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**

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISSOLVE PRELIMINARY INJUNCTION AND RESPONSE MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The plaintiffs improperly rely upon a minimal burden the Supreme Court has rejected as one that will advance a facial attack on voter ID laws, continue to maintain North Dakota's voter ID law is facially unconstitutional, and urge this Court to repeat the mistake of entering an across-the-board injunction that granted relief beyond the named plaintiffs suing on behalf of themselves.

Properly limited to as-applied challenges for the individual plaintiffs, this case provides them no likelihood of success to justify any injunctive relief because North Dakota law provides each of them multiple voting options that are free of any financial burdens imposed by the state. The multiple additional voting options North Dakota provides to Native Americans, not provided to other voters, also dispel any claim that North Dakota's laws were passed with a discriminatory intent or have a discriminatory impact under Section 2 of the Voting Rights Act.

Under Crawford's balancing test, North Dakota's interests in establishing voters' basic qualifications *prior* to their votes being counted in elections justify the bare minimum burdens imposed by North Dakota law. The Court's injunction reintroduced a flaw into North Dakota's non-registration election system that impermissibly diluted and distorted the votes of all North Dakotans who voted in the 2016 general election. North Dakota's current law provides a fail-safe for those voters who neglect to bring a valid ID with them on the day of an election. Defendant Alvin A. Jaeger therefore respectfully requests that the Court dissolve its current injunction and refuse to enter a new one.

ARGUMENT

I. The Court's across-the-board statewide injunction violates Crawford.

Under North Dakota law, a non-driver's license ID that can be used for voting purposes is available to all North Dakota residents free of charge, including the plaintiffs. Notwithstanding the availability of this free ID, the seven individual plaintiffs brought this suit claiming North Dakota law violates their equal protection rights due to

their impoverished state and the financial burdens of having to obtain free IDs at one of the state's Department of Transportation (DOT) sites. The seven individual plaintiffs support their claim with evidence that suggests Native Americans are statistically less likely to possess IDs because of the financial burdens associated with obtaining IDs.

The specific financial burdens alleged in this case -- the same burdens alleged in Crawford -- supported by the statistical evidence presented by the plaintiffs, simply do not advance a valid facial attack on a voter ID law in the post-Crawford world.

In this case, as in Crawford, the plaintiffs are asking the Court "to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity." Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 200 (2008) (Stevens, J., announcing the judgment of the Court). The evidence shows that more than 97% of the voters in North Dakota's Central Voter File (CVF) already have a valid ID for voting purposes. Thus, in this case, as in Crawford, "the statute's broad application to all [North Dakota] voters . . . imposes only a limited burden on voters' rights [and the] precise interests advanced by the State are therefore sufficient to defeat [the plaintiffs'] facial challenge to [North Dakota's voter ID laws]." Id. at 202-03 (internal quotation marks and citations omitted). Finally, in this case, as in Crawford, the plaintiffs "have not demonstrated that the proper remedy–even assuming an unjustified burden on some voters—would be to invalidate the entire statute." Id. at 203. "The application of the statute to the vast majority of [North Dakota] voters is amply justified by the valid interest in protecting the integrity and reliability of the electoral process." Id. at 204 (internal quotation marks and citation omitted).

Applying Crawford, circuit courts of appeal have subsequently recognized that a facial attack on voter ID laws based upon a special burden imposed on just a limited number of voters *cannot succeed* – even when statistical evidence shows a lower percentage of minorities have qualifying IDs – because '"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'" for the vast majority of voters. Lee v. Virginia State Bd. of Elections, 843 F.3d 592, 600 (4th Cir. 2016) (quoting Crawford, 553 U.S. at 198). Instead, attacks brought against voter ID laws based upon the burdens discussed in Crawford are limited in scope to as-applied challenges brought by the individual voters who claim the voter ID law imposes a special burden on them. See Frank v. Walker, 819 F.3d 384, 386 (7th Cir. 2016) (applying Crawford and explaining that "the burden *some* voters faced could not prevent the state from applying the law generally" but that an as-applied challenge is compatible with Crawford because the "high hurdles for some persons eligible to vote [may] entitle *those particular persons* to relief") (emphasis added); see also Veasey v. Abbott, 830 F.3d 216, 249 & n.40 (5th Cir. 2016).

The current statewide injunction cannot be reconciled with these controlling principles of Crawford, or the fact that over 97% of voters listed in the state's CVF already have a valid ID and are not burdened by the voter ID requirements. Under Crawford, North Dakota's voter ID law is simply not subject to a facial attack that justifies an across-the-board injunction. See Frank v. Walker, 819 F.3d at 387 ("The predicament of people who cannot get acceptable photo ID with reasonable effort would not have supported the sweeping injunction the district court entered."). And the fact that a very small percentage of individuals lack a qualifying ID does not, as the plaintiffs suggest, automatically establish that North Dakota's voter ID law is unconstitutional. There could be as many individual reasons why someone lacks a qualifying ID as there are individuals who lack them, each of which when examined would show that the state's legitimate interests prevail under Crawford's balancing test with respect to any minimal burden imposed.

"[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979); see also Gerlich v. Leath, 861 F.3d 697, 710 (8th Cir. 2017) ("An injunction must not be 'broader than necessary to remedy the underlying wrong.'") (quoting Coca-Cola Co. v. Purdy, 382 F.3d 774, 790 (8th Cir. 2004)); cf. Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 263, 265 (8th Cir. 1985) (reversing an overly-broad injunction that provided relief beyond the specific harms alleged in the suit). "While district courts are not categorically prohibited from granting injunctive relief benefitting an entire class in an *individual suit*, such broad relief is rarely justified because injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Sharpe v. Cureton, 319 F.3d 259, 273 (6th Cir. 2003) (citing Yamasaki, 442 U.S. at 702). "Precisely because equitable relief is an extraordinary remedy to be cautiously granted, it follows that the scope of relief should be strictly tailored to accomplish only that which the situation specifically requires and which cannot be attained through legal remedy." Aluminum Workers Int'l Union Local Union AFL-CIO, No. 215 v. Consol. Aluminum Corp., 696 F.2d 437, 446 (6th Cir. 1982).

"A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; [but] it may not attempt to determine the rights of persons not before the court." Zepeda v. INS, 753 F.2d 719, 727 (9th Cir. 1983). "Allowing individual plaintiffs to obtain injunctions to enforce the rights of others outside the context of class-action litigation . . . may violate the rights of those third parties not before the court. The plaintiffs are permitted to leverage the rights of the third parties over whom the court has not acquired personal jurisdiction, without the consent of those third parties – indeed, often without their knowledge – and without giving them an opportunity to opt out." Michael T. Morley, De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other

Constitutional Cases, 39 Harv. J. of L. and Pub. Pol'y 487, 516-17 (2016). Among other reasons, an across-the-board injunction in an individual suit is problematic because "[g]overnment defendants may be enjoined from enforcing a law against people who support the measure, would prefer or even benefit from its enforcement, and would gladly refrain from enforcing their rights against it." Id. at 517; see also Ryan C. Williams, Due Process, Class Action Opt Outs, and the Right Not to Sue, 115 Colum. L. Rev. 599, 629 ("Judicial recognition of . . . an autonomy-based right to seek vindication of one's legal claims in court seems to strongly support the existence of a corollary autonomy-based right to refrain from asserting those claims as well.").

In the specific context of a voting rights case alleging the same burdens involved in Crawford, which the plaintiffs do, the Supreme Court has essentially placed a categorical prohibition against injunctive relief beyond that available to individual plaintiffs in an as-applied challenge. Thus, even assuming these seven individual plaintiffs suing solely on their own behalf could show that North Dakota's voter ID laws impose a special burden on them, this Court must still correct the error it made when it entered an across-the-board injunction that improperly granted relief to voters who have no constitutional impediments under North Dakota's law and are not parties to this action. In addition, this Court would violate Crawford if it grants overly broad injunctive relief to the plaintiffs pursuant to their second motion for a preliminary injunction.

In fact, the Court's current statewide injunction is overly burdensome not only to the defendant, but to all North Dakota voters. In granting injunctive relief that extended beyond the seven individual plaintiffs, this Court's injunction reintroduced a problematic flaw into North Dakota's non-registration election system that had been removed by the 2013 legislature due to the presence of thousands of unverifiable votes cast in the 2012 election through the use of self-authenticating Voter's Affidavits. Thousands of unverifiable votes were cast in the 2016 election as a result of the Court's statewide injunction.

Defendant explained in his original brief the reasons why the use of self-authenticating affidavits in a non-registration election system is inherently flawed, and will not repeat those reasons here. Importantly, however, the statewide injunction granted on behalf of seven individual plaintiffs effectively violated the constitutional rights of every other North Dakota resident who voted in the 2016 election, due to the presence of the thousands of unverifiable votes cast by self-authenticating Voter's Affidavits. The right to vote necessarily encompasses more than just the right to cast a ballot. It also includes the right to have a vote be "given full value and effect, without being diluted or distorted by the casting of fraudulent [or otherwise invalid] ballots." Anderson v. United States, 417 U.S. 211, 226 (1974).

In support of a request to perpetuate an overly-broad injunction that cannot be reconciled with Crawford, the plaintiffs continue to pull a bait-and-switch on the Court by referring to nameless, statistical hypothetical plaintiffs who are not parties in place of the seven individual plaintiffs who are parties in this non-class action. Post-Crawford injunctive relief is limited to what this Court may grant individual plaintiffs who allege and prove that a voter ID law -- as applied to them -- places a special burden on their individual right to vote. The plaintiffs continue to advance "undisputed" statistical evidence that is irrelevant in determining whether North Dakota's voter ID laws place a special burden on Richard Brakebill, Deloris Baker, Dorothy Herman, Della Merrick, Elvis Norquay, Ray Norquay, or Lucille Vivier.

The plaintiffs have not demonstrated, for example, how evidence about the distances between DOT sites and the Standing Rock or Fort Berthold Reservations proves an impermissible burden on their individual rights to vote, when none of them live on the Standing Rock or Fort Berthold reservations. See ECF Doc. ID No. 92 at 27 (Brief Page No. 26). Nor have the plaintiffs demonstrated how the allegation that a BIA-issued tribal ID does not count as a valid ID for Standing Rock tribal members, see id. at 18 (Brief Page No. 17), proves an impermissible burden on their individual rights to

vote, when none of them are members of the Standing Rock Sioux Tribe. The seven individual plaintiffs who brought this suit lack standing to challenge that aspect of the law on equal protections grounds, and this Court lacks authority to address that issue in the absence of an actual case or controversy between the defendant and these seven individual plaintiffs in their non-class action.

Indeed, the plaintiffs themselves admit that the vast majority (81%) of Native Americans have qualifying IDs, see id. at 2 (Brief Page No. 1), and therefore are not entitled to the limited as-applied injunctive relief available under Crawford. In addition, this Court has no ability to consider as-applied challenges that may have been, but were not, brought by the Native Americans who plaintiffs allege comprise the other 19% who may lack qualifying IDs but who are not parties in this non-class action lawsuit.

The Court's across-the-board injunction entered on equal protection grounds thus contains five-fold error in that it: (1) grants improper across-the-board injunctive relief against a law that is facially constitutional under Crawford; (2) grants improper injunctive relief to 81% of Native Americans that the plaintiffs must concede have no viable as-applied challenges to the law; (3) grants improper injunctive relief to the other 19% of Native Americans who may have viable as-applied challenges but who have not chosen to be parties to this action; (4) grants improper injunctive relief to *all* the other 19% of Native Americans who may lack qualifying ID without examining the individual reasons for their lack of ID to determine whether North Dakota's legitimate interests may still prevail under Crawford's balancing test with respect to any minimal burden imposed; and (5) as demonstrated in Section II below, grants improper injunctive relief to the seven individual plaintiffs because North Dakota law provides them multiple voting options untethered by any of the state-imposed financial burdens they allege impermissibly burden their right to vote.

If this Court maintains the current injunction, or enters a new one that requires the use of self-authenticating affidavits, the rights of every voting citizen in the state will

be violated, diluted, and distorted because post-election-day attempts to verify self-authenticating votes under a non-registration system – even extensive and expensive efforts – have proven ineffective in removing the reality that some votes (indeed, even thousands of them) will remain unverifiable and yet be included in an election's results. This occurred in the 2012 election, again in the 2016 election, and will inevitably continue to happen until North Dakota is permitted to eliminate the inherent flaw of permitting self-authenticating Voter's Affidavits within a non-registration system.

Because North Dakota law now permits a "fail-safe" for those voters who neglect to bring a valid ID with them on election day in the form of a set-aside ballot that permits them to establish the basic qualifications to vote in the six days after an election and still have their votes count, North Dakota should be permitted to remove the affidavit process from its non-registration election system.

II. North Dakota's voter ID laws are constitutional as applied to the individual plaintiffs.

With this case properly limited to as-applied challenges brought by seven individuals, the plaintiffs are still not entitled to any injunctive relief based upon the financial burdens they allege prevent them from voting in state elections. North Dakota's voter ID laws provide the seven plaintiffs (and other Native Americans who are not parties to this action) with multiple voting options untethered to any state-imposed financial burdens associated with traveling to a DOT site to obtain a free state-issued non-driver's license. Those options are:

Option 1: Prior to the day of an election, the seven plaintiffs (and other Native Americans who are not parties to this action) can vote by mail-in ballot using an official photo ID issued by their tribe. See N.D. Cent. Code §§ 16.1-01-04.1, 16.1-07-01; 16.1-11.1-01.

Option 2: Prior to the day of an election, the seven plaintiffs (and other Native Americans who are not parties to this action) can vote by mail-in ballot using a non-

photo ID issued by the tribe, which need consist of nothing more than an official letter from their tribal government setting forth the individual's basic qualifications to vote, i.e., legal name, date of birth, and current residential street address in North Dakota. Id.

Option 3: On the day of an election, the seven plaintiffs (and other Native Americans who are not parties to this action) can vote at a polling place using an official photo ID issued by their tribe. N.D. Cent. Code § 16.1-01-04.1.

Option 4: On the day of an election, the seven plaintiffs (and other Native Americans who are not parties to this action) can vote at a polling place using a non-photo ID issued by the tribe, which need consist of nothing more than an official letter from their tribal government setting forth the individual's basic qualifications to vote. Id.

The plaintiffs dismiss Options 2 and 4, which permit the use of a non-photo tribal ID and impose no financial burdens whatsoever on their ability to vote in a state election, on the grounds that the defendant has not engaged in a public education campaign to inform them of the voting options available to them under the plain language of the statute. Plaintiffs do not, however, cite any authority for the novel proposition that an equal protection analysis includes a public-education-campaign prong, such that an otherwise constitutional statute is somehow rendered unconstitutional due to a defendant's failure to publicly educate the plaintiffs about their statutory rights.

The plaintiffs also imply that the defendant, rather than this Court, gets to determine the meaning of the plain language of the statute and thus poll workers could refuse to accept an official non-photo tribal ID. Statutory interpretation is a judicial function. In the absence of a state court interpretation of N.D. Cent. Code § 16.1-01-04.1, this Court's objective is to predict how the North Dakota Supreme Court would interpret the statute. John T. v. Marion Indep. Sch. Dist., 173 F.3d 684, 687 (8th Cir. 1999). The defendant, his office, and future poll workers will be bound by a judicial

interpretation and cannot subsequently adopt their own interpretation or refuse to implement the law as written without consequences.

The plain language of the statute does not require a photo ID. The plain language of the statute requires only that a form of identification set forth three criteria: (1) legal name, (2) date of birth, and (3) residential street address. N.D. Cent. Code § 16.1-01-04.1(2). The plain language of the statute provides the form of identification setting forth those three criteria can be "issued by a tribal government to a tribal member residing in the state." Id. § 16.1-01-04.1(3)(a)(2). Plaintiffs point to no language in the statute that could be used by this Court to adopt an interpretation inconsistent with the defendant's. Furthermore, even if the statute is ambiguous with respect to whether an official letter from a tribe constitutes a valid non-photo ID, the North Dakota Supreme Court would have, and by necessary extension this Court does have, an obligation to interpret the statute in a manner that comports with constitutional requirements rather than deem it unconstitutional. See Union Pac. R. Co. v. United States Dep't of Homeland Sec., 738 F.3d 885, 892–93 (8th Cir. 2013) ("It is a bedrock principle of statutory interpretation that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'") (quoting U.S. ex rel. Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)); Ash v. Traynor, 579 N.W.2d 180, 182 (N.D. 1998) ("If a statute may be construed in two ways, one that renders it of doubtful constitutionality and one that does not, we adopt the construction that avoids constitutional conflict.").

With respect to Options 1 and 3, which permit the use of a photo ID issued by the tribe, the plaintiffs allege the minimal fee their own tribe charges for a photo ID amounts to North Dakota requiring them to pay to vote. The plaintiffs do not, however, make a poll tax claim under the Twenty-Fourth Amendment, and for good reason. North Dakota does not charge Native Americans anything to vote through the use of a tribal photo ID.

North Dakota does not receive any remuneration from the plaintiffs or the tribe for the amount the tribe itself charges its members for a photo tribal ID.

The relevant question is whether North Dakota itself imposes unconstitutional burdens on the seven plaintiffs' rights to vote, not whether their own tribe does so. North Dakota has the right to determine whether a voter possesses the basic qualifications to vote before permitting them to vote, and does so through a non-registration system that imposes no more burden than necessary to establish a voter's qualifications. The plaintiffs essentially want to be fully excused from establishing even their basic qualifications to vote, and essentially contend North Dakota can impose NO burdens on their right to vote, no matter how minor and even when the minor burden is not a state-imposed one but a tribally-imposed one.

The request to be free of all burdens whatsoever flies in the face of Crawford's balancing test, which permits North Dakota to impose minimal burdens on the right to vote when they advance important state interests, including the state's "legitimate interest in assessing the eligibility and qualifications of voters." Gonzalez v. Arizona, 677 F.3d 383, 410 (9th Cir. 2012). Moreover, although North Dakota's voter ID laws already provided the seven individual plaintiffs with multiple options to vote untethered to any state-imposed financial burdens (e.g., the burden of traveling to a DOT site to obtain a free state-issued ID), the broad injunctive relief this Court granted to these seven individuals came not only at the expense of the state's legitimate interests, but at the expense of the rights of 349,945 North Dakotans whose votes were diluted and distorted by the thousands of unverifiable votes cast by affidavit in the 2016 general election. See Anderson, 417 U.S. at 226 (discussing everyone's right to cast a "full" vote undiluted by invalid ballots).

Moreover, to the extent the minimal tribally-imposed cost of obtaining a tribal photo ID can be attributed to North Dakota due to the additional voting options provided to Native American voters, those minimal costs are akin to the costs associated with

obtaining the primary documents needed to prove identity, such as a birth certificate or certificate of naturalization. Those types of minimal costs have been rejected as imposing an invidious restriction on voting rights in the context of establishing a voter's threshold eligibility to vote. See Gonzalez, 677 F.3d at 409 ("Requiring 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.") (citing and discussing both Crawford and Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)).

Essentially, the plaintiffs continue to invite the Court into the trap of viewing North Dakota's voter ID laws exactly the same as other states that impose both registration burdens, and election-day voter ID burdens, on voters. North Dakota's progressive choice not to burden or disenfranchise voters with a registration deadline or process leaves its voter ID laws as the only means by which it can establish a voter's basic qualifications before permitting a vote to count in an election.

III. The plaintiffs' Section 2 claims are unlikely to succeed.

The plaintiffs' likelihood of success does not improve on their claims under Section 2 of the Voting Rights Act. To succeed on their discriminatory intent claim, the plaintiffs must persuade this Court that a statute that enlarges the rights of Native Americans by offering them all of the same voting options offered to other voters, plus multiple additional options tied directly to their status as Native Americans, was passed by the legislature with the intent of suppressing Native American votes.

To succeed on a disparate impact claim because of alleged financial obstacles to voting based on "race or color," 52 U.S.C. § 10301(a), the plaintiffs must persuade this Court that a statute that enlarges the rights of Native American voters through multiple additional voting options, tied directly to their status as Native Americans, has a disparate impact on them even though none of the multiple additional voting options

available to Native Americans involve a financial burden imposed by the State, and some of those options (i.e., the ability to use a non-photo tribal ID, which need consist of nothing more than an official letter from the tribe setting forth the individual's basic qualifications, either at a polling place on election day or via mail-in ballot prior to election day) involve no financial burden whatsoever.

As the plaintiffs themselves concede, the first prong of a Section 2 claim requires them to demonstrate that "members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." ECF Doc. ID No. 92 at 45 (Brief Page No. 44) (quoting Abbott, 830 F.3d at 244). North Dakota offers the seven individual plaintiffs (and other Native Americans who are not parties to this action) all of the same options to vote as other members of the electorate. In addition, based directly on their status as Native Americans -- the only citizens eligible for tribal IDs -- North Dakota enlarges the rights of the plaintiffs through multiple additional voting options not offered to other voters. Furthermore, the additional options granted to Native Americans involve no state-imposed financial burdens.

Because North Dakota's law offers the plaintiffs all of the same options to establish the qualifications to vote that are offered to other members of the electorate, plus additional options tied directly to their status as Native Americans, plaintiffs cannot demonstrate that they have less opportunity than other members of the electorate to participate in the political process. See Lee, 843 F.3d at 600 (rejecting a Section 2 claim in a similar case alleging a minority voting group was statistically less likely to possess valid IDs and stating that a "complex § 2 analysis is not necessary to resolve this issue because the plaintiffs have simply failed to provide evidence that members of the protected class have less of an opportunity than others to participate in the political process."); see also Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997) (noting that "a bare statistical showing of disproportionate

impact on a racial minority does not satisfy the § 2 'results' inquiry [i.e., the first prong]"); Feldman v. Arizona Sec'y of State's Office, 843 F.3d 366, 379 (9th Cir. 2016) ("Several courts of appeal have rejected § 2 challenges based purely on a showing of some relevant statistical disparity between minorities and whites [under the first prong]" and noting such cases from the Third, Fourth, Fifth, and Sixth Circuits).

In addition, the plaintiffs' failure to satisfy the first prong of a Section 2 claim renders their discussion of social and historical facts, the totality of the circumstances, and the Senate factors under the second prong irrelevant, and makes it unnecessary for the defendant to respond to those facts. See, e.g., Feldman, 843 F.3d at 380 ("If a plaintiff adduces no evidence that the challenged practice places a burden on protected minorities that causes them to have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, 52 U.S.C. § 10301(b), there is no § 2 violation whether or not the challenged practice is interacting with the history of discrimination at the second prong of the test[.]") (internal quotation marks and citation omitted). Moreover, repeated statements by the plaintiffs about the defendant's failure to respond to these "undisputed" facts will not somehow transform a legally deficient claim into a legally viable one, or negate this Court's independent obligation to determine whether there is a legally viable claim that is likely to succeed before this Court can grant the plaintiffs any injunctive relief.

Essentially, the plaintiffs appear to be attacking North Dakota for a law that seeks to remedy, rather than perpetuate, any past discriminatory practices against them. North Dakota law provides them options to vote through two different forms of ID available from their own tribe, and then multiple ways to use those two different forms of ID to vote, including mail-in ballot options that involve no more financial burden than the cost of the postage to return the ballot or to travel to a designated drop-off point. None of the plaintiffs' continuing rhetorical din, or reference to "undisputed" statistical evidence, can negate the simple indisputable fact that North Dakota's law on its face

shows an intent to, and actually does, provide more voting options to Native Americans than the rest of the electorate. In addition, any minimal burdens associated with voting imposed on all North Dakota voters are no more than the bare minimum required to determine a voter's threshold eligibility to vote, and to respect all of North Dakotans' rights to cast votes undiluted by fraudulent or unverifiable votes.

IV. North Dakota's laws are not the most restrictive in the nation.

The plaintiffs' brief continues to refer to North Dakota's voter ID laws as the most restrictive in the nation. This rhetoric ignores the fact that North Dakota is the least restrictive state in the nation with respect to registration, and continues to ignore the fact that the overall burden North Dakota's voter ID laws impose cannot be viewed in isolation, without considering the dissimilar purpose those laws serve in a non-registration system as compared to registration states.

A. North Dakota's non-registration system is less restrictive than other states' registration systems.

The plaintiffs do not acknowledge that North Dakota is undisputedly the least restrictive state with respect to registration requirements. Nor do they acknowledge the unique role North Dakota's voter ID laws serve within a non-registration system in establishing an individual's basic qualifications to vote prior to a vote being counted in an election. Nor do they acknowledge that the overall restrictions North Dakota places upon voters when compared to other states cannot be viewed in isolation without accounting for North Dakota's progressive choice to enfranchise, rather than disenfranchise, voters by imposing no registration barriers on the right to vote.

Indeed, there are numerous ways that a state may imbed latent barriers through a registration process, beyond the patent preclusive barrier that missing a registration deadline can have on an individual's right to vote. Latent obstacles could include not offering online registration, a requirement that voters register through a limited number of registration officials, with additional burdens that make it difficult to qualify as a

registration official, and even additional burdens imposed on the few individuals who qualify as registration officials with respect to steps that must be navigated to register a new voter.

North Dakota, of course, does not impose the preclusive and absolute barrier that other states' registration deadlines can have on an individual's right to vote. Nor does it impose other latent barriers a state may impose on an individual's right to vote through a registration process. Instead, North Dakota permits anyone to vote on election day merely by first establishing the basic qualifications to vote. This aspect of North Dakota's election system is clearly not the most restrictive in the nation.

B. North Dakota's non-photo ID requirements are less restrictive than other states' photo ID requirements.

The plaintiffs do not acknowledge that North Dakota permits non-photo IDs to be used to vote in elections, while seventeen other states are classified as photo ID states.[1] See National Conference of State Legislatures, Voter Identification Requirements/Voter ID Laws, ncsl.org, http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (last visited March 8, 2018).

This aspect of North Dakota's election system is clearly not the most restrictive in the nation.

C. North Dakota's use of tribal IDs (both photo and non-photo) is less restrictive than other states that do not permit the use of tribal IDs.

Most significantly, the plaintiffs do not acknowledge that North Dakota permits the use of tribal IDs (both photo and non-photo) to vote in state elections, while twenty-one other states that require some type of ID do not permit the use of tribal IDs,[2]

[1] Alabama, Arkansas, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, Rhode Island, South Dakota, Tennessee, Texas, Virginia, and Wisconsin.

[2] Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, New Hampshire, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Texas and West Virginia.

including twelve states that have federally-recognized tribes.[3] See id.; see also National Conference of State Legislatures, Federal and State Recognized Tribes, ncsl.org, http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx (last visited March 8, 2018).

In addition, as previously noted, a Native American's right to use a tribal ID under North Dakota law is unaccompanied by any state-imposed financial burdens, both with respect to the use of a non-photo tribal ID as well as a photo tribal ID. This aspect of North Dakota's election system is clearly not the most restrictive in the nation. Indeed, North Dakota law enlarges the voting rights of Native American citizens by permitting them more options to vote than all other North Dakota citizens, tied directly to their status as Native Americans.

Finally, the fact that any particular state may have the most restrictive laws in the nation, even if true, is of no moment unless those restrictions violate the constitution. The plaintiffs' continuing din about the restrictive nature of North Dakota's laws cannot substitute for their failure to identify how an election law that enlarges their rights by providing multiple additional voting options, tied directly to their status as Native Americans, violates the constitution or the Voting Rights Act when those multiple additional voting options involve no financial burdens imposed by the state.

V. The plaintiffs lack standing to challenge any alleged property ownership requirements of North Dakota's voter ID law, which does not impose a property ownership requirement in any event.

Relying primarily upon Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), the plaintiffs claim the residential street address requirements of North Dakota's voter ID laws are unconstitutional because they require voters to have a property ownership interest in a residence. See ECF Doc. ID No. 92 at 41-42 (Brief Page No. 40-41). Once again, the plaintiffs pull a bait-and-switch between themselves

[3] Alaska, Colorado, Connecticut, Florida, Indiana, Iowa, Kansas, Louisiana, North Carolina, Rhode Island, South Carolina, and Texas.

and nameless, hypothetical plaintiffs who are not parties. None of the plaintiffs lack an address that qualifies as a residential street address under North Dakota law, and thus lack standing to bring an equal protection challenge to this aspect of the law. See, e.g., Spokeo, Inc. v. Robins, __ U.S. __, 136 S. Ct. 1540, 1547 (2016) (explaining the "irreducible constitutional minimum" standing requirements that include an injury-in-fact that can be redressed by a favorable judicial decision).

The allegations made by Richard Brakebill, Ray Norquay, Della Merrick, Lucille Vivier, and Dorothy Herman in the amended complaint do not show that they lack a qualifying residential street address under North Dakota law. See ECF Doc. ID No. 77 at ¶¶ 9, 11-14. Nor do Elvis Norquay's allegations that he resides at the Fayes Albert building, a community homeless shelter, see id. at ¶ 10, establish that he lacks a qualifying residential street address. Under North Dakota law, "[f]or voting purposes . . . [a]n individual retains a residence in this state until another has been gained." N.D. Cent. Code § 16.1-01-04.2(3). Thus, even a person who once had a qualifying residence, but has not gained a new residence because of homelessness, would still have a qualifying address for voting purposes. In addition, as long as Mr. Norquay has resided at the Fayes Albert building for at least thirty days, he can claim that residence as his new residence for voting purposes. See N.D. Cent. Code § 16.1-01-04.2(4) ("The acts of residing at a new address for thirty days and verifying that address as provided under section 16.1-01-04.1 constitute a change in the individual's voting residence.").

Mr. Norquay's allegation that he does not view the Fayes Albert building as permanent housing, see ECF Doc. ID No. 77 at ¶ 10, does not preclude him from having a residence for voting purposes under North Dakota law. He either maintains his old residence until another has been gained pursuant to N.D. Cent. Code § 16.1-01-04.2(3), or gains a new residence through the conduct of residing at a new

residence for thirty days coupled with the conduct of verifying that as his new address pursuant to N.D. Cent. Code § 16.1-01-04.2(4)

In addition, even assuming a specific homeless person's particular and unique circumstances could result in the lack of a qualifying address that might satisfy standing requirements for an as-applied equal protection challenge, that claim could not be accompanied by a viable Section 2 claim because any alleged discriminatory practice allegedly imposed or applied by the state against the homeless would not be "on account of race or color." 52 U.S.C. § 10301(a).

The plaintiffs' lack of standing is dispositive. But their challenge would fail even if the Court could consider it. Unlike the property tax school district voting issue involved in Kramer, North Dakota law does not require a person to own property to vote. Nor is North Dakota's thirty-day residency requirement of the three-month or one-year durations identified as unconstitutional in Dunn v. Blumstein, 405 U.S. 330, 334-37 (1972). Nor is North Dakota's conduct-based determination of voting residence comparable to the strictly intent-based statutes at issue in Collier v. Menzel, 176 Cal. App. 3d 24, 31 (Cal. Ct. App. 1985) and Pitts v. Black, 608 F. Supp. 696, 698 (S.D. N.Y. 1984). The California and New York statutes at issue in Collier and Pitts had no provision similar to N.D. Cent. Code § 16.1-01-04.2(3), whereby a homeless person's former residence would still qualify as a residence for voting purposes "until another has been gained."

Plaintiffs also fail to demonstrate how the Court's current injunction addresses any alleged problems with North Dakota's residential street address requirement. Injunctive relief must be narrowly tailored to address the specific, alleged wrong, i.e., the punishment must fit the crime. The Voter's Affidavits approved by this Court in its current injunction still require an affiant to list a residential street address. Plaintiffs fail to explain how permitting Voter's Affidavits to be used by every single voter in the state fixes any alleged problems with the residential street address requirement for a

homeless person, even assuming a homeless person would ever have standing to challenge North Dakota's law given its specific provisions.

VI. The plaintiffs lack standing to challenge any alleged lack of 911 residential street addresses.

To the extent the plaintiffs complain about the lack of 911 addresses, see ECF Doc. ID No. 92 at 6-8, (Brief Page No. 5-7), their complaints suffer from the same standing infirmities as their property ownership/homeless allegations. None of the plaintiffs actually allege they lack a residential street address, and thus have no standing to raise an as-applied challenge on behalf of a nameless, hypothetical plaintiff who may only have a P.O. Box but who is not a party to this lawsuit.

To the extent the plaintiffs' factual assertions regarding the legislature's 2011 discussions about 911 addresses are intended to advance a social and historical facts/ totality of the circumstances/Senate factors attack on North Dakota's law under the second prong of a Section 2 analysis, those "undisputed" facts are irrelevant and do not require a response by the defendant where the plaintiffs are unable to satisfy the first prong of a Section 2 analysis. See, e.g., Feldman, 843 F.3d at 380. And repeated references to the defendant's failure to respond to these "undisputed" facts will not transform legally deficient claims into legally viable ones, or negate the Court's independent obligation to determine whether – notwithstanding undisputed facts – the plaintiffs actually advance legally viable claims on which they are likely to succeed before granting any injunctive relief.

VII. North Dakota is not required to prove actual fraud to remove the use of Voter's Affidavits from its non-registration election system.

Without citing a single case in support of the proposition, the plaintiffs continue to imply that North Dakota must prove actual fraud before it can remove the use of affidavits from its non-registration system. North Dakota's legitimate interests in deterring and detecting fraud justified its removal of the affidavit process from its non-registration election system, justify its request for the Court to dissolve the current

injunction, and justify its opposition to the Court entering a new injunction requiring the use of affidavits pursuant to the plaintiffs' second motion for a preliminary injunction.

In Crawford, the Supreme Court held that states have a legitimate interest in both "deterring and detecting voter fraud." 553 U.S. at 191. Notwithstanding the fact that the "record contains no evidence of any such fraud [in-person voter impersonation at polling places] actually occurring in Indiana at any time in its history," the Supreme Court nonetheless upheld Indiana's voter ID law because "flagrant examples of such fraud in other parts of the country . . . documented throughout this Nation's history by respected historians and journalists . . . demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election." Id. at 195-96.

The defendant has demonstrated that the use of affidavits in a non-registration system interferes with its interest in deterring voter fraud. The defendant has also demonstrated that the use of affidavits in a non-registration system interferes with its legitimate interest in detecting voter fraud precisely because it permits undetectable fraud to occur. The plaintiffs' continued argument – unsupported by any legal authority -- that North Dakota cannot address this flaw without proving actual fraud, cannot be squared with Crawford.

VIII. North Dakota's interest in preserving the integrity of its elections justifies the removal of the affidavit process even in the absence of proof of actual fraud.

The plaintiffs' implicit argument about an actual fraud requirement fails to address the fact that the problem with using affidavits in a non-registration state goes beyond an issue of outright fraud. As defendant explained in his original brief, another problem with the use of affidavits is that they permit votes to be counted in an election before the state can verify voters' basic qualifications to vote, and result in numerous votes that cannot be verified despite extensive and expensive post-election verification efforts.

Whether unverifiable votes represent actual fraudulent votes or not, North Dakota has a legitimate interest in preserving the integrity of its elections, and preserving all North Dakota citizens' rights to have their "full" vote count without being diluted by invalid votes See Anderson, 417 U.S. at 226 .

"[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.'" Crawford, 553 U.S. at 197 (quoting Building Confidence in U.S. Elections § 2.5 (Sept. 2005) (Carter-Baker Report)); see also 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. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.").

IX. The dissolution motion is not a motion for reconsideration.

Finally, the plaintiffs contend the defendant cannot explain why the Court's current injunction is overbroad and violates Crawford because the dissolution motion is essentially one for reconsideration, i.e., arguments not brought to oppose the first injunction cannot be raised now. See ECF Doc. ID No. 92 at 30 (Brief Page No. 29). Setting aside the fact that the defendant did argue the first time around that injunctive relief would violate Crawford, see ECF Doc. ID No. 45 at 9-10 (Brief page No. 5-6), the plaintiffs have brought a new motion for a preliminary injunction which the defendant has every right to oppose, and in so opposing, every right to make exactly the same arguments he advances in the request for dissolution. As the plaintiffs themselves acknowledged in asking for a consolidated briefing schedule, the "two motions appear to have a significant amount of overlap[.]" ECF Doc. No. 86 at 1.

The defendant's motion to dissolve is fully justified by a change in North Dakota law, which may not have addressed plaintiffs' allegations in the manner they wanted, but nevertheless addressed problems that arose in the 2016 general election as a result of the Court's across-the-board injunction requiring the use of Voter's Affidavits. But even if the motion was not justified by the change in law, the plaintiffs do not explain how the Court can engage in the mental gymnastics required for it to give full consideration to the defendant's arguments in opposition to the new motion for a preliminary injunction, but refrain from doing the same when considering the motion to dissolve the old injunction.

CONCLUSION

Defendant respectfully requests that this Court dissolve the current preliminary injunction that requires the use of Voter's Affidavits in North Dakota elections. Defendant further respectfully requests that the Court refuse to enter an injunction preventing North Dakota from implementing its current voter ID laws, because the plaintiffs have failed to show they are likely to succeed on the merits of their equal protection or Voting Rights Act claims.

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