

No. A-_____

In The
Supreme Court of the United States

Richard Brakebill; Dorothy Herman; Della Merrick; Elvis Norquay; Ray
Norquay; Lucille Vivier, ON BEHALF OF THEMSELVES,
APPLICANTS,

V.

Alvin Jaeger, IN HIS OFFICIAL CAPACITY AS THE NORTH DAKOTA SECRETARY OF
STATE,
RESPONDENT.

**APPLICATION TO EXTEND THE TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI**

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October 11, 2019

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

Pursuant to this Court's Rules 13.5, 22, and 30.3, Richard Brakebill, Dorothy Herman, Della Merrick, Elvis Norquay, Ray Norquay, and Lucille Vivier ("Applicants") respectfully request a 60-day extension of time, to December 30, 2019,¹ to file a petition for a writ of certiorari to review the judgment of the Eighth Circuit in this case. Applicants have not previously sought an extension of time from this Court. If not

¹ The requested 60-day extension ends on December 28, 2019, which is a Saturday. Under this Court's Rule 30.2, the period is therefore extended until December 30, 2019, which is the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court is closed.

extended, the time for filing a petition will expire on October 29, 2019. Consistent with Rule 13.5, this application is being filed at least ten days before that date.

A copy of the Eighth Circuit's opinion (*Brakebill v. Jaeger*, 932 F.3d 671 (8th Cir. 2019)) is attached at Tab A. This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

1. The Eighth Circuit's decision below addressed the validity of a 2017 North Dakota statute disenfranchising rural voters who have current mailing addresses (such as P.O. Boxes) in North Dakota but lack documented residential "street" addresses because they live on unmarked or unnamed dirt or gravel roads or because they are homeless. N.D. Cent. Code § 16.1-01-04.1(2)(b). Applicants challenged the state statute as a severe burden on their right to vote and thus a violation of the Fourteenth Amendment's Equal Protection Clause. The District Court for the District of North Dakota entered a preliminary injunction ordering the North Dakota Secretary of State to allow Applicants and other citizens with current, documented mailing addresses in North Dakota to vote, regardless of whether they also have documented residential "street" addresses. *See Brakebill v. Jaeger*, No. 1:16-cv-008, 2018 WL 1612190 (D.N.D. Apr. 3, 2018).

2. By a two-to-one vote, a panel of the Court of Appeals for the Eighth Circuit granted the Secretary of State's motion to stay that preliminary injunction pending appeal. *See Brakebill v. Jaeger*, 905 F.3d 553, 561 (8th Cir. 2018). This Court declined to vacate the Eighth Circuit's stay. *See Brakebill v. Jaeger*, 139 S. Ct. 10 (Oct. 9, 2018). Justice Ginsburg, joined by Justice Kagan, dissented, noting that "the risk of

disfranchisement is large” and that “approximately 18,000 North Dakota residents”—more than five percent of the turnout in a regular quadrennial election—lack documentation of a residential “street” address. *Id.*

3. On remand following the 2018 election, the same panel of the Eighth Circuit, again dividing two to one, held that the case turned on the District Court’s legal conclusions rather than on factual findings and vacated the District Court order enjoining the residential “street” address requirement. *See Brakebill v. Jaeger*, 932 F.3d 671, 681 (8th Cir. 2019).

4. Although the North Dakota statute at issue renders it effectively impossible for some North Dakota citizens who live on rural dirt or gravel roads or are homeless to qualify as voters and to exercise their right to vote, the panel majority did not apply strict scrutiny. The decision below therefore conflicts with precedents of this Court and of a state court of last resort that have consistently held that voter qualifications based on criteria other than age, residency in the State (or district), and citizenship are subject to strict scrutiny. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (concluding that “if a challenged statute grants the right to vote to some [adult] citizens and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest” (emphasis in the original) (citations and internal quotation marks omitted)); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 691, 625–26 & n.6 (1969) (holding that a state law prohibiting “some [school] district residents who are otherwise qualified by age and citizenship from participating in ... school board elections” violated the Equal Protection Clause because

it “absolutely prohibited [some]one from exercising the franchise”); *Fischer v. Stout*, 741 P.2d 217, 221 (Alaska 1987) (rejecting a challenge to the ballots of voters who had listed an Air Force base, with no street address, as their residence, concluding that the listing was “sufficient to fix a voter’s residence to a specific locale” within the election district); see also *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 204–05 (2008) (Scalia, J., concurring in the judgment) (explaining that strict scrutiny applies to “laws that severely restrict the right to vote” by “go[ing] beyond the merely inconvenient,” so “as to be virtually impossible to satisfy” (citations and internal quotation marks omitted)); *Williams v. Rhodes*, 393 U.S. 23, 24–25, 30–34 (1968) (holding state law that made it “virtually impossible” for minor political parties to be placed on ballot to choose presidential electors violated Equal Protection Clause).

5. Applicants intend to file a petition for a writ of certiorari asking this Court to review the Eighth Circuit’s decision. The petition is currently due on October 29, 2019. Appellate counsel from the law firm of Jenner & Block LLP have primary drafting responsibility for the petition. However, they have commenced their representation of Applicants only this week, as Applicants were represented by other attorneys below.

6. An extension is therefore necessary to allow Applicants’ counsel adequate time to determine the full implications of the Eighth Circuit’s decision and to determine how best to present these critical issues to this Court. Counsel are working diligently on this case. But sufficient time to thoroughly prepare Applicants’ petition is essential.

Accordingly, Applicants respectfully request that the time to file a petition for a writ of certiorari be extended to December 30, 2019.

Respectfully submitted,

A handwritten signature in cursive script, reading "Sam Hirsch", written in dark ink. The signature is positioned above a thin horizontal line.

SAM HIRSCH

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