure
18 is to use voter registration data.

19 Q. Paragraph 13 of your report, that section is
20 titled the "Republican Performance Index." What do we
21 need to understand about the Republican Performance
22 Index, Dr. Chen?

23 A. The most common way of measuring
24 partisanship of districts used by map drawers is to
25 use recent statewide elections, and that's exactly

1 what the performance index is. So the performance
2 index is a measure, it's developed by Research &
3 Polling, and it essentially aggregates together
4 statewide elections. Specifically it aggregates
5 together the 26 competitive statewide elections that
6 have been held in New Mexico since 2012, from 2012 to
7 2020. And what it's doing is it's going to be able to
8 characterize any given district in terms of its
9 Republican Performance Index.

10 And you can just think of this
11 Republican Performance Index as the Republican
12 candidates collective share of the two-party votes
13 across these 26 elections for any given district.

14 So, for example, if we were looking at
15 CD-1 in the SB-1 plan, that's a single district, and
16 we can characterize it's Republican Performance Index
17 by first counting up the total number of votes for all
18 the Republican candidates in those 26 contest, those
19 26 statewide contests, and then do the same for the
20 Democratic candidates in those 26 contests.

21 So you can see here in the Paragraph 14
22 table that for CD-1, there are a total of a little
23 over 4 million votes for Republican candidates in
24 CD-1. And then the Democrat I can candidates get a
25 little over 4.6 million. So what is the republic

1 share of that two party vote total? It's
2 46.5 percent. So we can characterize CD-1 in the SB-1
3 plan as have a Republican Performance Index of
4 46.5 percent. And you can just intuitively think of
5 that as for the voters in CD-1, 46.5 percent of the
6 votes cast during 2012 to 2020, were in favor of the
7 Republican candidate in the statewide elections.

8 Q. The next portion of your expert report,
9 Paragraph 15, is title "Partisan Affiliation of
10 Registered Voters."

11 Tell the Court what the import of that
12 section is, Dr. Chen.

13 A. This is just a different way of measuring
14 the partisanship of a district, using voter
15 registration partisanship data. And so for any given
16 district you just counts up how many registered
17 Republicans and how many registered Democratic voters
18 there were. And then you calculate what was the
19 Republican share of these Democrat plus we public can
20 registered voters of these two-party registered
21 voters.

22 So in Paragraph 16, there's a table
23 there. And the top row of the table is describing
24 CD-1 in the SB-1 plan. And you can see that CD-1 has
25 157,000 registered Republicans, and CD-1 has 211,916

1 registered Democrats. So what's the Republican share
2 of that total, it's 42.6. 42.6 of the two-party
3 registered voters are Republicans. So that's just a
4 different way of measuring the partisanship of
5 districts.

6 Q. On Page 16 of your report, Dr. Chen, you
7 have the heading, "District Level and Plan-Wide
8 Partisans Compares of the SB-1 Plan and Simulated
9 Plans." Do you see that?

10 A. Yes.

11 Q. What do we need to take away from that
12 portion of your report?

13 A. So in this next section of the report, what
14 I do is compare is SB-1 plan at a district by district
15 level, as well as characteristics for the entire plan.
16 And I compare SB-1 to the 1,000 computer simulated
17 plans that I produced.

18 And so in the following sections, I
19 present some district by district comparisons. And
20 then I present some plan-wide comparisons. And these
21 comparisons can be done using the performance index as
22 the measure of partisanship, and they can also be done
23 using the voter registration numbers, the voter
24 registration share of -- the Republican share of voter
25 registration as the measure of partnership. And so

1 presented both ways later on in this report.

2 Q. Did you, Dr. Chen.

3 At paragraph -- beginning at Paragraph
4 20 on Page 17, you have a section of your report
5 titled, "District By District Comparisons Using the
6 Partisan Index. " Do you see?

7 A. Yes.

8 Q. All right. I'm going to put a chart up to
9 help you explain that section to the Court.

10 A. So this is a district by district
11 comparison. And you can see that this figure has
12 three rows. I'll explain what each of these three
13 rows means, I'll explain why you see a bunch of gray
14 circles there and some red stars.

15 These are district by district
16 comparisons, and when I say "district by district,"
17 here's what I mean, for every plan, the SB-1 plan, as
18 well as the 1,000 computer simulated plans, we're
19 going to directly compare the most Republican district
20 within each plan.

21 Now, the SB-1 plan has CD-2 as its most
22 Republican district. So that's why you see CD-2 with
23 a red star labeled on the top row of this figure.
24 Now, what's actually being plotted here is the
25 Republican Performance Index of that district. And so

1 that's what's being plotted along the horizontal axis.
2 And you can see that the Republican Performance Index
3 of CD-1 is 46.5. And that was reported in Paragraph
4 14 of my report. So that's why you see the red star
5 where it is, where CD-2 is on the top row.

6 Now, let's compare CD-2 to the most
7 Republican district in each of the 1,000 computer
8 simulated plans. And that's why you see 1,000 gray
9 circles, that huge blob of 1,000 gray circles on that
10 top row. Those represent the partisanship of the most
11 Republican district Republican district within each of
12 these 1,000 computer simulated plans.

13 And, again, I'm plotting them along the
14 horizontal axis in terms of their Republican
15 Performance Index.

16 So let's just stay for the used on that
17 top row for right now. What is that top row showing
18 us. CD-2 has a Republican Performance Index that is
19 absolutely more favorable to Republican than
20 33 percent of the simulated plans. And 67 percent of
21 the simulated plans have the most Republican district.

22 I'm sorry. I'm going to start over
23 again. I misspoke.

24 So CD-2 is the red star on the top row.
25 CD-2 has a Republican Performance Index that is more

1 Republican than 33 percent of the computer simulated
2 plans most Republican district. 67 percent of the
3 simulated plans have the most Republican that is more
4 Republican favorable, that is more Republican than
5 CD-2 is.

6 So I hope I -- I got that out right this
7 time. I'm going to just restate it again to make sure
8 I stated that correctly.

9 33 percent of the simulated plans have
10 the most Republican district that is less Republican
11 than CD-2. And 67 percent of the simulated plans have
12 the most Republican district that the more Republican
13 than CD-2.

14 So what do those two numbers mean? I
15 mean, first of all, those two numbers are shown in the
16 two red arrows at the top of that first row. Now,
17 what are those two numbers telling us?

18 Well, it's telling us that CD-2 is well
19 within the distribution of the computer simulated
20 plans in terms of it's most Republican district.
21 Sometimes, CD-2 is more Republican than the most
22 Republican district in the simulated plans, bus
23 sometimes it's less. This split the 33 versus 67
24 percent. So it is in the middle of the distribution.
25 It's not right at the middle of the distribution, but

1 it is well within the normal range of the
2 distribution.

3 In other words, in this top row here, CD
4 is not a statistical outlier, it is not a partisan
5 outlier. It has a partisanship that is very much
6 within the norm of what we see in the most Republican
7 district in 1,000 computer simulated plans. It is not
8 a statistical outlier. That's what we see in the top
9 row.

10 Now, we can do the same comparison for
11 the second most Republican district, what you see on
12 the second row of this figure. And that's CD-1 in the
13 SB-1 plan. So CD-1 /TPH-PLT SB-1 plan has -- has a
14 Republican Performance Index of 46.5 percent. And so
15 what you can see here in the second row is that CD-1
16 is more Republican than 87 percent of the simulated
17 plan second-most Republican district. And it is less
18 Republican than 13 percent of the simulated plans most
19 Republican district.

20 So it's actually to the right of the
21 median, but it's still within the normal range of the
22 distribution. In other words, CD-1 a statistical
23 outlier in terms of partisanship.

24 And you go to the third row, and you see
25 the same thing with CD-3. CD-3 is the least

1 Republican district in the SB-1 plan, but it is within
2 the normal range of the distribution of the simulated
3 plans. 33.2 percent of the simulated plans have a
4 least Republican district that is less Republican than
5 CD-3, and 66.8 percent of the simulations have one
6 that's more. So it is within the normal range of the
7 distribution.

8 So we see the same thing for all three
9 of these districts. They are all within the normal
10 range of the distribution at a district level when
11 compared to the 1,000 computer simulated plans. None
12 of the three districts are partisan outliers. None of
13 them are extreme in their partisan characteristics
14 when compared to the 1,000 computer simulated plans.

15 Q. Thank you, Dr. Chen.

16 Let's look at Page 21 of your report
17 that begins with the heading, "District by District
18 Comparisons Using Voters Party Registration." Can you
19 explain that section of your report to us. ?

20 A. We're about to look on Figure 2 on the
21 screen here, at a very similar comparison. And this
22 figure is exactly the same as the last figure that we
23 saw, with one difference. And that one difference is
24 that now I'm measuring partisanship using registered
25 voters rather than the Republican Performance Index.

1 So along the horizontal axis here, you
2 can see that what I'm measuring all these districts by
3 is each district's Republican two-party share of
4 registered voters. Two-party share meaning the share
5 of Democrat plus Republican voters. So it's a
6 different measure of partisanship, but the results are
7 exactly the same in terms of the conclusion.

8 For all three districts we're seeing on
9 this figure, all three districts in the SB-1 plan are
10 well within the normal range of partisanship compared
11 to the 1,000 computer simulated plans at a
12 district-by-district level.

13 So you see in the top row, CD-1, it is
14 more Republican than 58.3 percent of the simulate
15 plans most Republican district. But it's less
16 Republican than 41.7 percent of the simulations. So
17 it is getting close to the median of the distribution.
18 It's not right at the median, but it's very close to
19 the middle of the distribution. It's very much within
20 the normal range of the distribution.

21 Same thing for the second row, which
22 describes CD-2, and same thing for the third row
23 describing CD-3. All three of these districts you see
24 here are well within the normal range of partisanship.
25 None of these three or statistical outliers. None of

1 them are outliers in terms of the Republican
2 partisanship. All of them have partisan
3 characteristics at the district level that are very
4 typical of and can very much be expected from what we
5 see in the 1,000 computer simulated plans.

6 Q. Thank you, Dr. Chen.

7 At the bottom of Page 23, Paragraph 34,
8 you have a heading titled, "Partisanship of the
9 District Containing Las Cruces." What's the import of
10 that section?

11 A. So we're going to do something a little bit
12 different here in this next figure, in this section.
13 This time I'm not going to compare the simulated
14 districts to the SB-1 districts in terms of the most
15 Republican, the second-most Republican district, the
16 third-most Republican district like we just did a
17 moment ago.

18 In this figure, I'm going to do
19 something a little bit different. What this figure is
20 comparing is just the district that contains
21 Las Cruces. And of course in the SB-1 plan, that's
22 CD-2. So if you look at the partisanship of that
23 district, it's about 47 percent using the Republican
24 Performance Index, CD-2 is. So CD-2, that's the red
25 star in the middle of the upper half of this figure.

1 So that's why there's a red star, and it's right
2 around 47 percent, because CD-2 has a Republican
3 Performance Index of 47 percent.

4 Now, let's compare it to the 1,000
5 simulated plans. But what I'm going to compare it to
6 in this figure is I'm just going to compare it to the
7 district containing Las Cruces from each of the 1,000
8 computer simulated plans. So I'm just comparing the
9 Las Cruces based district in the SB-1 plan to the
10 Las Cruces based district in the 1,000 computer
11 simulated plans. And I'm comparing these districts in
12 terms of the Republican Performance Index.

13 So what do we see here in the top half
14 of this figure? Well, 52 percent of the Las Cruces
15 districts in the 1,000 computer simulated plans, are
16 less Republican than CD-2 is, while 48 percent of the
17 Las Cruces districts in the 1,000 computer simulated
18 plans are more Republican. What does that mean? CD-2
19 is very close to the median of the distribution. It's
20 right in the middle of that distribution. You can see
21 that visually here, but you can also see it in terms
22 of the actual distribution. 52 percent below, and 48
23 percent above. It's very close to the median of this
24 entire distribution.

25 And so what that's telling us is is the

1 SB-1 plan's district for Las Cruces has a partisan
2 characteristic that is right near the median of what
3 can be expected for Las Cruces districts among the
4 1,000 computer simulated plans. It's clearly not an
5 outlier. It's clearly not a partisan outlier at all.
6 It's very close to the median.

7 And the bottom half of this figure just
8 shows that same information except in the form of
9 histogram. So the histogram is just telling us that
10 33.3 percent of the simulated plans are creating a
11 Las Cruces district that is right at are 47 percent
12 Republican Performance Index. In other words, that's
13 the most common outcome that you can see on this
14 histogram. And that's pretty clear that that matches
15 CD-2's Republican Performance Index. CD-2 is showing
16 with that read dashed line in the lower half of this
17 figure.

18 And, again, that's just the same thing
19 that we just talked about a moment ago, which is that
20 CD-2 is very typical and very close to the median of
21 the sort of partisan characteristic that you'd see for
22 a Las Cruces based district in the 1,000 computer
23 simulated plans.

24 Q. Dr. Chen, I'm going to show you Figure 4
25 from that same section. What is the import of Figure

1 4?

2 A. It's exactly the same thing that we just saw
3 on Figure 3, in the previous figure, with the only
4 difference being that here I've measured partisanship
5 of the district using the Republican share of
6 registered voters rather than the Republican
7 performance index.

8 But you see the results are largely the
9 same. When you measure partisanship using registered
10 voters, the results are largely the same. CD-2 is
11 very much within the normal range of the distribution.
12 It's reasonably close to the middle of. It's a little
13 bit to the left of the median. But it's clearly not
14 at all close to being a statistical outlier. It's
15 very much typical of the partisanship of districts for
16 Las Cruces that emerged in the 1,000 computer
17 simulated plans.

18 Q. Dr. Chen, on Page 28 of your report, titled,
19 "Statewide Comparisons," what does that section of
20 your report discuss?

21 A. In this section of the report, I've
22 presented or I've calculated some statewide
23 comparisons of the SB-1 plan to the 1,000 computer
24 simulated plans. And so here, we've got figure five
25 from the reports on the next -- on Page 29.

1 And this figure is presenting as a
2 comparison of a statewide plan characteristic. And
3 specifically what I've measured here is for every
4 plan, whether the SB-1 plan or computer simulated
5 plan, I'm asking how many districts were there in the
6 plan across three district, how many districts have a
7 46 to 54 percent Republican Performance Index.

8 Every plan has three districts, so the
9 answer is going to be zero, one, two, or three.

10 Now, let's start by looking at the
11 simulated plans. The simulated plans are described
12 here with this histogram on this figure. So what's
13 this histogram telling us? It's telling us that the
14 majority, two-thirds of the simulated plans, have
15 exactly one district that is between 46 to 54 percent
16 Republican Performance Index. 67.2 percent is the
17 number under that tallest bar in the middle. That's
18 telling you that two-thirds of the plans have exactly
19 one such district. A very, very small fraction have
20 zero such districts. That's that 1.5 percent on the
21 left. And then one-third of the plans, 31.3 percent,
22 have two such districts, two districts between 46 to
23 54 percent Republican Performance Index. So that's
24 describing the 1,000 computer simulated plans.

25 Now, let's compare the simulated plans

1 to the SB-1 plan. How many districts does the SB-1
2 plan have in this range? It's two. There are two
3 districts that have between a 46 to 54 percent
4 Republican Performance Index. So what this is telling
5 us is that the SB-1 plan, in creating two districts of
6 46 to 54 percent Republican Performance Index is at
7 the high range, at the high end of the range of the
8 simulations. It's -- there are no simulations that
9 create more than two such districts. And the vast
10 majority of the simulations actually create fewer than
11 two. So it's at the high ends of the range.

12 Q. Dr. Chen, having gone through your report,
13 what are the conclusions that you have drawn from your
14 analysis?

15 A. So my conclusions come from a district-level
16 comparison, as well as a plan-wide comparison. And I
17 found that the partisan characteristics of the SB-1
18 plan are typical, are well within the normal range of
19 the partisan characteristics of plans that are drawn
20 with a partisan lined algorithm adhering to the
21 districting criteria that I followed.

22 So both with the plan wide level, as
23 well as district-by-district level. I found that the
24 partisan characteristics of SB-1 could plausibly have
25 emerged from a partisan neutral map drawing process

1 adhering to the criteria that I followed in the
2 algorithm.

3 MR. WILLIAMS: Your Honor, at this time, I
4 would move the admission of Dr. Chen's report into
5 evidence as legislative defendant's Exhibit C.

6 THE COURT: We haven't done C? No, that's
7 how you marked it?

8 MR. WILLIAMS: That's how I've marked it.

9 THE COURT: Any objection?

10 MS. DIRAGO: No.

11 THE COURT: All right. Exhibit C will be
12 admitted.

13 MR. WILLIAMS: Thank you, your Honor.

14 BY MR. WILLIAMS:

15 Q. Dr. Chen, I've got a couple other questions
16 for you. Were you present for the deposition -- or
17 excuse me, the testimony of Mr. Trende?

18 A. Yes.

19 Q. Did you see Plaintiffs' Exhibit 3, which is
20 a chart that reflected the number of what they say is
21 the number of oil wells in New Mexico for ten
22 different counties?

23 A. Yes.

24 Q. All right. Did I ask you to look at that
25 last night?

1 A. Yes.

2 Q. And does that chart that plaintiffs have
3 presented, does it reflect the number of oil wells in
4 those ten counties?

5 A. You're asking me if it reflects the number
6 of active oil wells --

7 Q. Yes, sir.

8 A. -- within those ten counties.

9 Q. Yes, sir.

10 A. The answer is no.

11 Q. For Colfax and Harding County, are there any
12 active oil wells in those counties?

13 A. There are no active oil wells in those two
14 counties.

15 Q. Were you able to determine what Mr. Trende
16 had done with the shapefile that he analyzed in
17 reaching these incorrect numbers?

18 A. Yeah. I mean, it was pretty much /*F pretty
19 clear what happened. The shapefile that Mr. Trende
20 clearly looked at was a shapefile describing all wells
21 across the State of New Mexico, at least the ones that
22 were logged by OCD. And so the shapefile lists a lot
23 of wells that are not oil wells. And the shapefile
24 also lists lots of wells that are not active. Lots of
25 wells are plugged up, they've been discontinued,

1 they're not in use, they're not active oil wells.

2 But like I said, a lot of them are
3 just -- on oil wells, are something else. They're CO₂
4 wells, they're gas wells, a couple of other types.

5 And it's pretty clear from the numbers
6 on Mr. Trende's table that he added up all wells,
7 regardless of whether or not they were oil and
8 regardless of whether or not they were active or not.

9 Q. I have one last line of questions for you,
10 Dr. Chen, before I hope the judge lets us go to lunch,
11 and that relates to nonpartisan criteria.

12 I anticipate that you're going to get
13 some cross-examine on nonpartisan criteria. The
14 nonpartisan criteria that I think is going to be at
15 issue are the state oil and gas considerations.

16 In your experience redistricting,
17 Dr. Chen, can nonpartisan criteria have a partisan
18 effect?

19 A. Well, sure. That happens all the time.

20 Q. In what context does that occur, Dr. Chen?

21 A. Pretty much any criterion could have a
22 partisan effect, even if it is a nonpartisan criteria.
23 So to the extent that you would adhere districting
24 lines to county boundaries, to municipal boundaries,
25 those things can have partisan implications. They

1 don't necessarily have partisan implications, but they
2 certainly can.

3 And even better example is in southern
4 states, when, say, a districting plan is drawn on the
5 basis of racial considerations, for example, to create
6 a majority black district, well, if you create a
7 majority black district in a deep south state, you're
8 probably creating a Democratic leaning district.
9 That's just the way that race and political geography
10 works in the south, right? And I mean that's -- of
11 course that's well known.

12 So all kinds of nonpartisan criteria.
13 And when I say counties, when I say race, or racial
14 considerations when drawing the majority black
15 districts, these are obviously considerations that are
16 not actual partisanship. They are something else
17 that's not partisanship. But of course they can have
18 partisan effects.

19 Q. All right. Thank you, Dr. Chen.

20 MR. WILLIAMS: I pass the witness.

21 THE COURT: Okay. I think we'll break for
22 hundred, it's about noon. How many other witnesses
23 do you plan on calling?

24 MR. WILLIAMS: Your Honor, we have one more
25 witness after this.

1 THE COURT: Okay. So my thought is, we'll
2 break till about 130, get a little bit longer lunch
3 so we're not too rushed.

4 MR. WILLIAMS: That's fantastic. Thank you,
5 your Honor.

6 THE COURT: All right. We'll break till
7 130. Thank you.

8 (Recess held from 11:53 a.m.
9 to 1:31 p.m.)

10 THE COURT: Dr. Chen, if you want to come
11 back up. Or do we need -- let me -- before you come
12 up -- are we on the order.

13 THE COURT MONITOR: Yes.

14 THE COURT: And update, what do you know as
15 far as subpoenas?

16 MS. SANCHEZ: Everybody's working on the
17 searches as we speak.

18 THE COURT: Okay. Any idea -- do they have
19 any way to say how long it might take?

20 MS. SANCHEZ: I have varying estimates, but
21 so far we're still looking good for beginning of next
22 week. Maybe some of it sooner. But --

23 THE COURT: Okay.

24 MS. SANCHEZ: So in progress.

25 THE COURT: All right. At the end of the

1 day, I might ask you again to see if you have an
2 update.

3 MS. SANCHEZ: Sure, sure.

4 THE COURT: I'm sorry, Dr. Chen. If you
5 want to come back up.

6 All right.

7 CROSS-EXAMINATION

8 BY MS. DIRAGO:

9 Q. Hi, Dr. Chen.

10 A. Good afternoon, Ms. DiRago.

11 Q. How are you?

12 A. I'm doing well. Thank you.

13 Q. So we met virtually, never in person. But
14 as you know, I am counsel for the plaintiffs in this
15 case. So I want to just kind of get could be to it.

16 So according to you, you used partisan
17 blinds algorithm to create simulated maps, correct?

18 A. Yes.

19 Q. And, in fact, it is important that your
20 algorithm be partisan blind, right?

21 A. It's designed to be partisan blind, so of
22 course it is important that I programmed it the way
23 that I designed.

24 Q. Okay. And your simulation process is design
25 to ignore all partisan considerations?

1 A. It is designed to ignore partisanship
2 because it does ignore partisanship. It ignores
3 partisan data, partisan I know inputs.

4 Q. Okay. Let's look at your report, Page 4,
5 please.

6 MS. DIRAGO: Judge, I assume you have the
7 report still.

8 THE COURT: Yes.

9 MS. DIRAGO: Yeah.

10 BY MS. DIRAGO:

11 Q. This simulation process, this is down at the
12 bottom of Page 4, Paragraph 6. This simulation
13 process ignores all partisan and racial considerations
14 when drawing districts. You agree with that, don't
15 you?

16 A. Yes, ma'am.

17 Q. Okay. Same location here. Okay. Actually,
18 the last sentence on Page 4. The computer simulations
19 are programmed to draw districting plans following any
20 set of specified districting considerations.

21 Is that correct, that the simulations
22 are programmed?

23 A. I think the more accurate way to phrase that
24 is programming a computer algorithm. The algorithm
25 produce the simulations. That's what that sentence

1 means in more detail.

2 Q. Right. So this is actually inaccurate. And
3 trust me, I wouldn't really care normally, but I think
4 it's been brought up a few times. Everybody makes
5 mistakes, right?

6 A. I'm not sure what you're saying.

7 Q. So this sentence is inaccurate?

8 A. No. I just explained that the program is a
9 program of a computer algorithm. The algorithm is
10 produced in computer simulations. That's what I mean
11 when I say computer simulations are programmed. I'm
12 not sure what that's not clear to you.

13 Q. Well, no, it's clear. The simulations are
14 programmed to draw districting plans. You program the
15 simulations?

16 A. The simulation maps produced by
17 the algorithm.

18 Q. I don't need you to explain it more words.
19 My point is that this is an inaccurate statement.

20 A. Absolutely it's not an inaccurate statement.
21 If you --

22 Q. Then why do you have to keep explaining it
23 with different words?

24 MR. WILLIAMS: Objection, your Honor.
25 Argumentative.

1 THE WITNESS: Yeah, I'm sticking with my
2 same answer.

3 THE COURT: Yeah.

4 BY MS. DIRAGO:

5 Q. Okay. And normally, I'm not the kind of
6 attorney to worry about that. But I think we do have
7 to take some -- point out some the inaccuracies in
8 your report this time, unfortunately?

9 MR. WILLIAMS: Objection, your Honor.

10 That's not a question.

11 THE COURT: Correct, that's not a question.

12 BY MS. DIRAGO:

13 Q. Okay. So let's look at the rest of that
14 sentence. I think that's accurate. You say, let's
15 see, the simulations are programmed to draw
16 districting plans following any set of specified
17 districting consideration, such as population
18 equality, avoiding county splits, protecting municipal
19 boundaries and pursuing geographic compactness.

20 Is that accurate?

21 A. Yes.

22 Q. And do you program -- and you programmed
23 your algorithm here to consider those considerations,
24 right?

25 A. Those considerations are all detailed more

1 in Paragraph 9, but I think that all those examples
2 that I gave of districting considerations are
3 described in more detail in Paragraph 9.

4 Q. So did you program your algorithm to respect
5 all these considerations?

6 A. This sentence right here is me introducing
7 the abstract concept of computer simulated districting
8 plan.

9 Q. Mm-hmm.

10 A. This is not a thorough and complete
11 description of the actual criteria that I used in the
12 computer algorithm that I used to produce the 1,000
13 plans here. For that, I would refer you to
14 Paragraph 9, where I --

15 Q. That's not my question.

16 A. Let me just finish.

17 Q. So those -- those criteria are described
18 clearly in Paragraph 9. Now, go back to the sentence
19 that you're actually asking me about. This is talking
20 about in general, here are some examples of criteria
21 that I could put into -- put as specified district and
22 considerations into algorithm. The purpose of this
23 sentence is not saying this is actually what I did
24 here. These are just some general examples. So a
25 general example is population equality?

1 MS. DIRAGO: Judge, he's not answering my
2 question. I don't know when we cut this off. I'm
3 asking him if he programmed his algorithm with these
4 considerations. That is a fair, direct, simple
5 question that he's not answering.

6 MR. WILLIAMS: Your Honor, he is answering
7 the question.

8 MS. DIRAGO: No, he's not.

9 MR. WILLIAMS: She just doesn't like the
10 answer.

11 MS. DIRAGO: No. It's not an answer.

12 THE COURT: All right. It is a narrative
13 answer that is -- I would say you're trying to answer
14 a question that you believe she's asking rather than
15 the one she is directly asking. So I understand that
16 you think her question should include something else,
17 but for right now, just answer the question that
18 she's asking. The opportunity for you obviously
19 later to further expound on that.

20 THE WITNESS: Thank you, your Honor.

21 THE COURT: Go ahead. Reask your question.

22 BY MS. DIRAGO:

23 Q. The set of criteria that you have on the
24 bottom of Page 4, which I'll read it again, population
25 equality, avoiding county splits, protecting municipal

1 boundaries and pursuing geographic compactness. Did
2 you program your algorithm in this case to respect
3 those considerations?

4 A. I generally did, but this is not a detailed
5 description of what I actually programmed into the
6 algorithm.

7 Q. Do you --

8 A. The answer is yes, I generally did.

9 Q. What do you mean by "generally"?

10 A. This is a general description. So I'm just
11 pointing out that this is not a detailed description
12 of the criteria in the algorithm. That comes later
13 on. This is a very general description of examples of
14 criteria that I could program into the algorithm. But
15 I'm not specifically saying that this -- this actually
16 articulates exactly how I'm including these various
17 criteria.

18 Q. Okay. I'm not asking you about all the
19 criteria. I'm asking you if you programmed your
20 algorithm to -- to consider these criteria. And you
21 said you generally did. And I just don't understand
22 how you generally program an algorithm. You're the
23 expert. I just want you to explain that to me.

24 A. Yeah, I'm sticking with my same answer. I
25 generally did. And I'm happy to explain in some more

1 detail here.

2 Q. I would like you to explain what you mean by
3 you generally programmed your algorithm to respect
4 these criteria.

5 A. Yeah, sure, I'm happy to. So let's take the
6 first one, population equality, that does not say --
7 that phrase, population equality, that's a general
8 statement. It's saying, I'm generally programming the
9 computer simulations in general, as I always do, so
10 pursue population equality.

11 It does not specify exactly what
12 threshold of population equality. For that, we'd have
13 to look later in the report, Paragraph 9, where I do
14 actually say exactly what population equality
15 threshold was used. That's why I'm using the word
16 "generally."

17 Avoiding county splits, same thing.
18 Avoiding county splits is just a general statement. I
19 did not explain exactly what I mean by county splits.
20 For that, we need to look later to the report for the
21 specifics in Paragraph 9, where I explain exactly
22 where county splits follows on hierarchy.

23 There are some times when the computer
24 algorithm is allowed to use county splits. So there
25 are some instances in which the algorithm is not

1 actually avoiding county splits. But in general, it
2 is.

3 That's what I mean when I juice in a
4 qualifier generally. It's because this is a general
5 statement. It is not a specific articulation of
6 exactly how all of the criteria are programmed into
7 the algorithm.

8 Q. Okay. So when you said you generally
9 program these criteria, the generally was not a
10 qualifier of how you program it. It's just a
11 qualifier of how you're describing them in this
12 sentence?

13 A. No, it isn't.

14 Q. I only want to get to the bottom of what
15 generally programmed means.

16 A. I'm sticking with my previous answer, and
17 what I said --

18 Q. It does not quantify the word "program"?

19 A. That's incorrect. I'm sticking with my
20 previous answer, which is that it is a general
21 description of the criteria. And when I use the word
22 general --

23 Q. Okay.

24 A. -- I'm saying --

25 Q. No, no. I didn't mean to stop. Now I get

1 it. It's a general description of the criteria. That
2 I get. Okay. I mean, please finish, though, if you
3 have more to add.

4 A. I'm just sticking with my previous answer.

5 Q. Okay. So are these criteria here at the
6 bottom of Page 4 and bleeding over to Page 5, are
7 these traditional districting criteria?

8 A. They are.

9 Q. Okay. Are there any other criteria that you
10 would consider traditional districting criteria?

11 A. Yes.

12 Q. What are they?

13 A. District contiguity is considered a
14 traditional districting principle, and I'm pretty much
15 I make no mention of that here. Again, it's just not
16 a complete list of criteria here. By I think
17 contiguity is pretty clearly a traditional districting
18 principle.

19 Q. Are there any other traditional districting
20 criteria that you use? Strike that.

21 Are there any other tradition
22 districting criteria besides contiguity that are not
23 listed here on the bottom of Page 4 and bleeding over
24 to Page 5?

25 A. Let me just look through my list of criteria

1 in Paragraph 9 to try to give a more complete answer
2 to your question.

3 It appears that this -- again, this very
4 general, abstract sentence here does not include any
5 mention of preserving precinct boundaries, which I
6 describe at much greater length in Paragraph 9 later
7 on in the report.

8 So preserving precinct boundaries, I
9 think is a traditional districting principle. And I
10 don't believe I've listed it in this paragraph here.

11 Q. Okay. Are there any others that are not
12 listed there and besides contiguity and precinct,
13 respecting precinct lines?

14 A. Off the top of my head, no. I might be
15 misremembering one or two. But off the top of my
16 head, no.

17 Q. What about separating up the oil industry,
18 is that a traditional districting criteria?

19 A. I'm going to answer that question from the
20 standpoint of how I, as a redistricting expert, but
21 not a New Mexico expert, would --

22 Q. I would rather you just answer my question,
23 though.

24 A. I'm going to answer the question. I'm
25 explaining to you the perspective that I'm going to

1 answer the question from.

2 So I'm a redistricting expert. I am not
3 an expert specifically on New Mexico or New Mexico oil
4 industry. So most states do not have the -- the oil
5 extractive industry is not an a significant part of
6 most the state's economy. And it's probably a
7 significant part of very few states, New Mexico being
8 one of them.

9 And so no, oil industry considerations
10 are not traditional districting considerations across
11 the U.S. And that is the perspective from which I am
12 an expert. I am not an expert on New Mexico.

13 Q. Yeah, I'm not asking you about New Mexico.
14 I mean asking you as an expert in redistricting. And
15 you were actually an expert in the Rucho v. -- or is
16 it Common Cause v. Rucho? -- that case, right?

17 A. Yes.

18 Q. And have you read Justice Kagan -- have you
19 read the opinion by the majority and Justice Kagan?

20 A. I'm not sure I've read the whole thing. I'm
21 obviously familiar with it.

22 Q. Okay. And both the majority opinion and
23 Justice Kagan discuss traditional redistricting
24 criteria quite often in that opinion, right?

25 A. I'm happy to take your word for it. I'm not

1 affirming or denying that. But I'm happy to take your
2 word for it.

3 Q. Okay. And I think it was justice Roberts
4 who wrote the opinion. Do you know -- and since you
5 were involved in that case, do you know if they
6 considered oil well -- splitting the oil industry as a
7 traditional districting criteria?

8 A. I don't specifically know, but since the oil
9 extraction industry is not a significant industry in
10 North Carolina, I would be pretty doubtful about that.

11 Q. With it, in fact, you've never programmed
12 your algorithm to respect any -- or to split up any
13 industry, have you?

14 THE WITNESS: I'm going to -- can I ask the
15 Court to repeat the question?

16 THE COURT: I guess you could.

17 Will you repeat.

18 MR. WILLIAMS: You're in Lovington today,
19 Dr. Chen.

20 BY MS. DIRAGO:

21 Q. I will repeat. You can ask me to repeat the
22 question.

23 A. Okay. I'll ask you the question, the repeat
24 it.

25 Q. Okay. In all of your simulations that

1 you've programmed you never been asked to split up an
2 industry before, right?

3 A. I'm going to be as brief as I can. You
4 asked me this question in deposition, and I think I
5 answered it in much more detail to say that, while
6 industry is very broad term, and certainly ways in
7 which -- and the example that gave when you asked me
8 the same question in deposition, was I've certainly be
9 asked to say protect incumbent in congressional -- or
10 sorry, in some kind of legislative simulations.

11 And to the extent that you can consider
12 politicians an industry, for example, or a profession,
13 the term "industry" is just so broad, that there
14 probably would be some considerations that fall within
15 what you're asking about.

16 So I'm going to stick with the way I
17 answered it in deposition, but I'm not going to waste
18 your time by going into all that detail again.

19 Q. I appreciate that. Okay. So you've never
20 before been given the instruction to spread out oil
21 wells, have you, before this case?

22 A. I'm going to first point out that my -- the
23 instructions that were given to me were not to point
24 out oil wells. It was a bit more specific than that.
25 So I'm just going to start with that caveat.

1 Q. So is that a no?

2 A. Okay. I'm going to give that caveat. I'll
3 answer your question. And the answer is that no, I've
4 never -- because I've never worked as an expert in a
5 state where the oil extraction industry was a
6 significant part of the state's economy, so no.

7 Q. Okay. And you gave a caveat, have you ever
8 been -- and I'm going to use the exact instruction.
9 Have you ever been told by lawyers to make sure that
10 no district in the state contains more than 60 percent
11 of the state's oil wells?

12 A. Sorry, I'm going to ask you to repeat the
13 question.

14 Q. This is getting hard. Have you ever been
15 told by counsel, when you're creating simulated maps,
16 to ensure that no district has more than 60 percent of
17 the oil wells in the state?

18 A. Okay. Thank you for repeating it. The
19 answer is no, same thing as before, same explanation
20 as before. I've never worked --

21 Q. I don't need the explanation. What about
22 farms. Have you ever been told to spread out farms in
23 your maps?

24 A. Yes, same answer as before.

25 Q. Okay. Ranches?

1 A. Same answer.

2 Q. Orchards?

3 A. Same answer.

4 Q. Okay. You were an expert in Florida,
5 weren't you?

6 A. I've been an expert witness in -- a Florida
7 case, sure.

8 Q. Okay. But no orchards there?

9 A. Florida, I'm just -- I'm just trying to
10 remember what criteria I was instructed to use in
11 Florida. Florida has a very specific list of criteria
12 in their state Constitution. And I don't think
13 orchards are among the Constitutionally specified
14 criteria. Nothing relating to orchards, I don't
15 recall. But it's a very specific list of
16 constitutional criteria.

17 Q. And you wouldn't remember if you were told
18 to split up all the orchards in Florida? Is that what
19 you're saying right now?

20 A. No, my answer is no, I don't recall being
21 asked to split up orchards.

22 Q. Okay. What about crops?

23 A. Same answer.

24 Q. Chemical plants?

25 A. Same answer.

1 Q. Electrical plants?

2 A. Same answer.

3 Q. Factories?

4 A. Same answer.

5 Q. Greenhouses?

6 A. Same answer.

7 Q. Coal mines?

8 A. Same answer.

9 Q. What about gas? You weren't asked here to
10 spread out the gas wells, right?

11 A. That's correct.

12 Q. So defendant's counsel informed you that oil
13 industry is -- let me just look at exactly what you
14 say, because I know you are exact. Paragraph 9 --
15 Page 9, I believe. No, it's Paragraph 9. 9.F. okay.

16 You say: Defendants counsel informed me
17 that due to the economic importance of the oil
18 production city in New Mexico, a policy consideration
19 in the state's congressional districting process was
20 to spread out the state's oil wells across multiple.

21 Is that correct?

22 A. Yes.

23 Q. But you weren't told anything more about why
24 this was a policy consideration, right?

25 A. No. I think the sentence /EPB Late it. I

1 was told that the oil industry, the oil production, or
2 the oil extraction industry is pretty economically
3 important in New Mexico. I think that's -- that's the
4 explanation.

5 Q. And you don't know if this is a policy
6 consideration that was used to draw SB-1, do you?

7 A. I do know.

8 Q. Oh, you do know? What is the answer?

9 A. Well, defense counsel has since informed me
10 that the legislative record supports that there was
11 discussion and advocacy for oil industry
12 considerations in the legislative process?

13 Q. But you don't know whether SB-1 was drawn
14 using that policy consideration, right?

15 A. The information defend counsel gave me is
16 that it was a consideration by legislators, by house
17 representatives and senators during the SB-1 process.

18 Q. Okay. And that was since your deposition
19 that you were informed of that?

20 A. That's correct.

21 Q. So you didn't ask when you originally got
22 that information from defendant's counsel?

23 A. I'm just going to ask you to be more precise
24 about your counsel.

25 Q. You didn't ask if that was a policy

1 consideration that was used to draw SB-1 when
2 defendant's counsel told you to split up the oil wells
3 in New Mexico?

4 A. I -- I think this is first sentence in
5 Section F here in Paragraph 9 says what I did not at
6 the time, which was that it was a policy consideration
7 N congressional districting process of SB-1, and that
8 consideration was to spread out the state's oil wells
9 across multiple districts.

10 Q. But you didn't ask if SB-1 was indeed drawn
11 with that policy consideration, did you?

12 A. I don't think I asked that question. The
13 information that I was given was here, and so I just
14 reported that information. I don't know that I would
15 have asked the precise question that you're posing.

16 Q. Okay. And defendants's counsel did not
17 explain the connection between the importance of the
18 aisle well industry on one hand and the spreading out
19 of the oil wells of your maps on the ordinary person
20 hand?

21 A. That's incorrect. I think defense counsel
22 did inform me of that and I reported that in the first
23 sentence here, in Paragraph 9.F. so I think that was
24 the case and I think I reported that here in my
25 report?

1 Q. So I see defendant's counsel informed me
2 this was a policy consideration, therefore,
3 defendant's counsel instructed me to require that no
4 single congressional district in any computer
5 simulated plan contains more than 60 percent of the
6 oil -- the state's active oil wells.

7 It's the middle part, it's the why that
8 I don't see in here. And I'm asking you, did they
9 explain the connection, and we can all agree it's an
10 important industry. I don't understand why that means
11 you spread them out in your state? So I want to know
12 if you asked that question.

13 A. I don't think I asked that question because
14 I think the answer was already given to me in the
15 instructions that defendant's counsel gave to me.

16 So there are two things there. I said
17 that defendant's counsel informed me that this is a
18 policy consideration, that the economic importance of
19 the oil industry was -- well, that the oil industry is
20 important, and that therefore there's this policy
21 consideration. And defendant's counsel obviously gave
22 membership the specific instruction that I programmed
23 into the algorithm.

24 That, therefore, begins the second
25 sentence. I think that is connection between these

1 two things. It was really clear to me that one thing
2 led to the other, that the second was the result of
3 the first thing that defense counsel told me. So I
4 think that's laid out pretty clear in this paragraph
5 in my report.

6 Q. Okay. So how does one thing lead to the
7 other?

8 A. Well, just like I said. I was informed that
9 spreading out oil wells was a policy consideration and
10 that because of that, defense counsel there have
11 instructed me to program my algorithm with this
12 particular criteria.

13 Q. So that's all you know about the criteria,
14 right?

15 A. Exactly what I've written in my report.
16 Exactly.

17 Q. I'm still trying to figure that out. So if
18 you can enlighten me anytime during my cross of you,
19 please do.

20 Okay. And traditionally redistricting,
21 people want to keep communities together, not split
22 them up, right?

23 A. I have no opinion on the veracity of that
24 statement.

25 Q. Haven't you written about communities of

1 interest in redistricting?

2 A. Yeah. Absolutely. When we use the phrase
3 communities of interest in redistricting, we're
4 usually referring to a process. The idea of a
5 community of interest is so didn't there one state to
6 another, from one jurisdiction to another. There is
7 no single universal definition of community of
8 interest. Usually, when states talk about community,
9 or jurisdictions talk about community of interest,
10 they're talking about a process, a process of gather
11 information and testimony about communities of
12 interest.

13 Q. So I'm not asking you about the definition,
14 I'm asking you do you typically want to spread out or
15 split communities of interest or do you typically want
16 to keep them together in redistricting?

17 A. Same answer as before. I have no opinion
18 about this as just a categorical statement. I'm not
19 sure that it's possible to just make a categorical
20 statement or a generalization like that can.

21 Q. So gas introduction the pretty important in
22 New Mexico, right?

23 A. I have no opinion.

24 Q. Do you know if agriculture is?

25 A. I have no opinion.

1 Q. You weren't asked to spread out the
2 agriculture -- any crops or farms or ranches in this
3 case?

4 A. No.

5 Q. Okay. I'm going to get an exhibit.

6 MS. DIRAGO: May I approach, your Honor?

7 THE COURT: Yes.

8 BY MS. DIRAGO:

9 Q. So this is something that I printed off of
10 New Mexico Tech's -- hold on. I did write this down.
11 The New Mexico Bureau of Geology and Mineral
12 Resources. And this is an organization sponsored by
13 New Mexico Tech. And I'd like to direct you to the
14 sentence that starts with 67 percent.

15 And it says: 67 percent of New Mexico
16 Gas is produced in from the San Juan Basin and
17 33 percent is produced from the Permian basis.
18 95 percent of the oil is -- of the oil, so that was
19 gas. 95 percent of the oil is produced from the
20 Permian Basin and 5 percent of the oil is produced
21 from the San Juan Basin. Do you see that?

22 A. I see the sentences.

23 Q. Okay. There's a picture. But, again, you
24 were only asked to spread out the oil wells, which
25 were all in -- or 95 percent of them are all to the

1 Permian Basin, correct?

2 A. Your statement there does not follow from
3 the text that you just read. Text that you just read
4 on this page -- and I'm going to answer your question,
5 but I'm going to first start by staying that you just
6 put this document in front of me. I don't know
7 what it is. I don't know -- you know you've told me
8 whether it comes from, but I've not reviewed it. I
9 don't know what data it's based on.

10 With all those caveats out of the way.
11 You just read a sentence, and the sentence you read
12 does not support the statement that you just made.
13 The sentence you read --

14 Q. Did I had misread it?

15 MS. DIRAGO: Can he answer, your Honor?

16 THE COURT: What did you say then?

17 MS. DIRAGO: I said, "Did I misread it?"

18 THE COURT: Okay.

19 THE WITNESS: Okay. Thank you, your Honor.

20 A. Okay. The sentence that you just read says:
21 95 percent of the oil is produced from the Permian
22 Basin and 5 percent of the oil is introduced from the
23 San Juan Basin.

24 Now, I'm not verifying the accuracy of
25 any of those numbers. But that statement is different

1 than the statement that you just made in your
2 question, which is about the wells themselves and not
3 the oil. So you just conflated those two things. You
4 read the sentence, but then you interpreted it in a
5 meaning that is clearly different than the words owner
6 this page. So I'm taking issue with the premise of
7 your question because it's clearly contradicted bill
8 the text that you just reads on here.

9 Q. Okay. I understand what you're saying. So
10 you're saying that potentially, more of the wells are
11 not in the southeast -- the majority of the wells
12 within in the southeast corner of New Mexico?

13 A. I did not say that. I just said that the
14 words that you read off the text of this page are
15 different than the premise of the question that you
16 just asked.

17 Q. Do you know where the oil wells are in
18 New Mexico?

19 A. I turned over data about where the oil wells
20 are in New Mexico. I obviously used that information.
21 That information was inputted into my computer
22 simulation algorithm. And I turned over all that
23 information. There are obviously a lot of oil wells,
24 I think over 25,000 of them, active oil wells in
25 New Mexico. I'm not going to be able to tell you the

1 locations of all of them sit over here right now, but
2 I turned over all of that data.

3 Q. Did you ever look?

4 A. Of course I looked at my own data. Like I
5 said, there are 25,000 of them. But I reported the
6 locations of them with respect to the different parts
7 of New Mexico.

8 Q. But you just don't remember; is that what
9 you're saying?

10 A. Well, there are 25,000 of them. I mean, I
11 can't sit up here and tell you the locations of all 25
12 thousands or so of the active oil wells. There are a
13 lot of them.

14 Q. Do you know generally?

15 A. They are located in different parts of
16 New Mexico. That's what I can generally tell you.

17 Q. You didn't look to see if they were
18 clustered initial in particular?

19 A. I'm sure they might be, but, I mean, I'm not
20 going to be able to comprehensively characterize to
21 you the locations of all of them. The point is, it's
22 in the data. I've turned over all of the data.

23 Q. So it was important to you when you were
24 asked to spread out the oil wells, where they were
25 located?

1 A. Oh, that was --

2 MR. WILLIAMS: Form, foundation, misstates
3 the testimony, misstates the exhibit.

4 THE COURT: What are you trying to get him
5 to answer.

6 MS. DIRAGO: I want to know if it was
7 important to him, to his analysis.

8 THE COURT: Okay. Was it important to you
9 to know where the oil wells were for your analysis at
10 the time you performed it?

11 THE WITNESS: You're asking me to answer
12 that question now, your Honor?

13 THE COURT: Yes.

14 THE WITNESS: Okay. Thank you, your Honor.

15 A. Yes. And I did have that precise data on
16 the location of all the oil wells. I used that
17 precise location data on all the oil wells. And I
18 inputted that into the algorithm. So of course it was
19 important. That's why I used that data. It was
20 necessary in order for me to incorporate this
21 criteria.

22 Q. And if you saw the majority of the oil wells
23 were located in the southeast corner and that counsel
24 asked you to make sure that no district contains more
25 than 60 percent of the oil wells, would that raise

1 alarm bells to you?

2 A. No. As long as I have accurate location of
3 the -- of all the oil wells. The important thing to
4 me and the only thing that would raise alarm bells is
5 if it's not, sway, a well defined criteria and if I
6 can't understand that there's not data on.

7 I looked at the data, I looked at data
8 on all the oil wells, I incorporated that data, and
9 that's how I incorporated this consideration.

10 Q. So if you looked at your oil well data and
11 you saw that the majority of oil wells were in the
12 southeast corner, would that matter to your results
13 that you were then asked that no district contain more
14 than 60 percent of the oil wells in your maps?

15 A. No. The criterion works just the same. I
16 mean, the point is, that the data is being
17 incorporated into the algorithm. That's what's
18 important to me, is to get it right.

19 Q. I'm asking though if that matters to your
20 analysis in creating neutral and blind maps?

21 A. I'm sticking with the same answer. It's no.

22 MS. DIRAGO: So I have -- can I approach?

23 THE COURT: Yes.

24

25

1 BY MS. DIRAGO:

2 Q. Okay. So these were actually printed out
3 from the website that you say you got the oil and well
4 data from. Do you recognize these at all?

5 A. I don't, but I --

6 Q. I'm not sure that's now how you viewed the
7 data when you did view it?

8 A. Yeah. I mean, as I explained in my report,
9 in 9.F, Paragraph 9.F, I just downloaded the
10 geospatial data. So this is a visual -- this looks
11 like a visual map, you're representing it to me --
12 you're representing to me that it comes from the OCD
13 website. I'm not sure I would have been interested in
14 looking at these sort of visual maps. I was
15 interested in downloading the precise location data.

16 Q. Okay. And the instruction to make sure that
17 no district contains more than 60 percent of the oil
18 wells, looking at this map, it would have the effect
19 of cracking the southeast corner of New Mexico, right?

20 A. Yeah, I have no opinion on that.

21 Q. Do you see that most of -- and there are
22 two. There's one that's oil wells that one that are
23 gas wells. So I'm looking at the one that shows the
24 oil wells, and you can see that by the pink square.
25 And it says 76.1k. And then, if you look, most of

1 those oil wells are concentrated in the southeast
2 corner of New Mexico. Do you see that?

3 A. I'm not sure -- you just put this map in
4 front of me. I don't know how this map was created, I
5 don't know who created it, I don't know what this map
6 is representing. You just put this in front of me.
7 And I don't see any documentation. I don't know what
8 data it's based on. I don't have any context for
9 interpreting this map. So I'm...

10 Q. So if it were true that the majority of the
11 oil wells were in the southeast corner of New Mexico
12 and you were -- you programmed your algorithm to
13 ensure that no district has more than 60 percent of
14 the oil wells in that district, would that have the
15 effect of cracking the southeast corner of New Mexico
16 in every single one of your 1,000 maps?

17 A. I have no opinion.

18 Q. Really? You're an expert in simulation
19 analysis and redistricting, and you don't know whether
20 that criterion would have the effect of splitting the
21 southeast corner of New Mexico in every single one of
22 your 1,000 maps?

23 A. All right. That's a different question.
24 You just asked a different question. You asked me
25 about splitting. And I mean, certainly, if it were

1 the case that a significant portion of oil wells
2 /KWR-R in the Permian Basin, then sure, you'd have to
3 draw lines that often do go through the Southwest
4 corner. Not always. And it would differ in how it --
5 how the line the drawn. But sure, I could see that
6 that's a tendency.

7 But to be clear, the question you just
8 asked is different from your previous question.

9 Q. Okay. Do you know whether there's a
10 community of interest in the southeast corner of
11 New Mexico?

12 A. I have no opinion.

13 Q. So it was and relevant to your work here to
14 figure out if there was a community of interest in
15 that southeast corner of New Mexico?

16 A. No, that was not a question that was put
17 forward to me.

18 Q. Dr. Chen, you were named a defender of
19 democracy my Common Cause and you didn't want -- you
20 weren't curious to see if the instructions that
21 lawyers gave you were cracking a community of
22 interest?

23 A. Same answer.

24 Q. Which is what? No?

25 A. I was not instructed to answer that

1 question, so I did not analyze that question.

2 Identify got no opinion.

3 Q. So you don't know if that instruction
4 affected your results at all?

5 A. Which instruction are you talking about?

6 Q. The 60 percent oil well instruction.

7 A. Okay. The 60 percent oil well instruction
8 was incorporated into my algorithm. And so of course,
9 of course it influenced the maps that were drawn. And
10 specifically, I went and looked through all of the
11 maps, all 1,000 of the maps that the algorithm
12 produced, and I saw that yes, it did have -- in fact,
13 have the affect of treading out New Mexico's oil wells
14 across multiple districts.

15 Q. And does that affect your conclusion?

16 A. Of course that affected my conclusion. That
17 was the basis of my conclusion. The simulations are
18 the basis of my comparisons of comparing the
19 simulations with the SB-1 plan. And that's very much
20 what I opined about throughout my report.

21 Q. Okay. So sitting here today, as an expert
22 in this case, you cannot tell the Court how SB-1 would
23 compare to 1,000 simulated maps that were not drawn
24 with the 60 percent oil well consideration?

25 A. You're asking me about a different

1 hypothetical analysis, which I did not do because I
2 was not asked to answer that question, and so I have
3 no opinion.

4 Q. So you cannot tell the Court how SB-1 would
5 fare to maps where the oil well consideration was not
6 baked in?

7 MR. WILLIAMS: Objection. That's
8 argumentative, your Honor. I don't think Dr. Chen
9 has testified that anything was baked in.

10 THE COURT: What?

11 MR. WILLIAMS: She described it as "baked
12 in." I'm not sure I understand what that means. It
13 seems awfully argumentative.

14 THE COURT: Yeah, I think that that's maybe
15 a colloquialism that you could explain better.

16 MS. DIRAGO: Okay.

17 BY MS. DIRAGO:

18 Q. You cannot tell the Court how SB-1 would
19 compare to 1,000 maps that were not drawn with the
20 60 percent oil well consideration?

21 A. Same answer as before. I was not asked to
22 do that analysis, so I didn't answer that question. I
23 have no opinion.

24 Q. Okay. So you thus cannot tell the Court how
25 likely it would be for a partisan blind map maker to

1 create a map that split the southeast corner of
2 New Mexico into three counties when that map maker was
3 not instructed to adhere to that 60 percent rule?

4 A. So if I'm understanding you question
5 correctly, you're asking me to consider a map drawing
6 process that ignores the oil well consideration. And
7 so I've got the same answer, I was not asked to answer
8 that, did not do that analysis, and therefore have no
9 opinion.

10 Q. Is that why you didn't give an opinion here
11 about whether SB-1 gerrymandered?

12 A. Is what the reason why?

13 Q. Because you didn't look at how the map says
14 against 1,000 maps that were not drawn with that oil
15 well consideration, we've already testified is not
16 traditional redistricting criteria?

17 A. Okay. The reason I did not give an opinion
18 about partisan gerrymandering, is I was not asking to
19 analyze that question. Therefore, I didn't analyze it
20 and therefore, I have no opinion.

21 Q. But you're an expert in gerrymandering,
22 right?

23 A. Absolutely.

24 Q. And you've given opinions in many cases
25 before, whether a map was gerrymandered or not?

1 A. Yes.

2 Q. And, you know how to look for indications of
3 a gerrymander?

4 A. In general, I do. I'm not saying that I
5 could have done it in every specific spans, but
6 obviously, that is within my expertise.

7 Q. But you didn't do it here?

8 A. I wasn't asked to answer that question. I
9 didn't analyze it. I have no opinion.

10 Q. So despite the oil instruction, you say that
11 no county in your 1,000 simulated maps is split for
12 the oil well consideration, right?

13 A. There are no county splits that are caused
14 by that consideration. In other words, there are
15 reasons why counties do have to be split in New Mexico
16 congressional maps. They have to be split for equal
17 population reasons. There are the Zuni and the
18 Mescalero considerations that I explained earlier this
19 morning. But there are not additional splits that are
20 caused by the oil -- the oil wells consideration.

21 Q. Did you know none of your maps split
22 Lea County?

23 A. Yes.

24 Q. So then Lea County does not have to be split
25 to respect that 60 percent oil well consideration?

1 A. It's clearly quite possible to draw a county
2 that does not split Lea -- that does not split Leann
3 still abides by the 60 percent -- the 60 percent oil
4 well rule. I'm not saying that it couldn't happen.
5 But I didn't see it happen in the computer
6 simulations. But I'm not ruling out the possibility
7 of that happening.

8 Q. Right. So I just asked you that it's not
9 necessary. And so I think you created 1,000 maps but
10 didn't split Lea County, so it's clearly not
11 necessary, right?

12 A. Yeah. It clearly possible to draw a map
13 that doesn't split Lea.

14 MS. DIRAGO: Can I approach, your Honor?

15 THE COURT: Yes.

16 BY MS. DIRAGO:

17 Q. So Lea County was split by SB-1, right?

18 A. Yes.

19 Q. But Lea County did not have to be split for
20 population reasons, right?

21 A. I have no opinion on that.

22 Q. Well, none of your maps split Lea County,
23 and you had actually very tight population deviations.
24 So clearly, Lea didn't have to be split for those
25 reasons?

1 A. No, no, no, no. You asked me a question
2 regarding the intents or the policy goals behind the
3 drawing of SB-1. And I don't have an opinion as to
4 that particular question. You're asking me about
5 whether Lea was split or not split for population or
6 equality reasons. Again, I have no opinion about
7 that. I can only tell you that, yes, Lea County is
8 split. I cannot tell you why because I did not
9 analyze that question, and so that's why I have no
10 opinion on your question.

11 Q. Okay. I don't know if I misspoke or if you
12 misheard. But what I'm asking you is that it was not
13 necessary to split Lea County to account for
14 population equity.

15 A. Well, in general, when you're drawing a
16 New Mexico congressional plan, you are going to have
17 to split a few counties. It never has to be any
18 particular county. It doesn't have to be lady county,
19 it doesn't have to be Roosevelt. But there are going
20 to have to be some counties that one has to split for
21 population equality reasons in general.

22 So, general, no opinion.

23 Q. Yeah, and there's a lot of them that were
24 split southeast corner. Do you see that?

25 A. I don't know what you mean by "oh lot." I

1 mean, I'm happy to tell you what counties were split.

2 Q. So Lea County did not have to be split in
3 order to respect the Indian reservation conversations,
4 were they?

5 A. There were no Indian reservation
6 considerations in Lea County. Those consideration
7 were in McKinley and Otero as well as San Juan County.
8 So there are no Indian reservation considerations in
9 Lea County.

10 Q. So that a no?

11 A. Yeah, there were no Indian reservation
12 considerations in Lea County, so no, there's none that
13 are relevant.

14 Q. You're going to be here a very long time if
15 you add -- you know, you don't have to add all that
16 for me. I'm just asking straightforward questions?

17 MR. WILLIAMS: Objection. That's not a
18 question.

19 THE COURT: If you have an issue with how
20 he's answering, address the Court.

21 MS. DIRAGO: Okay.

22 BY MS. DIRAGO:

23 Q. Speaking of population deviations, I think
24 you wrote a 2013 paper called "Unintentional
25 Gerrymandering," a similar title to that. Do you know

1 what I'm speaking of?

2 A. Yeah. I know what you're talking about.

3 Q. And you authored it with Dr. Rodden?

4 A. Yes.

5 Q. What population deviation did you allow on
6 that paper?

7 A. I don't remember the precise population
8 deviation. I'm sure there was some deviation of some
9 kind that was allowed. I don't remember the precise
10 threshold in that paper, I was not even trying to
11 create valid congressional planning, where your
12 New Mexico or any other state. And so I was not
13 really that interested in adhering to a strict
14 population equality. So I definitely remember it was
15 not a zero deviation.

16 Q. Was it 5 percent?

17 A. I don't specifically remember. I'm not
18 going to dispute that. I'm happy to take your
19 representation for it. But like I said, I wasn't
20 trying to create valid congressional plans for
21 New Mexico or valid plans for any other state. So
22 5 percent would sound about right.

23 Q. Okay. And you testified earlier that -- you
24 testified, I believe, that all of Lea -- well, let me
25 ask you this. In your simulation maps, could all of

1 Lea and all of Eddy be in the same district?

2 A. You're not going to have all of Leann all of
3 Eddy. There certainly are some maps that have, say,
4 all of Lea County and parts of Eddy County together in
5 the same districts. But you're not going to have all
6 of both of those counties.

7 Q. Why is that?

8 A. There might be a variety of reasons. But
9 certainly the 60 percent oil wells criterion is one
10 reason why that's happening.

11 Q. So I'd like you to look at Page 22. Yeah,
12 we'll do 22 first.

13 So every one of those gray circles is
14 one of your simulation maps, right?

15 A. Not quite.

16 Q. Okay. Explain it to me.

17 A. Every gray circle represents a district from
18 one through 1,000 computer simulated maps. So on this
19 figure, you'll actually see a total of 3,000 gray
20 circles. Because each of the 1,000 maps that is three
21 districts.

22 Q. Got it. Okay. Thank you.

23 So I do see -- so what is the
24 percentages on the bottom there?

25 A. You're asking about the horizontal axis?

1 Q. Yes.

2 A. Okay. That the district's Republican
3 two-party share of registered voters.

4 Q. Okay. What does the 50 percent mark
5 indicate?

6 A. That is a point at which a district has the
7 same number of Republican as Democratic registered
8 voters.

9 Q. Okay. And so the 48 percent would be 48
10 percent Democrat?

11 A. No. The 48 percent -- remember, the
12 horizontal axis refers to the Republican two-party
13 share of registered voters. So if there's a district
14 at 48 percent, that means that 48 percent of the
15 two-party share -- of the two-party registered voters
16 are Republican.

17 Q. Okay. Can you look at your map on Page 18.
18 Not a map, I'm sorry. Chart.

19 A. Okay. .

20 Q. Okay. And what does the 50 percent mark
21 mean here?

22 A. It's the same idea, but this is a different
23 measure of partisanship. So the horizontal axis here
24 refers to the district's Republican Performance Index,
25 which I described earlier this morning. And so

1 50 percent here is referring to a district that has an
2 even number or the same number of votes for the
3 Republican and Democratic candidates across all the
4 various statewide elections that are used in the
5 performance index.

6 Q. Okay. And so here, does the 48 mean 48
7 percent RPI?

8 A. It means that 48 percent Republican
9 Performance Index.

10 Q. Okay. So that would be the same as 52
11 percent Democratic DPI?

12 A. Well, you just throughout that term DPI. I
13 don't know what you're referring to. I did not use
14 the term DPI, I don't believe. I'm always measuring
15 districts in terms of the Republican Performance
16 Index.

17 Q. Okay. Fair enough. That's fine. So I'm
18 looking at the top rectangle-ish blob of gray circles.
19 Are there 1,000 circles there?

20 A. Yeah, there are a thousand gray circles.

21 Q. Okay. How many do you see that are both
22 50 percent, roughly?

23 A. It's a pretty small fraction. It looks like
24 it's -- I couldn't real count up the number, but it's
25 a pretty small fraction.

1 Q. Okay. So a very large majority of the
2 districts in your 1,000 maps -- sorry. A very large
3 majority of District 2 in your 1,000 maps are more
4 Democratic than Republican?

5 A. Not quite. Not quite. That's not how you
6 interpret this. Because remember -- I explained this
7 on direct. What happened this is comparing in the top
8 row of this figure, it's the most Republican district
9 within each plan. It is not necessarily CD-2. It's
10 not necessarily the southern district. It is simply
11 the most Republican district within each plan,
12 wherever that district is.

13 Q. Okay. So if you take the to be blob, the
14 middle blob and the bottom blob out of -- that's 3,000
15 circles, right, if you add all the circles up? I
16 think you said that.

17 A. Yes.

18 Q. Okay. So you take all of these. There is a
19 very small portion of your 1,000 maps that had one
20 district, at least one district that was Republican
21 leaning?

22 A. There was a very small -- I'm just going to
23 be more precise.

24 Q. That's okay.

25 A. There's a very small number of the simulated

1 maps that have one district that is above a 50 percent
2 Republican Performance Index.

3 Q. Okay. So the very, very large majority of
4 your maps had through districts that leaned -- where
5 all three districts leaned Democrat?

6 A. Same caveat again. I'm going to state it
7 more precisely. I mean, clearly most of these
8 districts are below 50 percent, in terms of the
9 Republican Performance Index. So certainly, the vast
10 majority of these plans, you've got three districts
11 with the Republican Performance Index is under
12 50 percent.

13 Q. Okay. And so you compared the SB-1
14 districts to all of these districts, wherein the large
15 majority of them were Democratic? That's what the red
16 star is?

17 A. Sure. Within the red stars, I'm comparing
18 the SB-1's -- is the SB-1's plans districts to the
19 computer simulated plans districts in terms of their
20 partisanship. And obviously we've been describing the
21 partisanship of those districts.

22 Q. Okay. So SB-1 compared to 1,000 maps where
23 a larger majority of them were -- drew three districts
24 that were Democratic compared to those SB-1 is not an
25 outlier?

1 A. Sure. I mean, I'm obviously laying out the
2 comparisons here, and they're not -- none of the three
3 districts are an outlier.

4 Q. Well, I'm trying to get to your baseline
5 here. So the baseline is the three gray blobs.

6 A. I'm not sure what you mean by baseline. I'm
7 just going to put it my own words. I am comparing
8 each of the congressional districts in the SB-1 plan
9 to the individual districts in the computer simulated
10 plans, which, as you noted, the gray circles.

11 Q. Okay. And I guess I'm just noting that the
12 large majority of your maps have three districts that
13 are all Democratic.

14 A. And I'm -- you know, I'm just going to be
15 more precise. I'm not disputing that
16 characterization, but I'm not describing districts as
17 either Democratic or Republican.

18 I can them in terms of their precise
19 Republican Performance Index, and obviously the vast
20 majority of these are under a 50 percent Republican
21 Performance Index.

22 Q. Okay. So in your deposition, you said that
23 you had an article published in the California Law
24 Review, and that it was peer reviewed, correct?

25 A. Yeah. I said that in deposition. I went

1 back and checked. California Law Review is not peer
2 reviewed.

3 Q. Okay. And the only reason you checked is
4 because I told you I went to the University of
5 California and I didn't remember that journal being
6 peer reviewed, right?

7 A. No. You asked me a question, I went back
8 and checked, no, it's not peer-reviewed journal.

9 Q. Okay. I agree, that's fair.

10 My computer died. Hold on just a minute
11 please.

12 My daughter wants Starbucks. Should I
13 order it for her? I don't think so.

14 Okay. So you testified that the
15 parameters -- hold on a minute.

16 Right, so I think before we went to 11,
17 you were testifying that the criteria that you use in
18 your maps can be -- oh, that criteria that's not
19 explicitly partisan on its face can still have
20 partisan implications; is that correct?

21 A. I believe what I testified was that you can
22 have a criterion that is not partisan, that is not
23 partisanship, but the application of many such none
24 partisan criterion can certainly have partisan
25 effects.

1 Q. So to determine whether a criterion is
2 partisan, does the intent of the criterion matter to
3 you?

4 A. I just said partisan effects, so that is
5 just about effects. I mean, that phrase encapsulates
6 what I meant by partisan effects.

7 Q. Okay. So you don't -- in your analysis, you
8 don't care what the intent of the criterion was?

9 A. I'm not saying I do care or don't care. I
10 was not asked to analyze anything regarding intent,
11 and therefore, I have no opinion.

12 Q. So you're not saying you do care or you
13 don't care, so can you answer that? Can you care or
14 do you not care?

15 A. Well, I can certainly answer that with
16 respect to the questions that were posed in front of
17 me, that were posed to me by counsel, I was not asked
18 to analyze intent. Therefore, I have no opinion about
19 intent. And in that narrow sense, you could say I
20 don't care about intent because it was not necessary
21 to answering the questions that were posed to me.

22 Q. Okay. I understand now. What I mean is the
23 intent of the criterion, what the criterion was
24 intended to do.

25 A. Yeah, I don't -- I don't even -- I'm not

1 sure I really understand. When you say the intent of
2 the criterion, I mean, the criterion is not an animate
3 object. It's not an animate person, it can't have
4 intent. People have intent. So I'm not sure the
5 question makes sense to me.

6 Q. Okay. How about the people who designed the
7 criterion, what their intent? Does that matter to you
8 in your analysis?

9 A. Sure. I was not asked to analyze that,
10 therefore, I have no opinion. And from that
11 perspective, I was not trying to answer that question,
12 so I did not -- you know, I was not interested in
13 answering that question.

14 Q. I mean, you are an expert in gerrymandering
15 and I think that's a fair thing to think about --
16 well, okay. That's not a question.

17 Okay. So if you code into your
18 simulation a parameter that was articulated only by
19 those accused of gerrymandering, having no grounding
20 in the state's history or common accepted
21 redistricting practice, what would the maps, the
22 simulation -- what would the maps tell the Court.

23 A. Okay. That was a really long question.

24 Q. Yeah, it was.

25 A. I'm just -- I guess -- I mean, let's just

1 try -- you know, if I could ask you to read it back
2 slowly.

3 Q. So if you code into your simulation a
4 parameter that articulated on the by those accused of
5 gerrymandering, what would those simulated maps tell
6 the Court?

7 MS. DIRAGO: I mean, if you want to object,
8 you can object. Giving faces is probably not
9 appropriate.

10 A. Okay. I'm sorry about this. I'm just going
11 to ask you to repeat it one more time. That was
12 perfect speed. But just need to make sure I'm hearing
13 all the words, just because it's a long question.

14 Q. I understand. It's fine. And since it's
15 written down, it's totally easy for me.

16 Okay. If you code into your
17 simulation -- start over.

18 If you code into your simulation
19 criteria that was articulated only by those accused of
20 gerrymander what would the maps tell the Court?

21 A. Okay. I think I got all the question. I
22 think I heard the question.

23 So my answer is that it's not going to
24 change my opinion. And in general, I have no opinion
25 at all about what -- about how the Court interprets my

1 work. My job is just to accurately report my
2 statistical analysis, my empirical analysis, just to
3 report the science. How that's interpreted by the
4 Court is not -- I am disinterested about that
5 question. So it is just not something I think about,
6 and so I have no opinion.

7 But in general, I'm answering the first
8 part of your question by saying that that does not
9 change my empirical analysis, it doesn't change the
10 opinions that I've expressed.

11 Q. So, Dr. Chen, your speaks a lot about
12 partisan blind algorithm, partisan blind criteria,
13 partisan blind maps. And I guess what I'm asking you
14 is that if you're using criterion that actually had
15 the -- that was designed to have the intent to
16 gerrymander a map, isn't that tainting all of your
17 simulated maps then so, that every one of your 1,000
18 maps are also gerrymanders?

19 A. Yeah. I have no opinion on the premises of
20 your question regarding, say, map drawer intent. I
21 just have to opinion about that.

22 But I'm sticking with my name answer.
23 My job is to understand an empirical question that's
24 been put forward to me. And here, the empirical
25 question was, compare the SB-1 plan to maps that

1 follow these particular criteria. My job is to make
2 sure I can understand those criteria. My job is not
3 to try to go understand the intent of somebody that
4 hypothetically may have proffered or may have proposed
5 to criteria. My job is just to answer scientific
6 questions and to answer what I found. And that's it.
7 I have no more minutes beyond just me trying to
8 accurately report was the scientific answer was.

9 Q. So as long as -- as long as all your
10 simulated maps are -- split up the southeast corner,
11 SB-1 is not an outlier?

12 A. Yeah, no, that just not accurate. I'm
13 just -- I mean, I'm happy to restate what I just said,
14 but I think you know what I just said, so --

15 Q. I do. I thought that you testified that the
16 oil well constraint did split up the southeast corner
17 of New Mexico.

18 A. Sure. It -- I think -- I've -- I've
19 explained that, yeah, in my -- actually, most of these
20 maps, certainly there's going to be a line that's
21 drawn, and very often, it's drawn between Lea and Eddy
22 County.

23 Q. Okay. So when you come paper SB-1 to all
24 maps that also split up the southeast corner, then
25 it's not an outlier.

1 Isn't that what your ultimate conclusion
2 is in this case?

3 A. That's not my ultimate conclusion, but
4 certainly your -- it's perfectly fine to describe the
5 simulated maps as splitting up Lea and Eddy County
6 most of the time. I mean, I've said that's an
7 accurate characterization. Obviously, my opinion is
8 not just that. But certainly, that's perfectly fine
9 to describe it that way.

10 Q. Okay. So you don't compare SB-1 to any maps
11 that didn't split up the southeast corner of
12 New Mexico?

13 A. No, I mean, I've said that yeah, the maps
14 certainly have that characteristic of most of the time
15 placing Lea and Eddy County into a different district.
16 So sure, that is an accurate characterization of the
17 simulations. That's not my ultimate conclusion. My
18 ultimate conclusion is a little bit -- you know, is a
19 little bit broader, is a little bit more extensive
20 than just that.

21 So that's why I said it's not an
22 accurate -- it's not a complete and accurate
23 characterization.

24 Q. So many if the Court wanted to know how does
25 SB-1 fare to 1,000 maps that are not all told to split

1 up the southeast corner, you couldn't answer that
2 question?

3 A. I did not -- I did not tell the maps split
4 up the southeast corner. I instructed the maps to
5 obviously follow to oil wells criterion, which
6 obviously is going to have some geographic effects
7 with respect to Lea and Eddy County. But with respect
8 to an alternative set of simulations that I did not
9 conduct, I have no opinion.

10 Q. So Lea and Eddy County are in the Southeast
11 corner of New Mexico, right?

12 A. Sure.

13 Q. Okay. So I -- am I wrong, didn't all of
14 your maps split up Lea and Eddy County? Maybe not
15 fully, but to some degree? In all of your maps, Lea
16 and Eddy County, the entire Lea and Eddy County could
17 not be in the same district, right?

18 A. That is accurate. Lea and Eddy County are
19 not fully within the same district.

20 Q. Okay. So if the Court wanted to know how
21 does SB-1 fare against maps that are not all told to
22 split up Lea and Eddy County, you cannot answer that
23 question?

24 A. You used the phrase "all told," okay. And
25 that's what I'm taking issue with.

1 Q. Okay. That's the result of your
2 instruction.

3 A. That's fine. Okay. So that's the effect,
4 is what you're describing. They were not told to
5 split up any particular county. To be clear.

6 Q. Okay.

7 A. So you're then asking about -- sure, then
8 you're asking about a different set of hypothetical
9 analysis that I didn't conduct. And so I have no
10 opinion.

11 Q. Do you have an opinion whether that could be
12 actually an important question to answer here?

13 A. I have no opinion.

14 Q. Okay. I might be almost done. I've got a
15 lot of notes, so just one minute, but I think I am
16 done.

17 MS. DIRAGO: Your Honor, I would like to
18 renew our motion to exclude Dr. Chen's testimony as
19 not being helpful to the issue that we're dealing
20 with here. Because all his maps --

21 THE COURT: Your motion from previous?

22 MS. DIRAGO: I'm sorry, yes, yes.

23 THE COURT: Pretrial motion?

24 MS. DIRAGO: Yes. And I believe we said
25 earlier, this is yesterday, that we said that we

1 would revisit it after requesting Dr. Chen.

2 THE COURT: Okay. Any further argument on
3 it?

4 MS. DIRAGO: Well, I want to point out that
5 as Dr. Chen testified shall everyone one of his 1,000
6 maps did not put Lea and Eddy County in the same
7 district. And so if you're comparing SB-1 to all
8 those maps, it's not useful. It doesn't help you
9 determine whether SB-1 really an outlier of all maps
10 that could be drawn in New Mexico with nonpartisan
11 intent.

12 THE COURT: Mr. Williams.

13 MR. WILLIAMS: Your Honor, ultimately the
14 plaintiffs' motion for conclude Dr. Chen is based
15 upon the notion that the instruction 9.F to divide
16 the oil and gas interests is a partisan criteria.

17 We have presented evident in the court,
18 based on the legislative record that it is not a
19 partisan instruction, that it was a policy that was
20 considered and sad advocated for (inaudible) by the
21 New Mexico Legislature.

22 There is a question of fact before the
23 Court. The Court is going to have to make a decision
24 on that. But there is no ground for excluding
25 Dr. Chen for following the policy consideration.

1 THE COURT: Any final word?

2 MS. DIRAGO: I just don't think it's helpful
3 to you, and that's the standard that he has to
4 follow.

5 THE COURT: All right. I understand your
6 position, and I'm sure you'll argue that, but I don't
7 think that that excludes the testimony of Dr. Chen.
8 I think that he's an experts, which you agreed he is,
9 and you did not object to his report when it came in.
10 And so you can make argument as to the weight of his
11 testimony, but I'm not going to exclude his
12 testimony.

13 MS. DIRAGO: Okay. And I have no further
14 questions then.

15 THE COURT: Do you have -- how much redirect
16 do you have?

17 MR. WILLIAMS: I have one question.

18 THE COURT: Okay.

19 MR. WILLIAMS: Actually, I just -- not true.
20 It is one question.

21 THE COURT: Okay.

22 REDIRECT EXAMINATION

23 BY MR. WILLIAMS:

24 Q. Dr. Chen, I heard plaintiffs' counsel
25 describe you as the defender of democracy, do you

1 recall that?

2 A. Yes.

3 Q. Did they give you a cape?

4 A. Unfortunately, no.

5 MR. WILLIAMS: All right. I have no further
6 questions.

7 THE COURT: All right. I -- hold on a
8 minute. I might have one or two questions. I wrote
9 some down during the direct and cross. Some of them
10 were answered.

11 When you're doing the performance index,
12 you testified, and I think Mr. Trende also testified,
13 that you take about ten years worth of statewide
14 elections, correct?

15 THE WITNESS: Yes, your Honor.

16 THE COURT: Why do you not include district
17 elections for how those -- the performance index?

18 THE WITNESS: Yes, your Honor. So in
19 general, when redistricting experts measure the
20 partisanship of district, they use statewide
21 election, because that way you're doing an apples to
22 apples comparison across the entire State of New
23 Mexico.

24 When you use district elections, whether
25 that's legislative or congressional district

1 elections, that's no longer an apples to apples
2 comparison. It was a different race.

3 In CD-2 than it was in CD-1. So you're
4 not necessarily comparing the same strength of
5 candidates, same quality of candidates, same election,
6 circumstances.

7 THE COURT: All right. I understand. Okay.
8 A sum will others, and I'm sure if you can answer
9 them. If you can't, let me know.

10 You described communities of interest as
11 a process of gathering of information.

12 THE WITNESS: Yes, your Honor.

13 THE COURT: And what do you mean by that?

14 THE WITNESS: When you -- you see the phrase
15 communities of interest used in different
16 jurisdictions, it never means the same thing in
17 different states, different jurisdictions. Every
18 locality, every state, every jurisdiction has a
19 different conception of their communities of
20 interest.

21 And so usually what communities of
22 interest refers to is a process for learning about
23 communities of interest.

24 THE COURT: Okay.

25 THE WITNESS: So the process can involve,

1 for example, taking testimony, hearing from ordinary
2 citizens about what they believe their communities of
3 interest to be.

4 THE COURT: So if that is a traditional
5 districting principle which it has been described in
6 other cases as being a traditional districting
7 principle, how would you run a simulation or, you
8 know, program an algorithm to take that into effect
9 without having that information beforehand? Would
10 you be able to.

11 THE WITNESS: Well, your Honor, I
12 personally, in my -- and I describe this in my
13 academic work, I don't believe that the phrase -- I'm
14 sorry, I don't believe that the phrase communities of
15 interest refers to anything specification and
16 consistent from state to state, from jurisdiction to
17 jurisdiction. And that's exactly why you cannot
18 program a computer to automatically be able to define
19 what communities of interest are in this State versus
20 that state, because the computer is not going out
21 there taking testimony from ordinary people.

22 THE COURT: I understand.

23 THE WITNESS: The computer isn't being given
24 anything specific about communities of interest.

25 THE COURT: In your research and your work,

1 have you ever seen economic base designed as a
2 community of interest?

3 THE WITNESS: I'm sure I've heard of that,
4 your Honor. I'm sure some people have described
5 their community of interest in the that way.

6 THE COURT: And then you mentioned it,
7 several times it's been asked, about nonpartisan
8 criteria possibly having partisan effect.

9 THE WITNESS: Yes, your Honor.

10 THE COURT: You mentioned race in certain
11 states where there's taken into consideration.

12 THE WITNESS: Yes, your Honor.

13 THE COURT: And I don't know if you can
14 answer this, or may be another witness could have or
15 should have answered this. Would you agree that --
16 or disagree that the criteria of measuring the number
17 of active oil wells, which also creates an economic
18 base could have a partisan effect, even though it is
19 technically nonpartisan criteria?

20 THE WITNESS: Yes, your Honor, I think I
21 testified to that this morning, in response to
22 Mr. Williams' question, that certainly, there are any
23 number of criteria and certainly oil wells is an
24 example of that, that are, by their nature,
25 obviously, not partisan. There's nothing inherently

1 partisan about oil wells. But applying those
2 criteria can certainly have a partisan effect.

3 THE COURT: Okay. But that's not anything
4 that you studied or considered in your algorithm?

5 THE WITNESS: That's correct, your Honor.
6 I'm just -- I'm just noting that that is certainly a
7 possibility. I have not studied that and so I don't
8 have any opinion beyond noting that that is a
9 possibility, your Honor.

10 THE COURT: Okay. And then the last thing
11 is, you did -- you are giving an opinion in this
12 case that the -- and I'll mangle it, so correct me
13 one I mangle it, that SB-1, when -- compared to the
14 1,000 maps that your algorithm generated, a
15 nonpartisan -- or that there are -- it's a
16 nonpartisan basis for its creation?

17 I mangled that pretty bad, but if you
18 can (inaudible) with that.

19 THE WITNESS: Your Honor, I'll just restate
20 that in my own words.

21 THE COURT: Okay.

22 THE WITNESS: And I do get what you're
23 getting at. I'm just going to restate that in in the
24 words that I use as an expert.

25 So I looked at the district level as

1 well as the plan-wide partisan characteristics of
2 SB-1. And the partisan characteristics of the SB-1
3 plan are within the normal distribution of, are
4 typical after, are within what we could normally
5 expect from plans that are produced by a map drawing
6 process that adheres in the various criteria that I
7 was instructed to program into the algorithm.

8 So in essence, I'm testifying that it is
9 not an outlier, it's not a statistical outlier in
10 terms of its partisanship.

11 THE COURT: Okay. All right. That ends my
12 questioning.

13 Any further questioning based on the
14 Court's questioning, Mr. Williams.

15 MR. WILLIAMS: No, your Honor.

16 MS. DIRAGO: No your Honor.

17 THE COURT: All right. Thank you, Dr. Chen.
18 You may step down.

19 THE WITNESS: Thank you, your Honor.

20 THE COURT: Let's take a break. Who is
21 going to be next.

22 MS. DIRAGO: Mr. Sanderoff will be next,
23 your Honor.

24 THE COURT: Okay. All right. So let's take
25 about 15 minutes.

1 (Recess held from 2:54 p.m.
2 to 3:14 p.m.)

3 THE COURT: All right. If you'll raise your
4 right hand.

5 Do you solemnly swear or affirm under
6 penalty of perjury that the testimony you'll give
7 will be the truth, the whole truth and nothing but
8 the truth?

9 THE WITNESS: I do.

10 THE COURT: Thank you. Have a seat.

11 Ms. Sanchez.

12 MS. SANCHEZ: Thank you, your Honor.

13 BRIAN SANDEROFF,

14 having first been duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MS. SANCHEZ:

17 Q. Good afternoon, Mr. Sanderoff. Could you
18 please introduce yourself to the Court?

19 A. Yes. I'm Brian Sanderoff.

20 Q. And where do you live, Mr. Sanderoff?

21 A. I live in Albuquerque.

22 Q. How long have you lived in New Mexico, since
23 when?

24 A. Fifty-two years.

25 Q. Okay. And what did you do for a living sir?

1 A. I'm the president of Research & Polling,
2 Incorporated.

3 Q. What kind work does Research & Polling do?

4 A. Research & Polling is a public opinion
5 demographic analysis, market research firm in
6 Albuquerque. We work throughout the state, providing
7 both quantitative and qualitative type research.

8 Q. Okay. Does Research & Polling do work in
9 the area, as the name might suggest, of political
10 polling?

11 A. Yes.

12 Q. Can you tell me generally about Research &
13 Polling's work, and your work in that area?

14 A. Sure. Decades ago, we used to do it for
15 organizations and campaigns and the like. But we
16 changed over many decades ago and do it primarily for
17 the media. We've done all the political and election
18 polls for the *Albuquerque Journal* for 30 some odd
19 years, since 1986.

20 We conduct public policy and election
21 polls for lots of nonprofit organizations,
22 corporations that want to stay on top of things and
23 know what the score is politically in the state. So,
24 you know, an up will thousand dollars of them.

25 Q. Okay. Do you do any other political

1 analysis for any other media out the let's besides the
2 *Albuquerque Journal*?

3 A. Yes.

4 Q. And can you give us a sense of what that
5 includes?

6 A. Sure. Well, I think for 20 some odd years,
7 I've been the political analyst, election expert as
8 they call medical on KOAT, the Albuquerque based A, B,
9 C affiliate.

10 You know, I've appeared on CNN and Fox
11 News and *New York Times* and *LT times*, just this lost
12 month, both of them talking be New Mexico politics and
13 elections.

14 Q. Okay. And do you really specialize with
15 politics and elections within the State of New Mexico?

16 A. Yes, I think so.

17 Q. As opposed to --

18 A. Oh, I see what you're saying.

19 Q. -- other states in the country?

20 A. We do work throughout the nation and quite a
21 bit in Texas. But I'd say 95 percent of our work is
22 in New Mexico.

23 Q. Okay. Okay. And in connection -- well, can
24 you give us an idea over all those many decades, how
25 many political polls you've oh done?

1 A. It gets into the thousands.

2 Q. Okay.

3 A. You know, we've done 2,000 polls and at
4 least half of those would be on, let's say, a public
5 policy matter.

6 Q. All right. Has Research & Polling ever been
7 the subject or recognized by any kind of /TPHABL
8 recognition for -- in context with its polling work?

9 A. Yes.

10 Q. Tell us about that, please.

11 A. There's a nationally regarded website could
12 538, formally owned by Nate Silver, who is a well
13 known national statistician, and now by ABC News, I
14 guess that bought them out. And so they maintain a
15 database of 500 or so polling companies nationwide.
16 And they actually track all of our accuracy of our
17 polls in the media.

18 And for this last year now, they've had
19 only four polling organizations in the nation with an
20 A plus rating, and we're one of them. So we're proud
21 of that.

22 Q. Sure, sure. Thank you. And in terms of
23 your work over that past 40 years or so in elections
24 and polling in New Mexico, has that work required you
25 to analyze or evaluate whether a district or race is

1 competitive or not?

2 A. Sure.

3 Q. Is that something that you do all the time?

4 A. Yeah, for corporations and nonprofits, in
5 the past candidates. You see look at the election
6 results, and people want to know what it means, am I
7 in good shape, am I in bad shape, how much money to I
8 need to raise to win. Sure, anytime you do a poll,
9 the client is going to want to know what it all means.

10 Q. Sure. And in terms of your work for the
11 media, for the *Albuquerque Journal* or for KOAT or any
12 other media outlet that you're doing polling for, does
13 the fact that you're preparing that for a media
14 organization impact in any way the way you approach
15 your analysis?

16 A. I think so. When you do your work for the
17 media, and so you know your poll is going to end up,
18 the governor's race or congressional race, on the
19 front page, we have a great responsibility to the
20 readers, to the candidates. Because that poll could
21 actually have an impact on the election, fundraising
22 and the line.

23 Is when it comes to our media polling,
24 we take it up one notch higher in terms of
25 methodological approaches to make sure it's as

1 accurate as possibly can be. Because we know we're
2 going to be scrutinized.

3 No one has ever questioned the results
4 of one of our polls when they like the results, when
5 but they don't like the results, they go and do that.
6 And so we really -- and it's also good business,
7 frankly. You want your polls to be as accurate at
8 possible. Especially those that make it into the
9 public eye.

10 Q. So you may have already answered this, but
11 just to be clear, does Research & Polling perform any
12 polling work or election analysis on behalf of any
13 political candidates or political parties?

14 A. No. We stopped doing that decades ago. And
15 the reason is, once we started doing the media, we
16 wanted to avoid the /PRAERPBS of a conflict of
17 interest so that hopefully everyone will trust us.

18 Q. Okay. Let me shift gears just a little bit
19 and ask about your work in the area of redistricting
20 in New Mexico.

21 Can you tell me a little bit about the
22 roll that you have played and maybe more broadly
23 Research & Polling, but start with the roll that you
24 have played with redistricting in New Mexico?

25 A. Well, you're going to think I'm a will the

1 older than I am. But this is my fifth cycle of
2 redistricting for the state. 1981, '91, '01, '11, 21
3 years. So this is the fifth cycle for redistricting.
4 The first time I was a state government employee
5 assigned by the governor to work on it and with the
6 legislature. The our four times, Research & Polling
7 was -- actually had a contract with the state
8 legislature to provide the professional and technical
9 services to make the whole process work, to staff the
10 process.

11 Q. Okay. So can you tell us a little bit more
12 about what that involves, what staffing the process
13 for legislature involves under those contractors
14 you've had now for 30 some odd years? What are those
15 professional and technical services, generally, that
16 Research & Polling provides?

17 A. Most of it is really -- it's the center for
18 hardware and software to allow legislatures to draw
19 plans to set up the technology to provide the website
20 information so plans can be put on the public website.

21 The precinct is the building block in
22 New Mexico for redistricting. And precincts are, one,
23 authorized by the county commissions. And the state
24 law provides that under certain conditions, precincts
25 have to be split. I won't get into the details.

1 And so we work a year before
2 redistricting with all the county commission and the
3 census bureau to make sure that any precinct
4 boundaries that the county commissions create conform
5 to a census block boundary so that the census bureau
6 will give us precinct-level population and racial data
7 so that the legislature, the county commissions and
8 the city councils can all accomplish their work.

9 So it's a vast effort for fix the census
10 bureaus' maps or to fix the county commission precinct
11 maps so that the line conform.

12 Then, as we move closer, we are setting
13 up the software technology, the GIS systems, so that
14 when legislators make requests to have -- we honor --
15 satisfy all legislative requests for redistricting
16 plans. If a legislator wants a plan drawn, we can
17 draw it for them and give it to them. And so we have
18 to come up with common hardware and software issues
19 so that other people Democrat, Republican caucuses,
20 for example, can also draw their even plans.

21 And so basically, we're setting up the
22 technology, and we're also drawing plans at
23 legislators requests, house districts, senate
24 districts, public education commission districts,
25 county commission, congressional districts and the

1 like.

2 Q. Okay. All right. And when Research &
3 Polling, you know, honest one of those requests, you
4 get asked to process a particular plan on behalf of,
5 you know, legislator X, what does the actual product
6 look like that you generate? What kind of information
7 does that contain?

8 A. Every plan that's requested by a legislator
9 gets a form. Oh, and one thing I forgot to mention
10 earlier was the mapping technology. But when a plan
11 is drawn by us or if someone else draws a plan and
12 submits it to us, it has to go through a process
13 where we calculate the precinct level population,
14 racial statistics, partisan performance index, which
15 incumbents are paired, if any.

16 And it's a standard form that, then, if
17 the legislator decides to introduce the plan, then it
18 goes public and everybody can see it. If they decide
19 not to introduce the plan, then it just stays with the
20 legislator. So basically providing population, racial
21 and political data and maps, beautiful maps of all of
22 the boundary lines of that particular plan.

23 Q. All right. Thank you, Mr. Sanderoff. So
24 within that package, you mentioned something called a
25 partisan performance index, and I want to ask you a

1 little bit about that.

2 Can you explain for us in layman's terms
3 what a partisan performance index is?

4 A. Sure. It's really not complicated. So you
5 want to have a partisan measure, or at least
6 legislators do, to understand how an average Democrat
7 or an average Republican might perform in a given
8 district as you shift the boundaries and compare and
9 contrast of.

10 So what we do is we take all the
11 statewide raises that occurred in the State of
12 New Mexico, 2012, '14, '16, '18 and 2020. Remember we
13 were doing this for the session in '21.

14 And we take those raises, there are 26
15 of them, that we aggregated estimated precinct
16 boundary shifts overtime, as the boundaries and the
17 precincts changed and came up with the partisan
18 performance index. So anybody who drew a plan and the
19 boundaries started shifting, the numbers would start
20 shifting on the partisan performance index.

21 In this index, that included 26 raises
22 throughout the decade, we excluded any race where a
23 candidate won by more than 20 percentage points.
24 Winning by more than 20 percentages points became an
25 outlier to us. If the objective was to come up with

1 something reasonable accurate, that people can count
2 on, you can average all the other raises. And we
3 excluded three raises that we were what we considered
4 outliers.

5 Q. Okay. And is that methodology that you just
6 outlined for us, is that the same methodology that
7 Research & Polling used to create its partisan
8 performance index in 2011 and 2001 and 1991, as well?

9 A. Yes.

10 Q. And I guess one question is, have you ever
11 seen any need to change the way that you do the
12 partisan performance index? Has it been pretty
13 reliable?

14 A. I think so. Because again, the goal is to
15 come up with something that realistic. You know, one
16 of those raises the candidate won by 29 personal
17 point, is a well known powerful incumbent with lots of
18 money running against a placeholder that was just put
19 on the ballot who didn't do anything. And that
20 candidate won by almost 30 points, so why include that
21 in the index.

22 Q. Sure, sure. Let me ask you a slightly
23 different question from what is the partisan
24 performance index to what is the purpose of the
25 partisan performance index?

1 A. The purpose of the index is to /KPW*EUF
2 legislators a sense of partisanship of
3 competitiveness, of safety, of particular districts
4 that are drawn. So if people draw through different
5 districts, they can compare and contrast the partisan
6 performance index of the different -- among the
7 different districts.

8 So for the legislature, for example, you
9 know, you have 70 house seats. You can quickly look
10 at the Democrat and Republican parties and performance
11 for all 70 seats and compare it to another plan that
12 another legislator may support for state house
13 districts. It's a handy way of measuring competition.

14 Q. Okay. Is it meant to necessarily predict
15 the county some of the next election in that district
16 for whatever seat?

17 A. It's not designed for that. And we
18 constantly tell the legislators, it's not designed for
19 that. It's designed to be an average of how 26
20 statewide candidates' raises occurred. And so it
21 doesn't take into account the quality of the
22 candidates or incumbency or how much money they've
23 raised. Those things have to be taken into account by
24 the people who are looking at the numbers to give them
25 a better sense.

1 That doesn't mean that everyone doesn't
2 immediately think of them as predicting the outcome,
3 but that was not the intent.

4 Q. Sure, sure. Okay. Thank you. So you've
5 already mentioned this, but just to come back around
6 to 2021, did Research & Polling play this same sort of
7 professional technical services role for legislature
8 for redistricting in 2021?

9 A. Yes. Yes, from '91 -- for four cycles.

10 Q. Okay. And in 2021, did Research & Polling
11 have any role and connection with the work of the
12 citizens redistricting committee?

13 A. Yes.

14 Q. Can you tell us a little bit about what that
15 looks like?

16 A. Okay. The legislature and the -- I guess in
17 the session prior to redistricting past a statute to
18 create a citizen redistricting commission. And the
19 citizen redistricting commission was made up of
20 committee members, and they traveled the state in two
21 rounds of public hearings. And people realized, oh my
22 goodness, this has happened really fast that the
23 legislature passed this major undertaking.

24 And so they needed somebody to staff the
25 process. So we were still building the technology for

1 the legislature. We staffed the process, went to all
2 the meetings, creating the technology for them to do
3 everything they wanted to do. And we took a break
4 from the legislature during that period of July and
5 into October, staffing the citizens redistricting
6 committee, we took a break from our work with the
7 legislature, sort of to wear a different hat.

8 And then we went back to the legislative
9 had once we finished our work for the citizen
10 redistricting committee.

11 Q. Okay.

12 A. So it was performing the same type of
13 services for a different group.

14 Q. Understood. Okay. Let me ask you this.
15 Did you -- did you or Research & Polling have any role
16 in designing the map that is what we're calling SB-1,
17 the congressional redistricting map that's at issue
18 here?

19 A. No.

20 Q. And did you have any communications with
21 legislators about the design or the intent or the
22 effects of SB-1?

23 A. No.

24 Q. All right. And I think you mentioned
25 earlier that there are -- Research & Polling can

1 perform the task of drawing a plan upon request, but
2 there also may be plans that come to Research &
3 Polling that legislators may have developed without
4 your assistance?

5 A. That's true.

6 Q. Is that's something that happens?

7 A. That is something that happens. We still
8 have to process any plan that's going to be
9 introduced, whether we drew it at the request of the
10 legislator, whether some other organization drew it.
11 They have to process it through us so we get those
12 forms and those maps to make sure the populations add
13 up to the population of the state and they haven't
14 left out precincts. So people are forced to practices
15 their plans through us if they want them to be
16 introduced into the legislative process.

17 Q. And are there requests that come through
18 Research & Polling -- is it your understanding that
19 any requests Research & Polling gets to develop maps
20 or process maps, that those are treated as
21 confidential within the legislature?

22 A. Yes. It's in our contract that we're sort
23 of an arm of the legislative council service, like
24 attorneys who are trained that we -- that anything a
25 legislator asks us stays with us. We're not even

1 allowed to tell legislative leadership what we might
2 be doing for their own members. Everybody we do works
3 with the attorneys for legislative council service.

4 Q. Okay. I want to shift gears just a little
5 bit still in the area of redistricting, but I want to
6 ask you about your experience testifying as an expert
7 witness.

8 As I said it, Mr. Sanderoff, you were
9 involved in not only the redistricting process in
10 New Mexico back in 1991, I realize in a different roll
11 in 1981, but jumping to 1991, but did you also have
12 some involvement in 1991 with some court action that
13 took place surrounding some of the redistricting in
14 the state?

15 A. Yes. 1991 was different. In 1981,
16 New Mexico not once, but twice was found to racially
17 gerrymander by the U.S. courts. And so New Mexico was
18 under preclearance in 1991 and actually had to have
19 its plan precleared by the justice department.

20 So we staffed the 1991 process. The
21 house plan was precleared by the justice department.
22 But the senate plan -- the state senate plan was not.
23 And so the justice department basically came back to
24 New Mexico said, "We want you to create two minority
25 districts in Southeastern New Mexico."

1 So we worked with the legislature to
2 come up with something that would satisfy the justice
3 department, and then they sent me back to Washington,
4 D.C. to work with the justice department and get their
5 preclearance. And then once getting it precleared,
6 the legislature passed that plan.

7 So it changed the face of the state
8 senate in Southeastern New Mexico, and Research &
9 Polling was an active participant in helping the
10 legislature with the justice department.

11 Q. Okay. All right. Thank you.

12 Outside of that experience, have you
13 testified as an expert witness in court in connection
14 with redistricting litigation?

15 A. Yes. In the 2001, in the 2011 case, just
16 like this. That one was a little given, because the
17 governor and the legislature couldn't come to terms
18 with the plans, so it was just an impasse. And so it
19 was the judge who had to choose the plans. And so we
20 staffed the same process, answered any questions that
21 came up in court. So yes, we were experts in the 2001
22 and 2011 in court.

23 Q. Okay. Let me just ask you a follow-up
24 question about the 2011 litigation. That was, again,
25 a situation where there had been an impasse between

1 the legislature and the executive in terms of enacting
2 plan?

3 A. Right.

4 Q. In the course of that litigation, did some
5 of the district court's decision-making, and I realize
6 there were multiple plans at issue, but did some of
7 the district court's decision-making go up to the
8 state Supreme Court for review?

9 A. Yes.

10 Q. Okay. And to your knowledge, did the state
11 Supreme Court on that review, in its opinion, make any
12 suggestions or recommendations about what your role
13 might be going forward for the district court?

14 A. Yes, the Supreme Court told the district
15 court that they had to change the map and make some
16 changes based on the Supreme Court opinions. And the
17 Supreme Court recommended to the district judge that
18 it was okay to use Research & Polling to help the
19 district court judge accomplish it, accomplish the
20 wishes of the Supreme Court. So we worked with the
21 district judge to satisfy the district judge's
22 requests.

23 Q. And in that capacity, I realize this is
24 probably more of a legal than in your field, but
25 does the term Rule 11-706 expert sound familiar to

1 you?

2 A. Yeah, that does sound familiar.

3 Q. Was that the role that the played for the
4 district court in that 2011 --

5 A. It was.

6 Q. Okay. All right. And did your expert
7 /W-RBG in that 2011 case, which is sometimes referred
8 to as the Egolf case, sometimes as the Maestas case,
9 I'll just call it the 2011 case, did your work in that
10 case involve -- I realize there were not claims of
11 partisan gerrymandering as there are now, but did your
12 work at that point involve looking at issues
13 surrounding partisan performance and competitiveness
14 and (inaudible)?

15 A. It did.

16 MS. SANCHEZ: Your Honor, at this point, I
17 would tender Mr. Sanderoff as an expert in New Mexico
18 elections and political performance.

19 MS. DIRAGO: No objection.

20 THE COURT: All right. Mr. Sanderoff is an
21 expert in New Mexico elections political performance.

22 MS. SANCHEZ: Yes. Thank you.

23 May I approach, your Honor?

24 THE COURT: Yes.

25 BY MS. SANCHEZ:

1 Q. Mr. Sanderoff, I've handed you what we've
2 marked as legislative defendants Exhibit D, as in
3 David. Do you recognize that document?

4 A. I do.

5 Q. Is this a copy of the expert report you've
6 issued neighborhood connection with this case?

7 A. It is.

8 Q. I would like to ask you, we won't go over
9 the -- your experience and credentials, because we
10 already have talked about that, but I would ask you to
11 please flip to Page 5 of the report.

12 Towards to top of Page 5, you see
13 there's a Roman Numeral II, where it says "Scope of
14 Expert Engagement"?

15 A. Yes.

16 Q. Okay. It says there that you were retained
17 by counsel for the legislative defendants to evaluate
18 the political competitiveness of the congressional
19 redistricting plan that we're calling SB-1. Do you
20 see that?

21 A. Yes, I do.

22 Q. Okay. And is that a fair statement of the
23 scope of what you were engaged the in this case?

24 A. I think so, yes.

25 Q. Okay. Look at the next section of your

1 report, identifying the data and materials that you
2 relied upon, these are -- these are really pretty
3 self-explanatory, but I'd like to ask you specifically
4 about the fifth bullet point there, which references
5 Justice Kagan's dissenting opinion in *Rucho v. Common*
6 *Cause*.

7 Can you talk to us a little bit about
8 why that was something that you looked at in the
9 course of developing your opinions in this case?

10 A. Well, I think that I read the New Mexico
11 Supreme Court order, and I think it mentioned Justice
12 Kagan's dissenting opinion in *Rucho*, so I figured I
13 better read it.

14 Q. And did you, in fact, read it?

15 A. I did. Well, at least the relevant parts.

16 Q. Sure, sure. In -- let me -- let me --
17 before we dive into your opinions in connection with
18 that, let me just ask you about something here that's
19 at the bottom of the page, where you note, as we've
20 already discussed, that you didn't have any role in
21 designing SB-1 or consulting on the development of
22 SB-1.

23 Is it true, Mr. Sanderoff, that your
24 opinions that you've developed here are solely based
25 on the information you've identified in your report,

1 not on any type of involvement in the creation of
2 SB-1?

3 A. Correct.

4 Q. Okay. Let's -- let's dive into your
5 opinions then on Page 6 so your first opinion here
6 says SB-1 does not entrench the Democratic party in
7 power. Is that a fair statement of your opinion?

8 A. Correct.

9 Q. Okay. Can you tell us what -- how you were
10 using the term entrenched in making that opinion?

11 A. Well, the term entrenched to me, has always
12 meant something that is entrenched, that change would
13 be very difficult, if not impossible. The first thing
14 I did was look it up in a few dictionaries, and came
15 up with the same conclusion, that to entrench someone
16 or something is to make it difficult or impossible to
17 change.

18 And so, in Justice Kagan's dissent, she
19 was speaking about entrenchment as -- you have to
20 demonstrate evidence of entrenchment as one of the
21 tests that she has in a case. So the first prong, if
22 you will, of Justice Kagan, which just quoting from my
23 report which quotes from her, as to whether state
24 officials predominant purpose in drawing the district
25 lines was to entrench their party in power by diluting

1 votes of citizens and favoring it's rival.

2 And then the second prong was effect,
3 did they pull it off, they had they did he know
4 trench? And so when I -- reading that, I then looked
5 at the second congressional district and felt that
6 given -- for two different reasons, which I suspect
7 you're going to ask me about, I felt it was not
8 entrenched.

9 Q. Okay. And I am going to ask you about those
10 reasons.

11 A. Okay.

12 Q. So you identified two bases for this
13 opinion. Can you start with the first one, which I
14 believe referenced the partisan performance index?

15 A. Right. When one runs the partisan
16 performance index for Senate Bill 1 and looks at the
17 average of those 26 statewide elected officials over
18 that time frame, one finds that the average Democrat
19 receives 53.0 percent, and the average Republican
20 receives 47.0 percent. So a 53/47 margin among those
21 26 statewide elected officials.

22 It's been my experience over the decade,
23 when people start talking about a competitive race,
24 they start with a range of 54 to 46, and then look at
25 lots of other factors to determine if a race is

1 competitive.

2 In this case, it's -- the margin is
3 smaller than 54 to 46. It's 53 to 47. So in my
4 world, and the world, in the world of people who I've
5 associated with over the years, when they're looking
6 at whether or not a race is worth spending lots of
7 resources to hold on to, or to try to defeat and
8 incumbent, 53 to 47, would be a competitive race, and
9 therefore not be entrenched, if entrenchment means
10 making it very difficult if not impossible to change.

11 Q. Okay. Thank you for that explanation. And
12 I think you were asked some questions in your
13 depositions about in your deposition about this 46 to
14 54 percent competitive range.

15 Do you recall being asked in your
16 deposition whether you could identify any races in
17 New Mexico where the Democratic performance was 54 or
18 higher, the Republican at 46 or lower, and yet the
19 Republican actually won the race? Do you remember
20 being asked about that?

21 A. Yes.

22 Q. When you were asked about that in your
23 deposition, could you off the top of your head come up
24 with examples?

25 A. Not off the top of my head. I didn't even

1 try. But no, I did not come up with any off the top
2 of my head.

3 Q. Okay. Since you had your deposition, have
4 you had an opportunity to look at records of election
5 results and raises and performance index and identify
6 whether you did find any examples that fit that
7 category?

8 A. Yes.

9 Q. Okay. And did you?

10 A. Yes.

11 Q. Can you share those?

12 A. So we looked at the legislative races, and
13 we found that house District 39, which is in the
14 Silver City, Sierra County area, touches of Dona Ana
15 fell into that category where the average Democrat I
16 can performance in 2014 with, the average Democratic
17 performance was 56.7, but the Republican won it 53/47.

18 And actually, House District 39, which
19 is one of those districts that's bounced back and
20 forth over the decades, Representative Terrazas is
21 there now, Rudolpho Martinez was there, we all know
22 that seat going back and forth over the years, it also
23 fell into that category in 2020 and 2022.

24 So even with the new district boundaries
25 after redistricting, once again House District 39

1 three times -- so it would go back and forth between
2 Democrats and Republicans, but three times the
3 Republican won it, despite the relatively high
4 Democratic Performance Index.

5 The other example that we found was in
6 the state senate, State Senate District 30. Joshua
7 Sanchez. He is a Republican and he won with a
8 Democratic Performance Index of 54.1. So even the
9 Democratic performance never was above 54 or 54.1, the
10 Republican won it by two percentage points.

11 Q. And do you know, Mr. Sanderoff, do you have
12 any reason to think that in any of those raises you've
13 just identified, where the Republican won, had there
14 been some kind of scandal or disaster for the
15 Democratic candidate in those races where they went to
16 jail or got caught doing something awful?

17 A. Not to my knowledge. I did have have a
18 staff person check, anticipating that.

19 Q. Okay.

20 A. But no, not to my knowledge.

21 Q. So let's -- coming back to your report,
22 then. So I think we've kind of talked about the first
23 basis of no entrenchment opinion based on the
24 competitive range under the partisan performance
25 index. What is the second basis of your opinion that

1 there's no entrenchment?

2 A. Well -- and the first one, as you said was
3 the partisan performance index. And there's I think a
4 lot of value in that, generally. But you know,
5 there's nothing like looking at an actual election
6 within the actual congressional district under the new
7 boundaries.

8 And so we did have an election in
9 November of 2022 under the new district boundaries,
10 and in that election, Gabe Vasquez was running against
11 Yvette Harrell, and in that election, Gabe Vasquez one
12 by seven-tenths of one percentage point. So it was a
13 really close race, and the Democrat won it by the
14 smallest of margins.

15 It was a margin of 1350 votes out of
16 192,000. And so therefore, that was the second prong
17 of my opinion on that (inaudible) of one does not
18 entrench the party in power, since one, performance
19 index is at 53/47, and the actual election, the
20 Democrat performed even lower than what we had in that
21 Democrat performance figure of 53 to 47.

22 So it was based on those two things. I
23 said, this doesn't look like entrenchment.

24 So under the first item, the index. It
25 appears to be a competitive race. Under the second

1 item, the actual election returns, it appears to be
2 what we call a toss-up race, you know. And I think
3 that word's self-explanatory.

4 Q. Okay. And included in that toss-up, does
5 that mean a candidate of either major party could win?

6 A. Yes. In 2024, any party, any candidate
7 could win, absolutely.

8 Q. Okay. Before we leave this topic, I want to
9 come back to -- you've indicated you had read Justice
10 Kagan's dissent on this subject. Are you aware that
11 just about a week ago, our state Supreme Court issued
12 an opinion in this very case to provide some
13 additional guidance to the district court about what
14 the Court should be evaluating or looking for in this
15 case?

16 A. Yes. I read it.

17 Q. You did. Okay? And I want to read to you
18 really just a sentence from the that opinion and ask
19 you if it -- well, I'll read it first and then ask you
20 the question.

21 The sentence is, and this is, for
22 residence, this is September 2022 -- September 22nd,
23 2023 opinion of the state Supreme Court in this case,
24 at Paragraph 30. And the sentence is, quote,
25 talking -- again, talking about entrenchment, quote,

1 the consequences of such entrenchment under a partisan
2 gerrymander include the that ensuing elections are
3 effectively predetermined, essentially removing the
4 remedy of the franchise from a class of individuals
5 whose votes have been diluted.

6 A. Yes, I read that.

7 Q. You read that? Okay. And does that -- does
8 that sentence, does that description of entrenchment
9 and its consequences jibe with your understanding
10 operate entrenchment that you use to develop your
11 opinion?

12 A. So as -- to restate, to make sure I
13 understand, the Supreme Court was basically saying,
14 they're associating having to have a predetermined
15 county come for ensuing of future races as associated
16 with entrenchment.

17 So I would say, if I you understand your
18 question, that no, we're not predetermining the
19 outcome of future raises here. We have a toss-up race
20 that was won by seven-tenths of a point. And it would
21 be a big question mark about what would happen in this
22 district in the future.

23 Perhaps, it can go back and forth over
24 the years or what have you. It is no predetermined
25 outcome in future races.

1 Q. Would you agree that a competitive or
2 toss-up district, such as this one, effectively the
3 opposite of a predetermined entrenched outcome?

4 A. A toss-up is the opposite of predetermined,
5 sure.

6 Q. Okay. So, Mr. Sanderoff, I'd like to move
7 on to your second opinion on Page 7 of your report.
8 And here you say prior to SB-1, CD-2, or congressional
9 District 2, was not a safe Republican district but was
10 a strong leaning Republican district.

11 Is that your opinion?

12 A. Yes. I believe that CD-2, under the old
13 boundaries, was a strong leaning Republican district.

14 Q. And in order to form your opinion on the
15 topic, what types of raises did you analyze?

16 A. This time, I stuck to the actual elections
17 that occurred within the congressional district among
18 the congressional district candidates over time.

19 Again, we talked about the partisan
20 performance index. It's has its value, everybody uses
21 it. But there's nothing like also looking at, well,
22 what happened in that congressional district over the
23 years in real elections with the candidates who live
24 there, who lives in Hobbs, who live in Las Cruces, who
25 live in Alamogordo, and all the dynamics of the local

1 race itself.

2 Q. Okay. And it indicates here in your report
3 that you looked at those races within CD-2, going all
4 the way back to 2002. Can you talk to us about why
5 you used that time frame?

6 A. It was perfectly appropriate to not only go
7 back ten years, but to go back 20. And the reason is,
8 the simple answer is the boundaries of the second
9 congressional district did not change much between
10 decades ago and last decade.

11 In the 2011 litigation -- in the 2011
12 litigation, where the judge had to choose a
13 congressional plan, he mandated what was called a
14 least changed plan. All the different plaintiffs and
15 defendants could pitch their plan, and the judge chose
16 the plan that made the least change in the boundaries
17 from the 2002 boundaries to the 2011 boundaries and up
18 to 2020.

19 So it was okay to look back 20 years
20 since the boundaries hadn't changed much.

21 Q. Just a minor follow-up on that. Are you
22 familiar with what the judge's reasoning was for
23 taking that least change approach we know he had to
24 draw the map?

25 A. I am.

1 Q. And what was that?

2 A. Well, because that happened twice, those two
3 impasses with the legislature in the executive 2001
4 and 2011, the judge's rationale in both decades was,
5 I'm going to go back to the expression of legislative
6 intent, when they drew the congressional boundaries.

7 So the last time the legislature, the
8 governor actually got together and passed the bill was
9 in 1991. And so the judges would continue to pass
10 least changed plans since the last -- the judges did
11 not want to get into the business of redrawing the
12 maps. So they went with the smallest boundary changes
13 possible to account for population shifts.

14 And since all three districts have a
15 major population center, Las Cruces, Albuquerque,
16 Rio Rancho, the population shifts did not have to be
17 major.

18 Q. Okay. So when you looked at the history of
19 these congressional raises within CD-2, between 2002
20 and 2020, what did you find?

21 A. Well, so if we study the 2002, you know,
22 that was the year that Steve Pierce first got elected
23 to Congress. And before Steve Pierce was in Congress,
24 he served two terms in the state house, 1996, he was
25 elected, 1998, he was elected. So he had already

1 established a significant amount of name recognition
2 and fame in his district.

3 And so -- and Steve Pierce stayed in
4 that district until 2019, with one stint when he was
5 out for a while, and we'll talk about that. So
6 basically, from 2002 to 2019, with one break in
7 between, Steve Pierce was the Congressman.

8 And I was around then, of course, and
9 observed things. And what I was impressed by was the
10 margins. He would win his elections by big margins.
11 And Steve Pierce prided himself on not just working
12 the conservative areas. Steve Pierce focused on
13 Democratic constituencies. He went into predominantly
14 Hispanic communities and Native American communities
15 where, frankly, they usually vote Democrat, and would
16 talk to the leaders there.

17 And so he was going beyond what a
18 typical candidate would do, and as a result, he would
19 win his races by big margins. I don't think I'm you
20 have school in telling the story that in 2011, I
21 received two calls from Native American leaders and
22 they said, "Yeah, we know we all vote Democrat," this
23 and that, "but holding all things equal, when you're
24 drawing plans for legislators, we don't care about the
25 boundaries, we would like keep Steve Pierce as the

1 person who represents us in the Second Congressional
2 District." So it showed that he worked hard, will he
3 did well. And he won by big margins.

4 So what am I getting at here? Well, in
5 2008, Steve Pierce decided to run for higher office
6 and he left his term, he left his position in the
7 house. And so here he had an even playing field where
8 you didn't have an incumbent, and powerful incumbent,
9 he's no longer running, and what happens, the Democrat
10 wins the district, Harry Teague. And he wins it by a
11 pretty comfortable margin.

12 Then, Steve didn't win his raises
13 statewide, but he ran for re-election after using the
14 race for U.S. Senate, then in 2010, beat hairy
15 together by big margins and was back in Congress.

16 Then in 2018, Steve Pierce decides to
17 run for governor. So he's not in his house seat
18 again, and what happens, a Democrat wins it. So the
19 two times he's not there within that 20-year appeared
20 and backs down to run for higher office, a Democrat
21 wins.

22 So what that tells me was, I'm note --
23 this is a safe -- excuse me -- a strong leaning
24 Republican district, it is, and most of the time. But
25 in the two cases here where he didn't run, the

1 Democrat won. So that's why I call it a strong
2 leaning Republican district, not a safe guaranteed
3 one, because of the story I just told.

4 Q. All right. Thank you okay. Let's turn
5 to -- and just I think we can briefly do these last
6 couple of opinions.

7 Your third opinion on Page 9 of your
8 report, talks about all three -- under SB-1, all three
9 of New Mexico's congressional districts became more
10 politically competitive. Can you tell just briefly
11 explain how you arrived at that (inaudible)?

12 A. Yes, very simply. Kept away from the
13 indexes. Simply averaged.

14 So in CD-1, for example, there were five
15 congressional races. During the decade and looked'
16 average margin on victory and compared it to do margin
17 of victory for 2022 with the new boundaries.

18 So, for example, in CD-1, under the old
19 boundaries in five elections, the average margin of
20 victory was 21 percent. It was cut in half to 11 and
21 a half percent with the new district. And I don't
22 know if you want me to go over the numbers, but that
23 was the methodology we chose. It's within the report.

24 And in all three cases, the most recent
25 raise in 2022, with the new boundaries, the margin of

1 victory was less than the average of the five raises
2 under the old boundaries.

3 Q. Okay. We've heard in this case, and I
4 realize you haven't been here until today, but we've
5 heard some testimony some argument that the fact that
6 of all these three districts becoming more competitive
7 is actually a bad thing, that's a negative -- goes not
8 negative column about the map.

9 Did you agree or disagree with that in
10 terms of the value of making these districts more
11 competitive?

12 A. Well, I guess that a public policy question.
13 People could agree to disagree. I mean, my view, if
14 you're just asking my view, people who represent very
15 safety districts can be very strong willed about their
16 opinions and sometimes inflexible. If you look at
17 what happens in Congress right now, it seems like the
18 people who are trying to break the gridlock and try to
19 work out a bipartisan agreement are the ones who live
20 in swing district. They want to get reelected by not
21 taking a very right wing position or left wing
22 position. I personal think competition is good, if
23 it's (inaudible) competition, yeah.

24 Q. And I'm going to read you another quote from
25 another decision. This is in Maestas v. Hall case,

1 2012-NMSC-006. This was the Supreme Court's decision
2 in that -- the case we've been talking about, the 2011
3 redistricting case. And I'm in paragraph -- at the
4 end of Paragraph 41.

5 And the opinion states there, this is
6 the chief Justice Chavez, competitive districts are
7 healthy in our representative government because
8 competitive districts allow for the ability of voters
9 to express changed political opinions and preferences.

10 Do you agree with that statement?

11 A. Yes.

12 Q. Based on your experience following elections
13 in New Mexico?

14 A. Yeah. That's my viewpoint.

15 Q. Okay. All right. I think I want to keep my
16 eye on the time here, moving on to -- let me just ask
17 you briefly about your fourth opinion, Mr. Sanderoff,
18 and that's on Page 11 of your report.

19 Here you say political party
20 registration numbers are not meaningful predictors of
21 partisan performance in elections, especially in
22 Southeastern New Mexico.

23 Can you explain to us the basis of that
24 opinion?

25 A. Yes. So -- and if everyone is looking at

1 their report, there's a visual on Page 13. It just
2 shows the percentage of registered Democrats,
3 Republicans and Independents in the State of
4 New Mexico over time. And what it shows is that the
5 percentage of Democrats continues to decline,
6 Republicans have been pretty stable, and Independents
7 rise.

8 Yet, at the same time in the State of
9 New Mexico, the state has become more blue, more
10 Democratic, especially in places like Albuquerque.
11 And we see that graphic visually on Page 12, where we
12 just take as an example, the president raises. Look
13 at 2000 and 2004 on Page 12. New Mexico was known as
14 the battleground of battleground states in president
15 race razz.

16 Then by 2014, Obama won by 15, then by
17 10 percent, then by 8. And this chart, I made a
18 mistake in cutting and pasting. I left off the 2020
19 race where Biden won't by 10.8 percent, so that should
20 have been on the chart as well.

21 And so the point was, on the one hand,
22 New Mexico is becoming more blue, especially in the
23 cities. On the other hand, the Democratic voter
24 registration continues to dramatically. And so I'd be
25 cautious about using Democratic voter registration as

1 the predictor of partisan performance. Especially you
2 then have all those Independents who are more fickle.
3 They're up to 25 percent.

4 So that was, in a nutshell, why I
5 concluded that.

6 Q. Okay. Great. And I think on Page 13 of
7 your report, underneath that chart you were pointing
8 to, you offered some observations or reasons why, you
9 know, there might be that disconnect between the
10 registration numbers and the actual political
11 performance.

12 A. Right. One of the biggest reasons why
13 Democrats are declining and Republican has been
14 stable, is because a lot of conservative Democrats
15 have switched their registration to Republican. We
16 saw a lot of that Southeastern New Mexico over the
17 last couple decade.

18 There was a time not that long ago in
19 Southeastern New Mexico, where there were Democrats
20 and Republicans in Eddy County. You know, those days
21 are gone. And so if you have conservative Democrats
22 switching over to become Republicans, Republican are
23 passing on (inaudible). They're being replenished by
24 Democrats and they're switching parties.

25 And then Independents is another we have

1 to be careful. Because a lot of young people have
2 dismissed both parties. A lot of young parties are
3 disenchanted with the Democrats and the Republicans.
4 And so they're registering without any affiliation,
5 and so that's confusing the data as well for the
6 purposes of using registration to protect partisan
7 performance.

8 Q. Thank you. Mr. Sanderoff, kind of shifting
9 gears a little bit and, again, kind of harkening back
10 to your deposition in this case, do you recall being
11 asked some questions about using or taking into
12 consideration the location of oil and gas wells and
13 the oil and gas industry in redistricting? Do you
14 recall being asked some questions about that?

15 A. I do.

16 Q. And I think, if I'm correct, you indicated
17 in your deposition that you hadn't before in your
18 experience redistricting in New Mexico, you hadn't
19 been asked to do that or to take that particular
20 factor into consideration.

21 A. The factor of where the oil wells are in
22 drawing district boundaries?

23 Q. Right.

24 A. I've never been asked that.

25 Q. Okay. Okay. Let me ask you this, though,

1 just based on your decades of experience here in
2 New Mexico following the politics in the state
3 government and all the issues that you follow, there
4 at Research & Polling.

5 Are you familiar with whether the oil
6 and gas industry place a roll in the New Mexico any?

7 A. Yes.

8 Q. And how would you describe that?

9 A. They play a fantastic roll, a big role.

10 (Inaudible) quoted in the newspaper at -- people use
11 different numbers, but 40 percent of the state's
12 government revenue comes from oil and gas. Revenue
13 streams are coming in from the leases, the royalties,
14 the taxes, gross receipts tax, the payroll taxes. And
15 so oil and gas is a big driver of New Mexico's
16 economy.

17 Q. Okay. And do you recall being asked in your
18 deposition a question about whether it makes sense to
19 split the oil wells among different congressional
20 districts in the State of New Mexico?

21 A. I don't remember exactly what I said. I
22 think that I had never asked to. If somebody had a
23 plan to create two voices within this monolithic
24 group, that would be an example of what could be done,
25 I guess.

1 Q. Sure. And have you seen examples, even in
2 this last redistricting cycle of any groups who
3 specifically asked to be split month different -- two
4 have two voices, for example, in Congress instead of
5 one, and to be drawn across district lines?

6 A. We're not talking oil and gas now?

7 Q. Right, yeah. Just any -- any example that
8 comes to mind?

9 A. Yeah. The prominent example is June any
10 pueblo. They wanted to be split between two
11 congressional districts, because Native Americans have
12 a lot more work with the federal government than they
13 have with the state. And so they want to be split
14 between congressional districts. And the boundary
15 happens to fall in a place where that's doable.
16 Mescalero wanted to be split between two congressional
17 districts.

18 Los Alamos County are, I drew all these
19 beautiful plans for their consideration to unify
20 Los Alamos County, they said, "No, we want to be
21 split."

22 Los Alamos -- I'm talking state senate
23 now. I'm sorry. They wanted Los Alamos townsite in
24 one state senate district and White Rock in another
25 state senate district to have two voices there. And I

1 don't know if you were just talking about Congress. I
2 probably shouldn't have said that, but...

3 Q. No, no. Just general examples, I mean, as a
4 general matter, based on again, your experience, your
5 knowledge of the state, of how politics works in the
6 state, how districting works, is there anything
7 inherently wrong with wanting to have two voices
8 representing a particular area, a particular industry,
9 a tribe, as opposed to one?

10 A. If that's their strategy. You know, Eddy
11 County grew so much, as did Lea County. And so with
12 the citizen redistricting committee, I drew these
13 beautiful maps that Lea County could have its own
14 senator, Eddy County could have their own state
15 senator. And Eddy County commission said, "No. We
16 want to be split two or threes ways. We like having
17 rep .45's Lea County, Otero County, Eddy County and
18 sometimes" -- but it's just strategic decision of the
19 /TKPWHROUP about whether they want to be kept together
20 or have more voices, where they might not ever elect
21 somebody. But so I see examples of that.

22 Q. And it's a policy decision?

23 A. It's policy political decision.

24 Q. Okay. Well, thank you very much

25 Mr. Sanderoff. Appreciate your time this afternoon.

1 MS. SANCHEZ: I'll pass the witness.

2 THE COURT: All right. Thank you.

3 Cross-examination.

4 CROSS-EXAMINATION

5 BY MS. DIRAGO:

6 Q. Hello.

7 A. Hello. How are you?

8 Q. Good. How are you?

9 A. Fine. Thank you.

10 Q. So I deposed you virtually. You're taller
11 in person. I'm probably shorter in person than you
12 expected, so I guess we're even. As Sarah mentioned,
13 I have too much paper.

14 Okay. I guess it's probably easiest to
15 just go into what you were just testifying about, I
16 think you said, the Indian reservations mentioned they
17 wanted to be split up. You might have mentioned
18 another -- I think you weren't talking congressional
19 redistricting or -- but maybe Los Alamos, or --

20 A. Yeah, state senate.

21 Q. State senate. Okay? Did anyone from the
22 oil and gas industry indicate that they wanted to be
23 split up in this redistricting process?

24 A. No, not to me.

25 Q. Well, and you actually participated in the

1 CRC redistricting process, right?

2 A. We did.

3 Q. And -- that's pretty cool, by the way. You
4 attended most of the public meetings that the CRC held
5 because RPI staffed -- your company staffed those
6 meetings, right?

7 A. Right. And the ones I didn't attend, I
8 watched on Zoom.

9 Q. Oh, I didn't know that. Okay. So during
10 all those public meetings, did you ever see anybody
11 ask for the gas and oil industry to be split up?

12 A. No.

13 Q. As far as you know, no one at the CRC
14 committee had the goal of spreading out the oil wells
15 in the state, right?

16 A. They -- to my knowledge, no. They've never
17 requested any plan from us to draw that would do that.

18 Q. Okay. And what about -- I think you said
19 you've been doing this since 1981. Have you ever had
20 a request to split up the oil wells in the state?

21 A. No.

22 Q. Have you ever -- before this case, have you
23 ever even heard of somebody wanting to do that?

24 A. No.

25 Q. So there are a lot of oil wells in the

1 southeast, right?

2 A. Yes.

3 Q. Southeast of New Mexico. I don't know if
4 that's why you hesitated, but I should -- I should
5 clarify.

6 A. I was just clearing my throat.

7 Q. Okay. And a lot of people who live in the
8 southeast also work for the oil industry, right?

9 A. Yes.

10 Q. And you agree that a lot of voters in
11 Southeastern New Mexico have a common outlook, right?

12 A. Yes.

13 Q. And some might even call that a community
14 after interest?

15 A. Yes.

16 Q. And do you think it's because of this common
17 employer -- not a common employer, but working for the
18 same industry?

19 A. Among other things, yes, sure.

20 Q. Are so you also were testifying that SB-1
21 made D-2 more Democratic, right?

22 A. Yes.

23 Q. And I think you said under RPI's partisan
24 performance index, D-2 is now 53 percent Democrat and
25 47 percent Republican?

1 A. Correct.

2 Q. And you weren't looking at what the partisan
3 performance index of D-2 was under the previous map,
4 right?

5 A. No.

6 Q. Okay. So it wouldn't matter to you if SB-1
7 made D-2, that's congressional District 2, like 20 map
8 number of times more Democratic? It wouldn't matter
9 to your analysis that it's competent now?

10 A. We didn't focus on that topic. We focused
11 on the topics in my report regarding competitiveness.

12 Q. Okay. So you weren't looking at, like, the
13 changes that had been made.

14 A. Correct.

15 Q. Okay. Are and your personal definition of
16 competitiveness is where the district is between 54
17 and 46 percent Democratic to Republican?

18 A. As a starting pointed, yes.

19 Q. Okay. Or either, I guess it could be
20 Republican to Democrat?

21 A. Sure.

22 Q. Okay. But this range is not based on any
23 research or ^ studies ^ studs, right?

24 A. No. It's based on my experience of 40 years
25 of using it.

1 Q. Okay. So -- and I understand in your
2 deposition you couldn't remember any examples where a
3 Republican had gone a district that was percent
4 Democrat. And you have since gave a couple examples,
5 right?

6 A. Correct.

7 Q. But you also testified at your deposition
8 that a Republican winning a district that was 54
9 percent Democratic would be a rare event. Do you
10 still agree with that?

11 A. Under many circumstances, I believe -- well,
12 I found two and where one of them it happened three
13 times. But I would say, to answer your question, that
14 the 54/46 would be the starting point. I would want
15 to see more factors for me to then say the Republican
16 has a reasonable chance of winning.

17 If, let's say, the Democrat had a higher
18 name recognition or there was some baggage with the
19 Republican, then the 54/46 could become very, very --
20 the Democrat could become very vulnerable.

21 So that's why I say it's a starting
22 point. I would look deeper into other factors to
23 determine whether it's feasible for a Republican to
24 win a 54/46 district.

25 Q. Okay. So --

1 A. All things equal, it would be a long shot at
2 54.

3 Q. Okay. So it would be difficult?

4 A. Holding all things equal. But oftentimes,
5 there's not. Oftentimes there's great opportunities
6 for the Democrats or the Republicans at the 54/4611.

7 Q. Okay. And I think we agreed in your
8 deposition that if anyone could guarantee that Juan
9 party would win a district, that either one of us
10 would be a very wealthy person. So I understand that
11 there's -- anything could happen?

12 A. Right.

13 Q. Okay. And you did also say in your
14 deposition that the only way -- well, I don't want to
15 put words in your mouth. I think you said that if a
16 Republican won a district that was 54 percent
17 Democratic, that it would be for a special reason.
18 And that sounds to me what you're saying now?

19 A. Well, it could be for a special reason. I'm
20 saying it could be for other reasons, as well. But
21 yeah, sometimes legislators get defeated because of
22 controversies. Oftentimes those people end up getting
23 defeated in their primary, so they don't even make it
24 to the general election.

25 Q. Right. Okay. So you testified that D-2 is

1 now 53 percent, which is an emergency more -- a
2 percentage -- well, a percentage less -- wait, it's 53
3 percent Democratic is what you said. Okay? Right?

4 A. Yeah. It's actually 2 percent, but which is
5 a spread of --

6 Q. Oh, yes.

7 A. -- 6 points versus 8 points, right, 54 --

8 Q. Yes, thank you. I'm glad you clarified that
9 for me. That really helps. Okay. So anyway, the
10 question is, if the DPI is 53 percent, would it still
11 be difficult for a Republican to win?

12 A. Well, I guess -- no. I guess because we're
13 seeing evidence of that now, we're seeing a percent
14 Democratic performance and a 47 percent Republican
15 performance in that same district, CD-2, and the
16 Republican came within seven-tenths of a percent of
17 winning it. So I would say no, it would not be
18 difficult.

19 Q. Okay. Now, what about -- and we talked
20 about incumbent at your deposition, too. And I
21 believe you agreed that incumbent have an advantage at
22 the polls, correct?

23 A. Oftentimes, yes.

24 Q. Okay. So now why don't we make that
25 district just 53 percent Democratic, but there's a

1 Democrat who is an incumbent? Now is it difficult for
2 a Republican to win that district, all things being
3 equal, you know, putting aside a special situation
4 where there's a scandal or something?

5 A. I think it's -- the case of CD-2, no, I
6 wouldn't agree with you, because CD-2 is a
7 conservative district. And the Democrats to be more
8 liberal.

9 Look what happened with Xochitl Torres
10 Small, she won when she had no record. But then when
11 she had a record, Republicans were able to paint her
12 as too liberal, and then she lost.

13 I think Vasquez could fall into that
14 same phenomenon, where even though he's the incumbent
15 now, I think he's fairly vulnerable.

16 Q. Okay. So there are a lot of people in CD
17 two that are conservative, I think you just said?

18 A. Yes.

19 Q. Okay. Hold on just a second.

20 MS. DIRAGO: May I approach?

21 THE COURT: Sure.

22 MS. DIRAGO: I promise we will be quick. I
23 am exhausted.

24 BY MS. DIRAGO:

25 Q. Okay. So I don't think I've actually asked

1 you about this at your deposition. So this was from
2 Mr. Brace's expert report. And Mr. Brace is one of
3 the defendants' experts. I know I asked you at your
4 deposition if you read Mr. Brace's report. Is that
5 still true, haven't? And you said no. Is that still
6 true haven't read it?

7 A. Still true. I have not -- I have not seen
8 this or read his report.

9 Q. Okay. So that's fair. So with what I want
10 you to look at, then, is this second row here. And by
11 the way, the title here is NM underscore past SB-1
12 matrix. So this is information data that Mr. Brace
13 collected and put together in sort of easy to read I
14 think chart. And then the second row here shows
15 presidential elections, 2020, 2016 and 2012. And then
16 you can see on the left, you can go across by district
17 to see -- now, what would happen if SB-1 the lines
18 were in play during these years, where the -- who the
19 district would vote for.

20 And so what I want -- let's start with
21 2020 and look across -- so we're cons rating here on
22 District 2. And you see that District 2 under SB-1
23 would have elected Biden by 53 percent, would have
24 voted for Biden by 53 percent?

25 A. Just for clarification --

1 Q. Sure?

2 A. -- are we on the second row? What you --

3 Q. He.

4 A. -- are we on?

5 Q. I'm sorry. Yeah.

6 A. Can I ask a question to help me understand
7 this.

8 Q. Please.

9 A. So we're at the three presidential years,
10 2012, '16 and '20.

11 Q. Yeah?

12 A. Are we looking --

13 Q. '20 -- yes, you're right?

14 A. 2020. Are we looking at actual election
15 returns, or are we looking at what would happen under
16 the new boundaries? I got lost there.

17 Q. Yes, under the new boundaries.

18 A. So these are --

19 Q. So it didn't actually happen.

20 A. Got it.

21 Q. Yeah.

22 A. Got it.

23 Q. But it's -- I guess it's if that election
24 took place today and SB-1 was in -- or I guess a
25 better way to say it is if the SB-1 lines were in

1 place at that time of that election?

2 A. It took me 2020 election results and
3 reconfigured them under the new CD boundaries.

4 Q. That's right.

5 A. Okay. Just want to sure I understand.

6 Q. No. I -- that's totally fair. So it
7 strikes me -- and District 2 would have elected --
8 would have voted for Biden?

9 A. So there's that 53.0, the same as the
10 partisan performance index.

11 Q. Right, because -- right because it is, yeah,
12 yeah.

13 A. Now, this is actual elections as compared to
14 (inaudible).

15 Q. Yeah. So --

16 A. That's good.

17 Q. No. You have a got index. And by the way,
18 I've talked to people about you, and they all say
19 you're the man, so you know your stuff.

20 Okay. So CD-2 would have -- this --
21 well, we're not in District 2 anymore, but District 2
22 would have elected Biden. And then why don't you look
23 at 2016. District 2 with all the conservatives would
24 have elected Hillary Clinton by 53. We got 53.37
25 percent. And Obama, go across, District 2 would have

1 elected Obama by 54.89 percent, which is funny, base
2 even more than District 1 there.

3 But my question to you is, does that
4 surprise you, knowing -- and you just said that
5 District 2 has a lot of conservative people. Does
6 that surprise you?

7 A. Well, I guess the answer is no, because we
8 testified our partisan performance index for C2
9 through assistant 3 percent. And so we're seeing
10 (inaudible) number in 2020. Remember that /WHAOER
11 looking at is exogenous raises, you know what if Joe
12 buy again don't live in the congressional district,
13 they don't live in Hobbs and Las Cruces, so all those
14 local factors you're not taking into account. So
15 these indicators have value. But let's remember what
16 actually happens within the congressional districts
17 themselves.

18 Q. Right. So anything can happen, and you did
19 testify to this at your deposition that, you know, it
20 depends on where somebody lives and if they're an
21 incumbent and a lot of things. But this is sort of, I
22 don't know, almost removing those considerations and
23 just saying on an average what would have happened in
24 District 2, which is so conservative. They would have
25 elected Hillary Clinton. Does that -- I mean, that

1 surprises me?

2 A. Again, because we had an index showing
3 something similar, and then explain the difference
4 between the performance indexes and the actual
5 election returns in the district, I'm not surprised.

6 Q. Okay. So we are not in district -- we're
7 not sitting in District 2 anymore; is that correct?

8 A. We are --

9 Q. Or do you know?

10 A. -- in Lovington, and Lovington is in CD-3.

11 Q. CD-3. Okay. Are we in the same district as
12 Santa Fe?

13 A. Lovington is they same district as -- it's
14 CD-3, the same as Santa Fe, correct.

15 Q. Okay. How far is that?

16 A. Well, let's just call it a four-hour drive.

17 Q. Okay. What about San Juan County, however
18 is that?

19 A. Six hours.

20 Q. Really? Is that all?

21 A. Given the road network, it's not a -- not as
22 the crow flies. (Inaudible).

23 Q. Okay. And I can testify to that?

24 A. San Juan is the northwest corner of the
25 state, yes .

1 Q. I'm very, very close to being done, but I do
2 have to ask you another question about (inaudible).

3 So this is exhibit --

4 MS. DIRAGO: Can I approach, your Honor?

5 THE COURT: Yes.

6 MS. DIRAGO: So, so this is Exhibit 1 from
7 yesterday. I don't know if you want these
8 (inaudible).

9 THE COURT: I've got one. I've got it.

10 MS. SANCHEZ: I have it, too.

11 BY MS. DIRAGO:

12 Q. Okay. I believe I did show you these at
13 your deposition.

14 A. You did. Yeah, I had given it a very quick
15 read, but yes.

16 Q. Yeah. Okay. Well, like I said, you get a
17 shout out and a good one in these, but that's not why
18 I'm asking you, exactly. But my question, so why
19 don't we go down -- I do want to ask you in this,
20 like, a green box that says: That's good. You're
21 using Sanderoff's DPI, right?

22 Do you see that box?

23 A. I do.

24 Q. And it says, NCEC gave them at 53 percent,
25 but their methodology is too generous, Brian is

1 better.

2 Yeah, okay. So does that mean that NCEC
3 skews more Democratic with their numbers?

4 MS. SANCHEZ: Objection to the foundation.
5 She's asking him to speculate what some unidentified
6 person said in a text message.

7 MS. DIRAGO: Well, and I can lay a little
8 bit more foundation. I assume, he does polling, that
9 he would probably know who this is and what it means.
10 But it could -- fair point, I could ask him that
11 first.

12 THE COURT: Go ahead and ask that.

13 MS. DIRAGO: If I weren't so tired, I'd
14 probably think of that.

15 BY MS. DIRAGO:

16 Q. But do you know what NCEC is in this
17 context, or can you guess?

18 A. I think it's the Democratic party's -- it's
19 a partisan performance index of another organization.
20 Frankly, I'm not sure exactly which one.

21 Q. Okay. And I don't really -- I'm not asking
22 this to know who they are or for the truth of it.

23 My question is, do you think that
24 your -- that RPI's index skews Republican?

25 A. Do I think it does?

1 Q. Yeah.

2 A. No.

3 Q. Okay. Have you been told that before?

4 A. I've been told everything. All sides tell
5 me --

6 Q. I don't doubt that.

7 A. All sides tell me everything.

8 Q. Okay. So let's move down to that -- the Red
9 Box that starts with Sanderoff's DPI.

10 And it says: Sanderoff's DPI for your
11 Map H is 51.8 percent. That's not enough for a
12 midterm election. So we adjusted some edges, scooped
13 up more of Albuquerque and now are at 53 percent.

14 And you did testify that CD-2 is now 53
15 percent Democrat. I just want to know if you agree
16 that CD-1 under SB-1 is now 54 percent.

17 A. Under a DPI?

18 Q. Yes. Was the DPI 54 percent -- is CD-1's
19 DPI now 54 percent under SB-1?

20 A. Off the top of my head, I'm not sure. But
21 it would be close to that.

22 Q. Okay. And what about CD-3 being 55.4
23 percent?

24 A. I think that -- again, I don't want to
25 overly speculate, but that's not an unreasonable

1 number. I don't know if it's to the 10th --

2 Q. Okay.

3 A. -- because I don't have those numbers in
4 front of me.

5 Q. So you don't have any reason to think that
6 what Senator Stewart is saying she did, you don't have
7 any reason to doubt that's what happened?

8 A. When you say "what happened"?

9 Q. That --

10 A. Oh, that they --

11 Q. That that's what they did to SB-1.

12 A. Well, let me just read this.

13 Q. Sure.

14 A. So we adjusted some edges, scooped up more.

15 It looks like they increased the
16 Democratic performance in CD-2.

17 Q. And what about the other districts?

18 A. Well mathematically, they'd fall, they would
19 go down.

20 Q. Okay. So if you increase the Democratic --
21 the DPI in one district, it's got to come from
22 somewhere, right, so the DPI in the other districts
23 would go down?

24 A. Correct.

25 Q. And is that --

1 A. At least in one of them. Possibly in both,
2 at least in one.

3 Q. True, true. Okay.

4 A. Just simple math.

5 Q. And is that what happened between Map H and
6 SB-1?

7 A. Map H, Concept H, is a CRC map. Just
8 thinking out loud here.

9 Q. Yeah, sure. Go ahead.

10 A. Well, so what is your question?

11 Q. My question is if that actually happened. I
12 just want to know if that happened, that what she's
13 texting she's saying she did, did that actually
14 happen?

15 A. You're asking me if Senate Bill 1 ended up
16 at 53 percent DPI. And the answer is yes.

17 Q. Yeah, that we know. I'm asking about now
18 senate -- CD-1 and CD-3.

19 A. I don't have those numbers in front of me to
20 know if it's the exact number.

21 Q. Okay. But you have no reason to doubt that
22 those are the exact numbers?

23 A. I have no reason to doubt that -- I don't
24 know for sure. They don't seem unreasonable. But I
25 don't have those numbers in front of me.

1 Q. Okay. That's great. Thank you. Let me see
2 here. I think we're almost done.

3 Okay. You did not look for indications
4 that the drawers of SB-1 had partisan bias, right?

5 A. Whether I looked for indications?

6 Q. Right. As an expert here and with your
7 expert report --

8 A. No.

9 Q. -- that's not what you were looking at?

10 A. That's not what I was looking at.

11 Q. Okay. And I think you said that you're not
12 in the business of assessing or evaluating plans,
13 right?

14 A. Correct.

15 Q. And it's not --

16 A. What I meant by that was, on the fancy
17 computer simulations and --

18 Q. Okay.

19 A. -- doing that highly specialized work, we're
20 not in that business.

21 Q. Yeah.

22 A. Obviously I look at DPI as partisan
23 performance index and assessing things. But no, we
24 don't -- we don't do that very specialized work. But
25 I guess experts on both sides had spoken about it

1 today or yesterday.

2 Q. Yeah, I don't know if they're continue doing
3 that work after this trial.

4 Okay. So but you've never provided
5 analysis about whether a map has been partisan
6 gerrymandered, right?

7 A. I've never -- correct.

8 Q. Okay. And you -- you're not providing an
9 expert opinion about whether SB-1 has be part January
10 gerrymandered here?

11 A. Correct.

12 Q. Okay. That's it.

13 A. Great.

14 THE COURT: Redirect?

15 MS. SANCHEZ: No, thank you. Your Honor.

16 THE COURT: All right. I apologize. I just
17 have a couple quick questions.

18 You mentioned, and it's been testified
19 otherwise, too, about the increasing number of
20 interested or no party -- I'm not even sure how
21 they're indicated now in New Mexico, but people who
22 are not Democrat or Republican or even really third
23 party, that that number increased last several years,
24 correct?

25 THE WITNESS: Yes. They're technically

1 unaffiliated. They're not independent party, small
2 i, independent, unaffiliated, where they -- when they
3 register to vote they choose not to select in -- any
4 established party.

5 THE COURT: All right. And you mentioned in
6 your report that many young people decline to state a
7 party affiliation when they register but they often
8 vote for Democratic candidates, correct?

9 THE WITNESS: Yes. The young ones.

10 THE COURT: So is that significant enough,
11 and if so, how do you -- when you're doing this
12 two-party system analysis for, you know, RPI or PP I,
13 political -- the partisan performance index, does
14 that skew that? Because there's an increasing number
15 in the district that aren't voting. How do you
16 account for that?

17 THE WITNESS: Well, the DPI is based on
18 election returns. So it takes into account how
19 Independents are voting.

20 THE COURT: Okay.

21 THE WITNESS: So it doesn't skew anything.
22 Where it backs tricky in our polling, our public
23 opinion polling --

24 THE COURT: Right.

25 THE WITNESS: -- where we segment the

1 results by party and we get to see how those young
2 Independents are voting more live really. But it
3 doesn't affect our DPI because we're looking at
4 actual election returns.

5 THE COURT: Last question about
6 competitiveness. You had mentioned that 54 to 46 is
7 your competitiveness range, you said your starting
8 point.

9 THE WITNESS: Starting point.

10 THE COURT: And then you -- in your report,
11 you say other factors taken into account to determine
12 whether a race is competitive, are name recognition,
13 favorability, relative stepping and quality of the
14 candidates and their ability to raise campaign funds,
15 et cetera is there any way to quantify that?

16 THE WITNESS: No. That just takes judgment
17 and experience.

18 THE COURT: Experience, correct.

19 THE WITNESS: You know, if one candidate is
20 really well known and well liked and the other
21 candidate is unknown, you know, that's going to be
22 really valuable in your assessment.

23 THE COURT: So, for example, and this was
24 testified to yesterday, I believe, by the plaintiffs'
25 expert, for this past election for District 2 that's

1 under the SB-1 plan, even though Yvette Harrell was
2 an incumbent and even though it was a good year or
3 Republicans, they took back the house of
4 representatives, she was one of only two incumbent to
5 lose re-election in the house.

6 THE WITNESS: That's correct.

7 THE COURT: So those other factors, the
8 incumbency, name recognition, all those didn't really
9 help her. Even though she same close, it didn't
10 really help her, correct.

11 THE WITNESS: Yeah. She's a one high who
12 term incumbent. So maybe it gave her some help. Not
13 to the level of 20 years worth, like Steve Pierce.

14 You take other things into account. She
15 did have the race against Xochitl Torres Small where
16 she was beaten up pretty bad in terms of negative TV
17 adds. But then again, she ran her own adds that were
18 very positive and very good, take that into account.

19 But in this case, the incumbency
20 advantage that she had was not enough to get her over
21 the finish line.

22 THE COURT: So does that affect at all your
23 assessment that it is still a competitive district?

24 THE WITNESS: Yeah, it is. I believe it is
25 a really competitive district, just because of what I

1 said earlier about, you know, now that Gabe Vasquez
2 has a record, you know, typically in political
3 campaigns, the other side will use a record against
4 you. And so I sincerely believe that that's -- that
5 this raids could go either way. And he doesn't
6 necessarily have the advantage or the disadvantage.

7 THE COURT: Okay. All right. Thank you I
8 appreciate it.

9 Any other questions based on the Court's
10 questioning.

11 MS. DIRAGO: No, your Honor.

12 MS. SANCHEZ: No.

13 THE COURT: All right. Thank you.
14 Mr. Sanderoff, you can step down.

15 THE WITNESS: Thank you.

16 THE COURT: Okay. Do you have any other
17 witnesses.

18 MR. OLSON: No witnesses, your Honor. We
19 just need a couple things.

20 THE COURT: Okay. I also want to make sure,
21 just because I wasn't certain, was his report moved
22 into evidence.

23 MS. SANCHEZ: I failed to do that. I guess
24 we could do it now, because we're going to move
25 (inaudible).

1 MR. OLSON: Move Exhibit D, your Honor into
2 evidence.

3 THE COURT: That's his report?

4 MR. OLSON: Is it C.

5 MS. SANCHEZ: D. D is --

6 MR. OLSON: I think D.

7 THE COURT: D. Any objection to Exhibit D.

8 MS. DIRAGO: No. No objection.

9 THE COURT: All right. Exhibit D will be
10 admitted.

11 MR. OLSON: Your Honor, just so it's clear
12 for the record, we talked about stipulation after the
13 exhibits that were attached. The annotated findings
14 and conclusions, but we would formally move the
15 admission of Exhibits 1 through 36 that were attached
16 to our annotated findings and conclusions.

17 1 through 35, your Honor, was attached
18 to the annotated findings and conclusions submitted
19 on September 15th, 2023.

20 And Exhibit 36 was attached to the
21 annotated sort of rebuttal findings of fact and
22 conclusions of law submitted on September 20th, 2023.
23 So we would make sure -- we'd move formally for the
24 admission of those.

25 THE COURT: 1 through --

1 MR. OLSON: 36.

2 THE COURT: Are there two groups then, are
3 you saying.

4 MR. OLSON: There's one through 35 are
5 attached to the initial.

6 THE COURT: Okay.

7 MR. OLSON: The filing on September 15th.
8 And 36 was attached top the filing on September 20th.

9 THE COURT: Okay.

10 Any objection from plaintiffs?

11 MS. DIRAGO: No objection. But I would like
12 clarification on -- and it doesn't have to be right
13 now. But I know you said we're going to revise our
14 findings of fact. Are we going to be allowed to use
15 evidence that were in our previous findings of fact
16 that were not admitted here at trial.

17 MR. WILLIAMS: Except (inaudible).

18 MS. DIRAGO: Sure, sure, sure. Well, you're
19 right. I don't take issue with the ones they have
20 objected to based on authenticity, but all the other
21 ones. But I'm not just not clear on the procedure.
22 I wasn't aware that we had to move them all into
23 evidence. And maybe we don't, in order to use them
24 in our forthcoming brief.

25 THE COURT: So my understanding at the

1 beginning is that there was a stipulation that they
2 were coming in.

3 MR. OLSON: Yeah, I want to make sure for
4 the record. Yeah, there is a stipulation, your
5 Honor.

6 THE COURT: I think he's just making a
7 record formalizing that they're coming in.

8 MR. TSEYTLIN: Your Honor, you know, not
9 only -- we also are going to have additional ones
10 that come in /TW production, so --

11 THE COURT: Okay. We'll talk about that in
12 a minute.

13 MR. OLSON: Sure.

14 MS. DIRAGO: Okay.

15 THE COURT: So they'll be admitted.

16 MR. OLSON: The only other thing, your
17 Honor, we would move Exhibit E. I'll show to the
18 Court. This is the first eight pages of the report
19 post section review, the legislative finance
20 committee after this last session, regular session of
21 the legislature.

22 And the reason for that, your Honor, is
23 it just is being tendered for the -- to -- because it
24 highlights the importance of the oil and gas industry
25 to the state as a whole, both from standpoint of the

1 state's economy, and the state's budget. So we would
2 tender it for that purpose, Exhibit E.

3 THE COURT: Any objection?

4 MS. DIRAGO: So what -- sorry. What is
5 this?

6 THE COURT: This is -- this was used in
7 questioning one of the witnesses today, correct?

8 MR. OLSON: It was, your Honor. And it's a
9 report from the legislative finance committee, which
10 is an arm of the legislature. It's -- has a duty to
11 handle budgeting and revenue matters. And it's being
12 tendered for the purposes that I just stated.

13 MS. DIRAGO: I don't really -- I don't have
14 a problem with that. I mean, I obviously can't read
15 it to see if there's like hearsay and other things in
16 here that's objectionable. But I don't think your
17 Honor will use it for that purpose. So I don't have
18 a problem with.

19 THE COURT: It's a government probation
20 report.

21 MR. OLSON: It's a government document, your
22 Honor.

23 THE COURT: I'll admit Exhibit E.

24 MR. OLSON: And then we rest, your Honor.

25 THE COURT: All right. Rebuttal witnesses?

1 MS. DIRAGO: No.

2 THE COURT: Okay. All right. Do you want
3 to talk about the exhibits that were in question now?

4 MR. TSEYTLIN: Your Honor, the only exhibits
5 in question were a couple that they objected to in a
6 motion in limine. As I indicate then, we hadn't
7 intended to rely on those and we didn't rely on them
8 in trial and we don't intend to rely on them now.

9 THE COURT: All right. So are you gag to --
10 you'll withdraw those.

11 MR. TSEYTLIN: Yeah.

12 THE COURT: Okay.

13 MS. DIRAGO: Yeah. If we could -- we'll
14 would you those, if any. I just don't know offhand
15 if we have any exhibits that we haven't used here
16 that are in there. I don't think we do.

17 THE COURT: Okay.

18 MS. DIRAGO: But if you want me to go and
19 check to be sure, I can do that. But if we do have a
20 stipulation that they all come in, besides the ones
21 that they've objected to based on he or she, I
22 believe, then that's fine.

23 THE COURT: Are you okay with that?

24 MR. OLSON: I'm okay with that, your Honor.

25 THE COURT: Okay. All right. Let me ask,

1 is -- is it the intent to do closing arguments?

2 MR. TSEYTLIN: Yeah.

3 MS. DIRAGO: Yeah.

4 MR. TSEYTLIN: I mean, I understand we're
5 late. It's late here. I can do brief in my closing,
6 just --

7 THE COURT: You want to do it tonight or you
8 want to do it tomorrow?

9 MR. TSEYTLIN: I'm sorry, your Honor?

10 THE COURT: Tonight or tomorrow. We have
11 the courtroom reserved for tomorrow.

12 MR. TSEYTLIN: Sorry?

13 THE COURT: We have the courtroom reserved
14 for tomorrow.

15 MR. TSEYTLIN: I think I'd only prefer to do
16 it today. (Inaudible) till 5:30 yesterday. I can't
17 imagine that -- I mean, I'm not -- I mean, I can
18 limit myself to 15 means minutes.

19 MS. SANCHEZ: I can, too.

20 MR. TSEYTLIN: (Inaudible).

21 THE COURT: Okay. We're going to have to
22 take a short break before we do that then. Okay?

23 And then, do you have any other report
24 on -- from your people with the discovery.

25 MS. SANCHEZ: I haven't had an opportunity

1 to check since we last spoke, but I can run out now
2 and try to get an update on this /PWRAOEBG.

3 THE COURT: All right. That would be good.
4 And then --

5 MR. TSEYTLIN: (Inaudible).

6 THE COURT: And I do want to talk about
7 that, then about how we're going to handle that f and
8 when it comes through. Okay? All right.

9 MR. OLSON: Thank you, your Honor.

10 (Recess held from 4:50 p.m.
11 to 5:07 p.m.)

12 THE COURT: What was Exhibit D? We're
13 looking for Exhibit D. I probably have it here, but
14 do you remember what it was?

15 MS. SANCHEZ: D is Mr. Sanderoff's report.

16 THE COURT: Okay. And was the marked copy
17 his or.

18 MS. SANCHEZ: I think I handed it -- I think
19 I put the marked copy on the witness stand.

20 THE COURT: Okay. You want to -- you want
21 to put a --

22 MS. SANCHEZ: Sticker?

23 THE COURT: -- sticker on this one and --

24 MS. SANCHEZ: Sure.

25 THE COURT: You're good, you're good.

1 MS. SANCHEZ: That's the marked one? Okay.
2 Great.

3 THE COURT: I think this is a deposition and
4 some other things.

5 (Inaudible crosstalk.)

6 THE COURT: I don't think anything in there
7 is an exhibit, correct.

8 MR. WILLIAMS: None of this was admitted,
9 your Honor.

10 THE COURT: All right. On the record?

11 Okay. We are on the record. The
12 evidence is closed. Plaintiffs may make closing
13 argument.

14 CLOSING ARGUMENTS

15 MR. TSEYTLIN: Thank you, your Honor.

16 When I stood up here yesterday, I said
17 that we would bring into trial eight categories of
18 evidence that showed beyond any reasonable dispute
19 that this was an unconstitutional gerrymander under
20 Justice Kagan's test.

21 Now, there was obviously a lot of heat
22 about the simulations. But I think most of the eight
23 categories that I promised were essentially
24 undisputed. So I'm just going to go quickly through
25 them and summarize some of the evidence that we did

1 put.

2 First with regard to the statements, we
3 have the statements of Senator Stewart which provided
4 the DNA of the gerrymander. We asked multiple
5 witnesses about those statements. There really is
6 only one account of those statements that makes any
7 sense, which is that the Democrats who controlled the
8 legislature were trying to create a near perfect
9 gerrymander by pushing up the DPI in District 2,
10 while not pushing -- as close to 54 as they could,
11 while not pushing it below 54 in other districts,
12 making it a near perfect gerrymander.

13 We have additional discovery that we're
14 going to be getting in the next couple of days. Some
15 of it has already started rolling in from the
16 congressional staffer. You'll see in our later
17 submissions more evidence of the same character.
18 There's a clear, obvious, undisputed plan of creating
19 a balance of near perfect gerrymander with a rob
20 Peter to pay Paul principle. That's the statements.

21 Text category is the process. We put on
22 three witnesses here, completely undisputed that this
23 process was entirely partisan. Republicans in the
24 house and the senate were completely locked out of
25 the process. It was done entirely one-sided.

1 Democrats wouldn't even invite Republicans into the
2 meetings. They accepted none of their ideas, none of
3 their changes. Again, entirely undisputed.

4 Next is the voter registration stuff.
5 We put in undisputed from the secretary of state's
6 office through Mr. Trende's testimony and report that
7 the registration in D-2, which was the craft
8 district, went from zero percent, exact by even, to
9 13 percent Democrat.

10 Now, understanding Mr. Sanderoff doesn't
11 like registration as much, but the state Supreme
12 Court asked us to focus on it. Footnote 13 in the
13 Supreme Court's decision specifically talks about the
14 change in the voter register separation, and I think
15 with regard to change, what Mr. Sanderoff said he
16 didn't like about registration is you've got folks
17 who are increasingly -- young folks, increasingly
18 registered as Independents and things of that sort.
19 You know, that might account for kind of the static
20 state of where the registration starts, but it
21 wouldn't account for the delta, the change that
22 occurred, the change that occurred when they moved
23 from where it was before to SB-1 was a 13 point
24 registration swing in the Democrats favor. Exactly
25 the kind of thing the state Supreme Court told us to

1 look at.

2 Next, this is the DPI, the various
3 aggregators. And here are the story from actually
4 all four expert witnesses and the three that
5 testified here and then Mr. (Inaudible) report is the
6 same, which is the same story as in Senator Stewart's
7 Texas that will be in the additional evidence that's
8 being produced now, which is that the district were
9 essentially balanced to be a near perfect
10 gerrymander, 53 for D-2 and then 54 and 55 for the
11 other two. So a near perfect gerrymander, which a
12 perfect gerrymander would be 54, 54, 54, given the
13 political geography.

14 And by the way, the kept of a perfect of
15 gerrymander was 54, 54, 54, which Mr. Trende talked
16 about was undisputed in this trial. My friends asked
17 him a lot of hard questions, harsh questions about
18 his simulations. Actually no questions, no push back
19 on that part of his analysis. And that is I think
20 undisputed before this Court, and it's actually
21 supported by the evidence in the other three and kind
22 of the aggregate of -- some would call it DPR, some
23 would call it RPR, some would call it an index. But
24 it all really leads to the same.

25 Now, what we just heard from

1 Mr. Sanderoff, is that well, notwithstanding this,
2 this doesn't lead to entrenchment. But what
3 Mr. Sanderoff also testified is that he defines
4 entrenchment as impossible or difficult to win the
5 district.

6 We're happy with that phrasing. It is
7 clearly difficult for a party to within a district
8 where the undisputed evidence is that it's a 53
9 percent to 47 percent district. That means that in a
10 neutral year, with equally strong candidates and
11 equal funding, everything being equal, the Democrats
12 are going to win that 6 by 6 points.

13 Is it difficult for a party to win a
14 seat that the other side has by 6 points? Of course
15 it is. That's six points. And we -- and I heard
16 Mr. Sanderoff talk about the 2022 election. But that
17 really supports the same conclusion. You have an
18 incumbent, which is worth a couple of points. You
19 had a national public -- I think Mr. Trende's report
20 says that a Republican won nationally by like 3 or 4
21 points. That's almost close to the 6 points right
22 there. That would account entirely for the close
23 race.

24 But I think it is most fair to measure
25 difficulty, which is Mr. Sanderoff's account for

1 entrenchment, standard for entrenchment, based on and
2 a neutral year, with neutral -- that's why, by the
3 way, Senator Stewart was talking about DPI and saying
4 that 51.eight percent DPI in a midterm is not enough.

5 Because what you want -- so what's
6 difficult for the other side to win is that buffer.
7 So that when you have a difficult year for you, a
8 hard year for you, because the other side has gotten
9 to could you please because the other side has got --
10 wind at their sails due to the national environment,
11 you're still like lip to win.

12 And so -- and I understand my friends
13 focused a lot on the fact that the 2022 race was
14 close. Again, I would underline that the state
15 Supreme Court said that the Maryland case that was
16 decided in Rucho is an important benchmark. There,
17 there was also a very close raise that happened under
18 that map, ins a Republican year. And there, that was
19 a Democrat incumbent that almost lost.

20 Now, the next category of -- and then
21 also just one comment that they made during one of
22 their questions. They brought up Mr. Gallegos see
23 testimony that Republicans could win if they boosted
24 up their -- the turnout.

25 But Mr. Gallegos' testimony in Texas,

1 what he said afterwards, is that it's not an even
2 playing field, that it could be difficult, which is
3 exact I will the standard that Mr. Sanderoff talked
4 about is this -- for entrenchment, which is difficult
5 to win. And that's completely consistent.

6 Now the text door of evidence that I
7 promised we'd talk about is the unnecessary movement
8 of a lot of people. You've heard Mr. Trende talk
9 about that, but in order to balance the districts for
10 equal population to comply with the constitutional
11 requirement for equal populaceness. You needed to
12 move about 23,000 people.

13 What happened here is a movement of over
14 500,000 people, which is exactly the kind of thing
15 that happened in Maryland that Justice Kagan relied
16 upon. And that evidence came in from Mr. Trende. He
17 wasn't questioned on it and nobody pushed back in any
18 way on it. So that aspect of our proof is
19 undisputed.

20 The next thing that I promised that we'd
21 present is the DNA of the gerrymander, how exactly
22 did the Democrats do this almost near perfect
23 gerrymander. And you heard Mr. Trende testify that
24 what happened is they took (inaudible) and they
25 surgically moved around voters so you were adding

1 Democrats to District 2 and you were taking
2 Republicans out. You pointed to objective data
3 showing that. There was no questions from my friends
4 on the other side on that part of his testimony from
5 either of their experts or their expert that was not
6 testifying, Mr. Brace, owner that. So that is also
7 undisputed.

8 And by the way it also matches up with
9 what Senator Stewart said in text messages, was that
10 they took Concept H, 51.8, said that's not quite
11 enough for a midterm. And they moved -- they scooped
12 Republicans into the -- Democrats into that district,
13 scooped Republicans out, made it a near perfect
14 gerrymander.

15 The next category of evidence which got
16 the most during this trial was the simulations.
17 Mr. Trende's simulations which he testified, I with
18 submit, very credibly those that this is an extreme
19 outlier. Mr. Trende coded into his simulations only
20 traditional registering criteria, neutral criteria.
21 There was no question from the other side that any of
22 this criteria were somehow inadequate. So I'm not
23 belabor that. I think -- I think he's testified very
24 credibly.

25 Now, with regard to Dr. Chen, he's

1 obviously a very technically proficient expert and if
2 he had not been forced or asked by my friends on the
3 other side to cook the books but putting into a
4 clearly partisan factor into the simulations, I have
5 every confidence that his simulations would have
6 shown exactly what Mr. Trende showed. And while we
7 don't have that as evidence before the Court, we've
8 asked him, "Do you" -- "could you say that you're --
9 that SB-1 would not be an outlier if you didn't put
10 in that oil well considerations?" He couldn't say
11 that. He feels very, very careful to say that I'm
12 not giving any opinions that this is not a
13 gerrymander.

14 Which, by the way, in other cases he
15 testified he has given that opinion for. And he kept
16 saying very careful, because he's a very careful
17 expert, that he was not going beyond that.

18 And I think the reason for that is what
19 he also testified right at the beginning of my
20 colleague's questioning, which is that the oil wells
21 constraint is not a traditional redistricting
22 criteria. And it's not a traditional redistricting
23 criteria nationwide. He didn't -- he didn't have an
24 expertise to testify what was actually (inaudible)
25 criteria in New Mexico. But it's not a traditional

1 redistricting criteria in New Mexico, and we get that
2 from the testimony of Mr. Sanderoff was asked, in 50
3 years of experiencing redistricting, has he ever
4 heard of such a thing, splitting the oil wells. No.
5 And that's -- we asked, and then the attempt -- my
6 friends attempted to kind of bolster the fact that
7 they knew from his deposition that he was going to
8 make that concession. So (inaudible) okay to split
9 only other communities of it.

10 And I thought what he said was very
11 telling. He said. Yeah, you can split come
12 communities of interest because I heard some
13 testimony during my involvement that the pueblos want
14 to be split or these other folks wanted to be split
15 in this other redistricting.

16 And then Ms. DiRago asked him, did
17 anyone in the industry say they wanted the oil wells
18 to be cracked. No. I mean, he was dismissive of
19 that. Has he heard of that in his 50 years of doing
20 redistricting work in New Mexico. No. So it's not a
21 traditional redistricting criteria nationwide.
22 They're own expert, Dr. Chen, said that. It's not a
23 traditional redistricting criteria in New Mexico
24 their own expert, Mr. Sanderoff explained to you why
25 that is so.

1 So my friend says, well, Dr. Chen's
2 report is excluded because it's a factual question.
3 So factual question for your Honor under Justice
4 Kagan's rule book for considering simulation, is this
5 a traditional redistricting factor, or is this
6 pretext.

7 Now, the evidence that we have that it's
8 not -- that it's pretext, it has no grounding in
9 New Mexico history, no grounding in New Mexico law,
10 wasn't asked for by the industry or any meaningful
11 number of people, was only even mentioned in -- and
12 we're going to quote in more detail in our proposed
13 findings, only obliquely by a couple of the very
14 folks that are accused of gerrymandering. And the
15 results of that, and Dr. Chen, after some pressing,
16 he admitted it, is to crass southeast New Mexico,
17 which is exactly what a gerrymanderer would do.

18 And I thought was one exchange was very
19 telling. Ms. DiRago asked Dr. Chen to look at his
20 distributions to show, you know, where all his 3,000
21 districts. It was the thousand maps broken up by the
22 three districts. Why? And he showed and he admitted
23 that almost all those districts are -- are less than
24 50 -- or in -- in Mr. Sanderoff's problems, plus 51
25 DPI. Which means that once you bake in the clearly

1 pretextual oil constraint, you gets only
2 gerrymanders. Almost every single map that Dr. Chen
3 produced had three Democrat districts, zero
4 Republican districts in a typical year.

5 I'm not faulting Dr. Chen. He
6 obviously, as far as we know, performed the analysis
7 with the partisan constraint that my friends fed him
8 inspect a technically competent manner. But garbage
9 in, garbage out.

10 When you force a simulation to put in a
11 partisan criteria, and as my friend said, that's a
12 factual matter. It will be your Honor's decision who
13 had the better of the factual showing about whether
14 that was a traditional redistricting criteria in
15 New Mexico or a partisan pretext. You just get
16 garbage out, and that's unfortunately what we had
17 with his (inaudible) simulations, which is mostly 3-0
18 Democrat maps.

19 And finally criteria we talked about,
20 and said this would be at least etch citizen was the
21 traditional redistricting criteria, objective ones,
22 which is the county splits and the compactness. You
23 know, this map is one of the worst in New Mexico
24 history. The considerations that they relied on most
25 heavily with that are the oil well considerations and

1 the way they got to beat kind of a dead horse on
2 that.

3 So with all of that taken into account,
4 I will end now as I ended. Given these overwhelming
5 eight categories of evidence, that it is a partisan,
6 this is (inaudible) partisan intent, this has an
7 egregious partisan effect. And that my friends have
8 no justification for that effect. Which would ask
9 your Honor to hold that this is unconstitutional
10 (inaudible) gerrymander, and to schedule remedial
11 potion at the earliest possible time.

12 Thank you?

13 THE COURT: Thank you. Who will be closing?
14 Ms. Sanchez?

15 MS. SANCHEZ: Yes. Thank you.

16 There's no clock, so I'm going to try to
17 keep -- oh, thank you. I did not catch that.

18 Your Honor, thank you. On behalf of my
19 team here for the legislative defendants, we want to
20 thank the Court for undertaking this rather huge
21 amount of work on a very compressed scheduled on a
22 matter of first impression that's frankly important
23 to the whole state.

24 I am going to cut to the chase and just
25 jump right to the bottom line. SB-1 is not a

1 egregious partisan gerrymander for one very simple
2 reason. Under this plan, Congressional District 2 is
3 a highly competitive, toss-up district that either
4 party can win.

5 By definition, not just my definition,
6 but Justice Kagan's definition and our state Supreme
7 Court's definition, a competitive district that
8 either party with win is not entrenchment of the
9 dominant is, in fact, it is the opposite.

10 I want to read again the words of Chief
11 Justice Bacon in the opinion that was issued just
12 last week when she's talking about entrenchment.

13 Again, the consequences of such
14 entrenchment under the a partisan gerrymander include
15 that ensuing elections are effectively predetermined,
16 essentially removing the remedy of the franchise from
17 a contraction individuals who's votes have been
18 diluted, essentially rendering the voters choice moot
19 because it's locked in.

20 That's what egregious gerrymanderers do,
21 and this map does not do that.

22 The other thing this map doesn't top is
23 it doesn't PAC and it doesn't crack. Again, from
24 Justice Bacon's decision in this case from last week,
25 mere in Footnote 8 of the decision, she's quoting

1 Justice Kagan from -- I believe from the Rucho case,
2 and talking about what does packing and cracking mean
3 in this context. Okay.

4 So the partisan gerrymanderer, quote,
5 packs super majority of those voters into a
6 relatively few districts in numbers far greater than
7 needed for their preferred candidates to prevail. So
8 their votes become wasted in those districts.

9 And then he cracks the rest across many
10 more districts, spreading them so thin that there
11 candidates will not be able to win. That is what
12 cracking is, and that did not happen here because we
13 know, looking at CD-2, from the metrics that
14 Mr. Sanderoff used both from the partisan performance
15 data, taking all of those considerations into play,
16 and from the endogenous races, the history of raises
17 in CD-2 and then the race that we have under this
18 map, which was such an incredibly close race, a
19 toss-up race.

20 So the map under SB-2, under this map,
21 this is not what the Supreme Court is worried about.
22 The Supreme Court is worried about entrenchment such
23 that votes don't matter anymore. That's why I submit
24 to the Court that the Supreme Court's opinion talks
25 so much about the importance of the franchise, the

1 importance of the vote to our democracy, to our whole
2 system. Votes have to matter, voters should choose
3 politicians, not the other way around. And that's
4 exactly what happens in CD-2.

5 You heard Mr. Sanderoff, the sort of
6 guru of New Mexico elections and in politics tell you
7 that they expects this race to be very competitive
8 going forward. That Mr. Vasquez is, frankly,
9 vulnerable, and we could see this district flip back
10 and forth election to election; somewhat as it did
11 even before redistricting. We looked at that history
12 of CD-2 and saw, at least when Mr. Pierce isn't a
13 candidate, that district can go back and forth even
14 before the current lines.

15 So we also heard from Senator Gallegos,
16 who testified, quite frankly and candidly that
17 there's a problem with public voter turnout in the
18 southern part of the state, and that he does think
19 that that affected -- that affected the you be 2022
20 election.

21 We see that in the turnout numbers. We
22 included that in our findings and conclusions for the
23 Court, looking at the number of votes that --
24 registered voters in CD-2 that just didn't come out
25 to vote in the 2022 election.

1 So there clearly are other factors at
2 play and it's still a neck and neck race. In fact,
3 we briefly talked about here I think with Mr. Trende,
4 and then submitted in our supplemental findings and
5 conclusions. Our third expert, Mr. Brace, who we
6 didn't fly out for trial, but who submitted a lot of
7 material to the Court, talked about a survey USA poll
8 just from would weeks ago that find Ms. Harrell
9 leading Mr. Vasquez by about a point, 46 to 45 in the
10 race right now.

11 So if that was and enough, we also know
12 that prior to SB-1, CD-2 was not a safe Republican
13 district. And Mr. Sanderoff just walked us through
14 that history, that a Democrat could win it and had
15 won it on two occasions in the last two cycles of
16 redistricting.

17 So plaintiffs' don't particularly like
18 those facts. But no amount of text messages or
19 simulation analysis changes the political reality
20 under this map and that under the test that the
21 Supreme Court has so clearly laid out, this does not
22 meet the test for egregious gerrymandering.

23 And a lot of the companion, I think,
24 theme to the importance of that entrenchment that the
25 Court stresses is the danger of venturing in and

1 decreeing something an egregious partisan gerrymander
2 when it is not, when in enact, it is a set of policy
3 decisions that many people vehemently disagree with.
4 Clearly, this is a highly unpopular map in parts of
5 this state. But when courts get in the business of
6 weighing in on partisan preferences in a
7 redistricting map, when it's not egregious to the
8 point of being unconstitutional, to the point of
9 impairing the right to vote, then it becomes the
10 Court stepping in to the political fray. And that is
11 a danger that our Supreme Court, that even Justice
12 Kagan in her dissent warns against. That is not what
13 courts should be in the business of doing.

14 That's why it's so important to ensure
15 that if we're going to strike down a map as
16 unconstitutional, we better be really sure that it
17 is, in fact, egregious entrenchment under this test.
18 And this map just doesn't satisfy that test.

19 I want to touch on just briefly these
20 eight categories that plaintiffs' counsel have kind
21 of focused on. We have heard a lot about the text
22 string that Senator Stewart was involved in. It's
23 been -- it's been sort of trotted out at every
24 opportunity.

25 Frankly, there's not really any new

1 information there. We know -- we can look at the
2 maps, we can see the difference between Concept H and
3 SB-1. We can see how the partisan performance
4 numbers changed. No one is suggesting that SB-1 was
5 developed without partisan considerations. No one is
6 saying this is an agnostic map that had no partisan
7 aspect to the decision-making.

8 But that's exactly what the Supreme
9 Court has acknowledged that redistricting is an
10 inherently political exercise. It is
11 constitutionally assigned to the political branch of
12 government; of course politics are going to come into
13 play.

14 So there's really not a lot new there.
15 It may be kind of spicy to see the candid thoughts of
16 an individual lawmaker. But I think it's was
17 representative Townsend agreed, long time legislator.
18 You know, there's 112 legislators in the body. They
19 have their own reasons for supporting maps, they have
20 their own reasons for voting against maps.

21 So I would urge the Court to give
22 appropriate weight to what any one particular
23 individual has to say about their reasons for pouring
24 the map or what they were trying to do with their
25 input into the map.

1 Next, we heard some testimony that GOP
2 legislators felt sort of left out of this process.
3 But when we (inaudible) that a little bit more, you
4 know, they clearly participated in committee hearings
5 and floor debates, they commented, they proposed a
6 different plan. You know, the political reality is
7 that the GOP is in the minority in the legislature.
8 The governor is Democrat. And so that's probably not
9 the best political environment for a whole lot of
10 bipartisan compromise to happen.

11 It was very different in 2011 and 2001.
12 And, in fact, what happened, there was no enacted
13 maps because the legislature wanted to do one thing
14 the governor wanted to do another, and everybody had
15 to go to court. So it's not like it was panacea
16 before now. But that's sort of a political reality
17 and I think not very persuasive evidence for the
18 Court to be able to make a decision on.

19 The -- we've heard about change in voter
20 registration, composition in CD-2. We've heard
21 comparison to the Benasik case in Maryland. I got
22 ready for this closing pretty quickly, so I don't
23 have all those numbers to prepare for the Court. I
24 think the changes here are pretty significantly than
25 they were in the Benasik if you look at the full

1 picture.

2 But of course, we also heard from
3 Mr. Sanderoff that putting too much weight on voter
4 registration composition for a whole plethora of
5 reasons is probably a bad idea. And what we have as
6 much better data to evaluate CD-2 is the political
7 performance index numbers of course the actual raise
8 that took place and even recent polling indicating a
9 toss-up.

10 The next category, plaintiffs say, yeah,
11 it was a close election, they can't dispute that.
12 But in Benasik and Maryland, that -- that -- there's
13 a close raise, too. Well, if you look at Justice
14 Kagan's dissent in Rucho when she's talking about a
15 facts in Benasik, there actually had been four
16 congressional elections. And in that case -- in that
17 situation, that district had been flipped by the
18 Democrats. It had been flipped from a very safe
19 Republican district, where the -- unlike here, in
20 CD-2, the Republican was absolutely safe in that
21 district, and then it got flipped, and then there
22 were four elections after that, congressional
23 elections, where the Democrat won that race,
24 sometimes by a lot, by 21 percent, I think in one
25 case.

1 So there was powerful evidence that you
2 had -- they took a safe Republican district and
3 turned it into a safe Democratic district. Again,
4 not the case here.

5 The unnecessary moving and shift of
6 voters between districts. Your Honor, the Court
7 heard from -- at least from Mr. Sanderoff and I know
8 we've presented a bunch of information about this in
9 our written findings and conclusions, about the fact
10 that 2021 was the first time in 30 years that
11 New Mexico had an opportunity to have a congressional
12 map that actually reflects the policy decisions of
13 the legislature; that's actually an expression of
14 policy as opposed to that sort of least change,
15 court-drawn, very conservative map where /SKWR-PBLGS
16 are in the unfortunate position of having to draw a
17 map and saying, "I'm not a policymaker, I'm not in
18 the political branch, I'm in the judiciary. And so
19 I'm going to make the fewest choices when I have to
20 draw the map as I possibly can. And so I'm going to
21 equal out the population. That's it. I'm going to
22 do as little as I can."

23 Well, now you have the decision back if
24 the hands of political branch. Of course they were
25 going to policy decisions that's going to reflect

1 growth and change and developments in the state that
2 have happened over 30 years. So it is not surprising
3 that we're going to see quite a bit of change in this
4 map, and there's no constitutional will requirement
5 to have a least change map.

6 Let's see. There's been a lot of talk
7 about, you know, the starting point was Concept H,
8 and then it was -- the map was sort of transformed
9 into SB-1. I believe that -- now I'm -- even though
10 it's only been two days, I'm losing track of who said
11 what. But I think we heard some testimony that -- I
12 think it was from Trende, actually, that a lot of
13 these districts sort of stayed the same, both from
14 their old districts, from 2011, so the cores of the
15 districts stayed the same. Mr. -- I know Mr. Brace
16 in his report testified that about 70 percent of the
17 core districts stayed the same from the 2011 map.
18 And then when you look -- when you compare Concept H
19 to SB-1, I think it's, you know, 150, 160 precincts
20 that changed. So there wasn't all that much change.

21 Just to remind the Court, Concept H was
22 approved by the CR C. It was one of those maps that
23 sort of made it through the gauntlet with the CR C.
24 And it also passed Mr. Cotrell's -- or maybe
25 Dr. Cotrell's partisan fairness test I think he had

1 to do as part of that CRC process.

2 So the fact that Concept H was a
3 starting pointed I think really is in line with how
4 this process was supposed to work using the CRC.

5 The simulations, I'm not going to spend
6 a whole lot of time on that. There's been a lot of
7 discussion today. You know, there's -- I will just
8 point out, without retreading the ground, your Honor,
9 Mr. Trende's 2,040,000 maps that he testified about
10 are not testable. And we've seen why testing is so
11 important. Particularly using the kind of program
12 that he used.

13 And the other problem, the key problem
14 here, is that his maps are really not tied to any
15 reality of New Mexico. Even just taking his
16 population deviations as an example. Plus or minus
17 1 percent population deviations may not sound like a
18 big proportion of movement or allowance for
19 population and equality, but in the context of
20 congressional redistricting and the history of how
21 New Mexico has done it and what the law requires,
22 it's enormous.

23 1 percent of 700,000 people, which is
24 about how much each district should have, is 7,000
25 people. And to have a population difference of 7,000

1 people, or even up to 14,000 people, if you're
2 talking about plus or minus 1 percent, is huge
3 deviation that is in no way a map that New Mexico
4 would ever draw or adopt or be able to enact into
5 law. So there's disconnect between what Mr. Trende's
6 doing and the realities of New Mexico.

7 Contrast with Dr. Chen and his
8 simulation analysis, which actually was built to
9 acknowledge and recognize some of the policy choice
10 that were heard throughout the CRC, heard throughout
11 the legislative record, and incorporated to stop
12 extent into the SB-1 map. So rather than being
13 disconnected from that reality of New Mexico
14 redistricting, Mr. Chen's simulations took that into
15 account. And running his analysis that he testified
16 about I think explained very capably, SB-1 is not a
17 partisan outlier. Right? It's -- when you actually
18 run realistic simulations, it's actually comfortably
19 in the -- roughly in the middle of the pack.

20 Lastly, this sort of community of
21 interest splitting of the oil wells concept that
22 we've heard a lot about. The first thing that I want
23 to say about that, we've provided it with our
24 findings and conclusions. We didn't want to take the
25 Court's time here to play the videos and have you

1 watch the floor debates and the clips that we've
2 pulled together. But we have provided them to the
3 Court and I think we've given video clips.

4 THE COURT: And transcripts, too.

5 MS. SANCHEZ: And transcripts attached to
6 our findings and conclusions. So you can -- you can
7 see those. But it's absolutely something that was
8 discussed and debated in the legislative process.

9 And harkening back again to the state
10 Supreme Court's decision from last week, I think they
11 gave the Court some really important guidance about
12 this concept. I lost track of how many times
13 plaintiffs' counsel mentioned the phrase traditional
14 redistricting principles in his closing. But that's
15 sort of been a major argument here, by plaintiffs, is
16 that, well, this splits up a community of interest in
17 the southeast and that violates tradition redistrict
18 principle, it's bad, it's a sign of a gerrymander.

19 And what the state Supreme Court told
20 us, and this is in their September 22nd opinion at
21 paragraph 46, pages 33 to 34, they talk about
22 plaintiffs' argument, because on -- when they case
23 was on appeal, there was also a lot of talk about
24 traditional redistricting criteria.

25 And the Court makes clear that

1 plaintiffs' reliance of tradition redistricting
2 principles is misplaced; that that is not something
3 that the Court should use to analyze whether this is
4 an egregious partisan gerrymander in violation of
5 Kagan's Rucho test. And so, again, I would urge the
6 Court to take a look at paragraph 46 of their on that
7 point.

8 Okay. One final category that
9 plaintiffs really didn't address is the -- whether or
10 not the individual plaintiffs in this case, whether
11 their votes were substantially diluted under this
12 map. We heard from one plaintiff, we heard from
13 Senator Gallegos, and while he testified that he felt
14 like his vote was diluted, he really didn't have any
15 evidence to important that. And, in fact, when
16 Ms. Tripp talked with him a little bit more about the
17 2022 election under these new boundaries in CD-2, he
18 pretty much, you know, candidly talked about the lack
19 of voter turnout amongst Republicans and that he
20 thought that was a factor in Ms. Harrell's loss. And
21 we haven't heard testimony or evidence regarding vote
22 dilution of the other -- any of the other plaintiffs.

23 So in closing, I'm wrapping it up,
24 again, we thank the Court. This case presents really
25 interesting and important issues that affect our

1 entire state. And the functioning of our coequal
2 branches of government. We are confident, your
3 Honor, that if the Court dutifully follows and
4 applies the test and guidance set forth by the state
5 Supreme Court in the September 22nd opinion, that the
6 Court will conclude that SB-1 is a constitutional map
7 and that the Court will deny the plaintiffs' claims.

8 Thank you.

9 THE COURT: Thank you. Any rebuttal.

10 MR. TSEYTLIN: We've been here long enough,
11 your Honor.

12 THE COURT: All right. All right. So as
13 for the findings and conclusions, since they've
14 already been submitted as proposals, we talked about
15 supplementing them with new information, tell me
16 about the -- you said some things have already come
17 in.

18 MR. TSEYTLIN: Yeah. We've already started
19 receiving some discovery from (inaudible) staffer,
20 pretty explosive stuff. And assume with the
21 introduction that's coming, we're going to get more
22 stuff (inaudible). We obviously want the opportunity
23 to put that into our proposed findings. Obviously
24 that means the timing of the proposed findings should
25 hopefully be tied to some extent to when we can

1 expect to get that full production.

2 THE COURT: How -- how do you -- how do the
3 parties propose we're going to deal with that as far
4 as objections and...

5 MR. OLSON: Your Honor, there may be a few
6 things we don't know yet. (Inaudible) privilege log.
7 But, I mean, I guess with respect to those -- and we
8 aren't going to claim -- given the Court's order,
9 (inaudible) Court's order, a privilege log, I mean,
10 we'll submit them to plaintiffs. If they want to
11 tender them as additional evidence, I guess they can.
12 I mean, we'll be able to stipulate to where it came
13 from.

14 THE COURT: Okay.

15 MR. OLSON: So there should be any problem
16 there.

17 THE COURT: All right.

18 MR. OLSON: I do think, and identify --
19 we've got a draft, and I'll try to get it
20 Mr. Harrison or tomorrow, Saturday, at the latest, of
21 an order I think documenting what your order has
22 been. We'll probably do of document of record, your
23 Honor, just in case it's something the Supreme Court
24 needs to look at on the privilege issue.

25 THE COURT: All right.

1 MR. OLSON: But we'll do that.

2 THE COURT: I think -- so October 6th is the
3 deadline that I have to make a decision by. I think
4 that -- I've got to have a cutoff date for
5 submissions. I -- Monday, Tuesday?

6 MR. HARRISON: My apologies. Are the
7 legislative defendants going to make their production
8 by Monday; is that right?

9 THE COURT: I know you were talking about
10 Tuesday. Can you do it by Monday.

11 MS. SANCHEZ: I'm really pushing folks. I
12 mean, it's possible. It's possible. I mean --

13 THE COURT: We got tomorrow.

14 MS. SANCHEZ: Literally people are still
15 searching as we speak, so I just don't know what the
16 volume is going to be.

17 I will -- I mean, I can -- I can provide
18 an update tomorrow. I certainly will strive to do it
19 Monday. I think I can safely commit to doing it, you
20 know, later than Tuesday, but if I can -- if I can
21 get it earlier, I absolutely will.

22 MR. HARRISON: We don't need much lead time
23 in terms of if -- I would say it could be good enough
24 if they could produce by close of business on Monday.
25 We could have our submissions done on Tuesday. We

1 don't need tons of time with the documents. If
2 that's at all possible. That's what I'd like. By
3 Monday, that gives you three -- four days by close of
4 business Monday so that any supplements can be filed
5 by Tuesday so that I can have a decision by Friday.

6 THE ATTORNEY:

7 Q. I understand, your Honor, I guess -- I know
8 that I will have at least a bulk of it by the close of
9 Monday. If there's some, you know, stragglers or
10 something, you know, I can indicate that. But I think
11 that's fair. I will do that?

12 THE COURT: Okay. All right. I'd
13 appreciate that.

14 MR. HARRISON: And the only other thing I
15 think, quick housekeeping type things, Mr. -- so
16 we've obviously accepted our, quote, unquote, loss on
17 Ms. Leith. Mr. Park has confirmed for husband that
18 Mr. Gabello was an outside advisor to the government,
19 not a government employee, but a consultant and
20 advisor on issues related to politics and policies.
21 So I may reach out to Mr. Park and ask for
22 production. They were fairly willing initially to
23 produce.

24 And the only reason I would say that
25 comes up is, I wanted to raise it in case the

1 legislative defendants have an objection. But then,
2 in addition, most of the documents we'll be getting
3 in will need to be -- the Ellis-Moore documents that
4 we just got, and I hate to put them on the spot, but
5 if they can tell me if there's any authentication
6 problems with those, it would be nice (inaudible).
7 Obviously the ones they'll be producing, I would hope
8 we can agree to them producing them as an agreement
9 to authentication. And then anything that comes are
10 from Mr. Gabello. Those are the only documents that
11 we think might be coming in.

12 Obviously if we can -- if we can show
13 that production by -- all the folks are represented.
14 Mr. Vince Ward for Ellis-Moore. They were produced
15 earlier today. And then Mr. Park, for Mr. Gabello.
16 And so if we can agree to production by an attorney,
17 we'll suffice to authenticate. (Inaudible) here to
18 avoid what I think are probably technical disputes.

19 MR. OLSON: (Inaudible).

20 MS. SANCHEZ: That's -- he's who produced
21 the Ellis-Moore stuff to Carter. And I think we got
22 a copy.

23 MR. OLSON: Yeah. I mean, I don't think we
24 have a problem with authentication, your Honor. We
25 just -- we just need to look at what he got from

1 Mr. Ward. I haven't seen it yet, but I can't imagine
2 there would be any problem with authentication.

3 THE COURT: All right. One last thing. I
4 just -- I thought about this during closing.

5 Mr. Auh, I didn't mean to ignore you all
6 afternoon. But right now, if you tell me you have
7 any witnesses or anything...

8 MR. AUH: I appreciate the thought. But
9 that's just fine.

10 THE COURT: Okay. I apologize.

11 All right. So I think that that clears
12 everything up, and we'll be able to get a decision
13 out when we're supposed to. I want to thank you all
14 for excellent pleadings, excellent presentation. It
15 was -- it was very good, it enjoyable, it was
16 pleasant even for as contentious as it could get, it
17 was a pleasant experience, so I thank you all.

18 And if there's nothing else, we'll be in
19 recess.

20 (Proceedings adjourned 5:52 p.m.)

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1 RE: REPUBLICAN PARTY OF NM, et al. v.
2 TOULOSUSE OLIVER, et al.

3 REPORTER'S CERTIFICATE

4 I, PAUL BACA, CCR #112, DO HEREBY CERTIFY
5 that the foregoing transcript was prepared from a
6 provided audio recording, that the audio was reduced
7 to written transcript by Kelli Gallegos, and that the
8 foregoing pages are a true and correct transcription
9 of the recorded proceedings, to the best of our
10 knowledge and hearing ability. The audio quality was
11 FAIR.

12 I FURTHER CERTIFY that I am neither employed
13 by nor related to nor contracted with (unless excepted
14 by the rules) any of the parties or attorneys in this
15 matter, and that I have no interest whatsoever in the
16 final disposition of this matter.

17
18 _____
19 PAUL BACA
20 NEW MEXICO CCR #112
21 Commission Expires: 12/31/23
22
23
24
25

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT
REPUBLICAN PARTY OF NEW MEXICO, DAVID
GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS,
MANUEL GONZALES, JR., BOBBY and DEANN
KIMBRO, and PEARL GARCIA,

Plaintiffs,

vs. CASE NO.: D-506-CV-2022-00041

MAGGIE TOULOUSE OLIVER in her official
capacity as New Mexico Secretary of State,
MICHELLE LUJAN GRISHAM in her official
capacity as Governor of New Mexico, HOWIE
MORALES in his official capacity as New
Mexico Lieutenant Governor and President
of the New Mexico Senate, MIMI STEWART in
her official capacity as President Pro
Tempore of the New Mexico Senate, and
JAVIER MARTINEZ in his official capacity
as Speaker of the New Mexico House of
Representatives,

Defendants.

VIDEO-RECORDED DEPOSITION OF
JUSTICE EDWARD L. CHAVEZ

August 14, 2023
9:34 a.m. Mountain Time

PURSUANT TO THE NEW MEXICO RULES OF CIVIL
PROCEDURE, this deposition was:

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1 VIDEOGRAPHER: Good morning. Today is
2 August 14th, 2023. The time is 9:34 a.m. My
3 name is Paul Thompson. I am a legal video
4 specialist with Trattel Court Reporting &
5 Videography in Albuquerque, New Mexico.

6 We are here for the deposition of Justice
7 Edward L. Chavez, in the case of Republican
8 Party of New Mexico, et al. versus Maggie
9 Toulouse Oliver, et al.

10 Will counsel please state their appearances
11 for the record, and the witness will be sworn
12 in.

13 MR. HARRISON: Carter Harrison for the
14 plaintiffs.

15 MR. BAKER: Mark Baker for the legislative
16 defendants.

17 MR. STELZNER: Luis Stelzner for the
18 legislative defendants.

19 MR. WILLIAMS: Lucas Williams and Richard
20 Olson for the legislative defendants.

21 MR. DUFFY: Kyle Duffy on behalf of the
22 governor and the lieutenant governor.

23 JUSTICE EDWARD L. CHAVEZ
24 after having been first duly sworn under oath was
25 questioned and testified as follows:

1 EXAMINATION

2 BY MR. HARRISON:

3 Q All right. Are you ready the start?

4 A **Sure.**

5 Q Good morning, Justice Chávez. How are you
6 doing this morning?

7 A **Good morning. I'm doing great.**

8 Q Are you feeling well?

9 A **Feel great.**

10 Q Excellent. So I know that I had told you
11 that Bob Gorence would be conducting this deposition.
12 I had to step in. He had some personal issues and
13 had to leave the case, unfortunately, so I'll be
14 doing the deposition today.

15 A **You're trying the case.**

16 Q That's right. So tell me a little,
17 starting back to growing up and through your time
18 with the Supreme Court, can you give me just a brief
19 kind of self-bio?

20 A **Yeah. I grew up in Santa Fe, New Mexico,**
21 **working on small family ranches in northern New**
22 **Mexico, San Miguel County and Torrance County.**
23 **Product of the public school system, Santa Fe High**
24 **School. Went back east to college, Eastern New**
25 **Mexico University. Then I went to UNM law school.**

1 **Graduated in 1981. I went into -- clerked for**
2 **Justice Dan Sosa, Jr., out of law school. Then went**
3 **to work for Ed Casillas and his law firm, and after**
4 **that joined a couple of law school buddies, and we**
5 **had a law firm, Torres, Louis & Chávez.**

6 **I then went to the University of New**
7 **Mexico, worked with Joe Goldberg, university**
8 **counsel's office. After that went and joined with**
9 **Bill Carpenter and practiced with Bill for probably**
10 **15 years.**

11 **And then in 19 -- no, 2003, I went on the**
12 **New Mexico Supreme Court and retired March 9th, 2018.**
13 **Since then, I've done volunteer work for all three**
14 **branches of government. And the best was Roadrunner**
15 **Food Bank. And that's it.**

16 Q Okay. Tell me about your -- so obviously,
17 when you were on the Court, you wrote the court's
18 opinion in *Maestas v. Hall*, correct?

19 A **Correct.**

20 Q Tell me more generally, before you became
21 chair of the CRC -- and when I say "CRC," I mean the
22 Citizen Redistricting Commission.

23 A **Yes.**

24 Q What kind of experience did you have with
25 redistricting?

1 **A Well, the 2011 litigation was one area.**
2 **Before that, I chaired a committee along with Rod**
3 **Kennedy, where we started to study the use of citizen**
4 **redistricting committees throughout the United**
5 **States. And we proposed legislation to the**
6 **legislature that would create such a committee. And**
7 **I testified quite a bit in favor of the legislation,**
8 **and -- but I was very happy that they adopted it.**

9 **It's not an independent redistricting**
10 **committee, in the sense that we could only make**
11 **recommendations to the legislature. We were told**
12 **what the law was, what the interests of the**
13 **government were with respect to redistricting, what**
14 **our criteria would have to be. And we had**
15 **prohibitions as well, which I can go over.**

16 **I was told to bring whatever documents I**
17 **thought were relevant, so I brought the act and the**
18 **rules.**

19 **Q Excellent. So at the time, did you -- and**
20 **this is before, obviously, the CRC actually**
21 **existed -- did you favor a -- what I'll call a**
22 **mandatory redistricting commission?**

23 **A Definitely. Still do.**

24 **Q Okay. And basically why is that?**

25 **A Because I think you eliminate politics from**

1 **it as much as possible. You can't eliminate it, but**
2 **I think you can minimize the risks of politicians**
3 **deciding who the voters will be as opposed to the**
4 **voters deciding.**

5 Q What was your understanding of why the
6 legislature ultimately passed what I'll call an
7 advisory committee?

8 MR. BAKER: Objection, foundation.

9 A I don't know. My sense is that they were
10 worried about delegating the duty to us and whether
11 or not that would be constitutional if they fully
12 delegated the responsibility. That's debatable. But
13 it doesn't matter. It was their call. And frankly,
14 in my mind, that was a good beginning.

15 And they got to sample what it would be
16 like to have an independent citizen commission go out
17 and hold public meetings. And I think we had a very
18 successful time, despite all of the hurdles that we
19 faced.

20 So it could be that they just wanted to see
21 what kind of recommendations we would come up with,
22 but they also set the legal standards for what New
23 Mexico was interested in and what they were not
24 interested in. And that's in the written documents.

25 Q You say "what they're not interested in."

1 What do you have in mind when you say that?

2 **A Well, they were not interested in**
3 **competitiveness, for example, in the sense that we**
4 **could not consider any data, partisan data during the**
5 **drafting of the maps and the deliberations and the**
6 **adoption of maps. And so that was one thing that**
7 **they definitely did not want us to consider, is**
8 **whether or not we had reached partisan balance.**

9 **In the end, we had to send it, and despite**
10 **not looking at the information ourselves, to an**
11 **expert because we had to have the maps evaluated.**
12 **And the maps ultimately were evaluated by David**
13 **Cottrell.**

14 **Q Okay.**

15 **A But that was an interesting exercise.**

16 **Q Yeah. So tell me about your decision to**
17 **apply to be the chair position on the CRC and what**
18 **the application process was like.**

19 **A Well, I had participated in thinking about**
20 **the redistricting commission, so I decided to apply,**
21 **although I encouraged -- I called a number of people**
22 **and suggested and encouraged them to apply. The only**
23 **other one that I guess talked into applying was**
24 **Barbara Vigil from the Supreme Court. And the others**
25 **thought it would be too much work. They were right.**

1 **But it's -- it was well worth it.**

2 Q Okay. Now, obviously I've read the act, of
3 course, and I guess you can call them values that the
4 legislature put forth in the act. But what kind of
5 goals and values did you bring to your chairmanship
6 of the CRC?

7 A **Objectivity.**

8 Q What does that mean?

9 A **I didn't have a partisan view. And I,**
10 **above all, wanted to have the public be able to**
11 **testify about what their communities of interest**
12 **were, because I would say that that's probably a**
13 **dominating criteria, is communities of interest and**
14 **keeping them together. But first you have to**
15 **identify them.**

16 And I think that frankly, because of my
17 approach, which was unusual in the sense that I did
18 not put any limits on anybody's time to speak,
19 because I wanted the committee to hear fully and
20 fairly from all individuals, ask as many questions
21 they had of those giving testimony so that we could
22 properly identify the communities of interest.

23 Q Do you believe that redistricting should be
24 nonpartisan?

25 A **Yes.**

1 Q So I don't have the clip here. I'm going
2 to be characterizing something that you said in one
3 of the earlier CRC meetings. But you said that one
4 of the things that disappointed you about past
5 legislative redistricting processes -- and I believe
6 you were referring to two processes where in fact the
7 legislature didn't pass a -- or didn't enact a map,
8 but was the lack of public input.

9 Do you recall making a statement like that,
10 or do you recall what I'm talking about?

11 **A I'm sure I did, because I was trying to**
12 **encourage the public to speak up. And, in fact, they**
13 **did. That first meeting, I'm glad I was in Costa**
14 **Rica because had I been there, I think I might have**
15 **been attacked. They were very upset about -- I**
16 **proposed an ex parte rule and -- but they discovered**
17 **why the rule would have been important once they went**
18 **to the legislature.**

19 Q That was going to be my next set of
20 questions. So starting off, you obviously had the
21 act in front of you. Did you perceive any particular
22 strengths or weaknesses of the act?

23 **A I thought the strength was -- we used to**
24 **have guidelines. Ever since 1991 we had guidelines**
25 **in New Mexico that the Legislative Council Service --**

1 **anyway, they were adopted and they governed. They**
2 **haven't changed much, slightly. But we had those**
3 **since 1991. I think 1990 was maybe the first time**
4 **courts weren't involved in drawing maps, but then it**
5 **became a habit again, which is not a good thing, to**
6 **have the courts be involved.**

7 **So I thought that now that it was actually**
8 **written in law, the interests of the State with**
9 **respect to redistricting are clearly stated. And**
10 **that was helpful.**

11 Q I see.

12 A **And the fact that we were told to have so**
13 **many meetings. We actually had more meetings than**
14 **what were recommended. That was useful. The**
15 **drawback was we didn't really articulate a good way**
16 **to select members of the committee, because really**
17 **what we wanted, the intent was geographic**
18 **representation, and we didn't get that.**

19 **And we were criticized throughout the**
20 **process about the fact that we had -- well, number**
21 **one, we only had one female. We didn't have a Native**
22 **American on the committee. Everybody was pretty much**
23 **Albuquerque, with the exception of Senator Sanchez,**
24 **who was just south of here.**

25 Q In your view, could that issue be resolved

1 by better coordination among the appointing
2 authorities?

3 **A That could be, but we were so pressed for**
4 **time that that clearly didn't happen. I don't know**
5 **if they made the effort to do it or not, but I think**
6 **it -- it was the first go-around.**

7 **I think if we write another bill, we ought**
8 **to articulate, if we can, that it should involve**
9 **somebody from each quadrant of the state and central**
10 **New Mexico. I don't know that you can specify that**
11 **you have to have a Native American, but they are**
12 **sovereign territory, so you could identify that**
13 **geographically as a member of a sovereign nation. I**
14 **don't know. But I would try to be more specific.**

15 **And the bottom line is, if they allow this**
16 **to continue in the future -- by "this," I mean the**
17 **redistricting committee -- it's going to start almost**
18 **a year ahead of schedule. We started -- our first**
19 **meeting was in July. The first wind we got of it**
20 **that we were going to be authorized was basically**
21 **April, is my memory.**

22 **And you had to organize. You had to select**
23 **committee members. You had to come up with a budget.**
24 **You had to contract with people. It was really**
25 **compressed. And to boot, the Census Bureau didn't**

1 **have any of the census data. It's supposed to be out**
2 **by April 1st, is my memory, and it wasn't anywhere**
3 **close.**

4 Q Did you consult with any of the appointing
5 authorities, most probably the Ethics Commission, on
6 the selection of other members?

7 A **I did not.**

8 Q How do you feel like the size of the
9 committee worked out?

10 A **Perfect. I thought it was perfect. Seven**
11 **is a great number. Nine would have been okay. But**
12 **we had seven individuals that I thought -- and I know**
13 **that we were criticized because of the makeup, but**
14 **they worked hard. And I felt like they were**
15 **objective, all of them.**

16 Q Okay. And that was going to be -- this is
17 jumping ahead a little bit, but there were four
18 members that you would call political appointees and
19 three members that were Ethics Commission appointees.
20 Did you notice a difference in how the two classes of
21 members carried out their duties on the commission?

22 A **They each brought something different to**
23 **the table, in my mind. And the one that brought a**
24 **lot was Robert Radigan. Of course, he's, I guess --**
25 **is he a demographer? I know he works with demography**

1 **and whatnot, with population counts. He brought a**
2 **lot. Yeah. They each brought something to the**
3 **table.**

4 **And you could tell by their questioning. I**
5 **think Lisa Curtis asked a lot of questions throughout**
6 **all of the hearings. So that's one example of**
7 **somebody who was energetic and involved.**

8 Q So you have in front you the act. Section
9 7 of the act has what I suppose you'd call
10 traditional redistricting principles, if you want to
11 just look at the section I'm referring to.

12 A **I would call them traditional, only because**
13 **they've existed since 1991.**

14 Q Okay. And so you understand those to be
15 the redistricting priorities of the State of New
16 Mexico as expressed by the legislature.

17 MR. BAKER: Objection, form and foundation.

18 A **Yes. It definitely is. It says, District**
19 **plans, requirements and prohibitions. Couldn't be**
20 **clearer.**

21 **(Court reporter clarification.)**

22 **(Exhibit No. 1 was marked.)**

23 BY MR. HARRISON:

24 Q I'm going to hand you what I've marked as
25 Exhibit 1.

1 MR. HARRISON: And, Mark, here's a copy as
2 well.

3 BY MR. HARRISON:

4 Q So these are the draft rules of procedure
5 that were proposed at the first CRC meeting. You
6 wrote these; is that correct?

7 A **I wrote them, along with staff.**

8 Q Okay. Did you -- were they modeled after
9 anything?

10 A **No. Just looking at the way rule-making**
11 **takes place, it's modeled after that style.**

12 Q You probably know what rule we're going to
13 go to. But Rule 10 on page 2, if you wouldn't mind
14 taking a look.

15 A **Yes.**

16 Q So this is the ex parte communications
17 rule. Can you tell me what your thinking was in
18 including this rule?

19 A **Yeah. And I'm afraid I may not have done a**
20 **good job in the draftsmanship on this, because the**
21 **idea was, you don't want people lobbying a member of**
22 **the redistricting committee on the specifics about a**
23 **particular map.**

24 **If you did that, that would be fine, but if**
25 **you did that, then the committee member would reveal**

1 **it to the public at the next meeting. And the reason**
2 **you would do that is because now you've got a great**
3 **idea that was discussed behind closed doors. You**
4 **bring it out in the open so that other people are**
5 **aware of what was discussed. Some will speak in**
6 **favor. Some will speak in opposition. But now we**
7 **have another idea on the table.**

8 **And that's what we wanted, is all ideas to**
9 **be on the table, out in the open. This was written**
10 **as a prohibition, which just drove people nuts. And**
11 **I understood it. After the criticism, I thought it**
12 **should have been written preferably about what I just**
13 **said, which is if you want to have a private**
14 **discussion, go ahead and have a private discussion,**
15 **but it will be made public so that everybody else**
16 **knows what the idea is.**

17 **You might find support for it, might find**
18 **exclusive support for it. You might find people that**
19 **really dislike it and everybody dislikes it. But**
20 **that's the idea, is to make this an open and**
21 **transparent process. That was the whole goal here.**

22 **And we wanted to avoid -- the rule was**
23 **legislators were not supposed to participate in**
24 **lobbying efforts, as I understood it. And they**
25 **didn't. If they did, they -- we had legislators show**

1 **up and testify, and they should. I didn't think**
2 **anything wrong with that, because that's out in the**
3 **open.**

4 Q Well, let me ask you. So even -- this rule
5 obviously failed. It was amended out of the draft
6 rules by Lisa Curtis in a five-to-one vote.

7 A **Very good. Was I the only one that voted**
8 **against? No. I actually abstained, is what I**
9 **remember.**

10 Q You abstained.

11 A **Since I wrote it.**

12 Q But your understanding that legislators
13 were supposed to be barred from lobbying, does that
14 derive from this rejected Rule 10, or where does
15 that -- where does that prohibition come from?

16 MR. BAKER: Objection, form and foundation.

17 A **Nobody would have a private meeting that**
18 **would not be revealed. People could have -- I**
19 **suspect, I guess, if a legislator called somebody and**
20 **spoke to them about something, as long as it was**
21 **revealed during an open meeting, that would have been**
22 **fine.**

23 BY MR. HARRISON:

24 Q Okay. But that's from this Rule 10.

25 A **Yes.**

1 Q So in fact, with the rules as they were
2 adopted by the CRC, there was no prohibition on
3 legislators making -- or anyone making ex parte
4 contact.

5 **A Or anyone. In fact, I remember all the**
6 **members said, I have an open-door policy. They were**
7 **equally as offended by the rule. I have an open-door**
8 **policy. Come see me any time. I don't know if**
9 **anybody went to go see them anytime, but I know that**
10 **I actively participated by talking to a lot of**
11 **groups.**

12 **And my goal in talking to business groups,**
13 **any group that would want to hear from me, was to**
14 **educate them on how to participate in the process,**
15 **which included an online portal where they could**
16 **actually draw maps and make comments.**

17 Q So I did watch the video of that first
18 meeting, and it struck me that the debate was fairly
19 developed, suggesting to me either a high degree of
20 preparation by your members or maybe there had been
21 some discussions prior to the first meeting.

22 Did you have discussions with other members
23 or are you aware that other members had discussions
24 with each other?

25 **A I know the rule was out there. I don't**

1 **know if they had discussions with each other, but**
2 **they voiced their concerns in the meeting. And the**
3 **public -- I wouldn't say -- I don't know if they were**
4 **organized, but they knew what they were offended**
5 **about. It was a consistent message.**

6 Q Were you surprised, at the point of the
7 meeting, that there was that kind of a response to
8 the draft Rule 10, or were you kind of aware coming
9 into the meeting that there was going to be this
10 groundswell of opposition?

11 A **I wasn't aware that there would be a**
12 **groundswell of opposition.**

13 Q And did the idea of a modified form of this
14 rule ever come up again after the first meeting?

15 A **No.**

16 Q If you were asked to lead the CRC or a
17 commission like it again, would you propose some sort
18 of prohibition on ex parte communications?

19 A **Probably not.**

20 Q Just based on the level of opposition to
21 this one?

22 A **The level of opposition. And frankly, I**
23 **really don't think any took place. I know if I had**
24 **discussions with somebody, but it was usually in**
25 **general terms. It wasn't about a specific map or a**

1 **specific idea for a map. I'd even reveal I went to**
2 **whatever association or I went to the Better**
3 **Business -- the community here in Albuquerque and**
4 **spoke to them. And, you know, I mentioned it in**
5 **passing. But I don't think anything like that**
6 **happened.**

7 Q And then I guess my -- I'll try to move on
8 from this, but I did notice a divide in -- so if you
9 look at 10-A, it's framed as a prohibition. A member
10 of the committee may not engage in any private
11 communication. And then in subsection D, if a
12 communication that's prohibited happens, then the
13 person will disclose it.

14 So it seemed like Mr. Radigan and I believe
15 the very few comments, public comments that were in
16 support of it kind of read the rule as, these
17 communications are allowed, they just have to be
18 disclosed. And the voices opposed to the rule
19 focused on the prohibition and the fact that it was a
20 prohibition.

21 A **Exactly, yeah.**

22 MR. BAKER: Objection, form and foundation.

23 A **I think you're right. I think that --**
24 **that's why I think that it was probably -- it could**
25 **have been drafted better, and maybe I would have**

1 **avoided all the "you're un-American" discussions.**

2 Q So I guess would you support a rule that, I
3 guess, kind of just had the subsection D component,
4 so it wasn't necessarily a prohibition, it was just a
5 rule that when they happened, they would be presented
6 to the committee?

7 A **Yeah. If we proposed that, if the majority**
8 **of the committee wanted that rule, I wouldn't object**
9 **to it.**

10 Q Did you have any ex parte communications,
11 whether or not you actively participated or just
12 received ex parte communications from anybody about
13 any maps?

14 A **Not specific about maps, but I did get a**
15 **lot of calls about process. And then the best thing**
16 **that happened to us was when we had hired somebody**
17 **who would go out and actually do what I was trying to**
18 **do, which is teach the community how to draw maps.**
19 **And so everything went through mainly. That was a**
20 **better approach. Frankly, I mean, I put in a lot of**
21 **hours.**

22 Q Did any legislators contact you?

23 A **No.**

24 Q Are you aware of any legislators contacting
25 any other members of the committee?

1 **A No.**

2 Q So if you go to Rule 11, 11-B-8 real fast,
3 that's going to be on page 4. This was enacted.
4 It's in the final rules.

5 **A 11. I heard B-8-4.**

6 Q I think I gave you the cite of the enacted
7 rule. So it will be Rule 12-B-8, I'm sorry, which
8 will be on page 5.

9 **A Rule 12?**

10 Q It will be Rule 12-B-8 on --

11 **A C-8?**

12 Q B-8. You're right. C-8. Rule (sic) 5,
13 using the numbers at the bottom. And, again, my
14 apologies. The cite I gave you was from the enacted
15 rules, and these are the draft rules. But I'm going
16 to quote it to you anyway.

17 The act, not the rule, but the act provides
18 that, and I'm going to quote, Proposed redistricting
19 plans to be considered by the legislature shall not
20 be composed of districts that split precincts. And
21 that's 1-3A-7-A-4. And it's enacted Rule 11-B-8,
22 allows that, quote, if and only if necessary to
23 comply with the Voting Rights Act of 1965 as amended.

24 Can you -- well, let me first say, I guess
25 I was under the impression that most of the precinct

1 splitting that was done was just to comply with the
2 congressional maps, particularly was to comply with
3 the equal population requirement, not necessarily the
4 VRA.

5 MR. BAKER: Objection, form and foundation.

6 **A I don't recall us splitting any precincts.**

7 BY MR. HARRISON:

8 Q To be honest, I don't know if the committee
9 did this time around, but I know it was done, for
10 example, in 2011 redistricting.

11 MR. BAKER: Objection, form and foundation.

12 **A I do not believe that we split any**
13 **precincts. That was there in the event that we**
14 **needed it, only for VRA purposes. But I don't recall**
15 **that we needed to do that in the adoption of any of**
16 **our maps.**

17 **None of our concepts had split precincts.**
18 **In fact, the concepts, as I recall, may have been**
19 **done on the basis of the old census data. And then**
20 **we had to make some adjustments once the census data**
21 **became available. But, no, I don't recall splitting**
22 **precincts at all. We did split and the report**
23 **identifies when we split, for example, cities or**
24 **counties.**

25 Q So it -- I guess my particular interest is

1 that, you know, we have a statute that uses
2 prohibitory language --

3 **A Right.**

4 Q -- not subject to an exception. And in
5 your rules, you had an exception. Would you agree
6 with that?

7 **A Yes. We had an exception to comply with**
8 **federal law. Preemption would be the concern.**

9 Q So I guess, implicit in your answer -- and
10 tell me if I'm right or wrong. Implicit in your
11 answer is that the CRC was supposed to produce fully
12 legal maps that would be legal if enacted; is that
13 correct?

14 **A That was the goal.**

15 Q And I bring that up because -- so in
16 theory, right, there could be a system where the CRC
17 produces maps that use a certain set of criteria but
18 in fact may violate the VRA, and then that would be
19 expected to be caught at the legislative stage. And
20 you would agree that the VRA really only applies to
21 the maps that are enacted, correct?

22 MR. BAKER: Objection to form.

23 THE WITNESS: Was that the court reporter?

24 MR. BAKER: I don't know what that was.

25 MR. HARRISON: A watch.

1 **A I'm sorry. I really didn't understand the**
2 **question.**

3 BY MR. HARRISON:

4 Q That was a bad question. You felt that it
5 was the mandate of the CRC to produce fully legal
6 maps that pass muster under federal law and state
7 law, correct?

8 **A Yes.**

9 Q And then the portal that -- what's it
10 called? Districtr? Is that right?

11 **A Yes.**

12 Q Does it allow for -- when members of the
13 public would draw maps, did it allow for district
14 splitting, or I'm sorry, precinct splitting?

15 **A No. I didn't design it, but that was a**
16 **criteria, that it would not allow that. I'm assuming**
17 **that the contractors did their job.**

18 Q I'm going to go through real fast kind of
19 the thoroughness of the process. So my understanding
20 in Section 5 of the act, 5-A-2, that the CRC was
21 required to have 12 meetings, six pre-map proposal,
22 six post-map proposal; is that correct?

23 **A Yes.**

24 Q You guys in fact had 23; is that right?

25 **A I don't think that the 23 are necessarily**

1 **relevant to what you're asking or what that required.**
2 **That was public meetings, to get public input, as I**
3 **recall the rule. And instead of going six and six,**
4 **we went eight and eight, because we decided to hold**
5 **an additional meeting, as I recall, on sovereign**
6 **territory.**

7 **But we did have a lot of meetings. First**
8 **one was rule-making, and then the last was adoption.**
9 **I think we had to have a supplemental meeting or**
10 **something like that.**

11 Q Sure. And they were all OMA compliant,
12 correct, Open Meetings Act?

13 A Yes, yes. Well, I believe it -- somebody
14 **challenged us and said that our first meeting with**
15 **Princeton, they thought that I had maybe violated the**
16 **Open Meetings Act. That was just to educate the**
17 **members. They were held public. But now after that,**
18 **we started to announce that we would have a meeting**
19 **that would educate the members.**

20 Q Okay.

21 A **That was important. You've got to know**
22 **what you're doing.**

23 Q Can you give me an idea -- I'll ask how
24 many hours, but if you have a qualitative explanation
25 as well. Outside of the meetings themselves, how

1 much work did you put into your service on the CRC?

2 **A I worked seven days a week and usually**
3 **started at 3:00 in the morning, would end 10:00,**
4 **11:00 at night.**

5 Q Throughout the period that the CRC was
6 active?

7 **A Yeah. It took an enormous amount of time.**

8 Q And what staff did the CRC have?

9 **A We used the State Ethics Commission staff.**
10 **Really Sonny Haquani was the one who did our IT for**
11 **us, basically ran the meetings for us, the Zoom**
12 **meetings.**

13 Q So, I guess, realistically how many folks
14 did you have working with the CRC staff-wise?

15 **A That might be a better question for Jeremy**
16 **Farris. But Jeremy would have been involved to some**
17 **extent. They have a lawyer on staff that might have**
18 **contributed something initially until we got a lawyer**
19 **involved. Then Sonny and then Mike, who helped do**
20 **the minutes. That's four. And it wasn't for all the**
21 **time. Sonny and Mike were the ones that worked the**
22 **hardest. No. The most.**

23 Q And that staff support consisted of stuff
24 like compiling the agenda and then the minutes; is
25 that correct?

1 **A Yes.**

2 Q Did they keep -- did the staff keep
3 minutes?

4 **A Yes.**

5 Q By which I mean I know there were minutes.

6 **A Yes.**

7 Q Were they kept by staff?

8 **A Yes. But I went through them myself.**

9 Q Obviously, running the technical aspects of
10 the -- I think all the meetings were at least
11 available for participation virtually, correct?

12 **A Yes.**

13 Q Any other major functions that the staff
14 performed?

15 **A A lot of coordination. I had the idea,**
16 **which it didn't work as well, probably because it**
17 **wasn't advertised as well, but I wanted to have**
18 **satellite facilities so that people didn't have to**
19 **travel. For example, people from Silver City**
20 **wouldn't have to travel to Las Cruces to provide**
21 **public testimony.**

22 **So we'd set up a venue in Silver City, I**
23 **think at Western. We set up a venue at Eastern New**
24 **Mexico University, so that they could show up there**
25 **and testify. And so we contracted with somebody that**

1 **would be there. They would help organize all that.**
2 **They would go out and visit the venues to make sure**
3 **that the technology would be compatible.**

4 Q So the logistics of arranging for sites?

5 A **Right.**

6 Q Can you describe for me the work of the
7 other CRC members outside the meetings themselves?

8 A **No. I wasn't with them.**

9 Q And then were there any non-public or
10 informal meetings, including before the first
11 meeting?

12 A **No. I sent a memo out to everybody. I**
13 **don't think that's a meeting. But to organizers, I**
14 **wrote a memo that explained what all I thought we**
15 **needed to do to get organized and told them that we**
16 **would have a meeting, to be prepared to discuss it.**

17 Q Okay. And were there any significant
18 communication -- well, I'll say communications of
19 substance that you would have with individual members
20 in between meetings?

21 A **I think Robert Radigan and I may have had**
22 **more discussion than I had with anybody else. I**
23 **remember -- oh, jeez, my memory has faded, obviously.**
24 **But with Robert, there was a little concern about**
25 **undercounting -- the census undercounting New Mexico.**

1 **And so talked to Robert Radigan about maybe**
2 **some ideas for the future that -- because -- and I**
3 **think it finally came to a head in Espanola, is my**
4 **memory. And he and I both got on the phone with**
5 **David Scrase, because there was a thought that maybe**
6 **Medicaid data might be able to help out and make sure**
7 **that people weren't undercounted. And so we had**
8 **those sort of discussions.**

9 **I talked to him about maybe them going on**
10 **the radio instead of just me. But they, in an open**
11 **meeting, said I should be the only one that does any**
12 **of the public announcements.**

13 Q Okay. I know you would encourage all the
14 committee members to do public outreach, correct?

15 A **Go out and talk to -- if some organization**
16 **wants information, go talk to them. Let's not be the**
17 **boogeyman. I've already accomplished that.**

18 Q I got you. But the committee -- did the
19 committee vote that only you should be the public
20 face?

21 A **Eventually, yes. That was it. The idea**
22 **was a consistent message.**

23 Q So your point with Mr. Radigan I think
24 dovetails into kind of the next set of things I want
25 to talk about, which is the act gave the CRC some --

1 what I'll call some options, ability to make their
2 own value judgments about redistricting that I'm
3 going to go through.

4 So the first -- so these are mostly in
5 Section 7. So 7-A-3, I'm going to quote the statute.
6 The committee shall use the most recent federal
7 decennial census data generated by the United States
8 Census Bureau and may use other reliable sources of
9 demographic data as determined by majority vote of
10 the committee.

11 Did you guys use other demographic data?

12 **A No. We explored the possibility of doing**
13 **it, and I did some research about it. I think, if**
14 **I'm not mistaken -- I haven't read the report in a**
15 **couple of years. But I think I commented about it**
16 **because we made some recommendations to the**
17 **legislature that they think about doing some things**
18 **that would probably improve the count in New Mexico.**

19 **And we did the research. I guess I**
20 **concluded that you probably could lawfully consider**
21 **data, but you need to really make sure that it's**
22 **consistent throughout the state, was sort of the**
23 **bottom line that I reached.**

24 **Q So you guys relied entirely on Census**
25 **Bureau data.**

1 **A When it finally came in, yes.**

2 **Q And in terms of residents, I know there was**
3 **some talk early on about the issue of incarcerated**
4 **and noncitizen populations obviously tending to**
5 **inflate the population of certain areas beyond what**
6 **might be manifested in performance.**

7 **A Right.**

8 **MR. BAKER: Objection, form.**

9 **A I think they referred to it as prison**
10 **gerrymandering. The idea was, if you have**
11 **individuals from throughout New Mexico reside in**
12 **different areas of the state who are jailed in**
13 **certain locales and their address would be counted as**
14 **where they are jailed even though they can't vote,**
15 **and so you are inflating the population in that**
16 **particular district.**

17 **There are a lot of efforts throughout the**
18 **United States to fix that problem. Again, I remember**
19 **writing in the report, this is a, in our view -- that**
20 **would be the CRC -- is a legitimate concern. There's**
21 **a way to fix it, including working with the Census**
22 **Bureau. Whether or not the legislature has even read**
23 **the report or acted on it, I have no idea.**

24 **BY MR. HARRISON:**

25 **Q So is it fair to say it was an issue that**

1 the committee was pretty deeply concerned about?

2 **A Right. We ultimately concluded that that**
3 **was a legislative function and wasn't our function.**
4 **And so as a result, we wrote a recommendation that it**
5 **be taken up by the legislature and gave them some**
6 **different ideas.**

7 Q Sure. And I guess to be clear, though, am
8 I right that the real reason that it wasn't addressed
9 was that it was logistically impossible, at least on
10 the time frame that you guys had available to you?

11 **A That also. And the other question is**
12 **whether or not it would require legislation to**
13 **accomplish that.**

14 Q Because in your view, an inmate is in fact
15 a resident of their jail?

16 MR. BAKER: Objection, form.

17 **A I'm not sure I agree with that. That's**
18 **fairly debatable. Let me put it that way.**

19 BY MR. HARRISON:

20 Q Okay. But is that the reason that
21 legislation might be needed to change that construct?

22 **A It could be. It's just something that**
23 **requires a lot more policy discussion and a lot more**
24 **input from the public. I know that there's plenty of**
25 **information out there for the legislature to**

1 **consider, but it probably should be delegated to a**
2 **seven-member committee.**

3 Q So moving on to Section 7-A-10, it says, To
4 the extent feasible, the committee may seek to
5 preserve the core of existing districts.

6 Tell me what -- I guess tell me, was there
7 an overarching governing philosophy that was ever
8 voted on or agreed upon by the committee on how to
9 treat that factor?

10 A **Not that I recall, but I think we did a**
11 **fairly good job of doing just that. New Mexico is**
12 **really unique. In the last census, I think our**
13 **population only grew like 2.3 percent statewide.**
14 **There were a lot of shifts in the population, some**
15 **coming from the northwest down to the southeast. The**
16 **southeast had a larger population, as I recall. I**
17 **can get that information for you if you need it.**

18 **But all of that influenced what you did.**
19 **But when it comes to the congressional districts, I**
20 **think they've existed pretty much the same until now**
21 **since 1991. Most of the south of the state has been**
22 **that way. It could be because they all resulted in**
23 **litigation. But that's the way it's been. There**
24 **wasn't -- you were going to have to dip into the**
25 **south at some point to equalize the populations. And**

1 **we did that with a couple of plans.**

2 Q Sure. But I guess not much, by which I
3 mean you had a five-figure population decrease up in
4 the San Juan County region, the northwest region, a
5 five-figure increase in population down in the
6 southeast. You would agree that the districts from
7 the last decade wouldn't actually have to change all
8 that much to maintain equal population.

9 MR. BAKER: Objection to form.

10 A **Well, my recollection is we adopted one --**
11 **the first map we adopted -- it may have been A. My**
12 **memory is that one did not dip much into the south.**
13 **I can look it up if you want me to.**

14 BY MR. HARRISON:

15 Q No. I think that's correct. Concept A was
16 as much of a status quo map as possible.

17 A **It was probably the closest to status quo.**
18 **And the H dipped in. It took, as I recall, Chavez**
19 **County and maybe Lincoln. And then the map that they**
20 **called E Revised also went into Lincoln County. We**
21 **put half of Mescalero on it because that's what they**
22 **wanted. They testified that that's what their**
23 **preference would be, to have two representatives.**

24 Q So can you tell me what -- what is your
25 view on the redistricting value of preserving the

1 core of existing districts?

2 **A Continuity of representation. I think you**
3 **have -- you have communities of interest. Do they**
4 **have economic, social issues in common, things of**
5 **that nature, school districts? If you have**
6 **continuity, I think it benefits the public, because**
7 **they know how to organize themselves so that they can**
8 **talk with their legislator or people from Congress.**
9 **And that's the idea. You try not to split cities,**
10 **you try not to split counties, because they tend to**
11 **have common interests.**

12 **I actually drew a map, because I kept**
13 **hearing about this urban/rural divide, which does**
14 **exist, and I think I'd be a fool to suggest it**
15 **doesn't. And it had Bernalillo County, going through**
16 **Edgewood and then capturing Santa Fe. Put all the**
17 **city slickers together, with the exception of folks**
18 **from Edgewood, and keep everything else rural.**

19 **And now the folks who -- the cattle**
20 **industry, the acequias, the dairies, oil and gas**
21 **would have a way to organize themselves. I did it in**
22 **a way that would try to keep everything whole, to the**
23 **extent you can. I don't think -- well, I'll let you**
24 **ask the questions.**

25 **Q So I guess what I'm trying to -- so the act**

1 says, again, may seek to preserve the core of
2 existing districts. Obviously, all of these
3 redistricting principles are going to be subject to
4 each other, and they can limit each other.

5 But you don't have any doubt that that is a
6 worthwhile redistricting principle, again, subject to
7 countervailing interests, but that should be pursued
8 to the extent possible.

9 MR. BAKER: Objection to form.

10 A **Yeah. And I think we made that effort.**

11 BY MR. HARRISON:

12 Q And to clean up that question a little bit.
13 Preservation of the core of existing districts is in
14 and of itself a worthwhile and positive value in
15 restricting.

16 A **In my opinion, yes.**

17 Q And do you think that opinion was shared by
18 the committee?

19 MR. BAKER: Objection, foundation.

20 A **I think so. The majority voted for Map A.**

21 BY MR. HARRISON:

22 Q Okay. And I'll contrast that with the
23 avoidance of pairing incumbents, which would you
24 agree that there was disagreement among the committee
25 about whether that value mattered at all?

1 **A I suspect some were more concerned about it**
2 **certainly than me. I remember testifying about that.**
3 **My plate was full. I wasn't worried about protecting**
4 **incumbents. If somebody else wanted to protect an**
5 **incumbent and they found a way to do it, have at it.**
6 **I didn't take the time to try to solve any of those**
7 **problems.**

8 **Q Somebody else being the legislature?**

9 **A No. The members of the committee.**

10 **Q Okay.**

11 **A Everybody had a right to draw maps if they**
12 **wanted to draw maps. They could go to Brian**
13 **Sanderoff and meet with him and his team and ask them**
14 **to consider certain criteria and draw a map that**
15 **followed that criteria.**

16 **So if you saw that incumbents were paired,**
17 **you could say, is there a way that we can do this**
18 **without subordinating other redistricting principles.**
19 **And if you could, then you should. I think that's**
20 **the way the rule read.**

21 **And that's where I admitted that had I had**
22 **more time and interest, I might have looked at that**
23 **and at least looked at it and said, Here's why I**
24 **couldn't do that. Here's why I could not avoid**
25 **pairing you.**

1 Q Okay. And I'll read you the -- The
2 committee shall not consider the voting address of
3 candidates or incumbents, except to avoid the pairing
4 of incumbents, unless necessary to conform to other
5 traditional redistricting principles.

6 A **Yeah. I think that's what I told the**
7 **legislature. Had I had the time and interest, I**
8 **would have said, Okay, who's paired? Now, can I, in**
9 **my imagination, working with the maps, which is not**
10 **easy -- it's very time-consuming when you're a**
11 **novice -- could I have somehow avoided that split**
12 **without destroying a community of interest.**

13 Q So am I correct that your resolution of
14 this was that the committee allowed the stars with
15 the incumbent addresses to be on the maps; is that
16 correct?

17 A **My recollection is that when we went to**
18 **vote on maps, we knew who was paired, by the number,**
19 **not names. We had numbers of who was paired. That**
20 **would probably be -- you could find that in the**
21 **meetings. And I'm sure Brian Sanderoff reported that**
22 **information to us. That's my recollection. I would**
23 **have really prepared better had I known what all you**
24 **were interested in.**

25 Q Do you recall seeing, I guess, significant

1 effort or prioritization being given by the other
2 members of the committee in the avoidance of
3 incumbent pairing?

4 MR. BAKER: Objection, foundation.

5 **A My recollection is that somebody did raise**
6 **issues about some pairings. I don't remember**
7 **specifically. It may have been Lisa Curtis.**

8 BY MR. HARRISON:

9 Q And then would you agree that this issue,
10 the incumbent pairing issue, was one of the bigger
11 controversies that the CRC faced, at least in the
12 media?

13 **A I don't remember facing that in the media.**
14 **I remember that the Senate was upset about it.**

15 Q Okay. So the legislature expressed a
16 discontent with that aspect?

17 **A They did.**

18 Q Okay. And then I guess my question is, so
19 am I correct that a congressperson doesn't actually
20 have to live in their district, they just have to
21 live in the state, right?

22 **A Correct, as I recall.**

23 Q So does the avoidance of pairing incumbents
24 play any role in the fashioning of a congressional
25 map?

1 **A No.**

2 Q And can you recall it playing any role in
3 any of the discussions on the congressional maps?

4 **A No. I mean, you know that what you're**
5 **going to do, if you're going to take the first**
6 **congressional district and bring it south, that**
7 **they're going to have new people to take care of**
8 **and -- that were taken care of by somebody else. We**
9 **didn't think about that.**

10 Q And the last here is, Section 7-C-1, quote,
11 The committee shall not use, rely upon or reference
12 partisan data, such as voting history or party
13 registration data, provided that voting history and
14 elections may be considered to ensure the district
15 plan complies with applicable federal law.

16 So I assume this referred -- when they talk
17 about applicable federal law, I assume this refers to
18 the VRA Section 2 standard about whether a racial
19 minority is, quote, unquote, politically cohesive
20 and/or whether the majority votes as a block?

21 MR. BAKER: Objection, form and foundation.

22 **A Yeah. The Gingles factors, yeah.**

23 BY MR. HARRISON:

24 Q Okay. Do you read that section of the
25 Redistricting Act as allowing any other consideration

1 of partisan or voting history data?

2 **A No. I think it was very clear that we**
3 **shouldn't consider voting data, other than for VRA**
4 **purposes. I'm sorry. I dropped the mic.**

5 THE WITNESS: Court reporter, did I make a
6 mistake there, or were you able to get it?

7 COURT REPORTER: I heard you.

8 THE WITNESS: Okay. Sorry about that.

9 BY MR. HARRISON:

10 Q The CRC did not subject the congressional
11 maps to a VRA analysis; is that correct?

12 **A No, we did not.**

13 Q Can you explain why?

14 **A Not necessary. You don't -- I don't think**
15 **you had a -- I think I put something in a footnote**
16 **about that, because it was not anything we ever**
17 **discussed. But the idea is, would you meet the**
18 **criteria anyway.**

19 Q Sure. And so for --

20 **A The population size is so large for each**
21 **district that it would be hard to satisfy the**
22 **criteria.**

23 Q I see. So for natives, let's talk natives
24 specifically, you just couldn't draw a majority
25 native --

1 **A Right.**

2 Q -- district, correct?

3 **A Correct.**

4 Q And I think you further noted that to have
5 a, quote, unquote, effective majority, a native
6 district would have to be around 60 percent, given
7 what I assume is voter turnout data among those
8 populations?

9 MR. BAKER: Objection to form.

10 **A That is what I recall, 60 percent.**

11 BY MR. HARRISON:

12 Q And so that just wasn't possible.

13 **A That's true.**

14 Q And then with the -- what I understood a
15 little less was on the Hispanic side. Obviously, we
16 do have a majority Hispanic district. Can you
17 explain to me why the VRA wouldn't require the
18 drawing of a majority Hispanic district?

19 **A Do you think they're cohesive?**

20 Q And I wanted to be fair. So I'm going to
21 quote the footnote that I think addresses this. I
22 didn't want you to think that I was sandbagging you.
23 So, quote -- this is from your report. This is one
24 of the two footnotes, I think, that you were
25 referring to. The first addressed natives, and the

1 second I'm going to quote here.

2 Likewise, while narrow Hispanic VAP
3 congressional districts contained in several of the
4 plans, the size of the districts requires the
5 southeastern portion of the New Mexico be combined
6 with other parts of the state. I did copy and paste
7 that. Can you tell me what that means?

8 **A I'm not sure you can prove cohesiveness.**

9 **Q** Okay. So the VRA wouldn't be implicated
10 just because the Hispanic population of New Mexico
11 isn't sufficiently distinct from the way New Mexicans
12 in general vote?

13 **MR. BAKER:** Objection, form and foundation.

14 **A I'm not sure you could fairly conclude that**
15 **all Hispanics vote a particular way. And that's**
16 **becoming less and less true actually.**

17 **BY MR. HARRISON:**

18 **Q** Sure. Okay.

19 **A So that the white voters could not overcome**
20 **other their vote or a representative of their choice.**
21 **I don't think anybody has even argued that you need**
22 **to satisfy VRA for either -- any of the districts,**
23 **congressional districts.**

24 **Q** Okay. So the fact that CD-2, both
25 previously and now, is a majority Hispanic district

1 is not a prerogative of the VRA.

2 MR. BAKER: Objection, form and foundation.

3 **A In 2011, I'm not sure. Was it a majority**
4 **Hispanic voting age population?**

5 BY MR. HARRISON:

6 Q Well, I don't know about that, but --

7 **A Because that's what would count, right, the**
8 **voting age population? I think it may have been less**
9 **than 50 percent. I think it's higher now. One of**
10 **the maps I proposed was, I think, 54 percent or --**

11 Q Well, I apologize. Forget the last set of
12 maps. The maps that you worked on, the fact that you
13 would agree that the current -- well, you would agree
14 the current CD-2 is majority Hispanic.

15 **A Yes.**

16 Q And I believe all three of your
17 congressional concepts had a majority Hispanic
18 southern congressional district, correct?

19 **A I think that's right. You might ask Brian**
20 **Sanderoff's group. But I think that in 2011, it was**
21 **not. But it may have grown to that point.**

22 Q But the fact that all three congressional
23 concepts approved by the CRC had a majority Hispanic
24 southern district was not required by the VRA.

25 MR. BAKER: Objection, foundation.

1 **A I don't think so. You would have to**
2 **analyze the criteria.**

3 BY MR. HARRISON:

4 Q Sure. And I guess mechanically can you
5 explain to me how -- so you could imagine that being
6 kind of a difficult thing to manage, to both be
7 trying to draft partisan-blind maps on the one hand
8 and at the same time kind of keeping an eye on the
9 prerogatives of the VRA.

10 Am I correct that the CRC just never got
11 into that, they knew from kind of the beginning that
12 the VRA would not be implicated, at least as to the
13 congressional map?

14 MR. BAKER: Objection, form and foundation.

15 **A We never took that issue up directly, that**
16 **we need to comply with the VRA, that we need to have**
17 **a -- have to form a district that would comply with**
18 **the VRA, congressional district.**

19 BY MR. HARRISON:

20 Q How was that -- was that decision made or
21 assumed by legal counsel, by Research & Polling?

22 MR. BAKER: I'm going to -- well, Justice,
23 you can either not comment on legal counsel's
24 advice to you or not, but --

25 **A I'm telling you I don't remember any**

1 **discussion amongst the members of the committee about**
2 **needing to comply with the VRA for any congressional**
3 **district. To my knowledge, nobody has ever sued**
4 **making that assertion. But there are lawyers in the**
5 **room who have a history with the litigation, so they**
6 **would know better.**

7 BY MR. HARRISON:

8 Q And I want to be clear that I'm not
9 suggesting that there are VRA issues with the
10 congressional concepts. I just -- my questions here
11 are -- so in your final report, when you introduced
12 the three approved congressional concepts, there's a
13 section on VRA compliance. And it reads, quote, A
14 VRA analysis was not required for congressional maps.
15 And then it cites to pages 24 and 25, footnotes 3 and
16 4. And I quoted you one of those.

17 I'm just curious. To put something like
18 that in there, I believe that somebody thought about
19 it, with the CRC. And I guess -- can you tell me, I
20 guess, what's the full measure of consideration that
21 produced that line that I just quoted?

22 MR. BAKER: Objection, form.

23 A **I'll tell you that report was drafted. I**
24 **circulated it to every member of the committee. They**
25 **could make any suggestions, any comments they wanted.**

1 **What you see is the end product that all members**
2 **read. I feel confident that VRA was not required.**

3 BY MR. HARRISON:

4 Q Okay. And then just to -- I think you've
5 said. Just to clarify again, there was never a vote
6 or even specific conversation about the VRA's
7 applicability to the congressional maps.

8 A **Right.**

9 Q Let me move on to how you used not staff
10 but outside consultants, I guess we'll call them. So
11 you were interested in using the Harvard Law School's
12 Election Law Clinic as legal counsel, correct?

13 A **That was an option that was available to**
14 **us.**

15 Q The price was right?

16 A **The price was very good. It was free work**
17 **and very experienced lawyers and was a clinic. So**
18 **students from Harvard would participate. We did not**
19 **have anybody express interest in response to our**
20 **request for proposals.**

21 **And we had this opportunity. I presented**
22 **it to the committee. They said, We don't want any**
23 **outsiders telling us how to run our show. In fact,**
24 **we're going to take the authority away from you when**
25 **it comes to hiring legal counsel, which was fine.**

1 Q So you didn't end up utilizing Harvard's
2 services?

3 A **We did not.**

4 Q Okay. And as you understood it, the
5 objection to Harvard was they're out-of-state folks?

6 A **That seemed to be it, yeah. I don't think**
7 **they could have attacked their qualifications.**

8 Q Now, you ended up hiring Rothstein
9 Donatelli and Nielsen Merksamer; is that right?

10 A **Yes. Nielsen out of California.**

11 Q Okay. Was that a -- did you reopen the RFP
12 process for that?

13 A **We did, yeah. As I recall the first**
14 **meeting.**

15 COURT REPORTER: Excuse me. Could you
16 repeat that question? I didn't hear that
17 question.

18 BY MR. HARRISON:

19 Q Did you reopen the RFP process for that?

20 A **Yes, we did. That was the vote of the**
21 **committee.**

22 Q Who at Rothstein provided the support for
23 the committee?

24 A **Oh, jeez. A wonderful lawyer, extremely**
25 **helpful. What was her name? I'd have to look it up.**

1 Q Cammie Nichols, I'm guessing.

2 A Who?

3 Q Cammie Nichols.

4 A No.

5 Q Okay.

6 MR. BAKER: Megan Dorsey?

7 A **That sounds right, yes. And I'm sorry that**
8 **I don't remember the name, because she was very**
9 **helpful.**

10 BY MR. HARRISON:

11 Q Could you tell me -- and I probably don't
12 have much to get into this. But what type of support
13 did legal counsel give to the CRC?

14 A **If I had an issue, a question about Open**
15 **Meetings Act, they would help me out with that,**
16 **whatever issue came up. I reached out to the**
17 **California attorneys for purposes of their expertise.**
18 **And Rothstein Donatelli has local experience with**
19 **local laws. Like New Mexico's Open Meetings Act**
20 **would be a really good example.**

21 Q I see. Okay. So OMA compliance is, I
22 guess, one thing that they would have assisted you
23 with?

24 A **That was a big one. I don't remember**
25 **exactly how it came up. But, yes, and she was very**

1 **helpful.**

2 Q Did they assist on the substance of the --
3 of map drawing, either VRA analyses or anything like
4 that?

5 A **I don't believe, no.**

6 Q And then certainly not the application of
7 the traditional redistricting factors.

8 A **Right.**

9 Q That was done by the committee.

10 A **That was done by the committee. Rules were**
11 **pretty clear what we should consider, we thought.**

12 Q And then I think we kind of mooted this
13 question but -- well, it may still apply for the
14 House and Senate maps. Was there any attempt to have
15 like legal counsel see partisan data for purposes of
16 the VRA but keep the committee blinded to it?

17 A **Yeah. They could only do that with**
18 **Research & Polling. It was the same with David**
19 **Cottrell. David Cottrell worked with Research &**
20 **Polling, not with us as members of the committee.**

21 Q I see. So the CRC's processes attempted to
22 keep the CRC totally blind to partisan data, and to
23 the extent that some considerations were required by
24 federal law, that was siloed off into Research &
25 Polling.

1 **A Correct.**

2 MR. BAKER: Objection to form.

3 BY MR. HARRISON:

4 Q Interesting.

5 **A We don't have that data. Research &**
6 **Polling does.**

7 Q And I guess I'll ask the same set of
8 questions. So Research & Polling, there was not an
9 RFP done for them. They were provided by the
10 legislature. Am I correct?

11 **A Correct, yes. They are contracted to do**
12 **redistricting. They've been doing it now for**
13 **decades. And because a committee was not formed by**
14 **the legislature -- previously the legislature would**
15 **form a committee, and they'd go out and visit with**
16 **the public.**

17 **Research & Polling, I think it's all public**
18 **information, had a contract with them. And so they**
19 **signed a contract to provide the service for us.**
20 **There were limitations on what they could do with us**
21 **and prohibitions that they could not deal with any**
22 **legislators at all during the work for the CRC.**

23 **And there was a deadline, I think. October**
24 **31st may have been the deadline, or as soon as we**
25 **offered or tendered our proposed maps to the**

1 **legislature, then their services would end.**

2 Q Explain to me, they were prohibited from
3 talking to any legislators during the period where
4 the CRC was doing its work?

5 A **Correct.**

6 Q Prohibited by what?

7 A **By the contract.**

8 Q Okay. And this contract was -- this was a
9 Research & Polling contract with the legislature that
10 was kind of effectively assigned over or they were
11 loaned out to you on a legislative contract?

12 A **They were paid by Raúl's outfit. Is that**
13 **the Legislative Council Service?**

14 Q Okay. Burciaga?

15 A **Yes.**

16 Q Okay.

17 A **But, yeah, it should be -- in the first**
18 **meeting we had, the committee approved the agreement,**
19 **and the agreement was, they don't get to talk to**
20 **legislators, that they're -- they are exclusively**
21 **ours.**

22 Q And what services did Research & Polling
23 provide to the CRC?

24 A **They drew maps for us, and they attended**
25 **every meeting with the public, and they educated the**

1 **public about the maps, explained the maps to the**
2 **public and to us. If any one of us wanted to give**
3 **them criteria to draw maps, they would then have the**
4 **responsibility of drawing a map following the**
5 **criteria we gave them. It's, I imagine, the same**
6 **thing they do for the legislature.**

7 **And, again, every member was at liberty to**
8 **meet with Research & Polling and talk about maps. I**
9 **know I did. And I know I drew maps and I sent them**
10 **their way, and they might have a suggestion, you need**
11 **to squeeze -- you're not quite equal.**

12 Q So Districtr was a Tufts University
13 project?

14 A **That's my recollection, yes.**

15 Q And Research & Polling obviously didn't
16 have any direct involvement with Districtr.

17 A **I think they had to give them the data.**
18 **Once we got the census data, I think they may have --**
19 **whatever their files are, they would have transferred**
20 **it to Districtr, so that when the public drew maps,**
21 **they would be using correct data.**

22 Q Okay. Research & Polling would have to
23 give New Mexico's data to Districtr?

24 A **I'm pretty sure they did. You'd have to**
25 **check with Brian on that.**

1 Q Okay. And when you say that Research &
2 Polling would assist with the drawing of maps, you
3 would -- obviously, any member of the public or
4 member of the committee could go onto District and
5 draw their own maps for congressional, House or
6 Senate, correct?

7 A **Correct.**

8 Q But Research & Polling could provide a way
9 that -- you could describe qualitatively what you
10 wanted to do, and Research & Polling would handle the
11 draftsmanship for the person making that request?

12 A **Correct.**

13 Q Was Research & Polling made available to
14 the public to do that or just the members of the
15 committee?

16 A **Just to the members of the committee. But**
17 **they were at the -- they were at the meetings with**
18 **the public, and so they heard public testimony. And**
19 **I remember hearing public testimony and, at the**
20 **conclusion, saying, Now, Research & Polling, here's**
21 **what I've got. I heard the public. Will you go draw**
22 **a map based on the criteria I have just articulated.**
23 **And any other member, if you've got -- want to**
24 **express some criteria right here now, feel free to do**
25 **so. So we did that. I think I may have submitted**

1 **something to them in writing.**

2 **Yeah. They're a lot better at drawing maps**
3 **than I am. They could have probably drawn the maps**
4 **that I came up with in one-tenth the time.**

5 Q So Concept E, which was the Justice Chavez
6 compromise map, was kind of its tagline.

7 A **Yeah, it was. But that was -- that**
8 **actually, I think, was Research & Polling maybe.**

9 Q Okay. That was going to be my question.

10 A **And then I modified it to accommodate the**
11 **Mescaleros, and I think that was it.**

12 Q So, again, I assumed you were the --
13 Concept E was your brainchild, but you said Research
14 & Polling drafted it, correct?

15 A **Right.**

16 Q Do you remember what inputs you gave
17 Research & Polling?

18 A **As I sit here, no. But I think -- I might**
19 **be able to find that. I don't know.**

20 Q Would that be written somewhere?

21 A **It may have been stated verbally at a**
22 **meeting.**

23 Q Okay. So you would have said on the record
24 if Research -- by the next meeting, if Research &
25 Polling can prepare me a map that --

1 **A Right.**

2 Q -- X, Y, Z?

3 **A Yeah.**

4 Q And is your understanding, in general, that
5 was how Research & Polling assisted members of the
6 committee with map drawing, was that the request was
7 made orally at a committee meeting?

8 MR. BAKER: Objection, foundation.

9 **A No. It could be privately. They could go**
10 **meet with Research & Polling and learn all they could**
11 **and offer criteria.**

12 BY MR. HARRISON:

13 Q And we say "criteria." We're not talking
14 about what I'll call vague stuff like the Section 7
15 traditional redistricting principles. We'd be
16 talking like, Draw me a map that keeps Chaves and Lea
17 together, and over in the -- you know, puts counties
18 X and Y together in the other side of the state,
19 et cetera?

20 **A Yeah. That's pretty much it. The**
21 **International District is a great example. I think**
22 **they had two representatives, and I said just one. I**
23 **want a map with one. I want the International**
24 **District to have their own representation, because it**
25 **seemed obvious that they felt like they were being**

1 **ignored. They had two, but they were being ignored.**

2 Q I see.

3 **A And so you do something like that. With**
4 **the congressional districts, I don't remember. But I**
5 **remember talking to them about going down into the**
6 **southern part of the state.**

7 Q With the Albuquerque --

8 **A Concept E looks right. And I remember**
9 **listening to testimony from the South Valley that**
10 **they thought they had more in common with going**
11 **south. And so I said, okay, let's take a portion of**
12 **South Valley and let's include it in CD-2.**

13 Q Let me ask you about that real fast. The
14 claim that folks in the South Valley have more in
15 common with the southern half of the state than with
16 the Albuquerque metro area, did you find that
17 persuasive?

18 **A I thought there was enough commentary to**
19 **where it was persuasive. That's why I thought it's**
20 **worth looking at.**

21 Q Okay. So you got a lot of witness
22 testimony in support of that concept?

23 **A A lot -- I don't know that you can say a**
24 **lot. You know what would be fascinating right now is**
25 **to go to the South Valley and see how the voters feel**

1 **after this last election. That would be more**
2 **informative.**

3 **But, you know, you invite people to come**
4 **and testify. And a number of them from the South**
5 **Valley did come. I think it was at West Mesa High**
6 **School. And they did testify. And the testimony is**
7 **still recorded. You can go to our report link.**
8 **There's a link for it. You can go listen to the**
9 **testimony.**

10 **I felt that there was enough there that I**
11 **wanted a map that -- with the South Valley, just the**
12 **South Valley, a portion of it, into the southern**
13 **district. And I guess CD-2 is the best way to refer**
14 **to it.**

15 **Q** Okay. Are you familiar with the Center for
16 Civic Policy?

17 **A** **Sounds familiar.**

18 **Q** Sometimes abbreviated CCP.

19 **A** **Yeah.**

20 **Q** They were the progenitor of the Concept H,
21 the, quote, unquote, people's map.

22 **A** **Ah, okay.**

23 **MR. BAKER: Objection, form.**

24 **BY MR. HARRISON:**

25 **Q** You remember?

1 **A Center for Civic Policy, yeah.**

2 Q Okay. Did you observe that being a -- so
3 am I correct the witnesses would come in and identify
4 themselves as being maybe not on behalf of but they
5 would mention the CCP?

6 **A They would mention the people's map. They**
7 **had a lot of testimony about that throughout the**
8 **state.**

9 Q Yeah. So you would say that was a
10 visible -- I'll call it a campaign?

11 MR. BAKER: Objection to form and
12 foundation.

13 **A You can call it a campaign if you want. In**
14 **my mind, that was somebody who finally taught people**
15 **how to come forward and actively participate in our**
16 **democracy. And it was the most beautiful thing I'd**
17 **seen in my entire life --**

18 Q Oh, sure.

19 **A -- when it comes to the democracy.**

20 Q I'm not impugning it. I just mean you --
21 sometimes as you sit there --

22 **A (Indiscernible) people did.**

23 Q I mean, as you sat there as a committee
24 member, you saw that this was an organized --

25 **A Yeah.**

1 Q -- and mobilized effort, correct?

2 A Yeah. They were concerned. It was like
3 the rule. You know, they -- there were people that
4 really opposed, and they expressed themselves
5 clearly. And when you have a large group of people
6 that are willing to show up and testify and give some
7 personal testimony also -- some were just, I support
8 the people's map. Others would get up and they would
9 articulate the reasons for it. You can't ignore
10 that, not when you tell them that we're here to
11 listen to you.

12 Q Sure. And I've mostly been listening while
13 trying to do other stuff, so I -- am I right that
14 they would wear distinctive like yellow T-shirts,
15 something like that?

16 A That's my memory, is there was something
17 distinctive. You knew that they were together.

18 Q Okay. Would you say that the CCP and the
19 people's map had the most visibly organized, I'll use
20 the word again, campaign that you saw during your
21 time on the CRC?

22 MR. BAKER: Objection, form.

23 A That was probably the most consistent
24 discussion we had, so much so that I remember in one
25 of the public meetings with Robert Aragon, with the

1 **Republican Party, I asked him if he would like for us**
2 **to move the adoption of the people's map so that they**
3 **would have an opportunity to address it in**
4 **Farmington, because he said, We're going to have maps**
5 **for you in Farmington.**

6 **And I said, Well, do you have any comments**
7 **about this map? He said, Not at this time. I said,**
8 **Would you like for us to pass it so that you will**
9 **have that opportunity? He said, Yes. Which I**
10 **thought was a good idea. But they did not have maps**
11 **in Farmington.**

12 **Q So one of the hallmarks of what I'll call**
13 **the CCP testimony was this idea of putting the South**
14 **Valley into the southern congressional district. Do**
15 **you agree with that?**

16 **A You know what? I don't remember that being**
17 **the case. I think ultimately it ended up that way,**
18 **but I don't remember them really pushing that idea.**
19 **What I remember is they were really focused on the**
20 **southeastern part of the state.**

21 **Q Okay. Explain that to me.**

22 **A We had a lot of testimony in the**
23 **southeastern part of the state about the**
24 **Congressional District 2 map. And I remember that**
25 **they did go down into Chaves County. They kept**

1 **Chaves County together, is my memory. They didn't**
2 **split it. But they put it in the first congressional**
3 **district, is what I remember.**

4 **But it could very well be. I don't**
5 **remember them making a big deal about the South**
6 **Valley.**

7 Q Okay.

8 A **It is in the map, though, right?**

9 Q It is. I guess it strikes me as unusual
10 that someone would -- that anyone would feel
11 passionately about dividing up the southeastern
12 portion of the state.

13 MR. BAKER: Objection, form. Is that a
14 question?

15 BY MR. HARRISON:

16 Q Are you aware that's a criticism, that the
17 so-called oil patch is divided up three ways?

18 A **Oh, I saw that. I hadn't studied -- I**
19 **hadn't studied the map that was ultimately adopted**
20 **until a few days ago. And it is. I mean, you no**
21 **longer have Chaves County in there. You no longer**
22 **have -- well, you do have. You have Precinct 104,**
23 **like 71 votes that stay in the second congressional**
24 **district.**

25 **And then Lea County seemed to be split at**

1 **Hobbs. Chaves County largely between one and three.**

2 **But that wasn't the people's map, was it?**

3 Q No. I agree with you. I think your
4 recollection is correct. And so I -- I guess I -- so
5 you interpreted the CCP testimony as being highly
6 geared toward how to draw the boundaries in the
7 southeastern portion of the state and, in particular,
8 to keep Chaves and Lea County together in a single
9 congressional district?

10 MR. BAKER: Objection, form and foundation.

11 A **Yeah. My interpretation and the reason I**
12 **supported their map is because they kept Chaves**
13 **County all together. But they wanted representation.**
14 **Their biggest complaint was they were not being**
15 **listened to. And they were pretty persuasive in that**
16 **regard, that they did not have a congressional**
17 **representative who really cared about them.**

18 **And so they did not mess with that**
19 **geographic boundary. They did not split those**
20 **communities of interest. Ezzell -- Representative**
21 **Ezzell was very good about that. She apparently**
22 **had -- in her district, she said she had most of**
23 **Roswell and didn't reach as far as Lake Arthur, is my**
24 **recollection, which she pretty much verified that**
25 **that is a community of interest.**

1 **And they -- they left it intact, so I**
2 **didn't think that they were destroying the primary**
3 **principles of, you know, try to keep things pretty**
4 **much status quo. But communities of interest I think**
5 **dominate that. In my mind, that's the most important**
6 **thing. I understand you have to have continuity**
7 **and --**

8 BY MR. HARRISON:

9 Q Sure.

10 A But that's only for purposes so people
11 don't have to travel so far for their
12 representatives. That's not true with -- I don't
13 think that really applies to congressional districts.
14 They're going to have to travel.

15 Q And I realize there's going to be some
16 fuzziness in what a community of interest is, but
17 based on the testimony that you saw, you said that is
18 a community of interest. What is the community of
19 interest down in the southeastern part of the state?

20 MR. BAKER: Objection, form.

21 A Largely economic, but they also have
22 agriculture. They have oil and gas. There was
23 discussion about oil and gas and those employed by
24 oil and gas, discussion about people coming in from
25 Mexico.

1 **But here's an example. Senator Jennings,**
2 **he always says what's on his mind. He got up and he**
3 **told us that used to be you could talk to all the**
4 **people in oil and gas working. But if you want to do**
5 **that these days, you better know Spanish. So in my**
6 **mind, he was making the point that most people**
7 **working in the oil and gas industry are Hispanic.**

8 **Representative Ezzell, I asked her who --**
9 **what she talked to -- what she talked about with her**
10 **constituents during her townhall meetings that she**
11 **had referenced. And she said, We talk about all**
12 **those, you know, druggies and people coming from**
13 **south of the border.**

14 **So the next question is, Well, tell me, how**
15 **are you doing economically in this area? And she**
16 **said, We're doing great. If it weren't for us, New**
17 **Mexico wouldn't live. Which is -- I don't discount**
18 **that. I think oil and gas is very important to New**
19 **Mexico.**

20 **So then my next question is, Well, that's**
21 **wonderful. If your economy is thriving, I'm sure**
22 **your poverty level is low. Oh, no, it's not. I**
23 **can't reconcile those two, other than to understand**
24 **what the people are talking about, that they're not**
25 **getting representation, they're not being helped with**

1 **their economics or their concern for economics, pay**
2 **or maybe working conditions, whatever the issues**
3 **were. There seemed to be a divide.**

4 **And so I thought their map was fair, in**
5 **that it addressed those issues.**

6 MR. BAKER: Can we take a five-minute
7 break?

8 MR. HARRISON: Yeah.

9 VIDEOGRAPHER: The time is 11:02 a.m. We
10 are going off the record.

11 (Recess from 11:02 a.m. until 11:10 a.m.)

12 VIDEOGRAPHER: The time is 11:10 a.m. We
13 are back on the record.

14 BY MR. HARRISON:

15 Q So while I have you kind of thinking about
16 this topic, I'll go ahead and ask you. So you said
17 you looked at the final SB 1, the enacted
18 congressional map just recently?

19 A **Right, yeah.**

20 Q And you view it as doing something
21 different with the southeastern part of the state
22 than what Concept H, the people's map, did.

23 A **Yeah.**

24 Q And I'm not asking you to opine on whether
25 it's good or bad, but the legislature took a

1 different view of what the community of interest down
2 there is than from what the people's map embodied.

3 Do you agree with that?

4 MR. BAKER: Objection to form and
5 foundation.

6 **A I don't know that I can agree with that.**

7 BY MR. HARRISON:

8 Q Okay. Why not?

9 **A Because I don't think they articulated that**
10 **as a basis for the decision. The only thing I'm**
11 **aware of is they said they wanted to improve**
12 **competitiveness, which has never been a criteria in**
13 **New Mexico.**

14 Q Okay. So I guess then, to put it
15 differently, there was an idea of what the community
16 of interest in the southeastern part of the state is.
17 It was embodied in the people's map, Concept H, and
18 not reflected in the enacted SB 1 map. Would you
19 agree with that?

20 **A Yeah.**

21 MR. BAKER: Objection, form and foundation.

22 **A The map is different. The only thing that**
23 **might be the same with regard to Chaves County is the**
24 **boot or the heel, whatever you want to call it.**

25 BY MR. HARRISON:

1 Q You're talking about the -- it's a --

2 A **Chaves County has this strange -- on the**
3 **lower left-hand side, that's I think Precinct 104.**
4 **That's what they left for the CD-2 candidates, is**
5 **the -- I think it's a total of like 97 votes.**

6 Q I see. So at the first meeting, I'm going
7 to read you a quote that you gave off the cuff at
8 your first meeting in response to a question about
9 whether the committee could be nonpartisan. And you
10 said, quote, This is a balanced committee,
11 Republicans, Democrats and decline-to-state
12 individuals, and they'd each pledged to work together
13 in a nonpartisan fashion. And I believe in people
14 and I believe in their desire to be effective, and my
15 assurance to you is that if we follow our process, we
16 are going to succeed in being nonpartisan. Is
17 that --

18 A **That sounds like something I would say,**
19 **because I do believe in people and their desire to be**
20 **effective.**

21 Q Do you think the committee succeeded?

22 A **Yes, I do.**

23 Q Okay. One of the -- I mean, some obviously
24 we've already discussed. But in kind of broad
25 strokes, what steps were taken by the committee, by

1 you and by the committee, to be assiduously
2 nonpartisan?

3 **A Everything was done in the open. All of**
4 **our discussion regarding maps took place in the open.**
5 **All of our votes, whatever we articulated, our basis**
6 **for our votes, took place in open meetings.**

7 Q So it kind of -- I've expressed, I think, a
8 couple of times today like surprise at how true that
9 has seemed to be, that everything that the CRC did
10 happened at these meetings. And it sounds like that
11 was an intentional feature of the CRC?

12 **A Yes.**

13 Q And you're not aware that -- you've already
14 said that you didn't, but you're not aware that some
15 members would meet separately from the group to
16 discuss maps or the work of the CRC?

17 **A I'm not aware of any.**

18 Q Did you -- and this is a bit of an awkward
19 question, but did you observe any acts of
20 partisanship or any acts that you thought could
21 reasonably appear to be partisan from any of the CRC
22 members or staff during the period where the CRC was
23 active?

24 **A I would say not me. I don't think that**
25 **they acted partisan. People would look at that, who**

1 **were skeptical, would look at the vote on the first**
2 **map and see that -- I think it was the Democrats**
3 **voted against, and on the people's map the**
4 **Republicans voted against. If you wanted to be**
5 **skeptical, you would say, well, that was partisan. I**
6 **don't think that's true.**

7 Q Okay. And that's just the final vote.

8 A **Yeah, just as the final vote. But they had**
9 **open discussions about what they were doing, why they**
10 **were voting. I think even my map drew a dissent,**
11 **which is fine.**

12 Q It did. I actually had a question about
13 that. The CRC -- I just noticed this today. The CRC
14 lists the no vote, the single no vote as being
15 Joaquín Sanchez, who was one of the Ethics Commission
16 appointees. Is that correct?

17 A **Yeah, that's correct, yeah. A wonderful**
18 **teacher. He's a teacher.**

19 Q So throughout the legislative -- the
20 discussion at the legislature on SB 1, that was
21 misattributed to Lisa Curtis, I don't know why, as
22 being the sole no vote. And so I was surprised to
23 see that. What was Mr. Sanchez's opposition to the
24 Concept E map?

25 A **I don't recall. If he commented on it, it**

1 **would be in the meetings.**

2 Q And then what factors --

3 **A By the way, now that I -- I did talk to**
4 **Joaquín specifically about going on Spanish radio,**
5 **because he speaks very beautiful Spanish. I could do**
6 **it, but I thought he'd be ideal, but he declined.**

7 Q And that was before the committee decided
8 to have you be the spokesman?

9 **A Right.**

10 Q What do you think the reasons for the
11 opposition, the no votes to Concept A were?

12 MR. BAKER: Objection, foundation.

13 **A That would be on the tape.**

14 BY MR. HARRISON:

15 Q Okay. And can you explain to me in broad
16 strokes -- I think I understand, but explain to me in
17 broad strokes. So you had a bunch of maps submitted
18 by the public and drawn by the members of the
19 committee, presumably with help from Research &
20 Polling. What was the process of deciding which
21 three would be approved?

22 **A First we came up with concepts that were**
23 **based on public testimony. That was after the first**
24 **round of meetings. We published those, gave a couple**
25 **of weeks for the public to digest. We announced that**

1 **they were out there on the website.**

2 **We then went and got more feedback from the**
3 **public on the concepts. And now we had solid**
4 **numbers. Let me take that back. We had numbers from**
5 **the Census Bureau. And so we made the adjustments**
6 **that were needed to be made. And we had the maps,**
7 **and whoever wanted to make a motion at the meeting to**
8 **adopt a map, that's how it would be discussed.**

9 **So the committee members knew what maps**
10 **were on the table. They could study them for their**
11 **own purposes. And if they wanted to move the**
12 **adoption of one, they could.**

13 Q As a simple majority vote, up or down?

14 A **Yes.**

15 Q Okay. And you were required to adopt at
16 least three maps.

17 A **Correct.**

18 Q But am I right that you, in fact, adopted
19 only three maps for all three, House, Senate and
20 congressional?

21 A **That was it, yes.**

22 Q Was that a deliberate decision?

23 A **No. I wouldn't say that we said we're only**
24 **going to adopt three, but we wanted to do our job,**
25 **and we thought if we filtered that for the**

1 **legislature, that that might maximize the opportunity**
2 **that the legislature would adopt one of them. And my**
3 **recollection is there were three motions, and then**
4 **nobody else had a motion for any other maps. That's**
5 **my recollection.**

6 Q With the congressional specifically?

7 A **With all three. And toward the end, we**
8 **still had issues with the Native American area,**
9 **because we were hoping that we could get their full**
10 **input. And I don't remember why we couldn't quite**
11 **get there, but we did. But we still went ahead and**
12 **adopted maps because we had a deadline.**

13 **My memory, which has faded, so I can't tell**
14 **you precisely what was said or how it was done, but I**
15 **can tell you that it's on videotape.**

16 Q So you're obviously aware the congressional
17 maps have a uniquely strict equal population
18 requirement, correct?

19 A **Yes. I tried to keep that at zero.**

20 Q And are you confident that all three of the
21 approved concepts satisfied the equal population
22 requirements?

23 A **Yes.**

24 Q And so where the act requires that you
25 provide, quote, written evaluations of each adopted

1 map, what -- can you describe for me how that
2 information was -- how the distillation I see in your
3 report was arrived upon by the committee?

4 **A My recollection is the first meeting in**
5 **Santa Fe we set forth what we wanted the data to**
6 **reflect. That was just strictly the data, not the**
7 **partisan analysis. And that would be on the record.**
8 **But it's basically demographic data. You want to**
9 **know the population so that you can make sure that**
10 **you don't deviate too much.**

11 **It was demographic information that was**
12 **pretty routine with prior maps drawn by Research &**
13 **Polling, except that we were not asking for partisan**
14 **data. We were not asking for performance measures or**
15 **registrations for Democrats, Republicans, others,**
16 **DTS.**

17 **Q** So when you did your back-end, what I'll
18 call the anti-gerrymandering analysis by David
19 Cottrell --

20 **A Yes.**

21 **Q** -- is the statutory authorization -- the
22 statutory basis for that -- I'm going to give you my
23 guess or my assumption -- is 1-3A-8 has a reference
24 to the aforementioned written evaluation containing,
25 quote, a measure of partisan fairness. Is that the

1 basis for commissioning this anti-gerrymandering
2 analysis?

3 **A That was the basis for asking for**
4 **partisan -- to weigh the partisanship of the maps.**

5 Q And was it -- at the first meeting, you
6 mentioned that you had someone in mind, but then
7 didn't name a name, to conduct this back-end
8 analysis. Was that always Dr. Cottrell?

9 **A No. No. I -- No. I'm not going to**
10 **remember the names, but they were busy. They were**
11 **doing redistricting in other states.**

12 Q Okay.

13 **A But he was highly recommended by whoever we**
14 **vested with.**

15 Q So my recollection is that, as you know or
16 as you alluded to earlier, the committee stripped you
17 of a little bit of authority to enter into contracts
18 for legal services.

19 **A Correct.**

20 Q But you retained full authority to go out
21 and contract for most other services, correct?

22 **A For everything else, as far as I was**
23 **concerned.**

24 Q Including the anti-gerrymandering
25 consultant?

1 **A Including that, yeah. Interpreters. I**
2 **found interpreters, facilities, all of those**
3 **contracts.**

4 Q So did the committee vote on Dr. Cottrell,
5 or was that your -- you kind of unilaterally hired
6 him?

7 **A I don't remember a vote.**

8 Q Okay. Did the committee have then much
9 interface with Dr. Cottrell at all?

10 **A I don't think we had any interface with**
11 **him.**

12 Q If I'm correct, his analysis was done after
13 the committee had done all of its work, correct?

14 **A We had done all our work. All that was**
15 **left was for him to do that. He was going to have to**
16 **get data from Research & Polling and was going to**
17 **have to match the criteria that we utilized and --**
18 **including VRA information. And he would get the**
19 **registration information from Research & Polling. He**
20 **then submitted his report.**

21 **And we got lucky, because it is -- it was**
22 **sort of fascinating, your mind process of can we do**
23 **this without too much partisanship --**

24 Q Yeah.

25 **A -- if you know what I mean, because you're**

1 **doing it blind. I remember the Gaffney case where it**
2 **was discussed. I think I discussed it in Maestas,**
3 **that to say that you look -- draw maps blindly to**
4 **partisanship could result in the most partisan map**
5 **imaginable. You know, accidentally, but it could.**

6 Q Did you open an RFP for that task?

7 A **My memory is yes. That's my recollection.**

8 Q Do you recall if other folks applied?

9 A **I don't think so.**

10 Q Did you reach out to Dr. Cottrell?

11 A **We did, yeah, indirectly, because we**
12 **contacted somebody would do it, but they were**
13 **occupied, had too much on their plate, and they had**
14 **worked with him before and thought highly of him.**

15 Q Okay. Who gave him his scope of work?

16 A **I guess I did.**

17 Q Okay.

18 A **Because we had -- the rules provide for**
19 **what measures we were interested in.**

20 Q But he was there to do what I'll call an
21 anti-gerrymandering analysis, correct?

22 A **I guess you'd call it that. I mean,**
23 **there's always an element of gerrymandering.**

24 Q Sure, sure. Like I said, the statute
25 refers to a measure of partisan fairness.

1 **A Right.**

2 Q And your interpretation of that was to do
3 this computer ensemble analysis.

4 **A Right.**

5 Q And you came to that, to interpret a
6 measure of partisan fairness, as commissioning
7 Dr. Cottrell to do this analysis, based on your
8 understanding that these analyses represent kind of
9 the gold standard of preventing partisan
10 gerrymandering?

11 **A Yes.**

12 MR. BAKER: Objection to form.

13 BY MR. HARRISON:

14 Q So you wanted somebody to do a computer
15 ensemble analysis.

16 **A Exactly, yeah. And I think he chose more**
17 **tests than what we asked him to do, because I think**
18 **we had three criteria. It's in the rule.**

19 Q Well, he ran some of the other -- you know,
20 Polsby-Popper and compactness and efficiency gap.

21 **A Right, right. Because in theory, those**
22 **could be evidence of gerrymandering.**

23 Q Did you compare -- I guess, did you have
24 any particular view about the type of analyses that
25 Dr. Cottrell would perform as compared to that that

1 might be performed by another political science
2 professor at another university or another expert who
3 does these things?

4 **A If I understood your question, I looked at**
5 **information that was available, how other states have**
6 **done it historically. And ours was consistent with**
7 **what others have done.**

8 Q And I don't mean this as an implicit
9 criticism, although I guess it's going to come off
10 this way. Was this a matter of, you know, I know
11 that I want this set of analyses done, including a
12 computer simulation ensemble analysis. I have now
13 heard good things about David Cottrell at UGA, and so
14 I'm going to hire him without necessarily looking
15 into the details of how Dr. Cottrell's battery of
16 analyses differs from that of any other experts?

17 MR. BAKER: Objection to form.

18 **A I hired somebody who I had confidence would**
19 **do the job. We had criteria we asked that it**
20 **include. Here's the rule. It's 14-A-D-3.**
21 **Established standards for measuring partisan**
22 **gerrymandering, including the efficiency gap, the**
23 **mean-median difference and partisan symmetry.**

24 **I mean, that's in national publications,**
25 **that those are fair measurements. We were given a**

1 **little booklet by the Princeton gerrymandering**
2 **project that identified those as good measuring tools**
3 **for partisan fairness. And so we gave him that.**

4 **But we did use the word "including,"**
5 **because it's their expertise. If they have other**
6 **criteria that they wanted to look at, I suppose they**
7 **could. My recollection is he did. I think he looked**
8 **at symmetry, asymmetry.**

9 BY MR. HARRISON:

10 Q Okay. And so I guess to give you another
11 idea of kind of what I'm looking for, so he --
12 Dr. Cottrell ran, I believe, a thousand simulations
13 of each map.

14 A **That's my memory.**

15 Q You could do any number, right, 5,000, a
16 million? Did you have any particular opinion on what
17 number of simulations should be run?

18 A **No. I relied on his expertise.**

19 Q Okay. And so you selected Dr. Cottrell
20 then based on sort of gathering qualitative feedback
21 that he was a knowledgeable expert who is good at
22 what he does.

23 A **Yes.**

24 Q Okay. And do you happen to know, who all
25 did you talk to that you got that feedback on

1 Dr. Cottrell about?

2 **A I don't have a memory of who all I talked**
3 **to.**

4 Q Okay.

5 **A Yeah. I don't want to guess. But, you**
6 **know, I talked to the folks at Harvard, too. And**
7 **there was the Princeton gerrymandering project, so --**

8 Q Okay.

9 **A I tried to be diligent about it. I'll tell**
10 **you what. This next time it's going to work much**
11 **better because there's going to be a lot more time to**
12 **get organized and get this done.**

13 Q Sure. Now, you said that you had initially
14 had someone else in mind. That person was
15 unavailable. Was Dr. Cottrell the next person that
16 you engaged and tried to get interested in the
17 project?

18 **A That's my memory.**

19 Q Okay. So, again, I mentioned that line in
20 the statute about the written evaluation of each map
21 containing, quote, a measure of partisan fairness.
22 Was there any other -- aside from commissioning
23 Dr. Cottrell's analysis, was there any other way that
24 that statutory dictate was manifested in the
25 committee's work?

1 **A I'm sorry. I didn't --**

2 Q That was a horrible question. Did you do
3 anything else, other than hiring Dr. Cottrell, to
4 fulfill the statutory mandate that you comment on or
5 you give a measure of the partisan fairness of each
6 proposed concept?

7 **A All I did was with Dr. Cottrell. I haven't**
8 **looked at -- well, there's data now, not on our maps,**
9 **but there's data on the existing map.**

10 Q Are you aware that at the time that Concept
11 H, the people's map, was approved, The Journal
12 editorial board wrote an editorial essentially
13 opining that they felt the Concept H was motivated by
14 partisan intent?

15 MR. BAKER: Objection, form and foundation.

16 **A Did they really?**

17 BY MR. HARRISON:

18 Q They did. I'm just asking --

19 **A I don't even remember them being critical.**
20 **I think they were critical of the people who proposed**
21 **the map.**

22 Q They were, yeah.

23 **A But, you know, that's The Journal. They do**
24 **write editorials. I do read some of them. But who**
25 **cares? I mean, that's the truth. They're entitled**

1 **to their opinion. That map was evaluated by**
2 **Dr. Cottrell. And my memory is that he thought that**
3 **it satisfied the criteria, which, yeah, I was happy**
4 **about that, because I had to think, well, what**
5 **happens if one of our maps is bad? What am I going**
6 **to do? I'm running out of time.**

7 Q So the other two approved concepts, A and
8 E, were drafted by committee members, correct?

9 A **Concepts A and E? Concept A was drafted by**
10 **Research & Polling. Concept E was drafted by**
11 **Research & Polling, but I modified it myself.**

12 Q And drafted by Research & Polling at the
13 behest of the committee?

14 A **Correct, yeah.**

15 Q Now, Concept H was drafted by the CCP.

16 A **Correct.**

17 Q Correct? Okay. And the CCP, of course, is
18 not barred from considering partisan data if it wants
19 to.

20 A **No. Right. The public would know about**
21 **partisan data if they wanted to, I suppose.**

22 Q Sure, yeah. And I guess, did you view that
23 as a particular vulnerability of the people's map or,
24 I guess, any map that was submitted by an outside
25 entity versus a committee member?

1 **A I don't think I gave that any thought. I**
2 **recognized that that was a possibility. I recognized**
3 **that people could be drafting maps on the portal that**
4 **took into consideration past performance or maybe**
5 **registrations by looking at the secretary of state's**
6 **office.**

7 **But in my mind, the dominant factors were**
8 **the redistricting principles. And if you kept**
9 **communities of interest together, that was the best**
10 **thing to do. If you remained as status quo as**
11 **possible, that that would also be good. And so I**
12 **looked at that criteria.**

13 **I didn't -- I didn't imagine -- I can tell**
14 **you, though, that the southeast tends to vote**
15 **Republican. I had two counties down there, should**
16 **have had three, but I've got Eddy and Chaves County,**
17 **and I lost both counties. So you know, we're not**
18 **ignorant. We know in general terms how they vote,**
19 **but it has nothing to do with the way we drew our**
20 **maps.**

21 **But, yes, it is fair that the public could**
22 **have drawn whatever they proposed on the portal based**
23 **on partisan data. But as long as we adhered to the**
24 **traditional principles, I felt like we were going to**
25 **be okay, recognizing that Dr. Cottrell could have**

1 **told us these are all partisan, in which case what**
2 **were we going to do?**

3 Q Now, the portal did not facilitate -- the
4 Districtr did not facilitate the use of partisan
5 data. There was no option for members of the public
6 to click and see an overlay of partisan data,
7 correct?

8 A No.

9 Q So it would take some level of
10 sophistication then if an outsider wanted to draw a
11 partisan-gerrymandered map, because they would have
12 to use another data source to effectuate that
13 partisan gerrymander.

14 A Yeah. I guess you would know how to look
15 up the data, or you can probably buy data from the
16 secretary of state. I think that's right.

17 Q Okay.

18 A I may not be sophisticated enough to know.
19 But I know you can go to the secretary of state. You
20 can get the performance measures. You can get the
21 registrations. And so, yeah, people might have been
22 able to do that through the website. I don't know if
23 it gets down to precinct, though. I don't know.

24 Q Okay. Was that concern ever voiced,
25 though, that you had an entity here in the CCP that

1 may have had political or ideological leanings and
2 they had some sophistication that you could observe
3 from the fact that they were organizing an impressive
4 testimonial campaign and that it would be possible
5 that they would have taken into account partisan data
6 in their submission of Concept H?

7 MR. BAKER: Objection to form.

8 **A I would say the map drawers, whoever drew**
9 **those maps, knew what they were doing. What all they**
10 **considered I don't know, but they were very good at**
11 **drawing their maps.**

12 BY MR. HARRISON:

13 Q And by "knew what they were doing," you
14 mean they gave persuasive justifications using the
15 nonpartisan factors outlined in the --

16 **A They did.**

17 Q -- Redistricting Act?

18 **A They did. They talked about communities of**
19 **interest. And they brought forth people who would**
20 **support it.**

21 Q So after the CRC published its report and
22 submitted the -- and I'm focusing on the
23 congressional maps -- the three congressional maps to
24 the legislature, were you contacted, notified by
25 anyone about any of the subsequent modifications that

1 were made to Concept H, which became the basis of
2 Senate Bill 1?

3 **A Was I contacted? No. Nobody cared about**
4 **me after that. No. And, frankly, I had other issues**
5 **in my life.**

6 Q Sure, sure. Did you ever, at any point in
7 2021, speak with Joseph Cervantes? Do you know who
8 that is?

9 **A I do know who that is. Yeah. I was**
10 **invited to go reveal the maps to the Senate, and I**
11 **bumped into him in the hall, and we had a brief, very**
12 **brief conversation about -- he thanked me for the**
13 **work on the committee and said that they were anxious**
14 **to hear from me, that he looked at the work we've**
15 **done and that there would likely be modifications.**
16 **Okay. That's your prerogative. That was it.**

17 Q When did that happen?

18 **A On whatever day I was summoned to testify**
19 **before the Senate.**

20 Q Did you do in-person testimony?

21 **A I did.**

22 Q Okay. Were you ever -- so do you have any
23 particular analysis, aside from just looking at the
24 SB 1, the enacted map, about the reason or basis for
25 any of the changes that were made between Concept H

1 and SB 1?

2 **A Other than what I read in the newspaper.**
3 **And I understood that competitiveness -- actually,**
4 **you know what? I take that back. I remember**
5 **listening to Senator Ortiz y Pino. And he was very**
6 **complementary of those who were proposing the map,**
7 **saying that he didn't think that it was possible to**
8 **draw competitive districts but that they had in fact**
9 **done a really good job.**

10 **And so as far as I could tell,**
11 **competitiveness was the big criteria that they were**
12 **utilizing. It wasn't a criteria we could use. The**
13 **law forbid that.**

14 **Q Are you aware that anyone from the**
15 **legislature consulted anyone else, any other members**
16 **of the CRC --**

17 **COURT REPORTER: Excuse me. I'm sorry.**

18 **Could you repeat that question?**

19 **BY MR. HARRISON:**

20 **Q Are you aware that anyone from the**
21 **legislature consulted anyone else from the CRC**
22 **regarding the changes that were made from Concept H**
23 **to create SB 1?**

24 **A No. I don't have any awareness of that.**

25 **Q Okay. Even after SB 1's passage, did**

1 anyone contact you about the map, anyone from the
2 legislature or the governor's office contact you
3 about the map?

4 **A No.**

5 **Q** Are you aware that Dr. Cottrell and a UNM
6 political science professor named, I think, Gabe
7 Sanchez conducted an analysis of the enacted maps,
8 kind of a similar anti-gerrymandering analysis of the
9 actual enacted maps?

10 **A There's something vaguely in my mind about**
11 **that, maybe Fair Districts. I don't know. I still**
12 **participate with Fair Districts, but I was absent for**
13 **about 18 months, and I know I received feedback. But**
14 **I can't answer that question. I don't know any**
15 **details about it.**

16 **Q** So that paper, then, was not a CRC project.

17 **A No.**

18 **Q** Okay. And then it sounds like you don't
19 know much about it.

20 **A I don't.**

21 **Q** Let me -- so subsequent to -- in fact, I
22 believe it was this past session, 2023. There was a
23 House -- House Joint Resolution 1 proposed to create
24 a constitutional amendment making what I'll call a
25 mandatory redistricting committee. Are you familiar

1 with that?

2 **A I am.**

3 Q You submitted, I believe, written testimony
4 in support of that?

5 **A I did.**

6 Q Okay. Can you explain to me why?

7 **A Because I thought that the CRC did a really**
8 **good job. The only thing that would make it better**
9 **is if they had ultimate authority.**

10 COURT REPORTER: Is if they had what? I'm
11 sorry.

12 **A If they had ultimate authority. Instead of**
13 **recommending maps to the legislature, if an**
14 **independent redistricting committee did this, it**
15 **would be better for our democracy.**

16 BY MR. HARRISON:

17 Q Okay. And that's because you believe that
18 the legislature is inherently self-interested in
19 redistricting?

20 **A I think that's true, yeah. That's a pretty**
21 **frequent comment. Gabe Sanchez, the only thing I**
22 **remember him doing was a survey. And I think it's**
23 **something like 73 percent of those polled preferred**
24 **an independent redistricting committee. That's what**
25 **I remember. I don't remember him working with David**

1 **Cottrell. So I misspoke earlier when I thought I had**
2 **a vague memory of it.**

3 Q Now, HJR 1 had some -- aside from being a
4 constitutional amendment that made the commission
5 mandatory, had some structural modifications to the
6 CRC, correct?

7 A **Yes.**

8 Q And I presume those were to address some of
9 the criticisms about the lack of representativeness
10 of the committee?

11 A **That's true.**

12 Q Okay.

13 A **It still needs fine-tuning, in my mind.**

14 Q Okay. From the HJR 1 proposal?

15 A **Yes.**

16 Q Aside from, I guess, the composition of the
17 committee, what other, I guess, defects or areas for
18 improvement did you observe in the CRC process?

19 A **I think my opinion really is that other**
20 **than the makeup, CRC worked fine and is going to work**
21 **much better because it begins almost a year before**
22 **the work begins, and hopefully we're going to have**
23 **census data on time. I think CRC will work great**
24 **with the extra time that it will have.**

25 **I think we do have in there, though, that**

1 **we won't take into consideration addresses of**
2 **incumbents, period, in HJR 1. Although let me be**
3 **clear. I'm not a hundred percent with that, because**
4 **there is something to be said about continuity of**
5 **representation. And I've expressed that opinion, but**
6 **I'll go with the majority.**

7 Q Okay. That's interesting. I mean, and
8 you've expressed support for that concept in
9 connection with the importance of the value of
10 retaining the cores of existing districts, correct?

11 A Well, that and -- but incumbents. If you
12 have the same incumbent, it could be useful, the
13 continuity of representation. I recognize that as an
14 idea that supports it. And I've expressed it to the
15 people that I've worked with on the committee. They
16 have better reasons, I guess, not to want to consider
17 addresses.

18 Q Would it be -- just throwing this out
19 there. Would it be superior or at least a perfectly
20 adequate substitute to eliminate residency
21 requirements?

22 A I think, if you eliminated it, you still
23 have competition. Whoever lives in the district, if
24 they're paired well, they're going to have to
25 campaign against each other. That's all there is to

1 **it. And the voters get to decide. The whole idea is**
2 **for the voters to pick the representatives, not the**
3 **representatives picking the voters.**

4 Q This is a little specific, and so you might
5 not be familiar with it. Do you know who
6 Representative Jane Powdrell is?

7 A **Yes.**

8 Q Okay.

9 A **Yeah.**

10 Q Are you familiar with the changes to her
11 House -- State House district that came about this
12 redistricting session?

13 A **No. I'm aware it happened, but I don't**
14 **have -- no.**

15 Q Okay.

16 A **I really wasn't focused anymore on**
17 **redistricting after January.**

18 Q You voted in favor of all three approved
19 congressional maps, correct?

20 A **That's correct.**

21 Q But whether expressed or not, subjectively,
22 your preference was for Concept E, correct?

23 A **Yeah. I liked Concept E. I thought that**
24 **was workable. I thought A was workable. And I also**
25 **voted in favor of H, because I thought H kept**

1 **communities of interest together. I thought there**
2 **was a good expression of opinion as to why you would**
3 **want to move Chaves County away and give them a**
4 **different representative. But I figured the**
5 **legislature can choose between the three.**

6 Q But if it was your choice, it would have
7 been Concept E?

8 A **Yeah.**

9 Q And then, again, recognizing that obviously
10 the legislature has the constitutional authority to
11 be the final word on redistricting in New Mexico, you
12 were disappointed that the legislature did not adopt
13 one of the three congressional concepts proposed by
14 the CRC, correct?

15 A **It would have been great had they adopted**
16 **one.**

17 Q You were disappointed that they didn't.

18 A **Yeah. You know, a lot of work went into**
19 **that, and I thought we did a fair job.**

20 Q Did you observe the same work from the
21 legislature and the modifications they made to
22 Concept H?

23 MR. BAKER: Objection, foundation.

24 A **I don't -- did I observe the what?**

25 BY MR. HARRISON:

1 Q I'll phrase it. Am I correct that you did
2 not observe the same level of work, right, from the
3 legislature and the modifications they made to
4 Concept H to create their final bill?

5 MR. BAKER: Objection, foundation.

6 A **I watched very little of the legislature**
7 **and their adoption of the new maps, but what I saw**
8 **didn't impress me.**

9 BY MR. HARRISON:

10 Q Okay. And they certainly didn't reach out
11 to you or, as far as you know, the other members of
12 the committee?

13 A **No. They didn't reach out to me.**

14 Q Okay. And this shows how little I know
15 about the other two maps, but am I right that, in
16 fact, the legislature didn't wholesale adopt any of
17 the nine concepts that was proposed by the committee?

18 A **I think they may have adopted the House --**
19 **one of our House maps, I think, or they at least got**
20 **closest. It's okay. That's the way it was designed,**
21 **and I understood that. You know, you put in work and**
22 **you hope that it was good enough. It wasn't good**
23 **enough.**

24 Q It wasn't good enough, and that's purely
25 your expression of the fact that the legislature did

1 not adopt those maps, not any comment on defects in
2 the work product of the CRC, correct?

3 **A The work was solid.**

4 Q The work was honest.

5 **A But it was -- yes. But it was not enough**
6 **to get the legislature to adopt any of the**
7 **congressional maps, or any of the Senate maps for**
8 **that matter. And I do think they adopted one of the**
9 **House maps. Maybe they modified it slightly.**
10 **Anyway . . .**

11 Q And as far as you can tell, the reason for
12 the legislature adopting maps that were not maps
13 proposed by the CRC is that they considered factors
14 that were outside of the Section 7 of the
15 Redistricting Act factors?

16 MR. BAKER: Objection, foundation.

17 **A If they were motivated by competitiveness,**
18 **historically New Mexico has not used that as a**
19 **criteria. That's known nationally, and it's known**
20 **here in New Mexico. And so if that was the basis,**
21 **then I don't get it.**

22 BY MR. HARRISON:

23 Q Competitiveness being an aspect of
24 consideration of partisan data?

25 **A Right. We were forbidden from looking at**

1 **partisan data. They obviously were not. I've seen**
2 **the performance measures back in 2011. I've seen**
3 **them in 2021 on that basis. And the only material**
4 **change was to CD-2. It reversed the swing from swing**
5 **Republican to swing Democrat.**

6 **Otherwise, the first remained virtually the**
7 **same. The third remains a stronger than swing**
8 **district for the third. So I don't know if they**
9 **accomplished what they intended.**

10 Q Those changes appear to you to have been
11 the motivation for the modifications that were made
12 from Concept H to the final enacted SB 1.

13 MR. BAKER: Objection, foundation.

14 A **Yeah. I don't know, but I'm presuming**
15 **that's the case, since they talked about**
16 **competitiveness.**

17 MR. HARRISON: I'll pass the witness.

18 MR. BAKER: Kyle, I'm happy for you to go
19 next if you'd like, or I'll go next. You pick.

20 MR. DUFFY: No, I don't have anything.

21 MR. BAKER: Okay.

22 EXAMINATION

23 BY MR. BAKER:

24 Q All right, Justice Chavez. In terms of
25 what you know or don't know about why any legislator

1 voted for the final SB 1, I know that Mr. Harrison
2 asked you to speculate about that. But you don't
3 personally know the rationale that any individual
4 legislator relied on to vote.

5 **A No, I do not.**

6 Q And you knew, coming out of the CRC, that
7 the report you submitted would be treated the same as
8 an interim committee report, per the Redistricting
9 Act, right?

10 **A Yes.**

11 Q And so, as you acknowledged, you knew
12 that that would be --

13 **A They collect dust. Interim reports collect
14 dust. That's what they do.**

15 Q And obviously, you worked hard and you
16 hoped that it would get traction --

17 **A Yeah.**

18 Q -- and that they would approve, but you
19 knew that there was -- it was the legislature's
20 opportunity to take what you did and consider it,
21 alter it or vote in favor of one that you proposed,
22 right?

23 **A Or not even consider it.**

24 Q Or just leave it to collect dust.

25 **A Yeah, exactly.**

1 Q And here you understand that the
2 legislature started with Concept H as the foundation
3 for what ended up being SB 1, correct?

4 A **I could see how that could be the case,**
5 **yeah.**

6 Q And based on the report you submitted, that
7 was presented to the legislature following
8 Dr. Cottrell's analysis as a partisan-neutral map,
9 correct?

10 A **H was, yes.**

11 Q Yes. So at least as the legislature
12 started its work, if it started with Concept H, it
13 fairly could have treated that as a partisan-neutral
14 map from which to build SB 1, correct?

15 A **Yes.**

16 Q And in terms of competitiveness, I just
17 wanted -- I remembered as you were talking something
18 from *Maestas v. Hall*, and so I've got it up on my
19 screen.

20 A **Yes.**

21 Q Do you recall that you commented on
22 competitiveness in *Maestas*?

23 A **I did. Court-drawn maps.**

24 Q Yes.

25 A **If evidence is presented on**

1 **competitiveness, then, Judge, be careful because of**
2 **the political thicket that you're about to get in and**
3 **because they considered partisanship for all the**
4 **other maps and not the ones that ultimately was**
5 **adopted.**

6 **We sent it back and said, hear from**
7 **everybody, give everybody a fair chance to comment on**
8 **partisanship.**

9 MR. BAKER: And, Carter, this is paragraph
10 41 of Maestas.

11 BY MR. BAKER:

12 Q In addressing competitiveness, you wrote
13 for the Supreme Court, Competitive districts are
14 healthy in our representative government because
15 competitive districts allow for the ability of voters
16 to express changed political opinions and
17 preferences.

18 A **Yes.**

19 Q And do you still believe that's true today,
20 that competitive districts are healthy for
21 representative government?

22 A **I do. Now, how you define competitiveness**
23 **is the issue.**

24 Q Right. And in New Mexico, the ultimate
25 decision rests with the legislature, the elected

1 representatives in the legislature, with approval by
2 the governor, correct?

3 **A Definitely. It would have been good if**
4 **they would have allowed us to consider competitive**
5 **maps.**

6 Q But for your purposes, you had marching
7 orders as to what was in or out for the CRC, knowing
8 it would be different for the legislature itself.

9 **A No, I don't agree with that.**

10 Q Okay. You thought that the legislature was
11 going to be tied to the --

12 **A The Redistricting Act was the Redistricting**
13 **Act. This is how redistricting would be performed.**
14 **It didn't say that, You, Legislature, can now start**
15 **thinking about other criteria or superseding**
16 **traditional redistricting principles. I would not**
17 **agree with that.**

18 Q Okay. In terms of redistricting history in
19 New Mexico, the only cycle when the -- well, the
20 first time there were three districts was 1980,
21 correct, after the 1980 census?

22 **A Court-drawn?**

23 Q The first time that we got a third
24 congressional seat --

25 **A Oh, yes. Sorry, sorry.**

1 Q -- was in the early eighties. And that was
2 the subject of litigation, correct?

3 A Yes.

4 Q And then in '91 we had maps that were drawn
5 by the legislature and approved by the governor, and
6 the court didn't have to intervene, correct?

7 A **The first time, right.**

8 Q Correct? And then the next two cycles
9 ended up in litigation with court-drawn maps.

10 A **Correct.**

11 Q So when the legislature considered SB 1, it
12 was the first time in 30 years that the legislature
13 had had the opportunity to pass, submit to the
14 governor a legislatively drawn map as the system
15 contemplates.

16 A **Yes.**

17 Q And so when we're talking about the length
18 of time that certain principles have been in place,
19 the issue only comes around once every decade, right?

20 A **That's right.**

21 Q And in terms of the way maps have looked
22 traditionally, have you ever looked at the map from
23 1980, in terms of how it divided up the state?

24 A **I don't recall looking at 1980.**

25 MR. BAKER: So I'm going to just mark this

1 as -- are we on Exhibit 1?

2 MR. HARRISON: 2.

3 MR. BAKER: 2. I'll mark it as Exhibit 2.

4 I don't have a sticker.

5 (Exhibit No. 2 was marked.)

6 BY MR. BAKER:

7 Q But I'll represent to you that this is
8 taken from the plaintiffs' expert report and shows
9 the map. And do you see that it swings the southern
10 district up into the north?

11 A Yes.

12 Q And so there's at least a history in New
13 Mexico of maps that don't just follow the version
14 that was in place coming into this redistricting
15 cycle, with a circle in the middle and north and the
16 south.

17 A Yeah. The 1982 map. I think I had one of
18 those concepts that I was going to propose. I wish I
19 would have had that.

20 Q So whether you have a dog leg up or a dog
21 leg down, it's not a new thing in New Mexico to have
22 the districts swing up and down vertically north and
23 south rather just east and west. There was a decade
24 where that was the case.

25 A There was a decade where that was the case.

1 **You might even look at Senate districts. It may have**
2 **been Senator Ingles, didn't he have to go up to**
3 **Clayton as well at one time? So that happens, yeah.**

4 Q In terms of --

5 **A In fact, I did have that concept, because I**
6 **told you about Bernalillo County, including**
7 **Bernalillo County and Santa Fe County and a portion**
8 **of Torrance County. The rest would be CD-2 and 3.**

9 Q In terms of your statement that the
10 Redistricting Act controlled the criteria that the
11 legislature should consider, is that based on the
12 language of the statute itself or something else that
13 leads you to conclude that that was the only
14 thing the legislature can consider?

15 **A The statute itself. I guess they could**
16 **have told us that the rules are going to be different**
17 **for us than for you, CRC. But then why are you**
18 **asking us to do work that you're going to change the**
19 **rule on it?**

20 Q One thing, you gave them more maps that
21 they knew, if they started with, would pass partisan
22 scrutiny and had been subject to substantial public
23 comment, right?

24 MR. HARRISON: Objection, form.

25 BY MR. BAKER:

1 Q One thing that they knew, regardless of
2 what criteria they applied, a benefit of the CRC's
3 work was that if they started with one of your maps,
4 they knew that it was partisan-neutral and had been
5 subjected to substantial public comment, correct?

6 **A Yes. And adhered to the traditional**
7 **redistricting principles.**

8 Q And then they could tweak from there, but
9 they would know at least that starting there, they
10 had that in place.

11 **A Yeah. They could tweak as long as they**
12 **adhered to traditional redistricting principles.**

13 Q Here's one thing I was thinking about. I
14 wanted to get your thoughts on it, since you've
15 looked at this from a number of different seats. So
16 in a Maestas-type situation where you have
17 court-drawn maps, it's interesting to me that
18 there -- it struck me, reading the opinion, that
19 judges have to look at partisan data to do the least
20 change to the status quo possible.

21 **A No.**

22 Q Don't they have to consider -- I thought
23 they were doing least-changed maps.

24 **A Judges don't present the evidence. Well,**
25 **what was presented to Judge Hall was a lot of**

1 **information about partisanship. That was presented**
2 **to him. And as I understood the record, and I guess**
3 **the majority of the Supreme Court did, is the last**
4 **map that was proposed did not undergo the same**
5 **scrutiny from all the parties as did all other maps**
6 **on partisanship.**

7 **And so courts drawing maps is very**
8 **different than the legislature. I think you have to**
9 **be cautious. If they've asked you to look at that**
10 **information, you ought to look at it across the board**
11 **for all maps that were presented to you.**

12 **And I thought, and a majority agreed with**
13 **me, that Judge Hall, just take a closer look at this.**
14 **A lot of experts had already left, is the way I**
15 **understood the record, and so they didn't get to**
16 **comment on the partisanship of the last proposed**
17 **maps.**

18 **They went back -- I don't remember exactly**
19 **what all was done, but I do know this. The**
20 **Republicans took over the House during that decade.**
21 **And so I think it proved to be partisan-neutral.**

22 **Q And then in terms of the way that judges**
23 **approach the map-drawing process, though,**
24 **acknowledging (indiscernible) with legislators, they**
25 **are trying to effectuate the least partisan change**

1 possible, correct?

2 **A Yeah. Yeah. At least you thought about**
3 **it.**

4 Q And then with -- in your role on the CRC,
5 you were not looking at partisan outcomes at all,
6 correct?

7 **A Not at all.**

8 Q And have you read Rucho, the Supreme Court
9 decision?

10 **A Some time ago, yes.**

11 Q There, they say that partisanship is
12 inherent in redistricting. Is that something that
13 you agree with, that there's some level of
14 partisanship with --

15 **A Sure there is, yeah.**

16 Q And the instruction for courts under
17 Justice Kagan's dissent in Rucho and now what governs
18 here is, some partisanship is accepted, it just can't
19 be egregious. Have you read it that way?

20 **A Yeah. I think you look at intent. You**
21 **look at what did they intend, what was the effect,**
22 **and was there causation. I think that's a pretty**
23 **basic application of law. And so I think that's all**
24 **that's left.**

25 **She did use the word "egregious." Very**

1 **subjective. What's egregious to you may not be**
2 **egregious to me.**

3 Q Like shocks the conscience.

4 **A It's like the reasonable person standard.**

5 Q Fair enough. Or shocks the conscience
6 for --

7 **A Or shocks the conscience, yeah.**

8 Q But it accepts that there's going to be
9 partisan consideration in the drawing of maps as a
10 baseline for how legislators are allowed to do their
11 work, correct?

12 **A Yes. That's exactly right. There will be**
13 **some partisanship, and people will acknowledge that.**
14 **In fact, I think the Supreme Court said that. The**
15 **only exception they created was, if you don't**
16 **consider partisan data, then it's not a partisan map.**
17 **So the CRC map would have passed muster under the**
18 **New Mexico Supreme Court order, is the way I read it.**

19 Q Going back to Concept H, I just wanted to
20 hear a little bit more from you on your -- I think
21 you said that it was -- let me find the word you
22 used -- beautiful example of -- the people's map is
23 one of the most beautiful things you'd seen in terms
24 of the process?

25 **A Not the map. The participation.**

1 Q Yeah.

2 A I really enjoyed listening to everyone who
3 testified. To me, it was beautiful that people would
4 get up in their mother language and speak to us. I
5 really enjoyed that. And, yes, there were a number
6 of them. But that's -- I mean, to witness people
7 actively participate in the democracy is a beautiful
8 thing. That's what I meant.

9 Q Under the Redistricting Act, part of that
10 is not just speaking but also submitting actual maps,
11 correct? I mean, the statute contemplates that
12 people can submit maps.

13 A They've got to do that, yes.

14 Q And so from your perspective as the chair
15 of the CRC, was there anything about the fact that
16 Concept H was submitted by members of the public
17 rather than drawn by the CRC, is there anything
18 inappropriate about that or surprising or
19 questionable about that?

20 A No. We were hoping for more maps. I
21 actually thought we were going to get maps from the
22 Republican Party and the Democrat Party. They were
23 silent.

24 Q Along that line, I was going to ask you.
25 You mentioned that Robert Aragon was present and

1 there was discussion of them coming forward with
2 Republican maps in Farmington. Did I understand that
3 right?

4 **A That's what I understood him to say.**

5 Q And did Mr. Aragon or others acting at his
6 behest submit maps to the CRC in Farmington that
7 would have been different from the people's map?

8 **A No.**

9 Q Did they submit maps at all?

10 **A No, not that I recall, and none were drawn**
11 **on the portal. I went through every map on the**
12 **portal and tried to comment and offer suggestions for**
13 **what they might do to tweak them, because some**
14 **exceeded the deviation, for example, and so you'd let**
15 **them know. But go back, and if you can fix this, but**
16 **we can't consider it with this large of a deviation.**
17 **Things of that nature. And I don't remember reading**
18 **a map from any political party.**

19 Q What about from Tim Jennings? Did he
20 submit a map?

21 **A No.**

22 Q Hold on one second. Let me find some other
23 names I wanted to run by you on that. Dinah Vargas,
24 or Dinah Vargas, did she submit maps?

25 **A I don't know.**

1 Q Or Manuel Gonzales, Jr.?

2 A **The names of those who submitted maps are**
3 **identified, and I'm not going to remember names.**

4 Q That's fair.

5 A **Senator Jennings I know.**

6 Q That was easier. As I went down the line,
7 I realized I was probably asking you to pull a rabbit
8 out of the hat. But in any event, it's documented
9 who submitted the maps, and you don't recall any from
10 the Republican Party.

11 A **That's correct.**

12 Q Do you remember any, what we could call oil
13 patch maps, where people from the oil patch came in
14 in an organized group and said, We don't like Concept
15 H. We want an oil patch map that says X, Y and Z?

16 A **I don't remember anybody commenting on**
17 **somebody else's map and saying, We offer this as an**
18 **alternative. Whether or not the oil patch submitted**
19 **one, I'd have to go back and look, because we did get**
20 **communities of interest maps as well, and we did get**
21 **some from the southeastern part. But I don't**
22 **remember.**

23 **The wonderful thing about the independent**
24 **redistricting committee is it's all for the public to**
25 **still see, for the public.**

1 Q Sorry. I'm just checking things off here.

2 You probably remember the drill, trying to figure out
3 what you covered when you go second on depositions.

4 A Yes.

5 Q And Concept H was approved by the CRC by a
6 vote of five to two, correct?

7 A I don't remember.

8 Q Okay.

9 A Yeah. Yes. I do remember. Yes.

10 Q And do you recall that both Joaquín Sanchez
11 and Robert Radigan, the Ethics Commission appointees
12 to the CRC, both voted in favor of the people's map?

13 A Yes.

14 Q And to your knowledge, all rules and
15 regulations that govern the CRC were followed in the
16 proposal and recommendation of Concept H?

17 A Yes.

18 Q And then after your work was done, then
19 Professor Cottrell did the evaluation that showed
20 that each of the three maps that the CRC approved for
21 Congress passed the partisan bias test.

22 A That's the way I read his report.

23 MR. BAKER: Okay. I'll pass the witness.

24 Kyle, did that prompt anything from you?

25 MR. DUFFY: No. We're still good. Thank

1 you.

2 MR. BAKER: All right.

3 EXAMINATION

4 BY MR. HARRISON:

5 Q Just briefly. Mr. Baker brought up the
6 Rucho analysis and the New Mexico Supreme Court's
7 partial adoption of the Rucho analysis. So I'll
8 also --

9 A **The minority opinion.**

10 Q The dissent, that's right. But I wanted to
11 address another aspect of what the New Mexico Supreme
12 Court just decided, which is -- and I'm going to
13 quote from the order we have. It's paragraph 4 of
14 the Supreme Court's order. Intermediate scrutiny is
15 the proper level of scrutiny for adjudication of a
16 partisan gerrymandering claim under Article II,
17 Section 18 of the New Mexico Constitution.

18 And they cite to a case called Breen v.
19 Carlsbad Municipal Schools. You were -- I believe
20 Justice Maes wrote that opinion, but you were on the
21 Supreme Court when that opinion came down. It's been
22 a while.

23 A **Yes.**

24 Q Do you recall the opinion?

25 A **Uh-huh.**

1 Q Is intermediate scrutiny an easy standard
2 for the government to satisfy?

3 MR. BAKER: Objection, form and foundation.

4 A **No. The interesting thing about**
5 **intermediate scrutiny is it shifts the burden. You**
6 **would think that you would begin with those who are**
7 **complaining. But in this case, the government is**
8 **going to have the burden, and they're going to have**
9 **to show a connection with a substantial governmental**
10 **interest.**

11 BY MR. HARRISON:

12 Q What's a substantial governmental interest?

13 A **I guess that will be left to testimony.**
14 **Although I think the law and the history will be**
15 **useful.**

16 Q Would you suspect that the traditional
17 redistricting -- in the context of a restricting
18 case, the traditional redistricting factors would be
19 substantial government interest?

20 MR. BAKER: Objection, foundation.

21 A **They will be important, as will over- or**
22 **under-inclusiveness. Just look at the history of**
23 **intermediate scrutiny in New Mexico.**

24 BY MR. HARRISON:

25 Q It's a rigorous and searching standard,

1 correct?

2 MR. BAKER: Objection.

3 **A Well, it's more rigorous than rational**
4 **basis, for sure, but less than strict scrutiny.**

5 BY MR. HARRISON:

6 Q Indeed. Can you recall -- tell me about
7 laws that have withstood intermediate scrutiny.

8 **A I can't think of any off the top of my**
9 **head. I think we held in Breen that -- I think we**
10 **found a constitutional violation. I don't remember**
11 **what it was.**

12 Q And then under the federal constitution,
13 for example, sex discrimination is subject to
14 intermediate scrutiny, correct?

15 **A That's my memory.**

16 Q Is sex discrimination something that the
17 government is allowed to do lightly and for reasons
18 that aren't truly convincing?

19 MR. BAKER: Objection to form and
20 foundation.

21 **A No. I think Breen laid out the standard**
22 **that we follow in New Mexico pretty well. The burden**
23 **is on the government, and they have to show**
24 **connection with a substantial governmental interest.**
25 **I think it would be easier if you adhere -- if they**

1 **point to the traditional redistricting principles and**
2 **how their map complies with it, I think they're home**
3 **free.**

4 Q Okay. And you're confident the CRC's work
5 was justified and based solely or near solely on
6 traditional redistricting principles, correct?

7 A **I think it was based on traditional**
8 **redistricting principles, not nearly. I think we did**
9 **a really good job. We even told you what cities or**
10 **how many cities were split, how many counties were**
11 **split. So I think it was good work.**

12 Q When a government is defending a law that's
13 subject to intermediate scrutiny, is the expectation
14 that they are able to come in at the point of
15 litigation with post hoc explanations or
16 justifications for the constitutionality of the law?

17 MR. BAKER: Objection, form and foundation.

18 A **That's a really interesting question. And**
19 **the reason it's interesting is because we don't look**
20 **at legislative records. It's a weird thing, but we**
21 **don't. So I don't know if it's post hoc or not.**

22 BY MR. HARRISON:

23 Q Are you aware of any important government
24 interest that would support the modifications made
25 from Concept H to form SB 1?

1 MR. BAKER: Objection, form and foundation.

2 **A Repeat the question.**

3 BY MR. HARRISON:

4 Q Are you aware of any important government
5 interests that were served by the modifications that
6 were made to Concept H, the CRC's Concept H, to
7 create what became the enacted SB 1?

8 MR. BAKER: Objection, form and foundation.

9 **A I don't know if I can answer that. The map**
10 **deviated considerably with respect to communities of**
11 **interest and maintaining geographic boundaries. And**
12 **the basis for that, I think they correctly point**
13 **out -- all I heard was competitiveness.**

14 **And all I can tell you with confidence is**
15 **that competitiveness has not been a consideration in**
16 **New Mexico. That's published in governmental works,**
17 **national government. National Council of Governments**
18 **makes that clear. I think there are only four states**
19 **that consider competitiveness for purposes of**
20 **congressional maps.**

21 MR. HARRISON: I don't have anything
22 further.

23 MR. BAKER: Justice Chavez, thank you.

24 THE WITNESS: Thank you.

25 VIDEOGRAPHER: Can we get transcript orders

1 on the record, please?

2 MR. BAKER: E-tran, four to a page.

3 MR. HARRISON: E-tran, and I think we're
4 going to do expedited.

5 VIDEOGRAPHER: This concludes the
6 deposition of Justice Edward L. Chavez. We are
7 going off the record at 12:20 p.m.

8 (The deposition concluded at 12:20 p.m.)

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1 STATE OF NEW MEXICO
2 COUNTY OF LEA
3 FIFTH JUDICIAL DISTRICT COURT
4 REPUBLICAN PARTY OF NEW MEXICO, DAVID
5 GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS,
6 MANUEL GONZALES, JR., BOBBY and DEANN
7 KIMBRO, and PEARL GARCIA,

8 Plaintiffs,

9 vs. CASE NO.: D-506-CV-2022-00041

10 MAGGIE TOULOUSE OLIVER in her official
11 capacity as New Mexico Secretary of State,
12 MICHELLE LUJAN GRISHAM in her official
13 capacity as Governor of New Mexico, HOWIE
14 MORALES in his official capacity as New
15 Mexico Lieutenant Governor and President
16 of the New Mexico Senate, MIMI STEWART in
17 her official capacity as President Pro
18 Tempore of the New Mexico Senate, and
19 JAVIER MARTINEZ in his official capacity
20 as Speaker of the New Mexico House of
21 Representatives,

22 Defendants.

23 CERTIFICATE OF COMPLETION OF DEPOSITION

24 I, JO LANGSTON, New Mexico CCR #553, DO HEREBY
25 CERTIFY that on August 14, 2023, the deposition of
JUSTICE EDWARD L. CHAVEZ was taken before me at the
request of, and sealed original thereof retained by:

Attorney for the Plaintiffs
CARTER B. HARRISON, IV, ESQUIRE
Harrison & Hart, LLC
924 Park Avenue SW, Suite E
Albuquerque, NM 87102

I FURTHER CERTIFY that copies of this
certificate have been mailed or delivered to all
counsel and parties to the proceeding not represented
by counsel, appearing at the taking of the
deposition.

I FURTHER CERTIFY that examination of this
transcript and signature of the witness was waived by
the witness and all parties present.

1 I FURTHER CERTIFY that the recoverable cost of
2 the original and one copy of the deposition,
3 including exhibits, to Carter B. Harrison, IV, Esq.
4 is \$_____.

5 I FURTHER CERTIFY that I did administer the oath
6 to the witness herein prior to the taking of this
7 deposition; that I did thereafter report in
8 stenographic shorthand the questions and answers set
9 forth herein, and the foregoing is a true and correct
10 transcript of the proceeding had upon the taking of
11 this deposition to the best of my ability.

12 I FURTHER CERTIFY that I am neither employed by
13 nor related to nor contracted with (unless excepted
14 by the rules) any of the parties or attorneys in this
15 case, and that I have no interest whatsoever in the
16 final disposition of this case in any court.

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Jo Langston
New Mexico CCR #553
License Expires: 12/31/23

