

EXHIBIT 6

Soto Palmer, et al.

v.

Hobbs, et al.

* * * * *

Video-recorded Remote Deposition Upon Oral
Examination of
Joseph F. Fain
November 21, 2022

* * * * *

REPORTED BY:

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Joseph F. Fain

November 21, 2022

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SUSAN SOTO PALMER, et al.,

Plaintiffs,

v.

STEVEN HOBBS, in his official
capacity as Secretary of State
of Washington, and the STATE OF
WASHINGTON,

Defendants,

and

JOSE TREVINO, ISMAEL G. CAMPOS,
and State Representative
ALEX YBARRA,

Intervenor-Defendants.

No. 3:22-cv-05035-RSL

VIDEO-RECORDED REMOTE DEPOSITION UPON ORAL EXAMINATION OF
JOSEPH F. FAIN

Monday, November 21, 2022
9:00 a.m. to 4:36 p.m.

VIDEOGRAPHER: LINDSEY LEWIS

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1 November 21, 2022, Remote Proceedings:

2 PROCEEDINGS: 9:00 a.m.

3 THE VIDEOGRAPHER: We are now on the
4 record. Today's date is November 21st, 2022. The time is
5 now 9:00 a.m.

6 This is the video-recorded deposition of Joseph Fain
7 in the matter of Susan Soto Palmer, et al, versus
8 Steven Hobbs, et al, and the Intervenor Defendants
9 José Trevino, et al, pending in the United States District
10 Court, Western District of Washington, Case Number
11 3:22-cv-05035-RSL. This deposition is at the request of
12 plaintiff.

13 My name is Lindsey Lewis, your videographer, here
14 with Jeanne Gersten, your court reporter. We represent
15 Lakeside Reporting. This deposition is taking place via
16 Zoom.

17 Will counsel please identify and state your
18 appearances for the record.

19 MR. GABER: For the plaintiffs Mark Gaber
20 with the Campaign Legal Center. Joining me for plaintiffs
21 are counsel Annabelle Harless, Ernest Herrera, Sonni
22 Waknin and Simone Leeper.

23 MS. FRANKLIN: Erica Franklin for the State
24 of Washington, and Andrew Hughes might join me as well off
25 camera.

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1 MR. BOWEN: Brennan Bowen on behalf of
2 Intervenor Defendants.

3 MR. GABER: And I see one more plaintiffs'
4 counsel, Aseem Mulji joined as well.

5 MR. MILLSTEIN: Aaron Millstein, K&L Gates,
6 and I'm representing the deponent, Joe Fain.

7 MS. WORTHINGTON: Assistant Attorney
8 General Kate Worthington on behalf of Secretary of State.

9 THE VIDEOGRAPHER: Will the court reporter
10 please administer the oath.

11 JOSEPH F. FAIN,
12 having been sworn/affirmed on oath to tell the truth, the
13 whole truth, and nothing but the truth, testified as
14 follows:

15 MR. GABER: And before we get started with
16 questions, I know in the previous depositions we've agreed
17 that if one party states an objection, that that can count
18 for all the other parties to save time. That's fine with
19 me.

20 Do the counsel just want to indicate whether that
21 works for them as well?

22 MR. BOWEN: Yes, we would prefer that.

23 MS. FRANKLIN: The State would as well.

24 Thank you.

25 MR. MILLSTEIN: Agreed.

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1 MR. GABER: Great. Thank you.

2 E X A M I N A T I O N

3 BY MR. GABER:

4 Q Then Mr. Fain, my name is Mark Gaber. I'm an
5 attorney with the Campaign Legal Center, and I'll be
6 taking your deposition today.

7 Could you please state your name for the record?

8 A Joseph Frederick Fain.

9 Q And have you been deposed before?

10 A Yes, I have.

11 Q How many times?

12 A Once.

13 Q Once. And that was in the lawsuit related to the
14 Open Public Records requirement for the Commission; is
15 that right?

16 A That's correct.

17 Q You're an attorney; is that right?

18 A That's correct.

19 Q You've taken depositions before?

20 A No.

21 Q Okay. In that case then -- excuse me -- we'll talk
22 a little bit about the -- probably go over the ground
23 rules and whatnot.

24 So most important is that we not speak over each
25 other. There is a court reporter, as you know, who is

1 recording, transcribing our words, and her job will be
2 made very difficult if we do what is normal in a
3 conversation and take each other's cues and interrupt one
4 another. So I will make an effort not to do that. I just
5 ask that you do that as well, and so please wait until
6 I've finished to answer the question.

7 And then your attorney or one of the other attorneys
8 may not like the way that I've asked a question, and that
9 is bound to happen. When that happens they will state an
10 objection. So you may want to just briefly pause and
11 allow that opportunity if that's the case. However, then
12 please, you know, answer the question that was asked. The
13 objection is just for the record.

14 If at any point today you need a break, that's fine.
15 Please just I ask that you answer the question that's
16 pending at that time, and then we can go ahead and take a
17 break. And I anticipate that, you know, I will need
18 breaks as well, so we'll probably take one, you know,
19 every hour and a half -- hour, hour and a half or so.

20 Is there any reason that you can think of that you
21 cannot truthfully and fully answer my questions today?

22 A No.

23 Q So that reminds me of one more rule, which is that
24 the court reporter does need a verbal answer in order to
25 transcribe it, so please -- You know, nodding of the head

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1 and sort of nonverbal cues won't work for her. So please
2 do keep that in mind as well.

3 If at some point, you know, you think of something
4 that you -- that is necessary to give a full or complete
5 answer to a question that was pending but you need to add
6 that later, please just let me know and you can add that
7 to the record.

8 Does that make sense?

9 A Yes.

10 Q And unless you say otherwise, I will assume that you
11 understood my questions. So, you know, if you have a
12 question about my question please ask it, otherwise the
13 record will reflect your understanding.

14 Does that make sense?

15 A Yes.

16 Q What is your current occupation?

17 A I'm the President and CEO of the Bellevue Chamber of
18 Commerce.

19 Q And how long have you held that role?

20 A Since February of 2019.

21 Q And prior to that what was your occupation?

22 A I was the state -- in the State Senate.

23 Q And that was in District 47; is that correct?

24 A That's correct.

25 Q And you were a Republican member of the State

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1 Senate; is that right?

2 A That's correct.

3 Q And how long were you in office?

4 A I was elected in 2010.

5 Q Did you hold any elected positions prior to serving
6 in the State Senate?

7 A I didn't.

8 Q And did you practice as a lawyer before you became
9 an elected official?

10 A I don't believe so.

11 Q What was your role, or what was your occupation
12 before you became an elected official then?

13 A I was Chief of Staff to a King County Council member
14 for District 7.

15 Q Given that you haven't practiced as a lawyer, I
16 assume -- but correct me if I'm wrong -- you don't have
17 any particular experience with litigating or working in
18 the law related to the Voting Rights Act?

19 A No.

20 Q What year did you graduate from law school?

21 A Two thousand -- 2007 or 2008.

22 Q And did you also have a -- Were you in a dual track
23 program with an MBA; is that right?

24 A Yes.

25 Q When were you appointed to be a commissioner on the

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1 Redistricting Commission?

2 A January of 2021.

3 Q And how did that appointment come about?

4 A The Minority Leader, John Braun, asked if I was
5 willing to serve.

6 Q And when was that conversation?

7 A January -- Probably around the same time, January of
8 2021.

9 Q So he came to you. Did you talk to anyone before
10 that conversation indicating your interest or suggesting
11 that you would be a good candidate?

12 A I don't recall.

13 Q Was the first time that the possible appointment to
14 the Commission came up in that January conversation with
15 the minority leader?

16 A I don't recall.

17 Q Was it something that you wanted to serve in?

18 A Yes. I was interested in serving.

19 Q And how soon after that conversation was your
20 appointment made?

21 A Again, I don't recall the timeline between the
22 conversation and when the appointment was made.

23 Q What did you do to prepare for the work of being a
24 commissioner shortly after you were appointed by the
25 minority leader?

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1 A I don't recall anything specifically prior to the
2 Commission meetings beginning.

3 Q And when did the meetings begin?

4 A That I don't recall, either. Probably January or
5 February of 2021.

6 Q Okay. Generally then, not specifically, what sorts
7 of things did you do? Did you research? You know, did
8 you look at the map? Did you research how redistricting
9 had happened in the past? Did you look at some census
10 data? Did you talk to folks?

11 Like what did you do after you had the appointment
12 to sort of gear up for being on the Commission?

13 A I don't really -- Prior to the actual Commission
14 beginning I don't recall anything specific. I may have
15 looked at the maps, as you suggest, or gone to the website
16 from the 2010 Redistricting Commission work just to look
17 at that information.

18 Q Okay. What about once the meetings started taking
19 place, then what sorts of tasks and research did you do to
20 familiarize yourself with the redistricting process?

21 A I, you know, reviewed -- and this part would have
22 happened prior to my -- to the meetings starting, which
23 was to read the statute around the redistricting process.
24 I did -- I did do that.

25 The -- I believe the NCSL, which is the National

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1 Conference of State Legislators, has a resource, had an
2 online resource for redistricting. I recall looking at a
3 web page.

4 And I looked at -- and this would have been a
5 continuous process through the process -- but looked at
6 the chart of which existing legislative and congressional
7 districts had to gain or lose population.

8 Q What did you take from -- You said you read the
9 statute related to redistricting. What were your
10 takeaways from reading that statute?

11 MR. MILLSTEIN: Objection, vague.

12 A Is there a specific -- Is there a specific element
13 that you're asking about, or --

14 Q (By Mr. Gaber) No.

15 A -- is it in general?

16 Q I just -- You're the one that read it, so I'm
17 curious what your takeaways were from it.

18 A That it highlighted a few goals of the redistricting
19 process, in addition to laying out the, you know, actual
20 technical process for due dates and the like.

21 And I'm going to apologize here. I have a rib
22 injury, so I'm going to be shifting uncomfortably a lot
23 during this. I just want to let you know why I'm not --
24 not feeling the best.

25 Q I'm sorry to hear that, and you should feel free to

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1 move to whatever position --

2 A Yeah, I appreciate that.

3 Q -- you feel comfortable.

4 A I just wanted to let you know.

5 Q I've been there. That's not fun.

6 A Pickup football is a dangerous sport.

7 Q I tried it once.

8 What did you glean as the goals of the redistricting
9 statute in terms of priorities or process?

10 MR. MILLSTEIN: Objection to the extent it
11 calls for a legal conclusion.

12 A The statute -- and again, this won't be a list in
13 its entirety -- but prioritized communities of interest,
14 promoting competition, obviously equalized population.
15 Those were some of the priorities that I recall.

16 Q (By Mr. Gaber) Who did you -- After you were
17 appointed who did you talk to about the fact that you were
18 going to be serving as a commissioner?

19 A I probably talked to a number of people about --
20 about that.

21 Q So what about people who are involved in politics in
22 Washington, can you give -- Can you identify who you spoke
23 to?

24 A This would not be an exclusive list because I
25 believe I had a number of conversations, but I recall

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1 talking with former Senator Steve Litzow, having
2 additional conversations with Minority Leader John Braun.
3 I probably spoke with other members of the Senate, both
4 Republicans and Democrats.

5 I think I had a conversation with Tim Ceis, but I
6 don't recall at what point I had that conversation. He
7 was the former Senate Democratic Commissioner in 2010.

8 Again, it would be difficult to provide an
9 exhaustive list.

10 Q Did you -- So you were appointed by the -- to
11 represent the State Senate Republicans; is that right?

12 A I was appointed by the Senate minority leader.

13 Q Did you -- Sort of throughout the process did you
14 meet with all of the members of the Republican Caucus of
15 the State Senate?

16 A I don't recall if it was all of them, but I would
17 certainly say most of them.

18 Q And how many of the Democratic members of the State
19 Senate did you meet with or talk to?

20 A Again, I don't recall specifically, but probably --
21 at least probably five or six.

22 Q What about outside the Legislature, you know,
23 lobbyists or campaign -- folks who worked on campaigns and
24 the like?

25 A I can't recall specifically, but I'm sure I had

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1 conversations with -- with state lobbyists and other folks
2 that had been around during prior redistricting. That
3 wouldn't surprise me.

4 Q And in particular are there people who you remember
5 speaking to?

6 A I probably talked to Marty Loesch and Rob Makin.

7 I apologize, this was a while ago so I'm having a --
8 I'm certain that there were others, but they're not
9 jumping to mind right now.

10 Q Who is Marty Loesch?

11 A Marty Loesch is a former Chief of Staff to
12 Governor Gregoire and a current lobbyist.

13 Q Who does he lobby for?

14 A He has a number of clients. He works still with
15 Governor Gregoire's Challenge Seattle. He has, I believe,
16 Lyft, the ride share. I believe his firm has some work
17 with the University of Washington. I believe that he has
18 the -- possibly with the Ballmers. Again, I don't recall
19 beyond that.

20 Q And what was the substance of your conversation with
21 him about redistricting?

22 A I can't recall any specific conversation with them.
23 I just believe that I likely had conversations with them.

24 Q Do you recall generally what you would have spoken
25 with him about?

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1 A The same thing that I would have talked with anyone
2 else about, which is I've been appointed to this thing.
3 You know, what are your thoughts on the process? How do
4 you think that this plays out? Just general kind of high-
5 level conversations.

6 Q Anything with respect to specific districts?

7 A Again, I don't recall any specific conversation, so
8 any answer I give would be kind of speculation.

9 Q And that caveat is with respect to Marty Loesch, or
10 are you saying --

11 A To any of the conversations that I had at that time.

12 Q And what timeframe does that apply to?

13 A Probably at any point during the redistricting
14 process. It's hard to pick out a specific conversation
15 from, you know, several years ago.

16 Q What is -- Who is Rob Makin?

17 A He's a long-time Olympia lobbyist.

18 Q And for whom does he lobby?

19 A He has the Franciscan CHI Medical -- or Hospitals.
20 He has Microsoft. He has Sabey Corp. He may have had
21 Comcast at the time. I don't believe he does anymore.

22 He certainly has others, but none that are jumping
23 to the front of my mind.

24 Q Did you have any sort of systematized schedule for
25 meeting with folks? And I'm thinking in particular for

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1 the members of the State Senate who would be affected by
2 the redistricting. Did you have office hours or -- you
3 know, quote, unquote "office hours" or any sort of regular
4 meetings?

5 A No.

6 Q And I'm going to back up for a second and then come
7 back to this topic, but I realized I forgot to ask you.

8 What did you do to prepare for today's deposition?

9 A I spoke with my counsel, and I -- That's about it.

10 Q And by your counsel you mean Mr. Millstein; is that
11 right?

12 A That's right.

13 Q When did you speak with him?

14 A I spoke with him this morning. I spoke with him
15 Friday afternoon. And I spoke with him one other day last
16 week, but I don't recall which day.

17 Q And how long were those conversations?

18 A Less than 30 minutes, --

19 Q Did you --

20 A -- I believe.

21 Q Was anyone else present?

22 A No.

23 Q And was that over the phone or Zoom, or some other
24 way?

25 A I don't -- This morning was over the phone. Friday

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1 was -- I think it was over the phone as well or -- Because
2 I was -- I believe I was driving.

3 And then I don't recall if it was a Zoom meeting
4 earlier in the week or not.

5 Q Did you review any documents in preparation for the
6 deposition?

7 A I took another look through emails and texts to see
8 if there was anything that was responsive and didn't find
9 anything. I -- Yeah, I think that's about it.

10 Q So when you say to see if there is anything
11 responsive, are you talking about the subpoena that you
12 received in this matter?

13 A Yes.

14 Q When did you -- What was your process -- Once you
15 saw that subpoena for the first time, what process did you
16 sort of put in place to find documents and messages and
17 communications that were responsive?

18 A Yeah, I took another search through at the time for
19 any text communication. And then the emails and files and
20 things like that were in the custody of the Commission.

21 Q And did you go through your text messages to look
22 for responsive ones, or did you turn it over -- Did you
23 turn over your entire, you known, phone or message file to
24 counsel to conduct a search to determine if there were
25 responsive communications?

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1 A I think I looked through them.

2 Q And so what was your sort of framework for deciding
3 whether something was or was not responsive?

4 A A lot of the responsive messages had been turned
5 over previously and were in a folder that I had given
6 access to the Commission. So otherwise anything that had
7 to do with the redistricting process or conversations
8 around that would have been included.

9 I don't believe I found anything in addition.

10 Q And did this involve you just reading or rereading
11 those text messages, or were you like searching for key
12 words?

13 A Oh, I searched for keys words. I did search for key
14 words, yes.

15 Q And what were those?

16 A Redistricting, CVAP, Barreto, district. That's not
17 an exclusive list, but that's what I can recall for the
18 moment.

19 Q Did you -- In addition to searching for those or
20 possibly other key words, did you just go back and reread
21 all of the messages to see whether there were any that may
22 not involve those key words but might nevertheless be
23 responsive to the subpoena?

24 A I guess I'm -- Can you repeat the question? I guess
25 I'm not --

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1 Q What beyond a search -- Well, how did you -- How did
2 you search for the key words? Like physically did you
3 type in the search field --

4 Do you have an iPhone? Is that what you use?

5 A (Nodded.) Yes.

6 Q And so did you just type in like redistrict in the
7 search function on the iPhone?

8 A Yes.

9 Q So after you did that then, or in addition to that
10 did you go back and just reread your texts with the
11 relevant -- you know, the most likely other parties to
12 your communications during that time about redistricting
13 to see whether there were some that weren't being captured
14 by your searches?

15 A I know that I previously turned over all responsive
16 communication or texts with other commissioners or --
17 Yeah, with other commissioners or individuals that were
18 listed in the previous public records request.

19 I don't recall searching for any specific
20 individuals with regards to this subpoena.

21 Q Are there -- Are there text messages between other
22 commissioners or other Commission staff, say from
23 September to November, the end of November of 2021 that
24 you have not turned over?

25 A I don't believe so.

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1 Q During this time did you delete any text messages?

2 A I don't recall. I don't recall deleting any.

3 Q Do you have any sort of standard practice in that
4 regard? I know some folks never delete things. Other
5 folks -- My dad deletes his text messages like every night
6 sometimes.

7 So do you have a practice in that regard?

8 A I don't have a standard practice.

9 Q Does your phone have any sort of auto delete
10 function?

11 A Not to my knowledge.

12 Q And was your search limited -- or I guess did you
13 conduct searches for communications with legislators or
14 parties other than the ones that were in the public
15 records requests?

16 A I'd have to review what the public records request,
17 what the scope of that was. My understanding is that it
18 included all -- all legislators and all business or
19 communications related to the redistricting process, and
20 so that would have been inclusive of that.

21 Q And what -- In addition to texting were there other
22 means of communications that you employed with the other
23 commissioners or the Commission staff or interested
24 legislators about the redistricting process?

25 A Phone calls and my redistricting email.

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1 Q Did you use your personal email to talk about
2 redistricting at all?

3 A I don't believe so.

4 Q And what about other types of messaging services,
5 you know, other sorts of instant messaging other than text
6 messages?

7 A No.

8 Q Okay. So I'm going to jump back to the substantive
9 discussion we were having.

10 In addition to legislators and some lobbyists in the
11 state, was there anyone else or other categories of people
12 that you would talk to for your role on the Redistricting
13 Commission?

14 A Other than legislators, lobbyists, Commission staff,
15 your question is is there anyone else outside of that?

16 Q Right.

17 A Not that I recall.

18 Q How about any folks who are associated with the
19 Republican party of Washington?

20 A Yes. I had a -- Well, actually now that I recall, I
21 don't believe he was in that conversation. I just may
22 have had a brief conversation with the chair of the
23 Republican party when I had a meeting there at some point
24 during the process, but I don't know what -- if we went
25 into any detail about anything.

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1 Q Did you talk to anyone, any Republican party
2 affiliated officials outside, so like national Republican
3 party folks who were interested in redistricting?

4 A I don't recall.

5 Q Did you ever speak to anyone with the National
6 Republican Redistricting Trust?

7 A That name sounds familiar, and -- but I don't recall
8 any specific conversation with anyone from that
9 organization. That doesn't mean that that didn't occur,
10 but I don't recall any at this time.

11 Q Do you know an individual named Adam Kincaid?

12 A Yes. Yes, I -- That's a -- I did speak with Adam at
13 some point during the process, but not very frequently.

14 Q And when was that?

15 A Sorry. You just minimized one second.

16 I don't recall. I think I probably had one or two
17 conversations with him during the -- during the entire
18 process.

19 Q And what were those conversations about?

20 A I don't recall.

21 Q Do you recall anything from your conversations with
22 Adam Kincaid?

23 A I don't.

24 Q Did the Senate Republican leadership give you
25 suggestions on what districts should look like?

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1 A I don't believe so.

2 Q How long were your conversations with Adam Kincaid?

3 A I don't recall.

4 Q Were they by phone or some other means?

5 A I don't recall.

6 Q Did you exchange any written communications with
7 him?

8 A I don't recall.

9 Q Is there anyone else from the National Republican
10 Redistricting Trust that you spoke with?

11 A I'd have to hear names. I -- I don't believe so,
12 but I -- I don't know.

13 Q Did you receive ever any suggested maps from any
14 national Republican entities for say the congressional
15 districts in Washington?

16 A I'm sorry. From what? From what party?

17 Q Well, from anyone associated, broadly defined, with
18 national Republican entities.

19 A I don't think so. If I -- I'll qualify that. You
20 know, there was hundreds of maps that were submitted
21 directly to the Commission, and I don't recall if that
22 entity was one of them that had submitted one; but I don't
23 believe I received any draft maps from anyone.

24 Q And is the same thing true with respect to the state
25 legislative map?

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1 A I don't believe I received any draft legislative
2 maps from any national Republican group.

3 Q And what about from the state Republican party or
4 affiliated entities?

5 A I don't believe I received draft maps from the state
6 Republican party.

7 Q Other than an actual draft map, did you receive
8 input or instructions, directions from either the national
9 or state Republican affiliated parties or entities about
10 what particular districts they would like to see look
11 like?

12 A I don't believe so.

13 Q When you were drafting maps or your staff was
14 drafting maps did you send those maps ever to Republican
15 affiliated state or national organizations for their
16 feedback?

17 A I don't believe so.

18 Q Do you know whether your staff did?

19 A I don't know.

20 Q And who were your staff on the Commission?

21 A The -- Paul Campos and Lisa -- I'm forgetting Lisa's
22 last name for the moment. The executive director.

23 Q Lisa McLean?

24 A That's correct.

25 Q And Paul Campos, he sort of worked for you; is that

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1 right?

2 A Yes.

3 Q And --

4 A That is correct.

5 Q -- how did you hire him, or why did you hire him?

6 What was that process?

7 A The caucus selected him.

8 Q So you didn't personally choose him to be your staff
9 member?

10 A No.

11 Q Had you known Paul prior to being selected as your
12 staff member?

13 A Yes.

14 Q And in what capacity?

15 A He was the assistant or Deputy Secretary of the
16 Senate when we were in majority in the State Senate, so I
17 worked with him as the majority floor leader.

18 And then he served in another capacity -- I don't
19 remember what it was -- when we were in the minority. I
20 didn't work with him as much then.

21 Q And can you describe the working relationship that
22 you had in general terms with Paul in terms of, you know,
23 your sort of process of staffing yourself as a
24 commissioner?

25 A Yeah, it was pretty informal. We'd have a Zoom call

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1 once a week to check in. I would ask him to draw
2 different -- permutations of different maps and to then
3 discuss what were the factors that went into generating
4 those maps and what were the considerations that he took
5 into account. So that's pretty much the process.

6 Q And did you --

7 A Once in a while --

8 Q I'm sorry, I interrupted you.

9 A Oh, yeah. Once in a while I would draft my own map
10 and send it to him for his feedback.

11 Q How did you normally communicate with Mr. Campos?

12 A Phone calls and email.

13 Q What about text messages?

14 A I don't recall frequent text messages with him. If
15 it were it would be a, "Call you in five," or something
16 like that; but again, I don't recall any specific
17 messages.

18 Q The census data that's used for redistricting was
19 released in August, late August of 2021.

20 Does that sound right to you?

21 A Yes.

22 Q So prior to that there was a period of time, you
23 know, lengthy period of time where you were on the
24 Commission before that data was released.

25 What were you doing during that time to, you know,

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1 prepare for the eventual release of the data?

2 A Well, we had datasets that approximated -- I don't
3 recall where they came from, if it was the Community
4 Survey or the census estimates; but we had datasets that
5 allowed us to draw up concepts that were -- that we
6 expected to be between plus or minus five or 10 percent
7 within what the actual data would end up being.

8 Q And so this is -- I'm assuming this was the American
9 Community Survey, the five-year estimates of total
10 population that are based on the surveys that go out to a
11 certain number of households across the country.

12 Does that sound right?

13 A I don't know if there were other datasets that went
14 into creating the data file that was used to do those
15 draft maps, but I believe that that data was part of it.

16 Q But in any event, you didn't wait until the actual
17 census data came out. You started earlier using estimate
18 data to kind of get a sense of where you were going with
19 your proposed plans; is that right?

20 A That's correct.

21 MR. MILLSTEIN: Objection to form.

22 Q (By Mr. Gaber) And when did you start that actual
23 kind of draft mapping using the estimated data?

24 A I don't recall when the software was made available,
25 the Edge software was made available to myself or to

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1 staff. So I wouldn't know what month that occurred in,
2 but it was prior to the release of the full census data.

3 Q Did you or Mr. Campos use any programs other than
4 Edge to draft maps?

5 A I don't know what Mr. Campos used. I know he -- The
6 maps that I viewed that he produced were produced in Edge.

7 I used Edge, and then towards the -- maybe the last
8 few days of the process I recall viewing some maps in
9 Dave's Redistricting, but I didn't draw up draft maps in
10 Dave's Redistricting throughout the process.

11 Q Was Edge the only software that you used to work on
12 draft maps?

13 A With the exception of if I -- if I had used Dave's
14 in the final days to move lines around quickly and look at
15 populations. I don't recall drawing maps prior to that in
16 Dave's, so Edge would have been the primary tool.

17 Q And then once the -- So eventually -- You know,
18 we'll talk about it a little bit later, but you eventually
19 released, you know, your own proposed maps for the State
20 Legislature and for Congress sort of shortly after the
21 census data came out; is that right?

22 A Yes.

23 Q And how much did your proposal change based on the
24 actual numbers that had come out compared to sort of your
25 drafting process prior to that?

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1 A I don't recall.

2 Q Was it a substantial change, or were the estimates
3 largely close enough in line that you could just tweak?

4 A I don't recall.

5 Q Okay. Do you recall whether the general outlines of
6 your proposals were sort of set prior to the census data
7 being released?

8 MS. FRANKLIN: Objection, vague.

9 A We had several draft maps that we were looking at in
10 advance of the census data being released. The proposed
11 map may have included components of any number of those
12 draft maps.

13 Q (By Mr. Gaber) Were you involved in the selection
14 of Sarah Augustine as the Chair of the Redistricting
15 Commission?

16 A Yes.

17 Q And how so?

18 A The -- We were -- We voted on her as a Commission to
19 put her in that position.

20 Q Did you suggest her as the Chair?

21 A No. No.

22 Q How did that happen? Whose idea was it?

23 A I believe the name came from Brady, but -- It either
24 came from Commissioner Walkinshaw or Commissioner Sims.

25 Q Was there anyone else that you or Commissioner

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1 Graves had suggested as potential chairs?

2 A Yes. I believe so.

3 Q Who was that?

4 A I don't recall the name. I believe it was a retired
5 federal judge in eastern Washington. There may have been
6 other names, but I don't -- I don't recall who.

7 Q Did you know Ms. Augustine prior to her -- to voting
8 to make her the chair?

9 A I had had a conversation with her after her name was
10 proposed.

11 Q And what did you guys discuss in that conversation?

12 A Her professional background, her philosophy towards
13 negotiations and mediations in particular, her, you know,
14 willingness to take on the job if selected.

15 Q And what was her philosophy toward negotiation and
16 mediation that she relayed to you?

17 A I can -- I can tell you my net impression of what
18 she said. I can't remember what she actually said on the
19 call.

20 Q Okay. What was that?

21 A My net impression was that she was a professional
22 who placed her -- her reputation as a mediator above any
23 personal political agenda.

24 Q Did Senator Honeyford ever suggest Sarah Augustine
25 as a potential chair?

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1 A I -- I don't recall.

2 Q Do you know Drew Stokesbary?

3 A Yes.

4 Q And did you ever talk to Drew Stokesbary about
5 redistricting during the redistricting process?

6 A Yes.

7 Q And how many times?

8 A I don't recall.

9 Q What's your sort of rough estimate of the magnitude
10 of conversations?

11 A More than one, less than five.

12 Q And when would those have taken place?

13 A I don't recall.

14 Q Did you speak with him sort of in the last two weeks
15 before the November 15th deadline? Did it seem like he
16 was present during that period of time?

17 A I don't recall.

18 Q What general topics did you discuss with
19 Mr. Stokesbary?

20 A The makeup of the 31st Legislative District.

21 Q What about other Legislative Districts?

22 A I don't believe so.

23 Q Mr. Stokesbary, he's not -- He doesn't represent you
24 as a lawyer, does he?

25 A I don't believe so.

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1 Q Have you spoken with him about either this lawsuit
2 or the other lawsuit, the Garcia lawsuit that's
3 challenging Legislative District 15?

4 A I don't recall. I don't -- I don't think so, but I
5 don't recall.

6 Q Is there a conversation that you're thinking of with
7 him that you're unsure of whether it was about the
8 lawsuit?

9 A No. I'm just trying to think about who was involved
10 in -- and when I first learned of the other lawsuit, and I
11 don't have any specific recollection right now of what
12 that was.

13 Q And you understand that so this is -- The lawsuit
14 that we're sort of talking about today is the challenge
15 under the Voting Rights Act to District 15; is that right?

16 A That's correct.

17 Q And that there's a second lawsuit that challenges
18 District 15 as a racial gerrymander.

19 Do you understand that?

20 A Correct.

21 Q What is your impression of both lawsuits?

22 MR. BOWEN: Objection, form.

23 A Can you be more specific about what my impression
24 is?

25 Q (By Mr. Gaber) Well, I want to start broadly. So

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1 I'm just curious as to what -- you know, what you think.

2 You voted for the plan; right?

3 A I did.

4 Q So do you think that both lawsuits lack merit?

5 A Yes.

6 MS. FRANKLIN: Objection, calls for a legal
7 conclusion.

8 MR. MILLSTEIN: Thank you.

9 Q (By Mr. Gaber) And sorry, I didn't hear your
10 answer.

11 A I don't believe either lawsuit will be successful.

12 Q And do you disagree with the allegations in the
13 Garcia lawsuit that the plan was a racial gerrymander?

14 MR. MILLSTEIN: Objection, vague.

15 MS. FRANKLIN: Objection, calls for a legal
16 conclusion.

17 A Yeah, I don't believe I know enough about the --
18 about the case law behind what would allow either suit to
19 succeed to be able to go into any details.

20 Q (By Mr. Gaber) Did you talk with any lawyers from
21 the law firm Holtzman Vogel during the redistricting
22 process?

23 A I don't recall.

24 Q And what about regarding this lawsuit?

25 A I don't recall.

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1 Q Are you familiar with the law firm Holtzman Vogel?

2 A I may be, but I don't have -- It's not ringing a
3 bell right now. So maybe if I heard some of the attorneys
4 that were there.

5 Q Well, one of them is with us here today, Mr. Brennan
6 Bowen. Have you spoken with Mr. Bowen before about
7 redistricting or this or the Garcia lawsuit?

8 A Again, I don't recall.

9 Q And another is Jason Torchinsky. Have you spoken
10 with him about redistricting or these lawsuits?

11 A I don't -- I don't recall.

12 Q And then another is Dallin Holt. Have you spoken
13 with him about redistricting or any of these lawsuits?

14 A I don't recall.

15 Q And have you spoken with any of those attorneys
16 about -- ever before about anything?

17 A I don't -- I don't believe so.

18 Q Did you know that a racial gerrymandering lawsuit
19 was going to be filed before it was filed?

20 A I believe that I was aware that there was some
21 discussion around that, but I don't recall the details.

22 Q So then generally how did you become aware of that?

23 A I think I talked with Paul Graves about -- after the
24 VRA lawsuit was filed, I think that it may have come up in
25 that context.

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1 Q And what did Paul say?

2 A I don't recall.

3 Q What do you recall of the conversation?

4 A I think the -- about the fact that there was an
5 allegation relative to the 15th District, and it may be a
6 general conversation about, you know, legally what does
7 that mean, and what are -- What would a plaintiff or a
8 defendant need to show in a case like that, and what are
9 other causes of action that might also relate to race as a
10 component in redistricting.

11 Q And so that answer that you just gave, that was
12 about the forthcoming but not yet filed racial
13 gerrymandering case; is that right?

14 A I don't know if it was about the specific -- I don't
15 recall it being about a specific filing, but I believe we
16 discussed as part of the VRA conversation what are the
17 other -- What are the other potential actions that could
18 be brought up in -- with regards to race and
19 redistricting.

20 Q And it was your impression from that conversation
21 that there would be -- that someone was going to be filing
22 an additional lawsuit?

23 A Again, I don't recall specifics, but I do recall
24 that that had been -- that the possibility of a Complaint
25 alleging those, those components, could be part of this

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1 whole broader conversation.

2 Q And this was information that Mr. Graves had learned
3 that additional Complaints about racial gerrymandering in
4 particular would be filed?

5 MR. MILLSTEIN: Objection, calls for
6 speculation.

7 A I don't recall.

8 MS. FRANKLIN: Objection, foundation.

9 A Yeah, again, I really don't recall how specific the
10 conversation was.

11 Q (By Mr. Gaber) Was there anyone else in the
12 conversation, or was it just you and Mr. Graves?

13 A Again, I don't -- I can't even recall any specific
14 conversation. I'm giving you a vague impression of my
15 memory that A) I was aware that the -- that a Complaint
16 could be filed on those grounds, and that at a later time
17 it was that a Complaint would be likely to be filed; but
18 again, I don't recall who I would have learned that from
19 or who I would have had conversations with around that.

20 Q Have you -- During the redistricting process did you
21 talk to Ismael Campos, Paul Campos's brother?

22 A I don't believe -- I don't believe so.

23 Q Have you ever spoken with Ismael Campos?

24 A I don't recall.

25 Q What about Benancio Garcia?

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1 A I don't recall.

2 Q Alex Ybarra?

3 A I have spoken with Alex before.

4 Q And did you speak with him about the redistricting
5 process?

6 A I don't -- I don't believe so.

7 Q What about with regard to either of the two lawsuits
8 that have been filed?

9 A I don't believe so, but I don't recall.

10 Q Have you spoken with José Treviño ever?

11 A I don't recall.

12 Q Did you read the Complaint that was filed in this
13 case, the Section 2 Complaint?

14 A Parts of it. I don't recall if I read the whole
15 thing.

16 Q Which parts do you recall reviewing?

17 A In the original Complaint I recall reading through
18 the numbered list of allegations and of evidence.

19 Q And have you referred back to that again to reread
20 it, ever?

21 A No.

22 Q What about the Garcia case, did you read the
23 Complaint that was filed in that case?

24 A No.

25 Q Have you read any of the other documents that have

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1 been filed in the Court regarding this litigation?

2 A No.

3 Q Have you read any expert reports or the like related
4 to this case?

5 A No.

6 Q Have you read newspaper articles about the
7 litigation?

8 A Yes.

9 Q What takeaways do you have from those articles?

10 MR. MILLSTEIN: Objection, vague.

11 A I don't recall any specifics that were in the
12 articles.

13 Q (By Mr. Gaber) But you're staying informed about
14 litigation, at least through the media; is that fair?

15 MR. MILLSTEIN: Objection. Objection,
16 misstates prior testimony.

17 A I recall that I have read newspaper articles that
18 have covered it. I haven't methodically sought them out
19 on a regular basis.

20 Q (By Mr. Gaber) Have you read any deposition
21 transcripts related to this litigation?

22 A No.

23 Q Did you read any deposition transcripts from the
24 open records litigation?

25 A No.

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1 Q Did you read your own deposition transcript from the
2 open records litigation?

3 A I recall it being sent to me. I don't know if I
4 actually read it.

5 Q Do you know who is funding the attorneys for the
6 Garcia case, the racial gerrymandering lawsuit?

7 A I don't recall.

8 Q Do you know if you've ever been told who that was
9 and you just don't recall who it was, or what don't you
10 recall?

11 A I don't recall knowing who was funding that suit.

12 Q And so just so I'm clear, because I -- I'm a little
13 confused by the answer, "I don't recall."

14 Do you know who is funding that lawsuit?

15 A I do not know who is funding it. I do not know who
16 is funding that lawsuit, no.

17 Q Do you have any speculation or guesses as to who is
18 funding that lawsuit?

19 MR. MILLSTEIN: Objection, calls for
20 speculation.

21 MR. BOWEN: Thank you.

22 A Yeah, I wouldn't want to -- I wouldn't want to
23 speculate about something like that.

24 Q (By Mr. Gaber) Well, --

25 A I mean, --

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1 Q -- so if I ask you --

2 A I don't --

3 Q -- to speculate -- They can object, but if I ask you
4 to speculate, then you do have to, so --

5 A I don't know who is funding the -- I don't know who
6 is funding it, and I don't recall if I've ever known who
7 is funding it.

8 Q I'm going to switch gears to the map drawing
9 process. Who drew the legislative plan that you released
10 to the public in September?

11 A Paul Campos and I.

12 Q And was it all Paul, or were parts of it you? Sort
13 of what was the iterative process that got to that map?

14 A Yeah, it was partly Paul, and it was partly me.

15 Q Okay. And can you just describe generally for me
16 sort of what that workflow looked like? You know, did
17 this -- We talked a little bit earlier about perhaps some
18 of it might have been from the draft before the census
19 data came out.

20 Once the census data came out in August what did the
21 process look like?

22 A I had asked Paul to create a map that prioritized
23 the continuity of school districts and that created as
24 many competitive or swing districts as possible.

25 And he put together an initial draft. I recall

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1 meeting with him and then taking over the mouse and making
2 some changes to some areas; and I don't recall
3 specifically what, but they would have been most likely in
4 the central Puget Sound area.

5 And then he went back and made some additional
6 changes or kind of completed because the populations that
7 we had been drawing -- and especially when I took over --
8 were not equalized, and so he went back to make sure that
9 they were equalized. And I think that's the process that
10 we -- that we went through on those maps.

11 Q And you mentioned one thing in particular,
12 competitiveness, and I think --

13 Did you say that you wanted to draw the maximum
14 number of competitive districts that were possible?

15 A Yes. That's correct.

16 Q And how did you go about determining what that
17 maximum number was?

18 A We used different election data to figure out which
19 districts were -- or which -- We used -- We used historic
20 election data to determine what -- where the lines would
21 need to be to create competitive districts.

22 Q And was it your goal to wherever there could be a
23 competitive district, to draw one?

24 A I had an overall goal of wanting to see more
25 competitive districts rather than fewer.

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1 Q And so I guess I'm just trying to get at you said
2 that -- I think you said something -- I don't know if this
3 is your exact words, but something like maximize or have
4 the most or --

5 So I'm just curious as to, you know, were you
6 focused on competitive districts in that particular part
7 of the state? Or were you focused on particular districts
8 and trying to make those districts more competitive? Or
9 were you looking to see if there were new districts that
10 sort of -- you know, you hadn't conceived of prior in the
11 prior map?

12 MS. FRANKLIN: Objection, compound and
13 vague.

14 A The last point you made about specific districts,
15 there are some generally accepted districts that were
16 previously competitive, and I likely started with those
17 districts to preserve their competitiveness or to enhance
18 it.

19 Q (By Mr. Gaber) And did you use some sort of metric
20 for competitive districts, like a range of electoral
21 results that you viewed as in the range of competitive?

22 A Yes.

23 Q And what was that?

24 A I used several different indicators and several
25 different races. I wouldn't be able to list all of them,

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1 but they would range from Secretary of State race data,
2 treasurer race data, the U.S. Senate race data.

3 Q And within that -- I guess what I'm trying to get at
4 is is it like 45 to 55 percent for one party is the range
5 of competitive or a different range? What are the results
6 that indicate to you that it's a competitive district?

7 A I would lean more towards the smaller range being
8 considered competitive, perhaps 47 to 53, but -- I do
9 recall having conversations with my fellow commissioners
10 about how we would determine what competitive meant.

11 Q And I know that -- and we can talk maybe a little
12 bit more later about this, too -- but I know that is it
13 the treasurer's, the 2020 treasurer's race with
14 Pellicciotti was the candidate, that that was sort of used
15 as a benchmark; is that right?

16 A That emerged as a consensus benchmark amongst the
17 commissioners. It was not the only data point that I
18 considered, but it was a -- It was one that we believed
19 generally was accurate.

20 Q And did you sort of, I guess, quantitatively or
21 qualitatively did you agree with that decision, that that
22 was a good benchmark to use?

23 A If there was only one race that you would be able to
24 select in order to determine competitiveness, then I felt
25 that that was the most appropriate race.

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1 Q And can you talk a little bit about why that is?
2 What about that particular election or the candidates or
3 the outcome was useful in the way that others might not
4 have been as useful?

5 A Sure. One of the --

6 MR. MILLSTEIN: Objection, compound.

7 A It was a close race to begin with. I assumed that
8 the name ID, since there was not a lot of campaigning
9 around it or not paid media around that, not a lot of
10 attention to the race, that I viewed it as a no-name
11 Republican against a no-name Democrat for a position that
12 was not perceived as being strongly ideological, and that
13 under those circumstances you could see a -- what a
14 generic ballot -- how a generic ballot or a generic
15 competition between a Republican and a Democrat in any
16 given district might play out.

17 Q (By Mr. Gaber) And the way you looked at it sort of
18 above 53 percent or below 47 percent, you were falling
19 kind of outside the range of true competition; is that a
20 reasonable --

21 A I wouldn't say it's a hard line, but I would say the
22 further you move from 50/50, the less competitive the
23 district is.

24 Q And I'll show you an example a little bit later,
25 too; but you actually, you know, kind of really delved

1 into the data and had spreadsheets for each map that had
2 the electoral results and a host of different elections
3 and other sort of population and demographic data for each
4 of the districts, ranked them, you know.

5 Do you recall this?

6 MR. MILLSTEIN: Objection, lacks
7 foundation.

8 A Yeah, I don't recall all of the different pieces of
9 data or things that were developed as part of the process,
10 but I do recall plenty of spreadsheets.

11 Q (By Mr. Gaber) And these -- and again, I can show it
12 to you in a bit, but I'm just generally speaking -- these
13 were spreadsheets that you had your staff create for you;
14 is that right?

15 A Yes. I especially later in the process had a very
16 specific rubric for how I -- how I would view the
17 competitiveness of a district, yes.

18 Q In terms of the public plan that you released -- I
19 think it was in September of 2021; am I right about that?

20 A Around then, yeah.

21 Q Did you do anything to ascertain whether there were
22 any requirements under the Voting Rights Act for any
23 particular districts that should be taken into
24 consideration or that you took into consideration in
25 drawing your proposal?

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1 MR. MILLSTEIN: Objection, compound.

2 A I recall having a briefing by the Attorney General's
3 Office with regards to the VRA, and so that information
4 would have been available to me at the time of drafting
5 the map.

6 Q (By Mr. Gaber) When was that briefing?

7 A At the beginning of the process. I don't remember
8 what month, but it was early on.

9 Q Before the census data was released?

10 A Yes.

11 Q And was that a verbal briefing, or was that a
12 written briefing?

13 A It was a -- I believe a PowerPoint presentation
14 during a Commission meeting.

15 Q And do you recall who the attorneys from the AG's
16 Office were who gave that presentation?

17 A I don't.

18 Q Did you consult that PowerPoint when you were
19 drawing the proposed plan? And I'm talking about the one
20 that you released publicly.

21 A I don't believe so.

22 Q Did you consult with any other Voting Rights Act
23 experts or consultants or attorneys to vet your public
24 proposal to see whether it was complying with the Voting
25 Rights Act?

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1 MR. MILLSTEIN: Objection, vague and
2 compound.

3 A I did not consult with anyone after the development
4 of my proposed map to determine if it complied with the
5 Voting Rights Act.

6 Q (By Mr. Gaber) What about before it was released?

7 A I think my answer was during the development of my
8 map.

9 Q Did you instruct Mr. Campos to look at any
10 demographic data to see whether that that data would
11 suggest the potential that there could be a voting rights
12 obligation?

13 MR. MILLSTEIN: Objection, calls for a
14 legal conclusion, compound.

15 MS. FRANKLIN: Objection, vague.

16 A I don't recall any specific direction on a specific
17 instance. I would say that the racial demographics of
18 different districts were a part of our conversation and
19 analysis during the development of maps.

20 Q (By Mr. Gaber) And specifically with regard to the
21 Yakima region, when your public proposal that you released
22 in September of 2021 was being developed did you have any
23 conversations with Mr. Campos about the potential that
24 there could be a VRA obligation for Latino voters in the
25 Yakima area?

1 MR. MILLSTEIN: Objection, vague.

2 A I don't -- I don't recall any specific conversation.

3 It was known to me at the time that that would be the --

4 That is -- That was an area of concern for individuals

5 with regards to the VRA. So inasmuch as I knew that, it

6 would have entered my -- my processes.

7 Q (By Mr. Gaber) And how did you come to that kind of
8 general awareness?

9 A I don't recall the timeline of different public
10 testimony or the analysis that had been prepared by
11 Barreto, so I don't know at what point these things were
12 brought up or addressed, only that they were.

13 Q And so is the Barreto report and analysis, is that
14 sort of the primary initial thing that happened to make
15 you aware of the potential issue in the Yakima area?

16 MR. MILLSTEIN: Objection, vague.

17 MS. FRANKLIN: Objection, misstates prior
18 testimony.

19 A I don't recall the timeline, so I don't know what
20 the initial precipitating event or information would have
21 been. Since we received a briefing on the VRA very early
22 on in the process, I believe that the general awareness of
23 that issue existed early on in the process.

24 Q (By Mr. Gaber) And that's specifically about Latino
25 voters in the Yakima area?

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1 A I don't know at what point the geography of the
2 concerns were known, only that the VRA as a potential
3 issue could come up during the development of maps. And
4 again, I don't recall when the geography of where those
5 areas would come out.

6 I was aware of the previous VRA, state VRA concerns
7 and processes and lawsuits in the area and had been aware
8 of those for several years, so -- Yeah.

9 Q And so you knew that the City of Yakima had lost a
10 VRA lawsuit about the City Council districts in Yakima?

11 A I was, yes.

12 MR. MILLSTEIN: Objection, lacks
13 foundation.

14 Q (By Mr. Gaber) What was your answer?

15 A I was aware of that, yes.

16 Q And were you also aware that Yakima County had had a
17 finding by a state court judge of -- that there was
18 racially polarized voting in Yakima and that there was
19 liability under the state Voting Rights Act?

20 MR. MILLSTEIN: Objection, lacks
21 foundation.

22 A I don't recall the county. I recall the city.

23 Q (By Mr. Gaber) And then were you generally aware
24 that there is a sizable Latino population in the Yakima
25 area?

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1 A Yes.

2 Q And that's before -- That awareness of the sizable
3 Latino population, I assume that comes from being a member
4 of the State Legislature and a long-time person involved
5 in Washington politics, that that's something you're
6 generally aware of; is that fair?

7 A That's correct.

8 MS. FRANKLIN: Objection, vague.

9 Q (By Mr. Gaber) And I -- I missed the answer.

10 A Yes. My involvement as a legislator made me aware
11 of those.

12 Q Now, there was a period of time where there was some
13 discussion on the Commission, as I understand it, or among
14 the commissioners of potentially hiring a VRA consultant
15 to advise the Commission.

16 Can you talk a little bit about those conversations
17 and what happened, where that ended up?

18 MR. MILLSTEIN: Objection, lacks
19 foundation.

20 A There was -- After the briefing by the Attorney
21 General's Office there was some discussion around bringing
22 in an additional expert to advise.

23 Q (By Mr. Gaber) And who raised that suggestion?

24 MS. FRANKLIN: Objection, lacks foundation.

25 A I don't recall.

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1 Q (By Mr. Gaber) What do you recall about that
2 conversation?

3 A It -- The -- I had a conversation with the -- The
4 specific conversations, I recall having a conversation
5 with the Chair and with Commissioner Graves. I may have
6 had a conversation with Commissioner Walkinshaw regarding
7 it, but I don't -- I'm not entirely sure.

8 Q And what did you think of the idea?

9 MR. MILLSTEIN: Objection, vague.

10 A I would -- I did not support bringing on the
11 additional consultant.

12 Q (By Mr. Gaber) Why not?

13 A I felt that the issue was going to be one that was
14 used for partisan advantage and that we would be -- it
15 would -- It would make the issue more difficult for us to
16 navigate, given that it would be unlikely for us to agree
17 on an expert that we viewed as neutral.

18 And if we could go towards a break in the next, you
19 know, five minutes or so.

20 Q Yeah. I want to -- So I don't forget, I want to ask
21 a couple questions about your answer, and then we can take
22 a break.

23 A Okay.

24 Q So you said that the issue you thought would be used
25 for partisan advantage. What do you mean by that? When

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1 you say issue are you talking about the consultant, hiring
2 a consultant, or were you talking about generally the
3 Voting Rights Act?

4 A I'm referring to the selection of a neutral
5 consultant and that it would be difficult to come to a
6 consensus around someone who would provide analysis that
7 could be relied upon by all four commissioners as not
8 having an agenda or a position on how to address that
9 issue.

10 Q Did you recommend any names of people that you
11 thought could fit that charge?

12 A I don't recall.

13 Q What was Chair Augustine's view?

14 MR. MILLSTEIN: Objection,--

15 MS. FRANKLIN: Objection, --

16 MR. MILLSTEIN: -- calls for speculation.

17 MS. FRANKLIN: -- lack of foundation.

18 A I recall a conversation with Chair Augustine where
19 she, I believe, wanted to bring on an additional expert on
20 the issue.

21 Q (By Mr. Gaber) And what about Commissioner Graves,
22 did he express any view on the topic?

23 MS. FRANKLIN: Objection, lack of
24 foundation.

25 Q (By Mr. Gaber) Did he express any view to you that

1 you were aware of?

2 A I believe he shared my view that it would complicate
3 the process, and then it would be difficult to find a
4 neutral analyst.

5 Q What was your idea, if you had one, for the
6 alternative approach to determining whether there was an
7 obligation under the VRA to draw a particular district or
8 ensure compliance with the VRA of any map that was drawn?

9 MR. MILLSTEIN: Objection, vague.

10 MS. FRANKLIN: Objection, compound.

11 A That one was a bit too vague and compound for me to
12 sort out. Could you try to rephrase?

13 Q (By Mr. Gaber) So I guess if you didn't want to have
14 a consultant, an expert on the VRA to analyze the plan,
15 what was your vision for how you would -- you would
16 determine whether the map ultimately complied?

17 MR. MILLSTEIN: Objection, lacks
18 foundation.

19 A I don't -- Yeah, I don't recall having a specific
20 process in mind.

21 Q (By Mr. Gaber) Okay. So there really was no backup
22 plan to the consultant. That was just the end of it?

23 MS. FRANKLIN: Objection, misstates prior
24 testimony.

25 A I don't recall having a process in place that early

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1 in the -- in the drawing of the maps.

2 Q (By Mr. Gaber) So having rejected the idea of an
3 expert consultant, were there any steps that you took for
4 yourself to understand what the VRA requirements were?

5 MR. MILLSTEIN: Objection, argumentative.

6 Q (By Mr. Gaber) I'm not trying to argue with you. I
7 hope you don't think that that's the case.

8 A No, I -- If I'm understanding the question
9 correctly, you're asking what other things did I do to
10 educate myself about the VRA; is that correct?

11 Q Yes, exactly.

12 A Yeah, I -- And again, I don't recall at which -- at
13 what point in the process I did this, but I did read
14 additional case law and analysis of the Gingles incentive
15 factors.

16 I can't recall specific cases or websites that I --
17 that I viewed, other than I looked at the history of
18 the -- I guess it's an Alabama case that's going through
19 the courts currently, and then just consulted a number of
20 different resources about what -- where has the -- where
21 the VRA has been used in the past with regards to
22 redistricting.

23 Q And one of those that you knew about was in Yakima
24 for the City Council there?

25 A That is correct.

1 Q So the Alabama case, that's the Merrill versus
2 Milligan case that the Supreme Court heard argument on
3 earlier this year. Is that what you're referring to?

4 A Yes, I believe so.

5 Q What from that case did you review or consult,
6 briefing or the District Court's decision, or what in
7 particular?

8 A Yeah, based on the timeline I don't believe oral
9 arguments of the Court would have occurred yet. The
10 District Court ruling would have. So I possibly read that
11 decision. Again, I'm -- Or maybe it was the -- It was
12 possibly -- and again, I'm --

13 Just to let you know, a notification of a phone call
14 came up here, --

15 Q Oh.

16 A -- so I wanted to close that down, so -- Sorry.

17 Yeah, so it would have been -- It would have been
18 something along those lines.

19 MR. MILLSTEIN: And Counsel, just to check
20 in regarding taking the break that was requested. I know
21 you said you had a few more questions. You've gone
22 through a few more, so I didn't know when you were going
23 to reach a breaking point.

24 MR. GABER: Yeah, I think in just a minute.
25 I just want to -- I will in a minute or two, but I just

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1 want to close the loop on the material that he looked at
2 for the VRA.

3 Q (By Mr. Gaber) So you mentioned I think it's
4 Gingles, but then other people say Gingles. I don't know.
5 But I think it's Mr. Gingles, but -- their actual name.

6 But you're familiar with those, the preconditions,
7 those three preconditions; is that right?

8 MS. FRANKLIN: Objection to the extent it
9 calls for a legal conclusion.

10 A I have been -- I have read and been briefed on those
11 conditions, yes.

12 Q (By Mr. Gaber) And the Senate factors that go into
13 the totality of the circumstances consideration, that's
14 something that you're familiar with?

15 MS. FRANKLIN: Same objection.

16 A I have been briefed and read materials with regard
17 to the Senate factors.

18 Q (By Mr. Gaber) And then you think you may have
19 looked at some other case law, but it sounds like you
20 answered my next question, which is that you couldn't give
21 me specific names?

22 A That's correct.

23 Q Okay. I think -- Oh, when you say you were briefed,
24 by whom were you briefed?

25 A During the previous briefing that we discussed with

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1 the Attorney General's Office, that attorney addressed
2 both of those components.

3 Q Okay. Any others that come to mind? I'm going to
4 ask you about the separate law firm that was engaged
5 later, but other than that any others that --

6 A In terms of a formal briefing, no.

7 Q Okay.

8 MR. GABER: Let's take a -- Is a 10-minute
9 break good?

10 THE WITNESS: That would be great.

11 MR. GABER: So I have -- I'm in the Eastern
12 time zone, so is it 10:38 there, or is it nine --

13 THE WITNESS: Correct.

14 MR. GABER: 10:38?

15 THE WITNESS: Um-hmm.

16 MR. GABER: So we'll come back around
17 10:48.

18 THE WITNESS: Sounds good.

19 MR. GABER: Great. Thanks.

20 THE VIDEOGRAPHER: We're now going off the
21 record. The time is 10:38 a.m.

22 (Break 10:38 a.m. to 10:51 a.m.)

23 THE VIDEOGRAPHER: We're now back on the
24 record. The time is 10:51 a.m.

25 Q (By Mr. Gaber) Mr. Fain -- Well, before I say that,

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1 do you prefer Senator Fain? Mr. Fain? Commissioner Fain?

2 What should I call you?

3 A I prefer Joe, but --

4 Q Joe.

5 A But I suppose if you need to be formal, you know,
6 Mr. Fain is fine.

7 Q Okay. You mentioned that you had -- Before we went
8 on the break you mentioned that you, I think, were getting
9 like a phone call or something on your screen, and I
10 just -- Since we're doing this remotely and I can't see
11 what's happening in the room, what screens do you have or
12 windows do you have open on your computer?

13 A I have no windows open. The -- The call pushed out
14 a notification, and so I've been trying to figure out how
15 to disable notifications, so --

16 Q Okay. And do you have any notes or written
17 documents there with you?

18 A I do not.

19 Q Did you -- Do you know a man by the name of Adam
20 Foltz?

21 A I'm sorry, you broke up there. One more time?

22 Q Do you know Adam Foltz?

23 A That name sounds familiar, but I don't -- I don't
24 know who -- Maybe if you gave me his position or title,
25 which --

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1 Q I don't know that he has a title, but he's involved
2 in drawing redistricting plans generally for Republican
3 officials. He worked in Wisconsin and Texas.

4 Does that ring any bells?

5 A Yes. Yes, I believe so.

6 Q Have you spoken with him before?

7 A I don't know if I spoke with him directly or if
8 someone else spoke with him, but I think I have.

9 Q And would that have been about redistricting in
10 Washington?

11 A Yes.

12 Q And what -- What do you recall from that
13 conversation?

14 A Again, I don't recall a specific conversation.
15 The -- There was some consideration of bringing in some
16 additional help towards the latter end of the
17 redistricting process, and I believe -- again, I'm not
18 certain -- but I believe that was the individual that was
19 being considered; but I don't think we moved forward with
20 it.

21 Q And who is "we" in that context?

22 A It would have been -- The individuals that were part
23 of that conversation would have been John Braun and
24 possibly Jim Troyer, who is the Republican Chief of Staff.

25 Q And when was this, the potential of bringing

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1 Mr. Foltz on? And, you know, if you don't know the exact
2 date, but roughly when in the process?

3 A It would have been later in the process, I believe,
4 but I can't recall exactly when.

5 Q And what was -- Who suggested him as a potential to
6 assist?

7 A I don't remember.

8 Q Do you think it would have come up did you say with
9 Mr. Braun -- or Senator Braun -- or Jim Troyer?

10 A Possibly.

11 Q And what sparked the sort of discussion of
12 potentially bringing in an external map drawer?

13 A I think the compressed timeline of the availability
14 of data and the deadline, being that it was insanely
15 short, just needing someone else that had the technical
16 expertise to quickly draw and quickly analyze.

17 Q Did you talk with Commissioner Graves about
18 potentially having Mr. Foltz join the effort?

19 A I don't recall.

20 Q Was Commissioner Graves present for that meeting
21 with John Braun or Jim Troyer?

22 A I don't recall any specific meeting where it was
23 the three of us there, but I don't believe that
24 Commissioner Graves was part of the -- part of the
25 conversation.

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1 Q And then did you have a meeting with Mr. Foltz ever
2 after that conversation with Senator Braun or Jim Troyer?

3 A I think I may have had a phone call with him, but
4 again, I don't -- I don't recall specifics.

5 Q And why was the -- Did you make the decision not to
6 bring him on for his map drawing services?

7 A I recall that I thought we were moving ahead with
8 having him assist; but then I don't recall really seeing
9 anything that came out of that, so it might have just
10 slipped away in the bustle of the timeline.

11 Q Were any draft maps ever sent to Mr. Foltz for his
12 review or feedback?

13 A It's possible.

14 MS. FRANKLIN: Lacks foundation.

15 A It's possible, but I don't recall specifically.

16 Q (By Mr. Gaber) And what makes you think it's
17 possible?

18 A I'm thinking back to what we were -- how we were
19 discussing our needs and what we would have an additional
20 individual do for us.

21 And so part of that might have been, you know,
22 here's -- Here's where we are right now, kind of like
23 sharing our current status in the process.

24 Q Did you ever send draft maps to Mr. Foltz?

25 A I don't recall doing so.

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1 Q And do you know whether Mr. Campos did?

2 A I don't have any knowledge of that.

3 Q Are there any other outside consultants similar to
4 Mr. Foltz who were considered or involved in the map
5 drawing process?

6 MS. FRANKLIN: Objection, lacks foundation.

7 MR. GABER: And just for myself can you
8 explain what you think is wrong with that question? I
9 asked are there any other.

10 MS. FRANKLIN: Oh, I just wasn't sure if he
11 would be aware of ones that were considered by other
12 people other than himself.

13 MR. GABER: Okay.

14 Q (By Mr. Gaber) You can answer the question.

15 A Yeah, I don't know of any other individuals that
16 were consulted.

17 Q And then before we broke -- broke -- before we
18 broke -- I don't know if that's right -- but before we
19 left on our break you had mentioned that you been given
20 the sort of formal or explained that you had formal VRA
21 briefings.

22 Were there any sort of un-informal briefings beyond
23 the Washington Attorney General's that you received?

24 A I don't believe so.

25 Q In terms of the negotiation process that you had

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1 with -- or your working process with the other three
2 commissioners, do you recall that there was sort of a dyad
3 approach that the commissioners took to their discussions
4 and negotiations?

5 A Yes.

6 Q And can you describe for me what that is or what
7 that means?

8 A The -- Commissioner Graves and Commissioner Sims
9 were primarily focused on the legislative maps and having
10 conversations about those, and Commissioner Walkinshaw and
11 myself were primarily focused on the federal congressional
12 map.

13 Q And what was the reason for that approach?

14 A Expeditious negotiations in a short timeline.

15 Q And how was your -- Did you sort of trust -- Did you
16 rely on Commissioner Graves to sort of present the
17 Republican view for the most part for the legislative
18 plan?

19 MR. MILLSTEIN: Objection, vague.

20 A For the most part, but not entirely.

21 Q (By Mr. Gaber) And you, in fact, did draw throughout
22 the process legislative plans as well; is that right?

23 A That's correct.

24 Q In terms of the actual negotiation process over the
25 period of months you also used the dyad approach there,

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1 too, where you would ensure that outside of the public
2 meetings that there were only two or fewer commissioners
3 on a conversation; is that correct?

4 A That's correct.

5 Q And why was that?

6 A To comply with the Open Public Meetings Act.

7 Q And what was your understanding of the requirement
8 there?

9 A That a decision-making quorum of the Commission
10 couldn't be meeting to discuss Commission business outside
11 of a public meeting.

12 Q And so as between holding a public meeting to have
13 the discussions and ensuring that there were fewer than
14 three commissioners involved in the conversation, why did
15 you choose the latter approach?

16 MR. MILLSTEIN: Objection, vague.

17 A Yeah, could you rephrase that?

18 Q (By Mr. Gaber) Well, I guess you said to comply with
19 the Open Public Meetings Act is why you would ensure that
20 only two commissioners were taking part in the
21 conversation. Why not just have a meeting with more than
22 two folks present?

23 MR. MILLSTEIN: Objection, misstates prior
24 testimony, and vague.

25 A There's always time that people are working on --

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1 Just in government in general there's always time outside
2 of a meeting where people are still working on issues and
3 still working to prepare for meetings, so it seems natural
4 that there would be times when those conversations would
5 take place between colleagues.

6 Q (By Mr. Gaber) How many public meetings were there?

7 A I don't recall.

8 Q Did you ever -- In the public meetings did you ever
9 discuss or sort of negotiate over your views on what the
10 districts should look like?

11 MR. MILLSTEIN: Objection, compound.

12 A Yeah, it's a bit of an open-ended question. There
13 were certainly times in the public meeting where we
14 discussed our -- our priorities and the things that we
15 were taking into account when drawing maps.

16 Q (By Mr. Gaber) Would you say that the public
17 meetings were more high level in terms of priorities and
18 discussions of commissioners' views and less district
19 specific?

20 MR. MILLSTEIN: Objection, vague.

21 A At times they were more high level. I think at
22 times there was more specifics, but generally it was a
23 high-level conversation.

24 Q (By Mr. Gaber) Did the bulk of the negotiations over
25 specific districts occur outside the context of a public

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1 meeting?

2 MR. MILLSTEIN: Objection, vague, lacks
3 foundation.

4 A There were a number of conversations that involved
5 specific districts that occurred during the dyad
6 conversations.

7 Q (By Mr. Gaber) And those would be outside the
8 confines of a public meeting; right?

9 A There were a number of conversations about the -- in
10 dyads that occurred outside of a public meeting.

11 Q And I guess my question was whether the bulk of the
12 actual negotiations about specific districts, whether that
13 occurred in those dyads and not in public meetings.

14 Is that a fair characterization?

15 MR. MILLSTEIN: Objection, vague.

16 MS. FRANKLIN: And objection, lacks
17 foundation.

18 A There were a number of specific conversations in the
19 dyads that dealt with the specifics of individual
20 districts.

21 Q (By Mr. Gaber) During any of the public meetings did
22 you engage in any map drawing for the public to see?

23 A I don't recall if there was a time when we presented
24 our initial maps or if we just sent -- or discussed them
25 or if we just sent them out in a press release. So I

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1 don't -- I don't recall.

2 Q But no instance comes to mind?

3 A I recall seeing maps up on a screen during one of
4 the -- during public meetings, but I don't recall the
5 situation around them.

6 Q Why did you only release one public proposal for
7 legislative or congressional districts?

8 A That's -- That was the custom of previous
9 commissions, and given the shortened timeline also sort of
10 a practical point.

11 Q Sorry, say the last part again.

12 A Sort of an issue of practicality and sort of timing.

13 Q There were maps created along the way that you
14 exchanged with the other commissioners; right?

15 A Yes.

16 Q Why were none of those made public?

17 MR. MILLSTEIN: Objection, lacks
18 foundation.

19 A They were -- They were iterative, and it would be
20 unclear about what that would reflect. Also, unclear what
21 the impact on the process, given the short timeline would
22 be.

23 Q (By Mr. Gaber) We talked a little bit earlier, or
24 you mentioned that -- or the topic of the Barreto analysis
25 came up. Who is Dr. Barreto in your understanding?

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1 A I believe he's a professor at is it UCLA?

2 Q And how did you become aware that he had conducted
3 an analysis of the Yakima area districts?

4 A I don't recall when I first became aware of it.

5 Q Do you recall who provided you his analysis?

6 A I don't recall.

7 Q Did you read Dr. Barreto's analysis?

8 A I believe so.

9 Q And I am going to mark our first exhibit. And I'm
10 less adept at this, and my colleague, Ms. Leeper, is going
11 to do something that is going to cause it to come on the
12 screen, I believe.

13 MR. MILLSTEIN: And Mark, will you be
14 sharing the exhibits in the chat window, or maybe your
15 colleague could so that we can have a copy?

16 MR. GABER: I will not be. I don't even
17 know how to do that, but I assume Simone will do whatever
18 we have done in the prior --

19 MR. MILLSTEIN: That has been the custom in
20 these depositions, to share the exhibits in the chat
21 window.

22 So thank you, Simone, in advance if you could do
23 that.

24 (Fain Exhibit No. 1 introduced and displayed.)

25 MR. GABER: So it looks she has done that.

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1 So we'll mark this as Exhibit 1.

2 Q (By Mr. Gaber) And this is the analysis from
3 Dr. Barreto. Does this look familiar to you, Mr. Fain, as
4 the Barreto analysis that you reviewed?

5 A I thought I reviewed something more in a narrative
6 form, but this might be a component of it.

7 Q And maybe Ms. Leeper can kind of scroll through.
8 And I don't know if you want us to go through every
9 page of it, but generally does this look familiar to you
10 as the analysis Dr. Barreto?

11 A Again, I recall something -- and maybe it was a
12 cover letter of some sort that accompanied some of his
13 data and pulled it out; but it was a while ago, so I don't
14 recall specifically.

15 Q Okay. What is your understanding of Dr. Barreto's
16 conclusions?

17 A Was there anything from Dr. Barreto that preceded
18 the release of the original maps? And I hate to be the
19 person that asks the questions. I just --

20 Q That's not normally how we do deps.

21 A I know. That's what I am trying to refresh myself
22 on, if this was the only thing that was shared, so -- But
23 you will be --

24 Q I am sure I will be told if that's the case.

25 A Yeah. Go ahead and repeat your question, and I'll

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1 stick to answering those.

2 Q I think my question was what was your understanding
3 of Dr. Barreto's conclusions?

4 A That -- I believe that the Yakima area districts
5 needed specific consideration in order to comply with the
6 Voting Rights Act.

7 Q And so drilling just a little bit deeper than that,
8 did you understand whether Dr. Barreto had presented data
9 and a conclusion about the presence of racially polarized
10 voting in the Yakima area?

11 A I did not dive deeply into the specifics of his
12 analysis of racially polarized voting.

13 Q You are aware of the concept of racially polarized
14 voting?

15 A Yes.

16 Q And what do you understand it to refer to?

17 MS. FRANKLIN: Objection to the extent it
18 calls for a legal conclusion.

19 A That members of a specific and identifiable racial
20 group demonstrated similar voting patterns or behaviors.

21 Q (By Mr. Gaber) And what is your understanding of its
22 relevance to determining whether a particular district
23 should be drawn for purposes of compliance with the Voting
24 Rights Act?

25 MS. FRANKLIN: Objection.

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1 MR. MILLSTEIN: Calls for a legal
2 conclusion.

3 MS. FRANKLIN: Thank you.

4 MR. MILLSTEIN: Thank you.

5 MR. GABER: I say no thank you.

6 A That is one of the Gingles/Gingles factors.

7 Q (By Mr. Gaber) And so was it your understanding that
8 the sort of baseline conclusion from Dr. Barreto is that
9 there was an obligation to draw a district in the Yakima
10 area that would comply with the VRA for Latino voters in
11 that region?

12 MR. MILLSTEIN: Objection, calls for a
13 legal conclusion, and lacks foundation.

14 A It was my impression that Dr. Barreto believed that
15 a district in that region needed specific conditions to
16 meet the VRA.

17 Q (By Mr. Gaber) And what was your understanding of
18 what those conditions were?

19 A I don't have any specific understanding of what they
20 were. Mostly that the obligation, according to
21 Dr. Barreto, existed.

22 Q And did you understand or do you understand the
23 focus of the VRA to be on the ability of a minority group
24 to elect -- to have an equal opportunity to elect its
25 candidate of choice?

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1 MR. MILLSTEIN: Objection to the extent it
2 calls for a legal conclusion, and lacks foundation.

3 A Generally I understand that to be the -- one of the
4 purposes of the VRA.

5 Q (By Mr. Gaber) And having reviewed Dr. Barreto's
6 analysis, what was your understanding of his conclusion
7 with respect to who the candidates of choice for the
8 Latino voters in the Yakima area were?

9 A I don't believe I reviewed it closely enough to come
10 to that conclusion.

11 Q So outside of closely reviewing it, did you have an
12 impression or did you discuss with people what
13 Dr. Barreto's conclusions were with respect to who the
14 candidates of choice were of Latino voters in the Yakima
15 area?

16 MS. FRANKLIN: Objection, compound.

17 A The only impression that I was given by individuals
18 who were advocating for his position would be that that --
19 that a candidate would need to be a Democrat in order to
20 comply with the VRA.

21 Q (By Mr. Gaber) And who did you obtain that view
22 from?

23 A I had that conversation with Commissioner Sims.

24 Q Anyone else?

25 A Possibly with Commissioner Walkinshaw, and -- but I

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1 don't recall anyone else.

2 Q Other than Dr. Barreto's analysis of the voting
3 patterns and behavior of voters in the Yakima area, was
4 there any other analysis or data related to voting
5 patterns that you consulted on the question of who the
6 candidate of choice of Latino voters in the Yakima area
7 was?

8 MR. MILLSTEIN: Objection, misstates prior
9 testimony, and compound.

10 A That demographic and election results data was
11 contained within the Edge database that was used to create
12 and review draft maps. So inasmuch as you could see both
13 the populations of particular racial groups as well as the
14 overall voting trends of that area, that data was
15 available to me.

16 Q (By Mr. Gaber) And what was your assessment from
17 seeing -- Is it shown in shading on Edge in terms of like
18 blue and red, or how does it -- what does it look like?
19 I've never seen it.

20 A I don't recall the heat map, as you might say. I
21 think there was a readily available partisan heat map, but
22 then you would have a spreadsheet or a table of the
23 demographic analysis that accompanied any particular
24 configuration.

25 Q And then so -- And you looked at that information?

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1 A I did.

2 Q And what did you determine about the correlation
3 between where Latino voters in say Yakima were located and
4 what candidates were prevailing in those elections?

5 A I didn't draw any conclusions.

6 Q Why not?

7 A I didn't -- I didn't see -- The data that I was
8 reviewing at least on a high level didn't show me anything
9 to make me believe that that was a the case.

10 Q That what was the case?

11 A That there was a particular preference for a
12 particular type of candidate based on the data, at least
13 in a high-level review.

14 Q And so what particular geographic locations did you
15 look at to make that, I guess, non-determination?

16 A Again, speaking at a high level, I can't tell you
17 what areas in specific -- specifically, but that you could
18 have an area that had a similar proportion of Latino
19 voters or Hispanic voters that voted more Republican. And
20 then you could take a different chunk that had the same or
21 roughly the same percentage of Hispanic or Latino voters
22 that displayed a different voting preference.

23 And so that just on a high level showed me that that
24 was not correct.

25 Q And would that be a comparison between like an urban

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1 area versus another area that might be more rural; is
2 that --

3 A I don't recall any specifics.

4 Q So you just have -- Your recollection is of a
5 general sense that there were some areas where there were
6 Hispanic voters and Republican election victories, and
7 there were some areas where there were Hispanic voters and
8 Democratic victories?

9 A Um-hmm.

10 Q Did you dig any deeper than that high-level
11 analysis?

12 A When there was a proposed -- When analyzing the
13 proposed district that Professor Barreto had put forward
14 and in analyzing the proposed districts that the
15 Democratic commissioners put forward, that -- I would say
16 that would be the time that I would dig into more of the
17 specifics.

18 Q Did you do anything to look at differentials in
19 voter turnout in the -- among Latino voters in the
20 different precincts that you were comparing?

21 A I don't recall.

22 Q You didn't conduct any sort of more intensive
23 analysis like an ecological regression or ecological
24 inference analysis of the racial voting patterns?

25 A I don't believe so.

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1 Q Did you hire any, you know, experts or consultants
2 who would be equipped to do that type of analysis?

3 A I don't recall doing so.

4 Q Other than your own sort of high-level comparison of
5 different parts of the region and their voting patterns,
6 did you do anything else to assess whether you would
7 agree or disagree with Dr. Barreto's statistical analysis?

8 A Not that I recall.

9 Q I'm going to introduce the second exhibit,
10 Exhibit 2, which again will just appear on the screen
11 magically.

12 (Fain Exhibit No. 2 introduced and displayed.)

13 MR. GABER: And you may have to -- I don't
14 know if we can make it bigger, but -- Oh, we can. That's
15 wonderful.

16 Q So this is a text message that was produced to us in
17 discovery, and it's a conversation between you and
18 Commissioner Graves.

19 And I assume you probably don't have your text
20 messages memorized, but do you recall this as a
21 conversation that you had with Commissioner Graves?

22 A Not specifically, but I'll take your word for it.

23 Q So you see that on October 28th at 1:15 -- and so
24 these were --

25 MR. GABER: Maybe Simone, if you can go

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1 back to the -- zoom out so I can see the full thing again.

2 Sorry.

3 Q (By Mr. Gaber) So you see at the top it says to

4 Paul Graves? And just to help orient us for how iPhone

5 messaging works, this would be messages that you were

6 sending to Paul. And so you're in the blue, and he would

7 be in the gray. Is that --

8 Is that your understanding of how your iPhone works?

9 A Yep.

10 Q Okay. So we can go back to October 28th. So you

11 texted to Paul that you had just finished reading Tara's

12 memo, and he didn't -- There isn't a response here from

13 him. Who is Tara?

14 A I believe she was -- Was she the Assistant AG

15 assigned to the Commission?

16 Q And do you recall -- Without telling me the

17 specifics, do you recall what the general topic of this

18 memorandum was?

19 A I don't.

20 Q Was there a memorandum about the Voting Rights Act

21 in Yakima related to redistricting from the AG's Office

22 that you would be referring to here?

23 A There may have been, but I don't recall any

24 specifics.

25 Q Did you ever -- After Dr. Barreto's report became

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1 public did you receive a briefing from the Attorney
2 General's Office about either the analysis or Voting
3 Rights Act compliance in the Yakima area Legislative
4 District?

5 A I don't recall.

6 Q You have no recollection of whether you had a
7 briefing from the Attorney General's Office about the VRA
8 in Yakima?

9 A If that was referencing a memo that dealt with that
10 topic, I don't know if there was a subsequent briefing
11 that also involved that. I really need to be refreshed on
12 those details.

13 Q Well, unfortunately I can't do that because they
14 have been withheld as privileged, so -- I wish -- I wish
15 that I could do that for you or for myself.

16 Do you recall whether you would have shared that
17 memorandum with anyone?

18 A I don't recall doing so.

19 Q And did you have a -- I see that -- Well, I guess
20 would you have deleted any text messages from
21 Commissioner Graves?

22 A I don't believe so.

23 Q Did you talk with him over the phone about the
24 Attorney General's Office's analysis of either
25 Dr. Barreto's report or of the VRA in Yakima?

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1 A I don't recall specifics around this memo that
2 you're referring to from the Assistant Attorney General.
3 I did have conversations with Commissioner Graves
4 regarding the Barreto report.

5 Q And what did you discuss with him about the Barreto
6 report?

7 A What impact that would have on the negotiation and
8 if there was a need for additional analysis of the legal
9 conclusions that Professor Barreto found.

10 Q And what was the substance of your discussion about
11 the impact it would have on the negotiations?

12 A The underlying contention from the Democratic
13 negotiators was that the district that was drawn in that
14 area had to be Democratic in order to comply. That was a
15 position that I disagreed with, I believe that Paul
16 disagreed with, and that we were trying to maintain
17 competitive districts across the state.

18 So if this was a geographic region that was
19 particularly important to draw in a particular way for the
20 Democratic negotiators, that we would just need to balance
21 that in how we drew other districts.

22 Q And balance that in what way?

23 A In the competitiveness of relative districts.

24 Q Explain that a little bit more for me.

25 A If a district in this part of the state was made

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1 considerably more competitive, then across -- using a
2 partisan analysis, that to maintain the kind of
3 proportional share of partisan performance in other
4 districts in the state in the -- that we would -- that
5 there would need to be greater competition elsewhere.

6 Q So I guess one thing I don't understand is one of
7 the -- Earlier you said that your primary goal was to
8 maximize the number of competitive districts; is that
9 right?

10 A Yes.

11 Q So why wasn't it just considered a good thing to
12 make them a competitive district in this area? If one
13 could be drawn, why didn't you propose a more competitive
14 district instead of state Republican districts in this
15 area?

16 A I believe in one of the maps that I sent over to one
17 of the commissioners it actually included a map that was
18 drawn very closely to how Professor Barreto had drawn it,
19 or perhaps even exactly as he had drawn it.

20 And then in other parts of the state it increased
21 competition so that both -- a district was becoming more
22 democratically competitive, and then elsewhere a district
23 would become more Republican competitive in order to
24 maintain kind of that parity of competition throughout the
25 state. So I did as you suggested.

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1 Q So was the goal then not necessarily to have the
2 maximum number possible, but rather to have some like tit
3 for tat equal number that lean in one direction or the
4 other?

5 MR. MILLSTEIN: Objection, vague.

6 A The goal wold be to -- at least from my perspective
7 would be to have as many competitive districts as possible
8 and that as you deviate from the mean, or you deviate from
9 than 50/50 split, that the competitiveness of those
10 districts as you get further from 50/50 have some
11 relationship to the overall partisan balance of the state.

12 Q (By Mr. Gaber) And you said that you and
13 Commissioner Graves disagreed with Commissioner Sims's
14 expressed view that the district would have to perform for
15 Democratic candidates to comply with the VRA.

16 What was the basis for your view in that regard?

17 MS. FRANKLIN: Objection to the extent it
18 calls for a legal conclusion.

19 A I just didn't believe that the VRA as a general law
20 automatically meant that Democrats had to win elections.
21 It didn't catch me as being the purpose of the Voting
22 Rights Act.

23 Q (By Mr. Gaber) We discussed a little earlier and I
24 think you agreed that one of the aspects of it was
25 ensuring an equal opportunity for the minority group to

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1 elect its candidate of choice; is that -- is that correct?

2 MR. MILLSTEIN: Objection to the extent it
3 calls for a legal conclusion.

4 A Yeah, I believe we discussed that earlier.

5 Q (By Mr. Gaber) And so did you -- I think we've
6 already talked about this. You had Dr. Barreto's analysis
7 and conclusion with respect to who the candidates of
8 choice were. You had -- You had looked at the map and
9 just sort of at a high level compared some --

10 Is it some precincts you compared, or what was the
11 unit of geography you were comparing?

12 A A collection of precincts, so --

13 Q And --

14 A Go ahead.

15 Q And I guess did you -- Like in doing that did you --
16 How did you choose which ones to compare to make sure you
17 were getting, you know, kind of a representative sample?
18 Or did you do anything to --

19 A Yeah, I looked at the other statutory requirements
20 of the redistricting process, which includes compactness
21 and communities of interest.

22 I felt that Professor Barreto's map didn't comply
23 with those two components. It was rather, you know, oddly
24 shaped and split the Latino vote in a number of areas in
25 order to ensure it captured Democratic leaning Latinos but

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1 not Republican leaning Latinos.

2 So I looked at drawing a more cohesive or compact
3 district. That was one of the things that was a priority.

4 Q And I guess my question was specifically about
5 determining who the candidates of choice were for the
6 aggregate, you know, on average for the Latino community.

7 Did you do anything in comparing at a high level
8 Republican versus Democratic leaning Latino precincts to
9 determine whether you were capturing a statistically, you
10 know, accurate assessment of the population?

11 A Your question about statistically accurate is a
12 little bit -- You know, what does that actually mean?

13 All I can say is that I reviewed the partisan
14 performance and the percentage of Latino voting population
15 in multiple configurations and saw that the partisan
16 performance --

17 Sorry, my dog is having a field day outside there
18 downstairs.

19 Q Oh, I can't hear it.

20 A You can't hear it? Okay. That's good. I'll
21 continue.

22 So I just compared various configurations of the
23 district and saw that the partisan performance changed
24 more depending upon the geography than it did about --
25 than it did with the relative Hispanic population shifts.

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1 Q And when you say configurations, what -- what
2 different --

3 A Yeah.

4 Q -- configurations are you referring to?

5 A The geographic boundaries. So I would compare the
6 existing district to one that shifted westward, to include
7 the entire Yakama Tribal Reservation, one that would
8 include the City of Yakima or not include the City of
9 Yakima, things like that.

10 And I can't recite all the specifics, but those were
11 some of the considerations.

12 Q So aside from the sort of your looking at the map
13 and Dr. Barreto's analysis, there was no other data
14 analysis that you had done or that you reviewed to
15 determine the candidates of choice; is that correct?

16 A I don't recall any, and I don't recall any data
17 analysis accompanying the -- the other memo that you had
18 previously referenced. I don't recall a data analysis
19 with that; but again, it's been a long time since I looked
20 at that.

21 Q Okay. Did you read the -- So you were aware that in
22 the City of Yakima the plaintiffs had won a Section 2
23 lawsuit for a Latino opportunity district in the City
24 Council; is that right?

25 A That's correct.

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1 Q Had you read that opinion in that case?

2 A I may have read it, but back in -- when it was first
3 issued as part of our legislative conversations on the
4 state level VRA; but again, maybe only bits and pieces of
5 it.

6 Q Did you vote for or against enacting the Washington
7 VRA?

8 A What year was that that it eventually passed?

9 Q I do not know, but -- Again, I assume magically I'll
10 find out shortly.

11 2018 is the answer to your question.

12 A I would want to double check my -- my voting record
13 before I -- I have a -- I think I did, but I want to
14 double check.

15 Q You think that you voted no?

16 A I want to -- I'd like to double check to --

17 Q Okay.

18 A It seems like a pretty easy way to confirm one way
19 or the other.

20 Q We can maybe find that out as well, but sitting here
21 today do you have a view of -- If you were voting on it
22 today how would you vote?

23 MR. MILLSTEIN: Objection, calls for
24 speculation.

25 A Yeah, I wouldn't want to speculate.

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1 Q (By Mr. Gaber) Well, you are you, so I don't think
2 you need to speculate. And you're familiar with the
3 Washington VRA, so I don't think I'm asking you to
4 speculate.

5 So, you know, if you were to cast the ballot or cast
6 a vote on up or down on enacting it, how would you vote?

7 A Yeah, again, I --

8 MR. MILLSTEIN: Same objections.

9 A Yeah, I'd like -- I'd like to know what my voting
10 record was and also to rereview some of the components of
11 it because that's something that -- That was a long time
12 ago, and I'd like to know the specifics.

13 Q (By Mr. Gaber) Okay. I'm going to mark Exhibit 3,
14 which are minutes -- or a transcript, rather, from the
15 November 1st, 2021 public meeting of the Commission, and
16 that will pop up shortly.

17 (Fain Exhibit No. 3 introduced and displayed.)

18 Q And in particular I want to draw your attention to
19 some comments that you made that appear on page 11 of the
20 transcript.

21 And I can give you a second to take a look at those.
22 There's like three short paragraphs there. You can take a
23 look at that and let me now when you've had a chance to
24 see it.

25 A Okay.

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1 Q Now, it mentions that there's some disagreement
2 among the commissioners or differences of opinion on the
3 topic of the VRA.

4 Is that what we were discussing earlier, that about
5 who the candidate of choice of Latinos in the area was?

6 A Yes.

7 MR. MILLSTEIN: Objection, misstates the
8 exhibit.

9 A It would be regarding that compliance with the VRA
10 requires a Democratic district.

11 MR. GABER: I am going to mute myself
12 quickly, but I don't think we need to take a break. I'll
13 be real quick. I just need to figure out what document I
14 want to show you next. I'm going to do that right now.

15 I think I solved my -- I didn't solve it. I think
16 Simone solved my problem. We're going to put Exhibit 2
17 back up on the screen.

18 (Fain Exhibit No. 2 displayed.)

19 Q (By Mr. Gaber) And after -- after a funny GIF from
20 one of my favorite actresses, Jessica Walter, you have --
21 you texted Commissioner Graves on November 2nd at
22 8:50 p.m., "A very interesting evening . . . and our job
23 was just made impossible."

24 What is this text referring to?

25 A Given the date, I assume it was the election returns

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1 in the -- in the off-year election.

2 Q And what about that was interesting? Just tell me
3 more about this text message. Tell me everything you know
4 about this text message.

5 A I don't know specifically what it referred to; but
6 based upon the -- what appears to be a screenshot down
7 below, the more conservative tilt of the electorate in
8 some areas could have made the negotiations more
9 difficult.

10 But again, I don't remember specifically what I was
11 referring to.

12 Q "And our job was just made impossible." Do you know
13 what area of the -- I mean, so you have something about
14 Yakima. You have a screenshot about Yakima.

15 What else was on the ballot? It looks like there
16 was a proposition about local income taxes. Is there --
17 Are there candidates on the ballot there?

18 This is 2021. Is that --

19 A Yeah, I -- I don't recall. Obviously those are --
20 that that's, you know, a day apart there, those texts. So
21 I'm not positive that they're necessarily related to one
22 another.

23 So I don't -- I don't recall exactly what the --
24 what that was referencing, other than the election returns
25 in general.

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1 Q And do you recall the date of the Washington
2 Attorney General's briefing on the Voting Rights Act and
3 Dr. Barreto's analysis?

4 A I don't.

5 Q You see on November 3rd at 7:00 -- so this is the
6 next morning. Well, I guess --

7 A Um-hmm.

8 Q -- first Commissioner Graves responds in the middle
9 at 2:22 a.m. that he'll be very interested in April's
10 approach tomorrow.

11 What is your understanding of what he was
12 communicating by that?

13 A I assume --

14 MR. MILLSTEIN: Objection, calls for
15 speculation.

16 A Yes. Based on this my best recollection is that it
17 would have been based on what we saw in the election,
18 interested to see how April would approach the
19 conversation.

20 Q (By Mr. Gaber) And then there's like a part of a
21 screenshot. It's not -- It's only part of a sentence, I
22 guess a news report about the election results. But then
23 you say, "We will need to draw a Dem leaning Latino
24 district in Yakima that doesn't include any Yakima."

25 Can you tell me more about what you were

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1 communicating there?

2 A Yes. I was being facetious or a little bit
3 sarcastic that all of the conversation about the VRA,
4 particularly since the previous lawsuit had focused around
5 the City of Yakima and districting it and the lawsuit
6 there, and so with all of the conversation about needing
7 to take care of Yakima in the VRA, that the fact that the
8 proposals that we would see or that the voting history
9 here with a 78 percent of the vote voting to ban an income
10 tax, a relatively conservative position, that it was a bit
11 ironic that the way to comply with the VRA in Yakima was
12 to not include Yakima.

13 So it was not a direction that we would need to do
14 something. It was in order to, you know, appease the
15 folks that want to see a more Democratic leaning district
16 down there, it would need to be gerrymandered in such a
17 way where the Yakima District didn't include Yakima.

18 Q Okay. So the basis for that -- and I get that you
19 were being facetious there; but the basis for that is an
20 off year -- not only an off year, but an odd numbered
21 off-year election about tax, tax ordinances in the city's
22 charter; is that -- Am I correct about that?

23 A That's what was referenced there.

24 Q And did you consult with anyone to determine whether
25 or not that would be an appropriate type of election to

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1 determine whether or not or who the candidates of choice
2 of Latino voters was?

3 A No.

4 Q And in looking in the election -- You said that you
5 looked at election results as you were doing sort of both
6 a high-level analysis and as you were mapping the high-
7 level analysis in response to Dr. Barreto's report, what
8 was your impression of what the actual election results
9 were in Latino areas of the City of Yakima when there were
10 candidates on the ballot as opposed to tax initiatives?

11 A I don't recall anything outside of that the courts
12 had found and required a remedy under the VRA for the City
13 of Yakima, so I don't -- I don't know of any specifics
14 beyond that.

15 Q But you're aware of a -- Well, I guess tell me. Or
16 are you aware that there's heavy Democratic electoral
17 performance in the eastern part of the City of Yakima or
18 where the Latino population is concentrated?

19 MR. MILLSTEIN: Objection, lacks
20 foundation.

21 A I'm not conversant in the details down to that
22 level.

23 Q (By Mr. Gaber) So you have no -- I'm not even asking
24 at the detail level. Are you generally aware that the
25 Latino voters in Yakima, that the areas where there are

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1 heavy Latino concentrations in the City of Yakima vote
2 strongly Democratic?

3 MR. MILLSTEIN: Same objection.

4 A Again, I have not looked into the details about what
5 areas are -- what areas have the higher percentages of
6 Latino performance or the partisan performance of those
7 areas, outside of the map drawing that I previously
8 alluded to.

9 Q (By Mr. Gaber) Well, and so I'm asking about that.
10 When you did that analysis did you -- Was the City of
11 Yakima not among the areas that you looked at to compare
12 to see what the -- who the candidates of choice of Latino
13 voters might be?

14 A All I can recall is that I was able to draw maps
15 that included similar percentages of Latino population
16 that had different voting -- that had different voting
17 results.

18 Q And was the City of Yakima among those that you
19 looked at?

20 A Not as a -- Not as a unit itself, but as a component
21 of a larger district.

22 Q And you have no recollection of whether the Latino
23 voters in Yakima appeared to vote Democratic or vote
24 Republican?

25 A Again, outside of my cursory knowledge of the -- of

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1 the lawsuit and -- No.

2 Q So you came to the conclusion that you disagreed
3 with Dr. Barreto about who the candidates of choice were
4 without an awareness of how Latino voters in the City of
5 Yakima voted; is that correct?

6 A I did not do a detailed analysis about how the -- of
7 voting preferences of Latinos in Yakima, beyond what I
8 have previously referenced.

9 MR. GABER: I am going to take a break.
10 And what time is it where you all are? It's --

11 THE WITNESS: 11:54.

12 MR. MILLSTEIN: Yes.

13 MR. GABER: Okay. And so my question is do
14 we want to -- Do you want to break for lunch now? And if
15 so, I think last time we did half an hour. Is that
16 sufficient?

17 MR. MILLSTEIN: Just checking in, I know
18 I'm not trying to push you. I'm just wondering do you
19 know how far along you are roughly in your questioning?
20 Thirty percent? Sixty percent?

21 MR. GABER: I'm not as organized as my
22 colleagues, and so I am less able to tell you. I think --
23 You know, we have a number of more exhibits; like we're
24 going to go through some more exhibits, but I don't know
25 that that necessarily means that it's going to take longer

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1 than the first part did, so --

2 How much time have I used?

3 MR. MILLSTEIN: Just at probably three --
4 three hours, just under.

5 MR. GABER: Oh, under three, a little under
6 three hours? Okay.

7 MR. MILLSTEIN: A little under three
8 because of the break.

9 MR. GABER: Okay. So I'm going to guess
10 that I -- I'm going to try -- I'm going to try to be half
11 or a little over half way done, because I do want to try
12 to accommodate the -- I think that --

13 And I guess maybe this is a time, too, to ask you,
14 Aaron, if -- if we go a little -- If I'm not able to end
15 with I think there was a request for like an hour and a
16 half of time. I know a couple folks -- Someone was sick,
17 and someone else left early; but is there a hard stop? Or
18 if we go a little bit longer than seven to get everyone's
19 time in today, is that possible?

20 MR. MILLSTEIN: My hope is that we can do
21 this before seven. I would say even for Ms. Sims that we
22 were done by 6:30. You know, if you're going to use the
23 full seven hours of your time, which it sounds like you're
24 contemplating that at this point, then let's try to keep
25 the breaks as short as we can, just because Mr. Fain is

1 still -- You know, he's got his family there, and --

2 MR. GABER: Yeah. Yeah.

3 MR. MILLSTEIN: I just want to be
4 respectful of folks' time. So let's just try to keep the
5 breaks to a minimum then, if everyone is saying, "I need
6 my full" -- And you can take your full seven hours. I
7 understand that.

8 So let's just try to keep breaks to a minimum. So
9 30 minutes for lunch sounds like a good idea.

10 MR. GABER: Okay. And just to make sure I
11 understand, I am going to try to use less than seven hours
12 because one, I want to be respectful of his time and all
13 of our time; but if we end up -- If all three of us, all
14 three parties together --

15 Do you think we'll be able to all go today if it
16 goes a little bit beyond seven hours, or are we going to
17 be in a situation --

18 MR. MILLSTEIN: I think --

19 MR. GABER: -- where we --

20 MR. MILLSTEIN: I think we can if it --

21 MR. GABER: Okay.

22 MR. MILLSTEIN: -- goes a little bit beyond
23 seven hours, yeah.

24 MR. GABER: Okay. Good. All right. I
25 think that's easier for -- Certainly I can't imagine he

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1 wants to come back for another day, so --

2 THE WITNESS: (Shook head.)

3 MR. GABER: Okay.

4 MR. BOWEN: Our preference would also be
5 not to re-notice another deposition.

6 MR. MILLSTEIN: I mean, who doesn't want to
7 be deposed, so --

8 MR. GABER: Right.

9 Okay. Good. So let's do a half hour break then,
10 and so we'll come back at 3:30 my time, which is 12:30
11 your time.

12 MR. MILLSTEIN: Yes.

13 MR. GABER: Okay. Good. Thank you.

14 THE VIDEOGRAPHER: We are now going off the
15 record. The time is 11:58 a.m.

16 (Break 11:58 a.m. to 12:34 p.m.)

17 THE VIDEOGRAPHER: We're back on the
18 record. The time is 12:34 p.m.

19 MR. GABER: Thank you.

20 Q (By Mr. Gaber) And welcome back, Mr. Fain, from
21 lunch.

22 I want to talk now about -- and you have mentioned
23 this already, that there was -- After your public
24 legislative proposal there was a nonpublic but a map that
25 you had submitted to the Democratic commissioners as sort

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1 of an offer, and that map is labeled in the documents we
2 received as FainV2.

3 I assume that refers to the fact that it's the
4 second legislative map; does that sound right?

5 A I didn't provide the file names. I don't know.

6 Q Okay. Well, you had your public one, which I was
7 assuming was FainV1, and then there's this one that you
8 sent around November 8th.

9 Was there any other legislative maps that you
10 offered or suggested to the other commissioners that
11 you're aware of?

12 A As the time went later there was probably more
13 back-and-forth with maps; but every map that was sent to a
14 commissioner was sent over the email, so it would be in
15 the -- in the records.

16 Q Okay.

17 MR. GABER: Well, I'm going to mark an
18 exhibit. And I have forgotten, are we on Exhibit 4?

19 THE REPORTER: Yes, we're on four.

20 MR. GABER: Four. Okay. So we'll mark
21 Exhibit 4, and that will show up in a moment.

22 (Fain Exhibit No. 4 introduced and displayed.)

23 Q And this is a cover email that corresponds to one of
24 the spreadsheets that we mentioned earlier that was
25 created with the analytics for each map. And as you can

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1 see, it's November 8th this was sent from -- and I don't
2 know how to pronounce that.

3 Is it Min Fei; is that --

4 A Yeah, I just knew her as Min, so --

5 Q Okay. To Paul Campos, your staffer. And Paul had
6 earlier -- in copying you had earlier requested a ranking
7 chart for you see Fain_V2? So this is just a--

8 I'm doing this just to orient you as to the
9 spreadsheet that I'm going to show you next.

10 MR. GABER: So we'll mark Exhibit 5, which
11 is the spreadsheet.

12 (Fain Exhibit No. 5 introduced and displayed.)

13 Q Do you recognize this as -- this particular one is
14 the -- You see at the top it says Fain_V2, the file name
15 at the top. And this is the one that was attached to that
16 email.

17 Do you recognize the spreadsheet?

18 A Yes.

19 Q And this is the type of spreadsheet that you had
20 created for the iterations of the plans that you were
21 reviewing?

22 A Yes.

23 Q And can you just sort of generally describe your
24 understanding of the data that's presented in this and the
25 like spreadsheets?

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1 A Yeah. The aim of this construct was to take all of
2 the legislative districts in the state and rank them
3 from -- I believe most -- I think this was the rank of
4 most Democratic to least Democratic. I'm trying to recall
5 what it was. Essentially it's a mark of competitiveness.

6 The purpose for that is so that if there was a
7 district that was -- that you're not comparing the current
8 third district against the past third district, but rather
9 you're comparing the current rank of competitiveness with
10 the previously same rank of competitiveness, just to be
11 able to communicate how the overall partisan trend of the
12 state in any given map is shifting.

13 Q Okay. And I think Simone will add Exhibit 5 to the
14 chat so you have that as well.

15 But the ranking that we see on the left-hand side of
16 the screen, I gather since we see No. 1 there, the draft
17 Pellicciotti --

18 And Pellicciotti was the Democratic candidate for
19 treasurer; right?

20 A Um-hmm.

21 Q And that's the highest percentage there, 83.6. So
22 the first ranked one is District 37. That's the most
23 Democratic in this map; is that fair?

24 A That is correct.

25 Q And then you have tabs for population totals, racial

1 demographics, voting age, and then -- then there's
2 election results from 2020, 2018, and it looks like the
3 tabs continue; is that correct?

4 A That's correct.

5 Q And so in this map -- To back up a second, I guess,
6 there was a number of -- and we'll talk a bit more about
7 this later -- but there was a back-and-forth and kind of a
8 change throughout the process of whether the district that
9 ultimately became the Latino CVAP majority district in
10 Yakima, whether that was numbered 14 or 15; do you recall
11 that?

12 A I do.

13 Q And we'll look at -- I'm going to have -- The map
14 will be the next thing we look at from this, but I can
15 tell you that it is numbered 15. I want to make sure that
16 that's correct -- yes, is numbered 15.

17 So you see that's the 29th ranked district on the
18 list here; do you see that?

19 A Yes.

20 Q And so in your proposal FainV2 the Democratic
21 candidate Pellicciotti would have received 50.2 percent of
22 the vote; is that right?

23 A That's correct.

24 Q And then on the right-hand side where it says
25 current Pellicciotti percentage, I gather we would look to

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1 see what District 15 is; is that the idea? And what is --
2 Or are we looking to see what is the district that has
3 that same rank?

4 A The district number.

5 Q Okay.

6 MR. GABER: And let's take a look at the --
7 Simone, if you can go to the 2020 general election tab.

8 MR. MILLSTEIN: And again, would it be
9 possible to get this exhibit put into the chat window as
10 well, please?

11 MR. GABER: I think that probably is
12 possible if I -- if I stop asking her to do things.

13 MS. LEEPER: Yeah, I apologize. I'm going
14 to pull down the share for a second. It won't let me send
15 an Excel file while I have it open, so give me one moment.

16 MR. MILLSTEIN: Thank you. It's just
17 helpful to have the full document, the full exhibit.

18 MR. GABER: So we'll send that and reopen
19 it afterwards on the screen.

20 Q (By Mr. Gaber) But so I don't waste time, so the
21 idea there is that did you have all of the statewide
22 election results from 2020 in that tab?

23 A I have to go back and take a look and see if it was
24 all or if it was just those that had partisan. It looks
25 like it might just be the partisan races.

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1 Q Okay. And --

2 A That's, I guess -- Yeah.

3 Q So it's the partisan?

4 A If that's Espinoza down there. I'm trying to
5 remember which ones. I don't think the -- the --

6 Q The State Supreme Court, --

7 A -- State Supreme Court.

8 Q -- right, that's not partisan.

9 A Yeah. And as the Superintendent of Public
10 Instruction I believe is nonpartisan, so --

11 Q Okay.

12 A Yeah.

13 Q So it looks like it's -- it may be all of the
14 statewide--

15 A Um-hmm.

16 Q -- elections.

17 A Is Lands Commissioner up there?

18 Q And we see that there's the 2018 general election.
19 I don't -- I don't know what 2020 CD. That's the Senate
20 race in -- That would be the only statewide race in 2018,
21 right, the Senate election with Maria Cantwell?

22 A Um-hmm.

23 Q And so for each of these maps that you had your
24 staff create a spreadsheet like this that sort of in depth
25 presented all of the election results in recent years for

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1 those districts; is that right?

2 A That's correct.

3 Q And then if we take a look at -- So District 15 is
4 the Yakima area district in this map of the Yakima area
5 majority Hispanic CVAP district.

6 And we saw already that Pellicciotti would have won
7 in your version of District 15. It was 50.2 percent of
8 the vote. And we'll just take a look at some of the other
9 races in 2020.

10 And is it the case that the Democratic candidate
11 would have prevailed in other races as well in
12 District 15?

13 A I'd have to go through them one by one.

14 Are you able to highlight that entire line? There
15 you go. Thank you.

16 It appears that's not in the Wyman, Secretary of
17 State's race, but --

18 Q So it looks like other than -- And this is a
19 two-party breakdown that you have; right?

20 A Yeah. I'm not certain if it's the -- It's probably
21 just the raw totals of --

22 Q Okay.

23 A -- those two candidates. If there was a third
24 candidate or write-ins or something, I'm not certain, but
25 those may have been excluded in the calculation.

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1 Q That makes sense. So at least according to this it
2 looks like the Republican Secretary of State candidate in
3 2020 would have won the district, but the rest of the --
4 all the other statewide candidates, the Democratic
5 candidate would have carried your District 15; is that
6 right?

7 A Again, based on what I can quickly see on the
8 screen.

9 Q And then you see at the top there's columns that say
10 top 8R and top 4R. What does that -- What does that refer
11 to? What does that mean?

12 A If you click on the -- one of the percentages it
13 will show the cells that are taken in part of that.

14 My best guess is top four would be in the '20
15 on-year election would be governor, lieutenant governor,
16 secretary of state and treasurer. Oh, perhaps it's the
17 president and then the -- down from there.

18 But again, --

19 Q And is that like an indicator of -- What do you mean
20 by top four or top eight?

21 A The top four races on the ballot.

22 Q Okay. I see. So that's sort of a -- That's before
23 we get to the particular elections. Is it like a
24 composite score of the partisan performance for the
25 district?

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1 A Yeah, I believe so. And again, the formula is --
2 is --

3 Q I see.

4 A You'll be able to parse that out if you need to.

5 Q And how did you select which race or which elections
6 to identify as the top four and the top eight?

7 A There was -- It was an evolving consideration
8 throughout the process to determine which ones we felt
9 most accurately reflected the public in a particular
10 district.

11 So that's why, for instance, you'd have a top eight
12 and top four in all of the different races included in
13 there so that it was pretty transparent, and folks could
14 make sure that it wasn't just an outlier. We determined
15 competitiveness based upon the Wyman numbers as opposed to
16 the Pellicciotti numbers. You'd have a very different --
17 a very different analysis, so I figured I'd just include
18 all the numbers in my analysis.

19 Q Did you share these spreadsheets with other
20 commissioners?

21 A I did.

22 Q Which commissioners?

23 A At various times I probably shared them with all
24 four, but I'd want to go and check my email records there
25 to see.

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1 Q Would you say it's more so with Commissioner Graves
2 than the other two?

3 A Yes, probably.

4 Q So I want to -- And I think we're up to Exhibit 6
5 then. I would like to pull up the -- get to the map that
6 corresponds with these, and I think to get there we're
7 first going to show you an email that transmitted that
8 map.

9 (Fain Exhibit No. 6 introduced and displayed.)

10 Q So you see here on November 8th this is an email
11 from Matt Bridges to Ali O'Neil, among others.

12 Do you know Matt Bridges?

13 A I can't recall what his position is.

14 Q Do you recall that he was a staffer for the Senate
15 Democratic Caucus?

16 A That would make sense based upon the email.

17 Q And you and Mr. Campos were using the Edge software
18 for the maps; is that right?

19 A Yes.

20 Q And so to transmit them did you transmit them like
21 through the Edge program to the other commissioners?

22 A I don't know if it was done the same way every time
23 or if it was an Edge map file was attached to an email.
24 That could be a possibility.

25 Q Okay. Were you aware that the Democratic

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1 commissioners were using Dave's Redistricting App more so
2 than were using Edge?

3 MR. MILLSTEIN: Objection, lacks
4 foundation.

5 A I believe that they were using Dave's Redistricting
6 more than Edge.

7 Q (By Mr. Gaber) Okay. So what I'm going to do is
8 since they used Dave's Redistricting and I don't have an
9 Edge account, we're going to pull it up for you on Dave's,
10 copying that link. That's the best way I know how to show
11 you the map.

12 MR. MILLSTEIN: And Counsel, just to take a
13 moment. In prior depositions when it came to the Dave's
14 Redistricting maps parties had agreed in terms of just
15 standing objections to address potential authenticity
16 issues down the road.

17 I don't know if the parties want to come to an
18 agreement with respect to that now or if we want to
19 address this exhibit by exhibit. I'm just trying to think
20 of a way to try to streamline it and not gum up your
21 questioning, too.

22 MR. GABER: Well, I don't intend to -- at
23 most we're just going to do two maps. And I think we also
24 discussed generally that, you know, the Dave's data is --
25 I think there was some hope that we'll come to a

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1 stipulation about the reliability and authenticity of the
2 data and all that.

3 MR. MILLSTEIN: I'll just make a -- I'll
4 just make an objection to this map to the extent that it
5 lacks foundation that this is Fain's map; but I'll stand
6 that I'm not going to make that objection, and I'm not
7 calling it into question. I see the email, but I'll just
8 leave it at that.

9 MR. GABER: Okay. And I think what we'll
10 do is Simone, if you can add on the left panel in the
11 overlays tab, I think, the district number and the
12 district lines. And then maybe we can -- for the moment
13 we can take the city lines off.

14 Q (By Mr. Gaber) So Mr. Fain, do you recognize
15 District 15 in here as the version of District 15 that you
16 included in your proposed map on the 8th in the FainV2
17 map?

18 A I have no reason to doubt that that's what this is.

19 Q What -- What motivated you to configure District 15
20 in this plan?

21 A If I recall, I was trying to present a position that
22 matched an important priority of the other commissioners;
23 and if a particular partisan performance or a particular
24 geographic boundary for one of these districts was that
25 important to them in the negotiating process, I wanted to

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1 be very transparent about if this is something that
2 matters to them, then this is what a map that can meet
3 that goal would look like from my perspective.

4 MR. GABER: And before I forget, Jeanne,
5 would you be able to take a screenshot of this, and then
6 we can mark it as an exhibit so there's a record of what
7 we're doing here?

8 THE REPORTER: Yes. I just took a
9 screenshot.

10 MR. GABER: Thank you. And I think that
11 makes that seven; right?

12 THE REPORTER: That's correct, Exhibit 7.
13 (Fain Exhibit No. 7 introduced and displayed.)

14 Q (By Mr. Gaber) Do you -- When did you start working
15 on this iteration of District 15?

16 A I don't recall. I'd have to see the email
17 timestamps to get a better sense.

18 Q It was sent on November 8th, 2021. Do you know when
19 you -- how long you were working on this?

20 A I don't.

21 Q Am I right that it would have been after the Barreto
22 analysis was released?

23 A I believe so.

24 Q Did you have discussions with Commissioner Graves
25 about this proposal, specifically with respect to the

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1 configuration of District 15?

2 A I don't recall a specific conversation, but it's
3 likely.

4 Q Do you -- What did he say about -- What was his view
5 that he expressed about this configuration?

6 A Again, I don't recall a specific conversation.

7 Q What about with Commissioners Sims or Walkinshaw?

8 A I recall a conversation with Commissioner Sims. The
9 fundamental disagreement was over the issue we discussed
10 earlier.

11 The Democratic commissioners' position was that they
12 should be able to draw a Democratic leaning district in
13 this region, essentially what I guess you would term for
14 free. They could just draw this how they liked because of
15 their arguments with the VRA, and that shouldn't have any
16 impact on any other districts in the state -- and that was
17 a position that I disagreed with.

18 Q Did they tell you -- Did they tell you if they liked
19 or approved of this configuration of District 15? I mean,
20 as you entered the election results, in all but one of
21 them the Democratic candidate was on top in the 2020
22 elections, at least.

23 Did they communicate whether they approved of this?

24 A My recollection -- and I'm not positive of this --
25 I'd want to go through the record -- but that this map was

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1 at least identical or close to other maps that had been
2 generated by either Barreto or the Democratic
3 commissioners or, you know, some folks that were
4 advocating for a VRA -- the issue on the VRA in the area.

5 Q And I assume from the fact that you proposed this
6 map -- and obviously there's other areas of the state that
7 we can talk about as well -- but you were -- It's a map
8 that you would have been willing to sign on to?

9 A I believe so. I -- I shared it, so --

10 Q There's nothing about District 15 here that you find
11 objectionable?

12 A I -- I would say that just having something
13 objectionable about a given district doesn't necessarily
14 mean that I would or would not support an overall map.

15 So there may be things that I find objectionable to
16 the district or that I did at the time that I don't
17 recall, but it doesn't mean that I wouldn't have supported
18 the overall map.

19 Q Sitting here today this is a district that is
20 reasonably compact; right?

21 A I'm trying to see what the -- what boundary lines we
22 have on there.

23 Q We can zoom out a little bit, too, so you can --
24 Maybe that might help to --

25 A Just to make sure that I know what's what.

1 My -- My recollection of what the impacts of a
2 district drawn like this on other districts is certainly
3 not as clear as it was.

4 Sometimes my objection to a particular
5 configuration -- or rather my concern about a particular
6 configuration of a district wasn't necessarily because of
7 what that district itself looked like, but what it forced
8 other districts to do. I'm not saying that that's the
9 case in this district map. I'd have to go back through
10 and really refresh myself, but that's just something worth
11 noting.

12 Q But if you just look at District 15, that's a
13 district that is reasonably compact. Do you agree with
14 that?

15 MS. FRANKLIN: Objection to the extent it
16 calls for a legal conclusion.

17 A Again, I don't recall the population densities in
18 those areas or if it split cities or anything like that,
19 which I know you could just turn on.

20 So I'm not certain -- I'm not certain that the
21 several mechanisms that are used to judge compactness are
22 necessarily complied with by this map.

23 Q (By Mr. Gaber) Well, what sort of metrics did you --
24 Did you use metrics to judge? I know there's like -- and
25 we can look if we want. There's --

1 A Yeah.

2 Q There's actual metrics, but there's also just sort
3 of like the -- You can just eyeball it, too.

4 I mean, is that sort of your sense of how to look at
5 compactness?

6 MS. FRANKLIN: Same objection.

7 A My view of compactness was not limited to the
8 geographical shape of a district. Compactness also
9 includes where population densities are and whether those
10 entire areas are subsumed within a particular district.

11 So again, I don't -- I would need more analysis to
12 be able to tell you whether or not I viewed this as
13 acceptably compact.

14 Q (By Mr. Gaber) You proposed it.

15 A Is that a question?

16 Q Yes.

17 A Yes.

18 Q Well, it's more of a statement, but if you want to
19 answer it as a question.

20 A I -- I would -- I would say rather than
21 characterizing it as I proposed it, I would say that I
22 conceded to it because I believe -- Again, and I need to
23 look at this to confirm -- but I believe it had been
24 proposed in some shape or form by other folks; and I was
25 trying to -- If this is truly something that's important

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1 to them, I wanted to come to their position and then
2 develop a map around that -- that position that would then
3 comport to some of my priorities.

4 Q Did you or your staffer or both draw this map?

5 A Again, I would need to look at other maps that had
6 been circulating at the time to see how closely this
7 matched other maps that had been proposed by other
8 individuals.

9 Q What -- So ultimately, though the final map looks a
10 fair bit like this in terms of the configuration. It's
11 different in that it's a district that leans towards the
12 Republicans; is that right?

13 MR. MILLSTEIN: Objection, lacks
14 foundation.

15 A I'd need to see the data.

16 Q (By Mr. Gaber) You know, I don't know if you -- Do
17 you recall your deposition with the -- in the OPMA -- is
18 that the acronym -- lawsuit? You know, you testified
19 there that it was a district that leaned towards the
20 Republicans.

21 Does that seem like your impression of the enacted
22 version of District 15?

23 MR. MILLSTEIN: Objection, lacks
24 foundation.

25 A I'd want to confirm by looking, but my -- I would

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1 agree that my impression is that based on the data points
2 that we were using, that the final 15th did lean slightly
3 Republican.

4 Q (By Mr. Gaber) Do you know why Commissioner
5 Walkinshaw or Commissioner Sims didn't take you up on this
6 offer?

7 MR. MILLSTEIN: Objection, lacks
8 foundation.

9 THE WITNESS: I was just waiting for that
10 one.

11 A I don't believe they provided an explicit reason for
12 rejecting it, but I have my -- my assumptions.

13 Q (By Mr. Gaber) And what are those?

14 A That the map as a whole was not sufficiently -- did
15 not provide Democratic candidates sufficient enough
16 victories in other parts of the state.

17 In particular, all of the maps that had been
18 proposed by both of the Democratic commissioners had
19 cemented a safe majority for the Democrats in the State
20 Senate so that no district -- there were no -- There
21 weren't enough swing districts to be able to compete over
22 the majority, but that they would have an
23 institutionalized safe majority in the State Senate, and
24 maps that didn't -- that put the majority in question or
25 up for -- up for election had been previously rejected.

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1 Q In this map which districts would have been the ones
2 that, you know, as you just described it, would be
3 objectionable to the Democrats in your understanding?

4 MS. FRANKLIN: Objection, lacks foundation.

5 A I don't recall which ones in this specific map.

6 Q (By Mr. Gaber) So your understanding or your
7 assumption then was that the Democratic commissioners
8 wouldn't accept this offer with respect to District 15
9 because the map as a whole would not have cemented a safe
10 Democratic majority in the State Senate?

11 MR. MILLSTEIN: Objection, calls for
12 speculation.

13 A That is what I speculate.

14 Q (By Mr. Gaber) And that's what you believed at the
15 time?

16 A That is what I believed at the time.

17 Q And so on the flip side, is it correct that you were
18 not willing to vote for this version of District 15 if in
19 exchange control of the Senate was not a possibility for
20 Republicans?

21 MR. MILLSTEIN: Objection, vague.

22 A It's certainly my position on a number of things --
23 well, during the process -- but in general I would say if
24 the -- I believed at the time that if there wasn't a
25 conceivable possibility -- and again, not a probability.

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1 There were a number of maps that I proposed, perhaps
2 even including this one, that leaned very heavily in the
3 Democrats' favor for control; but if there wasn't even a
4 possibility of Republican control, however remote, then in
5 my opinion it did not meet the statutory requirements for
6 competitiveness.

7 Q (By Mr. Gaber) But specifically with respect to
8 District 15 you weren't going to vote for this
9 configuration of District 15 in this map FainV2 unless it
10 was paired with the possibility that there were enough
11 competitive seats that Republicans could in a good
12 Republican year win control of the Senate; is that a fair
13 assessment?

14 MR. MILLSTEIN: Objection, misstates prior
15 testimony.

16 A My goal was to promote competitiveness and to ensure
17 that control was not a foregone conclusion, such that the
18 voters really didn't have a choice at the end of the day.

19 And I was trying to be keenly aware of where my
20 colleagues in the Democratic -- Democratic Commission,
21 what was important to them. So I was trying to put
22 forward offers that achieved goals that they had
23 identified in exchange for promoting competitiveness.

24 Q (By Mr. Gaber) And ultimately this -- this was not
25 the district that was enacted; right?

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1 A I don't believe so. I'd have to see that map to
2 confirm.

3 Q But this -- I mean, you know, this version that you
4 drew leaned towards the Democrats; right?

5 A That's correct.

6 Q And the one that was enacted leaned towards the
7 Republicans, so it changed in some manner; is that right?

8 MR. MILLSTEIN: Objection, lacks
9 foundation.

10 A I would like to see the numbers, but that's my best
11 recollection at this time.

12 Q (By Mr. Gaber) And so is it the case then that
13 ultimately the Democratic commissioners found it more
14 important to shore up other seats than to draw a version
15 of 15 like what you drew here that -- Is that your
16 assumption based on what ultimately ended up happening?

17 MR. MILLSTEIN: Objection, lacks
18 foundation, calls for speculation.

19 A I don't know what various things the Democratic
20 commissioners were weighing. All I know is that they
21 rejected this offer.

22 Q (By Mr. Gaber) I don't recall. Did you say that you
23 talked to Commissioner Walkinshaw about this offer?

24 A I may have, but I don't recall. I know that I
25 discussed it with Commissioner Sims.

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1 Q So we're going to -- We'll take this down, and we'll
2 next mark Exhibit 8. And this will be a text exchange
3 between you and Commissioner Sims that we'll take a look
4 at.

5 (Fain Exhibit No. 8 introduced and displayed.)

6 Q And so this version was produced from
7 Commissioner Sims. So you see that you're at the top is
8 Joe Fain. So in this version the green is Commissioner
9 Sims, and the gray is you.

10 Does that make sense?

11 A It does.

12 Q And I'm looking in particular at this June 18th
13 message in the middle, and Commissioner Sims asks you for
14 thoughts on the 14th over the 15th because of the
15 presidential election. And you respond that, "I think if
16 a swing district is drawn there, it definitely makes sense
17 to have it on the ballot in a presidential year."

18 So was this around the -- When did you first start
19 talking with other commissioners about whether the
20 district in the area should be labeled the 14th or the
21 15th?

22 A I think it was an ongoing -- ongoing conversation in
23 the background throughout the -- throughout the time. I
24 don't know any specific date.

25 Q And to be on the presidential ballot it would need

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1 to be an even numbered district; is that correct?

2 A Is that how they're split? I guess so.

3 Q That's my understanding, the 14th would be in a --

4 A Well, not all the -- I don't recall which one would
5 be in which. Not all even numbered districts are on the
6 off cycle.

7 Q Yeah, you are correct, and I am wrong. So I have
8 now learned twice so --

9 So it's specific to each district whether or not --
10 It has nothing to do with whether it's even or odd
11 numbered. I'm from Wisconsin. In Wisconsin it's the
12 opposite. That would make more sense.

13 So 15 is in an off year, and 14 is in a presidential
14 year; is that right?

15 A If that's your -- That's a statement. I won't argue
16 with it.

17 Q Okay. Why did you think that it made sense for a
18 swing district to be in the presidential year?

19 MR. MILLSTEIN: Objection, lacks
20 foundation.

21 A Yeah, I actually don't recall this text exchange, so
22 I'm not sure. I don't know if I'm stating a preference or
23 if I'm just agreeing with something that she had said, so
24 I don't recall it.

25 Q (By Mr. Gaber) Well, what you said was it definitely

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1 makes sense to have it on the ballot in a presidential
2 year if it's a swing district. Is that a fair --

3 I've moved the clause around, but that is what your
4 text message says; is that right?

5 A Yes. I don't know the context of that comment,
6 though. So if it -- I would -- I don't know if it's a
7 concession to make it a swing district or to do it in a
8 presidential year or if it's one or the other.

9 And, you know, so I don't -- I don't recall the
10 context. There's a lot of different variables there, and
11 that probably matters as much to my position as anything.

12 Q The presidential year would have higher voter
13 turnout; is that correct?

14 A Typically.

15 Q And in Washington the gubernatorial elections are
16 also in the presidential cycle; right?

17 A That's correct.

18 Q And was part of the discussion with your colleagues
19 on the Commission that Latino voters in particular had
20 disproportionately lower turnout in non-presidential
21 cycles?

22 MR. MILLSTEIN: Objection, lacks
23 foundation.

24 A I don't recall if that was specifically discussed.

25 Q (By Mr. Gaber) You don't recall talking with

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1 Commissioner Walkinshaw raising the issue of Latino voter
2 turnout in non-presidential years?

3 A I don't recall the conversation. Voter turnout is a
4 conversation that, you know, is in the background of a lot
5 of these issues, but I don't recall a specific
6 conversation around Latino voter turnout.

7 Q What about generally?

8 A Generally if voter turnout is higher in presidential
9 years, yes, that was --

10 Q And then generally that Latino voter turnout was
11 disproportionately lower than white voter turnout in
12 non-presidential years?

13 MR. MILLSTEIN: Objection to the extent it
14 calls for a legal conclusion, and lacks foundation.

15 A I don't recall a conversation about that.

16 Q (By Mr. Gaber) Why did you number -- In your
17 proposal that we just looked at why did you number it as
18 15 rather than 14?

19 A I believe that the current 14th and 15th District,
20 the overlap of those two districts -- I believe -- I'd
21 need to check -- but my recollection is that there was
22 more overlap with the current 15th, but I'd want to double
23 check that.

24 Q And that -- Would have that kept the incumbents in
25 the existing districts that they represented?

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1 A My recollection is that it would.

2 Q We'll take this down and mark Exhibit 9. And while
3 Simone pulls that up I'll just ask you some questions.

4 MR. GABER: I think this is actually not
5 what I was going to ask about. The exhibit is the Davis
6 Wright Tremaine memo, so my apologies to Simone about
7 that.

8 Q But while she brings that up, are you familiar with
9 the law firm Davis Wright Tremaine?

10 A I am.

11 Q And what is your familiarity with them?

12 A I've had numerous encounters with attorneys from
13 their firm over the years.

14 Q Have they represented you before?

15 A Again, prior to the memo that you're putting up
16 there, I don't believe they've ever -- I don't believe
17 that they've ever represented me.

18 (Fain Exhibit No. 9 introduced and displayed.)

19 Q So at some point -- Was it in October, 2021 that
20 Davis Wright Tremaine was retained? Was it by you and
21 Commissioner Graves to represent you in your capacity as
22 commissioners?

23 A I can't speak to the representation so much as I
24 know that Commissioner Graves had reached out to Davis
25 Wright Tremaine for assistance.

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1 Q And did they -- Was it your understanding that they
2 represented you for providing advice about the application
3 of the Voting Rights Act to the Yakima area?

4 A I know that they were preparing this memo and that
5 they did prepare this memo for review.

6 Q And was it Commissioner Graves who retained them?

7 A Commissioner Graves had had the contact with them to
8 ask the question for them to prepare. I don't know beyond
9 that.

10 Q Why were they retained?

11 A The analysis that had been used by the Democrats
12 appeared to have a particular finding in mind, and we
13 wanted to have a broader analysis of the pertinent issues
14 that was a bit more balanced or took a -- took a broader
15 point of view.

16 Q And did you -- When you met -- Did you meet with
17 Rob Maguire and the other -- and/or the other attorneys
18 listed on the memo before they wrote this memo?

19 A I don't recall if we met before or after.

20 Q Were you involved in the discussions telling them
21 what -- you know, what your questions were and what the
22 analysis is that you wanted to have done?

23 A I don't recall if I spoke with them directly or if I
24 just had conversations with Commissioner Graves.

25 Q And were they told that "they" wanted a broader or

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1 different analysis than what Dr. Barreto had done?

2 MR. MILLSTEIN: Objection to the extent I
3 think you're starting to stray into attorney-client
4 privileged communications.

5 Q (By Mr. Gaber) Well, who released this memo?

6 A I believe -- I believe Commissioner Graves.

7 MR. GABER: So, you know, I think that any
8 privilege on this topic has been waived, that this can't
9 be used as a shield and a sword. I mean, we can certainly
10 take that up with the Court if we have to; but I can't
11 imagine that after releasing -- after a client releases
12 the attorneys' memo on the topic that there's going to be
13 a sustainable privilege objection over the conversations.

14 MR. MILLSTEIN: As long as the questions
15 are related to this memo I'm not going to object, as long
16 as it's focused on that. To the extent it goes beyond
17 that, what ought fairly be considered with respect to the
18 memo, as I take your point, that's where I would draw the
19 line.

20 But proceed, and I think it probably won't be an
21 issue.

22 MR. GABER: Okay. I don't remember what
23 question I asked. Jeanne, are you able to read that back?

24 THE REPORTER: Sure. Just a moment.

25 MR. GABER: Thank you.

1 THE REPORTER: The question was, "And were
2 they told that 'they' wanted a broader or different
3 analysis than what Dr. Barreto had done?"

4 A That's your question?

5 Q (By Mr. Gaber) Yes.

6 A I think the -- And again, I don't recall if it was a
7 conversation that I was part of that involved Davis Wright
8 Tremaine or if I was just speaking with Commissioner
9 Graves, but my general feeling at the time that was
10 communicated to Commissioner Graves is that I did not feel
11 that the Barreto analysis, despite not being deeply
12 familiar with it, but I had concern about the objectivity
13 of it and did not think it would be wise to solely rely on
14 that analysis in determining what the -- what is or is not
15 required relative to the VRA.

16 Q Did you tell the Davis Wright Tremaine lawyers that
17 you disagreed with Dr. Barreto's conclusions regarding in
18 particular who the candidates of choice were of Latino
19 voters?

20 A Again, I did not -- I don't recall if I had a direct
21 conversation with them in advance of them preparing the
22 memo, but I generally questioned the independence of the
23 analysis and didn't -- didn't go so far as to point by
24 point have, you know, picked it apart myself.

25 I was more worried with making sure that we had a

1 second opinion as to our obligations.

2 Q Now I want to go through a couple of -- Well, before
3 I do that, how many conversations did you have --

4 Did you have a meeting with these attorneys from
5 Davis Wright Tremaine after you received this memo?

6 A I may have. I don't specifically recall.

7 Q I mean, do you recall a phone call or a Zoom
8 meeting, or did you discuss the contents of this with the
9 attorneys?

10 A Again, I don't -- I don't actually recall if that
11 occurred. It may; it may not. This was obviously a very
12 fast-paced time in the Commission's life, lifespan.

13 Q Did you read their memo?

14 A I did.

15 Q So at the end of the first paragraph in the
16 introduction do you see the sentence -- this is the last
17 sentence there that, "As we discussed, our analysis is
18 predominantly legal, rather than factual, and we have not
19 endeavored to conduct factual research regarding
20 demographic trends, voting behavior, election results, or
21 the other factual assertions in the Assessment."

22 Do you see that?

23 A I do.

24 Q And does that comport with what you had requested of
25 them, not to conduct an analysis of voting patterns but

1 rather give you legal advice?

2 A That is correct.

3 Q Did you ask them how they could give you legal
4 advice on the Voting Rights Act without conducting
5 analysis of the facts and the voting patterns in the area?

6 A No, not to my knowledge. Not to my memory.

7 Q Would you find legal advice about the Voting Rights
8 Act reliable if it didn't include any analysis of the
9 underlying facts and data that is relevant to that
10 question?

11 MR. MILLSTEIN: Objection, vague.

12 A I received advice from the Attorney General's Office
13 earlier in the year that didn't involve specific data. I
14 felt that that was a helpful conversation.

15 I similarly felt that the way that -- a better
16 understanding of the way the courts had interpreted the
17 VRA and the questions that they asked was helpful.

18 Q (By Mr. Gaber) Who -- Were you charged for this
19 analysis by Davis Wright Tremaine?

20 A I personally was not charged for this analysis. I
21 don't know who was.

22 Q Do you know if Davis Wright Tremaine was paid?

23 A I don't specifically know.

24 Q No one asked you to contribute?

25 A No one asked me to pay any bill. I had assumed that

1 it was a request of the caucus.

2 Q By the caucus do you mean the Republican Caucus in
3 the Senate?

4 A Correct. That was my assumption at the time.

5 Q Do you know who the client was?

6 A I did not have a discussion about what the
7 attorney-client relationship was. The request was merely
8 we need an additional analysis, and they were willing to
9 prepare one.

10 Q Do you know what materials were provided to Davis
11 Wright Tremaine to help them make their analysis?

12 A I do not.

13 Q They mentioned Dr. Barreto's assessment, and they
14 call it the assessment throughout. Presumably they were
15 sent that.

16 Do you know if anything else was sent to them?

17 A Again, I don't recall. I believe at this point the
18 Barreto analysis was in the public domain, so I don't know
19 how they came upon it. And I'd have to rereview the
20 letter, which I have not done, to see if there's other
21 items that they referenced.

22 Q So let's turn to page 8 if we can, and then I want
23 to draw your attention to the last sentence of the first
24 paragraph. And again, this is talking about Dr. Barreto's
25 analysis, but it says, "Ultimately, there has been no

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1 assessment whether the Commission can draw a compact
2 Democrat-leaning district in Yakima County. It appears
3 that it is entirely possible and it must be explored prior
4 to any decision to draw a majority-minority district."

5 Do you see that?

6 A I do.

7 Q And so is it your understanding that Davis Wright
8 Tremaine's advice to you was that before resorting to
9 drawing a majority-minority district to comply with the
10 VRA, you must first see if you could draw a Democratic
11 leaning district without it being majority minority?

12 A I'm not sure I tracked the question there at the
13 end.

14 Q Well, what do you -- What do you understand that
15 last sentence where it says, "Ultimately" -- that begins
16 with ultimately and ends with the period. What do you
17 understand them to be -- I guess that's two sentences.
18 I'm sorry.

19 What do you understand them to be advising you?

20 A I would want to review the preceding sentences to
21 make sure I'm getting the context correctly, but my -- I
22 gather that if it's impossible to draw --

23 Yeah, I'd have to -- I'd have to read the entire
24 paragraph here.

25 (Pause in proceedings to review document.)

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1 A Yeah, again, my assumption is that one of the
2 components, not necessarily a Democratic-leaning district,
3 but that the population of Latino voters with a similar
4 voting pattern would need to be geographically distributed
5 in such a way where a compact district could be drawn in
6 order to trigger one of the components of the VRA.

7 Q And the assumption or the information that's relayed
8 here is that these Latino voters prefer Democratic
9 candidates; and the question is is the district majority
10 minority, or can it be drawn without that focus on race?

11 Is that -- Is that your understanding of what
12 they're communicating here?

13 A Yeah, again, I'd have to go back through and really
14 digest what they're -- what they put here, so --

15 It's been a long time since I've read this memo.

16 Q Well, let's take a look at page 9, and there's a
17 header here, header four, "The analysis shows that a
18 Democratic-leaning district can be drawn in the region
19 using traditional race neutral districting principles."

20 Do you see that?

21 A I do.

22 Q And so but the premise of their advice to you was
23 before drawing the majority-minority district to comply
24 with the VRA, see first whether, as they think is readily
25 possible, a Democratic-leaning district can be drawn

1 without that focus.

2 Is that a fair assessment of what they're advising
3 you here?

4 A That appears to be a component of their argument.

5 Q And did you then do that?

6 A I'd have to go back and look at various permutations
7 of different maps.

8 Q Did you disagree with their premise that they relied
9 upon, that the candidate of choice that needed to be
10 protected was the ability to vote for candidates that were
11 on the Democratic side?

12 A I still don't believe that the VRA requires a
13 specific political party to win an election by default;
14 that the analysis of block voting is an important
15 component of that overall requirement.

16 I also look at this argument on their part by
17 being -- by saying that it's not just the -- They appear
18 to be making a bit of an argument where it's not just the
19 Latino vote that needs to be aligned more heavily in one
20 direction, but that the majority or the White vote needs
21 to be aligned in the same direction opposite to that of
22 the Latino interests for it to be considered a racial
23 gerrymander.

24 Q And is it your understanding that that question is
25 about a particular district; right? Like you look

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1 district by district to see if the White voters in that
2 district are voting in opposition to say the Latino voters
3 in that district; is that what you understood?

4 MS. FRANKLIN: Objection to the extent it
5 calls for a legal conclusion.

6 A I think once the district boundaries are drawn and a
7 lawsuit is brought forth, that that is one of the
8 components that is analyzed.

9 Q (By Mr. Gaber) And so what they were saying was it
10 appears to us it's possible to draw a Democratic-leaning
11 district here, and you may not have to -- perhaps without
12 consideration of race.

13 Is that what you understand them to be saying?

14 A I -- That is what the paragraph states.

15 Q And the premise there is that the reason we're
16 talking about this, the reason that the VRA is relevant
17 here is because the candidates of choice in this area
18 necessarily are Democratic candidates. That's the premise
19 of their conclusion; right?

20 MR. MILLSTEIN: Objection, lacks
21 foundation.

22 A Yeah, I don't have any evidence in this particular
23 report that I recall that states that.

24 Q (By Mr. Gaber) Well, this sentence that we're
25 looking at talks about creating -- how you need to look

1 first to see if you can create a Democratic-leaning
2 district without looking at race; and then if that doesn't
3 work, then you can turn to race to do it.

4 That's what they advised you; right?

5 A They are stating that the initial analysis to be
6 done would be the voting patterns of the majority, to
7 determine that is in opposition to the minority, and to
8 determine if you can -- at least by their analysis here --
9 build a district that is -- favors the majority -- favors
10 the minority candidate's preference without taking race
11 into account.

12 Q And since the premise here is that the Latino
13 voters' candidate of choice is the Democratic candidate,
14 the question then is are the White voters voting for
15 Republican candidates in sufficient numbers to defeat the
16 Democratic candidate?

17 Is that your understanding of the question that is
18 to be answered?

19 MR. MILLSTEIN: Objection, lacks
20 foundation.

21 MS. FRANKLIN: Objection to the extent it
22 calls for a legal conclusion.

23 A I think that's a bit beyond what I interpreted from
24 this letter. I think what I previously stated was what I
25 had taken away from it, that you had to show oppositional

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1 voting by a majority in sufficient numbers as to defeat a
2 unified minority's voting preferences.

3 Q (By Mr. Gaber) And in the district that you drew,
4 the Fain Version 2, that district would have overcome that
5 oppositional voting as we looked at the election results.
6 In all but one of the statewide elections that was the
7 case; right?

8 A I'm not stating that I believe that there was
9 oppositional voting. I merely drew a district that met
10 the desires of my -- the folks I was negotiating with.
11 That was the -- That was the purpose of that.

12 Q Did you undertake any analysis to determine whether
13 there was voting by White voters en bloc sufficient to
14 delete Latino-preferred candidates?

15 MR. MILLSTEIN: Objection to the extent it
16 calls for a legal conclusion.

17 A No, I don't believe so.

18 Q (By Mr. Gaber) Why not?

19 A Well, at this juncture we had 11 days left in the
20 negotiation; and given that the individuals I was
21 negotiating with had a myriad of priorities that they
22 cared about, I used my time to try to figure out how to
23 get towards a successful vote.

24 I didn't view that analysis as being something that
25 would move us closer to -- I didn't feel that arguing over

1 the legality of this issue would be something that would
2 move us forward to a successful vote.

3 Q If we look at page 2 of the memo, kind of in the
4 middle of the paragraph that begins, "The Commission
5 lacks." Do you see it says in the middle of that
6 paragraph, "Again, no such analysis" --

7 "No such analysis has been conducted." Then it
8 says, "Finally, the third Gingles precondition is not met
9 because a race neutral Democrat-leaning district can be
10 readily created in Yakima County."

11 And it goes on to say that the Democratic
12 commissioners had proposed such a map and that the
13 Republican commissioners contend that their proposed maps
14 similarly create competitive districts in the region.

15 Do you know which proposed maps the Davis Wright
16 Tremaine lawyers are referring to, the Republican proposed
17 maps?

18 MS. FRANKLIN: Objection, lacks foundation.

19 A Not off the top of my head.

20 Q (By Mr. Gaber) Would you consider the Fain Version 2
21 map that you offered that we looked at a little bit ago an
22 example of a competitive map that was race neutral in its
23 drawing?

24 MS. FRANKLIN: Objection to the extent it
25 calls for a legal conclusion.

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1 A I would say that it is a competitive map. I would
2 need to look at all the race data again to understand the
3 impacts of that information.

4 Q (By Mr. Gaber) Well, I guess my -- The question
5 isn't about the impact but rather about the process of
6 drawing it.

7 MS. FRANKLIN: Same objection.

8 A Yeah, the process of drawing it was just merely to
9 come to as close to the goals of the Democratic
10 commissioners as possible. It was independent of -- That
11 was the primary objective was to have something that would
12 satisfy the requirements in this area.

13 Q (By Mr. Gaber) And not -- And that involved looking
14 at primarily the electoral results; right? That's wanting
15 it to be one that would perform for the Democratic
16 candidate?

17 A That was a large component of it.

18 Q And that's -- And the reason that Commissioner Sims
19 and Walkinshaw were telling you this was because they
20 believed that the Democratic candidate was the Latino
21 candidate's -- Latino voters' candidates of choice; is
22 that correct?

23 MR. MILLSTEIN: Objection, lacks
24 foundation.

25 MS. FRANKLIN: Objection, calls for

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1 speculation.

2 A My -- The only thing I am confident of is that they
3 wanted more Democratic districts in more places.

4 Q (By Mr. Gaber) But clearly the discussion in the
5 Yakima area was about the Voting Rights Act. Regardless
6 of whether you believed there was some other motivation
7 for why they were raising it, that would have been the --
8 That was the publicly stated reason in the Barreto report,
9 for example?

10 MR. MILLSTEIN: Objection, vague.

11 A I believe that the primary motivation based on the
12 conversations I had with the Democratic commissioners was
13 to create more Democratic districts.

14 Q (By Mr. Gaber) Why did Commissioner -- or do you
15 know why Commissioner Graves released this memo?

16 MS. FRANKLIN: Objection, lacks foundation.

17 A I don't recall at what point the memo was released
18 or in what -- what the situation was with -- whether it
19 was provided to the press or if it was released through
20 the Commission. I don't recall the specifics of that.

21 Q (By Mr. Gaber) What would be the purpose of
22 releasing -- You're a lawyer. Usually you don't tell your
23 clients to publicly release your legal advice.

24 What would be the purpose of publicly releasing
25 this?

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1 MR. MILLSTEIN: Objection, calls for
2 speculation and lacks foundation.

3 A The assumption that I could make is that to have a
4 broader set of arguments as part of the larger
5 conversation on the applicability of the VRA.

6 Q (By Mr. Gaber) You wanted something to point to to
7 say that it wasn't required to draw the district that they
8 were requesting?

9 MR. MILLSTEIN: Objection, calls for
10 speculation.

11 A You asked me to speculate as to why someone might
12 release it, not necessarily why it was released. I don't
13 believe I was the individual to release it, so I can't
14 speak to those motivations.

15 Q (By Mr. Gaber) Did you support its release?

16 A I don't recall if we had a conversation about it. I
17 really don't. We may have.

18 I don't have a problem with a broader acknowledgment
19 of the issues that are part of a big issue that's being
20 discussed by the Commission.

21 Q Did you understand Davis Wright Tremaine to be
22 saying that if you drew a Democratic-leaning district in
23 the Yakima area that was not drawn, you know, with an
24 overt or overly focused on race, that that map would not
25 violate the Voting Rights Act because it would provide

1 Latino voters with an equal opportunity to elect their
2 candidate of choice?

3 Is that your understanding of the thrust of their
4 conclusion?

5 MR. MILLSTEIN: Objection, vague.

6 A I don't know what I understood at the time to be
7 their primary thesis, other than I was more focused on
8 what were the things that needed to be contained within a
9 final proposal that would garner the support from the
10 Democratic commissioners so that we could approve the map.

11 Q (By Mr. Gaber) Sitting here today looking at what
12 Davis Wright Tremaine concluded, is that a fair assessment
13 of their conclusion?

14 A Having just read a paragraph and a half dealing with
15 that issue, I can see that that is a component of their
16 argument; but it's a much longer memo than that, so I
17 would have to read the whole thing to be completely
18 refreshed.

19 Q But ultimately the Commission, as you've testified
20 earlier, adopted a plan that in the area draws a district
21 that leans towards the Republicans; is that right?

22 MR. MILLSTEIN: Objection, misstates prior
23 testimony.

24 A Yeah, again, I'd have to look at the -- I'd have to
25 look at the data, and I would want to look at it in terms

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1 of a myriad of races, not just one, as well as voting
2 trend patterns, which I think are important.

3 Q (By Mr. Gaber) What do you mean by voting trend
4 patterns?

5 A Is the area changing? Is the same geographic area
6 changing its voter -- voting habits over time in a, you
7 know, consistent direction?

8 Q Okay. We're going to mark another exhibit. I'm
9 going to try to show you some of those voting patterns for
10 the enacted plan in a moment, but before we do that I'm
11 going to put back up the thing that I told Simone to take
12 down before this. I had actually intended to put it up,
13 but she's better than I am.

14 MR. GABER: This will now be Exhibit 10, I
15 think. And this is a text exchange between -- again,
16 produced from April Sims. Wait, this is not -- I don't
17 think this is what I wanted to ask you about. No, it's
18 the 10/21, Fain 10/21. And we may want to take that off
19 the screen.

20 So I'm going to do something dangerous, and I'm
21 going to try doing this since I have it readily available.
22 Give me one second.

23 MR. MILLSTEIN: Mark, for whatever it's
24 worth, I think if you just drag it into the chat it should
25 share with everyone.

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1 MR. GABER: Oh, really? Okay.

2 Interesting. All right. So this is the screenshot. Let
3 me try what you suggested.

4 Actually, I'm going to -- I'm going to have
5 Simone -- That's more than I can handle and think at the
6 same time, so I'll have Simone put it in the chat box.

7 (Fain Exhibit No. 10 introduced and displayed.)

8 Q (By Mr. Gaber) But can you -- Do you see this text
9 message that is -- has Joe Fain at the top? And this is
10 produced from Commissioner Graves's production.

11 So in this instance you are the gray, and
12 Commissioner Graves is the blue.

13 Does that make sense?

14 A Okay.

15 Q So in particular the October 21st, the second text
16 exchange there at 9:36 a.m. where Commissioner Graves says
17 that, "Sarah just called and yelled at me for being
18 pigheaded. She'll probably say the same to you."

19 And then you asked about what, and he says, "Mostly
20 excluding her from the process, but also not hiring
21 Rob Maguire sooner, or recognizing that Dems and Brady in
22 particular just want this to go to court."

23 First of all, the Sarah there is Sarah Augustine; is
24 that right?

25 A That is correct.

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1 Q Do you know what Commissioner Graves -- why she felt
2 that she was excluded from the process?

3 MR. MILLSTEIN: And objection, calls for
4 speculation.

5 Q (By Mr. Gaber) And my question is do you know.

6 A Inasmuch as she and I talked about her involvement
7 in the process, I know that at times she was frustrated
8 that she wasn't more in the loop about what kind of
9 conversations had happened in the dyads.

10 Q And did you think that that was a fair criticism?

11 A I understood why she felt the way she did.

12 Q Why -- I mean, do you know why she thought that
13 Rob Maguire in particular should have been hired sooner?

14 MS. FRANKLIN: Objection, lacks foundation.

15 A She had encouraged hiring a VRA -- VRA experts early
16 on in the process because she believed that this would be
17 a significant issue and wanted to front load some of the
18 work. And she had expressed that same frustration to me
19 that that hadn't all happened much earlier in the process.

20 Q (By Mr. Gaber) But so I mean, would you -- Would you
21 characterize Davis Wright Tremaine as being among the
22 neutral folks to give advice in this area?

23 A I wasn't suggesting that she was advocating for a
24 particular position, rather that she wanted all the cards
25 on the table earlier. At least that would be how I would

1 have interpreted the conversations that I've had with her
2 independent of this text message, which I obviously wasn't
3 part of that conversation.

4 Q So your understanding is that her position was if
5 you were going to hire, you know, a Republican-leaning
6 expert, you should have done it sooner?

7 MS. FRANKLIN: Objection, lacks foundation.

8 A I wouldn't characterize it like that. I think her
9 early advocacy was to expend Commission resources on
10 having an additional -- having these issues around the VRA
11 discussed earlier on.

12 Q (By Mr. Gaber) And what did -- What was your
13 understanding of her view that the Democratic
14 commissioners, and particularly Commissioner Walkinshaw,
15 just wanted it to go to court? What does that mean?

16 MS. FRANKLIN: Objection, lacks foundation.

17 A I think it speaks for itself that there was a
18 general belief that -- and when I say general belief, I
19 mean a near universally held belief that the Senate
20 Democratic position was to stall and put it into the hands
21 of the court; that they would be more successful in court
22 than they would through the Commission.

23 Q (By Mr. Gaber) And by court there you mean the State
24 Supreme Court?

25 A That's correct.

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1 Q Is that right?

2 A That's correct.

3 Q Did Commissioner -- or Chair Augustine express this
4 view to you as well, that this was sort of the tactic of
5 the Democratic commissioners?

6 A She expressed to me that she believed that that was
7 a very likely theory to explain some of the behavior by
8 the Senate Democratic commissioner.

9 MR. GABER: If this is a good time, let's
10 take a break. And does ten minutes sound good?

11 MR. MILLSTEIN: That works.

12 MR. GABER: Great.

13 THE VIDEOGRAPHER: We're now going off the
14 record. The time is 2:06 p.m.

15 (Break 2:06 p.m. to 2:21 p.m.)

16 THE VIDEOGRAPHER: We're now back on the
17 record. The time is 2:21 p.m.

18 Q (By Mr. Gaber) Okay. We're going to pull up another
19 exhibit. This will be the Excel spreadsheet that you had
20 created for the final map to discuss the -- You had wanted
21 to look at the election data for the district to see how
22 it went.

23 (Fain Exhibit No. 11 introduced and displayed.)

24 Q So this will be -- Well, first we have Exhibit 11,
25 which is the email to show you what was attached. And so

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1 you see Paul asked Min on the 16th for the rankings on the
2 final map.

3 And then we'll pull up the spreadsheet that was
4 sent, and that will be Exhibit 12.

5 (Fain Exhibit No. 12 introduced and displayed.)

6 Q So on the -- just on this first page you can see
7 District 15 is rank 31, and so the Pellicciotti percentage
8 is 46.7 percent; is that right?

9 A It appears to be.

10 Q And again, he's the Democratic candidate for
11 treasurer in 2020.

12 And then we can also look at the full range of 2020
13 general election results in District 15, and do you see
14 that the --

15 Well, first of all I think for the lieutenant
16 governor was there a -- Was there a Republican challenger
17 for lieutenant governor?

18 A No. There were two Democrats in the final.

19 Q Okay. So that one is not particularly useful, but
20 for the other races do you see that in perhaps all but the
21 49.9 percent for Trump the Republican candidates carried
22 the district?

23 A Yeah. I need to see further down the line there,
24 but that appears to be the case, and --

25 Now, the insurance commissioner there, I can't

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1 recall if that's a partisan race or not. The incumbent,
2 Kreidler, is a Democrat.

3 Q Which column is that?

4 A The blue.

5 Q The blue column, the Patel 20 percent? And that's
6 insurance commissioner?

7 A Um-hmm.

8 Q And you don't know whether or not there's a partisan
9 affiliation shown on the ballot for that office?

10 A I know that Kreidler is an identified Democrat. I
11 don't know -- I can't recall exactly if that race is
12 partisan.

13 Q And so does this -- The chart that you're looking at
14 now, does this comport with your testimony in your prior
15 deposition in your view that the District 15 that was
16 drawn leans Republican?

17 MR. MILLSTEIN: Objection, lacks
18 foundation.

19 A Yeah, I'd say a very slight lean Republican, and
20 considerably more competitive and more Democratic than it
21 was prior to redistricting.

22 Q (By Mr. Gaber) We'll pull this down, and then we'll
23 mark Exhibit 13, which is a memo that you sent to your
24 fellow commissioners on the 13th of November.

25 (Fain Exhibit No. 13 introduced and displayed.)

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1 Q Do you recognize this document?

2 A I do.

3 Q And what is it?

4 A It's a memo that I prepared going into the final few
5 days of negotiation that lays out how I view different
6 plans and how I use that chart that you've brought up
7 repeatedly to assess the competitiveness of different maps
8 as a whole.

9 Q And what was the purpose of sending this memo on the
10 13th?

11 A I felt that my colleagues still didn't fully grasp
12 the mechanism or the visualization that I was using to
13 determine what competitiveness meant.

14 There was a real consistent desire to just compare
15 current district performance to proposed district
16 performance; and that wasn't a way of being able to not
17 only determine the competitiveness of the state as a
18 whole, but also the relative shifting of different
19 districts as redistricting progressed.

20 So really an educational document to say this is how
21 I view the world and what I need to see to support a map.

22 Q And then I think if we scroll to the -- is it the
23 second page or the third page?

24 And so in this memo you had received a proposal from
25 Commissioner Walkinshaw on the 13th; is that right?

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1 A If that's what the report says. I don't recall what
2 day I received it.

3 Q It's in your -- in the graph chart that you have
4 there. The title is about the --

5 A Yeah.

6 Q It looks like Walkinshaw offer November 13th at
7 noon.

8 A Okay.

9 Q Do you recall you rejected that because you thought
10 it had too few swing seats; is that -- or too few
11 competitive districts?

12 A That was not a map that I voted in favor of.

13 Q Now, if you -- If we can scroll to the last page.
14 In your memo in the third to the last paragraph you
15 stated, "I have also remained very flexible to Democratic
16 priorities, including offering several maps that create a
17 majority-minority citizen voting age population district
18 in the Yakima area, as you have proposed."

19 And then you say you just want to ensure that
20 there's a balance in competition as a result of that; is
21 that right?

22 A That's correct.

23 Q Now, we've discussed one of the maps that you sent
24 that I think that's the -- or fits the description of
25 having -- at least having a Democratic-performing

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1 district for Latino voters in Yakima.

2 This indicates that there were others. Are there
3 some that I'm missing that you're aware of?

4 A Again, I'd have to go back and check files. So I
5 don't know specifically what other maps I might have put
6 forward.

7 Q And so you would have been willing to vote for such
8 a map if there had been more competitive districts
9 elsewhere in the state? That's basically your position on
10 the matter?

11 A Yeah, and I -- I don't know if I would have limited
12 it to more competitive districts elsewhere, but just I
13 characterize it as a more general equity and
14 competitiveness. I would have been happy to support that.

15 Q So we'll take this down, and we'll mark as
16 Exhibit 14 the text exchange from November 7th with
17 Commissioner Graves.

18 (Fain Exhibit No. 14 introduced and displayed.)

19 Q And so here this is produced from you, so you see
20 it's to Paul Graves. So in this instance you are in the
21 blue, and Commissioner Graves is in the gray.

22 Does that make sense?

23 A Yes.

24 Q And so on November 7th -- and this would be the day
25 before you sent your FainV2, the one we talked about

1 earlier with the district in Yakima that would have
2 performed for the Democratic candidates as the Latino
3 choice.

4 Commissioner Graves asks you, "If you have notes on
5 the price for their 14, can you please send them to me?
6 I'll try to put together a full map for tomorrow and want
7 to make sure we're on the same page."

8 What is he referring to to your knowledge of notes
9 you might have on their price for the 14th?

10 MS. FRANKLIN: Objection, lacks foundation.

11 MR. MILLSTEIN: Objection, misstates prior
12 testimony.

13 A I interpreted that as he was asking me what did you
14 communicate to the Democratic commissioners as being my
15 needs in other parts of the state or the map as a whole in
16 exchange for agreeing to their 14th District as proposed.

17 Q (By Mr. Gaber) And what were those needs? We've
18 talked generally about it, but what specifically?

19 A Yeah, I can't talk specifically about it because I
20 don't -- I don't recall what was communicated as part of
21 this back-and-forth with whomever I had that
22 back-and-forth with.

23 Probably the best memorialization of that would have
24 been in the map that you had up on the screen earlier.

25 Q Okay. So if we wanted to know what -- you know,

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1 what the tradeoff was in the other parts of the state, we
2 could just look at that map and compare it to what the
3 Democratic commissioners had offered up to that point?

4 A I don't know that comparing it to what had been
5 offered by the Democratic commissioners. I think it's
6 just that I drew a map that I believe I would have
7 supported and that had their -- I won't use a number, but
8 a Yakima Valley District that met the goals as they stated
9 them. So I think that's the best data point.

10 Q So he asked if you had notes. Did you have any?
11 Did you send him something in response to this?

12 A I don't think I sent anything over. I think the
13 communication between our various staff would have shared
14 whatever was in a map proposal that I had put together.

15 So I don't know. I would need to go back and see
16 what stage that map that you showed earlier, what the
17 timeline was relative to this message string.

18 Q So that would have been -- It was shared on the 8th.

19 A Okay.

20 Q So that would have been the next day you shared
21 that.

22 A So I guess -- I mean, those would be the notes, --

23 Q Okay.

24 A -- the map itself.

25 Q That makes sense.

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1 And then -- And it looks like Commissioner Graves
2 was putting together a map at the same time. I think he
3 had shortly thereafter released one.

4 You note, "I asked Paul and Anton to join forces so
5 we aren't at cross purposes." Up to this point had you
6 been -- had they been sort of mapping separately from one
7 another?

8 And Anton here is Anton Grose, who is Commissioner
9 Graves's staffer; is that right?

10 A That's correct.

11 Q So up to this point had they been sort of operating
12 independently?

13 A More or less I'd say that's true. There hadn't been
14 that much communication between the two of them.

15 Q And at this point you wanted to be on the same page,
16 at least with respect -- according to this text -- to
17 what's happening in the Yakima District; is that fair?

18 A I don't believe that that message relates to the
19 Yakima issue. I think it just is a general statement.

20 Q Okay. Generally speaking, how would you describe
21 your coordination with Commissioner Graves with respect to
22 the 14th -- Well, I don't know what to call it, but with
23 respect to the --

24 If we talk about the Yakima District we're talking
25 about the what I'll say is the Latino opportunity or

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1 the -- I don't even know what to call it.

2 The district that ultimately became District 15, you
3 understand what I'm talking about?

4 A I do. Thank you.

5 Q Okay. Well, I do want to make sure we don't have an
6 objection, that we all understand what I'm talking about.
7 So I'm going to refer to it as the 15th District, which is
8 what the district became enacted as.

9 Does that work for you?

10 A I understand what part of the state we're talking
11 about.

12 Q Okay. And then at other times in certain
13 communications it's referred to as the CVAP District.

14 Do you recall that?

15 A It sounds plausible.

16 Q And so my question was what -- Could you describe
17 your coordination with Commissioner Graves with respect to
18 your positions as to what that district should look like?

19 MR. MILLSTEIN: Objection, vague.

20 A I think the conversations had been mostly
21 conceptual, which is, you know, I'm a -- I'm a person that
22 cares about getting the negotiating -- negotiation done;
23 and if -- If someone I'm negotiating with cares deeply
24 about something, I usually want to find a way to allow
25 that person to achieve what their goals are, because I

1 find that it typically makes it easier to achieve my goals
2 as well.

3 And so I think the conceptual position on that
4 region was we need to maintain statewide competitiveness,
5 and that whatever happened in that area from a partisan
6 standpoint would need to be reflected in the drawing of
7 districts elsewhere from a partisan standpoint, from a
8 competition standpoint; but that, you know, whether or not
9 it was drawn a certain way I was -- I was happy to cede to
10 the Democratic commissioners the geographical boundaries
11 that they cared about, so long as it was in exchange for
12 statewide competitiveness.

13 Q (By Mr. Gaber) And it sounds like you tried to move
14 beyond sort of the conceptual coordination to actually
15 just having your staffers work together as it got closer
16 to the deadline; is that a fair assessment?

17 A I don't -- I don't believe that they were working
18 together in the creation of maps. I think it was more
19 along the lines of just if there -- if I was communicating
20 something to -- If I was making an offer, or if I had a
21 map or something like that, we didn't want to be tripping
22 over each other's toes.

23 Q Did Commissioner Graves talk to you about what he
24 viewed as the importance of drawing the Yakima District as
25 being over a majority Latino CVAP?

1 MR. MILLSTEIN: Objection, vague.

2 A Yeah, I don't -- I guess I don't know exactly how to
3 answer that question. I can speak to how I felt about --
4 about that, which is I wanted to satisfy as many of the
5 requests of the Democratic commissioners and in the
6 furtherance of getting to a negotiated deal.

7 Q (By Mr. Gaber) Well, you also heard public testimony
8 supporting the need for a Latino opportunity district in
9 the Yakima area; is that right?

10 A I heard a lot of testimony about that region. I
11 heard quite a bit from the Tribal Nations of the Yakama
12 Reservation about -- about issues that impact this as
13 well, so trying to find a way to balance those community
14 asks.

15 Q But did you talk with Commissioner Graves about his
16 view that you should draw the district over 50 percent
17 Latino CVAP in part to improve the litigation standing of
18 defending the map later on?

19 MR. MILLSTEIN: Objection, lacks
20 foundation.

21 A I don't recall anything being characterized from a
22 litigation standpoint. I don't recall anything like that.

23 From a negotiation standpoint there was desire to
24 meet as many of those needs as possible because we felt it
25 would be more beneficial in getting to a final deal.

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1 Q (By Mr. Gaber) Did Commissioner Graves express to
2 you his view that he wanted the district to be over
3 50 percent Latino but to perform for Republican
4 candidates?

5 MR. MILLSTEIN: Objection, lacks
6 foundation.

7 A Yeah, I don't recall specifically what we were going
8 for.

9 Again, I -- If you're familiar with an indifference
10 curve, there were any number -- any number of
11 configurations of this district that I would have been
12 equally supportive of, depending upon the statewide
13 performance of competitiveness. So that's --

14 Q (By Mr. Gaber) So you would characterize yourself as
15 generally indifferent to what the district looked like in
16 this area. You just cared how it affected the overall
17 number of potentially competitive seats that, you know --
18 I think earlier you said so that potentially the
19 Republicans could win control of the State Senate in a
20 given year?

21 A Yeah. I --

22 MS. FRANKLIN: Objection, compound.
23 Objection, vague.

24 A Yeah, and it's not they would win, but there would
25 be -- that it wasn't a foregone conclusion that that would

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1 be impossible, because I believed that that would have a
2 damaging impact on representative democracy in the state
3 if there was never -- If elections stopped mattering, I
4 figured that would kind of be a bad thing. So the --

5 In terms of indifferent, if I -- If there was a way
6 to build a map that satisfied the communities that had
7 come forward and asked for, you know, various things, that
8 still maintained the competitiveness and that it was
9 compact and kept communities of interest together, if
10 there's a way to have done all of that -- and I believe
11 that I probably had some proposals that did that,
12 certainly would be a map that I would preference over a
13 map that didn't do as many of those things, even if it
14 still maintained statewide competitiveness.

15 So I wouldn't necessarily say it's indifference to
16 the geography, but I would say that I favored statewide
17 competitiveness very highly.

18 Q (By Mr. Gaber) So we discussed earlier you had your
19 proposal, the Fain Version 2 map we looked at, that
20 obviously wasn't adopted.

21 A (Nodded.)

22 Q And instead District 15 ended up being leaning
23 Republican, as we discussed.

24 What did Commissioners Sims and Walkinshaw get in
25 other parts of the state in exchange for not getting the

1 district they wanted in District 15?

2 MS. FRANKLIN: Objection, --

3 MR. MILLSTEIN: Objection --

4 MS. FRANKLIN: -- vague.

5 MR. MILLSTEIN: Sorry, Erica.

6 A Well, they did get considerable movement in that
7 district. I think it was around 43 percent Democratic
8 performance, and it jumped to 47 percent or something
9 along those lines. So it was outside of that ten-point
10 range of what we considered a competitive district, and
11 now it was very much inside the range of being a
12 competitive district.

13 And there's some evidence to suggest that trend
14 lines in the area might make it even more competitive as
15 the years go on. So there wasn't really a -- That was
16 a -- That was a movement in their direction, the final --
17 the final map that was -- that was drawn.

18 Q (By Mr. Gaber) Compared to the -- You mean compared
19 to the prior enacted plan from 2011?

20 A On a reasonable basis of comparison, yes.

21 Q Well, I mean, one could look at the iteration of
22 maps throughout the process. So compared to the version
23 that you proposed on November 8th, it was a fair bit worse
24 in terms of the Democratic performance. Is that --

25 You would agree with that?

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1 A I would agree that the performance in that district
2 was not as strong for Democrats in the final version than
3 with my version; but if you're characterizing something as
4 a -- as a concession, you can't concede that which you do
5 not have; and what you currently had was the status quo
6 enacted map.

7 Q Okay. So just work with me for a moment, though,
8 and assume that you can. So you offered a map on
9 November 8th; and presumably if they had said, "Yep, we're
10 done. That's it," you would have voted for that; right?

11 MR. MILLSTEIN: Objection, calls for
12 speculation.

13 A I proposed the map. That's as far as I can go --

14 Q (By Mr. Gaber) Okay.

15 A -- on that.

16 Q Yeah, I assume you weren't in the business of
17 proposing maps that you would not vote for. That wouldn't
18 be a good tactical move; right?

19 A That is not my negotiating style typically.

20 Q And so what did -- They didn't get District 15 in
21 that map, so what did they get somewhere else in the
22 state?

23 MS. FRANKLIN: Objection, vague.

24 A I would need to sit down and compare the various
25 maps. And your contention that they didn't get

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1 District 15, I would -- at least the way that I view the
2 importance of competitiveness in redistricting, I would
3 say that they took it from being an uncompetitive district
4 to being a district that they could compete in. Using my
5 own personal values of how redistricting should be done, I
6 would consider that a win because it became competitive,
7 so --

8 Q (By Mr. Gaber) If I -- If we were to just compare
9 the enacted plan versus the November 8th proposal you had,
10 what you're saying is that we can look elsewhere in the
11 state and see how things shifted, and that will answer the
12 question of what the Democrats got instead of getting a
13 district that they said was necessary to comply with the
14 Voting Rights Act?

15 MR. MILLSTEIN: Objection, lacks
16 foundation.

17 A Yeah, I think that's a tough comparison because at
18 the end of the day it's -- The comparison is the
19 current -- the current map.

20 But if you want to look at how I viewed the map
21 drawing process, you look at the chart of ranked districts
22 by competitiveness, and you could just look at the
23 performance of those various proposals over the final
24 chart to at least see how I would have viewed the
25 evolution of the negotiation.

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1 Q (By Mr. Gaber) How would you describe your
2 relationship with Commissioner Walkinshaw?

3 MS. FRANKLIN: Objection, vague.

4 A Can you be more specific?

5 Q (By Mr. Gaber) Well, how was -- How did you find
6 working with him?

7 A How did I find working with him? I never had a
8 negative personal experience or anger situation or
9 anything like that in my years working with him, and I
10 worked with him prior to being commissioners in the State
11 Legislature and had a good working relationship with him
12 then.

13 Q We'll pull up Exhibit 15, which is a text exchange
14 with Commissioner -- or Chair Augustine from November 10th
15 through the 13th.

16 (Fain Exhibit No. 15 introduced and displayed.)

17 Q So in the middle of this text exchange -- and this
18 is you're in the green here, and Chair Augustine is in the
19 gray. You see that on November 10th you characterize an
20 offer that you got from Commissioner Walkinshaw as being
21 in bad faith in your conversation with Chair Augustine.

22 What did you mean by that?

23 A If I did share the numerical chart, you could bring
24 that up as exactly what I mean by that.

25 The relative performance of similarly ranked

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1 competitive districts dramatically shifted in the
2 Democratic direction, far more than the relative shift of
3 the state in the Democratic direction. So I viewed it as
4 a step backward in the negotiation and a partisan
5 gerrymander.

6 Q And this wasn't -- This was about the map as a
7 whole. This wasn't necessarily about the Yakima area
8 district?

9 A That's correct.

10 Q And then let's take a look at Exhibit 16, which will
11 be a text exchange with Commissioner Walkinshaw from
12 November 14th through the 15th.

13 (Fain Exhibit No. 16 introduced and displayed.)

14 Q So the deadline, the statutory deadline for the
15 Commission to adopt a plan or plans was November 15th at
16 midnight; is that -- is that correct?

17 A I believe that's correct.

18 Q So this is on the Sunday before on the 14th, and
19 you're in blue here. You're texting to Commissioner
20 Walkinshaw, and you say, "I heard that you're a 'no' on
21 the leg maps no matter what at this point?"

22 And then you go on to say, "If that's a negotiating
23 tactic by April, then it's kind of lame. If it's not,
24 then let me know so I can pack it up and spend my day
25 doing something more productive." [as read]

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1 Where had you heard that Commissioner Walkinshaw was
2 a no regardless of what the map looked like?

3 A I don't recall specifically if it was something that
4 had come up in conversation with or alluded to in a
5 conversation with either Commissioner Graves or
6 Commissioner Sims. That, and also his kind of overall
7 sense of urgency in getting to a deal on the legislative
8 maps, you know, certainly led to a belief that the rumors
9 that the Senate Democrats had wanted this to go to the
10 court all along, they had been true.

11 Q And so does that mean that your perception was that
12 Commissioner Walkinshaw had a lack of urgency at this
13 point in actually getting to an agreed map?

14 A I did not have a sense that he wanted to find a --
15 that he was committed to finding an agreement on a
16 legislative map at this point.

17 Q And what about Commissioner Sims?

18 A I believed that she wanted to find a deal on both
19 maps.

20 Q Now, Commissioner Walkinshaw says that, "That's a
21 mischaracterization. There was a clear agreement that
22 Paul backed out on."

23 What is your understanding of what he meant by that?

24 MS. FRANKLIN: Objection, lacks foundation.

25 Q (By Mr. Gaber) Do you have an understanding? What

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1 did you believe he meant by that?

2 A There was a conversation that -- that I'm aware that
3 took place between Commissioner Graves and Sims; and my
4 understanding is that they left that conversation with a
5 very different sense of what was still on the table, and
6 that led to some consternation between the various sides.

7 Q Now, at this point in the process -- So this is on
8 the 14th, the day before -- was the Yakima area district
9 really a major point in the discussion at this point, or
10 was it more focused on other parts of the state?

11 A I don't think that any particular geography was ever
12 really the key breaking point. It was the overall
13 competitiveness of different -- of the districts that
14 were, quote, unquote, "swing districts."

15 At this point we had communicated that we were
16 willing to accept any configuration really of the Yakima
17 area to fit their needs, whatever those needs would be, so
18 long as that change in competitiveness was reflected
19 elsewhere in the state's maps.

20 So as a point of contention, I mean, both sides had
21 kind of -- or our side at least had said, you know,
22 "You're in the driver's seat in terms of what we -- what
23 we do here."

24 Q Now, later on, possibly in this same text, if you
25 can -- Maybe not in this same text.

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1 At some other point do you -- and we can pull up a
2 text message -- do you recall telling Commissioner
3 Walkinshaw that further negotiation on the congressional
4 map would depend upon there actually being agreement about
5 the legislative map?

6 A I see the comment that I have in blue there, if
7 that's what you're referring to. If you're referring to
8 --

9 Q That's exactly that I'm referring to. Thank you.

10 A Yes, I do recall sending that.

11 Q And why was that your position?

12 A From a negotiating standpoint I -- A) I was
13 committed to finding a resolution at the Commission level
14 for the redistricting plan, and I feel like I was joined
15 in that position by the two other -- by two of the other
16 commissioners.

17 I believed that the -- if Commissioner Walkinshaw
18 thought that we would just come to a consensus on the
19 congressional district maps and pass those without having
20 a resolution on the legislative map, then he might be less
21 motivated to find a resolution on the legislative map.

22 I was hoping that members of the Democratic
23 congressional delegation would not want to have the
24 uncertainty of their districts going to the Supreme Court
25 and might motivate Commissioner Walkinshaw to be more

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1 flexible on the legislative maps, or less about
2 flexibility and more about -- be more committed to finding
3 a deal.

4 Q And so I mean, ultimately you -- the Commission
5 proceeded towards adopting two plans, so I take it that
6 then the negotiations continued on both of them.

7 A Um-hmm.

8 Q And as you said, that was not -- At that point it
9 was no longer about particular districts. It was just
10 about at the end of it that the partisan -- overall
11 partisan makeup?

12 A I would say that that was a significant factor.
13 Certainly not the only factor, but it would be a
14 significant factor.

15 Q Did you -- Did the -- Did the commissioners make
16 that clear in any public meeting, that it was coming down
17 to, you know, we don't really care what the map looks
18 like, but so long as it meets these sort of partisan
19 metrics at the end?

20 MS. FRANKLIN: Objection, vague.

21 MR. MILLSTEIN: And misstates prior
22 testimony.

23 THE WITNESS: Yeah, I was going to do that
24 second one.

25 A I don't think we would be saying that we're again

1 either indifferent or that we don't care what the map
2 looks like, but that the goal of a competitive map is
3 what's most valuable and that we should comport with the
4 other statutory requirements while prioritizing a
5 competitive map.

6 I don't think at any point during the Commission
7 process that I didn't bring that up as being my -- being
8 my goal. I think I gave many interviews and spoke with the
9 Commission and obviously wrote that letter, so transparent
10 about the need for a competitive map.

11 Q (By Mr. Gaber) And so my question was did --
12 however you want to characterize it, you talked about how
13 ultimately the negotiations were over statewide partisan
14 metrics; and so my question is was that made clear to the
15 public, even -- you know, whether the final meeting that
16 you have on the 15th, at that public meeting, or any of
17 the prior meetings that that was sort of the primary focus
18 of how things were being negotiated?

19 MR. MILLSTEIN: Objection, vague.

20 A Yeah, I think I answered the question. That was my
21 top priority all along was balance, competitive -- balance
22 and competitive districts.

23 So I can only speak for what I communicated to the
24 public, and that was done well in advance of the final
25 week of negotiations.

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1 Q (By Mr. Gaber) Did you perceive compliance with the
2 Voting Rights Act as a Democratic priority more than a
3 legal obligation of the Commission?

4 MS. FRANKLIN: Objection to the extent it
5 calls for a legal conclusion.

6 MR. MILLSTEIN: And calls for speculation.

7 A I wouldn't have characterized it as compliance with
8 the Voters' Rights Act because as was stated, that's a --
9 that's a legal test.

10 I would say that having a district that the
11 advocates for a Latino majority district -- excuse me --
12 would be satisfied with would be a priority of the
13 Democratic commissioners.

14 Q (By Mr. Gaber) And I think we talked about how the
15 Commission or the commissioners -- and you were among this
16 group -- declined to hire an expert by the Commission to
17 determine whether or not that legal obligation existed;
18 right?

19 MR. MILLSTEIN: Objection, misstates prior
20 testimony.

21 A Yeah, I think I had previously stated that I didn't
22 believe that we would be able to find an objective
23 position; therefore, I didn't want to cede the drawing of
24 the map to whatever consultant we brought in to -- and
25 whatever biases they might have had towards what was

1 required there.

2 So it wasn't for lack of importance with the VRA,
3 but just the belief that bringing in a long tirade of
4 dueling consultants wasn't actually going to get us
5 further to a conclusion.

6 Q (By Mr. Gaber) And when you hired lawyers to give
7 advice you didn't ask them to actually conduct an analysis
8 using the facts or the voting patterns or behavior; right?

9 A I don't believe so.

10 Q When did you think -- or who did you think would be
11 the determiner of compliance with the VRA? Like where in
12 the process did you envision that a determination should
13 be made and followed with respect to what the Voting
14 Rights Act required?

15 MR. MILLSTEIN: Objection, calls for a
16 legal conclusion, and speculation.

17 Q (By Mr. Gaber) Well, I guess that -- So did you
18 think about well, at some point we need to figure out what
19 the VRA requires here?

20 A Yes.

21 Q And when was that point?

22 A Starting at the very beginning that was a
23 consideration.

24 Q And so from then until the adoption of the plan you
25 didn't actually hire someone to analyze the data to make

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1 that determination; is that right?

2 A There was no sense of --

3 MR. MILLSTEIN: Objection, lack of
4 foundation.

5 A The -- You know, being in my position had been we're
6 going to be happy to draw almost any permutation of what
7 this district looks like. I didn't feel like that there
8 was an ideological fight over the issue. It was more
9 about maintaining competitiveness.

10 MR. GABER: We'll mark -- I've lost count
11 of the numbers. What are we on, 15?

12 THE REPORTER: Seventeen is next.

13 MR. GABER: Seventeen. We'll mark 17,
14 which is -- I'm fumbling. I don't know what it is.
15 Hopefully Simone knows better than I do of what my own
16 exhibits are. It sounds like she does.

17 MR. MILLSTEIN: And can you also share this
18 in the chat, please?

19 MR. GABER: Yes, I think she will.

20 (Fain Exhibit No. 17 introduced and displayed.)

21 Q (By Mr. Gaber) So this is an exchange. This is
22 actually not a text message that you were on. This is an
23 exchange between J.T. Wilcox.

24 Do you know who he is?

25 A I do.

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1 Q And who is he?

2 A The House Minority Leader.

3 Q And this is a text exchange between him and
4 Commissioner Graves, and do you see towards -- This is
5 Monday at 11:36 a.m. where Commissioner Graves says to
6 J.T., "I think we'll get there."

7 First he's asked, "How's it going?" And
8 Commissioner Graves says, "I think we'll get there. I
9 think Joe has a lot of good contacts who can make Brady's
10 life very hard who want a deal."

11 Who do you think he's talking about here?

12 MR. MILLSTEIN: Objection, calls for
13 speculation.

14 A As I had previously remarked about the congressional
15 map, I had believed that the congressional delegation was
16 very interested in having finality on the issue; and if
17 they believed that one of the commissioners was going to
18 stand in the way of that, that they would not be
19 supportive of that decision. At least that was my
20 assumption.

21 Q (By Mr. Gaber) And so this -- What you mean then is
22 that you could call up the -- one of the Democratic
23 members of congress in the state who would not be very
24 happy if Commissioner Walkinshaw were preventing a map
25 from being adopted by the Commission?

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1 A Yeah, I don't -- I wouldn't necessarily agree with
2 that, so much as if the word got out that the Commission
3 would not be taking a congressional map up for a vote
4 separately from a legislative map, then that -- that by
5 itself would create the pressure, not any particular
6 communications.

7 Q Okay. Because it says here, "Joe has a lot of good
8 contacts."

9 A Which is --

10 Q That sounds a little different than just the fact of
11 the congressional map not being taken up on its own,
12 causing some pressure on Brady, doesn't it?

13 A I don't know. You'd have to -- have to take that
14 one up with Paul. But the pressure would come from them
15 believing that they wouldn't have a map at the end of the
16 day. It would go to the court.

17 Q Were you satisfied with the congressional map that
18 was adopted?

19 A I voted in favor of it.

20 Q In retrospect are you satisfied with it?

21 A I still voted in favor of it.

22 Q We'll pull up Exhibit 18, which is a text exchange
23 with Commissioner Graves from November 8th through the
24 10th.

25 (Fain Exhibit No. 18 introduced and displayed.)

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1 Q Okay. And I want to ask you, so this is a text
2 exchange that you had with Commissioner Graves. And you
3 see at the top Monday, November 8th, and you say --

4 Do you recall this text exchange?

5 A Vaguely.

6 Q Okay. So you say, "Good Lord," and then Paul Graves
7 responds, "Let's schedule a welfare check for this guy
8 after the last meeting."

9 Who are you talking -- Who is he talking about in
10 your understanding?

11 MR. MILLSTEIN: Objection, vague, calls for
12 speculation.

13 A I don't know specifically who that is referencing.

14 Q (By Mr. Gaber) What were you doing on the 8th at --
15 you know, in the afternoon?

16 A Was there a commission meeting at that time?

17 Q I think that's likely the case.

18 A Okay. Then perhaps it references someone testifying
19 in committee.

20 Q Who would be -- Who do you see a little earlier --
21 later -- or sorry, the next text down?

22 A Can you make that a little bigger for me?

23 Q I'm sorry.

24 A I appreciate it.

25 MR. GABER: And then actually go up a bit,

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1 if you wouldn't mind. Thank you.

2 Q So Paul says, "Mighty nice bipartisan Commission you
3 have there. It would be a shame if something happened to
4 it."

5 Do you know -- Does that help refresh your
6 recollection of the conversation that was happening that
7 he's referring to?

8 A Yeah. I don't believe that that comment relates to
9 the previous one. I think that references another comment
10 by public testimony.

11 Q And so that's public testimony that he's
12 characterizing?

13 A Again, my best recollection is yes.

14 Q Okay. And when it says, "Should ask him if he plans
15 to run for the 9th," is that referring to a congressional
16 district?

17 A I -- I don't know. I don't know who was --

18 Q Okay.

19 A -- testifying at that time.

20 MR. GABER: Okay. We can take that down.

21 Thank you.

22 Q I want to talk a bit about the sort of last rush to
23 adopt a map or maps on the 14th and the 15th, and I want
24 to start sort of generally.

25 Can you just describe for me your impression of

1 those last two days and how the process unfolded?

2 A Can you be more specific about what you're asking?

3 Q No. No. I just want to get your overall

4 description first of, you know, what the process looked

5 like. Was it rushed? Was it chaotic? Were there time --

6 downtime periods? Who was --

7 Sort of just give me your overall assessment of the

8 last two days, and then we'll dive in a little bit more

9 specifically.

10 MR. MILLSTEIN: Objection, vague.

11 A I liked your testimony. It was rushed. It was

12 chaotic. There were lots of periods of downtime.

13 Q (By Mr. Gaber) Okay. What were you doing on the

14 15th?

15 A That was Monday?

16 Q Yes.

17 A We were -- had a lot of time where we were sitting

18 in the early evening waiting for some communication to

19 come back from the Democratic commissioners.

20 I had had some conversations in the morning with I

21 think Commissioner Walkinshaw, had some conversations with

22 Commissioners -- I don't recall if I had any conversation

23 with Commissioner Sims that morning. I had conversations

24 with Sarah.

25 Yeah, it was a weird and exhausting day.

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1 Q And where were -- Physically where were you?

2 A A hotel in Federal Way.

3 Q And were you -- Were you still in the sort of dyad
4 approach at this point? So were you physically with
5 Commissioner Walkinshaw at points during that period of
6 time?

7 A Yes. At some point during the day on Monday I had
8 had one-on-one conversations with Commissioner Walkinshaw.

9 Q And then you also had one-on-one conversations with
10 Commissioners Graves and Sims?

11 A I don't recall the timing of when I had
12 conversations with Commissioner Sims, but I did have
13 one-on-one conversations with Commissioner Graves.

14 Q Okay. And were you working on any map drawing on
15 that day?

16 A Again, I don't recall specifically during the
17 daytime hours what was -- whether there was map drawing.
18 There was that evening.

19 Q And who was doing that map drawing?

20 A Staff -- I mean staff was doing the map drawing, but
21 with the presence of the dyad on the particular maps. So
22 I think all four caucus lead staff were drawing at some
23 point.

24 Q Were you and your staff member, Mr. Campos, were you
25 focused on the congressional map that day, or were you

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1 also working on the legislative map?

2 A I think primarily focused on the congressional map,
3 but -- from a drawing aspect, but not -- There was
4 certainly not as much of controversy over negotiating it.
5 So it was in some cases sort of waiting for progress on
6 the legislative map.

7 Q Was that -- Was the congressional map sent to the
8 incumbent members of congress for their feedback and
9 approval?

10 A The original proposals were sent, the proposals that
11 each of the four commissioners had created.

12 Q What about the, you know, the map that ultimately
13 became the final?

14 A Not to my knowledge.

15 Q And were there discussions that you had with any of
16 the other commissioners or staff with commissioners about
17 what the 15th or 14th District should look like on
18 November 15th?

19 A I don't recall any specifics beyond what we've
20 already discussed.

21 Q What was your understanding -- So ultimately the
22 kind of chaos and pausing continued until midnight,
23 roughly; is that about right?

24 A I'm a little fuzzy on the specific times, but --

25 Q Do you recall shouting out at one point that there

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1 was about 30 seconds left and that a vote needed to take
2 place?

3 A I don't remember what I -- I don't remember what I
4 said, but I do recall hollering downstairs.

5 Q Okay. So there was a vote; right?

6 A (Nodded.)

7 THE REPORTER: Could you answer out loud,
8 please?

9 THE WITNESS: Oh, I'm sorry. Pardon me.

10 A Yes.

11 Q And what did you understand that you were voting on?

12 A A conceptual structure of both legislative and
13 congressional districts that was based upon the various
14 performance in those areas.

15 Q And so was it memorialized, like --

16 Who made the motion?

17 A I don't recall who made the motion.

18 Q Okay. Do you recall what the motion was -- like how
19 was it described?

20 A I don't recall. I mean, it's in the public record.
21 I'd have to go back and watch it to get that correct.

22 Q So it would be like a framework for what the
23 partisan composition and the number of competitive seats?

24 A I don't believe that it was -- I don't believe it
25 was characterized as a framework in the motion, but I

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1 don't remember the exact words.

2 Q Okay. So but there was actually like a motion made?

3 A I believe so.

4 Q Okay. And but there wasn't a map attached. The map
5 was to be drawn later after this agreement on the partisan
6 metrics; is that correct?

7 A Yes. There was no map attached to the vote.

8 Q And so how did -- Was another vote taken to approve
9 the actual map that was submitted to the State Supreme
10 Court, or --

11 A I don't -- I don't believe so.

12 Q So the only vote was that we want a map that has
13 the -- you know, that satisfies these criteria for
14 partisan performance?

15 MR. MILLSTEIN: Objection, lacks
16 foundation.

17 A The vote that took place was on a framework that I
18 believe each of the commissioners, or at least that I had
19 an understanding of what that framework would look like
20 from a partisan performance perspective.

21 Q (By Mr. Gaber) And that could have been satisfied in
22 any number of mapping ways; right?

23 MS. FRANKLIN: Objection, calls for
24 speculation.

25 A I don't actually understand the question.

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1 Q (By Mr. Gaber) Well, if it was just a -- If it was
2 sort of a framework for we want X number of districts that
3 are competitive and X number that lean one way or the
4 other, is that kind of what the framework was?

5 A Yeah, I would -- I would say that that was a
6 component of the framework. I think that there would have
7 been also kind of evolutions of previous maps and
8 conversations stacked on top of one another.

9 Q Did you see the final map before it was submitted to
10 the State Supreme Court on the 16th? Was it on the 16th
11 that it was submitted, or was it the 17th?

12 MR. MILLSTEIN: Objection, compound.

13 A I don't recall when it was submitted to the
14 Supreme Court. I thought it was the afternoon of the
15 16th, but I'd have to go back and look at the transmittal
16 letter.

17 And again, it was also sent to the secretary of the
18 Senate as well, I believe, or perhaps the Secretary of
19 State. I don't recall.

20 Q (By Mr. Gaber) Did you look at the -- Did you look
21 at the map before it was sent?

22 A I believe I looked at the map -- Whenever it was
23 sent to me I think I looked at it.

24 Q But there were -- You didn't -- As you said, you
25 didn't have an opportunity -- There was no more votes that

1 happened?

2 A No.

3 Q It had already been --

4 A I don't believe so.

5 Q Did the commissioners hold any sort of public debate
6 on the merits of the enacted plan?

7 A There was some commentary during the -- prior to the
8 voting about the plan, and there was conversations earlier
9 in the evening about where there were some sticking points
10 in the negotiation.

11 Q Well, there wouldn't have been any -- Right, there
12 couldn't have been any public debate about the merits of
13 the plan at that point in the vote because there wasn't a
14 plan until after the vote?

15 MR. MILLSTEIN: Objection, vague.

16 Q (By Mr. Gaber) Well, do you understand what I mean?

17 A The -- Yeah. There was conversation earlier in the
18 evening about what areas of controversy were being
19 discussed prior to the vote.

20 And then after the vote I don't recall any
21 additional conversation or debate about the maps. There
22 was the transmittal letter and things like that, but there
23 wasn't any additional comments, to my memory.

24 Q Because there wouldn't have been any sort of public
25 forum where after the map was drawn where the

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1 commissioners would have stated their positions about it
2 on the record?

3 A I don't recall if there was any conversation in a
4 future Commission meeting about it. I don't know.

5 Q Were you -- So as I understand it, primarily Osta
6 Davis and Anton Grose were finalizing the -- or drawing
7 the maps after the commissioners had voted around
8 midnight, so through the night on the 16th and the early
9 morning hours.

10 Is that your understanding as well?

11 MS. FRANKLIN: Objection, compound.

12 A I don't know all of the individuals that were -- all
13 of the staff members. You mentioned two staff members. I
14 don't know if other staff members were also involved.

15 Q (By Mr. Gaber) What were you doing during that time?

16 A I was with -- Earlier in the evening I was -- or
17 excuse me, earlier, after midnight I was with Paul Campos
18 and Commissioner Walkinshaw, you know, to review the maps
19 that had been drawn based upon our conversations earlier
20 in the night because they were memorializing, putting on a
21 paper what we had -- what we had discussed earlier in the
22 evening.

23 Q Is that the congressional map?

24 A The congressional map, yes.

25 And then I hung around there until around 6:00 a.m.,

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1 and that's when I left. I had to get to an event, I
2 think.

3 Q Were you present as the legislative map was being
4 drawn?

5 A I was in the large banquet room during some of the
6 time in which that map was being drawn.

7 Q Who else was present there with you?

8 A There were a number of folks that were in the large
9 conference or banquet room. Off and on the Democratic
10 Committee staffer or the caucus staffers, Commissioner
11 Augustine. I think some of her staff were there off and
12 on, her staff from the Commission.

13 And at one point or another each of the four
14 commissioners came in and out during that time.

15 Q And how many commissioners were present at any given
16 time? Were you ever present with another commissioner?

17 A Yes, I was present with Commissioner Walkinshaw
18 while we were reviewing what staff had come up with.

19 Q And that's with respect to the congressional maps?

20 A (Nodded.)

21 Q Was Commissioner Graves there at that time at any
22 point?

23 A Commissioner Graves and Commissioner Sims were in
24 and out, but they were over on the other side of the room
25 doing the legislative maps primarily.

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1 Q Have you ever spoken with Nicki Torres?

2 A I don't believe so.

3 Q Do you know whether or how she came to become a
4 candidate for Legislative District 15?

5 A I don't.

6 MR. MILLSTEIN: Objection, lacks
7 foundation.

8 Q (By Mr. Gaber) Was your answer no?

9 A I don't, no.

10 Q Did you ever speak with James Troyer about potential
11 candidates for District 15?

12 A No. There was an incumbent in the seat, and I did
13 not know he was stepping down.

14 Q When did you come to know that Senator Honeyford
15 would be stepping down?

16 A When he announced it.

17 Q And when was that?

18 A Was it either the Friday or the Monday of -- Friday
19 of filing or the Monday following filing. I don't recall
20 what the timeline was.

21 Q So before that point you had no inkling that he
22 would not be running for reelection?

23 A No.

24 Q Did you ever speak with Paul Graves about potential
25 candidates for either the State Senate for the State House

1 districts or seats in District 15?

2 A Insofar as understanding where the incumbent lived.

3 I don't think we had any conversation about speculating
4 who future candidates might be.

5 Q Did you -- Was it your understanding that it was
6 appropriate to make decisions based on where it might
7 benefit or harm incumbents?

8 MR. MILLSTEIN: Objection, vague and
9 compound.

10 A I was -- I was concerned with the location of
11 incumbents primarily as a way to make the negotiations
12 proceed more smoothly.

13 Q (By Mr. Gaber) And what do you mean by that?

14 A It was a common negotiating tactic in redistricting
15 to redistrict out the other party's incumbent members and
16 then trade to have them put back in. I felt that was a
17 needless performative step that we didn't have time for
18 given the short time horizon.

19 So I didn't make it an aim to exclude people from
20 the district that had elected them.

21 Q You should talk to your friends in Texas about that.

22 A I take a --

23 (Court reporter request for clarification.)

24 A I said I take a different tact, I guess.

25 Q Did you ever talk with John Braun about potential

1 candidates for any of the District 15 seats?

2 A I don't believe so.

3 MR. GABER: Okay. I'm going to take a
4 short break, maybe let's say five or seven minutes. So
5 we'll come back at 3:42 your time. Is that okay?

6 MR. MILLSTEIN: Yeah. Are you thinking
7 you're just about -- you're wrapping up?

8 MR. GABER: I'm getting close, yeah, to
9 being done. So unless I'm told that I've missed an entire
10 huge topic, I think maybe I'll just have a few more
11 questions.

12 THE WITNESS: And if I could clarify
13 something that I said earlier, because I want to make sure
14 I didn't misspeak -- about Nicki Torres.

15 I was first aware of her when she filed, which
16 occurred earlier in the week, if I recall, so -- But it
17 was the week of filing is when I was made aware of her
18 candidacy, so --

19 Q (By Mr. Gaber) Did you know her before that point?

20 A I don't think so. I don't think so.

21 Q Okay.

22 A I still don't think I've met her.

23 Q Okay. All right.

24 MR. GABER: Well, let's take our break and
25 come back at 3:42 roughly your time.

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1 THE WITNESS: Okay. That's good.

2 THE VIDEOGRAPHER: We're now going off the
3 record. The time is 3:36 p.m.

4 (Break 3:36 p.m. to 3:44 p.m.)

5 THE VIDEOGRAPHER: We are now back on the
6 record. The time is 3:44 p.m.

7 MR. GABER: Okay. Commissioner Fain, I
8 don't have any further questions for you. Thank you for
9 your time. But my understanding is that attorneys for the
10 State and for the Intervenor-Defendants will have some
11 questions.

12 THE WITNESS: Thank you.

13 MR. GABER: I'm not sure who goes first,
14 but I'm sure they'll work it out.

15 MS. FRANKLIN: Go ahead if you would like,
16 or we can do it.

17 MR. BOWEN: Erica, go ahead. I'll defer to
18 you. In the event that you guys wrap it up, I won't be
19 duplicative of any questions, so --

20 MS. FRANKLIN: Okay. Thank you.

21 E X A M I N A T I O N

22 BY MS. FRANKLIN:

23 Q Hi, Mr. Fain. My name is Erica Franklin. I am an
24 Assistant Attorney General representing the State of
25 Washington in this litigation.

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1 A (Nodded.) Nice to meet you.

2 Q Nice to meet you, too.

3 Are you aware that the plaintiffs in the Garcia
4 lawsuit allege that the Commission took race into account
5 when not required by the VRA?

6 A Sorry. Could you ask that question one more time?

7 Q Sure. It's a little convoluted.

8 Are you aware -- You mentioned earlier, we spoke a
9 little bit about the Garcia lawsuit. Are you aware that
10 the plaintiffs in that lawsuit are alleging that the
11 Commission illegally took race into account?

12 MR. BOWEN: Objection, form.

13 A Sorry. I was on the other -- I'm sorry, I was -- I
14 was on the other lawsuit.

15 So yes, I'm aware that that was a --

16 Q (By Ms. Franklin) And you said earlier that you
17 disagreed with the allegation --

18 (Simultaneous speaking, reporter request to repeat.)

19 A That that was an allegation.

20 Q And you said earlier that you disagreed with the
21 allegations in that lawsuit; is that correct?

22 MR. BOWEN: Objection, form.

23 A I'm not certain exactly what I said earlier. I
24 think I was asked something about whether I thought that
25 either lawsuit had merit, and I believe my answer was

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1 something along the lines of I didn't think either would
2 be successful.

3 Q (By Ms. Franklin) And let's talk about Garcia for a
4 moment. Why don't you think that lawsuit would be
5 successful?

6 MR. BOWEN: Objection, calls for
7 speculation.

8 MR. MILLSTEIN: Objection to the extent it
9 calls for a legal conclusion.

10 A I'm not as familiar with the -- the equal protection
11 grounds that I think is being alleged in that Garcia suit,
12 so I don't really have a good answer for that.

13 Q (By Ms. Franklin) Okay. We can -- Let me move on.
14 During your time on the Redistricting Commission did
15 you believe that the VRA required a majority Hispanic CVAP
16 in the Yakima Valley?

17 MR. MILLSTEIN: Objection, calls for a
18 legal conclusion.

19 A No, I don't believe so.

20 Q (By Ms. Franklin) Are you aware of others who did
21 believe that?

22 A Solely that, or that plus something else?

23 Q Let's start with solely that.

24 A Solely that, I don't know of anyone that thought
25 that that by itself would satisfy the VRA for those

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1 individuals that were concerned about the VRA.

2 Q Did Commissioner Walkinshaw express a belief to you
3 that it was necessary, if not sufficient, to have a
4 majority Latino CVAP district in the Yakima Valley?

5 A He made that contention as well, and that it also
6 must perform as a Democratic district. That was the
7 position that he extolled to me. So it wasn't enough to
8 be CVAP.

9 Q And what about Commissioner Sims, did she express
10 the view to you that the VRA required a majority Hispanic
11 CVAP district in the Yakima Valley?

12 A My impression of Commissioner Sims' position was
13 that it -- that the Democratic performance also mattered,
14 but I don't know if she believed it needed to be a
15 majority Democratic district at this time or if it just
16 needed to be competitive.

17 Q And did Commissioner Walkinshaw express a belief
18 that when certain conditions were met, the VRA required
19 Latino voters to be able to elect a candidate of their
20 choice?

21 MR. MILLSTEIN: Objection, compound.

22 A When certain conditions are met, the Voters' Rights
23 Act would have a requirement on voting in a particular
24 district, so I think that would -- that's my
25 understanding.

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1 Q (By Ms. Franklin) And did Commissioner Sims express
2 that same belief to you?

3 A Similar answer. I believe it's the -- you know, if
4 certain conditions are met, then the Voters' Rights Act
5 would apply.

6 Q And do you believe that Commissioner Walkinshaw held
7 those beliefs in good faith?

8 MR. MILLSTEIN: Objection, calls for
9 speculation.

10 A I'm not certain.

11 Q (By Ms. Franklin) You testified earlier that you
12 believe that the VRA requires minority voters to be able
13 to elect the candidates of their choice; correct?

14 A I don't recall exactly what I said, if you want to
15 look back at the record. So maybe if you want to rephrase
16 that I can --

17 Q So even if you didn't share this belief, did you
18 believe that there were reasonable grounds for a person to
19 believe that the VRA required a majority Hispanic CVAP
20 district in the Yakima Valley?

21 MR. MILLSTEIN: Objection, vague.

22 A If the question is do I believe that there -- that
23 someone could hold a reasonable position that the VRA
24 applied? Is that -- Is that the question, or the -- I'm
25 not sure what --

1 Q (By Ms. Franklin) Yeah, let's break it down a
2 little bit. Could a person hold a reasonable belief that
3 the VRA applied in the Yakima Valley?

4 MR. MILLSTEIN: I'll object, calls for
5 speculation.

6 A Yeah, so it's hard for me to define what a
7 reasonable belief would be. Does a reasonable belief
8 require that the individual is knowledgeable to a certain
9 degree about what the -- about what the VRA calls for, or
10 is it just --

11 So I guess I'm having a hard time answering --
12 answering that question.

13 Q (By Ms. Franklin) Let me try to rephrase. Would it
14 be reasonable to -- Even if you didn't believe this, would
15 it be reasonable to believe that you needed to have a
16 majority Hispanic CVAP district in the Yakima Valley in
17 order to comply with the VRA?

18 MR. MILLSTEIN: Same objection.

19 A I don't see much of a rephrase there, so --

20 I think it goes to what the individual that's
21 holding that position, what knowledge they're expected to
22 have in order to be the basis of that reasonable belief.
23 So it's just kind of a -- It really is hard for me to
24 speculate on a hypothetical.

25 Q (By Ms. Franklin) Given the knowledge that

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1 Commissioners Walkinshaw and Sims have, for example, just
2 to make it less of a hypothetical, was it reasonable for
3 them to believe that the VRA required a majority Hispanic
4 CVAP district in the Yakima Valley?

5 MR. MILLSTEIN: Objection, speculation,
6 lacks foundation.

7 A Yeah, I don't know. If we were to ask about the
8 individual --

9 I don't believe that Commissioner Sims was being
10 disingenuous with me about her belief in the application
11 of the VRA in the Yakima Valley. Whether that's a
12 reasonable assessment is a bit of a different standard. I
13 don't think she was being disingenuous.

14 MS. FRANKLIN: Okay. So I would like to
15 mark -- I believe we're on Exhibit 19. Just one moment.

16 THE REPORTER: That's correct. Nineteen is
17 the next one.

18 MS. FRANKLIN: Let me see. I'm not very
19 good at this either, but -- Okay. So -- And now I'm going
20 to attempt to share my screen. Sorry. Hang on one
21 moment.

22 (Fain Exhibit No. 19 introduced and displayed.)

23 Q (By Ms. Franklin) Okay. Does that -- Hang on.

24 Are you seeing the Washington State Redistricting
25 Commission?

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1 A Yes.

2 Q I'm sorry, I'm just having a little technical
3 difficulty. Okay.

4 A I think you have it right.

5 Q Sorry. I've got it right?

6 A Yep.

7 Q Okay. Thanks for bearing with me.

8 A No problem.

9 Q This one. Okay. So if we can just scroll down to
10 the sixth paragraph where --

11 So first of all, do you recognize this document?

12 A I do.

13 Q And what is it?

14 A A press release at the announcing of my draft plans.

15 Q Okay. So then if we go down to this paragraph that
16 I'm highlighting here, "Fain's plan also makes several
17 changes to keep other communities of interest intact. His
18 proposal includes seven majority-minority districts
19 statewide, and one additional majority-minority citizen of
20 voting age population (CVAP) district, increasing
21 Washington's number from four to five."

22 Was it important to you to create minority --
23 majority-minority districts throughout the state?

24 A I thought that one of the elements that would be
25 particularly important to the Democratic commissioners

1 would be this issue, and I wanted to signal that I did not
2 have opposition to increasing the number of districts that
3 were majority minority.

4 Q Okay. And now I'm going to switch gears to the next
5 exhibit, which we will mark as Exhibit 20, I believe. And
6 then let me just stick that in the chat.

7 Sorry, I'm not nearly as good at this as Simone is.
8 (Fain Exhibit No. 20 introduced and displayed.)

9 Q Okay. So are you seeing a Davis Wright Tremaine
10 memo on the screen; right?

11 A Yes, it is.

12 Q Oh, no. I'm sorry. This isn't quite the right
13 exhibit. Well, we can go a little out of order.

14 A Okay.

15 Q Hang on. Okay. So do you recognize this document?
16 I can make it a little bit smaller.

17 A Yeah, I'm not sure if I reviewed that document, but
18 I may have.

19 Q Okay. So how were -- Are you aware of how the Davis
20 Wright Tremaine attorneys were selected?

21 A I believe that Commissioner Graves selected them.

22 Q And do you know how he chose those particular
23 attorneys?

24 A I believe that one of the components was that they
25 had had some experience on election-related matters.

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1 Q Were there other reasons? You mentioned that as
2 just one of the components.

3 A Yeah, I don't know what -- I don't know the others.
4 That was the one that -- That was the one that was
5 mentioned to me.

6 Q Did you have any role in the process of selecting
7 these attorneys?

8 A Not that I recall. He may have asked me if I had
9 any preferences when he was interested in hiring someone,
10 but I don't recall having any.

11 Q How did he know that these particular attorneys had
12 experience in these matters?

13 MR. MILLSTEIN: Objection, calls for
14 speculation.

15 A I don't know.

16 Q (By Ms. Franklin) Do you know if these attorneys
17 were recommended by anyone?

18 MR. MILLSTEIN: Same objection.

19 A I don't know.

20 Q (By Ms. Franklin) And what did you know about these
21 attorneys before or at the point where they were engaged?

22 A I had known that Rob Maguire had been an attorney
23 that had been used on other matters on a more business
24 friendly or conservative side, but I can't recall any
25 specific clients that he had or issues that he worked on,

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1 at least at the time.

2 Q And what about Mr. Korrell, did you know anything
3 about him?

4 A I don't believe so.

5 Q Did Commissioner Graves mention to you whether they
6 had done any vetting of these attorneys before hiring
7 them?

8 A Sorry, you cut out a little bit there. Did --

9 Q Oh.

10 A -- Commissioner Graves, did you say?

11 Q Did he mention whether there had been any vetting of
12 these attorneys before hiring them?

13 MR. MILLSTEIN: Objection, vague.

14 A Yeah, I don't -- I don't know what you mean by
15 vetting. He felt comfortable with them, and I ceded to --
16 I didn't have any -- I trusted Paul to make a decision.

17 Q (By Ms. Franklin) Was it -- Were you aware that
18 Mr. Korrell and Mr. Maguire were both -- had both been
19 affiliated with the Republican party previously?

20 A I don't know about their affiliation with any party
21 organization. I did know that they were on a more, you
22 know, center right client base.

23 Q Was that significant to you?

24 MR. MILLSTEIN: Objection, vague.

25 A Yeah, I don't think it was terribly important.

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1 Mostly I was interested in seeing what issues were germane
2 to the VRA analysis that might have been glossed over by
3 the other analysis.

4 Q (By Ms. Franklin) Okay. You mentioned earlier
5 today that you didn't think it was possible to enlist a
6 VRA consultant, that because you thought it would just be
7 used for partisan advantage; is that correct?

8 A I was concerned that the selection of a consultant
9 would be impossible because the desire would be to select
10 somebody that would be more towards your own position, and
11 therefore we wouldn't be able to get to a selection.

12 Q Did you believe that these particular lawyers from
13 Davis Wright Tremaine would reach different conclusions
14 than Dr. Barreto had?

15 MR. MILLSTEIN: Objection, lacks
16 foundation.

17 A I didn't know what conclusions they would come to,
18 but I believed that they would raise a different
19 perspective than or -- and bring up other issues that
20 hadn't been addressed in the Barreto analysis.

21 Q (By Ms. Franklin) Did you have any reason to
22 believe they would be more -- they would provide a more
23 balanced perspective?

24 A I believed that they would provide a competing
25 perspective, and --

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1 Q Did you --

2 A -- that that -- that that may be a more balanced
3 perspective.

4 I'm not an expert on these issues, but I believed
5 that they would bring up a broader array of things to
6 consider.

7 Q Do you believe that they would provide neutral legal
8 advice, or did you believe that?

9 A I did believe that they would provide neutral legal
10 advice, well-founded legal advice. They're lawyers. I
11 would hope so.

12 Q And we spoke to this a little bit earlier, but when
13 I guess you through Commissioner Graves collectively
14 requested advice from Davis Wright Tremaine, did you
15 indicate what advice you wanted to receive?

16 A I don't recall having any conversations with them
17 directly about this matter during the selection process.
18 I don't recall, at least.

19 Q Do you think it was clear to the Davis Wright
20 Tremaine attorneys what advice you wanted, even if you
21 didn't have any specific conversations about it?

22 A I don't know how they could have a sense of what I
23 would have wanted if they hadn't had an opportunity to
24 hear from me.

25 I just wanted to have an analysis of the issues that

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1 hadn't been addressed by the Barreto analysis in a more --
2 -- in a, you know, a position or a memo to balance that,
3 that analysis.

4 Q Do you think it was clear to them that you were
5 looking for an analysis refuting the position that
6 Dr. Barreto covered?

7 MR. MILLSTEIN: Objection, lacks
8 foundation.

9 A I did not know what position they would take in
10 their analysis until I read their analysis.

11 Q (By Ms. Franklin) Okay. I'm going to move to the
12 next exhibit. Bear with me while I put this one in the
13 chat. Okay. That actually worked.

14 (Fain Exhibit No. 21 introduced and displayed.)

15 Q So this is not an email that you're on, so I don't
16 expect you to remember it; but I just thought it might
17 refresh your memory. I'll give you a moment to just look
18 at it.

19 A Okay. I've not seen that document before.

20 Q Okay. I know earlier you mentioned conversations
21 with Adam Kincaid. Does this refresh your recollection at
22 all as to the content of those conversations?

23 A No.

24 Q And obviously this email is talking about this
25 organization, the Fair Lines America Foundation

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1 potentially financing the Davis Wright Tremaine work.

2 Do you know if they ended up financing it?

3 MR. MILLSTEIN: Objection, lacks
4 foundation.

5 A No.

6 Q (By Ms. Franklin) Did you ever speak to I'll start
7 with Commissioner Graves about the potential for this
8 organization to finance that work?

9 MR. BOWEN: Objection, lacks foundation.

10 A I did discuss with Commissioner Graves where we
11 might have funding available to hire outside counsel to
12 review the Barreto analysis.

13 I don't recall any specifics outside of possibly the
14 respective political or party caucuses in the House and
15 Senate on the Republican side as being -- as being likely
16 sources.

17 Q (By Ms. Franklin) Did you ever talk with
18 Commissioner Graves just generally about the National
19 Republican Redistricting Trust?

20 A We had a conversation about it before in terms of
21 what are the national resources out there for
22 redistricting commissioners, but it was very general and
23 probably pretty early on. I don't recall anything
24 specific.

25 Q And did you talk to him about the Fair Lines America

1 Foundation?

2 A We may have. I don't recall specifically.

3 Q Okay. I'm going to move to my next exhibit, which
4 is I'm actually going back to Exhibit 9. It's already
5 been introduced, so I'm not going to put anything into the
6 chat. Okay. Let's -- Just a moment.

7 (Fain Exhibit No. 9 displayed.)

8 Q So we talked a lot about this, and I don't want to
9 belabor it; but just -- Can you just give me a general
10 sense of what the conclusions -- what you understood to be
11 the conclusions of this memo?

12 A That I guess my kind of net takeaway was that some
13 of the conclusions of the Barreto memo were -- were
14 possibly not correct, given the legal analysis; that more
15 data analysis would be part of determining the
16 applicability of the VRA possibly, and that absent --

17 Absent a showing that there was a clear VRA issue in
18 an area, that using race as a predominant factor could
19 create a problem with the equal protection clause, which
20 is not something that I -- that their issue is not one
21 that I probably had been aware of prior to this memo.

22 Q Did you agree with those conclusions?

23 MR. MILLSTEIN: I'm going to object to the
24 extent it calls for a legal conclusion.

25 A I don't think I knew strongly enough which analysis

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1 I would say was a hundred percent right or a hundred
2 percent wrong, but it was a very good issue spotting
3 document. I did not -- I was not overly concerned about
4 the -- Based on the flexibility that I had in drawing this
5 part of the state, I did not fear a VRA issue.

6 Q (By Ms. Franklin) Do you agree that taking Hispanic
7 voters' race into consideration would be a racial
8 gerrymander, in violation of the 14th Amendment?

9 MR. MILLSTEIN: Objection to the extent it
10 calls for a legal conclusion.

11 A I did not think that I was violating the 14th
12 Amendment by considering race in this area.

13 Q (By Ms. Franklin) Okay. Just one moment. I'd like
14 to move to my next exhibit. Just -- Sorry, just --

15 Okay. And now we're on Exhibit --

16 Is this Exhibit 20? I'm sorry.

17 THE REPORTER: This will be No. 22.

18 MS. FRANKLIN: I'm so sorry. So I would
19 like to mark this as Exhibit 22. Oh, and let me -- Okay.
20 Are you seeing it now?

21 THE WITNESS: No.

22 MR. MILLSTEIN: And I'm not seeing it in
23 the chat.

24 MS. FRANKLIN: Okay. Here we go.

25 THE WITNESS: There it is.

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1 (Fain Exhibit No. 22 introduced and displayed.)

2 Q (By Ms. Franklin) Now are you seeing it? Sorry
3 about that. I'm really terrible at this.

4 MR. MILLSTEIN: Erica, could you drop this
5 in the chat as well?

6 MS. FRANKLIN: Oh, I did. I thought I did.
7 I'm sorry, let me try that again.

8 MR. MILLSTEIN: No problem.

9 MS. FRANKLIN: Thank you for bearing with
10 me taking time to do it. I apologize. Oh, okay.

11 Okay. Now I'm actually dropping it in the chat.
12 Are you seeing it now? Okay. Thank you. Sorry.

13 Q (By Ms. Franklin) Okay. Do you recognize this
14 document, Mr. Fain?

15 A It appears to be meeting minutes from the
16 November 24th commissioner meeting.

17 Q Okay. And were you in attendance?

18 A I believe I was. I don't think I missed any.

19 Q Okay. So this was after the enacted map was -- had
20 been passed, given to the court; correct?

21 A I believe so, yes.

22 Q So on page 2 in the last bullet it refers to JF. Is
23 that you?

24 A I believe so.

25 Q And it says, "JF asked for clarification on the

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1 paragraph in question. He agreed with BW that the
2 paragraph is not necessary in the report, as he believes
3 the maps are VRA compliant."

4 Do you see that?

5 A I do.

6 Q And do you believe that the enacted legislative
7 district map was compliant with the VRA?

8 MR. MILLSTEIN: Objection to the extent it
9 calls for a legal conclusion.

10 A I had stated publicly that I believed that it did.

11 Q (By Ms. Franklin) Okay. Now I'd like to turn to
12 another exhibit. Hopefully I can do this one a little bit
13 more gracefully.

14 Okay. I'm screen sharing. I'll put one in the
15 chat. So I'd like to mark this as Exhibit 23.

16 (Fain Exhibit No. 23 introduced and displayed.)

17 Q So I'd like to turn to the second email in the
18 thread. I'll scroll to it.

19 And do you see the email from Margot Spindola on
20 June 15th?

21 A I do.

22 Q Do you know who Margot Spindola is?

23 A I don't believe so.

24 Q So I see that you're not on this email, but I just
25 wanted to call your attention to the second paragraph,

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1 which said that, "Our Redistricting Justice for Washington
2 coalition recently met with Commissioners Fain and Graves
3 and had a couple of questions for you along with some
4 feedback regarding some materials we'd like to request."

5 Do you recall that meeting?

6 A I do.

7 Q What was discussed at that meeting?

8 A I think there was some discussion about the 9th
9 Congressional District, and there was some overall
10 discussion about majority-minority districts and how many
11 there are in the state.

12 And I think there may have been some conversation
13 about the Yakima area, but I don't recall any specifics.

14 Q Okay. Okay. I'd like to move to Exhibit 23.

15 THE REPORTER: The next one is 24.

16 MS. FRANKLIN: Oh, I'm sorry, 24. And then
17 I just dropped it into the chat.

18 (Fain Exhibit No. 24 introduced and displayed.)

19 Q Okay. So I'd just like to scroll down to this email
20 that starts part way down the page from Paul Campos to you
21 on November 4th.

22 Do you recognize this email?

23 A I don't.

24 Q Did you receive it?

25 A According to the -- According to the email I did. I

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1 don't specifically recall getting it, but --

2 Q Fair enough. No worries.

3 A -- I don't doubt -- I don't doubt that I got it.

4 Q Okay. And in the second paragraph it says, "I
5 renamed their 14th to 15th because Honeyford is in it, and
6 King was not." Do you see that?

7 A I do.

8 Q And when you read that what did you take it to mean?

9 A That we had had a map -- and I don't know. I'd have
10 to scroll up and see whose map we were talking about --
11 but that there had been a map that was created that
12 flipped the districts that each of those members lived in,
13 and that Paul renamed them to keep the members that were
14 elected in those districts inside of them.

15 Q And were you supportive of his renaming?

16 A I don't recall if I had a position at the time.

17 Q Do you recall whether you thought it would have
18 any -- that change would have any impact on VRA
19 compliance?

20 MR. MILLSTEIN: Objection, calls for a
21 legal conclusion.

22 A I don't think I would have considered the number
23 that a district had as to whether or not it complied.

24 MS. FRANKLIN: Okay. Now I'd like to mark
25 what I believe is Exhibit 25, and let me put it into the

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1 chat. I think I finally understand how to do this.

2 (Fain Exhibit No. 25 introduced and displayed.)

3 Q Okay. So I want to start with the email on the top
4 of this first page. Let me scroll up.

5 So this is an email between yourself and Paul
6 Campos. Do you recognize this one?

7 A I do.

8 Q And do you see where it says, "Can you also include
9 this stacking, cracking and packing slide on the VRA
10 briefing?"

11 A I do.

12 Q What slide were you referring to there?

13 A I believe it was a slide from the Attorney General's
14 presentation where it had an image of a couple different
15 districts, and it stacked, cracked and packed them, and
16 then explained what those three things were.

17 Q Okay. And then you go on to say in this email, "I
18 do want to talk a bit about this issue with the caucus to
19 help them understand the complexity and importance of the
20 VRA and its impact on this process."

21 Do you see that part?

22 A I do.

23 Q So when you say -- First of all when you say "this
24 issue," I want to talk about this issue.

25 What issue were you referring to?

1 A Stacking, cracking and packing and what those mean
2 and how they're -- how they're used to challenge maps and
3 that the VRA as an issue is something that's going to be
4 talked a lot about during the negotiations of this
5 process. I just wanted the caucus to be aware of that.

6 Q So why was it important to you that the caucus
7 understood the complexity and importance of the VRA?

8 A Well, I was just learning about what the
9 implications of the VRA would be, hence that future email
10 that you're going to -- or the previous email that you're
11 going to turn to in a minute.

12 And I didn't know what kind of -- of -- I didn't
13 know if it would -- at this point if it would require
14 anything to be done in that area differently than what
15 folks had been discussing or what current law was.

16 And given that it was going to be a big issue that
17 received a lot of attention, I just wanted the members to
18 know a little bit about it and -- You know, I always
19 wanted to have -- I wanted members to know that I was
20 happy to take their feedback, but that I was going to be
21 acting very independently in what I needed to do; but I
22 wanted them to know what some of those factors that I
23 would have to be thinking about would be.

24 Q When you say the factors that you would have to be
25 thinking about, did you mean your VRA -- your obligations

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1 under the VRA?

2 A Any number of issues that would come up in
3 redistricting from, you know, competitiveness to VRA to,
4 you know, the way that population growth had occurred and
5 population shifts had occurred.

6 I think a lot of times folks in office have a sense
7 that they live in the bubble that is their current
8 district and that it's going to grow or shrink depending
9 on what their population growth numbers are, and they
10 don't consider that it's actually the five other districts
11 that they're next to and what needs to happen in those
12 districts that will probably affect them more.

13 So it was just about providing more information.

14 Q Did you think it was important for the other -- for
15 all the commissioners to understand what their obligations
16 were, their legal obligations were under the VRA?

17 A I did.

18 Q Okay. So as you predicted, I am going to scroll
19 down to the later part of this document.

20 Do you recognize this email from --

21 A I do.

22 Q -- yourself to Sarah Augustine?

23 A (Nodded.) I do.

24 Q And why did you -- I guess we are going a little
25 backwards in time. Why did you want to put a briefing on

1 the federal VRA on the calendar?

2 A It was going to be an issue that came up, and I
3 thought it would be good to start by having an assessment
4 of or having an explanation of what the factors and
5 conditions that went into a VRA complaint might be and
6 some of the case law around it so that all the members had
7 some baseline understanding of what the VRA required and
8 in some cases what the VRA didn't require, and also some
9 of the internally conflicting requirements of stacking,
10 packing and cracking.

11 And this was again not something that I was super
12 familiar with, and so I wanted it for my own education as
13 well.

14 Q And why did you want the Commission to be briefed on
15 cases in which courts had thrown out maps?

16 A Because I didn't want our map to be thrown out.

17 Q And were you -- Throughout the redistricting process
18 were you drafting -- Were you going about the process in
19 such a way as to try to avoid having your map thrown out?

20 A I did not want to have the map thrown out, so I did
21 not want to have things included in it that would lead to
22 that.

23 Q Are you aware that plaintiffs in -- the plaintiffs
24 in the Soto Palmer lawsuit argue that you -- that the
25 Commission intentionally discriminated against Latino

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1 voters in drawing maps?

2 A I believe that's one of their allegations.

3 Q And how would you -- What's your response to those
4 allegations -- that allegation?

5 A Patently false.

6 Q Did you ever intentionally discriminate against
7 Latino voters in drawing maps?

8 A Absolutely not.

9 Q And why -- When you say it's patently false, why?

10 A I think we've had a number of things that have come
11 up today that show, starting with the sincere desire to
12 understand what our obligations were under the VRA and
13 maps that I proposed that -- that essentially came to the
14 position of some of the advocates that were asking for
15 districts there to be drawn in a certain way, to the final
16 map that shifted significantly in frankly both the
17 Democratic direction, but also in the overall CVAP number
18 for that district.

19 So I think there was a lot of good faith effort
20 to -- and result to respect the VRA and the Latino
21 population in that part of the state, so --

22 MS. FRANKLIN: Thank you. I have no
23 further questions, but I really appreciate your time.

24 THE WITNESS: Thank you.

25 MR. BOWEN: Okay. I will keep this as

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1 short as possible. I know it's been a long day, and I
2 appreciate you bearing with, especially given the rib
3 injury. Having had that myself playing college football,
4 I know it's no fun.

5 THE WITNESS: It takes forever.

6 MR. BOWEN: Let's see. I'm just going --
7 Erica did a great job of covering most of what I wanted to
8 go over, so I'm just going back through my notes here and
9 seeing if there was one additional thing. Okay. Here we
10 go.

11 E X A M I N A T I O N

12 BY MR. BOWEN:

13 Q So there was some discussion earlier, I think with
14 both plaintiffs' counsel and with the State AG's counsel,
15 about the swapping of the 14th and 15th Legislative
16 District as the majority-minority district; is that
17 correct?

18 A Yes. I think that which one of those would -- would
19 be a majority-minority district was discussed, yeah.

20 Q Okay. And did you consider or are you aware of any
21 considerations that involved race in deciding to make that
22 swap?

23 A Once the district had been -- I guess I'm --

24 Oh, could you repeat the question? I'm a little
25 confused.

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1 Q Yes.

2 A After the district was drawn was there a -- was race
3 a consideration about which number would have it?

4 Q Which number was going to be the majority minority.
5 Was that --

6 A No.

7 Q No? Okay. That's the only question I have.

8 MR. BOWEN: I'm done. Thank you.

9 THE WITNESS: Great.

10 MR. MILLSTEIN: Well, unless plaintiffs or
11 the State have any further questions, I think that covers
12 us.

13 MR. GABER: None from me.

14 MS. FRANKLIN: None from me. Thank you.

15 THE WITNESS: Thank you.

16 MR. MILLSTEIN: Great. Let me just say I
17 really do appreciate everybody working to go through this
18 as quickly as possible, and I just really do appreciate
19 that. So thank you on behalf of my client.

20 MR. GABER: You're welcome.

21 THE VIDEOGRAPHER: All right. This
22 concludes the videotaped deposition of Joseph Fain. We
23 are now going off the record. The time is 4:36 p.m.

24 (Deposition concluded at 4:36 p.m.)

25 (Signature reserved.)

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1 C E R T I F I C A T E

2 STATE OF WASHINGTON)
) SS
 3 County of King)

4 I, the undersigned Washington Certified Court
 Reporter, pursuant to RCW 5.28.010 authorized to
 5 administer oaths and affirmations in and for the State of
 Washington, do hereby certify:

6 That the annexed and foregoing deposition of the
 witness named herein was taken stenographically before me
 7 and reduced to typewritten form under my direction.

I further certify that the witness examined will be
 8 given an opportunity to review and sign their deposition
 after the same is transcribed, unless indicated in the
 9 record that the parties and witness waived the signing.

I further certify that all objections made at the
 10 time of said examination to my qualifications or the
 manner of taking the deposition or to the conduct of any
 11 party have been noted by me upon the deposition.

I further certify that I am not a relative or an
 12 employee or attorney or counsel of any of the parties to
 said action, or a relative or employee of any such
 13 attorney or counsel, and that I am not financially
 interested in the said action or the outcome thereof.

I further certify that the witness before examination
 14 was by me duly sworn to testify the truth, the whole
 15 truth, and nothing but the truth.

I further certify that the deposition, as
 16 transcribed, is a full, true and correct transcript of the
 testimony, including questions and answers and all
 17 objections, motions and exceptions of counsel made and
 taken at the time of the foregoing examination and was
 18 prepared pursuant to Washington Administrative Code
 308-14-135, the transcript preparation format guideline.

19
 20 IN WITNESS WHEREOF, I have hereunto set my hand this
 2nd day of December, 2022.

21 

22 Jeanne M. Gersten, RDR, CCR
 Registered Diplomat Reporter
 23 Washington CCR No. 2711
 License effective until April 2, 2023
 24 Residing at Seattle, Washington
 25



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1 CHANGE/SIGNATURE SHEET

2 I, the undersigned, JOSEPH F. FAIN, hereby
 3 certify that I have read the foregoing deposition and
 4 that, to the best of my knowledge, said deposition is true
 and accurate, with the exception of the following
 corrections listed below:

5	PAGE	LINE	CHANGE	REASON
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				

Signature

Date

19
 20 Witness: Joseph F. Fain
 Soto Palmer, et al. v. Hobbs, et al.
 21 USDC Western District of Washington at Seattle
 Cause No. 3:22-cv-05035-RSL
 22 Date: November 21, 2022

23 Reported by: Jeanne M. Gersten, RDR, CCR No. 2711
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