

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

Turtle Mountain Band of Chippewa Indians,
et al.,

Plaintiffs,

v.

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

Defendant.

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

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO
EXCLUDE MATTHEW CAMPBELL AND ALAN HERBISON FROM DEFENDANT'S
WITNESS LIST**

On May 8, 2023, Defendant's counsel informed Plaintiffs' counsel of Defendant's desire to call Mathew Campbell, who is the Deputy Director of the Native American Rights Fund and who serves as Plaintiffs' counsel in this case, as a witness at trial (whether through testimony live at trial or via trial deposition). Defendant's counsel explained that they wished to examine Mr. Campbell regarding comments he provided to the Legislative Redistricting Committee on September 15, 2021. The practice of taking an opposing counsel's deposition (or calling opposing counsel as a trial witness) is disfavored, and none of the limited circumstances that courts sometimes find to warrant such testimony are present here. The information sought by Defendant (1) can be obtained by other means; (2) is privileged and not relevant to this case; and (3) is not crucial to Defendant's case. *See Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986).

Moreover, on May 5, 2023, Defendant served on Plaintiffs their Supplemental Rule 26(A)(1) Disclosures, which lists for the first time Alan Herbison, Voting Precinct GIS Project

Manager for the Secretary of State of North Dakota, as person likely to have discoverable information that the disclosing party may use to support its claims or defenses. Defendant has provided no justification for this untimely disclosure, and Mr. Herbison should not be permitted to testify at the trial in June.

The Court should grant Plaintiffs' motion and Defendant should be precluded from calling Mr. Campbell and Mr. Herbison at trial.

BACKGROUND

As described in detail in prior briefs before this Court, in 2021, the North Dakota Legislative Council Redistricting Committee ("Redistricting Committee") was established by the North Dakota Legislative Assembly to develop a redistricting plan for the state. *See* ECF No. 1 at 11, ¶¶ 41, 42. The Redistricting Committee received testimony from numerous individuals about the redistricting around the Native American reservations. This included testimony from tribal leaders, tribal members and tribal voting rights advocates. Additionally, redistricting testimony was provided to the Tribal and State Relations Committee, which contained cross-over membership with and reported to the Redistricting Committee.

On August 17, 2021, the Tribal and State Relations Committee held a meeting at the Turtle Mountain Community College, where testimony was provided regarding "Legislative Redistricting and Tribal Census Data." ECF No. 60-3 at 1. Information and discussion was given by Turtle Mountain Chairman Jaimie Azure and Turtle Mountain General Counsel Alysia LaCounte regarding concerns over the accuracy of the Census data. *Id.* Nicole Donaghy, Director of North Dakota Native Vote, gave written and oral testimony requesting that the Legislature (1) comply with the Voting Rights Act ("VRA") (including drawing single-member districts where the VRA requires); (2) follow the Community of Interest standard to keep groups of similar culture and identity within legislative districts, and to not split Turtle Mountain into multiple districts; and

(3) to consult with tribal governments and citizens throughout the redistricting process. ECF No. 60-4.

During its meeting on September 8, 2021, the Redistricting Committee heard testimony from Rick Gion, Director of North Dakota Voters First, asking “the committee to consider creating subdistricts for rural populations and tribal areas.” ECF No. 60-15 at 3. According to the meeting minutes, Mr. Gion noted, “If members of different tribes want different approaches to redistricting, North Dakota Voters First is open to discussions regarding those approaches.” *Id.*

On September 15, 2021, the Redistricting Committee received comments and testimony from Standing Rock Sioux Tribe Chairman Mike Faith, Standing Rock Sioux Tribe Councilman Charles Walker, Spirit Lake Gaming Commission Executive Director Collette Brown, Native American Rights Fund attorney Matthew Campbell, and North Dakota Native Vote Executive Director Nicole Donaghy. ECF No. 60-16, 1-2. For this meeting, written testimony was also submitted by Chairman Faith (ECF No. 60-19), Councilman Walker (ECF No. 60-20), Collette Brown (ECF No. 60-18) and Nicole Donaghy (ECF No. 60-17). A transcription of the meeting can be found at ECF No. 74-2.

During the September 15th meeting, tribal representatives testified about the need for fair maps that comply with the Voting Rights Act, for tribal areas to not be split among multiple districts, for tribes to be treated as communities of interests, and for the Redistricting Committee to hold hearings on reservations to increase tribal input. *Id.* According to the transcript, Chairman Faith and Collette Brown asked Matthew Campbell to speak to the Redistricting Committee. *Id.* at 7 and 44. Mr. Campbell’s statements mirrored those of the tribal leaders and other testifiers, restating their calls to improve representation and be treated as communities of interest. *Id.* at 46-

58. Mr. Campbell also noted his legal representation of the Spirit Lake Tribe and Standing Rock Sioux Tribe. *Id* at 46-47.

Besides his legal representation of the Spirit Lake Tribe in other litigation, Mr. Campbell is counsel of record in this case on behalf of all named plaintiffs. Mr. Campbell did not testify regarding the issue in this case, which is whether the map approved by the Redistricting Committee, which places the Turtle Mountain Reservation into a House subdistrict and cracks the Spirit Lake Reservation apart from the Turtle Mountain Reservation, violates the VRA. The Redistricting Committee’s proposed map, which was ultimately adopted by the Legislative Assembly, was not publicly available until well after the September 15 Redistricting Committee hearing. At the time of Mr. Campbell’s testimony to the legislature, the Census data necessary to engage in redistricting had only been released in its “legacy” format—a difficult to use format requiring commercial GIS software companies to use. The user-accessible data was not released until September 16, 2021.¹

During the next Redistricting Committee hearing, held on September 28-29, 2021 (ECF No. 60-24), further testimony was provided by Standing Rock Sioux Tribe Chairman Faith (ECF No. 60-25) (requesting a House subdistrict for the Standing Rock reservation), MHA Chairman Mark Fox (ECF No. 60-26) (requesting a House subdistrict for the MHA Nation’s Fort Berthold Reservation), Spirit Lake Chairman Douglas Yankton, Sr. (ECF No. 60-27) (requesting a House subdistrict for the Spirit Lake Reservation, MHA tribal member and current State House member Representative Lisa DeVille (ECF No. 60-28) (requesting a House subdistrict for the MHA Nation’s Fort Berthold Reservation).

¹ <https://www.census.gov/newsroom/press-releases/2021/2020-census-redistricting-data-easier-to-use-format.html>.

The Redistricting Committee ultimately produced a redistricting plan that failed to honor Spirit Lake’s request to be placed in a subdistrict, and instead proposed to place Turtle Mountain in a subdistrict—something Turtle Mountain never requested. The Redistricting Committee’s proposed map was made publicly available on September 28, 2021. On November 1, 2021, after having an opportunity to digest the Census data and the potential redistricting options in light of what appeared to be a serious undercount of Native American population—Spirit Lake Chairman Yankton and Turtle Mountain Chairman Azure sent a joint letter to the Legislature, the Redistricting Committee and the Governor, requesting the approval of a single legislative district encompassing their respective reservations. ECF No. 1-2. The letter noted how the Committee’s redistricting map proposed to place the Turtle Mountain Reservation into a subdistrict in violation of the VRA, and that Turtle Mountain never requested to be placed in a subdistrict. *Id* at 3. It also provided an illustrative redistricting plan to show how both reservations could be placed into a single legislative district, and how that district could be incorporated into the Committee’s proposed map while avoiding costly litigation. *Id* at 5-7.

At the November 8, 2021, Redistricting Committee meeting, Chairman Yankton and Chairman Azure provided written and oral testimony, further requesting that the Committee approve a single legislative district encompassing both reservations, and describing the shared interests between the two Tribes. ECF No. 60-32 at 17-32. The Redistricting Committee rejected the Chairmen’s request and the Legislative Assembly adopted the map subject to challenge in this case.

ARGUMENT

I. Mr. Campbell Should Be Excluded from Defendant’s Witness List.

Mr. Campbell should be excluded from Defendant’s witness list. The Eighth Circuit has made clear its general disfavor to subjecting opposing counsel to testifying at deposition or trial:

“We view the increasing practice of taking opposing counsel's deposition as a negative development in the area of litigation, and one that should be employed only in limited circumstances.” *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). In *Shelton*, the court lamented that, “[t]aking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation.” *Id.*

The *Shelton* court established three elements that must be present to require an opposing counsel's testimony: “that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.” *Id.* (internal citations omitted); (*See also Ultimate Motorcars, Inc. v. Houston Specialty Ins. Co.*, 2022 WL 16951458 (D. Neb. 2022) (application of the *Shelton* test to prohibit deposition of opposing counsel)). Defendant cannot meet this test.

First, Defendant has (or had) other means to obtain information regarding the topics on which Mr. Campbell testified to the Legislature. To begin, rather than waiting until the eve of trial and announcing their intent to call opposing counsel, Defendant could have sought discovery from any number of witnesses to the legislative process during the discovery period. If Defendant had done so, he likely would have been able to obtain whatever information he seeks to uncover about the legislative process that he now seeks to obtain by compelling Mr. Campbell to testify. But Defendant did not engage in any fact discovery nor take any depositions of Plaintiffs, their representatives, any other person who testified to the legislature, or any legislator who heard testimony. At a minimum, such discovery would be a necessary step for Defendant to demonstrate

that there is no other means for them to obtain whatever information they now seek.² Indeed, Mr. Campbell's comments to the Redistricting Committee were substantially similar to comments received from various tribal leaders, tribal members and voting rights advocates—none of whom Defendant sought to depose or otherwise obtain discovery from. Defendant's failure to make any effort to obtain whatever information they now seek during the discovery period of this case does not justify their attempt to compel their opposing counsel to testify at trial or by trial deposition—instead it suggests that Defendant's true motive is to create additional work for Mr. Campbell and Plaintiffs during the critical weeks leading up to trial. Moreover, Defendant already possesses recordings and transcripts of these proceedings, and thus does not require Mr. Campbell's to testify at trial to determine what testimony he gave the legislature. Defendant has not and cannot show that compelling Mr. Campbell to testify at trial is the only way they can obtain whatever information they seek.

Second, the information provided by Mr. Campbell is not particularly relevant or probative to the issues in this case. The question in this case is whether the *enacted* redistricting plan has discriminatory results for Native American voters in Districts 9, 9A, 9B, and 15 such that they lack an equal opportunity to participate in the electoral process. *See* 52 U.S.C. § 10301. Mr. Campbell's testimony to the legislature about general principles they should follow in enacting a new redistricting plan—given in advance of the release of publicly-accessible Census data and in advance of the Committee's release of its redistricting proposal—does not bear on whether the

² Notably, Mr. Campbell, who does not reside in North Dakota, would not ordinarily be susceptible to a trial subpoena in this Court. *See* Fed. R. Civ. P. 45 (limiting reach of a trial subpoena to within 100 miles or within the state the person resides). Given the Eighth Circuit's precedent disfavoring compelled testimony of counsel, it would be especially inappropriate to permit Defendant to utilize a procedural mechanism to redress their failure to conduct discovery in the ordinary course that is only available *because* Mr. Campbell is counsel in this case.

enacted districts satisfy the Legislature’s obligations under Section 2 of the VRA. At most his testimony was merely cumulative of the testimony offered by the Chairmen of the Plaintiff Tribes, and by Plaintiff Brown—none of which was heeded by the Legislature when they enacted the challenged plan. Moreover, Mr. Campbell informed the Redistricting Committee of his representation of the Spirit Lake Tribe at the time he testified, did not testify regarding any conversations with his clients, nor did he testify about any advice provided to them. As such, any information sought by Defendant beyond the statements made by Mr. Campbell at the hearing is protected by attorney-client privilege.

Finally, compelling Mr. Campbell to testify at trial about what testimony he gave the legislature—which testimony Defendant already possesses via transcript and video recording—cannot possibly be “crucial” to his defense. Mr. Campbell provided no information to the Committee that was not provided by other witnesses. Defendant did not conduct any fact discovery related to Mr. Campbell’s testimony or any other part of the legislative process. Defendant did not rely on Mr. Campbell’s statements in either their motion to dismiss or their motion for summary judgment. Defendant’s belated attempt to conduct discovery in by seeking a trial deposition or testimony from Mr. Campbell speaks more to the approaching trial date than to Defendant’s need for Mr. Campbell’s testimony.

II. The Court Should Exclude Mr. Herbison from Defendant’s Witness List.

The Court should exclude Mr. Herbison from Defendant’s witness list. A party is prohibited from relying on a witness at trial for whom they failed to comply with the disclosure requirements under Fed. R. Civ. P. 26(a) or (e), unless that failure is substantially justified or harmless. *See* Fed. R. Civ. P. 37(c)(1). On May 5, 2023, nearly five months after discovery close, Defendant belatedly supplemented his Rule 26(a)(1) disclosures by identifying a previously

undisclosed Secretary of State employee, Alan Herbison, as having information purportedly relevant to this case.³ *See* Ex. 1 (Defs’ Supp. Rule 26(a)(1) Disclosures) (“Supp. Disclosures”). Mr. Herbison, is the Voting Precinct GIS Project Manager for the Defendant Secretary of State and is described as having “information regarding mapping related to redistricting in North Dakota, the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs’ Complaint, regarding Defendant’s defenses, and regarding other matters at issue in this subject lawsuit.” *Id.* But Mr. Herbison has held his position in Defendant’s office since approximately November 2020.⁴ As such, any evidence or testimony related to the topics identified by Defendant has been reasonably available to Defendant during the entire pendency of this lawsuit, including at the time that Defendant’s initial disclosures were due and throughout the entire discovery period. As such Defendant’s failure to include Mr. Herbison on his initial disclosures—or at least to supplement prior to the close of discovery—cannot be justified. Fed. R. Civ. P. 26(a)(1)(E) (“A party must make its initial disclosures based on the information then reasonably available to it.”). Nor can Defendant justify his late disclosure based on his failure to fully investigate whether his own employees had information relevant to this lawsuit until the eve of trial. *Id.* (A party is not excused from making its disclosures because it has not fully investigated

³ Defendant also listed a second previously undisclosed fact witness, Ms. Erika White. Ms. White was recently named as the North Dakota Elections Director, replacing former Elections Director Bryan Newby, who was previously disclosed by Defendant. Both Ms. White and Mr. Newby are described as having “information regarding the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs’ Complaint, regarding Defendant’s defenses, and regarding other matters at issue in this subject lawsuit.” *See* Ex. 1 (Supp. Disclosures); Ex. 2 at 2 (Defs’ Initial Rule 26(a)(1) Disclosures) (“Initial Disclosures”). While Plaintiffs do not object to the disclosure of Ms. White on timeliness grounds, they reserve the right to object to any testimony offered by Ms. White that is cumulative of testimony offered by Mr. Newby, whom Defendant has indicated they may still call.

⁴ Mr. Herbison lists his employment with the State on his public LinkedIn profile, available at <https://www.linkedin.com/in/alan-herbison-68bb416b>.

the case.”); *see also Falconer v. Penn Maritime, Inc.*, 232 F.R.D. 37 (D. Maine 2005) (excluding as witnesses three of a party’s employees that were not identified during discovery and that the party failed to list on its initial disclosures).

Plaintiffs raised their objection to Defendant’s late disclosure of Mr. Herbison as a potential witness in this case during a meet and confer between the parties on May 8, 2023, including to the extent that Defendant sought to rely on Mr. Herbison for expert testimony based on his specialized role and expertise as GIS Project Manager.⁵ Counsel for Defendant nonetheless attempted to justify the late disclosure by pointing to Defendant’s Expert Disclosures, which includes a statement that “Defendant reserves the right to call as non-retained expert witnesses, all state officials identified in their Rule 26 disclosure as experts in relation to the impacts of redistricting on elections in North Dakota.” Ex. 3 at 2 (Defs’ Expert Disclosures). But parties must specifically identify all experts, including non-retained experts, according to the deadlines set by the Court, Fed. R. Civ. P. 26(a)(2)(A) and (D). Moreover, parties must provide “a summary of the facts and opinions to which the witness is expected to testify,” for any non-retained expert. *Id.* 26(a)(2)(C)(ii). Defendant failed to comply with any of these provisions with regard to Mr. Herbison. As such, Defendant’s purported reservation of right to untimely disclosure of unnamed experts is insufficient to comply with his obligations under Rule 26(a)(2).⁶ *See, e.g., Vanderberg*

⁵ Defendant characterized Mr. Herbison as a fact witness in his supplemental disclosures, *see* Ex. 1 (Supp. Disclosures) (disclosing Mr. Herbison pursuant to Fed. R. Civ. P. 26(a)(1) rather than Fed. R. Civ. P. 26(a)(2)), but based on late disclosure, his role as GIS Project Manager, and the purportedly relevant information in his possession regarding “mapping related to redistricting in North Dakota,” it appears that Mr. Herbison is intended to provide testimony based on his particular expertise in response or rebuttal to the expert testimony previously disclosed by the parties.

⁶ Indeed, Defendant failed to comply with his obligation to provide “a summary of the facts and opinions to which the witness is expected to testify,” Fed. R. Civ. P. 26(a)(2)(C)(ii), for either of the two non-retained experts he identified in his expert disclosures. *See* Ex. 3 at 2 (Defs’ Expert Disclosures) (listing then-Secretary of State employees Brian Newby and Brian Nybakken as non-

v. Petco Animal Supplies Store, Inc., 906 F.3d 698, 703 (8th Cir. 2018) (excluding potential expert witness based on parties failure to “disclose what facts and opinions would be disclosed by what witnesses). As such, Mr. Herbison’s late disclosure cannot be justified based on Defendant’s nonspecific reservation of rights, and the Court should decline to allow Defendant to offer him as an expert on that basis.

Finally, the failure to disclose Mr. Herbison in a timely manner is not harmless, because the late disclosure precluded Plaintiffs from being able to depose Mr. Herbison and identify and obtain any responsive testimony of their own. *See id* at 705-06 (upholding district court finding that party was “seriously prejudiced” by disclosure that occurred “after the close of discovery and just two months before trial”). As such, the Court should exclude Mr. Herbison’s testimony. *See* Fed. R. Civ. P. 37(c)(1).

CONCLUSION

For the reasons provided herein, Plaintiffs respectfully request that this motion be granted.

retained experts, describing the subject matter of their potential testimony, but failing to provide a summary of any facts or opinions to be offered by either witness). As such, the Court should exclude any expert opinion testimony offered by either Mr. Newby or Mr. Nybakken. *See* Fed. R. Civ. P. 37(c)(1); *Vanderberg*, 906 F.3d at 703.

May 12, 2023

/s/ Michael S. Carter

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Mark P. Gaber

Mark P. Gaber

Counsel for Plaintiffs

EXHIBIT 1

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

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

Plaintiffs,

vs.

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

Defendant.

Case No. 3:22-cv-00022

**DEFENDANT MICHAEL HOWE'S
SUPPLEMENTAL RULE 26(A)(1)
DISCLOSURES**

Defendant Michael Howe, in his official capacity as Secretary of State of North Dakota (hereinafter "Defendant") for his supplemental disclosure pursuant to Rule 26(a)(1) hereby provide the following information and documents as described herein:

(A) The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information:

1. Alan Herbison

Voting Precinct GIS Project Manager
State of North Dakota

- Alan Herbison is the North Dakota Voting Precinct GIS Project Manager for the office of Secretary of State of North Dakota. He has information regarding mapping related to redistricting in North Dakota, the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

2. Erica White

600 East Boulevard Avenue
Bismarck, ND 58505-0360

- Erica White is the North Dakota State Election Director in the office of Secretary of State of North Dakota. She has information regarding the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

Dated this 5th day of May, 2023.

By: /s/ David R. Phillips
David R. Phillips
Special Assistant Attorney General
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT MICHAEL HOWE'S SUPPLEMENTAL RULE 26(A)(1) DISCLOSURES** was on the 5th day of May, 2023 emailed to the following:

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 DAVID R. PHILLIPS

EXHIBIT 2

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

<p>Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>Alvin Jaeger, in his official capacity as Secretary of State of North Dakota,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">Case No. 3:22-cv-00022</p> <p style="text-align: center;">DEFENDANT ALVIN JAEGER'S INITIAL RULE 26(A)(1) DISCLOSURES</p>
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Defendant Alvin Jaeger, in his official capacity as Secretary of State of North Dakota (hereinafter “Defendant”) for his disclosure pursuant to Rule 26(a)(1) hereby provide the following information and documents as described herein:

(A) The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information:

1. Wesley Davis

- Wesley Davis is a named plaintiff in this lawsuit and has information regarding the allegations contained in the Plaintiffs’ Complaint, regarding Defendant’s defenses, and regarding other matters at issue in this subject lawsuit.

2. Zachery S. King

- Zachery S. King is a named plaintiff in this lawsuit and has information regarding the allegations contained in the Plaintiffs’ Complaint, regarding Defendant’s defenses, and regarding other matters at issue in this subject lawsuit.

3. Collette Brown

- Collette Brown is a named plaintiff in this lawsuit and has information regarding the allegations contained in the Plaintiffs’ Complaint, regarding Defendant’s defenses, and regarding other matters at issue in this subject lawsuit.

4. Alvin Jaeger

600 East Boulevard Avenue
Bismarck, ND 58505-0360

- Alvin Jaeger is a named defendant in this lawsuit and is the Secretary of the State of North Dakota. He has information regarding the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

5. Irwin James Narum (Jim) Silrum

600 East Boulevard Avenue
Bismarck, ND 58505-0360

- Irwin James Narum (Jim) Silrum is the Deputy Secretary of the State of North Dakota. He has information regarding the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

6. Brian Newby

600 East Boulevard Avenue
Bismarck, ND 58505-0360

- Brian Newby is the North Dakota State Election Director in the office of Secretary of State of North Dakota. He has information regarding the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

7. Lee Ann Oliver

600 East Boulevard Avenue
Bismarck, ND 58505-0360

- Lee Ann Oliver is the Election Specialist in the office of Secretary of State of North Dakota. She has information regarding the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

8. Brian Nybakken

600 East Boulevard Avenue
Bismarck, ND 58505-0360

- Brian Nybakken is the Elections Administration System Manager in the office of Secretary of State of North Dakota. He has information regarding the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

9. Brent Sanford

600 East Boulevard Avenue
Bismarck, ND 58505-0360

- Brent Sanford is the Lieutenant Governor of the State of North Dakota. He has information regarding the allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

10. Reice Hasse

600 East Boulevard Avenue
Bismarck, ND 58505-0360

- Reice Hasse is the former Senior Policy Advisor to Governor Burgum. He has information regarding the allegations contained in the Plaintiffs' Complaint, regarding State outreach to tribal representatives during redistricting, Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

11. Claire Ness

600 East Boulevard Avenue
Bismarck, ND 58505-0360
(701) 328-2210

- Claire Ness is currently the Deputy Attorney General of the State of North Dakota. At the time of the subject redistricting process, Claire Ness was Senior Counsel for the North Dakota Legislative Council. She has information regarding the legislative redistricting process, regarding State outreach to tribal representatives during redistricting, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

12. Emily Thompson

600 East Boulevard Avenue
Bismarck, ND 58505-0360
(701) 328-2916

- Emily Thompson is the Legal Division Director of the North Dakota Legislative Council. She has information regarding legislative records relating to the subject redistricting, regarding the legislative redistricting process, regarding State outreach to tribal representatives during redistricting, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

13. Samantha Kramer

600 East Boulevard Avenue
Bismarck, ND 58505-0360
(701) 328-2916

- Samantha Kramer is Senior Counsel and Assistant Code Revisor for the North Dakota Legislative Council. She has information regarding legislative records relating to the subject redistricting, regarding the legislative redistricting process, regarding State outreach to tribal representatives during redistricting, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

14. John Bjornson

600 East Boulevard Avenue
Bismarck, ND 58505-0360
(701) 328-2916

- John Bjornson is the Director of the North Dakota Legislative Council. He has information regarding legislative records relating to the subject redistricting, regarding the legislative redistricting process, regarding State outreach to tribal representatives during redistricting, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

15. Nathan Davis

600 East Boulevard Avenue
Bismarck, ND 58505-0360

- Nathan Davis is the Executive Director of the North Dakota Indian Affairs Commission. He has information regarding State outreach to tribal representatives during redistricting and has information regarding the testimony he provided during the redistricting process.

16. Marietta Kemmet

600 East Boulevard Avenue
Bismarck, ND 58505-0360

- Marietta Kemmet is an Executive Assistant to Nathan Davis, Executive Director of the North Dakota Indian Affairs Commission. She has information regarding State outreach to tribal representatives during redistricting.

17. Alysia LaCounte

General Counsel, Turtle Mountain Band of Chippewa Indians
4180 Hwy 281
Belcourt, ND 58316
(701) 477-2600

- Alysia LaCounte has information regarding the testimony she provided to the Interim Tribal and State Relations Committee.

18. Nicole Donaghy

Executive Director
North Dakota Native Vote
919 South 7th Street, Ste. 603
Bismarck, ND 58504
(888) 425-1483

- Nicole Donaghy has information regarding the testimony she provided to the Interim Tribal and State Relations Committee and testimony she provided to the Redistricting Committee.

19. Jamie Azure

Chairman, Turtle Mountain Band of Chippewa Indians
4180 Hwy 281
Belcourt, ND 58316
(701) 477-2600

- Jamie Azure has information regarding the testimony he provided to the Interim Tribal and State Relations Committee.

20. Karen Ehrens
Secretary, League of Women Voters of North Dakota
233 West Ave C
Bismarck, ND 58501
- Karen Ehrens has information regarding the testimony she provided to the Redistricting Committee.
21. Rick Gion
Director, North Dakota Voters First
- Rick Gion has information regarding the testimony he provided to the Redistricting Committee.
22. Matt Perdue
Lobbyist, North Dakota Farmers Union
- Matt Perdue has information regarding the testimony he provided to the Redistricting Committee.
23. Collette Brown
Executive Director, Gaming Commission, Spirit Lake Casino and Resort
7889 Hwy 57
Saint Michael, ND 58370
(701) 776-4747
- Collette Brown has information regarding the testimony she provided to the Redistricting Committee and regarding testimony she provided to the Tribal and State Relations Committee.
24. Mark Fox
Chairman, Three Affiliated Tribes of the Fort Berthold Reservation
404 Frontage Rd.
New Town, ND 58763
(701) 627-4781
- Mark Fox has information regarding the testimony he provided to the Tribal and State Relations Committee and testimony he provided to the Redistricting Committee,
25. Ted Lone Fight
- Ted Lone Flight has information regarding the testimony he provided to the Tribal and State Relations Committee.
26. Melanie Moniz
- Melanie Moniz has information regarding the testimony she provided to the Tribal and State Relations Committee.
27. Joletta Bird Bear

- Joletta Bird Bear has information regarding the testimony she provided to the Tribal and State Relations Committee.

28. Cynthia Monteau

- Cynthia Monteau has information regarding the testimony she provided to the Tribal and State Relations Committee.

29. Ruth Buffalo

- Ruth Buffalo has information regarding the testimony she provided to the Tribal and State Relations Committee.

30. Douglas Yankton

Sr., Chairman, Spirit Lake Tribe
P.O. Box 359
Fort Totten, ND 58335
(701) 381-2006

- Douglas Yankton has information regarding the testimony he provided to the Tribal and State Relations Committee and testimony he provided to the Redistricting Committee.

31. Mike Faith

Chairman, Standing Rock Sioux Tribe
1 Standing Rock Avenue
Fort Yates, ND 58538
(701) 854-8500

- Mike Faith has information regarding the testimony he provided to the Redistricting Committee.

32. Charles Walker

Councilman, Standing Rock Sioux Tribe
1 Standing Rock Avenue
Fort Yates, ND 58538
(701) 854-8500

- Charles Walker has information regarding the testimony he provided to the Redistricting Committee.

33. Matthew Campbell

Staff Attorney, Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

- Matthew Campbell has information regarding the testimony he provided to the Redistricting Committee.

34. Erin Oban

- Erin Oban has information regarding the testimony she provided to the Redistricting Committee.

35. Pete Hanebutt

Director of Public Policy, North Dakota Farm Bureau
4900 Ottawa Street
Bismarck, ND 58503
(701) 224-0330

- Pete Hanebutt has information regarding the testimony he provided to the Redistricting Committee.

36. Kevin Hermann

- Kevin Hermann has information regarding the testimony he provided to the Redistricting Committee.

37. Aaron Birst

Legal Counsel and Assistant Director – Policy, North Dakota Association of Counties
1661 Capitol Way
Bismarck, ND 58502
(701) 328-7300

- Aaron Birst has information regarding the testimony he provided to the Redistricting Committee.

38. Kathy Skroch

10105 155th Avenue SE
Lidgerwood ND 58053-9761
(701) 538-7396

- Kathy Skroch has information regarding the testimony she provided to the Redistricting Committee.

39. Mike Schatz

400 East Nineth Street
New England, ND 58647-7528
(701) 579-4823

- Mike Schatz has information regarding the testimony he provided to the Redistricting Committee.

40. Gerald Wise

Mayor, City of Lincoln

- Gerald Wise has information regarding the testimony he provided to the Redistricting Committee.

41. Jan Jellif

- Jan Jelliff has information regarding the testimony she provided to the Redistricting Committee on September 22-23, 2021.

42. Jennifer Tarlin

- Jennifer Tarlin has information regarding the testimony she provided to the Redistricting Committee on September 22-23, 2021.

43. Terry Jones

P.O. Box 1964
New Town, ND 58763-1964
(701) 627-3397

- Terry Jones has information regarding the testimony he provided to the Redistricting Committee. He also has information regarding the matters he testified to at the hearing on the motion for preliminary injunction held May 5, 2022 in case no: 1:22-cv-00031.

44. Jason Heitkamp

921 Dakota Avenue, Suite F
Wahpeton, ND 58075-4341
(701) 640-4643

- Jason Heitkamp has information regarding the testimony he provided to the Redistricting Committee.

45. Norma Kjos

- Norma Kjos has information regarding the testimony she provided to the Redistricting Committee.

46. Peter Leedahl

- Peter Leedahl has information regarding the testimony he provided to the Redistricting Committee.

47. Marvin Nelson

P.O. Box 577
Rolla, ND 58367-0577
(701) 550-9731

- Marvin Nelson has information regarding the testimony he provided to the Redistricting Committee.

48. Gary Kreidt

3892 County Road 86
New Salem, ND 58563-9406
(701) 843-7074

- Gary Kreidt has information regarding the testimony he provided to the Redistricting Committee.

49. Howard Anderson

721 21st Avenue NW
Turtle Lake, ND 58575-9606
(701) 861-9749

- Howard Anderson has information regarding the testimony he provided to the Redistricting Committee.

50. Craig Headland

4950 92nd Avenue SE
Montpelier, ND 58472-9630
(701) 489-3184

- Craig Headland has information regarding the testimony he provided to the Redistricting Committee.

51. Sebastian Ertelt

P.O. Box 63
Gwinner, ND 58040-0063
(701) 683-2194

- Sebastian Ertelt has information regarding the testimony he provided to the Redistricting Committee.

52. Larry Bellew

812 Bel Air Place
Minot, ND 58703-1751
(701) 852-5786

- Larry Bellew has information regarding the testimony he provided to the Redistricting Committee.

53. All individual North Dakota legislators who participated in the subject redistricting process, including in the Interim Redistricting Committee, Interim Tribal and State Relations Committee, Joint Redistricting Committee, North Dakota House of Representatives, and/or North Dakota Senate.

54. All other individuals, whose names and addresses are presently unknown, who have knowledge regarding the allegations in Plaintiffs' Complaint, Defendant's Answer, and other matters at issue in this subject lawsuit.

(B) A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment:

1. All documents produced and/or referenced by Plaintiffs and/or Defendants-Intervenors in their Rule 26(a)(1) disclosures, to the extent not objected to.
2. Various documents within the control of Plaintiffs and/or Defendants-Intervenors in this matter which have not yet been provided and/or produced, to the extent not objected to.

3. All documents produced by any of the Plaintiffs and/or Defendants-Intervenors in response to discovery requests.
4. Miscellaneous documents previously provided via counsel.
5. Various other documents which may be located during the discovery process, to the extent not objected to.
6. All documents, exhibits, and evidence submitted in favor of or in opposition to plaintiffs' motion for preliminary injunction (case no: 1-22-cv-00031).
7. 2020 U.S. Census data, legislative redistricting data, and precinct data from the 53 counties in North Dakota. This data is kept in the electronic files of the Secretary of State's office.
8. Communications between the Secretary of State's office and county election officials regarding the implementation of the redistricting plan contained in House Bill 1504. These communications are kept in the electronic files of the Secretary of State's office.
9. Communications between the Secretary of State's office and state and district political parties regarding the implementation of the redistricting plan contained in House Bill 1504. These communications are kept in the electronic files of the Secretary of State's office.
10. Communications between the Secretary of State's office and Legislative Council regarding the implementation of the redistricting plan contained in House Bill 1504. These communications are kept in the electronic files of the Secretary of State's office.
11. Communications between the Secretary of State's office and members of the public regarding the implementation of the redistricting plan contained in House Bill 1504. These communications are kept in the electronic files of the Secretary of State's office.
12. Communications between the Secretary of State's office and state election vendors regarding the implementation of the redistricting plan contained in House Bill 1504. These communications are kept in the electronic files of the Secretary of State's office.
13. Communications between the Secretary of State's office and the Governor's office regarding redistricting, kept in the electronic files of the office of the Governor.
14. Various communications and documents to and from the Governor's office regarding redistricting, kept in the electronic files of the office of the Governor.

15. Communications and documents relating to House Bill No. 1504, kept in the electronic files of the office of the Governor.

16. All documents, files, and videos that are publicly available on the Redistricting Committee webpage:

<https://www.legis.nd.gov/assembly/67-2021/committees/interim/redistricting-committee>

17. All documents, files, and videos that are publicly available on the Tribal and State Relations Committee webpage:

<https://ndlegis.gov/assembly/67-2021/committees/interim/tribal-and-state-relations-committee>

18. All documents, files, and videos that are publicly available on the following webpage:

<https://www.ndlegis.gov/assembly/67-2021/special-session/bill-video/bv1504.html>

19. All Redistricting Committee memoranda publicly available on the following webpage:

<https://www.legis.nd.gov/assembly/67-2021/session-interim/2021-committee-memorandums>

20. All maps that are publicly available on the Redistricting Committee webpage:

<https://www.legis.nd.gov/assembly/67-2021/session-interim/2021-legislative-redistricting-maps>

21. All maps approved by the North Dakota Legislative Assembly during the November 2021 special session, and related files, data, charts, and Interactive Statewide Map publicly available on the following webpage:

<https://www.legis.nd.gov/assembly/67-2021/special/approved-legislative-redistricting-maps>

22. All maps of prior legislative districts, publicly available through the links on the following webpage:

<https://www.legis.nd.gov/assembly/67-2021/members/members-by-district>

(C) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered:

Not applicable.

(D) For inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment:

Not applicable

Defendant reserves the right to supplement or amend these disclosures if new or additional information becomes available.

Dated this 23rd day of June, 2022.

By: /s/ David R. Phillips
David R. Phillips
Special Assistant Attorney General
ND Bar # 06116
300 West Century Avenue
P.O. Box 4247
Bismarck, ND 58502-4247
(701) 751-8188
dphillips@bgwattorneys.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT ALVIN JAEGER'S INITIAL RULE 26(A)(1) DISCLOSURES** was on the 23rd day of June, 2022, emailed to the following:

Mark P. Gaber
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Campaign Legal Center
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Washington, DC 20005
kelty@narf.org

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

EXHIBIT 3

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

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

Plaintiffs,

vs.

Alvin Jaeger, in his official capacity as
Secretary of State of North Dakota,

Defendant.

Case No. 3:22-cv-00022

**DEFENDANT MICHAEL HOWE’S
DISCLOSURE OF EXPERT WITNESSES**

Pursuant to the Rule 26(a)(2) of the Federal Rules of Civil Procedure and pursuant to written discovery requests propounded by Plaintiffs, Defendant Michael Howe, in his official capacity as Secretary of the State of North Dakota (“Defendant”), hereby makes the following disclosure of expert witnesses he intends or reserves the right to call at trial in the above-entitled action:

1. M.V. (Trey) Hood III
University of Georgia
Professor of Political Science
Baldwin Hall 103D
Athens, GA 30602

Please see attached Expert Report of Trey Hood dated January 17, 2023 and Dr. Hood’s Curriculum Vitae (attached as *Exhibit A*). Dr. Hood’s opinions are set forth in his written report and are based upon discovery to date, review of documents and data in this case and in the public record, information produced during the course of discovery in this lawsuit, as well as his education, professional training and experience. Defendant reserves the right to supplement, amend, expand, and/or change Dr. Hood’s expert disclosure upon completion of additional discovery, evidence, or information received, including, but not limited to, the completion of additional fact and/or expert depositions taken in this matter, and production of additional records,

evidence, and information. Dr. Hood's hourly charge for work performed on this case is \$400 per hour for review of file materials and \$400 per hour for deposition and testimony time.

2. Brian Newby
State Election Director
Secretary of State's Office
600 East Boulevard Avenue
Bismarck, ND 58505-0360

Brian Newby – a non-retained expert – is the North Dakota State Election Director in the office of Secretary of State of North Dakota. Mr. Newby will testify regarding the election procedures and deadlines in North Dakota, the duties of state and local election officials, and the impact of redistricting on elections in North Dakota, including the onerous requirements that would result from any court-ordered redistricting, based on North Dakota law and regulations, and policies and training of election officials by the Secretary of State's office.

3. Brian Nybakken
Elections Administration System Manager
Secretary of State's Office
600 East Boulevard Avenue
Bismarck, ND 58505-0360

Brian Nybakken – a non-retained expert – is the Elections Administration System Manager in the office of Secretary of State of North Dakota. Mr. Nybakken will testify regarding the election procedures and deadlines in North Dakota, the duties of state and local election officials, and the impact of redistricting on elections in North Dakota, including the onerous requirements that would result from any court-ordered redistricting, based on North Dakota law and regulations, and policies and training of election officials by the Secretary of State's office.

4. Defendant reserves the right to call as non-retained expert witnesses, all state officials identified in their Rule 26 disclosure as experts in relation to the impacts of redistricting on elections in North Dakota.

5. Defendant further reserves the right to disclose additional experts as it deems necessary upon completion of any additional discovery, evidence, or information including, but not limited to, the completion of additional fact and/or expert depositions taken in this matter, and production of additional records and information.

Dated this 17th day of January, 2023.

By: /s/ David R. Phillips
David R. Phillips (# 06116)
Bradley N. Wiederholt (#06354)
Special Assistant Attorney General
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dphillips@bgwattorneys.com
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Attorney for Defendant Alvin Jaeger, in his official capacity as Secretary of State of the State North Dakota

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT MICHAEL HOWE'S DISCLOSURE OF EXPERT WITNESSES** was on the 17th day of January, 2023 emailed to the following:

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Timothy Q. Purdon
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By: /s/ David R. Phillips
DAVID R. PHILLIPS