

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.

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

Defendant.

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

Case No. 3:20-cv-00076

I. INTRODUCTION

At the oral argument on Plaintiffs’ Motion For Preliminary Injunction (Doc. 4), held at the Quentin N. Burdick Federal Courthouse on June 4, 2020, the Court gave the parties until the close of business on June 8, 2020 to supplement their briefs if they choose. Clerk’s Minutes, Doc. 30, p. 1. Accordingly, Defendant Al Jaeger, in his official capacity as Secretary of State of North Dakota (“Secretary”) submits this Supplemental Memorandum In Opposition To Plaintiffs’ Motion For Preliminary Injunction, for the purpose of directing the Court’s attention to relevant recent case law not previously cited in the briefs relating to the Plaintiffs’ motion, and to make a concluding argument regarding the Plaintiffs’ requested relief.

II. ARGUMENT

A. *Miller v. Thurston.*

Counsel for both parties at the oral argument indicated that, while there has been significant recent litigation in other jurisdictions on the issues and with similar facts presented in this case, there is no binding precedent in the Eighth Circuit directly on point. As noted by counsel for both parties, however, there is a similar case from Arkansas that is currently being appealed to the Eighth Circuit Court of Appeals: Miller v. Thurston, 20-2095 (W.D. Ark. Filed Jun. 5, 2020), on appeal from the

United States District Court for the Western District of Arkansas, No. 5:20-CV-05070. Attached hereto as Exhibit 1 is Appellant's Motion to Stay and for a Temporary Administrative Stay Pending Consideration Of This Motion, and Motion to Expedite, filed by the Defendant in the case, John Thurston, in his official capacity as Arkansas Secretary of State. The arguments presented to the Eighth Circuit in that case are similar to the arguments made by the Secretary in the present case. See Exhibit 1, pp. 1-25.

The Secretary directs the Court's attention in particular to the argument made by the Arkansas Secretary of State that the District Court in that case applied an incorrect heightened legal standard with respect to the First Amendment claim. Exhibit 1, pp. 11-15. As in the Miller case, this Court should not assume that Plaintiffs' First Amendment rights are implicated at all by the facts presented. Similar to the Miller case, the present litigation involves a state constitutional ballot initiative process that allows the people to amend the state constitution and enact state legislation. As noted in the briefing in Miller, the state restrictions are on the people's legislative powers, as contrasted with the rights to political expression and voting, and therefore do not implicate the First Amendment at all. Id. State regulation of the legislative process (whether or not in the context of citizen ballot initiatives) is a legislative function that does not implicate the First Amendment in the manner claimed by Plaintiffs. Id.

The Miller case has not yet been decided by the Eighth Circuit, however, the various arguments made by the Arkansas Secretary of State are persuasive. See Exhibit 1, pp. 1-25. For similar reasons presented by the Arkansas Secretary of State, the Secretary in the present case requests the Court deny the Plaintiffs' Motion For Preliminary Injunction.

B. Other Recent Cases.

There have been various recent court decisions in other jurisdictions that support the Secretary's arguments with respect to the present motion for preliminary injunction.

For example, in Arizonans for Fair Elections v. Hobbs, the United States District Court for the District of Arizona found the plaintiffs were unlikely to succeed on the merits as there was not a severe burden on the plaintiffs' First Amendment rights caused by the COVID-19 pandemic, with the court finding it particularly important that the plaintiffs could have begun organizing and starting signature collecting much earlier but failed to do so. No. CV-20-00658-PHX-DWL, 2020 WL 1905747, at *10-11 (D. Ariz. Apr. 17, 2020) (attached as Exhibit 2); see also Morgan v. White, No. 20 C 2189, 2020 WL 2526484, at *6 (N.D. Ill. May 18, 2020) (stating, "Plaintiffs have not established that it is state law, rather than their own 16-month delay, that imposes a severe burden on their First Amendment rights, even in the context of the COVID-19 pandemic.") (attached as Exhibit 3).

The Secretary also directs the Court's attention to Fair Maps Nevada v. Cegavske, wherein the United States District Court for the District of Nevada applied Purcell principles in refusing to enjoin in-person signature requirements for a ballot initiative in light of the state's governmental interest in preventing fraud, and in light of the fact that "the relief Plaintiffs seek as to the In-Person Requirements generally requires the Court to get impermissibly in the weeds of designing election procedures because Plaintiffs ask the Court to order the Secretary to set up a system for collecting and verifying signatures offered to support an initiative petition electronically, for the first time, immediately." No. 3:20-CV-00271-MMD-WGC, 2020 WL 2798018, at *16-17 (D. Nev. May 29, 2020) (attached as Exhibit 4).

Lastly, the Secretary directs the Court's attention to Thompson v. Dewine, in which the Sixth Circuit Court of Appeals stayed a district court injunction pending appeal, finding that the state was likely to prevail on the merits and drawing distinctions between the strict stay-at-home order in Michigan (Esshaki v. Whitmer, No. 20-1336, 2020 WL 2185553 (6th Cir. May 5, 2020)) and the

lesser COVID-19 related legal restrictions applied in Ohio. Thompson v. Dewine, No. 20-3526, 2020 WL 2702483, at *2–5 (6th Cir. May 26, 2020) (attached as Exhibit 5). The court in Thompson also noted “that the district court exceeded its authority by rewriting Ohio law with its injunction”, stating “federal courts have no authority to dictate to the States precisely how they should conduct their elections.” 2020 WL 2702483 at *5 (internal citations and quotations omitted).

C. Plaintiffs Have Failed To Give Sufficient Clarity As To Their Requested Relief.

Plaintiffs’ Motion and prior briefing on their Motion suggested they were seeking 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(1) and (2)), and that they were seeking 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. Doc. 4, pp. 1-2; Doc. 5, p. 20. However, at the recent oral argument, Plaintiffs’ counsel confused the issue of the specific relief sought, suggesting that the Court should order the parties to meet and confer, and jointly submit to the Court a plan for signature collection, which may or may not include an electronic signature component. Plaintiffs essentially request the Court issue a similar order to its recent order in Self Advocacy Solutions N.D. v. Jaeger, Case No. 3:20-cv-00071, 2020 WL 2951912 at *11-12 (D. N.D. Jun. 6, 2020) (attached as Exhibit 6).

However, the present case is not similar to Self Advocacy Solutions, N.D. v. Jaeger, and the Plaintiffs have not provided sufficient specificity of the relief sought for this Court to rule in their favor. In the Self Advocacy Solutions v. Jaeger case, the Court ordered the Secretary to give instructions to county election officials in terms of notice and an opportunity to cure signature mismatch issues. The Secretary is the supervisor of elections in North Dakota. N.D. Cent. Code § 16.1-01-01. The present case does not involve instructions to county election officials on election

procedures. Rather, Plaintiffs seek an order directing the Secretary of State work with Plaintiffs' counsel to re-write portions of North Dakota's Constitution in order to temporarily redefine the state right to amend the North Dakota Constitution through a ballot initiative. Plaintiffs request in that regard goes far beyond any power of the Secretary (whose own office is a creation of the North Dakota Constitution, Art. V, Sec. 2). The Secretary is at a loss for how he would even go about re-writing North Dakota's Constitutional requirements, or what Constitutional or legal authority he would have for doing so. Further, since abandoning their strict demand for the allowance of electronic signatures, the Plaintiffs have removed all specificity from their request for preliminary injunction and the request should be denied. Under Federal Rule of Civil Procedure 65(d)(1), "Every order granting an injunction. . . must: (A) state the reasons why it is issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."

III. CONCLUSION

For the foregoing reasons, and the reasons discussed in the Secretary's prior briefing (Doc. 17) and arguments at the June 4, 2020 oral argument, the Secretary respectfully requests the Court deny Plaintiffs' Motion For Preliminary Injunction (Doc. 4).

Dated this 8th day of June, 2020.

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