Civil No. 18-1725

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Richard Brakebill, Dorothy Herman, Della Merrick,
Elvis Norquay, Ray Norquay, and Lucille Vivier,
on behalf of themselves,

Appellees

v.

Alvin Jaeger, in his official capacity as the
North Dakota Secretary of State,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

REPLY BRIEF OF APPELLANT

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LAW AND ARGUMENT

I. North Dakota's RSA requirement was not adopted following the 2012 election or to target Native American voters.

The appellees' Statement of the Case seems intent on creating the impression that election laws passed after the 2012 election included changes to North Dakota's residential street address (RSA) requirement, and were part of a targeted attack on Native Americans that made North Dakota's laws the most restrictive in the nation with respect to Native American voters. Those suggestions are misleading.

A. The residency requirement is longstanding.

North Dakota's RSA requirement did not change following the 2012 election. As appellees acknowledge, "organizations lauded North Dakota's electoral system" as it existed prior to 2012. Appellees' Br. 5. This lauded system included North Dakota's residential address requirements, with the definition of residence dating back to 1895. See N.D. Rev. Codes § 12 (1895) ("Every person has in law a residence. . . . It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.") (subsequently codified at N.D. Cent. Code § 54-01-26 (1967)); N.D. Cent. Code § 16.1-01-04 (2003) ("[E]very qualified elector may have only one residence, shown by an actual fixed permanent dwelling, establishment, or any other abode . . . determined in accordance with the rules for determining residency . . . in section 54-01-26.").

The requirement that a voter "show identification, which includes the individual's residential address," also preceded the 2012 election. N.D. Cent. Code § 16.1-05-07(1) (2003). The central voter file (CVF) was created in 2003; both it

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and poll books maintained thereafter were required to include "the complete residential address of the individual." N.D. Cent. Code §§ 16.1-02-12(2) (2003); 16.1-02-13(2) (2003).

The claim that, prior to 2012, "voters who did not have . . . street addresses could vote if a poll worker vouched for them, or if the voter executed an affidavit," Appellees' Br. 1, is misleading to the extent it implies an affiant could vote without identifying a residential address. Prior to 2012, affidavit voters were required to include their addresses on the affidavit. See N.D. Cent. Code § 16.1-05-06 (1999) (requiring an affidavit to include "present address"); N.D. Cent. Code § 16.1-05-06 (1981) ("The affidavit shall include the name and address of the affiant"). The affidavits the district court required during the November 2016 election were modeled after the affidavit form used before the 2013 legislation, and required affiants to state their current residential address. See Dist. Ct. Doc. ID ## 51-3 Exhibit 2, 54-2 Exhibit B.

Thus, any suggestion that North Dakota's RSA requirement was part of a targeted attack on Native Americans following the 2012 election is incorrect and misleading. The election law changes that followed the 2012 election resulted from a long overdue recognition that the use of self-authenticating affidavits was incompatible with a non-registration election system. The practice could, and did, result in unverifiable votes being included in election results with no means to separate those votes after an election was certified, even if post-election attempts to verify votes proved effective, which they did not. Vote dilution claims could have been raised by qualified electors who challenged the State's reliance upon

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ineffective post-election verification measures when there was no means to separate out ballots of unqualified individuals. The district court implicitly recognized the unsoundness of its first injunction when it refused the appellees' request to keep the use of affidavits in place and vacated the first injunction.

In addition, the practice of poll worker vouching was problematic. Recently, North Dakota has faced unique challenges in ensuring the integrity of its elections due to a more mobile and diverse 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, Appellant App. 208; see also Dist. Ct. Doc. ID # 81-57 at 12. This new population is ethnically diverse. 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. See Dist. Ct. Doc. ID #81-57 at 42.

Given North Dakota's changing demographics, the continued use of poll worker vouching raised the possibility of equal protection/discrimination claims arising from poll workers' ability to identify and vouch for their long-time Caucasian neighbors, but inability to vouch for Black, Asian, or Hispanic individuals who just recently moved to North Dakota.

B. North Dakota's election laws are not the most restrictive in the nation with respect to Native American voters.

Appellees also contend North Dakota's laws "became arguably the 'most restrictive'" in the nation following the 2012 election. Appellees' Br. 9. But this is

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merely a quote from the district court's first injunction order, which merely referred to the appellees' own argument. See Appellant App. 67. In fact, there are several objective ways to determine that North Dakota law is not the most restrictive in the nation with respect to Native American voters.

First, North Dakota is the only state that does not impose a registration requirement. Other states with registration deadlines impose an absolute barrier on an individual's ability to vote, but North Dakota residents – including Native Americans – are not disenfranchised by such deadlines and can vote on the day of an election simply by establishing their threshold qualifications to vote in the manner required by the State.

Second, North Dakota permits the use of tribal IDs to vote, while twenty-one other states that require some type of ID do not permit them,[1] including twelve states that have federally-recognized tribes.[2] 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 July 16, 2018); 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 July 16, 2018). Indeed, North Dakota law enlarges the voting rights of Native Americans by permitting them more options to vote than all other North Dakota citizens, tied directly to their status

[1] 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.
[2] Alaska, Colorado, Connecticut, Florida, Indiana, Iowa, Kansas, Louisiana, North Carolina, Rhode Island, South Carolina, and Texas.

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as Native Americans.

Third, North Dakota permits non-photo IDs to be used to vote in elections, while seventeen other states are classified as photo ID states.[3] 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 July 16, 2018). With respect to tribal IDs, the State does not prescribe the form the tribal ID must take, including whether it is a photo or non-photo ID, so long as it is an official document issued by or on behalf of the tribal government setting forth the name, date of birth, and current RSA of a tribal member. N.D. Cent. Code § 16.1-01-04.1(2) & (3)(a)(2); see also Silrum Affidavit ¶ 43, Appellant App. 222.

II. All appellees have RSAs, and thus lack standing to challenge the RSA requirement.

The Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.'" Gill v. Whitford, __ U.S. __, 138 S.Ct. 1916, 1929 (2018) (quoting Reynolds v. Sims, 377 U.S. 533, 561 (1964)). Accordingly, the "individual and personal injury of the kind required for Article III standing" requires plaintiffs who challenge an election law to show "a burden on those plaintiffs' own votes," that is, an "injury that they have suffered as individual voters." Id. at 1931. Voters must "demonstrate a burden on their individual votes," id. at 1934, because the "Court is not responsible for vindicating generalized partisan preferences" and has a "constitutionally proscribed role . . . to vindicate [only] the

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

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individual rights of the people appearing before it." Id. at 1933. Moreover, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." Id. at 1934 (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 (2006)).

In Gill, the Supreme Court held that voters who lived outside of districts where gerrymandering allegedly caused Democratic votes to be diluted had no standing to challenge Wisconsin's legislative redistricting plan because the "disadvantage to the voter as an individual . . . results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be limited to the inadequacy that produced his injury in fact." Id. at 1930 (internal citations and quotation marks omitted).

Here, the six individual appellees have no standing to challenge North Dakota's RSA requirement because all six have qualifying RSAs, and thus cannot show that that requirement burdens their individual votes. Thus, any remedy that purports to address the RSA requirement cannot possibly be tailored to redress an alleged injury of six individuals unburdened by the requirement. The district court's P.O. Box injunction provided them no remedy, because none of them have alleged or shown they must rely upon a P.O. Box to vote. Indeed, the district court's injunction actually permits the type of vote dilution harm discussed in Gill by permitting votes to be arbitrarily "packed" in precincts where a post office may be located, and pulling votes away from precincts where the voters actually reside.

The appellees try to cure Elvis Norquay's lack of standing by claiming he "currently lacks an address as he is homeless." Appellees' Br. 20. Under North Dakota law, Elvis Norquay cannot lack an address for voting purposes because "[a]n

individual retains a residence in this state until another has been gained." N.D. Cent. Code § 16.1-01-04.2. Elvis Norquay had a qualifying RSA before becoming homeless – 4604 BIA Road 10 #664, Belcourt, North Dakota. Appellant App. 225. He retains that address for voting purposes until he gains another. In October 2017, he admits he obtained a tribal ID that lists his address in Belcourt. Id. Thus, he can vote with his tribal ID listing his qualifying RSA.

Although now contending Elvis Norquay lacks an address altogether, the appellees nevertheless acknowledge he resides somewhere by claiming he "will be unable to vote in the precinct *where he currently resides*," Appellees' Br. 40, but without revealing where that is. Appellees also contend Norquay is being treated differently than other voters because North Dakota gives him the choice of voting by mail-in ballot or returning to Belcourt to vote in-person.[4] Id. Providing Norquay this choice is not treating him differently than others. All voters in North Dakota have the option of voting by mail-in ballot. All voters in North Dakota have the option of voting in-person.

North Dakota treats all individuals the same with respect to requiring them to have more than a transient connection to a particular precinct before permitting them to vote there, a legitimate state interest implicitly recognized in North Dakota's Constitution. See N.D. Const. Art. II § 1 ("When an elector moves within the state, he shall be entitled to vote in the precinct from which he moves until he establishes voting residence in another precinct."); see also One Wisconsin Inst., Inc. v.

[4] As the Secretary previously noted, Norquay's alleged burden of traveling to Belcourt is belied by his admission that he travels there to pick up his mail. See Appellant Br. 22 n.5.

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Thomsen, 198 F. Supp. 3d 896, 937 (W.D. Wis. 2016) ("[A] voter's residence in a particular [precinct] is a qualification for voting in that [precinct]. The state has an interest in making sure that only qualified voters are participating in elections, and the proof of residence requirement is directly linked to that goal.").

The state constitution authorizes the "legislative assembly [to] provide by law for the determination of residence for voting eligibility[.]" N.D. Const. Art. II § 1. North Dakota's legislature did so by determining that "[t]he 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." N.D. Cent. Code § 16.1-01-04.2(4). Thus, North Dakota has deemed a less than thirty-day connection to a particular precinct to be too transient to permit a voter to change his voting residence. To the extent North Dakota requires Elvis Norquay to vote in the last precinct in which he had more than a transient interest (whether by mail-in ballot or in-person), he is being treated the same as all other North Dakotans who must establish a thirty-day presence in a new precinct before voting there.

The fact remains, North Dakota provides Elvis Norquay a choice of voting through nothing more than the cost of the postage needed to mail a ballot, in the last precinct where he has more than a transient interest. Election jurisprudence clearly recognizes that a state need not remove every possible burden for every possible voter with respect to every possible means of voting. See Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (noting the "chaos" that would accompany the democratic process without "substantial regulation of elections" that "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with

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others for political ends. Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions"); see also Libertarian Party of Ohio v. Husted, 831 F.3d 382, 400 (6th Cir. 2016) (indicating that an evaluation of the burdens imposed by election laws requires consideration of "the combined effect of the applicable election regulations, not simply each law in isolation" as well as "whether alternative means are available to exercise [voting] rights") (internal quotation marks and citations omitted).

If Elvis Norquay has established a thirty-day residence in the precinct where he currently resides, North Dakota law permits him to vote there. In a declaration signed February 7, 2018, Elvis Norquay indicated he began living in a homeless apartment complex in Dunseith in November 2017. Appellant App. 225, 227. In his answers to interrogatories, Norquay identified his residence in Dunseith as a qualifying RSA – 215 SE Willow Creek #9001, Dunseith. Id. at 243. These facts suggest that Elvis Norquay has established the requisite connection to a new precinct if he chose to verify the Dunseith address as his new voting address pursuant to N.D. Cent. Code § 16.1-01-04.2(4). And he could vote with this new RSA by obtaining a non-photo ID from his tribal government listing that address pursuant to N.D. Cent. Code § 16.1-01-04.1(3)(a)(2). Norquay has failed to allege any burdens in obtaining a non-photo ID from his tribal government listing where he currently resides or listing his Dunseith address if he has not gained a new residence since living there.

Significantly, the appellees' contention that Elvis Norquay currently lacks an address does not provide him standing to challenge North Dakota's RSA requirement in any event, even if it were possible for a person to lack a voting

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address under North Dakota law. Norquay has not shown he lacked an RSA when the amended complaint was filed. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (indicating standing "must exist at the commencement of the litigation"). Indeed, none of the allegations in the Amended Complaint that relate to the individual and particular burdens allegedly faced by the six appellees establish that they had standing to challenge North Dakota's RSA requirement at the commencement of the litigation. See Appellant App. 98-103.

The appellees contend the subgroup of voters at issue is "Plaintiffs and those similarly situated." Appellees' Br. 47. This suit is not, however, a class action brought on behalf of appellees and others similarly situated. It is a non-class action brought by six individuals on behalf of themselves, all of whom must "demonstrate a burden on their individual votes." Gill, 138 S.Ct. at 1934. The district court improperly entered a statewide injunction on behalf of six individuals who lack standing to challenge the RSA requirement. The P.O. Box injunction cannot be squared with well-recognized standing principles, most recently articulated in the election law context in Gill, and must be reversed. This Court should further direct the dismissal of the appellees' challenge to North Dakota's RSA requirement. See Cuno, 547 U.S. at 354.

III. North Dakota's RSA requirement does not require voters to maintain an interest in property.

In arguing that North Dakota's RSA requirement is unconstitutional, appellees simultaneously rely upon cases finding a law unconstitutional because it requires property ownership, while contending they are not claiming North Dakota's RSA requirement includes a property ownership element. See Appellees' Br. 44

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(citing Quinn v. Milsap, 491 U.S. 95 (1989) and Turner v. Fouche, 396 U.S. 346 (1970)).[5] Despite the fact that all six appellees have qualifying RSAs that can be used to vote – and therefore the district court's P.O. Box injunction does not redress any particularized and individual injury from which they suffer – the appellees nevertheless defend the injunction, and their standing, on the grounds that North Dakota law still imposes the burden of "maintaining" an interest in property. Appellees' Br. 35-37, 44.

Appellees specifically claim that maintaining an RSA requires "paying the expenses associated with living there." Appellees' Br. 36. That is incorrect. Nothing in North Dakota law requires a person to pay the expenses associated with their residence in order for it to qualify as an RSA for voting purposes. See N.D. Cent. Code § 16.1-01-04.2(1). Appellees also claim one of the burdens in maintaining an address is paying utility bills. Appellees' Br. 36. Also incorrect, as the statute imposes no such requirement in order to have a voting residence.

Appellees further claim that Elvis "Norquay has to pay utility bills to maintain an address" citing Appellant's Appendix at 225. Appellees' Br. 36. Nothing on page 225 of Appellant's Appendix indicates Elvis Norquay had to pay utility bills to maintain an address; on the contrary, he specifically averred that Rolla Social Services pays his utility bill. See Appellant App. 226 ("I immediately give the utility

[5] Appellees' reliance on 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) to determine residency for the homeless is misplaced. 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 still qualifies for voting purposes "until another has been gained."

bill to Rolla Social Services who pays it."). In addition, the appellees' Amended Complaint specifically alleges that Elvis Norquay "does not currently pay for his own utilities." Id. at 100.

Other than these alleged burdens of "maintaining" an address not imposed by the statute, the only other "maintaining" burdens the appellees rely upon are "find[ing] a residence that has an address," and "arranging to obtain an ID that shows that address." Appellees Br. 36. The appellees fail to explain how that first task is a burden, given the fact that all six have residences that qualify as RSAs. The second is an alleged burden in obtaining an ID, not a burden in obtaining a residence. All six appellees have qualifying residences, but yet challenge the requirement that they have qualifying residences.

In Common Cause/Ga. v. Billups, the court identified the extra step of "obtaining" a photo ID as the injury sufficient to confer standing because government-erected barriers that make it more difficult to obtain a benefit can constitute an injury-in-fact even if those barriers do not ultimately result in an inability to obtain the benefit. 554 F.3d 1340, 1351 (11th Cir. 2009) (citing Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993)). Here, however, the State imposed no barriers on the appellees' ability to obtain, or maintain, a residence. All six have residences that satisfy the RSA requirement. Thus, while they may have standing to challenge their ability to obtain a valid ID on other grounds, they cannot claim the lack of an RSA as a barrier they face in obtaining a valid ID. They also cannot show any particularized injury

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remedied by the district court's P.O. Box injunction, because all six can vote using their RSAs, and none of them must rely upon a P.O. Box.

Moreover, to some extent, all of their alleged burdens of maintaining a connection to a "fixed permanent dwelling, establishment, or any other abode to which the individual returns when not called elsewhere," N.D. Cent. Code § 16.1-01-04.2(1), amount to nothing more than the practical incidents of residing in a state with harsh winter climates. The appellees fail to explain how they could survive as residents of North Dakota without having shelter from the elements in the form of some "dwelling, establishment, or any other abode" that they could establish as a residence for voting purposes. Indeed, all of these appellees have the requisite connection to such a place, even Elvis Norquay despite his recent homelessness. Standing to challenge the RSA requirement is not conferred on six appellees who have RSAs due to the theoretical and hypothetical possibility that other individuals may lack an RSA.

IV. North Dakota's RSA requirement advances legitimate state interests and is not facially invalid.

North Dakota has a legitimate "interest in protecting the integrity and reliability of [its] electoral process." Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008). North Dakota advances this interest by ensuring that all voters are qualified to vote in the particular precinct where they reside, and thus receive the correct ballots. See, e.g., Thomsen, 198 F. Supp. 3d at 937 ("[A] voter's residence in a particular [precinct] is a qualification for voting in that [precinct].). The RSA

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requirement is not only directly tied to that legitimate interest, but integral to executing a valid election.

All candidates have an interest in receiving valid votes, and all voters the right to fully-valued votes, undiluted by ineligible votes. See Anderson v. United States, 417 U.S. 211, 226 (1974). The State has an interest not only in identifying that a voter is qualified to vote within North Dakota, but also to show that a voter is qualified to vote in a particular precinct. The RSA requirement is directly related to the Secretary's responsibility to ensure that the correct ballot be given to each voter. "Delivery of the correct ballot to the voter not only guarantees that individuals are able to vote on every contest for which they are eligible, but also ensures that they are not incorrectly given the opportunity to cast votes in contests for which they are not eligible based on residential address." Arnold Affidavit, Appellant App. 191.

As explained in the Secretary's principle brief, the number of separate ballots required for a statewide election numbers close to 1000, see Dist. Ct. Doc. ID # 81-2 through 81-54, and in some instances neighbors living across the street from one another may have to cast different ballots if precinct lines separate the two sides of the street. The Secretary invites the Court to examine the exemplar overview map of just a single North Dakota county, discussed in John Arnold's affidavit at paragraph 12, see Appellant App. 190, to understand the importance the RSA requirement has in ensuring the integrity of any given election given the multiple overlays of jurisdiction involved in providing the correct ballot to each individual voter. The failure to identify voters' current RSAs impacts the validity of multiple election contests within each particular precinct in any given election. The

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appellees' contention that the RSA requirement is unrelated to voter qualifications simply ignores fundamental aspects of the procedural realities involved in carrying out a valid election for the sake of candidates and voters alike.

The appellees have failed to show how the RSA requirement would be invalid under all circumstances in order to support a facial, constitutional attack. See United States v. Salerno, 481 U.S. 739, 745 (1987). The record shows the requirement imposes no burden on the vast majority of North Dakota residents, and advances multiple legitimate state interests. See Crawford, 553 U.S. at 202-04 (holding an election law that advances important state interests (including safeguarding voter confidence, protecting the integrity of elections, aligning state law with the requirements of federal law, preventing voter fraud, and assessing the eligibility and qualifications of voters) is facially constitutional when it imposes nothing more than a limited burden on the vast majority of voters).

V. The record contains evidence of actual fraud, even though the State need not prove actual fraud to advance its legitimate interest of preventing fraud.

To defend the district court's injunction, appellees rely upon the district court's statement that "the record before the Court has revealed no evidence of voter fraud in the past, and no evidence of voter fraud in 2016." Appellant App. 262. That statement is inaccurate. In the 2012 election, there was "clear evidence of double voting" in nine cases of voter fraud referred to the respective State's Attorneys for prosecution. Silrum Affidavit ¶ 13, Appellant App. 210. The election law changes that followed the 2012 election reduced election fraud, as there was only one suspected case of voter fraud during the three elections where those laws were in

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place. Id. ¶ 16, Appellant App. 211.

In the 2016 election governed by the district court's first injunction, the amount of suspected voter fraud again increased. There were at least three cases of double voting, with at least one that resulted in prosecution. Id. ¶¶ 40-41, Appellant App. 221. There was an additional case of voting by a suspected non-U.S. citizen through the use of an affidavit required by the first injunction. Id. ¶ 42, Appellant App. 222. Following the November 2016 election, the Secretary also discovered that 311 individuals were using the addresses of United Parcel Service (UPS) stores in Bismarck, Fargo, Grand Forks, and Minot as their RSAs, some of whom used those addresses to vote by affidavit pursuant to the first injunction. Id. ¶ 20, Appellant App. 212; see also Dist. Ct. Doc. ID # # 81-67, 81-68. Fraudulently voting in the wrong precinct, as determined by the arbitrary geographical location of a UPS store instead of where a voter actually resides, is precisely the type of voter fraud now sanctioned by the district court's P.O. Box injunction, which similarly permits voting in the wrong precinct based upon the arbitrary location of a post office.

In addition to this record evidence of fraud, the district court's first injunction created the potential of fraud that the State had addressed by removing self-authenticating affidavits from its election laws in 2013, that is, the possibility of unqualified voters using self-authenticating affidavits to vote with pseudonyms knowing there is very little chance of the fraud being detected or prosecuted. See Silrum Affidavit ¶¶ 11, 24-35, 37-40, 44; Appellant App. 209, 214-18, 219-21, 222-23; see also Dist. Ct. Doc. ID # 81 at 12-15.

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Moreover, North Dakota is not required to present evidence of actual fraud to advance its legitimate state interest of preventing fraud. See Crawford, 553 U.S. at 195-96 (concluding Indiana had a legitimate interest in preventing election fraud notwithstanding a lack of record evidence of actual fraud). "Legislatures ... should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." Munro v. Socialist Workers Party, 479 U.S. 189, 195–96 (1986).

With respect to the 2016 election tainted by the district court's first injunction, the potential of undetected fraud through the use of self-authenticating affidavits in a non-registration state was publicized by the press, which would inevitably undermine voter confidence in the integrity of the State's elections if allowed to continue. 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-northdakota-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.").

States can anticipate and guard against potential fraudulent voting because public confidence in elections is a legitimate state interest. See Crawford, 553 U.S. at 197 ("[An] electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters") (internal quotation

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marks and citation omitted). The district court's current P.O. Box injunction actually sanctions a person's ability to vote in the wrong precinct, and will clearly undermine the public's confidence in the integrity of the State's elections.

VI. The district court improperly entered an overbroad statewide injunction.

Even if the appellees had shown that North Dakota's RSA requirement imposed a special burden on them, the district court's statewide across-the-board injunction still conflicted with the principles discussed in Crawford regarding the distinction between as-applied and facial challenges. "[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 Frank v. Walker, 819 F.3d 384, 387 (7th Cir. 2016) ("The predicament of people who cannot get acceptable photo ID with reasonable effort would not have supported the sweeping injunction the district court entered."). The district court's statewide injunction is not tailored to redress any particular plaintiff's injury. Gill, 138 S.Ct. at 1934. Given the fact that all appellees can satisfy the RSA requirement, they have not shown the requirement is unconstitutional as applied to them, let alone successfully mounted the "difficult challenge" of showing the RSA requirement is invalid under all circumstances. Salerno, 481 U.S. at 745. Thus, the district court should have, but failed, to limit its analysis to as-applied challenges brought by six individuals. It also failed to limit injunctive relief to the individual appellees. Indeed, the impropriety of the district court's injunction is self-evident from the fact that none of the appellees benefit from a statewide injunction that permits other

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voters to use a P.O. Box to vote when all six appellees have an RSA they can use to vote.

VII. The district court improperly enjoined enforcement of the tribal ID provisions.

In enjoining enforcement of the tribal ID provisions found at N.D. Cent. Code § 16.1-01-04.1(3)(a)(2), the district court not only ignored standing requirements for six individuals who are not members of a tribe whose IDs are issued by the Bureau of Indian Affairs (BIA), but further ignored that BIA-issued IDs are treated by the Secretary in all respects the same as IDs issued by a tribal government. See Silrum Affidavit ¶ 43, Appellant App. 222 ("The State accepts Tribal IDs issued by a Tribe or by the Bureau of Indian Affairs as valid forms of ID as long as it includes the required information.").

The district court likewise failed to conduct an "appropriately deferential analysis," Planned Parenthood of Ark. & E. Okla. v. Jegley, 864 F.3d 953, 958 (8th Cir. 2017), to determine whether the statute permits appellees to obtain a non-photo ID from a tribe, which need consist of nothing more than an official letter setting forth name, date of birth, and current RSA.

The district court's pronouncement that the Secretary had been wrongly construing and applying North Dakota law was clearly for no other purpose than generating potential constitutional conflict where no such potential conflict existed. Because the Secretary was already interpreting and implementing the statute in a manner that avoided constitutional conflict, the appellees could not show the "sine

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qua non" of irreparable harm[6] required before a court may "thwart a state's presumptively reasonable democratic processes[.]" Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 530 F.3d 724, 733 (8th Cir. 2008).[7] Indeed, the absurdity is striking: the district court enjoined enforcement of the statute, but then merely ordered the Secretary to continue to interpret the statute in the manner in which it was already being interpreted.

The appellees' contention that Crawford mandates free IDs for indigent voters, Appellees' Br. 51, ignores the fact that North Dakota's voter ID requirements are used to establish threshold qualifications to vote in its non-registration system, not just to identify an already-registered voter. The Ninth Circuit's application of Crawford in a case involving the assessment of threshold eligibility and qualifications of voters recognized that payment of some fees may be inevitable for a voter to establish those qualifications, but that such a fee does not result in an invidious restriction under Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966). See Gonzalez v. Arizona, 677 F.3d 383, 409-10 (9th Cir. 2012).

The district court's determination that 2,305 Native Americans will not be able to vote in 2018 is flawed. Significantly, the district court "did not find that

[6] Frejlach v. Butler, 573 F.2d 1026, 1027 (8th Cir. 1978).

[7] The appellees' statement that the "Secretary offered no evidence to show that any of the Tribes in North Dakota are able to issue free IDs," Appellees' Br. 51, when such IDs need consist of nothing more than a letter merely setting forth a tribal member's name, date of birth, and current RSA, is an improper attempt to shift the burden of proof to the Secretary. The appellees bear the burden of proving irreparable injury. See. e.g., Glenwood Bridge, Inc. v. City of Mpls., 940 F.2d 367, 371 (8th Cir. 1991). Their failure to sustain that burden "ends the inquiry" and warrants the denial of injunctive relief. Id.

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substantial numbers of [Native Americans] eligible to vote have tried to get a[n] . . . ID but been unable to do so" under North Dakota's current law. Frank v. Walker, 768 F.3d 744, 746 (7th Cir. 2014). The relevant issue is not the number of Native Americans (or other voters for that matter) that may not possess a valid ID, but whether North Dakota's election system unconstitutionally burdens their ability to obtain one.

> [T]he fact that [some individuals] have not acquired . . . ID [does not necessarily lead to the inference] that that step is particularly difficult. A more plausible inference would be that people who do not plan to vote also do not go out of their way to get a[n] . . . ID that would have no other use to them. This does not imply that a need for . . . ID is an obstacle to a significant number of persons who otherwise would cast ballots.

Frank v. Walker, 768 F.3d at 749.

North Dakota's election laws permit Native Americans to vote simply by obtaining an official document from their tribal government that lists their name, date of birth, and current RSA. See N.D. Cent. Code §§ 16.1-01-04.1(2) & (3)(a)(2). North Dakota law does not otherwise limit the form of the tribal document, and both photo and non-photo tribal IDs are permitted under the statute. The six individuals who brought this suit all have names, dates of birth, and qualifying RSAs. Some have admitted to having tribal IDs that can be used to vote under current North Dakota law, and all failed to show what prevents them obtaining a valid ID from their tribal government.

VIII. The district court improperly enjoined enforcement of the supplemental document provisions.

The supplemental document provisions found at N.D. Cent. Code § 16.1-01-04.1(2)(b) are evenhanded, reasonable efforts by the State to give voters more

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options to satisfy the State's voter ID requirements when their acceptable IDs may be missing some information. The appellees fail to explain how the State's choice of adopting the same list of documents recognized under the Help America Vote Act (HAVA) to accomplish that goal is unreasonable.

The appellees also fail to recognize that the supplemental document provisions are not the only means by which a voter can satisfy the State's voter ID requirements, and thus cannot be viewed in isolation. The Court must consider "the combined effect" of North Dakota's election system when considering the supplemental document provisions as one "alternative means" of exercising voting rights. Libertarian Party of Ohio v. Husted, 831 F.3d at 400. Native American voters have multiple options available to them (i.e., state-issued drivers' licenses and nondrivers' ID, photo and non-photo IDs issued by their tribes), and the ability to supplement any of those IDs with HAVA documents. Like the other provisions enjoined by the district court, appellees failed to show the supplement document provisions would be invalid under every circumstance so as to justify a statewide injunction.

IX. The district court improperly ordered the Secretary to clarify the meaning of N.D. Cent. Code § 16.1-01-04.1(5).

Appellees failed to respond to this issue, which was raised in Point VII of the Appellant's Brief. Appellees are subject to the same rules as appellants with respect to the failure to address an issue in their brief. See St. Louis Effort for AIDS v. Huff, 782 F.3d 1016, 1023 n.6 (8th Cir. 2015) (deeming the appellees to have abandoned an issue not addressed in their brief); United States v. Johnson, 710 F.3d 784, 787 n.1 (8th Cir. 2013) (declining to address an appellee's argument raised for the first time

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at oral argument). The Secretary requests that this Court deem appellees' failure to defend this aspect of the district court's injunction as an admission that the Secretary's arguments on this point are well-taken, and reverse the district court on this point.[8]

CONCLUSION

The district court's multiple injunctions disregard well-established standing requirements, and the bedrock principle that injunctive relief must be narrowly tailored to redress a particular injury. Appellees failed to show the North Dakota election laws they challenge are unconstitutional as applied to them, let alone unconstitutional under all circumstances in order to prevail on a facial challenge. The Secretary respectfully requests that this Court reverse the district court's improper and unwarranted statewide injunctions.

[8] The failure to reverse the district court on this point despite the appellees' non-opposition has real consequences. The State could find itself facing a substantial claim for attorney fees under 42 U.S.C. § 1988 on the grounds that appellees were a partially-prevailing party with respect to this (or other) aspects of the district court's second injunction. For example, the appellees have made a claim against the State and its taxpayers for over $1.1 million in fees and expenses resulting from the first preliminary injunction issued on August 1, 2016, which was less than seven months after appellees filed their initial complaint on January 20, 2016. See Dist. Ct. Doc. ID # 107-11 at 19.

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Dated this 16th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

Civil No. 18-1725

The undersigned certifies pursuant to Fed. R. App. P 32(a)(7) and 8th Cir. R. 28(A) that the text of Reply Brief of Appellant (excluding the table of contents and table of authorities) contains 6,476 words.

This brief has been prepared in a proportionally spaced typeface using Word 2017 word processing software in Times New Roman 14 point font and has also been scanned for viruses and is virus free.

Dated this 16th day of July, 2018.

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