

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

---

Jared Hendrix, as chairman of the North  
Dakota for Term Limits Sponsoring  
Committee, and North Dakota for Term  
Limits,

Petitioners,

vs.

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

Respondent.

---

**SUPREME COURT NO. 20220233**

---

**PETITIONERS' REPLY TO RESPONDENT'S RESPONSE TO PETITION  
FOR WRIT OF MANDAMUS**

---

Jesse H. Walstad (#07375)  
**Vogel Law Firm**  
US Bank Building  
200 North 3rd Street, Suite 201  
PO Box 2097  
Bismarck, ND 58502-2097  
Telephone: 701.258.7899  
Email: [jwalstad@vogellaw.com](mailto:jwalstad@vogellaw.com)

Edward D. Greim, P02626  
Matthew Mueller, P02627  
**GRAVES GARRETT LLC**  
1100 Main Street, Suite 2700  
Kansas City, MO 64105  
Tel: 816.256.3181  
Email: [edgreim@gravesgarrett.com](mailto:edgreim@gravesgarrett.com)  
[mmueller@gravesgarrett.com](mailto:mmueller@gravesgarrett.com)

**Attorneys for Petitioners**

**TABLE OF CONTENTS**

	<u>Paragraph</u>
TABLE OF AUTHORITIES AND CASES .....	p. 2
INTRODUCTION .....	1
STANDARD OF REVIEW .....	2
District Court's Factual Findings .....	5
STATEMENT OF FACTS AND RESPONSE TO DISTRICT COURT FINDINGS .....	7
A.    The Secretary's March 22 Decision Not to Certify the Petition .....	10
B.    The Committee's Curative Response Addressed the Identified Issues .....	12
C.    The Secretary's May 12 Affirmance of his Decision Not to Certify .....	15
D.    Flawed Factual Basis for Invalidating all Signatures Notarized by Toe .....	21
THE DISTRICT COURT'S LEGAL AND FACTUAL ERRORS .....	46
E.    The District Court Erroneously Concluded there is No Correction Period Provided under North Dakota Law .....	46
F.    The District Court Relied on Inadmissible Hearsay to Conclude Signatures were Collected in Violation of the Pay Per Signature Ban .....	50
G.    The Secretary Abandoned the Argument that AMT Paid Bonuses, But the District Court Excluded Signatures Gathered by AMT Anyway .....	54
H.    No Evidence to Support Exclusion of Signatures Tuttle Obtained .....	55
LAW AND ARGUMENT .....	56
I.    THE SECRETARY'S DECISION REGARDING ZEPH TOE MUST BE REVERSED .....	56
II.   THE SECRETARY IMPROPERLY STRUCK OVER 8,000 OTHERWISE-VALID SIGNATURES ON PETITIONS ALLEGEDLY SUBMITTED BY CIRCULATORS WHO WERE OFFERED A BONUS .....	69
CONCLUSION .....	74

**TABLE OF AUTHORITIES AND CASES**

	<u>Paragraph</u>
<b><u>North Dakota Century Code</u></b>	
N.D.C.C. § 16.1-01-12(1)(j) .....	44, 45, 69
N.D.C.C. § 27-02-17.....	5
<b><u>Other Authorities</u></b>	
N.D. Const. art. III, § 1 .....	61
N.D. Const. art. III § 6 .....	8, 12, 19, 47, 64, 68
N.D. Const. art. III, § 7 .....	2
N.D.R. Evid. 801-802 .....	50, 52
U.S. Const. amend XIV .....	64
<b><u>Cases</u></b>	
<i>Berg v. Jaeger</i> , 948 N.W.2d 4 (N.D. 2020).....	5
<i>Dawson v. Meier</i> , 78 N.W.2d 420 (N.D. 1956).....	4
<i>Frederick v. Lawson</i> , 481 F.Supp.3d 774 (S.D. Ind. 2020).....	64
<i>Haugen v. Jaeger</i> , 948 N.W.2d (N.D. 2020) .....	2
<i>Matthews v. Eldridge</i> 424 U.S. 319 (1976) .....	64
<i>McCarney v. Meier</i> , 286 N.W.2d 780 (N.D. 1979) .....	4
<i>Onstad v. Jaeger</i> , 949 N.W.2d 214, 220 (N.D. 2020) .....	5
<i>Self Advocacy Solutions v. Jaeger</i> , 464 F.Supp.3d 1039 (D. N.D. 2020).....	62, 63, 66, 67
<i>Self Advocacy Solutions v. Jaeger</i> , 2020 WL 3068160, at *1 (D.N.D. June 5, 2020).....	66
<i>Self Advocacy Solutions v. Jaeger</i> , 2020 WL 6576304, at *1 (D.N.D. Aug. 28, 2020)....	66
<i>State v. Hernandez</i> , 707 N.W.2d 449 (N.D. 2005) .....	57
<i>Thompson v. Jaeger</i> , 2010 ND 174, 788 N.W.2d 586.....	61, 63
<i>Zaiser v. Jaeger</i> , 822 N.W.2d 472 (N.D. 2012).....	3, 57
<i>McCarney v. Meier</i> , 286 N.W.2d 780.....	4, 52

## INTRODUCTION

[¶1] Petitioners’ Term Limits Petition qualified for the ballot. Secretary Jaeger struck 15,740 signatures that passed his office’s exacting review, solely because he thought the affidavit signatures of two circulators varied too much. From this inexpert hunch, Secretary Jaeger speculated that: an imposter forged some of the two circulators’ signatures, for unknown reasons; the notary, Zeph Toe, was complicit; the notary could not be trusted at all; and none of the 700 circulator affidavits notarized by Toe could be credited. Jaeger could not be shaken. He refused to consider an affidavit from the main circulator swearing each of her own signatures were real and re-affirming her circulator affidavits. He refused to consider Toe’s affidavit that he had witnessed each circulator’s signature. And he refused to contact any of these people or take any other steps that might contradict his hunch. The documents show Jaeger was wrong; any question was easily rebutted by the affidavits. By making his own inexpert hunch irrebuttable, Jaeger violated the Fourteenth Amendment’s Due Process Clause and the North Dakota Constitution. For these and other reasons, this Court should exercise *de novo* review to place the Term Limits Initiative on the ballot, restore the rights of over 31,000 North Dakotans who signed the most popular petition in state history, and avoid creating a truly shocking and dangerous precedent.

## STANDARD OF REVIEW

[¶2] This Court has original jurisdiction to review “[a]ll decisions of the secretary of state” regarding the sufficiency of an initiative petition. N.D. Const. art. III, § 7. It “independently examine[s] the Secretary of State’s decision on a petition issue to determine whether he has complied with the law.” *Haugen v. Jaeger*, 948 N.W.2d 1, 3 (N.D. 2020). This “authority... is without limitation or qualification.” *Id.* (internal quotations omitted).

[¶3] The Secretary argues his decisions are reviewed for abuse of discretion, citing *Zaiser v. Jaeger*, 822 N.W.2d 472 (N.D. 2012). *Zaiser*, though, held only that the Secretary receives *some* deference in sampling signatures; there remains “a presumption that each signature in the petition is the genuine signature of the person whose name it purports to be.” *Id.* at 479. *Zaiser* casts no doubt on the Court’s holding in *Haugen* a month prior that its review “is without limitation or qualification.” 948 N.W.2d at 3.

[¶4] Because this case challenges the Secretary’s invalidation of certain signatures, the Court is tasked with reviewing “the sufficiency and legality of the signatures on the various copies” of the petition. *Dawson v. Meier*, 78 N.W.2d 420 (N.D. 1956). The Court must *only* consider evidence that “entered into the secretary of state’s determination that the petitions were insufficient.” *McCarney v. Meier*, 286 N.W.2d 780, 787 (N.D. 1979). To the extent the Secretary invalidated signatures based on a question of law, the Secretary’s interpretation is entitled to no deference and the Court’s review is *de novo*. *Id.*

#### **District Court’s Factual Findings**

[¶5] The Court appointed the Honorable James S. Hill, pursuant to N.D.C.C. § 27-02-17, to hold an evidentiary hearing and issue findings of fact regarding “the Respondent’s disqualification of petition signatures.” The Court does not review the District Court’s factual findings under a “clearly erroneous” standard, but merely gives “appreciable weight,” so long as they are supported by substantial evidence. *Berg v. Jaeger*, 948 N.W.2d 4, 10-11 (N.D. 2020); *Onstad v. Jaeger*, 949 N.W.2d 214, 220 (N.D. 2020) (factual findings entitled to appreciable weight where “supported by substantial evidence”).

[¶6] The District Court’s findings deserve little weight. They rely primarily on a paper record. Testimony and cross was severely limited, and, though the court labeled Secretary

Jaeger “credible,” he testified on no material disputed fact from personal knowledge. Instead, he offered inexpert opinion of handwriting—already in the record—of four people he had never met. The circulators’ handwriting is just as accessible to this Court as it was to the District Court and Secretary Jaeger. Furthermore, significant portions of the findings are unsupported by any evidence or rely on errant conclusions of law. The District Court had no authority to issue legal conclusions and this Court owes them no deference.

#### **STATEMENT OF FACTS AND RESPONSE TO DISTRICT COURT FINDINGS**

[¶7] The Secretary invalidated all signatures where the circulator who signed the affidavit on the petition packet had their signature notarized by Zeph Toe, including 15,740 signatures that were admittedly valid. (P40, Tr. 114:6-115:4; Tr. 113:13-114:5). Had the admittedly valid signatures on the Zeph Toe notarized petitions been counted, the Term Limits Petition would have qualified for the ballot.

[¶8] The District Court’s findings repeat the Secretary’s error, rubber-stamping his invalidation of everything Toe notarized on the hunch that a few handwriting examples out of several thousand raised “red flags.” Given the serious consequences—qualification for the ballot—and the fundamental rights at stake, this Court has a duty to independently examine the facts relied upon by the Secretary and to disregard the errant deference the District Court provided. Layering further deference would render the Secretary’s invalidation decision immune from judicial review, contravening N.D. Const. art. III § 6.

[¶9] As the Secretary now admits, his decision to invalidate all the signatures on sheets notarized by Toe was based on a review of petition affidavits from just two circulators: Chloe Lloyd and Ramona Morris. (P40, Tr. 61:13-62:6). Long after his decision was made and in preparation for the hearing, the Secretary identified two additional circulators—Wayne Williams and Ritchell Aboah—that he admits played no part in his decision and

who were first disclosed the evening before the hearing—months after the correction period. *Id.* The Secretary’s basis for relying on Lloyd and Morris to invalidate all petitions notarized by Toe is addressed below. Williams and Aboah are also addressed but were not part of the decision. No other circulators formed the basis of the decision. (*Id.* Tr. 60:7-16).

**A. The Secretary’s March 22 Decision Not to Certify the Petition**

[¶10] On March 22, 2022, Secretary Jaeger wrote to Jared Hendrix on behalf of the Sponsoring Committee notifying Hendrix the Secretary chose to invalidate 29,101 of the submitted signatures, leaving the Term Limits Petition about 14,000 signature shy of qualifying for the November ballot. (P2; R21). Though just five days earlier the Secretary had only identified a few thousand signatures at issue, his decision to keep the Term Limits Petition off the ballot was propelled by the complete invalidation of all signatures appearing on petitions whose circulators had their affidavits notarized by Toe: “Several signatures of circulators were likely forged on affidavits in the presence of a notary public. Therefore, all affidavits (attached to 751 petitions that included 15,740 signatures) notarized by this notary were not counted.” *Id.* Never before has the Secretary issued a decision invalidating all of the petitions from a single notary. (P40, Tr. 56:15-20).

[¶11] The March 22 letter did not identify which signatures were “likely forged” or the circulators allegedly involved. (P2; R21). However, the Secretary testified his decision was based on handwriting comparisons he conducted involving only Chloe Lloyd and Ramona Morris. (P40, Tr. 61:13-62:6).

**B. The Committee’s Curative Response Addressed the Identified Issues**

[¶12] During the 20-day correction period under N.D. Const. Art. III, §6., the Committee submitted an affidavit from Zeph Toe. (P17). Under penalty of perjury, Toe attested: (i) he required circulators to identify themselves in accordance with the law (¶8); (ii) he

witnessed each circulator sign each packet after it was filled out (§10); (iii) he kept a log of each notarial act, as provided with his affidavit (§§12-13); (iv) he is unaware of, and would not have allowed, any forgery (§§14-15); (v) he is unaware of, and would not allow, anyone changing a circulator's affidavit after notarization (§§16-17); and (vi) he reaffirmed the circulators whose signatures are affixed on the packets he notarized appeared before him and identified themselves before the packet was signed and notarized (§18).

[§13] The Committee also submitted an affidavit from Chloe Lloyd (P19) during the 20-day correction period. Under penalty of perjury, Lloyd rebuts the Secretary's speculation with the following facts: (i) each time she had petitions notarized, she was identified in accordance with the law (§6); (ii) she reviewed the petitions attached to her affidavit, including the petitions identified by the Secretary and affirmed they contained her handwriting and were signed by her in the presence of a notary (§§7-10); and (iii) she was not aware of anyone, including herself, altering any of her petitions after they were notarized (§11). Significantly, Ms. Lloyd's affidavit ends with her reaffirmation, precisely matching the statutory language, verifying the elector signatures on each of the petitions she circulated and on which she signed the circulator's affidavit. (P19, §12).

[§14] The Committee provided the Secretary with other materials during the correction period to address the signature-level issues and pay-per-signature allegations. This included records verifying the addresses of certain signors stricken by the Secretary, (P13, at 7-14), an affidavit from AMT's Valerie Gallagher who swore AMT employees were only paid hourly wages and providing financial documentation to verify this fact, (P27), and affidavits bearing on the constitutionality of the pay per signature ban from two signature gathering industry professionals. (P29, P30).



**C. The Secretary's May 12 Affirmance of his Decision Not to Certify**

[¶15] On May 12, 2022, Secretary Jaeger wrote the Committee's counsel, stating: "The claims made in your letter do not change my decision that the petitions are still considered to be insufficient..." (P14; R29). The Secretary provided no further explanation.

[¶16] The Secretary revealed for the first time at the hearing that he did not consider the Committee's submission of affidavits from the primary persons called into question by the Secretary—Lloyd and Toe—to be an attempt to correct the concerns he raised. (P40, Tr. 55:22-56:3, 88:13-15). Thus, he did not consider them in affirming his decision to not certify the Petition, primarily because he assumed his own handwriting analysis was correct, and illogically inferred the affidavits must be false. (*Id.*, Tr. 89:1-7; 89:18-23; 89:24-90:3; 91:9-15; 92:6-12). The Secretary could not recall anyone in his office reviewing Toe's notary log and comparing it to the circulator notarizations because based on the "discrepancies, it just didn't seem to make -matter." (*Id.*, Tr. 90:9-25). Oliver never even reviewed the affidavits. (*Id.*, Tr. 115:25-116:9).

[¶17] When queried whether there was "anything Zeph Toe could've told you to make you change your mind based on your handwriting review," the Secretary replied: "I doubt it." (*Id.*, Tr. 91:16-18). The Secretary admitted he considered the Lloyd Affidavit (P19) to be an affidavit from Lloyd, (P40, Tr. 93:20-22), but did not consider it to be a correction, (*Id.*, Tr. 93:23-94:12), because in light of his handwriting opinion, the affidavit could not be true. (*Id.*, Tr. 92:1-12) ("[I]t didn't make any difference what she said because the signatures on the affidavits varied."). When asked what it would have taken from Lloyd for him to believe she circulated the petitions, the Court sustained his counsel's objection.

[¶18] Neither the Secretary nor anyone from his office ever attempted to contact Toe, (*Id.*, Tr. 62:20-22, 88:16-18), or Lloyd, (Tr. 62:25-63:2), or Morris, (Tr. 63:3-8), to inquire

about the alleged irregularities. (Tr. 115:14-20). When asked why he did not speak with them or have someone else do so, the Secretary stated “I don’t know. To me the decision was based on the affidavit and the discrepancy in the signatures.” (Tr. 63:6-8). Rather than conducting any meaningful investigation, the Secretary treated his own inexperienced handwriting opinion as conclusive and irrebuttable regardless of what countervailing evidence was offered.

[¶19] Based solely on the Secretary’s inexperienced handwriting opinion, the District Court accepted the Secretary’s view that the Toe and Lloyd affidavits must have been false. R. Dkt. ¶35. Apparently unaware of the Constitutional provision on point, the District Court stated there is no provision under North Dakota law which allows for the Committee to have submitted these affidavits, despite the clear edict that the people reserved to themselves a 20-day correction period under Art. III, Sect. 6.

[¶20] On the eve of the hearing, the Committee first learned the Secretary’s theory for invalidating the Toe signatures, the only explanation the Secretary considered, was the circulator must not have appeared before the notary when executing the affidavit. (R33).

**D. Flawed Factual Basis for Invalidating all Signatures Notarized by Toe**

[¶21] The Secretary’s decision to invalidate Zeph Toe petitions was based entirely on his review of circulator handwriting on petitions Toe notarized. (P40, Tr. 63:9-12; 79:3-7). The Secretary’s “analysis” was put to the test at the evidentiary hearing. First, the Secretary openly and explicitly stated that although his decision was based entirely on handwriting analysis, he is not a handwriting expert. (Tr. 37:3-6) (“I have to admit, I’m not a trained handwriting expert.”); (Tr: 39:22-23) (“Q. What is your experience analyzing handwriting? A. Well, I’m not an expert...”). He was careful to note on several occasions that his staffer, Lee Ann Oliver, had substantially more experience in handwriting comparisons. *See Id.*

(“...and in particular[] with Lee Ann, you know, she’s reviewed over a mission of them”). Yet, both the Secretary and Ms. Oliver made clear that all decisions regarding the Petition, including the decision to invalidate all Toe notarized signatures, were made by the Secretary alone. (Tr. 51:12-14) (to Secretary) (“Q. Did you make the personal decision that all affidavits notarized by Zeph Toe would not be counted? A. Yes.”); (Tr. 112:12-14) (to Oliver) (“Q. Whose decision was it to eliminate all of the petitions where Zeph Toe notarized them? A. The Secretary of State.”). Petitioners objected to the Secretary’s attempt to provide expert testimony, but the District Court overruled the objection, allowing him to testify to his opinion about the differences in handwriting solely because of his “constitutional and statutory function.” (Tr. 41:10-21).

[¶22] When cross-examined, the Secretary could not explain how he decided that signatures purportedly from the same circulator were different or articulate any process or method he employed to identify genuine signatures. Instead, he merely attempted to assure those involved that they should trust him, because he can identify “likely forgery” when he sees it, even if he is incapable of explaining how.

[¶23] On the stand, the Secretary abandoned a key theory upon which he once relied. He testified the issues identified regarding the circulator’s address had no bearing on the validity of the notarial act which followed and did not reflect in any manner on the credibility of the notary, including Toe. (Tr. 72:15-73:7; 74:12-23). Though the Secretary previously emphasized perceived issues with the circulators’ addresses as part of the basis for his decision, he admitted those alleged irregularities regarding an address are not necessarily indicative of fraud, nor do they create a problem with the notarization process.

(Tr. 31:15-18). However, the Secretary assumed both of those things—the existence of fraud and a notary violation—without any evidence or investigation.

[¶24] Thus, the Secretary’s sole basis for invalidating all signatures notarized by Toe was his analysis of the handwriting of Lloyd and Morris. (Tr. 61:13-62:6).

[¶25] The Secretary raises a number of issues regarding one circulator—Chloe Lloyd—as the primary basis for invalidating all signatures on petitions with affidavits notarized by Toe. (R32). The Secretary admitted Lloyd’s “handwriting is generally pretty sloppy,” (Tr. 64:18-22), but believed he could spot differences nonetheless. Curiously, although the District Court would accept the Secretary’s opinion that Lloyd had not signed some of her petition affidavits, the District Court also ruled there was no “foundation” for the Secretary to review Lloyd’s signature and testify as to whether she actually signed her April 2022 affidavit during the correction period. (Tr. 93:6-18). This was despite the fact the Secretary considered Lloyd’s affidavit (P19) to be her true affidavit and statement. (Tr. 93:20-22). If the Secretary lacked foundation to opine on the genuineness of Lloyd’s signature on her curative affidavit, it calls into question how the Secretary could have purported to decide her signatures on her individual petition affidavits were invalid.

[¶26] The Secretary claims Lloyd’s signatures “appear extremely inconsistent”, citing petitions 1379 and 816. (R32, ¶16(a)). His affidavit does not explain how they are different or which signature he claims to be the “correct” one. However, he concludes the difference in handwriting means Lloyd did not complete the sworn statement in front of Toe. *Id.* Based solely on his inexpert handwriting opinion, the Secretary declared this an unlawful notarial act, raising serious concerns regarding Toe’s credibility. *Id.*

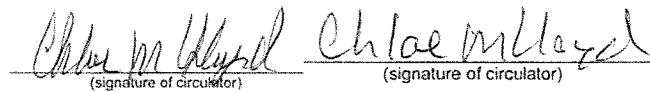
[¶27] Next, the Secretary claims Lloyd signatures executed on September 20, 2021 “vary wildly.” (R32, ¶16(b)). The signatures raised by the Secretary are reproduced in Exhibit P41 hereto. Neither the Secretary nor his affidavit explain how they “vary wildly,” but he once again concludes the perceived variations indicate only one conclusion: Lloyd did not appear in person to sign her signature in front of Toe. *Id.* Based on this handwriting analysis alone, the Secretary determined Toe engaged in an unlawful notarial act raising serious concerns regarding Toe’s credibility. *Id.* The Court can review the mild signature variations in P41 and reach the same conclusion as Petitioners: the handwriting does not vary so “wildly” to justify the Secretary’s decision.

[¶28] The Secretary takes issue with nine petitions where he claims the words “Dickinson, ND 58601” were added to the address for Ms. Lloyd on the circulator’s affidavit. (R32, ¶16(c)). Yet in his testimony, the Secretary admitted the address of the circulator does not affect the validity of the notarial act. *See* discussion, *supra*. Lloyd also attested the handwriting was hers. (P19, ¶¶10-11). Even if the writing was added by someone other than Ms. Lloyd, it has no bearing on the validity of Toe’s work. The Secretary admitted he has no evidence that Toe allowed the affidavit to be altered in his presence, but only that the signatures had “too much variance.” (Tr. 78:19-79:13).

[¶29] The Secretary criticized two petitions because Lloyd listed different addresses on September 4<sup>th</sup> (Petition 1379: 870 4<sup>th</sup> Ave W, Dickinson, ND 58601) and September 7<sup>th</sup> (Petition 814: 694 Palm Beach Road, Dickinson, ND 58601). (R32, ¶16(d)). Both are North Dakota addresses, but the Secretary concluded this suggested fraud. A simpler explanation—that Lloyd had moved—was off the table. The Secretary had Lloyd’s contact information, yet never contacted her to ask if she had moved. (Tr. 62:25-63:2).

[¶30] The Secretary, perhaps recognizing that signature variability is insufficient to call into question Toe’s reliability as a notary, attempts to juxtapose Lloyd’s signatures notarized by a different notary—Kevin Richmond—to show that those signatures did not suffer from the same “irregularities” he identified on the Toe petitions. (R32, ¶16(e); Tr. 44:7-45:7; Tr. 63:15-19) (“Q: And it was significant to you, it sounds like, that Ms. Lloyd’s notarizations—or her affidavits with Kevin T. Richmond, a different notary, did not show the same problems that you saw with this Zeph Toe, is that correct? A. That’s correct.”).

[¶31] On cross-examination, the Secretary could not explain why two signatures on the Richmond notarized petition that looked as similar as signatures on the Toe petitions were valid, while the Toe notarized signatures showing equal levels of similarity were invalid. When asked to compare Lloyd’s signatures on petitions 811 and 1383—two examples he cited to show valid signatures notarized by Richmond—the Secretary could not identify what rendered the signatures similar enough to one another to demonstrate validity:



Chloe M. Lloyd (signature of circulator) Chloe M. Lloyd (signature of circulator)

(R.33 at 40, 57). Petitioner’s counsel queried: “So in your opinion, how are these similar in a way that’s different from the discrepancies that we see under the Zeph Toe’s signatures?” (Tr. 70:22-24). The Secretary replied: “There is -- I understand what you’re getting at. I just know that in total if you look at the entire thing, the way it’s finished in the top and everything, that these signatures are somewhat the same. There are differences, I can see that. I -- you know, but it doesn’t take away the many discrepancies that occurred with Mr. Toe.” (Tr. 70:25-71:5). The Secretary provided no analysis or explanation regarding how the signatures differ, other than: “There are differences, I can see that.” Moments later, the Secretary testified Lloyd’s signatures on Toe Petitions 815 and 830,

copied below, were so dissimilar that they factored into his invalidation decision:

  
(signature of circulator) (signature of circulator)

(Tr. 72:8-14). Faced with these examples, the Secretary could not explain when differences in signatures became substantial enough to cause him to disbelieve the notarial certificate.

(Tr. 72:15-73:7). In short, the Secretary utilized no expertise, no method, and no standards.

[¶32] The other signatures notarized by Richmond which the Secretary claims are all signed by the same person, in Richmond's presence, are attached hereto as Exhibit P42. This Court can review the same paper the Secretary and District Court did and conclude with Petitioners that the Secretary's inexpert opinion regarding Lloyd was in error.

[¶33] The Secretary claims some signature pages from circulator Ramona Morris that were notarized by Toe suffered from similarly disqualifying irregularities. (R32, ¶17(a)).

[¶34] First, the Secretary claims that on two petitions, a Moorhead, MN address was written in, then crossed out and replaced with a North Dakota address. *Id.* (identifying petitions 1114 and 1115). Yet, the Secretary abandoned the theory that the circulator address has any impact on the validity of the notarial act. *See* discussion, *supra*. Further the Secretary did not present any evidence to show the address was added after the petitions were notarized, nor did he introduce any evidence that Morris was not, in fact, a North Dakota elector. Instead, he used the address correction to summarily conclude that Morris must not have appeared before Toe to sign the affidavit. (R32, ¶17(a)).

[¶35] Next, the Secretary claims Morris's signatures were inconsistent across three of the affidavits she signed. (R32, ¶17(b)). The Secretary did not provide any testimony as to how the differences were so significant as to justify the wholesale invalidation of signatures notarized by Toe. All that was offered was the Secretary's opinion via affidavit that they

“appear extremely inconsistent” and “raise[] serious credibility concerns about the notary, Zeph Toe, *because the affiant did not complete their sworn statement in his presence when he executed the notarial certificate...*” (R32, ¶17(a)). From his analysis of these signatures, reproduced in Exhibit P43 here, the Secretary concluded Morris did not appear before Toe to sign because the “R” looked “a little bit different.” (Tr. 45:16-21).

[¶36] Neither the Secretary nor anyone in his office attempted to speak with Ms. Morris during the 35-day review process or since. (Tr. 63:2-4). The Secretary testified that no one spoke with Ms. Morris because the decision to throw out the Toe notarized signatures was entirely based on his handwriting opinion, (Tr. 63:6-14), and nothing could be done or said to influence his decision based on the handwriting. (Tr. 63:3-8).

[¶37] The District Court did not make any findings of fact specific to Ramona Morris aside from an observation that she was a circulator about which the Secretary claimed to observe “red flags” during the review process. Dkt., 27, ¶27. This Court can review the same paper the Secretary and District Court did and should conclude with Petitioners that the Secretary’s inexpert opinion was in error.

[¶38] On the eve of the hearing, the Secretary first offered two new examples purportedly demonstrating issues with Zeph Toe: circulators Wayne Williams & Ritchell Aboah. (R33; R34; R36). The Secretary and the Court acknowledged neither Williams nor Aboah had any bearing on the Secretary’s determination before March 22<sup>nd</sup> or May 12<sup>th</sup>. Dkt. 27, ¶27; (Tr. 61:23-62:3). The Secretary only identified these two circulators in preparation for litigation to “bring credibility to [his] decision that [he] made earlier.” (Tr. 61:23-62:3).

[¶39] As Petitioners addressed in their Motion in Limine in the District Court, facts that the Secretary learned *after* he made his determination regarding the Term Limits Petition



have no bearing on the propriety of his decision. *See* P44. Further, providing this explanation five months after his decision and only after being sued by the Committee infringes upon the Committee's due process rights, including the right to correct any alleged errors during the 20-day correction period. N.D. Const. Art. III, § 6.

[¶40] The Secretary relies on the Williams affidavits because on two of them, Toe had to make a correction in the notary certificate. (R32, ¶18(a)). The Secretary does not claim the certificate is invalid but says this raises "serious credibility concerns about the notary, Zeph Toe, because her [sic] notarial certificates have been consistent except for these three affidavits," which the Secretary again uses as a basis to conclude "the affiant did not complete their sworn statement in" Toe's presence. *Id.* The Secretary similarly testified that these corrections in the notarial certificate were "red flags" because Toe only had to make corrections on 3 of the 750 petitions he notarized, (Tr. 80:7-20), whereas normally Toe was "very meticulous." (Tr. 47:8-15). The Secretary did not provide any other factual basis to conclude Williams was not present before Toe, though the Secretary speculated, "[i]t just doesn't seem possible" that Williams might have accidentally filled in part of the notary certificate and that Toe corrected it. (Tr. 81:14-25). In any other situation, a notary's consistency across 750 petitions would be viewed positively.

[¶41] The Secretary also opines Mr. Williams's signatures are inconsistent because the signatures on petitions 998 and 1005 are consistent, but those signatures differ from those on petitions 1006 and 1003. **R32, ¶18(b)**. These four signatures, excerpted from Exhibit R36 are reproduced in Exhibit P45 hereto. At the hearing, the Secretary testified the handwriting on Petitions 1005 and 1006 was not the same, (Tr. 81:10-13), nor was the

handwriting on Petitions 1006 and 998. (Tr. 81:14-25; 82:13-17). This Court should review the signatures and conclude the Secretary’s inexpert opinion is simply wrong.

[¶42] The Secretary’s claims regarding Aboah similarly lack substance. The Secretary’s affidavit states Aboah’s signatures “appear extremely inconsistent.” (R32 at 7). His opinion is that these two signatures are “extremely inconsistent”:



[¶43] The Secretary also takes issue with perceived inconsistencies in Aboah’s address on different affidavits, specifically petitions 475 and 474. (R32 at 7). Once again, these perceived inconsistencies lead the Secretary to conclude Aboah did not personally appear before Toe when signing these sheets. *Id.* The addresses on the two petitions he cites are identical: “2366 55<sup>th</sup> St S Fargo ND 58104.” *See* P46. Even if there are small differences in the addresses, while on the stand, the Secretary abandoned the theory that the circulator’s address has any bearing on the validity or reliability of the notarial act that follows. *See* discussion, *supra*. Again, the Court can review the signatures as readily as the Secretary, and should conclude his inexpert opinion on variability is simply wrong.

[¶44] The record lacks support for the exclusion of signatures under a Pay-Per Signature theory. The Secretary only testified that Pat Finken emailed Jim Silrum alleging “circulators that were employed by Mr. Tuttle were paid bonuses.” (Tr. 52:11-54:11). His brief testimony on the issue provides no factual support for the exclusion of signatures. Oliver provided no testimony regarding a violation. Her testimony was limited to her knowledge that the “signatures before approval date” column on exhibit R-5 was used to identify signatures initially excluded on this basis. (Tr. 110:13-19). While the Secretary and Oliver made oblique reference to disqualification of some signatures gathered by

certain circulators employed by Tuttle, no evidence was offered related to violations by circulators working for AMT. Though back on March 7, 2022, the Secretary claimed some AMT circulators were paid bonuses, he has since abandoned that argument in its entirety, offering no argument, testimony, or affidavits related to AMT at the hearing or in his Responsive brief. Despite the complete absence of evidence, the District Court found “the Committee did not comply with N.D.C.C. § 16.1-01-12(1)(j).” Dkt. 27, ¶ 41.

[¶45] Most concerning, a numbers game has evolved related to the signatures excluded under this errant theory. The District Court erroneously substantiated the exclusion of 7,793 signatures for Pay-Per Signature violations based “upon credible evidence,” but provided no explanation for the 7,793-signature figure. *Id.*, ¶ 45. The Respondent acknowledges the errant finding, but inexplicably invites the Court to exclude 8,274 signatures instead, *See* Dkt. 33, p. 11, fn. 2, which necessarily includes some signatures collected by AMT circulators.

### **THE DISTRICT COURT’S LEGAL AND FACTUAL ERRORS**

#### **E. The District Court Erroneously Concluded there is No Correction Period Provided under North Dakota Law**

[¶46] Not only did the Secretary refuse to consider any materials submitted by the Committee during the 20-day correction period (*see* Section 1(c) *supra*) but the District Court explicitly disclaimed that a correction period is even allowed or relevant here:

The decision of the Secretary of State was based upon review by his office of the petitions actually submitted to his office and existing North Dakota law. No attestations from circulators nor declarations of notary publics were attached to the signatures and notarizations at that time. *That is not provided for in North Dakota law.* The Secretary of State performs his statutory duty upon review of the submitted petitions. *There is no statutory provision in North Dakota for an “after-the-fact explanation” of the petition gathering process as appears suggested by Hendrix through offering affidavits and declarations of circulators and the subject notary...*

Dkt. 27, ¶35 (emphasis added); (P40, Tr. 84:4-17) (court says Committee’s analysis of Secretary’s decision is irrelevant). On this same basis, the Court rejected several exhibits from Petitioners challenging the Secretary’s signature-level mistakes. (Tr. 84:4-17).

[¶47] While the Committee agrees with the District Court that there is no *statutory* provision allowing for the correction of issues identified by the Secretary, the mandatory and self-executing provision of the *Constitution* does so allow. In this regard, the District Court’s finding is clearly erroneous as a matter of law. If the Secretary of States makes the decision not to certify the sufficiency of an initiative petition, the North Dakota Constitution *requires* “the secretary of state shall notify the ‘committee for the petitioners’ and allow twenty days for correction.” N.D. Const. art. III, § 6.

[¶48] This error of law is compounded by the District Court’s repeated deference to the Secretary’s decision, which it characterized as being “[b]ased on the totality of information available...at the time of review.” Dkt. 27, ¶30; ¶33 (The Court further finds that his action was based upon the facts known to him at the time of this review undertaken I the timeline set by statute review...). This errant reasoning ignores a critical step in the petition sequence meant to afford the sponsoring committee due process. The Secretary’s review function did not end when he declared the petition insufficient on March 22, 2022. The declaration of insufficiency triggers the 20-day correction period under Art. III, Sect. 6. The Committee is entitled to a 20-day opportunity to correct errors the Secretary identified.

[¶49] This right is meaningless if the Secretary refuses to consider any countervailing evidence after he has made up his mind following the 35-day review. For the District Court to endorse this course of action by claiming there is no right whatsoever for the committee to submit corrections (i.e., the Toe and Lloyd affidavits) violates the rights afforded under

the North Dakota Constitution and fundamentally violates due process. As the Secretary and District Court would have it, the Secretary's decision on day 35 of his review period is both irrebuttable and unreviewable.

**F. The District Court Relied on Inadmissible Hearsay to Conclude Signatures were Collected in Violation of the Pay Per Signature Ban**

[¶50] The only evidence related to the Pay-Per Signature issue came in the form of inadmissible hearsay. The Secretary testified to an email from Pat Finken to Jim Silrum. (R37); (P40, Tr. 52:23-24). The Petitioners objected orally and in writing under N.D.R.Evid. 802. *See* (P47); (Tr. 53:9). The District Court did not address the objection but received the exhibit stating “[t]he Court will sort out the relevance issues related to it.” (Tr. 53:10-11). Respondent did not argue the hearsay objection and no legally cognizable exception was articulated. (Tr. 52:25-53:15). Over objection, the Secretary testified Finken is “an individual in the community,” (Tr. 54:2). He omitted that Finken is the chairman of the Brighter Future Alliance, a group that has publicly opposed members of the sponsoring committee. The Secretary testified the email indicated “circulators that were employed by Mr. Tuttle were paid bonuses.,” (Tr. 53:24-25), and that audio recordings were attached to the email, but he never listened to them. (Tr. 54:7-10). The alleged recordings were not offered, nor was evidence of the contents received. (Tr. 52:23-54:11).

[¶51] The District Court addressed the Petitioners' written objection to the admission of exhibit R38, BCI Special Agent Mark Nickel's affidavit. (Tr. 85:25-86:4). Nickel's affidavit is replete with multiple layered hearsay lacking any indicia of reliability or trustworthiness. It claims to summarize recordings that were never disclosed, transcribed, or offered. Based on Respondents' counsel's assertion that Nickel would testify “[i]f there is time” the District Court received the affidavit without discussion of the objections. (Tr.

86:3-4). In its Order, the District Court indicated the “acceptance of affidavits was a product of time restrictions.” Dkt. 27, ¶ 9. When weighed against the prejudicial effect of the unfronted and unreliable hearsay it contains, any interest in expedience must not prevail over the rules of evidence and Petitioners’ right to due process. Once his affidavit was erroneously received, Nickel did not testify, further prejudicing the Petitioners by depriving them an opportunity to confront the witness. Because it contains little more than inadmissible hearsay the Court should exclude R38.

[¶52] The District Court received written and oral objections to Respondent’s exhibits R41-49. *See* (P47); (Tr. 86:7-16; 119:7-125:13). The District Court and the State confirmed these exhibits were obtained long after the Secretary’s decision. (Tr. 119:24-25). No testimony or foundation was laid, and the exhibits were first disclosed the night before the hearing. Petitioners objected on relevance grounds citing *McCarney v. Meier*, for the proposition that the exhibits could not have entered into the Secretary’s determination. (Tr. 122:4-14); *see also* 286 N.W.2d 780, 787 (N.D. 1979). Petitioners also objected that the exhibits contain inadmissible hearsay under N.D.R. Evid. 801-802, noting the authors of the statements could not even be determined. (Tr. 122:15-123:3).

[¶53] The District Court Order incorrectly states the Petitioners objected to R41-49 under N.D.R. Evid. 403 & 404 and received the exhibits without addressing the hearsay objections. Dkt. 27, ¶ 42. The admission of R41-49 is in plain violation of the hearsay rules and disregards the complete lack of foundation, authenticity, or indicia of reliability. The Court should disregard these exhibits and any factual findings arising from them.

**G. The Secretary Abandoned the Argument that AMT Paid Bonuses, But the District Court Excluded Signatures Gathered by AMT Anyway**

[¶54] Respondents offered no evidence to support the exclusion of any signature obtained by AMT based on a pay per signature violation. Though the Secretary conflates signatures gathered by AMT with those gathered by circulators hired by Tuttle, they operate as distinct entities employing separate circulators. AMT does not pay its circulators by the signature. *See* (P27: ¶4). AMT fully cooperated with the unprecedented investigation, including disclosure of its pay records to the State’s investigators for all of its circulators it employed. Those records showed AMT’s circulators were paid exclusively based on the number of hours worked. *See (Id. at ¶¶6-10)*. It is evident from testimony and briefing that the Secretary abandoned the argument that AMT violated the pay per signature ban. Accordingly, the presumption of validity of the signatures AMT obtained is not rebutted.

**H. No Evidence to Support Exclusion of Signatures Tuttle Obtained**

[¶55] Even if the otherwise inadmissible evidence contained in R38 and R41-49 were considered, at most 3,172 signatures gathered by Tuttle’s circulators could be vulnerable to exclusion under a Pay-Per Signature theory because there is no evidence that Tuttle himself was paid per signature. *See* discussion, *infra*. Per the Secretary, Tuttle and the circulators he employed only gathered 4,870 signatures. *See* (P3, pg. 1). The Secretary erroneously asserts, based on the total of the “signatures before approval date” column, that 8,274 should be excluded, but offers no support for the exclusion of the inexplicable exclusion of an additional 3,404 signatures. *See* Dkt. 33, fn 2. As discussed *infra*, no admissible evidence supports the exclusion of signatures under this theory.

**LAW AND ARGUMENT**

**I. The Secretary’s Decision Regarding Zeph Toe Must Be Reversed**

[¶56] Just a few minutes of live testimony from Secretary of State Jaeger on August 23, 2022, revealed an astonishing truth that had been hidden from Petitioners and North Dakota

petition signers since the Secretary's final decision on May 12, 2022. Specifically, the Secretary conceded that he struck 15,740 otherwise-valid signatures from petitions notarized by Toe solely based on his own inexpert hunch that the signatures of two circulators varied too much. From this, the Secretary leapt to a series of conclusions. This decision was not only wrong, it was a shocking abuse of his limited discretion to perform a ministerial function, depriving petition supporters of their rights under the Fourteenth Amendment and the North Dakota Constitution. It must be reversed.

**A. The Decision Was Error or, Alternatively, an Abuse of Discretion**

[¶57] The Secretary's decision was simply wrong, both in law and fact. First, the Secretary misapplied the law solely relying on his own inexpert opinion regarding handwriting to not merely rebut, but to conclusively extinguish, 15,740 signatures that he admits were themselves valid. There is "a presumption that each signature in the petition is the genuine signature of the person whose name it purports to be." *Zaiser*, 822 N.W.2d at 479. This Court, reviewing questions of law *de novo*, agreed in *Zaiser* that the presumption was legally rebutted when circulators admitted widespread forgery of signatures; the Secretary did not merely infer fraud. *Id.* But here, the theory of "fraud" starts with a contested, inexpert handwriting opinion on *circulator affidavits*, and winds through an attenuated chain of assumptions. The Secretary knows he is "not a trained handwriting expert," but finds his inexpert opinion conclusive because "it's pretty easy to spot differences, in my mind at least." (Tr. 39:19-40:7). Handwriting analysis requires expert opinion. *See, e.g., State v. Hernandez*, 707 N.W.2d 449 (N.D. 2005). The District Court ruled the Secretary lacked foundation to opine on the genuineness of Lloyd's signature on her curative April 22 affidavit. (Tr. 93:6-18). If that is correct, the Secretary could not have formed conclusive, irrebuttable opinions that Lloyd's signatures on her



petition affidavits were false. The Secretary legally erred in relying on his own inexpert opinion to not just overcome the presumption of validity, but to conclusively refute it.

[¶58] The Secretary also legally erred by refusing to consider any other facts. The relevant notary (Toe) and the primary circulator (Lloyd) re-reviewed all of the petitions they had signed or notarized. Toe swore under oath to identifying and witnessing Lloyd and the other circulators signing each affidavit. Lloyd swore she had signed each circulator affidavit, and the handwriting was hers. Importantly, she even swore to a traditional correction, re-affirming her circulator's statement regarding each elector who signed her petitions. The Secretary refused to consider either affidavit. Why? He viewed the statements as necessarily false because they conflicted with his own handwriting hunch.

[¶59] Confirmation bias predominated the process. Despite the constitutional rights at stake, the Secretary made no effort: to contact or interview the circulators or notary; to consider what if any incentive the parties would have had for engaging in the imagined fraud, particularly when most of the underlying elector signatures are facially valid; to consider alternative explanations for perceived variance in signatures; to consider whether the circulators exhibited variance in their other handwriting; to use any forensic handwriting expert; to employ a reliable methodology of signature comparison; to consult any source of information or expertise; or to consider whether his chain of assumptions, in the aggregate, was fair accurate. The Secretary assumed at each stage that a variance could only mean an imposter, and that Toe must have been involved. As a matter of law, these untested and uninvestigated hunches did not overcome the presumption of validity.

[¶60] As shown in the Statement of Facts and exhibits, the Secretary's decisions were factually wrong. The signatures in the Lloyd affidavits are not exactly alike, but the

Secretary's key proposition was that the variance in non-Notarized affidavits did not exist, and variance only appeared in the Notarized affidavits. A review of the petitions shows this is simply untrue. Mere perceived differences in handwriting, without more, does not rebut the presumption of validity, requiring affidavits from the Petitioner to explain the claimed variances. Even if it had, the Secretary simply refused to consider corrective affidavits.

**B. The Secretary's Decision to Rely on His Own Inexpert Hunch as Conclusive and Irrebuttable Violates Procedural Due Process**

[¶61] North Dakota citizens reserved the self-executing right to amend their constitution by initiative. N.D. Const. art. III, § 1. "The right to initiate and refer laws is part of the fabric of our liberty as North Dakotans." *Thompson v. Jaeger*, 2010 ND 174, ¶ 1, 788 N.W.2d 586, 588. It is "a fundamental right, and the relevant constitutional provisions must be liberally construed in favor of the people's exercise of that right." *Id.* at ¶11. The initiative is a liberty or property interest of which the Secretary cannot deprive electors or petition sponsors without due process. That is precisely what happened here.

[¶62] Before the 2020 election, Chief Judge Welte entered a preliminary, then permanent, injunction against Secretary Jaeger for a due process violation analogous to what Petitioners just learned happened here. The state failed to provide voters notice of, and an opportunity to cure, "mismatches" that reviewers perceived between signatures on voters' absentee ballots and the signatures on their applications. *See Self Advocacy Solutions v. Jaeger*, 464 F.Supp.3d 1039, 1052 (D. N.D. 2020) ("SAS"). The SAS court applied the same provision applicable here: the Fourteenth Amendment's Due Process Clause.

[¶63] First, the SAS court found absentee voting is a protected liberty interest. SAS, 464 F.Supp.3d at 1052. The initiative, as "part of the fabric of our liberty as North Dakotans," qualifies. *Thompson*, 2010 ND 174 at ¶1, 788 N.W.2d at 588.

[¶64] The remaining questions are what process was due Petitioners, and whether it was deprived. In North Dakota, the fundamental law guarantees the process that is due: a 20-day correction period and judicial review in this Court. *See* N.D. Const. art. III, § 6. A cure process is also required under the Fourteenth Amendment’s Due Process Clause. Courts consider three factors in determining what process is due:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Matthews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Frederick v. Lawson*, 481 F.Supp.3d 774, (S.D. Ind. 2020) (election officials’ failure to accept absentee ballots after conducting “matching” review without any standards or procedures, and without providing voters an opportunity to cure, violates Due Process Clause of the Fourteenth Amendment).

[¶65] Here, these three factors required that the Secretary not treat as conclusive his own inexpert belief in mismatches among two circulators’ signatures. First, the private interest at risk is weighty: the very right to use the initiative process, part of the “fabric” of liberty in North Dakota. Second, the risk of an error arising from Secretary Jaeger’s inexpert signature comparison, utilizing no procedures or outside resources, is extremely high, while it would have cost little for the Secretary to simply consider the evidence from three individuals within a pre-existing cure period. Third, the Secretary’s contact with the two circulators and the allegedly fraudulent notary would have involved minimal cost.

[¶66] In *SAS*, the Secretary concluded the matter with a telling concession that contradicts his position here, consenting to a permanent injunction binding him to a process for *hundreds* of “mismatched” voter signatures. He agreed “[t]he voter may confirm the

legitimacy of the signatures by a response using any form of written communication, phone call or in-person visit with the county auditor.” *SAS*, 2020 WL 3068160, at \*1 (D.N.D. June 5, 2020). The final judgment enjoined him to allow such a voter response in all future elections after taking “reasonable steps,” including phone calls or mail, to inform voters of the allegation of a mismatch. *SAS*, 2020 WL 6576304, at \*1 (D.N.D. Aug. 28, 2020).

[¶67] The Secretary did not claim in *SAS*—as he has here—that it would be reasonable to treat his initial belief regarding a “mismatched” signature as conclusive, or that he would not allow the elector to rebut it. Nor would the Court have allowed such unfounded positions, as “[a]ttempting to contact voters and allowing an opportunity to verify ballots ensures compliance with the bare-minimum requirements of procedural due process.” *SAS*, 464 F.Supp.3d at 1053. Yet here, where only two circulators were suspected of mismatched signatures, the Secretary not only refused to contact them, he treated sworn statements that disproved his hunches as perjurious and unworthy of his review. This circular reasoning fails to comply with the “bare minimum” requirements of due process under the Fourteenth Amendment. On this ground alone, the Secretary’s decision to cancel half of the petition’s otherwise-valid signatures must be reversed.

**C. The Secretary’s Decision Violates the Sponsors’ Rights to Meaningful Notice and a Correction Period under the North Dakota Constitution**

[¶68] This state’s constitution requires that “if the secretary of state finds [the petition] insufficient, the secretary of state shall notify the “committee for the petitioners” and allow twenty days for correction. N.D. Const., art. III, § 6. As discussed above, the Secretary did not accept the affidavits of Toe or Lloyd as corrections. His reasoning was illogical and circular: because his inexpert signature comparison was infallible and he was certain that this supported a string of assumptions regarding Toe, he would simply treat Toe’s and

Lloyd's sworn statements as perjurious. Such reasoning renders the cure period an empty show. For the Secretary, it was. From the stand, he could not state that any showing would have changed his mind. The Secretary's failure to even consider the curative affidavits violated Petitioners' right to a meaningful constitutional correction period.

**II. The Secretary Improperly Struck Over 8,000 Otherwise-Valid Signatures on Petitions Allegedly Submitted by Circulators Who Were Offered a Bonus**

[¶69] The Secretary invalidated signatures due to unsupported allegations that circulators were paid “bonuses” in violation of N.D.C.C. § 16.1-01-12(1)(j). The record is barren of support to rebut the presumption of validity, and the Secretary's broad application of the statute must be rejected in favor of a narrow construction to avoid constitutional violations.

[¶70] The record is barren of support for the exclusion of signatures under a “Pay-Per-Signature” theory. A separate entity, not the Committee, hired Charles Tuttle to collect between 5,000 and 7,000 signatures. Tuttle and Jessica Jaworski were paid a flat fee of \$25,000. There was no evidence of any agreement or discussion of incentive pay or bonuses. As discussed in detail in the Petition, the Pay-Per-Signature Ban does not bar a sponsoring committee from conveying general expectations and timelines to individuals or entities retained to circulate petitions. *See* Dkt. 1, ¶¶ 62-65. The Secretary now erroneously asserts, based on a record barren of proof, that 8,274 signatures were properly excluded for violating the Pay-Per-Signature Ban. *See* Dkt. 33, fn. 2.

[¶71] The signatures initially excluded under this theory *included* signatures struck based on the now abandoned position that signatures gathered by AMT may have violated the statute. As discussed above, the allegation initially raised against AMT has been dispelled and abandoned, and the presumption of validity of those signatures remains intact.

[¶72] Assuming, *arguendo*, admission of exhibits R41-49 and SA Nickel’s affidavit was not clear error, no record evidence shows that Tuttle *personally* violated the statute. Tuttle gathered 1,698 signatures and paid himself; there is no evidence that he paid himself based on quantity. There was no agreement to pay Tuttle, or his employees, incentive pay for achieving the communicated goal. The 1,698 signatures Tuttle collected must be counted.

[¶73] The only evidence that could be construed as supporting exclusion under the Pay-Per-Signature theory relates to the 3,172 signatures from circulators employed by Tuttle. It consists of SA Nickel’s uncontroverted hearsay affidavit (R38) and the hearsay documents allegedly obtained in a search of Tuttle’s home (R41-49). Each of these exhibits was admitted in error. There is no evidence in the record upon which the presumption of validity could be rebutted under a Pay-Per Signature theory. *See* discussion, *supra*.

### **CONCLUSION**

[¶74] For the foregoing reasons, the Secretary’s decision must be reversed.

Respectfully submitted September 1, 2022.

By: **VOGEL LAW FIRM**  
/s/ Jesse H. Walstad  
Jesse H. Walstad  
US Bank Building  
200 North 3rd Street, Suite 201  
Bismarck, ND 58502-2097  
Telephone: 701.258.7899  
Email: jwalstad@vogellaw.com  
ATTORNEYS FOR PETITIONERS

Edward D. Greim, P02626  
Matthew Mueller, P02627  
**GRAVES GARRETT LLC**  
1100 Main Street, Suite 2700  
Kansas City, MO 64105  
Tel: 816.256.3181  
Email: edgreim@gravesgarrett.com  
mmueller@gravesgarrett.com

**CERTIFICATE OF COMPLIANCE**

[¶75] Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 31 pages.

Dated this 1st day of September, 2022.

**VOGEL LAW FIRM**

/S/ JESSE H. WALSTAD

BY: Jesse H. Walstad (#07375)

US Bank Building

200 North 3rd Street, Suite 201

Bismarck, ND 58502-2097

Telephone: 701.258.7899

Email: [jwalstad@vogellaw.com](mailto:jwalstad@vogellaw.com)

ATTORNEYS FOR PETITIONERS

Edward D. Greim, P02626

Matthew Mueller, P02627

**GRAVES GARRETT LLC**

1100 Main Street, Suite 2700

Kansas City, MO 64105

Tel: 816.256.3181

Email: [edgreim@gravesgarrett.com](mailto:edgreim@gravesgarrett.com)

[mmueller@gravesgarrett.com](mailto:mmueller@gravesgarrett.com)

**Exhibit P40**  
**(Hendrix et al. v. Jaeger**  
**8/23/22 Hearing Transcript)**



STATE OF NORTH DAKOTA, COUNTY OF BURLEIGH  
IN DISTRICT COURT, SOUTH CENTRAL JUDICIAL DISTRICT

Jared Hendrix, as chairman )  
of the North Dakota Term )  
Limits Sponsoring Committee, )  
and North Dakota Term Limits, )  
)  
)  
Petitioners, )  
) Supreme Court Case No. 20220233  
vs. )  
)  
Alvin A. Jaeger, in his )  
official capacity as North )  
Dakota Secretary of State, )  
)  
Respondent. )

Evidentiary Hearing

Before the Honorable James S. Hill, District Judge  
Burleigh County Courthouse  
Bismarck, North Dakota  
August 23, 2022

Recorded and transcribed by:  
Kimberly Gullicks, AAERT CER, CET  
District Court Recorder/Transcriber  
514 East Thayer Avenue  
Bismarck, North Dakota 58501

APPEARANCES

For Petitioners:

Edward D. Greim  
Graves Garrett LLC  
1100 Main Street, Suite 2700  
Kansas City, Missouri 54105

Jesse Walstad  
Vogel Law Firm  
200 North Third Street, Suite 201  
P.O. Box 2097  
Bismarck, North Dakota 58502-2097

Matthew Mueller  
Graves Garrett LLC  
1100 Main Street, Suite 2700  
Kansas City, Missouri 54105

For Respondent:

David Ray Phillips  
Bakke Grinolds Wiederholt Attorneys  
300 West Century Avenue  
P.O. Box 4247  
Bismarck, North Dakota 58502-4247

Matthew Arnold Sagsveen  
Office of Attorney General  
500 North Ninth Street  
Bismarck, North Dakota 58501-4509

WITNESS INDEX

WITNESS:	PAGE
Alvin Jaeger	
Direct Examination by Mr. Phillips	25
Cross-Examination by Mr. Greim	58
Lee Ann Oliver	
Direct Examination by Mr. Phillips	102
Cross-Examination by Mr. Greim	113

EXHIBIT INDEX

EXHIBIT:	RECEIVED
P-1	Timeline 83
P-2	Letter from Jaeger to Hendrix 83
P-3	Summary Document 83
P-4	Letter from Hendrix to Jaeger 83
P-5	E-mail from Hendrix to Jaeger 83
P-6	E-mail from Jaeger to Hendrix 83
P-7	E-mail from Oliver to Tillman 83
P-8	Petition Packet Summaries 83
P-9	Zeph Toe Signatures Summary 83
P-10	E-mail from Tillman to Oliver 83
P-11	E-mail from Jaeger to Tillman 83
P-12	Letter from Attorney Greim to Jaeger April 11, 2022 Initial Cure Letter 83
P-13	Letter from Attorney Greim to Jaeger April 18, 2022 Cure Letter 83
P-14	Letter from Jaeger to Attorney Greim 83
P-15	E-mail from Oliver to Tillman 83
P-16	Chloe Lloyd Circulator Summary 83
P-17	Affidavit of Zeph Toe 83
P-18	Zeph Toe Notary Log 83
P-19	Affidavit of Chloe Lloyd 83
P-20	Inconsistent Review Examples 83
P-25	Examples of Voter's ID's but Signature Invalidated 84
P-26	Summary of Signatures Excluded for Alleged Pay-Per-Signature 84
P-27	Affidavit of Valerie Gallagher 84
P-28	Charles Tuttle Signature Summary 84
P-29	Affidavit of Tim Mooney 84
P-30	Affidavit of Greg Graves 84
P-31	Greim Records Request to Jaeger May 4, 2022 85
P-32	Greim Records Request to Jaeger May 12, 2022 85
P-33	Jaeger May 17, 2022 Response to Greim Records Request 85
P-34	April 20, 2022 E-mail from Jaeger to Tillman 85
P-35	AMT E-mail Transmitting Payroll Records to Silrum 85
P-36	AMT Payroll Reports 85

EXHIBIT INDEX (continued)

EXHIBIT:	RECEIVED	
P-37	AMT E-mail Transmitting List of Circulators to Silrum	85
P-38	Term Limits 20-Day Cure	85
P-39	March 29, 2022 Jaeger Referral to AG Wrigley	85
R-1	Affidavit of Lee Ann Oliver	85
R-2	Initiating Documents	85
R-3	Letter dated February 15, 2022 Re: Receipt of Petitions	85
R-4	Term Limits Media Advisory Dated February 15, 2022	85
R-5	Petition Database Summary	85
R-6	Petition 0940	85
R-7	Petition 0955	85
R-8	Petition 0974	85
R-9	Petition 1042	85
R-10	Petition 0030	85
R-11	Petition 0066	85
R-12	Petition 0256	85
R-13	Petition 0257	85
R-14	Petition 0287	85
R-15	Petition 0369	85
R-16	Petition 0392	85
R-17	Petition 0432	85
R-18	Petition 1053	85
R-19	Petition 1129	85
R-20	Petition 1130	85
R-21	Letter Dated March 22, 2022 from Jaeger to Hendrix with Chart	85
R-22	Letter Dated March 29, 2022 Re: Term Limits Petition Violation Report to AG	85
R-23	E-mail String Dated March 25, 2022 between Hendrix and Jaeger	85
R-24	E-mail String Dated April 6-11, 2022 between Oliver and Mueller	85
R-25	Attachments to Exhibit R-24	85
R-26	E-mail Dated April 11, 2022 from Mueller to Jaeger and Silrum	85
R-27	Letter dated April 11, 2022 from Edward Greim to Alvin Jaeger Re: Initial Cure of Term Limits Petition	85

EXHIBIT INDEX (continued)

EXHIBIT:	RECEIVED	
R-28	Letter Dated April 18, 2022 from Edward Greim to Alvin Jaeger Re: Cure of Term Limits Petitions	85
R-29	May 12, 2022 Letter from Jaeger to Greim	85
R-30	Petitions 1254-1265 and 1354	85
R-31	Petitions 119-499 and 1150	85
R-32	Affidavit of Alvin Jaeger	38
R-33	Spreadsheet Prepared by Jaeger that Lists the Petitions Circulated by Chloe Lloyd and copies of Chloe Lloyd's Circulator Affidavits	38
R-34	Spreadsheet Prepared by Jaeger that Lists the Petitions Circulated by Zeph Toe and Copies of Zeph Toe's Circulator Affidavits	38
R-35	Spreadsheet Prepared by Jaeger that Lists the Petitions Circulated by Romana Morris and Copies of Ramona Morris's Circulator Affidavits	38
R-36	Spreadsheet Prepared by Jaeger that Lists the Petitions Circulated by Wayne Williams and Copies of Wayne Williams's Circulator Affidavits	38
R-37	E-mail Dated February 28, 2022 from Pat Finken to Jim Silrum	53
R-38	Affidavit of Mark Nickel	86
R-39	June 27, 2022 Cover E-mail from Mueller to Mark Nickel	86
R-40	June 27, 2022 Letter from Greim to Nickel	86

1            (THE FOLLOWING PROCEEDINGS WERE HAD AND MADE OF RECORD, AS  
2 FOLLOWS, on August 23, 2022, commencing at 9:00 a.m.):

3

-----

4            THE COURT: Good morning, everyone. We'll open the  
5 record in Burleigh County District Court. It's 9:00 a.m. on  
6 August 23, 2022. We're opening the record in a matter that's  
7 captioned Jared Hendrix, as chairman of the North Dakota for  
8 Term Limits Sponsoring Committee and North Dakota for Term  
9 Limits, petitioners versus Alvin Jaeger, Alvin A. Jaeger, in  
10 his official capacity as Secretary of State of the State of  
11 North Dakota. The Supreme Court Docket number is 2022233.

12            As mentioned, my name is James Hill. I'm one of the  
13 judges of the District Court. I'm here -- I refer to myself  
14 somewhat as a doorstep. I'm the doorstep before this matter at  
15 the Supreme Court. The Supreme Court has assigned this matter  
16 in an order dated August 17, 2022. It is directed that the  
17 District Court "hold an evidentiary hearing and make findings  
18 of fact on the following issue: the respondent's  
19 disqualification of petition signatures," end quote. That is  
20 precisely what I'm being asked to do.

21            I have in the courtroom Matthew Sagsveen and David  
22 Phillips who are Assistant Attorney Generals. Matthew  
23 Sagsveen, Solicitor General. I do have Jesse Walstad in the  
24 courtroom. Ed Greim is here. I saw him on camera yesterday.  
25 Matthew Mueller, I assume, is the other gentleman who's with

1 you today. Matthew Mueller and Edward Greim are admitted pro  
2 hac vice by the North Dakota Supreme Court of North Dakota.  
3 This District Court will honor that finding by the Supreme  
4 Court.

5 I mentioned to the parties yesterday, this hearing's  
6 going to be completed within two hours. Two hours of  
7 evidentiary time. I'm going to be walking out of the courtroom  
8 at noon. I'm not saying that to be mean. I'm not saying that  
9 to do anything other than to give everyone an idea of what  
10 we're going to do to manage the time in this case. There's  
11 going to be a little time to take a break if we have to, and  
12 there might be some procedural matters.

13 I asked that the parties understand that when we do  
14 call the witnesses, they're going to come up to the witness  
15 stand, they're going to be sworn by my court reporter, there  
16 will be one official record. This case -- this matter will not  
17 be recorded by anyone other than my court reporter, Kim  
18 Gullicks. So no recording is going to take place. Obviously,  
19 our press is here. By order and rule they certainly have their  
20 job to do in this matter.

21 There are a number of exhibits, obviously, that the  
22 parties, I assume, are going to ask that I look at. I did ask  
23 that the parties meet this morning at 8:00 if they could. I  
24 know that some of the attorneys have been coming in late.  
25 Mr. Walstad had to get in extra early this morning to get



1 everybody to the courtroom, but we got everybody here, and I  
2 know that it's an effort.

3           But I want you to all understand this, I'm operating  
4 as a District Judge. I am essentially like a special master.  
5 I'm making findings. That's what I'm doing. I'm making  
6 factual findings. This is a matter of where I think the last  
7 missive from the Secretary of State on the writ -- or excuse  
8 me -- on the matter submitted to his office was on August 5 --  
9 or April 5, 2022. The writ that was sent to the Supreme Court  
10 was filed on August 12. The Supreme Court, in its order, on  
11 August 17 asked that I hold a hearing, and today is August 23.  
12 So I pushed some things aside. Please understand we do have a  
13 pretty heavy docket in the South Central; so we had to do some  
14 things. I have a directive to have my findings to the Supreme  
15 Court by Friday the 26th of August. A hearing at the Supreme  
16 Court, as noted, is on September 2nd which is a week from  
17 Friday. So we're operating under some very specific  
18 guidelines.

19           I ruled on a couple of things yesterday. I will put  
20 on the record that I did order this be an in-house hearing,  
21 that if any witness was to testify, they were to testify on the  
22 witness stand. There was a motion in limine. I appreciate the  
23 fact that the motion was sent to me by e-mail, but  
24 unfortunately, we don't have much of a procedure in a case  
25 that's been sent to us in a special master setting. If we were

1 to operate under Rule 3.2, we wouldn't have a response for 14  
2 days. We wouldn't have time for a response, no hearing date,  
3 nothing. But I did observe yesterday afternoon that it really  
4 related to relevance objection to exhibits and admissibility of  
5 some exhibits. I think the lawyers have been around a long  
6 time certainly understand relevant subjects to a judge sitting  
7 on a case where I'm making the findings are a little bit, well,  
8 let's just say, suggest that they -- they're -- they don't have  
9 the same weight if you're dealing with presenting something to  
10 a jury. I've been around a long time, and I think that the  
11 lawyers going to have to trust that if I do accept an exhibit,  
12 I'll give the due weight that it necessarily has to have. What  
13 I'm concerned about is that any witness that purports to  
14 testify by affidavit, that's not going to happen. If you're  
15 going to be presenting testimony by witness, the witness has to  
16 be here to give testimony.

17           So with that in mind, I did direct that the State go  
18 first, but I think that there might be -- oh, by the way,  
19 mechanically, I want you to know this way it works. If there's  
20 a number of exhibits that are offered in this matter, and I  
21 accept those exhibits, I am obligated, along with my findings,  
22 to submit those exhibits to the Supreme Court. I file them.  
23 Well, I say, I file them, but the truth is everyone knows that  
24 the court reporter does all the work in these cases. She's  
25 going to file for me. So once we get the exhibit situation

1 taken care of, you know, I can take paper copies, but if you  
2 have zip drives with the exhibits on them that would be  
3 helpful, whatever we can do. Speak to my court reporter during  
4 the break time if you can. And once we get a handle on what  
5 exhibits are being admitted that are going to be transmitted to  
6 the Supreme, we'll be able to do that in a much more  
7 expeditious fashion by doing it electronically.

8 So that being in mind, Matthew Sagsveen, I'm assuming  
9 you're taking a lead for the State.

10 MR. SAGSVEEN: I'm going to defer to Mr. Phillips  
11 today, Your Honor.

12 THE COURT: All right. Mr. Phillips it is.

13 Mr. Phillips, you took some time, I take it, to meet  
14 with, I call it the Jesse Walstad team, if you will.  
15 Mr. Greim and -- I know Mr. Greim and his compatriot  
16 Mr. Mueller are coming in on late flights thanks to Delta  
17 Airlines, but that's just the way it is.

18 Mr. Phillips, have you come -- is there some  
19 housekeeping matters? Some exhibits that we can agree to?

20 MR. PHILLIPS: Yes, Your Honor.

21 There is a joint exhibit list with some handwriting  
22 on it. I believe my opposing counsel has it.

23 THE COURT: Very good. Do you want to give it to me?  
24 You can approach, Mr. Greim.

25 MR. GREIM: And, Your Honor, there's -- it probably

1 requires some --

2 THE COURT: Okay. You've got to stay at a microphone  
3 if you're going to walk.

4 MR. GREIM: Sure.

5 Your Honor, this may require some explanation if I  
6 could.

7 THE COURT: Explain away.

8 MR. GREIM: Okay. So we, the parties, have  
9 essentially agreed to most of the exhibits. Where we have not,  
10 we have an X in the objection box. And what we had discussed  
11 last night was rather than arguing those objections here,  
12 although that may be the Court's preference, but we at least  
13 have -- give you the option of having written out our  
14 objections so you could take those under advisement when you  
15 take all the paper at the end of the day today and have more  
16 time for live testimony. So we have written out our objections  
17 to each affidavit and exhibit in a pretty short and concise  
18 filing that goes along with this. And I would submit both of  
19 those. We also have copies of exhibits that we want to have up  
20 for the Court and for the witness here.

21 THE COURT: Terrific. Why don't you hand me what  
22 you've got. I love the phrase, essentially agreed. That was  
23 first year of law school in courts class when I heard that  
24 expression, essentially agreed. But I appreciate and  
25 understand exactly what the parties are conveying to me.

1           What I've received is a joint exhibit list, and on  
2 the joint exhibit list that I am going to accept, it's a joint  
3 exhibit list for that reason, obviously, noted is joint.  
4 There's a series of exhibits that have been listed. There are  
5 red pen marks that have notation. Sometimes they say no  
6 objection by State, some say objection by State. We'll deal  
7 with those.

8           Now, what's going to happen is I'm going to have to  
9 look at those and determine whether or not they are acceptable.  
10 I see that counsel's also handed me petitioner's objection to  
11 respondent's exhibits. That in and of itself is seven pages.  
12 There's identification of exhibits they're objecting to and the  
13 reasons thereof. So I'm going to accept both of those  
14 documents. And I will say, that's the most expeditious use of  
15 the time because I can take a look quickly at the exhibits  
16 themselves and determine what I will do with respect to those  
17 documents.

18           You have a couple binders for me here?

19           MR. PHILLIPS: Your Honor, may I approach as well  
20 with a binder?

21           THE COURT: Yeah. Sure. Terrific.

22           MR. GREIM: Your Honor, the binders are both the same  
23 color, but they're labeled.

24           THE COURT: That's good.

25           MR. GREIM: I'll put one over here for the witnesses

1 stand.

2 THE COURT: All right. What I've received, for the  
3 record, I received petitioner's exhibit notebook. I've also  
4 received the notebook of the State. It looks like it is  
5 labeled, Lee Ann Oliver affidavit and exhibits, Alvin Jaeger  
6 affidavit and exhibits, Mark Nickel affidavit and exhibits. I  
7 have the judge's copy. There is a copy for the witness that  
8 will be used, likewise, the petitioner's exhibit book noted.  
9 And it looks like you both use the same numbers from one  
10 through. So of course that's another nightmare for a court  
11 reporter, but I'll deal with that as we go.

12 My question to both counsel is do you have all these  
13 exhibits on a zip drive?

14 MR. GREIM: We do, Your Honor.

15 THE COURT: Give that to my court reporter at a  
16 break. I'd like to have that at some point. I think it'd be  
17 useful.

18 MR. PHILLIPS: Your Honor, there is a drive in the  
19 binder that I just gave.

20 THE COURT: In yours. Okay. It's got it.

21 Mr. Greim, you're still standing there. So there  
22 must be a reason.

23 MR. GREIM: There is.

24 Your Honor, I just wanted to make a record on the  
25 affidavit question and the question of witnesses just very

1 briefly.

2 THE COURT: Yeah.

3 MR. GREIM: None of our witnesses were able to be  
4 here between 9:00 and 11:00 this morning. We made best efforts  
5 beginning on Friday to contact them. Our primary witnesses  
6 were available to testify remotely, and their affidavits were  
7 also were submitted to the Secretary in April. And so, I mean,  
8 not to get into metaphysical questions about exactly what we're  
9 doing here today. But, you know, we would submit those as the  
10 affidavits that were actually given to the Secretary that are  
11 part of the record. I just wanted to make a record that they  
12 also could have been available, albeit by Zoom today, and that  
13 the parties had agreed that the affidavits would be admissible.

14 THE COURT: I appreciate your position, Mr. Greim.  
15 And I'll ask for comment by the State on that issue.

16 MR. PHILLIPS: Yes, Your Honor.

17 Would you prefer that we come to the podium, Your  
18 Honor.

19 THE COURT: No. You don't have to. Use your mic.  
20 What I prefer is you stay on your microphone is really what I  
21 prefer because it makes a much cleaner record for me, and  
22 you're also dealing with a lot of papers and documents. So  
23 it's my preference that you stay seated.

24 MR. PHILLIPS: Thank you, Your Honor.

25 Yes, we have discussed affidavits between the

1 parties. And you'll notice that the affidavits in the joint  
2 exhibit list don't show any objection on the ones that they are  
3 submitting. The agreement that we had was that we would  
4 stipulate to the admissibility of affidavits. And a big part  
5 of that is that the three witnesses I plan to call really can  
6 educate the Court in terms of the process of a petition review.  
7 But, you know, that would take quite a long time in this  
8 relatively short hearing. And so we have fairly lengthy  
9 affidavits from our State witnesses that contain quite a bit of  
10 information that would be useful to the Court, and it may not  
11 be advisable to spend this entire hearing going through it.

12           That said, the agreement was that we would be able to  
13 make sort of line-item objections to the various things in the  
14 affidavit. Opposing counsel has chosen to do that with the  
15 affidavits that we have submitted. We're going to leave it to  
16 the Court to weigh the credibility of the witnesses that are  
17 not there. I will point out that our witnesses are present  
18 today and so we have both affidavit and live testimony from  
19 those same witnesses.

20           THE COURT: Well, and what you can do with witnesses  
21 who have affidavits, you can ask them if their affidavits are  
22 true and correct, and that would be the substance of their  
23 testimony. You can do that.

24           Let me be very clear to the parties, is that, you  
25 know, theoretically, theoretically, I had 47,000 potential



1 witnesses. That's what I have as a District Judge. I'm only  
2 one little meaningless District Judge in the South Central  
3 Judicial District doing the best he can to perform his  
4 constitutional function. So I have a limited time to do that,  
5 and I couldn't give a blanket order allowing for a hearing  
6 where people anywhere, any time, any place, could submit an  
7 affidavit.

8 I understand that there's a unique character to some  
9 of the witnesses because these submissions to the Secretary of  
10 State included affidavits. They included in a time sequence.  
11 So I'm looking at that category of an affidavit a little  
12 differently than I would look at, for instance, if Mr. Greim  
13 went out and got ten affidavits as of August 19, last Friday,  
14 and said, here, Judge, I want you to take some new affidavits,  
15 but I'm not going to produce those people. But he's not doing  
16 that, and I understand that. So if you have that unique  
17 affidavit -- and I think that applies to Mr. Zeph Toe. He was  
18 one that there was an affidavit submitted back in the context  
19 of what's there. My concern with affidavits are I don't have  
20 anything to judge credibility of those witnesses. I have  
21 simply a piece of paper, and I have to make a credibility  
22 determination based upon my view of an affidavit, and that's  
23 very difficult.

24 So this is what we're going to do. As we go through  
25 the witnesses, I'm going to take from the parties lead in those

1 witnesses that have produced affidavits that the parties agree  
2 that I can consider those affidavits. But I am not going to  
3 indiscriminately allow a series of affidavits that have been  
4 created since this matter became somewhat of a litigious matter  
5 in the summer of this year. I just would be exposing myself to  
6 virtually thousands of potential witnesses, and I'm not going  
7 to do that. But I fully understand that they're the character  
8 of witness Lee Ann Oliver, or the Secretary, himself, would've  
9 produced an affidavit of some sort. He's here to testify. I  
10 understand that. So I will take that into account. And if  
11 these parties are agreeing that the affidavit of Zeph Toe that  
12 was previously offered to the Secretary for consideration in  
13 the course of his decision-making process, if they agree that I  
14 can consider it, I will accept that exhibit. Can't make it any  
15 clearer.

16 Mr. Phillips, are you ready to go?

17 MR. PHILLIPS: Understood, Your Honor.

18 Will we be discussing any of the other admissibility?

19 THE COURT: Well, I --

20 MR. PHILLIPS: I want to be -- one thing I would --

21 THE COURT: You know, you put -- I think what we need  
22 to do is we need to get to the testimony portion of this case.  
23 You've given me the list. I have it. I see that there are  
24 objections. But if you want me to sit here and take the part  
25 of your hour time, I'd be glad to do that, but there won't be

1 any time left to do anything.

2 MR. PHILLIPS: No, Your Honor, I certainly wouldn't.

3 I will just point out, though, that we won't be  
4 introducing every single exhibit through a witness because some  
5 of them are simply addressed in their affidavits. So perhaps I  
6 could move to admit the exhibits that are not objectionable.

7 THE COURT: All right. What I've got is a series of  
8 exhibits, P-1 through and including 39. Those are petitioner  
9 exhibits. I have, unfortunately, I have to refer to the  
10 numbers again, R-1 through and including 49. So I have R-1  
11 through including 49, respondent's exhibits. They are  
12 designated respondent exhibits. And it doesn't appear that  
13 there are any objections to those exhibits. The parties have  
14 agreed to admissibility, Mr. Phillips?

15 MR. PHILLIPS: To all of the ones that are -- that  
16 don't have an objection noted with an X.

17 THE COURT: Well, the respondent's exhibits have  
18 none. Petitioner's exhibits, I have Exhibit P-17. Looks like  
19 no objection to the admissibility of the affidavit of Zeph Toe.  
20 P-19, affidavit of Chloe Lloyd, no objection by the State; so  
21 that objection's withdrawn. P-21A, objection by State. I have  
22 to look at invalidated but substantially compliant list. I  
23 have to look at that one. That's not admitted. It's  
24 provisional. I have P-27, P-28, P-29, affidavit of Valerie  
25 Gallagher, affidavit -- or excuse me -- Charles Tuttle

1 signature summary, affidavit of Tim Mooney, and affidavit of  
2 Greg Graves. So just to be sure, P-27 through and including  
3 30, looks like no objection by State, is that correct?

4 MR. PHILLIPS: Are your -- Your Honor, I wonder if  
5 you have the one that we filled out this morning that's -- does  
6 the judge have the correct copy?

7 THE COURT: Well --

8 MR. GREIM: Your Honor, the most updated one is the  
9 one with the red handwriting that's loose. It's not at the  
10 front of one of the binders.

11 THE COURT: Oh. It's -- I've got a -- if I go  
12 through the series, P-27 through and including 33, I've got --  
13 there were objections to those exhibits, but then I have an  
14 indication that on Exhibits 27, 28, 29 and 30, there is no  
15 objection by State. Is that position -- but there is objection  
16 to Greim records request to Jaeger, that's Exhibit P-31; P-32,  
17 Greim records request to Jaeger; and then P-33, Jaeger response  
18 to Greim records request. Those objections stand. Is that  
19 correct, Mr. Phillips?

20 MR. PHILLIPS: That's correct, Your Honor.

21 And I don't know if you'd indicated P-21A, B, C;  
22 P-23A, B, C; and --

23 THE COURT: Oh, I see. I have 19 and 21A. Those  
24 objections have been withdrawn.

25 MR. PHILLIPS: Your Honor, maybe we should move on to

1 the evidence portion and --

2 THE COURT: I think we should move on.

3 MR. PHILLIPS: -- we'll address it on a break.

4 THE COURT: And I don't want to waste my time. But I  
5 will tell you this, right now, what I'm going to do,  
6 Respondent's Exhibits 1 through and including 49 are received  
7 by the Court. The exhibits offered by the Petitioners,  
8 Exhibits 1 through and including 39, are received with the  
9 exception of, I will look at P-31, P-32, and P-33. It appears  
10 those objections stand. I will determine whether or not I'm  
11 going to receive those exhibits. I will quite frankly tell you  
12 that those three exhibits, I don't know that there's going to  
13 be a great way to mislead me even if I accept those exhibits.  
14 Mr. --

15 MR. PHILLIPS: Your Honor, I would say that it's my  
16 understanding that those exhibits are thousands of pages --

17 THE COURT: I understand.

18 MR. PHILLIPS: -- not entirely contained within  
19 there.

20 THE COURT: I understand. So I got to look at them.  
21 I got to look at them. I get that. Okay.

22 MR. PHILLIPS: The other thing I would say, Your  
23 Honor, is that there are no --

24 THE COURT: Oh, I see.

25 MR. PHILLIPS: -- as far as I know, no --

1 THE COURT: It's on a thumb -- yeah.

2 MR. PHILLIPS: -- no affidavits relating to those.  
3 They're just simply statements of an individual who hasn't  
4 testified by --

5 THE COURT: And you're specifically referring to  
6 P-31, P-32, and P-33?

7 MR. PHILLIPS: Oh, I'm sorry, Your Honor. I was on  
8 P-21, 22, and 23. I'm sorry, Your Honor.

9 No, those exhibits are fine. You were correct that  
10 we had removed our --

11 THE COURT: Oh. And I'm going to look at -- I'm not  
12 receiving P-21A. That is -- there's an objection by the State  
13 at this point. I think that's the one you're suggesting  
14 that --

15 MR. PHILLIPS: The more important exhibit -- or  
16 objection, Your Honor, was the 21s. The 31, we will maintain  
17 our objection, but it was a relevance objection.

18 THE COURT: What about --

19 MR. PHILLIPS: 31, 32, and 33.

20 THE COURT: Are you maintaining your objection to --  
21 I have 21A. I don't know why. 21A through and including, it  
22 would be 21A, 21B, 21C, obviously. Their signature shots are  
23 on thumb drives. There's virtually thousands of issues.

24 MR. PHILLIPS: Yes, Your Honor. It's --

25 THE COURT: Those are reserved. I will look at that

1 and give a ruling on the admissibility of 21A, 21B, 21C.

2 I will tell you that the other exhibits will be  
3 received. I will note the fact that there is objection to  
4 records request P-31 and 32. There's also a response to the  
5 record request. Frankly, I think that's an exchange of  
6 letters. It's not going to mislead me.

7 MR. GREIM: Your Honor, just to be clear also. Let  
8 me -- in the R exhibits, we do have objections to a few of  
9 those.

10 THE COURT: Oh, you do?

11 MR. GREIM: Yes. And those should be -- I don't  
12 think any of those --

13 THE COURT: Oh, I see it. No. I agree.

14 MR. GREIM: Right.

15 THE COURT: I agree.

16 There's an objection to the Alvin Jaeger affidavit.  
17 I'll hear what he has to say. There's an objection to the  
18 spreadsheet. That's going to be -- well, we'll see how that  
19 goes, but I think that's part of the process here. So that  
20 spreadsheet likely is going to come in, as is Exhibit 34, 35,  
21 and 36. I see the objections as we speak now.

22 I think what we need to do is we need to move on. I  
23 did mention that I received all of the exhibits of the  
24 respondents, but I will take a look when I take a break, and  
25 I'll take a look at 32, 33, 34, 35, and 36. I'll also look at

1 37, and 38, along with the objection to Exhibit 41 through and  
2 including 49. Those are the objections that you've raised.

3 All right. With that in mind, the other exhibits are  
4 received. And we'll take a quick look over the break, and I'll  
5 let you know exactly where we're going to go. I think we need  
6 to get moving.

7 MR. PHILLIPS: Thank you, Your Honor.

8 I call Secretary of State Alvin Jaeger.

9 THE COURT: Mr. Secretary.

10 MR. GREIM: Your Honor, I'm sorry. While he's  
11 proceeding, since we've got other witnesses who will be  
12 testifying here, I wonder if we can invoke the rule.

13 THE COURT: You can invoke a rule. You want the rule  
14 invoked? There's no debate about the rule.

15 So if you're a potential witness in this case on  
16 either side, you step out.

17 Secretary, would you come forward, sir.

18 MR. JAEGER: May I bring my water?

19 THE COURT: Approach my court reporter and she's  
20 going to swear you in.

21 ALVIN JAEGER,  
22 called as a witness, being first duly sworn, was examined and  
23 testified as follows:

24 THE COURT: Mr. Secretary, would you give me an audio  
25 check. Give me your name, sir.



1 THE WITNESS: Alvin A. Jaeger.

2 THE COURT: You're coming through loud and clear,  
3 sir.

4 THE WITNESS: Some people call me Al Jaeger, and my  
5 mother always called me Alvin.

6 THE COURT: I've heard that before.

7 All right. Mr. Secretary, it's hard for me not to  
8 call you Mr. Secretary; so I'm going to do that. It is your  
9 office that I extend that respect.

10 Mr. Phillips is going to ask some questions, and I  
11 think Mr. Greim probably is going to be the person to pose  
12 questions to you. Please listen to the question and answer it  
13 the best you can.

14 DIRECT EXAMINATION

15 BY MR. PHILLIPS:

16 Q. Mr. Secretary, please state your full name for the  
17 record.

18 A. Alvin A. Jaeger. Commonly known as Al Jaeger, and as  
19 I said, my mother always called me Alvin.

20 Q. And are you currently serving as the North Dakota  
21 Secretary of State?

22 A. Yes, I am.

23 Q. When were you first elected to that position?

24 A. In 1992. And I've been reelected eight times.

25 Q. In 1992. So you've served about 30 years?

1           A.    Yes.

2           Q.    Are the duties of the Secretary of State spelled out  
3 in the North Dakota Constitution and North Dakota Century Code?

4           A.    Yes, they are.  I have well over 40 different duties  
5 ranging all over from commissioning notaries, licensing  
6 contractors, you name it.  There's a very detailed list on our  
7 website that spells out everything.

8           Q.    A wide variety of responsibilities.

9           A.    Oh, very much.

10          Q.    What is the role of the Secretary of State  
11 specifically with respect to initiated statutory and  
12 constitutional measures?

13          A.    Well, it's -- there's some things that are very  
14 specifically spelled out in the constitution, and then there  
15 are statutory things.  And so what we have done over the years,  
16 we have established very specific criteria which we have  
17 followed over the years to be very consistent in the  
18 application of all petitions that are brought to my office  
19 regardless of what the subject matter might be.

20          Q.    Has your office developed a specific process and  
21 criteria for reviewing petitions as part of the initial  
22 process?

23          A.    Yes, we have.  In addition to that, we have a  
24 pamphlet on her website that very clearly outlines how to  
25 initiate a petition to be ultimately a measure on the ballot.

1 It's very specific and has a lot of information in it, and has  
2 the laws that apply to the initiative and referendum process.

3 Q. Lee Ann Oliver is going to be testifying today and  
4 has submitted an affidavit. It's marked as Respondent's  
5 Exhibit 1. Have you reviewed that affidavit before today?

6 A. Yes, I have.

7 Q. And does that discuss the process and criteria that  
8 she and other staff in your office use when reviewing  
9 petitions?

10 A. Oh, yes. It's very detailed and it's one that's been  
11 followed for really my entire tenure.

12 Q. Do you agree with all the contents in her affidavit?

13 A. Yes, I have. There's only been one change, and that  
14 was as a result of the law change where signers of petitions  
15 needed to also print their name in addition to signing their  
16 name.

17 Q. When you say, "there's only been one change," do you  
18 mean in the 30 years you've been serving as Secretary?

19 A. Right. Basically, the criteria's stayed the same.

20 Q. Do you apply the same criteria regardless of the  
21 contents of a particular measure?

22 A. Oh, yes. Definitely. I definitely have had  
23 petitions that I do not agree with, but that's beside the  
24 point. My first job is to keep with my oath of office which is  
25 to follow the constitution and laws of the State of North

1 Dakota.

2 Q. And you mentioned one change that's taken place in  
3 your 30 years. What was that change again?

4 A. That was when the signers of a petition has -- have  
5 to print their name in addition to signing their name. And  
6 there's a very specific reason for that because if you review  
7 petitions there are people who basically have a scribble as a  
8 signature, and we are mandated to do our best to ascertain, if  
9 we can, send out in a random sampling, and if you can't figure  
10 out the name, you can't send a postcard to them, and so that's  
11 why the printed name becomes very important.

12 Q. How many initiated measures have you reviewed in  
13 your 30 years?

14 A. Well, over 30 years I've received over 90 requests  
15 for approval of the format. Now, not all 90-plus have made it  
16 to the ballot because either didn't get enough signatures or  
17 whatever. But I would say, the numbers that actually made the  
18 ballot I would say were around 50, you know, give or take a  
19 little bit, 45, 50.

20 Q. Is it fair to say that some of the review is done by  
21 your staff instead of by you personally?

22 A. Yes. But in all cases I do check in on the review  
23 process. And over the years I've become also very aware of  
24 when there's differences. The differences really show up very  
25 dramatically. And so I keep abreast of the process

1 Q. And maybe give a little bit more detail. When do you  
2 tend to jump in personally in the review process?

3 A. Well, it depends. Sometimes I just happened to come  
4 in and I notice something, and I shared with Lee Ann, and we --  
5 all of a sudden something reveals itself. And so it is during  
6 the process. We have 35 days to do the review, and so time is  
7 pretty concise. And so that during that 35 days, I do check on  
8 what's going on.

9 Q. Ultimately, is it your duty as Secretary of State to  
10 pass on the sufficiency of the petitions?

11 A. Oh, yes. Definitely. The responsibility is mine.  
12 The staff provides me with information, I review that  
13 information, but ultimately I'm the Secretary of State. The  
14 constitution and state law indicate that's a decision of the  
15 Secretary of State. And I take that very seriously and I make  
16 the decision.

17 Q. I want to make sure that everyone including the judge  
18 understands some of the terminology that we're going to be  
19 using today. When we talk about signers of a petition, who's  
20 that referring to?

21 A. That would be the qualified North Dakota electors  
22 that are allowed to sign the petition.

23 Q. And when we talk about the circulator, who is the  
24 circulator?

25 A. The circulator has to be a qualified North Dakota

1 resident and they, by constitution and state law, are the only  
2 ones that can circulate the petition.

3 Q. This would be somebody who goes out in the public and  
4 gathered signatures?

5 A. That's correct.

6 Q. After the circulator has gathered signatures on a  
7 petition, is he or she required to sign an affidavit?

8 A. Yes. One of the criteria is that the entire petition  
9 has to be circulated in its entirety. There's a page, the  
10 front page, has the names of the sponsoring committee and then  
11 the context, the petition title, context of it. And then very  
12 last, there's an affidavit which basically when -- but the  
13 circulator's doing, saying that to the best of their knowledge,  
14 everyone that signed the petition is a qualified North Dakota  
15 elector. That they -- each state that they did, in fact,  
16 witness it. And it is a statement, an affidavit, which has to  
17 be then signed and witnessed by a notary public.

18 Q. So the circulator is attesting under oath to the fact  
19 that they have conducted the gathering of signatures pursuant  
20 to law?

21 A. Yes.

22 Q. When we talk about the notary on a petition, I assume  
23 that's a notary public. What's the role of a notary on a  
24 petition?

25 A. Well, first of all, you know, the whole thing of a

1 notary is to determine that, and particularly with the swear-in  
2 statement, the law is very clear that the signer of the  
3 affidavit must do that in front of a notary. And it's very,  
4 very clear. And so what the notary, by their notarial  
5 certification is doing, they're saying that so-and-so appeared  
6 in front of me and they signed all of this other stuff, but  
7 this individual did appear in front of me and did sign their  
8 name, called as a witness, being first duly sworn, was examined  
9 and testified as follows: to the affidavit.

10 Q. Is it just a formality to have it notarized?

11 A. Oh, no. No. This is very, very clearly required.  
12 It really goes back to the whole thing of the, you know, the  
13 process. It's a very critical part because all of it goes back  
14 to the integrity of the process.

15 Q. And when a notary makes a notarial act on the  
16 petition, what are they saying?

17 A. They're basically saying that, if I may just -- John  
18 Doe appeared in front of me, Jane Doe appeared in front of me,  
19 and I saw them sign their name to the affidavit.

20 Q. Does that impact the validity of the signatures that  
21 are actually on the petition?

22 A. No. Because at that point, all the notary is doing  
23 is notarizing the affidavit. The notary is not have -- the  
24 notarial act doesn't have anything to do with the signatures  
25 itself, but it is very important because the notary is saying

1 that the circulator did appear in their presence and affixed  
2 their signature in their presence. That's very important.

3 Q. And the circulator is attesting that the signer  
4 signed in their presence, and the notary is indicating that the  
5 circulator was under oath --

6 A. Right.

7 Q. -- and attested?

8 A. Right.

9 Q. So is there any question about the signatures on a  
10 petition if there are -- is a problem with the notarial act?

11 A. No. The signatures, themselves, are all reviewed  
12 independently. You know, in case of staff, particularly Lee  
13 Ann, she's, I'm guessing it's well over a million signatures  
14 that she's reviewed and petitions for initiative process and  
15 also for candidates.

16 Q. Do you have a role as Secretary of State with respect  
17 to notaries, themselves, and commissioning of notaries?

18 A. Yeah. One of my duties is that I commission notary  
19 publics. In that process, over the 30 years, I have carried  
20 out a number of administrative responsibilities where notaries  
21 have made errors. Some have been suspended, some of them paid  
22 fines, some have done whatever, but I -- probably several  
23 hundred where I've done that to.

24 Q. Are notary publics officers of the state?

25 A. Yes, they are.



1 Q. Do they take an oath?

2 A. Yes, they do.

3 Q. What's the --

4 A. The same oath that I take.

5 Q. And what's the significance of that oath?

6 A. Well, the oath is that they uphold the laws of the  
7 state and the constitution, and what have you. It's not a  
8 clerical function. It is a very specific function. And when a  
9 notary is commissioned, even if they're employed by an  
10 employee, you know, buy an -- as an -- if they're employed as  
11 an employee, if the employer says something that they want the  
12 notary to do something that's contrary to law, the notary's  
13 first obligation is to their oath of office and to follow state  
14 law.

15 Q. I want to be clear on this one issue here. If there  
16 is something wrong with the notary on a petition, can you rely  
17 on the attestation of the circulator that the signatures were  
18 gathered according to law?

19 MR. GREIM: Objection. Vague.

20 THE COURT: Overruled.

21 THE WITNESS: Please repeat your question again, so  
22 that --

23 BY MR. PHILLIPS:

24 Q. If the -- if I was in a deposition, I'd have it read  
25 back. So if the -- if there's something wrong with the

1 notarial act petition --

2 A. Uh-huh.

3 Q. -- can we rely on the certification of the circulator  
4 that the signatures were gathered correctly during the  
5 signature gathering process?

6 A. Well, in one way there isn't a connection because,  
7 you know, for example, when petitions sometimes has -- the  
8 signers have been from out of state, and yet, what the  
9 circulator has indicated through their affidavit that everybody  
10 to the best of their knowledge was a citizen of North Dakota,  
11 and even though there's a Minnesota address on it. So what the  
12 important part is that that's what the circulator said.

13 The notary says the circulator made that claim, completed  
14 that affidavit in my presence, and I saw them affix their  
15 signature.

16 Q. With respect to the Term Limits Petition at issue in  
17 this case, did your staff bring any concerns to you?

18 A. Yes.

19 Q. What kind of concerns did they bring to your  
20 attention?

21 A. Well, like I said, there was out of state, there were  
22 address concerns, there's duplication, circulators signing  
23 one -- several petitions. And one of the things that, you  
24 know, so there's several things in the review. They just start  
25 happening. You can see them. In all the petitions over the

1 years there are things, certain things, that happen, and they  
2 just, kind of, blow up in a way. And, you know, this  
3 particular case, what -- we do have times where petitions have  
4 been tossed out because of a notarial error. In this  
5 particular case, particularly with one notary, as it relates to  
6 at least four circulators, there was more than one error.  
7 There was numerous errors.

8 Q. And were those serious errors?

9 A. Yes.

10 Q. We'll go through some examples here today. Are we  
11 talking about Notary Zeph Toe?

12 A. Yes.

13 Q. Did Zeph Toe notarize a significant number of the  
14 petitions that were under review?

15 A. Yeah. It was somewhat over 700.

16 Q. Do you know about how many signatures that impacted?

17 A. It was, I believe, around 15,000. It's in my  
18 affidavit, the specific number.

19 Q. Did your staff also bring concerns about other  
20 circulators not being citizens?

21 A. Yes. There were a few cases where that was had. In  
22 fact, there was a couple circulators that were not citizens,  
23 and of course, those petitions were denied.

24 Q. Let's talk specifically about the affidavits on the  
25 petitions that were notarized by Zeph Toe. Is Zeph Toe a

1 notary public in North Dakota?

2 A. Yes. I believe he was commissioned in June.

3 Q. June of 2021?

4 A. Yes. I'm sorry. Yes.

5 Q. How soon was that in relation to his collection of  
6 signatures?

7 A. The first evidence that we have had, to my  
8 recollection, probably started in September, maybe. At least,  
9 you know, he did a lot of them, but, you know, and there were  
10 many, many notaries involved, you know, in the other half. I  
11 mean, he basically notarized half of the petitions, and the  
12 other half there's many different notaries. And, you know,  
13 the -- we didn't encounter the same thing as we did with him.

14 THE COURT: You said, September of 2021?

15 THE WITNESS: Yes.

16 THE COURT: That's the first evidence you saw in your  
17 office?

18 THE WITNESS: Yes, that I saw in terms of the  
19 exhibits that we have offered as part of my affidavit, and  
20 testimony, and stuff.

21 THE COURT: Thank you.

22 Go ahead, Counsel.

23 BY MR. PHILLIPS:

24 Q. We're going to talk about some specific examples in a  
25 moment with exhibits being shown to you, but what are some of

1 the things you found wrong with the Zeph Toe notarized  
2 petitions?

3 A. Well, essentially the difference in signatures. You  
4 know, I have to admit, I'm not a trained handwriting expert.  
5 But over the years, and in particularly with Lee Ann, you know,  
6 she's reviewed over a million of them. And there are  
7 tendencies that you very quickly spot. And in the examples  
8 with Mr. Toe, they're -- what's interesting about that there  
9 was days where eight, nine, ten different affidavits were  
10 notarized and as you flip through those, on the same day, the  
11 variance in signatures for particularly, well, all four of the  
12 circulators, but particularly in a couple of them, become very  
13 evident.

14 Q. Mr. Secretary, I'm --

15 A. I have a screen over here.

16 Q. Okay.

17 THE COURT: I want to just interject here. I note  
18 what is being shown to this witness is a copy of Respondent's  
19 Exhibit 33. I believe that actually that's part of a  
20 package. 33, 34, 35, and 36 are the package spreadsheets.

21 There is an objection by Mr. Greim to the  
22 introduction of those exhibits. I'm going to rule on that  
23 because we need to get some sense of completeness. I am going  
24 to, despite the objection, receive all five exhibits. I do  
25 that on a couple of grounds. This is spreadsheet created by

1 the Office of the Secretary of State in the ordinary --

2 THE WITNESS: It actually was created by me.

3 THE COURT: By the Secretary himself, and that comes  
4 from his office in his official capacity. I would note that  
5 the spreadsheets that represent R-33 through and including  
6 R-36, to which there is objection, are a part of the  
7 attachments to the writ that was filed in the Supreme Court.  
8 They are part of a public record already. They were offered as  
9 part of a record, and I'm going to receive them noting the  
10 objection of counsel. That will include the affidavit, Exhibit  
11 R-32, which is the affidavit of Alvin Jaeger. He's present.  
12 He can testify to his affidavit if he's questioned. But I'm  
13 going to receive Exhibits R-32, R-33, R-34, R-35, and R-36 on  
14 that basis.

15 You may proceed.

16 MR. PHILLIPS: Thank you, Your Honor.

17 THE COURT: The objection is noted for the record.

18 BY MR. PHILLIPS:

19 Q. Mr. Secretary, do you recognize Exhibit 33?

20 A. Oh, I definitely do.

21 Q. What is that?

22 A. It's a spreadsheet. This particular one is the one  
23 that relates to Circulator Lloyd, Chloe Lloyd. And what I did  
24 is I put all of her petitions in order on the date they were  
25 notarized. And so you'll see several examples where I put

1 notes there that on certain dates, the 16th, the 20th,  
2 whatever, there were seven, eight, nine different affidavits  
3 notarized by Mr. Toe on those days.

4 Q. And this spreadsheet is your summary of those  
5 documents --

6 A. Yes.

7 Q. -- that follow?

8 A. Yes.

9 Q. Did you prepare this summary in anticipation of this  
10 hearing?

11 A. Yes, I did. Because that was one of the things that,  
12 you know, to put it in a way and also, you know, even though it  
13 became evident back when we denied the petition, I felt, Your  
14 Honor, that to put it in order on the date that they were  
15 notarized. And so all four spreadsheets are in that order  
16 because it shows, it showed to us the discrepancy in the  
17 signatures when you compare different affidavits that were  
18 notarized on the same day.

19 Q. Mr. Secretary, before we go into an example here on  
20 this exhibit, what is your experience analyzing handwriting?

21 A. With what?

22 Q. What is your experience analyzing handwriting?

23 A. Well, I'm not an expert, but myself, my staff,  
24 several others looked at the same information that we have  
25 offered, and quite frankly it's pretty easy to spot

1 differences, in my mind at least. And I ultimately made the  
2 decision that those were significant, and that it goes back to  
3 the responsibility of the notary to have said that the  
4 circulator actually affixed their signature in their presence.  
5 And with the variance of signatures by the circulators, it's  
6 rather, and particularly in the same day, it's was difficult  
7 for me to determine that they were all done by the same person.

8 Q. I believe you said earlier that Chloe -- or that your  
9 staff personally, Lee Ann Oliver, has reviewed over a million  
10 signatures?

11 A. Oh, yes. Yeah.

12 Q. And I imagine yours is something less, but quite a  
13 few?

14 A. Well, I've seen it. I mean, I -- we don't have time  
15 for me to go in all my tales of all the petitions and the  
16 things that we found, but basically they become very evident.

17 Q. Thank you.

18 One of the irregularities that you've talked about in the  
19 affidavit that you've prepared in this case, and it's one of  
20 the exhibits, an irregularity you point out is that Chloe  
21 Lloyd's signatures on different affidavits appear inconsistent.  
22 I'm going to have this exhibit shown on Page 4 of the exhibit.  
23 Is this a circulator affidavit that is signed by Chloe Lloyd?

24 A. Yes. And it's the first one that is on my  
25 spreadsheet.



1 Q. Let's turn to Page 24 of the exhibit. And so is this  
2 also purportedly the signature of Chloe Lloyd?

3 A. According to Mr. Toe it is.

4 Q. I'll just have you go back once more.

5 So just to be clear, that's on -- that's her signature on  
6 one affidavit?

7 A. Uh-huh.

8 Q. And that's her signature on another?

9 A. Yes.

10 Q. Does this raise any concerns with you?

11 A. Yes.

12 MR. GREIM: Your Honor, I'm going to object to the  
13 witness giving his opinion and speculating under Rule 702.

14 THE COURT: The objection's overruled. He's the  
15 Secretary of State. He has a constitutional statutory  
16 function. He can give his opinion. It's the weight that goes  
17 to that opinion. But if there is to be an expert under a 702  
18 theory, the Secretary of State who has a constitutional and  
19 statutory function, is in a position to give testimony. So  
20 you've got your objection, but it's overruled.

21 Mr. Secretary can continue.

22 BY MR. PHILLIPS:

23 Q. And do you have any concerns about this and what are  
24 those concerns?

25 A. Well, in my opinion, they are not the same. And yet,

1 the notary said that the same person appeared in front of him.

2 If I can, Your Honor, I see a difference.

3 Q. Mr. Secretary, I'm going to -- one other thing that  
4 you mentioned as an inconsistency in the affidavits is that  
5 Chloe Lloyd's signature varies wildly even on the same day.  
6 I'm going to have this exhibit turned to Page 24. Is this a  
7 petition affidavit or circulator affidavit that is dated on, I  
8 believe, September 20th?

9 A. Yes.

10 Q. Okay. And are the ones that follow all between this  
11 page and Page 32, are they all also signed by, purportedly  
12 signed by Chloe Lloyd on the 20th of September?

13 A. Well --

14 Q. I'll have him scroll through so we can look at them.

15 A. Well, yes -- I can't respond, I mean, unless you show  
16 me another screen.

17 That was also done in the 20th. It didn't match the  
18 first one.

19 That was also done in the 20th. It doesn't match the  
20 first two.

21 That's, again, that particular screen doesn't match  
22 the earlier ones.

23 You know, again, there's a discrepancy in terms of  
24 the signatures.

25 Q. And --

1           A.    Here's another example.  They're, again, they were  
2 all done on the same day.  It's unlikely that the circulator  
3 came in on eight, nine different times during the day.  It  
4 seems like it would have been done in one sitting on one day.  
5 And yet, in one sitting her signature varies considerably, and  
6 Mr. Toe said that she did appear in front of him.

7           Q.    Do you have concerns that Chloe Lloyd may not have  
8 appeared in front of Zeph Toe?

9           A.    Yes.

10          Q.    We'll go back to Page 24 on the exhibit.  Another  
11 irregularity you pointed out in your affidavit is that Chloe  
12 Lloyd's address has been altered with the words Dickinson,  
13 North Dakota 58601 in different handwriting on various  
14 petitions.

15          A.    Yes.  You know, essentially the circulator is  
16 supposed to, by law, provide their entire residential address.  
17 And on many of her petitions it just shows 696 Palm Beach Road.  
18 Now, somebody else other than her handwriting added Dickinson.  
19 And that is on many signatures.  Someone else completed her  
20 address.  It was the -- if you read the affidavit, it does say  
21 that I live at this address.  And why you wouldn't add  
22 Dickinson, why it would need to be added by someone else, that  
23 does come up as another red flag.

24          Q.    Another issue that you've raised in your affidavit is  
25 that Chloe Lloyd's residential address is not consistent on

1 different affidavits. If we could turn to Page 4.

2 A. In that one she used a different address than on the  
3 rest of the affidavits.

4 Q. And then on Page 5 in comparison.

5 A. And then it's Palm Beach, and it appears that, you  
6 know, Dickinson has been added.

7 Q. Did any other notary notarized affidavits that were  
8 signed by Chloe Lloyd?

9 A. No.

10 Q. What about Kevin Richmond?

11 A. Oh, I'm sorry. I'm sorry. You're correct.

12 All of -- a good share -- in my spreadsheet I show  
13 the number of affidavits that were notarized by Mr. Toe. They  
14 were generally circulated in the Fargo and Grand Forks area.  
15 Then she circulated petitions in the Bismarck general area, and  
16 they were notarized by a notary in Bismarck. Those are the  
17 last part of my spreadsheet. And you'll notice that in those  
18 that were notarized by Mr. Richmond, her signature on all of  
19 those seams, they seem to be very comparable to each other.

20 Q. What does that tell you about the Zeph Toe notarized  
21 affidavits?

22 MR. GREIM: Objection. Calls for speculation and  
23 legal conclusion.

24 THE COURT: Overruled.

25 THE WITNESS: Well, basically, all I'm doing here is

1 comparing the signatures of the circulator that were notarized  
2 by Mr. Richmond compared to the variance in signatures that  
3 were signed by Mr. Toe. I'm not making a -- all I'm doing is  
4 comparing signatures.

5 Q. Did you find any particular flaws or invalidities  
6 with the affidavits of Chloe Lloyd notarized by Kevin Richmond?

7 A. No, I didn't.

8 Q. Let's show Exhibit 35, please.

9 A. This is my spreadsheet. There weren't quite as many  
10 here with this particular circulator. If I may, Counsel,  
11 the -- on the first two petitions the circulator put down a  
12 Moorhead address. And if you could switch to that, those first  
13 two, you'll see that she has Moorhead, and someone else wrote  
14 down a  
15 Fargo address after that.

16 Under the constitution a petition can only be  
17 circulated by a qualified elector. And then if you look at her  
18 signature, that R, there's a -- it's a little bit different. if  
19 you go to the next one. And then drop down to the next one,  
20 that signature compared to the first two, and then if you go  
21 to --

22 BY MR. PHILLIPS:

23 Q. I'll have you pause, Mr. Secretary.

24 A. Sure.

25 Q. I might have Mr. Sagsveen show, once more, the page

1 that we're currently looking at is Page 4 of the exhibit. And  
2 go up one more page.

3 THE COURT: Mr. Phillips, when you do refer to  
4 exhibits, I want you to be very careful to refer to them as R  
5 for respondent because we have two different numbers, and I  
6 don't want my Supreme Court to be misled in this process.

7 MR. PHILLIPS: Yes, Your Honor. And what we're  
8 referring to at the moment is R-35.

9 THE WITNESS: I think what may have happened on my  
10 spreadsheet, the --

11 THE COURT: Why don't you wait for Mr. Phillips.  
12 He's going to ask a question.

13 THE WITNESS: Okay. Thank you.

14 BY MR. PHILLIPS:

15 Q. I'm not going to go through all of the examples that  
16 you have on your affidavit because they are contained on your  
17 affidavit.

18 A. Uh-huh.

19 Q. But just to be clear, are these just representative  
20 examples of the things that you found, the ones that we've  
21 talked about today?

22 A. Yes.

23 Q. Let's go to Exhibit R-35 -- R-36. R-36. Do you  
24 recognize this?

25 A. Yes, I do.

1 Q. Does this spreadsheet relate to Circulator Wayne  
2 Williams?

3 A. No. This isn't the Williams one.

4 Q. Oh. Apologies. I skipped 36. Let's go to R-37.  
5 No. Please scroll down to Page 2 of R-36.

6 Okay. I believe this one is --

7 A. Yes. This is the Williams one.

8 Q. And what did you note about the date in the notary  
9 portion of this?

10 A. Well, one of the things that Mr. Toe was very  
11 consistent on, if you look at his notarial certificate, this  
12 actually, now, goes into January of 2022 where we started in  
13 September of 2021. On all of his, he's very meticulous, very  
14 the same on that. And if you go to the following, down to the  
15 next one. Another one down.

16 Q. And I'll just -- I'll have you pause for a moment.

17 A. Okay. Pause right there if I --

18 Q. Yep.

19 Okay. Mr. Secretary, what is the difference between the  
20 one we just looked at on Page 2 of Exhibit R-36 --

21 A. Well, first of all, again, going back to the example  
22 that's up there. You can see how if the circulator was in his  
23 presence, he was completing his notarial certificate in the  
24 same manner. Then if you --

25 Q. And what is the difference between --

1           A.     Then if you scroll down.

2           Q.     And I'm going to have you pause for just a moment,  
3 Mr. Secretary.

4           A.     Yeah.

5           Q.     What is the difference in this page, Page 2, of  
6 Exhibit R-36 and let's go to Page 4 of Exhibit R-36?

7           A.     Well, the signature's also different.

8           But I want to point out, if you look at the notarial  
9 certificate, if Mr. Williams was in the presence of Mr. Toe,  
10 why would he make that particular error where he had to cross  
11 out the information, and that was done on three different  
12 petitions. It would be inconsistent with the other 700-plus  
13 that he did. And in my opinion on these threes petitions,  
14 Mr. Williams's signature is not the same as on the other ones.  
15 And also in this case, a couple of those petitions were  
16 notarized by a different notary.

17          Q.     And in this case does the date that is crossed out  
18 have the same handwriting as Zeph Toe has used in his other  
19 petitions?

20          A.     Yeah. Yes, it is. But what was originally there is  
21 not his writing because it would be inconsistent with all of  
22 the rest that he did.

23          Q.     Based on all of these irregularities that you found,  
24 what did you conclude about Zeph Toe?

25          A.     What I concluded is that the notarial -- the



1 affidavits on the ones that were notarized by Mr. Toe, that the  
2 signature of the circulator, as shown by these examples, varied  
3 quite significantly. Not one time, but in several times.

4 Q. And what did you conclude about Mr. Toe?

5 A. Well, what I concluded is that --

6 MR. GREIM: Your Honor, I'm sorry. I hate to  
7 interrupt the answer, but I'm not sure if this is asking for a  
8 different kind of conclusion. But I'm going to object once  
9 again asking for an opinion and for some sort of legal  
10 conclusion that -- which there's no foundation.

11 THE COURT: Well, that's precisely what he has to do  
12 in reviewing the petition, though, Counsel. I mean, I have to  
13 hear the Secretary's position in accepting or rejecting the  
14 petitions, and that's precisely what I am commissioned to do by  
15 the Supreme Court. I have to determine the factual issues  
16 regarding respondent's disqualification of the petitions.

17 Now, if we were in a month-long trial dealing with  
18 irregular signatures on a check, that might -- it might be an  
19 appropriate objection, but here he's a constitutional officer  
20 who has a constitutional and statutory function. He made a  
21 decision. I want to know why he made the decision.

22 MR. GREIM: And --

23 THE COURT: And I think it is reasonable to accept  
24 it; so the objection's overruled.

25 MR. GREIM: And, Your Honor, not to go -- I just want

1 to make clear, so I don't keep interrupting.

2 THE COURT: Sure.

3 MR. GREIM: I think our objection -- we don't have an  
4 objection to him stating why he did what he did. I think that  
5 is what we're here for. Our objection is to the testimony  
6 being taken on the question of whether, in fact, the signatures  
7 are different.

8 THE COURT: This is his opinion that he's offering.  
9 He's entitled to give it. So to that extent, objection is  
10 overruled. But I understand that that is a legal position  
11 you're taking with respect to the testimony that the Secretary  
12 has given; so you're not abandoning that objection. It's  
13 presumed that you would object to that testimony.

14 BY MR. PHILLIPS:

15 Q. What did you conclude about Mr. Toe?

16 A. Well, essentially, when we have a situation where one  
17 particular notary has done this numerous times, there's kind of  
18 a -- it's -- and where half -- he apparently was hired. I  
19 mean, he did over 750 affidavits. And on at least four  
20 circulators, he -- it appears to us that he didn't actually  
21 witness the circulator affixing their signature. That is in  
22 violation of the oath and everything it's all about in notary.

23 And in my opinion, what happened then is, do I excuse  
24 this? It's a reflection of the entire petition process of all  
25 the petitions that he notarized. You know, it's, you know, if

1 I may, I'm even going to quote from the Bible because in  
2 Luke --

3 Q. Secretary, I may ask you that --

4 A. Later?

5 Q. Yes.

6 A. You didn't even know I was going to bring that up.

7 What I'm saying is that this, breaking the law, doing  
8 unlawful acts on these, puts doubt on everything else.

9 Q. When you say it "puts that on everything else," do  
10 you mean it --

11 A. That he did regarding these petitions.

12 Q. Did you make the personal decision that all  
13 affidavits notarized by Zeph Toe would not be counted?

14 A. Yes.

15 Q. And why did you make that decision?

16 A. Again, what he did tainted everything else.

17 Q. As a result of the irregularities that you found, are  
18 you proceeding with an administrative action to revoke Zeph  
19 Toe's commission as a notary?

20 A. Yes.

21 MR. GREIM: Your Honor, I object to this as being  
22 outside of the scope of the proceeding which is what the basis  
23 of his decision was back in March and April and May.

24 THE COURT: What's the relevancy of that for this  
25 Court on the issue that the Supreme Court has given to me?

1 MR. PHILLIPS: Your Honor, it establishes the  
2 truthfulness and -- of the rationale given by the Secretary,  
3 and indicates that, you know, the conclusion that he's made in  
4 this situation is consistent with the very --

5 THE COURT: All right. I will allow --

6 MR. PHILLIPS: -- next decision he made.

7 THE COURT: -- the answer, but it'll be a yes or no,  
8 and then that subject is closed.

9 THE WITNESS: Yes.

10 BY MR. PHILLIPS:

11 Q. Let's talk about the signatures collected by  
12 circulators hired by Charles Tuttle. Does North Dakota have a  
13 law prohibiting individuals, measure committees, and other  
14 organizations from paying or offer to pay on the basis -- on a  
15 basis related to the number of signatures obtained?

16 A. Yes.

17 Q. Okay. And does that law also state that any  
18 signature obtained in violation is void and may not be counted?

19 A. Yes.

20 Q. Was your office ever contacted by anyone about a  
21 violation of the paper signature statute?

22 A. Yes.

23 Q. I'd like to show you what's been marked as R-37. Oh,  
24 I'm sorry. What is --

25 THE COURT: R-37 is up on the screen. It's

1 identified as an e-mail dated February 28, 2022, from Pat  
2 Finken to Jim Silrum. There's an objection that's not  
3 otherwise resolved. It's an e-mail prior to the time that the  
4 petitions were submitted. What's the relevance?

5 MR. PHILLIPS: It's information that the Secretary  
6 obtained while he was making his decision that factored into  
7 his decision-making process.

8 THE COURT: Mr. Greim, position?

9 MR. GREIM: Hearsay, Your Honor.

10 THE COURT: The document is an e-mail. The Court  
11 will sort out the relevance issues related to it. It predates,  
12 of course, consideration of the affidavits themselves, but it  
13 may have some historical reference if it plays into the  
14 decision of the Secretary. So Exhibit 37, over objection, is  
15 received.

16 BY MR. PHILLIPS:

17 Q. And what is this exhibit?

18 A. Well, this is the communication that my office was --  
19 received.

20 Q. From whom?

21 A. I believe it was Mr. Finken that shared it.

22 Q. And what is, I don't know if you can read it, but  
23 what does this e-mail generally indicate?

24 A. That there was an indication that circulators that  
25 were employed by Mr. Tuttle were paid bonuses.

1 Q. And who is Mr. Finken?

2 A. He's an individual in the community, I guess.

3 Q. Were there recordings attached to this e-mail?

4 A. Pardon?

5 Q. Audio recordings?

6 A. I'm sorry.

7 Q. Were there audio recordings attached to this e-mail?

8 A. I believe there were, yes.

9 Q. Did you ever listen to those recordings?

10 A. I didn't specifically. My deputy who's been involved  
11 in all of this listened to them.

12 Q. And I'm going to show you what's been marked as  
13 Exhibit 22.

14 THE COURT: Which exhibit number?

15 MR. PHILLIPS: R-22.

16 BY MR. PHILLIPS:

17 Q. Is this a --

18 THE COURT: Just wait a minute. That exhibit also --  
19 that's a letter dated March 29, 2022. It's referred to a  
20 generic -- let's see. That's been -- its -- no objection to  
21 it; correct? And I want to make clear for the record all  
22 exhibits to which there is no objection are received. I'm  
23 trying to deal with those that are objections, but that's why I  
24 stopped you. I didn't mean to do it. It obviously is one.

25 So go ahead.

1 MR. PHILLIPS: No problem, Your Honor.

2 BY MR. PHILLIPS:

3 Q. Is this a letter that you sent to the Attorney  
4 General of North Dakota?

5 A. Yes. Because state law is very clearly -- clearly  
6 says that when I find discrepancies I must refer my stuff to  
7 the Attorney General.

8 Q. Did the Bureau of Criminal Investigation investigate  
9 this matter to your knowledge?

10 A. That's my understanding is at the direction of the  
11 Attorney General.

12 Q. Did you learn anything about the investigation by the  
13 Bureau of Criminal Investigation? Did you learn anything about  
14 their investigation?

15 A. Oh, yes. Yeah, I did.

16 Q. Did they keep your office updated on this?

17 A. Oh, yes. Yeah.

18 Q. As it progressed?

19 A. Yes.

20 Q. As their investigation progressed?

21 A. Yes.

22 Q. Did the Term Limits Sponsoring Committee submit any  
23 corrections during the 20-day period for corrections?

24 A. They provided information to my office, but it really  
25 wasn't -- we determined that they weren't really corrections

1 to -- that they weren't really corrections. And so we didn't  
2 consider them. In other words, I was being asked to change my  
3 mind and I didn't see anything there that changed my mind.

4 Q. You've overseen the process with respect to initiated  
5 measures for over 30 years; correct?

6 A. For 30 years, yes.

7 Q. Does the Term Limits Petition stand out to you in any  
8 way in compared to the other petitions you've reviewed in the  
9 past?

10 A. Not necessarily because we certainly had some very  
11 bad situations over the years. I think in this particular  
12 situation where we've had isolated notarial situations. We've  
13 never had one where one notary has committed this many unlawful  
14 acts.

15 Q. Have you ever previously invalidated all of the  
16 petitions from a single notary?

17 A. Not from single notary. Not like we have here  
18 because there were just so many, so many things. In other  
19 words, his unlawful acts basically tainted the entire process  
20 of the petitions he circulated.

21 Q. And, Mr. Secretary, you have signed an affidavit in  
22 this case; correct?

23 A. Yes, I have.

24 Q. And that one is Exhibit R-32. Are the statements in  
25 your affidavit true and accurate to the best of your knowledge



1 and belief?

2 A. They sure are because I had to swear to it in front  
3 of a notary.

4 Q. And that contains some additional information that  
5 the judge may find useful in this case?

6 A. Well, we -- I've spelled out in my affidavit things  
7 that I felt were important.

8 Q. Thank you, Mr. Secretary.

9 MR. PHILLIPS: I have no further questions.

10 THE COURT: Thank you.

11 And the objection is to the affidavit of Alvin  
12 Jaeger, that's R-32. And I realize I've got to act quickly on  
13 these matters.

14 I note for instance that P-17 is an affidavit of Zeph  
15 Toe. The State has signaled they're not going to object to  
16 that. They're going to allow for the introduction of that  
17 exhibit.

18 In a similar setting, I believe there's an affidavit  
19 of Chloe Lloyd. There's no objection to the State there. That  
20 is P-19. These are contemporaneous affidavits and they're not  
21 going to -- these witnesses are not going to be produced; so  
22 I'm going to allow for that as indicated in the overall  
23 statement that any objection to any exhibit to which there is  
24 no objection will be received. In a similar vein, accepting  
25 all of the objections one would make to an affidavit of a

1 witness who is being -- that actually has been produced, I am  
2 going to receive Exhibit R-32. R-32 is received, and counsel  
3 will have an opportunity to cross-examine.

4 MR. PHILLIPS: Thank you, Your Honor.

5 THE COURT: Anything more with this witness?

6 MR. PHILLIPS: No further question, Your Honor.

7 THE COURT: Mr. Greim, you want to go? I mean, I'll  
8 let you have it, I'll let you have a break, but, you know,  
9 breaks are going to be hard to come by.

10 MR. GREIM: We'll just jump into it, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. GREIM:

13 Q. Secretary Jaeger, who else besides Lee Ann Oliver did  
14 you consult in making your decision that the signatures of the  
15 circulators you identified in the Zeph Toe petitions were  
16 different?

17 A. Other members of my staff and members of the Attorney  
18 General's Office. So I would say they were looked at by  
19 numerous people, and I made the decision.

20 Q. Now, do you recall that after you made your -- well,  
21 your first decision was made on March 22nd, isn't that correct?

22 A. Whatever the date was, yes.

23 Q. Okay. And your second decision to -- well, your  
24 decision not to reverse your first decision was made on May the  
25 12th; correct.

1           A.    If that's what the letter states, yes.

2           Q.    And I'm not going to go, just to save time, I'm not  
3 going to go pull these up and run through it with you, but  
4 they're there in the record and --

5           A.    Yes.  Right.

6           Q.    -- we'll just --

7           A.    Whatever that's in the --

8           Q.    We'll move ahead.

9           A.    -- record, I -- the public record.

10          Q.    Do you recall that the petitioner's committee asked  
11 you for the complete basis of your decision?

12          A.    We gave them spreadsheets.  They were very detailed.  
13 Every signature that is eliminated there's a reason given.  
14 They were, you know, very, very specific.  Those were all  
15 provided to the committee.

16          Q.    And with respect to Zeph Toe, the committee asked  
17 you, did it not, for every affidavit upon which you are basing  
18 your decision?

19          A.    I believe those were provided.

20          Q.    The committee asked you for a list of every  
21 circulator who you believed had a -- had given a signature that  
22 was not witnessed by Mr. Toe; correct?

23          A.    I -- yes, I think so.  Yes.

24          Q.    And no list was provided, was it?

25          A.    That I'm not aware in terms of communication.  That

1 would've been staff that would've been communicating that, so.

2 Q. Okay. So you're not the witness to talk to about  
3 what was provided to the committee in terms of the basis for  
4 your decision?

5 A. I have reviewed all of the affidavits. I am in a  
6 position to comment on all of those that I provided.

7 Q. Well, let me ask you, so we looked at three of the  
8 four circulators. I think your testimony today was that  
9 these -- that there were four circulators --

10 A. Uh-huh.

11 Q. -- who had irregularities that formed the basis of  
12 your decision on Zeph Toe; correct?

13 A. Uh-huh.

14 Q. And there are not other circulators that you're also  
15 basing your decision on that we haven't heard about, are there?

16 A. No.

17 Q. And were all four of those circulators identified to  
18 the committee at the end of your 35-day investigation period?

19 A. I don't know if they all were.

20 Q. Okay. If any were held back, why would that have  
21 been?

22 A. I don't think that anything was held back. I think  
23 that ultimately when the lawsuit was initiated I found  
24 additional petitions that had the same -- that have been  
25 presented.

1 Q. Okay. And the -- were the additional petitions, the  
2 ones that are attached to Exhibit 36 with Mr. Williams?

3 A. That would be one.

4 Q. I know there's another one.

5 A. Yes. The other one. But the two that really  
6 became -- that were given to the committee, the additional two  
7 I found in going through the files because each of them were by  
8 circulator. They did point out what we already knew. They  
9 were additional examples. And so -- in particular with the  
10 one with Mr. Williams that wouldn't have made any -- I mean if  
11 I had known about that, my decision would still have been the  
12 same.

13 Q. Okay. That wasn't -- the question I'm asking right  
14 now, though, is simply to identify these individuals. And so  
15 let me just make it clear for the record. The two circulators  
16 you identified to the committee, either before or during the  
17 cure period, were Ramona Morris and Chloe Lloyd; correct?

18 A. Yes.

19 Q. And Walter Williams and Ritchell Aboah, for lack of a  
20 better understanding of his name, those are the two new ones;  
21 correct?

22 A. Right.

23 Q. And those are circulators you came up with in  
24 reaction to the filing of the lawsuit in August; correct?

25 A. Yes. That's what I did. Because I wanted to show

1 that there were more examples in those two, and that just  
2 provided more information to bring credibility to my decision  
3 that I made earlier.

4 Q. We received these from you, from your counsel last  
5 night. When were the -- when was the analysis done?

6 A. Last week.

7 Q. Now, did you ever interview Mr. Toe?

8 A. No. He was referred to the Attorney General, the  
9 Attorney General's Office through -- BCI interviewed him.

10 Q. But did anyone in your office ever interview him?

11 A. No.

12 Q. And did BCI give you a report of its investigation?

13 A. Yes.

14 Q. Did you rely on it?

15 A. At this particular point, their investigation was  
16 after I made my decision. My decision had been made, the  
17 interview with Mr. Toe took place when I referred the matter to  
18 the Attorney General's Office, and they took it from there  
19 through their -- through BCI.

20 Q. So you made your decision without trying to speak to  
21 Mr. Toe, yourself; correct?

22 A. That's correct.

23 Q. And did you attempt to speak with Ms. Lloyd?

24 A. I didn't personally attempt that, no.

25 Q. Did someone in your office attempt to speak to

1 Ms. Lloyd?

2 A. I'm not sure that they did.

3 Q. Okay. Did anyone in your office attempt to speak to  
4 Ms. Morris?

5 A. No.

6 Q. Why not?

7 A. I don't know. To me the decision was based on the  
8 affidavit and the discrepancy in the signatures.

9 Q. So your decision ultimately is based on your own  
10 handwriting analysis, is that correct?

11 A. Yes. I've said I'm -- it's -- my analysis over many  
12 years of experience in looking at many signatures. And I also  
13 had my, Lee Ann Oliver, our election specialist, who has  
14 reviewed over a million.

15 Q. And it was significant to you, it sounds like, that  
16 Ms. Lloyd's notarizations -- or her affidavits with Kevin T.  
17 Richmond, a different notary, did not show the same problems  
18 that you saw with this Zeph Toe, is that correct?

19 A. That's correct.

20 Q. So let's -- well, let me ask you this, as you look  
21 through the Chloe Lloyd affidavits, putting aside the reference  
22 to Dickinson, North Dakota 58601, would you agree that in  
23 general the handwriting with the 694 Palm Beach Road address is  
24 pretty sloppy?

25 A. Yes.

1 MR. PHILLIPS: Objection.

2 THE WITNESS: I would say that.

3 MR. PHILLIPS: Which exhibit are you referring to?

4 THE COURT: Is there an objection?

5 MR. PHILLIPS: Objection. Which exhibit is being  
6 referred to and is it not being shown to the witness?

7 MR. GREIM: Sure.

8 THE COURT: He asked generically, were the addresses  
9 sloppy? I don't know if -- is that your objection?

10 MR. PHILLIPS: That's my objection, Your Honor.

11 THE COURT: All right. It's not precise enough.  
12 Would you reframe that. I'm sure you can.

13 MR. GREIM: Sure. Yeah.

14 BY MR. GREIM:

15 Q. I just -- the -- so Exhibit 33 has your entire set of  
16 Chloe Lloyd affidavits; correct?

17 A. Yes.

18 Q. And would you agree as you look through, and take a  
19 moment if you need to. As you thumb through the 694 Palm Beach  
20 Road section, where she writes in her address, would you agree  
21 with me that her handwriting is generally pretty sloppy?

22 A. Yes.

23 Q. By the way, the requirement that a residence be  
24 stated for the notary -- I'm sorry -- for the circulator, that  
25 does not come from the constitution, does it?



1           A.    Comes from state law.

2           Q.    Right.  And state law does not specify whether the  
3 city, state, or zip code must be given, does it?

4           A.    I believe it refers to an address.  And an address  
5 without a city would be somewhat unusual.

6           Q.    How do you -- does your office use that information  
7 when you receive the affidavits and get the circulator address?

8           A.    Well, in this particular case the decision that we  
9 made on those petitions primarily went to the variance in the  
10 signatures and not whether this was a violation.  And in normal  
11 course, those petitions may not have been allowed.  But it's  
12 the part of the affidavits, particularly that -- the variance  
13 in signatures.

14          Q.    Sure.  My question is a somewhat different one,  
15 though, Mr. Secretary.  My question is, does your office use  
16 the circulator address typically in the circulator affidavits?

17          A.    I'm not sure I understand your question.  The  
18 circulator has to provide a complete address.

19          Q.    Right.  And my question is --

20          A.    And she didn't.

21          Q.    Okay.  But my question is, is that of use to your  
22 office?  Does your office actually use it in some way in  
23 fulfilling its duties?

24          A.    I'm sorry.  I still didn't understand what you're  
25 asking.

1 Q. Okay.

2 A. The address wasn't given.

3 Q. Sure. I'll --

4 A. Somebody else added it.

5 Q. Okay. But my question is a general question. Okay.  
6 It's not about Chloe Lloyd in particular. Maybe that's where  
7 we're missing each other.

8 Let me ask you this, does your office use the address of  
9 the electors on the petition lines in any particular way?

10 A. Well, yes. And then going back to the circulator,  
11 the circulator has to be a qualified North Dakota elector. And  
12 if they don't indicate that it's the city in the state, how can  
13 we determine whether they're a qualified elector?

14 Q. Right. Now, you separately do receive a list of the  
15 circulators with their contact information from the sponsor;  
16 correct?

17 A. Yes. Eventually we did.

18 Q. Okay. And so for Chloe Lloyd you actually received a  
19 document showing that her address was 694 Palm Beach Road,  
20 Dickinson, North Dakota; correct?

21 A. That might have might have been on the listing, but  
22 it wasn't in the affidavit. The affidavit is what becomes the  
23 thing that we look at.

24 Q. And if someone had not gone through, maybe it was  
25 Chloe Lloyd, herself, maybe it was someone else, but if the

1 city, state, and zip did not appear, if the -- if this had been  
2 submitted with only 694 Palm Beach Road, how would that have  
3 impacted, as a practical matter, your review of the sufficiency  
4 of the petitions?

5 A. It would've been significant because we could not  
6 have determined whether they are a North Dakota qualified  
7 elector because what address is it? Is it California? Is it  
8 some other state? You need a city and state.

9 Q. Couldn't you have simply looked at the list of the  
10 circulators from the sponsoring committee?

11 A. The review was done before we -- that list doesn't  
12 have anything -- the connection is not there. It's the  
13 affidavit, sir. It's the affidavit that requires it. The list  
14 is for us to know who the circulators were. The review of the  
15 petitions are based on what is on the affidavit.

16 Q. Let me ask you now, I'm going to go back to an issue  
17 that I was covering before I flipped around. I think you  
18 testified earlier that the difference between Mr. Richmond and  
19 Zeph Toe was an important part of your analysis. The  
20 difference in Ms. Lloyd's signatures in her affidavit between  
21 Richmond and Toe were -- was important to you.

22 A. Yeah. Her address, even starting everything through  
23 the -- everything is different from the Richmond ones compared  
24 to the Toe ones.

25 Q. And so your testimony is that Mr. Richmond, the

1 signatures for Ms. Lloyd, she writes them all the same for  
2 Mr. Richmond; correct?

3 A. Yes.

4 Q. Okay. Well, let's test that. Let's look at  
5 Exhibit 33. And unfortunately I don't have an electronic copy,  
6 and so I'm going to have to ask you and everyone following  
7 along to simply go to the last --

8 THE COURT: What exhibit are you looking at?

9 MR. GREIM: Sure. We're at Exhibit 33.

10 THE COURT: Yeah. But 33 could be the petitioner --

11 MR. GREIM: I'm sorry. Respondents.

12 THE COURT: -- or the respondent. Which one?

13 MR. GREIM: I'm sorry, Your Honor. Respondent's 33.

14 THE COURT: Respondent 33.

15 MR. GREIM: And we may be pulling it up. So we'll  
16 display this.

17 BY MR. GREIM:

18 Q. I would just simply -- let's just look at a series of  
19 Richmond petitions. We'll start with October 8th. And I'm  
20 just going to say for the record, we're going to look at about  
21 the last four pages of Exhibit -- Respondent's Exhibit 33.

22 THE COURT: What are you asking? You're kind of  
23 scrolling through this. Are you asking the witness to look at  
24 this?

25 MR. GREIM: Yes. He has a binder. Oh, he doesn't

1 have his own binder.

2 THE WITNESS: I have a binder here. I'm watching up  
3 there.

4 MR. GREIM: Okay. Your eyes are better. I actually  
5 can't use that.

6 THE WITNESS: I can see it.

7 MR. GREIM: Okay.

8 THE COURT: So what is the question?

9 MR. GREIM: Okay. Well, I just wanted to get there  
10 first, Your Honor.

11 BY MR. GREIM:

12 Q. Okay. So I'm going to ask you to take a look at the  
13 exhibit or the -- this is the very first of the October 8th  
14 Chloe Lloyd signatures with Mr. Richmond.

15 A. Uh-huh.

16 Q. Okay. I see that it's pulled up. I can see that  
17 much.

18 And please take a look at her signature there. And, now,  
19 let's flip to the next one. And you see on the same day she  
20 has her signature appearing again; correct? The very next  
21 page. The very next -- after the first October 8th. Should be  
22 Petition 1383 should be handwritten up --

23 A. They're still all similar in terms of how they are  
24 written, the different whatever. They don't have the  
25 discrepancies that the Toe ones had.

1 Q. So it's your testimony that the one that we're  
2 showing here, which is in the upper right-hand corner on  
3 Exhibit, Respondent's 33, you'll see No. 1383 is written in the  
4 upper right-hand corner. That the Chloe Lloyd signature here,  
5 in your view, is substantially similar to the one on the  
6 previous page?

7 A. Substantially, yes.

8 Q. Okay. And so you believe that this is the same  
9 person writing both of these; correct?

10 A. If they were done in the same day.

11 Q. Done on the same day. One -- and it's the same  
12 person; correct?

13 A. They're --

14 Q. In your opinion?

15 A. They're still -- yes. In my opinion, there's  
16 similarities in terms of how they are signed.

17 Q. Well, if I could ask you, what are the similarities  
18 between 1383 that we just looked at and the immediately prior  
19 page?

20 I wonder if Mr. Mueller can reduce this so that we can see  
21 them together somehow.

22 So in your opinion, how are these similar in a way that's  
23 different from the discrepancies that we see under the Zeph  
24 Toe's signatures?

25 A. There is -- I understand what you're getting at. I

1 just know that in total if you look at the entire thing, the  
2 way it's finished in the top and everything, that these  
3 signatures are somewhat the same. There are differences, I can  
4 see that. I -- you know, but it doesn't take away the many  
5 discrepancies that occurred with Mr. Toe.

6 Q. Well, let's go back. Let's see -- let's look at your  
7 analysis again under Mr. Toe. So let's, if we could,  
8 Mr. Mueller -- I won't spend too long on this, but I want to  
9 make my point here.

10 If we go to Exhibit 33, the beginning, Respondent's 33,  
11 the beginning of the pages of the Chloe Lloyd signature pages.  
12 Let's go one, two -- sure. I'll give you a petition number.  
13 Let's go to Petition 815.

14 Okay. And you'll see here that Chloe seems to have  
15 written, more printed her first name, but written her last name  
16 in cursive; correct?

17 A. Yes.

18 Q. Okay. So is it your opinion, now, I just want to  
19 compare this. Let's go three pages from there to Page 808. Is  
20 it your opinion that this Chloe M. Lloyd is a different person  
21 or still the same?

22 A. I can't -- without the sheets, I can't compare back  
23 and forth with the flipping. If I --

24 Q. I mean, we have 15,740 signatures riding on this; so  
25 I'm going -- there --

1 THE COURT: You know, Counsel, I don't need any  
2 comments. What I need is a question.

3 MR. GREIM: Okay.

4 THE COURT: The Secretary has said that unless he  
5 sees them together, he can't do it. But we're not arguing,  
6 we're questioning.

7 BY MR. GREIM:

8 Q. Page 815. We'll go back again and let's see if we  
9 can get it pulled up. Okay. So here's 815, and then I'm going  
10 to ask you to compare that, again, with, let's just say 830.

11 A. Yeah. Those are different.

12 Q. So your testimony is that those two are different?  
13 They're from the hand of a different person?

14 A. Looks like to me.

15 Q. Okay. Yet, the differences we saw under Mr. Richmond  
16 in your testimony are from the hand of the same person?

17 A. Supposedly, yes.

18 Q. Well, you say "supposedly."

19 A. Well, he, through his notarial certification, said  
20 that they appeared in front of him.

21 Q. Right. And normally -- okay. So you say that he  
22 said, from his notarial certification they appeared in front of  
23 him. What is it going to take for you -- what's the -- what  
24 level of difference will it take for you to disbelieve the  
25 notarial certification?



1           A.     In this case, there were significant differences with  
2 the ones that Mr. Toe did.

3           Q.     And your testimony was the differences -- we saw  
4 differences under Mr. Richmond, but they weren't substantial  
5 enough?

6           A.     At this particular point, there wasn't anything  
7 followed through on Mr. Richmond in that regard.

8           Q.     Okay. I'm going to ask you now about the change in  
9 address from 870 West 4th Avenue to 694 Palm Beach Avenue. You  
10 testified that that was another reason to believe that there  
11 was a mistake in the notarization?

12          A.     No. That was a mistake in the address of the  
13 circulator.

14          Q.     Okay. So the fact that the note -- that the  
15 circulator's address changed between September 4th and  
16 September 7th --

17          A.     But it could be that the address was changed after he  
18 did his notarial act.

19          Q.     Okay.

20          A.     And that would've --

21          Q.     But you don't know either way, though, do you?

22          A.     No.

23          Q.     Okay. And is it -- you did not talk to Ms. Lloyd  
24 about where she was actually residing at this time?

25          A.     No.

1 Q. So you don't know whether she moved from one  
2 apartment to the other?

3 A. No.

4 Q. So are you nonetheless taking the difference in  
5 address as some evidence that there was a flaw in Mr. Toe's  
6 notarial act?

7 A. Not necessarily because the address is another issue  
8 in terms of the affidavit, and it's the matter that the  
9 circulator is swearing that this is their address. And here  
10 you have an example, right there, where Dickinson was added by  
11 somebody else.

12 Q. Okay. We'll get to the Dickinson point in a moment,  
13 Mr. Secretary. I'm just asking you about the change. I'm  
14 trying to isolate the basis for your decision. And so my  
15 question is, the fact that Chloe Lloyd said that she resided at  
16 870 West -- or I'm sorry -- 870 4th Avenue on September 4th,  
17 and then on September 7th, it's 694 Palm Beach Road, is that or  
18 is that not a part of your decision that Mr. Toe had a flaw in  
19 his notarial act?

20 A. No. It wasn't because that is a different issue. It  
21 isn't about his notarial certification. The notarial  
22 certification is solely that someone by that name appeared in  
23 front of him.

24 Q. Right.

25 A. It has --

1 Q. Let --

2 A. The -- what the circulator said, that's up to the  
3 circulator.

4 Q. Let me ask you then about the Dickinson, the alleged  
5 addition of Dickinson, North Dakota, to each, or to many of the  
6 pages for Ms. Lloyd. Now, if that happened in the presence of  
7 the circulator -- I'm sorry -- in the presence of the notary,  
8 would there be a flaw of notarization?

9 A. Well, essentially, what the notary is doing is  
10 saying, this is what you said. And a notary realizing that she  
11 says she lives at this address would seem to indicate that the  
12 notary should have caught the fact that it didn't have a city  
13 and state.

14 Q. Well, let me be a little clearer about this. What  
15 the notary avers is that this person, who either presented  
16 identification or whom was known to the notary because of past  
17 interactions, appeared before him? That's the first part;  
18 right?

19 A. Repeat your question again.

20 Q. Yeah. I'm sorry. I garbled that. What -- the very  
21 first thing that the notary affirms is that the person who  
22 appears before him is who they say they are, and that is based  
23 either on that person's presentation of identification or based  
24 on the notary's personal knowledge --

25 A. That would be --

1 Q. -- based on the notary's past interaction; correct?

2 A. That would be correct. And if identification was  
3 provided then it would seem like Dickinson should've been on  
4 there when the notarial act was taken care of.

5 Q. Okay. And then the second thing that the notary  
6 avers is that that person actually signed in their presence;  
7 correct?

8 A. Right.

9 Q. All right. And so if -- let's say that someone came  
10 before a notary and Dickinson, North Dakota 58601 was already  
11 written by someone on the page, and that person then, the  
12 circulator, filled out everything else and signed in the  
13 notary's presence, is there a flaw in the notarial act?

14 MR. PHILLIPS: Objection. Calls for speculation.

15 THE COURT: Overruled. We've let them do a little  
16 opinionating, so. I need to hear the question, though, because  
17 I don't have a full question. Try it again.

18 BY MR. GREIM:

19 Q. Okay. I'm going -- I'm giving you a hypothetical  
20 question, Secretary Jaeger. We'll see if I can do this  
21 correctly.

22 Suppose that a circulator approaches the notary with their  
23 stack of petitions, and then they've got this form, and the  
24 form is not entirely blank when they approach the notary.  
25 Dickinson, North Dakota 58601 is already written out to the

1 right of the address line. And then in the presence of the  
2 notary, the circulator writes his or her name, writes in the  
3 rest of the address, and signs it. Is there any flaw in that  
4 notarial act?

5 THE COURT: Now do you have an objection?

6 MR. PHILLIPS: Objection. Calls for speculation.

7 THE COURT: Yeah. I'm going to sustain that  
8 objection.

9 BY MR. GREIM:

10 Q. Let me ask you this, if Chloe Lloyd only writes in  
11 694 Palm Beach Road, Mr. Toe notarizes it, witnesses her  
12 signature, turns it in to the petition company, and then later  
13 on somebody else writes Dickinson, North Dakota 58601, is there  
14 any flaw in Mr. Toe's notarial act?

15 MR. PHILLIPS: Same objection, Your Honor.

16 THE COURT: Overruled. If the Secretary understands  
17 the question, he can answer it.

18 THE WITNESS: Well, essentially, we are unable to  
19 determine whether she was a qualified North Dakota elector  
20 without the city.

21 THE COURT: That's your answer.

22 BY MR. GREIM:

23 Q. Well, is there any reason to believe Mr. Toe is  
24 dishonest if someone outside of his presence makes a marking on  
25 this page after he surrenders the page?

1           A.    I'm not here --

2           MR. PHILLIPS:  Same objection, Your Honor.

3           THE WITNESS:  -- to judge on Mr. Toe's honesty.

4           THE COURT:  Yeah.  That -- I mean, you're asking him  
5 to judge the honesty issue.  I -- by injecting that term makes  
6 it an improper question.  Sustained.

7 BY MR. GREIM:

8           Q.    What is your basis for believing that Mr. Toe  
9 committed any sort of error that taints the rest of his  
10 petitions if some -- if it were true that someone else wrote  
11 Dickinson, North Dakota, on the petition outside of his  
12 presence?

13           MR. PHILLIPS:  I'm going to make the same objection.

14           THE COURT:  Yeah.  This -- where is that in the  
15 record?  I don't have a record.  You're creating a scenario  
16 that I haven't heard in terms of questioning this witness.  So  
17 objection sustained.  Reframe the question, please.

18 BY MR. GREIM:

19           Q.    Well, let me ask you this, Mr. Jaeger, Secretary  
20 Jaeger, what evidence do you have that Mr. Toe allowed the  
21 affidavit to be altered?

22           A.    I don't, but that's not what our decision was based  
23 on.  What our decision was based on was the circulator in the  
24 presence of the -- Mr. Toe, and by comparing the signatures  
25 amongst the different petitions, there is too much of a

1 variance, and there are some very significant variances on the  
2 same day.

3 Q. So you're -- that is helpful. So you're -- the basis  
4 of your decision regarding the unreliability of Mr. Toe's  
5 notarization is the difference in the handwriting in the  
6 signatures of the circulators; correct?

7 A. Yes.

8 Q. And nothing else; correct?

9 A. Because the other issues would be different. They  
10 just raised red flags that, okay, now we -- somebody's adding  
11 Dickinson. And this affidavit compared to this affidavit, the  
12 signatures are different, obviously different. And if counsel  
13 didn't see that, I'm sorry, but a lot of other people have.

14 Q. I'm aware of our time, and let me just end with  
15 Walter Williams. I'm going to do my best. This is Exhibit,  
16 Respondent's Exhibit 36.

17 A. Uh-huh.

18 Q. And I'm going to see if we can go to the, first,  
19 second, the third page of the notarizations.

20 A. Uh-huh.

21 Q. This is the first of --

22 A. There's three of them like that.

23 Q. Right. First of three pages in which there is  
24 something crossed out in the actual notarization section. Are  
25 we there?

1 A. Yes.

2 Q. Okay. So your testimony before was that this is an  
3 irregularity that indicates that perhaps Mr. Williams was not  
4 really present in front of Mr. Toe?

5 A. Yes.

6 Q. Okay. And I want to make sure I follow your  
7 reasoning. Is it because -- yeah, I think you indicated that  
8 Mr. Toe seems to have crossed out a date in the first blank on  
9 the page, and then has crossed out it looks like someone wrote  
10 in Cass.

11 A. Uh-huh.

12 Q. And that's also crossed out; correct?

13 A. Yeah. There's no city in North Dakota called Cass.

14 Q. Right. And you'll see that it's -- it looks like  
15 it's initialed by Mr. Toe, Z.T. and Z.T.

16 A. Uh-huh.

17 Q. And so why would this indicate that Mr. Williams was  
18 not present when Mr. Toe notarized the affidavit?

19 A. Because on 750-some petitions, he did not make an  
20 error like that.

21 Q. Let me ask you, is it at least possible, looking at  
22 01-18, the very first thing that was crossed out, that  
23 Mr. Williams simply showed up to Mr. Toe having already  
24 completed the bottom, and Mr. Toe --

25 MR. PHILLIPS: Objection. Speculation.



1 MR. GREIM: -- and that Mr. Toe simply corrected it?

2 THE WITNESS: Well, besides --

3 MR. PHILLIPS: And compound.

4 THE WITNESS: -- the fact that those three signatures  
5 don't match the other signatures.

6 BY MR. GREIM:

7 Q. Well, let's -- okay. Let's look at that. I don't  
8 want to spend too long, but let's look at the very first page.  
9 Let's stay on the first page. That's -- this is petition  
10 1,006. So is it your testimony that the signature on 1,006 was  
11 not written in the same hand as the person who signed petition  
12 1,005? Let's look at 1,005.

13 A. Yes.

14 Q. Okay. Let's look at -- let's compare 1,006 to 998.  
15 You think that the signature on 998 is written by a different  
16 person than the one who wrote 1,006?

17 A. Okay. In comparison -- and we have two notaries  
18 involved here. And on these three where something is done,  
19 that would be absolutely odd. When you're doing an affidavit  
20 and somebody's across from you, the whole act, why would Mr.  
21 Williams have filled that out? It just doesn't seem possible.  
22 And so, to me, I -- not only in comparison, the three  
23 signatures compared to how they appear on the other affidavits  
24 by Zoe and -- by Toe, and also by another notary, why these  
25 three are different and why this discrepancy?

1           MR. GREIM: Your Honor, I move to strike that as  
2 nonresponsive. I just asked it -- I just asked the witness to  
3 compare the signature on 998 to 1,006.

4           THE COURT: He's responded, and he's also opined  
5 regarding other issues; so the answer stands as given by the  
6 Secretary.

7           MR. GREIM: Okay. Well, I hate that I -- I think I  
8 didn't understand it. I'm just going to ask --

9           THE COURT: Sure. Go ahead.

10          MR. GREIM: -- the question.

11          THE COURT: Ask it again.

12 BY MR. GREIM:

13          Q. So I just want to ask the witness, is it your  
14 testimony that based on a review of the handwriting that's on  
15 the line signature of circulator on Petition 998 versus 1,006,  
16 that they were not written in the same hand?

17          A. Correct.

18          MR. GREIM: Your Honor, I know that we've taken a lot  
19 of time. I wonder if we could take a very, very short break,  
20 and then I just want to see if I have any more questions for  
21 this --

22          THE COURT: We can do that.

23          For the record, where you are, I think both counsel  
24 need to know this. The direct examination was approximately 38  
25 minutes, and where you are right now is you're about the same,

1 Mr. Greim. So we'll take a break, but understand that you're  
2 kind of working on a short timeline here. So with that in  
3 mind, the parties have each absorbed about 38 minutes of time  
4 each. You got 60 minutes, but the parties are going to have a  
5 short break. I'm going to reinforce that this is going to be  
6 done. We are going to finish this.

7 It's 10:46. We're going to adjourn until 11:00 on  
8 the bell. 11:00 on the bell we'll be back in session. Thank  
9 you.

10 (Recess from 10:46 a.m. to 11:01 a.m.)

11 THE COURT: We're back on the record in Supreme Court  
12 Case No. 20220233, Jared Hendrix, as chairman of North Dakota  
13 for Term Limits Sponsoring Committee, and North Dakota for Term  
14 Limits, petitioners, versus Alvin A. Jaeger, North Dakota  
15 Secretary of State. We took a break. It is 11:02 a.m. We're  
16 back in session. The Secretary is on the stand.

17 I just wanted to clear up a couple of things. I did  
18 have a chance to look through the exhibit list that the parties  
19 had given to me. And I want to make clear, and I want to be  
20 clear for you, because you're going to be carrying this case  
21 forward. Any exhibit to which there is no objection are  
22 received. Any rulings that I've made will be noted on the form  
23 itself. Where that puts us with respect to the plaintiff's  
24 exhibits, Plaintiff's Exhibit 1 through and including 20, there  
25 are no objections; so those are received. Then there's a

1 series of Exhibits P-21A, P-21B, P-21C, P-22, P-23A, P-23B,  
2 P-23C, P-24A, P-24B, and P-24C, there are objections to those  
3 documents.

4 Now, I've seen some of those. I know they are part  
5 of the petition that was filed with the Court. The Court is  
6 not going to receive those exhibits in their entirety, and I do  
7 so on the basis that they are essentially an analysis by  
8 petitioners of what they would have done were they the  
9 Secretary of State. The decision I have to make is the  
10 decision the Secretary of State made in disqualifying the  
11 petitions. So those are not documents created for the purpose  
12 of statute nor would they have any constitutional basis. They  
13 are simply an analysis after the fact of a decision made. So  
14 I'm not going to receive those because I don't think they're  
15 relevant into the decision that I have to make. So Exhibits  
16 21A through and including 26 -- or excuse me -- 24C are not  
17 received. 25 and 26 are -- P-25 and P-26 are received.

18 It looks like Exhibits 27, 28, 29, and 30, those  
19 are P exhibits, they're all affidavits. There were objections  
20 to them, but they've been withdrawn. Am I correct,  
21 Mr. Phillips?

22 MR. PHILLIPS: Correct, Your Honor.

23 THE COURT: All right. So P-27, P-28, P-29, P-30,  
24 those are the affidavits of Valerie Gallagher, the Charles  
25 Tuttle signature summary, affidavit of Tim Mooney, and

1 affidavit of Greg Graves are received without objection.

2           There are objections to P-31, P-32, and P-33. Those  
3 are simply a request by an attorney for records. I think  
4 Attorney Greim making a request of the Secretary, actually two  
5 of them, and then there's a response. They are what they are.  
6 I'm going to receive them. They're requests, and there's a  
7 response. They are what they are. They're attorney requests  
8 and they're Secretary responses. So Exhibits P-31, P-32, P-33  
9 are received.

10           That leaves P-34 through and including P-39. Those  
11 are all received because there is no objections. They are  
12 identified, they are received.

13           Respondent's exhibits, let's clear those up right now  
14 for everybody. R-1 is the affidavit of Lee Ann Oliver. Is she  
15 going to be testifying, Mr. Phillips?

16           MR. PHILLIPS: Yes, Your Honor.

17           THE COURT: All right. I'm going to receive it on  
18 the same basis I received Secretary Jaeger's affidavit. That's  
19 going to be received.

20           That gives us R-2 through and including R-31.  
21 There's no objections to those; so they are received.

22           I've already ruled on Exhibits R-32, R-33, and R-34,  
23 R-35, R-36, and R-37. Those have all been ruled upon; so they  
24 are received as noted in the form.

25           That brings us R-38. That's that affidavit of

1 Mike -- Mark Nickel. Is he testifying?

2 MR. PHILLIPS: If there is time, he will.

3 THE COURT: If there's time. I'm going to receive  
4 Exhibit 38. 38 is received.

5 39 and 40, those are not objected to. The 39 and 40,  
6 that's R-39, R-40, they are received.

7 That brings us to the payment ledgers. I have no  
8 idea of what R-41 through and including R-49 are. Are you  
9 continuing to offer those exhibits, Mr. Phillips?

10 MR. PHILLIPS: Yes, Your Honor.

11 Those are documents obtained by the Bureau of  
12 Criminal Investigation in the execution of a search warrant.

13 THE COURT: All right. Well, I want to think about  
14 those. Maybe we'll get some framed -- a moment to argue. I'm  
15 going to allow Mr. Greim to tell me why those should not be  
16 received. We'll have a few minutes once we get done.

17 All right. I wanted to give some guidance. When I  
18 was sitting in your spot, I wanted a judge to at least make a  
19 statement and rule. And if I rule, at least you have something  
20 and you can tell the Supreme Court right or wrong.

21 All right. We're back with the Secretary. And like  
22 I say, we're burning time here. Each party's burned up  
23 about 40 minutes of the time I gave to you. So, Mr. Greim,  
24 you're back at it with the Secretary at 11:07.

25 BY MR. GREIM:

1 Q. Secretary Jaeger, I want to end up with you talking  
2 about the cure or the correction period. Correction period, I  
3 think, is the phrase that you use here.

4 Do you recall -- let's pull up Exhibit 12. Do you recall,  
5 Secretary Jaeger, receiving a letter from me on behalf of the  
6 committee on April 11th regarding the correction and amendment  
7 of certain issues raised by your office?

8 A. Sure. I responded to it.

9 Q. All right. And do you recall that Exhibit 12  
10 attached an affidavit of Chloe Lloyd and an affidavit of Zeph  
11 Toe?

12 A. Yes.

13 Q. Okay. Let's turn, now, let's flip. We don't need to  
14 linger on this one. Let's flip to Exhibit 17. Do you  
15 recognize this, sir? In fact, that there's a -- you do have a  
16 binder in front of you, Secretary Jaeger, which has Exhibit 17  
17 if you'd prefer to see it that way.

18 A. Would you direct me as to which one of the many tabs  
19 I'm supposed to look at.

20 Q. There should be a tab labeled Exhibit 17, Secretary  
21 Jaeger.

22 A. I have it.

23 Q. Are you there?

24 A. Yes, I do.

25 Q. Okay. And you'll see it's three pages. His

1 notarization and signatures on the last page, Exhibit 3.

2 THE COURT: Question.

3 A. Yes.

4 Q. All right. And do you recognize this document?

5 A. Yes.

6 Q. All right. Did you review it?

7 A. Yes.

8 Q. All right. Now, earlier you testified that the  
9 committee did not really attempt to correct its petition,  
10 instead they simply argued your decision. Do you recall that  
11 testimony?

12 A. Yes.

13 Q. And is it true that you don't view the affidavit of  
14 Zeph Toe as a correction?

15 A. No.

16 Q. Okay. So we established earlier that you did not  
17 attempt to contact him.

18 A. No.

19 Q. Let me take you to a few of his statements. I just  
20 want to ask you, you'll see in Paragraph 8, we're on Page 1,  
21 again, of Exhibit 17, Petitioner 17. He says, each time a  
22 petition circulator appeared before me, I require them to  
23 identify themselves in accordance with, and then he cites the  
24 law regarding identifications. Do you see that?

25 A. Yes, I do.



1 Q. Did you consider that statement in making your  
2 decision?

3 A. No.

4 Q. Why not?

5 A. Because it was inaccurate because the signatures  
6 varied too much among the various petitions; so I can't believe  
7 it.

8 Q. Okay. And then in Paragraph 9 he said, if I was  
9 unable to substantiate the identification of the petition  
10 circulator, I refused to notarize their petition packet. Do  
11 you see that?

12 A. Yes.

13 Q. And did you consider that in making your decision?

14 A. No.

15 Q. Did you consider contacting Mr. Toe after you  
16 received this affidavit to ask him about his statements?

17 A. No.

18 Q. Okay. So you assumed the statements in the affidavit  
19 were false?

20 A. Compared to what I saw on the affidavits that are  
21 part of my testimony, my affidavit --

22 Q. Okay.

23 A. -- it doesn't jive. It doesn't match.

24 Q. Paragraph 10 he says, once the necessary information  
25 was filled out, I then witnessed each petition circulator sign

1 the respective packet. Again, did not consider that?

2 A. No. Because it didn't match what was on the  
3 affidavits.

4 Q. And then in 19, I'll just skip to the end, he said --  
5 well, I won't go quite that far. Let's go to Paragraph 12. He  
6 says, I've had the opportunity to review the log I keep as a  
7 record of the notarial acts I performed. Do you see that?

8 A. Yes, I do.

9 Q. Okay. Do you recall receiving pages from the log of  
10 Mr. Toe --

11 A. Yeah. There was a --

12 Q. -- for both Ramona Morris and Chloe Lloyd?

13 A. There was some snippets. Yes.

14 Q. Okay. But you received pages from the log that  
15 covered all of the petition pages he did for those two;  
16 correct?

17 A. I don't recall specifically about that.

18 Q. Did anyone review the log and compare them to the  
19 notarizations?

20 A. Not to my knowledge, and I didn't.

21 Q. Okay. So you're not sure if your office actually  
22 reviewed the log regarding Mr. Toe and compared them to the  
23 notarizations?

24 A. At this particular time in reviewing his affidavit  
25 and the discrepancies, it just didn't seem to make -- matter.

1 I mean --

2 Q. And then in Paragraph 19 he says, I hereby reaffirm  
3 that the circulators whose signatures are affixed on the  
4 petition packets, which I notarized, did appear before me in  
5 person, identified themselves in accordance with the law, and  
6 that I witnessed them sign the petition packet before  
7 notarizing the same. Do you see that?

8 A. Yes, I do.

9 Q. And, again, you consider that to be a false  
10 statement?

11 A. Well, all I know is that on 40, 50 different  
12 affidavits, he said that somebody appeared in front of him  
13 where the signatures didn't match, and now I'm supposed to  
14 believe his affidavit that he did everything correctly. It  
15 doesn't match.

16 Q. So was there anything Zeph Toe could've told you to  
17 make you change your mind based on your handwriting review?

18 A. I doubt it.

19 Q. Let me now take you to Exhibit 19. This is the  
20 affidavit of Chloe Lloyd. I'll give you a second. You can,  
21 once again, if you wish, turn in the binder. It's only a few  
22 exhibits after 17.

23 A. Which exhibit number is it again?

24 Q. It's 19.

25 A. Okay.

1 Q. And you'll see it, again, this is about a three-page  
2 affidavit and it attaches every single signature page,  
3 affidavit page, that Chloe Lloyd did with Zeph Toe, or at least  
4 purports to do so; correct?

5 A. That's what she says. Yes.

6 Q. Okay. And did your office review this to determine  
7 whether that was true or not?

8 A. We've reviewed it and didn't consider it.

9 Q. And did you not consider the Chloe Lloyd affidavit  
10 for the same reasons you did not consider the Zeph Toe  
11 affidavit?

12 A. That's correct.

13 Q. Well, let me ask you --

14 A. And it was notarized in California, I noticed.

15 Q. Right. Do you view that as an invalid statement  
16 then? Or is it -- or do you give it any less evidence --  
17 evidentiary credibility because it was notarized in California?

18 A. No. I just thought it was odd since she was  
19 supposedly a qualified elector in North Dakota and this  
20 affidavit happened to be notarized in California, so.

21 Q. Did it cause you to doubt the veracity of her  
22 statements?

23 A. No. Because, again, the signatures varied, and it  
24 didn't make any difference what she said because the signatures  
25 on the affidavits varied.

1 Q. Well, let me ask you, looking at Page 2 of her  
2 affidavit, you'll see she actually wrote and printed her name,  
3 and put our address down there, and her -- even her phone  
4 number. Do you see that?

5 A. Yes.

6 Q. So you've offered many opinions today about which  
7 signatures of Chloe Lloyd are correct and which are not. And I  
8 just want to ask you, do you, sitting here today, believe -- or  
9 do you contest that this is the true signature of Chloe Lloyd?

10 A. That's what's on the affidavit.

11 Q. All right. I understand it's on the affidavit,  
12 Secretary Jaeger. But because you've offered your opinion on  
13 her other signatures, I'm now showing you a signature from  
14 April 14th, and my question is, do you believe this to be her  
15 correct signature or do you believe it's an imposter or forger?

16 MR. PHILLIPS: Objection. Lack of foundation.

17 Previous --

18 THE COURT: Sustained.

19 BY MR. GREIM:

20 Q. When you received this affidavit, did you consider  
21 this to be an affidavit from Chloe Lloyd?

22 A. Yes.

23 Q. And you'll see at the very end on Paragraph 12 it  
24 says, I, Chloe Lloyd, was a qualified elector at the time I  
25 collected the petitions attached to this affidavit. At the

1 time I collected the attached petitions I resided at 694 Palm  
2 Beach Road, Dickinson, North Dakota 58601. Do you see that  
3 paragraph?

4 A. Yes.

5 Q. And then if you look at the following sentences, I  
6 won't read them all to save time, but that is the same thing  
7 that a circulator swears out on the affidavit page of a  
8 petition; correct?

9 A. Appears to be.

10 Q. All right. And you did not view this as a correction  
11 due to any flaws that were in her earlier petition pages?

12 A. No.

13 Q. What if an imposter -- well, I won't ask a  
14 hypothetical. That seems to not -- but -- so did you view  
15 Paragraph 12 as a false statement?

16 A. Most of that is repeat on what's on the affidavit. I  
17 can't say that that's false.

18 Q. All right. Well, I mean, if it were -- if Chloe  
19 Lloyd appeared to you and said, it is true. It was I who  
20 actually witnessed all of these signatures. And I can tell you  
21 the things that are on the affidavit, on the petition pages --

22 A. The affidavit is not the --

23 MR. PHILLIPS: Objection. Calls for speculation.

24 THE WITNESS: -- individual affidavits --

25 MR. PHILLIPS: Objection.

1 THE WITNESS: -- attached to the petitions.

2 BY MR. GREIM:

3 Q. Right. But if you look, you'll see the first  
4 sentence -- you know, I'm sorry. I kept talking.

5 There was an objection.

6 THE COURT: Agree. Yeah. You probably should wait.  
7 It's kind of my job to rule on objections, and I like to do  
8 that because that's the only time I get to speak.

9 Mr. Phillips, we got an answer. Your objection  
10 still stand?

11 MR. PHILLIPS: Yes, Your Honor.

12 THE COURT: What's the objection?

13 MR. PHILLIPS: Calls for speculation.

14 THE COURT: Yeah, it is speculative. I'm going to  
15 sustain that objection.

16 Let's frame a question, and then if there's an  
17 objection, please wait.

18 BY MR. GREIM:

19 Q. Let's go to -- after the zip code, there's a  
20 statement, and it says, each signature contained on the  
21 attached petitions was executed in my presence. And I'll stop  
22 there for a moment. Do you see that?

23 A. Yes.

24 Q. Okay. And then she has, in fact, attached the notary  
25 pages from every one of her petitions, or purports to have done

1 so; correct?

2 A. Yes.

3 Q. Okay. Then she goes on and says, and to the best of  
4 my knowledge and belief each individual whose signature appears  
5 on the attached petitions was a qualified elector at the time  
6 they signed the petition. Did I read that correctly?

7 A. Yes.

8 Q. Okay. And then finally it says, and each signature  
9 contained on the attached petitions is the genuine signature of  
10 the individual whose name it purports to be. Did I read that  
11 correctly?

12 A. Please repeat your question. I'm not following you.

13 Q. Sure. And each signature contained on the attached  
14 petitions is the genuine signature of the individual whose name  
15 it purports to be. Did I read that correctly?

16 A. Are you talking about Chloe? Is it her signature?

17 Q. I'm reading -- no. I'm reading to you from  
18 Paragraph 12, Secretary Jaeger. I'm asking you whether I'm  
19 reading that correctly, and then I'm going to ask you a  
20 follow-up question.

21 A. What you're asking is on the affidavit.

22 Q. Okay. That --

23 A. And I don't --

24 Q. -- answers my question.

25 THE COURT: He's just asked a question.



1 THE WITNESS: I don't know how to expand it.

2 THE COURT: He's got an exhibit, he's reading it to  
3 you.

4 THE WITNESS: Yeah.

5 THE COURT: Is his reading correct? He's only -- he  
6 only -- he's going to --

7 THE WITNESS: Yeah.

8 THE COURT: -- ask you a final question whether you  
9 accept it, but you read it. He's read it correctly?

10 THE WITNESS: Yeah.

11 THE COURT: This is a waste of time. Now, the  
12 question. Let's get to the question.

13 BY MR. GREIM:

14 Q. Okay. Well, and the question is, did you believe  
15 these statements that she made to you?

16 A. No. Not on -- based on my initial review of all of  
17 the affidavits.

18 Q. What would've it have taken from Chloe Lloyd for you  
19 to believe that she was the circulator who circulated the  
20 petitions that were submitted under her name?

21 MR. PHILLIPS: Objection. Calls for speculation.

22 THE COURT: Sustained.

23 BY MR. GREIM:

24 Q. In your view, was there any way to correct the Chloe  
25 Lloyd affidavits?

1 MR. PHILLIPS: Same objection.

2 THE COURT: The same ruling. Sustained.

3 BY MR. GREIM:

4 Q. Okay. I guess I just want to make clear, then, this  
5 is my final question. Your decision to strike the 15,740  
6 signatures that your office otherwise did not object to on  
7 petitions notarized by Zeph Toe was based on your handwriting  
8 comparison of the circulators; correct?

9 MR. PHILLIPS: Objection. Compound. I'm not sure I  
10 understood the question.

11 THE COURT: It's a compound question.

12 Do you understand his question?

13 THE WITNESS: No.

14 THE COURT: Then you got to ask it again. The  
15 witness doesn't understand.

16 MR. GREIM: Okay.

17 THE COURT: I don't either.

18 BY MR. GREIM:

19 Q. All right. Secretary Jaeger, you rejected 15,740  
20 signatures on petitions that were notarized by Zeph Toe;  
21 correct?

22 A. Yes.

23 Q. All right. And you had no other objection to  
24 the 15,740 signatures other than the fact that Zeph Toe  
25 notarized them, notarized the affidavits of the circulators;

1 correct?

2 A. There were a lot of things found on those particular  
3 petitions that -- where signatures would've been eliminated;  
4 however, it was decided to take them out of the total  
5 calculation. And so the fact is is that Mr. Toe committed  
6 unlawful acts in my opinion, numerous times. And because of  
7 that, that tainted the entire collection of what he did.

8 MR. GREIM: Your Honor, move to strike as  
9 nonresponsive. That wasn't the question.

10 MR. PHILLIPS: I believe it was responsive, Your  
11 Honor.

12 THE COURT: Pardon me?

13 MR. PHILLIPS: I believe it was responsive, Your  
14 Honor.

15 THE COURT: The answer stands.

16 BY MR. GREIM:

17 Q. Do you have any objection to Mr. Toe's notarial act  
18 other than based on your review of the handwriting of the  
19 circulators?

20 MR. PHILLIPS: Objection. Asked and answered  
21 throughout the testimony.

22 THE COURT: Well, he's asking global questions.

23 THE WITNESS: Well --

24 THE COURT: And he's asking for platform response.  
25 So if the Secretary has an answer, he can give it.

1           THE WITNESS: Well, in this particular case, we have  
2 numerous unlawful acts where I believe the notary was -- did  
3 not witness the signature of the circulator. I have  
4 commissioned notaries for 30 years. I have treated all of the  
5 several hundred settlement agreements that have been run  
6 through the Attorney General's Office where individual notaries  
7 have made a mistake. This is the first time that I have been  
8 faced with one notary in one set of such situation of all of  
9 these petitions that did numerous unlawful acts on the  
10 petitions.

11           In this particular case, the notary violated his oath  
12 of office. How can I believe that the rest were good? How can  
13 we believe that if he was dishonest with these, that the rest  
14 of them are credible? So it strikes at the credibility of the  
15 notary, and that is why I did not accept all of his petitions.

16           MR. GREIM: All right. We'll leave it there. No  
17 further questions.

18           THE COURT: Anything more?

19           MR. PHILLIPS: No further questions.

20           THE COURT: Mr. Secretary, you can step down.

21           I would note for the record, that where we're at is,  
22 Mr. Phillips, you've asked about 38 minutes of -- taken, 38  
23 minutes of time to ask questions. And, Mr. Greim, you're  
24 at 55; so you got about five minutes left. I think, maybe, by  
25 accepting a lot of the affidavits we've taken care of a lot of

1 the time that you might have used. But we got a little time to  
2 call the next witness.

3 So, Mr. Secretary, you can -- take your water bottle.  
4 We're not -- we don't provide water at the Burleigh County  
5 Courthouse.

6 THE WITNESS: I noticed that.

7 THE COURT: I know. You had to go buy it. I get it.  
8 Well, we're very frugal with the people's money.

9 Do you have a witness, Mr. Phillips?

10 MR. PHILLIPS: Yes, Your Honor. I call Lee Ann  
11 Oliver.

12 THE COURT: Is she in the hallway someplace?

13 Mr. Sagsveen's done bailiff duties before, he can go  
14 find her.

15 Ms. Oliver, come on up. Ms. Oliver, you're going to  
16 approach my court reporter, and she's going to swear you in.

17 MS. OLIVER: In front here?

18 THE COURT: Right there.

19 LEE ANN OLIVER,  
20 called as a witness, being first duly sworn, was examined and  
21 testified as follows:

22 THE COURT: Ms. Oliver, you can take the witness  
23 stand right there. This is our brand new courtroom, 100.  
24 We're doing a lot of changes here, and my big problem is  
25 worrying about if I can remember the code to get out of the

1 courtroom. That's always difficult sometimes.

2 Would you state your name for the record, please.

3 THE WITNESS: Lee Ann Oliver.

4 THE COURT: All right. I'm going to ask you to, you  
5 know, I always say, my wife's a librarian, use your librarian  
6 voice. Yell.

7 THE WITNESS: Okay.

8 THE COURT: Project to these lawyers. They want to  
9 hear you. Mr. Phillips has got some questions. Mr. Greim, the  
10 gentleman, my right, your right, is going to ask some  
11 questions, too.

12 Please proceed.

13 MR. PHILLIPS: Thank you, Your Honor.

14 THE COURT: Frame it in the time limits you got.

15 MR. PHILLIPS: Thank you.

16 DIRECT EXAMINATION

17 BY MR. PHILLIPS:

18 Q. Ms. Oliver, you flew in from your vacation in Florida  
19 today?

20 A. Yes, I did.

21 Q. And you're flying back later today.

22 A. Yes, I am.

23 Q. Thank you for being here.

24 Are you employed by the Secretary of State's Office?

25 A. Yes.

1 Q. And what is your position there?

2 A. I'm an election specialist.

3 Q. And how long have you held that position?

4 A. Thirty-three years.

5 Q. Is it part of your duties to review initiated measure  
6 petitions?

7 A. Yes, it is.

8 Q. Is the process by which measures are placed on the  
9 statewide ballot contained in century code and the  
10 constitution?

11 A. Yes, it is.

12 Q. And has the Secretary of State's Office compiled a  
13 publication that describes the process in detail?

14 A. Yes. We have a how to initiate law in North Dakota.

15 Q. I'm just going to show Exhibit 2. And is this the  
16 publication the Secretary of State's Office puts out?

17 A. Yes, it is.

18 Q. If a member of the public, or the judge, or anyone  
19 else wanted to get the basics of the process, is it contained  
20 within this publication?

21 A. Yes, it is.

22 Q. Have you submitted an affidavit in this case?

23 A. I have.

24 Q. And for the record, that is marked as R-1. Are the  
25 statements in your affidavit true and accurate to the best of

1 your knowledge and belief?

2 A. Yes.

3 Q. In your affidavit you provide a detailed description  
4 of the processes and criteria that the Secretary of State uses  
5 to review petitions. Let's talk in your testimony today about  
6 the Term Limits Petition in particular. How many days does the  
7 Secretary of State's Office have to review petitions?

8 A. By law, 35.

9 Q. And in this case when did that period end?

10 A. March 22nd, I believe.

11 Q. Is the 35-day limit a product of state law?

12 A. Is it part of state law?

13 Q. Yes.

14 A. Yes.

15 Q. During that 35-day period, after the petitions are  
16 received by the Secretary of State's Office, were you  
17 personally involved in the review of the Term Limits Petition?

18 A. I was.

19 Q. Were any other staff members of the Secretary's  
20 office involved?

21 A. Two others.

22 Q. Who were they?

23 A. They were Ophelia Baumgartner and Brian Nybakken.

24 Q. Maybe just explain to the Court, generally, what you  
25 do when you review petitions at the Secretary of State's



1 Office.

2 A. Initially, the overall -- when they come in, we count  
3 them. We give each petition a number. And then we just make  
4 sure that they're what we call it, in their entirety. That  
5 they have your sponsoring committee, the language, where the  
6 petition -- where they signed, and the affidavit on the back.

7 Q. And then after they're counted, do you do a thorough  
8 review of everything on them?

9 A. Yes. We go through them again. We count every  
10 signature, initially, to make sure that they do have enough  
11 according to code before we start scrutinizing. And then after  
12 that we go through them again line by line and look for what  
13 the law requires them to have.

14 Q. So when you say, you go "line by line," do you review  
15 every single signature on a petition?

16 A. Yes, we do.

17 Q. In this case, over 46,000?

18 A. Yes.

19 Q. And you review every circulator affidavit?

20 A. Yes.

21 Q. And everything else that's within the petition?

22 A. Uh-huh.

23 Q. And including the notary stamp?

24 A. Yes.

25 Q. What are the -- it's contained within your affidavit,

1 what are some of the things that you're looking for on those  
2 petitions?

3 A. When we -- when I look at a petition, what we make  
4 sure is that it's, like I said, in its entirety. That we have  
5 all the sponsoring committees, all the pages of the wording of  
6 the petition, and the affidavit and the back.

7 When we go through and scrutinize we look for dates on the  
8 names, they can't be before the petition was okayed by our  
9 office, and the dates cannot be after the date that the  
10 petition was notarized. We look for printed names, signatures,  
11 complete addresses, the city, state, zip. We make sure that  
12 the circulator and the notary are not husband and wife. We  
13 make sure that the circulator and the notary have not signed  
14 that particular petition. We make sure that the circulator put  
15 their complete address on the back. We make sure that the  
16 venue of the notary's filled out, that, you know, there's the  
17 expiration date, the stamp, the signature. We look for if  
18 there are signatures that's very obvious that they signed, you  
19 know, for somebody else. It does happen. A husband and a  
20 wife, and husband says, oh, my wife would sign this or vice  
21 versa. We look for that.

22 Q. And does your affidavit contain a lengthy list of the  
23 various things that you look for?

24 A. Yes, it does.

25 Q. And does that have citations to the relevant laws?

1 A. It does. Uh-huh.

2 Q. How long did the review process take for the Term  
3 Limits Petition?

4 A. It took the entire 35 days.

5 Q. Is that longer than typical?

6 A. What took longer was the actual review of them. We  
7 usually do take 35 days to allow for postcards, that sort of  
8 thing. But the initial part going through did take longer.

9 Q. Your initial full review took the entire --

10 A. Right.

11 Q. -- 35 days?

12 A. Uh-huh. It did.

13 THE COURT: Excuse me, Ms. Oliver. What you got  
14 to -- don't uh-huh --

15 THE WITNESS: Sorry.

16 THE COURT: -- because that's a problem with -- my  
17 court reporter's going to have a real problem dealing with  
18 that.

19 THE WITNESS: Okay. Sounds good.

20 THE COURT: I appreciate it.

21 THE WITNESS: You bet.

22 BY MR. PHILLIPS:

23 Q. And why did the review take so long?

24 A. Well, there were over 8,000 more signatures. And  
25 also when we were looking through them, or when I was looking

1 through them, there was just more, I call them red flags that  
2 were popping up. So it just takes longer to go into each  
3 petition and look at that, you know. There was just more  
4 things that were popping up.

5 Q. The process and criteria for reviewing petitions that  
6 you've talked about today and that appear on your affidavit, is  
7 that the same process that's been applied for the last 30 years  
8 that the Secretary has been in office?

9 A. It's the same process. The only difference since  
10 I've been there was when the law was changed where it would  
11 require the printed name as well as the signature name. That's  
12 the only difference.

13 Q. And to be clear, you've been there even longer than  
14 Secretary Jaeger?

15 A. Yes.

16 Q. After you and the other staff members go through the  
17 petitions and signatures to determine validity, do you enter  
18 data into a database?

19 A. Yes. When we number the petitions, this is another  
20 reason why we do that, is so that we can go back and pinpoint  
21 the exact petition that a signer signed on. So, yes, we do.  
22 We go through, and if we say Petition No. 1, and these  
23 signature names are not counted because of this reason, that  
24 worksheet shows why we did not count them.

25 Q. I'm going to show you what's been marked as

1 Exhibit 5. What is this document?

2 A. That's a document that is produced so we are able to  
3 say what petition number, which signature line on that  
4 petition, why it was thrown out.

5 MR. PHILLIPS: And my apologies, Your Honor.  
6 It's R-5.

7 Q. There are a number of columns on this chart. What do  
8 those columns generally represent?

9 A. What they -- well, so that you can tell -- like, if  
10 one says inadequate signature that's because it was not printed  
11 or it was not signed. It was not complete.

12 So up on the top, blank addresses, it, kind of, it  
13 was blank, there was no address there. They maybe put in their  
14 phone number instead of their address.

15 Q. Shows you the reason it was --

16 A. The reason why it was thrown out. Yes.

17 Q. The -- does this reflect all the reasons that a  
18 particular signature might be thrown out?

19 A. Yes.

20 Q. Is there -- could there be multiple reasons and only  
21 one of them show up on this?

22 A. Oh, yeah.

23 Like, for example, if there's a signature line that they  
24 did not print their name, but then they also on their address  
25 to not have a complete address, it's only going to show up one

1 of those reasons because if we put down two, the numbers are  
2 not going to work. It's going to look like we threw out more  
3 than what we did.

4 Q. There's a column on this exhibit, it's called  
5 signatures before approval date. Do you see that?

6 A. Uh-huh.

7 Q. What is that column normally used for?

8 A. That's usually what is -- usually it's going to show  
9 is if there were signatures that were collected before our  
10 office okayed the measure to circulate.

11 Q. Is that what the column was used for with the Term  
12 Limits Petition?

13 A. No. We used that column -- it was blank. There were  
14 no signatures that were accepted or gotten before the approval  
15 date. So we needed a column, and what we decided to use that  
16 column for was to keep track of all the signatures that weren't  
17 counted because the circulators who collected those were paid  
18 bonuses. So we used that column for that because it was blank  
19 otherwise.

20 Q. That'd be the ones that were hired by Charles Tuttle?

21 A. By Charles Tuttle; correct.

22 Q. So the heading of the categories is mislabeled --

23 A. Yes.

24 Q. -- for that reason?

25 A. Yes.

1 Q. Was there any way to reflect the real reason in the  
2 data that's shown on this chart? In other words, can you  
3 change the titles in the columns?

4 A. Our system doesn't do that right now.

5 Q. Were the Zeph Toe petitions that were invalidated by  
6 the Secretary's decision, are those reflected in this exhibit?

7 A. No, not on this one.

8 Q. Are they reflected on a different summary?

9 A. They are reflected on a single page summary.

10 Q. I'm going to show you Exhibit R-21 and Page 2 of that  
11 exhibit. Is this a summary that was given to the sponsoring  
12 committee?

13 A. Yes.

14 Q. And what's shown on this summary, generally?

15 A. The notary error one, right now that's where the Zeph  
16 Toe numbers show up.

17 Q. Okay. Generally, does it give a breakdown of the  
18 various --

19 A. Yes.

20 Q. -- petitions that were either valid or invalid?

21 A. Uh-huh.

22 Q. And did you just say -- is it your testimony that the  
23 Zeph Toe petitions that were invalidated by the Secretary's  
24 decision are contained on the line that says notary errors?

25 A. Correct.

1 Q. How many of those 15,777 shown on that line are a  
2 result of the decision with respect to Zeph Toe?

3 A. I don't know the exact number, but I know it was,  
4 like, over 15,000.

5 Q. Does 15,740-something --

6 A. 700-something.

7 Q. -- sound right?

8 A. Yes.

9 THE COURT: You have about two minutes, Mr. Phillips,  
10 to clean it up.

11 BY MR. PHILLIPS:

12 Q. Whose decision was it to eliminate all of the  
13 petitions where Zeph Toe notarized them?

14 A. The Secretary of State.

15 Q. Whose decision was it to not count the paper  
16 signature affidavits?

17 A. Also, the Secretary of State.

18 Q. Did you find a number of errors or reasons to  
19 invalidate petitions in this case?

20 A. Yeah. That's what I felt was wrong or invalid, then  
21 that's when I would take them to the Secretary of State.

22 Q. Did you find anything concerning within the petitions  
23 based on your review?

24 A. Yes. The -- just from -- all the petitions that I've  
25 ever looked at, there's -- when I was going through them there



1 was cause for concern on a number of the circulator affidavits.  
2 They did not look correct me.

3 Q. Did you take your concerns to the Secretary of State  
4 himself?

5 A. That's when I did; correct.

6 MR. PHILLIPS: It appears I'm out of time.

7 THE COURT: That's it.

8 MR. PHILLIPS: Thank you.

9 THE COURT: Good job. Thank you.

10 Mr. Greim, you got about five minutes. Go ahead.

11 CROSS-EXAMINATION

12 BY MR. GREIM:

13 Q. If we can pull up Petitioner's Exhibit 9, please.  
14 And you can find that in your binder to save time there,  
15 Ms. Oliver. Sorry.

16 THE COURT: Which number? Nine?

17 MR. GREIM: Yes. Petitioner's 9.

18 THE COURT: Thank you.

19 BY MR. GREIM:

20 Q. And you'll see it's a very large spreadsheet, not  
21 quite as large as Exhibit, Respondent's 5, but pretty long;  
22 correct?

23 A. Correct.

24 Q. And do you recognize this as a separate spreadsheet  
25 like Respondent's 5, but covering the Zeph Toe petitions?

1 A. Can you say that again.

2 Q. Sure. Do you recognize this as a spreadsheet like  
3 Respondent's Exhibit 5, but instead covering the Zeph Toe  
4 petitions?

5 A. Yes.

6 Q. And if you go with me to Page 39, it's almost at the  
7 very back, the last line of data. And while you flip back, you  
8 may want to keep a finger back on Page 1 so you can see what  
9 the columns are.

10 A. I'm at 39. Yep. Got it.

11 Q. Okay. Do you see that the second column in is the  
12 initial signature count, is that right?

13 A. Yes.

14 Q. And so what number do you see there?

15 A. 21,684.

16 Q. What does that indicate to you?

17 A. That would be all the signatures on every petition no  
18 matter how the signatures looked.

19 Q. Right. For Zeph Toe; correct?

20 A. Right.

21 Q. And then if you look at the third to last column, do  
22 you see the number of 15,740?

23 A. Yes.

24 Q. And what does that represent?

25 A. That -- the valid signatures.

1 Q. In other words, those are the signatures appearing on  
2 Zeph Toe notarized petitions that -- to which there is no  
3 objection other than the Zeph Toe notarization; correct?

4 A. Correct.

5 MR. PHILLIPS: Objection.

6 MR. GREIM: Okay.

7 MR. PHILLIPS: She wouldn't have foundation for that.  
8 That'd be a decision of the Secretary of State.

9 THE WITNESS: Well --

10 THE COURT: I understood the question, and I'm going  
11 to leave the answer where it is. I know contextually what the  
12 question was and the answer received was; so it'll stay.

13 BY MR. GREIM:

14 Q. Ms. Oliver, I'm going to make sure. Are you aware of  
15 anyone in the Secretary's office trying to contact either  
16 Ms. Chloe Lloyd, Ms. Ramona Morris, or Mr. Zeph Toe to ask them  
17 about their work on this petition?

18 A. From our office?

19 Q. Yes.

20 A. I'm not aware of that, no.

21 Q. Do you remember reviewing the affidavits from Chloe  
22 Lloyd and Zeph Toe that were submitted during the correction  
23 period?

24 A. We -- I looked at all of them; so I -- yes, I have.

25 Q. All right. And did you make any determination

1 yourself as to whether the statements in the Chloe Lloyd or the  
2 Zeph Toe affidavits were truthful?

3 A. No.

4 Can I back up. I didn't look at their affidavits. I just  
5 strictly looked at the affidavits, the circulator affidavits.  
6 I'm sorry. I messed up on the affidavits. The circulator  
7 affidavit just on the petitions. And if I thought there was  
8 red flags there, that's when they were taken to the Secretary  
9 of State's Office or Secretary of State.

10 Q. Finally, I want to take you to Exhibit 16, if we can  
11 squeeze it in.

12 THE COURT: Sure. Go ahead.

13 Q. This is Petitioner's Exhibit 16.

14 A. Uh-huh.

15 Q. And you'll see this is entitled a summary sheet  
16 provided by Secretary regarding Circulator Chloe Lloyd.

17 A. Yes.

18 Q. And you'll see that the first page includes some  
19 notes, and then following are several, sort of, example pages  
20 for Chloe Lloyd; correct?

21 A. Correct.

22 Q. Do you know who compiled this document?

23 A. I'm sure I did.

24 Q. Okay. Are those your notes on the first page?

25 A. Yes.

1 Q. Okay. And so you indicate a couple of things that  
2 you've seen. Are these things you reported to the Secretary of  
3 State?

4 A. Yes.

5 Q. And in the second paragraph do you see where you say,  
6 when was this additional city, state, zip added?

7 A. Correct.

8 Q. If it was at the time of notarization or before  
9 notarization, that is okay. And then you go on, but let me  
10 stop with your first part of the sentence there. What did you  
11 mean by, "that is okay"?

12 A. Well, being a notary myself I know when you're  
13 notarizing a document, you notarize it, nothing can be added to  
14 it. And so if something was added after the notary took place,  
15 it wouldn't be, it shouldn't be counted.

16 Q. But if it was there before, as you said, that is  
17 okay?

18 A. That was my -- when I wrote this, that's my question.  
19 I'm typing up questions, and that's what I would ask the  
20 Secretary of State is if it was there before the notarization,  
21 but someone else wrote it in there, do you think that's okay?  
22 That would be my question. It was raised to the Secretary of  
23 State.

24 Q. Sure. Then you continue and say, but if it was found  
25 out that it was added once the notarization took place, that is

1 a notary violation; right?

2 A. That's my understanding, yes.

3 Q. Now, when you say, "that is a notary violation," are  
4 you -- do you mean it's a violation by the notary? It's some  
5 wrongful act by the notary?

6 A. Yes.

7 Q. Okay. What if it was added outside the presence of  
8 the notary by somebody else who had possession of the petition  
9 pages, would it still be a violation by the notary?

10 MR. PHILLIPS: Objection. Calls for speculation.

11 THE COURT: I'm going to allow the answer if you have  
12 an answer.

13 THE WITNESS: I don't.

14 I would just know if it was added after the notary  
15 takes place, that ruins that page; therefore, it ruins the  
16 petition. That's my understanding.

17 MR. GREIM: Okay.

18 THE COURT: Mr. Greim, last question.

19 MR. GREIM: No further questions.

20 THE COURT: Thank you.

21 You may step down, Ms. Oliver. I understand you're  
22 traveling. At least I heard something to that effect. You can  
23 step down and leave and head out. Leave the exhibits.

24 For the record, we've reached a point where I believe  
25 that I've been pretty generous in a timeline. I've kept track

1 of things. Parties of each absorbed 60 minutes of time to put  
2 their case in and -- before the Court.

3 I have admitted a number of exhibits that include  
4 affidavits; so I do have affidavit testimony that I'm going to  
5 have to review at this point. What is left for the record, is  
6 if we could both turn -- or all three sides turn to  
7 Exhibits R-41 through and including R-49. I don't know what  
8 they are. I haven't had a chance to look at them, but I have  
9 to figure out what to do with them. So, Mr. Phillips, give me  
10 your two-minute basis for me receiving them.

11 MR. PHILLIPS: These are documents that were obtained  
12 in a search warrant related to the Charles Tuttle paper  
13 signature issue.

14 THE COURT: So why should I receive them?

15 MR. PHILLIPS: They -- under the statute, signatures  
16 that are obtained in violation of the statute are void as a  
17 matter of law and shall not be counted. Your Honor, I would  
18 argue that the, you know, if the signatures are void, that's a  
19 relevant issue for this Court. I'll point out that, you know,  
20 if -- I will tell you, because you may have to question, that  
21 these were obtained after the Secretary's initial --

22 THE COURT: That's not a question.

23 MR. PHILLIPS: -- decision.

24 THE COURT: That's the fact, isn't it?

25 MR. PHILLIPS: That is a fact, Your Honor.

1           I would say; however, that whether or not these  
2 signatures were properly excluded is an issue in this case. I  
3 would say that if there was exonerating evidence that came out  
4 after the Secretary's decision to determine that as a matter of  
5 law these are, in fact, not void, petitioner would certainly  
6 wish to introduce that and the Court should hear it so that it  
7 doesn't make an erroneous decision ultimately on the --

8           THE COURT: So let me get this straight.

9           MR. PHILLIPS: -- validity of the signatures.

10          THE COURT: A search warrant was issued by a judicial  
11 officer. The search warrant was served. And upon a return,  
12 there's a summary required under statute, the summary recorded  
13 that Exhibits R-41 through and including R-49 were recovered as  
14 a product of that search, is that correct?

15          MR. PHILLIPS: Correct.

16          THE COURT: That's the return that was made to the  
17 judicial officer?

18          MR. PHILLIPS: Correct.

19          THE COURT: That's the judge up in Minot?

20          MR. PHILLIPS: I don't recall who issued it, Your  
21 Honor.

22          THE COURT: All right. Well, you know, I got to  
23 figure out where we're going here.

24          MR. PHILLIPS: Yes.

25          THE COURT: All right. That's your basis.



1           All right. Let me hear Mr. Greim. I don't know if  
2 you want to argue.

3           MR. WALSTAD: If I may.

4           THE COURT: Mr. Walstad, get in here.

5           MR. WALSTAD: Thank you, Your Honor.

6           THE COURT: I'm so glad you woke up on this one. I  
7 need you here.

8           MR. WALSTAD: My witness is -- we've run --

9           THE COURT: Tell me why.

10          MR. WALSTAD: -- out of time.

11          So, Your Honor, first to dovetail on the State's  
12 point. You know, their argument being that these signatures  
13 are -- that signatures obtained in violation of the paper for  
14 signature ban are invalid as a matter of law is an open-ended  
15 question without a time frame. Now, the constitution gives the  
16 Secretary a 35-day review period. That time frame is clear.

17          The warrant that allegedly produced documents is  
18 Respondent's Exhibit 42 through 49 was executed less than eight  
19 days ago. Suppose it was executed in December and this matter  
20 had already been voted --

21          THE COURT: December of 2021?

22          MR. WALSTAD: December after the election, Your  
23 Honor. Suppose that the petitions were approved, the voter --  
24 the electors voted it, then the warrant was executed, would  
25 that still invalid -- would that go back in time? I guess,

1 time framing, that's my question. But the argument -- or the  
2 evidentiary points really are two, Your Honor, and these were  
3 reflected in our written objections, too.

4 First, relevance under 401, 402. And I'm not going  
5 to bore the Court. The case law, and this is McCarney versus  
6 Meier. It's a 1979 case. The details are in that memo, but  
7 the Supreme Court in that case, where the Attorney General had  
8 purported irregularities that were raised after the Secretary's  
9 decision, the Supreme Court said, and I'm quoting. "It has not  
10 been asserted that those irregularities entered into the  
11 Secretary of State's determination that the petitions were  
12 insufficient and the Court did not consider that evidence."  
13 And we think that the same is instructive here and that that  
14 information should be kept out under 402.

15 Additionally, these, both 41, Respondent's 41  
16 through 49, all contain hearsay statements. There's text  
17 messages for which the sender and receiver are not identified  
18 or known with any measure of certainty. There's also  
19 handwritten statements on some alleged time cards that don't  
20 have any author ascribed or even -- that you could even infer  
21 from the documents. So there's hearsay issues.

22 And I might guess that the State might say, well,  
23 those are not hearsay, those are the statements of a party  
24 opponent. But I would argue, Your Honor, that there's no basis  
25 of fact in make a determination under 801(d)(2) that actual

1 ostensible agency existed as to Zeph Toe's -- between Zeph  
2 Toe's employees and -- I'm sorry -- Tuttle's employees and  
3 North Dakota and U.S. Term Limits. Thank you, Your Honor.

4 THE COURT: You have about 30 seconds to respond to  
5 that, Mr. Phillips.

6 MR. PHILLIPS: Your Honor, there's 35 days to review  
7 these petitions. It guts the statute entirely if that is also  
8 the cutoff to ever evaluate the -- whether the signatures are  
9 void as a result of the statute under this framework. The  
10 statute is meaningless and is essentially unenforceable.

11 THE COURT: What I'm going to do, I haven't seen the  
12 documents. I want to look at them. You're talking about  
13 things that have happened within several weeks. I don't know  
14 what happened. I don't have a copy of the search warrant. I  
15 don't have any of that. I have a pretty firm record to suggest  
16 that one of the issues was a pay-per-view -- paid-for-  
17 signature-type disqualification because the Secretary  
18 specifically identified that.

19 I have a pretty firm record that a search warrant was  
20 executed with respect to Mr. Tuttle's home. I don't know  
21 anything about it, but I do know that records were obtained as  
22 a result of that search. And it does go back to one of the  
23 critical issues that is framed. I don't know if that's the  
24 batch of signatures that would either make or break the number  
25 for placing it on a ballot, but I got to make a determination

1 in this case.

2 MR. PHILLIPS: Your Honor, if I may provide some  
3 additional information for you.

4 THE COURT: Well, are you going to say things that he  
5 doesn't know? I mean, you know, I'm sitting there -- he's put  
6 at a disadvantage. Mr. Walstad, I'm looking at you. You know,  
7 that's all well and good. I have documents that have been  
8 seized. I have no doubt that the report of the officer who  
9 executed the search warrant produced these documents. I don't  
10 think that's in question. Question is, is how do you respond  
11 to 401, 402 relevance objection? Or Mr. Tuttle was one of the  
12 collectors, if you will, circulators; so how do I -- you know,  
13 is -- but with the party in the case is Jared Hendrix, as  
14 chairman of the Term Limits Sponsoring Committee.

15 MR. PHILLIPS: It's relevant to the validity of the  
16 petitions. Your Honor, the -- I do want to point out that much  
17 of this information is in the BCI officer's, Mark Nickel, his  
18 affidavit that --

19 THE COURT: His affidavit.

20 MR. PHILLIPS: -- that we have submitted.

21 THE COURT: I need to look that.

22 MR. PHILLIPS: I will just point out that I  
23 understand this issue could impact that depending on how the  
24 Court rules. I will point out that his affidavit contains  
25 dates in there, some of those dates do predate the Secretary's

1 decision and some postdate. I'm arguing, Your Honor, that it  
2 is all admissible, but I wanted to point that out for the Court  
3 that that affidavit does include information and things that  
4 happened before the Secretary's decision, and it also explains  
5 that the information was conveyed to the Secretary's office.

6 THE COURT: Mr. Walstad gets the final word.

7 MR. WALSTAD: One word, Your Honor. Secretary Jaeger  
8 testified that he did not rely on this information from BCI in  
9 reaching his determination. I think that the order of the  
10 Supreme Court has issued to this Court and to these parties is  
11 limited to factors bearing on the Secretary's determination to  
12 disqualify signatures in this case. He testified that this did  
13 not bear on that decision.

14 THE COURT: Thank you. I appreciate the comments of  
15 counsel. You've done an outstanding job in terms of the time  
16 limit I gave you, and I realize I'm the one that's putting time  
17 limits on you. I will take it under advisement, but I  
18 guarantee you it can't be under advisement for very long. You  
19 know, one thing about being old, I don't sleep very much; so it  
20 really helps a lot in my ability to get extra time to draft.  
21 That's why I did not ask for proposed findings because I'm  
22 making them myself. I have to do that. I'm trying to do the  
23 best I can to honor the order of the Supreme Court. And I'm  
24 doing in that because the parties need the issue, they need  
25 to -- you need my findings whether you will like them or not.

1 One party may or may not. But I need to get it there so that  
2 you have that opportunity before the Supreme Court on  
3 September 2nd. So I'll guarantee you this is going to be  
4 happening rather quickly.

5 I'm going to decide the issue of Exhibits R-41  
6 through and including 49. I'll mention it in the opinion that  
7 I do. I will be issuing findings and I will issue -- I think,  
8 fairly, I should at least look at the exhibits, and I haven't  
9 seen them. I don't even know what they are. As I said, I'm  
10 familiar enough with the subpoena process; so I know that  
11 summaries have to be done. I don't think there's any contest  
12 as to what they are. I don't think there's any question that  
13 they were received in the process of a search warrant.  
14 Question is, should I receive them and should I review them?  
15 And I will make that determination.

16 So with that, it's 11:56 a.m. I met my objective. I  
17 want -- somebody wants to say something. Mr. Greim?

18 MR. GREIM: Your Honor, two things. One, I've got  
19 the electronic --

20 THE COURT: Oh, good. Terrific.

21 MR. GREIM: But, second, we prepared a PowerPoint.  
22 Obviously, we can't show it. We gave it, a print out, to the  
23 other side. It's available if it would help you at all. It  
24 just summarizes the facts from --

25 MR. PHILLIPS: I would object.

1 MR. GREIM: -- our position.

2 THE COURT: That would be a summary argument, and  
3 that would mean Mr. Phillips would want to give me one as well.

4 And behind that wall, I have my law clerk and my law  
5 clerk is a new mom; so Olivia is there with her. She's only  
6 about two months old. But I'm working her, and I'm under the  
7 gun, and I'm going to work as hard as I possibly can. I owe it  
8 to you fellows and to the parties. I owe it. So I'm not going  
9 to look at any PowerPoint. You're going to have to accept that  
10 I'm going to weigh fairly what we have before us.

11 Now, I've got -- I'm going to keep both sets of the  
12 exhibits, if it's okay, because my court reporter's going to  
13 have a set. I'm going to have a set myself. I have the zip  
14 drive the State's provided. Mr. Greim, you've got that. Give  
15 that to Kim.

16 With that, any other administrative issue?

17 MR. PHILLIPS: Just thank you, Your Honor.

18 THE COURT: Mr. Greim., Mr. Mueller, Mr. Walstad,  
19 Mr. Sagsveen?

20 All right. We're adjourned at 11:58 a.m. I did what  
21 I promised I would do. Thank you.

22 (Adjourned at 11:58 a.m.)

23

24

25

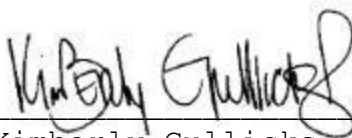
CERTIFICATE OF COURT RECORDER

I, Kimberly Gullicks, a duly certified digital electronic court recorder and transcriber,

DO CERTIFY that I recorded the foregoing proceedings had and made of record at the time and place indicated.

I FURTHER CERTIFY that the foregoing and attached 127 typewritten pages contain a true, accurate, and complete transcript from the electronic sound recording then and there taken.

Dated at Bismarck, North Dakota, this 29th day of August, 2022.



---



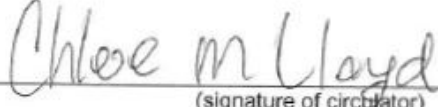
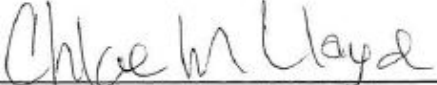
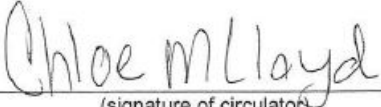

Kimberly Gullicks, AAERT CER, CET  
Official District Court Recorder/Transcriber

THE FOREGOING CERTIFICATION OF THIS TRANSCRIPT DOES NOT APPLY TO THE REPRODUCTION OF THE SAME BY ANY MEANS UNLESS UNDER THE DIRECT CONTROL AND/OR DIRECTION OF THE CERTIFYING COURT RECORDER/TRANSCRIBER.



**Exhibit P41**  
**(Lloyd September 20**  
**Signatures)**

The following signatures were excerpted from Respondent’s exhibit R33 to focus on the Chloe Lloyd signatures submitted on September 20, which the Secretary claims “vary wildly.” R32, ¶16(b).



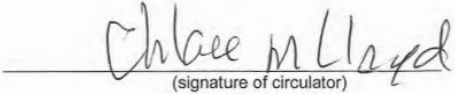
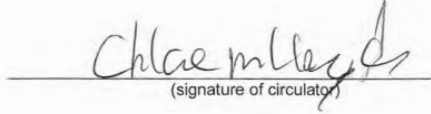
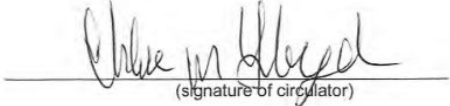
Petition Number	Signature
816	 _____ (signature of circulator)
817	 _____ (signature of circulator)
818	 _____ (signature of circulator)
819	 _____ (signature of circulator)
820	 _____ (signature of circulator)
821	 _____ (signature of circulator)

1382	 <hr/> <p>(signature of circulator)</p>
1401	 <hr/> <p>(signature of circulator)</p>
1404	 <hr/> <p>(signature of circulator)</p>

**Exhibit P42**  
**(Richmond Comparison)**

The following signatures were excerpted from Respondent's exhibit R33 to focus on the signatures which the Secretary claims were notarized by Kevin Richmond and **are all from the same person**. See R32, ¶16(e).

Petition Number	Signature
813	 (signature of circulator)
822	 (signature of circulator)
823	 (signature of circulator)
1380	 (signature of circulator)
1388	 (signature of circulator)
1393	 (signature of circulator)
1400	 (signature of circulator)

1403	 (signature of circulator)
1381	 (signature of circulator)
1396	 (signature of circulator)
1402	 (signature of circulator)
1386	 (signature of circulator)
1389	 (signature of circulator)
1399	 (signature of circulator)
1390	 (signature of circulator)

1395	 <p>(signature of circulator)</p>
811	 <p>(signature of circulator)</p>
1383	 <p>(signature of circulator)</p>
1384	 <p>(signature of circulator)</p>
1387	 <p>(signature of circulator)</p>

**Exhibit P43**  
**(Morris Comparison)**



The following circulator's affidavits were excerpted from Respondent's Exhibit R35 to focus on signatures from Ramona Morris which the Secretary claims were substantially different. See R32, ¶17(b).

State of North Dakota  
County of Cass # 1114  
(county where signed)

I, Ramona Morris (circulator), being sworn, say that I am a qualified elector; that I reside at 2542 Villa De S. Apt 303 Fargo ND 58103 (address);

that each signature contained on the attached petition was executed in my presence; and that to the best of my knowledge and belief each individual whose signature appears on the attached petition is a qualified elector; and that each signature contained on the attached petition is the genuine signature of the individual whose name it purports to be.

Ramona Morris  
(signature of circulator)

Subscribed and sworn to before me on November 8<sup>th</sup>, 2021, at Fargo, North Dakota (city)

(Notary Stamping Device)

Zeph Toe  
Notary Public  
State of North Dakota  
My Commission Expires June 29, 2025

Zeph Toe  
(signature of notarial officer)

State of North Dakota  
County of Cass # 1111  
(county where signed)

I, Ramona Morris (circulator), being sworn, say that I am a qualified elector; that I reside at 2542 Villa Drive #303 Fargo North Dakota 58103 (address);

that each signature contained on the attached petition was executed in my presence; and that to the best of my knowledge and belief each individual whose signature appears on the attached petition is a qualified elector; and that each signature contained on the attached petition is the genuine signature of the individual whose name it purports to be.

Ramona Morris  
(signature of circulator)

Subscribed and sworn to before me on November 11, 2021, at Fargo, North Dakota (city)

(Notary Stamping Device)

Zeph Toe  
Notary Public  
State of North Dakota  
My Commission Expires June 29, 2025

Zeph Toe  
(signature of notarial officer)

State of North Dakota

County of Cass  
(county where signed)

# 1112

I, Ramon MORRIS, being sworn, say that I am a qualified elector; that I reside at  
(circulator)

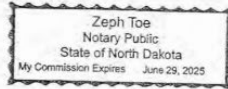
2542 Villa Dr South # 303 Fargo ND 58103  
(address)

that each signature contained on the attached petition was executed in my presence; and that to the best of my knowledge and belief each individual whose signature appears on the attached petition is a qualified elector; and that each signature contained on the attached petition is the genuine signature of the individual whose name it purports to be.

Ramon Morris  
(signature of circulator)

Subscribed and sworn to before me on November 9, 2021, at Fargo, North Dakota  
(city)

(Notary Stamping Device)



Zeph Toe  
(signature of notarial officer)

**Exhibit P45**  
**(Williams Exhibit)**

The following signatures were excerpted from Respondent's exhibit R36 to focus on the signatures which the Secretary claims are **not** from the same person. The Secretary claims that the signatures on 998 and 1005 are "consistent" and that they differ from the signatures on 1006 and 1003. See R32, ¶18(b).

#998

lector; that I reside at  
58324;

nd that to the best of my knowledge and belief each  
at each signature contained on the attached petition is the

Wayne Williams  
(signature of circulator)

#~~1004~~ 1005

lector; that I reside at  
ND 58324

nd that to the best of my knowledge and belief each  
at each signature contained on the attached petition is the

Wayne Williams  
(signature of circulator)

#1006

ed elector; that I reside at  
ND, 58324

e; and that to the best of my knowledge and belief each  
nd that each signature contained on the attached petition is the

Wayne Williams  
(signature of circulator)

#1003

d elector; that I reside at  
D, 58324;

; and that to the best of my knowledge and belief each  
f that each signature contained on the attached petition is the

Wayne Williams  
(signature of circulator)

**Exhibit P46**  
**(Aboah Exhibit)**

The following address lines were excerpted from Respondent's exhibit R34 related to Ritchell Aboah, which the Secretary claims are **not** consistent between the same person.

State of North Dakota  
County of Cass #474  
(county where signed)

I, Ritchell Aboah (circulator), being sworn, say that I am a qualified elector; that I reside at  
2366 55th St S Fargo ND 58104 (address).

State of North Dakota  
County of Cass #425  
(county where signed)

I, Ritchell Aboah (circulator), being sworn, say that I am a qualified elector; that I reside at  
2366 55th St S Fargo ND 58104 (address).

**Exhibit P47**  
**(Petitioners' Objection to**  
**Respondent's Exhibits)**

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

---

Jared Hendrix, as chairman of the North Dakota for Term Limits Sponsoring Committee, and North Dakota for Term Limits,

Petitioners,

vs.

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

Respondent.

---

**SUPREME COURT NO. 20220233**

---

**PETITIONERS' OBJECTIONS TO RESPONDENT'S EXHIBITS**

---

[¶1] The Petitioner, by and through their counsel of record, submits the following objections corresponding with the objections reserved in the simultaneously filed Joint Exhibit List.

[¶2] **R-1, Affidavit of Lee Ann Oliver:** The Petitioner objects to the admission of the Affidavit of Lee Ann Oliver as follows:

- (a) Paragraph 4.j.2: statement of the law that is incorrect: "During the correction period," if the committee disagrees with the Secretary's decisions, it can file a petition with the Supreme Court. In fact, the correction period is for filing a correction with the Secretary, although a committee is not required to take this step before filing a lawsuit.
- (b) Paragraph 14a: reference to "significant violations by Zeph Toe" is a legal conclusion, speculation, and lacks personal knowledge or any other foundation.
- (c) Paragraph 14.b: "only the street address was there," and "it appears someone else" wrote in the city/state/zip; it "does not take a handwriting expert to see" that someone else wrote in part of the address, followed by a citation to law regarding the requirement of notarization: speculation, no personal knowledge or other foundation, and legal argument.



- (d) Paragraph 14.d: signatures were “inadequate:” this is a legal conclusion and argument and is improper.
- (e) Paragraph 15: The entirety of this paragraph is objectionable in that it attributes certain acts to Ramona Morris without any personal knowledge or investigation; it is speculative; it lacks foundation.
- (f) Paragraph 16: Hearsay about a third-party’s statement to “this office” used to try to prove the truth of the matter. Further, there is no foundation and no personal knowledge that Charles Tuttle was “paid more” based on the number of signatures he gathered. This is unsupported speculation.
- (g) Paragraph 25-26: Speculation and lack of foundation as to attempts to characterize the intent of the writer or the legal import or effect of written submissions from the committee to the Secretary. The submissions speak for themselves.
- (h) Paragraph 27: witness’s characterization that “no corrections were offered by the committee” when it made its submissions is inadmissible to establish whether the committee’s two written submissions were, as a matter of law, corrections.
- (i) Paragraph 28.b: witness’s claim that the “address listed is undeliverable by the USPS” is speculation and lacks any foundation.
- (j) Paragraph 30: second sentence is a pure legal argument.
- (k) Paragraph 31: middle sentence is a pure legal argument. Last sentence is a sweeping claim that lacks foundation.

[¶3] **R-23, Affidavit of Alvin Jaeger:** The Petitioner objects to the admission of the Affidavit of Alvin Jaeger as follows:

- (a) Paragraph 11: last sentence: opinion and legal argument
- (b) Paragraph 13: irrelevant to the question of the determination the Secretary made in March and May.
- (c) Paragraph 14: characterization of Toe as having committed unlawful and “flagrant unlawful” acts is opinion, argument, and lacks foundation.
- (d) Paragraph 14: statements of Toe’s movement from Iowa and other acts: lack of personal knowledge or other foundation.
- (e) Paragraph 16-18: all of the sentences in the paragraphs other than the sentences identifying the attachments: argument, speculation, and lacks personal knowledge or other foundation to discuss what Toe did or other

parties did during notarization, or what other parties may have done before or after notarization on the certificate. Jaeger is simply guessing from looking at the paper itself.

- (f) Paragraphs 16-18: the challenges leveled in these paragraphs, with the exception of as related to Lloyd, Morris, and Lewis, were never disclosed as a basis for the decision, and none of the attached spreadsheets (R-33-36) relating to these circulators were disclosed despite the Petitioners' express requests for all papers reflecting the basis for the Secretary's decision, whether during his review period, the Petitioners' cure period, or afterward, until the evening before trial.
- (g) Paragraph 20: hearsay statement from a third party about alleged payment per signature for some Tuttle-related workers, being offered for truth of the matter.
- (h) Paragraph 23: legal discussion in first three sentences and not testimony as to facts. Last sentence, irrelevant in that it interjects the question of the Secretary's impartiality and beliefs regarding his review of this matter and 90 other matters that are not before the court.

[¶4] **R-33, Spreadsheet prepared by Jaeger that lists the petitions circulated by Chloe Llyod and copies of Chloe Lloyd's circulator affidavits:** The Petitioner objects to the admission of the spreadsheets on the grounds they contain inadmissible opinion without necessary foundation and inadmissible hearsay under N.D.R.Ev. 801.

[¶5] **R-34, Spreadsheet prepared by Jaeger that lists the petitions circulated by Zeph Toe and copies of Zeph Toe's circulator affidavits:** The Petitioner objects to the admission of the spreadsheets on the grounds they contain inadmissible opinion without necessary foundation and inadmissible hearsay under N.D.R.Ev. 801.

[¶6] **R-35, Spreadsheet prepared by Jaeger that lists the petitions circulated by Ramona Morris and copies of Ramona Morris' circulator affidavits:** The Petitioner objects to the admission of the spreadsheets on the grounds they contain inadmissible opinion without necessary foundation and inadmissible hearsay under N.D.R.Ev. 801.

[¶7] **R-36, Spreadsheet prepared by Jaeger that lists the petitions circulated by Wayne Williams and copies of Wayne Williams' circulator affidavits:** The Petitioner objects to the admission of the spreadsheets on the grounds they contain inadmissible opinion without necessary foundation and inadmissible hearsay under N.D.R.Ev. 801.

[¶8] **R-37, Email dated February 28, 2022 from Pat Finken to Jim Silrum:** The Petitioner objects to the admission of the email and the statements contained therein as inadmissible hearsay under N.D.R.Ev. 801.

[¶9] **R- 38, Affidavit of Mark Nickel:** The Petitioner objects to the admission of the Affidavit of Alvin Jaeger as follows:

- (a) Paragraph 4: Discusses 4 audio records allegedly provided to an unknown individual at the Secretary of State's Office by Patrick Finken of the Brighter Future Alliance purporting to be the recorded statements of Jamal Omar. The Petitioner objects on the grounds of lack of foundation and authenticity and inadmissible hearsay under N.D.R.Ev. 801. Further, the recordings and the hearsay statements they contain lack any indicia of reliability and trustworthiness as the sources and chain of custody are unknown and no corroboration is available.
- (b) Paragraph 5: Double layered hearsay summary of conversations Jamal Omar allegedly had with Andriana Polk and Andre Strickland on a recording allegedly provided to SA Nickel without authenticity or chain of custody. The Petitioner objects on the grounds of lack of foundation, is a summation rather than transcription, and authenticity and inadmissible hearsay under N.D.R.Ev. 801.
- (c) Paragraph 6: Double layered hearsay summary of conversations of conversations Jamal Omar had with Josh Parham, Logal Jaworsji, and Mark Vann on a recording allegedly provided to SA Nickel without authenticity or chain of custody. The hearsay statements lack the indicia of reliability and trustworthiness because Jamal Omar allegedly used a deceptive stratagem to obtain statements saying he wanted to hire them to circulate a petition and wanted to know what they were being paid by their current employer. If this is subjectively understood as a contract offer or wage negotiation with a potential employer, it is reasonable to infer the declarants may have bolstered or exaggerated their stated wages to leverage an increase in the potential offer. Also contains unauthenticated summary of "complaints" of unidentified declarants. The Petitioner objects on the

grounds of lack of foundation, is a summation rather than transcription, and authenticity and inadmissible double hearsay under N.D.R.Ev. 801.

- (d) Paragraph 7: Double layered hearsay summary of conversations of conversations allegedly between Jamal Omar and Josh Parham and Tara Whitworth and Sheena Mittleider on a recording allegedly provided to SA Nickel without authenticity or chain of custody. Jamal Omar again allegedly employees a deceptive stratagem to obtain statements related to wages, thereby eroding any indicia of reliability. The Petitioner objects on the grounds of lack of foundation, is a summation rather than transcription, and authenticity and inadmissible double hearsay under N.D.R.Ev. 801.
- (e) Paragraphs 9 & 11: Contains hearsay summary of SA Nickel's conversation with Charles Tuttle and Jessica Jaworski on March 11, 2022. Lacks indicia of reliability because it contains internally conflicting hearsay statements of Charles Tuttle and Jessica Jaworski regarding wage terms for individuals they may have employed, but lacks corroborating information from which a credibility determination could be drawn. The internal conflict demonstrates the inherent lack of credibility and truthfulness the hearsay rule is designed to exclude. The State may respond that Charles Tuttle and Jessica Jaworski's statements to SA Nickel are non-hearsay as a statement of an opposing party under the N.D.R.Ev. 801(d)(2); however, Tuttle and Jaworski are not and have never been agents or employees of the Petitioner, there is insufficient evidence for the Respondent to establish agency as a prerequisite to 801(d)(2)(D), they lack representative capacity, the Petitioner has not adopted or manifest a belief in the truth of the statements, and the tacit-admission rule does not apply.
- (f) Paragraph 12: Summary of SA Nickels interview of Logan Jaworski on March 11, 2022. Similar to the hearsay objection raised in the preceding paragraph, there is no exception to the hearsay prohibition to permit the introduction of Logan Jaworski's out of court statements. Similarly, it is not excluded under N.D.R.Ev. 801(d)(2).
- (g) Paragraph 14: Double layered hearsay summary of conversations of conversations allegedly between SA Karmen Brosten and Carrie Lusby. SA Nickels provides a hearsay summation of a conversation he apparently had with SA Brosten. Even if the first layer of hearsay were excepted, Ms. Lusby's hearsay statements are not excluded from the hearsay prohibition for lack of proof of agency, employment, or other qualification under N.D.R.Ev. 801(d)(2).
- (h) Paragraphs 16, & 17: Double hearsay summaries of telephone calls with Tara Whitmore and Sheena Mittleider. In addition to the hearsay issues, there is a lack of authenticity and identity of the declarants, no phone numbers or other corroboration is available to ascertain identity of the declarants or veracity of the statements.

- (i) Paragraph 22: Summary of observation of text messages between to unidentified declarants presumed, without foundation, authenticity, or corroboration to be Charles Tuttle and Scott Tillman. Because the statements are hearsay and the declarants can only be assumed, without any corroboration of identity, the summary should be excluded.
- (j) Paragraph 25: Hearsay statements of Charles Tuttle.
- (k) Paragraphs 23-35: These paragraphs recount the execution of a search warrant on Charles Tuttle’s residence in Minot on August 15, 2022, three days after the Writ Petition in the above captioned matter was filed and several months after the Secretary made the disqualifying determinations at issue in this case.
- (l) In receiving evidence and reaching its findings the Court is guided by the precedence established in *McCarney v. Meier* and must only consider evidence that “entered into the secretary of state’s determination that the petitions were insufficient.” 286 N.W.2d 780, 787 (N.D. 1979). Similarly, in *McCarney*, the State interjected extraneous information and arguments to supply a post hoc rational for insufficiency. *Id.* The Court opined: “We deem it inappropriate for this court to address the other purported irregularities raised by the attorney general. It has not been asserted that those irregularities entered into the secretary of state's determination that the petitions were insufficient.” *Id.* A similar evidentiary limitation is compelled in this case. Because information outlined in Paragraphs 23-35 was obtained after the Secretary issued his disqualifying determination on March 22, 2022, could not have entered into the determination, it is irrelevant to the material issues presented and must be excluded.

[¶10] **R-41, Payment ledger, checks, and text messages:** Because information outlined in R-41 was obtained after the Secretary issued his disqualifying determination on March 22, 2022, it could not have entered into the determination and is irrelevant to the material issues presented and must be excluded. *See McCarney v. Meier*, 286 N.W.2d 780, 787 (N.D. 1979).

[¶11] **R-42-49, Various Alleged Timecards:** The timecards lack authentication and reliability. In the absence of first hand witness testimony to provide foundation and context for the hearsay statements on the alleged timecards they introduction would add more confusion than clarity to the issue before the Court. Furthermore, the alleged timecards are

irrelevant because information outlined in R-41-49 was obtained after the Secretary issued his disqualifying determination on March 22, 2022, it could not have entered into the determination and is irrelevant to the material issues presented and must be excluded. *See McCarney v. Meier*, 286 N.W.2d 780, 787 (N.D. 1979).

[¶12] The Petitioners respectfully reserves the right to modify, refine, or supplement these objections as may be necessary on the record of the evidentiary hearing.

Respectfully submitted this 23<sup>rd</sup> day of August, 2022.

/s/ Jesse H. Walstad  
Jesse H. Walstad (#07375)  
**Vogel Law Firm**  
Attorneys for Petitioners  
US Bank Building  
200 North 3rd Street, Suite 201  
PO Box 2097  
Bismarck, ND 58502-2097  
Telephone: 701.258.7899  
Email: [jwalstad@vogellaw.com](mailto:jwalstad@vogellaw.com)

Edward D. Greim, P02626  
Matthew Mueller, P02627  
**GRAVES GARRETT LLC**  
1100 Main Street, Suite 2700  
Kansas City, MO 64105  
Tel: 816.256.3181  
Email: [edgreim@gravesgarrett.com](mailto:edgreim@gravesgarrett.com)  
[mmueller@gravesgarrett.com](mailto:mmueller@gravesgarrett.com)

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

---

Jared Hendrix, as chairman of the North  
Dakota for Term Limits Sponsoring  
Committee, and North Dakota for Term  
Limits,

Petitioners,

vs.

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

Respondent.

---

**SUPREME COURT NO. 20220233**

---

**AFFIDAVIT OF SERVICE**

---

Jesse H. Walstad (#07375)  
**Vogel Law Firm**  
Attorneys for Petitioners  
US Bank Building  
200 North 3rd Street, Suite 201  
PO Box 2097  
Bismarck, ND 58502-2097  
Telephone: 701.258.7899  
Email: [jwalstad@vogellaw.com](mailto:jwalstad@vogellaw.com)

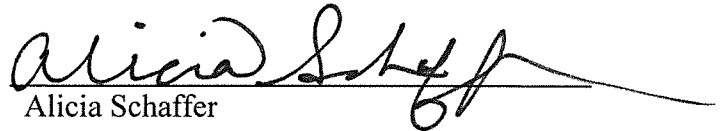
Edward D. Greim, P02626  
Matthew Mueller, P02627  
**GRAVES GARRETT LLC**  
1100 Main Street, Suite 2700  
Kansas City, MO 64105  
Tel: 816.256.3181  
Email: [edgreim@gravesgarrett.com](mailto:edgreim@gravesgarrett.com)  
[mmueller@gravesgarrett.com](mailto:mmueller@gravesgarrett.com)

STATE OF NORTH DAKOTA )  
 ) ss.  
COUNTY OF BURLEIGH )

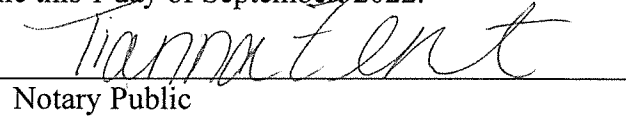
Alicia Schaffer, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on September 1, 2022, **Petitioners' Reply to Respondent's Response to Petition for Writ of Mandamus and Exhibits P40-P47** were filed electronically with the Clerk of Court of the North Dakota Supreme Court through the Supreme Court E-Filing Portal, and that the same document was electronically served through the portal:

David Phillips  
dphillips@bgwattorneys.com

Matthew Sagsveen  
masagsve@nd.gov

  
Alicia Schaffer

Subscribed and sworn to before me this 1 day of September, 2022.

  
Notary Public

