UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Turtle Mountain Band of Chippewa Indians, et al.,	)	
Plaintiffs,	)	
vs.	)	File No. 3:22-cv-00022-PDW-ARS
Michael Howe, in his official capacity as Secretary of State of the State of North Dakota,	)	
Defendant.	)	

TRANSCRIPT OF BENCH TRIAL
Volume I
Pages 1-201

Taken at
United States Courthouse
Fargo, North Dakota
June 12, 2023

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

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INDEX OF EXAMINATIONS

WITNESSES FOR PLAINTIFFS:	PAGE
Douglas Yankton	
Direct Examination By Mr. Purdon	41
Cross-Examination By Mr. Phillips	89
Redirect Examination By Mr. Purdon	115
Dr. Loren Collingwood	
Direct Examination By Ms. Danahy	120
Cross-Examination By Mr. Phillips	167
Redirect Examination By Ms. Danahy	198

(The above-entitled matter came before the Court, the Honorable Peter D. Welte, United States District Court Judge, presiding, commencing at 9:00 A.M., Monday, June 12, 2023, in the United States Courthouse, Fargo, North Dakota. The following proceedings were had and made of record in open court with the parties and counsel present:)

THE COURT: Okay. We're on the record, and the case before the Court this morning is Turtle Mountain Band of Chippewa Indians, et al., plaintiff, versus Michael Howe, et al., defendant. And we are here for a trial that is estimated to last five days, and it looks like everybody is in place.

What I will do to begin with is just establish for the record that I am Peter Welte, a judge of the district court for the District of North Dakota, the Eastern Division. I will ask plaintiff -- lead counsel for the plaintiff to introduce him or herself and all at their table for the record, and then I will ask the same for defendant. So plaintiff?

MR. CARTER: Good morning, Your Honor.

THE COURT: Good morning.

MR. CARTER: Michael Carter on behalf of the plaintiff, and I am from the Native American Rights Fund. Joining me today, my cocounsel currently in the gallery, Samantha Kelty also from the Native American Rights Fund; to my immediate left, Mark Gaber with Campaign Legal Center; Molly

Dan from Campaign Legal Center; our paralegal, Laurie Sterling; cocounsel from Robbins Kaplan, LLP, Timothy Purdon; and Bryan Sells from the law office of Bryan L. Sells.

THE COURT: Very good. Thank you.

For the defense.

MR. PHILLIPS: Good morning, Your Honor, David Phillips, lead attorney for the defendant. At the table with me is my paralegal Kate Finck, Attorney Brad Wiederholt from my office, and the Deputy Secretary of State of the State of North Dakota, Sandy McMerty is here as well.

THE COURT: Thank you. Mr. Phillips.

Counsel, I have reviewed the record in preparing for this matter, and I understand that the final pretrial in this case was held on -- it looks like May 30th. At that time the parties believed that the trial length would be five days, firm. I wanted to reiterate that this morning, and, Mr. Carter, has that changed?

MR. CARTER: No, Your Honor.

THE COURT: Thank you. And Mr. Phillips?

MR. PHILLIPS: No, Your Honor.

THE COURT: Very good. I note that the parties anticipated 20 to 30 minutes for opening statements, an hour for closing statements. I don't believe that we have any hanging housekeeping matters this morning.

Mr. Carter, if you could pull that microphone a

little closer to you, please. And I'll just let the parties know that they may remain seated and just speak into the microphone, that'll -- that will help Ronda an awful lot.

But are there any hanging housekeeping matters that you can think of before we just dive into opening statements, Mr. Carter?

MR. CARTER: Yes, Your Honor, and I'll defer to Mr. Gaber on that point.

THE COURT: Mr. Gaber?

MR. GABER: Yes. Good morning, Your Honor. After the Court's order last week, the parties conferred about admission of exhibits and agreed to the pre-admission of the vast majority of the exhibits. I can read the sequence of exhibit numbers that were agreed to. There's just two categories that are not --

THE COURT: Okay. Please, proceed.

MR. GABER: So the admitted exhibits would be Plaintiffs' Exhibits 1 through 97, Plaintiffs' Exhibits 100 through 112, Plaintiffs' Exhibits 120 through 126, Plaintiffs' Exhibits 128 through 140, and Plaintiffs' Exhibits 146 through 149, and then all of the defendants' exhibits.

And then there's two categories of exhibits that the defendants retain foundation objections to, which are Plaintiffs' Exhibits 98 and 99. Those are the Secretary's briefs in the *Walen* matter that are on the exhibit list. With

respect to those our position would be that their party admissions and signed by counsel for the Secretary.

And then several of the Maptitude reports that were added after the motion in limine was filed with respect to the Dave's Redistricting App data, I don't think there's any dispute over the accuracy of that information. I believe that Mr. Phillips can speak to it, but I believe it's -- with respect to the timing, that they were after the expert reports.

THE COURT: Very good. Okay. Thank you, Mr. Gaber.

Mr. Phillips, you care to speak to that?

MR. PHILLIPS: Yes, Your Honor. And Mr. Gaber has stated it correctly in terms of the exhibits that are, you know, stipulated to and the ones that are in dispute.

As to the two briefs -- this would be Plaintiffs' Exhibits 98 and 99 -- it's our position that these are legal briefs submitted by trial counsel in this case in a different matter. It's a motion that's pending before the Court in a different case. I'm not sure what foundation they would have to admit that. I would say it's not a party admission. It's legal arguments made by counsel in a different case and isn't relevant in this matter.

I would -- we will also maintain our objection to the other grouping of exhibits. It's Plaintiffs' Exhibit 113 through 119, 127, and 141 through 145. Those are objected to on the grounds that they're newly generated maps and reports.

They're created by the Maptitude Redistricting Software.

These weren't disclosed prior to any of the discovery or expert disclosure deadlines. Their expert has conducted analyses on these exhibits very recently. They were generated just last month. I have not had the opportunity to depose their expert on those issues, and I'm not prepared to stipulate to their admission, nor to admit that they're accurate in any way, so we would maintain our objection as to those.

Every other exhibit we agree and stipulate to admissibility.

THE COURT: Very good. Are any of the objected-to exhibits anticipated to be attempted to be admitted during this morning's session?

MR. GABER: I do not think so, Your Honor. We -- perhaps with Dr. Collingwood, but I'm not sure where -- that it would be necessary.

THE COURT: Counsel, I'm not going to rule on that at this time, and I just want to see how things start to unfurl this morning. And there are factors that the Court needs to consider, and that includes the context of these purported exhibits. And I can get a lot better read on the context once we start to hear some of the presentation of the parties.

Is there any objection to handling it that way, Mr. Gaber?

MR. GABER: None, Your Honor.

THE COURT: Mr. Phillips?

MR. PHILLIPS: No objection, Your Honor.

THE COURT: Very good. Let's proceed that way then. It will take a while to have our opening statements as well, and we'll just -- we will commence with the -- with the matter in chief.

I will make it clear for the record that the stipulated exhibits will be admitted and received, and as far as publication is concerned, you may publish in the regular course of your presentation.

Very good. I think the table is set, and --

MR. GABER: Your Honor, if I may, there's one more matter.

THE COURT: Absolutely.

MR. GABER: Sorry. Mr. Sells was going to address the Eighth Circuit's decision in the discovery matter just briefly.

THE COURT: Absolutely. Mr. Sells.

MR. SELLS: We don't have a mic at the auxiliary table, so I'm just going to come up to the podium.

THE COURT: Appreciate that.

MR. SELLS: So as you know, the Eighth Circuit essentially reversed in part this Court's ruling on the motions to compel, and the plaintiffs currently intend to seek further review of the Eighth Circuit's decision. We think that the

decision opens up a Circuit split that needs to be addressed probably by the full Eighth Circuit, if not the Supreme Court, and so we've been thinking over the weekend about how to address that as far as the trial is concerned.

And what we'd like to suggest to the Court is that we make a proffer of what we think we might find from the documents if we were to get them and proceed over the course of the week as normal and a rule based on that proffer. In other words, we're not asking the Court to delay any ruling whatsoever, but we think you can take into account the proffer, and if it makes a difference to the ruling, it does. If it doesn't, you can indicate that in your ruling, and that may affect the scope of the Eighth Circuit's review.

But we're open to suggestions if you have a better way to address that, but that's kind of where we landed after giving it some thought over the weekend.

THE COURT: All right, Mr. Sells.

Mr. Phillips, do you care to speak to that?

MR. PHILLIPS: Your Honor, I would oppose that solution. I don't -- so to be clear, I don't represent the legislature in this matter. I don't have any special access to the documents, so I don't know what's going to be disclosed, if anything, in the event that the Eighth Circuit's decision is changed, nor has the other side provided in discovery what they believe would be disclosed by the legislature. In any event,

it's -- they appear to be suggesting a hypothetical introduction of what the record may contain and what it may not, and I would oppose that, Your Honor.

THE COURT: Mr. Sells, in a matter like this, everybody -- everybody has a role, everybody has a position. But what really matters after this case is decided is the record on review, and it's the Court's desire to keep that record as pristine and clear as possible, realizing that by the time we get to this point of the day Friday morning, that's not going to be very clean and not very possible.

So what we're going to do is, the Court is denying the request of plaintiff in that respect. We don't need to muddy up the record with anything that is unnecessary. I think that -- from reviewing the matter and the record as it sits right now, I think there is plenty that the parties have to present without getting into what I would call that rabbit hole. I'm just unwilling to do that, and so the request is denied.

MR. SELLS: Okay. I would just ask that the record be clear that we have offered to make a proffer and that the Court is denying our request to do that because it may impact whether the Eighth Circuit believes the issue is moot or not.

THE COURT: Understood, and --

MR. SELLS: It's our desire to seek further review of that decision.

THE COURT: And I have great appreciation for that, Mr. Sells, and thank you.

MR. SELLS: Thank you.

THE COURT: Thank you.

Mr. Gaber.

MR. GABER: I'll turn it over to Mr. Carter for opening.

THE COURT: Very good. Mr. Carter.

MR. PHILLIPS: Your Honor, before opening begins, I just had one, you know, early matter as well.

THE COURT: I beg your pardon. I did neglect to turn to Mr. Phillips. Mr. Phillips, please.

MR. PHILLIPS: No problem, Your Honor, and just really briefly, I wanted to point out that the parties have agreed to some stipulated facts. Those were filed last night. I just wanted to point that out for the Court's attention that those are of record and we've agreed to those basic facts.

THE COURT: I appreciate that, and that is Filing Number 108 in the record, and the Court was reviewing that this morning before we commenced. I appreciate that, Mr. Phillips. Thank you.

MR. PHILLIPS: Thank you, Your Honor.

THE COURT: Okay. Mr. Carter -- or Mr. Phillips, anything further?

MR. PHILLIPS: Nothing further, Your Honor.

THE COURT: Please, Mr. Carter. Thank you.

MR. CARTER: Thank you again, Your Honor, and good morning.

THE COURT: Good morning.

MR. CARTER: My name is Michael Carter on behalf of the Native American Rights Fund. I'm from the Citizens Potawatomi Nation of Oklahoma and appearing for the plaintiffs in this matter. We already introduced my cocounsel, but also wanted to recognize members of our trial support team that are here today in the gallery, Kris Hoerter, Abreya Higgins, and Allison Neswood. I also failed to introduce Nicole Hansen from Campaign Legal Center, who's in the gallery and is admitted cocounsel in this case as well, so I apologize for that.

I'd also like to recognize our clients in this case, the Turtle Mountain Band of Chippewa Indians; the Spirit Lake Tribe, including former chairman, Douglas Yankton, Senior, who's in the courtroom this morning; and individual tribal members, Collette Brown, who's also in the courtroom -- she's a member of the Spirit Lake Tribe -- and also Plaintiff Zachary King and Wesley Davis of the Turtle Mountain Band.

Your Honor, the plaintiffs' expected witnesses for our case in chief are Chairman Douglas Yankton, Senior, from Spirit Lake; Turtle Mountain Chairman Jamie Azure; Plaintiff Collette Brown; Former District 9 Senator, Richard Marcellais; and Former District 9 House Representative, Marvin Nelson.

Plaintiffs' expert witnesses are Dr. Loren Collingwood, who will be testifying regarding the *Gingles* preconditions; Dr. Daniel McCool, who will be testifying to the totality of the circumstances under the Senate factors; and Dr. Weston McCool, who will testify specifically to the fifth Senate factor.

So, Your Honor, just let me start this morning with why we're here. Your Honor, we're here because North Dakota's 2021 state legislative redistricting plan has the effect of diluting the Native American voting strength in northeastern North Dakota, so many statistics will be presented this week, but there's one set of statistics that may best capture the effect of this vote dilution.

Between 2010 and 2020 the Native American's share of the state's voting-age population increased from 5.1 percent to 5.9 percent, as this slide shows. The number of Native American voters increased from over 26,000 people to over 35,000 people within that timeframe. This equates to roughly a 24 percent increase in that population over the ten-year period.

After the 2011 legislative Redistricting Plan 12 years ago, three legislators were able to be elected from Native American voter opportunity districts. Opportunity districts are districts that effectively perform for Native American voting majority. All three of those were from

District 9, which covers the Turtle Mountain Reservation.

Despite Native American voters at the time representing 5.1 percent of the state's voting-age population, these three seats only represented 2.1 percent of the legislative body. And despite that 24 percent increase in the Native American voters in the state, as reflected in the 2020 Census, the 2021 Redistricting Plan from two years ago reduced the number of legislators who could be elected from the Native American opportunity districts down from 3 to 2, which equates to 1.46 percent of the legislative body.

And so the question is, how did this happen? Well, as this slide shows, House Subdistrict 4A was created to mirror the Fort Berthold Reservation in compliance with the Voting Rights Act, and it -- that allowed tribal members in that area of the state to elect a House representative of their choice and establish a new legislative seat for Native American voters.

On the other hand, the legislature created Subdistrict 9A around the Turtle Mountain Reservation, which packs a supermajority of Native voters into a single House subdistrict, while at the same time the map cracks apart Native voters who live near the Turtle Mountain Reservation and on Turtle Mountain Trust Lands into Subdistrict 9B. It, likewise, cracks the Spirit Lake Reservation into District 15, leaving Native American voters in both Subdistrict 9B and District 15

without an equal opportunity to elect the candidate of their choice.

The resulting outcome is that the Native American voters in northeastern North Dakota lost the ability to elect candidates of their choice to two legislative seats, one House seat and one Senate seat. So just think about that. The Native American voting population increased, but their opportunity to elect decreased in this new plan even despite a new opportunity district created for the Fort Berthold Reservation.

We intend to prove at trial that this negative effect in northeastern North Dakota was caused by the legislature's decision to approve a redistricting plan that dilutes the Native American voting strength around the Turtle Mountain and Spirit Lake Reservation, and now there are no Native Americans serving in the state Senate for the first time since 1990, as this slide points out.

Now, the defendant makes many misplaced arguments regarding the redistricting process, so let's discuss what the evidence and the testimony will show. Early on in the redistricting process the Spirit Lake Tribe requested redistricting hearings on -- on the reservation so that tribal members could meaningfully participate in the process and requested that the Redistricting Committee create a House subdistrict for the Spirit Lake Reservation.

It was clear from the testimony at that time that the reasons for the subdistrict request centered around seeking more responsive representation and improving the ability of tribal members to elect the candidate of their choice. Importantly, Turtle Mountain never requested a subdistrict, and, unfortunately, when the Redistricting Committee published it's proposed map near the end of September of 2021, it showed that the Spirit Lake Reservation was drawn into a full legislative district where tribal members would have no effective voting strength, while the Turtle Mountain Reservation was packed into an unrequested single-member House district.

Under the 2011 Redistricting Plan 12 years ago, District 9 mirrored Rolette County, the Rolette County boundaries, and had a Native American voting-age population, or NVAP as it's referred to, of about 75 percent. And due to the overall state population increase from the 2020 Census, it was necessary for District 9 to expand geographically to include the Spirit -- I'm sorry -- to expand geographically to include additional population.

To accomplish this, rather than expanding the district southward to include the Spirit Lake Reservation, the Redistricting Committee chose to expand District 9 eastward to encompass two counties of close to 100 percent White population. This configuration caused District 9 to fail to

perform for the Native American candidate of choice for state Senate.

And so in response to the redistricting committee's publication of its proposed map, the committee's map was carefully evaluated and found to violate the Voting Rights Act. Therefore, Spirit Lake and Turtle Mountain, whose reservations are about 55 miles apart from each other, they worked together to propose a new map that would unite the tribes in a full legislative district without the need for subdistricts, a map that would follow traditional redistricting principles and allow the legislature to meet its obligations under the Voting Rights Act, while also allowing Native American voters in northeastern North Dakota to continue to have an equal opportunity to elect their preferred candidate to three legislative seats, as they had been able to do for the prior decade.

This tribally-proposed map was submitted jointly by Turtle Mountain Chairman Azure and Spirit Lake Chairman Yankton in a letter to the legislature and governor submitted on November 1, 2021. That letter expressed concerns with the lack of redistricting meetings near reservations and also showed how the committee's proposed map was unlawful.

The letter also showed how the tribally-proposed districts would comply with the Voting Rights Act, and further showed how such a district could be easily incorporated into

the committee's proposed map with minimal changes to other districts.

One week later, on November 8, 2021, both tribal chairmen travelled to Bismarck to provide testimony to the Redistricting Committee, continuing to advocate for their proposed district. The chairmen testified about the shared interests between their respective tribes and tribal members, and despite the committee voting to approve other changes to the Redistricting Plan that day, the chairman's request was met with hostility from the committee and overwhelmingly rejected.

The committee's map, which ultimately was approved by the legislature, created the single Super Pac Subdistrict 9A that encompasses the Turtle Mountain Reservation and contains an NVAP of 80 percent, as this slide indicates, while cracking apart Turtle Mountain Trust Lands into House Subdistrict 9B, which has an NVAP of 32 percent, and separately cracking apart the Spirit Lake Reservation into District 15, with an NVAP of 23 percent.

The full Subdistrict 9 has an NVAP of 54 percent, and like District 15 and Subdistrict 9B, does not effectively perform for the Native American candidates of choice, and this fact was shown in the first elections under the new Redistricting Plan in 2022.

As expected, only the Super PAC Subdistrict 9A elected the Native-preferred candidate. Former Senator Richard

Marcellais, who is a Turtle Mountain member and who has been representing District 9 as senator for over a decade, handily lost his re-election bid despite overwhelming support from Native American voters in District 9. Likewise, a longtime incumbent House representative and Native-preferred candidate, Marvin Nelson, was easily defeated in Subdistrict 9B.

And, of course, the legislature was well aware of this eventual outcome when adopting the current legislative map. That's because the tribes informed the Redistricting Committee that its proposed map would violate the Voting Rights Act if adopted.

Now, the defendant has argued and may continue to argue that the timing of the tribes' request was untimely, that apparently the tribes did not provide enough notice to the Redistricting Committee that the committee's proposed map would fail to comply with federal law. But, of course, it was the legislature's duty and the redistricting committee's duty all along to ensure that its map complied with all redistricting laws, not the voter's duty.

But in this case the redistricting was -- committee was given the benefit of a warning that its map was unlawful. Unfortunately, this warning was unheeded. In response, the defendant is now complaining that this warning was given too late, a week before the Redistricting Committee approved its map. The defendant's argument is without argument and

irrelevant under the law. The Redistricting Committee should never have produced this map in the first place and had more than enough time to amend it. The legislature is fully responsible for its own map.

Now I want to talk about legal issues that are actually relevant to this case, Your Honor. And although Your Honor has reviewed the legal standards ad nauseam between this case and the *Walen v. Burgum* case, I want to highlight those standards applicable to this case, as well as the primary contested issues.

Plaintiffs allege that the legislature's map violates Section 2 of the Voting Rights Act. That's the crux of this action, Your Honor. Section 2 provides that no voting qualification or prerequisite to voting or standard practice or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.

There are three preconditions that must be shown in order to prove a Voting Rights Act violation, which were established by the Supreme Court in *Thornburg v. Gingles* and reaffirmed last week by the Supreme Court in *Allen v. Milligan*. Plaintiffs will meet their burden of proving each of these preconditions.

The three preconditions are that, one, the minority

group is sufficiently large and geographically compact to constitute a majority in a single-member district; two, that the minority group is politically cohesive; and, three, the majority votes sufficiently as a bloc to enable it to defeat -- to usually defeat the minority's preferred candidate.

The Court will hear expert testimony on these three preconditions, but in summary, plaintiffs will show through the expert testimony of Dr. Colling -- Dr. Loren Collingwood that illustrative plans establish that the Native American population is sufficiently large and geographically compact to constitute an effective majority in an entire legislative district comprising one Senate and two House seats.

Plaintiffs will also show that the Native American population is politically cohesive, which both parties' experts agree. And Dr. Collingwood will testify to his analysis showing that the majority population in the area votes as a bloc in order to usually defeat the Native American-preferred candidate.

Regarding the first *Gingles* precondition, defendant contends that plaintiffs' illustrative map, which is provided in this slide, would constitute a racial gerrymander. However, defendants' own expert, Dr. Hood, was unwilling to make such an affirmative statement in his report. And during his deposition, Dr. Hood admitted that the plaintiffs' illustrative plans are actually more compact than several of the current

North Dakota Legislative Districts, more compact than districts found by the Supreme Court to be reasonably compact, and more compact than other districts he, himself, found to be reasonably compact in other cases.

For the second *Gingles* precondition, Dr. Collingwood will also establish the political cohesiveness of the Native American voters in and around the Turtle Mountain and Spirit Lake Reservations. And as I mentioned a moment ago, the defendants' expert concurs with Dr. Collingwood's conclusions on this precondition.

Regarding the third *Gingles* precondition, Dr. Collingwood will testify to the analysis in his expert report concluding that the third *Gingles* precondition is satisfied in this case; though, again, the 2022 election results were abundantly clear on this point. The candidates who were strongly supported by Native American voters lost in Senate District 9 and House Subdistrict 9B due to White bloc voting. And the case law tells us that the 2022 elections are by far the most probative elections for this Court to examine for this case.

Not only were the 2022 elections the most recent, but they were the only truly endogenous elections because they were the only elections that have taken place in the districts in question as currently configured. Endogenous elections are those specifically involving the legislative seats in question

in the case. Endogenous elections and those elections occurring closest in time are the most probative to a value -- evaluate in a *Gingles* analysis.

Also, the probative value of elections are further increased if the election involved a Native American candidate, which was the case in the '22 election for Senate District 9. In his deposition, defendant's expert report acknowledged this and admitted that his report failed to properly account for these elections and to assign them enhanced probative value.

Defendant's expert, Dr. Hood, also contends that the current district configuration allows the Native American-preferred candidate to usually win Senate District 9 in contradiction to what actually happened in the 2022 election. However, Dr. Hood's analysis improperly conflates and combines the outcomes of both House subdistricts and the full Senate district all together to reach his conclusion.

But case law confirms that districts like 9A, which have super majority-minority populations, should not be considered when assessing the third *Gingles* precondition whether White voters vote as a bloc to usually defeat the minority-preferred candidates. To do otherwise means that vote dilution in neighboring districts could statistically be covered up by packing Native voters into a single district or a subdistrict, like what was done here.

Not only that, but defendant here is objecting in

this case to his own briefing before Your Honor in the *Walen v. Burgum* case, because there defendant has taken a contradictory position to his position in this case. As Your Honor knows, that case involves a challenge to the subdistricts in Districts 4 and 9.

In his motion for summary judgment in that case, defendant admits that removing the subdistricts from District 9 would result in a Voting Rights Act violation for the full district; yet, defendant argues here that the full District 9 complies with the Voting Rights Act. So if, as defendant argues in *Walen v. Burgum*, District 9 without subdistricts cannot stand on its own under VRA scrutiny, then neither can it be valid under the VRA in this case. And, of course, District 15 and Subdistrict 9B fall woefully short of compliance with the Voting Rights Act, almost never allowing the Native-preferred candidate to get elected.

Dr. Collingwood's report also shows consistently depressed turnout rates for Native American voters when compared to White voters. In the *Bone Shirt* case, the Eighth Circuit found that this turnout differential requires that Native American opportunity districts in that case be established with NVAPs of at least 65 percent.

Dr. Collingwood's report also describes special circumstances that were present in the outlier 2018 election, so both chairmen will also testify to the special circumstances

present in that 2018 election. But in short, an unprecedented amount of -- an unprecedented amount of national resources and attention were present based on unique political and legal circumstances generated in response to the legislature's voter ID law at that time.

This created a onetime inversion of the Native voter turnout compared to all other elections evaluated over the past decade, as you can see from this chart. These special circumstances diminished the 2018 -- 2018 election's probative value under the *Gingles* analysis so that it should be given diminished or no weight by this Court. A VRA-compliant district must provide Native American voters with an effective opportunity to elect district, not a once -- not a once-in-a-generation opportunity to elect.

Now, once the *Gingles*' preconditions are established, plaintiffs must show and will show that under the totality of the circumstances, the political process is not equally open to Native American voters. In 1982 the United States Senate adopted what is known as the Senate factors, which are listed here on this slide. These are -- these factors are to be used by Courts to look to evaluate under the totality of the circumstances analysis.

Plaintiffs' Senate factor expert, Dr. Daniel McCool, is an expert in Native American voting rights and has used qualitative methodology in his report to research whether the

legislature's redistricting plan dilutes the voting strength of members of Turtle Mountain and Spirit Lake and to evaluate whether the plan reduces their opportunity to elect candidates of their choice.

Dr. Weston McCool will testify in his separate expert report specifically regarding the fifth Senate factor, which looks at socioeconomic factors that hinder the ability of Native Americans to equally participate in the political process.

Drs. Daniel McCool and Weston McCool will provide more detail of their expert analysis and conclusions when they testify, showing that six of the eight factors are strongly present in this case, but I wanted to highlight just a few important pieces of information this morning, Your Honor.

First, Native Americans in North Dakota were not granted full suffrage until 1958, 34 years after the Indian Citizenship Act of 1924 and within the lifetime of many tribal members and their parents. According to Dr. Daniel McCool's report, Native Americans in North Dakota or those on their behalf have taken legal action at least nine times to protect their voting rights. For the seven actions that have concluded, the Native American plaintiffs have either won or successfully settled every case, with the two outstanding cases being the ones that are before Your Honor.

Dr. Daniel McCool also notes that this -- that it is

very rare to find Native Americans holding any kind of public office in the state even outside of the legislature despite comprising 5.9 percent of the voting-age population.

For the fifth Senate factor, Dr. Daniel McCool found that socioeconomic factors such as lack of income, education, healthcare, and internet access combined to form a barrier to political participation, and we provided one of the graphs from his report on this slide, Your Honor, showing the poverty rates in North Dakota.

In his separate report for the fifth Senate factor, Dr. Weston McCool found systemic and statistically significant socioeconomic disparities between Native Americans and their White neighbors in the three counties of interest in this case, and he concluded that the systemic disparities hinder the ability of tribal members to participate effectively in the North Dakota political process.

Dr. Daniel McCool's comprehensive analysis revealed an enormous body of evidence indicating that the Senate factors have characterized the relationship between Native Americans and the State of North Dakota for an extended period of time.

Dr. Daniel McCool finds that the Redistricting Plan -- the legislature's new Redistricting Plan exacerbates problems with Native and Angelo relationships and is a tenuous policy that makes it more difficult for Native Americans to elect candidates of their choice.

It is important to note that the Senate made clear in its Senate factors report that there is no requirement that any particular -- any particular number of factors be proved or that a majority of them point one way or another. It is truly a totality-of-the-circumstances test that must be evaluated on a case-by-case basis. We believe that the testimony of the experts will be overwhelming to satisfy this test.

And just briefly in conclusion, Your Honor, the plaintiffs respectfully come before this Court to simply ask that their votes not be diluted and ask that a new Redistricting Plan be ordered that complies with the Voting Rights Act. We look forward to proving our case. Thank you.

THE COURT: Thank you, Counsel.

Mr. Phillips.

MR. PHILLIPS: Your Honor, I'm going to start out talking this morning about the legislative process that happened in 2021. And you may think to yourself, what difference does it make, right? This is a Voting Rights Act case. It's a Section 2 case. We've got the *Gingles* factors. We've got the totality-of-the-circumstances test. What difference does it make what happened at the legislature?

Your Honor, I think it does matter for a few reasons. In this case the Tribes and Native Americans appeared in our legislature and made certain requests, provided certain information to our government. And these are not sort of

random representatives of a minority group. We're talking about the plaintiffs in this case being sovereign nations, tribes that -- and their enrolled members, who interacted government to government with our state government, provided information and made requests that were considered.

Additionally, Your Honor, I point out that the responsiveness of the state in this case, the state's willingness to meet with Native Americans, meet with tribal representatives, hear their concerns and incorporated into the ultimate redistricting that was done as relevant to the totality-of-the-circumstances test in this case ultimately.

Now, there was an extensive legislative process. The entire legislative record is now admitted into evidence in this case, and I just want to point out a little bit of the structure here. We had two relevant legislative committees during this process, there was the Redistricting Committee and the Tribal and State Relations Committee.

The Redistricting Committee was required by law to develop a Redistricting Plan, draft the proposed legislation to submit to legislative management, and they did that in this case.

The Tribal and State Relations Committee, you know, the purpose of that committee is right in the name. It's a committee designed to maintain relations between the tribes and the state. The plaintiffs are going to complain in this case

that the Redistricting Committee didn't hold any meetings on tribal lands, but the Tribal and State Relations Committee did hold redistricting meetings on tribal lands, including on the reservations of the plaintiffs in this case.

The Tribal and State Relations Committee also reported back to the Redistricting Committee as part of the process. Additionally, Representative Boschee was on both committees, so they had some common membership. And, additionally, Native American and tribal representatives did testify in front of both committees both on and off of the reservations.

The Tribal and State Relations Committee held three meetings on reservations. As you can see there, those are including the plaintiffs in this case. Tribal representatives did appear at those, and we'll be going through that during the trial. The Redistricting Committee had even more meetings in Bismarck and Fargo. Again, tribal representatives appeared and gave testimony at these meetings.

And what did they ask for? You know, the testimony in front of the legislature and in front of these committees really consistently asked for three things: Comply with the Voting Rights Act by creating subdistricts around the reservations, consider the reservations individually to be communities of interest and keep them in tact, and listen to the tribes, hold public meetings on the reservations.

1 These are just some examples of the testimony that
2 was given in front of the various committees specifically
3 asking for subdistricts. I won't linger on these too long;
4 this one asking for subdistricts as well.
5 In addition to asking for subdistricts, the tribal
6 representatives asked for the reservations to be treated as
7 communities of interest, specifically that the Turtle Mountain
8 Reservation be considered its own community of interest and
9 that the Spirit Lake Reservation be considered its own
10 community of interest.
11 And so ultimately what did the Tribes ask for in
12 front of the legislature? Well, Spirit Lake asked for the
13 creation of a subdistrict even though the population on the
14 reservation and the Native American population in that area
15 around there is not high enough to create subdistricts. Now,
16 in the testimony the request was that the state reject the
17 census data on that and go with other data in terms of the
18 population of Native Americans.
19 Turtle Mountain is going to claim in this case that
20 they didn't ask for subdistricts at all. There were -- there
21 was a meeting held on the Turtle Mountain Reservation. It was
22 a joint meeting of the state tribal -- the Tribal and State
23 Relations Committee and the Turtle Mountain Tribal Council.
24 They both had a joint public meeting there on that reservation.
25 The testimony was consistently asking for the creation of a

subdistrict. This is not something that tribal leaders rejected or indicated they disagreed with or otherwise told the state that this is not something that was wanted.

After all of these meetings and taking all of this testimony, the Redistricting Committee, as it was required to do, put together a final report. They put together the final legislation and the proposed maps. On that same day Turtle Mountain and Spirit Lake Tribe for the first time sent a letter asking for what -- the remedy they were essentially seeking in this case instead, to do a single district that encompasses both reservations.

The claim in this case that there really wasn't enough time, you know, in this -- it's true that this census took place during COVID, and the data didn't come out from the U.S. Government until later than usual. It's true everyone was operating on shortened timelines.

But in this case the census data was released in its Legacy format on August 12, 2021. It was released in the user-friendly format on September 16th. I'll note that the Three Affiliated Tribes did request a map with subdistricts on September 23, not long after the user-friendly format came out. The plaintiffs in this case didn't. They left the testimony as it was, which was requesting the subdistricts.

Additionally, Chairman Azure did testify in front of the Redistricting Committee as to the -- when it was pointed

out to him that this request was made quite late, you know, admitted that the reason it was late was because the tribes -- the two tribes, it took them some time to get together and actually work out what they wanted to request from the state. It wasn't a delay because of the census. It wasn't a delay because of anything the state did in terms of scheduling meetings.

Outside of the legislative process, Your Honor, this trial will also involve an analysis of the districts at issue. This is the map that was passed by the state. This is the one that shows the subdistricts in District 9 in that upper right-hand corner of the map.

The solution in District 9 that was implemented by the state was very similar to the solution that was implemented in District 4 on the western side of the state, subdistricts around the reservation where there was a sufficient population to guarantee Native Americans to be able to elect at least one candidate of their choice. Now, unlike District 4, in addition, it's our position -- and Dr. Hood will testify about the likelihood of electing additional candidates in the district at-large. The state implemented a similar proposal and solution in District 9 because that was what was requested.

These are the proposed maps submitted by the plaintiffs in this case, and so this is -- these maps or something very similar to these is what the plaintiffs are

asking this Court to order the state to do, unlike the maps that it drew.

Now, to analyze that, as the Court is well aware and as opposing counsel pointed out, there's some well-understood case law, and the Court is aware of it. It is the plaintiffs' burden to prove the *Gingles* factors. And as the Court is aware, those three factors are that the racial minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; number two, the minority group is politically cohesive, its members tend to vote similarly; and, three, the majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate. It's the plaintiffs' burden to prove these.

As to the *Gingles* 1 factor, the evidence is going to show that this prong is met as to the as-enacted District 9 with its subdistricts. Dr. Hood, the defendant's expert, is going to testify that this prong is not met in the as-enacted District 15, where the Native American population was too low to create subdistricts or otherwise account for the Native American population there.

Importantly, Your Honor, as Dr. Hood will testify, the as-enacted District 9 performed better than the proposed maps on traditional redistricting criteria. The plaintiffs are going to argue, Your Honor, that that's an improper methodology. Their argument is going to be that in the *Gingles*

1 analysis, you don't do a comparison of the as-enacted with
the proposed.
I would point the Court's attention to the very
recent decision of the U.S. Supreme Court in *Allen versus Milligan*, where the U.S. Supreme Court talked with approval
about the District Court's specific comparison of the
as-enacted maps with the proposed maps in its *Gingles*'
analysis. And so we stand by the position, and our expert will
testify, that that is a proper analysis that needs to be done
in a *Gingles* 1 situation.
Gingles 2 is the next element. Now, there is -- we
fully concede there's racially polarized voting in Districts 9
and 15 at-large, but we do put the plaintiffs to their burden
of proof here when it comes to the subdistricts in 9A and 9B.
The evidence will establish that there's insufficient data to
conduct a proper analysis with ecological inference that
experts use to determine racially polarized voting specifically
in the Subdistricts 9A and 9B.
As to *Gingles* 3, the evidence will show that this is
not met in the as-enacted District 9. The Native American
candidate of choice wins 60 percent of the time in the
functional analysis of the elections considered by the
plaintiffs' own expert.
The plaintiffs are going to argue that some elections
analyzed by the plaintiffs' expert should be given more weight

than others. We'll be addressing this in the testimony, obviously. The plaintiffs are selectively applying less weight to elections that happen to have higher Native American turnout and other recent elections that they'll just count without justification.

Ultimately, Your Honor, the plaintiffs will not be able to meet their burden to establish the *Gingles* preconditions.

Next part of the test, if they do establish the *Gingles* preconditions, is the totality of the circumstances. I've listed here the Senate factors. I'm not going to go through them in any detail. We certainly put the plaintiffs to their burden of proof on establishing these factors, and some of them are clearly met, right?

I'm not going to argue, Your Honor, that there is no racial discrimination against Native Americans. I'm not going to argue that there's not a history of racial discrimination against Native Americans. I won't argue that there aren't real world current consequences to racial discrimination in history. These are very real things. I'm not going to deny them, of course.

But I would ask the Court to consider as part of its analysis of the totality of the circumstances the state's efforts to consult with the tribes during the redistricting specifically, and additionally, the state's efforts to assist

Native Americans in voting and in other ways that the testimony will support.

At the end of the day, Your Honor, what we have is an as-enacted map, and it's contrasted with a proposed map or a couple of proposed maps. This is one of them by the plaintiffs. The as-enacted map provides for Native Americans an opportunity to elect their candidates of choice, with 60 percent chance of electing candidates of choice. The proposed maps give Native Americans 91 to 93 percent chance of electing their candidate of choice for the three seats that are in that proposed map.

It's also -- the proposed map, you'll notice, is a barbell shape. You can see the population of Native Americans on the right side there, and we've got sort of a barbell shape that connects to remote populations of minorities. We will argue that what the plaintiffs are asking the state to do puts the state in the position where it could be a defendant in another lawsuit with a different plaintiff that's alleging the state is racially gerrymandering, that we have specifically drawn this barbell with race as the primary factor.

Ultimately, drawing a district that provides for Native Americans a 91 to 93 percent chance of electing all of their candidates of choice in that district goes far beyond what the Voting Rights Act requires, and it should be rejected by this Court. Ultimately, at the end of the day, the

plaintiffs won't meet their burden of proof. Thank you, Your Honor.

THE COURT: Thank you, Counsel.

Counsel, I realize that this may be a little bit early, but it will get us on track to break for lunch around noon. I want to make sure that my staff gets an appropriate break in the morning and that now would be an okay time. We can resume at 10:30 with plaintiffs' first witness, and that will take us until noon, so we will take that break right now, and we'll start up again at 10:30. We're in recess.

(Recess taken from 10:12 a.m. to 10:40 a.m.)

THE COURT: I'm desirous to address a couple housekeeping issues of the Court's own making or desire, and so I just want to advise counsel. First, with regards to the request made by the plaintiffs from Mr. Sells regarding a proffer of evidence that would be intended to be offered and the interplay with the recent Eighth Circuit opinion, the Court denied the request.

Now, if counsel wishes to -- I realize that we are in trial. If you wish to develop the record by submitting that request in writing via a motion, I would permit that, and it would require a response by the defendants as well. I don't know if the parties have considered that perhaps developing the record in that fashion might be mutually beneficial. I don't know.

But I'm just going to put it out there that, Mr. Sells, Mr. Purdon, if that's the desire of the plaintiffs, you know, get that in writing as quickly as you are able to in the heat of trial, and then I would certainly afford the defendants an opportunity to respond in writing.

Secondly, and please remain seated at counsel table, Mr. Phillips, but you had objections to several exhibits, and I think I had written them down appropriately. At the time that you would like to have those addressed in an omnibus fashion, I would ask that you restate the exhibit numbers and the objections, and that could probably be after lunch today. Would that be appropriate timing, Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor.

THE COURT: Okay. And Mr. Gaber --

MR. GABER: Yes.

THE COURT: -- would that be satisfactory to the defense?

MR. GABER: Yes, Your Honor.

THE COURT: Let's do that at the beginning of the session after lunch then, and we'll do that.

All right. Mr. Purdon, please proceed.

MR. PURDON: Thank you, Your Honor. Good morning.

THE COURT: Good morning.

MR. PURDON: The plaintiffs call Doug Yankton.

THE COURT: Mr. Yankton, if you would please approach

Lori, my courtroom deputy. She is going to administer an oath. Please come forth, sir. Thank you. And raise your right hand.

DOUGLAS YANKTON,

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

THE COURT: Thank you. Please be seated, Mr. Yankton. Please proceed.

MR. PURDON: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. PURDON:

Q. Good morning. Can you introduce yourself to Judge Welte, please?

A. Sure. Good morning, Your Honor. So I'm the former chairman of the Spirit Lake Tribe. My name is Doug Yankton, Senior. I've resided predominantly my entire life on the Spirit Lake Indian Reservation, with the exception of a couple years that I did attend junior and -- junior college in the late nineties, early -- or early eighties, late --

Q. Former Chairman Yankton, are you an enrolled member of the Spirit Lake Nation?

A. Yes, I am.

Q. And we're going to get into a little bit of your background. I was going to ask you where you grew up, where you've lived, but we've covered that. You did graduate from high school on the -- I believe on the Spirit Lake Reservation,

correct?

A. Yes.

Q. What high school?

A. Four Winds High School.

Q. And then you did get some college after that? Do I have that correct?

A. Yes, a couple years.

Q. Where at?

A. One year I attended United Tribes Technical College. One year I attended Bismarck Junior College, and then one year at the University of Mary.

Q. Bismarck Junior College, of course, is the Bismarck State -- Bismarck State College now. We've -- they've upgraded their nomenclature since you -- since you attended, correct?

A. Yes.

Q. Okay. And when you moved back to -- after your year at the University of Mary, you moved back to the reservation, essentially?

A. Yeah, I did.

Q. What year was that, about?

A. Roughly around '95, '96, I believe.

Q. Okay. And did you go to work for the tribe at that point?

A. Not immediately.

Q. Okay.

A. I kind of did some self-employment ventures, and then I

worked for the tribe, you know, about a year or two later after that.

Q. Okay. And what agency at the tribe were you working for?

A. I started off working for the tribe, itself, establishing some youth recreational programs.

Q. Okay.

A. And then I -- in the, oh, late '90s, early 2000s, I started working for our local Spirit Lake Housing Corporation that is a tribally-designated entity that operates predominantly all of the housing -- a majority of the housing on the Indian reservation.

Q. Okay. And did you eventually become the manager or the head of that agency?

A. Yeah, over the course of the years I kind of worked my way up to being the director of --

Q. Director --

A. -- the program.

Q. Okay. And there come a time where you ran for council?

A. After a stint at the housing, as the housing director and being employed there for about, oh, roughly 15 years, eight of those -- eight or nine of those years as housing director, and then I was approached by members of my community on throwing my name in the hat to be a tribal leader to represent my district, as they're called.

Q. And what district is that?

A. Crow Hill.
Q. And when were you elected to council from Crow Hill?
A. In 2015, I believe.
Q. Okay. And then at Spirit Lake, does the -- does the tribal council pick the vice chair of the tribe?
A. Yes.
Q. And were you elected vice chair of the tribe?
A. Yeah, I was nominated and elected as the vice chair.
Q. And how long did you serve in that position as the Crow -- as the vice chair?
A. As the vice chair and the council representative I served four years.
Q. Four years, so that's 2019?
A. Yes.
Q. And in 2019 you -- you were asked and you ran for tribal chair; is that correct?
A. Yeah.
Q. Did you win that race?
A. No.
Q. Okay. So you lost the race for tribal chair in 2019, but -- spoiler alert -- you became chair about a year later, right?
A. Roughly exactly a year, yes.
Q. And explain to the Court how you lose the election but you become a chair a year later.

A. So in tribal politics, our Constitution garners the members of our tribe certain authorities. One of those is we have a petition and a recall process.

So the former chair got petitioned, and then we held a hearing just like this, a formal hearing. And you're allowed to defend yourself as to why you think you should not be recalled. If you can't do that, there's first a vote by a recall, and once that happens, if you're recalled, then they have another process in the hearing where you -- you are nominated by your people. So I was fortunate enough to be nominated, and then -- then there's another vote taking place.

Q. Yeah, so you -- you were -- eventually became the chair through that process, and you served as chair for about three years; is that correct?

A. Yeah, three years exactly.

Q. And -- and that includes this period of the redistricting process that we've been talking about this morning, right?

A. Yes.

Q. And, now, there was a Spirit -- there was an election at Spirit Lake here just a month, six weeks ago. Did you seek reelection as chair?

A. No, I didn't.

Q. And why not?

A. It's just, you know, for me it was kind of personal. I -- just taking a different road, so to speak, more of a cultural

historical road for me.

Q. Is being a tribal chairperson, chairman, chairwoman, is that an easy job?

A. Not in particular. It just depends.

Q. Okay. Fair enough. Before we get into -- just a little bit about your family, I know that you have a number of children, but I want to -- I want to single one out. You have a son named Jayden, correct?

A. Yes.

Q. And he was a member of something pretty special in the last couple years. What was he a member of?

A. He was one of, I think, less than a handful of teams throughout the State of North Dakota to finish out their seasons as state Class B champions and also undefeated.

Q. And that was at Four Winds High School.

A. Yes.

Q. They were the Class B champs in 2022.

A. Yep.

Q. Undefeated season.

A. Yes.

Q. And he's currently -- I think he current -- he was -- I believe he spent his -- at least his first year at United Tribes, correct?

A. Yes, just completed.

Q. Okay.

THE COURT: I will -- I'm going to interject here. Counsel for both parties needs to understand that with regards to the recordation and reporting of the proceedings, we also have another court reporter working behind the scenes and tracking this as well, so it's important to speak with some deliberation. Thank you.

MR. PURDON: I will -- I apologize, and I'll do my best, Your Honor. I appreciate it. Thank you.

THE COURT: Thank you.

Q. (MR. PURDON CONTINUING) Former Chairman Yankton, can you tell the Court a little bit about the Spirit Lake Tribe?

A. Yeah, so the Spirit Lake Tribe is the northeast portion of the state of North Dakota. We're about, oh, an hour, hour-and-a-half from the Canadian border. We're compromised of about 405 square miles. We fluctuate in membership. Since I've been a tribal leader, you know, anywhere from 7,500 to 7,700 people. It just depends. People, you know, some move home for a short period of time, they leave again, so it kind of fluctuates when it comes to population.

Q. Of that 7,500 enrolled members, how many live in or around, you think, the Spirit Lake Nation Reservation?

A. I would have to say roughly -- like I said, it fluctuates. On the reservation at any given time there could be 4,500 members.

Q. And just for the record, Spirit Lake Tribe is a federally

recognized tribe?

A. Yes.

Q. How did the -- can you tell me a little bit -- just a little bit briefly about the history of how the various bands -- Dakota bands came to be on the Spirit Lake Reservation?

A. Oh, from -- you know, it probably goes way back even before the times of the oral stories that I was told or that I know about, but it started probably, you know, from the stories I heard, in 1862, Indian wars. I don't know how many people are familiar with that here today, but that's one of the things that I've kind of always prided myself in is knowing about some of the histories of my tribe specifically on where we came from and how we came from those areas, so we've been -- at one time we were bigger than what we are today.

Q. Yeah, and the '62 Indian wars -- 1862 Indian wars, were they settled by the -- by an 1867 treaty involving the Sisseton-Wahpeton Sioux Band?

A. That specific war, yes.

Q. Yeah, and is that the treaty that relocated the Sisseton-Wahpeton Dakota Bands from Minnesota to Spirit Lake?

A. It -- so you could say that it was a part of that process, but we roamed these lands --

Q. Sure.

A. -- for a number of years prior even to that. What

1 happened is it separated us, so now you had the
2 Sisseton-Wahpeton Oyate of South Dakota and North Dakota.
3 **Q.** Right.
4 **A.** And then you had -- some of those people when we were one
5 ended up here --
6 **Q.** Yeah.
7 **A.** -- in Spirit Lake, so, yeah.
8 **Q.** All right. I want to turn briefly here to the 2021
9 redistricting process. We heard a little bit about that this
10 morning. I just want to be clear here for the Court. What was
11 the final recommendation that you made as the chair -- the
12 chairman of the Spirit Lake Nation to the North Dakota
13 legislature on how your district should be created -- or should
14 be enacted, your final recommendation?
15 **A.** I think, you know, the final recommendation that -- when I
16 gave testimony was a remedy, so to speak, that would help the
17 two tribes to support and possibly get Native representation at
18 the legislative level, and that was the map that you saw
19 earlier.
20 **Q.** The combined district with Turtle Mountain --
21 **A.** Yes.
22 **Q.** -- and Spirit Lake together.
23 **A.** Yes.
24 **Q.** That was your final recommendation as the chairman of
25 Spirit Lake?

A. Yes.
Q. And you certainly communicated that to the state government, letter to the governor, correct?
A. Yes.
Q. And you just testified you went to Bismarck and testified at one of the final hearings here advocating for that?
A. Yes.
Q. Okay. As the crow flies, how far apart are Spirit -- the Spirit Lake Reservation and the Turtle Mountain Band of Chippewa Indian Reservation?
A. I would say it's maybe 50, 60 miles from boundary to boundary.
Q. So, Chairman, we've talked about this a little bit in preparation for today. There was a time when the Chippewa people, the Ojibwa people who now -- whose descendants now live on the Turtle Mountain Reservation and the Dakota people, some of whose decedents now are -- include you and other people who live on the Spirit Lake Nation, was there a time where they were antagonistic and -- I don't know that I would use the word "enemies," but after the same sort of scarce resources?
A. Yes.
Q. In the 1800s?
A. Well, probably even into the early 1900s, you know.
Q. Yeah, was there -- is there a story, though, that you've heard growing up about how some of the tensions between those

two groups of people, the Chippewa, Ojibwa, and the Dakota, how some of that tension came to pass?

A. Yeah.

Q. Why don't you -- why don't you tell the Court a little bit about that story?

A. I can, and I'll kind of shorten it up a little.

Q. That'd be great.

A. I'll just -- I don't want to take up too much of your time. I know we all have more important things, but so, you know, through oral stories -- so for me, a lot of the stories came from females, grandmas and great-grandmas, because I had no grandpas. They both were deceased before I was born; specifically, my grandma -- or my grandpa on my dad's side passed away in World War II. He got killed in action, so the stories were a lot shared to me by my grandma, his wife.

And so history goes, so there was an old game that was started, and this game evolved through a hunting trip. You had the Chippewas, Senator Marcellais and his people, his ancestors, and my ancestors up in the hills towards Walhalla. They call it Pembina, the Pembina hills up in that area.

And there was an elk that got shot, and there was -- the two tribes, rather than fighting and killing over this elk, they created a game which was called "the moccasin game," and so there's rules to it, but I won't get into the rules. But so they played this game, and that's how they resolved as to who

got to take the game that was killed, rather than killing over the kill.

Q. Yeah. We talked about this a little bit. You said that the elk had a Chippewa arrow in it and a Dakota arrow in it, and both sides knew which one was their arrow. That's part of the story?

A. Yes. And so to sum up the story, the Dakotas, Chairman Marcellais, won the game, and we got the elk.

Q. And this -- this historical story that you've heard through the oral tradition, put a date on it. Late 1800's?

A. Yeah.

Q. Okay. Now, the reason, obviously, we go through that story is -- and just to center us here, one of the issue's the Court is going to address is whether the voters who live at the Turtle Mountain Reservation and the voters who live at the Spirit Lake Reservation, whether or not they are politically cohesive. You understand that's one of the issues in this trial, right, Former Chairman?

A. Yes.

Q. Yeah, and you understand when I say "politically cohesive," what that can mean is that they tend to vote similarly, right? You understand that?

A. Yes.

Q. Okay. So do you think -- with that definition in mind, do you think that the voters who live on the Turtle Mountain

Reservation and the voters who live on the Spirit Lake Reservation, that they are, in fact, politically cohesive?

A. Yes, I believe they are.

Q. And why do you think that?

A. You know, I believe that because -- I don't know how many people here today have ever been in Indian country or in reservation settings on a day-to-day basis. A lot of our issues are similar, similar --

Q. When you say "our issues," do you mean Turtle Mountain and Spirit Lake?

A. Yes.

Q. Go ahead.

A. Yes, they're similar in the realm of, you know, the societies we live in today.

Q. Okay.

A. They're not much different. Even as -- the two tribes over the course of the last 15, 20 years have became even closer. We have a lot of intertribal marriages. We have what we call our children. We call them Chippe-Siouxs, meaning they're half Dakotas and half Chippewa. And I, myself, have nieces and nephews of that caliber.

So we come a long ways over the last few years, especially even dating back to the 1800s, in supporting one another as tribes and a lot of even today's modern-day political views.

Q. Yeah, so do you -- would you say that these voters we're talking about, those who live at Turtle Mountain, those who live at Spirit Lake -- can you give some examples of some of the shared values that those voters might have?

A. Yeah. You know, we -- for example, one of the reasons why we're here today. We support one another when we know something is not right that is going to hinder our people from having a fair shake at, you know, anything when it comes to the political realm or even federally, that we try to support one another.

Q. That cultural value of standing up for other Natives.

A. Exactly.

Q. How about -- can you talk a little bit about perhaps the shared experiences of voters at Turtle Mountain and Spirit Lake versus maybe the shared experiences of North Dakotans who live in non-reservation rural areas?

A. I think, you know, for like Spirit Lake, for example, we have -- not that I'm aware of, historically had any representation at the legislative level come from Spirit Lake, senators, representatives. The only one lately that comes to mind is we had -- we have a county commissioner. But at the legislative level, we -- we are pretty close with a lot of Turtle Mountain --

Q. Right.

A. -- people who get represented -- get elected into state

legislation, so we reach out to them for, you know --

Q. So let me -- if I can just parse that a little bit, the experience at Turtle Mountain -- or at Spirit Lake, the two together, is -- in terms of interacting with the legislature, are you saying it might be different than a voter who lives in Larimore, Cavalier, Cavalier County? Which -- let me take a step back. Would the experience of a Spirit Lake voter be more similar to a Turtle Mountain voter or to a voter from Cavalier?

A. I think it would be more similar to Turtle Mountain because we have a lot of the same common interests when it comes to rural reservation living versus surrounding small-town community living.

Q. And what are some of those issues of common needs from the North Dakota legislature that would be common for Turtle Mountain and Spirit Lake?

A. I think with the exception of public education implementation funding, state funding, you know, I think -- you know, historically we've never had things on the reservation that would be what we were eligible for, that a small town within the -- for example, Benson County is a big county. It encompasses predominantly all of our reservation, but yet our people would have to travel to these small surrounding towns for public services.

Q. To access state public services?

A. State public services rather than locally.

Q. Do the tribes -- I think that's fine. You think tribal members at Turtle Mountain -- excuse me, not tribal members. Do you think voters on the Turtle Mountain Reservation and voters at Spirit Lake -- do you have an opinion on whether or not generally they might be similar socioeconomic status?

A. Yes.

Q. What do you think?

A. You know, it's just that as Native American people, irregardless of what nations we come from, we tend to always support one another more so than outside of the cultural aspects of what we believe.

Q. Do Turtle Mountain -- the sovereign government of Turtle Mountain and the government of Spirit Lake, do they partner together any political or policy organizations?

A. Yeah, we -- you know, Chairman Azure and I, we served together on different boards. Specifically, you know, we represent each of our tribes on not only national level, but local levels here. One example would be the United Tribes' Board of Directors, the United -- the United Tribes of North Dakota Chairman's Association, and one of the newest charters is the United Tribes Gaming Association.

Q. And I want to walk through each of those because not everyone is familiar with that. The first board -- so there are three organizations, United Tribes Technical College, United Tribes -- United Tribes of North Dakota Chairman's

Association, and then a United Tribes Gaming Organization, three --

A. Yes.

Q. -- organizations. And the board of directors, are they identical for the three?

A. Yes.

Q. And it's the chairman -- chairman or chairwoman of the tribe and another delegate?

A. Yes.

Q. So five tribes, ten board members.

A. Yes.

Q. Okay. And you guys -- you all meet monthly?

A. The first Friday of every month.

Q. Right. So 12 times a year, five -- five chair-people and other delegates together in Bismarck usually at the college, I think, right?

A. Yes.

Q. Okay. So the first organization is the board of the United Tribes Technical College. What does that board do?

A. That board -- pretty much the board was established to implement and regulate policy and procedures.

Q. At the college.

A. For the college, yes.

Q. Those tribes actually chartered that college. When was that?

A. Shoot. 1969, '70, maybe.
Q. So there's been this long-running board of the college, but -- now talk a little bit about the second one, the United Tribes of North Dakota Chairman's Association. It also meets monthly, same meeting?
A. Yep.
Q. And then tell -- what does that organization do?
A. That one there, we share a lot of different types of issues that we may be encountering at our -- at our own respective nations, or we bring to the attention as to what might affect each of us that the state or the federal government might be doing.
Q. So among the things that organization does is you come together to discuss interests vis-à-vis the state government of North Dakota.
A. Yes.
Q. And then the United Tribes, the gaming organization, that's relatively newer. What does that organization do?
A. That organization -- so we, as the five tribes, delegate a subcommittee, so to speak, of regulators that work for us internally as tribes in our gaming industry. And they, in a sense, stay on top of what may or may not affect us as tribal gaming operations.
Q. That -- what may or may not affect you in terms of state action?

A. Yes.
Q. And -- and that's been -- over the last five or six years, have there been an increasing amount of gaming issues between the tribes and the state?
A. Yes, I believe so.
Q. And not -- not to get too deep into it, but what's the -- what's the new thing that is causing problems in this area?
A. The latest thing I think that's been causing issues for the tribes that have gaming operations is the legalization of e-tab machines.
Q. The e-pull tab machines that we see in the bars.
A. Yes.
Q. And that's impacted tribal gaming operations.
A. Immensely.
Q. Yeah, and so Turtle Mountain and Spirit Lake, along with the other tribes, come together to discuss how to -- how to interact with the state on these issues.
A. Yeah, and we've given even testimony on those matters.
Q. Now let's talk a little bit about the North Dakota tribal college system. The tribes have colleges?
A. We have a -- each tribe, as well as Bismarck -- there are four tribal colleges, and then there is the United Tribes college, yes.
Q. And has there been an increase in state funding to the tribal colleges over the last -- recently?

A. Happily, yes.
Q. And how did that come about, that increased funding from the legislature?
A. So there again, we leave that up to our -- we each appoint or we hire a college board -- or college president to oversee the operations, and they have the blessings to negotiate with the state people.
Q. So in all these organizations, it's not Spirit Lake pushing gaming issues to the state government and then another tribe. You come together in these organizations to do that.
A. Yes.
Q. Okay. Can you talk just briefly about the North Dakota Native Tourism -- the Native Tourism Alliance?
A. So there again, you know -- I could talk on this for hours, but --
Q. Well, we don't do that.
A. -- I'll try to keep it as brief as possible. So a few years back, when I was a tribal leader -- we all know that in North Dakota the five tribes are predominantly tourist attraction sites who get little or no state tourism dollars at all, so we said, "Hey, we need to do something about this," and we created a board of the five tribes. We each delegate representatives to represent us, and they too have the freedom to speak freely with the state tourism department and legislators to include us.

Q. Yep. Okay. And just lastly on these shared operations, shared initiatives, is there a move afoot these days to -- for increased collaboration between Turtle Mountain and Spirit Lake on a potential drug task force?

A. Yeah. You know, so just to share a little insight on that, we all know, you know, there's a huge drug problem not only in Indian country, but -- on the reservation, but in North Dakota in general. We wanted to work together to collaborate, to share resources because we know how the drug trade works. It's a system of targeting Indian country, the five reservations, you know, so --

Q. You said "we wanted to collaborate." The government at Turtle Mountain and the government at Spirit Lake?

A. Yes.

Q. And you're collaborating to support each other, maybe cross-deputization agreements, those sorts of things?

A. It wouldn't be much different than what we did with the state through memorandums of agreements.

Q. Okay. Thank you. Pivoting a little bit, Former Chairman Yankton, can you tell me how the Spirit Lake Nation and the Turtle Mountain Band of Chippewa Indian governments, how they interact with the North Dakota executive branch and governor?

A. Yeah. So with the governor specifically there's what's called a department -- it's called the Indian Affairs commissioner -- director. And then also the governor had

established an Indian Affairs Commissioner's Board, which it's comprised of the governor, himself, the five chairmen and, I believe, two, maybe three appointed tribal people from -- for example, like Dr. McDonald is on there representing the educational level.

Q. So that Indian Affairs Commission board, how often does it meet?

A. Quarterly.

Q. So once a quarter the tribal chairmen and women and some of these other appointees come in and you meet with the governor, correct?

A. Yes.

Q. The governor doesn't -- doesn't schedule quarterly meetings with each individual tribe at different locations at different times, correct?

A. Not on a schedule.

Q. No. I mean, you can -- I understand you can request a meeting with the governor, but the formal way for regular meetings are the executive branch and all the tribes together, correct?

A. Yep.

Q. And then in terms -- so we were talking about the executive branch. In terms of the legislative branch of government in North Dakota, is there a committee of the legislature that is set up to meet with the tribes?

A. Yes.
Q. And what's that called?
A. So there was a -- and this was introduced -- it almost went away, and Senator Marcellais reintroduced it, so they kept it active. There again, we, in the past, as tribal leaders would go to Bismarck. But more recently with the new chair of the committee, Wardner, Senator Wardner started actually bringing it to the reservation.
Q. And that's the Tribal and State Relations Committee?
A. Yes.
Q. How often does that regularly meet?
A. I believe that was quarterly also.
Q. Okay. Does that Tribal-State Relations Committee, when it meets, it meets with all of the tribal chair-people, correct?
A. Yes, and one tribe would host.
Q. One tribe would host, but it's -- these are not individual meetings, tribe by tribe. It's a general meeting on a quarterly basis.
A. No, that -- this one here was just like if they came to Spirit Lake, it would be just Spirit Lake.
Q. Okay. Do other tribal leaders sometimes attend those meetings?
A. Oh, yeah. We've -- you know, as the five tribal chairmans, we have been very receptive of inviting tribal leaders to come to, you know, our meetings and participate.

Q. Okay. Pivoting -- pivoting again, Former Chairman, let me ask you this: Do Spirit Lake -- the Spirit Lake Nation and the Turtle Mountain Band ever join together to pursue similar policy objectives, working on bills at the -- at the North Dakota legislature?

A. Yes.

Q. What sort of issues do you work together on with the other tribes with regards to the legislature?

A. You know, one that comes to mind, you know, that's been probably the most problematic is gaming.

Q. The gaming?

A. Yeah.

Q. And we talked a little bit about the e-tabs?

A. Yeah.

Q. So there's been -- tribes have come together to interact with the legislature over the past couple sessions on this issue?

A. Mm-hmm.

Q. Is that "yes," for the record?

A. Yes.

Q. Other issues? Gaming is one. Any other issues?

A. I guess one -- you know, the most prominent ones here most recently is the one why we're here today.

Q. Redistricting voting rights?

A. I mean, so, Your Honor, for me, I'm a -- I'm a pretty

simple person. I like to try to get along with everybody, and this is something I've always told the congressional delegates, the governor.

I'm not a big stickler on political affiliations. I don't -- I don't judge my constituents by what their affiliation is. I get to know them, and then I feel them out, and I can tell if a person is genuinely a good person. And for me as being a tribal leader, they know how I am and who I am, but I will not let political organizations, legislations run all over me or my people.

Q. Right.

A. So this is why we took the stances that we took and why I'm here today.

Q. Yeah. So we've got -- we talked about gaming. We talked about voting rights, legislative redistricting, other issues. Is taxation sometimes an issue between --

A. Taxation, yes. You know, like I said, so all of these things that we're talking about, we're trying to come up with remedies to work together rather than --

Q. You're trying to come up to remedies to work together with the state.

A. Yes.

Q. Right, but when the tribes do that, do the tribes tend to come together to -- to work these out with the state?

A. Yes, because in a sense, even like what we're talking

about today, some things are good for some tribes and some things are not good for some tribes. Same thing with taxation. Some things will be good for a tribe, and they get to negotiate their own cuts, and that might not be good for our tribe. It just depends.

Q. Right. What about -- I want to talk about one area where there's some additional common interest. I think -- well, actually, I think we covered the -- we covered the legislative funding for tribal colleges. We covered that, so -- but just to put a point on it, tribes also have common interest with the legislature when it comes to the funding that -- the state funding of the tribal colleges --

A. Yes.

Q. -- another area?

Okay. Spirit Lake Nation and Turtle Mountain -- voters who live at Spirit Lake Nation and Turtle Mountain ever similarly affected by legislation that's considered or passed at the North Dakota state legislature?

A. Yes.

Q. In this last session were there a couple of examples of bills like that? I'm thinking about the state ICWA bill.

A. Yeah. You know, so luckily for us, you know, we had a representative who was able to introduce -- that legislation passed for us that, you know, will possibly work for the tribes of North Dakota.

Q. So take a step back. The federal ICWA law -- there's a Supreme -- Supreme Court case pending right now that could impact the federal ICWA law.

A. Yes.

Q. And so in this last session there was an effort to pay -- to pass a backstop, a state ICWA law; is that right?

A. Yes.

Q. And you mentioned a representative who assisted with -- oh, let me ask it this way. Did Turtle Mountain and Spirit Lake and the other tribes, did they work together to support that bill?

A. Yes, we did.

Q. And you talked about a representative who helped on that. Who was that?

A. Representative Davis from Turtle Mountain.

Q. Jayme Davis?

A. District 9.

Q. District 9, Jayme Davis, she's an enrolled member at Turtle Mountain?

A. Yes.

Q. And she'd be --

THE COURT: Mr. Purdon, I'm going to interrupt, and I'm just going to draw attention for -- both for the witness and for you, Mr. Yankton, you had -- a couple of times you had mentioned that you weren't going to take all day on something,

and, Mr. Purdon, your robust exchange sometimes makes it hard to track in a transcript because the witness maybe isn't finishing answers. I just want to let all parties know that you have as much time as you need. Mr. Yankton, take your time. Mr. Purdon, take your time. There's no need to sacrifice completeness for speed. Just slow down, and we'll be good.

MR. PURDON: I appreciate that. I'll tell you that I thought that when you started that, it was going to go the other way, tell me to hurry up, but I -- I deeply appreciate that, Your Honor.

Q. (MR. PURDON CONTINUING) Representative Davis, I think I asked, she's an enrolled member at Turtle Mountain, correct?

A. Yes.

Q. And she is the -- she's the representative, I think, out of 9A, District 9A, correct?

A. Yes.

Q. And you went -- Spirit Lake went to her for assistance on the state ICWA law?

A. So this was a matter that was brought to the -- one of the monthly meetings with all five tribes in Bismarck. You know, once we started getting information regarding the federal case that's out there, we started reaching out to the other tribes, and then we started -- each tribe started reaching out to legal counsel on how we could remedy and work with the state.

Q. And so the tribes came together and approached -- worked with Representative Davis.

A. Yes.

Q. Did you work with any of the elected representatives from District 15 on this?

A. No.

Q. Was there another bill, the sportsmanship bill? Are you familiar with that?

A. Yeah. There was an incident that happened here in the state of North Dakota that -- kind of a racial incident, and I actually watched the first one that came out on -- I can't remember what it's called -- BEK TV, or whatever. It's a sports channel for North Dakota. And the very next day I get a call from one of the parents of the children that was being racially targeted, and I also put together some response to the schools, the town of Jamestown, and gave a -- gave out press releases to media.

Q. There was -- as a result of that there was a study resolution that was introduced in the North Dakota legislature, right?

A. Yes.

Q. Asking the North Dakota High School Activities Association to potentially develop policies around sportsmanship; is that right?

A. Yes.

Q. And -- and who did the tribes work with on that piece of legislation?

A. There again, we reached out to Ms. Davis out of Turtle Mountain.

Q. And she doesn't represent Spirit Lake, correct?

A. No.

Q. Okay. So we've talked about bills in last session. Have the two tribes, Spirit Lake and Turtle Mountain, come together in judicial and litigation arenas on similar policies? Setting aside this case today, are there other examples of the tribes working together in litigation, judicial issues?

A. Yeah. You know, one that comes out is we filed amicus briefs, you know, with -- both supported one another, along with the other tribes, when it came to, you know, what's a big problem in, you know, each reservation, is the opioid lawsuit.

Q. So let's just break those out so the Judge understands. The -- we talked earlier about this case pending at the Supreme Court on federal ICWA, right?

A. Yes.

Q. And there was an amicus brief filed by tribes in that case?

A. Yes.

Q. Turtle Mountain and Spirit Lake joined together on that?

A. Yes.

Q. A number of other tribes too, but those two?

A. Yes.
Q. And then Spirit Lake and -- and Turtle Mountain have both filed cases against opioid manufacturers and distributors?
A. Yes.
Q. Okay. There's also a very specific issue, I think, within the exterior boundaries of Spirit Lake concerning the Grand [sic] Island State Park where the two tribes have come together to interact with the state. Can you just give the Court some background on the issue at Grand Island? It's kind of interesting.
A. Yeah, so Grahams Island Park --
Q. And maybe I'm saying it wrong. Is it "Graham"?
A. Graham Island.
Q. Graham Island.
A. Yeah, Graham Island. So Graham Island is a state park just north of our hub. Our hub is called Fort Totten.
Q. Right.
A. So as the crows fly you have Fort Totten, then you have the big lake, and then Grahams Island is just there. It's there, and so how I kind of know some of this is my mother, who just retired from our tribal realty department, was a realtor, so I used to ask a lot of land questions, land questions in regards to my tribe. And so Grahams Island State Park, from my understanding, is still part -- parts of it is still owned by heirship. Heirship means that there's a number of people have

a interest in the land.

Q. Heirship, h-e-i-r. Heirship?

A. Yep --

Q. And some of those --

A. -- heirship.

Q. And some of those people are enrolled at Turtle Mountain, right?

A. Yes.

Q. So the point is that within the exterior boundaries of Spirit Lake Nation, there are some parcels of land near Grahams Park that are actually owned, allotted to Turtle Mountain enrolled members?

A. Yes.

Q. Okay. And there was -- there was some issue at the park with some excavation, and they came to you, right?

A. Yeah. They reached out to both tribes, actually, through our THPO programs, tribal preservation office programs, which we now have. It's similar to the state. They have state historic preservation office. We just have tribal now.

And so there was some possible excavating. There might've been not necessarily burial mounds, but there might've been rock formations or something that we don't take lightly, you know, because it's -- it's part of our history. You know, so we collaborated together between Chairman Azure, myself and our THPO directors, and we had representatives attend and meet

with the state park people.

Q. If state park people have issues at this park, you have this sort of odd situation where there's Turtle Mountain allotted land on the Spirit Lake Reservation, and the solution was, the two tribes to come together, interact with the state?

A. Yes.

Q. I believe you were there. Both -- both historic preservation officers were there?

A. Yes.

Q. All right. I'm going to pivot. I'm going to pull up an exhibit. I want to show you on the screen, Former Chairman Yankton, what's previously been marked and admitted Plaintiffs' Exhibit 155. I think it's there in front of you as well, Chairman Yankton, on the stand.

A. Yep.

Q. Yes. So do you recognize that letter?

A. Yes.

Q. That's a letter you wrote?

A. Yes.

Q. And what was the purpose of sending this letter out? What were you looking to accomplish?

A. So what we wanted, and we were even willing to host, is to invite the Redistricting Committee to Indian country.

Q. To hold a hearing on the reservation?

A. On the reservation.

Q. And this is dated when?
A. May 20, 2021.
Q. So early in the redistricting process.
A. Yes.
Q. Okay. Was this request for an on-reservation hearing of the Redistricting Committee, was that honored by the state?
A. No, it wasn't.
Q. Did you -- did you appear or -- or, excuse me. Scratch that. Did you appear and offer testimony at redistricting -- did you appear and/or offer written testimony at Redistricting Committee hearings.
A. Yes.
Q. And in that -- the beginning of your interaction on redistricting, the first part, what was the Spirit Lake Nation asking for in the early stages of redistricting?
A. In the early stages I believe we were asking for subdistricts.
Q. A subdistrict at District 15.
A. Yes.
Q. And that would be a subdistrict that put the reservation and the -- and Native voters into a subdistrict.
A. Yes. That's correct.
Q. Okay. Were you asked during the redistricting process -- in the final plan that was implemented, did Spirit Lake receive a subdistrict?

A. No, we didn't.
Q. Were you asked in the redistricting process if the Spirit Lake Nation -- you, as the chairman, asked if the Spirit Lake Nation preferred to be districted with the City of Devils Lake or separate from the City of Devils Lake? Were you asked that?
A. I don't believe we were asked that. And even if they did, I would've probably said "no." You know, I don't think I would agree to being --
Q. So I'm going to -- I'm going to pull up some records here, and we'll talk about this, but let's just take a step back, and maybe we'll come back to it. It was not the desire of the Spirit Lake Nation to be districted with the City of Devils Lake, correct?
A. No. No.
Q. That's correct? And if asked, that's what you would've said?
A. Yeah.
Q. If I told you that in the record there's a -- there's a clip of you being asked this and saying "no," would you disagree with that? We can find it.
A. No, I wouldn't disagree, but I'm pretty sure it's no.
Q. Okay.
A. I would not want to be in that same --
Q. Right. If asked, you would've said no.
A. Yeah.

Q. Okay. So in late September we got the draft plan from the Redistricting Committee. You recall that.

A. Yes.

Q. And what did that plan do for Spirit Lake? Did it give you a subdistrict?

A. No.

Q. Okay. It was a single-member state House district with a senator and two representatives, correct?

A. Yes.

Q. And that's District 15?

A. 15, yes.

Q. And it includes the City of Spirit Lake -- excuse me. It includes the Spirit Lake Reservation and the City of Devils Lake?

A. Yes.

Q. Okay. I want to direct your attention here. This looks like minutes -- Defendant's Exhibit 344, this is the minutes of a Tribal Relations Committee hearing. Do you see this language, Chairman Yankton?

A. Yeah.

Q. It says that you told the committee that you noted that the tribe would prefer to be in a separate legislative district from Devils Lake, correct?

A. Yes.

MR. PURDON: Okay. I've been handed another note,

just for the record.

Q. (MR. PURDON CONTINUING) Doug, what does -- what does "ICWA" stand for?

A. ICWA is the Indian Child Welfare Act.

Q. Thank you. All right. Let's -- let's summarize here, and then we'll move on. You wrote a letter to the state asking for a redistricting hearing of their committee on the reservation, correct?

A. Yes.

Q. Was that request honored?

A. No, it wasn't.

Q. You asked the Legislative Redistricting Committee for a subdistrict that would include the Spirit Lake Reservation, correct?

A. Yes.

Q. In their original plan that was released in late September, did you get a subdistrict?

A. No, we didn't.

Q. And you had asked not to be districted with the City of Devils Lake in testimony, correct?

A. Correct.

Q. When the plan came out, did they honor that request?

A. No.

Q. So after seeing the draft plan that didn't do any of those things, what did you and -- did the Spirit Lake Nation and the

Turtle Mountain Band -- what did you do to figure out what you were going to do next?

A. So after reviewing the draft -- or the mapping and none of our requests were met -- and obviously we did not want to be in the same district as Devils Lake because we don't -- a number of our people live to the southern border towns of our reservation, so we -- Chairman Azure and I decided, you know, we need to reach out to legal counsel to see how we could --

Q. Yeah, and -- and during that period of time the draft plan came out like late September, so you reached out to legal counsel. Did you also then have the final census data available?

A. Yes.

Q. And did you eventually come upon a joint recommendation on how -- how you wanted to remedy the situation?

A. Yes.

Q. And what was that joint -- with Turtle Mountain, your joint recommendation to the state?

A. So our final -- our joint recommendation was, you know, if this was allowed, it would -- we would possibly have a better chance of electing somebody from each of our respective tribes, basically, you know, in sponsoring or supporting them.

Q. Right. Did your final recommendation -- if this was allowed, what was it that you were recommending?

A. To open up and have a bigger -- oh, what do you call it?

1 **Q.** The district would include both reservations?
2 **A.** Yeah, a district that would include both of us, and then
3 we would be able to vote for one another.
4 **Q.** Right, and you -- you and Chairman Azure -- I mean, this
5 wasn't a secret. You shared this with the state government,
6 correct?
7 **A.** Yes.
8 **Q.** You sent it in a letter to the governor and the
9 legislature, I think, on November 1, 2021?
10 **A.** Yeah, along with even, I think, some of the maps that
11 were --
12 **Q.** Yeah, some of the maps, right? And then you and Chairman
13 Azure actually both went to Bismarck and testified at the
14 Redistricting Committee, I think, on November 8, 2021, correct?
15 **A.** Yes.
16 **Q.** And you both in your testimony said, "We've seen your map.
17 This is what we would like to see"?
18 **A.** Yes.
19 **Q.** Is that what happened?
20 **A.** No.
21 **Q.** No. No. No. Is that what you testified?
22 **A.** Oh, testified, but it didn't happen.
23 **Q.** Right.
24 **A.** Yeah.
25 **Q.** So after they got your input saying we'd like to be

included in the same district, they finalized the plan at the state legislature, correct?

A. Yes.

Q. Did they include you -- put you both in the same district?

A. No.

Q. All right. Former Chairman, I'm going to pivot to another topic. In addition to this politically cohesive issue that we talked about, another issue the Court is going to have to address here is whether in North Dakota, the White voting bloc usually defeats the preferred candidate of the Native American voter. You understand that's one of the issues before the Court.

A. Yes.

Q. And this will include an examination of the turnout rates of Native American voters in North Dakota. You understand that?

A. Yes.

Q. Are you -- based on your experience here as a tribal leader and living in North Dakota, living on the reservation, are you familiar generally with Native American voter turnout percentages in North Dakota versus non-Native turnout?

A. Yeah. I mean --

Q. What's your understanding?

A. It's not very good. The percentages are very bleak, you know, probably less than 5 percent.

Q. So in your experience, Natives turn out at a lower rate --
A. Yes.
Q. -- than non-Natives in North Dakota.
A. Yes.
Q. Okay. Now, the 2018 election, though, was different, correct?
A. Yeah.
Q. And I'm going ask you some questions about the 2018 election. Is that okay?
A. Sure.
Q. Okay. So there was a big race on the ballot in 2018, correct?
A. Yes.
Q. And what race was that?
A. I believe that race pertained -- the two top candidates at that time was Senator Heitkamp and Senator Cramer.
Q. So it was -- it was a U.S. Senate election in 2018, very high profile, correct?
A. Yes.
Q. It was a race that was being watched nationally because of the balance of the Senate.
A. Yes.
Q. It's also true -- you're familiar with the fact that sometime in the past, that North Dakota legislature passed some new voter ID laws, right?

A. Yes.
Q. And did they put some new requirements on what had to be on an ID so someone could vote?
A. Yes.
Q. What did they add?
A. They wanted to add that all people who were of age 18 that were to be eligible to vote now had to have a requirement on their -- whether it was a state ID, driver's license, tribal ID, physical addresses.
Q. A physical residential address.
A. Yes.
Q. Prior to that many people on the reservation have a PO Box on their tribal ID as an address?
A. You know, prior to that the people in Indian country, on reservations, they specifically -- what I remember -- only needed, even if it wasn't a photocopy of an ID, a paper document.
Q. Yeah. Sure. There was a way to -- there was a way to cure and all that, but, I mean -- I'm taking a step back. Do you agree that often in Indian country, on a tribal ID -- strike that. Do you agree that often at Spirit Lake, on a tribal ID prior to this people might have a PO Box instead of a residential address?
A. Yes.
Q. And then were there also issues with some people not being

able to get physical residential addresses generally?
A. Yes.
Q. Yeah, so there's this new law, this new requirement, and you recall that there were some court decisions so that that law -- the first time it went into effect was also the 2018 election, right?
A. Yes.
Q. Okay. And was this an issue on the reservation, this new law -- the first election with this new ID requirement, did that cause issues on the reservation?
A. Yes.
Q. What sort of issues?
A. A lot of people either didn't know or they didn't have physical addresses.
Q. You were on the council at this point?
A. Yes.
Q. Was there a concern on council that people not be able to vote?
A. Yeah. I mean, so not only did they not know or they did not have, even for those that had physical addresses, they were incorrect.
Q. Some of them were incorrect?
A. Yes.
Q. So did -- so you were -- council was concerned that this could cause trouble with tribal member voting. What sort of

actions did the council take to try and address this?

A. So when I was on council, and the rest of the tribal leaders at that time, you know, we kind of met and we said that we -- you know, we need to -- we need to rally, so to speak, rally the troops, and we created organizations. We reached out to other organizations and started, so to speak, campaigning the importance of getting out there to vote. In Indian -- in Indian country specifically show -- you know, show the country or the state that we're still here.

You know, so we created organizations. We supported. We funded. We kept open our ID place. We helped our people try to figure out what is your physical address. We'll help you. You know, we set up things like that.

Q. Massive effort to address the issue.

A. Yes.

Q. And not just at Spirit Lake, but across all the reservations in North Dakota?

A. Yeah. You know, it kind of caught wildfire, and everybody, you know, started --

Q. Was -- did this issue -- the combination of this high profile race and this -- these issues with the new voter ID law, did that spur additional attention and resources to Native get-out-the-vote in North Dakota?

A. Yeah.

Q. Like what sort of resources?

A. Shoot, there was even celebrities coming out and --

Q. Did Dave Matthews Band come and visit the reservation to get-out-the-vote?

A. Yeah.

Q. Was -- were there -- were there resources in the form of funds and money that were directed at get-out-the-vote?

A. Yes.

Q. By local organizations?

A. Local, even by famous, you know.

Q. National organizations?

A. National organizations.

Q. Have you ever seen those sorts of resources deployed for get-out-the-vote -- Native get-out-the-vote in North Dakota before?

A. No.

Q. Have you ever seen it since?

A. Not -- not like this.

Q. Was there national media coverage of this issue?

A. Yeah, I even got a few calls from the *Associated Press,* you know, for --

Q. But was this covered in the *New York Times, Washington Post*?

A. Yes.

Q. Major networks, cable news?

A. Yep.

Q. Did that attract even more resources to the issue?
A. Yeah, it did, and it really helped. You know, for Indian country in North Dakota specifically, it was some of the highest turnouts that we seen of Native voters.
Q. And what motivated Native voters to get out in 2018 and vote at those numbers?
A. I think what motivated is when you try to take something away, we're going to rally and not let them take it away.
Q. Call it a backlash?
A. Yeah.
Q. Yeah. I sort of covered this, but just for the record, have you ever seen anything like the GOTV effort in Indian country in North Dakota, the funding, the organization? Have you ever seen that in any election before?
A. Not since I've been keeping track of, you know, politics.
Q. And we haven't seen it since 2018?
A. No.
Q. All right. A couple more questions. We talked earlier about the state ICWA bill and the sportsmanship study with the North Dakota High School Activities Association in this just past 2023 session. You remember we talked about that?
A. Yes.
Q. And you talked about that the Spirit Lake Nation as a government and you as the chair. You were very interested in those two issues at the legislature?

A. Yes.
Q. Why were you interested? Because they impacted --
A. So I think, you know, any time that there's something out there that's going to be a negative reflect on who we are -- I am one of five tribal leaders. I am going to voice my concerns to protect those who can't protect themselves.
Q. And you determined that the best way to be heard in Bismarck on these issues was to work with Representative Davis?
A. Yes.
Q. She's not a -- she's not a Spirit Lake Nation member, is she?
A. No. And, you know, had -- if we're able to get one of our own, I'm sure I would -- probably would reach out to them, but, you know, that's the closest to us.
Q. Did the District 15 legislators who were elected in 2022 and serving in the 2023 session, did they reach out to you as the chairman on either one of these issues?
A. No.
Q. Do you think that having additional Native-preferred candidates in northeastern North Dakota to serve in the North Dakota legislature would -- would improve the responsiveness of the North Dakota state government to the voters at Spirit Lake and Turtle Mountain?
A. Yes. If I can make additional comment, not only do I think, you know, that it -- would it help improve -- so me

being as a tribal leader, I'm the type of person who is willing to share and make aware of how things operate in Indian country and how we are. And I think that's, you know, what needs to be done here in -- not only in North Dakota, but throughout the whole world and country here, is -- being able to get along is going to help us to live alongside each other.

And so I'm -- like I said earlier in my statement, first and foremost, I'm an easy-going guy. I try to work with other agencies, entities, representatives, what have you, so we could just, you know, treat each other as human beings and not be -- having things taken away.

MR. PURDON: Thank you, Former Chairman Yankton. I have just one housekeeping detail. I'm going to tender the witness, Your Honor, but could I have that exhibit brought back up? I misidentified this exhibit. I want to get it right for the record. This is the minutes of the Legislative Council -- or the Tribal-State Relations Committee where Yankton was asked if they wanted to be districted with Devils Lake. This is actually Exhibit 334 of the defendants. I believe I said 344, but this is actually Exhibit 334. Do I have that correct? They're all giving me thumbs up.

No further questions.

THE COURT: Mr. Phillips, that is Exhibit 334?

MR. PHILLIPS: We just confirmed that, Your Honor. I apologize.

THE COURT: Thank you, Mr. Purdon. Thank you, Mr. Phillips. The record will reflect that the exhibit is Defendants' 334. Thank you, Mr. Purdon.

Mr. Phillips, shall we begin cross-examination, run until noonish and then take a break?

MR. PHILLIPS: Yes, Your Honor. That's fine with me.

THE COURT: Very good. Thank you. Please proceed.

Mr. Yankton, you doing okay on water there?

THE WITNESS: Yeah. Yeah, I'm good.

MR. PHILLIPS: Please feel free to interrupt me when it does get to noon.

THE COURT: Will do. Thank you.

CROSS-EXAMINATION

BY MR. PHILLIPS:

Q. Former Chairman Yankton, my name is David Phillips. I'm one of the attorneys representing the defendants in this case. I have some questions for you as well.

Okay. Can you pull up Plaintiffs' 155? This is a letter that you looked at in the direct examination, and do you recognize this letter?

A. Yes.

Q. And what are you overall asking for in this letter? Let me ask you this, Chairman Yankton: In this letter, weren't you essentially asking that the Redistricting Committee hold hearings on the reservation?

A. Yes.
Q. The --
THE COURT: Mr. Phillips, which exhibits do we have -- oh, Plaintiffs' 155.
MR. PHILLIPS: Yes.
THE COURT: Very good. Thank you. I beg your pardon. Proceed.
MR. PHILLIPS: Thank you.
Q. (MR. PHILLIPS CONTINUING) And this was sent to the Redistricting Committee?
A. It was sent to one of the members, committee members.
Q. Okay. On May 20, 2021.
A. Yes.
Q. The Redistricting Committee didn't actually hold any meetings during the redistricting on the reservation, correct?
A. Not on -- not on my reservation. I can't speak for the other reservations.
Q. The Tribal and State Relations Committee, though, did hold redistricting hearings on the reservations? Does that make sense?
A. On other reservations? That, I don't know.
Q. So there's two committees, right? There's a Redistricting Committee --
A. Yep.
Q. -- and a Tribal and State Relations Committee?

A. Yep.
Q. The Redistricting Committee did not hold any meetings on the reservation, correct?
A. Correct.
Q. The Tribal and State Relations Committee, though, did hold meetings on the reservations.
A. Yes.
Q. Including the Spirit Lake Reservation.
A. Yes.
Q. I think that was September 1, 2021. Does that sound right?
A. Yep, that sounds about correct.
Q. Do you know what the purpose of the Tribal and State Relations Committee is?
A. Yeah. So for us specifically, when Senator Wardner and his members come to -- you know, they ask for us to prepare beforehand that they get there on certain items or issues that might be able to be addressed or resolved between my tribe and the state departments.
Q. And with respect to the meeting on September 1, the issue to be addressed was redistricting, correct?
A. That was never brought up. You know, I don't think we really got into talking about the redistricting process at that meeting specifically.
Q. At the meeting on your reservation?

A. With Senator Wardner and his legislative group you mean?
Q. Was -- I'm talking about the meeting at the Spirit Lake casino of the Tribal and State Relations Committee.
A. Yeah.
Q. Was redistricting discussed at that meeting?
A. Not that I recall.
Q. We'll get back to that a little bit later.
Do you -- are you aware of whether the Tribal and State Relations Committee reported anything to the Redistricting Committee?
A. No, not that I'm aware of.
MR. PHILLIPS: Can we pull up Exhibit -- Plaintiffs' Exhibit 135? And, Kate, I'm going to have you scroll down to page 29. Kate, towards the bottom of what's being displayed there is what you'll need to zoom in on, right there.
THE COURT: I'm going to interrupt, Mr. Phillips.
Lori, could you clear off the screen?
Q. (MR. PHILLIPS CONTINUING) Former Chairman Yankton, I'll represent to you that this is a report issued by the Redistricting Committee. Have you ever seen this before?
A. Yeah, I believe I did see it.
Q. And it says at the top the committee also received updates from the committee members who are on the State and Tribal Relations Committee, which met with representatives of the Turtle Mountain Band of Chippewa, Three Affiliated Tribes and

Spirit Lake Nation on their respective reservations regarding redistricting and other matters. The updates generally were consistent with the testimony presented to the Redistricting Committee. One member of the House testified in opposition to subdistricts. Do you have any reason to dispute this statement?

A. No. No, I don't.

Q. Let's go back to exhibit -- Plaintiffs' Exhibit 155, please. Now, this letter that you sent to members of the Redistricting Committee --

MR. PHILLIPS: I'm going to have you scroll down, Kate, to the very bottom of this exhibit. Even further. There you go.

Q. (MR. PHILLIPS CONTINUING) And there's a cc on here to Erica Thunder, the interim executive director of the Indian Affairs Commission. Do you see that?

A. Mm-hmm. Yes.

Q. Why did you copy Erica Thunder on this letter?

A. Just so it would get to somebody at that -- at that level, you know, to adhere to our request.

Q. Within the Indian Affairs Commission?

A. Even at the legislative -- one of the legislators even, you know.

Q. Later Nathan Davis became the executive director of the Indian Affairs Commission; is that right?

A. Nathan Davis?
Q. Nathan Davis.
A. Yes.
Q. Did you have any communications with Nathan Davis about scheduling the meeting with the Tribal and State Relations Committee on the Spirit Lake Reservation?
A. Let me see. I believe I -- I reached out to a local representative in Grand Forks County, and when I called, they pretty much just said that they weren't coming to Spirit Lake. And the reason for the hearing that I wanted at Spirit Lake was to make more of my people aware of what was being done because a lot of our people are not going to attend a hearing somewhere else or neither would I. Why couldn't it be held at Spirit Lake?
Q. As I understand your testimony, that you said the Tribal and State Relations Committee would not come to the Spirit Lake Reservation?
A. So the Tribal and State Relations Committee started coming at Senator Wardner's request, started having us host, and he would bring his members to our tribe. What I wanted was the hearing committee to come to my tribe to give the rationale as to why they were doing the things they were doing.
Q. Let's look at Exhibit -- Defendant's Exhibit 398. Do you recognize this, Former Chairman Yankton?
A. Yes.

1 **Q.** Am I correct that this is your written testimony that you
2 provided to the Redistricting Committee on September 29, 2021?
3 **A.** Yes.
4 MR. PHILLIPS: Looking at -- and maybe, Kate, you can
5 zoom in there on the first paragraph.
6 **Q.** (MR. PHILLIPS CONTINUING) Looking at that first
7 paragraph, I mean, in this letter you're advocating for Spirit
8 Lake to be placed in a subdistrict, right?
9 **A.** Yes.
10 **Q.** And throughout this written testimony you're providing
11 reasons that subdistricts would be beneficial to your tribe,
12 correct?
13 **A.** Yes.
14 **Q.** On the last page of this exhibit you even have a map of a
15 proposed subdistrict, don't you?
16 **A.** Yes.
17 **Q.** Did you prepare this map?
18 **A.** No.
19 **Q.** Who did?
20 **A.** Our legal counsel.
21 **Q.** Are you aware that the Census Bureau released their
22 easier-to-use data on September 16, 2021?
23 **A.** Pardon?
24 **Q.** Are you aware of when the census data was released in
25 2021?

A. Yeah.
Q. And was that on September 16, 2021, that they released the easier-to-use format?
A. Yes.
Q. And this written testimony that you submitted was submitted on September 29, 2021, correct?
A. September, yep.
Q. Let's go back to the map once more. On this map -- if you scroll down a little bit further, Kate -- this does seem to incorporate census data, doesn't it, in the bottom left-hand corner of this map?
A. Yes.
Q. In this written testimony on September 29, 2021, you didn't ask for a single district to be drawn around both the Turtle Mountain and the Spirit Lake Reservations, correct?
A. Correct.
Q. You asked for a subdistrict.
A. Subdistrict, yep.
Q. Do you know if the population of Native Americans in and around the Spirit Lake Reservation is sufficiently large to give Native Americans an opportunity to elect their candidate of choice with this map you've drawn or provided?
A. I believe it would.
THE COURT: And with that, that would be an ideal time to transition toward lunch. When we resume at 1:20 today,

Mr. Yankton will remain under oath and will resume being on the stand. We will take a break until 1:20.

When we begin at 1:20, Mr. Phillips, let's address those objected-to exhibits, and counsel for plaintiff can respond, and I think that will do it. Is there anything else, Mr. Phillips, from your side?

MR. PHILLIPS: No, Your Honor.

THE COURT: Mr. Gaber, is there anything from plaintiffs that should be addressed before lunch?

MR. GABER: No, Your Honor.

THE COURT: Very good. Let's take a break, and we'll be back in 80 minutes. Thank you. We're in recess.

(Recess taken from 12:00 p.m. to 1:23 p.m.)

THE COURT: Okay. We're back on the record after our lunch break. The record will reflect that it is 23 minutes past the hour. The witness, Mr. Yankton, is not on the stand as we are going to deal with some evidentiary issues. And before we deal with those issues, for the plaintiffs, are there any other hanging housekeeping issues that ought to be addressed at this session?

MR. GABER: Not other than the exhibits, no, Your Honor.

THE COURT: All right. Thank you, Mr. Gaber.

Mr. Phillips, if you would proceed, and specifically if you could address the exhibits with a little bit more

1 particularity. I do show that -- I believe it would be
2 Plaintiffs' 98 and 99, 113 to 19, 127, and 141 to 145.
3 MR. PHILLIPS: That's correct, Your Honor.
4 THE COURT: All right. Thank you. Please proceed.
5 MR. PHILLIPS: Thank you, Your Honor. Taking them in
6 order, I'll address first here Plaintiffs' Exhibits 98 and 99.
7 Those are the memorandum in support of summary judgment in the
8 *Walen* case and the reply memorandum in support of summary
9 judgment in the *Walen* case. As we said in our trial brief,
10 there isn't anyone to lay foundation for these exhibits, and we
11 didn't stipulate with these two exhibits, and they're not
12 relevant. They're legal arguments in a different lawsuit, not
13 evidence in this case.
14 I will point out, Your Honor, that it sounds like the
15 other side is interested in using this to point out some sort
16 of contradiction in the state's position between this case and
17 the *Walen* case. That is an issue that was explored in great
18 detail in the depositions of the experts in this case. And, in
19 fact, it's my understanding both parties intend to discuss
20 their opposing experts' reports in the other case and try to
21 point out some differences.
22 This is something that can be fully fleshed out with
23 what's already been addressed in discovery and what is in the
24 expert reports, not in legal briefs submitted by attorneys.
25 And so, Your Honor, we would seek to exclude those briefs.

THE COURT: Okay. Thank you. 113 to 119 -- or wait. Did I -- yeah, that's right. 113 to 119.

MR. PHILLIPS: Yes, Your Honor. And to be clear, the rest of them are all a group. They're just not in order in the list of exhibits, but they're all the same issue. These are collectively Maptitude reports and maps that were generated in late May. These were created recently, I believe, in response to our motion in limine to exclude Dave's Redistricting data and opinions in relation to Dave's Redistricting App. And so, you know, we made the argument that some of their expert opinions should be excluded on the basis of the unreliability of Dave's Redistricting App.

Part of their response was to produce new reports generated with a different software, Maptitude. Well, the Court has already ruled, you know, the Dave's Redistricting App data is sufficiently reliable and it's not going to be excluded in this case. There's no reason to now also bring in these Maptitude reports.

And as I pointed out in our trial brief, these were never previously disclosed. They were produced just last month. Their expert has conducted an analysis on them as -- again, as part of the response to the Dave's Redistricting App motion, but I haven't deposed him on that. They weren't disclosed prior to any of the relevant deadlines in this case, discovery or expert.

And so there really is -- it's really too late to just bring in new reports that support new analyses and particularly in light of the fact that the Dave's Redistricting data is now admissible, so we would also move to exclude those reports.

THE COURT: Thank you, Mr. Phillips.

MR. PHILLIPS: Thank you.

THE COURT: Mr. Gaber, you might want to pull that microphone closer.

MR. GABER: Oh, sure.

THE COURT: Thanks.

MR. GABER: Yes, Your Honor. With respect to Exhibits 98 and 99, as Mr. Phillips mentioned, these are briefs that were filed on behalf of the Secretary of State and the governor, who are defendants in the *Walen* case.

On pages 39 and 40 of the brief, the Secretary takes the position that the removal of the subdistrict in District 9 would lead to White voters usually defeating the candidates of choice of Native American voters. Of course, that's the third *Gingles* prong in our argument with respect to the full District 9 violating the VRA.

With respect to the foundation issue, these were, of course, signed by counsel for the secretary, submitted to the Court. We received them on ECF. Mr. Wiederholt is here, who signed them. I don't think there's an issue as to whether or

no these are what they purport to be. I hope there's not. If there were, that would be a problem for the *Walen* case, certainly. And so I certainly think that the foundation is laid by the officers of the court who are present.

With respect to the relevance or the admissibility, it's a statement by an agent of a party opponent in the case. That goes straight to the core of the issue that is before this Court in this case.

With respect to the Maptitude reports, and I won't repeat the exhibit numbers, Mr. Phillips is correct. Those were generated after the motion in limine was filed. The data, as we pointed out in our response, is all the same as the Dave's Redistricting data. I think it's just sort of helpful to the Court because it shows each district and has the corresponding data.

The data has been stipulated to in the stipulations that we filed, for the most part. I think it's helpful. I don't -- you know, this is a Bench trial. I certainly don't think that there is a problem with admitting them, but there are also stipulations. And so if they were not to be admitted, it's certainly not going to stop us from proving any sort of element of the case.

THE COURT: Counsel, I've reviewed the filings in this matter, and I've considered the arguments. Let's address these one at a time.

With regards to the *Walen* briefing, the Court is persuaded that not only are there foundational issues here, but I would be hesitant in even trying to determine what relevance, if any, this briefing would have. The context -- since it was filed in a different matter with different issues, the context in it would be something that might not necessarily be able to be drawn out in this hearing.

I don't find the briefing to be particularly useful, and I do think that the issues that are of concern to the plaintiffs in this case can be drawn out and fully fleshed out based on the other evidence and the rest of the record in this case. So the Court is not permitting the *Walen* briefing to be part of this trial. I don't -- I don't hesitate in that regard.

The maps, Mr. Phillips points out these were created in response to the motion in limine, which Mr. Gaber actually also concedes. I do believe that in this particular case, since we have other maps that are going to be part of the record and part of the consideration for the Court, that these can be helpful and that they can add context. Now, the Court is completely capable of assigning the appropriate weight to these.

With regards to the timing, although that is a concern of the Court, I do believe, since the issues pertaining to the other mapping are similar issues, certainly anything

that the defendants have as a -- as a concern about this can be brought out through cross-examination. And the Court can also consider the fact that they haven't had them for that long to consider.

I think that they probably could be presented as rebuttal evidence regardless, and so we're going to let it in in the spirit of it being a Bench trial and the Court having the ability to assign weight and relevance and propriety of the evidence, and so I'm going to let the mapping in.

I believe that addresses the two remaining issues. I certainly would entertain any objection by either side to the Court's ruling. Mr. Gaber?

MR. GABER: No, Your Honor.

THE COURT: Mr. Phillips?

MR. PHILLIPS: No objection, Your Honor.

THE COURT: All right. Let's -- Mr. Yankton, there you are, sir.

MR. PHILLIPS: And, Your Honor, I will just point out briefly that those 98 and 99 are in the binders that have been provided to the Court and to the -- to Your Honor.

THE COURT: Thank you, Mr. Phillips. And we can return those after the hearing or after today. We'll get them back. Thank you, Mr. Phillips, for pointing that out.

Mr. Yankton, we're going to resume with cross-examination by Mr. Phillips. And take your time, and we

will proceed. Go ahead, Mr. Phillips.

MR. PHILLIPS: Thank you.

Q. (MR. PHILLIPS CONTINUING) Good afternoon, Former Chairman Yankton. Right before we left for the break, I believe you had testified that the subdistrict that was requested by Spirit Lake on September 29, 2021, would have given Native American voters an opportunity to elect the candidates of their choice. Do you remember that testimony?

A. Yes.

Q. And is that still your testimony?

A. Yes, that --

Q. So we have up on the screen here Exhibit D-398, and it's on the page that has the map of the proposed subdistrict. Do you see that?

A. Yes.

Q. Now, on the very bottom, if Kate can scroll down to the very bottom of this page, it does have some census data. Do you see that?

A. Yes.

Q. And on the -- in the very bottom row it lists -- it's a little bit cryptic there, but the Native American population that is 18 or older; in other words, the voting-age population. Do you see that?

A. Yes.

Q. And it says 0.415337. Another way to say that would be

41.5337 percent. Do you see that, what I'm talking about?
A. Yep.
Q. And this appears to apply to the subdistrict that surrounds the Spirit Lake Reservation in this map?
A. Yes.
Q. According to this data then, the Native American voting-age population in the subdistrict that you proposed is only -- is a little bit more than 41 percent; isn't that right?
A. Yes.
Q. And a Native American voting-age population of 41.5 percent, is that enough to allow Native Americans to elect the candidate of their choice in that subdistrict?
A. You know, that, I probably really couldn't say, if that would be enough.
Q. Almost 60 percent of the district would be non-Native American or most likely White, correct?
A. With a combination of either nonindigenous or indigenous people from another tribe, yes.
Q. In this actual subdistrict, according to the census data, it's 41.53 percent Native American, correct?
A. Yes.
Q. Okay. On this proposed map -- and I think you are able, as we'd seen earlier, to draw on the screen. Are you able to identify where Devils Lake is located on this map?
A. You want the lake or the town?

1 **Q.** The town.
2 **A.** Okay. So it's probably like -- I'll just kind of point.
3 Right in that area, maybe (indicating).
4 **Q.** Now, this proposed map that we're looking at, it's got
5 kind of a subdistrict on the north that's labeled 10 and a
6 subdistrict on the south that's labeled 9, and combined they
7 make a single district, right?
8 THE COURT: Mr. Yankton, you can push that mic away
9 so you don't brush up against it if you want to. Thank you.
10 THE WITNESS: I didn't bring my readers, so I got to
11 bring this a little closer. Is there any way you can make this
12 bigger or no?
13 **Q.** (MR. PHILLIPS CONTINUING) Yes.
14 **A.** Okay. Now can you run that by me again real quick?
15 **Q.** Sure. So what we're looking on on this map, we have a
16 subdistrict to the north that's labeled 10 and a subdistrict to
17 the south that's labeled 9, and then together they form a
18 single Senatorial district. Do you see that?
19 **A.** Yes.
20 **Q.** And Devils Lake is contained within that district,
21 correct?
22 **A.** Yes. Devils Lake would be like in the area where it says
23 11,605?
24 **Q.** Do I remember your testimony correct earlier that it was
25 your position and the tribe's position that you did not want

Devils Lake included in the same district as the reservation?
A. Yes.
Q. Now, this proposed map that was submitted to the Redistricting Committee on September 29, it included Devils Lake in the proposed district, correct?
A. Yes, in this map. So this here map was the map that was proposed if -- when we weren't allowed the subdistricts, though.
Q. This map was proposed by you to the Redistricting Committee, correct?
A. Yes.
Q. Now I'm going to -- I'm going to have Kate pull up two exhibits on the screen at the same time. It's Plaintiffs' Exhibit 398 and Plaintiffs' Exhibit 101. Now, what we're looking at on the left-hand side here, P-101, is the enacted district. This is what North Dakota enacted recently that's being challenged in this case. The map on the right is the map that you proposed to the Redistricting Committee on September 29. In overall shape of the district, these are remarkably similar; are they not?
A. Yes.
Q. It looks like the only difference is in that bottom left-hand corner. The as-enacted map follows I think what's Highway 281, and your proposal veers in a little bit. Do you see that difference?

MR. PURDON: I'm going to object. That misstates the -- the record. It's not the only difference. The one on the right has a subdistrict as well.

MR. PHILLIPS: On the -- go ahead. I'm sorry.

THE COURT: Go ahead. Mr. Purdon, you cut in on what I was hearing there. Please restate.

MR. PURDON: Right. My -- I was objecting to his question as misstating the evidence. His question was, there's a little difference on that nub that comes out on the -- kind of the left. I said that misstates the evidence in that there's another difference between the two maps. The one on the right proposed by the tribe has a subdistrict in it. The one enacted by the North Dakota legislature does not, so that's an additional difference. He's misstating the record. He's misstating the evidence is my objection.

MR. PHILLIPS: Your Honor, I'd be happy to restate the question to address the outer boundary of the district.

THE COURT: Let's do that. The objection is sustained, but, you know, for -- we can certainly clarify the record here with restating the question, so please do, Mr. Phillips. Thank you.

MR. PHILLIPS: Thank you, Your Honor.

Q. (MR. PHILLIPS CONTINUING) Former Chairman Yankton, looking at the outer boundaries of these two districts, the as-enacted district on the left and your proposed district on

the right, the only difference between those outer boundaries is in the southwest portion of the map where the as-enacted map follows the highway, correct?

A. Yeah, it looks pretty similar, I guess.

Q. I'm done with those exhibits.

Is it true that Collette Brown testified at the Redistricting Committee and the Tribal and State Relations Committee on behalf of the tribe?

A. Yes, not as -- but as a tribal member, yeah.

Q. Was she -- was she there in any capacity because you were unable to make it to those meetings?

A. Not at the hearings, but at some of the legislative meetings.

Q. I'm going to direct your attention to Exhibit D-327, and there is a line in here, middle-bottom of the page where it says, "The tribe and its operations are major economic drivers in the greater Devils Lake area, providing jobs and opportunities for many North Dakotans and tribal members." Do you see that part?

A. Yes.

Q. Is it fair to say that the Spirit Lake Tribe has some alignment of interest with Devils Lake community?

A. Yes.

Q. And we're going to look at Exhibit -- Defendant's Exhibit 410, and we'll look specifically at page 27. Is this

the letter that you wrote to the governor and other members of the legislative leadership?

A. Yes.

Q. Oh, and I'm sorry. We can scroll up a little bit. In this letter are you requesting that a single district be created to encompass both the Turtle Mountain Reservation and the Spirit Lake Reservation?

A. I think the first portion or what was the most important part was for the Redistricting Committee to have a hearing within the reservation so we could -- as the people of our tribe and even myself get a better understanding as to how this was going to benefit or not benefit us when it came to voting to -- to vote for a representative from within our own boundaries.

Q. And let's scroll to page 30 on this exhibit. Also within this letter there's a proposed map for a district that encompasses both reservations; is that right?

A. Yes.

Q. And this is being requested by you of the State of North Dakota?

A. Yes.

Q. In my review of the record, this is the first documentation that I've seen where the Spirit Lake Tribe requested this solution of placing both reservations in a single district. Are you aware of anything earlier than

November 21 of 2021, the date of this letter?

A. Not that I recall. So this map here was what we thought would be a remedy beings that we, as Spirit Lake, didn't get our subdistrict request, and so we thought this would be a remedy to where we could -- as both tribes support one another irregardless of what members ran for.

Q. This is a little more than a month after your last request for the subdistrict that we just looked at on September 29; is that right?

A. I believe so.

Q. If I've done the math right, it's 47 days since the release of the census data that you sent this letter. Does that sound right?

A. Approximately. That might be correct.

Q. Let's look at Exhibit -- or Defendant's Exhibit 410, and go to page 17, please. I guess we're on the same exhibit. This appears to be your written testimony at the November 8 meeting of the Joint Redistricting Committee; is that correct?

A. Yes.

Q. And you testified in person at that meeting as well, right?

A. I can't remember if I did or not. I know one of them I just submitted testimony, but I can't remember. It's been a long time for me, you know.

Q. Do you recall Chairman Azure testifying at that meeting?

A. Yeah, I guess we -- yeah, now -- now that you say that, we were both there, I think. I think we were there.

MR. PHILLIPS: I'm going to play a video clip for you. It's a portion of Defendants' Exhibit 444.

(Video clip played in court.)

Q. (MR. PHILLIPS CONTINUING) And that was Chairman Azure's description of the reason that this request came so late. Do you disagree with his reasoning?

A. No, I don't disagree with it. But, I mean, you know, it was a little later than expected, but we also didn't expect to not be able to get our own subdistricts.

Q. You testified earlier today quite a bit about interests in common between the Spirit Lake Tribe and the Turtle Mountain Tribe. Did you give testimony like that to the Redistricting Committee as well?

A. I don't believe so.

Q. The two tribes are -- and I'm talking about Turtle Mountain and Spirit Lake. They are sovereign nations, correct?

A. Yes.

Q. Are there any public policy concerns that are unique to Spirit Lake that Turtle Mountain does not share?

A. Not that I recall.

Q. I think you talked earlier about taxation being something where the individual tribes may want to negotiate what's best for themselves. Do you recall that testimony?

A. Yeah. Okay. Yeah. Now, so, like -- I mean, so we all have those types of common interests when it comes to negotiating with the state, but we are sovereign in the aspect that we will negotiate our own percentages. It's not all the same across the board.

Q. That's true of the tax issue? Are there any other issues that are unique to your tribe?

A. I think, you know, we -- so on some issues, that we would try to similarize. For example, I think we talked about the gaming issues.

Q. And I'll just stop you there. I'm interested in things that are not the same between your two tribes.

A. Not the same? I'm not sure what would not be the same.

Q. Taxation is the only difference between the two tribes public policy-wise?

A. Well, there could be others, but I just don't recall any right now at the moment.

Q. You testified earlier that there was higher turnout of Native American voters in 2018. Do you remember that testimony?

A. Yes.

Q. It sounds like there was a strong local effort to get-out-the-vote that year; is that correct?

A. Yes.

Q. What did your tribe do to try to turn out the vote that

year?

A. Oh, we -- as a tribe we did a lot of public events, predominantly separate public events because we are comprised of four districts that are kind of scattered throughout the nation. The communities encompass anywhere from 5 miles to 25 miles apart just depending on, you know, which community you come from. So we had different tribal leaders, different directors of programs and different committee members organize and have luncheons or suppers and just talk about the importance of voting.

And then we had some of our programs that issued, for example, the tribal IDs help assist our tribal members to establish a legal physical address, residential address. And so there we charged a fee, but we waived the fees for our tribal members to come and take the time to get an ID.

You know, so we tried different types of efforts to, you know, reiterate the importance of getting out there to vote, you know, because of what was being -- or what was going on or what was happening to us as Native Americans.

Q. And what you just talked about, those were all local efforts, correct?

A. Yes.

Q. And there was some mention of creating organizations earlier in your testimony. What did that refer to?

A. Pardon?

Q. You referred earlier to the creation of organizations to help get out the vote. What were you referring to in that testimony?

A. So just like our local -- our local tribal -- so we have different programs, and we encouraged our programs, you know, to do some fliers about Voting Rights Act and just kind of making our people aware of the importance of why they need to get out there to vote. And for us as Natives, the only thing that entices people to pay attention or participate is we have to have food involved, so we had little luncheons or even, you know, offered evening dinners to come and hear, come and listen to why we're doing what we were doing.

Q. These local efforts, providing food and so forth, that could be done in other election years too, couldn't it?

A. Now we do it, yeah. We will be doing it, I'm sure, in the future. It's hard to say. I'm not the tribal leader anymore, so it depends on what other leaders tend to want to do.

MR. PHILLIPS: Thank you very much. I have no further questions for you.

THE WITNESS: Okay. Thank you.

THE COURT: Thank you, Mr. Phillips.

Mr. Purdon?

MR. PURDON: Just very briefly, Your Honor.

<u>REDIRECT EXAMINATION</u>

BY MR. PURDON:

Q. Good afternoon again, Former Chairman. The efforts that you were talking about, the sort of unusual, extraordinary get-out-the-vote efforts from 2018, you talked about the tribe waived fees for folks who wanted to get ID's or get their ID's updated, correct?

A. Yes.

Q. Did the tribe lose revenue by waiving those fees?

A. Yes.

Q. The resources that were brought to bear by the tribe in other -- in other ways to get-out-the-vote, raise the profile of the voting, those sorts of things, does that cost money?

A. Yes, it did, and it took away from what we call our "unrestricted accounts." And if we -- so we used those unrestricted -- our own tribal dollars for, you know -- we would like to say more important activities, but to us this was an important activity, so --

Q. And your people in 2018, they were asking the council to take action in these regards, right?

A. Yes.

Q. This was a political -- as part of the backlash, your membership was asking for these things to make it easier for people to vote.

A. Yes.

Q. And that comes with a cost, correct?

A. Yes.

1 **Q.** Tribe ever been reimbursed by the State of North Dakota
2 for those extra costs to let those folks vote?
3 **A.** Not that I'm aware of.
4 MR. PURDON: Can I get Exhibit -- sorry. Can I get
5 Exhibit 398, please? Can I get the map at the bottom? Can I
6 get the map at the bottom of the page? Can you blow that up a
7 little bit for Chairman Yankton?
8 **Q.** (MR. PURDON CONTINUING) So this was the -- I think I have
9 this right. This is the -- this is your September 29 written
10 testimony, and it has this map attached, correct?
11 **A.** Yes.
12 **Q.** And you were just asked some questions about this,
13 correct?
14 **A.** Yes.
15 **Q.** In your request on September 29 was a subdistrict inside
16 your district that had Devils Lake outside your subdistrict,
17 correct?
18 **A.** Yes.
19 **Q.** And the Spirit Lake Reservation primarily in the
20 subdistrict, correct?
21 **A.** Yes.
22 **Q.** Did the legislature grant this request?
23 **A.** No.
24 MR. PURDON: No further questions, Your Honor.
25 THE COURT: Based on the scope of redirect, do you

have any recross, Mr. Phillips?

MR. PHILLIPS: No, Your Honor.

THE COURT: All right.

MR. PURDON: Your Honor, if I could request -- I don't -- Former Chairman Yankton is not under subpoena, but we just want to make sure he can be released. And he needs to get back to Fort Totten, and I don't think there's any objection with that.

THE COURT: No objection?

MR. PHILLIPS: No objection, Your Honor.

THE COURT: All right. Mr. Yankton, thank you for your testimony today, and thank you for being here. Safe travels as you go home.

THE WITNESS: Thank you, Your Honor.

MR. PURDON: That's it. You're free to go, Doug.

THE COURT: Thank you very much.

MS. DANAHY: Good afternoon, Your Honor. The plaintiffs call Dr. Loren Collingwood to the stand.

THE COURT: Thank you.

MS. DANAHY: And if I may, I have a couple demonstratives that we'll be using. May I approach and hand out --

THE COURT: Please do. Yes, Counsel. I'm going to have Dr. Collingwood placed under oath, but then I have a couple of other things to address, okay?

MS. DANAHY: All right.

LOREN COLLINGWOOD,

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

THE COURT: Thank you. And, Counsel, earlier we addressed Plaintiffs' 113 to 119, 127 and 141 through 145. I just wanted to clarify for the parties, I don't believe that they've been offered yet. If you want to offer them at the time that you're going to use them or if you want to offer them now, I'm going to note for the record the prior objection of defendants, but then I would admit them.

MR. GABER: We would like to offer them now, Your Honor.

THE COURT: Very good. And other than your prior objection, Mr. Phillips -- I'm sorry to ambush you there -- but other than your prior objection, do you have any other objection to those exhibits?

MR. PHILLIPS: I would just maintain the prior objections. I don't have any new ones to add, Your Honor.

THE COURT: Very good. They will be received, and you may publish them in the course of your presentation. Thank you.

MS. DANAHY: Your Honor, may I approach and give him some water?

THE COURT: You may. Thank you.

DIRECT EXAMINATION

BY MS. DANAHY:

Q. Good afternoon, Dr. Collingwood. Will you please state your name for the record?

A. Loren Collingwood.

Q. How are you employed, Dr. Collingwood?

A. I'm an associate professor of political science at University of New Mexico.

Q. And is that a tenured position?

A. It is.

Q. How long have you been at the University of New Mexico?

A. About two-and-a-half years.

Q. And what did do you before that?

A. I was an associate and assistant professor at University of California Riverside.

Q. For how long?

A. Seven or eight years.

Q. What is your educational background?

A. I have a BA in psychology from California State University Chico and a Ph.D. in political science from University of Washington.

Q. Do you also have a Master's degree?

A. I always forget that one because you get that on the way, and it doesn't really mean much to us with a Ph.D.

Q. But that's also from the University of Washington,

correct?

A. It is.

Q. What are your general fields of academic study?

A. American politics, voting, elections, race and ethnicity, immigration, applied statistics and political methodology, particularly racially polarized voting.

Q. Do you teach courses on all those topics?

A. Yes.

Q. What are some of the courses that you teach?

A. I teach all of our data science classes, which is effectively statistical programming, both at the undergrad and grad level. I teach advanced statistical methods for political science Ph.D. students. I teach general American politics classes, race and ethnic politics, Latino politics classes. I teach a class on the Voting Rights Act and social science data. And then I've taught a couple classes on state politics.

Q. And have you written any peer-reviewed articles on the topics of academic expertise we just discussed?

A. Yes.

Q. Roughly how many times have you published papers on those topics?

A. I think 42.

Q. That's very specific.

A. Well, you know, it's how we keep track of our worth.

Q. Generally speaking, Dr. Collingwood, what were you asked

to do for this case?

A. Well, I was basically asked to assess the *Gingles* preconditions under the Voting Rights Act case law.

Q. And what is your understanding of the *Gingles* preconditions?

A. Well, the first one is whether a majority or minority district can be drawn in the area of investigation. The second is to see whether the racial minority population here, Native Americans, whether they're politically cohesive; i.e., they tend to support the same set of candidates. And then the third is to see if -- whether the White majority typically blocs the racial minority from electing their candidates of choice.

Q. And you mentioned earlier that you're an expert on racially polarized voting. Can you just explain for the Court what that term means?

A. So it's a very basic concept. It typically involves the White majority. Angelo, non-Hispanic White voters tend to favor a set of candidates, and then the minority voters in the area -- here, Native Americans -- whether they typically prefer a different set of candidates. So it's a very, very basic idea.

Q. In your academy work, what methodology do you use to study the presence or absence of racially polarized voting?

A. Experts and scholars use a process known as ecological inference.

Q. Do you have any specialized experience in using ecological inference?

A. Yes.

Q. What's that?

A. Well, I've probably run ecological inference at least 10,000 times, so I think that's good. And then I've written several articles that use ecological inference or that discuss it in some way, both from a substantive and methodological standpoint. And then I'm also an author of several R statistical packages that deal with ecological inference in some way.

Q. And is "R" a programming language?

A. It is.

Q. Can you just briefly explain how ecological inference works for those of us that are not statisticians?

A. Well, the basic idea is we don't have individual-level data; i.e., we don't know how voters vote due to the private ballot, but we know where voters live. And we know there are census blocs. They're precincts in particular here, and we know how people voted in that area. And then we can gain measures of how the different demographic composition is in that same area. And through various different mathematical and statistical algorithms, we can make a guess as to the overall share of, say, Native Americans who are voting one way and White voters who are voting a different way.

Q. And you mentioned that you've published peer-reviewed academic papers on the EI methodology. About how many times have you done that?

A. I think five or six.

Q. Is that -- is the ecological inference the same methodology that you used in this case?

A. Yeah, I use it in all of these different cases that I work in.

Q. We'll get to your case work in just a second. What other types of analysis did you conduct in this case?

A. Well, I also did a -- basically a compactness analysis and a general redistricting principles analysis of the enacted District 9, a couple different alternatives or illustrative maps as well.

Q. And did you do an electoral performance analysis?

A. I also did an electoral performance analysis.

Q. And I think our friends on the other side refer to that sometimes as a functional election analysis? Does that sound right?

A. Yes.

Q. I'll probably use the term "performance analysis." If I use that, you'll know what I mean?

A. Yes.

Q. What is a performance analysis kind of roughly speaking?

A. Also a very basic idea. You simply look at the district

that you're examining, so D9 or D9A or 9B or 15, and then you look at the different precincts that make up that geographic area, and you look to see how different candidates performed in that area.

And what's particularly useful about an electoral performance analysis is that you can look at other election results, not only just the results for that particular area, and so you can weigh different districts and maps against themselves, against one another to see how outcomes are likely to go.

Q. And what is the purpose of the performance analysis?

A. Well, it's a -- it's a way to measure racial bloc voting and blocking, different blocs of blocs blocking.

Q. It's very confusing because there's b-l-o-c and b-l-o-c-k in this context. You mentioned that you also looked at some traditional redistricting criteria, and in particular compactness. What is a compactness score?

A. Well, the basic idea is we want to think of a circle, and if a -- if all our districts were circles, they would all have a compactness score of one. But, of course, blocs and -- which is the lowest unit where we select to put a boundary, blocs aren't circles, and so you're never going to have a fully compactness score of one. And so it's simply a way for -- we get a score from zero to one, where zero is basically not compact at all, one is extremely compact, and then there's a

range of acceptable scores that we can look at and compare how the district actually looks.

Q. And which scores did you primarily look at for this case?

A. I looked at the Polsby-Popper score and the Reock score.

Q. And you mentioned just a minute ago some of your other casework. Have you worked as an expert in other redistricting cases?

A. Yes.

Q. How many cases?

A. Well, in this cycle I've probably worked in at least 19 states, but many of those are kind of consulting, and so I would say tenish.

Q. And I'm going to pull up Plaintiffs' Exhibit 3, which has been admitted. Dr. Collingwood, do you recognize this document?

A. Yes.

Q. What is it?

A. It's my curriculum vitae.

Q. And if we go to page 16, does this show a list of the cases that you've done expert work for?

A. Well, it's a little outdated. I have a couple cases ongoing in Texas that have settled, I think, recently. And then I just testified last week in a case in Washington state, which was a -- kind of a similar situation here. It was a district in a legislative map.

Q. And have you ever done map drawing for government entities?

A. Yes.

Q. When you talk about your expert work in other cases, did you conduct an RPV -- I'm sorry, a racially polarized voting, which I will probably refer to as RPV, analysis in any of those cases?

A. Yes, most of them.

Q. And did you use the same EI methodology you used here to conduct that analysis?

A. Yes.

Q. Did you conduct a performance analysis in any of those cases?

A. Most of them.

Q. And did you conduct a compactness analysis?

A. Yes.

Q. Have Courts generally credited your analysis?

A. Yes.

Q. Has a Court ever not accepted or discredited your testimony?

A. No.

Q. Dr. Collingwood, have you testified in any other redistricting cases in North Dakota?

A. Yes.

Q. What was that?

A. That's the *Walen v. Burgum* case.

Q. And did you submit an expert report in that matter?

A. Yes.

Q. What kind of analyses did you conduct in the *Walen* matter?

A. As a polarized -- racially polarized voting and performance analysis.

MS. DANAHY: Thank you, Dr. Collingwood.

At this time, Your Honor, I'd like to offer Dr. Collingwood as an expert who is qualified to testify on the matters under consideration in this case and offer his expert testimony on voting behavior, race and ethnicity, racially polarized voting, map drawing, electoral performance, and redistricting analysis.

THE COURT: Mr. Phillips, any objection?

MR. PHILLIPS: No objection, Your Honor.

MS. DANAHY: Thank you, Your Honor.

THE COURT: Thank you. You may proceed.

Q. (MS. DANAHY CONTINUING) To start off, Dr. Collingwood, I'd like to just ask you a few background questions, perhaps, and we're going to start with some census numbers. So first off, are there different ways in which the census counts or reports voting-age population by race?

A. Yes.

Q. And what are those?

A. There's always released a single-race category and then an

any-part-race category.

Q. And can you just explain a little bit about what the differences are?

A. By way of example, there may be someone who is both Native American and then they also check, say, Black or Asian. In a single-race analysis, they wouldn't get counted. In an any-part-race analysis, they would get counted; so the "any part" is more encapsulating.

Q. Do you normally look at single race or any part in your work on Voting Rights Act cases?

A. There might be reasons to do one or the other, but typically when you're dealing with, say, map drawing, you're looking at any part, especially when it comes to racial minority voters.

Q. And is that, generally speaking, the data that you looked at here?

A. Yes.

Q. I'd like to pull up Plaintiffs' Exhibit 103, which has been admitted. Do you recognize this document, Dr. Collingwood?

A. I believe I saw it this morning, yes.

Q. Do you mean during the opening?

A. Yeah, but I've seen it many times.

Q. What is this document?

A. Actually, maybe I didn't see this one this morning. I saw

the new map. So this is the 2011-2012 enacted legislative -- legislative plan.

Q. And I'll just note for the record that this is -- exhibit can be found in the Appendix G to your rebuttal report, which has also been admitted into evidence. Is this the map that was in place during the last decade?

A. Yes.

Q. And if I refer to this as the benchmark map, will you understand what I'm referring to?

A. Yes.

Q. And I'd like to pull up Plaintiffs' Exhibit 136. Dr. Collingwood, are you familiar with this document?

A. I am.

Q. And what is this?

A. It's a population change summary for all the different legislative districts in the state. It's a pretty normal document. It's -- when you're doing redistricting, this is -- or something to this effect, you will always want to know how the population has shifted based on the most recent census and whether we need to make changes to particular districts or areas, or maybe we don't. If there's no population change, we don't necessarily need to make changes to that district. So that's what this is.

Q. And just for the record, why are we concerned about changes based on population when we're talking about

redistricting?

A. Well, the single most important principle of redistricting is population equality, and so if a district grows too much according to the U.S. Census or declines too much, you're going to have to add in new people or take people away.

Q. And I'd like to highlight just here on page 1, District 9. And according to this document, what was the total population difference in District 9 between 2010 and 2020?

A. 1,750 people.

Q. And what was the percentage change?

A. It's a 12.6 -- 12.56 percentage point drop.

Q. And does that place District 9 outside the acceptable population for redistricting?

A. It does, definitely.

Q. And so what does that mean?

A. That means District 9 now is going to need to add additional people from nearby counties.

Q. And if we go down to page 3, if we can, and just look at Rolette County --

A. Yes.

Q. -- does this have the same population change?

A. It does. Rolette County and District 9 were one and the same under the old -- the benchmark plan.

Q. All right. And I'd like to pull up now Plaintiffs' Exhibit 101, and this has been admitted. Dr. Collingwood, can

you tell me what this document is?
A. This is the 2021 enacted plan, so the map that we saw in the early goings of the case, so this is what's happening now.
Q. Apologize. I didn't mean to speak over you. If I refer to the enacted plan, will you understand that I'm referring to this map?
A. Yes.
Q. I'd like to pull up now the first demonstrative exhibit, and this -- this is just those two maps side by side with a zoom in on District 9. Those are those two exhibits that we just looked at. Dr. Collingwood, what can you tell me about the geographic changes that were made to District 9 during the 2021 redistricting process?
A. Basically off to the left you can see the old district, and then portions of Towner and Cavalier Counties were added to Rolette County to comprise the new enacted District 9.
Q. And is there any other change that was made?
A. There's also now a new subdistrict.
Q. How does Rolette County compare to Towner and Cavalier County in terms of racial demographics?
A. I think one -- one way I think about this is -- I do a fair amount of work in this area, both from a expert standpoint and also just in my professional academic work. Rolette County is one of the highest density Native American counties in the country. Meanwhile, Towner and Cavalier are two of the highest

percentage White counties in the country.

Q. And I know this isn't on the map, but are you able to describe or maybe circle with your finger where the Turtle Mountain Reservation is in the enacted plan?

A. I just put my finger there. It's more rectangular, but that's the general area.

Q. And that's -- can you just describe for the record what you've -- where you've put that?

A. Good point. It's in the north-ish center part of 9A, where you could kind of imagine a rectangle going. That's the boundary of the reservation.

Q. And is the Turtle Mountain Reservation wholly contained in Subdistrict 9A?

A. The reservation proper is.

Q. I'd like to pull up now the second demonstrative that we have.

A. Can I hold on a second? I want to now get rid of this.

Q. Oh, I think there's a clear button on the bottom.

A. Yes.

THE COURT: Lori, can you give an assist on this one? Thank you.

THE WITNESS: I got it. I am a professor, after all.

Q. (MS. DANAHY CONTINUING) And this demonstrative just includes Native VAP or NVAP data that was included in your initial and rebuttal reports, which have been admitted as

Plaintiffs' Exhibits 1 and 42, as well as the parties stipulated facts and it looks at the benchmark map, the enacted map and plaintiffs' demonstrative maps.

What did you find, generally speaking, with respect to the demographics of the districts at issue in this case, including plaintiffs' demonstrative districts?

A. Right. So we begin with a district that had been 74.4 percentage Native American voting-age population, any part, and that's higher than the majority NVAP districts that we tend to see, the mean around the country of 66 to 68 percent. And so then with the new district we now see that NVAP dropping basically 20 percentage points to 54.5 percent.

And then what we see is a fragmentation within District 9, a fragmentation of, you know, the boundaries drawn along the reservation lines, but there's these off-reservation Trust Lands that are just to the north and I think to the west as well. Those were placed into 9B, and so you have a large density of Native Americans in 9A and maybe only a third of the NVAP -- or a third of the voting-age population in 9B. Meanwhile, district -- enacted District 15 is relatively lower on Native American population of 23.1 percent.

The two different demonstratives in which I examined, they both fit almost exactly the nationwide median and mean of in this case 66.1 to 69.1 percent, depending on the demonstrative you're looking at, and so they fit within the

norm of what we tend to see Native American performing districts at.

Q. And just to make sure we have a clear record, what is the Native VAP of enacted District 9A?

A. 54.5.

Q. I think that's the full district.

A. Oh, sorry.

Q. The enacted --

A. 79.8.

Q. And enacted District 9B?

A. 32.2.

Q. Enacted District 15?

A. 23.1.

Q. And then plaintiffs' -- Plaintiffs' Plan 1, District 9?

A. 66.1.

Q. And the Plan 2, District 9?

A. 69.1.

Q. How does District 9A compare to other majority Native districts nationwide?

A. I think it's something like the fifth largest in the country.

Q. And how does enacted District 9 as a whole compare to other Native American districts nationwide?

A. I think it's the second lowest of any NVAP majority district in the country.

Q. And then I think you testified to this, but Plaintiffs' Demonstrative Plan 1, District 9, how does that compare to other majority Native NVAP districts across the country?

A. It's exactly the median.

Q. Do both versions of plaintiffs' demonstrative plans have a majority Native voting-age population?

A. Yes.

Q. And I'd like to now pull up Plaintiffs' Exhibit 59. Dr. Collingwood, can you tell me what this is?

A. This is similar to some of the maps we've been looking at today. This is what we would call a cloropleth map or a choropleth map, and what it does is it -- the unit of analysis here or the unit we're looking at, the smallest unit is the bloc, and that's a census geographical unit. And all we're doing is we're shading that bloc based on the percentage of the Native American voting-age population that resides in that bloc.

So two things become apparent. Number one, we can see the boundary between 9A and 9B going right through a high-density Native area. Number two, we can see that there's the Spirit Lake population in Benson County, and so that's -- relatively, I think the numbers are 54.69 miles -- I could be off by a .01 decimal point -- between the two reservation boundaries. So those are the kind of noticeable aspects to this map.

Q. And just for the sake of the court reporter, can you spell the type of map that you were talking about? Maybe you can't. I probably wouldn't be able to, or say it slowly?

A. Cloropleth or Choropleth. I should've not said that every time I say it because it sounds fancy, but then it's like -- it's just a density map, heat map.

Q. What does this map tell us about how the legislature added population to District 9?

A. Well, the legislature could have clearly drawn the map south and southeast connecting the two reservations, but instead the legislature didn't do that. It went east.

Q. And I think that you testified that that's Benson County there to the south. Do you know which is closer to Rolette County, Cavalier County, which I believe is farthest to the east there, or Benson County?

A. Benson County is closer than -- Benson County is closer to Rolette County relative to Cavalier to Rolette County.

Q. And you talked a little bit about this earlier, but we're talking about the Turtle Mountain Reservation and then the Trust Lands. Can you -- if we zoom in a little bit, can you indicate where those are?

A. Oh, right. It's -- the Trust Lands are to the north and I believe also to the west of the boundary between 9A and 9B, and that's why you see those high-density blue or purple dots there or rectangular dots.

MS. DANAHY: And I'll just note for the record that the specific location of the Turtle Mountain Trust Lands is also shown in Plaintiffs' Exhibit 57.

Q. (MS. DANAHY CONTINUING) I want to start -- now, we've kind of covered some of the background with your *Gingles* prong 1 analysis. What did you look at for purposes of *Gingles* prong 1?

A. Well, I looked at the enacted plan, different compactness scores, as we've discussed earlier. Obviously you're looking at population, deviation. And then I also looked at the two demonstrative plans, so those are the main -- you know, the main components other than kind of looking at the demographic nature of the maps and stuff like that.

Q. And I'm going to pull up Plaintiffs' Exhibit 105. Do you recognize this as Plaintiffs' Demonstrative Plan 1, Dr. Collingwood?

A. Yes.

Q. And --

A. But what's particularly notable here is under the new precinct -- the new precinct boundaries or the voter tabulation district or precincts where data are collected for voting, Plan 1 does not split those up at all.

Q. And is split precincts one of the traditional redistricting criteria?

A. It is. Yeah, that's one that I didn't mention, but that's

always something in all my map drawing, that ideally, all else equal, you don't want to split a precinct across a district boundary, in part because next time when I go to do the analysis, I have to do a little bit extra work, so that's kind of just a self-serving thing there. But that's always one thing that we look at, is different governmental unit splits and stuff like that.

Q. And we'll walk through some of that analysis here in a second, but you testified earlier that you -- I believe that you reviewed plaintiffs' demonstrative plan to see whether they're majority or minority; is that correct?

A. Yes. I mean, all of these maps are -- including the enacted map and then D-9 and then the two demonstratives, are clearing basically -- clearly clearing the *Gingles* 1 threshold. I think it would be -- it's basically impossible to dispute that.

Q. And what is your opinion with respect to whether District 9 in Plaintiffs' Demonstrative Plan 1 is compact and respects traditional districting criteria?

A. Oh, it clearly is. If you -- if you look at this map, you wouldn't -- I mean, it's just -- on its face it looks -- it fits within the overall state. Nothing is particularly notable here.

Q. And is Plaintiffs' Demonstrative Plan 1 comparatively compact when looking at other districts within the enacted

plan, not just visually but mathematically?

A. Yes, it falls within the range of compactness scores that we see across the map, so it's not suddenly way out of whack compared to other districts, particularly other districts with water boundaries.

Q. And did you look at whether it is comparatively compact with respect to other districts that have been approved by the Supreme Court under the Voting Rights Act?

A. Yes, I did, actually.

Q. And what did you find, generally speaking?

A. Well, there is -- you know, I live in New Mexico, so I follow Texas politics a little bit, and I've worked there a fair amount and dissertation research down there too, and stuff, a little bit, and so they -- in Texas there is a Supreme Court --

Q. We're going get to that specific map in a second, but just generally speaking --

A. Oh.

Q. -- what was your conclusion?

A. It falls within acceptable VRA standards.

Q. And you testified already that this map keeps precincts whole?

A. Yes.

Q. What about county splits? Is that a traditional redistricting criteria that you looked at?

A. Yes, this -- this map performs very similarly to the enacted map in terms of splitting counties. I think it's like five-four or something like that.

Q. And with respect to District 9 in Plaintiffs' Demonstrative Plan 2, did you form an opinion as to whether it's compact and complies with traditionally redistricting criteria?

A. Yes, also the same.

Q. And I just want to highlight a couple things. With respect to Demonstrative Plan 2, what did you find with respect to county splits?

A. I believe it's the same or better than the enacted plan.

Q. And does Demonstrative Plan 2 split any precincts?

A. Honestly, I can't remember.

Q. What is the impact of Plaintiffs' Demonstrative Plan 2 on the neighboring districts surrounded with respect to the enacted plan?

A. Right. So in order to say that Demonstrative 2 -- not this one, but Demonstrative 2 were enacted, the map overall would have to be slightly tweaked to make sure that population deviation and balance is within acceptable standards. And so the notable aspect of Demonstrative 2 means that there's not as much movement and necessary changes to nearby districts.

Q. I'd like to pull up the third demonstrative, if we can, and this is just a chart comparing the Reock and Polsby-Popper

scores for Plaintiffs' Demonstrative Plan 1, Districts 9 and some of the other districts in the enacted plan. And this data is all pulled from what's been admitted as Plaintiffs' Exhibit 126 and 128. How does plaintiffs' demonstrative district plan score on these measures?

A. Right. So here is -- this is just a comparison with other, let's say, similarly situated districts in North Dakota that were enacted. And so we can look at both the Reock, which is area-based, and the Polsby-Poppers, which is perimeter-based, and we can compare them against other similarly situated districts with water boundaries, and you can see that the Plaintiffs' Demonstrative 1 is fairly similar on these metrics, a little bit higher in some, a little bit lower than others, but none of these numbers are striking relative to these other districts in the plan.

Q. And does Plaintiffs' Demonstrative Plan District 9 score higher on the compactness measures than any districts -- any other districts in the enacted map?

A. It does.

Q. And you mentioned water boundaries. I see that's also on the demonstrative there. Can you explain what the relevance is of the water boundaries to this measure?

A. Well, the way that the Polsby-Popper score works is it takes the area of the district and then compares it to an area of a circle that has the same circumference as to the perimeter

of that enacted plan or that enacted map or that enacted district. And so as the water cuts in and out, especially like some areas that have, you know, kind of bendy rivers, that's going to necessarily grow the size of the perimeter of the district, and so it's going to reduce the overall compactness score.

Q. And I think you've testified to this, but just looking at this chart, how does plaintiffs' demonstrative district compare to other districts in the enacted plan that have these water boundaries?

A. It's fairly similar. It's a little better on some measures, on relative measures, a little lower on others, so it doesn't stand out in any particular way.

THE COURT: You can -- you can back up a little bit from the microphone there.

THE WITNESS: Going too hard?

THE COURT: Yep. Thank you.

Q. (MS. DANAHY CONTINUING) Plaintiffs' Demonstrative Plan 1, District 9, does that have water boundaries?

A. Yes.

Q. Thank you. We can take that down. And we talked -- we started talking a little bit about Texas, so I'd like to pull up Plaintiffs' Exhibit 42. What is this document, Dr. Collingwood? There we go. What's this document, Dr. Collingwood?

A. That's my rebuttal report.
Q. And let's go to the pages 11 and 12 and pull those up simultaneously, if we can. And, Dr. Collingwood, you started talking about Texas a little bit ago. Why are we considering Texas in this redistricting case in North Dakota?
A. Well, Texas has a Voting Rights Act district that was basically a Latino opportunity district for the Supreme Court, and that district, District 15, which we see here in the purple, that goes down from probably Corpus Christi area -- I could be wrong about that -- but down towards McAllen and those areas. I'm somewhat familiar with this region just because I've done, you know, a fair amount of research down there; large Latino population. And the Reock score and Polsby-Poppers scores of that specific district are lower than what the illustrative maps are in this case.
Q. And what is the -- what is the significance of the fact that these districts have lower compactness scores than plaintiffs' enacted district -- or, I'm sorry, plaintiffs' demonstrative district?
A. Right. Well, I think if the Supreme Court is ordering this district creation and has said these are acceptable compactness scores, I think that the defense argument that the compactness scores here are maybe not acceptable, I think it doesn't hold water.
Q. Thank you, Dr. Collingwood, and we can take that down.

I'd now like to move on to the work that you did with respect to racially polarized voting in Districts 9, 9A, 9B and 15. And, actually, before we get to that, were you asked to determine whether there is racially polarized voting statewide in North Dakota?

A. I did.

Q. And what did you find with respect to statewide RPV?

A. So the first thing I did is I looked at contests featuring Native American candidates, which are some of the most probative contests when the group itself that's bringing the complaint actually has candidates from that community. And so there are four of those at least that occurred statewide; there are three in 2016 and one in 2022.

And so what I found is that there's strong Native cohesion behind the Native candidates, there's strong White bloc voting for a different set of candidates, and that the Native-preferred candidates lose in all four elections.

Q. And then just for the record, what we're talking about here is Native American candidates who ran for statewide -- in statewide races.

A. Right. Because I'm looking at statewide offices, they have to be running statewide.

Q. Thank you, Dr. Collingwood. What did you find with respect to whether racially polarized voting exists in Districts 9, 9A, 9B, and 15?

A. Racially polarized voting is effectively a fact of life in this area.

Q. Did you find higher rates of RPV in races featuring Native American candidates in this region?

A. Yes.

Q. What elections did you look at to conduct your RPV analysis for District 9?

A. Well, I looked at elections from 2014 to 2022. I looked at the most recent endogenous election, which is the jurisdiction under investigation, which is Legislative District 9 election itself. And then I looked at statewide elections and subset the data to the boundaries of Legislative District 9 across these eight cycles. I think in total in District 9 I looked at about 38 contests.

Q. And I'd like to now pull up Plaintiffs' Exhibit 12. Do you recognize this document, Dr. Collingwood?

A. I do recognize this.

Q. And what is this?

A. These are the results of my ecological inference analysis for the most recent round of elections in North Dakota.

Q. And is that in 2022?

A. 2022.

Q. Before we talk about the actual results, can you just walk us through how this -- how this figure works?

A. How it works?

Q. Yeah. Can you tell us what -- what this all means, what the columns mean, what the various lines mean?

A. All right. So for the Court and for everyone else, I'll mainly focus on just one example, and I'll focus on the 2022 state Senate D-9 race between Marcellais and Weston because that's the most probative race of all races.

And so these are two different sets of results using the same data but applying a different statistical method to them, one which -- Dr. Hood used the same statistical method, RxC, the same one he used on the right, and the other one is called King's EI for King's Ecological Inference.

Q. And just for the record, can you just explain the difference between the two methods here?

A. They're just different approaches, different ways of cutting the butter or something else. They're both simulation-based. They have a lot of the same principles. RxC is designed more for the multi-candidate, multi-race scenario.

But in any event, what I -- I typically will include these both in my analyses because it just provides me more confidence in the data. If I see the estimates are tending to go into the same direction, then I can be more confident that what I'm seeing is actually what is happening.

Q. And then you said you were going to focus on the 2022 state Senate District 9 race. Can you explain for the record just how to read this?

A. Right. So what the results do is they -- the number in the box is known as the point estimate. So, for example -- and the bars denote voters, either Native voters or White voters. So what this column is showing is that 80 -- I estimated 81.3 percent of Native American voters are backing Marcellais. Meanwhile, just 24.3 percent of White voters are backing Marcellais. We know that voting here is racially polarized because 75.7 percent of White voters are backing the other candidate, Weston, and just 18.7 percent, or so, of Native voters are estimated to be backing Weston. So this is a textbook example of very clear racially polarized voting.

Q. And with respect to District -- 2022 elections in District 9 as a whole, what did you find in terms of whether RPV exists?

A. So there are eight different contests here, and there's minority cohesion in 100 percent of contests, and there's White cohesion in 100 percent of contests. And so there is racially polarized voting no matter which way you cut it in 100 percent of the contests here.

Q. And did you conduct an EI or an RxC analysis of racially polarized voting in Districts 9A and 9B?

A. No.

Q. And why not?

A. Once you start narrowing in on the data, and I think Dr. Hood agrees with me on this point, you're starting to have situations with three, four precincts, and so ecological

inference might start to become unstable at that point. And so I think it's good practice to say, okay, let's look at the full district, and we can deduce results from there.

Q. And I'd like to pull up Plaintiffs' Exhibits 1. What is this document, Dr. Collingwood?

A. This appears to be my expert report.

Q. All right. And if we can go to Tables 3 and 4 on page 16 -- maybe we can look at just table 3 first. What do you show in these tables?

A. Well, because we can't through the ecological inference method to deduce that there's racially polarized voting, that doesn't mean we can't logically infer that there's racially polarized voting. And so what I did here is we have Subdistrict 9A. There's three different precincts with a range of NVAP, Native American voting-age population. This is a range. And so if there's racially polarized voting, a priori, this is what we would do as social scientists. We would say, "What would we expect to see?"

We know now that, as we've already done the analysis, that Marcellais is getting strong support from Native American voters. And so if Marcellais is getting strong support from Native American voters, then the areas where the Native Americans physically live, Rolette 3, should be strongly supporting Marcellais.

And if you scroll over to the second most-right

column, you see Marcellais is getting 87.3 percent of the vote in that same precinct with 94 percent Native American voting-age population. That's probably almost 100 percent of the vote when you take some turnout issues into account.

Then if you scroll down to the Rolette 5 precinct -- it's, I believe, the southern part of Rolette County -- it's a more White area. We wouldn't call this a homogeneous precinct per se because 61 percent White voting-age population. There's still some racial diversity in this area.

But we should expect as social scientists to see if there's racially polarized voting going on, that Marcellais will do worse in the areas where White voters disproportionately live. And when you go and you look at that column, you see that Marcellais is only getting 30 percentage -- 30 points of the vote in that area.

Q. And based on what we know about the demographics of the subdistricts and the overall district and the vote totals that you've discussed here, is it mathematically possible for there to be racially polarized voting in District 9 but not District 9A based on these numbers that you've just been discussing?

A. It's not mathematically possible. You can't algebraically go and say, "Let's assume there's not racially polarized voting here, how many votes do we need over here to get to the total Dem candidate vote share?" It's not mathematically possible for there not to be racially polarized voting.

Q. Overall, what is your conclusion with respect to whether there is RPV in the 2022 elections in District 9 and 9 -- sorry, Districts 9A and 9B?

A. There definitely is.

MS. DANAHY: We can take that down. Thank you.

Q. (MS. DANAHY CONTINUING) Dr. Collingwood, in addition to the -- these two -- the tables we've just reviewed and the district -- the 2022 elections we discussed, I believe you testified that you analyzed several other contests between 2014 and 2022. Does that sound right?

A. Yes.

Q. I'm not going to walk through each one of those now, but I do want to note for the record that those analyses are shown in what's been admitted as Plaintiffs' Exhibits 7, 8, 9, 10 and 11. And broadly speaking, Dr. Collingwood, what were the results? I'm sorry. Were the results of those analyses consistent across all elections?

A. Yes, I think -- I think in 94 percent, or so, of the contests there's racially polarized voting that I looked at. A couple didn't have them, but for the most part it's present. It's some of the highest racially polarized voting of any place that I've investigated.

Q. And that was for District 9; is that right?

A. Yes.

Q. And did you also analyze whether RPV exists in District

15?

A. Yes.

Q. And how many contests, approximately, did you analyze there?

A. A similar amount. I think I didn't look at 2014 for a variety of data issues, but I think around 30, or so.

Q. And what did you find with respect to the existence of RPV in District 15?

A. I think there's RPV in every election but one. I think the 2018 Senate election didn't have it, and that was it.

Q. Was there RPV in that election --

A. You might -- yeah, yeah. There might've been -- it was the blocking issue on that one. Sorry.

Q. Yeah. Broadly speaking, what was your conclusion with respect to whether there's RPV in District 15?

A. There's definitely RPV, racially polarized voting, in District 15.

Q. And, again, I'm not going to walk through each of those separate analyses. I think this has been stipulated to by the parties, but I do want to note that these analyses can be found in what has been admitted as Plaintiffs' Exhibits 20, 21, 22, 23, and I have an odd exhibit number here, but I think it's Plaintiffs' Exhibit 42 -- or 24. I'm sorry. Plaintiffs' Exhibit 24.

Dr. Collingwood, what was your overall conclusion

with respect to whether there is RPV in North Dakota elections and in the districts at issue here?

A. There is.

Q. And I'd like to move now to your analysis of whether White bloc voting usually defeats the Native candidate of choice, so I'm going to pull up Plaintiffs' Exhibit 43. Do you recognize this document, Dr. Collingwood?

A. I think this is the wrong exhibit.

Q. Nope, this is the correct one. We're going to start with this.

A. Then, yes, I do recognize this document.

Q. What is this?

A. This is a voter turnout analysis across five different election years using, I think, the same methodology or similar methodology that Dr. Hood used, using ecological inference to estimate how Native Americans and White voters vote in Legislative District 9 specifically.

Q. And what years does this chart look at?

A. 2014, 2016, 2018, 2020, and 2022.

Q. And did you create this chart?

A. Yes.

Q. What experience do you have, if any, studying Native American voter turnout?

A. A fair amount. I've worked as an expert in a few of these and done consulting as a -- as a researcher in various areas,

including North Dakota, New Mexico, and South Dakota, so I have quite a bit of experience using ecological inference to estimate voter turnout rates by race.

Q. And, generally speaking, what does this chart tell us about White turnout compared to Native turnout in North Dakota and in District 9?

A. So for the most part this chart is consistent with other analyses I've conducted among these populations, which is to say Whites vote at a much higher rate than do Natives in state and/or federal elections.

Q. Is that consistent with your experience generally with Native American turnout?

A. I would say at this point in the things I've looked at, it's basically a rule.

Q. And setting aside 2018 for now, what is the sort of general rate of Native American turnout across the elections that we're looking at here?

A. So another rule in American politics, and I'll talk about this a little bit more, is -- and I think observers of American politics would agree, is that presidential elections have higher turnout. And we see a turnout bump relative to midterms for every racial or income or educational group. Often you might see the minority population turning out a bit higher in presidential years in terms of the rate of change relative to Whites.

But here we see that Native American voters are typically voting in the 20 to 35 percent range. What does that mean again? That means of all the voting-age population of people, people who could vote, how many did vote, and what's that percentage, so that's what we're talking about. And so these numbers are consistent in that White voters are typically in the 60 to 65 percent range, with the exception of 2022 here.

Q. And do you also see a bump in general -- or presidential years in White turnout?

A. Yes, we do. You can -- you can see that trend line here comparing 2014 with 2022. They're very similar when we're looking at Native voters specifically. And then we see 2016 and 2020, the turnout points go up there, and those are presidential election years, so -- and we see the same type of pattern with Whites and then also statewide just as a comparison.

Q. Now, what does this chart tell us with respect to that general turnout trend when you look at Native turnout during the midterm election in 2018?

A. So earlier chairman -- or Former Chairman Yankton discussed on-the-ground campaign dynamics and voter registration in LD-15, and so those types of processes would also be occurring in LD-9. And so as a social scientist, when I see that I -- to me that's qualitative information, right? It's possible that it's just one person's perspective or an

anecdote. And so it's a very important process in the research process, is to get that information.

But as quantitative social scientists and data scientists, we then go and actually run the numbers and get these objective numbers, and what we see here is 2018 fits with that picture that was being painted earlier exactly. And I would say I've been doing these types of turnout analyses and studies in these different areas that are higher-density Native American. I've never seen any turnout number like this, ever.

Q. And overall, just based on turnout, what would you conclude about the 2018 election?

A. It's an anomalous election.

Q. And I'd like to pull up the fourth demonstrative here. This is a chart of data that is found at the top of page 5 of your rebuttal report, which has been admitted as Plaintiffs' Exhibit 42. What does this chart show?

A. This actually shows an estimated share of the actual voters in these different election years. So the legislature created a majority-minority seat. There's only one year where Native Americans and Whites actually composed the same share of the electorate. That's this year in 2018.

What we typically see is an electorate that's majority White when we take voter participation into account. And so that's why I think you typically see the median or mean of NVAP districts, in part, at around 66 percent, or so, is to

account for turnout imbalance by race.

Q. And when you say the legislature created the district, are you talking about enacted District 9?

A. Yes.

Q. And just remind us, what was the -- what is the Native VAP for enacted District 9?

A. I think it's 54.5 or 54.1.

Q. And you mentioned earlier some of Chairman Yankton's testimony about the special circumstances surrounding the 2018 election; is that right?

A. Yes.

Q. Is that the type of special circumstance -- I think you've testified to this a little -- that would lead to these anomalies that we're seeing in the turnout rate?

A. Yes, it is.

Q. And we're going to go through your performance analysis here in a second, but were the 2018 election results also anomalous?

A. Yes.

Q. And how so?

A. The preferred candidate of Native American voters won, I think, every contest in the -- in the subset of District 9.

Q. In your expert opinion, what, if any, probative weight would you give the 2018 elections in analyzing *Gingles* prong 3?

A. That's a good question. It's an extremely anomalous

election, but it's still an election. It's still data. So I think, like, if you assigned it some sort of weight between zero to 100, maybe 2 or 3.

Q. Thank you, Dr. Collingwood. And we can take that down. I'd like to move to your performance analysis here, and just to start off, what was the data source that you used for election results in conducting this analysis -- these analyses?

THE COURT: Ms. Danahy, I'm going to interrupt at this time, and before we get into the performance analysis of Dr. Collingwood, I think that we could take a little break for staff and for all. It's five minutes after three. We can resume at 3:25, and then we'll go to the end of the day. Thank you for permitting me to interrupt, and we will be in recess until 3:25.

MS. DANAHY: Thank you, Your Honor.

THE COURT: Thank you.

(Recess taken from 3:05 p.m. to 3:30 p.m.)

THE COURT: Ms. Danahy, please proceed.

MS. DANAHY: Thank you, Your Honor.

Q. (MS. DANAHY CONTINUING) Dr. Collingwood, I think when we left off, we were just starting with your performance analysis, and I'd like to just start with some background. What was the data source that you looked at for election results for this analysis?

A. The data source for the 2022 analysis comes from the

Secretary of State data released. Just precinct returns that come from the Secretary of State, and it's publicly available data.

Q. And with respect to the other elections that you looked at?

A. There I used what's known as the VEST data, Voting and Election Scientists Team, which are voter results, vote -- results for different candidates at the VTD or precinct level, and that comes in through redistricting software that's used in Dave's Redistricting, for example.

Q. All right. Thank you. What are the three types of elections that give you the most information in understanding how a district will perform for purposes of *Gingles* 3?

A. Well, the most important would be what we just had, which is endogenous. Get used to that term. That's all we talk about in graduate school, for anyone who's thinking about getting a Ph.D. But endogenous in this case means an election in Legislative District 9 or Legislative District 15. We just had one in 2022. The Legislative District 9 election also featured a Native American candidate, a candidate from the racial minority that's under examination in their voting patterns that's bringing the claim, and then also the most recent election, 2022.

Q. I'd like to pull up Plaintiffs' Exhibit 15. What is this document, Dr. Collingwood?

A. These are the election results of my electoral performance analysis for these eight elections in 2022 that I'm looking at. We have the endogenous District 9 election between Marcellais and Weston, but then we also have the statewide contests, for example, Attorney General, Secretary of State. And each one of these results is subset to that specific district of only the voters living in District 9 on the left, only the voters living in District 9A in the middle, and only the voters living in District 9B on the right.

Q. Let's start with the first column, District 9. What did your results show for District 9 in the 2022 elections?

A. So it's important to keep in mind that we've already conducted a racially polarized voting analysis of this -- of these elections, and so we know who White voters prefer and we know who Native American voters prefer.

And so, for example, in the 2022 agricultural commissioner race there in D9, we can see that the preferred candidate of White voters -- and forgive me if I mispronounce this, but the record won't show it -- Goehring at 60.2; so Goehring is getting 60.2 percentage of the vote in District 9, and Dooley is getting 39.6 percent of the vote.

So within District 9, the White-preferred candidate is winning that election, and the White-preferred candidate wins every single election in District 9, and that's very easy to tell because you can always see the green bar further to the

right than the blue bar.

Q. And did any of these contests feature Native American candidates?

A. It's part of my standard procedure when I can and have enough time and know the race of the different candidates to denote a racial minority candidate -- in this case, two Native American candidates -- with a star or an asterisk. And so that's Legislative District 9 and the Public Services Commissioner featuring Fedorchak versus Moniz, who is Native American.

Q. And in the Senate District 9 race, did the Native-preferred candidate lose?

A. They did.

Q. And, similarly, in the public service commissioner race, did the Native -- was the Native candidate the Native-preferred candidate in both those rates?

A. They were.

Q. And do they lose in -- did that Native candidate lose in both those races?

A. They lost both of those contests.

Q. And I think you said this earlier, but the Legislative District 9, that's an endogenous contest?

A. It is the most probative of all contests.

Q. And why is that?

A. That's why we're here.

1 **Q.** All told, what was the block rate, b-l-o-c-k, for
2 Native-preferred candidates in the 2022 elections in District
3 9?
4 **A.** 100 percent.
5 **Q.** And what does the second column show?
6 **A.** So this is the same exact analysis in Subdistrict D9, and
7 the top level takeaway is that a Native American voter can
8 elect candidates of choice in District 9A.
9 **Q.** And I think you said "D9," but you were referring to 9A in
10 that one?
11 **A.** Yes.
12 **Q.** What does the third column show?
13 **A.** This is the Subdistrict 9B, and so we see the reverse
14 pattern here where the White-preferred candidate wins
15 handily -- very handily in every contest.
16 **Q.** I'd like to pull up the final demonstrative, and this just
17 summarizes the -- your performance analysis, Dr. Collingwood,
18 for endogenous elections, the two most recent elections, and
19 elections featuring Native American candidates. And all of
20 this data is found in your initial and rebuttal reports, which
21 are admitted as Plaintiffs' Exhibit 1 and 42. With respect to
22 the full District 9, what is the block rate for endogenous
23 elections?
24 **A.** 100 percent.
25 **Q.** And with respect to the full District 9, what is the block

rate for the most recent election cycle?

A. Also 100 percent.

Q. And what about the block rate for the most recent two cycles in the full District 9?

A. 71 percent.

Q. And I don't believe this is in the chart, but what is the block rate for Native American candidates in the most recent elections in the full District 9?

A. Also 100 percent.

Q. And then across all the elections that you analyzed for the full District 9, what was the block rate for the Native American candidates?

A. 60 percent.

Q. Based on your analysis, Dr. Collingwood, what do you conclude with respect to whether *Gingles* 3 is met in Districts 9 and 9B?

A. Well, you can see that it is.

Q. And is that based on endogenous elections?

A. Right. I assigned the most weight to endogenous elections and recent elections.

Q. And what about elections involving Native American candidates?

A. Likewise, in every case you can see that blocking is happening more often than not.

Q. And just for the record, what is the -- I'm sorry. I was

getting ahead of myself. Did you do a *Gingles* 3 analysis of 9A?

A. No, you don't need to.

Q. And why not?

A. Because Native voters are able to win there, so blocking is effectively irrelevant.

Q. Did you also conduct a performance analysis of District 15?

A. Yes.

Q. And I'm not going to go through each one of those, but is that analysis contained in your report?

A. Yes.

Q. And for the record, those figures have been admitted as Plaintiffs' Exhibit 25, 26, 27 and 28.

Overall, what did your analysis show with respect to District 15?

A. Also there's blocking in District 15.

Q. Did you read Dr. Hood's report?

A. Yes.

Q. And does he agree with you with respect to whether *Gingles* 3 is present in District 15?

A. Yes.

Q. Did you conduct a performance analysis of plaintiffs' demonstrative plans?

A. I did.

Q. Why did you do that?

A. Well, to show that a remedy is possible.

Q. And what elections did you use to conduct the performance analysis of the demonstrative plans?

A. The same elections I conducted racially polarized voting on.

Q. And what did you find with respect to whether there is blocking in plaintiffs' Demonstrative Plan 1. I'm sorry. I asked the wrong question. What did you find -- what were the results of your performance analysis in Plaintiffs' Demonstrative Plan 1?

A. I think over 90 percent of the time the Native-preferred candidate is winning.

Q. And what about with respect to plaintiffs' Demonstrative Plan 2?

A. The same result.

Q. So based on those -- that analysis -- based on that analysis, would both those districts be -- perform for Native American voters?

A. Yes.

Q. And then I just want to summarize here before we finish. What did you find with respect to whether plaintiffs' demonstrative districts are reasonably compact and comply with traditional redistricting criteria?

A. They do.

Q. And did you find that those districts are both majority Native?

A. I did.

Q. What did you find with respect to whether there is political cohesion among Native American voters in Districts 9, 9A, 9B, and 15?

A. They are cohesive.

Q. And then, finally, what did you find with respect to whether White bloc voting, b-l-o-c, usually defeats the Native-preferred candidate of choice in Districts 9, 9B, and 15?

A. It does.

Q. Overall, what change, if any, was there in the Native American voting population in North Dakota between the 2010 and 2020 census?

A. Any part race, I think it went from 5.1 to 5.9 percentage points.

Q. And under the benchmark plan, which is the plan that was in effect last district -- or last decade, how many effective Native American majority multimember districts were there?

A. Three.

Q. How many districts were there?

A. One with three elected officials.

Q. And under the enacted plan, how many effective Native American majority multimember districts are there?

A. Well, there's two subdistricts.

Q. There's two subdistricts. Are there any performing multimember districts?

A. No.

Q. And then under plaintiffs' Demonstrative Plan 1, how many effective Native American majority multimember districts would there be?

A. One.

Q. And that would allow a Native-preferred -- the Native Americans the opportunity to elect how many candidates to the --

A. Three.

MS. DANAHY: Thank you, Dr. Collingwood.

I tender the witness.

THE COURT: Mr. Phillips, will you be handling this for defendant?

MR. PHILLIPS: Yes, Your Honor.

THE COURT: Thank you. Please proceed.

CROSS-EXAMINATION

BY MR. PHILLIPS:

Q. Good afternoon, Dr. Collingwood.

A. Good afternoon.

Q. Let's pull up Exhibit -- or Plaintiffs' Exhibit 3. Dr. Collingwood, is this your CV that you produced in this case?

A. It looks like it.

Q. Let's go down to page 16, and we'll zoom in a little bit on the expert witness work there. This lists the cases that you've appeared in as an expert witness; is that correct?

A. Well, at the time that I produced it, but I've since appeared a few more times.

Q. One of the cases on this list is the *Walen* case, the other redistricting case currently in North Dakota; is that right?

A. Correct.

Q. And in that case you're working as an expert for the intervenors, correct?

A. Correct.

Q. Other than the *Walen* case on here where you're working for intervenors, do you typically perform expert work for plaintiffs in voting cases?

A. Yeah, probably.

Q. That would be plaintiffs with a government agent or a government entity on the opposite side?

A. Yeah.

Q. And we just talked about the *Walen* case. That case also involves the most recent 2021 redistricting in North Dakota?

A. It does.

Q. And that case involves District 4 in addition to District 9, right?

A. Correct.

Q. Just to be clear, though, your work in the *Walen* case is limited to an analysis of District 4, and you don't have an opinion in that case about District 9, which is at issue in the present case.

A. I get very confused about the 4A, the 9A, the B's, but I believe that's correct.

Q. In the *Walen* case you performed a racially polarized voting analysis and what I call a functional analysis, correct?

A. Correct.

Q. I think opposing counsel referred to it as a performance analysis. Are those the same thing?

A. Yes.

Q. And that's similar to the type of analysis you've done in the present case.

A. Correct.

Q. And you produced an expert report in the *Walen* case?

A. Yes.

Q. Let's pull up Defendant's Exhibit 472. Is this your expert report in the *Walen* case?

A. It looks like it.

Q. Let's scroll down to page 7, and there's a Figure 1 here at the top of page 7, and this depicts District 4 with its two subdistricts, 4A, and 4B. Do you see that?

A. I do.

Q. And it's my understanding, in District 4 they elect one

1 senator in the full district, and then they have one House
2 member being elected from each subdistrict; is that correct?
3 **A.** Yes.
4 **Q.** And that's similar to how it operates in District 9 at
5 issue in this case?
6 **A.** Yes.
7 **Q.** District 4A surrounds the Fort Berthold Indian Reservation
8 and has a high concentration of Native Americans.
9 **A.** That's my understanding.
10 **Q.** Do you know the Native American voting-age population in
11 District 4A? If I told you your report says 62.7 percent, does
12 that sound right?
13 **A.** That sounds right.
14 **Q.** Okay. That's a high concentration of Native Americans in
15 4A, right?
16 **A.** That's right around the median or average Native American
17 majority number that we tend to see. It's almost -- as I
18 presented earlier, you can see it's almost exactly the same.
19 **Q.** And the rest of District 4 is made up of 4B, and that has
20 a high concentration of Whites and a low concentration of
21 Native Americans, right?
22 **A.** Correct.
23 **Q.** This is a similar breakdown in structure to District 9,
24 with 9A having a high population of Native Americans and 9B
25 having a low population of Native Americans.

A. Well, I would say almost a third of the voters in a subdistrict being Native American is not a low population of Native American voters. If -- so I wouldn't say they're exactly the same.

Q. And you're referring to 9B?

A. Yeah.

Q. Does 9A have a similar concentration of Native Americans as 4A?

A. I think it was, what, 78, 79, which is -- memory serves, it's like the fifth largest number of Native Americans in any seat in the U.S., so, yes.

Q. Let's scroll to page 5. You may have to zoom in a little bit towards the top of that. This is a chart that you prepared in the *Walen* case, and it's my understanding that this shows 34 exogenous elections that you analyzed. Does that sound accurate?

A. It's triggering PTSD, but yes.

Q. Okay. And then later in your report you also analyzed an endogenous election in 2016, and those were the elections that were analyzed as part of this report. Does that sound right?

A. Yeah, I think so. That's right.

Q. Now, looking at this chart in the *Walen* case, does this reflect what we refer to as a functional analysis?

A. Well, a lot of times in my reports I do some sort of summary upfront, and so this obviously doesn't have the

detailed data because other experts and I sometimes disagree about what cohesion means or something like that, but this is kind of an overall summary.

Q. An overall summary of your functional analysis results?

A. Of my racially polarized voting, and then in this case I was able to put in kind of the blocking analysis.

Q. My understanding is you -- on these past elections you essentially run them as if they were held in the new district or in a proposed district. And what you're depicting here is whether the Native American candidate of choice would have won under the current district in past elections. Is that a fair assessment -- or a fair summary, I should say?

A. That's correct.

Q. In this chart there's a column that says "D4, Native-prefer win"; and a column that says "D4A, Native-prefer win"; and a "D4B, Native-prefer win." What do these columns stand for?

A. The first column, D4, Native-prefer win, basically asks the question, does the Native-preferred candidate win in the full District 4? And if they did based on my analysis, then I say yes; and then if they lost, I say no.

Q. You can't see the whole chart right at the moment, but if we can scroll out a little bit, in 4A the Native American candidate of choice wins in all but one election that you analyzed, and in 4B the Native American candidate of choice

loses in all of the elections that you analyzed?

A. That's what it looks like to me, yes.

Q. And it looks like in District 4 as a whole, the Native American candidate of choice loses all of the elections in the Senate seat?

A. Yes.

Q. In the endogenous election involving a Native American candidate in 2016, he lost his election too?

A. I don't remember.

Q. If I represented to you that your report says that, would that --

A. I would agree with my own report.

Q. So in District 4, as recently redistricted, the Native American candidate of choice is very likely to win in Subdistrict A, and the Native American candidate of choice is very unlikely to win in Subdistrict B. Is that a fair statement?

A. That's a fair statement.

Q. And the Native American candidate is unlikely to win in the Senate seat as well.

A. Correct.

Q. This table in the *Walen* case, you know, lays out nicely the full results of this analysis and the wins and losses. Do you have a similar table to this in your report in the current case?

A. It's similar, but not exactly the same.

Q. We'll go through it in a little bit and look at the differences. Well, let me ask you this before we get to it even. Do you have a breakdown of the wins and losses on all the cases that you -- or all the elections that you analyzed in your report in the current case?

A. No, I don't think so.

Q. Dr. Hood did perform that analysis in his report, right?

A. I think he had some type of table like that.

Q. You haven't opined in the *Walen* case that Native Americans are packed or cracked in any way, correct?

A. I can't remember.

Q. Is it your opinion in the present case that Native Americans are packed into Subdistrict 9A?

A. When you look at the full picture of what we're looking at which is incorporating wins, losses, District 15, District 9, clearly getting packed into that area.

Q. Are Native Americans being packed into your two demonstrative maps that are included in your reports?

A. No.

Q. If I recall correctly, your testimony in the two demonstrative maps, Native American candidate of choice wins in the functional analysis 91 to 93 percent of the time; is that right?

A. That is -- that sounds right.

Q. Let's go to page 21. There's a conclusion section here, and we'll scroll down to the end of it. I'm going to read it off my notes here because I -- it says -- towards the end there it says, "Therefore, *Gingles* 3 is present in Subdistrict 4B, in District 4 overall, but not in Subdistrict 4A, which was drawn to allow Native American voters to overcome White bloc voting." Do you see that?

A. Yes.

Q. And that's your opinion in the *Walen* case?

A. Well, yeah. I wouldn't write this conclusion if it wasn't my opinion.

Q. The creation of Subdistrict 4A overcomes White bloc voting.

A. It does.

Q. Is it your opinion that there's no violation of the Voting Rights Act with respect to District 4, Subdistrict 4A, and Subdistrict 4B?

A. It's my opinion that the legislature followed the Voting Rights Act and the law when they created District 4A.

Q. And it goes on to say here in the conclusion that, "Subdistrict 4A thus affords Native American voters the opportunity to elect their candidates of choice that they otherwise lack in the absence of the subdistrict." Do you see that?

A. Yes.

Q. And that's your opinion with respect to District 4A.
A. Correct.
Q. It essentially guarantees a House member for Native American voters, correct?
A. It's about as good as you're going to get under these types of analyses. You know, there could be huge population shifts that occur because of climate change, or something, and everyone starts moving to North Dakota. You know, I can't predict that, but based on the data that I've analyzed, it's about as good as you're going get.
Q. Let's pull up your report in this case. It's Plaintiffs' Exhibit 1, and do you recognize this as your report in the present case?
A. Looks like it.
Q. Scroll down to page 6 where you have a Table 1. And then also, if you keep scrolling down onto the next page, there's a Table 2. These tables together, they show the elections that you analyzed in this case, the Turtle Mountain case; is that right?
A. There might have been one other case, one other election I looked at that wasn't in the summary because it's like a subdistrict contest or something like that, if memory serves. But overall, yes, these are the contests I looked at.
Q. And an asterisk on this chart denotes a Native American candidate, right?

A. Correct.
Q. How did you determine that the individuals on this list who have a star are Native American?
A. Well, some I kind of already knew just by following politics. Well, you know, I went and looked up who Senator Marcellais was, and it's evident that he's Native American. And then I think I asked counsel to see if they could, you know, find out on the ground who is and who isn't Native of these different candidates.
Q. And there's -- it's a little hard to see, but we could zoom in a little bit. It refers to RPV on the chart. That refers to racially polarized voting.
A. That's correct.
Q. How did you select these specific races to include in your analysis?
A. Well, for 2022 because we now have endogenous contests and subdistrict contests. I think the subdistrict one that I did look at somewhat is not on this for D9, but we had the two -- you know, the D9 state Senate, and then the two D15 contests I looked at. And then I also -- pretty standard, I will select contests that are held statewide and then subset that down to the different areas where I'm conducting my analysis.
Q. And if we scroll down a little bit, I think you can see the elections chosen. They range from 2014 to 2022, right?
A. Right. So either the Secretary of State data -- I'm

pretty familiar with the North Dakota Secretary of State data because they have -- they also have the same, probably, vendor as South Dakota and other states I've worked in, so I'm familiar with it, so I can pretty typically figure out who's running and who's not running for statewide offices and kind of the general election type offices. And so I don't always, but I tend to select just all of the kind of statewide offices so I'm not kind of cherry-picking, or anything.

Q. And those elections run from 2014 to 2022?

A. Yeah.

Q. You personally chose the elections to include in your analysis, didn't you?

A. I personally did.

Q. Did Dr. Hood's report and analysis include these exact same races?

A. It's my understanding he may've only had six or eight total races that he looked at.

Q. He does provide summary charts where he's analyzed all of these races, though, from your reports?

A. That sounds right.

Q. If you didn't want to include an election in your analysis, you could have excluded it, right?

A. I believe I have the freedom to do that.

Q. It's my understanding, when you perform a functional analysis in cases like these, you assign more weight to certain

elections. That's a fair statement?
A. Correct.
Q. Did you indicate that in your initial report in this case or only your rebuttal?
A. I'm not sure if I used the term "weight" specifically. But in my initial analysis I indicated that the Court or the decisionmaker should use care and caution, if those were, I think, the words I used, when considering whether to include the 2018 contests particularly.
Q. In terms of giving more weight to certain elections, I think I noted that you've said endogenous -- endogenous elections have more weight than exogenous elections, elections with Native American candidates have more weight than elections without, and more recent elections have more weight than older elections. Was there any other category that you included?
A. Typically general elections because that's where the blocking tends to occur, at least in a partisan system, but I didn't -- I think here I didn't look at primary elections.
Q. And you don't apply a mathematical formula to heavier-weighted elections, right? I mean, you just point out to the Court which ones you believe to be more probative; is that fair?
A. That's correct.
Q. And I've maybe used it interchangeably, but when we say "more weight," that's another way of saying having higher

probative value?

A. Yes.

Q. Since you don't apply any mathematical calculation to the probativeness of an election, is there any tipping points where a certain number of elections having -- being more probative tips your opinion one way or another in a case?

A. Sorry. Could you maybe restate that?

Q. You don't apply a mathematical calculation to probativeness, correct?

A. Is that -- is that rephrasing it?

Q. I'm going to take it a step at a time instead.

A. Yes.

Q. And so when you go to analyze cases like this, how do you know when a threshold has been crossed in terms of there being an opportunity to elect minority candidates of choice?

A. How do I know if a threshold is being crossed? Are you talking about, like, 2018 and whether they should be included or excluded, or whether I should look at only 2022, or I guess that's what I -- you know, I'm not quite sure.

Q. Let me clarify. So it's my understanding that the Voting Rights Act requires in circumstances like this that the minority voters should be given an opportunity to elect the candidate of their choice; is that fair?

A. Sorry. I had a salad for lunch. I got to -- I mean, the statement of opportunity, I have to be careful when I say that

because is it like a 1 percent opportunity? Does that count as an opportunity? No. I think they need a fair -- a good, solid chance to be able to win an election.

Q. Is an opportunity more often than not; in other words, 51 percent?

A. Yeah, I think if -- I think that's Dr. Hood's sort of angle there, and I think that's a fair point to start with, more often than not.

Q. Pardon me. Just give me a moment, Dr. Collingwood. Do you agree with Dr. Colling -- or, I'm sorry, Dr. Hood if it's his opinion that an opportunity to elect means more often than not?

A. Yeah, I think so.

Q. And you don't have any calculation in your reports that indicates whether the more-often-than-not threshold is crossed in this case?

A. I mean, I -- you saw the results. So, I mean, the results speak for themselves. I think the most recent elections -- elections featuring Native American candidates, elections that are endogenous -- receive more weight. And when you look at those three elections, those three different types of elections, the White majority is blocking the Native minority in District 9 specifically more often than not.

Q. And you've analyzed elections from 2014 to 2022, right?

A. Yes.

1 **Q.** And you've testified that more recent elections are more
2 probative than older elections, right?
3 **A.** Correct.
4 **Q.** Is it your understanding that currently Native Americans
5 in District 9 and 15 tend to prefer Democratic candidates?
6 **A.** That's what my analysis shows, so, yes, that's my
7 understanding.
8 **Q.** And do Whites in those districts tend to prefer Republican
9 candidates?
10 **A.** Correct.
11 **Q.** Those preferences haven't changed from 2014 to 2022, have
12 they?
13 **A.** No.
14 **Q.** Did you conduct any empirical analysis on whether there
15 were population changes in the area that may have impacted
16 election results from 2014 to 2022?
17 **A.** Do you mean, like, within the districts themselves or the
18 overall population change?
19 **Q.** Within the districts.
20 **A.** No.
21 **Q.** So when you give more weight to more recent elections,
22 you're just simply applying the general rule that more weight
23 is given to more recent elections.
24 **A.** I mean, all of this thinks that maybe I should write an
25 article and publish it so that, you know, I don't have to do

this again.

Q. The elections that you've found to be more probative or having a higher weight in this case, they're 2022 and 2020 elections, right?

A. Yes.

Q. Normally would you be looking for a pattern to establish vote dilution?

A. So in many cases I've looked at, I go back ten cycles or -- sorry -- five cycles or four cycles, and you see a general trend that's consistent across the board. And so when you see that, you don't need to really incorporate much of the pattern shift, but here you see this clear pattern shift. So, yes, I think it's very relevant to look at the different patterns in blocking in this area.

Q. Are two election cycles enough to create a pattern?

A. Well, it's my understanding that the defense expert looked at two election cycles only and drew conclusions, and so, yeah, I think that was right to look at -- you can just look at two elections and potentially draw a conclusion.

Q. It's your opinion that the elections in 2018 are less probative than the other elections you analyzed, right?

A. I think that the testimony given by other witnesses and --

Q. Dr. Collingwood, is it your opinion?

A. Yes, it is.

Q. Thank you. Going backwards, we've got the 2022 election

cycle, 2020 and 2018. So the 2018 elections were only three election cycles ago; isn't that right?

A. Yes.

Q. And there was a high turnout of Native Americans that year?

A. It's the highest I've ever seen.

Q. It's my understanding there was a dispute that year involving voter ID and that there was a get-out-the-vote effort amongst Native Americans. Is that your understanding as well?

A. And Dave Matthews Band also showed up, I think, and that helped mobilize voters, but it would be hard to tease that out specifically.

Q. Do you have personal knowledge of the events that happened in North Dakota in 2018, or are you gathering that from another source?

A. I was not in North Dakota in 2018 during this time.

Q. In 2018, with the high Native American turnout, did the Native American voters have the opportunity to elect their candidates of choice?

A. Yes.

Q. Does the Voting Rights Act require that minority groups be given a guarantee of election outcomes?

A. No.

Q. It only requires that they be given an opportunity to elect their candidates of choice, right?

A. I think it's context-specific in different configurations with different groups. Sometimes you're looking at multigroup districts. But, yeah, in general you hear the term "opportunity" a lot.

Q. Let's go to Plaintiffs' Exhibit 81. This is Dr. Hood's report in this case, the defendant's expert. Have you reviewed and analyzed this report?

A. I have -- I've seen it.

Q. Let's go to page 11. This is -- am I understanding correctly -- one of the demonstrative maps that you've provided in your report?

A. It looks like it.

Q. And I shouldn't say that it is your demonstrative map. The outline is your demonstrative map that Dr. Hood has placed into his report and overlaid the population of Native Americans. Is that a maybe more accurate statement of this?

A. Sure.

Q. And we'll go to the next page, which has Figure 3 in it, and is this the shape of your other demonstrative map?

A. It looks like it.

Q. And did I state that accurately, that what these appear to depict is the shape of your demonstrative maps with, in green, the Native American populations shown?

A. It looks like it.

Q. And the Native American population on the north end of --

we'll stick to this map, is clustered in and near the Turtle Mountain Reservation, right?

A. Correct.

Q. And that Native American population is currently entirely contained within District 9?

A. That's my understanding.

Q. When you go to draw a demonstrative map like this, is the -- is it fair to say the only way to bring in more Native American population into the district is by pulling from the population in the Spirit Lake Reservation to the south?

A. I wouldn't say the only way, but I think in order to comply with compactness and other redistricting criteria, yes.

Q. Other than the Native American populations that we're looking at on this exhibit, is there any other substantial population of Native Americans in the area of District 9 and District 15?

A. No, you probably have to, I think, go over to MHA, to the -- you know, the left and kind of do a squiggly-type thing. You could -- you could probably make it contiguous, but it probably wouldn't be very compact.

Q. Now, the MHA Nation is on kind of the other side of the state, right? That's not possible to bring MHA into District 9?

A. I mean, you've seen some of those maps from some places where the districts are pretty misconfigured. So I think a map

that is going to perform for Native Americans in an area and fit within traditional redistricting criteria, it's my understanding that this is -- this is how you would do it.

Q. But it's also your opinion that the state could draw a district that encompasses both the Turtle Mountain Reservation and the reservation on the Fort Berthold -- the Fort Berthold Reservation?

A. I'm not -- I mean, they probably could. I'm not recommending that, so I don't really want to go there and get nailed later for saying something.

Q. Let's pull up Plaintiffs' Exhibit 101. This is the statewide enacted map. Fort Berthold is in District 4A, sort of in purple there. Do you see that?

A. Yes.

Q. Now, seeing the state as a whole, do you believe that population from Fort Berthold Reservation could be pulled in and made into a single district with the Turtle Mountain?

A. I mean, the software -- I'm not saying it's not theoretically possible, okay? I think it's probably theoretically possible. I mean, keep in mind blocs are very, very small and stuff like that.

Q. Let's go back to the other exhibit. Is it possible for the state to take a part of the -- to take part of the population from the Turtle Mountain Reservation and part of the population from the Spirit Lake Reservation and make a single

district out of it?

A. Is it possible? I mean, from a mapping GIS perspective, sure, but I think you're going run into -- we'll probably be right back here again. You're going to run into a massive community-of-interest problem if that were to occur, I think.

Q. That would violate traditional redistricting principles?

A. I think a Native American reservation is one of the most important communities of interest that -- you know, that we know. There's actual boundaries, unlike, say, other minority communities that are more neighborhoods, so I think it would definitely violate community-of-interest principles, generally.

Q. Now, the actual map enacted in North Dakota did not split any reservation, correct?

A. Right. So on that ground, credit where credit is due in terms of the full District 9.

Q. And are you aware of the testimony that was given in the legislature where the state was asked not to split reservations?

A. I didn't follow the legislative testimony. I'm too busy with crunching data on lots of different things, and so I take it for -- you know, just stuff I've heard. It sounds like something that would be said.

Q. Is it fair to say that if the State of North Dakota was to do another redistricting and incorporate population from both the Turtle Mountain Reservation and the Spirit Lake

Reservation, it would have to include the entirety of both reservations in order to comply with traditional redistricting criteria?

A. I would think that that would be a goal that it would try to do.

Q. You've heard some testimony today from Former Chairman Yankton about Spirit Lake Reservation. Do you have any personal knowledge of the communities of interest in either Spirit Lake or Turtle Mountain?

A. No.

Q. Let's go back to Plaintiffs' Exhibit 1, and let's go to page 31. Now, this is your actual Demonstrative Map 1, correct, from your report?

A. This looks like my report.

Q. And is this the first demonstrative map contained within your report?

A. Correct.

Q. And then I believe the second one is on page 38, if you scroll there. This is the second one?

A. Correct.

Q. To be clear, you didn't create the shape files for these demonstrative maps, did you?

A. Correct.

Q. Those are provided to you by plaintiffs' attorneys?

A. Correct.

Q. Let's go page 2 of this exhibit. Oh, I'm sorry. Yes, page 2, go to the last bullet point, please. The last bullet point on page 2 of your report says, "An analysis of plaintiffs' demonstrative maps shows that Native American-preferred candidates would succeed in securing these districts. In Demonstrative 1 of the 35 contests I analyzed, the Native American-preferred candidate won 32 of 35 or 91 percent. In Demonstrative 2 of the 28 contests I analyzed, the Native American-preferred candidate won 26 of 28 or 93 percent." Do you see that?

A. Yes.

Q. Is that accurate?

A. It looks accurate to me.

Q. In your calculation there, did you omit any elections?

A. I did it on the elections, basically, that I had data on, and so that's why it's maybe slightly different, because some of the contests I looked at were like subdistrict or what have you, or I think in District 15 there was some sort of VTD precinct alignment issue in 2014, so I didn't incorporate those, so that's why there's fewer precincts --

Q. You didn't --

A. -- or fewer elections.

Q. Sorry. I cut you off. You didn't give any more or less weight to any of those elections, did you?

A. I didn't need to.

Q. It's fair to say, under your demonstrative maps, the Native American candidates of choice are extremely likely to win?

A. I would say anything over 90 percent is -- falls into the extremely likely. It's not a guarantee, as we know, but it's on the extremely likely situation.

Q. In this case it's either 91 percent or 93, depending on which of your demonstrative maps we look at?

A. Correct.

Q. There's three legislative seats in the current District 9, right, two House members and one senator?

A. Correct.

Q. And there's also three seats in your demonstrative maps at issue; one senator, two House members.

A. But no subdistrict.

Q. But the same number of legislators.

A. Yes.

Q. Is the only way for North Dakota to comply with the Voting Rights Act to draw a District 9 that makes it extremely likely for Native American candidates to elect their candidate of choice?

A. Maybe that's a legal opinion. You know, I'm just looking at different enacted versus demonstratives and reporting out the results. So 90 percent? No. As a specific number, that's not what I would say, but I'm also not a lawyer, so I don't

want to give a legal interpretation of what the VRA is saying in that specific area.

Q. The Voting Rights Act doesn't guarantee election outcomes, though, right?

A. I agree with that. But also, you know, West Virginia used to be a Democratic state. Now it's a Republican state, so, you know, things can change, so there's no guaranteed -- no guarantees in anything except for death and taxes.

Q. Does the Voting Rights Act require 91 percent-plus odds of electing minority candidates -- or a minority candidate of choice?

A. No.

Q. Let's go to page 2, and specifically the fourth bullet point. Now, this bullet point in your report says, "In my reconstituted electoral performance analysis, Native American-preferred candidates win handily in the newly adopted Legislative Subdistrict 9A. However, Native American-preferred candidates disproportionately lose in the newly adopted Legislative Subdistrict 9B because White voters cohesively vote as a bloc against Native American voters' preferred candidate." Do you see that?

A. Yes.

Q. We looked earlier at your conclusion in the *Walen* report, and in that case you concluded that the existence of Subdistrict 4A allowed Native American voters to overcome White

bloc voting, correct?

A. That sounds right.

Q. In the course of your analysis did I hear your testimony correctly that you applied what's known as ecological inference?

A. Correct.

Q. And remind me again what ecological inference is?

A. It's basically a method for taking ecological data, which in this case is precinct data, and then inferring how individual actors or individuals who live within those ecologies do things, which in this case is voting. And so we have precinct data, and we have estimates as to what the electorate demographically looks like in those areas. And then we apply either Kings EI, which is a well-known statistical method, or we apply in this case a Rows by Columns multinomial Dirichlet Model, which is, I think, what Dr. Hood and I both use in one of our analyses.

Q. Is it important to use ecological inference?

A. Well, it is the go-to method for conducting racially polarized voting studies in voting rights' cases. I don't -- I know very few cases at least since the nineties that don't use ecological inference.

Q. In your analysis of the districts at issue, did you analyze whether there was racially polarized voting?

A. Well, I just presented for an hour-and-a-half that I did,

so, yes.

Q. Does racially polarized voting apply to the second and third prongs of the *Gingles* test?

A. Well, the most important part of racially polarized voting is to assess how the minority voters, in this case Native Americans, are voting and whether they're cohesive for the same set of candidates, and so you necessarily need an ecological inference racially polarized voting analysis to do that.

Q. Did you determine there was racially polarized voting in District 9 as a whole?

A. Yes.

Q. And District 15?

A. Yes.

Q. Did you also determine there's racially polarized voting in Subdistrict 9A and Subdistrict 9B?

A. It necessarily follows that there has to be.

Q. So you did determine that?

A. Yes.

Q. You didn't use ecological inference to make that determination, though, did you?

A. No, I had to backwards it out through a basic algebra check.

Q. Dr. Collingwood, the answer is yes or no. You didn't use it?

A. If you're -- I would -- I guess you need to ask me a more

specific question because I did use it, and so I think you need to ask me a more specific question on that.

Q. Is there sufficient precinct-level data to perform ecological inference within Subdistrict 9A?

A. If you're asking me, did I conduct an ecological inference on just the three precincts of 9A using Kings EI or Rows by Columns, no, if that's what you're asking me.

THE COURT: Dr. Collingwood, I have the transcript here. He's just asking if there's sufficient precinct-level data to perform ecological inference within Subdistrict 9A.

THE WITNESS: Right. So you have three precincts, and so I would say no. And I think Dr. Hood would probably agree with me.

Q. (MR. PHILLIPS CONTINUING) Is the same true of Subdistrict 9B?

A. You might -- you might be able to in 9B. I think there's four or five precincts, but it's one of those things where you make a decision to not conduct ecological inference on, say, 9A because of insufficient data. Then if you went and then did do it on 9B, it would look -- what's up with that? It would look funky, and so I didn't want to do that.

Q. And in this case you didn't use it in 9A or 9B individually.

A. Correct.

MR. PHILLIPS: Your Honor, I'm happy to go on to

another topic. I just didn't know if we were going to cut off around 4:30 or 5:00.

THE COURT: We'll go until very close to five. Thank you.

MR. PHILLIPS: Let's pull up Plaintiffs' Exhibit 42. Oh, I'm sorry. I don't need that yet.

Q. (MR. PHILLIPS CONTINUING) Is it your opinion that Dr. Hood's *Gingles* 3 analysis is flawed because he equally weighed all the elections that you analyzed?

A. Yes.

Q. Is it your opinion that Dr. Hood's methods were flawed when he analyzed District 15 under *Gingles* 1?

A. Yeah, I don't remember what Dr. Hood said on *Gingles* 1 in District 15.

Q. Let me ask you this: Do you think that Dr. Hood's analysis was flawed when he compared the as-enacted map to your demonstrative map?

A. I don't know what you're asking.

Q. In a *Gingles* 1 analysis, is it acceptable to compare the as-enacted maps with the proposed maps and opine about which map performs better?

A. Sure. That's fine. That's what we do.

Q. *Gingles* 1 doesn't just look at the possibility of an alternative map, it also analyzes the as-enacted map, is that fair?

A. I think people have different approaches. That's one way to go, is to look at both. Typically -- you know, to be honest with you, most of the time you're looking at a district that didn't achieve some sort of voting-age population metric, and the *Gingles* 1 is often demonstrating that that is possible. This case is not like that, so we already know from the beginning that the *Gingles* 1 threshold is not really in dispute. It's just how the district looks or some sort of compactness analysis, or something.

Q. I wrote this down when you testified earlier, and I don't -- I hope I've written it down accurately. I believe you said that compactness of demonstrative maps falls within accepted VRA standards. Do you recall that testimony?

A. That sounds like something that I would say.

Q. Did you compare -- with respect to compactness, did you compare your demonstrative plans with the as-enacted District 9?

A. I think so. I'd have to go back and check, but I would say yes.

Q. Do you know if you found that the as-enacted map was more or less compact than the proposed map?

A. I think it's more compact.

Q. Now, in your testimony earlier you'd compared your demonstrative maps with other districts in North Dakota and other districts in other states. You didn't talk about a

comparison with the as-enacted District 9; is that fair?

A. In my testimony today I did not make that reference point.

MR. PHILLIPS: I'm going to call it early. No more questions, Your Honor.

THE COURT: Thank you, Mr. Phillips.

Redirect, counsel?

MS. DANAHY: I'm much shorter than my friend on the other side. Just a few questions, Your Honor. I'm going to pull up just an demonstrative slide here, and we saw this in the opening today.

REDIRECT EXAMINATION

BY MS. DANAHY:

Q. I know you're not a lawyer, Dr. Collingwood, but I'd love if you could, when we have this back up, read this language from *Thornburg versus Gingles* for me.

A. Are you asking me to read this?

Q. Yes. Could you read that for me? Sorry. I was just waiting to see --

A. For the record or just --

Q. For the record, please.

A. Actually -- just kidding. Third, "the minority must be able to demonstrate that the White majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances, such as the minority candidate running unopposed -- usually to defeat the minority's preferred

candidate."

MS. DANAHY: And then can we pull up -- I think we also have the text of the Voting Rights Act in one of those earlier slides. All right. Actually you can take that down. Thank you.

Q. (MS. DANAHY CONTINUING) Does the Voting Rights Act require just an opportunity for the minority candidate to elect, or does it require an equal opportunity for the minority population to elect?

A. I would say at least an equal opportunity.

Q. If we pull up Plaintiffs' Exhibit 43, in your opinion, based on your experience, is a district that only performs in an anomalous circumstance where the minority population doubles its typical turnout -- does that provide an equal opportunity to elect?

A. No, this is a really extreme, unlikely situation.

Q. And I'd like to pull up Plaintiffs' Exhibit 42 and go to page 8. This is from your rebuttal report, Dr. Collingwood. And can we highlight -- based on the election performance analysis that you did, Dr. Collingwood, if you exclude 2018 or give it very little probative weight due to special circumstances and look at the most recent three elections in 2022, 2020, and 2016, does the Native-preferred candidate win more often than not?

A. No.

1 **Q.** What is the bloc rate by White-preferred candidates in
2 that situation?
3 **A.** Well, in that situation you can see here it's 57 percent.
4 **Q.** And in order to have a bloc rate under 50 percent for the
5 elections that you analyzed, do you have to overweight old
6 elections, exogenous elections and elections that do not
7 include Native American candidates?
8 **A.** Yes.
9 **Q.** You were talking a little bit about District 4A. In that
10 part of the state are there nearby populations of Native voters
11 that were fragmented into other districts?
12 **A.** No.
13 **Q.** Is that why 4A affords an opportunity to elect rather than
14 diminishing an opportunity to elect?
15 **A.** That's what you have there. That's all you have there.
16 **Q.** And does subdistricting 9A and fragmenting Native voters
17 into 9B and 15, does that diminish rather than maintain Native
18 voting strength in northeast North Dakota?
19 **A.** All we need to do is look at the election results from the
20 most recent round of elections. The Native Americans living in
21 Spirit Lake are not represented by their candidates of choice,
22 and only the Native Americans who live in 9A are represented by
23 a candidate of choice, not Native Americans in the full 9
24 District or 9B.
25 MS. DANAHY: Thank you, Your Honor. And thank you,

Dr. Collingwood. That's all I have.

THE COURT: Thank you, counsel.

Mr. Phillips, based on the scope of redirect, I would permit recross if you so desired.

MR. PHILLIPS: Thank you, Your Honor. I have no further questions.

THE COURT: Very good. Dr. Collingwood, thank you for your testimony. Your obligation to testify is complete. I don't anticipate him being recalled, or do you?

MS. DANAHY: We may recall him for rebuttal if necessary, but --

THE COURT: All right. You may step down for now. Thank you, sir.

THE WITNESS: Thank you.

THE COURT: Well, rather than start a witness for five or ten minutes, I suspect now would be a decent time to break for the day. We will recommence tomorrow morning at 9:00 a.m. If there are any lingering housekeeping issues or anything like that, we can address them tomorrow morning at the beginning. Since we don't have a jury waiting or anything like that, we'll just proceed that way.

Thank you, counsel, and thank you, staff, and we will be in recess until tomorrow morning.

(Proceedings concluded at 4:46 p.m., that same day.)

CERTIFICATE OF COURT REPORTER

I, Ronda L. Colby, a Certified Realtime Reporter and Registered Merit Reporter,

DO HEREBY CERTIFY that I recorded in shorthand the foregoing proceedings had and made of record at the time and place hereinbefore indicated.

I DO HEREBY FURTHER CERTIFY that the foregoing typewritten pages contain an accurate transcript of my shorthand notes then and there taken.

Dated at Bismarck, North Dakota, this 12th day of June, 2023.

/s/ Ronda L. Colby

RONDA L. COLBY, RPR, CRR, RMR
United States District Court Reporter
District of North Dakota
Western Division