

UNITED STATES DISTRICT COURT
FOR THE 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.

Case No. 1:16-CV-00008

**MEMORANDUM IN SUPPORT OF MOTION
TO DISSOLVE PRELIMINARY INJUNCTION**

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INTRODUCTION

In response to concerns that the validity of an extremely close 2012 United States Senate race could not be verified because of numerous votes cast by voters who stated their eligibility to vote only by means of executing a Voter's Affidavit, the 2013 North Dakota Legislative Assembly removed the Voter's Affidavit from the State's election laws. Use of Voter's Affidavits is incompatible with North Dakota's longstanding and progressive choice to use a non-registration election system. Voter's Affidavits let individuals vote before the State can verify the voters' basic qualifications, and allow potentially ineligible votes to be included in certified election results.

Without the check provided by comparing the identity of an individual voting by affidavit with a registry list, a Voter's Affidavit permits an individual to create a fake name, link it with a valid address in a given precinct, and then cast a vote -- with virtually no chance of the fraud being detected. A special interest group or individual targeting an election in North Dakota could cast fraudulent votes in multiple precincts on a given election day, and multiply the impact of the fraud by employing more than one individual to carry out the scheme -- all with virtually no threat of detection or subsequent criminal consequences.

The use of self-authenticating Voter's Affidavits in a non-registration system leaves a post-election challenge as the only means to challenge votes submitted mistakenly or fraudulently by Voter's Affidavit. A post-election challenge is untenable because mistaken or fraudulent votes cannot be separated from the vote count after-the-fact, even if a vote is found to be fraudulent and even if the fraud is prosecuted.

On August 1, 2016, this Court enjoined North Dakota from enforcing the voter identification (ID) election laws passed by the 2013 Legislative Assembly. This action was taken on the grounds that those voter ID requirements violated the equal protection rights of Native American citizens. The Court determined Native Americans face

disproportionate burdens in obtaining acceptable forms of ID in order to vote in a state election. ECF Doc. ID 50 at 21. The Court noted the 2013 law eliminated both of the former “fail-safe” provisions – the Voter’s Affidavit and Poll Worker Verification -- that allowed putative electors who lack valid IDs to cast votes. Id. at 3. The Court determined that some form of “fail-safe” provision was required to allow a putative elector to cast a vote. Id. at 28-29. The Court then entered an Order Regarding Preliminary Injunction that allowed all electors in the state – not just the seven individual plaintiffs -- to utilize a Voter’s Affidavit to cast votes in elections held in the state “until further order of this Court.” ECF Doc. ID 62 at 3.

Subsequent to this Court’s preliminary injunction and implementing order, the North Dakota Legislature amended its election laws to include a “fail-safe” provision. Effective July 1, 2017, North Dakota law permits individuals who do not present a valid ID when appearing to vote to mark a ballot that is set aside until the individual’s qualifications as an elector can be verified. See N.D. Cent. Code § 16.1-01-04.1(5). Prior to the meeting of the canvassing board occurring on the sixth day after an election, an individual can establish eligibility as an elector through a combination of documents that verify eligibility to vote. Id. The supplemental documents permitted by the new law are the same documents individuals without ID may use under federal law when registering to vote in another state. When the documents proving eligibility are submitted to the proper election official prior to the meeting of the canvassing board, the ballot set aside for that voter is cast and counted by the canvassing board.

Defendant Alvin A. Jaeger respectfully submits that the solution fashioned by the Court in the Order Regarding Preliminary Injunction -- the “across-the-board” use of self-authenticating Voter’s Affidavits in a non-registration state – reintroduces a problematic flaw into North Dakota law. Due to the intervening change in circumstance resulting from the alternative “fail-safe” provision of North Dakota’s new law – which is compatible with the State’s progressive choice not to require registration -- defendant

moves the Court to dissolve the preliminary injunction to prevent another North Dakota election from being tainted by the use of self-authenticating Voter's Affidavits.

BACKGROUND INFORMATION

For over sixty-five years, North Dakota residents have voted without the burden of registration. Arnold Affidavit ¶ 4. Unlike all other states that bar citizens from voting unless they have registered prior to voting, all North Dakota residents are permitted to vote simply by establishing the basic qualifications to vote. With respect to voter registration, North Dakota is undisputedly the least restrictive state in the nation.

North Dakota's Constitution sets forth the three basic qualifications to vote. An individual must be (1) a citizen of the United States, (2) who is at least eighteen years of age, and (3) a North Dakota resident. N.D. Const. Art. II, § 1; see also N.D. Cent. Code § 16.1-01-04.¹ North Dakota defines residency for purposes of voting as having "resided in the precinct at least thirty days immediately preceding any election." N.D. Cent. Code § 16.1-01-04(1)(c).

The means by which North Dakota determines U.S. citizenry, age, and North Dakota residency is by having an individual "provide a valid form of identification [ID] to the proper election official" that contains the individual's "[l]egal name; . . . [c]urrent residential street address in North Dakota; and . . . [d]ate of birth." Id. § 16.1-01-04.1(2). The two primary forms of valid ID are: "(1) A driver's license or nondriver's identification card issued by the North Dakota department of transportation; or (2) An official form of identification issued by a tribal government to a tribal member residing in this state." Id. § 16.1-01-04.1(3). Both a North Dakota driver's license and a nondriver's identification card can be used to determine whether the holder is a citizen of the United States. See N.D. Cent. Code §§ 39-06-03.1(2) & (3); 39-06-07.1; 39-06-14(5). Similarly, tribal IDs are only issued to enrolled members of federally recognized tribes and thus an

¹Some individuals who meet these three basic qualifications may still be ineligible to vote because they have been declared mentally incompetent or because they have not had their civil rights restored following a felony conviction. See N.D. Const. Art. II, § 2.

individual's possession of one also establishes U.S. citizenry. See Indian Citizenship Act of 1924, Pub. L. No. 175, 43 Stat. 253 (1924); 8 U.S.C. § 1401(b).

If an ID is not current or is missing required information (e.g., current residential street address), the voter can present an election official with certain documents that provide the missing or outdated information. Those supplemental documents are “(1) A current utility bill; (2) A current bank statement; (3) A check issue by a federal, state, or local government; (4) A paycheck; or (5) A document issued by a federal, state, or local government.” N.D. Cent. Code § 16.1-01-04.1(3)(b). This list of supplemental documents is identical to the list of documents an elector without ID can use to register to vote under the Help America Vote Act (HAVA). See 52 U.S.C. § 21083(b)(2)(A)(i).

Establishing an elector's current residential street address is vital not only to verify the elector's basic qualifications to vote, but also necessary to provide the elector with the proper ballot. Ballots must be specifically tailored for many different local elections, such as district and municipal judges, county commissioners and state's attorneys, city mayors and council members and alderpersons, school boards, water authorities, diversion conservancies, park boards, ambulance district boards, vector control district boards, and library boards. Precinct and precinct part boundary lines are drawn because of a change from one jurisdictional area to another. As a result, neighbors living across the street from one another must cast different ballots with different contests included on each if the precinct or precinct part lines separate the two sides of the street.

For example, for the June 2016 primary election in North Dakota, no less than 807 separate optical scan ballots were required to properly administer the election statewide. Arnold Affidavit, ¶ 13 & Exhibits A1-A53. Forty-eight distinct optical scan ballots were required in Burleigh County, and 102 distinct optical scan ballots were required in Cass County. Id. Exhibits A8 & A9. County auditors also prepared an additional 102 paper ballots from which the votes were counted by hand rather than the

voting machine for certain smaller contests, such as vector control district board elections, library boards, or ambulance boards. Id. ¶ 14. In all, then, a total of 909 different ballots were required statewide. The integrity of any particular election, and the integrity of all races for public office and measures at issue in a given election, can only be ensured if the State can show that each elector was provided the correct ballot associated with the residential address where the individual resides. Id. ¶ 15.

Three precincts in Mercer County alone illustrate very well the state's interest in identifying exact residential street addresses in order to provide the correct ballot to each voter. In the June 2016 election, poll workers in Precinct 3313 had to determine which of four distinct precinct part ballots to provide to its voters because some voters were eligible to vote for a Zap Rural Fire District measure based upon their residential street address while others were not, some were eligible to vote for Beulah School Board members while others were not, and some were eligible to vote for a Zap City measure and three specific city elections for council member, municipal judge, and park board member while others were not. Id. Exhibit A29. Similarly, poll workers in Precincts 3314 and 3316 had four distinct precinct part ballots to match with eligible voters based on residential street address because of votes on a city measure, a fire district measure, city council member elections, and differing school board member elections. Id.

All candidates necessarily have an interest in ensuring that the votes they receive are valid, and that all voters eligible to vote for them receive the correct ballot. The candidates for Park Board Members of the City of Bismarck, for example, have an interest in ensuring the voters in the Solheim School precinct receive the WC (With City) precinct part ballot if their residential street address makes them eligible to vote in the park board election, but that voters who are not eligible receive the NC (No City) precinct part ballot. Id. Exhibit A8. Numerous other examples showing subtle yet vital differences between election boundary lines can be found among the 807 statewide

optical scan ballots and the additional 102 paper ballots required for the June 2016 election, as well as other statewide elections. The failure of a voter to identify his or her exact residential street address has a direct impact on the integrity and validity of multiple election contests within a particular precinct (or county where an elector tries – intentionally or unintentionally – to vote in the wrong precinct).

As this Court noted in granting the preliminary injunction, prior to 2013 North Dakota law permitted an individual to vote in an election by executing a Voter's Affidavit attesting that he or she is a qualified elector. See N.D. Cent. Code § 16.1-05-07(2) (2012) ("If an individual offering to vote does not have or refuses to show an appropriate form of identification, the individual may be allowed to vote . . . according to section 16.1-05-06"); N.D. Cent. Code § 16.1-05-06 (2012) (setting forth the circumstances under which a putative elector can execute a Voter's Affidavit and vote in the absence of providing a valid ID).

This practice permits individuals to have their votes count in an election without the State first verifying or being shown verification as to whether they possess the basic qualifications to vote. The practice of using self-authenticating Voter's Affidavits has been a potential problem ever since North Dakota adopted a non-registration system in the sense that the State cannot guarantee the integrity of election results prior to final certification of same, but must instead rely upon post-election efforts by election officials to verify the qualifications of the affiants. Attempts made by election officials to verify the qualifications of the affiants often prove to be ineffectual for a variety of reasons. For example, the mail is not delivered to a residential street address in many North Dakota communities, but to a post office box. Attempting to verify an affiant's residential street address by sending a post-election verification post card to a post office box does not verify the affiant's residential street address and whether the proper ballot was provided to him or her. Silrum Affidavit ¶ 26.

The practice of using Voter's Affidavits contributes to the problem of having voters listed in North Dakota's central voter file with illegitimate addresses. Following the November 2016 election, it was discovered that 311 individuals living in the four largest counties by population (Burleigh, Cass, Grand Forks, and Ward) were using the addresses of United Parcel Service (UPS) stores in Bismarck, Fargo, Grand Forks, and Minot as their residential street address for voting purposes. Silrum Affidavit ¶ 20. Even if these addresses found their way into the central voter file through the use of acceptable forms of ID rather than previous use of a Voter's Affidavit, purposeful fraud was likely required at some point because applications for a driver's license or non-driver's ID require an individual to list their residential street address and are signed under penalty of perjury. Hamilton Affidavit ¶ 4 and Exhibit H1.

In a non-registration system, the practice of using Voter's Affidavits permits an individual with ill intent to cast fraudulent ballots in multiple precincts, but avoid detection and prosecution simply by using a pseudonym in conjunction with a legitimate address within each precinct. A relatively small number of voters all using the same strategy could cast hundreds or thousands of fraudulent votes in a single election, with very little threat that the fraud would ever be traced back to them through the pseudonyms entered on the Voter's Affidavits. Instead, what inevitably occurs is that the state's post-election attempts to verify the affiants' qualifications result in post cards not being returned at all or being returned as undeliverable, i.e., "ghost votes." This is problematic because elections are often decided by a relatively small number of votes. The public's and the candidates' confidence in the integrity of election results is undermined when the State cannot verify even a small number of votes in any given election, whether fraudulent or not.

Significantly, even if fraud is later discovered, the fraudulent votes would have already been included in the election results, the election already certified, and there

would be no means to separate the fraudulent votes from those cast by eligible voters to arrive at the correct election results.

The possibility of undetected and unchallenged voter fraud stemming from North Dakota's use of self-authenticating Voter's Affidavits under a non-registration system dates back to the 1960s. In his book, *With No Apologies*, Barry Goldwater discussed the special election held in 1960 for a vacancy in the United States Senate due to William Langer's death, and his belief that voter fraud resulting from the use of Voter's Affidavits resulted in John Davis losing the election to Quentin Burdick.² Goldwater also discussed the difficulty of investigating the fraud after the election results had already been certified:

Davis was a popular governor, but he did not enjoy the support of organized labor. North Dakota had the same kind of instant voter registration President Carter has advocated—that is, on election day a voter could present himself at the polls, announce his name, give an address, and sign an affidavit to cast it.

Davis lost that special election by about 1,000 votes, even though the polls had shown him in the lead. A few days after the ballots were counted I was informed the Republicans had discovered widespread vote fraud. In the city of Minot some 535 people had cast their ballots on the basis of that affidavit of qualification, but investigators could not locate the individuals or the addresses given. Similar results were discovered in Bismarck and Fargo.

With No Apologies, The Personal and Political Memoirs of United States Senator Barry M. Goldwater at 107-08 (William Morrow and Company 1979).

Goldwater goes on to opine that the United States Attorney General's failure to bring a post-election challenge to the 1960 "ghost vote" in North Dakota's special election may have played a part in President Kennedy's election in 1960, an election some believe was impacted by voter fraud in West Virginia in the Democratic primary, and voter fraud in Texas and Illinois in the general election:

In retrospect, it seems to me that had Nixon challenged the admitted fraudulent votes in the West Virginia primary, Kennedy would not have

²Burdick's margin of victory was just 1,118 votes out of 218,745 total votes cast. Silrum Affidavit ¶ 7 & Exhibit S1.

been nominated. Had [Attorney General Bill Rogers] gone to court over the [1960] ghost vote in North Dakota, public opinion would have been supportive of [a post-election] challenge to the general election results in Illinois and Texas.

Id. at 124.

Recently, North Dakota has faced unique challenges in ensuring the integrity of its elections due to a more mobile, diverse, and transient population. In the six years preceding the November 2016 general election, North Dakota is estimated to have gained 85,000 residents, equivalent to the 2010 populations of Bismarck and Mandan. See Silrum Affidavit ¶ 9 & Exhibit S2 at page 12. Significantly, this net gain of 85,000 does not account for thousands of others who would have come to the state, established a residence for at least thirty days, but then left. Between 2011 and 2016, North Dakota led the nation in the average annual rate of net gain from migration. Id. Exhibit S2 at page 22.

Some of the Voter's Affidavits from the November 2016 general election reflect the mobile and transient nature of North Dakota's current population. Of the 16,215 ballots cast by voters using the Voter's Temporary Affidavit during that election, 4,849 of the affiants listed an address in another state as their former residence. Silrum Affidavit ¶ 38. In addition, all forty-nine other states and the District of Columbia were listed as former states of residence by these affiants. Id. An additional 2,784 affiants did not list a former residence on an executed Voter's Affidavit, leaving open the possibility that some of them had just recently moved to North Dakota from another state or were still residents of that former state. Id.

North Dakota's population is becoming more diverse as well. Between April 1, 2010 and July 1, 2015, North Dakota experienced an estimated change of 13% in its population by race and ethnicity, with a 123% increase in its Black population, a 49% increase in its Asian population, a 78% increase in its Pacific Islander population, and a 99% increase in its Hispanic population. Silrum Affidavit Exhibit S2 at page 42.

As this Court noted in granting the preliminary injunction, until recently North Dakota permitted poll workers to vouch for eligible voters because the poll clerks “generally knew who were and were not eligible voters in their precincts.” ECF Doc. ID 50 at 2. The Court identified this as a “fail-safe” mechanism to prove a voter’s eligibility. Id. But given North Dakota’s changing demographics, the continued use of this “fail-safe” raises the possibility of a different kind of equal protection/discrimination claim when poll workers can identify and vouch for their long-time Caucasian neighbors, but cannot vouch for Black, Asian, or Hispanic individuals who just recently moved to North Dakota.

North Dakota’s small population, coupled with the use of self-authenticating Voter’s Affidavits, make it a potential target for special interest groups who believe a concentrated block of votes may sway a close but important election, such as a United States Senate seat. Individuals with a common purpose can be mobilized very quickly by special interest groups through the internet and social media. Indeed, the number of individuals mobilized almost overnight to come to North Dakota to protest the Dakota Access Pipeline reached “some 5,000 to 10,000 protesters at the height of the movement in early December [2016].” Terry Sylvester, Dakota pipeline protest camp nearly empty as holdouts face removal, Reuters (February 27, 2017, 5:05 AM), <http://www.reuters.com/article/us-north-dakota-pipeline/dakota-pipeline-protest-camp-nearly-empty-as-holdouts-face-removal-idUSKBN16115W>. Many stayed longer than thirty days. Although this influx of nonresidents did not come to North Dakota to vote, the state has an interest in preventing the same phenomena from happening for the purpose of influencing a close, national election or a statewide measure that could have cascading impacts on the law of other states.

In 2012, there were 10,519 votes cast using self-authenticating affidavits in an election where the United States Senate race between Rick Berg and Heidi Heitkamp was decided by just 2,936 votes out of the 321,144 votes cast for that contest. Silrum

Affidavit ¶ 10. Similar to the 1960 “ghost vote” discussed by Goldwater, election officials had difficulty contacting those voters for verification purposes after the election for a number of reasons: “affiants . . . had moved to another address and had not left a forwarding address, did not include a unit number of the address provided, or did not reside at the address they listed.” Silrum Affidavit ¶ 11.

In addition, there was no uniform statewide verification process because each county auditor had the post-election responsibility of verifying the eligibility and qualification of the affiants. Id. Because 10,519 votes were cast by individuals who could not or refused to prove eligibility, the fact that the Senate race was decided by a mere 2,936 votes raised questions regarding the eligibility of the unverified affiants. Id. ¶ 10. Because of the inherent limitations of relying upon a post-election verification process when self-authenticating Voter’s Affidavits are permitted, “[e]ven if it had been possible to identify ineligible voters, it would have been impossible to extract the votes cast by these [ineligible] voters from the final tally.” Id. ¶ 11.

Because of the unanswered questions raised about the qualifications of the voters in the 2012 election, the 2013 Legislature eliminated the self-authenticating Voter’s Affidavits from its election process. Id. ¶ 14. At that time, North Dakota had determined that more than 97% of the voters listed in the state’s Central Voter File (CVF) had a valid driver’s license or non-driver’s ID issued by the North Dakota Department of Transportation. Id. To alleviate the minimal burden that might be imposed upon less than 3% of the known electorate that did not already have a valid ID, a non-driver’s ID would be issued at no cost to any resident who did not already have a driver’s license or non-driver’s ID and who wanted an ID for voting. Id.

The elimination of the long-standing flaw of permitting self-authenticating Voter’s Affidavits in a non-registration state was, however, short lived. In September 2016, the Court entered its Order Regarding Preliminary Injunction that permitted any elector to vote through the use of a Voter’s Affidavit. During the November 2016 general election,

16,215 ballots were cast by individuals using the self-authenticating Voter's Affidavits. Id. ¶ 21. Similar to the 2012 general election, election officials were faced with the difficulty of determining the qualifications of the affiants after the election had already been certified. It is now more than a year after the November 2016 election; despite numerous hours and tens of thousands of dollars spent attempting to verify the qualifications of the voters allowed to cast ballots through the use of a Voter's Affidavit, 3,682 votes cast in the November 2016 election remain unverified to this date. Id. ¶¶ 22-33.

This gaping hole in North Dakota's election process has been publicized by the press, which will inevitably undermine voter confidence in the integrity of the State's elections. See Rob Port, We Have No Idea if Voter Fraud Changed the Outcome of Some North Dakota Elections, SayAnythingBlog.com (September 12, 2017), <https://www.sayanythingblog.com/entry/no-idea-voter-fraud-changed-outcome-north-dakota-elections/>. ("The truth is that, under our current election laws, fraud could be happening and it could be impacting election outcomes, and not only can we not detect it in any sort of a timely fashion even if we did there's little we could do to reverse already certified election results.").

Similar to the 2012 election where the number of votes cast by those executing Voter's Affidavits (10,519) exceeded the vote difference in the United States Senate race, there were eighteen state legislative contests in the 2016 election where the number of votes cast by affiants exceeded the vote differential between the candidates. Silrum Affidavit ¶¶ 36-37. The inability to verify the validity of these close contests due to the use of Voter's Affidavits is not a partisan question, since the candidates ultimately elected were from both the Republican Party and the Democratic-NPL Party. Id. ¶ 37.

The untenable need to rely upon post-certification challenges to votes cast by self-authenticating Voter's Affidavits in a non-registration state is reflected by the ineffectual threat of criminal penalties attached to the act of submitting a fraudulent vote

through this process, even when the fraud is detected. Notwithstanding the difficulty of verifying the qualifications of affiant voters, the State identified at least nine suspected cases of fraudulent votes submitted during the 2012 general election. Id. ¶ 13. Despite referring these cases to the respective State's Attorneys in the counties where the fraud occurred due to "clear evidence of double voting," none were prosecuted. Id.

Following the 2016 general election, the Secretary of State's office is aware of 348 cases referred to the respective State's Attorneys for additional investigation and possible prosecution for voter fraud, and another 3,371 cases of unverifiable votes cast by Voter's Affidavit that should have been referred to the respective State's Attorneys. Id. ¶ 33. Of those cases, the Secretary of State's office is aware that the State's Attorneys were able to verify the qualifications of just 37 of the voters who cast ballots by Voter's Affidavit, id., but that only one individual has been charged with voter fraud and that case resulted in a diversion agreement suspending criminal prosecution. Id. ¶ 41. The Secretary of State also identified one instance of an individual voting by absentee ballot in North Dakota and in person in Idaho that was referred to federal prosecutors rather than a State's Attorney, but federal prosecutors declined to pursue the case. Id.

The Secretary of State's office has also encountered difficulty merely investigating whether any fraud occurred due to the use of Voter's Affidavits. Following the November 2016 general election, the names of 2,836 individuals who cast ballots in North Dakota through the use of a Voter's Affidavits and who listed Minnesota as their former state of residence were forwarded to the Minnesota Secretary of State's office to determine whether there were any instances of those individuals voting in both Minnesota and North Dakota in the 2016 general election. Id. ¶ 39. Minnesota responded, in part, by stating it could not share information with North Dakota about whether any of those 2,836 individuals who voted by affidavit in North Dakota may have also voted in Minnesota. Id.

Significantly, the limited instances of detectable fraud are distinct from the primary problem tied to the process for the verification of affiants – the undetectable fraud that can occur by using self-authenticating Voter's Affidavits in a non-registration state because affiants can use pseudonyms that cannot be traced back to the actual individual who casts an illegal vote, i.e., undetectable "ghost votes."

In response to this Court's August 2016 order requiring a "fail-safe," the North Dakota legislature passed House Bill 1369 during the 2017 legislative session. House Bill 1369 is now codified in various sections of Title 16.1 and, in relevant part, adopts a set aside ballot "fail-safe" for voters who do not possess a valid ID when appearing to vote. See N.D. Cent. Code § 16.1-01-04.1(5).

Unlike the process for self-authentication by use of a Voter's Affidavit, the set aside ballot "fail safe" adopted by the 2017 Legislature Assembly is compatible with North Dakota's use of a non-registration election system. Voters who do not possess a valid ID when appearing to vote are still permitted to mark a ballot, but that ballot is initially set aside, the voter is given not less than six days to establish their voting qualifications through supplemental documents identical to those permitted under federal law pertaining to voter registration, and the set aside ballot is included in the final certification of an election if a putative voter establishes the basic qualifications to vote with the proper election official.

Due to this intervening change in the law, defendant now respectfully requests this Court to terminate the preliminary injunction that requires use of self-authenticating Voter's Affidavits, because the use of such affidavits impairs North Dakota's significant and legitimate interests in (1) promoting voter confidence in the integrity of elections, (2) establishing an individual's basic qualifications and eligibility to vote, (3) aligning some of its election provisions with those of federal law under HAVA, and (4) preventing voter fraud.

ARGUMENT

I. The change in law justifies termination of the injunction.

“It is well settled that a district court retains authority under Rule 60(b)(5) to modify or terminate a continuing, permanent injunction if the injunction has become illegal or changed circumstances have caused it to operate unjustly.” Ass'n for Retarded Citizens of North Dakota v. Sinner, 942 F.2d 1235, 1239 (8th Cir. 1991). “The district court may exercise this power when it realizes that the injunctive relief is no longer needed due to intervening circumstances.” United States v. Northshore Min. Co., 576 F.3d 840, 849 (8th Cir. 2009).

A change in the law “provides sufficient justification for Rule 60(b)(5) relief.” Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc., 413 F.3d 897, 903 (8th Cir. 2005); see also Flavor Corp. of Am. v. Kemin Indus., Inc., 503 F.2d 729, 732 (8th Cir. 1974) (noting that “changes in any applicable statutory law” may justify modification of an injunction).

In granting the preliminary injunction, this Court emphasized North Dakota’s lack of “some type of a provisional ballot casting if a voting-age citizen does not have the requisite ID on election day.” ECF Doc. 50 at 22. The set aside ballot provisions in North Dakota’s current law now justify lifting the preliminary injunction to eliminate the need to use self-authenticating Voter’s Affidavits, which necessarily impair the State’s ability to ensure the integrity of elections, establish the basic qualifications on voters, and prevent voter fraud.

II. North Dakota’s interests justify any burdens imposed on Native American voters to establish the threshold qualification to vote.

All states have enacted complex election laws that “invariably impose some burden upon individual voters.” Burdick v. Takushi, 504 U.S. 428, 433 (1992). Indeed, each state’s posture toward in-person early voting, same-day registration, voter ID, out-of-precinct voting, and registration, just to name a few electoral mechanisms, “inevitably

affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.” Id. (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). A balancing test applies to voter-qualification related restrictions: a court must “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.” Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 190 (2008) (internal quotation marks and citations omitted).

A. North Dakota’s legitimate interests in preserving voter confidence, aligning its election requirements with federal law, and preventing voter fraud justify the minimal burden imposed on Native American voters.

Safeguarding voter confidence is a legitimate and important state interest. See Crawford, 553 U.S. at 197 (“[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process . . . the ‘electoral system cannot inspire confidence if no safeguards exist . . . to confirm the identity of voters.’”) (quoting Building Confidence in U.S. Elections § 2.5 (Sept. 2005) (Carter-Baker Report)).

Aligning election requirements with federal law is a legitimate and important state interest. See id. at 193 (noting the passage of HAVA “indicate[s] that Congress believes that photo identification is one effective method of establishing a voter’s qualification to vote and that the integrity of elections is enhanced through improved technology”).

Preventing voter fraud is a legitimate and important state interest. See id. at 196 (“There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process.”).

This Court entered its preliminary injunction in August 2016. In December 2016, the Fourth Circuit addressed an equal protection challenge to Virginia’s voter ID laws. See Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016). The Virginia law is similar to North Dakota’s current law in that “the Virginia legislature sought to synchronize its [photo ID] requirements with the Help American Vote Act (‘HAVA’), 42 U.S.C. § 15483, a federal law that requires photo identification for first-time voters registering by mail in federal elections.” Id. at 594. Similar to the allegations in this case, the plaintiffs alleged Virginia’s photo ID requirements violated the Equal Protection Clause by unduly burdening African American and Latino voters who, like the Native American plaintiffs involved here, alleged they were statistically less likely to have a valid form of identification. Id. at 594, 600. Similar to North Dakota’s current law, the Virginia law allows voters who lack a valid ID on the day of election to cast a provisional ballot and present the necessary documentation within three days. Id. at 594. Similar to North Dakota’s current law, Virginia voters could obtain a free ID from Virginia’s Board of Elections. Id.

Like the Native American plaintiffs here, the plaintiffs in Lee argued the Virginia law unduly burdened them by having to travel to the registrar’s office to obtain a government ID. Applying the Supreme Court’s decision in Crawford, the Fourth Circuit rejected the equal protection challenge. The Fourth Circuit determined that “the justifications Virginia advances here for [its voter ID law] are the same as those advanced by Indiana [in Crawford] – alignment with federal statutes like HAVA, prevention of voter fraud, and the preservation of voter confidence in the integrity of elections.” Lee, 843 F.3d at 606-07. Although Virginia did not require its registered voters to present a birth certificate or other documentation to obtain a free ID, “[r]equiring voters to provide documents proving their identity is not an invidious classification based on impermissible standards of wealth or affluence, even if some individuals have to pay to obtain the documents. On the contrary, such a requirement

falls squarely within the state's power to fix core voter qualifications.” Gonzalez v. Arizona, 677 F.3d 383, 409 (9th Cir. 2012).

The plaintiffs argue that, for some groups of minority voters, this opportunity is disproportionately burdened because a lower percentage of minorities have qualifying photo IDs and the process of obtaining photo IDs requires those voters to spend time traveling to and from a registrar's office. The Supreme Court has held, however, that this minor inconvenience of going to the registrar's office to obtain an ID does not impose a substantial burden. As recognized in Crawford, 553 U.S. at 198, 128 S.Ct. 1610, “the inconvenience of making a trip to [a government office], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” 553 U.S. at 198, 128 S.Ct. 1610 (Stevens, J., announcing the judgment of the Court); see also id. at 209, 128 S.Ct. 1610 (Scalia, J., concurring in the judgment) (“The burden of acquiring, possessing, and showing a free photo identification is simply not severe,” and “the State's interests are sufficient to sustain that minimal burden”).

Lee, 843 F.3d at 600.

Similarly, in Gonzalez, the Ninth Circuit recognized that the minor financial burden imposed on individual members of the twenty Native American tribes in Arizona in order to establish the basic qualifications to vote (i.e., age, U.S. citizenry, and state residency) did not support a facial constitutional challenge brought on equal protection grounds:

The lead opinion in Crawford held that the burden imposed on citizens who must obtain a photo identification document was not sufficiently heavy to support a facial attack on the constitutionality of the state law, in light of the state's legitimate interests in deterring and detecting voter fraud, modernizing election procedures, and safeguarding voter confidence. Id. at 191, 202-03, 128 S.Ct. 1610. The same reasoning is applicable here. While the lead opinion noted that photo identification cards were provided for free by Indiana, it also recognized that to obtain these free cards, prospective voters needed to “present at least one ‘primary’ document, which can be a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport.” Id. at 198 n.17, 128 S.Ct. 1610. Obtaining these primary documents, the Supreme Court acknowledged, may require payment of a fee. Id. Because Proposition 200's polling place provision allows voters to present these same sorts of primary documents, Proposition 200 is no more burdensome than the identification requirement upheld in Crawford. Nor has ITCA suggested any reason why Arizona's interests in imposing a photo identification requirement would be less weighty than the state interests at issue in Crawford. Therefore, even under the balancing test set forth in

Crawford's lead opinion, we would uphold Proposition 200's polling place identification requirement against a facial challenge.

In sum, because any payment associated with obtaining the documents required under Proposition 200's polling place provision is related to the state's legitimate interest in assessing the eligibility and qualifications of voters, the photo identification requirement is not an invidious restriction under Harper, and the burden is minimal under Crawford. As such, the polling place provision does not violate the Fourteenth Amendment's Equal Protection Clause.

Gonzalez, 677 F.3d at 409-10.

The tribal ID permitted under North Dakota's current law need be nothing more than a document from tribal authorities setting forth the tribal member's name, date of birth, and current residential street address. Silrum Affidavit ¶ 43. Indeed, the multiple options permitted by North Dakota law for a Native American voter (tribal ID or free document from tribal authorities, a North Dakota driver's license or a free North Dakota nondriver's ID) show that Native Americans have more options than the rest of the electorate to establish the basic qualifications to vote in North Dakota. In addition, in light of the fact that North Dakota specifically accommodates Native Americans by permitting a tribal ID to be used to vote, much of the evidence put forth by the plaintiffs about the alleged burdens of obtaining a state-issued ID (i.e., not enough DMV sites, travel distances, etc.) is largely irrelevant to the plaintiffs' equal protection challenge.

Thus, under Crawford's balancing test, the precise state interests advanced in Lee (aligning ID requirements with federal law, prevention of voter fraud, and preserving confidence in the integrity of elections) and Gonzalez justified the burden imposed by photo ID laws that had a disparate impact on minorities who were statistically less likely to have a valid ID. Similarly, North Dakota's interests in preserving voter confidence, aligning its ID requirements with those of HAVA, and preventing voter fraud justify the minimal burden imposed on Native American voters in obtaining a free non-photo ID, notwithstanding the allegation that they are statistically less likely to have a valid ID than is a Caucasian voter. Native American voters in North Dakota have no more of an

impermissible burden in obtaining a tribal ID, free tribal document, or a free nondriver's state ID, than the constitutionally permissible burden imposed on minority voters in Virginia or the constitutionally permissible burden imposed on Native American voters in Arizona.

B. North Dakota's interest in establishing the basic qualifications to vote without requiring registration justifies the minimal burdens imposed by the current law.

Unlike Lee, Gonzalez and Crawford, all of which involved challenges to voter ID in registration states, this case involves a challenge to voter ID in a non-registration state. Thus, while the Fourth Circuit's rationale and application of Crawford in Lee, or the Ninth Circuit's rationale and application of Crawford in Gonzalez, standing alone, would be sufficient justification for the Court to lift the preliminary injunction, there is an additional reason why an equal protection challenge should fail in this case. Simply put, a challenge to North Dakota's non-photo ID requirements also implicates the State's interest in establishing voters' qualifications without imposing upon them a burden to register.

Voter ID requirements in other states impose a burden upon voters who have already established their qualifications and eligibility to vote through the registration process. While other states require an elector to present an ID on election day for the purpose of comparing information on the ID with the information in the state's registry, North Dakota uses its non-photo ID requirements to determine whether an individual is (1) a citizen of the United States, (2) who is at least eighteen years of age, and (3) a North Dakota resident. See N.D. Const. Art. II, § 1; N.D. Cent. Code § 16.1-01-04.

This fundamental difference between North Dakota and all other states necessarily puts an equal protection challenge to North Dakota's law on a different footing than challenges to voter ID in other states. This fundamental difference also requires the Court to view the use of self-authenticating Voter's Affidavits in a different manner. While self-authenticating affidavits in registration states permit registered

voters to attest to their identity if they do not have a valid ID on election day, their names and addresses must still appear in the state's registry before being allowed to vote.

Because North Dakota does not burden voters with registration, a different kind of check and balance is required to determine a voter's qualifications. When a putative elector presents herself at a North Dakota polling place, a poll worker should not be required to merely accept the voter at her word that she is a United States citizen, over the age of eighteen, and a resident of North Dakota. By permitting a putative elector to participate in an election without first establishing the eligibility to vote, self-authenticating Voter's Affidavits directly interfere with the state's "legitimate interest in assessing the eligibility and qualifications of voters." Gonzalez, 677 F.3d at 410.

In granting the preliminary injunction, this Court faulted the defendant for not showing that the affidavit laws of other states fail to prevent fraud and promote voter confidence. Specifically, the Court referred to Idaho, Indiana, Louisiana, Michigan, North Carolina, and South Carolina as states that permit a voter to vote by affidavit. See ECF Doc. 50 at 25. Respectfully, any comparison of North Dakota's process to another state's registration process is necessarily flawed because an affidavit in a registration state serves an entirely different purpose than it serves in a non-registration state.

Idaho

This Court referenced Idaho Code § 34-1114 as a statute that allows an individual who lacks an ID on election day to vote by signing an affidavit. Unlike North Dakota, voters in Idaho who have not registered at least twenty-five days prior to an election are generally not permitted to vote. See Idaho Code § 34-408. Idaho does have an exception which permits voters who have not pre-registered to do so on the day of an election, see Idaho Code § 34-408A, but the affidavit process this Court compared to North Dakota's does not apply to a same-day registrant under § 34-408A.

The affidavit exception found at Idaho Code § 34-1114 only pertains to the photo identification requirements of a pre-registered voter under Idaho Code § 34-1113. See Idaho Code § 34-1114 (“If a voter is not able to present personal identification as *required in section 34-1113*, Idaho Code, the voter may complete an affidavit in lieu of the personal identification.”) (emphasis added). In other words, individuals cannot vote by affidavit in Idaho unless a poll worker can verify the information contained in the affidavit with information already appearing in a registry.

Indiana

This Court referenced Ind. Code § 3-11.7-5-2.5(c) as a statute that allows an individual who lacks an ID on election day to vote by signing an affidavit. Unlike North Dakota, voters in Indiana who have not registered at least twenty-nine days prior to an election are generally not permitted to vote. See Ind. Code §§ 3-7-10-1; 3-7-13-1; 3-7-13-11. The limited affidavit provisions found at § 3-11.7-5-2.5(c) (for indigents or those with a religious objection to having their photo taken) only apply to voters who have already established their eligibility to vote through the registration process. See Ind. Code § 3-5-2-50 (“‘Voter’ means a person who is qualified and registered to vote in an election.”); Ind. Code § 3-11.7-5-2.5(c) (expressly limiting the affidavit process to a “voter,” i.e., someone who has already established her qualifications to vote through registration). In other words, individuals cannot vote by affidavit in Indiana unless a poll worker can verify the information contained in the affidavit with information already appearing in a registry.

Louisiana

This Court referenced La. Rev. Stat. § 18:562 as a statute that allows an individual who lacks an ID on election day to vote by signing an affidavit. Unlike North Dakota, voters in Louisiana who have not registered at least thirty days before an election are generally not permitted to vote. See La. Rev. Stat. §§ 18:135; 18:521. The affidavit process outlined at § 18:562 only pertains to a registered voter who has already

established the qualifications to vote through the registration process. See La. Rev. Stat. § 18:562 (requiring a review of the precinct register to determine if the affiant has registered to vote, and only permitting the affiant to vote after the state is “satisfied that the applicant has identified himself as the voter named on the precinct register and that he is qualified to vote”). In other words, Louisiana’s affidavit process is limited to establishing the identity of an individual already known to be a qualified voter.

Michigan

This Court referenced Mich. Comp. Laws § 168.523(2) as a statute that allows an individual who lacks an ID on election day to vote by signing an affidavit. Unlike North Dakota, voters in Michigan who have not registered at least thirty days before an election are generally not permitted to vote. Mich. Comp. Laws §§ 168.491; 168.497. Section 168.523, the statute that permits an affidavit, is entitled “Identification of registered elector.” Individuals permitted to sign affidavits on election day are limited to those who have already established their qualifications and eligibility to vote through the state’s registration process. See Mich. Comp. Laws § 168.523(2) (stating “an elector being allowed to vote without the identification required under this subsection is subject to challenge as provided in section 727”); Mich. Comp. Laws § 168.727 (subjecting a vote to challenge “if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct”). In other words, Michigan does not permit a self-authenticating affidavit to be used as a substitute for establishing a person’s initial qualifications and eligibility to vote. When someone forgets to bring an ID to the polling place to vote in Michigan, she will not be permitted to vote unless she has already established that she is a “qualified and registered elector of the precinct.”

North Carolina

This Court referenced N.C. Gen. Stat. § 163-166.13(c)(2) (recodified at N.C. Gen. Stat. § 163A-1145 effective May 1, 2017) a statute that allows an individual who

lacks an ID on election day to vote by signing an affidavit. Unlike North Dakota, voters in North Carolina who have not registered at least twenty-five days before an election are generally not permitted to vote. See N.C. Gen. Stat. §§ 163A-840; 163A-860(a); 163A-865(d). Thus, the provision at § 163-166.13(c)(2) (now § 163A-1145(c)(2)) that permits a voter to complete a reasonable impediment declaration in lieu of presenting a photo ID applies to voters who have already registered. Although North Carolina also has a provision that permits a voter who claims to be registered, but who does not appear on the list of registered voters, to execute a written affirmation stating that they are registered in order to cast a provisional ballot, see N.C. Gen. Stat. § 163A-1142, whether the provisional ballot counts will still depend upon confirming that the voter is “registered in the county as provided in G.S. 163A-860” and “voted in the proper precinct under G.S. 163A-841 and G.S. 163A-842” and “was otherwise eligible to vote[.]” N.C. Gen. Stat. § 163A-1169(a)(4). In other words, the affidavits that are a part of North Carolina’s registered-voter system cannot fairly be compared to the Voter’s Affidavits this Court required North Dakota to accept under its non-registration system.

South Carolina

This Court referenced S.C. Code § 7-13-710(D)(1)(b) as a statute that allows an elector who lacks an ID on election day to vote by signing an affidavit. Unlike North Dakota, voters in South Carolina who have not registered to vote at least thirty days before an election are generally not permitted to vote. See S.C. Code §§ 7-5-110; 7-7-220. The identification requirements found at § 7-13-710 are used for the express purpose of “confirm[ing] the person presenting himself to vote is the elector on the poll list, [i.e., a registered voter].” S.C. Code § 7-13-710(E). Necessarily, then, the photo ID exceptions found at subparagraph (D) are only available to electors on the poll list, i.e., registered voters. In other words, South Carolina does not permit an election-day self-authenticating affidavit to be used as a substitute for establishing a person’s initial qualifications and eligibility to vote, because a person presenting an affidavit under

subparagraph (D) has already established eligibility through South Carolina's registration process. Respectfully, South Carolina's affidavit process cannot fairly be compared to the self-authenticating Voter's Affidavits this Court's current order requires North Dakota to use. An affidavit permitted by South Carolina law serves the entirely different and limited purpose of excusing an already qualified and registered voter from presenting a photo ID on election day due to a religious objection to being photographed, or because of a reasonable impediment that prevents the already qualified and registered elector from obtaining a photo ID.

The possibility of undetected fraud through the use of affidavits is not present in a registration state. In a registration state, an individual with ill intent could not use a pseudonym coupled with a legitimate residential street address in a given precinct to cast a fraudulent ballot, because the pseudonym would not appear in the state's registry. The situation in North Dakota is entirely different. The reason that self-authenticating Voter's Affidavits should not be permitted in a non-registration state is that they permit fraudulent votes to be included and certified in the vote count, and any fraud resulting from the use of a pseudonym is virtually impossible to uncover after-the-fact.

In Crawford, the Supreme Court did not require Indiana to present evidence of actual polling place fraud before considering Indiana's fraud prevention interest a legitimate one. Rather, the Court referred to "examples of such fraud in other parts of the country [that] have been documented throughout this Nation's history by respected historians and journalists" to conclude "not only is the risk of voter fraud real but [] it could affect the outcome of a close election." Crawford, 553 U.S. at 195-96.

The very fact that the number of unverifiable votes cast by self-authenticating Voter's Affidavits in the 2012 general election exceeded the vote differential in that year's United States Senate race, and the very fact that 3,682 votes cast by self-authenticating Voter's Affidavits in the 2016 general election remain unable to be

verified almost a year later – despite thousands of hours and tens of thousands of dollars spent attempting to verify those votes -- is reason enough to lift the preliminary injunction requiring the use of self-authenticating Voter's Affidavits. It stands reason on its head to require the state legislature to prove actual fraud before fixing a demonstrable flaw in North Dakota's election laws, when the flaw is the possibility that fraud can occur without any realistic means of detecting it.

In granting the preliminary injunction, this Court said North Dakota's interests in preventing voter fraud and promoting voter confidence "would not be undermined by allowing Native American voters, or any other voters who cannot obtain an ID, to present an affidavit or declaration in lieu of one of the four (4) forms of permissible voter ID's." ECF Doc ID 50 at 25. Respectfully, that statement is inaccurate. First, the statement fails to account for the important state interest most relevant to North Dakota's choice to correct a longstanding flaw in its system by removing the use of self-authenticating Voter's Affidavits – the interest in establishing the initial qualifications and eligibility of voters. North Dakota's choice to use the least restrictive registration process in the nation leaves its non-photo ID requirements as the one-step necessary means of establishing the threshold qualifications to vote. Where other states use their registration system to prevent an individual from using a pseudonym to cast a ballot by affidavit on election, North Dakota's choice to remove the impediment of registration leaves it dependent upon presentation of a valid non-photo ID to establish the threshold qualifications to vote.

Second, the use of self-authenticating Voter's Affidavits in a non-registration state is inherently flawed precisely because it creates the possibility of undetectable fraud. And this inherent flaw does undermine voter confidence. See Rob Port, We Have No Idea if Voter Fraud Changed the Outcome of Some North Dakota Elections, SayAnythingBlog.com (September 12, 2017), <https://www.sayanythingblog.com/entry/no-idea-voter-fraud-changed-outcome-north->

dakota-elections/ (“The truth is that, under our current election laws, fraud could be happening and it could be impacting election outcomes, and not only can we not detect it in any sort of a timely fashion even if we did there’s little we could do to reverse already certified election results.”).

Moreover, in Frank v. Walker, the Seventh Circuit essentially concluded that the Supreme Court’s Crawford decision *requires* this Court to accept that North Dakota’s voter ID requirements advance the State’s legitimate interest in promoting voter confidence in the integrity of elections. 768 F.3d 744, 750 (7th Cir. 2014) (“To put this in legalese, whether a photo ID requirement promotes public confidence in the electoral system is a ‘legislative fact’—a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state. Judges call the latter propositions ‘adjudicative facts.’ On matters of legislative fact, courts accept the findings of legislatures and judges of the lower courts must accept findings by the Supreme Court.”)

III. The Court’s “across-the-board” injunction should be lifted even in the absence of a change in the law.

Finally, Defendant Jaeger contends the statewide injunction entered by this Court should be dissolved even if the North Dakota legislature had not passed a new law containing a “fail-safe” provision. Both the Fifth and Seventh Circuits have interpreted Crawford as foreclosing a facial equal protection challenge based on the minimal financial burdens associated with obtaining a valid ID that *some but not all* voters may face. In Frank v. Walker II, the Seventh Circuit explained it reversed the district court’s injunction in Frank v. Walker I because an “across-the-board” injunction would be incompatible with the Supreme Court’s rejection of the facial challenge to Indiana’s law in Crawford where “[t]he application of the statute to the vast majority of Indiana voters is amply justified.” 819 F.3d 384, 386 (7th Cir. 2016) (quoting Crawford, 553 U.S. at 204). “It follow[s] that the burden *some* voters faced could not prevent the state from

applying the law generally.” Id. (emphasis added). The Seventh Circuit explained that Crawford’s foreclosure of facial attacks based upon the minimal financial burdens of obtaining ID leaves an as-applied challenge by individual plaintiffs as the only approach compatible with Crawford:

Instead of saying that inconvenience for some voters means that no one needs photo ID, plaintiffs contend that high hurdles for some persons eligible to vote entitle those particular persons to relief. Plaintiffs’ approach is potentially sound if even a single person eligible to vote is unable to get acceptable photo ID with reasonable effort. The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily. Plaintiffs now accept the propriety of requiring photo ID from persons who already have or can get it with reasonable effort, while endeavoring to protect the voting rights of those who encounter high hurdles. This is compatible with our opinion and mandate, just as it is compatible with Crawford.

Id. at 386–87.

The Fifth Circuit also implicitly recognized that Crawford and the Frank decisions foreclose the propriety of an “across-the board” injunction notwithstanding that particular plaintiffs may obtain individual relief in an as-applied challenge due to financial burdens a voter ID law places upon them in particular. See Veasey v. Abbott, 830 F.3d 216, 249 & n.40 (5th Cir. 2016).

Here, the seven individual plaintiffs brought suit only on behalf of themselves. The statistical evidence the plaintiffs presented does not demonstrate that *all* of North Dakota’s Native American citizens are disproportionately burdened by North Dakota’s non-photo ID requirements, let alone that *all* other North Dakota citizens are unconstitutionally burdened by those requirements. As a consequence, the “across the board” injunction entered in this case that excused all North Dakota citizens from complying with the non-photo ID requirements, and allowed any North Dakota citizen to vote through the use of a Voter’s Affidavit, was improper for the same reasons the “across the board” injunction was improper in Crawford. See Frank v. Walker II, 819 F.3d at 386-87; see also Jackson Women’s Health Org. v. Currier, 760 F.3d 448, 458

(5th Cir. 2014) (noting that an injunction that applies to non-parties is “an overly broad remedy in an as-applied challenge”).

97.5% of known voters in North Dakota possess a valid ID. Silrum Affidavit ¶ 8. While the seven individual plaintiffs who sued on behalf of themselves may be entitled to ask the Court to enjoin the state from enforcing North Dakota’s voter ID law as applied to them because of some unique financial burden, under Crawford they are not entitled to obtain a statewide injunction that prevents North Dakota from applying the law to the vast majority of its voters.

CONCLUSION

The minimal burden North Dakota’s non-photo ID requirements impose on voters cannot be examined in isolation without considering North Dakota’s progressive choice to use a non-registration system. Thousands of unverifiable votes were cast in the 2012 election as the result of the flaw of using self-authenticating Voter’s Affidavits in a non-registration state. Thousands of unverifiable votes were cast in the 2016 election as the result of using self-authenticating Voter’s Affidavits in a non-registration state. Thousands of unverifiable votes will likely be cast in future elections as long as North Dakota is forced to use Voter’s Affidavits in conjunction with its choice to remove registration as an impediment to voting.

North Dakota’s current law contains a “set aside” ballot “fail safe” provision that is compatible with its non-registration system. That “fail safe” should finally permit North Dakota to fix the longstanding flaw of using self-authenticating Voter’s Affidavits in a non-registration state. Defendant Jaeger therefore respectfully requests that the Court terminate the injunction it entered in August 2016.

Dated this 16th day of January, 2018.

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