

EXHIBIT 23

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I N D E X

W I T N E S S E S

DEFENDANTS' : PAGE NO.

IRWIN JAMES NARUM SILRUM

Direct Examination by Mr. Phillips	43
Cross-Examination by Mr. Sanderson	60
Redirect Examination by Mr. Phillips	77
Recross-Examination by Mr. Sanderson	80

INTERVENOR DEFENDANTS' :

LOREN COLLINGWOOD

Direct Examination by Ms. Kelty	82
Cross-Examination by Mr. Sanderson	101

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

2 * * *

3 (Further proceedings reported but not
4 transcribed herein: May 5, 2022, the following
5 proceedings continued at 9:59 a.m.):

6 JUDGE ERICKSON: The movants will call their
7 next witness.

8 MR. SANDERSON: And, Your Honor, at this
9 time the movants have no further witnesses for the
10 hearing.

11 JUDGE ERICKSON: Thank you. The State will
12 call its first witness.

13 MR. PHILLIPS: Yes, Your Honor, I'd call Jim
14 Silrum.

15 THE COURT: If you would please step
16 forward, stand before the clerk, raise your right hand
17 and take the oath.

18 (Witness sworn.)

19 JUDGE ERICKSON: I'll once again remind you
20 that the microphone is directional. When you get seated
21 in the witness stand, if you would please state your
22 full name for the record and spell your last name, sir.

23 THE WITNESS: Good morning. My name is
24 Irwin James Narum Silrum. My last name is spelled
25 S-i-l-r-u-m.

1 JUDGE ERICKSON: You may.

2 MR. PHILLIPS: Thank you.

3 **IRWIN JAMES NARUM SILRUM,**

4 HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH, THE
5 WHOLE TRUTH, AND NOTHING BUT THE TRUTH, RELATIVE TO
6 SAID CAUSE, TESTIFIED AS FOLLOWS:

7 **DIRECT EXAMINATION**

8 **BY MR. PHILLIPS:**

9 Q. Mr. Silrum, are you employed by the State of
10 North Dakota?

11 A. I am.

12 Q. And what is your position?

13 A. Deputy Secretary of State.

14 Q. How long have you served at deputy secretary of
15 state?

16 A. Eighteen and a half years.

17 Q. Were you appointed by the North Dakota Secretary
18 of State Alvin Jaeger?

19 A. Yes.

20 Q. With respect to elections, what is the role of
21 the North Dakota secretary of state?

22 A. The secretary of state is the chief election
23 official for the State of North Dakota.

24 Q. And what are your duties specifically as the
25 deputy?

A. With just two exceptions, I have all the same

1 responsibilities as the secretary of state.

2 Q. Is it fair to refer to you as a state election
3 official?

4 A. Absolutely, as opposed to a local election
5 official.

6 Q. From your perspective as a state election
7 official, when did the 2022 primary election begin?

8 A. We normally say that an election begins on
9 January 1st of an election year because state law
10 requires that precincts be established by December 31st
11 of the year prior. However, this year with the
12 redistricting bill that was signed by the governor and
13 the secretary of state on November 12th, we began in
14 earnest on the redistricting work at that time to
15 associate all the voters in the state to their correct
16 legislative districts, and then the precincts were
17 established after that.

18 Q. Are you generally aware of what the plaintiffs
19 are asking the Court to order in this preliminary
20 injunction motion?

21 A. I believe I am.

22 Q. What's your understanding of what the plaintiffs
23 are asking for?

24 A. The removal of subdistricts in Districts 4 and 9.

25 Q. Is it your understanding they're asking that to

1 be done prior to the conclusion of the 2022 elections?

2 A. It's my understanding they're asking for it to be
3 done before the 2022 elections begin or occur.

4 Q. As a state election official, do you have any
5 concerns about that?

6 A. I do.

7 Q. Did you express some of those concerns in your
8 Affidavit that was filed in this case?

9 A. I did.

10 Q. I'm going to refer to your Affidavit which was
11 already filed in this case as document 19 with attached
12 exhibits documents 19-1 through 19-5. Do you recognize
13 that document?

14 A. I do.

15 Q. Is this the Affidavit that you prepared and
16 signed in this case?

17 A. It is.

18 Q. When did you sign this Affidavit?

19 A. I believe it was April 7th.

20 Q. Of 2022?

21 A. Yes.

22 Q. Before we get into some of the specifics on your
23 Affidavit, I'd like you to give the Court a bit of an
24 update on things that might have changed since you
25 signed this Affidavit.

1 Have any election deadlines passed since you
2 signed this on April 7th?

3 A. For the June 14th primary election nearly all of
4 them have passed because voters are already voting in
5 the election. So therefore the candidate filing
6 deadline, which was 64 days before the election which
7 occurred at 4 p.m. on April 11th, has passed. Last
8 Friday military and overseas voters were sent ballots
9 according to federal law and just today all those people
10 who have requested absentee ballots, people like you and
11 me, would receive our absentee ballots. They're being
12 sent in the mail today.

13 Prior to that legislative districts have all
14 met to endorse their candidates and then the candidates
15 who were not endorsed were given the opportunity to
16 circulate their petitions and gather enough valid
17 signatures to gain ballot access that way. So nearly
18 all of the deadlines have passed except for election day
19 itself.

20 Q. Aside from those legal deadlines, what else have
21 state and county election officials already completed
22 with respect to the June primary?

23 A. In March we held a legally required state-wide
24 election official training and as a part of that we
25 conducted the first of the mock elections that we

1 conduct for prior to every election because elections
2 are an absolute. You need to get it 100 percent correct
3 or you don't -- if you receive a failure you don't let
4 it go forward. So we have to make sure that everything
5 is going to be working seamlessly before election day
6 occurs and the votes are tallied.

7 Q. Let's talk about some of the specific deadlines
8 that are mentioned in your Affidavit. The deadline for
9 candidates to file petitions with signatures, has that
10 deadline passed?

11 A. Yes. That was at 4 p.m. on April 11, 2022.

12 Q. Would it be too late today under North Dakota law
13 for a candidate to submit additional petition
14 signatures?

15 A. Absolutely.

16 Q. What about the deadline to -- and you mentioned
17 this before but I'll ask you a few follow-ups. The
18 deadline to send out ballots to military and overseas
19 voters, has that deadline passed?

20 A. Yes. Last Friday was the deadline for military
21 and overseas ballots.

22 Q. Have the ballots actually been mailed out then?

23 A. Yes, and the last I looked ballots had actually
24 been returned.

25 Q. Would this include ballots being mailed to

1 military and overseas voters who were voting in
2 Districts 4 and 9 and their subdistricts?

3 A. Yes.

4 Q. Are there both federal and state laws that affect
5 military and overseas voters?

6 A. Yes.

7 Q. What does federal law specifically require with
8 respect to military and overseas voters?

9 A. Federal law requires that for every military or
10 overseas voter who applies prior to the 45th day before
11 an election they must be sent a ballot on that day. So
12 therefore ballots must be -- must be prepared prior to
13 that deadline. In North Dakota we say the 46th day.
14 The law says 46th day because the 45th always occurs on
15 a Saturday, and so we wanted to be far more generous to
16 military and overseas voters.

17 Q. And did that date pass on April 29th?

18 A. Yes.

19 Q. What about the deadline to send ballots to other
20 absentee voters, has that passed?

21 A. That's actually today. So anyone who has applied
22 for an absentee ballot prior to today is being sent an
23 absentee ballot today.

24 Q. Have ballots already been mailed out then to
25 those absentee voters?

1 A. I would assume so, yes.

2 Q. Would that include being mailed to voters who are
3 voting in Districts 4 and 9 and the subdistricts?

4 A. The entire state, yes.

5 Q. For the ballots that have already been mailed to
6 voters, to date do those ballots reflect the current
7 subdistricts contained within Districts 4 and 9 and the
8 candidates running for office in those subdistricts?

9 A. Yes.

10 Q. Are the ballots that are sent to voters in one
11 subdistrict different than the ballots that are sent to
12 voters in a different subdistrict?

13 A. Absolutely.

14 Q. How are they different?

15 A. In one subdistrict there would be a contest for
16 the House candidate for that subdistrict and in another
17 subdistrict they would have a different contest for the
18 House candidate in that subdistrict. But aside from
19 that ballots are different in every precinct because of
20 the changes that exist. So, yes, they are very
21 different.

22 Q. Would those other differences be, for example,
23 city elections or school board elections?

24 A. City, school, vector districts, ambulance
25 districts, library districts. There's a whole myriad of

1 reasons why ballots change from one jurisdiction to
2 another.

3 Q. I'm going to ask you some questions about
4 paragraph 12 in your Affidavit. That starts on page 5
5 of document 19. I'm not going to ask you to read it but
6 maybe you can explain to the Court what you were talking
7 about in this paragraph in your Affidavit.

8 A. There are two means by which candidates can gain
9 access to the ballot for a political party office and
10 that would be either being endorsed by the local
11 district party of the candidate's choice or else
12 circulating petitions to gather enough signatures to
13 gain ballot access that way.

14 North Dakota law requires that the number of
15 signatures required for a district, a legislative
16 district, is one percent of the resident population of
17 that district. And so we do a calculation -- secretary
18 of state I should say does a calculation of what all
19 those numbers are across the state so that candidates
20 will know how many signatures they would need. Because
21 Districts 4 and 9 were subdivided, those who are running
22 for the House are only running in approximately half of
23 the district so, therefore, they would only be required
24 essentially half the number of signatures that let's say
25 the Senate candidate from the same district would need

1 to gain ballot access. And those signatures must be
2 valid signatures from electors of that district,
3 qualified electors of that district.

4 Q. Was there a concern that if this Court were to
5 eliminate the subdistricts that some candidates might no
6 longer qualify to be on the ballot if they didn't
7 collect sufficient signatures for a whole district?

8 A. That was my concern expressed in paragraph 12,
9 yes.

10 Q. In paragraph 12 you didn't identify any specific
11 candidates, correct?

12 A. Correct, because the time that I submitted this
13 was prior to the candidate filing deadline.

14 Q. Since you signed this Affidavit, have there been
15 any developments with respect to any specific
16 candidates?

17 A. Yes. In Districts 9, 9A and 9B, two candidates
18 who did not get the endorsement of their district party,
19 one a Republican and the other a member of the
20 Democratic NPL, submitted signatures on their petitions
21 to qualify for the ballot in those districts.

22 A woman by the name of Jayme Davis from
23 District 9A, if she had needed to submit for the entire
24 district I believe I remember that would have been 161
25 valid signatures. She submitted less than that because

1 it -- she was only required to do half of that.

2 Another individual currently seated
3 legislator, Charles Damschen, submitted signatures in 9B
4 and he also submitted less than the number needed for
5 the entire district but enough for the subdistrict.

6 Q. Do you recall how many signatures he needed --
7 would have needed for a full district?

8 A. For a full district it would be the same, 161
9 valid signatures.

10 Q. Do you recall how many signatures he actually
11 submitted?

12 A. I do not remember the exact numbers but I could
13 provide that to the Court if it's needed.

14 Q. If I represented to you that it was 98, does that
15 sound correct to you?

16 A. Yes.

17 Q. Are candidates Jayme Davis and Chuck Damschen
18 currently qualified to be on the ballot in the June
19 primary?

20 A. Yes.

21 Q. Have they been certified for the June primary
22 ballot?

23 A. Yes.

24 Q. How does that certification work?

25 A. When the paperwork comes in from any candidate

1 for offices that must file their candidate paperwork
2 with the secretary of state, our staff reviews those
3 thoroughly to make sure that all of the paperwork is
4 filed and complete, for example, the statement of
5 interests is filed and complete. The Affidavit of
6 candidacy is filed and complete. And then for those
7 that are endorsed that the proper endorsements were made
8 on the endorsing paperwork. For those that filed by
9 petition the signatures are all reviewed to make sure
10 that they are indeed residents of that subdistrict or
11 district as the case may be to make sure that they are
12 valid signatures.

13 Q. Have Jayme Davis and Chuck Damschen's names
14 already been printed on the ballots for the June
15 primary?

16 A. Yes, they have. And they were -- they along with
17 every other candidate that filed with the secretary of
18 state received certification paperwork from our office
19 that said that they were certified for the ballot.

20 Q. Have these printed ballots with their names on it
21 been mailed to voters yet?

22 A. Yes.

23 Q. Which voters?

24 A. Well, all voters across the state but certainly
25 in Districts 4 -- 4A, 4B, 9A, 9B.

1 Q. And that would include the military and overseas
2 and absentee voters, correct?

3 A. Yes.

4 Q. If this Court issues an order eliminating the
5 subdistricts in District 4 and District 9 at this time
6 as the plaintiffs have requested, would candidates Jayme
7 Davis and Chuck Damschen be qualified to be on the June
8 primary ballot?

9 A. In my opinion not according to state law because
10 if the subdistricts cease to exist their valid
11 signatures that they submitted would be considered
12 insufficient because they were -- there were not enough
13 for the entire district.

14 Q. Would their names need to be removed from the
15 ballot?

16 A. It's unclear at this point because state law does
17 not -- does not cover that but it would certainly enter
18 into the complicated election procedure a number of
19 problems that would be hard to -- hard to address.

20 Q. If this Court issues an order eliminating the
21 subdistricts in District 4 and District 9, would ballots
22 need to be reprinted?

23 A. Yes.

24 Q. Why?

25 A. Well, because the -- currently the -- those

1 voters who live in let's say, for example, 4A receive a
2 ballot that has the House candidate in the two political
3 parties that are represented on the ballot for just that
4 House subdistrict. So if the -- if the subdistricts
5 were removed the ballots would have to be reprinted so
6 that there would be a single contest that is a vote for
7 two for the House districts -- House district.

8 Q. What efforts would election officials have to
9 undertake to get the ballots reprinted now?

10 A. They would have to essentially recycle all the
11 ballots that they've already received, create new
12 ballots. They would have to adjust the programming that
13 is for the voting system tabulators that tabulates the
14 votes correctly. And then for all people who have been
15 sent ballots they would need to be sent brand new
16 ballots along with a notice saying the election has
17 changed. You need to -- you need to vote this new
18 ballot. If you haven't already sent in your previous
19 ballot, please discard that and send in the new one.

20 It would -- there would also have to be some
21 sort of a mechanism put in place so that the local
22 election officials could tell the envelope of a revised
23 ballot from the envelope -- return envelope of the
24 initial ballot because there's no way that they could
25 look at the ballot itself because privacy of voting is

1 sacred in this situation so somehow the ballot
2 envelopes, return envelopes would have to be different.

3 And then we would have to make sure that the
4 programming is correct. We would have to indeed conduct
5 another mock election as a part of our logic and
6 accuracy testing. So the list goes on. It's a very
7 time-consuming process.

8 Q. If you were to resend ballots to voters along
9 with a note that you mentioned, as an election official
10 do you have any concerns about voter confusion?

11 A. Absolutely. I would have no idea if they're
12 going to make sense of that note. Some -- for example,
13 some voters might think: Well, the rest of my ballot
14 must have been okay so on this new ballot I will just
15 vote the contest in question. And then you would have a
16 situation where only one ballot from a voter can be
17 counted in the election and so presumably the second
18 ballot would have to be counted, but that would
19 disenfranchise them if they had only voted for the House
20 contest in thinking that their other votes would be
21 counted on the prior ballot that they already returned.
22 There's just a whole number of reasons why voters could
23 be confused over this.

24 Q. Could that result in voter disenfranchisement?

25 A. Yes.

1 Q. How so?

2 A. As I said, if they -- if the voter misunderstands
3 the communication and only votes for the House contest
4 thinking that's the only thing that's changed from the
5 other one, then all of their other votes would be --
6 would not be counted. So therefore they would not have
7 the chance to express their opinions in the primary for
8 offices like attorney general or secretary of state or
9 all of the other -- and more seriously, because it's the
10 June election, cities and schools, this is their general
11 election. There is not a primary election so
12 essentially you would be eliminating those people from
13 their ability to express their opinions on who should be
14 their mayor, their city council members, their school
15 board members if they make a mistake in this process.

16 Q. Is there also a concern that a voter might not
17 receive or be able to send back the second ballot?

18 A. Yes. Actually for military and overseas voters
19 there is something that is referred to as the federal
20 write-in absentee ballot and primarily that is for those
21 individuals who are in harm's way who are just not able
22 to receive or return their ballot as needed.

23 For example, someone who is serving on the
24 USS North Dakota may have -- which is a submarine, may
25 have requested and received their absentee ballot and

1 returned that and they did so simply because they know
2 that they're currently headed underwater for the next
3 three to six months. If they are not able to receive
4 their secondary ballot, they would be -- they would be
5 disenfranchised because their original ballot coming
6 back in would -- decisions would have to be made that
7 are not clear at this point as to how those votes from
8 that contest -- those contests would be counted.

9 Q. Are there any other steps that election officials
10 would have to take if the Court were to eliminate the
11 challenged subdistricts in this case?

12 A. Yes. Just like after the redistricting session
13 was over in which election officials across the state
14 reviewed all -- more than 47,000 street files that exist
15 in the state's central voter file to make sure that the
16 voters are associated to their correct legislative
17 district, correct precinct, correct split of a precinct,
18 that sort of thing. Those would all have to be done
19 again in Districts 9 and Districts 4.

20 The other concern that I would have there is
21 the simple elimination of the districts -- subdistricts.
22 I would wonder how they would be interpreted by the
23 counties that make up districts that are a part of
24 Districts 9 and 4 simply because they -- those district
25 county commissions might say to themselves: You know,

1 we established the precincts for the county based on the
2 fact that subdistricts existed. Now that subdistricts
3 don't exist they might change -- decide to change those
4 precinct boundaries and then Katy bar the door, we have
5 all kinds of problems that would exist there. There's
6 just no controlling rule or law over that that would
7 prevent that from happening.

8 Q. If this Court didn't make any changes at all with
9 respect to the June primary but instead eliminated the
10 subdistricts in advance of the general election in
11 November, would you have any concerns about that?

12 A. I do.

13 Q. What are your concerns?

14 A. Simply because the individuals who are given the
15 chance to vote for the nomination of their party's
16 candidates in Districts 4A, 4B, 9A, 9B would suddenly be
17 expanded to the entire district. So the people who
18 nominated them in the primary would possibly have their
19 votes diluted because of the entire district voting.

20 Additionally, in -- I believe it is in 4A
21 there are presently -- well, there are two Democratic
22 NPL candidates whose names are on the ballot. As it
23 stands right now, only one of those will move forward to
24 the general election. If subdistricts were eliminated
25 then -- especially since there isn't a Democratic NPL

1 candidate running in 4B, that would mean the Democratic
2 NPL party would be at a disadvantage because they would
3 only have one candidate on the ballot. However, in the
4 Republican district party of 4, there are candidates in
5 4A and 4B and they would presumably both go forward. So
6 I think it would be unfair to a political party but also
7 unfair to the voters of those subdistricts.

8 Q. Does North Dakota law provide any guidance in how
9 to handle a situation like that?

10 A. None whatsoever.

11 MR. PHILLIPS: Thank you, deputy secretary.
12 I have no further questions.

13 JUDGE ERICKSON: Thank you. Cross from the
14 intervenors?

15 MS. KELTY: No, Your Honor.

16 JUDGE ERICKSON: Thank you. From the
17 plaintiffs?

18 MR. SANDERSON: Yes. Thank you, Your Honor.

19 **CROSS-EXAMINATION**

20 **BY MR. SANDERSON:**

21 Q. Good morning, Mr. Silrum. My name's Paul
22 Sanderson. I represent the plaintiffs in this case.

23 Now you began your testimony if I'm correct
24 that you said normally a primary election begins on
25 January 1st, correct?

1 A. Correct.

2 Q. You said, however, for the upcoming 2022
3 elections the primary election began on November 12th.
4 Was that your testimony?

5 A. That is correct.

6 Q. Okay. And just to be clear the bill we're here
7 talking about that was signed by the governor on
8 November 11th was then filed with the secretary of state
9 on November 12th, correct?

10 A. Correct.

11 Q. And so it became law. The law creating the
12 subdistricts went into effect on November 12th, correct?

13 A. Correct.

14 Q. The same day your office began the primary
15 election process, correct?

16 A. Correct.

17 Q. And you would agree then, Mr. Silrum, that
18 Plaintiffs Charles Walen and Paul Henderson would not
19 have had any opportunity to file an action between the
20 time the bill -- or the law went into effect creating
21 the subdistricts and the time your office began primary
22 election proceedings.

23 A. Correct.

24 Q. Okay. I want to start with Exhibit D of your
25 Affidavit. Do you recall that where you've listed out

1 the 47 districts, including the population of each of
2 the districts?

3 A. I believe I recall that, yes.

4 Q. I'm going to put it on the Elmo (indicating). Do
5 you recognize this as Exhibit D to your Affidavit?

6 A. Yes.

7 Q. And is this a document you prepared?

8 A. Yes.

9 Q. And you've -- to be clear I want to start with
10 District 4. The total population of the newly designed
11 District 4 as part of the 2021 redistricting was 16,469;
12 is that correct?

13 A. Correct.

14 Q. And would you agree generally, Mr. Silrum, that
15 that 16,469 generally fell close to the middle of the
16 population of the 47 districts?

17 A. I have not analyzed that completely but I would
18 suspect that legislative counsel made sure of that.

19 Q. And I think we could go -- then I did -- there
20 are a number of districts such as District 3 that have
21 15,000 plus members in their district and there are
22 other districts such as we see District 6 that have
23 17,000 plus members. You see that?

24 A. I do.

25 Q. By my calculation, I went through your Exhibit D,

1 I had -- nine of the 47 districts had in the 15,000
2 population and I believe 17 districts had 17,000
3 population.

4 Would that kind of coincide with your
5 understanding of where the population base was?

6 A. I'll take your word for it.

7 Q. And certainly we would agree --

8 JUDGE WELTE: Mr. Sanderson, if I may
9 interrupt, do you have a lapel mic you could use?

10 MR. SANDERSON: I don't. I can put one on,
11 Judge.

12 JUDGE WELTE: Thank you very much.

13 Q. (Mr. Sanderson continuing) And, Mr. Silrum, the
14 population district in District 4 of 16,469 is certainly
15 not an outlier in the 47 districts, correct?

16 A. It is not.

17 Q. Okay. And similarly with respect to District 9
18 of 16,158 residents, that also is not an outlier in the
19 total population of the 47 districts.

20 A. Correct.

21 Q. Okay. And you would agree, Mr. Silrum, that the
22 subdistricts in Districts 4A and 4B do not change the
23 exterior boundaries of District 4, correct?

24 A. I agree.

25 Q. Okay. And if the Court were to remove the

1 subdistrict boundaries, the exterior boundaries of
2 District 4 would remain the same, correct?

3 A. Correct.

4 Q. And District 4 again would then have a total
5 population of 16,469.

6 A. Correct.

7 Q. And, Mr. Silrum, I want to ask you about
8 specifically District 9 -- or, excuse me, District 4.
9 When was the last election in District 4 for the House
10 of Representatives?

11 A. Even numbered districts were on the ballot in
12 2020.

13 Q. Okay. And we're correct the only race election
14 that's affected by the subdistricts is the House of
15 Representatives in Districts 4 and Districts 9, correct?

16 A. In District 4 that would be true but in
17 District 9 there are -- so, yes. The answer -- if I
18 understand your question correctly now, the answer would
19 be yes.

20 Q. Okay. Out of all the different election options
21 on the ballot, the only one that the subdistrict applies
22 to in Districts 4 and 9 are to the House of
23 Representatives election in those two districts,
24 correct?

25 A. Correct.

1 Q. Okay. Now one of the things we see on your
2 Exhibit D is you have the last column "District
3 Political Parties Must Reorganize." And am I correct in
4 understanding that certain districts the population
5 changed to a significant amount that that district had
6 to have a new election?

7 A. That is correct.

8 Q. Okay. And we see in District 4 that you have
9 highlighted in green that their population did not
10 change to a significant enough extent where they would
11 have had to have a new election in District 4, correct?

12 A. I would -- I would clarify that by saying the
13 district parties did not need to reorganize in 4.

14 Q. Okay. Am I correct the reason that District 4 is
15 up for election in 2022 is because of the creation of
16 subdistricts in District 4?

17 A. Yes.

18 Q. Okay. And if this Court were to remove the
19 subdistricts in District 4, the two House of
20 Representative members that were elected in 2020 could
21 finish their four-year -- constitutional four-year term,
22 correct?

23 A. I would have to address my legal counsel on that.

24 Q. Okay. Well, they certainly don't -- they're
25 certainly not one of the districts such as District 8

1 that had to have a new election because of political
2 party or reorganization, correct?

3 A. I believe you're misunderstanding the point of
4 this particular chart. This was not a particular chart
5 determining which of the districts needed to have
6 reelections. It was specifically created so that
7 district political parties would need to know whether or
8 not they needed to reorganize, which means they needed
9 to have a publically-noticed meeting to determine who
10 would be their chairman, who would be their
11 vice-chairman, vice-chairwoman, secretary, treasurer,
12 and the board because state law specifically speaks to
13 that in Chapter 16.1-03, I believe the section is 17 and
14 subsection 2.

15 Q. And maybe the easier way -- and I probably could
16 have asked you a more direct question. The only reason
17 that District 4 is up for election is because of the
18 creation of the two subdistricts, correct, on the House
19 of Representatives side?

20 A. That is the reason it is on the ballot, yes.

21 Q. Okay. Now I want to talk about you -- you
22 mentioned some of the impacts that would occur if the
23 subdistricts are removed and kind of leading to the
24 voter confusion and voter disenfranchised that you
25 testified to earlier.

1 I want to ask you: If the subdistricts are
2 removed by this Court in District 9, there's no
3 requirement that the exterior boundaries of District 9
4 would need to be redrawn; is that correct?

5 A. Correct.

6 Q. And if the exterior boundaries of District 9 do
7 not need to be redrawn, there would be no need to redraw
8 the precincts in District 9, correct?

9 A. I cannot say that, no.

10 Q. Well, every person that would vote at a precinct
11 in District 9 currently, whether in 9A or 9B, would then
12 be voting for just District 9 as a total, correct?

13 A. As I stated earlier, county commissions are given
14 responsibility under law to establish precincts, and
15 precincts were more than likely established simply
16 because of the subdistrict boundaries as well.
17 Therefore, there is no guarantee that a county wouldn't
18 change its precinct boundaries because those
19 subdistricts no longer exist.

20 Q. Every voter in District 9 or 9A or 9B belongs to
21 a precinct, correct?

22 A. Currently, yes.

23 Q. And every voter in that precinct, whether in 9A
24 or 9 -- the total 9 with the subdistricts removed their
25 vote would count. Changing the subdistricts wouldn't

1 remove a voter from being able to vote in a precinct.

2 Is that fair?

3 A. As long as the precincts don't change.

4 Q. Now I want to ask you a little bit about in
5 your -- you set forth a timeline in your Affidavit,
6 correct?

7 A. Yes.

8 Q. And Governor Burgum signed House Bill 1397 on
9 April 21, 2021, correct?

10 A. If you say so.

11 Q. And House Bill 1397 established the Interim
12 Legislative Management Redistricting Committee, correct?

13 A. I believe so.

14 Q. And the purpose of that Redistricting Committee
15 was to draw and implement the redistricting plan based
16 on the 2020 census, correct?

17 A. Correct.

18 Q. The -- certainly there was no -- there's no law
19 or rule in North Dakota that would prevent Governor
20 Burgum from signing and appointing -- signing a bill and
21 appointing the Redistricting Committee earlier than
22 April 21, 2021, correct?

23 A. I suppose it could have been done at any time --

24 Q. Okay.

25 A. -- during the session.

1 Q. The interim -- and according to your Affidavit
2 the Interim Redistricting Committee did not begin
3 holding its first meetings until July 29th of 2021,
4 correct?

5 A. That sounds correct.

6 Q. And the Redistricting Committee met six times
7 during the redistricting process according to your
8 Affidavit, correct?

9 A. Correct.

10 Q. There was no provision in North Dakota law that
11 would have prevented the Redistricting Committee from
12 meeting earlier than July 29, 2021, correct?

13 A. There was no provision except for the fact that
14 the census data was not available by that earlier date.

15 Q. Certainly. And the full census data came
16 available in August of 2021, correct?

17 A. Correct.

18 Q. Yet the Redistricting Committee had already begun
19 meeting in July before the full census data had taken
20 place, correct?

21 A. Okay.

22 Q. I mean, you're aware they began meeting July 29th
23 of 2021 before the full census data, correct?

24 A. Okay, yes.

25 Q. Okay. And October 29, 2021 Governor Burgum

1 signed his bill appointing a special session, correct?

2 A. Yes.

3 Q. There was -- there's no law or regulation under
4 North Dakota law that would have prevented Governor
5 Burgum from calling the special session and signing that
6 bill prior to October 29, 2021, correct?

7 A. Not that I'm aware of.

8 Q. Okay. And the special session began on
9 November 8, 2021, correct?

10 A. Correct.

11 Q. And again there's no law or rule in North Dakota
12 that would have prevented that special session from
13 occurring earlier than November 2021.

14 A. No. Precedence is that that's when it usually
15 happens.

16 Q. And you're not aware of any statute that would --
17 under North Dakota law that would prevent an earlier
18 special session?

19 A. No.

20 Q. Now I want to talk about you testified to some of
21 the things that would be very time consuming for your
22 office if another election had to be held. One of them
23 you said ballots would have to be reprinted.

24 A. Correct.

25 Q. Could ballot -- that's something your office can

1 do is reprint ballots, correct?

2 A. Actually that's done by the individual counties.
3 We assist the counties in the preparation of their
4 ballots but that is their responsibility.

5 Q. Okay. And certainly you believe that counties
6 could reprint ballots for a House election in District 9
7 if requested?

8 A. Yes, they can, but not as quickly as one might
9 think.

10 Q. Okay. You said notice would need to be sent with
11 the ballots. That's something that could be done by
12 either your office or the county for District 9,
13 correct?

14 A. It would have to be done by the county because
15 our office does not send out a single ballot.

16 Q. So the county certainly has the ability to send
17 out a notice for a special election in District 9 if so
18 requested?

19 A. We would not refer to it as a special election
20 but, yes, they would have to be the ones to send out a
21 notice.

22 Q. Well, let's talk about special elections. You're
23 familiar with the state election code obviously,
24 correct?

25 A. A little bit.

1 Q. And are you aware that North Dakota election code
2 has provisions for holding special elections?

3 A. Yes.

4 Q. Has your office taken any steps to look at
5 holding a special election in District 9?

6 A. No.

7 Q. You're aware in the past North Dakota has held
8 special elections, correct?

9 A. Yes.

10 Q. And on multiple occasions North Dakota has held
11 special elections?

12 A. Yes.

13 Q. And included in the power under the North Dakota
14 election code would be the ability to hold a special
15 election for a primary election, correct?

16 A. I would have to check on that to be honest
17 because generally a special election is considered a --
18 in the same regards as a general election. So I could
19 not answer the Court honestly on that based on my
20 knowledge.

21 Q. Okay. Now if a special election was going to be
22 held, new ballots issued and a notice prepared by the
23 counties, that's something that can be done, correct?

24 A. Yes.

25 Q. And your office could assist counties in

1 preparing a notice explaining to voters for the House of
2 Representatives election in District 9 what the
3 requirements were of that ballot?

4 A. Yes.

5 Q. Okay. Local election officials would need to
6 revise the ballot and programming would be done to
7 correct and tabulate the results of that ballot,
8 correct?

9 A. Correct.

10 Q. And that's something that could be done by local
11 election officials with the help of your office?

12 A. With the help of our office and also with the
13 assistance of a number of others, yes.

14 Q. Now one of the things you mentioned was voter
15 confusion. Would you agree that a properly written
16 notice would help cure any voter confusion with respect
17 to a special election for a House race in District 9?

18 A. I would argue that it could but based on my
19 experience with the way people read and do not read
20 instructions I would say there's a good question that
21 they would not.

22 Q. Has your office taken a look at any potential
23 notices if a special election were needed for a House
24 race in District 9?

25 A. No.

1 Q. Now one of the things you testified to earlier is
2 the problem with issuing new ballots would be there were
3 a number of other elections that took place on that
4 ballot other than just House race in District 4 and
5 District 9, correct?

6 A. Yes.

7 Q. Would not -- would a simple solution not be
8 simply to accept all the election results in Districts 4
9 and 9 other than House race and issue a special election
10 for that? Would that not solve your concerns with
11 respect to those other elections?

12 A. I have not given that any thought so I -- I could
13 not answer the Court honestly.

14 Q. Well, as you sit here today one of the things you
15 mentioned I believe was that in District 9 there would
16 be school board elections, correct?

17 A. Correct.

18 Q. Wouldn't a solution to this be accepting the
19 results of the school board election and just having a
20 special election solely on the House of Representatives
21 race in District 9?

22 A. As I stated earlier, I cannot explain to the
23 Court with all honesty that I know that a special
24 election can be held for a primary. Therefore, I would
25 need to consult to know whether or not that could even

1 happen.

2 Q. Okay. Well, one of the things you talked about
3 was -- one of the big issues is a 64-day candidate
4 filing deadline, correct?

5 A. (Nods head.)

6 Q. Is that a yes?

7 A. Yes.

8 Q. And not to be rude but just to make sure we have
9 a record with a verbal response. And you said for the
10 June primary the 64-day filing notice was April 11th I
11 believe, correct?

12 A. That is correct.

13 Q. So just kind of throwing out -- and I know you
14 probably don't have these. I'll just kind of ask you to
15 take my word. But let's say a primary election was
16 going to be held. Special primary election in District
17 9 was going to be held on August 9th. The 64-day
18 candidate filing for that would be June 6th. Does that
19 kind of seem right that you'd meet that by June 6th?

20 A. Yes.

21 Q. Another issue you said was 46-day overseas and
22 military ballots. That's a deadline that's important,
23 correct?

24 A. Correct.

25 Q. And for an August 9th primary special election

1 primary in District 9 the 46-day overseas and military
2 ballot would be June 24th.

3 A. I'll take your word for it.

4 Q. So it's possible to meet those deadlines by
5 pushing out a primary election to a later date such as,
6 let's say, August, correct?

7 A. Provided that a special election can be a primary
8 election.

9 Q. Okay. Now I know you're in North Dakota. You
10 specialize in North Dakota election law. But are you
11 aware of other states and when their primaries are held?

12 A. Yes. Some have already occurred, some will occur
13 after ours, and some occur right around the same time as
14 ours.

15 Q. And, for example, in the state of Wisconsin are
16 you aware that their primary's in August of 2022?

17 A. That sounds right.

18 MR. SANDERSON: Okay. Mr. Silrum, I have no
19 further questions. Thank you.

20 JUDGE ERICKSON: For the state defendants,
21 redirect?

22 MR. PHILLIPS: Yes, thank you. I have a few
23 questions.

24 JUDGE ERICKSON: How long do you expect this
25 to go? I think we probably are close to where we need

1 to take a break.

2 MR. PHILLIPS: I don't expect to take long
3 for this portion.

4 JUDGE ERICKSON: All right.

5 **REDIRECT EXAMINATION**

6 **BY MR. PHILLIPS:**

7 Q. Mr. Silrum, remind me again when the
8 redistricting became law in North Dakota in this 2020
9 round.

10 A. It became law when filed with the secretary of
11 state on November 12th.

12 Q. Are you familiar with the past redistrictings
13 that have taken place every 10 years?

14 A. Yes. I've been fortunate to be involved in them
15 as an election official.

16 Q. Is the completion of redistricting in North
17 Dakota following the 2020 census consistent with the
18 historical trend for when the redistricting was
19 completed?

20 A. Yes.

21 Q. This is even though the state did not receive
22 census data until late this year, correct?

23 A. Yes. I would actually say it was a miracle that
24 it happened in November because of the lateness of the
25 data.

1 Q. Did that data come late from the federal
2 government because of COVID issues?

3 A. Absolutely.

4 Q. Can redistricting be completed without census
5 data from the federal government?

6 A. No.

7 Q. The opposing counsel asked you some questions
8 about elimination of the subdistricts. If this Court
9 sends this matter back to the state legislature to do
10 the redistricting, do we know whether or not the state
11 legislature would simply remove the subdistricts?

12 A. I'm not a member of that branch of government.
13 I'm in the executive branch so I wouldn't even hazard a
14 guess.

15 Q. When the subdistricts were created, does
16 substantial population equality have some impact on the
17 shape and size of the larger districts around it?

18 A. That is my understanding but you would need to
19 ask that of legislative -- the legislative branch who's
20 responsible for redistricting.

21 Q. If we went back to the legislature they may make
22 a different decision if the subdistricts are no longer
23 allowed with respect to the shape and size of the larger
24 district, correct?

25 A. I suppose.

1 Q. The county officials make decisions with respect
2 to creation of precincts, correct?

3 A. County commissions specifically.

4 Q. And the counties print the ballots?

5 A. Correct.

6 Q. You're not testifying today as a county official,
7 correct?

8 A. I am not.

9 Q. As we sit here today and stand here today, people
10 have already voted in the elections being held in the
11 subdistricts that are being challenged, correct?

12 A. Correct.

13 Q. And they've been sent ballots?

14 A. Yes.

15 Q. If a special election is held, will those same
16 people receive a second ballot?

17 A. They would have to, yes.

18 Q. Is there any risk of voter confusion in that
19 scenario?

20 A. I believe so.

21 Q. How so?

22 A. For the reasons previously stated. If you'd like
23 I can reiterate them.

24 JUDGE ERICKSON: That's fine.

25 MR. PHILLIPS: Thank you. No further

1 questions.

2 JUDGE ERICKSON: Thank you. Ms. Kelty?

3 MS. KELTY: No questions, Your Honor.

4 JUDGE ERICKSON: Mr. Sanderson?

5 **RECROSS-EXAMINATION**

6 **BY MR. SANDERSON:**

7 Q. Mr. Silrum, the ballots you talked about that
8 were sent out to voters, were the ballots for voters in
9 Districts 4 and Districts 9 different with respect to
10 the election of the House representatives than every
11 other voter in other districts in the state?

12 A. Yes.

13 Q. And was that because voters in the subdistricts
14 in Districts 4 and Districts 9 only got to submit a vote
15 for one representative?

16 A. Yes.

17 Q. With the ballots that went out to the voters in
18 Districts 4 and Districts 9, did the secretary of state
19 or the county election officials send any notice
20 explaining to voters in Districts 4 and Districts 9 why
21 they're only voting for one representative?

22 A. Not to my knowledge.

23 Q. Why was that not done?

24 A. I don't have an answer for that.

25 Q. Now the North Dakota secretary of state's office

1 has the resources to assist with a special election if
2 one needs to be done in District 9, correct?

3 A. Correct.

4 Q. You could assist with preparing a notice to
5 voters as to why a special election has to be held in
6 District 9 for the House of Representatives seat?

7 A. As I already answered, yes.

8 Q. You could make postings and put notice on your
9 website as to why a special election in District 9 for
10 the House of Representatives would need to occur?

11 A. Yes.

12 Q. Your office could perform local training of
13 election officials to assist them in understanding and
14 explaining to voters why a special election for the
15 House in District 9 would need to occur?

16 A. Yes, we could.

17 Q. Your office could assist in publishing notices in
18 local newspapers as to the reasons why a special
19 election in District 9 for the House of Representatives
20 needed to occur?

21 A. Yes, we could.

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

24 JUDGE ERICKSON: Thank you. You may step
25 down, Mr. Silrum.

1 We'll go ahead and take a break at this
2 point until 11:15.

3 (Recess taken; 10:55 a.m. to 11:15 a.m.)

4 JUDGE ERICKSON: All right. We'll go back
5 on the record. All counsel of record are personally
6 present. When we broke Mr. Silrum had just finished
7 testifying.

8 Does the -- do the government defendants
9 have anyone further to call?

10 MR. PHILLIPS: No, Your Honor.

11 JUDGE ERICKSON: All right. And, Ms. Kelty,
12 do the intervenors have a witness to call?

13 MS. KELTY: Yes, Your Honor. We'll call
14 Dr. Loren Collingwood.

15 JUDGE ERICKSON: Very good.

16 Dr. Collingwood, if you please would step
17 forward, take the oath, and once again the microphone's
18 directional. When you get on the stand if you would
19 just state your full name and spell your last name, I'd
20 appreciate it.

21 (Witness sworn.)

22 THE WITNESS: My name is Loren Collingwood,
23 C-o-l-l-i-n-g-w-o-o-d.

24 **LOREN COLLINGWOOD,**

25 HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH, THE
 WHOLE TRUTH, AND NOTHING BUT THE TRUTH, RELATIVE TO

1 SAID CAUSE, TESTIFIED AS FOLLOWS:

2 **DIRECT EXAMINATION**

3 **BY MS. KELTY:**

4 Q. Thank you, Dr. Collingwood. And what do you do
5 for a living?

6 A. I'm a political scientist. I'm an associate
7 professor of political science at University of New
8 Mexico.

9 Q. Do you have any experience with voting rights and
10 redistricting in the United States?

11 A. Yes. I've probably worked in 15 or 17 states
12 doing that.

13 Q. All right. Let's talk about that experience.
14 What are your general fields of academic expertise?

15 A. The overriding field I work in is American
16 politics and political behavior, voting, elections. I
17 also do a lot of research in race and ethnicity as well
18 as applied statistics and so racially polarized voting
19 is a subset of that discipline.

20 Q. Have you published on these topics?

21 A. Yes.

22 Q. Can you tell us about some of those publications?

23 A. Well, I've published 39 articles, peer-reviewed
24 articles, two books with Oxford University Press. Most
25 of my publications do revolve around race and ethnicity

1 in the United States to some degree.

2 Q. And any chapters, Dr. Collingwood?

3 A. About a dozen book chapters.

4 Q. Have you served as an expert witness on voting
5 rights or redistricting in other cases?

6 A. Yes.

7 Q. What are you typically asked to do as an expert
8 in voting or redistricting cases?

9 A. Probably most of the time people ask me to
10 evaluate the Voting Rights Act, what's known as the
11 Gingles criteria.

12 Q. And just broadly what does that look like?

13 A. Well, there's three prongs. Some of that has
14 been discussed today. One is the presence or absence
15 and the ability to draw a majority-minority district in
16 a certain area. And then Gingles prongs two and three
17 revolve around the concept of racially polarized voting.
18 That -- in a layperson's perspective that effectively
19 means if a particular group of voters or racial or
20 ethnic group is voting generally for one set of
21 candidates and a different group of voters, another
22 racial group, is voting for another set of candidates
23 consistently we see that pattern. We can establish the
24 presence of racially polarized voting.

25 Q. And over the course of your entire career so far,

1 how many times would you say you've performed an
2 analysis similar to the one that you performed in this
3 case?

4 A. Thousands.

5 MS. KELTY: Dr. Collingwood, let's take a
6 look at your CV, if we could pull that up. And for the
7 record we have marked this as Intervenor's Exhibit 1.

8 JUDGE ERICKSON: Yes. One has been
9 received. We have it.

10 MS. KELTY: When all else fails we have
11 paper. So may I approach?

12 JUDGE ERICKSON: You may. Why don't we get
13 a lapel mic on you too if you're going -- you're going
14 to have him testify from there or are you going to have
15 it on the Elmo?

16 MS. KELTY: I'm just going to hand it to him
17 and walk right back.

18 JUDGE ERICKSON: Oh, okay. That's fine.

19 MS. KELTY: Thank you, Your Honor. I'll
20 stay stationary for you.

21 Q. (Ms. Kelty continuing) Do you recognize this,
22 Dr. Collingwood?

23 A. Yes.

24 Q. What is this?

25 A. This is my CV.

1 Q. Is this current?

2 A. Yes.

3 MS. KELTY: And, Your Honor, the parties
4 have stipulated to the admission of Intervenor
5 Defendants' Exhibit 1.

6 Q. (Ms. Kelty continuing) Dr. Collingwood, does
7 this include your current experience and qualifications
8 in entirety?

9 A. Yes.

10 MS. KELTY: And at this time, Your Honor, I
11 would like to offer Dr. Collingwood as an expert in the
12 field of American politics, voting behavior, race and
13 ethnicity including racially polarized voting and
14 political methodology. And I'll note that the
15 plaintiffs have agreed to stipulate to the
16 qualifications of Dr. Collingwood.

17 JUDGE ERICKSON: I don't ordinarily receive
18 experts anymore. What I'll do is I'll say I'll receive
19 the testimony and he is qualified to testify on the
20 matters under consideration in this case.

21 MS. KELTY: Thank you, Your Honor.

22 Q. (Ms. Kelty continuing) Dr. Collingwood, could
23 you briefly summarize what the defendant intervenors
24 asked you to analyze in this case.

25 A. Well, my task here was to evaluate effectively

1 Gingles two and three. So the first prong is to
2 establish whether there is or is not racially polarized
3 voting in District 4. The second task that I was asked
4 to do was to evaluate how the different districts
5 perform for different types of candidates.

6 And so what I generally found was in the
7 first analysis of racially polarized voting that voting
8 is very racially polarized in District 4 and that when
9 you take the preferred candidates of, say, the Native
10 American population versus the white population, in the
11 full district the white preferred candidate is going to
12 win in every single election I looked at except for
13 maybe one or two and that the subdistricts are
14 necessary.

15 Q. And did you prepare a report setting forth your
16 analyses?

17 A. Yes.

18 MS. KELTY: And let's take a look at your
19 report, Dr. Collingwood. I assume technology is still
20 MIA.

21 May I approach, Your Honor?

22 JUDGE ERICKSON: You may.

23 Q. (Ms. Kelty continuing) Dr. Collingwood, do you
24 recognize this (indicating)?

25 A. Yes. This is my report.

1 Q. And again the parties have stipulated to the
2 admission of Dr. Collingwood's report here.

3 Dr. Collingwood, did you reach any
4 conclusions here?

5 A. Yes, I did. Again the main conclusion is that of
6 all the elections I looked at this is a very clear-cut
7 case of racially polarized voting present in District 4
8 between the Native American population and the
9 non-Native primarily white population. They prefer
10 different types of candidates routinely.

11 Q. And are those conclusions set forth in your
12 report?

13 A. They are.

14 Q. Let's talk first about your racially polarized
15 voting analysis. I want to focus first on your
16 conclusion that voting in North Dakota is racially
17 polarized.

18 Before we get there can you help us -- for
19 the Court help us define "racially polarized voting"?

20 A. Yes. It's a very simple concept. From a
21 numerical perspective we could begin with, say, 50 plus
22 one percent of voters of, say, the Native American
23 population. If you get at least 51 percent of voters
24 voting one way and 51 percent of voters of another
25 racial population voting another way, obviously it can

1 go all the way up to a hundred on either side, that's
2 the basic way that we think about racially polarized
3 voting.

4 But I should note we also want to consider
5 many elections, not just one election for various
6 specific campaign dynamics that could occur sometimes
7 that are, say, at odds with what you see in the overall
8 pattern. So it's -- we try to establish this with a lot
9 of elections.

10 Q. So what sort of analysis do you do to arrive at
11 your conclusions about racially polarized voting and
12 what sort of analysis did you do here to arrive at your
13 conclusion that voting in North Dakota is racially
14 polarized?

15 A. So the general process is to gather precinct vote
16 returns either from the secretary of state's office or
17 some other -- some other entity that produces those and
18 then that data is joined with demographic data, in this
19 case census or American community survey data but
20 there's other types of data so that in every precinct we
21 at least have a sense of the share of the racial
22 distribution in that area and we can conduct a variety
23 of different statistical analyses. One people have
24 referred to as regression analysis. That's one common
25 method. But there's many methods and the method that I

1 use is typically seen as an improvement upon what's
2 known as the Goodman Regression, which is the ecological
3 inference method of conducting racially polarized voting
4 analysis.

5 Q. And what is "ecological inference"?

6 A. So again it's this idea -- the key with a lot of
7 this is to try to take as much information we can from
8 every precinct. So you might have a precinct or a
9 voting tabulation district that has -- 80 percent is a
10 racial minority population, 20 percent white and we see,
11 okay, look, that precinct is tending to vote for a
12 democratic candidate or for Biden, for example.

13 We have another situation where we might
14 have it more mixed, fifty-fifty, or another situation
15 that's predominantly white, Anglo white as we would
16 maybe saying in New Mexico. And in that situation we
17 might see a different set of voting patterns, and
18 putting all of that together using these different
19 estimation techniques we can arrive at a reliable
20 estimate as to how different groups of voters vote.

21 Q. And is this racial bloc voting analysis standard
22 in voting cases?

23 A. Yes. This is the exact method that we use.

24 Q. Have you done racial bloc voting analysis before
25 in other cases?

1 A. Yes.

2 Q. About how many times would you say you've done
3 that analysis?

4 A. Well, I've done ecological inference analysis,
5 like I said, thousands of times and several other cases
6 this year recently and in previous years.

7 Q. All right. Let's talk a little bit more about
8 ecological inference, otherwise known as EI. Has EI
9 been approved by the Courts?

10 A. Yes. It's one of the predominantly approved
11 methods that Courts use to evaluate the efficacy of
12 these analyses.

13 Q. And you mentioned earlier the regression analysis
14 as well. Can you just give us a little bit of a
15 comparison between regression versus EI?

16 A. Well, EI is built specifically for this type of
17 phenomenon generally where you're dealing with
18 ecological data where you don't actually know: Is it
19 that specific white person that voted that specific way?
20 We don't know that as we've discussed earlier.

21 Goodman's Regression or regression analysis
22 is built just kind of as a general linear model. It's
23 not specific to ecological data or precinct data. And
24 so given that the assumptions of data distribution on
25 race in different precincts and geographic units here,

1 ecological inference would be the more appropriate
2 method.

3 Q. And let's talk about data a bit. Earlier you
4 said that you use data from election precincts from the
5 secretary of state's office and the American Community
6 Survey.

7 Are those data standard for this kind of
8 analysis?

9 A. Yes.

10 Q. Okay. Let's talk about the elections that you
11 analyzed here and turning now to page 8 of 39 of your
12 report. What elections did you consider in your racial
13 bloc voting analysis?

14 A. I looked at all top-of-the-ticket candidate
15 elections that were located on the secretary of state's
16 website from 2020 to 2014.

17 Q. And why did you look at state-wide elections?

18 A. The predominant reason is districts and precincts
19 might change over time and so I also conduct what's
20 known as an electoral performance analysis. So one of
21 the general approaches that I do is to use the same set
22 of elections that allow me to look at both racially
23 polarized voting and then also move into the electoral
24 performance analysis which deals with precinct changes
25 and stuff like that that makes it harder to, say, look

1 at just a little smaller election or something like
2 that.

3 Q. Is it common in your field for state-wide
4 elections to be used in this kind of analysis?

5 A. Yes.

6 Q. And do you find the use of state-wide elections
7 to be reliable indicators of future voting patterns?

8 A. Yes, especially in this case where there's 27
9 contests, it allows us to really get a full picture of
10 voting in this area.

11 Q. Which state-wide elections did you consider here?

12 A. Well, again we have examples ranging from the
13 2020 presidential contest, U.S. House, governor,
14 auditor, treasurer, public services commissioner, and
15 then in 2018 some of the same types of contests
16 including U.S. Senate, attorney general, secretary of
17 state, agricultural commissioner. There's also a public
18 service commission either two term -- or two-year, tax
19 commissioner. So these are the types of offices that
20 really does capture a range of different elections.

21 Q. And what election cycles did you review?

22 A. 2020, 2018, 2016, 2014.

23 Q. Why those election cycles?

24 A. Well, in general I want to capture elections that
25 are most proximate to the time period, which is going to

1 be 2020. And as I started moving down the pattern is so
2 consistent of the establishment of racially polarized
3 voting in this area that, say, moving down to 2012 or
4 2010 elections that are going back farther the data is
5 getting a bit more challenging to work with because
6 changes to county precincts and stuff like that can
7 introduce more challenges. That's -- 27 elections is
8 definitely enough to -- as an analyst to know kind of
9 what's going on here.

10 Q. All right. Dr. Collingwood, let's talk about
11 your findings and the results of your racial bloc voting
12 analysis. Turn to page 12 of 39 of your report. What
13 conclusions, if any, did you draw?

14 A. As you can see or not but hopefully the Court can
15 see the report here just to quickly walk through these
16 findings and we really only need to go over one contest
17 and maybe a couple sidebars to that because the results
18 are just so consistent.

19 In general I am finding that the non-Native,
20 which is primarily the -- almost overwhelmingly the
21 white population in this area is tending to vote for the
22 Republican candidate or in this case Donald Trump, we're
23 looking at the first one, around 80 percent of the time,
24 okay? So what does that mean? I'm estimating here that
25 81.3 percent of white voters who live in District 4 are

1 supporting Donald Trump. Meanwhile, just 18.2 percent
2 of Native American voters are backing that same
3 candidate.

4 Drop down to support for the Biden here.
5 You can see the pattern is almost identically reversed
6 where 18.7 percent of non-Native voters in this area are
7 backing Biden. Meanwhile 81.8 percent of Native
8 American voters are backing Biden. Okay. So this is
9 clearly passing on both sides the 50 percent plus one
10 threshold. The error bars as you can see those kind of
11 error bands, confidence bands, are never crossing the
12 threshold at 50 percent. This is a very clear-cut case.

13 MS. KELTY: And, Your Honor, I would draw
14 your attention now that we have technology to the screen
15 because it shows the colors here. It might be a little
16 easier to review.

17 Q. (Ms. Kelty continuing) Can you explain a little
18 bit more, Dr. Collingwood, about the confidence
19 intervals?

20 A. So these methods do require a -- there's a margin
21 of error. We're looking at a set of precincts, right?
22 We're joining data together and we're effectively
23 conducting simulations to arrive at this 80 percent and
24 so what we can do with that simulation approach is each
25 time we make a simulation or an estimate as to what the

1 vote is and we can build that up over time and generate
2 what's known as a -- effectively called as a posterior
3 distribution. And the point that's the most likely
4 estimate here is what we call the point estimate and
5 that is the end of that bar, right?

6 So in the case of the first election it's
7 81.3 but we know that there's some statistical error
8 around that and so here we can sort of make the
9 assessment that that range of the kind of likely
10 outcomes as, say, 77 to 85, okay? So that's kind of the
11 confidence that we can have in that. And this is a wide
12 discussion that we have in my field but that's the
13 general -- the point of that.

14 Q. And now let's look at the figure here that deals
15 with the 2016 election. I believe it would be Figure 4
16 a few pages down. And here I want to draw your
17 attention to three races that featured Native American
18 candidates: Iron Eyes for U.S. House, Beaubrun for
19 public services commissioner and Buffalo for insurance
20 at the bottom. What are your findings here?

21 A. Well, I do a lot of racially polarized voting in
22 a variety of places and one thing that is -- that can
23 tell you something is the race or ethnicity of the
24 particular candidate, and these three candidates are
25 Native American candidates. And so what you can

1 identify here with these three candidates, take Iron
2 Eyes for example, the Native population -- I'm
3 estimating the native vote is 97 to 98 percent in
4 support of I believe Chase Iron Eyes. That's higher
5 than what you typically see among even the Native
6 American vote for, say, non-Native candidates.

7 And then you see a very similar pattern when
8 you go down to Hunte Beaubrun, around the same
9 percentage. Fully 95 percent plus I'm estimating of
10 Native American voters are backing this candidate.
11 Finally down on Ruth Buffalo you see a very similar
12 trend.

13 And so it does appear that the Native
14 American vote, when there is a Native American candidate
15 running, the support is going to be even a little bit
16 higher than what we might typically anticipate if it's a
17 white candidate or a non-Native candidate running.

18 Q. And overall, Dr. Collingwood, how does this level
19 of racial polarization you found here compare to other
20 jurisdictions you've been involved in?

21 A. I've worked in many jurisdictions and this is on
22 the very high end, particularly in the case when there's
23 a Native American candidate that is running. There's
24 just strong support within that community for that type
25 of candidate it does appear at least based on this. And

1 so I would say this is on the very high end of what we
2 tend to see on racially polarized voting.

3 Q. Now let's talk about your performance analysis,
4 turning now to page 18 of your report and looking at
5 Figure 7. Can you explain for us just at a high level
6 what you're trying to do with a performance analysis?

7 A. So the first analysis that I conducted
8 establishes the presence of racially polarized voting.
9 But under the Voting Rights Act if there's racially
10 polarized voting but that you can't draw a district, you
11 say there is white bloc voting but say it's fairly
12 small. And basically there's -- the whites are not
13 blocking the Native vote enough of the time, what that
14 might mean is that the Native-preferred candidate might
15 still be able to win some of the time, okay? So that's
16 the test on the Gingles three.

17 And so what we do with an electoral
18 performance analysis is we look at different district
19 configurations and how the Native-preferred or the
20 non-Native or white-preferred candidate does because we
21 already know how they have -- we already know under
22 Gingles test two how they tend to vote.

23 And so take, for example, the U.S. House
24 contest -- or let's stick with the presidential
25 election. Cruising down to line 4 there we see

1 "President." The green line, that's support for Donald
2 Trump. That's the white-preferred candidate. And then
3 the blue line or navy blue line is the Native-preferred
4 candidate, which in this case is Joe Biden. So what
5 we're estimating here under the full district is that
6 Donald Trump would win that district almost two to one
7 if the subdistricts were removed. The Native population
8 would not be able to elect their preferred candidate
9 because you can see that green bar going down. Each
10 time it's further to the right, okay?

11 Then when we move over to "ND 4A," the
12 middle panel, that's the panel my understanding that is
13 surrounding the Native American reservation. There we
14 actually see the efficacy of the subdistrict in action.
15 You can see there that the Native-preferred candidate,
16 those blue lines, are winning every single time under my
17 reconstituted performance analysis.

18 Switching over to "ND 4B," the second
19 subdistrict, you can see it's basically a blowout
20 victory here for the white-preferred candidates in every
21 single election. It's not close at all.

22 Q. So how do you go about making this analysis?

23 A. So we have the precincts and voter tabulation
24 districts. We know what the shape file is like, what
25 the map is like for the different configurations. So we

1 have the full ND 4, we have 4A, 4B. We can determine
2 where the voters live based on the precincts that
3 they're located in and then once we have that
4 established we simply sum down the vote for Trump, sum
5 down the vote for Biden. That's the general process.
6 And so you can do this with any election.

7 Q. Did you make any conclusions here?

8 A. The clear conclusion, based on my performance
9 analysis, is that the subdistricts are necessary in this
10 case to effectively clear Gingles three of the Voting
11 Rights Act.

12 Q. And so, Dr. Collingwood, based on your analysis
13 in this case, your training as a political scientist and
14 your experience with redistricting, have you formed any
15 opinion on whether Native Americans are politically
16 cohesive?

17 A. They're absolutely politically cohesive. That's
18 incontrovertible.

19 Q. And have you formed an opinion on whether whites
20 vote sufficiently as a bloc to block Native Americans
21 from electing candidates of their choice at the full
22 District 4 level?

23 A. Yes. As you can see here on the panel on the
24 left, that's a very consistent finding. The white
25 majority will block the Native American minority in this

1 particular voting context of being able to elect
2 candidates of choice at the full district level.

3 Q. And in your opinion would eliminating the
4 subdistricts violate Section 2 of the Voting Rights Act?

5 A. That's my professional opinion.

6 Q. How so?

7 A. As I've just stated, there's a presence -- the
8 subdistrict creates an ability to draw a
9 majority-minority seat. That's Subdistrict 4A. As I've
10 demonstrated here previously also in the full area,
11 there's racially polarized voting. That's Gingles two.
12 And Gingles three, which is this analysis, effectively
13 shows that the Voting Rights Act will not be violated if
14 this 4A is in place but it will be if it's taken away.

15 MS. KELTY: No further questions.

16 JUDGE ERICKSON: Thank you.

17 Mr. Sanderson?

18 MR. SANDERSON: Yes. Thank you, Your Honor.

19 **CROSS-EXAMINATION**

20 **BY MR. SANDERSON:**

21 Q. Dr. Collingwood, my name is Paul Sanderson. I
22 represent the plaintiffs in this case. I just have a
23 couple quick questions for you.

24 The report and opinions you prepared in this
25 case are limited to Legislative District 4, correct?

1 A. That's correct.

2 Q. Okay. You're not offering any opinions on
3 voting -- racial polarized voting in District 9,
4 correct?

5 A. Not in this report.

6 Q. Okay. And looking at the report you offered into
7 evidence in this case, it is dated April 7, 2022,
8 correct?

9 A. That's correct.

10 Q. And your April 7, 2022 report regarding racial
11 polarized voting was not presented to the North Dakota
12 Redistricting Committee during the 2021 redistricting
13 process, correct?

14 A. Correct.

15 Q. And you did not testify at any redistricting
16 hearings regarding your opinions on racially polarized
17 voting in 2021, correct?

18 A. That's correct.

19 Q. And you've not reviewed any expert reports on
20 racially polarized voting presented to the Redistricting
21 Committee in 2021, correct?

22 A. Correct.

23 Q. And just to be clear your expert report on coming
24 up with the conclusions and the elections you evaluated
25 in forming your opinions do not contain any prior

1 District 4 House of Representative election results,
2 correct?

3 A. That's correct.

4 MR. SANDERSON: No further questions.

5 JUDGE ERICKSON: Thank you.

6 MR. PHILLIPS: No questions, Your Honor.

7 JUDGE ERICKSON: All right. Thank you,
8 Mr. Phillips.

9 Did you have any redirect, Miss Kelty?

10 MS. KELTY: No, Your Honor.

11 JUDGE ERICKSON: All right. You may step
12 down, sir. Thank you for your time.

13 THE WITNESS: Thank you.

14 JUDGE ERICKSON: All right. Do you have any
15 further witnesses to call, Miss Kelty?

16 MS. KELTY: No, Your Honor. We rest.

17 JUDGE ERICKSON: All right. Here's the
18 story. We have a couple of commitments over noon
19 from -- on the part of a couple of judges so what we'll
20 do is we'll break at this point. We'll go ahead and
21 reconvene at 1:30 to take argument on all the legal
22 issues, okay? All right. Thank you.

23 (Recess taken; 11:50 a.m. to 1:35 p.m.)

24 JUDGE ERICKSON: We're back on the record in
25 a case entitled Walen versus Burgum. It's File

1 No. 1:22-cv-31. The record should reflect that all
2 counsel are present. That's not quite true.
3 Mr. Wrigley has -- is no longer with us but otherwise
4 everyone else is present.

5 When we broke we were about to take the
6 closing arguments. Mr. Sanderson, are you going to
7 argue on behalf of the plaintiff/movants?

8 MR. SANDERSON: Yes, I am, Your Honor.

9 JUDGE ERICKSON: You may proceed.

10 MR. SANDERSON: Thank you. May it please
11 the Court, counsel: I'm here today on behalf of Charles
12 Walen, a representative of District 4, and Paul
13 Henderson, a representative of District 9, who are
14 seeking -- who filed this lawsuit seeking an injunction
15 and declaratory action against the defendants, Governor
16 Doug Burgum and Secretary of State Al Jaeger, regarding
17 the newly created subdistricts in Districts 4 and
18 Districts 9.

19 The plaintiffs in this case assert that the
20 newly created subdistricts are -- constitute racial
21 gerrymandering in violation of the Equal Protection
22 Clause of the Fourteenth Amendment. And currently we're
23 here today on the plaintiffs' motion for a preliminary
24 injunction under Rule 65 seeking to enjoin the
25 defendants from conducting any elections in the

1 subdistricts until a final determination on the merits
2 can be made.

3 In this case with respect to our preliminary
4 injunction there are four factors that the plaintiffs
5 must prove: substantial likelihood of success,
6 irreparable harm absent the injunction, public interest
7 and balance of the equities. And I'll address each of
8 these. But as this Court has recently ruled while no
9 one factor is controlling certainly the substantial
10 likelihood of success on the merits is the most
11 important factor of these four.

12 So with respect to the merits of this case
13 under the Fourteenth Amendment Equal Protection Clause
14 states are prohibited from separating citizens into
15 voting districts on the basis of race absent sufficient
16 justification. Now again plaintiffs have brought a
17 racial gerrymandering case and to prove racial
18 gerrymandering first plaintiffs bear the burden to
19 establish that race was a predominant factor motivating
20 the decision to place voters within a particular
21 district. If the plaintiffs meet that burden the burden
22 then shifts for element No. 2 to the state that the
23 drawing of the districts were narrowly tailored to
24 achieve a compelling government interest, otherwise
25 known as strict scrutiny.

1 Now following the filing of our preliminary
2 injunction motion in this case at the beginning of March
3 the United States Supreme Court issued a decision which
4 is directly on point to the issues you're presented with
5 in this case. The Wisconsin Legislature case was issued
6 by the U. S. Supreme Court on March 23, 2022, and the
7 issues and basically the facts are identical to what
8 were presented here today.

9 In that case the governor argued that
10 race-based districts in Wisconsin were required by
11 Section 2 of the Voting Rights Act. The U. S. Supreme
12 Court found that the evidence presented by the governor
13 failed to meet the Gingles -- the Thornburg v. Gingles
14 three preconditions that we've talked about. And in
15 that case the Court walked through the framework that
16 the State must show it had a strong basis in evidence in
17 order to pass such racial gerrymandering in compliance
18 with their compelling interest in complying with the
19 Voting Rights Act.

20 But most importantly on March 23, 2022,
21 United States Supreme Court remanded that issue back to
22 Wisconsin to fix the issues before the upcoming
23 elections in 2022. And we'll talk about -- and I
24 certainly am going to address the State's Purcell
25 arguments later but one thing to remember and that we'll

1 discuss in much more detail towards the end of my
2 closing argument, at no point -- Purcell principle was
3 not applicable in the Wisconsin Legislature case because
4 the Supreme Court would not allow an unconstitutional
5 election to proceed. So we'll address that like I said
6 in more detail.

7 So we bear the burden in this motion to show
8 that race was the predominant factor in the
9 legislature's determination. And the United States
10 Supreme Court has set forth the ways that a plaintiff
11 can go about showing or proving that race was a
12 predominant factor.

13 First, No. 1, it can be established through
14 circumstantial evidence regarding the district's shape
15 or demographic makeup. This Court needs to look no
16 further than Subdistrict 4A and Subdistrict 9A. The
17 boundaries of those subdistricts are completely
18 following the outer boundaries of two reservations. And
19 let's not forget the state of North Dakota has 47
20 legislative districts. Only two such districts were
21 selected for subdistricts because they contained the
22 Turtle Mountain Reservation and the Fort Berthold
23 Reservation, and --

24 JUDGE ERICKSON: Does it matter at all that
25 in the long history of the United States we have

1 traditionally said that being an Indian is a political
2 status as opposed to a racial classification? And when
3 we're looking at a reservation, it's a tribal entity
4 that has inherent attributes of sovereignty and it also
5 is a dependent domestic nation in a guardian/ward
6 relationship with the United States government.

7 And so is it -- is it necessarily so that
8 the classification is race-based as opposed to, you
9 know, political status-based?

10 MR. SANDERSON: And, Judge, I think that's
11 one of the arguments asserted by the intervenors and
12 both the State is that this is more a traditional
13 redistricting purpose trying to keep this community
14 together.

15 JUDGE ERICKSON: Yeah. They've argued
16 mostly culture, right? They've not really argued as
17 much that the independent status of the tribe as being a
18 different entity. It's not -- the intervenors have
19 argued that.

20 But, I mean -- but at the end of the day my
21 question is: Does that matter and, if not, why not?

22 MR. SANDERSON: It doesn't matter for
23 purposes of the analysis that the Supreme Court has set
24 forth. Whether the community would be Native American,
25 whether the community would be black, whether it would

1 be a religious community that you wanted to keep
2 together, the fact that it's being done on the basis of
3 race is the most important factor.

4 JUDGE ERICKSON: But I think that's the
5 question. Is it actually being done on the basis of
6 race or is it being done on the basis of Indian status?

7 MR. SANDERSON: And the uncontroverted
8 evidence, as I'm going to get to here momentarily,
9 Judge, will show that race was the predominant factor.
10 And this factor that the North Dakota Legislative
11 Assembly relied upon solely was they wanted to avoid a
12 Section 2 voting rights claim made by the tribes in this
13 case. And the evidence submitted by the State in
14 support with their Affidavit from Miss Thompson contains
15 testimony, written testimony submitted at some hearings.
16 And in there the tribes threaten a voting rights claim
17 case.

18 Not only, I mean, as the Court is aware
19 Judge Welte's sitting on a voting rights case from the
20 Turtle Mountain Tribe regarding the subdistricts in
21 District 9. So, you know, to your point whether it was
22 done that way or not or whether it was considered, that
23 wasn't the predominant factor. The predominant factor
24 was solely race and solely on the basis to avoid a
25 Section 2 voting rights case because South Dakota just

1 got hit with a voting rights case and the legislature
2 wanted to avoid that.

3 So with respect to -- I want to go to the
4 demographic makeup because you're going to hear some
5 testimony here momentarily about that. But not only
6 were the boundaries drawn specifically on the
7 reservation borders, they were drawn specifically in
8 that -- with respect to Turtle Mountain Tribe and Fort
9 Berthold Tribe because the demographic makeup of those
10 two tribes was sufficient in number to constitute a
11 majority in those districts. Again showing why race was
12 done that way.

13 The legislature didn't draw subdistricts
14 around the Standing Rock Tribe. They didn't draw
15 subdistricts around the Spirit Lake Tribe because again
16 those tribes do not have sufficient population or
17 demographic makeup to support a majority in the
18 subdistrict. So those factors -- this Court needs to
19 look no further than that circumstantial evidence to
20 know that race was a predominant factor in this.

21 But also the second point of how we meet our
22 burden in this case is that through legislative history
23 statements by elected officials. And that legislative
24 history is used by Courts throughout and that's what we
25 attempt and will show here. The legislative history in

1 this case shows race was a predominant factor. This
2 morning you heard the testimony of Representative Terry
3 Jones, the House representative from District 4, who
4 attended the subdistrict -- or the Redistricting
5 Committee meetings regarding the subdistricts. He
6 testified at those. He spoke to the Legislative
7 Council. He testified on the floor. And Mr. Jones --
8 Representative Jones' testimony, as you heard today,
9 race was the predominant factor.

10 Now in our motion we submitted some
11 hyperlinks to various testimony to support race was a
12 predominant factor and, you know, we were criticized by
13 the intervenors and the State as to being cherry-picking
14 random comments from certain legislators out of context.
15 Following is a video from Joint Redistricting Chairman
16 Representative Devlin where he will state unequivocally
17 race was the predominant factor.

18 (Unidentified video played.)

19 MR. SANDERSON: Our burden's met. The
20 chairman of the Joint Redistricting Committee testified
21 on the floor of the House: We are putting in
22 subdistricts because it is the requirement of the Voting
23 Rights Act.

24 We've met our burden with respect to
25 condition one. And let's not forget, complying with the

1 Voting Rights Act is a compelling state interest and
2 they can do that. They can do that based on race. But
3 if they do that they have to meet the Gingles factors
4 that we'll talk about.

5 (Unidentified audio/video played.)

6 MR. SANDERSON: Two of the tribes in the
7 state of North Dakota meet the criteria and the criteria
8 he's referring to is being sufficiently large enough to
9 comply with the first requirement of Gingles for a
10 Voting Rights Act claim.

11 Now again you're going to hear from
12 Redistricting Committee Member Headland who states the
13 subdistricts were drawn on the basis of race.

14 (Unidentified audio/video played.)

15 MR. SANDERSON: I have issues dividing
16 subdistricts on the basis of race and I can't support
17 this subdivision. Redistricting Committee Monson in a
18 committee hearing, Representative Monson admitting the
19 subdistricts are being drawn on the basis of race.

20 JUDGE WELTE: Counsel, before you play this
21 could you do something about the volume because I'm not
22 able to hear it? Thank you.

23 MR. SANDERSON: I apologize, Judge. Thank
24 you.

25 (Unidentified audio/video played.)

1 MR. SANDERSON: Committee Representative
2 Monson just said: We gerrymandered to give Native
3 American populations the opportunity to win elections.
4 And this is what's referred to in the Courts as
5 affirmative racial gerrymandering, but it's still racial
6 gerrymandering and it still must meet the statutory and
7 constitutional framework set down by the U.S. Supreme
8 Court.

9 Finally another committee member,
10 Representative Schauer, a Redistricting Committee
11 member, admitting that race is a predominant factor and
12 the reason we did this is because they now meet the
13 population requirements to meet the first prong of
14 Gingles.

15 (Unidentified audio/video played.)

16 MR. SANDERSON: These are not cherry-picked
17 testimony from random legislators taken out of context.
18 These are committee members. This is a committee member
19 on the floor advocating for the passage of this bill and
20 the sole reason is to comply with Section 2 of the
21 Voting Rights Act and that's race based.

22 The argument that Representative Schauer
23 just made regarding the sufficient population was
24 directly addressed on March 23rd by the U. S. Supreme
25 Court. Arguments that minority population was now

1 sufficiently large and compact to meet the Voting Rights
2 Act, Section 2, is just the sort of uncritical
3 majority-minority district maximization that we have
4 expressly rejected.

5 The governor -- to go on the governor of
6 Wisconsin provided almost no other evidence or analysis
7 supporting the voting rights claim. Strict scrutiny
8 requires much more. We've met our burden to show race
9 was a predominant factor. So now the burden switches to
10 the State to show that they have met the -- if race is a
11 predominant factor and complying with the Voting Rights
12 Act is a predominant factor, then the burden now shifts
13 to the State to withstand strict scrutiny. And to do
14 that the U. S. Supreme Court has set forth the framework
15 in Thornburg v. Gingles, the three conditions that must
16 be met.

17 Now we're going to address the Gingles
18 factors or preconditions but let's not forget that's
19 just the starting point. That's not the end of the
20 analysis. Now our position in this case those clearly
21 aren't met. There's absolutely no evidence. But even
22 if they were met there were additional factors that need
23 to be taken care of.

24 So the three Gingles preconditions, first,
25 the minority group is large and geographically compact

1 to constitute a majority in the district. There's
2 nobody here arguing that Subdistrict 4A and Subdistrict
3 9A meet the first Gingles factors. What we're here
4 today and the basis of -- the entire basis of this
5 racial gerrymandering case are the next two factors.

6 Factor No. 2 of Gingles, the minority group
7 is politically cohesive and, factor No. 3, the
8 district's majority vote must vote as a bloc to defeat
9 the minority's preferred candidate. Unless these three
10 factors are established there neither has been a wrong
11 nor can there be a remedy created by the legislature.

12 And one thing that's very important when
13 considering whether the factors two and three of Gingles
14 were met is they must be met at the time the districts
15 were drawn, meaning they must be met at the time the
16 Redistricting Committee created those subdistricts back
17 in November 2011. And again this was just again
18 confirmed a month and a half ago by the Wisconsin
19 Legislature. The determination of whether there's
20 substantial evidence must be done at the time of
21 imposition. Attempting to rewrite the legislative
22 history or rejustify what or why it was done doesn't
23 count.

24 Most telling this is going to be from the
25 floor debate and one of the Redistricting Committee

1 members is Representative Nathe and he is asked a
2 question by Representative Hoverson following
3 Representative Jones' testimony that you heard this
4 morning saying this is what is required. A racial
5 polarization study must be done.

6 (Unidentified audio played.)

7 MR. SANDERSON: Committee Member Nathe
8 admits they did not do any polarization studies.
9 Instead they relied on -- and what he's referring to the
10 Tribe, Chairman Fox says -- it's again attached to the
11 exhibits of Miss Thompson in this case, submitted some
12 written testimony that he lost a school board election
13 in 1990 and that the two intervenors in this case lost
14 the election in 2020. That is the extent of past
15 historical evidence that was provided to the committee.
16 And, as we've cited in our briefs, lay testimony from a
17 party seeking racial gerrymandering is not sufficient.
18 There has to be substantial evidence.

19 Not only on the House floor was this
20 discussed but Senator David Hogue testified that the
21 Gingles preconditions had not been met in the Senate.

22 (Unidentified audio/video played.)

23 JUDGE HOVLAND: So, Mr. Sanderson, I've got
24 a question. I'm just curious why you would not have
25 hired an expert witness in this case and I'll have the

1 same question for the State. I think these cases cry
2 out for some expertise.

3 MR. SANDERSON: And, Judge, I respectfully
4 disagree with -- you know, with the assumption that this
5 case is prime for expert testimony. This is a
6 sufficiency of the evidence case. What was presented to
7 the legislature at the time? We don't get to come in
8 and back door in sufficient evidence and say: Oh, but
9 the legislature could have considered this. It's what
10 they considered at the time. And the record is
11 absolutely void of any evidence to meet factors two and
12 three of Gingles.

13 Had they done that, had there been
14 sufficient evidence we wouldn't be here. But they
15 didn't follow the statutory framework. And this was --

16 JUDGE ERICKSON: There are some cases that
17 say that you don't necessarily need a scientific study
18 but it still has to get to substantial evidence, right?

19 And so the question is: If we listen to
20 what was presented to the Redistricting Committee -- and
21 there's a lot of things that were said, there's some
22 testimony that was received, there's a number of written
23 statements that were received. The question is: Are
24 they merely anecdotes or are they sufficiently detailed
25 to constitute substantial evidence? And I know what

1 your answer is. I want to know why it is that.

2 MR. SANDERSON: The Supreme Court has been
3 very clear on what is required to be substantial
4 evidence for -- to meet the Gingles factors, and I think
5 Dr. Collingwood is Exhibit A for our case.
6 Dr. Collingwood's report, that racial polarization
7 study, is exactly the type of evidence that the
8 legislature needs to rely on to support this. But it
9 wasn't.

10 And we're not here to -- we're not here,
11 nobody's here arguing whether or not there's racial
12 animus in District 4 or District 9. That's not the
13 issue. The issue is: Did the legislature have evidence
14 in front of it to support that? I'm not here -- while I
15 disagree with the methodology, some of the methodology
16 Dr. Collingwood used, that's not an issue for us and the
17 intervenors would not have had to go out and hire
18 Dr. Collingwood if there was any evidence they could
19 rely on.

20 Let's talk about -- we've pointed
21 out Representative Nathe admitting there was no evidence
22 to meet those. So let's look at -- this case was filed
23 on February 16th. The State submitted its brief -- and
24 they know our main argument. The entire purpose of this
25 case is: Have the two Gingles factors been met? Page

1 19 of the State's brief, here is their response to the
2 Gingles factors: The Court has identified three
3 preconditions, the Gingles preconditions which are
4 necessary to proceed under Section 2 of the Voting
5 Rights Act, citing the Cooper Supreme Court case that we
6 rely on heavily. One sentence: "If a State has good
7 reason to think that all the 'Gingles preconditions' are
8 met, then so too it has good reason to believe that
9 Section 2 requires drawing a majority-minority
10 district."

11 That is the only evidence the State of North
12 Dakota is presenting to you that they've met sections
13 two and three of Gingles. Where's the citation in the
14 record to any evidence, any study, any voting rights?
15 And one of the things when we cite the Abbott case --
16 and U.S. Supreme Court Abbott opinion is really clear on
17 what is necessary and they -- they're very clear about
18 making sure that not only do you have to look at past
19 historical voting data, you specifically need to look at
20 past voting data with respect to the districts at issue.
21 And that's where we take issue with Dr. Collingwood on
22 it but again that's not here.

23 But there's no district data. There's no
24 precinct data that the legislature relied on.

25 JUDGE ERICKSON: Is there any requirement

1 that the precinct data be specifically analyzed and
2 reported on?

3 MR. SANDERSON: Absolutely, Judge. And
4 there's just case after case both from the Supreme Court
5 and, you know, more detailed from some of the federal
6 district courts that have analyzed this. They said --

7 JUDGE ERICKSON: There's no question that
8 there's a lot of data in these cases and there's a lot
9 of studies in these cases. The question is -- and those
10 studies are by and large analyzed and Courts determine
11 whether or not that is sufficient evidence.

12 Is there a requirement in any case, however,
13 that says that that sort of granular analysis precinct
14 by precinct is necessary?

15 MR. SANDERSON: Yes, absolutely.

16 JUDGE ERICKSON: And so which case is that?

17 MR. SANDERSON: The Abbott case we cited, I
18 believe the Wisconsin Legislature case we cited, they
19 both say that. You have to look at specific precinct
20 data. Generalizations about election results are not
21 sufficient. And it just wasn't done.

22 And again Dr. Collingwood's expert report is
23 Exhibit A to that fact. There would be no need to hire
24 an expert in April of 2022 if the legislature had that
25 in front of it. The intervenors or the State would be

1 putting that up right in front of you showing this is
2 what the legislature relied upon to meet that. But that
3 wasn't done, and certainly not in District 9.
4 Absolutely no evidence in District 9 and, in fact, we
5 have the tribe opposing the subdistrict in District 9.
6 Senator Richard Marcellais, an enrolled member of the
7 tribe who has won the last six elections in District 9,
8 voted against this subdistrict and spoke against the
9 subdistricts on the floor.

10 The undisputed evidence before you shows the
11 Gingle factors have not been met by the North Dakota
12 Legislature in creating the subdistricts in order to
13 comply with Section 2 of the Voting Rights Act and for
14 that reason the plaintiffs will prevail on the merits
15 just as the plaintiffs in the Wisconsin case prevailed
16 earlier.

17 Just quickly with the remaining injunction
18 factors, the second factor, irreparable harm absent the
19 injunction. This Court has recently said: An injury
20 regarding constitutional right to vote is irreparable
21 because there is no redress once the election occurs.
22 And in this case if my clients are not entitled to their
23 two representatives like everyone else in the state,
24 they'll miss an entire policy-making, an entire
25 legislative session that only occurs once every two

1 years. That is irreparable harm sufficient to meet
2 these factors.

3 And then the public interest and balance of
4 equities, with respect to the public interest the public
5 has a huge interest in a right to fair constitutional
6 elections and their right to vote in those elections.
7 And then we get to -- and this is taking us into the
8 Purcell argument here but the balance of equities.
9 We're talking about a deprivation of my clients'
10 constitutional rights to vote, a violation of the
11 Fourteenth Amendment Equal Protection Clause against the
12 State's argument that it's a significant impact to the
13 election process and those workers and it would be a
14 hassle.

15 JUDGE HOVLAND: So tell me how you get
16 around Purcell and the most recent pronouncement of the
17 Supreme Court in Alabama.

18 MR. SANDERSON: You're referring to the
19 Merrill case and I'll get there. The State's argument
20 in this is six months is not enough time to fix the
21 unconstitutional election.

22 JUDGE ERICKSON: Well, really what they
23 might be arguing is that people have already started
24 voting and, you know, if you look around the country and
25 you look at election law challenges that have been

1 brought everywhere for all sorts of reasons over the
2 last, you know, five or six years, the one cardinal
3 bright shining light, the cardinal rule is when they
4 start voting we quit deciding.

5 And so why should we decide that issue
6 rather than letting at least the primary play out?

7 MR. SANDERSON: And, Judge, I'll respond to
8 it this way and we'll address it Purcell. We are unable
9 to find a single case where a Court has applied Purcell
10 to let an unconstitutional election proceed. They've
11 applied Purcell to stop voting rights changes, you know,
12 statutory changes, rules. But not once -- and neither
13 the State nor the intervenors have cited one case in
14 their briefs where an unconstitutional election is
15 allowed to go forward. And what they're asking --

16 JUDGE ERICKSON: Do you have a case where
17 after people have started voting a Court has entered an
18 order to stop an unconstitutional election that's been
19 affirmed on appeal?

20 MR. SANDERSON: Judge, I -- we cited a
21 number of cases and mostly federal court cases where
22 three, four, five months is sufficient time. I'm not
23 sure -- I can't stand in front of you right now and say
24 whether the voting process had started at that time. I
25 would suspect, you know, just knowing the timelines it

1 likely had.

2 But Purcell is not an absolute bar on an
3 injunction. It is just one factor that this Court must
4 weigh against others. And in this case you're weighing
5 the Purcell timing and inconvenience against a party's
6 constitutional rights.

7 And one thing that's lost in this, and I
8 want to make sure the framework of this is really clear,
9 the State is arguing we're coming in trying to change
10 election laws. We're not. We're asking -- my clients
11 are asking that the status quo be maintained. Voters in
12 North Dakota have elected two representatives in their
13 district for decades as far as back as we can possibly
14 find, if not a hundred years but for decades. The State
15 of North Dakota attempted to change that on
16 November 12th of 2021 and they want to change that
17 process. It's them asking for a change close to the
18 timing within a year of the election. So this Court's
19 Self-Advocacy Solutions v. Jaeger decided in 2020
20 Purcell does not apply when injunction would not
21 fundamentally alter elections and there's no risk of
22 voter confusion.

23 The concerns that trouble the Court in
24 Purcell are not present in this instance. There's no
25 voter confusion. There's no dissuasion from voting.

1 All these things -- all those issues remain the same
2 when weighing the impact of the threat to the
3 constitutional fundamental right to vote outweighs the
4 inconvenience to voters. In this case if this Court
5 were to remove the subdistricts every person in District
6 4 would get to vote. Every person in District 9 would
7 get to vote. The precincts don't have to change. The
8 outer boundaries don't have to change. There would be
9 no confusion because this is how voters have voted for
10 the last hundred years in this state.

11 JUDGE WELTE: It isn't just confusion, and
12 certainly whether or not there's confusion is still at
13 issue here, but isn't it also cost or hardship
14 amongst -- upon the voters as well? Shouldn't those be
15 considerations?

16 MR. SANDERSON: And certainly those can be
17 considerations. I haven't heard any testimony nor seen
18 any in this case of what the cost of printing additional
19 ballots would be, what the cost of holding another
20 special election. But I would really contend that
21 those -- that monetary cost is far outweighed by the
22 16,000 voters in District 9 who are going to have their
23 constitutional rights violated if an election on
24 unconstitutional subdistricts proceeds. The State's
25 entire Purcell argument is based on an erroneous

1 assumption also that this Court does not have the power
2 to go in and change it. A big piece of their argument
3 is you have to remand this back to the legislature.
4 They could change everything. They could change the
5 districts. It could throw the whole state off. That is
6 simply not correct.

7 Courts -- and this is the Covington case
8 which they actually cite, a 2018 U.S. Supreme Court
9 opinion. The District Court has its own duty to cure
10 illegally gerrymandered districts through an orderly
11 process in advance of elections. Courts have a duty to
12 make sure an unconstitutional election does not proceed.
13 We are six months out from the November election. There
14 is sufficient time to fix this.

15 And again although -- the U. S. Supreme
16 Court said in the Upham case, although Courts must refer
17 to the legislative judgments on these issues as much as
18 possible, it's forbidden to do so when the legislative
19 plan will not meet the special stands of population
20 equity or racial fairness that are applicable to
21 Court-ordered plans. This Court has every power and
22 authority to go in and fix this election and there are a
23 number of ways that that can be done.

24 But, Judge Hovland, to your point I want to
25 address the Merrill case you brought up. Merrill was

1 decided on February 7, 2022, a month and a half before
2 the Wisconsin Legislature case. And one of the very
3 important things in Merrill was in Merrill Justice
4 Kavanaugh outlined four factors which if established
5 would overcome the Purcell doctrine: One, the
6 underlying merits favor the plaintiff; two, the
7 plaintiff would suffer irreparable harm absent
8 injunction; three, the plaintiff is not unduly delayed
9 bringing the Complaint; and four, the changes in
10 question are feasible before the election.

11 And in Merrill Judge Kavanaugh said the
12 plaintiffs had failed to meet at least two of those and
13 he said in the Merrill opinion in February that the
14 plaintiffs haven't even shown that they would prevail on
15 the merits let alone a substantial likelihood they would
16 prevail on the merits. And then too the changes are
17 feasible before the election. One of the things -- this
18 was -- Merrill was completely redrawn the entire state
19 of Alabama and one of the things Justice Kavanaugh
20 pointed out in that opinion is we're in a situation
21 where candidates don't even know what district they're
22 in. Incumbents don't know what -- they don't even know
23 what district they live in at this stage. And they said
24 that is not sufficient and Purcell would apply to that.
25 And that again was a voting rights claim.

1 JUDGE WELTE: Mr. Sanderson, you mentioned
2 before the status quo and you just spoke to the factor
3 about the changes being feasible before the election.

4 When you talk about District 4 and you talk
5 about District 9, District 4 and District 9 in 2022, are
6 they the same as they were in 2020? Because that's not
7 the status quo. If they aren't the same, if District 4
8 in 2022 is not the same as it was in 2020, is that the
9 status quo?

10 MR. SANDERSON: I think your point, Judge,
11 has the outer boundaries changed somewhat on District 4?
12 I can't answer that completely. I expect that there may
13 be some sort of change. But what hasn't changed is
14 their fundamental right to vote for two representatives
15 as every other person in the 47 districts in North
16 Dakota. That has not changed.

17 So we talked about Merrill here. That was
18 in February. A month and a half later the Wisconsin
19 Legislature case goes in front of the U. S. Supreme
20 Court and the difference -- the critical difference is
21 the Wisconsin Legislature case is a constitutional
22 challenge. The Wisconsin Legislature case a month and a
23 half later on March 23rd does not mention Purcell at
24 all. The dissent doesn't even raise Purcell as a
25 reason, and they said: You have time, in March 23 of

1 2022 before the August primary, to go back and fix this
2 because they're not going to allow an unconstitutional
3 election to proceed.

4 So when looking at the Merrill case, Judge,
5 and looking at what just came down in Wisconsin, I think
6 you can draw a clear line. And so with respect to the
7 Merrill exception to Purcell in this case we meet all
8 four of these. Again we've talked about the merits.
9 They're clear-cut. There's no dispute on this. They
10 suffer irreparable injury if they're not entitled to the
11 same equal rights that all other voters have.

12 I want to address the undue delay argument
13 briefly but you heard the testimony of Jim Silrum here
14 today. They began primary election work on
15 November 12th, the same day the law went into effect.
16 If we would have -- on November 12th. If we would have
17 filed on November 13th they'd be making the same
18 argument that this is -- this process -- it would take
19 three months to get here just like it did. We filed 96
20 days after the law went into effect. And let's not
21 forget it was the State that asked for a 44-day
22 extension to answer so they could prepare transcripts in
23 this case. The plaintiff has not delayed in bringing
24 this case.

25 So the changes -- then it comes down to

1 this. We've met the first three factors of the Merrill
2 exception to Purcell. So then it comes down to the
3 fourth factor. The changes in question are feasible
4 before the election. One thing that I hope was
5 perfectly clear if this Court finds that the
6 subdistricts were drawn unconstitutionally in Districts
7 4 and 9, District 4 does not need to have another
8 election. They would not be up for election in 2022
9 but for the unconstitutional subdistrict as Mr. Silrum
10 mentioned. Their population didn't change enough that
11 they needed to go through reorganization.

12 So we take District 4 off. The
13 representatives from District 4 who were
14 constitutionally elected to a four-year term get to
15 finish out their four-year term. So all we are dealing
16 with is one election in District 9, a House of
17 Representatives election, if you remove the subdistrict.
18 And all this talk about having to redo the entire
19 election, every other election issue or contest on that
20 ballot could stay the same. Those results could be
21 tabulated just like that. All that has to be done --
22 well, there's infinite -- numerous possibilities but
23 just looking at holding a special election.

24 JUDGE ERICKSON: You know, the problem is
25 that as I look at 16.1-13 I'm not seeing any basis

1 statutorily to call a special election in the absence of
2 a vacancy. And so you're asking us to as a federal
3 court do something that's quite extraordinary and that
4 is you're asking us to direct a state to conduct an
5 election that does not seem to be authorized by the
6 statute. And there seems to be a federalism issue there
7 that's a little troubling to me.

8 MR. SANDERSON: I disagree. I don't think
9 it is troubling, Your Honor. I think this Court
10 instructing the State to not proceed with an
11 unconstitutional election should be exactly what this
12 Court should be doing. There are six months to ensure
13 that my clients and 16,000 other voters' constitutional
14 rights are not violated and they don't miss out on two
15 years of representation, an entire legislative session
16 where all kinds of policy decisions will be made where
17 they don't have an equal footing at the table. That far
18 exceeds any inconvenience that's being asserted.

19 I believe -- and I also disagree that it's
20 unprecedented. Federal courts routinely order
21 elections, redraw districts. Federal court's job is to
22 ensure that unconstitutional elections do not proceed
23 and that should be the driving force here, our
24 constitutional rights. We have six months to fix this,
25 nine months from the day we filed our Complaint. To

1 argue that nine months is not sufficient time and your
2 constitutional rights should be buried for two years, it
3 just doesn't make sense; nor can they cite a single
4 Purcell case that has upheld the Purcell principle over
5 a plaintiff's constitutional right to a fair election.

6 So I disagree that this Court does not have
7 the power to do that. There's all kinds of remedies
8 that could be done. The Court could allow -- the Court
9 could strike the 64-day candidate. The Court could
10 strike the requirement -- the biggest one is that the --
11 those two individuals in District 9 that did not get the
12 party endorsement that went out and required signatures
13 to get on the ballot do not have sufficient signatures
14 to run in the entire district. The State's saying we
15 should put those two candidates' rights over the 16,000
16 members of District 9 and their constitutional rights,
17 and that's just absurd. That just should not be what
18 this Court endorses when we have six months to fix that
19 problem.

20 So there are a number of ways this Court
21 could say for the House election in November the
22 requirement that they meet the 164 signatures is not
23 necessary. They can get on the ballot. The parties can
24 go back and renominate. There's all kinds of things
25 that can be done. There's an infinite number of

1 possibilities to rectify this situation without
2 violating my clients' constitutional rights. And
3 special elections have been held and I believe there's
4 statutory authority and this Court certainly has the
5 inherent power to ensure that an unconstitutional
6 election does not proceed.

7 Members of the Court, my clients believe
8 they have met their burden on the merits. They have
9 established that the sole reason or predominant reason
10 for the legislature's creation of subdistricts in
11 District 4 and District 9 was to comply with the Voting
12 Rights Act, which was a race-based decision. And
13 Courts -- or the legislature certainly has the right.
14 That's a compelling reason. But when they exercise that
15 justification they are subject to strict scrutiny, and
16 they failed to meet the strict scrutiny because the
17 failed to meet the Gingles factors. My clients will
18 prevail on the merits of this case if it moves forward,
19 and the -- certainly the inequities between the
20 plaintiffs' constitutional rights and the State's claim
21 of the inconvenience it faces in the election certainly
22 favor granting an injunction in this case.

23 And for those reasons the plaintiffs ask
24 that an injunction be granted, the status quo be
25 maintained, that members of District 9 and District 4

1 are allowed to elect two representatives to the House in
2 North Dakota and that a full determination of the merits
3 can be heard before the State implements the race-based
4 subdistricts.

5 And again we believe the Purcell doctrine
6 does not apply. Ample time exists through the cases
7 we've cited for an election that's not unconstitutional
8 to take place within the next six months.

9 So with that I thank you for your attention
10 and we ask that the injunction be granted in this case.

11 JUDGE ERICKSON: Thank you.

12 Mr. Phillips?

13 MR. PHILLIPS: May it please the Court:
14 First and foremost the State defendants are requesting
15 that this Court apply the Purcell principle and refuse
16 to issue the preliminary injunction that's requested
17 because the 2022 election cycle has already started.

18 Regardless of the merits of the plaintiffs'
19 case, the State defendants have introduced the testimony
20 of Deputy secretary of state Jim Silrum both by
21 Affidavit and by live testimony today explaining the
22 problems with making a change to the districts right now
23 and this would include either just eliminating the
24 subdistricts or potentially having the districts redrawn
25 altogether by the state legislature.

1 Some of these problems have very significant
2 implications for the rights of nonparties, including
3 candidates and including voters. For example, as
4 Mr. Silrum testified there are two candidates who
5 collected enough signatures to be on the ballot for the
6 House in their subdistricts. They don't have enough
7 signatures to be on the ballot in a whole district.
8 Those candidates are Jayme Davis in Subdistrict 9A and
9 Chuck Damschen in Subdistrict 9B. These two candidates
10 have already been certified to get onto the ballot in
11 North Dakota. Their names are printed on the ballots
12 and those ballots have been mailed to voters, some of
13 who have returned those ballots. This election is
14 currently underway as we sit here today.

15 JUDGE HOVLAND: So do you agree with
16 Mr. Sanderson that a federal court can waive those
17 requirements?

18 MR. PHILLIPS: I think that -- I wouldn't
19 deny that the federal court has significant power.
20 However, in this case it's not even really a waiver of a
21 requirement. There is no state law that accounts for
22 the elimination of subdistricts in the middle of an
23 election. We have a scenario where the districts were
24 created by the legislature. The election started and
25 what's being contemplated by the plaintiffs is that the

1 boundaries of the districts are going change in the
2 middle of the election.

3 So it's tricky because I'm not entirely sure
4 even what North Dakota law this Court might waive as I
5 don't know that there is a process or procedure to deal
6 with this situation.

7 JUDGE ERICKSON: Well, their argument is
8 that the election's going to be unconstitutional and
9 that because it's failed to meet the Gingles
10 preconditions that there's still time to fix this,
11 right? And I think their argument essentially is -- I
12 think that if you listen to the testimony they really
13 think that we can strike the subdivision line, leave the
14 districts as they are, and that we can compel a
15 compacted voting process by compelling a special
16 election, right? And, you know, I asked them whether or
17 not there was any statutory authorization and they're
18 basically arguing that it's within the inherent powers
19 of the Court to call this special election because it is
20 necessary to protect the constitutional rights of the
21 citizens of Districts 4 and 9.

22 And why are they wrong?

23 MR. PHILLIPS: I don't deny that the Court
24 has significant power to correct violations of the
25 constitution. I would ask this Court to consider the

1 constitutional rights of the voters who risk
2 disenfranchisement if they're confused in this election.
3 I would ask the Court to consider the voters as well in
4 terms of sort of upending an election as it's
5 proceeding.

6 Mr. Silrum testified to the importance of
7 elections being as perfect as possible. The Purcell
8 doctrine exists for a reason and it's to not make
9 last-minute changes in an election that must go on sort
10 of regardless of what happens. And so there are other
11 rights at stake here besides just the plaintiffs' and
12 those should be considered. It's why the Purcell
13 doctrine exists, which is to say that the Court's will
14 enforce constitutional law and will protect
15 constitutional rights but it will not throw out the
16 rights of all voters in pursuit of that immediately
17 before an election.

18 JUDGE ERICKSON: Thank you.

19 MR. PHILLIPS: With respect to these
20 candidates that are problematic in District 9, it's not
21 really clear what should be done. They could be kept on
22 the ballot. If that happens then there's a violation of
23 North Dakota law with respect to signatures. Certainly
24 other candidates may cry foul who did receive enough
25 signatures. There are candidates in North Dakota who

1 submitted signatures but didn't have enough valid
2 signatures to be on the ballot. They were rejected.

3 Leaving these candidates on the ballot while
4 having rejected others is problematic because the
5 contrary is true as well. Removing these candidates
6 from the ballot will be removing them from the ballot by
7 changing a rule after it's too late for these candidates
8 to comply.

9 JUDGE ERICKSON: What I'm hearing you argue
10 is there's an equal protection problem with the people
11 that have circulated petitions in a subdistrict,
12 acquired enough signatures to be on the ballot in that
13 subdistrict, and that somehow if you were to say that,
14 yeah, we changed the rules and now you're going to run
15 in the whole district and that you allow them to remain
16 on the district that that would somehow violate equal
17 protection with all the other people who failed to
18 acquire enough signatures to get on the ballot, which by
19 the way is a number we usually don't know because they
20 don't file anything and tell us anything about it.

21 But in order for that to be a real problem,
22 don't they have to be equally situated? And they're not
23 because on one hand you have people that have made a de
24 jure signature gathering attempt and have filed the
25 correct number of signatures to get on the ballot as it

1 existed and on the other you have people who just were
2 de facto short of the number of signatures they needed.

3 And drawing a distinction between those two
4 classes of people, wouldn't that pass just any kind of
5 rational analysis? And since none of these are based on
6 a protected class that's what we'd be doing, right?

7 MR. PHILLIPS: It's problematic because
8 voters have a right to select and nominate their
9 candidate of choice, and this series of events and
10 what's being asked for by the plaintiffs is a series of
11 events that they're asking to lead towards the removal
12 of candidates from the ballot. That has obvious
13 implications to voter rights. We're talking about
14 kicking -- we're not talking about just who were
15 certified. We're talking about candidates that are in
16 ballots in the hands of voters today and removing them.

17 JUDGE ERICKSON: Well, either that or
18 saying: We're going to waive the signature requirement
19 and they stay on. I mean, in this world where we're
20 talking about -- we're exercising rather extraordinary
21 federal powers, right? And wouldn't it seem far more
22 reasonable to say everybody stays on the ballot than
23 saying, okay, everybody's off?

24 MR. PHILLIPS: Yeah, it's -- it also
25 implicates, you know, which candidates ran in the first

1 place. You know, we have some candidates that are
2 nominated by the parties. We have others that are
3 seeking petitions. If you are actually running by
4 petition, you're limited to the signatures of the people
5 in your subdistrict.

6 There are a myriad of factors that might
7 have come into play had this change been made early on
8 in terms of where they could seek those signatures,
9 whether they could get nominated by the party for the
10 district-at-large instead of moving forward by petition.
11 As I said, there are so many unknowns we just don't know
12 the problems that may have existed. And the Purcell
13 doctrine is what guides the Court not to jump in and
14 make massive changes with so many unknowns that -- while
15 we don't know all of the harmful effects there will be,
16 there will be many known harmful effects and many
17 unknown harmful effects both to candidates and to
18 voters.

19 I don't want to downplay the risk to voter
20 confusion by sending second ballots to the same voters
21 or by holding a second special election for the same
22 election that was already held. I'm not really aware of
23 legal authority to order that special election anyway
24 that's being asked for. But all of the issues that
25 Mr. Silrum talks about and testified to in terms of

1 voter confusion apply in that scenario. We're at a
2 stage where voters are voting and the plaintiffs are
3 asking to have those voters revote.

4 Mr. Silrum also testified in his Affidavit
5 to numerous other actions that have taken place since
6 the redistricting. It is important that, you know, this
7 is a redistricting year. It's not a normal election in
8 the sense that there is a huge machinery in any election
9 that kicks into gear many months before an election. It
10 kicks into gear even earlier in a redistricting year.
11 And in his Affidavit and his testimony I hope we've
12 established the many interrelated factors that are
13 impacted by a change of districting now. And all of
14 those actions that had to be taken by county officials,
15 by state officials since the redistricting was done,
16 many of those may have to be redone. They took months.
17 This law was passed in November.

18 In addition, Your Honors, the claims of the
19 plaintiff in this case or the plaintiffs shouldn't be
20 looked at in a vacuum. We are asking this Court to take
21 into account that there are multiple redistricting cases
22 in North Dakota at the moment. As a quick update I have
23 spoken with counsel for the other parties and a joint
24 motion to consolidate we think will be entered into and
25 filed by all parties except for the plaintiffs in the

1 Walen case asking to consolidate these two cases at
2 least for purposes of scheduling.

3 What's important here is that the current
4 Walen case involves a constitutional challenge. The
5 other case, the Turtle Mountain case, involves only a
6 Voting Rights Act challenge. One of those cases the
7 plaintiffs have moved for preliminary injunction and so
8 the only thing before the Court is the issue relating to
9 the constitutional violation. And the plaintiffs are
10 pushing to move forward as fast as possible regardless
11 of the consequences to the election to remedy that
12 alleged violation of the constitution.

13 As far as these two cases, I certainly am
14 not going to concede that the plaintiff is likely to be
15 successful in either of them but I have to acknowledge
16 that there's a risk that one or more of these plaintiffs
17 may be successful. If that's the case we have argued
18 that this Court should send the matter back to the state
19 legislature as the appropriate body to redo a
20 redistricting. It's nonsensical to send the case
21 back -- send it back to the State to do an entire
22 redistricting, you know, numerous hours of legislative
23 hearings and everything else that goes into that process
24 only to address the constitutional issue and only
25 because the Court hasn't yet gotten to the Voting Rights

1 Act claims that have been brought in the other case.

2 This sort of piecemeal decision-making with
3 respect to the constitutional claims and the Voting
4 Rights Act claims has the potential to send the matter
5 back for redistricting to remedy an alleged violation of
6 the constitution. A later order of the Court in the
7 other case may turn -- may show the results that that
8 map that was drawn violates the Voting Rights Act.

9 So we have a situation where if this is
10 going to be sent back to the State at any point, and I'm
11 not conceding that it should be, but if it is the
12 legislature should have the benefit of the Court's
13 orders with respect to the alleged constitutional
14 violation and with respect to the Voting Rights Act so
15 that any redistricting that is redone would comply with
16 all applicable laws and all orders of the Court.
17 There's no reason to push this case through well in
18 advance of the other case just to remedy this alleged
19 constitutional violation, which that remedy may turn out
20 to be a violation of federal law for all we know. That
21 issue hasn't yet been adjudicated.

22 JUDGE ERICKSON: Well, obviously I'm not
23 part of the Voting Rights Act case but as I'm sitting
24 here thinking about it it's like if the problem in this
25 particular case is a Gingles problem, a pre-conditional

1 constitutional problem, well, there's a Voting Rights
2 Act problem kind of by definition at that point, right?
3 It's going to have to be thought about.

4 And if we look at what the Gingles
5 pre-conditional findings are that we're concerned with,
6 the Gingles factors if you prefer, you know, the first
7 thing we've got to figure out is like, well, what
8 legislative facts were ever found, right? And as I look
9 at this record there's all kinds of anecdote. There's
10 all kinds of testimony. There's all kinds of things
11 that are in the record. There's no report from any
12 expert that ties that evidence plus the elections
13 together, right? And then there are no legislative
14 Findings of Fact. And it's not even one of those cases
15 where, you know -- we can find cases where a single
16 legislator stands up in either the Redistricting
17 Committee or on the floor of the House or Senate and
18 they go through and they say: Here are the Gingles
19 factors as we considered and found them. And federal
20 courts have said that's a sufficient finding.

21 And I've kind of looked through this record
22 and combed through it and I'm not seeing anything where
23 anybody actually ever made a finding legislatively that
24 we can defer to, right? And so what you're asking us to
25 do in a case that requires the application of strict

1 scrutiny is to examine the whole record and by inference
2 draw that the findings were made. And if -- you know,
3 on the other side here they keep showing clips of people
4 saying: It's not in the record. It's not in the
5 record. It's not in the record, you know, which may
6 undermine that argument.

7 So, you know, how are we supposed to go
8 about doing that without any specific fact finding on
9 the part of this committee?

10 MR. PHILLIPS: To be clear, Your Honor, I am
11 not conceding that race was the predominant factor in
12 this redistricting and so I don't concede that the
13 Gingles factors should have been analyzed by the
14 legislature or was required to.

15 JUDGE ERICKSON: I get that piece. I mean,
16 I'm not -- I mean, I understand that we were contesting
17 every single piece. What I'm looking at is there are no
18 fact findings legislatively.

19 MR. PHILLIPS: I would suggest, Your Honor,
20 that that actually may be evidence that race was not the
21 predominant factor and we actually have significant data
22 in the record and requests in the record to treat the
23 reservations as communities of interest and to respect
24 the political boundaries of the tribal lands.

25 JUDGE ERICKSON: I get that and then the

1 question becomes: What about this imprecise language
2 that's being used by any number of members of the
3 Legislative Assembly, which do tend to indicate that
4 decisions were being made based on a racial
5 classification as opposed to the Indian status and the
6 nature of the tribal status as an independent political
7 community with a cultural cohesiveness that ought to be
8 kept together when possible?

9 MR. PHILLIPS: Your Honor, our position is
10 that the plaintiff has not met its burden of
11 establishing the legislative record. He made the
12 comment that our position is that they've cherry-picked
13 and that is our position. You know, if I was to submit
14 a deposition transcript to this Court in support of a
15 motion, I would submit the whole transcript because, you
16 know, if you have a snippet of a transcript or a
17 30-second video we don't know what was said before, we
18 don't know what was said after.

19 And in this case there were, I believe it
20 says in the Affidavit, over 40 hours of testimony,
21 debate and so forth. And so was race discussed?
22 Clearly. There are some videos of that. Was race the
23 predominant factor? Our argument is that, no, and the
24 plaintiffs have not established that it was.

25 And by the way discussion of race and

1 discussion of the Voting Rights Act is to be expected of
2 legislatures. They have to account for it and they even
3 talk about whether or not it applies, whether they
4 conclude it does or doesn't.

5 So snippets that mention race are not
6 convincing that race was the predominant factor. These
7 40 hours of hearings are public records. They're all
8 online. There's no reason we don't -- that the
9 plaintiffs didn't submit a transcript or other
10 sufficient information for this Court to be able to
11 parse out whether it was the predominant factor as
12 opposed to random comments from legislators.

13 In this case they also presented a single
14 legislator in terms of his memory of the events and of
15 these hearings. He clearly was not present at all of
16 them and got some of his information by talking to
17 others. This is not a sufficient record. So I want to
18 be clear that our position is that the record isn't
19 complete and that's -- that would have been the
20 responsibility of the plaintiffs and we deny that
21 they've met that initial hurdle of showing race was the
22 predominant factor. And so they are not likely to
23 succeed for that reason alone.

24 And nothing else springs from that. I mean,
25 if there's not a finding that race was a predominant

1 factor, then the Gingles factors are not relevant.

2 Those only become relevant to meet the strict scrutiny
3 test once race was used as the predominant factor.

4 JUDGE HOVLAND: I realize, Mr. Phillips, you
5 came into this probably late in the game as an outside
6 counsel, Special Assistant attorney general, but do you
7 know why the State or Legislative Assembly, the
8 Legislative Council, the secretary of state would not
9 have hired an expert witness, would not have done -- had
10 some statistical analysis done? I mean, it could have
11 easily been done.

12 MR. PHILLIPS: I would say that I'm not
13 convinced the record is complete enough to say that it
14 didn't exist. I don't know the answer to that question
15 but I'm not going to concede that more data and analysis
16 doesn't exist in the legislative record or --

17 JUDGE HOVLAND: Well, counsel for the
18 Legislative -- or the legislative counsel that spoke at
19 that hearing said there hadn't been any statistical
20 analysis done, hadn't hired an expert witness.

21 MR. PHILLIPS: Again I would fall back on a
22 cherry-picked --

23 JUDGE HOVLAND: Sure, fair enough.

24 MR. PHILLIPS: I don't know the answer to
25 that. But I would say again it does fall in line with

1 our main argument with respect to the merits, which is
2 that the plaintiffs haven't proved that race was the
3 predominant factor, in which case there's discussion of
4 race certainly but not enough to establish that that was
5 the predominant factor that triggered the further
6 analysis under Gingles.

7 JUDGE ERICKSON: You've suggested that the
8 plaintiffs had an obligation to come forward with the
9 full record, sufficient transcripts for us to review it.
10 The committee hearings are all online. They're all
11 residing on the State's website.

12 Is it improper in your world for the Court
13 to go back and to do its independent review of the
14 Redistricting Committee hearing recordings and make its
15 own decision, or is that outside the record such that it
16 at this point needs to be ignored?

17 MR. PHILLIPS: I believe that it is outside
18 the record. It's the plaintiffs' burden to establish
19 the record in this court of law, and they've failed to
20 do so.

21 JUDGE ERICKSON: And we could take judicial
22 notice of things like the law or a fact that can't
23 reasonably be computed or -- or in fact it can be. You
24 know, what was the temperature on August 4, 2021?

25 But are we free to go back and just review

1 the entire legislative process and make our own
2 independent findings? I know you're going to say no,
3 you can't do that. But if that's true how is it that we
4 look at all sorts of legislative history to inform our
5 decisions elsewhere?

6 MR. PHILLIPS: This is a key issue in the
7 case, Your Honor. If something is in the record that is
8 important and that the Court finds important, that the
9 parties might have found important, we should have been
10 arguing about it today. We had witnesses on the stand
11 today. We're having oral argument today.

12 The plaintiffs didn't meet their burden. As
13 the North Dakota Supreme Court often says: Judges are
14 not ferrets that go looking for the evidence on behalf
15 of parties, and that's what I would suggest in this
16 case.

17 JUDGE ERICKSON: So essentially you would
18 say failing to argue those facts would constitute a
19 waiver of that factual argument?

20 MR. PHILLIPS: Correct, Your Honor.

21 JUDGE ERICKSON: Very good.

22 MR. PHILLIPS: I will point out, Your Honor,
23 as well Judge Hovland asked a question about retaining
24 of experts and one thing to bear in mind is that in this
25 matter my client is the secretary of state and the

1 governor and they actually aren't members of the
2 legislature and so some of that information might not be
3 available to my client in terms of their own files.
4 Although, I would suggest that all of the evidence
5 that's there is public record that the plaintiffs could
6 have obtained and presented to the Court.

7 JUDGE WELTE: Mr. Phillips, would you agree
8 that if the Court needs to make a determination as to
9 whether race was a predominant factor then the Court
10 should know all of the factors that were considered to
11 determine if one was predominant or if they were equally
12 considered?

13 MR. PHILLIPS: The Court should know that.
14 I don't think this record is sufficient though for this
15 Court to make that determination.

16 JUDGE WELTE: You don't believe that the
17 record's sufficient to determine all of the factors that
18 were actually considered --

19 MR. PHILLIPS: Correct.

20 JUDGE WELTE: -- and that that's just simply
21 the plaintiffs' burden?

22 MR. PHILLIPS: We were not going to meet the
23 plaintiffs' burden of the initial factor and so we
24 didn't introduce an entire record. That entire record
25 would have included that as well.

1 JUDGE WELTE: Thank you.

2 MR. PHILLIPS: And I do want to be clear
3 that there is a record in this case of testimony
4 introduced by the defendants of specific requests,
5 numerous specific requests for the reservation lands to
6 be treated as communities of interest and for the
7 political boundaries to be respected. That is in the
8 record. Are those predominant factors? You know --

9 JUDGE ERICKSON: Would have been nice if
10 somebody in the legislature would have told us that.

11 MR. PHILLIPS: Importantly it doesn't
12 trigger a constitutional analysis. The plaintiffs argue
13 that they're deprived of representation by having one
14 representative in the House instead of two. This
15 argument has been made a couple of times in passing in
16 the briefing and in the oral argument, and just to be
17 clear legislative subdistricts are permitted by the
18 North Dakota Constitution, explicitly in Article IV,
19 Section 2, and the plaintiffs haven't cited any case law
20 suggesting that that's impermissible under the federal
21 constitution. Those subdistricts have, as much as
22 practicable, the same population as half of the full
23 district and so representation is proportional. It is
24 half the number of people voting for half the number of
25 representatives. So that fact alone does not establish

1 a violation of the constitution.

2 Overall, Your Honors, balancing the harm to
3 voters, to candidates, to election officials, the harm
4 that would come in upending an election right now we
5 would argue that even if there was a constitutional
6 violation with respect to the plaintiffs, it weighs in
7 favor of denying the preliminary injunction.

8 The plaintiffs have referenced the recent
9 Wisconsin Legislature case at the U. S. Supreme Court.
10 I would like to point out a couple of important
11 distinguishing factors between this case and that one.
12 In that case it was a situation where the governor and
13 the legislature had reached an impasse in terms of
14 districting maps. It went to the Court to choose the
15 appropriate map.

16 That is not the situation in North Dakota
17 where the political process did come to a resolution on
18 districting maps, enacted them into law, and then county
19 and state election officials sprung into action to
20 implement that law. It makes a certain amount of sense
21 that a Court needs to step in and make last-minute
22 changes when the political process failed to timely
23 create districting maps. It's a different situation
24 where a plaintiff is coming in after the political
25 process worked and asking for a last-minute change in an

1 election.

2 I will also point out that that case did go
3 up to the United States Supreme Court in March for an
4 August primary and the Court found that under the law in
5 Wisconsin that was sufficient time. There's less time
6 in this case and we've presented significant evidence as
7 to why in North Dakota based on North Dakota's unique
8 requirements it would be harmful to upend the election
9 right now and that there isn't sufficient time to make
10 changes. People have voted and are voting today.

11 In addition, Your Honors, I would argue and
12 as we have argued in the briefs that this Court should
13 not simply erase the subdistrict lines. That is a map
14 that the state legislature never approved. The
15 legislature has never had a map that looks like it does
16 today just without the subdistricts. In this case if
17 the matter were sent back to the State we don't know how
18 the legislature would respond. We don't know what maps
19 they would draw. I mean, an important factor in
20 redistricting is population equality, substantial
21 population equality. If the political bodies made the
22 decision that the reservations constitute a community of
23 interest and they want to draw a subdistrict line around
24 that reservation, that naturally constrains how the line
25 can be drawn in the larger district because you have to

1 have half the population in that subdistrict and so your
2 outer boundary is going to change if you didn't make the
3 political decision to do subdistricts.

4 So if we sent it back to the state
5 legislature, we don't know that that's the remedy they
6 would impose. They may decide something different. I
7 would ask that this Court defer and allow the State to
8 exercise its duties if it was going to take action
9 rather than imposing a map that was never vetted through
10 the political process. And if our state legislature did
11 make a decision to alter the outer district lines and
12 not just the subdistricts, that would have cascading
13 effects throughout North Dakota. It would change
14 basically every district in the state in order to
15 maintain that population equality. Making that kind of
16 a change would require substantial work at the county
17 and state level, everything from redesignating the
18 precincts and beyond.

19 I'd be happy to answer any questions.
20 Otherwise I will rest.

21 JUDGE HOVLAND: I have none, thank you.

22 MR. PHILLIPS: Thank you.

23 JUDGE ERICKSON: Miss Kelty? Oh, I'm sorry.

24 Mr. Carter, you may proceed.

25 MR. CARTER: May it please the Court: Good

1 afternoon, Your Honors. I am Michael Carter appearing
2 today on behalf of the defendants-intervenors MHA Nation
3 as well as individual MHA tribal members Lisa DeVille
4 and Cesareo Alvarez. From the outset I just want to
5 reiterate something that has been made clear in our
6 briefing to this point which is that intervenors'
7 interest in this case is only limited to District 4 and
8 so my arguments will be limited to such.

9 I have three main points that I want to make
10 to the Court this afternoon and first is that
11 District 4 -- the formation of District 4 follows
12 traditional redistricting principles; second, that the
13 district's formation is justified and required under
14 Section 2 of the Voting Rights Act; and, third, that the
15 plaintiffs are requesting an unlawful remedy of this
16 Court.

17 So our first two arguments focus on the
18 two-step analysis that was provided in the Cooper v.
19 Harris case saying that the plaintiffs must first prove
20 that race was the predominant factor motivating the
21 legislature's decision to draw a particular district
22 and then second if racial decisions did predominate
23 whether the district is still nevertheless required
24 under -- to ensure compliance with Section 2 of the
25 Voting Rights Act.

1 For the first step plaintiffs have failed to
2 meet their burden to prove that District 4 was drawn
3 predominantly based on race. As our brief contends,
4 Subdistrict 4A follows traditional redistricting
5 principles of compactness and respect for political
6 boundaries and respect for the MHA Nation as a community
7 of interest. Those were all types of traditional
8 redistricting principles that were provided in the slide
9 show earlier I think in the PowerPoint.

10 And so I want to impress upon the Court the
11 burden that is on the plaintiffs in order to prove that
12 traditional redistricting principles were subordinated
13 by notions of race. In the Abbott v. Perez case that
14 plaintiffs cite to, the Supreme Court stated that
15 plaintiffs have the burden to overcome the presumption
16 of legislative good faith and show that the legislature
17 acted in bad faith to racially gerrymander. In the
18 Cooper v. Harris case, the Supreme Court stated that the
19 plaintiffs' burden here is a demanding one here and that
20 a Court must be very cautious about imputing racial
21 motive to a state's redistricting plan.

22 So that is the background for the burden
23 that plaintiffs have to meet in order to prove racial
24 motive was predominant in a redistricting plan. This
25 burden cannot be met by showing that the legislature was

1 aware of race or that the legislature considered race in
2 its decision-making. In fact, those types of
3 considerations I think are probably present in most
4 redistricting analyses and decision-making that
5 legislatures have to make, but that does not mean that
6 race predominated the decision-making.

7 The record before this Court does not
8 establish such predominance. The cases plaintiffs rely
9 on involve districts that were bizarrely shaped, not
10 compact, including land bridges and appendages sometimes
11 over a hundred miles long. Those characteristics are
12 not met in this case and in fact it's quite the
13 opposite.

14 As you can see on the screen, we provided a
15 picture of District 4. You can see the darker-shaded
16 area to the south is the Subdistrict 4A which
17 directly -- or precisely follows the reservation
18 boundaries, which I think is possibly the most compact
19 district in the state or subdistrict.

20 And so as I said the Subdistrict 4A
21 precisely follows the political boundaries of the Fort
22 Berthold Reservation that is home to the MHA Nation.
23 The district is geographically compact and the district
24 respects the MHA as a community of interest. In fact,
25 it was a stated goal, as was testified to earlier, of

1 the Redistricting Committee to respect the political
2 boundaries of the reservations in the state, and that's
3 what the Redistricting Committee and the legislature did
4 here, similar to the way that county lines have been
5 respected throughout the redistricting map whenever
6 feasible based on population.

7 The legislature received testimony regarding
8 how these traditional redistricting principles apply to
9 MHA. Specifically MHA Chairman Mark Fox testified how
10 the reservation is a community of interest with shared
11 customs and traditions that distinguish it from the
12 surrounding area. The lack of evidence from plaintiffs
13 on this issue, being unable to rebut the fact that these
14 factors are present, the compactness, the respect for
15 political boundaries and the respect for the community
16 of interest, should leave this Court with no other
17 option but to determine that plaintiffs have failed to
18 meet their burden.

19 And the second step of the Harris analysis
20 if this Court is inclined to believe that race
21 predominated the decision-making of the legislature when
22 adopting District 4, even if that is so plaintiffs do
23 not meet the burden -- I'm sorry, the subdistricts are
24 justified regardless and required under the Voting
25 Rights Act, Section 2. So compliance with Section 2 of

1 the Voting Rights Act has been held -- as was stated
2 previously, has been held by the Supreme Court as a
3 basis for drawing districts predominantly based on race.

4 The Court has ample evidence showing the
5 necessity for the Subdistrict 4A in this case as
6 required by the Voting Rights Act through application of
7 the Gingles analysis. Our brief details the testimony
8 that was provided to the legislature during the
9 redistricting process. Experts testified -- election
10 experts testified regarding the VRA and Gingles
11 requirements generally. Tribal members and tribal
12 leaders testified before the Redistricting Committee
13 describing the application of the Gingles preconditions
14 to the proposed subdistrict. Specifically MHA Chairman
15 Mark Fox testified to the Gingles preconditions and the
16 existence of racial bloc voting in the area regarding
17 school districts, House elections across multiple
18 elections.

19 JUDGE ERICKSON: Are you suggesting that
20 because a presumption that the legislature acts in good
21 faith and given the evidence in the record that the
22 absence of any specific legislative findings -- I mean,
23 even something as simple as just a summary by the chair
24 saying: Here's the factor that we considered. Here's
25 how we got there. In the absence of that if we have

1 that presumption of good faith we can look at the record
2 and say these facts support the conclusions here and
3 that -- you know, that this is therefore required.

4 MR. CARTER: Well, Your Honor, I would say
5 that there was a finding by the Redistricting Committee
6 and the legislature that --

7 JUDGE ERICKSON: Because they drew the map,
8 right, or more than that?

9 MR. CARTER: Well, it was stated by the
10 Redistricting Committee that the -- that regardless the
11 map would be required as is because of the Voting Rights
12 Act. Because of the Gingles requirements, that was
13 specifically stated.

14 THE COURT: Yeah, that part is -- and that's
15 a conclusion but there's no -- there's actually no
16 specific findings that relate to the factors themselves,
17 I mean, and it may be because I'm a judge who looks at
18 other judges' work all the time. I'm used to seeing
19 specific factual findings and that legislative fact
20 finding is inherently different, right?

21 MR. CARTER: That's correct, Your Honor.
22 And I would -- my response to that is to say that they
23 were provided with the testimony from the tribe
24 regarding the Gingles factors and then came to the
25 conclusion based on that testimony that the VRA required

1 the subdistrict. So they had the legislative background
2 they needed to make that conclusion and then made that
3 conclusion on the record.

4 I'd also say that plaintiffs reliance on the
5 Wisconsin Legislature case that was recently decided by
6 the Supreme Court is misplaced. Besides the timing
7 issues that counsel for the State discussed and the
8 differences in the timing that go to the Purcell type
9 arguments, plaintiffs also use that case to say it's
10 analogous to our case regarding legislative findings or
11 Gingles analysis under the VRA.

12 However, in that case the Court was
13 considering a map that was submitted to it by the
14 Wisconsin governor, and as I think was in the slide show
15 by plaintiffs there was no -- there was nothing in the
16 record regarding VRA analysis or requirements unlike
17 what we have here. And so based on essentially no
18 evidence regarding Voting Rights Act given by the
19 governor to the Court, then that was what distinguishes
20 our case, why that case was remanded.

21 And just quickly to respond to something
22 that was stated by plaintiffs, it was stated as though
23 there was some kind of a rule saying that it's -- you
24 cannot meet Gingles requirements unless you analyze
25 precinct level data. I've not seen that held by a Court

1 saying that's a specific rule. In fact, the Supreme
2 Court in the Abbott case did approve one of the
3 districts they were reviewing that did not have any kind
4 of hypertechnical analysis done on precinct level data.
5 But even in that case the district was not compact. It
6 was -- there was a land bridge connecting two minority
7 populations within different metropolitan areas and that
8 district was still upheld.

9 As well regarding the Abbot v. Perez case
10 that the plaintiffs have used I think stated this in
11 both their initial motion and their reply stating the
12 proposition that lay testimony cannot be used to go
13 toward a Section 2 analysis. That again is also not
14 something that is a holding in any case that I'm aware
15 of. The Abbott-Perez case did not say that. In that
16 case what the Court was referring to was the fact that
17 an outside group was demanding that the subdistrict --
18 I'm sorry, that the district be established, be drawn.
19 It was simply a demand without any further analysis.
20 They were saying that simply a demand cannot meet the
21 requirements of the VRA, and that again is not what we
22 have in our case.

23 In our case besides requesting that the
24 district be created by those who testified, though as I
25 said before there was VRA specific testimony that was

1 provided to and considered by the legislature so
2 therefore the record shows that the creation of the
3 subdistrict is warranted under Section 2 of the Voting
4 Rights Act.

5 And that gets into my final point, Your
6 Honor, is that what the plaintiffs have asked for in
7 their -- as a remedy in their briefing is unlawful.
8 What they have asked for is for this Court to dissolve
9 the subdistrict lines and then proceed with the
10 elections as what they call status quo. We contend that
11 this is a crucial issue for this Court to consider
12 before issuing any order in this case. Again the remedy
13 they're asking for is essentially for this Court to
14 dissolve the subdistrict lines in B4. That's really the
15 only remedy request that I've seen in the pleadings.
16 Today I've heard about sending it back to the
17 legislature and those kinds of things, which were not
18 briefed as far as I can tell.

19 I would also say that plaintiffs have
20 dismissed Dr. Collingwood's report and testimony as
21 irrelevant because the legislature did not have that
22 information, did not have his report or testimony when
23 adopting their redistricting map. However, given both
24 the legislative record that I've already discussed as
25 well as Dr. Collingwood's report, it has been shown to

1 this Court that the subdistrict is in fact required
2 under the Voting Rights Act. Plaintiffs did not contest
3 the report. Dr. Collingwood stated unequivocally that
4 the Subdistrict 4A is required under the Voting Rights
5 Act and went through the analysis why it is required,
6 how it meets every Gingles precondition, and none of
7 that was questioned by any party here today.

8 Therefore, granting plaintiffs' requested
9 remedy to dissolve the subdistrict lines would create a
10 new map not approved by the legislature that would
11 dilute the voting strength of the MHA tribal members in
12 violation of Section 2 of the Voting Rights Act. The
13 Court would essentially be performing a line item veto
14 to the redistricting bill that the legislature approved
15 creating a new district that the legislature did not
16 approve that has been shown to violate the Voting Rights
17 Act.

18 Even if the Court is inclined to agree with
19 that, that the plaintiffs have overcome all of the
20 hurdles to get to the point of the remedy, the remedy
21 they've requested would violate the Voting Rights Act
22 and cannot be put into place. So we contend that a
23 holding by this Court consistent with this premise would
24 negate the need to even get to the merits of plaintiffs'
25 motion because their requested remedy is unlawful on its

1 face.

2 In conclusion, Your Honors, plaintiffs again
3 have failed to show that District 4 was drawn
4 predominantly based on race, failed to show that the
5 subdistrict is not required under the Voting Rights Act
6 and have requested an unlawful remedy. Therefore, we
7 request that the motion for preliminary injunction be
8 denied and I'm happy to address any questions the judges
9 may have.

10 JUDGE HOVLAND: Has there been any discovery
11 undertaken in this case to date?

12 MR. CARTER: No, Your Honor.

13 JUDGE HOVLAND: And when did MHA Nation
14 intervene and when was Collingwood retained and hired in
15 this case to prepare a report?

16 MR. CARTER: Your Honor, I don't have the
17 dates off the top of my head as far as intervention.
18 Obviously after the case was filed for intervention and
19 for the completion of the report, I think it was early
20 April I believe that the report was completed.

21 JUDGE HOVLAND: Thank you.

22 JUDGE ERICKSON: No further questions.
23 Thank you.

24 MR. CARTER: Thank you, Your Honor.

25 JUDGE ERICKSON: Do you have rebuttal,

1 Mr. Sanderson?

2 MR. SANDERSON: Yes, I do briefly, Your
3 Honor.

4 JUDGE ERICKSON: How long will it take?

5 MR. SANDERSON: I don't think this is --
6 five to ten minutes.

7 JUDGE HOVLAND: Brief is always in the eyes
8 of the beholder.

9 JUDGE ERICKSON: Is that okay, Kelly?

10 THE REPORTER: Yes.

11 MR. SANDERSON: You know me too well.

12 Judge Erickson, I'd like to start with the
13 question you'd asked me before. You'd asked me what
14 provisions under North Dakota law allow for special
15 elections? And I believe you -- special elections to
16 fill a vacancy, 16.1-13-14, that's certainly one of
17 them. But special elections, that's a specific special
18 election. If you go to 16.1-13-12 --

19 THE REPORTER: Please slow down.

20 MR. SANDERSON: Now I'll probably be eight
21 minutes, Judge. I gotta slow down.

22 JUDGE ERICKSON: That's okay.

23 MR. SANDERSON: It talks about special
24 elections in other context and that. But more
25 importantly, Judge, and what I should have referred you

1 to when you asked that question, is specifically
2 Chapter 16.1-11, primary elections. And that's most --
3 the special election we need here would be a primary
4 election to rectify this.

5 But before I get into that I want to make
6 one thing clear. Mr. Phillips said, you know, part of
7 the remedies that we're -- the series of events that
8 we're asking for, the only event that the plaintiffs are
9 asking for in this case is their constitutional rights
10 not be violated by an unconstitutional racial
11 gerrymandering. So I want to be clear we were just
12 proposing with the special election the idea of remedies
13 that this Court could order, not that this is what we're
14 demanding. We're demanding the -- our clients'
15 constitutional rights not be violated.

16 So back to the issue of primary elections,
17 16.1-11, specifically 16.1-11-01, primary elections,
18 it's when held nomination of candidates and nominations
19 for special elections and the last sentence of that
20 says: "In special elections nominations for the
21 officers enumerated in this section must be made as
22 provided in this title."

23 So clearly the North Dakota Legislature
24 contemplated that special elections can be held for
25 primaries. And then I next turn your attention to

1 16.1-11-15, "Nominating petition not to be circulated
2 prior to January first - Special Election." And that's
3 the statute, Judge, that says, you know, for a normal
4 primary you can't begin collecting signatures before
5 January 1st. But the last -- again the last sentence
6 says: "A nominating petition for a special election may
7 not be circulated or signed more than thirty days before
8 the time when a petition for the special election must
9 be filed."

10 So that statute alone indicates the
11 legislature has contemplated that special elections for
12 primaries may be held and that different rules could
13 apply for them. Now again I don't think the statute
14 goes further to explain all the situations that were
15 raised by Mr. Silrum. But it does show to your
16 question, Judge Erickson, that there is a statutory
17 process in place for a special election for a primary
18 and the North Dakota Legislature certainly has
19 contemplated it. So you do have that.

20 One of the most troubling things that was --
21 was indicated by the State in this is the election
22 process has already started. We don't have a remedy.
23 And Mr. Silrum's talked about the day this law went into
24 effect the election process started. What they're
25 essentially hiding behind Purcell is my clients have

1 absolutely no remedy for the constitutional violation.
2 There's just not enough time. That cannot be what this
3 Court stands for. It's a -- because the election
4 process has started, yup, sorry, your constitutional
5 rights no longer apply and you have no remedy until the
6 next election.

7 We filed this case nine months before the
8 November election. Ample time exists. The holding of a
9 special primary election is not insurmountable. It's
10 not some cascading events that can't be accomplished.
11 We are talking about one election for the House of
12 Representatives in District 9. That can be done.
13 Certainly some deadlines have to be moved. Some things
14 have to be complicated. Ballots have to be printed,
15 other things. But again comparing that to the
16 constitutional rights of the plaintiffs and 16,000 other
17 voters in that district is not insurmountable.

18 One of the interesting things Mr. Phillips
19 mentioned was that the plaintiffs have been pushing this
20 forward as fast as possible. Yes, we have. Their
21 constitutional rights are at stake. And let's be very
22 clear, the constitutional right that was asked of
23 Mr. Phillips is not that we have -- the constitutional
24 issues and right is not that we have two elected
25 representatives. It's that we are not subjected to

1 reside in a racially gerrymandered district and that's
2 the constitutional issue. And the effect of that is
3 that we would have equal protection with everyone else
4 but the remedy and the harm is being subject to a
5 racially gerrymandered district that has no
6 justification.

7 Now the State and the intervenors have both
8 argued that we didn't meet -- race wasn't the
9 predominant factor. It wasn't an issue. Yet they turn
10 to the Gingles factors and start talking about the
11 legislative -- you know, counsel's presentation on
12 Gingles, all the testimony on Gingles. If race wasn't
13 the predominant factor you would never get to Gingles.
14 Yet the legislative history of this bill on the
15 subdistricts is replete with testimony on Gingles and
16 there's only one reason you get to Gingles. Because
17 race was a predominant factor for a Section 2 voting
18 rights claim and that's why Gingles is there. That's
19 why they hired an expert to talk about the Gingles
20 factor. So, you know, this argument that race wasn't
21 there, there would be no need to be discussing the
22 Gingles factor if this was traditional redistricting
23 principles.

24 On the traditional redistricting principles,
25 we cited in our reply brief the U.S. Supreme Court case

1 Bethune-Hill v. Virginia State Board of Elections, the
2 2017 case, noting that traditional redistricting
3 principles are numerous and malleable. A state cannot
4 escape the consequences of unconstitutional racial
5 gerrymandering by arguing after the fact that
6 gerrymandered districts complied with traditional
7 redistricting principles.

8 And I simply ask you: What evidence was
9 presented here by either the State or the intervenors to
10 show traditional redistricting principles were applied
11 by the North Dakota Legislature in creation of the
12 subdistricts? There was none because that wasn't. It's
13 an after-the-fact attempt to rewrite the history to
14 avoid the voting rights claim in this case.

15 Now both the State and the intervenors want
16 to talk that we have failed to meet our burden that race
17 was a predominant factor and again saying we
18 cherry-picked legislative history. But again as we've
19 pointed out that is not the only way to show race is a
20 predominant factor, the circumstantial evidence showing
21 the boundaries of the subdistricts and the composition
22 of the demographics. There's no other inference you can
23 draw than the creation of the subdistricts around two
24 reservations to allow for them to both have majority
25 population on this, and that alone shows race is a

1 predominant factor.

2 Now if they want to bring up District 4,
3 let's not forget the Turtle Mountain -- excuse me, the
4 Fort Berthold Indian Reservation has been in District 4
5 for decades. At no other point in time have they
6 attempted to draw a subdistrict to preserve the cultural
7 identity of that. Why was it done now? For one reason
8 after this census: to avoid a voting rights claim.

9 The Turtle Mountain Reservation has been
10 within District 9 for decades. Again no attempt to
11 subdistrict -- subdivide that was done before until the
12 tribe showed up and threatened voting rights actions.
13 So the circumstantial evidence alone, what witness did
14 you hear evidence from today regarding race as a
15 predominant factor? We called Representative Terry
16 Jones. It was undisputed. He said race was the
17 predominant factor for this decision. What evidence did
18 the State or the intervenors present that contradicted
19 that? None.

20 So then third -- the third step, we've shown
21 you the legislative history. And when -- again the
22 cherry-picking argument, when the chairman of the
23 Redistricting Committee says on the floor these
24 subdistricts were created because of the Voting Rights
25 Act, there's nothing more you need. Creating

1 subdistricts under the Voting Rights Act is inherently
2 based on race as courts throughout this country
3 including the Wisconsin court just said.

4 So this argument that we have not met our
5 burden, we've presented all the evidence to show that.
6 What witness, what testimony, what piece of legislative
7 history have they shown -- has either party shown to
8 rebut the evidence we've presented?

9 There was also a question -- and, Judge
10 Erickson, this goes back to a question you asked me and
11 I think was kind of responded to. And I know I referred
12 you to the Abbott case and your question specifically
13 was: Well, what specific evidence do we need to meet
14 the Gingles factors? In the Abbott case, and it's 138
15 Supreme Court 2305 starting right after -- on page 2332.
16 The Court says: "We have made clear that redistricting
17 analysis must take place at the district level," citing
18 the Bethune-Hill case. "In failing to perform that
19 district-level analysis, the District Court went
20 astray." They go on on the next page: "North Carolina
21 pointed to two expert reports on 'voting patterns
22 throughout the State,' but we rejected that evidence as
23 insufficient. Texas has pointed no actual 'legislative
24 inquiry' that would establish the need for its
25 manipulation of the racial makeup of the district."

1 The Supreme Court in Abbott -- and we've
2 cited numerous other cases that have established what is
3 necessary to meet the Gingles preconditions, and lay
4 testimony that the intervenors argue is sufficient is
5 simply not enough. And there's numerous cases in our
6 brief citing that as Abbott has also cited that.

7 So with that again on behalf of Mr. Walen
8 and Mr. Henderson we ask the Court protect their
9 constitutional right of equal protection in the upcoming
10 election. Sufficient time exists to prevent an
11 unconstitutional election for moving forward and we
12 would ask that the preliminary injunction motion be
13 granted. Thank you for your time.

14 JUDGE ERICKSON: Thank you. Does the State
15 have anything? I'd give you three minutes if you feel
16 like there's something you have to say.

17 MR. PHILLIPS: Very briefly, Your Honor,
18 there is -- was discussion of state law respecting
19 special elections. There's no state law that accounts
20 for stopping an ongoing election in the middle of it,
21 for changing the boundaries of districts in the middle
22 of an election, for changing names on the ballots that
23 have already been printed and sent to voters, for
24 essentially starting over a current election that's
25 ongoing with a second election that's a special

1 election.

2 So broad, you know, powers to have a special
3 election does not give the State or this Court the
4 authority to order the State to hold a special election
5 that's being asked for by the plaintiffs in this case.
6 Thank you.

7 JUDGE ERICKSON: Thank you. Anything from
8 the intervenors?

9 MR. CARTER: No, Your Honor.

10 JUDGE ERICKSON: Thank you very much. The
11 matter is taken under advisement. I want to thank you
12 very much for your time here today. The evidence and
13 the arguments have been helpful. We'll get something
14 out as soon as possible.

15 (Adjourned at 3:30 p.m.)
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CERTIFICATE OF REPORTER

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

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

I DO HEREBY FURTHER CERTIFY that the
foregoing and attached (138) typewritten pages contain
an accurate transcript of my shorthand notes then and
there taken.

Dated this 18th day of January, 2023.

/s/ Kelly A. Kroke

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