

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Michael J. Haugen, Jacob Stutzman,  
Trent Barkus, and Brighter Future  
Alliance,

Petitioners,

v.

Alvin Jaeger, in his official capacity as  
North Dakota Secretary of State and  
the Sponsoring Committee of  
Measure 3,

Respondents.

**Supreme Court No. 20200213**

---

**RESPONSE BRIEF OF RESPONDENT  
ALVIN JAEGER, IN HIS OFFICIAL CAPACITY AS  
NORTH DAKOTA SECRETARY OF STATE**

---

State of North Dakota  
Wayne Stenehjem  
Attorney General

By: Matthew A. Sagsveen  
Solicitor General  
State Bar ID No. 05613  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
Email [masagsve@nd.gov](mailto:masagsve@nd.gov)

By: David R. Phillips  
Assistant Attorney General  
State Bar ID No. 06116  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
Email [drphillips@nd.gov](mailto:drphillips@nd.gov)

Attorneys for Respondent Alvin Jaeger.

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
Table of Authorities .....	3
	<b><u>Paragraph</u></b>
Statement of Case .....	1
Statement of Facts .....	5
I.    The Initiative Petition Process.....	5
II.   Measure 3.....	8
Law and Argument.....	15
I.    The Secretary Of State Has Limited, Ministerial Duties With Respect To Reviewing An Initiative Petition For Form And Passing On The Sufficiency Of An Initiative Petition .....	15
II.   The Initiative Petitions Contain The Full Text Of The Measure.....	20
III.  The Initiative Petition Title Fairly Represents The Substance Of The Constitutional Amendment.....	27
Conclusion.....	30

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
<u>Dawson v. Meier</u> , 78 N.W.2d 420, 424 (N.D. 1956) .....	16
<u>Dyer v. Hall</u> , 51 N.D. 391, 199 N.W. 754 (1924) .....	3, 21, 22, 23, 24, 25
<u>Ferstl v. McCuen</u> , 296 Ark. 504, 758 S.W.2d 398 (1988) .....	27
<u>Manny v. Paulus</u> , 281 Or. 215, 573 P.2d 1248 (1978) .....	27
<u>Matter of Title, Ballot Title, Etc.</u> , 649 P.2d 303 (Colo.1982).....	27
<u>Municipal Services Corp. v. Kusler</u> , 490 N.W.2d 701 (N.D. 1992) .....	17, 25, 26, 27, 29
<u>Preckel v. Byrne</u> , 243 N.W. 823 (N.D. 1932) .....	26
<u>Preckel v. Byrne</u> , 244 N.W. 781 (N.D. 1932) .....	26
<u>Schmidt v. Gronna</u> , 281 N.W. 57 (N.D. 1938) .....	16
<u>Thompson v. Jaeger</u> , 2010 ND 174, 788 N.W.2d 586.....	16
 <u>Statutes</u>	
N.D.C.C. § 16.1-01-09 .....	5, 15, 16
N.D.C.C. § 16.1-01-09(1)(b).....	4, 7, 10, 27, 29
N.D.C.C. § 16.1-01-09(1)(c).....	7, 10, 27
N.D.C.C. § 16.1-01-09(2).....	8
N.D.C.C. § 16.1-01-09(3).....	8

N.D.C.C. § 16.1-01-09(5).....	8
N.D.C.C. § 16.1-01-09(6).....	8
N.D.C.C. § 16.1-01-10 .....	5, 8, 13, 15, 16
N.D.C.C. § 16.1-07-18 .....	23
N.D.C.C. § 16.1-07-19 .....	3, 9, 20, 23, 24, 26, 28
N.D.C.C. § 16.1-07-20 .....	23
N.D.C.C. § 16.1-07-21 .....	23
N.D.C.C. § 16.1-07-22 .....	23
N.D.C.C. § 16.1-07-23 .....	23
N.D.C.C. § 16.1-07-24 .....	23
N.D.C.C. § 16.1-07-25 .....	23
N.D.C.C. § 16.1-07-26 .....	23
N.D.C.C. § 16.1-07-27 .....	23
N.D.C.C. § 16.1-07-28 .....	23
N.D.C.C. § 16.1-07-29 .....	23
N.D.C.C. § 16.1-07-30 .....	23
N.D.C.C. § 16.1-07-31 .....	23
N.D.C.C. § 16.1-07-32 .....	23
N.D.C.C. § 16.1-07-33 .....	23
N.D. Const. art. III, § 2.....	2, 6, 10, 15, 16, 17, 20
N.D. Const. art. III, § 3 .....	8, 16
N.D. Const. art. III, § 4 .....	16
N.D. Const. art. III, § 5 .....	13

N.D. Const. art. III, § 6.....	2, 8, 15, 17, 18, 25
N.D. Const. art. III, § 7 .....	8, 18, 25
N.D. Const. art. III, § 9 .....	8
N.D. Const. art. IV, § 2.....	10

## STATEMENT OF CASE

[¶1] On August 12, 2020, Michael J. Haugen, Jacob Stutzman, Trent Barkus, and Brighter Future Alliance (collectively “Brighter Future”) filed a Petition For Writ Of Injunction, requesting that the North Dakota Supreme Court issue a writ of injunction prohibiting North Dakota Secretary of State Alvin Jaeger (“Secretary of State”) from placing Initiated Constitutional Measure No. 3 (“Measure 3”) on the November 3, 2020 statewide election ballot. Brighter Future argues the Secretary of State should have rejected the petitions supporting Measure 3 for two reasons: 1) allegedly, none of the petitions contain the full text of the proposed constitutional amendment, and 2) the petition title allegedly does not fairly represent the measure. See Petition For Writ Of Injunction, pp. 13-18.

[¶2] The Secretary of State’s constitutional responsibilities to approve initiative petitions “as to form” and to “pass upon each petition” (N.D. Const. art. III, §§ 2 and 6) are merely ministerial in nature. In this case, by approving as to form and passing upon the petitions supporting Measure 3, the Secretary of State correctly carried out his ministerial duties in light of the language of the North Dakota Constitution, relevant statutes, and past precedent of this Court.

[¶3] In support of its first argument, that allegedly the petitions do not contain the full text of the proposed constitutional amendment, Brighter Future relies entirely on the case Dyer v. Hall, 51 N.D. 391, 199 N.W. 754 (1924). Brighter Future’s briefing suggests the Dyer case created a bright line rule that absolutely prohibits any citation to a statute in a constitutional initiative petition unless the full text of the statute is also included in the petition. Since the text of Measure 3 makes a single

reference to N.D.C.C. § 16.1-07-19 without including the full text of that statute, Brighter Future concludes the subject petitions are fatally flawed and should have been rejected by the Secretary of State for circulation to obtain signatures and inclusion on the November 3, 2020 statewide election ballot. However, it is not clear that Dyer created the bright line rule suggested by Brighter Future, nor is it clear that the reasoning used by the Court in Dyer still applies equally to the facts of the present case 96 years later. The Secretary of State conducted his ministerial review of the petitions supporting Measure 3 in the same manner as his review of all other constitutional initiative petitions, and found them to be in the proper form and to be sufficient in this case in light of his understanding of the applicable constitutional and statutory requirements. In the absence of further guidance from this Court, the Secretary of State had no power to reject the petitions supporting Measure 3 or to refuse to place Measure 3 on the November 3, 2020 statewide election ballot.

[¶4] With respect to Brighter Future’s second argument, that the petition title allegedly does not fairly represent the measure, Brighter Future ignores that the petition title is intended to be a “short and concise statement” (N.D.C.C. § 16.1-01-09(1)(b)) and is not required to contain every detail from the full text of the measure. The language of the petition title for Measure 3 was approved by the Attorney General, is not misleading, and fairly represents the measure.

## **STATEMENT OF FACTS**

### **I. The Initiative Petition Process.**

[¶5] This case involves an initiative petition, seeking to add Measure 3 to the

November 3, 2020 statewide election ballot in order to amend the North Dakota Constitution. The initiative petition process is governed by Article III of the North Dakota Constitution. Section 1 of Article III says 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 North Dakota Century Code §§ 16.1-01-09 and 16.1-01-10.

[¶6] To start the process, twenty-five or more electors must agree to act as the sponsoring committee, which presents the proposed petition to the Secretary of State “for approval as to form”. N.D. Const. art. III, § 2. “The secretary of state shall approve the petition for circulation if it is in the proper form and contains the names and addresses of the sponsors and the full text of the measure.” Id.

[¶7] Additionally, upon receipt of the proposed petition, the Secretary of State drafts the petition title, which is “a short and concise statement that fairly represents the measure.” N.D.C.C. § 16.1-01-09(1)(b). The petition title must be submitted to the Attorney General for approval or disapproval. Id. Once approved by the Attorney General, the petition title is affixed to the petition. Id. The Secretary of State and the Attorney General are required to complete their reviews of the proposed petition and petition title “in not less than five, nor more than seven, business days, excluding Saturdays.” N.D.C.C. § 16.1-01-09(1)(c).

[¶8] The sponsoring committee may then circulate the approved petition form to

obtain the required number of signatures from qualified electors<sup>1</sup>. N.D. Const. art. III, § 3; N.D.C.C. § 16.1-01-09(2). The sponsoring committee then returns the petitions, along with the signatures and required affidavits from the circulators and chairperson of the sponsoring committee, for review and approval by the Secretary of State. N.D.C.C. §§ 16.1-01-09(2), (3), (5), and (6); and N.D.C.C § 16.1-01-10. “The secretary of state shall pass upon each petition” as to sufficiency (N.D. Const. art. III, § 6) after a review process for a “reasonable period, not to exceed thirty-five days”, which includes investigation of the signatures (N.D.C.C. § 16.1-01-10). “All decisions of the secretary of state in regard to any petition are subject to review by the supreme court.” N.D. Const. art. III, § 6; see also N.D. Const. art. III, § 7.

## **II. Measure 3.**

[¶9] With respect to the initiative petition at issue in this case, the sponsoring committee is Respondent North Dakota Voters First (“NDVF”), which presented the proposed petition to the Secretary of State. The text of Measure 3, contained in the initiative petition, covers various issues relating to military-overseas voters, election audits, open primaries, instant runoff elections, legislative redistricting, and subdivision of House legislative districts. App. 4-6. However, the portion of the text of Measure 3 most relevant to the present case relates to military-overseas voters and states:

---

<sup>1</sup> For a constitutional amendment proposed by ballot initiative petition, the petition must be “signed by electors equal in number to four percent of the resident population of the state at the last federal decennial census....” N.D. Const. art. III, § 9.

## **Section 1. Help Our Heroes Vote.**

In order to provide military-overseas voters with ample opportunity to vote, on or before the business day preceding the sixtieth day before an election, the secretary of state shall transmit ballots and balloting materials to all covered voters who submit a valid military-overseas ballot application. This shall apply for all elections covered in N.D.C.C. section 16.1-07-19.

App. 4.

[¶10] On March 6, 2020, the Secretary of State sent a letter to the chairperson of NDVF, acknowledging receipt of the proposed petition and providing a timeline for the initiative petition process. Appendix Of Alvin Jaeger, In His Official Capacity As North Dakota Secretary Of State (“Secretary App.”) at 5-6. As required by law, the Secretary of State then drafted a petition title and sent it to the Attorney General to approve or disapprove, and also conducted a review of the petition as to form. N.D. Const. art. III, § 2; N.D.C.C. § 16.1-01-09(1)(b) and (c); Secretary App. 7-10.

The Attorney General approved the following petition title on March 17, 2020:

This initiated measure would add a new section to and amend Section 2 of Article IV of the North Dakota Constitution. It would require ballots to be transmitted to qualified military-overseas electors by the sixty-first day before an election. It would require all voting machines to produce a paper record of each vote cast and the Secretary of State to conduct a random audit of election results and issue an audit report within 120 days of an election. It would establish a new process for open primary elections in which all electors would be allowed to vote the ballot regardless of political party affiliation; all candidates for each office would be listed on a single ballot; candidates would be allowed, but not required, to identify their political party; and, regardless of political party identification, the four candidates receiving the most votes would advance to the general election ballot for that office. No other candidates could appear except those nominated through the primary election. It would permit political parties to state on the ballot which candidates they endorse. It would allow voters in general elections to rank their first, second, third, and fourth choices of the candidates for each office and have the votes counted through a defined procedure until a candidate receives a majority of the votes cast for that office. It

would require the Ethics Commission to draw legislative senatorial districts by unanimous vote, divide each senatorial district into two legislative house districts, hold eight public hearings on the proposed redistricting plan with two of the hearings held on two different American Indian Reservations, and follow certain criteria for the drawing of legislative districts. It would require the Secretary of State to provide the Ethics Commission with the tools and data necessary to draw the districts and the legislature to provide adequate funds for the duties of the Ethics Commission.

Secretary App. 8-9.

[¶11] On March 17, 2020, the Secretary of State sent a letter to the chairperson of NDVF, identifying two corrections that NDVF needed to make to the petition in order for it to be approved for circulation. Secretary App. 7-10. The issues identified in the March 17, 2020 letter for correction relate to the names and signatures of individuals on the sponsoring committee list, and the notarial certificate on an affidavit, which are not relevant to the present case before this Court. Secretary App. 10. The Secretary of State did not identify any issue or require any correction with respect to the actual text of the proposed measure. See id.

[¶12] After NDVF made the corrections to the petition, the Secretary of State sent a letter to the chairperson of NDVF on April 30, 2020, approving the petition for circulation and including an updated timeline for the initiative petition process. Secretary App. 11-13.

[¶13] On July 6, 2020, prior to the 120-day deadline before the November 3, 2020 statewide election required by Article III, Section 5 of the North Dakota Constitution, NDVF submitted to the Secretary of State the petition with signatures of qualified electors. Secretary App. 14. The Secretary of State then began the review and investigation required by N.D.C.C. § 16.1-01-10; Secretary App. 14.

[¶14] After completing the review and investigation, the Secretary of State sent a letter to the chairperson of NDVF dated August 11, 2020, indicating that the number of valid signatures of qualified electors exceeded the required number, and Measure 3 will be placed on the ballot for the November 3, 2020 statewide election. Secretary App. 14-15.

## LAW AND ARGUMENT

### I. The Secretary Of State Has Limited, Ministerial Duties With Respect To Reviewing An Initiative Petition For Form And Passing On The Sufficiency Of An Initiative Petition.

[¶15] The Secretary of State's responsibilities with respect to initiative petitions are to approve the petitions "as to form" and to "pass upon each petition." N.D. Const. art. III, §§ 2 and 6. The precise scope of the Secretary of State's duties when approving as to form and passing upon the sufficiency of a petition are limited by Article III of the North Dakota Constitution and sections 16.1-01-09 and 16.1-01-10 of the North Dakota Century Code.

[¶16] The duties vested in the Secretary of State grant him a limited role at the beginning of the initiative petition process, after the sponsoring committee has drafted the measure, and at the end, after signatures are collected on petitions. See N.D. Const. art. III, § 2; N.D.C.C. §§ 16.1-01-09; 16.1-01-10. The sponsoring committee must first present the petition to the Secretary of State for approval as to form. N.D. Const. art. III, § 2. After the sponsoring committee collects the requisite number of signatures, the Secretary of State's limited duties include ensuring that each signature is dated, that the petition contains the names and addresses of the sponsors, and that there are a sufficient number of valid

signatures. N.D. Const. art. III, §§ 2, 3, and 4; N.D.C.C. § 16.1-01-10; see also Thompson v. Jaeger, 2010 ND 174, ¶ 4, 788 N.W.2d 586 (rejecting petitions because they lacked the names and addresses of the sponsors); Dawson v. Meier, 78 N.W.2d 420, 424 (N.D. 1956) (rejecting undated signatures). This Court has described these duties as strictly “ministerial” in nature. Schmidt v. Gronna, 281 N.W. 57, 60 (N.D. 1938).

[¶17] The Secretary of State is required to act as an impartial administrator. If the petitions are proper in form and contain the requisite number of valid signatures, “the secretary of state shall place the measure on the ballot.” N.D. Const. art. III, § 6. In Municipal Services Corp. v. Kusler, 490 N.W.2d 701, 706 (N.D. 1992) the North Dakota Supreme Court stated: “We hold that the Secretary’s constitutional responsibility under Article III, § 2, N.D. Const., to approve the form of a petition, is limited to ascertaining whether the petition complies with the statutory requirements for form and whether the petition contains impermissible, extraneous statements. In reviewing a petition for form, the Secretary must not be concerned with the merits of the petition or with the substances of its text.”

[¶18] For all these reasons, the role of the Secretary of State is limited in this action. The Secretary of State is required to act as an impartial official performing a ministerial function when reviewing these petitions for an initiative measure. If the petitions are proper in form and contain the requisite number of valid signatures, the Secretary of State is required to place the measure on the ballot. The Secretary of State is not to consider the substance or determine constitutionality of the initiative measure. “All decisions of the secretary of state in

the petition process are subject to review by the Supreme Court in the exercise of original jurisdiction.” N.D. Const. art. III, § 7. “If proceedings are brought against any petition upon any ground, the burden of proof is upon the party attacking it...” N.D. Const. art. III, § 6.

[¶19] With respect to Measure 3, the Secretary of State properly fulfilled his ministerial duties. Brighter Future in this case argues the Secretary of State should have rejected the petitions supporting Measure 3 for two reasons: 1) allegedly none of the petitions contain the full text of the proposed constitutional amendment, and 2) the petition title allegedly does not fairly represent the measure. See Petition For Writ Of Injunction, pp. 13-18. However, both of Brighter Future’s reasons are flawed. The Secretary of State properly reviewed and approved Measure 3 for placement on the November 3, 2020 statewide election ballot.

## **II. The Initiative Petitions Contain The Full Text Of The Measure.**

[¶20] Section 2 of Article III of the North Dakota Constitution states in relevant part, “[t]he secretary of state shall approve the petition for circulation if it is in proper form and contains the names and addresses of the sponsors and the full text of the measure.” N.D. Const. art. III, § 2 (emphasis added). Brighter Future argues the Secretary of State should not have approved the petition for circulation, and argues this Court should issue a writ of injunction, because the text of the measure includes a citation to N.D.C.C. § 16.1-07-19 without including the text of that statute, thus allegedly not including the “full text of the measure.” Petition For Writ Of Injunction, pp. 13-16.

[¶21] In support of its argument regarding the full text of the measure, Brighter

Future cites to only one case: Dyer v. Hall, 51 N.D. 391, 199 N.W. 754 (1924). In Dyer, decided by this Court in 1924, the secretary of state rejected an initiative petition seeking to amend the North Dakota Constitution because, among other reasons, the petition did not contain the full text of the measure. Id. at 754. The measure in the petition at issue in Dyer incorporated by reference a large number of statutes, including whole statutory chapters, in an effort to give constitutional weight to the statutes, making them irrepealable through subsequent legislation. Id. at 754-57. The Court noted, “[t]he notion that the fundamental law of the state can be weighted, in the manner here attempted, by incorporating therein by reference only a large number of statutes, enacted during a period of many years and scattered throughout several volumes of compiled statutes and session laws, is entirely novel in American jurisprudence.” Id. at 757. The Court found that the secretary of state properly refused to accept the petition as sufficient because it did not contain the full text of the measure. Id.

[¶22] In Dyer, the Court stated the reason for the “full text of the measure” requirement is “obvious”, explaining:

The average voter does not have conveniently at hand the text of the Constitution or the statutes of this state; if, therefore, he is to have an opportunity to know fully and intelligently what he is doing when he signs or declines to sign a petition, or votes on a proposed amendment, it is only if the full text of the proposed amendment to the Constitution be inserted in the petition, and embodied in the publicity pamphlet sent him, that he will be able to do so. Before he votes, if the proponents of the measure faithfully do their duty, he will have an opportunity to read a ballot title that fairly and briefly represents the measure proposed, or, if he desire, he may read the full text of the amendment. If, however, provisions of the Constitution, or provisions of statutes, are incorporated in the proposed amendment, by reference only, the signers of petitions and voters, have no opportunity to read or examine fairly the contents and

appreciate the real import of the proposed amendment. They will then have to rely upon the representations of interested parties.

Id. at 756–57. Further, the Court explained “that the purpose of the requirement that the petition contain the full text of the proposed amendment was to obviate all uncertainty as to the subject-matter dealt with in the Constitution, and to lessen the possibility of fraud or imposition in procuring signatures.” Id. at 757.

[¶23] However, the Dyer case is distinguishable from the present case in several important respects. In Dyer, the petition at issue sought to incorporate by reference only a large number of statutes directly into the North Dakota Constitution to give constitutional weight to the cited statutes. Id. at 754-57. In contrast, Brighter Future in the present case points only to a single statutory reference in Section 1 of Measure 3, which states:

In order to provide military-overseas voters with ample opportunity to vote, on or before the business day preceding the sixtieth day before an election, the secretary of state shall transmit ballots and balloting materials to all covered voters who submit a valid military-overseas ballot application. This shall apply for all elections covered in N.D.C.C. section 16.1-07-19.

App. at 4. This single reference to N.D.C.C. § 16.1-07-19 does not incorporate the statute into the North Dakota Constitution to give the statute constitutional weight, as was attempted in Dyer. Rather, the statutory reference in this case appears to merely clarify that the preceding first sentence shall apply for all elections covered in N.D.C.C. section 16.1-07-19. Importantly, the preceding first sentence applies broadly, with the only limitations being that it applies in “an election” in which a covered voter submits a valid military-overseas ballot application. App. at 4. In other words, based on the first sentence quoted above, the “secretary of state shall

transmit ballots and balloting materials to all covered voters who submit a valid military-overseas ballot application” in any election. Id. The second sentence, wherein the statutory reference is found, simply reiterates the same point by referencing the statute that lists the specific types of elections military-overseas voters may vote in under North Dakota law. The referenced statute, N.D.C.C. § 16.1-07-19, states in its entirety:

The voting procedures in sections 16.1-07-18 through 16.1-07-33 apply to:

1. A general, special, or primary election for federal office.
2. A general, special, or primary election for statewide or state legislative office or state ballot measure.
3. A general, special, or primary election for political subdivision office or political subdivision ballot measure.

The applicability of Section 1 of Measure 3 to any election in which a covered voter submits a valid ballot application is evident from the first sentence, and is unchanged by the second sentence. While the second sentence is arguably superfluous, it is not the duty of the Secretary of State to analyze the style or specific language of the measure while carrying out his ministerial duties.

[¶24] Additionally, the Court in Dyer noted “[t]he average voter does not have conveniently at hand the text of the Constitution or the statutes of this state.” Dyer, 199 N.W. at 756. This was undoubtedly true when the Dyer decision was issued in 1924. However, this Court may take judicial notice that in the year 2020, 96 years after the Dyer decision, the average voter now does have conveniently at hand, on any smartphone, tablet, or computer with internet access, the text of the

Constitution and statutes of this state.<sup>2</sup> The referenced statute, N.D.C.C. section 16.1-07-19, which contains only a short three-point list of election types, does not narrow the applicability of the measure established in the preceding first sentence, and can be found by an average voter with a simple internet search, is not analogous to the large number of statutes attempted to be imported into the Constitution in Dyer in 1924.

[¶25] The Petition for Writ of Injunction gives the incorrect impression that Dyer establishes a bright-line rule that any single reference to a statute in the text of an initiative measure without the full text of the statute is categorically impermissible. The North Dakota Supreme Court may certainly create such a bright-line rule and the Secretary of State would be bound to follow it as part of his ministerial duties. The North Dakota Constitution grants this Court the authority to review all decisions made by the Secretary of State with respect to a petition during the petition process. N.D. Const. art. III, §§ 6 and 7. In conducting this review, the North Dakota Supreme Court independently examines the actions of the Secretary of State to “determine whether he has complied with the law.” Municipal Services Corp., 490 N.W.2d at 702. This Court’s authority to review the Secretary of State’s decisions is “without limitation or qualification.” Id. at 701-02. However, Dyer does not establish the bright-line rule Brighter Future suggests. Unless this Court orders otherwise, it does not appear the Secretary of State has legal authority to reject the petitions at issue in the present case on grounds that they do not contain the full text of the measure.

---

<sup>2</sup> Available at no charge at <https://www.legis.nd.gov/>.

[¶26] Brighter Future also argues that reference to a statutory provision in the measure would allow future constitutional changes to be made by the Legislative Assembly and not by the people. Petition For Writ Of Injunction, pp. 1 and 16. There is no reason to assume the North Dakota Supreme Court would decide a hypothetical future case on such an issue in the manner suggested by Brighter Future. The Court could find that future changes to N.D.C.C. section 16.1-07-19 do not serve to narrow the applicability of Section 1 of Measure 3, as the plain language of the first sentence suggests. Alternatively, the Court could lock into place the language of N.D.C.C. section 16.1-07-19 at the time of the amendment's passage for purposes of analyzing Section 1 of Measure 3. In any event, regardless of the outcome of such a future hypothetical issue, the limited nature of the Secretary of State's role does not include the authority to review the substance or merits of the measure under his review. Municipal Services Corp., 490 N.W.2d at 705. "The secretary of state is not required nor permitted to determine whether the proposed measure is constitutional in substance. He is not required to hazard an opinion as to whether, if adopted, it would be subject to constitutional objections." Preckel v. Byrne, 244 N.W. 781, 784 (N.D. 1932). If the measure is approved by the voters, then the issue of whether the measure is constitutional is determined in the same manner as the constitutionality of an act of the Legislature is determined. Preckel v. Byrne, 243 N.W. 823, 825 (N.D. 1932). As the North Dakota Constitution, the North Dakota Century Code, and this Court make clear, the Secretary of State's neutral role is limited to passing only on the form and sufficiency of the petitions. It is beyond the Secretary of State's authority to determine whether a particular

measure is constitutional or raises constitutional issues. Municipal Services Corp., 490 N.W.2d at 706; Preckel, 244 N.W. at 784.

**III. The Initiative Petition Title Fairly Represents The Substance Of The Constitutional Amendment.**

[¶27] Brighter Future also argues that Measure 3's petition title does not fairly represent the substance of the constitutional amendment. Petition For Writ Of Injunction, pp. 16-18. It should be noted, as required by N.D.C.C. § 16.1-01-09(1)(b) and (c), the Secretary of State submitted the petition title to the Attorney General for approval or disapproval, and the Attorney General issued his timely written approval on March 17, 2020. Secretary App. 8-9. Under N.D.C.C. § 16.1-01-09(1)(b), the petition title must "fairly represent[] the measure". The North Dakota Supreme Court has explained the standard as follows:

The statutory directive is that the Secretary prepare a "short and concise" statement "fairly" representing the proposed measure. We agree with the Arkansas Supreme Court's analysis of the purpose and scope of a ballot title:

"[T]he ballot title is designed to adequately summarize the provisions of the proposal and be complete enough to convey to the voter an intelligible idea of the scope and import of the proposal.... The ballot title must also be free from any misleading tendency, whether by amplification, omission or fallacy. It must not be tinged with partisan coloring....

"It is difficult to prepare a perfect ballot title. It is sufficient if it informs the voters with such clarity that they can cast their ballot with a fair understanding of the issue presented." (Citations omitted.) Ferstl v. McCuen, 296 Ark. 504, 758 S.W.2d 398, 400 (1988).

In reviewing a ballot title, the court must not concern itself with the merit or lack of merit of the proposed measure, because that determination rests with the electorate. Matter of Title, Ballot Title, Etc., 649 P.2d 303 (Colo.1982). Furthermore, the ballot title need not encompass every possible effect of the measure nor must it convey possible problems

that may arise upon implementing the measure. Id., at 310. If the ballot title is neither misleading nor unfair, it is not our responsibility to draft a better one. Manny v. Paulus, 281 Or. 215, 573 P.2d 1248 (1978).

Municiple Services Corp., 490 N.W.2d at 702–03.

[¶28] Brighter Future first argues the petition title is insufficient because, like the text of the measure, it fails to include the text of N.D.C.C. § 16.1-07-19, and the petition title fails to reference the statute at all. Petition For Writ Of Injunction, p. 16. Brighter Future states the petition title fails to “identify that the rights of military voters apply only in elections covered by section 16.1-07-19.” Id. Section 1 of Measure 3 states in part, “[t]his shall apply for all elections covered in N.D.C.C. section 16.1-07-19”; Section 1 of Measure 3 does **not** state “[t]his shall **only** apply for all elections covered in N.D.C.C. section 16.1-07-19”, as suggested by Brighter Future. In any event, as discussed above, under on the first sentence of Section 1 of Measure 3, the “secretary of state shall transmit ballots and balloting materials to all covered voters who submit a valid military-overseas ballot application” in any election. App. at 4. The following sentence in the petition title fairly represents this section of the measure without the need to reference the statute: “It would require ballots to be transmitted to qualified military-overseas electors by the sixty-first day before an election.” App. at 4 From this sentence in the petition title, voters are informed that the amendment applies to “an election” wherein qualified military-overseas electors receive a ballot.

[¶29] Brighter Future next argues the petition title does not fully explain the new system of runoff voting. Petition For Writ Of Injunction, pp. 16-17. Brighter Future further argues, “with respect to redistricting changes, the title states only that the

Ethics Commission would be required to draw new legislative districts based on 'certain criteria', without identifying the criteria." Id. at p. 17. As noted above, this Court has found "the [petition] title need not encompass every possible effect of the measure nor must it convey possible problems that may arise upon implementing the measure. If the [petition] title is neither misleading nor unfair, it is not our responsibility to draft a better one." Municiple Services Corp., 490 N.W.2d at 703 (citations omitted). The petition title in this case is neither misleading nor unfair, and as found by both the Secretary of State and the Attorney General, it fairly represents the measure. The petition title does not recite every single detail of the full text of the measure and is not required or intended to do so. Otherwise, the title would be neither "short" nor "concise". N.D.C.C. § 16.1-01-09(1)(b).

### **CONCLUSION**

[¶30] For the foregoing reasons, the Secretary of State respectfully requests the Court deny the Petition For Writ Of Injunction, and allow the Secretary of State to place Measure 3 on the November 3, 2020 statewide election ballot.

Dated this 19<sup>th</sup> day of August, 2020.

State of North Dakota  
Wayne Stenehjem  
Attorney General

By: /s/ Matthew A. Sagsveen  
Matthew A. Sagsveen  
Solicitor General  
State Bar ID No. 05613  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
Email [masagsve@nd.gov](mailto:masagsve@nd.gov)

By: /s/ David R. Phillips  
David R. Phillips  
Assistant Attorney General  
State Bar ID No. 06116  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
Email [drphillips@nd.gov](mailto:drphillips@nd.gov)

Attorneys for Respondent Alvin Jaeger.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Michael J. Haugen, Jacob Stutzman,  
Trent Barkus, and Brighter Future  
Alliance,

Petitioners,

v.

Alvin Jaeger, in his official capacity as  
North Dakota Secretary of State and  
the Sponsoring Committee of  
Measure 3,

Respondents.

**CERTIFICATE OF COMPLIANCE**

**Supreme Court No. 20200213**

[¶1] The undersigned certifies pursuant to N.D.R. App. P. 32(a)(8)(A), that the Response Brief Of Respondent Alvin Jaeger, In His Official Capacity As North Dakota Secretary Of State contains 23 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365, word processing software in Arial 12-point font.

Dated this 19<sup>th</sup> day of August, 2020.

State of North Dakota  
Wayne Stenehjem  
Attorney General

By: /s/ Matthew A. Sagsveen  
Matthew A. Sagsveen  
Solicitor General  
State Bar ID No. 05613  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
Email masagsve@nd.gov

By: /s/ David R. Phillips  
David R. Phillips  
Assistant Attorney General  
State Bar ID No. 06116  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
Email drphillips@nd.gov

Attorneys for Respondent Alvin Jaeger.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Michael J. Haugen, Jacob Stutzman,  
Trent Barkus, and Brighter Future  
Alliance,

Petitioners,

v.

Alvin Jaeger, in his official capacity as  
North Dakota Secretary of State and  
the Sponsoring Committee of  
Measure 3,

Respondents.

**CERTIFICATE OF SERVICE**

**Supreme Court No. 20200213**

---

[¶1] I hereby certify that on August 19, 2020, the following documents:  
**RESPONSE BRIEF OF RESPONDENT ALVIN JAEGER, IN HIS OFFICIAL  
CAPACITY AS NORTH DAKOTA SECRETARY OF STATE, CERTIFICATE OF  
COMPLIANCE, and APPENDIX OF ALVIN JAEGER, IN HIS OFFICIAL  
CAPACITY AS NORTH DAKOTA SECRETARY OF STATE** were filed  
electronically with the Supreme Court through the E-Filing Portal and served on the  
following:

David W. Asp - [dwasp@locklaw.com](mailto:dwasp@locklaw.com)  
Shane Goettle - [goettlelaw@gmail.com](mailto:goettlelaw@gmail.com)  
Timothy Q. Purdon - [tpurdon@robinskaplan.com](mailto:tpurdon@robinskaplan.com)

State of North Dakota  
Wayne Stenehjem  
Attorney General

By: Matthew A. Sagsveen  
Solicitor General  
State Bar ID No. 05613  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
Email [masagsve@nd.gov](mailto:masagsve@nd.gov)

By: David R. Phillips  
Assistant Attorney General  
State Bar ID No. 06116  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
Email [drphillips@nd.gov](mailto:drphillips@nd.gov)

Attorneys for Respondent Alvin Jaeger.