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

3

   REPUBLICAN PARTY OF NEW MEXICO,
4 et al.,

5   Plaintiffs,

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

7 MAGGIE TOULOUSE OLIVER,
   et al,
8
           Defendants.
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                    TRANSCRIPT OF PROCEEDINGS
13
                     September 27, 2023
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   HEARD BEFORE:
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           THE HONORABLE FRED VAN SOELEN
20

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   TRANSCRIBED BY:
22
           PAUL BACA PROFESSIONAL COURT REPORTERS
23   500 4th Street, Northwest, Suite 105
           Albuquerque, New Mexico 87102
24
           **Unless provided, spellings of all names
25   are phonetic.

A P P E A R A N C E S

FOR THE PLAINTIFFS:

   MR. CARTER HARRISON
   MR. MISHA TSEYTLIN
   MS. MOLLY DIRAGO

FOR DEFENDANT LUJAN GRISHAM:

   MS. HOLLY AGJANIAN

FOR DEFENDANT TOULOUSE OLIVER:

   MR. PETER AUH

FOR THE LEGISLATIVE DEFENDANTS:

   MR. RICHARD OLSON
   MS. SARAH SANCHEZ
   MR. LUCAS WILLIAMS
   MS. ANN TRIPP

I N D E X

1   TRANSCRIPT OF PROCEEDINGS

2   THE COURT: Good morning, ladies and

3   gentlemen. Thank you all for your patience in

4   getting or technological issues solved. We have a

5   call in to work on the temperature and bring it down

6   a little bit. Apparently, that's controlled

7   somewhere completely different from here, so...

8   Let me call the case. This is in

9   Lea County Cause Number CV-2022-041.

10   I'll go ahead and let counsel announce

11 their presence for their apparently. Go ahead. For

12 the plaintiffs.

13   MR. HARRISON: Yes, your Honor. For the

14 plaintiffs, Carter Harrison, Misha Tseytlin and Molly

15 DiRago.

16   THE COURT: All right. And for the

17 executive defendants.

18   MS. AGJANIAN: Good morning, your Honor.

19 Holly Agjanian on behalf of Governor Michelle Lujan

20 Grisham (inaudible).

21   THE COURT: I guess if I was going in order,

22 I would have started with the secretary of state.

23   MR. AUH: Good morning, your Honor. Peter

24 Auh on behalf of the secretary of state.

25   THE COURT: All right. And for the

1 legislative defendants.

2   UNIDENTIFIED MALE: Your Honor, Richard

3 Olson, Sarah Sanchez, Lucas Williams and Ann Tripp on

4 behalf of the legislative defendants.

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

6   We probably need to start with the

7 motions for a stay that had been filed. I think the

8 legislative and executive defendants both filed

9 motions.

10   For the legislative defendants, is there

11 anything else that needs to be raised on that? I

12 think the Supreme Court has ruled on that; is that

13 correct?

14   MS. SANCHEZ: Your Honor, this is Sarah

15 Sanchez on behalf of the legislative defendants.

16   In connection with the filing of the

17 writ petition on behalf of legislative defendants

18 yesterday afternoon, we did not file a motion for

19 stay. We did file a notice of automatic stay under

20 the statute --

21   THE COURT: Okay. I apologize.

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

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

24   MS. SANCHEZ: That's fine, your Honor,

25 there's been a lot going on.

1   THE COURT: And so you may address that.

2   MS. SANCHEZ: Sure, your Honor. Absolutely.

3 Thank you.

4   That would, by the text of the statute

5 and the narrow issue on which that particular writ

6 petition was filed just on the legislative privilege

7 issues that the Court addressed in its letter

8 decision yesterday, the automatic stay, as we

9 understand it, under the statute, when the state

10 takes an appeal or a writ of error, is -- only

11 applies to the specific order decision that is

12 being -- that we've asked the Supreme Court to

13 review.

14   So we do not take the position that that

15 ought to stay these entire proceedings or inhibit in

16 any way us going forward with the trial today, but

17 that it would only affect the multitude, I suppose,

18 of motions, subpoenas, the discovery subpoenas, the

19 trial subpoenas that are impacted within the scope of

20 the Court's decision letter unless and until we do

21 hear some guidance from the Supreme Court, they take

22 up thank you writ.

23   But as far as everything else before

24 your Honor, the parties are prepared to present these

25 three days. We are ready to go forward.

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

2   Mr. Harrison.

3   MR. HARRISON: Yes, your Honor. So I -- we

4   certainly agree the trial should go forward. And

5   Supreme Court, I think, on its order on the executive

6   defendant's petition made clear that the trial shall

7   go forward as scheduled.

8   We do not agree that there's an

9   automatic stay in place. The real significance of

10   that is the obligation of the subpoenaed legislators

11   to produce documents and then to appear at trial in

12   the interim before the Supreme Court does something.

13   We can -- I'm prepared to talk a little

14   bit about that. I mean, the -- if -- if the answer

15   from the legislative defendants is going to be that

16   these folks are not going to produce or sit for

17   testimony kind of regardless, then obviously it would

18   be more -- I can go into some of these details more

19   in a motion for I don't want to say sanctions, but a

20   motion for an adverse inference.

21   What we'll say is that we're fairly

22   confident there's not an automatic stay in place of

23   any part of this. So the rule of civil proceeding

24   governing stays is 1-62.A, more broadly, 1-62. And

25   they have cited Subdivision A, which provides that

1   when a government official or entity, quote, the

2   taking of an appeal shall, except as provided in

3   Paragraphs A and C of this rule, operate as a stay.

4   Well, now you go up into Paragraph A of

5   that rule and it says, quote, unless otherwise order

6   by the Court, an interlocutory of final judgment in

7   an action for an injunction shall not be stayed

8   during the period of its entry and until an appeal is

9   taken during the pendency of an appeal.

10   So all that rules means is that when you

11   get a money judgment against the government or a

12   government official, you can't go collect on it while

13   it's on appeal. It doesn't have any application

14   here.

15   Secondly, to the extent that they've

16   cited also a statute that has plainer language, and

17   that's at Section 39-3-23, that statute has been

18   expressly held to -- in this exact context to

19   conflict with the rule and thus be overruled by the

20   rule under what the Supreme Court calls its Ammerman

21   Doctrine, which is that Supreme Court has under its

22   power superintending control gets to regulate

23   procedure and not the legislature.

24   The case finding that was City of

25   Albuquerque versus Jackson, 1984-NMCA-062. And I'll

1   quote from Paragraph 5. Quote, Section 39-3-23

2   provides that the city's appeal automatically stayed

3   Judge Franchini's decision. This being a procedural

4   matter, however, the statute is not to be enforced

5   contrary to a Supreme Court rule. Civil procedure

6   Rule 62.E provides that an appeal by the state or any

7   political division operates in the stay except as

8   provided in Subdivisions A and C, which of course was

9   the argument that I just made, so I won't reiterate,

10   as it was made through that case.

11   So second -- and, again, that's one

12   perfect adequate on its own argument. Second,

13   Rule 1-62.E, in addition to incorporated the

14   injunctive relief carved out from Subdivision A, by

15   its terms, refers to, quote, unquote, appeals by

16   government entities, not petitions for writ of error.

17   And if -- well, maybe in some context,

18   you say, well, they say appeal, but they mean --

19   counted everything, you filed within an appellate

20   court. But if you look down, your Honor, in

21   subdivision F of 1-62, deals specifically with writs

22   of error, it's titled writs of error. So it wouldn't

23   make any sense for the rule to be loosey-goosey

24   losing appeal in a different situation to mean

25   appeals or petitions for writ of error. So by its

1   terms even, it doesn't apply.

2   So third, there's the appellate rule

3   governing writs of error. So the rule that governs

4   what they filed at the Supreme Court. And that's

5   Rule 12-503 has a specific subdivision on stays. And

6   that's Subdivision M -- Subdivision M, as in Molly.

7   It says, quote, on issuance of the writ -- so what

8   you do is you file a petition for writ of error and

9   the Court of Appeals, and really probably should be

10   the Court of Appeals, issues the writ and then

11   dockets your appeal on the general calendar.

12   So on issuance of the writ, and, of

13   course, writs are things issued by a court, what they

14   file as a petition, on issuance of a writ, a party

15   seeking a stay of the order that is a subjected of

16   the writ of error or a stay of the proceedings

17   pending an appeal shall first seek an order from the

18   district court. And any party may, thereafter, seek

19   appellate review of the district court's ruling under

20   12-205, 12-206 or 12-207. That, again, is the rule

21   governing what they filed in the -- you know,

22   petitions for writs of error.

23   Of course, so that contemplates two

24   things that haven't happened here, which is the

25   appellate court grants the writ, and then secondly,

1   they go to the district court and ask for a stay here

2   and your Honor says no. Then they get to appeal that

3   decision. Obviously that's a far, far cry from a,

4   quote, unquote, automatic stay.

5   And then, more generally, a writ of

6   error is close to the right procedure, but A, it

7   normally would be filed in the Court of Appeals,

8   because that's the Court that has appellate

9   jurisdiction over -- direct appellate jurisdiction

10   over this case. But, you know, I -- that, I don't

11   think is necessarily for this Court to decide. But I

12   will also note that a mere order compelling discovery

13   has been held repeatedly to not actually be a

14   collateral order appealable through a writ of error.

15   They've got to be held in contempt first. And I'll

16   quote one of the, again, myriad cases out there

17   standing for this proposition.

18   This is King versus Allstate Insurance

19   Company, 2004-NMCA-031, and I'm quoting from

20   Paragraphs 18 and 19. Quote, an order compelling

21   discovery is not a collateral order. And then

22   ellipsis, a party who seeks to challenge an order

23   granting a motion to compel discovery or an order

24   denying a request for a protective order with respect

25   to discovery materials can either apply for an

1   interlocutory appeal or refuse to comply, be held in

2   contempt, and file an appeal as of right from both a

3   contempt judgment and the underlying discovery order

4   on which the contempt was based.

5   So there's a lot of reasons, your Honor,

6   that, you know -- and the only reason it matters to

7   us, if they're not going to have the folks we

8   subpoenaed produce the documents that we subpoenaed

9   and sit for -- to give testimony, it's too late for

10 us to depose them of course at this point, you know,

11 so be it. But they don't get to go through that and

12 have no -- no substantive case consequences for it.

13 We think that an adverse inference would be

14 appropriate and that they can't hide behind a

15 so-called automatic stay to justify noncompliance

16 with the subpoenas in the meantime.

17   And, of course, we'd like the Court to

18 decide this on the merits, and we think we have

19 plenty of evidence to make our case on the merits.

20 And this would go to prong one of Justice Kagan's

21 multi-prong test, the intent finding. But we think

22 that if we do a full-scale refusal to comply with the

23 subpoenas, it would be appropriate for the Court to

24 draw an adverse inference or default finding on prong

25 one. Although we, of course, would still want fact

1　finding, and we believe that we make a strong

2　evidentiary showing on prong one with the literally

3　three pages of discovery production we have because

4　they include -- they include the text from

5　Ms. Stewart, and then of course we have things that

6　we received outside of discovery, namely, public

7　statements made on Twitter to the Associated Press,

8　et cetera, that we've come across without the need

9　for discovery.

10　　　　　So for those reasons, your Honor, we

11　contend that there is no automatic stay in place.

12　　　　　THE COURT: All right. Thank you.

13　　　　　Ms. Sanchez.

14　　　　　MS. SANCHEZ: Thank you, your Honor. So a

15　few things. This is the first time that I've heard

16　the cases cited by Mr. Harrison, so I don't know what

17　they say. But I do know what the statute and the

18　rules say, and the statute and the rules are pretty

19　clear.

20　　　　　Section 39-3-23 is the statute, it's the

21　automatic stay statute, it says, quote, when the

22　appellant or plaintiff in error is the state, county,

23　or a municipal corporation, the taking of an appeal

24　or suing out of a writ of error operates to stay the

25　execution of the judgment, order or decision of the

 1 district court without bond.

 2   And that's a pretty clear statement by

 3 statute. There's no notes in the statute that it's

 4 been overruled or abrogated in any way.

 5   And we notify, of course, the Supreme

 6 Court of the fact that we have done that in our writ

 7 petition. There has been no indication from them

 8 that they disagree or believe that that isn't

 9 effective, and no direction to this Court otherwise.

10   Second of all, this is not simply an

11 order compelling discovery. What is at issue here,

12 as I know the Court knows, is a matter of first

13 impression, construing and applying a constitutional

14 privilege, one of the only privilege that is

15 enshrined in our state Constitution and determining

16 what the scope of that privilege is and how it

17 applies to legislators who are being subpoenaed for

18 extensive documents, communications, testimony, both

19 in discovery and at trial.

20   And we appreciate the Court's

21 endeavoring to review the very large amount of

22 material that was submitted by both parties in that

23 regard and to decipher to the Court's judgment where

24 those lines R and we respect that. But we also know

25 that this is of such paramount importance to the

1   legislature as an institution, to the functioning of

2   that branch of government, that our courts have never

3   before had occasion to weigh in on, despite 40 years

4   of redistricting litigation in this state. This is

5   the first time we've seen this issue need to be

6   litigated because the plaintiffs have decided to

7   invade the e-mail in-boxes, text messages and other

8   accounts of the legislators who worked to pass this

9   enacted legislation.

10   So we think it's perfectly appropriate

11   to seek the Supreme Court's review. The Supreme

12   Court has made it clear in their amended order issued

13   in August, that this issue is going to come back to

14   them, this case is going to come back to them. Under

15   Rule 503, the Supreme Court has jurisdiction over

16   writs of error. We thought that was the most

17   efficient, effective way to get final word on what

18   the boundaries of this privilege are before we

19   proceed with that case if, in fact, legislators can

20   be compelled to be questioned about their work on

21   legislation, which I would contend to the Court is

22   exactly what the constitutional provision in Article

23   IV, Section 13, prohibits. They shall not be

24   questioned.

25   But we believe it's appropriate to

1   proceed with everything else that we're -- the

2   parties are ready to present to the Court and await

3   word from the Supreme Court if they're going to give

4   direction on this issue.

5   There is case law, including from the

6   United States Supreme Court, contrary to plaintiffs'

7   counsel's representation, that do not need to wait

8   for a contempt order or to have further proceedings

9   on this issue in this court before seeking review.

10   And I would point the Court to Eastland versus United

11   States Servicemen's Fund, 421 U.S. 491. It's a 1975

12   United States Supreme Court case. And there's a

13   quote from concurrence to that case speaking

14   specifically to issue requiring legislators to

15   negotiate protective orders or to suffer contempt

16   proceedings diminishes the purposes of the

17   legislative privilege. In addition, nonparties to

18   the litigation should not be expected to resist the

19   subpoena by placing themselves in contempt, end

20   quote, before having a determination on the scope of

21   this privilege, particularly considering that this is

22   the first court to weigh in on the issue.

23   So we respectfully ask that the Court

24   honor the automatic stay that has been effectuated by

25   statute and by rule. There's no exception in the

1   rule for this particular situation. This is a

2   political division. We represent the pro tem and the

3   speaker on behalf of the legislative as a body. And

4   we sought the review on that behalf. And that

5   triggers the protections both of Rule 62 and 39-3-23.

6   Thank you.

7   THE COURT: All right. Thank you.

8   As far as the motion for a stay, I think

9   that there are a couple things. I don't think the

10   rule or the statute are as clear on that granting of

11   an automatic stay or that would apply in this case,

12   which is -- I tend to agree with plaintiffs, that

13   it's more of an evidentiary or discovery type ruling

14   and not any type of judgment or interlocutory order.

15   So I'm not completely certain -- I'm not

16   certain it doesn't apply, but I'm not certain it does

17   apply in this case.

18   I also have some questions about

19   individual members of the legislature are actually

20   government entities. I know they are here on

21   behalf -- well, on their own behalf, but I just

22   don't -- I'm not certain that they represent the

23   entire body in this case.

24   And so -- and more practically, this

25   issue is before the Supreme Court now. I know

1　they've ordered expedited briefing on the matter.　I

2　know that plaintiffs have already filed their

3　response.　I think the more practical approach is to

4　proceed.　If the Supreme Court does issue a ruling

5　that -- that my decision or my ruling on that issue

6　is in error, I'm sure they will let us know.

7　　　　　　　I think if there has been evident

8　presented at that time that would fall under that

9　ruling, I think that I'm and I think we all are

10　bright enough to figure out how to put aside or set

11　aside that evidence.

12　　　　　　　And so as of right now, I think that the

13　practical -- and on top of that, I think the Supreme

14　Court has made it very clear that they want this

15　proceeding to go forward.　It's -- it would be a lot

16　easier to set aside evidence that may be should not

17　have come in, if that's what the Supreme Court

18　decides, rather than not allow and then later on find

19　out that it should have come in.

20　　　　　　　So with deadlines that we're on under

21　the Supreme Court, I think that for all those

22　reasons, I'm going to deny the motion for a stay.

23　　　　　　　For the executive defendants, this is

24　one I meant to before, do we need to address that

25　anymore?

1   MS. AGJANIAN: No, your Honor. We can

2   withdraw that motion. That's just fine.

3   THE COURT: Okay. So yeah, I think it -- in

4   all of these matters, unless and until the Supreme

5   Court tells me that this matter is stayed, we're

6   going to proceed forward.

7   Okay. So next let's bring up the most

8   recent motion that was filed to exclude Dr. Chen's

9   report. I know you filed a notice of brief will do

10   you want to speak any more on that?

11   UNIDENTIFIED MALE: Thank you, your Honor.

12   We filed the motion to exclude Dr. Chen on the basis

13   that his simulation analysis included a factor that

14   rendered them not a neutral baseline.

15   Therefore, under his own testimony at

16   the deposition and what Justice Kagan said about

17   (inaudible) analysis, his testimony is not helpful to

18   the Court.

19   Now, we are, of course, at a bench

20   trial. You know, I'm happy to argue that full

21   motion. You know, the other way to approach it would

22   be to have him, you know, provide his testimony, to

23   ask him about it, then your Honor could decide at

24   that point whether our objections to his

25   admissibility, his testimony makes sense. So, of

1   course, I would take the Court's guidance as to how

2   to court would like to proceed, as it is a bench

3   trial.

4   THE COURT: Before I ask for a response, I

5   was thinking maybe -- is that not the better way --

6   if you object to the foundation for his testimony,

7   wouldn't it be a better way just to object before he

8   puts it on, you know, as you stated, asking questions

9   about it and/or isn't it more towards argument about

10 how relevant his testimony would be in his report.

11   UNIDENTIFIED MALE: Certainly, one could

12 look at the objection that we raised as one confusing

13 to relevance. However, when you have, as we

14 respectfully submit, a partisan factor explicitly and

15 admittedly put into a simulations analysis, our

16 respectful submission that it just destroyed the

17 whole simulation abdominal. It's not about -- it's

18 not about what weight to give to it, it's just the

19 whole simulation analysis goes.

20   In fact, I didn't hear my friends in

21 their papers dispute that general proposition that,

22 in fact, if we could convince the Court that the oil

23 well considerations are a partisan factor that

24 Dr. Chen's testimony could then be admitted, their

25 point was that those are not partisan considerations.

1   We can argue about that. But I didn't hear any

2   objection (inaudible) papers to kind of a general

3   principle approximately that if we, in fact,

4   establish our core point on that motion that the oil

5   well considerations are just a partisan consideration

6   and that Dr. Chen could offer any useful testimony to

7   this Court based on his report.

8   THE COURT: All right.

9   Legislative defendants.

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

11   While I disagree that this is an

12   evidentiary foundation issue, we have provided in our

13   response to that motion the foundational facts upon

14   which the instruction to Dr. Chen relied in taking

15   into account oil and gas considerations.

16   I think the fair thing that has been

17   said is there will be a dispute of fact as to whether

18   that instruction was based on a nonpartisan criteria

19   or, as the plaintiffs contend, a partisan criteria.

20   Under the New Mexico law that addresses

21   those issues, where you have a solid foundation that

22   is testable, that goes to the weight, the evidence

23   should come in and the fact finder should give it the

24   weight that the fact finder ultimately decides the

25   appropriate.

1   THE COURT: All right. Executive

2   defendants, do you wish to weigh in, at all.

3   MS. AGJANIAN: No position, your Honor.

4   THE COURT: Secretary of state?

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

6   THE COURT: Okay. Anything else.

7   MR. OLSON: No, your Honor.

8   THE COURT: Okay. I -- I tend to agree also

9   that it should come in. I think that if you want to

10 obviously make objections to the foundation when he

11 testifies, you can do that. But I also tend to agree

12 that it's more a weight of the evidence argument.

13 Who they are putting forward as their expert, they'll

14 be disagreements about that, and I think that's how

15 the Court should approach that, is it's a

16 disagreement about the weight of the evidence.

17   So I'm going to deny the motion to

18 exclude his report at this time.

19   Next, what I have, I issued the decision

20 letter on the legislative privilege issue. I did it

21 that way because, as I stated, it affects so many of

22 the other outstanding motions and issues of what type

23 of evidence will be presented, that after I issued

24 it, I probably thought, well, that doesn't -- I don't

25 know if it helps the parties all that much because

1 you still have your questions on the individual

2 motions.

3   So I don't want how you want to go

4 through with this. Do you want the address your

5 individual motions, or how do you want to address

6 your motions?

7   MR. HARRISON: I actually, your Honor,

8 (inaudible) remarkably good job. I mean, there are

9 still some margin cases. For example, we subpoenaed

10 two of the PRC members, the citizen redistricting

11 committee, members Lisa Curtis and Michael Sanchez.

12 And the legislative defendants objected on their

13 behalf saying that legislator CRC member committees

14 are within the privilege.

15   I think our -- I think under your

16 Honor's framework, the analysis would be is the CRC

17 part of -- I believe your Honor used the term part of

18 the legislative process. So I think that specific

19 issue could use an answer.

20   And then we have a factual ambiguity

21 about Ms. Leann Leith, who we had previously been

22 under the -- I had previously been under the

23 understanding was the paid -- the legislatively paid

24 staffer for the speaker, and we've since received

25 information, and I'm promising this is true, but I

1 now no longer believe that's the case. I believe she

2 was paid by the speakers PAC, and was a political

3 consultant, which to me would make the difference

4 between her being within the privilege under your

5 Honor's framework and not being within the privilege

6 under your Honor's framework.

7   So that's a factual question that we

8 don't necessarily need the Court for but we need

9 facts for.

10   But for the most part, I actually

11 thought that it answers the legal questions. Now,

12 procedurally, we're in the position of, you know, we

13 subpoenaed, admittedly, a lot of documents from a lot

14 of people. And we're now at first day of trial. I

15 don't know if the -- the few folks we've gotten to

16 ask have told us candidly that they didn't collect

17 the documents requested. We didn't get a privilege

18 log, which normally would be -- we would collect

19 privilege log things and so then you always -- you

20 have them if the privilege assertion the overruled.

21   So I didn't -- I actually think the

22 decision letter did a pretty good job of answering

23 the vast majority of the questions out there legally.

24 It's just the question of our -- you know, as I sit

25 here today, my understanding is that the legislative

1 defendants intend to kind of go all in on their

2 appeal to the Supreme Court and not produce in the

3 meantime. I don't know that for a 100 percent fact.

4 I don't know if it's been extended to -- I've reached

5 out to the lawyers for the consultants. I don't know

6 if they're planning on doing the same thing. But I

7 think the main questions that remain honestly of ones

8 of there clearly need to be production under the

9 Court's order unless the Supreme Court disagrees with

10 the Court, and how are we going to get it. And the

11 testimony version of that same question, which is are

12 they going to show up.

13   THE COURT: Okay. All right.

14   Legislative defendants, Ms. Sanchez.

15   MS. SANCHEZ: Thank you, your Honor. You

16 know, I think part of the issue that we're dealing

17 with, as a practical matter, your Honor, is that the

18 vast number of subpoenas that plaintiffs received and

19 issued in this case, each of within contains dozens,

20 if not hundreds of individual document requests.

21   To take the time to parse through what

22 of those requests might be protected under the

23 Court's decision letter, and what pieces of it might

24 now, when you're talking about (inaudible) word

25 searches or periods of time and who was communicating

1 with whom, I think just as a practical matter, would

2 be incredibly difficult for the parties, even if we

3 were able to agree on how to apply that, would just

4 as a practical matter be very difficult.

5   One aspect of this that I want to make

6 clear for the record is that we're not -- in response

7 to some of the Court's comments about, you know, as

8 evidence starts to come in that turns out to be off

9 limits, we can exclude that. There's into jury.

10   We're not just talking about

11 admissibility problem, your Honor, when we talk about

12 a privilege, a privilege against disclosure. Once

13 privileged material, information, communication, has

14 been disclosed, it's out of the bag, the genie is out

15 of the bottle. And the harm done, and this is part

16 of what we presented to the Supreme Court in the writ

17 petition and why we felt like that extraordinary

18 relief was needed, because once that disclosure has

19 been made, particularly if it's made in a public

20 circumstance, there's no getting that back. And

21 that's why it's so important to have guidance ahead

22 of time, before we know, not from just admissibility

23 standpoint, but from a disclosure standpoint, what

24 needs to be disclosed.

25   And that permeates throughout all of the

1 subpoenas to all of these individuals, whether they

2 be staff, consultants, legislators or members of the

3 CRC.

4   The CRC, for example, is a creation of

5 statute. The statute that created the citizens

6 redistricting committee specifies that their work is

7 to essentially take place of what would normally be

8 an interim legislative committee, that goes around

9 the state, develops proposed plans, recommends them

10 to the legislature, and then issues up to the

11 legislature whether or not to take those

12 recommendations or not of.

13   And the substitute actually specifies

14 that they step into that exact position with respect

15 to how their work is treated. That goes to the heart

16 of the legislative process. Even if those

17 individuals on the committee obviously were not

18 themselves elected lawmakers, they're there in a

19 legislative capacity preparing proposed legislation.

20 So obviously the public part of their work is public,

21 but the private communications that would normally be

22 covered by the legislative privilege, if they were

23 legislators, would be covered by that because of

24 their legislative role.

25   What we presented to the Court in much

1 of the briefing, we tried not to be too repetitive,

2 but these issues kept arising with every subpoena the

3 plaintiffs kept serving, is the analysis of when the

4 legislative privilege applies is really a functional

5 one that courts have applied.

6   In the states where they're looking at

7 speech and debate clauses like New Mexico's, they're

8 not looking at whose payroll are you on, who signs

9 your paycheck. They're looking at what is your role

10 in the legislative process. And I think the Court's

11 decision letter sort of touches on that in talking

12 about sort of roles -- you know, what was your role,

13 did you have an official role. But I think,

14 respectfully, that's a different analysis from who's

15 paying you, are you getting paid, who signs our

16 paycheck, who actually signed your employment

17 contract, if you have one. The question is what role

18 are you playing in the process.

19   And that's part of what we need guidance

20 from the Supreme Court on, is is it going to be a

21 functional approach, as these other courts have

22 taken? Is it going to be a paycheck question? Is it

23 going to be something else? And we don't know that.

24 But the risks inherent of making disclosures of what

25 turns out to have been privileged information, not

1   just for these legislators involved in this case, but

2   for the in the feature for folks to know what's

3   privileged and what's not, is critical to their

4   functioning.

5   So those -- I think from a practical

6   standpoint and from a legal analysis standpoint, it

7   may just not be possible in the time that we have

8   here to apply the Court's reasoning to the 80

9   something, I haven't added them all up, to the

10   subpoenas that we talked about. And then, from the

11   standpoint of the trial subpoenas, compelling

12   testimony at trial, we face the same problem with a

13   disclosure, again, apart from the admissibility

14   issue, but a disclosure of privileged information

15   that turns out to have been in error. The harm from

16   that is something that we can't repair, so we really

17   do need guidance ahead of time. We can talk about

18   how to handle that from a practical standpoint here,

19   but that is why we have taken the repetition, that is

20   why we understand the notice of stay to apply to this

21   decision of the Court. It's clearly not just

22   applicable to final judgments.

23   THE COURT: All right. You said you didn't

24   ask the Supreme Court for a stay, correct?

25   MS. SANCHEZ: We notified them that we you

1   understand it to have been -- to triggered a

2   automatic stay under the statute. I haven't checked

3   my e-mail in the last few minutes, but I don't -- I

4   haven't seen --

5   THE COURT: Let me check mine.

6   MS. SANCHEZ: -- that there's been a

7   response from them on that particular issue.

8   THE COURT: I don't see anything yet. Just

9   the last thing I see is the responses filed by the

10 plaintiffs.

11   So all right, thank you.

12   MS. SANCHEZ: Thank you.

13   THE COURT: Executive defendants, any input,

14 secretary of state?

15   MR. AUH: No, your Honor.

16   THE COURT: Okay. Anything else?

17   MR. HARRISON: Just very, very briefly. So

18 I -- I didn't necessarily hear, other than again, the

19 CRC specific discrete CRC issue that we teed up,

20 necessarily anything saying that we needed more

21 clarity from your Honor. I think what the

22 legislative defendants want is clarity from someone

23 other than your Honor, from the Supreme Court on

24 this.

25   In terms of, you know, burden and

1   practicality of compliance, we served the subpoenas

2   back in July, and, you know, and as I mentioned, we

3   offered repeatedly to narrow them to the defendants,

4   the lawyers for every consultant, you know, to

5   negotiate to try and get -- that's how we got some

6   production from CCP, by dropping three-fourths, you

7   know, or more of what we subpoenaed them to do. We

8   dropped our entire 30(b)(6) request and every other

9   document, except for communication from legislators.

10 And they said, "Okay, fine."

11   And so we were ready to deal (inaudible)

12 defendants have taken a -- a position that privilege

13 is both absolute in the technical sense and huge in

14 the practical sense. And the only thing I'd like to

15 address is the problem with this, quote, unquote,

16 analysis that then goes back to, you know, the

17 problem -- the term "consultant." Anyone you consult

18 is a consultant. And the problem is now, frankly,

19 anyone that, for example, Mimi Stewart would care

20 enough to talk to about the SB-1 process, she then

21 can later say is obviously consulting with them, "As

22 part of my duties as a legislator."

23   So we don't think that's a workable

24 standard. We disagree that that's some kind of

25 majority approach anywhere. Frankly, this kind of

1 whole line of expanding this legislative privilege

2 outward into the world beyond the legislature and its

3 staff has been this one Abbott case out of Fifth

4 Circuit, which is kind of an outlier among the larger

5 bed of case law.

6   Thank you, your Honor.

7   THE COURT: All right. Well, if you're

8 asking for a specific ruling on the CRC, I can give

9 you that. I think that they are part of the

10 legislative process. They were created by the

11 legislature for this very purpose of coming up with

12 proposed districting. So I think that that is

13 definitely a part of the legislative process when it

14 comes to -- so I think they would fall under

15 legislative privilege.

16   More broadly, Ms. Sanchez and the

17 legislative defendants, I don't want to poo-poo your

18 concerns about this. I really understand what you're

19 saying, but my reading of case law from around the

20 country and other districts and jurisdictions that

21 have considered that issue, I put into my -- my

22 letter, I don't think it is an absolute privilege. I

23 think there have been states and cases where some

24 level of disclosure or some level of basically

25 forcing legislators to talk about their decision

1   making have been -- have been allowed or have been

2   required.

3   I think obviously legislative privilege

4   exists. Article IV, Section 13, I think is there.

5   And I think I incorporated it in my decision letter.

6   And I think really almost as a practical matter, I

7   think that's the best approach to take.

8   And so just to be clear, the way I view

9   it is anything, any communication, any of their

10 thoughts about the legislation that they passed are

11 privileged. And they can't be called to testify and

12 asked what their thoughts were during that process,

13 but any statements they made basically to the public

14 can be. So if they -- they held a press conference

15 or if they made a statement to what I would say is an

16 average citizen, if proper foundation is laid for

17 that, then that would come in, because I don't think

18 that is part of the legislative process that is

19 privileged under the New Mexico Constitution.

20   When it comes down to outside groups,

21 again, obviously their staff, other legislators --

22 the reason I talked about paid consultants, and what

23 I'm looking for is a formal relationship. I think

24 plaintiffs are correct, that if you look at it as

25 anybody a legislator talks to about this as part of

1 the process, then that would include everybody. That

2 would include, you know, constituents, that would

3 include citizens, someone stopping them on the street

4 and asking them about it. And I don't think that

5 that's necessarily what I think should be privileged.

6   And so I don't know about -- evidence

7 will have to be shown as to the role of Ms. Leith,

8 but if they were -- if they were paid by the

9 legislature or have some sort of formal role from the

10 legislature, I think that they would fall under

11 legislative privilege.

12   If they were just an advocacy group that

13 basically putting their two cents worth in, to me,

14 that's just like an average citizen putting their two

15 cents worth in, and therefore, they would not fall

16 under the legislative process.

17   So therefore, I don't know -- that's not

18 necessarily the answer you get. The Supreme Court

19 obviously is going to look at that. I think that

20 obviously they would understand the importance of

21 this and they'll probably give us a decision on that

22 as soon as -- as soon as they can.

23   MS. SANCHEZ: Your Honor, if I could just

24 ask for a brief clarification. And I'll also add one

25 clarification. And I appreciate the Court's

1 elaborating a little bit on your reasoning.

2   In the motion that we filed relating to

3 staff and consultants that was on August 14th, and

4 that was a motion to quash specifically subpoenas

5 that were served on Research & Polling, which is

6 Brian Sanderoff's job that had a formal contract with

7 the legislative council service to provide the

8 technical services that assist in preparing maps and

9 so forth and they're set up in the roundhouse and

10 actually provide the software that people use, as

11 well as Ms. Szczepanski, who is now a member of the

12 legislature, but at the time of redistricting she was

13 I believe the chief of staff for the speaker of the

14 house, and Ms. Leann Leith, I'm looking at our

15 motion, and we -- we noted that she's formally

16 employed by the house of representatives as a policy

17 advisor for the speaker of the house. So she had

18 a -- I truly don't know who signed her paycheck, but

19 she had a formal position with the house of

20 representatives and was there formally employed,

21 advising the speaker of the house. So I think that

22 falls within what the Court just identified as being

23 within the privilege under the Court's analysis.

24   As to the public type of statements that

25 the Court referred to, what I -- what I would ask for

1   clarification from the Court on is, is the Court

2   indicating that those statements, those

3   contemporaneous you statements to how you've defined

4   the public during the course of the legislative

5   process, those statements themselves I understand the

6   Court is deciding are not covered by the privilege

7   and may be admissible at trial if a proper foundation

8   is laid for them or if there's not an objection to

9   admissibility.

10   What is not entirely clear to me, and

11   maybe I might be missing something from the Court's

12   explanation or decision, is whether the legislators

13   can be compelled to be questioned about those

14   statements to the public, that the Court has defined

15   as statements to the public.

16   The statements themselves come in, we

17   understand that that would be the Court's ruling.

18   But what is not clear is if the legislators can be

19   compelled to sit for questioning about this.

20   THE COURT: And ask, "What were you thinking

21   when you said this or what was your reasoning?"

22   MS. SANCHEZ: Yeah. What were you talking

23   about, what were you thinking about, why did you say

24   this, you know, beyond just the communication that

25   exists.

1   THE COURT: My thought is no. The

2   statements will speak for themselves. But you can't

3   inquire into, you know, why did you say that or what

4   were you thinking when you said that. You know, I

5   think the statements have to speak for themselves.

6   MS. SANCHEZ: Okay. Thank you for that

7   clarification.

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

9   MS. SANCHEZ: Thank you.

10   THE COURT: As far as Research & Polling,

11   the other two, you do you want to address that?

12   MR. HARRISON: Yes, your Honor.

13   So Research & Polling, I would think, is

14   in a -- actually a very unique pox. So under your

15   Honor's ruling, I think they probably would count as

16   staff (inaudible) and then went and disclosed

17   Mr. Sanderoff who is the principal and the public

18   face of Research & Polling as an expert, which, you

19   know, we would say is unusual and waives attempt to

20   kind of use them as a sword while shielding his

21   factual involvement in the case. So that's a kind of

22   unique issue.

23   Ms. Szczepanski might -- with

24   Ms. Szczepanski and Ms. Leith, we would agree that

25   they're paid by the legislature under the Court's

1 (inaudible). We don't believe -- agree with the

2 Court, but we've got the Court's ruling and we want

3 to try to (inaudible) working with it. And so under

4 the Court's ruling, we would agree that if they're

5 paid by the legislature as part of legislatively paid

6 staff, like the -- in each house the majority and

7 minority each have their own staffer that is -- could

8 fairly be called a partisan, but are legislatively

9 paid. I believe that was Ms. Szczepanski. We'd like

10 an actual clarification of that in some way. But I

11 think they're right.

12   On Ms. Leith, I think they may be

13 incorrect. I think she may be a political person

14 paid just by the speaker's PAC, which is a large, you

15 know, political action committee.

16   THE COURT: How do you propose we resolve

17 that question?

18   MR. HARRISON: I mean, we -- it likely would

19 have been -- it certainly would have been something

20 we would have asked had she sat for a deposition, but

21 she declined. You know, we noticed her deposition

22 (inaudible) and she filed a notice of nonappearance

23 and declined. I mean, I would like to take her word

24 for it under oath. But I would say we expect

25 Ms. Leith to be a fairly important witness. The kind

1   of buzz that we're converting to admissible suggests

2   that she was important at the process of this

3   gerrymander.

4   THE COURT: All right. Well, let me just

5   ask, what was Ms. Leith's status during the

6   redistricting process?

7   MS. SANCHEZ: Well, I think as an advisor to

8   the speaker of the house and employed by the house of

9   representatives, she was integral to discussions with

10   staff -- with legislators and the process of

11   preparing legislation.

12   THE COURT: What was her official role? Was

13   she legislative aide?

14   MS. SANCHEZ: I think her official title was

15   policy advisor to the speaker.

16   THE COURT: Policy advisor to the speaker.

17   And Mr. Harrison brought up whether she was paid for

18   by the legislator or a packet, and do you think that

19   makes any difference?

20   MS. SANCHEZ: I don't, your Honor. I

21   haven't seen any --

22   THE COURT: Do you know which one it was?

23   Was she paid for by --

24   MS. SANCHEZ: I truly don't know the answer:

25   You know, I think we could -- over lunch, we could

1 get an affidavit or something to get some clarity on

2 that issue.

3   But I would submit to the Court that I

4 don't recall seeing any case law on legislative

5 privilege that is analyzing who signs the paycheck.

6 I think it's talking about what is their function.

7   Yes, if it's -- if it's somebody in off

8 the street or if it's somebody who flew in from some

9 D.C. group for the day to, you know advocate for a

10 position, I think that's very different than someone

11 who is working for the house of representatives on

12 behalf of the speaker in a legislative session. That

13 is pretty centrally a legislative role.

14   But I'm happy to get clarification on

15 some of these details for the Court. I don't want to

16 hold us up. I can probably do that over the course

17 of the day and get the Court (inaudible).

18   THE COURT: I think that would be helpful,

19 if we could get something just definitive on her

20 title and/or position. I'd like to know how she was

21 paid. I'm not sure that that is definitive because I

22 think it is more of a formal role issue, what role

23 did they play formally in the process. You know,

24 again, an outside advocacy group versus someone who

25 is engaged in some role, formal role to provide the

 1 information and expertise on the issue. So that

 2 would be helpful.

 3   MR. HARRISON: And my only additional idea,

 4 your Honor, is the legislative defendants did have

 5 Raul Burciaga, who is the head of the legislative

 6 council services, kind of the lead staffer for the

 7 legislature.

 8   Now, we had indicated that they were

 9 only going to use him for authentication, and so we

10 had indicated that, "You don't need to do that, you

11 don't have to come." And he still doesn't, but I

12 would say I think we would -- if he knows, and I

13 suspect he would, we would accept his -- you know,

14 his statements about the role -- I would probably ask

15 who paid her, what was her title, was she a

16 government employee, did she have an office? You

17 know, kind of basic set of questions like that, and I

18 would think that he might be a good person who had

19 been prepared for trial to testify in this case --

20   THE COURT: Okay.

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

22   THE COURT: All right. I think that would

23 be helpful.

24   All right. Anything else, Mr. Harrison?

25   MR. HARRISON: No, your Honor.

1   THE COURT: Legislative defendants, any

2   other issues or motions that you want a formal ruling

3   on?

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

5   Sorry.

6   Your Honor, just a clarification

7   question, I suppose for plaintiffs' counsel, is

8   plaintiffs' council suggesting that you would accept

9   representations from Mr. Burciaga in an affidavit or

10 some form like that, or that we -- he's asking us to

11 bring Mr. Burciaga to court to testify on this issue?

12   THE COURT: Mr. Harrison.

13   MR. HARRISON: No, we'd -- we'd take him.

14 The only reason I'd like to have talk to him is, like

15 I said, I would have probably a -- I could think of a

16 better list, but, you know, off the top of my head,

17 who signs her paychecks, you know, are you considered

18 a government employee with, you know, PERA and all

19 this stuff that I don't know much about, having never

20 been a state employee, did you have an office in the

21 legislature, what was your job title? You know, if

22 she wasn't paid, who did -- was she paid by the

23 speaker's PAC, which is what they call his PAC. What

24 her, quote, unquote, title is, I don't know is

25 necessarily -- you know, when you work for the

1 speaker even in a political capacity, they throw

2 around the term speaker's PAC, for example. It's

3 just a PAC, right? It just has a speaker's title on

4 it.

5   So other than -- an affidavit would be

6 fine. Like I said, ideally, it would answer some

7 questions like that. And ideally, I'd have a little

8 more time than no time at all top think of the

9 questions. But we're certainly not saying we demand

10 him to be here. Even virtually.

11   THE COURT: All right. Does that answer

12 that?

13   MS. SANCHEZ: Yes. Thank you. I don't

14 believe we have anything else to address.

15   MR. OLSON: Your Honor, there is one other

16 thing. I don't know that we need to take it up now.

17 We can take it up anytime we're in trial. We can

18 take it up (inaudible). But we filed a motion to

19 strike or in limine on the discrete number of

20 exhibits that were attached to the annotated findings

21 of fact and conclusion office law.

22   The Court will recall, in the scheduling

23 order, we agreed that we would submit annotated

24 findings of fact and conclusions of law with

25 affidavits, speaker reports, evidence and the like.

1   And I believe I'm correct that the parties basically

2   are agreement with respect to everybody's submissions

3   and admissibility, with the exception of the Trende

4   and Chen reports. But then there's a couple discrete

5   items, none of which are probably not even going to

6   come up in our discussion over the next couple of

7   days, that we've got some objections to on foundation

8   and hearsay grounds.

9   So, you know, we can take that up

10   however you want to take it up. Well filed the

11   motion I think it was September 20th, your Honor, on

12   that issue. And there's just, like, four or five

13   exhibits that we raise a question about.

14   THE COURT: They're addendums to the

15   proposed findings and conclusions?

16   MR. OLSON: Yes, sir, they are discrete

17   exhibits attached to the plaintiffs' annotated

18   findings and conclusions that were filed. I think

19   the initial set was on 15th, I think it was, your

20   Honor, your Honor, which was September.

21   THE COURT: I think -- you know want to

22   address this?

23   MR. OLSON: Yes, your Honor. We're not sure

24   we're going to be introducing any of those in any of

25   our presentation.

1   THE COURT: All right.

2   MR. OLSON: If which decide to do so, I'm

3   sure they can object at that time.

4   THE COURT: Okay. Well, I --

5   MR. OLSON: Those things were mentioned

6   (inaudible).

7   THE COURT: What I think, also, just -- and

8   I appreciate the proposed findings from the parties

9   beforehand, at the end of the evidentiary portion,

10 I'm going to give each side an option or an

11 opportunity to amend those. And so I think that's

12 when we'll take that up. Okay?

13   All right. Anything else from the

14 legislative defendants.

15   MR. OLSON: Your Honor, we have (inaudible)

16 motion to exclude the testimony of Mr. Trende. We

17 received plaintiffs' response to that motion

18 yesterday. We have not filed a reply. But we are

19 prepared to argue that.

20   That motion, I think, could be

21 appropriately argued immediately prior to

22 Mr. Trende's anticipated testimony.

23   THE COURT: Okay.

24   Is that all right? All right.

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

1   issue.

2   All right. Anything else from

3   legislative defendants?

4   Executive defendants, anything else?

5   MS. AGJANIAN: No, your Honor.

6   THE COURT: Secretary of state?

7   MR. AUH: No, your Honor.

8   THE COURT: Okay. All right. I'm going to

9   take a quick break, and then when we come back, I'll

10 give either side the option of making your opening

11 statements.

12   Do you wish to make an opening

13 statement?

14   MR. HARRISON: Yes, your Honor.

15   THE COURT: Okay. And then defendants, you

16 can either make an opening statement, you can defer

17 till later, or you can waive opening statements.

18 I'll just go down the row with that. But let's take

19 about ten minutes. Okay?

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

21   to 10:26 a.m.)

22   THE COURT: Thank you. You may be seated.

23 Appreciate it.

24   All right. We are back on the record,

25 ready the begin. Do plaintiffs' wish to make an

1 | opening statements.

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

3 | I...

4 | THE COURT: That's fine.

5 | OPENING STATEMENTS

6 | MR. TSEYTLIN: Thank you, your Honor. Misha

7 | Tseytlin for the plaintiffs.

8 | On Friday, we got more fulsome guidance

9 | from the New Mexico Supreme Court, you know, about

10 | the types of evidence and the types of inquiries that

11 | we shoulder take in the proceedings. And I want to

12 | highlight three things the Supreme Court said.

13 | First that -- we emphasize to the

14 | touchstone here is Justice Kagan's three-part

15 | (inaudible) justification test from Rucho, and that

16 | we can use all types of evidence to prove up those

17 | elements. We have (inaudible) on the first two

18 | elements and they have obligation on the third.

19 | Second, they said -- the Court said the

20 | types of evidence that they would find very

21 | compelling for a showing of egregious gerrymandering

22 | is the types of evidence and the showings that were

23 | made in the North Carolina and especially the

24 | Maryland cases that were issued in Rucho. And it

25 | suggested that we consider whether the evidence here

1   is of the same type, just as powerful as it was in

2   those cases.

3   And finally, the Court asked us to focus

4   on the cracking or packing of individual districts,

5   with a special focus on voter registration shifts, so

6   our other objective evidence.

7   So with that in mind, I'd like to

8   briefly talk this morning about eight categories of

9   evidence that we're going to present to your Honor

10 over the next couple of days that I think will

11 establish beyond serious dispute that we have

12 satisfied those first two elements, intent and

13 effect, and that my friends on this side cannot

14 satisfy the justification -- their justification

15 burden.

16   Now, the first category of elements

17 we'll discuss is the direct evidence of intent. And

18 I'm not discussing that because it's the most

19 important. And, in fact, as the Supreme Court said,

20 objective evidence is more important. But I want to

21 say that first because we have a piece of direct

22 evidence here that I think frames and puts in good

23 context a lot of the objective evidence that we're

24 going to discuss throughout the trial and present to

25 your Honor. And that piece of evidence we'll discuss

1   a little bit on Monday with your Honor, which is the

2   text messages from Senator Stewart to CCP.

3   And the reason that the text message is

4   to telling, so helpful, is that it frames kind of the

5   DNA of the gerrymander that occurred here.

6   A lot of times you'll get -- sometimes

7   in (inaudible) cases, you'll get the kind of evidence

8   that was revealed in the Benisek case, the Maryland

9   case, that Justice Kagan held was partisan

10 gerrymandering. There you have the governor in

11 Maryland admitting that he was trying to gerrymander.

12 That kind of high level, high level (inaudible) you

13 will get that.

14   What's so remarkable in these texts is

15 that she -- Senator Stewart not only admits that

16 gerrymandering was happening, but explains how and

17 why. She says, well, the Concept H map, that only

18 provides a 51.8 percent DPI, which is kind of the

19 composite measure of the parts of District 2. That's

20 not enough for a midterm. She's clearly referring to

21 the event upcoming midterm, where Democrats were

22 concerned that it was going to be a tough election

23 because it's the first election of a new presidency.

24   And she says, "What we did," excitedly

25 "we moved more voters into District 2 that were

1   Democrat, and we bumped that up to 53 percent

2   Democrat, 53.47." And then her -- on the other side

3   of the text, the question was, "Well, who takes the

4   hit?"

5   And the reason that question is

6   important is this principle that your Honor will hear

7   about, including from our expert, Mr. Trende, when

8   you have a small comparative state with a couple

9   districts, if you're going to make one district more

10   Democrat, you're going to end up making other

11   districts more Republican. It's this concept you got

12   to pay Peter to pay Paul or however Mr. Trende says

13   it.

14   And this person on the other side of

15   this text message said, "Well, what's going to happen

16   to the other districts?"

17   And Senator Stewart says, "Don't worry,

18   we balanced this out. So now we have 53 percent

19   District 1, we have 54 percent District" -- no,

20   "District 2, we have 54 percent District 1, you know,

21   55 percent District 3."

22   This is close to (inaudible)

23   gerrymandering, in other words, because you have

24   Democrat solid advantage across three districts,

25   pretty much as solid as you're going to get.

1   Now, my friends, in their opposition to

2 our statement, proposed statement of fact, and that's

3 (inaudible) during this trial, said you can't rely on

4 those statements. And they said some cases that say,

5 well, you look at -- you don't look at individual's

6 statements from individual senators, look at the

7 objective text of the legislation.

8   Now, that might be true in statutory

9 interpretation. You definitely don't want to look at

10 what an individual senator said about that. But when

11 you're talking about a case of invidious intent, it's

12 common to look at individual statements, especially

13 of the leadership. Justice Kagan certainly looked at

14 that in how much I don't. It's looked at inned

15 (inaudible). It's (inaudible) across the country.

16 In fact, Maryland -- I mean, in fact, New Mexico

17 joined an amicus brief at the U.S. Supreme Court in

18 the Rucho case, so you've got to look at those kinds

19 of statements. So it's kind of (inaudible) to be

20 arguing contrary to now.

21   The second category of evidence that

22 we'll be presenting to your Honor is the completely

23 partisan dominated process. And this is something

24 that Justice Kagan also looked at in Rucho. You'll

25 hear evidence that Republicans were completely boxed

1 out of the process. This was a completely behind

2 closed doors, Democrat only driven process. This is

3 another factor that Justice Kagan and other courts

4 look at in determining partisan intent.

5   The third category of evidence that

6 we'll be presenting to your Honor will be something

7 that I highlighted that the New Mexico Supreme Court

8 on Friday said it was particularly important to hit,

9 which was the change in party registration

10 composition for the targeted district.

11   And here, you'll hear undisputed

12 evidence that District 2 went from an exactly even

13 party registration, Republicans to Democrat, to a 13

14 point advantage to Democrats as a result of this

15 gerrymandering. That's exactly the kind of evidence

16 that the New Mexico Supreme Court said we should be

17 looking at. They pointed that out with regard to the

18 Maryland case in footnote 13 of their opinion, and

19 we'll present that evidence.

20   The next category of evidence that we'll

21 be presenting, your Honor, is composite partisanship

22 of the districts. This is a more sophisticated way

23 of doing what the registration data does, and this is

24 what Senator Stewart is talking about in her text

25 message. This is DPI, or whatever you want to have

1 the acronym.

2   Basically, you take a series of

3 statewide elections, you average them out and you try

4 to determine the baseline partnership of each

5 district. And here, we have actually an incredible

6 amount of unanimity between our expert, Mr. Trende,

7 and their expert, which is essentially, just like

8 Senator Stewart's text says, what they did is they

9 created a 53, 54, and 55 percent three district

10 combination, which is a near perfect gerrymander.

11   Now, they don't have any basis to really

12 dispute (inaudible) their own experts give those kind

13 of numbers. They try to spin and it and say, "You

14 know, we're trying to make districts competitive."

15   Obviously that's not what they were

16 doing. If they wanted to make districts competitive,

17 she could have made two districts 50/50 or 51/49.

18 Instead, they came close to maximizing their partisan

19 advantage.

20   And so the other basis they say is

21 competitive, and they're going to say is competitive,

22 is look, we had a close election here in 2022. With

23 respect, that's exactly the argument that we made in

24 Benisek with regard to Maryland's district, where

25 also a very close election, and Justice Kagan had no

1   trouble finding that that was an egregious

2   (inaudible) gerrymander. And the reason for that is,

3   one election doesn't tell you much. Especially when

4   we've got a '22 election here, that was a favorable

5   year for Republicans, and there was an incumbent

6   running. In 2014, in the Maryland case, that was

7   another favorable year for Republicans, such as a

8   Democrat incumbent in the gerrymandering district

9   almost lost.

10   And so with that comparative argument,

11   and that specific argument was made a rejected in

12   Benisek, didn't carry the day. They certainly can't

13   carry the day here.

14   The next category of evidence that we'll

15   presents to your Honor is the unnecessary shifting of

16   large numbers of voters. This is, again, something

17   that Justice Kagan looked at with regard the Maryland

18   gerrymander where the Democrats in Maryland shifted

19   large amount of voters in and out their District 6 to

20   accomplish the gerrymander.

21   Here, you'll hear undisputed evidence

22   that because of the only minor shifts in New Mexico's

23   population between 2011 -- 2010 and '22, really

24   needed to move about 23,000 folks to get to the

25   perfect population quality. Instead the legislature

1   moved over 500,000 to accomplish the partisan ends,

2   over 120 something thousand with regard to

3   District 2. That is exactly the kind of evidence

4   that approved powerful in Maryland and similarly

5   powerful here.

6   Another category of evidence that your

7   Honor will hear about today is the specific DNA of

8   the gerrymander that jurisdiction here.

9   Now, Senator Stewart posted this in her

10   text message. She said we took Concept H, which

11   everyone agrees is the most favorable of the three

12   maps that came out of the redistricting committee,

13   and we made it more Democrat.

14   Well, our expert will testify that he

15   analyzed how exactly the difference are between

16   Concept H and SB-1 ensures that it was systematically

17   designed to change SB -- Concept H to a max

18   gerrymander by moving Democrat voters into D-2 and

19   moving Republican voters out of D-2. This is the

20   packing and cracking.

21   The next category of evidence we'll talk

22   about is the simulation analysis. Now, this is the

23   second where I've litigated a simulation analysis

24   case, and this is trendy in the last years. And it

25   is very complicated and technical.

1   So the way I like to think about it,

2   what you're trying to do with a simulation analysis,

3   is you're trying to come up with partisan neutral

4   criteria, and then tell a computer, what would a map

5   that's not a partisan map look like, based on these

6   partisan neutral criteria. And then you generate a

7   bunch of maps and you line them up in terms of how

8   favorable they are to party and you see where the

9   enacted map lines up.

10   Mr. Trende did that analysis with

11   2 million maps, and he found that SB-1 was more

12   partisan than 99.89 percent of those maps, which is

13   an extreme outlier.

14   Now, my (inaudible) testimony of

15   Dr. Chen who did -- who did a thousand simulations

16   and he seemed to come to a different conclusion.

17   Now, there's going to be some methodology (inaudible)

18   that Dr. Chen did that we'll explore with him. But

19   it was still -- what I saw, and I did a double take,

20   was a very surprising result, given all the other

21   objective evidence we have about a registration data

22   and perfect gerrymander, you know, DPI numbers, which

23   all the experts agree on, and I was like, what could

24   be going on here?

25   And you flip through their report and

1   you find out what's going on, is that counsel for

2   (inaudible) defendants in what I -- to my knowledge

3   is a (inaudible) instruction, told him to code a

4   partisan consideration into his instructions.

5   And the reason that -- the way that the

6   simulations work, the only reason they work, is

7   you're trying to extract away from the politics at

8   the moment. You're trying to figure out what would

9   neutral maps look like.

10   So they said, split up the oil and gas

11 wells. So we said how is that a partisan neutral

12 consideration. We said, is there anything in

13 New Mexico's history that would suggest that that is

14 a neutral criteria? No answer from the other side.

15 Is there anything in the law that would suggest that

16 the -- New Mexico law that was just splitting up oil

17 and gas wells? No answer. Is there even a

18 meaningful number of folks asking to split up -- and

19 by split up -- the technical term in redistricting is

20 actually called "cracking" -- to cracking the oil and

21 gas industry? No.

22   We said did anyone other than the

23 various gerrymanderers say anything about this? No

24 answer. And, in fact, if you look at the statements

25 of the alleged gerrymanderers, they're not all saying

1   that they want the oil and gas industry cracked.

2   Some of them are saying, "It would be nice to have

3   united." Other of them are just kind of generally

4   saying -- oh, and observed that the map -- that the

5   map did crack it. Nobody puts it (inaudible) place.

6   There's no mystery why of all the many things that

7   were said during the committee process or during the

8   legislative hearings, that they asked Mr. -- Dr. Chen

9   to code this hard wired to all his sims.

10   And the reason -- and that's a

11   (inaudible) consideration, is this is exactly what a

12   gerrymander would do, by having this oil well

13   consideration, which has no grounding in anything in

14   New Mexico, you assure that all those sims split the

15   Republican heavy district. But my friends just

16   didn't have the courage or conviction to actually

17   have a fair testing under their own expert's analysis

18   what neutral sims would look like, even under

19   Dr. Chen's analysis. So they essentially asked him

20   to cook the books.

21   Now, the final consideration and

22   category that we'll present to you, we'll talk about

23   with your Honor, is traditional redistricting

24   criteria. Now, Justice Kagan doesn't focus a lot on

25   that in her opinion, her notion being that a lot of

1   the traditional redistricting criteria are kind of

2   malleable, and so a gerrymander can achieve their

3   ends by pointing to this criteria and that criteria.

4   But I will say that there are some

5   redistricting criteria that are more malleable than

6   others. We'll present etched to your Honor that in

7   terms of compactness and cracking municipal

8   boundaries, this is either the worst or one of the

9   worst maps in New Mexico's history. Those are very

10 objective criteria.

11   My friends' considerations of

12 redistricting criteria are at odds with each other.

13 Sometimes they said it's good to unite communities on

14 interest. You know, like lifestyle, I think is one

15 of their communities of interest. But other times,

16 with the oil and gas wells, they want to crack the

17 communities of interest. So this kind of shows the

18 danger of going down that path, which Justice Kagan

19 also discussed.

20   So those are eight categories of

21 evidence that we'll present to your Honor. And we're

22 going to ask at the end of the trial for your Honor

23 to find that we have satisfied our burden to show

24 egregious partisan intent, egregious partisan effect,

25 and that my friends haven't a showed a justification

1   egregious partisan effect. And then we'll ask your

2   Honor to set a schedule for an immediate -- or

3   remedial proceeding.

4   All right. Thank you, your Honor.

5   THE COURT: All right. Thank you.

6   Legislative defendants.

7   MR. OLSON: Your Honor, let me sort of

8   address the Court regarding -- what we think the

9   evidence is going to show in the next couple of

10   days -- and keep in mind, your Honor, we submitted

11   quite a bit of evidence in the annotated findings and

12   conclusions supported by affidavits and documents

13   that have been stipulated to. And so frankly,

14   there's a lot of the material that I'm going to

15   discuss that's in there, and some of it's going to be

16   discussed here with these witnesses over the next

17   couple of days.

18   Your Honor, you know, I mean, something

19   to keep in mind as we're going through the next

20   couple of days is, the New Mexico congressional

21   districts haven't really been redistricted for 30

22   years. The last time the political bodies, the

23   legislature and executive were able to meet consensus

24   and redistrict the congressional districts was in

25   1990.

1   In 2000, in the (inaudible) case,

2   because the executive and the legislature was not

3   able to agree on a congressional district map, Judge

4   Frank Allen from Bernalillo County, did

5   redistricting. And he basically adopted what -- the

6   term a least change type analysis.

7   In 2010, after the 2010 census, again,

8   as I recall that one, your Honor, there wasn't even a

9   bill that got out of the legislature. And Judge

10 James Hall, who was sitting as a pro tem appointed by

11 the Supreme Court on that case, again, redistricted

12 the congressional district utilizing a least change

13 type of analysis, maintaining, in essence, the

14 districts that at that time that existed for 20

15 years, now, as of 2020, 30 years.

16   So for 30 years, the state's

17 policymakers did not have the ability, because of

18 stasis, to be able to come in and apply state policy

19 in determining what the best mix of the congressional

20 districts was.

21   So basically what plaintiffs are

22 advocating for is another ten years on our least

23 change analysis. Well, your Honor, that's not

24 mandated by law, that's not what's required to be

25 done. The political bodies have a part to play

1   obviously in this redistricting. In fact, they're on

2   the front line of it.

3   So what we're about here is an issue of

4   first impression say, in New Mexico and we're likely

5   significantly ahead of the curve with other states,

6   because there has been a determination by the Supreme

7   Court that there is a cause of action to be

8   considered under the New Mexico equal protection

9   clause as to whether there's been excessive partisan

10   gerrymandering and an a redistricting scheme.

11   And, of course, clear that political

12   considerations in redistricting are appropriate.

13   They occur and the Court acknowledges that. The

14   question is -- and -- and the Court acknowledges that

15   some partisan actions and some partisan effect is

16   permissible. And the Court's clear on that in its

17   opinion that it came down with last Friday.

18   The issue, as stated by the Court, and

19   what the plaintiffs must approve, is that there's

20   been egregious action that has affected a partisan

21   shift egregiously in the districting, egregious

22   partisan gerrymander, I think, is the term they used.

23   You need to look at whether it's

24   substantial vote dilution. And the touchstone, your

25   Honor, and all of it's replete in multiple points in

1   the Court's decision, first one that -- when it

2   referenced the Kagan (inaudible), and then at

3   multiple points in the decision that came down last

4   Friday, is whether there's been entrenchment, where,

5   in essence, the districting plan predetermines

6   elections.

7   At one point, the Court pointed out that

8   there has to be -- I think it's at Page 23 of the

9   opinion, Justice Bacon says. The consequences of

10   such entrenchment under a partisan gerrymander

11   include that (inaudible) elections are effectively

12   predetermined, essentially removing the remedy of the

13   franchise from a class of individuals whose votes

14   have been diluted.

15   Your Honor, we would submit that there

16   is no evidence whatsoever that reflects that there's

17   been a predetermination or entrenchment with respect

18   to the Senate Bill 1, and in particular focused on

19   the second congressional district.

20   So the Court adopted a three-part test.

21   You must approve the predominant purpose is to

22   entrench the dominant party by dilution of votes.

23   Secondly, you must prove that, in fact, the

24   entrenchment occurred as a result of substantial

25   dilution. And then, only if you do that, only if

1 you've established that, does the burden shift to the

2 state to articulate legitimate, nonpartisan

3 justifications. The first two steps are necessary to

4 establish an egregious gerrymandering. You have to

5 show entrenchment through intentional dilution.

6   The only place, of course, that

7 (inaudible) in egregious cases is articulated by our

8 Supreme Court and actually the legislature should not

9 be declared unconstitutional in a doubtful case.

10   So I want to discuss what we think the

11 evidence will show. First, your Honor, with respect

12 to the issue of whether the predominant purpose of

13 Senate Bill 1 is to entrench the predominant party in

14 power, we don't really have to look beyond the

15 legislation itself and its accompanied Democratic

16 data that was circulating through the legislature

17 through the process of debating and enacting Senate

18 Bill 1.

19   The congressional -- is second

20 congressional district was drawn with political

21 performance levels that fall well within the range

22 that experts, who you'll hear from over the next

23 couple of days and prepared reports that have been

24 submitted into evidence with your Honor, determined

25 and considered competitive, i.e., it's a race in the

1   congressional district that can be won by either

2   major party candidate. There's in entrenchment,

3   there's no predetermination of elections. In fact,

4   that was true, your Honor, before the 2020

5   redistricting -- or the 2021 redistricting. The

6   second congressional district had switched back and

7   forth between the parties a couple of times over the

8   last 15 to 20 years before 2020. So there's no

9   entrenchment, your Honor.

10   The stray comments by a few legislators,

11   some after the fact, are irrelevant and certainly

12   aren't determinative of legislative intent. Our law

13   in New Mexico is clear on that. The legislature acts

14   as a body. Stray comments by a few don't equate with

15   intent.

16   If the plaintiffs cannot establish the

17   (inaudible) purpose is to entrench, then per se,

18   Senate Bill 1 and specifically as focused on the

19   second congressional district, is not an egregious

20   gerrymander.

21   So the second question that the Court

22   posits, if you get past the first prong, is did the

23   entrenchment occur as a result of substantial

24   dilution. Well, your Honor, the most cogent evidence

25   of that is the result of the 2022 election.

1   There's a 1300 vote margin, seven-tenths

2   of a percent separating then Congresswoman Harrell

3   with Gabe Vasquez. We submitted in our supplemental

4   submission that was filed on the 20th of September,

5   your Honor, an affidavit from one of our experts, Kim

6   Brace, who is an expert in redistricting and census

7   matters from the Washington, D.C. area, and points

8   out that polls for the 2024 election show that former

9   Congresswoman Harrell is already ahead in the latest

10   polls. We already have under this redistricting

11   plan, the Senate Bill 1, that the plaintiffs are

12   contesting, a former Republican legislator met with a

13   Navajo Nation, announced a Republican nomination for

14   CD-3. If the intent was to entrench, then the

15   parties who were allegedly entrenching did a pretty

16   sorry job.

17   The registration numbers, your Honor,

18   you're going to hear in large part are meaningless.

19   You'll hear that from Brian Sanderoff. And I think

20   most of the experts will agree that what's of

21   significance is partisan performance numbers, how not

22   only how the district performs leaving aside

23   (inaudible) registration numbers, how they actually

24   get out and vote, how the vote gets split between

25   various parties.

1   And you're going to hear from a

2   performance standpoint, the differential in CD-2 is

3   well within a range of competition. Makes it a very

4   competitive swing district.

5   Your Honor, the other thing is, with

6   respect to vote dilution, if anything, the current --

7   the Republicans that are in the current iteration of

8   CD-2, their votes are even more important than they

9   used to be. If you look at the data, a lot of wasted

10   Republican votes in CD-2. Now their vote counts even

11   more. They need to get out and vote so they can get

12   their -- their chosen candidate in. And they came

13   very close with Congresswoman Harrell, and it's

14   indicated in the current polls are likely to turn

15   this seat again.

16   Your Honor, lastly, assuming

17   entrenchment, then the issue is whether there's

18   legitimate nonpartisan reasons for the policy

19   articulated in Senate Bill 1. And your Honor, the

20   record is replete with nonpartisan reasons.

21   There was discussion both at the CRC and

22   in the legislature about the interests of the

23   southern Rio Grande Valley from just south of

24   Albuquerque down to the border and affinities between

25   those areas. There was discussion amongst some of

1   the native nations, the Mescalero Apaches about

2   wanting to be split between two separate

3   congressional districts. There's always been the

4   districts centered around the core of the major urban

5   areas in the state, Las Cruces, Santa Fe and

6   Albuquerque. There was discussion about melding

7   urban with rural constituency.

8   And there was multiple discussions, your

9   Honor, at the senate rules -- senate floor debate by

10 Senator Cervantes, which is in part of Exhibit 27

11 that we've submitted, your Honor, where he notes that

12 likewise, each of the other two districts does the

13 same, captures some of the largest urban areas of our

14 state that, at the same time, brings in important

15 rural areas of our state that are so important to our

16 economy, the area that oil and gas communities of our

17 state, the farming communities of our state.

18   Again, on the -- senate rules committee,

19 Senator Ivey-Soto made similar comments about the

20 importance of the oil and gas industry and maximizing

21 its representation in Congress so that it had

22 multiple advocates for it at the federal level.

23 There was discussion about that from representative

24 Gail Chasey in the house -- house state government

25 elections and Indian affairs committee. There was

1 further discussion about that by Senator Cervantes in

2 the senate rules committee. There was discussion

3 about that by representative Antonio Maestas on the

4 house floor during the vote on Senate Bill 1 in the

5 house. Also by resident Nathan small on the house

6 floor in a discussion and vote on Senate Bill 1.

7   So contrary to what plaintiffs suggest,

8 the fact of the matter is, the oil and gas industry

9 and the concerns about the oil and gas industry and

10 the desire to maximize the representation at the

11 federal level was, in fact, a significant issue,

12 discussed and articulated by multiple of the

13 legislators as they were discussing Senate Bill 1.

14   Dr. Chen, utilizing those nonpartisan

15 public policy considerations, worked that into his

16 algorithm, and his analysis reflects that given the

17 nonpartisan policy considerations, Senate Bill 1

18 falls well within, from a partisan standpoint,

19 performance standpoint, what would be reasonably

20 anticipated. It's not a partisan outlier.

21   So, your Honor, in conclusion, we'd

22 submit that -- and then the New Mexico Supreme Court

23 has noted that some degree of partisan consideration

24 districting is permissible as a political process.

25 But if it's egregious, might be a product of

1   constitutional violation.

2   Well, that requires entrenchment,

3   effectively predetermining elections, and removing,

4   in essence, the franchise from allegedly diluted

5   voters.

6   The New Mexico Supreme Court has noted,

7   and as repeated multiple times by Justice Kagan in

8   the Rucho case, because of the political nature of

9   the issues, of course, only intervene in egregious

10   indications.

11   Your Honor, the evidence the almost

12   uncontroverted, there's no entrenchment. In fact,

13   the likelihood is that we'll be looking at a

14   competitive raise in CD-2 every two years.

15   The evidence is also uncontroverted,

16   your Honor, that multiple nonpolicy considerations

17   went into the drafting of the bill. And the analysis

18   by Dr. Chen highlights it's well within the

19   anticipated range from partisan standpoint it's not

20   an outlier.

21   The only logical conclusion, your Honor,

22   at the end of the day is that there's been no

23   egregious partisan gerrymander.

24   Thank you, your Honor.

25   THE COURT: Thank you.

1   Ms. Agjanian.

2   MS. AGJANIAN: Your Honor, I'd like to --

3   I'm probably going to waive, but I would like to

4   defer for now, please.

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

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

7   THE COURT: Okay. All right, then.

8   Plaintiffs, you may call your first

9   witness.

10   MR. HARRISON: Your Honor, the plaintiffs

11   call Jim Townsend.

12   THE COURT: If you'll come up around here.

13   Before you sit down, if you'll raise your right hand.

14   Do you solemnly swear or affirm under

15   penalty of perjury that the testimony you'll give

16   will be the truth, the whole truth and nothing but

17   the truth?

18   THE WITNESS: I do.

19   THE COURT: Thank you. Have a seat.

20   JIM TOWNSEND,

21   having first been duly sworn, testified as follows:

22   DIRECT EXAMINATION

23   BY MR. HARRISON:

24   Q. Good morning, Mr. Townsend. Can you please

25   introduce yourself and give your position in state

1 government?

2   A. My name is Jim Townsend. I live in Artesia,

3 New Mexico. I am a state representative for district

4 54 in the house of representatives.

5   Q. Okay. And were you in the house of

6 representatives at the time of the 2021 redistricting

7 session?

8   A. I was.

9   Q. Okay. And did you have any special

10 positions within the house caucus?

11   A. At that time, I was minority floor leader.

12 So caucus leader, if you may. But Republican leader

13 in the house of representatives.

14   Q. Okay. Can you very briefly describe, in

15 case anybody here doesn't know, what the duties of the

16 floor leader are?

17   A. My job is to represent my caucus in the

18 process of debate on bills and the negotiation of

19 those bills as they were vetted out.

20   Q. Okay. And would that often involve

21 important bills, discussions between you and

22 Democratic leadership of the house?

23   A. It did.

24   Q. Okay. I'd like to talk a little bit about

25 Senate Bill 1, which is what we're here today to

1 discuss.

2   So who -- how was San Mateo bill one

3 drafted, meaning, from when it came in the door the

4 first day, how did it get into that shape?

5   A. Well, Senate Bill 1 evolved from a piece of

6 legislation that came out of the senate into a senate

7 judiciary committee substitute for Senate Bill 1.

8   So it was a bill that was modified in

9 process.

10   Q. Okay. So let's talk about the bill that was

11 initially introduced. Who participated in the

12 drafting of that?

13   A. Senator Cervantes was the sponsor of that

14 bill. And he was the -- he was the drafter. I wasn't

15 involved and neither were any of the Republicans, to

16 my knowledge.

17   Q. Okay. Now, are you aware -- well, is it

18 your understanding that Senate Bill 1 has as its sort

19 of loses basis concept aged from the citizens

20 redistricting committee?

21   A. I believe that to be correct.

22   Q. Okay. But they -- but there were changes

23 that are -- am I correct, that there were changes that

24 I believe that sponsors put in around 14 percent from

25 Concept H to the entry to Senate Bill 1?

1   A. Yes, sir, that is correct.

2   Q. Okay. And whatever process was involved in

3   changing Concept H to the originally introduced Senate

4   Bill 1, what do you know about that process?

5   A. I don't know anything about it. That

6   occurred basically overnight and came back out as a

7   committee substitute. And we were not involved at all

8   in that process.

9   Q. Okay. And by "we," as far as you know,

10   there was no GOP representation at all in the sort of

11   behind closed doors aspects of crafting the

12   legislation?

13   A. That is correct. There were -- to my

14   knowledge, there were absolutely nowhere involved, not

15   from any of the minority.

16   Q. Okay. And so let's talk about the special

17   session. I think you -- I don't want to misstate what

18   you said. I think you mentioned the only -- the only

19   change that ever -- that happened to the bill during

20   the session was this committee substitute; is that

21   correct?

22   A. On SB-1?

23   Q. Yes, sir.

24   A. Yes, sir, that is correct.

25   Q. Now, did Republicans voice their displeasure

1 over various aspects of the bill?

2   A. Oh, yeah. When we heard the bill was out,

3 some of us were in senate judiciary that next morning.

4 It came over to the house. I think it was debated for

5 an extended period. I don't know that it went the

6 full three hours, but it was an extended period. And

7 Representative Nibert kind of led that debate and the

8 introduction of his floor committee substitute for

9 that bill.

10   But yeah, it was -- it was hotly

11 contested by many members of the house in -- both

12 informally and in the debate.

13   Q. Okay. Did any of those formal amendments

14 pass?

15   A. No, sir. Representative Nibert's amendments

16 was tabled and it went nowhere. So we were not able

17 to interject any modification whatsoever to what came

18 across.

19   Q. Were those bipartisan votes?

20   A. Those were party line votes, if my memory is

21 correct. In fact, I know they were party line votes.

22   Q. Okay. And same thing with the final package

23 of the bill. Was that a bipartisan in any way, or did

24 any Republican vote for the final bill?

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

1   one Democrat, Representative Sweetser, from over in

2   Deming, voted with a minority. But we were not

3   successful. That bill passed as basically with all

4   Democratic votes, no Republican votes.

5   Q. So to be clear, one Democrat broke ranks and

6   agreed with the Republicans, but no Republicans

7   supported it?

8   A. That is -- that is correct.

9   Q. Okay. And in terms of informal, you know,

10 off the floor process, what was your impression from

11 talking to, I guess in particular, Democratic

12 leadership?

13   A. Well, I -- it was pretty clear to us that

14 that bill was going to be forced through as it was.

15 There was no --

16   UNIDENTIFIED MALE: Objection, hearsay.

17   THE COURT: Response.

18   MR. HARRISON: So we're asking for

19 discussion of the legislative process. I don't

20 understand why this should be hearsay.

21   THE COURT: I'm not sure I heard a request

22 for hears. If there was a request as to something

23 someone said, I think it was more of his

24 understanding. Objection overruled.

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

1   was the feeling of the caucus from their interactions

2   with members on the other side of the aisle, that that

3   bill was the bill, and it was going to be forced

4   through.

5   Q.   In fact, that's exactly what happened, was

6   that went through based on party line votes, with no

7   modifications whatsoever.

8   THE COURT: Let me interrupt real quick. I

9   apologize. It's been -- I've been informed that a

10   person on the witness list is on Google Meets.

11   Nobody has asked the rule of exclusion to apply. I

12   wanted to bring it up.

13   UNIDENTIFIED MALE: Right. We're going to

14   ask that the rule be (inaudible), your Honor.

15   THE COURT: Anybody? Okay.

16   MR. HARRISON: I'm sorry. Was that no, I

17   don't --

18   THE COURT: Right.

19   MR. HARRISON: Okay. Thank you.

20   THE COURT: Okay. Thank you. Appreciate.

21   Go ahead.

22   BY MR. HARRISON:

23   Q.   Okay. And then the -- I think we've

24   mentioned the SJC substitute, which was the one change

25   made to the bill throughout the legislative /PROESZ,

1   was that a Republican inspired change in any way?

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

3   change.

4   Q. Okay. So let me -- I'm going to -- now,

5   you've been -- well, I'll just ask. Are you aware of

6   the discovery efforts that have been made in this

7   case?

8   A. I became aware yesterday of some of those.

9   But before that, no, sir.

10   Q. Okay. So are you aware that -- are you

11   aware if we sent out subpoenas to the Democratic

12   members of the 2021 legislature?

13   A. I am.

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

15   documents?

16   A. I am not.

17   MR. HARRISON: Okay. I'm going to quickly

18   (inaudible), your Honor, approach.

19   THE COURT: (Inaudible).

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

21   well.

22   THE COURT: Okay. Just for identification?

23   MR. HARRISON: I was going to have him -- I

24   believe our process has been (inaudible).

25   MR. OLSON: (Inaudible)?

1   MR. HARRISON: This is, your Honor. And if

2   we can mark it, and if we're starting a new

3   plaintiffs using numbers, maybe, we can call this

4   Exhibit 1, plaintiffs' trial Exhibit 1.

5   THE COURT: All right. You said there was

6   proffer to pre-admit these.

7   MR. HARRISON: We have -- there were -- I

8   believe so, your Honor.

9   THE COURT: Okay.

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

11   Honor?

12   THE COURT: Was there any type of agreement

13   on pre-admitting these, or...

14   MR. OLSON: Well, I think all the agreement

15   was all the exhibits that were attached to the

16   (inaudible) findings and conclusions --

17   THE COURT: Okay.

18   MR. OLSON: -- were admissible with the

19   exception of the -- we've got the Alberico motion

20   with Chen and the Trende report.

21   THE COURT: Okay.

22   MR. OLSON: And then the four or five items

23   that I had in my motion (inaudible).

24   THE COURT: Okay. That's fine. I just

25   wanted to make sure.

1   MR. HARRISON: Yeah, that's my

2   understanding, too, your Honor.

3   THE COURT: So this will be Plaintiffs'

4   Exhibit 1?

5   MR. HARRISON: I think we'd like to probably

6   make sense to start over numerically for the trial.

7   THE COURT: Okay.

8   BY MR. HARRISON:

9   Q. So, Mr. Townsend, or Representative

10   Townsend, you're looking at what we called Plaintiffs'

11   Exhibit 1. So this is one of, again, three pages of

12   documents that we got in discovery, and I -- I'm going

13   to ask you some questions -- well, I think you've said

14   you don't know anything about the process, and that's

15   your perspective. We do have some information on the

16   actual process we know was used.

17   So I'm going to go through here. So

18   you'll now see -- so you see text messages that are in

19   read from the president of the senate, Mimi Stewart,

20   who is a named defendant in this case, and then in

21   green with what I'll assert to you is a member of the

22   center for civic policy.

23   If you go down to her -- to the one,

24   two, three, fourth text messages from senate president

25   steward, where she says: We've improved the people's

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

2 mark.

3   Do you know what DPI means?

4   A. Yes. It's Democratic performance, I believe

5 is what is referenced.

6   Q. Okay. Now, when she's talking about making

7 that -- that improvement, was the GOP involved in that

8 process of improving Concept H?

9   A. No, sir, we were not.

10   Q. Okay. Now we do have a representative form

11 of government. Sometime people are -- can be

12 represented even when they're not present. Are GOP

13 interests reflected in that improvement?

14   A. No, sir, they are not.

15   Q. Okay. Now, this process that we now know to

16 be the process that converted Concept H into SB-1 also

17 had some findings. So if you go down to the very next

18 text message from senate president Stewart, you'll see

19 where it says: Sanderoff's DPI for your Map H is

20 51.eight percent. That's not enough for a midterm

21 election.

22   Okay. So that finding, did the GOP

23 participate in making that finding, that that was too

24 close for a midterm election?

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

1 whatsoever.

2   Q. Okay. Does that finding seem like it

3 reflects the GOP's interests?

4   A. No, sir, it does not.

5   Q. Okay. And then, again, we have some more

6 talk about the process in the same text: That's not

7 enough for a midterm election, so we adjust some

8 edges, scooped up more of Albuquerque and are now at

9 53 percent. CD-1 is 54 percent. CD-3 is

10 55.4 percent.

11   So that process, was the GOP in any way

12 involved in that process of scooping and adjusting

13 edges?

14   A. No, sir, we were not.

15   Q. I'd like to shift gears a little bit and

16 talk about the southeastern part of the state. Is

17 there a community of interest in the southeastern part

18 of the state?

19   A. Sure, there is. More than one. But you

20 have all the gas communities that this, in my opinion,

21 is a community of interest. You have agriculture

22 that's a community of interest. So yes, we did have

23 communities of interests.

24   Q. Okay. And is the oil and gas industry

25 important to Southeastern New Mexico?

1   A.   Yes, sir, very much.

2   Q.   Okay.   And that's because of the oil basin

3   in Lubbock, a large scale Permian Basin?

4   A.   Number of jobs, revenue, school children

5   going to school.   There's a lot of reasons for it, but

6   oil and gas is very important to southeast New Mexico,

7   and to New Mexico as a whole.

8   Q.   Okay.   So my next line of questions are

9   going to be, you may have heard in opening, the

10 legislative defendant's expert, in creating a

11 simulation, it created (inaudible) however many

12 100,000 maps, programmed a parameter that no district

13 should have more than 60 percent of the oil wells in

14 the state, which as far as you know, would that

15 require splitting up Southeastern New Mexico from

16 where the oil wells are in New Mexico?

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

18 it would do.

19   Q.   Okay.   And I want to clarify that this line

20 of questioning is not whether that is per se illegal,

21 but whether it is a necessary evil in the way that

22 lines always have to be drawn, or whether it is what

23 it's being presented as, which is a good, in and of

24 itself.

25   So as you were part of the legislative

1 process and going through things, did the Dems try to

2 sell to you that it was a feature, not a bug, of an

3 SB-1 map, that it split up what I'll call the oil

4 patch region of the state into three districts?

5   A. Yes, sir. We heard that in the debate on

6 the senate judiciary's substitute for SB-1, and a that

7 that would be beneficial.

8   Quite to the contrary. That is not

9 beneficial. And it isn't any counties or communities

10 of interest to be broke up in that manner. So it is

11 not in their best interests and it is not serving them

12 well.

13   Q. Okay. Are you aware -- has anyone in -- an

14 oil industry executive or any oil industry interest

15 group express the desire to be divide up into more

16 than one congressional district?

17   UNIDENTIFIED MALE: Hearsay, your Honor.

18   THE COURT: Mr. Harrison.

19   MR. HARRISON: So we're admitting it not for

20 whether it's -- frankly, it's whether it is good,

21 quote, unquote, for them to be divide, but to make

22 the point that we content that this 60 percent

23 parameter was added after the fact, was concocted in

24 litigation, and was not a part of the legitimate

25 considerations that were used in the legislature.

1   THE COURT: But your specific question was,

2   have you heard from any oil and gas person; is that

3   correct?

4   MR. HARRISON: That is correct, which would

5   then go to whether the -- and what I really want is

6   whether legislators heard anything, not so much

7   whether the oil industry executives said it, but

8   whether the legislature got that feedback, that it

9   was desirable to crack the oil patch.

10   THE COURT: I'm going to sustain the

11   objection. I think you can ask a more general

12   question, did you hear from the oil gas industry, not

13   specifically what they said.

14   MR. HARRISON: Okay.

15   BY MR. HARRISON:

16   Q. Well, I guess I'll start with you. Tell me

17   what your day job is when you're not legislating.

18   A. Well, I'm retired today, so I don't have a

19   day job, except taking care of legislative business.

20   Q. What was your day job?

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

22   company.

23   Q. Okay. And can you give me a little more

24   detail? High level at --

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

1   the division of Holly Corporation, which was Holly

2   Energy Partners, a pipeline company, and that was my

3   responsibility, the day-to-day operations of that

4   entity.

5   Q. Okay. Did you or Holly Energy have any

6   dissatisfaction with being -- with the oil patch being

7   in a single congressional district?

8   A. No. I think it was -- it is a common

9   thought that being united in having an aggregate group

10 that can influence their legislature was in their

11 benefit. So I don't know of any oil and gas company

12 that thought being split up was in their best

13 interests.

14   Q. Okay. And as far as you're aware, did any

15 oil and gas -- anyone from the oil and gas industry or

16 trade groups testify at the legislature in support of

17 the SB-1?

18   A. No, sir.

19   Q. Okay. Now, you -- have you also done state

20 house redistricting?

21   A. We had -- in this process, we did state

22 house, and the senate did the state senate

23 redistricting.

24   Q. Okay. Now, this doesn't really come up with

25 congressional districts in New Mexico, but in the

1 process working with state house, were you made aware

2 or are you aware that federal Voting Rights Act

3 sometimes requires the drawing of majority/minority

4 racial districts?

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

6 sir.

7   Q. Okay. Now, just as a -- by way of

8 comparison, so if you were informed and believed -- so

9 if you concluded that the federal VRA required you to

10 draw a majority Navajo district, would you ever

11 instead say, "No, I'm going to split this Navajo

12 community into three districts, where they don't have

13 a majority in any"?

14   A. No. That would seem to be counterintuitive

15 to that end.

16   Q. Okay. So you wouldn't say, "No, we love you

17 so much and you're so important, you need to have

18 three districts and three representatives"?

19   A. I would no and I don't believe it's in the

20 best interests of that entity for that to occur.

21   Q. Okay. And more generally, if you and your

22 neighbor share common values, are you each better off

23 having different representatives that share neither of

24 your values?

25   A. No, sir.

1   Q. Or voting together on a single

2   representative who shares your values?

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

4   Q. Okay. And overall, just your gross

5   impression of having been through this process in a

6   leadership position, what was the overarching goal of

7   Senate Bill 1?

8   A. Senate Bill 1 was a judiciary substitute,

9   was -- the intent was to make sure that Democrats were

10   elected in those districts.

11   Q. In all three districts?

12   A. In all three districts.

13   MR. HARRISON: Nothing further, your Honor.

14   THE COURT: Mr. Olson.

15   CROSS-EXAMINATION

16   BY MR. OLSON:

17   Q. Representative Townsend, to follow up on

18   that last question, you'd agree that there's, what,

19   112 legislators in the -- between the senate and the

20   house; is that correct?

21   A. Pretty close.

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

23   senate?

24   A. Correct.

25   Q. And so each one of those legislators voted

1 and each of one of those legislators had their own

2 reasons for voting for Senate Bill 1; isn't that

3 correct?

4   A. You would think so.

5   Q. Okay. So I want to ask you a few questions,

6 following up on some of your examination?

7   Do you have any idea how often

8 legislation passes in the house, because that's the

9 one you're most familiar with? You've been in the

10 house for how long?

11   A. This is ending my 5th term.

12   Q. Okay. How many times the legislation passes

13 in the house on party line votes?

14   A. There's a lot of votes that go through on a

15 bipartisan. I don't know what the percentage is, but

16 I see votes that go through bipartisan, as well, many

17 times.

18   Q. Okay. Sir, there's votes that go through

19 bipartisan, but there's also many votes that go

20 through on a party line basis; isn't that correct?

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

22 but there are some.

23   Q. For instance, oftentimes, the appropriations

24 bills go through a party line vote, do they not?

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

1   voted for in a bipartisan fashion. That's the first

2   bill that comes out, or the second bill that comes out

3   in the house. And although there may be a lot of

4   disagreement to it, there are members of the minority

5   that vote for it and have historically.

6   Q. Does the house Republican caucus (inaudible)

7   take a position on what the party position is on

8   voting on, for instance, House Bill 2, the general

9   appropriations bill?

10   A. Not typically. We do take a caucus position

11 sometimes, but I don't remember a time that we took a

12 caucus position on that bill.

13   Q. But, for instance, the house Republican

14 caucus generally will take a position on tax bills,

15 won't it?

16   A. Probably. It -- you know, it depends on

17 what the tax bill is. I mean, it is a bill that's

18 reducing tax? Yeah, we'll probably be for that one.

19 If it's a bill that raising tax, probably not.

20   Q. So a bill raising taxes, you'd likely see

21 party line type votes, would you not?

22   A. It would not surprise me.

23   Q. Okay. You mentioned that Southeastern

24 New Mexico, you consider it oil and gas industry and

25 agricultural interests to be a community of interest;

1   is that correct?

2   A.   That is correct.

3   Q.   And in New Mexico, we have oil and gas

4   activity concentrate had not only on the southeast

5   part of the state but also in the northwest part of

6   the state; isn't that right?

7   A.   That is correct.

8   Q.   And so, would you agree that there's a

9   community of interest between the oil and gas

10   producers in southeast New Mexico with those in the

11   northwest part of the state?

12   A.   They are different in many ways, but common

13   in the fact that they are producers. That is correct.

14   Q.   And in the federal level, they have my of

15   the same issues that they deal with, for instance,

16   with regulations from the bureau of land management;

17   isn't that correct?

18   A.   I think that is true.

19   Q.   And regulations dealing with things like

20   Endangered Species Act and the like; isn't that

21   correct?

22   A.   I believe that to be correct.

23   Q.   And, again, agricultural interests, you've

24   got agricultural interests in the southeast part of

25   the state, but they extend up the east side of the

1 state and over across the northern part of the state,

2 too, do they not?

3   A. They do.

4   Q. Okay. And, I mean, for an industry

5 standpoint, isn't it beneficial to have multiple

6 legislators that you can go visit with about concerns

7 about federal regulation, BLM regulations, getting

8 permits, things of that nature?

9   A. No, sir, it is not.

10   Q. You don't consider it to be worthwhile to

11 have multiple representatives supporting oil for you

12 in D.C.?

13   A. I think you have to dig deeper into that

14 question. And is your voice, is your voice to that

15 legislator meaningful. And if you have a small

16 segment of an industry that a representative really

17 has more of Albuquerque than they do or Lea County,

18 who are they going to listen to? They're going to

19 listen to where the votes are in Lea -- in

20 Albuquerque. They're not going to listen to that

21 small community. And that is the problem that we have

22 had in southeast New Mexico with splitting it up. It

23 has not been fractured, it has been destroyed. That

24 community of interest has been demolished.

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

1   somebody who is representing the incident of northwest

2   producers to also have some involvement with the

3   southeast producers and enhance that representation

4   you have in D.C.?

5   A.   If you're talking about representatives

6   working collectively, then you would have two

7   representatives that were working on the same issue.

8   That is different from fracturing a community and

9   weakening the ability of that industry to influence a

10 single legislator.

11   MR. OLSON: Just a minute, your Honor.

12 Nothing further, your Honor.

13   THE COURT: All right. Ms. Sanchez.

14   MS. SANCHEZ: Nothing, your Honor.

15   THE COURT: Mr. Auh?

16   All right. Redirect?

17   MR. HARRISON: No, your Honor.

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

19 step down.

20   You may call your next witness. How

21 long do you think your next witness will be?

22 30 minutes?

23   MR. HARRISON: Probably.

24   THE COURT: Okay.

25   MR. HARRISON: So we're calling William

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

2 know what the...

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

4   Am I muted?

5   THE COURT MONITOR: (Inaudible).

6   THE COURT: Mr. Sharer, if you'll press star

7 6, we can hear you.

8   Are we sure he's still on there?

9   THE COURT MONITOR: (Inaudible).

10   THE COURT: He's not on here right now. He

11 was earlier. That's who I was discussing. Let me

12 see if you can get him on.

13   There he is.

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

15 Mr. Sharer, can you hear me?

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

17 me.

18   THE COURT: Yes. Can you hear us?

19   Do you know why he wouldn't be able to

20 hear us?

21   THE COURT MONITOR: (Inaudible).

22   THE COURT: Can you hear us at all,

23 Mr. Sharer?

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

25   THE COURT MONITOR: (Inaudible).

1   THE WITNESS: Hello.

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

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

4   MR. HARRISON: Not the Court.

5   THE COURT: All right. Mr. Sharer, this is

6   judge Van Soelen, can you hear me?

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

8   you.

9   THE COURT: All right. You're being called

10   as a witness. Are you ready to testify?

11   THE WITNESS: I am.

12   THE COURT: All right. I'm going to ask you

13   to raise your right hand. I'm going to swear you in.

14   Do you solemnly swear or affirm under

15   penalty of perjury that the testimony you'll give

16   will be the truth, the whole truth and nothing but

17   the truth?

18   THE WITNESS: I do.

19   THE COURT: All right. Thank you.

20   MR. HARRISON: And, your Honor, I can't see

21   him on this, but I can see him on this. Would you

22   mind if I (inaudible)?

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

24   All right, Mr. Harrison. Go ahead.

25

1   WILLIAM SHARER,

2   having first been duly sworn, testified as follows:

3   DIRECT EXAMINATION

4   BY MR. HARRISON:

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

6   A. Excellent.

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

8   Could you start off by giving me your background, what

9   your position in state government is?

10   A. So my name is William Sharer, but I do by

11 Bill. I'm the state senator for District 1, which is

12 mostly Farmington, and just a bit west of Farmington.

13 I've been in the senate since 2001. And I'm currently

14 the ranking member of senate finance committee.

15   Q. Okay. Did you participate in the 2021

16 redistricting session?

17   A. Oh, yes.

18   Q. Okay. And is that your first redistricting

19 session?

20   A. No. That's actually my third. So I

21 participated in 2001, 2007 and then 2021.

22   Q. Okay. Now, those past two rounds of

23 redistricting, if I'm not mistaken, they obviously

24 both were subjected to gubernatorial vetoes, but with

25 one exception, which I believe is the 2011

1   congressional map. The legislature, in fact, passed

2   maps for house and senate both redistricting sessions

3   in Congress in 2001. Am I correct about that?

4   A. Yes. We did.

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

6   shorter. I apologize.

7   So I'm first going to start with asking

8   you some questions about, if on the senate side, from

9   your perspective on the senate side about the

10   legislative process about SB-1.

11   So I guess to start, is it your

12   understanding that SB-1 was based loosely on the

13   people's map Concept H from the CRC?

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

15   Q. Okay.

16   A. On page -- yes.

17   Q. Okay. But your understanding is there were

18   significant deviations made from H to SB-1?

19   A. Yes, there were.

20   MS. SANCHEZ: Your Honor, I'm going to

21   object to leading and ask that counsel be mindful

22   about that.

23   MR. HARRISON: I'll certainly try to limit

24   it. My apologies.

25   THE COURT: Okay. Go ahead.

1   BY MR. HARRISON:

2   Q. So that process of transforming Concept H

3   into SB-1, were any Republicans involved in that

4   process?

5   A. Well, of course during committees, yes. But

6   as far as I know building it and all of that, I do not

7   believe any Republicans were involved.

8   Q. Okay. And I'm even talking about the by

9   necessity, off the record process of however the

10   introduced bill was created, you know, which of course

11   would have been done not in the legislature itself.

12   Are you aware that the sponsors of SB-1, you know,

13   reached out to Republicans or formed a committee with

14   Republicans or anything like that?

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

16   any Republican.

17   Q. Okay. Now, post introduction and during the

18   session, did Republicans voice their complaints about

19   SB-1?

20   A. Oh, yes. Numerous times.

21   Q. Okay. Within were these complaints made

22   both on and off the record?

23   A. Yes. Most of them probably off the record.

24   But certainly, there were formal complaints, as well.

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

1 by the sponsors of the bill or Democratic leadership

2 to address Republican complaints?

3   A. Nothing. In fact, there are amendments that

4 were offered, but none of the amendments were

5 considered. In fact, I don't think most of them were

6 considered for more than a few seconds before there

7 was a motion to table it.

8   Q. Okay. And now I don't know if you were on

9 for Representative Townsend's testimony. But is it

10 correct that the only changes that were made to SB-1

11 throughout the legislative process or special session

12 were the SJC substitute made on December 10th?

13   A. Yes. So what was introduced had an

14 amendment -- or not an amendment, a substitute the day

15 after it passed committee. So it was brought back

16 again. And that substitute really incorporated

17 what -- what we knew of as the Indian (inaudible)

18 plan. So basically you have to put this in, so

19 Senator Cervantes put it in.

20   Q. Okay. Are you aware of any meetings that

21 culminated in the I guess off the floor deliberations

22 that culminated in the introduction of the committee

23 substitute?

24   A. Again, if there were meetings, they

25 certainly did include any Republicans. If a

1 Republican was going to be in that meeting, I would

2 probably be the guy. President Nez of the Navajo

3 Nation once referred to me as the best Indian he has

4 in the senate.

5   Q. So I guess to go into that a little bit, are

6 you -- you're one of the more active Republicans in

7 negotiating with the tribes on what you could either

8 call tribe relations or just issues where the tribes

9 have a distinct interest in the outcome of

10 legislation?

11   A. Oh, absolutely. I'm the only Republican

12 that actually bumps up against the Navajo Nation. And

13 not quite a third of District 1 that I represent is

14 Navajo.

15   Q. Okay.

16   A. So that's (inaudible).

17   Q. Did the tribes -- during the session, did

18 tribal leaders ever attempt to convene a meeting with

19 legislators over changes they wanted to see to SB-1?

20   A. Well, maybe legislators, but certainly not

21 Republican legislators. And I tried to -- to meet

22 with them over this. And they -- they would not.

23   Q. Okay. So I want -- so tell me more about

24 that. You were -- are you testifying that you all

25 were aware that there was a meeting being had between

1 Democratic legislators and tribal leaders?

2   A. Yes, there was. I believe this meeting was

3 on -- it may have been on the 8th or 9th of December,

4 I'm not sure. I was trying to find an exact date in

5 my phone because I've called several times to try to

6 get in to meet with the delegation, the Native

7 American delegation that was putting them together,

8 and they came up with this consensus plan.

9   And what I was told is they had a

10 consensus plan, they agreed to it, and they weren't

11 going to change it. So after that, I continued to try

12 to get in there by making phone calls. And

13 eventually, I was told, and I want to read this, if I

14 can, because it was -- it stuck in my mind so strong

15 at that time.

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

17 hearsay.

18   MR. HARRISON: Your Honor, so what he's

19 going to say --

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

21 me.

22   THE COURT: Hold on just a minute.

23   MR. HARRISON: I'm sorry. There was an

24 objection. I don't know if you can hear. I'll let

25 you continue in a second.

1   So, your Honor, what he's going to say s

2   he asked to be a part of this meeting and was told,

3   "Don't come. You can't come. It will be a waste of

4   our time." That obviously is not for the matter

5   asserted. It's a declarative/imperative statement

6   from individuals in the meeting, excluding him from

7   that part of the process, and that is also

8   significant, in and of itself.

9   What this vein of evidence is is to show

10   that the actual process that created and passed SB-1

11   and, in this case, the one actual change, which was a

12   committee substitute, you know, at one point it

13   wasn't just that we didn't ask, we -- Mr. Sharer --

14   or Senator Sharer asked and was told, "No, you can't

15   be a part of this meeting."

16   THE COURT: All right. So your answer to

17   the objection is that it's not hearsay. So there's

18   an exception?

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

20   THE COURT: Ms. Sanchez.

21   MS. SANCHEZ: Well, your Honor, I'm

22   concerned because it sounds like the witness intends

23   to read from a statement we've never seen before from

24   somebody who hasn't been identified. And I don't

25   know what that statement is or who the supposed

 1 declarant is in order to assess whether it's the

 2 subject of a hearsay exception or not.

 3   MR. HARRISON: We can have him not read, if

 4 that -- I wasn't aware that he had --

 5   THE COURT: Yeah, I think it would be

 6 hearsay. It's -- the statement is, from what you've

 7 said, going to go to the truth of the matter of what

 8 he was told, he was told this.

 9   MR. HARRISON: Okay.

10   THE COURT: So I'll sustain the objection.

11 You can probably get the information in another way.

12   MR. HARRISON: And to clarify, because I

13 don't want to seem like I'm just (inaudible), I can

14 ask him please put aside whatever you got in front of

15 you, what is your recollection of what you were told

16 when you asked to enter the meeting?

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

18   MS. SANCHEZ: That's still hearsay.

19   MR. HARRISON: All right.

20   THE COURT: I understand what you're trying

21 to get in. I think you can ask if he --

22   MR. HARRISON: Was allowed?

23   THE COURT: -- was allowed.

24 BY MR. HARRISON:

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

1 anything you were told by any person, but am I

2 correct -- I think you've already testified, you

3 attempted to participate in a meeting of tribal

4 leaders and Democratic legislators in advance of the

5 committee substitute? Am I correct, is that what

6 you've testified to so far?

7   A. Yes. It would have been a waste of their

8 time, is what I was told.

9   Q. Okay.

10   MS. SANCHEZ: Objection (inaudible).

11 BY MR. HARRISON:

12   Q. Were you allowed to -- and just I think --

13 (inaudible) but yes or no, were you allowed to

14 participate in that meeting?

15   A. No.

16   Q. Okay. (Inaudible) I have for you, Senator

17 Sharer, so you've mentioned that you were -- you also

18 participated in the last two rounds of redistricting

19 legislation.

20   Can you compare, just give an overall

21 comparison of the atmosphere of collegiality on then

22 the approach of compromise in those past few sessions

23 versus the 2021 session?

24   A. Certainly. So in 2011, and I was brand new

25 then, we had our first session in January through

1 March, and then we had redistricting in September. So

2 I clearly was brand new, didn't have any experience

3 then. But I clearly remember sitting in rooms with

4 Brian Sanderoff, as well as multiple other

5 legislators, but he's not, so maybe two or three on

6 each side, where we were adjoining districts, talking

7 about, you know, if we move this district here, we

8 move that district here, how about these communities

9 of interest. And so those kind of conversations

10 happened. Certainly not formally, but they happened.

11   And then Brian Sanderoff would a draw

12 those up and then we could look at them and so we

13 moved on.

14   In that case, because it was a close

15 chamber, there clearly was an effort to try to come up

16 with plans that worked.

17   In 2011, the chamber wasn't as close,

18 but there still was collegiality. We still met,

19 Democrats and Republicans, again with Brian Sanderoff,

20 where he drew up the maps that we discussed and we

21 moved forward from there.

22   But in both cases, I think the

23 difference was that there was a Republican governor

24 who could veto anything that we thought was unfair.

25 So there was a real effort I believe to come up with

1　fair districts during those two.

2　　　　　　During this one, there wasn't even

3　pretending to be an effort. This is the way it is,

4　and you all can just take it or not.

5　　　　Q. Okay. Thank you. And I have to go back and

6　clarify one thing. The meeting that you were not

7　allowed to attend between the tribal leaders and

8　Democratic legislators, did the one put that you had

9　or the proposed which I thinks to SB-1 that you had

10　and wanted to voice to those individuals, were they

11　like deeply significant issues, like don't split up

12　the southeast, or were they -- what kind of issues

13　were they?

14　　　　A. So mostly, it was just moving of a few

15　precincts around. So at least from my perspective, it

16　wasn't any grand change. I mean, I wasn't trying to

17　redefine anything. I simply thought that there was

18　some opportunities there for make things more fair by

19　moving -- I think it was six precincts that I was

20　talking about total, through the whole state. Well,

21　(inaudible) was Congressional District 3 that I was

22　working. But (inaudible).

23　　　　　　MR. HARRISON: Okay. I've got nothing

24　further, your Honor.

25　　　　　　THE COURT: All right. Ms. Sanchez.

1   MS. SANCHEZ: Your Honor, any objection from

2   me doing this from the desk?

3   THE COURT: No. Go ahead.

4   MS. SANCHEZ: Thank you.

5   CROSS-EXAMINATION

6   BY MS. SANCHEZ:

7   Q. Good morning, Senator Sharer. My name is

8   Sarah Sanchez. I'm one of the attorneys for the

9   legislative defendants. I realize probably can't see

10   me or can't see any my face. But can you hear me

11   okay?

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

13   see you.

14   Q. Okay. Now, I understand, Senator, you

15   represent senate District 1 up there in San Juan

16   county in the northwest part of the state; is that

17   right?

18   A. Yes.

19   Q. And that area is in congressional District

20   3, correct?

21   A. Yes.

22   Q. All right. And it's been in that district

23   for a long time, correct?

24   A. Since Congressional District 3 was created,

25   yes.

1   Q. All right. So nothing about that changed

2   under SB-1, the plan that we're talking about now,

3   correct?

4   A. Yes.

5   Q. Okay. Now, I think /KWRAOUFZ shared with us

6   your disappointment that the redistricting session or

7   the process or at least the conversations around SB-1

8   in the legislative redistricting session in 2021 was

9   not as bipartisan as collegial as your previous

10   experiences with redistricting over the previous two

11   decennials; is that right?

12   A. Yes.

13   Q. Okay. Now, you're not -- in saying that,

14   you're not suggesting that there was some kind of

15   procedural violation with how SB-1 moved through the

16   legislature or that it's package was not valid,

17   correct?

18   A. (Inaudible) it was valid.

19   Q. Okay. Now are you familiar, Senator, with

20   the citizens redistricting committee that was set up

21   by some earlier legislation that was passed?

22   A. I am.

23   Q. And are you aware that the citizens

24   redistricting committee, I'll just call it the CRC for

25   short, held a number of public meetings around the

1 state, including in your area?

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

3   Q. Okay. And did you make -- did you make

4 comments at that meeting concerning the congressional

5 map in particular?

6   A. I don't recall, but I do -- certainly I make

7 comments, but I don't recall if I made them about the

8 congressional map.

9   Q. All right. And coming back to the

10 redistricting session in the legislature in December

11 of 2021, did any Republican --

12   A. I can't hear you.

13   Q. Oh, can you hear me now?

14   A. Yes.

15   Q. Okay. In the redistricting session in 2021,

16 did any Republicans introduce a bill for congressional

17 redistricting? I'm not talking about a floor

18 substitute or amendments. I'm asking if they -- if

19 any Republican lawmakers introduced a congressional

20 redistricting plan?

21   A. To tell you the truth, I don't -- I don't

22 know. I can't imagine that we didn't -- that Senator

23 Baca didn't, but I can't tell you one way -- posit one

24 way or the other if it was actually introduced. That

25 would certainly be on the record, though. You can

1　look and legislative council and see if it was

2　introduced.

3　　　　Q.　Would it surprise you to learn that Senator

4　Baca did not introduce a congressional happen?

5　　　　A.　It would surprise me to learn that no one

6　did, if that's the case.

7　　　　Q.　All right.　And you mentioned in your

8　previous redistricting experience, you mentioned

9　Mr. Sanderoff, Brian Sanderoff and his Research &

10　Polling group that would -- was brought in there to

11　provide some services to the lawmakers in preparing

12　redistricting plans.　Do you recall that testimony?

13　　　　A.　I do.

14　　　　Q.　Okay.　And over the years in terms of your

15　work in the legislature and your involvement in

16　redistricting, did you ever have any problems or

17　concerns with how Mr. Sanderoff handled that work or

18　the capabilities and reliability of his staff?

19　　　　A.　Well, certainly he had the capabilities to

20　do that.　I always felt that he leaned a little bit

21　left, but not -- not out of line.

22　　　　Q.　Okay.　And you didn't have any concerns

23　about his knowledge or his understanding of what went

24　into what he needed to do to assist you all in

25　preparing maps?

1   A.   No.

2   Q.   Okay.   Senator, are you aware that just

3   recently, last Friday, the New Mexico Supreme Court

4   issued an opinion in this case providing some

5   additional guidance to the district court about how to

6   decide this matter?

7   A.   I don't -- I don't know what that guidance

8   is.   I read that the Supreme Court had made some

9   decisions, but I really don't know what they were.

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

11   A.   No.

12   Q.   Okay.   One of the things that the Supreme

13   Court talks about in its decision is the importance of

14   the franchise, of the right to vote for New Mexicans.

15   And for that being a cornerstone of our democracy.   Do

16   you agree with that concept?

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

18   Q.   Okay.   And that's something that you value

19   as a state senator and somebody representing

20   constituents in the roundhouse?

21   A.   Absolutely.   Everybody ought to have the

22   right to vote once.

23   Q.   Okay.   And I think you shared with us, I

24   want to make sure I heard you correctly on this, that

25   your senate District 1 up there is approximately about

1 30 percent Native American; is that correct?

2   A. At the (inaudible) districting, I was at 37.

3 Now, after redistricting, it's 30. Not significant

4 change.

5   Q. Okay. And you value the rights of your

6 Native American constituents to participate fully in

7 the political process?

8   A. Oh, absolutely.

9   Q. Okay. Senator, you've talked to us today

10 that you care about bipartisanship and voting rights

11 and Native American political participation.

12   Wasn't it just last year in the 2022

13 legislation that you single-handedly filibustered for

14 two hours to kill a voting rights bill that Democrats

15 had sponsored that would have established a Native

16 American Voting Rights Act?

17   MR. HARRISON: Objection, your Honor.

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

19   Objection to relevance.

20   THE COURT: Ms. Sanchez, what is the

21 relevance?

22   MS. SANCHEZ: Your Honor, this goes to the

23 credibility of this witness in talking about the

24 criticisms that he has of this process. He engaged

25 in the same type of behavior that's being accused of

1   my clients here.

2   THE COURT: So you're questioning -- tell me

3   your question again.

4   MS. SANCHEZ: I can leave out the preamble,

5   your Honor. But the question is in the 2022 session,

6   did Senator Sharer filibuster for two hours to kill a

7   voting rights bill that would have included a Native

8   American Voting Rights Act that was defeated because

9   of his filibuster.

10   THE COURT: All right. I don't know what

11 the contents of that bill were -- are or were, so I'm

12 not sure how this relates to his credibility in this.

13   MS. SANCHEZ: Well, your Honor, I think it

14 relates to his testimony that he felt excluded from

15 this process, that this wasn't a bipartisan process

16 and that the Native American participation in it was

17 something that he was excluded from, when --

18   THE COURT: Did it have something to do with

19 districting for congressional districts?

20   MS. SANCHEZ: Well, it certainly has to do

21 with the voting rights that the Supreme Court are so

22 focused on in their decision in this case that go to

23 the heart of why the Court wants to entertain this

24 claim, I think.

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

1   piece of legislation or his actions and words on the

2   floor debate on a piece after legislation clearly

3   don't, quote, unquote, go to credibility. They don't

4   go to anything than the very same principles that the

5   legislative defendants have been talking about

6   protecting, which is if we can't even get discovery

7   on what people said, we're allowed to harass them

8   over the way he voted on a piece of legislation that

9   who knows what it had in it, what kind of poison pill

10   it had in it, despite the fact that they slapped the

11   name on it Native American Voting Rights Act? It's

12   an inappropriate line of questioning and it's

13   irrelevant.

14   THE COURT: All right. I'm going to agree.

15   I'm going to sustain the objection more than anything

16   because I don't think that it would be beneficial to

17   get into an argument about why someone voted on some

18   other piece of legislation. So I'm going to

19   establish the objection. I don't think that's

20   relevant.

21   MS. SANCHEZ: Thank you, your Honor. I just

22   wanted to clarify. I'm not asking about his vote.

23   I'm asking about the act of filibustering. But I --

24   THE COURT: Same ruling.

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

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

2   Honor?

3   THE COURT: Yes.

4   BY MS. SANCHEZ:

5   Q. Senator, just coming back to the questions I

6   was asking you about, Research & Polling, you recall

7   the Research & Polling folks, Mr. Sanderoff's staff

8   was available there at the roundhouse during the

9   special redistricting session if any lawmakers had any

10 requests for them to process a map or answer questions

11 that came up in the process of redistricting?

12   A. Yes. He was there.

13   Q. Okay. And I'm not going to ask you if you

14 consulted with him at all. I don't want to get into

15 that. But you were aware that he was -- his services

16 or his staff's services were available to you if you

17 needed them?

18   A. Oh, yes. Absolutely.

19   MS. SANCHEZ: Okay. Thank you. I have

20 nothing further.

21   CHAIR BACA: Ms. Agjanian?

22   MS. AGJANIAN: No, your Honor.

23   THE COURT: Mr. Auh.

24   MR. AUH: No, your Honor.

25   THE COURT: Redirect.

1   MR. HARRISON: No redirect, your Honor.

2   Thank you, Senator Sharer.

3   THE COURT: Thank you, Senator Sharer.

4   You're free to go. Thank you.

5   THE WITNESS: All right. Thank you, your

6   Honor.

7   THE COURT: All right. Seeing that it's

8   about noon, I propose we take a break for lunch and

9   come back and be ready to go by 1:15. Is that all

10   right?

11   All right. We'll be in recess.

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

13   to 1:15 p.m.)

14   THE COURT: All right. We are back on the

15   record in Lea County Cause Number CV-22-041.

16   Ms. Agjanian, I see you standing.

17   MS. AGJANIAN: I am, your Honor.

18   THE COURT: So you've received a copy of the

19   writ, correct?

20   MS. AGJANIAN: Correct, Judge.

21   THE COURT: All right so for the record, a

22   writ has been issued by the Supreme Court, directing

23   me to dismiss you and your clients from the case, so

24   you're hereby dismissed. I'll follow it up with a

25   written order later on today.

1   MS. AGJANIAN: Your Honor, may I make a

2   motion to be excused? That way the Court has to

3   grant one of my motions.

4   THE COURT: I'm already under order from the

5   Supreme Court to dismiss you, so you are dismissed,

6   and if you have. Have a good day.

7   All right. Mr. Harrison.

8   MR. HARRISON: Yes, your Honor. I don't

9   know if your Honor saw, but the Supreme Court issued

10   another writ --

11   THE COURT: Yes.

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

13   THE COURT: They did issue an order denying

14   the writ of error, petition for writ of error,

15   correct?

16   MR. HARRISON: That's correct, your Honor.

17   They denied the petition for writ of error. And it

18   was further ordered that the petition did not stay

19   the district court's order or the proceeding from the

20   district court.

21   THE COURT: Okay. All right. And I assume

22   you have seen that also.

23   MS. SANCHEZ: I have, your Honor. And we're

24   kind of getting the declaration with regard to

25   Ms. Leith prepared for Mr. Burciaga, as discussed --

1   THE COURT: Okay.

2   MS. SANCHEZ: -- this afternoon. We should

3   have it for the Court shortly. May I -- since I

4   don't have a printer here, may I forward that to the

5   Court's Proposed Text e-mail and Mr. Harrison?

6   THE COURT: Yes. If you can help her with

7   that. My Proposed Text e-mail would goal to Clovis.

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

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

10   UNIDENTIFIED FEMALE: (Inaudible).

11   THE COURT: Okay.

12   MS. SANCHEZ: Whatever the Court prefers.

13   THE COURT: Okay. Yeah, she'll give you an

14   e-mail. Yeah, I think so, she'll give you an e-mail

15   to send it to.

16   MS. SANCHEZ: Thank you.

17   MR. HARRISON: And, your Honor, on that

18   front, we ask that the Court order full document

19   production of -- we reiterate after your Court's

20   latter decision, we sent an e-mail that, of course,

21   we copy the Court on, but saying, you know, that we

22   would accept from the legislators production on a

23   truncated privilege log, such that they don't have to

24   log it all communications post the day of pass age,

25   which I don't remember off the top of my head.

          1   And then /TPOEU communications that are

          2   predate of passage of the legislation, they can just

          3   put the identities of the parties, like, so-and-so to

          4   these people. And they don't need to summarize the

          5   contents of the communication in the way that you

          6   normally would for, like, an attorney-client

          7   privilege log, because I don't think it's necessary

          8   under the analysis laid out by the Court. But

          9   anyway, which may be (inaudible), but would ease the

         10   burdensome what, but we would ask, your Honor, that

         11   the counter please order production by 8:00 a.m.

         12   tomorrow, which I would normally feel bad about,

         13   although the Supreme Court just ordered us to do two

         14   briefs by 8:00 a.m. today, so it's, you know --

         15   THE COURT: All right. So you've reissued

         16   subpoenas shortening what you're asking for.

         17   MR. HARRISON: No. We just reached that

         18   informally to say we don't need --

         19   THE COURT: Okay.

         20   MR. HARRISON: -- a full privilege log. You

         21   know, if it's post I believe December 18th, 2021,

         22   which the Court said anything post enactment of

         23   legislation is privileged, you don't need to log it

         24   all, (inaudible) it is privileged. If it's pre-that

         25   date and you claim that it's privileged, so it's the

1 legislator to legislator communication or legislator

2 to staff communication, all we need is the identity

3 of the parties.

4   Because that then establishes -- it

5 doesn't matter what the subject is. It's either

6 irrelevant or privileged and so that's good enough.

7 But we would like to see -- because, you know, the

8 reality is, there could be some additional folks that

9 are on that periphery where the legislative

10 defendants say they're within the privilege

11 (inaudible), but the -- you know, we litigate the

12 issue and it turns out they're not, for example, and

13 so we you had would still ask for that, but mostly,

14 you know, production and ideally production quickly

15 enough to where we can use it in our examination of

16 the legislators and the two consultants that we

17 subpoenaed for trial.

18   Thank you, your Honor.

19   THE COURT: Mr. Olson or Ms. Sanchez or --

20 any response?

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

22 responses.

23   First of all, I think the Court has

24 clarified that these individuals cannot be called and

25 questioned about the statements that if there are

1   responsive statements that the statement speaks for

2   themselves and the Court considers them outside the

3   privilege.

4   Second of all, from just a practical

5   standpoint in a burdensomeness standpoint, which is

6   the other issue we raise in subpoenas, and I think

7   we've heard from some pretty Frank admissions from

8   plaintiffs' counsel is that there was some strategic

9   overreaching in terms of what was asked for in terms

10   of these subpoenas, we presented declarations from

11   folks with the legislature that to do a search and

12   review for all the documents that have been

13   requested, hundreds of word searches and e-mail

14   searches would take months.

15   And so, you know, if there's a narrower

16   scope, which we understand from the Court's ruling,

17   that there's a much narrower scope, certainly in

18   terms of what the Court considers to be outside of

19   privilege, that hasn't been defined anywhere in these

20   subpoenas.

21   What I would propose to the Court is --

22   obviously I haven't had an opportunity, since we're

23   if trial, to confer with our client about the denial

24   of written what is even possible to do and how

25   quickly, I would ask that the Court give me the

1 evening to do that, and we would be ready first thing

2 tomorrow to report back with what we are able to do.

3 But I just can't, on the fly right now, commit to a

4 particular turn around time, particularly when these

5 subpoenas of what's being asked for here is the

6 privilege log for all privileged documents requested

7 and then subpoenaed, even if we just limit it to the

8 trial subpoenas. It's still an enormous scope, pages

9 and pages of documents.

10   THE COURT: Yeah, I guess I'm not completely

11 clear on what you're asking. Your original subpoena,

12 apparently, from what I've understood, asked for a

13 large amount of information. The Court has ruled,

14 has (inaudible) that narrows that somewhat.

15   Are you still asking for everything that

16 will be within that? Or are you just saying that you

17 wanted a list of people that they communicated with.

18   MR. HARRISON: So, your Honor, most of

19 the -- most of the subpoenas use -- you search terms.

20 Now, the overbreadth of the search terms has been

21 overstated. I've sat and ran on my own -- you know,

22 they can be run on an outlook or gmail system, and it

23 took me about an hour to run them on on a single

24 e-mail account. And I think there are a couple

25 (inaudible) multiple e-mail accounts. So it's been

1   overstated.

2   And I also understand that not every

3   legislator is not super text savvy and all that.

4   Again, we served these things back in July, which we

5   have not -- there's been no lack of diligence on the

6   plaintiffs' part in terms of seeking this discovery.

7   And the legislative defendants, who, in

8   fairness, had privileged communications that need to

9   be ruled on, you know, I think we admit, you know,

10 we're not game to narrow these things down and

11 produced, because their position was that privilege

12 covered essentially all that was requested, including

13 communications with third parties. So yes, what we'd

14 asked was production for -- the so the subpoenas ones

15 their face request communications with everyone. And

16 now, of course, the Court has -- that discuss SB-1

17 and Democrat, or SB-1 -- it's a set of search terms

18 designed to create in the aggregate things that would

19 be relevant to specifically congressional

20 redistricting, not one of the other bills that was

21 out there. And then, specifically, references to the

22 partisan tilt of the districts. So --

23   THE COURT: These would be communications

24 with people outside of the legislative privilege?

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

1   at this point, is production of communications with

2   folks -- from a legislator to CCP to congressional

3   consultant, et cetera, so yes.

4   Now, we would ask -- I would even be

5   willing to go further and say we would log -- they

6   could leave off entirely just you as not being part

7   of the subpoena anymore, true legislator to

8   legislator communications. We'd still ask for a log

9   that just gives names of identities for anybody

10   they're contending is staff or consultant. Because

11   the problem is, there's still a lingering

12   disagreement about, you know, who is -- who is,

13   quote, unquote, a non-legislator person who is within

14   the privilege. And so we would, ideally, I guess get

15   production of folks -- of communications between

16   legislators and folks that they agree are not

17   legislative staff, and then a privilege log of any

18   pre-passage communication between legislators and

19   folks that they contend are legislative staff. So

20   they could leave off a true senator to senator

21   communication, they could leave off, since we know

22   that it's going to be privileged.

23   But if it's a legislator from the

24   outside, which, bear in mind, you know, the

25   legislature is not particularly well staffed, so

1 we're not talking about a ton of communication that

2 should fall into that. But there's going to be room

3 to -- I don't want to say you don't need to log

4 everything that's between a legislator and stuff,

5 because then the problem is, you get -- you know,

6 it's going to (inaudible) indicate their

7 interpretation of what a quote, unquote staffer is

8 that's different from ours.

9   And we'd like to at least know the

10 identity of the counter party to the communications.

11   THE COURT: All right. Okay.

12   Ms. Sanchez, how -- with those narrower

13 (inaudible), how much time would you think you need

14 to talk to your people about that? Did you say by

15 tomorrow morning?

16   MS. SANCHEZ: Well, I can certainly talk to

17 them tonight and we'll try to have -- and we'll have

18 in the morning for the Court a much better

19 understanding of what's even possible, considering

20 those parameters that were laid out for us.

21   I don't know -- I don't know that what

22 even counsel has just outlined is possible within --

23 to accomplish within a day or two.

24   THE COURT: Okay.

25   MS. SANCHEZ: And I appreciate that they

1 served these subpoenas a long time ago. We also

2 filed a motion to quash a long time ago. The Court

3 has had a lot of filings before it. And I don't want

4 there to be any suggestion that we're attempting to

5 do anything last minute here.

6   THE COURT: Right.

7   MS. SANCHEZ: We timely moved to quash based

8 on the constitutional privilege. So I will endeavor

9 to do everything that I can before 9 o'clock in the

10 morning to figure out what's possible, to communicate

11 with our clients about where we stand and what --

12   THE COURT: Okay.

13   MS. SANCHEZ: -- counsel is asking.

14   THE COURT: We'll do that. I'll hold off on

15 that until tomorrow morning and hear from you on

16 that. Okay?

17   MR. HARRISON: And may we make one, I guess,

18 additional request be that if they could get us by

19 tomorrow morning, the production of just the --

20 document production of just those individuals we

21 subpoenaed for trial. I believe they represent

22 five -- five individuals. That obviously -- I mean,

23 that's doable. I think fairly clearly, there may be

24 one person who happens to have left the country or

25 whatever. Although they got (inaudible).

1   THE COURT: Who are the 5?

2   MR. HARRISON: Senator Cervantes.

3   THE COURT: Oh, their witnesses?

4   MR. HARRISON: Yes. The ones we served

5   trial subpoenas on, which is only four legislators

6   and two consultants. And one of those consultants

7   has separate representation.

8   THE COURT: Okay.

9   MR. HARRISON: So if we could get production

10   of at least the document request to those five. That

11   would have us be at least, you know, cooking with

12   gas.

13   THE COURT: Okay. All right. So with maybe

14   that focus tomorrow morning, I'll still wait and hear

15   from you tomorrow morning.

16   MS. SANCHEZ: Thank you, Judge.

17   THE COURT: Okay? All right anything else

18   before we get back at it?

19   Okay. Mr. Harrison.

20   MR. HARRISON: Yes, your Honor. The

21   plaintiffs call Mr. David Gallegos.

22   THE COURT: Come around here, sir. And

23   before you sit down, if you'll raise your right hand.

24   Before.

25   Do you solemnly swear or affirm under

1   penalty of perjury that the testimony you'll give

2   will be the truth, the whole truth and nothing but

3   the truth?

4   THE WITNESS: Yes, sir.

5   THE COURT: Thank you. Have a seat.

6   DAVID GALLEGOS,

7   having first been duly sworn, testified as follows:

8   DIRECT EXAMINATION

9   BY MR. HARRISON:

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

11   A. Doing well. Thank you.

12   Q. Can you give me your -- your position with

13   state government and your tenure in that position.

14   A. So I've a state senator for -- this is my

15   third year. I was in the house for eight years before

16   I moved to senate. So currently have district 41,

17   which is Eddy and Lea County.

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

19   A. District 61, which is similar in footprint,

20   but just in Lea County.

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

22   A. Yes.

23   Q. Okay. And I'll go ahead and tell you that

24   there was some language in the Supreme Court that we

25   felt like we needed to call a plaintiff to testify,

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

2   So tell me, under the old -- so the

3   pre-2021 redirecting -- or districting scheme in

4   New Mexico, what congressional district were you a

5   resident of?

6   A.   In CD-2.

7   Q.   Okay. And then under the current

8   districting, what district are you a resident of?

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

10 legislative district.

11   Q.   I see. Okay. And then what's your

12 political party?

13   A.   Republican.

14   Q.   Okay. What is -- what is your view on the

15 SB-1, the 2021 redistricting map?

16   A.   Well, you know, we looked at them. I know

17 they had meetings all over the state and had a lot of

18 input. When we got into Santa Fe, we started having

19 meetings on preferences and looking at the maps. I

20 have a real hard time with the current map because of

21 the division it caused in Lea County just with my

22 constituents, and everyone in my family. Eve got

23 family here in Lovington, and they don't feel like

24 they're being cared for.

25   And there's just a lot of difference

1 between here and Las Vegas, New Mexico and/or

2 Albuquerque, and maybe still in CD-2 now goes up into

3 the Albuquerque sector.

4   Q. Okay. Now you mentioned that your senate

5 district, your state senate district has been split

6 among two congressional districts?

7   A. Correct.

8   Q. Okay. Do you not feel that benefits your

9 constituents, they have two Congress people rather

10 than one?

11   A. It doesn't benefit. So the -- the issue is

12 in oil and gas, they've split the oil and gas sector.

13 When we had -- regardless of who it was, could speak

14 for all the industry in our part of the state. Now we

15 have two Congressman and one -- but in reality, it

16 makes it harder for them.

17   And then the other problem I have with

18 it is, it separated Hispanics, because a majority of

19 the large population of workforce in the oil field is

20 Hispanic. And there, again, they don't have a very

21 solid -- or don't feel they have a voice. And now

22 it's divide and it's makes it even harder for them to

23 be responded to by their congresswoman or Congressman.

24   Q. Okay. Now, you -- have you familiarized

25 yourself with areas of what's called is South Valley

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

 2        A.  I have.  I actually have family there that

 3   feel like they're victims in this same process.  They

 4   should be looked at as part of the metro Albuquerque

 5   area.  And I did a lot of not door to door there, but

 6   some functions in the area, where they had people come

 7   in just to -- first to meet them.  And they just felt

 8   sort of isolated from their own people because our --

 9             MS. TRIPP:  Hearsay.

10             THE COURT:  Just a minute.

11                Mr. Harrison.

12             MR. HARRISON:  I mean, he's giving the

13   gestalt, overall impressions of what his constituents

14   in the state say.

15             THE COURT:  If you could ask it a way that

16   leans less on what they've told him or things of that

17   nature.

18   BY MR. HARRISON:

19        Q.  Yeah, if you could steer clear, I guess, of

20   kind of reiterating what, especially specifics of what

21   people have told you, but -- and continue answering

22   the question.

23             THE WITNESS:  Would it be better, your Honor

24   if I give you names?  I've got cousins that actually

25   brought this topic up to me while in Albuquerque.
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1   THE COURT: No. (Inaudible).

2   THE WITNESS: No names? Okay.

3   BY MR. HARRISON:

4   Q. We'll stick with your view of how to

5   redistricting affects this. So you mentioned that in

6   your view, the folks in the South Valley being locked

7   in with CD-2 basically, and let me know what your

8   testimony is, those folks, the actual concerns of

9   their day-to-day life are Albuquerque metro concerns,

10   like crime, traffic, et cetera, that will be handled

11   one way or the other by the -- by the Albuquerque

12   metro congressperson who they now don't get to vote

13   for? Is that...

14   A. It is. That's very clear, because of the

15   difference in lifestyles in Eunice and in South

16   Valley. They are part of the metro area.

17   Q. Okay. It's been raised so I'll ask you what

18   you think of it, what do you think of the claim that

19   folks in the South Valley tend to be Hispanic, and so

20   they belong in the southern district?

21   A. Well, again, just from the discussions I've

22   had, they don't feel like they belong. There's a

23   difference, just thinking through Las Cruces and

24   Albuquerque. They don't feel part of what happens in

25   the south -- southern corridor.

1   Q. Okay. And, you know, since I've got you up

2 here, and since you were in the senate, I'll very

3 briefly ask you about your experience in the

4 legislative process.

5   So representing kind of the area of

6 greatest concern for the SB-1 map, what was -- what

7 were your impressions of the process of the 2021

8 special redistricting session as it relates to SB-1?

9   A. Well, I was disappointed. So I look at the

10 process being open and honest with the people. As a

11 legislator, I was not invited to be part of the

12 discussions.

13   We had side discussions, you know, as

14 far as the maps and what we thought and our input,

15 where we would go with what the maps were there. But

16 when it came down to the actual decision of the maps,

17 I don't know of any Republicans that were ever asked

18 to be in the conversation. They were sort of forced

19 upon us, and we just have to live with the

20 consequences.

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

22   THE COURT: You the.

23 BY MR. HARRISON:

24   Q. And this may seem obvious, but in your view,

25 would -- post-redirecting, are you more or less apt to

1　be able to elect the congressperson of your choice?

2　　　　A.　I'd say that'd be impossible.

3　　　　Q.　And then to put a finer point on it, is CD-2

4　more or less apt to elect a Republican

5　post-redistricting?

6　　　　A.　Try that one more time.

7　　　　Q.　To say it, I guess, in a different way, or

8　different spin, is the CD-2 more or less apt top elect

9　a Republican post-redistricting?

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

11　　　　　MR. HARRISON:　Okay.　And I'll pass the

12　witness, your Honor.

13　　　　　　　　　　CROSS-EXAMINATION

14　BY MS. TRIPP:

15　　　　Q.　Good morning, Senator Gallegos.　My name is

16　Ann Tripp, and I'm an attorney with the legislative

17　defendants office.　Thank you for being here today.

18　　　　　　　Before we get started, I just wanted to

19　say congratulations on the baby box initiative.　I saw

20　that in the news.　And you were a sponsor of that

21　legislation, correct?

22　　　　A.　Yes, ma'am.　Thank you.

23　　　　Q.　So the plaintiffs have asked you here today

24　to testify, and they covered a couple things.　And

25　they mentioned a Supreme Court order or opinion and

1 that's why they called you. Have you read that

2 opinion?

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

4   Q. But you did say you've been a senator for

5 three years and a representative for eight years in

6 the state?

7   A. Yes, ma'am.

8   Q. And during that time, have you /REPB opposed

9 in your districts down here in Lea County?

10   A. Yes, ma'am.

11   Q. And what year was that?

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

13   Q. Opposed -- I'm sorry. I should have said

14 opposed by a Democratic candidate?

15   A. Oh, 2012.

16   Q. 2012. So about 11 years ago?

17   A. Yes, ma'am.

18   Q. And you're also a voter in the

19 congressional -- the second congressional district; is

20 that right?

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

22   Q. And were you a voter in the second

23 congressional district in 2018?

24   A. Yes, ma'am.

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

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 1    in Congressional District 2?

 2            A.  Yes, ma'am, correct.

 3            Q.  And so you just mentioned that you were

 4    disappointed in the process in which Senate Bill 1 was

 5    based.  And so when I'm referring to Senate Bill 1,

 6    I'm referring to the redistricting legislation.  And

 7    if you were -- you were disappointed, but did you note

 8    anything procedurally improper with that legislation?

 9            A.  No, ma'am.  Just because I wasn't part of

10    the internal process for design the maps.

11            Q.  Were you able to attend any of the committee

12    hearings and ask questions?

13            A.  No, ma'am.  Actually, my mother was very ill

14    and I was care giving for her.

15            Q.  I'm sorry, I asked a poor question.  Were

16    you able to attend any of the senate committee

17    hearings during the redistricting session?

18            A.  Yes, ma'am.  I stepped in -- I was not on

19    committee, but I stepped in to hear some of the

20    dialogue that went on.

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

22    correct?

23            A.  No, ma'am, I did not.  Well, I did not ask

24    to ask questions.  I was there trying to absorb the

25    information.
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1   Q.   Okay.   Were you also able to ask questions

2   or comment during the senate floor debate on SB-1?

3   A.   I think we were available to, but I do not

4   remember asking any questions on it.

5   Q.   And you didn't proper any amendments or maps

6   of your own during the redistricting session?

7   A.   I did not.   They had some prepared, other

8   legislators, and I thought they were adequate in their

9   direction.   So I didn't duplicate their efforts.

10   Q.   And when you refer to other legislators, are

11   you referring to Senator Moores, who prepared the

12   floor amendment to Senate Bill 1?

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

14   ma'am.

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

16   A.   And I think that Senator Sharer had some

17   ideas.   And I think that in their discussions, they

18   stayed with Senator Moores'.

19   Q.   I understand.   So the only proposal from

20   amendment from Republican during the redistricting

21   session was from Senator Moores?

22   A.   I believe that's correct.

23   Q.   Thank you.   And so I think earlier, you

24   mentioned -- when you -- when I said committee, you

25   assumed it was the citizens redistricting committee?

1   A. Right.

2   Q. And you voted in favor of that legislation

3   that established the independent redistricting

4   committee?

5   A. Yes, ma'am.

6   Q. And voting in favor of that legislation, you

7   realized at the time that it was forming the basis as

8   an interim committee? It wasn't creating binding

9   guidelines or plans on the legislature?

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

11   Q. Okay. But you didn't attend any of the

12   meetings or submit any comments to the citizens

13   redirect committee?

14   A. Correct.

15   Q. Okay. And so there's a declaration

16   submitted during this process of this litigation that

17   you signed. Are you familiar with that, or do you

18   remember --

19   A. Yes, ma'am.

20   Q. -- doing that? It was in -- it was

21   regarding a motions practice during the case, but I

22   wanted to go through a few things, because you said

23   that you made these statements based on your personal

24   knowledge?

25   A. Correct.

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

2   A. Pardon?

3   Q. Do you need a copy of your declaration, or

4   do you remember what you said?

5   A. Oh, no, that -- if you wouldn't mind, that'd

6   refresh my memory.

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

8   Honor?

9   THE COURT: Yes.

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

11   THE COURT: I would. Thank you.

12   BY MS. TRIPP:

13   Q. All right. And so I just -- first, at

14   Paragraph 4, you say that you regularly vote for

15   Republican candidates. And so that's -- mentioned

16   earlier in your testimony that you voted in 2018 and

17   in 2020, and so does this statement apply to those

18   years, as well?

19   A. Yes, ma'am.

20   Q. Okay. And then in Paragraph 7, you state

21   that "Senate Bill 1 dilutes the power of my vote."

22   Did I read that correctly?

23   A. Yes, ma'am.

24   Q. And when you say "dilutes the power of my

25   vote," you're not referring to population deviation

1 | between congressional districts, are you?

2 | A. As a Hispanic, I would say that was a large

3 | part of that, yes, ma'am.

4 | Q. Okay, senator. In terms of dilution, the

5 | phrase one person, one vote, you're not making an

6 | allegation that Senate Bill 1 doesn't have a right

7 | amount of people in each district; is that right?

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

9 | balanced.

10 | Q. Okay.

11 | A. But on the basis of my vote not having value

12 | is where I come up with that as being diluted, or

13 | feeling that I'm being diluted.

14 | Q. And that feeling of being diluted, is that

15 | based on any objective evidence, a number?

16 | A. Not a number. But historical interactions

17 | with the congressmen or Congress persons.

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

19 | A. Yeah. I was just going to state that within

20 | the past, when we've had Democrat congressmen,

21 | identify reached out to both on constituent issues,

22 | and a state senator had never returned a call.

23 | And my job as a senator or even a state

24 | rep, was to be able to carry my message for my

25 | constituents to my delegation if they were not able to

1   make that connection. And it doesn't work, I was not

2   able to make that contention.

3   Q. And --

4   MR. HARRISON: I'm sorry, my apologies. I

5   have a problem with her questioning off the

6   declaration. Could we possible admit it into the

7   record if we're going to do that H.

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

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

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

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

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

13   MS. TRIPP: Are we using letters?

14   THE COURT: Call it Exhibit 2 as your

15   exhibit, or -- your exhibit is A.

16   MR. HARRISON: I guess we're just going to

17   do (inaudible).

18   THE COURT: Let me see here.

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

20   UNIDENTIFIED FEMALE: (Inaudible) Number 2

21   of ours, (inaudible).

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

23   Exhibit A.

24   UNIDENTIFIED FEMALE: Do you need that?

25   THE COURT: If this is the official one.

1   UNIDENTIFIED FEMALE: We'll make that

2   (inaudible) copy.

3   THE COURT: All right. Go ahead.

4   BY MS. TRIPP:

5   Q. All right. Senator Gallegos, so further on

6   in Paragraph 7, you state that -- and I'll summarize,

7   that, "Dilutes the power of my vote by cracking the

8   most concentrated block of Republican voters."

9   A. Yes, ma'am.

10   Q. And so that summation, which is based on

11   your Honor personal knowledge, that's not based on an

12   analysis of voter registration?

13   A. Well, in my purview, in my view of that,

14   I've been doing voter registration in Lea and Eddy

15   County for quite a few years, and we have a really

16   strong group of voters in the area. Not that they all

17   showed up to the election cycle, but we have quite a

18   few Republicans.

19   So my purview on that is when you split

20   off anything north Hobbs, in Lovington, Tatum, it

21   reduced the block of Republicans that we had here for

22   Lea County, for CD-2.

23   Q. Thank you, Senator. And so the

24   geographically concentrated block is based on voter

25   registration of registered Republican voters; is that

1 right?

2   A. Yes, ma'am.

3   Q. Thank you. And then also kind of part of

4 diluting the vote, you go on to speak about the -- in

5 Paragraph 8, that the -- the legislature eliminated

6 the only Republican member of Congress, making it --

7 and in your own testimony, you said it was impossible

8 to elect a Republican. Did I -- is that correct? You

9 said that was your statement earlier?

10   A. Yes, ma'am. I believe so. I know that the

11 numbers didn't show that much of a disparity in the

12 final vote. But I think that, from my view of this,

13 it'd be really hard for us to offset what the South

14 Valley did to us.

15   Q. And so I think you just referred to the

16 numbers maybe not reflecting. And so you're referring

17 to the 2022 election that was decided only by 1300

18 votes?

19   A. Yes, ma'am.

20   Q. And so when you say it's impossible, your

21 impossible is that 1300 votes?

22   A. It would take a huge voter mindset change.

23 We had a lot of people that did not come to the polls,

24 for whatever reason.

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

1 necessarily the district, it was voter turnout?

2   A. Well, I guess from my view, there again, I

3 think we have a statewide problem of disenchantment by

4 voters, and it just seemed to be in the Republican

5 sector. But with the addition to the Democrat voters

6 in the Albuquerque sector, I think it pulls everything

7 that way unless there's a change in our thoughts on

8 Republican voting.

9   Q. Thank you. And -- and so when you voted in

10 2018 as a Republican voter, that was under the prior

11 redistricting map, was your vote diluted then?

12   A. I don't believe so. I think we had --

13 personally, I don't think at that time I was.

14   Q. But in 2018, a Democratic candidate won the

15 election in Congressional District 2; is that correct?

16   A. Yeah, I'm going to say I lost my time line.

17 That was two cycles back?

18   Q. Two cycles back.

19   A. I just know whenever the -- the maps were

20 created in what year?

21   Q. Okay. So under --

22   A. I apologize. I'm not supposed to ask

23 questions?

24   Q. So SB-1 creates the map for 2021 and

25 controlled the 2022 election; is that right?

1   A.   Correct.

2   Q.   Okay.   And the prior map which was actually

3   created in 2011 --

4   A.   Right.

5   Q.   -- that would have been in effect during the

6   2018 election cycle?

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

8   Q.   All right.   And during the 2018 cycle, I

9   believe Congressman Xochitl Torres Small won the

10   election.

11   A.   Correct, she did.

12   Q.   And so was your vote diluted during that

13   2018 election?

14   A.   In -- in -- I'm going to say no.   But the

15   caveat there was, when I went to bed in Alamogordo

16   that night, Yvette Harrell had won, and do not

17   understand the logistics behind surprises in the

18   morning where she had lost.

19   Q.   Thank you, Senator.   But to confirm, the

20   New Mexico Secretary of State's election results, it

21   was that a Democratic candidate did carry

22   Congressional District 2 in 2018?

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

24   Q.   Thank you.   And so in terms of your vote

25   being diluted today, it's not based on voter

1 registration; is that right? It was based on more of

2 a feeling, I think is what you testified?

3   A. Well, and I guess my thought on that is,

4 it's determined by voter registration, that we didn't

5 have a the South Valley constituents in our CD-2 at

6 the time prior to the map.

7   Q. I believe your testimony earlier was that

8 Congressional District 2 under SB-1 is not only

9 impossible to elect -- you're a Congressman -- but is

10 less apt to reelect a Republican; is that correct?

11   A. I do believe that.

12   Q. And are you following the 2014 campaign or

13 election currently for Congressional District 2?

14   A. I have not. I know that they both -- those

15 voice their opinion that are running, as far as

16 current Congressman, and congresswoman Yvette Harrell

17 is seeking re-election, so yes.

18   Q. Would you disagree with common political

19 pundits that say it's a close raise, and perhaps it's

20 even a 1 percent raise that Yvette Harrell is in the

21 lead?

22   A. I've seen polls that are (inaudible) and on

23 the last day, they have different outcomes. So I

24 don't put all my (inaudible) in a poll.

25   Q. But I think I heard you say earlier that

1 with voter turnout, that that result could be

2 different; is that right?

3   A. I truly believe that if we give I'm going to

4 say southeast New Mexico hope in a candidate, that our

5 voter numbers will increase and that would be possibly

6 the difference. Maybe that's what the pundit's

7 looking at.

8   Q. And so senator, would you agree that the

9 quality of the candidate greatly effects the outcome

10 of an election?

11   A. In a fair fight, I would say yes.

12   Q. Was it a fair fight in 2018?

13   A. I go back to the night when I went to bed,

14 Yvette Harrell had won, when I woke up, she had lost.

15   Q. Understood?

16   A. So I do not believe that was a fair fight.

17   MS. TRIPP: Thank you, Senator. Just a

18 second.

19   No further questions, your Honor.

20   Thank you, Senator.

21   THE WITNESS: Thank you.

22   THE COURT: Mr. Auh, do you wish to

23 question.

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

25   THE COURT: Okay. Redirect.

                    REDIRECT EXAMINATION

1

2   BY MR. HARRISON:

3   Q. So to clarify this hard, versus less apt,

4   versus impossible, you would agree that technically

5   speaking, anything the possible if a candidate is

6   indicted on a serious -- on serious criminal charges,

7   would you agree that that might lessen their chance of

8   winning an election?

9   MS. TRIPP: Your Honor, (inaudible).

10   THE COURT: I think we're kind of asking

11 about hypotheticals, so...

12   MR. HARRISON: Yeah, I mean, this is exactly

13 what we were --

14   THE COURT: I think this is the same ground

15 that you covered, so overruled.

16   THE WITNESS: Would you like me to answer,

17 your Honor.

18   THE COURT: Yes. Go ahead.

19   A. So I do see that that would be a really hard

20 obstacle for them to overcome in an election cycle.

21   Q. And so would you agree that in a

22 circumstance like that, a Republican could lose in a

23 strongly Republican district, or a Democrat would lose

24 in a strongly Democratic district?

25   A. I do. I believe they could.

1   Q. And similarly, what do you think it would

2   take -- what does the picture look like in your mind

3   for a Republican winning the current CD-2?

4   A. With that configuration of the map, I still

5   think it would be have very hard, uphill battle. We

6   live on flat hand here, but it would be a sure climb

7   to the top to have to make a change over what the maps

8   did to us.

9   Q. Okay. And do you agree that -- well, do you

10   that Yvette Harrell lost in 2022?

11   A. There again, I'm not -- I don't have the

12   confidence ins our system that system do. I would say

13   I'm on the borderline if it was illegal or not. But I

14   think that regardless of if it was legal or not, on

15   the machines, the additions to the South Valley on

16   CD-2, made a huge impact in the voter counts.

17   Q. Okay. But I guess putting aside the

18   integrity of the process, you certainly -- do you

19   agree that Yvette Harrell was the congresswoman for

20   the CD-2 prior to the 2022 election and now is not?

21   A. Yes, I do.

22   Q. And that overall nationally, what kind of a

23   year was 2022 for Republican candidates?

24   A. It started out that it was going to be a

25   huge great wave, but it did not make it here to

1 New Mexico.

2   Q. Sure. But nationally, did Republican, for

3 example, take the house of representatives?

4   A. They did.

5   Q. Okay. And the U.S. House of

6 Representatives?

7   A. Yes.

8   Q. Okay. And are you aware of any general

9 trend of how elections often continued to go in the

10 recent past for the party out of power, that does not

11 have the white house in a midterm election?

12   A. And I've heard where that's usually a good

13 thing for us. But I just -- I still wonder on, again,

14 going back to the integrity issue, I still have

15 questions on the integrity. But I understand in the

16 mid terms, it should be a plus for us.

17   Q. And do you agree that there are generally

18 advantages to running as an incumbent candidate?

19   A. There is. It's really pretty hard to

20 displace an incumbent.

21   Q. Okay. So in 2022, Yvette Harrell was an

22 incumbent running in what I'll call a read year?

23   A. Yes, sir, that would be correct.

24   Q. Okay. And she still lost the election?

25   A. Small margin, but yes, sir, it was a loss.

1   Q.   Okay.   Thank you.

2   MR. HARRISON: I have nothing further, your

3   Honor.

4   THE COURT: Anything else, for this witness?

5   All right.   Thank you, Senator.   You may

6   step down.

7   THE WITNESS: Thank you.

8   THE COURT: You may call your next witness.

9   MS. DIRAGO: Your Honor, we call Sean

10   Trende, but I believe you wanted to hear the motions

11   before that.

12   THE COURT: Okay.   Let's go ahead and

13   consider that.   If I can read along, tell me again

14   the date that you filed.

15   UNIDENTIFIED MALE: One second, your Honor.

16   Well, of course I just closed all of my

17   documents, your Honor.   Bear with me one second.

18   Your Honor, other initial motion was

19   filed on September 20th.   And plaintiffs' response

20   was filed yesterday, 9/26.

21   THE COURT: All right.   Go ahead.

22   UNIDENTIFIED MALE: Your Honor, defendant

23   owes motion is based upon Sean Trende having

24   destroyed the 2,040,000 simulations underlying his

25   expert report.   Under New Mexico law, the default is

1   expert testimony is not admissible. It is only

2   admissible where the proponent can show that the

3   testimony is reliable.

4   Mr. Trende's expert report is scientific

5   evidence. It's scientific evidence that must be

6   testable. In this case, Mr. Trende believed, taking

7   him at his word, believed that he was producing

8   source code to the defendants that would have

9   generated reproducible results. He feels wrong.

10   Mr. Trende didn't understand the

11   software he was using would not create reproducible

12   results. It was very clear from his deposition that

13   he did not understand that.

14   So rather than save the 2,040,000

15   simulations that he says underlie his opinions that

16   form the basis of his analysis, he didn't save it.

17   They are gone and they are gone forever.

18   After this was brought in Mr. Trende's

19   attention in his first deposition, he initially

20   claimed that he were reproducible. And shortly

21   thereafter, a day or two later, plaintiffs produced

22   to us 2,040,000 simulations that they claimed were

23   the original simulations. They were not.

24   I took Mr. Trende's deposition a second

25   time. And in that deposition, he agreed, well, based

1   upon the documentation of the simulation software he

2   downloaded, and based upon the source code of the

3   simulation software he downloaded, that it would not

4   create reproducible simulations. We left it at that.

5   Yesterday, your Honor, plaintiffs filed

6   a response to our motion to exclude. In that motion

7   to exclude, plaintiffs included a 11 page declaration

8   of Sean Trende, that frankly, it looks like a revised

9   expert opinion. The deadline for expert opinions is

10 long past.

11   The upshot of plaintiffs' argument is

12 that by virtue of having generated an additional

13 2,040,000 simulations, and because Mr. Trende says,

14 "They're very similar in the ones I destroyed," and

15 that neither you nor we can test, your Honor, we need

16 to take Mr. Trende's word for it, that his report is

17 based on data that looks like what he said it did.

18 But we don't know that. And we can never know that.

19   Under the rules of evidence, there must

20 be an evidentiary foundation for the opinions. The

21 rules of evidence provide that when a scientific

22 expert testifies in court regarding the scientific

23 evidence, he may be required to produce it. And in

24 this case, Mr. Trende cannot because he destroyed his

25 evidence.

1   This has been addressed in State versus

2   Gutierrez. It's a state that came out of your

3   Honor's home court in Clovis. In that case, the

4   state was pursuing murder charges against the

5   defendant. Long before they brought charges against

6   that defendant, they had polygraphed what was then

7   their main suspect for this crime. The polygraph

8   came back as deceitful.

9   In the time that passed between the

10   polygraph of what was then their suspect and the

11   prosecution of the real defendant, the polygraph

12   materials were lost. All that was left was the

13   report.

14   Peculiarly, the criminal -- I guess not

15   peculiarly if I was the criminal defendant. I would

16   have wanted to admit that expert report, because it

17   would tend toe exculpate me. Nonetheless, there were

18   some procedural shenanigans that went on, and this

19   issue went up to the New Mexico Supreme Court. And

20   they held that where the data underlying an expert

21   report has been destroyed, there are two remedies

22   available to the district court.

23   The first is the exclusion of that

24   evidence, and all evidence that could be impeached by

25   that evidence if it exist police department.

1   The second remedy is that there could be

2   an adverse inference associated with that destroyed

3   report -- or the destroyed evidence and the intended

4   report.

5   The differentiation is, the Court says

6   the district court has to evaluate the materiality of

7   that underlying evidence and the prejudice to the

8   party opposing.

9   In this case, unlike the criminal

10   defendant, we are not seeking admission of

11   Mr. Trende's simulation-based opinions because we

12   can't test them.

13   Your Honor, they are material, in fact,

14   they are fundamental to Mr. Trende's opinions.

15   Repeatedly throughout his expert report, he says he

16   generated millions of maps, and based upon those

17   millions of maps, he was able to conduct an analysis

18   against SB-1.

19   But we can't test that because the data

20   was destroyed. It's prejudicial because we can't

21   test it. In fact, we have nothing but Mr. Trende's

22   insurances today that the original 2,040,000

23   simulations that he claims support his opinion are

24   gone.

25   So plaintiffs have said, well,

1   Mr. Trende has generated new simulations, an

2   additional 2,040,000, and it makes him twice as

3   right. It's still based upon the premises that we

4   have to take his word for it that these new

5   simulations that are not the same as the old ones,

6   they can't be, he says are similar or identical in

7   analytical outcome as the original 2,040,000

8   simulations. We still have to take Mr. Trende's word

9   for it. We is not even test that hypothesis that

10   they are similar in the original 2,040,000.

11   So we end up in the exact same position

12   we were originally. The evidence is gone and we

13   cannot test it to see if Mr. Trende applied it

14   appropriately or if the data supports what he says it

15   used to say.

16   Under these facts, your Honor, the

17   evidence is inadmissible. Mr. Trende should not be

18   permitted to testify about his simulation based

19   opinions. Thank you.

20   THE COURT: Thank you.

21   MR. TSEYTLIN: Thank you, your Honor. I'll

22   try to be brief here. Mr. Trende is here. He is

23   fully able to explain what happened.

24   But briefly, there was absolutely,

25   absolutely, absolutely no destruction of any maps.

1 Mr. Trende, as he -- as he explained in his

2 supplemental declaration, as he's here ready to

3 explain now, his standard practice does not save

4 individual maps. And he also explained why that's

5 so. It's because in the state of the art, we are

6 creating 2 million maps, it makes no scientific sense

7 whatsoever to interrogate individual maps. What you

8 do is you look at the partisan distribution.

9   That is his standard practice, that's

10 also the standard practice of Dr. Imai, who is the

11 pioneer of this method. So while my friends say

12 repeatedly here, oh this destruction, which the way

13 was just a falsehood, this not -- it's standard

14 practice of not saving maps is prejudicial to them,

15 they have never even attempted to explain what they

16 would do with the 2 million maps, the original

17 2 million maps if they had them. And we know the

18 proof is in the pudding, because now they have

19 another 2 million maps. And they're not going to be

20 doing anything with them.

21   Because the whole point of the analysis,

22 if state of the or the, as Mr. Trende will testify,

23 is to look at the partisan distribution. And they

24 say, "No, that, well, we're concerned that, well,

25 maybe the initial 2 million didn't match the new

1 2 million," that is, again, a misunderstanding of the

2 method.

3   They have the code. They could

4 (inaudible) another 2 million, another 2 million,

5 another 2 million. And they would keep having the

6 same partisan distribution. Because that is the

7 entire point of the simulation analysis. When you

8 have a big enough sample, you're going to keep coming

9 out with the same distribution.

10   And each time you run that 2 million, if

11 you ran it again, another 2 million, if you ran it

12 again, another 2 million, you'd still have SB-1

13 manage an outlier in the same way.

14   Now, I assume this -- hear my friend

15 saying that some -- maybe he's not implying that

16 Mr. Trende is lying about the first 2 million or

17 something like that. Well, that's an issue that

18 guess to credibility and the weight. That's

19 certainly not an exclusion issue.

20   So what I would respectfully suggest and

21 obviously lay it out in for more detail in our

22 papers, is to have Mr. Trende come up here and

23 testify, explain to you what happened, how there was

24 absolutely, absolutely no destruction of any data,

25 how what he did was his standard practice, what

1 Dr. Imai recommends, which is to look at the

2 distributions and how the second 2 million generated

3 only further strengthens it's his conclusions.

4   And the only other thing that I would

5 say is, my friend (inaudible) exclusion for

6 destruction of evidence, all that involves an element

7 of purposeful destruction to keep the evidence away.

8 Here, there's no allegation, at least in the papers,

9 that anything purposeful happened. It is, on this

10 record, undisputed, that what Mr. Trende did was

11 standard practice. Mr. Trende is one of the lead

12 experts in this field.

13   The same simulation analysis was the

14 lead evidence that got the maps thrown out in

15 New York, was the lead evidence that got the map

16 thrown out in Maryland. And he's using the same

17 standard practice. If your Honor is concerned that

18 he -- that the standard practice, at least of not

19 saving the simulations and only looking at

20 distributions, that certainly can go to the weight of

21 credibility your Honor puts on Mr. Trende's

22 simulation methodology, but it certainly is no basis

23 for exclusion.

24   THE COURT: All right. Thank you.

25   UNIDENTIFIED MALE: (Inaudible), your Honor.

1   THE COURT: Well, let me ask you before you

2   start. So you got a second set of 2 million plus

3   maps.

4   UNIDENTIFIED MALE: That is correct, your

5   Honor.

6   THE COURT: Did you get the information that

7   you're saying the first time, did you get it with the

8   second.

9   UNIDENTIFIED MALE: We did not get the

10   information that was destroyed. We got different

11   information, your Honor.

12   THE COURT: Right. But did you -- but what

13   you got -- you said you got the first one, but you

14   wanted the underlying data?

15   UNIDENTIFIED MALE: No, your Honor. We got

16   a report, and the report has been filed with the

17   Court. The report purports to be based upon

18   2,040,000 simulations.

19   THE COURT: Right.

20   UNIDENTIFIED MALE: Those do not exist.

21   They were not provided to us. We asked for them.

22   They were not provided to us because they were

23   destroyed. So we have never received --

24   THE COURT: You got another 2 million?

25   UNIDENTIFIED MALE: We got a different

1   2,040,000 simulations.

2   THE COURT: Is the same issue present there,

3   where they're not saved?

4   UNIDENTIFIED MALE: No, no. He saved the

5   second time around. After he learned he destroyed

6   the ones that formed the basis of his report, he

7   generated additional maps. I don't know how he did.

8   But what he testifies to in his affidavit, in

9   response, is they're similar, he says, but we can't

10 test that, because we done have the original data

11 that forms the basis of this expert opinion or his

12 expert report. So we're left with a complete lack of

13 an evidentiary foundation, your Honor. The data that

14 underlies his report is gone, doesn't exist. And is

15 he's generated, he says, an additional 2,040,000

16 simulations. And trust me, they look a lot like the

17 old once.

18   But we can't trust him. There must be

19 an evidentiary foundation under the rules of evidence

20 in order for expert testimony to be admissible. That

21 is why, your Honor, our expert saves his maps.

22 That's why we produce our maps, so people can test

23 them, they can look at them. That wasn't done in

24 this case.

25   Now, plaintiffs' counsel has said that

1   the maps were never destroyed. That is not

2   consistent with what Mr. Trende testified to. I'll

3   direct the Court to Exhibit C of our motion at Pages

4   22 and 23 of the deposition of Sean Trende.

5   At his deposition, I asked: Did you

6   generate any maps as part of your expert report.

7   Answer: Yes.

8   All right. Did you give them to

9   plaintiffs' counsel?

10   I gave them, as I believe I still have

11   them, which is to say, I don't.

12   All right. So you generated maps, but

13   you no longer have them?

14   Answer: I typically don't save the maps

15   I generate.

16   Question: When did you make the

17   decision to destroy those maps?

18   Answer: Well, the maps aren't destroyed

19   and the shape files are never created. They are

20   stored in an object NR, and when you turn it off, it

21   goes away.

22   But, Mr. Trende goes on, because the

23   codes is created with the seed set in it, it should

24   be replicable by plaintiffs' experts or defendants'

25   experts.

1   And therein lies the rub. That

2   testimony from Mr. Trende says it's not destroyed

3   because it's reproducible. It's not reproducible

4   because Mr. Trende's statement there was based on a

5   fundamental misapprehension of how his software

6   works. It's not reproducible. He thought he wasn't

7   destroying the evidence because it could be perfectly

8   reproduced at any time. It can't. It never will be.

9   And there is no evidentiary foundation, your Honor,

10   for his opinions in his report.

11   The best they can do is to produce

12   another set of simulations and pinky promise that

13   they're the same or similar to those underlying

14   Mr. Trende's report.

15   Now, what plaintiffs' counsel has said

16   is, the maps themselves aren't important, it's the

17   distribution. Your Honor, we don't get to check the

18   distribution. We don't have an ability to check

19   whether the distributions that are reflected in that

20   report are what was in those 2,040,000 maps that

21   Mr. Trende did not save and that are not

22   reproducible. There is no way to meet the

23   evidentiary foundation that is required for the

24   admission of expert testimony.

25   Your Honor, Mr. -- there's a lot in the

1 deposition testimony that cited to the Court in

2 Exhibit C. Mr. Trende acknowledged in that

3 deposition that he knew our experts would want to

4 look at his maps, and that's why he set a seed, so

5 that our experts, or whom could look at them.

6   I don't disbelieve Mr. Trende when he

7 says he doesn't -- he didn't understand what he was

8 doing, he didn't. But that doesn't change the fact

9 that the maps are destroyed. I can't look at one

10 map, I can't look at 2,040,000 maps. And I can't

11 check whether the distributions that are reflected in

12 his report are based upon the data he destroyed. He

13 can't play a foundation. And if he can't lay a

14 foundation, it is definitionally untestable and

15 unreliable. It doesn't matter whether it's 1 or

16 2 million. It's untestable at this point.

17   Thank you, your Honor.

18   THE COURT: All right. So you have

19 Mr. Trende here?

20   MS. DIRAGO: I believe he's in the witness

21 room. Oh, he's in the hallway.

22   THE COURT: Okay. I think we probably need

23 to hear from him. I'd like to know more about the

24 process of producing these as part of laying the

25 foundation.

1   Before we do that, though, we -- it's

2   been about an hour. How about we take about ten

3   minutes.

4   (Recess held from 2:16 p.m.

5   to 2:32 p.m.)

6   THE COURT: All right.

7   MS. DIRAGO: So, Judge --

8   THE COURT: Are we back on the record?

9   MS. DIRAGO: Well, are you going to go. So

10   what I was going to do originally is, you know, start

11   my testimony and go through his experience and his

12   credentials. And then he has -- he actually is

13   opining on a lot of issues that are not related or

14   relying on the simulation.

15   So it's -- I don't know if you want me

16   to do a voir dire just based on this issue, or if you

17   want me to go through all his experience and all that

18   first, and then get into like the background of his

19   simulations. I'll do it however you want.

20   THE COURT: Okay.

21   MS. DIRAGO: I was under the impression,

22   your Honor, correct me if I'm wrong, that we were

23   still going to -- (inaudible) working on this motion

24   rather than going into direct testimony.

25   It would seem to me that it would be a

1   much cleaner process to get the issue of the Section

2   6.4 system in addition, and then ones the Court has

3   ruled on that, let plaintiffs put on whatever

4   testimony they can at that point.

5   THE COURT: Okay. Yeah, let's do that.

6   Let's address that with this one partial issue, and

7   then we'll go (inaudible).

8   MS. DIRAGO: Okay. And do you want his -- I

9   think his experience in this industry is important.

10   Can I go through that, or do you not...

11   UNIDENTIFIED MALE: Your Honor, with respect

12   to opposing counsel, the issue is not his

13   qualifications as an expert. The issue is where is

14   the evident.

15   THE COURT: Okay.

16   UNIDENTIFIED MALE: And that's the very

17   narrow issue that we're presented with.

18   MS. DIRAGO: That's fine. I do think it's

19   germane in a couple areas, which maybe I can get into

20   that a little bit at that point.

21   THE COURT: Yeah, I'll let you see do that.

22   So let's go ahead and get started. Let me have you

23   raise your right hand, please.

24   Do you solemnly swear or affirm under

25   penalty of perjury that the testimony you'll give

1 will be the truth, the whole truth and nothing but

2 the truth?

3   THE WITNESS: Yes.

4   THE COURT: Thank you. Have a seat.

5   SEAN TRENDE,

6   having first been duly sworn, testified as follows:

7   VOIR DIRE EXAMINATION

8 BY MS. DIRAGO:

9   Q. So, Mr. Trende, I do think that we need to

10 just give a background about the simulation process

11 that you go through.

12   So if you don't mind, can you tell me

13 how a simulation-based analysis works?

14   A. So the idea for a simulation based analysis

15 is that you use a computer to generate thousands, tens

16 of thousands, hundreds of thousands, millions of maps,

17 depending on how you set it, that are drown without

18 respect to whatever the issue you're interested in.

19 You can make so it's strong without any racial data.

20 You can make it, as I did here, drown without /TPHEUZ

21 political data.

22   And the idea is that you're trying to

23 simulate what a neutral map maker would have done had

24 they not even had access to the political data.

25 You're basically trying to do a poll of maps that are

1 drawn political data.

2   And then you look at the inactive plan.

3 And you say, okay, do the features of the enacted plan

4 look anything like that like the plans that were drown

5 without respect to politics. You can feed the

6 political data back into the simulated maps after

7 their drawn to see what the political -- what it would

8 look like politically if you were drawing without

9 knowing what you were doing.

10   And so you create what's called a

11 ensemble of maps. In this case, I did a million

12 ensemble maps, then another million under the

13 different set of circumstances, and then another

14 40,000 under a different set of constraints or

15 limitations on how people might draw the maps.

16   You get those ensembles, you look at the

17 enacted plan, and the enacted plan doesn't look

18 anything like the ensemble maps in terms of politics,

19 if the districts are way more Republican or way more

20 Democrat, you say, okay, they were almost certainly

21 using political data or heavily rely on it when they

22 drew the maps.

23   Q. And I do think it's relevant to just tell

24 us, you know, what you were doing on Monday.

25   A. So on Monday, I was defending my

 1 dissertation, and I did pass.

 2   Q. And so you have a degree or getting a

 3 degree. I don't know how that work. But you will be

 4 a doctor in what field?

 5   A. I've fulfilled all the requirements for the

 6 degree of Ph.D. in political science. December --

 7   MR. WILLIAMS: Your Honor, I object to this

 8 to the extent, again, we're not talking about

 9 qualifications as an expert. We're not talking about

10 Mr. Trende's educational background. What we're

11 talking about here is the destruction (inaudible).

12   THE COURT: Okay.

13   MS. DIRAGO: Can I respond?

14   THE COURT: Yes. Except I'm going to modify

15 a little bit of what I just ordered.

16   We're talking about laying a foundation

17 for the admission of his expert testimony. And

18 you're saying it's not testable, therefore he can't

19 lay a foundation for it, right?

20   MR. WILLIAMS: That's correct, your Honor.

21   THE COURT: Okay. So to that extent, maybe

22 then we do need to get into laying the foundation and

23 ruling on whether or not it's admissible. So I'm

24 going to go ahead and retract what I said before and

25 say we need to go into -- lay the foundation for what

1 you want to submit for Mr. Trende.

2   MS. DIRAGO: Okay. Okay. Thank you.

3 BY MS. DIRAGO:

4   Q. So I don't know if you even answered. So

5 you have a Ph.D. from Ohio State University, and what

6 is it in?

7   A. It will be December 17th, 2022, a Ph.D. in

8 political science.

9   Q. Okay. /TKPWRET. And can you tell us about

10 your educational background before that?

11   A. Yeah. I graduated from Yale in 1995 in

12 history and political science. I graduated from Duke

13 in 2001 with a degree in -- with a J.D., and then I

14 also received a master's in political science at that

15 time.

16   In 2019, I got a -- I received a

17 master's in applied statistics from, and I apologize,

18 I do have to say it this way, the Ohio State

19 University, and then the Ph.D. is forthcoming.

20   Q. Okay. And are you currently employed?

21   A. Yes. I'm the senior elections analyst for

22 real clear politics.

23   Q. Is real clear politics a partisan

24 organization?

25   A. It is not.

1   Q.   What does real clear politics do?

2   A.   Real clear politics does a number of things.

3 It's meant to be a one-stop shop for political

4 information. So it aggregates polling data. It

5 aggregates from both of the left and the right

6 articles on issues. We go to great lens to try to

7 pair multiple perspectives on issues of the day. And

8 then we also produce original content.

9   Q.   And what do you do for real clear?

10   A.   I do some work on the rating of races, their

11 competitiveness, interpreting, you know, what it means

12 when a district is drawn a certain way, how

13 competitive it would be. And then I also write my own

14 content for them.

15   Q.   Okay. And so does any of your work concern

16 redistricting?

17   A.   Yeah. Redistricting's at the core of

18 understanding how competitive a congressional district

19 is or a senate seat and how it's likely to go in a

20 given political environment.

21   Q.   Are you affiliated with the American

22 Enterprise Institute?

23   A.   I am. I'm a visiting scholar there.

24   Q.   Have you authored anything regarding

25 election analysis?

1   A. I've been writing about election business

2 for 13 years now.

3   Q. Okay. Any books?

4   A. I wrote a book called "The Lost Majority:

5 Why the Future of Government is Up For Grabs" and who

6 will take it.

7   I was the coauthor of the 2014 "Almanac

8 of American Politics," which covered the 2012

9 elections, which required me to go in and, since that

10 was a redirecting year, understand how the districts

11 had been drawn that we were writing about.

12   And I write a regular chapter in Larry

13 Sabato's books after the election's completed.

14   Q. Was the Almanac of American Politics cited

15 by anyone (inaudible)?

16   A. Yeah, it's regularly cited by political

17 scientists.

18   Q. Okay. Have you ever spoken on the topic of

19 American analysis?

20   A. Routinely.

21   Q. Such as?

22   A. Such as -- across the political spectrum.

23 At the Brookings Institution, at AEI, at Cato. It's,

24 you know, where I have the opportunity.

25   Q. What about abroad?

1   A.   Yeah.   So I was invited, after the 2016

2   elections, to -- the U.S. Embassies abroad with set up

3   program abroad with scholars can come on talk at local

4   universities and political organizations.

5   So I went to Sweden.   I guess that was

6   after the 2018 elections.   And I've also -- no, that

7   would have been after 2016 with Sweden.   And after

8   2018 with Spain.   And I was invited to Italy, but

9   couldn't because of my teaching schedule.

10   Q.   So where do you teach?

11   A.   I teach at Ohio state.

12   Q.   Have you taught anywhere else?

13   A.   I did teach for a semester as Ohio Wesleyan.

14   Q.   And do you teach anything related to

15   redistricting, or have you?

16   A.   Yeah.   So for four semesters I have taught a

17   class called, "Voting: Political Participation" that

18   tracks -- it focuses on how people vote.   The first

19   half is what motivates people to vote, make the

20   choices that they make.   The second half focuses on

21   how that interacts with the law.

22   And so we probably spend a quarter of

23   the class talking about political redistricting,

24   redistricting simulations, how to run them.   We also

25   talk about doing them in the racial context, as well.

1   But their final project is all about redistricting, as

2   well.

3   Q.   Have you ever appeared on television as an

4   elections expert?

5   A.   Yeah. I've on Chris Hayes. I've been on

6   C-SPAN. I've been on the -- I can't even think of the

7   fox morning show's name right now, but a number of

8   place as talking about elections.

9   Q.   Okay. And radio?

10   A.   Again, radio, kind of across the spectrum,

11 NPR, talk radio. Wide variety of places.

12   Q.   And what about written news sources?

13   A.   Most my writing is done at real clear

14 politics. Like I said, I've done the work for Larry

15 Sabato's books. I wrote for the center for poll six

16 at UVA for a while, done some publishing at national

17 review back in the early 2000s, a couple other places.

18   Q.   And what about advisory panels, have you sat

19 on any advisory panels?

20   A.   Yeah. So I sat on the States of Change

21 advisory panel, which was a joint effort between

22 American Enterprise Institute, Brookings, and the pie

23 partisan policy center.

24   And the goal of that was to look at

25 census information and demographic trends and try to

1   see how that would translate to political changes in

2   the upcoming dates.

3   Q.   Have any courts ever appointed you to act in

4   any special capacity?

5   A.   Yes. So one of the more random adventures

6   of my life, I was appointed by at the Supreme Court of

7   Belize in their version of Baker v. Carr as the

8   Court's expert. And I was asked by the Court, as part

9   of that process, to draw remedial maps that could be

10   used.

11   I was also appointed with Dr. Bernie

12   Grofman to draw the congressional state senate and

13   state house maps for Virginia when their redistricting

14   commission deadlocked. So the two of us drew almost

15   200 congressional -- or 200 legislative districts in

16   about a month together.

17   Q.   What about Arizona?

18   A.   So Arizona, I was -- I was not a

19   redistricter there, but I was appointed by their

20   redistricting commission as a voting right expert for

21   counsel in that process that they went through.

22   Q.   And have you previously served as an expert

23   witness on matters concerning gerrymandering?

24   A.   Multiple cases. They're listed in my CV,

25   but probably the most prominent are the decision that

1 struck down the New York congressional state senate

2 map, as well as the Maryland congressional map.

3   Q. So I'd like to go back to your -- the

4 simulations and what you did for this case.

5   So what type of simulation technique do

6 you use?

7   A. So there's a technique called Sequential

8 Monte Carlo, which is implemented through a package

9 calmed Redist, R-e-d-i-s-t, that can be run in the

10 computer programming language R, just the letter R.

11   Q. Okay. So how does Redist work?

12   A. So the way that Redist thinks about

13 redirecting is you can imagine a sequence of hexagons,

14 let's say. And there's a number of ways that you

15 could connect those hexagons so that you would be able

16 to travel to -- one hexagon to another on a map, but

17 only passing through a hexagon once. And that's

18 conceptually known as a spanning tree.

19   What Redist says is, okay, we have all

20 these -- if we thought of these hexagons instead as

21 precincts, you draw the spanning tree where all

22 precincts are connected to each other, but there's

23 only one path to get from one precinct to the other.

24   If you remove one of those lines, line

25 segments, called an edge, if you removed it, the

1 remaining -- you kind of break off a portion of the

2 districts -- of the precincts, and that's basically

3 your district.

4   And so Redist uses an algorithm called

5 Wilson's Algorithm to randomly draw spanning trees.

6 And then it will break off the edges until you have

7 equipopulous districts. And it will do so according

8 to -- you know, you can add constraints, such as

9 compactness, or county lines. But it will draw a

10 large number of random districts fairly quickly. So

11 that's the basics of how it works.

12   Q. Who developed it?

13   A. So it was developed by Dr. Imai at Harvard

14 University. He had a graduate student, Cory McCartan,

15 who did a lot of the work on it, as well.

16   Q. Are they well known in the field?

17   A. Very much so, especially Dr. Imai. He's one

18 of the most prominent political methodologists in the

19 country.

20   Q. So is this Redist package, you called it?

21   A. Yes.

22   Q. Is the Redist package publicly available?

23   A. It is. It is. Well, anyone who can program

24 an R can download it to the R environment.

25   What makes R unique, not unique, but

         1   kind of different from a lot of statistical software

         2   is that people write packages for it all the time.

         3   They write certain sets of commands that have certain

         4   properties. And so there's always different ways of

         5   evaluating the data that come online to it.

         6   And so when the Redist package was

         7   created by McCartan and Imai, they put it up on a

         8   server, and with a command install packages, you can

         9   download the Redist package and run the software.

        10   Q. So do you know R, can you --

        11   A. Yeah, because people are constantly

        12   updating -- no one knows everything R can do because

        13   there's so many options available for it. But I'm

        14   conversant in it. Just like I always learn that

        15   there's new words in the English land, I always learn

        16   new things about R. But I can get the job done.

        17   Q. That's a good way to put it.

        18   Okay. So the Redist package, you said

        19   it was publicly available, and it is free?

        20   A. It's free.

        21   Q. So if there's flaws in the algorithm, can

        22   people point that out?

        23   A. They can point that out to the developers,

        24   and there's usually pages you can post on to ask

        25   questions and say, "Hey, it would be really /TKPWRET

1   to have this functionality added," or...

2   Q. Okay. So people can improve it, as well?

3   A. Yeah.

4   Q. So have you used Redist before?

5   A. Yeah, yeah. I've used it in a number of

6   court cases.

7   Q. In court cases?

8   A. Yeah. So in the -- first off, I've used it

9   for my dissertation. But I also used it in the

10 New York and Maryland court cases, and then some cases

11 that are pending.

12   Q. Okay. Has it been relied on -- or has an

13 analysis using Redist been relied by courts in

14 redistricting cases?

15   A. So the two that I was involved in in

16 Maryland and New York relied upon it. But it's also

17 been relied upon from other expert witnesses in

18 Kentucky, South Carolina. I believe -- I believe

19 Dr. Imai used SMC for Ohio, as well. But a number of

20 states.

21   Q. All right. So let's talk about what you did

22 specifically in this case.

23   So you put -- you created simulated

24 maps. How many did you create?

25   A. So 2,040,000. Well, now --

1   MR. WILLIAMS: Your Honor, I'm going to

2   object at this point. Pursuant to the rules of

3   evidence, I would like to see the 2,040,000 simulated

4   maps that we're talking about.

5   MS. DIRAGO: That's what -- that's the point

6   of this.

7   MR. WILLIAMS: He says that he's created

8   them. Under the rules of evidence, I'm entitled to

9   see them. I'm making that request right now.

10   THE COURT: Okay. I'm going to allow him to

11   testify to what he did first, and then we'll get

12   to -- to your motion.

13   Go ahead.

14   BY MS. DIRAGO:

15   Q. Okay. So you said 2 million and 40?

16   A. 2,040,000, and then a second set of

17   2,040,000.

18   Q. All right. Let's talk about the first set.

19   Why did you create that number?

20   A. Well, it's a set of a million, another set

21   of a million, and four sets of 10,000. And in

22   New York, one of the objections that had been raised

23   by an opposing expert witness was he thought the

24   number of simulations that were run were too small.

25   And so in our reply brief, we increased the number of

 1   simulations. And then his testimony was, "Well, that

 2   still isn't enough."

 3   So I figured I would run as many

 4   simulations as I could reasonably run. And I actually

 5   did 500,000, and it ran pretty quickly, so I did a

 6   million. And I figured no one could complain that a

 7   million maps was too few.

 8   Q. And how long did it take you then, like

 9   total?

10   A. To run all of the sets doesn't take that

11   long on my computer. It was less than a day.

12   Q. Okay. And did you say your maps?

13   A. No.

14   Q. First -- yeah.

15   A. No, I didn't save them.

16   Q. Okay. How come?

17   A. Well, because the -- when you run these

18   maps, you're not interested in the individual man's.

19   What you're interested in -- Dr. Imai's testified

20   about this under oath and been emphatic about it.

21   MR. WILLIAMS: Objection, your Honor.

22   Hearsay.

23   THE COURT: Sustained.

24   MS. DIRAGO: Judge, I just -- I'd like --

25   he's offering it to show what's done in the industry

1 and the field, and that -- he's an expert in the

2 field, and that's --

3 　　　　THE COURT: If he going to testify to what

4 Dr. Imai has testified to, I don't think that

5 that's --

6 　　　　MS. DIRAGO: Okay. Okay.

7 　　　　THE COURT: -- admissible.

8 BY MS. DIRAGO:

9 　　　Q. Sorry, I think you -- go ahead with your

10 answer.

11 　　　A. Yeah. So it's -- it's not the actual maps

12 that you're interested in. It's the distribution

13 that's been published. Realistically, no one is going

14 to look through 2 million maps in a reasonable amount

15 of time.

16 　　　　So you're interested in the output and

17 the distribution. And that's what should be

18 reproducible from run to run, is the distribution. If

19 you run a second time or a third time and the

20 gerrymandering index changes wildly, or the -- you

21 know, in one set the maps look like an outlier, but in

22 the second set they don't look like an outlier, then

23 you've got a problem. But that's also why you run a

24 million maps. Because at that large number of

25 samples, very little, if anything, is going to change

1   from draw to draw.

2   Q. Have you ever exchanged maps in discovery

3   when you've been involved in a court case?

4   A. I have requested maps through times --

5   Q. Tell me the circumstances.

6   A. -- in a number of cases. This case, because

7   I found when I ran Dr. Chen's code it ran very, very

8   slowly, and I didn't think I would have the maps on

9   time to do an analysis.

10   I requested them in a case in South

11   Carolina, where Dr. Imai was using a different

12   approach that also took a very long time to run, and I

13   asked if he had them. And then the third case,

14   Dr. Duchen, in Texas, programs in Python, which I

15   don't program well in. And so she produced the

16   chains. But I don't know if they have the individual

17   maps in them, because I couldn't read them.

18   Q. And then before this case, have you ever

19   produced your maps to the other side?

20   A. I don't think I have. Because you don't

21   look at individual maps, you're looking at the

22   distribution, it's just not how you're supposed to

23   proceed.

24   Q. So would you say it was -- it typical in

25   these cases not to produce the maps?

1   A.   Yes.

2   Q.   So did you end up producing simulated maps

3   to the other side in this case?

4   A.   Yes.

5   Q.   Were they the exact same 1 million maps that

6   you relied on for your first report?

7   A.   So I thought they would be the identical

8   maps, because I did something known as setting a seed

9   in R.   And when you set a seed in R, it's something

10 they teach very early on, what it does is it

11 guarantees that all the random choices being made by

12 the program are the same every time that you run it

13 through.

14   And so since I set the seed, I thought

15 that if you ever, for some reason, needed to go back

16 and make a perfect reintroduction of the individual

17 maps, the seed would cover it.

18   It's been suggested in the deposition

19 that there's something unique about the Redist package

20 that doesn't work that way, that it only be fully

21 reproducible.   So some of the individual maps may be

22 different.   But the distributions, especially for the

23 larger sample maps, replicated almost perfectly.

24   Q.   So does it matter that the second 2 million

25 and 40 -- 400 maps that you produced were not the

1   exact same as the first set?

2   A. For the purposes of analysis, it's really

3   not because the distributions came out the same.

4   Because the maps were the extreme outliers, no matter

5   what, if anything, it's stronger that now we have 4

6   million and 40,000 simulated maps.

7   MR. WILLIAMS: Objection, your Honor. At

8   this point, Mr. Trende is now receiving about his

9   supplemental expert report that was untimely under

10   your schedule.

11   So this testimony is inappropriate and

12   should not be received.

13   MS. DIRAGO: Judge, the whole purpose of

14   that -- of this questioning is that the second set

15   only confirms his findings. That's the scientific

16   method. The more you do it and you get the same

17   results over and over, the stronger it is.

18   And Mr. Trende produced, with the same

19   code, he produced another set of maps, was able to

20   analyze them and he determined and we gave them to

21   the other side, and the defendants can figure this

22   out, they have an expert who is fully capable to do

23   this, we determined that the results, meaning the --

24   and I can show all this to you, because it makes more

25   sense when you look at it. But there's a thing

1 called a gerrymandering index, for example, that

2 shows where this map, SB-1, lies, in comparison to

3 the other maps. That is remarkably, remarkably

4 similar from the second set.

5   So we don't have a situation where

6 they're saying, the second, "It's all wrong. Look,

7 oh, this gerrymandering is so much different from

8 your first set," and they can say that, and they

9 haven't.

10   So the whole point is that it can be

11 reproduced over and over and over, and that's what we

12 did.

13   THE COURT: Okay.

14   MR. WILLIAMS: Your Honor, the objection is,

15 yesterday, Mr. Trende tender essentially a

16 supplemental expert report, and right now he is

17 testifying out of the supplement expert report that

18 isn't timely under your scheduling order. His

19 opinions were supposed to be provided to us on August

20 11th. This was not in that. This testimony is not

21 properly received.

22   THE COURT: All right. So that was produced

23 yesterday?

24   MS. DIRAGO: Yes. Recently. And I don't

25 even -- for the purposes of right now, I don't think

1   it matters -- I don't need to even admit it for the

2   substance. But to show that what he did the first

3   time is -- the fact that those maps were not produced

4   the first time, to show that that is irrelevant on a

5   scientific basis. I think it's fair for him to talk

6   about his analysis of the second set of maps. That

7   is 100 percent germane to whether the first set of

8   maps is relevant here.

9   THE COURT: All right.

10   MS. DIRAGO: And reliable. Sorry. Reliable

11   here.

12   MR. WILLIAMS: Your Honor, what's happening

13   now is we are getting into a situation -- it's good

14   because, trust me, my second set of analyses, it

15   verifies the stuff that I can't give you from the

16   first. So we have the same evidentiary bootstrapping

17   problem.

18   MS. DIRAGO: No.

19   THE COURT: Okay.

20   MR. WILLIAMS: He can't vouch for it without

21   giving it to us. He's saying his second set

22   duplicates his first. I can't verify that unless I

23   get his first set of data.

24   Rule 11-705 says we should get it. And

25   they won't and can't get it.

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 1                THE COURT:  Okay.

 2                MS. DIRAGO:  It's inaccurate that they can't

 3     test it.  Absolutely Dr. Chen can test it.  He can

 4     look, he can run the same analysis --

 5                THE COURT:  Okay.

 6                MS. DIRAGO:  -- and see that it's the same.

 7                THE COURT:  All right.  This is what I want

 8     to do right now.  Talk about the -- the practice of

 9     what Mr. Trende does and whether this is something

10     that is done.  You talked about that in your

11     argument, this is something that is done.  Talk about

12     that.  I think that's where we need to get to to see

13     whether we're going to hear the results of --

14                MS. DIRAGO:  Okay.  That something is done,

15     sorry, what do you mean?

16                THE COURT:  You mentioned that this is his

17     regular practice --

18                MS. DIRAGO:  Okay.

19                THE COURT:  -- it's a regular practice in

20     his industry, his line of work.  So ask him about

21     that.

22     BY MS. DIRAGO:

23         Q.  Okay.  Dr. Trende, what is the regular

24     practice in your line of work when creating

25     simulations?
```

1   A.   Yeah.   When I receive code from Dr. Imai or

2   Dr. Duchen or whoever is the opposing expert, I

3   usually give the code and the data set that it's based

4   upon.   And then I run the code and see if the results

5   pop out the same.   That is always how I receive the

6   data.

7   And the reason is, I'm not interested in

8   the specifics of maps.   I'm interested in making sure

9   that the distribution that pops out verifies what they

10   said.

11   The interpretation of the maps, frankly,

12   is factual matter.   I have, you have the maps there

13   and you can -- when you're running the analysis to

14   creates the various charts and data in R, it's not

15   really opinion matter, it's factual matter that I'm

16   verifying from them.

17   Q.   And so did you produce your code to

18   defendants?

19   A.   I did.

20   Q.   And what could Dr. Chen, or anyone else who

21   was in this field, what can they do with that code?

22   MR. WILLIAMS: Objection, your Honor.

23   Foundation.   If they're going to talk about the code,

24   they're going to (inaudible).

25   THE COURT: Overruled.   Go ahead.

1   A. Yeah. So the code is something that someone

2   who is a competent coder in R can run. I know that

3   Dr. Chen is more than competent because I've seen his

4   code and I know his work going back a long times. And

5   other experts could run it and say, okay, you know,

6   the gerrymandering index that gets plotted out is the

7   same one as the gerrymandering index that appears in

8   the report. I can look at the chart in the report and

9   look at the chart of what I reproduced, and it turns

10   out the map is, in fact, an outlier either way. Any

11   expert should be able to do that.

12   Q. So even though they perhaps could not

13   produce the same exact set of randomly generated maps,

14   they can produce their own set of randomly generated

15   maps and compare that to your report, right?

16   A. Absolutely. I mean, it's a way to hit an

17   opposing expert, in fact, if you can run it again

18   without the seeds and you get a wildly different

19   answer, it destroys the expert's credibility,

20   potentially.

21   Q. So is that typically why you don't exchange

22   the maps, you just exchange the code?

23   A. I think the reason the maps don't typically

24   get exchanged is just that they're large, bulky files

25   and you have the code and you assume the other side's

1 expert can run the code. I don't know. I just -- I

2 get the code, I have the data, and the first thing I

3 try to do is to run it.

4   Q. And the fact that -- you talked a little bit

5 about -- I think you talked a little bit about why the

6 maps didn't save. Can you -- was that intentional --

7 I'm sorry, not why the maps didn't save. But why the

8 code was written to not produce the exact same set of

9 random generated maps. Can you talk just a little bit

10 more about, you know, your intent there?

11   A. I honestly believe that by setting the seed,

12 nothing changed when you ran it from time to time.

13 But it wasn't anything I was particularly concerned

14 about or gave a lot of thought to because you

15 typically don't produce the maps. You just run the

16 code and replicate.

17   MS. DIRAGO: Okay, Judge. I think -- unless

18 you'll let me go into the second set and --

19   THE COURT: I know -- yeah.

20   We're at -- do you have any questions?

21   MR. WILLIAMS: Yes, your Honor.

22   THE COURT: Okay. Go ahead and voir dire

23 the witness.

24   MR. WILLIAMS: Do you want to rest of your

25 stuff?

1   MS. DIRAGO: I'm assuming I'm going to go

2   back up. I mean, I'm just going to leave it there,

3   because --

4   MR. WILLIAMS: I would -- I would like the

5   space.

6   MS. DIRAGO: Oh, sure. You should have just

7   said that.

8   THE COURT: Are you going to voir dire on

9   all his credentials or just --

10   MR. WILLIAMS: No. I'm just going to go to

11   the evidentiary issue, your Honor.

12   THE COURT: Okay.

13   VOIR DIRE EXAMINATION

14   BY MR. WILLIAMS:

15   Q. You don't dispute, do you, Mrs. Trende, that

16   we can't reproduce the 2,040,000 simulations that are

17   discussed in your expert report of August 11th, 2023;

18   is that correct?

19   A. The particular maps will not necessarily be

20   perfectly replicated.

21   Q. All right. And have you -- I believe you

22   testified a few minutes ago that you have never before

23   been asked to produce your maps to anyone else; is

24   that correct?

25   A. I don't think so.

1   Q. You don't --

2   A. I've only asked people on three occasions,

3   and I typically don't get asked.

4   Q. So would it be fair to say this is the first

5   time you've been asked to produce the work that is

6   underlying your expert reports?

7   A. I think I was asked to do it in Maryland,

8   and then the opposing expert admitted that he couldn't

9   interpret them anyway, so they weren't produced.

10   Q. Okay. So effectively then, with the

11   exception of Maryland, where apparently your expert

12   was unable to interpret the data, you've before been

13   asked to produce your work; is that correct?

14   A. That's my recollection on producing

15   particular maps.

16   Q. You mentioned that you are teaching a class

17   at the Ohio State University on how to run

18   simulation -- or excuse me -- gerrymandering

19   simulations; is that correct?

20   A. No. I'm teaching a class called voting

21   participation and turnout that covers a wide variety

22   of voter turnout. About a quarter of it is spent on

23   gerrymandering. And we do get into the various ways

24   of running -- of simulating maps and what they do.

25   Q. Within the coursework that you teach at the

1 Ohio State University regarding redistricting

2 simulations, do you teach about the Redist package?

3   A. Yes.

4   Q. Do you teach specifically about the Redist

5 underscore SMC function?

6   A. No.

7   Q. All right. And why is that, Dr. Trende --

8 or Mr. Trende? I'm going to keep promoting you from

9 time to time?

10   A. Because it's not really in the core of what

11 the class is about. The idea is for the students to

12 understand how it works. But it's not necessarily to

13 train them to run redistricting software.

14   Q. Now, I believe I have heard you say today

15 that the reason that it is okay that you don't have

16 your original 2,040,000 simulations is that we can run

17 additional simulations; is that correct?

18   A. Yes.

19   Q. All right. And I believe that I have heard

20 argument today, and this didn't come out of your

21 mouth, so I'm not going to represent to you that it

22 did, that because of that circumstance, we have not

23 suffered any prejudice, "we" being the defendants. Is

24 that a statement that you agree with?

25   A. That is a -- I mean, there's a lot of legal

1 stuff built in there, but I think from the bottom line

2 of being able to understand whether the map is an

3 outlier and to verify it, I guess that's how I argue

4 it. But I don't know what your arguments for

5 prejudice all are, either.

6   Q. You did testify on direct from Ms. DiRago

7 that you don't know why we would want the 2,040,000

8 maps because no one is going to look at them; is that

9 correct?

10   A. Getting through all 2 million maps in a

11 reasonable amount of time would certainly take a lot

12 of time.

13   MR. WILLIAMS: Your Honor, can I approach

14 the witness?

15   THE COURT: Okay.

16 BY MR. WILLIAMS:

17   Q. Mr. Trende, I have handed you a scholarly

18 article written by Dr. Kosuke Imai. Are you familiar

19 with that article?

20   A. Yes.

21   Q. And what is that article purporting to be?

22   A. This is the published article that lays the

23 foundation for understanding Sequential Monte Carlo.

24   Q. And that is the article that forms the basis

25 for the Redist SMC algorithm that you used to generate

1   2,040,000 simulations?

2   A.   Correct.

3   Q.   All right.   Now, let's talk about why we

4   might want those 2,040,000 maps.

5   During your deposition, I asked you, I

6   hope you recall, what you did to test your code.   Do

7   you recall that question?

8   A.   Yes.

9   Q.   And do you recall your answer?

10   A.   I think you asked it a couple of times.   I

11   didn't do anything to test the Redist software itself.

12   I did run a small number of maps, I think I said a

13   thousand or so, to make sure that things didn't get

14   completely jumbled up or get bizarre output.

15   Q.   Did you recall your testimony that all you

16   did was make sure that the code ran to completion.

17   A.   That may be in part of the testimony, but

18   there was a part where I also said I did print out a

19   couple maps to make sure -- because sometimes you have

20   something that happens during the data processing

21   phase where the counties will get completely messed up

22   and you'll get nonsense for your output.   But as far

23   as actually looking to make this your that

24   Drs. McCartan and Imai wrote a competent R package, I

25   didn't look into that at all.   I (inaudible) --

1   Q. Sir, and just to make clear. So now I

2   understand you actually did print out some of the

3   maps?

4   A. I didn't print any maps?

5   Q. Well, you literally just said you printed

6   out some out and looked at them?

7   A. No, you --

8   Q. Do you recall that testimony (inaudible)?

9   A. You don't print them out like on a printer,

10   but they are created, like, on the screen, yes. And

11   that was in my first deposition.

12   Q. Okay. So beyond that, you did nothing to

13   test the quality of the simulation as that you were

14   producing?

15   A. Correct.

16   Q. Okay. I want to turn your attention,

17   Mr. Trende, to Page 11 of Exhibit B.

18   MS. DIRAGO: Objection. Your Honor, he's

19   talking about the quality of the first maps, but he's

20   also complaining that he can't see the maps. How is

21   that relevant to a simple narrow question of voir

22   dire right now?

23   MR. WILLIAMS: Your Honor, the question is

24   evidentiary destruction. Section 4.4.4 of Dr. Imai's

25   article deals with diagnostics and the quality of

1 simulations that are put out there. It is absolutely

2 relevant to why we need this evidence and why the

3 destruction of the evidence is --

4   THE COURT: You can ask him about this.

5   MR. WILLIAMS: -- of critical importance.

6   Thank you.

7 BY MR. WILLIAMS:

8   Q. Have you read Section 4.4.4 of Dr. Imai's

9 article titled, "Diagnostics," Mr. Trende?

10   A. I think this is in the latest iteration of

11 the article. But yeah.

12   Q. You think what? I'm sorry?

13   A. This is in the latest iteration of the

14 article, but yes.

15   Q. All right. Have you read -- so you have

16 read this latest iteration of the article?

17   A. Yes.

18   Q. And this latest iteration of the article was

19 published before you did your expert work in this

20 case, correct?

21   A. Yes.

22   Q. All right. Now, in the paragraph that

23 begins with "Other diagnostics," do you see that?

24   A. Yes.

25   Q. All right. It talks about the requirement

1   of sample diversity. Do you see that?

2   A. Yes.

3   Q. What is sample diversity, Mr. Trende?

4   A. It's how the different -- how different

5   samples are from each other.

6   Q. And so I believe you testified during your

7   deposition, that of the 2,040,000 simulations that you

8   no longer can produce, that there was a 50 percent

9   duplication rate; is that correct?

10   A. Somewhere in that range, yes.

11   Q. And do you know what the similarity index

12   was on the remaining 50 percent?

13   A. I don't.

14   Q. All right. All right. It want to look at

15   the very last sentence of that paragraph that reads:

16   A nondiverse sample will have many samples of similar

17   or identical plans, which tends to increase sampling

18   error and reduces the interpretability of the

19   generated samples.

20   Do you see that?

21   A. Yes.

22   Q. And the second sentence says: One measure

23   of quality is sample diversity.

24   Do you see that?

25   A. Yes.

1   Q.   Do you know if there is a way within the

2   Redist package to check sample diversity?

3   A.   There was an update published on the package

4   that has a diagnostic. I did learn about that after I

5   ran the diagnostics -- or I ran the simulation in this

6   case.

7   Q.   And that is called "Plans Underscore

8   Diagnostics"?

9   A.   I don't know.

10   Q.   Okay. Nonetheless, it was in the Redist

11 package and you did not use it; is that correct?

12   A.   It wasn't in the Redist package that I had

13 in my computer at the time. But I did not use it.

14   Q.   All right. And if we had been presented

15 with the 2,040,000 maps that were destroyed, we would

16 have been able to run that data against the function

17 you just described, correct?

18   A.   I'm not sure if you would have.

19   Q.   Do you know that we couldn't?

20   A.   I'm skeptical.

21   Q.   Why are you skeptical, Mr. Trende?

22   A.   Because the way that you receive the maps is

23 in a bunch of CSPs, and I don't know if you can

24 repackage the CSPs into something that you run the

25 sample diversity score on.

1   Q.   So you're not aware of the notion that an

2   object stored in RAM in the R programming language can

3   be unloaded into a CSV and then perhaps future back

4   into that same object?

5   A.   I don't know if it can be put back into the

6   same object.

7   Q.   So you don't know what the sample diversity

8   was, do you?

9   A.   No.

10   Q.   And you know that we certainly can't check

11   that; is that correct?

12   A.   You can't check it on the exact same maps,

13   but since the output of the maps is virtually

14   identical from run to run, you could run it, which I

15   would guess you have, and run a sample diversity score

16   on it and say, "This doesn't look good," or "It does."

17   Q.   Do you know what Dr. Imai believes a

18   nondiverse sample is?

19   A.   I don't, since he wasn't -- since they

20   didn't put this function on until recently, he

21   wouldn't have used it in any of his testimony or any

22   of his cases. So I haven't heard from him.

23   Q.   You do agree with Dr. Imai when he says that

24   it is important to run diagnostics?

25   A.   That is what the latest version of the

1   article says, yes.

2   Q.   And that's something that you didn't do?

3   A.   That's correct.

4   Q.   And that's something that now we cannot test

5   because the data was destroyed?

6   A.   It's something that you can test by running

7   the code through, I'm guessing you've done this, and

8   one the sample diversity score on it.

9   Q.   What's the basis for your guess, Mr. Trende?

10   A.   Just a hunch.

11   Q.   Okay. You do a lot of hunches?

12   A.   Sometimes.

13   Q.   Is the 2,040,000 simulations that we don't

14   get, is that a hunch?

15   MS. DIRAGO: Objection. It's argumentative.

16   THE COURT: I'm not sure I understand the

17   question.

18   MR. WILLIAMS: I'll let it go, your Honor.

19   BY MR. WILLIAMS:

20   Q.   You're confident that the SMC algorithm

21   produces appropriate simulations in the absence of

22   diagnostics; is that correct?

23   A.   I have no reason to doubt it.

24   Q.   What why don't we look at Page 18 of

25   Dr. Imai's article. And look at under the heading, at

1   7, "Concluding remarks."

2   In the last paragraph, Dr. Imai writes:

3   One important draw back particular to the SMC

4   algorithm arises in situation with dozens or hundreds

5   or separate districts.

6   Now we don't have that here, do we?

7   A. No.

8   Q. No, we don't. In summary statistics, which

9   rely on these districts which rely on these directs

10   will have -- excuse me, I started -- while this is not

11   a problem with many SMC applications, such as by easy

12   inference for redistricting, this means that all of

13   the sample plans will share one or more district that

14   completely identical.

15   Do you see that?

16   A. Yes.

17   Q. And in your 2,040,000 maps, half of them

18   were identical, correct?

19   A. Yes.

20   MS. DIRAGO: Objection. Judge, he's going

21   into the substance, which I (inaudible) --

22   MR. WILLIAMS: I am not. I'm am getting

23   into why it's important that we should have received

24   the evidence so we could test it.

25   THE COURT: All right.

1   MS. DIRAGO: He's going into the substantial

2   of what the first maps showed, which is --

3   MR. WILLIAMS: We don't know what they

4   showed (inaudible).

5   THE COURT: Are you not basically trying to

6   impeach his report right now?

7   MR. WILLIAMS: I am trying to show --

8   plaintiffs have argued, your Honor, that we do not

9   need their 2,040,000 maps. And at this point, I am

10   showing the Court why we need the maps, why their

11   destruction is material, why it is prejudicial.

12   MS. DIRAGO: This is exactly why it goes to

13   the weight of the argument.

14   MR. WILLIAMS: It does not go to the weight.

15   It goes to the admissibility.

16   This is an issue of evidentiary

17   foundation. They would sure like to turn it into the

18   weight of the evidence. This is about admissibility.

19   And without being able to show the

20   evidentiary foundation, this doesn't come into

21   evidence, and we don't have to worry about weight.

22   THE COURT: All right. So your foundational

23   argument -- tell me your question again. You're

24   asking about the results of the second run, correct?

25   MR. WILLIAMS: No. I am asking that you we

1 don't know, because Mr. Trende testified at his first

2 deposition that on the destroyed maps, he had a

3 50 percent duplication rate.

4   THE COURT: Okay.

5   MR. WILLIAMS: And that's what I'm asking

6 about for right now. I don't care about the second

7 replacement set. We're talking about the set that's

8 at issue in his expert report.

9   THE COURT: Okay.

10   MS. DIRAGO: That is not an issue that has

11 anything to do with foundation. He's trying to

12 impeach his first set of maps.

13   THE COURT: I mean, she has a point. If

14 you'd gotten those maps, you still would have had the

15 50 percent duplication, correct?

16   MR. WILLIAMS: We would have. But what we

17 don't know, we don't know whether -- because we can't

18 run the diagnostics against them, we can't examine

19 them. So this gets to our motion, your Honor. Which

20 is admissibility and the remedy for destruction.

21 This is all squarely laid out in the motion.

22   THE COURT: I don't see how this goes to

23 admissibility. I think that you're getting more into

24 what weight we should give this evidence.

25   MR. WILLIAMS: It is still part of the

1   motion that we teed up, and I understand, your Honor.

2   Was part of this process that we're getting into now.

3   THE COURT: All right. Well, I agree with

4   counsel that this is -- doesn't go to admissibility.

5   So ask another question or ask a more generalized

6   question about destruction or whatever.

7   BY MR. WILLIAMS:

8   Q. All right. So fundamentally, your argument

9   today, Mr. Trende, is: Trust me. The second set of

10 data looks like the first. Correct?

11   A. No.

12   Q. All right. Can you show me the first set of

13 data so that I can verify your representation that the

14 second set looks like the first?

15   A. I can share it -- well the histogram is

16 recorded in the first report. And then I did a

17 declaration as a factual matter showing what the

18 histograms look on the maps that were produced to you.

19   And the maps, the large sample

20 simulations are virtually identical. And the smaller

21 sample simulations are close to identical. And that's

22 exactly what you would expect, that as you have

23 continuous draws, the similarity between draws

24 increases.

25   So no, you don't have to be trusting me.

 1   You can look at the output of the distributions, which

 2   is what you're really interested in when you're

 3   running these simulations.

 4   Q.   Mr. Trende, what I think you just told me

 5   is, it's not trust me, it's trust me because I signed

 6   the declarations. How can I --

 7   MS. DIRAGO: Objection. Misstates his

 8   testimony.

 9   BY MR. WILLIAMS:

10   Q.   How can I --

11   THE COURT: I'm going to sustain the

12   objection.

13   BY MR. WILLIAMS:

14   Q.   How can I test the replacement data against

15   the first data?

16   A.   Well, you can look at the output that is

17   recorded in the expert report. And if you aren't

18   going to trust my data, you can -- or my factual

19   interpretation of the data, you could have Dr. Chen

20   create histograms of the maps that you received and

21   see if they -- if the output is similar or close to

22   identical.

23   I did that to illustrate that they are,

24   in fact, close to identical. But you don't have to

25   trust me, you can take those maps and compare

1 themselves yourself. The output that is in the first

2 report is set in stone and can't be changed. So I'm

3 not sure how trust comes into that at all.

4   Q. The trust comes in because we can't test

5 your data because it was destroyed; is that correct?

6   A. You can test it. I just explained to you

7 how you can test it.

8   Q. I can't test 2,040,000 maps that don't

9 exist; is that correct?

10   A. You can look at the other 2,040,000 maps

11 that were produced to you, and unless I had some --

12 honestly, unless I had some great stroke of luck

13 producing the first set of results, which is what

14 we're interested in in the opening report, you know

15 that it does the same thing. You can probably run it

16 a third and fourth time and probably have identical

17 results. You can run or diagnostics, if you would

18 like, on those outputs.

19   And because it's a large enough sample

20 that it's converged upon the true direction, nothing

21 substantive should change from run to run.

22   Q. As I appreciate it, your testimony is you

23 did 2,040,000 maps, they weren't you saved, they're

24 not reproducible. You then performed an additional

25 2,040,000 simulations, and they looked remarkably

1　similar to the ones we don't have; is that correct?

2　　　　A.　Yes.

3　　　　Q.　Is there anybody other than you, Mr. Trende,

4　that that's true or not?

5　　　　A.　Yes.　You can take the maps that were

6　produced to you.　You can generate the output from

7　them.　You can compare them to the images that were

8　produced in a PDF file and can't be changed yourself.

9　　　　MR. WILLIAMS:　Your Honor, this gets into

10　the question of -- I'm going to have to go beyond the

11　scope of the maps themselves to demonstrate to the

12　Court that these assurances are themselves not

13　supported by his report.

14　　　　　　So I'm going to need some latitude to

15　get in beyond the reports themselves.

16　　　　THE COURT:　Well, what do you mean by that?

17　　　　MR. WILLIAMS:　Mr. Trende's report, he just

18　testified that, well, one thing you can do rather

19　than just take his word it in this affidavit, that

20　they're similar, is we can look at his original

21　report and look at the histograms, the box plots, the

22　dot plots, and the figures in Section 6.4.　And I

23　have a lot of questioning about that, where what's in

24　the source code is not what's in his report.　So we

25　have all of these problems that cause a lot of

1   questions about the original 2,040,000 simulations.

2   THE COURT: Okay. I think I've got enough a

3   basis to make a decision on whether or not this will

4   come in.

5   MR. WILLIAMS: Okay.

6   THE COURT: If we need to --

7   MR. WILLIAMS: If the Court's made a, then

8   the Court has made a decision. I'm not going to flog

9   that horse.

10   THE COURT: Okay.

11   Do you have anything else?

12   MS. DIRAGO: Not from (inaudible).

13   THE COURT: All right. So I think I have

14   enough of a grasp of the situation to understand how

15   he produced his report. I understand the defense

16   argument about the maps not being saved. But based

17   upon his physical exam testimony about how the

18   process works, I don't think that the fact that those

19   were not saved is an evidentiary bar to his coming

20   in. I think he's testified that that's the normal

21   practice. And I understand -- I'm not saying that

22   they're going to come in. I understand what you're

23   saying about running a second -- running it through

24   again. And I'm not ruling on whether that's

25   admissible or not. But that that's the adequate or

1 appropriate way to analyze or test his initial run,

2 and so I'm going to deny the objection -- or the

3 motion to strike his report.

4   So do you want to get into the rest of

5 your testimony, the rest of your direct?

6   MS. DIRAGO: Yeah, if that's okay with you

7 in terms of timing.

8   THE COURT: Sure. How much more do you

9 have? Probably a while?

10   MS. DIRAGO: Yeah.

11   THE COURT: All right. Do you want to -- do

12 we need to take a break right now?

13   MS. DIRAGO: Sure.

14   THE COURT: Okay. Let's take about ten

15 minutes, and then we'll go forward with that.

16   (Recess held from 3:26 p.m.

17   to 3:37 p.m.)

18   THE COURT: Be seated. Thank you.

19   All right. Let's go back on the record.

20 I just want to make it clear, I am finding that the

21 lack of producing this does not bar his -- the

22 admittance of his opinion or his report, however, you

23 will be able to argue as to what weight the Court

24 should give to that.

25   Go ahead.

1   MS. DIRAGO: And I don't know if I have to

2   formally call Mr. Trende now, for the record.

3   THE COURT: Well, he's already --

4   MS. DIRAGO: And I can -- I assume for the

5   record, I can dispense with all the background that

6   I've already done through.

7   THE COURT: Yes.

8   MS. DIRAGO: Okay. Good.

9   DIRECT EXAMINATION

10   BY MS. DIRAGO:

11   Q. And actually, what I want to do, kind of

12   ironically, is focus on the stuff that is not based on

13   your simulations, first.

14   Okay. Mr. Trende, have you been

15   retained as an expert in this matter?

16   A. I have been.

17   Q. Who retained you?

18   A. I was retained by defendants -- by

19   plaintiffs in this case.

20   Q. Are you being paid for your services?

21   A. I am.

22   Q. How much?

23   A. I'm being paid $450 an hour.

24   Q. And is any part of your compensation

25   department on the outcome of this case?

1   A. It is not.

2   Q. Did you render any written reports in

3   connection with this work?

4   A. I did. I filed one report.

5   MS. DIRAGO: Your Honor, can I approach the

6   witness?

7   THE COURT: Yes.

8   MS. DIRAGO: And I approach you.

9   THE COURT: Sure. Thank you.

10   BY MS. DIRAGO:

11   Q. So this will be -- well, after all, what did

12   I just hand you?

13   A. This is the expert report of Sean P. Trende

14   that is dated August 11th, 2023.

15   Q. And is this the report that you rendered in

16   this case?

17   A. It is.

18   Q. Your Honor, I move to admit his report,

19   which we will label Plaintiffs' Exhibit 2?

20   THE COURT: Any other comment?

21   MR. WILLIAMS: Your Honor, you've ruled that

22   you're going to let it in, so we'll --

23   THE COURT: Okay.

24   MR. WILLIAMS: I would -- I would like to

25   avoid just interrupting (inaudible) a standing

1 objection to any testimony that's related to Sections

2 6.4, 6.41, 6.42, anything that's in testimony.

3   THE COURT: Okay. I'll find that you have

4 adequately preserved any objection to those sections.

5   MR. WILLIAMS: Thank you, your Honor.

6   THE COURT: Exhibit 2 will be admitted.

7 BY MS. DIRAGO:

8   Q. So what were you asked to do by plaintiffs

9 in this case, Mr. Trende?

10   A. I was asked to examine the maps that were --

11 or the congressional map that was produced by the --

12 or enacted into law by the New Mexico Legislature and

13 evaluate them to see if they disadvantaged the

14 Democratic party -- or Republican Party.

15   Q. Okay. And I'm going to ask you what

16 information you relied on, and if you were -- and if

17 your Honor wants to follow along, this is on Page 5 of

18 your report.

19   So what information did you rely on to

20 reach your conclusions here?

21   A. So this was a little bit of a tough call,

22 but I just look closely at Justice Kagan's dissenting

23 opinion in Rucho v. Common Cause. Though I am an

24 attorney, I'm not admitted or practicing in this case,

25 so I didn't want to engage in out right legal

1   argumentation.

2   But at the same time, when trying to

3   craft the report, I thought it was necessary to

4   explain what I -- the reason I was doing what I was

5   doing and part of that is just understanding what

6   Justice Kagan's dissenting opinion meant for me to do.

7   The second thing I did, I looked at, was

8   block assignment files for the various plans. So what

9   a block assignment file is, is it's just a spreadsheet

10 that typically just has two columns. One labeled some

11 form of identification, one column labeled "District."

12   And so what it does is, for every census

13 block, which is the smallest geographic unit that the

14 census uses in its work, it will -- every census block

15 has its own unique identifier. And the block

16 assignment files will match the census block to every

17 district in which they're placed. So it's a way to

18 allow you to build the maps from the ground up,

19 effectively, for analysis.

20   I looked at congressional district shape

21 files, which are maintained at UCLA; voter

22 registration data from the New Mexico Secretary of

23 State; Supreme Court of New Mexico's order; and then

24 other documents and data referred to.

25   So the basic idea was, just look at all

1 the data I could so that I could adequately match

2 demographic and political information to the districts

3 that were created.

4   Q. Great. And based on your work, did you

5 reach any conclusions?

6   A. Yes. It -- based on the work, I -- it seems

7 to a reasonable degree of scientific certainty in my

8 field that these maps were constructed with the intent

9 of disadvantaging the Republican Party, and, in fact,

10 did so.

11   Q. How confident are you in these conclusions?

12   A. Very. It's almost inconceivable that these

13 maps were not drawn with heavy political

14 considerations behind them.

15   Q. All right. And then on Page 6, we have

16 methods and guiding principles. I'm going to go

17 through them in detail, but can you just list those

18 out for us?

19   A. Yeah. So there are kind of five just

20 background things that I felt needed to be established

21 before getting into the meat of the report.

22   The first was my opinion of Justice

23 Kagan's dissenting opinion on Rucho, which is not

24 binding on anyone, but it guided on how I performed my

25 report.

1   The second an a measure for measuring

2   directing partisanship, known as PBI.

3   The third talks about how to gerrymander

4   a state with few districts and some of the challenges

5   involved there.

6   I did an analysis of regions in

7   New Mexico and finally explained the simulation

8   technique, which I think I've already done that fifth

9   one.

10   Q. All right. So let's take Justice Kagan's

11   dissenting opinion first.

12   How did you use her dissenting opinion

13   in Rucho?

14   A. So I just read through it carefully. And

15   like I said, since I have practiced allow for eight

16   years before becoming a political analyst, I just -- I

17   gave my interpretation of it. And, again, to guide

18   the work that I would be doing.

19   Q. So you practiced law for eight years and

20   decided not to be a lawyer anymore?

21   A. Actually, I just -- I clerked on the Tenth

22   Circuit for Justice (inaudible) for a year, so I guess

23   it's technically nine, and then eight years in firms.

24   Q. Okay. Okay. And what -- does Justice Kagan

25   endorse any methods to analyze plans nor gerrymanders?

1   A.   Yeah.   So the first one is kind of counter a

2   bit to -- it's a check on the work that I was doing,

3   which is that judges shouldn't just strike down a map

4   because it shows some political motivation.   There has

5   to be something that's extreme.   So that kind of set a

6   standard for what I wanted to use for evaluating the

7   maps.

8   And then the second she has her

9   three-part test, which is intent, effect and

10   causation.

11   Q.   And does Justice Kagan endorse a simulation

12   analysis?

13   A.   She does.   So in both the intent and to a

14   lesser stents is effects prong, she says that a

15   simulation analysis is one way, although not to only

16   way, that you can prove up a gerrymander.

17   Q.   What's another way that she analyzed?

18   A.   So she's explicit that it doesn't have to be

19   through these kind of -- I think she even uses the

20   term "fancy math."   But it doesn't have to be these

21   complex simulations.   You can do a qualitative

22   assessment.   Look at how partisanship has been

23   changed, look at how voting data has been changed from

24   map to map, look at how the legislature moved votes

25   and people around when it drew the map.

1   And sometimes, and I think it's the case

2   here, even a qualitative analysis shows clear intent

3   and effect when drawing this map.

4   Q. Okay. So your second guiding principle is

5   elaborated on Page 10. What was that?

6   A. So the second guiding principle was measures

7   of partisanship. So if we're going to evaluate, if

8   we're going to evaluate something as to whether it's a

9   gerrymander or not, we have to have some understanding

10   of what these political numbers mean that we see.

11   So there's two things that are pretty

12   common. The first one is typical rule in political

13   science, which is using two-party vote share. And so

14   what two-party vote share is basically the votes from

15   presidential election without the third parties

16   included.

17   And the reason that we do this is -- so

18   1992, Bill Clinton wins 43 percent of the popular

19   vote, George H.W. Bush wins 37 and a half percent. A

20   few years earlier, Michael Dukakis has won 46 percent

21   of the popular vote. And so if you're only looking at

22   those numbers, you would include that the Democrat

23   vote share had declined by 3 points between 1988 and

24   1992. But while technically true, that gives a very

25   misleading view of what happened in that presidential

1 election.

2   So what political scientists will do and

3 what two-party vote share does is, okay, we're going

4 to take out Ross Perot's 19 percent of the vote and

5 just look between George H.W. Bush and Bill Clinton,

6 what was the vote share for the two parties.

7   And when you do this, you say, okay,

8 Bill Clinton won 53.4 percent of the two-party vote.

9 Which is a more accurate description of what happened

10 in the 1992 election.

11   The second thing I you'd, I do rely on

12 two different metrics for partisanship. The first the

13 looking at presidential vote share alone.

14 Presidential vote share, especially for Congress, is a

15 highly predictive tool. But I also use a partisan

16 index of statewide rises in New Mexico from 2016 to

17 2020. So what this allows us to do is kind of smooth

18 out the data. So if there's any quirky about the

19 data, using ten elections will smooth that out. It

20 kind of comes out in the wash.

21   The final thing that I use is what's

22 known as the partisan voting index. Now, the partisan

23 voting index is a tool to allow you to compare one

24 election to another. So if you were to look at

25 Massachusetts in 1984, Ronald Reagan won it with 52

1   percent of the vote. And so if all you knew was that,

2   you would say, wow, Massachusetts is a conservative

3   leaning swing state.

4   That 52 percent number has to be read in

5   the context of the fact, though, that he was winning

6   by 59 percent nationally. Massachusetts was still a

7   Democratic leaning state, but the national environment

8   was to favorable to Republicans was that it was enough

9   to flip that state.

10   So what you would say then is, okay,

11   Ronald Reagan wins 52 percent of the vote in

12   Massachusetts, he wins 59 percent nationally, so that

13   year, Massachusetts leaned towards the Democrats by 7

14   points. Okay?

15   And so if you think about it, you know,

16   a few years later Bill Clinton wins the state handily,

17   and so you would say, if you just look at the numbers,

18   "Wow, Massachusetts really swung to the left." If you

19   look at the PBI numbers, though, Massachusetts hardly

20   moves at all. It's about 7 or 8 percent more

21   Democratic than the rest of the country as a whole.

22   So it's just a way to compare across

23   elections accounting for different national

24   environments.

25   Q. Did you look at the PBI for New Mexico?

1   A.   I did.   I did a time series in the body of

2   my report that traces the PBI of New Mexico over time.

3   You can also look at it in the -- yeah, that traces it

4   over time.

5   Q.   Okay.   And what did it tell you?

6   A.   That New Mexico has had a bit of a left ward

7   trend.   But it's not at dramatic as you might see just

8   by looking at Democratic performance.   It's been a

9   couple points to the left of the country, but not

10   overwhelmingly so.

11   Q.   Okay.   And is this PBI used by elections

12   analysts?

13   A.   It's relevantly used by elections analysts.

14   And it's used in the political science community, as

15   well.   I checked to make sure that it does get cited

16   to.

17   Q.   Okay.   So let's go on to your third guiding

18   principle approximately on Page 13.   This is extreme

19   gerrymandering in a competitive state with few

20   districts.   Does that describe New Mexico?

21   A.   Yes.   So as I said, New Mexico is a state

22   that favors Democrats, but, you know, it has been won

23   by a Republican president candidates in a good

24   Republican year recently from a neighboring state.

25   But still, you know, there have been competitive

1   statewide Republican candidates recently. So it's not

2   a place like New York or California, where it's just

3   blue pretty much top to bottom at this point.

4   Q. So do you analyze gerrymandering in a

5   competitive state with few districts differently than

6   you would, say, New York?

7   A. You have to. Because one important thing to

8   keep in mind with gerrymandering is that the statewide

9   average of the districts has to be the statewide

10 average overall. If the state is 53 percent Democrat,

11 you can't create for 54 percent Democratic seats.

12 Otherwise the statewide average would be 54. And so

13 there's kind of a cap to how high you can take the

14 partisanship of all the districts.

15   Past that, it's a bit of a rob Peter to

16 pay Paul engagement. Let's say you wanted to make an

17 incumbent a little bit safer, so you made one of those

18 districts slightly more Democratic. Those Democrats

19 have to have been taken out of somewhere. And so it

20 either has to come out of District 1 or 3, and so that

21 district is going become a little bit more Republican.

22 And the more Democratic you make that second state --

23 or second district, the more Republican the other

24 districts are going to become.

25   And so there's a cap of like a perfect

1   gerrymander, and then the more you deviate from that

2   cap, the more you deviate from that ideal and make it

3   less perfect.

4   Q. So does the chart on Page 15 help? I'm

5   sorry, the graphic is not that great. It's better

6   with glasses. Why don't you tell me what this chart

7   on Page 15 is showing us.

8   A. So this is -- it's called toy data.

9   Political scientists, if they want to illustrate

10   appoints will use political data to try to point

11   out -- it just shows a state in three different

12   scenarios.

13   So this is a state that overall is two

14   plus 3, right? The Republican gets 48 percent of the

15   vote nationally, 45 percent of the vote in the

16   districts. And as drawn in Scenario 1, they're all

17   going to tend to favor Democrats. They're all 55, 45

18   D plus 3 districts.

19   Well, let's say that the map maker

20   wanted to make Districts 2 and 3 a little bit more

21   Democratic, they wanted to protect an incumbent for

22   whatever reason. Think can do that. So they take

23   five residents out of each -- out of District 2 and 3

24   each -- I'm sorry, they put five Democrats into

25   Districts 2 and 3.

1   But to do that, to comply with equal

2   population, they have to push Republicans out. If

3   they push Democrats out, the partisanship doesn't

4   change. And those Republicans have to go somewhere;

5   they go into District 1.

6   So now district -- now in this Scenario

7   2, those two Districts 2 and 3 are a bit more

8   Democratic. But District 1 is a bit more competitive.

9   Well, let's stay they think that's not good enough, an

10   incumbent complains, "I want my district more

11   Democratic."

12   So they say, "Okay. We'll push five

13   more Democrats into Districts 2 and 3 and push five

14   Republicans out." Those Republicans have to go

15   somewhere. Now District 1 is just 53/47. So it's not

16   big of a deviation from what a perfect gerrymander in

17   the state would be. But you've made one of the

18   districts look a little bit more competitive than it

19   is, but you're still very close to the best you can do

20   in the state.

21   Q. So does it make it more difficult for you to

22   assess whether a map has been gerrymandered, the fact

23   that the state is smaller and more competitive?

24   A. Well, put some nuance on it, especially on

25   an effects analysis, because you have to keep in mind

1   that there's a cap to what the legislature could have

2   done. But it's the same tools for analysis. You have

3   to see which partisans the legislature moved around,

4   which voters the legislature moved around. And then

5   you can do more quantitative stuff to see what they

6   actually came up with. You just have to remember what

7   the perfect map -- what the perfect gerrymander looks

8   like in that state.

9   Q. Okay. So two defendants experts have said

10   that SB-1 was not gerrymandered because the states --

11   the districts were made more competitive. What you do

12   say to that?

13   A. Well, there's two things. The first is it's

14   true that they were made more competitive in a sense,

15   that the Democrat vote share in two of the districts

16   came down. But competitiveness isn't a one-to-one

17   basis thing. It's not like for every state -- every

18   point that the district becomes more Democratic, it

19   becomes, you know, linearly more favorable to the

20   Democrats of.

21   At a certain point, and it's not a

22   hundred percent Democratic. At a certain point, it's

23   just a Democratic district. So the district that

24   leans towards the opposing party by more than 3 or 4

25   points, it's going to be very difficult for the party

1 to pick it up no matter what.

2   And the second thing s you have to

3 remember, like just -- because there's a cap on how

4 good of a gerrymander you can do in a state like

5 New Mexico, you have to keep in mind that having a

6 district that is, you know, just one or two points

7 favoring Democrats with the other ones four or five

8 points, that's pretty close to the ideal gerrymander

9 in the State of New Mexico, unless you just can't draw

10 a congressional gerrymander in New Mexico, which I

11 don't think would comply with the law.

12   Q. Okay. Show let's move on to your next

13 principle, which is regions of New Mexico. Can you

14 describe your approach in the different regions in

15 New Mexico that are in your report?

16   A. Sure. So if we're going to talk about the

17 state, I thought it would be useful -- sometimes you

18 want to break things down into different areas of the

19 state. While I could look at the state and come up

20 with guesses with regions what we talk about are, you

21 know, I -- that would be fertile grounds for

22 cross-examine, what New Mexico regions are.

23   So I looked around for what people have

24 used to talk about New Mexico and their regions, and I

25 actually found the New Mexico Tourism Board has

 1 definitions of regions. And I utilized those regions

 2 for discussing my report.

 3   Now, these aren't intended to be the

 4 only way you could look at regions in New Mexico. I'm

 5 sure there are many ways you could look at the regions

 6 of New Mexico. I just wanted to have something that

 7 was grounded in someone else's opinion to use as a

 8 baseline so it's not just my objective views of how

 9 regions of the state should be analyzed.

10   Q. Okay. And as I said, I'm going to kind of

11 skip the simulation stuff right now, I know we already

12 went into it, and go to pages 23 to 25. You've got a

13 bunch of maps on these pages. Can you explain what

14 these are?

15   A. Okay. So these maps -- and I apologize for

16 the counter -- in a sense for the counter intuitive

17 color scheming. Instead of the red and blue, I have

18 what's called the viridis color palette. There's

19 actually a straightforward reason for this, which is

20 that read and blue maps don't print well on and

21 noncolor printer. This color scheme will print out on

22 a regular printer. The other is that I'm colorblind,

23 red/green colorblind, and viridis is good for

24 colorblind people. But I'm more concerned about the

25 printer issue.

1   So what these are is the presidential

2 vote center that center PBI vote measure by county and

3 region in New Mexico from 1984 to 2020. And so what

4 it allows us to do is kind of go through and see what

5 areas have been heavily Democratic over time and see

6 what areas have been heavily Republican over time.

7   And what you can see from these maps is

8 that for a very, very long time, Southeastern

9 New Mexico has been the most Republican portion of the

10 state.

11   Q. So I don't know if you can explain this.

12 But this lighter yellowish light green is more

13 Republican under your PBI, and then the darker, sort

14 of purple, is that more Democrat?

15   A. Yes. So the purple is sort of close to

16 blue, so that's what I anchored as the Democratic vote

17 share. Republican is yellow instead of red.

18   Q. So what is your conclusion, looking at the

19 history here of New Mexico?

20   A. Well, you can look at the area of the state

21 that's been voting the most heavily Republican. And

22 so if you were trying to crack an area of the state

23 when direct causing a map to disadvantage Republicans,

24 that is the place where you would go to try to split

25 up those votes. Because if those votes are kept

1   together, they're going to create a mass that allows a

2   district to elect a Republican member of Congress.

3   Q.   Okay.   And so the most recent map is on

4   Page 25, right?

5   A.   That's right.   That's the 2020 election.

6   Q.   Okay.

7   A.   You can also notice from these maps, and I

8   don't think it's any great surprise, that Bernalillo

9   County has been trending leftward over time.   And

10 that's consistent.   You know, the district elected

11 Steve Schiff for a long time, and Heather Wilson.   And

12 it just doesn't anymore, so...

13   Q.   Okay.   And then what about Figure 8, what is

14 this showing us?

15   A.   So this is kind of a summary table of those

16 maps.   So this is looking at those regions and showing

17 the trend in those regions over time.   And so you can

18 see that Southeastern New Mexico, at the top, has

19 always been very Republican.   It's trended more so

20 over time.

21   There's some stability to the map

22 because a lot of the movements have canceled out.   But

23 as far as kind of how the regions are ranked in terms

24 of partisanship, it's -- you know, the ranking has

25 been fairly stable.

1   Q.   So PBI, I guess the numbers on the left,

2   what are these showing us?

3   A.   So they're showing at the presidential level

4   how much -- how far to the right or the left of the

5   nation as a whole these regions were during a given

6   election. So, you know, Southeast New Mexico has

7   typically been 10 to 20 points more Republican than

8   the county as a whole. It's the foundation of

9   Republican voting in New Mexico.

10   Q.   Okay. So that's that top line, green line,

11   dotted line?

12   A.   Yes.

13   Q.   Okay. And one thing that strikes me is that

14   all the lines sort of dip and rise sort of together.

15   Can you explain that?

16   A.   Well, there others state effects, right?

17   Sometimes a presidential candidate will really mesh

18   with the state, and sometimes they won't. You know,

19   George W. Bush probably benefited from the affinity of

20   being -- you know, getting news coverage and such.

21   And other presidential candidates didn't fair as well

22   overall in the state practice. .

23   But, again, these are meant to show --

24   the whole point of having a summary map like this is

25   to show over time how things have gone. Yes, there's

1   ebbs and flows, but the consistent takeaway is that

2   Southeastern New Mexico is the bedrock of the state

3   Republican Party electoral coalition.

4   Q.   Okay.   And I see a big (inaudible) in 2008.

5   What was that?

6   A.   That was Barrack Obama, who really connected

7   with (inaudible).

8   Q.   (Inaudible).

9   A.   Yeah.   Oh, and -- yeah, yeah.

10   Q.   Did you want to say anything?

11   A.   No, I didn't.

12   Q.   Okay.   Let's see.   You have several maps

13   also on Pages 27 to 31.   What are these?

14   A.   So this is getting into the history of

15   congressional districts in New Mexico.   And so if you

16   want to understand where the legislature went in this

17   last three districting, it's good no know where it's

18   been.

19   And so, as you can see, going back to

20   1972, at this point, the state only had two

21   congressional districts.   And while I understand that

22   the New Mexico Tourism Board hasn't adopted this

23   particular standard yet, they're probably on to

24   something with their regions.   Because as it turns

25   out, the lines that the legislature drew in 1972 line

1   up with the regions of the state. They didn't split

2   them at all.

3   If you go on to 1982, there was a

4   significant redraw three, because the state received

5   three congressional districts for the first time. And

6   the first district was extended eastward a bit into

7   Southeastern New Mexico, but not overwhelmingly so.

8   If you get to 1992 -- and I'll just go

9   quickly through the next three maps, since they're

10   all -- the 1992 to 2010 line were virtually identical.

11   It's the same thing, there's one county that was taken

12   out of Southeastern New Mexico. But by and large, the

13   congressional districts followed the regional lines of

14   New Mexico. And most importantly, Southeastern

15   New Mexico wasn't cracked by these maps.

16   Q. Okay. So let's move onto your qualitative

17   analysis of the 2020 redistricting. So the very

18   bottom of Page 31, you talk about how New Mexico's

19   district lines were malapportioned by the ends of the

20   2010s. Was that was that a result of the 2020 census

21   results?

22   A. That's right. So the annual census was

23   conducted, we got the new numbers. And New Mexico

24   didn't gain or lose a congressional district, but the

25   congressional districts, of course, were no longer

1   equipopulous, and so they had to be changed.

2   Q. Okay. And there's a chart on Page 32. I

3   want to go over what this says. Maybe starting, I

4   don't know, district by district, probably (inaudible)

5   most helpful to the Court.

6   A. Of course. So the state was malapportioned,

7   but it wasn't badly malapportioned. So District 1,

8   the population was about 11,000 under the ideal

9   population size, to 1.6 percent. So it had to gain

10 residents.

11   District 2 was about 8,000 over the

12 ideal population, so it was going to have to lose

13 8,000 residents.

14   District 3 was about 3,000, 3100

15 residents over. So it also was going to have to give

16 up some residents. But it wasn't something that

17 required a massive redraw.

18   And so, you know, having used Justice

19 Kagan's opinion as a guideline as to how I conducted

20 my analysis, I noted that she had put in the Maryland

21 case a great degree of emphasis on the fact that

22 Maryland's congressional lines didn't have to change

23 significantly, and yet, hundreds of thousands of

24 people were moved around.

25   Q. Okay. So let's look at what did happen

 1   here. I believe Page 34 has a chart for you to

 2   explain this.

 3   A. That's right. So Page 33 just gives the

 4   district lines that were created.

 5   Page 34, though, walks through -- it's a

 6   what we call paralyzed comparison of the districts.

 7   It shows the district as it existed in 2020, and then

 8   traces the movements of the population between

 9   districts.

10   So even though District 1 had to gain

11   population, it only retained 528,000 of its residents

12   from the last redistricting. Instead, 166,485

13   residents were moved out of the District 1, which was

14   supposed to gain population into District 2.

15   Q. And, Mr. Trende, was District 2 under

16   populated?

17   A. District 2 was overpopulated.

18   Q. So you're saying they took residents from a

19   district that was under populated and move it into a

20   district that was overpopulated?

21   A. That's exactly correct.

22   Q. And by how many people, did you say?

23   A. 166,485.

24   Q. Okay. And then what did -- what did they do

25   with the second district?

1   A.   Okay.   So the second district did have the

2   loss some population, about 8,000 people.   You know, a

3   third of the population of Lea County.   Instead, the

4   second district mauves 55,518 residents into the first

5   district, and then gives 140,435 residents into the

6   third district.

7   Q.   So that's almost 200,000?

8   A.   Yes.

9   Q.   What about the third district?

10   A.   So, again, the third district only /#45D to

11   give up, I think, 2100 or 3100 residents from that

12   table.

13   Instead, it moved 122,222 residents into

14   the first district; 21,292 residents into the second

15   district.

16   Q.   So were these large shifts of people

17   necessary to satisfy the one person one vote

18   requirement?

19   A.   They were not.

20   Q.   Okay.   Do you know where these shifts

21   occurred geographically?

22   A.   Yeah.   So if you look on Page 35 of the

23   report, I've mapped this out, and the changes take

24   place in two areas.   The first is in Southeastern

25   New Mexico.   And so what this does -- it says shifted

1   districts, it should be shifted precincts in the

2   legend. I got it right in the title.

3   This shows that the in Southeastern

4   New Mexico, which is the most Republican part of the

5   state, that's where most of the shifts out of to

6   second district into the first and third districts

7   took place. That's where the second district was

8   giving up residents.

9   Northeast of the other shifts were

10 taking place in the Albuquerque area, where the second

11 district, you know, in Bernalillo County, Sandoval and

12 Valencia Counties. So this wasn't just a random

13 distribution of people being moved around -- along

14 around district borders or, you know, throughout the

15 state. It was a very concentrated efforts for moving

16 voters around, concentrated in the most Republican

17 area of the state and the fastest Democratic trending

18 area of the state.

19   Q. So these shifts were not politically

20 neutral?

21   A. They were not. And so what I've done next,

22 if you look on Page 36, you can look at the shift of

23 2020 presidential votes between the districts. So if

24 you counted how many -- by looking at the precincts

25 that were moved, you can sum up the number of Trump

1   votes that were moved from district to district and

2   how many Biden votes were moved. And the summary

3   statistics is on the right side, the net Democratic

4   shift.

5   So from District 1 to District 2, from

6   Democratic leaning District 2 a Republican district,

7   16,216 net Biden voters were moved into this second

8   district.

9   From the second district back into the

10 first district, the voters were moved out of 2 into 1,

11 was a net 6,600 -- it was a negative 6,640 Democratic

12 shift. Which means it gave up 6,640 Trump voters on

13 balance.

14   From District 2 to District 3, the

15 second district lost 23,976 Trump voters on balance.

16   From District 3 to district 1, pretty

17 neutral, 184 Democratic voters were shifted into 1.

18 And then, from District 3 to District 2, 800 Biden

19 voters were shifted into District 2.

20   So for all the -- for District 2, on

21 balance, it gained about 17,000 Biden voters from

22 Districts 1 and 3, and then it gave up about 28,000

23 Trump voters to Districts 1 and 3.

24   Q. Okay. Now, on Page 37, what is this /SHART

25 showing us?

1   A.   So this is -- instead of using the -- just

2   the Biden/Trump approach, this is using the index of

3   ten statewide political races.   And it shows the same

4   thing.   On balance, Democrats were moved out of

5   District 1 into District 2.   On balance, Democrats

6   were moved out of -- or Republicans were moved out of

7   District 2 and into District 1.

8   On balance, Democrats were moved out

9   of -- Republicans were moved out of District 2 into

10   District 3.   And on balance, Democrats were moved out

11   of District 3 into District 2.

12   If you look across then elections, you

13   had about 137,000 Democratic votes moved into

14   District 2, and about 200,000 Republican votes moved

15   out of District 2.

16   Q.   And then on Page 38, you have another much

17   bigger chart.   That is this?

18   A.   Yeah, so this --

19   Q.   Much smaller, I'm sorry.

20   A.   Yeah.

21   Q.   (Inaudible) staples.   I apologize for the --

22   A.   No, no, no.   That's my fault.   I should have

23   printed it better.   No, for the eye strain, I could

24   have printed that sideways and it would have been

25   better.

1   Anyway, so this is looking at the

2   registration advantage for the parties in the

3   congressional districts in New Mexico from 1988 to

4   2022. The data is taken right off of the secretary of

5   state's website.

6   And so what you can do is look in the

7   far right column, the far right three columns. That's

8   the summary column. Those are the summary columns

9   that show how to Democratic registration advantage in

10 the districts has changed of time. And so you can

11 see, by the end of the decade, before redistricting in

12 2021, in District 1, the Democrats registration

13 advantage was 18.7 percent. After the redistricting

14 took place, that was down to 9.1 percent. And that

15 has bounced up a little bit as people switched parties

16 or people have moved in.

17   In other words, the Democrats still

18 maintain a healthy advantage in the first district.

19 But if you want to think about it in gerrymander

20 verbiage, they're not wasting an as many of their

21 partisans, right? It doesn't matter if you win the

22 first district by two votes or 200,000 votes, you get

23 100 percent of the representation.

24   So a lot of those registrants are wasted

25 under the old map. They're moved into other

1   districts. The same story is true to a lesser extent.

2   Of the third district, Democrats had a 21 point

3   advantage. That gets reduced down to 18 points, 17.6.

4   The opposite, though, happens in

5   District 2. By the time of the 2022 redistricting,

6   the Republicans actually had, for the first time, a

7   small registration edge in the second district. It's

8   the first time it's happened in any congressional

9   district in New Mexico in the last 20 years.

10   Redistricting versus that. It gives Democrat a 13

11   percent registration edge in the district. So this is

12   consistent with what we've seen with the previous two

13   tables, that the result of the 2022 redistricting was

14   to move a large number of partisan, Democratic

15   partisans, out of Districts 1 and 3 and into

16   District 2. And then to move Republican partisans out

17   of District 2 into 1 and 3.

18   Q. Okay. And then what about the charts on

19   pages 39, 40 and 41?

20   A. So I guess this is my make up for this hard

21   to read chart. It's -- the data are summarized in

22   line chart, or -- yeah, line graphs.

23   So as you can see, the Democrat

24   registration advantage in that first district had been

25   growing over time. It reduces in 2022, but it's still

 1 in substantial Democratic advantage.

 2   On the next page, Page 40, you can see

 3 that the Democratic registration advantage had been

 4 steady declining over time, to the point that the

 5 Republicans had a slight advantage. In fact, it's

 6 sharply reversed in the 2022 redistricting.

 7   If you look at Table 3, you can see that

 8 the Democrats advantage had been slowly declining.

 9 It's moved down below 20 percent in the districting.

10 Again, Democratic partisans on net being moved out of

11 Districts 1 and 3, Republican partisans on net being

12 moved out of District 2.

13   Q. All right. And then I just want to direct

14 you back to Page 9, because this is where you were

15 talking about Justice Kagan's dissent. And you

16 discuss it citing her dissenting opinion. And I'd

17 like to know if that's what you see happening here.

18   So she, in the middle of this third

19 second -- second full paragraph.

20   A. Yeah, so Justice Kagan is reading about

21 Maryland, which had eight districts and not three.

22 And I guess the line -- yeah, she does use the

23 verbiage "fancy evidence." She observes that

24 Maryland, rather than engaging in minimal change, what

25 she writes is that the legislature moves 360,000

1 residents out, and another 350,000 in. So in a state

2 that really just needed minimal changes between the

3 districts, she saw that there were massive numbers of

4 people being moved.

5 And then she noticed that this was not a

6 politically neutral move. She said that the upshot

7 was an a district with 66,000 fewer Republican voters,

8 and 24,000 more Democratic voters.

9 So when she would have struck down the

10 Maryland map, this is what she was looking at, that

11 the voters were being moved around in such a way that

12 it greatly diminished the partisanship advantage in

13 that district by moving Republican voters out and

14 Democratic voters in, which is the same thing that

15 happened here.

16 Q. Okay. And so you've sort of answered my

17 questions, but have you drawn any conclusions from

18 this shifts of data?

19 A. Yeah.

20 Q. Shifts of people. I'm sorry.

21 A. Yeah. The qualitative analysis is clear,

22 that the movement of voters under these lines punished

23 the Republican Party and advantaged the Democratic

24 party by taking a district that was becoming a

25 Republican registration advantage for the first time

1   of any district in the last 20 years and making it

2   much, much more Democratic.

3   Q. Have you read the expert reports that the

4   defendants have submitted?

5   A. I have.

6   Q. Do any of defendant's experts assess how to

7   legislature shifted between and among districts when

8   drawing SB-1?

9   A. I don't think there's any disagreement on

10 that.

11   Q. All right. We have a chart on Page 42.

12 What is this showing us?

13   A. So this is another way of looking at the

14 same data. This is the partisanship of the districts

15 pre and post. So 20 -- on the right side is the --

16 I'm sorry. On the left side we're looking at Biden

17 percentages. So the first district using two party

18 vote was 61.7 percent Biden. It comes down to 57.4

19 percent Biden. So this is still a district that

20 President Biden won by a healthy margin. Even using

21 the PBI, it's -- it would be five points to the left

22 of the country. District 3 the brought down to

23 55.5 percent. It's still a district that is 3 to 4

24 points more Democratic than the rest of the country as

25 a whole.

1   And then District 2, Biden vote shares

2   increased from 44 percent of the vote up to 53 percent

3   of the vote. So quite to the left of the country as a

4   whole. So while you had a situation where you had two

5   Democratic districts a fairly reliable Republican

6   district, you have three districts in the state that

7   lean towards the Democrats.

8   You can do the same analysis using the

9   ten statewide raises, our index. That's the right

10   side of that chart. The first district was taken down

11   from 60 percent to 56 percent using the Democratic

12   index. The third district was taken down from 59.nine

13   to 57.3 percent. So this is, again, they're wasting

14   few are Democratic votes in these districts.

15   And then District Number 2, is taken

16   from one that is 46.1 percent Democrat, so leaning

17   towards the Republicans, to one that 54.6 percent

18   Democrat, giving the Democrats an advantage in the

19   district?

20   Q. So is this showing -- correct me if I'm

21   wrong, but is this showing that if the SB plan was in

22   place in 2020, that District 2 would have elected

23   Biden?

24   A. I'm sorry. Can you repeat that?

25   Q. Yeah. If the lines were -- with the SB-1

1   plan was in place in 2022, District 2 would have

2   elected Biden?

3   A. Yeah. District 2 would have voted for Joe

4   Biden.

5   Q. Yeah, not elected. But you got it. Okay.

6   So you mentioned this platonic idea of a

7   gerrymander here. Is that what you're seeing with

8   these numbers?

9   A. That's right. I mean, New Mexico is only as

10 Democratic as it can be. It's about 54 to 55 percent

11 Biden's state. This does deviate from this ideal

12 somewhat, but not very much. It is close to a perfect

13 Democratic gerrymander of the state. It's close to

14 maximizing the Democrats advantage in the state.

15   Q. All right. And then you have a chart on

16 Page 43. Can you explain what this one shows us?

17   A. So this is looking at those ten statewide

18 races that we talked about, how those ten candidates

19 fared in the in the different districts under both the

20 old lines and the new lines.

21   So under the old lines, in District 1,

22 the Democrats won all ten of those races. Under the

23 new lines, they won all ten of those races. This is

24 what I get at when I say they're wasting fewer votes.

25 Yes, they're bringing down the Democratic vote total

1   in District 1, but not so much that any statewide

2   Democrat would have lost that district in the last few

3   years.

4   Same thing with District 3. It was won

5   by all ten Democrats in my index under the old lines.

6   Same with the new lines. It becomes slightly less

7   Democratic, but not so much that it starts to coast

8   the statewide Democrats votes.

9   The second district on the other hand

10   goes from one that one statewide Democrat had carried

11   to one that the statewide Democrats carried of every

12   time. So all ten of them. So this is a district that

13   going back to 2016 and top of the tickets statewide

14   raises hasn't voted for a Republican.

15   Q. So looking at these changes and taking all

16   this data into consideration, is this a significant

17   change that they made?

18   A. Yes. It moves the state from one where, you

19   know, it's a 54, 55 Democratic state, and Democrats

20   would get 66 percent of the representation in

21   Washington, D.C., into one where Democrats are going

22   to tend to get all the representation in Washington,

23   D.C. And you can see that in the 2022 election

24   results. New Mexico has had a all Democratic

25   delegation three times since it had multi membered --

1 multiple districts.

2   2008, Democratic waive year. 2018,

3 very, very good Democratic year. And 2022, a year

4 where Republicans won control of Congress, and only

5 two Republican incumbents lost. One of whom was Steve

6 Chabot in Ohio, who had his direct redistricted out

7 from under him. One of whom is Yvette Harrell. She's

8 one of two incumbent, Republican incumbent to lose

9 that year. You can argue for a third, because there

10 was a Republican who won a special election in

11 southern Texas, but we typically don't count people

12 who had won an independent special election against an

13 incumbent.

14   Q. And so that election, how many districts did

15 the Democrat take in New Mexico?

16   A. They took all three. They got 100 percent

17 of the representation off of 55 percent of the

18 statewide popular vote.

19   Q. And as you say in your report, impact is one

20 of Justice Kagan's prongs. What do you say about that

21 impact prong, looking at this data?

22   A. So now going forward, you know, the

23 Democratic incumbent -- or the current Democratic

24 incumbent showed that he could win in a Republican

25 leaning year. Now he's going to have the advantage of

1   incumbency. I guess it's possible that a substantial

2   rub public can wave election that he might lose, just

3   like Democrats could win it before in very good years.

4   But overall, this is going to be a district that

5   favors a Democrats, and it showed -- even though it

6   was a close election, given the overall environment,

7   where Republicans were winning control of the house of

8   representatives, winning majority of the popular vote

9   for Congress for I think the fifth time since the

10   1950s, it wasn't a great environment for him to be

11   running in, and yet he still managed to topple and

12   incumbent.

13   Q. So in your expert opinion, does this show

14   that the Democratic party is now entrenched in

15   District 2?

16   A. Yes.

17   Q. Okay. I would like to go ahead into the

18   simulations.

19   MS. DIRAGO: Judge, how are we looking on

20   time. Do you want me to go till 5:00?

21   THE COURT: Sure. That's fine.

22   MS. DIRAGO: Okay.

23   BY MS. DIRAGO:

24   Q. So I think you've talked about traditional

25   redistricting criteria. Can you explain some examples

1 of traditional redistricting criteria?

2   A. So traditional redistricting criteria,

3 different people have different definitions.

4 Contiguity, you want your districts to be contiguous.

5 Compactness, making the districts compact. Respect

6 for county or municipal lines is a tradition

7 redistricting principle. There's some disagreement

8 about communities of interest. I know Dr. Chen would

9 say no. The majority of the state agree with him, but

10 a bare majority, some would say yes. So there is some

11 wiggle room on what they are. But compactness,

12 ewuipopulation, county lines, contiguity are the big

13 ones.

14   Q. Okay. And did you use those criteria in

15 your simulations?

16   A. For the most part, yes.

17   Q. What about the population deviations, what

18 was -- what did you program your simulations to do

19 there?

20   A. So the simulations are meant -- so one

21 problem with running simulations with equal population

22 is that it's very difficult to get the simulation to

23 converge on perfect equality.

24   So what the peer-reviewed literature

25 does, what most of the testimony has done, is say,

1 okay, we're going to let the maps -- the simulations

2 run plus or minus 1 percent on the population

3 deviation.

4   The reason they do that is to make it

5 easier for the simulation redistricting programs to

6 converge. And then the idea is, once you got the map

7 to that point, moving census blocks in and out to make

8 the populations perfectly equal isn't going to change

9 the answer because it's not going to change the

10 partisanship of the districts enough to change your

11 answer.

12   So -- and that's consistent with my

13 experience drawing maps how you do it. You draw your

14 concept first, get everything pretty much in place.

15 And then you have to fine tune to meet the federal

16 population standard.

17   Q. Okay. You have a funny looking picture on

18 page 46. Can you tell me what this is?

19   A. Okay. So there are a lot of funny looking

20 pictures going forward. I'm just warn the Court right

21 now.

22   So what this is is what's called -- if

23 counsel wouldn't mind, this might be easier to explain

24 with reference to Page 48.

25   Q. Absolutely.

1   A.   So after you draw your ensemble of 1 million

2   statewide maps, there's a question, okay, what do we

3   do with this.   And so the first thing you can do is

4   create these dot plots.   So what the dot plots do is

5   they'll take Map 1 -- the computer will take Map 1 in

6   your simulation, and it'll say, okay, now that I've

7   drawn these maps without respect to partisanship,

8   let's put the data back in through the precincts.   We

9   know which precincts go to which congressional

10   district.   What is the most Republican congressional

11   direct, what's it's partisanship?   It will calculate

12   that and it will put one dot down.

13   It'll say, okay, what's the partisanship

14   of the second-most congressional -- second most

15   Republican congressional district in this map?   It'll

16   place a dot down there.

17   What's the partisanship of the

18   third-most Republican district, the most Democratic

19   district in the map?   It'll put a dot down there.

20   And say okay, let's take up the second

21   district, do the same thing, put down dots for that.

22   It does it a million times for 3 million total dots

23   that give you the partisanship of every district, of

24   every district of every map in the ensemble.

25   So what this does is it says in the maps

1   that have been drawn, the range of partisanship for

2   the most Republican district is somewhere between

3   60 percent Republican, 40 percent Democratic, and

4   about 55 percent Democratic, 45 percent Republican.

5   Okay. And then you can do the analysis for the second

6   and third districts.

7   Q. So these district numbers are not New Mexico

8   district numbers?

9   A. That's right. It's ranks.

10   Q. Right.

11   A. It's the most Republican district, the

12   second-most Republican district, the third-most

13   Republican district in a given map. So then, well, I

14   want to compare this in the enacted plan. So the

15   black dot represented the enacted plan.

16   So the first black dot, the most

17   Republican district, is the second District of

18   New Mexico. Partisanship about 53 percent. This is

19   presidential. The second-most Republican district is

20   District Number 3. Be then the most Democratic

21   district, the one plotted on the far right is District

22   Number 1.

23   And so you can now compare the most

24   Republican -- your can compare the range of most

25   Republican districts in this partisan neutral ensemble

1 to what the map makers produced.

2   Q. Talk about printer problems, there's

3 3 million dots on this page?

4   A. Yes.

5   Q. Okay. So how do you -- what do you do? I

6 think maybe -- what is it, Page 48 -- no, Page 49 I

7 think is your solution to how to show millions of

8 dots. And maybe you can explain this a bit.

9   A. Yeah, so one problem you get with -- when

10 you get to, like, through million dots, is that you

11 get over-plotting, right. You just get a blob like

12 you see here because it's trying -- even small dots

13 will fill up a page pretty quick. So this is another

14 way to display the data. It is not as intuitive at

15 dot plots.

16   But on Page 49, you can see box plots.

17 And so the way you read the box plot, there's four

18 things you need to know, the first is that the black

19 line is the median. Okay? The middle of the

20 distribution. So even though you have this, like,

21 basic blob that runs from 40 percent Democratic to 55

22 percent Democratic, the middle of it, it's not the

23 average, it's the middle of the distribution, is about

24 43 percent Democratic, for the most we public can

25 district, as opposed to 53 percent for the enacted

1   plan.

2   The box that is formed around that line,

3   50 percent of the dots are contained in that box.

4   Okay? So that's the middle half of maps that were

5   drown. Again, nowhere near what the enacted plan came

6   up with.

7   Those little lines that one up and down

8   are called whiskers. Okay. Those whiskers

9   represent -- there's a formula for calculating them

10   based off of the (inaudible) range, but the whiskers

11   represent maps that are outside that middle 50 percent

12   but weren't really all that unusual. And then the

13   dots represent out -- statistical outliers.

14   And so what this tells us is that -- you

15   know, you can intuit it District 1 being ten points

16   more Democratic than you would expect to get from a

17   politics neutral draw. That first district is an

18   outlier. Same thing with the second district. Same

19   thing with the third district.

20   And what's really important is the way

21   that those outliers occur. The Republican leaning

22   district is made much more Democratic. The two

23   Democratic districts are made more Republican

24   outliers, but not so Republican that they crossover

25   and become a Republican voting area.

1   This is some that Professor Herschlag

2   called the -- well, I have the exact quote written

3   down. I've used term the DNA of the gerrymander.

4   He's called it something very similar. This is what

5   you get when you're gerrymandering a map. Your taking

6   Republican areas and combining them with Democrats to

7   make it more Democratic. You're taking Democratic

8   areas and wasting republican votes to make them more

9   Republican.

10   Q. And I think that quote is on Page 50.

11   A. I was close, yes. He called it's the

12   signature of gerrymandering.

13   Q. Okay. And what you said, does this pattern

14   reflect the cracking on Democrats -- I'm sorry, the

15   packing of Democrats and cracking of Republican

16   districts?

17   A. So this is a map where Republican votes /RA

18   cracked. So yes, by taking the Republican votes and

19   spreading them out on multiple districts by cracking

20   the Republican vote in the most Republican area of the

21   state, splitting it up between three districts, the

22   Republican vote share is diluted. And then when you

23   place those Republican partisans into the Democratic

24   area, it does dilute the Democratic vote so much, but

25   not so much that they won't almost always elect

1   Democrats. That's why all three districts have been

2   carried by ten statewide deck accurate particular top

3   of the ticket office holders now since 2016.

4   Q. So can we -- I don't want to ignore the

5   gerrymandering index us because I like it. Can we go

6   back to 46, then, and tell me what this is showing?

7   A. So the big problem that people who have

8   tried to attack political gerrymandering get faced is

9   the question, okay, how much gerrymandering is too

10 much. That's what tripped up to five justices in the

11 Rucho majority.

12   And the gerrymandering index actually

13 gives us an answer to that. Because what you can do

14 is you can say -- and it's a little bit easier to see

15 this based off the box plot.

16   Q. Yeah.

17   A. So for District 1, we're going to look at

18 the middle map's partisanship for the Republican

19 district is. I think we set it somewhere around

20 44 percent Democratic. And so the first map in the

21 ensemble was -- we'll just call it 46 percent

22 Democratic. Okay. That's a miss of 2 points. Okay?

23   And then maybe the second district, the

24 middle district, actually ended up on the nose, right

25 on the middle of the distribution. So not a miss.

1   And then the third district, we'll say

2   it ended up 3 points off -- well, it would have to be

3   2 points off, so that's another 2 point miss.

4   So you have a 2 point miss, a zero point

5   miss and a 2 point miss. Square those two, 4 points

6   of miss, you add them together, 8. You take the

7   average. On average, that would be 2.6 points of miss

8   for the districts. And that's your gerrymandering

9   index. Okay?

10   You do that for all million maps in the

11   distribution, and what you ends up with are all

12   million maps in the ensemble. And what you end 1 is

13   this histogram on Page 46, which will give you a

14   summary of your million maps in the index. And how

15   many of them had a gerrymandering index of however

16   many points. So you can see the X axis on this with

17   you gerrymandering index of zero, gerrymandering index

18   of .02, gerrymander index of .04. And then their

19   plotted at 500th of a point in intervals. So each one

20   of these lines is the count of maps in our ensemble

21   that had a gerrymandering index of a given score.

22   Well, that's not so interesting, in and

23   of itself. What's interesting is you then calculate

24   the gerrymandering index for the enacted plan. And

25   you compare it to the gerrymandering index for the

1   ensembles. And as it turns out, the gerrymandering

2   index for our first set of maps is greater than almost

3   all of the maps in the ensemble. You can use, if we

4   want, a hard cutoff. We can say that it is, you

5   know -- the traditional cutoff in political science is

6   5 percent. And it is definitely more extreme than

7   95 percent of the maps in our randomly generated

8   ensemble.

9   And that's how we differentiate between,

10   say, Justice Kagan's run of the mill use of politics,

11   and extreme gerrymandering, something that that is far

12   outside from what you would expect from a party that

13   was drawing a map and not relying heavily on the

14   political data.

15   Q.   And do others in your field endorse this

16   gerrymandering index method?

17   A.   Yes. It was actually used by McCartan and

18   Imai to illustrate their sequential Monte Carlo

19   simulations. And it was developed in paper that had

20   multiple authors, (inaudible) in 2017.

21   Q.   Okay. Your figures on Page 51, 52 and 53,

22   these look like more gerrymandering -- another

23   gerrymandering index in box plot and dot plot. Can

24   you explain what these are?

25   A.   So if you got that basic story down, the

1 rest of the report is (inaudible) straightforward. So

2 just -- the next iteration is okay, let's look at

3 those simulated maps. But instead of using the

4 presidential vote share as our measure or partisan

5 share, let's use our index of ten raises as the

6 measure or partisan share. And if you do that, the

7 story doesn't change. It's still an extreme

8 gerrymander far beyond to distribution that's

9 generated from a politics neutral draw.

10   And then, if you look on pages 52 and

11 53, you see the dot plots and the box plots that tell

12 the same story about the maps being outliers in the

13 districts that are gone.

14   Q. All right. So moving on, on Page 54, you

15 explain a second set of analyses that you did, where

16 you froze or locked certain lines. Can you explain

17 that for us?

18   A. That's right. So we know that the map

19 drawers did not draw on a blank slate. You know, the

20 maps that we've seen so far, start with just a field

21 of 1800 precincts or however many there are. But

22 that's not how this map turned out, right. For the

23 most part, the cores of districts will retain intact.

24 For all of the moving of partisans that occur, these

25 districts still kept about 500,000 of their original

1 residents.

2   So the next analysis, what -- that'll

3 take place, is okay, let's take account of this

4 political course. Let's look only at the precincts

5 that the legislature decided to swap and see how

6 likely it is that someone who are just going to play

7 with the precincts that the legislature has decided to

8 play with, how likely is it that you whether ends 1 a

9 partisan outcome that the legislature ended up with?

10   And these are even more extreme. So if

11 you're not just drawing on a blank slate, if you're

12 only looking at the precincts that the legislature

13 moved around. It's incredibly unlikely that you would

14 have ended up with a map that looked like this one.

15 None of the million simulated maps have the

16 gerrymandering index that the enacted plan does.

17   And, again, we're -- we're granting the

18 legislature 500,000 people in every district. Put

19 them in the same district that you put them. We're

20 only going to look at the precinct that you moved

21 around. The odds of combining those precincts that

22 you moved around, that the legislature moved around,

23 and coming out with the partisan outcome that they

24 ended up with, mind-blowingly small. You can look at

25 the dots on 56.

1   You know, when we're drawing out a blank

2   slate, some of the dots fell within our box plots and

3   our dot plots. Not now. That first district is way

4   more Republican than any of the districts created by

5   the neutron ensemble, just looking at the precincts

6   that were actually moved.

7   Q. Did you just say way more Republican?

8   A. Probably not, but I meant way more

9   Republican -- it way more Democratic.

10   Q. Yeah.

11   A. I probably did say way more --

12   Q. I think you did.

13   A. That second district which is the most

14 Republican district, is way more Democratic that what

15 you would normally get when you're just looking at the

16 precincts that the legislature moved between the 2012

17 to 2020 map and the 2022 map.

18   Q. Okay. And then you have maps at 58, 59 and

19 60.

20   A. So this is the same set of maps. Except

21 instead of looking at the presidential election, we're

22 looking at our index of ten statewide races. And it's

23 the same story. The gerrymandering index is an

24 extreme outlier. The dot plots that -- the most

25 Republican district, the second district, is way more

1   Democratic than anything drawn by the politics neutral

2   maps. The box plot shows the same thing.

3   Q. All right. And you did additional

4   simulations to that. I think you explained that on

5   Page -- or starting at least on Page 61, with voter

6   registration data. Can you explain that a little bit?

7   A. Okay. So we've looked a lot at the

8   political outcomes. But Justice Kagan had also

9   mentioned voter registration data as a statistics. So

10   I ran another set. Ideally, I would have just been

11   able to take the voter registration data and put it

12   on, but I didn't watch it up until after the fact, so

13   I -- after I'd run the set of -- the first 2 million

14   simulations, so I matched up the registration data, I

15   ran 10,000 more simulations. And I used registration

16   as the measure of partisanship. Of.

17   And it's the same story. The maps that

18   are drawn are beyond that -- they have more of an

19   overlap, but we're still in a situation where only

20   2 percent of ensemble maps have larger gerrymandering

21   indices than the enacted plan. And when you look at

22   the dot plots on box plots, that second district, the

23   most Republic district in the state is more Democratic

24   than almost all the maps were drawn. It presents as

25   an outlier on the box plots?

1   Q.   Okay.   And Page 67 then you explain another

2   comparison you did.   Can you detail that a little bit

3   for us?

4   A.   So actually, the maps between -- I should

5   have said this, but the ones between 65, 66 and 67,

6   just like I looked at only the precincts that were

7   swapped, using presidential data and the ten statewide

8   maps, I looked at the -- only the precincts that were

9   swapped using the registration advantage, the data

10 tell the same story.

11   Now, on Page 67 -- so not only do we

12 know that the cores of the previous enacted districts

13 were largely maintained, but it appears, at least,

14 that the core of Citizens Plan H were also maintained.

15 There are only about 166 precincts swapped between

16 Citizens Plan H and the enacted plan.   Okay?

17   So we wanted to evaluate what those

18 changes really mean.   And so on Page 68, this is

19 similar to the table that I created earlier, showing

20 the movement of partisans from the previous plan to

21 the new plan.   This shows the movement of partisans

22 from plan H to the enacted plan by district.   And so

23 you can see on net, the partisans that were moved out

24 of Citizens Commission H into district -- Citizens H

25 District 1 into District 2 were 55 percent for Joe

1   Biden. And the partisans that were moved out of

2   District 2 into District 1, so out of the second

3   district, were almost 60 percent Donald Trump.

4   They're 59.1 percent Donald Trump voters.

5   So the voters that were moved out of 1

6   into 2 were Biden voters. The voters that were moved

7   out of 2 into 1 were Trump voters. If you compare

8   Citizens Commission H District 2 with the -- I'm

9   sorry, with Citizens H, Citizens Commission H

10   District 2 into the enacts plan, District 3, 34.1

11   percent Biden vote share. The voters that were moved

12   from District 2 into the citizens plan to the final

13   plan voted overwhelming for Donald Trump, 65.9 percent

14   of the two-party vote.

15   The voters that were moved out of three

16   into District 2 were a bit -- were swing here. They

17   were 51 percent for Joe Biden. But, again, these

18   voters that are 51 percent Joe Biden were replacing a

19   cohort of voters that were overwhelmingly in favor of

20   Donald Trump. So even from Citizens Commission H to

21   the enacted plan were citizens that were moved. It

22   was the same story. Move Republics out of District 2,

23   move Democrats out of District 1 and 3 into

24   District 2.

25   And the next page, 69, shows the same

1   story, but with party registration. The registered

2   voters moved out of 1 into 2, were 61 percent

3   Democratic. The registered voters moved of 2 into 1

4   were 49 percent Democratic. The registered voters

5   moved out of 2 into 3 were 39 percent Democratic. And

6   the registered voters moved out of 3 into 2 were 48

7   percent Democratic.

8   So the movement of registered voters at

9   qualitative level, even setting the simulations aside,

10   tells them are remarkably consistent story over

11   multiple looks.

12   Q. So what about the figures following that? I

13   think 70, 71, 72.

14   A. So this was inspired on the simulations that

15   were run on just the precincts that were swapped

16   between the old lines and the new lines. This is the

17   simulations run only on the precincts that were moved

18   from Citizens H to the enacted plan.

19   It takes -- if it was in citizens 1 --

20   Citizens H in District 1, all those voters were kept

21   in the enacted plan District 1. All those voters were

22   kept together.

23   If it was in Citizens H District 2 and

24   in the enacted plan District 2, all those voters were

25   forced to be kept together. If it was in Citizens H

1   District 3, and the enacted plan District 3, those

2   voters are forced to be kept together.

3   The only voters that are allowed to move

4   are the voters in those precincts that were, in fact,

5   swapped between H and the final version.

6   So the question is, okay, just moving

7   these if you precincts around, how likely is it that

8   you would end up within a map that would look like the

9   enacted plan if you weren't pay attention to politics?

10 And the answer once again is exceptionally unlikely.

11 None of the resulting maps, 10,000 maps in the

12 ensemble looked like the enacted plan.

13   This is true if we look at the histogram

14 on Page 70. It's true if we look at the dot plots on

15 Page 71. It's true if we look at the box plots on

16 Page 72.

17   Q. Okay. And while we're discussing the

18 comparison of H to SB-1, I would like you to look at

19 what's already been marked as Exhibit 1?

20   MS. DIRAGO: Judge, do you have Exhibit 1?

21   THE COURT: I do.

22   MS. DIRAGO: I don't think -- I bet you

23 don't.

24   THE COURT: I have a copy (inaudible). Here

25 it is.

1   MS. DIRAGO: Okay. (Inaudible) that?

2   THE COURT: Yeah.

3   MS. DIRAGO: Okay. Yeah.

4   THE WITNESS: Thank you, your Honor.

5   BY MS. DIRAGO:

6   Q. As I said, this is admitted as Exhibit 1.

7   I'd like you to look at the text messages there on the

8   right. And at the top, it says "Senator Mimi Ste." I

9   think it's supposed to say Stewart.

10   Let's see. So Senator Stewart's first

11 text says: What is the number or the designation of

12 the CCP people's map?

13   Do you know what that's referring to?

14   A. Yes. That's Citizens Plan H, I believe.

15   Q. Okay. And the response is H.

16   And then, let me go down -- okay. Then

17 a few texts down, Senator says: We improved the

18 people's map and now have CD-2 at 53 percent DPI,

19 explanation point.

20   Does DPI meaning anything to you

21 (inaudible)?

22   A. I believe that's Mr. -- yes, it does.

23   Q. What does it mean?

24   A. I believe it's Mr. Sanderoff's Democratic

25 Performance Index.

1   Q. Okay. And then two boxes down, let's see,

2   the person whose messages these are says: We didn't

3   have -- that's good. You're using Sanderoff owes DPI,

4   right? We didn't have the benefit of that. And CEC

5   gave them at 53 percent, but their methodology is too

6   generous, Brian is better. Biden got 51 percent on

7   our map, and MLG 53.7 percent.

8   Do you know who MLG is?

9   A. I am guessing that is the governor.

10   Q. And then she says: Who takes the hit?

11   What's your map DPI for CD-1 and CD-3. There's only

12   so much DPI to go around, you know.

13   Does that mean anything to you, as an

14   expert in the field of redistricting and

15   gerrymandering?

16   A. Yes. That's similar to -- have I been

17   tender as that?

18   Q. I'm sorry?

19   A. Have I been tender as that?

20   Q. How? What? Have you -- oh, you know, I

21   haven't tender you I guess because of everything that

22   happened I maybe have not tender you as a witness,

23   although you've been accepted as a witness.

24   THE COURT: Yeah, I did not know -- I

25   thought it sounded like you all has been agreed upon

1   this beforehand. But there has been no tender at

2   this time.

3   MS. DIRAGO: Okay. Well, I would like to

4   tender Mr. Trende as an expert in election analyses

5   and redistricting?

6   THE COURT: Sir, comments?

7   MR. WILLIAMS: To the extent it relates to

8   the qualitative portion of his testimony, there's no

9   objection. To the extent that it relates to Section

10   6.41 and 6.42, yes, your Honor.

11   THE COURT: Okay. Well, I will -- based on

12   upon his testimony and his background, I will declare

13   him an expert in the area of -- say it again.

14   MS. DIRAGO: Elections analyses and

15   redirecting.

16   THE COURT: Elections analyses and

17   redistricting.

18   A. So yes, as an expert in elections analyses

19   and redistricting, that last sentence, there's last

20   sentence, "There's only so much DPI to go around, you

21   know," is exactly what I was talking about when I said

22   that in a Democratic leaning swing state, you have

23   your ideal gerrymander, and then there's some robbing

24   Peter to pay Paul that inevitably happens the more you

25   deviate from that.

1   So if we were going to raise the

2   Democratic performance of District 2 it's going to

3   come from someone else.

4   Q. Then Senator Stewart says: Sanderoff's DPI

5   for your Map H is 51.8 percent. That's not enough for

6   a midterm election, so we adjusted some edges, scooped

7   up more of Albuquerque and are now at 53 percent.

8   CD-1 is 54 percent, CD-3 is 55.4 percent.

9   Does that comport to what your data

10   found has happened in between -- in your comparison of

11   Map H and SB-1?

12   A. Yeah. I hadn't seen this when I did my

13   analysis, and I was kind of surprised, because that's

14   exactly the story that the data tell, that they made

15   District 1 and District 3 somewhat more Republican,

16   but not so Republican that's they're going to start

17   electing Republicans.

18   District 2 is taken and made even more

19   Republican -- or made for Democratic. And it's just

20   exceedingly unlikely that this happens by chance. The

21   only way this happens is by intentionally moving

22   Democrats and Republicans around to achieve this

23   partisan goal.

24   Q. All right. And if you turn back to Page 72

25   of your report to round out what you did with your

1 simulations, can you tell us what you did with the

2 Indian reservations there?

3   A. So the last thing I did was to keep Indian

4 reservations intact, run the simulations, see if it

5 was any different. And the answer is no, it's the

6 same story. The map presents as an extreme outlier.

7   Q. So you testified that you read Dr. Chen's

8 expert report in this case. Did you know Dr. Chen

9 before the case?

10   A. Yes.

11   Q. Do you remember Dr. Chen's expert conclusion

12 in this case?

13   A. I think he believed it was not a

14 gerrymander.

15   Q. Actually, I don't believe he did opine on

16 whether it was a gerrymander or not. But do you

17 know -- did defendant's expert, Dr. Chen, create

18 simulated maps, as well?

19   A. Yes, yes. He ran simulations using his own

20 algorithm.

21   MR. WILLIAMS: Objection, your Honor. Goes

22 beyond the scope of the expert report.

23   MS. DIRAGO: I don't see why he has to be

24 confined to the expert report. There is about their

25 expert's report.

1   THE COURT: Yeah. Is that not correct?

2   MR. WILLIAMS: It hasn't been disclosed, his

3   opinions, (inaudible). This is the first time we're

4   hearing about them right now.

5   MS. DIRAGO: Well, that's not true. But

6   also, he can testify to your expert did in his

7   report. That's exactly why we hired him.

8   THE COURT: Yeah. I mean, would that not be

9   correct? Wouldn't your expert also testify about his

10   opinion about Mr. Trende's report?

11   MR. WILLIAMS: We'll see what he says. If

12   you let him testify about my guy, we'll see what he

13   has to say about his testimony about my guy's work.

14   But we designated Dr. Chen for a very narrow purpose.

15   We designated Mr. Trende for a very narrow purpose.

16   And we got a report. And this goes beyond the scope

17   (inaudible).

18   MS. DIRAGO: I don't think there's any

19   reason why he has to stay in the scope of his report.

20   We both hired experts that did very similar analyses,

21   except there was one glaring difference that I'd like

22   my expert to discuss.

23   There's no way that you're going to hear

24   testimony about Dr. Chen to decide his credentials or

25   to decide what he did, how -- how it's going to

1 inform your opinion without hearing what my expert

2 has to say about that. It's very technical stuff.

3   MR. WILLIAMS: Your Honor, they haven't

4 designated him for this purpose. There's nothing in

5 the report that says he would be offering additional

6 testimony about my client's -- or my expert's

7 opinion. This testimony goes beyond the scope of the

8 report. The report was supposed to be complete. And

9 this goes well beyond.

10   THE COURT: All right.

11   MS. DIRAGO: There was no agreement here.

12 Nothing like that has been agreed on or set by your

13 Honor. That's just...

14   THE COURT: I agree. I don't think that

15 he's limited. I think he's been called as an expert

16 in this entire area, and I think that it's very

17 reasonable that he would look at other reports that

18 are going to come into evidence and be able to give

19 his opinion on those.

20   MS. DIRAGO: Okay.

21 BY MS. DIRAGO:

22   Q. So we're talking about traditional

23 redistricting criteria. Did you look at the criteria

24 that Dr. Chen used to create his simulated maps?

25   A. I did.

1   Q.   Was there anything there that gave you

2   concern?

3   A.   In particular, there's constraints set --

4   it's explicit in his report. But it's in his code

5   that sets it so that no district can have more than

6   60 percent of the oil wells in the state within a

7   single district.

8   Q.   Okay. Hold on just a second (inaudible).

9   MS. DIRAGO: May I approach, your Honor?

10   THE COURT: Yes.

11   BY MS. DIRAGO:

12   Q.   Do you know what this document is showing?

13   A.   This is a summation that I did showing the

14   number of -- looking at Dr. Chen's produced data and

15   summarizing the number of oil wells in each county,

16   active in each county.

17   Q.   And how did you create this chart?

18   A.   In the R programming language.

19   Q.   What data did you use to create it?

20   A.   Dr. Chen's.

21   MS. DIRAGO: Your Honor, I move to admit

22   this as Plaintiffs' Exhibit 3.

23   MR. WILLIAMS: Your Honor, I'll object to

24   this being admitted. It does not purport to show

25   what Mr. Trende purports it to show. And I would

1   like the opportunity to cross-examine Mr. Trende with

2   regard to this exhibit.

3   MS. DIRAGO: You absolutely can

4   cross-examine him on that. I've laid the foundation.

5   There's no reason why it shouldn't be admitted.

6   THE COURT: Okay. The foundation is -- are

7   you saying you got this information from Dr. Chen's

8   report?

9   THE WITNESS: From his data.

10   THE COURT: His data?

11   MS. DIRAGO: And if you read like me to ask

12   him a couple more questions on how he extracted that?

13   THE COURT: Sure.

14   BY MS. DIRAGO:

15   Q. So how did you extract this data?

16   A. So there's a column in one of Dr. Chen's

17   spreadsheets. So he bases his simulations on a

18   shapefile, which is a special type of spreadsheet that

19   also has geographic coordinates for all of the

20   precincts in the database. It's what you use for the

21   creation of maps.

22   And there's a column in it that has the

23   number of oil wells in each precinct and so you can

24   sort it by county on this column for active or

25   inactive. You can sort it by county. You can then

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 1   summarize by county and take the total?
 2        Q.  And, Mr. Trende, I'm probably going to get
 3   the exact language wrong.  But did Dr. Chen provide
 4   you the information to create this map, this chart?
 5        A.  It comes off of his data.
 6        Q.  Okay.
 7            THE COURT:  All right.  I'll allow this to
 8   come in.  Obviously you can question him about its
 9   relevance when you cross-examine him.
10   BY MS. DIRAGO:
11        Q.  Okay.  So what I see here, the counties, as
12   you said, on the left.  And then what is the second
13   chart under the letter N?
14        A.  The number of -- the number of wells in each
15   county.
16        Q.  Oil wells?
17        A.  Yes.
18        Q.  And then on the third column, what is that
19   showing us?
20        A.  That's the percentage of the statewide
21   total.
22        Q.  Okay.  And, again, was this programmed into
23   Dr. Chen's allege algorithm when he was creating
24   simulated maps?
25        A.  He programmed it so that none of his -- so
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1   that none of the districts in his map would have more

2   than 60 percent of the state's oil production

3   facilities active.

4   Q. Okay. No more than 60 percent. I see Lea

5   and Eddy, and there's percentage numbers there. Does

6   that add up to more than 60 percent?

7   A. Yes.

8   Q. Just barely, right?

9   A. Yep.

10   Q. So what does that mean, if somebody

11   programmed this into their code, creating simulated

12   maps, what would the effect be?

13   A. So if Lea and Eddy County were ever wholly

14   combined in a district, that district would have more

15   than 60 percent of the state's active oil production

16   and the district would be rejected. It ensures that

17   Lea and Eddy County would be placed in different

18   districts.

19   MS. DIRAGO: Okay. And I -- I'm sure the

20   Court is familiar, but I would like to just show you

21   this. And I need to admit this one into -- oh, I'm

22   sorry. Can I approach?

23   THE COURT: Yes.

24   MS. DIRAGO: I don't need to admit this into

25   evidence. But I think it would just be helpful

1   (inaudible).

2   BY MS. DIRAGO:

3   Q. And this was taken directly from defendant's

4   expert's report, and he purports it to be a map of the

5   2011 map for New Mexico. Does that comport with what

6   you think it is?

7   A. Yes.

8   Q. Okay. So it's -- show for the record where

9   Lea and Eddy County are? Or tell me for the record

10 where they are?

11   A. So Lea County is in the far southeast of

12 New Mexico, the extreme Southeastern New Mexico

13 region, and Eddy County is just to its west.

14   Q. Okay. So you're saying that when Dr. Clean

15 created a thousand maps, Lea and Eddy has to be in

16 different congressional districts for every one of

17 those thousand maps?

18   A. That's correct.

19   Q. Have you ever seen a redistricting criteria

20 like this?

21   A. I've never seen an industry request to be

22 split up between districts before, no.

23   Q. Did you look at Dr. Chen's maps to see, in

24 fact, if every one of those maps had Lea and Eddy in

25 different counties -- different districts?

1   A.   I did.

2   Q.   And did you find that that was true?

3   A.   It is true.

4   Q.   Dr. /TREPB, are you -- I'm sorry, Mr., soon

5   to be doctor, are you an expert -- are you doing

6   expert work in Texas right now?

7   A.   I am.

8   Q.   Is the oil industry important in Texas?

9   A.   Yes.

10   Q.   But you still have never seen a

11   redistricting criteria that split an oil industry like

12   that before?

13   A.   Not as an official criteria, no.

14   Q.   So in your opinion, does splitting up a

15   community of interest into multiple districts maximize

16   that group's representation?

17   A.   Not when it's reduced that much, no. It

18   makes it so the representative or representatives of

19   Southeastern New Mexico aren't as reliant on it. In

20   the process, splitting up, guaranteeing that in every

21   map that's drawn the most Republican area of the state

22   is going to be split up because you can never have Lea

23   and Eddy in the same county. So no matter whams,

24   there has to be a district that comes down and gets

25   Eddy, going into the most Republican area of the state

1   in those simulations. And then there has to be a

2   second district that comes into the most Republican

3   area of the state, event across Lincoln and Chavez,

4   into Lea, and splits that Republican area of the state

5   up. It's guaranteed in those simulations.

6   Q. And what you think that did to his results,

7   by comparing SB-1 to only maps that split Lea and Eddy

8   County?

9   A. It guarantees that there's going to be --

10   that you're not going to get the same type of

11   Republican vote showing as if you didn't have that

12   constraints put into place. If it's not something --

13   it definitely makes the districts that are created in

14   the simulations more Democratic than they would be if

15   you didn't have that constraint in place.

16   Q. And can you tell us, what is the definition

17   of cracking?

18   A. Cracking is when you take a group on you

19   dilute its votes by splitting them up among multiple

20   districts.

21   Q. And is the splitting up of the oil industry

22   in the southeast corner of New Mexico evidence of

23   cracking?

24   A. Yes.

25   Q. Is it evidence of the intent to crack?

1   A.   Certainly, especially when you look at the

2   political distribution of voters in the state from the

3   early ages in my report.

4   Q.   Is there anything else that you noticed

5   about Dr. Chen's maps that was odd?

6   A.   They never split Lea County.

7   MS. DIRAGO: Your Honor, I would like to

8   admit, or at least go over his supplemental

9   affidavit. Mr. Trende, it is not, as defendant's

10   counsel characterizes it, a second report. It is in

11   response solely to concerns that were raised from

12   defendant's counsel. And we never had any kind of

13   agreement to submit to each side every exhibit that

14   we would use at trial. So I don't think that there

15   should be any parameters or any reason what I think

16   bring in that report, at least ask Mr. Trende about

17   the results. It's factual base. There's really no

18   opinions in it.

19   MR. WILLIAMS: Your Honor, we do object. We

20   received this late yesterday for the first time. We

21   haven't had a chance to look at it. It could have

22   been disclosed a whole bunch earlier. It wasn't, and

23   it is, notwithstanding the plaintiffs'

24   characterization of it -- they're saying it's not a

25   supplemental report. It is a supplemental report.

1 It is used to vouch for that report that's at issue.

2 It should not come into evidence.

3   MS. DIRAGO: Well, your Honor, the schedule

4 here has been so truncated. Typically experts will

5 submit rebuttal reports, especially when concerns are

6 raised by the other side. That's what we did.

7   THE COURT: When did you perform this

8 second?

9   MS. DIRAGO: It was in response to -- they

10 filed a motion to exclude him and --

11   THE COURT: Right.

12   MS. DIRAGO: How long did he perform it?

13 Can I ask him? I don't know.

14   THE COURT: When did you perform the second

15 analysis?

16   THE WITNESS: I performed it for the

17 purposes of writing this response towards the end of

18 last week. I don't know when the response was ready

19 to file.

20   MR. WILLIAMS: Your Honor, we filed our

21 motion to exclude Mr. Trende long before they filed

22 their motion to exclude --

23   MS. DIRAGO: No.

24   MR. WILLIAMS: -- Dr. Chen. Yet, we were

25 somehow able to get briefing completed, complete with

1 replies before we got this response yesterday. This

2 is an untoward delay. It's trial by ambush. This

3 exhibit should not come into the evidence.

4   MS. DIRAGO: Your Honor, from the beginning,

5 defendant's counsel has been asking us for more code,

6 more maps, a second deposition. We have complied

7 with everything for the sole purpose of being open

8 and because the work is sound and solid and shows

9 exactly what we say it does. This is -- it's like an

10 affidavit that you would attach to a response,

11 because we got a motion to exclude. This shows that

12 all of their issues in their motion can be put to

13 rest.

14   THE COURT: Well, I've already ruled on the

15 motion, so --

16   MS. DIRAGO: Okay.

17   THE COURT: -- as far as what it -- isn't it

18 really bolstering his testimony?

19   MS. DIRAGO: It would be showing that the

20 second set of maps has the same conclusions as the

21 first.

22   THE COURT: All right. Well, what I'm going

23 to rule right now is that it wouldn't be proper to

24 come in now. It just bolsters his report.

25   MS. DIRAGO: Okay.

1   THE COURT: I understand the defense might

2   question further on that. That seems to be a major

3   part of their objection to his report. And it's

4   possible it can come in later. I think you'd have to

5   recall him as a witness.

6   MS. DIRAGO: Okay. I understand. What

7   about I'm -- well, okay. On redirect, I assume if

8   they question him on it, they would be able to.

9   THE COURT: Depending on the questioning,

10   yes.

11   MS. DIRAGO: Yeah. Okay.

12   BY MS. DIRAGO:

13   Q. Okay. Mr. Trende, after completing your

14   qualitative and simulation analyses on SB-1, in your

15   expert opinion, did the drawers of SB-1 intend to

16   gerrymander the congressional plan in order to benefit

17   their own political party?

18   A. Yes.

19   Q. And as an expert in the field of elections

20   analysis and gerrymandering, in your expert opinion,

21   do you hold any doubt that the effects of that

22   gerrymander have and will continue the benefit the

23   Democratic party and disadvantage the Republican

24   Party?

25   A. No doubts. I absolutely believe that.

1   Q. And in your expert opinion, did that

2 gerrymander entrench the Democratic party in power in

3 the second congressional District of New Mexico?

4   A. Yes.

5   MS. DIRAGO: Okay. Then I have no further

6 questions.

7   THE COURT: All right. I expect contraction

8 will be lengthy.

9   MR. WILLIAMS: You might be right, your

10 Honor.

11   THE COURT: So it being 5:15, I propose we

12 come back tomorrow morning.

13   About how many more witnesses do the

14 plaintiffs have, do you think.

15   MS. DIRAGO: This is it.

16   MR. HARRISON: Well, depending on what

17 happens with the adverse legislators.

18   MS. DIRAGO: Oh, right.

19   THE COURT: Okay. I want to suggest we want

20 to get an earlier start. We start at 8:30.

21   MS. DIRAGO: That's fine with me.

22   THE COURT: If that's all right.

23   MS. DIRAGO: I'm on Central time, so that

24 works.

25   THE COURT: Just so that there's enough time

1 to get everything in. I know we have three days, but

2 just to make sure.

3   MS. DIRAGO: I think that's fine.

4   THE COURT: Okay. All right. So we'll

5 (inaudible) recess, and everybody be back here ready

6 to go 8:30.

7   MS. DIRAGO: Thanks judge.

8   (Proceedings adjourned at 5:16 p.m.)

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 1   RE:   REPUBLICAN PARTY OF NM, et al. v.
           TOULOSUSE OLIVER, et al.
 2

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 4          I, PAUL BACA, CCR #112, DO HEREBY CERTIFY

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16   final disposition of this matter.

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