

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

Self Advocacy Solutions N.D., League of
Women Voters of North Dakota, Maria Fallon
Romo,

Plaintiffs,

vs.

Alvin Jaeger, in his official capacity as
Secretary of State, Debbie Nelson, in her
official capacity as County Auditor of Grand
Forks County,

Defendants.

**DEFENDANT ALVIN JAEGER'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Case No. 3:20-cv-00071

INTRODUCTION

Plaintiffs' Motion for a Preliminary Injunction (Doc. 11) challenges an election law that has been used in North Dakota for almost forty years. Yet this request was filed less than a month before the next election to be held on June 9, 2020. That election is already underway. Election manuals have been finalized in compliance with statutory deadlines, election officials trained on the procedures to follow in this particular election, thousands of ballot applications have been mailed to voters and returned, thousands of ballots sent out to voters, and thousands of ballots returned.

Because the June 9 election is already underway, the Court should preserve the status quo and allow that election to proceed uniformly, under the same set of rules for all voters, without even considering the merits of the Plaintiffs' suit. The ability to implement the remedy requested by the Plaintiffs is not as simple as they make it sound. The result of a last-minute injunction will be confusion among voters and chaos among election officials scrambling to implement new rules mid-stream of an election. Just earlier this year, the United States Supreme Court reiterated that it "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020).

In addition, the statute being challenged sets forth duties conducted by multiple bipartisan entities across the State, i.e., the election boards in the various county polling places and the county canvassing boards. Yet this suit does not name those boards or all board members as defendants. Notice and an opportunity to respond – the relief requested by the Plaintiffs – necessarily involves those two groups of bipartisan bodies in all of the State’s counties. Any injury the Plaintiffs may allegedly suffer is not fairly traceable to Secretary of State Jaeger, nor redressable by a judgment against him, because the Legislature did not give him the statutory duty to compare signatures on returned ballot envelopes. The Court cannot recognize the Plaintiffs’ Article III standing to challenge the signature matching requirement, let alone grant the injunctive relief they request, in the absence of the parties responsible for enforcing the challenged law. Moreover, two of the Plaintiffs (Self Advocacy Solutions N.D. and League of Women Voters of North Dakota) lack standing for another reason. They have not alleged sufficient facts to show they have an injury-in-fact under associational standing requirements.

Finally, even if the Court overlooks the standing issues, none of the Plaintiffs can show the statute they challenge is facially unconstitutional in all of its possible applications. As to the as-applied challenge brought by Plaintiff Maria Fallon Romo, North Dakota law already provides relief for her alleged injury. Under existing law, any individual who is unable to provide a complying signature may simply mark an “X” in the box provided on both a ballot application and a return ballot envelope, and have a disinterested person print the voter’s name and attest that the mark is that of the voter. In other words, North Dakota law already provides sufficient relief for this individual, at minimal burden; no additional injunctive relief is necessary.

For these reasons, and more as set forth below, Secretary of State Alvin Jaeger respectfully requests that the Court deny Plaintiffs’ Motion for a Preliminary Injunction (Doc. 11).

BACKGROUND

Plaintiffs seek a preliminary injunction enjoining the Secretary of State from implementing a statutory signature match requirement with respect to absentee or mail ballots without a notice and opportunity to cure available to voters. Doc. 11, pp. 1-2. North Dakota’s absentee voting

process and signature match requirement (which has existed in North Dakota law since 1981), are described in detail in the Affidavit Of Irwin James Narum (Jim) Silrum (“Silrum Affidavit”), filed herewith.

LAW AND ARGUMENT

I. The Court should not interfere with the June election, which is already in progress.

“There is no doubt that the right to vote is fundamental, but a federal court cannot lightly interfere with or enjoin a state election.” Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (citing Reynolds v. Sims, 377 U.S. 533, 555 (1964)). For “[i]f the district court judgment is ultimately reversed, the State cannot run the [June 2020] election over again[.]” Veasey v. Perry, 769 F.3d 890, 896 (5th Cir. 2014).

Under Purcell v. Gonzalez, 549 U.S. 1 (2006), there are “considerations specific to election cases” that a court is required to weigh when considering the “harms attendant upon issuance or nonissuance of an injunction” including the consideration that “[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.” Id. at 4-5; see also Reynolds, 377 U.S. at 585 (“[U]nder certain circumstances . . . where . . . a State’s election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief . . . *even though [the law at issue may be] found invalid.*”) (emphasis added); Williams v. Rhodes, 393 U.S. 23, 35 (1968) (declining to interfere with an upcoming election despite a determination that the challenged election law was unconstitutional).

Particularly in the context of election laws, unwarranted preliminary injunctions have “a needlessly ‘chaotic and disruptive effect upon the electoral process.’” Benisek v Lamone, 138 S.Ct. 1942, 1945 (2018) (quoting Fishman v. Schaffer, 429 U.S. 1325, 1330 (1976)). For example, in Spirit Lake Tribe v. Jaeger, No. 1:18-CV-222, 2018 WL 5722665 (D.N.D. Nov. 1, 2018), the Court declined to grant injunctive relief on the eve of the November 2018 election, stating “[t]he federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching.” Id. at * 1 (citing Purcell, 549 U.S. at 4-5; Williams, 393 U.S.

at 34-35; Veasey v. Perry, 769 F.3d at 892-95). In that case, as in this case, “early voting ha[d] already begun.” Id. Despite the Court’s “great cause for concern” about the “litany of problems” it believed the lawsuit contained, it concluded an “injunction on the eve of the election will create as much confusion as it will alleviate[.]” Id.

Similarly, here, the Court should not interfere with an election already in progress even if it believes the law is unconstitutional. The law being challenged has been in place for almost 40 years. Absentee and mail-in ballots are widely used in North Dakota. In the last statewide election in November 2018, there were 96,391 valid absentee or mail-in ballots casts by North Dakota voters. <https://vip.sos.nd.gov/pdfs/Portals/statistics-turnout.pdf>. Similar, widespread use of mail-in ballots existed in previous elections. Id. Notwithstanding the fact that the COVID-19 pandemic may have heightened focus on the June 2020 election, any alleged deficiencies in the signature provisions of N.D. Cent. Code § 16.1-07-12 have existed through many election cycles, and could have been challenged earlier without waiting until the eleventh hour before the next election.

As Plaintiffs contend, this same issue has been the subject of litigation in other jurisdictions dating back to 2006. See Doc. 11-1 at 9-10 (citing, among other decisions, Zessar v. Helander, No. 05 C 1917, 2006 WL 642646 (N.D. Ill. Mar. 13, 2006)). The Court is permitted to take into consideration the timing of this particular challenge in deciding whether last-minute injunctive relief is appropriate for an election already in progress. See, e.g., Benisek, 138 S.Ct. at 1944 (holding that a party requesting a preliminary injunction in an election case must generally show reasonable diligence in pursuing his claims).

The Plaintiffs suggest that implementing notice and opportunity-to-cure provisions at the last minute for this election will not impose any significant fiscal or administrative burden on election officials, implying that it is as simple as adopting the notice provisions for military and overseas voters found at N.D. Cent. Code § 16.1-7-17, and the opportunity-to-cure provisions for set-aside ballots found at N.D. Cent. Code 16.1-15-08. See Doc. 11-1 at 15-16.

The remedy for any alleged constitutional deficiencies in the signature matching provisions of N.D. Cent. Code § 16.1-07-12 is not as simple as the Plaintiffs suggest. The notice provisions

for military and overseas voters only apply to ballots that have already been “rejected,” N.D. Cent. Code § 16.1-7-17, and thus do not provide an opportunity to cure because the final rejection occurs at the meeting of the county canvassing boards six days after the election. See N.D. Cent. Code § 16.1-07-12 (indicating that “final determination of eligibility” is made by the county canvassing board).

The opportunity-to-cure provisions for set-aside ballots involve circumstances where voters present themselves in person at the polling place, and thus necessarily receive simultaneous notice at that time. See N.D. Cent. Code § 16.1-01-04.1(5) & (6). Under those circumstances, the six days that follow before the meeting of the county canvassing boards provide sufficient time for an opportunity to cure.

In the case of the signature matching requirement, by statute the final rejection of a ballot is not made until the county canvassing board meets. N.D. Cent. Code § 16.1-07-12. Thus, any potential fix would, at a minimum, have to revise this statutory provision. Even if the preliminary rejection by the election board is deemed to be the moment at which a voter could be notified, the question remains whether the six days between election day and the meeting of the county canvassing boards would provide sufficient time to accomplish both notice to the affected voters¹ and a reasonable opportunity to cure. Any potential fix may require adjusting the amount of time between the initial rejection by an election board and the meeting of the county canvassing board. In addition, the details of what constitutes an opportunity to cure would need to be addressed; for example, should voters be allowed to appear in person at the county canvassing board, submit an affidavit attesting that the voter signed both the return ballot envelope and application, both of those options, or other options. Any alleged fix is not so simple as incorporating existing provisions of current election law. An alleged remedy may require rewriting or revising several different statutory provisions about absentee ballots, election boards and canvassing boards, and

¹ For example, would an attempt to contact a voter by phone be deemed sufficient notice, even assuming the voter does not answer the call, or would an attempt to contact a voter by mail be required, in which case the opportunity to cure would be shortened by the time the mail notice reached the voter.

when those entities must meet to review submitted ballots, etc.

In Martin v. Kemp, 341 F. Supp. 3d 1326 (N.D. Ga. 2018), a case involving a similar challenge to signature requirements, a federal district court granted injunctive relief shortly before the November 2018 election because the Court determined notice and opportunity-to-cure provisions already existed under Georgia law that could easily be implemented by election officials and applied to circumstances where ballots and ballot applications contained mismatched signatures. See id. at 1339. But in the same consolidated case involving a challenge to absentee ballots rejected for reasons other than a signature mismatch, the same district court refused to grant last-minute injunctive relief because there was no similar “simple” fix under existing law. See Martin v. Kemp, No. 1:18-cv-4776-LMM, 2018 WL 10509489 at *3-5 (N.D. Ga. Nov. 2, 2018).

The court explained:

Plaintiffs' assertion that there is “no reason why the Court cannot order the Martin Plaintiffs' simple remedy given that it already ordered relief in the GMVP case” mischaracterizes the nature of Plaintiffs' requested relief as compared to the relief granted by the Court on the signature mismatch issue. See Martin Dkt. No. [39] at 27. First, as this Court explained earlier this week in its order denying Secretary Kemp's Motion to Stay Pending Appeal [27], the Court's temporary restraining order regarding signature matching “simply requires county elections officials to apply the *already established procedures* set forth in O.C.G.A. §§ 21-2-229(e), -419, -493.” Martin Dkt. No. [38] at 8 (emphasis added). By contrast, Plaintiffs' proposed procedure would require this Court to, in essence, rewrite the entirety of the absentee ballot statutes in order to provide clear and effective direction to elections officials.

Id. at *3.

Instead, the Court applied the principles of Purcell and Reynolds to conclude that it should not interfere at the last minute with an election that was already in progress:

In sum, the November 6, 2018 election is rapidly approaching. The absentee voting process began on September 21, 2018, and the deadline for mailing absentee ballots is today, November 2, 2018. See Martin Dkt. No. [37] at 6. Poll worker training has long since concluded. See Martin Dkt. No. [37-2] ¶ 26. Implementing an entirely new process for an extremely large subset of absentee voters just days before the election will both burden elections officials and increase the risk of voter confusion. As a result of the magnitude and timing of the relief requested—coupled with the premise that courts should use discretion in considering injunctions that will have a “chaotic and disruptive effect on the electoral process”—the Court finds that Plaintiffs have failed to carry their burden in demonstrating that balance of harms weighs in their favor and that the requested injunction would not be adverse to the public interest. See, e.g., Fishman v. Schaffer, 429 U.S. 1326, 1330 (1976). This

does not mean that the Court is not troubled by some of the allegations in Plaintiffs' Motion. Instead, it merely holds that there is not enough time to adequately implement the more wide-ranging solutions proposed.

Id. at *5.

Similarly, here, the June 9 election is rapidly approaching. Absentee voting process began on April 24 for military and overseas voters and April 30 for all other voters. As of May 21, 2020, there were already 161,256 ballots in the hands of voters and 39,734 have already been cast by the voter. Silrum Affidavit, ¶ 26. The procedures that election boards follow with respect to mismatched signatures, as well as the procedures that county canvassing boards follow cannot easily be adjusted in time to implement a suitable fix for any alleged notice and opportunity-to-cure deficiencies without rewriting significant provisions of the absentee ballot statutes.

Moreover, this Court does not have the power to fashion injunctive relief that requires a rewriting of North Dakota's absentee or mail-in ballot statutory provisions, whether for the June 2020 election or future elections. "Simply put, federal courts have no authority to dictate to the States precisely how they should conduct their elections." Esshaki v. Whitmer, No. 20-1336, 2020 WL 2185553 at *2 (6th Cir. May 5, 2020) (citing Clingman v. Beaver, 544 U.S. 581, 586 (2005)).

Esshaki involved a challenge to executive orders issued by the Governor of Michigan in response to the COVID-19 pandemic; potential political candidates for certain State and nationally-elected offices claimed that the executive orders prevented them from collecting the number of signatures required by state law to have their names placed on the primary election ballot. Esshaki, 2020 WL 2185553 at *1. A district court enjoined Michigan from enforcing the ballot-access provisions without providing some reasonable accommodations to the aggrieved candidates, but then took the injunction a step further by dictating the manner in which the State would provide those accommodations. Id. at *2.

The Sixth Circuit upheld that portion of the injunction that required Michigan to provide reasonable accommodations, but reversed that portion of the injunction that essentially rewrote Michigan's ballot access provisions, stating "[t]his compulsory aspect of the preliminary injunction was not justified." Id. "[T]he public interest is furthered by protecting the State's

constitutionally guaranteed authority and preventing a federal court from usurping a State's legislative authority by re-writing its statutes.” Id. (citing A. Philip Randolph Inst. v. Husted, 907 F.3d 913, 917 (6th Cir. 2018)).

Under Purcell and similar Supreme Court decisions, the Court should not grant any injunctive relief in this case that impacts the June 2020 election. But even if the Court grants injunctive relief for future elections, it should refrain from doing anything more than declaring the signature match provisions found at N.D. Cent. Code § 16.1-07-12 unconstitutional without notice and an opportunity to cure. The Court has no authority to usurp a State's legislative authority to determine precisely how the State might provide notice and an opportunity to cure, or otherwise remedy the alleged constitutional violation arising from the signature match requirements of state law.

II. The Plaintiffs are unlikely to succeed on the merits of their claim against the existing Defendants.

The four factors a court should consider in determining whether to grant a preliminary injunction are: “(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.” Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981). In addition,

[w]here a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute . . . the moving party must make a more rigorous showing that it is likely to prevail on the merits. This is necessary to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis.

Planned Parenthood of Ark. & E. Okla. v. Jegley, 864 F.3d 953, 957–58 (8th Cir. 2017) (internal quotation marks and citation omitted). The likelihood of success on the merits is the most significant factor. S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 776 (8th Cir. 2012). As demonstrated below, the Plaintiffs cannot establish that they are likely to succeed on the merits of the claims raised in this lawsuit against the specific Defendants that have been sued.

A. All of the Plaintiffs lack standing because any alleged injury is not redressable against the current Defendants.

This lawsuit challenges the signature match provisions set forth in N.D. Cent. Code § 16.1-07-12, and asks for injunctive relief in the form of notice and an opportunity to be heard when ballots are rejected pursuant to those provisions. The signature match provisions are carried out by the various election boards in all of the polling places in the counties of the State, as well as county canvassing boards. Those respective entities are comprised of bipartisan membership dictated by the Legislature, some of whom are statutory officers directly elected by the citizens of the State. See N.D. Cent. Code § 16.1-15-15 (“The county canvassing board must be composed of the county recorder, county auditor, chairman of the board of county commissioners, and a representative of each of the two political parties that received the highest number of votes cast for governor at the most recent general election at which a governor was elected.”); N.D. Cent. Code § 16.1-05-01(2)(a)(1) (indicating the election judges that comprise two of the three-person election boards at each polling place “must be appointed in writing by the district chairs representing the two parties that cast the largest number of votes in the state at the last general election.”).

None of the various election boards in the respective counties of the State have been made parties to this lawsuit. Only one member of the multiple-member county canvassing board in Grand Forks County has been made a party to this lawsuit. None of the members of the respective county canvassing boards in any of the other counties in the State have been made parties to this lawsuit. Defendant Secretary of State Alvin Jaeger is not a member of any of the various election boards in the counties of the state. Nor is he a member of any of the bipartisan county canvassing boards. He is not an elected county recorder, an elected county auditor, an elected chairman of the board of any county commission, nor is he selected by either of the two political parties receiving the highest number of votes cast in the last general election to serve as a representative of either of those two parties on a county canvassing board. Nor does the Secretary of State play a role in the selection of the members of the various election boards or county canvassing boards, or determine who the citizens of the State may elect as county recorders, auditors, or county commissioners.

Before granting any injunctive relief, this Court must satisfy itself that the Plaintiffs have standing, which includes an inquiry into whether an alleged injury is “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)). Here, North Dakota tasks bipartisan election boards and bipartisan county canvassing boards with the statutory duty of comparing signatures. The Legislature did not give the Secretary that power, but instead placed it within the control of independently elected officials and representatives of the two parties. Although the Secretary is statutorily charged with implementing “uniform training programs for all election officials in the state” N.D. Cent. Code § 16.1-01-01(2)(a), he does not directly participate in the enforcement of the signature match provisions. The various bipartisan board members are employed by the counties, not the Secretary, and are therefore not directly under his control. See N.D. Cent. Code §§ 16.1-05-05; 16.1-15-18.

In Jacobson v. Florida Sec’ of State, several individual voters and two organizations sought an injunction challenging a Florida law that governed the order in which candidates appear on the ballot. 957 F.3d 1193, 2020 WL 2049076 at *1 (11th Cir. Apr. 29, 2020). By statute, the task of preparing the ballots and placing candidates thereon fell to the sixty-seven county Supervisors of Elections, “none of whom were made parties to [the] lawsuit[.]” Id. In a suit brought against the Secretary of State, the district court granted an injunction enjoining the Secretary and the various county Supervisors from preparing ballots in accordance with the challenged statute. Id.

The Eleventh Circuit *reversed* the injunction, in part, because “any injury would be neither traceable to the Secretary nor redressable by relief against her. Instead, any injury would be traceable only to 67 Supervisors of Elections and redressable only by relief against them.” Id. at *9. The Eleventh Circuit based its conclusion in part on the fact that the Supervisors were elected at the county level, not appointed by the Secretary, and compensated by the counties. Id. at *10. Further, the Court said “the Secretary’s position as the chief election officer of the state with general supervision and administration of the election laws does not make the order in which

candidates appear on the ballot traceable to her.” Id. (internal citations and quotation marks omitted). “Florida law expressly gives a different, independent official control over the order in which candidates appear on the ballot.” Id.

Similarly, here, the Legislature assigned the statutory task of comparing signatures to independent bipartisan election boards and county canvassing boards who are not parties to this lawsuit. Those bipartisan bodies are not appointed by the Secretary, but are either elected officials or representatives determined at the county level, all of whom are compensated by the counties. For the same reasons the injuries were not redressable against the Florida Secretary of State in Jacobson, the injuries alleged in this case are not redressable in a suit against Secretary of State Jaeger.

Plaintiffs here may argue that this Court can nonetheless order the Secretary, in his role as the general supervisor of elections, to provide written guidance to the various independent bipartisan election boards and county canvassing boards in the State on procedures for giving notice and an opportunity to cure.

In Jacobson, the Eleventh Circuit rejected that argument as well:

But this “notice” theory of redressability contravenes the “settled principle[]” that “it must be *the effect of the court’s judgment on the defendant*—not an absent third party—that redresses the plaintiff’s injury.” [Lewis v. Governor of Ala., 944 F.3d 1287, 1301 (11th Cir. 2019) (en banc)] (internal quotation marks omitted). Any persuasive effect a judicial order might have upon the Supervisors, as absent nonparties who are not under the Secretary’s control, cannot suffice to establish redressability. See id. at 1305 (“If courts may simply assume that everyone (including those who are not proper parties to an action) will honor the legal rationales that underlie their decrees, then redressability will *always* exist.” (quoting Franklin v. Massachusetts, 505 U.S. 788, 825, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) (Scalia, J., concurring in part and concurring in the judgment))). “Redressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power.” Id. (quoting Franklin, 505 U.S. at 825, 112 S.Ct. 2767 (Scalia, J., concurring in part and concurring in the judgment))). Because the voters and organizations failed to sue the officials who will cause any future injuries, even the most persuasive of judicial opinions would have been powerless to redress those injuries.

Id.

The lack of redressability in this case, in a suit that does not include the bipartisan entities

that enforce the challenged statute, is due to the limited power of the federal courts who “have no authority to erase a duly enacted law from the statute books.” Id. at *11 (quoting Jonathan F. Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 936 (2018)). Instead, a federal court’s “power is more limited: we may enjoin executive officials from taking steps to enforce a statute. And we can exercise that power only when the officials who enforce the challenged statute are properly made parties to the suit.” Id. (internal quotation marks and citation omitted).

The Plaintiffs may also argue that all of these redressability problems are cured by the fact that the Secretary is a proper defendant under Eleventh Amendment jurisprudence because he has “some connection” with the enforcement of the challenged law. McDaniel v. Precythe, 897 F.3d 946, 952 (8th Cir. 2018).

But Article III standing and the proper defendant under Ex parte Young² are separate issues. . . . To be a proper defendant under Ex parte Young – and so avoid an Eleventh Amendment bar to suit – a state official need only have some connection with the enforcement of the challenged law. In contrast, Article III standing requires that the plaintiff’s injury be fairly traceable to the defendant’s actions and redressable by relief against *that* defendant.

Jacobson, 2020 WL 2049076 at * 11 (internal quotation marks and citations omitted). The fact that the Secretary may be a proper defendant does not cure the standing requirements of Article III when the alleged injury can only be redressed by other nonparties.

The Plaintiffs may also argue that this Court may bind nonparties “who are in active concert” with a defendant pursuant to Rule 65(d)(2)(C) of the Federal Rules of Civil Procedure. But “that rule applies only when a plaintiff validly invokes federal jurisdiction by satisfying the traceability and redressability requirements of standing against a defendant,” because the Federal Rules of Civil Procedure do not themselves create an independent basis for federal jurisdiction. Id. (citing In re Infant Formula Antitrust Litig., MDL 878 v. Abbott Laboratories, 72 F.3d 842, 843 (11th Cir. 1995)).

Finally, the Plaintiffs may argue their alleged injuries are redressable through this lawsuit because the Secretary has authority to issue a regulation that can require election boards and county

² 209 U.S. 123 (1908).

canvassing boards to provide notice and an opportunity to cure before rejecting a signature. But North Dakota law is clear that an administrative regulation is void if it “exceeds [an agency’s] statutory authority or conflicts with the statute it implements.” State ex rel. Clayburgh v. American West Cmty. Promotions, Inc., 2002 ND 98, ¶ 13, 645 N.W.2d 196, 205. There is nothing to guarantee that independently elected county recorders, auditors, county commission chairmen, or independently appointed representatives of the two parties, will follow a regulation adopted by the Secretary that conflicts with their obligations under statute. See Jacobson, 2020 WL 2049076 at * 13 (rejecting a similar claim against the Florida Secretary of State and noting that the “causation element of standing requires” that the named defendant “possesses authority to *enforce* the complained-of provision”) (internal quotation marks and citation omitted).

In sum, the Plaintiffs are not only unlikely to succeed on the merits of their claim, but this current lawsuit against the named Defendants is subject to dismissal without even reaching the merits due to its failure to allege an injury that can fairly be traced to the two named Defendants, or redressed by an injunction against those two Defendants. Lujan, 504 U.S. at 560.

B. The two organizational Plaintiffs have not alleged sufficient facts to show they have an injury-in-fact.

In addition to all three of the Plaintiffs’ failures to allege a redressable injury against the named Defendants, two of the Plaintiffs also fail to satisfy the injury-in-fact requirements of Article III standing. See Lujan, 504 U.S. at 560 (discussing the three separate elements of constitutional standing, one of which is an injury in fact or “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical”) (internal quotation marks and citation omitted).

The allegations regarding Plaintiffs Self Advocacy Solutions N.D. and League of Women Voters of North Dakota are found – in their entirety -- at paragraphs 16 through 20 of the complaint. See Doc. 1. Plaintiff Self Advocacy alleges it has members who “promote human and civil rights for people with disabilities,” that it “encourages members to exercise their right to vote in North Dakota elections,” and that it “has advocated for its members to vote by absentee ballot.”

Id. at ¶ 16. Self Advocacy allegedly has members whose “disabilities affect their ability to sign their name.” Id. at ¶ 17.

Similarly, Plaintiff League of Women Voters has members who “encourage informed and active participating in government”; the League also “encourages its members and the public to exercise their right to vote in North Dakota elections” which includes educating “its members and the public about how to vote by absentee ballot[.]” Id. at ¶ ¶ 18-19. The League allegedly “has members whose signatures may not be visually consistent over time” or “who are at risk of having their absentee ballot signatures deemed not to ‘correspond’ with their absentee ballot application.” Id. at ¶ 20.

“[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” Missourians for Fiscal Accountability v. Klahr, 830 F.3d 789, 793–94 (8th Cir. 2016). These two Plaintiffs can establish an injury-in-fact for standing purposes either by showing associational standing to assert the claims of their members, or by showing an injury directly to the organization. See, e.g., Jacobson, 2020 WL 2049076 at * 7 (citing Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009), and Common Cause/Ga. v. Billups, 554 F.3d 1340, 1350-51 (11th Cir. 2009)).

The allegations in the complaint are inadequate to establish standing in either of these ways. To establish standing to assert the claims of an organization’s members, a plaintiff must identify at least one member who will suffer an injury. See Summers, 555 U.S. at 498. The complaint’s allegations in this case generally allege that the two organizations have members who will be injured by the signature match provisions, but fail to identify at least one specific member who will be injured. See id. at 497 (rejecting a test that requires nothing more than an “organization’s self-description of the activities of its members [and thus] a statistical probability that [at least] some of those members are threatened with concrete injury” as the proper test for organizational standing). In this case, the allegations in the complaint contain nothing more than the organizations’ self-description of the activities of its members. This is insufficient to establish standing in the voting context given the unique, individual nature of voting rights. See Gill v.

Whitford, 138 S.Ct. 1916, 1929 (2018) (emphasizing the “individual and personal” nature of the right to vote); Jacobson, 2020 WL 2049076 at *7-8 (applying Summers and refusing to recognize the Democratic National Committee’s standing to sue as an organization absent proof “that at least one of its unidentified members is certain to be injured by [the challenged statute]”) (internal quotation marks and citation omitted).

The complaint’s allegations are also inadequate to show an injury-in-fact directly to the two organizations. An organization can show standing to sue based on its own injury by establishing that it has been forced to divert its resources to counteract the alleged unconstitutional acts of the Defendants. See Jacobson, 2020 WL 2049076 at * 8 (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) and Fla. State Conference of NAACP v. Browning, 522 F.3d 1153, 1163 (11th Cir. 2008)). In addition, a plaintiff attempting to show injury for purposes of standing through a diversion-of-resources theory must establish “what activities [it] would divert resources *away from* in order to spend additional resources on combatting [the alleged unconstitutional effect of the signature match], as precedent requires.” Id. at *9 (citing Havens Realty Corp., 455 U.S. at 379 n.21, and Browning, 522 F.3d at 1166). The allegations here do not establish that either organization has or will divert resources to combat the alleged unconstitutional impact of North Dakota’s signature match provisions. The allegations here also fail to identify what activities the two organizations would divert resources away from in order to spend additional resources combatting the signature match provisions.

C. None of the Plaintiffs can show the statute is facially unconstitutional.

Even if this Court wholly ignores the serious Article III standing issues this current lawsuit contains, the Plaintiffs cannot show that the signature match requirements are facially invalid. A facial challenge can only succeed where a plaintiff “establish[es] that no set of circumstances exists under which the Act would be valid.” United States v. Salerno, 481 U.S. 739, 745 (1987). In Crawford v. Marion Cty. Election Bd., the Supreme Court established that an election law advancing important state interests (including safeguarding voter confidence, protecting the integrity of elections, aligning state law with the requirements of federal law, preventing voter

fraud, and assessing the eligibility and qualifications of voters) is facially constitutional when it imposes nothing more than a limited burden on the vast majority of voters. 553 U.S. 181, 202-04 (2008).

Crawford preserved as-applied challenges for the “small number of voters who may experience a special burden under the statute” in which that special burden is weighed “against the State’s broad interests in protecting election integrity” under a “unique balancing analysis.” Id. at 200. But specially-burdened plaintiffs bringing as-applied challenges cannot “demonstrate[] that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute.” Id. at 203; see also Brakebill v. Jaeger, 932 F.3d 671, 678 (8th Cir. 2019) (stating that, under Crawford, even when “a plaintiff can show that an election statute imposes excessively burdensome requirements on *some* voters, that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters”) (internal citation and quotation marks omitted); Frank v. Walker, 819 F.3d 384, 386 (7th Cir. 2016) (applying Crawford and stating “the burden *some* voters faced could not prevent the state from applying the law generally,” but that an as-applied challenge is compatible with Crawford because the “high hurdles for some persons eligible to vote [may] entitle *those particular persons* to relief”) (emphasis added); see also Veasey v. Abbott, 830 F.3d 216, 249 & n.40 (5th Cir. 2016).

North Dakota’s signature match requirement advances the important state interests recognized in Crawford. It protects the integrity of elections, prevents voter fraud, and ensures that absentee or mail-in ballots are completed by the same voter who applied for a ballot. The requirement protects all candidates’ interests in ensuring that the votes they receive are from valid constituents, and further protects all voters’ interests by ensuring that valid votes are undiluted by invalid or fraudulent ballots. See Anderson v. United States, 417 U.S. 211, 226 (1974) (discussing the right to have a vote be “given full value and effect, without being diluted or distorted by the casting of fraudulent [or otherwise invalid] ballots”).

The signature match requirement does not interfere with the rights of the vast majority of North Dakota voters. For example, in the November 2018 election, 95,562 ballots were cast by

absentee or mail-in ballot, and only 334 were rejected for signature mismatches. In other words, the vast majority of voters have consistent signatures that can be verified by the bipartisan election boards and county canvassing boards tasked with the statutory duty of comparing signatures. The Plaintiffs cannot show that the signature match requirement is unconstitutional under all circumstances in order to meet their heavy burden of demonstrating a facial challenge.

The signature match requirement prevents one voter from applying for a ballot, and another person signing that ballot. If a ballot application was signed by a voter named Alexander Hatzenbuehler, for example, but the signature on the ballot was signed by Marilyn Brockington, that invalid or fraudulent ballot should be rejected. The chance that such a ballot is fraudulent is high, and the risk of an erroneous deprivation almost non-existent. In addition, notice provisions would be complicated by the need to determine which of the two voters should be given notice and an opportunity to cure, the person who signed the application or the person who signed the return ballot envelope. Thus (even overlooking the lack of the Plaintiffs' standing) any facial challenge necessarily fails because there are at least some circumstances where the signature matching requirements do not impose an unconstitutional burden.

As a consequence, the Plaintiffs cannot “demonstrate[] that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the [signature match requirement under all circumstances].” Crawford, 553 U.S. at 203. “The application of the statute to the vast majority of [North Dakota] voters is amply justified by the valid interest in protecting the integrity and reliability of the electoral process.” Id. at 204 (internal quotation marks and citation omitted); see also Salerno, 481 U.S. at 745 (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid[.]”) (internal citations and quotations omitted).

In the specific context of a voting rights case involving a facially constitutional statute, Crawford essentially places a categorical prohibition against injunctive relief beyond that available

to individual plaintiffs in as-applied challenges. See also Gill, 138 S.Ct. at 1929 (emphasizing that the individual nature of the right to vote).

D. The single individual Plaintiff cannot show she requires injunctive relief for an as-applied challenge.

When properly limited to an as-applied challenge brought by individual Plaintiff Maria Fallon Romo, she cannot show the signature matching requirement places an unconstitutional burden on her, or requires anything more than knowledge of what North Dakota law already permits.

All “citizens are presumed to know the law[.]” Penny v. Giuffrida, 897 F.2d 1543, 1547 (10th Cir. 1990) (citing Heckler v. Cmty. Health Servs. Of Crawford Cty., Inc., 467 U.S. 51, 63 n.17 (1984)). Thus, Romo and other citizens are presumed to know that North Dakota law requires the signatures on the ballot application and the ballot to “correspond.” N.D. Cent. Code § 16.1-07-12. In addition, Romo acknowledges that she is aware of the difficulties she has in producing a recognizable signature because of her medical condition, and that her doctors have told her for years to expect this difficulty. See Doc. 11-17 at ¶ 5.

North Dakota law already allows persons who are unable to produce a signature to mark both a ballot application and a return ballot envelope with an “X,” and have the “X” witnessed by a disinterested individual. N.D. Cent. Code §§ 16.1-07-06(2); 16.1-07-08(2). This choice for individuals with a disability who are concerned about producing recognizable signatures (or any voter, for that matter) is clearly set forth on both the absentee/mail-in ballot application as well as the return ballot envelope. See Docs. 11-13, 11-14.

It is unfortunate that Ms. Romo did not take advantage of her ability to mark her return ballot envelope with an “X” and have a disinterested person witness her mark in the November 2018 election. It is unfortunate that Ms. Romo was unaware of the requirements of North Dakota law. See Doc. 11-17 at ¶ 7. But the States, necessarily “must play an active role in structuring elections [and] ‘as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic

processes.” Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)). “Election laws will invariably impose some burden upon individual voters.” Burdick, 504 U.S. at 433.

North Dakota has chosen to protect the interests of all voters by having signatures validated by two separate levels of bipartisan review (the election board and county canvassing board), and further provides an option for individuals to simply mark their signature as an “X” and have that mark witnessed by a disinterested individual. This may not be the system that any particular individual voter, including Ms. Romo, may choose. But the “right to vote in any manner” that a voter may desire is not “absolute.” Id. North Dakota law gives Ms. Romo a reasonable means to exercise her constitutional right to vote, by imposing the minimal burden of having her signature (or X) witnessed by a disinterested individual.

“[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” Califano v. Yamasaki, 442 U.S. 682, 702 (1979); see also Gerlich v. Leath, 861 F.3d 697, 710 (8th Cir. 2017) (“An injunction must not be ‘broader than necessary to remedy the underlying wrong.’”) (quoting Coca-Cola Co. v. Purdy, 382 F.3d 774, 790 (8th Cir. 2004)). Here, as relevant to Ms. Romo’s as-applied challenge, North Dakota’s election system adequately protects Ms. Romo’s individual right to vote. No injunction is necessary because she already has relief available to her under existing North Dakota law.

III. The other Dataphase factors weigh in the Defendants’ favor.

The Plaintiffs’ request for a preliminary injunction should be denied because this suit against the Secretary of State cannot redress the injuries alleged in the Complaint. The Plaintiffs simply cannot succeed on the merits where none of them have established the redressability requirement of Article III standing. But even if the Court disregarded the lack of standing, the other Dataphase factors favor the Defendants here as well.

The State of North Dakota will be irreparably harmed if an injunction is granted. “Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” Maryland v. King, 567 U.S. 1301, 1301 (2012)

(Roberts, C.J., in chambers) (internal quotation marks and citation omitted)). This is especially true in the election contest. As stated above, the Supreme Court has repeatedly recognized the harm caused by upsetting a state's election process with last minute changes to its process. Republican Nat'l Comm., 140 S. Ct. at 1207; Benisek, 138 S. Ct. at 1945; Purcell, 549 U.S. at 4-5 (2006).

Balancing the harm the State will suffer against any alleged harm the Plaintiffs will suffer favors the State. The two organizational Plaintiffs have not even alleged they have been harmed by having to divert resources, let alone demonstrated any harm in that regard. And the ability to mark a ballot application and ballot envelope with an "X" and have that mark attested by a disinterested individual already adequately protects individual Plaintiff Romo from any harm allegedly caused by North Dakota's signature match requirements.

Denying a preliminary injunction is also in the public interest. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." Purcell, 549 U.S. at 4. Entering an injunction in the middle of an election already underway will undermine the public's confidence in that election.

Entering an injunction will also undermine the public's confidence in the judicial system. "The judicial system . . . play[s] a vital part in a democratic state, and the public has a legitimate interest in [its] operations." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1035 (1991) (citing Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 838-39 (1978)). The Court's injunctive power with respect to state law is limited to enjoining a defendant from taking action. Here, any injunction would have to address the signature matching action of government officials and entities who have not been made parties to the lawsuit. The Court would thereby violate well-recognized Article III standing requirements by entering an injunction in this case.

CONCLUSION

For the reasons stated above, Defendant Secretary of State Alvin Jaeger respectfully requests that the Court deny the Plaintiffs' request for a preliminary injunction.

Dated this 22nd day of May, 2020.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

Self Advocacy Solutions N.D., League of
Women Voters of North Dakota, Maria Fallon
Romo,

Plaintiffs,

vs.

Alvin Jaeger, in his official capacity as
Secretary of State, Debbie Nelson, in her
official capacity as County Auditor of Grand
Forks County,

Defendants.

**AFFIDAVIT OF IRWIN JAMES NARUM
(JIM) SILRUM**

Case No. 3:20-cv-00071

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Irwin James Narum (Jim) Silrum, states as follows:

1. I declare under penalty of perjury that the statements made in this affidavit are true and correct to the best of my knowledge and belief.

2. I am the Deputy Secretary of State (“Deputy”) for the State of North Dakota and have held this position since November 2003. As Deputy, my duties include assisting the North Dakota Secretary of State (“Secretary”) in carrying out the duties of the office of Secretary of State (“SOS”), including general duties, elections, licensing, central indexing, and business registration and information. A detailed list of the duties can be found on the Secretary of State website at <http://sos.nd.gov/about-office/duties-secretary-state>.

3. My specific duties for the SOS in elections are to assist the Secretary who serves as the state of North Dakota’s chief election officer, specifically: training county election officials; prescribing the form and content of statewide election ballots, receiving and filing petitions for initiated, constitutional, and referred measures; receiving candidate filings from individuals seeking statewide, legislative, or judicial office; filing oaths of office for legislative, judicial, and executive officials; filing campaign disclosure statements of statewide, judicial, and legislative

candidates, state political parties, district political parties, political committees, and independent expenditure filers; and certifying names of elected statewide, judicial, legislative, and multi-county jurisdiction candidates of the state.

Absentee Voting Process In North Dakota

4. “Any qualified elector of this state may vote an absent voter's ballot at any general, special, or primary state election, any county election, or any city or school district election.” (N.D. Cent. Code § 16.1-07-01). “At any time in an election year, any qualified elector may apply to the county auditor, the auditor or clerk of the city, or the business manager of the school district, as the case may be, by personal delivery, facsimile, electronic mail or otherwise, for an official ballot to be voted at that election. A voter may obtain an application form approved by the secretary of state, for an absent voter's ballot for a general, special, primary, county, city, or school election from the secretary of state, a county or city auditor, a candidate, a political party, or a political committee.” (N.D. Cent. Code § 16.1-07-05(1)). “A completed application must be submitted to the appropriate election official in a timely manner so as to allow the applicant to receive, complete, and mail the absent voter's ballot before the day of the election.” (N.D. Cent. Code § 16.1-07-05(3)).

5. The application for the absentee ballot may be obtained in a variety of places (and the paper version of that form is attached hereto as Exhibit 1):

- The Secretary of State's Absentee or Mail Ballot Application (<https://vip.sos.nd.gov/absentee/Default.aspx>) found on Vote.ND.Gov.
- The Secretary of State's Absentee/Mail Ballot Application (pdf) (<https://www.nd.gov/eforms/Doc/sfn51468.pdf>) found on Vote.ND.Gov.
- Leading up to the 2020 June Election, the Secretary of State's office mailed absentee ballot applications to each individual listed in the central voter file, which is a record of who has voted previously rather than a record of who can vote.
- During many election cycles, political parties and candidates have mailed out application forms to those people they believe will support them. This has become a key element of “get out the vote” campaigns.
- The state's 53 counties have published absentee applications on their websites over the years, but the Absentee or Mail Ballot Application (<https://vip.sos.nd.gov/absentee/Default.aspx>) utility on Vote.ND.Gov

has become so popular that many of the counties simply include the link to this on their web pages.

6. The qualified elector can easily fill out the application by using the application utility found on the Secretary of State's website since this has a live connection to the data recorded in the central voter file. Upon entry by the voter of the driver's license or the non-driver's ID card number and date of birth, the utility pulls onto the form all requested information that is stored in the central voter file. The applicant then only needs to indicate which election or elections during the year for which they want to vote absentee, fill in the phone number if they have one, indicate where they would like the ballot sent if different from the residential address (e.g., a North Dakotan who spends the winter in Arizona), print, sign, and date the application before sending it to the proper election official. The application utility also provides the correct name and address for the County Auditor of the county in which the voter resides.

7. The County Auditor receives the application, reviews it to ensure all required fields were completed, and then compares the data on the form with the data maintained in the central voter file. If the form is complete and the data matches, the voter's record in the central voter file is updated to reflect that a ballot request has been received and a ballot has been sent, before actually sending the ballot and all other required materials to the voter.

8. Upon receiving the ballot, the voter opens the outer envelope and extracts a return envelope that has a secrecy envelope with the blank ballot enclosed (an example is attached hereto as Exhibit 2). After marking the ballot with the voter's choices, the ballot is inserted into the secrecy envelope, which is then inserted into the return envelope. The voter must then sign and date the back of the return envelope. If the voter is unable to sign, just like on the application, the voter may place an X in the box provided and a disinterested individual writes the name of the voter and then signs their own name in the space provided.

9. The County Auditor's office, upon receipt of the returned ballot, makes sure that the return envelope has a signature and a date that is no later than the day before the date of the election. (It should be noted that the return envelope will have the voter's name and a bar code

printed on a label that was placed on the return envelope by the County Auditor's office before sending the ballot to the voter. This allows the County Auditor's office to quickly locate that voter's record in the central voter file rather than depending solely on the ability to read the handwriting of the voter.) The county staff member processing the return of the ballot finds the voter's record in the central voter file, marks that the ballot has been returned, and then locates the ballot application from the voter so that the two items can be stored together until processing and tabulation by the election board. When looking to ensure the return envelope has a signature and a date and matching it with the application sent by the voter, no verification of the signatures is done at that time because the law mandates that responsibility to the election board and ultimately the canvassing board.

10. If the returned ballot is missing a signature or a date, the voter is contacted and must come into the County Auditor's office to complete what is missing. N.D. Cent. Code § 16.1-07-10 states, "After submission to the appropriate election officer, a marked absent voter's ballot may not be returned to the voter for any reason other than to complete any missing information required on the affidavit on the back of the return envelope."

11. N.D. Cent. Code § 16.1-07-12 succinctly states when and how the election board is to process the returned absentee ballots. It says,

"At any time beginning on the day before election day and the closing of the polls on election day, the election clerks and board members of the relevant polling place first shall compare the signature on the application for an absent voter's ballot with the signature on the voter's affidavit provided for in section 16.1-07-08 to ensure the signatures correspond. If the applicant is then a duly qualified elector of the precinct and has not voted at the election, they shall open the absent voter's envelope in a manner as not to destroy the affidavit thereon. They shall take out the secrecy envelope with the ballot or ballots contained therein without unfolding the same, or permitting the same to be opened or examined and indicate in the pollbook of the election that the elector has voted. The election board members not participating in the comparing of signatures and entering voters into the pollbook shall remove the ballot or ballots from the secrecy envelope, unfold and initial the same, and deposit in the proper ballot box for tabulation. The votes from these cast ballots may not be tallied and the tabulation reports may not be generated until the polls have closed on election day. If the affidavit on the outer envelope of a returned absentee ballot is found to be insufficient, or that the signatures on the application and affidavit do not correspond, or that the applicant is not then a duly qualified

elector of the precinct, the vote may not be allowed, but without opening the absent voter's envelope, the election inspector or election judge shall mark across the face thereof "rejected as defective" or "rejected as not an elector", as the case may be. These rejected ballots are then turned over to the county canvassing board for final determination of eligibility. The subsequent death of an absentee voter after having voted by absentee ballot does not constitute grounds for rejecting the ballot."

12. All accepted absentee ballots are tabulated by the election board and all rejected ballots are then turned over to the canvassing board for final determination of acceptance or rejection. If the canvassing board disagrees with the election board's decision on the rejection of the ballot, the ballot is tabulated and the voter's record is updated to reflect having voted. If the canvassing board agrees with the election board, the ballot remains unopened and is rejected.

13. Since voters have until the day before the election to postmark the return of their absentee ballot, several returned absentee ballots are received after the work of the election board is complete. N.D. Cent. Code § 16.1-07-09 clearly states what is to be done with any ballot arriving after election day, but before the meeting of the canvassing board.

"In the case of congressional, state, county, city, or school district elections, if an envelope postmarked or otherwise officially marked by the United States postal service or other mail delivery system before the date of election and containing an absent voter's ballot is received by the officer too late to be forwarded to a polling place of the proper voting precinct in time to be tabulated, the ballot must be tallied by the canvassing board of the county, the governing body of the city, or the school board of the school district, as the case may be, at the time the returns are canvassed. Any envelope without a postmark or other official marking by the United States postal service or other mail delivery system or with an illegible postmark or other official marking and containing an absentee voter's ballot must be received by mail by the proper officer prior to the meeting of the canvassing board. An absent voter may personally deliver the absent voter's ballot to the appropriate officer's office at any time before five p.m. on the day before the election. Any envelope containing an absent voter's ballot with a postmark or official date stamp on the day of election or thereafter may not be tallied with the ballots timely submitted for the election. Before forwarding any ballot to a canvassing board pursuant to this section, the officer forwarding the ballot shall print the date of receipt on the envelope. Upon receipt, the canvassing board shall determine that the elector was qualified to vote in that precinct, that the elector did not previously vote in that precinct on the date of the election, and that the signatures on the absentee ballot application and the voter's affidavit were signed by the same person before allowing the ballot to be tallied."

14. These late arriving absentee ballots are reviewed and either accepted or rejected by

the canvassing board alone. Of the absentee ballots that were received after November 6, 2018 but by November 12, 2018, 378 were accepted for tabulation. In that same election, there were 138 ballots rejected by the canvassing board because they were returned by the voter on election day or after.

Election Boards

Members of the Election Board

15. According to N.D. Cent. Code § 16.1-05-01, the election board must consist of:

- An **Election Inspector** hired by the County Auditor or the governing body of a city. The individual appointed to this position must be selected based on the inspector's knowledge of the election procedure.
- At least two **Election Judges** appointed by the "district chairs representing the two parties that cast the largest number of votes in the state at the last general election. In polling places in which over one thousand votes are cast in any election, the county auditor may request each district party chair to appoint an additional election judge." The law does allow the County Auditor to fill these positions if a response has not been received from the district chairs by the fortieth day before an election. The guidance provided by this office has been that when the County Auditor is required to do this, the people they would like to appoint should be vetted by the district party chair of the district party the individual is to represent on the election board.
- At least two **Poll Clerks** hired by the County Auditor or the governing body of a city. Poll clerks must be appointed based on their knowledge of election matters, attention to detail, and any necessary technical knowledge.

Qualifications of the Election Board Members

16. According to N.D. Cent. Code § 16.1-05-02, the **Election Inspector, Election Judges, and Poll Clerks:**

- Must be a qualified elector of a jurisdiction served by the board.
- May not serve if the individual:
 - a. Has anything of value bet or wagered on the result of an election.
 - b. Is a candidate in that election.
 - c. Is the husband, wife, father, mother, father-in-law, mother-in-law, son, daughter, son-in-law, daughter-in-law, brother, or sister, whether by birth or marriage, of the whole or the half-blood, of any candidate in that election.
- Before beginning their work for the election, each member must take

the following oath, “I do solemnly swear (or affirm as the case may be), that I will perform the duties of inspector, judge, or clerk (as the case may be) according to law and to the best of my ability, and that I will studiously endeavor to prevent fraud, deceit, and abuse in conducting the same.”

- These individuals must attend election training conducted by the County Auditor or that officer’s staff. The training is to make sure they are familiar with the duties of administering the election assigned to the office they serve.

Duties of the Election Board Members

17. According to N.D. Cent. Code 16.1-05-04, in the case of a mail election:

a. The **Poll Clerks**:

1. Review the signature from the voter on the application with the signature found on the envelope containing the returned ballot.
2. For those ballots where the signatures are a match and the voter is qualified to vote in the election, they open the envelope and separate the inner secrecy envelope with the voted ballot from the envelope containing the identification of the voter. This is to ensure the privacy of the vote is maintained.
3. For those ballots where they question whether or not the signatures match, they set the entire envelope aside for a decision to be made by all of the election workers as to whether the ballot should be accepted or rejected and, if rejected, record on the envelope the reason the ballot was rejected.

b. The **Election Judges**:

1. Remove the voted ballot from the secrecy envelope.
2. Initialing the ballots accepted for tabulation.
3. Running the ballots through the tabulator.
4. Working together in pairs to remake any ballots that cannot be read by the tabulator.

c. The **Election Inspector**:

1. Supervises the conduct of the other officials working on the election board.
2. Assigns the duties performed by the Election Clerks including the maintenance of the pollbooks used in the election, which is where the record of voting is recorded.

d. The **Election Board and Poll Clerks**:

1. Maintain order and security in the space where the ballots are tabulated.
2. Make decisions on whether signatures match.

3. At the conclusion of the tabulation of the votes, each must sign an affidavit stating that the tabulation of the votes is true and correct. (See N.D. Cent. Code 16.1-15-05)
4. Securely wrap and return all ballots and election materials to the County Recorder. (See N.D. Cent. Code § 16.1-15-08)

County Canvassing Boards

Members of the County Canvassing Board

18. According to N.D. Cent. Code 16.1-15-15, the Canvassing Board must include:
 - The County Recorder.
 - The County Auditor.
 - The Chairman of the County Commissioners.
 - A representative from each of the two political parties that received the highest number of votes for Governor the last time the office was on the ballot.
 - If there are more than one district political party in a county, each district party is entitled to representation if both parties are represented equally.
 - No member of the Canvassing Board may also have served as a member of an Election Board for the same election.

Qualifications of the County Canvassing Board Members

19. According to N.D. Cent. Code §§ 16.1-15-16 and 16.1-15-17, the members:
 - Must be a qualified elector of a jurisdiction served by the board.
 - May not serve if the individual:
 - a. Has anything of value bet or wagered on the result of an election.
 - b. Is a candidate in that election.
 - c. Is the husband, wife, father, mother, father-in-law, mother-in-law, son, daughter, son-in-law, daughter-in-law, brother, or sister, whether by birth or marriage, of the whole or the half-blood, of any candidate in that election.
 - Before beginning their work for the election, each member must take the following oath, “I do solemnly swear (or affirm as the case may be), that I will perform the duties of inspector, judge, or clerk (as the case may be) according to law and to the best of my ability, and that I will studiously endeavor to prevent fraud, deceit, and abuse in conducting the same.”

Duties of the County Canvassing Board

20. According to N.D. Cent. Code 16.1-15-19:
 - Make decisions on any ballot that was set aside by the Election Board because the voter was unable to provide a valid form of ID when voting.

- Canvass any write-in votes cast that meet the criteria set forth in N.D. Cent. Code 16.1-15-01.1.
- Initial and count all absentee ballots that were cast prior to election day but were received after the Election Board completed its work.
- Make final decisions on the acceptance or rejection of all absentee ballots rejected by the Election Board.

Signature Verification

21. Depending on when the ballot is received, under North Dakota law, signature verification is conducted by members of the election board and members of the county canvassing board (for ballots received prior to election day), or only by members of the county canvassing board (for ballots received on or after election day). In all cases, the county canvassing board makes the final determination of eligibility. In that regard, North Dakota law states that signature verification must occur by the members of the election board for all ballots received prior to election day (N.D. Cent. Code § 16.1-07-12) comparing the signature included on the application for the ballot (N.D. Cent. Code § 16.1-07-06(1)(h)) with the signature included on the envelope containing the returned voted ballot (N.D. Cent. Code § 16.1-07-08(2)). This verification to ensure the signatures correspond leads to a decision on the acceptance or rejection of each absentee ballot received, as stated in N.D. Cent. Code § 16.1-07-12:

“If the affidavit on the outer envelope of a returned absentee ballot is found to be insufficient, or that the signatures on the application and affidavit do not correspond, or that the applicant is not then a duly qualified elector of the precinct, the vote may not be allowed, but without opening the absent voter's envelope, the election inspector or election judge shall mark across the face thereof "rejected as defective" or "rejected as not an elector", as the case may be. These rejected ballots are then turned over to the county canvassing board for final determination of eligibility.”

As to ballots properly submitted prior to election day, and received on or after election day, the review process used by county canvassing boards is governed by N.D. Cent. Code § 16.1-07-09, which states in relevant part:

“Before forwarding any ballot to a canvassing board pursuant to this section, the officer forwarding the ballot shall print the date of receipt on the envelope. Upon receipt, the canvassing board shall determine that the elector was qualified to vote in that precinct, that the elector did not previously vote in that precinct on the date of the election, and that the

signatures on the absentee ballot application and the voter's affidavit were signed by the same person before allowing the ballot to be tallied.”

All Absentee Voters Must be Treated the Same

22. According to N.D. Cent. Code § 16.1-15-17, the County Canvassing Board is to meet on the sixth day following the election to certify the election results from the county. The only reason this is ever delayed is when the sixth day would happen to fall on that sixth day as sometimes occurs after a General Election when Veterans’ Day (November 11) falls on the Monday following the election.

23. As required by N.D. Cent. Code § 16.1-15-22, the “certified abstract must be in the possession of the secretary of state before four p.m. on the eighth day after the primary election.” This is required by law so that the State Canvassing Board can meet as soon as possible after the results from each county are received by the Secretary of State. It is worth noting that the State Canvassing Board’s duties do not include any review, acceptance, rejection, or counting of any ballots since all ballots must be counted by the election officials in the county of the voter casting the ballot.

24. The reason for the post-election deadlines for the various boards to meet is due to the fact that those elected to public office are to begin their work soon after the results have been certified. After a June Election, an elected school board member is to take office at the annual meeting of the school board in July according to N.D. Cent. Code § 15.1-09-02 and a city officer is to take office on the fourth Tuesday in June according to N.D. Cent. Code §§ 40-08-06, 40-08-10, and 40-09-04. After a General Election, an elected legislator is to take office on the first day of December.

25. If a recount of the election were to be necessary or requested according to N.D. Cent. Code § 16.1-01-01, the recount itself cannot take place until the work of the county canvassing board or the state canvassing board is complete depending on the office to be recounted. Even as the law is stated now, the work by the various boards must occur quickly to seat the elected officers in time, but that is even more difficult when a recount is to occur.

The June 2020 Election is Already Well Under Way

26. As of 4 p.m. on May 21, 2020, there are already 161,256 ballots in the hands of voters and 39,734 have already been cast by the voter. The turnout for the 2012 June Election was 175,303 and 139,957 in 2016. 2012 and 2016 were years in which the office of Governor was on the ballot, which it is again this year so it is likely that the turnout will be similar to those years. The number of ballots requested at this point says that the majority of voters who will vote in this election already have their ballot. Making any sort of change at this point would unfairly impact those voters that have already cast their absentee ballots according to the laws as they are currently written.

County Information Regarding the 334 Rejected Absentee Ballots from November 2018

27. Below are examples of files our office received from the counties relating to the absentee ballots that were rejected by the election board and/or the canvassing board after the 2018 General Election:

The signature on the absentee ballot application from Ms. Maria Romo:

I do solemnly affirm that I have resided or will reside in the precinct, where my residential voting address is located, for at least thirty days next preceding the election and will be a qualified elector of the precinct. 2

SIGN HERE Maria Romo Date 10-11-18
Signature (required)

The signature on the return envelope from Ms. Maria Romo:

VOTER AFFIDAVIT

Under penalty of possible criminal prosecution for making a false statement, I swear that I am a U.S. citizen, a ND resident and have resided in my precinct for thirty (30) days preceding this election, and this is the ONLY ballot I will cast in this election.

Voter Signature Maria Romo

The signature on the absentee ballot application from Ms. Kourtney Culver:

Signature (required) *Kourtney Culver*

The signature on the return envelope from Ms. Kourtney Culver:

VOTER AFFIDAVIT

Under penalty of possible criminal prosecution for making a false statement, I swear that I am a U.S. citizen, a ND resident and have resided in my precinct for thirty (30) days preceding this election, and this is the ONLY ballot I will cast in this election.

Voter Signature *K Culver*

The signature on the absentee ballot application from Mr. Nicholas Geiger:

Signature (required) *Nick Geiger*

The signature on the return envelope from Mr. Nicholas Geiger:

VOTER AFFIDAVIT

Under penalty of possible criminal prosecution for making a false statement, I swear that I am a U.S. citizen, a ND resident and have resided in my precinct for thirty (30) days preceding this election, and this is the **ONLY** ballot I will cast in this election.

Voter Signature *Nick Geiger*

The signature on the absentee ballot application from Ms. Rachel Trenne:

Signature (required) Rachel C Trenne

The signature on the return envelope from Ms. Rachel Trenne:

VOTER AFFIDAVIT

Under penalty of possible criminal prosecution for making a false statement, I swear that I am a U.S. citizen, a ND resident and have resided in my precinct for thirty (30) days preceding this election, and this is the ONLY ballot I will cast in this election.

Voter Signature

Rachel C Trenne

The signature on the absentee ballot application from Mr. Donald Raaum:

Signature (required)

Applicant Unable to Sign:

The signature on the return envelope from Mr. Donald Raaum:

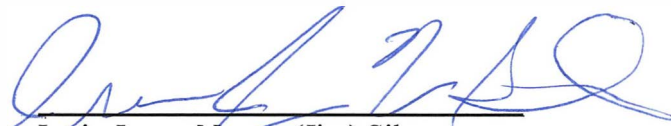
VOTER AFFIDAVIT

Under penalty of possible criminal prosecution for making a false statement, I swear that I am a U.S. citizen, a ND resident and have resided in my precinct for thirty (30) days preceding this election, and this is the ONLY ballot I will cast in this election.

Voter Signature Don Raaum (

28. Although I would not presume to speak for the members of the election boards and canvassing board who rejected the ballots from these individuals, I can certainly understand their belief that the two signatures did not match in the above examples.

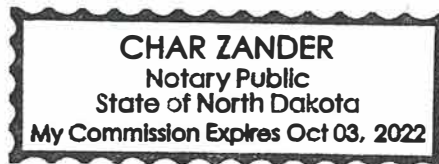
Dated this 21 day of May, 2020.



Irwin James Narum (Jim) Silrum
North Dakota Deputy Secretary of State

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Subscribed and sworn to before me
this 21st day of May, 2020.



Char Zander
Notary Public





Postage
Required.
Post Office will
not deliver
without proper
postage.



DIVIDE COUNTY AUDITOR/TREASURER
GAYLE JASTRZEBSKI
PO BOX 49
CROSBY ND 58730-0049

The above is the front of the absentee ballot return envelope

EXHIBIT
2

VOTER AFFIDAVIT

Under penalty of possible criminal prosecution for making a false statement, I swear that I am a U.S. citizen, a ND resident and have resided in my precinct for thirty (30) days preceding this election, and this is the ONLY ballot I will cast in this election.

Voter Signature _____ OR*



Voter's Name _____

Date: _____ 20 _____

Witness to the Mark

**If the absent voter is unable to sign the voter's name, the voter shall mark (X) or use the applicant's signature stamp on the statement in the presence of a disinterested individual. The disinterested individual shall print the name of the person marking the X or using the signature stamp below the X or signature stamp and shall sign the disinterested individual's own name following the printed name together with the notation "witness to the mark."*

Instructions: Seal your ballot in this envelope • Fill out and sign this affidavit • Mail or deliver to County Auditor

The above is the back of the absentee ballot return envelope

BALLOT SECRECY ENVELOPE

INSTRUCTIONS TO VOTE BY MAIL

- ☐ YOU ARE ENTITLED TO COMPLETE YOUR ABSENTEE VOTER'S BALLOT IN SECRECY.
- ☐ YOU ARE ENTITLED A SECOND-CHANCE TO VOTE – Should you make a mistake while voting, you have the right to return your spoiled ballot to the County Auditor and receive a new one. Contact your Auditor for more information. (N.D.C.C. § 16.1-13-32)
- ☐ IN THE JUNE ELECTION, CROSS-OVER VOTING IS NOT ALLOWED. When voting a party ballot in the June election, you must vote along party (e.g. Republican, Democratic/NPL) lines. If you split your vote, your ballot won't be counted for those races.
This does not apply to non-partisan races or measures. (N.D.C.C. § 16.1-11-22 (4))

1. Vote – Be sure to blacken each oval completely using a blue or black pen. Do not make an X or other mark.
*To write in a name you must blacken the oval **and** write the name on the line provided.*

2. After voting, fold your ballot to conceal your vote. Place your folded, voted ballot in the secrecy envelope or sleeve provided, and then place the secrecy envelope or sleeve in the self-addressed return envelope provided and seal.

3. Complete and sign the voter's affidavit found on the back-side of the return envelope.

4. Affix the proper postage before mailing – extra postage is required.

Ballots must be postmarked no later than the day before the election.