

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

CHARLES WALEN, an individual, et al.,

Plaintiffs,

v.

DOUG BURGUM, in his official capacity as  
Governor of the State of North Dakota, et al.,

Defendants,

and

MANDAN, HIDATSA AND ARIKARA NATION, et  
al.,

Intervenor-  
Defendants.

Civil No. 1:22-cv-00031

**INTERVENOR-DEFENDANTS' OPPOSITION TO LEGISLATIVE ASSEMBLY'S AND  
REP. JONES'S MOTION TO QUASH DEPOSITION SUBPOENA**

The motion to quash Intervenor-Defendants' deposition subpoena of Rep. Jones, filed by the Legislative Assembly and Rep. Jones, should be denied. The motion omits the fact that Rep. Jones already voluntarily inserted himself into this proceeding by testifying on behalf of Plaintiffs at the preliminary injunction hearing. By doing so, he waived any legislative privilege that might otherwise apply to his testimony. And in any event, the legislative privilege is a qualified privilege that courts have routinely found must yield in redistricting litigation. Moreover, Rep. Jones has waived any claim of attorney client privilege with respect to his conversations about redistricting with outside counsel and with Legislative Counsel.

## BACKGROUND

During the legislative debate on the North Dakota legislative redistricting plan, Rep. Jones—who was directly affected by the creation of subdistricts within legislative district 4—spoke in opposition to the Fort Berthold reservation subdistrict, saying “[i]f we leave subdistricts in this bill as is proposed, we will be guilty of racial gerrymandering, according to [a redistricting attorney] that I was talking to. . . . I was told by this attorney, that is racial gerrymandering.”<sup>1</sup> Although he revealed the legal advice he was provided by the attorney with whom he spoke, he did not identify the attorney.

On May 5, 2022, this Court held a hearing on Plaintiffs’ motion for a preliminary injunction. Plaintiffs’ first witness was Rep. Jones, who voluntarily appeared and testified on behalf of Plaintiffs. *See* Ex. 1 (PI Tr. Excerpt at 7). On direct examination, Rep. Jones testified that “[t]here was information coming to me from members on the Redistricting Committee that they were considering subdistricts in Districts 4 and District 9” and that eventually “the members on the committee were telling me that it was getting very serious.” *Id.* at 9. He testified in Court that he had testified to the Redistricting Committee in opposition because “the information I was getting as I was studying was that what was happening was not appropriate, was unconstitutional.” *Id.* at 10. When asked on direct whether “[i]n addition to attending meetings, did you discuss with members of the Redistricting Committee your concerns about the redistricting process and subdistricts in Districts 4 and 9,” Rep. Jones testified, “[y]es, I did.” *Id.* at 10. Testifying about these private conversations, Rep. Jones stated that “[s]omewhat in my discussions with them and in the stuff that I was watching them discuss they missed the point that you had to meet all three

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<sup>1</sup> Nov. 9 House Floor Session, 67th Leg., 1st Spec. Sess. 1:44:49 (N.D. Nov. 9, 2021), <https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20211109/-1/22663>.

of [the *Gingles* preconditions], and so I was desperately trying to explain to them that there's more than just one criteria that had to have been met." *Id.* at 11.

Rep. Jones was asked on direct examination whether race predominated in the drawing of subdistricts, and the Court overruled Defendant's objection that the question called for a legal conclusion. "It does call for a legal conclusion in part. However, I think his understanding of what the process was as a member of the legislature is relevant, and I'll hear it for what it's worth." *Id.* at 12.

Plaintiffs' counsel also asked Rep. Jones to testify about conversations Rep. Jones had regarding Legislative Council's work. Rep. Jones testified that he asked Redistricting Committee members "whether voting data had been compiled" to analyze the requirements of the Voting Rights Act, and affirmed that his questions to members were about "whether Legislative Council had performed those analyses for the Redistricting Committee" and he was told they had not. *Id.* at 34. Then, on recross examination, Rep. Jones testified that he also asked Legislative Council attorney Clair Ness specifically about this:

Q: Have you ever talked to Clair Ness about analyses that she may have run?

A: Yes.

Q: You have spoken with her?

A: Yes.

Q: When did you speak with her?

A: I can't say exactly the time but it was during this time when we were working on this stuff to find out what had been done.

....

Q: You'd indicated earlier that someone told you that Legislative Council did not perform a data analysis; is that correct?

A: Yes.

Q: Who told you that?

A: I was talking to [Rep.] Austen Scahuer and I was talking to the chairman of the committee.

*Id.* at 36.

## ARGUMENT

### I. Rep. Jones waived any legislative privilege by voluntarily testifying in this case.

Rep. Jones waived any legislative privilege by voluntarily testifying at the preliminary injunction hearing in this case. “A legislator who agrees to testify of course may be deposed; by voluntarily testifying, the legislator waives any legislative privilege on the subjects that will be addressed in the testimony.” *Florida v. United States*, 886 F. Supp. 2d 1301, 1302 (N.D. Fla. 2012).<sup>2</sup> Waiver of legislative privilege “need not be ‘explicit and unequivocal,’ and may occur either in the course of litigation when a party testifies as to otherwise privileged matters, or when purportedly privileged communications are shared with outsiders.” *Favors v. Cuomo*, 285 F.R.D. 187, 211-12 (E.D.N.Y. 2012) (quoting *Almonte v. City of Long Beach*, No. CV 04-4192 (JS) (JO), 2005 WL 1796118, at \*3-4 (E.D.N.Y. July 27, 2005)). This is a settled proposition. *See, e.g., Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1995) (holding that legislative privilege was “clearly waived” where legislators “testified extensively as to their motives in depositions with their attorney present, without objection”); *Trombetta v. Bd. of Educ., Proviso Township High Sch. Dist. 209*, No. 02 C 5895, 2004 WL 868265, at \*5 (N.D. Ill. April 22, 2004) (explaining that legislative privilege “is waivable and is waived if the purported legislator testifies, at a deposition or otherwise, on supposedly privileged matters”); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at \*10 (N.D. Ill. Oct. 12, 2011) (“As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider.”); *see also Virgin Islands v. Lee*, 775 F.2d 514, 520 n.7 (3rd Cir. 1985); *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292,

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<sup>2</sup> Movants include nearly a full page of block quotes from *Florida* arguing the case supports their motion, but omit that court’s recitation of the universal rule that voluntarily testifying—as Rep. Jones has done in this case—waives the legislative privilege. *See Mot.* at 10.

298 (D. Md. 1992). The reason for this rule is straightforward: the legislative privilege may not be used as both shield and sword whereby a legislator “strategically waive[s] it to the prejudice of other parties.” *Favors*, 285 F.R.D. at 212.

Rep. Jones waived any legislative privilege when he voluntarily testified in this case in support of Plaintiffs’ preliminary injunction motion about his motivations, his private conversations with other legislators, legislative staff, and outside advisors and attorneys, and his understanding of what analyses the Redistricting Committee or Legislative Council did or did not conduct. Rep. Jones may not strategically waive the privilege by revealing only that information he deems beneficial to his cause and then refuse to be deposed and preclude the opposing parties from probing those matters. The case law makes clear that Rep. Jones must testify at deposition about the subject matter he revealed during his voluntary testimony in this case.<sup>3</sup>

**II. Even absent Rep. Jones’s waiver, the qualified legislative privilege would not preclude deposition testimony.**

Even if Rep. Jones had not waived legislative privilege through his voluntary testimony, his deposition would still be proper because the legislative privilege is qualified, he has discoverable information to which no privilege claim applies, and the privilege must give way in this case even if it did apply. “[T]he legislative privilege for state lawmakers is, at best, one which is qualified.” *League of United Latin Am. Citizens v. Abbott* (“*LULAC*”), No. 22-50407, 2022 WL 2713263, at \*1 (5th Cir. May 20, 2022).<sup>4</sup> The privilege “must be strictly construed and

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<sup>3</sup> Movants provide no explanation or citation for why Rep. Jones’s voluntary testimony might not have waived legislative privilege; instead they wrongly assert that Rep. Jones has not “made any appearance other than to assert legislative privilege in response to the Tribal Defendants’ subpoena.” Mot. at 2.

<sup>4</sup> Notably, in *LULAC* the legislators’ motion to quash was denied and the legislators were ordered to sit for depositions regarding the Texas redistricting plans. The legislators sought an emergency

accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.” *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov’t*, 849 F.3d 615, 624 (5th Cir. 2017). “Redistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege because judicial inquiry into legislative intent is specifically contemplated as part of the resolution of the core issue that such cases present.” *Bethune-Hill v. Va. State Bd. of Election*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015). The legislative privilege therefore “must be a qualified privilege in such a scenario and yield in the face of an evidentiary need that lies at the core of the inquiry required by the Supreme Court in redistricting cases.” *Id.*

“Most courts that have conducted this qualified privilege analysis in the redistricting context have employed a five-factor balancing test imported from deliberative process privilege case law.” *Id.*; see *South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 161 (D.S.C. 2022); *Rodriquez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at \*7; *Favors*, 285 F.R.D. at 209-10; *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014). These factors are “(1) the relevance of the evidence sought, (2) the availability of other evidence, (3) the seriousness of the litigation, (4) the role of the State, as opposed to individual legislators, in the litigation, and (5) the extent to which discovery would impede legislative action.” *South Carolina State Conference of NAACP*, 584 F. Supp. 3d at 161.<sup>5</sup>

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stay in the United States Supreme Court after they failed to obtain one in the Fifth Circuit, and that request was denied by the Supreme Court. See *Guillen v. LULAC*, 142 S. Ct. 2773 (2022) (Mem.) (“Application for stay presented to Justice Alito and by him referred to the Court denied.”).

<sup>5</sup> The *South Carolina State Conference of NAACP* court rejected the argument advanced by Movants here that only criminal cases involve the potential for legislative privilege to give way.

Application of these factors weighs in favor of a ruling that the privilege must give way. First, the testimony sought is highly relevant. At the preliminary injunction hearing, Rep. Jones testified that he engaged in private conversations and obtained information about the purpose behind the subdistrict legislation, the analysis of the VRA implications, and his opinion from his conversations and the public hearings that race was the predominant consideration in drawing the subdistricts. This testimony is relevant to Plaintiffs' racial gerrymandering claim; if it were not, they would not have elicited it at the preliminary injunction hearing. Indeed, this Court already acknowledged the relevance of this testimony in permitting it over the objection of Defendants at the hearing. *See supra*. Movants contend that Rep. Jones's testimony is not relevant because he is just a single legislator and was not a mapdrawer or member of the Committee, but he has testified about knowledge he has regarding those who were involved in drawing the map and conducting analyses of the map. That makes his testimony highly relevant.

Second, while circumstantial evidence—such as the fact that subdistrict 4A on its face respects (not subverts) traditional redistricting criteria is available—a redistricting litigant “need not confine their proof to circumstantial evidence alone.” *South Carolina State Conference of NAACP*, 584 F. Supp. 3d at 164 (internal quotation marks omitted).

Third, as the *South Carolina State Conference of NAACP* court and others adjudicating redistricting litigation have found, “every redistricting case litigated in the federal courts demonstrates that at some juncture, state interests give way when the conflict with the

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“It is not the simple distinction between ‘criminal’ and ‘civil’ cases which determines the availability of this evidentiary privilege, but rather, the importance of the federally created public rights at issue. And when cherished and constitutionally rooted public rights are at stake, legislative evidentiary privileges must yield.” 584 F. Supp. 3d at 162.

constitutionally guaranteed fundamental right to vote free from racial discrimination,” and thus “[t]he third factor weighs in favor of disclosure.” *Id.* at 165.

Fourth, this is “not a case where individual legislators are targeted by a private plaintiff seeking damages.” *Id.* Rather, “Plaintiffs’ stated purpose is to overturn legislative action on constitutional grounds.” *Id.* As a result, “[t]his factor suggests the legislative privilege ought to yield to Plaintiffs’ attempt to enforce a substantial public right.” *Id.*

Fifth, “the legislative independent interest and the risk of chilling legislative function ‘is significantly reduced, if not eliminated, [ ] when the threat of personal liability is removed.’” *Id.* (quoting *Owen v. City of Independence, Mo.*, 445 U.S. 622, 656 (1980)); see also *Bethune-Hill*, 114 F. Supp. 3d at 336 (stating that redistricting case involved “important *public* rights guaranteed by federal law).

Even if Rep. Jones had not waived his privilege by voluntarily testifying in this case (he has), the legislative privilege would still give way—as multiple courts have found to be the case in redistricting cases—because the five-factor balancing test applied to assertions of legislative privilege in redistricting cases weighs in favor of disclosure.

Moreover, Rep. Jones has discoverable information to which no claim of legislative privilege could even apply. Defendant-Intervenors contend that the Voting Rights Act required the drawing of subdistrict 4A. That contention requires analysis of voting patterns, the Senate Factors (including the extent to which Native Americans suffer the effects of past discrimination), and a local appraisal of voting conditions. Rep. Jones has represented the Fort Berthold Reservation in the legislature for several years and is undoubtedly familiar with the community and these topics. There is not a conceivable claim that such testimony would be shielded by legislative privilege. See *LULAC*, 2022 WL 2713263, at \*1 (approving of district court’s



reasoning that “there are likely to be relevant areas of inquiry that fall outside of topics potentially covered by state legislative privilege” warranting deposition of Texas legislators regarding redistricting plans).

**III. Rep. Jones has waived attorney client privilege regarding conversations with outside redistricting counsel and North Dakota Legislative Council.**

Rep. Jones has waived attorney client privilege regarding his conversations with outside redistricting counsel and with North Dakota Legislative Council. “Voluntary disclosure of attorney client communications expressly waives the privilege.” *United States v. Workman*, 138 F.3d 1261, 1263 (8th Cir. 1998). “The waiver covers any information directly related to that which was actually disclosed.” *Id.*; see also *PaineWebber Grp., Inc. v. Zinsmeyer Trusts P’ship*, 187 F.3d 988, 992 (8th Cir. 1999) (noting that such waiver “typically appl[ies] . . . to all communications on the same subject matter”).

During the legislative debate, Rep. Jones revealed that he had spoken to outside legal counsel and he revealed the legal advice that he was given: that drawing subdistricts would be an unconstitutional racial gerrymander. See *supra* note 1. He voluntarily revealed that legal advice in an effort to convince the legislature not to take action he opposed. Having disclosed this conversation, Rep. Jones may not now claim attorney-client privilege with outside counsel on the subject matter of the subdistrict redistricting.

Moreover, during this testimony at the preliminary injunction hearing, Rep. Jones testified that he had had private conversations with Ms. Ness from Legislative Council and conversations with Redistricting Committee members about their interactions with Legislative Council, and that he learned that Legislative Council had conducted no analysis of voting patterns. By testifying as such, he has waived any attorney client privilege he may otherwise have had with Legislative Council.

Rep. Jones cannot use privileges—whether legislative or attorney client—as both a shield and sword, selectively revealing information he deems beneficial while shielding from discovery information that may not be. As he has waived relevant privileges, he must testify as to these matters.

### **CONCLUSION**

For the foregoing reasons, Movant’s motion to quash should be denied.

November 30, 2022

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**CERTIFICATE OF SERVICE**

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

/s/ Mark P. Gaber

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# **EXHIBIT 1**

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

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Charles Walen and Paul )  
Henderson, )  
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Plaintiffs, )  
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vs. )  
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Doug Burgum and Alvin )  
Jaeger, )  
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Defendants, )  
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and )  
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Mandan, Hidatsa & Arikara )  
Nation, Lisa DeVille, )  
and Cesareo Alvarez, Jr., )  
 )  
Intervenor Defendants. )  
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**FILE NO. 1:22-cv-31**

**PARTIAL**

**T R A N S C R I P T**

**O F**

**P R O C E E D I N G S**

**(Testimony of Terry B. Jones)**

**MOTION FOR PRELIMINARY INJUNCTION**

**May 5, 2022**

**Pages 1-37**

HELD AT: QUENTIN BURDICK UNITED STATES COURTHOUSE  
655 FIRST AVENUE NORTH  
FARGO, NORTH DAKOTA 58102

BEFORE: THE HONORABLE RALPH R. ERICKSON, PETER D. WELTE  
AND DANIEL L. HOVLAND

COURT REPORTER: KELLY A. KROKE

**A P P E A R A N C E S**

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I N D E X

W I T N E S S E S

**PLAINTIFFS'**

**PAGE NO.**

**TERRY B. JONES**

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Redirect Examination by Mr. Sanderson	30
Cross-Examination by Mr. Phillips	35

E X H I B I T S

**EXHIBIT NO.**

**DESCRIPTION**

**OFR'D**

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(See Clerk's Minutes - ECF Doc.#36)



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**P R O C E E D I N G S**

(May 5, 2022: The following proceedings commenced at 9:00 a.m.):

JUDGE ERICKSON: We'll go on the record in a case entitled Charles Walen, et al. Versus Doug Burgum, et al. It's File No. 1:22-cv-31. The record should reflect that -- well, all counsel are here. And why don't we go ahead and do this: Why don't we have counsel for the plaintiffs go ahead and identify themselves for the record.

MR. SANDERSON: Good morning, Your Honor. My name is Paul Sanderson. I represent the plaintiffs, Charles Walen and Paul Henderson. At counsel table with me is Attorney Ryan Joyce and Attorney Robert Harms.

JUDGE ERICKSON: All right. And for the defendants Burgum and Jaeger, Mr. Wrigley, do you wish to speak first?

MR. WRIGLEY: Speak first?

JUDGE ERICKSON: Well, no, I mean, I just want to -- you are the Attorney General. Excuse me, I'm sorry. You are the Attorney General. I thought I'd ask you first.

MR. WRIGLEY: I keep forgetting to -- nice to see you this morning.

JUDGE ERICKSON: All right. And do you want

1 to identify other counsel appearing on behalf of the  
2 State employees, State defendants?

3 MR. PHILLIPS: David Phillips, Your Honor,  
4 Special Assistant Attorney General. The Solicitor  
5 General Matt Sagsveen is also present and the Deputy  
6 Secretary of State Jim Silrum is present today.

7 JUDGE ERICKSON: All right. And then we  
8 have -- who's appearing by video? I'm sorry.

9 MR. GABER: Mark Gaber for the intervenors,  
10 Your Honor.

11 JUDGE ERICKSON: All right. Okay. And who  
12 else -- is anyone else appearing on behalf of the  
13 intervenors? Oh, I'm sorry, there you are. I kept  
14 looking around saying I can't see where everybody is.

15 MR. CARTER: Good morning, Your Honor.  
16 Michael Carter on behalf of the intervenors along with  
17 Samantha Kelty and Emily deLisle assisting.

18 THE COURT: Thank you. All right. I am a  
19 United States Circuit judge and so obviously this whole  
20 presiding over a real proceeding is a little complicated  
21 for me. But now that we've got the hard part done and  
22 that is have all of the attorneys identified for the  
23 record, I think I'll lay out just kind of in general  
24 order the way that I see the proceedings.

25 I believe that the parties do have some

1 additional evidence or cross-examinations that they wish  
2 to present and so we'll take up all evidence from any  
3 party who wishes to present evidence at this hearing  
4 first. Following that we'll likely take a short recess  
5 and then come back and take argument on the legal  
6 matters. I presume that we'll not -- that we will not  
7 be in a position to rule from the bench so we'll  
8 probably take it under advisement and look to get  
9 something out in writing shortly thereafter.

10           The issue before the Court obviously is  
11 we're here on the motion for a preliminary injunction  
12 and the factors that we need to consider both the  
13 substantive law relating to the Voting Rights Act and to  
14 the issuance of preliminary injunctions is well-known  
15 and so I won't summarize the law for you because I'm  
16 pretty confident that you've got that piece of it down  
17 so far.

18           All right. I say "so far" because we all  
19 know that Courts have a tendency to, you know, get to a  
20 place that is somewhat unexpected and so we'll see where  
21 we go from there. All right. So at this point it's the  
22 movants' case to present any additional evidence that  
23 they wish.

24           A couple of general rules. I would like  
25 whoever is going to examine the witness to examine from

1 the podium or the lectern so that they're closer to the  
2 witness and so that the line of sight for the court  
3 reporter is straight and because we have people sitting  
4 over here on the left it just will be a problematic  
5 otherwise, okay?

6 And so I don't know who's going to speak  
7 first for the movants but they may call their first  
8 witness.

9 MR. SANDERSON: Thank you, Your Honor. The  
10 movants would call Representative Terry Jones.

11 JUDGE ERICKSON: Representative Jones, if  
12 you would please come forward, stand before the clerk,  
13 raise your right hand and take the oath.

14 (Witness sworn.)

15 THE COURT: Representative Jones, the  
16 microphone in front of you is directional so it would be  
17 helpful if you talk directly into it. It'll pick you up  
18 a little bit better.

19 Thank you. You may proceed.

20 MR. SANDERSON: Thank you, Judge.

21 **TERRY B. JONES,**

22 **HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH, THE**  
23 **WHOLE TRUTH, AND NOTHING BUT THE TRUTH, RELATIVE TO**  
24 **SAID CAUSE, TESTIFIED AS FOLLOWS:**

24 **DIRECT EXAMINATION**

25 **BY MR. SANDERSON:**

1 Q. Good morning, Representative Jones. Could you  
2 please state your full name and address for the record.

3 A. Terry Burton Jones, 413 Eagle Drive in New Town,  
4 North Dakota, 58763.

5 Q. And, Representative Jones, are you currently one  
6 of the elected North Dakota House of Representatives  
7 from District 4?

8 A. Yes.

9 Q. What year were you first elected to the  
10 Legislative Assembly?

11 A. 2016.

12 Q. And could you just briefly explain the areas --  
13 the geographical areas that District 4 covers.

14 A. It's a huge district. It goes all the way from  
15 Kenmare up against the Canadian border down to Halliday  
16 and Dunn Center. It reached clear over just underneath  
17 Minot. They've changed it here just recently and  
18 shrunked it a little bit but it's a huge district,  
19 covers a lot of country.

20 Q. And does District 4 also include the Fort  
21 Berthold Indian Reservation?

22 A. It does.

23 Q. When was your most recent election in District 4?

24 A. We just were reelected in 2020.

25 Q. How long a term were you elected for in 2020?

1 A. I was elected for a four-year term.

2 Q. And currently are you up for election in 2022?

3 A. Yes. Because of the subdistricts, we had to run  
4 again this year.

5 Q. Now, Representative Jones, I want to ask you a  
6 few questions. You're aware that the Redistricting  
7 Committee of the legislature met in 2021?

8 A. Yes.

9 Q. Were you a member of the Redistricting Committee?

10 A. No, I was not.

11 Q. Did you attend Redistricting Committee meetings?

12 A. I did.

13 Q. How many Redistricting Committee meetings did you  
14 attend?

15 A. I believe I attended either two or three towards  
16 the end of the redistricting work.

17 Q. Why would you as a representative of District 4  
18 attend the Redistricting Committee meetings in 2021?

19 A. There was information coming to me from members  
20 on the Redistricting Committee that they were  
21 considering subdistricts in Districts 4 and District 9.  
22 At first I wasn't too concerned about it but towards the  
23 end the members on the committee were telling me that it  
24 was getting very serious. It looked like it was going  
25 to move forward.

1 Q. Did you testify before the Redistricting  
2 Committee?

3 A. I did.

4 Q. And what was the purpose of your testimony before  
5 the Redistricting Committee?

6 A. I'm a representative from District 4 and I  
7 represent members, the district members. And the  
8 information I was getting as I was studying was that  
9 what was happening was not appropriate, was  
10 unconstitutional. So in order to both uphold my oath to  
11 support the Constitution of North Dakota and my job to  
12 represent and serve the District 4 people, I attended  
13 those meetings to try to make sure that we didn't do  
14 something that was wrong.

15 Q. In addition to attending meetings, did you  
16 discuss with members of the Redistricting Committee your  
17 concerns about the redistricting process and  
18 subdistricts in Districts 4 and 9?

19 A. Yes, I did.

20 Q. Based on your attendance in the meeting and your  
21 testimony at the Redistricting Committee hearings, do  
22 you have an understanding of why the Redistricting  
23 Committee recommended subdistricts in Districts 4 and 9?

24 A. I do.

25 Q. And based on your observations, why did the

1 Redistricting Committee recommend subdistricts in their  
2 maps for Districts 4 and 9?

3 A. Redistricting is a complex thing and there's been  
4 some history with this particular issue here in  
5 District 4. Previous redistricting attempts ended up  
6 causing a lawsuit to occur and that lawsuit when it was  
7 tried it was discovered that the first prong of the  
8 Gingles case criteria had not been met. And so the  
9 judge in that case said because the first prong hasn't  
10 been met he dismissed it.

11 Somehow the members of the committee that  
12 had been involved with that got the interpretation that  
13 if the numbers were ever met that it was inevitable that  
14 you would have to have a subdistrict. Somehow in my  
15 discussions with them and in the stuff that I was  
16 watching them discuss they missed the point that you had  
17 to meet all three of those things, and so I was  
18 desperately trying to explain to them that there's more  
19 than just one criteria that had to have been met. And  
20 so that's what was my main focus for attending the  
21 meetings and visiting them with.

22 Q. And, Representative Jones, you indicated that  
23 there was a prior lawsuit the State of North Dakota was  
24 involved in. Was it your understanding that prior  
25 lawsuit involved the Voting Rights Act claim?



1 A. Yes, it was.

2 Q. And based on your observations and attendance at  
3 the subdistricting committee -- or the districting --  
4 Redistricting Committee meetings, was race a predominant  
5 factor the committee determined in creating the  
6 subdistricts in Districts 4 and 9?

7 MR. PHILLIPS: Objection. Calls for a legal  
8 conclusion.

9 JUDGE ERICKSON: It does call for a legal  
10 conclusion in part. However, I think his understanding  
11 of what the process was as a member of the legislature  
12 is relevant, and I'll hear it for what it's worth. I  
13 mean, this is a bench proceeding. We understand that  
14 ultimately we'll be the people drawing that legal  
15 conclusion.

16 You may answer.

17 THE WITNESS: Thank you, Your Honor.

18 A. It was my understanding that their concern was  
19 based almost entirely on race of the group inside the  
20 boundaries.

21 Q. (Mr. Sanderson continuing) Now one of the things  
22 you testified a moment ago to, Representative Jones, was  
23 the Gingles factor and you're referring to U. S. Supreme  
24 Court case Thornburg v. Gingles; is that correct?

25 A. That is correct.

1 Q. Okay. Based on your observations and attendance  
2 at the Redistricting Committee meetings, did the  
3 Redistricting Committee ever retain or consult an expert  
4 regarding voting patterns in Districts 4 and 9 during  
5 the redistricting process?

6 A. They did not.

7 Q. Based on your observations and attendance at the  
8 redistricting hearings, did the Redistricting Committee  
9 ever review any previous election results in Districts 4  
10 or District 9?

11 A. To my knowledge they did not.

12 Q. Now again based on your observations and  
13 attendance at the Redistricting Committee hearings, did  
14 the Redistricting Committee do any studies analyzing  
15 voting results in Districts 4 and 9?

16 A. They did not.

17 Q. And along those same lines based on your  
18 observation and attendance at those meetings, was there  
19 ever any discussion regarding precinct voting analysis  
20 in District 4 or District 9?

21 A. There was no discussion that I'm aware of.

22 Q. Now you're aware that the Redistricting Committee  
23 passed maps that included subdistricts for Districts 4  
24 or 9 and sent that to the House floor, correct?

25 A. That is correct for recommendation -- or with a

1 recommendation.

2 Q. As a member of the North Dakota Legislative  
3 Assembly and the House of Representatives, were you  
4 present on the House floor on November 9, 2021 when the  
5 Redistricting Committee's proposed maps containing  
6 subdistricts in District 4 and District 9 were debated?

7 A. Yes, I was.

8 Q. During the floor debates was the topic of  
9 subdistricts in Districts 4 and 9 addressed?

10 A. Yes, it was.

11 Q. When the topics of subdistricts in Districts 4  
12 and 9 were addressed that day, did you speak on the  
13 floor?

14 A. Yes, I did.

15 Q. At this point we'd like to show a video to  
16 Representative Jones.

17 JUDGE ERICKSON: You may.

18 (Unidentified video played.)

19 JUDGE WELTE: Counsel, could you pause the  
20 video?

21 Are you able to do anything about the  
22 volume? I believe Lori has it maxed out here.

23 MR. SANDERSON: I don't know why our  
24 computer's not going through the Court's system.

25 JUDGE WELTE: And I would not be a good

1 person to answer that either but thank you.

2 (Unidentified video played.)

3 Q. (Mr. Sanderson continuing) Representative Jones,  
4 following your floor testimony on November 9, 2021, did  
5 the House vote on the Redistricting Committee's proposed  
6 redistricting maps which includes subdistricts in  
7 Districts 4 and 9?

8 A. Yes, they did.

9 Q. And what was the result of the House floor vote?

10 A. We passed the redistricting bill with  
11 subdistricts included.

12 Q. Now following the passage of that bill and it  
13 being signed into law by Governor Burgum in this case,  
14 what district are you currently located in?

15 A. District 4.

16 Q. And what subdistrict are you currently located  
17 in?

18 A. I'm in district -- Subdistrict 4A.

19 Q. And does your Subdistrict 4A, is it -- does it  
20 contain the entire boundary of the Fort Berthold  
21 Reservation?

22 A. Yes, it does. The boundary is the boundary of  
23 Subdistrict 4A.

24 Q. Okay. And when you say that, 4A is comprised  
25 solely of the Fort Berthold Indian Reservation?

1 A. That is correct.

2 Q. Okay. Now, Representative Jones, are you opposed  
3 to the idea of subdistricts in North Dakota?

4 A. Absolutely not.

5 Q. If you felt the Gingles factors had been  
6 demonstrated by the Redistricting Committee and the  
7 evidence required, would you support the creation of  
8 subdistricts in Districts 4 and 9?

9 A. Yes, I would.

10 MR. SANDERSON: I have no further questions  
11 of this witness.

12 JUDGE ERICKSON: Thank you. Cross by the  
13 State defendants?

14 MR. PHILLIPS: No questions, Your Honor.

15 JUDGE ERICKSON: Thank you. Cross by the  
16 intervenors?

17 MS. KELTY: Yes, Your Honor.

18 **CROSS-EXAMINATION**

19 **BY MS. KELTY:**

20 Q. Hi, how are you?

21 A. Fine, thank you.

22 Q. Representative Jones, I'm Samantha Kelty. I  
23 represent the Defendant Intervenors MHA Nation, Lisa  
24 DeVille and Cesareo Alvarez.

25 Representative, you did not sit on the

1 Redistricting Committee, did you?

2 A. I did not.

3 Q. And how would the new map of District 4 affect  
4 you in your election?

5 A. It changes the representation for District 4  
6 subdistricts divided into two groups, 4A and 4B, and the  
7 concerning part for me is that it leaves those people  
8 that are in District 4 with only one representative  
9 where previously they had two representatives  
10 representing them.

11 Q. Are you aware of the testimony submitted to the  
12 committees describing past election results and the  
13 presence of racial bloc voting?

14 A. Could you repeat the question?

15 Q. Sure. Are you aware of the testimony that was  
16 submitted to the Redistricting Committee describing past  
17 election results and the presence of racial bloc voting?

18 A. No, I'm not aware of it. I heard the discussion  
19 in the committee meetings that I was in but I was not  
20 aware of the testimony in its entirety.

21 Q. So you did hear some of the discussion, correct?

22 A. Yes.

23 Q. Are you aware of North Dakota's recent voter ID  
24 law that discriminates against Native American voters?

25 A. Could you explain how the new law discriminates

1 against Native American voters?

2 Q. Are you aware of the law that I'm referring to?

3 A. I'm not aware of any law that we've passed that  
4 discriminates against Native American voters so I would  
5 like you to explain how it discriminates so I can  
6 understand which law you're referring to.

7 Q. Sure, Representative Jones. I'm just going to  
8 ask you the questions here, okay?

9 Are you aware of the voter ID law,  
10 Representative?

11 A. Yes.

12 Q. And did you vote for that?

13 A. Yes.

14 Q. Let's talk about the MHA Nation. In the House  
15 you served on the Tribal and State Relations Committee,  
16 didn't you?

17 A. Yes.

18 Q. Since 2021?

19 A. Yes.

20 Q. And part of that committee studies -- an  
21 assignment was to study tribal/state issues, correct?

22 A. Yes.

23 Q. And you're familiar with the MHA Nation?

24 A. Yes.

25 Q. The Three Affiliated Tribes?

1 A. Yes.

2 Q. And the MHA Nation has a unique political status,  
3 doesn't it?

4 A. I don't know what you mean "unique."

5 Q. Is the MHA Nation a sovereign entity?

6 A. MHA Nation is a sovereign entity, yes.

7 Q. And you're familiar with the MHA people?

8 A. Yes.

9 Q. The MHA people have a distinct history, right?

10 A. Yes.

11 Q. And MHA people have unique economic interests as  
12 well, don't they?

13 A. No.

14 Q. Well, some of their economic interests arise from  
15 the Nation's location on the Bakken Oil Formation,  
16 correct?

17 A. Correct.

18 Q. And MHA people have their own languages; is that  
19 right?

20 A. Yes.

21 Q. And they have a distinctive culture, correct?

22 A. Yes.

23 Q. The MHA people are a distinct population, right?

24 A. Yes.

25 Q. And as a representative during the redistricting



1 process, you learned about redistricting?

2 A. I missed the question. What did you say?

3 Q. Did you learn about redistricting during the  
4 redistricting process?

5 A. Yes, I did learn more about it.

6 Q. And one of those trainings was from the National  
7 Conference of State Legislatures, correct?

8 A. I'm not even sure if I attended that. I'm not  
9 sure which training you're referring to. There's a lot  
10 of stuff going on. I assume it's during session and I  
11 can't recall exactly any particular training from that  
12 organization.

13 Q. I understand. I sometimes can't remember last  
14 month.

15 So if we could, Your Honor, I'd like to pull  
16 up a copy of the NCSL PowerPoint.

17 JUDGE ERICKSON: You may.

18 MS. KELTY: Thank you. And let the record  
19 reflect I've previously provided a copy to the other  
20 counsel and we're looking here, this is ECF doc 21-1 and  
21 it's starting at page 50 of the ECF doc 21-1.

22 Q. (Ms. Kelty continuing) Representative, do you  
23 recognize this?

24 A. It looks familiar, yes.

25 Q. Okay. What is this?

1           A.    It's a presentation to the North Dakota  
2 legislature on redistricting.

3           Q.    By who?

4           A.    NCSL.

5           Q.    Were you shown this?

6           A.    I believe so, yes.

7           Q.    Okay.  When?

8           A.    Beginning of the session in the Brynhild Haugland  
9 Room if I recall correctly.

10          Q.    And it says there August 26, 2021; is that  
11 correct?

12          A.    Correct.

13          Q.    Does that sound about when you were shown this?

14          A.    No.

15          Q.    So when were you shown it?

16          A.    If I recall it was the beginning of the session,  
17 which would have been closer in the December time.

18          Q.    Okay, understood.  And for what purpose were you  
19 shown this?

20          A.    To assist us as legislators in understanding the  
21 redistricting process.

22          Q.    Okay.  Let's take a look at page 85 of the ECF,  
23 85 of the PDF.

24                    JUDGE ERICKSON:  Before we do that I wonder  
25 if we should not either stipulate that the exhibits that

1 have been filed and attached can be received and  
2 considered by the Court or have an offer. And I think  
3 we should have done the same thing with the video;  
4 although the video I think we could have let in for  
5 refreshing recollection. But it just seems to me that  
6 if we're going to try and get this record so it's clean,  
7 you know, if an appeal is taken we should know what  
8 we're able to consider.

9 So let's start with the movants. First of  
10 all, have you talked amongst yourselves about what you  
11 would want in or not want in as evidence or should we  
12 handle each exhibit just as being in an exhibit?

13 MS. KELTY: We did not, Your Honor. We  
14 arrived a little late. If we had a few seconds that  
15 would be great.

16 JUDGE ERICKSON: Why don't we take a couple  
17 minutes, five minutes, and let's see if we can't hammer  
18 out how we want to handle the exhibits, all right?  
19 Because at this point what we've got in the record are a  
20 bunch of things that haven't been marked and -- but we  
21 do know where they are in the record so, I mean, it's  
22 not a complete lost cause but I think we ought to arrive  
23 at some consensus. We'll stand in recess for five  
24 minutes.

25 (Recess taken; 9:25 a.m. to 9:40 a.m.)

1 JUDGE ERICKSON: We'll go back on the  
2 record. All counsel of record are present. They've had  
3 a chance to discuss the -- a potential stipulation on  
4 the exhibits.

5 Have the parties reached an agreement?

6 MS. KELTY: We have, Your Honor, and we  
7 appreciate that time to do so. We've stipulated to the  
8 admission of all exhibits that have been submitted into  
9 the record in addition to Intervenors' Exhibit 1 that  
10 we've marked, which is an updated copy Dr. Loren  
11 Collingwood's CV.

12 JUDGE ERICKSON: All right. And so --

13 MS. KELTY: And the video, excuse me.

14 JUDGE ERICKSON: We'll receive Intervenors'  
15 Exhibit No. 1. I should have confirmed that the  
16 stipulation has been accurately stated.

17 On the part of the movants?

18 MR. SANDERSON: Yes, Your Honor, other than  
19 we talked about the video we showed. That's a public  
20 record taken off the North Dakota legislature's website  
21 and we do have a couple others we intend to show but our  
22 understanding is that we have an agreement that those  
23 will be admissible. That's our understanding.

24 JUDGE ERICKSON: All right. Thank you. And  
25 does the State agree with the stipulation as noted?

1 MR. PHILLIPS: Yes, Your Honor.

2 JUDGE ERICKSON: All right. The Court will  
3 receive all of the previously marked exhibits. I have  
4 received Intervenors' 1. We will receive every video  
5 that is shown during the course of this proceeding. The  
6 other videos of the Redistricting Committee hearings are  
7 a matter of public record. And I should note for the  
8 record that I know that I've reviewed them and I suspect  
9 my fellow judges on the panel have reviewed them as  
10 well. And so that's where we're at on this.

11 And Representative Jones remains on the  
12 stand and now we can go back to asking him some  
13 questions.

14 MS. KELTY: Thank you, Judges, and thanks  
15 for that clarification.

16 Q. (Ms. Kelty continuing) Before we took a break we  
17 were taking a look at what is in the record as document  
18 21-1 and I believe we were looking at page 50 of 109 of  
19 that document. As reflected in the record the parties  
20 have stipulated to the admission of the entirety of  
21 document 21-1. Is it not displaying? Okay. For some  
22 reason it's not connecting. Thank you, Lori.

23 And, Representative Jones, I have a hard copy  
24 here. Would you like to take a look at that or -- in  
25 addition to the video?

1 A. This will be fine, thank you.

2 Q. Great. We'll save some paper here. So does this  
3 refresh your recollection as you stated that you did  
4 receive a PowerPoint presentation from NCSL on  
5 redistricting, Representative?

6 A. Yes.

7 Q. And so during this training you learned that  
8 maintaining a community of interest is a traditional  
9 redistricting principle, correct?

10 A. Correct.

11 Q. And let's take a look at page 85 of 109 of this  
12 document. And here, Representative, this is the first  
13 part of the presentation that speaks to the  
14 criteria/principles. What does that say there in the  
15 top left-hand corner of the screen?

16 A. "Criteria/Principles: Compactness."

17 Q. And let's scroll down to page 89 of 109 and what  
18 is the topic -- what is the topic of this slide,  
19 Representative?

20 A. It says, "Other critical (sic) NCSL tracks."

21 Q. "Other criteria NCSL tracks?"

22 A. "Other criteria," sorry.

23 Q. I know. I forgot my glasses so I'm having a hard  
24 time seeing that. And what is the first bullet point  
25 there?

1 A. "Preserving communities of interest."

2 Q. Okay, great. And we can take this down. Thank  
3 you.

4 Representative, let's talk about the Fort  
5 Berthold Reservation. You live here in North Dakota,  
6 correct?

7 A. I live on the reservation in fact.

8 Q. Oh, okay, good to know. So how long have you  
9 lived on the reservation?

10 A. I've been close to or onto it for 11 years.

11 Q. Wow, that's incredible. So you're familiar with  
12 the reservation?

13 A. Yes.

14 Q. And that's the reservation on which the MHA  
15 Nation is located, correct?

16 A. Yes, the Three Affiliated Tribes.

17 Q. And it's a community there, right?

18 A. Yes.

19 Q. An independent community?

20 A. Several communities actually.

21 Q. Right. Several distinct communities within the  
22 reservation, correct?

23 A. Yes.

24 Q. And it's governed by its own government?

25 A. Several governments.

1 Q. And can you please explain your answer there?

2 A. Yes. There seems to be some confusion here about  
3 the reservation. There's several towns in there that  
4 are including my town which is New Town. There's  
5 Parshall. There's several other towns included in the  
6 reservation. The reservation boundary was moved up in  
7 about 1972 six miles to include those towns. So you're  
8 asking me to say that there's one form of government on  
9 the reservation when in fact we have North Dakota  
10 citizens, North Dakota property, taxpayers of North  
11 Dakota, all of that represented within the boundaries of  
12 that reservation as well as the tribal nation, the Three  
13 Affiliated Tribes, and their government.

14 So you're asking a very complicated question  
15 in a very simplistic way.

16 Q. I think you did reply to my question so, yeah, I  
17 appreciate that. I was referring to the tribal  
18 government so thanks for clarifying.

19 That tribal government has a Tribal Business  
20 Council, correct?

21 A. Correct.

22 Q. And a chairman?

23 A. Correct.

24 Q. And MHA Nation is a federally recognized tribe?

25 A. Yes.



1 Q. And the Nation exercises sovereign authority,  
2 right?

3 A. Yes.

4 Q. And you live on the reservation so you're  
5 familiar with the reservation's boundaries?

6 A. I am.

7 Q. Its geographical boundaries?

8 A. Yes.

9 Q. And its boundaries are different from state  
10 boundaries, right?

11 A. They're included in the state boundaries.

12 Q. But they are different. They are distinct from  
13 the state boundaries; is that right?

14 A. Yes.

15 Q. And they are distinct from county boundaries,  
16 right?

17 A. Correct.

18 Q. And they are also different from municipal  
19 boundaries, right?

20 A. Correct.

21 Q. And, Representative, during redistricting the  
22 Redistricting Committee created a policy to not split  
23 reservations; is that right?

24 A. That has been a standing policy for many years.

25 Q. And during this year's redistricting at least the

1 committee chairman repeated this policy?

2 A. Yes.

3 Q. Numerous times?

4 A. Yes.

5 Q. And you're familiar with House Subdistrict 4A as  
6 you testified in your direct, right?

7 A. Yes.

8 Q. And Subdistrict 4A follows the reservation's  
9 boundaries, right?

10 A. Correct.

11 Q. In fact, it precisely follows the reservation's  
12 boundaries, right?

13 A. Yes.

14 Q. The lines of HD 4A do not deviate from the lines  
15 of the reservation, right?

16 A. Correct.

17 Q. And as a representative during the redistricting  
18 process you also learned about other redistricting  
19 principles, correct?

20 A. Yes.

21 Q. And so respecting political boundaries is a  
22 redistricting principle, right?

23 A. Yes.

24 Q. A traditional redistricting principle.

25 A. Yes.

1 MS. KELTY: I have no further questions.

2 JUDGE ERICKSON: Thank you. Redirect from  
3 the movants?

4 MR. SANDERSON: Yes. We're going to need to  
5 show a video here for a second.

6 **REDIRECT EXAMINATION**

7 **BY MR. SANDERSON:**

8 Q. Representative Jones, you were asked about  
9 document 21-1 and that was a presentation on  
10 redistricting to the North Dakota Legislature by Ben  
11 Williams from the National Council of State  
12 Legislatures, correct?

13 A. Yes.

14 Q. And that was on August 26, 2021, correct?

15 A. The document is dated that and I just don't  
16 recall meeting in August to go over that. I thought  
17 maybe it was presented closer in the December time frame  
18 but I could be -- I could be off on that.

19 Q. Representative Jones, I'm going to show you  
20 briefly a video from the presentation Attorney Williams  
21 presented to the Redistricting Committee on August 26,  
22 2021, and then I want to ask you a few questions about  
23 it.

24 (Unidentified video played.)

25 Q. (Mr. Sanderson continuing) Now, Representative

1 Jones, I just played to you a portion of Attorney  
2 Williams' presentation to the Redistricting Committee  
3 regarding the Gingles factors and you heard him discuss  
4 the Gingles factors and the need for regression studies  
5 based on precinct data. You heard that testimony?

6 A. I did.

7 Q. And again, Representative Jones, are you aware of  
8 the Redistricting Committee ever performing any  
9 regression studies based on precinct data to meet the  
10 Gingles criteria?

11 A. No.

12 Q. Are you aware of any outside parties presenting  
13 any regression study analysis to the Redistricting  
14 Committee during their deliberations for creation of  
15 subdistricts in Districts 4 and 9?

16 A. No.

17 MR. SANDERSON: Representative Jones, I have  
18 no further questions. Thank you.

19 JUDGE ERICKSON: Thank you. From the State  
20 defendants?

21 MR. PHILLIPS: Your Honor, I would like to  
22 consult with my client.

23 JUDGE ERICKSON: You may.

24 MR. SANDERSON: Your Honor, before we move  
25 on to the State may I ask another question of

1 Representative Jones? I know I rested and passed but  
2 would ask the Court's permission to briefly address one  
3 other topic that I overlooked.

4 JUDGE ERICKSON: Any objection from the  
5 State defendants?

6 MR. PHILLIPS: No objection.

7 JUDGE ERICKSON: From the intervenors?

8 MS. KELTY: No objection.

9 JUDGE ERICKSON: You may.

10 Q. (Mr. Sanderson continuing) Representative Jones,  
11 you also attended -- during the time you attended the  
12 subdistricting committee meetings, were you also aware  
13 that North Dakota Legislative counsel was present at  
14 those meetings?

15 A. Yes.

16 Q. Okay. And during one of the meetings Legislative  
17 Council Attorney Clair Ness spoke to the committee about  
18 the Gingles factors. Were you present during that?

19 A. Yes.

20 Q. I'd like to play a brief video for you from a  
21 Redistricting Committee hearing in this matter.

22 (Unidentified video played.)

23 MS. KELTY: Just asking for a bit of  
24 foundation to verify who's speaking in this video.

25 JUDGE ERICKSON: Just a second. Okay. I

1 think the objection is it's not clear who was speaking.  
2 I suspect I know but it's not my position to make that  
3 finding so do you want to clarify who was actually  
4 asking the question of Miss Ness?

5 Q. (Mr. Sanderson continuing) And, Representative  
6 Jones, do you recognize the representative that asked  
7 the question of Legislative Council Attorney Clair Ness?

8 A. Yes, I do.

9 Q. And who was that individual?

10 A. Representative Austen Schauer.

11 Q. And was Representative Schauer a member of the  
12 Redistricting Committee in 2021?

13 A. Yes.

14 Q. And the video we're seeing, is that a legislative  
15 Redistricting Committee meeting that occurred in 2021?

16 A. Correct.

17 Q. Okay. And so we'll replay the video from the  
18 start for clarification but the video's going to show  
19 Representative Schauer asking a question regarding the  
20 Gingles factors to Legislative Council Attorney Clair  
21 Ness.

22 (Unidentified video played.)

23 Q. (Mr. Sanderson continuing) And, Representative  
24 Jones, my follow-up question there, are you aware of  
25 Legislative Council ever performing any analytical data

1 on prior voting or precinct voting in Districts 4 and 9  
2 and presenting that to the Redistricting Committee at  
3 any time?

4 A. No. I'm not aware of any of that being  
5 presented. And I asked multiple times if that had been  
6 done and I was assured it had not been done.

7 Q. And when you say you'd asked, who did you request  
8 whether voting data had been compiled for the  
9 Redistricting Committee?

10 A. Members of the Redistricting Committee.

11 Q. Okay. And when you said had that been done, were  
12 you referring to whether Legislative Council had  
13 performed those analyses for the Redistricting  
14 Committee?

15 A. Correct.

16 Q. And your understanding is Legislative Council  
17 never performed any past voting data or precinct data  
18 historical elections in Districts 4 and 9 for the  
19 Redistricting Committee?

20 A. Correct.

21 MR. SANDERSON: I have no further questions.  
22 Thank you.

23 JUDGE ERICKSON: Thank you. From the State  
24 defendants?

25 MR. PHILLIPS: Your Honor, if we could?

1 JUDGE ERICKSON: You may.

2 MR. PHILLIPS: Thank you. Your Honor, I do  
3 have a few questions.

4 JUDGE ERICKSON: You may.

5 MR. PHILLIPS: Just a few questions.

6 **RECROSS-EXAMINATION**

7 **BY MR. PHILLIPS:**

8 Q. Did you attend all three public meetings of the  
9 Interim Tribal and State Relations Committee?

10 A. I assume you're asking about this year 2021-2022?  
11 Yes, I have.

12 Q. You attended all three?

13 A. Yes.

14 Q. Did you attend all six public meetings of the  
15 Interim Redistricting Committee?

16 A. No.

17 Q. Did you attend both meetings of the Joint  
18 Redistricting Committee?

19 A. I believe I did towards the end, the two of them  
20 that I did attend.

21 Q. Do you know which ones?

22 A. I do not other than it was the last two at the  
23 end of the process.

24 Q. There was some discussion in your testimony  
25 earlier and a video where Clair Ness was speaking. Do



1 you remember that?

2 A. Yes.

3 Q. Have you ever talked to Clair Ness about analyses  
4 that she may have run?

5 A. Yes.

6 Q. You have spoken with her?

7 A. Yes.

8 Q. When did you speak with her?

9 A. I can't say exactly the time but it was during  
10 this time when we were working on this stuff to find out  
11 what had been done.

12 Q. You don't remember the time that you spoke with  
13 her?

14 A. I believe I already said no, I do not know  
15 specifically the time.

16 Q. You'd indicated earlier that someone told you  
17 that Legislative Council did not perform a data  
18 analysis; is that correct?

19 A. Yes.

20 Q. Who told you that?

21 A. I was talking to Austen Schauer and I was talking  
22 to the chairman of the committee.

23 Q. Did they tell you whether they had spoken with  
24 Clair Ness or anyone else with Legislative Council?

25 A. I don't recall.

1 MR. PHILLIPS: Thank you. No further  
2 questions.

3 JUDGE ERICKSON: From the intervenors?

4 MS. KELTY: Could I have one moment, Your  
5 Honor?

6 JUDGE ERICKSON: You may.

7 MS. KELTY: Thank you. No further  
8 questions, thank you.

9 JUDGE ERICKSON: Thank you. You may step  
10 down, Representative Jones.

11 MR. JONES: Thank you.

12 \* \* \*

13 (Further proceedings reported but not  
14 transcribed herein.)

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**CERTIFICATE OF REPORTER**

I, Kelly A. Kroke, a duly appointed  
Registered Professional Reporter;

DO HEREBY CERTIFY that I reported in  
shorthand the foregoing proceedings had and made a  
record at the time and place indicated.

I DO HEREBY FURTHER CERTIFY that the  
foregoing and attached (37) typewritten pages contain an  
accurate partial transcript of my shorthand notes then  
and there taken.

Dated this 29th day of November, 2022.

/s/ Kelly A. Kroke  
KELLY A. KROKE - RPR, RMR  
United States District Court Reporter  
District of North Dakota  
Eastern Division