

**IN THE 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,

v.

ALVIN JAEGER, in his official capacity as
Secretary of State of North Dakota,

Defendant.

Case No. 3:20-cv-00076-PDW-ARS

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Plaintiffs seek to exercise their First and Fourteenth Amendment rights in a manner that keeps them and over 26,000 North Dakotans safe. They do not ask to produce fewer signatures or to delay the process. That the Governor continue to urge people to remain socially distant from one another is irrelevant, the Secretary says, because he has not *ordered* it. Thus, the Secretary suggests the public interest would be best served by Plaintiffs engaging in in-person interactions with over 26,000 North Dakotans during a pandemic instead of collecting electronic signatures. This makes no sense.

ARGUMENT

I. Plaintiffs' First and Fourteenth Amendment Rights Are Severely Burdened.

As applied to them and during the COVID-19 pandemic, North Dakota's ballot access provisions severely burden Plaintiffs' constitutional rights. To begin, contrary to the Secretary's view, Plaintiffs have a First and Fourteenth Amendment right to circulate and sign initiative petitions. Although a state is not required to extend the right to petition for state constitutional

amendments, once it has done so, it may not enforce requirements that infringe on First and Fourteenth Amendment rights. As the Supreme Court has explained, “the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer v. Grant*, 486 U.S. 414, 422 (1988); *see also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999) (“Initiative-petition circulators . . . resemble candidate-petition signature gatherers . . . for both seek ballot access.”). Likewise, the Eighth Circuit explained in *Initiative & Referendum Institute v. Jaeger* that “[w]hile states have ‘considerable leeway to protect the integrity and reliability of the initiative process,’ at the same time, the First Amendment requires vigilance ‘to guard against undue hindrances to political conversations and the exchange of ideas.’” 241 F.3d 614, 616 (8th Cir. 2001) (quoting *Buckley*, 525 U.S. at 191–92).

This precedent forecloses the Secretary’s contention that no federal constitutional interests are “implicated or infringed” in this case. Br. at 9. The Secretary primarily relies upon *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997), *see* Br. at 9-10, but the court there merely held that an imprecise numerical requirement for signatures, “does not in any way impact the communication of [the initiative circulators’] political message or otherwise restrict the circulation of their initiative petitions or their ability to communicate with voters about their proposals.” *Id.* at 1113.¹

Here, the Secretary’s enforcement of North Dakota’s in-person signature, witnessing, and notarization requirements during the current COVID-19 pandemic *does* substantially imperil Plaintiffs’ ability to communicate and circulate petitions. It requires Plaintiffs to engage in unsafe behavior in order to exercise these rights. Indeed, on Tuesday of this week a district court in Ohio enjoined that state’s wet-ink and witnessing requirements as applied to the plaintiff initiative

¹ In each of the cases cited by the Secretary, the particular facts did not suffice to prove a constitutional violation; the court did not hold *no facts* could prove such a violation. Br. at 9-11.

petition circulators during the COVID-19 pandemic. *See* Opinion & Order, *Thompson v. DeWine*, No. 2:20-cv-2129 (May 19, 2020) (attached as Ex. 1). The court rejected the same arguments advanced by the Secretary here, concluding that the initiative petition requirements implicated federal constitutional rights, *id.* at 19, which were severely burdened as applied during “these unique circumstances of a global pandemic,” *id.* at 25. The court found that this was so even though “some businesses are now re-opened,” *id.* at 26, because “Ohioans have been directed to maintain social distancing, staying at least six feet apart from each other,” *id.* Not only had businesses previously been closed and mass gatherings canceled, the court reasoned, but also the “close, person-to-person contacts required for in person signature gathering have been strongly discouraged . . . and likely pose a danger to the health of the circulators and the signers.” *Id.*

The Secretary cannot plausibly contend Plaintiffs are not seriously burdened now. Indeed, the Secretary repeatedly complains of the burdens *he faces* because of the pandemic. Br. at 2, 17. Yet the Secretary contends that Plaintiffs’ claims should fail for three reasons: (1) the coronavirus, not the state, is responsible and the Governor’s orders did not prohibit signature collection, (2) some restrictions have loosened, and (3) Plaintiffs could have collected signatures earlier. These arguments are without merit.

First, that the Secretary did not cause the COVID-19 pandemic and that North Dakota has not *prohibited* signature gathering is irrelevant. As the *Thompson* court explained, “the state action challenged here is “[North Dakota’s] strict enforcement of its ballot access provisions – in the face of this pandemic’ and not the State’s Orders.” Ex. 1, Slip Op. at 18. The Sixth Circuit reached the same conclusion in *Esshaki v. Whitmer*, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020). Indeed, courts routinely grant relief from election regulations because of the effects of natural disasters. *See, e.g., Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016)

(extending voter registration deadline because of Hurricane Matthew); *Georgia Coal. for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344 (S.D. Ga. 2016) (same). The government need not *cause* the condition that requires as-applied relief from its regulations. For example, the government may not cause someone to be poor, but still cannot constitutionally enforce a requirement that the poor person pay appellate transcript fees. *See Griffin v. Illinois*, 351 U.S. 12 (1956). It does not matter that the Governor has not “legally prevented [Plaintiffs] from collecting signatures” or that—as the Secretary puts it—“the mere existence of a pandemic,” and not the Secretary, has caused Plaintiffs’ burden. Br. at 14 (emphasis added). What matters is that the Secretary is strictly enforcing wet-ink signature, witnessing, and notarization requirements in the face of a pandemic in which people are following—again, as the Secretary puts its—“mere[] health recommendations” to avoid one another, stay home, cancel events, and limit capacity at those businesses that are open, Br. at 8, to forestall the growth of the *merely* 2,229 COVID-19 cases and 51 deaths in North Dakota.

Second, the fact that some restrictions imposed by the Governor have been loosened “subject only to occupancy and social distancing guidelines,” Br. at 8, does not foreclose relief here. The Secretary suggests that Plaintiffs are not burdened anymore because they could enter the reduced capacity bars and restaurants (taking spots from paying customers), don gloves and masks, get some hand sanitizer and 26,904 “disposable pens,” and toss those pens and petition pages to voters “from six feet away.” Br. at 12 and n.2. To state this proposition suffices to defeat it.² The Secretary acknowledges that, even with loosened restrictions, people are “voluntarily social distancing,” Br. at 13, as the state recommends, and events continue to be canceled, such as the

² Nevertheless, Plaintiff NDVF plans next week to conduct a brief test project to assess the feasibility of in-person signature gathering taking the types of precautions identified by the Secretary in his brief. Plaintiffs anticipate—as any reasonable observer of the current circumstances would—that the conditions still do not lend themselves to in-person petition circulating.

State Fair. Whether voluntary or not—the sparsity of in-person encounters makes it a severe burden for the Secretary to *require* in-person encounters in order for Plaintiffs to exercise their First and Fourteenth Amendment rights. *See* Ex. 1, *Thompson*, Slip Op. at 18.

Third, Plaintiffs were diligent in organizing to get on the November ballot, and would have met the signature deadline absent the pandemic. Sawicki Dec. ¶ 5, ECF No. 5-1. North Dakota law does not require petitioners to follow a specific timetable, and reasonable diligence cannot require them to foresee an unforeseeable pandemic and plan accordingly. Indeed, according to the Secretary himself, *zero* of the four initiated constitutional measures approved for circulation this cycle have made it to the signature review stage, let alone qualified for the ballot.³ This includes measures certified to start collecting signatures as early as June 2019.⁴ Plaintiffs can hardly be faulted for failing to achieve a feat that no other initiated constitutional measure attempting to get on the ballot has yet accomplished.

NDVF structured its operations to ensure that, under any *foreseeable* circumstances, it would be able to gather the 26,904 signatures required to place the proposed amendment on the November ballot.⁵ By early March, NDVF had, among other things, formally established a 501(c)(4), hired consultants, submitted the proposed amendment language to the Secretary of State, incurred legal fees, solicited volunteers to gather signatures, and “spent significant time planning its strategy to collect the signatures.” Sawicki Dec. ¶¶ 4-5, ECF No. 5-1; Oxendahl Dec. ¶ 6, ECF No. 5-18. Further, NDVF hired a national firm specializing in collecting signatures, and

³ *See* Sec’y of State of North Dakota, *Ballot Petitions under Signature Review*, <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=117&ptlPKID=1#content-start> (last accessed May 21, 2020); Sec’y of State of North Dakota, *Ballot Measures: November 3, 2020*, <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=128&ptlPKID=1#content-start> (last accessed May 21, 2020).

⁴ *See* Sec’y of State of North Dakota, *Ballot Petitions Being Circulated*, <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=119&ptlPKID=1#content-start> (last accessed May 21, 2020).

⁵ The Secretary’s contention that Plaintiffs should have also planned for terrorist attacks in North Dakota or the oil and gas economy to crater to the point of eliminating in-person contacts, Br. at 14, is specious.

was ahead of the timetable the firm recommended to field a team that could meet the deadline. Ex. 2, Jacobson Dec. ¶¶ 1-3. NDVF was preparing to launch its petition campaign just as the weather was warming and the large public gatherings crucial to signature gathering were becoming more common. Sawicki Dec. ¶¶ 6, 9. Before the pandemic forced NDVF to pause its signature-gathering efforts, Ms. Sawicki, Chair of NDVF’s Board, “anticipated that [NDVF] would obtain the required signatures by the statutory deadline.” *Id.* ¶ 5.

Moreover, NDVF was ahead of the schedule followed in past successful initiated measures in North Dakota. For example, during the 2018 cycle, an initiated constitutional amendment successfully made it onto the ballot as Measure 2 after being approved for circulation on May 23, 2018, with a deadline of July 9, 2018.⁶ The petitioners required only 45 days to collect around 35,000 signatures.⁷

Finally, the Secretary’s claim that NDVF delayed in gathering signatures does not address the harms suffered by other Plaintiffs in this case. Even if NDVF somehow had a responsibility to foresee an unforeseeable global pandemic, Plaintiffs Jane Sinner and Lois Altenburg *still* have a First Amendment right to associate with the NDVF campaign and to express their views by signing a petition. They cannot vindicate that right without a remote signature option, because they cannot risk even the slightest exposure to COVID-19. Sinner Dec. ¶ 3, ECF No. 5-20; Altenburg Dec. ¶ 3, ECF No. 5-19.⁸

⁶ *Sec’y of State of North Dakota, Timeline for Constitutional Initiative Relating to the Elections in Which a Qualified Elector May Vote*, <https://vip.sos.nd.gov/pdfs/Measures%20Info/Petitions%20Being%20Circulated/06%20Time%20line%2023May18.pdf>.

⁷ James MacPherson, *North Dakota Measure Would Bar Noncitizen Voting*, Rapid City Journal (July 6, 2018), https://rapidcityjournal.com/news/latest/north-dakota-measure-would-bar-noncitizen-voting/article_e02ea0f2-e0f3-5c85-86d3-ed86fa4cfc20.html

⁸ *See also Esshaki v. Whitmer*, No. 2:20-cv-10831, 2020 WL 1910154, at *8 (E.D. Mich. Apr. 20, 2020) (late-entry candidate entitled to relief).

II. Electronic Signature Gathering is Administrable and Serves the Public Interest.

The *Thompson* court this week ordered the parties to confer about technical and security issues related to electronic signature gathering and to propose a final electronic signature remedy to the Court. Ex. 1, Slip Op. at 40-41. This Court should do the same. The Secretary raises questions such as how to ensure genuine signatures, what the petitions will look like, how many individual petition pages would be submitted, and what software the Secretary would need to review the signatures. Br. at 16-17. In the face of these questions, Br. at 16, the Secretary throws his hands up and contends that it would be better for Plaintiffs to have in-person interactions with over 26,000 North Dakotans during a pandemic because, *inter alia*, these precise questions have not been answered and his staff is busy in June, *id.* at 17. In fact, the Secretary would receive a hard copy list of the signers with all the necessary information in a form more useable and reliable than is currently the case. Ex. 2, Jacobson Dec. ¶¶ 5-11 (providing details regarding electronic signature proposal). This fact aside, the public interest would be served by the parties conferring on how to permit electronic signature gathering—undeniably safer for the public health—while ensuring that fraud can be prevented and detected.⁹ It is inconceivable that the State would *actually* prefer a group of petition circulators to instead engage in over 26,000 personal interactions with North Dakotan citizens—including many acutely vulnerable to illness—amidst a pandemic.¹⁰ Again, that makes no sense.

CONCLUSION

Forcing Plaintiffs to engage in unsafe conduct to petition and communicate serves no state interest and violates their constitutional rights. Plaintiff's Motion should be granted.

⁹ There is no reason the Secretary could not follow the same system of contacting a sampling of electronic signatories, just as he normally contacts a sampling of wet-ink signatories. Br. at 5; Jaeger Aff. ¶ 14.

¹⁰ This Court does not need to predict whether future petition circulators in future years will be unconstitutionally burdened by in-person signature requirements. Br. at 14-15. Future facts are for future cases.

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Respectfully submitted,

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