No. 18A_____

In the
Supreme Court of the United States

RICHARD BRAKEBILL, DOROTHY HERMAN, DELLA MERRICK, ELVIS NORQUAY, RAY NORQUAY, and LUCILLE VIVIER

Applicants,

v.

ALVIN JAEGER, in his official capacity as the North Dakota Secretary of State,

Respondent.

EMERGENCY APPLICATION TO VACATE EIGHTH CIRCUIT STAY OF SECOND PRELIMINARY INJUNCTION

Directed to the Honorable Neil Gorsuch,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Eighth Circuit

John Echohawk
NATIVE AMERICAN RIGHTS FUND
1506 BROADWAY
BOULDER, CO 80302
(303) 447-8760
jechohawk@narf.org

Counsel of Record for Applicants

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Supreme Court Rule 29.6, the undersigned states that none of the Applicants has a parent corporation, and no publicly held corporation holds 10 percent or more of any Applicant's stock.

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Brakebill v. Jaeger, No. 18-172, 2018 WL 4559487 (8th Cir. Sept. 24, 2018) ..... passim

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Amended Complaint, *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. Dec. 27, 2017), ECF No. 77 16

Austen Bundy, *Distance, language can still pose challenge to Native American voting*, Cronkite News - Arizona PBS (May 14, 2018) https://cronkitenews.azpbs.org/2018/05/14/distance-language-can-still-pose-challenge-to-native-american-voting/ 8

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John Hageman, *Judge slaps down ND effort to fight voter ID ruling*, Bismarck Tribune (May 1, 2018) https://bismarcktribune.com/news/state-and-regional/judge-slaps-down-nd-effort-to-fight-voter-id-ruling/article_4bcabfee-b1b8-5160-b4cb-6d6f959d739b.html 11

John Hageman, *Citing Native Americans' 'cherished right' to vote, federal judge orders changes to ND voter ID law*, Bismarck Tribune (Apr. 4, 2018) https://bismarcktribune.com/news/state-and-regional/citing-native-americans-cherished-right-to-vote-federal-judge-orders/article_98bd9d55-7c2e-55b8-b73a-5b9a2a1f1be7.html 10-11

Herald Staff, *Grand Forks polls open at 7 a.m. Tuesday*, Grand Folks Herald (June 11, 2018 5:51 PM) http://www.grandforksherald.com/news/government-and-politics/4459018-grand-forks-polls-open-7-am-tuesday 10

Carrie Jung, *Home Addresses On Navajo Nation Are Rare, Officials Working To Change That*, 991.5 KJZZ (Oct. 8, 2015 8:20 AM) http://kjzz.org/content/202564/home-addresses-navajo-nation-are-rare-officials-working-change 8

New Hampshire Secretary of State, *Registering to Vote in New Hampshire*, http://sos.nh.gov/nhsos_content.aspx?id=8589972818 (last visited Sept. 27, 2018) 7

North Dakota Secretary of State, *ID Required for Voting*, retrieved Sept. 25, 2018, from https:vip.sos.nd.gov/idrequirements.aspx 11

Office of the Minnesota Secretary of State, *Register to Vote – I'm Homeless*, https://www.sos.state.mn.us/elections-voting/register-to-vote/im-homeless/ (last visited Sept. 27, 2018) 7

Oral Argument, *Brakebill v. Jaeger*, No. 18-1725 (Sept. 10, 2018) http://media-oa.ca8.uscourts.gov/OAaudio/2018/9/181725.MP3 11

Jill Schramm, *Court ruling hangs over June election*, Minot Daily News (Arp. 21, 2018) http://www.minotdailynews.com/news/local-news/2018/04/court-ruling-hangs-over-june-election/ 11

Wisconsin Elections Commission, *Homeless Voters Guide* (July 18, 2018) https://elections.wi.gov/sites/default/files/publication/154/wi_voter_guide_for_homeless_voters_pdf_11043.pdf 7

To the Honorable Neil Gorsuch, Associate Justice of the United States Supreme Court and Circuit Justice for the Eighth Circuit:

Applicants are Native American voters, some of whom are threatened with imminent disenfranchisement by recent changes to North Dakota election law. The North Dakota District Court preliminarily enjoined those changes, which impose new voter identification and residential address requirements that will prevent Native Americans living on reservations and in other rural communities from being able to vote in the 2018 election in a few short weeks. On September 24, 2018, a divided panel of the Eighth Circuit stayed the injunction. Emergency relief from the panel's stay is urgently required to prevent irreparable harm to applicants' fundamental right to vote.

The North Dakota election law here imposes impossible and severe burdens on the franchise for Native American voters. The law requires voters to present identification that includes a "current residential street address." N.D. Cent. Code § 16.1-01-04.1(2)(b). Thousands of Native American voters—a disproportionate share of the population—cannot satisfy that requirement. As the District Court found, that is because, among other reasons, (1) Native American voters live on reservations or in other rural areas that do not have residential addresses to begin with, (2) tribal IDs often do not list residential addresses, (3) Native Americans are disproportionately homeless, and (4) there are very few driver's license centers on or near Native reservations. To make matters worse, North Dakota also charges $8 for an ID card that would allow a person to vote, and requires every voter to provide

proof that they have a physical, residential property with a "current residential street address," a requirement that is unrelated to any legitimate qualification for exercising the franchise, and that also disproportionately disenfranchises Native Americans. *See* Order, *Brakebill v. Jaeger*, No. 1:16-cv-008, 2018 WL 1612190 (D.N.D. Apr. 3, 2018), ECF No. 99.

The District Court twice held that North Dakota's voter ID and residential address requirements impose unconstitutional barriers on Native Americans' right to vote. In order to relieve Native Americans who live on reservations or in other rural areas from the residential street address requirement, the District Court order required the Secretary to allow voter IDs that "include[] either a 'current residential street address' *or a current mailing address (P.O. Box or other address)*." Order, 2018 WL 1612190, at *7 (emphasis added). That order has been in place since April, and was in place during the State's primary election in June.

But three days ago – with military voting for the November elections already underway and just days before absentee ballots will be mailed – the Eighth Circuit upended the state of play. A divided panel of that Court vacated the District Court's injunction, leaving thousands of Native American voters unable to cast a ballot. The errors in the Eighth Circuit's stay decision are by themselves reason enough to grant the relief requested here. But those errors are exacerbated by the timing of the ruling. Changing the rules so close to an election—after voting has actually started—will irreparably injure Native American voters and cause serious voter confusion, precisely the situation this Court warned against in *Purcell v. Gonzalez*,

549 U.S. 1 (2006). This Court should not permit a rule change after the election has already started, with voting rights of thousands of Native Americans in North Dakota hanging in the balance. *See e.g. Veasey v. Perry*, 135 S. Ct. 9 (2014) (denying emergency application to vacate 5th Circuit stay); *Frank v. Walker*, 135 S. Ct. 7 (2014) (granting emergency application to vacate 7th Circuit stay of district court order for preliminary injunction). The Eighth Circuit's stay order should be vacated.

STANDARD OF REVIEW

A Circuit Justice may vacate a stay "where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed [by the Supreme Court] upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue a stay." *W. Airlines v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *see also Hollingsworth v. Perry*, 130 S. Ct. 705, 709–10 (2010). Additionally, given the nature of the underlying challenge, the Eighth Circuit was "required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases[.]" *Purcell*, 549 U.S. at 4–5. "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election

draws closer, that risk will increase." *Id.* Given the exigencies of this case, this is one of the "rare, extraordinary circumstances" when the Applicants can seek a Stay in the Supreme Court in the first instance. *W. Airlines, Inc.*, 480 U.S. at 1304.

REVIEW OF DISTRICT COURT FINDINGS

This litigation has been ongoing since 2016, and a detailed record was developed below. In particular, plaintiffs submitted extensive evidence, including eight expert reports, two detailed surveys that quantified the number of potentially disenfranchised voters, and tribal leader and member declarations. The State did not contest any of this evidence. Based on plaintiffs' uncontested submissions, the District Court made extensive factual findings detailing the disproportionately burdensome effects of North Dakota's voter ID laws, and it issued a preliminary injunction before the 2016 election and again before the 2018 primary to blunt those discriminatory effects.

The District Court's relevant findings fall into three basic categories.

First, many Native Americans do not have current residential street addresses. "The State has acknowledged that Native American communities often lack residential street addresses or do not have clear residential addresses." Order, 2018 WL 1612190, at *4. "[M]any tribal ID's do not satisfy North Dakota's requirement showing the 'applicant's current or most recent North Dakota residential address.'" Order, *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548, at *7 (D.N.D. Aug. 1, 2016), ECF No. 50. "The record reveals that many homes on the reservations either do not have residential addresses (the Post Office delivers

their mail to post office boxes) or there is no clear address, so tribal ID's do not reflect any residential address." *Id.* "On many reservations, the residential address system produces conflicting and problematic results." *Id.,* at *5. "21.6% of Native Americans do not have two documents that show their residential address." *Id.*

Second, North Dakota does not offer any qualifying ID for free. "State non-driver ID cards still cost $8 . . . whereas most states provide such ID's at no cost." Order, 2018 WL 1612190, at *6. "Deputy Secretary of State James Silrum stated in his affidavit . . . that State non-driver ID cards are issued at no charge but offers no authority for this statement – and this fact is contradicted by the North Dakota DOT website which reveals a fee for the ID." *Id.* "Native Americans who currently lack a qualifying voter ID may not be able to afford that." Order, 2016 WL 7118548, at *6. Additionally, it is undisputed Plaintiff Herman was charged $8 for a North Dakota issued non-driver's ID card that was supposed to be free under the law. Herman Decl. at 3, *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. June 20, 2016), ECF No. 44-11.

Third, thousands of qualified Native American voters and tens of thousands of non-Native American voters lack qualifying IDs. "At least 4,998 otherwise eligible Native Americans (and 64,618 non-Native voters) currently do not possess a qualifying voter ID under the new law." Order, 2018 WL 1612190, at *4.[1] The

[1] The District Court found that some tribal IDs were issued by the Bureau of Indian Affairs (BIA) and not a tribal government, and therefore not qualifying. The District Court expanded the types of IDs available to tribes to include BIA IDs and IDs from "any other tribal agency or entity, or any other document, letter, writing, enrollment card, or other form of tribal identification issued by a tribal authority,"

District Court found that "48.7% of Native Americans who lack a qualifying ID also lack the supplemental documentation needed – which means at least 2,305 Native Americans will not be able to vote in 2018 under the new law." *Id.*, at *4. And 15,908 non-native eligible voters who lack qualifying ID also lack the supplemental documentation needed. *Id.*

The District Court concluded that "the new law [enacted after the 2016 injunction] . . . still requires voters to have one of the very same forms of qualifying ID's in order to vote that was previously found to impose a discriminatory and burdensome impact on Native Americans." *Id.*, at *2. The Eighth Circuit was required "to give deference to the discretion of the District Court," including its factual findings, but there is "no indication that it did so." *Purcell*, 549 U.S. at 5. This was error.

REASONS FOR GRANTING THE STAY

I. This Court is Likely to Review this Case Upon Final Disposition by the Court of Appeals

This case is an excellent vehicle for the Court to continue the vitality of *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966), which provides that restrictions on the right to vote must be related to legitimate voter qualifications in order to pass constitutional muster, and to assess the lawfulness of voter identification laws that

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and similarly expanded supplemental documents. Order, 2018 WL 1612190, at *7. The Secretary only moved to stay the "current mailing address (P.O. Box or other address)" aspect of the court order. The aspect of the District Court's order that allows for more tribal IDs remains in effect. Even with the expanded list of acceptable IDs, however, many voters still will not have qualifying identification, especially if they lack a current residential street address.

have repeatedly come before the federal courts in the decade after *Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181 (2008). The likelihood of further review here supports the request for emergency relief.

To be qualified to vote in North Dakota—unlike in every other state—one must have "an actual fixed permanent dwelling, establishment, or any other abode," and that physical, residential property also must have a street address.[2]

The District Court found that Native American communities in North Dakota often lack residential street addresses, and therefore the requirement to have a residential street address is unrelated to whether one is qualified to vote. North

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[2] While all other states require voter registration and North Dakota does not, no state requires a residential street address to register or qualify to vote without a homeless exception. Most states must comply with the National Voter Registration Act ("NVRA"), which requires every registration state to allow voters to draw a map showing where they reside if they do not have a residential address. 52 U.S.C. § 20505(a)(1) ("Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission[.]"); 11 C.F.R. § 9428.4(a)(2) (allowing voter to draw on map where they live if there is no residential address). Six states are exempt from the NVRA (Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming) but only North Dakota requires a residential street address without a homeless exception. *See* Idaho Secretary of State Office, Idaho Voter Registration Application, https://idahovotes.gov/media/voter_registration.pdf (last visited Sept. 27, 2018), ("If no street address, describe location of residence by cross streets, section, township, range, or other physical description"); Office of the Minnesota Secretary of State, *Register to Vote – I'm Homeless* https://www.sos.state.mn.us/elections-voting/register-to-vote/im-homeless/ (last visited Sept. 27, 2018) (noting that for the homeless, their residence is where they sleep and they can write a description of that location); New Hampshire Secretary of State, *Registering to Vote in New Hampshire*, http://sos.nh.gov/nhsos_content.aspx?id=8589972818 (last visited Sept. 27, 2018) (noting a homeless shelter or other provider can vouch for the homeless); Wisconsin Elections Commission, *Homeless Voters Guide* (July 18, 2018) https://elections.wi.gov/sites/default/files/publication/154/wi_voter_guide_for_homeless_voters_pdf_11043.pdf (noting a park bench or other location can be utilized); Wyo. Stat. Ann. § 22-1-102(xxx) (definition of residence does not include an address requirement).

Dakota Indian reservations are not alone in lacking residential addresses. Many other Indian reservations across the country also lack residential addresses. *See, e.g.* Austen Bundy, *Distance, language can still pose challenge to Native American voting*, Cronkite News Arizona PBS (May 14, 2018) https://cronkitenews.azpbs.org/2018/05/14/distance-language-can-still-pose-challenge-to-native-american-voting/ ("Many Native Americans, because they are more rural, have non-traditional street addresses," Gordon said. "So for instance, in Arizona, the voter registration form provides a space to draw a map to where you live."); Carrie Jung, *Home Addresses On Navajo Nation Are Rare, Officials Working To Change That*, 991.5 KJZZ (Oct. 8, 2015 8:20 AM) http://kjzz.org/content/202564/home-addresses-navajo-nation-are-rare-officials-working-change (Navajo Nation lacks addresses).

This is also true for individuals (Native American and otherwise) who are homeless, because the location where they are and where they intend to remain may not have a physical residential property with a residential street address. Given that whether an elector has a physical residence that has a current residential address is "unrelated to" whether a voter is actually qualified to vote, it is invidious and cannot survive even rational basis review. *Crawford*, 553 U.S. at 189 ("[U]nder the standard applied in [*Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966)], even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications."); *Gonzalez v. Arizona*, 677 F.3d 383, 409 (9th Cir. 2012) (noting law fell outside of "*Harper*'s rule" because it was related to voter

qualifications); *see also Quinn v. Millsap*, 491 U.S. 95, 107, 109 (1989) (rejecting property requirements for eligibility to governor's board); *Turner v. Fouche*, 396 U.S. 346, 363-4 (1970) (rejecting property requirements for eligibility to school board). Despite its plain unconstitutionality, the Eighth Circuit, after failing to properly analyze whether the statute is invidious, has already indicated that the law will likely survive Plaintiffs' equal protection challenge. Opinion, *Brakebill v. Jaeger*, No. 18-172, 2018 WL 4559487 (8th Cir. Sept. 24, 2018). To protect thousands of disenfranchised voters and many other places in Indian Country that lack residential addresses, review by this Court is likely.

Additionally, this case has a fully developed factual record and presents an ideal vehicle to settle the unresolved questions in *Crawford*, where the plurality found plaintiffs lacked a sufficient record to determine the impacts of Indiana's voter ID law. The laws here "are arguably some of the most restrictive voter ID laws in the nation." Order, 2016 WL 7118548, at *2. Plaintiffs were in fact disenfranchised by the ID and residential address requirements and have been required to pay for voter IDs. Plaintiffs submitted extensive uncontested evidence including tribal-leader declarations and a comprehensive survey detailing the impact of the current North Dakota law on qualified voters, and have eight different expert reports describing the various burdens imposed on Plaintiffs by these requirements. Voter-ID laws continue to grow in this Country and proper application of *Crawford* is an issue that calls for this Court's review.

II. The Eighth Circuit's Stay Will Cause Confusion and Discord at the Polls, Precisely the Situation this Court warned against in *Purcell*

By staying the District Court's order after early voting has already begun, the Eighth Circuit has created a "conflicting" order that will lead to increased disenfranchisement due to "voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. For this reason alone, this Court should stay the Eighth Circuit's order. The sequence of events bears this out. For the past six months, the District Court's April 3, 2018 preliminary injunction has been in effect. That injunction provided a critical safeguard for voters who lack residential addresses and rely upon P.O. Boxes or other mailing addresses to conduct their affairs. The District Court suspended the requirement that a voter ID or supplemental documentation must show the voter's "current residential street address" and instead expanded the requirement to include proof of a residential address, P.O. Box, or other mailing address.

Following issuance of the order, local news agencies notified electors that identification or supplemental documentation that showed P.O. Boxes and other mailing addresses would be accepted at the polls.[3] The North Dakota Secretary of

[3] *See e.g.* Barbara Dunn, *Letter: Don't worry if you can't get your ID renewed before the November election*, Inforum (Sept. 8, 2018 1:49 PM) http://www.inforum.com/opinion/letters/4495981-letter-dont-worry-if-you-cant-get-your-id-renewed-november-election; Herald Staff, *Grand Forks polls open at 7 a.m. Tuesday*, Grand Folks Herald (June 11, 2018 5:51 PM) http://www.grandforksherald.com/news/government-and-politics/4459018-grand-forks-polls-open-7-am-tuesday; John Hageman, *Citing Native Americans' 'cherished right' to vote, federal judge orders changes to ND voter ID law,* Bismarck Tribune (Apr. 4, 2018) https://bismarcktribune.com/news/state-and-regional/citing-native-americans-cherished-right-to-vote-federal-judge-orders/article_98bd9d55-7c2e-55b8-

State's website likewise has been notifying voters of North Dakota's voter-ID requirements under the District Court order for months. *See* North Dakota Secretary of State, *ID Required for Voting*, retrieved Sept. 25, 2018, from https:vip.sos.nd.gov/idrequirements.aspx (printout attached as Appendix E). The District Court's injunction was in effect for the June 2018 primary, and voters who had an identification showing a P.O. Box or other mailing address would reasonably expect their IDs to work again in the upcoming general election.

During oral argument, the Secretary informed the Eighth Circuit that the start date for military and overseas voting in the general election was September 21, with general absentee voting commencing September 27. Oral Argument at 32:20, *Brakebill v. Jaeger*, No. 18-1725 (Sept. 10, 2018) http://media-oa.ca8.uscourts.gov/OAaudio/2018/9/181725.MP3. Indeed, the general election had begun before the Eighth Circuit issued its decision on September 24, and the Eighth Circuit's order changed the rules of the general election.

The stay was issued at a time that the Secretary had indicated was too close to the election. At oral argument, the Secretary acknowledged that preparation prior to an election consists of "2-3 months to prepare the [election officials'] manual and then 3-4 weeks for the Attorney General to proof it" and that "the timeline was still accurate." *Id.* at 34:00.

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b73a-5b9a2a1f1be7.html; Jill Schramm, *Court ruling hangs over June* election, Minot Daily News (Arp. 21, 2018) http://www.minotdailynews.com/news/local-news/2018/04/court-ruling-hangs-over-june-election/; John Hageman, *Judge slaps down ND effort to fight voter ID ruling*, Bismarck Tribune (May 1, 2018) https://bismarcktribune.com/news/state-and-regional/judge-slaps-down-nd-effort-to-fight-voter-id-ruling/article_4bcabfee-b1b8-5160-b4cb-6d6f959d739b.html.

In 2016, before the last North Dakota general election, the State represented to the District Court that it would only be able to accommodate an injunction if it was "issued by early September 2016." Order, 2016 WL 7118548, at *12. In requesting expedited review of its initial stay motion, the Secretary explained timely resolution was necessary in order

> for proper planning by election officials with respect to the establishment of uniform procedures to be followed, making the necessary adjustments to election forms, updating informational materials for voters, the training of local election officials and poll workers, conducting any specialized training for voters, and providing enough time for voters to be prepared to vote.

Def.'s Mot. for Expedited Review, *Brakebill v. Jaeger*, No. 1:16-cv-008 (Mar. 9, 2018), ECF No. 95. The State urged expedited review since "interested individuals are already applying to receive an absentee or mail-in ballot when they are available, and that absentee and mail-in ballots for the election can be submitted as early as April 27, 2018." *Id.*

The Eighth Circuit quoted *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 18A240, 2018 WL 4285989 (Sept. 7, 2018), for the proposition that there is no steadfast rule against changing the rules of an election after Labor Day since the Court in that case instituted a stay on September 7, 2018. Yet, the Eighth Circuit here issued its order nearly a month after Labor Day, and three days after the election in fact began. By staying the District Court order, the Eighth Circuit has created a "conflicting" order after the election has commenced that will lead to "voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. Additionally, the Eighth Circuit changed the rules of the election

without providing adequate time for voters to learn about the rule change or time to obtain updated voter identification with a current residential street address, increasing potential confusion and discord. Without a qualifying ID, voters who would have been able to vote under the District Court's order will be disenfranchised.

III. Plaintiffs And Those Similarly Situated Will Be Irreparably Harmed Absent This Court Staying the Eighth Circuit's Order

Plaintiffs and others will be disenfranchised. Plaintiff Norquay will be required to travel to his old precinct to vote, which will be a hardship he may not be able to overcome. E. Norquay Decl. at 2-3, *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. Feb. 16, 2018), ECF No. 90-13. Ms. Vivier has already been turned away from the polls even with an appropriate ID, which will likely occur again. Vivier Decl. at 4, *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. Apr. 24, 2018), ECF No. 109-1. Plaintiff Brakebill, and the other Plaintiffs also may not be able to update their IDs before the general election. Brakebill Decl. at 4, *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. June 16, 2016), ECF No. 44-9; E. Norquay Decl. at 3; Vivier Decl. at 2-4. "[T]he court does not dispute that several plaintiffs testified that they lack a valid form of identification under the statute." Op., 2018 WL 4559487, at *8 (Kelly, J. dissenting). And when constitutional rights are threatened or impaired, irreparable injury is presumed. *See ACLU of Ky. v. McCreary County, Ky.,* 354 F.3d 438, 445 (6th Cir. 2003). A restriction on the fundamental right to vote therefore constitutes irreparable injury. *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *cf. McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984).

The District Court found that North Dakota's residential address requirement "disenfranchises anyone who does not have a 'current residential street address' . . . includ[ing] homeless persons as well as many persons living on Native American reservations." Order, 2018 WL 1612190, at *6. Based upon an extensive record, the District Court found Native Americans are disproportionately homeless, suffer from severe housing shortages, often are transient living in insecure housing, and live in rural areas that altogether lack residential addresses. Order, 2016 WL 7118548, at *7.

The Eighth Circuit acknowledged that it would be impossible for voters who lack residential addresses to meet the requirements of the law, and therefore they would be disenfranchised. Op., 2018 WL 4559487, at *2. Nevertheless, the majority held that this "fact does not justify a statewide injunction that prevents the Secretary from requiring a form of identification with residential street address from the vast majority of residents who have residential street addresses." *Id.*, at *3 (footnote omitted). It is impossible to square this conclusion with this Court's admonition more than 50 years ago that "[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges this right [to vote]." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The majority never considered whether the District Court's injunction could be modified or narrowed so that it more specifically addressed and remedied the potential disenfranchisement of Native Americans living on reservations and in rural areas.

The Eighth Circuit dissent correctly noted that even though "the election provision at issue burdens only some voters[, that] does not preclude relief." Op., 2018 WL 4559487, at *7. Instead of disenfranchising whole classes of voters, the Eighth Circuit could have tailored the District Court's order and "narrow[ed] it to cover only individuals who lack a valid form of identification reflecting a current residential street address." *Id.* But, the Eighth Circuit stayed the aspect of the District Court order that allowed for the use of P.O. Boxes or other mailing addresses that was designed to alleviate the burden on Native American voters. Native American voters who lack residential addresses now have no available relief, and they will be disenfranchised.

The District Court's decision was well considered and should not have been overturned. The District Court was well aware that the "current residential address requirement" previously led to the widespread disenfranchisement of Native voters. In the 2014 election, voters were subjected to North Dakota's first iteration of its ID-plus-residential-address requirements. That law disenfranchised voters because tribal IDs often lack current residential street addresses. For example:

- Plaintiff Lucille Vivier, was prevented from voting in 2014 because her tribal ID did not list a residential address. Vivier Decl. at 1-2.

- Plaintiff Richard Brakebill, a Navy veteran, was denied the right to vote in 2014 because he had an expired driver's license and a tribal ID that did not have a current residential address. Order, 2016 WL 7118548, at *8.

- Plaintiff Dorothy Herman, who had voted for 45 years, was unsuccessful in obtaining a new form of ID after two trips to a North Dakota Driver's License Site. *Id.* On her first trip, the site was closed; and on her second trip she was denied a new ID because her old state ID (which had her current address) had expired and she did not have a copy of her birth certificate. *Id.* In 2014,

Herman was denied a ballot because her tribal ID did not contain a current residential address. After the election, Plaintiff Herman paid $8 for a North Dakota issued non-driver's ID card that, according to a statute that has not been in enforced in North Dakota, was supposed to be free under the law. Herman Decl., at 3.

- Plaintiff Elvis Norquay, a Marine Corps veteran who cannot afford the documentation needed to obtain a state ID, likewise was denied the right to vote in 2014 because his tribal ID did not list a residential address. E. Norquay Decl. at 2.

- Plaintiffs Ray Norquay and Della Merrick also attempted to vote in the 2014 election, but were denied ballots because they only had tribal IDs that did not list their addresses. Amend. Compl. at 5-6. As a result of being denied the right to vote, they went to the tribal offices that same day and purchased new IDs with residential street addresses, after which they both went back and were permitted to vote. Thus, these Plaintiffs had to pay to vote. *Id.*

While Plaintiffs, in the intervening four years, have since paid to update their IDs with residential addresses (although Plaintiff Elvis Norquay does not have a current residential address or qualifying ID due to his intermittent homelessness), Plaintiffs' experiences demonstrate the reality faced by many Native American voters who lack a current residential street address on their identification. The District Court injunction provided a solution that addressed the needs of Native American voters who lacked such addresses by allowing identification reflecting their P.O. Boxes and other mailing addresses that are more commonly used by Native Americans. Now, voters that lack a current residential street address will likely be irreparably harmed by being disenfranchised absent a stay of the Eighth Circuit's order.

IV. The Eighth Circuit Was Demonstrably Wrong in Its Application of the Stay Factors

a. Plaintiffs are likely to succeed on the merits of their Equal Protection claims

First, the Eighth Circuit "clearly and demonstrably" erred by ignoring the invidious nature of North Dakota's laws. *W. Airlines*, 480 U.S. at 1305. The Eighth Circuit asserted, without citation, that North Dakota's physical, residential property requirement was not invidious. Op., 2018 WL 4559487, at *3. As such, it determined that Plaintiffs could not bring a facial challenge because it assumed it was applying the Anderson-Burdick balancing test to assess "excessively burdensome requirements." *Id.* This Court, however, has defined invidious requirements to be those that are "unrelated to voter qualifications." *Crawford*, 553 U.S. at 189. When a law is invidious because it is unrelated to voter qualifications, it cannot survive even rational basis review and is unconstitutional on its face in every application. *Id.*

As discussed, North Dakota's strict definition of residence – requiring one to reside at a physical, residential property that has a street address – is not related to whether an individual is qualified to vote. An otherwise qualified voter could live within a precinct on the reservation and have no residential address, or be homeless and have no physical property. Indeed, the North Dakota Constitution provides an exclusive list of voter qualifications, and a physical address within a precinct is not among them. N.D. Const. art III, sec. 1 ("Every citizen of the United States, who has

attained the age of eighteen years and who is a North Dakota resident, shall be a qualified elector.")

The Eighth Circuit majority failed to address whether the strict definition was invidiously discriminatory, and just assumed that it was a "reasonable, nondiscriminatory restriction[]." *Crawford*, 553 U.S. at 190. This is in contravention of *Crawford* and *Harper*, which noted that there are some laws that "invidiously discriminate." *Id.* at 189. If the Eighth Circuit had properly applied the standard for invidious discrimination, it would never have reached the Anderson-Burdick balancing test because North Dakota's law is not a "reasonable, nondiscriminatory" restriction. *Id.* at 190. Rather, it is an "invidiously discriminatory" restriction that cannot survive even rational basis review. *Id.* at 189. Thus, it is invalid on its face.

The dissent properly recognized that requiring a "physical, residential property" to be qualified to vote "demonstrate[s] that North Dakota has erected unconstitutional barriers for prospective voters." Op., 2018 WL 4559487, at *7 (Kelly, J. dissenting) (citation omitted). Given that North Dakota's laws require one to have a residential address, even though there are not residential addresses in many reservation communities in North Dakota, the Eighth Circuit clearly and demonstrably erred in staying the District Court's order.

Second, under North Dakota law, voters must pay to vote because there are no free IDs in North Dakota. Throughout this litigation, the State charged $8 for non-driver IDs and driver IDs, and tribal IDs cost on average $10. Order, 2018 WL 1612190, at *6; Order, 2016 WL 7118548, at *6. This Court has consistently held

voters cannot be charged a fee in order to vote. *Harper*, 383 U.S. at 670. Accordingly, in *Crawford*, the Supreme Court found that an ID law would not survive "if the State required voters to pay a tax or fee to obtain a new photo [ID]." 553 U.S. at 198. As the dissent again correctly concluded, the fee, "standing alone, would demonstrate that North Dakota has erected unconstitutional barriers for prospective voters." Op., 2018 WL 4559487, at *7 (Kelly, J. dissenting).

The Eighth Circuit asserted that the cost of ID does not implicate the "disputed portion of the injunction," and "therefore, is not justified as a remedy for any barrier arising from state-imposed fees." Op., 2018 WL 4559487, at n.2. This reasoning is contradicted, however, by the District Court's factual findings and the experiences of Plaintiffs Della Merrick and Ray Norquay. The District Court found and the Eighth Circuit recognized that at least 2,305 Native American voters (and 15,908 non-native eligible voters) lack a qualifying ID and any underlying documentation showing a residential address. Op., 2018 WL 4559487, at *2. Della Merrick and Ray Norquay were denied a ballot because they lacked a current residential address. After they were denied a ballot they purchased an ID for the cost of $10.

The District Court, recognizing these facts, increased the availability of qualifying IDs by permitting mailing addresses or other addresses on the IDs. The Eighth Circuit's stay order nullified the availability of these other potential IDs. This forces voters that have those IDs and lack supplemental documents to purchase new IDs in order to vote. "The fact that most voters already possess a

valid driver's license, or some other form of acceptable identification, would not save the statute under [this Court's] reasoning in *Harper,* if the State required voters to pay a tax or a fee to obtain a new photo identification." *Crawford*, 553 U.S. at 198. Given this, the Eighth Circuit demonstrably erred in finding the Secretary was likely to succeed on the merits of its stay motion.

b. The Eighth Circuit committed clear error by substituting itself as a trier of fact

The Eighth Circuit demonstrably erred by failing to defer to and accept the District Court's factual finding that the State charges $8 for non-driver voter IDs. That factual finding was not clearly erroneous because there is evidence that North Dakota has been charging for voter IDs. The Secretary asserted in the District Court that the law forbade the State from charging for IDs, and on that basis denied that the State charged for IDs. Order, 2018 WL 1612190, at *6. Yet, Plaintiff Dorothy Herman was forced to pay for a non-driver's voter ID despite the law. Herman Decl. at 3. And the District Court took judicial notice of the Department of Transportation website (which Plaintiffs directed it to and their expert described), which established that the State in fact continues to charge for IDs despite the Secretary's representations. Order, 2018 WL 1612190, at *6.

The Eighth Circuit went outside the record on appeal to note that the Department of Transportation's "current website shows – consistent with the statute – that a nondriver identification card is available without a payment of a fee." Op., 2018 WL 4559487, at n.7. This recent change to the Secretary of State's website is not sufficient to overturn the District Court's factual finding that the

State in fact charges for IDs. The Eighth Circuit cannot substitute its judgment for that of the District Court on factual matters, and the District Court's findings were not clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) ("This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently."); *accord Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015).

c. The Eighth Circuit erred in concluding the State will suffer irreparable injury

Irreparable harm does not exist for "something merely feared as liable to occur at some indefinite time." *Connecticut v. Massachusetts,* 282 U.S. 660, 674 (1931); *see Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996) ("[T]o demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief."). As the dissent explained "[t]he only irreparable injury North Dakota could face is the possibility that voters might cast a ballot in the wrong precinct under the district court's injunction." Op., 2018 WL 4559487, at *8 (Kelly, J. dissenting). The majority incorrectly concluded that the irreparable injury standard was met here because voters "could" cast a ballot in the wrong precinct, "could" affect an election, and that there is a "possibility" of fraud. Op., 2018 WL 455948, at *4. This is merely feared harm. *Connecticut,* 282 U.S. at 674. And as the dissent noted "[t]here is no evidence in the record properly before us that this outcome is likely." Op., 2018 WL 4559487, at *8 (Kelly, J. dissenting).

This potential out of district voting will only occur if the Eighth Circuit

interprets the District Court order to require the state to allow a voter to vote in the precinct where her P.O. Box is located rather than where she resides. The dissent properly recognized, however, that

> nothing in the district court's injunction requires a voter to change the definition of 'residence' used to determine the voter's precinct. . . it modifies only the requirements of the voter's identification. Nothing in the injunction prevents an election official from accepting a North Dakota identification bearing a mailing address from a different precinct, and using a map or an affidavit to confirm his 'residence.' (Op., 2018 WL 4559487, at*8, Kelly, J. dissenting).

In fact, North Dakota law already requires poll workers to use precinct maps to confirm that a voter is in the correct precinct, and if not, to direct them to the correct precinct. N.D. Cent. Code Ann. § 16.1-05-08 (precinct maps to be used to "direct an individual who may be attempting to vote incorrectly in that precinct."). The State will only suffer irreparable harm if it ignores this North Dakota law. There are less restrictive alternatives available to the state to satisfy its concerns, a few of which the dissent outlined and that state law already requires. As such, the Eighth Circuit demonstrably erred in concluding the State will suffer irreparable injury from the District Court's order.

d. The Eighth Circuit erred by failing to balance the harms

The Eighth Circuit recognized that it was required to consider whether a stay would substantially injure the other parties in the proceeding and where the public interest lies. Op., 2018 WL 4559487, at *2 (*citing Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Yet the Eighth Circuit simply ignored these two factors in its analysis. This alone is demonstrable error. *See Planned Parenthood of Greater Texas*

Surgical Health Servs. v. Abbott, 571 U.S. 1061 (2013) (vacating a stay is warranted when lower court "demonstrably" erred in its application of "accepted standards.").

In contrast, the District Court, after carefully analyzing all of the factors, found that the irreparable harm the Plaintiffs will face, the balance of harms, and the public interest all favor Plaintiffs. *See* Order, 2018 WL 1612190, at *1 and *7. As discussed, the stay will result in irreparable harm to Plaintiffs and other North Dakota voters, which the dissent properly characterizes as "severe and irreparable." Op., 2018 WL 4559487, at *8 (Kelly, J. dissenting).

The public interest also favors vacating the stay. The rights at stake are of the most cherished and fundamental – the right to participate in the democratic process. As the District Court recognized, "the public interest in protecting the most cherished right to vote for thousands of Native Americans who currently lack a qualifying ID and cannot obtain one, outweighs the purported interest and arguments of the State." Order, 2016 WL 7118548, at *13. The District Court's order provides common sense and a sense of fairness to remedy the problems to ensure that all residents of North Dakota, including those who live on reservations and lack residential addresses, "will have an equal and meaningful opportunity to vote." Order, 2018 WL 1612190, at *8. As it stands, the overturning of the District Court's order three days after voting already commenced will cause confusion and disarray, and will result in the increased disenfranchisement of eligible voters. The District Court order, therefore, should be reinstated.

CONCLUSION

The Eighth Circuit's stay of the District Court's preliminary injunction should be vacated.

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Respectfully submitted,

By: /s John Echohawk
John Echohawk

Counsel of Record for Applicants
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Phone: (303) 447-8760
jechohawk@narf.org

Matthew Campbell,
NM Bar No. 138207, CO Bar No. 40808
mcampbell@narf.org
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Phone: (303) 447-8760

Jacqueline De León, CA Bar No. 288192,
DC Bar No. 40808
jdeleon@narf.org
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302

Daniel David Lewerenz, WI Bar No. 1069385,
OK Bar No. 30627
lewerenz@narf.org
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW (Rear), Suite D
Washington, D.C. 20005
Phone: (202) 785-4166

Richard de Bodo, CA Bar No. 128199

Rich.debodo@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
2049 Century Park East, Suite 700
Los Angeles, CA 90067
Phone: (310) 255-9055
Fax: (310) 907-2000

Tom Dickson, ND Bar No. 03800
tdickson@dicksonlaw.com
DICKSON LAW OFFICE
P.O. Box 1896
Bismarck, North Dakota 58502
Phone: (701) 222-4400
Fax: (701) 258-4684

Joel West Williams, PA Bar No. 91691
williams@narf.org
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW (Rear), Suite D
Washington, D.C. 20005
Phone: (202) 785-4166

Counsel for Applicants