

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

Elizabeth Jane Sinner, Whitney Oxendahl, Carol
Sawicki, Lois Altenburg, And North Dakota
Voters First,

Plaintiffs,

vs.

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

Defendant.

**DEFENDANT’S MEMORANDUM IN
OPPOSITION TO
PLAINTIFFS’ MOTION FOR
PRELIMINARY INJUNCTION**

Case No. 3:20-cv-00076

INTRODUCTION

Defendant Alvin Jaeger, in his official capacity as Secretary of State of North Dakota (“Secretary”), submits this memorandum in opposition to Plaintiffs’ Motion For Preliminary Injunction (Doc. 4).

Plaintiffs have requested the Court issue a preliminary injunction enjoining the Secretary from enforcing the in-person signature, witnessing, and notarizing requirements contained in the North Dakota Constitution (N.D. Const. art. III, § 3) and the North Dakota Century Code (N.D. Cent. Code §§ 16.1-01-09), relating to signature gathering on a petition to place a state constitutional amendment on the ballot in the November 2020 election. Doc. 4, pp. 1-2; Doc. 5, p. 20. Plaintiffs further requested that the Court essentially re-write North Dakota’s state constitutional amendment process to require the Secretary to accept electronic signatures submitted using a private third-party service such as DocuSign, rather than the “wet” signatures currently required. Plaintiffs do not mount a facial challenge against North Dakota’s initiative petition requirements. Doc. 5, p. 12. Rather, they assert that the in-person signature, witnessing, and notarizing requirements violate their Fourteenth and First Amendment rights only “as applied to Plaintiffs during the current COVID-19 pandemic.” Id.

However, the extraordinary remedy of preliminary injunction is unwarranted in this case. Plaintiffs are unlikely to succeed on the merits. The state-created and state-defined ballot initiative process in North Dakota does not implicate Plaintiffs federal Constitutional rights under either the

Fourteenth or the First Amendment simply because of the existence of a pandemic. In any event, even if the Court finds that Plaintiffs' federal Constitutional rights are implicated, there has been no violation of any such rights. The State of North Dakota has not taken action during the current pandemic to hinder or prohibit Plaintiffs from gathering signatures pursuant to the state constitutional process that has been faithfully administered numerous times through many election cycles over the years. Affidavit of Alvin A. Jaeger ("Jaeger Aff."), ¶¶ 4, 6, 12; Exh. 1. Further, North Dakota's process permits signature collection for an entire year, far longer than the entire length of the current pandemic, but Plaintiffs failed to avail themselves of the entire time available to them. Instead, they delayed the start of the process such that their entire signature gathering efforts must occur during the pandemic. Any threat of allegedly irreparable harm to Plaintiffs is a result of their own delay and failure to take advantage of the full time afforded them under North Dakota law. Additionally, the interest of the Secretary and the public outweigh any alleged harm to Plaintiffs. As established in the affidavits submitted in support of this memorandum, the untested remedies sought by Plaintiffs raise significant concerns, and cannot be feasibly instituted by election officials in the short time remaining for Plaintiffs' signature collection to be included on the November 2020 ballot. These concerns are particularly acute while election officials are already struggling to carry out an election in these unprecedented times of global pandemic. Regardless, it is beyond the power of the federal courts to re-write North Dakota's state constitutional ballot initiative process in the manner sought by Plaintiffs, and this Court should decline Plaintiffs' request to do so.

The Secretary requests the Court deny Plaintiffs' Motion For Preliminary Injunction (Doc. 4) in its entirety.

FACTUAL BACKGROUND

I. North Dakota's Initiative Petition Requirements And Process.

Since the adoption of the North Dakota state constitution on October 1, 1889, four types of questions have been submitted to the electorate for approval or rejection:

1. Amendments to the North Dakota constitution as proposed by the legislative assembly or as proposed by the people through a petition procedure;

2. Statutory proposals initiated by the people through a petition procedure;
3. Acts of the North Dakota Legislative Assembly referred to the electorate by a petition procedure; and
4. A proposed new constitution, with 4 alternate propositions to certain sections, submitted by a constitutional convention (April 28, 1972).

Jaeger Aff., ¶ 4; Exh. 1, p. 1. The power to initiate and refer laws was adopted in North Dakota in 1914. Jaeger Aff., ¶ 4; Exh. 1, p. 4. Since statehood, over half of all measures voted upon by the people (272 of 514) represent initiated or referred measures that have required petitions to be circulated and signatures gathered, with the other 242 measures since statehood resulting from legislative action or the Constitutional Convention. Id. Only 26 of the 50 states allow any form of initiative or referendum at all. <http://www.iandrinstitute.org/states.cfm>; <https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx>. Of those states that do allow it, only 18 states allow for a constitutional amendment through the initiative process. Id.

The initiative petition process in North Dakota is governed by Article III of the North Dakota state constitution. Section 1 of Article III indicates that the article is self-executing and all of its provisions are mandatory, however, “[l]aws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair” the powers created by Section 1 of Article III. Additional rules governing the initiative petition process are contained in N.D. Cent. Code §§ 16.1-01-09 and 16.1-01-09.1.

North Dakota’s initiative petition process is described in detail in the Affidavit of Alvin A. Jaeger, filed herewith, and the exhibits attached thereto. The process is well explained to the public through regularly updated publications and information available on the Secretary’s website. Jaeger Aff., ¶¶ 7-10.

To start the process, twenty-five or more qualified North Dakota voters must agree to act as the sponsoring committee for a petition. N.D. Const. art. III, § 2; Jaeger Aff., ¶ 6. The sponsoring committee must present the proposed petition to the Secretary of State for approval as to form. N.D. Const. art. III, § 2; Jaeger Aff., ¶ 6. Since 1993, when Defendant Alvin Jaeger was first elected as the North Dakota Secretary of State, approximately 88 petitions have been submitted by sponsoring

committees seeking approval as to form. Jaeger Aff., ¶¶ 2, 6. Upon receipt, the Secretary creates the petition title and it is submitted to the North Dakota Attorney General for approval or disapproval. N.D. Cent. Code § 16.1-01-09(1)(b); Jaeger Aff., ¶ 6. Once approved the statement is affixed to the petition and returned to the sponsoring committee for securing signatures. N.D. Cent. Code § 16.1-01-09(1)(b); Jaeger Aff., ¶ 6. Of the 88 petitions approved for circulation during Defendant Alvin Jaeger's service as Secretary of State, 42 sponsoring committees secured enough signatures to meet the deadlines to have their petition placed on the ballot as a measure. Jaeger Aff., ¶ 6.

When the Secretary receives a proposed petition for approval, he sends a receipt letter and timeline to the sponsoring committee. Jaeger Aff., ¶ 11. The sponsoring committee is then given the petition title and, if necessary, a correction memo. Id. When a proof copy is returned to the Secretary, a letter approving the petition for circulation along with an updated timeline is given to the sponsoring committee. Id. According to N.D. Cent. Code § 16.1-01-09(7), an initiative petition may be circulated for one year from the date it is approved for circulation by the Secretary. Jaeger Aff., ¶ 11. However, according to the North Dakota Constitution, if a sponsoring committee wishes to have the measure placed on a specific statewide election ballot, the required number of signatures must be obtained and submitted to the Secretary prior to one hundred twenty days before the election at which the measure is to be voted upon. N.D. Const. art. III, § 5; Jaeger Aff., ¶ 11.

The last page of each petition contains an affidavit that must be signed by the circulator in the presence of a notary public. Jaeger Aff., ¶ 12. The circulator must swear that the electors who have signed the petition did so in the circulator's presence¹. Id. This affidavit is required by the North Dakota Constitution, Article III, Section 3, and has been in the state's Constitution since 1978 when it was approved by the state's voters. Jaeger Aff., ¶ 12. Since 1980, there have been 75 measures and referendums placed on the ballot by petition which required the affidavit as part of the petition. Id. In the present motion, Plaintiffs seek an injunction preventing the Secretary from enforcing the

¹ It should be noted, the requirement is merely that signing of the petition must take place in the circulator's presence. There is no requirement that the circulator stand closer than 6 feet to the signers, and no requirement that either the circulator or the signers violate any other health and safety guidelines regarding the use of masks, hand sanitizer, physical distancing, and similar precautions.

state constitutional requirement that the signatures are made in the circulator's presence, that the circulator must sign a notarized affidavit, and forcing the Secretary to accept electronic signatures through a service such as DocuSign rather than the "wet" signatures required on North Dakota's petition form. Doc. 4, pp. 1-2; Doc. 5, p. 20.

When a sponsoring committee has secured enough signatures, the petitions containing the signatures are submitted to the Secretary. Jaeger Aff., ¶ 13. The Secretary then sends a receipt to the sponsoring committee. Id. Each petition is then numbered, and the Secretary undertakes a review process, including a review of the signatures, pursuant to N.D. Cent. Code § 16.1-01-10, which states:

The secretary of state shall have a reasonable period, not to exceed thirty-five days, in which to pass upon the sufficiency of any petition mentioned in section 16.1-01-09. The secretary of state shall conduct a representative random sampling of the signatures contained in the petitions by the use of questionnaires, postcards, telephone calls, personal interviews, or other accepted information-gathering techniques, or any combinations thereof, to determine the validity of the signatures. Signatures determined by the secretary of state to be invalid may not be counted and all violations of law discovered by the secretary of state must be reported to the attorney general for prosecution.

N.D. Cent. Code § 16.1-01-10; Jaeger Aff., ¶ 13.

Depending on whether the petition is a constitutional or statutory initiative, a random selection of 2,000 to 4,000 individuals who signed the petition are selected and mailed postcards. Jaeger Aff., ¶ 14. Follow up calls are made if necessary. Id. Exhibits 14 and 15 to the Jaeger Aff. are a detailed guideline for the review process, a work sheet, and a final tally report of the signature review process. Jaeger Aff., ¶ 14; Exhibits 14, 15.

Once a determination is made that enough signatures were submitted and verified, a letter is sent to the sponsoring committee informing it that the petition was approved for placement on the ballot. Jaeger Aff., ¶ 15

Fraudulent activity has been discovered within several petitions during Defendant Alvin Jaeger's 27 years of service as Secretary of State. Jaeger Aff., ¶ 16. The violations were discovered through the physical review of the petitions as described above. Id. When fraudulent activity is discovered, it is referred to the Attorney General for potential prosecution. Id. The 2013 Legislative

Assembly adopted additional penalties for petition related offenses. N.D.C.C. § 16.1-01-12; Jaeger Aff., ¶ 16.

II. Plaintiffs' Petition.

Plaintiff North Dakota Voters First (“NDVF”), a sponsoring committee, submitted its proposed state constitutional amendment petition to the Secretary for review and approval on March 6, 2020. Jaeger Aff., Exh. 8. On March 17, 2020, the Secretary supplied the NDVF with the petition title, as well as the listing of corrections for the petition’s format. Exh. 9. More than a month later on April 29, 2020, the sponsoring committee returned the petition to the Secretary for review. Jaeger Aff., ¶ 11. On April 30, 2020, the Secretary approved the petition for circulation, at which point Plaintiffs could begin the process of collecting signatures. Jaeger Aff., Exh. 10.

As discussed above, under North Dakota law, an initiative petition may be circulated for one year from the date it is approved for circulation by the Secretary, however, if a sponsoring committee wishes to have the measure placed on a specific statewide election ballot, the required number of signatures must be obtained and submitted to the Secretary prior to one hundred twenty days before the election at which the measure is to be voted upon. N.D. Const. art. III, § 5; N.D. Cent. Code § 16.1-01-09(7); Jaeger Aff., ¶ 11. With respect to Plaintiff NDVF’s ballot initiative, the deadlines for the June and November elections in 2020 were either April 20, 2020, or July 6, 2020. Jaeger Aff., ¶ 11. If NDVF had submitted its petition early enough, it could have made use of the full one year statutory signature gathering period, but NDVF failed to take advantage of the full time available to it. Jaeger Aff., ¶ 11. NDVF did not submit a petition to start the process until March 6, 2020. Id. NDVF was provided the petition title and correction memo on March 17, 2020, but did not provide the Secretary with a petition proof copy until April, 29, 2020, 43 days later. Jaeger Aff., ¶ 11; Exh. 9. The next day, April 30, 2020, the petition was approved for circulation, which only gave NDVF 67 days to collect signatures (until July 6, 2020) compared to the 365 days it was statutorily allowed. Jaeger Aff., ¶ 11; Exh. 10. Further, NDVF could have, but failed to submit its petition for a constitutional amendment related to redistricting for review prior to any of the statewide elections in the 10 years since the last census. Jaeger Aff., ¶ 11.

III. COVID-19 Pandemic And Executive Orders.

It is undisputed that the United States, and much of the world, are currently experiencing a global pandemic caused by COVID-19. Doc. 5-2; <https://www.cdc.gov/coronavirus/2019-ncov/index.html>. On March 13, 2020, the North Dakota Governor declared a state of emergency under E.O. 2020-03 (Doc. 5-2) in response to the COVID-19 pandemic, and activated the North Dakota State Emergency Operations Plan. See N.D. Cent. Code § 37-17.1-05(3) (an emergency must be declared by executive order). The Governor has since issued a series of executive orders addressing a wide range of issues relating to the COVID-19 pandemic. See Doc. 5-3 through Doc. 5-13; Doc. 5-15; see also Exh. 18, E.O. 2020-06.6. Among the issues addressed by executive order were voting (E.O. 2020-13 [Doc. 5-6] “strongly encouraged” all county commission boards to authorize voting by mail for the June 2020 election, established secure mail ballot drop box locations, suspended in-person polling place requirements, and made other election changes), K-12 schooling (E.O. 2020-10 [Doc. 5-5] closed all public and non-public K-12 school facilities and directed the development of distance learning plans), and government office staffing (E.O. 2020-06 [Doc. 5-3] directed state agencies and offices to accelerate the transition of non-essential staff members to remote, in-home worksites).

However, most of the issues addressed by the executive orders are irrelevant to Plaintiffs’ claims in this case. Plaintiffs only identify two issues with collecting signatures allegedly stemming from executive orders: 1) “the cancellation of large sports, entertainment and other events” which normally “provide the most productive venues for collecting signatures” and 2) “limitations on the number of patrons as well as social distancing requirements” at restaurants and bars, where circulators might also obtain signatures. Doc. 5, p. 7. It should be noted, many large events would likely have been cancelled, and restaurant and bar attendance would likely be down to some extent simply due to health concerns of private individuals, even if the state government had not required it. Regardless, the restriction on large sports, entertainment and other events was fully lifted on May 15, 2020 by E.O. 2020-06.6, and no longer even arguably presents a hindrance to Plaintiffs. Exh. 18 (E.O. 2020-06.6, p. 3, ¶ 10). With respect to restaurants and bars, they are likewise open, subject only to

occupancy and social distancing guidelines. Doc. 5-15 (E.O. 2020-06.4, p. 2, ¶ 6); ND Smart Restart, <https://ndresponse.gov/covid-19-resources/covid-19-business-and-employer-resources/nd-smart-restart> (last accessed May 19, 2020). The most Plaintiffs can allege the State of North Dakota is doing to prevent it from collecting signatures is to somewhat reduce restaurant and bar occupancy in the state, which might be lower in light of current events anyway. Importantly, unlike the Governors in some other states, the North Dakota Governor never issued a stay-at-home order and never issued any executive order that would actually prohibit Plaintiffs from gathering signatures. All other issues complained about by Plaintiffs are merely health recommendations, or general public sentiment and concern, which should not form the basis of a constitutional claim against a state official. Doc. 5, pp. 4-8. It is not the Secretary making it difficult to collect signatures; it is the existence of a naturally occurring pandemic.

IV. Plaintiffs' Requested Relief.

Plaintiffs requested that the Court enjoin the Secretary from enforcing North Dakota's constitutional requirement that the signatures obtained on their petition are made in the circulator's presence, that the circulator must sign a notarized affidavit, and forcing the Secretary to accept electronic signatures through a service such as DocuSign rather than the "wet" signatures required on North Dakota's petition form. Doc. 4, pp. 1-2; Doc. 5, p. 20.

ARGUMENT

I. A Preliminary Injunction Is An Extraordinary Remedy.

"A preliminary injunction is an extraordinary remedy. . . ." Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003). "The burden of proving that a preliminary injunction should be issued rests entirely with the movant." Goff v. Harper, 60 F.3d 518, 520 (8th Cir. 1995); see also Watkins, 346 F.3d at 844. Courts balance four factors when determining whether a preliminary injunction should be issued: "(1) the likelihood of the movant's success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to the other litigants; and (4) the public interest." Watkins, 346 F.3d at 844 (citing

Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981). The movant bears the burden of proving all four factors. Watkins, 346 F.3d at 844. Plaintiffs have not carried their burden with regard to these factors, and therefore their motion for preliminary injunction should be denied.

II. Plaintiffs are not likely to succeed on the merits.

Plaintiffs are not likely to succeed on the merits in this case, and thus have not met their burden of proving the first preliminary injunction factor.

a. Plaintiff's federal constitutional rights are not implicated or infringed.

Plaintiffs state in their brief, “[t]he North Dakota Supreme Court has recognized that ‘the people’s power to initiate or refer legislation is a fundamental right.’” Doc. 5, p. 9 (citing Thompson v. Jaeger, 2010 ND 174, ¶ 11, 788 N.W.2d 586). However, this state-created and state-defined right (N.D. Const. art. III, §§ 1-10; N.D. Cent. Code §§ 16.1-01-09 through 16.1-01-10) should not be confused with Plaintiffs’ rights under the United States Constitution, alleged to be infringed in this case. Plaintiffs do not allege a violation of the North Dakota Constitution or North Dakota Century Code, or a violation of any right created thereby. Rather, Plaintiffs seek an order from the Court enjoining the Secretary from enforcing state constitutional provisions and state statutory law because, as applied to Plaintiffs during the COVID-19 pandemic, state law allegedly violates the Fourteenth and First Amendments to the United States Constitution. Doc. 5, p. 12. However, contrary to Plaintiffs’ allegations, their Fourteenth and First Amendment rights are not implicated under the facts presented in this case. In any event, even if Plaintiffs’ federal Constitutional rights are implicated, there is no infringement and a preliminary injunction is therefore not warranted.

i. Fourteenth Amendment.

The Eighth Circuit Court of Appeals has consistently refused to recognize any Fourteenth Amendment rights under the federal Constitution relating to state ballot initiative processes. In Dobrovolny v. Moore, the plaintiffs challenged a provision in the Nebraska state constitution, as interpreted by the Nebraska Supreme Court, which requires petition signatures equal to at least 10 percent of registered voters on the date that initiative petitions must be submitted to the Nebraska

secretary of state, in order to place a state constitutional amendment on the ballot. 126 F.3d 1111, 1112 (8th Cir. 1997). The plaintiffs in Dobrovolny claimed the 10 percent requirement did not give them notice of the specific number of signatures required and violated their right to procedural due process under the Fourteenth Amendment. Id. at 1113. The Eighth Circuit rejected the plaintiffs' claim, stating, "[c]learly, the right to a state initiative process is not a right guaranteed by the United States Constitution, but is a right created by state law." Id. (citing Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291, 295 (6th Cir. 1993)). The court went on to explain, "[t]he state 'retains the authority to interpret [the] scope and availability' of any state-conferred right or interest." Dobrovolny, 126 F.3d at 1113 (citing Biddulph v. Mortham, 89 F.3d 1491, 1500 (11th Cir. 1996; quoting Gibson v. Firestone, 741 F.2d 1268, 1273 (11th Cir.1984)). Further, "[a] liberty interest created by state law is by definition circumscribed by the law creating it." Dobrovolny, 126 F.3d at 1113 (quoting Montero v. Meyer, 13 F.3d 1444, 1450 (10th Cir. 1994)). The court concluded, "[c]learly, appellants can claim no constitutionally-protected right to place issues before the Nebraska electorate; any opportunity to do so must be subject to compliance with state constitutional requirements." Dobrovolny, 126 F.3d at 1113 (quoting Montero, 13 F.3d at 1446–47).

The Eighth Circuit Court of Appeals has on multiple occasions reaffirmed its decision in Dobrovolny and found that case to be binding precedent on the issue of whether state ballot initiative requirements implicate federal Fourteenth Amendment rights. See MacMann v. Matthes, 843 F.3d 770 (8th Cir. 2016) (rejecting a Fourteenth Amendment claim, finding that residents of a city have no federal constitutional rights with respect to a municipal referendum process, and the process is subject to the procedures set forth in the city charter); Bernbeck v. Gale, 829 F.3d 643 (8th Cir. 2016) (explaining that there is neither a due process nor equal protection right guaranteed by the Fourteenth Amendment in a state initiative and referenda process, stating, "[w]hat may constitute the invasion of a deeply fundamental, constitutionally recognized right to vote cannot be assumed to apply interchangeably with the state-created, nonfundamental right to participate in initiatives and referenda."); Hoyle v. Priest, 265 F.3d 699 (8th Cir. 2001) (explaining in response to a Fourteenth Amendment claim from a sponsor of a state constitutional amendment ballot initiative that state

initiative processes are not protected by the Fourteenth Amendment, and states retain authority to interpret the scope and availability of any state-conferred right).

Plaintiffs' Fourteenth Amendment rights are not implicated in this case, which involves a state-created and state-defined ballot initiative process. Plaintiffs are not likely to succeed on the merits of their Fourteenth claim, and their request for preliminary injunction should thus be denied.

ii. First Amendment.

As Plaintiffs note (Doc. 5, pp. 9-11), the United States Supreme Court has recognized that signature collectors have First Amendment rights with respect to their political expression relating to a ballot initiative petition. See Meyer v. Grant, 486 U.S. 414 (1988); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999). However, “[a]bsent some showing that the initiative process substantially restricts political discussion”, that First Amendment jurisprudence is inapplicable. Dobrovolny, 126 F.3d at 1113. The Court is not required “to subject a state's initiative process to strict scrutiny in order to ensure that the process be the most efficient or affordable.” Id. The Eighth Circuit Court of Appeals has refused to strike down state ballot initiative restrictions when “the state law regulating the initiative procedure does not restrict political speech and the state's interest in protecting the integrity of its initiative process is paramount. . . .” Hoyle v. Priest, 265 F.3d 699, 704 (8th Cir. 2001) (citing Biddulph v. Mortham, 89 F.3d 1491, 1500–01 (11th Cir.1996) (concluding the Constitution requires the initiative process be uniformly applied and content neutral, not efficient or user-friendly), cert. denied, 519 U.S. 1151 (1997); Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291, 296–97 (6th Cir.1993) (“[T]he state may constitutionally place nondiscriminatory, content-neutral limitations on the plaintiffs' ability to initiate legislation.”)).

In any event, there has been no violation of Plaintiff's First Amendment right to political expression. Neither the Secretary, nor any other state official, has acted to impair Plaintiffs' ability to circulate a petition. To explain the current environment created by the COVID-19 pandemic, Plaintiffs cite to various executive orders issued by the North Dakota Governor, many of which have already expired or have nothing to do with signature collection and will have no impact on Plaintiffs. Docs. 5-2 through 5-13; Doc. 5-15. They also cite to various guidance and recommendations, such

as recommended maintaining of a distance of six feet from others. Doc. 5, p. 8.² However, unlike many states, North Dakota never had a state-wide stay-at-home order and never outlawed signature collection. Further, many actual restrictions that did exist have since been lifted and no longer present any restriction to Plaintiffs. For example, under E.O. 2020-06.6 issued on May 15, 2020, “[r]ecreational and sports arenas, and music and entertainment venues may begin to reopen”, without any legally binding restrictions, only strong encouragement to adopt a large gatherings protocol. Exh. 18.

Undoubtedly, the existence of a global pandemic has impacted how individuals are voluntarily interacting with each other. The Court can take judicial notice of the fact that in the current environment, many individuals who choose to engage with others in business or discourse have elected to wear masks, gloves, use hand sanitizer, place plastic barriers between people, and use disposable items such as disposable pens. These changes in how people voluntarily interact and how they exercise their First Amendment rights are the result of a virus, not the result of North Dakota law. Plaintiffs are free to engage in these practices, as is likely to be the new normal for many human interactions in the coming months due to peoples’ natural fear of the virus, not due to state action.

Plaintiffs cite very recent cases involving signature collection in light of the current COVID-19 pandemic. Doc. 5, pp. 11, 16-17. Specifically, Plaintiffs focus on the opinion of the U.S. District Court for the Eastern District of Michigan in Esshaki v. Whitmer, a case involving the collection of signatures from registered voters in order to place a Congressional candidate and other candidates on the ballot. No. 2:20-CV-10831-TGB, 2020 WL 1910154 (E.D. Mich. Apr. 20, 2020). It should be noted, the Esshaki case involves placing candidates on a ballot, which implicates additional federal Constitutional rights relating to voting that do not apply to state-created and state-defined ballot initiatives. Further, key to the decision in Esshaki, and a key distinction with North Dakota, is that the Michigan Governor issued a stay-at-home order that directed residents to remain at home, prohibited public and private gatherings of any number of people not part of the household, and

² There has been no allegation that it is impossible to witness a signature from six feet away.

ordered people performing essential services to maintain 6 feet of distance. Id. at *2. Violation of the stay-at-home order in Michigan is a criminal offense and campaign workers were not exempted. Id. That combination of restrictions effectively outlawed signature gathering in Michigan. See id. In Esshaki, it was the combination of a strict stay-at-home order (not the mere existence of a pandemic), and the ballot petition requirements, that was constitutionally problematic. Id. North Dakota never had a similar stay-at-home order and none of the executive orders of the North Dakota Governor are fairly comparable to the stay-at-home order in Esshaki. Plaintiffs attempt in their brief to muddy the water by citing many unrelated executive orders and recommendations, without pointing out any actual legal prohibitions on Plaintiffs collecting signatures, witnessing signatures, and notarizing affidavits. Further, some actual restrictions Plaintiffs do point to have since been lifted. The issues Plaintiffs have pointed to in gathering signatures during the COVID-19 pandemic are nearly entirely the result of people voluntarily social distancing, not any limits actually imposed by North Dakota state government. Further, while the district court in Esshaki issued a preliminary injunction, on appeal, the Sixth Circuit Court of Appeals stayed the preliminary injunction to the extent it attempted to re-write the state process, including requiring acceptance of electronic signatures. Esshaki v. Whitmer, No. 20-1336, 2020 WL 2185553, at *1-2 (6th Cir. May 5, 2020). This issue is discussed in more detail below. Infra pp. 18-19. Plaintiffs also cite Libertarian Party of Illinois v. Pritzker, No. 20-CV-2112, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020), which contains the same key distinction in Illinois, a restrictive stay-at-home order which was never in place in North Dakota, or to the extent they are similar, has since been lifted.

Further, North Dakota law afforded NDVF one full year to obtain signatures, during most of which the COVID-19 pandemic did not exist yet. When evaluating whether North Dakota's process offends the Constitution, the Court should consider the entire process, which includes a signature gathering period of one year that far exceeds the entire length of COVID-19 pandemic so far. A process that affords an entire year to gather signatures has inherent protection against unexpected circumstances that may make signature gathering more challenging for a limited time. It is difficult to imagine an emergency that would make it impossible for an organization to gather signatures for

the entirety of a year. The Court should not limit its analysis to the unique conditions present only during the last couple of months simply because NDVF chose not to avail itself of the full time it could have under North Dakota law to gather signatures. NDVF's entire signature gathering period is occurring during the COVID-19 pandemic due to its own delay in commencing the ballot initiative process.

If NDVF planned to focus its signature gathering efforts at large public gatherings and restaurants, as it suggests in its brief and supporting affidavits (Doc. 5, pp. 7-8), then it took a significant risk by waiting until virtually the last minute to submit its proposed amendment petition for approval to circulate. Any number of global, regional, or local events, such as economic downturn (which is always a risk in a state like North Dakota with its heavy dependence on the volatile oil and gas industry), terrorist attack, or simply bad weather, can result in cancellation or low turnout to public events and restaurants. North Dakota's one year signature gathering period provides sufficient protection against short term difficulty in gathering signatures due to unexpected events. Plaintiffs admit they are not making a facial challenge and do not assert that North Dakota's process is unconstitutional in the absence of a pandemic. Doc. 5, p. 12. They claim only that North Dakota's process is "unconstitutional as applied to Plaintiffs during the current COVID-19 pandemic." *Id.* The Court should not ignore the many additional months of signature gathering time NDVF could have made use of but chose not to, during a time when even Plaintiffs admit North Dakota's process was Constitutional.

Additionally, Plaintiffs have failed to establish that the Secretary or any other state official is legally preventing them from collecting signatures. Rather, Plaintiffs seem to be arguing that the mere existence of a pandemic ought to make North Dakota's requirement for "wet" signatures unconstitutional. However, if North Dakota's constitutional and statutory process may be temporarily suspended by the Court due to a pandemic, as requested by Plaintiffs, it begs the question: when will North Dakota's process be reinstated? Plaintiffs do not rely on an actual state prohibition of signature collecting to support their claims, but rather merely difficulty in collecting signatures due to the existence of a pandemic. Under Plaintiffs' theory of the case, will North Dakota's state constitutional

process be reinstated when a vaccine for the novel coronavirus is developed? When the World Health Organization declares the pandemic over? When public opinion polls show a reduction in fear of social contact? Plaintiffs essentially request that this Court suspend the North Dakota constitution indefinitely with no clear standard of when it may be reinstated, which this Court should reject.

III. There is no threat of irreparable harm to Plaintiffs, and any arguable harm to Plaintiffs is the result of their own delay.

As discussed above, Plaintiffs have not been prevented by the Secretary or the State of North Dakota from collecting petition signatures and there is no threat of irreparable harm to Plaintiffs. While Plaintiffs may have to take basic precautions in dealing with others during the signature collection process (such as masks, gloves, disposable pens, etc.), as we all have in interactions with others since the start of the pandemic, Plaintiffs are not being legally hindered in their efforts.

However, even if the Court finds there is some harm to Plaintiffs, as discussed above, such harm is merely the result of Plaintiff's own delay in starting the ballot initiative process. Plaintiffs could have made use of an entire year of signature gathering under North Dakota law, a period that far exceeds the entirety of the COVID-19 pandemic so far, but Plaintiffs failed to submit their petition for review with sufficient time in advance of the November 2020 election to make use of the entire legislative time available. Further, since Plaintiffs' proposed constitutional amendment affects redistricting, it could have pursued the initiative measure process prior to any of the statewide elections in the 10 years since the last census, but failed to do so. The second preliminary injunction factor is not met.

IV. The State's interest and the public interest outweighs any alleged harm to Plaintiffs.

The interests of the Secretary, the State of North Dakota, and the public outweigh any potential harm to Plaintiffs, and therefore the third and fourth preliminary injunction factors are not satisfied. The state's interests in "exclud[ing] those signatures that are falsely obtained or forged", in "protect[ing] the state's initiative process from abuse", and "protecting the integrity of its initiative process [are] paramount. . . ." Hoyle, 265 F.3d at 704. The process implemented by the Secretary with numerous other initiative ballot measures in the past is well designed, time-tested, and helps

prevent fraud through a uniform system of in-person signature collection, submission, and investigation.

In the Plaintiffs' filings, they fail to explain in any practical detail how electronic signature solutions such as DocuSign could be utilized for the large scale collection of petition signatures and submission to the SOS for review. Affidavit of Irwin James Narum (Jim) Silrum ("Silrum Aff."), ¶ 5. Plaintiffs only state that, "[s]ervices like DocuSign can ensure 'comprehensive security from start to finish' including by a digital audit trail, anti-tampering control, and unalterable, systematic capture of signing data." Doc 5. pp. 17-18 (quoting DocuSign, Product security, <https://www.docusign.com/trust/security/product-security>). The DocuSign website includes explanations of how electronic signatures can be obtained, but is silent as to how the DocuSign solution would work for the large scale collection of petition signatures and submission to the SOS for review pursuant to the North Dakota Constitution (Article III, Section 3) and North Dakota state law (N.D. Cent. Code § 16.1-01-09). Silrum Aff., ¶ 5. If electronic signature solutions were to be implemented in North Dakota for initiative ballot signature collection and submission to the Secretary for review, a process and regulations would need to be developed to ensure compliance with state law, to ensure uniformity and fairness, and to ensure the signatures submitted can be timely investigated by the Secretary. Id. This is true even if some state law requirements, such as in-person witnessing of signatures, or in-person notarization of circulators' signatures are suspended by the Court. Id.

As indicated in the Affidavit of Irwin James Narum (Jim) Silrum, there are a number of unanswered questions that would make it difficult to develop such a process and regulations:

- How will a petition circulator gathering signatures remotely or on the internet be able to accurately and securely verify that each individual signor is a qualified North Dakota elector, and that each signature is a genuine signature of the individual whose name it purports to be. N.D. Cent. Code § 16.1-01-09(3) requires circulators to swear to these facts.
- What is the form of the petition presented to each signor? Would each person requesting the opportunity to sign a petition be sent the petition with no other signatures included, or would each be sent the entirety of the petition with the already-obtained signatures included on it?
- What will the Sponsoring Committee submit to the Secretary to review? Will the Sponsoring Committee submit 26,904 or more petitions with a single

electronic signature on each, or will the Sponsoring Committee submit one petition with 26,904 or more electronic signatures? Will the Sponsoring Committee submit a paper summary, or an electronic report generated by DocuSign or another third-party vendor, and what would be the contents of the submission?

- What process, software, and tools would the Secretary need in order to accept the electronic signatures, and to investigate them?

Silrum Aff., ¶ 6.

Undoubtedly more questions would surface if the Secretary and/or Plaintiffs were to attempt to implement an electronic signature solution, and each question would require an answer prior to the first electronic signature being obtained. Silrum Aff., ¶ 7. The Secretary does not dispute the validity of electronic signatures for many purposes such as contracts, agreements, and general correspondence, but does dispute that all necessary questions could be answered and an acceptable solution be put in place that would comply with the North Dakota Constitution and North Dakota Century Code prior to the Constitutional deadline of July 6, 2020, for the possibility of a measure to be included on the General Election ballot in November, 2020. Id.

The election on June 9, 2020, is fast approaching. Silrum Aff., ¶ 8. The Secretary has only six employees who cover election responsibilities, with each having worked many hours of overtime each week since the start of April and this will likely continue until the end of June. Id. Since some of these staff members of the Secretary's office would need to be involved in whatever signature solution could be determined, indeed if one could be determined, they would need to find the time in their schedules now and after the June 2020 election to take on the monumental task requested of the Plaintiffs in this action. Id. Any statewide election is demanding of the time for the Secretary's limited number of staff, but the June 2020 election is the first election ever conducted in the state that will be all by mail, without any polling places in use, and in the midst of a pandemic. Id. This has been an extraordinary undertaking by the Secretary's office and the state's 53 offices of the county auditors and their focus must continue toward the goal of administering another well-run election. Id.

V. Even if North Dakota's petition requirements violate Plaintiffs' federal constitutional rights, the federal courts may not dictate how North Dakota must run its ballot initiative process.

The federal courts indisputably have the power to enjoin state officials from enforcing state

requirements that violate the federal Constitutional rights of an individual (although there has been no Constitutional violation in this case for the reasons discussed above). However, the remedies sought by Plaintiffs in their Complaint (Doc. 1, pp. 28-29) and Motion for Preliminary Injunction (Doc. 4, pp. 1-2; Doc. 5, p. 20) would require this Court to go much further. Plaintiffs have asked this Court to not only bar North Dakota from enforcing its in-person signature and witnessing requirements, but further to affirmatively dictate to North Dakota specifically what it must accept instead, namely that it must accept electronic signatures using a service such as DocuSign. Doc. 1, p. 29; Doc. 5, p. 20. This requested relief would essentially re-write North Dakota's ballot initiative requirements, which is beyond the power of the federal courts.

The Sixth Circuit Court of Appeals' recent Order in Esshaki v. Whitmer, No. 20-1336, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020) is instructive. While the Sixth Circuit did not stay the part of the district court's preliminary injunction that prohibits enforcement of the ballot-access provisions of the statute³, the Sixth Circuit did stay the district court's preliminary injunction to the extent it attempted to re-write state requirements, stating:

But the district court went further and, through a plenary re-writing of the State's ballot-access provisions, ordered the State to do three specific things concerning the manner in which it will conduct this ballot access, namely it: (1) reduced the number of signatures required by 50%; (2) extended the deadline for filing the signatures to May 8; and (3) **ordered the State to permit the collection of signatures through the use of electronic mail.** Esshaki, — F.Supp.3d at —, 2020 WL 1910154, at *10. This compulsory aspect of the preliminary injunction was not justified. Simply put, federal courts have no authority to dictate to the States precisely how they should conduct their elections. See Clingman v. Beaver, 544 U.S. 581, 586, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005) (“The Constitution grants States broad power to prescribe the ‘Times, Places and Manner of holding Elections for Senators and Representatives,’ Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices.” (citations and quotation marks omitted)). This is the States' constitutionally protected right.

Id. at *2 (emphasis added).

For the reasons discussed above, no federal Constitutional violation has been presented by Plaintiffs and the Court should deny the Motion For Preliminary Injunction (Doc. 4) in its entirety.

³ As to this portion of the Order in Esshaki, the present case is factually distinguishable and should result in a different outcome. Supra pp. 12-13.

However, in the event the Court does find that North Dakota's in-person signature, witnessing, and notarizing requirements may violate the First or Fourteenth Amendments, as alleged by Plaintiffs, it is beyond the power of this Court to direct North Dakota to accept electronic signatures or to otherwise re-write North Dakota's state constitutional ballot initiative process. It is simply not a function of the federal courts to draft and impose upon states the specific rules and regulations that must be adhered to in the process amending a state constitution, through a ballot initiative or otherwise.

Even if this federal Court had the power to re-write North Dakota's state-created ballot initiative process in the manner requested by Plaintiffs, such a re-writing would not be prudent under the facts of this case. As indicated in the Silrum Affidavit, the remedies sought by Plaintiffs could not be feasibly implemented in a timely fashion and would overburden election officials that are already operating under extreme conditions due to the pandemic.

As this case raises significant issues relating to a state's right to govern its own ballot initiative process, the Court should consider how state courts have recently dealt with similar cases. Judge John W. Larson in the Montana First District Court recently issued an Order Denying Plaintiff's Emergency Motion For Declaratory And Injunctive Relief on April 30, 2020, in a Montana case nearly identical to the present case in terms of the claims and relief sought by the plaintiffs. Exh. 19. The court in that case found that the state judiciary (let alone the federal judiciary) was not in the best position to suspend laws relating to ballot initiative petitions in light of the COVID-19 pandemic. Id. at pp. 7-8. The court stated it is "not inclined to invade the role of the executive or legislative branches. None of the Governor's recent orders or directives specifically suspend ballot initiative petition gathering at this time, although the Governor has selectively addressed issues such as voting by mail and early voting in the upcoming primary election." Id. at p. 7. The Montana court stated it is not in a position to ascertain the ability of state and county officials to carry out the requested relief "under the current circumstances with many courthouses closed and operating with limited staffing [due to the pandemic]." Id. at p. 8. The court noted, "[t]he Governor is in the best position with his emergency authority to suspend certain laws." Id. With respect to DocuSign, the court stated, "counsel has conceded that there are no other known cases were [sic] DocuSign was used in the

context of seeking voter signatures for state or local initiatives.^[4] As such, the Court is not inclined to address the novelty of using DocuSign and force the widespread application of the service” by county officials and the Secretary of State. *Id.* at. p. 9. The Montana court quoted the Supreme Judicial Court of Massachusetts, stating:

there are too many issues and unanswered questions to allow us confidently to impose a remedy that would transform a nomination system that required “wet” signatures into one that permitted a broad range of electronic signatures, including a printed name. To name just a few, there are the inherent time constraints discussed *supra*; there are potential logistical, legal, and cybersecurity related concerns; and, of course, there is the fact that local and State governments are already operating under severe constraints, and often with skeletal staffing, due to the pandemic.

Id. at p. 11 (quoting *Goldstein v. Sec'y of Commonwealth*, 484 Mass. 516, 531, 142 N.E.3d 560, 574 (2020)). The court did not “find sufficient grounds to adopt and operate an untried system.” Exh. 19, p. 11. Defendant requests that this Court likewise refuse to force North Dakota’s election officials to implement an untried system on short notice in the middle of a pandemic.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests the Court deny Plaintiffs’ Motion For Preliminary Injunction (Doc. 4).

Dated this 20th day of May, 2020.

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⁴ Plaintiffs in the present case have also failed to point out any other cases where DocuSign has been used in this context.