UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Richard Brakebill, Deloris Baker, Dorothy Herman, Della Merrick, Elvis Norquay, Ray Norquay, and Lucille Vivier, on behalf of themselves, Plaintiffs, vs. Alvin Jaeger, in his official capacity as the North Dakota Secretary of State, Defendant.	Civil No. 1:16-cv-8

Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction

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I. Preliminary Statement.

In their moving papers, Plaintiffs established through extensive factual evidence and expert testimony that North Dakota's new voter ID laws disproportionately burden Native Americans, threaten to disenfranchise numerous Native American voters, and violate the Voting Rights Act ("VRA") and the U.S. Constitution. Plaintiffs showed that Plaintiffs Lucille Vivier, Dorothy Herman and Richard Brakebill, after voting routinely throughout their adult lives, were turned away by poll workers in November 2014 (even though the poll workers knew them personally and knew they were qualified to vote) because they had invalid IDs under the new laws. In addition, Plaintiffs introduced expert testimony establishing that many other Native Americans were denied the right to vote in 2014, and that **nearly 4,000 Native Americans (if not more) will be denied the right to vote in the upcoming 2016 election** if preliminary injunctive relief is not granted.

In opposing Plaintiffs' motion, Defendant refused to address these facts and Plaintiffs' substantial other evidence of discriminatory impact, disproportionate burdens, and disenfranchisement. Defendant also declined to address Plaintiffs' detailed analysis of the Senate Factors, even though consideration of these factors is essential in evaluating claims under the VRA. Instead of confronting Plaintiffs' evidence that Native Americans living in North Dakota have been discriminated against for more than 100 years in all areas of life including elections, Defendant offered unsupported, self-serving speculation that the harm to Plaintiffs and the abridgment of their voting rights was just an "inconvenience[] of rural life," cavalierly offered empty platitudes like "there is only so much the State can do," and suggested that Native Americans were somehow making an affirmative "choice" not to vote.[1] Defendant also urged the Court to apply an incorrect legal standard.

Defendant asserts its new ID laws are necessary to fight voter fraud. However, Defendant ignored Plaintiffs' evidence regarding the historical absence of any voter fraud in North Dakota. Moreover, Defendant offered no compelling justification for the ultra-

[1] Opposition, ECF No. 45 at 2, 6.

strict nature of North Dakota's laws (e.g., other states that have enacted voter ID laws have included fail-safe provisions, have allowed many more forms of ID, and have eliminated fees relating to acquiring voter ID). Defendant also fails to dispute that the true reason the laws were enacted was to suppress votes that would likely go to Democratic candidates. These weak justifications are not a valid basis for depriving citizens of the right to vote.

Defendant also argues the Court should not issue injunctive relief because it would be difficult for the State to implement an order before the 2016 election. Defendant's position is unacceptable. First, Defendant represented to the Court and to Plaintiffs that the State could comply with any injunction order the Court issued by early September. Second, Defendant's argument is not credible. Before the adoption of HB 1332 and 1333, experts ranked North Dakota's election system among the nation's best in overall performance. Reverting to the system the State utilized in 2012 (the relief sought by Plaintiffs) would involve little burden. Third, the State is required to do what is necessary to implement an injunction entered to preserve voting rights.

The right to vote is a fundamental, foundational constitutional right that the U.S. Supreme Court has declared is "preservative of all rights."[2] Contrary to Defendant's assertions, the deprivation of the right to vote is irreversible and irreparable. Thus, Plaintiffs respectfully request that the Court grant preliminary injunctive relief.

II. Contrary to Defendant's Assertions, Plaintiffs Will Likely Prevail On Their VRA Claims.

A. Plaintiffs, Not Defendant, Applied The Proper Legal Standard.

Plaintiffs' primary cause of action is a vote denial claim under Section 2 of the VRA. Defendant inaccurately represents that the U.S. Supreme Court articulated the legal test for Section 2 claims in Crawford v. Marion County Election Board and Burdick v. Takushi. This is not true. Neither case involved VRA-based claims. In both cases, the Court considered only constitutional challenges. In Crawford, the Court considered whether Indiana's voter

[2] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

identification laws "substantially burden[] the right to vote **in violation of the Fourteenth Amendment,**"[3] and "reaffirmed Anderson's requirement that a court **evaluating a constitutional challenge** to an election regulation weigh the asserted injury to the right to vote against the '"precise interests put forward by the State as justifications for the burden imposed by its rule."'"[4] And in Burdick, the issue was "whether Hawaii's prohibition on write-in voting unreasonably infringes upon its' citizens' rights **under the First and Fourteenth Amendments**."[5]

Defendant asserts that Frank v. Walker "demonstrate[s] how to apply Crawford to facial challenges—constitutional or statutory—to electoral laws."[6] But the Seventh Circuit only noted that "Crawford requires us to reject a **constitutional** challenge to Wisconsin's statute," and does not state that the constitutional test applies to Section 2 cases.[7]

Contrary to Defendant's assertions, courts have long held that Section 2 of the VRA focuses on results or effects.[8] Plaintiffs applied the correct legal standard in their moving

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[3] Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 187 (2008). Defendant asserts Crawford looks at the burden on "voters generally." (Opposition, ECF No. 45 at 5.) But Justice Stevens' opinion is the "controlling" opinion in Crawford. See Obama for America v. Husted, 697 F.3d 423, 441 n.7 (6th Cir. 2012); ACLU of New Mexico v. Santillanes, 546 F.3d 1313, 1321 (10th Cir. 2008) ("it appears that Justice Stevens's plurality opinion controls"). And Justice Stevens indicated courts should evaluate the burden on different classes of voters. Crawford, 553 U.S. at 200.

[4] Crawford, 553 U.S. at 190 (emphasis added). In quoting the Crawford test, Defendant left out the part of the sentence indicating courts should use the test in "evaluating a constitutional challenge." See Opposition, ECF No. 45 at 4.

[5] Burdick v. Takushi, 504 U.S. 428, 430 (1992).

[6] Opposition, ECF No. 45 at 5. In Frank II, the court noted a district court "'should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.' If plaintiffs are entitled to relief for those of their number who cannot obtain qualifying photo ID with reasonable effort, nothing in the way they structured their complaint poses an obstacle." Frank v. Walker, 819 F.3d 384, 388 (7th Cir. 2016).

[7] Frank v. Walker, 768 F.3d 744, 751 (7th Cir. 2014).

[8] Thornburg v. Gingles, 478 U.S. 30, 35 (1986) ("Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory **effect** alone and to establish as the relevant legal standard the '**results test**,' . . .") (emphasis added).

papers, and relied upon the two-step analysis for Section 2 vote denial cases adopted by the Fourth, Fifth and Sixth Circuits.[9] The United States, which "has a substantial interest in ensuring Section 2's proper interpretation and uniform enforcement around the country," agrees the test cited by Plaintiffs is the legal standard this Court should apply in evaluating Section 2 claims.[10] Thus, the Anderson/Crawford/Burdick balancing test applies only to Plaintiffs' claims for violations of the Equal Protection Clause of the Fourteenth Amendment, which Plaintiffs address below.

B. Plaintiffs Have Demonstrated They Will Likely Prevail On Their Section 2 Claims.

In their opening papers, Plaintiffs demonstrated they will likely prevail on the two-part test for VRA vote denial claims. Based on extensive empirical and historical evidence, Plaintiffs established the new voter ID laws impose a substantial discriminatory burden on Native Americans because Native Americans disproportionately lack qualifying forms of ID, suffer from poverty and other conditions that make it more difficult for them to acquire qualifying ID, and disproportionately lack access to the transportation they need to travel the significant distances to a state office.[11] Plaintiffs also showed, through an analysis of the relevant Senate Factors, that the discriminatory burden is caused by, and linked to, social and historical discrimination against Native Americans.[12] In response, Defendant failed to address any of Plaintiffs' empirical or historical evidence, failed to address any of the Senate Factors, failed to address, and even appeared to ridicule, Plaintiffs' evidence of discrimination, and therefore failed to rebut that, under the "totality of the circumstances,"

[9] Plaintiffs' Memo., ECF No. 44 at 23-24 (quoting test and citing cases).

[10] See Statement of Interest of the United States of America, ECF No. 27 at 2-6. Plaintiffs incorporate the Statement of Interest in its entirety.

[11] Plaintiffs' Memo., ECF No. 44 at 3-18.

[12] Plaintiffs' Memo., ECF No. 44 at 25-35.

Plaintiffs will likely prevail at trial.[13] Instead, Defendant offered baseless and unsubstantiated theories that the harm to Plaintiffs could all be attributed to living in rural parts of the State and to Plaintiffs' own failures.[14]

1. Defendant's challenges to Plaintiffs' experts fail.

At pages 8-9 of its Opposition, Defendant asserts that "Plaintiffs' studies and experts" are wrong because they mistakenly assume Native Americans all live on isolated reservations while all white North Dakotans live in cities. Defendant makes this assertion without any supporting evidence, without any of his own expert analysis, and even without citing to any facts introduced by Plaintiffs or anything Plaintiffs' experts said. Defendant's criticism is baseless, and the Court should reject it out of hand.

Moreover, Plaintiffs' expert declarations establish the experts' methodology was sound and are devoid of the flaws hypothesized by Defendant. Dr. Barreto testified that he and Dr. Sanchez "implemented a **statewide** survey of eligible voters in North Dakota,"[15] and he detailed the methods they used, which closely adhere to accepted survey standards and techniques[16]:

- They utilized a random digital dial approach to maximize the likelihood that all North Dakota residents had an equal probability of being asked to participate in the survey, regardless of whether they live in rural or urban areas.[17]
- They utilized "a statewide sample of 900 eligible voters, **representative of the full demographics of North Dakota**."[18]

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[13] The United States also explained in its Statement of Interest how important it is to analyze the Senate Factors in evaluating a Section 2 claim. See Statement of Interest of the United States of America, ECF No. 27 at 4-6.

[14] See, e.g., Opposition, ECF No. 45 at 6.

[15] Barreto Decl., ECF No. 44-1 at ¶ 10 (emphasis added).

[16] Barreto Decl., ECF No. 44-1 at ¶ 14.

[17] Barreto Decl., ECF No. 44-1 at ¶ 24.

[18] Barreto Decl., ECF No. 44-1 at ¶ 27 (emphasis added).

- They incorporated mailings into their survey to capture populations not reachable through land or cell phones, and used a mix of postal addresses to ensure they captured a wide sample of Native American eligible voters across the entire state, not just those on reservations.[19]
- To make sure their survey results were representative of the state's overall population, they properly weighted their data in line with the U.S. census.[20]

Dr. Webster's declaration also establishes his methodology was sound and that he appropriately analyzed the state as a whole. For example, Dr. Webster analyzed and developed an average for Native American and non-Native American distances to the Driver's License Sites "at the statewide level."[21] Table 4 of Dr. Webster's Report shows the statewide mean distance to a DLS for a Native American as compared to the mean distance for non-Native American voters.[22]

Dr. Barreto's, Dr. Sanchez's and Dr. Webster's rigorous methodological design means the Court can rely on their study results as representative of the entire eligible voter population for North Dakota, and should ignore Defendant's unsubstantiated assertions.[23]

2. Defendant is wrong to equate Native Americans with all others living in rural North Dakota.

Defendant asserts without basis that the new voter ID laws do not impact Native Americans differently than other North Dakotans living in rural areas.[24] However, Defendant offered no evidence contradicting Plaintiffs' substantial evidence establishing

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[19] Barreto Decl., ECF No. 44-1 at ¶ 35.

[20] Barreto Decl., ECF No. 44-1 at ¶ 37.

[21] Webster Decl., ECF No. 44-4 at ¶¶ 12, 29, 30, 31, 34.

[22] Webster Decl., ECF No. 44-4 at ¶ 34.

[23] It is within the Court's purview to assess through statistical analyses whether minorities are disproportionately affected by a change in the law. Veasey v. Abbott, 796 F.3d 487, 508 (5th Cir. 2015), reh'g en banc granted, 815 F.3d 958 (5th Cir. 2016).

[24] Opposition, ECF No. 45 at 8-10.

that Native Americans disproportionately suffer from poor economic conditions. For example, Defendant did not dispute that: Native Americans living in North Dakota are three to five times more likely to live in poverty than non-Native Americans;[25] the household income for Native Americans is only about half that of non-Native Americans;[26] and that 22.3 percent of Native Americans who lack qualifying voter ID have household incomes less than $10,000, compared to just 12.3 percent of non-Native Americans.[27]

It is undisputed that the more severe conditions in which Native Americans live translates to disproportionate burdens when it comes to complying with the new voter ID laws.[28] In this respect, Defendant ignored Plaintiffs' evidence that:

- 23.5 percent of Native Americans currently lack valid voter IDs, compared to only 12 percent of non-Native Americans.[29]
- 15.4 percent of Native Americans who voted in 2012 currently lack qualifying voter IDs, compared to only 6.9 percent of non-Native Americans.[30]
- Only 78.2 percent of Native Americans have a North Dakota driver's license, compared to 94.4 percent of non-Native Americans.[31]
- 47.7 percent of Native Americans who do not currently have qualifying voter

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[25] Plaintiffs' Memo., ECF No. 44 at 18-19 (citing Webster Decl. at ¶ 18 and McCool Decl. at ¶ 81).

[26] Plaintiffs' Memo., ECF No. 44 at 8-9 (citing McCool Decl. at ¶ 81).

[27] Plaintiffs' Memo., ECF No. 44 at 8-9 (citing Barreto Decl. at ¶ 47).

[28] See, e.g., Veasey, 796 F.3d at 507 (concluding district court did not err in determining Texas voter ID law violates Section 2 by disparately impacting minority voters).

[29] Plaintiffs' Memo., ECF No. 44 at 8 (citing Barreto Decl. at ¶¶ 11, 39-40). North Dakota poll workers are instructed to reject IDs, including tribal IDs, that are not currently valid. See 2016 Election Officials' Manual at 8 (stating "Acceptable forms of identification at the polls include a valid North Dakota" driver's license, non-driver's identification card, "Tribal government issued identification card," and long term care identification certificate) (available at https://vip.sos.nd.gov/pdfs/Portals/election-official-manual-2016.pdf).

[30] Plaintiffs' Memo., ECF No. 44 at 8-9 (citing Barreto Decl. at ¶ 41).

[31] Plaintiffs' Memo., ECF No. 44 at 18-19 (citing Barreto Decl. at ¶ 11).

ID lack the underlying documents they need to obtain acceptable ID.[32]

- § Only 73.9 percent of Native Americans lacking qualifying voter ID own or lease a car, compared to 88 percent of non-Native Americans; and 10.5 percent of Native Americans lack any access to a motor vehicle, compared to only 4.8 percent of non-Native Americans.[33]
- § Native Americans, on average, must travel twice as far as non-Native Americans to visit a Driver's License Site.[34]

Defendant also tries to ignore the fact that Native Americans have suffered from "125 years of discrimination going back to statehood."[35] Defendant failed to address Plaintiffs' evidence regarding the discrimination Native Americans have endured in North Dakota, including discrimination in electoral processes.[36] The entrenched discrimination against Native Americans in North Dakota helps explain all the above-cited disparities. This is why all of these (disproportionate) burdens are not simply a "result of Plaintiffs' choices," but rather a result of social and historical circumstances.[37] And even if the burdens were attributable to Plaintiffs' choice (which they are not), the "argument that the failure to overcome a burden to voting is nothing more than the individual's choice was refuted."[38]

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[32] Plaintiffs' Memo., ECF No. 44 at 12 (citing Barreto Decl. at ¶ 44).

[33] Plaintiffs' Memo., ECF No. 44 at 20 (citing Barreto Decl. at ¶¶ 47, 49; Webster Decl. ¶¶ 30, 34, 41).

[34] Plaintiffs' Memo., ECF No. 44 at 20 (citing Barreto Decl. at ¶¶ 47, 49; Webster Decl. ¶¶ 30, 34, 41).

[35] Opposition, ECF No. 45 at 9.

[36] Plaintiffs' Memorandum, ECF No. 44 at 25-29.

[37] See Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1037-38 (D.S.D. 2004) (discussing fifth Senate Factor).

[38] Veasey v. Perry, 29 F. Supp. 3d 896, 919 (S.D. Tex. 2014) (citing Marengo County and Kirksey); United States v. Marengo Cty. Comm'n, 731 F.2d 1546, 1556 (11th Cir.1984) (rejecting argument that Section 2 only ensures access to the political process without formal barriers); Kirksey v. Bd. of Supervisors of Hinds Cty., 554 F.2d 139, 145 (5th Cir. 1977) (failure to register cannot be considered a matter of voter apathy without specific supporting evidence); see also United States v. Dallas Cty. Comm'n, 739 F.2d 1529, 1536

Defendant asserts the new voter ID laws cannot be discriminatory because they purportedly "treat all similarly-situated North Dakotans alike," and they do not make it "needlessly difficult to obtain acceptable ID."[39] The United States explained in its Statement of Interest (which Plaintiffs incorporate in its entirety) why these arguments are legally invalid.[40] Moreover, the arguments are superficial. While HB 1332 and 1333 might not overtly discriminate against Native Americans, there can be no doubt, in view of Plaintiffs' uncontested evidence, that the law has a disproportionate and discriminatory impact on Native Americans that is caused by or linked to social and historical discrimination.[41]

3. Defendant is wrong that Tribal IDs provide a cure.

Defendant repeatedly claims that because Tribal IDs are a qualifying ID, HB 1332 and 1333 provides an easy solution for Native Americans living in North Dakota. However, this ignores the facts relating to Tribal IDs. For a Tribal ID to qualify under the laws, it must be (1) issued by tribal governments and (2) contain a current residential address. As Plaintiffs explained in their opening papers, many Tribal IDs do not meet these requirements.[42] Dr. McCool's research confirmed that the Tribal IDs held by many Native Americans lack address information. Moreover, many Native Americans do not even have a physical address (they receive their mail at P.O. boxes), or have multiple physical addresses, meaning they cannot even get a Tribal ID that satisfies the State's criteria.[43] Indeed,

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(11th Cir. 1984) ("The existence of apathy is not a matter for judicial notice. The record does not contain evidence supporting the district court's finding that apathy was a prime cause of black defeat."); but see Frank, 768 F.3d at 749.

[39] Opposition, ECF No. 45 at 6, 9.

[40] Statement of Interest of the United States of America, ECF No. 27 at 8-9, 13-14.

[41] Defendant's argument that the burdens faced by Native Americans are no greater than those faced by white North Dakotans living in rural areas (which is untrue) actually supports Plaintiffs' motion: those North Dakota citizens will also benefit from less restrictive voter ID requirements that place substantial burdens on them as well.

[42] Plaintiffs' Memo., ECF No. 44 at 16; McCool Decl., ECF No. 44-2 at ¶¶ 66, 75.

[43] McCool Decl., ECF No. 44-2 at ¶¶ 66, 75; Vivier Decl., ECF No. 44-10 at ¶ 6.

Plaintiffs Richard Brakebill, Lucille Vivier, and Dorothy Herman were all turned away at the polls in November 2014 because their Tribal IDs did not show a residential address.[44] Moreover, the federal Bureau of Indian Affairs issued many of the Tribal IDs that Native Americans currently possess, including the Tribal IDs held by Plaintiffs Vivier and Brakebill[45] and all Native Americans living at the Standing Rock Reservation. Because these IDs were not issued by a tribal government, they do not satisfy the new voter ID laws.[46]

In addition, Defendant ignores the fact that getting a new Tribal ID costs money (both in travel expenses and ID fees), which places an undue burden on impoverished Native Americans.[47] For example, Plaintiff Vivier testified she "cannot afford the additional travel expenses and costs for a tribal ID, which is now $10."[48] This is also true for other Plaintiffs. If voters are required to pay a tax or fee to obtain new ID, that violates the Constitution.[49]

C. *Crawford* and *Frank* Do Not Support Denial of Relief.

In arguing in favor of the legality of North Dakota's new voter ID laws, Defendant relies principally on two cases—Crawford and Frank v. Walker. However, the statutes at issue in these cases are dramatically different from North Dakota's ultra-strict ID laws. Crawford concerned Indiana's relatively lenient photo ID requirement, and none of the Crawford plaintiffs claimed the Indiana law would prevent them from voting in the upcoming election.[50] Similarly, none of the plaintiffs in Frank contended they had gone to a polling place and were denied their right to vote. Thus, neither Crawford nor Frank

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[44] Plaintiffs' Memo., ECF No. 44 at 17-18; Brakebill Decl., ECF No. 44-9 at ¶ 6; Vivier Decl., ECF No. 44-10 at ¶¶ 3, 4; Herman Decl., ECF No. 44-11 at ¶ 5.

[45] See, e.g., Vivier Decl., ECF No. 44-10 at ¶ 3; Brakebill Decl., ECF No. 44-9 at ¶ 14.

[46] Plaintiffs' Memo., ECF No. 44 at 16.

[47] Plaintiffs' Memo., ECF No. 44 at 32-33; McCool Decl., ECF No. 44-2 at ¶ 66.

[48] Vivier Decl., ECF No. 44-10 at ¶ 8.

[49] See Crawford, 553 U.S. at 198 (indicating law would not survive "if the State required voters to pay a tax or fee to obtain a new photo identification").

[50] Frank v. Walker, 773 F.3d 783, 786 (7th Cir. 2014) (Posner, J., dissenting).

involved allegations of actual disenfranchisement. In contrast, Plaintiffs in this case have submitted sworn testimony that they **actually were turned away from voting**.[51] And Plaintiffs submitted other evidence establishing disenfranchisement, including testimony regarding a study finding that nearly 700 college students were unable to vote.[52]

Moreover, unlike the North Dakota laws, both the Indiana law in Crawford and the Wisconsin law in Frank included fail-safe provisions intended to prevent the disenfranchisement of voters. The Indiana law allowed indigent voters, religious objectors and voters who did not have the required photo ID when they went to vote to cast provisional ballots, which the State would count if the voter signed an affidavit.[53] And the Wisconsin law allowed voters without sufficient IDs to cast provisional ballots and return at a later time to produce ID.[54] In contrast, North Dakota's new voter ID laws eliminated previously existing affidavit and voucher fail-safe systems. This is significant, given the Supreme Court's statement in Crawford that the existence of fail-safe mechanisms was an important basis for its decision to uphold the Indiana law.[55] Defendant has not offered any purported compelling state interest why North Dakota no longer provides any fail-safe

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[51] Brakebill Decl., ECF No. 44-9 at ¶ 6; Vivier Decl., ECF No. 44-10 at ¶ 4; Herman Decl., ECF No. 44-11 at ¶ 5.

[52] See, e.g., McCool Decl., ECF No. 44-2 at ¶¶ 70-75. See also N. Bauroth & K. Nelson, Home is Where the Vote Is: A Research Note on the Effects of Changes in North Dakota Voter Identification Laws in College Student Turnout in the 2014 Elections, Online Journal of Rural Research & Policy, 11 Online J. Rural Res. & Pol'y, no. 1, 2016, http://newprairiepress.org/cgi/viewcontent.cgi?article=1072&context=ojrrp.

[53] Crawford, 553 U.S. at 199.

[54] Frank, 773 F.3d at 785 (Posner, J., dissenting). See also Lee v. Virginia State Bd. of Elections, No. 3:15CV357-HEH, 2016 WL 2946181, at *1 (E.D. Va. May 19, 2016) (discussing provisional ballot fail-safe); N.C. State Conference of the NAACP v. McCrory, No. 1:13CV658, 2016 WL 1650774, at *98 (M.D.N.C. Apr. 25, 2016) (discussing North Carolina's reasonable impediment exception).

[55] Crawford, 553 U.S. at 197-98 ("[T]he availability of the right to cast a provisional ballot provides an adequate remedy for problems of that character."); see also id. at 199 ("The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted.").

mechanisms, even though the cases he relies upon (including the Supreme Court case) reached their results based on the presence of fail-safe protections.

There are other critical differences between North Dakota's voter ID laws and the laws at issue in Crawford and Frank:

- In Crawford, the law required ID only for in-person (and not absentee) voting.[56] In Frank, absentee voters had to provide ID only if they were first time voters or voters that changed their address or name.[57] In contrast, the North Dakota laws require **every** voter to provide the required ID and only have very limited exceptions for absentee voters.
- In Crawford, the law allowed the use of any Indiana or U.S. government-issued ID that includes name, photo, and expiration date.[58] In Frank, the law allowed eight forms of ID.[59] North Dakota only allows four forms of ID.
- In Frank, Wisconsin, in response to a state supreme court decision, issued regulations making any required supporting documentation (like birth certificates) free.[60] In contrast, North Dakota charges $7 for a birth certificate and does not exempt the costs of any documentation.[61] Defendant has not offered any compelling reason why these fees cannot be excepted or waived for indigent voters.

Veasey v. Abbott—which concerned Texas's voter ID law—is the decision most relevant to this case. In Veasey, the Fifth Circuit ruled that Texas's voter ID law violated Section 2 of the VRA because it had a disproportionate impact on minorities based on social

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[56] Crawford, 553 U.S. at 185-86.

[57] Frank, 773 F.3d at 785 (Posner, J. dissenting).

[58] Frank, 773 F.3d at 784.

[59] Frank, 768 F.3d at 746; Frank, 773 F.3d at 785 (Posner, J. dissenting).

[60] Frank, 768 F.3d at 747.

[61] See Plaintiffs' Memo., ECF No. 44 at 10-11 (discussing getting birth certificates).

and historical conditions.[62] Much like the record in this case, the record in Veasey

> reveals that Plaintiffs and those who lack both SB 14 ID and underlying documentation face more difficulty than many Texas voters in obtaining SB 14 ID. Plaintiffs and others similarly situated often struggle to gather the required documentation, make travel arrangements and obtain time off from work to travel to the county clerk or local registrar, and then to the DPS, all to receive an EIC.[63]

While Texas's voter ID law is more restrictive than the laws at issue in Crawford and Frank, **it is still less restrictive than the North Dakota laws**. For example:

- The Texas law authorized the use of six different forms of ID when voting in person.[64] North Dakota only permits four forms of ID for in-person voting.[65]
- The Texas law permitted voters to cast a provisional ballot if they could not produce ID at the polls.[66] North Dakota offers no fail-safe provisions.[67]
- The Texas law waived any state or county fees associated with obtaining a birth certificate.[68] North Dakota charges $7 for a birth certificate, and does not waive any fees.[69]
- The Texas law recognized exceptions for voters with disabilities, voters that lost their ID as a result of a natural disaster, and voters who have a religious objection to being photographed.[70] North Dakota has no exceptions for in-person voting.

The fact the Fifth Circuit in Veasey struck down a law that is less restrictive than North

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[62] See generally Veasey, 796 F.3d 487.

[63] Veasey, 796 F.3d at 516.

[64] Veasey, 796 F.3d at 494.

[65] See Plaintiffs' Memo., ECF No. 44 at 5-7 (discussing provisions of HB 1332 and 1333).

[66] Veasey, 796 F.3d at 495.

[67] See Plaintiffs' Memo., ECF No. 44 at 5-7 (discussing provisions of HB 1332 and 1333).

[68] Veasey, 796 F.3d at 494-95.

[69] See Plaintiffs' Memo., ECF No. 44 at 10-11 (discussing getting birth certificates).

[70] Veasey, 796 F.3d at 495.

Dakota's new voter ID laws provides an additional basis to believe Plaintiffs will likely prevail on their Section 2 claims.

III. Contrary to Defendant's Assertions, Plaintiffs Will Likely Prevail On Their Constitutional Claim.

Defendant has also failed to identify any reason why Plaintiffs will not prevail on their claim for violation of the Equal Protection Clause of the 14th Amendment. As Plaintiffs noted in their Memorandum, the U.S. Supreme Court in Burdick and Crawford articulated a balancing test for such claims that involves weighing the injuries caused by the laws against the "precise interests put forward by the State as justifications for the burden imposed by its rule."[71] For severe or substantial burdens, the regulation must be "narrowly drawn to advance a state interest of compelling importance."[72]

Defendant concedes that the "precise interest put forward by" North Dakota is the prevention of voter fraud: "The goal of these bills is to uniformly fulfill the State's obligation to verify that any particular voter meets the constitutional prerequisites to vote: that he or she is at least 18 years old, a citizen of the United States of America, and a resident of the state of North Dakota."[73]

First, the new laws contradict the purported state interest by disenfranchising state citizens who are qualified to vote. This can include qualified voters who cannot afford to get a new ID, as well as individuals who could have demonstrated they were qualified voters if fail-safe mechanisms were available. Second, the laws fail to verify that all state voting qualifications have been satisfied. Only U.S. citizens may vote in North Dakota.[74] However, a non-citizen can obtain both a North Dakota driver's license and a non-driver ID by presenting a permanent resident card, a foreign passport, or an I-94 stamped as a

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[71] Plaintiffs' Memo., ECF No. 44 at 36 (quoting Burdick and Crawford).

[72] Burdick, 504 U.S. at 434.

[73] Opposition, ECF No. 45 at 1. See also id. at 7, 15.

[74] N.D. Const. art. II, § 1.

refugee/asylee.[75] Thus, not only do state driver's licenses and non-driver IDs fail to verify the U.S. citizenship qualification, but an unqualified person could present these qualifying forms of ID at a polling place and cast a fraudulent ballot.

In addition, Defendant offered no evidence (or even any argument) suggesting North Dakota had a voter fraud problem necessitating significantly more restrictive ID requirements, and ignored contrary evidence offered by Dr. McCool indicating that:

- Defendant himself admitted in a 2006 letter that his "office has not referred any cases of voter fraud to the United States Attorney, the North Dakota Attorney General, or to local prosecutors," because "We haven't had any to refer." Defendant stated: "What we have works and works very well."[76]
- Various studies and surveys of voter fraud reported only a few cases of attempted fraud in North Dakota. Former Governor Lloyd Omdahl declared that "North Dakota conducted elections without voter registration for 56 years without fraud. Voting fraud is not in our blood."[77]
- At the time the North Dakota legislature was considering HB 1332 and 1333, numerous state officials and elected representatives noted the absence of any voter fraud problem, and commented that the legislation was a "solution looking for a problem."[78]

As Dr. McCool concluded, there was no justification for more strict voter ID requirements.[79]

Defendant also ignored Plaintiffs' evidence regarding the real reason why the Republican-dominated North Dakota legislature passed the new voter ID laws: to depress

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[75] See N.D. DOT, Proof of Identification Documents, ID Card Requirements (2015), http://dot.nd.gov/divisions/driverslicense/docs/proof-of-identification-documents.pdf; see also N.D. Cent. Code 39-06-03 (North Dakota's Motor Vehicle Code does not exclude non-citizens from eligibility to a obtain driver's license of non-driver ID).

[76] McCool Decl., ECF No. 44-2 at ¶ 36.

[77] McCool Decl., ECF No. 44-2 at ¶¶ 36, 39, 40.

[78] McCool Decl., ECF No. 44-2 at ¶¶ 37, 38, 39, 41, 42.

[79] McCool Decl., ECF No. 44-2 at ¶¶ 44-46.

turnout among likely Democratic voters. Dr. McCool referred to academic studies establishing the "negative impact" voter ID laws have had on the turnout of Democratic voters, and cited numerous examples of Republican politicians and operatives boasting about the partisan political benefits their party would realize from restrictive voter ID laws.[80] However, suppressing votes to help Republicans win elections would be a repugnant and undemocratic interest, and cannot provide a basis for upholding the laws.

Moreover, Plaintiffs' evidence indicates North Dakota's new ID laws impose disproportionate burdens on Native Americans that have resulted in, and will continue to result in, eligible Native Americans not being able to exercise their right to vote. Given the substantial burdens on the right to vote Plaintiffs have identified, North Dakota's voter ID law must be narrowly drawn to serve a state interest of compelling importance. While the prevention of voter fraud might have been sufficient in Crawford (where the restrictions were more lenient and reasonable), it must be much weightier here given the substantial burdens North Dakota's voter ID laws place on voters. Given the lack of voter fraud and the fact the voter ID law will not prevent fraud, the State cannot meet its heavy burden.

IV. Plaintiffs Satisfy The Other Preliminary Injunction Factors.

In their opening papers and above, Plaintiffs have shown they are likely to succeed on the merits. The Eighth Circuit has held this is the most critical of the 4-factor preliminary injunction test.[81] Plaintiffs also have established the other three factors.

A. Plaintiffs Have Established Irreparable Harm.

As Plaintiffs pointed out, courts have declared that "irreparable injury is presumed" when constitutional rights, such as the right to vote, are "threatened or impaired" because

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[80] McCool Decl., ECF No. 44-2 at ¶¶ 49-55.

[81] Shrink Missouri Government PAC v. Adams, 151 F.3d 763, 764 (8th Cir. 1998) ("The most important of the Dataphase factors is the appellants' likelihood of success on the merits."). Defendant improperly relies on Vorachek v. Citizens State Bank in reciting the preliminary injunction standard. (Opposition, ECF No. 45 at 3.)

the franchise is a "fundamental political right" that is "preservative of all rights."[82] Empirically, Plaintiffs have proven the new voter ID laws disenfranchised Plaintiffs Vivier, Herman and Brakebill, and many other Native Americans and North Dakotans in the 2014 election.[83] Plaintiffs also have proven that **more than 3,800 Native Americans will likely be denied the right to vote in the upcoming election** absent injunctive relief.[84] These injuries are also considered irreparable because no monetary damages can compensate deprivation of the right to vote.[85]

Defendant maintains there is no irreparable injury because Plaintiffs have several months "to take the necessary steps to secure ID."[86] This argument completely ignores the overwhelming evidence Plaintiffs submitted indicating the new voter ID laws impose such disproportionate burdens on Native Americans that many will not be able to obtain qualifying ID and/or cannot afford the costs of obtaining new IDs, and that they have a discriminatory impact on Native Americans.[87] Defendant tries to argue the State cannot be responsible for any harm, but it was the State that enacted an extra-strict, broadly-drawn law without legitimate justification.

B. The Balance Of Hardships Tips In Favor Of Injunctive Relief.

Contrary to Defendant's assertion, Plaintiffs expressly addressed the balance of hardships by showing that the permanent and irreversible injury of eligible voters not being able to participate in this year's election outweighs the minimal burden the State would incur if it had to conduct this year's election in the same way it successfully

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[82] Plaintiffs' Memo., ECF No. 44 at 38 (quoting cases).

[83] Plaintiffs' Memo., ECF No. 44 at 17-18 (citing declarations).

[84] Plaintiffs Memo., ECF No. 44 at 12 (citing Barreto Decl. ¶ 44).

[85] Plaintiffs' Memo., ECF No. 44 at 18, 38-39.

[86] Opposition, ECF No. 45 at 11.

[87] The failure-to-overcome-a-burden-is-nothing-more-than-an-individual's-choice argument has been refuted. See Veasey, 29 F. Supp. 3d at 919. See also Bone Shirt, 336 F. Supp. 2d at 1037-38.

administered elections before enactment of the new voter ID laws.[88]

Defendant argues the Court should deny Plaintiffs' request for relief because there is purportedly no time to "rollback" HB 1332 and 1333.[89] This claim is directly contrary to the representations Defendant made to the Court and Plaintiffs when regarding the briefing schedule for this motion. During a May 12 status conference, and also in talks with Plaintiffs' counsel, Defendant indicated the State would be able to effectuate any injunction order issued **by early September** (which is consistent with Defendant's statement that work for upcoming elections "picks up intensity on September 6").[90] Moreover, Plaintiffs and the Court agreed to Defendant's proposed briefing schedule based on Defendant's representations that the State could comply with an order issued **by early September**. The Court should not let Defendant reverse position now, after ordering the stipulated schedule.

Defendant identifies purported problems the State would face were the Court to order relief. **These assertions are unsupported by evidence** and are overblown. First (at page 13), Defendant complains of insufficient time to replace "election materials" created for the "2016 Election Cycle." The State can easily replace these with materials the State used in 2012. Defendant argues it cannot "dust off" the 2012 versions because the State has to account for other election law changes made since 2012 (which the State fails to specify). But the State can address this problem by distributing supplementary written materials that only cover the non-voter ID changes since 2012, or just the voter ID changes.

Second (at page 13), Defendant complains it would have to provide "supplemental training" to election workers. Yet, Defendant admits poll worker training occurs between September 23 and November 8.[91] Moreover, it is likely that most, if not all, election

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[88] Plaintiffs' Memo., ECF No. 44 at 39.

[89] Opposition, ECF 45 at 12.

[90] Opposition, ECF 45 at 12.

[91] Opposition, ECF 45 at 13.

workers had experience with elections under the prior rules. It will be easy for those workers to adapt to an injunction order that reverts to the prior system.

Third (at page 14), Defendant complains an injunction order would waste the "more than $18,000 already spent solely on the public voter identification educational campaign." First, the evidence clearly indicates Defendant's educational campaigns have not been effective.[92] Second, an expenditure of $18,000, while not trivial, cannot outweigh an individuals' right to vote or justify disenfranchising them. As the court stated in Stewart v. Blackwell, "the State's proffered justifications of cost and training are wholly insufficient to sustain its continued certification of the technologies. Administrative convenience is simply not a compelling justification in light of the fundamental nature of the right."[93]

Fourth (at pages 14-15), Defendant complains an injunction would deprive voters "of their reassurance that only qualified voters were allowed to cast ballots." However, Defendant has not provided any evidence that the new laws "reassure" voters that only qualified voters can vote. To the contrary, voters may well have been more reassured about the fairness of North Dakota's previous voting system. Indeed, Defendant ignored Plaintiffs' evidence that, before the enactment of the new voter ID laws, election experts hailed North Dakota's election system as the best in the nation and said there was no voter fraud problem. Furthermore, as discussed above, Defendant ignores the fact that the new voter ID laws do not assure that only U.S. citizens will vote.

Fifth (at page 15), Defendant complains, without evidence, that an injunction order would harm volunteer poll workers because the change would increase stress. **Defendant has it upside down**. Eliminating the more restrictive voter ID requirements would decrease stress. Poll workers would not need to know as many rules and they would be less likely to have to confront people at the polls and tell them they cannot vote.

Ultimately, Defendant concedes it could implement an injunction order with a

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[92] Plaintiffs' Memo., ECF No. 44 at 9.

[93] Stewart v. Blackwell, 444 F.3d 843, 869 (6th Cir. 2006), vacated as moot, Stewart v. Blackwell, 473 F.3d 692 (6th Cir. 2007).

"Herculean effort."[94] It likely would be much less burdensome than that. Indeed, it is difficult to believe it would be hard for the State to revert to a system in place just one election cycle ago. The Court should trust and expect that North Dakota can and will comply with any injunction order it issues. Indeed, when a state has notice that election laws may change in the months preceding the election, it should prepare for each alternative.[95]

C. The Public Interest Supports Affirmation of Voting Rights.

Plaintiffs did not, as Defendant argues, ignore the public interest prong of the PI test. Indeed, Plaintiffs pointed out that the public interest "favors permitting as many qualified voters to vote as possible."[96] The public interest in protecting perhaps the most cherished right an American citizen can possess for thousands of Native Americans who currently lack qualifying ID and cannot obtain an ID without overcoming substantial, disproportionate burdens, outweighs the purported interests asserted by Defendant.[97]

V. Conclusion.

For all the foregoing reasons, Plaintiffs respectfully request that the Court order the requested preliminary injunctive relief.[98]

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[94] Opposition, ECF No. 45 at 16.

[95] See Veasey v. Perry, 135 S.Ct. 9-10 (2014) (mem.) (Ginsburg, J., dissenting) ("Texas knew full well that the court would issue its ruling only weeks away from the election. The State thus had time to prepare for the prospect of an order barring the enforcement of Senate Bill 14.").

[96] Plaintiffs' Memo., ECF No. 44 at 40 (quoting Obama for America, 697 F.3d at 437).

[97] See Opposition, ECF No. 45 at 12-16.

[98] While Purcell v. Gonzales notes that courts must be aware of considerations specific to election cases, these considerations are part of the many factors courts weigh in issuing a preliminary injunction. 549 U.S. 1, 4 (2006) (per curiam), see R.L. Hasen, Reining in the Purcell Principle, 43 Fla. St. U. L. Rev. 1, 2, 37-8 (forthcoming 2016).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2016, the document titled "**Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction**" was electronically filed with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing ("NEF") to:

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